



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.

**PUBLIC VERSION
UNDREDACTED
JUNE 2, 2010**

Defendants, and

LANDRY'S RESTAURANTS, INC.,

Nominal Defendant.

**SECOND AMENDED VERIFIED CLASS
ACTION AND DERIVATIVE COMPLAINT**

Plaintiff Louisiana Municipal Police Employees' Retirement System ("LMPERS" or "Plaintiff"), on behalf of itself and all other similarly situated public shareholders of Landry's Restaurants Inc. ("Landry's" or the "Company") (the "Class"), brings the following Class Action and Derivative Complaint ("Complaint") against the individual members of the board of directors of Landry's (the "Landry's Board" or "Board"). The allegations of the Complaint are based on the personal knowledge of Plaintiff as to itself,

and on information and belief, including the investigation of counsel and extensive discovery that has taken place in this action, as to all other matters.

NATURE AND SUMMARY OF THE ACTION

1. Tilman J. Fertitta (“Fertitta”) is the Chairman and CEO of Landry’s. This case arises because Fertitta exploited his fiduciary position and power, in breach of his fiduciary duties, to serve his self-interest.

2. As the economy was floundering in January 2008, Fertitta, who at that time owned 39 percent of the Company’s stock, offered to pay \$23.50 per share to acquire the balance of the Company’s common shares from Landry’s public shareholders. By April, after Bear Stearns abruptly failed and the credit markets were in a tailspin, Fertitta lowered his offer to \$21 per share. The special committee created to negotiate with Fertitta (“Special Committee”) signed a merger agreement at Fertitta’s April offer price on June 15, 2008 (the “\$21 Buyout”).

3. The June 2008 merger agreement (“\$21 Merger Agreement”) included no financing conditions or similar “outs” for Fertitta, but it did excuse Fertitta’s performance if a “Material Adverse Effect” (“MAE”) related to Landry’s financial condition occurred. As is typical, the \$21 Merger Agreement unambiguously excluded from the definition of “MAE” any “Act of God” or industry or economy-wide downturn. Wells Fargo Foothill (“Wells Fargo”) and affiliates of Jefferies & Company, Inc. (“Jefferies”) were financing the \$21 Buyout (collectively, the “Lenders”) and provided a debt commitment letter (the “Debt Commitment Letter”) containing a virtually identical MAE clause.

4. On September 13, 2008, Hurricane Ike struck the Texas coast, causing temporary closure of and limited damage to some of the Company's properties. At his deposition, Fertitta confessed a case of buyer's remorse:

I wasn't scared. I might have been a little nervous, but I wasn't scared. What I really looked at is not what I'm scared of, but what is it worth. At the time of this week, the credit crisis in the United States, Lehman had failed, and the stock market had fallen a thousand points, and we had just suffered a hurricane, but I wasn't scared. I was maybe a little nervous and I did not think that with the economic crisis going throughout the rest of the country, that it was worth \$21 anymore.

5. Unfortunately for Fertitta, however, the \$21 Merger Agreement imposed a steep price if Fertitta chose to abandon the transaction in the absence of any MAE or other contractual right to terminate -- a \$24 million reverse termination fee. Thus, despite any misgivings about the \$21 per share price they had agreed to finance just three months earlier, neither Fertitta nor the Lenders had any right to simply walk away from the deal scot-free. They had agreed to bear the risk of hurricanes or other natural catastrophes, as well as further general economic deterioration.

6. The immediate responses from the Lenders reflected their recognition that the deal could not be renegotiated. According to Fertitta himself, the first word he got from Jefferies was when lead banker Jim Walsh made clear his desire to send positive signals about the deal to investors: "The stock is falling. We need to stabilize it to show the deal is going to happen." Wells Fargo banker Rusty Parks readily testified that the Hurricane "was not an out under our financing papers which means it wasn't an out in the merger agreement."

7. In the days following the Hurricane, the Lenders sent to Landry's a list of basic due diligence requests, which they needed in order to prepare and finalize the Information Memorandum they would use to syndicate the financings. The Special Committee members recognized that these requests were "typical information" and "there was a whole lot of chatter" that is "typical" in deals.

8. The Lenders got their answers in a series of communications and meetings on September 19, 22 and 23. Based on those inquiries, the Lenders prepared an Appendix to the Information Memorandum that summarized their view of the effect of Hurricane Ike on Landry's financial position: "Although the units affects by Ike will cause slight disruptions to the Company's performance, the Company expects that Revenue and EBITDA will continue to grow in comparison to 2007. Business interruption proceeds from the Company's insurance policies will offset the lost profit associated with the affects of Hurricane Ike." At no time did any of the Lenders assert that an MAE had occurred or state that they could make such assertion at their option. As Jefferies' Morris testified:

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.

9. If Fertitta was a third party buyer with no fiduciary position or influence on his fellow directors, any rational and properly functioning board would have required the buyer to either proceed with the deal or pay the reverse termination fee. Fertitta, however, was not a third party and never had any intention of acting like one. Instead,

Fertitta abused his fiduciary position and powers in order to avoid closing a deal for which he had buyer's remorse without paying one penny of the reverse termination fee. Under the most basic tenets of Delaware law, when a fiduciary abuses his agency powers for personal profit, a breach of the duty of loyalty is established and remedies awarded.

10. On September 18, before the Lenders had even received responses to their diligence requests, much less formulated a view as to the import of this information, Fertitta took matters into his own hands. That day, he delivered to the Special Committee a letter stating that in light of the Hurricane of the prior weekend and the "tumultuous credit markets and economic conditions," he was convinced that the Lenders were prepared to assert an MAE as a basis to avoid their financing obligation. He then added, falsely, that an MAE assertion by the Lenders "would allow me to terminate the Merger Agreement as a result of a Material Adverse Effect."

11. Raising the pressure on the Committee, Fertitta claimed that in the absence of a buyout by him, the Company had no ability to refinance about \$400 million of outstanding Landry's Notes that could be redeemed by the holders in February 2009. The Committee's financial advisor specifically asked whether an outstanding and undrawn \$280 million Wachovia-led revolving bank facility could be used to materially solve the Notes problem. Fertitta's advisors falsely told Cowen the revolver would accelerate before the Notes redemption. A memorandum from Fertitta's counsel analyzing a non-public amendment to the Wachovia Credit Line was produced in this litigation because of a waiver of privilege. This memo shows that, in fact, the Wachovia Credit Line would remain outstanding past the redemption date and could be drawn

down. Put simply, Fertitta lied by asserting that the shareholders had no lifeline besides him.

12. Following the Hurricane, the Lenders continued working full steam ahead towards closing the \$21 Buyout, until September 24, when, according to an email from Morris to his boss, Brent Stevens, Jefferies ran a revised financing scenario “in light of Tilman having approached the special committee regarding a 4 dollar price reduction.” With the Lenders working on two different transactions, efforts to close the existing deal were impaired.

13. The Special Committee’s counsel, Jack Capers of King & Spalding (“K&S”), appears to have tried in every way to provide independent advice and to ensure that the Special Committee acted solely for the benefit of the Landry’s public shareholders. He wrote a series of letters making clear the Committee had not received any information supporting an assertion of an MAE or any other right to terminate. During a call on September 28, K&S partner Richard Cirillo flatly told Fertitta and his advisors: “We don’t see that there is an MAE or failure of the EBITDA condition or any other options to terminate.” And in repeated letters, Capers specifically reserved the right of the Committee to sue Fertitta for specific performance of the Merger Agreement, payment of the reverse termination fee, or otherwise.

14. If the case against Fertitta was so strong, why didn’t the Special Committee simply sue him and force him to either close or pay the \$24 million? Surely the Company would have sued a third party playing Fertitta’s game. But Fertitta used his

fiduciary position as a shield against consequences. When asked about suing Fertitta, one Committee member made clear that such a lawsuit would “cripple” 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.

15. While Capers was evidently trying to protect the shareholders, however, the head of the Special Committee, Michael Chadwick, was undermining those very efforts. Specifically, in a gross breach of attorney-client confidence and of fiduciary duty to the shareholders, Chadwick made a practice of secretly forwarding Capers' emails to the Committee along to Fertitta's advisors. Among other things, this included advice about Delaware law regarding MAE clauses, advice about Fertitta's rights under the agreement and Delaware law, and strategies for negotiating various points with Fertitta.

16. With Capers still holding tight, Fertitta and his long-time counsel, Steve Scheinthal, caused Landry's to issue an October 7, 2008 press release disclosing that the \$21 Buyout was “in jeopardy.” He did not disclose that he had offered \$17 per share or that the Committee had demanded \$19 per share. This was the first public sign that Fertitta was breaching his fiduciary duties, and hence the beginning of the Class Period.

17. A few days later, the Committee met with Fertitta in person to consider the \$17 offer. True to form, Fertitta pulled the proverbial rug out from under them, suddenly lowering his offer to \$13. When the advisors protested, Fertitta berated, cursed and threatened the Committee, K&S and the Committee's financial advisor Cowen & Co. At his deposition, Fertitta pointedly did not dispute that he threatened them. That same day, after excusing the advisors from the room, the Committee accepted a \$13.50 revised buyout price from Fertitta (the "\$13.50 Buyout").

18. Although he had agreed to a "go-shop" process to follow announcement of the \$13.50 Buyout, Fertitta again breached his fiduciary duties by rapidly accumulating shares on the open market after that announcement, first impairing any prospect of success of the go-shop and soon thereafter acquiring a greater than 50% stake in the Company.

19. As Capers' protested these purchases privately, the SEC aggressively questioned the lawfulness of these purchases and their effect on the deal. In a series of letters delivered to the SEC by Fertitta's counsel, Fertitta misled the regulators about the purpose and economic effect of these transactions, while also improperly suggesting that the Committee had passed on the fairness of these purchases. They had not.

20. Once he had majority control, Fertitta had buyer's remorse on the \$13.50 Buyout. On January 5, 2009, the Company issued a revised and near-final proxy statement. On January 11, K&S abruptly resigned. The following day, the Company shocked its shareholders by reporting that, in light of the SEC's request for disclosure of an October amendment to the Lenders' Commitment Letter, the Special Committee had

terminated the merger agreement. Even though any financing problem was solely Fertitta's, the Committee let him off the hook for any reverse termination fee by acting to terminate the \$13.50 deal itself.

21. Other than saving Fertitta a few dollars, why did the Committee terminate the \$13.50 Buyout? The Committee told shareholders (and this Court) that they terminated in order to assure that the Lenders would still refinance the outstanding Notes, which did not require a public proxy. The problem for the Committee, as the evidence shows, is that the amended commitment letter that Fertitta and his Lenders refused to publicly disclose clearly obligated the Lenders to refinance the Notes irrespective of whether the \$13.50 Buyout was ever put to a shareholder vote. The Committee could have simply done nothing and seen the Notes refinanced. Instead, they let Fertitta walk away for nothing, as the stock price plummeted to under \$6.

22. After Landry's stock struggled in the \$10 range for the first half of 2009, it began to rebound in the fall. Fertitta went back to the Special Committee that had been so accommodating the prior year and got them to approve a \$14.75 per share merger in November (the "\$14.75 Buyout"). This deal price was patently inadequate and, with Fertitta reserving the right to vote his now nearly 59% majority against any opposing deal, the process both before and after announcement of the deal was an exercise in futility. Indeed, two bidders submitted preliminary proposals to pay up to \$19 per share for the Company, but they recognized that they could do nothing without Fertitta's support, and their bids withered.

23. Plaintiff seeks to hold Fertitta liable for his gross and serial acts of disloyalty, which were facilitated by the Board and its Special Committees in bad faith and in breach of their own fiduciary duties.

JURISDICTION

24. This Court has jurisdiction over this action pursuant to 10 *Del. C.* § 341.

PARTIES

25. Plaintiff LMPERS is a retirement system created for the purpose of providing retirement allowances and other benefits for full-time municipal police officers and employees in the state of Louisiana, secretaries to chiefs of police and employees of this retirement system. LMPERS is a stockholder of Landry's, has been a stockholder of Landry's throughout the class period alleged in this Complaint and will continue to be a stockholder of Landry's through the conclusion of this litigation.

26. Fertitta has been Landry's President and Chief Executive Officer since 1987. Landry's paid Fertitta over \$7 million in 2006, over \$8 million in 2007, over \$6 million in 2008, and over \$2.9 million in 2009. Before getting into the restaurant business, Fertitta owned a women's clothing store, vitamin distributors, building construction and development, coin operated video games, and hotel operations. Many of these companies failed, and Fertitta was only able to become involved with Landry's and avoid bankruptcy because his creditors filed for bankruptcy first in the midst of the Texas savings and loans crisis. Fertitta's involvement with the Company began when he bought out three members of the Landry's family who co-owned the Company. The transaction resulted in lawsuits alleging that Fertitta had conspired with two of the

Landry's family members to squeeze a third family member out, and that he then turned around and defrauded his two co-conspirators. Fertitta ultimately agreed to pay substantial sums to settle the fraud allegations. Steven Scheinthal was Fertitta's lawyer.

27. Steven L. Scheinthal has served as Landry's Executive Vice President or Vice President of Administration, General Counsel and Secretary since September 1992, and has been a member of the Landry's Board since 1993. Landry's paid Scheinthal over \$1 million in 2006, \$1.1 million in 2007, and over \$680,000 in 2008.

28. Kenneth Brimmer has been a member of Landry's Board since 2004. He was a member of the Special Committee that evaluated and negotiated the \$21 Buyout, and he is Co-Chairman of the 2009 Special Committee that evaluated and negotiated the \$14.75 Buyout. Brimmer has known Fertitta since the early 1990s, when they negotiated the potential establishment of a Landry's restaurant in a casino project. Brimmer subsequently received a \$500,000 consulting fee when Landry's purchased the Rainforest Café chain (which he headed). Brimmer joined the Landry's Board shortly after his consultant arrangement with Landry's ended. Brimmer received \$50,000 for his service on the Special Committee. For his role as a director, Landry's paid Brimmer over \$110,000 in 2007 and \$180,000 in 2008.

29. Michael S. Chadwick has been a member of Landry's Board since 2001. He was Chairman of the Special Committee that evaluated and negotiated the \$21 Buyout, and received \$60,000 for his service on that committee. Chadwick was the designated investment banker at Sanders Morris Harris when that firm served as an underwriter in a Landry's public offering in the late 1990s. Since then, Chadwick has

also provided Fertitta with financial advice in connection with a possible sale of Landry's to a buyout group in Dallas. Based on their relationship, Fertitta asked Chadwick to join the Landry's board of directors. Chadwick now serves as Co-Chairman of the 2009 Special Committee. For his role as a director, Landry's paid Chadwick over \$115,000 in 2007 and over \$104,000 in 2008.

30. Michael Richmond became a member of Landry's Board in 2003. He was a member of the Special Committee that evaluated and negotiated the \$21 Buyout, and received \$50,000 for his service on that committee. Richmond has known Fertitta since the 1980s when a Landry's restaurant became a tenant in a Galveston waterfront project that Richmond was redeveloping. In the mid-1990s, Fertitta purchased the San Luis hotel in Galveston from Richmond's company. For his role as a director, Landry's paid Richmond over \$115,000 in 2007 and over \$94,000 in 2008. Richmond left the Landry's Board in May 2009, after he was not re-nominated for election at the 2009 Annual Meeting of Stockholders.

31. Joe Max Taylor has been a member of Landry's Board since 1993. For his role as a director, Landry's paid Taylor over \$130,000 in 2007 and over \$99,000 in 2008.

32. Richard H. Liem has been Landry's Executive Vice President and Chief Financial Officer since June 2004. Liem joined Landry's in 1999 as its Vice President of Accounting and Corporate Controller. Liem was elected to the Landry's Board at the 2009 Annual Meeting of Stockholders held on May 7, 2009. Landry's paid Liem over \$1.3 million in compensation during 2007 and 2008.

33. The individual defendants named above in paragraphs 27 through 32 are collectively referred to as the “Landry’s Directors” or the “Director Defendants.”

34. By reason of their positions, the Landry’s Directors owed fiduciary duties to Landry’s and its shareholders, including the obligations of loyalty, good faith, fair dealing, and due care. They were required to discharge their duties in a manner they reasonably believed to be in the best interests of Landry’s and all its shareholders, and not in furtherance of other interests. Specifically, they could not further the interests of Fertitta at the expense of Landry’s public shareholders.

35. Fertitta Holdings, Inc. (“FHI”) is a Delaware corporation and is wholly owned by Fertitta.

36. Fertitta Acquisition Co. (“FAC”) is a Delaware corporation and a wholly owned subsidiary of FHI (together with FHI, the “2008 Fertitta Entities”), and was formed to be the acquiring entity in the \$21 and \$13.50 Buyouts.

37. Fertitta Merger Co. is a Delaware corporation and a wholly-owned subsidiary of Fertitta Group Inc.

38. Fertitta Group Inc. is a Delaware corporation formed for the purposes of the \$14.75 Buyout (together with Fertitta Merger Co., the “2009 Fertitta Entities”).

39. Fertitta, Liem, the 2008 Fertitta Entities, the 2009 Fertitta Entities, and the Director Defendants are collectively referred to herein as “Defendants.”

NOMINAL DEFENDANT

40. Landry’s is a Delaware corporation headquartered at 1510 West Loop South, Houston Texas, 77027. Landry’s is a national, diversified restaurant, hospitality

and entertainment company, which principally engages in the ownership and operation of full-service, casual dining restaurants. Landry's owns and operates over 180 restaurants in 28 states, including the Rainforest Café, Saltgrass Steakhouse, Landry's Seafood House, The Crab House, Charley's Crab, and The Chart House. Landry's also owns and operates various hospitality businesses including the Golden Nugget Hotels and Casinos in downtown Las Vegas and Laughlin, Nevada.

FACTUAL ALLEGATIONS

A. Fertitta's 2008 Agreement and Financing to Buy the Company for \$21 Per Share

41. On January 5, 2008, Fertitta organized and chaired a Board meeting where the only item of business was a discussion by Fertitta about exploring a going-private transaction. Landry's general counsel, Scheinthal, and CFO, Liem, were also present. At this time, Fertitta considered himself a controlling shareholder of Landry's. In response to Fertitta's proposal, the Board approved a motion allowing Fertitta to access and utilize Company personnel and incidental resources to explore a bid.

42. On January 27, 2008, Fertitta offered to acquire the 61 percent of the Company's common stock that he did not already own for \$23.50 per share. Scheinthal and Liem were again present. Fertitta knew even when he made this first offer that the economy was slowing down and headed for recession:

Q. In other words, when you made the 23.50 offer, one of the things you were taking into account is, you know, we're heading into a, you know, recession, credit markets are tight, right?

A. Yeah. We knew we had to get it done.

43. In response to the offer, the Landry's Board formed a Special Committee, consisting of Brimmer, Richmond and Chadwick. Initially, the Landry's Board charged this Committee with performing a strategic alternatives analysis with respect to the Company to consider whether a sale of the Company would be in the best interest of Landry's and its shareholders. This was later changed to a grant of authority to sell the Company without consideration as to whether a sale would be in the best interest of Landry's and its shareholders at this time. The final Board minutes thus charged the

Special Committee authority to “exercise all power and authority of the Board of Directors in connection with (i) evaluating the Proposal, (ii) soliciting competing bids for the Company and (iii) negotiation a definitive acquisition agreement with the person selected by the Special Committee, including, if applicable, [Fertitta], relating to the acquisition of the Company.”

44. On February 11, 2008, the Special Committee retained K&S as its legal advisor. On April 2, 2008, the Special Committee retained Cowen as its financial and M&A advisor.

45. From the outset, it was clear to all that Scheinthal and Liem were working on Fertitta’s side and should not be treated as if they were loyal to the Special Committee. As Fertitta testified at his deposition in this case:

A. I think it was made very clear from the beginning that Steve Scheinthal and Rick Liem were on the Fertitta team, that they would be staying with me.

Q. Okay.

A. So since -- they were adversaries to the Special Committee.

Q. Okay. They were adversaries. So the Special Committee should treat them as adversaries?

A. Yes.

46. On April 4, 2008, Fertitta caused Landry’s to issue a press release, without the Special Committee’s knowledge, announcing that Fertitta had lowered his offer from \$23.50 to \$21 per share. The press release announcing Fertitta’s reduced offer, like the letter that Fertitta sent to the Special Committee informing them of this offer, specifically justified the lower offer by referencing the difficult economic environment and the

ongoing global credit crisis. Fertitta testified that he lowered his offer to \$21 per share “[b]ecause of sales trends and the credit market. And Jefferies was starting to knock us back and they wanted to have a higher rate of interest.”

47. Shortly after the April 4 press release was issued, K&S informed Landry’s counsel at the law firm of Haynes & Boone that Landry’s press releases purporting to describe actions of the Special Committee, the status of the Committee’s work, or negotiations with Fertitta should be reviewed by the Special Committee and its counsel before they were issued.

48. Despite the deteriorating economic environment, a number of financial institutions expressed interest in providing committed financing for the transaction in May 2008. For example, in addition to Jefferies, GE Capital and Deutsche Bank also informed Liem that they were interested in arranging 100% committed financing. Furthermore, UBS had expressed interest in providing one-third of any financing that Jefferies or GE Capital committed to arrange.

49. On May 27, 2008, Fertitta awarded the contract to Jefferies and signed an engagement letter. As is typical, the bankers at Jefferies were required to seek internal approval before formally committing Jefferies to provide the requested financing. On June 11, 2008, they sent a memo requesting approval from the Jefferies Finance Credit Committee. This memo described the described the debt commitment that Jefferies would provide as a “Full, No-Outs Commitment.” Morris later testified that this was Jefferies’ shorthand for a commitment where “there’s no business diligence out, and there’s no market or syndication out.”

50. The credit committee approved the commitment and, on June 12, 2008, Jefferies and Wells Fargo issued a formal debt commitment letter to Fertitta. Jefferies agreed to provide “full, no outs commitments” for a \$315 million bridge loan (in anticipation of a \$315 million senior notes offering), \$125 million of a \$250 million term loan, \$50 million in preferred equity, and \$25 million of a credit revolver. Wells Fargo committed to provide the remaining \$125 million of the \$250 million term loan and another \$25 million of the credit revolver.

51. The deteriorating economic environment was no secret when Jefferies and Wells Fargo agreed to provide these substantial commitments. In negotiating the Debt Commitment Letter, the Lenders specifically noted the “highly illiquid” nature of the debt markets. It was further no secret that Bear Sterns had just collapsed. However, based on Landry’s liquidity and the value of Landry’s assets – including \$320 million of owned real estate and an additional \$260 million in leasehold interests – Jefferies “felt good about the company,” and concluded that Landry’s would be able to cover its debt obligations even if the Company experienced two consecutive years of negative same store sales.

52. Under the terms of the engagement letter, Fertitta agreed to pay Jefferies a commitment fee of approximately \$3 million for Jefferies’ full, no outs commitment to finance the transaction. Jefferies does not receive a commitment fee for every transaction it agrees to finance. Jefferies’ banker Christian Morris (“Morris”) testified during his deposition that it was important for Jefferies to be paid a \$3 million commitment fee here, because Jefferies had done a lot of diligence on Landry’s and agreed to provide “a very

strong letter” over an extended period of time that did “not have a specific business due diligence condition.” Based on its due diligence, and in return for a \$3 million commitment fee, Jefferies thus agreed to bear the financing risk of a further deterioration in the economy, as well as the risk of syndicating the debt.

53. Even when Fertitta agreed to pay \$21 per share in June 2008, he had some early signs of buyer’s remorse. When asked if he thought the \$21 price “was a reasonably rich price for Landry’s,” Fertitta explained, “I know I was probably not as comfortable as I was in January ... at the way the world was going.” Fertitta recognized, however, that while the Lenders were concerned about difficulty syndicating the debt, they had bargained to bear that risk:

Q. So -- so did you understand that if they had difficulties syndicating the debt, if they walked away because of that, then you could sue them for breach of contract?

A. Yes.

Q. Okay. And so that was a risk they were bearing. The syndication was a risk that was on them, not on you, right?

A. Yes.

54. On June 12, 2008, the Lenders also issued a market flex and securities demand letter (the “Market Flex”) to Fertitta. The Market Flex outlined certain pricing elements of the Debt Commitment Letter. The Lenders always understood that the Debt Commitment Letter would be disclosed to the SEC and Landry’s shareholders. However, to protect their ability to syndicate the loans at an advantageous rate, the Lenders insisted that the Market Flex not be disclosed.

55. On June 16, 2008, the Landry's Board executed the \$21 Merger Agreement (the "\$21 Merger Agreement"). The total consideration Fertitta agreed to pay to Landry's public shareholders was approximately \$220 million.

56. The \$21 Merger Agreement contained a reverse termination fee requiring FAC (backed by Fertitta's personal guarantee) to pay a \$24 million reverse termination fee (the "\$24 Million Reverse Termination Fee") if it failed to close the deal for any legitimate reason.

57. The \$24 Million Reverse Termination Fee did not purport to limit Fertitta's liability or even apply to bad faith breaches of contract or any breaches of fiduciary duty, or in any other respect limit Fertitta's exposure to damages in tort.

58. The \$21 Merger Agreement did, however, excuse FAC (and, thereby, Fertitta) from paying the \$24 Million Reverse Termination Fee if, after December 31, 2007, an MAE ("material adverse effect") had occurred. The \$21 Merger Agreement defined an MAE, in relevant part, as:

"Material Adverse Effect" means any event, development, change or circumstance (any such item, an "Effect") that, either individually or in the aggregate, has caused or would reasonably be expected to cause a material adverse effect on the condition (financial or otherwise), results of operations, assets, liabilities (contingent or otherwise), properties, solvency, business, management or material agreements of the Company and its subsidiaries taken as a whole, except in each case for any Effect resulting from, arising out of or relating to any of the following, either alone or in combination: ... (B) any change in interest rates or general economic conditions (i) in the industries or markets in which the Company or any of its subsidiaries operates, (ii) affecting the United States or foreign economies in general or (iii) in the United States or foreign financial, banking or securities markets, in each case which changes do not affect the Company and its subsidiaries to a materially disproportionate degree; (C) any natural disaster or act of God....

59. The Debt Commitment Letter between the Lenders and Fertitta also included an MAE clause (“MAE Clause”), with a substantively identical exception for any “natural disaster or act of God” or “*any change in interest rates or general economic conditions in the industries or markets in which the Company or any of its subsidiaries operates* or affecting the United States or foreign economies in general or in the United States or foreign financial, banking or securities markets (which changes do not affect the Company and its subsidiaries to a materially disproportionate degree). . . .” (emphasis added).

60. The Special Committee’s counsel, Jack Capers, 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.

61. On June 17, 2008, Fertitta publicly disclosed as an attachment to a Form 13D the Debt Commitment Letter and the “Market Flex.” After noting their displeasure, the Lenders quickly gave a waiver to Fertitta for filing the Market Flex with the SEC.

62. Over the summer, as the economy worsened, Fertitta faced increasing risk that the deal he negotiated would become unfavorable to him. He recognized, however, that although the credit market was getting worse during the summer, the Company’s performance was in line with the broader economy. Despite any misgivings, Fertitta had no basis to assert an MAE.

63. Numerous witnesses have confirmed that by late August and in early September, the \$21 Buyout appeared to be on track to close shortly. Fertitta testified that the parties were near done with preparing the proxy statement by late August and that he

expected that the deal would close in early October. Indeed, the only party with any motive to see the \$21 Buyout falter was Fertitta, who saw the global economy suffering and was contractually bound by the buyout unless he was willing to pay \$24 million (nearly one-third of his entire \$90 million equity commitment) just to exit the deal.

B. Hurricane Ike Provides Fertitta a Facade to Push For a Reduction in the \$21 Buyout Price

64. On September 13, 2008, Hurricane Ike struck Galveston, Texas, causing closure of and damage to certain of the Company's properties

65. Even before Hurricane Ike struck, the Lenders had preliminary discussions with representatives of Landry's about its potential effect on the Company. During those discussions, Landry's reassured the Lenders that it had sufficient property and business interruption insurance to cover the anticipated damage.

66. When the Hurricane hit, Fertitta quickly realized that despite the short-term damage, the Company's long-term prospects remained positive. As Fertitta testified: "Well, we all know in the years to come you're always going to rebound, you hope, but you still have to worry about short-term. I was not concerned, probably, long-term. I was more concerned short-term." When asked if he feared in the immediate aftermath of the Hurricane that he was overpaying for the Company, Fertitta explained: "Long-term, probably no and short-term, probably yes."

67. Surely recognizing that short-term damage of the sort Fertitta described is no basis to assert an MAE, the Lenders' first reaction to the Hurricane was a positive signal. For example, Jefferies banker Jim Walsh immediately suggested undertaking effort to stabilize the stock price in order to send a signal to the market that the Hurricane

would not derail the \$21 Buyout. 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.” Quite simply, unless Fertitta decided to pay \$24 million rather than closing the deal, the Hurricane should have been a non-event for purposes of the \$21 Buyout.

68. On September 15 – the first business day after the Hurricane – the Board met with Fertitta (who chaired the meeting), Liem and Scheinthal to discuss Hurricane Ike. By this time, Fertitta had toured the properties using the Company helicopter and the Board relied on him for information regarding the extent of the damage. At this meeting, the Board then authorized a share repurchase program to support the stock and, because the Company would not be purchasing shares in light of the pending transaction, also approved share purchases by Fertitta (the “Share Purchase Program”). In response to perceived overreaction to the effects of Hurricane Ike, Fertitta would act as an affiliate of the Company in buying shares to support the stock price. As Fertitta testified:

I remember there being confusion of who should 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 catch-all of either party can buy the stock, we need to get 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.

69. The members of the Special Committee attended this September 15 Board meeting and voted to approve the Share Purchase Program in their capacity as Board members. However, they did not disclose the Share Purchase Program to the Special Committee’s outside counsel at K&S, who expressed serious concerns for the deal in

light of Fertitta's open-market share purchases. Because Capers was not informed of the September 15 Board meeting, however, the proxy statements did not mention the Share Purchase Program, which therefore remained hidden from the SEC and Landry's public shareholders.

70. On September 17, Landry's issued a press release with an upbeat preliminary assessment of the effects of Hurricane Ike on the Company. It informed the market that the property damage was manageable and that the property and business interruption damage would largely be covered by insurance. The press release stated for example that "[o]nly one restaurant in Galveston sustained significant damage, as did two restaurants at the Kemah Boardwalk." The press release quoted Fertitta as saying that he was "committed to reopening our operations in both Kemah and Galveston as soon as possible" and that Landry's would have "even newer and better facilities than before." The press release further quoted Liem as saying that "[w]hile the final effect of the property damage and earnings impact resulting from the storm has not yet been finally determined, we are comfortable that the majority of our property losses and cash flow are expected to be covered by property and business interruption insurance."

71. Acting as an affiliate of the Company, Fertitta thereafter began to purchase shares pursuant to the Share Purchase Program. From September 17 through September 19, Fertitta purchased 400,000 shares at prices ranging from \$11.83 to \$14.11 per share.

C. Fertitta Demands That The Special Committee Lower The Buyout Price

72. While increasing his personal stake in the Company, Fertitta approached the Special Committee to renegotiate the \$21 Buyout. On September 17, the Special

Committee's financial advisor, Cowen, learned that Fertitta wanted to "cut the price to \$17/share." At this time, the Lenders had not done any investigation into the damage caused by Hurricane Ike. Indeed, the Lenders would not even tour the properties until six days later.

73. Nevertheless, Fertitta sent a letter to the Special Committee on September 18, 2008 in which he stated that in order to maintain the deal and avoid a Lender-led refusal to fund the deal, the Committee would need to accept a revised acquisition price of \$17 per share:

Recent events from this past weekend, coupled with a tumultuous credit market and economic conditions not seen by this country since the Great Depression likely put the Proposed Merger in jeopardy. We are concerned that as a result both Jefferies and Wells Fargo Foothill's (the "Lenders") additional requests for due diligence, they may likely determine that a Material Adverse Effect under the Commitment Letter has occurred which will result in the Lenders withdrawing their financing commitment.

74. Fertitta further claimed in the letter that: "I have every reason to believe that it is in all of our interests not to have the Lenders withdraw their commitments, which would allow me to terminate the Merger Agreement as a result of a Material Adverse Effect." Of course, this position was simply false and inconsistent with the terms of the merger agreement, which provided no financing contingency or MAE based on a failure of financing, irrespective of whether Fertitta's lenders validly or arbitrarily refused to fund the deal.

75. When asked whether Fertitta was threatening to assert an MAE to avoid his obligations to close the merger, irrespective of whether the lenders funded, Fertitta was clear:

Q. Well, were you -- were you telling the Special Committee that you were prepared to declare a Material Adverse Effect?

[objection]

A. I was telling the Special Committee it would allow me to terminate the Merger Agreement as a result of Material Adverse Effect. This was the day after the storm and I'm sure whatever I wrote in this letter I felt very good about.

76. Fertitta closed his September 18 letter by expressing his belief that he could “persuade the Lending Banks to move forward with debt financing if [he] revised his offer to reflect [Landry’s] reduced value, which he believed at such time was \$17.00 per share.” Fertitta’s letter did not state that the Lenders actually determined or were even taking the position that an MAE had occurred as contemplated by the Debt Commitment Letter, *only that he believed they might do so*. As the evidence showed, Fertitta’s supposed fears were fabricated.

77. Parks testified, for example, that as of September 18, 2008, Wells Fargo was committed to financing the \$21 merger and was “desperately trying to get to the bank meeting” to allow for syndication of Wells Fargo’s debt commitment. Morris similarly testified that as of September 19, Jefferies and Wells Fargo were still moving forward towards trying to syndicate the loans on the \$21 Buyout.

78. Throughout 2008, Landry’s had almost \$400 million of 9.5% Senior Notes outstanding that would be due in 2014 (the “Notes”). 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”). While the Notes would be refinanced as part of any of Fertitta’s Merger Agreements with the Company, Fertitta, Liem, and

Scheinthal had not arranged any refinancing of the Notes in the event a merger would fail to close by the Put Date.

79. Fertitta used the prospect of Landry's inability to refinance its long-term debt as a key leverage point in his negotiations with the Special Committee, notwithstanding that his fiduciary duties required Fertitta to help, not hurt, the Company. Fertitta's stated belief in his September 18 letter that he could "persuade the Lending Banks to move forward with debt financing if [he] revised his offer to reflect [Landry's] reduced value, which he believed at such time was \$17.00 per share" was nothing other than a projection of Fertitta's own desire to reduce the deal price while falsely suggesting that absent a price reduction, Landry's would not have the financing to pay off the Notes. Morris testified, for example, that Jefferies never threatened Fertitta that it would not perform under the Debt Commitment Letter unless the \$21 Buyout was renegotiated at 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.

80. Instead, Fertitta's testimony makes clear that Fertitta saw the Hurricane as a justification to buy Landry's at a lower price. When asked whether he was urging the Committee to accept the \$17 per share price because it remained attractive relative to the price at which the stock was trading on September 18, Fertitta explained that he "really was struggling with how the future looked ahead of me to be paying \$21 a share."

81. Upon receipt of Fertitta's September 18 letter, the Special Committee's counsel recognized the tension between Fertitta's private renegotiation efforts and his favorable quote in the Company's press release of the prior day: "We considered internally the differences between this press release and the statements in the letter from Mr. Fertitta dated September 18."

D. Fertitta, and Not the Lenders, Forced the Renegotiation

82. In the context of this litigation, Defendants have constantly tried to assert that the Lenders were the driving force behind the renegotiation; not Fertitta's buyer's remorse. This assertion does not hold up.

83. Morris testified, for example, that Jefferies never threatened Fertitta that it would not perform under the Debt Commitment Letter unless the \$21 deal was renegotiated at a lower price. As Fertitta's CFO, Liem, conceded:

[The Lenders] never said they were backing out. . . . They never said, 'We're calling an MAE,' and they never said 'We were backing out.' They simply *intimated* areas that *might be interpreted to become* a material adverse effect such as the long-lasting impact of Hurricane Ike on Galveston and Kemah. (emphasis added).

84. Fertitta's stated belief in his September 18 letter that he could "persuade the Lenders to move forward with debt financing if [he] revised his offer to reflect [Landry's] reduced value, which he believed at such time was \$17.00 per share" was nothing other than a projection of Fertitta's own self-interest desire to reduce the deal price.

85. As Fertitta was working to force a lower deal price, the Lenders continued to work towards closing the \$21 Buyout, as the Commitment Letter required. As of

September 18, 2008, the Lenders had outstanding requests for information to assess the damage caused by Hurricane Ike. The Lenders had specifically asked for information about the number of employees displaced, the movement of employees to different locations on account of Hurricane Ike, the impact on EBITDA of Hurricane Ike and the related restaurant closures, the amount of lost EBITDA covered by insurance, the Company's new forecasts and projections, and the analysis of Landry's "covenant compliance." Special Committee member Richmond, a banker, testified that the Lenders requested "typical information" and that "there was a whole lot of chatter" that was "typical" in deals.

86. On September 19, 2008, Liem provided the Lenders with responses to their diligence, making clear that, despite Hurricane Ike, the employee displacement was "not meaningful," and insurance was expected to cover between 80 and 100 percent of the negative EBITDA impact from Hurricane Ike. In an attachment to the e-mail, Liem provided the Lenders with Landry's financial projections indicating that, despite Hurricane Ike, Landry's expected to meet all financial requirements contained in the Debt Commitment Letter.

87. The Lenders were satisfied. Wells Fargo banker Rusty Parks testified, for example, that Wells Fargo was "focused on . . . the company meeting its EBITDA," and that "[t]he company demonstrated after significant diligence that they were going to meet the minimum EBITDA level."

88. The Company also did not have any credit issues as a result of Hurricane Ike. As Liem testified, no bank called any loans or terminated any of Landry's credit lines, nor did any supplier refuse to deal with the Company on credit.

89. The Lenders were also satisfied with Landry's insurance coverage for the property and business interruption damage caused by Hurricane Ike. Scheinthal testified that the Lenders never stated that they would withdraw their commitment because the Company was not adequately insured for losses caused by Hurricane Ike. Nor did the Lenders express serious concern about the Company's insurance coverage affecting their ability to provide financing for the \$21 Buyout. Jefferies banker Christian Morris confirmed that Jefferies never asserted that it would not perform under the Debt Commitment Letter until the actual insurance to be paid was known or on the basis that the insurance coverage was inadequate.

90. On September 22, 2008, Wells Fargo and Jefferies participated in a conference call with representatives of Landry's and Landry's insurance broker to discuss the Company's insurance coverage for the damage caused by Hurricane Ike. The insurance broker confirmed Liem's earlier representation to the Lenders that Landry's had adequate insurance coverage. Fertitta did not inform the Special Committee that this call would take place, let alone that Landry's insurance broker had confirmed that there was adequate insurance coverage.

91. On September 23, 2008, Fertitta took the Lenders on a tour of Landry's Galveston and Kemah operations. Morris described the trip as a "fact finding mission."

Wells Fargo's Parks was present and understood from Fertitta's body language that Fertitta was looking to renegotiate the \$21 Buyout.

92. The Lenders incorporated the information they learned during the September 22 call with Landry's insurance broker and the September 23 fact-finding mission into a Confidential Information Memorandum for potential investors. On September 24, Wells Fargo prepared an Appendix to the Information Memorandum addressing the anticipated financial effects of the Hurricane on Landry's business. Among other things, this Appendix stated:

Houston

Of the 31 restaurants, 15 restaurants reopened on September 15, 2008 or earlier. By September 18, 2008, 27 stores were reopened. The 4 remaining stores were opened the following week as power was restored. The Company's Houston-area restaurants did not suffer any physical damage; however, due to store closures, the Company estimated that the storm caused approximately \$1.5 million of business interruption, which is expected to be claimed.

Because of the power outages throughout Houston after the storm, many of the Company's operable locations were able to benefit from increased sales as consumers waited for power to be restored to their homes. As a result, the Company increased revenues at operable locations offset those that were closed due to the power outages.

The Company does not expect the short closure of these locations, due to Ike, to affect its financial performance. As shown below, the Company believes there will be minimal affects in 2008 results.

Galveston

The Company's restaurants located in Galveston, Texas suffered minimal damages related to Ike. The Company retains eight restaurant locations in the area, primarily along Galveston's seawall. Due to the storm, the damages amounted to approximately \$6.5 million. . . . It is expected that half of the units will be open within the month. . . .

The closure of these locations is expected to affect the Company's financial performance *slightly*. The estimated loss of profits from these stores will be fully recovered through the Company's business interruption insurance....

Kemah

The restaurants and hospitality operations at the Company's owned and operated Kemah Boardwalk suffered the most damage out of the Company's properties.... The majority of restaurants in Kemah are anticipated to be open by mid-November with the Kemah Boardwalk completely operational by [] March 2009.

The Company estimates damages of approximately \$19.8 million. The estimated loss of profits from the stores will be offset by the Company's business interruption insurance in the amount of approximately \$6.9 million. Because the Kemah Boardwalk is a local tourist destination, most of its sales occur between March and September. The Kemah Boardwalk will reopen in time for the beginning of spring break, the beginning of the tourist season.

93. The Appendix to the Information Memorandum included a specific section about insurance. Under the heading "Insurance Overview," the Lenders were prepared to represent the following to potential investors:

The Company carries two property insurance policies through the Texas Windstorm Insurance Association ("TWIA") and Lloyd's of London ("Lloyd's").....

In aggregate, the Company expects to claim approximately \$35.9 million in damages and business interruption caused by Ike....

Under the TWIA and Lloyd's policy, the Company expects to receive \$[9.6] million and \$[25.0] million in net proceeds, respectively, as the Company expects to pay approximately \$[1.3] million in deductibles. To date, the Company has received a \$10.0 million payment from Lloyd's for initial repairs. Additional proceeds will be advanced as the Company's claims are finalized.....

Although the units affected by Ike will cause slight disruptions to the Company's performance, the Company expects that Revenue and EBITDA will continue to grow in comparison to 2007. Business

interruption proceeds from the Company's insurance policies will offset the lost profit associated with the affects of Hurricane Ike....

In total, the affect of Ike will result in an estimated decrease of \$26.0 million in sales and approximately \$6.2 million of Adjusted EBITDA for the FY 2008 and \$28.1 million in revenue and \$1.3 million in Adjusted EBITDA for FY 2009. The Company expects that it will recover all or most of these losses under the Company's business interruption proceeds.....

The insurance proceeds will allow the Company to benefit from reduced capital expenditures in future years. In addition, the Company expects to benefit from a significant amount of reinvestment into the Galveston/Kemah area

94. As the Lenders were gathering information for the road show showing that the Company would survive the Hurricane just fine, Fertitta continued his efforts to renegotiate the \$21 Buyout and the related financing. On September 23, Fertitta's lawyers at Olshan sent Fertitta a draft of an amended commitment letter. If the banks had truly been the source of the pressure to renegotiate the terms of the transaction – as Defendants have claimed – industry practice and logic would dictate that the banks would take the lead in drafting the necessary amendments and waiver documents. As Fertitta testified when asked who took the lead in creating the amendment to the Commitment Letter in connection with the revised deal, "I can't imagine that a bank or firm would let the customer draft their document." Tellingly, this initial draft of the amendment to the Commitment Letter (bearing the Lenders' letterhead no less) was prepared by Fertitta's advisors.

95. In sum, none of the Lenders ever declared an MAE. Nor did they ever provide any letter, opinion, memorandum, or other written documentation that they were purportedly considering declaring an MAE (or setting forth their reasons for doing so).

Likewise, Fertitta's counsel's never provided a legal opinion that an MAE had occurred or could validly be asserted.

96. Surely recognizing the flimsiness of Fertitta's assertions that he and the Lenders could refuse to close the \$21 Buyout, the Special Committee's counsel, Capers, called on Fertitta to support his position with facts: "I think this letter or one of the other letters said that we had no basis to believe at the time that an MAE had occurred. If they felt like an MAE had occurred, then we want to see, we wanted to see their position on this." Rather than disclose the information clearly rebutting Fertitta's purported "concerns" about an MAE, however, Fertitta caused Landry's to withhold from the Special Committee the financial and insurance information showing that no MAE had occurred.

97. Instead, Fertitta – through Liem – told Jefferies on September 24, 2008 to prepare revised financing scenarios based on a renegotiated price of \$17 per share. Jefferies promptly did so. Later that same day, Morris emailed his boss, Brent Stevens, and Jefferies' head of high yield syndication, Brian Wolfe, the revised financing scenario "in light of Tilman having approached the special committee regarding a 4 dollar price reduction." Morris testified that the fact that Tilman Fertitta had approached the Special Committee about renegotiating the deal price by \$4 per share made it more difficult for Jefferies to hold a bank meeting with other lenders to syndicate the \$21 Buyout. As Morris testified:

It's just you communicate to the lenders in a transaction. Here's the complete transaction, do your work. And this is the complete transaction, not this is maybe the transaction, and then you can decide. I mean, we've

got to present them the whole transaction so they can do their work and then agree or not agree to that transaction.

Morris further explained that after September 24, a “significant focus” of Jefferies’ energies was on developing an amendment to the Debt Commitment Letter for a deal at a lower price rather than doing everything that was necessary to close the \$21 Buyout. Even though the Special Committee did not agree to reduce the price for several weeks, Jefferies thus never ran a syndication process with respect to the transaction before the Debt Commitment Letter was amended to reflect a renegotiated transaction.

98. After Fertitta told Jefferies to prepare revised financing scenarios based on \$17 per share, Fertitta sent a letter – through Scheinthal – to Jefferies pretending that he was still committed to the \$21 Buyout. Fertitta’s September 24 letter to Jefferies stated: “I have been ready, willing and able to proceed with the financing since [June 12, 2008] and have provided Jefferies and WFF with all requested information.” Morris testified being surprised to receive the letter.

99. On September 25, 2008, following a phone call among Fertitta and Jefferies representatives, Jefferies responded to Fertitta’s letter by sending a letter that was carefully worded by its legal counsel to avoid calling an MAE, stating instead that Fertitta “may” not be able to satisfy certain unidentified conditions of the Commitment Letter. Morris confirmed that the September 25 letter specifically did not state that Jefferies would not perform on the Debt Commitment Letter.

100. Morris understood that Fertitta might use Jefferies September 25 letter in his negotiations with the Special Committee. Sure enough, Fertitta sent a letter on September 25 attaching the Jefferies letter.

101. K&S saw through this ruse, responding to Fertitta's letter of the same day, and writing that: (a) the Special Committee did not view the correspondence between Jefferies and Fertitta as a termination of the Debt Commitment Letter; (b) Fertitta had not disclosed whether he agreed with Jefferies' assertion that the Company "may" not be able to meet certain unidentified conditions in the Debt Commitment Letter; and (c) the Special Committee must receive this information in order to evaluate the situation fully.

102. Capers advised the Committee about possibly suing Fertitta and seeking specific performance of the \$21 merger agreement in light of his misconduct. The Special Committee believed that it could not sue Fertitta because a lawsuit between the Company and its CEO would have crippled the Company and, moreover, created substantial uncertainty in the marketplace. In other words, Fertitta put Landry's in an impossible situation.

103. On September 28, 2008, the Special Committee and its advisors held a teleconference with Fertitta, Scheinthal, Liem, and their advisors. Capers' litigation partner at K&S, Richard A. Cirillo, spoke on behalf of the Special Committee. According to notes taken of the call, Cirillo told Fertitta: "We don't see that there is an MAE or failure of the EBITDA condition or any other options to terminate."

104. Fertitta did not take Cirillo's statements seriously. As Fertitta explained: "Well, they represent the Special Committee. That's their lawyer and they are going to – they are going to – they are going to be adversarial to us. I don't believe anything they say. They're a lawyer. They're just a hired gun." Moreover, when asked why the Special Committee would even be adversarial with Fertitta, who claimed that he was trying to

save the Company but his hand was being forced by the Lenders, Fertitta testified with a demonstrable lie:

Maybe they -- maybe -- maybe they didn't understand the math that we were not getting any of the savings, that it was all going to Jefferies. Maybe they just didn't want to believe it or they didn't get it..... The one thing I felt good about was, I wasn't saving money and the shareholder getting less. Okay? It was all going to the bank to make sure this company was refinanced.

105. At the beginning of the second day of his testimony, however, Fertitta admitted that the prior evening he had spoken with Scheinthal, who was present during Fertitta's first day of testimony, and that Scheinthal reminded Fertitta that the banks were not the sole driver of the lower price. Rather, the deal had become less financially attractive for Fertitta:

A. One of the things was when we were negotiating, not only was it the -- not only was Jefferies getting a majority of the benefit and that's why the price was coming down, it was also the fact that our business trends -- he reminded me that the Golden Nugget had done \$62 million the year before and was on a trend to do \$42 million. And that you went from a couple hundred million dollars, \$300 million in equity in the Golden Nugget to negative equity in the Golden Nugget, and that I had forgotten to bring that up.

Q Okay.

A. Which there was truly horrible business trends.

Q. So and that -- and that made the acquisition less attractive for you?

A. No, it just made it where you had to buy at the right price.

Q. Well, right, it made the acquisition of \$21 less attractive to you?

A. Yes

In other words, Fertitta plainly and repeatedly admitted that he had buyer's remorse and did not want to pay \$21 per share if he could avoid it.

E. **The Special Committee Undermines Its Own Lawyer and Favors Fertitta's Interests over the Public Shareholders**

106. On September 30, K&S sent an email to the Special Committee discussing this Court's recent opinion in the Huntsmann-Hexion litigation, and interpreting that opinion to find 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 and MAE." Without the knowledge of K&S, Chadwick opened backchannel communications with Scheinthal, whom he knew to be working for Fertitta. Chadwick immediately forwarded K&S's legal analysis to Scheinthal, deliberately undermining the integrity of the Special Committee process.

107. The very next day, the Committee began to back down in the face of Fertitta's self-interested demands. On October 1, 2008, the Special Committee proposed, "for negotiation purposes," a \$19.00 per share merger. Notably, by the beginning of October, Cowen had received the same post-Hurricane financial updates as Jefferies. As Capers explained, even taking into account the harm from Hurricane Ike, Cowen informed the Special Committee "that the \$17 was at the lower end of the range" of its valuation analysis. Put another way, the damage was hardly devastating.

108. On October 6, 2008, Fertitta again warned the Special Committee that *he believed* the Lenders would declare a "material adverse effect" had occurred. Fertitta was steadily increasing the pressure on the Special Committee and its advisors. As Capers testified, Fertitta and his advisors "accused us of being everything, you know, bad under the sun at all times for months."

109. By October 6, 2008, with the Special Committee still holding to its \$19 counteroffer, Fertitta wrote a letter citing weakness in the Landry's stock price and stating that unless the Committee acted promptly to accept his \$17 offer, even that offer would be "jeopardized."

110. The Special Committee, however, was still unable to come to terms with accepting the \$17 offer, in part because Cowen's analysis barely supported that price. As the Committee's counsel explained:

[T]hey 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.

111. With the \$17 offer still pending, Fertitta took matters into his own hands. On October 7, 2008, Fertitta caused Landry's to issue a press release stating that the Lenders were considering pulling out of their debt commitments and that the \$21 Buyout's financing was therefore in jeopardy. The press release stated in relevant part:

Landry's Restaurants, Inc. (NYSE: LNY – the "Company"), reported today on the current status of the Merger Agreement with Tilman J. Fertitta, Chairman, President and CEO, to acquire the Company. The Special Committee of the Board of Directors, which was formed to evaluate Mr. Fertitta's offer, has been informed by Mr. Fertitta that in view of the closure of the Company's Kemah and Galveston properties, the instability in the credit markets, and the deterioration in the casual dining and gaming industries, the debt financing required to complete the pending transaction is in jeopardy at the current \$21.00 per share price. Mr. Fertitta has further advised the Committee that he is in negotiations with Jefferies and Company about the financing for a transaction at a substantially reduced price. The Committee and Mr. Fertitta have not yet agreed upon terms of a new transaction, and there is no assurance that a transaction at a reduced price will even be reached.

112. This press release made no mention of Fertitta's outstanding \$17 per share offer or the Special Committee's \$19 counteroffer. As the Special Committee's financial advisor, Owen Hart, testified: "Obviously, the fear with an announcement like this is that it could lower the price." It did just that, as the press release represents the first public indication that Fertitta was breaching his fiduciary duties.

113. Scheinthal testified that he omitted the \$17 offer from the press release because of his understanding that the offer was not on the table any more. Maybe Scheinthal knew of Fertitta's plans, but the Special Committee would have to wait a few more days.

114. A draft of the October 7, 2008 press release was sent to Jefferies for comment before it was issued. Despite the express agreement between K&S and Landry's counsel that press releases regarding the Special Committee would be shared with the Committee's advisors, Fertitta did not share this press release with the Special Committee before it was issued.

115. In the three trading days following this announcement regarding the possible renegotiation of the \$21 Buyout, the price of Landry's stock fell 35 percent (to \$8.44 per share).

116. Capers had resisted Fertitta's insistence that the Special Committee meet with Fertitta in person, explaining that he first wanted an agreement on price and closing certainty. On October 10, 2008, however, the Special Committee met with Fertitta in Houston, without preconditions.

117. With the price of Landry's common stock in the single digits and the Special Committee evidently prepared to accept the \$17 offer that had been on the table for several weeks, Fertitta pulled the proverbial rug out from under the Committee. As soon as he perceived that the Special Committee was preparing to accept his \$17 offer, he withdrew it, stating that he would only pay \$13 per share.

118. When the Special Committee's advisors expressed their frustration with Fertitta's tactics and the fact that despite supposedly using his "best efforts" to bring the \$21 Buyout to a closing, Fertitta had not even negotiated the form of debt agreements – which by October 10, 2008 made it virtually impossible that the existing deal could close before its contractual "Drop Dead Date" – Fertitta did what he does best: using force and intimidation to his advantage. As Capers explained:

Q: Did he make any threats?

[Objection]

A: He threatened to sue several people in the room.

Q: Who?

A: Me, Cowen.

Q: How about the board members?

A: I think he may have mentioned something about firing them, but I'm not sure.

Q: In your view, was Fertitta composed when he was making these threats?

[Objection]

A: No.

119. Cowen's Hart similarly explained that Fertitta has a temper and that:

Tilman can be very gruff in how he deals with people when he wants something to be done. In certain meetings we were told that we were not acting professionally and we were moving too slowly, that we were doing a disservice. We were incompetent. We were not moving at a pace he clearly would like. And so his – his tendency was to be very forceful in his commentary. ...

Specifically, we were called [expletive] morons in one meeting.

120. Fertitta did not deny making these threats and insults:

Q. Did you tell Cowen or Capers that you would sue them for the damage they were doing to the company and its shareholders?

A. I -- I was very frustrated. Could I have said that? Absolutely there is that possibility. Matter of fact, I think people have told me that I did say that, so I believe it. But I was probably just blowing steam, because they had taken \$50 million out of the shareholders' pocket and I was very frustrated.

121. As soon as Fertitta left the October 10 meeting, the Special Committee decided to negotiate a revision to the terms of Fertitta's buyout of Landry's public shareholders. After so informing their advisors and, in an unusual break with protocol, insisting on negotiating with Fertitta without any advisors present, the Committee and Fertitta agreed to a revised deal at \$13.50 per share. The renegotiation was tremendously profitable for Fertitta at the expense of Landry's public shareholders. At the \$21 Buyout price, the payment to Landry's shareholders would have been approximately \$220 million. Under the revised \$13.50 Buyout, the total payment to Landry's shareholders would have been \$136 million, a reduction of \$84 million. Thus, from the first day, Fertitta came out significantly ahead by renegotiating the deal.

122. Ironically, right until the Special Committee succumbed, Wells Fargo was still focused on closing the \$21 Buyout under the terms of the original Debt Commitment Letter. As Parks testified:

Q: Because [as] of October 17th you were still looking to close under the original commitment letter on November 15th.

A: Our feeling is that under the original letter, June 12th letter, if the company asked us to close and they carried through with all the conditions precedent, that we would have closed.

Q: Because there was no MAE?

[objection]

A: Because there was no MAE and because basically that's what we signed up for.

123. On October 18, 2008, Landry's issued a press release announcing the amended merger agreement with Fertitta, with a reduced purchase price of \$13.50 per share and a reduced reverse termination fee of \$15 million (the "\$15 Million Reverse Termination Fee"). 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.

124. The only consideration to shareholders through the \$13.50 Buyout was the Lenders and Fertitta agreeing to refrain from asserting an MAE. This consideration was illusory, as neither Fertitta nor the Lenders had any legitimate claim that an MAE had occurred under the \$21 Merger Agreement or the Debt Commitment Letter. First, a hurricane is a natural disaster and/or an act of God and could not constitute an MAE under either agreement. Second, the deteriorating credit markets and the general downturn in the casual dining and gaming industries – specifically noted in the press

release as a reason for the amendment – fall squarely within exceptions to the MAE clause in the \$21 Merger Agreement and the Debt Commitment Letter.

125. While restaurants and gaming were undoubtedly affected by the economic downturn, there is no evidence that the changes affected the “Company and its subsidiaries to a materially disproportionate degree,” nor had any such evidence been submitted to or received by the Special Committee or Board. Fertitta’s own counsel even confirmed that he never provided a legal opinion that an MAE had occurred as a result of *any* event. Nor did the Special Committee ever receive any legal opinion or correspondence from the Lenders that an MAE had occurred as a result of *any* event.

126. In fact, the Revised Proxy states that “the special committee had not received any information that would lead it to believe that a material adverse effect under the original merger agreement had occurred” and suggests that the only reason the Board agreed to amend the terms of the \$21 Buyout was the unpalatable prospect of litigation by the Company against its CEO and the Lenders – a position the Board had been forced into by Fertitta’s self-serving conduct. Put another way, Fertitta used his status as a fiduciary to insulate himself from lawsuits by the Company that no doubt would be filed and successful if he was a third party buyer.

F. The Shareholders and the Special Committee’s Advisors Were Never Told That The Company’s Existing Wachovia Credit Line Was Available To Assist Any Refinancing

127. The principal public justification for revising the \$21 Buyout downward to \$13.50, rather than pursuing enforcement of the original \$21 Buyout or calling off the deal altogether, was the Special Committee’s concern about Landry’s ability to refinance

the Notes that could be put to the Company beginning on February 28, 2009 (the “Put Option”). For example, in assessing the \$13.50 offer, Cowen clearly linked its analysis to the importance of refinancing the Notes. In this regard, the Special Committee based its decision to recommend approval of the \$13.50 Buyout largely on what the Special Committee believed was an unavailability of alternative financing for the Notes. However, this belief, based on representations of Fertitta and Landry’s CFO Rick Liem, was false.

128. 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. The Wachovia Credit Line contained a negative covenant against prepaying, redeeming or purchasing any existing debt, including the Notes, and the failure to comply with this covenant would be an event of default and trigger early termination of the Credit Agreement. Landry’s filed the Wachovia Credit Line with the SEC on January 4, 2005.

129. In August 2007, Landry’s amended the Wachovia Credit Line (“2007 Amendment”). Among other things, the 2007 Amendment provided that Landry’s *could* use the Wachovia Credit Line to pay Noteholders who put their Notes to the Company before their maturity date. Specifically, Section 5.02(k) of the Credit Agreement, as amended, now expressly permitted “regularly scheduled or required payments or redemptions” of the Notes. The Noteholders’ exercise of the Put Option in February 2009 would therefore not violate the negative covenant and will not trigger acceleration of the Wachovia Credit Line. A one-page memorandum dated November 6, 2008, from

Fertitta’s lawyers at Olshan reconfirmed this, stating that as a result of the 2007 Amendment, “the exercise by holders of Senior Notes of their put option pursuant to [...] the Indenture would not violate the negative covenant and would not trigger an Event of Default under the Credit Agreement.”

130. Despite the plain language of the 2007 Amendment, Landry’s public disclosures incorrectly suggested that the Wachovia facility could not be used to redeem the Notes because doing so would accelerate the Wachovia facility. Specifically, in Landry’s Form 10-K for 2007, filed in March 2008, the Company disclosed to shareholders as follows:

In connection with issuing the New Notes, we amended our existing Bank Credit Facility to provide for an *accelerated maturity should the New Notes be redeemed by the noteholders*, revised certain financial covenants to reflect the impact of the Exchange Offer and redeemed our outstanding Term Loan balance.

131. The August 2007 amendment and the Olshan memo remained hidden from the public shareholders until after the deal was terminated in January 2009, as explained below. Fertitta and his representatives also incorrectly informed the Special Committee’s advisors that the disclosures in Landry’s 2007 Form 10-K were true and that the Wachovia Credit Line was not available to materially assist refinancing of the Notes. As Fertitta testified unequivocally:

Q. ... [W]hen the Special Committee asked, you know, “Hey, you know, we have this pending crisis, can we use the Wachovia Credit Facility to deal with it,” your answer was, “No”?

A. Right.

132. Landry's CFO Rick Liem told Cowen that Landry's could not use the Wachovia Credit Line to stave off a crisis caused by the Put Date. On October 11, 2008, Cowen's Jason Abt emailed Liem, stating that Cowen was updating its opinion materials and had a number of questions. One of the questions was whether "the \$300mm bank syndicate facility [could] be used to partially repay the 9.5% Senior Notes?" Liem responded that "[o]ur bank facility will mature prior to the Senior Notes."

133. Cowen's Abt pressed Liem further, stating:

I believe the credit facility matures on 12/28/09 and the put on the Senior Notes is at the end of 2/09. If needed, due to the put on the Notes, could you utilize the credit facility to partially repay the Notes or does the credit facility have restrictions related to that purpose?

Liem replied: "No, banks mature as soon as bonds are put."

134. Based on Fertitta's and Liem's representations, Cowen incorrectly concluded that Landry's would not have any liquidity to pay for the redeemed Notes if the \$21 Buyout failed. This ominous prospect figured prominently in Cowen's fairness analysis and its advice to the Special Committee, concluding that "[s]hould a transaction fail to occur and the note holders elect to exercise their put option, the Company could face a material liquidity situation."

135. Fertitta and his advisors also misinformed the SEC that the Wachovia Credit Line was not available for dealing with the refinancing of the Notes. For example, in a December 9, 2008 letter (over a month after Fertitta, Scheinthal and Liem received the Olshen memo on this very point), Fertitta represented to the SEC as follows: "Holders of the Company's 9.5% senior notes (of which approximately \$400 million in principal amount are outstanding) are permitted to put those notes to the Company

beginning after February 28, 2009 at 101% of the principal amount thereof. *Exercise of this put right may also lead to an acceleration of the Company's existing revolving credit facility.*"

136. Thus, both before and after receiving a memo from his own outside counsel showing that the Wachovia Credit Line was not going to accelerate upon early redemption of the Notes, Fertitta incorrectly informed the SEC, the Special Committee's advisors and Landry's shareholders that the Wachovia Credit Line would accelerate and therefore was not a viable alternative for the Company to refinance the Notes.

137. If shareholders had been told that the Company already had access to most of the money it would need to refinance or restructure the Notes, the \$13.50 per share price plainly would not look attractive. Put another way, Fertitta benefitted by the public perception (as well as that of Cowen and K&S) that in the absence of a revised deal with Fertitta, the Company truly had no options to deal with the refinancing. As the chair of Cowen's fairness opinion review committee observed when assessing whether the terms of the \$13.50 per share were fair to Landry's public shareholders:

If [Landry's] decide[s] not to pursue [its] legal remedies, then the deal is fair, though as a financial advisor we should qualify it as such.

Best deal for shareholders would be to refinance the bonds and live to fight another day and sell later.

Cowen's Owen Hart similarly testified that his view of the fairness of \$13.50 reflected Landry's inability to obtain new financing unless it was tied into a revised transaction with Fertitta.

138. In Landry's 2008 Form 10-K, which was filed a few months after the \$13.50 Buyout was terminated, Landry's quietly corrected the language of the 2007 10-K stating that the August 2007 amendment to the Wachovia Credit Line provided for "*an accelerated maturity should the New Notes be redeemed by the noteholders*". The corrected disclosure states that the August 2007 amendment to the Wachovia Credit Line provided for "*an accelerated maturity should the 9.5% notes maturity date change...*".

G. The October Amendment Preserved the Lenders' Right to Abandon the Deal And Added New Financing Conditions

139. In connection with the \$13.50 Merger Agreement, Fertitta and the Lenders also amended the Debt Commitment Letter ("Amended Debt Commitment Letter"). Fertitta testified in this regard that it was important to him personally that the shareholders be totally insulated from concern about whether or not the Company could refinance the Notes. Fertitta highlighted: "Think about if I wouldn't have had backup financing for the company, would that have been a fair vote for the shareholders? Absolutely not. I wanted the shareholders to have a very fair vote to have the alternative to vote for the 13.50 deal or we do know now that we do have backup financing." He added:

And we're going to have backup financing this time for the company, regardless if our deal happens or not, so the shareholders have the ability to vote on a 13.50 deal and know that there is still backup financing. It would have been very unfair to the shareholder to have to vote on a 13.50 deal with no backup financing. And then they know that their – the company would be into – in bankruptcy. It was – it would have been a horrible mistrust of me as Chairman, CEO and President of this company.

140. In fact, the positive thing about the Amended Debt Commitment Letter was the Lenders committed to provide backup financing for the notes that could be put to

the Company at the end of February 2009 in case the \$13.50 Buyout failed to close. As Morris testified:

Q: And you were committed to, if anything goes wrong with the acquisition, to do the refinancing?

A: Yes.

Q: And you were committed to do the refinancing whether or not the deal itself was closed or terminated, right?

A. Well, per what this letter says, we were committed to doing the refinancing.

Q. Okay and the outside date by which you would agreed you would do the refinancing was the drop dead date, right?

A. Yeah. Let's just be clear. And the blow up date of where the notes would be put is like February 28th. So we're waiting until the last minute practically. Yeah.

Q. But you agreed to bear that risk, right?

A. Yes.

This was also consistent with Fertitta's testimony about his business understanding of the Lenders' obligations: "My understanding, when this commitment was signed, I believe, was if for any reason I wasn't able to close this deal, that I had backup financing for the company."

141. While Fertitta recognized at his deposition the "horrible mistrust" if he, in his fiduciary capacity, failed to ensure the refinancing of the Company's debt irrespective of whether the deal closed, the fact is that under Defendants' own theory of the case, the Amendment to the Debt Commitment Letter by its own terms left the Lenders – and indirectly Fertitta – with virtually unfettered rights to renegotiate the deal yet again if they so opted.

142. Specifically, as the record made clear that nobody could credibly seek to avoid funding the deal (in the case of the Lenders) or closing the deal (in the case of Fertitta) on account of a purported MAE, various witnesses, including Fertitta and the Committee members, insisted that they were deathly afraid the Lenders would assert additional termination rights, such as a failure to meet financial performance or EBITDA conditions. Fertitta said his concerns were broader than the MAE:

I don't even know that we were as concerned about the MAE as there were other places -- there were numerous places in the document that you could look at and see that if they wanted to get out of the deal, it would be a long lawsuit to hold their feet to the fire.... I was concerned about lots of issues in the commitment letter

143. Had that truly been the case, it would have been imperative that in any revised merger and amendment to the commitment letter, the Lenders not only waive any potential MAE, but also waive any other termination rights they could have asserted. As Fertitta testified with respect to the Amendment to the Debt Commitment Letter, "I wanted to lock them in."

144. The Amendment to the Debt Commitment Letter, however, did not "lock them in" at all. Instead, the amendment to the Commitment Letter -- the document that became the central focus of the SEC's inquiries (discussed below) and was the purported reason for the termination of the \$13.50 merger agreement (also discussed below) -- states the following about the Lenders' supposed termination rights:

Each of Jefferies Funding, Jefco and WFF hereby waives as a condition to its Commitment and its Alternative Commitment (as defined below) and Material Adverse Effect that may have arisen as a result of facts actually known to it on the date hereon. You acknowledge and agree that we are not waiving any other condition to the Commitments.

145. By agreeing to an amendment that waived the MAE condition but leaving in place all other potential termination rights, including the financial performance conditions, Fertitta effectively conceded that the unidentified financial performance conditions that Jefferies mentioned in its September 25 letter (stating that the Company “may” not meet them) were never a serious concern to the Company. Of course, Fertitta had no alternative because everyone recognized that there was no MAE. However, if the concerns about the Company’s ability to meet the financial conditions were real (and they were not) Fertitta knowingly gave Jefferies an option to force the Committee to again revisit the pricing of the deal anytime Jefferies (whether for its benefit or at the request of Fertitta) chose to do so.

146. Rather than waiving pre-existing financing conditions, the Amendment added additional financing conditions. As Morris confirmed, under the terms of the Amendment, Jefferies preserved the financing conditions of the Debt Commitment Letter while adding incremental EBITDA conditions that applied to later periods in time.

147. Unlike the original Debt Commitment Letter – where the specific pricing information for the financing was included in a separate side letter – Fertitta and Jefferies inserted certain pricing information in the Amended Debt Commitment Letter itself. To prevent disclosure of those terms to the market, the parties also agreed to a revised confidentiality provision. This was highly unusual. Parks testified, for example, that he had never inserted such confidential pricing information and a similar confidentiality provision into a commitment letter.

148. Moreover, Parks added, Fertitta, Scheinthal and Liem understood that the SEC was likely to ask for information contained in the Amended Debt Commitment Letter, particularly since the buyout was a “13e-3 transaction” requiring heightened disclosures. Parks testified that, at the time, he did not believe the confidentiality provision would create a problem for the revised merger agreement because the Lenders expressly agreed that “we would cooperate with them and their counsel to prepare a proper disclosure, to which basically it is everything but pricing.”

H. Fertitta’s Fall 2008 Stock Purchases Constitute Breaches of Fiduciary Duty

149. In negotiating the revised merger agreement, K&S insisted on allowing another go-shop process. Fertitta agreed to the process, recognizing that based on his 39% ownership block a competing bid was at least conceivable: “If somebody would have come in and offered \$18 a share or \$16 a share, my 39 percent could not have held. You would have had 61 percent vote for it.”

150. Having been kept in the dark that the Board had approved the Share Purchase Program authorizing Fertitta to purchase Landry’s shares as an affiliate of the Company, K&S did not insist on a standstill or poison pill to protect the integrity of the go-shop process.

151. From the moment the revised merger agreement was signed, Fertitta started purchasing shares, rapidly undermining any prospect of a meaningful go-shop process.

152. 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. On

October 21, 2008, Fertitta bought 190,071 shares and an average price of \$11.71. This 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.

153. 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. In breach of his fiduciary duties to permit Landry's shareholders a chance to receive the highest available price, and in a conscious effort to undermine the efforts of his fellow directors to comply with their fiduciary duties, Fertitta impaired the second go-shop process by acquiring majority control of the Company on the open market, at prices below even the already-lowered acquisition price that he had forced upon the shareholders. Not only did Fertitta obtain absolute majority control of the Company without paying the \$21 price he had agreed to in June – which reflected the control premium he was required to pay – but Fertitta actually acquired control at a discount to fair value driven by investor fears about Fertitta's own improper conduct. He profited multiple times from his own breaches of fiduciary duty.

154. Despite the Special Committee's knowledge that such purchases could jeopardize the \$21 Buyout, the Special Committee refused to take any concrete steps to protect shareholders from this obvious risk. If anything, the Committee may have affirmatively facilitated Fertitta's purchases.

155. The Special Committee's counsel clearly recognized Fertitta's game and the risk that stock purchases posed to the deal. When Capers learned of these purchases

through Fertitta's Schedule 13D filings, he promptly called Fertitta's counsel to complain:

We expressed concern on several different levels, primarily that it was going to adversely affect our ability to get a transaction done, and also raised questions about whether he was in a position to buy stock, given his access to material nonpublic information.

156. The Special Committee's counsel also expressed the concern that Fertitta's open market purchases could violate his "best efforts" obligation to close the deal, as set forth in the \$13.50 Merger Agreement.

157. K&S further explained that the question of whether or not the Special Committee had determined that Fertitta's open market stock purchases were "fair" would be a central factor in any SEC investigation into the legality of Fertitta's open market stock purchases as a component of the going private transaction. Capers made clear in his deposition that neither the mid-September stock purchases nor later purchases were approved as fair by the Special Committee:

Q: Well, did the committee make a fairness determination with respect to Mr. Fertitta's acquisition of stock in the market at those prices?

A: No.

Q: Did they ever?

A: No.

158. When Capers confronted Fertitta's open market stock purchases with Fertitta's counsel, he was told that Fertitta had no intention of purchasing any more shares on the open market. That representation was false. Fertitta continued to purchase Landry's shares on the open market.

159. Capers again objected to Fertitta's counsel, Steven Wolosky:

I told him again the reasons why we were concerned that the open-market purchases would jeopardize a deal, and I told them that we had understood based on conversations with Mr. Wolosky after the original amendment of the 13D that Mr. Fertitta had no intention of going back on the market and this was an isolated event and didn't expect to be back in the market and that, you know, that we then found out that Mr. Fertitta had been back in the market. And it went through the same arguments that I had made before about why we thought this would jeopardize the deal, and I told him that we felt like it was appropriate for Mr. Fertitta to sign a standstill in connection with [the] October amendments of the deal.

160. Despite Capers' concerns, Fertitta refused to sign the standstill. Moreover, despite Capers' concerns, the Special Committee did not enact a poison pill or take any other action to protect the Landry's public shareholders. The Special Committee's inexplicable impotence resulted either from their decision that it was better to align themselves with Fertitta (since doing so was easier than complying with their fiduciary duties) or it resulted from their bad faith indifference to their fiduciary duties.

161. By December 2, 2008, Fertitta owned 9.66 million Landry's shares (including restricted stock and options) or 56.7 percent of all outstanding shares. By comparison, as of June 16, 2008, at the time the \$21 Buyout was approved by the Board, those entities owned approximately 6.63 million Landry's shares (including restricted stock and options), or 39 percent of all outstanding shares.

162. In acquiring corporate control in this fashion while the \$21 Buyout and \$13.50 Buyout were pending, Fertitta breached his fiduciary duties to Landry's shareholders. Fertitta used his powers as Chairman and CEO of the Company in a self-interested scheme to undermine his own going private deals by illicitly purchasing Landry's shares to obtain control of the Company while in possession of material non-public information.

163. When asked whether his stock purchases impaired the go-shop process, Fertitta claimed he would have sold his shares and supported any deal at a price above \$13.50:

Q. After the 13.50 deal was announced, the Special Committee was able to start the go-shop process, right?

A. Yes.

Q. To the extent that a bidder cannot stop you from voting against its offer and you hold more than 50 percent, would you agree with me that once you're over 50 percent, no one is going to make a bid?

[objection].

A. Not if the shares are neutralized. And I have a fiduciary right, regardless if I own 90 percent or 10 percent -- I had an offer at 13.50. If somebody would have come in and topped my offer, I would have felt the responsibility to vote for the deal.

Q. You would have understood your fiduciary duties to require you to vote for the deal that's higher than 13.50?

A. Yes.

Fertitta added that "If somebody would have topped the 13.50 and I did not want to top them, I would have voted for the deal."

164. Fertitta's current description of his fealty to his shareholders and his willingness to sell if someone topped his bid is inconsistent with his current position, in which he has refused to commit to selling his shares if someone tops whatever price he is willing to pay, be it the \$14.75 agreement currently in limbo or any higher price he might offer. The fact is that Fertitta's fall 2008 purchases gave him the absolute power to insulate himself from any competitive bidding, and Fertitta has in the past and until today

continues to use his majority power to prevent the public shareholders from receiving any competing proposal – violating the very principle he testified he would honor on April 16, 2010.

165. 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 wrote to Fertitta taking note of his open market purchases and asking him to “tell us why these purchase of shares through open market transaction is not a step in a series of transactions having one or more of the effects listed in Rule 13e-3(a)(3)(ii).”

166. The SEC also asked whether the Special Committee had passed on the fairness of the open market purchases. Fertitta’s long-time counsel, Art Berner, inaccurately suggested that the Special Committee had approved the purchases and had viewed them as fair in the context of the transaction.

167. In response to further questions from the SEC, Berner tried to get K&S to represent to the SEC that the Committee had approved Fertitta’s purchases. K&S refused, 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.”

168. Capers opposed all of Fertitta’s advisors’ efforts to imply to the SEC that Fertitta’s purchases had been approved by the Committee. For example, as Capers wrote in an email to the Special Committee and Fertitta’s team:

When we learned about Mr. Fertitta’s first open market purchases, we expressed to Art and to Steve Wolosky our concerns about the potential effect of these

purchases on the transaction. On behalf of the committee, we bargained for a standstill to stop the purchases. We were persuaded to accept a voting agreement in lieu of a standstill because we were told that Mr. Fertitta had no intention of making any additional purchases.... ***We object, however, to any statements in your correspondence with the SEC or in any filings with the SEC that state or imply the committee approved the open market purchases or approved the merger with Mr. Fertitta in contemplation that he would engage in significant open market purchases of the company's stock.***

169. Rather than allow his lawyer to persist, Fertitta's efforts to mislead the SEC, Chadwick attempted to force his lawyer to stay out of the issue altogether. On December 19, 2008 Chadwick wrote to K&S that "this is a TJF matter and should be dealt with by Haynes & Boone and/or TJF counsel, not SC." Nine minutes after telling K&S to stay out of the issue, Chadwick forwarded his email to Scheinthal – who was admittedly Fertitta's loyalist.

170. In the meantime, Berner responded to the SEC's inquiries, writing on December 9, 2008 that Fertitta's purchases were not part of the going-private transaction because, among other things, "the acquisition of shares by Mr. Fertitta in the open market actually ***reduces*** the likelihood of the transaction's success." (emphasis in original). Berner also told the SEC that "the open market acquisitions by Mr. Fertitta do not decrease Mr. Fertitta's acquisition expense" and that "Mr. Fertitta's recent purchases have not reduced his cash outlay at all." Therefore, argued Berner, "Mr. Fertitta's open market purchases should not be considered a step in a Rule 13E-3 transaction."

171. When asked if buying shares on the open market saved him money even though the amended commitment letter only gave Fertitta an offset to his required equity contribution based on the actual dollars he spent (as opposed to giving him a credit based on the higher buyout price of \$13.50), Fertitta was unequivocal:

A. Because if I'm still buying shares under what they're trading at, it's still going to be less dollars. Forget what it says on paper. Dollar cash – cash dollars, I'm still putting in less dollars, they're just not giving me credit for it on paper. But if you do the math, I think you would see that cash dollarwise, I would be paying less.

Q. Why?

A. That's just the way I figured it.

Q. Oh, I see, because you're -- you're still going out of pocket \$90 million, but the total acquisition purchase price was lower, because you don't have to then buy those shares for 13.50; is that what you're saying?

A. Is that what I'm saying?

MR. STERLING: Every share he can buy for \$11 that he would otherwise have to pay 13.50 for, he saves \$2.50.

A. That's -- the answer is yes. The answer is yes.

Q. You benefit by buying shares because they're no longer on the market and they're not going to tender in for the 13.50?

MR. STERLING: Right. He's going to buy a hundred percent sooner or later, you know, anyway.

Q. Okay. So you're not reducing your immediate out-of-pocket commitment to fund the deal, but you are reducing the total acquisition cost?

A. Yes.

Q. And that's a benefit to you, right?

A. Yes. I'm trying to save a few million dollars, because the 90 million was very difficult. Remember, the stock market had fallen, so other assets weren't worth what they were worth.

172. Fertitta's own testimony belies this representation made on Fertitta's behalf to the SEC. On December 24, 2008 the SEC determined to allow the transaction to close based on Fertitta's representations. Specifically, the SEC wrote:

We have considered your response to comment one in our letter dated December 11, 2008, and we continue to disagree with your position. In this regard, we note that as a result of the accumulation of shareholders in the open market purchases, Mr. Fertitta's ownership has increased from 35% to 56.7% of the total number of shares outstanding. This accumulation of shares in the company has a reasonable likelihood of producing, either directly or indirectly, any of the effects described in Rule 13e-3(a)(3)(ii).... *While the staff of the Division of Corporation Finance will not undertake any further examination of the filing persons' non-compliance with Rule 13e-3 at this time, please confirm that the filing persons understand that the staff reserves the right to make further inquiry into this matter and make any recommendation it deems appropriate.*

173. The same SEC letter, however, stated that the SEC wanted further disclosure about "each filing person's fairness determination" with respect to Fertitta's stock purchases, including "the fairness of these purchases to the stock holders that would get cash in the merger" and "the fairness to those stock holders that sold shares to Mr. Fertitta in the open market."

174. 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.

175. Capers brought these issues to the Committee's attention on December 30 and gave what he surely thought was confidential advice about how the Committee should protect itself from further misconduct by Fertitta. Chadwick again told Capers to stay out of it. Pertinent aspects of the exchange between Capers and the Committee appear below:

Capers: As you will see, the SEC is continuing to express concern about TF's open market purchase of the company's stock. There is a reference in the revised proxy on page 152 to the fact that TF has made certain agreements regarding open market stock purchases, including an agreement that he will not make any additional purchases while the merger is outstanding. Was this agreement approved by the board?... As

previously discussed, we have some concern that the board could be subject to criticism if this deal does not close and TF has acquired control of the company through the open market purchases.

Chadwick: Specific stock purchases by TJJ were not specifically approved by the SC and certainly the SC is not policing whether or not TJJ is acting in compliance with SEC rules and regs.... The Board as a body did not object to TJJ purchases if same were made in compliance with SEC rules and regs and LNY insider policy, as I recall. The SC did not specifically weigh in on any specific TJJ purchases to my knowledge. I really believe that these issues are TJJ issues.... I have assumed that H&B and TJJ counsel, well aware of the issues at hand, are appropriately advising TJJ. Thanks for bringing to the attention of the SC, though.

Capers: Bill Nelson at H&B just confirmed that TF's new agreements regarding stock purchases are agreements made with the SEC only. We think that you should consider asking TF to make those agreements with the special committee as well.... The company would not have any remedy against TF under these circumstances if the agreements are just with the SEC.

Chadwick: If he has agreed with the SEC ... is that not sufficient?

Capers: TF's agreement with the SEC will apparently be sufficient to get the proxy cleared by the SEC but will not give the company any remedy if he violates the agreement and the violation affects the merger. Our concern is that we are now on notice from the SEC that TF's stock purchases have complicated the proxy process. The SEC seems to be willing to let the deal go forward but has reserved the right to raise a complaint against TF.... If TF enters into an agreement with the committee, the company would have a remedy in case he violated the agreement with the SEC to protect the shareholders from a potential loss of the deal....

Chadwick: Maybe we are talking about just affirmation and documentation of the understanding with the SEC, which is understandable from SC perspective but not really substantive?

Capers: In our view this is substantive. He has made this agreement with the SEC. We will ask that he also make the agreement with the company.

176. Taking no chance that Capers catch Fertitta's advisors by surprise with this demand, shortly after receiving the final email from Capers, Chadwick secretly

forwarded the entire exchange between Capers and the Committee to Scheinthal, who was advising the Fertitta side of the transaction. Fertitta's testimony in response to this clear effort by Chadwick to undermine Capers' efforts in protecting Landry's shareholders is telling:

Q. Well, Mike Chadwick was -- is working at arm's-length from you, right? I mean, he was the head of the Special Committee, so he was supposed to be working at arm's-length with you, right?

A. As a Special Committee member, he was working arm's-length. As a board member, he worked with me.

Q. Okay. And everyone understood that Steve Scheinthal was working on your side of the transaction, right?

A. Yes.

177. Chadwick's practice of acting as Fertitta's mole, as alleged herein and as will be further detailed at trial, undermined any conceivable notion that the Committee acted independently or that its decisions and actions deserve any credit as a reasonable protection for Landry's public shareholders. Chadwick's passing to Fertitta of Caper's strategic thoughts constituted a flagrant breach of Chadwick's fiduciary duties.

I. The Special Committee Improperly Terminated the Merger Agreement

178. 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. Specifically, the SEC requested disclosure of the pricing terms that Jefferies and Fertitta had placed in the body of the Amended Debt Commitment Letter (instead of the usual stand alone "market flex letter").

179. Fertitta and the Lenders had anticipated this request when they entered into the Amended Debt Commitment Letter. Fertitta and Jefferies used this routine and foreseen request to undermine the transaction.

180. Fertitta and Jefferies balked at providing information to the SEC regarding the Amended Debt Commitment Letter. In early January 2009, Capers learned firsthand that, yet again, the risk to the deal was coming from Fertitta and Jefferies:

I talked to the SEC, and they expressed willingness to work with us to try to find some way to avoid the disclosure of the commitment letter itself. And at that point, I could not persuade Proskauer [Jefferies' counsel] to, you know, continue to engage with the SEC to look for alternatives that would work for both sides.

Capers testified that the SEC wasn't looking to blow up the transaction:

A: *They expressly indicated that they did not want to blow up the transaction*, but they had to find some way of achieving compliance with the regulation that required disclosure and satisfying Jefferies' concern at the same time.

181. Despite the SEC's express statement that it was not looking to blow up the deal, Fertitta and Jefferies simply refused to provide adequate disclosure of the Amended Debt Commitment Letter.

182. As set forth above, when the Lenders refused to agree to disclosure of the Amendment, they remained fully bound to the refinancing of the Notes.

183. But the refinancing of the Notes required \$100 million less financing than the \$13.50 acquisition did, so once the Lenders would complete the refinancing, Fertitta would be \$100 million short of the amount needed for him to close. As had become the case at Landry's for quite some time, when Fertitta had a problem that should have fallen

on his shoulders alone, the Special Committee raced to take the pressure off of him. As Fertitta explained at his deposition

A. ... I think the Special Committee terminated it because of the fact that we were \$100 million short on the financing. We wanted to –

Q. You were \$100 million short on the financing?

A. Yes.

Q. So why would the Special Committee terminate rather than say, “Tilman, that’s your problem”?

A. I don’t know.

184. The merger agreement could not be clearer. If Fertitta for any reason failed to obtain the last \$100 million or any amount of the financing needed to close the deal, he would still have to close unless he paid the reverse termination fee. Yet nobody acting for the Special Committee dared insist Fertitta make this payment if he wanted to avoid his closing obligations. As Fertitta made clear, “There was never a discussion of me paying a termination fee.” Speaking of the possibility that he would owe a termination fee, Fertitta added, “It was one hundred percent it never came up.”

185. On January 8, 2009, the Special Committee called a meeting to discuss terminating the \$13.50 Merger Agreement. They did not tell their outside counsel about it. Capers attended the meeting only because he learned of it when Fertitta’s counsel accidentally mentioned it.

186. On January 10, 2009, Fertitta disclosed his true intentions – and the real reason for Jefferies’ refusal to work in good faith with the SEC. Specifically, with the deal again facing a Fertitta-driven 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*. Having already succeeded in using various crises as cover for lowering his offers from \$23.50, to \$21, to \$17 and ultimately to \$13.50, Fertitta stayed true to form.

187. The next day, the Special Committee met again, and discussed terminating the \$13.50 Merger Agreement. Capers informed the Special Committee at that meeting that K&S would resign from serving as the Committee's counsel, effective immediately.

188. Director Richmond initially waived on terminating the \$13.50 Buyout. Soon thereafter, Richmond was removed from the Board.

189. On January 12, 2009, Landry's shocked the market by announcing that it had terminated the previously announced \$13.50 Buyout and had agreed to release Fertitta from his obligations under the \$13.50 Merger Agreement.

190. In a press release issued on January 12, 2009, the Committee sought to justify its decision to terminate the \$13.50 Buyout by claiming that the Lenders' "refusal" to disclose the secret terms of the financing left it with "no choice" but to terminate the acquisition in order to preserve the Company's alternative financing. As set forth above, the Lenders unambiguously obligated to refinance the Notes irrespective of whether any merger vote took place. Morris and Fertitta both confirmed this fact.

191. 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.

192. The Committee's termination of the merger did not salvage the Notes refinancing. The termination achieved only one purpose. Failure of acquisition financing was the acquirer's problem and would have required Fertitta to pay the \$15 Million Reverse Termination Fee. Inexplicably, the Board freed Fertitta of even that obligation by agreeing to have the Company, rather than Fertitta, "terminate" the transaction.

193. Conveniently for Fertitta, 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." This disclosure revealed that reconstruction stemming from Hurricane Ike was well ahead of schedule, a fact Fertitta was surely apprised of while acquiring control of Landry's on the open market.

194. As a result of Fertitta gaining majority control of Landry's through his unlawful open market purchases, on March 11, 2009, Landry's exercised its rights under an exemption to the New York Stock Exchange's rules as a controlled company, to permit Landry's to remove the requirement of maintaining a board comprised of a majority of independent directors. Fertitta immediately took advantage of this exemption by nominating and electing Liem, Landry's Executive President and Chief Financial Officer, to the Board to replace Michael Richmond. Landry's Definitive Proxy Statement, filed with the SEC on April 3, 2009, confirms Fertitta's complete dominance and control of Landry's and its Board, stating that "the vote of Mr. Fertitta will be determinative of the outcome of any vote or election."

J. Defendants Seek to Justify Their Conduct by Blaming the Special Committee's Advisors for Harming Landry's Public Shareholders

195. When Fertitta had buyer's remorse and wanted to restructure the buyout so he would not have to pay \$21 per share, no one on the Special Committee acted to oppose him. They accepted his representations that the renegotiation was the Lenders doing and secretly informed Fertitta of the legal advice they were receiving from their independent counsel, K&S.

196. K&S, on the other hand, was attempting to keep Fertitta from avoiding his contractual obligations and breaching his fiduciary duties. For that, both Fertitta and the Committee have thrown Capers under the proverbial bus. For example, Fertitta testified:

Q. Do you think he's an honest person?

A. I don't know.

Q. Do you think he's a competent lawyer?

A. No.

Q. And while the deal was pending, did you let anybody know -- you reached that view while this was all going on, right?

A. Everybody on this side. Every lawyer said they had never worked with anybody like Jack Capers before. Okay. Every lawyer on this side. Every individual on this side. Okay.

Q. What was --

A. It was a consensus opinion that he was a bad lawyer.

197. Fertitta then went on to say that "I think the Special Committee hired their lawyer very quickly, but then it was that bad lawyer that took his time doing everything else."

198. When asked to explain why Capers was such a bad lawyer, **Fertitta blamed him for delay in allowing the Special Committee** to meet with Fertitta to discuss a renegotiation. It evidently did not occur to Fertitta that perhaps Capers was deliberately refusing to meet with Fertitta because of a strategy of forcing the \$21 Buyout to remain on the table. But when pressed on Capers' strategy, Fertitta again lashed out at the K&S partner:

Q. Now, were you upset because Capers was just you felt taking too hard a line with you or was he just being nonresponsive, or something else?

A. I have no problem with Mr. Capers taking a hard adversarial line with me. That's his job in representing the Special Committee. I don't think that Mr. Capers had a grasp of what was happening in the world when we were telling him our business trends and that the whole credit market was coming apart. And, you know, it would be like, "Well, go out and let some other people look at it," when everybody knows there is nobody else. Okay. Maybe down in Atlanta is a different planet and they weren't getting the Wall Street Journal. Okay.

199. Capers' refusal to have the Special Committee accept Fertitta's demand for an in-person meeting to renegotiate the deal is proven out by the record. When the Committee finally met Fertitta in person, on October 10, 2008, Fertitta pulled the proverbial rug out from under Capers and the Committee, withdrawing his then-pending \$17 per share offer and replacing it with a \$13 per share offer. In a remarkable display of "chutzpah," Fertitta blames Capers for lowering of the deal price to \$13.50 on Capers:

Q. So you think Jack Capers delayed costs to the shareholders a difference between 17 and 13.50?

A. Definitely.

II. FERTITTA ATTEMPTS ANOTHER BUYOUT

200. On September 9, 2009, the Company announced that on September 4, 2009, Fertitta had made yet another offer to acquire Landry's. The Company also disclosed for the first time on September 9 that on August 14, 2009, the Board had reconstituted the Special Committee (other than Richard) to review strategic alternatives, including a possible sale of Landry's

201. On August 18, 2009, the Special Committee retained Cadwalader, Wickersham & Taft LLP ("Cadwalader"), as counsel. The Special Committee retained Moelis as its financial advisor on August 26, 2009.

202. In a September 4, 2009 offer letter, Fertitta proposed a going-private transaction and a related tax-free spin-off of Landry's wholly-owned subsidiary, Saltgrass, Inc. ("Saltgrass"), in which Fertitta would acquire all of the shares of Landry's common stock that he did not already own and Landry's stockholders, including Fertitta, would receive shares of Saltgrass in exchange for their shares of common stock (the "Saltgrass Offer").

203. On October 21, 2009, the Special Committee sent a letter to Fertitta rejecting the Saltgrass Offer.

204. On October 22, 2009, the Fertitta proposed an all-cash transaction at \$13.00 per share for the remaining public shares of Landry's common stock.

205. After the Special Committee rejected two minor price increases in Fertitta's offer, Fertitta offered \$14.75 per share as his "best and final" offer. The Special Committee then requested that Cadwalader send Wolosky, Fertitta's counsel, a revised

merger agreement. Between October 28, 2009 and November 3, 2009, the parties negotiated the terms of the \$14.75 Merger Agreement.

206. On November 3, 2009, the Special Committee unanimously approved the \$14.75 Buyout.

207. As set forth below, Fertitta and the Board have approved the \$14.75 Buyout for self-interested purposes. Moreover, shareholders are incited to support this deal irrespective of the fairness of the price because the failure of yet another deal could well drive the stock price back down to the single-digits where it traded after Fertitta sabotaged the previous agreement.

208. The \$14.75 Buyout will not have any effect on the class action claims presented in this Action against Fertitta and the Board because those claims are direct assets of Class members, including investors with locked in losses from selling their shares as a result of Fertitta's and the Committee's serial breaches of duty. Class members who sold their shares before any closing of the \$14.75 Buyout (or any modified deal) would still be entitled to a judgment awarding them the full difference between the \$21 per share (plus interest) they should have received absent Fertitta's disloyalty and their actual sale price.

209. The Board had a strong motive to approve the \$14.75 Buyout for self-interested purposes: they wanted to avoid their personal liability by giving Fertitta a cheap and easy option on Landry's notwithstanding his history of abusing his fiduciary powers. The same Board members who previously allowed Fertitta's wrongful conduct now hope the \$14.75 Buyout will help them escape personal liability, both by potentially

undermining valuable derivative claims and because Fertitta has agreed to provide the Board with unusually broad indemnification that, under the circumstances, constitutes an impermissible payoff to the Board for its support of the \$14.75 Buyout.

A. The \$14.75 Buyout is Unfair

210. The \$14.75 Buyout is unfair for numerous reasons, both in terms of price and process.

211. First, the price does not reflect Landry's true worth, as measured by comparing Landry's current publicly reported financial results against the financial condition of Landry's in June 2008, which Landry's and Fertitta agreed justified the \$21 Buyout.

212. The 2009 Special Committee, moreover, relied on a fundamentally flawed valuation analysis by Moelis. Indeed, certain aspects of the Moelis valuation are so glaringly flawed that it was not reasonable for the Special Committee to rely on it.

213. Next, the \$14.75 Buyout is unfair because the out of pocket cost to Fertitta of closing this transaction is actually cheaper than the cost of closing even the modified \$13.50 per share price Fertitta had agreed to pay after his September 2008 breaches of fiduciary duty. Fertitta is only contributing \$40 million in cash equity in the new deal. In the previous deal, he committed \$60 million of his own capital – \$90 million of cash equity (in addition to the stock he owned), less what he spent on open market purchases, which was just under \$30 million.

214. Had the \$14.75 Buyout simply required Fertitta to make the same equity commitment as he had made in the prior deal to purchase the shares that he does not

already own, Landry's shareholders would receive about another \$2.75 per share, for a total of \$17.50 per share. Moreover, the Landry's Board saved Fertitta \$24 million by wrongfully terminating the prior deals. It was a breach of fiduciary duty for the Board to let Fertitta keep the fruits of his wrongs in the first place and it is a new breach of duty for them to now let him keep those funds while also paying a depressed price in the \$14.75 Buyout.

215. Fertitta is further using the prospect of broad indemnification of the Board to bribe them to sell out the current Landry's shareholders by approving an unfair price. Pursuant to the \$14.75 Merger Agreement, the surviving company (wholly owned by Fertitta) has agreed to indemnify current and former officers and directors against:

any and all costs, expenses, including reasonable attorneys' fees, judgments, fines, losses, claims, damages, Liabilities and amounts paid in settlement in connection with any Action or investigation arising out of, pertaining to or in connection with any act or omission or matters existing or occurring or alleged to have occurred at or prior to the Effective Time, including the Transactions and any acts or omissions in connection with such Persons serving as an officer, director or other fiduciary in any entity if such service was at the request or for the benefit of the Company.

216. The indemnification in the \$14.75 Merger Agreement is much broader than the indemnification provided in the prior merger agreements. Specifically, Fertitta is now indemnifying the Board for any claim that they did not act in good faith. This is a tremendous transfer of value to the Board considering the terms of, and circumstances surrounding, this transaction.

217. Furthermore, in the past, the 2008 Special Committee allowed Fertitta to abandon prior deals even though he represented that he had committed debt financing. This time around, the 2009 Special Committee did not even insist that Fertitta represent

that he had committed financing in place. Rather, the 2009 Special Committee was satisfied to give Fertitta an option on the Company based simply on a weak “highly confident” letter from the same financing source that once before conspired with Fertitta to improperly pressure the 2008 Special Committee to undermine the prior agreements. Indeed, under the circumstances, the 2009 Special Committee’s willingness to accept non-binding assurances from Jefferies, coupled with their willingness to sign a deal with Fertitta that did not even require him to obtain committed financing, reflects their decision to ignore their fiduciary duties to shareholders yet again in return for reducing their personal liability for prior breaches of fiduciary duty.

218. Likewise, the 2009 Special Committee also failed to secure the same minority shareholder protections that the 2008 Special Committee had secured in the \$13.50 Merger Agreement. In connection with the \$13.50 Merger Agreement, Fertitta signed a voting agreement that served to “neutralize” his improper open-market purchases (the “2008 Voting Agreement”). The 2009 Special Committee did not require a similar agreement with respect to the \$14.75 Buyout.

219. Specifically, the 2008 Voting Agreement provided that if the \$13.50 Merger Agreement was terminated as a result of a superior proposal, the 2008 Special Committee could vote all additional shares of Landry’s common stock acquired by Fertitta after June 16, 2008 in favor of such superior proposal. The 2008 Voting Agreement also provided that any shares acquired by Fertitta after June 16, 2008 would not be counted for the purpose of determining whether the \$13.50 Buyout would be approved.

220. The 2009 Special Committee chose not to secure similar limitations when negotiating the \$14.75 Buyout. While the \$14.75 Buyout does contain a majority of the minority provision, it is waivable and also does not limit Fertitta’s ability to veto any deal or limit the prospects of a superior proposal due to his majority ownership of the Company – majority ownership that was obtained through his violation of fiduciary duties.

221. The 2009 Special Committee also did not modify the terms of Fertitta’s golden parachute, as the 2008 Special Committee did. The \$13.50 Merger Agreement provided that “[a]ny termination fee paid to Parent will be credited against the cash amounts due to Mr. Fertitta as severance compensation if his employment is terminated following a change of control that arose out of an Acquisition Proposal that resulted in the termination of the merger agreement.” Here, Fertitta is demanding that he receive the full golden parachute, which is valued between \$40 and \$50 million. This represents roughly *15% of the Company’s current \$350 million market capitalization*.

222. This golden parachute arose from Fertitta’s January 1, 2003 employment agreement with the Company (the “Employment Agreement”). At the time, the Company rationalized the extravagance of Fertitta’s severance package, taking the position that loss of the Company’s CEO could “materially and adversely affect” the Company’s business. The Employment Agreement provides that in the event Fertitta loses his job in a change of control, he will receive, among other things:

- An immediate payment of *over five times Fertitta’s base salary*;
- Immediate vesting of any restricted stock and/or stock options which Fertitta has received;

- ***Complete indemnity for Fertitta from any tax liability*** resulting from the parachute payments;
- ***An additional \$5 million lump sum*** payment; and
- No payment offset if Fertitta takes other employment.

223. The Employment Agreement further provides that the Company shall continue to provide a myriad of benefits to Fertitta and his family even after his death. The Company would also be required to provide security for Fertitta, which in 2006 alone cost the Company roughly \$250,000.

224. Whatever the original justification for the parachute may have been, when it initially expired in 2007, this obscene severance package was plainly an encumbrance to the Company and its strategic alternatives. The Board inexplicably did not elect to terminate this encumbrance in 2007. Instead, the Employment Agreement and ostentatious parachute were extended for another five years.

225. Now the Company is saddled with the Employment Agreement and its severance provisions at the worst possible time – when it should secure the highest price for its shares. All bidders know that the purchase price for Landry’s is automatically increased by about \$50 million due to the Employment Agreement. This \$50 million is acting as a wholly improper ***15% termination fee on the \$14.75 Buyout***. This compensation package should be invalidated as patently excessive for a Company the size of Landry’s and as a preclusive defensive measure.

226. In this regard, the \$14.75 Merger Agreement has a “go-shop” provision copied from each of the two prior merger agreements. Neither “go-shop” period succeeded because no bidder would bother trying to buy the Company over Fertitta’s

objection. This was true when Fertitta was merely a dominant minority shareholder at the time of the previous agreements. Because the Board breached its duties, Fertitta is today a majority stockholder. Yet the 2009 Special Committee did not require Fertitta to agree to sell his shares in case of an offer at a price above the \$14.75 he is offering. This failure renders any repeat of the go-shop in the merger agreement illusory and of no value to shareholders.

227. Indeed, Fertitta has used his majority stake to act against the interests of Landry's shareholders by thwarting competing – and superior – acquisition proposals. Specifically, on November 17, 2009, the 2009 Special Committee received two non-binding, preliminary indications of interest from prospective acquirers. The first preliminary indication of interest contemplated the acquisition of all of Landry's common stock at a price between *\$17.00 to \$18.00 per share*. The second preliminary indication of interest contemplated the acquisition of all of Landry's common stock not owned by insiders at a purchase price between *\$16.00 to \$19.00 per share* (together, the "Superior Proposals").

228. The 2009 Special Committee presented the Superior Proposals to Fertitta on November 19, 2009. The next day, Fertitta informed the 2009 Special Committee that "he did not have any interest in engaging in discussions with either of the two potentially interested parties." No meaningful discussion or negotiation of the Superior Proposals could realistically proceed without at least the participation of the Company's majority shareholder and Chairman – and Fertitta knew this. By refusing to consider the Superior

Proposals, Fertitta essentially rejected them on behalf of the Company without any input from the 2009 Special Committee.

229. Put simply, as long as Fertitta enjoys his majority block, there is no way public shareholders will get fair value for their shares. Fertitta has shown he will not pay fair value unless judicially forced to do so, and Fertitta will block any third party from maximizing the value of Landry's shares.

B. In the Preliminary Proxy Statement, Defendants Fail to Disclose Material Information to the Class

230. Landry's Proxy Statement omits material information about the \$14.75 Buyout. First, the Proxy Statement omits any discussion whatsoever about how Fertitta acquired majority control of the Company during the sales process. Even if Fertitta had not used his control to harm Landry's shareholders, how he acquired majority ownership of the Company – at the acquiescence of the Special Committee and in the midst of his buyout attempts – would undoubtedly be material to a shareholder's decision about whether to vote for the \$14.75 Buyout. Since Fertitta did use his control to harm Landry's shareholders, the importance of that information is only heightened.

231. The Proxy also omits extensive material information about Moelis' valuation, the Special Committee's reasons for accepting the \$14.75 offer, and the go-shop process.

232. Since Defendants omitted such material information from the Proxy Statement, Defendants breached their duties of candor and full disclosure to the Company's shareholders.

CLASS ACTION ALLEGATIONS

233. Plaintiff brings this action pursuant to Rule 23 of the Rules of the Court of Chancery, individually and on behalf of all persons or entities (except Defendants herein and any persons, firm, trust, corporation or other entity related to or affiliated with them and their successors in interest) who suffered harm because of the acts and omissions alleged herein and: (1) who held Landry's common stock as of the October 7, 2008 disclosure by Landry's that the \$21 Buyout was "in jeopardy" through the October 17, 2008 termination of the \$21 Buyout or who purchased Landry's shares during the period between October 17, 2008 and the January 11, 2009 termination of the \$13.50 Buyout (the "2008 Transaction Subclass); and/or (2) who held shares of Landry's common stock as of the November 4, 2009 announcement of the \$14.75 Buyout and who continue to hold shares through the earlier of the date of judgment herein or the closing of the \$14.75 Buyout (the "2009 Transaction Subclass" and, together with the 2008 Transaction Subclass, the "Class").

234. This action is properly maintainable as a class action for the following reasons:

a. The Class is so numerous that joinder of all members is impractical. As of June 30, 2009, and at all relevant times herein, Landry's had outstanding over 16 million shares of its common stock, of which nearly 50% was held by individuals and entities too numerous to bring separate actions. It is reasonable to assume that holders of the Landry's common stock are geographically dispersed throughout the United States.

b. There are questions of law and fact which are common to the Class and which predominate over questions affecting any individual class member. The common questions include, *inter alia*,

- whether Fertitta breached his fiduciary duties to the Company and its shareholders through his conduct described above;
- whether the 2008 Fertitta Entities and/or the 2009 Fertitta Entities aided and abetted Fertitta's breaches of fiduciary duties;
- whether the Director Defendants breached their fiduciary duties by affirmatively facilitating Fertitta's renegotiation of the \$21 Merger Agreement;
- whether the Director Defendants breached their fiduciary duties by failing to take reasonable action to protect against known threats to corporate and shareholder welfare, including failing to take any steps to limit the risks to shareholders' interests posed by Fertitta's ability to gain a controlling interest in the Company on the open market.
- whether the Director Defendants breached their fiduciary duties by allowing Fertitta to abandon the \$21 Merger Agreement and the \$13.50 Merger Agreement by way of a mere pretext, thereby allowing Fertitta to escape the obligations of the 2008 Fertitta Entities to complete the \$21 Buyout and the \$13.50 Buyout.
- Whether the Landry's Board breached their fiduciary duties by entering into the \$14.75 Merger Agreement.
- Whether Fertitta and the Landry's Board breached their fiduciary duties of disclosure in connection with the Proxy Statement.
- Whether, as a result of his breaches of fiduciary duty, Fertitta has been unjustly enriched.

235. Plaintiff is committed to prosecuting this action and has retained competent counsel experienced in litigation of this nature. Plaintiff is a member of the Class, and Plaintiff's claims are typical of the claims of the other members of the Class.

Accordingly, Plaintiff is an adequate representative and will adequately protect the interests of the Class.

236. Plaintiff anticipates that there will be no difficulty in the management of this litigation as a class action.

237. The Landry's Directors have acted on grounds generally applicable to the Class with respect to the matters complained of herein, thereby making appropriate the relief sought herein with respect to the Class as a whole.

238. Plaintiff has suffered damages and will continue to suffer additional damages as a result of the acts and conduct of Fertitta and the Landry's Directors alleged herein, including the massive decline in Landry's stock price to well below the \$21 per share price of the original Buyout as a result of the Defendants' conduct.

239. The prosecution of separate actions would create the risk of:

- inconsistent or varying adjudications which would establish incompatible standards of conduct for the Defendants, and/or
- adjudications which would as a practical matter be dispositive of the interests of other members of the Class.

DEMAND EXCUSED ALLEGATIONS

240. Plaintiff has not made a demand on the Landry's Board to institute this action against Defendants in connection with the wrongs alleged herein. Such demand would be futile and useless, and is thereby excused, because the acts forming the basis of Plaintiff's derivative claim are so egregious on their face that the Board's conduct cannot meet the test of valid business judgment; thus, a substantial likelihood of director liability exists.

241. All six of the Company directors until January 2009 are named herein, and include: Defendants Fertitta, Brimmer, Chadwick, Richmond, Scheinthal and Taylor. As alleged herein, in gross breach of their fiduciary duties as officers and/or directors of Landry's, these six Director Defendants have colluded with one another and/or have failed to take necessary actions against Fertitta and the Fertitta Entities, thus harming the Company. These breaches include, but are not limited to, improperly allowing Fertitta to escape his (and FAC's) obligations under the \$21 Merger Agreement, and failing to take reasonable steps to preserve the value of the Company including, but not limited to, enforcing the terms of the \$21 Merger Agreement and forcing Fertitta to pay a \$24 Million Reverse Termination Fee.

242. A demand upon these Director Defendants would be futile and useless because they have incentive to conceal, rather than expose, the truth regarding the facts and circumstances surrounding the renegotiation of the \$21 Buyout, the decision not to enforce the \$21 Merger Agreement against FAC and Fertitta, improperly failing to insist upon modifications to a golden parachute and Employment Agreement, and the Board's termination of the \$13.50 Merger Agreement.

243. Demand is further futile and useless because Fertitta gained majority control of Landry's through his open market stock purchases. As a result, the Company exercised its rights under an exemption to the New York Stock Exchange's rules as a controlled company, to permit Landry's to remove the requirement of maintaining a board comprised of a majority of independent directors. Landry's took advantage of this exemption by nominating and electing Liem to the Board to replace Richmond, a

purportedly independent director. Thus, the Company has conceded that a majority of the Board today is not independent.

CLAIMS FOR RELIEF

COUNT I

(Class Action Claim For Breach of Fiduciary Duty Against Fertitta)

244. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

245. Defendant Fertitta, as Landry's Chief Executive Officer and Chairman, owes the Class and the Company the utmost fiduciary duties of due care, good faith, and loyalty. Defendant Fertitta has persistently breached his fiduciary duties.

246. Fertitta breached his fiduciary duties by favoring his own interests over those of the Landry's' public shareholders, and abusing his position as Chief Executive Officer and Chairman of Landry's in order to:

- (a) use Hurricane Ike (and the credit crises) as pretexts to force the Board to renegotiate the \$21 Merger Agreement and agree to the \$13.50 Merger Agreement with no additional consideration for shareholders;
- (b) undermine the special committee process by causing Landry's senior management and the chair of the Special Committee to serve his personal interests rather than the interests of Landry's and the public shareholders;
- (c) gain control of the Company without paying shareholders a fair price or a control premium; and

(d) cause the Board to agree to be the party “terminating” the \$13.50 Merger Agreement to avoid even his obligations to pay the \$15 Million Reverse Termination Fee.

247. Plaintiff and the Class have suffered damages as a result of the acts and conduct of Fertitta alleged herein, including the lost opportunity to receive the original \$21 per share Buyout price or in the alternative, damages suffered as a result of the massive decline in Landry’s stock price to well below the \$21 per share price of the original deal.

COUNT II

(Class Claim for Aiding and Abetting Breach of Fiduciary Duty Against the 2008 Fertitta Entities and the 2009 Fertitta Entities)

248. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

249. Defendant Fertitta, as Landry’s Chief Executive Officer and Chairman, owes Plaintiff and the Class the utmost fiduciary duties of due care, good faith, and loyalty. Fertitta has failed to fulfill his fiduciary duties. FAC, FHI, Fertitta Merger Co. and Fertitta Group, Inc. (the “Fertitta Entities”) are deemed to have knowledge of the fiduciary duties Fertitta owes the Class because Fertitta is a control person of the Fertitta Entities and in fact does control, the Fertitta Entities,

250. The Fertitta Entities knowingly participated in the breaches of fiduciary duty by Fertitta and benefited from those breaches.

251. As a result of the Fertitta Entities’ actions, Plaintiff and the Class have suffered, and continue to suffer, damages.

COUNT III

(Class Claim For Breach of Fiduciary Duty Against the Director Defendants)

252. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

253. The Director Defendants have breached their fiduciary duties by affirmatively facilitating Fertitta's renegotiation of the \$21 Merger Agreement. The Director Defendants allowed Fertitta to renegotiate the \$21 Merger Agreement on terms highly favorable to Fertitta at the expense and to the significant detriment of Landry's shareholders.

254. The Director Defendants have breached their fiduciary duty to take reasonable action to protect against known threats to corporate and shareholder welfare. By failing to take any steps to limit the plain and inescapable risks to shareholders' interests posed by Fertitta's ability to gain a controlling interest in the Company on the open market, the Board caused the Class to forfeit control of the Company and forego any control premium.

255. In light of Fertitta's open desire to renegotiate the previously agreed to \$21 Buyout, and his known continued accumulation of Landry's shares during the negotiation and pendency of the \$21 Buyout and the \$13.50 Buyout, the Board was obligated to take reasonable defensive measures to stop Fertitta from gaining control of the Company outside the terms of the respective merger agreements. There was the distinct threat that Fertitta would acquire control of the Company "on depressed prices," and would have been rational and necessary for the Board to adopt a "poison pill" to

protect shareholders' majority interest in the Company and the value of their shares. Alternatively, the Board should have incorporated a standstill provision in the \$13.50 Merger Agreement, or taken other measures, to prevent Fertitta from further acquiring shares of the Company outside the terms of the \$13.50 Merger Agreement.

256. The Director Defendants also breached their fiduciary duties by allowing Fertitta to abandon the \$21 Merger Agreement and the \$13.50 Merger Agreement by way of a mere pretext, thereby allowing Fertitta to escape the obligations of the 2008 Fertitta Entities to complete the \$21 Buyout and the \$13.50 Buyout.

257. Plaintiff and the Class have suffered damages as a result of the acts and conduct of Landry's Directors alleged herein. Plaintiff and the Class will receive neither the benefits contemplated by the \$21 Merger Agreement, \$13.50 Merger Agreement, nor any control premium for their shares, as a result of the Director Defendants' breaches of fiduciary duty. Further, the Class has suffered as a result of the massive decline in Landry's stock price to well below the \$21 Buyout as a result of the Director Defendants' conduct.

COUNT IV

(Derivative Claim Against the Board as of January 2009 For Failure to Seek the Reverse Termination Fee)

258. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

259. All six of the Company directors until January 2009 are named herein, and include: Defendants Fertitta, Brimmer, Chadwick, Richmond, Scheinthal and Taylor. As alleged herein, in gross breach of their fiduciary duties as officers and/or directors of

Landry's, these six Director Defendants have colluded with one another and/or have failed to take necessary actions against Fertitta and the 2008 Fertitta Entities, thus harming the Company by:

- (a) de-valuing the Company in furtherance of Fertitta's plan to gain control of Landry's at minimal expense;
- (b) refusing to take reasonable measures to protect the rights of shareholders and the Company in response to Fertitta's suggestion of a non-existent right to terminate the \$21 Merger Agreement;
- (c) allowing Fertitta to escape his (and FAC's) obligations under the \$21 Merger Agreement, and failing to take reasonable steps to preserve the value of the Company including, but not limited to, enforcing the terms of the \$21 Merger Agreement and forcing Fertitta to pay a \$24 Million Reverse Termination Fee to terminate the \$21 Merger Agreement; and
- (d) improperly allowing Fertitta to escape his (and FAC's) obligations under the \$13.50 Merger Agreement, and failing to take reasonable steps to preserve the value of the Company including, but not limited to, enforcing the terms of the \$13.50 Merger Agreement and forcing Fertitta to pay a \$15 Million Reverse Termination Fee to terminate the \$13.50 Merger Agreement/

260. As a direct and proximate result of the Director Defendants' breaches of fiduciary duties, the Company has sustained, and will continue to sustain, substantial harm. The Director Defendants are liable to Landry's as a result of the acts and omissions alleged herein.

COUNT V

(Derivative Claim Against Fertitta And FAC For Breach of Contract)

261. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

262. Under the terms of the \$21 merger agreement, FAC was required to pay a \$24 million Reverse Termination Fee to the Company if it failed to close the deal for any legitimate reason. Fertitta personally guaranteed this payment.

263. As of October 17, 2008, Fertitta and FAC had no termination right under the terms of the \$21 Merger Agreement other than to pay the \$24 million termination fee. Fertitta and FAC did not perform under the \$21 Merger Agreement but never paid the \$24 million Reverse Termination Fee.

264. Fertitta and FAC are liable to the Company for failing to perform their obligations under the \$21 Merger Agreement without paying the \$24 million Reverse Termination Fee.

COUNT VI

(Against Fertitta For Breaches of Fiduciary Duty In Connection with the \$14.75 Buyout)

265. Plaintiff repeats and realleges each and every allegation above, as if fully set forth herein.

266. As Landry's CEO, Chairman and controlling shareholder, Fertitta owes the Class the utmost fiduciary duties of due care, good faith, and loyalty. Fertitta also owes the Class the duty to disclose all facts material to Landry's shareholders.

267. As the prospective sole owner of Landry's, Fertitta's financial interests are adverse to the financial interests of Landry's public shareholders in connection with the \$14.75 Buyout. Fertitta wants to pay the lowest possible price to Landry's public shareholders in the \$14.75 Buyout, while the Class of Landry's public shareholders wants to obtain maximum value in connection with the \$14.75 Buyout.

268. Fertitta must, but has not, acted in accordance with Delaware’s stringent “entire fairness” standard in connection with the \$14.75 Buyout. Under this standard, Fertitta must (but cannot) establish that the 2009 Buyout is the result of a fair process that returns a fair price for all Landry’s shareholders. Fertitta’s proposed merger consideration is inadequate, and unfair, and Fertitta has dominated and controlled the Board’s process, thus breaching his fiduciary duties.

269. Fertitta has failed to fulfill his fiduciary duties in the \$14.75 Buyout. Moreover, Fertitta’s golden parachute was enacted as a disproportionate and unreasonable defensive measure that will thwart any third party offers to acquire the Company. Fertitta’s golden parachute is improper because it serves as a 15% termination fee that is preventing competing proposals from being made for the Company. The Board’s approval of such a large golden parachute was inexplicable and further demonstrates Fertitta’s dominance over the Board.

270. Plaintiff and the Class have been harmed by these breaches of fiduciary duty because they have not received a fair price in the \$14.75 Buyout nor was the \$14.75 Merger Agreement the product of fair dealing.

271. Plaintiff and the Class have no adequate remedy at law.

COUNT VII

(Against the Landry’s Board For Breaches of Fiduciary Duty In Connection with the \$14.75 Buyout)

272. Plaintiff repeats and realleges each and every allegation above as if fully set forth herein.

273. The Landry's Board owes the Class the utmost fiduciary duties of due care, good faith, and loyalty.

274. The Landry's Board has breached those fiduciary duties by entering into the \$14.75 Merger Agreement whereby the Landry's Board has ceded control over any merger process to Fertitta.

275. The Landry's Board is obligated by its fiduciary duties and the entire fairness standard to ensure that any merger transaction is accomplished by fair dealing and in a fair process that returns a fair price. The Landry's Board has breached these duties.

276. In order to prevent further breaches of fiduciary duty by the Landry's Board with respect to the \$14.75 Buyout, the 2009 Special Committee must be replaced by a court-appointed Trustee to run the sale of Landry's to ensure that Landry's public shareholders receive the best price reasonably available for their stock.

277. Plaintiff and the Class have no adequate remedy at law.

COUNT VIII

(Class Claim Against Fertitta and the Board For Breaches of the Fiduciary Duty of Disclosure in Conjunction With the Proxy Statement)

278. Plaintiff repeats and realleges each and every allegation above, as if fully set forth herein.

279. Fertitta and the Board have violated their fiduciary duties owed to the Class by failing to disclose in the Proxy Statement all information material to the Class in deciding how to vote their shares on the \$14.75 Buyout, or to otherwise ensure that the

statements made in the Proxy Statement are not materially misleading, while asking the Class to vote on the \$14.75 Buyout.

280. As a result of the actions by Defendants Fertitta and the Landry's Board, Plaintiff and the Class will suffer irreparable injury including, but not limited to, the unlawful deprivation of their right under Delaware corporate law to cast a fully informed vote on the \$14.75 Buyout and their valuable equity ownership in Landry's.

281. Unless enjoined by the Court, Defendant Fertitta and the Landry's Board will continue to breach the fiduciary duties owed to Plaintiff and the Class including, but not limited to, coercing members of the Class to acquiesce to the \$14.75 Buyout.

282. Plaintiff has no adequate remedy at law.

COUNT IX

(Class Claim Against Fertitta for Unjust Enrichment)

283. Plaintiff repeats and realleges each and every allegation above, as if fully set forth herein.

284. Through acts of disloyalty and in breach of his fiduciary duties, Fertitta has improperly enriched himself at the expense of the Class.

285. Fertitta purchased shares on the open market in violation of his obligations to the Class, and in contradiction to his assurances to the 2008 Special Committee.

286. The purchases enriched Fertitta not only by the value of a control premium, but also by providing the control necessary to terminate the \$13.50 Buyout without paying termination fee, reconstitute the Board to his personal satisfaction, and negotiate the wholly unfair \$14.75 Buyout.

287. Fertitta also is unjustly enriched by his golden parachute which is described above.

288. This enrichment came at the direct expense of the Class. The Class lost the full value of a control premium, as well as any significant ability to control the disposition of their investment.

289. Plaintiff has no adequate remedy at law.

RELIEF REQUESTED

WHEREFORE, Plaintiff demands judgment as follows:

(a) Finding Fertitta liable for breaching his fiduciary duties to the Class in connection with the renegotiation of the \$21 Merger Agreement, Fertitta's assumption of control of the Company, and the termination of the \$13.50 Merger Agreement;

(b) Finding the Fertitta Entities liable for aiding and abetting Fertitta's breaches of his fiduciary duties to the Class in connection with the renegotiation of the \$21 Merger Agreement, Fertitta's assumption of control of the Company, and the termination of the \$13.50 Merger Agreement;

(c) Finding the Director Defendants liable for breaching their fiduciary duties to the Class in connection with, at the least, the renegotiation of the \$21 Merger Agreement, Fertitta's assumption of control of the Company, and the termination of the \$13.50 Merger Agreement;

(d) Ordering Fertitta and the 2008 Fertitta Entities to consummate the Buyout at the agreed purchase price of \$21 a share or to pay to all Class members damages representing the difference between \$21 per share and the price at which Class members

sold their shares in the open market or the value of Landry's stock on the date of this Complaint;

(e) In the alternative, ordering Fertitta to pay the \$24 Million Reverse Termination Fee set forth in the \$21 Merger Agreement;

(f) Declaring this Action properly maintainable as a class action;

(g) Enjoining consummation of the \$14.75 Buyout until and unless curative disclosures are made;

(h) Putting Fertitta's Landry's shares that he purchased on the open market after June 2008 in a constructive trust to be voted in favor of the transaction that provides the highest offer to maximize Landry's value for its public shareholders;

(i) Appointing a Trustee to conduct the sale of Landry's to maximize the public shareholders' value;

(j) Awarding the Class compensatory damages, together with pre- and post-judgment interest, for the devaluation of Landry's shares as a result of defendants' actions;

(k) Awarding Plaintiff the costs and disbursements of this action, including attorneys', accountants', and experts' fees; and

(l) Awarding such other and further relief as is just and equitable.

Dated: May 21, 2010

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