

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.

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

Defendants, and

LANDRY'S RESTAURANTS, INC.,

Nominal Defendant.

C.A. No. 4339-VCL

**JOINT DECLARATION OF MARY S. THOMAS AND MARK LEOVITCH IN  
SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF THE PROPOSED  
SETTLEMENTS, PLAN OF ALLOCATION, AND REQUESTED AWARD OF  
ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES**

MARY S. THOMAS and MARK LEOVITCH declare as follows:

1. We are, respectively, members of Grant & Eisenhofer P.A. ("G&E") and Bernstein Litowitz Berger & Grossmann LLP ("BLBG"), Co-Counsel for Plaintiff and Court-appointed Class Representative Louisiana Municipal Police Employees' Retirement System ("Plaintiff").

2. This declaration is submitted in support of Plaintiff's application for: (1) final approval of two proposed partial settlements, as set forth in the June 22, 2010 Stipulation of

Partial Settlement (the “2009 Settlement”) and the July 23, 2010 Stipulation of Partial Settlement (the “2008 Settlement”) (collectively, the “Settlements”), that together will fully resolve the above-captioned action (the “Action” or “Litigation”); (2) final approval of the proposed plan of allocation of the proceeds of the 2008 Settlement; (3) certification, for settlement purposes, of the 2008 and 2009 Settlement Classes as defined in Plaintiff’s Brief; and (4) awards of attorneys’ fees and costs in connection with the Settlements.

## **I. Introduction**

3. The underlying Litigation stems from Plaintiff’s challenge to Defendants’<sup>1</sup> conduct in connection with two terminated buyouts (the “\$21 Buyout” and the “\$13.50 Buyout”) of the Company by Landry’s Restaurants, Inc. (“Landry’s”) CEO, Chairman, and largest shareholder, Tilman J. Fertitta (“Fertitta”).

4. After Plaintiff filed its first Complaint, Fertitta agreed to acquire Landry’s for \$14.75 per share (the “\$14.75 Buyout”).

5. Plaintiff prosecuted this Action vigorously. Only after nearly a year and a half of hard-fought litigation did the parties agree to the Settlements.

6. To settle Plaintiff’s claims, Defendants must provide consideration worth nearly \$80 million -- \$14.5 million in cash to the 2008 Class and a takeover price increased by \$65 million conditioned on a settlement.

## **II. The Commencement of the Litigation**

7. Plaintiff’s counsel began investigating this case after reviewing a New York Times article entitled, “Next Deal From Hell Award Winner: Landry’s,” dated January 13, 2009

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<sup>1</sup> “Defendants” are 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., Fertitta Merger Co., and Nominal Defendant Landry’s Restaurants, Inc.

– one day after the Board announced the termination of the \$21 Buyout. Further investigation included a review of Landry’s proxy statement, which further aroused Plaintiff’s suspicions.

8. On February 5, 2009, Plaintiff filed its class action and derivative complaint (the “Complaint”), alleging generally that: (1) Fertitta breached his fiduciary duties to Landry’s shareholders in connection with the negotiation and termination of the proposed buyouts; (2) the Board and Special Committee breached their fiduciary duties to Landry’s shareholders by facilitating Fertitta’s breaches; (3) the Fertitta Entities aided and abetted Fertitta’s breaches of fiduciary duty; and (4) the Director Defendants breached their fiduciary duties by failing to require Fertitta to pay the \$24 Million Termination Fee required under the \$21 Buyout.

9. Plaintiff was the only shareholder to prosecute this action.

10. Plaintiff’s counsel assumed the risk of litigating this case because they believed Landry’s shareholders suffered a wrong.

### **III. Defendants’ Motion to Dismiss the Complaint**

11. On April 2, 2009, Defendants moved to dismiss Plaintiff’s Complaint. After oral argument on June 9, 2009, this Court denied Defendants’ motion to dismiss in its entirety on July 28, 2009, finding that the Complaint adequately alleged claims for breaches of fiduciary duty.

### **IV. Discovery and Trial Preparation**

12. The parties engaged in nearly a year of extensive and extremely contentious discovery proceedings.

13. During the discovery period, the parties negotiated a stipulation concerning the exchange of confidential information, which this Court ordered on August 19, 2009.

14. The parties negotiated two scheduling stipulations, which this Court ordered on September 17, 2009 and February 29, 2010.

15. The parties also negotiated an amendment to the February 29, 2010 Scheduling Order, but failed to reach an agreement, which resulted in this Court ordering a schedule during a May 14, 2010 case management office hearing.

16. During discovery, Plaintiff learned that, throughout negotiations, Fertitta misled the Special Committee<sup>2</sup> and that the special committee process itself was tainted both by Fertitta's tactics and by the Special Committee's own breaches of protocol. Plaintiff uncovered these and other facts over Defendants' fierce resistance.

17. The discovery proceedings in this case included:

- multiple document discovery demands on Defendants and various third parties, and review of over 600,000 pages of documents produced by Defendants and third parties;
- twelve depositions, three of which spanned multiple days (including depositions of senior officers and directors of Landry's, members of the Special Committee, the Special Committee's legal and financial advisors, the Lenders, and Plaintiff);
- expert discovery, including three opening and one rebuttal expert reports, and the negotiation of an expert discovery stipulation, which the Court ordered on March 3, 2010;
- serving and responding to interrogatories by the parties; and
- meeting and conferring, and corresponding on numerous occasions over the production of certain documents and the extensive assertions of privilege by Defendants and third parties.

18. Plaintiff also filed two key discovery motions that sought to compel critical information over which Defendants asserted privilege.

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<sup>2</sup> The "Special Committee" means the committee composed of Defendants Chadwick, Brimmer, and Richmond, formed by Landry's to consider strategic alternatives to maximize shareholder value, including a going-private transaction.

19. First, on December 2, 2009, Plaintiff moved to compel or in the alternative to preclude the Special Committee Defendants<sup>3</sup> from asserting reliance upon legal advice with respect to the \$21 Buyout after the Special Committee improperly asserted privilege at the Special Committee's counsel's deposition. After oral argument on January 11, 2010, the Court determined that the Special Committee improperly asserted privilege, and ordered that the witness (Jack Capers) be redeposed.

20. On March 22, 2010, Plaintiff moved to compel Fertitta, Scheinthal, and Liem (*i.e.*, the "Fertitta Defendants")<sup>4</sup> to produce all shared communications regarding the \$21 and \$13.50 Buyouts, over which they asserted privilege. Shortly before a hearing scheduled for March 29, 2010, the Fertitta Defendants agreed to produce the vast majority of the documents sought. This production contained several critical documents that supported Plaintiff's claims, including a memorandum from Fertitta's outside counsel, showing that the Fertitta Defendants misled the Special Committee and its advisors about the availability of certain funds to repurchase the Notes.

#### **V. Plaintiff's Supplement and Amendments to the Complaint**

21. After the Company announced the \$14.75 Buyout on November 3, 2009, Plaintiff filed a November 13, 2009 supplement to the Complaint challenging that proposed transaction.

22. Plaintiff filed an amended complaint on January 29, 2010 and a second amended complaint ("Amended Complaint") on May 21, 2010, incorporating the evidence Plaintiff developed during the discovery proceedings.

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<sup>3</sup> "Special Committee Defendants" are Defendants Chadwick, Brimmer, and Richmond.

<sup>4</sup> The only other "Fertitta Defendants" were shell companies established by Fertitta for the sole purpose of acquiring Landry's.

## **V. Class Certification**

23. Defendants challenged Plaintiff on every aspect of this litigation, including class certification.

24. After the Court suggested that the parties stipulate to class certification during a May 14, 2010 office conference, Defendants forced Plaintiff to move for class certification on May 28, 2010 before ultimately agreeing to “provisionally” stipulate to class certification on June 22, 2010 (after Defendants briefed their opposition to class certification on June 11, 2010).

## **VI. Defendants’ Motion to Dismiss Plaintiff’s Amended Complaint**

25. Defendants moved to dismiss the Amended Complaint on May 28, 2010, and Plaintiff opposed that motion on June 28, 2010. The litigation settled shortly before this Court was scheduled to hear oral argument on the fully-briefed motion.

## **VII. Negotiation and Settlement**

26. With litigation proceeding, an arms-length and months-long settlement negotiation process developed.

27. On December 31, 2009, Plaintiff sent a letter to the Special Committee’s counsel demanding that the Special Committee members rectify their prior and ongoing breaches of fiduciary duties regarding the \$14.75 Buyout.

28. The Special Committee’s counsel met with Plaintiff’s counsel in early January 2010. After that meeting, Plaintiff and Defendants began working on a term sheet reflecting amendments to the \$14.75 Buyout.

29. Defendants also requested that Plaintiff’s counsel communicate with Landry’s second largest shareholder, Pershing Square Group (“Pershing Square”), which openly opposed

the \$14.75 Buyout and had enough shares to block the deal due to the majority of the minority clause in the \$14.75 Merger Agreement.

30. The parties then agreed to mediate Plaintiff's remaining claims related to the \$21 Buyout.

31. The parties retained retired United States District Court Judge Nicholas Politan as their mediator, drafting detailed mediation statements for his consideration (along with other documents) prior to the mediation session.

32. On March 12, 2010, the parties conducted a full-day mediation session with Judge Politan, but failed to reach a settlement for the \$21 Buyout. As Fertitta was unwilling to buy the Company absent resolution of the entire Action, negotiations came to a halt.

33. The settlement negotiations resumed after Fertitta's April 15-16, 2010 deposition when Defendants Fertitta and Scheinthal became directly engaged in negotiating the terms of a settlement related to the \$14.75 Buyout, after Plaintiff's counsel received defense counsel's express authorization.

34. By April 26, 2010, Plaintiff and the Fertitta Defendants believed they had reached a settlement concerning the \$14.75 Buyout and so informed the Court. The next day, however, the Special Committee did not recommend the revised deal to the Board. The parties, therefore, engaged in further negotiations for several more weeks.

35. On May 23, 2010, after additional and extensive arms-length negotiations, the parties finally reached a comprehensive partial settlement related to the \$14.75 Buyout, and informed the Court about its terms. Fertitta agreed to increase his offering price from \$14.75 to \$24 per share to acquire Landry's, and agreed to shareholder protections for the revised deal, including (a) a new 45 day go-shop period; (b) waiver of all standstills, except for hostile offers,

during the go-shop period; (c) the elimination of a termination fee to Fertitta and the inclusion of a provision that he could only seek reimbursement of his actual expenses; (d) cost reimbursement incentives up to \$500,000 for the two highest bidders' due diligence costs if Landry's reached a deal with Fertitta instead of those bidders; (e) Fertitta's agreement to vote any of his shares purchased on the open-market after June 16, 2008 in proportion to how the minority actually votes on any alternative transaction; and (f) allowing Plaintiff's counsel to monitor the go-shop process and to provide comments on proxy disclosures.

36. After announcing the partial settlement, Defendants reached out to Pershing Square, which agreed to enter into a voting agreement to support the \$14.75 Buyout after Fertitta agreed to raise his offer price to \$24.50 per share.

37. On June 22, 2010, the parties filed a Stipulation of Partial Settlement related to Plaintiff's claims challenging the \$14.75 Buyout.

38. The parties later re-engaged in discussions to settle Plaintiff's claims related to the failed \$21 Buyout.

39. On July 7, 2010, the parties attended another full-day mediation session with Judge Politan, which resulted in an agreement in principle to settle Plaintiff's claims related to the \$21 Buyout.

40. On July 14, 2010, after more negotiations, the parties memorialized a term sheet for the 2008 Class Settlement.

41. On July 23, 2010, the parties submitted a long-form stipulation for the 2008 Class Settlement, which provided a fund of \$14.5 million for Landry's shareholders.

42. On July 26, 2010, this Court entered a Scheduling Order, preliminarily approving the 2008 Settlement, certifying the 2008 Settlement Class, directing Notice<sup>5</sup> to be sent to the 2008 Class members, preliminarily approving the Plan of Allocation set forth in the Notice, and scheduling a settlement hearing to hear objections, if any, to Plaintiff's motion for final approval of the Settlements.

### **VIII. Attorneys' Fees and Expenses**

43. During the course of the prosecution of this action, Plaintiff's counsel expended a total of 12,146 hours, for a total value (at current billing rates) of approximately \$5,000,000. *See* Thomas Decl., Exs. H through J. They also incurred unreimbursed expenses of \$599,503.71 in connection with the prosecution of this action. *Id.*

Dated: September 17, 2010

BERNSTEIN LITOWITZ BERGER  
& GROSSMANN LLP

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<sup>5</sup> *See* Thomas Decl., Ex. G.