

FILED

Loren Jackson
District Clerk

NOV 10 2009

CAUSE NO. 2009-72839

Time: 2:27
IN THE DISTRICT COURT OF Harris County, Texas
By BS Deputy

RALPH BIANCALANA, individually,
and on behalf of all others similarly
situated,
Plaintiff,

v.

TILMAN J. FERTITTA, STEVEN L.
SCHEINTHAL, KENNETH BRIMMER,
MICHAEL S. CHADWICK, JOE MAX
TAYLOR, RICHARD H. LIEM and
LANDRY'S RESTAURANTS, INC.,
Defendants

HARRIS COUNTY, TEXAS

165 JUDICIAL DISTRICT

SHAREHOLDERS' ORIGINAL CLASS ACTION PETITION

Plaintiff Ralph Biancanala files his Original Class Action Petition¹ as follows:

I. DISCOVERY LEVEL

1. Discovery in this case shall be conducted under Level 3 of the Texas Rules of Civil Procedure.

II. NATURE OF DISPUTE

2. Plaintiff brings this action individually and as a class action on behalf of the public shareholders of Landry's Restaurants, Inc. ("Landry's" or the "Company") in connection with the proposed sale of Landry's to Tilman J. Fertitta ("Fertitta") for \$14.75 per share, pursuant to a proposal made by Fertitta and accepted by Landry's on November 3, 2009 (the "Buyout").

3. The consideration that Fertitta has stated he will offer to Landry's shareholders in the proposed acquisition is unfair and grossly inadequate, because, among other matters, the intrinsic value of Landry's common stock is materially in excess of the amount offered, giving due

¹ Plaintiff's factual allegations are based upon personal knowledge with respect to paragraph 5, and upon information and belief based upon the investigation of counsel, as to all other factual allegations.

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consideration to the Company's growth and anticipated operating results, net asset value, and future profitability. The entire fairness standard of judicial review applies to all aspects of the proposed transaction because (1) Fertitta stands on both sides of the deal and (2) the purported special committee established by Landry's is not independent and disinterested. Additionally, various stock and bond analysts who cover Landry's described the offer as "cheap" and that Fertitta stands to benefit because the Defendants have "fatigued shareholders" with their shenanigans and repeated attempts to consummate this Buyout over the last two years.

4. If the proposed Buyout is successful, Landry's will no longer be a publicly traded company and Plaintiff and other public shareholders will no longer possess ownership in the Company. Accordingly, "a going private transaction is one of the few corporate transactions that drastically alter the nature of a stockholder's holding. For that reason, these transactions receive relatively close scrutiny from the courts and merit extra care from the directors involved on both sides of the transaction." *Fiduciary Duties and Standards of Review in the Context of Going Private Transactions*, Elizabeth A. Nowicki, Tulane University School of Law.

III. PARTIES

5. Plaintiff, Ralph Biancanala, is a current stockholder of Landry's and has owned Landry's stock continuously since a time period prior to the Proposed Buyout. Mr. Biancanala is a resident of Spring in Harris County, Texas.

6. Defendant Tilman J. Fertitta has served as Landry's President and Chief Executive Office since 1987. In 1988, Fertitta became the controlling shareholder of Landry's and he currently owns 55.1 percent of the Company's outstanding shares. Fertitta has been a member of the Company's Board of Directors since 1993. Mr. Fertitta is a Texas resident who works out of the

Houston, Harris county office of Landry's Restaurants, Inc. at 1510 West Loop South, Houston, Texas 77027, where he may be served.

7. Defendant Steven L. Scheinthal ("Scheinthal") has served as member of the Board of Directors of Landry's since 1933. Scheinthal is also Landry's General Counsel and an Executive Vice President. Mr. Scheinthal is a Texas resident who works out of the Houston, Harris county office of Landry's Restaurants, Inc. at 1510 West Loop South, Houston, Texas 77027, where he may be served.

8. Defendant Kenneth Brimmer ("Brimmer") has served as a member of Landry's Board of Directors since 2004. Mr. Brimmer is a Texas resident who works out of the Houston, Harris county office of Landry's Restaurants, Inc. at 1510 West Loop South, Houston, Texas 77027, where he may be served.

9. Defendant Michael S. Chadwick ("Chadwick") has served as a member of Landry's Board of Directors since 2001. Mr. Chadwick is a Texas resident who works out of the Houston, Harris county office of Landry's Restaurants, Inc. at 1510 West Loop South, Houston, Texas 77027, where he may be served.

10. Defendant Joe Max Taylor ("Taylor") has served as member of the Board of Directors of Landry's since 1993. Mr. Taylor is a Texas resident who works out of the Houston, Harris county office of Landry's Restaurants, Inc. at 1510 West Loop South, Houston, Texas 77027, where he may be served.

11. Defendant Richard H. Liem ("Liem") has served as member of the Board of Directors of Landry's since 2009. Mr. Liem is a Texas resident who works out of the Houston, Harris county office of Landry's Restaurants, Inc. at 1510 West Loop South, Houston, Texas 77027, where he may be served.

12. As Directors of the Company, Fertitta, Chadwick, Scheinthal, Taylor and Brimmer (collectively the "Individual Defendants"), are in a fiduciary relationship with the Company, Plaintiff and the public stockholders of Landry's. By virtue of their positions as directors and/or officers of Landry's and/or their exercise of control and dominant ownership over the business and corporate affairs of Landry's, each and every of the Individual Defendants have, and at all relevant times had, the power to control and influence, and did control and influence and cause Landry's to engage in the practices complained of herein. Each Individual Defendant owed and owes Landry's and its shareholders fiduciary obligations and were and are required to: use their ability to control and manage Landry's in a fair, just and equitable manner; act in furtherance of the best interests of Landry's and its shareholders; govern Landry's in such a manner as to heed the expressed views of its public shareholders; refrain from abusing their positions of control; and not to favor their own interests at the expense of Landry's and its shareholders.

13. Defendant Landry's Restaurants, Inc. ("Landry's") is a Delaware company authorized to do business in Texas that maintains a principal place of business at 1510 West Loop South, Houston Texas 77027. Landry's owns and operates restaurants, hotels and casinos. Among its restaurants owned are Landry's Seafood House, Saltgrass Steakhouse, Rainforest Café, Chart House, Cadillac Bar, Willie G's, Grotto, Vic & Anthony's Steakhouse, Pesce and La Griglia. Landry's also owns the Golden Nugget Casinos, Kemah Boardwalk, the Aquarium, Inn at the Ballpark and the San Luis Hotel & Resort. Landry's trades on the New York Stock Exchange under the symbol "LNY." Landry's may be served by serving its registered agent for service, Steven L. Scheinthal, 1510 West Loop South, Houston Texas 77027.

14. The Individual Defendants, together with Landry's are sometimes collectively referred to herein as "Defendants."

IV. JURISDICTION AND VENUE

15. All Defendants are subject to the jurisdiction of this Court, and the amount in controversy is within the jurisdictional limits of this Court.

16. Venue is proper in Harris County because it is the county in which the conduct that forms the basis of the suit took place and is the county in which the Defendants are located. Harris County is also where a substantial part of the events or omissions giving rise to the claims occurred.

V. BACKGROUND FACTS

17. Defendant Fertitta has been trying to acquire all of the outstanding shares of Landry's since January of 2008, when Fertitta sent a letter to the Landry's Board of Directors (the "Board") stating his intention to acquire all of the outstanding shares of Landry's that he did not presently own for a price of \$23.50. After a series of lawsuits regarding that bid, it was revealed the Fertitta had made the initial bid without even securing the necessary financing. Because Fertitta could not secure the required financing, he was forced to lower his bid for Landry's to \$21.00.

18. In October 2008, Fertitta was forced to lower his bid again to \$13.50, claiming that the added pressure from a tightening credit market and damage to several of Landry's properties from Hurricane Ike prompted the drastic reduction in offer price.

19. In January 2009, Landry's Board of Directors was forced to reject Fertitta's offer because it received a demand letter from the Securities and Exchange Commission ("SEC") requiring the company to issue a proxy statement and disclose the terms of commitment and commitment letters from the lead lenders financing the deal. *Landry's Form 8-K filed January 12, 2009*. Rather than make these disclosures, the Board choose to scuttle the deal and backed out of the transaction.

20. The botched transaction was described by New York Times columnist and University of Connecticut Professor Steven Davidoff as “truly worthy of Deal from Hell status.” *New York Times Mergers and Acquisitions Blog*, January 13, 2009. The market’s confidence in Landry’s financial prospects soured and the common stock price plummeted to \$6.54 in January 2009.

21. Amidst the chaos that he helped create, Defendant Fertitta continued to acquire Landry’s stock on the cheap. Fertitta increased his holdings from approximately 29 percent to 55 percent – taking a majority stockholder position. Fertitta was able to acquire these shares because the Board never negotiated a standstill agreement with Fertitta. A standstill agreement is commonly used in buyout and merger transactions to prohibit the proposed buyer from making side purchases of shares while simultaneously negotiating an offer. The Board’s failure to execute a standstill agreement with Fertitta further demonstrates its willingness to serve Fertitta’s own self interest and their inability to protect the interests of the Company’s minority shareholders.

22. In August of 2009, the Board formed a Special Committee of outside non-employee directors, presumably comprised of Defendants Brimmer, Chadwick, and Taylor, to “consider strategic alternatives.” *Landry’s Form 8-K filed November 4, 2009*. Not surprisingly, immediately after the Special Committee was formed, Defendant Fertitta offered to purchase all of Landry’s outstanding shares under an agreement whereby Landry’s shareholders would exchange their Landry’s shares for shares of Landry’s Saltgrass, Inc., a subsidiary of Landry’s. The Special Committee rejected Fertitta’s offer as inadequate.

23. On November 3, 2009, the Company announced that it had entered into a definitive merger agreement with Defendant Fertitta’s acquisition company, a company wholly-owned by Fertitta, to acquire all of the shares not yet owned by Fertitta at a price of \$14.75. The transaction is contingent on Landry’s refinancing some of its debt to fund a portion of the transaction. Of the \$1.2

billion purchase value, \$550 million will be provided by newly issued debt securities offered by Landry's in a private placement.

24. The timing of the Buyout offer was intended to acquire Landry's at a lower trading price. The Buyout was timed to occur mere days before the Company announced that it had posted a significant third quarter profit compared to the same quarter in the previous year. Specifically, on November 6, 2009, the Company posted third quarter 2009 profits of \$6.7 million or 41 cents per share compared to a loss of \$17.1 million or \$1.06 per share in the same quarter a year prior. Taking advantage of this lower trading price and with knowledge of the Company's bright prospects, Fertitta and the Defendants timed the Buyout to provide Fertitta with a favorable price at the expense of the minority shareholders.

25. The value of \$14.75 per share to be paid to the class members is unconscionable, unfair and grossly inadequate and constitutes unfair dealing because, among other things, (a) the intrinsic value of the stock of Landry's is materially in excess of the \$14.75 value, giving due consideration to the possibilities of growth and profitability of Landry's in light of its business, earnings and earnings power, present and future; (b) the \$14.75 value is inadequate and offers an inadequate premium to the public shareholders of Landry's; and (c) the \$14.75 value is not the result of arm's-length negotiations, but was fixed arbitrarily by Fertitta to "cap" the market price of Landry's stock, as part of a plan for Fertitta to obtain complete ownership of Landry's assets and business at the lowest possible price. The intrinsic unfairness in Defendants' actions is also the product of the currently undervalued price of the shares in the marketplace.

26. The definitive merger agreement contains a "Go Shop" provision, that provides the Company can solicit alternative proposals from third parties until December 17, 2009 or until Landry's debt financing is completed. However, the "Go Shop" provision does not provide any true

assurance to shareholders that their interests will be protected by open competition. Given that Fertitta has been able to acquire over 55 percent of the outstanding shares since his first bid for Landry's, it is highly unlikely that any competitor will enter the bidding process for a minority stake. The illusory nature of this "Go Shop" provision is further demonstrated by the fact that the Company must pay a "break-up" fee of \$2.4 million to Fertitta in the event that a superior proposal is accepted by the Company. As a result, Fertitta is able to in effect set his own buyout price without an auction or other means to maximize shareholder value.

27. Stock analysts that follow the Company have been critical of the Buyout terms and the offered price. Bond analyst Barbara Cappaert of KDP Investment Advisors wrote in an investor's note that the Buyout was "[n]ot a bad move for Fertitta," and opined, "[w]e think in either event that the buyout price is cheap." Analyst Michael Gallo of C.L. King & Associates, who has followed the long saga of the Landry's Buyout, adds, "[h]e's [Fertitta] probably fatigued the shareholders . . . Most of the guys who would've wanted a higher price have long ago given up."

28. The stock value that Fertitta has offered has been dictated by Fertitta to serve his own interests, and is intended to force Landry's shareholders to relinquish their Landry's shares at a grossly unfair price. Such action constitutes unfair dealing.

29. Fertitta, by virtue of his position as CEO and President, is in possession of proprietary corporate information concerning Landry's future financial prospects. As a result, the degree of knowledge and economic power between Fertitta and class members is unequal, making it grossly and inherently unfair for Fertitta to obtain the remaining Landry's shares at the unfair and inadequate price that he has proposed.

30. Any buyout of Landry's public shareholders by Fertitta on the terms recently proposed will deny class members their right to share proportionately and equitably in the true value of

Landry's valuable and profitable business, and future growth in profits and earnings, at a time when the Company is poised to increase its profitability. This concern is magnified by the fact that Fertitta has repeatedly colluded with the other Individual Defendants to complete a Buyout that does not maximize shareholder value.

31. The Individual Defendants' fiduciary obligations require them to:

- (a) act independently so that the interests of Landry's public shareholders will be protected;
- (b) adequately ensure that no conflicts of interest exist between defendants' own interests and their fiduciary obligation of entire fairness or, if such conflicts exist, to ensure that all the conflicts are resolved in the best interests of Landry's public shareholders; and
- (c) provide Landry's shareholders with genuinely independent representation in the negotiations with Fertitta.

32. Even the purported "independent" special committee is not in reality free from the sway of Fertitta. As President, CEO and controlling shareholder, Fertitta chose each member to initially serve on the Board, and has been instrumental in their being allowed to remain on the Board. Moreover and illustrative of this point, the Company's Compensation Committee comprised of defendants Taylor and Chadwick approved a compensation package for Fertitta in 2006 that totaled \$15,328,909. This astronomical sum was nearly 5 percent of the entire market capitalization of the Company at that time and has no financial or business justification outside of the Board members being controlled by or otherwise seeking favor from Fertitta.

33. By reason of the foregoing, Defendants have breached and will continue to breach their duties to the minority public shareholders of Landry's and are engaging in improper, unfair dealing and wrongful and coercive conduct.

34. Plaintiff and the Class will suffer irreparable harm unless Defendants are enjoined from breaching their fiduciary duties and from carrying out the aforesaid plan and scheme.

VI. CLASS ACTION ALLEGATIONS

35. Plaintiff brings this action individually and as a class action pursuant to Rule 42 of the Texas Rules of Civil Procedure, on behalf of all public stockholders of the Company (except Defendants herein and their affiliates) and their successors in interest, who are or will be threatened with injury arising from Defendants' actions as more fully described herein (the "Class").

36. This action is properly maintainable as a class action.

37. The class of stockholders for whose benefit this action is brought is so numerous that joinder of all Class members is impracticable. As of November 3, 2009 there were 16,147,000 shares of the Company's common stock outstanding.

38. There are questions of law and fact which are common to the Class including, *inter alia*, whether:

- (a) Individual Defendants have breached and continue to breach their fiduciary duties to plaintiff and the members of the Class in the Buyout of Landry's to maximize value for all Landry's stockholders;
- (b) The Buyout with Fertitta is unfair to the public stockholders as it underestimates the true value of Landry's at the expense of the public stockholders;
- (c) Fertitta aided and abetted the breaches of duties by the remaining Individual Defendants; and
- (d) Plaintiff and the other members of the Class will be irreparably damaged by the wrongs complained of herein.

39. Plaintiff is committed to prosecuting this action and has retained competent counsel experienced in litigation of this nature. The claims of Plaintiff are typical of the claims of the other

members of the Class and Plaintiff has the same interests as the other members of the Class. Accordingly, Plaintiff will fairly and adequately represent the Class.

40. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class and establish incompatible standards of conduct for the party opposing the Class.

41. Defendants have acted and are about to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief with respect to the Class as a whole.

VII. CLAIMS AND CAUSES OF ACTION

A. Claim for Breach of Fiduciary Duties Against the Individual Defendants

42. Plaintiff repeats and realleges each allegation set forth herein.

43. The Individual Defendants have knowingly or recklessly and in bad faith violated fiduciary duties of duty, loyalty, good faith, candor and independence owed to the public shareholders of Landry's and have acted to put their personal interests ahead of the interests of Landry's shareholders.

44. By the acts, transactions and courses of conduct alleged herein, the Individual Defendants, acting individually and as part of a common plan, knowingly or recklessly and in bad faith are attempting to unfairly deprive Plaintiff and other members of the Class of the true value of their investment in Landry's.

45. As demonstrated by the allegations herein, the Individual Defendants knowingly or recklessly failed to exercise the care required and breached their duties of loyalty, good faith, candor and independence and/or knowingly aided and abetted violations of the duties owed to the shareholders of Landry's because, among other reasons:

- (a) They failed to take steps to maximize the value of Landry's to its public shareholders and they took steps to avoid competitive bidding, to cap the price of Landry's stock and to give Fertitta an unfair advantage; and
- (b) They ignored or did not protect against the numerous conflicts of interest resulting from the directors' own interrelationships or connection with the sale of Landry's.

46. By reason of the foregoing acts, practices and course of conduct, the Individual Defendants have knowingly or recklessly and in bad faith failed to exercise care and diligence in the exercise of their fiduciary obligations toward Plaintiff and other members of the Class.

47. As a result of the Individual Defendants' unlawful actions, Plaintiff and the Class will be irreparably harmed. Unless the Proposed Buyout is enjoined by the Court, the Individual Defendants will continue to knowingly or recklessly and in bad faith breach their fiduciary duties owed to Plaintiff and the Class, will not engage in arm's-length negotiations on the sale terms, and will not supply Landry's shareholders sufficient information to enable them to cast informed votes on the proposed Buyout and may consummate the Buyout, all to the irreparable harm to Plaintiff and the Class.

48. Plaintiff and the Class have no adequate remedy at law. Only through the exercise of this Court's equitable powers can Plaintiff and the Class be fully protected from the immediate and irreparable injury which the Individual Defendants' actions threaten to inflict.

B. Claim for Aiding and Abetting Breaches of Fiduciary Duty Against the Company and Fertitta

49. Plaintiff repeats and realleges each allegation set forth herein.

50. The Company and Fertitta have aided and abetted the Individual Defendants in their breaches of fiduciary duty. Fertitta knew of the Individual Defendants' breaches of fiduciary duty, and in fact actively and knowingly has encouraged and participated in said breaches in order to

obtain the substantial financial benefits that the proposed acquisition would provide him at the expense of Landry's stockholders.

51. The Company and Fertitta colluded in or aided and abetted the Individual Defendants' breaches of fiduciary duties, and were active and knowing participants in the Individual Defendants' breaches of fiduciary duties owed to Plaintiff and the Class.

52. Fertitta participated in the breach of the fiduciary duties by the Individual Defendants for the purpose of advancing his own interests. Fertitta will obtain both direct and indirect benefits from colluding in or aiding and abetting the Individual Defendants' breaches. Fertitta will benefit from the acquisition of the Company at a grossly inadequate and unfair price if the Proposed Buyout is consummated.

53. Plaintiff and the Class will be irreparably injured as a direct and proximate result of the aforementioned acts.

VIII. PRAYER FOR RELIEF

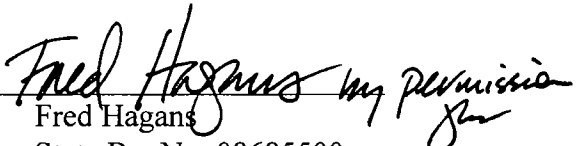
WHEREFORE, Plaintiff respectfully requests that this Court:

- (a) Declare this to be a proper class action;
- (b) Enjoin, preliminarily and permanently, any acquisition of the Company under the terms presently proposed until the Board of Directors has taken all steps to ensure a fair and proper process to maximize value for all Landry's stockholders;
- (c) Declare the termination fee provisions of the Proposed Buyout to be unfair, unreasonable and improper deal protection devices, and enjoining the payment of any termination fee to the Fertitta Defendants or its affiliates;
- (d) Declare that Defendants have breached their fiduciary duties to Plaintiff and the class and that the Fertitta Defendants aided and abetted such breaches;
- (e) Award pre-and post judgment interest, attorney's fees, expert fees and other costs, in an amount to be determined; and

- (f) Grant such other and further relief as the Court deems appropriate including damages plus interest.

Respectfully submitted,

**HAGANS BURDINE MONTGOMERY
& RUSTAY, P.C.**

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