

IN THE SUPREME COURT OF THE STATE OF NEVADA

PARAMETRIC SOUND )  
CORPORATION, TB HOLDINGS, INC., )  
KENNETH POTASHNER; ELWOOD )  
NORRIS; SETH PUTTERMAN; )  
ROBERT KAPLAN; ANDREW WOLFE; )  
and JAMES HONORE, )

Petitioners, )

vs. )

THE EIGHTH JUDICIAL DISTRICT )  
COURT, in and for the County of Clark, )  
State of Nevada, and THE ELIZABETH )  
GONZALEZ, District Judge, )

Respondents, )

and )

VITIE RAKAUSKAS, individually and )  
on behalf of all others similarly situated, )  
and Intervening Plaintiffs RAYMOND )  
BOYTIM and GRANT OAKES, )

Real parties in interest. )

No. 66689

District Court No. A-13-686890-B

Dept. No. XI

Electronically Filed  
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Elizabeth A. Brown  
Clerk of Supreme Court

**RESPONSE OF REAL PARTIES IN INTEREST TO PETITIONERS'  
NOTICE OF SUPPLEMENTAL AUTHORITY**

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Pursuant to NRAP 31(e), Real Parties In Interest (“Plaintiffs”) hereby respond to Petitioners’ (“Defendants”) Notice of Supplemental Authority regarding the decision in *F5 Capital v. Pappas*, No. 16-530-cv, 2017 WL 1485032 (2d Cir. Apr. 26, 2017) (the “Notice”).

## **I. PLAINTIFFS’ RESPONSE TO DEFENDANTS’ NOTICE**

Defendants’ Notice warrants clarification on four issues. First, while Defendants state that the *F5 Capital* claims existed “in connection with a merger,” that statement is incomplete. Notice p. 1. *F5 Capital* indeed involved a merger, but the claims were brought by the acquiring entity’s stockholders, not the target stockholders. *F5 Capital*, 2017 WL 1485032, at \*2. This important distinction is discussed in the Supplemental Brief of Real Parties in Interest (“Plaintiffs’ Supplemental Brief”) at pages 23-25.<sup>1</sup>

Second, the court in *F5 Capital* observed that the plaintiff “does not allege[] that any of the materials distributed to the shareholders in connection with the vote were deceptive in any way.” *F5 Capital*, 2017 WL 1485032, at \*5 n.12. As a result, the Second Circuit did not have occasion to consider the rule that “a claim that shareholders were deprived of the right to a fully informed vote is direct under state law.” Plaintiffs’ Supplemental Brief pp. 8-9.<sup>2</sup> Plaintiffs’ Complaint contains allegations consistent with this rule. *Id.*

Third, Defendants contend that *F5 Capital* is relevant to the “collective control” issue of direct/derivative standing. *See* Plaintiffs’ Answering Brief pp. 36-38; Plaintiffs’ Supplemental Brief pp. 19-20. The *F5 Capital* decision contains two quotes when introducing this issue, one from the Delaware Court of Chancery in

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<sup>1</sup> The Second Circuit in *F5 Capital* applied Delaware law to a Marshall Islands corporation.

<sup>2</sup> *See also* Answer of Real Parties In Interest to the Petition for Writ of Mandamus Or, in the Alternative, Writ of Prohibition (“Plaintiffs’ Answering Brief”) pp. 30-31.

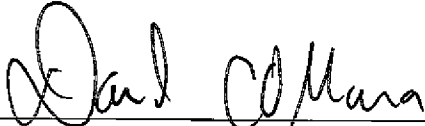
*Feldman v. Cutaia*, 956 A.2d 644, 655 (Del. Ch. 2007) and another from the same court in *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 658 (Del. Ch. 2013). See *F5 Capital*, 2017 WL 1485032, at \*5. Defendants’ Notice partially quotes the first cite, but omits the second. The *Carsanaro* quote from *F5 Capital* clarifies that a “control group” can also be established in “some legally significant way – e.g., by contract, common ownership, agreement, or some other arrangement – to work together toward a shared goal.” *Id.* (quoting *Carsanaro*, 65 A.3d at 659).

Fourth, the Second Circuit’s cite to *Carsanaro* in *F5 Capital* confirms that *Carsanaro* remains good law. The parties debated this point in earlier briefing. See Plaintiffs’ Answering Brief pp. 10-19, 36-38; Plaintiffs’ Supplemental Brief pp. 19-20, 25-26. Cf. Defendants’ Supplemental Brief pp. 27-31 (section entitled, “This Court Should Decline to Adopt the Delaware Chancery Court’s Overbroad *Carsanaro* Exception”). Plaintiffs’ concurrently filed Notice of Supplemental Authority sheds further insight into the viability of *Carsanaro*.

DATED: May 22, 2017

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On May 22, 2017 I caused to be served a true and correct copy of the Notice of Supplemental Authority by Real Parties in Interest by the method indicated:

☒ Depositing in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, following ordinary business practices (Judge Gonzalez Only)  
☐ Personal Delivery  
☐ Certified Mail with Return Receipt Requested  
☒ Electronically through the Court's ECF system

addressed as follows:

Honorable Elizabeth Gonzalez  
Eighth Judicial District Court  
Regional Justice Center  
200 Lewis Avenue  
Las Vegas, NV 89155

DATED: May 22, 2017

  
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BRYAN SNYDER