IN THE SUPREME COURT OF THE STATE OF NEVADA

Nos. 83598, 84971, and 85358

IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION.

PAMTP, LLC,

Appellant,

v.

KENNETH F. POTASHNER; VTB HOLDINGS, INC.; STRIPES GROUP, LLC; SG VTB HOLDINGS, LLC; JUERGEN STARK; and KENNETH FOX,

Respondents.

Consolidated Appeals from Final Judgment and Fees and Costs Awards

Eighth Judicial District Court Case No. A-13-686890-B

APPELLANT'S APPENDIX – VOLUME 22 OF 24

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AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Respectfully submitted this 12th day of January, 2023.

MCDONALD CARANO LLP

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano LLP, and on January 12, 2023, a true and correct copy of the foregoing was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system.

/s/ *CaraMia Gerard*
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DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION.	Case No. A-13-686890-B Dept. No. XI **OPPOSITION TO PLAINTIFF'S MOTION TO RETAX DEFENDANT KENNETH POTASHNER'S VERIFIED MEMORANDUM OF COSTS**

Defendant Kenneth Potashner by and through undersigned counsel, hereby opposes Plaintiff's Motion to Retax his Verified Memorandum of Costs (the "Motion").

This Opposition is based upon the following Memorandum of Points and Authorities, the papers on file with the Court, and those matters adduced by the Court at the hearing hereof.

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/ / /

/ / /

DATED this 21st day of October 2021.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This action concerns the sole opt-out claim following the resolution of the shareholder class action and derivative action that was filed in 2013. Plaintiff PAMTP, LLC ("Plaintiff" or "PAMTP") is the purported assignee of the claims of certain former shareholders of Parametric Sound Corporation ("Parametric") who opted out of the settlement of the class action. Plaintiff initially filed a separate, virtually identical opt-out Complaint in May 2020, but that was immediately subject to Defendants'[1] motion to consolidate in this Court, which motion was granted.

Consistent with the fact that this action was merely a continuation of the underlying class action (and bears the same case number), Plaintiff obtained the benefits of all of the document and deposition discovery obtained in this action. Plaintiff also continued to pursue, and obtain, discovery that was originally sought in the underlying class action. And Plaintiff identified as

[1] "Defendants" refers collectively to two sets of defendants that have been referred to throughout this litigation as the "Director Defendants" and the "Non-Director Defendants," respectively. The "Director Defendants" include former Parametric directors Kenneth Potashner, Elwood Norris, Seth Putterman, Robert Kaplan, and Andrew Wolfe. Norris, Putterman, Kaplan, and Wolfe settled with PAMTP prior to trial. The Non-Director Defendants include Defendant VTB Holdings, Inc. ("VTBH" or "Turtle Beach"), which has been a party to this litigation since 2013, Specially Appearing Defendants Stripes Group, LLC and SG VTB Holdings, LLC, which have been parties since 2016, and Specially Appearing Defendants Juergen Stark ("Stark") and Kenneth Fox ("Fox"), who have been parties since 2020.

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witnesses at trial many witnesses whose depositions were taken during the discovery period of the class action, including relying upon, and using at trial, the same expert and expert report designated by the class plaintiffs. Indeed, other than Plaintiff's assignors, Plaintiff did not examine any witnesses at trial who had not been deposed by the time it filed its tag-along opt-out Complaint.

Plaintiff's claims ultimately proceeded to trial in August 2021. Having failed to establish facts sufficient to support its claims, the Court granted Defendants' Motion for Judgment on Partial Findings Pursuant to NRCP 52(c) at the close of plaintiff's case-in-chief. As the prevailing parties, Defendants are statutorily entitled to costs under NRS 18.020(3).

Plaintiff's Motion to Retax does not challenge that Potashner is a prevailing party in this action. Instead, Plaintiff asserts various meritless arguments to challenge Potashner's costs. The Motion should be denied for at least the following reasons:

First, Defendants are entitled to costs incurred prior to Plaintiff's decision to opt out of the class action in May 2020. Indeed, Plaintiff's assignors were members of the class until they opted out. And Plaintiff continued pursuing the same claims brought by the class Plaintiffs, for which it requested, obtained, used, and reaped the benefits of the discovery that occurred between 2013 and 2019 for purposes of preparing its case for trial. Moreover, by definition, Plaintiff cannot avail itself of the Court's May 18, 2020 dismissal order dismissing the action as to the rest of the class "with prejudice and without costs" because the assignors who formed Plaintiff expressly opted-out of that dismissal to continue pursuing the litigation.

Second, Plaintiff seeks to exclude costs related to an evidentiary hearing on a motion for sanctions that was requested by Plaintiff. But NRS 18.020 is mandatory and does not limit recovery of costs to only those matters or motions within the action upon which the prevailing party was successful. Nor is there any exception in the statute or any Nevada case law permitting the Court to disregard the statute's mandatory award of costs to a prevailing party. Moreover, Plaintiff's motion was only partially successful— the Court did not impose Plaintiff's desired sanction; instead, it issued an alternative, lesser sanction. In any event, the sanction did not affect the outcome of the trial. Indeed, the Court discussed the sanction at length in its Findings of Fact

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and Conclusions of Law but still found that Plaintiff still had not met its burden of proof on any of its claims.

Third, Potashner is entitled to his e-discovery costs incurred in this action. The Nevada Supreme Court in *In re DISH Network Derivative Litig.*, 133 Nev. 438, 401 P.3d 1081 (2017) ("*DISH Network*") expressly allowed recovery of e-discovery expenses under NRS 18.005(17). Plaintiff misinterprets *DISH Network* to suggest that hosting and storage costs are not recoverable under NRS 18.005(17), but those specific costs were affirmed as recoverable by the Nevada Supreme Court and the same hosting costs are requested here. Further, the electronic discovery costs were required to be incurred due to the ESI Protocol, and the Court specifically directed the manner of the electronic collection of documents for purposes of this litigation.

Finally, Plaintiff's objections to Potashner's *pro hac vice* expenses are without merit. Both Plaintiff and Defendants reasonably engaged non-Nevada counsel to represent them in this case, and the *pro hac vice* costs for participation by two non-Nevada lawyers who actively participated with Nevada counsel in the proceedings and during trial were reasonable and necessary under NRS 18.005(17).

For these reasons, discussed in greater detail below, the Court should deny Plaintiffs' Motion to Retax in its entirety.

II. PROCEDURAL BACKGROUND

A. Plaintiff Was a Member of the Class and Obtained the Benefits of The Entire Class Discovery Until Settlement Was Reached on the Eve of Trial

This action was commenced by several Parametric shareholders through putative class actions in August 2013 prior to the January 15, 2014 merger between Parametric and Turtle Beach. These shareholders, purporting to act on behalf of all Parametric shareholders, asserted claims against Parametric's directors for allegedly breaching their fiduciary duties to Parametric's shareholders and for aiding-and-abetting such alleged breaches against Turtle Beach.

During discovery in the action, the parties negotiated an ESI Protocol, and the Court resolved certain disputes among the parties regarding custodians, temporal scope, and search terms to be applied to the Defendants' electronic documents. *See, e.g.*, Joint Status Report ("the parties

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have agreed to a proposed Order Re: ESI Protocol . . ."). In addition, the Court specifically discussed with Potashner's counsel the process by which counsel would work with an e-discovery vendor to collect and process their documents, concluding that Defendants' process for collecting and reviewing Potashner's electronic documents was "satisfactory" to the Court. *See* Feb. 17, 2015 Hr'g Tr. at 8-16.

On September 14, 2017, the Nevada Supreme Court issued a Writ of Mandamus instructing the Court to "dismiss the complaint without prejudice to the shareholders' ability to file an amended complaint." *See Parametric Sound Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 417, 429, 401 P.3d 1100, 1110 (2017). After the Nevada Supreme Court's decision in September 2017, these former Parametric shareholders (referred to herein as the "Class Plaintiffs") filed yet another amended class action complaint on December 1, 2017, that continued to assert the same direct breach of fiduciary duty and aiding-and-abetting claims. The class was certified on January 18, 2019, and the class notice was sent to potential class members shortly thereafter. The January 18, 2019 Order defined the class as "those individuals holding [Parametric] common stock on . . . January 15th, 2014" and set a date by which any class member wishing to be excluded from the class was required to provide written notice. *See* Jan. 18, 2019 Order at ¶¶ 3, 21. Six requests for exclusion were received prior to the deadline set in the class notice. *See* Decl. of Ross Murray filed on April 24, 2020, at ¶ 16; *id*. at Ex. D. None of the assignor shareholders (who later assigned their claims to PAMTP, LLC) opted out of the class at that time.

After certification of the class, the case proceeded through discovery in preparation for a jury trial set for a five-week stack beginning on November 18, 2019. *See* First Amended Business Court Scheduling Order and Order Setting Civil Jury Trial, Pre-Trial and Calendar Call dated July 16, 2018. The parties conducted numerous depositions including: Defendants' valuation expert, John Montgomery (October 31, 2018 and August 21, 2019); Parametric Director James Honore (May 10, 2019); Parametric Director Robert Kaplan (May 17, 2019); Stripes Partner Karen Kenworthy (May 29, 2019); VTBH CFO Bruce Murphy (June 27, 2019); Parametric Director Seth Putterman (July 2, 2019); VTBH Director and Stripes Operating Partner Ronald Doornink (July 11, 2019); Houlihan Lokey Director Mark Dufilho (July 23, 2019); Parametric CFO James Barnes

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(July 25, 2019); Parametric CEO Kenneth Potashner (deposed a second time on August 8, 2019, having originally been deposed on December 11, 2013 in connection with multiple California and Nevada cases filed by Parametric shareholders); Craig-Hallum Managing Director David Wambeke (deposed a second time on August 9, 2019); VTBH CFO John Hanson (August 14, 2019); VTBH CEO Juergen Stark (August 15, 2019); Parametric Consultant John Todd (August 16, 2019); Plaintiffs' valuation expert, John T. Atkins (August 20, 2019); Stripes Founder and Partner Kenneth Fox (August 22, 2019); Parametric Director Andrew Wolfe (September 5, 2019); and Parametric Director Elwood Norris (September 6, 2019). *See* Nov. 15, 2019 Stipulation of Settlement at 4-5.

On September 27, 2019, the Class Plaintiffs filed a Motion for Sanctions Against Defendants Kenneth Potashner and VTBH for Willful Spoliation of Evidence arising from certain text messages that Potashner and other defendants lost as a result of their decision to replace their cell phones as well as certain emails that were ultimately produced by third-parties, but not also by Potashner.[2]

After the close of discovery, filing of dispositive motions, and on the eve of trial – during which Plaintiff PAMPT LLC and its assignor shareholders remained members of the class – Class Plaintiffs and Defendants reached a settlement. On November 15, 2019 – three days before the date set for the jury trial five-week stack was to begin (*see* July 16, 2018 Order) – the Class Plaintiffs and Defendants filed a Stipulation of Settlement for settlement and dismissal of the case. *See generally* Nov. 15, 2019 Stipulation of Settlement.

On January 17, 2020, the Court granted preliminary approval of a settlement of the class action. The preliminary approval order set a hearing date for final approval of the settlement and imposed a deadline of May 4, 2020 for any class member who wished to be excluded or "opt out" from the class prior to the settlement being entered. *See* Jan. 17, 2020 Order (filed on Jan. 18, 2020) at ¶¶ 2 & 17. The Order provided that "[a]ll Persons who submit valid and timely Requests for Exclusion in the manner set forth in this paragraph shall have no rights under the Stipulation, shall not share in the distribution of the Net Settlement Fund, and shall not be bound by the [Nov.

[2] This motion was later refiled by the PAMTP plaintiff. *See infra,* section C.

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15, 2019] Stipulation or any final judgment." *Id*. at ¶ 16.

B. Plaintiff Opts Out of the Class and Class Settlement, and Files a Separate Complaint that Copied, Almost Verbatim, the Class Action Complaint and Which Extensively Cited to Discovery from the Class Action

Although a handful of Parametric shareholders had opted out in early 2019 after the class was certified and class notices were mailed, Plaintiff's assignor shareholders were the only shareholders to opt out of the class in 2020 after receiving notice of the pending settlement. *See* Decl. of Ross Murray filed on April 24, 2020 at ¶ 17; *id*. at Ex. E. Accordingly, Plaintiff and its assignors opted out of the class *and* the settlement of the action.

On May 18, 2020, the Court "finally approved in all respects" the class action and derivative settlement and entered a final judgment dismissing all of the Class' released claims, with prejudice, pursuant to the terms of the Stipulation of Settlement filed on November 15, 2019. *See* Final Judgment and Order of Dismissal with Prejudice dated May 18, 2020 and filed on May 19, 2020. The Court dismissed the action "with prejudice and without costs." *Id*. at ¶ 7.

On May 20, 2020, Plaintiff filed its opt-out Complaint (the "PAMTP Complaint"). The Complaint was almost a complete duplicate of the Class Plaintiffs' Amended Complaint filed on December 1, 2017, with only minor changes such as the omission of the derivative allegations, the identification of the new parties, and a small amount of new allegations related to alleged post-merger conduct at Turtle Beach.[3] Indeed, the allegations in PAMTP's Complaint cited heavily to the discovery produced in the class action.[4]

Defendants filed a Motion to Consolidate the opt-out and class actions on June 5, 2020. Plaintiff filed a response representing that it did not object to consolidation of the actions because it would "serve the principles of judicial economy," particularly as Plaintiff represented that it intended to rely on all of the discovery that had already been conducted in the class action. *See* June 11, 2020 PAMTP Resp. to Defs.' Mot. to Consolidate at 2 (stating that "consolidation of the

[3] Because all derivative claims had been resolved in the Class Settlement, PAMTP's Complaint was only predicated on its own direct claims against the Defendants.

[4] *See* PAMTP Compl. at 11 n.3 (noting that all of the numerous document citations in the PAMTP Complaint refer to "Bates stamp numbers from documents exchange in discovery" in the instant action).

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cases would allow Plaintiff to receive immediately the discovery that has already been conducted in this matter."). The Court granted the Motion to Consolidate on June 23, 2020, and Plaintiff's opt-out action was consolidated with the class action "for all purposes under NRCP 42(a)." *See* June 23, 2020 Order at 2.

C. Plaintiff Uses the Discovery, Motions, and Rulings from the Class Action to its Benefit in Pursuing its Claims

Plaintiff has continually relied on the discovery conducted in the class action. On the same day that the Court ordered consolidation of the opt-out litigation with the class action, Plaintiff served a Demand for Prior Discovery on Defendants pursuant to NRCP 26(h), requesting "immediate production of all discovery in this action." *See* Amended Certificate of Service of Plaintiff PAMTP LLC's Demand for Prior Discovery filed on June 24, 2020.

On July 17, 2020, Plaintiff filed a Motion to Compel Discovery Pursuant to Rule 26(h) seeking an order compelling production of all discovery in the class action. Plaintiff asserted that its opt-out claims were not separate from the class proceedings and thus compliance with NRCP 16 and 16.1 already had been accomplished during the class proceedings in 2014. *See* July 17, 2020 Mot. to Compel at 1-2; Aug. 17, 2020 PAMTP Reply ISO Motion to Compel at 2. Plaintiff also asserted that the class action discovery was relevant as Plaintiff's claims were "identical to the Class Plaintiff's claims." *Id*. at 4. Plaintiff prevailed and the Court compelled production under NRCP 26(h). *See* Aug. 31, 2020 Order.

Plaintiff also relied on discovery rulings in the class action. For example, Plaintiff filed a motion for sanctions for Turtle Beach's non-production of certain subpoenaed material (referred to as the "Weisbord Documents"). *See* Plaintiff PAMTP LLC's Motion for Rule 37 Sanctions filed on March 3, 2021. In that motion, Plaintiff relied on an October 7, 2019 Order (an order in the class action) ordering Turtle Beach to produce the Weisbord Documents. *Id*. at 8 (labeled as p. 1); *see* 10/07/2019 Minutes. Plaintiff even acknowledged in its March 3, 2021 motion that "[t]he Class Plaintiffs fought hard to obtain critical discovery" leading to the October 7, 2019

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Order which formed the basis for the motion. *See* Mar. 3, 2021 Mot. for Rule 37 Sanctions at 8 (labeled as p. 1).[5]

Plaintiff further relied on discovery motion practice in the class action. Based on the prior discovery it obtained, Plaintiff re-filed essentially the same motion for sanctions that had been previously filed by the Class Plaintiffs before the class settlement, seeking sanctions against the Defendants for spoliation of evidence. *See* Plaintiff's Motion for Sanctions Against Defendants Kenneth Potashner, Juergen Stark, and VTB Holdings, Inc. for Willful Spoliation of Evidence filed on March 4, 2021; *compare* Class Plaintiffs' Motion for Sanctions against Defendants Kenneth Potashner and VTB Holdings, Inc. for Willful Spoliation of Evidence filed on September 27, 2019 (nearly identical motion). Although the parties disagreed about the relevance of the text messages and emails at issue in the motion for sanctions, the Court ultimately granted *in part* Plaintiff's motion for sanctions, but it imposed a lesser sanction than what was requested by Plaintiff.[6] *See generally* July 15, 2021 Order.

Leading up to trial, Plaintiff further relied on the discovery by identifying in its Pretrial Disclosures numerous witnesses whose depositions were taken during class discovery. *See* Plaintiff's Supplemental Pretrial Disclosures Pursuant to NRCP 16.1(a)(3) dated August 4, 2021, attached hereto as **Exhibit A**, at 6-7 (listing no less than 18 witnesses whose depositions were taken during prior discovery to be potentially presented by deposition at trial). Further, Plaintiff identified numerous witnesses for trial whose depositions had been taken during class discovery, including the same expert (J.T. Atkins) relied upon by Class Plaintiffs, as well as identified as exhibits documents that had been produced in the class discovery. *Id*. at 2-5 & Ex. 1. Accordingly, Potashner's Verified Memorandum of Costs seeks recovery of only the deposition transcripts of the witnesses who were identified by Plaintiff as potential witnesses at trial. Recognizing that

[5] The parties later stipulated to a withdrawal of Plaintiff's March 3, 2021 motion for sanctions. *See* Apr. 5, 2021 S&O for Withdrawal of Motions and Request for Removal of Hearings.

[6] In its Findings of Fact and Conclusions of Law dismissing Plaintiff's Complaint pursuant to NRCP 52(c), this Court recognized, and discussed at length, the sanctions awarded Plaintiff against Potashner and held that such sanctions had no impact on her decision to dismiss the Plaintiff's Complaint. *See* Order Granting Defs.' Mot. for Judgment Pursuant to NRCP 52(c), at ¶¶ 42, 55-60, 82-89.

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these other depositions were not proposed for use at the trial with Plaintiff, Potashner excluded the costs of the deposition and video transcripts of certain other witnesses whose depositions were taken during class discovery, including the class representatives and other shareholders.

D. Plaintiff's Claims Proceed to Trial and The Court Grants Judgment After the Close of Plaintiff's Case in Chief Pursuant to NRCP 52(c)

The case proceeded to trial beginning on August 16, 2021.[7] To prevail on its claims at trial, Plaintiff was still required to establish (1) "a controlling shareholder's or director's expropriation of value from the company, causing other shareholders' equity to be diluted," and (2) "actual fraud" by the Parametric Board of Directors in order to overcome the statutory "conclusive deference to the directors' judgment." *See Parametric*, 133 Nev. at 428-29, 401 P.3d at 1109. But Plaintiff failed to establish either element. Specifically, Plaintiff failed to demonstrate that Parametric had a controlling shareholder. In fact, Plaintiff's claimed controlling shareholder, Potashner, did not own a single share of Parametric stock at the relevant time. *See* Sept. 3, 2021 Order Granting Defs.' Mot. for Judgment Pursuant to NRCP 52(c), ¶ 82. The Court also concluded that a majority of Parametric's Board were independent and not controlled by or beholden to Potashner. *Id.* ¶¶ 56, 59. Accordingly, the Court properly entered judgment in Defendants' favor pursuant to NRCP 52(c). *Id*. at 21.

As a prevailing party, pursuant to NRS 18.005, 18.010, and 18.020, Potashner filed his Verified Memorandum of Costs on September 22, 2021. Plaintiff filed its Motion to Retax on October 7, 2021.

III. LEGAL ANALYSIS

A. Legal Standard

NRS 18.020(3) provides that "[c]osts **must** be allowed of course to the prevailing party . . . in an action for the recovery of money or damages, where the plaintiff seeks to recover more than $2,500." NRS 18.020(3); *see also Beattie v. Thomas*, 99 Nev. 579, 588 n.5 (1983) ("Nevada enacted NRS 18.020, under which allowance of costs to the prevailing party in certain specified

[7] Director Defendants Norris, Putterman, Kaplan, and Wolfe settled with PAMTP prior to trial. Defendant Potashner, however, proceeded to trial, along with the Non-Director Defendants.

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cases is ***mandatory rather than discretionary***.") (emphasis added). NRS 18.005 identifies the categories of recoverable costs to a prevailing party. Even if costs are not specifically enumerated under NRS 18.005, a district court may award costs for additional items pursuant to NRS 18.005(17) where such costs are reasonably and necessarily incurred in the action. *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1352, 971 P.2d 383, 386 (1998); *see also In re Dish Network Derivative Litig.*, 133 Nev. 438, 451, 401 P.3d 1081, 1093 (2017) ("*DISH Network*") (affirming award of electronic discovery costs, which are not expressly enumerated in the statute, as reasonable and necessary under NRS 18.005(17)). Plaintiff does not dispute that Potashner was a prevailing party, nor does Plaintiff suggest that Potashner's Verified Memorandum of Costs was insufficiently detailed or lacking in support. Instead, Plaintiff asserts only that certain broad categories of costs included in the Non-Director Defendants' Memorandum of Costs fall outside the scope of NRS. 18.005 and NRS 18.020. As discussed below, these costs are recoverable and the Motion to Retax should be denied.

B. The Court Should Allow Costs Incurred Prior to May 2020 Because Plaintiff Was Part of the Class, Obtained the Benefits of Class Discovery and Motion Practice, and Relied on the Class Discovery and Witnesses at Trial

Plaintiff argues that Potashner cannot recover costs prior to May 20, 2020 (the date Plaintiff filed its opt-out complaint) because the settlement in the class action provided that parties were to bear their own costs. *See* Mot. at 7; *see also* May 18, 2020 Final Judgment and Order of Dismissal with Prejudice at ¶ 7 (dismissing the action "with prejudice and without costs."). First, the Court's Jan. 17, 2020 Order granting preliminary approval of the settlement expressly provided that "[a]ll Persons who submit valid and timely Requests for Exclusion in the manner set forth in this paragraph shall have no rights under the Stipulation, shall not share in the distribution of the Net Settlement Fund, and ***shall not be bound by the [Nov. 15, 2019] Stipulation*** or any final judgment." *See* Jan. 17, 2020 Order (filed on Jan. 18, 2020) at ¶ 16 (emphasis added). Thus, having chosen to exclude itself from the class and the class settlement, Plaintiff is not bound by the settlement, cannot obtain the benefits of the class settlement regarding the costs, and cannot avoid paying recoverable costs based upon the settlement in the class action. *See* Decl. of Ross Murray filed on April 24, 2020 at ¶ 17; *id*. at Ex. E.

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Second, Plaintiff did not opt out until the class action case was already ripe for (and indeed was only days away from) trial, and discovery had been completed. Thus, Plaintiff was a member of the class during the years of contested discovery. *See Dancer v. Golden Coin, Ltd.*, 124 Nev. 28, 31 n.2 (2008) ("Nevada class action procedures under NRCP 23, on the other hand, involve a presumption that class members are participants in the class action unless they 'opt-out' following class notice.").[8] Moreover, it strains credulity for Plaintiff to argue that Potashner is not entitled to costs incurred in the class action discovery because Plaintiff has extensively benefited from and heavily relied upon the discovery conducted during the class action to pursue its claims in this case.[9] This Court already recognized that Plaintiff ordinarily would have been brought "as part of the class action case" and not as a "separate case." *See* Aug. 25, 2021 Trial Tr. at 40:8-11. But Plaintiff chose to continue litigating the claim asserted in the class litigation by filing a new complaint on May 20, 2020 that was nearly identical to the class complaint, and then agreed to the consolidation of the class action and opt-out actions ***because it intended to rely on the class plaintiffs' prior discovery***. *See* June 11, 2020 Resp. to Defs.' Mot. to Consolidate at 2. Plaintiff cannot have it both ways – it cannot rely on the plaintiffs' prior discovery to pursue its claims and then later avoid the costs incurred in the prior discovery upon losing.

Further, as noted in his Verified Memorandum of Costs, Potashner sought recovery of the transcript and court reporter costs of the depositions of ***only the witnesses that Plaintiff identified*** in its Pretrial Disclosures. Potashner did **not** seek recovery of the costs of any of the deposition

[8] Plaintiff did not opt-out at the class notice stage in 2019 and only opted out of the settlement in 2020.

[9] Plaintiff obtained all of the discovery conducted in the class action, including numerous depositions and thousands of documents, and used the class action discovery to pursue its claims here, including but not limited to: (1) relying on this discovery to re-file the *same* motion for spoliation sanctions Class Plaintiffs had filed (*compare* Mar. 4, 2021 Mot. for Sanctions with Sept. 27, 2019 Mot. for Sanctions); (2) relying on a previous order to compel production of the Weisbord Documents entered in the class action as a basis for another motion for sanctions (*see* March 3, 2021 Mot. for Rule 37 Sanctions at 8); (3) identifying in its pretrial disclosures no less than 18 witnesses whose depositions had been taken in prior discovery and might be presented by deposition at trial (*see* Plaintiff's Pretrial Disclosures (**Ex. A)** at 6-7); and (4) identifying in its Pretrial Disclosures numerous witnesses for trial whose depositions had been taken and documents that had been produced in the class discovery (including the Class Plaintiffs' expert witness) (**Ex. A** at 2-5 & Ex. 1).

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transcripts of other witnesses whose depositions were taken during the class discovery.[10] Thus, Plaintiff cannot credibly argue that the costs incurred prior to May 20, 2020 that Potashner is seeking to recover are not reasonable and directly related to this very action.

Finally, Plaintiff's notion that for purposes of NRS 18.020 the action did not begin until Plaintiff filed its opt-out complaint on May 20, 2020 (*see* Mot. at 7) is completely contrary to numerous positions Plaintiff has taken throughout this litigation. As explained above, Plaintiff sought prior class discovery pursuant to NRCP 26(h) and filed a motion to compel based on the same. Conveniently, at the time it was seeking prior discovery, Plaintiff argued that the benefits of the class action discovery applied in this case – specifically, Plaintiff argued that no new Rule 16 conference was necessary because any such requirement was satisfied by the occurrence of the Rule 16 conference "in the Class Action on October 17, 2014." *See* July 17, 2020 Mot. to Compel at 1-2. Plaintiff also argued that any distinction between the class action proceedings and the opt-out proceedings was relevant only for "appellate purposes." *See* Aug. 17, 2020 Reply ISO Mot. to Compel at 2. Similarly, Plaintiff also argued in its Pre-Trial Memorandum that any calculation of prejudgment interest should begin *before* May 20, 2020. *See* Plaintiff's Supp. Pretrial Memo. dated August 8, 2021, at 12. Plaintiff acknowledged that NRS 17.130 states that the accumulation of prejudgment interest begins with the filing of the operative complaint and argued that the applicable complaint is "the initial complaint in the Class Action," which was filed on "August 13, 2013." *Id.*[11] Plaintiff cannot now decide that this action did not begin until May 20, 2020 simply

[10] Plaintiff does not take any issue with any of the specific costs incurred prior to May 20, 2020 in Potashner's Verified Memorandum of Costs. Instead, in its Motion, Plaintiff simply makes the blanket argument that Potashner cannot recover *any* costs prior to May 20, 2020, without asserting that any of the costs themselves are inappropriate. As a result, Potashner need not litigate the specific costs incurred prior to May 20, 2020 asserted in his Verified Memorandum of Costs. Instead, as explained herein, all of these costs should be allowed.

[11] Plaintiff attempts to explain this obvious inconsistency in its positions by suggesting that the calculation of prejudgment interest is based on the date the claim accrued and not on the initial complaint was served. Mot. at 9. This argument runs contrary to the clear language of the statute, which would explain why consistent precedent from the Nevada Supreme Court has rejected this argument repeatedly. *See, e.g., Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 430 (2006) (prejudgment interest "as specified in NRS 17.130(2)" runs "from the time of service of the summons and complaint"); *Lee v. Ball*, 121 Nev. 391, 395 (2005) ("Under NRS 17.130(2), a judgment accrues interest from the date of the service of the summons and complaint until the date the judgment is satisfied"); *Las Vegas-Tonopah-Reno Stage Line, Inc. v. Gray Line Tours*, 106 Nev. 283, 289 (1990) (clarifies that the accrual date is only used when "damages [are] sustained

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because it would be inconvenient for Plaintiff to pay costs prior to that date, especially when Plaintiff has taken the opposite position on numerous occasions. *See, e.g.*, *Kaur v. Singh*, 477 P.3d 358, 362 (Nev. 2020) ("Judicial estoppel prevents a party from stating a position in one proceeding that is contrary to his or her position in a previous proceeding."). In sum, for purposes of NRS 18.020, the action began on August 13, 2013. Plaintiff has cited to no authority permitting it to avoid paying for recoverable costs of litigation that it assented to and took advantage of.

C. Potashner Should Recover His Costs in Connection With the Evidentiary Hearing.

The Court should likewise reject Plaintiff's argument that costs are not recoverable because Defendants did not wholly prevail on Plaintiff's motion for discovery sanctions and that so doing would reward Potashner "for his own wrongdoing." *See* Mot. at 8-9. But NRS 18.020 provides in relevant part that "[c]osts must be allowed of course to the prevailing party against any adverse party against whom judgment is rendered . . ." Here, a judgment was rendered in Potashner's favor against Plaintiff. *See* Sept. 3, 2021 Findings of Fact, Conclusions of Law, and Judgment at 21. Potashner was not required to win on every single issue or motion to be awarded costs as a "prevailing party" under NRS 18.020. A party is a prevailing party under NRS 18.010 "if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing suit;" a prevailing party "need not succeed on every issue." *See Las Vegas Metro Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. 80, 90, 343 P.3d 608 (2015) (citing *Valley Elec. Ass'n v. Overfield*, Nev. 7, 10, 106 P.3d 1198, 1200 (2005) and *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)). Indeed, even where a party "lost every round except the last" in litigation, the party is entitled to costs under NRS 18.020(3) as a matter of right. *See Franchise Tax Bd. of Cal. v. Hyatt*, No. 80884, 2021 Nev. Unpubl. LEXIS 298 at *3 & 9, 485 P.3d 1247, 2021 WL 1609315 (Nev. Apr. 23, 2021) (unpublished decision) (reversing district court's denial of costs under NRS Chapter 18 where district court found neither party was entitled to costs under NRS 18 as the prevailing party "based on mixed results throughout more than two decades of litigation"). Thus, the mere fact that Potashner did not prevail at the evidentiary hearing on a

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after the service of the complaint").

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spoliation motion has no bearing on the fact that he is a prevailing party in the action entitled to costs under NRS 18.020.[12]

Nor does Plaintiff cite to any Nevada or other case authority permitting the Court to disregard Nevada's cost statute in favor of its so-called "unclean hands" argument. An award of costs under NRS 18.020 is mandatory. *See* NRS 18.020 (stating that "[c]osts must be allowed ***of course***" to the prevailing party) (emphasis added). There is no discretionary component to an award of costs under NRS 18.020, even where unclean hands is argued. *See Hyatt*, 2021 Nev. Unpubl. LEXIS 298 at *8-9 (where party argued denial of costs was appropriate due to unclean hands of the other party, Court reversed denial of costs because costs "are mandatory under NRS 18.020"). Indeed, NRS 18.020 specifically requires that costs "must be allowed of course to the prevailing party" and does not include a discretionary component. *Compare* FRCP 54(d)(1) ("costs—other than attorney's fees—***should be*** allowed to the prevailing party…") (emphasis added); *Beattie v. Thomas*, 99 Nev. 579, 588 n.5 (1983) ("Nevada has not adopted FRCP 54(d) . . . Rather, Nevada enacted NRS 18.020, under which allowance of costs to the prevailing party in certain specified cases is ***mandatory rather than discretionary***.") (emphasis added); *see also Randono v. Turk*, 86 Nev. 123, 133, 466 P.2d 218, 224 (1970) (noting that where the costs in the suit were covered by NRS 18.020, they were "mandatory," as opposed to an equity action where the awarding of costs was "discretionary"); *Lyon v. Walker Boudwin Constr. Co.,* 88 Nev. 646, 650-651, 503 P.2d 1219, 1221 (1972) (comparing language in NRS 18.020 governing costs which "provides that costs *shall* be allowed to the plaintiffs" to the language in NRS 18.010 governing fees which provides that the trial judge "*may* allow attorney's fees…"). Accordingly, there is no basis to deny Potashner recoverability of his costs for the evidentiary hearing.

[12] Moreover, the Court only granted ***in part*** Plaintiff's motion for sanctions and imposed a lesser sanction than what Plaintiff requested based upon the loss of certain text messages resulting from Potashner's and other defendants' replacement of cell phones, as well as certain emails that were ultimately produced by third parties. The Court expressly discussed its adverse evidentiary inference against Potashner in its Order entering judgment under NRCP 52(c) and concluded that Plaintiff still had failed to meet its burden of demonstrating that Potashner was a controlling shareholder or director of Parametric during the relevant time period.

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D. The Court Should Award Potashner's Reasonable and Necessary Electronic Discovery Costs.

Potashner incurred substantial electronic discovery costs to respond to the class plaintiffs' expansive discovery requests and Plaintiff's subsequent requests in this case, which include costs to collect, host, search for and produce the documents requested by Plaintiff. NRS 18.005(17) defines "costs" to include "[a]ny other reasonable and necessary expense incurred in connection with the action[.]" The Nevada Supreme Court expressly held that costs associated with "electronic discovery conducted by electronic discovery vendors" are recoverable as costs under NRS 18.005(17). *See DISH Network*, 133 Nev. at 451, 401 P.3d at 1093 (allowing recovery of all of the SLC's reasonable electronic discovery costs).

Plaintiff first argues that Potashner's e-discovery costs should be retaxed because the Nevada statute does not expressly permit recovery of such costs. In support of its argument, Plaintiff cites inapposite case law analyzing the federal costs statute, 28 U.S.C. § 1920, which considered whether e-discovery costs are recoverable under the federal statute. But in *DISH Network*, the Nevada Supreme Court, interpreting ***Nevada's*** statute, NRS 18.005(17), expressly concluded that electronic discovery expenses are recoverable. The Nevada Supreme Court's opinion in *DISH Network* confirming the recoverability of e-discovery expenses is the controlling authority here. 133 Nev. at 451, 401 P.3d at 1093.

Second, Plaintiff misinterprets *DISH Network* to impermissibly restrict the scope of recoverable "electronic discovery expenses" permitted to only those costs which are incurred to "acquire and process" electronically stored information, yet to exclude electronic discovery costs to host/store the collected data. But the electronic discovery expenses that were awarded in *DISH Network* included the ***very same types of hosting and storage charges*** that are detailed in the invoices for which Potashner seeks recovery in his Verified Memorandum of Costs in this case. *See In re DISH Network Derivative Litig.*, No. A-13-68675-B (Clark Cty., Nev.), Special Litig. Cmte. of DISH Network Corp.'s Verified Mem. of Costs (filed Oct. 15, 2019) at 13-14 (including numerous descriptive entries for "hosting data," "host data," "index data"); *id.* at App'x pp. 324-360 (invoices for electronic discovery expenses, including charges for "data hosting," "hosted

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data," etc.).[13] Indeed, the Supreme Court's reference to the acquisition and processing of data was in the context of rejecting the plaintiffs' argument on appeal that e-discovery costs should be treated as an expense of counsel as opposed to a separate recoverable cost. *Id.* Moreover, Plaintiff presents no intelligible argument distinguishing why e-discovery costs incurred for acquiring and processing data necessary to collect data would be recoverable but the hosting of that same data to permit Potashner and his counsel to review and produce documents from the electronic data set should not be recoverable. Clearly the hosting of the data, which enabled Potashner to identify, search, and review documents for purposes of responding to discovery requests in the litigation were reasonable and necessary.

For these reasons, the Court should deny Plaintiff's request to retax $98,913.36 in Potashner's electronic discovery costs.

E. Potashner's *Pro Hac Vice* Costs Were Reasonable and Necessary.

Plaintiff disingenuously objects to Potashner's request to recover *pro hac vice* costs for two non-Nevada lawyers when Plaintiff was represented by non-Nevada counsel throughout its case. The Nevada Supreme Court has never addressed this issue in analyzing Nevada's cost statute, and Plaintiff merely cites certain federal court opinions analyzing the federal costs statute disallowing such expenses. But Plaintiff failed to mention there is a split of authority among the federal courts on this issue, with many federal courts allowing *pro hac vice* fees as recoverable costs. *See, e.g., Craftsmen Limousine, Inc. v. Ford Motor Co.*, 579 F.3d 894, 898 (8th Cir. 2009) (holding that district court did not abuse its discretion in awarding *pro hac vice* expenses); *United States ex rel. Gear v. Emergency Medical Associates of Illinois, Inc.*, 436 F.3d 726 (7th Cir. 2006) (affirming award of *pro hac vice* fees as costs).

In any event, this case presented complex and novel issues of corporate law in Nevada concerning breach of fiduciary in the area of equity expropriation. The parties all engaged non-Nevada counsel to participate in these proceedings. Potashner's non-Nevada counsel actively participated in document collection and review, attended all of the depositions, and examined

[13] Indeed, the District Court awarded, and the Supreme Court affirmed, the full amount of $151,178.32 in electronic discovery costs that were requested by the Special Litigation Committee in the *DISH Network* case. *DISH Network*, 133 Nev. at 451, 401 P.3d at 1093.

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witnesses at trial and during the evidentiary hearing. Accordingly, the *pro hac vice* expenses for participation by two non-Nevada lawyers for Potashner who actively participated with Nevada counsel in the proceedings were reasonable and necessary under NRS 18.005(17).

IV. CONCLUSION

For the foregoing reasons, Potashner respectfully requests that this Court deny Plaintiff's Motion to Retax his Verified Memorandum of Costs.

Dated this 21st day of October 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of October 2021, a true and correct copy of the foregoing **OPPOSITION TO PLAINTIFF'S MOTION TO RETAX DEFENDANT KENNETH POTASHNER'S VERIFIED MEMORANDUM OF COSTS** was served by the following method(s):

☒ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

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EXHIBIT A

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Attorneys for Plaintiff PAMTP LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION	Case No.: A-13-686890-B Dept. No.: XI **PLAINTIFF PAMTP LLC'S SUPPLEMENTAL PRETRIAL DISCLOSURES PURSUANT TO NRCP 16.1(a)(3)**
This Document Relates To: ALL ACTIONS.	

Pursuant to NRCP 16.1(a)(3), Plaintiff PAMTP LLC, by and through its counsel of record, the law firms of McDonald Carano LLP and Levi & Korsinsky, LLP, hereby serves the following supplemental pretrial disclosures:

. . .

I. NRCP 16.1(a)(3)(A)(i) Witnesses

A. Witnesses Plaintiff Expects to Present at Trial:

1. Adam Kahn
c/o George F. Ogilvie III, Esq.
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4. Juergen Stark
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5. Kenneth Fox
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B. Witnesses who have been subpoenaed for trial:

At this time, Plaintiff has not subpoenaed any witnesses for trial. Plaintiff reserves the right to update this information in advance of trial.

C. Witnesses who may be called if the need arises:

1. Robert Masterson
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3. Ronald Etkin
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4. Muriel Etkin
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11. Ronald Doornink
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17. Mark Dufilho
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20. Cris Kiern
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23. Michael Coronato
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24. Siddharth Hariharan
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If the need arises, Plaintiff reserves the right to call any witness (including persons most knowledgeable and custodians of records) listed in Defendant's NRCP 16.1 initial disclosures and

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all supplemental NRCP 16.1 disclosures thereafter.

Plaintiff reserves the right to call any witness (including persons most knowledgeable and custodians of records) listed in his initial NRCP 16.1 disclosures and all supplemental NRCP 16.1 disclosures thereafter.

Plaintiff reserves the right to call any witness disclosed by any other party in this action, and to use any exhibit for purposes of rebuttal or impeachment.

Plaintiff reserves the right to object to any such witnesses identified by any other party to this matter.

Plaintiff reserves the right to cross-examine any such witnesses called by any other party to this matter.

Plaintiff reserves its right to amend or supplement its list of witnesses in advance of trial.

II. NRCP 16.1(a)(3)(A)(ii) Witnesses to be Presented by Deposition

At this time, Plaintiff does not anticipate presenting any witnesses by deposition. Notwithstanding the forgoing, Plaintiff may use the following depositions, and any exhibits thereto, at trial:

1. Ronald Doornink, July 11, 2019
2. Mark Dufilho, July 23, 2019
3. James Honore, May 10, 2019
4. Daniel Hoverman, December 17, 2013
5. Bruce Murphy, June 27, 2019
6. John Todd, August 16, 2019
7. David Wambeke, December 13, 2013 and August 9, 2019
8. John Atkins, August 20, 2019
9. Ronald Etkin, March 18, 2021
10. Alan Goldberg, March 5, 2021
11. Adam Kahn, March 10, 2021
12. Robert Kaplan, May 17, 2019
13. Elwood Norris, September 6, 2019

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14. Marcia Patricof, April 13, 2021

15. Kenneth Potashner, December 11, 2013, August 8, 2019 and May 5, 2021

16. Seth Putterman, July 2, 2019

17. Richard Santulli, March 31, 2019

18. Barry Weisbord, March 11, 2021

19. Andrew Wolfe, September 5, 2019

20. John Montgomery, August 21, 2019

21. John Hanson, August 14, 2019

22. Karen Kenworthy, May 29, 2019

23. James Barnes, July 25, 2019

Plaintiff reserves its right to amend or supplement its list in advance of trial.

III. NRCP 16.1(a)(3)(A)(iii) Exhibits

In accordance with NRCP 16.1(a)(3)(C), attached hereto as **Exhibit 1** is a spreadsheet identifying each exhibit Plaintiff expects to offer at trial or, if the need arises, may offer at trial. Plaintiff reserves the right to use as a trial exhibit any document disclosed or exchanged during discovery. Plaintiffs further reserve the right to use any exhibits disclosed by any other party in this action, and to use any exhibit for purposes of rebuttal or impeachment.

Plaintiff anticipates using large poster boards for demonstrative exhibits as well as electronic display of exhibits.

Plaintiff reserves the right to amend his list of exhibits following any future supplemental disclosure of documents from Defendants.

Plaintiff reserves the right to amend and supplement this disclosure in advance of trial.

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IV. OBJECTIONS TO PRETRIAL DISCLOSURES

All objections to other parties' pretrial disclosures will be made within the timeline provided in NRCP 16.1(a)(3).

DATED this 4th day of August, 2021.

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By: */s/ George F. Ogilvie III*
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the law firm of McDonald Carano LLP and on the 4th day August, 2021, the foregoing **PLAINTIFF PAMTP LLC'S SUPPLEMENTAL PRETRIAL DISCLOSURES PURSUANT TO NRCP 16.1(a)(3)** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

/s/ Jelena Jovanovic
An Employee of McDonald Carano LLP

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EXHIBIT “1”

PAMTP LLC's List of Exhibits			
No.	**Exhibit Title**	**Bates Beginning**	**Bates End**
1	Parametric Sound Corporation - Minutes of the Regular Meeting of The Board of Directors of Parametric Sound Coporation December 13, 2012	PAMTNV0000006	PAMTNV0000007
2	Uanimous Written Consent of the Board of Directors of Parametric Sound Coporation to Action Taken Without a Meeting	PAMTNV0000024	PAMTNV0000061
3	Parametric Sound Corporation - Minutes of the Annual Meeting of The Board of Directors of Parametric Sound Coporation February 21, 2013	PAMTNV0000062	PAMTNV0000076
4	Parametric Sound Corporation - Minutes of the Special Meeting of The Board of Directors of Parametric Sound Coporation April 25, 2013	PAMTNV0000122	PAMTNV0000125
5	Parametric Sound Corporation - Minutes of the Special Meeting of The Board of Directors of Parametric Sound Coporation July 1, 2013 and July 2, 2013	PAMTNV0000160	PAMTNV0000163
6	Minutes of the Special Meeting of the Board of Directors of Parametric Sound Corporation July 5, 2013	PAMTNV0000164	PAMTNV0000170
7	Minutes of the Special Meeting of the Board of Directors of Parametric Sound Corporation July 20, 2013	PAMTNV0000171	PAMTNV0000174
8	Minutes of the Special Joint Meeting of the Board of Directors and Audit Committee of Parametric Sound Corporation July 23, 2013	PAMTNV0000175	PAMTNV0000177
9	Minutes of the Special Joint Meeting of the Board of Directors and Compensation Committee of Parametric Sound Corporation August 2, 2013	PAMTNV0000189	PAMTNV0000198
10	Parametric Sound Corporation Investor Presentation March 2013	PAMTNV0000313	PAMTNV0000335
11	Mergers & Acquisitions Capital Markets Financial Restructuring Financial Advisory Services - Draft	PAMTNV0006093	PAMTNV0006103

12	License Agreement	PAMTNV0007031	PAMTNV0007048
13	Email from Ken Potashner from Andrew Wolfe dated October 23, 2012 email re Couple of initial thoughts on sound bar	PAMTNV0032661	PAMTNV0032664
14	Email from Kaplan Robert to James Barnes dated July 7, 2013 email re Juergen call	PAMTNV0033288	PAMTNV0033289
15	Email from Andrew Wolfe to Elwood Norris and James Barnes dated July 10, 2013 email re Update	PAMTNV0033294	PAMTNV0033294
16	Email from Elwood Norris to Jim Barnes dated March 30, 2013 re Monday's meeting	PAMTNV0033560	PAMTNV0033562
17	Email from Elwood Norris to Jim Barnes dated July 4, 2013 re HHI	PAMTNV0033890	PAMTNV0033892
18	Email from Elwood Norris to Jim Barnes, Robert Kaplan and UCLA dated July 11, 2013 re Ken & TB	PAMTNV0033904	PAMTNV0033904
19	Email from James Barnes to Woody Shop dated July 22, 2013 re HHI and my Resignation	PAMTNV0033914	PAMTNV0033914
20	Email from James Barnes to Woody Shop dated July 22, 2013 re revised position	PAMTNV0033915	PAMTNV0033915
21	Deleted (Duplicate, Ex. 29)		
22	Email from Adam Greenway to James Barnes, Ken Potashner dated August 9, 2013 re Go-Shop Process	PAMTNV0038785	PAMTNV0038786
23	Parametric Sound Corporation Go Shop Buyers List (PAMTNV0038812)	PAMTNV0038811	PAMTNV0038812
24	Email from Ken to Jim Barnes, Sussan Chakamian dated January 23, 2013 re Parametric Sound/FBN NDA	PAMTNV0039019	PAMTNV0039023
25	Email from Ken to James Barnes dated March 12, 2013 re Before I send this give me your input	PAMTNV0039368	PAMTNV0039368
26	Email from Ken to Jim Barnes dated March 28, 2013 re Update	PAMTNV0039561	PAMTNV0039561
27	Email from Ken Potashner to Jim Barnes and John Todd dated April 6, 2013 re Gaming/computing license (PAMTNV0039748)	PAMTNV0039748	PAMTNV0039751

28	Email from Ken Potashner to Juergen Stark dated April 6, 2013 re Update	PAMTNV0039756	PAMTNV0039757
29	Email from Ken Potashner to Juergen Stark dated April 8, 2013 re Non excl license	PAMTNV0039816	PAMTNV0039821
30	Email from Ken Potashner to Juergen Stark dated April 9, 2013 re PAMT	PAMTNV0039840	PAMTNV0039840
31	Email from Ken Potashner to Mark Dufilho dated April 12, 2013 re Brief call	PAMTNV0039865	PAMTNV0039866
32	Email from Ken Potashner to Juergen Stark dated April 24, 2013 re Break up fee	PAMTNV0040125	PAMTNV0040125
33	Email from Ken Potashner to Jim Barnes dated May 17, 2013 re Confidential - Amazon IP review	PAMTNV0040339	PAMTNV0040344
34	Email from Ken to James Barnes dated May 17, 2013 re Please bring PAMT management to see us at the earliest opportunity	PAMTNV0040368	PAMTNV0040372
35	Email from Ken to John Todd dated May 31, 2013 re Waiting on update	PAMTNV0040576	PAMTNV0040577
36	Email from James Barnes to Ken Potashner dated June 2, 2013 re Update and Press Release (PAMTNV0040591, PAMTNV0040592-53)	PAMTNV0040591	PAMTNV0040593
37	Deleted (Duplicate, Ex. 36)		
38	Email from James Barnes to Ken Potashner dated June 2, 2013 re Update	PAMTNV0040595	PAMTNV0040595
39	Email from Ken to John Todd dated June 9, 2013 re License	PAMTNV0040658	PAMTNV0040658
40	Email from Ken Potashner to James Barnes dated June 19, 2013 re DA-license	PAMTNV0040772	PAMTNV0040772
41	Email from Ken to Andrew Wolfe dated July 5, 2013 re Update on executive session	PAMTNV0041051	PAMTNV0041051
42	Email from Ken Potashner to John Todd dated August 13, 2013 re Lets talk?	PAMTNV0041742	PAMTNV0041743

43	Email from Ken Potashner to Juergen Stark dated September 5, 2013 re Craig Hallum Fee Agreement	PAMTNV0041988	PAMTNV0041990
44	Email from John Lipman to Ken Potashner dated August 14, 2013	PAMTNV0046980	PAMTNV0046980
45	Email from Rick Hartfiel to James Barnes dated August 14, 2013 re Revised Craig Hallum Proposal (PAMTNV0047470)	PAMTNV0047470	PAMTNV0047484
46	Email from Juergen Stark to Ken Potashner dated April 19, 2013 re Document (PAMTNV0049600)	PAMTNV0049600	PAMTNV0049607
47	Recap of Licensing/Co-Development Engagements with Motorola Mobility	PAMTNV0052416	PAMTNV0052416
48	Email from James Barnes to Daniel Hoverman dated March 24, 2013 re Investor CA (PAMTNV0053793)	PAMTNV0053793	PAMTNV0053798
49	Email from James Barnes to John Todd re Early 2012 road show deck (PAMTNV0053887)	PAMTNV0053887	PAMTNV0053908
50	Email from Juergen Stark to Ken Potashner dated August 3, 2013 re Project Surround Investor Presentation (PAMTNV0056829)	PAMTNV0056829	PAMTNV0056844
51	Deleted (Duplicate, Ex. 258)		
52	Email from Juergen Stark to Ken Potashner dated July 31, 2013 re 1 license issue	PAMTNV0057413	PAMTNV0057415
53	Email from Juergen Stark to Andy Wolfe dated July 23, 2013 re Break Up License	PAMTNV0057667	PAMTNV0057674
54	Email from Juergen Stark to Ken Potashner dated June 14, 2013 re New emitter and getting together	PAMTNV0058676	PAMTNV0058676
55	Email from Juergen Stark to Ken Potashner dated August 12, 2013 re Motorola contact	PAMTNV0060361	PAMTNV0060362
56	Email from Juergen Stark to Ken Potashner dated July 20, 2013 re Licenses	PAMTNV0060525	PAMTNV0060525
57	Email from Juergen Sark to Ken Potashner dated August 13, 2013 re Motorola contact	PAMTNV0060541	PAMTNV0060542

58	Email from Robert Kaplan to Woody Norris dated July 6, 2013 re options	PAMTNV0061365	PAMTNV0061366
59	Email from Robert Kaplan to Susan Passovoy dated July 1, 2013 re Pampt	PAMTNV0061388	PAMTNV0061389
60	Email from Robert Kaplan to James Barnes dated July 1, 2013 re Requested merger documents	PAMTNV0061426	PAMTNV0061427
61	License Agreement (PAMTNV0065220)	PAMTNV0065218	PAMTNV0065260
62	Email from John Hentrich to Jim Barnes, Ken Potashner dated August 1, 2013 re Pamt_VTB License Agreement SMRH 8-1-13 (PAMTNV0066252)	PAMTNV0066252	PAMTNV0066295
63	Email from John Hentrich to Michael Orlando dated August 1, 2013 re Andy/Ken PAMPT - VTB License: RSVP	PAMTNV0066296	PAMTNV0066297
64	Email from John Hentrich to Ken Potashner dated August 1, 2013 re Andy/Ken: PAMT-VTB License RSVP	PAMTNV0066298	PAMTNV0066300
65	License Agreement - Execution Draft (PAMTNV0069830)	PAMTNV0069830	PAMTNV0069875
66	Email from James Barnes to Ken Potashner dated June 9, 2013 re Break up fee	PAMTNV0070745	PAMTNV0070748
67	Email from Robert Kaplan to Seth Putterman dated August 2, 2013 re Proposed Resolutions for 4.p.m. Board meeting	PAMTNV0072292	PAMTNV0072295
68	Email from Robert Kaplan to Seth Putterman dated August 2, 2013 re Proposed Resolutions for 4.p.m. Board meeting	PAMTNV0072324	PAMTNV0072326
69	Email from Ken Potashner to Juergen Stark re sleep	PAMTNV0086617	PAMTNV0086617
70	Email from Ken Potashner to Juergen Stark re SM Payments	PAMTNV0086620	PAMTNV0086621
71	Email from Ken Potashner to Joshua Weisbord dated January 13, 2014 re buy me 150,000 DROP to get to 1mm in big act please	PAMTNV0086846	PAMTNV0086848

72	Email from Juergen Stark to Ken Potashner dated December 12, 2013 re Further thoughts	PAMTNV0088100	PAMTNV0088101
73	Deleted (Duplicate, Ex. 170)		
74	Email from Ken Potashner to Juergen Stark dated November 19, 2013 re SA Article	PAMTNV0090998	PAMTNV0090999
75	Email from Ken Potashner to Juergen Stark dated October 25, 2013 re PAMT numbers	PAMTNV0094986	PAMTNV0094986
76	Email from Siddharth Hariharan to Ken Potashner, Karen Kensworthy re Another Quick Q: Investor meetings, November 4th vs. November 11th	PAMTNV0095422	PAMTNV0095424
77	Deleted (Duplicate, Ex. 78)		
78	Email from Ken Potashner to Juergen Stark dated October 19, 2013 re numbers	PAMTNV0095569	PAMTNV0095570
79	Email from Ken Potashner to Juergen Stark dated October 14, 2013 re warrants	PAMTNV0096468	PAMTNV0096469
80	Email from John Todd to Ken Potashner dated August 14, 2013 re $1m funding	PAMTNV0099274	PAMTNV0099275
81	Email from John Todd to Ken Potashner dated August 22, 2013 re Convert approval	PAMTNV0099861	PAMTNV0099863
82	Email from John Todd to Ken Potashner dated August 8, 2013 re Last input before call later	PAMTNV0100953	PAMTNV0100955
83	Email from Juergen Stark to Ken Potashner dated August 3, 2013 re fairness opinion	PAMTNV0101203	PAMTNV0101203
84	Email from Ken Potashner to Juergen Stark re Updated Fairness Opinion Presentation (PAMTNV0101319)	PAMTNV0101319	PAMTNV0101379
85	Email from Ken Potashner to Juergen Stark re Q3 earnings call	PAMTNV0101694	PAMTNV0101694
86	Email from Juergen Stark to David Lowey, Bob Picunko dated July 23, 2013 re preparing for agreement announcement	PAMTNV0103786	PAMTNV0103791
87	Email from Ken Potashner to John Todd dated July 13, 2013 re update	PAMTNV0104228	PAMTNV0104229

88	Email from Ken Potashner to Juergen Stark dated July 14, 2013 re Drs Metha/Mattson	PAMTNV0104263	PAMTNV0104264
89	Email from Ken Potashner to Juergen Stark dated July 15, 2013 re HHI	PAMTNV0104268	PAMTNV0104268
90	Email from Juergen Stark to Ken Potashner dated July 11, 2013 re update	PAMTNV0104270	PAMTNV0104271
91	Email from Ken Potashner to Juergen Stark dated July 12, 2013 re Update	PAMTNV0104290	PAMTNV0104294
92	Email from Ken Potashner to Charges Cargile, Bob Phillippy dated August 11, 2013 re Update	PAMTNV0104315	PAMTNV0104318
93	Deleted (Duplicate, Ex. 136)		
94	Email from Ken Potashner to Juergen Stark dated July 19, 2013 re precedence	PAMTNV0104836	PAMTNV0104836
95	Email from Ken Potashner to Ron Doornink dated July 20, 2013 re info	PAMTNV0104837	PAMTNV0104837
96	Email from Juergen Stark to Ken Potashner dated July 19, 2013 re jul 31	PAMTNV0104902	PAMTNV0104902
97	Email from Ken Potashner to Juergen Stark dated July 21, 2013 re Clarity	PAMTNV0104912	PAMTNV0104912
98	Email from Ken Potashner to Juergen Stark dated July 11, 2013 re legal effort PAMT	PAMTNV0105035	PAMTNV0105036
99	Email from Ken Potashner to Juergen Stark dated July 6, 2013 re FYI	PAMTNV0105120	PAMTNV0105121
100	Email from Ken Potashner to Juergen Stark dated July 3, 2013 re post closing BOD	PAMTNV0105448	PAMTNV0105448
101	Email from Ken Potashner to James Honore, Robert Kaplan, Elwood Norris, James Barnes, Seth Putterman, and Andrew Wolfe dated June 29, 2013 re Update	PAMTNV0105759	PAMTNV0105760
102	Email from Ken Potashner to Juergen Stark dated July 2, 2013 re FYI	PAMTNV0105781	PAMTNV0105782
103	Email from Ken Potashner to Juergen Stark dated July 3, 2013 re HHI	PAMTNV0105849	PAMTNV0105849

104	Email from Ken Potashner to Juergen Stark dated July 3, 2013 re HHI	PAMTNV0105854	PAMTNV0105855
105	Email from Ken Potashner to Mark Dufiho dated June 5, 2013 re investor update release	PAMTNV0106696	PAMTNV0106696
106	Email from Ken Potashner to Juergen Stark dated June 2, 2013 re Pamt	PAMTNV0106815	PAMTNV0106815
107	Email from Ken Potashner to John Todd dated April 24, 2013 re Fwd: Break up fee	PAMTNV0108234	PAMTNV0108238
108	Email from Ken Potashner to Juergen Stark dated April 15, 2013 re conference call	PAMTNV0108344	PAMTNV0108347
109	Email from Ken Potashner to Juergen Stark dated April 4, 2013 re update	PAMTNV0108760	PAMTNV0108763
110	Email from Ken Potashner to Juergen Stark dated April 8, 2013 re company update press release	PAMTNV0108985	PAMTNV0108985
111	Email from Ken Potashner to Juergen Stark dated April 13, 2013 re Qualcomm	PAMTNV0109178	PAMTNV0109179
112	Email from Ken Potashner to Seth Putterman dated October 24, 2013 re Unfortunate Indeed	PAMTNV0112296	PAMTNV0112297
113	Email from Robert Kaplan to Ken Potashner dated July 23, 2013 re VTB PAMT acquisition	PAMTNV0112504	PAMTNV0112507
114	Email from Robert Kaplan to Andrew Wolfe, Elwood Norris, James Barnes, James Honore, Seth Putterman, Ken Potashner, John Henrich re VTP PAMT acquisition	PAMTNV0112517	PAMTNV0112519
115	Email from Ken Potashner to Elwood Norris, Seth Putterman, Andrew Wolfe, James Honore, John Hentrich and Robert Kaplan re Update	PAMTNV0112539	PAMTNV0112539
116	Email from Elwood Norris to Robert Kaplan, John Hentrich, Seth Putterman re FW TB	PAMTNV0112541	PAMTNV0112541
117	Email from Seth Putterman to Andrew Wolfe re more hhi scenarios	PAMTNV0112558	PAMTNV0112559
118	Email from Andrew Wolfe to James Barnes, Seth Putterman re Spoke to Juergen again	PAMTNV0112625	PAMTNV0112628

119	Email from Ken Potashner to Seth Putterman re final chapter	PAMTNV0112643	PAMTNV0112644
120	Email from Seth Putterman to Elwood Norris re Brian-Anaheim Meeting	PAMTNV0113764	PAMTNV0113771
121	Email from Elwood Norris to Seth Putterman, dated March 28, 2013, re Hss at darpa	PAMTNV0113889	PAMTNV0113891
122	Email from Seth Putterman to Robert Kaplan dated October 27, 2013 re BoD issues	PAMTNV0115179	PAMTNV0115180
123	Email from Robert Kaplan to Seth Putterman dated August 2, 2103 re BoD compensation	PAMTNV0115196	PAMTNV0115197
124	Email from Seth Putterman to Robert Kaplan dated July 28, 2013 re BoD compensation	PAMTNV0115287	PAMTNV0115287
125	Email from Robert Kaplan to Seth Putterman dated July 24, 2013 re Fwd: John Todds	PAMTNV0115292	PAMTNV0115292
126	Email from Ken Potashner to Andrew Wolfe dated July 5, 2013 re Update on executive session	PAMTNV0115321	PAMTNV0115322
127	Email from Juergen Stark to Ken Potashner dated August 2, 2013 re Lock up	VTBH 000111	VTBH 000112
128	Email from Juergen Stark to Ron Doornink dated July 20, 2013 re FWD: info	VTBH 000124	VTBH 000124
129	Email from Juergen Stark to Ken Potashner dated August 1, 2013 re :breakup license	VTBH 000527	VTBH 000527
130	Email from Juergen Stark to Ken Fox dated August 5, 2013 re: PAMT-press release?	VTBH 000822	VTBH 000825
131	Email from Ken Potashner to Juergen Stark dated July 9, 2013 re: Dr. negotiations	VTBH 001503	VTBH 001503
132	Email from Ken Potashner to Juergen Stark dated July 17, 2013 re HHI license narrowing	VTBH 001516	VTBH 001516
133	Email from Ken Potashner to Juergen Stark dated August 5, 2013 re Paris-Revisions to Merger Agreement	VTBH 001570	VTBH 001572
134	Email from Ron Doornink to Juergen Stark dated August 3, 2013 re Ken on BOD	VTBH 001587	VTBH 001587

135	Deleted (Duplicate, Ex. 277)		
136	Email from Ken Potashner to Juergen Stark dated July 19, 2013 re Aspire	VTBH 002140	VTBH 002142
137	Email from Ken Potashner to Juergen Stark dated May 20, 2013 re CONFIDENTIAL- Amazon IP review	VTBH 002189	VTBH 002192
138	Email from Juergen Stark to Ron Doornink dated April 6, 2013 re Gaming/computing license	VTBH 002990	VTBH 002992
139	Email from Juergen Stark to Ken Potashner re Range	VTBH 004040	VTBH 004041
140	Deleted (Duplicate, Ex. 100)		
141	Deleted (Dupilcate, Ex. 43)		
142	Email from Ken Potashner to Juergen Stark dated April 27, 2013 re FDA approval	VTBH 005061	VTBH 005061
143	Email from Juergen Stark to Karen Kenworthy dated March 27, 2013 re Update from Ken P (Parametric)	VTBH 005649	VTBH 005650
144	Email from Juergen Stark to Ken Potashner dated August 2, 2013 re Illustration	VTBH 006118	VTBH 006118
145	Email from Ken Potashner to Juergen Stark, Karen Kenworthy dated April 4, 2013 re McD (VTBH 006261)	VTBH 006261	VTBH 006263
146	Email from Juergen Stark to Karen Kenworthy, Ron Doornink, Bruce Murphy, and Ken Fox dated March 31, 2013 re Meeting with Ken this afternoon	VTBH 006603	VTBH 006604
147	Email from Juergen Stark to Ken Fox dated May 9, 2013 re Ton Trichon- call notes	VTBH 007665	VTBH 007666
148	Email from Ken Fox to Juergen Stark dated April 12, 2013 re Call with Ken and initial gameplan	VTBH 007727	VTBH 007728
149	Email from Juergen Stark to Ron Doornink dated August 13, 2013 re Paris Press Release Draft 8.2.2013 with comments (VTBH 008036)	VTBH 008036	VTBH 008041
150	Email from Ken Potashner to Juergen Stark dated July 17, 2013 re Fwd: draft press releases	VTBH 008077	VTBH 008083
151	Email from Ken Potashner to Juergen Stark dated May 25, 2013 re Clarity	VTBH 008868	VTBH 008869

152	Email from Ken Potashner to Juergen Stark dated July 12, 2013	VTBH 009741	VTBH 009742
153	Email from Ken Potashner to Juergen Stark dated July 3, 2013 re Board get together	VTBH 010857	VTBH 010860
154	Email from Ken Potashner to Juergen Stark dated March 29, 2013 re Monday's meeting	VTBH 011084	VTBH 011086
155	Email from Juergen Stark to Ron Doornink dated April 20, 2013 re NewCo Board Corporation	VTBH 011638	VTBH 011640
156	Email from Ron Doornink to Juergen Stark dated July 21, 2013 re Fwd: Update	VTBH 012528	VTBH 012528
157	Email from Karen Kenworthy to Juergen Stark dated August 2, 2013 re Phantom Factor	VTBH 013231	VTBH 013234
158	Email from Ron Doornink to Ken, Juergen Stark dated April 23, 2013 re Board Composition (VTBH 013411)	VTBH 013411	VTBH 013412
159	Email from Ron Doornink to Juergen Stark re Fwd: Update	VTBH 013436	VTBH 013437
160	Email from Ron Doornink to Juergen Stark re Bone	VTBH 013712	VTBH 013712
161	Email from Ken Potashner to Juergen Stark re fyi-tell Ken Fox I want 75-25 deal based on this	VTBH 013765	VTBH 013765
162	Email from Ken Potashner to Juergen Stark re how many non-insider shareholders need to vote for PAMT?	VTBH 015502	VTBH 015503
163	Email from Juergen Stark to Karen Kenworthy and Ron Doornink re Very good Point from Ron	VTBH 015820	VTBH 015821
164	Email from Ken Fox to Juergen Stark dated August 5, 2013 re Ken P	VTBH 016192	VTBH 016192
165	Email from Juergen Stark to Ron Doornink dated July 21, 2013 re Fwd: Legal effort PAMT	VTBH 017661	VTBH 017662
166	Email from John Hanson to Tony Chan dated December 19, 2013 re Fwd: Covenant Discussion Update and Voyetra Turtle Beach, Inc. Loan Covenant Analysis spreadsheet (VTBH020031, VTBH020033)	VTBH020031	VTBH020038

167	Email from John Hanson to Juergen Stark dated November 13, 2013 re (Seeking Alpha) Parametric Sound: A Turkey's Desperate Attempt to Avoid the Chopping Block	VTBH048603	VTBH048608
168	Email from Ken to Juergen Stark dated January 10, 2014 re think it thru	VTBH066656	VTBH066657
169	Email from Ken Potashner to Juergen Stark dated December 11, 2013	VTBH068943	VTBH068943
170	Email from Ken Potashner to Juergen Stark dated November 30, 2013 re update	VTBH073092	VTBH073093
171	Email from Juergen Stark to Ken Potashner dated December 31, 2013 re: Important	VTBH089382	VTBH089382
172	Email from Juergen Stark to John Hanson dated October 25, 2013 re Fw: Parametric-Disclosure of Financial Projections in Merger Proxy	VTBH093183	VTBH093186
173	Email from Juergen Stark to Ken Potashner dated October 7, 2013 re mutual nervous	VTBH095533	VTBH095534
174	Email from Daniel Hoverman to Mark Dufilho, Adam Greenway re Update	HL-PAR00037153	HL-PAR00037154
175	Email from Robert Wernli dated November 2, 2013 re Proxy Gameplan Update (JPMorgan00031040)	JPMorgan00031040	JPMorgan00031044
176	Email from James Barnes to Woody Shop dated July 21, 2013 re recap of Juergen/Ron Call	PAMTNV0033913	PAMTNV0033913
177	Email from Elwood Norris to Jim Barnes dated 7/16/2013 re Indemnification Agreement	PAMTNV0124175	PAMTNV0124175
178	Email from Ken Potashner to Juergen Stark dated November 11, 2013 re PAMT- Paris-Closing checklist - 11.17.2013 SMRH Draft (PAMTNV0148960)	PAMTNV0148960	PAMTNV0148973
179	Email from Ken Potashner to John Todd dated July 6, 2013 re FWD: Ken re: update on executive session	PAMTNV0149890	PAMTNV0149892
180	Email from Ken Potashner to Juergen Stark dated August 5, 2013 re Confidential: Memo re Communications	PAMTNV0154429	PAMTNV0154431

181	Kaplan Work Product	PAMTNV0173545	PAMTNV0173585
182	Handwritten notes re Kaplan Reply	PAMTNV0173586	PAMTNV0173587
183	Indemnification Agreement dated March 5, 2014	PAMTNV0173588	PAMTNV0173592
184	Indemnification Agreement dated March 10, 2014	PAMTNV0173593	PAMTNV0173596
185	Parametric Sound Corporation Minutes of Board of Directors Meeting January 30, 2014	Stripes0081566	Stripes0081572
186	Parametric Sound Corporation Minutes of Board of Directors Meeting April 23, 2014	Stripes0081630	Stripes0081630
187	Parametric Sound Corporation Minutes of Board of Directors Meeting May 1, 2014	Stripes0081639	Stripes0081641
188	Parametric Sound Corporation Minutes of Audit Committee Meeting February 7, 2014	Stripes0081685	Stripes0081685
189	Email from Karen Kenworthy to Aditi Dubey re FW: Confidential Update	Stripes_0042369	Stripes_0042370
190	Email from Karen Kenworthy dated December 30, 2013 to Dan Marriott re PAMT memo	Stripes_0047334	Stripes_0047335
191	Email from Karen Kenworthy from Dan Marriott to Karen Kenworthy dated December 30, 2013 re PAMT memo	Stripes_0048622	Stripes_0048622
192	October 17, 2013 Memorandum re "Now You're Public" - Overview Public Company Considerations in connection with the Proposed Merger with Parametric Sound Corporation	Stripes_0078146	Stripes_0078213
193	Compensation of Parametric Executive Officers and Directors	TB-00000552	TB-00000557
194	Parametric Sound Corporation Minutes of Informal Meeting of the Independent Directors of Parametric Sound Corporation March 26, 2013	TB-00008881	TB-00008922
195	Email from James Barnes to Ken Potashner dated June 20, 2013 re Juergen/Ken agenda points (TB-00075623)	TB-00075623	TB-00075625
196	Email from Robert Wernli dated November 4, 2013 re Proxy Gameplan update	TB-00086687	TB-00086692

197	VTB Holdings, Inc. - Index to Consolidated Financial Statements (TB-00104486)	TB-00104485	TB-00104545
198	VTB Holdings, Inc. - For FASB Accounting Standard Codification Topic 718 (TB-00104794, TB-00104899)	TB-00104793	TB-00104951
199	Deleted (Duplicate, Ex. 198)		
200	Draft- VTB, Inc. Common Stock Valuation dated September 30, 2012 (TB-00105461)	TB-00105431	TB-00105513
201	Draft- VTB, Inc. Common Stock Valuation dated March 31, 2013 (TB-00105519)	TB-00105517	TB-00105602
202	Parametric Sound Corporation - Unanimous Written Consent of the Pricing Committee of the Board Directors- April 24, 2014	TB-00143033	TB-00143038
203	Parametric Sound Corporation - Unanimous Written Consent of the Pricing Committee of the Board Directors- April 24, 2014	TB-00143039	TB-00143044
204	Turtle Beach Corporation - Investor Presentation April 2014	TB-00143045	TB-00143070
205	Parametric Sound Corporation - Unanimous Written Consent of Board of Directors - April 15, 2014	TB-00143071	TB-00143083
206	Cowen and Company - Equity Research Digital Media Parametric Sound	TB-00143084	TB-00143202
207	Meeting calendar entries - Juergen Stark/Michael Patcher	TB-00143203	TB-00143205
208	Parametric Sound Corporation - Minutes of Audit Committee Meeting April 22, 2014	TB-00143206	TB-00143206
209	Parametric Sound Corporation - Minutes of Board of Directors Meeting April 23, 2014	TB-00143207	TB-00143207
210	Turtle Beach Corporation - Code of Business Conduct and Ethics	TB-00143208	TB-00143216
211	Turtle Beach Corporation - Securities Trading Policy	TB-00143217	TB-00143227
212	Lock-Up Agreement	TB-00143228	TB-00143229

213	FINRA Matter No. 20140415627- Exhibit A to Letter dated August 13, 2014	TB-00143230	TB-00143231
214	Letter dated August 12, 2014 to David Bennett from Megan Wynne re Review of Trading in Turtle Beach Corp.	TB-00143232	TB-00143238
215	Letter dated December 22, 2014 to David Bennett from Megan Wynne re Review of Trading in Turtle Beach Corp.	TB-00143239	TB-00143242
216	Letter dated April 2, 2015 to Megan Wynne from Samuel J. Draddy re Turtle Beach Corporation ("Hear") FINRA Matter No. 20140415627	TB-00143243	TB-00143243
217	Letter dated November 24, 2014 to Megan Wynne from David Bennett re Turtle Beach Corporation ("Hear") FINRA Matter No. 20140415627	TB-00143244	TB-00143246
218	Email from Robert Wernli dated October 29, 2013 re Revised Proxy Statement v. 2.0	TB-00197594	TB-00197594
219	Parametric Sound Corporation Minutes of Board of Directors Meeting January 30, 2014	TB-00200299	TB-00200304
220	Indemnification Agreement dated March 10, 2014	TB-00200306	TB-00200309
221	Indemnification Agreement dated March 5, 2014	TB-00200310	TB-00200314
222	Email from Ron Doornink to Ken, Juergen Stark dated June 10, 2013 re Board Composition	VTBH002194	VTBH002195
223	Email from Ken Potashner to Juergen Stark dated July 3, 2013 re post closing BOD	VTBH004242	VTBH004242
224	Email from Jacob Sperry to Mark Koch, John Hansen, Michael Broderick, and Bruce Murphy dated November 30, 2013 re FM MD&A comments still applicable to 11PM draft	VTBH021382	VTBH021383
225	Email from Bruce Murphy to John Hanson re 280G (VTBH022240)	VTBH022240	VTBH022299
226	Email from Jeremy Levy dated November 4, 2013 re Proxy Gameplan Update	VTBH050551	VTBH050558

227	Transaction Summary	VTBH050559	VTBH050564
228	Email from Jeremy Levy dated November 4, 2013 re Proxy Gameplan Update (VTBH051342)	VTBH051342	VTBH051353
229	Email from Tony Chan to Robert Wernli and Michael Broderick dated November 2, 2013 re Proxy Gameplan Update (VTBH054884)	VTBH054884	VTBH054893
230	Email from Juergen Stark to John Hanson and Robert Wernli dated November 3, 2013 re Proxy Gameplan Update	VTBH054976	VTBH054981
231	Email from Katie Price dated November 4, 2013 re Proxy Gameplan Update and Investor Presentation November 2015 (VTBH055227, VTBH055234)	VTBH055227	VTBH055278
232	Deleted (Duplicate, Ex. 231)		
233	Deleted (Duplicate, Ex. 166)		
234	Condensed Financial Projections (excel spreadsheet)	PAMTNV0044588	PAMTNV0044589
235	Email from Mark Dufilho to Daniel Hoverman dated December 17, 2013 re: Also...	HL-PARA00089659	HL-PARA00089660
236	2012 Stock Option Plan of Parametric Sound Corporation	N/A	N/A
237	Email from Ken Potashner to Joshua Weisbord dated November 11, 2014 re: HEAR: Q3 Lite as Transition Takes Longer; Reduces FY-14 Guidance as Visibility Remains Limited; Maintain Buy Rating, Lower Price Target to $13	N/A	N/A
238	Email from Ken Potashner to Joshua Weisbord dated October 18, 2015 re: Fwd: Your call	N/A	N/A
239	Parametric Sound Corporation Schedule 13D dated January 23, 2014	N/A	N/A
240	Parametric Sound Corporation Schedule 13D dated August 14, 2013	N/A	N/A
241	File Produced Natively	Craig-Hallum_Parametric_013054	Craig-Hallum_Parametric_013054

242	File Produced Natively	Craig-Hallum_Parametric_013064	Craig-Hallum_Parametric_013064
243	Letter from Craig-Hallum to Board of Directors, dated Aug. 2, 2013 (Craig-Hallum_Parametric_019386)	Craig-Hallum_Parametric_019385	Craig-Hallum_Parametric_019391
244	Definitive Proxy Statement submitted by Parametric Sound Corporation to SEC, filed Dec. 3, 2013 (Craig-Hallum_Parametric_043535)	Craig-Hallum_Parametric_043533	Craig-Hallum_Parametric_043874
245	Etkin Stocks and Options January 2014	ETKIN_1	ETKIN_2
246	Goldberg Oppenheimer Statement of Account Summary Period Ending 1/31/14	GOLDBERG_1	GOLDBERG_7
247	Email from Mark Dufilho to Daniel Hoverman Re: Forecasts, dated Oct. 31, 2013	HL-PARA00029030	HL-PARA00029033
248	Email from Mark Dufilho to Ken Potashner dated May 14, 2013 re:Fwd:Re:	HL-PARA00043968	HL-PARA00043971
249	Email from Ken Potashner to multiple recipients dated June 16, 2013 Re: DA	HL-PARA00058540	HL-PARA00058542
250	U.S. District Court Southern District of California, Final Judgement as to Defendant John J. Todd (SEC v. John J. Todd, etc.) filed 04/09/12	Kaplan Exhibit 4, 4 pages long	
251	Masterson Client Statement Morgan Stanley January 2014	MASTERSON_1	MASTERSON_8
252	Deleted (Duplicate, Ex. 3)		
253	Deleted (Duplicate, Ex. 5)		
254	Deleted (Duplicate, Ex. 14)		
255	Deleted (Dupilcate, Ex. 16)		
256	Deleted (Duplicate, Ex. 30)		
257	Email from Bruce Murphy to Ken Potashner, James Barnes, and Juergen Stark dated April 15, 2013 re Item 4 - Summary Financials through 2016	PAMTNV0042353	PAMTNV0042354
258	Email from James Barnes to Ken Potashner dated July 31, 2013 re: FW: DA Financial Statements	PAMTNV0057372	PAMTNV0057379

259	Email from Robert Kaplan to Elwood Norris dated June 29, 2013 re Re: BOD mtg…	PAMTNV0061383	PAMTNV0061384
260	Email from Elwood Norris to Jim Barnes, Re: FW: BOD & potential changes to board if merger with turtlebeach happens, dated 3/15/2013	PAMTNV0077743	PAMTNV0077744
261	Email from Ken Potashner to Elwood Norris cc: Andrew Wolfe, Re: Had a call from Josh…, dated 7/8/2013	PAMTNV0078709	PAMTNV0078711
262	Email from Jim Barnes to PAMT Directors dated April 19, 2013 re BOD Materials	PAMTNV0085838	PAMTNV0085856
263	Email from Ken Potashner to Juergen Stark dated December 3, 2013 re: hype	PAMTNV0088514	PAMTNV0088517
264	Email from Ken Potashner to Joshua Weisbord dated November 19, 2013 re: Fwd: Cowen	PAMTNV0090880	PAMTNV0090881
265	Email from Ken Potashner to Joshua Weisbord dated November 8, 2013 re: Fwd: With all due respect	PAMTNV0091492	PAMTNV0091493
266	Email from Ken Potashner to Multiple Recipients, Re: Google Alert - Turtle Beach, dated Nov. 9, 2013	PAMTNV0091660	PAMTNV0091661
267	Email from Juergen Stark to multiple recipients dated October 31, 2013 re: Forecasts	PAMTNV0094775	PAMTNV0094779
268	Email from Daniel Hoverman to Multiple Recipients, Re: Forecasts, dated Oct. 31, 2013	PAMTNV0094800	PAMTNV0094806
269	Email from Ken Potashner to Juergen Stark dated October 27, 2013 re: JGB	PAMTNV0095064	PAMTNV0095069
270	Email from Ken Potashner to Juergen Stark, Re: option overhand, dated Oct. 29, 2013	PAMTNV0095394	PAMTNV0095404
271	Email from Ken Potashner to Juergen Stark dated October 9, 2013 re: uSoft	PAMTNV0096130	PAMTNV0096130
272	Email from Ken Potashner to John Todd on 9/1/2013 Re: link attached this time - sorry	PAMTNV0098947	PAMTNV0098947
273	Email from Juergen Stark to Ken Potashner, Re: Tony re lock ups, dated July 28, 2013	PAMTNV0103444	PAMTNV0103449

274	From Juergen Stark to Ken Potashner dated July 29, 2013 re: Series B/phantom	PAMTNV0103520	PAMTNV0103521
275	Email from Ken Potashner to Juergen Stark, Re: interesting question, dated July 25, 2013	PAMTNV0104079	PAMTNV0104080
276	Email from John Todd to Ken Potashner on 7/1/2013 Re: update	PAMTNV0105772	PAMTNV0105774
277	Email from Ken Potashner to Juergen Stark, Re: history timeline, dated May 25, 2013	PAMTNV0106727	PAMTNV0106729
278	Email from Seth Putterman to Ken Potashner and Elwood Norris dated November 21, 2013 Re: Resignation	PAMTNV0110295	PAMTNV0110295
279	From Ken Potashner to multiple recipients dated October 3, 2013 re: Andy Wolfe	PAMTNV0112370	PAMTNV0112370
280	Email from Elwood Norris to Multiple Recipients, Re: Fwd: Had a call from Josh..., dated July 8, 2013	PAMTNV0112579	PAMTNV0112581
281	Email from Ken Potashner to Seth Putterman on 2/17/2013 Re: HHI	PAMTNV0113946	PAMTNV0113946
282	Email from Seth Putterman to Robert Kaplan, Re: Options vesting, dated Oct. 29, 2013	PAMTNV0115175	PAMTNV0115175
283	Email from Ken Potashner to Andrew Wolfe, Re: G. Loy, dated April 23, 2013	PAMTNV0120575	PAMTNV0120575
284	Email from Ken Potashner to Elwood Norris, Re: clarification, dated 7/1/2013	PAMTNV0121816	PAMTNV0121816
285	Email from Andrew Wolfe to Ken Potashner, Re: VTB PAMT acquisition, dated July 21, 2013	PAMTNV0122205	PAMTNV0122206
286	Email from Elwood Norris to Kaplan Robert on July 24, 2013 Re: John Todds	PAMTNV0144510	PAMTNV0144511
287	Deleted (Duplicate, Ex. 112)		
288	Email from Seth Putterman to Elwood Norris on 4/14/2013 Re: M and B and banking	PAMTNV0147177	PAMTNV0147177
289	Staff Meeting Notes, 1-2-2013, Witness: Elwood Norris	PAMTNV0147470	PAMTNV0147608
290	Email from Ken Potashner to Jesse Bromberg dated July 6, 2013 re Fwd: Ken RE: Update on executive session	PAMTNV0149887	PAMTNV0149889

291	Email from Ken Potashner to Joshua Weisbord dated October 11, 2013 re: Fwd: Message to Prospective Investors	PAMTNV0150031	PAMTNV0150035
292	From Ken Potashner to Mark Dufilho and Daniel Hoverman dated September 12, 2013 re: PAMT	PAMTNV0153579	PAMTNV0153579
293	Email from Ken Potashner to Elwood Norris, Re: TB, "I am glad we're not married...Qcomm dial in", dated 7/19/2013	PAMTNV0158040	PAMTNV0158041
294	Email from Ken Potashner to James Barnes dated October 11, 2013 re: Your avaolabilyy	PAMTNV0158643	PAMTNV0158644
295	Email from Ken Potashner to Joshua Weisbord dated September 5, 2013 re: U	PAMTNV0158884	PAMTNV0158884
296	Email from Andrew Wolfe to Ken Potashner, Re: FW: Turtle beach Related aprty transaction- Monday's meeting, dated March 30, 2013	PAMTNV0159192	PAMTNV0159193
297	Email from Ken Potashner to John Todd dated May 23, 2013 re: Fwd: Re:	PAMTNV0160633	PAMTNV0160633
298	Email from Ken Potashner to Seth Putterman on 4/11/2013 Re: Brian - Anaheim Meeting	PAMTNV0161432	PAMTNV0161438
299	Email from Ken Potashner to Juergen Stark dated June 7, 2013 re: Interview	PAMTNV0162233	PAMTNV0162234
300	Email from Ken Potashner to Juergen Stark dated July 4, 2013 re: Weekend meeting	PAMTNV0163004	PAMTNV0163006
301	Email from Ken Potashner to Joe Ramos, Re: update, dated April 19, 2013	PAMTNV0163128	PAMTNV0163128
302	Putterman Resignation Letter and cooresponding handwritten notes	PAMTNV0163257	PAMTNV0163265
303	Text message log from/to Ken Potashner and Andrew Wolfe	PAMTNV0163289	PAMTNV0163289
304	Log of outgoing/incoming emails/phone messages to&from Ken Potashner, dated 7/21/13 - 1/12/2014	PAMTNV0163290	PAMTNV0163293

305	Email from Kaplan Robert to Woody Norris on August 1, 2013 Re: JT et al	PAMTNV0165154	PAMTNV0165154
306	Email from Robert Kaplan to Elwood Norris, Re: issues with BoD gathering, dated July 19, 2013	PAMTNV0165333	PAMTNV0165333
307	Email from Robert Kaplan to Elwood Norris, Re: TB, dated July 19, 2013	PAMTNV0165335	PAMTNV0165335
308	Email from Elwood Norris to Robert Kaplan dated July 1, 2013 re: FW: update	PAMTNV0165442	PAMTNV0165443
309	Patricof Revoc Trust Oppenheimer Account Statement for January 2014	PATRICOF_1	PATRICOF_24
310	Letter from Plaintiffs Counsel to Defendants Re: exclusions dated 4/22/2020	PLAINTIFF_1	PLAINTIFF_28
311	Santulli Oppenheimer Account Statement for January 2014	SANTULLI_1	SANTULLI_4
312	Email from Juergen Stark to Karen Kenworthy, dated April 25, 2013, Re: TB/Dechert	STRIPES 0000909	STRIPES 0000912
313	Email from Dan Marriott to Karen Kenworthy, dated July 11, 2013, RE: URGENT: PNC TB- Amendment	STRIPES 0006042	STRIPES 0006045
314	Email from Bruce Murphy to multiple recipients, dated June 27, 2013, Re Turtle Beach Company Overview - Confidential bpm updated 6-27.pptx; VTB 2013 - 2015 Base (STRIPES 0008371)	STRIPES 0008371	STRIPES 0008463
315	Email from Juergen Stark to Karen Kenworthy (cc Ken Fox), dated June 14, 2013, Re; PNC update	STRIPES 0009292	STRIPES 0009293
316	Email from Juergen Stark (Turtle Beach CEO) to Multiple Recipients, Re: Documents for later, Attachments: VTB and PAMT Discussion Document.pptx; VTB Long Range Forecast - Draft.pptx (STRIPES 0011447)	STRIPES 0011447	STRIPES 0011469
317	Email from Ken Fox to multiple recipients, dated July 10, 2013, Re: Board meeting agenda	STRIPES 0017472	STRIPES 0017474

318	Email from Karen Kenworthy to Juergen Stark and Bruce Murphy, dated June 19, 2013, RE: PNC	STRIPES 0021273	STRIPES 0021274
319	Email from Ken Fox to Karen Kenworthy, dated August 22, 2013, Re Convert approval	STRIPES 0031354	STRIPES 0031356
320	Deleted (Duplicate, Ex. 425)		
321	Email from Jeffrey Doherty to Juergern Stark on February 27, 2014 Re: VTB/PNC - Fourth Amendment	STRIPES 0036772	STRIPES 0036774
322	Deleted (Duplicate, Ex. 427)		
323	Deleted (Duplicate, Ex. 428)		
324	Email from John Hanson to multiple recipients, dated December 16, 2013, re TB Forecast Slide for Call, attaching 2013FcstUpdatev121513(Call).pptx	STRIPES 0041202	STRIPES 0041203
325	Deleted (Duplicate, Ex. 319)		
326	Email from John Hanson to Juergen Stark (cc Karen Kenworthy), dated January 2, 2014, Re: Bank call	STRIPES 0048637	STRIPES 0048639
327	Deleted (Duplicate, Ex. 413)		
328	Email from Karen Kenworthy to Juergen Stark on 12/6/2013 re: PNC/Financing...	STRIPES 0056436	STRIPES 0056437
329	Deleted (Duplicate, Ex. 414)		
330	Email from Juergen Stark to Ron Doornink, dated November 1, 2013, Fwd: URGENT- Reconciliation, attaching PAMT Model - downside 8_15_2013 updated for July August - RECONCILIATION.xlsx	STRIPES 0082003	STRIPES 0082005
331	Email from Juergen Stark to multiple recipients, dated July 10, 2013, Re: Board meeting agenda, attaching July 10 2013 BOD- 2013 Mid Year Review Consolidated-Final.pptx (STRIPES 0083164)	STRIPES 0083164	STRIPES 0083195
332	Deleted (Duplicate, Ex. 421)		
333	Deleted (Duplicate, Ex. 412)		
334	Deleted (Duplicate, Ex. 333)		
335	Deleted (Duplicate, Ex. 428)		
336	Deleted (Duplicate, Ex. 84)		

337	Email from Karen Kenworthy to Ken Fox, dated March 4, 2014, Re: Fourth Amendment	STRIPES_0046915	STRIPES_0046918
338	Email John hanson to Juergen Stark (cc Karen Kenworthy), dated January 2, 2014, Re: Bank call	STRIPES_0048637	STRIPES_0048639
339	Email from Juergen Stark to multiple recipients, dated March 25, 2014, re Document for this morning's call, attaching Post BOD Revised Financial Plan DRAFT.pptx	STRIPES_0073406	STRIPES_0073407
340	Parametric Sound Corporation - White Paper - Merger Related Items - Accruals - September 30, 2013	TB-00002997	TB-00003000
341	Minutes of the Special Joint Meeting of	TB-00009017	TB-00009023
342	Email from James Barnes to "PAMT Directors", dated July 23, 2013, FW: Draft Materials, attaching PAMT_BOD Presentation_7.23.13.pdf	TB-00063566	TB-00063590
343	Email from James Barnes to multiple recipients, dated June 16, 2013, Re: Merger VTBH or VTB	TB-00065029	TB-00065031
344	Email from Cyril Berdugo to multiple recipients, dated March 25, 2013, RE: Investor CA	TB-00069167	TB-00069171
345	Email from John Hanson to Ken Potashner and Juergen Stark dated December 30, 2013 re: 280G Update from McGladrey	TB-00078079	TB-00078081
346	Email from Ken Potashner to multiple recipients, dated October 29. 2013, Re: Front section of MDA	TB-00088349	TB-00088351
347	Email from Ken Potashner to James Barnes, dated October 24, 2013, Re: Bonus	TB-00095606	TB-00095606
348	Email from James Barnes to Ken Potashner, dated October 24, 2013, Re: updated FS and pro forma	TB-00095611	TB-00095611
349	Email from Ken Potashner to James Barnes, dated October 22, 2013, Re: glass	TB-00095640	TB-00095640

350	Email from Max Fonarev to multiple recipients, dated October 11, 2013, re Final common stock valuation reports, attaching: Valuation VD 03-31-13_Common Stock (Sorbus for VTB) FINAL.pdf; Valuation VD (TB-00105050)	TB-00105050	TB-00105208
351	Email from John Todd to Grant Kerry on 8/21/2018 Re: FW:inputs	TODD0000289	TODD0000289
352	Email from John Todd to Grant Keary, dated November 14, 2018, FW: disappointing	TODD0001213	TODD0001213
353	Email from John Todd to Grant Kerry on 11/15/2018 Re: FW: Fairness opinion	TODD0002084	TODD0002085
354	Email from John Todd to Grant Kerry on 11/16/2018 Re: FW: Craig Hallum Fee Agreement	TODD0002222	TODD0002224
355	Email from Ken Potashner to John Todd, dated March 27, 2013, Fwd: License	TODD0003479	TODD0003480
356	Email from Ken Potashner to John Todd, dated March 31, 2013	TODD0003597	TODD0003597
357	Email from Ken Potashner to John Todd on 4/19/2013 Re: HHI	TODD0004326	TODD0004326
358	Email from Ken Potashner to John Todd, dated June 18, 2013, re FWD: reverse example	TODD0005763	TODD0005765
359	Email from Ken Potashner to John Todd on 7/20/2013 Re: board and juergen discussions	TODD0006417	TODD0006417
360	Email from Ken Potashner to John Todd, dated August 8, 2013, re Fwd: Huge win	TODD0006507	TODD0006507
361	Email from Ken Potashner to John Todd, dated December 12, 2013, Re: Hhi	TODD0008818	TODD0008818
362	Email from John Todd to John Todd dated July 21, 2013 Re: Woody	TODD0010275	TODD0010275
363	Email from Ken Potashner to Juergen Stark, dated June 27, 2013, Re: JPM	VTBH 002092	VTBH 002093

364	Email from Juergen Stark to Ron Doornink, dated August 7, 2013, Re; SOLUTION	VTBH 002153	VTBH 002155
365	Deleted (Duplicate, Ex. 364)		
366	Deleted (Duplicate, Ex. 154)		
367	Deleted (Duplicate, Ex. 160)		
368	Deleted (Duplicate, Ex. 163)		
369	Email from Juergen Stark to Tony Chan on 4/29/2013 Re: Document for the BOD meeting	VTBH017509	VTBH017531
370	Email from John Hanson to multiple recipients on 12/16/2013 Re: budget comparison analysis	VTBH019909	VTBH019912
371	Email from John Hanson to multiple recipients, dated December 12, 2013, Fwd: Further thoughts	VTBH020040	VTBH020041
372	Email from Juergen Stark to John Hanson on 11/8/2013 Re: $5m. PNC etc	VTBH048021	VTBH048021
373	Email from Kristin Carney to John Hanson on 11/3/2013 Re: Will you be on call with Juergen today?	VTBH055184	VTBH055186
374	Email from Juergen Stark to John Hanson on 10/31/2013 Re: Forecasts	VTBH057642	VTBH057645
375	Email from Kristin Carney to John Hanson, dated October 31, 2013, Re: CPGS Refurb, attaching KG Fcst 10.28-13.xlsx	VTBH059014	VTBH059016
376	Email from Ken Potashner to Juergen Stark and Adam Kahn, dated January 3, 2014, Re: Update	VTBH068005	VTBH068006
377	Email from Ken Potashner to Juergen Stark, dated December 11, 2013, re Duhhh...	VTBH069002	VTBH069002
378	Email from Juergen Stark to multiple recipients on 11/8/2013 Re: Re: $2.5m	VTBH081233	VTBH081234
379	Email from John Hanson to Juergen Stark on 10/31/2013 Re: forecast model/script	VTBH089491	VTBH089495
380	Email from Juergen Stark to multiple recipients, dated October 31, 2013, Re: Forecast Model/Script	VTBH090322	VTBH090326

381	Email from Juergen Stark to John Hanson on 10/30/2013 Re: on with tony	VTBH090704	VTBH090720
382	Email from Ken Potashner to Juergen Stark on 10/28/2013 Re: Financing	VTBH091543	VTBH091543
383	Email from Juergen Stark to multiple recipients, dated October 10, 2013, Re: usoft	VTBH095139	VTBH095140
384	Weisbord Oppenheimer Statement Account Summary for January 2014	WEISBORD_1	WEISBORD_2
385	Email from John Hanson to Joshua Weisbord dated October 9, 2015 re: file we are discussing	WEISBORD-CAL-00070507	WEISBORD-CAL-00070509
386	Email from Joe Azevedo to Joshua Weisbord dated July 20, 2015 re: FW: Weekly Sales Report 2015-07-28.xlsx	WEISBORD-CAL-00074555	WEISBORD-CAL-00074706
387	Email from Joe Azevedo to Joshua Weisbord dated March 15, 2016 re: FY'16 Operating Plan	WEISBORD-CAL-00075265	WEISBORD-CAL-00075268
388	Email from Joe Azevedo to Joshua Weisbord date February 25, 2016 re: FY'16 Plan $172M Net	WEISBORD-CAL-00075271	WEISBORD-CAL-00075272
389	Email from John Hanson to multiple recipient dated May 1, 2015 re: March 2015 Guidance	WEISBORD-CAL-00075430	WEISBORD-CAL-00075430
390	Email from John Hanson to multiple recipient dated January 20, 2016 re: Net Revenue Additional Comments	WEISBORD-CAL-00075597	WEISBORD-CAL-00075597
391	Email from John Hanson to multiple recipient dated September 9, 2015 re: Q3 15 and FY 15 Forecast vs. Guidance	WEISBORD-CAL-00075816	WEISBORD-CAL-00075818
392	Email from John Janson to Joshua Weisbord dated June 10, 2015 re: 2 quick things	WEISBORD-CAL-00075897	WEISBORD-CAL-00075899
393	Email from William Elder to multiple recipients dated March 16, 2015 re: comments on earnings release	WEISBORD-CAL-00076869	WEISBORD-CAL-00076874
394	Email from John Hanson to Joshua Weisbord dated August 14, 2015 re: IR coverage	WEISBORD-CAL-00077778	WEISBORD-CAL-00077780
395	Email from Joe Azevedo to multiple recipients dated May 9, 2015 re: joe...pls help	WEISBORD-CAL-00077861	WEISBORD-CAL-00077862

396	Email from Jow Azevedo to Joshua Weisbord on 10/23/2015 Re: send me all data/excel etc. that i can get crunching...thx	WEISBORD-CAL-00080085	WEISBORD-CAL-00080140
397	Email from Jow Azevedo to Joshua Weisbord on 10/23/2015 Re: send me all data/excel etc. that i can get crunching...thx	WEISBORD-CAL-00080141	WEISBORD-CAL-00080165
398	Email from Joe Azevedo to Multiple Recipients, Re: Turtle Beach Conf call support, dated 11/7/2014	WEISBORD-CAL-00080649	WEISBORD-CAL-00080651
399	Email from John Hanson to Joshua Weisbord, Re: will open to 2014 consolidated results, Attachment: Copy of July FS with CFO Bridge (8-24-15), dated Sept. 4, 2015.	WEISBORD-CAL-00083105	WEISBORD-CAL-00083152
400	Email from Brian Buturla to Joshua Weisbord dated August 14, 2014 re: Book1.xlsx	WEISBORD-CAL-00084736	WEISBORD-CAL-00084739
401	Email from Mark Koch to multiple recipients dated December 15, 2014 re: Option exercuse murphy.pdf	WEISBORD-CAL-00085141	WEISBORD-CAL-00085142
402	Email from Mark Koch to Joshua Weisbord dated July 25, 2014 re: Options exercise udpate	WEISBORD-CAL-00088101	WEISBORD-CAL-00088102
403	Email from Joe Azevedo to multiple recipients dated January 18, 2016 re: Conservative and Base Cases	WEISBORD-CAL-00097827	WEISBORD-CAL-00097832
404	Email from Joe Azevedo to multiple recipients dated January 18, 2016 re: Conservative and Base Cases	WEISBORD-CAL-00097833	WEISBORD-CAL-00097838
405	Email from Juergen Stark to multiple recipients dated January 12, 2016 re: Important - Needham presentation	WEISBORD-CAL-00099685	WEISBORD-CAL-00099687
406	Email from Cris Keirn to multiple recipients dated January 19, 2016 re: Some board requests	WEISBORD-CAL-00103375	WEISBORD-CAL-00103376
407	Email from Juergen Stark to "ALL VTB US" dated January 14, 2015 re: 2014 estimate update and investor presentation	WEISBORD-CAL-00106400	WEISBORD-CAL-00106430
408	Email from Juergen Stark to multiple recipients dated January 20, 2016 re: 2015 and 2016 commentary	WEISBORD-CAL-00106431	WEISBORD-CAL-00106439

409	Email from Juergen Stark to Joshua Weisbord dated January 16, 2015 re: Fwd: Investor meeting and company valuation	WEISBORD-CAL-00108562	WEISBORD-CAL-00108563
410	Icerose Master Fund (Morgan Stanley) Statement for January 2014	ICEROSE_1	ICEROSE_97
411	Deleted (Duplicate, Ex. 314)		
412	Email from John Hanson to Karen on 2/13/2014 Re: FWD: 2014 & 2015 Financial forecasts	STRIPES_0032694	STRIPES_0032695
413	Email from Karen Kanworthy to Aditi Dubey on 2/13/2014 Re: FWD 2014 & 2015 Financial Forecasts	STRIPES 0049205	STRIPES 0049219
414	Email from Juergen Stark to Ron Doornink on 10/4/2013 Re: Confidential: MSFT Headsets	STRIPES 0081782	STRIPES 0081788
415	Deleted (Duplicate, Ex. 341)		
416	Deleted (Duplicate, Ex. 350)		
417	Deleted (Duplicate, Ex. 412)		
418	Deleted (Duplicate, Ex. 313)		
419	Email from Karen Kenworthy to Juergen Stark dated June 17, 2013 re: PNC updates	STRIPES 0009794	STRIPES 0009796
420	Email from Wayne Marino to multiple recipients dated May 18, 2013 re: Fund I Valuations	STRIPES 0023727	STRIPES 0023728
421	Email from Wayne Marino to multiple recipients dated April 3, 2013 re: SAVE THE DATE - STRIPES GROUP 2013 ANNUAL LP MEETING	STRIPES 0026548	STRIPES 0026626
422	Email from Wayne Marino to multiple recipients dated December 6, 2013 re: September 30, 2013 Quarterly Reports	STRIPES 0030062	STRIPES 0030129
423	Deleted (Duplicate, Ex. 319)		
424	Email from John Hanson to multiple recipients dated January 10, 2014 re: PNC Negotiation Tonight	STRIPES 0032069	STRIPES 0032071
425	Email from Karen Kenworthy to multiple recipients dated December 10, 2013 re: Status update for Q1 2014?	STRIPES 0032410	STRIPES 0032412

426	Email from Karen Kenworthy to Wayne Marino dated August 21, 2013 re: when are you hoping to send out investment summaries? valuation done for seamless now	STRIPES 0036681	STRIPES 0036683
427	Email from Karen Kenworthy to Ken Fox dated December 23, 2013 re: TB/PNC update	STRIPES 0037477	STRIPES 0037478
428	Email from Dan Marriott to Karen Kenworthy date January 1, 2014 re: Important: TB Cap Call Doc - KEN PLEASE ALSO READ IF YOU HAVE INTERNET	STRIPES 0037505	STRIPES 0037509
429	Deleted (Duplicate, Ex. 84)		
430	Email from Wayne Marino to multiple recipients dated August 30, 2013 re: Quarterly reports	STRIPES 0039651	STRIPES 0039716
431	Email from Karen Kenworthy to multiple recipients dated August 7, 2013 re: SOLUTION	STRIPES 0054722	STRIPES 0054725
432	Deleted (Duplicate, Ex. 143)		
433	Email from Karen Kenworthy to Juergen Stark dated September 15, 2013 re: Further thought on $5m	VTBH097468	VTBH097468
434	Email from Grant Keary to Ken Potashner dated July 29, 2013 re: John Todd - Letter on Consulting Agreement	TODD0006265	TODD0006266
435	Deleted (Duplicate, Ex. 360)	TODD0006507	TODD0006507
436	Email from Ken Potashner to John Todd dated August 15, 2013 re: Beta	TODD0006624	TODD0006624
437	Email from Tracy Neumann to Ken Potashner dated October 6, 2013 re Pamt	TODD0007363	TODD0007363
438	Email from Ken Potashner to John Todd dated December 4, 2013 re for future reference	TODD0008720	TODD0008720
439	Email from Ken Potashner to John Todd dated July 1, 2013 re clarification	TODD0005998	TODD0005998
440	Email from Ken Potashner to Juergen Stark dated November 12, 2013 re input	TODD0008053	TODD0008053
441	Email from Juergen Stark to multiple recipients dated January 15, 2014 re Deal closed	STRIPES_0064206	STRIPES_0064206

442	Email from Jeffrey Doherty to Karen Kenworthy dated December 13, 2013 re Quick connect this afternoon?	STRIPES_0062555	STRIPES_0062556
443	Email from Juergen Stark to multiple recipients dated December 4, 2013 re Investor Presentation for next week	STRIPES_0029955	STRIPES_0029962
444	Email from Ken Potashner to John Todd dated September, 24, 2013 re update	TODD0007110	TODD0007110
445	Email from Bruce Murphy to Juergen Stark dated May 7, 2013 re Updated covenant worksheet	VTBH 009761	VTBH 009762
446	Fax from Jones Day to Dechert dated June 18, 2013 re Reservation of Rights and Notice of Default	STRIPES 0019325	STRIPES 0019328
447	Email from Jeffrey Doherty to multiple recipients dated June 28, 2013 re Revised proposed amendment	STRIPES 0005883	STRIPES 0005885
448	Email from Karen Kenworthy to Juergen Stark dated July 12, 2013 discussing Jeffrey Doherty and PNC revolver	STRIPES 0010675	STRIPES 0010679
449	Email from James Barnes to multiple recipients dated December 17, 2013 re PAMT Vote Report	TB-00078183	TB-00078184
450	Email from Michael Coronato to multiple recipients dated December 18, 2013 re PAMT Vote Report	TB-0078169	TB-00078171
451	Email from Michael Coronato to multiple recipients dated December 20, 2013 re PAMT Vote Report	JPMorgan 00020504	JPMorgan 00020506
452	Email from Ken Potashner to John Todd dated March 25, 2013 re Fwd: fairness opinion	TODD0010334	TODD0010334
453	Email from Ken Potashner to John Todd dated March 29, 2013 re options	TODD0010337	TODD0010337
454	Email from Ken Potashner to John Todd dated May 18, 2013 re Inputs	TODD0005115	TODD0005115
455	Email from Ken Potashner to Grant Keary dated July 29, 2013 re FW: 7 Parametric Todd00001	TODD0006262	TODD0006262
456	Email from Ken Potashner to John Todd dated May 14, 2013 re Jim Hardiman - Updated info	TODD0007679	TODD0007680
457	Email from Ken Potashner to John Todd dated November 17, 2013 re PAMT Xmas party	TODD0008163	TODD0008163

458	Email from Ken Potashner to Juergen Stark dated November 26, 2013 re fire drills	TODD0008292	TODD0008292
459	Email from Ken Potashner to Ritvik Mehta dated March 12, 2013 re Demo-Parametric Sound	PAMTNV0175386	PAMTNV0175388
460	Email from Juergen Stark to Ron Doornink dated January 29, 2014 re Board documents	TB-00190991	TB-00191011
461	Email from James Barnes to Ken Potashner and John Todd dated August 14, 2013 re FW: Presentation	TODD0006577	TODD0006590
462	Email from Karen Kenworthy to Ken Fox dated July 12, 2013 re TB facility: Update	STRIPES 0027053	STRIPES 0027054
463	Email from Dan Marriott to Karen Kenworthy dated August 2, 2013 re Google Alert - Turtle Beach Headsets	STRIPES_0043950	STRIPES_0043951
464	Email from Karen Kenworthy to Dan Marriot and Ken Fox dated December 13, 2013 re My annual review	STRIPES 0000632	STRIPES 0000635
465	Email from Wayne Marino to Karen Kenworthy dated January 2, 2014 re RE: IMPORTANT: TB Cap Call Doc - KEN PLEASE ALSO READ IF YOU HAVE INTERNET	STRIPES_0031521	STRIPES_0031526
466	Email from Ken Potashner to PAMT Board dated June 30, 2013 re update	TODD0005976	TODD0005976
467	Email from Ken Potashner to John Todd dated July 1, 2013 re Fwd: deal	TODD0005993	TODD0005993
468	Email from Elwood Norris to Ken Potashner dated June 29, 2013 re BOD meeting	TODD0005975	TODD0005975
469	Email from Ken Potashner to John Todd dated January 27, 2014 re fraud	TODD0009094	TODD0009094
470	Email from Ken Potashner to Juergen Stark dated June 19, 2013	PAMTNV0162854	PAMTNV0162855
471	Email from Ken Potashner to Juergen Stark dated June 23, 2013 re Re: Dilligence	PAMTNV0105447	PAMTNV0105447
472	Email from Ken Potashner to John Todd and James Barnes dated October 10, 2013 re Fwd: Percolating	TODD0007443	TODD0007443

473	Email from Ken Potashner to Juergen Stark and others dated October 29, 2013 re proxy	PAMTNV0095423	PAMTNV0095423

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION This Document Related To: ALL ACTIONS	LEAD CASE NO.: A-13-686890-B DEPT. NO.: XI **REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR ATTORNEYS' FEES**

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I. INTRODUCTION

Plaintiff unreasonably rejected two offers of judgment and then forced Defendants and the Court to participate in a trial of an equity expropriation claim so lacking in merit that the Court issued judgment in Defendants' favor under NRCP 52(c) without even requiring them to begin their affirmative case. These basic facts are not genuinely in dispute. As a result, all that remains for the Court to consider before awarding Defendants their post-offer attorneys' fees is whether the four factors set forth in *Beattie v. Thomas*, 99 Nev. 579, 588, 668 P.2d 268, 274 (1983) weigh in Defendants' favor. On that front, Plaintiff offers no meaningful resistance.

First, Plaintiff cannot claim to have brought its equity expropriation claim in good faith because it always has known that it could not prove at least two of the claim's essential elements: the existence of a controlling shareholder and actual fraud by a majority of the Board. Plaintiff's Opposition notably is devoid of any assertion that Plaintiff ever had evidence to suggest either that Kenneth Potashner (the alleged controller) was even of a shareholder of Parametric at the relevant time or that a majority of Parametric's Board engaged in actual fraud. Plaintiff also fails to refute that the Assignors had strong ulterior motives for bringing this litigation. Given the total lack of evidence on essential elements of Plaintiff's claim, such ulterior motives provide the only rational explanation for Plaintiff's rejection of Defendants' offers.

Second, Plaintiff cannot dispute that Defendants' offers were reasonable because Plaintiff fails to identify any fault in Defendants' calculation that Plaintiff's maximum compensatory damages would have been less than $280,000. Defendants offered a substantial portion of this amount, despite the glaring weaknesses in Plaintiff's claims. Moreover, Plaintiff ignores entirely the standing challenges that "troubled" the Court and likely would have prevented Plaintiff from recovering nearly 97% (or more) of any compensatory damages that may have been available. Rather than address these calculations, Plaintiff points to irrelevant settlement calculations in the class *and derivative* proceedings, where the class and derivative plaintiffs asserted six additional claims that warranted an entirely different damages analysis.

Third, given the fatal errors embedded in Plaintiff's claims and the minimal damages that may have been available even in the unlikely scenario where Plaintiff prevailed at trial, rejecting

Defendants' offers was plainly unreasonable, especially in light of the costs and fees to which Plaintiff would be — and now is — exposed when it failed at trial.

Fourth, Defendants' fees are reasonable, especially given the complexity of the issues presented here. Plaintiff feigns confusion about how work was divided among the law firms that represented Defendants (even though detailed time entries were provided with the Motion), but fails to identify any single charge for work that was duplicative, unnecessary, performed exclusively for a defendant who settled, or was otherwise unreasonable on any basis. Moreover, Defendants' counsels' rates were comparable to those charged by Plaintiff's own counsel, which Plaintiff's counsel declared under penalty of perjury were reasonable in a declaration filed with this Court.

In short, all four *Beattie* factors weigh heavily in Defendants' favor. For this reason, it is unsurprising that Plaintiff resorts to begging this Court to ignore the *Beattie* analysis and, instead, to conclude counterfactually that Plaintiff's trial loss under NRCP 52(c) was somehow more favorable than Defendants' offers of judgment. Specifically, Plaintiff asserts without citation to Nevada authority that it deserves credit for amounts received in a pre-trial settlement with certain Defendants. Plaintiff ignores, however, the extensive Nevada authority recognizing that NRCP 68 permits consideration only of the amounts received "at trial." Instead, Plaintiff proposes that this Court create new law that would frustrate the purpose of NRCP 68(b) by allowing any plaintiff to neuter an unapportioned offer of judgment simply by settling with one defendant for the offered amount and then proceeding to trial against the rest. For good reason, that is not the law in Nevada and Plaintiff cites no authority suggesting otherwise.

Defendants' Motion is simple. Defendants prevailed at trial after making multiple reasonable efforts to resolve this litigation prior to trial pursuant to NRCP 68. All four *Beattie* factors weigh overwhelmingly in favor of awarding Defendants their attorneys' fees. Plaintiff fails to provide any basis for the Court to decline issuing such an award. Defendants' Motion should be granted.

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II. PLAINTIFF FAILS TO DEMONSTRATE THAT IT EVER HAD A GOOD FAITH BASIS TO PURSUE ITS EQUITY EXPROPRIATION CLAIM

Under the first *Beattie* factor, which asks whether Plaintiff asserted its claims in "good faith," Plaintiff does not dispute its equity expropriation claim required proof that, among other elements, (1) Potashner was a shareholder of Parametric who exercised actual or effective control over the company at the time the Merger was negotiated and approved and (2) a majority of the Board engaged in "actual fraud" to cause the Merger to occur. But Plaintiff's Opposition fails to explain how Plaintiff ever reasonably could have believed that it had any hope of proving either element. To the contrary, by failing to mention even a single piece of evidence suggesting either that Potashner held any Parametric stock at the relevant time or that any Parametric director other than Potashner engaged in "actual fraud," Plaintiff's Opposition confirms that Plaintiff never had any evidence to support either contention. Plaintiff's continued silence precludes a finding of good faith.

A. Plaintiff Offers No Reasonable Basis For Its Allegation That Potashner Was A Controlling Shareholder Despite Not Owning A Single Share.

Plaintiff does not dispute the basic fact that Potashner could not have been a controlling shareholder of Parametric at a time when he was not even a shareholder of Parametric.[1] Plaintiff's own representative conceded as much at trial. *See* Aug. 16, 2021 Trial Tr. at 144:24-145:4 ("a

[1] Plaintiff, of course, could not dispute this basic legal principle. The Nevada Supreme Court only recognized the existence of direct equity expropriation claims, as defined in *Gentile v. Rosette,* 906 A.2d 91, 100 (Del. 2006), in an effort to "align [Nevada's] jurisprudence with Delaware's" with respect to shareholder standing. *See Parametric Sound Corp. v. Eighth Jud. Dist. Ct.*, 133 Nev. 417, 428-29, 401 P.3d 1100, 1108 (2017) ("*Parametric*"). Before overruling *Gentile*, the Delaware Supreme Court held that *Gentile*'s holding must be constrained to the "unique circumstances" present in that case, which included "an improper transfer of both economic value and voting power from the minority stockholders to the controlling stockholder." *El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248, 1263-64 (Del. 2016) (emphasis added). For this reason, every Delaware Court to apply *Gentile* required plaintiffs to establish the existence of a controlling stockholder. *See, e.g.*, *Klein v. H.I.G. Capital, L.L.C.*, C.A. No. 2017-0862-AGB, 2018 WL 6719717, at *9 (Del. Ch. Dec. 19, 2018) ("the *Gentile* framework does not fit the facts pled in this case" where "the economic harm that allegedly occurred came not from the issuance of shares of stock to a controller") (emphasis added); *Almond v. Glenhill Advisors LLC*, C.A. No. 10477-CB, 2018 WL 3954733, at *24 (Del. Ch. Aug. 17, 2018) ("Whatever the ultimate fate of the *Gentile* paradigm may be, . . . there must be a controlling stockholder or control group") (emphasis added). Last month, the Delaware Supreme Court overruled *Gentile*, thereby extinguishing the continued viability of a direct equity expropriation claims. *See Brookfield Asset Mgmt., Inc. v. Rosson*, No. 406, 2020, 2021 WL 4260639, at *19 (Del. Sept. 20, 2021).

controlling shareholder must own at least one share"). Plaintiff's misinformed contention that Defendants focused on actual control, rather than "effective control" (Opp. at 21), is both incorrect and also completely irrelevant because it is undisputed that a controlling shareholder must be a shareholder regardless of the type of control asserted. *See, e.g.*, *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 307 (Del. 2015) (even "effective control" requires showing of "potent voting power and management control" from a "stockholder") (emphasis added). Plaintiff also does not dispute that Potashner's lack of stock ownership prior to the shareholder vote on the Merger has been a matter of public record since 2013.[2] Thus, Plaintiff always has known, or should have known, that Potashner did not "own at least one share" when the Merger was approved, which, by Plaintiff's own admission, precluded Potashner from being a controlling shareholder and precluded Plaintiff from arguing otherwise.[3] It is inconceivable that Plaintiff would now attempt to argue that it ever held a good-faith belief otherwise when the parties are in full agreement that a controlling shareholder must own stock in the company, but Potashner owned no stock at the relevant time.

Rather than even attempt to contest these facts, Plaintiff buries its legal failings under a tired list of contentious emails between Potashner and the rest of the Board that it has used routinely to prop up its now-failed claims. Opp. at 5-10. But Plaintiff's equity expropriation claim required proof of more than a contentious relationship between Potashner and the rest of the Board.[4] There is no dispute that Plaintiff needed to prove that Potashner was a shareholder who wielded actual or effective control over the other members of the Board. There also is no dispute that Potashner was not a shareholder and Plaintiff knew it.

[2] As noted in the Motion, Plaintiff has known since 2013 that Potashner owned only unexercised stock options when then Merger was negotiated and approved, which gave him no voting rights. *See* Motion at 10-11.

[3] Stock ownership, of course, is only the beginning of the "controlling shareholder" analysis. Even ignoring Potashner's lack of stock ownership, Defendants also always have maintained that Plaintiff had no evidence that Potashner controlled any other director. *See* Motion at 11-12. The Court agreed. Final Order Findings of Fact ¶¶ 83-84.

[4] If anything, this contentious relationship demonstrates Potashner's lack of control over the rest of the Board. The Court concluded correctly that every member of the Board exercised his own independent business judgment in approving the Merger. Final Order Findings of Fact ¶¶ 83-84.

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B. Plaintiff Presented No Evidence Of Actual Fraud By A Majority Of Parametric's Board, Which Confirms That It Never Had Such Evidence.

Plaintiff does not dispute that it was required to rebut the business judgment rule for a majority of Parametric's Board of Directors by demonstrating, under NRS 78.200 and NRS 78.211, that this majority had engaged in "actual fraud" in approving the Merger. *See Parametric*, 133 Nev. at 428-29, 401 P.3d at 1109;[5] *see also* Final Order Conclusions of Law ¶ 8 ("Plaintiff failed to meet its burden of proving that a majority of the Board engaged in a knowing violation of law or intentional misconduct, or engaged in actual fraud."). Parametric's Board included six directors and Plaintiff still does not contend that it had any evidence suggesting that at least four of them engaged in "actual fraud." To be sure, Plaintiff certainly alleged that Potashner engaged in actual fraud, and the Court correctly rejected that argument, but Plaintiff never provided evidence (and still does not) suggesting that any of the other five directors engaged in actual fraud.

Plaintiff practically admitted at trial that it had no such evidence when it asked the Court, mid-trial, to ignore the Nevada Supreme Court's express instruction that Plaintiff needed to prove "actual fraud" by a majority of the Board in this case. *See* Aug. 24, 2021 Memorandum of Law at 2-4. Instead, Plaintiff urged this Court to hold it to a lesser standard under which Plaintiff would only need to establish that the directors acted in "bad faith." *Id.* Although the Court rejected that argument as inconsistent with the relevant statutory language and the Nevada Supreme Court's clear instruction in this case, Plaintiff continues to make this same claim in its Opposition. Opp. at 23; *Parametric*, 133 Nev. 428-29 n. 15, 401 P.3d at 1109.[6] Plaintiff cannot now claim to have acted in good faith when, plainly, Plaintiff believed that any hope of prevailing on this essential

[5] As stated by the Nevada Supreme Court, "the Nevada Legislature has . . . enact[ed] statutes that give conclusive deference to the director's judgment as to the consideration received for issued stock absent actual fraud. Thus, [Parametric] shareholders must show actual fraud in any direct equity dilution claim they may have in order to overcome the statutory deference afforded to the directors." *Parametric*, 133 Nev. 428-29 n.15, 401 P.3d at 1109 (emphasis added).

[6] Plaintiff also was aware of Nevada precedent stating that, in order to assert any breach of fiduciary duty claim against directors of a Nevada corporation, a plaintiff "must establish that the director or officer had knowledge that the alleged conduct was wrongful" because that is "the sole circumstance under which a director or officer may be held individually liable for damages stemming from the director's or officer's conduct in an official capacity." *See Chur v. Eighth Jud. Dist. Ct.*, 136 Nev. 68, 72 (2020).

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element of its claim depended on the Court disregarding clear statutory language and applicable Nevada Supreme Court precedent.

C. Defendants' Prior Settlement Of Stronger Claims That Did Not Require Proof Of A Controlling Shareholder Does Not Suggest That Plaintiff Could Pursue An Equity Expropriation Claim In Good Faith.

Plaintiff's Opposition focuses heavily on Defendants' decision to settle the direct and derivative claims asserted in the Class Action for nearly $10 million, which Plaintiff offers as purported proof of both its good-faith belief in the validity of its equity expropriation claims and also its belief that such claims carried substantial value. *E.g.*, Opp. at 3, 11, 12, and 19. In Plaintiff's revisionist history, the claims settled in the class proceedings "suffered from the very same deficiencies that supposedly rendered PAMTP's equity expropriation claim entirely incapable of support at trial" and were subject to the same calculation of damages that applied to Plaintiff's equity expropriation claim. Opp. at 26. Such arguments misrepresent the history and substance of this litigation to a shocking degree.

As an initial matter, Plaintiff does not dispute that the Assignors owned less than 10% of the shares at issue in the Class Action, meaning Plaintiff never could have claimed the same amount of potential damages even if Plaintiff asserted the exact same claims as the class and derivative plaintiffs. More importantly, Plaintiff did not (and could not) assert the same claims as the plaintiffs in the class and derivative action. In addition to the two direct claims that Plaintiff asserted at trial (equity expropriation and aiding-and-abetting this alleged expropriation), the class and derivative plaintiffs also asserted six derivative claims including (1) a garden-variety breach of fiduciary duty claim, (2) gross mismanagement, (3) abuse of control, (4) corporate waste, (5) aiding-and-abetting, and (6) unjust enrichment. *See* Dec. 1, 2017 Amended Complaint. The derivative claims were much more substantial claims than the direct ones and they warranted the settlement amount reached even though the direct claims were worthless. Unlike the direct claims, none of the derivative claims required proof of a controlling shareholder. Further, unlike the direct claims, none of the derivative claims had the same cap on compensatory damages that existed for equity expropriation claims under *Gentile*, which limits damages to the amount expropriated from minority shareholders by the controlling shareholder. *See Gentile*, 906 A.2d at 103. The derivative

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unjust enrichment claim, in particular, was focused on separate conduct occurring years after the Merger at issue here and did not require the class or derivative plaintiffs to prove "actual fraud."

The derivative claims did not "suffer from the very same deficiencies" that defeated Plaintiff's equity expropriation claim, as Plaintiff suggests (Opp. at 26), and the derivative claims could have resulted in substantially higher damages than the direct equity expropriation claim if Defendants were unsuccessful in defeating them at trial.[7] In a proverbial "tail wagging the dog" scenario, Plaintiff asks this Court to believe the equity expropriation claim played a material role in the class settlement discussions when it is clear (and dictated by common sense) that the comparatively stronger derivative claims drove those discussions. The fact that the equity expropriation claim was included in the eventual class settlement does not suggest that it had any merit or that Defendants (or, indeed, even the class or derivative plaintiffs) attached any value to that claim.

D. Plaintiff's Success On Pre-Trial Motions For Which It Bore No Burden Of Proof Does Not Suggest Plaintiff Pursued Its Equity Expropriation Claim In Good Faith.

As predicted, Plaintiff's next ploy to feign the appearance of good faith is to fall back on its prior victories at the pleading and summary judgment stages, when the evidentiary burdens still fell on Defendants. *See, e.g.*, Opp. at 20. At the pleading stage, Defendants had no opportunity to introduce facts from outside the complaint, such as Potashner's lack of stock ownership. At the summary judgment stage, Plaintiff argued that Potashner exercised effective control over Parametric and also argued, in the alternative, that he acted as part of a "control group" with Non-Party James Barnes and Defendant Elwood Norris, both of whom did own stock in Parametric. *See* May 26, 2021 Opposition to Motion for Summary Judgment at 13, 15 ("Even if Potashner cannot alone be deemed to have had effective control of Parametric, . . . a clear control group existed here" including "Potashner, [Non-Party Jim] Barnes, and [Defendant Woody] Norris"). The Court found

[7] To be clear, Defendants continue to believe they would have prevailed in the class proceedings. Nevertheless, litigation is always uncertain and failure to prevail, however unlikely, could have resulted in a substantial loss since the class and derivative plaintiffs were seeking astronomical damages. Thus, Defendants concluded that the rational course of action was to purchase peace of mind by settling the claims. That is precisely the type of sober reasoning Plaintiff should have employed here.

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the second argument—the existence of a control group—warranted a trial. *See* June 14, 2021 Hr'g. Tr. at 14:20-22. (denying motion for summary judgment because "Mr. Potashner has genuine issues of material fact as to whether he is part of a control group[.]"). But Plaintiff abandoned this meritless "control group" theory at trial. *See* July 16, 2021 Pre-Trial Memo at 8 (arguing that "Potashner exercised control over Parametric"); Aug. 16, 2021 Trial Tr. at 10:7-11 (Plaintiff's Opening Statement) (arguing that Potashner, alone, was "negotiating for his own self-interest in an attempt to use the merger to benefit himself.").[8] Under such circumstances, it is unsurprising that Plaintiff dodged an earlier dismissal in this case. It was not until trial, when the evidentiary burden fell on Plaintiff, that the Court was able to see just how deficient Plaintiff's claim truly was.

Regarding Plaintiff's failure to prove actual fraud, Plaintiff takes the mystifying position that Defendants failed to raise this argument before trial. Opp. at 22. But this contention was made repeatedly throughout the Director Defendants' Motion for Summary Judgment. *See, e.g.*, Director Defendants' June 11, 2021 Motion for Summary Judgment at 2, 13, and 15-16.[9] In fact, Plaintiff responded to this same argument that it now claims was never made by assuring the Court it would provide evidence at trial demonstrating that "at least five of the six Parametric directors" engaged in "intentional misconduct, fraud, or a knowing violation of the law." Pl. July 1, 2021 Opp. to Director Defendants' Motion for Summary Judgment at 16. It is unsurprising that this baseless representation was sufficient to stave off judgment under the deferential legal standard for summary judgment motions. It is equally unsurprising that this promised evidence was nowhere to be found at trial because it never existed. At trial, Plaintiff attempted to argue only that one director, not a majority, had engaged in fraud and failed to establish fraud even by that one director. For the rest, rather than present proof of actual fraud, Plaintiff unsuccessfully begged the Court on the last day of its case to relieve it of this obligation.

[8] Notably, despite being a purported member of this control group along with Potashner, Plaintiff rested its case without even calling Parametric's CFO, Jim Barnes. Further, when Plaintiff called Defendant Norris, the other member of this purported control group, Plaintiff did not ask even a single question attempting to establish the existence of such a group.

[9] The Director Defendants argued that Plaintiff could not prove "intentional misconduct, fraud, or a knowing violation of the law," which is a more lenient standard than "actual fraud."

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In short, Plaintiff avoided summary judgment by promising the Court evidence that Plaintiff knew it could never provide. Plaintiff promised evidence that Potashner shared "effective control" with a "control group" only to abandon any suggestion of a "control group" at trial. Plaintiff promised evidence that at least five Parametric Directors engaged in "intentional misconduct, fraud, or a knowing violation of the law" only to abandon this claim at trial and seek relief from any obligation to prove this essential element. Plaintiff's bait-and-switch tactics achieved their intended result by staving off summary judgment, but they do not establish any good-faith basis to believe that Plaintiff's equity expropriation claim had any merit.

E. The Evidentiary Sanctions Do Not Establish That Plaintiff Brought Its Claims In Good Faith.

Plaintiff also relies on the fact that the Court issued sanctions against three defendants in this case to suggest that Plaintiff's claims were brought in good faith. Opp. At 20. This nonsequitur falls well short. While the Court did determine that some small amount of evidence was not preserved over the eight-year history of this case and the Court granted and applied certain evidentiary sanctions to remedy this alleged loss, these sanctions had absolutely nothing to do with the primary failing in Plaintiff's case: an inability to demonstrate Potashner's stock ownership or fraud by a majority of the directors.

Indeed, Plaintiff ignores that this Court already rejected Plaintiff's efforts to use the evidentiary sanctions as a basis to establish control in this case. In a not-so-subtle admission of the weakness of its "control" claims, Plaintiff asked this Court to enter "an adverse factual inference finding that Potashner had control over Parametric at the time of the merger." *See* Pl. June 17, 2021 Pre-Evidentiary Hearing Brief at 13. The Court rejected that request at the evidentiary hearing on June 18, 2021 and asked Plaintiff to provide a "fallback position" that was actually "related to the lost . . . evidence." *See* June 18, 2021 Hr'g Tr. At 287:7-11. At that point, if not earlier, and with Defendants' second offer still pending, Plaintiff knew it would need to prove Potashner's purported control (including stock ownership) at trial with evidence, not by sanction. The Court's Order on July 15, 2021 further confirmed this fact by imposing no sanction related to control. Having failed to obtain the sanction it needed to patch up an otherwise insurmountable defect in its equity

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expropriation claim, Plaintiff proceeded to trial with full knowledge that it would not have evidence to prove stock ownership by the purported controlling shareholder. Plaintiff cannot credibly point to the evidentiary sanctions as providing a good-faith basis for this decision.

Again, it is undisputed that Potashner did not hold a single share of Parametric stock when the Merger was negotiated or approved and, thus, he was not a controlling shareholder at the time under any definition of "control." Although there are numerous other reasons to conclude that Potashner did not hold actual or effective control over Parametric, this fact, alone, is independently dispositive on this issue because a non-shareholder cannot be a controlling shareholder. *See supra* Section II.A. Plaintiff offers no explanation of what document could have possibly existed that would refute the undisputed fact that Potashner owned no stock when the Merger was negotiated or approved and, thus, could not possibly have been a controlling shareholder.

F. The Assignors' Statements And Conduct Demonstrate Their Bad Faith.

Despite *Beattie*'s clear instruction that this Court must consider whether Plaintiff and its Assignors acted in good faith (99 Nev. at 588-89, 668 P.2d at 274), Plaintiff takes great umbrage that Defendants question the Assignors' motives for pursuing this litigation. Opp. At 24. Although Plaintiff understandably would prefer not to discuss the Assignors' own conduct and statements, Plaintiff notably fails to dispute any of the following facts:

- The Court, not Defendants, stated on the record that Plaintiff's decision to file a new complaint and restart from the beginning a lawsuit that was already prepared for trial was unusual because "[t]ypically when I have this happen, I don't have a separate complaint that is filed to pursue the claim. It is a claim that is then tried as part of the class action case. It's not usually a separate case." Aug. 25, 2021 Trial Tr. At 40:8-11.
- Restarting this litigation from the beginning caused Defendants to incur substantial additional costs and fees, for which Defendants seek to recover only a portion through this Motion and their Memorandum of Costs.
- Assignor Kahn testified, under oath and in his own words, that he previously directed his legal counsel to make allegations against Turtle Beach that were

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"definitely not true" because exploiting litigation through allegations "but not really mean[ing] them" is "a course of action . . . to apply pressure" on companies in which he invests. *See* Aug. 16, 2021 Trial Tr. At 190:3-11, 196:2-21. Indeed, he testified that asserting such false legal claims was "part of [his] playbook" as an activist hedge fund manager. *Id*. Kahn continues to invest in Turtle Beach today, despite his "playbook" claims against the company.

- Assignor Weisbord is the father (and financial backer) of a former Turtle Beach employee who has spent years pursuing meritless wrongful termination claims in ongoing litigation against Turtle Beach in California state court, which he recently lost during a jury trial. Aug. 17, 2021 Trial Tr. At 129:22-25, 130:4-15.[10] He testified that his initial interest in this case arose out of a desire to merge the discovery records between the two cases. *Id.* at 71:4-9, 131:17-132:21.
- Every other Assignor had no material interest in this litigation and only participated as a favor to Assignor Weisbord. Mot. at 15 (citing testimony).

From these facts, which Plaintiff attempts to brush off as merely a "distract[ion]," combined with the glaring deficiencies in the claims Plaintiff chose to pursue, this Court can conclude easily that Plaintiff pursued its claims in bad faith. In fact, Plaintiff summarizes accurately what occurred here: "the Assignors gave up hundreds of thousands of dollars from the class settlement to pursue a claim they knew to be meritless in order to induce defendants to pay a [higher] settlement." Opp. At 25. Plaintiff now claims it would not have been "economically rational" for the Assignors to act in this way and Defendants agree that the Assignors' behavior was not economically rational. *Id.* But this only proves that their conduct was motivated by outside factors that had nothing to do with a good-faith assessment of the merits of their claims in this Court. The economically rational decision would have been to accept the offers of judgment, but the Assignors chose to pursue meritless claims for as long as possible because doing so served their well-established personal vendettas against Turtle Beach.

[10] Since the filing of this Motion, a jury rejected every claim asserted by Assignor Weisbord's son and also found that he had stolen confidential materials from Turtle Beach with malice, subjecting him to punitive damages under California's penal code.

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III. DEFENDANTS' OFFERS OF JUDGMENT WERE REASONABLE[11]

A. Plaintiff's Maximum Compensatory Damages Were Approximately $280,000.

Plaintiff does not dispute any of the following facts in its Opposition: (1) the measure of damages for an equity expropriation claim is limited to the fair value of the equity a controlling shareholder expropriates from minority shareholders, *see Gentile*, 906 A.2d at 103, 668 P.2d at 274,[12] (2) the only benefits Potashner received from the Merger included a severance payment and the acceleration of certain stock options, which had a publicly disclosed (unrealized) value of $2.8 million, and (3) the Assignors owned less than 10% of pre-Merger Parametric's outstanding stock, so their *pro rata* share of any damages would be 10% of the total amount expropriated, if an expropriation occurred. As such, Plaintiff cannot (and does not) reasonably dispute that $280,000 represented the maximum amount of compensatory damages if Plaintiff had a valid claim. Given the obvious deficiencies in Plaintiff's claims, both offers of judgment were reasonable but, at minimum, the $150,000 offer on a $280,000 claim was eminently reasonable.

Rather than dispute this straightforward analysis, Plaintiff suggests that a $280,000 maximum for its direct equity expropriation claims is somehow inconsistent with Defendants' decision to settle the class and derivative claims for nearly $10 million. Opp. At 26. Again, Plaintiff brushes by the fact that its Assignors owned less than 10% of the stock at issue in the Class Action. Similarly, Plaintiff ignores the undisputed fact that the Assignors sold approximately 97% of their stock before assigning their claims to Plaintiff, suggesting that Plaintiff could, at best, assert claims on behalf of only a fraction of a percent of the stock at issue in the Class Action. *See infra* Section III.B.[13]

Tellingly, Plaintiff says it "us[ed] the same calculations as the class plaintiffs" to arrive at its own estimate of damages of $10 million (10% of the $100 million sought by the class plaintiffs).

[11] Reasonableness of an offer is measured both in terms of timing and amount. *Beattie*, 99 Nev. at 588-89, 668 P.2d at 274 . Plaintiff disputes only that the amount of the offers was unreasonable.

[12] On July 19, 2021, this Court ordered that damages in this action would be limited to those available under *Gentile*. *See* Aug. 4, 2021 Order at 2-3 (precluding Plaintiff from introducing evidence or testimony to "support potential measures of damages other than those allowed under [*Gentile*]").

[13] Plaintiff does not dispute that its Assignors held only 28,700 shares of Parametric stock at the time of the assignments, which is only 3.5% of the stock the Assignors claim to have held at the time of the Merger.

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Id. But, as is explained in detail above, the value of the class claims rested almost entirely with the derivative claims that Plaintiff did not, and could not, assert here. To the extent Plaintiff assumed the damages from derivative claims not governed by *Gentile* could be transplanted to a direct equity expropriation claim governed by *Gentile*, Plaintiff committed a serious error in legal judgment. In fact, Plaintiff's damages expert confirmed at trial that he knew the Court had already limited damages in this case to those set forth in *Gentile*. *See* Aug. 17 Trial Tr. At 54:18-23. And yet, he admitted that he had never even read *Gentile* and had "no idea" if his calculations were consistent with it. *Id*. at 54:18-55:6. Unsurprisingly, his calculations bear no resemblance to a *Gentile* analysis. As he explained, he attempted to calculate only the value that he believed Parametric lost (i.e., derivative damages) and not the value of any equity that a controlling shareholder stole from the minority shareholders (i.e., equity expropriation damages). *See id*. at 11:19-12:5, 13:1-5. When asked if his calculated damages represented an amount that was "stolen" by a controlling shareholder (or anyone else, for that matter), his answer was an unequivocal "no." *Id.* 13:1-5. Plaintiff should have listened to its own expert and realized the damages that he calculated for the derivative claims in the class and derivative proceedings had nothing to do with the equity expropriation claims that Plaintiff asserted here. It was unreasonable for Plaintiff to assume otherwise.

Plaintiff also says a $280,000 maximum compensatory damages award is inconsistent with the Settling Defendants' decisions to settle their claims for a combined $400,000. Not so. To begin with, Plaintiff sought damages in excess of compensatory damages. Plaintiff sought prejudgment interest dating back to the date this litigation began in August 2013. Plaintiff also sought punitive damages. Defendants also expected fees and costs for a three-week trial to be significant. The parties also anticipated appellate proceedings regardless of which side prevailed at trial. In short, the Settling Directors easily could have determined (and apparently did determine) that failure to prevail at trial would cost more than $400,000 even though they believed that compensatory damages should be no more than $280,000. Additionally, as economically rational actors participating in settlement discussions in good faith, the Settling Directors had to consider the possibility (however unlikely) that the Court would not limit Plaintiff's compensatory damages to

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$280,000. Considering all these factors together led them to conclude that the settlement amount was a tolerable price to pay to remove any trial and appellate risk and ongoing litigation expense. This decision in no way suggests any genuine belief that Plaintiff would be entitled to compensatory damages in excess of $280,000 if it somehow prevailed on its equity expropriation claim.

B. Plaintiff Does Not Address The Court's Determinations Regarding The Uncertainty Of Plaintiff's Standing.

While $280,000 represents the maximum amount of compensatory damages that Plaintiff could have hoped to receive, it is highly unlikely that Plaintiff would have recovered this maximum amount even if it had prevailed because it is unclear that Plaintiff actually had standing to pursue any claims. It is undisputed that that the Assignors held no more than 28,700 collective shares at the time they assigned their claims to Plaintiff and the Assignors did not know if they had held any of those specific shares at the time of the Merger. Final Order Findings of Fact ¶ 10. Every other share that the Assignors claim to have held on the date of the Merger was sold to third parties before the Assignors purported to assign any claims to Plaintiff. *Id.* Those sales reduced Plaintiff's potential recovery in this action dramatically because the right to bring any equity dilution claim against Defendants was sold with those shares. *See Urdan v. WR Capital Partners, LLC*, 244 A.3d 668, 677 (Del. 2020). At trial, the Court stated it was "troubled by the standing arguments under *Urdan*," but was "not addressing those because I've addressed the substantive issues." Aug. 25, 2021 Hr'g Tr. At 86:12-17. If those "standing arguments" had been resolved in Defendants' favor then it would have reduced the available damages substantially, potentially to zero. Plaintiff offers no response to this severe, additional impediment to its case anywhere in its 30-page Opposition.

IV. PLAINTIFF FAILS TO ESTABLISH ANY REASONABLE BASIS FOR REJECTING DEFENDANTS' OFFERS

When deciding whether and when to settle claims with Plaintiff and the class and derivative plaintiffs, Defendants accounted for the possibility that their arguments regarding control, fraud, damages, and standing, among others, might fail. Similarly, the class and derivative plaintiffs accounted for the possibility that Defendants would prevail on these same arguments. Plaintiff, on

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the other hand, did nothing of the sort. Instead, Plaintiff appears to have assumed without question that it purchased a guaranteed victory when it opted out of the class action, that the class and derivative settlement figure was a "floor" for their damages, and that it would be entitled to millions of dollars beyond that floor, based exclusively on overinflated potential damages that had been calculated in the class and derivative proceedings for derivative claims that Plaintiff was not able to assert on its own.

Blinded by this potential windfall (and also by the ulterior motives of Assignors Weisbord and Kahn for pursuing this meritless litigation), Plaintiff disregarded numerous red flags along the way. Plaintiff evidently never considered how it would prove that someone who was not even a shareholder of Parametric was nevertheless a controlling shareholder. Plaintiff evidently never considered how it intended to prove that a majority of Parametric's board engaged in actual fraud when it had no evidence to support such a claim. Plaintiff similarly ignored numerous other litigation risks including the low amount of potential damages, uncertainty surrounding Plaintiff's standing to assert any claim, the untimeliness of Plaintiff's claims, and jurisdictional issues with the claims asserted against out-of-state Defendants.[14] Had Plaintiff taken a sober look at its claims, it would have seen the high likelihood of failure, as well as the low potential reward even if successful, and would have realized Defendants' offers were reasonable and should not have been ignored. Plaintiff's unwarranted optimism for a better outcome is not a reasonable basis for Plaintiff to have rejected these offers.

V. PLAINTIFF DOES NOT DISPUTE ANY FACTOR UNDER *BRUNZELL* DEMONSTRATING THAT DEFENDANTS' FEES WERE REASONABLE AND JUSTIFIED

As stated in Defendants' Motion, a determination of whether attorneys' fees are reasonable and justified depends on consideration of the four factors set forth in *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). The *Brunzell* factors are:

> (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the

[14] The Non-Director Defendants asserted statute of limitations and jurisdictional defenses that the Court determined presented questions of fact that needed to be addressed at trial. The Court had no occasion to consider these issues because it entered an early judgment against Plaintiff under NRCP 52(c).

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> work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived.

Plaintiff does not address, let alone refute, any of these factors. Plaintiff argues only that the amount of the fees incurred was "excessive," which is incorrect.

First, Plaintiff argues that counsel for the director defendants (Sheppard Mullin and Holland & Hart) represented both Potashner and also the settling defendants so their fees must be reduced proportionately to account only for Potashner. Opp. At 28. Plaintiff cites no authority for its newly minted theory that Potashner is now entitled to less than his full amount of fees following the offers of judgment because he was represented jointly along with other directors who chose to settle. Moreover, the Settling Directors' settlements had no effect on the amount of fees that Potashner incurred because Plaintiff called three of the four Settling Directors at trial. Even if they never had been parties, Potashner's counsel still would have needed to prepare for their testimony at trial. At minimum, after the Settling Directors settled with Plaintiff, all fees incurred by Sheppard Mullin and Holland & Hart were incurred for Potashner exclusively. In addition, Potashner has always been Plaintiff's main target and, given Plaintiff's theory that Potashner somehow controlled the Board, Plaintiff cannot (and has not) identified a single time-entry that Potashner did not necessarily incur to defeat Plaintiff's spurious theory of control.

Second, Plaintiff complains that the fees greatly exceed the maximum compensatory damages of $280,000 in this case. *Id.* While this is true, it is both unsurprising and entirely reasonable given Plaintiff's conduct in this case. Despite the wealth of counter-authority, Plaintiff has insisted throughout this litigation that it was entitled to millions of dollars in compensatory damages, plus eight years' worth of prejudgment interest, plus punitive damages. Defendants have never agreed with this position and tried repeatedly to resolve this matter before accruing fees and costs greatly exceeding the value of this case. Plaintiff refused to do so, leaving Defendants with no choice but to continue to litigate a claim they believed to hold no value. If Plaintiff had come

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up with a more realistic assessment of damages, Plaintiff almost certainly would not have taken this case all the way to trial. It is unreasonable for Plaintiff to now complain that the fees exceed the value of the case when Defendants did everything in their power to avoid that outcome, but Plaintiff forced it to occur.

Third, Plaintiff complains that the Non-Director Defendants' counsel charged more than the Director Defendants' counsel. *Id.* This, too, is as unremarkable as it is irrelevant because, as Plaintiff is fully aware, the Non-Director Defendants' counsel took the laboring oar on most joint-defense activities. As the detailed time entries attached to the Motion make clear, the Non-Director Defendants took the lead on drafting many of the parties' joint motions, including two out-of-three joint motions for summary judgment, discovery motions, motions in limine, and trial briefs. They also took the lead on pretrial disclosures, including preparation of the joint defense exhibit list. They also took the lead on joint-defense post-trial activities, including this Motion.[15] The Non-Director Defendants also had unique defenses to litigate, including substantial concerns regarding the statute of limitations and personal jurisdiction. Although Plaintiff has access to detailed time entries from each defense firm, Plaintiff does not contend that the Non-Director Defendant and the Director Defendants double billed for the same activities at any point, nor does Plaintiff suggest that any particular task performed by either set of Defendants' counsel was unnecessary or duplicative. The Non-Director Defendants incurred greater legal fees simply because their counsel performed more of the work needed for this trial.[16]

Lastly, Plaintiff complains that out-of-state counsel for the Defendants charged higher rates than the Nevada attorneys in this lawsuit. While this is true, such rates were not unreasonable. Plaintiff also hired out-of-state counsel who charged comparable rates and affirmed under penalty

[15] Prior to the hearing on this Motion, Defendants will be submitting updated declarations of their fees to account for the fees they continued to incur since filing the Motion. Defendants will further seek fees in connection with Plaintiff's appeal should Defendants prevail.

[16] This comparison between the work performed by counsel for the Non-Director Defendants and counsel for the Director Defendants does not diminish the significant and necessary work performed by counsel for the Director Defendants, who questioned many of the witnesses at trial and prepared and argued the winning Rule 52(c) Motion (among many other important tasks). Rather, it is simply a recognition of the fact that the parties increased efficiencies by agreeing that counsel for the Non-Director Defendants would take the laboring oar on most joint defense tasks and were instrumental in orchestrating Defendants' presentation at trial.

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of perjury that such rates were reasonable in this matter. *See* January 12, 2021 Declaration of Adam M. Apton ("[M]y current hourly billing rate [is] $900 per hour, which has been approved as reasonable in numerous other securities class action settlements, including within this Court in connection with the class action settlement of this action, and are well within the range of hourly rates that have been accepted by courts as reasonable in other securities or shareholder litigation across the country."). Moreover, in the class proceedings, out-of-state counsel to the plaintiffs charged rates exceeding $1,000 per hour per partner. *See* April 17, 2020 Declaration of David Knotts Ex. A.[17] Notwithstanding Plaintiff's failure to present any evidence on at least two of the most basic elements of its claim, this case raised significant additional issues about complicated and unresolved aspects of Nevada and Delaware law. Plainly, all parties agreed that out-of-state counsel with particular expertise in such issues was warranted. Both Defendants and Plaintiff retained out-of-state counsel charging similar hourly rates and Plaintiff cannot now claim that such rates were excessive.[18]

VI. PLAINTIFF'S REQUEST FOR THE COURT TO DISREGARD THE *BEATTIE* ANALYSIS AND CONCLUDE THAT PLAINTIFF'S TRIAL LOSS WAS A FAVORABLE RESULT IS MERITLESS

Absent any credible argument that the *Beattie* factors weigh in Plaintiff's favor, Plaintiff ultimately resorts to asking this Court simply to ignore this analysis entirely. Without citation to Nevada authority, Plaintiff suggests that this Court should pretend as if Plaintiff prevailed and won an award exceeding Defendants' offers of judgment because the Settling Defendants settled with Plaintiff before the conclusion of the trial for $100,000 each, totaling $400,000. But nothing in NRCP 68 suggests that the rule is intended to be interpreted this way. To the contrary, Nevada courts have recognized consistently that NRCP 68 requires a plaintiff who rejects an offer of judgment to obtain a more favorable result at trial to avoid the rule's penalty provision. *See, e.g.*, *Beattie*, 99 Nev. at 588, 668 P.2d at 274 (Court must consider, among other factors "whether the

[17] Class counsel was unable to collect the full extent of its fees because the settlement limited their recovery to 25% of the settlement fund and not because of any determination that their hourly rates were unreasonable or excessive.

[18] To the extent the Court concludes otherwise, it can impose a reasonable discount on the rates charged by Defendants' out-of-state counsel. Plaintiff provides no basis for rejecting these rates in their entirety.

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plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith.") (emphasis added); *Popowitz v. B.A. Sundown, LLC*, 130 Nev. 1231, 2014 WL 3809488, at *1 (Nev. July 31, 2014) ("Under NRCP 68, if an offeree rejects an offer of judgment and fails to obtain a more favorable judgment at trial, the offeree cannot recover attorney fees or costs and must pay the offeror's post-offer costs and fees." (emphasis added)).[19] Plaintiff did not obtain a more favorable judgment "at trial;" its claims were dismissed under NRCP 52©.

Under the federal equivalent to NRCP 68, FRCP 68, the United States Supreme Court also has recognized that a plaintiff must obtain a more favorable result "at trial" after rejecting an offer of judgment. *See Marek v. Chesny*, 473 U.S. 1, 5 (1985) (FRCP 68 "prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success upon trial on the merits.") (emphasis added). For this reason, courts interpreting FRCP 68 often recognize that any amount received in a pre-trial settlement should not be considered when determining if a party obtained a more favorable result after rejecting an offer of judgment. *See, e.g.*, *Deferio v. Board of Trustees*, 2014 WL 295842, at *11 (N.D.N.Y. Jan. 27, 2014) (FRCP 68 "applies only in cases resulting in a judgment obtained after either a trial or hearing to determine the extent of liability."); *Williams v. Greifinger*, 1999 WL 239684, at *2 (S.D.N.Y. Apr. 23, 1999) (refusing to consider settlement when applying FRCP 68).[20]

[19] *See also, e.g.*, *Jacks v. 702 LLC*, 2020 WL 6204325, at *2 (Nev. Ct. App. Oct. 21, 2020) ("The district court may order a party to pay the reasonable attorney fees if that party rejects the offer of judgment and then fails to obtain a more favorable judgment at trial." (emphasis added)); *Fire Red LLC v. Cassim Scholarshare, LLC*, 133 Nev. 1008, 2017 WL 6806308, at *3 (Ct. App. Dec. 29, 2017) ("If the offeree rejects the offer and then fails to obtain a more favorable judgment at trial, the district court may order the offeree to pay the offeror reasonable, post-offer attorney fees." **(**emphasis added and omitted)); *Green v. Buchanan*, 133 Nev. 990, 2017 WL 6513646, at *2 (Ct. App. Dec. 11, 2017) ("NRCP 68 provides that if a party rejects an offer of judgment and fails to obtain a more favorable judgment at trial, the district court may order that party to pay the offeror reasonable attorney fees." (emphasis added)**).**

[20] *See also Good Timez, Inc. v. Phoenix Fire & Marine Ins. Co.*, 754 F. Supp. 459, 462 (D.V.I. 1991) ("Rule 68 is inapplicable to cases that end by settlement between the parties"); *Hutchison v. Wells*, 719 F. Supp. 1435, 1442 (S.D. Ind. 1989) (Rule 68 "contemplates situations where offers of judgment are spurned and the case subsequently goes to trial" and it would be "problematic" to apply to cases that end in settlement); *E.E.O.C. v. Hamilton Standard Div., United Tech. Corp.*, 637 F. Supp. 1155, 1158 (D. Conn. 1986) ("The court has found no authority for the proposition that the offer of judgment provisions of [FRCP] 68 apply to cases that end in settlement and a stipulated dismissal as well as to cases that end with the entry of judgment after trial.").

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Against this backdrop, Plaintiff cites only a single, unreported federal case, in which, unlike here, a plaintiff prevailed on its underlying claims, but failed to obtain damages exceeding a joint offer of judgment made by two defendants, one of which settled before trial. *See Stone Creek, Inc. v. Omnia Italian Design, Inc.*, 808 F. Appx. 459 (9th Cir. 2020). The court declined to hold the successful plaintiff responsible for the non-settling defendant's attorneys' fees because the pre-trial settlement amount with the settling defendant exceeded the joint offer. Unlike the wealth of authority cited above, which discusses at length the policies and interpretations underlying NRCP 68 and its federal equivalent, the nonprecedential opinion cited by Plaintiff is devoid of any analysis of the issue and based its holding on wildly different facts in which, unlike here, the plaintiff asserted meritorious claims and prevailed.

Moreover, contrary to Plaintiff's assertion that its proposed rule would "encourage settlement" (Opp. At 18), application of Plaintiff's proposed new rule would actually do the opposite. For example, here, Plaintiff waited until the eve of trial to settle with the Settling Defendants, at which point Plaintiff knew it would be too late for any non-settling Defendants to issue a new offer of judgment under NRCP 68, which requires such offers to be made at least 21 days before trial. If it were true that these settlements could be used to eliminate the other Defendants' rights under NRCP 68, leaving them with no opportunity to issue a revised offer or otherwise remedy this issue, then the other Defendants would have had a strong incentive to oppose these settlements.[21] Using NRCP 68—a rule designed to encourage settlements—in a manner that plainly would have discouraged settlement efforts in this case would have produced an absurd result, yet it is precisely what Plaintiff now says should have happened here.[22] This is why courts repeatedly have rejected applying NRCP 68's federal equivalent in such ways. *See, e.g.*, *Deferio*,

[21] Plaintiff knew that settlement with the Settling Defendants required approval from Turtle Beach because Turtle Beach would be indemnifying the Settling Defendants for some portion of the settlement amount. *See* August 18, 2021 Director Defendants Motion for Determination of Good Faith Settlement at 9. Plaintiff now suggests that Nevada law punishes Turtle Beach for its role in allowing these settlements to occur.

[22] In multi-defendant cases, this result would be even more absurd in situations where settling defendants did not require the consent or approval of the non-settling defendants. Plaintiffs essentially could avoid proper application of NRCP 68 by settling with one defendant for one dollar more than the offered amount and then proceeding to trial against everyone else. Plaintiff's proposed rule does not encourage settlements, it encourages gamesmanship that would render NRCP 68 toothless.

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2014 WL 295842, at *12 (FRCP 68 cannot be interpreted to cause "an absurd and perverse result" of "discouraging . . . settlements"); *Hutchison*, 719 F. Supp. At 1443 (Refusing to consider the amount received in a settlement for Rule 68 purposes because "[i]f Rule 68 applied to the present case, it would provide a disincentive for attorneys to accept settlements"). Plaintiff provides no basis for the Court to endorse new law that would undercut the entire purpose of NRCP 68 by discouraging settlements.

Defendants also note that both offers of judgment were made "inclusive of attorneys' fees, costs of suit, and prejudgment interest, and prohibits any application or motion for a post-acceptance award of taxable costs, attorney's fees, or interest." *See* July 1, 2020 Offer of Judgment; May 28, 2021 Offer of Judgment. This means that Plaintiff's final result after trial is not zero, but actually will be a significant negative number that will account for Defendants' recoverable costs. As the undisputed prevailing party, Defendants collectively are seeking recoverable costs well in excess of the $400,000 Plaintiff obtained by settling with the Settling Defendants. Thus, even if the Court were to accept Plaintiff's strained reading that the Court should consider more under NRCP 68 than the specific amount obtained at trial, it is still clear that Plaintiff would have been better off accepting either of the offers of compromise and avoiding substantial costs it now must pay Defendants as the prevailing parties after trial.

Plaintiff went to trial and failed to survive a motion for judgment under NRCP 52©. It recovered nothing at trial, which obviously is a less favorable result than Plaintiff would have achieved under either of Defendants' offers. Application of the *Beattie* factors demonstrate that Defendants are entitled to their fees. This Court should reject Plaintiff's desperate effort to avoid the results of the *Beattie* analysis set forth above.

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VII. CONCLUSION

Under NRCP 68 and the *Beattie* factors, Defendants are entitled to their attorneys' fees because they made two reasonable offers, which Plaintiff rejected before having their case dismissed under NRCP 52(c) at trial.

Dated: October 28, 2021

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CERTIFICATE OF SERVICE

As an employee of Snell & Wilmer L.L.P., I certify that I served a copy of the foregoing **REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR ATTORNEYS' FEES** on the 28th day of October 2021, via e-service through Odyssey File and Serve to the email addresses listed below:

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DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION	Case No.: A-13-686890-B Dept. No.: XXII **PAMTP, LLC'S REPLY IN SUPPORT OF MOTION TO RETAX NON-DIRECTOR DEFENDANTS' MEMORANDUM OF COSTS** **(HEARING REQUESTED)**
This Document Relates To: ALL ACTIONS.	

I. INTRODUCTION

The Non-Director Defendants' audacious approach to defending this case and then seeking exorbitant costs can be summed up in a single line from their Opposition—they consider an evidentiary hearing to remedy their own willful destruction of evidence, which resulted in sanctions being imposed against some of them, to have been an "unnecessary sideshow." *See* Non-Director Defendants' Opposition at 12:17-19. In other words, vindicating the integrity of the Court's judicial process and the search for truth mean "nothing" for the Non-Director Defendants. *See id.*

The balance of the Opposition to PAMTP's Motion reveals the same casual disregard for NRS 18.020 and the "narrow scope" of recoverable costs in litigation. *See Taniguchi v. Kan*

Pacific Saipan, Ltd., 566 U.S. 560, 573 (2012). In the end, the Non-Director Defendants provide no reason for the Court to deny PAMTP's Motion. The Non-Director Defendants filed a bloated Memorandum of Costs[1] listing amounts that fall well outside NRS 18.005 and far below the reasonable and necessary threshold established by *Cadle Co. v. Woods & Erickson LLP*. As a result, PAMTP requests the Court grant its Motion and retax the Non-Director Defendants' Costs.

II. ARGUMENT

A. The Non-Director Defendants Cannot Collapse the Distinction Between the Class Action and This Action by Relying on Consolidation.

In defending their attempt to seek costs incurred in the Class Action, the Non-Director Defendants argue that because PAMTP consolidated this action with the Class Action and sought prior discovery from the Class Action under NRCP 26(h), therefore there is only "one, singular action" related to the Non-Director Defendants' tortious behavior. *See* Opposition at 9:10-11. Thus, the Non-Director Defendants argue, they have a right to recover all their costs incurred in the Class Action dating all the way back to 2013. *See id.* at 8:16-24.

Nonsense. The Non-Director Defendants ignore a tsunami of case law from the Nevada Supreme Court and the federal courts holding that consolidated cases under Rule 42 remain independent and distinct actions. In unambiguous terms, the Nevada Supreme Court has explained that "[c]onsolidated cases retain their separate identities." *Matter of Est. of Sarge*, 134 Nev. 866, 870-71, 432 P.3d 718, 722 (2018). This follows the United States Supreme Court declaring in 2018 that for "[o]ver 125 years, this Court, along with the courts of appeals and leading treatises, interpreted [consolidation] to mean the joining together—but not the complete merger—of constituent cases." *Hall v. Hall*, 138 S. Ct. 1118, 1125 (2018). As a result, "one of multiple cases consolidated under the Rule retains its independent character . . . regardless of any ongoing proceedings in other cases." *Id.*

The case before the Court is no different. As the Non-Director Defendants concede, PAMTP's assignors opted out of the Class Action, assigned their claims to PAMTP, and then

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[1] Unless indicated otherwise, all capitalized terms have the same meaning as in PAMTP's Motion.

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PAMTP filed an independent complaint. Though PAMTP moved to consolidate for convenience—the purpose for which NRCP 42 exists—this opt-out case and the Class Action did not lose their character as independent actions under Nevada law. *See In Re Wynn Resorts, Ltd.*, 465 P.3d 1184 at *2 (Nev. 2020) (unpublished) ("[C]onsolidation is purely a rule of convenience, and does not result in actually making such parties defendants or interveners in the other suit."). The Class Action is a separate "action" from PAMTP's opt-out action even after consolidation, and so the Non-Director Defendants are only entitled to recover their costs incurred in the opt-out case itself. *See* NRS 18.020(3) (prevailing party in the "action for the recovery of money or damages" may recover costs).

Moreover, recognizing that the Class Action and PAMTP's case are distinct makes good sense in the context of awarding costs. Every penny the Non-Director Defendants spent defending the Class Action would have been spent regardless of whether PAMTP opted out and brought its own suit. It thus makes no sense, and would be a perverse windfall, for PAMTP to be required to cover costs it did not cause to be incurred. The fortuity that PAMTP consolidated the cases has no bearing, whatsoever, on that common-sense conclusion.

Trying to skirt this straightforward result, the Non-Director Defendants argue that PAMTP moved for relief under NRCP 26(h) in seeking prior discovery from the Class Action, which, the Non-Director Defendants insist, means PAMPT is judicially estopped from arguing the Class Action and the opt-out action are separate actions for purposes of recovery of costs. *See* Opposition at 9:10-19. This argument is an artful dodge of the substance of PAMTP's prior motion. Like NRCP 42 on consolidation, NRCP 26(h) is a rule of convenience allowing a party to seek prior discovery in a case without having to endure the added time and expense of serving new NRCP 33 and 34 discovery requests and conducting additional depositions of prior deponents. *See* NRCP 26(h).

PAMTP moved for relief under NRCP 26(h) on that basis: discovery having already occurred in the Class Action, it would be wasteful and contrary to judicial economy to require PAMTP to serve new discovery requests and for the Non-Director Defendants to have to answer the same with new objections and responses. *See* PAMTP's Motion to Compel Discovery Pursuant

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to Rule 26(h) at 3:18-27 (noting the Class Action parties had produced over 100,000 documents and deposed 17 fact and expert witnesses). The Court agreed and granted PAMTP's NRCP 26(h) motion. *See generally* Order Granting PAMTP's Motion to Compel Discovery Pursuant to Rule 26(h).[2] Nothing in PAMTP's attempt to lower the parties' costs through requesting NRCP 26(h) relief is a concession that this action and the Class Action lost their independence under NRCP 42.

Finally, the Non-Director Defendants argue that it was "procedural gamesmanship" for PAMTP to file a separate action and that doing so "needlessly increased" the Non-Director Defendants' costs. Opposition at 11:6-10 (emphasis in original). This is untrue. As a preliminary matter, PAMTP had the absolute right under the Nevada Rules of Civil Procedure to opt out of the Class for any or no reason, as they were advised in opt-out notices Defendants drafted and the Court approved. PAMTP cannot be punished for following court instructions and seeking individualized redress, as its constitutional and statutory right. And PAMTP's assignors briefed the reasons why they were opting out of the Class Action to file this independent action—Class Counsel's delay and ultimate refusal to provide the assignors with information to evaluate the "fairness, adequacy, or reasonableness" of the Class Action settlement. *See* Objector Barry Weisbord's Opposition to Motion for Preliminary Approval of Settlement at 2:17-3:3. It was hardly "gamesmanship" for PAMTP's assignors to opt out of a settlement and file this action in May 2020 when they were at an informational disadvantage because Class Counsel refused to fulfill their duties to all class members. *See id.* On the contrary, it was only PAMTP's assignors asserting their rights to a reasonable and fair settlement. *See id.*

Nor did this needlessly increase costs as the Non-Director Defendants argue. Again, the Non-Director Defendants would have incurred the costs of the Class Action regardless of whether PAMTP opted out, and PAMTP does not object to paying the *reasonable* costs specific to its opt-

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[2] On the eve of the hearing on PAMTP's NRCP 26(h) motion, the Non-Director Defendants conceded that production of the prior discovery would "allow for a more robust discussion" at the Court's Rule 16 scheduling conference about "the scope of any remaining discovery that needs to be performed, as well as the scheduling of the dispositive motions and trial." Non-Director Defendants' Notice Regarding Plaintiffs' Motion to Compel at 1:24-28. Thus, the Non-Director Defendants embraced the convenience and cost savings brought about by PAMTP's NRCP 26(h) request.

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out action. Thus, the Non-Director Defendants deposed PAMTP's assignors just as they would have done in the Class Action, and they filed dispositive motions and pretrial motions just as they would have done in the Class Action. As the Non-Director Defendants note, PAMTP conducted only a single deposition and did not engage in extensive discovery requests because much of the discovery had already occurred in the Class Action. Thus, PAMTP's choice to opt out and file a separate action did nothing to the Non-Director Defendants' costs that would not have occurred in the Class Action.

The Non-Director Defendants are not entitled to merge the Class Action with PAMTP's action based on tortured readings of NRS 18.020 or accusations that asserting basic litigation rights amounts to gamesmanship. This action was independent from the Class Action, and so the Non-Director Defendants cannot recover costs before May 2020 that they incurred in the Class Action.

B. The Non-Director Defendants Daringly Ask the Court to Reward Them for Their Destruction of Evidence.

In seeking costs for the evidentiary hearing about the Non-Director Defendants destroying evidence, the Non-Director Defendants exclaim that the hearing—which prompted evidentiary sanctions—was an "unnecessary sideshow that accomplished nothing." Opposition at 12:17-19. They also argue that PAMTP has the burden under NRS 18.020 to show that the Non-Director Defendants cannot recover costs to remedy their own spoliation. Opposition at 12:7-9.

But this turns the burden under NRS 18.020 and *Cadle Co.* on its head. It is the party moving for costs that must show they were "**reasonable**, **necessary**, and actually incurred." *Cadle Co.*, 131 Nev. 114, 121, 345 P.3d 1049, 1054 (2015) (emphasis added). The Non-Director Defendants cannot meet the first two prongs of that test related to costs incurred for the evidentiary hearing. It is not reasonable for a party to recover costs brought about by its own spoliation of evidence. Nor is it necessary, as the moving party could have avoided such costs easily by complying with its duty to preserve evidence. The Non-Director Defendants have not met their burden under *Cadle Co.*, and it is not PAMTP's burden to show otherwise.

The Non-Director Defendants suggest this is a "victory test" under which a defendant could not recover costs associated with a motion it did not win. Opposition at 12:2-4. On the contrary,

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it is a common decency test that precludes a defendant from destroying evidence, flouting its obligations to the Court, and then recovering costs from an evidentiary hearing associated with its bad behavior. PAMTP does not seek to cut off the Non-Director Defendants' costs because they lost a motion before prevailing at trial. Instead, PAMTP seeks to cut off the Non-Director Defendants' costs because, as the Court held, they violated their duties to the Court and frustrated the search for truth.

C. The Non-Director Defendants Confirm Their Expert Did Not Testify, Which Precludes Them from Recovering His Costs.

In its Motion, PAMTP cited black letter law holding that an expert must testify to recover more than $1,500.00 in expert fees under NRS 18.005(5). *Pub. Employees Ret. Sys. of Nevada v. Gitter*, 133 Nev. 126, 134, 393 P.3d 673, 681 (2017). The Non-Director Defendants try to muddle this clear law by arguing they disclosed their expert John Montgomery as a testifying expert and that he would have testified but for PAMTP's loss on the Non-Director Defendants' NRCP 52 motion. *See* Opposition at 15:7-8. The Non-Director Defendants claim this case is directly analogous to *Logan v. Abe*, in which the Nevada Supreme Court upheld an award of defendants' rebuttal expert fee because the plaintiffs abandoned their initial expert "on the eve of trial" and chose not to have him testify. 131 Nev. 260, 268, 350 P.3d 1139, 1144 (2015). The fee in *Logan* was also "supported by NRS 17.115" covering offers of judgment. *See id.*

But *Logan* is not analogous to this case and provides no support for the Non-Director Defendants' attempts to recover $55,838.95 in expert witness fees for an expert who did not testify. First, while the Nevada Supreme Court in *Logan* supported the rebuttal expert witness fee under NRS 17.115 covering offers of judgment—an independent basis to award costs beyond NRS 18.020—the Nevada Legislature has since repealed that provision. That repealed provision cannot justify the Non-Director Defendants' expert fee.

Second, PAMTP did not abandon its initial expert on the eve of trial as the plaintiffs did in *Logan*. Quite the opposite, PAMTP put forth its expert, JT Atkins, on the second day of trial, and he persuasively testified about the damages the Non-Director Defendants caused PAMTP during the challenged transaction. *See* Aug. 17, 2021 Trial Transcript at 7-48. PAMTP did not cause the

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Non-Director Defendants to incur unnecessary rebuttal expert costs during discovery only to pull the rug at trial as the *Logan* plaintiffs did by refusing to introduce expert testimony.

Third, the Nevada Supreme Court decided *Logan* two years before it again reaffirmed in *Gitter* that an expert must testify to receive more than $1,500 in fees. *See* 133 Nev. at 134, 393 P.3d at 681. Thus, on the question before the Court—whether a party may recover expert fees over $1,500 for an expert that did not testify—*Gitter* rather than *Logan* provides the clear answer. A party cannot recover expert fees greater than the statutory limit unless its expert testifies.[3] The Non-Director Defendants admit that their expert did not testify; therefore, they cannot recover $55,838.95 in expert fees incurred after May 2020.

D. The Non-Director Defendants Do Not Credibly Justify Their $123,507.80 in "Trial Support" Costs Incurred at Out-of-Market Rates and Well Beyond What Was Necessary.

The Non-Director Defendants concede that, contrary to normal practice of a single war room at local counsel's office, they provided what they call "basic" computers, monitors, and other equipment for three other hotel rooms belonging to out-of-state counsel. *See* Opposition at 16:10-20. The Non-Director Defendants suggest this was expected given the COVID-19 pandemic and the need for social distancing.

But COVID-19 is not blank check to spend lavishly and unnecessarily during trial. The three "basic" computer-equipped hotel rooms cost a combined $25,450 and involved "24/7 IT support availability." *See* Memorandum of Costs, Ex. 10 at 1252-53. Those costs were unnecessary given that the parties were in trial most of the time and thus the hotel war rooms presumably went unused. Even more, the single war room that the Non-Director Defendants reference was over the top, with 5 printers, 12 monitors, 15 cables, and 2 WiFi routers. This alone cost $60,000, though no doubt the Non-Director Defendants' local counsel had suitable computer

[3] The Non-Director Defendants make much of the fact that the expert in *Gitter* was a non-testifying consulting expert while the Non-Director Defendants designated Montgomery as a testifying rebuttal expert. But this distinction is irrelevant. Under the statute, expert fees for either type of expert are limited to $1,500 unless the moving party convinces the Court that the "circumstances surrounding **the expert's testimony** were of such necessity as to require the larger fee." NRS 18.005(6) (emphasis added). Without testimony, there is no basis to exceed the statutory cap.

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equipment in their office.

The Non-Director Defendants also argue that $33,963.80 for trial graphics and onsite support was reasonable and necessary because of the Court's COVID protocols. Opposition at 17:5-9. But this misses the issue that PAMTP has raised. The Non-Director Defendants chose to use an out-of-jurisdiction provider from San Diego, California, that billed at rates far exceeding customary Las Vegas, Nevada rates. *See* Motion to Retax at 13:2-4. In fact, certain of that provider's employees billed for "trial graphics" at a rate higher than the local attorneys litigating the case. *See id.* This is yet another example of the Non-Director Defendants' excess spending during this case, and it was not reasonable or necessary under *Cadle Co.*[4]

E. The Non-Director Defendants Concede the Nevada Supreme Court Has Not Judicially Authorized the Recovery of Pro Hac Vice Fees.

The Non-Director Defendants argue that PAMTP is trying to "punish" them for hiring out-of-state counsel who required $2,000 in pro hac vice fees. Opposition at 17:15-26. But it is not an issue of punishment at all. Instead, it is an issue of whether the Non-Director Defendants can carry their burden to show that NRS 18.005 allows for recovery of pro hac vice fees as something other than ordinary overhead expenses. As the Non-Director Defendants admit, they cannot do so because "the Nevada Supreme Court has yet to address the issue specifically." Opposition at 17:21-23.

Though the Non-Director Defendants seek refuge in federal cases allowing recovery of pro hac vice fees under the federal cost statute, that statute is different than Nevada's cost statute. And even the Non-Director Defendants' own case of *Craftsmen Limousine, Inc. v. Ford Motor Company* notes that "many courts have found that such [pro hac vice] fees are not recoverable" under the Federal Rule. 579 F.3d 894, 898 (8th Cir. 2009). Because cost statutes are interpreted narrowly "absent explicit statutory instruction," pro hac vice fees are not recoverable in Nevada until the Nevada Legislature or the Nevada Supreme Court instructs otherwise. *See Rimini St. v.*

[4] While the Non-Director Defendants clarify that they did not take limousines to hearings and instead "downgraded" to mere sedans, they do not seek to defend their first-class flights into Las Vegas, their $300+ per night stays at the Encore and Cosmopolitan, and their $350+ meals with few attendees. *See* Motion to Retax at n. 4.

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Oracle USA, Inc., 139 S. Ct. 873, 878 (2019). Instead, they are ordinary overhead expenses.

F. The Non-Director Defendants Misapply *DISH Network* in Trying to Recover $140,048.59 in E-Discovery Costs Incurred in Just Over One Year.

Just as they did in their Memo of Costs, the Non-Director Defendants claim that $140,048.59 in e-discovery costs incurred between May 2020 and August 2021 fit within NRS 18.005(17)'s catchall provision for "other reasonable and necessary" expenses. They support this by citing *DISH Network*, in which the Nevada Supreme Court held that "costs of the electronic discovery vendors . . . were a reasonable and necessary expense incurred . . . as a method by which to acquire and process the information that was required to be produced in response to [the opponent's] NRCP 56(f) requests." 113 Nev. 438, 442, 401 P.3d 1081, 1087 (2017). In other words, the costs were "necessary" because the moving party incurred them in direct response to the other party seeking discovery that created the costs.[5]

But the Non-Director Defendants have made no showing that their purported e-discovery costs were "necessary" because of PAMTP's discovery demands. On the contrary, the Non-Director Defendants complained that they had done almost all the discovery during the prior class action, including producing "tens of thousands of documents in discovery." Opposition at 4:1-3. As a result, it appears the e-discovery costs after May 2020 have nothing to do with "acquir[ing] and process[ing] the information" to respond to PAMTP's discovery requests. 113 Nev. at 442, 401 P.3d at 1087. Instead, they appear to be routine hosting and storage costs associated with discovery that the Non-Director Defendants previously produced in the Class Action. As a result, *DISH Network* does not make them recoverable. *See id.*

III. CONCLUSION

PAMTP does not dispute that the Non-Director Defendants may be entitled to $117,331.23 under NRS 18.005 and 18.020 as the "prevailing party" in this action. But their Memorandum of

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[5] The Nevada Supreme Court decided *DISH Network* before the 2019 amendments to the Nevada Rules of Civil Procedure. In the prior version of NRCP 56, subprovision (f) allowed the party opposing summary judgment to request depositions or other discovery necessary to oppose summary judgment. Thus, in *DISH Network*, the acquisition and processing costs of e-discovery were prompted by the party who later challenged such costs. No such circumstances are apparent in the Non-Director Defendants' Memorandum of Costs.

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Costs seeks far beyond that amount for costs that the Non-Director Defendants did not incur in this action and other costs tied directly to the Non-Director Defendants destroying evidence necessary for PAMTP's case. Contrary to the Non-Director Defendants' flippant Opposition, PAMTP's effort to vindicate the Court's judicial integrity and the search for truth did not amount to an "unnecessary sideshow."

For the reasons above and in PAMTP's Motion, PAMTP requests that the Court retax the Non-Director Defendants' inflated and unrecoverable costs.

DATED this 9th day of November, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 9th day of November, 2021, a true and correct copy of the foregoing **PAMTP, LLC'S REPLY IN SUPPORT OF MOTION TO RETAX NON-DIRECTOR DEFENDANTS' MEMORANDUM OF COSTS** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

/s/Jelena Jovanovic
An employee of McDonald Carano LLP

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DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION	Case No.: A-13-686890-B Dept. No.: XXII **PAMTP, LLC'S REPLY IN SUPPORT OF MOTION TO RETAX DEFENDANT KENNETH POTASHNER'S VERIFIED MEMORANDUM OF COSTS** **(HEARING REQUESTED)**
This Document Relates To: ALL ACTIONS.	

I. INTRODUCTION

Though drafted in a more muted tone than the Non-Director Defendants' Opposition, Potashner's Opposition repeats the same arguments almost verbatim. Ignoring NRS 18.020's plain language and the Nevada Supreme Court's long history under NRCP 42 on cases remaining independent despite consolidation, Potashner first tries to collapse the Class Action with PAMTP's action based on a "benefit of discovery" theory. As did the Non-Director Defendants, Potashner also asks this Court to award him costs associated with an evidentiary hearing that ended in sanctions against him for destroying evidence. Even more, Potashner misreads the Nevada Supreme Court cases of *DISH Network* and *Hyatt v. Franchise Tax Board* to keep arguing that his e-discovery hosting and storage costs and costs incurred remedying his spoliation are recoverable.

Finally, Potashner admits the Nevada Supreme Court has never authorized an award of pro hac vice fees under NRS 18.020 before he immediately pivots to argue he should recover these based on split federal authority.

For the same reasons that PAMTP discussed in replying to the Non-Director Defendants' Opposition, Potashner's arguments fail. As a result, PAMTP requests that the Court grant its Motion and retax the Potashner's Costs.

II. ARGUMENT

A. Potashner's "Benefit of Discovery" Theory Ignores NRS 18.020's Plain Language About Costs Only Being Recoverable in One Action.

The central question before the Court under NRS 18.020 is what costs Potashner reasonably, necessarily, and actually incurred in PAMTP's action. *See* NRS 18.020(3) (costs allowed "in an action" for money damages); *see also Cadle Co.*, 131 Nev. 114, 121, 345 P.3d 1049, 1054 (2015) (costs under the statute must be reasonable, necessary, and actually incurred). Potashner tries to blur that statutory line by arguing that PAMTP "was a member" of the class during the Class Action that preceded PAMTP's action and so PAMTP received the "benefit" of the discovery in the Class Action. *See* Opposition at 11:14-12:16. Thus, Potashner argues, he should be able to shift the Class Action costs to PAMTP. *See id.* There are many problems with Potashner's theory.

First, it is not factually accurate for Potashner to state that PAMTP was a "member" of the Class Action. PAMTP is a limited liability company that was not part of the class in the Class Action. On the contrary, as Potashner and the Non-Director Defendants have routinely decried, certain shareholders that were members of the class in the Class Action opted out of the settlement, formed PAMTP in April 2020, and filed this separate action. Potashner cannot shift costs from the Class Action to a litigant that was not part of the Class Action.

Second, the Class Action is a separate action from PAMTP's action, and so the statutory language prevents recovery of costs from the Class Action. That the Court—at Potashner and the Non-Director Defendants' request—consolidated PAMTP's action with the Class Action does not mean they became one action under NRS 18.020. Quite the opposite, the Nevada Supreme Court

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has explained that "[c]onsolidated cases retain their separate identities." *Matter of Est. of Sarge*, 134 Nev. 866, 870-71, 432 P.3d 718, 722 (2018). This follows the United States Supreme Court declaring in 2018 that for "[o]ver 125 years, this Court, along with the courts of appeals and leading treatises, interpreted [consolidation] to mean the joining together—but not the complete merger—of constituent cases." *Hall v. Hall*, 138 S. Ct. 1118, 1125 (2018). As a result, "one of multiple cases consolidated under the Rule retains its independent character . . . regardless of any ongoing proceedings in other cases." *Id.* PAMTP's case remains a separate action after consolidation at Potashner's request, and so Potashner may only recover costs incurred in PAMTP's action filed in May 2020.

Third, a plaintiff obtaining a benefit from discovery in a prior case is not uncommon in civil litigation, and Potashner cites no case law or rule allowing the Court to shift discovery costs from a prior case to this one. Indeed, the entire section of Potashner's Opposition advocating for his "benefit of discovery" theory does not include a single case citation from the Nevada Supreme Court **or any other court in the United States allowing such cost shifting**. *See* Opposition at 11:14-14:6. Nor could it, as the American rule is that each side to litigation bears its own fees and costs absent express statutory direction otherwise. *See Pardee Homes of Nevada v. Wolfram*, 135 Nev. 173, 444 P.3d 423 (2019) (district court may only award fees and costs "when authorized by statute, rule, or agreement."). The touchstone question under NRS 18.020 is whether Potashner incurred his costs in PAMTP's action for money damages. For all costs incurred before PAMTP filed its Complaint in May 2020, the answer is no, and so they are not recoverable.

Finally, Potashner's "benefit of discovery" theory ignores that Potashner is seeking costs for far more than discovery in the Class Action and that PAMTP, as a nonmember of the class, received no benefit from such litigation activity. For example, Potashner's Memo of Costs seeks to recover costs for unrelated motion practice about ESI protocols, injunctions, and similar issues, depositions of witnesses that PAMTP did not call at trial, court reporter fees for motion practice that had nothing to do with PAMTP, and counsel's airfare and meals for document review, depositions, and so on. *See* Memo of Costs at Court Fees 2:1-6:27, Reporters' Fees 7:1-8:20, Reporter Compensation 9:22-10:13, Travel and Lodging Costs at 11:3-23:26. Whatever issues

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Potashner and the original Class Action plaintiffs litigated in hearings before May 2020, PAMTP received little to no benefit from them. Potashner's overreaching attempts to recover all his costs fail even under his "benefit of discovery" theory.

The result is straightforward. NRS 18.020 puts a statutory straightjacket around Potashner's costs limited them to only those he incurred in PAMTP's action. Potashner's costs in the separate class action before May 2020 are not recoverable from PAMTP.

B. Potashner's Argument that Costs for the Evidentiary Hearing Are Mandatory Under NRS 18.020 Ignores *Cadle Co.*'s Further Instruction That Such Costs Must Still Be Reasonable and Necessary.

Potashner does not deny that this Court held an evidentiary hearing, found he willfully destroyed evidence, and then entered evidentiary sanctions against him at trial. *See* Opposition at 15 n.12. Instead, he tries to distract the Court by citing *Franchise Tax Bd. of Cal. v. Hyatt* to argue that the Nevada Supreme Court has made costs "mandatory" for the prevailing party and the Court's discretion to evaluate them evaporated once Potashner won on his NRCP 52 motion. *See* Opposition at 14:21-15:2.

But this misstates the Court's analysis of costs, which is a two-step process. First, the Court should determine whether there was a prevailing party. Second, if there was a prevailing party, the Court should award its costs under *Cadle Co.* based on reasonableness and necessity. It is this two-step analysis that Potashner misses in citing *Hyatt*. In *Hyatt*, the Franchise Tax Board of California ("FTB") won a total victory after several appeals, yet the district court found that there was no "prevailing" party. *See Hyatt*, 2021 WL 1609315 at *1, 485 P.3d 1247 (Apr. 23, 2021) ("[T]he district court entered judgment for FTB and found that neither party was entitled to costs under NRS 18.005 and NRS 18.020."). In discussing costs as mandatory and "a matter of right," the Nevada Supreme Court focused on the district court's incorrect ruling that FTB had not prevailed despite winning the case entirely. *See id.* In other words, it focused on the first step of the cost analysis. The Nevada Supreme Court did not direct its attention to whether, having won,

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FTB's costs were still reasonable and necessary.[1]

The same is true here. PAMTP, though appealing the judgment from trial, admits that Potashner and the Non-Director Defendants "prevailed" in this case under the Court's current Judgment. But that does not mean Potashner is entitled to recover his costs "as a matter of right" like FTB in *Hyatt*. Instead, Potashner still must establish the second step of the analysis—that his costs were reasonable and necessary. It is here where he fails relative to the costs for the evidentiary hearing. A party who spoliates evidence cannot prove that the costs incurred to remedy this spoliation were either reasonable or necessary. Potashner's argument otherwise is the definition of rewarding unclean hands. It allows a party to flout the judicial system's integrity by destroying evidence and then recover monetarily for the same. That is neither reasonable nor necessary, and so Potashner cannot carry his burden of proof under *Cadle Co*.

C. Potashner's E-Discovery Costs for Hosting and Storing Data Are Unrecoverable Under *DISH Network*.

Repeating the Non-Director Defendants' arguments about e-discovery costs, Potashner seeks $159,128.09 for "electronic discovery" by exclusively relying on *DISH Network*. Potashner suggests that there is no "intelligible argument distinguishing why e-discovery costs for acquiring and processing data would be recoverable but the hosting of that same data . . . should not be recoverable." Opposition at 17:3-7. But *DISH Network* discussed this very point when the Nevada Supreme Court said that "costs of the electronic discovery vendors . . . were a reasonable and necessary expense incurred . . . as a method by which to acquire and process the information that was **required to be produced in response to [the opponent's] NRCP 56(f) requests**." 113 Nev. 438, 442, 401 P.3d 1081, 1087 (2017) (emphasis added). In other words, the costs were "necessary" because the moving party incurred them in direct response to the other party seeking discovery that created the costs.[2] This is far different from the scenario when a party uploads its

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[1] The battle between Hyatt and FTB rages on, as both parties are still briefing the reasonableness and necessity of FTB's claimed costs. *See* Hyatt's Supplemental Memorandum in Support of Motion to Retax Costs (Filed 9/21/21), Case No. 98A382999.

[2] The Nevada Supreme Court decided *DISH Network* before the 2019 amendments to the Nevada Rules of Civil Procedure. In the prior version of NRCP 56, subprovision (f) allowed the

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own documents for its own case management and incurs tens or even hundreds of thousands of dollars storing them.

Potashner makes no showing that his purported e-discovery costs were "necessary" because of PAMTP's discovery demands. On the contrary, the first portion of Potashner's Opposition about his "benefit of discovery" theory argues that most of the discovery was from the Class Action, not because of PAMTP's own discovery requests. This is the point from *DISH Network*—PAMTP's discovery requests did not create the bulk of Potashner's e-discovery costs, and so they are routine overhead rather than costs chargeable to PAMTP. It appears the e-discovery costs after May 2020 have almost nothing to do with "acquir[ing] and process[ing] the information" to respond to PAMTP's discovery requests. 113 Nev. at 442, 401 P.3d at 1087. Instead, they appear to be routine hosting and storage costs associated with discovery that Potashner had produced in the class action. As a result, *DISH Network* does not make them recoverable. *See id.*

D. Potashner Concedes the Nevada Supreme Court Has Not Judicially Authorized the Recovery of Pro Hac Vice Fees.

Potashner argues he should recover his pro hac vice fees for out-of-state counsel only a few sentences before he admits that the Nevada Supreme Court has never allowed recovery of pro hac vice fees under NRS 18.004. Opposition at 17:12-16. Potashner also admits that there is a split of federal authority on this point, thereby defeating any argument that pro hac vice fees are routinely recoverable in litigation. *See id.* at 17:17-22. Even Potashner's own case of *Craftsmen Limousine, Inc. v. Ford Motor Company* notes that "many courts have found that such [pro hac vice] fees are not recoverable." 579 F.3d 894, 898 (8th Cir. 2009).

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party opposing summary judgment to request depositions or other discovery necessary to oppose summary judgment. Thus, in *DISH Network*, the acquisition and processing costs of e-discovery were prompted by the party who later challenged such costs.

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Because cost statutes are interpreted narrowly "absent explicit statutory instruction," pro hac vice fees are not recoverable in Nevada until the Nevada Legislature or the Nevada Supreme Court instructs otherwise. *See Rimini St. v. Oracle USA, Inc.*, 139 S. Ct. 873, 878 (2019). Instead, they are ordinary overhead expenses.

III. CONCLUSION

PAMTP does not dispute that Potashner prevailed under the Court's current judgment. But he overreaches in seeking to recover $272,377.02 in costs that he incurred during the Class Action. Those are not costs he incurred in PAMTP's action; thus, they fall outside the statutory scope of NRS 18.020. Potashner egregiously overreaches in seeking to recover costs for an evidentiary hearing to remedy his own spoliation; and he improperly seeks recovery of costs for e-discovery unrelated to PAMTP's discovery requests and for pro hac vice fees for out-of-state counsel. As a result, PAMTP requests that the Court retax Potashner's inflated and unrecoverable costs as described in PAMTP's Motion and this Reply.

DATED this 9th day of November, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 9th day of November, 2021, a true and correct copy of the foregoing **PAMTP, LLC'S REPLY IN SUPPORT OF MOTION TO RETAX DEFENDANT KENNETH POTASHNER'S VERIFIED MEMORANDUM OF COSTS** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

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DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION	Case No.: A-13-686890-B Dept. No.: XXII **PLAINTIFF PAMTP LLC'S SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTION FOR ATTORNEYS' FEES**
This Document Relates To: ALL ACTIONS.	

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INTRODUCTION & BACKGROUND

Plaintiff PAMTP LLC ("PAMTP") submits this supplemental brief, as permitted by the Court, to address certain issues the Court raised during the December 2, 2021 oral argument held on Defendants' motion for attorney's fees pursuant to Nevada Rule of Civil Procedure 68. The facts relevant to Defendants' motion are set forth in PAMTP's brief opposing the motion (Dkt. 738), and PAMTP sets forth herein only those facts relevant to the Court's inquiry.

Defendants filed their motion for attorney's fees on September 29, 2021, PAMTP filed its opposition on October 13, and Defendants filed their reply brief on October 28. Defendants contended that Rule 68 allows an award of their fees because, they argued, PAMTP failed to obtain a result at trial that is more favorable than Defendants' offers of judgment, the first of which offered $1.00 on July 1, 2020, and the second of which offered $150,000 on May 28, 2021. Both offers were un-apportioned and would have settled PAMTP's claims against all ten defendants then remaining in the case. And both offers were also all-inclusive, precluding a separate award of any costs, interest, or allowable attorney's fees to which PAMTP might have otherwise been entitled.[1] PAMTP rejected both offers and, after defeating summary judgment, proceeded to a bench trial before Judge Gonzalez, which resulted in an order granting judgment to Defendants under Rule 52(c). That order is now on appeal to the Nevada Supreme Court.

In its opposition to Defendants' Rule 68 motion for fees, PAMTP argued, *inter alia*, subsequent to the offers of judgment, PAMTP obtained a settlement payment of $400,000 from a subset of four defendants, such that the resulting order approving the settlement qualified as a more favorable "judgment" within the meaning of Rule 68. Moreover, PAMTP pointed out that, as the statute directs, the relevant authorities compare an unapportioned offer from *all* defendants to the result achieved against *all* defendants—here, the combination of the subsequent partial settlement and the trial judgment against the remaining defendants. Dkt. 738 at 16–18. Thus, PAMTP argued, Rule 68 by its terms does not apply. PAMTP further contended, even if Rule 68 did apply, an

[1] *See* First Offer at 1:7–9 ("This offer is inclusive of attorneys' fees, costs of suit, and prejudgment interest, and prohibits any application or motion for a post-acceptance award of taxable costs, attorney's fees, or interest."); Second Offer at 1:7–9 (same).

award of fees was not appropriate under the first three *Beattie* factors and that, even if it were, Defendants' fee application was grossly inflated under *Brunzell*. *See generally id.* at III.B.

No party, however, addressed Rule 68(g), prompting the Court to ask several questions at argument and invite further briefing. Rule 68(g) provides, in relevant part:

> To invoke the penalties of this rule, the court must determine if the offeree failed to obtain a more favorable judgment. . . . If a party made an offer in a set amount that precluded a separate award of costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees, the court must compare the amount of the offer, together with the offeree's pre-offer taxable costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees, with the principal amount of the judgment.

For ease of reference, we refer to an offeree's "pre-offer taxable costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees" as its "Pre-Offer Expenditures." The Court provided the parties the opportunity to brief the effect of Rule 68(g) on the analysis of whether PAMTP obtained a more favorable result once Pre-Offer Expenditures are accounted for.

PAMTP has reviewed its Pre-Offer Expenditures—i.e., those costs that PAMTP incurred between the May 20, 2020 filing of the Complaint and the May 28, 2021 service of Defendants' $150,000 offer of judgment. While one might fashion an argument that $150,000 of the more than $300,000 in costs PAMTP incurred in the litigation were incurred pre-offer, PAMTP has concluded that it cannot in good faith make that argument. However, PAMTP's costs by the time of the first offer, for $1, did exceed that amount, so the Rule 68(g) question remains relevant. Moreover, PAMTP addresses certain arguments concerning Rule 68(g) that Defendants made at the December 2 hearing, to the extent they bear on the Court's analysis. PAMTP further notes, however, that the Rule 68(g) analysis is only the beginning of the Court's inquiry. In the event the Court rejects PAMTP's argument that the $400,000 settlement with four defendants by itself renders Rule 68 inapplicable, the Court should nonetheless deny Defendants' fee application in its entirety after applying the *Beattie* factors for the reasons PAMTP articulated in its opposition to Defendants' motion.

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ARGUMENT

I. UNDER RULE 68(G), AN OFFEREE'S PRE-OFFER EXPENDITURES MUST BE ADDED TO THE JUDGMENT BEFORE IT IS COMPARED WITH THE OFFER

As the Court correctly observed at argument, Rule 68(g) provides the calculation the Court must apply to determine whether an offeree obtained a result at trial that is more favorable than the offer of judgment upon which the Rule 68 motion rests. And, as the Nevada Supreme Court has repeatedly held, Rule 68(g) requires that "district courts *must*, where applicable and where the offer does not preclude such a comparison, include pre-offer prejudgment interest [and costs] *along with* the principal judgment amount when comparing the judgment obtained and an offer of judgment in post-trial proceedings for relief under the rule." *McCrary v. Bianco*, 122 Nev. 102, 104, 131 P.3d 573, 574 (2006).[2] Accordingly, "[w]hen, as here, the offer of judgment precludes separate awards of prejudgment interest or costs, pre-offer interest and costs *are included with the verdict* in the calculation to determine whether the offeree recovered more than the offer." *Slinker v. Zaleski*, 130 Nev. 1247, 2014 WL 1477989 at *1 (April 11, 2014, Dkt. No. 60764) (citing, inter alia, Rule 68(g)) (unpublished decision).[3] !

Indeed, any question of the meaning of Rule 68(g)'s comparison formula was answered in 2005, when the Legislature amended NRS 17.115, the then-governing statute, to clarify that Pre-Offer Expenditures must be added to the judgment (and not to the offer). As the Nevada Supreme Court explained in *State Drywall*, prior to this clarifying amendment, the statute (and Rule 68) had been interpreted to require that an offeree's Pre-Offer Expenditures "were to be added to the offer and compared to the principal amount of the judgment." *State Drywall, Inc. v. Rhodes Design & Dev.*, 122 Nev. 111, 115, 127 P.3d 1082, 1085 n.4 (2006). But, the Court observed, "[t]his would create an unfair comparison," because "[i]n some cases, [Pre-Offer Expenditures] could exceed the judgment, making it impossible for an offeree to achieve a more favorable judgment at trial." *Id.*

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[2] All emphases added unless otherwise noted. In *McCrary* itself, the offer did not preclude a separate award of costs, however, the Court noted that "costs become part of the equation only when the offer precludes a separate award of costs" (122 Nev. at 108) which is the case here.

[3] As discussed below, Rule 68(g) was amended in 2019—after *McCrary* and *Slinker*—to expand the categories of Pre-Offer Expenditures to be added to the judgment.

Thus, "[t]he Legislature addressed this potential inequity in 2005 by amending NRS 17.115(5), changing the comparison of an offer with costs to the judgment *plus* the offeree's [P]re-[O]ffer [Expenditures]." *Id.* (emphasis in original).

Critically, however, the Nevada Supreme Court also held that "this latest amendment was intended *to merely clarify* the comparison to be made when the offer of judgment precludes a separate award of costs." *Id*. Therefore, because the 2005 amendment did *not* change the substance of the law, the Nevada Supreme Court held that "it applies retroactively." *Id.* Of course, had the 2005 amendment changed the law, it would apply only prospectively under longstanding principles of statutory construction. *See, e.g.*, *Delucchi v. Songer*, 133 Nev. 290, 293–94, 296, 396 P.3d 826, 829, 831 (2017) (while some 2013 amendments to anti-SLAPP law were intended to clarify, and could be applied retroactively, others effected "a substantive change in the law such that retroactive application is improper"). Thus, the Court held that "district courts *must* add the offeree's pre-offer costs to the judgment when comparing an offer of judgment that is inclusive of costs." *State Drywall*, 122 Nev. at 115, 137 P3d. at 1085 n.4.

The relevant language of Rule 68(g) has not changed since the Nevada Supreme Court authoritatively construed it in *State Drywall*, and subsequently applied it in many more cases, including as recently as 2019. *See, e.g.*, *Tutor Perini Bldg. Corp. v. Show Canada Indus. US, Inc.*, 441 P.3d 548 (Table), 2019 WL 2305717 at *2 (Nev. May 29, 2019, Dkt. No. 74299) ("[U]nder the offer of judgment rule, prejudgment interest *must* be added to the judgment when comparing it to the offer of judgment, unless the offeror clearly intended to exclude prejudgment interest from its offer.") (citing Rule 68(g)) (unpublished decision). Rather, a 2019 revision to Rule 68(g) added new categories of Pre-Offer Expenditures that also must be summed with the judgment to perform the relevant comparison. Also, in October 2019, the Legislature re-enacted NRS 17.115, which had been repealed in 2015, as NRS 17.117, which mirrors the language of Rule 68(g); in doing so, the Legislature thus codified the authoritative formula the Nevada Supreme Court had announced, as a legislature "is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239–40, 129 S.Ct. 2484, 2492 (2009); *see, e.g.*, *Nevada State Democratic Party*

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v. Nevada Republican Party, 256 P.3d 1, 9 (2011) ("[I]in assessing the meaning of the election statutes involved in this appeal, we look to existing law and historical practice, which the Legislature did not disavow."). Unsurprisingly, then, district courts—including this Court earlier this year—have continued to apply the prevailing interpretation by adding Pre-Offer Expenditures to the amount of the judgment obtained at trial where, as here, the offer is "all inclusive" and preclude a separate award of the offeree's expenditures. *See, e.g.*, *Correa v. Mainville*, 2021 WL 1659833, at *3 (Nev. Dist. Ct. Apr. 15, 2021) (Johnson, J.) (adding Pre-Offer Expenditures to judgment, and finding that combined sum exceeded the offer and precluded an award of fees).[4]

The foregoing authorities are controlling and decisive: PAMTP's Pre-Offer Expenditures must be added to the judgment at trial. But even if the Court were not bound by these cases, it should reach the same conclusion anyway. Even if defendants' reading of the text were reasonable, which it is not in light of the statutory history, there would at most be an ambiguity in the statute. *Gonzales v. State*, 492 P.3d 556, 559–60 (2021) ("a statute is ambiguous" when "it is subject to more than one reasonable interpretation"). And in resolving any ambiguity, the Court should construe Rule 68 "in accordance with reason and public policy" and in a manner that "avoid[s] an absurd results." *G.C. Wallace, Inc. v. Eighth Jud. Dist. Ct. of State, ex rel. Cty. of Clark*, 127 Nev. 701, 705, 262 P.3d 1135, 1138 (2011). Here, only PAMTP's interpretation avoids an inequitable and clearly unintended result. In *State Drywall*, the Nevada Supreme Court recognized the "inequity" of adding Pre-Offer Expenditures to the offer rather than to the judgement: "In some cases," the Court reasoned, "costs could exceed the judgment, making it impossible for an offeree to achieve a more favorable judgment at trial." 122 Nev. 115, 137 P.3d at 1085 n.4; *see also McCrary*, 122 Nev. at 107, 131 P.3d at 576 n.10 (same). As the Nevada Supreme Court has also noted, adding Pre-Offer Expenditures to the offer rather than to the judgment "may encourage defendants to submit small, token offers of judgment so they can obtain attorney fees

[4] *See also, e.g.*, *Sandbags, LLC v. Gore*, 2017 WL 3845962, at *3 (Nev. Dist. Ct. July 03, 2017) (adding pre-offer expenditures to judgment); *Universal Consulting Corp. v. Norvic Demolition, Inc.*, 2014 WL 8391954, at *5 (Nev. Dist. Ct. Apr. 01, 2014) (same); *Lacoste v. Professional Networkers, Inc.*, 2012 WL 10203634, at *2 (Nev. Dist. Ct. Aug. 30, 2012) (same).

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and costs every time the jury gives a verdict in their favor." *Costco Wholesale Corp. v. Scrima*, 126 Nev. 702, 367 P.3d 760, 2010 WL 4278427 at *2 n.1 (2010). These necessary implications of defendants' interpretation would warp settlement dynamics and thwart the purpose of the statute to obtain reasonable settlements. *See Hutchison v. Wells*, 719 F. Supp. 1435, 1443 (S.D. Ind. 1989) ("The primary purpose of Rule 68 is to encourage settlements, and it should be construed with this objective in mind.").

Moreover, any ambiguity must be construed to *narrow* the statute, rather than to expand it, because Rule 68 operates in derogation of the common-law American Rule. Dkt. 738 at 16 (citing *Quinlan v. Camden USA, Inc.*, 126 Nev. 311, 314, 236 P.3d 613, 615 (2010); *Branch Banking v. Windhaven & Tollway, LLC*, 131 Nev. 155, 158–59, 347 P.3d 1038, 1040 (2015)). As a general matter, adding Pre-Offer Expenditures to the offer would make it harder for an offeree to beat the judgment, and thus cause more fee shifting; conversely, adding Pre-Offer Expenditures to the judgment would make it easier for an offeree to obtain a more favorable result, and thus cause less fee-shifting. Because fee-shifting departs from the common law, in case of ambiguity the interpretation that leads to less fee-shifting must be preferred. *See id.*

At the December 2 argument, counsel for Defendants suggested that an offeree's Pre-Offer Expenditures are added to the judgment only when the offeree obtains a favorable judgment at trial. There is no support in the text of the statute for that made-up distinction. Nor is there any in the case law; indeed, the Supreme Court has repeatedly admonished that a District Court "must" add Pre-Offer Expenditures to the judgment obtained at trial, and has, in fact, added Pre-Offer Expenditures even to a judgment of $0. *See, e.g.*, *Costco*, *supra*, 2010 WL 4278427 at *2 (because "the sum of [the offeree's] pre-offer taxable costs ($8,659.84) and the principal amount of the jury verdict ($0) is more favorable than Costco's offer of judgment ($1,000)," no award of fees was permitted).

Defendants also argued at the hearing that, because its offers were all-inclusive, it should somehow follow that *Defendants'* costs and attorney's fees—which to date have not even been awarded—should be accounted for in the Rule 68(g) calculation. But Rule 68(g) says nothing about the *offeror's* expenditures (let alone its *post*-offer attorney's fees, which are the only ones Defendant

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seeks); only the *offeree's Pre*-Offer Expenditures matter. Defendants cited no authority (and research has revealed none) that would make Defendants' (the offerors') Expenditures (including its *post*-offer fees) relevant to the analysis. To the extent Defendants mean to suggest that the amount of the judgment—which they argue is $0—should be reduced to a negative number to account for a potential award of costs or fees to Defendants, before PAMTP's Pre-Offer Expenditures are added, that suggestion must be rejected because it is utterly circular. Again, *before* the Court awards fees under Rule 68, it "must determine if the offeree failed to obtain a more favorable judgment." Rule 68(g). The Court cannot *first* award fees under Rule 68 and *then* use that award to change the analysis of whether PAMTP obtained a more favorable judgment or not—and thus whether fees are available in the first place—without violating the express terms of Rule 68(g). The Court should reject Defendants' circular logic and follow the language of the Rule.

Finally, Defendants expressed concern at the hearing that adding an offeree's Pre-Offer Expenditures to the judgment obtained at trial would render it difficult for an offeror to make an offer likely to force a settlement (or lead to the imposition of fees), because the offeror may not know the precise extent of the offeree's Pre-Offer Expenditures. But the statute itself provides the solution: an offeror can make a *non-inclusive* offer. If an offeror does so, then its offer will be compared to the principal amount of the judgment *without* any addition of Pre-Offer Expenditures. *See McCrary*, 122 Nev. at 108, 131 P.3d at 577. This Court should not contort the well-settled rule for all-inclusive offers simply because Defendants chose to make an all-inclusive, rather than a non-inclusive, offer.

II. HERE, PAMTP'S PRE-OFFER EXPENDITURES EXCEED THE FIRST (BUT NOT THE SECOND) OFFER OF JUDGMENT; BUT THAT IS ONLY THE BEGINNING OF THE ANALYSIS

As noted at the outset, PAMTP has carefully reviewed its Pre-Offer Expenditures and concluded that it cannot in good faith claim that, as of May 28, 2021, they exceed Defendants' second offer of $150,000, made on that date. That said, the Court may take judicial notice that PAMTP incurred a $1,530 Business Court filing fee prior to the first offer $1.00, made on July 1, 2020, as that is the filing fee for commencement of an action in Business Court in the Eighth Judicial

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District.[5] *See Jacks v. Cozen-McNally*, 2019 WL 11343507, at *4 (Nev. Dist. Ct. Sep. 16, 2019) (Johnson, J.) (taking judicial notice of same to find that judgment-plus-expenditures exceeded $10.00, and thus "the penalties of NRCP 68 should not be invoked against [an offeree] with respect to [a] $10.00 Offer of Judgment"). Rule 68(g) thus provides the basis for the Court to deny Defendants' motion relative to the $1 offer of judgment.

Given the above, the proper application of Rule 68(g) here does not ultimately change the outcome of whether PAMTP achieved a more favorable result at trial than the second offer. But that is only the beginning of the analysis. Regardless of Rule 68(g), the Court must first decide whether the $400,000 partial settlement renders Rule 68 inapplicable entirely. If the Court were to reject that contention, it would then need to apply the *Beattie* factors. As PAMTP explained in its opposition to Defendants' motion for attorney's fees, an award of fees cannot be justified under *Beattie*. In particular, the compelling factual record of Defendants' misconduct generated in the class action, and the class settlement for $10 million, provided compelling bases for PAMTP to pursue opt-out claims. Moreover, each of those facts, **as well as the post-offer partial settlement for $400,000**, independently establishes that PAMTP acted reasonably in rejecting the $1.00 and $150,000 offers. Dkt. 738 at Part III.B. Nor did Defendants point to any other facts to show either bad-faith pursuit of the claims in the first place or bad-faith rejection of the offers of judgment. Finally, even if the Court were to disagree with these points, Defendants' fee application is grossly inflated for the reasons stated in PAMTP's prior briefing. *See id*.

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[5] PAMTP's Pre-Offer Expenditures greatly exceed the $1,530 filing fee – in total, PAMTP's Pre-Offer Expenditures nearly approach Defendants' $150,000 offer of judgment – and less scrupulous litigants may fashion an argument that the Pre-Offer Expenditures exceed $150,000. Again, however, PAMTP cannot make that argument in good faith.

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CONCLUSION

The Court should deny Defendants' motion for fees under Rule 68.

Respectfully submitted this 16th day of December, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 16th day of December, 2021, a true and correct copy of the foregoing **PLAINTIFF PAMTP LLC'S SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTION FOR ATTORNEYS' FEES** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION _____ PAMTP LLC, Plaintiff, v. VTB HOLDINGS, INC., STRIPES GROUP, LLC, SG VTB HOLDINGS, LLC, KENNETH FOX, JUERGEN STARK and KENNETH POSTASHNER Defendants.	LEAD CASE NO.: A-13-686890-B A-20-815308-B DEPT. NO.: XXII **SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR ATTORNEYS' FEES**

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INTRODUCTION

At the December 2, 2021 hearing on Defendants' motion for attorneys' fees pursuant to NRCP 68, the Court ordered the parties to submit supplemental briefing on the applicability of NRCP 68(g) in determining whether or not Plaintiff—who lost on the merits on all claims as a matter of law pursuant to a judgment entered against it under NRCP 52(c)—secured a "more favorable judgment" than either offer of judgment presented by the Defendants. NRCP 68 has been recognized as a "loser pays" rule. As a matter of simple statutory interpretation, it is plain that Plaintiff did not secure a "more favorable judgment" in this case because it suffered a complete loss as a matter of law. *See* NRCP 68(f)(1), (g) (noting that penalties of NRCP 68 triggered when offeree "fails to obtain a more favorable judgment"). This reading of the statute is underscored by the fact that the calculus of NRCP 68(g) looks only to an offeree's "taxable" costs and fees. Nevada law is clear that costs and fees are only "taxable" if authorized by statute, rule, or contract. In this case, Plaintiff has no basis for taxing costs because it was not the prevailing party. By recovering nothing after trial, Plaintiff suffered a complete and one-sided loss. Thus, it is beyond reasonable dispute that the offeree's (Plaintiff's) "taxable" costs and fees here are $0 and Plaintiff cannot be said to have received any "favorable judgment" under NRCP 68(g).

Moreover, even if this Court were to interpret NRCP 68(g) counterfactually to include non-taxable pre-offer costs, a plain reading of that provision would not help Plaintiff here. The plain language of NRCP 68(g) requires that Plaintiff's taxable pre-offer costs be added to <u>the offer</u> and that sum compared to the ultimate judgment. In other words, Plaintiff's pre-offer costs (to the extent they are taxable, which they are not here) must be added to Defendants' offers of judgment, which would necessarily only <u>increase</u> the target over which Plaintiff would need to exceed to "obtain a more favorable judgment" from the $0 it in fact obtained on the merits. The Nevada Supreme Court has confirmed this reading of NRCP 68(g), as has the Legislature through various amendments to the now-repealed NRS 17.115 and its replacement by NRS 17.117, which is substantively identical to the current NRCP 68.

Finally, even if the Court were to interpret NRCP 68(g) counterfactually as providing that non-taxable, pre-offer costs are added to the judgment to determine whether Plaintiff's loss

somehow is now "a more favorable judgment," Plaintiff's non-taxable "pre-offer costs" here (which Plaintiff never has submitted) are unlikely to make a difference in any case, at least with respect to Defendants' second offer of judgment of $150,000 on May 28, 2021.

STATEMENT OF FACTS

Plaintiff PAMTP LLC is a shell company formed by former shareholders of Parametric Sound Corporation ("Parametric") who purported to assign their claims to it and opted out of a class action and settlement involving claims arising from Parametric's acquisition by VTB Holdings, Inc. ("Turtle Beach") in January 2014. In May 2020, Plaintiff filed a separate complaint asserting a claim for equity expropriation against Defendant Potashner and other former Parametric directors and a claim of aiding and abetting the same against the Non-Director Defendants.

In connection with their motions to dismiss, on July 1, 2020, Defendants issued an offer of judgment to Plaintiff pursuant to NRCP 68 for $1, inclusive of fees, costs, and interest. Plaintiff rejected the offer. Defendants subsequently issued a second offer of judgment in connection with their summary judgment motions on May 28, 2021, for $150,000, inclusive of fees, costs, and interest. Plaintiff rejected this second offer as well.

On August 26, 2021, after seven days of trial on Plaintiff's claims and after Plaintiff rested, the Court granted Defendants' motion for judgment as a matter of law pursuant to NRCP 52(c) on all claims. The Court subsequently entered final judgment in Defendants' favor on September 3, 2021. In its findings of facts and conclusions of law, the Court recognized (1) that Defendant Potashner owned no stock in Parametric at the time of the shareholder vote, (2) the majority of Parametric's Board "could and did outvote Potashner on any and all matters on which the majority disagreed with Potashner," (3) no director "was unable to freely exercise his judgment as a member of the Board" because of any action taken by Potashner, (4) no single Parametric shareholder had authority to make unilaterally any material changes to the company, (5) Potashner did not receive anything through the Merger that he was not entitled to receive through his employment agreement, (6) Potashner had no side deals or other agreements with Turtle Beach, and (7) all directors were equally diluted with every other Parametric shareholder. Final Order and Judgment, Findings of Fact ¶¶ 80-90. Thus, the Court held that "Plaintiff failed to meet its burden of proving that

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Parametric had a controlling shareholder or controlling director." *Id*., Conclusions of Law ¶ 14. The Court further held that Plaintiff "failed to meet its burden of proving that a majority of the Board engaged in a knowing violation of law or intentional misconduct or engaged in actual fraud." *Id.*, Conclusions of Law ¶ 8.

Pursuant to NRCP 68(f), Defendants filed a motion for their post-offer attorneys' fees because Plaintiff "failed to obtain a more favorable judgment" than either of their offers of judgment. In their Motion, Defendants established that their offers of judgment satisfied all of the factors for the Court to consider before granting such fees under *Beattie v. Thomas*, 99 Nev. 579, 588, 668 P.2d 268, 274 (1983), in that the offers were reasonable as to both timing and amount, Plaintiff's claims were not brought in good faith, Plaintiff unreasonably rejected Defendants' offers, and Defendants' requested fees were reasonable and justified under *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969).

At the December 2, 2021 hearing on Defendants' Motion, the Court *sua sponte* inquired as to what, if any, impact the calculation found at NRCP 68(g) had in determining whether Plaintiff "obtained a more favorable judgment" than Defendants' offers of judgment. Because Defendants' offers of judgment were inclusive of fees, costs, and interest, the relevant section of NRCP 68(g) provides:

> If a party made an offer in a set amount that precluded a separate award of costs, expenses, interest and if attorney's fees are permitted by law or contract, attorney's fees, the court must compare the amount of the offer, together with the offeree's pre-offer taxable costs, expenses, interest and if attorney's fees are permitted by law or contract, attorney's fees with the principal amount of the judgment.

Id. Because Plaintiff lost on every claim it prosecuted against Defendants, it has not petitioned (and lacks the right to petition) for any taxable costs, fees, or interest in this case and, consequently, there is no evidence in the record of such costs or fees. The Court requested the parties to submit supplemental briefing exclusively on the applicability of NRCP 68(g)'s formula recited above to Defendants' Motion.

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ARGUMENT

I. NRCP 68(g) Applies Only Where The Offeree Obtained A Favorable Judgment And Includes Only The Offeree's "Taxable" Pre-Offer Costs And Fees.

NRCP 68 and its statutory analogues (previously NRS 17.115, now NRS 17.117) are "essentially Nevada's version of [a] 'loser pay'" rule. AB 166 (2005), *Minutes of the Meeting of the Assembly Comm. Of Judiciary*, Mar. 16, 2005, 73rd Sess. at 2. As such, the penalties of NRCP 68 are triggered in instances where an offeree who declines an offer of judgment subsequently "fails to obtain a more favorable judgment." NRCP 68(f)(1), (g). Here, Plaintiff suffered a complete loss, so it categorically did not obtain a "favorable judgment" of any sort, much less a more favorable judgment than either of Defendants' offers. The Nevada Supreme Court has held that an offeree who rejects an offer of judgment and thereafter receives an adverse verdict at trial, as Plaintiff has here, "failed to obtain a more favorable judgment." *In re Estate & Living Tr. of Miller*, 125 Nev. 550, 553-54, 216 P.2d 239, 242 (2009).[1] To that end, the recent holding and facts of *Franchise Tax Board v. Hyatt*, 485 P.3d 1247, 2021 WL 1609315 (Nev. Apr. 23, 2021), which the parties have cited previously to the Court, are instructive. There, Hyatt pursued claims against the Franchise Tax Board ("FTB") for over 20 years and successfully obtained a damages verdict of $388 million. The FTB had previously made an offer of judgment to Hyatt of $110,000 "inclusive of all interest, costs, and fees," as Defendants did here. *Id*. at *1. The FTB appealed and the U.S. Supreme Court eventually reversed Hyatt's judgment because it held that the FTB was immune from such suit. *Id*. FTB then sought its fees and costs under NRCP 68 and NRS 17.115. *Id*.

[1] *But see Costco Wholesale Corp. v. Scirma,* 367 P.3d 760, 2010 WL 4278427 (Nev. Oct. 25, 2010) (unpublished). In *Costco*, the court in a non-precedential, unsigned opinion noted that an award of costs under NRCP 68 is discretionary and affirmed the trial court's exercise of its discretion not to award costs even though defendant prevailed a trial because, unlike here, defendant failed to satisfy the *Beattie* factors. The *Costco* decision also contains inapplicable analysis regarding a pre-trial offer of judgment under the now repealed NRS 17.115, which provided that the offeree's pre-offer taxable costs must be added to the judgment to determine whether the offeree beat the offer after trial. The court did not address the issue of whether the offeree's costs were "taxable" under Nevada law when the offeree has no right to recover any costs due to having suffered a complete loss at trial. Importantly, the court did not discuss NRCP 68(g) at all; rather the court affirmed simply based on defendant's inability to satisfy the *Beattie* factors. Every case Defendants have been able to locate applying NRCP 68(g) involved a case where the offeree prevailed on the merits but obtained a money judgment less than the face value of the offer of judgment or the offeror also prevailed on counterclaims.

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Although the court affirmed the trial court's denial of fees pursuant to the *Beattie* factors, the Court noted that "Hyatt failed to better FTB's $110,000 offer when the Supreme Court reversed judgment in his favor for lack of jurisdiction," and that fact alone rendered FTB "eligible for mandatory post-offer costs under Rule 68 and NRS 17.115(4)." *Id*. at *3. The court did not raise NRCP 68(g) in its analysis of FTB's eligibility for fees and costs under those provisions, although Hyatt's pre-offer costs over two decades of litigation most likely were substantially in excess of $110,000. Thus, NRCP 68(g) is conditioned on the offeree obtaining a favorable judgment, at least of some sort.

This understanding of the Rule is underscored by NRCP 68(g)'s use of an offeree's "taxable" costs and fees in its comparative calculation to determine whether the offeree obtained a "more favorable judgment." The Rule's use of the word "taxable" must be given meaning and effect and not be rendered superfluous by simply taking into account any and all pre-offer costs and fees, whether taxable to Defendants or not. *See Southern Nev. Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). The plain meaning of a "taxable" cost or fee is one that can be taxed upon the opposing party. In Nevada, a litigant can only obtain costs and fees from an opposing party if it is expressly authorized under statute, rule, or contract. *See U.S. Design & Constr. v. I.B.E.W. Local 357*, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002). As there is no contract at issue between the parties, the only possible source of taxable fees and costs to Plaintiff is through statute or rule.

The authorization and conditions for the award of costs and fees in Nevada in this case can be found in NRS Chapter 18. That statute provides that a litigant is entitled to certain costs and may claim certain fees only if it is the "prevailing party." *See* NRS 18.020 ("Costs must be allowed of course to the prevailing party against any adverse party against whom judgment is rendered") (emphasis added); NRS 18.010(2) ("In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party") (emphasis added). A "prevailing party" for purposes of Chapter 18 is a party that "succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing suit." *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. 80, 90 (2015) (emphasis in

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original) (quoting *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005)). Plaintiff here lost as a matter of law on each of its claims and took nothing from Defendants, so it cannot possibly be deemed a "prevailing party" in any sense of that term. *See In re Estate of Miller,* 125 Nev. at 553-54; *Kay v. Johnson*, 2009 WL 10692766, at *2 (D. Nev. July 9, 2009) (holding that party who "was not awarded damages" "cannot be considered the prevailing party for purposes of assessing whether [he] is entitled to an award of fees" (citing *Key Bank of Alaska v. Donnels*, 106 Nev. 49, 53, 787 P.2d 382, 385 (Nev. 1990)); *Pitzel v. Software Dev. & Inv. of Nevada*, 124 Nev. 1500, 2008 WL 6124816, at *5 n.21 (2008) (holding party who obtained directed verdict and defeated all of plaintiff's claims was the only "prevailing party" in that case). The limitation of NRCP 68(g)'s application to "taxable" costs also is consistent with NRCP 68(f)(1)(A)'s command that an unsuccessful offeree—as Plaintiff is here—is prohibited from recovering any costs or attorney's fees of any kind. *See* NRCP 68(f)(1)(A); *McCrary v. Bianco*, 122 Nev. 102, 110, 131 P.3d 573, 578 (2006); *Palace Station Hotel & Casino, Inc. v. Jones*, 115 Nev. 162, 165-66, 978 P.2d 323, 324 (1999); *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 418 (2006).

Plaintiff, of course, does not argue it is a "prevailing party," because it plainly is not. Nor has it (nor could it have) sought to "tax" Defendants for any of its costs or fees, and its time to do so long since has passed. *See* NRS 18.110(1) ("The party in whose favor judgment is rendered, and who claims costs, must file with the clerk, and serve a copy upon the adverse party, within 5 days after the entry of judgment"). Accordingly, Plaintiff concededly has no "taxable" costs or fees in connection with this litigation that even could potentially be considered in a calculation under NRCP 68(g).

This reading of NRCP 68(g) not only comports with the plain language of the Rule, but also with common sense. This provision comes into play in cases where the plaintiff/offeree obtained a favorable verdict, but for monetary damages that were less than the face value of the defendant/offeror's offer. It makes sense that the Legislature would want to blunt the sting of the "loser pays" sanction of NRCP 68 in the case of a "prevailing party" who is entitled to receive taxable costs and fees as a result of being the prevailing party under Chapter 18. In that specific scenario, those taxable costs are additional, actual recoveries for the "prevailing party" and it makes

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sense to take them into account under NRCP 68(g), where the offer of judgment included those recoveries as a lump sum. That creates an apples-to-apples comparison of the real value of the offer of judgment and the actual recoveries obtained by the offeree in the litigation.

Applying NRCP 68(g) here to bar Defendants' eligibility for attorneys' fees—where Plaintiff suffered a total loss, took nothing, and is not entitled to any taxable costs or fees from Defendants—would turn the statute's plain meaning on its head: it would turn a party who lost on every conceivable point into one who "obtained a more favorable judgment" than the offer of judgment by the fortuity that its unrecoverable costs were greater than the offer of judgment. It also would create a perverse incentive to avoid cost efficiencies by rewarding a non-prevailing plaintiff who accrued high pre-offer costs. Importantly, Plaintiff's pre-offer costs are irrelevant where they are not the prevailing party after trial because it has no right to recover any costs. The fact that Defendants chose to make an NRCP 68 offer of compromise does not somehow make Plaintiff's pre-offer costs recoverable after a complete loss. Neither the letter nor the spirit of NRCP 68 supports such an outcome.

II. Even the Application of NRCP 68(g)'s Formula Here Would Not Render Defendants Ineligible For Fees Under That Provision's Plain Meaning.

Even if the Court determined that NRCP 68(g) applied to offerees who lost on every issue on the merits at trial and considered their unrecoverable, non-taxable costs as part of that provision's formula, it still would not change the outcome here. NRCP 68(g) states in relevant part that where an offer of judgment includes costs and fees (and therefore bars the offeree from seeking such separately if the offer were accepted), "the court must compare the amount of the offer, together with the offeree's pre-offer taxable costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees, with the principal amount of the judgment." *Id*. (emphasis added). In other words, "the amount of the offer, together with the offeree's pre-offer taxable costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees" stands on one side of the equation, and "the principal amount of the judgment" stands on the other. *Id*. Since "the principal amount of the judgment" here is $0, it makes no difference what the offer

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and Plaintiff's pre-offer taxable costs are taken together is because each offer amount exceeded $0 and Plaintiff has no taxable costs.

The application of this formula has had a tortured history in large measure because of the interplay between the relevant language in NRCP 68(g) and the predecessor to its statutory analogue—NRS 17.115(5)—which was amended to differ from NRCP 68(g) in 2005 only to be repealed and replaced in 2019 with language that is once again identical to NRCP 68(g). The Nevada Supreme Court in *McCrary v. Bianco* recognized that NRCP 68(g) was amended in 1998 to include language substantively identical to what it is today: "Where a defendant made an offer in a set amount which precluded a separate award of costs, the court must compare the amount of the offer together with the offeree's pre-offer taxable costs with the principal amount of the judgment." 122 Nev. 102, 110 n.10. The *McCrary* court held that under this formula, pre-offer costs "are not [ ] awarded as part of the judgment; rather, they are calculated and added to the offer, and then compared with the principal amount of the judgment." *Id*. (emphasis in original).

The *McCrary* court further noted that NRS 17.115(5)—but not NRCP 68(g)—was amended in 2005 to change its formula to instead add the offeree's pre-offer costs to the judgment in making the comparisons between the offer and the judgment obtained. *Id*. This alteration, the court recognized, put the relevant offer-of-judgment standards in Nevada in conflict and Nevada courts sought to "harmonize" them by construing "the rule in conformance with the statute," notwithstanding the Rule's plain language. *Id*. (citing *State Drywall v. Rhodes Design & Dev.*, 122 Nev. 111 (2006)). But the Legislature subsequently repealed NRS 17.115 in its entirety in 2019 and replaced it with NRS 17.117. Unlike its predecessor, NRS 17.117 mirrors NRCP 68 nearly verbatim, including the relevant formula provided in NRCP 68(g). *Compare* NRCP 68(g) *with* NRS 17.117(12). As a result, Rule 68 and NRS 17.117 are not in conflict and can (and must) be read consistent with their identical and plain meanings, which was confirmed by the Nevada Supreme Court in *McCready*: any pre-offer costs of the offeree should be added together with the offer and then compared to the judgment rendered. NRCP 68(g); NRS 17.117(12). The Legislature's decision to repeal NRS 17.115 and its formula for adding the offeree's pre-offer costs to the judgment, and to replace it with NRCP 68(g)'s same formula for adding the offeree's pre-

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offer costs to the offer must be given effect as its manifest intent to conform the statutory formula to that in NRCP 68(g). *See State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.,* 116 Nev. 290, 293, 995 P.2d 482, 485 (2000) (holding that where a statute is plain and unmistakable, courts are not permitted to search for meaning beyond the statute itself); *see also City of Boulder City v. Gen. Sales Drivers, Delivery Drivers & Helpers, Int'l Brotherhood,* 101 Nev. 117, 118, 694 P.2d 498, 500 (1985) (explaining judicial presumption that the legislature enacts a statute with "full knowledge of existing statutes relating to the same subject"). The Legislature, by supplanting NRS 17.115 with NRS 17.117, necessarily overruled by statute prior judicial efforts to "harmonize" NRCP 68(g) with NRS 17.115(5) in a manner that is flatly inconsistent with the Rule's language. *See Doe Dancer I v. La Fuente, Inc.*, 137 Nev. Adv. Op. 3, 481 P.3d 860, 873 (2021) ("[L]ater-in-time legislation is 'controlling over [a] statute that addresses the same issue.'") (citation omitted); *Metz v. Metz*, 120 Nev. 786, 792, 101 P.3d 779, 783 (2004) (holding that a substantial change in a statute's language indicates a change in the legislative intent). Applied here, because both of the offers of judgment exceed the judgment obtained by Plaintiff of $0, the addition of pre-offer costs to the offers is immaterial to the outcome that Plaintiff failed to obtain a more favorable judgment than either offer of judgment and Defendants are eligible for fees under NRCP 68 pursuant to both of their offers of judgment.

III. Plaintiff's Costs That Could Have Been Taxed Had It Prevailed Are Not Likely To Exceed Defendants' Offer Even If Added To Plaintiff's "Judgment" Of $0.

Finally, even if the Court were to find that (1) an offeree who obtained no recovery somehow obtained a "more favorable judgment" than offers of amounts greater than $0, (2) the offeree's pre-offer "taxable" costs and fees do not actually need to be taxable, and (3) the plain language of Rule 68(g)—now consistent with NRS 17.117(12)'s identical language—that the offeree's pre-offer costs must be added to the offer, not the judgment, means the exact opposite, NRCP 68(g) is still unlikely to limit Defendants' recovery of fees. Although Plaintiff's "pre-offer costs" are notably not part of the record (because they are not taxable)—and any belated effort to supplement the record at this point without Defendants' able to "re-tax" such "costs" would be improper—Defendants note that Plaintiff argued that all of Defendants' taxable costs through trial

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in this case amounted to only $146,910.76. If Plaintiff takes the same approach as to which of its "pre-offer" costs are "taxable" as it did to Defendants' total taxable costs—which included the substantial costs associated with trial —it is unlikely its own pre-offer costs would exceed $150,000. As such, under any interpretation of NRCP 68(g), Plaintiff cannot argue it obtained a "more favorable judgment" than at least Defendants' second offer of judgment.

CONCLUSION

Giving effect to the plain meaning of Rule 68 as discussed herein furthers the policy objectives of offers of judgment and avoids inequitable outcomes. NRCP 68(g) should not relieve a plaintiff/offeree from that Rule's sanction when it rejects a reasonable offer, pursues a meritless claim, and ultimately loses on all counts just because it ran up costs in that unreasonable effort (and caused the victorious offeror pointlessly and wastefully to do the same). The threat of NRCP 68's sanction is meant to encourage settlement and spare parties from the needless expense of litigation. It would be a perverse outcome if the accrual of those same needless costs spared a failed offeree from NRCP 68's sting when the offeree refuses a reasonable offer and suffers complete defeat.

Under NRCP 68 and the *Beattie* factors, Defendants are entitled to their attorneys' fees because they made two reasonable offers of judgment, which Plaintiff unreasonably rejected before having their case dismissed under NRCP 52(c) at trial. The plain language of NRCP 68(g) confirms that Plaintiff "failed to obtain a more favorable judgment" than either of Defendants' offers of judgment. Defendants' motion for attorneys' fees should be granted.

Dated: December 16, 2021

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CERTIFICATE OF SERVICE

As an employee of Snell & Wilmer L.L.P., I certify that I served a copy of the foregoing **SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR ATTORNEYS' FEES** on the 16th day of December 2021, via e-service through Odyssey File and Serve to the email addresses listed below:

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DATED: December 16, 2021

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