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

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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*
An Employee of McDonald Carano LLP

Electronically Filed
12/22/2021 1:15 PM
Steven D. Grierson
CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

KEARNEY IRRV TRUST, Plaintiff, vs. KENNETH POTASHNER, Defendant. AND RELATED CASES AND PARTIES	CASE NOS. A-13-686890-B A-13-687232-B A-20-815308-B **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE SUSAN JOHNSON, DISTRICT COURT JUDGE

THURSDAY, DECEMBER 2, 2021

DEFENDANTS' MOTION FOR ATTORNEYS' FEES

APPEARANCES:

FOR PLAINTIFF:	GEORGE F. OGILVIE, III, ESQ. SCOTT DANNER, ESQ. DANIEL SULLIVAN, ESQ.
FOR KENNETH POTASHNER, NORRIS, PUTTERMAN, KAPLAN, & WOLFE:	J. STEPHEN PEEK, ESQ. ALEJANDRO E. MORENO, ESQ.
FOR VTB HOLDINGS, STRIPES GROUP, SG VTB HOLDINGS, KENNETH FOX & JUERGEN STARK:	JOSHUA D. N. HESS, ESQ. RICHARD C. GORDON, ESQ. DAVID A. KOTLER, ESQ.

RECORDED BY: NORMA RAMIREZ, COURT RECORDER
TRANSCRIBED BY: JD REPORTING, INC.

Case Number: A-13-686890-B

LAS VEGAS, CLARK COUNTY, NEVADA, DECEMBER 2, 2021, 9:52 A.M.

*** * * * ***

THE COURT: ...A686890-B. Would counsel who's present please identify yourselves for the record and then we'll get to the attorneys that are on BlueJeans.

MR. OGILVIE: Good morning, Your Honor. George Ogilvie on behalf of plaintiff.

MR. HESS: Good morning, Your Honor. Joshua Hess, Dechert, LLP, on behalf of the non-director defendants.

MR. GORDON: Yes. Richard Gordon, Bar Number 9036, on behalf of the non-director defendants.

MR. PEEK: Good morning, Your Honor. Steven Peek on behalf of Potashner. My bar number is pretty low, 1758, I think.

THE COURT: Yours is higher than mine, by the way. Mine is a lower number. But, you know.

MR. PEEK: But you haven't been practicing 50 years, either.

THE COURT: Not 50 years, but my number is 253. I'm just letting you know.

MR. KOTLER: Good morning, Your Honor. David Kotler from Dechert on behalf of the non-director defendants.

THE COURT: Okay. Counsel who's present by BlueJeans?

MR. SULLIVAN: Good morning, Your Honor. This is

Daniel Sullivan, Holwell, Shuster & Goldberg, for plaintiff PAMTP, LLC. Were you able to hear me, Your Honor?

THE COURT: Yeah, I can hear you just fine. Are there any others on BlueJeans?

MR. PEEK: There are two others.

MR. MORENO: Yes, Your Honor. Good morning, Your Honor. This is Alex Moreno of Sheppard, Mullin, Richter & Hampton for defendant Potashner. And I am admitted Pro Hac Vice.

MR. DANNER: Good morning, Your Honor. Scott Danner, also of Holwell, Shuster & Goldberg, for the plaintiff. And I am also Pro Hac Vice.

THE COURT: Okay. And we are here -- oh, by the way, we do have various related cases. Do we need to note those, Ms. Clerk, or do you have all those? Okay, perfect. We are here on the motion for attorney's fees.

MR. OGILVIE: Your Honor, if I could address a housekeeping matter first?

THE COURT: Sure.

MR. OGILVIE: At the last hearing on November 16th the Court granted Mr. Sullivan and Mr. Danner's Pro Hac Vice applications. We submitted them to the Court through the DC22 Inbox, I think is the email address. It was rejected because it didn't have the full caption.

THE COURT: Yep.

MR. OGILVIE: And I think -- I don't even know what the full caption would be, frankly. I mean, of the consolidated cases that the Court just referenced, we weren't associated with any of those consolidated cases. We've always just filed everything with the PAMPT versus Parametric caption on it, and I'm kind of stuck. I mean, do we have to submit it with -- these proposed orders with four pages of caption on it?

THE COURT: I've got them submitted with 50 pages of captions.

MR. OGILVIE: Okay.

THE COURT: And if I can type them, I feel that you guys can type them --

MR. OGILVIE: Okay.

THE COURT: -- or your secretary or whoever.

MR. HESS: We've offered to provide Mr. Ogilvie with the full caption. We, for better or worse, do have it, so.

MR. OGILVIE: Okay.

THE COURT: Yeah. And, you know, I'm going to just give you a quick war story on that, why I require that. In 2007, whenever I acquired 1,750 cases from, you know, 21 departments, one of the cases was a mechanic's lien case and I had a two and a half week bench trial on this mechanic's lien case. It took me awhile to do the decision. And before I even started it, I did reach out through the old Blackstone system to try and figure out who all the parties were to get my arms

around the case. And I thought I found what was the full caption and who all the parties were, and as you can imagine, it was voluminous.

But anyway, I go do my decision and all that. Then I get a call right after I do this, you know, 30-page decision and, well, what about defendant so-and-so, so-and-so and so-and-so? And I said, What about defendant so-and-so, so-and-so and so-and-so? I mean, these entities obviously were identified throughout the trial, but I didn't know they were defendants. I just thought they were -- and I addressed the issues relating to them, but I didn't know that they were defendants. So I went back through to try and find this caption again.

I couldn't figure it out. So I asked the parties to tell -- give me the full caption. You know, they couldn't do it, either. So from that date on I have required full captions so that I can get around who all the parties are. And I know it's a pain in the butt. I require it with CD cases, construction defect cases.

I have to require it with respect to business court cases because I get basically Smith versus Jones and all related cases. And I'm like, what's that? I mean, so I do require it. I type them out personally myself whenever I do my decisions. If I can type them, I think your offices can type them, too.

MR. OGILVIE: Understood, Your Honor.

THE COURT: Okay. So I know I'm a pain in the butt, but that is just one of my pet peeves.

MR. OGILVIE: Understood.

THE COURT: Okay?

MR. OGILVIE: And I'll accept Mr. Hess's offer. Thank you.

MR. HESS: Yeah.

THE COURT: Okay. Yeah, I mean, you guys should flip a coin and say, okay, who's going to have to type the full caption and then pass it around to everybody.

MR. HESS: Mr. Gordon already got that short straw, Your Honor. But we have it, since we've submitted already proposed orders to this Court --

THE COURT: Okay.

MR. HESS: -- and had a similar problem.

THE COURT: Okay.

MR. HESS: With your permission, Your Honor, may I remove my mask?

THE COURT: Absolutely.

MR. HESS: Thank you. Again, Your Honor, my name is Joshua Hess of Dechert, LLP, and I represent the non-director defendants in this case. I'll be arguing the motion on behalf of all defendants, although Mr. Peek may have a few specific things with respect to his client.

THE COURT: I'm sure he will.

MR. HESS: No comment. Your Honor, you know, we were here before you on the 16th. We appreciate that you've come in at the tail end of this case, a very long case that has a long history, and we appreciate that you're drinking from a fire hose. I will attempt to distill things as much as I can for your sake, and everyone else's sake for that matter. But before we get kind of into the heart of kind of the factors of the attorney's fees, I did want to kind of pause a little bit just, you know, on some important background, you know, kind of reacting a little bit to Mr. Ogilvie's presentation from the 16th.

The first point simply is we won. And that maybe got lost the last time we were here. We won. And it wasn't even close, Your Honor. The defendants prevailed on a 52(c) motion, basically a directed verdict, because plaintiffs failed to establish any of the key elements of their claim at trial.

And despite what was in plaintiffs' papers and what we heard from Mr. Ogilvie last time, it may surprise the Court to learn that this case is not about a discovery tort. Instead, this case was about a specific cause of action created under Nevada law by the supreme court in this case, something called a direct equity expropriation claim. And this is a highly specific and technical cause of action that the Nevada Supreme Court borrowed from a now overturned Delaware Supreme

Court case called *Gentile v. Rossette*.

The Delaware courts, when it still existed in Delaware, called the equity expropriation claim a special species of a fiduciary breach claim that requires that there is a controlling shareholder who steals both voting and economic power from the public minority shareholders for himself. And the Nevada Supreme Court, in creating this cause of action in this case, also recognized that Nevada's own statute providing unique and increased deference to corporate directors above and beyond the Delaware general corporate law, also noted in *Parametric* that such expropriation must be accomplished through actual fraud.

So the direct claim, which is the only claim that the plaintiff here could assert, had three key elements: the existence of a controlling shareholder, an expropriation of both economic and voting power by this controlling shareholder from the minority shareholders to himself, and that such expropriation was accomplished through actual fraud.

Simply put, this claim was not a garden variety we got less than we should have merger claim, which is functionally the claim they pursued anyway.

I want to pause here to note how this claim was different from those prosecuted by the class plaintiffs, since much of the opposition both to the cost motion and to the fees motion is based on, well, defendants paid a lot of money to

settle the class case, $10 million, so, you know, the offer of judgment was unreasonable. But the claims that the class plaintiffs pressed and that we settled with them were far different than the small subset of claims that the plaintiff here prosecuted against us. They're not identical.

In addition to the direct equity expropriation claims, the class asserted six additional derivative claims, each of which were different and four stronger than the direct claims. And at the risk of, you know, telling the Court something it already knows but it's important, I think, just to note so I'll do so, the difference between a direct and a derivative claim is very important here. The direct claim -- and that's why we went to the supreme court. The supreme court in an en banc decision clarified what a direct and derivative claim is under Nevada corporate law, which was somewhat unsettled until this case.

A direct claim is one that a shareholder can bring on his own behalf in his or her name. A derivative claim is one that belongs to the corporation and oftentimes a shareholder attempts to -- you know, usually the directors are the ones who have the sole ability to bring those claims, but under special circumstances shareholders can take that authority away from the directors and bring them on the corporation's behalf. So the derivative claims were about harms to the company, Parametric Sound Corporation, and direct claims are those that

would be injuries to the shareholders themselves. So very different. Very, very, very different claims.

And the derivative claims, unlike the special species of the equity expropriation claim, were garden variety fiduciary breach claims that you typically see in merger cases, that basically we didn't get enough in return for our shares. It also included a gross mismanagement claim, abuse of control claim, a corporate waste claim, aiding and abetting of the same, and finally an unjust enrichment claim against my clients for benefits they received even after the merger which weren't even at issue in this case.

And these claims are not novel, unlike the equity expropriation claim. They've been around, they're well known, often litigated. But also, these claims do not require, importantly, evidence of a controlling shareholder, nor do these claims require proof of an expropriation. And in certain cases, certain of these claims don't require proving actual fraud, all of which make them very different from the equity expropriation claim, and all of these were elements the plaintiff failed to meet at trial.

Notably, the damages analysis undertaken by the class's expert, Mr. Atkins, who the plaintiff here adopted wholesale without any alteration, none, confirmed in his testimony at trial that the only measure of damage that he offered was an opinion on damages for the derivative claims,

meaning injury to Parametric, the company, not to any shareholder. He did no analysis, no damages, provided no opinion for that, which is the only injury they could vindicate. They knew that when they read his report and adopted it without a single change.

Atkins conceded that although equity expropriation damages are limited under the Gentile case to those amounts obtained by the controlling shareholder improperly from minority shareholders, he not only never read that case, he did not provide any opinion on that measure of damage.

The importance of this is plain. The class plaintiff provided no expert opinion on the measure of damage for their direct equity expropriation claims, the claims that are brought here, only for their derivative claims. This represents what value the class plaintiffs put on those direct claims. Zero. The same amount that the defendants put on them as well when they settled with the class plaintiffs.

As part of the settlement, the derivative claims, which, again, derivative claims belong to the company and were not -- didn't belong to the class. So you couldn't opt out of that settlement because that was a settlement functionally with the company itself. So those derivative claims were completely extinguished by the settlement and the plaintiff could not opt out and continue to press those claims because they didn't have standing to do that. So all they could do is press the equity

expropriation claim to which the class plaintiffs assigned no damage, and plaintiff knew that in adopting Atkins' report without any amendment.

This background is important context as the Court goes through the *Beattie* factors, which I'm going to do right now, and in addition to considering the cost motion we heard a couple weeks ago, so let's get right to it.

The *Beattie* factors provide what the Court needs to review in awarding attorney's fees here to the prevailing parties, which the defendants certainly were. The first factor is that plaintiffs' claims were not brought in good faith. And as noted, the equity expropriation claim that plaintiff had is very specific and required exacting elements to establish, and it was obvious certainly by the second offer of judgment that plaintiff would be unable to establish them.

First, plaintiff knew from the outset that the derivative claims were extinguished and those were the only claims with damages.

Second, as noted in our paper, it was a matter of public record that Parametric had no public shareholders, even at the time of the merger in 2013. Mr. Potashner, upon whom plaintiff trained their fire, owned not one single share of Parametric at the time of the merger and didn't even have a vote to approve it. This was also a matter of public record as of 2013. And there's no case anywhere finding that someone

with no shares can be considered a controlling shareholder. That's just common sense. None.

And the closest plaintiff ever has gotten is Elon Musk may have control of Tesla, who owns 22.1 percent of that company. Potashner had zero -- zero, and that was known at the very beginning. They avoided this by providing the Court with an ever changing set of theories with an evolving control group, which at various times included various subsets of my clients, Mr. Peek's clients.

Eventually, on summary judgment they landed on a control group which included Mr. Potashner, Parametric's founder, Woody Norris, and Parametric's CFO, which, incidentally, was a nonparty to this case, Jim Barnes. And the Court noted that since there was an issue of fact as to the control group, she would not grant summary judgment to defendants. That was the way they got out of it.

Now, what happened at trial? We didn't hear a word one about this control group. It was gone, jettisoned from the very get-go. Indeed, plaintiff called Mr. Norris as a witness at trial. Plaintiff called him and didn't ask him one question, not one question about such a control group. Indeed, the totality of Mr. Norris's testimony elicited by plaintiff focused on his deep antipathy for and frequent clashes with Mr. Potashner.

Plaintiff always knew, always knew. It was in the

depositions that they got from the very beginning that Potashner and Norris weren't in cahoots with each other. They were at each other's throats. They knew that. Moreover, they didn't even call nonparty Barnes, the other purported member of this control group, as a witness in their case in chief. Didn't even bother to call him.

Plaintiff also tried to patch this hole by trying to establish control by sanction rather than through evidence. Plaintiff does not dispute that the sanction it sought in the evidentiary hearing that we've heard so much about against Potashner was that he exercised control over Parametric. Judge Gonzalez, however, correctly observed that this sanction had no relationship to the spoliation. None. And that's why we keep saying the evidentiary hearing, about which we keep hearing about, had no impact at the end of the day on the outcome of this trial. Judge Gonzalez recognized the discovery issues there would have no bearing on the issue of control. None.

Third, plaintiff knew that it would be unable to establish actual fraud by a majority of the Parametric Board in approving the merger with Turtle Beach to overcome the business judgment rule presumption. And in this matter, they did not even seek to elicit testimony from any of the directors other than Potashner about such conduct.

Moreover, as we noted in our papers, at the close of

the case they sought to lower their burden of proof to a showing of bad faith which, not uncoincidentally, was the adverse inference Judge Gonzalez had agreed to take with respect to Potashner. Again, they had to prove even the lesser bad faith standard they sought to push against Potashner by sanction, not by evidence.

Finally, these actions don't exist in a vacuum, and we know from testimony from the plaintiff's assignors provided at trial that the key managing members of the plaintiff had very strong ulterior motives for pursuing unmeritorious litigation against my clients.

Adam Kahn is the managing member of plaintiff and he heads plaintiff's largest assignor, IceRose Capital, which is a New York based hedge fund. Now, IceRose has lost a significant amount of money on its investment in Parametric over the years and it has blamed my clients for that loss for years. He's no stranger to us and Mr. Kahn's lawyers and me have been penpals for some time.

Indeed, Mr. Kahn testified at length that he views the threat of litigation, even baseless litigation, as part of his hedge fund playbook to seek leverage over companies in which he's invested. Indeed, he specifically testified in this case that he previously deployed this exact playbook against Turtle Beach before.

Specifically, Mr. Kahn, through his counsel at

Kirkland & Ellis, previously threatened to bring suit against Turtle Beach, defendants Stark and Fox, among others, for claims arising out of the merger with Parametric, the same transaction issue here. And he testified he never really intended to file the complaint that he presented to Turtle Beach, indeed, to me on Turtle Beach's behalf, but only used the threat of litigation to try to get himself a board seat.

In other words, Mr. Kahn has a proven history of abusing judicial process against the very parties in this litigation to obtain a business advantage over them. This case is no different.

Barry Weisbord is the other key figure for plaintiff and the ringleader of the assignor group. Aside from Mr. Kahn, who has his own axe to grind, every other assignor testified that the only reason they agreed to participate in this litigation is because Barry Weisbord told them to, and they left the management of this case completely to him. All the other assignors are either close relatives or partners, lifelong friends of his in a thoroughbred racing business.

Now, Mr. Weisbord's son Josh was a former employee of Turtle Beach, who has pursued a wrongful termination case against the company in California courts since 2017. Barry Weisbord testified that he financed his son's litigation against Turtle Beach.

He also testified that his interest in pursuing this

opt-out litigation was piqued when the class plaintiffs settled before obtaining the document discovery from his son's employment litigation. Mr. Weisbord testified that he wanted to bring the discovery from that case into this one to try to get a better result -- in other words, try to merge those cases together.

Notably, however, although tens of thousands of documents were ultimately imported from that case into this one, over defendants' strenuous objections, not one exhibit from the employment litigation was ultimately used at trial.

Also, Mr. Potashner testified at trial that Mr. Weisbord viewed this case as a means of exacting leverage over Turtle Beach to obtain a financial windfall for his son. Mr. Potashner testified that Mr. Weisbord made him an offer that if Mr. Potashner functionally rolled on my clients and Mr. Potashner viewed it -- changed his sworn testimony in the case and if plaintiff received $11 million for Josh Weisbord from Turtle Beach, the Weisbords would pay Mr. Potashner $1 million. Mr. Potashner testified this under oath.

As a side note, Josh Weisbord's claim went to trial right after trial in this case and the jury, after deliberating all of 45 minutes, found against Josh Weisbord and ultimately found that he had misappropriated confidential proprietary information from Turtle Beach with malice, which ultimately led to punitive damages of several hundred thousand dollars against

him under California's Penal Code.

But plaintiff, not surprisingly, claims that this is all a distraction. These facts adduced at trial illuminate plaintiff's motives in improperly litigating the case through trial here against my clients.

Ultimately, plaintiff's counterargument is that it must be in good faith, we survived motions to dismiss, we survived summary judgment motions, but if that was the standard no court in this state would ever award attorney's fees under Rule 68 because you have to get to trial. And if you made it to trial, you got through all that. So that's just not enough. That's not enough.

And there's no case that says that it is. But also, it's clear that the arguments that plaintiff deployed to survive those motions were pure sophistry and they abandoned each and every one of them the moment they actually had to prove their case.

In candor, Your Honor, it is not a secret that Judge Gonzalez was deeply skeptical of defendants in this case over the eight years we were before her, and she provided plaintiff with every opportunity to provide its case against them, even with the aid of adverse inferences. That indulgence, however, does not impute good faith on the plaintiff. Plaintiff still has an obligation to bring those claims in good faith, notwithstanding what Judge Gonzalez was

prepared to do to manage her own docket.

Indeed, the fact that Judge Gonzalez ultimately granted a 52(c) motion in defendants' favor, despite her serious misgivings that she noted on the record, just shows how bankrupt plaintiff's claims really were. As a consequence, it's clear that these claims were not brought in good faith.

The second factor is that defendants' offers of judgment were reasonable. The court looked at both the timing and the amount of those offers. The timing here is not contested, only amount. The first offer of judgment was made on July 1st, 2020, in conjunction with defendants' motion to dismiss for one dollar. As I've already discussed, it was plain by this point that the derivative claims generated all of the value for the class settlement, and it was clear from the class' own expert report which they adopted. So the only claim remaining was the equity expropriation claim, about which no party assigned any value. The one dollar offer was plainly reasonable, as it spared all parties the burdens of fruitless litigation.

Now, this was certainly a reasonable offer by the time of May 28th, 2021, when defendants increased their offer to $150,000 when motions for summary judgment were pending. By this point plaintiff knew, they knew Potashner owned no shares and that delusory control group was pure fiction because Norris and Potashner were in warring camps on Parametric's Board, and

that's the testimony they elicited at trial.

By this point plaintiff knew that at least five of Parametric's six directors approved the merger with Turtle Beach in good faith and based upon their own independent business judgment and in defiance of Potashner, who they did not trust and typically opposed.

By this point plaintiff knew that the only calculation of damages it presented was for injury to Parametric. By this point plaintiff also knew that it faced a serious challenge to its own standing under the *Urdan* case because the assignors had sold all of their Parametric shares at the time of the merger, along with any claims associated with them before they assigned their claims to plaintiff.

Indeed, although the court noted it need not address this point because the plaintiff utterly failed to meet its burden of proof on the merits, it did note that it found plaintiff's standing troubling.

The $150,000 offer was also generous in comparison to the available damages to plaintiff under *Gentile*. The amount of any hypothetical expropriation by Mr. Potashner, as the court recognized, was his change in control payments of $2.8 million. Beyond that, he was deluded by the merger the same as every other shareholder if he actually held shares. But plaintiff at best had 10 percent of Parametric shares, capping their damages at 208,000. That's generous because we

claim they didn't have any shares, but 10 percent is the highest. So plaintiff's offer of $150,000 was fair, generous even.

Again, the only refutation that plaintiff offers is that we paid this $10 million to the derivative claims. Again, not the same claims, for the reasons I've already talked about. And saying that we settled the same claims for $10 million is a demonstrable falsehood. Nor does the $400,000 in settlements obtained from some of the settling directors change the analysis. Those defendants had to weigh the continued cost of litigating the case, most likely to the Nevada Supreme Court, no matter who won.

Indeed, plaintiff is taking it on appeal. I'm sure we would have, too.

These individuals are elderly and had their reasons to put this case behind them at that price, especially since they are indemnified by my clients. Notably, the parties who even plaintiffs concede had the most liability persisted, even with adverse inferences and a skeptical judge, because we were confident in the ultimate outcome.

The third factor is plaintiffs unreasonably rejected defendants offers. At the end of the day this kind of collapses into the first prong that we talked about. Plaintiff knew it had no proof of the key elements of an equity expropriation claim, no damages calculation for such a claim

and severe standing issues. Taking this case to trial was not in good faith and not taking $150,000 on a claim that $280,000 maximum compensatory damages was not reasonable.

And again, it's totally and hopelessly false that the $10 million that we settled with the class had any relationship to these claims. The final factor is defendants' fee claims are reasonable.

And again, the Court looks at the *Brunzell* factors, which is the experience, professional standing and skilled counsel, which is not disputed, that the work done was difficult, intricate, presented issues of first impression in Nevada, which is true. The work here was actually performed, there's no dispute about that. And the results resulted in a complete victory for defendants on a Rule 52(c) motion. Plaintiffs' quibbles are easily dispatched.

First is the quizzical complaint that the non-directors' fees were higher than the directors' fees. I don't know why that makes any difference, but it's easily explained when you take into account that my clients indemnified the defense of all the defendants. So it makes sense that its own counsel took the laboring oar on overlapping issues, of which there are many.

Second is about the claim -- about the complaint of the fees of the defendant, Mr. Potashner, versus the settling defendants represented by the same counsel. I'll let Mr. Peek

handle the specifics here, but I note that plaintiff does not point to any single time entry where this has made a difference. But it's clear that Potashner was the focus on plaintiff's claims and there was little additional fees accrued for the other defendants that would not otherwise have been accrued for Potashner.

Third, plaintiff complains that defendants' fees exceeded the maximum damages of $280,000. No doubt plaintiff's fees did as well. But plaintiff sought tens of millions of dollars from our clients in compensatory, punitive damages, and interest over eight years. Although that wasn't reasonable, defendants had to defend against that amount.

And finally, plaintiff complains about the rate of out-of-state counsel, including myself. Candidly, this is pretty rich, given that plaintiff has now repeatedly hired out-of-state counsel to represent in this action and has sworn under oath that those counsels' rates, which are analogous to defendants' out-of-state counsel were reasonable. So all four of the *Beattie* factors weigh heavily in defendants' favor.

Now, the plaintiff tries to dodge *Beattie* entirely, for good reason, by claiming that the $400,000 settlement nulls the applicability of Rule 68. But there's nothing in Rule 68, or for that matter Nevada Rule of Civil Procedure 54 that supports that argument.

Just technically, I note, with the settlement the

court did not enter a separate judgment for the settled defendants. There was only one judgment the court entered and it was the one granting the 52(c) motion on the merits. The court indeed entered a good faith settlement finding, but that's it. So under Nevada Rule of Civil Procedure 54(b), finding no judgment to be from which an appeal lies, so it stumbles out of the gate.

But more to the heart of it, plaintiff's argument is only supported by a single unreported case interpreting Federal Rule of Civil Procedure 68, and that case offers no analysis. It literally is two sentences. Two sentences and no analysis whatsoever. And that case also involved a situation where the plaintiff prevailed at trial. Also, I would note that the analogous Nevada rule -- or unlike the analogous Nevada rule, Federal Rule of Civil Procedure 68 has been interpreted to a far more limited application than Nevada Rule of Civil Procedure 68.

By contrast, defendants have cited a welter of federal and Nevada cases that hold that settlements do not count as judgments under either Federal or Nevada Rule 68, and instead the measure is what the offeree was able to obtain at trial on the merits. This conclusion is supported by the text, history and purpose of Rule 68. Rule 68 is aimed at preventing needless costs in litigating weak claims for trial by exacting a penalty on refusals to accept reasonable offers to resolve

cases without trial.

Plaintiff claims that holding that partial settlements that did nothing to prevent a full trial on the merits bars the application of 68 and that somehow that would encourage settlement, but that has it exactly backwards. As the *Deferio* (phonetic) court notes, the issue isn't encouraging settlements in a vacuum, but preventing needless trials.

Under plaintiff's view, a plaintiff in a multi-defendant case could settle with any defendant for the offer of judgment and force the remainder to trial without any fear of repercussion. The rule cannot be found to promote such naked gamesmanship.

Also, if plaintiff is correct, then plaintiffs would be unwilling to later settle for any amount less than a prior offer of judgment. If settlements count as judgments, a settlement below a prior offer of judgment would expose the offeree to fees under Rule 68, so they would be insane to settle for an amount less than that. That can't possibly promote settlement, and there's no supporting authority to support that it does, nor does common sense.

Specific to the facts of this case, Turtle Beach, because of its joint and several liability and we indemnified, we had to agree, effectively, to the settlement. And Turtle Beach would have objected and would have blocked the settlement by the settling defendants if it expected the settlement to

relieve plaintiffs of the implications of Rule 68, especially since it was unable to issue a new offer of judgment by the time of the pretrial settlements -- or partial settlements. It was right on the day before trial started. So that can't possibly be encouraging settlement, either. We would have said no to those settlements if that was the outcome.

There's no authority that supports it. And so if that's new law that this Court creates, then in similar situations down the road where you're in a multi-defendant situation with joint and several liability, no defendant will agree to any settlement by any other defendant.

Unless there's any questions, Your Honor, I'll sit down.

THE COURT: Okay.

MR. PEEK: Good morning, Your Honor. I think Mr. Hess has already covered the *Beattie* factors, so I will not repeat this argument. He's also covered the *Brunzell* factors. I won't repeat that argument, either. I would like to highlight a few points that stood out to me as I reviewed the parties' brief and the circumstances surrounding the offers of judgment.

As has been discussed, plaintiff filed its complaint after its assignors opted out of the class and the class settlement of the class action and the shareholder derivative case, which was ultimately resolved in early 2020. Plaintiff

asserted the same claims in this action, for which it was seeking damages in an amount in excess of $12 million. That amount is approximately one and a quarter times the amount of the entire class settlement which involved, as you've heard, both direct and derivative claims.

When plaintiff's assignors opted out of the settlement, they seemed to believe that they had a guaranteed victory in the opt-out litigation. They ignored the motion for approval of the class settlement, which explained the significant risks and uphill battle that the class plaintiffs faced in pursuing their claims against the defendants and the reasons why the settlement was in the best interest of the class and the derivative shareholders.

Among those challenges that they outlined was the difficulty in establishing that Potashner was a controlling shareholder or director of Parametric. Plaintiff ignored the extensive testimony of various witnesses that established that the board acted independently in approving the merger transaction with Turtle Beach and most certainly independently of Kenneth Potashner, whom the plaintiff claimed controlled the Parametric Board. This testimony was already baked into the case.

These individuals had already been deposed by the class counsel. And they ignored that fact that there was no evidence that came out of these depositions proving that a

majority of the Parametric Board members acted fraudulently in approving the merger. And there were also serious concerns regarding plaintiff's standing to pursue its claims.

Earlier this year, Your Honor, as we know, the plaintiff refiled the same motion for sanctions that had been filed by the class plaintiffs earlier in the case just before the settlement. Following the court's approval of plaintiff's motion for sanctions and the necessary scheduling of an evidentiary hearing on plaintiff's motion, plaintiff seemed to be emboldened regarding the potential value of its claims. Plaintiff then rejected the $150,000 offer of judgment that was made by the defendants in May of this year.

Plaintiff continued to ignore those serious weaknesses in its case, the serious weakness of a controlling shareholder, the serious weakness of a controlling director, and actual fraud.

At the conclusion of the evidentiary hearing we know and were reminded repeatedly, the court did not award plaintiff the evidentiary sanctions that it was requesting in its motion. It requested that the court draw an adverse inference that Potashner was a controlling shareholder and director.

And as we've explained to the Court, the evidentiary sanction that was imposed by Judge Gonzalez ultimately had no impact on the court's conclusion that plaintiff had not -- plaintiff did not prove its equity expropriation claim at

trial.

Plaintiff, as we know, still had to prove that Mr. Potashner was a controlling shareholder or controlling director of Parametric and they were never able to do so. As Mr. Hess pointed out, Mr. Potashner held no stock in Parametric.

Plaintiff still had to prove in the face of the deference to the board's action under the business judgment rule, codified in NRS 78.200 and NRS 78.211, actual fraud in connection with the merger transaction by the Parametric Board, but plaintiff was unable to do that, either.

It argued a lower standard of actual fraud to Judge Gonzalez, citing some Delaware authority that flew in the face of a more recent case in Nevada, which is *Chur v. Receiver of the Insurance Commissioner*. Plaintiff's unreasonable hope or expectation based on the imposition of sanctions by Judge Gonzalez of a better outcome at trial is not a reasonable basis for plaintiff to have rejected defendants' offer of judgment.

There was no better outcome at trial, nor is the argument that Judge Gonzalez's statement, which was not incorporated into the findings of fact and conclusions of law on the Rule 50(c) motion -- 52(c) motion, that the case smells bad. That alone is not also a basis to deny our motion for fees.

You don't win by drinking your own Kool-Aid. You have to present facts, which the plaintiff did not have. And plaintiff rejected defendants' offer, despite the fact that even under plaintiff's equity expropriation claims $280,000 is the maximum amount that it could expect to recover. And that $280,000 is based upon, as the Court noted, that equity that Mr. Potashner may have expropriated. Of $2.8 million, their 10 percent would be $280,000.

But more importantly, Your Honor, under the *Urdan* case the only evidence that they presented was that they had about three percent. So if you did three percent times $2.8 million, it comes to $72,000. So there is no maximum amount of two eighty. That's unrealistic. They knew that going into the case.

The motion for summary judgment on *Urdan*, yes, that was denied. But the Court in its findings expressed concern about *Urdan*, but said that while a lot of it was troubling, it was mooted by the decision of their failure to provide evidence. So that amount, Your Honor, of two eighty or maybe lesser, 72,000, represents the plaintiff's proportionate share of the amount of the compensation that Potashner received. So plaintiff's rejection of the $150,000 offer, when their best case scenario was a $280,000 recovery, is not reasonable and the Court should appropriately award defendants its fees.

One argument, Your Honor, that plaintiff suggested,

maybe which was suggested because my firm and Sheppard Mullin represented Potashner and the four settling directors, the Court should reduce our fees proportionally to account only for Potashner. But they have not pointed to any of the fee application or the attached billings to address that question and said that we did something different.

We know that John Stigi from Sheppard Mullin examined Potashner. We know that my firm represented the other settling defendants, and they were witnesses and I and my partner, Bob Cassity, examined them. We still had to prepare for and present our witnesses during that trial.

Our preparation for trial and the amount of work that went into trial was not diminished in any way by the settlement of these settling defendants. And just because these four directors settled, the fees incurred during trial were exclusively on behalf of Mr. Potashner.

And given that Mr. Potashner was the plaintiff's primary target throughout the case, the fees that were incurred were predominantly for Mr. Potashner's benefit, who was the target as a controlling shareholder and a controlling director.

Finally, Your Honor, the argument that the $400,000 settlement means that plaintiff obtained a more favorable judgment is also contrary to law. It's contrary to the rules that mandate that the Court must compare the offer of judgment against the amount of judgment, not any prior settlement. The

amount of the judgment received at trial.

And that's what Rule 68 tells us. Defendants' offers of judgment, Your Honor, were also made inclusive of attorney's fees -- inclusive -- the cost of suit and prejudgment interest, and prohibits any application or motion for a post acceptance award of taxable attorney's fees or interest.

So we know, Your Honor, that we have a cost motion, which certainly is well in excess of the $400,000, well in excess of the $150,000. It's well in excess of what they could recover. So if they had accepted that offer they would have been relieved of the burden of the costs, they would have taken $150,000, walked away. And as you know, we have, what, over a million dollars in costs. The Court hasn't ruled on that, but those are at least presented to the Court.

In other words, if plaintiff had accepted either of defendants' offers of judgment, defendants would have had judgments entered against them in the amount of zero or $150,000 and defendants -- excuse me, one dollar or $150,000 and defendants would have waived the substantial costs they had incurred, which were far in excess of the $400,000 settlement.

Under these circumstances, Your Honor, there is no question that defendants obtained a more favorable judgment in the success on the Rule 50(c) motion -- 52(c) motion than the offers of judgment and are entitled to recover fees under NRS 17.117 and NRCP Rule 68.

Your Honor, plaintiff unreasonably rejected the defendants' offers of judgment and forced the defendants to spend substantial amounts in attorney's fees and costs to defend against these clearly meritless equity expropriation claims. U.

Nder these circumstances, the Court should award defendant their reasonable attorneys' fees as well as the costs that are still under submission.

Thank you, Your Honor.

THE COURT: Thank you.

Before I hear any more argument, I need to take about a five-minute break, okay? So let me take a five-minute break and then I'll hear some more, okay?

MR. SULLIVAN: Thank you, Your Honor.

(Proceedings recessed at 10:42 a.m., until 10:48 a.m.)

THE COURT: All right. Let's get everybody on the line.

Okay. Is everybody on BlueJeans back?

MR. SULLIVAN: Yes, I am, Your Honor.

THE COURT: Okay. Perfect. All right.

Mr. Gordon, you started to get up, so I assume that you wanted to say something.

MR. GORDON: No, I do not. I'm fine to proceed.

THE COURT: So we've heard everything from the defense?

MR. GORDON: Heard everyone on the defense side. Yep.

THE COURT: Okay. I need to hear from the plaintiff.

MR. SULLIVAN: Okay. Good morning, Your Honor. Again, this is Daniel Sullivan, Holwell, Shuster & Goldberg, for plaintiff, PAMTP, LLC.

Are you able to hear me okay still?

THE COURT: Absolutely. Thank you.

MR. SULLIVAN: Great. So first I just want to thank you for permitting me to appear before the Court pro hac and to appear remotely. I know there are some technical issues. We have them in New York, of course, as well. I had intended to be there in person, but a family medical issue arose that required me to stay here. So with that, I'll get right down to it.

I guess it's going to be two against one here this morning, but that's okay. I'll try not to take -- I'll try not to take as much time as my friends on the other side did. I'm aware of the fact that Your Honor has our brief and I think we laid the arguments out there.

Let me say just by way of preface, though, that Mr. Ogilvie made my job a lot easier this morning because the last time we were here on the 16th he provided I think a thorough summary for the Court about the history of the case, the background of the merger between Parametric and VTB

Holdings, or Turtle Beach as we call it, and that's the transaction that my clients who are Parametric shareholders have challenged. And he described how the case got from its initial beginnings to today. So I don't want to repeat that.

I'll just emphasize for relevance here that of course the case was originally a class action. It wound its way up to the Nevada Supreme Court and back down again. The defendants in the class action made a motion to dismiss that was denied. That ruling is instructive. Discovery was taken and ultimately the case settled, the class action settled last year in May for $10 million.

My clients then brought this opt-out proceeding. A motion to dismiss was made. It was denied. Motions for summary judgment were made. They were also denied. And so we went to trial and along the way, of course, Judge Gonzalez found that the three individual defendants who remain now, the three human beings, spoliated evidence, that they destroyed emails and text messages despite being warned repeatedly not to do so and that their explanations, including in open court for doing so were not credible; and that Mr. Potashner in particular, who is sort of the starring actor in this drama, acted in bad faith in supporting and approving the merger, as Judge Gonzalez said. So that's the background and now the defendants, having won a Rule 52(c) motion during trial, want their attorneys' fees.

And, you know, listening to Mr. Hess and Mr. Peek, I wasn't sure if I was listening to a fees motion or a motion for a directed verdict. There was a lot of the merits, there was a lot of whether the legal elements were met. And I'll get to all that, Your Honor, but I want to start by reorienting us around what's at issue here.

Of course the usual American rule is that each side bears its own fees. And there are, of course, statutory exceptions to that and the defendants invoked one of them, which is Rule 68. Any time a defendant seeks attorneys' fees under Rule 68, the premise of the motion must be, among other things, that the defendant made an offer of judgment, the plaintiff unreasonably rejected that offer, the case went on and the plaintiff ended up doing worse than the offer. That's the premise.

And the reason that's the premise is that you want to encourage reasonable settlements. You're not trying to just encourage any settlement, right? You don't want to bludgeon the plaintiffs to accept any old offer. The cases, including the *Beattie* case, say that the statute balances the need to encourage settlement with avoiding -- pushing plaintiffs to abandon meritorious claims on the cheap, okay. So that's the paradigm situation for Rule 68.

This case -- Your Honor, this case is the exact opposite of that paradigm, right. Originally there were ten

defendants in this opt-out proceeding. On July 1st, 2020, all ten offered one dollar, unapportioned. On May 28th, almost a year later, 2021, all ten defendants offered $150,000; again, unapportioned. Plaintiff rejected those offers. And then in August of 2021, a few months later, we did better. We settled with four of the original ten defendants for $400,000.

That fact alone, and I'm going to go through all the components of the motion here, but that fact alone should dispose of the motion. Not only did we reasonably think we could do better than the $150,000 unapportioned offer, we actually did, almost three times better.

And I have to apologize in advance, Your Honor, because that fact is going to come up at a couple of different points in my presentation because at every step of the analysis it fatally undermines the defendants' motion.

And the first place where it does, Your Honor, is that it puts the case outside the scope of Rule 68 entirely because the defendants -- because, as I said, this is the opposite of the paradigm case, right? We didn't reject an offer and do worse. We rejected an offer and did better. So the defendants cannot show, as the statute requires, that we did not obtain a more favorable judgment than their $150,000 offer. We did. We resolved the case against four of the original offerors in exchange for $400,000, and that outcome was effectuated by the Court's order of August 23rd granting

the determination of good faith settlement.

Now the defendants say that Rule 68 requires that you ignore the partial settlement. You have to pretend that it doesn't exist. That is wrong. Defendants have no case that supports their position.

Now they cite a bunch of cases, which I'm about to get to, but there is no case that they cite, and I'm sure that they looked. I know we looked. We scorched the earth, Your Honor, to try to find a case where a court awarded fees in a situation like this where half of the defendants settled for more than all of the defendants originally offered. No case that says that you get fees in that situation. So I encourage the Court to look at the cases that they do cite, and it's primarily I think in Footnotes 19 and 20 in their reply brief.

They fall into two categories, Your Honor, both of which are inapplicable. First, there are cases that generically refer to the way the statute works and generically refer to the rule, and they talk about the plaintiff's decision to reject the offer and to proceed to trial. Those cases did not involve a settlement. They didn't address the issue here at all. So, you know, I don't think that those have anything to say to the situation before the Court now.

The second category are cases that address a situation where there's no trial at all and there's just a settlement, right. So the defendant makes a Rule 68 offer, the

parties later settle entirely at a lower or equal amount, and the defendant claims either that the plaintiff should pay his fees under Rule 68 or at least not be entitled to post offer fees under a prevailing party statute.

For example, a 1988 or a discrimination statute, some kind of a fee-shifting statute. That situation, of course, is very different from the one here and the logic does not apply because in those cases the courts are limiting the application of Rule 68, just as we ask here, right?

Remember that Rule 68 is a statute in derogation of the common law and so it should be narrowly construed. That's just what the courts did in the settlement only cases. And they do so primarily, Your Honor, on the ground that to punish the plaintiff for accepting a settlement after the Rule 68 offer would undermine the purposes of the statute which, again, are to encourage reasonable settlements.

The same logic supports our position here, not the defendants, because the result of the defendants' view would punish a plaintiff who settles with some but not all because the plaintiff was going to know that he's going to be taking some of the defendants off the table for purposes of trial.

And I just want to read from one of the cases that they cite on this, Your Honor. This is the *Hutchison v. Wells* case, 719 F. Supp. at 1435. What I'm going to read is from 1443. This is one of the cases that they cite in Footnote 20

of their reply brief. The court says, quote, "The primary purpose of Rule 68 is to encourage settlements, and it should be construed with this objective in mind." Close quote. Exactly.

By contrast, Your Honor, there is one actually analogous case that we found, you know, the closest we could find. That's the *Stone Creek v. Omnia Italian Design* case at 808 F. Appx. 459 out of the Ninth Circuit. So there, two defendants made an aggregate offer. The plaintiff settled with one of the defendants for more than the offer, just like here. The plaintiff then went to trial. It won only injunctive relief, it didn't win any monetary damages, as it had sought.

So the question was, you know, whether the defendant is entitled to his fees, the same question we have here. The Ninth Circuit reasoned -- and I know Mr. Hess said there was no reasoning, it's just an unpublished decision. We cited the rule in our brief, Your Honor, Ninth Circuit decisions, unpublished decisions issued after 2005 may be cited precedentially as a matter of the Ninth Circuit's own rules.

In any event, there is reasoning. It's short because it's clear, and what the Ninth Circuit said was that Rule 68 precludes fees in that scenario because the plaintiff improved its position after the Rule 68 offer. So you add the partial settlement to the trial recovery, which in that case as in this case was zero.

So, you know, that is -- as I say, that's the closet case that either party has found and it supports our position, and I think it's consistent with the statute for two reasons.

Just as a matter of construction, Your Honor, Rule 54 defines the term judgment as used in the Nevada rules as meaning a decree and an order from which an appeal lies. The court's order granting the determination of good faith settlement, which recited the fact that there was consideration received and there was no fraud or collusion, you know, et cetera, fits within that definition. Certainly it's a decree.

You know, and another way to look at it from a statutory perspective, Your Honor, is that the concept -- the whole concept of Rule 68 is that you compare the offer to the judgment, right? Well, you cannot compare an unapportioned offer among a group of defendants to a judgment involving only a subgroup. It's apples and oranges, right? The original ten offered $150,000. Half of them were gone by the time of trial because they were willing to pay much more than that. So this is -- for those two reasons and the fact that the only court, as I said, to have actually addressed the situation interpreted the statute, as we're asking the Court to do here, we think we fall outside the scope of Rule 68 in this case. And that position is consistent with the purpose of the rule.

Again, the statute is intended to incentivize reasonable settlements in a fair way to both sides. It's not

to push as many plaintiffs as possible to accept any old offer, okay. And if the result of our interpretation -- this is where I think Mr. Hess was trying to get at, but if the result of our interpretation is that multi-defendant groups end up making higher offers in order to prevent a side group from making -- excuse me, a subgroup from making a side deal, that's a good thing. That furthers the purpose of the statute.

This case is a perfect example. The fact that a subgroup was willing to pay $400,000 is a sign that $150,000 was way too low. So the only situation in which the question here, Your Honor, is going to come up is when you have, as here, several defendants as a group they offer X and then a subgroup settles for X plus Y. Actually, here it was 3X or almost 3X. By definition that tells you that the offer of judgment was a bad offer, it was a low-ball, because some of the defendants were willing to pay more, and in speaking with their wallets, they spoke as clearly as can be. So, you know, that's the -- I think the cleanest way to resolve the motion, Your Honor.

But the $400,000 settlement disposes of the motion for another reason. Let's say that you don't want to address the statutory issue and go and look at the *Beattie* factors. Well, they can't possibly prevail under *Beattie* just because of the $400,000 settlement alone. And I'll get to the rest of it in a moment, but I'll start with that aspect of applying the

Beattie factors.

So one of the factors is that the plaintiff in rejecting the Rule 68 offer was grossly unreasonable. Your Honor, how can it have been grossly unreasonable for us to say no to $150,000 when after we said no half of the defendants paid us four hundred, and the less culpable half at that, right? If we had accepted the one fifty, we would never have received the four hundred. So the proof of our reasonableness is in the pudding.

And again, the defendants have no case at all, not one -- not one in which a court found that it was grossly unreasonable or bad faith for a plaintiff to reject a settlement offer, even though the plaintiff later obtained a higher settlement. And I think it will be very difficult, frankly, just as a matter of logic and common sense to reach that conclusion.

So whether you regard the $400,000 offer as meaning that Rule 68 does not apply at all and we're back in the world of the old-fashioned American rule, or you say that they can't possibly prevail under the *Beattie* factors because it couldn't have been unreasonable for us to reject the offer when we later did better, either way you get to the same place. But of course there's more than just --

Oh, and I should say in the interest of completeness that here today Mr. Hess briefly addressed the $400,000,

although in their brief they largely ignore it, he said the same thing they say in their brief at page -- their reply brief at page 13. And what they say essentially, Your Honor, is that, well, the settling defendants, they could have reasonably concluded that they might be exposed to damages that would make a $400,000 settlement worthwhile. Yes, exactly.

If it was reasonable for the settling defendants to pay $400,000 to get out of this case because of their exposure, it must have been reasonable for the plaintiff to refuse far less than that amount, a hundred and fifty, in the rational belief that it might obtain more. It totally refutes the defendants' post hoc assessments of the legal merits and the damages possibilities and all the rest, of course, which we totally disagree with. As I said, I think the Court can stop there, but I'll go on in the interest of completeness.

So there's also the $10 million class action settlement; right? This case is an opt-out. In the class action the defendants agreed to pay $10 million to settle the case and the class had asserted the same equity expropriation and aiding and abetting claims we brought here. And of course I won't belabor the point, but we say that's relevant because it goes to three of the *Beattie* factors.

It goes to whether we had a good faith basis to pursue the opt-out claims. Obviously they had value. It shows that the $150,000 offer and certainly the one dollar notional

offer was not reasonable, given what the defendants had been willing to pay to settle the class action, and it shows we were not grossly unreasonable in rejecting $150,000. We had a fair sense at the time of what the claims were worth.

Okay. Now, defendants say and they said here again today, ah-ha, but the class also brought derivative claims. That's true, they did. The problem is that the defendants leaped from there to say that those derivative claims were really what was driving the $10 million number and the equity expropriation claim was just a tag-along.

And they say that, but they don't have any evidence for it. They have no reason for it. It's just their say-so. And it's their burden to explain why for purposes of the *Beattie* analysis the Court should find that the derivative claims drove that $10 million amount. They can't just ask you to assume it.

So what do we know? What we know is that the defendants paid $10 million to settle claims arising from the same facts. The settlement does not assign values to the various claims that were released, right? It's not as though it says we're paying 5 million for this and for that. But you know, I think the last time we were here Mr. Peek said that this opt-out was a mere continuation of the class action.

In terms of the substance of the claims, Your Honor, I agree, but, by the way, if you want to look at the actual

evidence such as it is that we have of what was driving the settlement amount, look at where the money went, right? It's blackletter law.

I'm sure the defendants will agree to this, that the remedy for a direct claim goes to the shareholders, whereas the remedy for a derivative claim goes to the company. And guess what? When you look at the notice of settlement, which we attached as Exhibit 8 to our brief, Your Honor, it says on page 1 and page 4, among other places, that the money was all going to go, after fees and expenses, to the pre-merger shareholders directly. So if the record supports any conclusion, it supports the conclusion that it was the direct claims, not the derivative claims that were driving at least the monetary bus.

And that makes sense because usually when you settle a derivative action, you know, often what happens is you don't settle for money, putting aside the attorneys' fees, what happens is, you know, the company will agree to governance changes or disclosures or that kind of thing. So however you break it down, the key question is, I think, are whether the plaintiff here had a good faith basis to act as it did, both in pursuing the claims and then rejecting the settlement offers.

The fact that the class action was able to settle for 10 million surely bears on that analysis and gave plenty of reasons why the plaintiff was justified in doing what it did.

Okay. So in the face of all that, what do the defendants have to say? I think there's a lot of noise in the briefs, but I think it comes down to a few points, Your Honor, remaining that can easily be dispatched.

So first they say, you know, we never had a prayer of winning this case. It was obvious from the get-go that we had no case, notwithstanding what Mr. Hess said about this being a novel, specific and technical area of the law that was unsettled in Nevada, but that's the position that they take.

Of course that's not remotely true from our perspective. We defeated their motions to dismiss and for summary judgment. And they say, oh, well, you know, on summary judgment we didn't have the burden. You know, we said we were going to prove what we were ultimately unable to prove. But, Your Honor, at summary judgment if you don't have the evidence to support your claims, you lose. You lose.

They essentially say that we told Judge Gonzalez, you know, we promise we're going to prove it to you, and then we didn't have anything to show. Your Honor, I have not been in Nevada long either virtually or physically, but I have gathered that Judge Gonzalez would not have stood for an I.O.U. at summary judgment, nor would any judge I've ever litigated the question in front of.

Summary judgment is the put-up or shut-up moment in litigation. We put up the evidence and Judge Gonzalez found we

had enough for trial on all of the issues, including the other issues, the standing issues and the damages issues that -- in particular the standing issues that the other side emphasized this morning.

Now, they spent a vast amount of their briefing and arguments talking about the legal merits of the claims. As I said, listening to it this morning it really felt like a victory celebration. And it's true, they did prevail at trial in the first equity expropriation case ever to be tried in the state of Nevada, you know, and Judge Gonzalez did have to make rulings on technical, complex areas of law in order to reach the decision that she did.

But let's talk about the merits of the claims. Let's talk about what this case is actually all about. We gave you a sample, Your Honor, of the evidence of the misconduct here.

THE COURT: Counsel, I do have a question.

MR. SULLIVAN: Yes, Your Honor.

THE COURT: And I'm going to have to ask the other side about this as well. I'm looking at the actual $150,000 offer of judgment which was made on May 28th of 2021. Right?

MR. HESS: Correct.

MR. SULLIVAN: Yes, Your Honor. That's the right date.

THE COURT: Okay. The $150,000 offer, the second paragraph says, "This offer is inclusive of attorneys' fees,

costs of suit and prejudgment interest."

I assume your attorneys' fees, costs and prejudgment interest by May 28th exceeded $150,000.

MR. SULLIVAN: Well, I guess that's probably a question for the defendant -- oh, Your Honor, I understand what you're asking.

You know, I'm not sure what the number was at that point in time, but I think maybe this goes to the point Mr. Peek raised, Your Honor, about how if you were to subtract the fees from the $400,000 we would ultimately not have done better. They didn't cite any case for the proposition that you run the comparison that way for purposes of Rule 68 and I don't think it would make any sense. Of course, a party can always make the offer either inclusive or exclusive of attorneys' fees, you know, as the parties agree.

THE COURT: Well, I'm looking -- I'm looking --

MR. SULLIVAN: But I don't have today the number.

THE COURT: I'm looking at Rule 68(g) and it says whenever you've got -- okay.

> "How Costs, Expenses, Interest and attorneys' Fees Are Considered. To invoke the penalties of this rule, the court must determine if the offeree failed to obtain a more favorable judgment. If the offer provided that costs, expenses, interest, and if attorneys' fees are

permitted by law or contract, attorneys' fees would be added by the court. The court must compare the amount of the offer with the principal amount of the judgment" --

Meaning that if it had said that it was exclusive of attorneys' fees, then we'd compare one fifty with whatever the judgment was. If -- let's see, let me get back to this. Okay.

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

Et cetera. So this is inclusive. So it would have precluded -- I would have to compare your costs and attorneys' fees and so forth with respect to whether or not they beat the offer of judgment. That's the way I read Rule 68(g).

MR. SULLIVAN: So, I just want to make sure that I understand the analysis here. So, in other words, you would be adding one hundred and fifty to --

THE COURT: No, no, no, no, no. Okay. Let's say that it said exclusive, okay. Then they made an offer of judgment for one fifty. Their position is we got a Rule 52(c) motion on, so bottom line, your clients got the donut so they

beat their offer of judgment. But if it's inclusive, then we have to consider what attorneys' fees and costs that your client has incurred by that time. Were they more than $150,000?

MR. SULLIVAN: I don't know the answer to that, although I can certainly find out. I have a feeling they probably were.

THE COURT: Okay.

MR. SULLIVAN: But I don't know that sitting here today.

THE COURT: Okay.

MR. SULLIVAN: So then that would mean, I think, that they -- that even if you ignore everything else, they then would be -- or we did do better because, you know, the amount of the fees would have wiped out the $150,000.

THE COURT: Well, that's what my thinking is.

MR. SULLIVAN: Right.

THE COURT: But, okay. And then the $400,000 settlement that was made later with a few shareholders, I assume that that was done by stipulation and order for dismissal, it wasn't a judgment?

MR. SULLIVAN: Correct, Your Honor.

THE COURT: It wasn't a judgment?

MR. SULLIVAN: It wasn't a Rule 68 offer of judgment, if that's what you're asking.

THE COURT: No. Well, no, but the settlement, it was -- they said, hey, dismiss the case, we'll give you $400,000, and of course the plaintiffs said yes. And so that just went away by stipulation for dismissal without prejudice; right?

MR. SULLIVAN: Well, there was an order granting good faith determination of settlement.

THE COURT: Sure. But there wasn't a judgment on it; right?

MR. SULLIVAN: Well, there wasn't a separate judgment on it in the sense of a final judgment. That's true.

THE COURT: Okay.

MR. SULLIVAN: As we read Rule 54, Your Honor, we think that it, frankly, is broader than under the Federal Rules which treat a settlement as a judgment for purposes of the Federal Rule 68 because Rule 54 says that a judgment is defined to include both a decree and an order from which an appeal lies. So I don't think you need, you know, sort of a technical final judgment for it to count in the Rule 68 analysis.

And again, our fundamental submission on the statute is just that you can't -- that either you can't do the comparison that the statute requires mechanically because you've got an unapportioned offer for the ten and a judgment involving the six who remained. So again, it's an apples and oranges comparison.

Or if -- you know, even if you can do the analysis, you count the settlement as part of the analysis in the way that the Ninth Circuit did in the *Stone Creek* case, and so you add the four hundred to the zero and that's higher than a hundred and fifty. Or, indeed, a hundred and fifty minus the attorneys' fees, which as Your Honor knows, could very well take you into negative territory. Either way, you know -- or, like I say, or you look at the $400,000 partial settlement as conclusively defeating their case under *Beattie*. Either way, you get to the same place, you know, and I don't have a preference about how you get there.

But the bottom line, I think, is that there are -- the reason why there are so many ways to get there in this case is because just as a matter of common sense it can't be that when the defendants' own money was on the line and they were willing to pay much more than $150,000 to make the case go away, that it was bad faith for the plaintiff to pursue the case. You know, and again, I --

Well, let me stop there and just ask whether Your Honor has any other questions on that line.

THE COURT: No. You can continue.

MR. SULLIVAN: Okay. Thank you.

So what I was saying to Your Honor was just to respond to, you know, kind of all the hindsight, all the Monday morning quarterbacking about the case, you know, we won the

case, you know, they were never -- they could never have proven their claims, et cetera, and I did want to talk for a minute about the merits of our claims here and talk a little bit about what the case is all about.

We provided just a sampling, Your Honor, of the facts in our opposition to which they didn't really respond, although I'm sure that they don't agree with it. The conduct here is really appalling, right. This is a case about a merger between Parametric and Turtle Beach, which the Parametric shareholders have challenged.

The principal defendant at trial, as I said, the kind of starring actor in the drama, Ken Potashner, as a practical matter, controlled the merger process from start to finish. Whatever the Board's (video interference) authority, it practically ceded control to Potashner who negotiated the how, when and for what with his counterpart at Turtle Beach, Juergen Stark, who is another one of the defendants.

And that was in the case by the way, Your Honor, from the beginning. If you look at Judge Gonzalez's motion to dismiss order, he's got a bulleted list, which you can look at the brief. It came from our side's brief of how as a practical matter Potashner controlled the process. So effective control, de facto control was the theory of the case. There may have been others at the beginning, but it was a theory of the case right there at the beginning. And some of what Potashner did

with his control, and I'm not purporting to be exhaustive, but he kept the board in the dark about key details of the transaction. He bullied some members of the board. He offered carrots to others, all to make sure that they would not effectively check his goal of consummating the merger, which he wanted because he thought he was going to get control of the big slice of the pie in the postmerger world.

Again, it's just a sampling, Your Honor.

The board members called him, quote, or a member of the board called him, quote, a dictator and acknowledged that the board had been far too passive in dealing with him. That's Exhibit 5 to our opposition at page 2. There's caution to him about his conflicts, to no avail. Nothing was done.

Potashner even threatened another member of the board saying, and this is Exhibit 3 to our opposition, if I were you, I would be more interested in drinking wine and enjoying the fruits of your hard work instead of spending time -- spending great sums on lawyers and spending time being deposed. In other words, nice retirement you have there. Be a shame if anything happened to it.

And then finally, the board, you know, the board's supposed evaluation of the merger on its own relied on numbers that were false. And when I say numbers, I mean the value of Turtle Beach. Right. Remember, this was a -- this was a combination, and the Parametric shareholders were going to go

from being a hundred percent owners of Parametric to 19 percent owners of the combined -- the combined entity, right. So for that to be worthwhile, it turns on how much Turtle Beach is bringing to the table, right.

On EBITDA of Turtle Beach -- that is the earnings before interest, taxes, the depreciation and amortization -- was projected to be $40.6 million for 2013, and that's what the board was told. That's what they're (video interference) of which they relied was based on. But by the time of the shareholder vote, Potashner and Turtle Beach knew that the internal revised estimates put the number as low as $16 million for a highly leveraged company, Turtle Beach. That's a huge difference in terms of equity value.

So, look, the bottom line is I'm not here to relitigate the facts. You know, obviously we tried the case, and Judge Gonzalez thought we didn't have enough under the law. She did not disagree on -- with our account of the facts so much as she decided the case based on an interpretation of this complex and technical area of law, which, respectfully, we think was erroneous.

You know, it was the defendant saying this was a case of first impression in Nevada. The law's unsettled. Mr. Hess said this morning it's a specific technical novel area of the law. We have an appeal. Maybe we can settle it a little bit more. We'll see what happens, but the point is that there was

plenty of smoke and fire here.

And as Mr. Ogilvie said last time, Judge Gonzalez, herself, recognized that there's a lot of bad smell to it. And I know Your Honor is well aware of that quote by now, and well aware of Judge Gonzalez saying that she found it a hard decision to grant the motion. So I won't flaunt it, but the point is, as I said, there was plenty of smoke and fire here. So, you know...

And then one other point I wanted to make, Your Honor, if you'll bear with me for just a moment.

The other argument that the defendants make --

And even on BlueJeans it turns out one can misplace one's notes, but I have it now.

So what else do the defendants say? I just want to make one point on this. They take what they seem to think are potshots at two of the shareholders, Mr. Weisbord and Mr. Kahn. You know, I don't want to dwell on this because I don't really think it matters or advances the ball for them at all, but I do have to respond.

About Mr. Weisbord, they make an argument that frankly makes no sense to me at all, and I'm trying to understand it. They say he only wanted to participate in this lawsuit so that he could transplant discovery from a separate employment lawsuit his son brought in California in to this case because he thought it might be relevant here or strengthen

the claims here.

I really don't see how that proves anything at all to say that Mr. Weisbord wanted to use discovery in the California case if he thought it was relevant to bolster the claims here. All that shows is that he was trying to get as much evidence as he could to support the case. It doesn't mean that he brought the case in bad faith though because of a vendetta. So I don't see how that gets him anywhere at all.

Now, on the argument, I think in silent admission that they don't -- that this argument doesn't really make any sense, Mr. Hess brought up for the first time testimony of Mr. Potashner at trial that, oh, yeah, there was some sort of side deal Mr. Weisbord offered Mr. Potashner and, you know, how do you know this? Because Kenneth Potashner testified to it at the trial.

Well, Your Honor, Judge Gonzalez repeatedly found that Mr. Potashner was not credible, including his statements under oath at the spoliation hearing and at trial. So I think, you know, you can take that for -- you know, a very heavy pound of salt or a heavy handful of felt I should say.

Okay. So what about Mr. Kahn? They say he hired a law firm, and what they don't say is and this is back in 2014, to draft a complaint against Turtle Beach, but never filed the complaint at that time or did not file the claim at that time because they didn't have enough to go on at that point.

And so assume everything that they say is true. Okay. And I'm going to get into that in a little bit more detail in just a moment. But all it shows is that Mr. Kahn didn't sue until after the avalanche of discovery in the class action made clear he had a claim. In other words, he waited to actually sue until he had a concrete factual record to go on. I don't see how any of that shows he had some sort of a vendetta to pursue the defendants, on the contrary.

But, you know, I'll just say that if you go to the portion of the trial transcript that they cite, it's pages 185 to about 197 in the first day of trial, it's clear that what Mr. Kahn is saying is that he had a lawyer draft a complaint, which he believed to be entirely true. He repeats that multiple times, and he threatened litigation because he was worried about how the company was being run, and he wanted to get a reliable person on the board, either himself or a trusted third party, to provide what he called adult supervision at the company. So yes, he rattled some sabers to effectuate change on the board but didn't actually sue until much later. I don't see how that proves anything relevant here.

And, you know, I think what is more telling, Your Honor, is why they feel the need to grasp at straws to make the argument in the first place. They're doing it because they need to find some kind of ulterior motive they can imagine that my clients had to explain away the dispositive facts that I

started with. The fact that some of their own group, 4 of the original 10, obviously thought the claims had enough merit to settle them for $400,000. The fact that they themselves were willing to pay $10 million to settle the claims in the context of the class-action.

And I think that, as I've said now probably too many times this morning, that those facts alone really are dispositive.

But you certainly cannot say, I think that we, you know, putting all that aside, that we didn't have a good-faith basis to pursue a claim just because Judge Gonzalez ended up interpreting the law in a way adverse to us at the end of the day.

And I just want to know one thing. They -- I don't want to get into too much of a debate about the merits, but they do emphasize a lot the controlling shareholder point. You know, he was never a shareholder. How could they possibly have felt they had a claim.

Well, the Nevada Supreme Court does not limit an expropriation claim to a controlling shareholder only. The Supreme Court in this very case, 133 Nevada 417 429, said that an equity expropriation claim would involve, I'm quoting now, quote, "Involve a controlling shareholders or directors expropriation of value from the company causing other shareholders' equity to be diluted." Potashner was certainly a

director. We certainly always argued he had control.

And Mr. Peek himself I was interested to hear, noted that in this morning in describing the standard referred to a controlling shareholder or director, and that's not surprising since at trial defense counsel -- I'm not actually sure who it was, they said at Day 8 of the trial, page 13, said, and I think I'm going to quote again: "Your Honor, as we know, in Parametric it" -- meaning the Nevada Supreme Court -- "went a little bit further than it seemed in *Gentile* when it said a controlling shareholder or controlling director. So I'm going to have to address both." They've always known that the claim goes beyond controlling shareholders in the state of Nevada.

The last thing I'll say, Your Honor, I think, you know, all those factors go through or, you know, all the facts I've discussed, as I said, utterly defeats their motion under the *Beattie* factors.

The last thing I'll say on the fourth factor, which of course Your Honor doesn't have to reach if you agree on the first three of them, that were outside of the scope of Rule 68 in the first place for any number of the reasons we've discussed, but I'll just note two small points. Mr. Peek said, with respect to the fees incurred for both Mr. Potashner and the other, you know, the settling director defendants, that we never pointed to any -- any entries that were not work incurred by Mr. Potashner. That's not true. We did.

Footnote 5 of our brief, we referred to a couple of entries. I want to say in the Cassity declaration. For example, there's an entry on August 13th, 2021, for draft motion for good-faith supplement, draft motion for settlement agreement, work that includes drafting and revising settlement agreements and release of claims and motion for determination of good-faith settlement. That was not work on behalf of Mr. Potashner, Your Honor. That was work on behalf of the settling defendants. So they can't get, you know, if Your Honor even gets there, all that stuff has to be ripped out.

And the last point that I'll make and, you know, look, far be it for me to say (video interference) with retaining out-of-state counsel but, you know, that doesn't mean that you -- you still have to comply with or conform to the realities of the market that you're in for purposes of attorneys' fees, and I note that they recognize that the Court can cut the fees down to what's standard in this market.

The last thing I'll say on the fees is, you know, you only get there, Your Honor, as I say, if you agree with them that our claim was not only valueless, but so valueless that it was bad faith to pursue, grossly unreasonable to continue it. If that is true, and it's not, but if that is true, how can it have been reasonable for the defendants to spend millions and millions of dollars to litigate it. They say, well, we didn't know. It could have gone worse.

Your Honor, I've had cases on the defense side when the exposure by any reasonable measure is very, very limited. I'm sure, you know, we all have. The clients don't tell you to unleash the Army. They don't tell you to launch a missile to kill a mouse because they expect to have to pay for the missile. And the fact that they felt compelled to do all that, again, just like the settlements that they reached both before and after the offers that they made tell you everything you need to know about their actual in-the-moment assessment of their exposure and the value of the claims.

So for that reason, Your Honor, the motion for attorneys' fees should be denied. Thank you.

THE COURT: Thank you.

Just an FYI, Counsel, I've got a personal telephone call I have to make at noon, but we'll go until then. And, you know, assuming that you need more time, I don't have a problem with that. We do have trial starting back at 1:00, but I'll certainly finish --

MR. PEEK: Your Honor, I have a doctor's appointment at 1:10 that cannot be missed.

THE COURT: Right. Okay.

MR. HESS: We should -- I think we'll --

THE COURT: We'll be done?

MR. HESS: Yeah.

THE COURT: Counsel, I think the question I have for

you, and it was a question that I did ask of plaintiffs' counsel is whether or not you actually beat the offer of judgment. I think under NRCP 68(g), in terms of calculating, and I probably should have asked that question first. You don't have to go through the *Beattie* factors and all of that kind of stuff and --

MR. HESS: No, yeah.

THE COURT: But I think the crux really goes down to, I mean, this case stems from 2013, and I have to assume that the plaintiffs' attorneys' fees exceeded $150,000 by that time. I mean, now I haven't seen them because that's I think the comparison I have to make, isn't it?

MR. HESS: Well, I think our understanding of the reading is the comparison has to be -- it's $150,000 plus the fees that they would have to pay us, right. So that gets added. So if you were going to compare, do the comparison of what the actual offer is, what we're saying is, you know, for $150,000, we all get to walk away. So one of the benefits you're getting is that we're all going to pay our own costs. We're all going to pay our own fees. So that's a walk away. So that's -- that's part of the benefit of the offer of judgment.

And so here, as I think Mr. Peek explained quite well, you know, we've submitted over a million dollars in cost, which are, you know, to be granted as of right, and that is the

number you would add to the $150,000. Because if they, you know, had taken the offer of judgment, they would not be exposed to that or the fees. And now they're exposed to substantial amounts.

So, you know, saying that $400,000 (video interference) $150,000, I mean, in fact, it's just the other way around. The $400,000 won't even come close. They would have done far better had they taken the $150,000 because it would not -- we wouldn't be here today, right. We wouldn't -- we're on 16 on the costs and fees motions that they're now on the hook for.

THE COURT: Well, let's look at -- go back a little bit. Okay. Let's just say that the offer of judgment then was just for 150,000 exclusive of fees and costs.

MR. HESS: Right.

THE COURT: Would they have to pay your attorneys' fees then?

MR. HESS: Would they have to pay our attorneys' fees?

THE COURT: Yeah. Let's say it's 150,000 exclusive of fees and costs. Okay.

MR. HESS: Well, I think -- well, I think if it's exclusive of fees and costs, then I think the calculus would be would they have to pay our fees and costs of $400,000.

Well, it probably --

THE COURT: Well, attorneys' fees of what basically is 4 million, almost 4 million; right?

MR. HESS: Correct. Correct.

THE COURT: Okay.

MR. HESS: If it was exclusive of that, then I think you might have a point, Your Honor, that that would be a different calculus.

THE COURT: Right.

MR. HESS: But this was an inclusive.

THE COURT: Well, that's what I'm saying is that you're saying, well, you have to -- we're having to compare our fees as including that. So really the offer of judgment is $4,150,000; right?

MR. HESS: Right.

THE COURT: Okay. So I guess then, if we were to turn the table the other way where it's just $150,000 and it's exclusive of attorneys' fees and costs, then are you saying that, okay, they take the 150, and you still have to pay our 4 million?

MR. HESS: It wouldn't be --

THE COURT: And then, of course, we don't know what your attorneys' fees are at that time -- well, wait a minute. That would be prejudgment -- that would be pre.

MR. HESS: Pre, right.

THE COURT: The pre. And I assume that your

attorneys' fees, if you had 4 million incurred since May of 2021 and this case stems from 2013; right?

MR. HESS: Well, in fairness, in terms of our fees that we have sought, I mean, we have not sought all of our fees from 2013.

THE COURT: Right. Right. Okay.

MR. HESS: So we've only sought fees from the first offer of judgment, which was I believe July of 2020. So that's -- so it's not from time immemorial in this case. It's from July of 2020 is our earliest point.

THE COURT: Yeah. Well, okay. So if it's exclusive, and I'm trying to figure, you know -- this rule sometimes has been confusing to me.

MR. HESS: Yes.

THE COURT: And I am going to tell you that I have interpreted to be that you are out -- that the offeror is offering money, and if it's inclusive, that it includes their attorneys' fees, which means that the comparison of the offer would be the amount of money plus their attorneys' fees.

MR. HESS: Right.

THE COURT: With the judgment that is acquired, okay. Which clearly you beat it. Okay.

MR. HESS: Right. Yes. I agree with that interpretation.

THE COURT: Well, I mean, well, I shouldn't say you

beat it. If their attorneys' fees and costs, let's say that it's 150,000 plus one, you know, then you didn't beat the offer of judgment. Okay.

MR. HESS: Understood.

THE COURT: If it's exclusive, then you have to compare the amount of the judgment or the verdict or whatever it is with the amount of the offer, which in that case, if it were exclusive, you win.

You've got a different spin on it, but, I mean, because this rule doesn't quite -- I mean, it says, if the offer provided --

MR. HESS: Yeah.

THE COURT: -- that costs, expenses and interest and attorneys' fees -- I'm going to forget the as permitted by law -- the Court must compare the amount of the offer with the principal amount of the judgment without inclusion of the costs and expenses. If the party made the offer in a set amount that precluded a separate award of costs, expenses and interest and attorneys' fees, the Court must compare the amount of the offer together, and it says offerees preoffer taxable costs.

MR. HESS: Right.

THE COURT: Which they're the offeree?

MR. HESS: They are the offeree. Right.

Well, I think, Your Honor, when you have to look at it is again what -- you know, the purpose of the rule is to

spare the parties the costs.

THE COURT: Sure.

MR. HESS: So --

THE COURT: But I --

MR. HESS: So you have -- so I think -- I think what's being said there is you have to take into account that, you know, money obtained at judgment is not a free play, right. So you need to take into account what was the, you know, what was the spend on that. And, you know, in the cases, you know, again, I think we are, you know, and the $400,000 is kind of -- that's a moot point. And, you know, I think when you look at this, you know, Mr. Sullivan talked about one of the cases, but, you know, to this point, you know, if you look at the Deferio case, which we cited, you know, it notes that the judicial -- and this is about the federal rule, which is -- it has some bearing. It's far more narrow, I mean, to be candid, the federal rule would not provide for costs and fees to us in this case because ironically the Supreme Court has interpreted Federal Rule 68 to say that if a defendant wins than it goes to judgment and get zero, it actually doesn't count. So it is limited. I mean, the federal rule has its own limited application. But this part is I think notable.

The judicial conference of the United States, and United States Supreme Court have indicated that the rule is designed to apply in cases resulting in judgments obtained

after trial. The purpose of Rule 68, as adopted in 1938, is to encourage settlements and avoid protracted litigation by taxing plaintiff with costs. It should recover no more after trial than would've been received if he had accepted the offer of judgment. And it goes on to say the original rules drafted did not adopt Rule 68 for the purpose of promoting settlement in the way we understand settlement promotion today.

They simply adopted the offer of judgment rule that existed in state (indiscernible). Those State rules were not designed to promote settlement as such. They were designed to prevent plaintiffs from imposing costs unfairly when the defendant offered what the plaintiff was entitled to receive from trial. The text of Rule 68 makes much more sense when viewed in these fairness terms. And so --

THE COURT: Wait. By the way, whenever I have interpreted this.

MR. HESS: Yeah.

THE COURT: I have interpreted it as reasonable attorneys' fees, costs and all of that because I have had a situation where I asked the plaintiff what their attorneys' fees were preoffer, and they went over and beyond, which I'm like, no, that's not what you get, you know. But anyway, while I was listening to all of you guys, and you guys gave great argument in terms of the *Brunzell* and *Beattie* factors and all of that kind of stuff, but then I got to thinking wait a

minute. I mean, what did the offer actually say.

MR. HESS: Right.

THE COURT: And that's -- and it said inclusive.

MR. HESS: Indeed it said inclusive, yes. There's no doubt. And again, as we know, you know, we argued in our reply, you know, on page -- I can get to it. It's I think the last page.

THE COURT: And I will tell you that I think Rule 68(g), it kind of prevents the gotcha moments that we used to see where a month before trial you would suddenly get the offer of judgment that probably should have been made in the very beginning to avoid the costs and the attorneys' fees and things like that.

MR. HESS: Right. And I think that's why the rule has kind of -- it has to be so many days before trial.

THE COURT: Sure.

MR. HESS: So you don't -- right. You just, you know, you can't do a sandbag on somebody on the last day when, you know, everything is spent. Because then again, that -- and that goes to what we've been talking about, which is the whole point of the rule. It's not necessarily to like provide these partial settlements. It's to stop trial. It's to stop these costs from being incurred.

THE COURT: Right.

MR. HESS: Right. And so, you know, and so when the

offer is made with inclusive with the fees, I think, you know, the point that Mr. Peek made quite ably was that that means that the amounts of costs from that point forward have to be kind of also added to it. So it's 150,000 plus because those are the things that would have otherwise, if they had accepted that number, everything would have -- that was kind of an all-in package is what that's saying. It was all -- everything is in. Everyone is walking away and not going to see costs or fees under any statutory basis.

And as noted, there are other bases other than Rule 68. This is just the one we're talking about today.

But that's -- that's what we're talking about because, you know, right, we could have, for example, through the offer of judgment said, you know, in an exclusive and, you know, then we would say, well, okay, we have to compare that number to zero without the other costs, right, or whatever the judgment ultimately was without the costs taken into account.

Here it's zero, right. I mean, so it's kind of easy, right, because we're not talking about, you know, they -- I think this comes into play when there's a judgment that's a little bit less than what they asked for. So it's kind of your wondering like well, was the juice worth the squeeze; right? Here, this was a win. I mean, this was a home run, right, it's zero.

So in the $150,000 and, you know -- so they want to

deduct the $400,000. I would say clearly there's no case that would support that in Nevada. Settlements are not judgments for rule (indiscernible) for federal or Nevada purposes. So forget that.

So on 150 --

THE COURT: Well, and I am --

MR. HESS: -- doesn't matter. If you get zero, if you prevail, zero to 150 or you had the attorneys' fees, we win either way.

THE COURT: Okay. Well, I was going to say the settlements, frankly, I'm not impressed by that argument that the settlements are in fact a judgment. But I -- from your perspective, I mean, I -- see, this is the way I've interpreted it.

MR. HESS: Okay.

THE COURT: And I am -- and I want you to tell me where I'm wrong on this is that, and I have had it, particularly in construction defect cases, where there's an offer of judgment, and usually it's amount per house. Make an offer of judgment for 5,000 exclusive of attorneys' fees and costs. Okay. Well, in a lot of the CD cases, they're contingent -- they are a contingency fee arrangement.

MR. HESS: Yes. Right.

THE COURT: Or back before 2015, attorneys' fees were a damage, were part of the damages. So they would tack on. So

if it's 5,000 per house, then in its exclusive attorneys' fees, then you got to add the -- it's not write a check for 5,000 per house. It's then they say, okay. Well, this is what our attorneys' fees and costs are per house.

MR. HESS: Right.

THE COURT: And you've got to pay 5,000 plus the attorneys' fees and costs per house.

Does that make sense?

MR. HESS: Yeah.

THE COURT: Okay. Whereas like in this case, if it had been exclusive, then you say, okay, we'll pay you 150. Then if they said we accept, then you'd have to pay whatever their attorneys' fees and costs were to date, plus the 150.

MR. DANNER: Right. I know, and I think that's -- I get that point, Your Honor. And I think that's right. So if the offer of judgment says its exclusive, it's $150,000.

THE COURT: Right.

MR. HESS: And then you get submitted a bill for your costs.

THE COURT: Rates.

MR. HESS: And fees, and that's -- so that's the issue there.

So that -- I think that is the right reading, and ours was inclusive, and it's a walk away.

And so in our -- I mean, here we have zero versus

$150,000. I mean, I think those are the numbers we look at.

THE COURT: Well, but it says though, if the offer provided that cost, expenses and interests are permitted by law of -- and I'm going to just paraphrase because this if permitted by law.

MR. HESS: Yeah. Right. Yeah.

THE COURT: All right. If the offer provided that cost, expenses, interest and attorneys' fees would be added by the Court, meaning it's exclusive, then you compare the amount of the offer with the principal amount of the judgment, which if it had been exclusive, they didn't accept it, you made 150 they got the doughnut, you win.

MR. HESS: Yeah.

THE COURT: But it's not exclusive. It's inclusive. And if it's inclusive, if a party made an offer in a set amount that precluded a separate award of costs, expenses, interest and attorneys' fees, the Court must compare the amount of the offer together with the offeree's preoffer taxable costs, expenses, interest and attorneys' fees. And if their attorneys' fees were more than 150,000 and the comparison is that number against your 150 on whether or not you meet the offer of judgment.

MR. HESS: So I am -- to me that doesn't compute to me and for this reason is because you have to determine what the outcome was at trial. And every case I've seen looks at

what the awarded damages were; correct?

THE COURT: Well --

MR. HESS: And so that's -- that is the crucible of the rule. And so that interpretation, Your Honor, suggests to me that we're looking at numbers other than the number received at trial, which is kind of the lodestar for this purpose.

And here it's -- unquestionable when you say they got zero. And our offer of judgment was $150,000. And so that is the issue. I think this problem potentially comes into play more when you have a situation where you have a plaintiff who prevails but fall short, right. You know, they seek $10 million and only get $2 million or whatever. So then you have to start looking at the calculus. Okay. Well, what -- what really is baked into that; right?

And here, because it's a hundred percent prevailing, it's zero, right, and you look at the $150,000 number and you look at the zero number. Every case I've seen applying the rule is based -- that is what it does.

You know, maybe Nevada counsel has more, you know, insights into it than I do. I will admit this is the first time I have sought fees under Nevada Rules of Civil Procedure 68. So I'm happy to defer to those who have done it more frequently than I. And so maybe that would be a good idea if that's something the Court's struggling with. I would invite, you know, one of our very experienced Nevada counsel to discuss

their experience.

Do you want to do that?

MR. PEEK: Are you asking me to step up and take the hit?

MR. HESS: I don't often say nice things about you, Steve. So -- not on the record anyway.

MR. PEEK: Your Honor, I think I see this differently than the Court does.

THE COURT: Okay. Well, that's what I -- you know, ultimately you -- and I think you guys all appreciate I want to get this right.

MR. PEEK: I know. And I think you're substituting precludes when we use the word include. So if you're making that offer excluding, as you say, cost, fees and interest and that's accepted, you then come back to the Court and say, Judge, I want my fees and costs. And that's the way -- that's the practice.

So when you say inclusive, you are saying I'm all in, as Mr. Hess has said, and this is the way I've interpreted it, and I apologize. I hadn't really viewed it the way that the Court says is that I have to look at what the opposing parties or the offeree's costs were, what the offeree's interest was, what the offeree's fees were when I say inclusive.

I'm saying inclusive when I write the offer of a judgment is that we're not -- we're now relieving you of that

burden, if you will, Your Honor, of paying our costs, paying our fees, paying you any interest. So we're relieving you of that burden. That's the way I had interpreted the word inclusive as opposed to the way you're now looking at it and saying, well, we have this word preclude.

Because the exclusive and inclusive are exact opposites. Exclusive says I get, you know, after the judgment. You accept it. I get to then make an application for fees and costs.

In the inclusive, I don't get to do it. That's the way I read it.

The preclude I think is a different interpretation, and I don't disagree with the Court's interpretation of it, but I -- that's not the way that the practices in this, as I appreciate the practice here, and I certainly haven't had one of these come in front of you before, but when we use the word inclusive, we're saying to them is a walk away, as Mr. Hess said, and that's the way I've interpreted it.

I'm learning something new today with the word preclude as being an include?

THE COURT: Well, I'm not saying necessarily that I'm -- I'm just saying that that's the way I've handled it. Now, I obviously have not had to deal with something of this magnitude before, and it's been a lot simpler in the cases that I've dealt with before.

So --

MR. PEEK: Well, you're going to have to change, certainly my theory right now is what I was thinking about when I made my offer. I have to say, okay, offeree, what is your interest? What are your attorneys' fees? What are your taxable costs to date so that I can include -- so that I can somehow preclude or make sure that my offer is sufficient enough.

THE COURT: Exactly.

MR. PEEK: To allow you to recover in the offer of judgment what you believe would be your cost, attorneys' fees and interest. I get that, but I don't think that's what we're seeing here.

The way we wrote it, and certainly I was instrumental in counseling (indiscernible) Rick Gordon, what is the practice here. So we said okay. We add the word inclusive. That means that we're relieving you of the burden of our cost, our additional fees and any interest that you might recover.

THE COURT: But if there were no offer of judgment made at all, the American rule would apply, and they would not be saddled with attorneys' fees unless you were using it as a sanction under NRS Chapter 18.

MR. PEEK: Right.

THE COURT: Okay.

MR. PEEK: This comes close to that, but...

Well, we didn't make that motion, Your Honor, but certainly I think a lot of the arguments that we've made bring it very close to that Chapter 18.

But I get the point. You're right. The American rule would not allow me, had we not made any offer at all.

THE COURT: Right.

MR. PEEK: Fees at all.

THE COURT: Right.

MR. PEEK: Because there is no attorneys' fees provision anywhere at all. There's no statutory right, nor is there an agreement for fees in a derivative action.

THE COURT: Right.

MR. PEEK: Or excuse me, in a direct claim. So we then use the offer of judgment as a way to force the other side to give serious consideration.

But I'm trying to think as a practical matter how do I make that offer when I don't know what the other side's fees are, when I don't know what the other side's costs are.

THE COURT: Well, see that's the thing though. It does force you almost to make the offer, like, right away or -- or you have to almost ask them.

MR. PEEK: Yeah.

THE COURT: I think you could have presumed at this point their costs and fees --

MR. PEEK: But don't their fees have to be

recoverable as well?

UNIDENTIFIED SPEAKER: Yes. Yeah.

MR. PEEK: So their fees, they would have had to have a right to fees, which they didn't.

THE COURT: But it just says if the party made an offer and that precluded, okay. Let's see. The Court must compare the amount of the offer together with the offeree's preoffer taxable costs, expenses, interest and attorneys' fees.

MR. PEEK: Yeah, no, no. And if attorneys' fees.

UNIDENTIFIED SPEAKER: If attorneys' fees.

THE COURT: If attorneys' fees --

MR. PEEK: Right.

THE COURT: -- are permitted by law or contract.

MR. PEEK: And in this case they're not. So really all we're looking at --

THE COURT: Well, that's --

MR. PEEK: -- would be the taxable costs that they had.

THE COURT: Right.

MR. PEEK: Or the interest. Of course, they --

THE COURT: Well, they don't even have interest.

MR. PEEK: Right.

MR. HESS: Right.

THE COURT: Because they got doughnut.

MR. HESS: Correct.

MR. PEEK: They got the doughnut. So they have no interest. So all we're talking about is whether their costs --

THE COURT: Right. And their --

MR. PEEK: How much their costs were.

THE COURT: If their costs were exceed $150,000 that were incurred prior to May 28th of --

MR. PEEK: You have no evidence of that, Your Honor. In their analysis, they do not provide you for you to invoke that section of the rule.

THE COURT: Because nobody thought about it.

MR. PEEK: Well, that may be that neither Mr. Ogilvie or I or Rick Gordon, the Nevada lawyers thought about it in the way the Court has, but be that as it may, I don't know what their costs were. They haven't told us what the costs were. All they have said is you have -- I've got a $400,000. So I must have beat it. Well, and I think the Court has properly said, I'm not looking at that because this deals with at trial. It doesn't deal with settlement.

So I don't -- I think the -- that they did not beat the offer of judgment, Your Honor, unless they can provide proof to you that their taxable costs were over $150,000 because that's where -- that's where they're saying, oh, I, you know, I -- because it's the doughnut of zero, plus whatever their taxable costs were in the way the Court is providing this analytic to us today.

You have no evidence of that. They didn't bring it forward to you. If that's going to be their interpretation, it's their burden to say, I beat the offer of judgment because here's my taxable costs. And then we get to analyze that. So I'm not trying to say this is a gotcha moment for the plaintiffs, but maybe it is a gotcha moment for both of us.

THE COURT: Well, I need to make my call.

Do you guys want to think about this for a few minutes, and I --

(Pause in the proceedings.)

MR. PEEK: So just stay here and come back while we think about it? Because I do have a doctor's appointment I cannot change it.

THE COURT: Do you want to resume this hearing?

MR. HESS: Steve, up to you.

THE COURT: My phone call will probably take 10 minutes.

Yeah, I understand, Mr. Peek. You know, do you guys want to brief this issue?

MR. PEEK: I'll --

THE COURT: That would probably be up to Mr. Ogilvie and Mr. Sullivan an opportunity to show what their costs were.

MR. SULLIVAN: What we can do -- we can certainly confer on that, you know, and I think if it's something that, you know, obviously interests the Court, then we'd like an

opportunity to address it.

I'll just say I know that you have to go, but --

THE COURT: Well, just for a few minutes. Mr. Peek has to go.

MR. PEEK: Yeah. Your Honor, I think that to the extent that -- we don't need any more oral argument on this.

THE COURT: Okay. And we certainly don't need any more oral argument on the *Brunzell* or *Beattie* factors.

MR. PEEK: No, we don't. What I think the Court is addressing is whether or not they beat the offer under the --

THE COURT: Whether the defendants did, yeah.

MR. PEEK: Whether the defendants beat the offer.

THE COURT: Right.

MR. PEEK: Because the plaintiffs recovered the doughnut, as the Court says.

THE COURT: Exactly. Exactly.

MR. PEEK: So there's no interest available. There's no attorneys' fees available. So it really gets down to under your analysis costs, but I think there's more briefing to be done.

THE COURT: Just on that rule.

MR. HESS: I'll just point out that it's the taxable costs. So again --

THE COURT: It's taxable costs and --

MR. HESS: -- such as and I get it.

THE COURT: And, frankly, it's reasonable costs too. I mean, so it may be an analysis on examining what their costs are and whether they are reasonable.

MR. HESS: And, Your Honor, I mean, in this instance, it seems odd where we had complete victory that there would be any instance where we didn't meet any offer of judgment, right. It's a zero percent chance. I think that part of the rule, and this is primarily what I was trying to articulate, is that we have situations where the plaintiff doesn't get the doughnut but gets some number. And so they prevail, but they don't beat the offer of judgment.

THE COURT: Sure. Many times that --

MR. HESS: -- so they have taxable costs. So when we fail to look at the number, they are entitled to be -- to bring in those taxable costs to see whether or not they beat the offer of judgment if they prevailed in some way.

But here, I can't even imagine a rationale where you get a complete victory, a complete victory and somehow your offer of judgment of any amount, you know, putting aside the *Beattie* factors, that somehow you didn't beat the offer of judgment. I don't think there's a reasonable space for that. I don't think we need to brief this issue at all because I can't think of a single instance where that could possibly be true.

And the only thing that 68(g) talks about or relates

to is if a plaintiff wins but doesn't win quite as much as the offer of judgment. And so the Court's saying, okay. Let's take a look at the whole picture. Let's take a look at the costs because at that point --

THE COURT: Guys, I really --

MR. HESS: -- at that point you've got to put it in there.

THE COURT: Guys, it's noon, and I really need to --

MR. HESS: I understand, Your Honor.

THE COURT: But why don't you guys hang out and talk about this for a moment.

Mr. Peek, if you need to go, you need to go, and I'll be back in 10 minutes.

MR. PEEK: Well, I can -- well, I'll -- if you're only 10 minutes.

THE COURT: Okay. 10 minutes. Okay.

MR. SULLIVAN: Thank you, Your Honor.

(Proceedings recessed at 12:00 p.m., until 12:26 p.m.)

THE COURT: Okay. It was a little longer than 10 minutes. Sorry about that.

Did you guys have a chance to talk?

UNIDENTIFIED SPEAKER: Briefly.

THE COURT: Okay.

MR. HESS: Well, I think we disagree on the need for briefing I think. Plaintiff would like additional briefing,

and the defendants, respectfully, don't think additional briefing is needed.

Just 60 seconds is I think the most it will take.

THE COURT: Sure.

MR. HESS: Rather than continue to incur fees and costs, as we kind of were talking about before we broke, Your Honor, I think 20 -- I mean, 68(g), we get into that calculus only in the scenario where we talked about, because you have to have -- you have to look at it -- pardon me. The plaintiff has to be the prevailing party, right. And then you have to determine whether or not the plaintiff prevailed enough.

And if you look at G, it just says, you know, the invoke the penalties the Court must determine that the offeree failed to obtain a more favorable judgment, the offeree.

Now, in this case, there is no possible way the offeree obtained a more favorable judgment regardless of what its costs were at any point.

And I know that feeds in perfectly to what we were talking about before at the end when it's talking about preoffer taxable costs. So it assumes that the offeree has taxable costs and fees, and the only way that happens is if it obtained a favorable judgment. And so that makes sense.

THE COURT: Meaning more than -- that it doesn't really apply if it's zero, but it would if they got like a dollar?

MR. HESS: Right. Let's say plaintiff got $149,000 judgment at trial, and we would then come in and say we gotcha. In that case, then I think the rule provides not so fast to us, and so we're going to take a look at the taxable costs because obviously at that point the plaintiffs -- you know, rather than doing this kabuki dance, if I went to Mr. Ogilvie in May of 2021 and I said, Mr. Ogilvie, would you please provide me an affidavit with your taxable costs up to this date, he would rightly tell me to go take a long walk off a short pier.

THE COURT: Well, he might not if he knows what the reason is.

MR. HESS: Maybe, but I think in most cases that wouldn't be the case. And so I think this comes into play. The only time you know this, and again, the reasonable tax and costs is because some party has had cause to come to you and the Court to say I want these costs, taxed, and they've submitted an affidavit. They've submitted evidence to do that, and the Court says, okay. I'm going to look at this and add or not add depending on what the offer was those numbers.

But in every instance the rules presumes the plaintiff has prevailed in some manner. And so the question is did you prevail enough. And since we're trying to add things here, where the offerer prevailed, and, you know, is a complete victory, we don't even need to get in to this analysis because there's no -- we're the prevailing party. We had complete

victory. So you don't even have to get into like what the costs were because they can never do better than zero.

THE COURT: Well, and by the way, getting to your point about if I call Mr. Ogilvie to find out what his costs were, I'm going to just tell you whenever I do mediations or judicial settlement conferences, that's what they're called now that I'm a Judge. But I would always ask the plaintiff, particularly in the personal injury realm, what are your costs? Because I know what their fees are if they're contingent.

MR. HESS: Right.

THE COURT: What are your costs? Because I've got to go back to the defense side and say, look, this is what his fees and costs are right now, and that's part of the negotiating process.

MR. HESS: Fair enough. But, I mean, nothing would preclude counsel from just saying I'm not going to give that to you, in which case --

THE COURT: Yeah, which tells me he's not going to play.

MR. HESS: You know, that's gamesmanship; right?

THE COURT: Sure.

MR. HESS: And so it's, like, I'm not going to let you hit me within OOJ that you can have any insight into. And in any event, regardless of the practicalities.

And again I think 28 -- or 68(g) makes it clear that

this only comes into play if the offeree is the prevailing party, and we're just trying to figure out whether or not, notwithstanding that, the sanction of Rule 68 would apply. Here, since the offeree is clearly not the prevailing party, we don't even have to worry about it.

THE COURT: Okay. All right. Guys, I'm going to take a closer look at this one. I've got to take a look at the costs anyway.

MR. HESS: Yeah.

THE COURT: So, Mr. Ogilvie.

MR. OGILVIE: As Mr. Hess indicated, Your Honor, I think, as the Court said, it's important to get it right.

THE COURT: Sure.

MR. OGILVIE: And I think additional briefing would be helpful.

THE COURT: Okay. Do additional briefing. When can I expect briefing? On this issue?

MR. HESS: I presume this will be just like contemporaneous.

THE COURT: Sure.

MR. HESS: I don't know. A week.

MR. OGILVIE: Two weeks.

THE COURT: Two weeks?

MR. HESS: No, we don't need two weeks for this. This is -- I mean, you know what I'm going to say.

UNIDENTIFIED SPEAKER: (video interference) narrow.

THE COURT: It's Christmas time. You got parties to go to. I'll give you two weeks.

MR. OGILVIE: Thank you, Your Honor.

MR. HESS: Okay. So that would be -- what day is that?

THE COURT: What would two weeks be for briefing?

(Pause in the proceedings.)

THE COURT: December 15th or 16th?

THE CLERK: 16th.

MR. HESS: December 16th. Okay.

(Pause in the proceedings.)

MR. HESS: And, I mean, not to put a fine point on it, but, you know, (indiscernible) the briefing would be limited simply to the issue of the application of Rule 68(g).

THE COURT: Right.

MR. HESS: Perfect.

THE COURT: Okay. All right.

ATTORNEYS: Thank you, Your Honor.

THE COURT: All right. Yeah, I don't need to hear any more about the other stuff. I got it.

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MR. HESS: I got it. Yeah.

THE COURT: Okay.

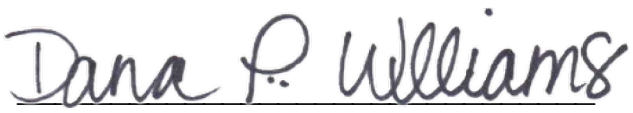
MR. HESS: Thank you, Your Honor.

THE COURT: All right. Thank you.

(Proceedings concluded at 12:32 p.m.)

-oOo-

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



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DISTRICT COURT

CLARK COUNTY, NEVADA

KEARNEY IRRV TRUST, Plaintiff, vs. KENNETH POTASHNER, Defendant.	CASE NO: A-13-686890-B DEPT. XXII

BEFORE THE HONORABLE SUSAN JOHNSON, DISTRICT COURT JUDGE
TUESDAY, NOVEMBER 16, 2021

RECORDER'S TRANSCRIPT OF HEARING RE: PLAINTIFF'S MOTION TO RETAX DEFENDANT KENNETH POTASHNER'S VERIFIED MEMORANDUM OF COSTS; PLAINTIFF'S MOTION TO RETAX NON-DIRECTOR DEFENDANTS' MEMORANDUM OF COSTS

APPEARANCES ON PAGE 2:

RECORDED BY: NORMA RAMIREZ, COURT RECORDER

Case Number: A-13-686890-B

APPEARANCES:

For the Plaintiff(s):	GEORGE F. OGILVIE, ESQ., DANIEL M. SULLIVAN, ESQ. (pro hac vice)
For the Defendant(s):	J. STEPHEN PEEK, ESQ., RICHARD C. GORDON, ESQ., JOSHUA D. N. HESS, ESQ., (pro hac vice) DAVID KOTLER, ESQ., (pro hac vice)

Las Vegas, Nevada; Tuesday, November 16, 2021

[Proceeding commenced at 9:06 a.m.]

THE COURT: Okay, let's go to page 5 and that's Kearney IRRV Trust versus Potashner, case number A-13-686890-B. And this is a consolidated matter with -- it's case number A-13-687232-B, and that's Rakauskas versus Parametric Sound Corporation. And we have another one, and it's 13-687354-B Prieston versus Potashner. There's another one, 13-687665-B Hansen versus Parametric Sound Corporation. Let's see, and we've got another one, case number A-13-688374-B Vasek versus Parametric Sound Corporation.

Looks like we've got at least a couple more, case number A-16-741073-B Mykita versus Stripes Group LLC, case number A-20-813308-B PAMPT LLC versus Potashner. And we've got two matters on.

So, would counsel please identify yourselves for the record?

MR. PEEK: Good morning, Your Honor, it's been a minute. I'm happy to be back. All of these cases have been --

THE COURT RECORDER: I'm --

MR. PEEK: -- consolidated --

THE COURT: Would -- I was going to say, would you identify yourself for the record, Mr. --

MR. PEEK: Oh, excuse me, Stephen Peek on behalf of Potashner.

THE COURT: Okay.

MR. KOTLER: Good morning, Your Honor, David Kotler on behalf of the Non-Director Defendant, so VTB, Stripes, Juergen Stark, and Kenneth Fox and Stripes Group.

MR. HESS: Joshua Hess also for the Non-Director Defendants, Your Honor.

MR. GORDON: Yeah, and Your Honor, Richard Gordon, bar number 9036, also for the Non-Director Defendants.

THE COURT: Okay.

MR. OGILVIE: Good morning, Your Honor, George Ogilvie on behalf of the Plaintiff PAMPT LLC. With me today is Mr. Dan Sullivan who has submitted a motion to associate counsel -- or associate as counsel in this matter.

THE COURT: Okay. We've got two matters. We got Plaintiff's motion to retax -- excuse me, I'm away from you guys, so I hope you don't mind if I take off the mask whenever I talk. And you -- if you want to be at the podium, you may do the same. I find that we muffle up whenever we've got these masks on.

MR. OGILVIE: Yeah, no objection, Your Honor.

THE COURT: And I don't think anybody wants this mask mandate to go away any sooner than I do.

Anyway, Plaintiff's motion to retax Defendant Kenneth Potashner's verified memorandum of costs and Plaintiff's motion to retax Non-Director Defendant's memorandum of costs. So, it's your motion.

MR. OGILVIE: Thank you, Your Honor.

MR. PEEK: And Your Honor, let the record reflect we have no

opposition to Mr. Sullivan's appearance here today as pro hac vice.

THE COURT: Okay.

MR. PEEK: I think it's set for hearing some time in December. We have no opposition though -- to it though.

MR. HESS: I think there's in fact -- to his colleague, Mr. Daner or -- and Mr. Sullivan both put in pro hac, we do not object to either, so.

THE COURT: Okay. Are you --

MR. SULLIVAN: That's correct.

THE COURT: -- is there anybody who objects?

MR. GORDON: Nope.

MR. KOTLER: I don't believe so.

MR. KOTLER: No.

THE COURT: Okay, is everybody represented here?

MR. PEEK: Yes, Your Honor.

MR. HESS: Yes, Your Honor.

THE COURT: Okay. Motion's granted.

MR. OGILVIE: Thank you, Your Honor.

THE COURT: And I don't think that that's on for hearing; is it?

MR. PEEK: It's set for --

MR. OGILVIE: It --

MR. PEEK: -- December sometime, Your Honor. It's not set for today, but I thought just --

MR. OGILVIE: I believe December 16th and December 23rd are the dates on which the two motions to associate are on calendar,

Your Honor. They were filed last week.

THE COURT: Okay, let me just --

MR. PEEK: I just though expediting them would be better, Your Honor.

THE COURT: I agree. Any time we can agree, that's terrific. Okay. Yeah, it's December 23rd we've got two motions. We've got for Scott Manning Danner and Daniel Martin Sullivan. Is there any objection to the one with Scott Manning Danner?

MR. PEEK: None, Your Honor.

MR. HESS: No objection.

THE COURT: Mr. Gordon?

MR. GORDON: Nope, no, Your Honor.

THE COURT: Okay, that one's granted too. So, you guys will -- you'll prepare the order.

MR. OGILVIE: I have an order if I can approach.

THE COURT: Well, actually you'll have to put it through the system.

MR. OGILVIE: Okay, understood.

THE COURT: Unfortunately, Mr. Ogilvie, the times of us having paper anymore is gone. And that's terrible, but whatever. I'm a paper person.

Okay, it's your motion.

MR. OGILVIE: Thank you, Your Honor. So, Your Honor finds herself in the unfortunate position of inheriting a case that she knows nothing about after a judgment has been entered. So, if the Court will

permit me, I will provide the Court with a little bit of background and not too much because a great extent of the litigation in the various matters that have been consolidated are irrelevant for purposes of the Court's consideration of the motions today. As I indicated, I represent PAMPT LLC, which is the PAMPT LLC versus Potashner case, which was the last case that the Court referenced in announcing the case this morning.

The PAMPT LLC matter was the tail end of various litigations pursued by various shareholders that sued over a merger that occurred in 2013, 2014. It was finalized in January 2014. So, again, the story relating to all those other consolidated cases is of marginal relevance, but I need to provide the Court with some background because it goes to -- the irrelevancy of the other consolidated cases go to one of the primary arguments in the motions to retax.

And the Defendants in this matter prevailed at trial. There were two primary Defendants -- or two primary groups of Defendants. There were the Director Defendants of Parametric, and there were the Non-Director Defendants that -- and both sides -- both groups filed memorandums -- memoranda of costs that we have challenged in the instant motion.

So, the out-- just to give the Court a roadmap before I get into the background as the motions to retax establish, Plaintiff is challenging costs set forth in the Defendant's respective memoranda, and those costs can be broken into five specific categories. They are costs that were incurred in unrelated class actions -- related, but unrelated because -- related in that it -- the claims sought in the class action are

the same as the claims sought in the matter before the Court, the matter that went to trial.

There are costs that we are challenging relating to an evidentiary hearing regarding spoliation, in which Judge Gonzalez found that the Defendants destroyed evidence. Plaintiff is also challenging excessive costs on lavish living expenses and IT expenses incurred during trial. Plaintiff is also challenging ESI hosting costs that are not taxable under Nevada law. And finally, -- well, not finally, but the last significant or substantial cost that Plaintiff is challenging is $55,000 in expert fees for an expert who did not testify at trial.

With that roadmap, let me provide the Court with a little bit of background here. And the -- as I indicated, the litigation, the complaint that was filed by PAMPT in May 2020, just 18 months ago, was over a merger that occurred between VTB Holdings and Parametric in 2013 and 2014. I say 2013 and 2014 because the actions taken by the Parametric Board of Directors in August 2013 led to a series of lawsuits against the Parametric Board of Directors and also led to the lawsuit that was brought by PAMPT in this matter, the matter before the Court. That merger was approved, again, by the Parametric Board of Directors in August 2013. It was submitted to a shareholder vote and finally closed on January 15th, 2014.

So, stepping back a little bit, VTB Holdings was, prior to the merger, a privately held company with fairly good revenue that wanted to go public. So, we had VTB Holdings, and we had Parametric Sound Corporation. And Parametric Sound Corporation was a small --

basically a startup, but it was a publicly traded corporation. VTB Holdings wanted to be a public company, so it got together with Parametric Sound Corporation and decided that rather than going public on its own through an initial public offering, thought that this merger with a public corporation would provide it with the public -- publicly traded standing that it sought.

The Plaintiffs in -- or the Plaintiff in this case, PAMPT, P-A-M-T-P [sic], is an entity that was formed by shareholders in Parametric Sound Corporation. So, we have shareholders that owned stock in Parametric Sound before the merger occurred in 2013, 2014. The Plaintiffs, we call -- they've been known as the assigners between counsel and the Court throughout the trial, assigned their claims for this improper merger. And when I say improper merger, improper in that the shareholders -- not just the shareholders that assign their claims to PAMPT and their eight specific shareholders.

But all of the shareholders in Parametric were damaged by the merger between the two entities. Damaged in the sense that the shareholders, all of the shareholders in the class action -- and I'll get to the class action in just a moment -- claimed that the value that they received as a result of the merger did not justify what they previously held in Parametric.

So, again, we have the shareholders of Parametric, pre-merger, a publicly traded corporation, who felt that they were damaged as a result of actions taken by the board of Parametric, aided and abetted by various members of VTB Holdings. Short -- very shortly,

within days after the Parametric board approved the merger in August 2013, a class action was filed on behalf of all of the Parametric shareholders against the Defendants in this case.

That -- after that action was filed, the Defendants filed a motion to dismiss. That motion to dismiss was denied. The Defendants sought writ relief from the Nevada Supreme Court, the Nevada Supreme Court ruled that the dismissal was -- that the case was improperly dismissed, should not have been dismissed, but stated that the Plaintiffs, the class action Plaintiffs -- again, this is well before the case that's before the Court. This is 2017. The Supreme Court ruled that the class action Plaintiffs should have the opportunity to replead; they did. Another motion to dismiss was filed, it was denied, the class action -- the class was certified by Judge Gonzalez, and the case was litigated.

In November of 2019, two years ago, the class -- the class through class counsel, and the Defendants through counsel in the courtroom today, negotiated a settlement, a settlement of all the class's claims. The settlement went through all the required stages of settlement of a class action. Ultimately, in April of 2020, now five months after settlement was reached, the shareholders of Parametric that formed PAMPT objected to the settlement, feeling that the settlement with the Defendants did not properly value the damages as a result -- that they experienced as a result of the Defendant's actions.

So, the Parametric shareholders that formed PAMPT assigned their interests to PAMPT to pursue this litigation. So, that -- we have one Plaintiff in this litigation, it's PAMPT LLC, which the members

are entirely the group of dissenting shareholders, if you will, that opted out of the class settlement.

Ultimately, the class settlement was finally approved. And on May 18th of 2020, Judge Gonzalez entered into order approving the final settlement, essentially bringing a close to the class action lawsuit. Two days later, on May 20th, 2020, PAMPT filed an action against the Defendants, a brand new action, which was subsequently consolidated with the class action. Nonetheless, it was an entirely separate action brought in -- under an entirely separate case number in an entirely separate courtroom.

THE COURT: So, we have a consolidation of this case to essentially a dead case or a closed case?

MR. OGILVIE: A case that had been settled.

THE COURT: Okay, but it wasn't completely done yet at that point?

MR. OGILVIE: Was -- no.

THE COURT: The -- meaning, the settlement docs had not been done.

MR. OGILVIE: Well, actually the final order of approving the settlement had been entered by Judge Gonzalez on May 18th, two days before PAMPT filed this lawsuit.

THE COURT: Essentially closing the class action case?

MR. OGILVIE: Essentially closing it, but not formally closing it.

THE COURT: Okay.

MR. OGILVIE: Bringing the proceedings to an end and resolving all claims that existed in the class action.

Again, the shareholders of Parametric that formed PAMPT brought this action that's currently before Your Honor through PAMPT, and it is styled PAMPT LLC versus Potashner, et al. That case was litigated over the course of 15 months between May 20th, 2020 and I would say August 16th, I believe, when we went to trial, of this year. So, we litigated the case for 15 months.

Part of that litigation, and a very intense portion of that litigation, involved the Plaintiff's motion for adverse inference -- or sanctions for the spoliation of relevant evidence brought against various Defendants. The motion was granted and Judge Gonzalez -- the motion was granted in May of 2021, six months ago. And Judge Gonzalez set an evidentiary hearing to determine the appropriate sanctions against the Defendants in June of 2021.

At that evidentiary hearing regarding spoliation, various parties testified. And Judge Gonzalez concluded that the spoliation finding was appropriate and that adverse inferences should be imposed against the Defendants, certain of the Defendants, for their conduct. And specifically, Judge Gonzalez determined that the primary bad actor in all of this, Defendant by the name of Kenneth Potashner, Kenneth Potashner was, in August 2013, the executive chairman of the board of Parametric.

He -- Mr. Potashner, the evidence revealed at trial, was the primary protagonist of the merger. He pushed the merger through. He

obtained the approval of the rest of his board for the merger, the rest of the board of Parametric. He did so through misrepresentations, through misleading statements, through bullying board members. And all of that evidence was presented at trial.

So, getting back to the evidentiary hearing. Again, Mr. Potashner, being the primary protagonist of the merger, testified that he didn't destroy any evidence, that he produced all the evidence that he was obligated to produce under two separate litigation holds that were provided to him by counsel in August and October of 2013. Judge Gonzalez determined that Mr. Potashner lied under oath, both at his deposition and again during the evidentiary hearing, finding in two separate instances, two separate sets of facts relating to Mr. Potashner, that Mr. Potashner's, open quote: testimony is refuted by the evidence adduced at the June 18th, 2021 hearing, and is not credible.

Judge Gonzalez also found that other Defendants, namely Juergen Stark, who was the CEO of VTB Holdings, the other group of Defendants, and Ken Fox who controlled VTB Holdings -- both on the other side from the Parametric side of the merger. Judge Gonzalez found that both of them were not credible. Their testimony at the June 18th evidentiary hearing was not credible. Specifically, as it related to Juergen Stark, the CEO of VTB Holdings. Judge Gonzalez found that his testimony is also refuted by the evidence adduced at the evidentiary hearing and is not credible.

Also, as it related to Mr. Fox, Judge Gonzalez found the testimony provided by Fox at the June 18th, 2021 hearing was not

credible. That's a quote from the Findings of Fact and Conclusions of Law, which concluded that evidentiary sanctions at trial were appropriate.

Regarding Mr. Potashner, Judge Gonzalez concluded, and I quote: Potashner willfully destroyed text messages and Gmail account emails after receiving litigation holds from his counsel. He then attempted to conceal his destruction of evidence by representing during deposition that he did not use text messages to discuss substantive business matters or delete emails from his Gmail account. The evidence adduced during the evidentiary hearing demonstrated that this was false and that Potashner, in fact, used text messages for substantive discussions and did not material -- did not produce materially relevant emails from his Gmail account.

As a result, Judge Gonzalez adopted an adverse inference against Mr. Potashner that he, "acted in bad faith when supporting and approving the merger." Regarding Mr. Stark and Mr. Fox from VTB, due to their spoliation of evidence, Judge Gonzalez also adopted an adverse inference that the lost information would have been adverse to them.

So, that was the evidentiary hearing in June of this year, immediately -- two months before trial. And it is that evidentiary hearing, as I will get to later in my argument, that the Defendants seek costs for, for their own conduct, for costs that are attributable solely to their own bad conduct in destroying evidence.

So, immediately before trial -- that was the evidentiary hearing two months before trial. Immediately before trial, the -- PAMPT, Plaintiff,

settled with the four less culpable directors of Parametrics. So, there were five directors of Parametric Sound Corporation. Again, executive chairman was Ken Potashner, and the other four board members that were sued settled with Plaintiff immediately before trial.

We went to trial, trial lasted -- Plaintiff's case lasted a week and a half. At the close of Plaintiff's case, Judge Gonzalez granted Defendant's Rule 52(c) motion primarily finding that the Plaintiff had filed -- had failed to establish that the primary bad actor, Ken Potashner, controlled Parametric -- the Parametric Board of Directors and that -- also finding that Plaintiff failed to satisfy the actual fraud element necessary to overcome the business judgment rule, which we all know protects the decisions of board members.

Those rulings are on appeal. In fact, we just filed our docketing statement yesterday, which outlines the issues on appeal. Nonetheless, in granting the Rule 52(c) motion, Judge Gonzalez stated on the record that she understands why this action was brought against the Defendants, that this case -- the actions of the Defendants have a really bad smell to them. And it -- she stated it was a very difficult decision for her to make to find that the Plaintiff did not satisfy the technical elements of the causes of action that Plaintiff brought in this matter.

So, with that as a background, we challenge the costs that are sought by Plaintiff -- or sought by Defendants in this matter. The first -- and as I stated, there's five primary categories of these costs that we contest. There is an additional -- there are some minor costs, relatively

minor in the grand scheme of things, costs for pro hac vice admissions of the State of Nevada that we submit our not awardable under Nevada statute. And that's set forth in our brief, but I'm not going to belabor that point. I'm going to focus on the primary categories of costs that Plaintiff challenges.

Despite having been determined to have acted in bad faith, bad faith both in terms of the merger and in the destruction of evidence, Mr. Potashner seeks hundreds of thousands of unrecoverable costs under Chapter 18, NRS Chapter 18. I'm going to break my arguments into Mr. Potashner's claim for costs and then the non-director claim for costs because they were brought under two separate memoranda of costs.

First, even though the Plaintiff PAMPT in this matter filed this complaint on May 20th, 2020, Mr. Potashner, and for that matter, the other Defendants, seek costs related to the class action that dated back to August 2013. So, the case was litigated for six and a half, almost seven years before PAMPT brought its independent action against these Defendants. In their memoranda of costs, Potashner and the Non-Director Defendants seek all of the costs that they incurred all the way back to August 2013, which are clearly not awardable under Nevada's taxable costs statutes, which is NRS 18.005 and NRS 18.020.

In fact, the final order awarding -- or final order that Judge Gonzalez signed approving the settlements in May 2020 stated, the Court hereby dismisses with prejudice and without costs the litigation and all of the costs contained therein. Again, that is the May 2020 order

from Judge Gonzalez resolving and a final -- making final approval of the settlement of the class action. Totally separate related claims -- in fact, the facts and the claims in this case are the same facts and claims brought in the class action, but it was an entirely separate action.

So, an award of -- Mr. Potashner seeks almost $300,000 in costs that he incurred in the class action. The Non-Director Defendants seek $585,000 in costs that they incurred, indisputably. Both of those numbers are indisputable that the Non-Director Defendants are seeking $585,083 in costs they incurred in defending the earlier class action, whereas Mr. Potashner seeks nearly $300,000 in costs he incurred in defending the class action.

There is no basis under Nevada law, and the Defendants in their opposition to the motion to retax submit no Nevada authority to seek the costs incurred in a separate matter. They argue that well, the cases were consolidated, therefore, they're one case. Well, that's diametrically opposed to case law in Nevada, in the federal system, and from the U.S. Supreme Court that consolidation is a matter of convenience. The individual cases that are consolidated do not lose their independent status as individual cases. And that is the basis on which the $300,000 in Mr. Potashner's claims -- claimed costs and the $585,000 in the non-director claimed costs related to the earlier class action should be denied.

Next, both Mr. Potashner and the Defendant, the Non-Director Defendants as I stated earlier, seek to recover costs for the evidentiary hearing that was brought about by their own willful destruction of

evidence. Now, I've read to the Court the quotations from the Findings of Fact and Conclusions of Law that Judge Gonzalez entered after the evidentiary hearing in June of this year on spoliation. Again, Judge Gonzalez found that Mr. Potashner lied during his deposition and in -- at the evidentiary hearing, essentially lying to the Court, found that the -- his testimony was refuted by the other evidence and simply was not credible.

Judge Gonzalez also found that Mr. Stark and Mr. Fox's testimony at the evidentiary hearing was not credible. Judge Gonzalez also found that either, negligently, as it relates to Mr. Stark and Mr. Fox, or intentionally, as it relates to Mr. Potashner, destroyed evidence that was relevant to this litigation. And here we have the Plaintiffs -- or the -- I'm sorry -- the Defendants, Mr. Potashner and the Non-Director Defendants seeking costs related to the evidentiary hearing that was brought about by their own destruction of evidence. It's absolutely insidious to believe that a Court could award costs related to an evidentiary hearing brought by the own bad conduct of the actors seeking those costs.

The *Cadle* case, the *Cadle Company* case the Supreme Court came out --

THE COURT: I'm familiar with it.

MR. OGILVIE: I --

THE COURT: The *Erickson versus Cadle Company*.

MR. OGILVIE: -- thank you -- states specifically that awardable costs have to be reasonable, necessary, and actually

incurred. Well, I don't -- I'm not questioning whether these costs related to the evidentiary hearing were actually incurred. But I submit to the Court that they certainly were not reasonable as it -- as evidenced by the fact that those costs were brought about by their own misconduct. And they certainly weren't reasonable for the -- or certainly weren't necessary for the same reason.

If Defendants had only complied with their obligation to -- their obligation to satisfy their discovery obligations, none of this spoliation hearing would have been necessary. None of these costs that are being sought by Mr. Potashner and the Non-Director Defendants would have been incurred.

The next category, Mr. Potashner seeks nearly $160,000 in e-discovery costs, expenses for storing and producing ESI. Now, that's temerity at its highest degree. He actually violated his e-discovery obligations by destroying relevant evidence, as found by Judge Gonzalez. Yet, Mr. Potashner seeks $160,000 for storing and producing the ESI. But I don't know if it's more than that or less than that, NRS 18.005 doesn't even provide for the recovery of such costs. And Courts in other jurisdictions have determined that those costs are not awardable hosting -- again, storing and producing the ESI is not a properly taxable cost.

So, those costs, for those two reasons, one, NRS 18.005, which is the only basis on which the -- these costs could be awarded, does not specifically identify such costs as awardable. And because it is a creature of statute, the statute must be interpreted strictly. And

because the statute does not identify such costs as awardable, they cannot be awarded.

So, as it relates to Mr. Potashner, because of his -- well, I submit to the Court, because -- as it relates to all the Defendants. Because of their failure to satisfy their discovery obligations to preserve and produce evidence, that this Court can exercise its discretion and deny all costs. Nonetheless, to the extent that the Court does award costs with -- when you strip away the improper costs sought by Mr. Potashner. And those improper costs are for nearly $300,000 in the costs related to the class action, the costs that he seeks related to the evidentiary hearing for his own willful destruction of evidence. The $160,000 in storing and producing ESI --

THE COURT: By the way, I'm assuming that part of that 160 deals with electronic storage that happened during the class action, there's an overlap in terms of your argument meaning that you don't believe that any of the costs associated with the class action should be awardable. And then maybe part of the 160 goes into that --

MR. OGILVIE: Actually, the 160 is related to this action that --

THE COURT: Because -- okay. Well, maybe my math is a little bit off here. I got in the Potashner that he's seeking 407,000 in costs, 272 deals with the class action. Blonde math, I get 135,000. 6,000 you got down as expropriation hearing leaving 129,000. Then you got 160,000.

MR. OGILVIE: If I can have the Court's indulgence. So, as it relates to Mr. Potashner, there's 272,000 to be exact that are related to

the class action.

THE COURT: Right.

MR. OGILVIE: There is 5200 -- $5,000 related to the evidentiary hearing.

THE COURT: Okay.

MR. OGILVIE: There are 98,000 in -- I'm sorry. I misspoke. I said 160. 98,000 -- call it 99,000 in costs for e-discovery hosting after the class action. So, as it relates to the --

THE COURT: Okay.

MR. OGILVIE: -- 98,000. And then an additional $1,000 in pro hac vice claims. So, a total of unrecoverable costs of $377,491, which leaves Mr. Potashner with a allowable cost of $29,579.

THE COURT: Okay.

MR. OGILVIE: As it relates to -- as the Plaintiff's motion to retax costs relate to the Non-Director Defendants, in addition to the class action costs, the evidentiary hearing costs, the e-discovery hosting costs, and the cost for pro hac vice fees, the Non-Director Defendants also seek $55,000 -- $56,000 in expert fees, incurred again, after May 20th, 2020, which is far above the NRS 18.005(5) award of --

THE COURT: Whoever is on the BlueJeans, if you do -- are not muted, please mute yourself, we can hear you. I'm sorry.

MR. OGILVIE: -- that's fine -- far above the $1500 that is awardable for expert witnesses under NRS 18.005(5). And we cited in our briefs the public employees' retirement system of Nevada's *Gitter* case.

THE COURT: Okay, who is that?

THE COURT RECORDER: I can't -- there's so many, Your Honor, I can't tell.

THE COURT: Well -- you can tell who's muted and who's not, right?

THE COURT RECORDER: I can't --

THE COURT: Can you mute them all?

THE COURT RECORDER: I can mute them all.

THE COURT: Let's mute them all.

THE COURT RECORDER: There's a lot, but I'll mute them.

MR. PEEK: Thank you, Your Honor.

THE COURT: All right.

MR. OGILVIE: Thank you, Your Honor.

THE COURT: I'm sorry, Mr. Ogilvie.

MR. OGILVIE: That's fine. The 2017 case, *PERS versus Gitter*, supports the position that a non-testifying expert when -- that the $1500 awardable under NRS 18.005(5) for expert witnesses can only be exceeded when the expert testifies at trial. It is undisputed that Mr. -- that the non-director's expert -- Non-Director Defendant's expert did not testify at trial.

The Defendants cite the *Logan* case, holding that when a party withdrew an expert witness immediately before trial, under the former statutory provision of -- for offers of judgment, which was NRS 17.115, which is no longer in existence, that because of the offer of judgment, those costs were appropriately awardable.

So, we have two bases, one, NRS 17.115 is inapplicable, no longer exists therein. It doesn't apply here, which the only basis for recovery of these expert witness costs would be under Chapter 18. And they -- again, Chapter 18 and the *PERS versus Gitter* case, which by the way was finally decided in 2017, which is two years after the *Logan* case, finds that, again, in order to recover more than the $1500 allowable under NRS 18.005, the expert witness must testify. Because the expert witness did not testify, there should not be any fee awardable to -- or any costs awardable to the Non-Director Defendants in excess of the $1500 allowable under the statute.

The last category that the non-directors -- the Non-Director Defendants seek is to recover $123,509 in trial support. And the trial support is, as we said it in our brief, bloated. It's inflated. It sported a lavish lifestyle during trial. It included equipment rental and graphics on-site support. Well, equipment -- the equipment included printers, copier, monitors, Wi-Fi routers and 24/7 IT support availability. Plaintiff submits, Your Honor, that all of that is part of overhead in every law firm. And counsel obviously has their own laptop computers. They obviously have their own monitors. There was no -- there is no basis to award costs for such overhead equipment.

Additionally, this 123,000 includes $300 to $400 rooms on the strip. It includes $2,000 first class airline ticket, includes a $350 meal for two, it includes private cars and limousine service to and from the courthouse. I use Uber. And I can't imagine that under the necessary and reasonable standard of *Cadle Company* that there can be an award

of costs for private cars and limousines.

The purpose of NRS Chapter 18 is to compensate a prevailing party for the necessary, basic, and minimal costs incurred in defending a lawsuit. The costs asserted by the Defendants are none of those. They are not necessary, they weren't reasonable. And as it relates to the costs from the class action, were not actually incurred as it relates to this case.

So, to the extent that the Court does consider an award of costs, we submit that Mr. Potashner has only established $29,579 in awardable costs. And the Non-Director Defendants have only established $117,331 in awardable costs, as opposed to their claim for I believe $1,047,000.

Unless the Court has any questions --

THE COURT: I was going to say, can you get a room on the strip for $3 to $400?

MR. OGILVIE: I think it depends on the time, but yeah. My --

THE COURT: I'm only kidding.

MR. PEEK: We don't need --

MR. OGILVIE: -- my co-counsel stayed at the Golden Nugget. And I think we ought to apply Golden Nugget rates.

THE COURT: Which is?

MR. OGILVIE: Well, I could find that. I could go online as I listen to Mr. Peek and give you the rate for tonight.

THE COURT: Okay.

MR. OGILVIE: Thank you.

THE COURT: Thank you. Counsel.

MR. PEEK: Thank you, Your Honor. Stephen Peek on behalf of Potashner. Your Honor, I think I want to reset the table and correct some of the record that I think is inaccurate here by Mr. Ogilvie. Your Honor, these claims were brought as equity delusion, equity expropriation claims.

The *In re Parametric* case overturned Judge Gonzalez's denial of a motion to dismiss but held that Plaintiffs would be allowed to amend to plead equity appropriation by a controlling shareholder or a controlling director. That case then proceeded in a class action, which included each of the shareholders that now seek recovery as opt-out shareholders, not as a separate, independent claim, but as opt-out shareholders.

And Your Honor, this is not a motion to alter or amend the judgment of dismissal essentially to set aside the judgment because they prevailed at an evidentiary hearing. This is a motion to retax the costs awarded.

NRS 18.020, Your Honor, provides that costs 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 $2500. This was confirmed in *Beattie versus Thomas*, where the Court held that an award of costs to the prevailing party in cases set forth in 18.020 is mandatory, rather than discretionary. It was also reaffirmed in that unpublished decision of the *California Franchise Tax Board versus Hyatt*, a case in which the McDonald Carano Firm prevailed and sought

costs against the prevailing -- against Hyatt after 12 or 15 years of litigation.

NRS 18.005 identifies the categories of recoverable costs to prevailing party. But even if costs aren't specifically enumerated in 18.005(1) through (16), there is a catchall where a District Court may award costs for additional items pursuant to NRS 18.005(17), if those costs, just those under (17), are reasonably and necessarily incurred in the action.

Here, Plaintiff does not dispute that Potashner was the prevailing party, nor does Plaintiff claim that Potashner's verified memo of costs lacks detail or documentary support. Each of Plaintiff's arguments fail, and Court should award Defendants -- Defendant Potashner his costs.

First, Plaintiff argues that Potashner may not recover costs prior to May 2020, because Plaintiff filed a separate action that was then consolidated with the class action. But Your Honor, these are opt-out shareholders. These are shareholders who said, I don't want to be part of this class settlement. I want to opt out and proceed on my own.

And as we explained in our opposition, Plaintiff's claims were merely a continuation of the same claims asserted in the class action, and Plaintiff improperly circumvented the class proceedings when it filed a separate opt-out complaint. It could have just proceeded as an opt-out based upon those claims set forth in the class action.

And Your Honor, if this were a separate action as argued by Mr. Ogilvie, the filing of the Plaintiff's action in May 2020 is well beyond

a statute of limitations contesting a merger that took place in January of 2014. They filed their action six plus years, under their theory of a separate action, after the merger took place. They can't have it both ways. They can't seek the protection of taking their case all the way back to August of 2013 and then ignore the class action and the class action proceedings.

It is a continuation of the original class action filed on August 2013, which action allowed Plaintiff to pursue those claims as opt-out shareholders in the consolidated action, consolidated by all these other actions brought by all these other Plaintiffs back in August and September of 2013. And Your Honor, I've been there from the beginning.

Plaintiffs argues that the Defendant prevailing party should not receive the benefit of the costs incurred in the class action. However, this is not an intellectually sound argument. The Court need only look at the actions that Plaintiff took to demonstrate how the Plaintiff not only received the benefits of the discovery undertaken by the class Plaintiffs but then use proactively and took advantage of all of the actions undertaken by the original class Plaintiffs. I'm going to highlight those for you.

First, Plaintiff argues that the Defendants upon a dismissal of the action were to bear their own costs from the date of dismissal, thus negating all the costs. However, as an opt-out party, the Court ruled that they shall not have any rights under the stipulation of settlement, shall not share in the distribution of the net settlement funds, and shall

not be bound by the stipulation on any final judgment. So, that argument goes away.

Two, after filing this opt-out complaint, a mirror of the class Plaintiffs' complaint, using all of the discovery recited in their opt-out complaint, Plaintiff did not oppose the motion to consolidate and argued in favor of consolidation. Because it said to the Court, it intended to rely on all the discovery that had already been conducted in the class action, stating as well that consolidation would allow it to receive immediately the discovery that had already been conducted. That's the second step that they took.

Three, the Plaintiff argued that no new Rule 16 conference was necessary because a Rule 16 conference had already been held in the class proceedings, again, acknowledging its case was simply a continuation of the class action.

Four, Plaintiff, after having served the demand for prior discovery under Rule 26(h) -- you can only get discovery if you're a party -- filed a motion to compel discovery seeking an order compelling production of the discovery in the class action. The motion was granted. And of course, Rule 26(h) specifically provides, the mechanism for obtaining, quote: disclosures or discovery that took place before the demanding party became a party to the action. Became a party to the action. Rule 26(h) doesn't apply to seeking discovery that occurred in a separate lawsuit, as they argue. It applies to the same action.

The discovery sought and the discovery provided by the Defendants in this action were all the documents collected, stored

through hosting, and produced by the Defendants, as well as copies of the 20 plus transcripts of all the depositions taken in the action. The Plaintiff could only have received the documents because of the fact that Defendants had retained, through an ESI vendor, at their cost and expense, all the documents collected and produced for which we seek recovery.

Plaintiff relied upon previous court orders compelling production of the -- so-called [indiscernible] documents and were granted access to these documents. That had been a motion to compel brought by the class Plaintiffs. They relied on that same motion, and they sought those productions of documents because they were part of the class action.

Plaintiff refiled the same motion for sanctions filed by the class Plaintiffs seeking sanctions for spoliation of evidence. At the evidentiary hearing on the motion for sanctions, the Plaintiff relied on all documents produced by the Defendants to the class Plaintiffs in seeking their sanctions.

Plaintiff served its own written discovery requests which then required Defendants to run additional searches in the electronic discovery documents that Defendants had collected, hosted, and retained through an ESI protocol established with the class Plaintiffs, upon which and again rely to their benefit.

Eight, in its pretrial disclosures, Plaintiff identified witnesses whose depositions had been taken by counsel for the class Plaintiffs, not by them, counsel for the class Plaintiffs. They didn't take any

depositions of their own.

Including in that group were class Plaintiff's expert which the Plaintiff had previously disclosed as its own expert. They didn't even -- when they identified an expert, they identified Mr. Atkins, the expert that had been identified to class -- by the class Plaintiffs. And they said, here's his report, the same report that Mr. Atkins had given to the class Plaintiffs. They relied upon that and brought Mr. Atkins to testify based upon his opinions that he had formulated through his retention by the class Plaintiffs. They didn't get a new expert; they used the same expert of the class Plaintiff's.

Nine, in its disclosure of depositions to be used at trial, Plaintiff identified testimony from depositions of witnesses, including the Defendants, whose deposition had been taken by the class Plaintiffs. All those page and line identified as deposition testimony at trial were from depositions taken by the class Plaintiffs, not by Mr. Ogilvie's law firm, nor his co-counsel Adam Hampton.

Ten, Plaintiff argued in the pretrial memorandum that prejudgment interest should begin to accrue from the date of the filing of the initial complaint in 2013. Now, as the Court knows, case authority says, that's the beginning date that's -- but they argued, we want interest all the way back to 2013, not from May of 2020, as they now argue today disingenuously.

Eleven, during trial, Plaintiff used depositions of the Defendants taken by the class Plaintiffs in impeachment of the Defendants who testified at trial. They used the deposition of Stark, the

depositions of my Defendants, my Director Defendants, to impeach them and to ask questions of them. They didn't take those depositions. They didn't take any of those depositions.

Nearly all of the exhibits -- excuse me, all of the exhibits introduced by Plaintiff came from the trove of documents produced by the Defendants to the class Plaintiffs. That trove is that same trove that we hosted and retained and maintained from 2013 until that matter went to trial in August of 2021.

Thirteen, during the trial -- we're going to talk about Judge Gonzalez's comments -- specifically called Plaintiff out on its improper procedural maneuver commenting that ordinarily Plaintiff's claims would have been brought as part of the class action case and not as a separate case.

So, Plaintiff's arguments that the costs that the Defendant incurred during the class action and before May 2020 should be retaxed, fails. The Plaintiff can't have it both ways. It can't receive the benefit of all that discovery that we obtained through our own searches, through our own collection, and then not pay for it. They argue to you that temerity on my part of arguing for documents collected that they used in an evidentiary hearing as their evidence of Mr. Potashner's bad acts, that that temerity offends them. I'm sorry that you got to use all of those documents that you collected from us that we retained for you as the opt-out Plaintiff in your evidentiary hearing.

Plaintiff argues that Potashner should not recover his costs in connection with the evidentiary hearing. But under NRS 18.020,

Potashner isn't required to win on every single issue or every single motion to be awarded costs as the prevailing party. We know that from the McDonald Carano case of *Franchise Tax Board of California versus Hyatt*, where the Nevada Supreme Court specifically observed that the FTB lost every round except the last on its sovereign immunity case because it was, when it prevailed on sovereign immunity, the prevailing party entitled to recover its costs.

The argument that Hyatt made, Your Honor, is the same argument that Mr. Ogilvie's made today, which he opposed in the CFTB case, which was Hyatt came with unclean hands. That equity should not allow the CFTB to have costs because Hyatt won in every round. He won in the Nevada -- he won in the District Court, he won in the Nevada Supreme Court, he won in the United States Supreme Court. And then finally, the Nevada Supreme Court -- or the United States Supreme Court reversed itself on sovereign immunity and gave the CFTB protection of sovereign immunity.

As applied here, the Defendants need not prevail on every motion, including the motion for evidentiary discovery sanctions to be entitled to recover their costs. They ultimately obtained dismissal with prejudice of all the Plaintiff's complaints -- claims and are unquestionably the prevailing parties.

Those same arguments about bad faith and about negligent spoliation, all of those same arguments were made to Judge Gonzalez as part of the final arguments against my motion for 52(c) relief asking for dismissal. Plaintiff's unclean hands argument rejected in *Hyatt* is

thus contradicted by both the statute and binding Nevada Supreme Court authority holding that such costs are mandatory. One need only read the unpublished decision of *CFTB versus Hyatt* to conclude that.

There is no discretionary exception to the statute's mandatory award of costs based upon the theory of unclean hands. And Plaintiff has cited no authority permitting such an exception.

The costs related to the evidentiary hearing, Your Honor, are also distinguishable from those in *Cadle*. In that case, costs weren't awarded because there was insufficient documentation to support the reasonableness and necessity of those costs under NRS [inaudible] 05(17). Here, Potashner has offered ample evidence to substantiate his costs and their reasonableness. So, under Nevada law, not all these other jurisdictions, state and federal, Potashner should be awarded costs connected to the evidentiary hearing.

Plaintiff also baselessly argues that the costs were not reasonably and necessary because it concerned Defendant's alleged spoliation of evidence. Plaintiff was seeking to obtain discovery sanctions that would be a substitute for evidence to prove the glaring deficiencies in its case that it knew it never could overcome. But the Court entered a lesser sanction than what Plaintiff requested.

In its Findings of Fact and Conclusions of Law dismissing the case, the Court specifically noted in paragraph 42 of its findings that, quote: the Court previously adopted an adverse inference against Potashner that he acted in bad faith when supporting and approving the merger. The evidence at trial supported this conclusion.

Notwithstanding that sanction and those adverse inferences, the Court found that the evidence presented at trial was insufficient to support the claims against the Defendants. And what were those claims? The claims were that there was an equity expropriation by controlling shareholders, an equity expropriation of those claims brought by these opt-out shareholders. And that those -- and that if there were controlling shareholders that they did so with actual fraud.

But what did the Court find? The Court found that all of the other directors, I think it was five out of six, all exercised their independent business judgment in reaching the conclusion that the merger should go forward. That exercise of that business judgment is protected not only by 78.138, but in this case, when they brought the action under 78.211, it also allows the protection of the business judgment absent actual fraud.

The Court found that they -- those directors, besides Potashner, exercised their own independent business judgment and that there was no actual fraud at all associated with the merger. No actual fraud despite their effort to try to plead and prove that at the trial. And they argued to the Court that there was actual fraud, and the Court said no, no Mr. Ogilvie, no Mr. Hampton. You haven't proven your case.

The Court should also award Potashner's reasonable and necessary electronic discovery costs. Plaintiff incorrectly argues that Potashner's e-discovery costs to host and store the collected data are not recoverable. Your Honor, I know that not to be the case because I argued the *In re Dish Network* derivative litigation to the Nevada

Supreme Court in which the Nevada Supreme Court specifically found, based upon Judge Gonzalez's decision, that electronic discovery costs were permitted under NRS 18.005(17) as reasonable and necessary costs incurred in connection with the action.

The Supreme Court affirmed that request of mine to award costs to the special litigation committee in *Dish*. The Supreme Court affirmed the District Court's award of all of the special litigation committee's requested e-discovery costs. Though -- so, there is authority, Your Honor, for that proposition that e-discovery costs are awardable because they are reasonable and necessary.

The e-discovery costs that we -- excuse me, that we requested and that were awarded in *Dish Network* include the very same types of hosting and storage charges that are detailed in Potashner's memorandum of costs and the invoices attached, Your Honor. We provided all of the invoices attached to our memorandum of costs. You know, you had to go through that, binders of documents of costs.

The hosting and storing of the data allowed Potashner to respond to the Plaintiff's -- PAMPT, I think they're calling, respond to his discovery request both in the class action and in which Plaintiff's representatives were class members, as well as in responding to the document request that Plaintiff made in this case, and which required additional search terms provided by Plaintiff to be applied to the data that we had stored and hosted by an e-discovery vendor. Those costs should be reasonable and necessary and part and awarded.

Finally, Your Honor, Potashner's pro hac vice costs were reasonable and necessary. Although the Nevada Supreme Court has not addressed this specific issue, many federal courts have allowed pro hac vice fees as recoverable costs. That said, the federal statute addressed in those cases does not have a provision similar to our (17) which allows recovery of any other reasonable and necessary expenses incurred, which is my basis for asking for costs of pro hac vice.

This case presented extremely complex and novel issues of corporate law in Nevada, novel issues of a California party to that -- to those proceedings, which was Parametric. And we, along with our non-Nevada counsel, actively participated in document collection and review, attended every deposition, and examined witnesses. Plaintiff himself has engaged out-of-state counsel. He reasonably fired his trial counsel and proceeded to engage another New York firm to participate in those proceedings.

So, it shows, Your Honor, that we all think that non-Nevada lawyers are helpful in our proceedings. So, we think that, Your Honor, the pro hac vice costs for Potashner's two non-Nevada lawyers were both reasonable and necessary.

In sum, Your Honor, none of Plaintiff's arguments in support of its motion are valid. It benefitted from all of the discovery that took place during the class action proceeding, all of the depositions, it was 20-some-odd depositions that were taken, the thousands of documents that we collected for the class Plaintiffs and that we produced, not only to the class Plaintiffs, but then later to this opt-out shareholder.

Don't be misled that this is a separate action, Your Honor. This is an opt-out Plaintiff from a class action that was settled. This is not a new and separate action. And if it were, it should have been dismissed because it would not have met the three-year statute of limitations for breach of fiduciary duty. Our costs are reasonable and necessary, and the motion to retax should be denied in all respects. And all $362,000, Your Honor, should be awarded.

My costs, Your Honor, were broken down, as you know, by each of the categories. We summarized each of the categories. Reporter's fees for depositions, $50,000, expert fees, $91,000, deposition travel and lodging, not trial travel, deposition travel and lodging, $46,000, legal research, $8,500, electronic discovery, $160,000, other reasonable and necessary delivery and filing services -- as you know, every time we file a piece of paper in business court now, I think we get charged $3.50 -- that was $1800. The pro hac vices, $5200.

So, just because we did not prevail on the evidentiary hearing, those $5,200 that they seek to retax should not be retaxed. And they should not be allowed to stand before you and argue that this is a separate case when they know better.

Thank you.

THE COURT: Mr. Peek, I do have a question. What's your take on the hotel costs and the first-class airline tickets, and the $350 meal?

MR. PEEK: Your Honor, you'll note that you didn't see that in

mine.

THE COURT: So, I should talk to somebody else.

MR. PEEK: I think you should talk to somebody else because I did not seek those costs. So, my co-counsel, I will tell you, stayed at the Marriot because my office was just around the corner from the Marriot, so I'd pick them up every morning to come to trial.

THE COURT: Well, you might be a gold member too.

MR. PEEK: Could have been.

THE COURT: Okay.

MR. PEEK: I don't know what they were, Your Honor. But I did not seek any of those costs. I did not seek meals. And I think the Court can infer why.

THE COURT: Okay. By the way, you give me too much credit. I've been in trial. I've read the motions and so forth, but I have not reviewed all of those receipts yet. So, but I plan to.

MR. PEEK: I know you do, Your Honor. And I think you will find that we are very meticulous. We -- you know, we've learned over the course of the years --

THE COURT: Mm-hmm.

MR. PEEK: -- what is recoverable and what is not recoverable. I've had quite a bit of experience in that. Not only from the *Dish* case but from other cases. Thank you, Your Honor.

And again, it's been a minute. And it's nice to see you.

THE COURT: It's good to see you, too. In fact, it's good to see all of you. I haven't seen all of you in a while.

MR. PEEK: I'll let Mr. Kotler talk about his --

MR. KOTLER: Yes.

THE COURT: Oh, so you're the one I need to talk about --

MR. KOTLER: That's very nice.

MR. PEEK: That's a nice segue.

MR. KOTLER: Yes, welcome to this courtroom.

UNIDENTIFIED SPEAKER: [Indiscernible].

MR. KOTLER: Good morning, Your Honor. David Kotler from Dechert on behalf of the Non-Director Defendants, and yes, I guess I'm going to be the one who addresses airline tickets and limousine costs, which I will get to.

First of all, it's a pleasure to be before Your Honor. I will not repeat what Mr. Peek argued. We will rely upon their position with regard to the fact that this is an opt-out case. So, we have expenses as well that Plaintiff seeks to retax prior to May 20th, 2020, we will rely on their position. With regard to the expenses for the evidentiary hearing, we will again rely on their position with that. And with regard to the e-discovery hosting, I certainly will not intend to explain to this Court the *Dish* case when you have the guy who argued it who just was up here talking, so we will rely on the Director Defendants for that.

And I also will rely on the fact that unlike Mr. Ogilvie, Mr. Peek did seem to note that we are here because we are the prevailing parties. So, although the allegations of the complaint and the rhetoric about this one was a protagonist, and this Plaintiff was damaged, all of that has been alleged and attempted to be proven and disproven as a result of

the Judge's findings at the conclusion of the trial and her granting of the 52(c) motion. So, the appellate arguments that Mr. Ogilvie, or the new New York lawyer -- it's nice to see another New York lawyer in the courtroom -- intend to make at some later point in time, while interesting to hear, do not bear on the question that we are here on today.

So, I will focus on the remaining of the costs that Mr. Ogilvie seeks to retax, particularly the expert witness fees incurred post-May 2020, and the lavish lifestyle that we were accustomed to as we tried this case in the middle of the pandemic, 3,000 miles away, in a courtroom that did not allow paper copies, or did not want paper copies. And yet we somehow managed to try the case and follow all social distance --

THE COURT: Do they still use paper in New York?

MR. KOTLER: They do. They do. It's kind of nice, you know, binders, the whole deal. It's kind of nice.

With regard to the expert witnesses, you know, as was set forth in our brief, you know, this really does come down to a pretty simple question. Our expert for whom they seek to retax costs was and would have been a testifying expert but for the Plaintiffs of -- the failure of the Plaintiff to make it past their Rule 52(c) motion.

Our expert was literally in the air on his way from New York to arrive in Las Vegas to testify two days after the Rule 52(c) argument. All of his work in preparing for the trial was reasonable and necessary to respond to the expert report of the Plaintiffs, who as Mr. Peek noted, was the same expert that the Plaintiff had used in the class case, for

whom the Plaintiff's counsel in the class case sought as part of their cost recovery in the class settlement, approximately $320,000 for that expert. Our expert's total costs, both prior to -- as part of the class and then as part of the opt-out case was less than that. I believe it was $223,000 of which 56 was post the opt-out case.

But ours was a testifying expert. So, in the -- let make sure I have the right name of it.

THE COURT: *Gitter*?

MR. KOTLER: *Gitter*, thank you. In that case, it turned on the non -- the fact that the expert was a non-testifying expert. Here, the circumstance is similar to the *Logan* case, in which the reason that our expert didn't testify was a failure of the Plaintiffs. In that case, the Plaintiffs had pulled their expert right before the trial. Here, the Plaintiffs had their expert testify and couldn't present enough evidence to get by a directed -- a Rule 52(c) motion so that our expert would have testified.

So, I would argue that the circumstances here are even more extreme than in the *Logan* case where the Plaintiff simply pulled their expert. Our guy was in the air, you know, we were working with him during the trial, following the testimony of the Plaintiff's expert. You know, I know because I was working with him. We were preparing demonstratives and doing all the things that you would expect to do during the trial, including having the guy fly here.

And as a result of the Plaintiff's complete failure of proof, he did not end up testifying. So, I would submit that the circumstances warrant not just the $1500, but the award of the full amount of the costs

that we seek with regard to the experts.

And finally, we get to the potshots at how Defendants, the non-New York lawyers here, managed to try this case. And you know, I did note, I am the one I guess who's responsible for the limousine because the car that takes me to the airport when I leave my house in Princeton and go to Newark Airport, it's hired by a company called A1 Limousine. As somebody who's sat in their cars for 25 years, they're not limousines. They're the same as Ubers, it's just that's who I use to get the 45 minutes from my house in Princeton to the airport at Newark, which we'd pointed out. And if Mr. Ogilvie or any of -- anyone on their side had actually looked at the A1 website, they would see that.

You know, so there are potshots like that. With regard to our trial setup, I don't know how Mr. Ogilvie would have tried this case if he weren't -- if it weren't in Nevada, but we can't simply show up at Mr. Gordon's law firm and kick people out of their offices and log on to their computers and use them as if we're members of the firm. There are security concerns, there are a whole bunch of IT issues. You know, we are members of a different firm.

So, it is ordinary and customary in trials when you are outside of your home office to have a setup, which we had here, put in place with -- we had our own computers, but the rest of the IT and the infrastructure that goes with it is exactly of the type that I have used in trials across the country that are typically used in non-resident trials. There was nothing lavish about it. It was necessary in order for our team to be able to try the case. And that was what we did.

With regard to the trial graphics, I don't think it was mentioned in the argument, but I saw in their brief, there was a potshot at the fact that we used a trial graphics person who was not in Nevada. Okay, it's true, we used a trial graphics person who was not in Nevada. However, that is, again, an ordinary trial support cost.

And again, with this particular trial, given that -- given Judge Gonzalez's preferences and the protocol in place for the trial, and the need to have every document put up on the screen for the witness and the Judge and all the parties, it was essential to have a person sitting in the hot seat, as I'm sure you've heard it called. And we had our person, and the work that he did is customary with regard to trials of this sort. And those are the expenses that we seek.

Finally, with regard to our hotel, the grand event, first of all, I have been informed that the rates at the Golden Nugget this weekend are 238. So, we can save that bit of mystery.

THE COURT: Did you end up staying over the weekends?

MR. KOTLER: We did. We showed up a couple days before the trial, and we stayed straight through. We did not travel back and forth. So, we stayed straight through and didn't --

THE COURT: And the rates are -- of the hotels, just it's -- I don't know that I've ever stayed in a Las Vegas hotel since I've been here since November of 1963. But the question I have is, aren't the rates cheaper on the weekdays, as opposed to the weekends? Don't the rates just go up on the weekends?

MR. KOTLER: We -- this time they did. I mean --

THE COURT: Mm-hmm.

MR. KOTLER: -- we had -- in my past experience, as someone who has stayed out in Las Vegas hotels both for business and pleasure, ordinarily in an August, it wouldn't be as crazy as it was this August. But with, you know, the loosening of the rules, this August seemed like New Year's Eve in -- everywhere we tried to stay. So, the rates, I suspect, were probably higher this August, certainly than they were in 2020 or probably in 2019 as well, just due to supply and demand.

I don't -- I suspect that the rates ultimately were higher on the weekend. And to be honest, we attempted to negotiate locked rates, and all of the hotels we spoke to said, ordinarily we would accommodate you, but we are so -- there's so much demand for people to be in Las Vegas right now, frankly, we don't want you because we want people out in our casinos, in our restaurants, in our bars, in our pools. We don't want you boring lawyers who are just going to stay in our hotels and not spend any of the money.

So, we were not able to negotiate rates down like I have been able to, you know, for 25 years traveling across the country. So, you know, that was the -- you know, we needed a place that could host our team. I saw some quibbles about the fact that we arranged for monitors in -- our associate's, not in Mr. Hess's or my hotel rooms, but in our associate's and our paralegal's hotel rooms. Again, given COVID protocols and social distancing, you know, we had people working around the clock, and the ability for them to conduct their work with

regard to the trial and to do it safely, you know, was a critical feature of our being able to put this case on here in Nevada.

Let's see if that covers it.

THE COURT: Oh, the $350 dinner for two people.

MR. KOTLER: Yeah, that predates my involvement in the case. I'm going to throw Mr. Hess under the bus. I have no doubt, Your Honor, that you know -- if that's the one -- if Mr. Ogilvie wants to complain about one dinner -- and Your Honor of course has the discretion to modify any expense that you deem needs to be modified. If Your Honor wants to apply a different rate to that one dinner, I don't think I'm going to stand up here and die on that particular hill.

But I do note that other than, you know, a footnote here or a -- you know, a passing mention in argument, you know, we submitted also reams and reams of paper, you know, every receipt. You know, I know the team went to great lengths to put together every single piece of paper. So, every expense that we submitted is supported.

And you know, the -- other than the shots and the few quibbles, I haven't seen anybody -- you know, I haven't seen some sort of systemic objection with evidence that, you know, that meal should have been, you know, $200 instead of $350. So, I think it's much more rhetoric than anything else. But I do take the point.

That's all I have, Your Honor. Thank you.

THE COURT: Thank you. Anybody else? Okay, Mr. Ogilvie.

MR. OGILVIE: Thank you, Your Honor. I got a chance to look at Mr. Sullivan's invoice for the Golden Nugget; it's $109 a night. So,

you know, whether --

THE COURT: Is that what it would have been in August when the case was being tried?

MR. OGILVIE: I couldn't tell you whether it is or not. And I will accept the fact that he is here during the week and weekend rates are probably higher.

Nonetheless, there was no requirement that defense counsel stay on the strip, particularly given the proximity of the downtown hotels, makes far more sense for them to stay here, both for convenience to the courthouse and for the rates that they're seeking. That's fine, they can stay on the strip and charge their clients whatever they want to charge them. But when they are seeking necessary, reasonable, and actually incurred costs from this Court, there should be some consideration given to the alternatives. And the Golden Nugget is a pretty nice hotel, two blocks from here.

And the first-class airfare, again, Mr. Sullivan flew economy here. So, those costs are unreasonable and were not necessary and should not be awarded.

Now, going to the arguments, you know, I think the arguments can be summed up by two things. One, everything that was done in the -- class action case benefitted the Plaintiffs here -- or the Plaintiff here. Whether or not the case was consolidated was -- is irrelevant for the argument that the Plaintiff benefitted from the discovery conducted in the class action. The costs incurred in the class action would have been incurred no -- irrespective of whether there was an opt-out or not.

The opt-out and the new action that the Court is -- that is before the Court, is -- it -- the fact that this separate action exists is no different than had the class action never been filed, except for the fact that there were -- was some discovery and it wasn't the discovery the -- described by Mr. Peek. Not all of the discovery in the class action was relevant to the claims in this case.

Nonetheless, the case before the Court is no different than had the class action not been filed, save and except for there was some discovery that was conducted in that case. But that's no different than if I had filed a suit and sought to utilize the deposition testimony of a case that's totally unrelated, testimony -- I say totally unrelated, not in the relation between the class action and this matter. I'm always able to use deposition testimony from another case against a witness who's testifying in my case. Notwithstanding the fact that it was unrelated to my case.

I'm always able to use discovery that was conducted in another case. So, the fact that there was discovery conducted in the class action that saved Plaintiff some discovery efforts in this case is irrelevant. It's an entirely separate case and the statute, NRS 18.020 clearly states that costs may be awardable under a -- in a case in which a person -- or a party was a prevailing party. There's no way that anybody here can claim that the Defendants were a prevailing party in the class action case. That case settled, and each -- and the final order approving the settlement states that the costs were to be borne by the Defendants.

That -- again, they didn't prevail in that case, they did prevail in this case, which leads me to the second argument pretty much that well, we prevailed, Judge, so therefore, we're entitled to everything. 18.005 specifically identifies the costs that are awardable. And I -- we cited this case in the -- in our briefs, but I want to mention it here. The U.S. Supreme Court from 2012, *Taniguchi versus Kan Pacific Saipan*, and I quote, "taxable costs are limited to relatively minor incidental expenses."

The Supreme Court described that as having an "narrow scope" and are a "fraction of non-taxable expenses borne by litigants." So, just because the Defendants prevailed, and I will get to some of the arguments that I heard from counsel about prevailing, doesn't mean that there is a floodgate -- floodgates open and they're entitled to all the expenses that they are contending that they incurred.

The other argument that I heard was the Plaintiff failed to prove any of the allegations that it made in bringing the case. That's not true. In fact, as I stated, Judge Gonzalez specifically -- expressly stated on the record that this case has so much bad smell to it. And the fact that there were technical elements that didn't rise to Judge Gonzalez's interpretation of actual fraud, again, that's on appeal, and we'll let the Supreme Court determine whether or not there was actual fraud.

But clearly there was misdeeds in the promoting and approval of this merger. And Judge Gonzalez specifically found as such and made an adverse inference, as I stated before, that Ken Potashner acted in bad faith in supporting and approving the merger. So, it's not

that this was a frivolous case that the Plaintiff brought on a wing and a prayer. Plaintiff actually established much of the allegations that it made in the complaint and sought to establish at trial. And as I stated in my earlier remarks, Judge Gonzalez indicated as much by saying that this is a hard -- a difficult case and very difficult for her to rule in favor of the Defendants.

Now, there were various arguments, you know, Mr. Kotler describes them as potshots, we're not taking potshots. We just simply took the memorandum of costs submitted by the Non-Director Defendants, looked at them, applied the statute to them, and just stated the facts. Those aren't potshots. Those are -- that's a lavish lifestyle that this Court, it should not [indiscernible].

Mr. Kotler said, I don't know how Mr. Ogilvie would have tried this case if he had to try it, or it was something to that effect, that they can't just -- out of state can't -- out-of-state counsel cannot just show up and kick people out of their offices. There's security concerns. I'm not unfamiliar with trying cases in other jurisdictions. I'm not unfamiliar with hosting co-counsel in -- from out of state in litigation.

And in fact, I did so in this case. And I provided my co-counsel with a war room, conference room, in our office that was reserved for the entire time of trial. That was not charged to the client. That is a matter of overhead, as are all of the expenses that the Defendants are seeking for monitors, war rooms, computers.

When I try a case out of the jurisdiction, I take a laptop computer. My paralegal takes a laptop computer and a monitor. We

may rent a printer; that's reasonable. But everything else is overhead, including the purported war rooms that counsel claims were necessary to try the case.

The graphics consultant, and Mr. Kotler described it as having to have someone in the hot seat. I had someone in the hot seat; my paralegal was there. My paralegal bills out at $195 an hour. It's a reasonable paralegal rate. My -- she's not a graphics consultant. There's no need for a graphics consultant to sit there using trial director to project an image of an exhibit on the screen. The -- all of the costs relating to the trial -- all of the costs. Now, if they were billing them as fees, we'd be having a different argument, and that argument on fees is set -- scheduled for this Thursday.

But $195, I would even say $200 an hour, for someone sitting in the described hot seat to project images is reasonable. But charging up to $400 an hour for the graphics consultant is not reasonable and is not in line with such costs in this jurisdiction.

Mr. Peek referenced the *Hyatt* case, *Hyatt versus California Franchise Tax Board* and referred to it as *CFTB*. We referred to it in the firm as the *FTB* case. Eighteen years of litigation, I'm proud of that case. After a $480 million judgment originally in favor of Mr. Hyatt, two trips to the U.S. Supreme Court, three trips to the Nevada Supreme Court, we actually prevailed, reversed the entire $480 million judgment. And in fact, yes, we were -- well, it's -- it is still ongoing.

But costs awarded in that case for a single case consistent with the statute that says costs are awardable to a prevailing party in a

case. This is a separate case from the class action matter, and none of the class action costs should be considered in the award -- any awards that this Court grants the Defendants in costs. Mr. Peek argued that if this were a separate case, it would be beyond the statute of limitations. Judge Gonzalez denied that motion for summary judgment. So, that issue is done and dusted.

Interest -- Mr. Peek argued that we were seeking interest from August of 2013. Well, the statute specifically provides that prejudgment interest is awardable from the date in which the cause of action accrues. Cause of action began to accrue with the August 2013 approval by the Parametric Board of Directors of the merger. There's no such equal statute relative to costs. That is a interest-specific statute intended to make the Plaintiff whole for the damages that it incurred years ago, potentially years ago.

THE COURT: I -- of course, it's escaping me right now, but isn't there case law that prejudgment interest accrues on the costs when the cost is incurred? Which causes me consternation in -- because I hear now, not only business court cases, but I hear construction defect cases, and it's a pain in the neck to try and figure that stuff out when you've got teeny, tiny, little costs and going back to the very beginning of when the cost was incurred.

MR. OGILVIE: It's almost not worth doing the calculation.

THE COURT: Exactly.

MR. OGILVIE: But the Court is correct. Yes, if someone wanted to go through the calculation of the cost of the interest on

awardable costs, accrues from the time that the costs were incurred.

THE COURT: Okay.

MR. OGILVIE: But that is a different issue than whether or not costs are awardable from a different case.

THE COURT: Right. I understand your position on that. I thought you were talking about interest.

MR. OGILVIE: Well, I am because Mr. Peek raised the argument that we are being disingenuous in saying that they don't -- that the Defendants are not entitled to an award of costs resulting from costs that were incurred in the class action when we were seeking -- Plaintiff was seeking interest that goes back to 2013. There is a -- there is no comparison, legal comparison, to the claim for costs -- or you know, Defendant's claim for costs from a separate action and the Plaintiff's claim for interest here, which goes back to the accrual of the cause of action in August of 2013.

And again, as I stated in my earlier remarks, I didn't cite the case, the case is *In re Wynn Resorts*, 2020 case, unpublished from the Nevada Supreme Court, which states, open quote: consolidation is purely a rule of convenience and does not result in actually making such party parties, Defendants, or intervenors in the other suit. So, in -- they're not Defendants, they're not intervenors, they're not Plaintiffs. We're not a Plaintiff in the class action suit. We're a Plaintiff in the PAMPT LLC versus Potashner case, which was filed in May of 2020.

And in -- again, the *In re Wynn Resorts* case clearly states the basis on which the distinction should be made between the class action

suit and this independent action, and states that it's -- again, consolidation is purely a rule of convenience and does not result in actually making such parties Defendants -- such parties in the separate action Defendants or intervenors in the other suit. We aren't Plaintiffs, Defendants, intervenors in the class action suit. We are Plaintiffs -- we are a Plaintiff in this independent action filed in May 2020.

Mr. Peek cited some of Mr. -- or Judge Gonzalez's statements, but none of the Defendants dispute her comments that the Defendants -- that Potashner, particularly, acted in bad faith in supporting and approving the merger, that he willfully destroyed evidence. And they don't dispute the fact that she made an adverse inference against the other -- two of the other Defendants represented by the Non-Director Defendant's counsel, Mr. Fox and Mr. Stark, that they -- that there should be an adverse inference imposed against them.

Now, Mr. Peek argues that he litigated the *Dish* case. The *Dish* case does -- did not -- and I would solicit the Court to review the *Dish* case. Because the *Dish* case found that e-discovery costs for producing and acquiring e-discovery or -- e-discovery costs for producing and acquiring documents was a proper awardable cost. Did -- it did not -- *Dish* does not state that the costs for hosting and storing e-discovery documents is an awardable cost.

So, we submit, Your Honor, that again, the cases -- the case before this Court is entirely different, separate action, filed by a single Plaintiff, similar to and asserting the same causes of action as the class action. The class action specifically was an expressly settled -- that

settlement was approved on the record, approved in a final order. And subsequent to that final order being entered, this action was settled.

Therefore, we submit that any -- none of the costs from the *Dish* -- from the class action case should be awardable in this action. We submit that the costs associated with the evidentiary hearing were a function of the Defendant's own bad conduct and is not awardable. We submit that the costs asserted for the war rooms, the computers, the monitors, trial graphics, all of that is either overhead or should have been handled in-house and billed individually in-house. We submit that the ESI hosting costs are not taxable under Nevada law. And we submit that because the -- Mr. Montgomery, the Defendant's expert, did not testify that at most he isn't -- the Defendants are entitled to recover $1500 under NRS 18.005.

THE COURT: All right, thank you.

MR. OGILVIE: Thank you, Your Honor.

THE COURT: Counsel, you mentioned that we've got a motion for attorney's fees on Thursday. I've got some other matters that I've got to hear that day, and unfortunately, I'm going to have to continue some other things today. I'll have to talk about with that. I'd like to continue this one, the motion for fees, to Tuesday. Is that -- I know it's Thanksgiving week, and I wouldn't have a problem if the New York guys presented by electronic. It's just that I've got to hear that, but I've got some -- I've got to put some of these matters for Thursday, I think.

MR. PEEK: Your Honor, given how long this one went today, I suspect that it will be just as long on Tuesday.

THE COURT: If not longer.

MR. PEEK: And I actually accept the invitation of the Court because I don't -- you know, having been one of those counsel, like these are, having to wait for long-winded arguments as we are today, I would prefer --

THE COURT: The good news is on the 23rd, I only have four matters. And I think I can get those done pretty quickly, and we'd have an 8:30 start. But it's up to you guys. I mean --

MR. PEEK: I don't know about my colleagues here, but it's okay with me. And actually, if we could maybe set this for 9:00 or 9:30 so that your four matters can be heard and we don't sit here listening to others.

THE COURT: Well, I'm going to hear those first anyway, and I think they're going to be fairly quick.

MR. PEEK: Could we then set ours at 9:00 as opposed to showing up at 8:30?

THE COURT: Sure.

MR. OGILVIE: Before we -- get --

THE COURT: I don't have a problem --

MR. OGILVIE: -- that far down --

THE COURT: Yeah.

MR. PEEK: Oh, okay, sorry George.

THE COURT: You've got plans, right?

MR. PEEK: Sorry.

MR. OGILVIE: Frankly, I can be here. I would prefer, my

client would prefer, that Mr. Sullivan appear in person.

THE COURT: Okay.

MR. OGILVIE: And next week, obviously the Court's recognized a difficult travel week. I understand what the Court's saying about Thursday. We -- there's nothing we can do about it. We would prefer this Thursday. Nonetheless, if the Court is going to continue it, we would prefer that it be continued to a date outside of the Thanksgiving week.

THE COURT: How's December 7 -- I mean, not 7, 2nd? That's a Thursday. I've got 7 matters that day.

MR. OGILVIE: Court's indulgence.

MR. PEEK: Your Honor, this seems to be more of a out-of-state counsel issue as opposed to in-state.

THE COURT: Right.

MR. PEEK: So, let me look at my calendar though for the 2nd.

MR. HESS: Thursday, December 2nd?

MR. PEEK: Your Honor, I can't, I have a doctor's appoint that --

THE COURT: That morning?

MR. PEEK: -- well, I have one at 1 o'clock.

THE COURT: Oh, we'll be done.

MR. PEEK: Okay.

THE COURT: We'll be done.

MR. PEEK: Okay.

MR. SULLIVAN: Yeah, that's fine.

MR. HESS: That's fine for us, the Non-Director Defendants.

THE COURT: Okay, and actually there's some things that I -- I don't know if you guys have noticed in your cases yet, but if -- in about 99 percent of the cases where I review ahead of time and if they're unopposed, I usually grant them by minute order, not to say that I do it all the time, but I can see some things here that I'm just waiting for the opposition time to pass. So, that number will probably go down.

All right, why don't we go ahead and schedule this for Thursday, December 2nd, at 9:00 a.m. I usually have a 9:00 a.m. start on Thursdays anyway because I like to go to my rotary meeting if I can. And that will be with respect to the motion for fees that's scheduled to be heard on Thursday.

MR. PEEK: And that'll be at 8:30 or 9:00, Your Honor?

THE COURT: Pardon me?

MR. HESS: 9:00.

MR. KOTLER: 9:00.

[Colloquy between the Court and the Court Clerk]

THE COURT: Well, we've got motions for fees, right?

THE COURT CLERK: Oh, okay.

MR. HESS: Yes.

THE COURT: Let's see.

MR. PEEK: Yeah.

THE COURT: No, I'm going to take, by the way, this issue with respect to costs under advisement because like I said, I read your motions, but I'm in -- I've been in back-to-back trials, as you can

imagine.

MR. PEEK: And I would invite, Judge, to read the *In re Dish Network* case in terms of --

THE COURT: I'm going to read even the *California Franchise Board* case.

MR. PEEK: It's a very -- they're -- the *Dish* case is a little longer, but the *California Franchise* is a short read. But I do invite you, as Mr. Ogilvie did, because I know what the ruling was contrary to Mr. Ogilvie's interpretation because I was there.

THE COURT: Okay. Okay, there's only one matter for motion for attorney's fees. Okay. That will be December 2nd, then.

MR. PEEK: Thank you.

THE COURT: Okay?

MR. OGILVIE: Thank you, Your Honor.

MR. HESS: Thank you, Judge.

MR. SULLIVAN: Thank you, Your Honor.

MR. KOTLER: Thank you, Your Honor.

MR. GORDON: Thank you, Your Honor.

[Proceeding concluded at 11:03 a.m.]

* * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Kaihla Berndt
Court Recorder/Transcriber

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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**
KEARNEY IRRV TRUST, individually and on behalf of all others similarly situated, **Plaintiff,** **Vs.** **KENNETH F. POSTASHNER; ELWOOD G. NORRIS; SETH PUTTERMAN; ROBERT M. KAPLAN; ANDREW L. WOLFE; JAMES L. HONORE; PARAMETRIC SOUND CORPORATION; PARIS ACQUISITION CORP.; and VTB HOLDINGS, INC.** **Defendants.** **GRANT OAKES; RAYMOND BOYTIM,** **Intervenor Plaintiffs.**	**ORDER DENYING DEFENDANTS' MOTION FOR ATTORNEYS' FEES** ***Consolidated with:*** **Case No. A-13-687232-B** **Dept. No. XXII**
VITIE RAKAUSKAS, individually and on behalf of all others similarly situated, **Plaintiff,** **Vs.** **PARAMETRIC SOUND CORPORATION; VTB HOLDINGS, INC.; PARIS ACQUISITION CORP., KENNETH F. POTASHNER; ELWOOD G. NORRIS; ROBERT J. KAPLAN; SETH PUTTERMAN; ANDREW WOLF; and JAMES L. HONORE,** **Defendants.**	***Consolidated with:*** **Case No. A-13-687354-B** **Dept. XXII**
GEORGE PRIESTON, individually and on behalf of all others similarly situated, **Plaintiff,** **Vs.**	

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

Case Number: A-13-686890-B

KENNETH F. POTASHNER; PARAMETRIC SOUND CORPORATION; JAMES L. HONORE; ROBERT M. KAPLAN; ELWOOD G. NORRIS; SETH PUTTERMAN; ANDREW WOLFE; VTB HOLDINGS, INC.; VOYETRA TURTLE BEACH, INC.; and PARIS ACQUISITION CORP., **Defendants.**	***Consolidated with:***
JOSH HANSEN, individually and on behalf of all others similarly situated, **Plaintiff,** **Vs.** **PARAMETRIC SOUND CORPORATION; JAMES L. HONORE; ROBERT M. KAPLAN; ELWOOD G. NORRIS; KENNETH F. POTASHNER; SETH PUTTERMAN; ANDREW WOLFE; VTB HOLDINGS, INC.; VOYETRA TURTLE BEACH, INC. and PARIS ACQUISITION CORP.,** **Defendants.**	**Case No. A-13-687665-B** **Dept. XXII** ***Consolidated with:***
SHAHA VASEK, individually and on behalf of all others similarly situated, **Plaintiff,** **Vs.** **PARAMETRIC SOUND CORPORATION; KENNETH POTASHNER; ELWOOD G. NORRIS; ROBERT M. KAPLAN; SETH PUTTERMAN; ANDREW WOLFE; and JAMES L. HONORE; VTB HOLDINGS, INC.; and PARIS ACQUISITION CORP.,** **Defendants.**	**Case No. A-13-688374-B** **Dept. XXII** ***Consolidated with:***
LANCE MYKITA, individually and on behalf of all others similarly situated, **Plaintiff,** **Vs.** **5G VTB HOLDINGS, LLC; STRIPES GROUP, LLC; VTB HOLDINGS, INC.;**	**Case No. A-16-741073-B** **Dept. XXII**

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

TURTLE BEACH CORPORATION, INC., **Defendants.**	***Consolidated with:***
PAMTP, LLC, **Plaintiff,** **Vs.** **SG VTB HOLDINGS, LLC; STRIPES; VTB HOLDINGS, INC.; JUERGEN STARK; KENNETH FOX; ANDREW WOLFE; SETH PUTTERMAN; ELWOOD G. NORRIS; KENNETH POTASHNER,** **Defendants.**	**Case No. A-20-815308-B** **Dept. XXII**

ORDER DENYING DEFENDANTS' MOTION FOR ATTORNEYS' FEES

This matter concerning the Motion for Attorneys' Fees filed by Defendants KENNETH POTASHNER and VTB HOLDINGS, INC. and Specially Appearing Defendants STRIPES GROUP, LLC, SG VTB HOLDINGS, LLC, JUERGEN STARK and KENNETH FOX on August 29, 2021 came on for hearing on the 2nd day of December 2021 at the hour of 9:00 a.m. before Department XXII of the Eighth Judicial District Court, in and for Clark County, Nevada with JUDGE SUSAN JOHNSON presiding; Plaintiff PAMTP, LLC appeared by and through its attorney, GEORGE F. OGILVIE, III, ESQ. of the law firm, MCDONALD CARANO, and DANIEL SULLIVAN, ESQ. and SCOTT DANNER, ESQ. of the law firm, HOLWELL SHUSTER & GOLDBERG; Defendant KENNETH POTASHNER appeared by and through his attorney, J. STEPHEN PEEK, ESQ. of the law firm, HOLLAND & HART, and ALEJANDRO E. MORENO, ESQ. of the law firm, SHEPPARD MULLIN RICHTER & HAMPTON; Defendant VTB HOLDINGS, INC. and Specially Appearing Defendants STRIPES GROUP, LLC, SG VTB HOLDINGS, LLC, JUERGEN STARK and KENNETH FOX attended by and through their attorneys, RICHARD C. GORDON, ESQ. of the law firm, SNELL & WILMER, and JOSHUA D.N. HESS, ESQ. and DAVID A. KOTLER, ESQ. of the law office, DECHERT, LLP. Having reviewed

the papers and pleadings on file herein, including the Supplemental Brief filed December 16, 2021, heard oral arguments of the attorneys and taken this matter under advisement, this Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT AND PROCEDURAL HISTORY

1. On August 13, 2013, the primary action was filed by non-controlling shareholders of PARAMETRIC SOUND CORPORATION, a small publicly traded company, on behalf of themselves and those similarly situated, to challenge the corporation's merger with VTB HOLDINGS, INC. (also referred to as "TURTLE BEACH") which closed on or about January 14, 2014. After the original complaint's filing, several other non-controlling shareholder actions challenging the merger were filed and eventually consolidated with the first action.. Essentially, the combined various complaints asserted three causes of action: (1) breach of fiduciary duties by PARAMOUNT SOUND CORPORATION'S Board of Directors, (2) aiding and abetting the directors' breach of fiduciary duties by PARAMETRIC SOUND CORPORATION and VTB HOLDINGS, INC. and (3) unjust enrichment.

2. PAMTP, LLC filed its Complaint in Case No. A-20-815308-B against SG VTB HOLDINGS, LLC, STRIPES, VTB HOLDINGS, INC., JUERGEN STARK, KENNETH FOX, ANDREW WOLF, SETH PUTTERMAN, ELWOOD G. NORRIS and KENNETH POTASHNER on May 20, 2020. PAMTP, LLC is a Delaware limited liability company formed for the purpose of asserting claims assigned to it by individuals and entities who held PARAMETRIC SOUND CORPORATION common stock on the closing date of the merger, January 15, 2014; these individuals and entities are ICEROSE CAPITAL MANAGEMENT, LLC, ROBERT MASTERSON, MARCIA PATRICOF on behalf of the PATRICOF FAMILY, LP, MARCIA PATRICOF REVOCABLE LIVING TRUST and the JULES PATRICOF REVOCABLE LIVING . . .

TRUST, ALAN and ANNE GOLDBERG, BARRY WEISBORD, RONALD and MURIEL ETKIN and RICHARD SANTULLI.

3. The derivative causes of action for breach of fiduciary duty, aiding and abetting and unjust enrichment claims were extinguished by the settlement and judgment entered into by the Court on May 18, 2020, two days before PAMTP, LLC filed its Complaint. Those who eventually assigned their claims to PAMTP, LLC opted out of the class settlement.

4. The "opt-out" portion of the case filed by PAMTP, LLC came regularly for trial before the Court on August 16, 2021. After conclusion of the Plaintiff's case-in-chief, Defendants made motions pursuant to NRCP 52(c), and ultimately, the Court granted the motions as set forth within its Order, Findings of Fact, Conclusions of Law and Judgment filed September 3, 2021.

5. During the course of the litigation, and specifically on July 1, 2020, Defendants collectively served an Offer of Judgment offering to allow judgment to be entered against them and in favor of PAMTP, LLC for $1.00, "inclusive of attorney's fees, costs of suit, and prejudgment interest." In addition, the Offer "prohibits any application or motion for a post-acceptance award of taxable costs, attorney's fees, or interest."[1] The Offer of Judgment was not accepted by PAMTP, LLC within the time frame set forth by NRCP 68(e).

6. Almost eleven (11) months later, on May 28, 2021, Defendants collectively served a second Offer of Judgment upon PAMTP, LLC, this time offering to allow judgment to be entered against them and in favor of PAMTP, LLC in the amount of $150,000.00. This Offer was also "inclusive of attorneys' fees, costs of suit, and prejudgment interest, and prohibit[ed] any application or motion for a post-acceptance award of taxable costs, attorney's fees or interest."[2] The second

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[1] *See* Exhibit 9 attached to Plaintiff's Opposition to Motion for Attorney's Fees filed October 13,2011.
[2] *See* Exhibit 10 attached to Plaintiff's Opposition to Motion for Attorney's Fees.

Offer of Judgment was not accepted by PAMTP, LLC within the time frame set forth by NRCP 68(e).

7. SG VTB HOLDINGS, LLC, STRIPES, VTB HOLDINGS, INC., JUERGEN STARK, KENNETH FOX, ANDREW WOLF, SETH PUTTERMAN, ELWOOD G. NORRIS and KENNETH POTASHNER now move this Court for reimbursement of their attorneys' fees incurred from the times their Offers of Judgment were made. In their view, they prevailed with respect to their Offers—that is, PAMTP, LLC failed to obtain a more favorable judgment than that set forth within their Offers. Further, they argue the application of the factors set forth in Beattie v. Thomas, 579, 588-589, 688 P.2d 268, 274 (1983), as well as those outlined in Brunzell v. Golden Gate National Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) weighs in their favor. They seek $7,054,396.88 in attorneys' fees incurred after the first Offer was made or $3,915,171.30 after the second was served. PAMTP, LLC opposes upon the basis the applicable of the ***Beattie*** factors do not weigh in Defendants' favor.

CONCLUSIONS OF LAW

1. Generally speaking, the district court may not award attorney fees absent authority under a statute, rule, or contract. *See* Albios v. Horizon Communities, Inc., 122 Nev. 409, 132 P.3d 1022, 1028 (2006), *citing* State Department of Human Resources v. Fowler, 109 Nev. 782, 784, 858 P.2d 375, 376 (1993). In this case, SG VTB HOLDINGS, LLC, STRIPES, VTB HOLDINGS, INC., JUERGEN STARK, KENNETH FOX, ANDREW WOLF, SETH PUTTERMAN, ELWOOD G. NORRIS and KENNETH POTASHNER seek an award of attorneys' fees under NRCP 68

2. NRCP 68 provides in salient part:

> (a) *The Offer:* At any time more than 21 days before trial, any party may serve an offer in writing to allow judgment to be taken in accordance with its terms and conditions. Unless otherwise specified, an offer made under this rule is an offer to resolve all claims in the action between the parties to the date of the offer, including costs, expense, interest, and if attorney fees are permitted by law or contract, attorney fees.
> . . .

(c) *Joint Unapportioned Offers.*

(1) *Multiple Offerors.* A joint offer may be made by multiple offerors.

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(3) *Offers to Multiple Plaintiffs.* An Offer made to multiple plaintiffs will involve the penalties of this rule only if:

(A) the damages claimed by all the offeree plaintiffs are solely derivative, much as where the damages claimed by some offerees are entirely derivative of an injury to the others or where the damages claimed by all offerees are derivative of an injury to another; and

(B) the same entity, person, or group is authorized to decide whether to settle the claims of the offerees.

. . .

(e) *Failure to Accept Offer.* If the offer is not accepted within 14 days after service, it will be considered rejected by the offeree and deemed withdrawn by the offeror. Evidence of the offer is not admissible except in a proceeding to determine costs, expenses, and fees. The fact that an offer is made but not accepted does not preclude a subsequent offer. With offers to multiple offerees, each offeree may serve a separate acceptance of the apportioned offer, but if the offer is not accepted by all offerees, the action will proceed as to all. Any offeree who fails to accept the offer may be subject to the penalties of this rule.

(f) *Penalties for Rejection of Offer:*

(1) *In General.* If the offeree rejects an offer and fails to obtain a more favorable judgment:

(A) the offeree cannot recover any costs, expenses, or attorney fees and may not recover interest for the period after the service of the offer and before the judgment; and

(B) the offeree must pay the offeror's post-offer costs and expenses, including a reasonable sum to cover any expenses incurred by the offeror for each expert witness whose services were reasonably necessary to prepare for and conduct the trial of the case, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney fees, if any be allowed, actually incurred by the offeror from the time of the offer. If the offeror's attorney is collecting a contingent fee, the amount of any attorney fees awarded to the party for whom the offer is made must be deducted from that contingent fee.

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(g) *How Costs, Expenses, Interest, and Attorney Fees Are Considered.* To invoke the penalties of this rule, the court must determine if the offeree failed to obtain a more favorable judgment. If the offer provided that costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees, would be added by the court, the court must compare the amount of the offer with the principal amount of the judgment, without inclusion of costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees. 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.

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DEPARTMENT XXII

3. Case law, interpreting NRCP 68, provides this rule was designed to facilitate and encourage settlement. It does so by placing the risk of loss on the non-accepting offeree, with no risk to the offeror, thus encouraging both offers and acceptances of offers. Matthews v. Collman, 110 Nev. 940, 950, 878 P.2d 971, 978 (1994). NRCP 68 invests the court with discretion to allow attorney fees when the judgment obtained by the offeror is more favorable than the offer. Armstrong v. Riggi, 92 Nev. 280, 281, 549 P.2d 753 (1976). The court's discretion will not be disturbed absent a clear abuse. Bidart v. American Title Insurance Co., 103 Nev. 175, 179, 734 P.2d 732, 735 (1987).

4. The factors to consider in making a discretionary award of attorney fees under NRCP 68 are whether:

(1) the plaintiff's claim was brought in good faith;

(2) the defendant's offer of judgment was reasonable and in good faith in both its timing and amount;

(3) the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and

(4) the fees sought by the offeror are reasonable and justified in amount.

After weighing the foregoing factors, the district court may, where warranted, award up to the full amount of fees requested. On the other hand, where the court has failed to consider these factors, and has made no findings based upon the evidence the attorney fees sought are reasonable and justified, it is an abuse of discretion for the court to award the full amount of fees requested. Beattie, 99 Nev. at 588, 668 P.2d at 274; *also see* Frazier v. Drake, 131 Nev. 632, 642, 357 P.3d 365 (2015).[3]

[3] *But see* MRO Communications, Inc. v. AT&T Co., 197 F.3d 1276, 1284 (9th Cir. 1999), *cert. denied*, 529 U.S. 1124, 120 S.Ct. 1995, 146 L.Ed.2d 820 (2000) (where affidavits and exhibits submitted in support of, and in opposition to, the motion for attorney's fees were sufficient to enable the court to consider each of the four factors outlined in *Beattie* and conclude the amount of fees was reasonable and justified, the court did not abuse its discretion in awarding

5. Should the court exercise its discretion in granting attorney's fees, it must consider certain factors in determining the amount awarded. *See* Schouweiler v. Yancy Company, 101 Nev. 827, 832, 712 P.2d 786, 790 (1985). Such factors include:

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

(2) the character of the work to be done: its difficulty, intricacy, importance, the time and skill required, the responsibility imposed and the prominence and character of the parties when they affect the importance of the litigation;

(3) the work actually performed by the lawyer: the skill, time and attention given to the work; and

(4) the result: whether the attorney was successful and what benefits were derived.

See Brunzell, 85 Nev. at 349, 455 P.2d at 33 (1969), *quoting* Schwartz v. Schwerin, 85 Ariz. 242, 336 P.2d 144, 146 (1959).

6. The first question is whether PAMTP, LLC failed to obtain a judgment more favorable than either Offer of Judgment of $1.00 and $150,000.00, respectively, both of which were inclusive of their attorney fees, costs of suit and pre-judgment interest incurred and prohibited any application or motion for a post-acceptance award of taxable costs, attorney's fees, or interest. Because the term "inclusive" was a term contained within the Offers of Judgment, this Court must add PAMTP, LLC'S attorney fees, costs and pre-judgment interest to the judgment received and compare that total to the $1.00 and $150,000.00, respectively, as set forth in NRCP 68(g), Here, PAMTP, LLC did not receive a judgment in its favor; Defendants received judgment as a matter of law under NRCP 52(c). In other words, PAMTP, LLC received zero ($0.00) as a judgment. The

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attorney's fees without making specific findings on the four factors).

pre-judgment interest earned, therefore, is zero ($0.00). The comparison this Court must make, then, is the extent of attorney's fees and costs of suit incurred by PAMTP, LLC to Defendants' $1.00 and $150,000.00 Offers by the time the two Offers was made. Here, neither party produced information regarding the attorney fees, costs and expenses that had been incurred by PAMTP, LLC from the time litigation was instituted on May 20, 2020 to when the Offers of Judgment were made, i.e. July 1, 2020 ($1.00) and May 28, 2021 ($150,000.00). Although it was not accorded such data by either side, what was available to the Court was financial records within its case management system, Tyler-Odyssey. Such records showed PAMTP, LLC incurred the initial filing fee of $1,530.00 on or about May 20, 2020. A comparison of the $1,530.00 to the $1.00 Offer of Judgment inclusive of attorneys' fees, costs of suit and pre-judgment interest shows the filing fees far exceeded the $1.00 offer to settle. That is, Defendants did not prevail with respect to its $1.00 Offer of Judgment.[4]

With respect to whether PAMTP, LLC obtained a judgment more favorable than the second Offer of Judgment made May 28, 2021, it is this Court's view the burden is upon Defendants, as the movants, to demonstrate the $150,000.00 exceeded the amount PAMTP, LLC incurred in attorney's fees, costs and expenses between May 20, 2020 and May 28, 2021. In so stating, this Court appreciates knowledge of the adversary's attorney's fees and costs generally are not known to the offeror's lawyer. However, that data could have been obtained by defense counsel simply asking for the information before Defendants made the $150,000.00 Offer of Judgment inclusive of attorney's fees, costs of suit and pre-judgment interest. There was nothing presented to suggest PAMTP, LLC was asked for and refused to give Defendants the data. Notably, if any evidence is a guide to this

[4]Notwithstanding the conclusion Defendants did not prevail with respect to the $1.00 Offer of Judgment, this Court also finds the second and third ***Beattie*** factors weigh in favor of PAMTP, LLC. In this Court's view, an offer to settle for $1.00 which was inclusive of PAMTP, LLC'S attorneys' fees, costs and pre-judgment interest incurred to date was neither reasonable nor made in good faith. In essence, Defendants proposed PAMTP, LLC accept $1.00 to settle the case when it had expended at least $1,530.00 filing fee plus its attorneys' fees. PAMTP, LLC'S decision to reject the $1.00 Offer was not grossly unreasonable or made in bad faith. This Court's view would be the same with respect to the $150,000.00 Offer of Judgment if PAMTP, LLC'S attorneys' fees and costs exceeded $150,000 by May 28, 2021.

Court, it is defense counsel's attorneys' fees that were incurred. Defendants' attorneys' fees increased $3,139,225.58 between their two Offers of Judgment made July 1, 2020 and May 28, 2021. This Court would have expected the extent of PAMTP, LLC'S legal fees to be commensurate to Defendants', and the $150,000.00 Offer of Judgment represents less than five (5) percent of that total. In short, this Court concludes Defendants did not meet their burden, and thus, their Motion for Attorney's Fees as it seeks attorney fees under NRCP 68 is denied.

7. Notably, within their Supplemental Brief filed December 16, 2021, Defendants propose "NRCP 68(g) looks only to the offeree's 'taxable' costs and fees," and PAMTP, LLC was not the prevailing party, and thus, its taxable costs are zero ($0.00). This Court disagrees with such assessment for at least a couple of reasons. *First,* the Offer of Judgment, in essence, is a contractual offer to settle for an amount certain, and thus, one must look to the terms of the offer. *See* NRCP 68(a) ("[A]ny party may serve an offer in writing to allow judgment to be taken in accordance with its terms and conditions."). The term "costs of suit," not "taxable costs," is utilized within both Offers of Judgment, and in this Court's view, "costs of suit" should be used in the comparison.[5] *Second,* notwithstanding that premise, the filing fees incurred May 20, 2020 *was* a "taxable cost" incurred "pre-offer," and it alone exceeded the $1.00 or amount of the first Offer of Judgment. Again, as noted above, this Court was not provided information demonstrating by a preponderance of the evidence the extent of PAMTP, LLC' attorney's fees, costs of suit or "taxable costs" incurred between May 20, 2020 and May 28, 2021, and therefore, it could not determine within its discretion whether Defendants prevailed with respect to their second Offer of Judgment.

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[5]Assuming it is not against public policy, parties to a contract may alter statutory provisions that normally would be abided by law.

8. Defendants next argue the "plain language of NRCP 68(g) requires that Plaintiff's taxable pre-offer costs be added to the offer and that sum compared to the ultimate judgment."[6] Such position conflicts with the holding recently made by the Nevada Court of Appeals in Hamilton v. Bott, 501 P.3d 468 (2021) (unpublished decision). In *Hamilton*, the appellate court determined the proper application of NRCP 68(g) was to compare the value of the plaintiff's total recovery by including the pre-offer fees, costs, expenses and interest with the verdict to the defendant's offer of judgment in order to determine whether a statutory award of fees and costs is precluded by NRCP 68(f). This Court applied NRCP 68(g) just as so held by the Nevada Court of Appeals in December 2021.

9. On page 9 of their Supplemental Brief in Support of Motion for Attorneys' Fees, Defendants suggest the burden of proof is upon PAMTP, LLC to demonstrate the statutory award of fees and costs is precluded by NRCP 68(f) by providing proof of its "non-taxable 'pre-offer costs" so a comparison can be made pursuant to NRCP 68(g). This Court rejects that suggestion for a couple of reasons. *First*, Defendants are the movant, and thus, in that role, movants generally have the burden of proof. *Second*, as NRCP 68 invests the court with discretion to allow attorney fees when the judgment obtained by the offeror is more favorable than the offer.[7] It is incumbent upon Defendants, as movants, to demonstrate the judgment obtained by them was more favorable than the offer. In short, this Court concludes the burden of proof here is upon Defendants.

Accordingly, based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED the Motion for Attorneys' Fees filed by Defendants KENNETH POTASHNER and VTB HOLDINGS, INC. and Specially

[6] *See* Supplemental Brief in Support of Defendants' Motion for Attorneys' Fees, p. 1.
[7] Armstrong, 92 Nev. at 281, 549 P.2d 753.

Appearing Defendants STRIPES GROUP, LLC, SG VTB HOLDINGS, LLC, JUERGEN STARK and KENNETH FOX on August 29, 2021 is denied.

Dated this 7th day of June, 2022

SUSAN JOHNSON, DISTRICT COURT JUDGE

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Susan Johnson
District Court Judge

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

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DISTRICT COURT
CLARK COUNTY, NEVADA

Kearney IRRV Trust, Plaintiff(s)	CASE NO: A-13-686890-B
vs.	DEPT. NO. Department 22
Kenneth Potashner, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order Denying Motion was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 6/8/2022

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DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION	LEAD CASE NO.: A-13-686890-B DEPT NO.: XXII **NOTICE OF ENTRY OF ORDER DENYING DEFENDANTS' MOTION FOR ATTORNEYS' FEES**
PAMTP LLC, Plaintiff, v. KENNETH POTASHNER, ELWOOD G. NORRIS, SETH PUTTERMAN, ROBERT KAPLAN, ANDREW WOLFE, KENNETH FOX, JUERGEN STARK, VTB HOLDINGS, INC., STRIPES f/k/a STRIPES GROUP, LLC and SG VTB HOLDINGS, LLC, Defendants.	RELATED CASE NO.: A-20-815308-B DEPT NO.: XXII

VITIE RAKAUSKAS, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. PARAMETRIC SOUND CORPORATION, VTB HOLDINGS, INC., PARIS ACQUISITION CORP., KENNETH F. POTASHNER, ELWOOD G. NORRIS, ROBERT M. KAPLAN, SETH PUTTERMAN, ANDREW WOLFE, and JAMES L. HONORE, Defendants.	CASE NO.: A-13-687232-C (Consolidated) DEPT NO.: XXII
GEORGE PRIESTON, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. KENNETH F. POTASHNER, PARAMETRIC SOUND CORPORATION, JAMES L. HONORE, ROBERT M. KAPLAN, ELWOOD G. NORRIS, SETH PUTTERMAN, ANDREW WOLFE, VTB HOLDINGS, INC., VOYETRA TURTLE BEACH INC.; and PARIS ACQUISITION CORP., Defendants.	CASE NO.: A-13-687354-C (Consolidated) DEPT NO.: XXII
JOSH HANSEN, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. PARAMETRIC SOUND CORPORATION, JAMES L. HONORE, ROBERT M. KAPLAN, ELWOOD G. NORRIS, KENNETH F. POTASHNER, SETH PUTTERMAN, ANDREW WOLFE, VTB HOLDINGS, INC., VOYETRA TURTLE BEACH INC.; and PARIS ACQUISITION CORP., Defendants.	CASE NO.: A-13-687665-C (Consolidated) DEPT NO.: XXII

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SHANA VASEK, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. PARAMETRIC SOUND CORPORATION, KENNETH F. POTASHNER, ELWOOD G. NORRIS, ROBERT M. KAPLAN, SETH PUTTERMAN, ANDREW WOLFE, JAMES L. HONORE, VTB HOLDINGS, INC., and PARIS ACQUISITION CORP., Defendants.	CASE NO.: A-13-688374-C (Consolidated) DEPT NO.: XXII
LANCE MYKITA, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. STRIPES GROUP, LLC and SG VTB HOLDINGS, LLC, Defendants.	CASE NO.: A-16-741073-B (Consolidated) DEPT NO.: XXII

PLEASE TAKE NOTICE that an Order Denying Defendants' Motion for Attorneys' Fees was entered by the Court on June 7, 2022. A copy of the Order is attached hereto.

DATED this 15th day of June, 2022.

McDONALD CARANO LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 15th day of January, 2022, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER DENYING DEFENDANTS' 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.

/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**
KEARNEY IRRV TRUST, individually and on behalf of all others similarly situated, **Plaintiff,** **Vs.** **KENNETH F. POSTASHNER; ELWOOD G. NORRIS; SETH PUTTERMAN; ROBERT M. KAPLAN; ANDREW L. WOLFE; JAMES L. HONORE; PARAMETRIC SOUND CORPORATION; PARIS ACQUISITION CORP.; and VTB HOLDINGS, INC.** **Defendants.** **GRANT OAKES; RAYMOND BOYTIM,** **Intervenor Plaintiffs.**	**ORDER DENYING DEFENDANTS' MOTION FOR ATTORNEYS' FEES** ***Consolidated with:*** **Case No. A-13-687232-B** **Dept. No. XXII**
VITIE RAKAUSKAS, individually and on behalf of all others similarly situated, **Plaintiff,** **Vs.** **PARAMETRIC SOUND CORPORATION; VTB HOLDINGS, INC.; PARIS ACQUISITION CORP., KENNETH F. POTASHNER; ELWOOD G. NORRIS; ROBERT J. KAPLAN; SETH PUTTERMAN; ANDREW WOLF; and JAMES L. HONORE,** **Defendants.**	***Consolidated with:*** **Case No. A-13-687354-B** **Dept. XXII**
GEORGE PRIESTON, individually and on behalf of all others similarly situated, **Plaintiff,** **Vs.**	

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

Case Number: A-13-686890-B

KENNETH F. POTASHNER; PARAMETRIC SOUND CORPORATION; JAMES L. HONORE; ROBERT M. KAPLAN; ELWOOD G. NORRIS; SETH PUTTERMAN; ANDREW WOLFE; VTB HOLDINGS, INC.; VOYETRA TURTLE BEACH, INC.; and PARIS ACQUISITION CORP., **Defendants.**	***Consolidated with:***
JOSH HANSEN, individually and on behalf of all others similarly situated, **Plaintiff,** **Vs.** **PARAMETRIC SOUND CORPORATION; JAMES L. HONORE; ROBERT M. KAPLAN; ELWOOD G. NORRIS; KENNETH F. POTASHNER; SETH PUTTERMAN; ANDREW WOLFE; VTB HOLDINGS, INC.; VOYETRA TURTLE BEACH, INC. and PARIS ACQUISITION CORP.,** **Defendants.**	**Case No. A-13-687665-B** **Dept. XXII** ***Consolidated with:***
SHAHA VASEK, individually and on behalf of all others similarly situated, **Plaintiff,** **Vs.** **PARAMETRIC SOUND CORPORATION; KENNETH POTASHNER; ELWOOD G. NORRIS; ROBERT M. KAPLAN; SETH PUTTERMAN; ANDREW WOLFE; and JAMES L. HONORE; VTB HOLDINGS, INC.; and PARIS ACQUISITION CORP.,** **Defendants.**	**Case No. A-13-688374-B** **Dept. XXII** ***Consolidated with:***
LANCE MYKITA, individually and on behalf of all others similarly situated, **Plaintiff,** **Vs.** **5G VTB HOLDINGS, LLC; STRIPES GROUP, LLC; VTB HOLDINGS, INC.;**	**Case No. A-16-741073-B** **Dept. XXII**

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DISTRICT JUDGE
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TURTLE BEACH CORPORATION, INC.,

Defendants.

Consolidated with:

PAMTP, LLC,

Plaintiff,

Vs.

SG VTB HOLDINGS, LLC; STRIPES; VTB HOLDINGS, INC.; JUERGEN STARK; KENNETH FOX; ANDREW WOLFE; SETH PUTTERMAN; ELWOOD G. NORRIS; KENNETH POTASHNER,

Defendants.

Case No. A-20-815308-B
Dept. XXII

ORDER DENYING DEFENDANTS' MOTION FOR ATTORNEYS' FEES

This matter concerning the Motion for Attorneys' Fees filed by Defendants KENNETH POTASHNER and VTB HOLDINGS, INC. and Specially Appearing Defendants STRIPES GROUP, LLC, SG VTB HOLDINGS, LLC, JUERGEN STARK and KENNETH FOX on August 29, 2021 came on for hearing on the 2nd day of December 2021 at the hour of 9:00 a.m. before Department XXII of the Eighth Judicial District Court, in and for Clark County, Nevada with JUDGE SUSAN JOHNSON presiding; Plaintiff PAMTP, LLC appeared by and through its attorney, GEORGE F. OGILVIE, III, ESQ. of the law firm, MCDONALD CARANO, and DANIEL SULLIVAN, ESQ. and SCOTT DANNER, ESQ. of the law firm, HOLWELL SHUSTER & GOLDBERG; Defendant KENNETH POTASHNER appeared by and through his attorney, J. STEPHEN PEEK, ESQ. of the law firm, HOLLAND & HART, and ALEJANDRO E. MORENO, ESQ. of the law firm, SHEPPARD MULLIN RICHTER & HAMPTON; Defendant VTB HOLDINGS, INC. and Specially Appearing Defendants STRIPES GROUP, LLC, SG VTB HOLDINGS, LLC, JUERGEN STARK and KENNETH FOX attended by and through their attorneys, RICHARD C. GORDON, ESQ. of the law firm, SNELL & WILMER, and JOSHUA D.N. HESS, ESQ. and DAVID A. KOTLER, ESQ. of the law office, DECHERT, LLP. Having reviewed

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the papers and pleadings on file herein, including the Supplemental Brief filed December 16, 2021, heard oral arguments of the attorneys and taken this matter under advisement, this Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT AND PROCEDURAL HISTORY

1. On August 13, 2013, the primary action was filed by non-controlling shareholders of PARAMETRIC SOUND CORPORATION, a small publicly traded company, on behalf of themselves and those similarly situated, to challenge the corporation's merger with VTB HOLDINGS, INC. (also referred to as "TURTLE BEACH") which closed on or about January 14, 2014. After the original complaint's filing, several other non-controlling shareholder actions challenging the merger were filed and eventually consolidated with the first action.. Essentially, the combined various complaints asserted three causes of action: (1) breach of fiduciary duties by PARAMOUNT SOUND CORPORATION'S Board of Directors, (2) aiding and abetting the directors' breach of fiduciary duties by PARAMETRIC SOUND CORPORATION and VTB HOLDINGS, INC. and (3) unjust enrichment.

2. PAMTP, LLC filed its Complaint in Case No. A-20-815308-B against SG VTB HOLDINGS, LLC, STRIPES, VTB HOLDINGS, INC., JUERGEN STARK, KENNETH FOX, ANDREW WOLF, SETH PUTTERMAN, ELWOOD G. NORRIS and KENNETH POTASHNER on May 20, 2020. PAMTP, LLC is a Delaware limited liability company formed for the purpose of asserting claims assigned to it by individuals and entities who held PARAMETRIC SOUND CORPORATION common stock on the closing date of the merger, January 15, 2014; these individuals and entities are ICEROSE CAPITAL MANAGEMENT, LLC, ROBERT MASTERSON, MARCIA PATRICOF on behalf of the PATRICOF FAMILY, LP, MARCIA PATRICOF REVOCABLE LIVING TRUST and the JULES PATRICOF REVOCABLE LIVING . . .

TRUST, ALAN and ANNE GOLDBERG, BARRY WEISBORD, RONALD and MURIEL ETKIN and RICHARD SANTULLI.

3. The derivative causes of action for breach of fiduciary duty, aiding and abetting and unjust enrichment claims were extinguished by the settlement and judgment entered into by the Court on May 18, 2020, two days before PAMTP, LLC filed its Complaint. Those who eventually assigned their claims to PAMTP, LLC opted out of the class settlement.

4. The "opt-out" portion of the case filed by PAMTP, LLC came regularly for trial before the Court on August 16, 2021. After conclusion of the Plaintiff's case-in-chief, Defendants made motions pursuant to NRCP 52(c), and ultimately, the Court granted the motions as set forth within its Order, Findings of Fact, Conclusions of Law and Judgment filed September 3, 2021.

5. During the course of the litigation, and specifically on July 1, 2020, Defendants collectively served an Offer of Judgment offering to allow judgment to be entered against them and in favor of PAMTP, LLC for $1.00, "inclusive of attorney's fees, costs of suit, and prejudgment interest." In addition, the Offer "prohibits any application or motion for a post-acceptance award of taxable costs, attorney's fees, or interest."[1] The Offer of Judgment was not accepted by PAMTP, LLC within the time frame set forth by NRCP 68(e).

6. Almost eleven (11) months later, on May 28, 2021, Defendants collectively served a second Offer of Judgment upon PAMTP, LLC, this time offering to allow judgment to be entered against them and in favor of PAMTP, LLC in the amount of $150,000.00. This Offer was also "inclusive of attorneys' fees, costs of suit, and prejudgment interest, and prohibit[ed] any application or motion for a post-acceptance award of taxable costs, attorney's fees or interest."[2] The second

. . .

[1] *See* Exhibit 9 attached to Plaintiff's Opposition to Motion for Attorney's Fees filed October 13,2011.
[2] *See* Exhibit 10 attached to Plaintiff's Opposition to Motion for Attorney's Fees.

Offer of Judgment was not accepted by PAMTP, LLC within the time frame set forth by NRCP 68(e).

7. SG VTB HOLDINGS, LLC, STRIPES, VTB HOLDINGS, INC., JUERGEN STARK, KENNETH FOX, ANDREW WOLF, SETH PUTTERMAN, ELWOOD G. NORRIS and KENNETH POTASHNER now move this Court for reimbursement of their attorneys' fees incurred from the times their Offers of Judgment were made. In their view, they prevailed with respect to their Offers—that is, PAMTP, LLC failed to obtain a more favorable judgment than that set forth within their Offers. Further, they argue the application of the factors set forth in Beattie v. Thomas, 579, 588-589, 688 P.2d 268, 274 (1983), as well as those outlined in Brunzell v. Golden Gate National Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) weighs in their favor. They seek $7,054,396.88 in attorneys' fees incurred after the first Offer was made or $3,915,171.30 after the second was served. PAMTP, LLC opposes upon the basis the applicable of the ***Beattie*** factors do not weigh in Defendants' favor.

CONCLUSIONS OF LAW

1. Generally speaking, the district court may not award attorney fees absent authority under a statute, rule, or contract. *See* Albios v. Horizon Communities, Inc., 122 Nev. 409, 132 P.3d 1022, 1028 (2006), *citing* State Department of Human Resources v. Fowler, 109 Nev. 782, 784, 858 P.2d 375, 376 (1993). In this case, SG VTB HOLDINGS, LLC, STRIPES, VTB HOLDINGS, INC., JUERGEN STARK, KENNETH FOX, ANDREW WOLF, SETH PUTTERMAN, ELWOOD G. NORRIS and KENNETH POTASHNER seek an award of attorneys' fees under NRCP 68

2. NRCP 68 provides in salient part:

> (a) *The Offer:* At any time more than 21 days before trial, any party may serve an offer in writing to allow judgment to be taken in accordance with its terms and conditions. Unless otherwise specified, an offer made under this rule is an offer to resolve all claims in the action between the parties to the date of the offer, including costs, expense, interest, and if attorney fees are permitted by law or contract, attorney fees.
> . . .

(c) *Joint Unapportioned Offers.*

(1) *Multiple Offerors.* A joint offer may be made by multiple offerors.

. . .

(3) *Offers to Multiple Plaintiffs.* An Offer made to multiple plaintiffs will involve the penalties of this rule only if:

(A) the damages claimed by all the offeree plaintiffs are solely derivative, much as where the damages claimed by some offerees are entirely derivative of an injury to the others or where the damages claimed by all offerees are derivative of an injury to another; and

(B) the same entity, person, or group is authorized to decide whether to settle the claims of the offerees.

. . .

(e) *Failure to Accept Offer.* If the offer is not accepted within 14 days after service, it will be considered rejected by the offeree and deemed withdrawn by the offeror. Evidence of the offer is not admissible except in a proceeding to determine costs, expenses, and fees. The fact that an offer is made but not accepted does not preclude a subsequent offer. With offers to multiple offerees, each offeree may serve a separate acceptance of the apportioned offer, but if the offer is not accepted by all offerees, the action will proceed as to all. Any offeree who fails to accept the offer may be subject to the penalties of this rule.

(f) *Penalties for Rejection of Offer:*

(1) *In General.* If the offeree rejects an offer and fails to obtain a more favorable judgment:

(A) the offeree cannot recover any costs, expenses, or attorney fees and may not recover interest for the period after the service of the offer and before the judgment; and

(B) the offeree must pay the offeror's post-offer costs and expenses, including a reasonable sum to cover any expenses incurred by the offeror for each expert witness whose services were reasonably necessary to prepare for and conduct the trial of the case, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney fees, if any be allowed, actually incurred by the offeror from the time of the offer. If the offeror's attorney is collecting a contingent fee, the amount of any attorney fees awarded to the party for whom the offer is made must be deducted from that contingent fee.

. . .

(g) *How Costs, Expenses, Interest, and Attorney Fees Are Considered.* To invoke the penalties of this rule, the court must determine if the offeree failed to obtain a more favorable judgment. If the offer provided that costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees, would be added by the court, the court must compare the amount of the offer with the principal amount of the judgment, without inclusion of costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees. 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.

SUSAN H. JOHNSON
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3. Case law, interpreting NRCP 68, provides this rule was designed to facilitate and encourage settlement. It does so by placing the risk of loss on the non-accepting offeree, with no risk to the offeror, thus encouraging both offers and acceptances of offers. Matthews v. Collman, 110 Nev. 940, 950, 878 P.2d 971, 978 (1994). NRCP 68 invests the court with discretion to allow attorney fees when the judgment obtained by the offeror is more favorable than the offer. Armstrong v. Riggi, 92 Nev. 280, 281, 549 P.2d 753 (1976). The court's discretion will not be disturbed absent a clear abuse. Bidart v. American Title Insurance Co., 103 Nev. 175, 179, 734 P.2d 732, 735 (1987).

4. The factors to consider in making a discretionary award of attorney fees under NRCP 68 are whether:

(1) the plaintiff's claim was brought in good faith;

(2) the defendant's offer of judgment was reasonable and in good faith in both its timing and amount;

(3) the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and

(4) the fees sought by the offeror are reasonable and justified in amount.

After weighing the foregoing factors, the district court may, where warranted, award up to the full amount of fees requested. On the other hand, where the court has failed to consider these factors, and has made no findings based upon the evidence the attorney fees sought are reasonable and justified, it is an abuse of discretion for the court to award the full amount of fees requested. Beattie, 99 Nev. at 588, 668 P.2d at 274; *also see* Frazier v. Drake, 131 Nev. 632, 642, 357 P.3d 365 (2015).[3]

[3] *But see* MRO Communications, Inc. v. AT&T Co., 197 F.3d 1276, 1284 (9th Cir. 1999), *cert. denied*, 529 U.S. 1124, 120 S.Ct. 1995, 146 L.Ed.2d 820 (2000) (where affidavits and exhibits submitted in support of, and in opposition to, the motion for attorney's fees were sufficient to enable the court to consider each of the four factors outlined in *Beattie* and conclude the amount of fees was reasonable and justified, the court did not abuse its discretion in awarding

5. Should the court exercise its discretion in granting attorney's fees, it must consider certain factors in determining the amount awarded. *See* Schouweiler v. Yancy Company, 101 Nev. 827, 832, 712 P.2d 786, 790 (1985). Such factors include:

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

(2) the character of the work to be done: its difficulty, intricacy, importance, the time and skill required, the responsibility imposed and the prominence and character of the parties when they affect the importance of the litigation;

(3) the work actually performed by the lawyer: the skill, time and attention given to the work; and

(4) the result: whether the attorney was successful and what benefits were derived.

See Brunzell, 85 Nev. at 349, 455 P.2d at 33 (1969), *quoting* Schwartz v. Schwerin, 85 Ariz. 242, 336 P.2d 144, 146 (1959).

6. The first question is whether PAMTP, LLC failed to obtain a judgment more favorable than either Offer of Judgment of $1.00 and $150,000.00, respectively, both of which were inclusive of their attorney fees, costs of suit and pre-judgment interest incurred and prohibited any application or motion for a post-acceptance award of taxable costs, attorney's fees, or interest. Because the term "inclusive" was a term contained within the Offers of Judgment, this Court must add PAMTP, LLC'S attorney fees, costs and pre-judgment interest to the judgment received and compare that total to the $1.00 and $150,000.00, respectively, as set forth in NRCP 68(g), Here, PAMTP, LLC did not receive a judgment in its favor; Defendants received judgment as a matter of law under NRCP 52(c). In other words, PAMTP, LLC received zero ($0.00) as a judgment. The

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attorney's fees without making specific findings on the four factors).

pre-judgment interest earned, therefore, is zero ($0.00). The comparison this Court must make, then, is the extent of attorney's fees and costs of suit incurred by PAMTP, LLC to Defendants' $1.00 and $150,000.00 Offers by the time the two Offers was made. Here, neither party produced information regarding the attorney fees, costs and expenses that had been incurred by PAMTP, LLC from the time litigation was instituted on May 20, 2020 to when the Offers of Judgment were made, i.e. July 1, 2020 ($1.00) and May 28, 2021 ($150,000.00). Although it was not accorded such data by either side, what was available to the Court was financial records within its case management system, Tyler-Odyssey. Such records showed PAMTP, LLC incurred the initial filing fee of $1,530.00 on or about May 20, 2020. A comparison of the $1,530.00 to the $1.00 Offer of Judgment inclusive of attorneys' fees, costs of suit and pre-judgment interest shows the filing fees far exceeded the $1.00 offer to settle. That is, Defendants did not prevail with respect to its $1.00 Offer of Judgment.[4]

With respect to whether PAMTP, LLC obtained a judgment more favorable than the second Offer of Judgment made May 28, 2021, it is this Court's view the burden is upon Defendants, as the movants, to demonstrate the $150,000.00 exceeded the amount PAMTP, LLC incurred in attorney's fees, costs and expenses between May 20, 2020 and May 28, 2021. In so stating, this Court appreciates knowledge of the adversary's attorney's fees and costs generally are not known to the offeror's lawyer. However, that data could have been obtained by defense counsel simply asking for the information before Defendants made the $150,000.00 Offer of Judgment inclusive of attorney's fees, costs of suit and pre-judgment interest. There was nothing presented to suggest PAMTP, LLC was asked for and refused to give Defendants the data. Notably, if any evidence is a guide to this

[4]Notwithstanding the conclusion Defendants did not prevail with respect to the $1.00 Offer of Judgment, this Court also finds the second and third ***Beattie*** factors weigh in favor of PAMTP, LLC. In this Court's view, an offer to settle for $1.00 which was inclusive of PAMTP, LLC'S attorneys' fees, costs and pre-judgment interest incurred to date was neither reasonable nor made in good faith. In essence, Defendants proposed PAMTP, LLC accept $1.00 to settle the case when it had expended at least $1,530.00 filing fee plus its attorneys' fees. PAMTP, LLC'S decision to reject the $1.00 Offer was not grossly unreasonable or made in bad faith. This Court's view would be the same with respect to the $150,000.00 Offer of Judgment if PAMTP, LLC'S attorneys' fees and costs exceeded $150,000 by May 28, 2021.

Court, it is defense counsel's attorneys' fees that were incurred. Defendants' attorneys' fees increased $3,139,225.58 between their two Offers of Judgment made July 1, 2020 and May 28, 2021. This Court would have expected the extent of PAMTP, LLC'S legal fees to be commensurate to Defendants', and the $150,000.00 Offer of Judgment represents less than five (5) percent of that total. In short, this Court concludes Defendants did not meet their burden, and thus, their Motion for Attorney's Fees as it seeks attorney fees under NRCP 68 is denied.

7. Notably, within their Supplemental Brief filed December 16, 2021, Defendants propose "NRCP 68(g) looks only to the offeree's 'taxable' costs and fees," and PAMTP, LLC was not the prevailing party, and thus, its taxable costs are zero ($0.00). This Court disagrees with such assessment for at least a couple of reasons. *First,* the Offer of Judgment, in essence, is a contractual offer to settle for an amount certain, and thus, one must look to the terms of the offer. *See* NRCP 68(a) ("[A]ny party may serve an offer in writing to allow judgment to be taken in accordance with its terms and conditions."). The term "costs of suit," not "taxable costs," is utilized within both Offers of Judgment, and in this Court's view, "costs of suit" should be used in the comparison.[5] *Second,* notwithstanding that premise, the filing fees incurred May 20, 2020 *was* a "taxable cost" incurred "pre-offer," and it alone exceeded the $1.00 or amount of the first Offer of Judgment. Again, as noted above, this Court was not provided information demonstrating by a preponderance of the evidence the extent of PAMTP, LLC' attorney's fees, costs of suit or "taxable costs" incurred between May 20, 2020 and May 28, 2021, and therefore, it could not determine within its discretion whether Defendants prevailed with respect to their second Offer of Judgment.

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[5]Assuming it is not against public policy, parties to a contract may alter statutory provisions that normally would be abided by law.

8. Defendants next argue the "plain language of NRCP 68(g) requires that Plaintiff's taxable pre-offer costs be added to the offer and that sum compared to the ultimate judgment."[6] Such position conflicts with the holding recently made by the Nevada Court of Appeals in Hamilton v. Bott, 501 P.3d 468 (2021) (unpublished decision). In *Hamilton*, the appellate court determined the proper application of NRCP 68(g) was to compare the value of the plaintiff's total recovery by including the pre-offer fees, costs, expenses and interest with the verdict to the defendant's offer of judgment in order to determine whether a statutory award of fees and costs is precluded by NRCP 68(f). This Court applied NRCP 68(g) just as so held by the Nevada Court of Appeals in December 2021.

9. On page 9 of their Supplemental Brief in Support of Motion for Attorneys' Fees, Defendants suggest the burden of proof is upon PAMTP, LLC to demonstrate the statutory award of fees and costs is precluded by NRCP 68(f) by providing proof of its "non-taxable 'pre-offer costs" so a comparison can be made pursuant to NRCP 68(g). This Court rejects that suggestion for a couple of reasons. *First*, Defendants are the movant, and thus, in that role, movants generally have the burden of proof. *Second*, as NRCP 68 invests the court with discretion to allow attorney fees when the judgment obtained by the offeror is more favorable than the offer.[7] It is incumbent upon Defendants, as movants, to demonstrate the judgment obtained by them was more favorable than the offer. In short, this Court concludes the burden of proof here is upon Defendants.

Accordingly, based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED the Motion for Attorneys' Fees filed by Defendants KENNETH POTASHNER and VTB HOLDINGS, INC. and Specially

[6] *See* Supplemental Brief in Support of Defendants' Motion for Attorneys' Fees, p. 1.
[7] Armstrong, 92 Nev. at 281, 549 P.2d 753.

Appearing Defendants STRIPES GROUP, LLC, SG VTB HOLDINGS, LLC, JUERGEN STARK and KENNETH FOX on August 29, 2021 is denied.

Dated this 7th day of June, 2022

SUSAN JOHNSON, DISTRICT COURT JUDGE

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Susan Johnson
District Court Judge

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Kearney IRRV Trust, Plaintiff(s)	CASE NO: A-13-686890-B
vs.	DEPT. NO. Department 22
Kenneth Potashner, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order Denying Motion was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION	LEAD CASE NO.: A-13-686890-B DEPT. NO.: XXII **NOTICE OF APPEAL**
PAMTP LLC, Plaintiff, v. KENNETH POSTASHNER, KENNETH FOX, JUERGEN STARK, VTB HOLDINGS, INC., STRIPES GROUP, LLC and SG VTB HOLDINGS, LLC, Defendants.	RELATED CASE NO.: A-20-815308-B DEPT. NO.: XXII

VITIE RAKAUSKAS, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. PARAMETRIC SOUND CORPORATION, VTB HOLDINGS, INC., PARIS ACQUISITION CORP., KENNETH F. POTASHNER, ELWOOD G. NORRIS, ROBERT M. KAPLAN, SETH PUTTERMAN, ANDREW WOLFE, and JAMES L. HONORE, Defendants.	CASE NO.: A-13-687232-C (Consolidated) DEPT NO.: XXII
GEORGE PRIESTON, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. KENNETH F. POTASHNER, PARAMETRIC SOUND CORPORATION, JAMES L. HONORE, ROBERT M. KAPLAN, ELWOOD G. NORRIS, SETH PUTTERMAN, ANDREW WOLFE, VTB HOLDINGS, INC., VOYETRA TURTLE BEACH INC.; and PARIS ACQUISITION CORP., Defendants.	CASE NO.: A-13-687354-C (Consolidated) DEPT NO.: XXII
JOSH HANSEN, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. PARAMETRIC SOUND CORPORATION, JAMES L. HONORE, ROBERT M. KAPLAN, ELWOOD G. NORRIS, KENNETH F. POTASHNER, SETH PUTTERMAN, ANDREW WOLFE, VTB HOLDINGS, INC., VOYETRA TURTLE BEACH INC.; and PARIS ACQUISITION	CASE NO.: A-13-687665-C (Consolidated) DEPT NO.: XXII

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CORP., Defendants.	
SHANA VASEK, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. PARAMETRIC SOUND CORPORATION, KENNETH F. POTASHNER, ELWOOD G. NORRIS, ROBERT M. KAPLAN, SETH PUTTERMAN, ANDREW WOLFE, JAMES L. HONORE, VTB HOLDINGS, INC., and PARIS ACQUISITION CORP., Defendants.	CASE NO.: A-13-688374-C (Consolidated) DEPT NO.: XXII
LANCE MYKITA, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. STRIPES GROUP, LLC and SG VTB HOLDINGS, LLC, Defendants.	CASE NO.: A-16-741073-B (Consolidated) DEPT NO.: XXII

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NOTICE is hereby given that Defendants Kenneth Potashner, VTB Holdings, Inc., and Specially Appearing Defendants Stripes Group, LLC, SG VTB Holdings, LLC, Juergen Stark, and Kenneth Fox, by and through their respective counsel, appeal to the Supreme Court of Nevada from the Order Denying Defendants' Motion for Attorneys' Fees, issued on June 7, 2022, filed on June 7, 2022, and for which a Notice of Entry of Order was filed on June 15, 2022.

Dated: June 30, 2022

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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 **NOTICE OF APPEAL** on the 30th day of June 2022, 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**
KEARNEY IRRV TRUST, individually and on behalf of all others similarly situated, **Plaintiff,** **Vs.** **KENNETH F. POSTASHNER; ELWOOD G. NORRIS; SETH PUTTERMAN; ROBERT M. KAPLAN; ANDREW L. WOLFE; JAMES L. HONORE; PARAMETRIC SOUND CORPORATION; PARIS ACQUISITION CORP.; and VTB HOLDINGS, INC.** **Defendants.**	**ORDER RE: PAMTP, LLC'S MOTIONS TO RE-TAX COSTS**
GRANT OAKES; RAYMOND BOYTIM, **Intervenor Plaintiffs.**	***Consolidated with:***
VITIE RAKAUSKAS, individually and on behalf of all others similarly situated, **Plaintiff,** **Vs.** **PARAMETRIC SOUND CORPORATION; VTB HOLDINGS, INC.; PARIS ACQUISITION CORP., KENNETH F. POTASHNER; ELWOOD G. NORRIS; ROBERT J. KAPLAN; SETH PUTTERMAN; ANDREW WOLF; and JAMES L. HONORE,** **Defendants.**	**Case No. A-13-687232-B** **Dept. No. XXII** ***Consolidated with:***
GEORGE PRIESTON, individually and on behalf of all others similarly situated, **Plaintiff,** **Vs.**	**Case No. A-13-687354-B** **Dept. XXII**

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

Case Number: A-13-686890-B

KENNETH F. POTASHNER; PARAMETRIC SOUND CORPORATION; JAMES L. HONORE; ROBERT M. KAPLAN; ELWOOD G. NORRIS; SETH PUTTERMAN; ANDREW WOLFE; VTB HOLDINGS, INC.; VOYETRA TURTLE BEACH, INC.; and PARIS ACQUISITION CORP., **Defendants.**	***Consolidated with:***
JOSH HANSEN, individually and on behalf of all others similarly situated, **Plaintiff,** **Vs.** **PARAMETRIC SOUND CORPORATION; JAMES L. HONORE; ROBERT M. KAPLAN; ELWOOD G. NORRIS; KENNETH F. POTASHNER; SETH PUTTERMAN; ANDREW WOLFE; VTB HOLDINGS, INC.; VOYETRA TURTLE BEACH, INC. and PARIS ACQUISITION CORP.,** **Defendants.**	**Case No. A-13-687665-B** **Dept. XXII** ***Consolidated with:***
SHAHA VASEK, individually and on behalf of all others similarly situated, **Plaintiff,** **Vs.** **PARAMETRIC SOUND CORPORATION; KENNETH POTASHNER; ELWOOD G. NORRIS; ROBERT M. KAPLAN; SETH PUTTERMAN; ANDREW WOLFE; and JAMES L. HONORE; VTB HOLDINGS, INC.; and PARIS ACQUISITION CORP.,** **Defendants.**	**Case No. A-13-688374-B** **Dept. XXII** ***Consolidated with:***
LANCE MYKITA, individually and on behalf of all others similarly situated, **Plaintiff,** **Vs.** **5G VTB HOLDINGS, LLC; STRIPES GROUP, LLC; VTB HOLDINGS, INC.;**	**Case No. A-16-741073-B** **Dept. XXII**

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

TURTLE BEACH CORPORATION, INC., **Defendants.**	***Consolidated with:***
PAMTP, LLC, **Plaintiff,** **Vs.** **SG VTB HOLDINGS, LLC; STRIPES; VTB HOLDINGS, INC.; JUERGEN STARK; KENNETH FOX; ANDREW WOLFE; SETH PUTTERMAN; ELWOOD G. NORRIS; KENNETH POTASHNER,** **Defendants.**	**Case No. A-20-815308-B** **Dept. XXII**

ORDER RE: PAMTP, LLC'S MOTIONS TO RE-TAX COSTS

These matters concerning:

1. Plaintiff PAMTP, LLC'S Motion to Re-Tax Defendant KENNETH POTASHNER'S Verified Memorandum of Costs filed October 7, 2021; and

2. Plaintiff PAMTP, LLC'S Motion to Re-Tax Non-Director Defendants' Memorandum of Costs filed October 7, 2021,

both came on for hearing on the 16th day of November 2021 at the hour of 8:30 a.m. before Department XXII of the Eighth Judicial District Court, in and for Clark County, Nevada with JUDGE SUSAN JOHNSON presiding; Plaintiff PAMTP, LLC appeared by and through its attorneys, GEORGE F. OGILVIE, III, ESQ. of the law firm, MCDONALD CARANO, DANIEL SULLIVAN, ESQ. of the law office, HOLWELL SHUSTER& GOLDBERG, and DAVID C. O'MARA, ESQ. of the O'MARA LAW FIRM; Defendant KENNETH POTASHNER appeared by and through his attorney, J. STEPHEN PEEK, ESQ. of the law firm, HOLLAND & HART, and ALEJANDRO E. MORENO, ESQ. of the law firm, SHEPPARD MULLIN RICHTER & HAMPTON; and Defendant VTB HOLDINGS, INC. and Specially Appearing Defendants STRIPES GROUP, LLC, SG VTB HOLDINGS, LLC, JUERGEN STARK and KENNETH FOX

appeared by and through their attorneys, RICHARD C. GORDON, ESQ. of the law firm, SNELL & WILMER, and DAVID A. KOTLER, ESQ. of the law office, DECHERT, LLP. Having reviewed the papers and pleadings filed in this matter, including but not limited to the thousands of pages related to the motions, heard extensive oral arguments of the lawyers and taken this matter under advisement, this Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT AND PROCEDURAL HISTORY

1. On August 13, 2013, the primary action was filed by a non-controlling shareholder of PARAMETRIC SOUND CORPORATION, a small publicly traded company, on behalf of itself and those similarly situated, to challenge the corporation's merger with VTB HOLDINGS, INC. (also referred to as "TURTLE BEACH") which closed on or about January 14, 2014. After the original complaint's filing, several other non-controlling shareholder actions challenging the merger were filed and eventually consolidated with the first action. The combined various complaints asserted three causes of action: (1) breach of fiduciary duties by PARAMOUNT SOUND CORPORATION'S Board of Directors, (2) aiding and abetting the directors' breach of fiduciary duties by PARAMETRIC SOUND CORPORATION and VTB HOLDINGS, INC. and (3) unjust enrichment.

2. PAMTP, LLC filed its Complaint in Case No. A-20-815308-B against SG VTB HOLDINGS, LLC, STRIPES, VTB HOLDINGS, INC., JUERGEN STARK, KENNETH FOX,[1] ANDREW WOLFE, ROBERT KAPLAN, SETH PUTTERMAN, ELWOOD G. NORRIS[2] and KENNETH POTASHNER on May 20, 2020, asserting claims of (1) breach of fiduciary duty and (2) aiding and abetting breach of fiduciary duty. PAMTP, LLC is a Delaware limited liability company

[1]SG VTB HOLDINGS, LLC, STRIPES, VTB HOLDINGS, INC., JUERGEN STARK and KENNETH FOX are the non-settling "Non-Director Defendants," and will be referred to as the "Non-Director Defendants" herein.

[2]ANDREW WOLFE, ROBERT KAPLAN, SETH PUTTERMAN and ELWOOD G. NORRIS are the "Non-Director Defendants" who ultimately resolved claims filed by PAMTP, LLC.

formed for the purpose of asserting claims assigned to it by individuals and entities who held PARAMETRIC SOUND CORPORATION common stock on the closing date of the merger, January 15, 2014; these individuals and entities are ICEROSE CAPITAL MANAGEMENT, LLC, ROBERT MASTERSON, MARCIA PATRICOF on behalf of the PATRICOF FAMILY, LP, MARCIA PATRICOF REVOCABLE LIVING TRUST and the JULES PATRICOF REVOCABLE LIVING TRUST, ALAN and ANNE GOLDBERG, BARRY WEISBORD, RONALD and MURIEL ETKIN and RICHARD SANTULLI.

3. Of significance here, the non-controlling shareholder plaintiffs were certified as a class by the Court on January 18, 2019 and defined as "those individuals holding [PARAMETRIC SOUND CORPORATION] common stock on…January 15, 2014." *See* Order filed January 18, 2019. Although all non-controlling shareholders had the opportunity to opt out or be excluded from the class, those who ultimately assigned their claims to PAMTP, LLC did not opt out of the class.

4. The derivative causes of action for breach of fiduciary duty, aiding and abetting and unjust enrichment claims were extinguished by the settlement and judgment entered into by the Court on May 18, 2020, two days before PAMTP, LLC filed its Complaint, which as set forth above, alleged the claims assigned to it by ICEROSE CAPITAL MANAGEMENT, LLC, ROBERT MASTERSON, MARCIA PATRICOF on behalf of the PATRICOF FAMILY, LP, MARCIA PATRICOF REVOCABLE LIVING TRUST and the JULES PATRICOF REVOCABLE LIVING TRUST, ALAN and ANNE GOLDBERG, BARRY WEISBORD, RONALD and MURIEL ETKIN and RICHARD SANTULLI.

5. The case filed by PAMTP, LLC came regularly for trial before the Court on August 16, 2021 and continued through August 25, 2021. After conclusion of the PAMTP, LLC'S case-in-chief, Defendants moved the Court for judgment in their favor as a matter of law pursuant to NRCP 52(c); these motions were granted by the Court as set forth within its Order Granting Defendants'

Motion for Judgment Pursuant to NRCP 52(c), Findings of Fact, Conclusions of Law and Judgment filed September 3, 2021. The Notice of Entry of Judgment was filed September 8, 2021.[3]

6. The Non-Director Defendants and MR. POTASHNER, as prevailing parties, filed their respective memorandums of costs on September 22, 2021. The Non-Director Defendants seek a total reimbursement of $1,046,849.92 in costs; MR. POTASHNER has itemized $407,071.11 as expenses to be recovered from PAMTP, LLC. These costs are set forth as follows:

Non-Directors' Costs

Costs Incurred by DECHERT, LLP Law Firm

Reporters' Fees for Depositions	$74,652.57
Expert Witness Fees	223,031.19
Printing/Photocopying/Scanning	82,992.66
Postage/Federal Express	2,443.46
Travel and Lodging for Hearings/Depositions	102,189.45
Computerized Legal Research	85,922.55
Electronic Discovery	309,399.52
Access to Court Records	99.30
Pro Hac Vice Admission Fees	9,350.00
Equipment Rental for Trial	123,508.80
Total:	**$1,012,571.70**

Costs Incurred by SNELL & WILMER

Clerks' Fees	$ 4,480.05
Reporters' Fees for Depositions/Hearings/Trial	16,172.38
Telecopies	1.50
Costs for Printing/Photocopying/Scanning	2,675.49
Postage/Federal Express	167.53
Travel and Lodging for Hearings/Depositions	1,752.93
Computerized Legal Research	2,920.00
Conference Calls	77.39
Pro Hac Vice Admission Fees	4,900.00
Messenger Services	1,130.95
Total:	**$34,278.22**

. . .

[3]The parties stipulated to an extension of the deadlines imposed by NRS 18.110 to September 22, 2021.

MR. POTASHNER'S Costs

Clerks' Fees	$ 2,636.00
Reporters' Fees for Depositions	49,098.70
Witnesses' Fees & Expenses	11,525.00
Expert Witness Fees	91,846.50
Court Reporter Fees	1,864.29
Photocopies	22,496.91
Travel and Lodging Costs	46,801.99
Computerized Legal Research	8,557.79
Electronic Discovery	159,160.51
Delivery and Filing Services-Messengers	1,919.50
Pro Hac Vice Admission Fees	5,200.00
Parking for Mandatory Hearings	725.00
Mediation Fees	2,844.57
Travel for Mandatory Supreme Court Hearings	762.59
Total:	**$407,071.11**

6. PAMTP, LLC has moved to re-tax the costs, arguing, *first*, the movants are not entitled to costs they incurred in defending the earlier class actions years before it filed its lawsuit in 2020. In its view, costs incurred before a party files a lawsuit are not recoverable under NRS Chapter 18 and the class action was independent under NRS 18.020. *Second*, the Non-Director Defendants and MR. POTASHNER seek recovery of costs they incurred with respect to the evidentiary hearing in June 2021 was brought about by their own willful and/or negligent destruction of evidence. In other words, these Defendants seek a monetary reward for their bad faith acts that harmed PAMTP, LLC'S case. *Third*, these Defendants seek recovery for electronic discovery (also referred to herein as "e-discovery") expenses incurred for storing and producing electronically stored information (also referred to as "ESI" herein) which are not identified as a recoverable costs under NRS 18.005. *Fourth*, the Non-Director Defendants seek recovery of $55,838.95 in expert witness fees incurred after May 20, 2020, an amount that exceeds NRS 18.005's allowance of no more than $1,500.00 per expert witness; in PAMTP, LLC'S view, the Non-Director Defendants did not show extenuating circumstances supporting recovery of larger fees. *Fifth*, the Non-Director Defendants

seek expenses for "trial support," and amounts for "equipment rental" and "graphics and onsite support," which are "bloated" and not reasonable under NRS Chapter 18. *Sixth and finally,* these Defendants seek *pro hac vice* fees which are not recoverable under NRS Chapter 18.

7. Defendants oppose, arguing the litigation commenced in 2013 and the consolidated matter has always been treated as a singular lawsuit. In Defendants' view, PAMTP, LLC conceded that point within its Pre-Trial Memorandum when it claimed entitlement to pre-judgment interest accruing from the date of dilutive issuance, January 15, 2014, or, alternatively, from the time the Complaint was filed, August 13, 2013, "because this Action arose as a direct result of Plaintiff's opt-out from the settlement of the Class Action, and continues under the initial case, number A-13-686890-B."[4] Further, PAMTP, LLC'S assignors were actual or putative class members in this action since its inception in 2013 and they received the benefits of class counsel's advocacy and discovery produced by Defendants. *Secondly,* in Defendants' view, they are entitled to costs associated with the evidentiary hearing; even though they did not prevail at that hearing, the sanctions PAMTP, LLC received played no material role in the case's outcome; that is, "[e]ven with the evidentiary scales tipped in Plaintiff's favor, this Court still found Plaintiff's claims to be so lacking in substance that judgment under NRCP 52(c) was appropriate."[5] *Third,* PAMTP, LLC misreads precedent from the Nevada Supreme Court as precluding recovery of costs associated with hosting and storing of e-discovery. If anything, that same authority cited by Plaintiff expressly authorizes and afforms recovery of such costs. *See* In re: DISH Network Derivative Litigation, 133 Nev. 438, 401 P.3d 1081 (2017). *Fourth,* PAMTP, LLC misconstrues NRS 18.005 by arguing the Non-Director Defendants are not entitled to recover more than $1,500 per expert witness when none of the experts testified at trial. Such limitation does not apply when the non-prevailing party's

[4] *See* Plaintiff's Pre-Trial Memorandum, pp. 10-11, filed July 16, 2021.
[5] *See* Non-Director Defendants' Opposition to Plaintiff's Motion to Re-Tax Costs, p. 2, filed October 21, 2021.

conduct results in the experts not testifying; here, the Court granted Defendants judgment as a matter of law rendering it unnecessary for the defense experts to testify. *Fifth,* the trial support expenses are reasonable and recoverable. *Sixth,* the fees incurred for attorneys appearing *pro hac vice* are reasonable and recoverable as it was necessary to retain non-Nevada lawyers to address issues never before litigated in Nevada.

CONCLUSIONS OF LAW

1. NRS 18.020 sets forth costs *must* be allowed of course to the prevailing party against his adversary against whom judgment is rendered in an action where the plaintiff seeks, *inter alia,* the recovery of real property or a possessory right thereto and/or more than $2,500.00. The determination of which expenses are allowed as costs is within the sound discretion of the trial court. Although this Court has wide discretion in awarding costs to prevailing parties, such is not without limits. *See* Cadle Company v. Woods & Erickson, 131 Nev. 114, 345 P.3d 1049 (2015). The Court's discretion should be exercised sparingly when considering whether to allow expenses not specified by statute and precedent. *See* Bergmann v. Boyce, 109 Nev. 670, 679, 856 P.2d 560, 566 (1993). In this case, there is no question the Non-Director Defendants and MR. POTASHNER are the parties that prevailed in this action as they were accorded judgment as a matter of law under NRCP 52(c) after PAMTP, LLC rested its case.

2. NRS 18.005 defines the "costs" recoverable by the prevailing party. They include:

> 1. Clerk's fees.
> 2. Reporters' fees for depositions, including a reporter's fee for one copy of each deposition.
> 3. Jurors' fees and expenses, together with reasonable compensation of an officer appointed to act in accordance with NRS 16.120.
> 4. Fees for witnesses at trial, pretrial hearings and deposing witnesses, unless the court finds that the witness was called at the instance of the prevailing party without reason or necessity.
> 5. Reasonable fees of not more than five expert witnesses in an amount of not more than $1,500 for each witness, unless the court allows a larger fee after determining that

the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee.

6. Reasonable fees of necessary interpreters.

7. The fee of any sheriff or licensed process server for the delivery or service of any summons or subpoena used in the action, unless the court determines that the service was not necessary.

8. Compensation for the official reporter or reporter pro tempore.

9. Reasonable costs for any bond or undertaking required as part of the action.

10. Fees of a court bailiff or deputy marshal who was required to work overtime.

11. Reasonable costs for telecopies.

12. Reasonable costs for photocopies.

13. Reasonable costs for long distance telephone calls.

14. Reasonable costs for postage.

15. Reasonable costs for travel and lodging incurred in taking depositions and conducting discovery.

16. Fees charged pursuant to NRS 19.0335.

17. Any other reasonable and necessary expense incurred in connection with the action, including reasonable and necessary expenses for computerized services for legal research.

Costs and Disbursements Incurred Prior to May 20, 2020

3. PAMTP, LLC alleges within its May 20, 2020 Complaint it was "lawfully and validly assigned" the "rights, titles and interests" of certain shareholders, to wit: ICEROSE CAPITAL MANAGEMENT, LLC, ROBERT MASTERSON, MARCIA PATRICOF on behalf of the PATRICOF FAMILY, LP, MARCIA PATRICOF REVOCABLE LIVING TRUST and the JULES PATRICOF REVOCABLE LIVING TRUST, ALAN and ANNE GOLDBERG, BARRY WEISBORD, RONALD and MURIEL ETKIN and RICHARD SANTULLI, "in any claims arising from or related to the Merger against Parametric or any other entity or individual that could be liable for the acts or omissions alleged in the litigation entitled *In re Parametric Sound Corporation Shareholders' Litigation*, No. A-13-686890-B."[6] "Assign" is defined as "[t]o transfer, make over, or set over to another. To appoint, allot, select, or designate for a particular purpose, or duty. To point at, or point out; to set forth, or specify; to mark out or designate; to particularize, as to assign errors on a writ of error; to assign breaches of a covenant." *See* Black's Law Dictionary, p. 108 (5th ed.

[6]*See* Complaint filed May 20, 2020, p. 7, paragraph 25.

1979); Reynolds v. Tufenkjian, 136 Nev. Adv. Op. 19, 461 P.3d 147, 153-154 (2020) (while claims for personal injury torts are not assignable, when a tort claim alleges purely pecuniary loss, as in the case [of a] negligent misrepresentation claim, the claim may be assigned."). Here, the basis of PAMTP, LLC'S lawsuit against the Non-Director Defendants and MR. POTASHNER stems from a tort alleging a purely pecuniary loss in that it arises from their alleged breach of fiduciary duty and aiding and abetting breach of fiduciary duty which originally were owed to the assignor-shareholders.

4. PAMTP, LLC argues the Non-Director Defendants and MR. POTASHNER are precluded from seeking reimbursement of any and all costs that were incurred between the institution of the first class action lawsuit on August 13, 2013 and the filing of its Complaint on May 20, 2020, i.e. $585,083.29[7] and "nearly $300,000.00."[8] That is, in PAMTP, LLC'S view, the parties who prevailed in this lawsuit are not entitled to costs that accrued prior to the filing of its Complaint. This Court disagrees with PAMTP, LLC'S position for at least a couple of reasons. *First,* PAMTP, LLC'S standing to sue stems solely from it being "lawfully and validly assigned" the "rights, titles and interests" of certain shareholders which arose from or related to the January 2014 merger.[9] Upon assignment, PAMTP, LLC received and accepted all risks and benefits of the class litigation starting from when the individual assignors became involved in the lawsuit. *Second,* this Court is also mindful PAMTP, LLC has claimed within its Pre-Trial Memorandum an entitlement to pre-judgment interest accruing from the date of dilutive issuance, January 15, 2014, or, alternatively, from the time the Complaint was filed, August 13, 2013, "because this Action arose as a direct result of Plaintiff's opt-out from the settlement of the Class Action, and continues under the initial case,

[7] *See* PAMTP, LLC'S Motion to Re-Tax Non-Directors' Memorandum of Costs filed October 7, 2021, p. 2
[8] *See* PAMTP, LLC'S Motion to Re-Tax defendant Kenneth Potashner's Verified Memorandum of Costs filed October 7, 2021, p. 2.
[9] *See* Complaint, p. 7, paragraph 25.

number A-13-686890-B."[10] Presumably, if PAMTP, LLC had been the prevailing party, it would have sought pre-judgment interest accruing since 2013 or 2014. As PAMTP, LLC sued based upon the assignment of claims that arose in 2013, this Court concludes the Non-Director Defendants and MR. POTASHNER, as prevailing parties, are entitled to reimbursement of reasonable costs necessarily and actually incurred from the time the original class action was instituted. PAMTP, LLC has lodged no other challenge as to the reasonableness and necessity of the costs incurred by Defendants prior to May 20, 2020. PAMTP, LLC'S Motions to Re-Tax Costs as they seek a subtraction or re-taxing of *all* costs incurred between the institution of the first class action lawsuit and the filing of its Complaint on May 20, 2020 are denied.

Costs Associated with the Spoliation Evidentiary Hearing

5. PAMTP, LLC argues the Non-Director Defendants and MR. POTASHNER should not be awarded their costs incurred in unsuccessfully defending claims they willfully and/or negligently failed to preserve data and communications at a two-day evidentiary hearing that took place June 18 and 25, 2021. While it does not identify the particular costs allegedly incurred by MR. POTASHNER, it indicates "over $23,000.00" was charged to the Non-Director Defendants. This Court agrees with PAMTP, LLC'S assessment. After hearing two-days of testimony, JUDGE GONZALEZ concluded MR. POTASHNER "willfully destroyed text messages and emails relevant to this litigation." The judge made an adverse inference "the lost text messages and emails relevant to this litigation would have shown that Potashner acted in bad faith when supporting and approving the merger. Potashner may testify and contest this at trial, but his testimony will go to his credibility only because an adverse inference of bad faith has already been made by the Court;…." JUDGE GONZALEZ also found "Stark and Fox…negligently failed to preserve text messages," and she

[10] *See* Plaintiff's Pre-Trial Memorandum, pp. 10-11.

made a determination the lost information would have been adverse to them.[11] Given the rulings adverse to the Non-Director Defendants and MR. POTASHNER, this Court, in its discretion, declines to award Defendants their costs incurred as a result of defending against the spoliation allegations which included the evidentiary hearing.

5. This Court has gleaned the following expenses were incurred by the Non-Director Defendants as a result of defending the spoliation allegations:[12]

Printing Expenses (Evidentiary Hearing)	
Litigation Discovery Group	$6,854.78
Travel Expenses, June 15-26, 2021	
David A. Kottler, Esq.	5,620.61
Joshua D. Hess, Esq.	4,170.19
Richard C. Gordon, Esq. (parking expenses)	39.00
Reporters' Fees, June 25, 2021:	
Transcript of Proceedings	132.52
Total:	**$16,817.10**

MR. POTASHNER incurred the following costs as a result of the spoliation evidentiary hearing:[13]

Court Fees	
June 16 – 17, 2021	$ 14.00
Witnesses' Fees and Expenses	
Jury to Verdict Trial Services	1,775.00
Travel and Lodging Costs, June 15-18, 2021	
Alejandro E. Moreno, Esq.	861.59
John P. Stigi, III, Esq.	1,448.95
Kenneth Potashner	639.76
Delivery and Filing Services	
June 14, 2022	244.90

[11] *See* Findings of Fact, Conclusions of Law and Order Imposing Spoliation Sanctions filed July 15, 2021, p. 10.

[12] The expenses are itemized and shown by receipts in Appendix of Exhibits to Non-Director Defendants' Memorandum of Costs (Volumes 1, 2, 3 and 4) filed September 22, 2021.

[13] MR. POTASHNER'S expenses are itemized and shown by receipts in Appendix of Exhibits to his Verified Memorandum of Costs (Volumes I, II, III, IV and V) filed September 22, 2021.

Parking for Mandatory Hearings	
June 18, 25, 2022	108.00
Total	**$5,092.20**

This Court disallows a total of $21,909.30 in costs associated with MR. POTASHNER'S and the Non-Director Defendants' defense of the spoliation issues.

Costs Associated With Electronic Discovery and Storage

6. As set forth *supra*, the Non-Director Defendants and MR. POTASHER seek the recovery of $309,399.52 and $159,160.51, respectively, incurred as "reasonable and necessary electronic discovery costs,"[14] claiming such fall within NRS 18.005(17)'s "catch-all" provision. Such costs included those to collect, host, search for and produce the documents requested by PAMTP, LLC. PAMTP, LLC moved to re-tax such costs on two bases: *First*, Defendants are not entitled to recover costs incurred prior to the May 20, 2020 Complaint's filing which has been addressed by the Court previously. *Second*, "[p]arties may not recover e-discovery for hosting and storage costs as a taxable cost."[15]

7. The issue raised by PAMTP, LLC has been addressed by the Nevada Supreme Court in In re DISH Network Derivative Litigation, 133 Nev. at 450-451, 401 P.3d 1081. There, the high court specifically held electronic discovery expenses are "costs" under NRS 18.005(17) as "[a]ny other reasonable and necessary expense incurred in connection with the action." *Id.*; *also see* NRCP 34(d) ("The party requesting that documents be copied must pay the reasonable cost therefor…."). In reviewing the records provided, this Court notes the costs incurred by Defendants were for electronic discovery conducted by vendors, not defense counsel, as a method to acquire and process the information required to be produced in response to PAMTP, LLC'S discovery requests. Such

[14]*See* MR. POTASHNER'S Opposition to Plaintiff's Motion to Retax Defendant Kenneth Potashner's Verified Memorandum of Costs, p. 16, filed October 21, 2021; *also see* Non-Director Defendants' Opposition to Plaintiff's Motion to Re-Tax Costs, p. 13.

[15]*See* PAMTP, LLC'S Motion to Retax Non-Director Defendants' Memorandum of Costs, p. 10.

costs included that for the vendors' hosting and storage. Other than its challenges to those expenses incurred prior to May 20, 2020 and those attributable to hosting and storage, PAMTP, LLC does not dispute the reasonableness or necessity of the electronic discovery costs. In this Court's view, the electronic discovery costs are "reasonable and necessary expense[s] incurred in connection with the action." *See* NRS 18.005(17). This Court therefore denies PAMTP, LLC'S motion as it seeks a re-tax of Defendants' electronic discovery expenses.

Expert Witnesses' Fees

8. NRS 18.005(5) identifies within its term "costs" as including "[r]easonable fees of not more than five expert witnesses in an amount of not more than $1,500 for each witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee." *See* Logan v. Abe, 131 Nev. 260, 267, 350 P.3d 1139 (2015) (Emphasis added); *also see* Frazier v. Drake, 131 Nev. 632, 646, 357 P.3d 365, 374 (2015). Here, MR. POTASHNER and the Non-Director Defendants seek reimbursement of $91,846.50 and $223,031.19, respectively, for expert witness fees. MR. POTASHER and the Non-Director Defendants retained the same experts, i.e. DR. JOHN MONTGOMERY and ANKURA CONSULTING GROUP.

9. As already set forth *supra,* PAMTP, LLC first moved to re-tax of Defendants' expert witness fees that were incurred prior to the filing of its Complaint on May 20, 2020; this Court has concluded Defendants are entitled to reimbursement of their costs necessarily and reasonably incurred prior to May 20, 2020.

10. PAMTP, LLC next challenges the Non-Director Defendants' expert witness fees incurred after May 20, 2020,[16] i.e. $59,573.45. It proposes the expert witness fees charged after May 20, 2020 should be limited to $1,500.00 per expert witness as no expert testified at the trial. In

[16]MR. POTASHNER'S expert witness fees were all incurred before May 20, 2020.

Frazier, 131 Nev. at 650, 651, 357 P.3d at 377-378, the Nevada Court of Appeals concluded any award of expert witness fees in excess of $1,500.00 per expert under NRS 18.005(5) must be supported by an express, carefully and preferably written explanation of the district court's analysis of factors pertinent to determining the reasonableness of the requested fees and whether "the circumstances surrounding the expert's testimony were of such necessity as to require a larger fee." *Cf.* Young v. Johnny Ribeiro Building, Inc., 106 Nev. 88, 93, 787 P.2d 777, 780 (1990) (requiring an "express, carefully and preferably written explanation" of the district court's analysis of factors pertinent to determining whether a dismissal with prejudice is an appropriate discover sanction). Here, in evaluating the request for such an award, this Court should consider the importance of the expert's testimony to the defense, the degree to which his opinions aided the trier of fact in deciding the case, whether the expert's report or testimony was repetitive of other expert witnesses, the extent and nature of the work performed by him, whether he had to conduct independent investigations or testing, the amount of time he spent in court, preparing a report and for trial, his areas of expertise, his education and training, the fee actually charged to the Non-Director Defendants, the comparable experts' fees charged in similar cases if the expert was retained from outside Clark County and the fees and costs that would have been incurred to hire a comparable expert where the trial was held. The aforementioned factors are non-exhaustive and others may be appropriate for consideration depending on the circumstances of a case. Frazier, 131 Nev. at 650-651, 357 P.3d at 377-378.

11. This Court finds the trial testimony of DR. MONTGOMERY, a Class Certification expert, would have been important to the Defendants' case and aided JUDGE GONZALEZ, the trier of fact, in deciding the case if the matter proceeded beyond the granting of the NRCP 52(c) motion. As DR. MONTGOMERY was the only expert witness retained by the Defendants, this Court discerns his testimony would not have been repetitive of another's. This Court also is unaware of any, and appreciates there may not be Class Certification experts residing in Nevada for Defendants

to make a comparison of the reasonableness of their expert's fees to those charged in Clark County. While ANKURA CONSULTING GROUP'S invoices provided by MR. POTASHNER outlined the hours and fees incurred as well as all tasks performed by DR. MONTGOMERY and other consultants, the information identifying the actual tasks accomplished was completely redacted by the Non-Director Defendants from the invoices they produced. With respect to what services were provided to the Non-Director Defendants, this Court is unable to determine the extent and nature of the work performed by DR. MONTGOMERY and the other ANKULA CONSULTING GROUP consultants, whether the expert had to conduct independent investigations or testing, the amount of time he spent preparing a report and for trial, as well as his time spent preparing for and having his deposition taken. No information, other than the invoices, was provided this Court regarding DR. MONTGOMERY'S areas of expertise, education and training. In other words, the Non-Director Defendants provided this Court very little information for it to perform an analysis of factors pertinent in determining the reasonableness of the requested fees and whether "the circumstances surrounding the expert's testimony were of such necessity as to require a larger fee." MR. POTASHNER'S unredacted invoices, on the other hand, showed DR. MONTGOMERY performed extensive analyses and testing, reviewed extensive documentation, prepared for and had his deposition taken.

12. Although DR. MONTGOMERY did not testify at trial, this Court concludes his fees and costs charged to the Non-Director Defendants in excess of $1,500.00 that were incurred during the eight (8) days he was in Las Vegas for trial were reasonable and necessary. DR. MONTGOMERY was not summoned by Defendants to testify at the trial as JUDGE GONZALEZ rendered her judgment as a matter of law after PAMTP, LLC rested its case. Thus, similar to the procedural history of Logan, 131 Nev. at 267, 350 P.3d 1139, "the 'circumstances surrounding the expert's testimony,' or in this case, the lack thereof, were of [PAMTP, LLC'S] creation and 'were of

such necessity as to require the larger fee.'" This Court, therefore, awards the Non-Director Defendants the fees/costs expended by DR. MONTGOMERY from August 17, 2021 to August 26, 2021, i.e. $40,763.95. This Court awards MR. POTASHNER the full extent of his expert witness fees, $91,846.50.

Costs Associated with Trial Support and Equipment Rental

13. The Non-Director Defendants seek recovery of $123,508.80[17] from PAMTP, LLC for costs associated with equipment rental and trial support under the "catch-all" of NRS 18.005(17) ("Any other reasonable and necessary expense incurred in connection with the action."). Such included $60,000.00 to set up the war room at the offices of SNELL & WILMER with five printers (both black and white and color capabilities), twelve (12) computer monitors, two WIFI router/range extenders one UniFi switch 48/500 and fifteen (15) 10' Category-5 (CAT-5) cables with 24/7 information technology ("IT") for twenty (20) days from August 6, 2021 to August 26, 2021, $22,450.00 to set up three hotel rooms with six (6) computer monitors and one color printer with 24/7 IT for sixteen (16) and seventeen (17) days, and $2,295.00 to rent a conference room for nine (9) days at the Bank of America building and $1,800.00 rental of a color printer for six (6) days, all with 24/7 IT support. The other $33,963.80 was for trial graphics and onsite support. In this Court's view, the $89,545.00 for the rental of equipment for up to twenty (20) was extreme in terms of the extent of apparatus rented and the cost thereof. Indeed, this Court cannot fathom the need for five (5) printers in a war room especially when, presumably, SNELL & WILMER, a national law firm, had printers with both black and white and color capabilities for use within its Las Vegas office. Further, $1,800.00 to rent a printer for six (6) days at a location near the courthouse is outrageous, especially considering one could have purchased an adequate printer for far less. Further, a need to

[17]Such encompassed $89,545.00 for equipment rental for trial and $33,963.80 for trial graphics and onsite support. *See* Volume 3, Exhibit 10, Bates Nos. 1251-1261 of Appendix of Exhibits to Non-Director Defendants' Memorandum of Costs.

rent eighteen (18) computers in a war room and three hotel rooms likewise appears extreme. In this Court's view, computer and printer equipment along with the accessories and 24/7 IT could have been acquired for far less than $89,545.00. This Court awards the Non-Director Defendants $29,848.33 for equipment rental and rental of the conference room located close to the courthouse as "[a]ny other reasonable and necessary expense incurred in connection with the action" under NRS 18.005(17).

14. Although it found it necessary to reduce the extent of the Non-Directors' equipment rental costs, this Court concludes the $33,963.80 expended for trial graphics and onsite support to be reasonable and necessary even though, ultimately, the graphics were never shown to the finder of fact. The graphics work necessarily had to be completed prior to the defense presenting its case, and the onsite support was needed throughout the trial which included the time PAMTP, LLC was presenting its case in chief. This Court, therefore, awards the Non-Directors $33,963.80 for trial graphics and onsite support.

Costs for Pro Hac Vice Admissions

15. PAMTP, LLC argues it should not be assessed $10,100.00[18] for MR. POTASHNER'S and the Non-Director Defendants' costs associated with the *Pro Hac Vice* admissions as such are not itemized expenses set forth within NRS 18.005. This Court agrees. While there is no question the MR. POTASHNER and the Non-Director Defendants are entitled to legal counsel of their choosing, there is no authority in Nevada for the proposition they, as prevailing parties, are entitled to reimbursement of expenses related to their out-of-state lawyers' admission to practice law within this state. This Court, therefore, disallows the $10,100.00 *Pro Hac Vice* Admissions expenses.

[18]MR. POTASHNER claims $5,200.00 in *Pro Hac Vice* Admissions expenses, and the Non-Director Defendants assert an entitlement to $4,900.00.

16. The aforementioned addresses all of PAMTP, LLC'S arguments concerning the reasonableness and necessity of Defendants' costs sought for reimbursement. All in all, of the $1,046,849.92 and $407,071.11, respectively, sought as reimbursable costs by the Non-Director Defendants and MR. POTASHNER, this Court awards the following:

Non-Directors' Costs

Costs Incurred by DECHERT, LLP Law Firm

Reporters' Fees for Depositions	$74,652.57
Expert Witness Fees	40,763.95
Printing/Photocopying/Scanning	82,992.66
Postage/Federal Express	2,443.46
Travel and Lodging for Hearings/Depositions	85,372.35
Computerized Legal Research	85,922.55
Electronic Discovery	309,399.52
Access to Court Records	99.30
Pro Hac Vice Admission Fees	0.00
Equipment Rental for Trial	63,812.13
Total:	**$ 745,458.49**

Costs Incurred by SNELL & WILMER

Clerks' Fees	$ 4,480.05
Reporters' Fees for Depositions/Hearings/Trial	16,172.38
Telecopies	1.50
Costs for Printing/Photocopying/Scanning	2,675.49
Postage/Federal Express	167.53
Travel and Lodging for Hearings/Depositions	1,752.93
Computerized Legal Research	2,920.00
Conference Calls	77.39
Pro Hac Vice Admission Fees	0.00
Messenger Services	1,130.95
Total:	**$29,378.22**

MR. POTASHNER'S Costs

Clerks' Fees	$ 2,636.00
Reporters' Fees for Depositions	49,098.70
Witnesses' Fees & Expenses	11,525.00
Expert Witness Fees	91,846.50
Court Reporter Fees	1,864.29

Photocopies	22,496.91
Travel and Lodging Costs	41,709.79
Computerized Legal Research	8,557.79
Electronic Discovery	159,160.51
Delivery and Filing Services-Messengers	1,919.50
Pro Hac Vice Admission Fees	0.00
Parking for Mandatory Hearings	725.00
Mediation Fees	2,844.57
Travel for Mandatory Supreme Court Hearings	762.59
Total:	**$395,147.15**

Accordingly, based upon the aforementioned Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED Plaintiff PAMTP, LLC'S Motion to Re-Tax Defendant KENNETH POTASHNER'S Verified Memorandum of Costs filed October 7, 2021 is granted in part, denied in part. Of the $407,071.11 sought by MR. POTASHNER, this Defendant is awarded $395,147.15 in costs pursuant to NRS 18.020.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED Plaintiff PAMTP, LLC'S Motion to Re-Tax Non-Director Defendants' Memorandum of Costs filed October 7, 2021 is granted in part, denied in part. Of the $1,046,849.92 sought by the Non-Director Defendants, these Defendants are awarded $774.836.71 pursuant to NRS 18.020.

Dated this 29th day of August, 2022

SUSAN JOHNSON, DISTRICT COURT JUDGE

41A 9AE 3484 D4F4
Susan Johnson
District Court Judge

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Kearney IRRV Trust, Plaintiff(s)	CASE NO: A-13-686890-B
vs.	DEPT. NO. Department 22
Kenneth Potashner, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 8/29/2022

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If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 8/30/2022

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