

IN THE SUPREME COURT OF THE STATE OF NEVADA

Nos. 83598, 84971, and 85358

IN RE PARAMETRIC SOUND CORPORATION
SHAREHOLDERS' LITIGATION.

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Elizabeth A. Brown
Clerk of Supreme Court

PAMTP, LLC,

Appellant,

v.

KENNETH F. POTASHNER; VTB HOLDINGS, INC.;
STRIPE 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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	Trial Exhibit 1052	16	AA 2818- AA 2862

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



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.

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

2 * * * * *

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

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

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

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

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

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

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

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

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

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

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

JD Reporting, Inc.

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

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

5 MR. PEEK: There are two others.

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

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

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

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

19 THE COURT: Sure.

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

25 THE COURT: Yep.

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

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

10 MR. OGILVIE: Okay.

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

13 MR. OGILVIE: Okay.

14 THE COURT: -- or your secretary or whoever.

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

17 MR. OGILVIE: Okay.

18 THE COURT: Yeah. And, you know, I'm going to just
19 give you a quick war story on that, why I require that. In
20 2007, whenever I acquired 1,750 cases from, you know,
21 21 departments, one of the cases was a mechanic's lien case and
22 I had a two and a half week bench trial on this mechanic's lien
23 case. It took me awhile to do the decision. And before I even
24 started it, I did reach out through the old Blackstone system
25 to try and figure out who all the parties were to get my arms

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

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

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

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

1 MR. OGILVIE: Understood, Your Honor.

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

4 MR. OGILVIE: Understood.

5 THE COURT: Okay?

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

8 MR. HESS: Yeah.

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

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

15 THE COURT: Okay.

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

17 THE COURT: Okay.

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

20 THE COURT: Absolutely.

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

1 THE COURT: I'm sure he will.

2 MR. HESS: No comment. Your Honor, you know, we were
3 here before you on the 16th. We appreciate that you've come in
4 at the tail end of this case, a very long case that has a long
5 history, and we appreciate that you're drinking from a fire
6 hose. I will attempt to distill things as much as I can for
7 your sake, and everyone else's sake for that matter. But
8 before we get kind of into the heart of kind of the factors of
9 the attorney's fees, I did want to kind of pause a little bit
10 just, you know, on some important background, you know, kind of
11 reacting a little bit to Mr. Ogilvie's presentation from the
12 16th.

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

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

1 Court case called *Gentile v. Rossette*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Plaintiff always knew, always knew. It was in the

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

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

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

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

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

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

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

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

25 Specifically, Mr. Kahn, through his counsel at

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

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

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

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

25 He also testified that his interest in pursuing this

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

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

11 Also, Mr. Potashner testified at trial that
12 Mr. Weisbord viewed this case as a means of exacting leverage
13 over Turtle Beach to obtain a financial windfall for his son.
14 Mr. Potashner testified that Mr. Weisbord made him an offer
15 that if Mr. Potashner functionally rolled on my clients and
16 Mr. Potashner viewed it -- changed his sworn testimony in the
17 case and if plaintiff received \$11 million for Josh Weisbord
18 from Turtle Beach, the Weisbords would pay Mr. Potashner
19 \$1 million. Mr. Potashner testified this under oath.

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

1 him under California's Penal Code.

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

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

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

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

1 prepared to do to manage her own docket.

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

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

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

1 that's the testimony they elicited at trial.

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

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

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

18 The \$150,000 offer was also generous in comparison to
19 the available damages to plaintiff under *Gentile*. The amount
20 of any hypothetical expropriation by Mr. Potashner, as the
21 court recognized, was his change in control payments of
22 \$2.8 million. Beyond that, he was deluded by the merger the
23 same as every other shareholder if he actually held shares.
24 But plaintiff at best had 10 percent of Parametric shares,
25 capping their damages at 208,000. That's generous because we

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

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

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

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

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

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

4 And again, it's totally and hopelessly false that the
5 \$10 million that we settled with the class had any relationship
6 to these claims. The final factor is defendants' fee claims
7 are reasonable.

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

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

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

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

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

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

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

25 Just technically, I note, with the settlement the

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

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

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

1 cases without trial.

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

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

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

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

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

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

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

14 THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

1 trial.

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

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

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

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

1 You don't win by drinking your own Kool-Aid. You
2 have to present facts, which the plaintiff did not have. And
3 plaintiff rejected defendants' offer, despite the fact that
4 even under plaintiff's equity expropriation claims \$280,000 is
5 the maximum amount that it could expect to recover. And that
6 \$280,000 is based upon, as the Court noted, that equity that
7 Mr. Potashner may have expropriated. Of \$2.8 million, their
8 10 percent would be \$280,000.

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

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

25 One argument, Your Honor, that plaintiff suggested,

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

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

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

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

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

1 amount of the judgment received at trial.

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

7 So we know, Your Honor, that we have a cost motion,
8 which certainly is well in excess of the \$400,000, well in
9 excess of the \$150,000. It's well in excess of what they could
10 recover. So if they had accepted that offer they would have
11 been relieved of the burden of the costs, they would have taken
12 \$150,000, walked away. And as you know, we have, what, over a
13 million dollars in costs. The Court hasn't ruled on that, but
14 those are at least presented to the Court.

15 In other words, if plaintiff had accepted either of
16 defendants' offers of judgment, defendants would have had
17 judgments entered against them in the amount of zero or
18 \$150,000 and defendants -- excuse me, one dollar or \$150,000
19 and defendants would have waived the substantial costs they had
20 incurred, which were far in excess of the \$400,000 settlement.

21 Under these circumstances, Your Honor, there is no
22 question that defendants obtained a more favorable judgment in
23 the success on the Rule 50(c) motion -- 52(c) motion than the
24 offers of judgment and are entitled to recover fees under NRS
25 17.117 and NRCP Rule 68.

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

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

9 Thank you, Your Honor.

10 THE COURT: Thank you.

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

14 MR. SULLIVAN: Thank you, Your Honor.

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

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

18 Okay. Is everybody on BlueJeans back?

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

20 THE COURT: Okay. Perfect. All right.

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

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

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

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

2 Yep.

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

4 MR. SULLIVAN: Okay. Good morning, Your Honor.

5 Again, this is Daniel Sullivan, Holwell, Shuster & Goldberg,
6 for plaintiff, PAMTP, LLC.

7 Are you able to hear me okay still?

8 THE COURT: Absolutely. Thank you.

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

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

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

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

5 I'll just emphasize for relevance here that of course
6 the case was originally a class action. It wound its way up to
7 the Nevada Supreme Court and back down again. The defendants
8 in the class action made a motion to dismiss that was denied.
9 That ruling is instructive. Discovery was taken and ultimately
10 the case settled, the class action settled last year in May for
11 \$10 million.

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

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

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

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

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

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

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

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

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

1 the determination of good faith settlement.

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

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

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

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

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

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

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

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

22 And I just want to read from one of the cases that
23 they cite on this, Your Honor. This is the *Hutchison v. Wells*
24 case, 719 F. Supp. at 1435. What I'm going to read is from
25 1443. This is one of the cases that they cite in Footnote 20

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

5 By contrast, Your Honor, there is one actually
6 analogous case that we found, you know, the closest we could
7 find. That's the *Stone Creek v. Omnia Italian Design* case at
8 808 F. Appx. 459 out of the Ninth Circuit. So there, two
9 defendants made an aggregate offer. The plaintiff settled with
10 one of the defendants for more than the offer, just like here.
11 The plaintiff then went to trial. It won only injunctive
12 relief, it didn't win any monetary damages, as it had sought.

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

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

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

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

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

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

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

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

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

1 *Beattie* factors.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 The fact that the class action was able to settle for
24 10 million surely bears on that analysis and gave plenty of
25 reasons why the plaintiff was justified in doing what it did.

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

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

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

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

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

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

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

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

16 THE COURT: Counsel, I do have a question.

17 MR. SULLIVAN: Yes, Your Honor.

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

21 MR. HESS: Correct.

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

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

1 costs of suit and prejudgment interest."

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

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

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

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

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

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

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

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

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

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

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

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

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

1 beat their offer of judgment. But if it's inclusive, then we
2 have to consider what attorneys' fees and costs that your
3 client has incurred by that time. Were they more than
4 \$150,000?

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

8 THE COURT: Okay.

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

11 THE COURT: Okay.

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

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

17 MR. SULLIVAN: Right.

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

22 MR. SULLIVAN: Correct, Your Honor.

23 THE COURT: It wasn't a judgment?

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

1 THE COURT: No. Well, no, but the settlement, it
2 was -- they said, hey, dismiss the case, we'll give you
3 \$400,000, and of course the plaintiffs said yes. And so that
4 just went away by stipulation for dismissal without prejudice;
5 right?

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

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

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

12 THE COURT: Okay.

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

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

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

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

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

21 THE COURT: No. You can continue.

22 MR. SULLIVAN: Okay. Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 plenty of smoke and fire here.

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

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

11 The other argument that the defendants make --

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

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

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

1 the claims here.

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

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

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

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

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

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

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

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

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

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

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

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

1 director. We certainly always argued he had control.

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

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

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

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

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

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

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

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

13 THE COURT: Thank you.

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

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

21 THE COURT: Right. Okay.

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

23 THE COURT: We'll be done?

24 MR. HESS: Yeah.

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

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

7 MR. HESS: No, yeah.

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

13 MR. HESS: Well, I think our understanding of the
14 reading is the comparison has to be -- it's \$150,000 plus the
15 fees that they would have to pay us, right. So that gets
16 added. So if you were going to compare, do the comparison of
17 what the actual offer is, what we're saying is, you know, for
18 \$150,000, we all get to walk away. So one of the benefits
19 you're getting is that we're all going to pay our own costs.
20 We're all going to pay our own fees. So that's a walk away.
21 So that's -- that's part of the benefit of the offer of
22 judgment.

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

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

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

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

15 MR. HESS: Right.

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

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

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

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

25 Well, it probably --

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

3 MR. HESS: Correct. Correct.

4 THE COURT: Okay.

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

8 THE COURT: Right.

9 MR. HESS: But this was an inclusive.

10 THE COURT: Well, that's what I'm saying is that
11 you're saying, well, you have to -- we're having to compare our
12 fees as including that. So really the offer of judgment is
13 \$4,150,000; right?

14 MR. HESS: Right.

15 THE COURT: Okay. So I guess then, if we were to
16 turn the table the other way where it's just \$150,000 and it's
17 exclusive of attorneys' fees and costs, then are you saying
18 that, okay, they take the 150, and you still have to pay our
19 4 million?

20 MR. HESS: It wouldn't be --

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

24 MR. HESS: Pre, right.

25 THE COURT: The pre. And I assume that your

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

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

6 THE COURT: Right. Right. Okay.

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

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

14 MR. HESS: Yes.

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

20 MR. HESS: Right.

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

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

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

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

4 MR. HESS: Understood.

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

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

12 MR. HESS: Yeah.

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

21 MR. HESS: Right.

22 THE COURT: Which they're the offeree?

23 MR. HESS: They are the offeree. Right.

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

1 spare the parties the costs.

2 THE COURT: Sure.

3 MR. HESS: So --

4 THE COURT: But I --

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

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

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

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

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

17 MR. HESS: Yeah.

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

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

2 MR. HESS: Right.

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

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

8 THE COURT: And I will tell you that I think Rule
9 68(g), it kind of prevents the gotcha moments that we used to
10 see where a month before trial you would suddenly get the offer
11 of judgment that probably should have been made in the very
12 beginning to avoid the costs and the attorneys' fees and things
13 like that.

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

16 THE COURT: Sure.

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

24 THE COURT: Right.

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

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

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

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

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

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

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

5 So on 150 --

6 THE COURT: Well, and I am --

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

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

15 MR. HESS: Okay.

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

23 MR. HESS: Yes. Right.

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

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

5 MR. HESS: Right.

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

8 Does that make sense?

9 MR. HESS: Yeah.

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

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

17 THE COURT: Right.

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

20 THE COURT: Rates.

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

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

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

1 \$150,000. I mean, I think those are the numbers we look at.

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

6 MR. HESS: Yeah. Right. Yeah.

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

13 MR. HESS: Yeah.

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

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

1 what the awarded damages were; correct?

2 THE COURT: Well --

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

7 And here it's -- unquestionable when you say they got
8 zero. And our offer of judgment was \$150,000. And so that is
9 the issue. I think this problem potentially comes into play
10 more when you have a situation where you have a plaintiff who
11 prevails but fall short, right. You know, they seek
12 \$10 million and only get \$2 million or whatever. So then you
13 have to start looking at the calculus. Okay. Well, what --
14 what really is baked into that; right?

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

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

1 their experience.

2 Do you want to do that?

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

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

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

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

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

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

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

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

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

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

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

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

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

1 So --

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

9 THE COURT: Exactly.

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

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

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

23 MR. PEEK: Right.

24 THE COURT: Okay.

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

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

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

6 THE COURT: Right.

7 MR. PEEK: Fees at all.

8 THE COURT: Right.

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

12 THE COURT: Right.

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

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

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

22 MR. PEEK: Yeah.

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

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

1 recoverable as well?

2 UNIDENTIFIED SPEAKER: Yes. Yeah.

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

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

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

10 UNIDENTIFIED SPEAKER: If attorneys' fees.

11 THE COURT: If attorneys' fees --

12 MR. PEEK: Right.

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

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

16 THE COURT: Well, that's --

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

19 THE COURT: Right.

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

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

22 MR. PEEK: Right.

23 MR. HESS: Right.

24 THE COURT: Because they got doughnut.

25 MR. HESS: Correct.

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

3 THE COURT: Right. And their --

4 MR. PEEK: How much their costs were.

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

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

10 THE COURT: Because nobody thought about it.

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

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

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

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

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

10 (Pause in the proceedings.)

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

14 THE COURT: Do you want to resume this hearing?

15 MR. HESS: Steve, up to you.

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

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

20 MR. PEEK: I'll --

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

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

1 opportunity to address it.

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

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

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

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

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

11 THE COURT: Whether the defendants did, yeah.

12 MR. PEEK: Whether the defendants beat the offer.

13 THE COURT: Right.

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

16 THE COURT: Exactly. Exactly.

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

21 THE COURT: Just on that rule.

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

24 THE COURT: It's taxable costs and --

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

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

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

12 THE COURT: Sure. Many times that --

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

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

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

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

5 THE COURT: Guys, I really --

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

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

9 MR. HESS: I understand, Your Honor.

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

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

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

16 THE COURT: Okay. 10 minutes. Okay.

17 MR. SULLIVAN: Thank you, Your Honor.

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

19 THE COURT: Okay. It was a little longer than
20 10 minutes. Sorry about that.

21 Did you guys have a chance to talk?

22 UNIDENTIFIED SPEAKER: Briefly.

23 THE COURT: Okay.

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

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

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

4 THE COURT: Sure.

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

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

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

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

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

1 MR. HESS: Right. Let's say plaintiff got \$149,000
2 judgment at trial, and we would then come in and say we gotcha.
3 In that case, then I think the rule provides not so fast to us,
4 and so we're going to take a look at the taxable costs because
5 obviously at that point the plaintiffs -- you know, rather than
6 doing this kabuki dance, if I went to Mr. Ogilvie in May of
7 2021 and I said, Mr. Ogilvie, would you please provide me an
8 affidavit with your taxable costs up to this date, he would
9 rightly tell me to go take a long walk off a short pier.

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

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

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

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

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

10 MR. HESS: Right.

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

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

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

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

21 THE COURT: Sure.

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

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

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

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

9 MR. HESS: Yeah.

10 THE COURT: So, Mr. Ogilvie.

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

13 THE COURT: Sure.

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

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

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

20 THE COURT: Sure.

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

22 MR. OGILVIE: Two weeks.

23 THE COURT: Two weeks?

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

1 UNIDENTIFIED SPEAKER: (video interference) narrow.

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

4 MR. OGILVIE: Thank you, Your Honor.

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

7 THE COURT: What would two weeks be for briefing?

8 (Pause in the proceedings.)

9 THE COURT: December 15th or 16th?

10 THE CLERK: 16th.

11 MR. HESS: December 16th. Okay.

12 (Pause in the proceedings.)

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

16 THE COURT: Right.

17 MR. HESS: Perfect.

18 THE COURT: Okay. All right.

19 ATTORNEYS: Thank you, Your Honor.

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

22 / / /

23 / / /

24 / / /

25 / / /

1 MR. HESS: I got it. Yeah.

2 THE COURT: Okay.

3 MR. HESS: Thank you, Your Honor.

4 THE COURT: All right. Thank you.

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

6 -oOo-

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

10 
11 Dana L. Williams

12 Dana L. Williams
13 Transcriber

14 ADDITIONAL TRANSCRIBERS: Janie Olsen
15 Liz Garcia

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<p>MR. DANNER: [2] 3/10 74/14</p> <p>MR. GORDON: [3] 2/10 33/23 34/1</p> <p>MR. HESS: [78] 2/8 4/15 6/8 6/12 6/16 6/18 6/21 7/2 48/21 63/22 63/24 64/7 64/13 65/15 65/18 65/22 66/3 66/5 66/9 66/14 66/20 66/24 67/3 67/7 67/14 67/20 67/23 68/4 68/12 68/21 68/23 69/3 69/5 70/17 71/2 71/4 71/14 71/17 71/25 73/7 73/15 73/23 74/5 74/9 74/18 74/21 75/6 75/13 75/23 76/3 77/5 81/23 81/25 83/15 84/22 84/25 85/4 85/13 86/6 86/9 86/24 87/5 88/1 88/12 89/10 89/15 89/20 89/22 90/9 90/18 90/21 90/24 91/5 91/11 91/13 91/17 92/1 92/3</p> <p>MR. KOTLER: [1] 2/21</p> <p>MR. MORENO: [1] 3/6</p> <p>MR. OGILVIE: [14] 2/6 3/17 3/20 4/1 4/10 4/13 4/17 6/1 6/4 6/6 90/11 90/14 90/22 91/4</p> <p>MR. PEEK: [36] 2/12 2/17 3/5 26/15 63/19 77/3 77/7 77/12 79/2 79/10 79/23 79/25 80/7 80/9 80/13 80/22 80/25 81/3 81/9 81/12 81/14 81/17 81/20 81/22 82/1 82/4 82/7 82/11 83/11 83/20 84/5 84/9 84/12 84/14 84/17 86/14</p> <p>MR. SULLIVAN: [22] 2/25 33/14 33/19 34/4 34/9 48/17 48/22 49/4 49/17 50/19 51/5 51/9 51/12 51/17 51/22 51/24 52/6 52/10 52/13 53/22 83/23 86/17</p> <p>THE CLERK: [1] 91/10</p> <p>THE COURT: [144]</p> <p>UNIDENTIFIED SPEAKER: [4] 81/2 81/10 86/22 91/1</p>	<p>30/22 32/9 32/12 32/18 32/18 37/3 37/10 37/22 41/17 42/9 43/5 44/25 45/3 48/19 48/24 49/3 51/4 51/15 53/16 64/10 64/14 64/18 65/1 65/6 65/8 66/16 72/25 74/16 75/1 76/8 76/16 82/5 82/21</p> <p>\$16 [1] 56/11</p> <p>\$16 million [1] 56/11</p> <p>\$2 [1] 76/12</p> <p>\$2 million [1] 76/12</p> <p>\$2.8 [3] 20/22 30/7 30/11</p> <p>\$2.8 million [1] 20/22</p> <p>\$280,000 [6] 22/2 23/8 30/4 30/6 30/8 30/23</p> <p>\$4,150,000 [1] 66/13</p> <p>\$40.6 [1] 56/7</p> <p>\$40.6 million [1] 56/7</p> <p>\$400,000 [25] 21/8 23/21 31/21 32/8 32/20 37/6 37/24 42/9 42/20 42/24 43/17 43/25 44/6 44/8 49/10 51/18 52/3 53/8 60/3 65/5 65/7 65/24 69/10 73/1 82/15</p> <p>\$72,000 [1] 30/12</p> <p>-</p> <p>-oOo [1] 92/6</p> <p>.</p> <p>...A686890 [1] 2/3</p> <p>...A686890-B [1] 2/3</p> <p>1</p> <p>1,750 [1] 4/20</p> <p>10 [8] 20/24 21/1 46/24 60/2 83/16 86/13 86/15 86/16</p> <p>10 minutes [1] 86/20</p> <p>10 percent [1] 30/8</p> <p>10:42 [1] 33/15</p> <p>10:48 [1] 33/15</p> <p>12:00 p.m [1] 86/18</p> <p>12:26 p.m [1] 86/18</p> <p>12:32 p.m [1] 92/5</p> <p>13 [2] 44/3 61/6</p> <p>133 [1] 60/21</p> <p>13th [1] 62/3</p> <p>1435 [1] 39/24</p> <p>1443 [1] 39/25</p> <p>150 [7] 66/18 73/5 73/8 74/11 74/13 75/11 75/21</p> <p>150,000 [5] 65/14 65/20 68/2 72/4 75/20</p> <p>15th [1] 91/9</p> <p>16 [1] 65/10</p> <p>16th [7] 3/20 7/3 7/12 34/23 91/9 91/10 91/11</p> <p>17.117 [1] 32/25</p> <p>1758 [1] 2/13</p> <p>18 [2] 79/22 80/3</p> <p>185 [1] 59/10</p> <p>19 [1] 38/14</p> <p>19 percent [1] 56/1</p>	<p>1938 [1] 70/1</p> <p>197 [1] 59/11</p> <p>1988 [1] 39/5</p> <p>1:00 [1] 63/17</p> <p>1:10 that [1] 63/20</p> <p>1st [2] 19/11 37/1</p> <p>2</p> <p>20 [3] 38/14 39/25 87/7</p> <p>2005 [1] 40/18</p> <p>2007 [1] 4/20</p> <p>2013 [6] 12/21 12/25 56/7 64/9 67/2 67/5</p> <p>2014 [1] 58/22</p> <p>2015 [1] 73/24</p> <p>2017 [1] 16/22</p> <p>2020 [5] 19/11 26/25 37/1 67/8 67/10</p> <p>2021 [9] 1/13 2/1 19/21 37/3 37/5 48/20 62/3 67/2 88/7</p> <p>208,000 [1] 20/25</p> <p>21 departments [1] 4/21</p> <p>22.1 [1] 13/4</p> <p>23rd [1] 37/25</p> <p>253 [1] 2/19</p> <p>28 [1] 89/25</p> <p>28th [5] 19/21 37/2 48/20 49/3 82/6</p> <p>3</p> <p>30-page [1] 5/5</p> <p>3X [2] 42/13 42/14</p> <p>4</p> <p>4 million [4] 66/2 66/2 66/19 67/1</p> <p>4 of [1] 60/1</p> <p>417 429 [1] 60/21</p> <p>429 [1] 60/21</p> <p>45 [1] 17/22</p> <p>459 [1] 40/8</p> <p>5</p> <p>5 million [1] 45/21</p> <p>5,000 [4] 73/20 74/1 74/2 74/6</p> <p>50 [5] 2/17 2/19 4/8 29/23 32/23</p> <p>52 [8] 7/15 19/3 22/14 24/3 29/23 32/23 35/24 50/24</p> <p>54 [5] 23/23 24/5 41/4 52/13 52/16</p> <p>6</p> <p>60 [1] 87/3</p> <p>68 [51] 18/10 23/22 23/22 24/10 24/15 24/17 24/20 24/23 24/23 25/4 25/17 26/1 32/2 32/25 36/10 36/11 36/23 37/17 38/2 38/25 39/3 39/9 39/10 39/14 40/2 40/21 40/23 41/13 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<p>Absolutely [2] 6/20 34/8</p> <p>abuse [1] 10/7</p> <p>abusing [1] 16/9</p> <p>accept [7] 6/6 24/25 36/19 42/1 74/12 75/11 78/8</p> <p>acceptance [1] 32/5</p> <p>accepted [6] 32/10 32/15 43/7 70/4 72/5 77/15</p> <p>accepting [1] 39/14</p> <p>accomplished [2] 8/11 8/18</p> <p>account [6] 22/19 31/3 56/17 69/6 69/8 72/17</p> <p>accrued [2] 23/4 23/6</p> <p>acknowledged [1] 55/10</p> <p>acquired [2] 4/20 67/21</p> <p>act [1] 46/21</p>	<p>acted [3] 27/18 28/1 35/22</p> <p>action [19] 7/21 7/24 8/7 23/16 26/24 27/1 29/8 35/6 35/8 35/10 44/16 44/18 45/2 45/23 46/16 46/23 59/5 60/5 80/11</p> <p>actions [1] 15/7</p> <p>actor [2] 35/21 54/12</p> <p>actual [11] 8/12 8/18 10/17 14/20 28/16 29/9 29/12 45/25 48/19 63/9 64/17</p> <p>actually [14] 18/16 20/23 22/12 37/11 40/5 41/20 42/13 48/14 59/6 59/19 61/5 64/2 69/20 71/1</p> <p>Adam [1] 15/12</p> <p>add [8] 40/23 53/4 65/1 74/2 79/16 88/18 88/19 88/22</p> <p>added [4] 50/2 64/16 72/4 75/8</p> <p>adding [1] 50/21</p> <p>addition [2] 9/6 12/6</p> 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42/24 60/7</p> <p>along [3] 20/12 35/15 45/10</p> <p>already [8] 6/12 6/13 9/10 19/12 21/6 26/16 27/21 27/23</p> <p>also [25] 3/11 3/12 8/8 8/10 10/7 10/14 12/24 14/7 16/25 17/11 18/13 20/9 20/18 24/12 24/13 25/13 26/17 28/2 29/24 31/23 32/3 35/14 44/16 45/6 72/4</p> <p>alteration [1] 10/23</p> <p>although [8] 6/24 11/6 17/7 20/14 23/11 44/1 51/6 54/6</p> <p>always [7] 4/4 13/25 13/25 49/13 61/1 61/11 89/7</p> <p>am [7] 3/8 3/12 33/19</p>	<p>67/15 73/6 73/16 75/23</p> <p>amendment [1] 12/3</p> <p>American [4] 36/7 43/19 79/20 80/4</p> <p>among [5] 16/2 27/14 36/11 41/15 46/9</p> <p>amortization [1] 56/6</p> <p>amount [43] 11/16 15/15 19/9 19/10 20/19 23/12 25/14 25/18 27/2 27/3 27/3 30/5 30/12 30/19 30/21 31/12 31/25 32/1 32/17 39/1 44/10 45/15 46/2 48/5 50/3 50/4 50/8 50/12 51/14 67/19 68/6 68/7 68/15 68/16 68/17 68/19 73/19 75/9 75/10 75/15 75/17 81/7 85/19</p> <p>amounts [4] 11/7 33/3 65/4 72/3</p> <p>analogous [4] 23/17 24/14 24/14 40/6</p> <p>analysis [16] 10/21 11/2 21/10 24/10 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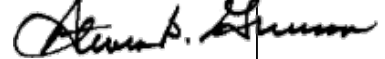
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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7 KEARNEY IRRV TRUST,
8 Plaintiff,

9 vs.

10 KENNETH POTASHNER,
11 Defendant.

CASE NO: A-13-686890-B
DEPT. XXII

12
13 BEFORE THE HONORABLE SUSAN JOHNSON, DISTRICT COURT JUDGE
14 TUESDAY, NOVEMBER 16, 2021

15 **RECORDER'S TRANSCRIPT OF HEARING RE:**
16 **PLAINTIFF'S MOTION TO RETAX DEFENDANT KENNETH**
17 **POTASHNER'S VERIFIED MEMORANDUM OF COSTS; PLAINTIFF'S**
18 **MOTION TO RETAX NON-DIRECTOR DEFENDANTS'**
19 **MEMORANDUM OF COSTS**

20 APPEARANCES ON PAGE 2:
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25 RECORDED BY: NORMA RAMIREZ, COURT RECORDER

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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)

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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.

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

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

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

8 THE COURT: Okay.

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

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

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

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

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

24 MR. OGILVIE: Thank you, Your Honor.

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

1 opposition to Mr. Sullivan's appearance here today as pro hac vice.
2 THE COURT: Okay.
3 MR. PEEK: I think it's set for hearing some time in December.
4 We have no opposition though -- to it though.
5 MR. HESS: I think there's in fact -- to his colleague, Mr.
6 Daner or -- and Mr. Sullivan both put in pro hac, we do not object to
7 either, so.
8 THE COURT: Okay. Are you --
9 MR. SULLIVAN: That's correct.
10 THE COURT: -- is there anybody who objects?
11 MR. GORDON: Nope.
12 MR. KOTLER: I don't believe so.
13 MR. KOTLER: No.
14 THE COURT: Okay, is everybody represented here?
15 MR. PEEK: Yes, Your Honor.
16 MR. HESS: Yes, Your Honor.
17 THE COURT: Okay. Motion's granted.
18 MR. OGILVIE: Thank you, Your Honor.
19 THE COURT: And I don't think that that's on for hearing; is it?
20 MR. PEEK: It's set for --
21 MR. OGILVIE: It --
22 MR. PEEK: -- December sometime, Your Honor. It's not set
23 for today, but I thought just --
24 MR. OGILVIE: I believe December 16th and December 23rd
25 are the dates on which the two motions to associate are on calendar,

1 Your Honor. They were filed last week.

2 THE COURT: Okay, let me just --

3 MR. PEEK: I just thought expediting them would be better,
4 Your Honor.

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

9 MR. PEEK: None, Your Honor.

10 MR. HESS: No objection.

11 THE COURT: Mr. Gordon?

12 MR. GORDON: Nope, no, Your Honor.

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

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

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

18 MR. OGILVIE: Okay, understood.

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

22 Okay, it's your motion.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 within days after the Parametric board approved the merger in August
2 2013, a class action was filed on behalf of all of the Parametric
3 shareholders against the Defendants in this case.

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

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

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

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

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

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

13 MR. OGILVIE: A case that had been settled.

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

16 MR. OGILVIE: Was -- no.

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

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

22 THE COURT: Essentially closing the class action case?

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

25 THE COURT: Okay.

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

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

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

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

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

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

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

15 Judge Gonzalez also found that other Defendants, namely
16 Juergen Stark, who was the CEO of VTB Holdings, the other group of
17 Defendants, and Ken Fox who controlled VTB Holdings -- both on the
18 other side from the Parametric side of the merger. Judge Gonzalez
19 found that both of them were not credible. Their testimony at the June
20 18th evidentiary hearing was not credible. Specifically, as it related to
21 Juergen Stark, the CEO of VTB Holdings. Judge Gonzalez found that
22 his testimony is also refuted by the evidence adduced at the evidentiary
23 hearing and is not credible.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 So, an award of -- Mr. Potashner seeks almost \$300,000 in
6 costs that he incurred in the class action. The Non-Director Defendants
7 seek \$585,000 in costs that they incurred, indisputably. Both of those
8 numbers are indisputable that the Non-Director Defendants are seeking
9 \$585,083 in costs they incurred in defending the earlier class action,
10 whereas Mr. Potashner seeks nearly \$300,000 in costs he incurred in
11 defending the class action.

12 There is no basis under Nevada law, and the Defendants in
13 their opposition to the motion to retax submit no Nevada authority to
14 seek the costs incurred in a separate matter. They argue that well, the
15 cases were consolidated, therefore, they're one case. Well, that's
16 diametrically opposed to case law in Nevada, in the federal system, and
17 from the U.S. Supreme Court that consolidation is a matter of
18 convenience. The individual cases that are consolidated do not lose
19 their independent status as individual cases. And that is the basis on
20 which the \$300,000 in Mr. Potashner's claims -- claimed costs and the
21 \$585,000 in the non-director claimed costs related to the earlier class
22 action should be denied.

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

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

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

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

21 THE COURT: I'm familiar with it.

22 MR. OGILVIE: I --

23 THE COURT: The *Erickson versus Cadle Company*.

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

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

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

12 The next category, Mr. Potashner seeks nearly \$160,000 in e-
13 discovery costs, expenses for storing and producing ESI. Now, that's
14 temerity at its highest degree. He actually violated his e-discovery
15 obligations by destroying relevant evidence, as found by Judge
16 Gonzalez. Yet, Mr. Potashner seeks \$160,000 for storing and producing
17 the ESI. But I don't know if it's more than that or less than that, NRS
18 18.005 doesn't even provide for the recovery of such costs. And Courts
19 in other jurisdictions have determined that those costs are not awardable
20 hosting -- again, storing and producing the ESI is not a properly taxable
21 cost.

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

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

3 So, as it relates to Mr. Potashner, because of his -- well, I
4 submit to the Court, because -- as it relates to all the Defendants.
5 Because of their failure to satisfy their discovery obligations to preserve
6 and produce evidence, that this Court can exercise its discretion and
7 deny all costs. Nonetheless, to the extent that the Court does award
8 costs with -- when you strip away the improper costs sought by Mr.
9 Potashner. And those improper costs are for nearly \$300,000 in the
10 costs related to the class action, the costs that he seeks related to the
11 evidentiary hearing for his own willful destruction of evidence. The
12 \$160,000 in storing and producing ESI --

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

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

19 THE COURT: Because -- okay. Well, maybe my math is a
20 little bit off here. I got in the Potashner that he's seeking 407,000 in
21 costs, 272 deals with the class action. Blonde math, I get 135,000.
22 6,000 you got down as expropriation hearing leaving 129,000. Then you
23 got 160,000.

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

1 the class action.

2 THE COURT: Right.

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

5 THE COURT: Okay.

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

9 THE COURT: Okay.

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

13 THE COURT: Okay.

14 MR. OGILVIE: As it relates to -- as the Plaintiff's motion to
15 retax costs relate to the Non-Director Defendants, in addition to the
16 class action costs, the evidentiary hearing costs, the e-discovery hosting
17 costs, and the cost for pro hac vice fees, the Non-Director Defendants
18 also seek \$55,000 -- \$56,000 in expert fees, incurred again, after May
19 20th, 2020, which is far above the NRS 18.005(5) award of --

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

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

1 THE COURT: Okay, who is that?

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

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

6 THE COURT RECORDER: I can't --

7 THE COURT: Can you mute them all?

8 THE COURT RECORDER: I can mute them all.

9 THE COURT: Let's mute them all.

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

11 MR. PEEK: Thank you, Your Honor.

12 THE COURT: All right.

13 MR. OGILVIE: Thank you, Your Honor.

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

15 MR. OGILVIE: That's fine. The 2017 case, *PERS versus*
16 *Gitter*, supports the position that a non-testifying expert when -- that the
17 \$1500 awardable under NRS 18.005(5) for expert witnesses can only be
18 exceeded when the expert testifies at trial. It is undisputed that Mr. --
19 that the non-director's expert -- Non-Director Defendant's expert did not
20 testify at trial.

21 The Defendants cite the *Logan* case, holding that when a
22 party withdrew an expert witness immediately before trial, under the
23 former statutory provision of -- for offers of judgment, which was NRS
24 17.115, which is no longer in existence, that because of the offer of
25 judgment, those costs were appropriately awardable.

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

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

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

1 of costs for private cars and limousines.

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

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

13 Unless the Court has any questions --

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

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

17 THE COURT: I'm only kidding.

18 MR. PEEK: We don't need --

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

21 THE COURT: Which is?

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

24 THE COURT: Okay.

25 MR. OGILVIE: Thank you.

1 THE COURT: Thank you. Counsel.

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

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

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

18 NRS 18.020, Your Honor, provides that costs must be allowed
19 of course to the prevailing party in an action for the recovery of money or
20 damages where the Plaintiff seeks to recover more than \$2500. This
21 was confirmed in *Beattie versus Thomas*, where the Court held that an
22 award of costs to the prevailing party in cases set forth in 18.020 is
23 mandatory, rather than discretionary. It was also reaffirmed in that
24 unpublished decision of the *California Franchise Tax Board versus*
25 *Hyatt*, a case in which the McDonald Carano Firm prevailed and sought

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

3 NRS 18.005 identifies the categories of recoverable costs to
4 prevailing party. But even if costs aren't specifically enumerated in
5 18.005(1) through (16), there is a catchall where a District Court may
6 award costs for additional items pursuant to NRS 18.005(17), if those
7 costs, just those under (17), are reasonably and necessarily incurred in
8 the action.

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

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

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

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

1 a statute of limitations contesting a merger that took place in January of
2 2014. They filed their action six plus years, under their theory of a
3 separate action, after the merger took place. They can't have it both
4 ways. They can't seek the protection of taking their case all the way
5 back to August of 2013 and then ignore the class action and the class
6 action proceedings.

7 It is a continuation of the original class action filed on August
8 2013, which action allowed Plaintiff to pursue those claims as opt-out
9 shareholders in the consolidated action, consolidated by all these other
10 actions brought by all these other Plaintiffs back in August and
11 September of 2013. And Your Honor, I've been there from the
12 beginning.

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

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

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

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

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

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

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

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

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

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

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

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

1 depositions of their own.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 The costs related to the evidentiary hearing, Your Honor, are
8 also distinguishable from those in *Cadle*. In that case, costs weren't
9 awarded because there was insufficient documentation to support the
10 reasonableness and necessity of those costs under NRS [inaudible]
11 05(17). Here, Potashner has offered ample evidence to substantiate his
12 costs and their reasonableness. So, under Nevada law, not all these
13 other jurisdictions, state and federal, Potashner should be awarded
14 costs connected to the evidentiary hearing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 My costs, Your Honor, were broken down, as you know, by
9 each of the categories. We summarized each of the categories.
10 Reporter's fees for depositions, \$50,000, expert fees, \$91,000,
11 deposition travel and lodging, not trial travel, deposition travel and
12 lodging, \$46,000, legal research, \$8,500, electronic discovery,
13 \$160,000, other reasonable and necessary delivery and filing services --
14 as you know, every time we file a piece of paper in business court now, I
15 think we get charged \$3.50 -- that was \$1800. The pro hac vices,
16 \$5200.

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

21 Thank you.

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

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

1 mine.

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

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

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

8 MR. PEEK: Could have been.

9 THE COURT: Okay.

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

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

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

19 THE COURT: Mm-hmm.

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

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

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

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

2 MR. KOTLER: Yes.

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

4 MR. KOTLER: That's very nice.

5 MR. PEEK: That's a nice segue.

6 MR. KOTLER: Yes, welcome to this courtroom.

7 UNIDENTIFIED SPEAKER: [Indiscernible].

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

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

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

1 the Judge's findings at the conclusion of the trial and her granting of the
2 52(c) motion. So, the appellate arguments that Mr. Ogilvie, or the new
3 New York lawyer -- it's nice to see another New York lawyer in the
4 courtroom -- intend to make at some later point in time, while interesting
5 to hear, do not bear on the question that we are here on today.

6 So, I will focus on the remaining of the costs that Mr. Ogilvie
7 seeks to retax, particularly the expert witness fees incurred post-May
8 2020, and the lavish lifestyle that we were accustomed to as we tried
9 this case in the middle of the pandemic, 3,000 miles away, in a
10 courtroom that did not allow paper copies, or did not want paper copies.
11 And yet we somehow managed to try the case and follow all social
12 distance --

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

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

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

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

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

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

8 THE COURT: *Gitter*?

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

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

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

1 that we seek with regard to the experts.

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

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

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

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

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

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

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

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

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

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

1 THE COURT: Mm-hmm.

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

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

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

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

3 Let's see if that covers it.

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

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

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

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

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

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

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

1 you know, whether --

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

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

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

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

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

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

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

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

1 That -- again, they didn't prevail in that case, they did prevail
2 in this case, which leads me to the second argument pretty much that
3 well, we prevailed, Judge, so therefore, we're entitled to everything.
4 18.005 specifically identifies the costs that are awardable. And I -- we
5 cited this case in the -- in our briefs, but I want to mention it here. The
6 U.S. Supreme Court from 2012, *Taniguchi versus Kan Pacific Saipan*,
7 and I quote, "taxable costs are limited to relatively minor incidental
8 expenses."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 THE COURT: Exactly.

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

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

2 THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

3 Therefore, we submit that any -- none of the costs from the
4 *Dish* -- from the class action case should be awardable in this action.
5 We submit that the costs associated with the evidentiary hearing were a
6 function of the Defendant's own bad conduct and is not awardable. We
7 submit that the costs asserted for the war rooms, the computers, the
8 monitors, trial graphics, all of that is either overhead or should have
9 been handled in-house and billed individually in-house. We submit that
10 the ESI hosting costs are not taxable under Nevada law. And we submit
11 that because the -- Mr. Montgomery, the Defendant's expert, did not
12 testify that at most he isn't -- the Defendants are entitled to recover
13 \$1500 under NRS 18.005.

14 THE COURT: All right, thank you.

15 MR. OGILVIE: Thank you, Your Honor.

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

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

1 THE COURT: If not longer.

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

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

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

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

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

17 THE COURT: Sure.

18 MR. OGILVIE: Before we -- get --

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

20 MR. OGILVIE: -- that far down --

21 THE COURT: Yeah.

22 MR. PEEK: Oh, okay, sorry George.

23 THE COURT: You've got plans, right?

24 MR. PEEK: Sorry.

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

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

2 THE COURT: Okay.

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

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

11 MR. OGILVIE: Court's indulgence.

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

14 THE COURT: Right.

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

16 MR. HESS: Thursday, December 2nd?

17 MR. PEEK: Your Honor, I can't, I have a doctor's appoint that
18 --

19 THE COURT: That morning?

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

21 THE COURT: Oh, we'll be done.

22 MR. PEEK: Okay.

23 THE COURT: We'll be done.

24 MR. PEEK: Okay.

25 MR. SULLIVAN: Yeah, that's fine.

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

2 THE COURT: Okay, and actually there's some things that I --
3 I don't know if you guys have noticed in your cases yet, but if -- in about
4 99 percent of the cases where I review ahead of time and if they're
5 unopposed, I usually grant them by minute order, not to say that I do it
6 all the time, but I can see some things here that I'm just waiting for the
7 opposition time to pass. So, that number will probably go down.

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

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

14 THE COURT: Pardon me?

15 MR. HESS: 9:00.

16 MR. KOTLER: 9:00.

17 [Colloquy between the Court and the Court Clerk]

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

19 THE COURT CLERK: Oh, okay.

20 MR. HESS: Yes.

21 THE COURT: Let's see.

22 MR. PEEK: Yeah.

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

1 imagine.

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

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

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

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

12 MR. PEEK: Thank you.

13 THE COURT: Okay?

14 MR. OGILVIE: Thank you, Your Honor.

15 MR. HESS: Thank you, Judge.

16 MR. SULLIVAN: Thank you, Your Honor.

17 MR. KOTLER: Thank you, Your Honor.

18 MR. GORDON: Thank you, Your Honor.

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


20 * * * * *

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

23

24

25



Kaihla Berndt
Court Recorder/Transcriber

ODM

DISTRICT COURT

CLARK COUNTY, NEVADA

**IN RE PARAMETRIC SOUND
CORPORATION SHAREHOLDERS'
LITIGATION**

**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.

**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.

**GEORGE PRIESTON, individually and on
behalf of all others similarly situated,**

Plaintiff,

Vs.

**Case No. A-13-686890-B
Dept. No. XXII**

**ORDER DENYING
DEFENDANTS' MOTION FOR
ATTORNEYS' FEES**

Consolidated with:

**Case No. A-13-687232-B
Dept. No. XXII**

Consolidated with:

**Case No. A-13-687354-B
Dept. XXII**

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

**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.

**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.

**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.

**LANCE MYKITA, individually and on behalf
of all others similarly situated,**

Plaintiff,

Vs.

**5G VTB HOLDINGS, LLC; STRIPES
GROUP, LLC; VTB HOLDINGS, INC.;**

Consolidated with:

**Case No. A-13-687665-B
Dept. XXII**

Consolidated with:

**Case No. A-13-688374-B
Dept. XXII**

Consolidated with:

**Case No. A-16-741073-B
Dept. XXII**

1 **TURTLE BEACH CORPORATION, INC.,**

2 **Defendants.**

3 **PAMTP, LLC,**

4 **Plaintiff,**

5 **Vs.**

6 **SG VTB HOLDINGS, LLC; STRIPES; VTB**
7 **HOLDINGS, INC.; JUERGEN STARK;**
8 **KENNETH FOX; ANDREW WOLFE; SETH**
9 **PUTTERMAN; ELWOOD G. NORRIS;**
10 **KENNETH POTASHNER,**

11 **Defendants.**

Consolidated with:

Case No. A-20-815308-B
Dept. XXII

12 **ORDER DENYING DEFENDANTS' MOTION FOR ATTORNEYS' FEES**

13 This matter concerning the Motion for Attorneys' Fees filed by Defendants KENNETH
14 POTASHNER and VTB HOLDINGS, INC. and Specially Appearing Defendants STRIPES
15 GROUP, LLC, SG VTB HOLDINGS, LLC, JUERGEN STARK and KENNETH FOX on August
16 29, 2021 came on for hearing on the 2nd day of December 2021 at the hour of 9:00 a.m. before
17 Department XXII of the Eighth Judicial District Court, in and for Clark County, Nevada with
18 JUDGE SUSAN JOHNSON presiding; Plaintiff PAMTP, LLC appeared by and through its attorney,
19 GEORGE F. OGILVIE, III, ESQ. of the law firm, MCDONALD CARANO, and DANIEL
20 SULLIVAN, ESQ. and SCOTT DANNER, ESQ. of the law firm, HOLWELL SHUSTER &
21 GOLDBERG; Defendant KENNETH POTASHNER appeared by and through his attorney, J.
22 STEPHEN PEEK, ESQ. of the law firm, HOLLAND & HART, and ALEJANDRO E. MORENO,
23 ESQ. of the law firm, SHEPPARD MULLIN RICHTER & HAMPTON; Defendant VTB
24 HOLDINGS, INC. and Specially Appearing Defendants STRIPES GROUP, LLC, SG VTB
25 HOLDINGS, LLC, JUERGEN STARK and KENNETH FOX attended by and through their
26 attorneys, RICHARD C. GORDON, ESQ. of the law firm, SNELL & WILMER, and JOSHUA D.N.
27 HESS, ESQ. and DAVID A. KOTLER, ESQ. of the law office, DECHERT, LLP. Having reviewed
28

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

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

4 **FINDINGS OF FACT AND PROCEDURAL HISTORY**

5 **1.** On August 13, 2013, the primary action was filed by non-controlling shareholders of
6 PARAMETRIC SOUND CORPORATION, a small publicly traded company, on behalf of
7 themselves and those similarly situated, to challenge the corporation's merger with VTB
8 HOLDINGS, INC. (also referred to as "TURTLE BEACH") which closed on or about January 14,
9 2014. After the original complaint's filing, several other non-controlling shareholder actions
10 challenging the merger were filed and eventually consolidated with the first action.. Essentially, the
11 combined various complaints asserted three causes of action: (1) breach of fiduciary duties by
12 PARAMOUNT SOUND CORPORATION'S Board of Directors, (2) aiding and abetting the
13 directors' breach of fiduciary duties by PARAMETRIC SOUND CORPORATION and VTB
14 HOLDINGS, INC. and (3) unjust enrichment.
15
16

17 **2.** PAMTP, LLC filed its Complaint in Case No. A-20-815308-B against SG VTB
18 HOLDINGS, LLC, STRIPES, VTB HOLDINGS, INC., JUERGEN STARK, KENNETH FOX,
19 ANDREW WOLF, SETH PUTTERMAN, ELWOOD G. NORRIS and KENNETH POTASHNER
20 on May 20, 2020. PAMTP, LLC is a Delaware limited liability company formed for the purpose of
21 asserting claims assigned to it by individuals and entities who held PARAMETRIC SOUND
22 CORPORATION common stock on the closing date of the merger, January 15, 2014; these
23 individuals and entities are ICEROSE CAPITAL MANAGEMENT, LLC, ROBERT
24 MASTERSON, MARCIA PATRICOF on behalf of the PATRICOF FAMILY, LP, MARCIA
25 PATRICOF REVOCABLE LIVING TRUST and the JULES PATRICOF REVOCABLE LIVING
26

27 ...
28

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

3 3. The derivative causes of action for breach of fiduciary duty, aiding and abetting and
4 unjust enrichment claims were extinguished by the settlement and judgment entered into by the
5 Court on May 18, 2020, two days before PAMTP, LLC filed its Complaint. Those who eventually
6 assigned their claims to PAMTP, LLC opted out of the class settlement.
7

8 4. The “opt-out” portion of the case filed by PAMTP, LLC came regularly for trial
9 before the Court on August 16, 2021. After conclusion of the Plaintiff’s case-in-chief, Defendants
10 made motions pursuant to NRCP 52(c), and ultimately, the Court granted the motions as set forth
11 within its Order, Findings of Fact, Conclusions of Law and Judgment filed September 3, 2021.
12

13 5. During the course of the litigation, and specifically on July 1, 2020, Defendants
14 collectively served an Offer of Judgment offering to allow judgment to be entered against them and
15 in favor of PAMTP, LLC for \$1.00, “inclusive of attorney’s fees, costs of suit, and prejudgment
16 interest.” In addition, the Offer “prohibits any application or motion for a post-acceptance award of
17 taxable costs, attorney’s fees, or interest.”¹ The Offer of Judgment was not accepted by PAMTP,
18 LLC within the time frame set forth by NRCP 68(e).
19

20 6. Almost eleven (11) months later, on May 28, 2021, Defendants collectively served a
21 second Offer of Judgment upon PAMTP, LLC, this time offering to allow judgment to be entered
22 against them and in favor of PAMTP, LLC in the amount of \$150,000.00. This Offer was also
23 “inclusive of attorneys’ fees, costs of suit, and prejudgment interest, and prohibit[ed] any application
24 or motion for a post-acceptance award of taxable costs, attorney’s fees or interest.”² The second
25 ...
26

27
28 ¹See Exhibit 9 attached to Plaintiff’s Opposition to Motion for Attorney’s Fees filed October 13, 2011.

²See Exhibit 10 attached to Plaintiff’s Opposition to Motion for Attorney’s Fees.

1 Offer of Judgment was not accepted by PAMTP, LLC within the time frame set forth by NRCP
2 68(e).

3 7. SG VTB HOLDINGS, LLC, STRIPES, VTB HOLDINGS, INC., JUERGEN
4 STARK, KENNETH FOX, ANDREW WOLF, SETH PUTTERMAN, ELWOOD G. NORRIS and
5 KENNETH POTASHNER now move this Court for reimbursement of their attorneys' fees incurred
6 from the times their Offers of Judgment were made. In their view, they prevailed with respect to
7 their Offers—that is, PAMTP, LLC failed to obtain a more favorable judgment than that set forth
8 within their Offers. Further, they argue the application of the factors set forth in Beattie v. Thomas,
9 579, 588-589, 688 P.2d 268, 274 (1983), as well as those outlined in Brunzell v. Golden Gate
10 National Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) weighs in their favor. They seek
11 \$7,054,396.88 in attorneys' fees incurred after the first Offer was made or \$3,915,171.30 after the
12 second was served. PAMTP, LLC opposes upon the basis the applicable of the Beattie factors do
13 not weigh in Defendants' favor.
14
15

16 CONCLUSIONS OF LAW

17 1. Generally speaking, the district court may not award attorney fees absent authority
18 under a statute, rule, or contract. *See Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 132 P.3d
19 1022, 1028 (2006), *citing State Department of Human Resources v. Fowler*, 109 Nev. 782, 784, 858
20 P.2d 375, 376 (1993). In this case, SG VTB HOLDINGS, LLC, STRIPES, VTB HOLDINGS, INC.,
21 JUERGEN STARK, KENNETH FOX, ANDREW WOLF, SETH PUTTERMAN, ELWOOD G. NORRIS
22 and KENNETH POTASHNER seek an award of attorneys' fees under NRCP 68
23

24 2. NRCP 68 provides in salient part:

25 (a) *The Offer:* At any time more than 21 days before trial, any party may serve
26 an offer in writing to allow judgment to be taken in accordance with its terms and conditions.
27 Unless otherwise specified, an offer made under this rule is an offer to resolve all claims in
28 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.

1 3. Case law, interpreting NRCP 68, provides this rule was designed to facilitate and
2 encourage settlement. It does so by placing the risk of loss on the non-accepting offeree, with no
3 risk to the offeror, thus encouraging both offers and acceptances of offers. Matthews v. Collman,
4 110 Nev. 940, 950, 878 P.2d 971, 978 (1994). NRCP 68 invests the court with discretion to allow
5 attorney fees when the judgment obtained by the offeror is more favorable than the offer.
6 Armstrong v. Riggi, 92 Nev. 280, 281, 549 P.2d 753 (1976). The court's discretion will not be
7 disturbed absent a clear abuse. Bidart v. American Title Insurance Co., 103 Nev. 175, 179, 734 P.2d
8 732, 735 (1987).
9

10 4. The factors to consider in making a discretionary award of attorney fees under NRCP
11 68 are whether:

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

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

15 (3) the plaintiff's decision to reject the offer and proceed to trial was grossly
16 unreasonable or in bad faith; and
17

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

19 After weighing the foregoing factors, the district court may, where warranted, award up to the full
20 amount of fees requested. On the other hand, where the court has failed to consider these factors,
21 and has made no findings based upon the evidence the attorney fees sought are reasonable and
22 justified, it is an abuse of discretion for the court to award the full amount of fees requested. Beattie,
23 99 Nev. at 588, 668 P.2d at 274; *also see* Frazier v. Drake, 131 Nev. 632, 642, 357 P.3d 365 (2015).³
24
25

26 _____
27 ³But see MRO Communications, Inc. v. AT&T Co., 197 F.3d 1276, 1284 (9th Cir. 1999), *cert. denied*, 529 U.S.
28 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

1 **5.** Should the court exercise its discretion in granting attorney's fees, it must consider
2 certain factors in determining the amount awarded. *See Schouweiler v. Yancy Company*, 101 Nev.
3 827, 832, 712 P.2d 786, 790 (1985). Such factors include:

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

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

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

11 (4) the result: whether the attorney was successful and what benefits were
12 derived.
13

14 *See Brunzell*, 85 Nev. at 349, 455 P.2d at 33 (1969), *quoting Schwartz v. Schwerin*, 85 Ariz. 242,
15 336 P.2d 144, 146 (1959).
16

17 **6.** The first question is whether PAMTP, LLC failed to obtain a judgment more
18 favorable than either Offer of Judgment of \$1.00 and \$150,000.00, respectively, both of which were
19 inclusive of their attorney fees, costs of suit and pre-judgment interest incurred and prohibited any
20 application or motion for a post-acceptance award of taxable costs, attorney's fees, or interest.
21 Because the term "inclusive" was a term contained within the Offers of Judgment, this Court must
22 add PAMTP, LLC'S attorney fees, costs and pre-judgment interest to the judgment received and
23 compare that total to the \$1.00 and \$150,000.00, respectively, as set forth in NRCP 68(g). Here,
24 PAMTP, LLC did not receive a judgment in its favor; Defendants received judgment as a matter of
25 law under NRCP 52(c). In other words, PAMTP, LLC received zero (\$0.00) as a judgment. The
26
27
28 attorney's fees without making specific findings on the four factors).

1 pre-judgment interest earned, therefore, is zero (\$0.00). The comparison this Court must make, then,
2 is the extent of attorney's fees and costs of suit incurred by PAMTP, LLC to Defendants' \$1.00 and
3 \$150,000.00 Offers by the time the two Offers was made. Here, neither party produced information
4 regarding the attorney fees, costs and expenses that had been incurred by PAMTP, LLC from the
5 time litigation was instituted on May 20, 2020 to when the Offers of Judgment were made, i.e. July
6 1, 2020 (\$1.00) and May 28, 2021 (\$150,000.00). Although it was not accorded such data by either
7 side, what was available to the Court was financial records within its case management system,
8 Tyler-Odyssey. Such records showed PAMTP, LLC incurred the initial filing fee of \$1,530.00 on or
9 about May 20, 2020. A comparison of the \$1,530.00 to the \$1.00 Offer of Judgment inclusive of
10 attorneys' fees, costs of suit and pre-judgment interest shows the filing fees far exceeded the \$1.00
11 offer to settle. That is, Defendants did not prevail with respect to its \$1.00 Offer of Judgment.⁴
12

13
14 With respect to whether PAMTP, LLC obtained a judgment more favorable than the second
15 Offer of Judgment made May 28, 2021, it is this Court's view the burden is upon Defendants, as the
16 movants, to demonstrate the \$150,000.00 exceeded the amount PAMTP, LLC incurred in attorney's
17 fees, costs and expenses between May 20, 2020 and May 28, 2021. In so stating, this Court
18 appreciates knowledge of the adversary's attorney's fees and costs generally are not known to the
19 offeror's lawyer. However, that data could have been obtained by defense counsel simply asking for
20 the information before Defendants made the \$150,000.00 Offer of Judgment inclusive of attorney's
21 fees, costs of suit and pre-judgment interest. There was nothing presented to suggest PAMTP, LLC
22 was asked for and refused to give Defendants the data. Notably, if any evidence is a guide to this
23
24

25 ⁴Notwithstanding the conclusion Defendants did not prevail with respect to the \$1.00 Offer of Judgment, this
26 Court also finds the second and third *Beattie* factors weigh in favor of PAMTP, LLC. In this Court's view, an offer to
27 settle for \$1.00 which was inclusive of PAMTP, LLC'S attorneys' fees, costs and pre-judgment interest incurred to date
28 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.

1 Court, it is defense counsel's attorneys' fees that were incurred. Defendants' attorneys' fees
2 increased \$3,139,225.58 between their two Offers of Judgment made July 1, 2020 and May 28,
3 2021. This Court would have expected the extent of PAMTP, LLC'S legal fees to be
4 commensurate to Defendants', and the \$150,000.00 Offer of Judgment represents less than five (5)
5 percent of that total. In short, this Court concludes Defendants did not meet their burden, and thus,
6 their Motion for Attorney's Fees as it seeks attorney fees under NRCP 68 is denied.
7

8 7. Notably, within their Supplemental Brief filed December 16, 2021, Defendants
9 propose "NRCP 68(g) looks only to the offeree's 'taxable' costs and fees," and PAMTP, LLC was
10 not the prevailing party, and thus, its taxable costs are zero (\$0.00). This Court disagrees with such
11 assessment for at least a couple of reasons. *First*, the Offer of Judgment, in essence, is a contractual
12 offer to settle for an amount certain, and thus, one must look to the terms of the offer. *See* NRCP
13 68(a) ("[A]ny party may serve an offer in writing to allow judgment to be taken in accordance with
14 its terms and conditions."). The term "costs of suit," not "taxable costs," is utilized within both
15 Offers of Judgment, and in this Court's view, "costs of suit" should be used in the comparison.⁵
16 *Second*, notwithstanding that premise, the filing fees incurred May 20, 2020 *was* a "taxable cost"
17 incurred "pre-offer," and it alone exceeded the \$1.00 or amount of the first Offer of Judgment.
18 Again, as noted above, this Court was not provided information demonstrating by a preponderance
19 of the evidence the extent of PAMTP, LLC' attorney's fees, costs of suit or "taxable costs" incurred
20 between May 20, 2020 and May 28, 2021, and therefore, it could not determine within its discretion
21 whether Defendants prevailed with respect to their second Offer of Judgment.
22

23 ...
24

25 ...
26

27 _____
28 ⁵Assuming 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,

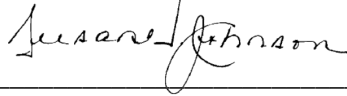
IT IS HEREBY ORDERED, ADJUDGED AND DECREED the Motion for Attorneys’ Fees filed by Defendants KENNETH POTASHNER and VTB HOLDINGS, INC. and Specially

⁶See Supplemental Brief in Support of Defendants’ Motion for Attorneys’ Fees, p. 1.

⁷Armstrong, 92 Nev. at 281, 549 P.2d 753.

1 Appearing Defendants STRIPES GROUP, LLC, SG VTB HOLDINGS, LLC, JUERGEN STARK
2 and KENNETH FOX on August 29, 2021 is denied.

3 Dated this 7th day of June, 2022

4 

5 SUSAN JOHNSON, DISTRICT COURT JUDGE

6 4A8 88E AEA4 2922
7 Susan Johnson
8 District Court Judge

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SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Kearney IRRV Trust, Plaintiff(s) | CASE NO: A-13-686890-B
7 vs. | DEPT. NO. Department 22
8 Kenneth Potashner, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order Denying Motion was served via the court's electronic eFile
13 system to all recipients registered for e-Service on the above entitled case as listed below:

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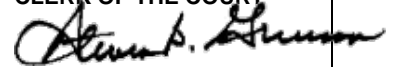
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PAMPT LLC

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,

RELATED CASE NO.: A-20-815308-B

Plaintiff,

DEPT NO.: XXII

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.

McDONALD CARANO
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1	VITIE RAKAUSKAS, Individually and on Behalf of All Others Similarly Situated,	CASE NO.: A-13-687232-C (Consolidated)
2		DEPT NO.: XXII
3	Plaintiff,	
4	v.	
5	PARAMETRIC SOUND CORPORATION, VTB HOLDINGS, INC., PARIS	
6	ACQUISITION CORP., KENNETH F.	
7	POTASHNER, ELWOOD G. NORRIS, ROBERT M. KAPLAN, SETH	
8	PUTTERMAN, ANDREW WOLFE, and JAMES L. HONORE,	
9	Defendants.	
10	GEORGE PRIESTON, Individually and on Behalf of All Others Similarly Situated,	CASE NO.: A-13-687354-C (Consolidated)
11	Plaintiff,	DEPT NO.: XXII
12	v.	
13	KENNETH F. POTASHNER, PARAMETRIC SOUND CORPORATION,	
14	JAMES L. HONORE, ROBERT M.	
15	KAPLAN, ELWOOD G. NORRIS, SETH	
16	PUTTERMAN, ANDREW WOLFE, VTB HOLDINGS, INC., VOYETRA TURTLE BEACH INC.; and PARIS ACQUISITION CORP.,	
17	Defendants.	
18	JOSH HANSEN, Individually and on Behalf of All Others Similarly Situated,	CASE NO.: A-13-687665-C (Consolidated)
19	Plaintiff,	DEPT NO.: XXII
20	v.	
21	PARAMETRIC SOUND CORPORATION, JAMES L. HONORE, ROBERT M.	
22	KAPLAN, ELWOOD G. NORRIS, KENNETH F. POTASHNER, SETH	
23	PUTTERMAN, ANDREW WOLFE, VTB HOLDINGS, INC., VOYETRA TURTLE BEACH INC.; and PARIS ACQUISITION CORP.,	
24		
25		
26	Defendants.	
27		
28		

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

By: /s/ George F. Ogilvie III

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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

ODM

DISTRICT COURT

CLARK COUNTY, NEVADA

**IN RE PARAMETRIC SOUND
CORPORATION SHAREHOLDERS'
LITIGATION**

**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.

**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.

**GEORGE PRIESTON, individually and on
behalf of all others similarly situated,**

Plaintiff,

Vs.

**Case No. A-13-686890-B
Dept. No. XXII**

**ORDER DENYING
DEFENDANTS' MOTION FOR
ATTORNEYS' FEES**

Consolidated with:

**Case No. A-13-687232-B
Dept. No. XXII**

Consolidated with:

**Case No. A-13-687354-B
Dept. XXII**

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

1 **KENNETH F. POTASHNER; PARAMETRIC**
2 **SOUND CORPORATION; JAMES L.**
3 **HONORE; ROBERT M. KAPLAN;**
4 **ELWOOD G. NORRIS; SETH**
5 **PUTTERMAN; ANDREW WOLFE; VTB**
6 **HOLDINGS, INC.; VOYETRA TURTLE**
7 **BEACH, INC.; and PARIS ACQUISITION**
8 **CORP.,**

9 **Defendants.**

10 **JOSH HANSEN, individually and on behalf of**
11 **all others similarly situated,**

12 **Plaintiff,**

13 **Vs.**

14 **PARAMETRIC SOUND CORPORATION;**
15 **JAMES L. HONORE; ROBERT M.**
16 **KAPLAN; ELWOOD G. NORRIS;**
17 **KENNETH F. POTASHNER; SETH**
18 **PUTTERMAN; ANDREW WOLFE; VTB**
19 **HOLDINGS, INC.; VOYETRA TURTLE**
20 **BEACH, INC. and PARIS ACQUISITION**
21 **CORP.,**

22 **Defendants.**

23 **SHAHA VASEK, individually and on behalf of**
24 **all others similarly situated,**

25 **Plaintiff,**

26 **Vs.**

27 **PARAMETRIC SOUND CORPORATION;**
28 **KENNETH POTASHNER; ELWOOD G.**
NORRIS; ROBERT M. KAPLAN; SETH
PUTTERMAN; ANDREW WOLFE; and
JAMES L. HONORE; VTB HOLDINGS,
INC.; and PARIS ACQUISITION CORP.,

Defendants.

LANCE MYKITA, individually and on behalf
of all others similarly situated,

Plaintiff,

Vs.

5G VTB HOLDINGS, LLC; STRIPES
GROUP, LLC; VTB HOLDINGS, INC.;

Consolidated with:

Case No. A-13-687665-B
Dept. XXII

Consolidated with:

Case No. A-13-688374-B
Dept. XXII

Consolidated with:

Case No. A-16-741073-B
Dept. XXII

1 **TURTLE BEACH CORPORATION, INC.,**

2 **Defendants.**

3 **PAMTP, LLC,**

4 **Plaintiff,**

5 **Vs.**

6 **SG VTB HOLDINGS, LLC; STRIPES; VTB**
7 **HOLDINGS, INC.; JUERGEN STARK;**
8 **KENNETH FOX; ANDREW WOLFE; SETH**
9 **PUTTERMAN; ELWOOD G. NORRIS;**
10 **KENNETH POTASHNER,**

11 **Defendants.**

Consolidated with:

Case No. A-20-815308-B
Dept. XXII

12 **ORDER DENYING DEFENDANTS' MOTION FOR ATTORNEYS' FEES**

13 This matter concerning the Motion for Attorneys' Fees filed by Defendants KENNETH
14 POTASHNER and VTB HOLDINGS, INC. and Specially Appearing Defendants STRIPES
15 GROUP, LLC, SG VTB HOLDINGS, LLC, JUERGEN STARK and KENNETH FOX on August
16 29, 2021 came on for hearing on the 2nd day of December 2021 at the hour of 9:00 a.m. before
17 Department XXII of the Eighth Judicial District Court, in and for Clark County, Nevada with
18 JUDGE SUSAN JOHNSON presiding; Plaintiff PAMTP, LLC appeared by and through its attorney,
19 GEORGE F. OGILVIE, III, ESQ. of the law firm, MCDONALD CARANO, and DANIEL
20 SULLIVAN, ESQ. and SCOTT DANNER, ESQ. of the law firm, HOLWELL SHUSTER &
21 GOLDBERG; Defendant KENNETH POTASHNER appeared by and through his attorney, J.
22 STEPHEN PEEK, ESQ. of the law firm, HOLLAND & HART, and ALEJANDRO E. MORENO,
23 ESQ. of the law firm, SHEPPARD MULLIN RICHTER & HAMPTON; Defendant VTB
24 HOLDINGS, INC. and Specially Appearing Defendants STRIPES GROUP, LLC, SG VTB
25 HOLDINGS, LLC, JUERGEN STARK and KENNETH FOX attended by and through their
26 attorneys, RICHARD C. GORDON, ESQ. of the law firm, SNELL & WILMER, and JOSHUA D.N.
27 HESS, ESQ. and DAVID A. KOTLER, ESQ. of the law office, DECHERT, LLP. Having reviewed
28

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

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

4 **FINDINGS OF FACT AND PROCEDURAL HISTORY**

5 **1.** On August 13, 2013, the primary action was filed by non-controlling shareholders of
6 PARAMETRIC SOUND CORPORATION, a small publicly traded company, on behalf of
7 themselves and those similarly situated, to challenge the corporation's merger with VTB
8 HOLDINGS, INC. (also referred to as "TURTLE BEACH") which closed on or about January 14,
9 2014. After the original complaint's filing, several other non-controlling shareholder actions
10 challenging the merger were filed and eventually consolidated with the first action.. Essentially, the
11 combined various complaints asserted three causes of action: (1) breach of fiduciary duties by
12 PARAMOUNT SOUND CORPORATION'S Board of Directors, (2) aiding and abetting the
13 directors' breach of fiduciary duties by PARAMETRIC SOUND CORPORATION and VTB
14 HOLDINGS, INC. and (3) unjust enrichment.
15
16

17 **2.** PAMTP, LLC filed its Complaint in Case No. A-20-815308-B against SG VTB
18 HOLDINGS, LLC, STRIPES, VTB HOLDINGS, INC., JUERGEN STARK, KENNETH FOX,
19 ANDREW WOLF, SETH PUTTERMAN, ELWOOD G. NORRIS and KENNETH POTASHNER
20 on May 20, 2020. PAMTP, LLC is a Delaware limited liability company formed for the purpose of
21 asserting claims assigned to it by individuals and entities who held PARAMETRIC SOUND
22 CORPORATION common stock on the closing date of the merger, January 15, 2014; these
23 individuals and entities are ICEROSE CAPITAL MANAGEMENT, LLC, ROBERT
24 MASTERSON, MARCIA PATRICOF on behalf of the PATRICOF FAMILY, LP, MARCIA
25 PATRICOF REVOCABLE LIVING TRUST and the JULES PATRICOF REVOCABLE LIVING
26

27 ...
28

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

3 3. The derivative causes of action for breach of fiduciary duty, aiding and abetting and
4 unjust enrichment claims were extinguished by the settlement and judgment entered into by the
5 Court on May 18, 2020, two days before PAMTP, LLC filed its Complaint. Those who eventually
6 assigned their claims to PAMTP, LLC opted out of the class settlement.
7

8 4. The “opt-out” portion of the case filed by PAMTP, LLC came regularly for trial
9 before the Court on August 16, 2021. After conclusion of the Plaintiff’s case-in-chief, Defendants
10 made motions pursuant to NRCP 52(c), and ultimately, the Court granted the motions as set forth
11 within its Order, Findings of Fact, Conclusions of Law and Judgment filed September 3, 2021.
12

13 5. During the course of the litigation, and specifically on July 1, 2020, Defendants
14 collectively served an Offer of Judgment offering to allow judgment to be entered against them and
15 in favor of PAMTP, LLC for \$1.00, “inclusive of attorney’s fees, costs of suit, and prejudgment
16 interest.” In addition, the Offer “prohibits any application or motion for a post-acceptance award of
17 taxable costs, attorney’s fees, or interest.”¹ The Offer of Judgment was not accepted by PAMTP,
18 LLC within the time frame set forth by NRCP 68(e).
19

20 6. Almost eleven (11) months later, on May 28, 2021, Defendants collectively served a
21 second Offer of Judgment upon PAMTP, LLC, this time offering to allow judgment to be entered
22 against them and in favor of PAMTP, LLC in the amount of \$150,000.00. This Offer was also
23 “inclusive of attorneys’ fees, costs of suit, and prejudgment interest, and prohibit[ed] any application
24 or motion for a post-acceptance award of taxable costs, attorney’s fees or interest.”² The second
25 ...
26

27
28 ¹See Exhibit 9 attached to Plaintiff’s Opposition to Motion for Attorney’s Fees filed October 13, 2011.

²See Exhibit 10 attached to Plaintiff’s Opposition to Motion for Attorney’s Fees.

1 Offer of Judgment was not accepted by PAMTP, LLC within the time frame set forth by NRCP
2 68(e).

3 7. SG VTB HOLDINGS, LLC, STRIPES, VTB HOLDINGS, INC., JUERGEN
4 STARK, KENNETH FOX, ANDREW WOLF, SETH PUTTERMAN, ELWOOD G. NORRIS and
5 KENNETH POTASHNER now move this Court for reimbursement of their attorneys' fees incurred
6 from the times their Offers of Judgment were made. In their view, they prevailed with respect to
7 their Offers—that is, PAMTP, LLC failed to obtain a more favorable judgment than that set forth
8 within their Offers. Further, they argue the application of the factors set forth in Beattie v. Thomas,
9 579, 588-589, 688 P.2d 268, 274 (1983), as well as those outlined in Brunzell v. Golden Gate
10 National Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) weighs in their favor. They seek
11 \$7,054,396.88 in attorneys' fees incurred after the first Offer was made or \$3,915,171.30 after the
12 second was served. PAMTP, LLC opposes upon the basis the applicable of the Beattie factors do
13 not weigh in Defendants' favor.
14
15

16 CONCLUSIONS OF LAW

17 1. Generally speaking, the district court may not award attorney fees absent authority
18 under a statute, rule, or contract. *See Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 132 P.3d
19 1022, 1028 (2006), *citing State Department of Human Resources v. Fowler*, 109 Nev. 782, 784, 858
20 P.2d 375, 376 (1993). In this case, SG VTB HOLDINGS, LLC, STRIPES, VTB HOLDINGS, INC.,
21 JUERGEN STARK, KENNETH FOX, ANDREW WOLF, SETH PUTTERMAN, ELWOOD G. NORRIS
22 and KENNETH POTASHNER seek an award of attorneys' fees under NRCP 68
23

24 2. NRCP 68 provides in salient part:

25 (a) *The Offer:* At any time more than 21 days before trial, any party may serve
26 an offer in writing to allow judgment to be taken in accordance with its terms and conditions.
27 Unless otherwise specified, an offer made under this rule is an offer to resolve all claims in
28 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.

1 3. Case law, interpreting NRCP 68, provides this rule was designed to facilitate and
2 encourage settlement. It does so by placing the risk of loss on the non-accepting offeree, with no
3 risk to the offeror, thus encouraging both offers and acceptances of offers. Matthews v. Collman,
4 110 Nev. 940, 950, 878 P.2d 971, 978 (1994). NRCP 68 invests the court with discretion to allow
5 attorney fees when the judgment obtained by the offeror is more favorable than the offer.
6 Armstrong v. Riggi, 92 Nev. 280, 281, 549 P.2d 753 (1976). The court's discretion will not be
7 disturbed absent a clear abuse. Bidart v. American Title Insurance Co., 103 Nev. 175, 179, 734 P.2d
8 732, 735 (1987).

10 4. The factors to consider in making a discretionary award of attorney fees under NRCP
11 68 are whether:

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

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

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

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

18
19 After weighing the foregoing factors, the district court may, where warranted, award up to the full
20 amount of fees requested. On the other hand, where the court has failed to consider these factors,
21 and has made no findings based upon the evidence the attorney fees sought are reasonable and
22 justified, it is an abuse of discretion for the court to award the full amount of fees requested. Beattie,
23 99 Nev. at 588, 668 P.2d at 274; *also see* Frazier v. Drake, 131 Nev. 632, 642, 357 P.3d 365 (2015).³

24
25
26
27 ³But see MRO Communications, Inc. v. AT&T Co., 197 F.3d 1276, 1284 (9th Cir. 1999), *cert. denied*, 529 U.S.
28 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

1 **5.** Should the court exercise its discretion in granting attorney's fees, it must consider
2 certain factors in determining the amount awarded. *See Schouweiler v. Yancy Company*, 101 Nev.
3 827, 832, 712 P.2d 786, 790 (1985). Such factors include:

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

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

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

11 (4) the result: whether the attorney was successful and what benefits were
12 derived.
13

14 *See Brunzell*, 85 Nev. at 349, 455 P.2d at 33 (1969), *quoting Schwartz v. Schwerin*, 85 Ariz. 242,
15 336 P.2d 144, 146 (1959).
16

17 **6.** The first question is whether PAMTP, LLC failed to obtain a judgment more
18 favorable than either Offer of Judgment of \$1.00 and \$150,000.00, respectively, both of which were
19 inclusive of their attorney fees, costs of suit and pre-judgment interest incurred and prohibited any
20 application or motion for a post-acceptance award of taxable costs, attorney's fees, or interest.
21 Because the term "inclusive" was a term contained within the Offers of Judgment, this Court must
22 add PAMTP, LLC'S attorney fees, costs and pre-judgment interest to the judgment received and
23 compare that total to the \$1.00 and \$150,000.00, respectively, as set forth in NRCP 68(g). Here,
24 PAMTP, LLC did not receive a judgment in its favor; Defendants received judgment as a matter of
25 law under NRCP 52(c). In other words, PAMTP, LLC received zero (\$0.00) as a judgment. The
26
27
28 attorney's fees without making specific findings on the four factors).

1 pre-judgment interest earned, therefore, is zero (\$0.00). The comparison this Court must make, then,
2 is the extent of attorney's fees and costs of suit incurred by PAMTP, LLC to Defendants' \$1.00 and
3 \$150,000.00 Offers by the time the two Offers was made. Here, neither party produced information
4 regarding the attorney fees, costs and expenses that had been incurred by PAMTP, LLC from the
5 time litigation was instituted on May 20, 2020 to when the Offers of Judgment were made, i.e. July
6 1, 2020 (\$1.00) and May 28, 2021 (\$150,000.00). Although it was not accorded such data by either
7 side, what was available to the Court was financial records within its case management system,
8 Tyler-Odyssey. Such records showed PAMTP, LLC incurred the initial filing fee of \$1,530.00 on or
9 about May 20, 2020. A comparison of the \$1,530.00 to the \$1.00 Offer of Judgment inclusive of
10 attorneys' fees, costs of suit and pre-judgment interest shows the filing fees far exceeded the \$1.00
11 offer to settle. That is, Defendants did not prevail with respect to its \$1.00 Offer of Judgment.⁴
12

13
14 With respect to whether PAMTP, LLC obtained a judgment more favorable than the second
15 Offer of Judgment made May 28, 2021, it is this Court's view the burden is upon Defendants, as the
16 movants, to demonstrate the \$150,000.00 exceeded the amount PAMTP, LLC incurred in attorney's
17 fees, costs and expenses between May 20, 2020 and May 28, 2021. In so stating, this Court
18 appreciates knowledge of the adversary's attorney's fees and costs generally are not known to the
19 offeror's lawyer. However, that data could have been obtained by defense counsel simply asking for
20 the information before Defendants made the \$150,000.00 Offer of Judgment inclusive of attorney's
21 fees, costs of suit and pre-judgment interest. There was nothing presented to suggest PAMTP, LLC
22 was asked for and refused to give Defendants the data. Notably, if any evidence is a guide to this
23
24

25 ⁴Notwithstanding the conclusion Defendants did not prevail with respect to the \$1.00 Offer of Judgment, this
26 Court also finds the second and third *Beattie* factors weigh in favor of PAMTP, LLC. In this Court's view, an offer to
27 settle for \$1.00 which was inclusive of PAMTP, LLC'S attorneys' fees, costs and pre-judgment interest incurred to date
28 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.

1 Court, it is defense counsel's attorneys' fees that were incurred. Defendants' attorneys' fees
2 increased \$3,139,225.58 between their two Offers of Judgment made July 1, 2020 and May 28,
3 2021. This Court would have expected the extent of PAMTP, LLC'S legal fees to be
4 commensurate to Defendants', and the \$150,000.00 Offer of Judgment represents less than five (5)
5 percent of that total. In short, this Court concludes Defendants did not meet their burden, and thus,
6 their Motion for Attorney's Fees as it seeks attorney fees under NRCP 68 is denied.
7

8 7. Notably, within their Supplemental Brief filed December 16, 2021, Defendants
9 propose "NRCP 68(g) looks only to the offeree's 'taxable' costs and fees," and PAMTP, LLC was
10 not the prevailing party, and thus, its taxable costs are zero (\$0.00). This Court disagrees with such
11 assessment for at least a couple of reasons. *First*, the Offer of Judgment, in essence, is a contractual
12 offer to settle for an amount certain, and thus, one must look to the terms of the offer. *See* NRCP
13 68(a) ("[A]ny party may serve an offer in writing to allow judgment to be taken in accordance with
14 its terms and conditions."). The term "costs of suit," not "taxable costs," is utilized within both
15 Offers of Judgment, and in this Court's view, "costs of suit" should be used in the comparison.⁵
16 *Second*, notwithstanding that premise, the filing fees incurred May 20, 2020 *was* a "taxable cost"
17 incurred "pre-offer," and it alone exceeded the \$1.00 or amount of the first Offer of Judgment.
18 Again, as noted above, this Court was not provided information demonstrating by a preponderance
19 of the evidence the extent of PAMTP, LLC' attorney's fees, costs of suit or "taxable costs" incurred
20 between May 20, 2020 and May 28, 2021, and therefore, it could not determine within its discretion
21 whether Defendants prevailed with respect to their second Offer of Judgment.
22

23 ...
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27 _____
28 ⁵Assuming it is not against public policy, parties to a contract may alter statutory provisions that normally
would be abided by law.

1 8. Defendants next argue the “plain language of NRCP 68(g) requires that Plaintiff’s
2 taxable pre-offer costs be added to the offer and that sum compared to the ultimate judgment.”⁶
3 Such position conflicts with the holding recently made by the Nevada Court of Appeals in Hamilton
4 v. Bott, 501 P.3d 468 (2021) (unpublished decision). In Hamilton, the appellate court determined
5 the proper application of NRCP 68(g) was to compare the value of the plaintiff’s total recovery by
6 including the pre-offer fees, costs, expenses and interest with the verdict to the defendant’s offer of
7 judgment in order to determine whether a statutory award of fees and costs is precluded by NRCP
8 68(f). This Court applied NRCP 68(g) just as so held by the Nevada Court of Appeals in December
9 2021.
10

11 9. On page 9 of their Supplemental Brief in Support of Motion for Attorneys’ Fees,
12 Defendants suggest the burden of proof is upon PAMTP, LLC to demonstrate the statutory award of
13 fees and costs is precluded by NRCP 68(f) by providing proof of its “non-taxable ‘pre-offer costs’”
14 so a comparison can be made pursuant to NRCP 68(g). This Court rejects that suggestion for a
15 couple of reasons. *First*, Defendants are the movant, and thus, in that role, movants generally have
16 the burden of proof. *Second*, as NRCP 68 invests the court with discretion to allow attorney fees
17 when the judgment obtained by the offeror is more favorable than the offer.⁷ It is incumbent upon
18 Defendants, as movants, to demonstrate the judgment obtained by them was more favorable than the
19 offer. In short, this Court concludes the burden of proof here is upon Defendants.
20
21

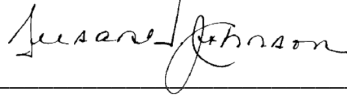
22 Accordingly, based upon the foregoing Findings of Fact and Conclusions of Law,

23 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** the Motion for Attorneys’
24 Fees filed by Defendants KENNETH POTASHNER and VTB HOLDINGS, INC. and Specially
25

26 _____
27 ⁶See Supplemental Brief in Support of Defendants’ Motion for Attorneys’ Fees, p. 1.
28 ⁷Armstrong, 92 Nev. at 281, 549 P.2d 753.

1 Appearing Defendants STRIPES GROUP, LLC, SG VTB HOLDINGS, LLC, JUERGEN STARK
2 and KENNETH FOX on August 29, 2021 is denied.

3 Dated this 7th day of June, 2022

4 

5 SUSAN JOHNSON, DISTRICT COURT JUDGE

6 4A8 88E AEA4 2922
7 Susan Johnson
8 District Court Judge

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SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Kearney IRRV Trust, Plaintiff(s) | CASE NO: A-13-686890-B
7 vs. | DEPT. NO. Department 22
8 Kenneth Potashner, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order Denying Motion was served via the court's electronic eFile
13 system to all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 6/7/2022

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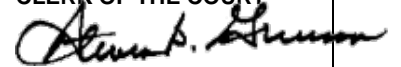
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21	If indicated below, a copy of the above mentioned filings were also served by mail	
22	via United States Postal Service, postage prepaid, to the parties listed below at their last	
23	known addresses on 6/8/2022	
24	George Albright	801 S. Rancho Dr., #D-4
25		Las Vegas, NV, 89106
26	Joseph Peek	9555 Hillwood Drive
27		2nd Floor
28		Las Vegas, NV, 89134

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Richard Gordon

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[Additional counsel on signature page]

*Attorneys for Defendant VTB Holdings, Inc. and
Specially Appearing Defendants Stripes Group,
LLC, SG VTB Holdings, LLC, Juergen Stark, and
Kenneth Fox*

**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.

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.

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-13-687232-C (Consolidated)
DEPT NO.: XXII

CASE NO.: A-13-687354-C (Consolidated)
DEPT NO.: XXII

CASE NO.: A-13-687665-C (Consolidated)
DEPT NO.: XXII

Defendants.

CASE NO.: A-16-741073-B (Consolidated)
DEPT NO.: XXII

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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4893-2202-2949

1 **ORDER**

2 **DISTRICT COURT**

3 **CLARK COUNTY, NEVADA**

4 **IN RE PARAMETRIC SOUND**
5 **CORPORATION SHAREHOLDERS'**
6 **LITIGATION**

7 **KEARNEY IRRV TRUST, individually and on**
8 **behalf of all others similarly situated,**

9 **Plaintiff,**

10 **Vs.**

11 **KENNETH F. POSTASHNER; ELWOOD G.**
12 **NORRIS; SETH PUTTERMAN; ROBERT M.**
13 **KAPLAN; ANDREW L. WOLFE; JAMES L.**
14 **HONORE; PARAMETRIC SOUND**
15 **CORPORATION; PARIS ACQUISITION**
16 **CORP.; and VTB HOLDINGS, INC.**

17 **Defendants.**

18 **GRANT OAKES; RAYMOND BOYTIM,**

19 **Intervenor Plaintiffs.**

20 **VITIE RAKAUSKAS, individually and on**
21 **behalf of all others similarly situated,**

22 **Plaintiff,**

23 **Vs.**

24 **PARAMETRIC SOUND CORPORATION;**
25 **VTB HOLDINGS, INC.; PARIS**
26 **ACQUISITION CORP., KENNETH F.**
27 **POTASHNER; ELWOOD G. NORRIS;**
28 **ROBERT J. KAPLAN; SETH PUTTERMAN;**
ANDREW WOLF; and JAMES L. HONORE,

Defendants.

GEORGE PRIESTON, individually and on
behalf of all others similarly situated,

Plaintiff,

Vs.

Case No. A-13-686890-B
Dept. No. XXII

ORDER RE: PAMTP, LLC'S
MOTIONS TO RE-TAX COSTS

Consolidated with:

Case No. A-13-687232-B
Dept. No. XXII

Consolidated with:

Case No. A-13-687354-B
Dept. XXII

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

**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.

**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.

**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.

**LANCE MYKITA, individually and on behalf
of all others similarly situated,**

Plaintiff,

Vs.

**5G VTB HOLDINGS, LLC; STRIPES
GROUP, LLC; VTB HOLDINGS, INC.;**

Consolidated with:

**Case No. A-13-687665-B
Dept. XXII**

Consolidated with:

**Case No. A-13-688374-B
Dept. XXII**

Consolidated with:

**Case No. A-16-741073-B
Dept. XXII**

1 **TURTLE BEACH CORPORATION, INC.,**

2 **Defendants.**

3 **PAMTP, LLC,**

4 **Plaintiff,**

5 **Vs.**

6 **SG VTB HOLDINGS, LLC; STRIPES; VTB**
7 **HOLDINGS, INC.; JUERGEN STARK;**
8 **KENNETH FOX; ANDREW WOLFE; SETH**
9 **PUTTERMAN; ELWOOD G. NORRIS;**
10 **KENNETH POTASHNER,**

11 **Defendants.**

Consolidated with:

Case No. A-20-815308-B
Dept. XXII

12 **ORDER RE: PAMTP, LLC'S MOTIONS TO RE-TAX COSTS**

13 These matters concerning:

14 1. Plaintiff PAMTP, LLC'S Motion to Re-Tax Defendant KENNETH POTASHNER'S
15 Verified Memorandum of Costs filed October 7, 2021; and

16 2. Plaintiff PAMTP, LLC'S Motion to Re-Tax Non-Director Defendants' Memorandum
17 of Costs filed October 7, 2021,

18 both came on for hearing on the 16th day of November 2021 at the hour of 8:30 a.m. before

19 Department XXII of the Eighth Judicial District Court, in and for Clark County, Nevada with

20 JUDGE SUSAN JOHNSON presiding; Plaintiff PAMTP, LLC appeared by and through its

21 attorneys, GEORGE F. OGILVIE, III, ESQ. of the law firm, MCDONALD CARANO, DANIEL

22 SULLIVAN, ESQ. of the law office, HOLWELL SHUSTER & GOLDBERG, and DAVID C.

23 O'MARA, ESQ. of the O'MARA LAW FIRM; Defendant KENNETH POTASHNER appeared by

24 and through his attorney, J. STEPHEN PEEK, ESQ. of the law firm, HOLLAND & HART, and

25 ALEJANDRO E. MORENO, ESQ. of the law firm, SHEPPARD MULLIN RICHTER &

26 HAMPTON; and Defendant VTB HOLDINGS, INC. and Specially Appearing Defendants

27 STRIPES GROUP, LLC, SG VTB HOLDINGS, LLC, JUERGEN STARK and KENNETH FOX
28

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

1 appeared by and through their attorneys, RICHARD C. GORDON, ESQ. of the law firm, SNELL &
2 WILMER, and DAVID A. KOTLER, ESQ. of the law office, DECHERT, LLP. Having reviewed
3 the papers and pleadings filed in this matter, including but not limited to the thousands of pages
4 related to the motions, heard extensive oral arguments of the lawyers and taken this matter under
5 advisement, this Court makes the following Findings of Fact and Conclusions of Law:

6
7 **FINDINGS OF FACT AND PROCEDURAL HISTORY**

8 1. On August 13, 2013, the primary action was filed by a non-controlling shareholder of
9 PARAMETRIC SOUND CORPORATION, a small publicly traded company, on behalf of itself and
10 those similarly situated, to challenge the corporation's merger with VTB HOLDINGS, INC. (also
11 referred to as "TURTLE BEACH") which closed on or about January 14, 2014. After the original
12 complaint's filing, several other non-controlling shareholder actions challenging the merger were
13 filed and eventually consolidated with the first action. The combined various complaints asserted
14 three causes of action: (1) breach of fiduciary duties by PARAMOUNT SOUND
15 CORPORATION'S Board of Directors, (2) aiding and abetting the directors' breach of fiduciary
16 duties by PARAMETRIC SOUND CORPORATION and VTB HOLDINGS, INC. and (3) unjust
17 enrichment.
18

19 2. PAMTP, LLC filed its Complaint in Case No. A-20-815308-B against SG VTB
20 HOLDINGS, LLC, STRIPES, VTB HOLDINGS, INC., JUERGEN STARK, KENNETH FOX,¹
21 ANDREW WOLFE, ROBERT KAPLAN, SETH PUTTERMAN, ELWOOD G. NORRIS² and
22 KENNETH POTASHNER on May 20, 2020, asserting claims of (1) breach of fiduciary duty and (2)
23 aiding and abetting breach of fiduciary duty. PAMTP, LLC is a Delaware limited liability company
24
25

26
27 ¹SG 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.

28 ²ANDREW WOLFE, ROBERT KAPLAN, SETH PUTTERMAN and ELWOOD G. NORRIS are the "Non-Director Defendants" who ultimately resolved claims filed by PAMTP, LLC.

1 formed for the purpose of asserting claims assigned to it by individuals and entities who held
2 PARAMETRIC SOUND CORPORATION common stock on the closing date of the merger,
3 January 15, 2014; these individuals and entities are ICEROSE CAPITAL MANAGEMENT, LLC,
4 ROBERT MASTERSON, MARCIA PATRICOF on behalf of the PATRICOF FAMILY, LP,
5 MARCIA PATRICOF REVOCABLE LIVING TRUST and the JULES PATRICOF REVOCABLE
6 LIVING TRUST, ALAN and ANNE GOLDBERG, BARRY WEISBORD, RONALD and MURIEL
7 ETKIN and RICHARD SANTULLI.
8

9 **3.** Of significance here, the non-controlling shareholder plaintiffs were certified as a
10 class by the Court on January 18, 2019 and defined as “those individuals holding [PARAMETRIC
11 SOUND CORPORATION] common stock on...January 15, 2014.” *See* Order filed January 18,
12 2019. Although all non-controlling shareholders had the opportunity to opt out or be excluded from
13 the class, those who ultimately assigned their claims to PAMTP, LLC did not opt out of the class.
14

15 **4.** The derivative causes of action for breach of fiduciary duty, aiding and abetting and
16 unjust enrichment claims were extinguished by the settlement and judgment entered into by the
17 Court on May 18, 2020, two days before PAMTP, LLC filed its Complaint, which as set forth above,
18 alleged the claims assigned to it by ICEROSE CAPITAL MANAGEMENT, LLC, ROBERT
19 MASTERSON, MARCIA PATRICOF on behalf of the PATRICOF FAMILY, LP, MARCIA
20 PATRICOF REVOCABLE LIVING TRUST and the JULES PATRICOF REVOCABLE LIVING
21 TRUST, ALAN and ANNE GOLDBERG, BARRY WEISBORD, RONALD and MURIEL ETKIN
22 and RICHARD SANTULLI.
23

24 **5.** The case filed by PAMTP, LLC came regularly for trial before the Court on August
25 16, 2021 and continued through August 25, 2021. After conclusion of the PAMTP, LLC’S case-in-
26 chief, Defendants moved the Court for judgment in their favor as a matter of law pursuant to NRCP
27 52(c); these motions were granted by the Court as set forth within its Order Granting Defendants’
28

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
<i>Pro Hac Vice</i> Admission Fees	9,350.00
Equipment Rental for Trial	<u>123,508.80</u>
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
<i>Pro Hac Vice</i> Admission Fees	4,900.00
Messenger Services	<u>1,130.95</u>
Total:	\$34,278.22

...

³The 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
<i>Pro Hac Vice</i> Admission Fees	5,200.00
Parking for Mandatory Hearings	725.00
Mediation Fees	2,844.57
Travel for Mandatory Supreme Court Hearings	<u>762.59</u>

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

1 seek expenses for “trial support,” and amounts for “equipment rental” and “graphics and onsite
2 support,” which are “bloated” and not reasonable under NRS Chapter 18. *Sixth and finally*, these
3 Defendants seek *pro hac vice* fees which are not recoverable under NRS Chapter 18.

4 7. Defendants oppose, arguing the litigation commenced in 2013 and the consolidated
5 matter has always been treated as a singular lawsuit. In Defendants’ view, PAMTP, LLC conceded
6 that point within its Pre-Trial Memorandum when it claimed entitlement to pre-judgment interest
7 accruing from the date of dilutive issuance, January 15, 2014, or, alternatively, from the time the
8 Complaint was filed, August 13, 2013, “because this Action arose as a direct result of Plaintiff’s opt-
9 out from the settlement of the Class Action, and continues under the initial case, number A-13-
10 686890-B.”⁴ Further, PAMTP, LLC’S assignors were actual or putative class members in this
11 action since its inception in 2013 and they received the benefits of class counsel’s advocacy and
12 discovery produced by Defendants. *Secondly*, in Defendants’ view, they are entitled to costs
13 associated with the evidentiary hearing; even though they did not prevail at that hearing, the
14 sanctions PAMTP, LLC received played no material role in the case’s outcome; that is, “[e]ven with
15 the evidentiary scales tipped in Plaintiff’s favor, this Court still found Plaintiff’s claims to be so
16 lacking in substance that judgment under NRCP 52(c) was appropriate.”⁵ *Third*, PAMTP, LLC
17 misreads precedent from the Nevada Supreme Court as precluding recovery of costs associated with
18 hosting and storing of e-discovery. If anything, that same authority cited by Plaintiff expressly
19 authorizes and affirms recovery of such costs. *See In re: DISH Network Derivative Litigation*, 133
20 Nev. 438, 401 P.3d 1081 (2017). *Fourth*, PAMTP, LLC misconstrues NRS 18.005 by arguing the
21 Non-Director Defendants are not entitled to recover more than \$1,500 per expert witness when none
22 of the experts testified at trial. Such limitation does not apply when the non-prevailing party’s
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28 ⁴See Plaintiff’s Pre-Trial Memorandum, pp. 10-11, filed July 16, 2021.

⁵See Non-Director Defendants’ Opposition to Plaintiff’s Motion to Re-Tax Costs, p. 2, filed October 21, 2021.

1 conduct results in the experts not testifying; here, the Court granted Defendants judgment as a matter
2 of law rendering it unnecessary for the defense experts to testify. *Fifth*, the trial support expenses
3 are reasonable and recoverable. *Sixth*, the fees incurred for attorneys appearing *pro hac vice* are
4 reasonable and recoverable as it was necessary to retain non-Nevada lawyers to address issues never
5 before litigated in Nevada.

6 CONCLUSIONS OF LAW

7
8 1. NRS 18.020 sets forth costs must be allowed of course to the prevailing party against
9 his adversary against whom judgment is rendered in an action where the plaintiff seeks, *inter alia*,
10 the recovery of real property or a possessory right thereto and/or more than \$2,500.00. The
11 determination of which expenses are allowed as costs is within the sound discretion of the trial court.
12 Although this Court has wide discretion in awarding costs to prevailing parties, such is not without
13 limits. See Cadle Company v. Woods & Erickson, 131 Nev. 114, 345 P.3d 1049 (2015). The
14 Court's discretion should be exercised sparingly when considering whether to allow expenses not
15 specified by statute and precedent. See Bergmann v. Boyce, 109 Nev. 670, 679, 856 P.2d 560, 566
16 (1993). In this case, there is no question the Non-Director Defendants and MR. POTASHNER are
17 the parties that prevailed in this action as they were accorded judgment as a matter of law under
18 NRCP 52(c) after PAMTP, LLC rested its case.
19

20
21 2. NRS 18.005 defines the "costs" recoverable by the prevailing party. They include:

- 22 1. Clerk's fees.
- 23 2. Reporters' fees for depositions, including a reporter's fee for one copy of each
24 deposition.
- 25 3. Jurors' fees and expenses, together with reasonable compensation of an
26 officer appointed to act in accordance with NRS 16.120.
- 27 4. Fees for witnesses at trial, pretrial hearings and deposing witnesses, unless the
28 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

1 the circumstances surrounding the expert's testimony were of such necessity as to require the
2 larger fee.

3 6. Reasonable fees of necessary interpreters.

4 7. The fee of any sheriff or licensed process server for the delivery or service of
5 any summons or subpoena used in the action, unless the court determines that the service was
6 not necessary.

7 8. Compensation for the official reporter or reporter pro tempore.

8 9. Reasonable costs for any bond or undertaking required as part of the action.

9 10. Fees of a court bailiff or deputy marshal who was required to work overtime.

10 11. Reasonable costs for telecopies.

11 12. Reasonable costs for photocopies.

12 13. Reasonable costs for long distance telephone calls.

13 14. Reasonable costs for postage.

14 15. Reasonable costs for travel and lodging incurred in taking depositions and
15 conducting discovery.

16 16. Fees charged pursuant to NRS 19.0335.

17 17. Any other reasonable and necessary expense incurred in connection with the
18 action, including reasonable and necessary expenses for computerized services for legal
19 research.

20 **Costs and Disbursements Incurred Prior to May 20, 2020**

21 3. PAMTP, LLC alleges within its May 20, 2020 Complaint it was "lawfully and validly
22 assigned" the "rights, titles and interests" of certain shareholders, to wit: ICEROSE CAPITAL
23 MANAGEMENT, LLC, ROBERT MASTERSON, MARCIA PATRICOF on behalf of the
24 PATRICOF FAMILY, LP, MARCIA PATRICOF REVOCABLE LIVING TRUST and the JULES
25 PATRICOF REVOCABLE LIVING TRUST, ALAN and ANNE GOLDBERG, BARRY
26 WEISBORD, RONALD and MURIEL ETKIN and RICHARD SANTULLI, "in any claims arising
27 from or related to the Merger against Parametric or any other entity or individual that could be liable
28 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.

⁶See 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. \$585,083.29⁷ 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,

⁷See PAMTP, LLC’S Motion to Re-Tax Non-Directors’ Memorandum of Costs filed October 7, 2021, p. 2

⁸See PAMTP, LLC’S Motion to Re-Tax defendant Kenneth Potashner’s Verified Memorandum of Costs filed October 7, 2021, p. 2.

⁹See Complaint, p. 7, paragraph 25.

1 number A-13-686890-B.”¹⁰ Presumably, if PAMTP, LLC had been the prevailing party, it would
2 have sought pre-judgment interest accruing since 2013 or 2014. As PAMTP, LLC sued based upon
3 the assignment of claims that arose in 2013, this Court concludes the Non-Director Defendants and
4 MR. POTASHNER, as prevailing parties, are entitled to reimbursement of reasonable costs
5 necessarily and actually incurred from the time the original class action was instituted. PAMTP,
6 LLC has lodged no other challenge as to the reasonableness and necessity of the costs incurred by
7 Defendants prior to May 20, 2020. PAMTP, LLC’S Motions to Re-Tax Costs as they seek a
8 subtraction or re-taxing of *all* costs incurred between the institution of the first class action lawsuit
9 and the filing of its Complaint on May 20, 2020 are denied.
10

11 **Costs Associated with the Spoliation Evidentiary Hearing**

12 **5.** PAMTP, LLC argues the Non-Director Defendants and MR. POTASHNER should
13 not be awarded their costs incurred in unsuccessfully defending claims they willfully and/or
14 negligently failed to preserve data and communications at a two-day evidentiary hearing that took
15 place June 18 and 25, 2021. While it does not identify the particular costs allegedly incurred by
16 MR. POTASHNER, it indicates “over \$23,000.00” was charged to the Non-Director Defendants.
17 This Court agrees with PAMTP, LLC’S assessment. After hearing two-days of testimony, JUDGE
18 GONZALEZ concluded MR. POTASHNER “willfully destroyed text messages and emails relevant
19 to this litigation.” The judge made an adverse inference “the lost text messages and emails relevant
20 to this litigation would have shown that Potashner acted in bad faith when supporting and approving
21 the merger. Potashner may testify and contest this at trial, but his testimony will go to his credibility
22 only because an adverse inference of bad faith has already been made by the Court;...” JUDGE
23 GONZALEZ also found “Stark and Fox...negligently failed to preserve text messages,” and she
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¹⁰See 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

<u>Printing Expenses (Evidentiary Hearing)</u>	
Litigation Discovery Group	\$6,854.78
<u>Travel Expenses, June 15-26, 2021</u>	
David A. Kottler, Esq.	5,620.61
Joshua D. Hess, Esq.	4,170.19
Richard C. Gordon, Esq. (parking expenses)	39.00
<u>Reporters' Fees, June 25, 2021:</u>	
Transcript of Proceedings	132.52
Total:	\$16,817.10

MR. POTASHNER incurred the following costs as a result of the spoliation evidentiary hearing:¹³

<u>Court Fees</u>	
June 16 – 17, 2021	\$ 14.00
<u>Witnesses' Fees and Expenses</u>	
Jury to Verdict Trial Services	1,775.00
<u>Travel and Lodging Costs, June 15-18, 2021</u>	
Alejandro E. Moreno, Esq.	861.59
John P. Stigi, III, Esq.	1,448.95
Kenneth Potashner	639.76
<u>Delivery and Filing Services</u>	
June 14, 2022	244.90

¹¹See Findings of Fact, Conclusions of Law and Order Imposing Spoliation Sanctions filed July 15, 2021, p. 10.

¹²The 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.

¹³MR. 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

¹⁴See 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.

¹⁵See PAMTP, LLC'S Motion to Retax Non-Director Defendants' Memorandum of Costs, p. 10.

1 costs included that for the vendors' hosting and storage. Other than its challenges to those expenses
2 incurred prior to May 20, 2020 and those attributable to hosting and storage, PAMTP, LLC does not
3 dispute the reasonableness or necessity of the electronic discovery costs. In this Court's view, the
4 electronic discovery costs are "reasonable and necessary expense[s] incurred in connection with the
5 action." See NRS 18.005(17). This Court therefore denies PAMTP, LLC'S motion as it seeks a re-
6 tax of Defendants' electronic discovery expenses.
7

8 **Expert Witnesses' Fees**

9 **8.** NRS 18.005(5) identifies within its term "costs" as including "[r]easonable fees of
10 not more than five expert witnesses in an amount of not more than \$1,500 for each witness, unless
11 the court allows a larger fee after determining that the circumstances surrounding the expert's
12 testimony were of such necessity as to require the larger fee." See Logan v. Abe, 131 Nev. 260, 267,
13 350 P.3d 1139 (2015) (Emphasis added); also see Frazier v. Drake, 131 Nev. 632, 646, 357 P.3d
14 365, 374 (2015). Here, MR. POTASHNER and the Non-Director Defendants seek reimbursement
15 of \$91,846.50 and \$223,031.19, respectively, for expert witness fees. MR. POTASHER and the
16 Non-Director Defendants retained the same experts, i.e. DR. JOHN MONTGOMERY and
17 ANKURA CONSULTING GROUP.
18

19 **9.** As already set forth *supra*, PAMTP, LLC first moved to re-tax of Defendants' expert
20 witness fees that were incurred prior to the filing of its Complaint on May 20, 2020; this Court has
21 concluded Defendants are entitled to reimbursement of their costs necessarily and reasonably
22 incurred prior to May 20, 2020.
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24 **10.** PAMTP, LLC next challenges the Non-Director Defendants' expert witness fees
25 incurred after May 20, 2020,¹⁶ i.e. \$59,573.45. It proposes the expert witness fees charged after
26 May 20, 2020 should be limited to \$1,500.00 per expert witness as no expert testified at the trial. In
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28 ¹⁶MR. POTASHNER'S expert witness fees were all incurred before May 20, 2020.

1 Frazier, 131 Nev. at 650, 651, 357 P.3d at 377-378, the Nevada Court of Appeals concluded any
2 award of expert witness fees in excess of \$1,500.00 per expert under NRS 18.005(5) must be
3 supported by an express, carefully and preferably written explanation of the district court's analysis
4 of factors pertinent to determining the reasonableness of the requested fees and whether "the
5 circumstances surrounding the expert's testimony were of such necessity as to require a larger fee."
6 Cf. Young v. Johnny Ribeiro Building, Inc., 106 Nev. 88, 93, 787 P.2d 777, 780 (1990) (requiring an
7 "express, carefully and preferably written explanation" of the district court's analysis of factors
8 pertinent to determining whether a dismissal with prejudice is an appropriate discover sanction).
9 Here, in evaluating the request for such an award, this Court should consider the importance of the
10 expert's testimony to the defense, the degree to which his opinions aided the trier of fact in deciding
11 the case, whether the expert's report or testimony was repetitive of other expert witnesses, the extent
12 and nature of the work performed by him, whether he had to conduct independent investigations or
13 testing, the amount of time he spent in court, preparing a report and for trial, his areas of expertise,
14 his education and training, the fee actually charged to the Non-Director Defendants, the comparable
15 experts' fees charged in similar cases if the expert was retained from outside Clark County and the
16 fees and costs that would have been incurred to hire a comparable expert where the trial was held.
17 The aforementioned factors are non-exhaustive and others may be appropriate for consideration
18 depending on the circumstances of a case. Frazier, 131 Nev. at 650-651, 357 P.3d at 377-378.

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22 **11.** This Court finds the trial testimony of DR. MONTGOMERY, a Class Certification
23 expert, would have been important to the Defendants' case and aided JUDGE GONZALEZ, the trier
24 of fact, in deciding the case if the matter proceeded beyond the granting of the NRCP 52(c) motion.
25 As DR. MONTGOMERY was the only expert witness retained by the Defendants, this Court
26 discerns his testimony would not have been repetitive of another's. This Court also is unaware of
27 any, and appreciates there may not be Class Certification experts residing in Nevada for Defendants
28

1 to make a comparison of the reasonableness of their expert's fees to those charged in Clark County.
2 While ANKURA CONSULTING GROUP'S invoices provided by MR. POTASHNER outlined the
3 hours and fees incurred as well as all tasks performed by DR. MONTGOMERY and other
4 consultants, the information identifying the actual tasks accomplished was completely redacted by
5 the Non-Director Defendants from the invoices they produced. With respect to what services were
6 provided to the Non-Director Defendants, this Court is unable to determine the extent and nature of
7 the work performed by DR. MONTGOMERY and the other ANKURA CONSULTING GROUP
8 consultants, whether the expert had to conduct independent investigations or testing, the amount of
9 time he spent preparing a report and for trial, as well as his time spent preparing for and having his
10 deposition taken. No information, other than the invoices, was provided this Court regarding DR.
11 MONTGOMERY'S areas of expertise, education and training. In other words, the Non-Director
12 Defendants provided this Court very little information for it to perform an analysis of factors
13 pertinent in determining the reasonableness of the requested fees and whether "the circumstances
14 surrounding the expert's testimony were of such necessity as to require a larger fee." MR.
15 POTASHNER'S unredacted invoices, on the other hand, showed DR. MONTGOMERY performed
16 extensive analyses and testing, reviewed extensive documentation, prepared for and had his
17 deposition taken.

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21 **12.** Although DR. MONTGOMERY did not testify at trial, this Court concludes his fees
22 and costs charged to the Non-Director Defendants in excess of \$1,500.00 that were incurred during
23 the eight (8) days he was in Las Vegas for trial were reasonable and necessary. DR.
24 MONTGOMERY was not summoned by Defendants to testify at the trial as JUDGE GONZALEZ
25 rendered her judgment as a matter of law after PAMTP, LLC rested its case. Thus, similar to the
26 procedural history of Logan, 131 Nev. at 267, 350 P.3d 1139, "the 'circumstances surrounding the
27 expert's testimony,' or in this case, the lack thereof, were of [PAMTP, LLC'S] creation and 'were of
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1 such necessity as to require the larger fee.” This Court, therefore, awards the Non-Director
2 Defendants the fees/costs expended by DR. MONTGOMERY from August 17, 2021 to August 26,
3 2021, i.e. \$40,763.95. This Court awards MR. POTASHNER the full extent of his expert witness
4 fees, \$91,846.50.

5 **Costs Associated with Trial Support and Equipment Rental**

6 **13.** The Non-Director Defendants seek recovery of \$123,508.80¹⁷ from PAMTP, LLC for
7 costs associated with equipment rental and trial support under the “catch-all” of NRS 18.005(17)
8 (“Any other reasonable and necessary expense incurred in connection with the action.”). Such
9 included \$60,000.00 to set up the war room at the offices of SNELL & WILMER with five printers
10 (both black and white and color capabilities), twelve (12) computer monitors, two WIFI router/range
11 extenders one UniFi switch 48/500 and fifteen (15) 10’ Category-5 (CAT-5) cables with 24/7
12 information technology (“IT”) for twenty (20) days from August 6, 2021 to August 26, 2021,
13 \$22,450.00 to set up three hotel rooms with six (6) computer monitors and one color printer with
14 24/7 IT for sixteen (16) and seventeen (17) days, and \$2,295.00 to rent a conference room for nine
15 (9) days at the Bank of America building and \$1,800.00 rental of a color printer for six (6) days, all
16 with 24/7 IT support. The other \$33,963.80 was for trial graphics and onsite support. In this Court’s
17 view, the \$89,545.00 for the rental of equipment for up to twenty (20) was extreme in terms of the
18 extent of apparatus rented and the cost thereof. Indeed, this Court cannot fathom the need for five
19 (5) printers in a war room especially when, presumably, SNELL & WILMER, a national law firm,
20 had printers with both black and white and color capabilities for use within its Las Vegas office.
21 Further, \$1,800.00 to rent a printer for six (6) days at a location near the courthouse is outrageous,
22 especially considering one could have purchased an adequate printer for far less. Further, a need to
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27 ¹⁷Such encompassed \$89,545.00 for equipment rental for trial and \$33,963.80 for trial graphics and onsite
28 support. See Volume 3, Exhibit 10, Bates Nos. 1251-1261 of Appendix of Exhibits to Non-Director Defendants’
Memorandum of Costs.

1 rent eighteen (18) computers in a war room and three hotel rooms likewise appears extreme. In this
2 Court's view, computer and printer equipment along with the accessories and 24/7 IT could have
3 been acquired for far less than \$89,545.00. This Court awards the Non-Director Defendants
4 \$29,848.33 for equipment rental and rental of the conference room located close to the courthouse as
5 "[a]ny other reasonable and necessary expense incurred in connection with the action" under NRS
6 18.005(17).
7

8 **14.** Although it found it necessary to reduce the extent of the Non-Directors' equipment
9 rental costs, this Court concludes the \$33,963.80 expended for trial graphics and onsite support to be
10 reasonable and necessary even though, ultimately, the graphics were never shown to the finder of
11 fact. The graphics work necessarily had to be completed prior to the defense presenting its case, and
12 the onsite support was needed throughout the trial which included the time PAMTP, LLC was
13 presenting its case in chief. This Court, therefore, awards the Non-Directors \$33,963.80 for trial
14 graphics and onsite support.
15

16 **Costs for Pro Hac Vice Admissions**

17 **15.** PAMTP, LLC argues it should not be assessed \$10,100.00¹⁸ for MR.
18 POTASHNER'S and the Non-Director Defendants' costs associated with the *Pro Hac Vice*
19 admissions as such are not itemized expenses set forth within NRS 18.005. This Court agrees.
20 While there is no question the MR. POTASHNER and the Non-Director Defendants are entitled to
21 legal counsel of their choosing, there is no authority in Nevada for the proposition they, as prevailing
22 parties, are entitled to reimbursement of expenses related to their out-of-state lawyers' admission to
23 practice law within this state. This Court, therefore, disallows the \$10,100.00 *Pro Hac Vice*
24 Admissions expenses.
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27 _____
28 ¹⁸MR. 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
<i>Pro Hac Vice</i> Admission Fees	0.00
Equipment Rental for Trial	<u>63,812.13</u>

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
<i>Pro Hac Vice</i> 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
<i>Pro Hac Vice</i> Admission Fees	0.00
Parking for Mandatory Hearings	725.00
Mediation Fees	2,844.57
Travel for Mandatory Supreme Court Hearings	<u>762.59</u>

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

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

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6 Kearney IRRV Trust, Plaintiff(s) | CASE NO: A-13-686890-B
7 vs. | DEPT. NO. Department 22
8 Kenneth Potashner, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order was served via the court's electronic eFile system to all
13 recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 8/29/2022

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20 If indicated below, a copy of the above mentioned filings were also served by mail
21 via United States Postal Service, postage prepaid, to the parties listed below at their last
22 known addresses on 8/30/2022

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26		Las Vegas, NV, 89134

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Richard Gordon

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