IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION.	Case No. 83598
PAMTP, LLC, Appellant, vs. KENNETH F. POSTASHNER; VTB HOLDINGS, INC.; STRIPES GROUP, LLC; SG VTB HOLDINGS, LLC; JUERGEN STARK; AND KENNETH FOX, Respondents.	
IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION.	Case No. 84971
KENNETH F. POSTASHNER; VTB HOLDINGS, INC.; STRIPES GROUP, LLC; SG VTB HOLDINGS, LLC; JUERGEN STARK; AND KENNETH FOX, Appellants, vs. PAMTP, LLC, Respondent.	
IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION.	Case No. 85358

PAMTP, LLC,

Appellant,

vs.

KENNETH F. POSTASHNER; VTB HOLDINGS, INC.; STRIPES GROUP, LLC; SG VTB HOLDINGS, LLC; JUERGEN STARK; AND KENNETH FOX,

Respondents.

APPEAL
From the Eighth Judicial District Court
The Honorable Susan Johnson, District Judge

COMBINED ANSWERING BRIEF IN DOCKET NO. 83598, ANSWERING BRIEF IN DOCKET NO. 85358, AND OPENING BRIEF IN DOCKET NO. 84971

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made so the Justices of this Court may evaluate possible disqualification or recusal.

The following have an interest in the outcome of this case or are related to entities interested in the case:

- VTB Holdings, Inc.;
- Stripes Group, LLC;
- SG VTB Holdings, LLC;
- Juergen Stark;
- Kenneth Fox; and
- Kenneth Potashner.

There are no other known interested parties.

Snell & Wilmer L.L.P. and Dechert LLP have represented VTB Holdings, Inc.; Stripes Group, LLC; SG VTB Holdings, LLC; Juergen Stark; and Kenneth Fox in this matter. Holland & Hart LLP and Sheppard, Mullin, Richter & Hampton LLP have represented Kenneth Potashner in this matter.

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JURISDICTIONAL STATEMENT

PAMTP, LLC ("PAMTP") appeals from a final judgment entered on September 3, 2021, against it and in favor of Defendants on a motion under NRCP 52(c) following the close of PAMTP's case-in-chief during a bench trial. PAMTP also appeals from an order awarding costs to Defendants entered on August 29, 2022, from which it filed a notice of appeal on September 14, 2022. The district court consolidated and amended those above-referenced orders into a single amended judgment on September 16, 2022, which was subsequently amended again on December 18, 2022, to award prejudgment interest to Defendants. PAMTP did not file a notice of appeal as to either consolidated, amended judgment.

Defendants appeal an order from the district court denying their motion for attorneys' fees on June 27, 2022, from which a notice of appeal was timely filed on June 30, 2022.

STATEMENT OF THE ISSUES

1. Do the doctrines of waiver and law of the case prevent PAMTP from challenging this Court's unanimous, *en banc* decision in this case—*Parametric Sound Corp. v. Eighth Judicial District Court*, 133 Nev. 417, 401 P.3d 1100 (2017)—to find that PAMTP's claims were direct rather than derivative, except for the equity-expropriation claim it tried and lost?

2. Were the district court's findings that PAMTP failed to meet the elements of an equity-expropriation claim in Nevada—namely, that there was no controlling shareholder or director, or actual fraud by a majority of Parametric's board—clearly erroneous?

3. Did the district court err in holding that PAMTP failed to rebut the presumption of the business-judgment rule for a majority of Parametric's directors in approving a transaction with Turtle Beach?

4. Does PAMTP lack standing under *Urdan v. WR Capital Partners, LLC*, 244 A.3d 668 (Del. 2020) to pursue claims of its purported assignors where those assignors had previously sold the shares that form the basis of their dilution claims?

5. Did the district court err in awarding Defendants costs from the commencement of the class action litigation, when the assignors were class members throughout the litigation, enjoyed the benefits of class counsel, took advantage of the class's discovery throughout its own case, and brought claims in continuation of the class litigation?

6. Did the district court err in denying Defendants' attorneys' fees by holding that PAMTP obtained a more favorable judgment than two offers of judgment because it found the terms of the rejected offers formed a contractual modification to NRCP 68(g) and by failing to follow the plain language of NRCP 68(g)?

STATEMENT OF THE CASE

This appeal is premised on the fiction that the district court held that PAMTP's claims were derivative rather than direct. It did no such thing. Instead, it was *this Court* that made that determination. *See Parametric Sound Corp. v. Eighth Judicial District Court* ("*Parametric I*"), 133 Nev. 417, 401 P.3d 1100 (2017). PAMTP thus pleaded only a direct claim for equity expropriation. The present appeal is nothing more than an attempt to relitigate *Parametric I*'s unanimous, *en banc* holding.

What the district court did decide—on a motion for directed verdict after an eight-day trial—is that PAMTP failed to prove the elements of the sole claim *Parametric I* said it could pursue and that it did pursue: an equity-expropriation claim. *Parametric I* allowed this case to proceed only with respect to an equity-expropriation claim as defined in *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006).[1] Under *Gentile*, claims for equity expropriation arise only when a controlling shareholder or director expropriates both economic value and voting power from minority shareholders. *Parametric I* also held that the Nevada corporate code

[1] *Gentile* since has been overruled, and Delaware no longer recognizes equity-expropriation claims. *See Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251 (Del. 2021); *infra* Part II.C.

requires a plaintiff to prove "actual fraud" to establish an equity-expropriation claim. Consequently, PAMTP brought only a direct claim for equity expropriation against the Director Defendants and an aiding-and-abetting claim against the Non-Director Defendants.[2]

The trial in this case, and the district court's order, appropriately focused on the elements of such a claim. In dismissing PAMTP's claims, the district court held, among other things, that (1) PAMTP failed to prove that Defendant Kenneth Potashner was a controlling shareholder or director, and (2) PAMTP failed to prove that a majority of Parametric's directors engaged in "actual fraud" in approving the merger with Turtle Beach. It also found that PAMTP failed to meet the test for individual liability for Nevada directors established in *Chur v. Eighth Judicial District Court*, 136 Nev. 68, 458 P.3d 336 (2020). These conclusions were supported by substantial evidence concerning the independence of the Board—including evidence of outright hostility toward Potashner himself on behalf of every other member of the Board—and by the fact that, at the time of the merger, Potashner owned no shares of Parametric.

[2] Unless otherwise noted, capitalized terms here have the same meaning as they do in PAMTP's opening brief.

The district court's conclusions were correct, and PAMTP's opening brief does virtually nothing to attack them. Instead, PAMTP now argues for the first time that the equity-expropriation claim it tried was something else. PAMTP's position is a red herring, and it effectively concedes that it was unable to prove the elements of equity expropriation.

Parametric I answered nearly every question raised by PAMTP's appeal. It held that the shareholders' challenges here were derivative equity-dilution claims—and not a direct merger challenge, as PAMTP implies here—leaving open a narrow path to recovery through an equity-expropriation claim. PAMTP brought and tried that claim, and it lost. It now attempts to gaslight this Court in a desperate attempt to relitigate *Parametric I*. Waiver and law-of-the-case doctrines foreclose PAMTP's recharacterization of its claim.

Moreover, PAMTP identifies no clear error in the district court's conclusions. It hardly touches the district court's finding that Parametric had no controlling shareholder or director, as is required by *Gentile* and *Parametric I*. Nor does PAMTP identify any "expropriation" of economic value or voting power. And while it attacks the district court's conclusions that the business-judgment rule and actual-fraud

requirement bar recovery, it argues only that Potashner engaged in fraud, leaving untouched the district court's dispositive conclusions regarding the rest of the Board's independence and good faith in approving the merger.

Further, even if PAMTP had proven an equity-expropriation claim, it lacks standing to litigate that claim. PAMTP's assignors sold the Parametric stock that granted them class membership long before forming PAMTP. Therefore, when PAMTP was formed, the assignors lacked standing to bring their claims. Although the district court did not need to reach this issue, it noted that it was "troubled" by PAMTP's lack of standing. The district court's factual findings are sufficient to support affirmance on this independent ground.

The district court also correctly denied PAMTP's motion to re-tax costs because PAMTP's assignors were parties to this action since its inception, and because Defendants are plainly prevailing parties. The district court erred, however, in denying Defendants' request for attorneys' fees. Nevada law provides that when an offer of judgment is made and rejected, and the offeree fails to obtain a judgment more favorable than the offer, the offeree must pay fees and costs. Here,

Defendants made two offers of judgment, and PAMTP rejected them both. PAMTP lost on both its claims, took nothing, and therefore should have been required to pay Defendants' attorneys' fees.

STATEMENT OF FACTS

I. THE MERGER

A. A struggling Parametric grasps for a cash infusion.

In the early 2010s, Parametric was a struggling company with no material revenue and substantial expenses. It struggled to commercialize its only significant asset: intellectual property in a product called HyperSound. HyperSound focused a narrow "beam" of sound waves on a specific point in a room or space. 20.AA.3776. The technology worked only sporadically and triggered significant adverse effects in some listeners. 15.AA.2714. As a result, it never had been marketed to consumers, and Parametric never had been profitable.

In 2013, Parametric found itself in dire need of a massive cash infusion to avoid insolvency. It retained Houlihan Lokey as an investment advisor to help it raise $15 million it needed to stay afloat. 7.AA.1296; 9.AA.1657; 20.AA.3779. No willing investors emerged, and eventually, Houlihan approached a gaming headset manufacturer,

Turtle Beach,[3] to gauge potential interest in a HyperSound license or in buying Parametric. 7.AA.1288; 20.AA.3778. At the time, Turtle Beach was a well-established market leader in its field, but wanted to expand its business beyond gaming headsets. 20.AA.3778–79. Seeking to diversify its holdings, Turtle Beach initially sought to license Parametric's technology, but because a licensing agreement would not have provided enough immediate liquidity to save Parametric from insolvency, Parametric pursued a larger transaction with Turtle Beach. 7.AA.1288. However, Turtle Beach's majority owner, Stripes Group LLC, was deeply skeptical of Parametric and its potential. 18.AA.3341–42. For comparison, in 2012, Turtle Beach had revenues of over $200 million and EBITDA of $48 million compared to $234,000 and -$2.6 million for Parametric. 3.SA.0572; 3.SA.0574. Stripes eventually agreed to a transaction with Parametric but insisted that its interest in Turtle Beach could not be diluted over 20%. 18.AA.3341–42.

[3] Except where otherwise noted, "Turtle Beach" refers to Respondent VTB Holdings, Inc. ("VTBH"). At the relevant time, VTBH was owned by Respondent SG VTB Holdings, LLC, which was owned by Respondent Stripes Group LLC ("Stripes"). Respondent Juergen Stark is and was the CEO of Turtle Beach, and Respondent Kenneth Fox was the managing principal of Stripes and a Turtle Beach director.

After robust negotiations, in 2013, Parametric and Turtle Beach agreed to a merger by which Turtle Beach's shareholders would acquire 80% of the post-merger entity, with the remaining 20% to stay with Parametric's shareholders. 7.AA.1287–98; 20.AA.3782. Given the relative revenues and prospects of the companies, Parametric's directors viewed this 4-to-1 exchange ratio as favorable to Parametric. 7.AA.1299–1301. The market at large agreed, as Houlihan approached nearly 50 companies during the go-shop period without receiving another offer for Parametric. 20.AA.3783.

The companies ultimately executed an agreement for a reverse triangular merger. 20.AA.3782. To effectuate the merger, Parametric created a subsidiary that was merged into Turtle Beach, with Turtle Beach surviving the merger. *Id.* Through this transaction, Turtle Beach became the wholly owned subsidiary of Parametric.[4] *Parametric I*, 133 Nev. at 420 n.4, 401 P.3d at 1103. Because Parametric remained intact, its shareholders were not asked to approve the merger. Instead, the

[4] The new company was renamed "Turtle Beach Corporation." For ease of use, "Turtle Beach" refers to VTBH except where otherwise noted.

Board was required to seek shareholder approval for the stock issuance necessary to effectuate the merger. *Id.*

B. Parametric revokes Potashner's options in HHI.

In early 2013, before Parametric was introduced to Turtle Beach, Parametric had begun planning to create a subsidiary that would apply HyperSound technology to medical products. 20.AA.3780. The subsidiary, known as HHI, had no revenue, no business plan, and no path to profitability. But Potashner believed HHI could succeed and demonstrated interest in leading its efforts. 11.AA.1898. Parametric's board of directors (the "Board") agreed to allow Potashner to pursue the opportunity (over the strenuous objection of certain directors) and, before Turtle Beach came on the horizon, gave Potashner stock options in HHI. 11.AA.1899; 15.AA.2669; 15.AA.2710–11; 7.AA.1292–93.

Potashner believed a merger could give Parametric more resources to grow HHI. 20.AA.3780. But when the merger materialized and the exchange ratio was negotiated, Turtle Beach had not been told about the stock options and thus believed that Parametric would continue to own all of HHI. 3.SA.0578. The options, discovered during due diligence, would diminish Turtle Beach's ownership in Parametric, and Turtle

Beach did not want Potashner's share in Parametric to be diluted less than other shareholders' interests. 20.AA.3780. Turtle Beach thus demanded that Parametric cancel Potashner's options as a condition of the merger, and, over Potashner's strong objection, Parametric obliged, canceling the options with no consideration. *Id.* Parametric also prohibited Potashner from negotiating with Turtle Beach directly regarding the options. 12.AA.2115–17.

C. Parametric's directors seek and follow independent financial advice.

By the time of the merger, the Board's relationship with Potashner had soured. Directors Robert Kaplan, Seth Putterman, and Elwood Norris disagreed with Potashner frequently and testified that they regularly ignored and contradicted his requests. 15.AA.2620–21; 15.AA.2760–61; 20.AA.3787–88. Indeed, each director who testified at trial was clear that their pattern was routinely to disregard and distrust Potashner. 15.AA.2667–69; 15.AA.2758–61; 16.AA.2881–88. Director Kaplan testified that he opposed hiring Potashner, voted against the initial grant of HHI options to him, then voted to cancel those options, and fought Potashner's efforts to force his retirement. 15.AA.2620–22; 15.AA.2669–73. Director Putterman, too, resisted Potashner's attempts

to have him resign from the Board. 15.AA.2754. And Director Norris, the founder of Parametric, the inventor of HyperSound, and Parametric's largest stockholder, testified that he repeatedly ignored and rejected Potashner's threats to replace Board members and otherwise reflexively opposed his proposals.[5] 15.AA.2666; 16.AA.2877–87; 16.AA.2894; 16.AA.2912–15.

Parametric's directors relied on guidance from two financial advisors in connection with the merger. 20.AA.3779; 20.AA.3780–81. As noted above, Houlihan Lokey contacted 13 potential alternative acquirers before the deal was approved and 49 parties during the "go-shop" period—none of which expressed interest in a bid. 20.AA.3779; 20.AA.3783. Craig-Hallum provided a fairness opinion based on seven valuation ranges for Parametric and ten for Turtle Beach. 20.AA.3781; 3.SA.0543–45. Parametric's valuation was based on "aggressive" projections that contained a number of extremely unlikely assumptions, including that Parametric would obtain $15 million in financing (that it

[5] Of the remaining two members, Honoré was never accused of any wrongdoing, and Kaplan, Putterman, and Norris all testified extensively to Director Wolfe's independence from Potashner and worthiness for the Board. 15.AA.2622; 15.AA.2724–25; 16.AA.2911.

already had failed to obtain) and that it could commercialize HyperSound in 2013, which, by all accounts, was impossible. 9.AA.1657–59. The analysis granted Parametric a 500% increase in revenue in 2013 and an additional 2300% increase in 2014. 3.SA.0537. By contrast, Craig-Hallum's valuations of Turtle Beach were based on its actual revenue. 3.SA.0540. With those projections and valuations, Craig-Hallum concluded that the exchange ratio was fair to Parametric. 20.AA.3781.

The Board relied on Craig-Hallum's fairness opinion in good faith, but not uncritically. *See* 20.AA.3781 (referring to "robust discussions" between the Board and Craig-Hallum); 15.AA.2681–82; 15.AA.2757. Given the group's hostility toward Potashner, it is unsurprising that Kaplan, Norris, and Putterman testified that "they did not trust or believe Potashner at all times," but agreed to the merger "based on their independent judgment." 20.AA.3783.

Furthermore, Kaplan, Norris, Putterman, Wolfe, and Honoré "conducted their own analysis" of the merger, with their own "legal counsel and financial advisors." 20.AA.3782. Kaplan in particular performed an independent financial analysis and concluded that the 4-to-1 exchange ratio was very *favorable* to Parametric, as Parametric

would account for only 17.4% of the new company's value, but its shareholders would hold a 20% stake. 15.AA.2682–87. Kaplan shared this analysis with Norris and Putterman. 15.AA.2683; 15.AA.2738.

D. Parametric and Turtle Beach disclose their underperformance.

Both companies underperformed the projections used in Craig-Hallum's analysis, but the difference between their underperformances was an order of magnitude. 20.AA.3784. In a call with Parametric shareholders on August 8, 2013, Turtle Beach specifically warned that 2013 would be a particularly volatile year because both Microsoft and Sony were releasing new gaming consoles for which Turtle Beach's headsets were an accessory. 20.AA.3783–84. For Microsoft in particular, the then-new Xbox One would require a proprietary component for headphones to be compatible with the console. 20.AA.3784. Microsoft failed to make the component available before the holidays, causing extraordinary, but temporary, underperformance. 20.AA.3786. Turtle Beach disclosed the possibility that the component would be withheld on its August call with Parametric's shareholders. 20.AA.3784. Turtle

Beach's actual 2013 revenues were ultimately 18% lower than the projections used in Craig-Hallum's fairness opinion. 20.AA.3784.

By contrast, Parametric missed its 2013 projections by *44%* and lowered its 2014 revenue projections by 83%. *Id.*; 9.AA.1677–78. Parametric's abysmal performance was no surprise; none of the assumptions underlying the projections it provided to Craig-Hallum had materialized, and Parametric was no closer to having a commercial product needed to drive its projected revenue. Parametric's directors considered renegotiating the exchange ratio, but because Parametric's underperformance was so much greater than Turtle Beach's—in addition to Parametric's looming insolvency and the failure of the "go-shop" period—they concluded that any renegotiation only would benefit Turtle Beach.[6] 20.AA.3784.

[6] During 2013, Turtle Beach had a credit facility with PNC Bank, mostly to help it manage cash flow during the holiday season. After a disappointing 2013, Turtle Beach needed more flexibility than the facility allowed, and it eventually paid off its account, entering into a new facility with Bank of America. Turtle Beach's negotiations with PNC regarding an amended facility, and the decision to find another facility, were timely communicated to Potashner and the Board, and the change in facility ultimately had no effect on Turtle Beach. 7.AA.1273; 19.AA.3464; 19.AA.3504; 20.AA.3784.

E. The Board and the shareholders approve the stock issuance, and Potashner leaves Parametric.

The Board unanimously approved the merger on August 2, 2013. 7.AA.1297. Because the directors collectively owned only about 21% of Parametric's common stock (although Potashner, notably, owned no shares), the Board was required to seek shareholder approval for the stock issuance necessary to effectuate the merger. *Parametric I*, 133 Nev. at 420 n.4, 401 P.3d at 1103. Although Parametric was not a party to the merger itself, and its shareholders were not asked to approve it, Parametric did need to issue a significant number of its shares to Turtle Beach to effectuate the transaction. *Id.* On December 27, 2013, Parametric's shareholders approved the transaction with over 95% of voting shares in favor. 20.AA.3786. The merger closed on January 15, 2014. 20.AA.3787.

Following the merger, Potashner left Parametric. Although he received a severance payment and accelerated vesting of stock options, both of those terms had been negotiated as part of his employment agreement that long predated the merger. 8.AA.1408–09; 20.AA.3788–89. Because of a lock-up of management shares negotiated as part of the

merger, Potashner was unable to exercise his options, which eventually expired worthless. 12.AA.2158; 20.AA.3783.

II. THE CLASS ACTION AND *PARAMETRIC I*

A. A shareholder class, including PAMTP's assignors, challenges the merger.

On August 8, 2013, after the merger was announced, a putative class of Parametric shareholders filed complaints in California and Nevada state courts alleging the merger was the product of breaches of fiduciary duty. 20.AA.3773; 7.AA.1250–51. The matter was consolidated with other related cases in the district court, and the shareholders eventually designated the intervening complaint of real-parties-in-interest Boytim and Oakes as the operative class complaint. *Parametric I*, 133 Nev. at 420, 401 P.3d at 1103. The district court certified a class limited to those who held shares of Parametric common stock on January 15, 2014, which included PAMTP's assignors. 1.SA.0053.

The class complaint asserted two causes of action: breach of fiduciary duties as to the Board's individual members and aiding and abetting those breaches as to all other defendants. The complaint alleged generally that all directors except Honoré were conflicted in the merger

and that the defendants' misconduct rendered the exchange ratio unfair. *Parametric I*, 133 Nev. at 420 & n.7, 401 P.3d at 1103.

B. This Court dismisses the class's claims as derivative in Parametric I.

On appeal from the district court's denial of the defendants' motion to dismiss, this Court concluded that the class's claims were derivative and therefore dismissed them. *See Parametric I*, 133 Nev. at 429, 401 P.3d at 1109–10. "A derivative claim is one brought by a shareholder on behalf of the corporation to recover for harm done to the corporation." *Id.* at 423, 401 P.3d at 1105 (citation omitted).[7]

This Court previously had held in *Cohen v. Mirage Resorts, Inc.* that some challenges to mergers were, of their own accord, direct, even when they involved harms that ultimately accrued to the company rather than the individual shareholder. 119 Nev. 1, 62 P.3d 720 (2003); *see Parametric I*, 133 Nev. at 424, 401 P.3d at 1106. *Parametric I* clarified the standing test articulated in *Cohen* to align with the Delaware

[7] To advance a derivative claim, a shareholder must "make a demand on the board of directors to address the shareholder's claims prior to bringing a derivative action, or demonstrate that such a demand is futile." *Id.* (citation omitted). Direct claims are brought on behalf of individual shareholders and, accordingly, do not require showings of demand or futility. *Id.*

Supreme Court's decision in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004). *Parametric I*, 133 Nev. at 425–26, 401 P.3d at 1106–08. *Tooley* employed the "direct harm test," which "distinguish[es] between direct and derivative shareholder claims." *Parametric I*, 133 Nev. at 422, 429, 401 P.3d at 1105, 1109. This test asks two questions: "Who suffered the alleged harm—the corporation or the suing stockholder individually—and who would receive the benefit of the recovery or other remedy?" *Id.* at 422, 401 P.3d at 1105 (citation omitted).

Applying *Tooley* to this case, this Court concluded that *Cohen* (as clarified by *Tooley*) provided no shelter for the shareholders and that the shareholders sought "damages resulting from dilution of equity," failing to "articulate a direct harm without showing injury to the corporation." *Id.* at 427–28, 401 P.3d at 1108–09. *Cohen* was of no help because the shareholders held no shares of an entity that actually merged. *Id.* at 428, 401 P.3d at 1109. Instead, "Turtle Beach was merged into Parametric's subsidiary and became a subsidiary of Parametric." *Id.* The shareholders—including the assignors—held shares only of Parametric, which did not merge. *Id.* By contrast, the plaintiff-shareholders in *Cohen*

were able to challenge the merger because the company in which they owned stock was actually merged. *Id.* at 428, 401 P.3d at 1108–09.

Having determined that Plaintiffs' claims were derivative equity-dilution claims, and not direct merger-challenge claims, this Court recognized only one instance where an equity-dilution claim could be brought directly. At the time, Delaware recognized a carve-out from *Tooley* when, in connection with the issuance of new shares, a controlling shareholder "expropriates" value from the company, diluting other shareholders' positions. *Id.* at 429, 401 P.3d at 1109 (citation omitted).

To succeed on a *Gentile* equity-expropriation claim, a plaintiff must demonstrate that a controlling stockholder "cause[d] the corporation to issue excessive shares of stock" in exchange for less valuable assets and that the exchange increased the controlling shareholder's stake at the expense of minority shareholders' holdings. *Gentile*, 906 A.2d at 100. The shareholder must demonstrate a loss of "economic value and voting power" from minority shareholders. *Id.* at 102. Relying on *Gentile*, this Court gave the shareholders leave to "amend their complaint to articulate equity expropriation claims, if any such claims exist." *Parametric I*, 133 Nev. at 428–29, 401 P.3d at 1109.

Parametric I further held that, in addition to *Gentile*'s elements for equity expropriation, NRS 78.200(2) and 78.211(1) "give conclusive deference to the directors' judgment as to the consideration received for issued stock absent actual fraud." 133 Nev. at 429 n.15, 401 P.3d at 1109.

C. The Class settles its direct claims and any remaining derivative claims.

This Court remanded to allow the class—including PAMTP's assignors, whose rights PAMTP putatively advances—to plead any available equity-expropriation claim. *Id.* at 428–29, 401 P.3d at 1109. On remand, the class brought direct equity-expropriation claims and also re-alleged derivative claims, which the district court permitted it to assert on behalf of the company. 1.AA.0001–90. In 2020, the class and defendants entered into a $9.75 million settlement that extinguished all derivative claims asserted on behalf of the company and the class's direct claims. 1.AA.0091–174. On May 18, 2020, the district court approved the class settlement and entered a final judgment dismissing with prejudice all derivative claims. 1.AA.0175–0203.

III. THE PRESENT LAWSUIT

A. The Assignors opt out of the class settlement (but not the class), create PAMTP, and bring a copycat lawsuit.

In April 2020, nine former Parametric shareholders (the "Assignors")[8] opted out of the class settlement. 20.AA.3804. This group never opted out of the class and enjoyed the benefits of class counsel for the seven-year life of the class lawsuit. 23.AA.4419. The Assignors thereafter formed PAMTP, a Delaware limited liability company, to prosecute this lawsuit, and executed agreements purporting to give PAMTP the right to advance their claims. 20.AA.3804–05.

Each Assignor owned Parametric stock on the merger date, making them putative class members. 20.AA.3805. But at the time of the assignment, every Assignor had sold all the Parametric stock they owned on the date of the merger. *Id.* Indeed, only one Assignor, IceRose Capital Management LLC ("IceRose"), owned *any* Parametric stock when PAMTP was formed (approximately 28,000 shares), and they were not the same shares it owned on the merger date. 20.AA.3805.

[8] The Assignors are identified in PAMTP's opening brief. PAMTP Br. 2.

PAMTP then brought the present lawsuit. *Id.* Its complaint copied the class complaint nearly verbatim,[9] altering it to bring the only two claims it could: one for "Breach of Fiduciary Duty (Equity Expropriation)," and one for aiding and abetting equity expropriation.[10] 2.AA.0204–70. The Assignors notified the district court of their decision to opt out of the class settlement on April 22, 2020, and PAMTP filed its complaint on May 20, 2020. 20.AA.3775. On June 23, 2020, without any objection from PAMTP, the district court consolidated PAMTP's complaint with the class action. 1.SA.0161–66. At trial, PAMTP used discovery that the class conducted, 1.SA.0188–96, and this lawsuit has been treated as a continuation of the class action in all respects.

B. After a bench trial, the district court finds PAMTP failed to prove equity expropriation.

The matter proceeded to an eight-day bench trial in August 2021. After PAMTP's case-in-chief concluded, Defendants moved under Nevada Rule of Civil Procedure 52(c) for judgment on partial findings, arguing

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[9] *See* 1.SA.0067–154 (redline comparing class's complaint to PAMTP's).

[10] As noted above, because the derivative claims were settled on behalf of the company, and not the class, they were completely extinguished. Thus, the Assignors could only opt out of the class settlement and bring the direct equity expropriation claims previously asserted by the class.

that PAMTP had failed to satisfy the elements of equity expropriation. 20.AA.3704–35. After briefing and oral argument, the district court granted the motion, concluding, among other things, that Potashner was not a controlling shareholder or director of Parametric and that PAMTP had failed to prove actual fraud and to overcome the business-judgment rule. 20.AA.3772–95.

As to Potashner's control, the district court found that Potashner owned *zero* shares of Parametric stock at all relevant times. 20.AA.3810; 20.AA.3817–18. It also rejected PAMTP's argument that Potashner exercised *de facto* control over Parametric, noting that "Norris, Putterman and Kaplan often were hostile to Potashner and acted contrary to what they perceived as Potashner's personal interests." 20.AA.3817. The district court also held that a majority of the Board "was independent of Potashner" and regularly voted against his interests. 20.AA.3817–18. Notably, the district court assumed *arguendo* that Potashner's severance payment and stock option vesting constituted expropriation, despite the fact that this compensation was agreed to well before the merger and that it was disclosed in Parametric's proxy statement. 20.AA.3821–22.

The district court noted that it previously had sanctioned Potashner for spoliating text messages and emails that pertained to this case. 20.AA.3803–04. It adopted an adverse inference that Potashner "acted in bad faith when supporting and approving the merger." 20.AA.3809 (citation omitted). But it also made findings that demonstrated the Board cured this self-interested behavior before the deal closed. In particular, the Board demanded that Potashner cancel his HHI options with no compensation. 20.AA.3810. As a result, Potashner "received nothing of value from Turtle Beach and lost stock options that he believed could have held substantial value following the merger." *Id.*

From these and other detailed factual findings, the district court concluded that PAMTP failed to meet its burden to rebut the business-judgment rule as to a majority of the Board, and to prove that a majority of the Board committed any knowing misconduct. 20.AA.3821. It affirmed that Houlihan Lokey and Craig-Hallum had "knowledge and competence concerning the matters in question" and that the directors had no conflicts of interest or lack of independence that colored the Board's reliance on their advice. *Id.* The district court also held PAMTP

failed to prove that the Board's decision involved actual fraud as Nevada law requires. 20.AA.3822.

SUMMARY OF ARGUMENT

The district court's decision should be affirmed for three main reasons. *First*, this Court's unanimous, *en banc* decision in *Parametric I* forecloses the bulk of PAMTP's argument on appeal. *Parametric I* held that the shareholders' claims were derivative and therefore could not survive. It left a narrow path to recovery through an "equity expropriation" claim under *Gentile* and remanded the case to allow the shareholders to shape such a claim. PAMTP took this Court's invitation and brought an equity-expropriation claim and nothing else. It tried that claim and lost.

Now, on appeal, PAMTP engages in brazen gaslighting, pretending that the claim it tried was for a non-*Gentile* breach of fiduciary duty all along. PAMTP argues that the district court erred by holding that its claims were derivative instead of direct. But the district court held no such thing and had no opportunity to do so. In *Parametric I*, *this Court* decided that the only direct claim the Assignors could bring was for equity expropriation, and that its remaining claims were derivative. The

district court held PAMTP did not prove the elements of that direct claim. PAMTP's principal argument on appeal—that a non-*Gentile* challenge to the merger is direct—was never argued to the district court because this Court rejected that same argument in *Parametric I*. Under Nevada's longstanding waiver and law-of-the-case doctrines, this Court should reject PAMTP's repainting of its claims and its transparent attempt to relitigate *Parametric I*. That ends this appeal.

Second, PAMTP did not prove the elements of *Gentile* equity expropriation at trial. The district court concluded that Parametric had no "controlling shareholder or controlling director." PAMTP identifies no clear error in this conclusion. Instead, it argues that neither the business-judgment rule nor the actual-fraud requirement prevents recovery. Even if this were true, it would not establish the elements of equity expropriation. Regardless, PAMTP presents nothing to undermine the district court's findings that a majority of Parametric's Board were independent and disinterested, and that they approved the merger based on their own, independent analysis and judgment, aided by unconflicted, competent outside financial advisors and counsel. PAMTP argues only that Potashner alone acted in bad faith. But even if this were

true, it does nothing to affect the district court's conclusive findings as to the rest of the Board, which remain unchallenged. Its argument that Potashner's actions "tainted" the other directors was never made below, misstates the law, and conflicts with the district court's factual findings.

Third, even if PAMTP could prove an equity-expropriation claim, it lacks standing to litigate that claim. Under *Urdan v. WR Capital Partners, LLC*, shareholders who sell their shares lose standing to bring claims that those shares were improperly diluted. 244 A.3d 668 (Del. 2020). This Court should adopt *Urdan*'s well-reasoned standing analysis. Here, the Assignors sold their Parametric stock before assigning their claims to PAMTP. Therefore, when PAMTP was formed, the Assignors lacked standing to bring their dilution claim. Although the district court did not reach this issue, it noted that it was "troubled" by PAMTP's standing based on its findings of facts. Those findings provide a sufficient, alternative reason for affirmance.

The district court also correctly denied PAMTP's motion to re-tax costs because the Assignors were parties to this action since its inception, and because Defendants are plainly prevailing parties. The district court erred, however, in denying Defendants' attorneys' fees. Nevada law

provides that when an offer of judgment is made and rejected, and the offeree fails to obtain a judgment more favorable than the offer, the offeree must pay fees and costs. Here, Defendants made two offers of judgment, and PAMTP rejected them both. PAMTP lost on both its claims, took nothing, and therefore should have been required to pay Defendants' attorneys' fees.

STANDARD OF REVIEW

Under Nevada Rule of Civil Procedure 52(c), "the district court in a bench trial [may] enter judgment on partial findings against a party when the party has been fully heard on an issue and judgment cannot be maintained without a favorable finding on that issue." *Certified Fire Prot., Inc. v. Precision Constr., Inc.*, 128 Nev. 371, 377, 283 P.3d 250, 254 (2012). "A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a)." NRCP 52(c). In entering the judgment, "the trial judge is not to draw any special inferences in the nonmovant's favor; since it is a nonjury trial, the court's task is to weigh the evidence." *Certified Fire Prot.*, 128 Nev. at 377, 283 P.3d at 254 (citation omitted). In other words, because the trial court

acts as the factfinder, "it need not consider the evidence in a light favorable to the nonmoving party." *Id.* (citation omitted).

"Where a question of fact has been determined by the trial court, this court will not reverse unless the judgment is clearly erroneous and not based on substantial evidence." *Id.* (citation omitted). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Unionamerica Mortg. & Equity Tr. v. McDonald*, 97 Nev. 210, 211–12, 626 P.2d 1272, 1273 (1981) (citation omitted). This Court has explained that "[s]ubstantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *Whitemaine v. Aniskovich*, 124 Nev. 302, 308, 183 P.3d 137, 141 (2008). Additionally, the court "will imply findings of fact and conclusions of law so long as the record is clear and will support the judgment." *Certified Fire Prot.*, 128 Nev. at 379, 283 P.3d at 255 (citation omitted). "Moreover, when the evidence conflicts, [the court] will not disturb the factual findings of the trial court." *Sutherland v. Gross*, 105 Nev. 192, 196, 772 P.2d 1287, 1289–90 (1989) (citation omitted). A trial

court's legal determinations are reviewed *de novo*. *Whitemaine*, 124 Nev. at 308, 183 P.3d at 141.

ARGUMENT

I. PAMTP'S ONLY REMAINING CLAIMS WERE FOR EQUITY EXPROPRIATION.

PAMTP's appeal is not an attack on the Rule 52(c) order, but on this Court's unanimous, *en banc* decision in *Parametric I*. In that decision, this Court found that PAMTP's claims were derivative equity-dilution claims. It granted leave to replead potential equity-expropriation claims under *Gentile*. Thus, in its complaint, PAMTP brought only two claims: one for "Breach of Fiduciary Duty (Equity Expropriation)," and one for aiding and abetting equity expropriation. 2.AA.0267–69. PAMTP tried those two claims, and it lost. That is the end of this case.

PAMTP cannot identify clear error in the district court's conclusions, so its opening brief simply ignores them, pretending that its claims were ordinary breach-of-fiduciary-duty challenges. Both of PAMTP's principal appellate arguments thus fail. It argues first that the district court erred by finding its claims were derivative rather than direct. PAMTP Br. 43–54. But the district court made no such finding. Instead, it was *this Court* that decided which of the class's claims were

derivative or direct. And only the equity-expropriation claims were direct. *Parametric I*, 133 Nev. at 429, 401 P.3d at 1109. This holding renders irrelevant PAMTP's arguments regarding the business-judgment rule and the actual-fraud requirement, PAMTP Br. 54–82.

Moreover, PAMTP's failure to defend the only claim that survived *Parametric I* is fatal under this Court's waiver doctrine. And even if it were not, Nevada's law-of-the-case doctrine prohibits PAMTP from revisiting *Parametric I*'s conclusions.

A. Parametric I *disposed of all claims but equity expropriation.*

The bottom-line holding of *Parametric I* could not be any clearer: with the exception of *Gentile* claims for equity expropriation, the class's challenges were for dilution and were therefore derivative. *Parametric I*, 133 Nev. at 427–28, 401 P.3d at 1108–09. Applying *Tooley*, this Court concluded that the shareholders sought "damages resulting from dilution of equity," failing to "articulate a direct harm without showing injury to the corporation." *Id.* at 427–28, 401 P.3d at 1108–09.

This Court rejected the same framing of the claims that PAMTP presses now. In asserting that its claims were direct, the Assignors and the rest of the class argued that "[t]he new combined company is not the

same one in which Plaintiffs invested." 1.SA.0008. The bulk of its argument to this Court in *Parametric I* was that its claims were merger challenges, not dilution claims. *See, e.g.*, *id.* They also argued that their claims were direct because they "go to the validity of the merger." 1.SA.0007–08. Similarly, here, PAMTP's opening brief centers on the argument that its claims are direct "because they arise out of an improper transfer of the shareholders' control." PAMTP Br. 44.

This Court rejected these arguments. It cabined *Cohen*'s merger rule to mergers involving "cashed-minority shareholders' rights," making clear that *Cohen* provided no shelter to the Parametric shareholders. *Parametric I*, 133 Nev. at 424, 401 P.3d at 1106. Analyzing the shareholders' claims, this Court rejected the class's argument that "all they need to do is allege that the merger was invalid or improper due to the Parametric board of directors' intentional misconduct or fraud." *Id.* at 427, 401 P.3d at 1108. PAMTP restates this same argument, but here, just as in *Parametric I*, PAMTP's claims enjoy no support from *Cohen*, and they "do not have a merger to challenge," as it has never held shares in an entity that merged. *Id.* At bottom, PAMTP "seek[s] damages

resulting from dilution of equity and [has] failed to articulate a direct harm without showing injury to the corporation." *Id.*

Having determined that Plaintiffs' claims were derivative, this Court recognized only one instance in which a dilution claim could be brought directly. At the time, Delaware recognized a carve-out from *Tooley* when, in connection with the issuance of new shares, a controlling shareholder "expropriates" value from the company, diluting other shareholders' economic and voting power. *Parametric I*, 133 Nev. at 429, 401 P.3d at 1109 (citation omitted). This sort of equity-expropriation claim was first recognized in *Gentile*, 906 A.2d 91. *See Parametric I*, 133 Nev. at 429, 401 P.3d at 1109. To succeed on a *Gentile* equity-expropriation claim, a plaintiff must demonstrate that a controlling stockholder "cause[d] the corporation to issue excessive shares of stock" in exchange for less valuable assets and that the exchange increased the controlling shareholder's stake at the expense of minority shareholders' holdings. *Gentile*, 906 A.2d at 100.[11]

[11] In 2021, mere days after judgment was entered in this case, Delaware did away with *Gentile* claims. *See Brookfield*, 261 A.3d 1251. *Brookfield* held instead that under *Tooley*, "the stockholder's claimed direct injury must be *independent* of any alleged injury to the corporation." *Id.* at 1268

PAMTP's opening brief all but ignores *Parametric I*, arguing instead that the district court erred in holding that its claims were derivative instead of direct. The premise of this argument—that the *district court* made this holding—is patently false. The district court held no such thing because *Parametric I* gave it no choice, having already defined the scope of direct and derivative claims in this matter. Indeed, the district court noted on the first page of its order that *Parametric I* determined that a direct equity-expropriation claim was all that remained of the case. 20.AA.3772.[12] PAMTP's extensive argument on this point is thus superfluous as to its only viable claim. And as to the claims it now pretends it brought, *Parametric I* very clearly decided that the class's claims were for equity dilution, which, with the narrow exception of *Gentile* equity expropriation, are derivative under the *Tooley* test.

(citation omitted; emphasis in original). It follows that "*Gentile* claims . . . are exclusively derivative under *Tooley*." *Id.* at 1277.

[12] *See also* 20.AA.3791 ("In 2017, the Nevada Supreme Court ruled in this litigation that the only direct claim that Parametric shareholders might have standing to assert arising out of the merger was an 'equity expropriation' claim." (quoting *Parametric I*, 133 Nev. at 429, 401 P.3d at 1109)).

PAMTP also argues—for the first time on appeal—that *Parametric I* "did not require a showing of expropriation by a controlling shareholder." PAMTP Br. 47. It claims that "this Court left the precise contours of a direct equity dilution claim open for consideration." *Id.* at 48. This too is false. *Parametric I* clearly identified the elements of a *Gentile* claim: "a controlling shareholder's or director's expropriation of value from the company, causing other shareholders' equity to be diluted." 133 Nev. at 429, 401 P.3d at 1109 (citing *Gentile*, 906 A.2d at 99–100, and *Gatz v. Ponsoldt*, 925 A.2d 1265, 1277 (Del. 2007)).[13] PAMTP clearly understood these elements until this appeal, as it argued that it met them in its district court briefing and at trial. *See infra* Part I.B.1.

[13] To those elements, this Court added that Nevada law "give[s] conclusive deference to the directors' judgment as to the consideration received for issued stock absent actual fraud." *Id.* at 429, 401 P.3d at 1109 n.15 (citing NRS 78.200(2) and 78.211(1)). Thus, in addition to the *Gentile* elements, the shareholders were required to "show actual fraud in any direct equity dilution claim they may have." *Id.* The district court correctly held that PAMTP failed to prove that the merger was the product of "actual fraud, intentional misconduct, or bad faith." *Id.*; 20.AA.3792; *see infra* Part II.B.

B. PAMTP cannot relitigate Parametric I.

1. PAMTP has waived any argument that its claims were not for equity expropriation.

PAMTP's wishful reconstruction of its claims comes very late in a very long game. Even if that reconstruction had merit, this Court will not consider nonjurisdictional arguments raised by an appellant and "not urged in the trial court." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). The same treatment applies to arguments that are "inconsistent with" and "different from the [argument] raised below," depriving the appellee and the district court an "opportunity to address" them. *Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 437, 245 P.3d 542, 544–45 (2010) (citation omitted).

Here, PAMTP's arguments to the district court were premised on *Parametric I*'s adoption of *Gentile* equity expropriation. PAMTP's pretrial brief presented eight principal issues of law that it expected to be contested at trial. 2.SA.0291–97. Among these eight issues: "Breach of Fiduciary Duty by Equity Expropriation," 2.SA.0291, "Defendant Potashner's Control Over the Company," 2.SA.0292, and "Breaches of Fiduciary Duty by Equity Expropriation Against the Other Director

Defendants," 2.SA.0293. Each of these issues is relevant only to equity expropriation.[14]

PAMTP's four opposition summary-judgment briefs similarly made no mention of any claim but equity expropriation as defined by *Gentile*. Opposing Defendants' first motion for summary judgment,[15] PAMTP's single point of argument was headed, "Defendants' Motion Fails Because Plaintiff Can Prove the Elements of Its Direct Claim for Equity Expropriation." 2.SA.0243. Within that argument, PAMTP asserted that "Potashner, Barnes and Norris Controlled Parametric," 2.SA.0245, and relied liberally on *Gentile*. Neither that brief nor any other brief in the district court raised any argument that *Parametric I* allowed for anything but a *Gentile* equity-expropriation claim.

PAMTP's Rule 52(c) brief, too, contained only an argument based on *Parametric I*'s actual-fraud requirement. 5.AA.0845–50. It acknowledged that its only claim was for equity expropriation, entitling

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[14] The other five issues were secondary to PAMTP's principal arguments. 2.SA.0294 (aiding and abetting); *id.* (damages); 2.SA.0295 (prejudgment interest); 2.SA.0296 (punitive damages); *id.* (standing).

[15] Defendants moved for summary judgment on all counts, 1.SA.0197–228, giving PAMTP ample reason to raise any available argument to save its claims.

its only point of argument, "'Actual Fraud' in Equity Expropriation Claims," 5.AA.0846, and arguing that the actual-fraud requirement "should not be read to heighten Plaintiff's burden of proof" above the *Gentile* elements. 5.AA.0849.

In sum, PAMTP's present theory is both "inconsistent with" and "different from the [theory] raised below," which deprived Defendants and the district court any "opportunity to address" it. *Schuck*, 126 Nev. at 437, 245 P.3d at 544–45. Its positions are wrong and completely disregard *Parametric I*. *See supra* Part I.A. But because they were not presented below, this Court should disregard them.

2. *Parametric I* is the law of the case.

Even if PAMTP had relied on its newfound theory below, *Parametric I* already rejected it. Nevada's law-of-the-case doctrine requires that an appellate court's decision on "a principle or rule of law . . . governs the same issues in subsequent proceedings." *Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010) (citations omitted). The doctrine applies to issues that were decided "explicitly or by necessary implication." *Id.* (citations omitted). It prevents the relitigating of decided issues in both trial and appellate

courts. *See, e.g.*, *Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 266, 71 P.3d 1258, 1262 (2003).

Here, *Parametric I* clearly disposed of the principal issue PAMTP raises on appeal.[16] PAMTP argues that the district court erred by concluding that its claim is derivative rather than direct. PAMTP Br. 43–54. As discussed above, the district court did not hold this; *Parametric I* did. 133 Nev. at 427–28, 401 P.3d at 1108–09. It left the door open only for a *Gentile* equity-expropriation claim. *Id.* at 428–29, 401 P.3d at 1109. That claim could survive only insofar as it was direct. *Id.* at 423, 401 P.3d at 1105.[17]

PAMTP's choice to file a new complaint rather than amend the class complaint does not immunize PAMTP from *Parametric I*. Any right PAMTP has to litigate the present case comes from the Assignors, who were members of the class from the beginning of this lawsuit in 2013

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[16] PAMTP's argument that the district court over-applied *Parametric I*, PAMTP Br. 47–54, is addressed at further length below. *See infra* Part II.

[17] Moreover, as the district court found, "[a]ny other claim contesting the merger would be derivative in nature, and was extinguished by the settlement." 20.AA.3791; *accord Parametric I*, 133 Nev. at 421, 401 P.3d at 1104 n.9 ("The shareholders do not argue . . . they can assert a derivative claim.").

through May 2020, including through the 2018 announcement of *Parametric I*. *See Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 261, 321 P.3d 912, 917 (2014) (party is in privity with "[t]he representative of a class of persons similarly situated, designated as such with the approval of the court, of which the person is a member" (citation omitted)); *In re Integra Realty Res., Inc.*, 354 F.3d 1246, 1259 (10th Cir. 2004) (law-of-the-case doctrine precludes "fellow class members" from relitigating same legal issue (citation omitted)). The Assignors opted out of the settlement agreement (but not the class), and did so years after this Court's decision in *Parametric I*.

Any contrary argument would face several insurmountable hurdles. First, PAMTP has waived any argument that it was not bound by *Parametric I* by failing to advance it to the district court. *See Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983. Second, PAMTP did not make this argument in its opening brief and cannot raise it for the first time on reply. *See Khoury v. Seastrand*, 132 Nev. 520, 530 n.2, 377 P.3d 81, 88 (2016). And finally, even if PAMTP's lawsuit were separate from the class's, its claims and the issues it seeks to relitigate would be barred by

claim and issue preclusion. *See Alcantara*, 130 Nev. at 257–58, 321 P.3d at 915–16.[18]

II. PAMTP DID NOT AND CANNOT PROVE AN EQUITY-EXPROPRIATION CLAIM.

PAMTP's argument that its claims were something different from *Gentile* equity expropriation is a tacit admission that it cannot show error in the district court's conclusions. PAMTP does not even attempt to show that the district court erred in concluding that Parametric lacked a controlling shareholder or director, as *Gentile* required. Nor does it argue that a controlling shareholder or director expropriated any value from Parametric. Regardless of PAMTP's arguments, the district court's conclusions were correct.

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[18] Indeed, the doctrine of issue preclusion bars all of PAMTP's attempts to relitigate *Parametric I*. *Parametric I* decided necessarily, finally, and on the merits that non-*Gentile* challenges to the merger were derivative. *See Alcantara*, 130 Nev. at 258, 321 P.3d at 916. The Assignors were plaintiffs in *Parametric I*, putting PAMTP in privity with a party to that case. *See id.* at 261, 321 P.3d at 917 (privity attaches to a litigant "who is represented by a party" to the previous case, including "[t]he representative of a class" (citation omitted)). This precludes PAMTP from arguing now that a non–equity-expropriation claim is direct, as well its arguments as to actual fraud and the business-judgment rule, which go only to the validity of a non-*Gentile* challenge. *See id.* at 259, 321 P.3d at 916–17.

PAMTP's failure to satisfy *Gentile* was not its only fatal error. Nevada law applies the business-judgment rule to directors, which requires plaintiff-shareholders to show actual fraud by directors to recover for breach of fiduciary duty in challenges to stock issuances. PAMTP argues that neither the business-judgment rule, PAMTP Br. 55–68, nor the actual-fraud requirement, *id.* at 68–82, prevents recovery. PAMTP's argument is a red herring: even if PAMTP could overcome either presumption, it would not fulfill the elements of equity expropriation. In any event, the district court did not clearly err in these conclusions.

PAMTP argues further that *Brookfield*, which expressly overruled *Gentile*, somehow accrued to PAMTP's benefit by eliminating the "controlling shareholder" requirement from equity-expropriation claims. This is flatly incorrect; if anything, *Brookfield* foreclosed PAMTP's only possible basis for recovery.

A. Under Gentile*, as adopted by* Parametric I*, PAMTP's claims fail.*

The district court applied *Gentile*'s elements faithfully. 20.AA.3791. It assumed without deciding that Potashner's severance payment and accelerated options vesting constituted expropriation from

the company and that it caused Parametric shareholders' equity to be diluted.[19] 20.AA.3791–92. But it held that PAMTP failed to prove that Parametric had a controlling shareholder or director. 20.AA.3792. *See Parametric I*, 133 Nev. at 429, 401 P.3d at 1109.

This conclusion was supported by ample, accurate factual findings. Based on the directors' own testimony and on records of the Board's analysis and deliberation, the district court concluded that the votes of directors Kaplan, Norris, Putterman, Wolfe, and Honoré to approve the merger "were not guided by, let alone controlled by, Potashner's support for the merger." 20.AA.3782–83; *see also* 20.AA.3787 (detailing the Board's "hostil[ity]" toward Potashner). Norris, Putterman, Kaplan, and Honoré had "no business interactions with Potashner" before Parametric, and "[n]one of the Settling Directors was unable to freely exercise his judgment . . . by reason of dominion or control of another." 20.AA.3788. And it held that no single person or group had unilateral authority to

[19] This assumption was incorrect. Potashner's severance and accelerated vesting were arranged long before the merger came about. 20.AA.3787. Moreover, *Gentile* requires the expropriation of "economic value *and voting power*" from minority shareholders. 906 A.2d at 102 (emphasis added). PAMTP has never disputed that no voting power was expropriated from minority shareholders.

"cause Parametric to merge," among other things. *Id.* The district court found further that "[n]either the Settling Directors nor any combination of Parametric insiders owned sufficient shares in the pre-merger Parametric to control the outcome of the vote in favor of the merger." 20.AA.3786. Finally, and perhaps most important, on the merger's record date, "Potashner owned *no shares*" of Parametric stock and thus could not even vote to approve the issuance of stock to effectuate the merger. 20.AA.3787 (emphasis added).

PAMTP ignores these findings and makes no argument that the district court clearly erred in concluding Potashner did not control Parametric. Instead, it moves the goalposts, arguing that *Gentile*'s "controlling shareholder or director" element does not require a director to have actual, 50% control. PAMTP Br. 48–49. It claims that the district court incorrectly read *Parametric I* "to require that the director must also be 'controlling,' *i.e.*, hold a controlling share position." *Id.* at 48.

This is wrong. As discussed above, the district court made extensive findings regarding Potashner's alleged *de facto* control of Parametric, apart from his ownership interest (or lack thereof) in the company. For example, it concluded that that Norris, Putterman, and

Kaplan were openly hostile to Potashner and "acted contrary to what they perceived as Potashner's personal interests." 20.AA.3787. These actions included canceling Potashner's HHI options with no consideration, rebuffing his efforts to oust Kaplan and Wolfe from their positions, and refusing to allow Potashner to sell any Parametric stock after the merger was announced. *Id.* PAMTP also ignores its own Managing Member's stark admission that to be "controlling" for these purposes, a shareholder "must own at least one share" of Parametric's stock. 6.AA.1059.

B. PAMTP cannot overcome Nevada's statutory protections for board decisions.

Much of the opening brief attacks the district court's holdings that PAMTP failed to overcome the business-judgment rule, the intentionality requirement of *Chur*, 136 Nev. 68, 458 P.3d 336, and Nevada's actual-fraud requirement. PAMTP Br. 54–82. This argument proves too little: to succeed at trial, PAMTP had to fulfill the elements of *Gentile* equity expropriation. *Parametric I*, 133 Nev. at 428, 401 P.3d at 1109. It did not, *see supra* Part II.A, and its failure to argue that it did ends this case, *see supra* Part I.B.1.

But even if PAMTP's arguments were indulged, they would fail. The district court correctly held that Nevada's business-judgment rule and *Chur*'s intentionality requirement insulated the Board from liability. It made detailed factual findings supported by substantial evidence, including that five of the Board's six directors approved the merger independently and only after thorough analysis. The district court was also correct that PAMTP failed to meet its burden to demonstrate that Potashner engaged in actual fraud. PAMTP's arguments otherwise rely on irrelevant Delaware cases that conflict with Nevada law. And the core of its argument as to actual fraud—that Potashner's conduct "tainted" the Board's approval of the merger—has no basis in law.

1. The Board was protected by the business-judgment rule and *Chur*.

To succeed on a breach-of-fiduciary-duty claim under Nevada law, shareholders must rebut the business-judgment rule and prove that the alleged breach of fiduciary duty involved "intentional misconduct, fraud or a knowing violation of law."[20] *Chur*, 136 Nev. at 71–72, 458 P.3d at

[20] This requirement is in addition to Nevada's actual-fraud requirement, which applies to the issuance of stock. *Parametric I*, 133 Nev. at 429 n.15, 401 P.3d at 1109 (citing NRS 78.200(2) and NRS 78.211(1)).

339–40 (quoting NRS 78.138(7)(b)(2)); *see also id.* at 71, 458 P.3d at 339 ("NRS 78.138 provides the sole mechanism to hold directors and officers individually liable for damages in Nevada."). The district court correctly concluded that Parametric's Board was entitled to the protections of the business-judgment rule and that PAMTP failed to show intentional malfeasance under *Chur*.

The district court relied on extensive evidence establishing that the Board's decision was informed by competent, independent advice. It held that the Board "engaged in robust discussions among themselves" and with its advisers regarding the deal and its alternatives. 20.AA.3779; *see also* 20.AA.3781–82. It further concluded that each director "determined independently that the merger was in the best interests of Parametric" and that Kaplan, Norris, Putterman, Wolfe, and Honoré "conducted their own analysis" of the merger, with their own "legal counsel and financial advisors." 20.AA.3782. The district court also found that before the deal was approved, Houlihan Lokey contacted 13 potential alternative acquirers and that none of them was interested in acquiring Parametric. 20.AA.3779. Houlihan Lokey also contacted 49 parties during the "go-shop" period, none of which expressed interest in a bid. 20.AA.3783.

Moreover, Craig-Hallum provided a fairness opinion on the Merger after conducting extensive financial analyses based on Parametric's and Turtle Beach's financials, including Turtle Beach's "net cash, number of fully-diluted shares of common stock outstanding and net operating losses." 20.AA.3781; 3.SA.0515–75. Craig-Hallum concluded that the exchange ratio was fair to Parametric. 20.AA.3781. The district court also found that the Board "engaged in robust discussion with representatives of Craig-Hallum" regarding its calculations and "relied in good faith upon the competency of" Craig-Hallum's opinions and analyses. *Id.* No director was ever told of any errors in those analyses. *Id.* The district court further found that each company was aware of the other's underperformance, 20.AA.3784, and that Parametric's proxy statement contained Turtle Beach's year-to-date 2013 revenues and disclosed issues surrounding its debt covenants, 20.AA.3785–86.

The district court also dealt thoroughly with Potashner's discovery violations and its own adverse evidentiary inference of bad faith. It had found Potashner "acted in bad faith when supporting and approving the merger," 20.AA.3779 (citation omitted), and that he sought to "enrich himself" through his HHI options, 20.AA.3780. But it also made findings

that demonstrated the Board cured this self-interested behavior before the deal closed. In particular, the Board demanded that Potashner forfeit his HHI options with no compensation. 20.AA.3780. As a result, Potashner "received nothing of value from Turtle Beach and lost stock options that he believed could have held substantial value following the merger." *Id.*

More important, the district court found that despite its adverse inference, the Board approved the merger "by a majority of independent and disinterested directors exercising their business-judgment in good faith." 20.AA.3782; *see also* 20.AA.3782–83. It made special note of Kaplan's, Norris's, and Putterman's testimony that "they did not trust or believe Potashner at all times," but agreed to the merger "based on their independent judgment." 20.AA.3783. The district court recited several incidents of the same group's "hostil[ity]" toward Potashner, including its refusal of Potashner's requests to remove Wolfe from the audit committee and to sell Parametric stock after the merger was announced. 20.AA.3787–88.

PAMTP offers no basis to conclude that these findings are clearly erroneous. Nor does it challenge the district court's conclusion that under

Chur, NRS 78.138 "must protect . . . directors who knew what they did but not that it was wrong." 20.AA.3790 (quoting *Chur*, 136 Nev. at 74, 458 P.3d at 342). As discussed above, each Director's trial testimony substantially supports the district court's findings regarding the Board's independence and good faith. This Court therefore has no basis on which to conclude that the business-judgment rule and *Chur*'s intentionality requirement do not protect the Board. 20.AA.3791.

2. The district court was correct that the merger did not involve actual fraud.

In addition to protections under *Chur* and the business-judgment rule, Nevada law "give[s] conclusive deference to the directors' judgment as to the consideration received for issued stock absent actual fraud." *Parametric I*, 133 Nev. at 429 n.15, 401 P.3d at 1109 (citing NRS 78.200(2) and 78.211(1)). The district court's factual conclusions also support its holding that PAMTP failed to satisfy the actual-fraud requirement. 20.AA.3791. And indeed, the district court requested and considered full briefing on this issue. 5.AA.0845–50; 5.AA.0905–14. This Court need not reach this issue, of course, because the business-judgment rule and *Chur* insulate the Board from liability. But even if it did address PAMTP's argument as to actual fraud, they would fail.

PAMTP argues principally that the term "actual fraud" in NRS 78.211(1) does not mean what it says, but instead extends to "a range of deliberate wrong-doing involving deception or manipulation." PAMTP Br. 70. While PAMTP chides the district court for failing to "explain what it thought 'actual fraud' meant," *id.* at 69, not a single word of PAMTP's 89-page brief explains what portion of the "range" of wrongdoing should or does apply in Nevada. Instead, PAMTP simply insists that whatever actual fraud is, it does not require that a plaintiff prove the elements of a cause of action for common-law fraud. PAMTP Br. 69–74. This argument is a scarecrow. The district court never held—and no defendant ever argued—that PAMTP needed to prove the elements of a common-law fraud cause of action. Indeed, as PAMTP acknowledges, PAMTP Br. 73 (citing NRS 78.138(7)), Nevada law precludes all common-law causes of action against directors.

Moreover, PAMTP's argument relies on a convoluted misreading of the actual-fraud requirement. It claims Nevada courts have not decided what "actual fraud" means and, writing on a blank slate, cites only a handful of Delaware cases. PAMTP Br. 70–74. But Nevada law gives ample, conclusive guidance as to the meaning of "actual fraud."

Statutory terms that have "a well defined meaning at common law are presumed to be used in their common law sense." *Moser v. State*, 91 Nev. 809, 812–13, 544 P.2d 424, 426 (1975) (citation omitted); *see also Ibarra v. State*, 134 Nev. 582, 584, 426 P.3d 16, 18 (2018) ("[I]f a term known to the common law has not otherwise been defined by statute, it is assumed that the common-law meaning was intended." (citation omitted)). Here, several cases from this Court define "actual fraud" as a common-law term and hold that it requires proof of intentional, false statements on which the claimant relied.[21] At least four of these cases, *see supra* note 21, were decided before 1991, when the actual-fraud requirement was enacted. This Court should assume that when the Legislature used the term "actual fraud," it was aware of that term's well-established meaning in Nevada common law.

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[21] *See Pac. Maxon, Inc. v. Wilson*, 96 Nev. 867, 871, 619 P.2d 816, 818 (1980) (defining "actual fraud" as "an intentional false representation which is relied upon in fact"), *op. modified*, 102 Nev. 52, 714 P.2d 1001 (1986); *N. Nev. Mobile Home Brokers v. Penrod*, 96 Nev. 394, 398, 610 P.2d 724, 727 (1980) ("actual fraud" exists where plaintiff relied on intentionally "untruthful and misleading" statements); *Havas v. Alger*, 85 Nev. 627, 633, 461 P.2d 857, 860 (1969) (defining "actual fraud" as "intentional misrepresentations of material fact . . . resulting in the intended deception"); *Friendly Irishman, Inc. v. Ronnow*, 74 Nev. 316, 318, 330 P.2d 497, 498 (1958).

The Delaware cases PAMTP cites to support its non-definition of actual fraud are unhelpful. *See* PAMTP Br. 71. *Parfi Holding AB v. Mirror Image Internet, Inc.*, which was reversed, did not address any claim for breach of fiduciary duty. 794 A.2d 1211, 1233 (Del. Ch. 2001), *rev'd,* 817 A.2d 149 (Del. 2002). PAMTP argues that *Parfi* interpreted a Delaware statute that is similar to Nevada's actual-fraud requirement. *Compare* NRS 78.211(1), *with* 8 Del. C. § 152. But *Parfi* stated explicitly that the Delaware statute was "inapplicab[le]" to the case. 794 A.2d at 1234.

Similarly, *Lewis v. Scotten, Dillon Co.* involved a fee request following a merger challenge that allegedly led to the deal falling through. 306 A.2d 755 (Del. Ch. 1973). The question before the court was whether the complaint presented "reasonable hope of ultimate success," which would render the plaintiff a "prevailing party" under the fee statute. *Id.* at 758. The court held that because the CEO of the defendant company had invested in the merger target, the complaint had such "hope." *Id.*; *see also id.* at 757 (noting that "excessive valuation, standing alone, is not enough" to show actual fraud (citation omitted)). Here, of course, there is no such conflict of interest, and the question is

not whether PAMTP's complaint *might* be meritorious. Its claims were actually tried, and they failed.

Diamond State Brewery v. De La Rigaudiere, too, stated that "a showing of no more than excessive valuation is insufficient to overcome the conclusiveness of the directors' judgment." 17 A.2d 313, 316 (Del. Ch. 1941). It ruled on the pleadings that "in addition to gross overvaluation, a partial failure of consideration has been demonstrated," overcoming the actual-fraud requirement. *Id*. at 317. Here, there is no such failure of consideration, and PAMTP's claims were tried to conclusion.

3. Potashner did not "taint" the merger.

Even if PAMTP had proven that Potashner engaged in actual fraud, it would not establish that, in approving the merger, the Board itself committed actual fraud. *See Wynn Resorts, Ltd. v. Eighth Judicial District Court*, 133 Nev. 369, 376, 399 P.3d 334, 342 (2017) (rejecting "argument that the business judgment rule applies only to individual directors and officers and not the Board itself" and holding instead that a plaintiff must overcome the rule for the Board as a whole).

PAMTP essentially concedes that a majority of the Board committed no fraud and argues instead that Potashner's misdeeds

"taint[ed] the board process," defeating statutory deference. PAMTP Br. 57 (citation omitted; cleaned up); *see id.* at 57–68. With no Nevada authority on its side, PAMTP cites three unpublished Delaware cases involving misconduct of less than a majority of Board members. PAMTP Br. 58–61 (citing *In re Emerging Commc'ns, Inc.*, 2004 WL 1305745 (Del. Ch. May 3, 2004), *In re Dole Food Co., Inc.*, 2015 WL 5052214 (Del. Ch. Aug. 27, 2015), and *In re Oracle Corp.*, 2018 WL 1381331 (Del. Ch. Mar. 19, 2018)). It claims that these cases—none of which was cited to the district court, 5.AA.0846–48—excused PAMTP from overcoming the presumption that a majority of the Board acted in good faith.

These cases are inapposite. The portions of *Oracle* that PAMTP cites addressed a Rule 12(b)(6) motion to dismiss a complaint. Its relevant holding is that the allegations PAMTP identifies—that two of Oracle's thirteen directors worked to manipulate an acquisition process, PAMTP Br. 60–61—"support[ed] a reasonable inference" that a duty of loyalty was breached. 2018 WL 1381331, at *21. Here, there is no need for such inferences, as this case was tried. Even if Potashner's misdeeds had supported a reasonable inference of a breach, that inference was defeated by the district court's factual findings after a trial on the merits.

Dole and *Emerging Communications* are similarly irrelevant. Those cases involved transactions with controlling shareholders, a condition absent here. Moreover, they involved an "entire fairness" analysis this Court has rejected as inconsistent with Nevada's business-judgment rule and *Chur*'s intentionality requirement. *Guzman v. Johnson*, 137 Nev. 126, 130–32, 483 P.3d 531, 536–37 (2021); *see Dole*, 2015 WL 5052214, at *26, *38; *Emerging Commc'ns*, 2004 WL 1305745, at *32–38.

PAMTP's argument that "the record is replete with instances of Potashner's and the Non-Director Defendants' fraud and misconduct" is thus aimed toward the wrong target. For example, testimony that "Potashner was a serial liar," PAMTP Br. 63, does nothing to establish that a majority of the Board was not entitled to business-judgment-rule protection for approving the merger. *See Wynn*, 133 Nev. at 376, 399 P.3d at 342. So, too, fails PAMTP's observation that the Board "took no steps to remove Potashner." PAMTP Br. 64. PAMTP does not state a claim against the Board for failing to fire Potashner. Its claims are premised instead on the approval of the merger, which Potashner had no power to

effectuate alone. At most, PAMTP's argument fulfills a legal standard that is irrelevant to this case.

So, too, fails PAMTP's argument that Potashner's conduct constituted actual fraud "under any standard." PAMTP Br. 74. Allegations regarding Potashner's (or Stark's or Fox's) conduct are relevant only insofar as they ultimately affected the disposition of the Board. Potashner had no independent authority to overrule the Board. *See Wynn*, 133 Nev. at 376, 399 P.3d at 342.[22]

C. Gentile *has been overruled, eliminating PAMTP's only viable claim.*

Additionally, the basis on which *Parametric I* allowed this case to proceed no longer exists. Days after the entry of judgment in this case, the Delaware Supreme Court did away with equity-expropriation claims and overturned *Gentile*. *Brookfield*, 261 A.3d at 1255. It held that *Gentile*'s fifteen-year life had "confus[ed]" *Tooley*'s "straightforward" rule.

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[22] This applies with equal force to PAMTP's argument that Potashner must be held liable regardless of the remainder of the Board's liability, PAMTP Br. 82–83. PAMTP's claims (and its theory of damages) rest entirely on the approval of the merger. Potashner was incapable of approving the merger himself. Similarly, PAMTP's argument that Potashner "slow played" licensing discussions, PAMTP Br. 11, fails to impugn the Board's judgment in approving the merger.

Id. at 1267. One example of this confusion was *Gentile*'s conclusion that "economic and voting dilution was an injury to stockholders *independent* of any injury to the corporation." *Id.* (emphasis in original). *Gentile* had held a dilution claim could be "*both* derivative and direct." *Id.* at 1268 (emphasis in original). But under *Tooley*, "the stockholder's claimed direct injury must be *independent* of any alleged injury to the corporation. *Id.* at 1268 (quoting *Tooley*, 845 A.2d at 1039). The *Brookfield* plaintiffs had alleged that a transaction had caused the issuance of shares to the acquirer for a sub-market price, diluting stockholders' "economic and voting power." *Id.* This may have sufficed to establish a direct claim for equity expropriation. But under *Tooley*, the "overpayment in stock and consequent dilution of minority interest" was clearly derivative. *Id.* From this and other factors, the court concluded that *Gentile* claims "are exclusively derivative under *Tooley*." *Id.* at 1277.

PAMTP's opening brief ignores this holding and badly misrepresents *Brookfield*, going as far as arguing that it accrues to PAMTP's benefit. In reality, if anything, *Brookfield* eliminated the only reason this Court had to allow PAMTP's claims to move forward:

adopting Delaware law as announced in *Gentile* and *Tooley*. *Parametric I*, 133 Nev. at 427, 401 P.3d at 1108.[23]

PAMTP's account of *Brookfield* otherwise fails. For the most part, PAMTP erroneously argues that *Brookfield* struck the controlling-shareholder requirement from equity-expropriation claims and, in effect, relaxed direct-standing requirements. PAMTP Br. 49–54. PAMTP also halfheartedly argues that *Paramount Communications Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1994), which predates *Parametric I* by more than 20 years, was a "change" in the law that supports the proposition that its reinvented claims are direct. PAMTP Br. 44–45; *see Brookfield*, 261 A.3d at 1267 n.66 (citing *Paramount*, 637 A.2d at 42–43,

[23] While Defendants clearly prevail under *Gentile*, *see supra* Part II.A, this Court would be well within its rights to modify *Parametric I* to do away with equity-expropriation claims altogether, aligning *Parametric I* with *Brookfield*. This Court has noted that "weighty and conclusive" reasons to overrule or modify a precedent exist when "the reasoning underlying" the case is later held to be erroneous. *Armenta-Carpio v. State*, 129 Nev. 531, 536, 306 P.3d 395, 398 (2013). Accordingly, in *In re Estate of Sarge*, this Court overturned a joinder principle that was developed to conform with federal treatment of the same matter, after "the federal cases relied upon" in previous cases were "overruled." 134 Nev. 866, 870, 432 P.3d 718, 722 (2018). So, too, here: the only reason to recognize *Gentile* claims is now gone. *See Fairholme Funds, Inc. v. United States*, 26 F.4th 1274, 1288 (Fed. Cir. 2022) (holding that in light of *Brookfield*, *Gentile*'s exception to *Tooley* is "no longer viable").

and *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173 (Del. 1986)). According to PAMTP, *Brookfield* held that any "claim by shareholders 'to address fiduciary duty violations in a change of control context' is a 'direct claim.'" PAMTP Br. 44 (quoting *Brookfield*, 261 A.3d at 1276).

This rehashes an argument *Parametric I* rejected and is contrary to Nevada law. Nevada does not allow for the application of *Paramount* and its progenitor, *Revlon*, 506 A.2d 173. Nevada's corporate code provides that directors need not consider "the effect of a proposed corporate action upon any particular group or constituency having an interest in the corporation as a dominant factor." NRS 78.138(5). This provision disallows directors from entering "*Revlon* mode," in which their fiduciary duties shift to maximizing the value of the company's acquisition. *Cf. Guzman*, 137 Nev. at 130–32, 483 P.3d at 536–37 (rejecting Delaware's "inherent fairness standard" as conflicting with NRS 78.138). As a result, the adoption of a cause of action premised on *Revlon* would be contrary to Nevada law.

Even if *Paramount* and *Revlon* applied in Nevada, PAMTP misconstrues their holdings. Neither case establishes a "claim." Nor

does either case affect the direct-derivative taxonomy. In fact, both cases were litigated between competing tender offerors. *Revlon*, 506 A.2d at 175; *Paramount*, 637 A.2d at 36. Instead, *Revlon* applies "enhanced scrutiny" to some transactions resulting in a change of control. 506 A.2d at 184. Before applying the business-judgment rule, Delaware courts will ask whether the directors' decision was "within a range of reasonableness," analyzing the directors' decisionmaking process and its result. *Paramount*, 637 A.2d 34, 45 (citations omitted).[24]

III. PAMTP LACKS STANDING.

Even if PAMTP could resurrect its equity-expropriation claim, it lacks standing to bring it. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (Nevada appellate courts will affirm on any ground supported by the record, regardless of whether the district court ruled on it). Relying on a Delaware statute with a verbatim Nevada counterpart, the Delaware Supreme Court held unanimously in *Urdan* that shareholders who sell their shares lose

[24] Although *Revlon* scrutiny is irrelevant to this case, there is no doubt that the district court's findings as to the directors' process and their overall independence, *see supra* Parts II.A–B, would satisfy its reasonableness analysis. Here, again, PAMTP points to no clear error that would establish a lack of reasonableness in process or outcome.

standing to bring claims that those shares were diluted. 244 A.3d 668. Here, the district court found that the Assignors sold their Parametric stock before assigning their claims to PAMTP. 20.AA.3775. Therefore, when PAMTP was formed, the Assignors lacked standing to bring their claims.

A. The right to litigate dilution claims attaches to shares, not shareholders.

Urdan's holding was based on Delaware Code § 8-302(a), which states that "a purchaser of a certificated or uncertificated security acquires all rights in the security that the transferor had or had power to transfer." 244 A.3d at 677 (quoting 8 Del. C. § 302(a)). The court held that because dilution rights "arise[] from the relationship among stockholder, stock and the company," the right to sue for dilution travels with the stock, not its owner. *Id.* at 678 (citation omitted). This is true whether the claims are "direct, derivative, or both." *Id.*

This reasoning is no less compelling in Nevada. The statute that *Urdan* applied is identical to a provision of the Nevada corporate code. *Compare* 6 Del. C. § 8-302(a) ("[A] purchaser of a certificated or uncertificated security acquires all rights in the security that the transferor had or had power to transfer."), *with* NRS 104.8302(1) (same).

B. Unquestioned findings of the district court show that the Assignors gave PAMTP no right to litigate this case.

The district court's undisputed factual findings show that PAMTP's standing cannot survive *Urdan*. The district court found that each Assignor sold their class shares before assigning their claims to PAMTP. *See* 20.AA.3775 ("Each of the Assignors held Parametric common stock on the date the merger closed. Each of them, however, sold that stock prior to assigning their claims to Plaintiff in April 2020."). Therefore, under *Urdan*, the Assignors' claims extinguished when they sold their stock before forming PAMTP. *See* 244 A.3d at 679; *see also In re Activision Blizzard, Inc.*, 124 A.3d 1025, 1055 (Del. Ch. 2015) ("Delaware decisions consistently treat dilution claims as direct, derivative, or both, but never as personal.").

The Assignors could have retained their claims if, "by agreement," they had reserved their rights at the time of sale to bring any claims deriving from their shares. *Urdan*, 244 A.3d at 679. But the district court also found that the Assignors made no agreements with the

purchasers of their Class Shares to preserve their claims. *See* 20.AA.3775–76. PAMTP does not contest this finding.[25]

PAMTP may argue, as it did below, that *Urdan* does not apply because *Urdan* involved a closely held company. But the principle that animated *Urdan* has nothing to do with the form of corporate ownership. Indeed, the court rejected the *Urdan* plaintiffs' argument that previous cases involving shareholder class actions did not apply to the closely held company. *Id*. at 678–79 (collecting cases).

PAMTP also relied on the fact that Assignor IceRose still owns 28,700 of Parametric's 16.5 million[26] outstanding shares. 2.SA.0278. But PAMTP never proffered any evidence that the shares IceRose currently holds were Class Shares it owned on January 15, 2014, when the class was defined. *See* 1.SA.0053; *Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 670, 262 P.3d 705, 714 (2011) (plaintiff bears burden of proof to

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[25] While the district court did not draw a legal conclusion from these findings, it very well could have. Indeed, the district court noted that it was "troubled" by the issue, stating that it did not address the issue "because [it had] addressed the substantive issues." 20.AA.3686.

[26] *See* Turtle Beach Corporation Common Stock (HEAR), NASDAQ.com, https://tinyurl.com/yc32cpb9 (last visited Mar. 23, 2023).

establish standing). And indeed, the evidence demonstrated that IceRose's current holdings were purchased after the class period.[27]

IV. THE DISTRICT COURT'S COSTS AWARD SHOULD BE AFFIRMED

A. The district court properly took into account the full proceedings.

The district court also correctly denied in part PAMTP's motion to re-tax costs. PAMTP's appeal from this decision fails for two reasons. *First*, the Assignors have been parties to this lawsuit since its inception in 2013, and, assuming PAMTP validly received Assignors' rights to litigate this case, it also accepted all risks and benefits of that lawsuit. *Second*, Defendants plainly prevailed in this action.

PAMTP argues that it cut off Defendants' right to recover costs by filing a new complaint rather than amending the class complaint, PAMTP Br. 84–85, and that it did not receive the "benefits" of the class litigation, *id.* at 87. But the Assignors were class members, and received the benefits of class counsel and, in particular, the substantial discovery produced by Defendants to class counsel in that action. In early 2020,

[27] IceRose held 489,761 shares on January 15, 2014. But under industry-standard accounting principles (as well as those undertaken by its broker, Interactive Brokers), it sold all those shares on or before October 22, 2014. 3.SA.0418–514.

the Assignors opted out of the class settlement, but continued to assert the same claims under the same caption. PAMTP employed a strange procedural maneuver—that increased the costs to all parties—by filing a new complaint (a nearly verbatim copy of the class's amended complaint), quickly agreeing to have it consolidated with the original action, and then demanding all discovery produced earlier in the singular action. *See* 1.SA.0155–60; 1.SA.0167–87. Because PAMTP's action was a continuation of the class action, it was liable for taxable costs from the beginning of the litigation.

B. Defendants, as the trial victors following the district court's Rule 52(c) Order, were the "prevailing parties."

PAMTP next contends that Defendants were not the "prevailing parties" in the action.[28] PAMTP Br. 85–87. PAMTP's argument overlooks the NRCP 52(c) order and instead focuses on Defendants' settlement with previous putative class members. But the Assignors opted out of that agreement. The preliminary approval of the settlement provided that anyone opting out of the settlement "shall have no rights

[28] This Court need not consider this position because PAMTP conceded below that Defendants were "the 'prevailing parties' in this action." 22.AA.4168. It has thus waived any arguments inconsistent with that position. *Schuck*, 126 Nev. at 437, 245 P.3d at 544–45.

under the Stipulation." 1.SA.0063. PAMTP cites no authority that allows a plaintiff to receive the benefits of a class settlement following an opt-out. PAMTP thought it could do better than the class, and so it took the risk of opting out. PAMTP's bet did not pay off, and it now faces the consequences of assuming the risk. And it is indisputable that Defendants prevailed in the genesis of this appeal—the NRCP 52(c) order. *See MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016) ("A party prevail[s] under NRS 18.010 if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing suit." (citation omitted)); *see also N. Nev. Homes, LLC v. GL Constr., Inc.*, 134 Nev. 498, 502, 422 P.3d 1234, 1238 (2018) ("There is no Nevada statute or court rule that requires the trial court to offset a judgment for damages on an independent claim by one party with a settlement recovery on the other party's claim to determine which side is the prevailing party . . . .").

V. THE DISTRICT COURT'S DENIAL OF DEFENDANTS' ATTORNEYS' FEES WAS ERRONEOUS.

Having prevailed on all claims on directed verdict, Defendants moved for their attorneys' fees under NRCP 68. NRCP 68 is Nevada's "loser pays" rule. It permits an award of attorneys' fees and costs to a

party who makes an offer of judgment, when the offeree rejects the offer and fails to obtain a more favorable judgment. *See* NRCP 68(f)(1). In this case, Defendants served two offers of judgment on PAMTP: (1) an offer of judgment for $1 on July 1, 2020, and (2) a second offer of judgment for $150,000 on May 28, 2021. At trial, Defendants obtained a directed verdict against PAMTP, and PAMTP took nothing. Notwithstanding this outcome, the district court denied Defendants' motion for attorneys' fees because it determined PAMTP had obtained a "judgment more favorable than either Offer of Judgment" pursuant to NRCP 68(g). 23.AA.4378. The district court came to this counter-factual determination by holding that, under NRCP 68(g), it must add PAMTP's pre-offer attorneys' fees and costs to its judgment ($0) to see if that sum exceeded either offer of judgment. This decision was erroneous for three reasons.

First, the district court erroneously held that the rejected offers of judgment were contracts between Defendants and PAMTP that altered NRCP 68(g). Because the offers were "inclusive of attorney's fees, costs of suit, and prejudgment interest," the district court determined that the term "costs of suit" contractually replaced NRCP 68(g)'s use of "taxable costs." But the offers of judgment were not contracts because PAMTP

rejected them. Defendants' unaccepted offers of judgment cannot alter the parties' obligations to each other, much less the language of NRCP 68(g).

Second, the district court compounded its error because, as it conceded, it did not have any evidentiary basis to determine PAMTP's fees and costs. Indeed, PAMTP conceded that its costs prior to the second offer of judgment did not exceed $150,000, confirming that it did not obtain a "judgment more favorable" than at least that offer. The district court's unsupported guess that PAMTP's fees and costs did exceed $150,000 is entitled to no deference, and its requirement that *Defendants* prove PAMTP's pre-offer costs and fees is unsupported and illogical.

Third, the district court erred in adding the offeree's costs and fees (whether taxable or not) to the judgment, as opposed to the offer, in determining whether PAMTP obtained a "judgment more favorable" than the offer. This interpretation is contrary to the clear language of NRCP 68(g) and relies on a statutory formulation that the Nevada Legislature has supplanted.

A. PAMTP's costs and fees were not "taxable costs."

1. NRCP 68(g) permits only comparison of taxable costs and fees.

The district court's order erroneously replaced NRCP 68(g)'s use of "taxable costs" with "costs of suit." To determine if an offeree obtained a more favorable outcome than a rejected offer of judgment, NRCP 68(g) provides that, in the case of an offer of judgment that is inclusive of fees and costs, as here,

> the court must compare the amount of the offer, together with the offeree's pre-offer *taxable* costs, expenses, interest, and if attorney's fees are permitted by law or contract, attorney's fees, with the principal amount of the judgment.

NRCP 68(g) (emphasis added). The rule's use of the word "taxable" would be rendered superfluous by taking into account all pre-offer costs and fees. *See S. Nev. Homebuilders Ass'n v. Clark Cnty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). The plain meaning of a "taxable" cost or fee is one that can be taxed upon the opposing party. In Nevada, a litigant can obtain costs and fees from an opposing party only if it is expressly authorized under statute, rule, or contract. *See U.S. Design & Constr. Corp. v. I.B.E.W. Local 357*, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002). There is no such authorization here.

As an initial matter, because PAMTP lost on every claim at trial and took nothing, it plainly is not a "prevailing party" entitled to taxable costs and fees under any statute or rule. In Nevada, a litigant is statutorily entitled to certain costs and may claim certain fees *only* if it is the "prevailing party." *See* NRS 18.020 ("Costs must be allowed of course to *the prevailing party* against any adverse party against whom judgment is rendered . . . ." (emphasis added)); NRS 18.010(2) ("In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to *a prevailing party*." (emphasis added)). A "prevailing party" is one that "succeeds on any *significant issue* in litigation which achieves some of the benefit it sought in bringing suit." *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. 80, 90, 343 P.3d 608, 615 (2015) (emphasis in original) (quoting *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005)). Here, PAMTP lost on both of its claims and took nothing from Defendants, so it cannot possibly be deemed a "prevailing party" in any sense of that term. *See In re Estate & Living Tr. of Miller*, 125 Nev. 550, 553–54, 216 P. 239, 242 (2009); *Kay v. Johnson*, 2009 WL 10692766, at *2 (D. Nev. July 9, 2009) (party who "was not awarded damages . . .

cannot be considered the prevailing party for purposes of assessing whether [he] is entitled to an award of fees" (citing *Key Bank of Alaska v. Donnels*, 106 Nev. 49, 53, 787 P.2d 382, 385 (Nev. 1990)); *Pitzel v. Software Dev. & Inv.*, 2008 WL 6124816, at *5 & n.21 (Nev. Dec. 31, 2008) (table) (party who obtained directed verdict and defeated all of plaintiff's claims was the only "prevailing party" (citing *Valley Elec. Ass'n*, 121 Nev. at 10, 106 P.3d at 1200)). The limitation of NRCP 68(g)'s application to "taxable" costs also is consistent with NRCP 68(f)(1)(A)'s command that an unsuccessful offeree—as PAMTP is here—is *prohibited* from recovering any costs or attorney's fees of any kind. *See* NRCP 68(f)(1)(A); *McCrary v. Bianco*, 122 Nev. 102, 110, 131 P.3d 573, 578 (2006); *Palace Station Hotel & Casino, Inc. v. Jones*, 115 Nev. 162, 165–66, 978 P.2d 323, 324 (1999); *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006).

PAMTP, of course, does not argue it is a "prevailing party," because it plainly is not, and it sought no taxable costs or fees here. Accordingly, PAMTP has no "taxable" costs or fees in connection with this litigation that could be considered in a calculation under NRCP 68(g).

2. Defendants' rejected offers of judgment could not modify "taxable costs" for "costs of suit."

The district court did not disagree that no Nevada statute or rule authorized taxable costs or fees to PAMTP, but held—*sua sponte*—that the parties modified NRCP 68(g)'s use of "taxable" costs to "costs of suit" through contract. 23.AA.4380. The "contracts" by which the parties ostensibly worked this revision were Defendants' offers of judgment that had been *rejected* by PAMTP. *Id.* The district court provided no authority for its novel conclusion, and it is contrary to fundamental tenets of contract law.

"Basic contract principles require, for an enforceable contract, an offer and acceptance, meeting of the minds, and consideration." *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). This Court has recognized that "[a]n offer of judgment is an offer to settle" a case, *Clark v. Lubritz,* 113 Nev. 1089, 1100, 944 P.2d 861, 868 (1997) (citation omitted), and that like any contract, "a stipulated settlement agreement requires mutual assent." *Grisham v. Grisham,* 128 Nev. 679, 685, 289 P.3d 230, 234–35 (2012) (cleaned up). Here, there was no such assent.

Notwithstanding these clear principles, the district court added PAMTP's non-taxable, pre-offer costs and fees to PAMTP's judgment of

$0 to determine whether it had obtained a more favorable result than either offer because the terms of Defendants' rejected offers were inclusive of "costs of suit." 23.AA.4380. The district court cited no case for its method, and Defendants have found none. Because rejected offers of judgment are not binding contracts, the district court had no basis to alter NRCP 68(g)'s language, and, as a result, PAMTP had no "taxable" costs to add to its $0 judgment. Thus, the district court should have compared PAMTP's judgment—$0—against the $1 and $150,000 offers, respectively, and found PAMTP did not achieve a more favorable outcome than either offer.

B. The district court had no evidence of PAMTP's costs and fees.

The district court compounded its error because, as it conceded, it "was not provided information demonstrating by a preponderance of the evidence of PAMTP, LLC'[s] attorney's fees, costs of suit or 'taxable costs' incurred." *Id.* Of course, if PAMTP had taxable costs, the district court would know them because it would have taxed them in the first place. Instead, the district court had to guess whether it was likely PAMTP's costs and fees exceeded either offer. 23.AA.4379. This guess is entitled to no deference. *See Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 82, 319

P.3d 606, 616 (2014) (district court's attorneys' fee award is reviewed *de novo* when it "implicates a question of law" (citation omitted)).

Additionally, the district court held that the burden of establishing PAMTP's pre-offer costs and fees was on *Defendants*, opining that this information "could have been obtained by defense counsel simply asking for the information" before the offers were made. *Id.* Again, the district court offered no support for its holding. In any event, PAMTP had no taxable costs, and even if it did, Defendants would not have been able to obtain evidence of PAMTP's fees and costs in discovery. *See, e.g.*, *Ralls v. United States*, 52 F.3d 223, 224 (9th Cir. 1995) (attorney invoices and payment information are privileged).

C. The district court erred by adding pre-offer costs and fees to the judgment rather than to the offer.

NRCP 68(g) states that where an offer of judgment includes costs and 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." In other words, "the amount of the offer," including pre-offer costs and fees, stands on one side of the equation, and "the principal amount of the judgment" stands on the other. *Id.* Since

"the principal amount of the judgment" here is $0, it makes no difference what Plaintiff's pre-offer costs and fees are because each offer amount exceeded $0.

The district court rejected this argument, relying exclusively upon *Hamilton v. Bott*, 2021 WL 6105008 (Nev. Ct. App. Dec. 23, 2021) (table), an unpublished decision of the Nevada Court of Appeals.[29] 23.AA.4381. Although that court compared the rejected offer to a verdict, including costs and fees, it did so citing no legal authority and contrary to NRCP 68(g)'s text.

The construction of NRCP 68(g) to add taxable costs and fees to the offer is confirmed by the legislative history of its statutory counterpart, NRS 17.117(12). The relevant portions of these two provisions are now substantively identical,[30] and the current version of the statute was

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[29] It was improper for the district court to rely on this case. *See* NRAP 36(c)(3) ("Except to establish [*res judicata*], unpublished dispositions issued by the Court of Appeals may not be cited in any Nevada court for any purpose.").

[30] *Compare* NRS 17.117(12) ("If the offer provided that costs, expenses, interests and, if attorney's fees are permitted by law or contract, attorney's 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's fees are permitted

enacted to do away with the very formula the district court applied. This demonstrates the Legislature's intent to adhere strictly to that formula, which adds pre-offer costs to the *offer*, not the judgment.

NRCP 68(g) was amended to its present form in 1998. *McCrary*, 122 Nev. at 107 n.10, 131 P.3d at 576. In 2005, NRCP 68(g)'s statutory analogue (which was codified at NRS 17.115(5)) was amended to add pre-offer costs to *the judgment* rather than to the offer, as NRCP 68(g) provides. In light of the 2005 amendment, this Court sought to "harmonize" the two provisions by construing NRCP 68(g) to add pre-offer costs to the judgment, despite the rule's language. *Id.* (citation omitted). But in 2019, the Legislature replaced the statute with NRS 17.117(12), which is once again identical to NRCP 68(g).

The Legislature's decision to re-adopt NRCP 68(g)'s formula demonstrates its intent to adhere strictly to that formula, which very clearly requires costs and fees to be added to the *offer*, not the *judgment*. *See Boulder City v. Gen. Sales Drivers*, 101 Nev. 117, 118, 694 P.2d 498, 500 (1985) (Legislature is presumed to have enacted statutes with "full

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by law or contract, attorney's fees."), *with* NRCP 68(g) (same with alterations only to spelling and punctuation).

knowledge of existing statutes relating to the same subject"). The district court's decision thus disregards not only NRCP 68(g)'s plain language, but also the crystal-clear intent of the Legislature. This Court should therefore reverse the fee order.

CONCLUSION

For the foregoing reasons, the district court's Rule 52(c) order and taxable costs order should be affirmed, and the fee order should be reversed.

DATED: March 23, 2023

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CERTIFICATE OF COMPLIANCE

I hereby certify that the **COMBINED ANSWERING BRIEF IN DOCKET NO. 83598, ANSWERING BRIEF IN DOCKET NO. 85358, AND OPENING BRIEF IN DOCKET NO. 84971** complies with the typeface and type style requirements of NRAP 32(a)(4)-(6), because this brief has been prepared in a proportionally spaced typeface using a Microsoft Word 2010 processing program in 14-point Century Schoolbook type style. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because the countable parts of the brief identified in NRAP 32(a)(7)(C) contain 13,761 words.

Finally, I hereby certify that I have read the COMBINED ANSWERING BRIEF IN DOCKET NO. 83598, ANSWERING BRIEF IN DOCKET NO. 85358, AND OPENING BRIEF IN DOCKET NO. 84971, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix

where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On March 23, 2023, I caused to be served a true and correct copy of the foregoing **COMBINED ANSWERING BRIEF IN DOCKET NO. 83598, ANSWERING BRIEF IN DOCKET NO. 85358, AND OPENING BRIEF IN DOCKET NO. 84971** upon the following by the method indicated:

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An Employee of SNELL & WILMER L.L.P.