IN THE SUPREME COURT OF THE STATE OF NEVADA
Nos. 83598, 84971 and 85358

IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION.

PAMTP, LLC,

Appellant,

v.

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

Respondents.

Consolidated Appeals from Final Judgment and Fees and Costs Awards
Eighth Judicial District Court Case No. A-13-686890-B

APPELLANT PAMTP, LLC'S COMBINED REPLY BRIEF (Nos. 83598 and 85358) AND ANSWERING BRIEF (No. 84971)

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STATEMENT OF ISSUE

1. In Docket No. 84971, did the district court correctly determine that Respondents are not entitled to attorneys' fees pursuant to NRCP 68(f) where PAMTP's total recovery against all Defendants was more favorable than either unapportioned offer of judgment, and where Respondents failed to show entitlement to fees under *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983)?

SUMMARY OF ARGUMENT

Respondents' brief is as remarkable for what it omits as for what it argues. Consider what Respondents do not dispute:

- As the district court found, Potashner deliberately squelched licensing deals that were the lifeblood of pre-merger Parametric's business so it would be cheaper and easier for VTBH and Stripes to acquire control. AOB 10–13.[1]

- On the other side of the ledger, Potashner, Stark, and others worked together to paint a false picture of the VTBH financial projections on which the merger's exchange ratio was based and on which the Board and shareholders relied. In investor communications they repeatedly conveyed that VTBH's lost 2013 revenue would be recaptured in the first quarter of 2014, and therefore the projections were accurate and the exchange ratio was fair. Yet Potashner, Stark and others knew that VTBH's outlook was *much worse* than projected. *See id.* at 21–33.

- The Directors other than Potashner knew *none* of this. They did not know Potashner had suppressed licensing deals or how severely VTBH's financial situation had deteriorated. And those who testified said such knowledge would have

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[1] Throughout, "AOB" refers to Appellant PAMTP, LLC's Combined Opening Brief, dated January 12, 2023, and "RAB" refers to Respondents' Combined Answering Brief in Docket No. 83598, Answering Brief in Docket No. 85358, and Opening Brief in Docket No. 84971, dated March 23, 2023. Citations to "AA" refer to Appellant's Appendix, citations to "SA" refer to Respondents' Supplemental Appendix, and citations to "ARA" refer to Appellant's Reply Appendix. As in PAMTP's Opening Brief, the first number in each appendix citation references the Volume and the second number references the page.

affected their decision to support the merger. *See id.* at 12–13, 33, 74–81.

- Stark also lied directly to Houlihan Lokey, the Board of Directors' financial advisor, and to Adam Kahn, the principal of PAMTP's largest assignor, IceRose Capital, about VTBH's financial prospects. *See id.* at 20, 29.

Respondents thus do not contest the key facts supporting PAMTP's claim—that Potashner engineered the merger by artificially depressing Parametric's core business (licensing) while concealing the significant deterioration of VTBH's financial condition to make the exchange ratio appear fair, and that he did so without the Board or the advisors on whom it relied knowing. Thus, even as they repeat the incantation that "PAMTP's claim[] w[as] tried to conclusion," RAB 53, Respondents' position ultimately relies not on the facts that were tried but rather on artificial legal arguments. And those arguments badly mistake Nevada law. Put simply, it cannot be that Nevada law does not provide a direct remedy to shareholders cheated out of control of a public company by fraud.

First, Respondents' lead argument is that the district court did not decide, and this Court cannot now decide, whether PAMTP's claim is direct or derivative because that issue was already decided in *Parametric*.

E.g., *id.* at 33 (citing *Parametric Sound Corp. v. Eighth Jud. Dist. Ct.*, 133 Nev. 417, 401 P.3d 1100 (2017)). This assertion is puzzling. The district court held that PAMTP failed to prove what it believed was an "essential element of an equity expropriation claim"—the existence of a controlling shareholder—reasoning that "[a]ny other claim . . . would be derivative in nature." 20.AA.3791–92. Contrary to that ruling, and as PAMTP explained in its opening brief, its claim is direct under *Parametric* and under recently clarified Delaware law (with which *Parametric* intended to align Nevada law) because PAMTP challenges a transaction whereby public shareholders lost control to a new controller and suffered direct harm as a result. Try as Respondents might to contend otherwise, that has been the core of PAMTP's claim all along.

Second, turning to the merits, Respondents try to evade the overwhelming record of Potashner's and the other Respondents' misconduct by relying on the Board's good faith and technical independence. They confuse the issue, suggesting at various points—as the district court did below—that PAMTP had to prove that the Board members other than Potashner were *liable* for breaches of fiduciary duty and that they *committed* actual fraud. But Nevada law does not require

a showing that *all* directors are liable to hold *one* liable; and, with respect to NRS 78.211(1), it requires only that there be "actual fraud in the transaction," not that the Board itself commit the actual fraud. The question, then, is not whether the other directors committed fraud or misconduct but whether their approval of the merger based on facts fraudulently manipulated and misrepresented by Potashner *insulates Potashner* from liability for *his* misconduct. It does not.

Third, Respondents argue PAMTP lacks standing because its assignors sold their shares before assigning their claims. But the district court correctly recognized that PAMTP has standing because at least one of its assignors held shares at the time of the assignments. Respondents' argument thus at most goes to the quantum of damages (i.e., how much was assigned), not whether PAMTP has a claim at all. In any event, the argument fails. Not only are Respondents estopped from advancing it—the argument contradicts the position they took in the class action to get the class settlement approved—but the argument is wrong on its own terms, and adopting it would seriously compromise the right of wronged shareholders to seek recompense. This Court should not and need not take such a step based on the record in this appeal.

Fourth, and turning to post-trial issues (which the Court need resolve only if it affirms the judgment against PAMTP), Respondents' argument as to costs fares no better. They have no answer to the statutory text, which provides for costs in the "action" in which they "prevail[ed]," NRS 18.020(3), not a separate action that they settled. Their attempt to seek a windfall based on the district court's consolidation of this case and the already-dismissed class action should be rejected.

Fifth, as to attorneys' fees, Respondents' tortured attack on the district court's decision not only fails on its own terms but ignores obvious alternative grounds for affirmance. PAMTP settled with four of the Director Defendants for $400,000, an amount unquestionably more favorable than Defendants' prior unapportioned offers of $1 and $150,000. Nor can Respondents possibly satisfy the Court's multi-factor test governing fee awards. *See Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983).

This Court should reverse the grant of Respondents' Rule 52(c) motion, vacate the post-trial orders, and remand for a new trial. At a minimum, the Court should reverse the costs order to the extent it

awarded costs incurred in the class action and affirm the denial of attorneys' fees.

ARGUMENT

I. PAMTP's Claim Is Direct

In *Brookfield Asset Management, Inc. v. Rosson*, 261 A.3d 1251 (Del. 2021), the Delaware Supreme Court overruled *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006), and held that certain equity dilution claims are exclusively derivative. At the same time, the court clarified that a subset of equity dilution claims, which had been direct before *Gentile*, remain direct. *Brookfield*, 261 A.3d at 1276–77. The claim that PAMTP advanced throughout this case and proved at trial fits within that subset. Thus, whether this Court maintains *Parametric*'s alignment with Delaware law as it existed pre-*Brookfield* or realigns Nevada law with that decision, PAMTP's claim is direct.

Though Respondents try to escape this reality, their attempt leads only to confusion. At first they insist the Court *must* adhere to *Parametric*—even invoking the law-of-the-case doctrine and res judicata—and hold that PAMTP's claims are derivative because PAMTP did not prove Potashner was a controlling shareholder. RAB 37–40 &

n.18. But *Parametric* neither held nor implied that, to be direct, equity dilution claims must be asserted against controlling shareholders; in fact *Parametric* expressly contemplated a broader universe of direct equity dilution claims. In the next breath, Respondents argue the Court should *overturn Parametric* and follow *Brookfield*—but not the part that recognizes change-of-control claims like PAMTP's as direct. *Id.* at 58–60 & n.23. Respondents' two-faced argument misunderstands both Delaware and Nevada law, and Respondents offer no compelling reason to misalign them.

Respondents then seek refuge in waiver, arguing PAMTP did not assert its theory below. But the actual record—not Respondents' cherry-picked account of it—shows the opposite. PAMTP has always framed its claim as challenging an improper transfer of control, it has always sought to hold Potashner liable as a director who caused the improper transfer, and it has always argued that evidence of Potashner's manipulation, deceit, and coercion—again, evidence Respondents do not meaningfully contest—establishes a direct claim.

And these facts do indeed establish a direct claim. To hold otherwise—and this is another point Respondents ignore—would cut a

huge hole in the protections Nevada law extends to shareholders. It would mean the only relief available to shareholders wronged by an improper transfer of control would involve most of the recovery going to the entity that wrongfully obtained control. AOB 53–54. None of Respondents' technical arguments justifies a rule that would render shareholders essentially defenseless against bad faith and fraudulent schemes to transfer control via dilution.

A. If This Court Applies *Parametric*, PAMTP's Claim Is Direct Even Though Potashner Was Not a Controlling Shareholder

Respondents' arguments are simply stated. First, they contend *Parametric* "left the door open only for a *Gentile* equity-expropriation claim," RAB 38, that *Gentile* allowed only claims against a "controlling shareholder," *id.* at 18, 32, and that Parametric did not have a controlling shareholder. In other words, Respondents endorse the district court's holding that PAMTP "failed to meet its burden to prove . . . expropriation of value by a controlling shareholder," an "essential element of an equity expropriation claim." 20.AA.3792. Second, they contend *Parametric* deemed all change-of-control claims to be derivative. RAB 30–32. Both arguments fail.

1. The premise of Respondents' argument (and the district court's holding) regarding the scope of *Parametric* is wrong. *Parametric* did not limit equity expropriation claims to situations where an existing controlling shareholder further diluted the minority. To the contrary, it expressly allowed claims "involv[ing] a controlling shareholder's *or director's* expropriation of value." 133 Nev. at 429, 401 P.3d at 1109 (emphasis added). Even Respondents acknowledged to the district court, during trial, that this language "went a little bit further it seemed than *Gentile*." 20.AA.3613:14–17.

Respondents were correct then. In *Parametric*, the Court intended to "align [its] jurisprudence with Delaware's," 133 Nev. at 427, 401 P.3d at 1108, and Delaware has long recognized that equity dilution claims can be direct even beyond the limits of *Gentile*. Indeed, *Gentile* itself recognized that expropriation by a controlling-shareholder was merely "one transactional paradigm" that can support a direct claim. *Gentile*, 906 A.2d at 99.

Take *Gatz v. Ponsoldt*, another case this Court cited favorably in *Parametric*. There, the Delaware Supreme Court described a direct equity expropriation claim as one that lies against a "fiduciary" and

arises where the fiduciary "exercises its control over the corporate machinery to cause an expropriation." *Gatz v. Ponsoldt*, 925 A.2d 1265, 1281 (Del. 2007) (cited by *Parametric*, 133 Nev. at 429, 401 P.3d at 1109). The court used the broader term "fiduciary," not "controlling shareholder" (though *Gatz* itself involved a controlling shareholder), and it did not state that *only* control exercised through majority ownership establishes a claim. Nor would that make sense. A fiduciary who (like Potashner) uses effective control to cause expropriation is just as liable as a fiduciary who uses formal control, through voting power or otherwise. The question is *whether* the fiduciary caused the expropriation, not *how*.

Now, on appeal, Respondents sing a different tune. Even though *Parametric* cited both *Gentile* and *Gatz* for the proposition that direct claims involve a "controlling shareholder's or director's expropriation of value," *Parametric*, 133 Nev. at 429, 401 P.3d at 1109, Respondents act as if this broader concept does not exist. To be sure, the Delaware Supreme Court recognized that *Gentile* caused confusion on this issue, leading some courts to assume, incorrectly, that "direct standing was ***only*** available in circumstances involving a controlling shareholder or,

by implication, a functionally equivalent control group." *Brookfield*, 261 A.3d at 1274 (emphasis added); *see* AOB 50–51. But *Brookfield* cleared up any confusion when it reaffirmed that change-of-control claims are direct. *See* AOB 49–54; *infra* at 13–14. And more importantly, *this* Court did not make that mistake in *Parametric*: It expressly went further than *Gentile*.

There is another reason to think this Court went further than *Gentile*: It had to. After all, before the merger, ***Parametric was not a controlled company***. Thus, if this Court meant to limit plaintiffs to pleading expropriation by a controlling shareholder, its remand to replead was pointless because it has always been evident that pre-merger Parametric had no controlling shareholder. It makes no sense to read *Parametric* as granting leave to replead a claim with elements this Court knew could not possibly be satisfied.

2. Respondents' other attempt to use *Parametric* to foreclose PAMTP's claim also fails. Respondents argue that *Parametric* must have held that change-of-control claims are derivative because it distinguished *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 62 P.3d 720 (2003), a decision that allowed direct challenges to cash-out mergers. RAB 30–32. Not so.

Respondents mistakenly conflate cash-out mergers with the broader concept of changes of control. *Cohen* was based on the proposition that a shareholder's challenge to a cash-out merger is direct because the harm is based on "lost unique personal property" (i.e., the shares). *Cohen*, 119 Nev. at 19, 62 P.3d at 732. All this Court held in *Parametric* was that *Cohen*'s cash-out-merger rule did not apply here because the shareholders held shares in Parametric, "which never merged, and thus the rights discussed in *Cohen* do not inure to the shareholders." *Parametric*, 133 Nev. at 428, 401 P.3d at 1109. Thus, the logic of that part of *Parametric* was driven (and is limited) by the reverse triangular structure of the merger. *See id.* at 427, 401 P.3d at 1108 ("the form of the merger is important").

None of that, however, affects the reality that Parametric's shareholders lost control of the company or negates their right to seek compensation for *that* distinct (and direct) harm. They went from "own[ing] a combined 100% of Parametric before the merger" to a "minority 19.1% interest." 20.AA.3787. As Respondents do not contest, "the suing stockholders, individually," suffered the harm because the loss of control negatively impacted Parametric's now-minority shareholders

(including PAMTP's members) and *only* those shareholders. *Parametric*, 133 Nev. at 427, 401 P.3d at 1108. The now-majority shareholders did not suffer harm because they *benefited* from the transfer of control, and the company did not suffer harm because it has no interest in who controls it. AOB 45–47; *see also Brookfield*, 261 A.3d at 1266–67 & n.66; *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 43 (Del. 1994). Nor do Respondents contest that the now-minority shareholders "would receive the benefit of any recovery" in this action—indeed, direct relief to those shareholders is the *only* way to compensate them for that harm. *See* AOB 45–47, 53–54; *see also Brookfield*, 261 A.3d at 1251.

B. If This Court Further Aligns Nevada Law with Current Delaware Law, PAMTP's Claim Is Still Direct

This Court could stop at *Parametric*. PAMTP recognizes, however, that it may wish to continue what it started in *Parametric* and further align Nevada and Delaware law on the distinction between direct and derivative claims. Under that approach, too, PAMTP's claim is direct.

In *Brookfield*, the Delaware Supreme Court overruled *Gentile*, but it made clear that equity dilution claims arising out of a change of control from public shareholders to a new controller *remain* direct. AOB 44–54; *see also Brookfield*, 261 A.3d at 1266–67 & n.66. Respondents have ***no***

response to this point. That should end the matter, because it establishes that PAMTP's claim was direct before *Brookfield* (i.e., under the Delaware law that *Parametric* adopted) and it remains direct after *Brookfield* (i.e., under current Delaware law that this Court may consider adopting).

Respondents' only hope of escaping this dilemma is if the Court creates a Nevada-specific exception to Delaware's *Tooley* test. Sure enough, that is exactly what Respondents ask it to do. Respondents argue that treating change-of-control claims as direct would be "contrary to Nevada law" because change-of-control claims in Delaware derive from law that Nevada does not follow—specifically, the Delaware Supreme Court's decisions in *Paramount* and *Revlon*. RAB 59–60 (citing *Paramount*, 637 A.2d 34; *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173 (Del. 1986)).

This argument rests on a basic confusion. It is true that *Paramount* and *Revlon* recognized specific fiduciary duties tailored to the change-of-control context, and it is true that Delaware and Nevada sometimes recognize different fiduciary duties. But what fiduciary duties apply and

how to prove them has nothing to do with whether a plaintiff alleges a direct *harm*.

PAMTP does not argue that Potashner breached any *fiduciary duties* unique to *Revlon* or *Paramount* or any other aspect of Delaware law. It argues that he breached fiduciary duties under *Nevada law*, i.e., the "duties of care and loyalty" that "govern[]" his "fiduciary relationship with the corporation *and its shareholders*." *See Shoen v. SAC Holding Corp.*, 122 Nev. 621, 632, 137 P.3d 1171, 1178 (2006) (emphasis added), *abrogated on other grounds by Guzman v. Johnson*, 137 Nev. 126, 483 P.3d 531 (2021). Potashner was required to "maintain, in good faith, the corporation's *and its shareholders'* best interests over anyone else's interests." *Id.* (emphasis added). He was not allowed to "act[] in bad faith when supporting and approving the merger." *See* 5.AA.0706; AOB 35. He was not allowed to favor a merger partner by "avoiding completing valuable licensing deals and delaying announcements of completed deals." *See* 20.AA.3780; AOB 61–62. And he was not allowed to misrepresent and withhold material information from the Board and shareholders. *See* AOB 21–34; *see also* 5.AA.0705–06; AOB 80–81. He

did all of that, which is why he is liable. Whatever additional duties *Paramount* or *Revlon* recognized do not come into it.[2]

Thus, for purposes of the directness inquiry, the question is whether the *harm* is direct, not whether the conduct violated this or that fiduciary *duty*. A director who breaches duties in a way that directly harms shareholders—whether the duties are based on "*Revlon* mode," "*Chur* mode," or any other mode—exposes himself to a direct claim from those shareholders. *See Parametric*, 133 Nev. at 427, 401 P.3d at 1108. And *Paramount*'s discussion of the *harm* resulting from an improper transfer of control makes clear that such harm is indeed direct. *Paramount*, 637 A.2d at 43; *see also supra* at 12–13.

This Court should therefore reject Respondents' dubious request to carve an exception into Nevada law precluding shareholders from suing

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[2] In any event, the only difference between Nevada and Delaware law Respondents identify is that the former "disallows directors from entering '*Revlon* mode'" when a company is for sale because it does not require directors to "consider 'the effect of a proposed corporate action upon any particular group or constituency having an interest in the corporation as a dominant factor.'" RAB 59 (quoting NRS 78.138(5)). So what? What matters is that Nevada does not permit directors to deceive and manipulate the Board and shareholders, which the record shows he did. *See* NRS 78.138(1), (3), (7); *Shoen*, 122 Nev. at 632, 137 P.3d at 1178.

directly for direct harms suffered because of improper changes of control. Not only is this request doctrinally incoherent—it would require a *different* result in Nevada compared to Delaware under the *exact same* direct-harm test—but it also undermines the fiduciary protections on which corporate law rests. As PAMTP explained, direct claims are the *only* way to meaningfully compensate shareholders for change-of-control harms like the one here. *See* AOB 53–54; *supra* at 12–13. It makes no sense to leave certain classes of shareholders without a remedy for serious fiduciary breaches, and in so doing to *misalign* Nevada and Delaware jurisprudence, contrary to this Court's aim in *Parametric*. *See* 133 Nev. at 427, 401 P.3d at 1108. Respondents have ***no answer*** to these points—because there is none.

C. PAMTP Did Not Waive Its Arguments that Its Claim Is Direct

Unable to meet PAMTP's arguments on the law, Respondents try to avoid them. They insist that PAMTP waived any direct claim based on anything other than *Gentile* itself (i.e., claims against previously existing controlling shareholders) and that its appellate arguments are inconsistent with its arguments to the district court. They are wrong.

PAMTP has always framed its claim as challenging an improper transfer of control. The Complaint alleges that the Board "gave up a controlling stake in the Company for negative value" and that the fiduciary duty breaches resulted in an "improper[] transfer[] [of] control." 2.AA.0206–08; *see also* AOB 46. In opposition to summary judgment, PAMTP argued that Potashner "expropriated value from Parametric shareholders by conducting the reverse merger with VTBH . . . , thereby transferring control of Parametric." 2.SA.0251.[3] And in opposition to Respondents' Rule 52(c) motion, PAMTP continued to argue that Potashner used his control over the company to cause an "expropriation of equity from Parametric shareholders" that was transferred to VTBH and Stripes. 20.AA.3649:16-20.[4]

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[3] *See also* 2.SA.0233 (Potashner "expropriated value . . . by conducting a reverse merger with VTBH" that "result[ed]" in Stripes being "handed" control over the company); 2.SA.0235 (Potashner "caused the expropriation of economic value and voting power from Parametric stockholders" and "transferred it to VTBH and Stripes"); *id.* ("Defendants excessively overvalued VTBH's assets and handed over a controlling stake in Parametric to Stripes for negative value.").

[4] At trial, too, this was the theory PAMTP asserted. *See, e.g.*,

PAMTP has also argued, consistently, that it can establish an equity expropriation claim by proving that Potashner used effective control over Parametric to cause the improper transfer of control. For example, at summary judgment, citing the same Delaware case law that this Court relied on in *Parametric*, PAMTP argued that Potashner "exercised [his] 'control over the corporate machinery to cause [the] expropriation of economic value and voting power'" to VTBH and Stripes. 2.SA.0253 (quoting *Gatz*, 925 A.2d at 1281). PAMTP's pre-trial memorandum explained that PAMTP "contends that Potashner exercised control over Parametric through the dereliction of duty by the rest of the Board" and "a pattern of bullying and deceiving the Board." 2.SA.0292. And at oral argument in opposition to the Rule 52(c) motion, PAMTP explained how the trial evidence supported that contention.[5]

10.AA.1777:11–18 ("[We] owned part of a public company, and a private company did a reverse merger. The public company got 19 percent of the new NewCo (phonetic) company and we feel that we were unfairly treated.").

[5] *See, e.g.*, 20.AA.3646:21-3649:20 ("bullying, insults, and threats" to the Board; "[w]ithholding or misrepresenting information"; "deliver[ing]

Respondents ignore *all* of this. They repeatedly insist that PAMTP "made no mention [below] of any claim but equity expropriation as defined by *Gentile*," RAB 36, but they ignore the record evidence above. And their argument again presumes—incorrectly, *see supra* at 9–12—that *Parametric* limited PAMTP to pleading *Gentile* controlling-shareholder claims. *Parametric* was not so limited, and as just shown, neither is PAMTP's claim.[6]

II. PAMTP Established a Fiduciary Duty Claim Against Potashner

PAMTP's claim is that Potashner, aided and abetted by the Non-Director Defendants, bullied, threatened, manipulated, deceived, and steered a too-complacent and under-informed Board into proceeding with the sale of control to VTBH and Stripes. Although Respondents

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board decisions . . . as fait accompli"; "single-handedly suspend[ing] licensing deals, fr[eezing] agreements, [and] delay[ing] positive announcements . . . in an effort to depress Parametric stock price in order to make the merger look better"; and "steer[ing] . . . stockholders towards approval" and "hid[ing] issues regarding VTB[H]'s financial condition").

[6] PAMTP has also argued that its claim fits within *Gentile* itself—e.g., by arguing that Potashner was part of a shareholder control group involving other directors, *see, e.g.*, 2.SA.0247–50—but its primary claim throughout the case has been based on Potashner's breaches of director duties rather than controlling shareholder duties.

repeatedly try to muddy the point, the claim PAMTP tried was *not* against the Board. The Board's decision to approve the transaction is relevant only to the extent it can preclude liability for Potashner and the Non-Director Defendants. The Court must therefore distinguish those statutes that govern *liability* from those that offer conditional *deference* protections that, based on the Board's decision, may insulate Potashner from responsibility.

PAMTP had to prove that Potashner was liable, which requires a showing that he breached a fiduciary duty and committed "'intentional misconduct, fraud or a knowing violation of law.'" *Chur v. Eighth Jud. Dist. Ct.*, 136 Nev. 68, 71–72, 458 P.3d 336, 340 (2020) (quoting NRS 78.139(7)(b)). Separately, to show that it could recover against Potashner for the consequence of his breach—the disastrous sale to VTBH and Stripes—PAMTP had to overcome both the presumption of the business judgment rule, *see* NRS 78.138(7)(a); NRS 78.138(3), which gives deference to a board's decision as a valid exercise of business judgment, and the protection of NRS 78.211(1), which gives conclusive deference to a board's approval of the consideration received for stock issuances "absent actual fraud in the transaction."

PAMTP showed in its opening brief that its evidence satisfied these requirements. Respondents offer precious little by way of rebuttal.

First, as to liability. Respondents argue that Potashner is not liable because he did not have formal control over the Board's voting machinery, but that is largely a rehash of the "controlling shareholder" argument, which relies on a misunderstanding of *Parametric* and ignores the evidence that Potashner in fact wielded effective control over whether the transaction would occur. *See supra* at 9–12, 19.

Worse, Respondents misstate the law, arguing as if PAMTP had to show that the Board *as a whole*, as opposed to Potashner *himself*, committed "intentional misconduct, fraud, or a knowing violation of law," NRS 78.138(7)(b). *See* RAB 45–49, 53–56 (assuming that "*Chur*'s intentionality requirement . . . protect[s] *the Board*" (emphasis added)). But nothing in NRS 78.138(7) requires a showing that the *entire* Board is liable in order to show that "*a director*" is "*individually* liable to a corporation or its stockholders." NRS 78.138(7) (emphasis added). Instead, liability requires that "*[t]he director's* . . . act or failure to act" constituted a fiduciary-duty breach and that "*such breach* involved

intentional misconduct, fraud or a knowing violation of law." *Id.*; *see also Chur*, 136 Nev. at 71–72, 458 P.3d at 340 (emphasis added).

Second, as to deference. Mirroring their confusion on liability, Respondents insist that PAMTP could not overcome the deference afforded by NRS 78.211(1) unless PAMTP showed that *the Board* committed actual fraud. *See* RAB 53–56. Wrong again. NRS 78.211(1) requires actual fraud "in the transaction" to overcome deference; it does not require that the board itself commit the fraud. As for the business judgment rule, Respondents emphasize that the Board was technically independent and acted in good faith. But Nevada law also presumes that directors act "on an informed basis." NRS 78.138(3). Therefore, the business judgment presumption can be rebutted by a showing that facts critical to their decision were withheld from them, thus rendering them uninformed (and not, as a practical matter, independent), regardless of whether they also acted in good faith.

Once these fundamental legal errors are corrected, all that remains is a largely undisputed record of stunning misconduct by Potashner that tainted—indeed, engineered—the Board's approval of the misbegotten

merger. Neither law nor logic justifies holding that the Board's technical independence and good faith insulate Potashner from liability.[7]

A. Respondents Concede Potashner's Bad Faith, Fraud, and Intentional Misconduct and the Board's Lack of Awareness Thereof

The evidence against Potashner was overwhelming. Consider the general background:

- Potashner started merger discussions with VTBH to advance his self-interest because he wanted to personally benefit from spinning out HHI. AOB 6–7; *see also* 20.AA.3780.
- He generally "acted in bad faith when supporting and approving the merger." 5.AA.0706; *see also* AOB 35.
- Parametric director Kaplan testified that the Board was "dysfunctional" during the sale process. AOB 65.
- The Board was aware that Potashner was a serial liar and that he constantly acted in his self-interest (although not the full extent of it), yet it permitted Potashner to remain in his position. As a result, Potashner maintained his bad-faith and self-interested control over the merger and was allowed to benefit from it, even after his HHI options were cancelled. *Id.* at 7–10, 63–66.

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[7] As Respondents do not dispute, if this Court reverses the district court's holding that PAMTP failed to establish primary liability against Potashner, the district court's dismissal of the aiding-and-abetting claim against the Non-Director Defendants must also be reversed, since the only basis for the latter holding was that PAMTP supposedly failed to prove the primary claim. *See* AOB 83–84.

Next, Potashner rendered the deal he wanted a fait accompli by secretly suppressing Parametric's business to make the deal seem favorable and to limit the Board's options:

- Potashner "avoid[ed] completing valuable licensing deals and delay[ed] announcements of completed deals." 20.AA.3780; *see also* AOB 10–13.

- The Board was *not* aware at the time that Potashner had avoided and slow-played licensing deals because he hid it. AOB 12–13.

- Potashner's actions weakened the company and left the Board no choice but to sell to VTBH and Stripes. *Id.* at 13.

Potashner also conspired with Stark and others to inflate VTBH's value by misrepresenting its financial prospects:

- Key inputs to the Craig-Hallum report regarding VTBH's financial projections were off by ***over 60%***. *Id.* at 21–22.

- Potashner and the Non-Director Defendants knowingly manipulated and concealed material financial information regarding VTBH's projections that undermined the 80/20 exchange ratio the Board and Parametric's shareholders approved. *Id.* at 21–33, 74–81.

- Potashner willfully destroyed evidence that "likely" related to his "knowledge of material information that was adverse or contrary to information being provided to Parametric's shareholders." 5.AA.0705–06; *see also* AOB 35.

- The Board was not aware of the reality of VTBH's deteriorating financial position, and the proxy and other public statements to Parametric's shareholders concealed that information. AOB 21–33, 78–81. The lies were also

> repeated privately to Houlihan Lokey, Parametric's financial advisors, and to Adam Kahn of PAMTP assignor IceRose Capital. *Id.* at 20, 28–29.

Once again, Respondents have ***no response*** to ***any*** of this. They do not contest—nor could they—that this string of bad acts constitutes the "intentional misconduct, fraud or knowing violation of law" required to hold Potashner liable. *See* NRS 78.138(7)(b).

Instead, they argue that it is irrelevant in light of the district court's findings about what the Board did. As noted above, however, the ultimate question is whether *Potashner*, not the Board, engaged in misconduct. Respondents do not dispute that he did. At best, they seem to argue, in various ways, that Potashner's misconduct did not *cause* any harm because the Board independently approved the transaction. In other words: No harm, no foul.

None of Respondents' attempts to break the causal link between Potashner's misdeeds and the merger makes any sense.

1. Respondents contend that the district court found the Board "cured [Potashner's] self-interested behavior before the deal closed" by cancelling his HHI options. RAB 48. This is wrong for several reasons.

The district court did *not* find that cancelling Potashner's HHI options "cured" his self-interest. *On the contrary*, it found that Potashner remained interested in the deal because he would receive a "severance payment and accelerated vesting of incentive stock options." 20.AA.3791.[8] It even presumed that Potashner's receipt of the payment and options "constituted an expropriation by Potashner of value from the company." 20.AA.3792. Although those incentives were not as remunerative as the HHI options would have been, they were still worth approximately $2.5 million—more than enough to motivate Potashner's continued bad faith, self-interested behavior. 7.AA.1318.

Nor could the district court have found that Potashner's self-interest was cured. Much of the misconduct—including the misleading descriptions of VTBH's financial outlook—occurred ***after*** the deal was announced and thus ***after*** his HHI options were cancelled. Indeed, the district court's own adverse inference of bad faith against Potashner was

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[8] Respondents argue that these incentives "were arranged long before the merger came about," RAB 42 n.19, but they do not dispute that the incentives *existed* and thus that Potashner was *motivated by self-interest to complete the merger*, which is the point.

expressly directed to misrepresentations to shareholders post-announcement. *See* 5.AA.0705–06.

Remarkably, Respondents simply ignore that Potashner and the Non-Director Defendants knowingly and materially misled Parametric's shareholders and the Board between the announcement of the deal and its closing. *See* AOB 20–33, 74–78. Although PAMTP discussed the misleading proxy disclosures and other investor communications at length, Respondents say ***not one word*** about them. They defend neither the trial record of their misleading communications, *id.*, nor the district court's misreading of the disclosures, *id.* at 78–80.

2. Next, Respondents insist that the fact—found by the district court, 20.AA.3780—that Potashner avoided and slow-played licensing deals "fails to impugn the Board's judgment in approving the merger," RAB 56 n.22. Even Respondents' version of the facts shows why that is not true.

Respondents point out that the Board "considered renegotiating the exchange ratio" because of VTBH's underperformance but "concluded that any renegotiation only would benefit Turtle Beach" because Parametric had also underperformed. *Id.* at 13. But Parametric's

"abysmal performance," *id.*, is attributable to the fact that ***Potashner avoided completing and slow-played licensing deals***, 20.AA.3780. As Respondents do not dispute, Parametric's primary monetization strategy and Potashner's "main responsibility" was to generate licensing deals. AOB 6, 10 (quoting 15.AA.2708:3–9 (Kaplan)). Thus, Respondents' assertion—without any citation—that Parametric was "no closer to having a commercial product," RAB 13, ignores reality. Parametric's business plan, as they concede, was "never [to] design/build products" but instead "to license." 13.AA.2414; AOB 10. And, in yet another concession through silence, at the time Potashner stopped that business in its tracks, the company was having success with that business model. AOB 6.

In other words, the downward revisions to Parametric's projections are not a reason to ignore Potashner's suppression of licensing deals; they are ***evidence*** that Potashner's scheme ***worked***. His early maneuvering made the deal with VTBH and Stripes inevitable. By the time the Board cancelled his HHI options, the damage was done; it was not cured or even capable of being cured at that point. As of July 2013, the Board felt it had no choice but to merge, *id.* at 13, and after the deal was announced,

it felt it had no leverage to renegotiate the exchange ratio, RAB 13. Its decisions therefore cannot be seen as an exercise of truly independent and fully informed business judgment. They were the inevitable and intended byproduct of Potashner's manipulative and deceptive conduct.

3. Finally, Respondents emphasize the Board's hostility toward Potashner at various points and its reliance on financial advisors. *See id.* at 42–44, 46–47, 48. But that the Board was sometimes hostile does not mean Potashner's misconduct had no effect on whether the transaction occurred. As for financial advisors like Craig-Hallum and Houlihan Lokey, Respondents simply ignore the evidence—which like so much else in this appeal lies undisputed—that those advisors, too, were misled. The Craig-Hallum fairness opinion rested on VTBH financial projections that turned out to be wildly false, a fact that Stark blatantly lied to Houlihan Lokey about, suggesting that its financials would "end up being modestly lower than forecast." *See* 17.AA.3066; AOB 28.

In short, Respondents do not point to trial evidence that Potashner's misconduct was somehow harmless. Neither did the district court. What remains is Respondents' primary theme—the Board's

approval of the deal is entitled to deference whatever Potashner did. As shown next, that argument fails.

B. Potashner's Conceded Misconduct Precludes Deference to the Very Board Decision Irretrievably Tainted by that Misconduct

1. Respondents *concede* actual fraud

In its opening brief, PAMTP laid out record evidence of several acts that should be considered actual fraud under any plausible standard. This includes Potashner's and the Non-Director Defendants' manipulative efforts to avoid and delay licensing deals, as well as their promulgation of misleading and deceptive disclosures about VTBH's financial outlook. AOB 74–80. PAMTP also cited the district court's finding that Potashner destroyed evidence that likely would have related to his concealment of material information from shareholders—i.e., evidence that likely would have further revealed his fraud. *Id.* at 80–81.

Respondents ***do not dispute*** that the trial evidence establishes those facts. Nor, incredibly, do they dispute that those facts constitute actual fraud, ***even under the definitions they propose***, because they involve knowing and intentional misrepresentations and omissions. *See* AOB 77–78; RAB 51 & n.21. Respondents also do not dispute that

PAMTP showed justifiable reliance, to the extent such a showing is required (which it is not).[9] *See* AOB 78. Respondents' discussion of the meaning of "actual fraud" is thus purely academic because they fail to dispute that, however it should be defined, PAMTP showed it.

Respondents argue instead that, "[e]ven 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." RAB 53 (emphases added). So what? NRS 78.211(1) requires only a showing of "actual fraud in the transaction," regardless of who committed it. And the clear import of the statute is that a board's approval of a transaction that was the product of actual fraud is not entitled to "conclusive" deference precisely *because the transaction was the product of actual*

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[9] Respondents' argument with respect to reliance is confusing. They say they never argued PAMTP had to prove common-law fraud, RAB 50, but in the next page they argue actual fraud means common-law fraud, *id.* at 51. Then, in another contradiction, they insist that actual fraud requires proof of a false statement "on which the claimant relied," *id.*, ignoring that, in the class action, they obtained approval for the class settlement based on a finding that "reliance is not an issue in this case" because "'there is no reliance requirement'" for these claims, 1.SA.0049 (quoting *In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 318, 327 n.10 (Del. 1993)).

fraud. That principle, like the statutory text, extends beyond situations where *the board itself* commits fraud.

Here, for example, Potashner, the CEO and Chairman of the Board, worked in bad faith and for self-interested reasons with a transaction counterparty to deceive the rest of the Board and Parametric's shareholders into approving a transaction that was bad for the shareholders. Can it really be the case, as Respondents contend, that Nevada law does not recognize a claim in that circumstance? Or that it would recognize a claim only where the *entire board* was in on the fraud? And all this, without any basis in the language of NRS 78.211(1)? To state these propositions is to refute them.

The lone source Respondents cite to support their counter-intuitive reading of NRS 78.211(1) only confirms how baseless it is. *See* RAB 53 (citing *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, 133 Nev. 369, 376, 399 P.3d 334, 342 (2017)). *Wynn* held, in a discovery-related appeal arising out of a case where the company "voluntarily filed [a] complaint[] seeking to have the court affirm [a] business decision," that "the business judgment rule protects action by a board of directors, just as it protects an individual director's action." *Wynn*, 133 Nev. at 373, 399 P.3d at 340.

Wynn thus addressed the business judgment presumption, ***not*** the separate deference-absent-actual-fraud provision of NRS 78.211(1), which was not even at issue. It neither held nor could have held that NRS 78.211(1) requires the plaintiff to show that the entire board committed actual fraud. No surprise, because such a holding would contradict the plain text of the statute and common sense.

2. PAMTP rebutted the business judgment presumption

Respondents' failure to dispute the facts amounting to actual fraud, along with other key concessions, make it impossible for them to win their primary argument—which the district court adopted—that the business judgment presumption insulates Potashner from liability because the Board approved the transaction. But Nevada law, and Delaware courts interpreting similar law, are clear that there is no deference to board decisions that are the product of manipulation, coercion, or deception.

Respondents ignore that independence and good faith are only part of the business judgment presumption. The presumption is not just that the board acted independently and in good faith, but also that it acted on "an informed basis." NRS 78.138(3); AOB 56–58. Notably, the presumption is phrased conjunctively—that the board is "presumed to

act in good faith, on an informed basis ***and*** with a view to the interests of the corporation." NRS 78.138(3) (emphasis added). Thus, a plaintiff can rebut the presumption by showing that material information was fraudulently concealed from a technically independent board acting in good faith. *Cf. Wynn*, 133 Nev. at 377, 399 P.3d at 343 (business judgment rule rebutted by "showing *either* that the decision was the *product of fraud or* self-interest *or* that the director failed to exercise due care in reaching the decision" (citation omitted) (emphasis added)).

Delaware law is in accord. Reasoning from first principles, Delaware courts hold that, where there is "illicit manipulation of a board's deliberative process," sometimes described as a "fraud upon the board," the "protections girding the decision itself vanish." *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1279, 1283–84 (Del. 1989). Thus, an individual board member's good faith and technical independence may insulate *himself* from liability for a bad decision, but it cannot immunize the bad actor who caused the board to make it. *See id.* at 1284 & n.32 (distinguishing business judgment doctrine's protections of "the decision itself" from protections for "independent directors' personal liability for th[e] challenged decisions).

PAMTP cited several cases where, applying this common-sense reasoning, Delaware courts have rejected deference to uninformed and manipulated board decisions. AOB 57–61. In response, Respondents did not cite *a single case* where a court deferred to a board decision in like circumstances—or indeed any cases at all. As for PAMTP's cases, Respondents do not even address the Delaware Supreme Court decisions establishing the basic principle that manipulated board decisions are not entitled to deference. *See* AOB 57 (citing *Mills*, 559 A.2d 1261; *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816 (Del. 2015)). And their attempts to distinguish the trial-court cases applying that principle fail.

For example, Respondents distinguish *Oracle* on the ground that it resolved a motion to dismiss. RAB 54–55. That is not a meaningful distinction. If the *allegations* of certain types of misconduct suffice to "state[] a claim" for breach of fiduciary duty, *In re Oracle Corp.*, C.A. No. 2017-0337-SG, 2018 WL 1381331, at *21–22 (Del. Ch. Mar. 19, 2018), then *proof* of those allegations would prove the claim. Here, PAMTP proved at trial exactly the sorts of allegations that *Oracle* held state a claim—that a director held unauthorized negotiations with the transaction counterparty, concealed those discussions from the board,

and manipulated the sale process to justify a bad price, including by using false financial projections. *Id.*

As for *Emerging Communications* and *Dole*, Respondents point out that those cases involved controlling-shareholder transactions and applied the "entire fairness" standard. RAB 55. While true, those observations are incidental. The relevant holdings from the cases are that the *consequence* of a breach of fiduciary duty involving deception, manipulation, misrepresentations, and concealment is to render tainted board and shareholder approvals ineffective. *See In re Emerging Communications*, No. Civ.A. 16415, 2004 WL 1305745, at *35–37 (Del. Ch. June 4, 2004); *In re Dole Food Co. Stockholder Litig.*, C.A. Nos. 8703-VCL & 9079-VCL, 2015 WL 5052214, at *26, 31–32 (Del. Ch. Aug. 27, 2015). The same rationale for holding that a defrauded board's decision is not entirely fair supports a holding that a defrauded board's decision is not entitled to the business judgment presumption. *See Mills*, 559 A.2d at 1283–84 (business judgment protections "vanish" where a board is "deceived"); *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161, 1178 (Del. Ch. 1999) ("[T]he business judgment rule is rebutted if there is evidence of disloyalty, including . . . 'fraud upon the corporation or the

board.'" (quoting *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 371 (Del. 1993)).

In other words, evidence that a board was defrauded and thereby uninformed can establish that its decision is *both* not the product of fair dealing *and* not the product of business judgment. That should not be surprising, since it was the product of manipulation and fraud. If Nevada law allows a good faith but uninformed and manipulated board approval to insulate the bad actors who engineered that approval, then fiduciary duties offer precious little protection indeed.

III. Respondents' Standing Argument Fails

In yet another effort to convince this Court not to confront the record of misconduct here, Respondents ask it to affirm on the ground, which the district court did not rely on, that PAMTP lacks standing to bring any claim at all. Specifically, Respondents assert that PAMTP's assignors, when they assigned their claims to PAMTP, had sold the shares they held at the time of the merger. This argument fails on several levels.

First, at most Respondents raise a question of the quantum of damages rather than whether PAMTP has a claim at all. At least one of

PAMTP's members—IceRose—owned shares at the time of the assignments. 20.AA.3775. Respondents concede this fact. *See* RAB 63. Indeed, the district court "f[ou]nd that at least some of the shares owned by" one of PAMTP's members "were transferred to" PAMTP, "[s]o they do have standing to make the arguments that they're making." 20.AA.3686.

Respondents' answer is that PAMTP never showed that IceRose owned those shares as of January 15, 2014. RAB 63. But they cite no authority for why that fact matters, and it is hard to understand why it would. Their theory is that the right to bring any shareholder claim is automatically conveyed from the seller to the buyer of shares unless the seller reserves its claims in the sale contract. That theory is wrong for various reasons, but even if it were correct, IceRose obtained the rights to sue that travelled with those shares from January 15, 2014 onward.

Either way, there is neither need nor benefit for this Court to wade into this issue. The district court should address it in the first instance. *E.g.*, *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg.*, 133 Nev. 28, 34, 388 P.3d 970, 975 (2017) (remanding so district court could "consider . . . in the first instance" arguments it "did not address").

Second, Respondents are judicially estopped from advancing their standing argument. Judicial estoppel prevents a party from taking "totally inconsistent" positions in two different proceedings. *Kaur v. Singh*, 136 Nev. 653, 657, 477 P.3d 358, 362–63 (2020). If the party "was successful in asserting the first position" and "the first position was not taken as a result of ignorance, fraud, or mistake," the party is barred from taking an inconsistent position in the second proceeding. *Id.*

Here, Respondents' argument is irreconcilable with their position in the class action. Specifically, the class action defendants obtained a final judgment and broad release of claims of those who demonstrated ownership of shares "held on January 15, 2014." 1.AA.0158; *see also* 1.ARA.127–30 (joining class plaintiffs' request for preliminary settlement approval); 1.ARA.0174–75, 0177–78 (limited joinders to class plaintiffs' request for final settlement approval). Class members were *not* required to show that they *still* held the shares. *See* 1.AA.0158. Moreover, the class was limited to those who owned shares on January 15, 2014 because *Respondents* argued that only shareholders who held shares on that date suffered harm, and that "[a] class definition that identifies shareholders

at any other point in time would automatically include plaintiffs who lack standing and would therefore fail for lack of definiteness." 1.ARA.042.

Respondents now take the opposite position—that shareholders with claims included those who held shares *after* January 15, 2014 even if not *on* that date. But that position would have made it difficult if not impossible for them to obtain their broad release in the class action. Moreover, if Respondents' current position is correct, they obtained the release—which gave Respondents global peace with respect to *all* current and former Parametric shareholders (except for opt outs)—based on a settlement that excluded shareholders who (Respondents now contend) actually owned the claims. That would be untenable, as Respondents would have obtained a substantial benefit from their old position while taking a new position that risks serious due process problems. *Cf, e.g.*, *Hesse v. Sprint Corp.*, 598 F.3d 581, 589 (9th Cir. 2010) (rejecting as "constitutionally infirm" argument that class settlement effectuated "broad release of other claims [the class plaintiff] did not possess").

Indeed, Respondents' shifting position creates fundamental unfairness. Assignors and other class members who owned shares on January 15, 2014 but later sold them were told they had a choice: either

join the settlement and receive the payment, or opt out and bring their own lawsuit, as PAMTP's Assignors did. *See* 1.AA.0147 (class notice). Respondents now contend that, in fact, this was not the choice: PAMTP's assignors had no standing to bring claims, so the real choice was between staying in the class and recovering their share of the settlement, or opting out of the class and recovering nothing. This kind of "unfair advantage" from "inconsistent positions" is exactly what judicial estoppel is designed to prevent. *Marcuse v. Del Webb Cmtys., Inc.*, 123 Nev. 278, 288, 163 P.3d 462, 468–69 (2007).

Third, if this Court were to reach the issue, it is important to clarify who has the burden. What the parties call standing—whether the plaintiff retains the claim on which it sues—is not a jurisdictional defense but a question of the merits. There is no doubt PAMTP asserts a justiciable claim. *Cf. Nat'l Ass'n of Mut. Ins. Cos. v. Dep't of Bus. & Indus.*, 139 Nev. Adv. Op. 3, 524 P.3d 470, 476 (2023) (identifying "injury-in-fact, redressability, and causation" requirements). The standing argument Respondents raise is thus an affirmative defense on which

Respondents rather than PAMTP bear the burden.[10] In fact, the defense is waived if not affirmatively pleaded. *Contrail Leasing Partners, Ltd. v. Exec. Serv. Corp.*, 100 Nev. 545, 549 n.2, 688 P.2d 765, 767 n.2 (1984) (citing NRCP 8(c) and 9(a)). Here, the Non-Director Defendants did not plead a standing affirmative defense at all. 2.AA.0355–56. And the two standing affirmative defenses Potashner pleaded were based on allegations that PAMTP failed to meet the procedural requirements for bringing a derivative claim, an entirely different argument, 2.AA.0314–15; *see also* 2.SA.0289–90.

Fourth, to the extent Respondents can advance the defense, they cannot satisfy their burden to sustain it. They misread the primary authority they cite, *Urdan v. WR Capital Partners*, 244 A.3d 668 (Del. 2020). *Urdan* involved a private sale of stock in a private company via heavily negotiated stock repurchase agreements that expressly transferred "all of Seller's right, title, and interest" in the stock to the

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[10] The one case Respondents cite for the opposite proposition is a summary judgment case that says nothing about trial burdens or standing. *See Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 670–71, 262 P.3d 705, 714 (2011); RAB 63–64.

buyer. *Id.* at 670. PAMTP's members did not sell their publicly-traded shares pursuant to such an agreement, an agreement which IceRose's Kahn testified "doesn't even make any sense as a general way that the stock market and securities work." 6.AA.1079.

Moreover, contrary to Respondents' position, RAB 61, *Urdan* recognized that "some dilution claims" do *not* travel with shares—i.e., claims where "the harm is to the stockholder, not the stock itself." *Urdan*, 244 A.3d at 679. The Assignors' claims fit this description because the harm—the improper transfer of control to VTBH and Stripes—befell the now-minority stockholders, not Parametric's stock. *See also id.* (citing "coerced sale to avoid dilution" and a "squeeze-out merger that involuntarily separates the stockholder from its stock and dilutes that stockholder in the process" as examples of dilution claims that do not travel with shares). For this reason too, PAMTP's assignors' claims were not transferred when they sold the shares even under *Urdan* itself.

In addition, through *Urdan*, Respondents rely entirely on a provision of the UCC (adopted by both Delaware and Nevada) relating to sales of "certificated or uncertificated securities." RAB 61 (citing NRS 104.8302(1); 6 Del. C. § 8-302(a)). As a threshold matter, Respondents do

not even attempt to demonstrate that the stock sales at issue were governed by Nevada's UCC as opposed to the law of New York, which presumably governed these transactions. *Cf.* 3.SA.0418, 513 (listing New York entities). *Compare, e.g.*, *Petersen Energía Inversora, S.A.U. v. Argentine Repub.*, 15 Civ. 2739, 16 Civ. 8569, 2023 WL 2746022, at *10 (S.D.N.Y. Mar. 31, 2023) (under New York law, "accrued causes of action do not automatically transfer with the sale of a security").

Nor do Respondents establish that these transactions constituted sales of "securities" within the meaning of NRS 104.8302(1), as opposed to sales of "security entitlements." The difference matters. A "security" is a share "represented by a security certificate in bearer or registered form," NRS 104.8102(1)(n), and is governed by Part 3 of Article 8 of the UCC, which includes the provision Respondents rely on regarding transfers of "certificated or uncertificated securities," *see* NRS 104.8302(1). A "security entitlement," by contrast, is a "right[] and property interest" with respect to "property that is held by a securities intermediary" for "another person in a securities account." NRS 104.8102(1)(j), (m)(2), (p) (definitions of "security entitlement," "financial asset," and "securities intermediary"). "Security entitlements" are

governed by Part 5 of Article 8 of the UCC, which does not include a provision similar to NRS 104.8302(1).

Here, Assignors' shares were all held, bought, and sold through securities accounts. Assignors therefore held *indirect* interests in the securities (i.e., entitlements to the securities) rather than the securities themselves. *See* 6.AA.1078–79 (Kahn testifying that PAMTP's assignors "never actually owned the certificates, they just had . . . the security entitlement"). That dooms Respondents' argument even on its own terms, because the concept of transferring a "right to a specific identifiable physical object" like a certificated security "***do[es] not work for the indirect holding system***." *See* U.C.C. § 8-503, cmt. 2 (emphasis added).

Indeed, under Respondents' theory, a company's shares should have different value depending on whether the shares had a live claim associated with them. (VTBH-sold shares, for example, would of course not carry a claim against VTBH.) But differentiating price based on who held the shares is impossible in a public market. Thus, Respondents' theory might work where rights to *specific* securities are transferred, as in *Urdan*. *See* 244 A.3d at 670. But it does not work here, where

entitlements to unidentified securities are transferred via public-market trades. And *Urdan* itself approvingly cited case law suggesting that the rule does not apply where, as here, "nothing in the record indicates that the market into which the Plaintiff sold its [shares] valued the potential [claim] in the price of the stock." *I.A.T.S.E. Local One Pension Fund v. Gen. Elec. Co.*, C.A. No. 11893–VCG, 2016 WL 7100493, at *6 (Del. Ch. Dec. 6, 2016) (cited by *Urdan*, 244 A.3d at 679 n.36).

Finally, Respondents' position raises serious questions that Respondents do not even attempt to address. If accepted, their position would mean that public shareholders who are improperly diluted and deprived of control of Nevada companies by fraudulent transactions would be put in an untenable position. They would either have to hold their shares and watch their investment deteriorate further, victims of the very change in control that wronged them, or cut their losses and by doing so lose their right to compensation for the wrong. At a minimum, this Court should not embrace such a position on an undeveloped record without full briefing.

IV. Respondents Were Not Entitled to Costs Incurred in Litigating the Prior Class Action

If this Court reverses the district court's Rule 52 order, the district court's costs order would necessarily be vacated too. Regardless, that order is independently reversible.

Put simply, Respondents should not recover, as costs in *this* action, over $850,000 in costs incurred in a *separate* action, dismissed *before* this one was commenced, in which they necessarily did not prevail because they *settled* pursuant to an agreement that *waived* their ability to seek costs. In their three-paragraph response, Respondents argue that PAMTP is on the hook for the class costs because this action is a "continuation of the class action" and PAMTP "accepted all the risks and benefits" of the class action. RAB 64–65. They are wrong.

First, there was no continuation. The class action was dismissed with prejudice, 1.AA.0175, and this case was commenced under a separate caption after that happened, 2.AA.0204. To be sure, the cases were later *consolidated* on Defendants' motion, but only for the sake of efficiency, because the district court agreed that the cases "involve[d] common questions of law and fact." 1.SA.0162 (citing NRCP 42(a)). The district court did not add PAMTP as a party to the class action or issue

any order suggesting that PAMTP took over or continued the case. Nor could it, since the class action had already been dismissed with prejudice. And "[c]onsolidated cases retain their separate identities" (AOB 85 (citing *In re Est. of Sarge*, 134 Nev. 866, 870–71, 432 P.3d 718, 722 (2018))), which Respondents do not dispute.

Thus, while Respondents assert that PAMTP's assignors "have been parties to this lawsuit since its inception in 2013," RAB 64, neither PAMTP nor its assignors were parties to the class action. To be sure, PAMTP's assignors were absent members of a putative class, but the class did not even exist until the Court certified it in January 2019, over five years after the action was commenced, 1.SA.0053. And, of course, PAMTP's assignors *opted out* of that class. *Cf. Smith v. Bayer Corp.*, 564 U.S. 299, 316 n.11 (2011) ("The great weight of scholarly authority . . . agrees that an uncertified class action cannot bind proposed class members."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810–11 (1985) (opt-outs are "removed from the [class] litigation entirely").

Second, PAMTP did not *agree* to a *continuation* of the class action. It is true PAMTP did not *oppose* Respondents' motion to *consolidate*, but only because "judicial economy would be served by" consolidation.

1.SA.0156. If Respondents had revealed at the time their position that consolidation would stick PAMTP with the downside risk of paying Respondents' costs in a class action PAMTP's assignors did not litigate, PAMTP would have opposed consolidation.

Third, PAMTP did not accept the benefits of the class—it opted out. The only "benefit" Respondents identify is that PAMTP received "substantial discovery" produced in the class action. RAB 64. But that was not a *benefit* to PAMTP; PAMTP was *entitled* to discovery relevant to its claims.[11] *See* NRCP 26(b)(1). And any benefits PAMTP received through consolidation were equaled or exceeded by *Respondents*, who were spared substantial time and expense by PAMTP agreeing not to relitigate the class action, as it was entitled to do. Indeed, that is why Respondents, not PAMTP, made the consolidation request—they believed it was in their interest.

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[11] Tellingly, Respondents do not attempt to defend the district court's erroneous determination that PAMTP benefited from the class action because it contended that pre-judgment interest ran from the inception of the class action. *See* AOB 88–89. As PAMTP explained, pre-judgment interest runs from the date of the harm for reasons having nothing to do with the separate cost-shifting statute or its purposes. *See id.*

Fourth, PAMTP should not be deemed to accept the risks of paying Respondents' class costs because Respondents did not accept a symmetrical risk. If PAMTP ultimately prevails, Respondents would be liable only for PAMTP's costs *in this action* because forcing Respondents to pay the class's costs to PAMTP would give PAMTP a windfall. By the same token, forcing PAMTP to pay Respondents' costs in the class action would give Respondents a windfall, because Respondents settled that action—they did not prevail—and in doing so waived their entitlement to costs.

Finally, accepting Respondents' argument would set a dangerous precedent for class actions and consolidated cases going forward. It would impinge on absent class members' due process rights by not allowing them to fully opt out of the class—under Respondents' interpretation, opt-outs could never escape the risk of paying class action costs. *See Phillips Petroleum*, 472 U.S. at 812 ("[D]ue process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class."). Indeed, sticking PAMTP with the class action costs would raise serious due process questions about *this* class settlement, given that opt-outs were told they "will not be legally bound

by anything that happens in this lawsuit" if they opted out. 1.AA.0147. Respondents' course would also disincentivize parties in all kinds of actions from seeking efficiency through consolidation because no party would willingly assume the risk of paying costs incurred in a separate action over which it had no control.

The better rule is to enforce NRS 18.020 as written—i.e., allow "[c]osts" to the "prevailing party" only in "an action" in which it prevails. That rule not only follows from the statutory text, it is also simple and fair. The district court's grant of $857,420.31 in class-action costs must be reversed.

V. Respondents Are Not Entitled Attorneys' Fees

The district court rejected Respondents' request for attorneys' fees because Respondents failed to meet their burden of showing that the judgment, when added to PAMTP's costs and fees, was less favorable than either offer. Respondents challenge the district court's reasoning, but the district court correctly rejected Respondents' proposed methodology—which rests on a literal reading of NRCP 68(g) that has long been recognized as mistaken. In any event, this Court can and should also affirm on the simpler ground that, since PAMTP settled with

four of the original ten Defendants for $400,000, PAMTP did better than both of Respondents' offers even without considering costs and fees. Nor can Respondents satisfy this Court's multi-factor test governing the discretionary award of attorneys' fees. *See Beattie v. Thomas*, 99 Nev. 579, 588, 668 P.2d 268, 274 (1983).

A. Respondents' Proposed Methodology Under NRCP 68 Is Wrong

Respondents argue that the district court erred when it added pre-offer costs and fees to the *offer* instead of the *judgment*. RAB 74–77. Their argument rests on the text of NRCP 68(g), but—critically—that text contains a well-known drafting error.

NRCP 68 provides that when an offer is inclusive of fees and costs—as both of Defendants' offers were here—the court must compare "the amount of the offer, together with the offeree's pre-offer" fees and costs,[12] "with the principal amount of the judgment." The literal language thus requires a comparison between the *offer* plus pre-offer fees and costs, on one hand, and the judgment alone, on the other. But the drafters actually

[12] Specifically, "pre offer taxable costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees." NRCP 68(g).

intended the *opposite* comparison—i.e., between the offer, on one hand, and the *judgment* plus pre-offer fees and costs, on the other. The language erroneously swapped the words "offer" and "judgment."

This drafting error has been recognized for nearly two decades. As then-Judge Bell explained in *HKM II v. Swisher & Hall*, an unpublished opinion that later became part of the legislative record relating to the statutory analogue of NRCP 68, the Supreme Court Committee that recommended the current language of NRCP 68 had concluded "that the only fair way to compare an offer of judgment to a judgment . . . would be to add to any *judgment* rendered the costs incurred by the Plaintiff up to the time of the offer . . . and compare that sum to the *offer*," and that was "clearly the intent of the Committee" when it recommended the new language. No. A396487, 2003 WL 24017776, at *3–4 (Nev. D. Ct. Nov. 25, 2003) (emphasis added). But "the language as actually adopted [wa]s diametrically opposed to what was intended," because it contemplated a comparison of the *offer* plus pre-offer fees and costs to the *judgment*. *Id.*

The cause was a drafting error in the Committee's recommendations to the Supreme Court. As Judge Bell explained, citing the drafting history of NRCP and noting that the author of the erroneous

recommendation-letter language was counsel to one of the parties in the case before him, "[t]he words 'offer' and 'judgment' were transposed in the letter of recommendation and then became inadvertently transposed in Rule 68 . . . !" *Id.* at *4. Judge Bell thus declined to apply the "unambiguous, but erroneous, clear language" of NRCP 68 because doing so would produce an "unintended, and arguably unjust, result." *Id.* Instead, he "ignor[ed]" the language to "reach the result obviously intended by the Supreme Court when it was inadvertently misled to pass a rule with language transposed." *Id.*

Subsequent developments confirmed Judge Bell's account of the drafting error and the correctness of his decision. Before 2005, NRS 17.115 contained a statutory analogue to NRCP 68 that used a formula based on the rule's erroneous language. *Id.* at *3. In 2005, the Nevada legislature amended the statute such that it compared "the amount of the *offer* with the sum of" the "principal amount of the *judgment*" plus pre-offer taxable costs. 2005 Nev. Stat., ch. 58, § 1, at 116 (emphases added). The intent was exactly to "fix" the transposition error that Judge Bell had identified. *See* Hearing on A.B. 166 Before the

Assembly Judiciary Comm., 73rd Leg. (Nev., Mar. 16, 2005), at 2–12 (discussing *HKM II*, 2003 WL 24017776).[13]

The following year, in *State Drywall, Inc. v. Rhodes Design & Development*, this Court recognized both the fact that the legislature fixed the statute *and* that the fix "was intended merely to *clarify* the comparison," not substantively change it. 122 Nev. 111, 115 n.4, 127 P.3d 1082, 1085 n.4 (2006). The Court thus held that district courts "must add the offeree's pre-offer costs to the *judgment* when comparing an offer of judgment that is inclusive of costs." *Id.* (emphasis added). And it so held in the context of a request for fees under *both* NRS 17.115(5) *and* NRCP 68. *Id.* In other words, it recognized that the text of NRCP 68 is wrong, and district courts applying it must use the clarified formula—which is what the district court did here.

Ignoring this case law and legislative history—Respondents' brief does not even acknowledge it, much less discuss it—Respondents argue that the current version of the fee-shifting *statute* (adopted by the Nevada

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[13] *Available at* https://www.leg.state.nv.us/Session/73rd2005/Minutes/Assembly/JUD/Final/3752.pdf.

Legislature in 2019) supports their interpretation of the *rule* (adopted by the Nevada *Supreme Court* in 1998). RAB 76–77. But they ignore that this Court already established the proper interpretation of NRCP 68, *see State Drywall*, 122 Nev. at 115 n.4, 127 P.3d at 1085 n.4, and they again ignore the legislative history.

NRS 17.115, the fee-shifting statute at issue in *State Drywall*, was repealed in 2015 and was not replaced until 2019, when the Legislature enacted NRS 17.117. The legislative history reflects that "[t]here was no explanation given for the decision" to repeal NRS 17.115, but it was possible "the statute was seen as being duplicative" of NRCP 68. Hearing on A.B. 418 Before the Assembly Judiciary Comm., 80th Leg. (Nev., Apr. 4, 2019), at 4.[14] Either way, the Legislature eventually recognized the repeal was a mistake because it risked eliminating fee-shifting in federal diversity cases applying Nevada law. *Id.* at 4–5. The purpose of NRS 17.117 was thus to "restore NRS 17.115," and the legislature did that by "putting our Nevada existing rule into statute." *Id.* at 5. As one

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[14] *Available at* https://www.leg.state.nv.us/Session/80th2019/Minutes/Assembly/JUD/Final/672.pdf.

Assemblyman explained, "[t]his is not something new; we are just codifying N.R.C.P. 68 to make sure that the federal court recognizes its importance." *Id.* NRS 17.117 thus uses the same formula as NRCP 68, inadvertently resurrecting the drafting error in the Rule that NRS 17.115 had previously fixed.

Respondents argue, without any citation, that the Legislature's decision to "re-adopt NRCP 68(g)'s formula demonstrates its intent to adhere strictly to that formula," RAB 76, but the record reflects no such intent. There was no consideration of the formula or the language, no mention of the erroneous transposition, and no discussion of the Legislature's heavily-considered decision to correct the error in 2005. Instead, NRS 17.117 was seen as "not something new," but rather a "restor[ation of] NRS 17.115." Hearing on A.B. 418, at 4–5.

Respondents' brief says ***not one word*** about this case law or legislative history. In effect, it asks the Court to ***overturn*** *State Drywall* and endorse a known drafting error, relying primarily on the erroneously drafted text and unsubstantiated mischaracterizations of the legislative record. That is, at best, irresponsible, and it is grounds by itself for rejecting Respondents' position.

Once the correct methodology for conducting the comparison is established, Respondents' remaining arguments are easily dispatched. They argue that the district court applied a contractual analysis to abrogate the language of Rule 68—which refers to "taxable" costs—but the court did no such thing. To the extent Rule 68's "taxable costs" concept applies, "taxable" does not mean, as Respondents argue, "taxed" in fact. *Contra* RAB 73 ("[I]f PAMTP had taxable costs, the district court would know them because it would have taxed them in the first place."). "Taxable" simply means capable of being taxed under the costs statute. *Cf. Taxable*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("subject to taxation" or "assessable"). Respondents do not argue (nor could they) that the district court factored in costs that may not be taxed under NRS 18.005, which defines allowable costs.

As for attorneys' fees, the district court correctly held that Respondents bore the burden to show the amount of PAMTP's fees (as they do not dispute). Respondents argue that the *evidence* of attorneys' fees is typically privileged, but that does not mean that the *amount* of those fees is not discoverable—indeed, Respondents submitted their own fee invoices in support of their motion. *See* 21.AA.3895. Respondents

could have sought the latter information to support their motion and simply declined to do so. They must accept the consequences.

B. In Any Event, PAMTP's Total Recovery Was More Favorable than Both Offers

This Court need not delve into the statutory history of NRCP 68 and NRS 17.115 and 17.117 because it may affirm on alternative grounds. The first ground is that PAMTP's pre-trial settlement with certain of the Director Defendants—and thus PAMTP's total recovery in this case—was clearly more favorable than the offers.[15]

To recap, *all ten* original Defendants collectively made two settlement offers, one for $1 on July 1, 2020, and another for $150,000 on May 28, 2021. RAB 67. Both offers were unapportioned—that is, made on behalf of all Defendants, collectively. Shortly before trial, PAMTP settled with the four Director Defendants other than Potashner for

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[15] PAMTP made this argument below as one of the primary reasons to reject Respondents' fee request, and the argument requires no further factual development. *See* 21.AA.3966; *see also Saticoy Bay, LLC, Series 34 Innisbrook v. Thornburg Mortg. Sec. Tr. 2007-3*, 138 Nev. Adv. Op. 35, 510 P.3d 139, 144 (2022) ("court may affirm the district court on any ground supported by the record, even if not relied upon by the district court").

$400,000. AOB 3; 21.AA.3979. The district court granted the settling Defendants' motion for determination of good faith settlement, 5.AA.0839, and the remaining Defendants proceeded to trial, 20.AA.3792. Thus, although PAMTP lost with respect to the non-settling Defendants, its total recovery—$400,000—was plainly more favorable than either offer.

Respondents argued below that courts cannot take settlements into account when determining whether PAMTP obtained a "more favorable judgment." They are wrong.

Nevada courts have not directly addressed this question, but federal courts have in interpreting the closely analogous federal fee-shifting rule.[16] In *Stone Creek, Inc. v. Omnia Italian Design, Inc.*, 808 F. App'x 459, 461 (9th Cir. 2020), two defendants made a joint $25,000 settlement offer pursuant to Federal Rule of Civil Procedure 68, which, like Nevada's Rule 68, requires the offeree to pay costs "[i]f the judgment

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[16] *See Moseley v. Eighth Jud. Dist. Ct.*, 124 Nev. 654, 662–63, 188 P.3d 1136, 1142 (2008) (when construing a Nevada Rule of Civil Procedure, the court may also look to the interpretation of similarly worded federal rules).

that the offeree finally obtains is not more favorable than the unaccepted offer." FRCP 68(d). After rejecting the offer, the plaintiff later settled with one defendant for a higher amount but went to trial against the other defendant and lost. *Stone Creek*, 808 F. App'x at 461. The district court held that the settlement could not be considered for purposes of the FRCP 68 "more favorable" analysis. The Ninth Circuit reversed, citing an earlier decision which reasoned that a settlement resulting in an order of dismissal with prejudice is a judgment "in substance" and holding that FRCP 68 should be construed with its "primary purpose . . . to encourage settlements" "in mind." *Lang v. Gates*, 36 F.3d 73, 76 (9th Cir. 1994). It held, "A settlement resulting in dismissal with prejudice constitutes a judgment for purposes of Rule 68," and thus the district court should have "add[ed] the settlement amount to the final judgment and compare[d] that figure to the defendants' joint Rule 68 offer." *Stone Creek*, 808 F. App'x at 461.[17]

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[17] Although *Stone Creek* is unpublished, it is citable under Ninth Circuit rules. *See* 9th Cir. R. 36-3(b) (permitting citation of unpublished opinions after 2007).

The Ninth Circuit's logic applies with even greater force here. The Nevada version of Rule 68 also imposes penalties on an offeree who "fails to obtain a more favorable judgment." NRCP 68(f)(1). And under Nevada law, the term "judgment" "includes a decree and any order from which an appeal lies." NRCP 54(a). Here, the district court entered an appealable order granting the settling Defendants' motion for determination of good faith settlement, *cf. The Drs. Co. v. Vincent*, 120 Nev. 644, 650, 98 P.3d 681, 685 (2004) (considering an appeal of an order granting a motion for determination of a good faith settlement), and it dismissed the claims against those Defendants pursuant to the settlement. Interpreting "judgment" in NRCP 68(f) to include the settlement is thus fully consistent with how that term is used in other parts of the rules. *See Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006) ("Whenever possible, this court will interpret a rule or statute in harmony with other rules and statutes." (quoting *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 993, 860 P.2d 720, 723 (1993))).

As the Ninth Circuit concluded in the context of FRCP 68, this interpretation is also consistent with NRCP 68's purpose "to encourage settlement." *Beattie*, 99 Nev. at 588, 668 P.2d at 274. A plaintiff who

rejects an unapportioned offer from all defendants would be less likely to settle with any portion of the defendants, because doing so would reduce the available recovery at trial and thereby make it less likely that the plaintiff could obtain a more favorable judgment. Respondents' interpretation of NRCP 68 discourages settlements in that context, whereas PAMTP's interpretation encourages them.[18]

Finally, including settlement amounts in the calculation of a plaintiff's total recovery is also consistent with this Court's instruction that exceptions to the American Rule be "strictly construed" and interpreted in "the way that least changes the common law." *Branch Banking v. Windhaven & Tollway, LLC*, 131 Nev. 155, 158–59, 347 P.3d

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[18] In the district court, Respondents argued that PAMTP's interpretation discourages settlements because it would allow plaintiffs to enter a partial settlement on the eve of trial, "eliminat[ing] the other Defendants' rights under NRCP 68" because they could not make a new NRCP 68 offer. 22.AA.4153 (noting that NRCP 68 offers must be made more than 21 days before trial). If Respondents resurrect that argument here, it should be rejected. There are no "rights" under NRCP 68, and to the extent there are, defendants can protect them. For example, they can make *apportioned* settlement offers or *higher unapportioned* offers. In other words, there are options—but punishing plaintiffs for *agreeing to a settlement*, the very thing NRCP 68 is designed to *encourage*, should not be one of them.

1038, 1040 (2015); *see also Smith v. Crown Fin. Servs. of Am.*, 111 Nev. 277, 286, 890 P.2d 769, 775 (1995) (narrowly construing a fee-shifting provision to "minimize[] any harmful impact upon the policies underlying the American Rule").

This Court has thus denied fee shifting in other contexts where the literal language of the statute supported the request. In *Kent v. Kent*, for example, the Court held that "a simple comparison of dollar amounts [was] an inappropriate standard for determining which result [was] more favorable" because in that case such a comparison would not reflect the true value of what the plaintiff obtained. 108 Nev. 398, 404, 835 P.2d 8, 11 (1992). And in *State Drywall*, the Court included pre-judgment interest in the favorability analysis even though NRCP 68(g) was "silent" on that issue because it was necessary to "achieve a balanced comparison" between the offer and the plaintiff's actual recovery (which included pre-judgment interest). 122 Nev. at 118–19, 127 P.3d at 1087. In both cases, the Court went beyond the plain language of the statute (something it need not do here) to ensure a comparison between the offer and plaintiff's *actual* recovery, because in those circumstances a

comparison between the offer and the money damages obtained at trial would not have been fair. The same is true here.

In the district court, Respondents cited several federal cases for the proposition that courts refuse to consider amounts received in pre-trial settlements when determining whether a plaintiff obtained a more favorable judgment. 22.AA.4152 & n.20. But those cases are not only distinguishable, they support PAMTP's position. In each case, the *plaintiff* requested a statutory fee award after settling the whole case in an amount *not* more favorable than a prior Rule 68 offer; the courts then held that Rule 68 did not *deny the plaintiff* post-offer fees. *See* FRCP 68(d) (requiring plaintiff to bear post-offer costs where judgment was not more favorable than the offer).[19] The rationale was that FRCP 68's "purpose" is to "encourag[e] settlements," and punishing plaintiffs for accepting settlements would "frustrate" that purpose.

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[19] *See Deferio v. Bd. of Tr. of State Univ. of N.Y.*, No. 5:11–CV–0563, 2014 WL 295842, at *11 (N.D.N.Y. Jan. 27, 2014); *Williams v. Greifinger*, No. 95 CIV. 0385, 1999 WL 239684, at *2 (S.D.N.Y. Apr. 23, 1999); *Good Timez, Inc. v. Phoenix Fire & Marine Ins. Co.*, 754 F. Supp. 459, 463 (D.V.I. 1991); *Hutchison v. Wells*, 719 F. Supp. 1435, 1442–44 (S.D. Ind. 1989); *E.E.O.C. v. Hamilton Standard Div., United Techs. Corp.*, 637 F. Supp. 1155, 1158 (D. Conn. 1986).

E.E.O.C. v. Hamilton Standard Div., United Techs. Corp., 637 F. Supp. 1155, 1158 (D. Conn. 1986) (quotation marks omitted).[20] NRCP 68 has the same purpose as FRCP 68, *see supra* at 64; *Beattie*, 99 Nev. at 588, 668 P.2d at 274, and punishing a party like PAMTP for accepting a partial settlement would have the same undesirable effect of discouraging settlements, contrary to that purpose.

Moreover, Respondents' position is even weaker here. If a plaintiff should not be denied *an award* of fees when it *failed* to obtain a settlement more favorable than the offer, then surely a plaintiff should not be required to *pay* the other side's fees when it *did* obtain a settlement more favorable than the offer—and *substantially* more favorable at that.

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[20] *See, e.g.*, *Deferio*, 2014 WL 295842, at *12 (interpreting FRCP 68 to punish post-offer settlements would lead to the "absurd and perverse result" of "*discouraging*" such settlements); *Good Timez,* 754 F. Supp. at 463 ("A plaintiff would be disinclined to accept, or even to consider seriously, a settlement offer once it has rejected the defendant's initial offer, because that plaintiff's interim costs may be automatically uncompensable under [FRCP] 68."); *Hutchison*, 719 F. Supp. at 1442–44 ("If [FRCP] 68 applied to the present case, it would provide a disincentive for attorneys to accept settlements once an initial settlement was rejected.").

C. Regardless, Respondents Fail to Satisfy the *Beattie* Factors

The second alternative ground for affirmance is that, even if Respondents could show that NRCP 68(f) applies—and they cannot—they would still have to show entitlement to fees under the four *Beattie* factors: "(1) whether [PAMTP's] claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether [PAMTP's] decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount." *Beattie*, 99 Nev. at 588–89, 668 P.2d at 274. They have not even attempted to make that showing on appeal, nor could they make that showing, either to this Court or to the district court on remand.

Again, the partial settlement alone warrants denial of their request. The settlement—which, again, was nearly *three times* the amount of the second offer *from all Defendants* and *400,000 times* the first offer—shows that the claims were brought in good faith (otherwise there almost certainly would not have been a settlement at all). It also shows that Defendants' offers were not reasonable and in good faith (they were materially lower than the partial settlement with the Director

Defendants other than Potashner, who were the *least culpable* defendants) and that—at a minimum—PAMTP's decision to reject the offers was not grossly unreasonable or in bad faith, since the settlement vindicated that decision. That means Respondents cannot satisfy the first three *Beattie* factors, which in turn makes the fourth factor irrelevant. *See O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 555, 429 P.3d 664, 668 (Ct. App. 2018).

The settlement thus supports denial of Respondents' fee request for two related reasons. Either it renders NRCP 68(f) inapplicable, *see supra* at IV.B, or it renders the fee request unwarranted, *see supra* at IV.C, because the settlement shows that PAMTP reasonably rejected the settlement offers and obtained a better result.

CONCLUSION

For the foregoing reasons, and the reasons stated in PAMTP's opening brief, the district court's Judgment under NRCP 52(c) should be reversed, and the case remanded for a new trial, and the district court's Costs Order based on that Judgment should also be vacated. In the alternative, the Costs Order should be reduced by the $857,420.31 in class action costs, and the Fees Order should be affirmed.

AFFIRMATION

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

Respectfully submitted this 8th day of May, 2023.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font, Century Schoolbook style. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 13,985 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, 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), which requires every assertion regarding matters in the record to be supported by a reference to the page 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

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this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: May 8, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano LLP and on May 8, 2023, a true and correct copy of the foregoing was electronically filed and served on all registered parties to the Supreme Court's electronic filing system.

/s/CaraMia Gerard
An Employee of McDonald Carano LLP