IN THE SUPREME COURT OF THE STATE OF NEVADA

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

PAMTP, LLC,

Appellant,

vs.

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

Respondents.

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

REPLY BRIEF IN DOCKET NO. 84971

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NRAP 26.1 DISCLOSURE STATEMENT

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

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

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

There are no other known interested parties.

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

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INTRODUCTION

The district court erred in denying Defendants' motion for attorneys' fees, and PAMTP offers no credible basis to support the district court's denial of Defendants' motion. PAMTP principally claims that attorneys' fees properly were denied based on a reading of Nevada Rule of Civil Procedure 68(g) that it concedes is contrary to the plain language of that rule. Even if that fanciful argument were correct, PAMTP has no answer to the district court's other, primary errors, which Defendants highlighted in their combined answering brief.

First, PAMTP does not defend either the district court's replacement of NRCP 68(g)'s "taxable costs" with "costs of suit" or its novel theory that the parties contractually changed the rule's language through the offers of judgment that PAMTP *rejected*. PAMTP instead argues, without any citation, that "taxable costs" are those that hypothetically could have been taxed by PAMTP on Defendants if PAMTP were the prevailing party. But Nevada law is clear that costs are "taxable" only if they are borne by a prevailing party. Thus, even under PAMTP's upside-down reading of NRCP 68(g), which adds costs to the judgment to compare to the offer, PAMTP did not fare better than

either offer of judgment because its recovery of $0 plus its taxable costs is still $0.

Second, PAMTP offers no support for the district court's erroneous conclusion that Defendants bore the evidentiary burden of establishing PAMTP's costs and fees.

Third, unable to overcome NRCP 68(g)'s unambiguous text, PAMTP argues that NRCP 68(g) and its statutory analog, NRS 17.117, are both "mistaken" as written. PAMTP presents a tortured, cherry-picked legislative history of a defunct statute—NRS 17.115—that it claims supports its position. But PAMTP concedes that NRS 17.115 was repealed and ultimately replaced in 2019 by NRS 17.117, which is purposefully identical to NRCP 68, requiring the comparison of the party's recovery against the offer plus costs. Under fundamental canons of statutory interpretation, this Court must assume that the Legislature's repeal of a statute *contrary* to NRCP 68 and subsequent adoption of language *identical* to the rule, particularly in light of caselaw noting the prior contradiction, was intentional and meant to confirm the plain meaning of NRCP 68(g).

Fourth, PAMTP argues that its settlement with certain defendants constituted a recovery "at trial" under NRCP 68(g). In support of this position, PAMTP offers only one unpublished, nonprecedential opinion that provides no analysis to support its conclusion that a settlement constitutes recovery under the federal offer-of-judgment rule. In contrast, there are numerous, published authorities holding the opposite because settlements are necessarily not recoveries obtained "at trial." PAMTP's rewriting of NRCP 68(g) would discourage settlements and enable gamesmanship in multi-party cases such as this.

Finally, although the district court made no findings on the issue, PAMTP argues Defendants did not meet the factors weighed by courts in awarding attorneys' fees under *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983). But the district court's holdings in granting a directed verdict in Defendants' favor—and PAMTP's wholesale abandonment of its equity-expropriation claim on appeal—show the *Beattie* factors were met here easily because PAMTP's claim never was brought in good faith and PAMTP unreasonably rejected Defendants' offers of judgment. For these reasons, the district court's order denying attorneys' fees to Defendants should be reversed.

ARGUMENT

I. PAMTP'S COSTS AND FEES WERE NOT "TAXABLE COSTS."

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

In determining whether PAMTP failed to obtain a judgment more favorable than Defendants' offers of judgment, the district court erroneously replaced NRCP 68(g)'s use of "taxable costs" with "costs of suit." PAMTP defends this error as essentially harmless, arguing that "'[t]axable' simply means capable of being taxed under the costs statute." PAMTP Reply Br. 59 (citation omitted). It contends that the district court simply "factored in costs that may . . . be taxed under NRS 18.005, which defines allowable costs." *Id.*

PAMTP's proposed definition is incomplete and, therefore, incorrect. PAMTP's costs were not "capable of being taxed" because, in Nevada, a litigant is entitled to costs only if it is the "prevailing party." NRS 18.020; *see also* NRS 18.010(2) ("In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a *prevailing party* . . . ." (emphasis added)). PAMTP provides no authority for its assertion that the *losing* party's costs are "taxable" under Nevada law. And the limitation of NRCP 68(g)'s

application to "taxable" costs is consistent with NRCP 68(f)(1)(A)'s command that an unsuccessful offeree—such as PAMTP—may not recover any costs or fees of any kind. By considering PAMTP's costs, the district court rendered the word "taxable" superfluous, contrary to Nevada law. *See S. Nev. Homebuilders Ass'n v. Clark Cnty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). Instead, the district court should have compared PAMTP's recovery ($0) and taxable costs ($0) to the offers of judgment and granted attorneys' fees to the Defendants.

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

The district court understood this meaning of "taxable costs" and thus had to evade it to deny Defendants' motion. In so doing, it erred by concluding that, by *rejecting* Defendants' offers of judgment, PAMTP effectuated a contract with Defendants that displaced NRCP 68(g)'s command to consider only "taxable" costs and, instead, consider "costs of suit." 23.AA.4380. PAMTP does not defend this error head-on; it argues instead that the district court did not apply a contractual analysis to abrogate the language of Rule 68. PAMTP Reply Br. 59. This ignores the district court's statement that "the Offer of Judgment, in essence, is a *contractual* offer to settle," and because "[t]he term 'costs of suit,' not

'taxable costs,' is utilized within both Offers of Judgment, . . . 'costs of suit' should be used in the comparison." 23.AA.4380 (emphasis added). Accordingly, the district court looked to the "costs of suit" rather than the rule's "taxable costs." *Id.* n.5.

PAMTP fails to provide any Nevada authority endorsing the district court's novel conclusion that the parties modified NRCP 68(g)'s use of "taxable" costs to "costs of suit" through contract. Nor does it mount any argument that a *rejected offer* could form the basis of such a contract. *See May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). Rather, the district court should have compared PAMTP's judgment—$0—against the $1 and $150,000 offers and found that PAMTP did not achieve a more favorable outcome than either offer. This Court should overturn the district court's fee order on this basis, too. *See* Defs.' Answering Br. 69–71.

C. PAMTP's settlement with former parties is not an award against Defendants for NRCP 68's purposes.

Citing no Nevada authority, PAMTP argues that its $400,000 settlement with four former defendants (the "Settling Defendants")[1]

[1] The Settling Defendants are Elwood Norris, Seth Putterman, Robert Kaplan, and Andrew Wolfe.

draws its total recovery above Defendants' offers of judgment. This argument is farcical. Nothing in NRCP 68 suggests that settlement with one party counts as recovery against another. To the contrary, Nevada courts have recognized consistently that NRCP 68 requires a plaintiff who rejects an offer of judgment to obtain a more favorable result *at trial* to avoid the rule's penalty provision. *See, e.g.*, *Beattie v. Thomas*, 99 Nev. at 588, 668 P.2d at 274 (explaining that the court must consider, among other factors "whether the plaintiff's decision to reject the offer and *proceed to trial* was grossly unreasonable or in bad faith" (emphasis added)); *State Drywall, Inc. v. Rhodes Design & Dev.*, 122 Nev. 111, 115 n.4, 127 P.3d 1082, 1085 n.4 (2006) (noting that "[i]n some cases, costs could exceed the judgment, making it impossible for an offeree to achieve a more favorable judgment *at trial*" (emphasis added)).[2] Clearly, PAMTP did not obtain a more favorable judgment "at trial."

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[2] *See also Nava v. Second Judicial Dist. Court*, 118 Nev. 396, 398–99, 46 P.3d 60, 61 (2002) ("NRCP 68(f) and NRS 17.115(4) set forth applicable penalties if the offeree rejects an offer and fails to obtain a more favorable judgment *at trial*." (emphasis added)); *Frazier v. Drake*, 131 Nev. 632, 641, 357 P.3d 365, 371 (Nev. Ct. App. 2015) ("If the party to whom the offer is made rejects it and then fails to obtain a more favorable judgment *at trial*, the district court may order that party to pay the offeror 'reasonable attorney fees.'" (emphasis added)).

Analogous federal law validates this interpretation. *See Moseley v. Eighth Judicial Dist. Court*, 124 Nev. 654, 662–63, 188 P.3d 1136, 1142 (2008) (when construing NRCP, courts look to the interpretation of similarly worded federal rules). Construing Federal Rule of Civil Procedure 68, the U.S. Supreme Court has recognized that a plaintiff must obtain a more favorable result at trial after rejecting an offer of judgment. *See Marek v. Chesny*, 473 U.S. 1, 5 (1985) (FRCP 68 "prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success *upon trial* on the merits" (emphasis added)). Under the federal rules, any amount received in a pretrial settlement is not considered when determining whether a party obtained a more favorable result after rejecting an offer of judgment. *See, e.g.*, *Deferio v. Bd. of Tr. of State Univ. of New York*, 2014 WL 295842, at *11 (N.D.N.Y. Jan. 27, 2014) (FRCP 68 "applies only in cases resulting in a judgment obtained after either a trial or hearing"); *Williams v. Greifinger*, 1999 WL 239684, at *2 (S.D.N.Y. Apr. 23, 1999) (refusing to consider settlement when applying FRCP 68); *Hutchison v. Wells*, 719 F.

Supp. 1435, 1443 (S.D. Ind. 1989) (refusing to consider the amount received in a settlement for Rule 68 purposes).[3]

PAMTP relies on a single, unreported federal case, which it claims demonstrates that courts take settlements into account to determine whether a party obtained a "more favorable judgment." PAMTP Reply Br. 61–62. In that case, a plaintiff *prevailed* on its claims at trial but failed to obtain damages exceeding a joint offer of judgment made by two defendants, one of which settled before trial. *See Stone Creek, Inc. v. Omnia Italian Design, Inc.*, 808 F. App'x 459 (9th Cir. 2020) (unpublished).[4] The court declined to hold the successful plaintiff responsible for the non-settling defendant's attorneys' fees because the pretrial settlement exceeded the joint offer. The opinion contains no

[3] PAMTP attempts to distinguish these cases on the ground that "the *plaintiff* requested a statutory fee award after settling the whole case in an amount *not* more favorable than a prior Rule 68 offer." PAMTP Reply Br. 66. But it does not explain why this matters. The point is that Rule 68 does not account for "success" through settlements, let alone from different parties.

[4] *Stone Creek* is unpublished and therefore "not precedent" even within the Ninth Circuit. *Grimm v. City of Portland*, 971 F.3d 1060, 1067 (9th Cir. 2020) (quoting U.S. Ct. of App. 9th Cir. R. 36-3(a)). PAMTP cites no other case—published or not—relying on *Stone Creek* for the holding it urges for here.

analysis of this issue, and, most importantly, the plaintiff—unlike PAMTP—asserted meritorious claims and prevailed at trial.

PAMTP argues that construing NRCP 68(g) to encompass settlements would "encourage settlement." PAMTP Reply Br. 63 (citation omitted). Precisely the opposite is true. For example, here, PAMTP waited until the eve of trial to settle with the Settling Defendants. At that point, PAMTP knew it would be too late for any non-settling Defendants to issue a new offer of judgment under NRCP 68 (which requires such offers to be made at least 21 days before trial). If PAMTP could use settlement with one defendant to eliminate the other Defendants' rights under NRCP 68, leaving them with no opportunity to issue a revised offer, then the non-settling Defendants would have had a strong incentive to oppose these settlements.[5] Using NRCP 68—a rule designed to encourage settlements—in a manner that plainly would have discouraged settlement in this case would have produced an absurd result; yet, it is precisely what PAMTP now says should have happened

[5] PAMTP knew that settlement with the Settling Defendants required approval from Turtle Beach because it would indemnify the Settling Defendants for some portion of the settlement amount. 22.AA.4153 n.21. PAMTP now suggests that Nevada law punishes Turtle Beach for its role in allowing these settlements to occur.

here.[6] This is why courts have rejected applying NRCP 68's federal equivalent in such nonsensical ways. *See, e.g.*, *Deferio*, 2014 WL 295842, at *12 (FRCP 68 cannot be interpreted to cause "an absurd and perverse result" of "discouraging . . . settlements"); *Hutchison*, 719 F. Supp. at 1443 (refusing to consider the amount received in a settlement for Rule 68 purposes because "[i]f Rule 68 applied to the present case, it would provide a disincentive for attorneys to accept settlements").

Anticipating this argument, PAMTP argues that "there are no 'rights' under NRCP 68," and "to the extent there are, defendants can protect them" by making "*apportioned* settlement offers or *higher unapportioned* offers." PAMTP Reply Br. 64 n.18. It further contends that the court should not "punish[] plaintiffs for *agreeing to a settlement*." *Id.* All these assertions are wrong. PAMTP's focus on the word "right" is sophistry, as there is no dispute that Defendants are entitled to attorneys' fees if this case satisfies NRCP 68's conditions, and the ability

[6] This result would be even more absurd in situations where settling defendants did not require the consent or approval of the non-settling defendants. On PAMTP's theory, PAMTP could have circumvented NRCP 68 by settling with *one* defendant for more than the offered amount and then proceeding to trial against everyone else. PAMTP's proposed rule does not encourage settlements; it encourages gamesmanship that would render NRCP 68 toothless.

to recover attorneys' fees under related rules and statutes is frequently referred to as a "right." *See, e.g.*, *In re Est. & Living Tr. of Miller*, 125 Nev. 550, 555, 216 P.3d 239, 243 (2009) (quoting *Williams v. Brochu,* 578 So.2d 491, 495 (Fla. Dist. Ct .App. 1991)). Moreover, neither apportioned nor higher unapportioned offers of judgment are options for co-defendants to protect themselves from plaintiffs who refuse to settle frivolous claims—as PAMTP did here. It cannot be the purpose of NRCP 68 to exclude innocent parties who happen to be sued alongside others who actually may be liable. And plaintiffs who initiate such baseless claims should not be readily absolved of responsibility. In other words, NRCP 68 does not "punish plaintiffs for *agreeing to a settlement*" with a settling defendant, PAMTP Reply Br. 64 n.18. Instead, by design, it punishes plaintiffs for bringing and maintaining unmeritorious claims.

If that were not enough, both offers of judgment were made "inclusive of attorneys' fees, costs of suit, and prejudgment interest, and prohibited any application or motion for a post-acceptance award of taxable costs, attorney's fees, or interest." 23.AA.4374. This means that PAMTP's result after trial is not zero, but actually a significant *negative* number that accounts for *Defendants'* recoverable costs. As the

prevailing parties, Defendants sought—and obtained—recoverable costs well in excess of PAMTP's settlement with the Settling Defendants. Thus, even if this Court were to consider more under NRCP 68 than the amount PAMTP obtained at trial, PAMTP still would have been better off accepting either of the offers of judgment to avoid these substantial costs.

Finally, PAMTP's invocation of "this Court's instruction that exceptions to the American Rule be 'strictly construed'" is a red herring. *See* PAMTP Reply Br. 64–65 (quoting *Branch Banking v. Windhaven & Tollway, LLC*, 131 Nev. 155, 158–59, 347 P.3d. 1038, 1040 (2015)). NRCP 68 is an avowed exception to the American Rule, as it expressly authorizes the recovery of attorneys' fees. As discussed above, this Court has explained repeatedly that an offeree who rejects an offer of judgment, as PAMTP did twice, must obtain a more favorable judgment *at trial* to avoid this exception.[7]

[7] As is discussed below, PAMTP's assertion that NRCP 68(g) should be "strictly construed" in this context is undercut by its contradictory, principal argument that the plain language of the Rule's formula for determining whether an offeree's recovery at trial is more favorable than the rejected offer is "mistaken" and should be turned upside-down.

So, too, fails PAMTP's reliance on *Kent v. Kent*, 108 Nev. 398, 835 P.2d 8 (1992). *See* PAMTP Reply Br. 65–66. In *Kent*, this Court explained that "in an equitable action[,] a simple comparison of dollar amounts is an inappropriate standard." 108 Nev. at 404, 835 P.2d at 11; *accord Leeming v. Leeming*, 87 Nev. 530, 535, 490 P.2d 342, 345 (1971) (concluding that NRCP 68 is inapplicable to divorce proceedings because of the many issues that are not susceptible to an arithmetic calculation and the importance of the parties' personal goals). But *Kent* was a partition action where the plaintiff was offered a portion of the property that defendants argued was "more favorable" than the portion he was ultimately awarded at trial. 108 Nev. at 403, 835 P.2d at 10–11. The court held that the preservation of the plaintiff's business, afforded by the court's award at trial but not by defendants' offer of judgment, was "more favorable than the offer made by [defendants]." *Id.* at 404, 835 P.2d at 11. Here, by contrast, PAMTP sought only money damages and won nothing at trial, so there is nothing more for the court to consider.

II. THE DISTRICT COURT HAD NO EVIDENCE OF PAMTP'S COSTS AND FEES.

PAMTP further argues that the district court correctly held that *Defendants* had a burden to show the amount of PAMTP's attorneys' fees.

PAMTP Reply Br. 59–60. PAMTP is mistaken. The district court cited no authority for its novel conclusion that Defendants bore this burden. 23.AA.4379. And, as explained previously, even if Defendants had requested this evidence, it would have been denied as privileged. *See, e.g.*, *Ralls v. United States*, 52 F.3d 223, 224 (9th Cir. 1995) (attorney invoices and payment information are privileged); Defs.' Answering Br. 74 (citing *Ralls*).

In response, PAMTP ignores *Ralls* and instead asserts, without citation to legal or factual authority, that its fees would have been discoverable. PAMTP Reply Br. 59. PAMTP also contends—again without any support—that Defendants "could have sought" such evidence.[8] *Id.* at 59–60. PAMTP's *ipse dixit* assertions violate this Court's mandate that a party provide its "contentions and the reasons for them, with citations to the authorities . . . which [it] relies." NRAP 28(a)(10); *see Greenwood v. F.A.A.*, 28 F.3d 971, 977 (9th Cir. 1994) (courts "are not like pigs, hunting for truffles buried in briefs" and thus

[8] Indeed, even if fee information was discoverable, this information would have been stale by the time it was produced during discovery and when an offer of judgment could be made.

do "not manufacture arguments" for a party (citation omitted)). This Court thus should disregard PAMTP's speculative arguments.

Regardless, even if Defendants bore the burden of proof, PAMTP had no "taxable" costs because, as discussed above, "taxable" costs are awarded only to a *prevailing party*. Thus, no proof is necessary—and any burden is satisfied—as PAMTP did not have any "taxable costs" to be added to the offer and compared to the judgment.

III. THE DISTRICT COURT ERRED BY ADDING PRE-OFFER COSTS AND FEES TO THE JUDGMENT RATHER THAN TO THE OFFER.

Separate and apart from the reversible errors discussed above, the district court erred by adding costs to the judgment, and not the offer, contrary to the text of NRCP 68(g). PAMTP acknowledges that the district court bungled the text of NRCP 68(g) but argues that the rule contains a "well-known drafting error" that completely contradicts the rule's text. PAMTP Reply Br. 53. Notably, the district court itself failed to note this "well-known drafting error" in reaching its conclusion, instead relying on a nonprecedential Court of Appeals decision that PAMTP does not defend. 23.AA.4381; *see also* PAMTP Reply Br. 52–58. PAMTP accuses the Defendants of overlooking the "case law and

legislative history" establishing this error. PAMTP Reply Br. 56. But it is *PAMTP's* slipshod treatment of authority that would delude this Court into the wrong result.

At the outset, the district court's misconstruction of NRCP 68(g) is a third-order issue. The arguments Defendants asserted above do not depend upon the outcome of this issue. As established above, even if PAMTP were right to ignore the rule's text, the amount of PAMTP's pre-offer costs and fees are irrelevant because "the principal amount of the judgment" in this case is $0, and each offer of judgment made by Defendants was greater than $0.

Even so, PAMTP is flatly wrong that the "literal" reading of NRCP 68(g) "has long been recognized as mistaken." PAMTP Reply Br. 52. PAMTP is right that this Court previously sought to "harmonize" the conflicting language of NRCP 68(g) and a similar statute, NRS 17.115(5), by construing NRCP 68(g) to add pre-offer costs to the *judgment*, contrary to the rule's language, but consistent with the later-enacted language of NRS 17.115(5). *See McCrary v. Bianco*, 122 Nev. 102, 107 n.10, 131 P.3d 573, 576 n.10 (2006). But, as explained in Defendants' answering brief, NRS 17.115(5) since has been repealed. Then, in March 2019, the

Legislature enacted NRS 17.117, which—exactly like NRCP 68(g), but unlike former NRS 17.115(5)—requires the court to "compare the amount of the offer with the principal amount of the judgment, without inclusion of costs, expenses, interest and . . . attorney's fees." NRS 17.117(12).[9]

Cherry-picking from a largely unhelpful legislative record, PAMTP argues that the Legislature was simply mistaken when it adopted NRCP 68(g)'s language into NRS 17.117. PAMTP claims that certain statements imply that the drafters intended to restore NRS 17.115 in every respect. PAMTP Reply Br. 57–58. But this was not the intention. Instead, the Legislature was concerned with one problem: because the Nevada Rules of Civil Procedure do not apply in federal diversity cases, there was an asymmetry in fee recovery between state and federal cases. *See* Hearing on A.B. 418 Before the Assembly Judiciary Comm., 80th Leg. (Nev. Apr. 4, 2019), at 4, http://bit.ly/3WQ8ego. Restoring NRS 17.115(5)'s conflicting language, which added pre-offer fees and costs to the judgment rather than the offer, never was mentioned. In fact, one Assemblywoman "thank[ed]" the drafters for crafting NRS 17.117 as

[9] Both offers of judgment were made after March 2019.

"*identical* to N.R.C.P. 68" because "for years we struggled with *two different rules in statute*." *Id.* at 6 (emphases added).

Even if NRS 17.117's legislative history were helpful to PAMTP, its text leaves no need to consult legislative history in the first place. *See, e.g.*, *State v. Jepsen*, 46 Nev. 193, 196, 209 P. 501, 502 (1922) ("Where the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself."); *City Counsel of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 891, 784 P.2d 1974 (1989) (same); *Pitmon v. State*, 131 Nev. 123, 129, 352 P.3d 655, 659 (Nev. Ct. App. 2015) (same). Unlike the conflicting language of NRS 17.115(5), NRS 17.117 leaves no room for ambiguity. The construction of NRCP 68(g) to add taxable costs and fees to the offer is *identical* to that of NRS 17.117, with alterations only to spelling and punctuation. Thus, Nevada's case law surrounding a previous iteration of the statute cannot, and does not, alter the clear language the Legislature recently implemented.

The Legislature's decision to readopt NRCP 68(g)'s formula in NRS 17.117 demonstrates its intent to adhere strictly to that formula. "It is

presumed that in enacting a statute the legislature acts with full knowledge of existing statutes relating to the same subject." *Boulder City v. Gen. Sales Drivers*, 101 Nev. 117, 118–19, 694 P.2d 498, 500 (1985). Additionally, "the legislature is presumed to have intended a logical result, rather than an absurd or unreasonable one." *High Noon at Arlington Ranch Homeowners Ass'n v. Eighth Judicial Dist. Court*, 133 Nev. 500, 506, 402 P.3d 639, 645 (2017) (citation omitted). There is no reasonable indication that the Legislature meant to preserve this Court's interpretation of a previous statute by enacting contrary language. Rather, the Legislature's requirement that costs and fees be added to the *offer*, not the *judgment*, was deliberate.

IV. THE *BEATTIE* FACTORS COUNSEL IN FAVOR OF AWARDING ATTORNEYS' FEES.

Finally, PAMTP argues that Defendants could not satisfy the factors set forth in *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), because its settlement with the Settling Defendants shows that its claims against the *non-settling* Defendants were brought in good faith, that Defendants' offers of judgment were not reasonable and in good faith, and that its decisions to reject the previous settlement offers were not grossly unreasonable or in bad faith. PAMTP Reply Br. 68–69. Although the

district court did not make findings concerning the *Beattie* factors, they weigh strongly in Defendants' favor.[10]

A. PAMTP's claims were not brought in good faith.

The first *Beattie* factor asks whether PAMTP asserted its claims in good faith. PAMTP's equity-expropriation claim required, among other important elements, proof both that Potashner exercised actual or effective control over Parametric at the time of the stock issuance and that a majority of the Board engaged in "actual fraud" to cause the merger with Turtle Beach to occur. PAMTP reasonably could not have believed that it had any hope of proving either element. Potashner held no Parametric stock at the relevant time, and PAMTP had no evidence that any Parametric director other than Potashner engaged in "actual fraud." Indeed, underscoring this point on appeal, PAMTP now disavows its equity-expropriation theory, misconstruing *Parametric I* and

[10] The *Beattie* factors are: "(1) whether the plaintiff'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 the plaintiff'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." 99 Nev. at 588–89, 688 P.2d at 274.

revealing an extraordinary (if well-founded) lack of confidence in its actual claims.

PAMTP knew or should have known it was impossible for it to prove an equity-expropriation claim. Even now, PAMTP admits that "before the merger, *Parametric was not a controlled company*." PAMTP Reply Br. 11. Further, PAMTP elsewhere acknowledges that *Gentile* requires "previously existing controlling shareholders." *Id.* at 17. These candid, if belated, admissions illustrate that PAMTP cannot simultaneously assert that it brought its claims in good faith and refuse to defend them on appeal.

Similarly, PAMTP concedes that no one except Potashner committed any sort of fraud. Instead, PAMTP argues Potashner "tainted" the Board's concededly good-faith approval of the merger with Turtle Beach. *Id.* at 31–38. In its latest of many attempts to recharacterize its equity-expropriation claim, PAMTP invokes *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261 (Del. 1989). That case involved a fraud-on-the-board claim, which applies "when a board is deceived" by the "opinions or reports of officers and other experts." *Id.* at 1283–84. But PAMTP never brought a fraud-on-the-board claim, nor

could it under *Parametric I*. And, even if it had, it could not have satisfied it. This is because there is no evidence that Potashner "deceived the rest of the board *into approving the transaction*." *Teamsters Loc. 237 Additional Sec. Benefit Fund v. Caruso*, 2021 WL 3883932, at *20 (Del. Ch. Aug. 31, 2021) (emphasis added; citation omitted). Rather, there is ample evidence supporting the district court's conclusion that the Board's other members disregarded Potashner's attempts to manipulate them.[11] Indeed, the district court specifically found that no other Board member relied upon Potashner in approving the merger and, instead, they relied on their own, unaffected analysis and judgment. 20.AA.3782. If anything, the Board treated Potashner's endorsement of the merger as a negative factor. At bottom, there has never been a modicum of evidence showing that any of the five other directors committed fraud, and Potashner lacked power to approve the transaction unilaterally. *See*

[11] Further, PAMTP cites no authority that Nevada even recognizes a fraud-on-the-board claim. And there is good reason to doubt it would, given that its roots are the enhanced scrutiny of *Revlon* that Nevada has clearly rejected. *See id.* (applying *Revlon* enhanced scrutiny); *see also In re Mindbody, Inc. S'holder Litig.*, 2023 WL 2518149, at *32 (Del. Ch. Mar. 15, 2023) (describing fraud on the board, and citing *Mills*, as a function of *Revlon* scrutiny).

Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court, 133 Nev. 369, 376, 399 P.3d 334, 342 (2017).[12]

PAMTP's position on appeal confirms that its claims never had any good-faith basis. *Parametric I* very clearly left PAMTP with only an equity-expropriation claim. PAMTP ignores that ruling, contending that its claims have always been framed as a merger challenge. PAMTP Reply Br. 18. But, as previously discussed at length, *Parametric I* squarely rejected this construct of PAMTP's claim. PAMTP argues again that *Parametric I* did not hold that equity-expropriation claims require a controlling shareholder. *Id.* at 7. This argument simply ignores *Parametric I* and *Gentile*, as well as PAMTP's position below.

B. Defendants' offers of judgment were reasonable and in good faith in timing and amount.

Defendants' offers of $1 and $150,000 reflected the weakness of PAMTP's position and the fact that PAMTP lacked standing to bring its

[12] PAMTP claims that *Wynn Resorts* is irrelevant to allegations of fraud because it "addressed the business judgment presumption, not the separate deference-absent-actual-fraud provision of NRS 78.211(1)." PAMTP Reply Br. 34. But, in its discussion of the business judgment rule, PAMTP fails to distinguish *Wynn Resorts* and states only that the business judgment rule can be overcome by evidence of fraud. *See* PAMTP Reply Br. 35. This begs the question and overlooks *Wynn Resorts*' actual holding.

claims. At the outset, PAMTP's assignors rejected the generous terms of the class settlement.[13] Defendants' initial offer of judgment came shortly after that rejection, on July 1, 2020. That offer was an opportunity for PAMTP to stop this process, prevent further futile efforts, and spare both parties from incurring additional fees and costs. After PAMTP created a nuisance value for this case, Defendants made a second offer on May 29, 2021, for $150,000. This offer, too, was generous by any reasonable metric, especially in light of the costs with which PAMTP could be (and has been) taxed. PAMTP knew or should have known it had no valid claim for damages at the time the offer was made.

Additionally, the timing of the offers was reasonable. Defendants' initial offer was made alongside their motions to dismiss. At that time—if not sooner—PAMTP should have recognized the severe flaws in its claims. If PAMTP had accepted that offer, all parties could have walked away without incurring millions in additional fees and costs. Defendants made their next offer after they moved for summary judgment, which

[13] PAMTP misrepresents its relationship to the class, insisting, without citation, that it opted out of the class. PAMTP Reply Br. 49. This is simply wrong. PAMTP's assignors opted out of the *settlement*, not the *class*. *See* Defs.' Answering Br. 20–21.

highlighted, among other things, that PAMTP would be unable to prove that Potashner controlled Parametric (effectively or otherwise) and that it did not have standing under *Urdan*.

Specifically, as argued below, while PAMTP sought nearly $10 million in compensatory damages, its true compensatory damages were—at most—approximately $280,000. *See* 21.AA.3892. The measure of damages for an equity-expropriation claim is limited to the fair value of the equity expropriated by the controlling shareholder. *See Gentile v. Rossette*, 906 A.2d 91, 103 (Del. 2006). The district court ruled that this purported expropriation, if there were any at all, was limited to Potashner's receipt of a "severance payment and accelerated vesting of incentive stock options provided for under Potashner's April 2012 employment agreement." 20.AA.3791–92. The proxy statement disclosed each of these payments in 2013, which had a reported then-present value of $2.8 million, meaning the maximum damages to all Parametric shareholders for a valid equity expropriation claim, if one had existed, would have been $2.8 million. PAMTP claims to have held less than 10% of Parametric's stock at the time of the merger, so its portion of the damages would have been limited to $280,000. A $150,000 offer

on a maximum claim of $280,000, let alone a claim with the numerous facial legal flaws as this one, is plainly reasonable. *See, e.g.*, *Nat'l Union Fire Ins. Co. v. Pratt & Whitney Canada, Inc.*, 107 Nev. 535, 543–44, 815 P.2d 601, 606 (1991) ($25,000 and $115,000 offers reasonable where plaintiff sought over $500,000 in recovery of losses paid to insurance customer).

PAMTP is wrong that its settlement with the Settling Defendants demonstrates the potential value of its compensatory damages. PAMTP sought more than just compensatory damages, including punitive damages and prejudgment interest dating back to beginning of the class litigation in August 2013. Defendants also expected to incur significant fees and costs for a three-week trial and likely appellate proceedings. The Settling Defendants easily could have determined that failure to prevail at trial would cost more than $400,000 even though compensatory damages could be no more than $280,000.

Even on PAMTP's own account, only one of its assignors—IceRose—possibly suffered damages from the transaction. But even IceRose had sold the only shares it held that allegedly were diluted. PAMTP argues that IceRose's sale does not matter under *Urdan*, but the

very page of the district court's order on which PAMTP relies states that PAMTP "presented insufficient evidence to allow the Court to determine whether IceRose's stockholding in Parametric at the time of the assignment was composed of any of the shares in Parametric it held" at the time of the transfer. 20.AA.3775; *see* PAMTP Reply Br. 38–39. Here, as in *Urdan*, IceRose sold the *very shares* that were alleged to have been diluted.[14]

PAMTP's account of its own standing is otherwise incoherent. PAMTP argues that this Court should let the district court fully address the standing question in the first instance. PAMTP Reply Br. 39. But the district court *did* address this question; PAMTP admits this within a few words of arguing it did not. *See* PAMTP Reply Br. 40–41; *see also* 1.AA.0175–80 (granting final judgment and broad release of claims of

[14] PAMTP contends that Defendants are estopped from invoking standing because they obtained settlement for those who owned shares on January 15, 2014, such that class members were not required to show that they still held shares when the settlement was reached. PAMTP Reply Br. 40 (citing ARA.0042). This ignores that the settlement included both direct claims (such as those pursued by PAMTP) and derivative claims, for which recovery would go to the company or its current shareholders. It also ignores that Defendants did not argue that the direct class should include shareholders who held shares on January 15, 2014, and sold later.

those who demonstrated ownership of shares held on January 15, 2014). PAMTP also states that standing is an affirmative defense on which Defendants bear the burden of proof. PAMTP Reply Br. 42–43. This is plainly wrong: "[a] plaintiff has the burden of proving that it has standing to assert its claims." *SureFunding, LLC v. Hatton*, No. 81639, 501 P.3d 988, 2022 WL 130583, at *1 (Nev. Jan. 13, 2022) (unpublished disposition) (citation omitted). PAMTP cites *Contrail Leasing Partners, Ltd. v. Exec. Serv. Corp.*, 100 Nev. 545, 688 P.2d 765 (1984), but that case involved a plaintiff's alleged failure to comply with certain "procedural requirements" of an execution sale. *Id.* at 549 n.2. Other Nevada authority confirms that *Contrail* applies only to "an allegation of lack of standing due to failing to comply with *procedural requirements*." *Brinkerhoff v. Foote*, No. 68851, 132 Nev. 950, 387 P.3d 880, 2016 WL 7439357, at *2 (Dec. 22, 2016) (unpublished disposition) (emphasis added).[15]

[15] PAMTP itself highlights that Potashner did in fact plead that "PAMTP failed to meet the procedural requirements for bringing a derivative claim," and labels this "an entirely different argument" from the *Urdan* standing argument asserted now. PAMTP Reply Br. 43. PAMTP is right: Defendants are not arguing about procedural requirements like those at issue in *Contrail* or *Brinkerhoff* (which involved procedural requirements to bring a derivative suit).

C. PAMTP's rejections were unreasonable.

PAMTP could not conclude reasonably that it was beneficial to decline Defendants' settlement offers. Instead, it is apparent PAMTP consciously disregarded every substantial risk (discussed throughout) indicating that its claims would fail. PAMTP appears only to have considered the best-case scenario; it assumed it had purchased a guaranteed victory when it opted out of the class settlement, and that the class and derivative settlement figure was a "floor" for its recovery. PAMTP's delusion that it was entitled to millions more in damages stemmed from the overestimated potential damages in the class and derivative proceedings (even though class counsel that put forward that number settled both direct and derivative claims for $9.75 million, which the district court that presided over the case for over seven years deemed fair). Yet, PAMTP only had left its own purported direct claims for expropriation and could not assert any derivative claims—all of which were disposed of as part of the class settlement. Thus, it is indisputable that PAMTP's rejections of Defendants' offers were unjustified.

D. Defendants' requested fees are reasonable and justified.

Finally, Defendants' requested fees satisfy the final *Beattie* factor. In considering whether the fees sought are reasonable and justified, the

court must consider the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969). The *Brunzell* factors are:

> (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived.

Id. at 349, 455 P.2d at 33 (citation omitted).

The quality of defense counsel is not reasonably in dispute. The law firms involved, Dechert LLP, Sheppard Mullin Richter & Hampton LLP, Snell & Wilmer LLP, and Holland & Hart LLP, are highly respected, and the specific attorneys who worked on the trial have extensive experience litigating similar matters. Indeed, at the end of trial, the Court praised defense counsel for their work: "I want to compliment all of you. This is my last trial, and I truly appreciate the professional way over many, many years that all of you, except for [PAMTP's counsel] Mr. Apton, who is our recent addition, have presented matters in this Court and I truly

have appreciated working with the quality of lawyers that I've had the benefit to work with." 20.AA.3686–87.

Additionally, this was a complex and difficult matter to litigate. *First*, as this was the first equity-expropriation claim to be litigated in Nevada, this case required the parties to litigate numerous complex issues of first impression in Nevada in *Parametric I*, and PAMTP's repeated reinventions of its claims have required sophisticated and time-consuming work to defeat. *Second*, due to the unusual procedural posture of PAMTP's opt out from the class settlement and subsequent filing of a "new" lawsuit as the purported assignee of former class members, Defendants were forced to address many new and complicated procedural and legal issues and arguments regarding standing in a case that already had been prepared for trial. *Third*, as discussed above, PAMTP disregarded law limiting its claims and sought exorbitant damages, forcing Defendants to retain preeminent legal counsel. *Fourth*, PAMTP demanded and received production of tens of thousands of documents produced in an unrelated lawsuit against Turtle Beach (brought by the son of one of PAMTP's assignors), which Defendants told PAMTP were entirely irrelevant and would be substantially burdensome

to produce. Although PAMTP agreed the cases were unrelated, it nevertheless insisted on this costly review and production, which (as Defendants foretold) played no role at trial.[16] *Fifth*, Defendants were forced to engage in additional motion practice to obtain highly relevant brokerage statements that PAMTP refused to produce. *Last*, trial was expected to be significant in both scope and length. Had PAMTP's presentation of its case not been an utter failure, trial would have lasted three weeks with over a dozen witnesses and hundreds of exhibits, all of which needed to be coordinated and presented under significant restraints caused by the height of the COVID-19 pandemic.

Finally, as a direct result of defense counsel's tireless advocacy over nearly a decade, the district court granted judgment in Defendants' favor on all claims under Rule 52(c) at the close of PAMTP's evidence. Accordingly, the *Beattie* factors weigh strongly in Defendants' favor. For this reason, and to correct the district court's other errors in its fee order, this Court should reverse the fee order.

[16] Predictably, PAMTP did not offer even a single one of these documents into evidence.

CONCLUSION

For the foregoing reasons, the district court's fee order should be reversed.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the **REPLY BRIEF IN DOCKET NO. 84971** complies with the typeface and type style requirements of NRAP 32(a)(4)-(6), because this brief has been prepared in a proportionally spaced typeface using a Microsoft Word 2010 processing program in 14-point Century Schoolbook type style. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because the countable parts of the brief identified in NRAP 32(a)(7)(C) contain 6,931 words.

Finally, I hereby certify that I have read the **REPLY BRIEF IN DOCKET NO. 84971**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is

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

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On June 21, 2023, I caused to be served a true and correct copy of the foregoing **REPLY BRIEF IN DOCKET NO. 84971** upon the following by the method indicated:

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