IN THE SUPREME COURT OF THE STATE OF NEVADA

PARAMETRIC SOUND CORPORATION, VTB HOLDINGS, INC., KENNETH POTASHNER; ELWOOD NORRIS; SETH PUTTERMAN; ROBERT KAPLAN; ANDREW WOLFE; and JAMES HONORE

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT COURT, in and for the County of Clark, State of Nevada, and THE ELIZABETH GONZALEZ, District Judge

Respondents,

and

VITIE RAKAUSKAS, individually and on behalf of all others similary situated, and Intervening Plaintiffs RAYMOND BOYTIM and GRANT OAKES,

Real parties in interest.

Case No.

District Court No. A-13-686890-B
Dept. No. XI

PETITION
From the Eighth Judicial District Court
The Honorable Elizabeth Gonzalez

PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Nevada Rule of Appellate Procedure 26.1, the undersigned counsel of certifies the following:

Petitioner VTBH Holdings Inc. is a wholly-owned subsidiary of **Turtle Beach Corporation** (formerly known as Parametric Sound Corporation). **Petitioner VTBH Holdings Inc.** is, and has always been, represented by Dechert LLP and Snell & Wilmer LLP throughout this litigation.

Petitioner Parametric Sound Corporation (now known as Turtle Beach Corporation), is a publicly-owned Nevada Corporation. It has no corporate parents and no publicly held company owns 10% or more of the company's stock. **Petitioner Parametric Sound Corporation** is currently represented by Dechert LLP and Snell & Wilmer LLP and was formerly represented by Sheppard, Mullin, Richeter, & Hamilton LLP and Holland & Hart LLP in preliminary injunction proceedings in this case that occurred in 2013.

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STATEMENT OF THE CASE

This petition raises a purely legal question of importance to Nevada corporate law: whether the narrow exception that permits dissenting shareholders who lose their shares in a statutory merger to challenge breaches of fiduciary duties against a company's directors directly should also permit individual shareholders to usurp Nevada companies' claims arising from any transaction styled as "a merger" where shareholders have not lost any shares, nor are even shareholders in a "constituent entity" to a merger under Nevada law. The answer to this question is no and the district court erred in reaching a contrary conclusion.

The district court committed error by holding that a fiduciary breach claim held by a company could be asserted directly, and not derivatively, by individual shareholders who retained their full interest in the company based solely on the grounds that the transaction was described as "a merger." It is a fundamental tenet of corporate law—both in Nevada and elsewhere—that directors and officers owe fiduciary duties to *companies*, not shareholders.[1] Similarly, it is also a

[1] *See, e.g., Sweeney v. Harbin Elec., Inc.*, 2011 WL 3236114, at *3 n. 1 (D. Nev. July 27, 2011) ("fiduciary duties are owed to the corporation") (internal quote omitted); *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A. 2d 92, 101 (Del. 2007) ("It is well settled that directors owe fiduciary duties to the corporation."); *see also Jernberg v. Mann*, 358 F.3d 131, 135 (1st Cir. 2004) ("While it is sometimes said that directors . . . owe a fiduciary duty to the corporation and its shareholders, any responsibility to the latter is anchored in the duty to the former . . . [a] director or officer of a corporation does not occupy a fiduciary relation to individual stockholders.") (internal quotation omitted).

fundamental tenet of corporate law that the directors of the corporation, not the shareholders, have the exclusive right to decide whether to engage in litigation on the corporation's behalf.[2] Therefore, the normal rule is that claims for breaches of those duties belong to the company and can be brought by shareholders derivatively, if at all, only when certain factors are met.[3]

Eleven years ago, this Court created a narrow exception to the rule that permitted shareholders to assert breach of fiduciary duty claims directly against corporate directors only in cases, like a cash-out merger, where shareholders lost

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[2] *See e.g.*, *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 632, 137 P.3d 1171, 1179 (2006) ("In managing the corporation's affairs, the board of directors may generally decide whether to take legal action"); *Levine v. Smith*, 591 A.2d 194, 200 (Del. 1991) ("The directors of a corporation and not its shareholders manage the business and affairs of the corporation, and accordingly, the directors are responsible for deciding whether to engage in derivative litigation."); *Auerbach v. Bennet*, 47 N.Y. 2d 619, 631 (N.Y. 1979) ("Derivative claims against corporate directors belong to the corporation itself. As with other questions of corporate policy and management, the decision whether and to what extent to explore and prosecute such claims lies within the judgment and control of the corporation's board of directors. . . . This is the essence of the responsibility . . . of the board of directors, and the courts may not intrude to interfere").

[3] *See, e.g.*, *Sweeney*, 2011 WL 3236114, at *3 n.1 ("Actions for breach of fiduciary duties . . . accrue to the corporation itself.") (internal quote omitted); *Dieterich v. Harrer*, 857 A.2d 1017, 1028 (Del. Ch. 2004) ("any monetary recovery for the breaches of [fiduciary] duty . . . would properly belong to the corporation, rather than to the stockholders personally or any ill-defined subset of them"); *Davis v. Magavern*, 237 A.D. 2d. 902 (N.Y. App. Div. 1997) (where "[t]he complaint alleges causes of action . . . for breach of fiduciary duty . . . the complaint alleges wrongs against the corporation, for which plaintiffs may sue only derivatively").

"unique personal property—his or her interest in a specific corporation." *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 19, 62 P.3d 720, 732 (2003). Where *Cohen* created an exception to the rule that fiduciary breach claims belong to the corporation, the district court erroneously inverted *Cohen*'s holding—and a fundamental tenet of corporate law—by holding that any claim involving transactions styled as "mergers" no longer belong to Nevada corporations. This is not only a dramatic departure from the corporate law of this State, but from the well-established law of the other principal corporate law jurisdictions in this country—Delaware and New York. Thus, the district court's ruling would broadly divest Nevada corporations of legal claims that properly belong to them—claims against directors for breach of duty to the corporation—and give control of such claims to tiny minority shareholders, such as Plaintiffs here.

The holding below has significant, negative consequences for Nevada corporations that would disadvantage them as to companies incorporated in the other major corporate law jurisdictions. The holding presumptively strips them of their fundamental powers to control how they are operated in a wide sweep of corporate transactions, and instead *per se* hands control to minority shareholders. The district court's holding was unfaithful to *Cohen* and inverted the cardinal canon of corporate law that companies control litigation brought on their behalf.

Consequently, this Court should issue the writ in this case and reverse the decision below.

ISSUE PRESENTED

Did the district court clearly err in holding that Plaintiffs had met the narrow exception in *Cohen* to pursue a direct claim for breach of fiduciary duty against a company's directors arising out of a transaction in which (1) Plaintiffs lost no unique and personal property, namely, their shares in the company, and (2) Plaintiffs never owned any shares in a constituent entity to a merger?

RELIEF SOUGHT

Petitioners request a writ of mandamus, or in the alternative, writ of prohibition, directing the district court to dismiss the lawsuit on the grounds that Plaintiffs have asserted derivative claims, but failed to comply with the requirements for asserting such a claim, as set forth in Nev. Rev. Stat. Ann. ("NRS") 41.520(2) (West 2014). This Court has regularly issued writs of mandamus directing the district court to reverse orders denying motions to dismiss. *See, e.g.*, *Gonzalez v. Eighth Jud. Dist. Ct.*, 298 P.3d 448, 451 (Nev. 2013); *Otak Nevada, LLC v. Eighth Jud. Dist. Ct.*, 260 P.3d 408, 412 (Nev. 2011).

WHY THE WRIT SHOULD ISSUE

The issue raised in this Petition presents a purely legal issue of first impression and asks this Court to clarify its prior decision in *Cohen*, which was decided 11 years ago. *Cohen* addressed whether claims are direct or derivative in

the context of a cash-out merger in which shareholders of a constituent entity to the merger relinquished their shares in exchange for allegedly inadequate consideration. This case asks whether the exception recognized in *Cohen*, allowing shareholders to bring a fiduciary breach claim against corporate directors directly, instead of derivatively, should apply to other transactions where the complaining shareholders were *not* shareholders of a "constituent entity of a merger" and were *not* required to tender their shares pursuant to the transaction at issue. *See Cohen*, 119 Nev. at 19, 62 P.3d at 732 (finding claims direct only where a dissenting shareholder of a constituent entity of a merger has "lost unique personal property—his or her interest in a specific corporation"). A decision from this Court clarifying *Cohen*'s exception in the critically different context presented here where shareholders did not lose "unique personal property" would help not only the present parties, but also future litigants engaged in fiduciary breach suits arising out of any transaction structured to avoid forcing shareholders to tender their shares. *See Gonzalez v. Dist. Ct.*, 298 P.3d at 450 ("In deciding whether to [entertain a writ of mandamus], we may consider, among other things, whether the petition raises an important issue of law that needs clarification."); *Buckwalter v. Eighth Jud. Dist. Ct.*, 234 P.3d 920, 921 (Nev. 2010) ("writ petition challenging the denial of a motion to dismiss" is appropriate where "the issue is not-fact bound and involves an unsettled and potentially significant[,] recurring question of law").

Because derivative claims belong to the company, and not to the individual shareholders, a writ of mandamus should issue here in order to protect the corporate form and ensure that corporations retain the right to assert and manage their own claims. This injury cannot be redressed at some later point in the litigation because the company will have already been deprived of its right to control litigation that can only be prosecuted in the company's name.

STATEMENT OF FACTS

The issue presented in this petition raises only a question of law. As such, this abbreviated statement of facts states only those facts relevant to understand the purely legal issue presented.

The claims at issue here arise out of what is known as a "reverse triangular merger" between Parametric Sound Corporation ("Parametric"), a publicly traded Nevada corporation, and VTB Holdings, Inc. ("VTBH"). The transaction was structured such that a wholly owned subsidiary of Parametric, Paris Acquisition Corporation ("Paris"), merged with and into VTBH, with VTBH as the surviving entity. As consideration for the merger, the outstanding shares of VTBH's stock were converted into rights to receive newly issued Parametric stock, which, once fulfilled, would result in VTBH's shareholders owning approximately 80% of Parametric's outstanding stock. The existing Parametric shareholders would

continue to own the remaining 20%, their original holdings diluted by the issuance of Parametric stock to VTBH's former shareholders. PA 292, 294.[4]

On December 3, 2013, a Definitive Proxy Statement was filed with the Securities and Exchange Commission announcing that a shareholder vote would be held on December 27, 2013 to vote on a "proposal to approve the issuance of Parametric's common stock." PA 118. Parametric's shareholders were expressly informed that they were *not* being asked to vote on the merger between VTBH and Paris, and would have no dissenters' rights related to that merger, because Parametric was not a "constituent entity" to the merger under Nevada law. *See* PA 188 ("Parametric stockholders are not entitled to dissenters' rights in connection with the merger [between VTBH and Paris] because approval by Parametric's stockholders of the merger agreement and the transactions contemplated thereby, including the merger, is not required under the NRS because Parametric is not a 'constituent entity' to the merger (the 'constituent entities' to the merger being [Paris] and VTBH)."); NRS 92A.015 ("'Constituent entity' defined").

A small handful of Parametric shareholders in California[5] and Nevada had sought to enjoin the shareholder vote but, on December 26, 2013, the district court

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[4] A copy of the Merger Agreement is publicly available as "Annex A" to the December 3, 2013 Definitive Proxy Statement, which is frequently cited throughout the Intervening Complaint. PA 285-356.

[5] Pursuant to the Nevada Court's order, the California plaintiffs were permitted to join the Nevada proceedings by filing separate briefs and presenting argument

denied the request for a preliminary injunction on the grounds that "Plaintiffs have not rebutted the presumption available to the [Directors] under [the business judgment rule]" and that Plaintiffs failed to plead that any material information had not been disclosed. PA 211. At the Parametric shareholder meeting the following day, over 95% of the shares of Parametric that were voted were voted in favor of issuing new shares to VTBH's shareholders.[6]

On January 15, 2014, VTBH and Paris consummated their merger and VTBH became a wholly-owned subsidiary of Parametric. At the same time, and pursuant to the overwhelming approval of the Parametric shareholders, Parametric issued new shares to VTBH's former shareholders. Neither the merger between VTBH and Paris, nor the issuance of new Parametric shares, required any Parametric shareholders to relinquish any portion of their shares. The only potential effect that the merger and issuance had on Parametric shareholders was to dilute their ownership percentage. Where the shareholders had collectively owned

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at a hearing prior to the Court's order denying the request for preliminary injunction.

[6] On May 20, 2014, Parametric changed its name to Turtle Beach Corporation. To avoid confusion, this brief refers to the company as "Parametric" throughout even though the company, today, has a different name and board of directors than it did during the events relevant to this litigation.

100% of a small company prior to January 15, 2014, they now owned 20% of that same company, which now owned a much larger and more profitable subsidiary.[7]

After the transaction was completed, the Nevada plaintiffs amended their complaint to seek "post-closing" damages and the California plaintiffs voluntarily withdrew their complaint. On February 26, 2014, the California plaintiffs sought to intervene in this case and presented yet another amended complaint, the fourth complaint presented in the California and Nevada actions combined. The district court granted their intervention on April 10, 2014, and Plaintiffs designated this new complaint (the "Intervening Complaint") as the operative complaint on May 8, 2014.

The Intervening Complaint, filed by only two purported Parametric shareholders, asserted claims for breach of fiduciary duty against "All Defendants," which nominally includes the former board members of Parametric, Parametric itself, and VTBH.[8] PA 45. Plaintiffs broadly alleged that each of

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[7] As confirmed in the Proxy Statement, in Parametric's fiscal year ended September 30, 2013, Parametric had a gross profit of approximately $271,000. In stark contrast, VTBH's gross profit for the twelve months ended September 28, 2013, was approximately $63,725,000. *See* PA 216. Accordingly, Parametric's shareholders were retaining a 20% interest in a combined entity expected to be approximately ***235 times*** more profitable.

[8] Plaintiffs would later concede that, despite their pleading, they were only asserting breach of fiduciary duty claims against the six former directors and that only the aiding and abetting claims were asserted against Parametric and VTBH. PA 571.

Parametric's board members was conflicted in approving the merger between Paris and VTBH and had purposely steered the transaction towards VTBH to the exclusion of any other potential suitors. PA 45. According to Plaintiffs, the transaction depreciated the value of Plaintiffs' shares and caused the loss of the shareholders' purportedly "majority voting interest" in Parametric (even though no single Plaintiff ever held a "majority voting interest" in Parametric, nor is it alleged that they formed part of a "control group"). PA 5.

Defendants moved to dismiss the Intervening Complaint on June 20, 2014. The motions asserted, *inter alia*, that Plaintiffs' claims should have been asserted derivatively, but the Intervening Complaint did not allege that Plaintiffs had attempted to do so. PA 515-16. Defendants specifically relied upon *Cohen* for the principle that shareholders may only bring direct claims when they allege that they have "lost unique personal property—his or her interest in a specific corporation." *See Cohen*, 119 Nev. at 19, 62 P.3d at 732; PA 60-61; PA 515-16. In response, Plaintiffs asserted that their claims were properly maintained as direct claims, also relying on *Cohen* to support their position. PA 544-45.

The Defendants' motions came before the district court for a hearing on August 28, 2014. At the hearing, Plaintiffs asserted that at the motion to dismiss stage, "[a]s far as the direct-derivative [distinction], it is clear that that question is simply one of is it a merger or is it a dilution. Well, first and foremost, we allege

that it is a merger. That should end the subject matter at least on the pleading phase, and we should be done." PA 611-12. The district court agreed that this was the standard "on the motion to dismiss stage" and denied the motions. PA 612, 617-18. The sole basis the Court offered for its denial was that "[t]his is the pleading stage, and I have to assume that the allegations that are made by the plaintiffs in [the Intervening Complaint] are true. At this point I am making that assumption." PA 617. When pressed that the legal question of whether the claims were direct or derivative could not be dealt with on summary judgment, the district court responded: "You can. Because if there are in fact no damages or the facts show it was not a merger, it was something else despite what it was called over and over and over again, I have a different issue." PA 618.

SUMMARY OF ARGUMENT

The district court erred by disregarding the corporate form and the cardinal rights that Nevada corporations possess. Specifically, the district court permitted Plaintiffs to usurp a claim for breach of fiduciary duty that belongs exclusively to Parametric by allowing Plaintiffs to assert a claim directly that could only be asserted derivatively. This Court established a clear exception for when a shareholder can assert a corporate claim directly in *Cohen*: direct claims can only be asserted where, among other things, the harm caused a dissenting shareholder loss of "unique personal property—his or her interest in a specific corporation."

Cohen, 119 Nev. at 19, 62 P.3d at 732. In denying Defendants' motions to dismiss, the district court found the claims to be direct based exclusively on the fact that a transaction styled as a "merger" had occurred, even though Plaintiffs were not shareholders of one of the merging entities and continued to own all of their shares in Parametric after the transaction. This mechanical reliance on the word "merger" by the district court vaulted semantics over substance and created a radical departure from the settled corporate law of this State, as well as that of every other major corporate law jurisdiction.

As an initial matter, *Cohen* does not create a *per se* rule – or even a presumption – that any claim in connection with a "merger" can be brought by shareholders directly. Instead, *Cohen* held that a shareholder could bring a fiduciary breach claim that typically belongs to a company directly only where, *inter alia*, they lost "unique personal property—his or her interest in a specific corporation." *Cohen*, 119 Nev. at 19. Unlike the claims asserted by the *Cohen* plaintiffs, Plaintiffs' claims here do *not* arise out of a loss of shares for which they allegedly received inadequate consideration. Rather, Plaintiffs' claims arise out of the purported *dilution* in the value of their shares—the same ones owned both before and after the transaction. But any dilution, either in economic value or voting power, was shared equally by every shareholder of Parametric and any change in share value does nothing more than reflect changes in Parametric's

market capitalization. If that market capitalization was harmed by the transaction, then it was *Parametric* that was harmed and only Parametric may assert a claim based on that harm.[9] It was legally erroneous for the district court to give this claim to Plaintiffs.

Granting the requested writ is necessary in order to reaffirm that under Nevada law, as stated in *Cohen*, corporations are independent entities that have the right to assert and manage legal claims on their own behalf. Specifically, the Court should clarify that *Cohen* does not create a *per se* rule that all merger-related claims are direct, especially when those claims are asserted by stockholders who (1) did not own stock in a company that was a constituent entity to the merger and (2) did not relinquish their shares, or any other unique personal property, in connection with the merger.

ARGUMENT

I. Defendants Have No Adequate Remedy On Appeal After Final Judgment.

The very nature of derivative claims is that they are claims that properly belong to the company and not to any particular stockholder. *See Shoen v. SAC Holding Corp.*, 122 Nev. 621, 633, 137 P.3d 1171, 1179 (2006) ("derivative suits

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[9] Notably, at the hearing on Defendants' motions, Plaintiffs' counsel conceded that "[t]he company itself actually, to the extent that the company is now this cool headphone company, benefitted" from the transaction. PA 613. This concession undermines their claim that Parametric's directors failed to act in the best interests of the company.

allow shareholders to compel the corporation to sue and to thereby pursue litigation *on the corporation's behalf* against the corporation's board of directors and officers, in addition to third parties") (internal quotations omitted) (emphasis added). A shareholder may only assert a derivative claim on behalf of a company after making a demand upon the board of directors in compliance with the statutory procedures set forth in NRS 41.520(2); *see also Shoen*, 122 Nev. at 633, 137 P.3d at 1179 ("because the power of to manage a corporation's affairs resides in the board of directors, a shareholder must, before filing suit, make a demand on the board, or if necessary, on the other shareholders, to obtain the action that the shareholder desires"). This demand requirement "recognizes the corporate form" by giving directors "an opportunity to control any acts needed to correct improper conduct or actions, including any necessary litigation" and by "protect[ing] clearly discretionary directorial conduct and corporate assets by discouraging unnecessary, unfounded, or improper shareholder actions." *Id.*

Allowing Plaintiffs to maintain this action violates the corporate form and deprives Parametric of its right to "control . . . any necessary litigation" arising out of the conduct at issue here. *Id.* Because Parametric has the exclusive right to manage this litigation, the error in allowing Plaintiffs to prosecute it cannot be remedied on an appeal from a final judgment after the case has been tried. *See Gonzalez*, 298 P.3d at 451 (post-trial appeal not an adequate remedy where it is

insufficient to protect the party's rights). Moreover, the district court has already made clear that it would only reconsider the issue in summary judgment proceedings if Defendants could present a factual basis that "it was not a merger." PA 618. There is no dispute that a merger occurred between VTBH and Paris but, under *Cohen*, that fact is not dispositive of, or even pertinent to, the direct/derivative issue in this case. *Cohen*, 119 Nev. at 19, 62 P.3d at 732.

Beyond entirely depriving Parametric of control over this litigation, requiring the Defendants to litigate this case to, at a minimum, summary judgment before Parametric has determined whether doing so is in the company's best interest would also cause a tremendous waste of judicial and corporate resources. Because these claims belong to Parametric, Plaintiffs lack standing to assert them on their own behalf. Allowing Plaintiffs to move forward without standing to do so will cause significant and unavoidable expenses to the Defendants in addition to unnecessarily disrupting Parametric's business. Writ review is appropriate because "this case is in the early stages of litigation and resolving [these] question[s] now promotes judicial economy." *See Otak Nevada, LLC*, 260 P.3d at 411 ("the right to appeal from a future final judgment is not always an adequate legal remedy precluding writ relief, such as when the case is at early stages of litigation and writ relief would promote policies of sound[ ] judicial administration") (quoting *Int'l*

Game Tech. v. Second Jud. Dist. Ct., 124 Nev. 193, 197-98, 179 P.3d 556, 559 (2008)).

II. The District Court Erred in Holding that Plaintiffs' Claims Regarding a Dilutive Transaction Were Direct and Not Derivative.

A. This Court's Decision In *Cohen* Did Not Hold That All Merger-Related Claims Could Be Brought by Shareholders Directly.

A review of this Court's holding in *Cohen* demonstrates that it did not create a *per se* rule that shareholder claims challenging "mergers" can, *ipso facto*, be brought directly. Indeed, *Cohen* makes clear that shareholders can bring a fiduciary breach claim directly only as an exception to the presumption that such claims typically belong to the company and must be brought derivatively. That exception requires plaintiffs to establish, *inter alia*, that they are dissenting shareholders to a statutory merger and lost their interest in the company in that merger.

In *Cohen*, this Court addressed "the rights of dissenting shareholders to challenge the validity of corporate mergers." 119 Nev. at 9, 62 P.3d at 726. In addressing the issue, the Court observed that the particular merger at issue in *Cohen* required the shareholders to "tender[ ] their shares." 119 Nev. at 8, 62 P.3d at 725. The Court then noted that in such a merger, "[s]hareholders who oppose the merger are not forced to become stockholders in the new corporation." *Id.* The Court's framing of the issue before it is critical, and distinguishes it from this

case, because it illustrates that the Court was focused on instances where corporate shareholders have lost their interest in a company and suffered harm as a result.[10] In such cases, because the plaintiff is no longer a shareholder of the company, he or she no longer has standing to assert a claim derivatively due to the continuous ownership requirement. 119 Nev. at 19, 62 P.3d at 732. (citing, *inter alia*, Nev. R. Civ. P. 23.1 and *Keever v. Jewelry Mountain Mines, Inc.*, 100 Nev. 576, 577, 688 P.2d 317, 317-18 (1984)). Thus, plaintiffs who were purportedly injured as a result of a cash-out merger can obtain recovery only through a direct action, if at all. However, where plaintiffs still remain shareholders, as here, this limitation does not exist.

In the context of a shareholder dissenting from a cash-out corporate merger (as described above), the Court distinguished between those claims that a

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[10] In Plaintiffs' opposition to the motions to dismiss, they argued that "*Cohen* relied on cases involving a variety of merger structures, all of which held that a plaintiff pleaded [ ] a direct claim for relief." PA 517. But in every one of those cases, the plaintiffs had lost their shares and thus, consistent with *Cohen*, had relinquished unique and personal property. *See Parnes v. Bally Entm't Corp.*, 722 A.2d 1243, 1246 (Del. 1999) (addressing a stock-for-stock merger); *Smith v. Gray*, 50 Nev. 56, 58, 250 P. 369, 372-73 (1926) (addressing a stock-for-stock merger); *Coggins v. New Eng. Patriots Football Club, Inc.*, 492 N.E. 2d 1112, 1119-20 (Mass. 1986) (addressing an all-cash freeze out merger); *Hogget v. Brown*, 971 S.W.2d 472, 482 (Tex. Ct. App. 1997) (addressing a merger in which all shares were cancelled and shareholders were entitled to "earnout certificates" allowing them to share in a portion of future revenue). All of these cases support the basic rule in *Cohen* that a claim is direct only if it is based on a loss of unique personal property. *Cohen* did not address any case in which the shareholders did not lose any property.

shareholder must assert derivatively (those which allege a harm suffered equally by all shareholders) and claims that may be asserted directly (those which allege a loss of unique personal property). Cohen was a minority shareholder in the Boardwalk casino, which Mirage Resorts, Inc. ("Mirage") had an interest in acquiring. *Cohen*, 119 Nev. at 7, 62 P.3d at 724. At the same time that the Mirage was negotiating and consummating a cash merger between a subsidiary and the Boardwalk, the Mirage also acquired three parcels of land neighboring the Boardwalk that were "either owned by entities connected with the Boardwalk's majority shareholders and directors or were subject to options to purchase in favor of the Boardwalk." *Id.*

Pursuant to the terms of the merger, the Boardwalk's shareholders, including Cohen, tendered their shares for a cash payment. 119 Nev. at 8, 62 P.3d at 725. Following the merger, Cohen filed suit for damages under breach of fiduciary duty theories. *Id.* According to Cohen, Mirage had paid inflated prices to the majority shareholders and directors of the Boardwalk for the three neighboring parcels of land in exchange for their approval of a merger that undervalued the Boardwalk. *Id.* Cohen also asserted that the directors had "mismanaged the Boardwalk, causing decreased profits, and that they or the majority shareholders usurped corporate opportunities." *Id.* Finally, Cohen alleged that the Boardwalk had paid

an excessive fee to its financial advisor in exchange for a fairness opinion that undervalued the company. *Id.*

The "primary" reason that the district court initially dismissed Cohen's claims was that the claims were "derivative in nature" and a former shareholder has no standing to assert derivative claims unless statutory prerequisites have been satisfied. 119 Nev. at 19, 62 P.3d at 732. On appeal, Cohen, as a "dissenting shareholder," asked this Court to review which of his claims were "derivative in nature." *Id.* This Court summarized the distinction as follows:

> A claim brought by ***a dissenting shareholder*** that questions the validity of a merger as a result of wrongful conduct on the part of majority shareholders or directors is properly classified as an individual or direct claim. ***The shareholder has lost unique personal property—his or her interest in a specific corporation.*** Therefore, if the complaint alleges damages . . . for wrongful conduct that caused harm to the corporation, it is derivative and should be dismissed.

Id. (emphases added).

Thus, the holding of *Cohen* can be summarized as follows: in the context of a merger, as defined under Nevada law, a shareholder of a merging entity who dissents from that merger and loses his or her interest in the corporation can bring his or her claim directly. Plaintiffs (and the district court) are thus plainly incorrect in asserting that "as far as the direct-derivative [issue], it is clear that that question is simply one of is it a merger or is it a dilution."[11] PA 611.

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[11] Indeed, even in *Cohen*, the Court dismissed the dissenting shareholders' fiduciary breach claims without prejudice as derivative "because the complaint fails to contain a claim actually seeking rescission or challenging the validity of

B. The Holding Of *Cohen* Does Not Apply in this Case because Parametric Was Not a Party to A "Merger" and Its Shareholders Retained Their Interest in the Company.

Applying the holding of *Cohen* as summarized above to this case, it is clear that Plaintiffs' claims cannot be brought directly. As an initial matter, unlike *Cohen*, no plaintiff has "lost unique personal property—his or her interest in a specific corporation." *Cohen*, 119 Nev. at 19. Neither the merger between VTBH and Paris, nor the issuance of new Parametric shares to VTBH's shareholders, forced any Parametric shareholder to relinquish his or her shares. Any alleged dilutive decline in the value of their shares is not equivalent to the loss of the shares themselves.[12] Unlike in *Cohen*, Plaintiffs' retention of their shares assures that they have the opportunity to continue to share equally in the profits of the business, including any potential benefit to Parametric obtained in a hypothetical derivative lawsuit addressing the very same claims Plaintiffs are attempting to assert on their own.

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the merger." *Cohen*, 119 Nev. at 23. Like the complaint in *Cohen*, the Intervening Complaint does not request a rescission of the merger, nor does it expressly request rescissory damages. This presents an independent reason under *Cohen* for finding the claim to be derivative. *Id.*

[12] *See AHW Inv. P'ship v. Citigroup Inc.* 980 F. Supp 2d 510, 526 (S.D.N.Y. 2013) ("While holding their stock, plaintiffs did not lose any value even if the market price dropped") (internal quotation and edits omitted); *Starr Found. v. Am. Int'l Grp., Inc.* 76 A.D.3d 25, 28 (N.Y. App. Div. 2010) (where shareholder retained its stock it "did not lose or give up any value; rather, it remained in possession of the true value of the stock, whatever that value may have been at any given time").

Plaintiffs tacitly conceded that they have not lost any real "unique personal property" by alleging that they meet this requirement through the loss of some ethereal "majority voting interest in the pre-Merger standalone Company." PA 5. Of course, because the pre-January 15, 2014 Parametric shareholders retained their shares, none of them actually lost the right to vote them. The Intervening Complaint also does *not* allege that any individual shareholder owned a majority interest prior to the transaction, or were even part of a "control group," and thus no individual shareholder had a *majority* voting interest that even could be lost in the first place.[13] To the contrary, this claim is based only on the fact that, in the aggregate, *all* of the incumbent Parametric shareholders (including the Defendants that Plaintiffs seek to exclude from their class) owned 100% of the company before the transaction but thereafter collectively owned 20% of the company. In other words, *every single Parametric shareholder had their voting interest reduced in equal proportions* and thus there was no "unique" and "personal" harm to any one shareholder. *See Cohen*, 119 Nev. at 19, 62 P.3d at 732 (direct claims exist where "[t]he shareholder has lost unique personal property—his or her interest in a specific corporation"); *id.*, 119 Nev. at 21, 62 P.3d at 734 (claims are derivative when they allege harms "shared by all stockholders and not related to any individual stockholder"). For their part, Plaintiffs have not cited a single case from

[13] Indeed, none of the named Plaintiffs even owned 5% of Parametric individually or beneficially at the time of the transaction. PA 195.

any jurisdiction holding that the "loss" of the type of "voting interest" they assert here is sufficient to constitute the loss of a majority interest, much less a loss of unique personal property to vest them with a direct claim.

Further, Plaintiffs attempt to bolster their claimed loss of a "majority voting interest" by asserting that "[m]inority ownership in a public company with a private controlling stockholder is subject to substantial discounts." PA 5. But this allegation reveals that Plaintiffs' diminished voting interest is nothing more than a restatement of their claim that the economic value of the shares themselves had diminished, which impacted all shareholders equally, if at all. If Plaintiffs' allegations are true that the market has applied "substantial discounts" to the value of Parametric stock because of the post-transaction presence of a controlling shareholder, then that depreciation directly affects Parametric's market capitalization and only indirectly affects the individual shareholders on a *pro rata* basis. Plaintiffs cannot artfully plead their way around the well-settled law (discussed further below) that equity dilution claims are derivative claims.

Plaintiffs also fail to meet another part of *Cohen*'s holding because they cannot be classified as "dissenting shareholders" to a merger under Nevada law because they were not shareholders in a "constituent entity" to a statutory merger. *Cohen*, 119 Nev. at 19. As described above, the transaction here involved two distinct steps. The first step involved a merger between Paris (a subsidiary of

Parametric) and VTBH where VTBH's shareholders relinquished their shares in exchange for a right to receive Parametric shares. The second step involved the issuance of new shares of Parametric. A "constituent entity . . . with respect to a merger" is defined under Nevada law as "each merging or surviving entity." NRS 92A.015. In this case, only VTBH and Paris meet this definition. Parametric did not merge with any company, nor was it the surviving entity of a merger. Consequently, its shareholders were not asked to approve a merger, but only to approve the issuance of shares to VTBH's shareholders. Moreover, Parametric's shareholders were expressly informed that they "are not entitled to dissenters' rights in connection with the merger because approval by Parametric's stockholders of the merger agreement and the transactions contemplated thereby, including the merger, is not required" under Nevada law. PA 188 (citing NRS 92A.380(a), which permits dissenters' rights only when there is a "consummation of a plan of merger to which the domestic corporation is a constituent entity"). Thus, Plaintiffs necessarily are not, as in *Cohen*, "dissenting shareholder[s]" to a merger; they are, instead, merely objectors to a dilutive stock issuance. Plaintiffs' claim for damages presents an inappropriate attempt to assert dissenters' rights that never existed in the first place.

C. Plaintiffs' Claim Is One Of Dilution, Which Is A Derivative Claim.

The alleged damages in this case stem not from VTBH's merger with Paris, but from the purportedly dilutive effect of issuing new Parametric stock to VTBH's former stockholders. Specifically, Plaintiffs allege that the market value of their stock – which they held both before and after the transaction – fell as a result of the transaction. PA 4-5. But a loss in market value of stock is not a unique harm. To the contrary, any change in the value of the stock applies equally to every stockholder because a claim that the stock value has diminished is nothing more than a claim that the company's market capitalization has diminished. For this reason, allegations that stock has been diluted, rather than lost, are derivative claims.

This principle is well recognized throughout the United States. *See e.g.*, *Sweeney v. Harbin Elec., Inc.*, 2011 WL 3236114, at *2 (D. Nev. July 27, 2011) (applying Nevada law) ("[A]ctions to enforce corporate rights or redress injuries to a corporation cannot be maintained by a stockholder in his own name . . . even though injury to the corporation may incidentally result in the depreciation or destruction of the value of the stock.") (internal quotation omitted); *Penn Mont Sec. v. Frucher*, 502 F. Supp. 2d 443, 464-65 (E.D. Pa. 2007) ("Courts typically treat share dilution as a derivative harm because the reduction in share value reflects the decline in value of the corporate entity as whole."); *Feldman v. Cutaia*,

951 A.2d 727, 732 (Del. 2008) (share dilution claims "are not normally regarded as direct, because any dilution in value of the corporation's stock is merely the unavoidable result (from an accounting standpoint) of the reduction in the value of the entire corporate entity, of which each share of equity represents an equal fraction").[14]

In the district court proceedings, Plaintiffs countered that treating their claim as "derivative" would be unjust because any consequential recovery would be made to Parametric and, thus, "back to the very bad guys who we claim did the misconduct." PA 614. Instead, Plaintiffs argue that a cash payout to the pre-January 15 shareholders of Parametric (excluding Defendants) is the only just remedy. Plaintiffs' argument is wrong as a matter of fact and law.

As an initial matter, Plaintiffs' recovery theory must be understood for what it is: a forced cash distribution to only a subset of Parametric shareholders. But Plaintiffs, as incumbent Parametric shareholders, had no expectation of cash as a result of their approval to issue new Parametric shares to VTBH or any other part of the contested transaction. The Proxy Statement made no representation suggesting that the shareholders could expect any cash distribution in connection

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[14] Indeed, although Plaintiffs were incorrect in arguing, under *Cohen*, that any claim related to a merger is necessarily a direct claim, their false dichotomy that "[a]s far as the direct-derivative [distinction], it is clear that that question is simply one of is it a merger or is it a dilution" is effectively an admission that dilution claims are derivative. PA 611.

with their vote and yet the shareholders approved the issuance of new shares, presumably based on the belief that it was in the company's interest to do so.

Plaintiffs' unsupported suggestion that derivative claims may be asserted directly whenever the alleged "bad guy" has an interest in the corporation, and thus may receive a tangential benefit from a successful derivative claim, would be an exception that swallows the rule that stock dilution claims are derivative claims. In *Sweeney*, the District Court for the District of Nevada found claims that a corporation's "directors issued . . . shares of stock at below market value" were derivative claims based on the holding in *Cohen* that claims are derivative where they are based on "'harm to the corporation, shared by all the stockholders and not related to an individual stockholder.'" *Sweeney*, 2011 WL 3236114, at *2 (quoting *Cohen*, 119 Nev. at 21, 62 P.3d at 733-34). The fact that the allegations were asserted against the board of directors and those same directors may obtain a tangential benefit from any eventual recovery in a derivative action did not change the nature of the claims. The same conclusion was reached by the Delaware Supreme Court in *Feldman* under similar facts. *See Feldman*, 951 A.2d at 732 (breach of fiduciary duty claims alleging dilution held to be derivative even though they were asserted against directors of the company that continued to own an interest in the company). Indeed, it is difficult to imagine any scenario in which a dilution claim based on breach of fiduciary duty by a director could ever be

asserted derivatively if Plaintiffs' invented exception were adopted. That is expressly not the law and it should be rejected.

CONCLUSION AND PRAYER

Plaintiffs lack standing to assert any of their claims directly because all of their claims are derivative claims that belong to Parametric alone. The district court's order offers no reason why the corporate form should be disregarded in this case, allowing shareholders to assert claims directly and potentially siphon profits that are properly owed to the corporation to fund a cash distribution to only a subset of minority shareholders. Defendants have no adequate remedy on appeal that could cure the improper usurpation of their corporate rights and they pray that this Court issue a writ of mandamus or, in the alternative, writ of prohibition, to direct the district court to reverse its order denying the Defendants' motions to dismiss.

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VERIFICATION

On October 13th, 2014, the affiant, Richard C. Gordon, Esq. appeared in person before me, a notary public, who knows the affiant to be the person whose signature appears on this document, who stated:

"I am counsel for Petitioner, Turtle Beach Corporation and VTB Holdings Inc., I have read the foregoing petition for writ of mandamaus or, in the alternative, writ of prohibition and all factual statements in the petition are either within the affiant's personal knowledge and true and correct or supported by citations to the appendix accompanying the petition.

"The exhibits in the appendix are true and correct copies of the original documents."

Richard C. Gordon, Esq.

GIVEN UNDER MY HAND AND SEAL OF OFFICE on this 13th day of October, 2014.

SHERI LYN BACARRO
Notary Public, State of Nevada
Appointment No. 10-1319-1
My Appt. Expires Jan 19, 2018

NOTARY PUBLIC In and For the
State of Nevada

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the type-face 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 2010 in Times New Roman, 14 point.

2. I certify that I have read this appellate 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)(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.

October _13_, 2014.

/s/ Richard C. Gordon

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Nevada Bar No. 9036

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 October 14, 2014, I caused to be served a true and correct copy of the foregoing **PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION** by the method indicated:

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