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 HONORABLE 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. 66689

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PETITION
From the Eighth Judicial District Court
The Honorable Elizabeth Gonzalez

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS, OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES
(Continued)

Page

Federal Cases

State Cases

TABLE OF AUTHORITIES
(Continued)

Page

State Statutes

Introduction

In *Cohen v. Mirage Resorts, Inc.*, this Court allowed a shareholder of a corporation to directly challenge the validity of a merger between that corporation and a third party because, as a result of that merger, "[t]he shareholder . . . lost unique personal property – his or her interest in a specific corporation." 119 Nev. 1, 19, 62 P.3d 720, 732 (2003). Now, Real-Parties-In-Interest ("Plaintiffs") ask this Court to broadly expand the holding in *Cohen* and allow shareholders of one corporation, Parametric Sound Corp. ("Parametric"), to directly challenge the validity of a merger between two different corporations, VTB Holdings Inc. ("VTBH")[1] and Paris Acquisition Corp. ("Paris"), even though that merger did *not* cause the Parametric shareholders to lose their personal interests in Parametric. Plaintiffs and the court below erred by treating any challenge to the validity of a merger as a direct claim without first considering if these particular Plaintiffs have a proper basis to assert such a challenge in the first place. *See* PA 611 ("it is clear that the question is simply one of is it a merger or is it a dilution"). Plaintiffs' attempts to shoehorn this transaction into the *Cohen* framework are unsuccessful because the Parametric shareholders have no standing to challenge the validity of a merger between VTBH and Paris that did not result in their loss of stock or any other "unique personal property." *Cohen*, 119 Nev. at 19, 62 P.3d at 732.

[1] Defendants continue to refer to VTB Holdings as "VTBH" in order to avoid the confusion caused by Plaintiffs' insistence on referring to both VTBH and Parametric as "Turtle Beach."

To be clear, this Petition does *not* ask the Court to determine whether Plaintiffs have alleged facts that, if proven, would establish a breach of fiduciary duty.[2] Instead, this Petition seeks a determination of the purely legal question of *who has the right to assert such a claim* under Nevada law. Accordingly, Plaintiffs' 15-page regurgitation of the factual allegations in their complaint are not relevant to the Writ Petition and are offered in Plaintiffs' Answer solely to evade the purely legal issue presented here. *See* January 16, 2015 Answer of Real Parties in Interest to the Petition for Writ of Mandamus ("Answer") at 4-19. Even if these allegations set forth a viable breach of fiduciary duty claim, which they do not, Plaintiffs' complaint still must be dismissed because that claim cannot be directly asserted by a Parametric shareholder. Under the controlling holding of *Cohen*, Plaintiffs' claims belong to Parametric and the court below committed legal error in permitting Plaintiffs to usurp those claims.

Legal Argument

I. Plaintiffs Cannot Directly Challenge The Merger Between VTBH and Paris Under *Cohen* Because Plaintiffs Did Not Own Shares In Either Company And Cannot Identify Any Loss Of "Unique Personal Property" Caused By The Merger.

The parties are in agreement that *Cohen* is the governing authority in Nevada on the issue of whether a shareholder's fiduciary breach claims are direct

[2] Plaintiffs incorrectly suggest the Defendants "conceded that the Complaint sets forth viable . . . claims for breach of the duty of loyalty, as well as aiding and abetting." Answer at 9 n. 6. Defendants made no such concession. The question of whether Plaintiffs have adequately pleaded such claims is simply not before this Court at this time.

or derivative in nature. Plaintiffs also do not dispute that, under *Cohen*, a "dissenting shareholder" to a corporate merger must establish that he or she "lost unique personal property" in order to directly challenge the validity of that merger. *Cohen*, 119 Nev. at 19, 62 P.3d at 732. A review of both the "Issue Presented" in the Petition and the "Counterstatement of Issue Presented" in Plaintiffs' Answer demonstrates that the parties are in agreement that, consistent with *Cohen*, this Petition turns upon a determination of whether Plaintiffs have successfully established that they "lost [their] interest in a specific corporation" as a result of a merger. *Compare* October 14, 2014 Petition for Writ of Mandamus or, in the Alternative, Writ of Prohibition ("Pet.") at 4 *with* Answer at 1. This question has a clear answer: Plaintiffs did ***not*** lose their stock in Parametric and that fact alone compels the issuance of the Writ.

Remarkably, despite recognizing that the core issue under consideration here is a determination of whether Plaintiffs have lost unique personal property, Plaintiffs spend only two paragraphs (out of 45 pages) attempting to establish such a loss. Answer at 3; 25. Those scant paragraphs are as unpersuasive as they are brief. Having jettisoned the argument advanced below that they lost unique personal property in the form of a fictional "majority voting interest" in Parametric,[3] Plaintiffs now advance a novel theory that they *effectively* "lost" their

[3] Plaintiffs abandoned their untenable position that they lost their "majority voting interest" in Parametric. PA 5. In fact, as disjointed public shareholders

Parametric stock because the company today is somehow "new and different" from the company in which they originally invested. *Id.* This argument is not only unprecedented and unsupported by any authority, it is illogical and would effectively eliminate derivative claims and impermissibly cede all fiduciary breach claims resulting from any transaction directly to shareholders. Indeed, under Plaintiffs' theory, any time a company's board of directors exercised its business judgment to expand a company's business beyond the confines of its current business, the company's shareholders would be able to assert direct claims and thereby supplant the board's business judgment.

The short shrift Plaintiffs give this novel argument, however, underscores their recognition that they are unable to demonstrate a loss of "unique personal property" under *Cohen*. Instead, the overwhelming majority of their legal argument is spent addressing the laws of other jurisdictions in a confusing attempt to eliminate this requirement, going so far as to argue, without citation to any Nevada authority, that the *Cohen* standard is no longer a "contemporary legal analysis of the direct/derivative distinction" (*id.* at 35) and has somehow "evolved into the . . . test . . . utilized by Delaware and New York." *Id.* (criticizing a Nevada

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they did not have a "majority voting interest." Moreover, as established in the Writ Petition, "Plaintiffs have not cited a single case from any jurisdiction holding that the 'loss' of the type of 'voting interest' they assert here is sufficient to constitute the loss of a majority voting interest, much less a loss of unique personal property to vest them with a direct claim." Pet. at 21-22. Plaintiffs do not address, let alone dispute, Defendants' arguments on this issue and consequently have waived it. *Mainor v. Nault*, 120 Nev. 750, 777, 101 P.3d 308, 326 (2004).

federal opinion employing the *Cohen* test). Plaintiffs, however, cannot evade the controlling standard in Nevada.[4]

Plaintiffs' inability to demonstrate that they "lost unique personal property" as a result of the merger flows directly from the fact that they were not "dissenting shareholders" to any corporate merger. In order to dissent from a merger, one must first be a shareholder in one of the merging companies. There is no dispute in this case that Plaintiffs were not shareholders of either of the merging companies, VTBH or Paris, and thus never had any right to approve of, or dissent from, the merger. *Cohen*, 119 Nev. at 9-10, 62 P.3d at 726. Nevertheless, even if this Court accepts Plaintiffs' lengthy invitation to *pretend* that Parametric legally merged with VTBH, based on Plaintiffs' misleading use of cherry-picked language from the proxy and merger materials (Answer at 1-7), this determination does not change the outcome. Indeed, even if Parametric *had* merged with VTBH, Plaintiffs' continued retention of their shares prevents them from establishing that they "lost unique personal property" and, accordingly, Plaintiffs cannot directly challenge the merger. *Cohen*, 119 Nev. at 19, 62 P.3d at 732.

[4] In any event, as set forth *infra* at 17-18, Delaware law is no different from Nevada law on this issue and Delaware courts have already found similar claims arising out of a very similar factual scenario to be derivative. *See In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808 (Del. Ch. 2005) ("*J.P. Morgan*").

A. Plaintiffs Have Not Lost Unique Personal Property.

Plaintiffs agree that the determination of whether a claim is properly characterized as direct or derivative turns on the nature of the alleged harm: harms to the corporation give rise to derivative claims, but independent harms to the individual shareholders give rise to direct claims. *See* Answer at 24 ("Put simply, claims on behalf of the shareholders are direct, while claims on behalf of the company are derivative"). In *Cohen*, the plaintiff, a dissenting shareholder of one of the merging entities, was permitted to directly challenge the validity of a merger specifically because he "lost unique personal property – his . . . interest in a specific corporation." 119 Nev. at 19, 62 P.3d at 732.

As established in the Petition, the Court in *Cohen* was mindful of the context in which the case was presented in reaching its holding. Specifically, *Cohen* was decided in the context of a cash-out merger where shareholders of the target company sought to challenge the validity of a merger that caused the loss of their shares in that company. As summarized in *Cohen*:

> This case involves the rights of dissenting shareholders to challenge the validity of corporate mergers, issues of first impression in the State of Nevada. Under Nevada law, a corporate merger must be approved by a majority of the corporation's shareholders. ***The existing shareholders then substitute their stock ownership in the old corporation for stock ownership in the new corporation.*** Shareholders who oppose the merger are not forced to become stockholders in the new corporation.

Id. at 9-10, 62 P.3d at 726 (emphasis added). In this particular scenario, in which the "dissenting shareholders" lose their "stock ownership in the old corporation," *Cohen* notes that "such shareholders" have "three choices:"

> (1) accept the terms of the merger and ***exchange their existing shares for new shares***; (2) dissent from the merger, compelling the merged corporation to ***purchase their shares pursuant to a judicial appraisal proceeding***; and/or (3) challenge the validity of the merger based on unlawful or wrongful conduct committed during the merger process.

Id. (citing Nev. Rev. Stat. Ann. ("NRS") 92A.300-92A.500 (West 2014)) (emphases added). Plaintiffs have prematurely jumped to the third "choice" without first establishing the pre-requisite condition giving rise to that choice: the loss of "stock ownership in the old corporation."[5] *Id.*

The language from *Cohen* quoted at length by Plaintiffs in the Answer further underscores the Court's understanding that direct actions can only be brought by dissenting shareholders to mergers when they have first lost their stake in the company, rendering them "former" shareholders:

> It is true that ***a former shareholder*** has no standing to sue for breach of fiduciary duty on a derivative claim. A derivative claim is one brought by a shareholder on behalf of the corporation to recover for harm done to the corporation. Because a derivative claim is brought on behalf of the corporation, ***a former shareholder*** does not

[5] Plaintiffs assert that *Cohen* considered a number of cases addressing a "variety of merger structures, some of which involved a retaining interest" in concluding that the *Cohen* plaintiff's claims were direct. Answer at 28. As was already noted in the Petition, shareholders in each of those cases lost their stock, which gave rise to their direct claims. Pet. at 17 n.10. Plaintiffs offer no response.

> have standing to assert a derivative claim. ***A former shareholder*** does, however, have standing to seek relief for direct injuries that are independent of any injury suffered by the corporation.

Id. at 19, 62 P.3d at 732 (quoted in Answer at 24) (emphases added).

Here, it is undisputed that the stock owned by Parametric's shareholders was not purchased or exchanged for stock in any other corporation. Plaintiffs are not, and never have been, ***former*** shareholders of Parametric as a result of a merger, let alone former shareholders of the companies that actually merged. Thus the requisite loss of "unique personal property" that provided the *Cohen* plaintiff with standing to assert a direct claim is entirely absent from the facts of this case. Because Plaintiffs have not suffered any unique and personal loss as a result of the merger between VTBH and Paris, *Cohen* holds that any claim brought by Plaintiffs challenging that merger must be brought derivatively, if at all.

Unable to plead that they have actually lost their shares, Plaintiffs attempt two evasions. Neither argument is supported by the law of Nevada, nor any other jurisdiction.

1. Plaintiffs' Novel Theory That They "Lost" Shares Because Parametric Changed Is Unsupported And Contrary To *Cohen*.

Although it is beyond dispute that Plaintiffs did not *actually* lose their shares, Plaintiffs now ask this Court to conclude for the first time that Plaintiffs *effectively* "lost their ownership in a specific corporation" because the purportedly

"new" version of Parametric "is not the same [entity] in which Plaintiffs invested." Answer at 3, 25. Under this theory, which was never raised below, Plaintiffs ask to be treated as if they had lost those shares in Parametric because "[a]fter the Merger, the new combined company . . . manufactures different products, is controlled by different stockholders, is run by a different board of directors, is operated by a different management team, and is in a different and deteriorating financial state." *Id*. at 3.

As an initial matter, Plaintiffs cite no authority from any jurisdiction to support their theory that an internal *change* in a company results in the shareholders' *loss* of shares in that company. And for good reason. It defies logic to suggest that any time a company, for example, changes its name, product mix, or even corporate directors (changes that are made routinely), a brand new company is legally formed such that shareholders of the "old" company are deemed to have instantaneously exchanged their stock in the "old" company for stock in the "new" company. Again, Plaintiffs' theory would neuter a board's ability to venture into new or different business opportunities because the public shareholders would then be able to assert purportedly direct claims for breach of fiduciary duty if, in hindsight, those business opportunities were less successful than first anticipated.

Furthermore, each of these purported "changes" to Parametric merely alleges potential harm *to the Company*. Plainly the alleged fact that Parametric is now purportedly in a "deteriorating financial state," if true, would be a corporate harm. *Id.* at 3, 24 (conceding that "mismanagement resulting in a loss of revenue" and "impairment of the [company's] expansion" are "harm[s] to the corporation" and give rise to derivative claims). Similarly, Plaintiffs' allegations that "[a]fter the Merger, the new combined company . . . manufactures different products, is controlled by different stockholders, is run by a different board of directors, [and] is operated by a different management team" are necessarily harms to the Parametric, if they are harms at all. *Id.* at 3.[6]

This transparent attempt to avoid the well-settled law that corporate harms give rise to derivative, not direct, claims is not supported by law or logic and should not be accepted here. If allegations of *corporate* harm are sufficient to establish an individual shareholder's "loss of unique personal property" based on the premise that, because of that corporate harm, the corporation is no longer "the same entity in which [the shareholder] invested," *id.* at 3, 25, then there is no meaningful distinction between direct and derivative claims. Such a conclusion would mean that every instance of *corporate* harm would turn all current shareholders into "former" shareholders, legally depriving them of standing to

[6] Of course, Plaintiffs' counsel has conceded that "[t]he company itself actually, to the extent the company is now this cool headphone company, benefitted" from the transaction. PA 613.

assert a derivative claim. *Cohen*, 119 Nev. at 19, 62 P.3d at 732 (stating that former shareholders do not have standing to bring derivative suits). And no shareholder would ever have an incentive to even attempt to bring a derivative suit if the basis for that suit—alleged corporate harm—would always serve as the basis for a direct claim as well.

By irreconcilably blurring, if not demolishing, the distinction between direct and derivative claims, Plaintiffs' theory is inconsistent with *Cohen*, which expressly recognized that even a dissenting shareholder to a merger could have certain claims that were direct and some that were derivative. *Id.* at 20, 62 P.3d at 732-33. *Cohen* expressly held, for example, that claims involving "mismanage[ment of] the corporation resulting in a loss of revenue" and corporate waste were derivative claims. *Id.* at 21, 62 P.3d at 734. But Plaintiffs would now have the Court believe that such claims could have been asserted directly if only the *Cohen* plaintiff had been clever enough to argue that because of this mismanagement the company was no longer "the same entity in which [he] invested." Answer at 3, 25. Even accepting Plaintiffs' allegations as true, Plaintiffs cannot transform these purported corporate harms into a loss of "unique personal property."[7]

[7] Plaintiffs suggest in passing, based on Delaware law, that they were directly harmed because of a purported lack of disclosures in the proxy materials. Answer at 30 (citing *In re Gaylord Container Corp. S'holders Litig.*, 747 A.2d 71, 81 n.12 (Del. Ch. 1999)). Plaintiffs have never challenged the lower court's

2. Plaintiffs Seek To Recast *Cohen* By Erroneously Asserting It's Holding Has "Evolved" To Relieve Them Of The "Unique Personal Property" Requirement

Recognizing their inability to meet *Cohen*, Plaintiffs seek to change it. Plaintiffs alternatively argue that this Court should abandon *Cohen*'s holding that a Plaintiff in a direct action must allege a loss of "unique personal property." *See* Answer at 32 (arguing that consideration of whether any shareholder has suffered "unique and personal harm" is "an unclear, confusing, and awkward standard"). Plaintiffs, however, provide the Court with no reason to overturn this portion of *Cohen*, other than to save their claims in this case. Thus, the Court should apply *Cohen* and reverse.

To avoid conceding that they cannot meet *Cohen*'s requirements, Plaintiffs attempt to dress their request for this Court to overturn *Cohen* in the sheep's clothes of "evolved" jurisprudence. *See id*. at 32-33 ("The Supreme Court should . . . continue to apply the *Cohen* standard, *which has since evolved* into the two-part test from *Tooley* utilized by Delaware and New York.") (emphasis added). Plaintiffs' theory of evolution, unlike Darwin's, does not bear scrutiny.

Plaintiffs' argument rests on the fallacy that the Delaware Supreme Court's rejection of Delaware's "special injury" test for direct shareholder claims in *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), decided one

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ruling that no material information was withheld from the proxy materials and, as noted and not disputed below, "Plaintiffs have abandoned their separate claim for breach of the fiduciary duty of disclosure." PA 54. The Intervening Complaint does *not* contain a disclosure claim.

year after *Cohen*, necessarily "updated" all of American corporate law, including in Nevada. Plaintiffs chastise Defendants for purportedly "disregard[ing] clear legal developments in Nevada, Delaware, and New York" by "repeatedly invoking the 'special injury' test." *See* Answer at 32. But this straw-man argument fails because Delaware's "special injury" test is not asserted at any point in the Petition. The quotations that Plaintiffs cite as purported proof that Defendants are relying on the "special injury" test plainly invoke only *Cohen*'s "unique personal property" test. *Id.* (citing Pet. at 21 ("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") and 24 ("But a loss in market value of stock is not a "unique harm")).

Plaintiffs cite to no Nevada case—not one—that has even touched upon *Cohen*'s holding, much less "evolved" it. Indeed, the only case cited by either party that was decided under Nevada law after *Cohen* that addresses its direct/derivative test is *Sweeney v. Harbin Elec., Inc.*, 2011 WL 3236114 (D. Nev. July 27, 2011). Pet. at 23-24. In *Sweeney*, the federal district court of Nevada addressed who has the right under Nevada law to assert a claim that the company's "directors issued . . . shares of stock at below market value" and held, under *Cohen*, that such equity dilution claims are derivative under Nevada law. 2011 WL 3236114, at *2. And yet, Plaintiffs attempt to avoid *Sweeney* (and therefore

Cohen) by arguing that some unmentioned legal authority changed Nevada corporate law on this issue in the eight years between *Cohen* and *Sweeney*. Answer at 35-36. Without mentioning any *Nevada* authority other than *Cohen* that the *Sweeney* court should have relied upon, Plaintiffs baselessly fault *Sweeney* on the grounds that it does not "employ a contemporary legal analysis of the direct/derivative distinction" and "does not contain an updated view of direct/derivative jurisprudence in Nevada or Delaware." *Id.*

Plaintiffs' theory suffers from the defect that changes in the corporate law of Delaware (or New York) do not automatically change the corporate law of Nevada. Even if it were true that Delaware law has "evolved" in some way that diverges from Nevada law (and it has not), then that change in Delaware would not overrule or modify the controlling precedent here. Although Nevada courts look to Delaware in cases where either the Nevada legislature or courts have not yet acted, absent strong policy reasons they do not blindly follow Delaware courts where Nevada courts have already come to a contrary position. *See Bader Enters., Inc. v. Olsen*, 98 Nev. 381, 384, 649 P.2d 1369, 1371 (1982) (denying a party's attempt "to avoid the consequences" of Nevada law "by invoking the law of the State of Delaware as controlling"), *abrogated on other grounds by Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 38 P.3d 872 (2002).

In any event, the supposed "update" in Delaware law that Plaintiffs identify is, in fact, no different from *Cohen*. The parties agree that the leading authority addressing the distinction between direct and derivative claims in Delaware is *Tooley*, 845 A.2d at 1033, which establishes a two-factor inquiry for determining the nature of a shareholder's claims: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" Contradicting their own assertion that Delaware law has "evolved" Nevada law, Plaintiffs concede that this test is entirely consistent with *Cohen*. Answer at 31-33.[8]

Regarding the first factor, asking "who suffered the alleged harm," *Tooley* endorsed the standard articulated in *Agostino v. Hicks*, 2004 WL 443987, at *7 (Del. Ch. Mar. 11, 2004): "Looking at the body of the complaint and considering the nature of the wrong alleged and the relief requested, has the plaintiff demonstrated that he or she can prevail without showing an injury to the corporation?" *Tooley*, 845 A.2d at 1036 (*quoting Agostino*). This language mirrors the *Cohen* requirement that direct claims exist where a shareholder

[8] Indeed, at the same time Plaintiffs argue that the "unique personal property" requirement of *Cohen* is outdated based on Delaware law, they contradict themselves and laud this Court as the "first-mover" and condescendingly state that it "deserves the credit for adopting [*Tooley*'s] general framework ahead of Delaware." Answer at 31-32. Plaintiffs cannot have it both ways – either *Cohen* has "evolved" based on Delaware law or was correct from the start and Delaware followed. Plaintiffs, however, offer no support for the former option.

"seek[s] relief for direct injuries that are independent of any injury suffered by the corporation." *Cohen,* 119 Nev. at 19, 62 P.3d at 732. Subsequent Delaware cases, applying *Tooley*, further explained that the corporation, not the individual shareholder, is harmed where the harm "'falls upon all shareholders equally and falls only upon the individual shareholder in relation to his proportionate share of stock as a result of the direct injury being done to the corporation.'" *Feldman v. Cutaia*, 956 A.2d 644, 655 (Del. Ch. 2007) (quoting *In re Berkshire Realty Co., Inc.*, 2002 WL 31888345, at *4 (Del. Ch. Dec. 18, 2002)). Once again, this language finds a counterpart in *Cohen*. *See* 119 Nev. at 22, 62 P.3d at 733-34 (noting that claims arising out of "harm to the corporation, shared by all the stockholders and not related to an individual stockholder" are "derivative in nature"). As set forth above, Plaintiffs' theory that Parametric is now a "new" company because the transaction purportedly caused harm *to Parametric* only gives rise to a derivative claim, and Delaware is no more sympathetic than Nevada to Plaintiffs' attempts to transform a derivative claim into a direct one. *See Feldman v. Cutaia*, 951 A.2d 727, 733 (Del. 2008) ("creative attempt[s] to recast [a] derivative claim for dilution . . . by alleging the same fundamental harm in a slightly different way . . . [are] disfavored").

Regarding the second *Tooley* factor, Plaintiffs argue (without citation to any authority) that any recovery in this case should go only to "Plaintiffs and

Parametric's other public stockholders at the time of the Merger" because the company is now "at least 80% controlled by former [VTBH] insiders and, thus, the vast majority of the recovery in a derivative case would be usurped by many of the same parties that wrongfully carried out the Merger."[9] Answer at 34. This statement is incorrect. Any recovery in a derivative action goes to the *company* and is not "usurped" by any particular shareholder. *Id.*; *J.P. Morgan*, 906 A.2d at 812. To the extent that any corporate recovery results in an increase in share value, which may not occur, *all* shareholders will partake in that tangential benefit on an equal basis. If the mere existence of a new class of shareholder were sufficient to destroy the derivative nature of any claim arising out of a stock issuance, then no derivative claim could ever be asserted regarding a stock issuance because a stock issuance will always create a new class of shareholders. Plaintiffs' theory, if accepted, would eviscerate the body of law in Nevada (and Delaware) recognizing that stock dilution claims are traditionally derivative despite the fact that a new class of shareholder is created by the issuance.[10] *See, e.g., Sweeney* 2011 WL 3236114, at *2; *Feldman*, 951 A.2d at 732.

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[9] Notably, none of these purported VTBH "insiders" are parties in this case and there is no allegation of wrongdoing asserted against them. Accordingly, Plaintiffs' own pleading does not support the suggestion that these "insiders" are "the same parties that wrongfully carried out the Merger." Answer at 34. In any event, this precise argument was expressly rejected by the Delaware Chancery Court under substantially similar facts. *See infra* at 24; *J.P. Morgan*, 906 A.2d at 812.

[10] With regard to the second *Tooley* factor, Plaintiffs heavily rely on *AHW Inv. P'ship, MFS, Inc. v. Citigroup Inc.*, 980 F. Supp. 2d 510 (S.D.N.Y. 2013). This case did not address a stock dilution or merger but, instead, addressed claims

If there were any doubt about how Delaware would apply the *Tooley* test in this case, it is dispelled by *J.P. Morgan*, *supra*, which addressed nearly identical claims arising out substantially similar facts under a *Tooley* analysis. Like the present case, *J.P. Morgan* addressed a transaction involving both a merger (between JPMC and Bank One) and a stock issuance (from JPMC to the former shareholders of Bank One). *J.P. Morgan*, 906 A.2d at 812. After JPMC merged with Bank One, JPMC's shareholders, having retained their stock in JPMC, complained that JPMC's "issuance of stock to consummate the merger" diluted the value of their stock. *Id.* at 818. Applying *Tooley*'s first prong, the court ruled that "[a] complaint that 'directly challenges the fairness of the process and the price' of a merger . . . suggests that the corporation suffered harm . . . and that the harm suffered by stockholders is only a natural and foreseeable consequence of the harm to the corporation." *Id.* Because such a harm "was a harm suffered by all pre-merger JPMC shareholders and, consequently, JPMC itself . . . the harm alleged in the complaint cannot give rise to a direct claim." *Id.*

As for *Tooley*'s second prong, the JPMC shareholders made the exact same argument that Plaintiffs rely upon here: "the previous Bank One stockholders, who

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from a select group of Citigroup shareholders that alleged that Citigroup had fraudulently induced them to hold their shares when they would have sold them, resulting in a personal loss of property when the shares diminished in price. Using language that reflects the "unique personal property" test, the Court found such fraud claims to be direct because "Plaintiffs have . . . alleged injuries resulting from their *unique reliance* that is 'independent of any alleged injury to' Citigroup." *Id.* at 517 (emphasis added).

ostensibly . . . benefited from any misconduct, should be excluded from the remedy." *Id.* at 819. The court held that this argument was "not persuasive" because if JPMC's directors had caused JPMC to overpay for Bank One then "[a]ny remedy from the alleged harm would necessarily accrue to JPMC and not to a subset of stockholders." *Id*. Under the same reasoning, any recovery for the alleged harms to Parametric should go to Parametric even if the former owners of VTBH, along with Plaintiffs, may receive some consequential return from that recovery.

B. Plaintiffs Are Not Dissenting Shareholders To A Corporate Merger Under Nevada Law.

Plaintiffs' inability to satisfy *Cohen*'s "unique personal property" test makes sense because *Cohen* was addressed specifically to "dissenting shareholders" who, unlike Plaintiffs, would lose their stock in a merging corporation. *Cohen*, 119 Nev. at 19, 62 P.3d at 732. It is undisputed that VTBH merged with Paris, leaving VTBH as the surviving subsidiary of Parametric. *See* Answer at 6 ("[VTBH] merged into Paris," and not Parametric). Therefore, under Nevada law, Parametric did not merge with VTBH and Parametric's shareholders are not "dissenters" to a corporate merger with VTBH. *See* NRS 92A.315 (defining "dissenter" as "a stockholder who is entitled to dissent from a domestic corporation's action under NRS 92A.380"); NRS 92A.380(1)(a) (stockholder entitled to dissent from a "plan of merger to which the domestic corporation is a *constituent entity*") (emphasis

added); NRS 92A.015(1) ("constituent entity" to a merger includes only "each merging or surviving entity").[11] Because Plaintiffs are not "dissenting shareholders" to a corporate merger, they have no basis to select any of the "three options" that *Cohen* recognized were available only to "such shareholders," including a direct challenge to the validity of a merger. *Cohen*, 119 Nev. at 9-10, 62 P.3d at 725-27.[12]

Much of Plaintiffs' Answer is focused on blurring the distinction between (1) the merger between VTBH and Paris and (2) Parametric's issuance of new stock in connection with this merger. For example, Plaintiffs cherry pick references to a "merger proposal" in the proxy materials to suggest that Parametric shareholders were offered the opportunity to approve of, or dissent from, the

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[11] Plaintiffs suggest that *Cohen* did not intend to invoke the statutory understanding of who constitutes a "dissenting shareholder" to a merger (Answer at 25), but this argument cannot be squared with this Court's express citation to the statutes cited here. *See Cohen*, 119 Nev. at 10, 62 P.3d at 726 ("dissenters' rights are set forth in NRS 92A.300-92A.500"). Fundamental principles of statutory interpretation require this Court to credit the statutory definition of a term when a statutory definition is provided. *See Lee v. State*, 116 Nev. 452, 454, 997 P.2d 138, 140 (2000) ("This court has recognized that it is 'not empowered to go beyond the face of a statute to lend it a construction contrary to its clear meaning'") (quoting *Union Plaza Hotel v. Jackson*, 101 Nev. 733, 736, 709 P.2d 1020, 1022 (1985)).

[12] Defendants have not waived the argument that Parametric was not a constituent entity to a merger under Nevada law. Answer at 29. Defendants repeatedly made the argument below that the merger was between VTBH and Paris, not Parametric, and that Plaintiffs did not lose their shares as a result of that merger. PA 58 (VTBH merged with a subsidiary of Parametric). Specific citations to the statutory provisions defining "dissenter" and "constituent entity," offered here merely to support the well-preserved and undisputed argument that Parametric did not legally merge with VTBH, were not required in the proceedings below to raise those statutory provisions here. *See, e.g., W. Techs., Inc. v. All-Am. Golf Ctr., Inc.*, 122 Nev. 869, 873 n.8, 139 P.3d 858, 860 n.8 (2006) (where substance of argument is preserved, specific statute supporting that argument may be cited on appeal though not cited below).

merger. Answer at 2, 6-7. But this suggestion is belied by the first page of the proxy materials, which clearly defines the term "merger proposal" as "a proposal to approve the issuance of . . . common stock . . . in connection with the merger" between VTBH and Paris. *See* PA 102.[13] Further, the proxy materials expressly disclaimed any right of Parametric's shareholders to vote on the merger itself. *See* PA 188 (informing shareholders that "approval by Parametric's stockholders of the merger agreement and the transactions contemplated thereby, including the merger, is not required").

Plaintiffs similarly misrepresent the terms of the Agreement and Plan of Merger (August 5, 2013 Merger Agreement ("Merger Agreement")). Parametric was a signatory to this agreement because Parametric was expected to provide consideration for the merger to VTBH in the form of a stock issuance, and not because Parametric would legally merge with either VTBH or Paris. *See* PA 354 ("Merger Consideration" to be provided by Parametric in the form of a "share issuance . . . at the [c]losing of the merger"). The Merger Agreement made clear that the only entities that would actually be merging were VTBH and Paris. PA 292 (defining "the merger" as "Merger Sub [Paris] shall be merged with and into VTBH"). Indeed, although the Answer includes a screenshot of the caption from the Merger Agreement showing that Parametric was a signatory to the Agreement,

[13] The merger, itself, as well as the Merger Agreement, are separately defined. PA 102-03.

Plaintiffs do not provide the caption, or any other reference, to the actual Certificate of Merger, which did not include Parametric as a signatory and expressly clarified that the only "Constituent Corporations" to the Merger were VTBH and Paris.[14]

Defendants' argument that Parametric was not a constituent entity to the VTBH/Paris merger, and thus Plaintiffs had no ownership interest in a merging entity to lose in that merger, underscores the more general principle that Plaintiffs have not "lost unique personal property" as a result of that merger. *Cohen*, 119 Nev. at 19, 62 P.3d 732. Accordingly, the answer to the question of whether Parametric was a "party" to a merger with VTBH for purposes of *Cohen* is ultimately immaterial here because Plaintiffs plainly did not lose their shares in Parametric, and thereby suffered no loss of "unique personal property." *Id.*[15]

[14] The Certificate of Merger was included as Exhibit A to the Merger Agreement, which is publicly available at https://www.sec.gov/Archives/edgar/data/1493761/000101968713002865/pamt_8k-ex0201.htm.

[15] Plaintiffs' request that this Court ignore the structure of the transaction is meritless. Answer at 27. Plaintiffs rely upon a single Delaware case, *Gatz v. Ponsoldt*, where a fiduciary forced a corporation to issue new shares to himself below market value and then, in a second transaction, the fiduciary passed those shares to a third party. 925 A.2d 1265, 1279 (Del. 2007). The fiduciary asked the court to conflate the two transactions and treat them as a single stock issuance to a third party. *Id.* The court *rejected* this invitation, stating that "transactional creativity, should not affect how the law views the substance of what truly occurred." *Id.* at 1281. The court refused to conflate the transactions because *the law* recognized that the two transactions were distinct events with distinct legal implications. *Id.* As in *Gatz*, there is no reason to create a transaction that never occurred (a merger between VTBH and Parametric) by conflating the VTBH/Paris merger and the Parametric stock issuance.

II. Plaintiffs' Claims Are Derivative Because They Arise Out Of A Purported Stock Dilution

In the proceedings below, Plaintiffs suggested to the trial court that the direct/derivative issue could be resolved by answering a deceptively simple question: "it is clear that the question is simply one of is it a merger or is it a dilution." PA 611. It was improper for the trial court to accept this standard because, as set forth above, the nature of the claims depends not on whether the shareholders are challenging a merger or a stock dilution, but on whether the shareholders have "lost unique personal property." *Cohen*, 119 Nev. at 19, 62 P.3d 732. Nevertheless, Plaintiffs' reliance on this argument is effectively an admission that if they are challenging a stock dilution then their claims are derivative. That admission is consistent with legal principles that have been widely recognized throughout the United States. *See, e.g.*, *Sweeney*, 2011 WL 3236114, at *2 (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 stock." (internal quotation omitted); *Penn Mont Sec. v. Frucher*, 502 F. Supp 2d 443, 446-65 (E.D. Pa. 2007); *Feldman*, 951 A.2d at 732 (applying Delaware law).

Plaintiffs now backpedal from their earlier position and attempt to argue, based entirely on Delaware law, that they may directly assert their claims even if

their claims are properly characterized as challenging a stock dilution. The *only* scenario, however, in which Delaware courts permit an equity dilution claim to be asserted directly is when, unlike here, there is also a claim of disloyal expropriation. *See Gatz*, 925 A.2d at 1280-81; *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618 (Del. Ch. 2013). But Plaintiffs concede that there is no claim of expropriation in this case. Answer at 37-38 (recognizing that a "claim of disloyal expropriation" is not a "scenario . . . implicated here").

Instead, and based on a single, unreported Chancery Court decision, Plaintiffs invent a second scenario in which a shareholder may directly challenge an equity dilution by arguing that even in the absence of an expropriation claim "Plaintiffs may also establish standing by proving that a majority of the Board was conflicted." Answer at 38 (quoting *In re Nine Sys. Corp. S'holders Litig.*, 2014 WL 4383127, at *29 (Del. Ch. Sept. 4, 2014) ("*Nine Sys.*")). But this unpublished Delaware opinion did *not* create a new exception to the general rule that equity dilution claims, absent allegations of expropriation, are derivative. Instead, the court clarified that the "standing" referred to in this quoted language means "standing to bring a direct *expropriation* claim," which, again, is not asserted here. *Id.* (emphasis added) Moreover, this language is *dicta*, as the court expressly acknowledged that this issue "was not raised by the parties" and "the Court does not decide whether [such] a showing . . . would be sufficient for standing to bring a

direct expropriation claim." *Id.* at *29 n.266. Plaintiffs cite no authority to suggest that mere allegations of a conflicted board, absent a claim of disloyal expropriation, is sufficient to establish standing for a direct claim for dilution under Delaware law or the law of any other state.[16] Plaintiffs' claims arise out of a purported stock dilution caused by Parametric's issuance, with majority shareholder of approval, of new stock to the former shareholders of VTBH and such claims are derivative.

CONCLUSION

Cohen requires shareholders to establish that they "lost unique personal property" as a result of a merger in order to directly challenge that merger. Plaintiffs' two-paragraph attempt to establish such a loss fails as a matter of logic and law. Under controlling Nevada law, and consistent with Delaware law, Plaintiffs cannot establish a proper basis for directly challenging the VTBH/Paris merger because they never owned stock in those companies and, as a consequence, the merger did not cause the loss of Plaintiffs' Parametric stock or of any other "unique personal property." Accordingly, Defendants respectfully request that this Court issue a Writ of Mandamus, or, in the alternative, Writ of Prohibition, directing the lower court to dismiss the Intervening Complaint on the grounds that

[16] Defendants strongly dispute Plaintiffs' allegations that a majority of the Parametric Board of Directors was conflicted. Nevertheless, that issue is not presently before this Court, notwithstanding the pages of irrelevant facts regurgitated in Plaintiffs' Answer.

Parametric's shareholders lack standing to directly challenge the validity of the merger between VTBH and Paris.

Submitted this 23rd day of February, 2015

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VERIFICATION

On February 23rd, 2015, 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 reply brief in support of 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.

Richard C. Gordon, Esq.

GIVEN UNDER MY HAND AND SEAL OF OFFICE on this 23rd day of February, 2015.

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.

February 23, 2015.

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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 February 23, 2015, I caused to be served a true and correct copy of the foregoing **PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS, OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION** by the method indicated:

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