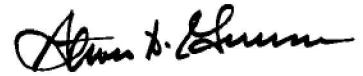


# **EXHIBIT G**



CLERK OF THE COURT

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7 EIGHTH JUDICIAL DISTRICT COURT

8 CLARK COUNTY, NEVADA

9 In re PARAMETRIC SOUND )  
10 CORPORATION SHAREHOLDERS' )  
LITIGATION )

Lead Case No. A-13-686890-B  
Dept. No. XI

CLASS ACTION

11 \_\_\_\_\_ )  
12 This Document Relates To: )

13 ALL ACTIONS. )  
14 \_\_\_\_\_ )

PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION TO STAY  
PENDING CONSIDERATION BY THE  
NEVADA SUPREME COURT

1           A.     INTRODUCTION

2           Defendants filed a writ petition challenging only one aspect of the Court's ruling on the  
3 motions to dismiss: that the case is a direct claim for damages to stockholders surrounding a  
4 merger rather than a derivative claim on behalf of the corporation. *See Cohen v. Mirage Resorts,*  
5 *Inc.*, 119 Nev. 1, 19, 62 P.3d 720 (2003) ("if the complaint alleges damages resulting from an  
6 improper merger, it should not be dismissed as a derivative claim"). Defendants do not question  
7 the Court's ruling that the Complaint in Intervention adequately alleges claims for breach of  
8 fiduciary duty against the individual defendants, as well as aiding and abetting against Parametric  
9 Sound Corporation ("Parametric") and VTB Holdings, Inc. ("Turtle Beach"). Plaintiffs should not  
10 be precluded from litigating the breach of fiduciary duty and aiding and abetting claims while  
11 defendants' writ on the direct/derivative issue is under consideration.

12           Courts consider the following factors when a party requests a stay pursuant to an appeal or  
13 writ petition:

- 14           (1)     whether the object of the appeal or writ petition will be defeated if the stay or  
15                    injunction is denied;  
16           (2)     whether appellant/petitioner will suffer irreparable or serious injury if the stay or  
17                    injunction is denied;  
18           (3)     whether respondent/real party in interest will suffer irreparable or serious injury if  
19                    the stay or injunction is granted; and  
20           (4)     whether appellant/petitioner is likely to prevail on the merits in the appeal or writ  
21                    petition.

22           NRCP 8(c). Defendants' primary case, *Fritz Hansen A/S v. Dist. Ct.*, 116 Nev. 650, 6 P.3d 982  
23 (Nev. 2000) ("*Fritz Hansen*"), strongly counsels **against** a stay here. Defendants set forth no  
24 reason why this Court should stay the case in contravention of direct Supreme Court precedent.  
25 For the reasons discussed herein, the litigation should continue on plaintiffs' breach of fiduciary  
26 duty and aiding and abetting claims.  
27  
28

1           **B. ANALYSIS OF THE FOUR FACTORS**

2                   **1. The Object of the Writ Petition Will Not Be Defeated if the**  
3                   **Stay Is Denied**

4           The object of defendants' writ petition, which challenges the Court's ruling on the motions  
5 to dismiss, is to obtain dismissal of the litigation. That object, dismissal, will not be defeated if  
6 the litigation continues at this time. *Fritz Hansen* considered a similar issue. There, the defendant  
7 filed a "petition for a writ of prohibition challenging a district court order that denied a motion to  
8 quash service for lack of personal jurisdiction." 116 Nev. at 652. The object of the petition, thus,  
9 was to "challenge . . . the district court's jurisdiction." *Id.* at 658. Because the defendants'  
10 continued appearance after denial of a stay would not "amount to a waiver of its challenge to the  
11 district court's jurisdiction," the Supreme Court held that the object of the petition would not be  
12 defeated by continued litigation. *Id.* The same logic applies here. Defendants can still obtain  
13 dismissal of the litigation in the unlikely event that the Supreme Court issues a writ and, moreover,  
14 defendants can attempt to dismiss the case at later stages of the litigation as well. (*See* Hearing on  
15 Motions to Dismiss, August 28, 2014, Tr. at 32 ("THE COURT: . . . While I understand there are  
16 issues that you may raise on a motion for summary judgment, which is a different standard, at this  
17 stage of the pleadings I'm denying it.").)

18           Factor one is firmly against defendants in the stay analysis, so defendants' brief sidesteps  
19 the issue by touting an illusory object of the writ. Defendants now claim they are not seeking  
20 dismissal, but instead they are seeking "the protection of the corporate right to manage litigation  
21 on [Parametric's] own behalf." (Defendants' Motion for Stay Pending Consideration by the  
22 Nevada Supreme Court on an Order Shortening Time ("Mot.") at 8.) But in reality, defendants  
23 are not attempting to "manage" the litigation. They are trying to make the case go away and  
24 dismiss adequately pleaded claims for breaches of the duty of loyalty. (*See* Defendants' Motions  
25 to Dismiss.) Indeed, later in the same brief, defendants forget the ruse and contend that the parties  
26 will be "spared . . . further litigation if the Supreme Court orders the dismissal of the case." (Mot.  
27 at 9.) In any event, even if "management of the litigation" were defendants' true intent, that object  
28 would not be defeated if the case proceeds. Nothing prevented Parametric from instituting



1 litigation against its directors when the fraudulent Merger came to light. Parametric could still  
2 manage the litigation at a later point in time if the case is derivative and if it believes the current  
3 plaintiffs have not fully investigated the egregious and self-interested conduct of its former  
4 directors. Either way, the object of the writ petition, whether dismissal or management of the  
5 litigation, will remain when the Supreme Court issues its decision.

6 **2. Defendants Will Not Suffer Irreparable or Serious Injury if the**  
7 **Stay Is Denied**

8 Defendants argue that they will be irreparably harmed if they abide by their discovery  
9 obligations under the NRCP while the writ is pending (Mot. at 8), but the Supreme Court squarely  
10 rejected that argument in *Fritz Hansen*. It held:

11 Fritz Hansen would not suffer irreparable or serious injury if the stay is denied. It  
12 argues that it should not be required to participate “needlessly” in the expense of  
lengthy and time-consuming discovery, trial preparation, and trial. ***Such litigation  
expenses, while potentially substantial, are neither irreparable nor serious.***

13 116 Nev. at \*658 (emphasis added). For that proposition, the Nevada Supreme Court cited several  
14 cases reaching the same conclusion. *Id.* Four years later, defendants’ own authority (*see* Mot. at  
15 8) recognized that “[w]e have previously explained that litigation costs, even if potentially  
16 substantial, are not irreparable harm.” *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253, 89  
17 P.3d 36 (Nev. 2004). In contrast, defendants cite no authority for their contrary position other  
18 than *Shoen v. Sac Holding Corp.*, 122 Nev. 621, 137 P.3d 1171 (Nev. 2006), which of course does  
19 not involve a motion to stay. It is indeed remarkable that, rather than concede that this factor is  
20 not in their favor, defendants advance this argument in the face of overwhelming authority to the  
21 contrary.

22 Defendants’ argument fails on the facts as well. Just prior to the December 2013 vote on  
23 the Merger, defendants told stockholders that Parametric and Turtle Beach internally projected the  
24 combined company to yield cash flows (called “adjusted EBITDA”) of \$62.3 million in 2014 and  
25 \$93.2 million in 2015.<sup>1</sup> Yet now, despite telling shareholders less than a year ago that they were

26  
27 <sup>1</sup> Preliminary Proxy available at: [http://www.sec.gov/Archives/edgar/data/1493761/](http://www.sec.gov/Archives/edgar/data/1493761/000119312513425181/d621612dprem14a.htm)  
28 000119312513425181/d621612dprem14a.htm.

1 expecting over \$150 million in cash flows for this year and next and despite their insurance  
2 policies, defendants claim that producing documents and sitting for a few depositions will “drain  
3 already-limited corporate funds” (Mot. at 8). If defendants’ proxy materials are to be believed,  
4 they will have no problem funding this litigation while the Supreme Court considers the writ on  
5 the direct/derivative issue.<sup>2</sup> Either way, the Supreme Court has held in no uncertain terms that  
6 litigation expense does not constitute harm sufficient to stay litigation during the consideration of  
7 a writ.

8 **3. Plaintiffs Are Not Likely to Suffer “Irreparable Harm” if a**  
9 **Stay Is Granted, but Litigation Will Be Delayed**

10 Unlike factors one, two, and four, the third factor does not often play a significant role in  
11 the decision whether to issue a stay. The Supreme Court addressed the issue in *Fritz Hansen* as  
12 follows: “it does not appear from the documents before us that [plaintiff] would suffer irreparable  
13 or serious injury if the stay were granted. Nevertheless, the underlying proceedings could be  
14 unnecessarily delayed by a stay, particularly where the district court has made only a preliminary  
15 determination as to personal jurisdiction, and the issue remains for trial.” 116 Nev. at 658. The  
16 Supreme Court similarly noted that “delay in pursuing discovery and litigation normally does not  
17 constitute irreparable harm.” *Mikohn Gaming*, 120 Nev. at 243. On the other hand, the Supreme  
18 Court explained in *Thompson*, that writ “petitions [challenging denials of motions to dismiss and  
19 motions for summary judgment] have generally been quite disruptive to the orderly processing of  
20 civil cases in the district courts, and have been a constant source of unnecessary expense for  
21 litigants.” *State ex. rel. Dep’t of Transp. v. Thompson*, 99 Nev. 358, 361, 662 P.2d 1338 (Nev.  
22 1983). Plaintiffs concede the third factor does not weigh heavily towards denial of the stay.

---

23  
24  
25 <sup>2</sup> Defendants also claim that “Plaintiffs have subpoenaed banks and other financial advisors  
26 to Parametric, without consideration of how such legal actions may affect Parametric’s future  
27 relationships with these entities.” (Mot. 8.) That is a correct statement. We did not consider the  
28 matter because it strains credulity to suggest that J.P. Morgan, for example, with a \$230 billion  
market capacity, would sever a relationship with Turtle Beach simply because it was served with  
a subpoena from Parametric shareholders requesting documents in connection with a merger for  
which J.P. Morgan was paid millions in fees.

1                   **4. Defendants Are Not Likely to Prevail on the Merits of the Writ**  
2                   **Petition**

3           Factor four heavily weighs against staying this litigation. Defendants' primary argument  
4 on this factor attempts to amplify the Supreme Court's boilerplate language of "arguable merit" to  
5 a substantively significant "likelihood of success" finding. (Mot. at 9.) If defendants were correct,  
6 a writ review would always warrant a stay. *But see Fritz Hansen*, 116 Nev. 650 (denying a stay).  
7 In addition, the fact that the Supreme Court ordered an answering brief does not dramatically  
8 increase the chance of defendants' success; the Supreme Court has stated that in this context,  
9 "[e]ven in cases where we ordered the respondents to file answers, *see* NRAP 21(b), the number  
10 of writs [of mandamus] actually issued was minimal." *Thompson*, 99 Nev. at 361.

11           To address this factor, the Court need not reach beyond the finding it already made when  
12 denying defendants' motions to dismiss. This is not a motion for reconsideration. Rather, two  
13 possibilities exist. If defendants present new arguments, they would not be properly raised on a  
14 writ and will be rejected by the Supreme Court. *See, e.g., Cal. St. Auto Ass'n v. Dist. Ct.*, 106 Nev.  
15 197, 788 P.2d 1367 (1990) (issues raised for first time on writ petition would not be considered).  
16 Alternatively, if defendants raise old arguments, the Court rejected those same arguments at the  
17 motion to dismiss stage. This Court properly followed black-letter Supreme Court precedent that  
18 "if the complaint alleges damages resulting from an improper merger, it should not be dismissed  
19 as a derivative claim." *Cohen*, 119 Nev. at 19. Put differently, "allegations [that] involve wrongful  
20 conduct in approving the merger and/or valuing the merged corporation's shares . . . are not  
21 derivative claims." *Id.* The law has not changed since the demurrer hearing and defendants are  
22 unlikely to convince the Supreme Court to overturn its longstanding precedent.

23           Nevertheless, we address defendants' two new arguments here. In their motion to stay,  
24 and in the writ petition, defendants trot out a new theory that *Cohen* does not apply because  
25 Parametric was purportedly never a party to the Merger. (Mot. at 9.) Defendants' own Agreement  
26 and Plan of Merger (the "Merger Agreement"), to which Parametric was a signatory, undermines  
27 that new assertion. The following is a screenshot of the opening page of the Merger Agreement:  
28

1  
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6  
7 AGREEMENT AND PLAN OF MERGER  
8 BY AND AMONG  
9 PARAMETRIC SOUND CORPORATION,  
10  
11 PARIS ACQUISITION CORP.  
12  
13 AND  
14 VTB HOLDINGS, INC.  
15 DATED AS OF AUGUST 5, 2013  
16

3

17 In addition to the binding Merger Agreement, defendants made similar statements indicating that  
18 Parametric was a party to the Merger: "Turtle Beach and Parametric Sound (NASDAQ: PAMT)  
19 today announced that Turtle Beach has designated two independent directors to be appointed to  
20 the board of directors immediately after the closing *of the pending merger of the two companies.*"

21 <sup>4</sup> Having told shareholders one thing, defendants are estopped to contend otherwise now.

22 Perhaps worse, defendants also contend for the first time that Parametric was not a  
23 "constituent entity" to the merger because "*Parametric's shareholders were not asked to approve*  
24 *any merger . . . .*" (Mot. at 10) (emphasis added.) That is wrong. Defendants made just the

25  
26 <sup>3</sup> Merger Agreement available at: [http://www.sec.gov/Archives/edgar/data/1493761/000101968713002865/pamt\\_8k-ex0201.htm](http://www.sec.gov/Archives/edgar/data/1493761/000101968713002865/pamt_8k-ex0201.htm).

27 <sup>4</sup> Schedule 14A available at: [http://www.sec.gov/Archives/edgar/data/1493761/000101968713004881/pamt\\_defa14a-121813.htm](http://www.sec.gov/Archives/edgar/data/1493761/000101968713004881/pamt_defa14a-121813.htm). (Emphasis added.)  
28

1 opposite representation when asking Parametric's shareholders to approve the Merger. The  
2 opening page of the Proxy states:

3 The Parametric board of directors, referred to as the "Parametric Board," has  
4 determined that the merger agreement and the transactions contemplated thereby,  
5 including the issuance of shares pursuant to the merger and the corresponding  
6 change of control of Parametric, are fair to, advisable and in the best interests of  
7 Parametric and its stockholders. *The Parametric Board recommends that  
Parametric stockholders vote "FOR" the merger proposal. . . . Your vote is  
important. The affirmative vote of the holders of a majority of the votes cast on  
the merger proposal at the Special Meeting (assuming a quorum is present in  
person or by proxy), excluding abstentions, is required for approval of the merger  
proposal.*<sup>5</sup>

8  
9 In sum, this case is properly a direct stockholder action, defendants' new arguments will  
10 not be well received by the Supreme Court, and the Court should allow plaintiffs to continue  
11 forward with the litigation.

### 12 C. CONCLUSION

13 For the foregoing reasons, plaintiffs respectfully request that the Court deny defendants'  
14 motion to stay and allow plaintiffs to continue litigating their claims for breach of fiduciary duty  
15 and aiding and abetting while the Supreme Court considers the writ on just the direct/derivative  
16 issue.

17 DATED: December 5, 2014

Respectfully submitted,

18 THE O'MARA LAW FIRM, P.C.  
19 DAVID C. O'MARA (Nevada Bar No. 8599)

20 

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26  
27 <sup>5</sup> Preliminary proxy available at: [http://www.sec.gov/Archives/edgar/data/1493761/](http://www.sec.gov/Archives/edgar/data/1493761/000119312513425181/d621612dprem14a.htm)  
28 [000119312513425181/d621612dprem14a.htm](http://www.sec.gov/Archives/edgar/data/1493761/000119312513425181/d621612dprem14a.htm).

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Co-Lead Counsel for Plaintiffs

1 **CERTIFICATE OF SERVICE**

2 I hereby certify under penalties of perjury that on this date I served a true and  
3 correct copy of the foregoing document by sending the document via email to the addresses  
4 listed below and the Court's electronic filing system.  
5

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12	Adam Warden	Plaintiffs	awarden@saxenawhite.com
13	Jonathan Stein	Plaintiffs	jstein@saxenawhite.com
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20	Tina Jakus	Defendants	tjakus@sheppardmullin.com
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22	Richard Gordon	Defendants	rgordon@swlaw.com
23	Gaylene Kim (assistant)	Defendants	gkim@swlaw.com
24	Joshua Hess	Defendants	Joshua.Hess@dechert.com
25	Brian Raphel	Defendants	Brian.Raphel@dechert.com
26	Reginald Zeigler	Defendants	Reginald.Zeigler@dechert.com

27 DATED: December 5, 2014.

28 /s/ Valerie Weis

# **EXHIBIT F**



1 TRAN

2 DISTRICT COURT

3 CLARK COUNTY, NEVADA

4 \* \* \* \* \*

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6  
7 IN RE PARAMETRIC SOUND ) CONSOLIDATED  
8 CORPORATION SHAREHOLDERS' ) CASE NO.: A-13-686890  
9 LITIGATION. )  
10 ) DEPT. NO.: XI  
11 )  
12 ) **Transcript of Proceedings**

---

13 BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

14 **MOTION TO EXTEND STAY**

15 WEDNESDAY, MAY 13, 2015

16  
17  
18 SEE APPEARANCES ON PAGE 2

19  
20  
21 RECORDED BY: JILL HAWKINS, DISTRICT COURT  
22 TRANSCRIBED BY: KRISTEN LUNKWITZ

23  
24 Proceedings recorded by audio-visual recording, transcript  
25 produced by transcription service.

1 **APPEARANCES:**

2 (All appearances were telephonically)

3 For the Plaintiffs: DAVID A. KNOTTS, ESQ.  
4 RANDALL J. BARON, ESQ.  
5 JONATHAN M. STEIN, ESQ.  
6 ADAM WARDEN, ESQ.  
7 DAVID O'MALLEY, ESQ.

8  
9  
10  
11 For the Individual Defendants:

12 J. STEPHEN PEEK, ESQ.  
13 JOHN PETER STIGI, III, ESQ.

14  
15 For the Corporate Defendants:

16 RICHARD C. GORDON, ESQ.  
17 BRIAN C. RAPHEL, ESQ.  
18 JOSHUA D. N. HESS, ESQ.  
19  
20  
21  
22  
23  
24  
25

1 WEDNESDAY, MAY 13, 2015 AT 1:04 P.M.

2

3 THE COURT: Good morning. Roll call. I'm sorry.  
4 Good afternoon. Can I do a roll call?

5 MR. GORDON: Good afternoon, Judge Gonzalez.  
6 Yes. This is Richard Gordon from Snell and Wilmer on  
7 behalf of the corporate defendants and also on the call for  
8 the corporate defendants are Josh Hess and Brian Raphael  
9 from Dechert.

10 MR. RAPHEL: Good afternoon, Your Honor.

11 THE COURT: Good afternoon. Mr. Gordon, it's --

12 MR. PEEK: Good afternoon, Your Honor.

13 THE COURT: -- your motion.

14 MR. PEEK: Good afternoon, Your Honor. Stephen  
15 Peek and John Stigi on behalf of the individual defendants.

16 THE COURT: Mr. Peek, I was just thinking about  
17 you moments ago.

18 MR. PEEK: I hope it wasn't in context of a  
19 decision that you issued that I haven't seen yet.

20 THE COURT: I haven't. I'm down to 39 pages.

21 MR. PEEK: Oh my gosh. [Indiscernible] you that  
22 much, huh? I thought it would just be easy.

23 THE COURT: Okay. Thanks, Mr. Peek.

24 MR. BARON: Your Honor, this is Randall Baron and  
25 David Knotts with Robins Geller on behalf of plaintiffs.

1 THE COURT: Okay. I have before me --

2 MR. STEIN: And Your Honor --

3 THE COURT: Yes.

4 MR. STEIN: I'm sorry, Your Honor. This is  
5 Jonathan Stein and Adam Warden from Saxena White also on  
6 behalf of the plaintiffs.

7 MR. O'MALLEY: And, Your Honor, finally David  
8 O'Malley with the O'Malley Law Firm on behalf of the  
9 plaintiffs.

10 THE COURT: Thank you. Mr. Gordon, it's your  
11 motion.

12 MR. GORDON: And I am going to defer to Josh Hess  
13 to speak on behalf of the corporate defendants.

14 MR. HESS: Yes, thank you, Your Honor. We're here  
15 just to extend the stay that's been in place since  
16 December, you know, at the time, you know, we -- the  
17 Supreme Court took our petition up on review and nothing  
18 really has changed to alter the calculus that the Court  
19 considered when it entered the stay originally other than  
20 we now know that the Court is going to review the decision  
21 en banc.

22 So according to the procedures that exist, the  
23 Court is going to enter a substantial precedent. So we  
24 think that further supports not taking any action here  
25 until the Supreme Court can take whatever action they're

1 going to take.

2 THE COURT: You understand my experience with the  
3 Nevada Supreme Court is not that they move very quickly.  
4 Right?

5 MR. HESS: Yes. I was -- in the last times that  
6 we were before you, you did mention that and --

7 THE COURT: Pokey would be a nice way.

8 MR. HESS: What's that?

9 THE COURT: Pokey or really slow.

10 MR. HESS: Well I defer to your experience on  
11 that, but given, you know, that, you know, we believe the  
12 factors for a stay when it's first entered still hold true  
13 here and given that, you know, the Supreme Court may take a  
14 long time, but those factors still support continuing the  
15 stay because if this litigation were to continue before  
16 this Court, you know, the issue is whether or not -- who  
17 controls this litigation and if the litigation proceeds  
18 with the -- here, before the Supreme Court can move forward  
19 and you're right. The Supreme Court does move at a glacial  
20 pace and I'm sure that you would move at not quite the same  
21 glacial pace the Supreme Court would, if we have a  
22 resolution of this case before the Supreme Court does  
23 anything, then we will have lost, effectively, the relief  
24 we are seeking from the Supreme Court.

25 THE COURT: Okay. Anybody else want to speak on



1 behalf of the motion?

2 MR. PEEK: Yeah, other than say that the corporate  
3 directors join in the request for the stay.

4 THE COURT: Okay. Thank you. Anyone like to  
5 speak in opposition to the motion?

6 MR. BARON: Yes, Your Honor. This is Randall  
7 Baron. How is the Court today?

8 THE COURT: Lovely, thank you.

9 MR. BARON: I vote for extra, extra pokey and I  
10 think this is a -- you know, none of us are surprised. You  
11 made it very clear that you did not believe that the  
12 Supreme Court would act on this quickly at all, if at all,  
13 and we still don't know that they will ever do anything. I  
14 think that you never went down the path of saying that you  
15 thought that the basis for a stay on a factor by factor  
16 basis had been met, it was more along the lines of: Well,  
17 let's give it a chance and see whether the Supreme Court  
18 chooses to take this one up quickly, but my experience is  
19 that they won't and, you know, when we come back after a  
20 few months and they haven't done anything, we can revisit  
21 and we can start moving forward because there's no reason  
22 to delay.

23 And I think the -- a couple of the things that the  
24 Court noted the last time was that there's nothing to  
25 indicate that this is a significant issue that would

1 actually stop this case. As you noted, we would -- if the  
2 Court determined this was some sort of derivative instead  
3 of direct, we'd just amend. I don't think that that would  
4 change anything going forward. I really don't buy the  
5 merits of the argument but there's no reason for us to  
6 argue. I think that while they tried something unique in  
7 their opening brief and their reply brief, they wholly  
8 abandoned that and they're back to the same argument that  
9 they made in front of you, which is even though we called  
10 it a merger eight million times, it's not really a merger.

11 I don't think at the end of the day that is  
12 something that is -- that should delay the progress any  
13 further. We're already six, seven months in without doing  
14 anything since the Motion to Dismiss was denied.

15 I have nothing further, Your Honor.

16 THE COURT: So, anybody else want to speak in  
17 opposition to the motion?

18 Okay. Before I rule on the motion, I need someone  
19 to update me on where we are related to the search and  
20 production of the information.

21 MR. STIGI: This is John Stigi. I -- is Your  
22 Honor referring to the issue regarding of collection of  
23 electronic documents that we were before the Court on  
24 several months ago?

25 THE COURT: Yes, February 17<sup>th</sup>, 2015 is the last

1 time we discussed it in person.

2 MR. STIGI: Right, and the Court had indicated  
3 that -- in a -- in the prior ruling that we were to be  
4 discussing and agreeing on the various ESI protocols and  
5 the parameters for doing it but that the actual work to do  
6 it would be subject to the stay. If that was not what the  
7 Court intended and that's what the language of -- and we  
8 went back to the transcript on that, and expected us to  
9 have been doing all of that work despite the stay,  
10 obviously we have collected and produced already tens, if  
11 not hundreds of thousands, of pages of documents or a  
12 hundred thousand pages of documents already. So there's  
13 been plenty of production already.

14 The additional work that we had discussed though  
15 was subject to the stay, at least that's the way we  
16 certainly read the Court's instruction going back, I think,  
17 in December.

18 THE COURT: I thought I was trying to get you to  
19 do the ESI production despite the stay but I'm looking to  
20 see if I have a written order that says that.

21 MR. STIGI: I am not aware of one. If there is  
22 one, I'm -- I have not seen that. Again, the understanding  
23 was that we would come to an agreement on the terms of it,  
24 but that the work itself was subject to the stay.

25 THE COURT: Hold on. I found the order. Okay.



1 [Pause in proceedings]

2 THE COURT: You're right. I didn't require  
3 compliance with the ESI protocol, only the finalization of  
4 negotiating the search terms, conditions, and execution of  
5 it. All right.

6 Anybody else? Okay. The motion is denied. While  
7 I certainly understand the issues related to the Nevada  
8 Supreme Court's progress and the appearance that they may  
9 actually be considering this, the continued pace needs to  
10 occur in some way, shape, or form, especially since this  
11 has not been a total stay of the proceedings. For that  
12 reason, the motion is denied. If you'd like to ask the  
13 Nevada Supreme Court, perhaps they can give you an idea as  
14 to what their plan is.

15 So, now I need to talk about production pursuant  
16 to the ESI protocol.

17 MR. PEEK: Your Honor, before you go into that,  
18 may we at least have some time in order to take it to the  
19 Supreme Court to ask them?

20 THE COURT: Absolutely, but I want the answer to  
21 my questions first so that the issue is framed  
22 appropriately for them so the next time --

23 MR. PEEK: Okay.

24 THE COURT: -- I say to them, hey, guys, you  
25 screwed up one of my cases and the lawyers got three months

1 to get ready for trial so that I can comply with the five-  
2 year rule, I will have given them a chance not to make a  
3 bad decision.

4 MR. PEEK: Okay.

5 THE COURT: And you don't know anything about what  
6 I'm talking about, Mr. Peek.

7 MR. PEEK: I have no clue, Your Honor. I'm --  
8 this is the Sergeant Schultz defense right now.

9 THE COURT: Yeah. So can we talk about the  
10 productions? I -- we all at least have the framework that  
11 when you go ask the Nevada Supreme Court as to what the  
12 issues are. Nobody?

13 MR. PEEK: I -- if I understand the inquiry, Your  
14 Honor, you want to know how we are going to proceed now  
15 that the search terms have been identified and agreement  
16 reached on them?

17 THE COURT: Yes. And I would like --

18 MR. PEEK: And how we're [indiscernible] --

19 THE COURT: -- to say: --

20 MR. PEEK: -- production.

21 THE COURT: -- Gosh, Judge, I think we can produce  
22 them in 30 days or gosh, Judge, we're going to start  
23 ordering productions in 30 days, or something like that  
24 that I usually hear.

25 MR. PEEK: Yeah, that's what I figured and I'm

1 going to have to rely on John because it is -- I think the  
2 search terms were directed to us and somewhat to the  
3 company, so I'm going to let John speak to that issue as to  
4 when we can commence a rolling production because I'm sure  
5 it will be a rolling production.

6 THE COURT: Sure.

7 MR. STIGI: Sure. This is John Stigi. Basically  
8 I will get, after this phone call, get on the phone with my  
9 team and have them go and meet with the individuals as soon  
10 as possible. If I can get them there tomorrow or Friday, I  
11 will do that. We will then -- with an E -- with an  
12 attorney sitting next to Mr. Potashner and Mr. Wolfe,  
13 etcetera, start doing exactly the -- what we agreed to and  
14 what the Court instructed.

15 I don't know off the top of my head whether that  
16 means a start of production in 30 days or 45 days, that  
17 sort of thing, but that's, I would imagine, the time frame  
18 with the proviso that -- whether we would be able to do a  
19 comparison between this, you know, additional collection  
20 against what's already been produced. There may well be a  
21 lot of duplicates, I would imagine, and an incredibly large  
22 number of duplicates of what has already has been produced,  
23 but with the proviso that's what plaintiffs' counsel  
24 understands is the result of all of this, so be it. But,  
25 yeah, I see no reason we wouldn't be able to begin rolling



1 productions of these additional documents if there are even  
2 that many of them, in the next 30 to 45 days.

3 THE COURT: Great. Then we will use an  
4 aspirational goal for the start of the rolling productions  
5 in 30 days. If there is going to be an impediment to that,  
6 I would rather hear about it sooner rather than later.

7 MR. STIGI: Understood.

8 THE COURT: Okay. Anything else, counsel?

9 MR. PEEK: Just --

10 THE COURT: Mr. Gordon, do you want to --

11 Sorry, Mr. Peek?

12 MR. PEEK: I was just going to say just to go just  
13 back to my inquiry about a stay pending an application --

14 THE COURT: Well, hold on. Mr. Gordon, you now  
15 need to send me an order that says I denied your request to  
16 further extend the stay that I had previously entered on  
17 February 4<sup>th</sup>, 2015, apparently, and that you are seeking a  
18 stay from the Nevada Supreme Court.

19 MR. GORDON: Sure.

20 THE COURT: Once you give me that, I will give you  
21 a stay of five days of anything, which will not be added to  
22 the 30 days for the aspirational goal for the rolling  
23 production. So I'll give you a five-day stay to seek  
24 relief with them.

25 MR. GORDON: Very good.

1 THE COURT: And then they'll decide if it's urgent  
2 or not urgent and if they want the stay or not want the  
3 stay.

4 MR. GORDON: Very good. We will prepare that  
5 order.

6 THE COURT: Okay. Get it over here so I can sign  
7 it though.

8 MR. GORDON: You got it. Thank you, Your Honor.

9 THE COURT: Have a lovely day. Bye.

10 MR. PEEK: Thank you, Your Honor. Thank you.

11

12 PROCEEDING CONCLUDED 1:18 P.M.

13 \* \* \* \* \*

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1 **CERTIFICATION**

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4 I certify that the foregoing is a correct transcript from

5 the audio-visual recording of the proceedings in the

6 above-entitled matter.

7

8 **AFFIRMATION**

9

10 I affirm that this transcript does not contain the social

11 security or tax identification number of any person or

12 entity.

13

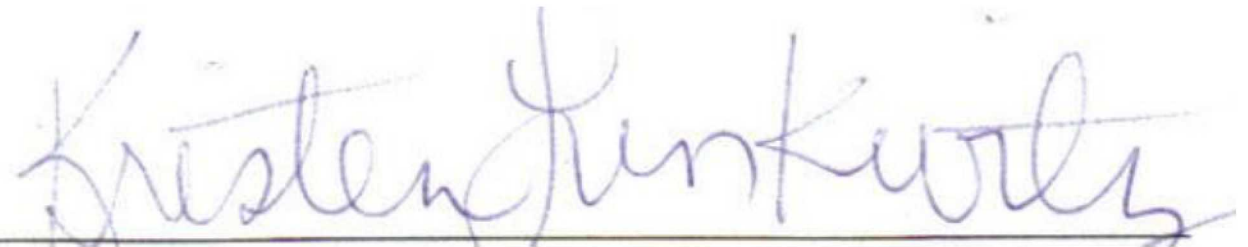
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22 KRISTEN LUNKWITZ

23 INDEPENDENT TRANSCRIBER

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25

# **EXHIBIT E**

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5 Liaison Counsel for Plaintiffs

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7 EIGHTH JUDICIAL DISTRICT COURT

8 CLARK COUNTY, NEVADA

9 In re PARAMETRIC SOUND  
10 CORPORATION SHAREHOLDERS'  
LITIGATION

) Lead Case No. A-13-686890-B  
) Dept. No. XI  
)

) CLASS ACTION

11  
12 This Document Relates To:

13 ALL ACTIONS.

) PLAINTIFFS' OPPOSITION TO  
) DEFENDANTS' MOTION TO EXTEND  
) STAY  
)



1 Plaintiffs continue to believe that this case should move forward while defendants' writ  
2 petition is pending, for the reasons stated in plaintiffs' original motion to stay opposition (attached  
3 hereto as Exhibit A). In their current motion, defendants articulate no reason why a decision is  
4 "imminent," apart from their observation that the passage of time means that a decision is closer  
5 today than it was yesterday, closer tomorrow than it is today, and so on. Plaintiffs request that the  
6 Court lift the stay and allow the matter to proceed.

7 DATED: May 12, 2015

Respectfully submitted,

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9  
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27  
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify under penalties of perjury that on this date I served a true and correct  
3 copy of the foregoing document by sending the document via email to the addresses listed below  
4 and the Court's electronic filing system.  
5

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10	Randall Baron	Plaintiffs	<u>RandyB@rgrdlaw.com</u>
11	Jamie Meske (paralegal)	Plaintiffs	<u>JaimeM@rgrdlaw.com</u>
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25	Reginald Zeigler	Defendants	<u>Reginald.Zeigler@dechert.com</u>

26 DATED: May 12, 2015.

27 /s/ Valerie Weis  
28 VALERIE WEIS

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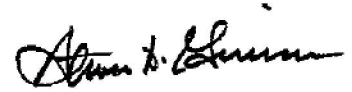
**INDEX OF EXHIBITS**

Exhibit No.	Description	No. of Pages
1.	Plaintiffs' Opposition to the Motion for Stay	10

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# EXHIBIT A

# EXHIBIT A

  
CLERK OF THE COURT

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9 EIGHTH JUDICIAL DISTRICT COURT

10 CLARK COUNTY, NEVADA

11 In re PARAMETRIC SOUND  
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) CLASS ACTION

14 This Document Relates To:

15 ALL ACTIONS.

) PLAINTIFFS' OPPOSITION TO  
) DEFENDANTS' MOTION TO STAY  
) PENDING CONSIDERATION BY THE  
) NEVADA SUPREME COURT

1           A.     INTRODUCTION

2           Defendants filed a writ petition challenging only one aspect of the Court's ruling on the  
3 motions to dismiss: that the case is a direct claim for damages to stockholders surrounding a  
4 merger rather than a derivative claim on behalf of the corporation. *See Cohen v. Mirage Resorts,*  
5 *Inc.*, 119 Nev. 1, 19, 62 P.3d 720 (2003) ("if the complaint alleges damages resulting from an  
6 improper merger, it should not be dismissed as a derivative claim"). Defendants do not question  
7 the Court's ruling that the Complaint in Intervention adequately alleges claims for breach of  
8 fiduciary duty against the individual defendants, as well as aiding and abetting against Parametric  
9 Sound Corporation ("Parametric") and VTB Holdings, Inc. ("Turtle Beach"). Plaintiffs should not  
10 be precluded from litigating the breach of fiduciary duty and aiding and abetting claims while  
11 defendants' writ on the direct/derivative issue is under consideration.

12           Courts consider the following factors when a party requests a stay pursuant to an appeal or  
13 writ petition:

- 14           (1)     whether the object of the appeal or writ petition will be defeated if the stay or  
15                   injunction is denied;  
16           (2)     whether appellant/petitioner will suffer irreparable or serious injury if the stay or  
17                   injunction is denied;  
18           (3)     whether respondent/real party in interest will suffer irreparable or serious injury if  
19                   the stay or injunction is granted; and  
20           (4)     whether appellant/petitioner is likely to prevail on the merits in the appeal or writ  
21                   petition.

22           NRCP 8(c). Defendants' primary case, *Fritz Hansen A/S v. Dist. Ct.*, 116 Nev. 650, 6 P.3d 982  
23 (Nev. 2000) ("*Fritz Hansen*"), strongly counsels **against** a stay here. Defendants set forth no  
24 reason why this Court should stay the case in contravention of direct Supreme Court precedent.  
25 For the reasons discussed herein, the litigation should continue on plaintiffs' breach of fiduciary  
26 duty and aiding and abetting claims.  
27  
28

1           **B. ANALYSIS OF THE FOUR FACTORS**

2                   **1. The Object of the Writ Petition Will Not Be Defeated if the**  
3                   **Stay Is Denied**

4           The object of defendants' writ petition, which challenges the Court's ruling on the motions  
5 to dismiss, is to obtain dismissal of the litigation. That object, dismissal, will not be defeated if  
6 the litigation continues at this time. *Fritz Hansen* considered a similar issue. There, the defendant  
7 filed a "petition for a writ of prohibition challenging a district court order that denied a motion to  
8 quash service for lack of personal jurisdiction." 116 Nev. at 652. The object of the petition, thus,  
9 was to "challenge . . . the district court's jurisdiction." *Id.* at 658. Because the defendants'  
10 continued appearance after denial of a stay would not "amount to a waiver of its challenge to the  
11 district court's jurisdiction," the Supreme Court held that the object of the petition would not be  
12 defeated by continued litigation. *Id.* The same logic applies here. Defendants can still obtain  
13 dismissal of the litigation in the unlikely event that the Supreme Court issues a writ and, moreover,  
14 defendants can attempt to dismiss the case at later stages of the litigation as well. (*See* Hearing on  
15 Motions to Dismiss, August 28, 2014, Tr. at 32 ("THE COURT: . . . While I understand there are  
16 issues that you may raise on a motion for summary judgment, which is a different standard, at this  
17 stage of the pleadings I'm denying it").)

18           Factor one is firmly against defendants in the stay analysis, so defendants' brief sidesteps  
19 the issue by touting an illusory object of the writ. Defendants now claim they are not seeking  
20 dismissal, but instead they are seeking "the protection of the corporate right to manage litigation  
21 on [Parametric's] own behalf." (Defendants' Motion for Stay Pending Consideration by the  
22 Nevada Supreme Court on an Order Shortening Time ("Mot.") at 8.) But in reality, defendants  
23 are not attempting to "manage" the litigation. They are trying to make the case go away and  
24 dismiss adequately pleaded claims for breaches of the duty of loyalty. (*See* Defendants' Motions  
25 to Dismiss.) Indeed, later in the same brief, defendants forget the ruse and contend that the parties  
26 will be "spared . . . further litigation if the Supreme Court orders the dismissal of the case." (Mot.  
27 at 9.) In any event, even if "management of the litigation" were defendants' true intent, that object  
28 would not be defeated if the case proceeds. Nothing prevented Parametric from instituting

1 litigation against its directors when the fraudulent Merger came to light. Parametric could still  
2 manage the litigation at a later point in time if the case is derivative and if it believes the current  
3 plaintiffs have not fully investigated the egregious and self-interested conduct of its former  
4 directors. Either way, the object of the writ petition, whether dismissal or management of the  
5 litigation, will remain when the Supreme Court issues its decision.

6 **2. Defendants Will Not Suffer Irreparable or Serious Injury if the**  
7 **Stay Is Denied**

8 Defendants argue that they will be irreparably harmed if they abide by their discovery  
9 obligations under the NRCP while the writ is pending (Mot. at 8), but the Supreme Court squarely  
10 rejected that argument in *Fritz Hansen*. It held:

11 Fritz Hansen would not suffer irreparable or serious injury if the stay is denied. It  
12 argues that it should not be required to participate "needlessly" in the expense of  
lengthy and time-consuming discovery, trial preparation, and trial. *Such litigation*  
*expenses, while potentially substantial, are neither irreparable nor serious.*

13 116 Nev. at \*658 (emphasis added). For that proposition, the Nevada Supreme Court cited several  
14 cases reaching the same conclusion. *Id.* Four years later, defendants' own authority (see Mot. at  
15 8) recognized that "[w]e have previously explained that litigation costs, even if potentially  
16 substantial, are not irreparable harm." *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253, 89  
17 P.3d 36 (Nev. 2004). In contrast, defendants cite no authority for their contrary position other  
18 than *Shoen v. Sac Holding Corp.*, 122 Nev. 621, 137 P.3d 1171 (Nev. 2006), which of course does  
19 not involve a motion to stay. It is indeed remarkable that, rather than concede that this factor is  
20 not in their favor, defendants advance this argument in the face of overwhelming authority to the  
21 contrary.

22 Defendants' argument fails on the facts as well. Just prior to the December 2013 vote on  
23 the Merger, defendants told stockholders that Parametric and Turtle Beach internally projected the  
24 combined company to yield cash flows (called "adjusted EBITDA") of \$62.3 million in 2014 and  
25 \$93.2 million in 2015.<sup>1</sup> Yet now, despite telling shareholders less than a year ago that they were  
26

27 <sup>1</sup> Preliminary Proxy available at: [http://www.sec.gov/Archives/edgar/data/1493761/](http://www.sec.gov/Archives/edgar/data/1493761/000119312513425181/d621612dprem14a.htm)  
28 000119312513425181/d621612dprem14a.htm.



1 expecting over \$150 million in cash flows for this year and next and despite their insurance  
2 policies, defendants claim that producing documents and sitting for a few depositions will "drain  
3 already-limited corporate funds" (Mot. at 8). If defendants' proxy materials are to be believed,  
4 they will have no problem funding this litigation while the Supreme Court considers the writ on  
5 the direct/derivative issue.<sup>2</sup> Either way, the Supreme Court has held in no uncertain terms that  
6 litigation expense does not constitute harm sufficient to stay litigation during the consideration of  
7 a writ.

8 **3. Plaintiffs Are Not Likely to Suffer "Irreparable Harm" if a**  
9 **Stay Is Granted, but Litigation Will Be Delayed**

10 Unlike factors one, two, and four, the third factor does not often play a significant role in  
11 the decision whether to issue a stay. The Supreme Court addressed the issue in *Fritz Hansen* as  
12 follows: "it does not appear from the documents before us that [plaintiff] would suffer irreparable  
13 or serious injury if the stay were granted. Nevertheless, the underlying proceedings could be  
14 unnecessarily delayed by a stay, particularly where the district court has made only a preliminary  
15 determination as to personal jurisdiction, and the issue remains for trial." 116 Nev. at 658. The  
16 Supreme Court similarly noted that "delay in pursuing discovery and litigation normally does not  
17 constitute irreparable harm." *Mikohn Gaming*, 120 Nev. at 243. On the other hand, the Supreme  
18 Court explained in *Thompson*, that writ "petitions [challenging denials of motions to dismiss and  
19 motions for summary judgment] have generally been quite disruptive to the orderly processing of  
20 civil cases in the district courts, and have been a constant source of unnecessary expense for  
21 litigants." *State ex. rel. Dep't of Transp. v. Thompson*, 99 Nev. 358, 361, 662 P.2d 1338 (Nev.  
22 1983). Plaintiffs concede the third factor does not weigh heavily towards denial of the stay.

23  
24  
25 <sup>2</sup> Defendants also claim that "Plaintiffs have subpoenaed banks and other financial advisors  
26 to Parametric, without consideration of how such legal actions may affect Parametric's future  
27 relationships with these entities." (Mot. 8.) That is a correct statement. We did not consider the  
28 matter because it strains credulity to suggest that J.P. Morgan, for example, with a \$230 billion  
market capacity, would sever a relationship with Turtle Beach simply because it was served with  
a subpoena from Parametric shareholders requesting documents in connection with a merger for  
which J.P. Morgan was paid millions in fees.

1                   4.     **Defendants Are Not Likely to Prevail on the Merits of the Writ**  
2                             **Petition**

3             Factor four heavily weighs against staying this litigation. Defendants' primary argument  
4     on this factor attempts to amplify the Supreme Court's boilerplate language of "arguable merit" to  
5     a substantively significant "likelihood of success" finding. (Mot. at 9.) If defendants were correct,  
6     a writ review would always warrant a stay. *But see Fritz Hansen*, 116 Nev. 650 (denying a stay).  
7     In addition, the fact that the Supreme Court ordered an answering brief does not dramatically  
8     increase the chance of defendants' success; the Supreme Court has stated that in this context,  
9     "[e]ven in cases where we ordered the respondents to file answers, *see* NRAP 21(b), the number  
10    of writs [of mandamus] actually issued was minimal." *Thompson*, 99 Nev. at 361.

11            To address this factor, the Court need not reach beyond the finding it already made when  
12    denying defendants' motions to dismiss. This is not a motion for reconsideration. Rather, two  
13    possibilities exist. If defendants present new arguments, they would not be properly raised on a  
14    writ and will be rejected by the Supreme Court. *See, e.g., Cal. St. Auto Ass'n v. Dist. Ct.*, 106 Nev.  
15    197, 788 P.2d 1367 (1990) (issues raised for first time on writ petition would not be considered).  
16    Alternatively, if defendants raise old arguments, the Court rejected those same arguments at the  
17    motion to dismiss stage. This Court properly followed black-letter Supreme Court precedent that  
18    "if the complaint alleges damages resulting from an improper merger, it should not be dismissed  
19    as a derivative claim." *Cohen*, 119 Nev. at 19. Put differently, "allegations [that] involve wrongful  
20    conduct in approving the merger and/or valuing the merged corporation's shares . . . are not  
21    derivative claims." *Id.* The law has not changed since the demurrer hearing and defendants are  
22    unlikely to convince the Supreme Court to overturn its longstanding precedent.

23            Nevertheless, we address defendants' two new arguments here. In their motion to stay,  
24    and in the writ petition, defendants trot out a new theory that *Cohen* does not apply because  
25    Parametric was purportedly never a party to the Merger. (Mot. at 9.) Defendants' own Agreement  
26    and Plan of Merger (the "Merger Agreement"), to which Parametric was a signatory, undermines  
27    that new assertion. The following is a screenshot of the opening page of the Merger Agreement:  
28

1  
2  
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6  
7 AGREEMENT AND PLAN OF MERGER  
8 BY AND AMONG  
9 PARAMETRIC SOUND CORPORATION,  
10  
11 PARIS ACQUISITION CORP.  
12  
13 AND  
14 VTB HOLDINGS, INC.  
15 DATED AS OF AUGUST 5, 2013  
16

3

17 In addition to the binding Merger Agreement, defendants made similar statements indicating that  
18 Parametric was a party to the Merger: "Turtle Beach and Parametric Sound (NASDAQ: PAMT)  
19 today announced that Turtle Beach has designated two independent directors to be appointed to  
20 the board of directors immediately after the closing *of the pending merger of the two companies.*"

21 <sup>4</sup> Having told shareholders one thing, defendants are estopped to contend otherwise now.

22 Perhaps worse, defendants also contend for the first time that Parametric was not a  
23 "constituent entity" to the merger because "*Parametric's shareholders were not asked to approve*  
24 *any merger . . . .*" (Mot. at 10) (emphasis added.) That is wrong. Defendants made just the

25  
26 <sup>3</sup> Merger Agreement available at: [http://www.sec.gov/Archives/edgar/data/1493761/000101968713002865/pamt\\_8k-ex0201.htm](http://www.sec.gov/Archives/edgar/data/1493761/000101968713002865/pamt_8k-ex0201.htm).

27 <sup>4</sup> Schedule 14A available at: [http://www.sec.gov/Archives/edgar/data/1493761/000101968713004881/pamt\\_defa14a-121813.htm](http://www.sec.gov/Archives/edgar/data/1493761/000101968713004881/pamt_defa14a-121813.htm). (Emphasis added.)  
28

1 opposite representation when asking Parametric's shareholders to approve the Merger. The  
2 opening page of the Proxy states:

3 The Parametric board of directors, referred to as the "Parametric Board," has  
4 determined that the merger agreement and the transactions contemplated thereby,  
5 including the issuance of shares pursuant to the merger and the corresponding  
6 change of control of Parametric, are fair to, advisable and in the best interests of  
7 Parametric and its stockholders. *The Parametric Board recommends that  
8 Parametric stockholders vote "FOR" the merger proposal. . . . Your vote is  
9 important. The affirmative vote of the holders of a majority of the votes cast on  
10 the merger proposal at the Special Meeting (assuming a quorum is present in  
11 person or by proxy), excluding abstentions, is required for approval of the merger  
12 proposal.*<sup>5</sup>

13 In sum, this case is properly a direct stockholder action, defendants' new arguments will  
14 not be well received by the Supreme Court, and the Court should allow plaintiffs to continue  
15 forward with the litigation.


16 **C. CONCLUSION**

17 For the foregoing reasons, plaintiffs respectfully request that the Court deny defendants'  
18 motion to stay and allow plaintiffs to continue litigating their claims for breach of fiduciary duty  
19 and aiding and abetting while the Supreme Court considers the writ on just the direct/derivative  
20 issue.

21 DATED: December 5, 2014

Respectfully submitted,

22 THE O'MARA LAW FIRM, P.C.  
23 DAVID C. O'MARA (Nevada Bar No. 8599)

24   
25 DAVID C. O'MARA

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Liaison Counsel

29 <sup>5</sup> Preliminary proxy available at: <http://www.sec.gov/Archives/edgar/data/1493761/000119312513425181/d621612dprem14a.htm>.

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Co-Lead Counsel for Plaintiffs

1 **CERTIFICATE OF SERVICE**

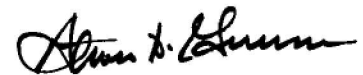
2 I hereby certify under penalties of perjury that on this date I served a true and  
3 correct copy of the foregoing document by sending the document via email to the addresses  
4 listed below and the Court's electronic filing system.  
5

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26	Reginald Zeigler	Defendants	<a href="mailto:Reginald.Zeigler@dechert.com">Reginald.Zeigler@dechert.com</a>

27 DATED: December 5, 2014.

28 /s/ Valerie Weis

# **EXHIBIT D**



CLERK OF THE COURT

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16 *Holdings, Inc.*

17 EIGHTH JUDICIAL DISTRICT COURT

18 CLARK COUNTY, NEVADA

19 IN RE PARAMETRIC SOUND  
20 CORPORATION SHAREHOLDERS'  
21 LITIGATION

LEAD CASE NO.: A-13-686890-B  
DEPT. NO.: XI

DEFENDANTS' MOTION TO EXTEND  
STAY PENDING CONSIDERATION BY  
THE NEVADA SUPREME COURT AND  
REQUEST FOR AN ORDER  
SHORTENING TIME

Snell & Wilmer

LAW OFFICES  
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LAS VEGAS, NEVADA 89169  
(702) 784-5200

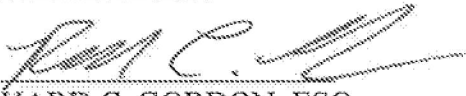
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1 Defendants, by and through their undersigned attorneys, hereby submit this MOTION TO  
2 EXTEND STAY PENDING CONSIDERATION BY THE NEVADA SUPREME COURT AND  
3 REQUEST FOR AN ORDER SHORTENING TIME ("Motion") seeking an Order extending the  
4 stay of all district court proceedings, previously granted on December 8, 2014, pending the  
5 resolution of Defendants' Petition For Writ of Mandamus Or, In The Alternative, Prohibition by  
6 the Nevada Supreme Court.

7 This Motion is made and supported by the Declaration of Richard C. Gordon, Esq., below,  
8 the pleadings and papers on file in this matter including the prior briefing related to this stay, and  
9 any argument presented at a hearing on this Motion.

10 Dated: May 11, 2015. SNELL & WILMER L.L.P.

11 By:   
12 RICHARD C. GORDON, ESQ.  
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21 *and VTB Holdings, Inc.*

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*Andrew Wolfe, James Honoré*

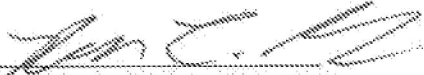
ORDER SHORTENING TIME

With good cause appearing, it is hereby ordered that the time for hearing of the foregoing Motion be, and the same will be heard on the 14<sup>th</sup> day of MAY, 2015 at 9:30 a.m. in Department XI.

DATED this 14<sup>th</sup> day of May 2015.

  
Hon. Elizabeth Gonzalez

Prepared and Submitted by:  
SNELL & WILMER L.L.P.

By:   
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Elwood Norris, Seth Putterman, Robert Kaplan,  
Andrew Wolfe, James Honoré*

DECLARATION OF RICHARD C. GORDON, ESO.

IN SUPPORT OF MOTION FOR STAY ON AN ORDER SHORTENING TIME

I, Richard C. Gordon, declare and state under penalty of perjury:

1. I am an attorney with the law firm of Snell & Wilmer LLP, counsel of record for Defendants Turtle Beach Corporation (formerly known as Parametric Sound Corporation) and VTB Holdings, Inc. in the above-titled action. I have personal knowledge of the following facts and would testify thereto under oath if called as a witness.

2. I make this declaration in support of this Motion to Extend Stay Pending Consideration By The Nevada Supreme Court And For An Order Shortening Time Thereon ("Motion").

3. This Motion asks the Court to extend the current stay of all proceedings pending the resolution of Defendants' Petition For Writ of Mandamus Or, In The Alternative, Prohibition ("Writ Petition"). Briefing before the Nevada Supreme Court has been completed, the status on the docket reads "Screening Completed," and the case has been assigned for *en banc* review. A true and accurate copy of the Nevada Supreme Court's docket for the Writ Petition is attached hereto as **Exhibit A**.

4. Good cause exists to hear this Motion on shortened time. This Court previously granted this stay on December 8, 2014, and previously extended it upon a stipulation by all of the parties on February 17, 2015. There has been no development in this case or in the proceedings before the Nevada Supreme Court that would alter the Court's – or the parties' – prior analysis. If the stay is not extended, the stay will expire on May 15, 2015, and Defendants will suffer the irreparable harm that the current stay is designed to avoid. A true and accurate copy of Defendant's original Motion for Stay of Proceedings Pending Consideration by the Nevada Supreme Court is attached as **Exhibit B**.

5. A status check is already scheduled in this case for May 15, 2015. Because the stay is scheduled to expire on that date, Defendants request that this motion be heard before that date.

///

1           6.       On May 4th, 2015, I spoke to Plaintiffs' local counsel, David O'Mara, Esq., to ask  
2 if Plaintiffs would consent to extend this stay by stipulation in advance of the upcoming status  
3 check, as they did in advance of our last status check. Mr. O'Mara indicated that he would speak  
4 with lead counsel for Plaintiffs and contact me once he had more information. On May 6<sup>th</sup>, 2015,  
5 Mr. O'Mara contacted me by telephone to inform me that Plaintiffs declined Defendants' request  
6 to extend the stay period. At that time, I informed Mr. O'Mara that Defendants would file the  
7 pending Motion.

8           7.       Defendants make this request for an order shortening time in good faith and not for  
9 any improper purpose. Defendants respectfully request that this Court hear this motion before its  
10 May 15, 2015, status check and before the current stay expires.

11           I declare under penalty of perjury under the law of the State of Nevada that the foregoing  
12 is true and correct.

13           Executed this 11th day of May, 2015.

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15 Richard C. Gordon  
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1     **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS'**  
2     **MOTION TO EXTEND STAY OF PROCEEDINGS PENDING CONSIDERATION BY**  
3     **THE NEVADA SUPREME COURT**

4           On December 1, 2014, after the Nevada Supreme Court ordered additional briefing on  
5 Defendants Petition For Writ of Mandamus Or, In The Alternative, Prohibition ("Writ Petition"),  
6 Defendants filed their Motion for Stay of Proceedings Pending Consideration by the Nevada  
7 Supreme Court ("Original Motion"). In the Original Motion, Defendants set forth the procedural  
8 background pertaining to the stay, the legal standards, and the factors necessary to grant the  
9 requested stay. On December 8, 2014, after considering briefing and oral argument from all  
10 parties, this Court granted the stay for 90 days "[u]nless someone asks me to extend it." Dec. 8,  
11 2014 Hr'g Tr. at 21:1-17. The Court memorialized this decision in an Order dated February 2,  
12 2015 ("Stay Order"), in which the Court set a status check for March 13, 2015, and stated that "if  
13 the Supreme Court has not ruled on the Writ Petition by the March 13, 2015 status check, the  
14 parties can, by motion or by stipulation, request an extension of the stay." Stay Order at 1.

15           On February 17, 2015, the parties appeared again before this Court. At that hearing, the  
16 parties informed the Court that they had stipulated to a six-week extension of the stay. The Court  
17 extended the stay to May 15, 2015 and vacated the March 13, 2015, status check. Feb. 7, 2015  
18 Hr'g Tr. at 18:11-19:14. The Court observed that "petitions for extraordinary relief" are  
19 generally "not very fast" and noted that it has "had cases stayed for a couple of years while we're  
20 waiting." *Id.* at 19:11-17.

21           Briefing has been completed in the Supreme Court proceedings. Currently, the case status  
22 listed on the docket is "Screening Completed" and the writ has been assigned for *en banc* review.  
23 See Exhibit A to Declaration of Richard C. Gordon ("Gordon Decl."). Given that the Supreme  
24 Court proceedings have made progress but have not yet reached a conclusion, Defendants  
25 requested that Plaintiffs again agree to extend the stay by stipulation. Gordon Decl. ¶ 6.  
26 Plaintiffs denied that request, prompting Defendants to file this motion. *Id.*

27     ///

28     ///


1 In the interest of brevity, Defendants expressly incorporate by reference the legal  
2 standards and arguments set forth in their Original Motion. *See* Gordon Decl. Ex. B. As  
3 previously briefed, and found persuasive by this Court, a stay is appropriate here because (1) the  
4 object of Defendant's Writ Petition—protection of Parametric's corporate right to manage legal  
5 claims that properly belong to it—would be defeated if Plaintiffs are permitted to continue to  
6 litigate such claims on their own behalves, prior to the Nevada Supreme Court having the  
7 opportunity to address the derivative nature of these claims; (2) violating this corporate right  
8 would cause irreparable harm to Parametric; (3) Plaintiffs will suffer no harm from a stay; and (4)  
9 Defendants' Writ Petition presents a substantial case on the merits of these important legal issues.

10 Nothing has changed in this case that should alter this Court's prior analysis of these  
11 factors. If anything, now that several months of progress have been made in the Nevada Supreme  
12 Court proceedings, the stay is *more* appropriate because the resolution of the Supreme Court  
13 proceedings is more imminent now than it was when this stay was originally granted in  
14 December. Moreover, the fact that the Defendants' Writ Petition has been tracked for *en banc*  
15 review demonstrates the significance of the issue presented in the petition. "Cases tracked for *en*  
16 *banc* decision are limited to those raising substantial precedential, constitutional or public policy  
17 issues, or when *en banc* consideration is necessary to secure or maintain uniformity of the court's  
18 decisions." Nevada Supreme Court Internal Operating Procedures, Rule 2(b)(2)(ii) (last amended  
19 June 1, 2013). The parties — and the Court — should not move forward with this litigation when  
20 the Nevada Supreme Court has telegraphed that it intends to make a "substantial" decision on a  
21 central issue in this case. Therefore, Defendants respectfully request that the Court extend the  
22 stay provided in the Stay Order for an additional 90 days or until the Supreme Court has made a  
23 determination on the Writ Petition.

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Dated: May 11, 2015.

SNELL & WILMER L.L.P.

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Andrew Wolfe, James Honoré*

21619920



**CERTIFICATE OF SERVICE**

As an employee of Snell & Wilmer L.L.P., I certify that I served a copy of the foregoing **DEFENDANTS' MOTION TO EXTEND STAY PENDING CONSIDERATION BY THE NEVADA SUPREME COURT AND REQUEST FOR AN ORDER SHORTENING TIME** on the 11th day of May 2015, via e-service through Wiznet to all counsel who are registered in the service list for this case, as well as electronic mail to the email addresses listed below:

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Valerie Weis (assistant)	Plaintiffs	<a href="mailto:val@omaralaw.net">val@omaralaw.net</a>
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/s/Gaylene Kim

An employee of Snell & Wilmer L.L.P.



**EXHIBIT A**

**EXHIBIT A**

The Supreme Court  
of Nevada

## Appellate Case Management System

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For official records, please contact the Clerk of the Supreme Court of Nevada at (775) 684-1600.

### Case Information: 66689

Short Caption:	PARAMETRIC SOUND CORP. VS. DIST. CT. (RAKAUSKAS)	Classification:	Original Proceeding - Civil - Mandamus/Prohibition
Lower Court Case(s):	Clark Co. - Eighth Judicial District - A688899	Case Status:	Screening Completed
Disqualifications:		Panel Assigned:	En Banc
Replacement:			
To SP/Judge:		SP Status:	
Oral Argument:		Oral Argument Location:	
Submission Date:		How Submitted:	

### Party Information

### Docket Entries

Date	Type	Description	Pending?	Document
10/14/2014	Filing Fee	Filing fee paid. E-Payment \$250.00 from Kelly H. Dove.		
10/14/2014	Petition/Writ	Filed Petition for Writ of Mandamus or, in the Alternative, Writ of Prohibition.	Y	14-34129
10/14/2014	Appendix	Filed Appendix to Petition for Writ - Volume 1.		14-34131
10/14/2014	Appendix	Filed Appendix to Petition for Writ - Volume 2.		14-34132
10/14/2014	Appendix	Filed Appendix to Petition for Writ - Volume 3.		14-34133
10/16/2014	Motion	Filed Motion to File Petitioners' Appendix Under Seal. (DETACHED EXHIBITS FIVE AND SIX AND FILED UNDER SEAL PER ORDER OF 11/26/14)		14-34516
10/22/2014	Appendix	Received Appendix to Petition for Writ (SEALED Volume IV) (RETURNED, UNFILED, PER ORDER OF 11/26/14).		
11/26/2014	Order/Procedural	Filed Order Directing Answer and Granting Motion to Seal. Real parties in interest's answer to writ petition due: 30 days. Petitioners: 15 days to file any reply. We grant petitioners' motion as to the motion to dismiss and the related reply. The clerk of this court shall return, unfiled, the appendix volume received on October 22 and petitioners shall have five days to resubmit two appendices to replace this volume. The first appendix, which shall be filed under seal, shall contain unredacted copies of petitioners' district court motion to		14-38970

		dismiss and their reply to the opposition to that motion. The second appendix, which will not be sealed, shall contain all documents from the proposed appendix for which sealing was not requested along with a redacted copy of the reply to the opposition to the motion to dismiss. The clerk of this court shall seal exhibits five and six to petitioners' October 16 motion.	
11/26/2014	Other Incoming Document	Filed Exhibits 5 and 6 (SEALED - detached from motion filed 10/16/14).	
12/08/2014	Appendix	Filed Petitioner's Appendix Volume 1 (1 of 2)	14-39887
12/08/2014	Appendix	Filed Petitioners' Appendix Volume 1 (part 2 of 2)	14-39888
12/08/2014	Appendix	Filed Petitioners' Appendix Volume 2 (part 1 of 2)	14-39889
12/08/2014	Appendix	Filed Petitioners' Appendix Volume 2 (part 2 of 2)	14-39891
12/08/2014	Appendix	Filed Petitioner's Appendix Volume 3.	14-39892
12/08/2014	Appendix	Filed Appendix to Petition for Writ, Volumes 1-3. (SEALED Copy)	
12/23/2014	Motion	Filed Stipulation to Extend Time to File Answering Brief (First Request)	14-42001
		Filed Order Approving Stipulation for Extension of Time. Real parties in interest shall therefore have until	
01/09/2015	Order/Procedural	January 16, 2015, to file and serve the answer, and petitioners shall have until February 23, 2015, to file and serve any reply.	15-00996
		Filed Motion to File Real Party in Interest's Answering Brief Under Seal.	
01/16/2015	Motion		15-01747
		Received Answer of Real Parties in Interest to Petition for Writ of Mandamus or, in the Alternative, Writ of Prohibition. (FILED PER ORDER 2/17/2015).	
		Filed Order Denying Motion to Seal. The clerk of this court shall file the answer received on December 23, 2015. Petitioners shall have until February 23, 2015, to file and serve any reply.	
02/17/2015	Order/Procedural		15-05088
		Filed Answer of Real Parties in Interest to the Petition for Writ of Mandamus or, in the Alternative, Writ of Prohibition.	
02/17/2015	Petition/Writ		Y 15-05108
		Filed Petitioners' Reply Brief in Support of Petition for Writ of Mandamus, or, in the alternative, Writ of Prohibition.	
02/24/2015	Petition/Writ		Y 15-05802

**EXHIBIT B**

**EXHIBIT B**

  
CLERK OF THE COURT

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15 *Attorneys for Turtle Beach Corporation and VTB*  
16 *Holdings, Inc.*

17 EIGHTH JUDICIAL DISTRICT COURT

18 CLARK COUNTY, NEVADA

19 IN RE PARAMETRIC SOUND  
20 CORPORATION SHAREHOLDERS'  
21 LITIGATION

LEAD CASE NO.: A-13-686890-B  
DEPT. NO.: XI

DEFENDANTS' MOTION TO STAY  
PENDING CONSIDERATION BY THE  
NEVADA SUPREME COURT ON AN  
ORDER SHORTENING TIME

Snell & Wilmer

LAW OFFICES  
3883 HOWARD HUGHES PARKWAY, SUITE 1100  
LAS VEGAS, NEVADA 89169  
(702) 784-5200

1 Defendants, by and through their undersigned attorneys, hereby submit this MOTION  
2 FOR STAY PENDING CONSIDERATION BY THE NEVADA SUPREME COURT ON AN  
3 ORDER SHORTENING TIME ("Motion") seeking an Order staying all district court  
4 proceedings pending a resolution of Defendants' Petition For Writ of Mandamus Or, In The  
5 Alternative, Prohibition, for which the Nevada Supreme Court ordered additional briefing on  
6 November 26, 2014.

7 This Motion is made and supported by the Declaration of Joshua D. N. Hess, Esq., below,  
8 the pleadings and papers on file in this matter, and any argument presented at a hearing on this  
9 Motion.

10 Dated: December 1, 2014.

SNELL & WILMER L.L.P.

By: 

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*Attorneys for Defendants Kenneth Potashner,  
Elwood Norris, Seth Putterman, Robert Kaplan,  
Andrew Wolfe, James Honore*


ORDER SHORTENING TIME

With good cause appearing, it is hereby ordered that the time for hearing of the foregoing Motion be, and the same will be heard on the 8<sup>th</sup> day of DECEMBER, 2014 at 9:00 a.m. in Department VI.

DATED this 2<sup>nd</sup> day of December, 2014.

  
Hon. Elizabeth Gonzalez

Prepared and Submitted by:  
SNELL & WILMER L.L.P.

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Andrew Wolfe, James Honore*

DECLARATION OF JOSHUA D. N. HESS, ESQ.

IN SUPPORT OF MOTION FOR STAY ON AN ORDER SHORTENING TIME

I, Joshua D. N. Hess, declare and state under penalty of perjury:

1. I am attorney with the law firm of Dechert LLP, counsel of record for Defendants Turtle Beach Corporation (formerly known as Parametric Sound Corporation) and VTB Holdings, Inc. in the above-titled action. I have personal knowledge of the following facts and would testify thereto under oath if called as a witness.

2. I make this declaration in support of this Motion to Stay Pending Consideration By The Nevada Supreme Court On An Order Shortening Time ("Motion").

3. This Motion asks this Court to stay all proceedings pending the resolution of Defendants' Petition For Writ of Mandamus Or, In The Alternative, Prohibition, for which the Nevada Supreme Court ordered additional briefing on November 26, 2014. A true and accurate copy of the Nevada Supreme Court's order is attached hereto as Exhibit A.

4. Good cause exists to hear this Motion on shortened time to ensure that this Motion is heard and decided before key discovery and briefing deadlines so that the parties are not needlessly propounding and completing discovery, or providing legal briefing, that is ultimately unnecessary.

5. For example, Defendants are currently engaged in broad rolling discovery, which must be completed by February 13, 2015. Plaintiffs have already served deposition subpoenas on numerous third parties and, absent a stay, additional depositions will likely be noticed by all parties. Further, Plaintiffs' motion for class certification, and any related briefing, must be filed by December 11, 2014 and Defendants must file any opposition by March 20, 2015. Properly responding to any motion for class certification will require additional discovery to be propounded.

6. Moreover, the very nature of Defendants' petition – that Plaintiffs' claim is derivative and that they have no standing to pursue it without meeting statutory prerequisites to permit the company to control its own litigation – merits determining whether such litigation should continue as promptly as possible.



1 7. Defendants' Petition For Writ of Mandamus Or, In The Alternative, Prohibition is  
2 dispositive and, if granted, will moot any discovery or class certification briefing.

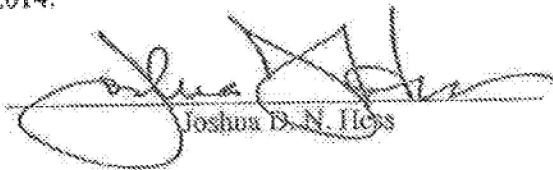
3 8. A hearing in this matter is already scheduled before this Court on December 8,  
4 2014 at 8:00 a.m. This Motion could be addressed at that hearing.

5 9. Shortly after learning that the Nevada Supreme Court had requested additional  
6 briefing on Defendants' petition, I e-mailed Plaintiffs' counsel to ask if they would consent to a  
7 stay. That same day, Plaintiffs' counsel declined Defendants' request and I informed them that  
8 Defendants would file this Motion.

9 10. This Motion is made in good faith and will not result in prejudice to any party.

10 I declare under penalty of perjury under the law of the State of Nevada that the foregoing  
11 is true and correct.

12 Executed this 1st day of December, 2014.

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15 Joshua D. N. Heys  
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MEMORANDUM OF POINTS AND AUTHORITIES

On October 14, 2014, Defendants filed a petition for writ of mandamus or, in the alternative, prohibition to the Nevada Supreme Court requesting that court to review this Court's decision dismissing Defendants' motion to dismiss and finding that Plaintiffs' claim was properly brought directly and not derivatively. Subsequently, on November 26, 2014, the Nevada Supreme Court ordered briefing on Defendants' petition. In exercising its discretion to order additional briefing, the Supreme Court noted the "arguable merit" of Defendants' position that Plaintiffs claims must be asserted derivatively, if at all, as well as the lack of any "plain, speedy, and adequate remedy in the ordinary course of the law" if the petition were not granted. *See* Exhibit A (Nov. 26 Order) at 1. The Supreme Court has requested a short briefing schedule, with Plaintiffs required to respond to the petition within 30 days of the order and Defendants being given 15 days thereafter for any reply. In order to allow all parties to focus on the potentially dispositive proceedings now before the Supreme Court and to avoid potentially wasteful expenditures of resources by the Court and the parties, Defendants believe a temporary stay of proceedings in this Court pending the resolution of Defendants' writ petition is warranted.

This case is based on allegations by a minority of shareholders of the company formerly known as Parametric Sound Corporation ("Parametric"). Plaintiffs allege that Parametric's Board of Directors breached their fiduciary duties by negotiating and agreeing to a reverse triangular merger under which VTB Holdings Inc. ("VTBH") would merge with Paris Acquisition Corporation ("Paris"), a subsidiary of Parametric, and Parametric would own the combined entity and would issue new shares of stock to the former shareholders of VTBH. In addition to asserting breach of fiduciary duty claims against the directors, Plaintiffs have also asserted aiding and abetting claims against VTBH and Parametric. Defendants' writ petition asks the Supreme Court to determine whether these claims properly belong to Parametric or the individual shareholders of Parametric. If the claims belong to Parametric, then Plaintiffs' complaint must be dismissed because Plaintiffs have failed to comply with the statutory requirements for asserting a derivative claim.

A favorable ruling from the Supreme Court will dispose of this case entirely but, absent a stay, the parties will be required to engage in burdensome and unnecessary discovery and class certification proceedings while awaiting a ruling from the Supreme Court, resulting in irreversible harm to Parametric and the frustration of the writ petition's purpose of protecting Parametric's right to manage litigation properly asserted on its own behalf. On the other hand, if the Supreme Court rules that the claims may be brought directly by Plaintiffs, then Plaintiffs' ability to continue to litigate at that point will not be prejudiced by the stay. Accordingly, and as set forth more fully below, a stay of proceedings is appropriate here.

#### **I. All Relevant Factors Weigh In Favor Of Granting A Stay**

Under Nevada Rule of Appellate Procedure 8(c), Nevada courts consider the following four factors in evaluating whether to grant a stay pending the resolution of a writ petition:<sup>1</sup> "(1) whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied; (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition." NRAP 8(c); *see also Hansen v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116 Nev. 650, 657 (2000). All four factors weigh in favor of granting the stay.

#### **A. Granting A Stay Of Proceedings Will Protect Parametric's Exclusive Corporate Right To Manage Litigation On Its Own Behalf**

Defendants' writ petition asserts that allowing Plaintiffs to litigate these claims directly violates fundamental tenants of corporate law, both in Nevada and elsewhere. Plaintiffs have alleged that Parametric's directors breached their fiduciary duties, but Plaintiffs have failed to recognize the basic legal principle that directors owe fiduciary duties to the company, not the company's shareholders. *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).

<sup>1</sup> Although this rule specifically addresses a stay of proceedings pending an appeal, the Nevada Supreme Court has recognized that this rule also applies to writ petitions challenging orders issued by the district courts. *See Hansen*, 116 Nev. at 657.

1 Accordingly, Parametric has the exclusive right to assert these claims. *Id.* Consequently, the  
2 breach of duty claim pressed here belongs solely to the company – Parametric – and not its  
3 shareholders, the Plaintiffs here. The object of Defendants’ writ petition is the protection of that  
4 exclusive corporate right. In furtherance of this right, individual shareholders may not usurp  
5 corporate claims for their own benefit and can only assert such claims derivatively on behalf of  
6 the corporation, and even then only after certain factors are met. But allowing Plaintiffs to  
7 continue to litigate this case for their personal benefit is irreconcilable with that corporate right.  
8 If the Nevada Supreme Court ultimately concludes that only Parametric had the right to litigate  
9 these claims, such a ruling will have little meaning if it is issued after Plaintiffs have already  
10 substantially litigated these claims *against* Parametric and without any determination by the  
11 company that such litigation is in its best interest. Granting the stay is the only way to ensure that  
12 the object of Defendants’ petition—the protection of the corporate right to manage litigation on  
13 its own behalf—is not frustrated before the writ petition is resolved.

14 **B. Absent A Stay Of Proceedings, Defendants Will Suffer Irreparable Harm**

15 A central aspect of the exclusive right of a corporation to manage litigation on its own  
16 behalf is the notion that the corporation is entitled to decide whether litigation is in the best  
17 interests of the company. *See, e.g., Shoen v. SAC Holding Corp.*, 122 Nev. 621, 632 (2006) (“In  
18 managing the corporation’s affairs, the board of directors may generally decide whether to take  
19 legal action”). But individual stockholders in a direct action have no similar obligation to  
20 consider the best interests of the company. Plaintiffs have sued Parametric and now seek an  
21 unspecified allocation of damages be paid by Parametric. Plaintiffs have engaged in broad and  
22 burdensome discovery requests that drain already-limited corporate funds. Plaintiffs have  
23 subpoenaed banks and other financial advisors to Parametric, without consideration of how such  
24 legal actions may affect Parametric’s future relationships with these entities. If the Nevada  
25 Supreme Court ultimately concludes that these claims belong to Parametric, it will be too late for  
26 Parametric to decide retroactively whether any of the actions taken by the Plaintiffs were in the  
27 best interests of the company. That decision will have already been made for the company by  
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1 plaintiffs whose interests are not the same as the company's and, at that point, any damage caused  
2 by this lawsuit will be irreversible. The Supreme Court has already highlighted the clear risk that  
3 Defendants may suffer irreversible harm by holding that "it appears that petitioners . . . may have  
4 no plain, speedy, and adequate remedy in the ordinary course of the law." See Exhibit A (Nov.  
5 26 Order) at 1. Granting a stay will prevent this lawsuit from causing any further negative  
6 consequences for Parametric's business and will preserve Parametric's right to determine whether  
7 further litigation is in the best interests of the company unless and until the Supreme Court  
8 decides that Parametric is not entitled to make that decision here.

9 **C. Plaintiffs Will Not Be Prejudiced By A Stay**

10 Plaintiffs will suffer no prejudice if this stay is granted. The delay itself does not  
11 constitute prejudice sufficient to warrant denial of a stay. See *Mikohn Gaming Corp. v. McCrea*,  
12 120 Nev. 248, 253, 89 P.3d 36, 39 (2004) ("a mere delay in pursuing discovery and litigation  
13 normally does not constitute irreparable harm"). Plaintiffs are seeking purely economic damages  
14 that will remain available if the Nevada Supreme Court ultimately denies Defendants' writ  
15 petition. Further, Defendants have already provided Plaintiffs with substantial discovery and all  
16 of the Defendants have put litigation holds in place so there is no risk that any additional potential  
17 discovery will be rendered unavailable by a stay of proceedings. There also is no risk that any  
18 witnesses will become unavailable. If anything, a stay of proceedings will only benefit Plaintiffs  
19 as it will allow them the opportunity to address the issues raised in Defendants' writ petition  
20 without the distraction of conducting additional fact discovery and preparing class certification  
21 briefing, all of which can be accomplished at a later date if Defendants' writ petition is denied.  
22 All parties will also be spared the potentially unnecessary expense of further litigation if the  
23 Supreme Court orders the dismissal of this case.

24 **D. Defendants Are Likely To Prevail On The Merits**

25 In ordering briefing on Defendants' writ petition, which it does sparingly, the Supreme  
26 Court has already noted the "arguable merit" of Defendants' writ petition. See Exhibit A (Nov.  
27 26 Order) at 1. Plaintiffs' position that they may directly assert their fiduciary breach and aiding  
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1 and abetting claims is based on a flawed understanding of *Cohen v. Mirage Resorts, Inc.*, 119  
2 Nev. 1 (2003). As explained in Defendants' writ petition, *Cohen* established a narrow exception  
3 to the general rule that claims for breach of fiduciary duty must be asserted derivatively. Under  
4 *Cohen*, a plaintiff may directly assert such a claim when the plaintiff is a shareholder of a  
5 constituent entity to a merger, that merger is invalid, and the plaintiff lost unique and personal  
6 property as a result of the invalid merger. However, that exception does not apply here because  
7 Plaintiffs are shareholders of Parametric, which did not merge with any other company and thus  
8 was not a constituent entity to a merger. *Id.* at 19. Because the merger occurred between VTBH  
9 and Paris (a wholly owned subsidiary of Parametric), Parametric's shareholders were not asked to  
10 approve of any merger and were never offered (or entitled to) any compensation in connection  
11 with any merger. The only issue subject to shareholder approval in this transaction was whether  
12 Parametric should issue new shares of stock to the shareholders of VTBH – a corporate action  
13 that was met with overwhelming approval despite the fact that it would result in the shareholders  
14 owning a diluted interest in a more profitable company. Plaintiffs are therefore not shareholders  
15 of a constituent entity of a merger and cannot invoke the exception created in *Cohen*.

16 Plaintiffs also cannot rely on *Cohen* because they have failed to identify any "unique  
17 personal property" that was purportedly lost as a result of this transaction. *Id.* at 19. Instead,  
18 Plaintiffs base their claims entirely on vague assertions that the economic value of their shares  
19 and voting interests have declined. Even if these allegations are true, these are harms suffered  
20 equally by every shareholder and are thus properly characterized as harms to the company, and  
21 not unique to any particular shareholders. Unlike the plaintiff in *Cohen*, whose specific "unique  
22 personal property" lost in the merger was his "interest in a specific corporation," here no plaintiff  
23 or purported class member here was obligated to tender any portion of his or her shares and thus  
24 no "unique personal property" has been lost. *Id.*

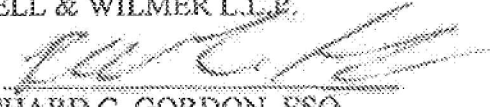
25 Based on the strength of the arguments submitted in Defendants' writ petition, the  
26 undisputed fact that Plaintiffs are not shareholders of a constituent entity to a merger, and the fact  
27 that the Supreme Court has exercised its discretion to treat Defendants' writ petition as one of the  
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minority of petitions for which they request additional briefing, Defendants respectfully submit that they are likely to prevail on the merits.

Because all four considerations weigh in favor of granting a stay, Defendants request that this Court stays all further proceedings pending the resolution of Defendants' writ petition to the Nevada Supreme Court.

Dated: December 1, 2014.

SNELL & WILMER L.L.P.

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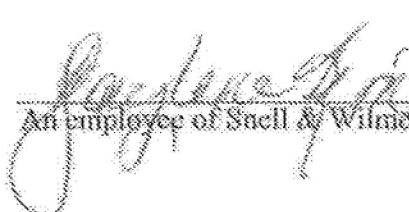
*Attorneys for Defendants Kenneth Potashner,  
Elwood Norris, Seth Putterman, Robert Kaplan,  
Andrew Wolfe, James Honore*



**CERTIFICATE OF SERVICE**

As an employee of Snell & Wilmer L.L.P., I certify that I served a copy of the foregoing **DEFENDANTS' MOTION TO STAY PENDING CONSIDERATION BY THE NEVADA SUPREME COURT ON AN ORDER SHORTENING TIME** on the <sup>2nd</sup> 1st day of December 2014, via e-service through Wiznet to all counsel who are registered in the service list for this case, as well as electronic mail to the email addresses listed below:

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An employee of Snell & Wilmer L.L.P.

20542377



# EXHIBIT

A

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
CLARK; AND THE HONORABLE  
ELIZABETH GOFF 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.

No. 66689

**FILED**

NOV 26 2014

TRACIE K. LINDERMAN  
CLERK OF SUPREME COURT  
BY R. Malone  
DEPUTY CLERK

*ORDER DIRECTING ANSWER AND GRANTING MOTION TO SEAL*

This original petition for a writ of mandamus or prohibition challenges a district court order in a corporations action.

Having reviewed the petition, it appears that petitioners have set forth issues of arguable merit and that they may have no plain, speedy, and adequate remedy in the ordinary course of the law. Therefore, real parties in interest, on behalf of respondents, shall have 30 days from the date of this order within which to file and serve an answer, including

authorities, against issuance of the requested writ. Petitioners shall have 15 days from service of the answer to file and serve any reply.

Additionally, on October 16, 2014, petitioners moved to seal certain documents. Real parties in interest have not opposed the motion. Petitioners seek to redact certain portions of their district court motion to dismiss and the reply to the opposition to that motion and to seal the unredacted copies of these documents. Petitioners included exhibits to their October 16 motion containing unredacted copies of these documents, but the proposed appendix they submitted, which was provisionally received on October 22, 2014, contains an unredacted copy of only one of these documents—the motion to dismiss—along with various other documents.

We grant petitioners' motion as to the motion to dismiss and the related reply.<sup>1</sup> SRCR 3(4). But in light of the issues with petitioners' proposed appendix noted above, the clerk of this court shall return, unfiled, the appendix volume received on October 22 and petitioners shall have five days from this order's date to resubmit two appendices to replace this volume. The first appendix, which shall be filed under seal, shall contain unredacted copies of petitioners' district court motion to dismiss and their reply to the opposition to that motion. The second appendix, which will not be sealed, shall contain all documents from the proposed

---

<sup>1</sup>Petitioners have not requested that the district court minutes, their district court motions to seal, or the district court sealing order be redacted or sealed.

appendix for which sealing was not requested along with a redacted copy of the reply to the opposition to the motion to dismiss. Finally, the clerk of this court shall seal exhibits five and six to petitioners' October 16 motion.

It is so ORDERED.

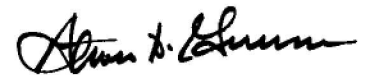
*J. Hardesty*  
Hardesty

*Douglas* J.  
Douglas

*Cherry* J.  
Cherry

cc: Holland & Hart LLP/Las Vegas  
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# EXHIBIT C



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16 *Holdings, Inc.*

17 **EIGHTH JUDICIAL DISTRICT COURT**

18 **CLARK COUNTY, NEVADA**

19 IN RE PARAMETRIC SOUND  
20 CORPORATION SHAREHOLDERS'  
21 LITIGATION

LEAD CASE NO.: A-13-686890-B  
DEPT. NO.: XI

**NOTICE OF ENTRY OF ORDER**

1 PLEASE TAKE NOTICE that the ORDER ON DEFENDANTS' MOTION TO STAY  
2 ACTION PENDING CONSIDERATION OF WRIT PETITION BY THE NEVADA SUPREME  
3 COURT was entered with this Court on February 4, 2015, a copy of which is attached hereto.

4 Dated: February 19, 2015

SNELL & WILMER L.L.P.

5  
6  
7 By: 

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19 *Sound Corporation, VTB Holdings, Inc.*  
20 *and Paris Acquisition Corp*  
21  
22  
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25  
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**CERTIFICATE OF SERVICE**

As an employee of Snell & Wilmer L.L.P., I certify that I served a copy of the foregoing  
**NOTICE OF ENTRY OF ORDER** on the 6 day of February 2015, via e-service through  
 Wiznet to all counsel who are registered in the service list for this case, as well as electronic  
 mail to the email addresses listed below:

Name	Party	E-mail Address
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Valerie Weis (assistant)	Plaintiffs	<a href="mailto:val@omaralaw.net">val@omaralaw.net</a>
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17 EIGHTH JUDICIAL DISTRICT COURT

18 CLARK COUNTY, NEVADA

19 IN RE PARAMETRIC SOUND  
20 CORPORATION SHAREHOLDERS'  
21 LITIGATION

LEAD CASE NO.: A-13-686890-B  
DEPT. NO.: XI

22 ~~PROPOSED~~ ORDER ON DEFENDANTS'  
23 MOTION TO STAY ACTION PENDING  
24 CONSIDERATION OF WRIT PETITION  
25 BY THE NEVADA SUPREME COURT  
26  
27  
28

1 Before the Court is Defendants' Motion for Stay Action Pending Consideration by the  
2 Nevada Supreme Court on an Order Shortening Time (the "Motion"). The Court heard oral  
3 argument on the Motion on December 8, 2014 at 8:00 a.m. David O'Mara, Esq., of the O'Mara  
4 Law Firm, P.C.; Jonathan Stein, Esq. and Adam Warden, Esq., of Saxena White, P.A.; and  
5 Randall Baron, Esq. and David Knotts, Esq. of Robbins Geller Rudman & Dowd, LLP appeared  
6 on behalf of Plaintiffs. Richard Gordon, Esq. of Snell & Wilmer, LLP and Joshua D. N. Hess,  
7 Esq., of Dechert, LLP appeared on behalf of Defendants Turtle Beach Corporation and VTB  
8 Holdings, Inc.; Robert Cassity, Esq. of Holland & Hart, LLP and John Stigi, Esq. of Sheppard  
9 Mullin Richter & Hampton, LLP appeared on behalf of the individual defendants Kenneth  
10 Potashner, Elwood Norris, Seth Putterman, Robert Kaplan, Andrew Wolfe, James Honore.

11 Based on the motions and pleadings on file, oral argument from counsel, and for good  
12 cause appearing, the Court hereby orders as follows:

13 **IT IS ORDERED** that the Motion is granted in part. Because the Nevada Supreme Court  
14 has ordered additional briefing on the Defendants/Petitioners' pending Writ Petition in Supreme  
15 Court Case No. 66689, this Action will be stayed for a period of 90 days from December 8, 2014.

16 **IT IS FURTHER ORDERED** that the Court will hold a status check in chambers on  
17 March 13, 2015 regarding the status of the Writ Petition with the Supreme Court of Nevada;

18 **IT IS FURTHER ORDERED** that if the Supreme Court has not ruled on the Writ  
19 Petition by the March 13, 2015 status check, the parties can, by motion or by stipulation, request  
20 an extension of the stay;

21 **IT IS FURTHER ORDERED** that the only exception to the stay of this Action will be  
22 resolution of the ESI protocol, including the negotiation of search terms and custodians;

23 **IT IS FURTHER ORDERED** that an in chambers status check regarding the ESI  
24 protocol is set for January 23, 2015;


1  
2 **IT IS SO ORDERED.**


3  
4 Dated: ~~February~~ January 2, 2015.

5   
DISTRICT COURT JUDGE

6  
7  
8 Submitted by:

Approved as to form and content by:

9   
10  
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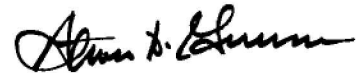
15 *Elwood Norris, Seth Putterman,*

16 *Robert Kaplan, Andrew Wolfe,*

17 *and James Honore*

18 208837859

# **EXHIBIT B**



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17 EIGHTH JUDICIAL DISTRICT COURT

18 CLARK COUNTY, NEVADA

19 IN RE PARAMETRIC SOUND  
20 CORPORATION SHAREHOLDERS'  
21 LITIGATION

LEAD CASE NO.: A-13-686890-B  
DEPT. NO.: XI

DEFENDANTS' MOTION TO STAY  
PENDING CONSIDERATION BY THE  
NEVADA SUPREME COURT ON AN  
ORDER SHORTENING TIME

Snell & Wilmer  
LLP

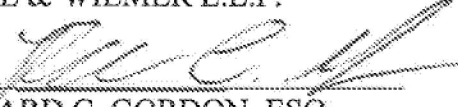
LAW OFFICES  
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Defendants, by and through their undersigned attorneys, hereby submit this MOTION FOR STAY PENDING CONSIDERATION BY THE NEVADA SUPREME COURT ON AN ORDER SHORTENING TIME ("Motion") seeking an Order staying all district court proceedings pending a resolution of Defendants' Petition For Writ of Mandamus Or, In The Alternative, Prohibition, for which the Nevada Supreme Court ordered additional briefing on November 26, 2014.

This Motion is made and supported by the Declaration of Joshua D. N. Hess, Esq., below, the pleadings and papers on file in this matter, and any argument presented at a hearing on this Motion.

Dated: December 1, 2014.

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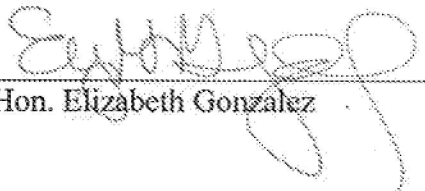
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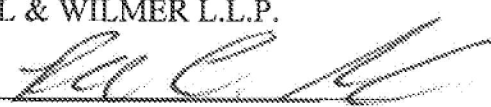
ORDER SHORTENING TIME

With good cause appearing, it is hereby ordered that the time for hearing of the foregoing Motion be, and the same will be heard on the 8<sup>th</sup> day of DECEMBER, 2014 at 9:00 am am VI.  
\_m. in Department VI.

DATED this 2<sup>nd</sup> day of December, 2014.

  
Hon. Elizabeth Gonzalez

Prepared and Submitted by:  
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**DECLARATION OF JOSHUA D. N. HESS, ESQ.****IN SUPPORT OF MOTION FOR STAY ON AN ORDER SHORTENING TIME**

I, Joshua D. N. Hess, declare and state under penalty of perjury:

1. I am attorney with the law firm of Dechert LLP, counsel of record for Defendants Turtle Beach Corporation (formerly known as Parametric Sound Corporation) and VTB Holdings, Inc. in the above-titled action. I have personal knowledge of the following facts and would testify thereto under oath if called as a witness.

2. I make this declaration in support of this Motion to Stay Pending Consideration By The Nevada Supreme Court On An Order Shortening Time ("Motion").

3. This Motion asks this Court to stay all proceedings pending the resolution of Defendants' Petition For Writ of Mandamus Or, In The Alternative, Prohibition, for which the Nevada Supreme Court ordered additional briefing on November 26, 2014. A true and accurate copy of the Nevada Supreme Court's order is attached hereto as **Exhibit A**.

4. Good cause exists to hear this Motion on shortened time to ensure that this Motion is heard and decided before key discovery and briefing deadlines so that the parties are not needlessly propounding and completing discovery, or providing legal briefing, that is ultimately unnecessary.

5. For example, Defendants are currently engaged in broad rolling discovery, which must be completed by February 13, 2015. Plaintiffs have already served deposition subpoenas on numerous third parties and, absent a stay, additional depositions will likely be noticed by all parties. Further, Plaintiffs' motion for class certification, and any related briefing, must be filed by December 11, 2014 and Defendants must file any opposition by March 20, 2015. Properly responding to any motion for class certification will require additional discovery to be propounded.

6. Moreover, the very nature of Defendants' petition – that Plaintiffs' claim is derivative and that they have no standing to pursue it without meeting statutory prerequisites to permit the company to control its own litigation – merits determining whether such litigation should continue as promptly as possible.

7. Defendants' Petition For Writ of Mandamus Or, In The Alternative, Prohibition is dispositive and, if granted, will moot any discovery or class certification briefing.

8. A hearing in this matter is already scheduled before this Court on December 8, 2014 at 8:00 a.m. This Motion could be addressed at that hearing.

9. Shortly after learning that the Nevada Supreme Court had requested additional briefing on Defendants' petition, I e-mailed Plaintiffs' counsel to ask if they would consent to a stay. That same day, Plaintiffs' counsel declined Defendants' request and I informed them that Defendants would file this Motion.

10. This Motion is made in good faith and will not result in prejudice to any party.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed this 1st day of December, 2014.

  
Joshua D. N. Hess

## MEMORANDUM OF POINTS AND AUTHORITIES

On October 14, 2014, Defendants filed a petition for writ of mandamus or, in the alternative, prohibition to the Nevada Supreme Court requesting that court to review this Court's decision dismissing Defendants' motion to dismiss and finding that Plaintiffs' claim was properly brought directly and not derivatively. Subsequently, on November 26, 2014, the Nevada Supreme Court ordered briefing on Defendants' petition. In exercising its discretion to order additional briefing, the Supreme Court noted the "arguable merit" of Defendants' position that Plaintiffs claims must be asserted derivatively, if at all, as well as the lack of any "plain, speedy, and adequate remedy in the ordinary course of the law" if the petition were not granted. *See* Exhibit A (Nov. 26 Order) at 1. The Supreme Court has requested a short briefing schedule, with Plaintiffs required to respond to the petition within 30 days of the order and Defendants being given 15 days thereafter for any reply. In order to allow all parties to focus on the potentially dispositive proceedings now before the Supreme Court and to avoid potentially wasteful expenditures of resources by the Court and the parties, Defendants believe a temporary stay of proceedings in this Court pending the resolution of Defendants' writ petition is warranted.

This case is based on allegations by a minority of shareholders of the company formerly known as Parametric Sound Corporation ("Parametric"). Plaintiffs allege that Parametric's Board of Directors breached their fiduciary duties by negotiating and agreeing to a reverse triangular merger under which VTB Holdings Inc. ("VTBH") would merge with Paris Acquisition Corporation ("Paris"), a subsidiary of Parametric, and Parametric would own the combined entity and would issue new shares of stock to the former shareholders of VTBH. In addition to asserting breach of fiduciary duty claims against the directors, Plaintiffs have also asserted aiding and abetting claims against VTBH and Parametric. Defendants' writ petition asks the Supreme Court to determine whether these claims properly belong to Parametric or the individual shareholders of Parametric. If the claims belong to Parametric, then Plaintiffs' complaint must be dismissed because Plaintiffs have failed to comply with the statutory requirements for asserting a derivative claim.

1 A favorable ruling from the Supreme Court will dispose of this case entirely but, absent a  
2 stay, the parties will be required to engage in burdensome and unnecessary discovery and class  
3 certification proceedings while awaiting a ruling from the Supreme Court, resulting in irreversible  
4 harm to Parametric and the frustration of the writ petition's purpose of protecting Parametric's  
5 right to manage litigation properly asserted on its own behalf. On the other hand, if the Supreme  
6 Court rules that the claims may be brought directly by Plaintiffs, then Plaintiffs' ability to  
7 continue to litigate at that point will not be prejudiced by the stay. Accordingly, and as set forth  
8 more fully below, a stay of proceedings is appropriate here.

9 **I. All Relevant Factors Weigh In Favor Of Granting A Stay**

10 Under Nevada Rule of Appellate Procedure 8(c), Nevada courts consider the following  
11 four factors in evaluating whether to grant a stay pending the resolution of a writ petition:<sup>1</sup> "(1)  
12 whether the object of the appeal or writ petition will be defeated if the stay or injunction is  
13 denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or  
14 injunction is denied; (3) whether respondent/real party in interest will suffer irreparable or serious  
15 injury if the stay or injunction is granted; and (4) whether appellant/petitioner is likely to prevail  
16 on the merits in the appeal or writ petition." NRAP 8(c); *see also Hansen v. Eighth Judicial Dist.*  
17 *Court ex rel. County of Clark*, 116 Nev. 650, 657 (2000). All four factors weigh in favor of  
18 granting the stay.

19 **A. Granting A Stay Of Proceedings Will Protect Parametric's Exclusive**  
20 **Corporate Right To Manage Litigation On Its Own Behalf**

21 Defendants' writ petition asserts that allowing Plaintiffs to litigate these claims directly  
22 violates fundamental tenants of corporate law, both in Nevada and elsewhere. Plaintiffs have  
23 alleged that Parametric's directors breached their fiduciary duties, but Plaintiffs have failed to  
24 recognize the basic legal principle that directors owe fiduciary duties to the company, not the  
25 company's shareholders. *See, e.g., Sweeney v. Harbin Elec., Inc.*, 2011 WL 3236114, at \*3 n. 1  
26 (D. Nev. July 27, 2011) ("fiduciary duties are owed to the corporation") (internal quote omitted).

27 <sup>1</sup> Although this rule specifically addresses a stay of proceedings pending an appeal, the Nevada  
28 Supreme Court has recognized that this rule also applies to writ petitions challenging orders  
issued by the district courts. *See Hansen*, 116 Nev. at 657.

1 Accordingly, Parametric has the exclusive right to assert these claims. *Id.* Consequently, the  
2 breach of duty claim pressed here belongs solely to the company – Parametric – and not its  
3 shareholders, the Plaintiffs here. The object of Defendants’ writ petition is the protection of that  
4 exclusive corporate right. In furtherance of this right, individual shareholders may not usurp  
5 corporate claims for their own benefit and can only assert such claims derivatively on behalf of  
6 the corporation, and even then only after certain factors are met. But allowing Plaintiffs to  
7 continue to litigate this case for their personal benefit is irreconcilable with that corporate right.  
8 If the Nevada Supreme Court ultimately concludes that only Parametric had the right to litigate  
9 these claims, such a ruling will have little meaning if it is issued after Plaintiffs have already  
10 substantially litigated these claims *against* Parametric and without any determination by the  
11 company that such litigation is in its best interest. Granting the stay is the only way to ensure that  
12 the object of Defendants’ petition—the protection of the corporate right to manage litigation on  
13 its own behalf—is not frustrated before the writ petition is resolved.

14 **B. Absent A Stay Of Proceedings, Defendants Will Suffer Irreparable Harm**

15 A central aspect of the exclusive right of a corporation to manage litigation on its own  
16 behalf is the notion that the corporation is entitled to decide whether litigation is in the best  
17 interests of the company. *See, e.g., Shoen v. SAC Holding Corp.*, 122 Nev. 621, 632 (2006) (“In  
18 managing the corporation’s affairs, the board of directors may generally decide whether to take  
19 legal action”). But individual stockholders in a direct action have no similar obligation to  
20 consider the best interests of the company. Plaintiffs have sued Parametric and now seek an  
21 unspecified allocation of damages be paid *by* Parametric. Plaintiffs have engaged in broad and  
22 burdensome discovery requests that drain already-limited corporate funds. Plaintiffs have  
23 subpoenaed banks and other financial advisors to Parametric, without consideration of how such  
24 legal actions may affect Parametric’s future relationships with these entities. If the Nevada  
25 Supreme Court ultimately concludes that these claims belong to Parametric, it will be too late for  
26 Parametric to decide retroactively whether any of the actions taken by the Plaintiffs were in the  
27 best interests of the company. That decision will have already been made for the company by  
28

1 plaintiffs whose interests are not the same as the company's and, at that point, any damage caused  
2 by this lawsuit will be irreversible. The Supreme Court has already highlighted the clear risk that  
3 Defendants may suffer irreversible harm by holding that "it appears that petitioners . . . may have  
4 no plain, speedy, and adequate remedy in the ordinary course of the law." *See* Exhibit A (Nov.  
5 26 Order) at 1. Granting a stay will prevent this lawsuit from causing any further negative  
6 consequences for Parametric's business and will preserve Parametric's right to determine whether  
7 further litigation is in the best interests of the company unless and until the Supreme Court  
8 decides that Parametric is not entitled to make that decision here.

9  
10 **C. Plaintiffs Will Not Be Prejudiced By A Stay**

11 Plaintiffs will suffer no prejudice if this stay is granted. The delay itself does not  
12 constitute prejudice sufficient to warrant denial of a stay. *See Mikohn Gaming Corp. v. McCrea*,  
13 120 Nev. 248, 253, 89 P.3d 36, 39 (2004) ("a mere delay in pursuing discovery and litigation  
14 normally does not constitute irreparable harm"). Plaintiffs are seeking purely economic damages  
15 that will remain available if the Nevada Supreme Court ultimately denies Defendants' writ  
16 petition. Further, Defendants have already provided Plaintiffs with substantial discovery and all  
17 of the Defendants have put litigation holds in place so there is no risk that any additional potential  
18 discovery will be rendered unavailable by a stay of proceedings. There also is no risk that any  
19 witnesses will become unavailable. If anything, a stay of proceedings will only benefit Plaintiffs  
20 as it will allow them the opportunity to address the issues raised in Defendants' writ petition  
21 without the distraction of conducting additional fact discovery and preparing class certification  
22 briefing, all of which can be accomplished at a later date if Defendants' writ petition is denied.  
23 All parties will also be spared the potentially unnecessary expense of further litigation if the  
24 Supreme Court orders the dismissal of this case.

25 **D. Defendants Are Likely To Prevail On The Merits**

26 In ordering briefing on Defendants' writ petition, which it does sparingly, the Supreme  
27 Court has already noted the "arguable merit" of Defendants' writ petition. *See* Exhibit A (Nov.  
28 26 Order) at 1. Plaintiffs' position that they may directly assert their fiduciary breach and aiding



1 and abetting claims is based on a flawed understanding of *Cohen v. Mirage Resorts, Inc.*, 119  
2 Nev. 1 (2003). As explained in Defendants' writ petition, *Cohen* established a narrow exception  
3 to the general rule that claims for breach of fiduciary duty must be asserted derivatively. Under  
4 *Cohen*, a plaintiff may directly assert such a claim when the plaintiff is a shareholder of a  
5 constituent entity to a merger, that merger is invalid, and the plaintiff lost unique and personal  
6 property as a result of the invalid merger. However, that exception does not apply here because  
7 Plaintiffs are shareholders of Parametric, which did not merge with any other company and thus  
8 was not a constituent entity to a merger. *Id.* at 19. Because the merger occurred between VTBH  
9 and Paris (a wholly owned subsidiary of Parametric), Parametric's shareholders were not asked to  
10 approve of any merger and were never offered (or entitled to) any compensation in connection  
11 with any merger. The only issue subject to shareholder approval in this transaction was whether  
12 Parametric should issue new shares of stock to the shareholders of VTBH – a corporate action  
13 that was met with overwhelming approval despite the fact that it would result in the shareholders  
14 owning a diluted interest in a more profitable company. Plaintiffs are therefore not shareholders  
15 of a constituent entity of a merger and cannot invoke the exception created in *Cohen*.

16 Plaintiffs also cannot rely on *Cohen* because they have failed to identify any "unique  
17 personal property" that was purportedly lost as a result of this transaction. *Id.* at 19. Instead,  
18 Plaintiffs base their claims entirely on vague assertions that the economic value of their shares  
19 and voting interests have declined. Even if these allegations are true, these are harms suffered  
20 equally by every shareholder and are thus properly characterized as harms to the company, and  
21 not unique to any particular shareholders. Unlike the plaintiff in *Cohen*, whose specific "unique  
22 personal property" lost in the merger was his "interest in a specific corporation," here no plaintiff  
23 or purported class member here was obligated to tender any portion of his or her shares and thus  
24 no "unique personal property" has been lost. *Id.*

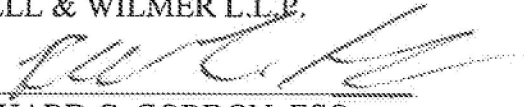
25 Based on the strength of the arguments submitted in Defendants' writ petition, the  
26 undisputed fact that Plaintiffs are not shareholders of a constituent entity to a merger, and the fact  
27 that the Supreme Court has exercised its discretion to treat Defendants' writ petition as one of the  
28

1 minority of petitions for which they request additional briefing, Defendants respectfully submit  
2 that they are likely to prevail on the merits.

3 Because all four considerations weigh in favor of granting a stay, Defendants request that  
4 this Court stays all further proceedings pending the resolution of Defendants' writ petition to the  
5 Nevada Supreme Court.

6 Dated: December 1, 2014.  
7

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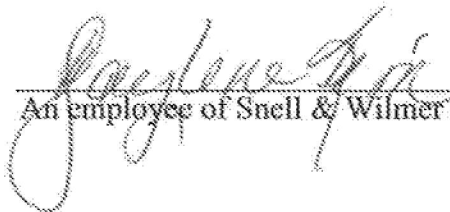
24 *Attorneys for Defendants Kenneth Potashner,*  
25 *Elwood Norris, Seth Putterman, Robert Kaplan,*  
26 *Andrew Wolfe, James Honore*  
27  
28



**CERTIFICATE OF SERVICE**

As an employee of Snell & Wilmer L.L.P., I certify that I served a copy of the foregoing **DEFENDANTS' MOTION TO STAY PENDING CONSIDERATION BY THE NEVADA SUPREME COURT ON AN ORDER SHORTENING TIME** on the <sup>2nd</sup> 1st day of December 2014, via e-service through Wiznet to all counsel who are registered in the service list for this case, as well as electronic mail to the email addresses listed below:

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Brian Raphel	Defendants	Brian.Raphel@dechert.com
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An employee of Snell & Wilmer L.L.P.

20542377

# EXHIBIT

A

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
CLARK; AND THE HONORABLE  
ELIZABETH GOFF 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.

No. 66689

**FILED**

NOV 26 2014

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY R. Malone  
DEPUTY CLERK

*ORDER DIRECTING ANSWER AND GRANTING MOTION TO SEAL*

This original petition for a writ of mandamus or prohibition challenges a district court order in a corporations action.

Having reviewed the petition, it appears that petitioners have set forth issues of arguable merit and that they may have no plain, speedy, and adequate remedy in the ordinary course of the law. Therefore, real parties in interest, on behalf of respondents, shall have 30 days from the date of this order within which to file and serve an answer, including

authorities, against issuance of the requested writ. Petitioners shall have 15 days from service of the answer to file and serve any reply.

Additionally, on October 16, 2014, petitioners moved to seal certain documents. Real parties in interest have not opposed the motion. Petitioners seek to redact certain portions of their district court motion to dismiss and the reply to the opposition to that motion and to seal the unredacted copies of these documents. Petitioners included exhibits to their October 16 motion containing unredacted copies of these documents, but the proposed appendix they submitted, which was provisionally received on October 22, 2014, contains an unredacted copy of only one of these documents—the motion to dismiss—along with various other documents.

We grant petitioners' motion as to the motion to dismiss and the related reply.<sup>1</sup> SRCR 3(4). But in light of the issues with petitioners' proposed appendix noted above, the clerk of this court shall return, unfiled, the appendix volume received on October 22 and petitioners shall have five days from this order's date to resubmit two appendices to replace this volume. The first appendix, which shall be filed under seal, shall contain unredacted copies of petitioners' district court motion to dismiss and their reply to the opposition to that motion. The second appendix, which will not be sealed, shall contain all documents from the proposed

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<sup>1</sup>Petitioners have not requested that the district court minutes, their district court motions to seal, or the district court sealing order be redacted or sealed.

appendix for which sealing was not requested along with a redacted copy of the reply to the opposition to the motion to dismiss. Finally, the clerk of this court shall seal exhibits five and six to petitioners' October 16 motion.

It is so ORDERED.

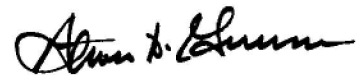
*Hardesty*, J.  
Hardesty

*Douglas*, J.  
Douglas

*Cherry*, J.  
Cherry

cc: Holland & Hart LLP/Las Vegas  
Sheppard, Mullin, Richter, & Hamilton LLP  
Dechert LLP/San Francisco  
Snell & Wilmer, LLP/Las Vegas  
Dechert LLP/New York  
O'Mara Law Firm, P.C.  
Robbins Geller Rudman & Dowd, LLP

# **EXHIBIT A**



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16 *Attorneys for Turtle Beach Corporation and VTB*  
17 *Holdings, Inc.*

18 EIGHTH JUDICIAL DISTRICT COURT  
19 CLARK COUNTY, NEVADA  
20

21  
22 CASE NO: A-13-686890-B  
23 Dep't NO: XT  
24  
25  
26  
27  
28

1 IN RE PARAMETRIC SOUND  
2 CORPORATION SHAREHOLDERS'  
3 LITIGATION

LEAD CASE NO.: A-13-686890-B  
DEPT. NO.: XI

**[PROPOSED] ORDER DENYING  
DEFENDANTS' MOTION TO EXTEND  
STAY PENDING CONSIDERATION BY  
THE NEVADA SUPREME COURT AND  
REQUEST FOR AN ORDER  
SHORTENING TIME**

10  
11 Before the Court is Defendants' Motion to Extend Stay Pending Consideration by the  
12 Nevada Supreme Court and Request for an Order Shortening Time (the "Motion"). The Court  
13 heard argument telephonically on Wednesday, May 13, 2015.

14 Based on the motions and pleadings on file and oral argument from counsel, the Court  
15 hereby orders as follows:


16 **IT IS ORDERED** that the Motion is DENIED.

17 **IT IS FURTHER ORDERED** that the existing stay will remain in place for five days  
18 following the entry of this Order, so that Defendants may seek a stay from the Nevada Supreme  
19 Court on an emergency basis.



1  
2 **IT IS SO ORDERED.**

3  
4 Dated: May 15<sup>th</sup>, 2015.

  
DISTRICT COURT JUDGE

5  
6  
7 Submitted by:

8  
9   
10 RICHARD C. GORDON, ESQ.  
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23 *Attorneys for Defendants Turtle Beach Corporation*  
24 *and VTB Holdings, Inc.*

25 21659283  
26  
27  
28

**DECLARATION OF BRIAN C. RAPHEL, ESQ. IN SUPPORT OF  
EMERGENCY MOTION TO STAY DISTRICT COURT PROCEEDINGS  
PENDING APPEAL**

I, Brian C. Raphel, declare and state under penalty of perjury:

1. I am an attorney with the law firm of Dechert LLP, counsel of record for Petitioners Turtle Beach Corporation (formerly known as Parametric Sound Corporation) and VTB Holdings, Inc. in the above-titled action. I have personal knowledge of the following facts and would testify thereto under oath if called as a witness.

2. I make this declaration in support of this Emergency Motion To Stay District Court Proceedings Pending Appeal.

3. A true and correct copy of the district court's Order denying Defendants' Motion To Extend Stay in the underlying action, dated May 15, 2015, is attached hereto as **Exhibit A**.

4. A true and correct copy of Defendants' Motion To Stay Pending Consideration By The Nevada Supreme Court On An Order Shortening Time in the underlying action, dated December 1, 2014, is attached hereto as **Exhibit B**.

5. A true and correct copy of the district court's Order granting Defendants' Motion To Stay Pending Consideration By The Nevada Supreme Court On An Order Shortening Time in the underlying action, dated February 6, 2015, is attached hereto as **Exhibit C**.

6. A true and correct copy of Defendants' Motion To Extend Stay Pending Consideration By The Nevada Supreme Court And Request For An Order Shortening Time in the underlying action, dated May 11, 2015, is attached hereto as **Exhibit D**.

7. A true and correct copy of Plaintiffs' Opposition to Defendants' Motion To Extend Stay P in the underlying action, dated May 12, 2015, is attached hereto as **Exhibit E**.

8. A true and correct copy of the transcript of a telephonic hearing held before the district court in the underlying action on May 13, 2015, is attached hereto as **Exhibit F**.

9. A true and correct copy of Plaintiffs' Opposition to Defendants' Motion To Stay Pending Consideration By The Nevada Supreme Court in the underlying action, dated December 5, 2014, is attached hereto as **Exhibit G**.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed this 18th day of May, 2015.

/s/ Brian C. Raphel  
Brian C. Raphel

**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 similarly situated, and  
Intervening Plaintiffs RAYMOND BOYTIM  
and GRANT OAKES,

Real parties in interest.

Electronically Filed  
May 18 2015 04:50 p.m.  
Case No. 66689 Tracie K. Lindeman  
Clerk of Supreme Court

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

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**PETITIONERS' EMERGENCY MOTION TO STAY DISTRICT COURT  
PROCEEDINGS PENDING APPEAL  
RELIEF REQUESTED BY MAY 26, 2015**

---

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*Attorneys for Petitioners Kenneth Potashner, Elwood Norris, Seth Putterman,  
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### **NRAP 27(e) Certificate of Counsel**

I, Richard C. Gordon, declare and state:

1. I make this declaration in support of Petitioners' Emergency Motion to Stay.

2. I am an attorney with the law firm of Snell and Wilmer, L.L.P. and counsel of record for Petitioners Turtle Beach Corporation ("Parametric") and VTB Holdings, Inc., in the above-entitled action.

3. The district court previously granted a stay of proceedings in the underlying matter for 90 days on December 8, 2014, and previously extended it upon a stipulation by all of the parties on February 17, 2015. On May 13, 2015, the district court denied a request to further extend the stay and directed Petitioners to seek relief from this Court. This decision was memorialized in an Order dated May 15, 2015, which was entered on May 18, 2015, and which provided Petitioners with a limited five day stay "so that Defendants may seek a stay from the Nevada Supreme Court on an emergency basis." That stay expires on Tuesday, May 26, 2015.

4. The Petition for Writ of Mandamus, or, in the alternative, Writ of Prohibition currently pending before this Court asserts that all of Plaintiffs' claims in the underlying action are derivative in nature and belong to Parametric. Absent a stay of the district court proceedings, the Plaintiffs in the underlying action will continue to

litigate their claims before this Court has an opportunity to address whether such claims properly belong to them. Such a result will immediately cause irreparable harm to Parametric's right to manage its own legal affairs since Parametric will be unable to retroactively undo Plaintiffs' actions if this Court rules that Parametric has the exclusive right to assert these claims.

5. The contact information of the attorneys for the parties is as follows:

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6. Plaintiffs were made aware of Defendants' intention to move for relief before this Court during the hearing before the district court on May 13, 2015. Further, I informed Plaintiffs' local counsel that we would be filing this motion on an



emergency basis on May 18th and provided a copy of this Motion immediately upon filing with the Court.

7. This Request is made in good faith and will not result in prejudice to any party.

/s/ Richard C. Gordon  
Attorney

## **I. Introduction**

Defendants<sup>1</sup> move for a stay of this action pending this Court’s adjudication of Defendants’ pending Petition for Writ of Mandamus (the “Petition”). This action arises out of breach of fiduciary duty claims asserted by certain shareholders of Turtle Beach Corporation, formerly known as Parametric Sound Corporation (“Parametric”), based on an allegedly dilutive stock issuance that Parametric provided as consideration for a merger between a subsidiary of Parametric and a third party. The Petition presents this Court with an important question, which has now been tracked for *en banc* review, of whether such claims belong to Nevada corporations or whether they belong to individual shareholders to assert directly. If this Court concludes that the claims asserted here belong solely to Parametric, then prosecution of those claims cannot be usurped by the individual Plaintiff shareholders without satisfying the demand requirements under Nevada law. However, if Plaintiffs are permitted to litigate these claims on their own behalves in the proceedings below before this Court issues its ruling on who owns the claims, and thus has sole legal standing to pursue them, then a ruling from this Court that these claims have always belonged to Parametric will be rendered meaningless.

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<sup>1</sup> For ease of reference, this motion continues the practice from the Petition of referring to Petitioners as “Defendants” and Real Parties In Interest as “Plaintiffs.”

Based on this reasoning, the district court initially *granted* a temporary stay of proceedings on December 8, 2014. It then denied a request to extend the stay beyond its expiration point on May 14, 2015, even though Plaintiffs were unable to advance any new argument to suggest that the stay should expire. Instead, noting its concerns about the time this Court might take to issue its decision, the district court directed Defendants to seek such relief from this Court and issued an order on May 15, 2015, which granted Defendants a limited stay of only five days to “seek a stay from the Nevada Supreme Court on an emergency basis.” Ex. A to Declaration of Brian C. Raphael (“Raphael Decl.”), attached as Exhibit 1. Accordingly, Defendants request that this Court issue an emergency order staying all further district court proceedings. This stay is necessary to ensure that Plaintiffs do not cause irreparable harm to Parametric’s corporate right to manage its own legal affairs by usurping legal claims that belong to Parametric, a harm that would negate the Petition’s entire purpose, before the *en banc* panel of this Court has had a sufficient opportunity to determine whether Plaintiffs have any right to assert such claims on their own behalves under Nevada law. As set forth more fully below, and as originally recognized by the district court, Defendants satisfy all criteria for a stay under NRAP 8(c) and the request should be granted.

## **II. RELEVANT BACKGROUND**

On November 26, 2014, this Court ordered additional briefing on Defendants’ Petition for Writ of Mandamus, or, in the alternative, Writ of Prohibition, which seeks

a review of the district court's determination that, despite *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1 (2003), individual shareholders of a specific company may directly challenge a merger between a subsidiary of that company and a third party that did not cause those shareholders to lose their stock or any other "unique personal property." *Id.* at 19. Following this Court's decision to hear this Petition, Defendants filed a motion to stay the district court proceedings on December 1, 2014, in which Defendants noted that (1) a stay was necessary to protect Parametric's corporate rights pending this Court's review, (2) denying a stay would cause irreparable harm to Parametric, (3) granting a stay would cause no harm to Plaintiffs, and (4) that Defendants had presented a substantial case on the merits. *See* Raphel Decl. Ex. B. Based on those arguments, the district court *granted* the motion on December 8, 2014, and stayed all further proceedings for 90 days. That order was memorialized in an Order dated February 2, 2015. *See* Raphel Decl. Ex. C. On February 17, 2015, pursuant to stipulation by the parties, the district court further extended the stay until May 15, 2015.

One week before the stay was set to expire, Plaintiffs informed Defendants that they intended to object to any further extension of the stay. Accordingly, Defendants filed a motion to extend the stay for an additional 90 days on May 11, 2015. Raphel Decl. Ex. D. This motion incorporated each of the arguments from the prior motion and noted that nothing had changed in these proceedings other than (1) briefing on the

Petition had been completed before this Court and (2) that this Court had tracked the Petition for *en banc* review. *Id.* Plaintiffs filed a one-paragraph opposition that merely incorporated their prior opposition to the stay and did not make any new arguments or allege that any circumstances had changed rendering the then-current stay inappropriate. Raphel Decl. Ex. E. Nevertheless, the district court denied the motion to extend the stay on May 13, 2015, based on its concern that this Court’s deliberations would be “[p]okey or really slow” and that this Court previously “screwed up one of [the district court’s] cases and the lawyers had three months to get ready for trial so that [it could] comply with the five-year rule.” Raphel Decl. Ex. F at 5:2-9; 9:6-14; 9:24-10:2.<sup>2</sup> In an Order dated May 15, 2015, the district court granted Defendants only five days to seek a stay from this Court “on an emergency basis.” Raphel Decl. Ex. A.

### **III. ARGUMENT**

#### **A. Defendants Satisfied NRAP 8(a)(1) By First Moving For A Stay Before The District Court.**

Under NRAP 8(a)(1), a party must ordinarily move first in the district court for a stay of proceedings pending the adjudication of an extraordinary writ. *State ex rel. Public Serv. Comm’n v. First Judicial Dist. Court*, 94 Nev. 42, 44, 574 P.2d 272, 273 (1978). In this case, the district court was not only first to consider a motion to stay, it

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<sup>2</sup> Notably, the length of an anticipated stay is not one of the factors to be considered under Nevada Rule of Appellate Procedure 8(c).

granted that initial motion and even extended it by stipulation of the parties to May 15, 2015. On May 13, 2015, however, although neither party identified any relevant change in circumstances to lift the stay, the district court reversed course and suddenly refused to extend that stay while this Court continued to consider the Petition. The district court expressly stated that any further stay of proceedings must be obtained from this Court. Raphael Decl. Ex. F at 9. As Defendants have exhausted any hope of obtaining relief from the district court, their request for stay is now properly before this Court.

**B. Defendants Satisfied NRAP 8(c).**

Under Nevada Rule of Appellate Procedure 8(c), Nevada courts consider the following four factors in evaluating whether to grant a stay pending the resolution of a writ petition:<sup>3</sup> “(1) whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied; (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.” NRAP 8(c); *see also Hansen v. Eighth Judicial Dist. Court ex rel.*

---

<sup>3</sup> Although this rule specifically addresses a stay of proceedings pending an appeal, the Nevada Supreme Court has recognized that this rule also applies to writ petitions challenging orders issued by the district courts. *See Hansen*, 116 Nev. at 657.

*County of Clark*, 116 Nev. 650, 657 (2000). All four factors weigh in favor of granting the stay.

1. The Object Of The Petition Will Be Defeated if the Stay Is Denied.

If this Court grants the Petition, it will mean that Plaintiffs' breach of fiduciary duty claims are derivative and belong to *Parametric* and not Parametric's individual shareholders. As the Petition sets forth, the fiduciary duties that Plaintiffs claim were breached were owed to Parametric. *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). If such duties were truly breached, resulting in damage to Parametric and a consequential decrease in the value of all Parametric stock, then Parametric has the exclusive right to assert and manage any claim to recover for that loss.

The Petition's object is the protection of that exclusive corporate right. Individual shareholders, such as Plaintiffs, may not usurp corporate claims for their own benefit and can only assert such claims derivatively on behalf of the corporation, and even then only after certain factors are met. *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 633 (2006) ("because the power 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"). But allowing Plaintiffs to continue to litigate this case for their

personal benefit is irreconcilable with that corporate right. If this Court ultimately concludes that only Parametric had the right to litigate these claims, such a ruling will be rendered meaningless if Plaintiffs have already substantially litigated these claims *against* Parametric and without any determination by the Company that such litigation is in its best interest. Granting the requested stay is the only way to protect Parametric's right to manage its own legal affairs at least until this Court has had an opportunity to determine if the underlying action violates that right.

2. Defendants Will Suffer Irreparable Injury If The Stay Is Denied

A central aspect of the exclusive right of a corporation to manage litigation on its own behalf is the notion that the corporation is entitled to decide whether litigation is in the best interests of the company. *See, e.g., Shoen*, 122 Nev. at 632 (“In managing the corporation's affairs, the board of directors may generally decide whether to take legal action”). Plaintiffs have no similar obligation and, instead, seek to further only their own, divergent pecuniary interests by demanding an unspecified allocation of damages *from* the same company that would rightfully *recover* damages if these claims were valid and asserted derivatively. Further, Plaintiffs have subpoenaed banks and other financial advisors to Parametric, effectively depriving Parametric of its right to decide if such efforts are worth the potential risk that such actions may have on long-term relationships with these entities. To be clear, the irreparable harm here is not the financial cost to Defendants of allowing Plaintiffs to



run this litigation, although such costs are—and already have been—substantial, but the loss of Parametric’s fundamental right to manage its own legal affairs and decide which actions serve the Company’s best interests. If this Court ultimately concludes that these claims belong to Parametric after this litigation is allowed to progress, it will be too late for Parametric to decide retroactively whether any of the actions already taken by the Plaintiffs were in the best interests of the Company. Plaintiffs will have already made decisions that only Parametric had the right to make and the deprivation of Parametric’s rights will be irreversible.

3. Plaintiffs Will Not Be Prejudiced By A Stay

In the district court proceedings, Plaintiffs conceded that a stay of proceedings would not cause any prejudice to them. *See* Raphael Decl. Ex. G at 4.

4. Defendants Are Likely To Prevail On The Merits

Briefing has been completed on this Petition and Defendants respectfully submit that they have established at least a substantial likelihood that they will prevail on the merits. The parties are in agreement that *Cohen*, 119 Nev. 1, governs the central question of whether Plaintiffs’ claims are derivative in nature. In their opposition, Plaintiffs do not dispute that, under *Cohen*, a “dissenting shareholder” to a corporate merger may directly challenge that merger only after establishing that he or she “lost unique personal property—his or her interest in a specific corporation.” *Cohen*, 119 Nev. at 19, 62 P.3d at 732. Here, Plaintiffs are not “dissenting

shareholders” of a company that merged with any other entity and, even if they were, they have not sufficiently alleged that they “lost unique personal property.” To the contrary, they owned stock only in a corporate parent of a merging company and they presumably still hold that same stock today.

As set forth in more detail in the Petition, the only merger that occurred here was between VTBH, a third party, and Paris Acquisition Corp. (“Paris”), a subsidiary of Parametric. That merger took place pursuant to a “Merger Agreement” that required Parametric to issue new stock to the former shareholders of VTBH as consideration for the merger. The Merger Agreement did *not* cause Parametric to merge with any company and it did not require any Parametric shareholders, including Plaintiffs, to relinquish their stock. The transaction at issue involved both a merger and a stock issuance, but Plaintiffs have never owned stock of either entity that took part in the merger side of the transaction. Accordingly, Plaintiffs are not dissenting stockholders to the merger between VTBH and Paris and have no personal right to challenge it. *See* NRS 92A.315; NRS 92A.380(1)(a); NRS 92A.015(1).

Any alleged harm to Plaintiffs is simply the byproduct of Parametric’s decision to issue new stock to VTBH’s former shareholders, which had, at most, a dilutive effect on the value of Parametric’s stock. But a dilution in the value of the stock, even if established, is not tantamount to a loss of “unique personal property.” *Cohen*, 119 Nev. at 19, 62 P.3d at 732; *Sweeney v. Harbin Elec., Inc.*, 2011 WL 3236114, \*2 (D.

Nev. July 27, 2011) (equity dilution claims are derivative). Plaintiffs have not “lost” any property. Recognizing the absence of any true loss of property, Plaintiffs resort to an unprecedented theory that they *effectively* “lost” their Parametric stock because the company in which they still hold stock is now somehow “new and different” from the company in which they originally invested. *See* Ans. Br. at 3, 25. This argument is not only unprecedented and unsupported by any authority, it is illogical and would effectively eliminate derivative claims by impermissibly ceding every conceivable fiduciary breach claim resulting from any transaction directly to shareholders so long as they could vaguely argue that the company was somehow “different” after the alleged breach. That is not the law in Nevada or any other jurisdiction, and for good reason.

This Court has tracked this Petition for *en banc* review, which suggests that it has already correctly recognized the importance of this case. Nev. Supreme Ct. Internal Operating Proc., Rule 2(b)(2)(ii). Regardless of the outcome of the Petition, this Court’s ruling could have a large and lasting impact on the legal rights of Nevada corporations to manage their own legal affairs. At a minimum, the proceedings in the district court should be stayed so as to avoid violating Parametric’s corporate rights while this Court carefully considers this important issue that will clarify those rights. Because all four considerations weigh in favor of granting a stay, Defendants request that this Court stay all further proceedings pending the resolution of the Petition.

Submitted on May 18, 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 May 18, 2015, I caused to be served a true and correct copy of the foregoing **PETITIONERS' EMERGENCY MOTION TO STAY DISTRICT COURT PROCEEDINGS PENDING APPEAL** by the method indicated:

- ☐ **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).

- ☒ **BY EMAIL:** by emailing a PDF of the document(s) listed above to the email addresses of the individual(s) listed below:

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Honorable Elizabeth Gonzalez  
Eighth Judicial District Court  
Regional Justice Center  
200 Lewis Avenue  
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**BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case and the following list:

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