EXHIBIT 1

б TRANSCRIPT OF TAPE-RECORDED HEARING IN THE MATTER OF 11 PARAMETRIC SOUND CORP., ET AL. VS. RAKAUSKAS, ET AL. 12 SEPTEMBER 1, 2015 14 CASE NUMBER 66689 Job Number: 265198

1	Page 2 00:00:00 HON. HARDESTY: Uh, this is a, uh, writ
2	proceeding Parametric Sound Corporation et al., versus,
3	um, the Eighth Judicial District Court and, uh, Vitie
4	Rakauskas, individually and behalf of others, uh, real
5	parties and interest, case number 66689.
6	MR. HESS: Good afternoon], [inaudible], Your Honors
7	
8	HON. HARDESTY: Hold on just a sec
9	MR. HESS: Oh. Sure. You bet.
10	HON. HARDESTY: just to let the courtroom clear,
11	and, um
12	MR. HESS: [inaudible]
13	00:00:47 HON. HARDESTY: Okay. Would you begin by
14	introducing the lawyers that are with you, and I'll ask,
15	uh, Mr. Baron to do the same.
16	MR. HESS: Uh
17	HON. HARDESTY: At your commencement of your
18	argument.
19	MR. HESS: That would be my pleasure. I'm my
20	name's Joshua Hess, uh, with me is, uh, John Stigi,
21	counsel for the director defendants; Richard Gordon, uh,
22	my co-counsel on behalf of the corporate defendants; and
23	also Robert Cassity, on behalf of the directed
24	defendants.
25	00:01:14 I'll be representing all the defendants, uh,

1	Page 3 here today, uh, at the argument.
2	May it please the court, this case concerns whether
3	a minority shareholder can bring a claim for breach of
4	fiduciary duties directly against the company's directors
5	in connection with a transaction wherein they did not
6	lose their interest in the company, nor did they suffer
7	any harm, independent of the harm suffered by the
8	company.
9	00:01:40 Under well-developed corporate law throughout
10	the United States, and specifically this court's decision
11	in Cohen against Mirage Resorts, Incorporated, the answer
12	to that question is clearly no.
13	As both sides have argued, it is well established
14	that claims that seek to vindicate corporate harms belong
15	to the corporation itself. It must be pursued by company
16	share it can only be pursued by company shareholders
17	derivatively, if at all, and subject to specific demand
18	requirements set forth by statute
19	00:02:12 HON. GIBBONS: Well, you know, Cohen's a long,
20	long case panel case; uh, three justices are no longer
21	here on the courts. So maybe you can, uh, enlighten us on
22	how you feel Cohen plays into your case, and explain the
23	difference in this case between direct claims versus
24	derivative claims, because they seem to be kind of murky
25	here to me, you know, how you define them. So if you'd do

	Page 4
1	that, I'd appreciate that
2	00:02:35 MR. HESS: Sure. And and and and and
3	you're you're not alone in in having that that,
4	uh, issue.
5	But but Cohen set forth a a clear standard,
6	that while recognizing that the harms to the corporation
7	belong to the to the company itself and should be
8	vindicated by the company, a dissenting shareholder to a
9	merger who alleges that there is flawed and invalid
10	merger process, uh, and and and lost his shares in
11	a cash-out merger had a direct claim.
12	00:03:04 And and that decision made a lot of sense
13	because at that point when you have a dissenting
14	shareholder who who loses his interest in the company,
15	you know, as as as Cohen put it, lost his personal
16	property his interest in the company.
17	At that point, you know, there's no surviving
18	company. The harm what whatever harm is alleged has
19	been has been monetized and is at the shareholder
20	level at that time. The shareholder has no other remedy,
21	other than a direct claim. And that's true, you know,
22	candidly, in in in the major corporate
23	jurisdictions elsewhere.
24	00:03:41 Here, you have a company that still exists.
25	Here, you have plans to hold just as many shares in the
1	

1	Page 5 company that they had both before the transaction and
2	afterwards. And when one's reality their their
3	alleged harm is that their share their their
4	their interest in the company has been diluted.
5	That in essence that as part of this
6	transaction, too many shares have been issued to the
7	other company's shareholders, in order to obtain the
8	assets of VTBH.
9	00:04:15 HON. GIBBONS: Well, assuming dilution's true,
10	doesn't that affect all the minority shareholders all
11	of them have their claims diluted so is it an argument
12	that it's a derivative case then, that that that
13	multiple people are affected by, uh, by this act
14	assuming it was wrong to do it?
15	MR. HESS: Well, I mean, I'd say the dilution not
16	only affects the minority's shareholders, it affected all
17	of Parametric's
18	HON. GIBBONS: Mm-hmm.
19	00:04:37 MR. HESS: shareholders. Because the dilution
20	claim itself undervalued the company. And that's how
21	that's that's the dilution issue here, is that the
22	company itself was undervalued. And as a consequence of
23	that, all share just as pro rata as their you know,
24	each share, their pro rata interest in the company itself
25	suffered a dilution. All of them. All of them
1	

1	Page 6 00:05:01 HON. HARDESTY: But isn't isn't Cohen saying
2	that if that dilution occurs through the wrongful conduct
3	of the directors, uh, either in affecting the price in
4	the merger, or in, uh, getting a merger that somehow
5	favored those officers and directors in a unique way;
6	that that is a basis for a direct claim by the
7	shareholders.
8	00:05:31 Uh, it it I I think the language in
9	Cohen kind of waxes and wanes, but it one of the
10	things that appears to be the case, from the decision, is
11	that at the very beginning of the opinion, uh, the court
12	says that direct that claims relating to lost profits,
13	usurpation of corporate opportunities or mismanagement
14	are derivative.
15	00:05:58 But it then says that you still have a direct
16	claim if the merger is the product of wrongful conduct by
17	the directors; correct? That way, all that changes is the
18	measure of damages.
19	MR. HESS: So, there's there's there's a few
20	things there that I I want to address
21	HON. HARDESTY: Okay.
22	MR. HESS: um, Mr. Chief Justice. The first issue
23	is on on, uh, whether or not, uh, well, just
24	addressing the first point, is that Cohen was very clear
25	that, again, the context of the case was a shareholder
1	

1	Page 7 who dissented in a cash-out merger
2	00:06:37 HON. HARDESTY: Mm-hmm.
3	MR. HESS: Now, in terms of whether or not
4	HON. PICKERING: But they didn't dissent; they
5	didn't exercise dissenters' rights in Cohen.
6	MR. HESS: Correct. And and and by dissenting,
7	you know, I I I think
8	HON. PICKERING: You use it in the vernacular, not
9	the technical [inaudible]
10	MR. HESS: Correct, Your Honor. Right. Because that
11	was an issue, certainly, in Cohen that
12	HON. PICKERING: And
13	MR. HESS: that remedy had passed Cohen by.
14	HON. HARDESTY: Mm-hmm.
15	00:06:57 MR. HESS: And so this is again just a
16	a dissenter. And so the issue is, you know, when you're
17	dissenting from a merger which, of course, you know,
18	the plaintiffs did not really have an opportunity to do
19	that here, because they were not part of the merger
20	entity.
21	But in any event going back to your point
22	Cohen did not deal with the dilution; it dealt with a
23	cash-out merger. And and that's a distinction with an
24	enormous difference.
25	Because there's no corporate law jurisdiction in the

1	Page 8 United States that has held that a dilution claim a
2	pure dilution claim is a direct claim, unless there's
3	very specific instances involved.
4	00:07:31 Now, Delaware has set forth that the only
5	instance in which a dilution case can be brought directly
6	and this is the Supreme Court's holding in Gentile
7	is where you have a controlling shareholder who then
8	who does it in in a fraudulent expropriation.
9	Neither of those things is alleged here; neither one of
10	those things.
11	And to go beyond that to read Cohen, which is a
12	cash-out merger case which under Delaware law, in a
13	cash-out merger case; yes. There would be direct claim.
14	00:08:05 But to read Cohen then to say in a just a
15	dilution case, which is what we have here absent a
16	controlling shareholder, absent a fraudulent
17	expropriation for minority shareholders would go way
18	beyond where Delaware has gone, and any other corporate
19	jurisdiction. That would be brand new law.
20	HON. SAITTA: So do we need to clarify Cohen?
21	00:08:27 MR. HESS: Well, I think I think for purposes
22	of this case, Cohen answers the question, you know, in
23	the affirmative that they have not been able to show that
24	they lost any personal property. They did not lose their
25	interest in the company

1	Page 9 HON. HARDESTY: Well, let's talk of that
2	MR. HESS: [inaudible]
3	HON. HARDESTY: that language, if we might. In
4	Cohen there is a use of that phrase.
5	Uh, it states, uh, a claim brought by a dissenting
6	shareholder that questions the validity of a merger as a
7	result of wrongful conduct on the part of majority
8	shareholders or directors is properly classified as an
9	individual or direct claim. This sentence, "A shareholder
10	has lost unique personal property his or her interest
11	in a specific corporation."
12	00:09:18 But what's interesting is that the citation to
13	that sentence doesn't use that sentence at all. So the
14	question that I think, uh, raised that is raised by
15	the Cohen case is whether this requirement of the loss of
16	unique personal property is really part of the test at
17	all.
18	Isn't it simply a question of whether the claim is
19	that the merger was the product of wrongful conduct?
20	00:09:49 MR. HESS: Well, the the problem with that is
21	
22	HON. HARDESTY: When you analyze what happened in
23	the Delaware Supreme Court in Tooley and subsequent
24	tests, and then some of the treatises, three tests seem
25	to have evolved at least according to those treatises
1	

1	one of which is the wrongful conduct test; isn't that
2	right?
3	MR. HESS: Uh, I would I would submit that there
4	there is no wrongful conduct test in terms of
5	determining whether or not there's a direct and
6	derivative claim, uh, at at all. That is not, in and
7	of itself, the test.
8	The test is, if you take Tooley which is the
9	governing law and I think you're grabbing that from
10	Parnes, which is pre-Tooley but Tooley clarified what
11	what the test, at least in Delaware, is. Which is,
12	where was the harm
13	00:10:32 HON. DOUGLAS: Counselor, you hit Delaware
14	twice. There's a 2013 ruling in Delaware at the chancery
15	court, uh, Carsanaro versus, uh, Bloodhound Tech, which
16	seems to deviate a little bit more and, uh, Delaware
17	seems to be moving in the direction that this case fits
18	into. Why doesn't it?
19	MR. HESS: Well, again, in Carsanaro, which I would
20	submit is is, you know, the [inaudible] is, again,
21	there's there's a dispute even among the chancery
22	court whether or not the Carsanaro was beyond the Supreme
23	Court in Delaware's teaching in Gentile.
24	But let's take for a minute that Carsanaro is is
25	good law and should should apply. In that case, the

	- 11
1	Page 11 chancery court still recognized that there was a an
2	expropriation; again, a a a corporate actor who had
3	ability to, uh, influence and could pull the corporate
4	levers as they as he put it.
5	00:11:25 Expropriated voting rights and economic rights
6	from minority shareholders, and then, you know, prior to
7	prior to prior to the the transaction at issue.
8	What is notable in this case is that there is no
9	allegation that, you know, there's they conclude a lot
10	of facts in their brief about what happened. But what's
11	interesting is there's never any allegation that any of
12	the directors of Parametric received a better deal.
13	There's no no why why did they favor Parametric?
14	We're never told. They were never given a special
15	deal. They were diluted as much as the minority
16	shareholders that plaintiffs purport to represent. So,
17	you know, there's no expropriation. And absent
18	expropriation, it wouldn't even fit into Carsanaro.
19	00:12:11 HON. DOUGLAS: If that being the case
20	HON. PICKERING: Then every merger case would be a
21	direct claim, if you'd credit that reading. I mean, every
22	single one if it's just wrongdoing on the part of the
23	board that's alleged, then you would be it'd all be
24	direct.
25	MR. HESS: Yeah. You you you I totally

1	Page 12 agree, Justice Pickering, that if you just basically say
2	bad faith test, and which is kind of where you know,
3	if you took took it off that far, which is well beyond
4	Delaware the Tooley framework would disappear.
5	00:12:40 HON. PICKERING: Do you think it matters to
6	Cohen that, um and I'm going to ask your opposing
7	colleagues the same question that that plaintiff in
8	Cohen, by virtue of the merger lost, he he would not
9	have had standing to bring a derivative claim
10	MR. HESS: [inaudible]
11	HON. PICKERING: um, so he's procedurally out in
12	the sidelines. Um, and I don't know I've read and re-
13	read Cohen, and I'm not sure exactly what it means. But,
14	um
15	MR. HESS: Mr. Bice was here earlier; he may have
16	helped.
17	HON. PICKERING: Yeah. Um, waxes and wanes is
18	probably more articulate.
19	But if it's concern about a a specific interest
20	or a specific shareholder tied up with the concept that,
21	um, the wrong didn't run to every single shareholder
22	equally, and this guy lost his stock particularly, and
23	maybe others got some advantage?
24	00:13:30 MR. HESS: I I think that's that's exactly
25	that's exactly the the point where I think you see

1	Page 13 the the the law emerge, where when you see a a -
2	- the shareholders of one company, and there's a
3	divergence of interests where one group usually a
4	controller is getting one deal; and these minority
5	shareholders are getting another worse deal. That's where
6	you start seeing a direct claim.
7	Because all of a sudden it's it's
8	HON. PICKERING: But aren't they alleging that here
9	or are they trying to? Um, they're trying to
10	MR. HESS: I don't think they I don't think they
11	are alleging that here
12	HON. PICKERING: Okay.
13	MR. HESS: because they can't allege that
14	Potasher and the other directors got a worse deal. They
15	haven't alleged that.
16	HON. PICKERING: They seem to allege that they're
17	happier now than they were before.
18	MR. HESS: Right. Because because as they've also
19	conceded, the company's now a new, cool, better company
20	than it was before. So
21	00:14:12 HON. PICKERING: I don't know that they've
22	conceded that.
23	MR. HESS: Well. I I I have another two
24	minutes left I'd like to [inaudible]
25	HON. DOUGLAS: But counsel, could before you sit

	Page 14
1	down
2	MR. HESS: Yes, sir.
3	HON. HARDESTY: if you could deal with the issue
4	that they're asserting, and that is the loss of unique
5	personal property.
6	MR. HESS: I'm I'm sorry. I didn't catch that.
7	HON. HARDESTY: The loss of unique personal
8	property. That's, in essence, what they're alleging,
9	through this merger.
10	MR. HESS: All right. Well well well, I I
11	think I think the the only loss that they've ever
12	sought to advance in this litigation is a majority voting
13	right, which they've abandoned, because it's just a
14	disjointed group of minority public shareholders; they
15	never had majority voting rights.
16	00:14:49 And then this other kind of ethereal concept
17	that it's a new company; that somehow that that
18	Parametric still exists, they never lost their shares,
19	that somehow
20	00:14:59 HON. PICKERING: Their their their
21	allegation is, essentially, they've been marginalized by
22	virtue of going from part of 100 percent to 20 percent.
23	MR. HESS: Right. Right. For 100 percent of a
24	company that had a \$270,000 profit to 20 percent of one
25	that had a \$63.7 million profit. So, yeah. And that's a

1	Page 15 dilution. And and you cannot find a case where all
	-
2	that is all you're alleging is that that kind of
3	dilution.
4	Not in Delaware absent, again, expropriation, which
5	is not alleged here. No court has ever found that's
6	correct.
7	HON. HARDESTY: Okay. Mr. Baron?
8	00:15:37 MR. BARON: Good afternoon, Your Honor. My name
9	is Randall Baron. I represent plaintiffs in this case. I
10	am here with co-counsel Mr. David O'Mara; Mr. David
11	Knott; Mr. Jonathan Stein; and Mr. Rick Atwood.
12	May it please the court, I I think, Justice
13	Hardesty, you hit it the nail on the head with your
14	question is, doesn't Cohen just cover this?
15	In fact, that's exactly what, uh, Judge Gonzalez
16	asked Mr. Peek in the question, which was, are we here on
17	a motion to dismiss or are we not? Yes.
18	The plaintiffs have alleged that they were harmed as
19	a result of a merger. Did they not? Yes; they did. That
20	is exactly what Cohen says is required to be pled to
21	confer standing.
22	00:16:25 The rest is all going to be questions of fact
23	that would have to be argued going forward whether or not
24	it really was a merger. All of that goes forward.
25	And to really take Justice Hardesty's view a little

and
o a
_
that
50.
ere
ghts
do
e .

	Decc. 17
1	Page 17 lengthy.
2	00:17:43 The opinion on direct derivative is really the
3	one paragraph that Justice Hardesty read. And the
4	above that, it cites Parnes and a couple other cases,
5	which simply stand for the proposition that a merger is a
6	direct claim.
7	And that's what Parnes says, and that's why that
8	section that one phrase that he read, which talks
9	about the unique interest cites to Parnes.
10	Because what it really says, is if you read that
11	quote, a claim brought by a dissenting shareholder that
12	questions the validity of the merger which is what we
13	plead as a result of wrongful conduct which we
14	plead, and which, uh, Justice Judge Gonzalez found
15	on the part of a majority shareholders or directors we
16	pled that is properly classified as an individual or
17	direct claim.
18	00:18:33 And then explaining that and that's all it
19	really is, this middle sentence
20	HON. DOUGLAS: Counsel, at the beginning of that,
21	you put in the word, "Dissenting shareholder"
22	MR. BARON: Yes. And I think
23	HON. DOUGLAS: And is that not different from our
24	situation here?
25	MR. BARON: Not at all. Because as as the Justice

1	Page 18 pointed out, Mr. Cohen wasn't a dissenting shareholder.
2	If the the technical and she asked counsel that,
3	and he said, yes; we're talking dissenting in the
4	colloquial term.
5	Because under a technical stat under a statute
6	for seeking to be a dissenter it's 92A.315 a
7	dissenter must be someone who, "Has dissenter's right and
8	is has perfected their dissenter's rights."
9	00:19:14 And we know Mr. Cohen didn't. We know that's the
10	whole purpose of the case; and yet he was still a
11	dissenter for the purposes of proceeding in that case
12	HON. PICKERING: But what's the remedy that you're -
13	- alleged you're entitled to, by virtue of what wrong?
14	MR. BARON: We are entitled to the difference in the
15	value of what the Parametric shareholders really got
16	what was left over their stub ownership of 20 percent,
17	and what the real value was. Now we
18	HON. PICKERING: That's a claim that every
19	Parametric shareholder would have; correct? Every former
20	Parametric shareholder, as of the date of this reverse
21	triangular merger?
22	MR. BARON: It was a pseudo-reverse
23	HON. PICKERING: Right. Right
24	MR. BARON: triangular merger, actually
25	HON. PICKERING: right. Whatever.
1	

1	Page 19
1	MR. BARON: which which
2	00:19:55 HON. PICKERING: But you agree then, that claim
3	would run in favor of every extant Parametric
4	shareholder?
5	MR. BARON: Just like Mr. Cohen's. Just [inaudible]
6	
7	HON. PICKERING: The answer is yes.
8	MR. BARON: The answer is just yes, just like Mr.
9	Cohen's. And I apologize for not directly answering. But
10	yes, because every shareholder who was cashed out in
11	Cohen got the same amount of cash.
12	So his position was identical. And that's why Parnes
13	in Delaware did what it did, which said in a merger that
14	is a unique personal interest.
15	00:20:29 And the reason and the court brought up
16	Tooley. The reason the court sort of moved beyond that
17	and I think counsel was honest when he said they
18	clarified where they were under the special injury test -
19	- is because, well, most derivative cases are obvious;
20	you overpay somebody, it's obviously the money goes
21	back to the corporations.
22	But in certain context, you have to worry about, if
23	we are right, if the directors did, in fact, breach their
24	fiduciary dues of loyalty and were disinterested, and
25	did, in fact, give Turtle Beach 80 percent control of

	Demo 20
1	Page 20 this company take that away from the the
2	shareholders who were 100 percent take away their
3	power to vote different board members, etc.; if that was
4	true and they were hurt, and you ultimately and the
5	court ultimately awarded damages who does it go to?
6	00:21:21 And that's really where Tooley had the problem;
7	right? Because in our situation, if we were to win the
8	case, and we were to proceed derivatively, and we were to
9	get let's say \$30 million, if it were a derivative
10	claim, the argument is that \$30 million just popped back
11	into the corporation that is 80 percent controlled by the
12	people who got the benefit in the first place.
13	And that's wrong. That is not the way that corporate
14	law is supposed to work. Corporate law is supposed to
15	give the benefit of the of justice to the people
16	who were wronged.
17	But if it if is stays in a derivative suit, then
18	it, basically, goes to the wrong people, which is exactly
19	why the two-part test of Tooley came about.
20	00:22:04 It doesn't really change whether there's a
21	special injury. It just says; look, in a merger it's
22	clear it would have to go to the people who were part of
23	the merger and not whoever owns the company now and is
24	running the company now in this case, Turtle Beach.
25	So I think that if you look down that line, and you
1	

	Page 21
1	realize that we're talking all about what happens in a
2	merger and I do really want to emphasize the the
3	sentence right after the question about the, um, loss to
4	unique personal property.
5	00:22:38 Because Cohen not only tells you what the rule
6	is, explains that it's like Parnes, which there's a
7	special injury in a merger; it then says, "Therefore, if
8	a complaint alleges damages resulting from an improper
9	merger, it should be it should not be dismissed as a
10	derivative claim."
11	So the court, in that one paragraph, tells you
12	exactly what it is you need to plead.
13	HON. SAITTA: But it doesn't de it doesn't
14	define any personal property.
15	MR. BARON: No. Because because unique personal
16	property was just a definition of what happens in a
17	merger. And that's why that's why it's not this long
18	dissertation on direct derivative. It is a dissertation
19	on what happens to a shareholder in a merger.
20	00:23:22 And let's not be let's not fool ourselves
21	with what Delaware courts in Gatts [ph] called the
22	what is it called it's called the create or the
23	creativity of lawyers, or the transactional creativity.
24	Because what the what the defendants did or
25	what the lawyers who do this transaction they do a lot

1	Page 22 of different transactions. But at the end of the day
2	we had two companies that became one.
3	We had the larger, private company that controlled
4	the company; they ended up taking the voting rights
5	mostly away from the Parametric shareholders.
6	All the assets were merged; all of the directors
7	were merged the officers were the people who Turtle
8	Beach wanted and the product lines were product lines
9	that Turtle Beach wanted to promote.
10	00:24:08 As a result of that, they had to have SEC
11	approval; there had to be shareholders who had to approve
12	both the stock issuance and the fact that they were going
13	to lose control in order for their to get approvals
14	for the merger which was a merger agreement; and
15	ultimately, for tax reasons and for accounting reasons,
16	the defendants themselves have to acknowledge that Turtle
17	Beach is the acquirer.
18	It's a merger. It's within Cohen. Now
19	00:24:42 HON. HARDESTY: So let me ask you something
20	that, with respect to what you must demonstrate in your
21	complaint, returning to that paragraph we've been talking
22	about; was the sentence, "The shareholder has lost unique
23	personal property, his or her interest in a specific
24	corporation," necessary in the opinion to demonstrate a
25	direct claim
1	

1 MR. BARON: No. HON. HARDESTY: -- versus a derivative claim? 2 MR. BARON: No. It is the definition -- and I think 3 you -- you hit the nail on the head when you said the 4 citation to it is to Parnes. 5 HON. HARDESTY: Mm-hmm. 6 7 MR. BARON: The reason the citation to that sentence 8 is to Parnes is because what Parnes found -- and if you read Parnes in detail, what they said is, we understand 9 10 we have the special injury test, we understand it's kind of confusing, but in a merger shareholders will lose an 11 12 interest in the property. 00:25:33 HON. HARDESTY: So as far as your position and 13 14 your argument is that if this sentence had been deleted 15 from the opinion, uh, you would have a direct claim as long as you could demonstrate that the validity of the 16 17 merger was -- at issue because of wrongful conduct, uh, by a majority shareholders or directors? 18 19 MR. BARON: Yes. 20 HON. HARDESTY: And the measure of your damages 21 would be something that would be determined at trial, uh, 22 based upon the effect of that wrongful conduct? 23 MR. BARON: That is correct. HON. HARDESTY: Okay. I think I understand your 24 25 position.

1	Page 24
1	MR. BARON: Excuse me?
2	HON. HARDESTY: I said, I think I understand your
3	position.
4	00:26:07 MR. BARON: And the interesting thing about
5	following the case or the rules just in the case
6	which is, if we allege a merger, and we allege that it
7	was an improper merger, and we allege that the director
8	breached their fiduciary duties in bringing it about, and
9	we allege that shareholders were damaged by that, we have
10	to prove it. If we prove it, that money goes to
11	shareholders.
12	We don't it doesn't make sense to say, "We don't
13	get the day in court to prove that claim." And
14	defendants' arguments I'm trying to say, we don't
15	is sort of this sky-is-falling approach.
16	00:26:46 They're saying, if you go down the approach of
17	allowing this merger to proceed derivatively, then all
18	sorts of horribles will happen. And they then in
19	various places in their
20	HON. PICKERING: But what how would you
21	distinguish, um, I mean, let's say they sold the major
22	asset for inadequate consideration?
23	MR. BARON: May I ask you a question; was there a
24	merger?
25	HON. PICKERING: No.

1	Page 25 MR. BARON: Then then then Cohen wouldn't
2	apply, and it would be derivative. Next question? That's
3	my point. That's
4	HON. PICKERING: So your point is, anytime there's
5	any kind of stock acquisition as opposed to dollars
6	changing hands, that that automatically makes it into a
7	direct as opposed to a derivative claim?
8	MR. BARON: No. I'm saying if there is a merger,
9	which means that there are two companies that combine
10	into one; one takes over, one doesn't they can even be
11	mergers in influence
12	00:27:33 HON. PICKERING: So that's the litmus test, in
13	your mind. And then you define merger expansively and
14	MR. BARON: Well, I don't even think you need to
15	define merger expansively. I don't think there is a
16	question the defendants ultimately concede from the
17	second paragraph of their brief that this was a merger.
18	And and there is no question that since they
19	concede that the that it's treated as though Turtle
20	Beach was the acquirer and Parametrics was the acquiree
21	[sic] for accounting purposes, that's exactly what
22	happened. So I don't think it's that expansive. And a
23	merger between companies is pursuant to a merger
24	agreement and
25	00:28:09 HON. PICKERING: But analytically, what's the

	Page 26
1	difference?
2	MR. BARON: Between a merger and a non-merger?
3	HON. PICKERING: No. Let's say they divested the
4	they sold some very valuable asset and made a misjudgment
5	and took, you know, stock from the company that they sold
6	it to as the consideration for it
7	MR. BARON: They didn't lose
8	HON. PICKERING: and that that would be, in
9	your estimation, a derivative claim?
10	MR. BARON: In this in that situation, where
11	again, the shareholders didn't have what happened here,
12	which is they lost from 80 80 to 100 percent voting
13	control the ability to vote in and out officers and
14	directors, the ability to proxy contests, the ability to
15	control this the
16	00:28:50 HON. PICKERING: Did they have that before?
17	MR. BARON: Did they?
18	HON. PICKERING: They were minority shareholders
19	before and after; right?
20	MR. BARON: Not in this case. No. They were
21	majority. They they were the the public
22	shareholders, the people who was the class of
23	shareholders that we represent, constituted a majority of
24	ownership.
25	They had about 80 percent ownership of that company;

1	Page 27 that other 20 percent was with officers and directors.	
2	They had they had control as a public shareholder	
3	body, and the way that Delaware talks about control and	
4	4 lack of control	
5	HON. PICKERING: So your clients were the majority,	
6	is what you're saying?	
7	7 MR. BARON: The class as a whole was. Not my clients	
8	in particular. My clients	
9	00:29:29 HON. PICKERING: And the majority voted and	
10	approved this transaction?	
11	MR. BARON: The majority that voted to approve this	
12	transaction was the public shareholders they were not	
13	they were not necessarily officers and directors	
14	and they voted to approve that based upon what we have	
15	alleged was misleading misleading information	
16	HON. PICKERING: Misinformation. Yeah.	
17	MR. BARON: and coercion. But again, defendants	
18	aren't challenging Judge Gonzalez's view of that.	
19	So looking at that sky is falling, the answer is	
20	to your question if there's not a challenge to a	
21	merger, then it's going to likely be derivative.	
22	00:30:01 If there is a dilution claim in which there is	
23	not an expropriation by a, uh, fiduciary and just so	
24	that you're clear, we've cited in our briefs also Nine	
25	Systems as well as Carsanaro both of which say that an	
1		

1	Page 28 expropriation that is brought about by a majority of	
2	interested directors is also a direct claim. And that's	
3	what	
4	HON. PICKERING: Right. But that's not this case;	
5	right?	
6	5 MR. BARON: It could be this case.	
7	7 HON. PICKERING: But that's not what's alleged.	
8	8 MR. BARON: That's not what's alleged.	
9	HON. PICKERING: Yeah.	
10	00:30:34 MR. BARON: It it it isn't. Because we	
11	allege a merger, because we allege specifically into what	
12	the Supreme Court of this state has said said you	
13	must. If you send it back can we allege a claim exactly	
14	like, um, Nine Systems? Yes. We can do that. But in this	
15	state we have a merger.	
16	And we have a clear rule from Cohen that says if you	
17	are challenging the validity of a merger, then that is a	
18	direct claim. That's all we need to plead; that's what we	
19	did plead.	
20	HON. PICKERING: May I ask a question?	
21	00:31:06 HON. HARDESTY: Yes. Of course.	
22	HON. PICKERING: Why would you analytically	
23	explain to me the rationale, um, in in simple terms	
24	for saying it's a direct claim in this sort of merger	
25	context, versus the selling the major asset too cheap	
1		

1	Page 29 context. Philosophically, why should that be the law?	
2	MR. BARON: Philosophically, because you are if	
3	there is a business judgment decision by the board of	
4	4 directors the board of directors manage the assets of	
5	the company as a whole.	
6	00:31:41 And if you are just simply selling off an asset	
7	7 of the company, you are acting as the company as a whole	
8	and therefore the company itself needs to needs to	
9	recover that.	
10	And let's sort of break that down and note	
11	Justice Hardesty did the work that he did in Americo. But	
12	remember, there's it when you choose to bring a	
13	derivative claim, you can bring it either demand futility	
14	or demand refute.	
15	You could just tell the board, I want you to go	
16	back, and I want you to go after the person who	
17	wrongfully gave up corporate money. And then what it does	
18	is it puts people back into the exact same situation they	
19	were.	
20	00:32:18 So for example, if I sold an asset to my	
21	brother-in-law and I'm sorry I'm going [inaudible],	
22	but I'm hoping it's okay with the court if I sold the	
23	asset to my brother-in-law for way too cheap, and I've	
24	hurt that company as a whole I haven't really just	
25	hurt the shareholders, I've just hurt the company as a	
1		

1	Page 30 whole if I go back and I sue sue my the person	
2	who sold us the brother-in-law and get that money	
3	back, then the corporation is in exactly the same	
4	position	
5	HON. PICKERING: But that's a classic derivative	
6	claim. Why isn't that the case in this case?	
7	00:32:48 MR. BARON: Because what happened here	
8	HON. PICKERING: Other than the label merger. But I	
9	mean	
10	MR. BARON: Because as a result of the merger,	
11	Turtle Beach now owns 80 percent of the company. If you	
12	were to go forward and get the money back that the Turtle	
13	that was overpaid for Turtle Beach asset and in the	
14	divestment of that 80 percent ownership interest, then	
15	what do you do with it?	
16	You put it back in a corporation, but that	
17	corporation is 80 percent owned by Turtle Beach, so that	
18	money goes back to Turtle Beach, and you are not	
19	remedying the wrong and giving the people who were hurt	
20	what they deserve	
21	00:33:23 HON. PICKERING: Unless you did rescission.	
22	MR. BARON: But that's not that's not	
23	HON. PICKERING: Yeah.	
24	MR. BARON: damages, and that's not Cohen,	
25	either. And yes, you're right, rescission. But to tell	

	Deres 21
1	Page 31 you the truth, rescinding publically paid
2	HON. PICKERING: Yeah. That's
3	MR. BARON: mergers
4	HON. PICKERING: Yeah. No. You can't
5	MR. BARON: is a nightmare. All right. If there's
6	any other questions? I'll sit down.
7	HON. HARDESTY: I don't think so.
8	MR. BARON: Thank you.
9	HON. HARDESTY: All right. Mr. Hess, we'll give you
10	two minutes.
11	MR. HESS: Yes. The so the issue is what is is
12	talismanic; is it a merger or not a merger? And, again,
13	focusing on the language from [inaudible]
14	00:33:55 HON. HARDESTY: But not necessarily. Let's
15	follow up on the discussion that Justice Pickering and
16	Mr. Baron were just having. It's not talismanic; it
17	really has to do with who receives the damages caused by
18	the improper conduct of the office's directors.
19	If it is a merger, then the shareholders who are
20	merged out, uh, would be the recipient of the damages
21	from the alleged wrongful conduct; correct?
22	00:34:23 MR. HESS: You you are right. But that case
23	is different from this case, because the shareholders
24	were not merged out. And that's the that's that's -
25	- that's

1	Page 32 HON. HARDESTY: Well, not entirely. Because one of	
2	the points that Justice Becker made in the Cohen case	
3	earlier in the opinion is that there may be an impact	
4	on value.	
5	5 Let's take the example that, uh, Mr. Baron and	
6	6 Justice Pickering were commenting about. He sells or a	
7	7 an asset, uh, to his brother-in-law at an understated	
8	price; the company is harmed; a merger occurs.	
9	The value at the merger time is going to be affected	
10	by the, uh, asset that has been sold at an understated	
11	price. Who should receive the benefit? The merger might	
12	have been a different price, if that had been still at	
13	asset of the company; correct?	
14	00:35:10 MR. HESS: Well, so there's there's	
15	there's there's two issues. One, again is, you know,	
16	you have kind of an expropriation issue, um, first and	
17	foremost	
18	HON. HARDESTY: Mm-hmm.	
19	MR. HESS: which is which is which is	
20	different there. But here we're talking about the whole -	
21	- they're selling the whole company. Uh, and and so	
22	the issue here is, you know you know, Mr. Baron's made	
23	much about this kind of this bad guys theory; but	
24	that's been rejected in JP Morgan shareholders'	
25	litigation.	

1	Page 33 Because again, you know, this is not a pass-through
2	remedy. If the \$30 million Mr. Baron hypothetically gets,
3 it's not going to be distributed out, like, right thr	
4	the company it goes in the company the share the
5	share price might not move one cent; right?
6	It just it just this is the they own this
7 part of this company; if it was undervalued the the	
8	the bad actors are going to be out \$30 million, and their
9	benefit is going to be, you know hard to it's hard
10	to monetize it; right?
11	00:35:59 And and focusing just on the Parnes part in
12	just the part is it merger/not merger, Delaware in
13	Dieterich v. Harrer hit this perfectly, in focusing on
14	the language we've been talking about says, that language
15	in "Parnes might be read as suggesting that all
16	shareholder claims for breach of fiduciary duty are
17	direct if they involve the merger. That is not, of
18	course, the law. Even after Tooley, a claim is not direct
19	simply because it is pleaded that way. And mentioning a
20	merger does not talismanically [sic] create a direct
21	action."
22	00:36:30 So you need to go through, at a minimum, Tooley
23	in Delaware, and under Cohen you need to allege the loss
24	of the personal, unique property. That's where
25	HON. HARDESTY: Is there any case that you have

	1	Page 34 found that uses the sentence that Judge Becker used in	
2 this opinion? That was the paragraph that we're talkin			
	3	3 about?	
	4	MR. HESS: Those exact those exact words?	
	5	HON. HARDESTY: Anything close to it.	
	6	6 MR. HESS: Anything close to it? Well, I mean, there	
	7	7 is you know, again, if you look at the acknowledgemen	
	8	8 of the various change in control cases, they don't just	
	9	assume there's a change in control. They go through	
	10	they an analysis.	
	11	00:37:02 If it was just simply, oh, there's a change in	
	12	control; this is an easy one. They wouldn't have had to	
	13	wrestle with it if it was that easy; but they wrestle	
	14	with it. And as a consequence they go through and figure	
	15	out, where was the harm?	
	16	6 Here, there's no divergence between the directors	
	17	and all of the shareholders of Parametric because they	
	18	got the exact same deal.	
	19	There's no no allegation that Turtle Beach sought	
	20	to influence and gave someone a better side deal that	
	21	impacted the value of the merger as a whole. None of	
	22	that.	
	23	00:37:32 And as a consequence, in Delaware under Tooley	
	24	it's a corporate harm if any harm at all; and that remedy	
	25	still exists, as a derivative action here, unlike in	

Page 35 2 Cohen. 3 HON. HARDESTY: Okay. Thank you very much, Mr. Hess. 4 Any questions from the court? 5 All right. Can you please stand submitted? 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25			
 HON. HARDESTY: Okay. Thank you very much, Mr. Hess. Any questions from the court? All right. Can you please stand submitted? All right. Ca	1		Page 35
Any questions from the court? All right. Can you please stand submitted? All right. Can you please stand submitted? All right. Can you please stand submitted?	2	Cohen.	
 All right. Can you please stand submitted? All right	3	HON. HARDESTY: Okay. Thank you very much, Mr.	Hess.
6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24	4	Any questions from the court?	
7 8 9 9 10 11 10 11 12 13 14 15 16 17 18 17 18 19 20 21 22 23 23 23 24 24 24	5	All right. Can you please stand submitted?	
8 9 10 11 11 12 13 14 15 16 16 17 18 19 20 21 21 23 23 24	6		
9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24	7		
10 11 12 13 14 15 16 17 18 19 20 21 22 23 24	8		
11 12 13 14 15 16 17 18 19 20 21 22 23 24	9		
12 13 14 15 16 17 18 19 20 21 22 23 24	10		
 13 14 15 16 17 18 19 20 21 22 23 24 	11		
14 15 16 17 18 19 20 21 22 23 24	12		
15 16 17 18 19 20 21 22 23 24	13		
16 17 18 19 20 21 22 23 24	14		
 17 18 19 20 21 22 23 24 	15		
 18 19 20 21 22 23 24 	16		
19 20 21 22 23 24	17		
20 21 22 23 24	18		
21 22 23 24			
22 23 24			
23 24			
24			
25			
	25		
Page 36 I, Chris Naaden, a transcriber, hereby declare under penalty of perjury that to the best of my ability the above 35 pages contain a full, true and correct transcription of the tape-recording that I received regarding the event listed on the caption on page 1. I further declare that I have no interest in the event of the action. September 11, 2015 Chris Naaden Chris Mana (Parametric Sound Corp., et al. vs. Rakauskas, et al. hearing, 9-1-15)

HEARING - 09/01/2015

Index: \$270,000..alleging

\$	00:12:11 11:19	00:31:41 29:6	8	actors 33:8
Ψ	00:12:40 12:5	00:32:18 29:20		address 6:20
\$270,000 14:24	00:13:30 12:24	00:32:48 30:7	80 19:25 20:11 26:12,25	addressing 6:24
\$30 20:9,10 33:2,8	00:14:12 13:21	00:33:23 30:21	30:11,14,17	advance 14:12
\$63.7 14:25	00:14:49 14:16 00:14:59 14:20	00:33:55 31:14 00:34:23 31:22	9	advantage
0	00:15:37 15:8	00:35:10 32:14	9-1-15 36:10	12:23
	00:16:25 15:22	00:35:59 33:11	92A.315 18:6	affect 5:10 16:11
00:00:00 2:1	00:17:06 16:12	00:36:30 33:22		affected 5:13,
00:00:47 2:13	00:17:43 17:2	00:37:02 34:11	A	16 32:9
00:01:14 2:25	00:18:33 17:18	00:37:32 34:23	abandoned	affecting 6:3
00:01:40 3:9	00:19:14 18:9		14:13	affects 5:16
00:02:12 3:19 00:02:35 4:2	00:19:55 19:2	1	ability 11:3 26:13,14 36:1	affirmative 8:23
00:02:35 4.2 00:03:04 4:12	00:20:29 19:15	1 36:3	absent 8:15,16	afternoon 2:6
00:03:41 4:24	00:21:21 20:6	100 14:22,23 20:2 26:12	11:17 15:4	15:8
00:04:15 5:9	00:22:04 20:20	11 36:5	accounting 22:15 25:21	agree 12:1 19:2
00:04:37 5:19	00:22:38 21:5		acknowledge	agreement
00:05:01 6:1	00:23:22 21:20	2	22:16	22:14 25:24
00:05:31 6:8	00:24:08 22:10 00:24:42 22:19	20 14:22,24 18:16 27:1	acknowledgem ent 34:7	allegation 11:9,11 14:21
00:05:58 6:15	00:25:33 23:13	2013 10:14	acquiree 25:20	34:19
00:06:37 7:2 00:06:57 7:15	00:26:07 24:4	2015 36:5	acquirer 22:17 25:20	allege 13:13,16 24:6,7,9 28:11,
00:07:31 8:4	00:26:46 24:16	3	acquisition	13 33:23
00:08:05 8:14	00:27:33 25:12		25:5	alleged 4:18 5:3 8:9 11:23
00:08:27 8:21	00:28:09 25:25	35 36:2	act 5:13	13:15 15:5,18 18:13 27:15
00:09:18 9:12	00:28:50 26:16	6	acting 29:7	28:7,8 31:21
00:09:49 9:20	00:29:29 27:9 00:30:01 27:22	66689 2:5	action 16:5,11 33:21 34:25	alleges 4:9 21:8
00:10:32 10:13	00:30:34 28:10		36:4	alleging 13:8,
00:11:25 11:5	00:31:06 28:21		actor 11:2	11 14:8 15:2

Litigation Services | 800-330-1112 www.litigationservices.com

Index: allowing..claim

16:3	articulate	16 32:5 33:2	breached 24:8	cash-out 4:11
allowing 24:17	12:18	Baron's 32:22	break 29:10	7:1,23 8:12,13
Americo 29:11	asserting 14:4	based 23:22	briefs 27:24	cashed 19:10
amount 19:11	asset 24:22	27:14	bring 3:3 12:9	Cassity 2:23
analysis 34:10	26:4 28:25 29:6,20,23	basically 12:1	29:12,13	catch 14:6
	30:13 32:7,10,	20:18	bringing 24:8	caused 31:17
analytically 25:25 28:22	13	basis 6:6	brother-in-law	cent 33:5
analyze 9:22	assets 5:8 22:6	Beach 19:25	29:21,23 30:2	challenge
	29:4	20:24 22:8,9,	32:7	27:20
answering 19:9	assume 34:9	17 25:20 30:11,13,17,18	brought 8:5	challenging
	assuming 5:9,	34:19	9:5 17:11 19:15 28:1	27:18 28:17
answers 8:22	14	Becker 32:2		chancery
anytime 25:4	Atwood 15:11	34:1	bulk 16:25	10:14,21 11:1
apologize 19:9	automatically	begin 2:13	business 29:3	change 20:20
appears 6:10	25:6	beginning 6:11	C	34:8,9,11
apply 10:25	awarded 20:5	17:20		changing 25:6
25:2		behalf 2:4,22,	called 21:21,22	cheap 28:25
appraisal	B	23	candidly 4:22	29:23
16:14,18	back 7:21 16:9	belong 3:14	caption 36:3	Chief 6:22
approach 24:15,16	19:21 20:10	4:7	Carsanaro	choose 16:18,
	28:13 29:16,18 30:1,3,12,16,	benefit 20:12, 15 32:11 33:9	10:15,19,22,24	23,24 29:12
approval 22:11	18		11:18 27:25	chose 16:12
approvals 22:13	bad 12:2 32:23	bet 2:9	case 2:5 3:2,	Chris 36:1,6
	33:8	Bice 12:15	20,22,23 5:12 6:10,25 8:5,12,	citation 9:12
approve 22:11 27:11,14	Baron 2:15	bit 10:16	13,15,22 9:15	23:5,7
approved	15:7,8,9 16:6,8	Bloodhound	10:17,25 11:8,	cited 27:24
27:10	17:22,25 18:14,22,24	10:15	19,20 15:1,9 18:10,11 20:8,	cites 17:4,9
argued 3:13	19:1,5,8 21:15	board 11:23	24 24:5 26:20	claim 3:3 4:11,
15:23	23:1,3,7,19,23	20:3 29:3,4,15	28:4,6 30:6	21 5:20 6:6,16
argument 2:18	24:1,4,23 25:1, 8,14 26:2,7,10,	body 27:3	31:22,23 32:2 33:25	8:1,2,13 9:5,9,
3:1 5:11 20:10	17,20 27:7,11,	brand 8:19		18 10:6 11:21 12:9 13:6 17:6,
23:14	17 28:6,8,10	breach 3:3	cases 17:4 19:19 34:8	11,17 18:18
arguments	29:2 30:7,10, 22,24 31:3,5,8,	19:23 33:16	cash 19:11	19:2 20:10
24:14				21:10 22:25

Index: claims..Delaware

			index: cia	aimsDelaware
23:2,15 24:13 25:7 26:9	colleagues 12:7	31:18,21 confer 15:21	corporations 19:21	D
27:22 28:2,13, 18,24 29:13 30:6 33:18	colloquial 18:4 combine 25:9	confusing 23:11	correct 6:17 7:6,10 15:6	damaged 24:9
claims 3:14,23, 24 5:11 6:12 33:16	commencemen t 2:17	connection 3:5 16:4	18:19 23:23 31:21 32:13 36:2	damages 6:18 20:5 21:8 23:20 30:24 31:17,20
clarified 10:10	commenting 32:6	consequence 5:22 34:14,23	counsel 2:21 13:25 17:20 18:2 19:17	date 18:20
clarify 8:20	companies 22:2 25:9,23	consideration 24:22 26:6	Counselor	David 15:10 day 22:1 24:13
class 26:22 27:7	company 3:6, 8,15,16 4:7,8,	constituted 26:23	10:13 country 16:13	de- 21:13
classic 30:5	14,16,18,24 5:1,4,20,22,24	contests 26:14	couple 17:4	deal 7:22 11:12,15 13:4,
classified 9:8 17:16	8:25 13:2,19 14:17,24 20:1,	context 6:25 19:22 28:25	court 2:3 3:2 6:11 9:23	5,14 14:3 34:18,20
clear 2:10 4:5 6:24 20:22 27:24 28:16	23,24 22:3,4 26:5,25 29:5,7, 8,24,25 30:11 32:8,13,21	29:1 control 19:25 22:13 26:13,15	10:15,22,23 11:1 15:5,12 16:19,20,21 19:15,16 20:5	dealt 7:22 decision 3:10 4:12 6:10 29:3
clients 27:5,7,8	33:4,7	27:2,3,4 34:8, 9,12	21:11 24:13 28:12 29:22	declare 36:1,4
close 34:5,6 co-counsel	company's 3:4 5:7 13:19	controlled 20:11 22:3	35:4	defendants 2:21,22,24,25
2:22 15:10 coercion 27:17	complaint 16:3 21:8 22:21	controller 13:4	court's 3:10 8:6	21:24 22:16 25:16 27:17
Cohen 3:11,22	concede 25:16,19	controlling 8:7,16	courtroom 2:10	defendants' 24:14
4:5,15 6:1,9,24 7:5,11,13,22 8:11,14,20,22	conceded 13:19,22	cool 13:19 Corp 36:9	courts 3:21 16:13 21:21	define 3:25 21:14 25:13,15
9:4,15 12:6,8, 13 15:14,20	concept 12:20	corporate 2:22	cover 15:14 create 21:22	definition 21:16 23:3
16:7,8,9,10 18:1,9 19:11	concern 12:19	3:9,14 4:22 6:13 7:25 8:18 11:2,3 20:13,	33:20	Delaware 8:4,
21:5 22:18 25:1 28:16	concerns 3:2	14 29:17 34:24	creativity 21:23	12,18 9:23 10:11,13,14,16 12:4 15:4
30:24 32:2 33:23 35:2	conclude 11:9 conduct 6:2,16	corporation 2:2 3:15 4:6 9:11 20:11	credit 11:21	16:21 19:13 21:21 27:3
Cohen's 3:19 19:5,9	9:7,19 10:1,4 17:13 23:17,22	9.1120.11 22:24 30:3,16, 17		33:12,23 34:23

Index: Delaware's..figure

				ale sligule
Delaware's	direct 3:23	dissenter 7:16	easy 34:12,13	exercise 7:5
10:23	4:11,21 6:6,12,	18:6,7,11	economic 11:5	exists 4:24
deleted 23:14	15 8:2,13 9:9	dissenter's		14:18 34:25
demand 3:17	10:5 11:21,24 13:6 16:5 17:2,	16:11 18:7,8	effect 23:22	
29:13,14	6,17 21:18	dissenters' 7:5	Eighth 2:3	expansive 25:22
	22:25 23:15		emerge 13:1	-
demonstrate	25:7 28:2,18,	dissenting 4:8,	_	expansively
22:20,24 23:16	24 33:17,18,20	13 7:6,17 9:5	emphasize	25:13,15
derivative 3:24	directed 2:23	17:11,21 18:1, 3	21:2	explain 3:22
5:12 6:14 10:6		5	end 22:1	28:23
12:9 17:2	direction 10:17	dissertation	ended 22:4	explaining
19:19 20:9,17	directly 3:4 8:5	21:18		17:18
21:10,18 23:2	19:9	distinction	enlighten 3:21	
25:2,7 26:9 27:21 29:13	director 2:21	7:23	enormous 7:24	explains 21:6
30:5 34:25	24:7	distinguish		Expropriated
		24:21	entitled 18:13, 14	11:5
derivatively	directors 3:4		14	expropriation
3:17 20:8	6:3,5,17 9:8	distributed	entity 7:20	8:8,17 11:2,17,
24:17	11:12 13:14 16:4 17:15	33:3	equally 12:22	18 15:4 27:23
deserve 30:20	19:23 22:6	District 2:3		28:1 32:16
detail 23:9	23:18 26:14	divergence	essence 5:5 14:8	extant 19:3
	27:1,13 28:2	13:3 34:16	14.8	extant 19.5
determined	29:4 31:18		essentially	F
23:21	34:16	divested 26:3	14:21	F
determining	disappear 12:4	divestment	established	fact 15:15,22
10:5		30:14	3:13	19:23,25 22:12
deviate 10:16	discussion	dollars 25:5	estimation	
	31:15		26:9	facts 11:10
Dieterich 33:13	disinterested	DOUGLAS		faith 12:2
difference 3:23	19:24	10:13 11:19	et al 2:2 36:9	falling 27:19
7:24 18:14	disjointed	13:25 17:20,23	ethereal 14:16	-
26:1	14:14	dues 19:24	avent 7:21	favor 11:13
diluted 5:4,11		duties 3:4 24:8	event 7:21 36:3,4	19:3
11:15	dismiss 15:17			favored 6:5
dilution 5:15,	dismissed	duty 33:16	evolved 9:25	feel 3:22
19,21,25 6:2	21:9		exact 29:18	1 221 3.22
7:22 8:1,2,5,15	dispute 10:21	E	34:4,18	fiduciary 3:4
15:1,3 27:22	-		exclusive	19:24 24:8
	dissent 7:4	earlier 12:15	16:15	27:23 33:16
dilution's 5:9	dissented 7:1	32:3		figure 34:14
			Excuse 24:1	

				· IIIIuIssue
find 15:1	Gonzalez's	34:15,24	13,20,24 24:2,	independent
fit 11:18	27:18	harmed 15:18	20,25 25:4,12,	3:7
III 11.10	good 2:6 10:25	32:8	25 26:3,8,16,	individual 9:9
fits 10:17	15:8	52.0	18 27:5,9,16	17:16
flawed 4:9	13.0	harms 3:14 4:6	28:4,7,9,20,21,	17.10
Haweu 4.9	Gordon 2:21	Harrer 33:13	22 30:5,8,21,	individually
focusing 31:13	governing 10:9		23 31:2,4,7,9,	2:4
33:11,13	governing 10.5	head 15:13	14 32:1,18	influence 11:3
follow 31:15	grabbing 10:9	23:4	33:25 34:5	25:11 34:20
	group 13:3	hearing 36:10	35:3	
fool 21:20	14:14		honest 19:17	information
foremost 32:17		held 8:1		27:15
	guy 12:22	helped 12:16	Honor 7:10	injury 19:18
forward 15:23,	guys 32:23	-	15:8	20:21 21:7
24 30:12	guyo 02.20	Hess 2:6,9,12,	Honors 2:6	23:10
found 15:5		16,19,20 4:2		
17:14 23:8	н	5:15,19 6:19,	hoping 29:22	instance 8:5
34:1		22 7:3,6,10,13,	horribles 24:18	instances 8:3
	hands 25:6	15 8:21 9:2,20		
framework	happen 24:18	10:3,19 11:25	hurt 20:4	interest 2:5 3:6
12:4		12:10,15,24	29:24,25 30:19	4:14,16 5:4,24
fraudulent 8:8,	happened 9:22	13:10,13,18,23	hypothetically	8:25 9:10
16	11:10 16:10	14:2,6,10,23	33:2	12:19 17:9
	25:22 26:11	31:9,11,22		19:14 22:23
full 36:2	30:7	32:14,19 34:4, 6 35:3		23:12 30:14 36:4
futility 29:13	happier 13:17	0 33.3		50.4
-	hard 33:9	hit 10:13 15:13	identical 19:12	interested 28:2
G		23:4 33:13		interesting
	Hardesty 2:1,8,	hold 2:8 4:25	impact 32:3	9:12 11:11
Gatts 21:21	10,13,17 6:1,		impacted	24:4
	21 7:2,14 9:1,	holding 8:6	34:21	
gave 29:17	3,22 14:3,7	HON 2:1,8,10,		interests 13:3
34:20	15:7,13 17:3	13,17 3:19 5:9,	improper 21:8	introducing
Gentile 8:6	22:19 23:2,6,	18 6:1,21 7:2,	24:7 31:18	2:14
10:23	13,20,24 24:2 28:21 29:11	4,8,12,14 8:20	inadequate	
	31:7,9,14 32:1,	9:1,3,22 10:13	24:22	invalid 4:9
GIBBONS 3:19	18 33:25 34:5	11:19,20 12:5,	inaudible 2:6,	involve 33:17
5:9,18	35:3	11,17 13:8,12,	12 7:9 9:2	involved 8:3
give 19:25		16,21,25 14:3,	10:20 12:10	
20:15 31:9	Hardesty's	7,20 15:7 16:2,	13:24 19:5	issuance 22:12
giving 30:19	15:25	7 17:20,23	29:21 31:13	issue 4:4 5:21
	harm 3:7 4:18	18:12,18,23,25		6:22 7:11,16
Gonzalez	5:3 10:12	19:2,7 21:13	Incorporated	11:7 14:3
15:15 17:14		22:19 23:2,6,	3:11	

Index: issued..non-merger

L bel 30:8 ck 27:4 nguage 6:8 :3 31:13 3:14 ger 22:3 v 3:9 7:25 :12,19 10:9,	lost 4:10,15 6:12 8:24 9:10 12:8,22 14:18 22:22 26:12 lot 4:12 11:9 21:25 loyalty 19:24 M	11:20 12:8 14:9 15:19,24 16:4 17:5,12 18:21,24 19:13 20:21,23 21:2, 7,9,17,19 22:14,18 23:11,17 24:6, 7,17,24 25:8, 13,15,17,23	27:16 misjudgment 26:4 misleading 27:15 mismanageme nt 6:13
bel 30:8 ck 27:4 nguage 6:8 :3 31:13 3:14 rger 22:3 w 3:9 7:25	12:8,22 14:18 22:22 26:12 lot 4:12 11:9 21:25 loyalty 19:24	16:4 17:5,12 18:21,24 19:13 20:21,23 21:2, 7,9,17,19 22:14,18 23:11,17 24:6, 7,17,24 25:8, 13,15,17,23	26:4 misleading 27:15 mismanageme nt 6:13
ck 27:4 nguage 6:8 :3 31:13 3:14 rger 22:3 v 3:9 7:25	22:22 26:12 lot 4:12 11:9 21:25 loyalty 19:24	18:21,24 19:13 20:21,23 21:2, 7,9,17,19 22:14,18 23:11,17 24:6, 7,17,24 25:8, 13,15,17,23	26:4 misleading 27:15 mismanageme nt 6:13
ck 27:4 nguage 6:8 :3 31:13 3:14 rger 22:3 v 3:9 7:25	lot 4:12 11:9 21:25 loyalty 19:24	20:21,23 21:2, 7,9,17,19 22:14,18 23:11,17 24:6, 7,17,24 25:8, 13,15,17,23	misleading 27:15 mismanageme nt 6:13
nguage 6:8 :3 31:13 3:14 rger 22:3 w 3:9 7:25	21:25 Ioyalty 19:24	7,9,17,19 22:14,18 23:11,17 24:6, 7,17,24 25:8, 13,15,17,23	27:15 mismanageme nt 6:13
nguage 6:8 :3 31:13 3:14 rger 22:3 w 3:9 7:25	21:25 Ioyalty 19:24	22:14,18 23:11,17 24:6, 7,17,24 25:8, 13,15,17,23	mismanageme nt 6:13
:3 31:13 3:14 r ger 22:3 w 3:9 7:25	loyalty 19:24	23:11,17 24:6, 7,17,24 25:8, 13,15,17,23	nt 6:13
3:14 • ger 22:3 w 3:9 7:25		7,17,24 25:8, 13,15,17,23	nt 6:13
ger 22:3 w 3:97:25	M	13,15,17,23	
v 3:97:25	М		
v 3:97:25		00.0 07.04	Mm-hmm 5:18
		26:2 27:21	7:2,14 23:6
:12,19 10:9,	made 4:12 26:4	28:11,15,17,24	32:18
	32:2,22	30:8,10 31:12,	monotine.
5 13:1 20:14	52.2,22	19 32:8,9,11	monetize
9:1 33:18	major 4:22	33:12,17,20	33:10
Nore 2.14	24:21 28:25	34:21	monetized
•	majority 0.7	merger/pot	4:19
1.23,25			40.00
t 13:24 18:16	-	33.12	money 19:20
ath, 17.1	,	mergers 25:11	24:10 29:17
igtny 17:1	27.3,9,1120.1	31:3	30:2,12,18
/el 4:20	make 24:12	middle 17.10	Morgan 32:24
ore 11.1	makes 25.6		mation 45.47
/ers 11:4	IIIdkes 20.0	million 14:25	motion 15:17
lines 16:20	manage 29:4	20:9,10 33:2,8	move 33:5
2:8	marginalized	mind 25:12	1 40 40
ted 20.2	_	11111 u 25.15	moved 19:16
ted 30:3	14.21	minimum	moving 10:17
gation 14:12	matters 12:5	33:22	-
2:25	maana 10:10	minority 2.2	multiple 5:13
05.40			murky 3:24
nus 25:12	25:9	,	
ng 3:19,20	measure 6:18		
•	23:20	20.10	N
0.00	members 20.2	minority's 5:16	
nger 3:20	members 20:3	minute 10.24	Naaden 36:1,6
se 3:6 8:24	mentioning		nail 15:13 23:4
	33:19	minutes 13:24	
6:7		31:10	name's 2:20
	_	Miraga 2:11	necessarily
ses 4:14	31:20,24	winage 3.11	27:13 31:14
ss 9:15 14:4.	merger 4:9,10,	misconduct	
	•	16:3	nightmare 31:5
	17,19,23 8:12,		non-merger
	13 9:6,19	wisintormation	26:2
	wyers 2:14 1:23,25 it 13:24 18:16 ngthy 17:1 vel 4:20 vers 11:4 es 16:20 2:8 ited 36:3 igation 14:12 2:25 mus 25:12 ng 3:19,20 1:17 23:16 nger 3:20 se 3:6 8:24 2:13 23:11 6:7 ses 4:14 ss 9:15 14:4, 7,11 21:3 3:23	wyers 2:14 1:23,25 majority 9:7 14:12,15 17:15 23:18 26:21,23 ngthy 17:1 27:5,9,11 28:1 vel 4:20 make 24:12 vers 11:4 makes 25:6 es 16:20 manage 29:4 2:8 marginalized ted 36:3 14:21 gation 14:12 matters 12:5 2:25 measure 6:18 3:19,20 measure 6:18 1:17 23:16 23:20 nger 3:20 members 20:3 se 3:6 8:24 33:19 6:7 merged 22:6,7 ses 4:14 31:20,24 ss 9:15 14:4, merger 4:9,10, 11 6:4,16 7:1, 11 6:4,16 7:1, 3:23 17,19,23 8:12,	wyers 2:14 majority 9:7 1:23,25 majority 9:7 1:123,25 14:12,15 17:15 it 13:24 18:16 23:18 26:21,23 ngthy 17:1 27:5,9,11 28:1 ivel 4:20 make 24:12 ivel 4:20 make 24:12 ivers 11:4 makes 25:6 es 16:20 manage 29:4 2:8 marginalized matters 12:5 33:22 gation 14:12 matters 12:5 2:25 measure 6:18 1:17 23:16 23:20 merger 3:20 members 20:3 merged 22:6,7 33:19 6:7 merged 22:6,7 se 9:15 14:4, merger 4:9,10, 11 6:4,16 7:1, 16:3 31:20,24 misconduct 16:3 17,19,23 8:12,

HEARING - 09/01/2015

Index: notable..purposes

			1110.011 110.00	abrepurposes
notable 11:8	owns 20:23 30:11	20:12,15,18,22 22:7 26:22	places 24:19	procedurally 12:11
note 29:10		29:18 30:19	plaintiff 12:7 16:10	proceed 16:23,
number 2:5	P	percent 14:22, 23,24 18:16	plaintiffs 7:18	24 20:8 24:17
0	pages 36:2	19:25 20:2,11	11:16 15:9,18	proceeding 2:2 18:11
O'mara 15:10	paid 31:1	26:12,25 27:1 30:11,14,17	plans 4:25	process 4:10
obtain 5:7	panel 3:20	perfected 18:8	plays 3:22 plead 17:13,14	product 6:16
obvious 19:19	paragraph 17:3 21:11	perfectly 33:13	21:12 28:18,19	9:19 22:8
occurs 6:2 32:8	22:21 25:17 34:2	period 16:13	pleaded 33:19	profit 14:24,25 profits 6:12
office's 31:18	parametric 2:2	perjury 36:1	pleading 16:5	promote 22:9
officers 6:5	11:12,13 14:18	person 29:16 30:1	pleasure 2:19	properly 9:8
16:3 22:7 26:13 27:1,13	18:15,19,20 19:3 22:5	personal 4:15	pled 15:20 17:16	17:16
one's 5:2	34:17 36:9	8:24 9:10,16 14:5,7 19:14	point 4:13,17	property 4:16 8:24 9:10,16
opinion 6:11	Parametric's 5:17	21:4,14,15 22:23 33:24	6:24 7:21 12:25 25:3,4	14:5,8 21:4,14, 16 22:23 23:12
16:25 17:2 22:24 23:15	Parametrics	ph 21:21	pointed 18:1	33:24
32:3 34:2	25:20 Parnes 10:10	Philosophically	points 32:2	proposition 17:5
opportunities 6:13	17:4,7,9 19:12	29:1,2	popped 20:10	prove 24:10,13
opportunity	21:6 23:5,8,9 33:11,15	phrase 9:4 17:8	position 16:2 19:12 23:13,25	proxy 26:14
7:18	part 5:5 7:19	Pickering 7:4,	24:3 30:4	pseudo-
opposed 25:5, 7	9:7,16 11:22 14:22 17:15	8,12 11:20 12:1,5,11,17	Potasher 13:14	reverse 18:22
opposing 12:6	20:22 33:7,11, 12	13:8,12,16,21	power 20:3	public 14:14 26:21 27:2,12
order 5:7 22:13	parties 2:5	14:20 16:2,7 18:12,18,23,25	pre-tooley 10:10	publically 31:1
overpaid 30:13	pass-through	19:2,7 24:20, 25 25:4,12,25	price 6:3 32:8,	pull 11:3
overpay 19:20	33:1	26:3,8,16,18 27:5,9,16 28:4,	11,12 33:5	pure 8:2
owned 30:17	passed 7:13	7,9,20,22 30:5,	prior 11:6,7 private 22:3	purport 11:16
ownership 18:16 26:24,25	Peek 15:16	8,21,23 31:2,4, 15 32:6	private 22:3	purpose 18:10
30:14	penalty 36:1 people 5:13	place 20:12	problem 9:20	purposes 8:21 18:11 25:21
	heohie 0.19		20:6	
	I	I	I	I

Index: pursuant..special

r			±	
pursuant 25:23	realize 21:1	rescinding 31:1	section 17:8	shareholders' 32:24
pursued 3:15,	reason 19:15,	51.1	seek 3:14	32.24
16	16 23:7	rescission 30:21,25	seeking 18:6	shares 4:10,25 5:6 14:18
put 4:15 11:4	reasons 22:15	,	selling 28:25	
17:21 30:16	receive 32:11	Resorts 3:11	29:6 32:21	show 8:23
puts 29:18	received 11:12	respect 22:20	sells 32:6	sic 25:21 33:20
Q	36:2	rest 15:22	send 28:13	side 34:20
	receives 31:17	result 9:7	sense 4:12	sidelines 12:12
question 3:12 8:22 9:14,18	recipient 31:20	15:19 17:13 22:10 30:10	24:12	sides 3:13
12:7 15:14,16	recognized	resulting 21:8	sentence 9:9,	simple 28:23
16:14 21:3	11:1	-	13 17:19 21:3	simply 9:18
24:23 25:2,16,	recognizing	returning	22:22 23:7,14	17:5 29:6
18 27:20 28:20	4:6	22:21	34:1	33:19 34:11
questions 9:6	recover 29:9	reverse 18:20	separate 16:22	single 11:22
15:22 17:12	refute 29:14	Richard 2:21	September	12:21
31:6 35:4	rejected 32:24	Rick 15:11	36:5	sir 14:2
quote 17:11	relating 6:12	rights 7:5 11:5	set 3:18 4:5 8:4	sit 13:25 31:6
R		14:15 16:11,	share 3:16 5:3,	situation 17:24
	remedy 4:20	14,18 18:8	23,24 33:4,5	20:7 26:10
raised 9:14	7:13 18:12	22:4	shareholder	29:18
	33:2 34:24	rise 16:4	3:3 4:8,14,19,	1 07 40
Rakauskas 2:4	remedying	Debert 0.00	20 6:25 8:7,16	sky 27:19
36:9	30:19	Robert 2:23	9:6,9 12:20,21	sky-is-falling
Randall 15:9	remember	rule 21:5 28:16	17:11,21 18:1,	24:15
rata 5:22.24	16:10 29:12	rules 24:5	19,20 19:4,10	sold 24:21
rata 5:23,24			21:19 22:22	26:4,5 29:20,
rationale 28:23	represent 11:16 15:9	ruling 10:14	27:2 33:16	22 30:2 32:10
re- 12:12	26:23	run 12:21 19:3	shareholders	sort 19:16
read 8:11,14		running 20:24	3:16 5:7,10,16,	24:15 28:24
12:12,13 16:6,	representing		19 6:7 8:17 9:8 11:6,16 13:2,5	29:10
7,8 17:3,8,10	2:25	S	14:14 17:15	corts 24.10
23:9 33:15	required 15:20		18:15 20:2	sorts 24:18
	requirement	SAITTA 8:20	22:5,11 23:11,	sought 14:12
reading 11:21	9:15	21:13	18 24:9,11	34:19
real 2:4 16:16			26:11,18,22,23	Sound 2:2 36:9
18:17	requirements	schemes 16:22	27:12 29:25	
reality 5:2	3:18	sec 2:8 22:10	31:19,23 34:17	special 11:14
				19:18 20:21
	l	I	I	l

Index: specific..wanes

21:7 23:10	subsequent	tax 22:15	transcriber	United 3:10 8:1
specific 3:17	9:23	teaching 10:23	36:1	unlike 34:25
8:3 9:11 12:19,	sudden 13:7	Tech 10:15	transcription	usurpation
20 22:23	sue 30:1		36:2	6:13
specifically	suffer 3:6	technical 7:9 18:2,5	treated 25:19	
3:10 28:11			treatises 9:24,	V
stage 16:5	suffered 3:7 5:25	tells 21:5,11	25	
stand 17:5		term 18:4	trial 23:21	validity 9:6 17:12 23:16
35:5	suggesting 33:15	terms 7:3 10:4	triangular	28:17
standard 4:5	suit 20:17	28:23	18:21,24	valuable 26:4
standing 12:9		test 9:16 10:1,	true 4:21 5:9	
15:21	supposed 20:14	4,7,8,11 12:2 19:18 20:19	20:4 36:2	vernacular 7:8
start 13:6		23:10 25:12	truth 31:1	versus 2:2 3:23 10:15
stat 18:5	Supreme 8:6 9:23 10:22	tests 9:24	Turtle 19:25	23:2 28:25
	28:12		20:24 22:7,9,	viable 16:24
state 28:12,15	surviving 4:17	theory 32:23	16 25:19	
states 3:10 8:1	U U	thing 24:4	30:11,12,13, 17,18 34:19	view 15:25 27:18
9:5	Systems 27:25 28:14	things 6:10,20		
statute 3:18 18:5	20111	8:9,10	two-part 20:19	vindicate 3:14
	T	tied 12:20	U	vindicated 4:8
statutory 16:22		time 4:20 16:13		virtue 12:8
stays 20:17	takes 25:10	32:9	ultimately	14:22 18:13
Stein 15:11	taking 22:4	today 3:1	20:4,5 22:15	Vitie 2:3
step 16:9	talismanic	told 11:14	25:16	vote 20:3 26:13
Stigi 2:20	31:12,16	Tooley 9:23	understand	voted 27:9,11,
	talismanically	10:8,10 12:4	23:9,10,24 24:2	14
stock 12:22 22:12 25:5	33:20	19:16 20:6,19		voting 11:5
26:5	talk 9:1	33:18,22 34:23	understated 32:7,10	14:12,15 22:4
struggle 16:16,	talking 18:3	totally 11:25		26:12
17	21:1 22:21	transaction 3:5	undervalued 5:20,22 33:7	VTBH 5:8
stub 18:16	32:20 33:14 34:2	5:1,6 11:7	unique 6:5	
subject 3:17		21:25 27:10,12	9:10,16 14:4,7	W
-	talks 17:8 27:3	transactional	17:9 19:14	Wait 16:2
submit 10:3,20	tape-recording	21:23	21:4,15 22:22	
submitted 35:5	36:2	transactions 22:1	33:24	wanes 6:9 12:17
		22.1		

wanted 22:8,9
waxes 6:9 12:17
weighing
16:14
well-developed 3:9
win 20:7
word 17:21
words 34:4
work 20:14 29:11
worry 19:22
worse 13:5,14
wrestle 34:13
writ 2:1
wrong 5:14
12:21 18:13 20:13,18 30:19
wrongdoing 11:22
wronged 20:16
wrongful 6:2,
16 9:7,19 10:1,
4 17:13 23:17, 22 31:21
wrongfully
29:17

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,	Case No. 66689 Electronically Filed Sep 18 2015 02:54 p.m. Tracie K. Lindeman Clerk of Supreme Court District Court No. A-13-686890-B Dept. No. XI
V.	
THE EIGHTH JUDICIAL DISTRICT COURT, in and for the County of Clark, State of Nevada, and THE ELIZABETH GONZALEZ, District Judge Respondents,	
and	
VITIE RAKAUSKAS, individually and on behalf of all others similarly situated, and Intervening Plaintiffs RAYMOND BOYTIM and GRANT OAKES, Real parties in interest.	
	J

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

RICHARD C GORDON, ESQ. NEIL A. STEINER, ESQ. (Admitted Pro Hac Vice) Nevada Bar No. 9036 DECHERT LLP 1095 Avenue of the Americas KELLY H. DOVE, ESQ. Nevada Bar No. 10569 New York, NY 10036 SNELL & WILMER L.L.P. Telephone: (212) 698-3822 E-mail: Neil.steiner@dechert.com 3883 Howard Hughes Parkway, Suite 1100 JOSHUA D. N. HESS, ESQ. (Admitted Pro Hac Vice) Las Vegas, Nevada 89169 DECHERT LLP Telephone: (702) 784-5200 One Bush Street, Suite 1600 E-mail: rgordon@swlaw.com San Francisco, CA 94104 kdove@swlaw.com Telephone: (415) 262-4583 E-mail: Joshua.Hess@dechert.com

Attorneys for Petitioners Turtle Beach Corporation and VTB Holdings Inc.

J. STEPHEN PEEK, ESQ. Nevada Bar No. 1758 ROBERT J. CASSITY, ESQ. Nevada Bar No. 9779 HOLLAND & HART L.L.P. 955 Hillwood Drive, 2d Floor Las Vegas, Nevada 89134 Telephone: (702) 669-4600 E-mail: speek@hollandhart.com bcassity@hollandhart.com JOHN P. STIGI III, ESQ. (*Admitted Pro Hac Vice*) SHEPPARD, MULLIN, RICHTER, & HAMPTON LLP 1901 Avenue of the Stars, Suite 1600 Los Angeles, CA 90067 Telephone: (310) 228-3700 E-mail: jstigi@sheppardmullin.com

Attorneys for Petitioners Kenneth Potashner, Elwood Norris, Seth Putterman, Robert Kaplan, Andrew Wolfe, James Honoré

TABLE OF CONTENTS

Page

INTRODU	CTION	J		1		
SUMMARY	Y OF 7	THE T	RANS	ACTION AT ISSUE		
ARGUMEN	NT					
I.	QUE	STION	J 1			
	A.	In Shareholder Suits, Direct Claims Are The Exception To The Rule That Corporations Control Litigation Over Corporate Harms				
	В.	The "Direct Harm," "Special Injury," And "Duty Owed" Tests All Require Dismissal Of Plaintiffs' Claims5				
		1. Plaintiffs' Claims Are Derivative Under The Direct Harm Test (And The Related Duty Owed Test)				
			a.	The Direct Harm Test6		
			b.	The Duty Owed Test10		
		2.	The S	Special Injury Test12		
		3.		tate, Including Nevada, Finds All Claims ving A Merger To Be Direct13		
			a.	Plaintiffs' "Challenging A Merger" Test Cannot Be Reconciled With Any Of The Recognized Tests		
			b.	The <i>Cohen</i> Test Is Closest To The Direct Harm Test17		
II.	QUE	STION	12			
	A.	The C	Genera	l Rule: Dilution Claims Are Derivative Only20		
	B.	Narro Clain Stock	ow Exc ns Are tholder	are And Utah Supreme Courts Recognize A ception To The General Rule That Dilution Derivative Only Where A Controlling Expropriates Value From Public rs		
	C.			Should Decline To Adopt The Delaware ourt's Overbroad <i>Carsanaro</i> Exception27		

TABLE OF CONTENTS (continued)

Page

ONCLUSION

TABLE OF AUTHORITIES

Federal Cases

Amadeus Global Travel Distribution, S.A. v. Ortiz, LLC,	
302 F. Supp. 2d 329 (D. Del. 2004)	11
APA Excelsior III, L.P. v. Windley,	
329 F. Supp. 2d 1328 (N.D. Ga. 2004)	12
Cole v. Ford Motor Co.,	
566 F. Supp. 558 (W.D. Pa. 1983)	3
Gray v. Bicknell,	
86 F.3d 1472 (8th Cir. 1996)	3
Judice's Sunshine Pontiac, Inc. v. Gen. Motors Corp.,	
418 F. Supp. 1212 (D.N.J. 1976)	4
Miller v. Up In Smoke, Inc.,	
738 F. Supp. 2d 878 (N.D. Ind. 2010)	3
Potter v. Janus Inv. Fund,	
483 F. Supp. 2d 692 (S.D. Ill. 2007)	23
Schaffer v. Universal Rundle Corp.,	
397 F.2d 893 (5th Cir. 1968)	3
Sweeney v. Harbin Elec., Inc.,	
2011 U.S. Dist. LEXIS 82872 (D. Nev. July 27, 2011)	
Windsor Shirt Co. v. N.J. Nat'l. Bank,	
793 F. Supp. 589 (E.D. Pa. 1992)	8
State Cases	
Agostino v. Hicks,	
845 A.2d 1110 (Del. Ch. 2004)	6. 7. 8
Altrust Fin. Serv., Inc. v. Adams,	
76 So. 3d 228 (Ala. 2011)	12
Aronson v. Lewis,	
473 A.2d 805 (Del. 1984)	4
Beninati v. Borghi,	
2014 WL 4639447 (Mass. Supp. July 9, 2014)	6
Brehm v. Eisner,	
746 A.2d 244 (Del. 2000)	4
Carsanaro v. Bloodhound Techs., Inc.,	
65 A.3d 618 (Del. Ch. 2013)	passim
Cede & Co. v. Technicolor, Inc.,	L.
634 A.2d 345 (Del. 1993)	11

TABLE OF AUTHORITIES (Continued)

Cohen v. Mirage Resorts, Inc.,
119 Nev. 1, 62 P.3d 720 (2003) passim
Danielewicz v. Arnold,
769 A.2d 274 (Md. App. 2006)23
Dieterich v. Harrer,
857 A.2d 1017 (Del. Ch. 2004)17
Dinuro Invs., LLC v. Camacho,
141 So.3d 731 (Fla. 3d DCA 2014)13
Elsman v. Standard Fed. Bankcorporation,
1999 WL 33453645 (Mich. Ct. App. Mar. 26, 1999)12
Feldman v. Cutaia,
("Feldman I") 956 A.2d 644 (Del. Ch. 2007) passim
Feldman v. Cutaia,
("Feldman II") 951 A.2d 727 (Del. 2008)
G&N Aircraft, Inc. v. Boehm,
743 N.E.2d 227 (Ind. 2001)10
Gatz v. Ponsoldt,
925 A.2d 1265 (Del. 2007) 11, 22, 26
Gentile v. Rossette,
906 A.2d 91 (Del. 2006) passim
Griffin v. Jones,
2015 WL 4776300 (Ky. Ct. App. Aug. 14, 2015)7
Hill v. Ofalt,
Hill v. Ofalt, 85 A.3d 540 (Pa. Super. Ct. 2014)
<i>Hill v. Ofalt</i> , 85 A.3d 540 (Pa. Super. Ct. 2014)
Hill v. Ofalt, 85 A.3d 540 (Pa. Super. Ct. 2014)
Hill v. Ofalt, 85 A.3d 540 (Pa. Super. Ct. 2014)
<i>Hill v. Ofalt,</i> 85 A.3d 540 (Pa. Super. Ct. 2014)
 Hill v. Ofalt, 85 A.3d 540 (Pa. Super. Ct. 2014)
 Hill v. Ofalt, 85 A.3d 540 (Pa. Super. Ct. 2014)
 Hill v. Ofalt, 85 A.3d 540 (Pa. Super. Ct. 2014)
 Hill v. Ofalt, 85 A.3d 540 (Pa. Super. Ct. 2014)
 Hill v. Ofalt, 85 A.3d 540 (Pa. Super. Ct. 2014)
 Hill v. Ofalt, 85 A.3d 540 (Pa. Super. Ct. 2014)

TABLE OF AUTHORITIES (Continued)

Lightner v. Lightner,
266 P.3d 539 (Kan. Ct. App. 2011)
May v. Coffey,
967 A.2d 495 (Conn. 2009)
Parnes v. Bally Entertainment Corp.,
722 A.2d 1243 (Del. 1999)16
Perry v. Cohen,
285 S.W.3d 137 (Tex. Ct. App. 2009)
Ring v. Kaplan,
2012 WL 763582 (Minn. Ct. App. Mar. 9, 2012)12
Sabey v. Howard Johnson & Co.,
5 P.3d 730 (Wash. Ct. App. 2000)7
Schuster v. Gardner,
25 Cal. Rptr. 3d 468 (Cal. Ct. App. 2005) 6, 23
Smith v. Gray,
250 P. 369 (Nev. 1926)11
Sw. Health & Wellness, LLC v. Work,
639 S.E.2d 570 (Ga. Ct. App. 2006)23
Tooley v. Donaldson, Lufkin, & Jenrette, Inc.,
845 A.2d. 1031 (Del. 2004) passim
Torain v. Craig,
289 P.3d 479 (Utah 2012)
Witherbee v. Bowles,
201 N.Y. 427, 95 N.E. 27 (1911)
Yudell v. Gilbert,
99 A.D.3d 108 (N.Y. App. Div. 2012)
State Statutes
Del. Code Ann. tit. 8 § 141(a)4
NRS 78.139(1)
Other Authorities
Cornerstone Research, <i>Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2014 M&A Litigation</i> , at 1, available at https://www.cornerstone.com/GetAttachment/897c61ef-bfde-46e6-a2b8-

5f94906c6ee2/Shareholder-Litigation-Involving-Acquisitions-2014-Review.pdf

TABLE OF AUTHORITIES (Continued)

Page

)
-
-

Introduction

This Court has requested the parties to provide supplemental briefing on two issues relevant to the determination of whether Real-Parties-In-Interest ("Plaintiffs") may directly challenge a stock issuance provided as consideration for a merger between two entities in which Plaintiffs did not own, let alone lose, any shares. First, this Court has asked the parties to consider three tests courts have used to distinguish direct suits from derivative suits—Direct Harm, Special Injury, and Duty Owed—and to recommend which test Nevada should use going forward to replace or clarify the standard previously set in Cohen v. Mirage Resorts, Inc., 119 Nev. 1, 19, 62 P.3d 720 (2003). Although the District Court's order denying Petitioners' motion to dismiss should be reversed under any of these tests because none of them reach the unprecedented conclusion advanced by the District Court that *every* challenge to *every* merger is *always* a direct claim, Defendants maintain that the Direct Harm test already used by New York, Delaware, and most other states—is the most appropriate test.

Second, the Court also asked the parties to consider whether share dilution cases—like the present case—can be brought directly or derivatively. Share dilution cases are unequivocally derivative under all three tests. The <u>only</u> recognized exception to this general rule applies in cases involving allegations of misappropriation of corporate assets by controlling shareholders. Notably, Plaintiffs

1

conceded at oral argument that they have not alleged that such an exception applies here. Exhibit 1, Tr. of Oral Arg., *In re Parametric Sound Corp.*, Case No. 66689 (Nev. Sept. 30, 2015) ("Hr'g Tr.") at 18:12-19:9; 28:4-8.¹

Because the transaction at issue resulted only in a dilution of the Parametric shareholders' shares, the claims are necessarily derivative and the District Court's order should be reversed.

SUMMARY OF THE TRANSACTION AT ISSUE

Plaintiffs are shareholders of a company formerly known as Parametric Sound Corp. ("Parametric"). By the end of 2013, Parametric was a nearly bankrupt company that had failed to bring to market its only potentially marketable asset – audio technology known as Hypersound. VTBH Inc. ("VTBH") was and is a successful developer and marketer of audio components, particularly headsets used in interactive gaming. In the fiscal year of 2013, VTBH had revenues of \$202 million and a profit of \$63.7 million. In August 2013, Parametric and VTBH agreed to the transaction that has given rise to the claims asserted in this case.

In the first part of the transaction, Parametric formed a subsidiary entity, Paris Acquisition Corp. ("Paris"), which VTBH merged into and remained as the surviving

¹ The transcript of the September 1, 2015, oral argument was professionally transcribed by Litigation Services from this Court's certified compact disc of the same for ease of citation in the instant brief.

entity. VTBH's shareholders lost their shares in VTBH and Parametric became the sole owner of VTBH. Because Parametric was *not* one of the merging entities, none of Parametric's voting shareholders were entitled to vote on the merger.

The second part of the transaction provided the consideration to the VTBH shareholders in exchange for their lost shares in VTBH. Instead of providing them with cash for their lost shares (which Parametric did not have), Parametric issued new Parametric stock such that the VTBH shareholders ultimately owned 80% of Parametric. This stock issuance was voted upon and overwhelmingly approved by Parametric's shareholders. No Parametric shareholder was asked to sell his or her shares as part of this transaction.

ARGUMENT

I. QUESTION 1

A. In Shareholder Suits, Direct Claims Are The Exception To The Rule That Corporations Control Litigation Over Corporate Harms.

As a preliminary matter, suits that seek relief for breaches of duties owed by company directors and officers normally belong to the company itself and must be brought either by the company or derivatively by shareholders, if at all.² This rule

² See, e.g., Gray v. Bicknell, 86 F.3d 1472, 1488 (8th Cir. 1996) ("The general rule . . . in breach of fiduciary duty suits" is that "individual shareholders must sue corporate directors and officers derivatively. Only under specific circumstances may an individual pursue such an action directly."); Schaffer v. Universal Rundle Corp., 397 F.2d 893, 896 (5th Cir. 1968) (direct action is the "exception" and "[t]hat exception to the general rule does not arise . . . merely because the acts complained of resulted

follows from the "cardinal precept" of American corporate law "that directors, rather than shareholders, manage the business and affairs of the corporation." *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984) (citing Del. Code Ann. tit. 8 § 141(a)), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

In other words, when a court allows a shareholder to assert a direct claim against a company's directors or officers for breaches of duties to carefully and loyally manage the company, it does so as a narrow exception to the general rule favoring derivative claims, regardless of which test it applies. To do otherwise would ignore the corporate form and usurp claims belonging to the corporation by vesting those claims with individual shareholders who owe no duties whatsoever to the company or the entire body of its shareholders.

In this case, none of the tests identified by the Court would deviate from the general rule that a claim alleging that a stock dilution that diminished *the company's* value, and thus incidentally the *pro rata* value of each share of stock, belongs to the company. Indeed, this is true even in the case of a dilution associated with a merger. *See In re J.P. Morgan Chase & Co. S'holder Litig.*, ("*J.P. Morgan I*") 906 A.2d 808, 812 (Del. Ch. 2005), *aff'd*, ("*J.P. Morgan II*") 906 A.2d 766 (Del. 2006). The

in damage both to the corporation and to the stockholder"); *Miller v. Up In Smoke, Inc.*, 738 F. Supp. 2d 878, 884 (N.D. Ind. 2010) (shareholder asserting direct claim must "overcome the presumption in favor of derivative actions"); *accord Cole v. Ford Motor Co.*, 566 F. Supp. 558, 568-69 (W.D. Pa. 1983); *Judice's Sunshine Pontiac, Inc. v. Gen. Motors Corp.*, 418 F. Supp. 1212, 1222 n.26 (D.N.J. 1976).

universality of this conclusion is underscored by the fact that Plaintiffs here are forced to assert a talismanic "merger" standard that is virtually unknown in the jurisprudence of corporate law and has not been adopted by any State.

B. The "Direct Harm," "Special Injury," And "Duty Owed" Tests All Require Dismissal Of Plaintiffs' Claims.

The three "primary tests" this Court has identified to determine whether a claim by a shareholder is derivative or direct all conclude that Plaintiffs' claims here are derivative. Doc. #15-26806 at 2. The "Direct Harm" test requires consideration of whether the shareholder alleges a wholly independent injury or if the shareholder alleges an injury that is merely incidental to some corporate harm. The "Duty Owed" test essentially asks the same question, but determines whether an injury was to the stockholder or the corporation by asking whether the duty breached was owed to the stockholder or the corporation. The "Special Injury" test requires consideration of whether the alleged injury applied equally to every shareholder or if specific shareholders suffered unique harms.

Instead of adhering to these three recognized tests, Plaintiffs have fabricated a fourth, previously unrecognized "Challenging a Merger" test, which forgoes all of these considerations and allows any challenge to a "merger" (however defined) to proceed directly without any additional analysis whatsoever.

1. Plaintiffs' Claims Are Derivative Under The Direct Harm Test (And The Related Duty Owed Test)

a. The Direct Harm Test

A claim is derivative under the Direct Harm test if the harm from the alleged wrongdoing flows first to the company, and is direct only when the alleged injury to the shareholder is not secondary to the company's loss. As Delaware courts have explained, "[f]or a plaintiff to have standing to bring an individual action, he must be injured *directly* or *independently* of the corporation." *Kramer v. W. Pac. Indus., Inc.,* 546 A.2d 348, 351 (Del. 1988) (emphasis in original). In other words, "the inquiry should focus on whether an injury is suffered by the shareholder that is not dependent on a prior injury to the corporation." *Agostino v. Hicks*, 845 A.2d 1110, 1122 (Del. Ch. 2004). New York has also adopted this test as a "common sense approach." *Yudell v. Gilbert*, 99 A.D.3d 108, 114 (N.Y. App. Div. 2012). In addition to Delaware and New York,³ more jurisdictions employ a "Direct Harm" test than any other test.⁴

³ As recognized in *Cohen*, this Court "relies on Delaware and New York case law in interpreting Nevada's corporate merger law." *Cohen*, 119 Nev. at 26.

⁴ See, e.g., Schuster v. Gardner, 25 Cal. Rptr. 3d 468, 474 (Cal. Ct. App. 2005) ("An individual cause of action exists only if damages of the shareholders were not incidental to damages of the corporation") (emphasis in original); *Hill v. Ofalt*, 85 A.3d 540, 548 (Pa. Super. Ct. 2014) ("[A] shareholder must allege a direct, personal injury – that is independent of an injury to the corporation – and the shareholder must be entitled to receive the benefit of any recovery"); *accord Beninati v. Borghi*, 2014 WL 4639447, at *24 (Mass. Supp. July 9, 2014); *Perry v. Cohen*, 285 S.W.3d 137, 144 (Tex. Ct. App. 2009); *Lightner v. Lightner*, 266 P.3d 539 (Kan. Ct. App. 2011); *Sabey v. Howard Johnson & Co.*, 5 P.3d 730, 735 (Wash. Ct. App. 2000); *Griffin v. Jones*, 2015 WL 4776300, at *5 n.2 (Ky. Ct. App. Aug. 14, 2015).

The current, prevailing articulation of this test was stated in Delaware in 2004 in *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d. 1031(Del. 2004). After a thorough review of over 50 years of caselaw, the Delaware Supreme Court affirmed the Chancery Court's analysis in *Agostino* and arrived at the following articulation of the "Direct Harm" standard:

[A] court should look to the nature of the wrong and to whom the relief should go. The stockholder's claimed direct injury *must be independent* of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail *without showing an injury to the corporation*.

Tooley, 845 A.2d at 1038-39 (emphasis added). The Court summarized this standard in a two-part test: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Id.* at 1033. The second prong should "logically follow" the first. *Id.* at 1036.

In applying the Direct Harm test, courts do not simply accept a complaint's conclusory allegation of direct harm. *See, e.g., Feldman v. Cutaia*, ("*Feldman I*") 956 A.2d 644, 659-60 (Del. Ch. 2007), *aff'd* ("*Feldman II*") 951 A.2d 727, 733 (Del. 2008) (recasting a derivative claim as direct is "disfavored by Delaware courts"). Rather, the focus is on the essential nature of the plaintiff's claim. Here, the only form of damages that Plaintiffs request is a "top-up" of the value of the Parametric shares they continue to hold. *See* Hr'g Tr. at 18:14-17 (Plaintiffs seek "the difference

in the value [between] what the Parametric shareholders really got . . . and what the real value was"); PA 548 ("here, it is axiomatic that a damages computation 'may include the difference, if any, between the merger price and the fair value of the shares""). But corporate shares have no value independent from the value of the corporation itself. *See, e.g., Windsor Shirt Co. v. N.J. Nat'l. Bank*, 793 F. Supp. 589, 595-96 (E.D. Pa. 1992) ("To a businessperson, the market capitalization of a company's stock is the company's market value"). The shares are only undervalued if *the corporation* is undervalued. As a result, Plaintiffs' claim that the value of their shares has been harmed fundamentally seeks to remedy a corporate harm. *Agostino*, 845 A.2d at 1122 ("the inquiry should focus on whether an injury is suffered by the shareholder that is not dependent on a prior injury to the corporation.").

This principle has been squarely addressed in substantially similar circumstances in *J.P. Morgan I*. In that case, the Delaware Chancery Court addressed a transaction like the present one that involved a merger in which a dilutive stock issuance was offered as consideration for the merger. The stockholder plaintiffs, like the plaintiffs in this case, sued the board of directors for breach of fiduciary duty by claiming that the "issuance of stock to consummate the merger" diluted their collective ownership. *J.P. Morgan I*, 906 A.2d at 812. Addressing *Tooley*'s first prong, the court observed that, distilled to its essence, plaintiffs' claim alleged that J.P. Morgan "overpaid for Bank One." *Id.* at 818. It also noted that, "[i]f [J.P. Morgan]

had paid cash for Bank One, the plaintiffs' claim would clearly be derivative," as "[t]he only harm to the stockholders would have been the natural and foreseeable consequences of the harm to [J.P. Morgan]." *Id.* That the transaction's consideration took the form of a dilutive stock issuance did not produce a different outcome: "To the extent that any alleged decrease in the asset value and voting power of plaintiffs' shares . . . results from the issuance of new equity to a third party . . . , plaintiffs' dilution theory as a basis for a direct claim fails and any individual claim for dilution must be dismissed." *Id.* (internal citations omitted). As for the second prong, the Court held that because only J.P. Morgan suffered an alleged injury for the dilution resulting from the alleged "overpayment" for Bank One, "[a]ny remedy from the alleged harm would necessarily accrue to [the company] and not to a subset of stockholders." *Id.* at 818-19. The same conclusion is warranted here.

Applying the Direct Harm test to this case demonstrates the derivative nature of Plaintiffs' claims. Plaintiffs take the position that Parametric's directors caused Parametric to overpay the former shareholders of VTBH in exchange for VTBH's assets. In Plaintiffs' view, the former VTBH shareholders should have received something less than the 80% ownership interest in Parametric that they acquired. However, it was Parametric, not the individual Plaintiffs, that issued the new shares and if some portion of those shares (or their monetary value) should now be returned, it is inconceivable that they would be returned to any entity other than the one that issued them in the first place: Parametric. If the Defendants caused Parametric to overpay, then Parametric was harmed and Parametric should receive the remedy, with Parametric's shareholders enjoying the *pro rata* benefit of that remedy based on their respective ownership interests. The Direct Harm test does not permit Plaintiffs to personally and directly recover for *Parametric's* alleged overpayment. Such a claim can only be asserted derivatively.

b. The Duty Owed Test

The Duty Owed test is effectively an alternative approach to the same inquiry as the Direct Harm test. *Tooley*, applying the Direct Harm test, stated that a "stockholder must demonstrate that the duty breached was owed to the stockholder." *Tooley*, 845 A.2d at 1039. This makes sense. If a director breaches a duty owed directly to the stockholder, then the injury will be direct to the stockholder. Under the Duty Owed Test, "a direct action may be brought when it is based upon a primary or personal right belonging to the plaintiff-stockholder." *See G&N Aircraft, Inc. v. Boehm*, 743 N.E.2d 227, 235 (Ind. 2001) (internal quotation omitted). A claim is "derivative when the action is based upon a primary right of the corporation[,]" but direct claims are narrowly based on "[t]he rights of a shareholder" that "may be derived from the articles of incorporation and bylaws, state corporate law, or agreements among the shareholders or between the corporation and its shareholders." *Id.*

The Duty Owed test is based on the notion, already recognized in Nevada, that the fiduciary obligations a director owes a corporation are different from the obligations owed to the individual stockholders. See Smith v. Gray, 250 P. 369, 373 (Nev. 1926) (noting that the "trust relation . . . between the stockholder and the directors" is "confined to the shares of stock held by the stockholders"). Typically, directors owe only limited duties, such as those regarding voting rights or disclosure obligations, directly to stockholders. See, e.g., Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 372 (Del. 1993) (discussing the "duty of disclosure owed to shareholders"). Although Plaintiffs have attempted to implicate some duty owed to the stockholders by arguing that they lost a supposedly majority interest in the company following the issuance of stock, Plaintiffs concede they never held such an interest in the first place. Hr'g Tr. 27:5-8.⁵ In contrast, duties related the value of the corporation—*i.e.*, the value of a stockholder's pro rata ownership—are duties that run to the corporation. See, e.g., Elsman v. Standard Fed. Bankcorporation, 1999 WL 33453645, at *2

⁵ To the extent that Plaintiff argues that *all* the unaffiliated public shareholders, in the aggregate, controlled Parametric through their combined majority ownership, it is well-settled that hypothetical control cannot be established by aggregation. *See, e.g., Amadeus Global Travel Distribution, S.A. v. Ortiz, LLC*, 302 F.Supp. 2d 329 (D. Del. 2004) ("It is axiomatic that any conceivable majority of shareholders in the aggregate holds the hypothetical power to control the corporate entity" but the law "require[s] that control be actual"); Gatz. v. Ponsoldt, 2004 WL 3029868 at * 9 (Del. Ch. 2004) ("an aggregate of outstanding shares held by the public does not translate into a right to a control premium"). In addition, as Plaintiffs conceded at oral argument, a majority of stockholders voted in favor of the merger and stock issuance, effectively eviscerating any such claim. Hr'g Tr. 27:9-15.

(Mich. Ct. App. Mar. 26, 1999) (holding that a claim by former shareholders that "they received less money for their shares after the merger" implicated solely a duty to the corporation and gave rise solely to derivative claims).

As with the Direct Harm test, Plaintiffs' claims would be derivative under the Duty Owed test. The damages sought here are based exclusively on the notion that Parametric received insufficient consideration for the 80% equity position it granted VTBH. This implicates only a duty to the corporation and not any duty to the shareholders, thus potentially giving rise only to a derivative claim.

2. The Special Injury Test

Whereas the Direct Harm test considered whether the shareholders claimed an injury that was wholly independent from any harm to the company, the Special Injury test asks whether any shareholder claims an injury that is wholly independent from any harm to *any other shareholder*.⁶ Although the Special Injury test has recently fallen out of favor in some States, the test nevertheless remains good law today in many States and even Delaware continues to consider whether all shareholders have alleged the "same" injury to the extent that this inquiry informs the analysis under

⁶ See, e.g., Ring v. Kaplan, 2012 WL 763582, at *4 (Minn. Ct. App. Mar. 9, 2012) ("[t]he determinative question is whether the injury was separate and distinct from the injury to other persons in a similar situation as the plaintiff.") (internal quotation marks omitted); accord Landstrom v. Shaver, 561 N.W.2d 1, 12 (S.D. 1997); APA Excelsior III, L.P. v. Windley, 329 F. Supp. 2d 1328, 1360 (N.D. Ga. 2004); Altrust Fin. Serv., Inc. v. Adams, 76 So.3d 228, 247 (Ala. 2011).

Tooley's Direct Harm test. *See, e.g, Tooley*, 845 A.2d at 1035; *see also Dinuro Invs., LLC v. Camacho*, 141 So.3d 731, 737 (Fla. 3d DCA 2014) ("[T]his test can be . . . difficult to apply, as the 'special' nature of the injury can be a nebulous inquiry that is often not readily apparent."); *cf. Feldman I*, 956 A.2d at 655 (post-*Tooley* analysis considering whether the harm "falls upon all shareholders equally"). Plaintiffs conceded at oral argument that the only alleged injury in this case is one that applies equally to all shareholders. Hr'g Tr. 19:2-19:11. Accordingly, if this test is applied here, it is indisputably fatal to Plaintiffs' ability to bring the alleged claims directly.

3. No State, Including Nevada, Finds All Claims Involving A Merger To Be Direct.

a. Plaintiffs' "Challenging A Merger" Test Cannot Be Reconciled With Any Of The Recognized Tests.

Importantly, the District Court did not apply *any* of the recognized tests in ruling that the claims asserted in this case were direct claims. Instead, the Court adopted Plaintiffs' incorrect assertion that the "question is simply one of is it a merger or is it a dilution" and "*Cohen* makes it very clear that a merger is a direct claim." PA 611, 613, 617-18. Again, at oral argument before this Court, Plaintiffs took the same stance that *any* challenge to *any* merger would be a direct claim. Hr'g Tr. 16:2-6 ("Q. Is it your position that every complaint alleging misconduct by officers and directors in connection with the merger gives rise to a direct action at the pleading stage? A. Yes.").

Plaintiffs were asked how this case would differ from a hypothetical case in which a company sold a "major asset for inadequate consideration" – an apt comparison considering that Parametric owned only one marketable asset at the time of the transaction. Plaintiffs provided the following facile response:

Mr. Baron: May I ask you a question? Was there a merger?Justice Pickering: No.Mr. Baron: [T]hen *Cohen* wouldn't apply and it would be derivative. Next question?

Hr'g Tr. 24:23-24:3. Plaintiffs conceded at oral argument that selling a major asset for inadequate consideration (even to a related party) would give rise only to a derivative claim because "if you are just simply selling off an asset of the company . . . the company . . . itself needs to . . . recover that." *Id.* at 29:6-9. Plaintiffs offer no satisfactory explanation for this absurd distinction in which the subset of shareholders they represent should recover directly if the company issued equity for less than its fair market value, but only Parametric (not the shareholders directly) could recover if instead the company sold its primary asset (on which the equity is based) for below market value.⁷ In both situations, if Parametric received inadequate consideration in the sale then it is Parametric that is owed compensation.

⁷ Plaintiffs attempt to argue that it would be somehow unfair for Parametric to recover here because, following the transaction, the former VTBH shareholders now own 80% of Parametric and thus the money would not go "to the people who were wronged." But Parametric is not a pass-through entity and damages in a derivative case would <u>not</u> be paid to the former VTBH shareholders. Instead, any remedy would go to Parametric and every shareholder would benefit in the same way they

Plaintiffs' suggestion that merely alleging that a merger occurred—even between entities in which they never owned any shares—is sufficient to state a direct claim cannot be reconciled with the law of any jurisdiction. It requires no analysis whatsoever of the type of harm alleged, as required by both the Direct Harm and Special Injury tests, nor does it consider the type of duty that has allegedly been breached, as required by the Duty Owed test. Plaintiffs obviously favor their illusory "Challenging a Merger" test because it is the *only* standard that could possibly allow the purported class to directly assert claims based on a diminution of stock value—a harm that is nothing more than a reflection of a diminution of *corporate* value and that Plaintiffs concede would apply equally to every shareholder. The duty owed and injury alleged are simply *irrelevant* under Plaintiffs' favored test, thus converting it into a fail-safe test that would always conclude that every challenge to a merger was direct, even though that notion has been discredited and rejected by the principal corporate law jurisdictions in the United States.

At oral argument and in the briefing, Plaintiffs relied exclusively on *Parnes v*. *Bally Entertainment Corp.*, 722 A.2d 1243, 1245 (Del. 1999) in an attempt to suggest

have allegedly been harmed – derivatively. Again, if the former VTBH stockholders failed to provide sufficient value for their 80% position in Parametric, then it was Parametric that suffered the harm arising from the undercapitalization. *See, e.g., J.P. Morgan I*, 906 A.2d at 819 (where company allegedly overpaid for a merger by issuing too many shares, "any remedy from the alleged harm would necessarily accrue to the company and not to the subset of stockholders" even though there were new shareholders following the merger).

that Delaware has endorsed the "Challenging a Merger" test. Although *Parnes* did recognize that there may be a direct claim when shareholders received inadequate consideration for their lost shares in a stock-for-stock merger because of an unfair merger process, it did not do so without qualification. The court instead recognized that the "problem" with finding such claims direct is that "it is often difficult to determine whether a stockholder is challenging the merger itself, or alleged wrongs associated with the merger." *Id.* The Intervening Complaint challenges only wrongs "associated with the merger" because Plaintiffs indisputably never owned shares in either merging entity and thus had no right to challenge any merger. Rather, as in *In re J.P. Morgan*, Plaintiffs merely challenge the exchange ratio of the "associated" dilutive stock issuance to the former VTBH shareholders.

Moreover, "Delaware Courts have interpreted the *Parnes* exception very narrowly." *In re Nymex S'holder Litig.*, 2009 WL 3206051, at *10 (Del. Ch. Sept. 30, 2009). Delaware has cautioned against the error the District Court made here, stating "*Parnes* might be read as suggesting that all shareholder claims for breach of fiduciary duty are direct if they involve a merger. That is not, of course, the law." *Dieterich v. Harrer*, 857 A.2d 1017, 1027 (Del. Ch. 2004).⁸ Instead, "[e]ven after *Tooley*, a claim

⁸ Indeed, Delaware has long recognized that "[a] complaint that 'directly challenges the fairness of the process and the price' of a merger . . . suggests that *the corporation suffered harm* . . . and that the harm suffered by stockholders is only a natural and foreseeable consequence of the harm to the corporation." *In re J.P. Morgan I*, 906 A.2d at 812 (emphasis added).

is not 'direct' simply because it is pleaded that way and mentioning a merger does not talismanically create a direct action." *Id. Dietrich* specifically recognized that it would be highly unlikely for a direct claim to exist when, as here, the "ultimate merger partner was a third party." *Id.* at 1029. No court endorses a test as broad as the one Plaintiffs assert here, which would allow shareholders who suffered no independent harm to directly challenge a merger between two entities in which they never owned shares in the first place.

b. The Cohen Test Is Closest To The Direct Harm Test.

Cohen contains references to each of the above tests, but ultimately provides a standard closest to the Direct Harm test. *See Cohen*, 119 Nev. at 19, 62 P.3d at 732 ("shareholder . . . ha[s] standing to seek relief for direct injuries *that are independent* of any injury suffered by the corporation.") (emphasis added). In explaining its holding, *Cohen* provided the following language that caused the District Court's confusion: "A claim brought by a dissenting shareholder that questions the validity of a merger as a result of wrongful conduct on the part of majority shareholders or directors is properly classified as an individual or direct claim. The shareholder has lost unique personal property—his or her interest in a specific corporation." *Id*.

Plaintiffs attempt to read the first sentence in *Cohen*'s test in a vacuum to support their unprecedented "Challenging a Merger" test. But this Court's further requirement that a plaintiff plead a loss of "unique personal property—his or her
interest in a specific corporation" such that the plaintiff is "entitled to relief that [is] independent of any injury suffered by the corporation" is no accident. 119 Nev. at 19, 62 P.3d at 732. This requirement *is* the Direct Harm test. Unsurprisingly, Plaintiffs request that this Court ignore this language in the *Cohen* test, effectively removing the Direct Harm test from Nevada jurisprudence. Hr'g Tr. at 23:13-19. Contrary to Plaintiffs' request, this Court should affirm the Direct Harm standard and clarify that *Cohen* does not create a new, unprecedented standard under which every challenge to every merger will be a direct claim.

Without question, the adoption of Plaintiffs' test would turn Nevada into the most permissive jurisdiction in the United States for activist shareholders seeking to challenge mergers. Approximately 93% of all public mergers are challenged in court,⁹ and the same law firms that file suits over virtually every corporate acquisition are actively seeking jurisdictions that are most likely to confer standing to assert direct claims.¹⁰ If Nevada adopts a test that would confer standing on individual stockholders without requiring even minimal scrutiny of the economic realities of

⁹ See Cornerstone Research, Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2014 M&A Litigation, at 1, available at https://www.cornerstone.com/GetAttachment/897c61ef-bfde-46e6-a2b8-5f94906c6ee2/Shareholder-Litigation-Involving-Acquisitions-2014-Review.pdf

¹⁰ McCormick, et. al., Fleeing the Homeland: The Aggressive Pursuit of Merger Litigation Outside of Delaware, available at http://www.tklaw.com /files/Publication/dab6e344-3c66-4b19-983c-964af1a313ef/Presentation/Publication Attachment/46e0d0d7-c5e1-415c-b886-a4f47d9258c1/AgressivePursuitofMerger Lit.pdf

their claims, based simply on the existence of a merger (no matter how broadly defined) and some vague reference to wrongful conduct, then Nevada will become a haven for such lawsuits. Every shareholder claim related to a corporate "merger" could potentially meet Plaintiffs' proffered standard and leave directors and officers of Nevada corporations open to wide-ranging personal liability under direct claims brought by shareholders who have no duty to act in the company's best interests. Corporations would, thus, favor virtually any other jurisdiction where their directors and officers would not be exposed to such unprecedented risk of personal liability for every corporate transaction. Such a result would undermine Nevada's unique legislative policy to treat change in control transactions (such as mergers) with the same deference provided to any other business decision adopted by a corporation's board of directors. *See* NRS 78.139(1).

II. QUESTION 2

A. The General Rule: Dilution Claims Are Derivative Only

Shares of corporate stock represent an asset of a corporation. A corporation, by resolution of its board of directors, can issue additional shares of stock for a variety of business purposes. A corporation can issue new shares of stock and sell them on the public market to raise capital. A corporation can issue new shares of stock to employees as part of their incentive compensation. A corporation also can issue new shares of stock for purposes of acquiring an asset from (or consummating a business

transaction with) a third party. "Stock is a form of currency that can be exchanged for other forms of currency (such as cash) or used for a variety of corporate purposes, including paying off debts, acquiring tangible or intangible assets, compensating employees, or acquiring other entities." *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 655 (Del. Ch. 2013).

A share dilution claim arises when a corporation issues stock "at below market value, thereby depriving the corporation of income and depressing the price of the shareholders' stock as a general matter." Sweeney v. Harbin Elec., Inc., 2011 U.S. Dist. LEXIS 82872, at *6 (D. Nev. July 27, 2011); see also Gentile v. Rossette, 906 A.2d 91, 96-97 (Del. 2006) (identifying a dilution claim as arising where a company "authorizes the issuance of stock for no or grossly inadequate consideration"). "A claim for wrongful equity dilution is premised on the notion that the corporation, by issuing additional equity for insufficient consideration, made the complaining stockholder's stake less valuable." Feldman I, 956 A.2d at 655. As such, a dilution claim is fundamentally a claim for corporate waste because the directors are alleged to have "wasted" corporate assets (*i.e.*, the corporation's newly issued shares of stock) by exchanging those assets for money or other assets of lesser value. See, e.g., J.P. Morgan II, 906 A.2d at 771.

Because equity dilution claims are essentially claims for corporate waste, it is the general rule that such claims are "not normally regarded as direct" because any injury is only to the corporation itself. *See Feldman II*, 951 A.2d at 732 (citing *Gentile*, 906 A.2d at 99). "[A]ny dilution in value of the corporation's stock is merely the unavoidable result (from an accounting standpoint) of the reduction in the value of the entire corporate entity, of which each share of equity represents an equal fraction." *Id.* "[S]uch equal injury to the [company's] shares resulting from corporate overpayment is not viewed as, or equated with, harm to specific shareholders individually." *Id.* Rather, a wrongful dilution claim is "essentially [a claim] for mismanagement of corporate assets," which causes a corporate harm. *Id.* at 734.

Under a *Tooley* analysis, "the alleged injury is to the corporation because it falls upon all shareholders equally and falls only upon the individual shareholder in relation to his proportionate share of stock as a result of the direct injury being done to the corporation." *Feldman I*, 956 A.2d at 655 (internal quotations omitted). In other words, share dilution in the form of a *pro rata* diminution in value of all the corporation's shares is not a separate, independent injury to individual or classes of stockholders. Hence, under *Tooley*, the corporation — and only the corporation — is injured by the receipt of inadequate consideration in exchange for the new, dilutive share issuance. As described above, this understanding of *Tooley* was confirmed in *J.P. Morgan I*, 906 A.2d 808. Upon review, the Delaware Supreme Court recognized that "[b]ecause claims of waste are classically derivative, the Vice Chancellor's conclusion [*i.e.*, dismissing the share dilution claim under *Tooley*] is correct." *J.P. Morgan II*, 906 A.2d at 771.

The Delaware Supreme Court has reaffirmed under *Tooley* that equity dilution claims typically fall within the classic pattern of a derivative corporate waste claim. *See Gentile*, 906 A.2d at 99 ("In the typical corporate overpayment case, a claim against the corporation's fiduciaries for redress is regarded as exclusively derivative, irrespective of whether the currency or form of overpayment is cash or the corporation's stock."); *see also Gatz v. Ponsoldt*, 925 A.2d 1265, 1278 (Del. 2007) (approving of *Gentile* and finding that a claim of "over-issuance" of shares is generally derivative); *Feldman II*, 951 A.2d at 733 (finding dilution claim derivative and holding that "[w]here all of a corporation's stockholders are harmed and would recover *pro rata* in proportion with their ownership of the corporation's stock solely because they are stockholders, then the claim is derivative in nature.").

This basic legal principle is not unique to Delaware. *See, e.g., Schuster*, 25 Cal. Rptr. 3d 468, 473 ("Under California law, 'a shareholder cannot bring a direct action for damages against management on the theory their alleged wrongdoing decreased the value of his or her stock (*e.g.*, by reducing corporate assets and net worth) [The claim] was for "diminution of stock value [and] was incidental to the injury to [the company]" and was, therefore, derivative"); *May v. Coffey*, 967 A.2d 495, 499-502 (Conn. 2009) (dilution claims are derivative because "individual stockholders cannot sue the officers . . . on the theory that they are entitled to damages because mismanagement has rendered their stock of less value, since the injury is generally not to the shareholder individually, but to the corporation — to the shareholders collectively."); *Potter v. Janus Inv. Fund*, 483 F. Supp. 2d 692, 700 (S.D. Ill. 2007) ("[T]he injury alleged by Plaintiffs, specifically, dilution of share value due to market-timing arbitrage, obviously is derivative in nature."); *Danielewicz v. Arnold*, 769 A.2d 274, 279, 283 (Md. App. 2006) (where plaintiff asserts "breach[es] of trust which depreciated the capital stock or rendered it valueless," directors are liable to the corporation, "not to its creditors or stockholders, and any damages recovered are assets of the corporation"); *accord Sw. Health & Wellness, LLC v. Work*, 639 S.E.2d 570, 576-77 (Ga. Ct. App. 2006).¹¹ The common thread running through these authorities is that a shareholder's claim that the corporation issued stock for

¹¹ Older New York precedents historically treated share dilution claims as direct claims. But these cases were decided before New York amended its Business Corporation Law in 1998 to eliminate a presumption of "preemptive rights," which, under the former New York law, provided stockholders with a personal contractual right to maintain their percentage ownership in the corporation upon the issuance of new shares. *See, e.g., Witherbee v. Bowles*, 95 N.E. 27, 28 (N.Y. 1911) (wrongful dilution was direct because it deprived plaintiff of his position as the majority stockholder and "depriv[ed] him of his relative position as a stockholder"); *cf.* N.Y. Bus. Corp. Law § 622 (McKinney 2015). A different result may portend in New York going forward. *See* Renee L. Crean, *Has New York Effectively Challenged Delaware's Market Dominance With Recent Amendments to the New York Business Corporation Law?*, 72 ST. JOHN'S L. REV. 695, 706 (1998) (discussing New York's elimination of the presumption of preemptive rights).

insufficient consideration is fundamentally a claim for corporate waste, which must be brought, if at all, derivatively.

In the only reported decision considering the issue under Nevada law, the United States District Court for the District of Nevada held that Nevada law follows the general rule that dilution claims are derivative. *See Sweeney*, 2011 U.S. Dist. LEXIS 82872, at *5-6. Nevada law should continue to adhere to the general rule, particularly as all standing "tests" used to distinguish direct suits from derivative suits, including the test in Delaware established in *Tooley*, reinforce the general rule in dilution cases.

B. The Delaware And Utah Supreme Courts Recognize A Narrow Exception To The General Rule That Dilution Claims Are Derivative Only Where a Controlling Stockholder Expropriates Value From Public Stockholders

Delaware recognizes a narrow exception to the general rule that equity dilution claims are derivative where, unlike here, a majority or controlling stockholder uses its control to issue stock to itself for inadequate consideration. In such circumstances, Delaware views the minority stockholders' rights as impaired relative to those of the controlling stockholder. This injury is viewed as unique to the minority and separate from the corporation's waste-type injury. *See Gentile*, 906 A.2d at 100. Importantly, unlike a typical dilution claim, the injury in this instance results from a conflict between groups or classes of stockholders.

In *Gentile*, the CEO/controlling stockholder forgave certain debt the corporation owed him in exchange for being issued stock. See id. at 93. The plaintiffs, public stockholders, sued directly, claiming the value of the issued stock exceeded the value of the retired debt. Id. After the Court of Chancery dismissed the claims as derivative, the Delaware Supreme Court reversed, holding that the plaintiffs' claims were both direct and derivative. Id. Applying *Tooley*, it held that minority shareholders suffer direct harm independent from the company in a stock dilution *only* when two conditions are present and pleaded: "(1) a stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value; and (2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders." Gentile, 906 A.2d at 100. According to Gentile, the injury under such circumstances is not, as here, pro rata as to all shares but instead affects only the minority shareholders as a result of "an improper transfer — or expropriation — of economic value and voting power from the public shareholders to the majority or controlling stockholder." Id.¹²

¹² The *Gentile* exception has not gained much traction outside of Delaware. Only Utah has adopted it. *See Torain v. Craig*, 289 P.3d 479, 485 (Utah 2012). Other states expressly reject the exception. *See, e.g., May*, 967 A.2d at 506 ("we fail to see how the company's receipt of less than fair value for its new shares of stock becomes a separate and distinct harm to individual shareholders merely because a

The Delaware Supreme Court also found the conditions for "expropriation" identified in *Gentile* present in *Gatz*. There, a minority stockholder using entities owned or controlled by him, exercised *de facto* control over the corporation. *Gatz*, 925 A.2d at 1268. Pursuant to a two-step transaction, he first exercised that control to "expropriate, for [his] benefit, economic value and voting power from the public shareholders" (*see id.* at 1281) by issuing himself new shares and then, in the second step, cashed-out his improperly gained stake in the company by selling it to a third party. *See id.* at 1271-73. The Delaware Supreme Court held that even though the stockholder "[did] not retain the direct benefit from the expropriation" but, instead, transferred it to a third party, the controlling stockholder nevertheless expropriated value. *Id.* at 1281. Hence, the plaintiffs were entitled to bring their dilution claims directly.

Notably, the Delaware Supreme Court has since confirmed that *Gentile*'s exception is a narrow one. In *Feldman II*, the Delaware Supreme Court emphasized that an exception to the general rule that dilution claims are derivative exists only when a controlling stockholder benefits from the expropriation. 951 A.2d at 732 ("In the absence of a controlling stockholder, such equal 'injury' to the [company's] shares resulting from a corporate overpayment is not viewed as, or equated with, harm to

controlling shareholder, rather than an independent third party, acquires the offsetting benefits.").

specific shareholders individually.") (internal quotation marks omitted). The Supreme Court also reaffirmed that, in the dilution context, "[w]here all of a corporation's stockholders are harmed and would recover pro rata in proportion with their ownership of the corporation's stock solely because they are stockholders, then the claim is derivative in nature." *Id.* at 733.

Plaintiffs do not allege that there was any controlling shareholder prior to the transaction, let alone a misappropriation by such a shareholder. Instead, Plaintiffs concede that *every* former Parametric shareholder was allegedly harmed equally. Hr'g Tr. 19:2-19:11. Accordingly, the factual predicate for applying the *Gentile* exception is entirely absent here, and Plaintiffs' claims are derivative.

C. This Court Should Decline To Adopt The Delaware Chancery Court's Overbroad *Carsanaro* Exception.

The Delaware Chancery Court in *Carsanaro*, 65 A.3d 618, and *In re Nine Sys*. *Corp. S'holders Litig.*, ("*Nine Sys.*") 2014 Del. Ch. LEXIS 171 (Del. Ch. Sept. 4, 2014), posited a further exception to the general rule that dilution claims are exclusively derivative. This exception extends *Gentile*'s "expropriation" concept beyond controlling stockholders to directors who, acting disloyally, issue dilutive stock to themselves or their third-party affiliates. Importantly, *Plaintiff concedes that no such claim has been alleged here*. Hr'g Tr. at 28:4-8.¹³ Accordingly, this Court

¹³ Plaintiffs' self-serving argument that they "could" assert a misappropriation claim if this case were remanded is baseless, as the claim has not been pleaded. Hr'g Tr.

need not consider whether to adopt the *Carsanaro* exception but, even if this Court does adopt the exception, it cannot possibly apply to the facts of this case where no expropriation by a director is alleged.

The exception's value as precedent is highly uncertain as it conflicts with the Delaware Supreme Court's insistence in *Feldman* that any expropriation-based theory of direct liability rest upon facts showing a controlling shareholder shifted economic value and voting power to itself. Moreover, the *Carsanaro* exception, if adopted and applied broadly, risks swallowing the general rule that dilution claims are presumptively derivative.

In *Carsanaro*, plaintiffs were founders of the corporation and held its common stock. 65 A.3d at 628. As a result of initial financing rounds, several venture capital firms received preferred stock, secured board seats for their designees, and obtained control of the board. *See id.* at 628-34. Thereafter, these firms caused the corporation to issue additional classes of preferred stock *to themselves* and other investors for inadequate consideration, resulting in the dilution of plaintiffs' ownership to less than 1%. *Id.* Plaintiffs sued the directors who approved the dilutive financings for breach of fiduciary duty, and sued their respective funds as aiders and abettors. *Id.*

^{28:6.} Notably, the complaint in this case has already been amended twice and *none* of the three complaints have ever suggested a misappropriation claim, nor could they.

The Chancery Court acknowledged the need to interpret Delaware Supreme Court precedents in a manner that did not undercut the traditional characterization of stock dilution claims as exclusively derivative. *Id.* at 657-58. And while accepting the need for a "line in the sand," it chose not to "limit *Gentile*'s expropriation principle to cases involving a majority stockholder." *Id.* at 658. Instead, based on the belief that" the directors *could be said* to have expropriated value from the common stockholders in the manner contemplated by *Gentile*," the Chancery Court proposed the following director-expropriation exception:

> In my view, the Delaware Supreme Court's decisions preserve stockholder standing to pursue individual challenges to self-interested stock issuances when the facts alleged support an actionable claim for breach of the duty of loyalty. *Standing will exist if a controlling stockholder stood on both sides of the transaction*. Standing will also exist if the board that effectuated the transaction lacked a disinterested and independent majority.

Id. (emphasis added). However, the Chancery Court was careful to add the qualification that "[s]tanding will not exist if there is no reason to infer disloyal expropriation[,]" – such as when "stock is issued to an unaffiliated third party" or "as part of an employee compensation plan" or "when a majority of disinterested and independent directors approves the terms." *Id.*¹⁴ But here, there is concededly no allegation of any disloyal expropriation. Hr'g Tr. at 28:4-8.

¹⁴ In *Nine Systems*, a case involving an allegedly dilutive recapitalization by selfinterested directors, the Chancery Court determined similarly that a stockholder

Here, it does not matter if this Court adopts the *Carsanaro* exception because Plaintiffs concede that no misappropriation claim has been asserted and, accordingly, the exception would not apply even if adopted. For this reason, this Court does not need to decide if *Carsanaro* will apply in Nevada. However, to the extent this Court is inclined to address that question—and even though it has no bearing on this case— Defendants respectfully submit that it does not serve as an efficient test in Nevada for accurately discerning direct claims from derivative-only claims. The Carsanaro exception is highly problematic and cannot be reconciled with any of the primary tests, addressed *supra*. It purports to find a direct expropriation claim even when the claim in question concerns no majority stockholder using its power to expropriate additional shares to itself. The exception requires no consideration of whether the corporation has been harmed, as required by the Direct Harm test, and it requires no consideration of precisely which duties have been breached, as required by the Duty Owed test. And, in the absence of a majority stockholder who commits the expropriation, every shareholder is equally harmed by the dilutive issuance, which mandates that any claim be asserted derivatively under the Special Injury test. Because this exception is blind to the primary tests previously articulated, the use of

could plead a direct dilution claim against directors based upon an expropriation theory even though there was no controlling stockholder. *See Nine Sys.*, 2014 Del. Ch. LEXIS 171, at *83-85. The Court applied *Carsanaro*, but it conceded that "*Carsanaro* may also exceed what the Delaware Supreme Court intends in this area of Delaware law." *Id.* at *85.

this exception in cases where, unlike here, some misappropriation has been alleged would threaten to "swallow the general rule that equity dilution claims are solely derivative." *See*, *e.g.*, *Feldman I*, 956 A.2d at 657. At a minimum, the possibility of litigation harassment and abuse would be high.

Defendants submit that there is no sound policy reason, let alone legal basis, to depart from the general rule that dilution claims by public shareholders are derivative when the directors have been diluted in the exact proportion as the public shareholders. Accordingly, if this Court were to adopt the Carsanaro exception (for future cases in which it may be applicable), this Court should, at minimum, make clear that such an exception is limited to instances where the defendant directors are alleged to have caused the corporation to issue new stock to themselves for inadequate consideration. In such cases, the directors could be said to have participated in the allegedly wrongful dilutive action in their capacity as shareholders to the detriment of other shareholders, thus causing the kind of "shareholder versus shareholder" conflict that motivated the Delaware courts to establish the narrow exceptions to the general rule in the first place. But no expropriation is even alleged here so there is no basis, even under *Carsanaro*, to depart from the general rule that Plaintiffs' equity dilution claims are derivative.

CONCLUSION

Under any of the "primary tests," the District Court's ruling should be

overruled because Plaintiffs' equity dilution claims are derivative.

September 18, 2015

SNELL & WILMER L.L.P.

By: <u>/s/ Kelly H. Dove</u> RICHARD C. GORDON, ESQ. KELLY H. DOVE, ESQ. 3883 Howard Hughes Parkway Suite 1100 Las Vegas, Nevada 89169

NEIL A. STEINER, ESQ. (*Pro Hac Vice*) DECHERT LLP 1095 Avenue of the Americas New York, NY 10036

JOSHUA D. N. HESS, ESQ. (*Pro Hac Vice*) DECHERT LLP One Bush Street, Suite 1600 San Francisco, CA 94104

Attorneys for Petitioners Turtle Beach Corporation and VTB Holdings Inc.

J. STEPHEN PEEK, ESQ. ROBERT J. CASSITY, ESQ. HOLLAND & HART L.L.P. 955 Hillwood Drive, 2d Floor Las Vegas, Nevada 89134 JOHN P. STIGI III, ESQ. (*Pro Hac Vice*) SHEPPARD, MULLIN, RICHTER, & HAMPTON LLP 1901 Avenue of the Stars, Suite 1600 Los Angeles, CA 90067

Attorneys for Petitioners Kenneth Potashner, Elwood Norris, Seth Putterman, Robert Kaplan, Andrew Wolfe, James Honoré

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the type-face requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, 14 point. This brief contains approximately 8,300 words.

2. I certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

September 18, 2015.

/s/ Kelly H. Dove

Kelly H. Dove Nevada Bar No. 10569

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 September 18, 2015, I caused to be served a true and correct copy of the foregoing **PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION** 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:

Name	Party	E-mail Address
David C. O'Mara, Esq.	Plaintiffs	david@omaralaw.net
Valerie Weis (assistant)	Plaintiffs	val@omaralaw.net
David Knotts	Plaintiffs	DKnotts@rgrdlaw.com
Randall Baron	Plaintiffs	RandyB@rgrdlaw.com
Jamie Meske (paralegal)	Plaintiffs	JaimeM@rgrdlaw.com
Adam Warden	Plaintiffs	awarden@saxenawhite.com
Jonathan Stein	Plaintiffs	jstein@saxenawhite.com
Mark Albright	Plaintiffs	gma@albrightstoddard.com
Loren Ryan (paralegal)	Plaintiffs	e-file@saxenawhite.com
Steve Peek	Defendants	speek@hollandhart.com
Bob Cassity	Defendants	bcassity@hollandhart.com
Alejandro Moreno	Defendants	amoreno@sheppardmullin.com
John P. Stigi III	Defendants	JStigi@sheppardmullin.com
Tina Jakus (assistant)	Defendants	tjakus@sheppardmullin.com
Valerie Larsen (assistant)	Defendants	VLLarsen@hollandhart.com
Neil Steiner	Defendants	neil.steiner@dechert.com
Joshua Hess	Defendants	Joshua.Hess@dechert.com
Brian Raphel	Defendants	Brian.Raphel@dechert.com
Reginald Zeigler (assistant)	Defendants	Reginald.Zeigler@dechert.com

BY OVERNIGHT MAIL: by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.

☑ BY U.S. MAIL: by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below:

> Honorable Elizabeth Gonzalez Eighth Judicial District Court Regional Justice Center 200 Lewis Avenue Las Vegas, NV 89155

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:

	<u> </u>
ALBRIGHT STODDARD WARNICK &	HOLLAND & HART LLP
ALBRIGHT	J. Stephen Peek, Esq.
G. Mark Albright, Esq.	Robert J. Cassity, Esq.
801 South Rancho Drive, Suite D-4	9555 Hillwood Drive, 2 nd Floor
Las Vegas, NV 89106	Las Vegas, NV 89134
Email: gma@albrightstoddard.com	Email: speek@hollandhart.com
	bcassity@hollandhart.com
SAXENA WHITE P.A.	VLLarsen@hollandhart.com
Jonathan M. Stein, Esq.	
Adam Warden, Esq.	SHEPPARD MULLIN RICHTER & HAMPTON
5200 Town Center Circle, Suite 601	LLP
Boca Raton, FL 33486	John P. Stigi III, Esq.
(<i>Pro Hac Vice</i> pending)	Alejandro Moreno, Esq.
Email: jstein@saxenawhite.com	1901 Avenue of the Stars, Suite 1600
awarden@saxenawhite.com	Los Angeles, CA 90067
e-file@saxenawhite.com	(<i>Pro Hac Vice</i> pending)
	Email: jstigi@sheppardmullin.com
Attorneys for Kearney IRRV Trust	amoreno@sheppardmullin.com
nitomeys for Reamey new Trast	tjackus@sheppardmullin.com
	<u>tjackus @ sheppardinumin.com</u>
	Attorneys for Kenneth Potashner, Elwood Norris,
	Seth Putterman, Robert Kaplan, Andrew Wolfe and
	James Honore
	Junes Honore
O'MARA LAW FIRM, P.C.	DECHERT L.L.P.
David C. O'Mara, Esq.	Neil A. Steiner, Esq
311 E. Liberty Street	1095 Avenue of the Americas
Reno, NV 89501	New York, NY 10036
Email: <u>david@omaralaw.net</u>	Email: <u>neil.steiner@dechert.com</u>
val@omaralaw.net	
ROBBINS GELLER RUDMAN & DOWD	Joshua D. N. Hess, Esq
LLP	Brian Raphel, Esq.
Randall Baron, Esq.	One Bush Street, Suite 1600
David Knotts, Esq.	San Francisco, CA 94104
655 West Broadway, Suite 1900	Email: Joshua.hess@dechert.com
San Diego, CA 92101	Brian.Raphel@dechert.com
Email: <u>DKnotts@rgrdlaw.com</u>	Reginald.Zeigler@dechert.com
randyb@rgrdlaw.com	
JamieM@rgrdlaw.com	
	Attorneys for Defendants Parametric
Counsel for Intervening	Sound Corporation, VTB Holdings, Inc.
Plaintiffs/California Plaintiffs	and Paris Acquisition Corp

22570214

X

/s/ Ruby Lengsavath

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