

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

IN RE PARAMETRIC SOUND
CORPORATION SHAREHOLDERS'
LITIGATION.

PAMPT LLC,
Appellant,
v.
KENNETH F. POTASHNER et al.,
Respondents

No. 83598

Electronically Filed
Nov 15 2021 05:59 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

DOCKETING
CIVIL APPEALS

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Eighth Department XI
County Clark Judge Elizabeth Gonzalez
District Ct. Case No. A-13-686890-B

2. Attorney filing this docketing statement:

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Firm McDonald Carano LLP
Address 2300 West Sahara Avenue, Suite 1200
Las Vegas, NV 89102

Client(s) PAMPT LLC

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney J. Stephen Peek, Robert J. Cassity Telephone (702) 669-4600
Firm Holland & Hart LLP
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Client(s) Kenneth F. Potashner

Attorney See attached list of all counsel. Telephone _____
Firm _____
Address _____

Client(s) _____

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- | | |
|--|---|
| <input checked="" type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal: |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): _____ |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____ |

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

Parametric Sound Corp. v. Eighth Judicial District Court, Docket No. 66689
VTB Holdings, Inc. v. Eighth Judicial District Court, Docket No. 75608

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

N/A

8. Nature of the action. Briefly describe the nature of the action and the result below:

Appellant PAMTP LLC brought claims against Respondents Kenneth F. Potashner, Kenneth Fox, Juergen Stark, VTB Holdings, Inc., Stripes f/k/a Stripes Group, LLC, and SG VTB Holdings, LLC (collectively, “Respondents”), as well as additional parties who were dismissed as defendants after the onset of trial, for breaching fiduciary duties and aiding and abetting breaches of fiduciary duty in connection with the merger between Parametric Sound Corporation and VTB Holdings, Inc. Specifically, Appellant argued that this merger constituted an unlawful expropriation of the shareholders’ equity under Nevada law—a cause of action recognized by this Court in a related proceeding in *Parametric Sound Corporation v. Eighth Judicial District Court*, 133 Nev. 417, 401 P.3d 1100 (2017). The district court upheld Appellant’s claims at the summary judgment stage but dismissed them on a NRCP 52(c) motion at the conclusion of Appellant’s case-in-chief. Appellant is appealing that order.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

See attached supplement.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

N/A

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain: This appeal involves the application of NRS 78.211(1) to a claim of equity expropriation, which is a substantial issue of first impression. In the prior appeal of an earlier class action (Docket No. 66689), this Court noted that to prove its equity appropriation claim, a plaintiff must show "actual fraud." No Nevada court has ever interpreted that phrase, until the decision below, in which the District Court departed from consistent Delaware law construing the same phrase in a similar statute.

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

The matter is presumptively retained by the Supreme Court under NRAP 17(a)(9) and (11) because this case originated in business court and raises as a principal issue a question of first impression involving Nevada common law, as set forth in response to Question 12 above.

14. Trial. If this action proceeded to trial, how many days did the trial last? 8 _____

Was it a bench or jury trial? Bench _____

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?
No

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from 09/03/2021

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. Date written notice of entry of judgment or order was served 09/08/21

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ____, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion _____

(c) Date written notice of entry of order resolving tolling motion was served _____

Was service by:

☐ Delivery

☐ Mail

19. Date notice of appeal filed 09/30/2021

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

NRAP 4(a)

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

- | | |
|---|---------------------------------------|
| <input checked="" type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205 |
| <input type="checkbox"/> NRAP 3A(b)(2) | <input type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3) | <input type="checkbox"/> NRS 703.376 |
| <input type="checkbox"/> Other (specify) _____ | |

(b) Explain how each authority provides a basis for appeal from the judgment or order: Appellant appeals a final judgment entered in an action commenced in the court in which the judgment was rendered.

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

PAMTP LLC, Kenneth F. Potashner, Kenneth Fox, Juergen Stark, VTB Holdings, Inc., Stripes f/k/a Stripes Group, LLC, SG VTB Holdings, LLC, Robert Kaplan, Elwood G. Norris, Seth Putterman, and Andrew Wolfe

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

Defendants Elwood G. Norris, Seth Putterman, Robert Kaplan, and Andrew Wolfe settled and have been formally dismissed.

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

PAMTP LLP sued Potashner, Norris, Putterman, Kaplan, and Wolfe for breach of fiduciary duty (equity expropriation). PAMTP LLP sued Fox, Stark, Stripes, SG VTB, and VTBH for aiding and abetting breach of fiduciary duty (equity expropriation). On August 23, 2021, the claims against Norris, Putterman, Kaplan, and Wolfe were dismissed pursuant to a settlement agreement. On September 3, 2021, judgment was entered in favor of Potashner on the claim of breach of fiduciary duty and in favor of the remaining defendants on the aiding and abetting claim.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

N/A

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

PAMPT LLC

Name of appellant

Jeff Silvestri

Name of counsel of record

11/15/2021

Date

/s/ Jeff Silvestri

Signature of counsel of record

Clark County, Nevada

State and county where signed

Supplement to Civil Docketing Statement

2. Attorney filing this docketing statement:

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Clients: VTB Holdings, Inc., Stripes Group, LLC, SG VTB Holdings, LLC, Juergen Stark, and Kenneth Fox

9. Issues on appeal. State concisely the principal issue(s) in this appeal.

- (1) The evidence at trial showed that, before Parametric’s Board of Directors approved the challenged merger, Respondent Kenneth Potashner, the Executive Chairman and CEO of Parametric, (i) had day-to-day control of Parametric, (ii) conceived of, negotiated, and executed the transaction between Parametric and its merger counterparty, (iii) lied to, bullied and importuned his fellow directors, who permitted Potashner to have operational control of the merger negotiation process, and (iv) used his control over Parametric to depress its value, making alternatives to a merger unpalatable. Did the District Court err in finding that, nevertheless, Potashner was not a “controlling director” for purposes of Appellant PAMTP’s equity expropriation claim?
- (2) Did the District Court err in ignoring evidence that Potashner continued to control the merger process *after* the board voted to approve the merger, but before the shareholders approved it, including by making misrepresentations to major shareholders concerning the projections for the combined business, and manipulating his fellow directors?
- (3) Addressing an issue of first impression under Nevada law, the District Court interpreted NRS 78.211(1) to require a plaintiff claiming equity expropriation on the basis of an issuance of stock to establish an actual *common-law* fraud in the transaction. Did the District Court err?
- (4) Assuming the District Court correctly ruled that PAMTP was required to prove all the elements of common law fraud to prevail, did the District Court err in concluding that PAMTP had not done so?
- (5) Did the District Court err to the extent that it held that, even if PAMTP had established the elements of its equity expropriation claim against Potashner, it nonetheless could not recover because the majority of the Board of Directors—who settled with PAMTP before trial—were protected by the business judgment rule presumption under NRS 78.138(7)?

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDONALD CARANO LLP and that on November 15, 2021, a true and correct copy of the foregoing **DOCKETING STATEMENT** was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system as listed below:

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HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

Richard C. Gordon
SNELL & WILMER LLP
3883 Howard Hughes Parkway, #1100
Las Vegas, NV 89169

I hereby certify that I am an employee of McDonald Carano LLP and on November 15, 2021, I served a true and correct copy of the foregoing **DOCKETING STATEMENT** by U.S. Mail, postage prepaid, addressed to:

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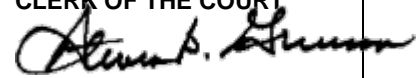
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Stephen E. Haberfeld
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Los Angeles, CA 90048

Settlement Judge

DATED this 15th day of November, 2021

/s/ CaraMia Gerard
An Employee of McDonald Carano LLP



CASE NO: A-20-815308-B
Department 13

COMPB

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

PAMTP LLC,

Plaintiff,

v.

KENNETH POTASHNER, ELWOOD G.
NORRIS, SETH PUTTERMAN,
ROBERT KAPLAN, ANDREW WOLFE,
KENNETH FOX, JUERGEN STARK,
VTB HOLDINGS, INC., STRIPES f/k/a
STRIPES GROUP, LLC and SG VTB
HOLDINGS, LLC,

Defendants.

Case No.:

Dept. No.:

COMPLAINT

DEMAND FOR JURY TRIAL

(Business Court Requested Per EDCR 1.61)

**EXEMPT FROM ARBITRATION PER
NAR 3(A): AMOUNT IN CONTROVERSY
OVER \$50,000**

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...

...

I. INTRODUCTION

1. Plaintiff PAMTP LLC (“Plaintiff”) brings this action against Defendants for breaching fiduciary duties in connection with the merger between Parametric Sound Corporation (“Parametric” or the “Company”) and VTB Holdings, Inc. (“VTBH”) on January 15, 2014 (the “Merger”). The Defendants include certain members of Parametric’s Board of Directors at the time of the Merger (the “Board”): Stripes, formerly known at the time of the Merger as Stripes Group, LLC (“Stripes Group”), Kenneth Fox, Stripes Group’s founder and Managing General Partner during negotiations leading to the Merger, Juergen Stark, CEO and director at VTBH during negotiations leading to the Merger, and SG VTB Holdings, LLC (“SG VTB”).

2. The Merger. Defendants designed the transaction as a dilutive reverse merger wherein the privately-held VTBH merged into a Parametric subsidiary, at which time Stripes Group obtained control over the post-close entity. Defendants announced the Merger on August 5, 2013, and the transaction closed on January 15, 2014. Immediately after close of the Merger, Parametric issued millions of highly dilutive shares to Stripes Group and VTBH insiders, the net effect being that Stripes controlled approximately 81% of the post-Merger Company. Meanwhile, Parametric shareholders, who owned a combined 100% of the Company before the Merger, were reduced to a minority 19% interest in the post-Merger Company. On May 27, 2014, the Company changed its name from “Parametric Sound Corporation” to “Turtle Beach Corporation” (“Turtle Beach” or the “post-Merger Company”).

3. It is now irrefutable that the Merger was, and still is, an unmitigated disaster for the Parametric stockholders. On August 4, 2013, just before the Merger was announced, Parametric’s stock closed at \$17.69 per share. The market reacted negatively to the Merger and by January 15, 2014, the day the Merger closed, Parametric’s stock had dropped to \$14.19 per share.

4. As of November 28, 2017, the Turtle Beach’s stock closed at \$0.57 per share. In other words, each Parametric stockholder who held shares of as of that date lost over 96% of the value of his or her investment as a result of the Merger. This decline represents over \$100 million in destroyed market value between pre-Merger Parametric and the post-Merger entity.

1 5. Parametric's Board. The conflicted Parametric Board expropriated value from the
2 Company for its own benefit by conducting the reverse merger with VTBH at a knowingly inflated
3 value and then issuing millions of highly dilutive shares to Stripes Group and VTBH insiders,
4 improperly transferring control of the Company. The Parametric Board engineered a dilutive
5 transaction whereby it received economic benefits not shared with the public stockholders and
6 transferred control of the Company to Stripes Group and VTBH.

7 6. During the process leading up to the Merger and at the time the Company
8 announced the Merger, the Board members were conflicted, interested, and not independent. The
9 Merger was not approved by a majority of disinterested and independent directors. At the time of
10 the Board's Merger vote on August 2, 2013, the Board had six members. All of those six
11 individuals were conflicted and/or acted in self-interest when voting on the Merger.

12 7. The conflicted Parametric Board knowingly and excessively overvalued VTBH in
13 the Merger and knew that Parametric would be issuing millions of dilutive shares in the Merger
14 for an entity with a depressed value. This excessive overvaluation and subsequent issue of dilutive
15 shares was a result of bad faith indifference to and severely disloyal interest in the rights of
16 Parametric stockholders.

17 8. Evidence of VTBH's financial decline emerged shortly after the Merger. As
18 disclosed by the post-Merger Company the day after the Merger, VTBH's main lender, PNC Bank,
19 National Association ("PNC"), forced VTBH to restructure its credit facility at extremely
20 unfavorable terms in response to VTBH's worsening financial condition. VTBH also borrowed
21 an additional \$7 million from SG VTB (at a rate of 10% per annum until December 31, 2014 and
22 20% per annum for all periods thereafter) to pay down existing debt. The severity of VTBH's
23 financial condition preceding the Merger is illustrated by the fact that it missed its projected
24 EBITDA target for 2013 by **61%** (\$13.852 million actual compared to \$36 million estimated
25 midpoint).

26 9. As a result of the Merger, the Parametric Board handed Stripes Group control of
27 81% of the post-Merger Company. Meanwhile, Parametric shareholders, who owned a combined
28 100% of the Company before the Merger, were reduced to a minority 19% interest in the post-

Merger Company.

10. Kenneth Fox (“Fox”), Stripes Group’s founder and Managing General Partner during negotiations leading to the Merger, Juergen Stark (“Stark”), CEO and director of VTBH during negotiations leading to the Merger, Stripes Group, and SG VTB aided and abetted the Parametric Board’s expropriation of equity. Fox, Stark, Stripes Group, and SG VTB knew that VTBH had experienced significant financial decline in the months leading to the Merger and yet relied on outdated and inflated projections in connection with the Merger.

11. This, and other evidence described below, shows that Fox, Stark, Stripes Group, SG VTB, and VTBH knowingly participated in the Parametric Board’s actual fraud related to the dilutive stock issuance to gain access to the public markets. Since the Merger, Stripes Group insiders have used their control to usurp the Company’s publicly-traded status and extract tens of millions of dollars for themselves, while the Company sinks.

12. Indeed, contemporaneously with the Merger, Stripes Group, Stark, and Fox caused the Company to borrow money from them at exorbitant interest rates to pay down debt held by VTBH from before the Merger. By January 15, 2014, the entirety of the term loan held by VTBH’s main lender, PNC, which bore an interest rate of 5.50% to 6.50%, was replaced by notes held by Stripes Group, Stark, Fox, and other insiders at interest rates three times greater. The only reason why VTBH replaced its term loan debt with these notes at such an exorbitant interest rates was to benefit the insiders at the expense of Parametric’s shareholders, including Plaintiff.

13. To ensure the success of their scheme, Fox and Stark did everything in their power to convince key Parametric shareholders to vote in favor of the Merger. On several occasions prior to the merger, Stark and other insiders at Stripes Group as well as Potashner met with members of Plaintiff, including Adam Kahn and Robert Masterson. It was during these meetings that the defendants convinced Plaintiff into voting for the Merger by falsely representing the strength of VTBH and its prospects post-Merger. Without Plaintiff’s votes, the Merger very well may not have succeeded.

14. Throughout the Merger process, Stripes Group, Stark, and Fox manipulated, encouraged, and emboldened improper and selfish conduct by Parametric’s corporate fiduciaries.

Kenneth Potashner, Parametric's CEO ("Potashner") and the full Board knew of VTBH's financial problems, but concealed the facts from Parametric stockholders and completed the deal regardless.

15. Damages. In sum, the Merger constituted a fraudulent expropriation of equity, whereby a majority-conflicted Parametric Board, for self-interested reasons, excessively overvalued VTBH's assets and gave up a controlling stake in the Company for negative value. This gross overvaluation was not due to an honest error of judgment but was the result of intentional bad faith and a reckless indifference to the rights of Parametric's former stockholders. In addition, in light of their joint conspiracy, Stripes Group, VTBH, SG VTB, and the Parametric Board acted as a control group that intentionally harmed Parametric stockholders while each reaping unique, personal benefits. All defendants had the ability to use the levers of their corporate control to benefit themselves and each took advantage of that opportunity.

II. JURISDICTION AND VENUE

16. Pursuant to the Constitution of the State of Nevada, Article 6, §6, this Court has jurisdiction over all causes of action asserted herein.

17. This Court has jurisdiction over each defendant named herein because each defendant is either a corporation that is incorporated in, conducts business in, and maintains operations in this State, or is an individual who has sufficient minimum contacts with the State of Nevada so as to render the exercise of jurisdiction by the Nevada courts permissible under traditional notions of fair play and substantial justice.

18. Parametric was a public corporation incorporated under the laws of the state of Nevada.

19. The Court has jurisdiction over Stripes, formerly known as Stripes Group, and SG VTB because both entities maintain substantial, continuous and systematic contacts with Nevada and the aiding and abetting cause of action against Stripes Group and SG VTB arises from Stripes Group's and SG VTB's contacts with Nevada. Stripes Group and SG VTB purposefully availed themselves of the protection of the laws of Nevada, purposefully established contacts with Nevada, and affirmatively directed contact toward Nevada.

20. Similarly, the Court has jurisdiction over Fox and Stark because Fox, as control person for Stripes Group and SG VTB, and Stark, as control person for VTBH, maintain substantial, continuous and systematic contacts with Nevada and the aiding and abetting cause of action against Fox and Stark arises from Stripes Group's, SG VTB's, and VTBH's contacts with Nevada. Fox and Stark purposefully availed themselves of the protection of the laws of Nevada, purposefully established contacts with Nevada, and affirmatively directed contact toward Nevada.

21. Stripes Group and SG VTB purposefully availed themselves the protection of Nevada law and this action arises from their conduct targeting Nevada, including the following: (i) through the Merger, Stripes and SG VTB gained control of a Nevada corporation and continue to operate the Company as a Nevada corporation; (ii) Stripes Group and SG VTB selected, negotiated for, and consummated the merger of a company they controlled, VTBH, and Parametic, a Nevada corporation; (iii) Stripes Group and SG VTB were involved in negotiating and approving nearly all material decisions concerning the Merger; and (iv) Fox, the founder, sole owner, and Managing General Partner of Stripes Group and sole manager of SG VTB signed the Merger Agreement, which was then filed with the Nevada Secretary of State to consummate the Merger.

22. Fox and Stark purposefully availed themselves the protection of Nevada law and this action arises from their conduct targeting Nevada, including the following: (i) through the Merger, Stripes and SG VTB, with Fox in control, gained control of a Nevada corporation and continue to operate the Company as a Nevada corporation; (ii) Stripes Group and SG VTB, with Fox in control, selected, negotiated for, and consummated the merger of a company they controlled, VTBH, and Parametic, a Nevada corporation; (iii) Stripes Group and SG VTB were involved in negotiating and approving nearly all material decisions concerning the Merger; (iv) Fox, the founder, sole owner, and Managing General Partner of Stripes Group and sole manager of SG VTB signed the Merger Agreement, which was then filed with the Nevada Secretary of State to consummate the Merger; and (v) VTBH, with Stark in control, merged with a Nevada corporation.

...

...

III. PARTIES AND RELEVANT NON-PARTIES

A. Plaintiff

23. Plaintiff is a limited liability company organized under the laws of the State of Delaware.

24. The following shareholders held Parametric common stock as of the date of the Merger:

- a. IceRose Capital Management, LLC;
- b. Robert Masterson;
- c. Richard T. Santulli;
- d. Marcia Patricof, on behalf of the Patricof Family LP, Marcia Patricof Revocable Living Trust, and the Jules Patricof Revocable Living Trust;
- e. Alan and Anne Goldberg;
- f. Barry L. Weisbord; and
- g. Ronald and Muriel Etkin.

25. The shareholders identified in the immediately preceding paragraph lawfully and validly assigned to Plaintiff their rights, titles and interests in any claims arising from their ownership of Parametric stock, including any and all claims arising from or related to the Merger against Parametric or any other entity or individual that could be liable for the acts and/or omissions alleged in the litigation entitled *In re Parametric Sound Corporation Shareholders' Litigation*, No. A-13-686890-B (Clark County, Nevada) (the "Class Action Litigation").

26. Plaintiff, when discussed herein, includes the aforementioned individual shareholders, when applicable.

B. Defendants

27. Defendant Kenneth Potashner (previously defined as "Potashner") was the Executive Chairman of Parametric's Board at the time of the Merger. He was appointed a director in December 2011 and Executive Chairman in March 2012. He essentially acted as Parametric's CEO.

...

28. Defendant Elwood G. Norris (“Norris”) was a member of Parametric’s Board at the time of the Merger and is Parametric’s founder. He served as Parametric’s CEO and Chairman of the Board since the Company’s incorporation on June 2, 2010, but resigned from these positions concurrent with the appointment of Potashner as the Company’s Executive Chairman in March 2012. Norris remained with the Company post-Merger as its “Chief Scientist” at least through the end of 2016.

29. Defendant Seth Putterman (“Putterman”) was a member of Parametric’s Board at the time of the Merger. He was appointed a director in May 2011.

30. Defendant Robert Kaplan (“Kaplan”) was a member of Parametric’s Board at the time of the Merger. He was appointed a director in May 2011.

31. Defendant Andrew Wolfe (“Wolfe”) was a member of Parametric’s Board at the time of the Merger. He was appointed a director in February 2012.

32. The Parametric Board members (other than Potashner) named above in ¶¶28-31 are sometimes collectively referred to herein as the “Outside Directors.”¹

33. The defendants named above in ¶¶27-31 are sometimes collectively referred to herein as the “Individual Defendants.”

34. Defendant VTBH was a company that designed and marketed audio peripherals for video game, personal computer, and mobile platforms. It was headquartered in Valhalla, New York. It was majority owned by Stripes Group and SG VTB. VTBH is a wholly-owned subsidiary of the post-Merger Company.

35. Defendant Stripes, known as Stripes Group LLC at the time of negotiations leading to the Merger, is a private equity firm focused on internet, software, healthcare, IT and branded consumer products businesses. Stripes Group is incorporated in Delaware and headquartered at 402 West 13th Street, New York, NY 10014.

¹ While Norris held the position of “President and Chief Scientist” and was thus a member of Parametric’s management during the Merger process, he did not directly participate in Potashner’s unilateral Merger negotiations with VTBH and Stripes, and is thus referenced as an “Outside Director” for purposes of this Complaint.

36. Kenneth Fox (previously defined as “Fox”) is Stripes Group’s founder and served as its Managing General Partner during the negotiations leading to the merger. Fox was also the sole manager of SG VTB, which is the largest current stockholder of the Company (along with a “control group” controlled by Fox and Stripes Group). Fox signed the Merger Agreement, which effectuated the Merger described herein. Fox directly participated in the Merger process and personally directed and controlled Stripes Group and VTBH principals throughout the Merger process. Fox sat on the Turtle Beach board of directors after the Merger, stepping down on November 15, 2018.

37. Defendant SG VTB is a Delaware LLC and is a wholly owned subsidiary of Stripes Group. Fox is its sole manager. Stripes Group formed SG VTB in 2010 in order to acquire a majority position in VTBH. SG VTB is an investment vehicle for Stripes Group.

38. Defendant Juergen Stark (previously defined as “Stark”) was CEO of VTBH during negotiations leading to the Merger, and was named to that position by Stripes in September 2012. During negotiations leading to the Merger, Stripes demanded that Stark continue as CEO of Turtle Beach post-Merger. Stark has served as Turtle Beach’s CEO since the Merger and continues to serve as its CEO today. Stark also sits on the Company’s current board of directors, and as of January 1, 2020 became Chairman of the board. Stark frequently interacted with Potashner throughout the Merger process and was fully aware of, and encouraged, Potashner’s misconduct as set forth herein.

C. Relevant Non-Parties

39. Turtle Beach is headquartered in San Diego, California and was incorporated in the state of Nevada in 2010. The Company calls itself a “premier audio technology company with expertise and experience in developing, commercializing and marketing innovative products across a range of large addressable markets under the Turtle Beach® and HyperSound® brands.” The Company’s stock is (as of the date of this filing) traded on NASDAQ Global Market under the symbol HEAR.

40. James L. Honore (“Honore”) was a member of Parametric’s Board at the time of the Merger. He was appointed a director in March 2012.

41. Ronald Doornick (“Doornick”) is an Operating Partner of Stripes Group and has been a principal at Stripes Group since May 2006. Doornick was the Chairman of VTBH during the sale process, and is now Board Chairman of the Company. Doornick is also part of the current “control group,” which owns a majority of the Company’s outstanding shares. Doornick was instrumental for Stripes Group in effectuating the Merger. Doornick served as the Chairman of the Turtle Beach’s board of directors until stepping down on at the end of 2019.

42. Karen Kenworthy (“Kenworthy”) is a partner at Stripes Group and has been with Stripes Group since 2006. As detailed herein, Kenworthy was intimately involved in the Merger process.

43. James Barnes (“Barnes”) was Parametric’s Chief Financial Officer (“CFO”) during the Merger process, but was ousted by Stripes following completion of the Merger.

44. John Todd (“Todd”) was a Parametric “consultant” during the sales process, was hired by Potashner, and was directly involved (through Potashner) in the Merger. Like Potashner, Todd was one of the few option holders in HyperSound Health, Inc. (“HHI”). Todd has been found liable to the SEC for securities fraud. In 2012, the Southern District of California entered final judgment after the Ninth Circuit found substantial evidence in the trial record to support a unanimous 2007 jury verdict that found Todd unlawfully misrepresented a company’s financial condition while CFO. In addition to monetary penalties, Todd was banned from acting as an officer of any public company for a ten-year period. Likewise, the State of California has prohibited Todd from operating a franchise within the state, because, given his history of fraud, “the involvement of Todd in the sale or management of [a] franchise in this State would create unreasonable risk to prospective franchisees.”²

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...

...

² www.dbo.ca.gov/ENF/pdf/b/BevMaxFranchising_SIS.pdf.

IV. ENCOURAGED BY STRIPES GROUP AND VTBH, THE PARAMETRIC BOARD ENGAGED IN DISLOYAL AND BAD FAITH CONDUCT DURING THE MERGER PROCESS³

45. Potashner met with Doornick, Kenworthy, and Stark throughout March and April 2013 and ironed out a deal on the Merger. During that time, Potashner sought the assistance of bankers at Houlihan Lokey Capital, Inc. (“Houlihan Lokey”), which already harbored a conflicting relationship with Stripes Group. Potashner wasted no time in threatening the Outside Directors to go along with the Merger. On March 30, 2013, regarding his just-commenced negotiations with Stripes Group and VTBH, Potashner wrote to Norris: “If the Board costs us this deal I will look for them all to resign or I will resign.” Norris responded to other Board members, “Is this blackmail or what[?]”⁴

46. On April 19, 2013, Potashner reached an agreement on the Merger with Stripes Group and VTBH without consulting the Outside Directors or conducting any real diligence or audit of VTBH’s finances. Potashner’s initial term sheet contemplated a reverse merger at a 78%/22% split, meaning that Parametric stockholders would receive 22% of the combined company after the Merger.⁵

47. After Potashner’s initial agreement, there was no improvement in the final bid from VTBH—it actually got worse. By the time the Board signed the Merger Agreement in August 2013, Parametric shareholders’ post-Merger interest had dropped from 22% down to 19%.

48. Over the next two months, the Outside Directors continued to allow Potashner to negotiate the Merger with no real oversight, supervision or guidance. For example, from April 25, 2013 to June 25, 2013, the Board held just two telephone conferences, one lasting a mere 28 minutes and the other lasting just 45 minutes. The Outside Directors requested a copy of the draft-Merger Agreement for the first time on July 1, 2013. A quick review of Potashner’s draft caused

³ Citations herein refer to Bates stamp numbers from documents exchanged in discovery in the matter of *In re Parametric Sound Corporation Shareholders’ Litigation*, Lead Case No. A-13-686890-B, before the Honorable Elizabeth Gonzalez in the Eighth Judicial District Court for the State of Nevada, Clark County.

⁴ PAMT0033560-62.

⁵ PAMT0049600-07; PAMT0006093-103.

Outside Director Kaplan to state that: “I needed this as I feel we have been left in the dark and have had misrepresentations presented to us.”⁶ During this time, Potashner conceded that the Outside Directors also informed him that he was ““giving the company away.””⁷ Despite those accusations, the Outside Directors did nothing to stop Potashner. Worse, they enabled him.

A. Potashner Defied Board Orders Then Obtained a Payoff for His Options in HHI, a Parametric Subsidiary

49. Throughout the Merger process, Potashner personally held an ownership interest in a Parametric subsidiary called HyperSound Health, Inc., or “HHI.” In 2012, Parametric formed HHI “to develop technology for products targeting persons requiring sound amplification and the more than 36 million Americans who suffer from hearing loss.”⁸ Potashner saw great value in HHI and, in part, effectuated the Merger because he believed that he could continue to profit from HHI after the deal. Potashner repeatedly stated that he believed HHI was worth \$1 billion.⁹ Whether or not that valuation was objectively supportable, Potashner believed it and worked to secure that value for himself.

50. This conflict is better described in Potashner’s own words. Potashner confided to Stark on July 11, 2013 that the “whole reason that I entered into the deal [with VTBH] in the first place [was] [t]o build a multi-billion dollar HHI and benefit from it.”¹⁰ In the same email, Potashner described his request for a secret post-close consulting agreement, writing: “I . . . said in a gentlemen agreement to give me a consulting deal if I couldn’t talk you into keeping [HHI] equal to what you think my stake was worth.”¹¹ Stripes was aware of Potashner’s confession.¹²

51. A few days later, on July 20, 2013, Potashner described his HHI-related conflict directly to Stripes as follows:

⁶ PAMT0061426.

⁷ VTBH008868.

⁸ <http://corp.turtlebeach.com/media-resources/releases/releases-detail/125/parametric-sound-corporation-reports-year-end-fiscal-2012-results>.

⁹ VTBH005061; PAMTNV0113764.

¹⁰ PAMTNV0105035; VTBH009741.

¹¹ *Id.*

¹² VTBH017661.

As we established HHi my intention was to hire a new CEO for PAMT and commit my full energies to developing HHi. I got BOD support, we hired a search firm (swbi), and actually were interviewing CEO candidates on the first day I met Juergen [Stark]. . . . My intent was to sell PAMT at the right time and keep HHi as the foundation of a new company. . . . The problem very simply is that [you] didn't sign up for buying part of the company, you wanted it all.¹³

52. Stark considered it remarkable that he was even involved "in a discussion where 2 insiders somehow have a potential future ownership stake in [HHI] that is now driving the dynamics of the [overall] deal . . . it's just crazy."¹⁴

53. In fact, when selecting the Merger form, Stark reported that Potashner "said he liked the reverse merger option the best and is happy we are headed in that direction because it 'allows him to participate in the upside of commercial and health [HHI] which he feels is large.'¹⁵ Notably, Fox responded that Potashner's self-interest was "[g]ood news."¹⁶

54. This conflict did not exist in a vacuum, as Potashner acted in furtherance of his HHI-related objectives throughout the Merger process. In his first meetings with Stripes and VTBH in March and April 2013, Potashner repeatedly expressed a desire to carve out HHI and "make sure the potential value in health is enabled to occur."¹⁷

55. On July 1, 2013, the Parametric Board held a meeting to discuss Potashner's HHI-related conflict. Just before the meeting, Potashner was caught lying to the Board about whether he had reached an agreement with VTBH and Stripes Group regarding his HHI options.¹⁸ Potashner said an agreement was finalized, but Stark confirmed to the Outside Directors this was false.¹⁹ During the July 1, 2013 meeting, the Board gave its first of three instructions to Potashner that he "immediately cease all discussions with [Stripes Group and VTBH] regarding HHI and HHI stock options to avoid any conflict of interest and attain clarity regarding the position of

¹³ VTBH000124.

¹⁴ PAMTNV0104290.

¹⁵ VTBH007727.

¹⁶ *Id.*

¹⁷ VTBH002990; VTBH006603.

¹⁸ PAMT0000160.

¹⁹ *Id.*

[Stripes Group and VTBH] on this issue.”²⁰

56. This mandatory blackout period existed from Monday, July 1, 2013 through the close of the Merger. Potashner violated the instruction on multiple occasions. Stripes Group, on the other hand, knew of Potashner’s ban and, after initially resisting, willingly participated in Potashner’s prohibited HHI discussions. Indeed, the following interactions occurred during just the first two days of the blackout period:

- Tuesday, July 2, 2013: The morning following the instruction to “immediately cease” HHI-related discussions, Potashner emails Stark and Doornick at 6:47 a.m. to justify his position on HHI and invite Doornick to discuss the matter at dinner the upcoming Sunday.²¹ Potashner and Stark also speak by phone that evening about HHI.²²
- Wednesday, July 3, 2013: Potashner writes Stark to propose that HHI option-holders (including Potashner) retain their interest in HHI, writing: “At a personal level I believe [retaining HHI] will be supported and avoid scenarios that I believe would put substantial risk and litigation exposures into the PAMT/VTB transaction.”²³ Stark knew this contact was improper, responding, “Shouldn’t I be discussing this with Seth [Putterman] and Jim [Barnes]?”²⁴ Despite that knowledge, Stark continues to discuss HHI with Potashner.

57. On Friday, July 5, 2013, following a second Parametric Board meeting on HHI, Wolfe informed Potashner:

Regarding HHI related matters, the Board affirmed its prior direction to you to avoid all discussions with VTB/Juergen/Stripes regarding your HHI stock options since you have a conflict of interest. Because your stock options are interrelated with the stock options of John [Todd] and the doctors of HHI, you should also avoid any discussion of their stock options or HHI in general.²⁵

58. Potashner responded, “I understand your request relative [to] HHI negotiations and will comply.”²⁶ As one might expect, Potashner was lying. Potashner thereafter engaged in the following prohibited communications:

²⁰ *Id.*

²¹ PAMTNV0105781.

²² PAMT0033890.

²³ PAMTNV0105854.

²⁴ *Id.*

²⁵ PAMT0041051.

²⁶ PAMTNV0115321.

- Saturday, July 6, 2013: Potashner forwards Stark a proposal from Wolfe (not meant for Stark) providing that Potashner keep all of his HHI shares.²⁷ Potashner stated, “[a]s I mentioned, the bankers are running an analysis as well and I expect it to confirm this view.” Potashner concluded by asking Stark to keep the email confidential.²⁸
- Sunday, July 7, 2013: Potashner meets with Stark in person to discuss HHI-related issues.
- Tuesday, July 9, 2013: Potashner proposes to meet with Stark, Barnes, and HHI’s consulting doctors to discuss an HHI spin-out transaction.²⁹
- Thursday, July 11, 2013: Potashner and Stark discuss HHI valuation details over email, while Potashner continues to argue his position that HHI be retained as a subsidiary, describing HHI as a “cottage” in which Potashner wanted to “live” post- Merger.³⁰ Potashner forwards his “HHI as a cottage” email chain with Stark to colleagues at another company, bragging that it showed “[h]ow to harass the CEO of a company that is effectively buying you into an entity structure you require using parables.”³¹
- Saturday, July 13, 2013: Potashner invites Stark to discuss HHI issues “by phone today and then in person on Sunday.”³² Stark responds to confirm a meeting with Potashner regarding HHI the upcoming Wednesday.
- Sunday, July 14, 2013: Potashner and Stark discuss HHI in detail over email, where Potashner concludes by again explaining, “I am convinced we can’t solve [HHI issues] pre-deal because of litigation scenarios plus shareholder vote issue. I am convinced we can solve post deal.”³³
- Monday, July 15, 2013: Potashner emails Stark to negotiate a list of five “[c]oncessions made on HHI,” concluding, “hope you can be flexible and we get the deal done.”³⁴ Stark keeps Stripes and Doornick informed of Potashner’s improper communications.³⁵
- Wednesday, July 17, 2013: Potashner and Stark meet with Barnes and doctors working with HHI to discuss HHI-related issues. Following the meeting, Potashner emails Stark regarding the scope of HHI’s license.³⁶

²⁷ PAMTNV0105120.

²⁸ PAMTNV0105120.

²⁹ VTBH001503.

³⁰ PAMTNV0104270; PAMTNV0104315.

³¹ PAMTNV0104315.

³² PAMTNV0104228.

³³ PAMTNV0104263.

³⁴ PAMTNV0104268.

³⁵ VTBH013712.

³⁶ VTBH001516.

- Thursday, July 18, 2013: Potashner and Doornick discuss HHI by phone and, as a result, Potashner states that “I will make a proposal to my BOD on HHI Saturday.”³⁷

59. On Friday, July 19, 2013, Outside Director Norris emailed Potashner to reiterate the ban on HHI discussions:

It turns out you have been speaking with TB folks without Andy in on the conversation(s). I expressly remember the board having stated that you are NOT authorized to do that as it relates to the subject of HHI. Phone calls, emails, texts, etc. You are major conflicted on that matter.

Please start acting like you are working for PAMT, not yourself!³⁸

60. Unfortunately, after Potashner browbeat Norris and the other Outside Directors into submission (as described below), the Outside Directors would not order Potashner to do anything again. So, Potashner continued his prohibited discussions:

- Friday, July 19, 2013: In support of his ownership interest in HHI, Potashner emails Stark to describe an earlier “precedence” where executives at Maxwell Technologies (including Potashner) held interest in a subsidiary company.³⁹ The same day, Potashner, Stark, and others - with no Outside Directors present - conduct a conference call to discuss HHI-related issues. Stark writes Potashner, “geezus, I continue to be stunned that you don’t see the significant issues with HHI. [W]hat a gigantic mess. [R]on [Doomink] is 100% aligned with this view.”⁴⁰
- Saturday, July 20, 2013: Potashner writes Doornick, stating that “[a]s we established HHI, my intention was to hire a new CEO for PAMT and commit my full energies to developing HHI. My intent was to sell PAMT at the right time and keep HHI as the foundation of a new company.”⁴¹
- Sunday, July 21, 2013: Potashner asks Stark for a continued role with HHI post close, stating: “If I did a good job on HHI and we agreed that there was an options scenario for me there tied to downstream vesting..... By then I plan on having it worth \$100m.”⁴² Potashner emails Doomink the same day, writing: “Hi Ron[.] Requiring HHI options to be canceled unconditionally cancelled prior to the [Merger Agreement] signing, not at close, is an unreasonable request. You are telling us how we have to run our business even in the event

³⁷ VTBH002140.

³⁸ PAMTNV0112541.

³⁹ PAMTNV01 04836.

⁴⁰ PAMTNV01 04902.

⁴¹ PAMTNV0104837.

⁴² PAMTNV0104912.

1 we don't close the deal."⁴³ Potashner and Doornick hash out a deal on HHI over
2 ensuing emails that day, with no one else copied.⁴⁴

3 61. As he was externally violating the blackout period, Potashner internally engaged
4 in a series of threats and demands to the Outside Directors in order to secure payment for his HHI
5 options. The Outside Directors first proposed a dissolution of HHI to Potashner at a July 5, 2013
6 Parametric Board meeting. Potashner did not take the news well. The Board minutes state:

7 Further, if the Board were to dissolve HHI, Mr. Potashner stated that he
8 would call a special meeting of stockholders for the purpose of replacing
9 the Board. Mr. Potashner informed the Board that he could obtain proxies
10 for 40% of the Company's outstanding shares to effectuate such a
11 replacement.⁴⁵

12 62. Following that meeting, Potashner confided to Wolfe and outlined his litigation
13 plan against the Outside Directors if they did not comply: "All other choices we face (unilaterally
14 cutting options, limiting license, firing people, etc.) will result in ...very aggressive claims against
15 individuals and the company that I am convinced will not only blow up the [VTBH] deal but result
16 in substantial corporate and personal legal exposures."⁴⁶

17 63. Potashner's threats caused the Company's founder and President, Norris, to
18 threaten to disassociate from the Company, stating that "Potashner's proposed actions would be
19 unacceptable to him and that he would not continue with the Company if the Board were
20 replaced."⁴⁷

21 64. Over the next two days, Potashner laser-focused on Outside Director Putterman.
22 On July 6, 2013, Potashner wrote to Putterman to describe Potashner's prior litigation against
23 individual board members at SonicBlue where "we settled and I received a large check from the
24 Company/BOD."⁴⁸ Potashner concluded his email with the not-so-veiled threat, "[w]ould not like

25
26 ⁴³ VTBH012528.

27 ⁴⁴ VTBH013436.

28 ⁴⁵ PAMT0000164.

⁴⁶ PAMT0033294.

⁴⁷ PAMT0000164.

⁴⁸ PAMTNV0112643.

1 to ever have to go through that again.”⁴⁹ The next morning, Potashner informed Putterman by
2 email that cancelling HHI before the deal “will result in lawsuits.”⁵⁰ Potashner then picked up the
3 phone to call Putterman, threatening to call a shareholder meeting and “fire” the rest of the
4 Board.⁵¹ Two days later, Potashner again called Putterman to state that if the Board did not accept
5 his position, in Putterman’s words, “the lawsuit from John [Todd] if we do otherwise will be
6 devastating. . . .”⁵²

7 65. The Board held a meeting on July 20, 2013, where Potashner made a number of
8 additional demands regarding HHI, including:

- 9
- A cash payment of \$250,000 in exchange for Todd’s agreement not to sue the Board;
 - A continuation of Todd’s consulting agreements with HHI for another fifteen months so that he would continue to receive additional cash and options; and
 - An additional cash payment for Potashner, Barnes, and Todd “equal to nine-months salary.”⁵³
- 13

14 66. At the same meeting, Potashner threatened that if his demands were not met, “Todd
15 would sue the Company and the [VTBH] merger transaction could be derailed in such [a] case.”⁵⁴
16 Interestingly, however, neither Potashner nor Todd had any legal right to demand payment in
17 exchange for cancellation of their HHI options. Their HHI 2013 Equity Incentive Plan provided
18 that in the event of a “change in control” or other merger by Parametric, the merger agreement
19 may provide for all HHI options “cancellation with or without consideration, in all cases without
20 the consent of the Participant [i.e., Potashner or Todd].”⁵⁵

21 67. The Outside Directors saw through Potashner’s threats, which he purportedly made
22 on Todd’s behalf. During this time, Kaplan confided to the other Outside Directors that
23 Potashner’s HHI options were issued because of false representations to the BoD. . . . And of

24

25 ⁴⁹ *Id.*

26 ⁵⁰ *Id.*

27 ⁵¹ PAMTNV0112625.

28 ⁵² PAMTNV0112558.

⁵³ PAMT0000171.

⁵⁴ *Id.*

⁵⁵ PAMT0000024.

1 course Ken is using JT [John Todd] as a surrogate for getting as much as he can for his own HHI
2 position. . . . I believe JT is not really the problem. It is Ken pushing him and hiding behind JT's
3 coattails. . . . Yet, as it has been presented to us, we are being held hostage and being blackmailed
4 by this consultant. His strength is a lawsuit that could delay the merger.⁵⁶

5 68. Similarly, Norris wrote:

6 Since John [Todd] and Ken [Potashner] are threatening now, why should
7 we think they'll be easier after the deal? Juergen [Stark] is asking for a
8 lawsuit if he buys that. John and Ken will force TB to let them run HHI or
9 sue TB. That's the next shoe that'll drop. I guarantee it. I don't think they
10 connected that dot.⁵⁷

11 69. Despite recognizing the conflict, the Outside Directors caved and allowed
12 Potashner, Wolfe, and Barnes to call VTBH and convey Potashner's demands. The demands
13 included that VTBH not shut down or dismantle HHI for six months following the close of a
14 merger, pay cash payments to Potashner and Todd at 100% of 2013 bonus levels (whether or not
15 they earned such amounts), and agree not to restructure the HHI license agreement. In return,
16 Potashner and Todd would agree not to sue VTBH and Parametric (despite their lack of any legal
17 right to do so).⁵⁸

18 70. Potashner, Wolfe, and Barnes jointly made these demands to Turtle Beach on July
19 20, 2013. Notably, the Outside Directors asked Potashner to throw in a gift for themselves in the
20 same call. When reporting back to the Board, Potashner stated, "I also introduced [to Stark] the
21 concept of accelerating BOD options and there was no adverse reactions."⁵⁹ The next day,
22 Potashner also surreptitiously emailed and called Stark to discuss his position in HHI.⁶⁰

23 71. On July 21, 2013, Potashner wrote to Norris, stating: "In the event that the BOD
24 decides to cancel [my HHI options with no guarantee that the Merger will close,] please consider
25

26 ⁵⁶ PAMTNV0115292.

27 ⁵⁷ PAMT0033904.

28 ⁵⁸ PAMT0000171.

⁵⁹ PAMTNV0112539.

⁶⁰ PAMTNV0104912.

1 this my formal resignation for the company.”⁶¹ As noted above, however, Potashner worked out
2 a deal directly with Doornick, whereby VTBH promised that it would postpone any cancellation
3 of HHI. So Potashner followed up the next day after another development: “I am glad that Ron
4 Doornick, VTB Chairman has revised their position so our BOD doesn’t need to face the issue of
5 cancelling the options prior to DA [Merger Agreement signing]. I therefore will withdraw the
6 resignation threat and we don’t need to get everybody further worked up.”⁶²

7 72. The Parametric Board set another meeting to discuss the issue on July 23, 2013.
8 That morning, Wolfe indicated that Stark wanted HHI options to be cancelled. Rather than stand
9 up to Potashner, Wolfe acted as his mouthpiece, calling Stark’s request “unreasonable” and
10 stating, “I think this is the point where we say no.”⁶³ Wolfe’s solution—worked out in advance
11 with Potashner—was to pay Potashner a cash ransom. Wolfe proposed that “[w]e would approve
12 2013 bonuses for key personnel including ... Ken [Potashner], and John [Todd].”⁶⁴ When another
13 Outside Director indicated that Potashner’s options should indeed be canceled because “the
14 options are still wrong and not in the best interest of our shareholders,” Potashner wrote that any
15 proposal to cancel his options “would blow up the deal, result in a massive amount of lawsuits
16 and personal liability for the BOD, and is the worst thing for our shareholders.”⁶⁵

17 73. Pressured by Potashner’s threats, the Board again caved at the July 23rd meeting.
18 The Board agreed to pay Potashner and Barnes their full 2013 cash bonuses (whether entitled or
19 not), but deferred the final approval to a Compensation Committee meeting.⁶⁶ The Board also
20 agreed to pay Todd \$250,000 in exchange for an agreement not to sue Parametric (despite his lack
21 of legal right to do so).⁶⁷

22 . . .

25 ⁶¹ PAMT0033914.

26 ⁶² PAMT0033915.

27 ⁶³ PAMTNV0112504.

28 ⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ PAMT00001 75; PAMTNV01 12625.

⁶⁷ PAMT00001 75; PAMTNV01 12625.

74. Stripes Group and VTBH continued to manipulate Potashner and lead him to believe that he would continue with HHI post-close, despite the eventual cancellation of his options. On July 21, 2013, Stripes Group agreed that it would not seek cancellation of Potashner's HHI options before signing the Merger Agreement, but would defer the matter to address in the Merger Agreement itself and postponed until the Merger's close.⁶⁸ On July 23, 2013, Stark circulated a draft press release announcing the Merger, which contained the following line: "Ken Potashner ... will continue a leadership role for Hypersound Health, Inc. ('HHI'), the Company's health subsidiary, which continues to demonstrate extraordinary results for those with hearing deficiencies."⁶⁹

75. While Stripes Group externally manipulated Potashner into believing he would continue to have a role, Stripes Group internally planned to kick him out. On August 5, 2013, Fox wrote regarding the Merger announcement press release: "My reaction to the press release is too much Ken P. [H]e is going to have effectively no role going forward."⁷⁰ Stripes Group knew how to manipulate Potashner, however, and kept that plan a secret until ousting him just months after the Merger closed.

76. On January 10, 2014, less than a week before the close, Potashner learned that VTBH's lenders were forcing it to dissolve HHI. Potashner panicked. Potashner asked his CFO to cancel Merger-related payments (but they had already been sent) and wrote to Stark, "lets delay the closing and renegotiate the [HHI] point."⁷¹ Potashner asked Stark to "[see if there is another way to push on the bank."⁷² Potashner admitted that "[a]t a personal level and as a shareholder of PAMT, I would not have supported the deal if I thought HHI was going to be dismantled."⁷³

⁶⁸ VTBH013436

⁶⁹ PAMTNV0103786; VTBH008077

⁷⁰ VTBH000822.

⁷¹ PAMTNV0086620.

⁷² VTBH066656

⁷³ PAMTNV0086617

B. Stripes Group and Potashner Conspired to Delay Positive Company Announcements in an Attempt to Create a Manipulated Premium

77. Potashner conspired with Stripes Group to illegally manipulate Parametric's stock price by suppressing it in advance of the Merger announcement. In Potashner's and Stripes Group's views, the 81/19 dilution ratio would look slightly better for stockholders if Parametric's stock price were lower upon announcement. In Potashner's words, Fox—the head of Stripes—personally expressed a “preference” that Potashner and Parametric “don't defend the stock in that premium on deal will look better.”⁷⁴ Potashner admitted that doing so was in breach of his fiduciary duties. During the process, he confirmed to VTBH that “[w]ithholding licensing deals and announcements is contrary to the responsibility that I have.”⁷⁵ Yet, Potashner continued to delay and suppress several favorable and material announcements keeping Parametric's stock price artificially low.

78. Potashner confirmed on March 27, 2013, in one of his first discussions with Stripes Group, that “I expressed to Karen [Kenworthy] that we collectively should not be overly concerned by the stock run up in that we have choices in terms of where we assign the valuation. We also have now accumulated unannounced wins that I plan on delaying announcements on for as long as possible.”⁷⁶

79. Just a week later, Potashner informed Stripes Group that his suppression of material information was against the advice of Parametric's outside securities counsel. On April 4, 2013, Potashner wrote to Kenworthy and Stark, stating: “Our corp counsel said we need to do an 8-k on the McD. If it weren't for our discussion I would do a full press release but I have deemed that it would be bad form. Taking one for the team.”⁷⁷ Potashner was referencing an agreement to place a Hypersound technology installation at McDonald's Disneyland restaurant, which represented a significant development in Parametric's efforts to commercialize and

⁷⁴PAMT0040595.

⁷⁵ PAMTNV010627.

⁷⁶ VTBH011084.

⁷⁷ VTBH006261.

1 implement its audio technology. But rather than file an 8-K and inform stockholders of the positive
2 news, as company counsel recommended, Potashner concealed this material information.

3 80. Potashner admitted that delaying the positive announcements harmed Parametric.
4 On April 8, 2013, Potashner informed Stark that “[a]lso I wanted to mention that we will do a
5 press release in the morning. Our shares have come under substantial pressure in the last couple
6 days relative to the delay in me announcing licensing deals.”⁷⁸ Stark intervened, however, and
7 Parametric issued no such press release the next morning, nor did Parametric announce any
8 licensing deals at any point thereafter. Instead:

- 9 • On May 17, 2013, Potashner outlined for Stark his plan for a post-Merger-
10 Announcement press strategy: “I also have been stockpiling announcements
11 that we can roll out to solidify price if there is weakness. You and I can
12 strategize on whether we want to lay low or get more aggressive in terms of
13 supporting the stock.”⁷⁹
- 14 • The same day, John Todd wrote to Potashner: “As I understand they [Stripes
15 and VTBH] believe the stock will drop once we announce and that this will
16 make the deal less favorable than an IPO. . . . If they have announcements and
17 we have announcements [to release after the Merger] we can not only hold
18 price but significantly improve price.”⁸⁰

19 81. Parametric’s stock price declined significantly between May 28 and June 1, 2013.
20 Regarding the McDonald’s signage, on May 31, 2013, Potashner wrote to Stark: “I have ... an
21 announcement on our completion of Disneyland McD I am waiting to see if we are a go before
22 making decisions.”⁸¹ Potashner’s draft internal press release stated, in part, as follows:

23 The Company’s commercial business focuses on the ability to target
24 communication and create sound zones in various retail sites. The
25 Company completed the scheduled installation of HyperSound technology
26 at a McDonald’s Disneyland restaurant last week and continues to grow its
27 commercial product pipeline.⁸²

28 82. This language would have defended the stock and signaled to the markets that the

26 ⁷⁸ PAMTNV01 08985.

27 ⁷⁹ PAMT0040368.

28 ⁸⁰ PAMT0040339.

⁸¹ PAMT0040576.

⁸² PAMT0040591; PAMT0040592.

company was executing on its prior promises of commercialization. Indeed, Potashner would later confirm the importance of McDonalds' selection of the HyperSound pilot by reporting to Stark that it "led to McDonald's Channel selecting HyperSound as a premium audio solution for McDonalds Channel restaurant installations." Potashner used this information to ask for a restructured deal, writing to Stark: "[T]ell Ken Fox I want 75-25 deal based on this."⁸³ Potashner confirmed that this specific information, if released, would constitute "powerful stuff" that "will be an exclamation point on what we are doing," demonstrating Parametric's "great hand going forward" if a deal wasn't reached.⁸⁴

83. Fox intervened and, through Stark, asked Potashner to keep the material information from stockholders. As noted, Potashner followed up with a phone call to Stark on June 2, 2013 and wrote: "Just spoke to Juergen [Stark] and his preference (and Ken [Fox's]) preference is that we don't defend the stock in that premium on deal will look better."⁸⁵ (Parenthesis in original.) Potashner complied with Fox's wishes and deleted the McDonald's Disneyland reference from the final press release.⁸⁶ On June 5, 2013, Potashner confirmed to Stark, "I will defer the release based on our discussion."⁸⁷ As a result, Parametric's stock price continued to decline.

84. On July 17, 2013, Potashner ultimately confirmed to Stark that, as a result of the suppression of announcements, "[s]tock is under tremendous pressure now."⁸⁸ Just before the announcement of the Merger on August 5, 2013, Parametric's stock price remained under pressure, which made a terrible deal look slightly better.

C. At Stripes Group's Urging, Potashner and the Board Stalled and Undermined Competing Corporate Opportunities

85. Stripes Group principals (Fox, Doornick, and Kenworthy), along with Stark, also

⁸³ VTBH013765.

⁸⁴ PAMTNV0101694.

⁸⁵ PAMT0040595.

⁸⁶ See http://www.parametricsound.com/press_release_details.php?id=82.

⁸⁷ PAMTNV0106696; PAMT0040658.

⁸⁸ VTBH008077.

1 successfully encouraged Potashner to undermine the Company's potential corporate opportunities
2 during Merger negotiations. Potashner obliged. As a result, Potashner stalled discussions with
3 other licensing partners and potential acquirers as soon as Stripes Group and VTBH arrived on
4 the scene.

5 86. Potashner admitted that doing so was in breach of his fiduciary duties. Potashner
6 explained to VTBH that "Withholding licens[ing] deals ... is contrary to the responsibility that I
7 have." And during the process, Potashner wrote: "My stock is taking a beating due to me deferring
8 signing licensing deals I have intentionally constrained the progress [of Amazon attempting to
9 buy the Company]. I am still in a precarious situation delaying licenses that [would otherwise]
10 bring us economic value and valuation."⁸⁹

11 87. The first time they spoke, Stripes Group made it clear that Potashner should stall
12 other corporate opportunities. On March 12, 2013, Potashner wrote to Kenworthy, stating: "I may
13 need help on how to slow down one of the discussions we have underway. The time urgency is
14 that they are targeting a gaming accessory product for this Xmas and thinking in the 200-300k
15 unit range."⁹⁰ Potashner was referencing the SIIG/Optek deal described herein.

16 88. On March 27, 2013, Kenworthy reported directly to Fox that Potashner complained
17 "[h]e's receiving substantial pressure from one of his other potential licensing partners to advance
18 their discussion[s] (but claims it would clearly not be in the interest of [VTBH] or Stripes for us
19 to do so.... I assume it's Sony)."⁹¹ (Parentheses in original.) The very next day, March 28, 2013,
20 Potashner confirmed to Kenworthy that "I will suspend any licensing discussions with any parties
21 while we have our discussions with TB/Stripes."⁹² Kenworthy responded in approval.

22 89. On April 4, 2013, Potashner confirmed to Stark that he "will slow play" an active
23 and then-promising collaboration with Qualcomm.⁹³ The next day, Qualcomm stated that it
24

25
26 ⁸⁹ PAMT0039840; VTBH002189; VTBH001759; PAMTNV0106815.

27 ⁹⁰ PAMT0039368.

28 ⁹¹ VTBH005649.

⁹² PAMT0039561.

⁹³ PAMTNV0108760.

“would be interested in a potential licensing discussion” and “will get the NDA taken care of today.”⁹⁴ Potashner did nothing for a week. On April 12, 2013, Potashner wrote to Stark that “it makes sense for me to advance this discussion,” but Stark responded that “I would slow-roll a bit.”⁹⁵

90. On April 7, 2013, Potashner confirmed to Stark that “I would be able to announce the license [with VTBH] and buy additional time both with the parties that we have stalled I have several things going on including defining a financing and the pressures of the license activities we put on hold.”⁹⁶ Stark agreed, responding to Potashner that: “In fact I assumed you would absolutely not want to announce any license deal since you’ve stalled all the other parties.”⁹⁷

91. Days later, Potashner admitted the harm caused by his stalling efforts. On April 9, 2013, Potashner wrote to Kenworthy and Stark: “My stock is taking a beating due to me deferring signing licensing deals. Any ideas?”⁹⁸ On April 15, 2013, Potashner forwarded an email to Stark from SIIG/Optek, explaining “[t]his is one of the license deals I have frozen. Very high royalty rate 9% and China [is a] big market. If I signed and announced this deal our stock would be in the 20s.”⁹⁹

92. On April 19, 2013, Doornick reported to Fox, Kenworthy, and Stark, inter alia, and confirmed that “[t]he Parametric guys ...face a lot of pressure from their potential licensing partners (having put several deals on hold).”¹⁰⁰

93. During this time, capable buyers were interested in purchasing Parametric. On April 12, 2013, Potashner described a conversation with an Amazon executive as follows: “He declared Amazon is interested in buying the company. . . . He said they are familiar with our technology and believe it will be highly relevant to future products Amazon plans on

⁹⁴ PAMTNV0109178.

⁹⁵ Id.

⁹⁶ PAMT0039816.

⁹⁷ Id.

⁹⁸ PAMT0039840.

⁹⁹ PAMTNV0108344.

¹⁰⁰ VTBH011638.

launching.”¹⁰¹ But on May 20, 2013, Potashner forwarded an Amazon email to Stark writing, “I have intentionally constrained the progress here but I don’t believe I can further do so. Even though you don’t see Amazon as viable I see it as a means of selling PAMT.”¹⁰²

94. On May 25, 2013, Potashner admitted to Stark that “[I] need to get on running my business and getting shareholder value. Withholding license deals and announcements is contrary to the responsibility that I have.”¹⁰³ Despite recognizing the problem, Potashner continued to withhold licensing deals and positive announcements through the Merger.

95. Potashner again confirmed that delaying licenses was contrary to his fiduciary duties. On June 2, 2013, Potashner explained to Stark that “I am still in a precarious situation delaying licenses that do [otherwise] bring us economic value and valuation...I am not in a position where I can sit back and let stock fall too far.”¹⁰⁴ Yet Potashner did just that because, as noted, the very same day - June 2, 2013 - VTBH informed Potashner that it was Stripes Group’s preference to avoid defending the stock because the “premium on deal will look better.”¹⁰⁵

96. The rest of the Parametric Board finally noticed Potashner’s improper stalling efforts. On July 6, 2013, Kaplan wrote:

Personally I think this has gone on far too long. We need to get on with the business of running the business. What has been going on since this VTB [Stripes] idea surfaced? Where are our licensing agreements, where are sales (incremental improvement due to David), Epsilon, Amazon, The Chinese, McDonalds, The Bear stores (still in beta mode), Sony, Samsung, etc.? AND WE HAVE SURE BURNED THROUGH A HELL OF A LOT OF MONEY....

It is time for the BOD to step up and take charge! We have been far too passive in the past. It is good to have a strong leader but not a dictator.¹⁰⁶

97. While Kaplan’s email demonstrated a brief glimpse of spirit, the next day, July 7, 2013, Kaplan embarked on his personal quest for an additional bonus in connection with the

¹⁰¹PAMT0039865.

¹⁰² VTBH002189.

¹⁰³ VTBH00J759.

¹⁰⁴ PAMTNV0106815.

¹⁰⁵ PAMT0040595.

¹⁰⁶ PAMT0061365.

1 Merger (described below). After realizing the potential for personal benefit, Kaplan fell in line.
2 The Outside Directors, through Kaplan's email, were thus informed of Potashner's stalling efforts
3 and by their acquiescence, were complicit in the misconduct.

4 98. Ultimately, before the Board even voted on the Merger, Potashner gave VTBH and
5 Stripes Group "veto rights on all licenses," precluding the Company from entering into a superior
6 licensing agreement before giving control of the Company to Stripes Group.¹⁰⁷

7 **D. The Parametric Board Knew that VTBH's Balance Sheet Was Deteriorating**
8 **but Voted in Favor of the Unfair Merger Regardless**

9 99. Before voting on the Merger, Potashner and the Outside Directors knew that
10 VTBH's finances were in bad shape and that, as a result, Parametric would be issuing millions of
11 dilutive shares in exchange for an entity with negative value.

12 100. On June 29, 2013, Potashner expressed the following alarming concerns to all of
13 the Outside Directors, including Honore, Kaplan, Norris, Putterman, and Wolfe:

14 The key concern I have has been the financing challenges for VTB. They
15 had both covenant issues and the need to increase the credit line to support
16 their growth as well as the inclusion of the PAMT expenses post closing.

17 * * *

18 [The] biggest concerns I have highlighted include unaudited financials and
19 a new item around the independence of their [VTB's] auditors.

20 * * *

21 The biggest issue outstanding in my mind is an issue concerning \$12M of
22 debt that VTB has that was not disclosed to us at the time we negotiated
23 exchange rates...I believe this is indication that their balance sheet wasn't
24 as strong as they represented and we should get something as an offset.¹⁰⁸

25 101. VTBH's balance sheet did not thereafter improve. A month later, on July 31, 2013
26 (two days before the Parametric Board voted on the Merger), VTBH provided its second quarter
27 financials to Barnes, Parametric's CFO. Barnes promptly forwarded the numbers to Potashner
28

¹⁰⁷ PAMT0060525.

¹⁰⁸ PAMTNV0105759.

1 writing, “FYI. Proxy may not be pretty. Going to have some selling to do.”¹⁰⁹

2 102. Notably, despite their awareness of Turtle Beach’s dire financial state and
3 previously undisclosed debt, Potashner and the Outside Directors did not negotiate anything “as
4 an offset,” did not renegotiate the exchange rates, and continued to pay no heed to the red flags
5 regarding Turtle Beach’s poor financial condition.

6 103. On August 2, 2013, the Board met and voted in favor of the Merger Agreement.
7 This August 2nd meeting took the form of a one-hour conference call. During that call, the
8 Outside Directors met Potashner’s cash demands and agreed to pay his 2013 bonus payments at
9 the maximum target rate of \$210,000.¹¹⁰ According to the Proxy, Potashner was entitled to receive
10 a “golden parachute” upon a change in control which would result in compensation of more than
11 \$2.8 million (including the \$210,000 bonus described above plus a cash payment of \$350,000 and
12 equity bonus in the form of accelerated vesting of stock options valued at nearly \$2.25 million.

13 104. As described in greater detail below, during the very meeting they were supposed
14 to be paying attention to a fairness opinion and assessing the fairness of the Merger for Parametric
15 stockholders, the Outside Directors spent their time emailing about their own personal payouts.
16 The Outside Directors knew that the Merger was potentially disastrous and knew that they would
17 be issuing highly dilutive equity, and thus control of the Company, for almost nothing in return.
18 But the Parametric Board was more concerned with getting paid.

19 105. At that meeting, Craig-Hallum Capital Group, LLC (“Craig-Hallum”) presented its
20 “fairness opinion” to the Parametric Board. While the flawed substance of that opinion is also
21 described in greater detail below, Potashner explained that it was a close call. The following day,
22 Potashner wrote to Stark in an email entitled “fairness opinion”:

23 We did get it but you should know that just barely. With the renegotiation
24 to 81-19 we were below one of the 3 metrics and when you aggregate the 3
25 metrics the deal is “barely fair.”
26

27
28 ¹⁰⁹ PAMT0057372.

¹¹⁰ PAMT0000I89.

The issue with this is that the document goes public and can make the vote harder for the shareholders. I will need to do a good job selling the strategic ramifications.¹¹¹

106. Potashner later lamented to Stark, “If we received 22% of the shares we wouldn’t have been out of bounds on the fairness opinion.”¹¹² Nevertheless, the Board still approved the Merger at the severely dilutive ratio of 80.9% to 19.1%.¹¹³

107. Parametric announced the Merger after the market closed on August 5, 2013. The Company’s shares immediately tanked. Parametric’s stock closed at \$17.69 per share on August 5, 2013, and dropped to just \$14.08 per share by August 6, 2013—a 20% decline in shareholder value. The drop would have even been more significant had Stripes and Potashner not suppressed Parametric’s stock price in the preceding five months.

E. The Go-Shop Was a Sham

108. The Merger Agreement contained a provision requiring Parametric to contact parties within 30 days of the signing of the Merger Agreement to secure a competing deal. The go-shop commenced on August 5, 2013. During the go-shop, however, Potashner sabotaged other potential bidders through delay and refusals, then referred them directly to Stark and Stripes Group. Stark would then swat them away.

109. Potashner and Stark’s correspondence regarding the go-shop is illuminating. On August 3, 2013, Potashner sent Stark a draft Merger announcement with the following reference to the go-shop: “Parametric, with the assistance of an independent financial advisor, will actively solicit alternative proposals during this period.”¹¹⁴ Stark responded right away to demand removal of that sentence, writing, “You’re not looking for an alternative and neither are we.”¹¹⁵

110. Potashner responded minutes later to confirm that he would “soften” that language, because:

¹¹¹ PAMTNV0101203.

¹¹² VTBH068943.

¹¹³ PAMTNV0101319.

¹¹⁴ VTBH008036.

¹¹⁵ PAMT0056829.

We were not shopping the company, Just to [be] 100% transparent there were 2 others that we discussed but I put them on licensing track discussions and anticipate they will stay there - Amazon and Dolby. I have slowed both discussions to get our deal done but this will be a topic for you and I next week.¹¹⁶

111. On August 7, 2013, Potashner informed Stark that VTBH should not “invit[e] in/embolden one of the other companies that expressed interest in us” because “I like our deal. I don’t want to be an operating unit of Amazon.... You and I are totally aligned. I know the stock price doesn’t matter now for your or mine personal liquidity.”¹¹⁷

112. On August 12, 2013, one week into the go-shop period, Motorola Mobility’s Senior Vice President and General Counsel contacted Parametric to “re-engage” because “Motorola wanted to own [Parametric’s] IP.”¹¹⁸ Even though Motorola was on the “Go Shop Buyers List,” Potashner and Houlihan Lokey did not directly respond regarding this serious indication of interest, rather, Potashner leaked the contact to Stark and asked that VTBH respond.¹¹⁹ On August 15, 2013, Stark spoke directly with Motorola to hear that Motorola—a potential acquirer competing with Stark—purportedly was not interested.¹²⁰ Stark’s contact with Motorola, of course, was highly inappropriate and rife with conflict given the fact that Stark was employed at Motorola for nine years between 2003 and 2012 and served as its former Chief Operating Officer.

113. In addition, on August 13, 2013, Potashner thwarted Amazon by informing it that Parametric’s video gaming licenses were off limits (despite Amazon’s interest in purchasing Parametric as a whole).¹²¹

114. After the go-shop expired, Potashner confirmed to Stark that he had blocked competing bids. On November 19, 2013, Stark asked Potashner about a negative online article regarding the Merger. Stark quoted the following line in his email: “HL [Houlihan Lokey]

¹¹⁶ VTBH008036.

¹¹⁷ VTBH004040.

¹¹⁸ PAMT0060361.

¹¹⁹ PAMT0038812; PAMT0060361; PAMT0060361; PAMT0060541.

¹²⁰ PAMT0052416.

¹²¹ PAMT0041742.

contacted 13 parties with no interest and then 49 parties with no interest.”¹²² Stark asked Potashner, “Can you provide the bullets to counter this please?”¹²³ What Stark did not realize—nor did Potashner when he responded—was that the above quoted line was in fact summarizing language from the Proxy itself.¹²⁴ Regarding the go-shop, after mentioning that 49 parties were contacted, the Proxy stated: “None of these prospective buyers, or any other parties, expressed interest in making an acquisition proposal for Parametric.”¹²⁵

115. Potashner responded with his “counter” to this language, writing to Stark: Dolby and Amazon had interest. I will take you through the discussions when we are together. I put boundaries that were very difficult in that I didn’t want an exit given that the \$ 150M valuation although good for merger calculations was light in mind for an exit. I would not have let you take us private either. Better to discuss face to face.¹²⁶

116. For context, a valuation for Parametric of \$150 million would have amounted to above \$19.00 per share at the time of the Merger. On August 2, 2013, for example, Parametric’s market capitalization existed at approximately \$135 million.¹²⁷ Yet Potashner egregiously “put boundaries in place” to prevent \$150 million offers because he personally did not want them.

117. The go-shop also contained several structural problems. First, the Break-Up License applied fully during the go-shop, which precluded bids (as discussed below). Second, the five day business match-right provision also barred potential bidders by, according to Professor Subramanian of Harvard Business School and Harvard School of Law, “allow[ing] Turtle Beach to slow down, and potentially run out the clock on, a potential third-party bid,” resulting in an “infeasible” timeframe for a competing bid. Third, Houlihan Lokey, a conflicted financial advisor, was allowed to participate in the “solicitation” of other bidders in Potashner’s “go shop.” Like Potashner and Stark, Houlihan Lokey had no incentive to actually find an alternate bidder during

¹²² PAMTNV0090998.

¹²³ Id.

¹²⁴ VTBH048603.

¹²⁵ Proxy at 58.

¹²⁶ PAMTNV0090998.

¹²⁷ PAMTNV0101319.

the go-shop process, and every incentive not to. Houlihan Lokey's engagement fee had already been curtailed significantly when it was forced to rebate \$300,000 to pay for the Craig-Hallum fairness opinion fee after it was discovered that Houlihan Lokey had represented VTBH in its private sales process in 2011 and was thus conflicted.¹²⁸ Houlihan Lokey also sought a financing role from Stripes Group on the Merger itself.¹²⁹

V. THE STOCKHOLDER VOTE WAS BOTH UNINFORMED AND COERCIVE

A. Defendants Purposefully Submitted a Misleading Proxy to Parametric Stockholders

118. As noted, the August 5, 2013 Merger announcement was not well received. Stockholders and the financial press both strenuously criticized the Merger and the stock sharply decreased. During this time, defendants expressed repeated concern regarding the likelihood that stockholders might vote against the deal based on VTBH's deteriorating balance sheet.

119. Defendants designed the Proxy in order to conceal material information from Parametric stockholders and cram through the disastrous Merger for their personal benefit. Unlike most mergers where a pure majority is required for approval, this Merger only required a majority approval of the votes cast at the special meeting. When Kenworthy asked how many non-insider votes were required, Potashner proudly explained, "I skewed the scenario so we don't need 50% of the vote. Just 50% of those in attendance or those who vote their proxy. This should help."¹³⁰

1. The Proxy Omits Material Information Concerning VTBH's Financial Decline and True Value.

120. Defendants knew that VTBH had experienced a significant financial decline in the months leading to the Merger, rendering the projections used in Craig-Hallum's fairness opinion and disclosed in the Proxy (the "Fairness Opinion/Proxy Projections") false when the Proxy was filed on December 3, 2013. Yet, the Proxy failed to alert Parametric stockholders of this material

¹²⁸ Deposition Transcript of Daniel Hoverman ("Hoverman Tr.") at 110-11, 154, 213-20.

¹²⁹ Id.

¹³⁰ VTBH015502.

fact.

121. The Fairness Opinion/Proxy Projections were actually developed in spring 2013. As a result of their age, the Fairness Opinion/Proxy Projections were both over-influenced by VTBH's strong first quarter of 2013 and not influenced at all by VTBH's financial decline in the second half of 2013. Indeed, on October 25, 2013, Stark described the Fairness Opinion/Proxy Projections as follows:

Our [Fairness Opinion/Proxy Projections] are a bit high and reflect what we believed would happen this year. I believe they were done in the Spring timeframe (May?) though and we had just come off of a very strong Q1 so there is grounding for these. Since then, the market has clearly slowed much more than we expected. And even by August DA signing, I had adjusted the range down accordingly.¹³¹

122. On August 2, 2013, Craig-Hallum relied on these outdated projections to render its fairness opinion.¹³² Notably, the Fairness Opinion/Proxy Projections contained 2013 Adjusted EBITDA of \$40.6 million and 2013 net revenue of \$218 million for VTBH.¹³³ Less than a week later, Stark confirmed to Fox, Kenworthy, Doornick, and others that those numbers were inaccurate, and that VTBH's "best estimates right now" came to just \$32 million to \$40 million for 2013 EBITDA, and just \$190 million to \$215 million for 2013 net revenue, meaning the entire ranges provided by Stark fell below the corresponding values used in the Fairness Opinion/Proxy Projections.¹³⁴

123. VTBH's estimates for beyond 2013 were also wildly misleading. For 2014, VTBH's downside projection for revenue and EBITDA was \$247.8 million and \$49.9 million, which was below the Craig-Hallum fairness opinion figures of \$268.6 million and \$56.7 million, respectively. VTBH lowered these projections again in December 10, 2013, adjusting revenue and EBITDA to \$205.8 million and \$29.9 million, respectively.

124. In addition, although the Proxy forecasted \$100.4 million EBITDA for 2016,

¹³¹ VTBH093183.

¹³² PAMT0056986; Proxy at 74.

¹³³ *Id.*

¹³⁴ VTBH015820.

internally Stripes knew that “\$100m of EBITDA by 2016 is possible but requires upside scenarios to occur across all of our business segments and for us to become #3 player in high-end stereo/mobile headsets or for us to find new audio or gaming markets that can contribute \$20-\$40m of new EBITDA (=\$100 to \$200m of new revenue).” In other words, VTBH’s estimates were divorced from reality.

125. Potashner also voiced concern that VTBH’s deteriorating financial condition put Craig-Hallum’s fairness opinion in jeopardy, as disclosing VTBH’s then-current financial state could prevent Craig-Hallum from standing by its original fairness opinion and/or executing a new fairness opinion at the Merger ratio.

126. Potashner knew as of August 8, 2013 that VTBH’s latest “best estimates” were below the corresponding values in the Fairness Opinion/Proxy Projections, but was determined to push the Merger through even if it meant standing by the inaccurate values. On August 8, 2013, Potashner told Stark to “be aware that the fairness opinion will become public with proxy so you don’t want to be pessimistic to the point you contradict the data you provided that was basis for that opinion.”¹³⁵

127. Potashner forwarded this email to Todd, at which point Todd responded:

The more I think about it I don’t know how you can go out with any numbers that are lower than fairness opinion unless there has been a material change in business. I think we are boxed in that 2013, 2014 first look must match fairness opinion. Otherwise you need to conclude fairness opinion was wrong.¹³⁶

128. On August 9, 2013, notwithstanding Potashner’s and Stark’s knowledge about VTBH’s deteriorating financial condition, the two executives gave a false and materially misleading portrayal of VTBH and what they anticipated from VTBH in terms of future earnings during Parametric’s third-quarter 2013 earnings conference call. During the call, Stark told investors that “[they] expect[ed] our 2013 revenues to be in the range of \$190 million to \$215

¹³⁵ PAMTNV0100953.

¹³⁶ *Id.*

million and our EBITDA to be in the range of \$32 million to \$40 million.” VTBH ultimately missed this target by **61%** (\$13.852 million actual compared to \$36 million estimated midpoint).

129. On August 21, 2013, Potashner admitted to Kenworthy and Stark:

I recommend we take the long view, don’t get greedy and help us sail through the shareholder vote. Please note I didn’t try to renegotiate deal after you [VTBH] did a downward reforecast and then missed that reforecast.¹³⁷

130. VTBH continued its precipitous financial decline in September and October 2013. On October 7, 2013, Potashner explained to Stark that “Jim Barnes has been nervous for a bit that your Q2 numbers show you as losing money and having negative equity value.”¹³⁸ On October 14, 2013, Potashner wrote to Stark, “[t]he war is going to be getting shareholder support with deal terms that keep getting worse.”¹³⁹ Potashner also stated to Stark, “I have to do some damage control necessary to assure success with shareholder vote.”¹⁴⁰ Similarly, on October 18, 2013, Potashner told Stark that he has “been going over [numbers] with Jim [Barnes]. Shitty numbers. Money losing, negative equity, etc.”¹⁴¹

131. Despite VTBH’s deteriorating financial state, Defendants were determined to consummate the Merger, even if it meant defrauding Parametric stockholders. On October 25, 2013, Potashner informed Stark that “[i]nitial input is that changing the numbers might necessitate new fairness opinion. We are discussing implications of simply taking the numbers out of the proxy. Jim is leading this assessment and will [provide] more info later today.”¹⁴² On October 29, 2013, Potashner made the following revealing comment to Stark, Barnes and others:

As we discussed it is critical that the proxy leaves the tone of very positive financial numbers going forward. Even the actuals are weak for 13. Do you believe you accomplished this? This is the one key determinate of what the

¹³⁷ PAMTNV0099861.

¹³⁸ VTBH095533.

¹³⁹ PAMTNV0095569; PAMTNV0099861; PAMTNV0096468.

¹⁴⁰ PAMTNV0104228.

¹⁴¹ PAMTVNV0095570.

¹⁴² PAMTVNV0094986.

company will be valued at the day after the proxy and set the stage going forward.¹⁴³

132. Likewise, on October 31, 2013, Potashner explained to Stark that “there is a concern that given you brought down 2013 due to MSFT and CH [Craig-Hallum] may believe that [20]14 is off as well and thus fairness opinion exposed.”¹⁴⁴

133. On November 30, 2013, Potashner explained to Stark that “I think we (pamt) are under tremendous pressure in that the numbers keep getting softer, the apparent lack of controls, and the covenants exposures. The [‘]does this deal make sense[’] question is being asked.”¹⁴⁵ Later in the email chain Potashner stated that he has a “CFO who is very nervous and I am trying to get to the bottom of it.”¹⁴⁶

134. During this period, VTBH developed an updated set of projections that it would ultimately provide to its lender—PNC—to certify its compliance with certain debt covenants (the “Bank Projections”). On December 6, 2013, only three days after filing the Proxy, VTBH circulated a substantially final version of the Bank Projections.¹⁴⁷ VTBH ultimately sent the Bank Projections to PNC on December 19, 2013.¹⁴⁸

135. Predictably, the Bank Projections made two things very clear: (i) VTBH’s financial condition continued to worsen throughout the fall of 2013; and (ii) the projections used in the fairness opinion and disclosed in the Proxy were grossly inflated and overvalued VTBH. The following table provides 2013 net revenue and EBITDA values for the sets of projections discussed above:

...
...
...

¹⁴³ PAMTNV0095423.

¹⁴⁴ VTBH089382.

¹⁴⁵ VTBH073092; PAMTNV0088385

¹⁴⁶ *Id.*

¹⁴⁷ VTBH02263.

¹⁴⁸ VTBH020031.

Set of Projections	2013 Net Revenue	2013 ADJUSTED EBITDA
Fairness Opinion/Proxy Projections	\$218 million	\$40.6 million ¹⁴⁹
Bank Projections Low-End	\$179.6 million	\$22.2 million
Bank Projections High-End	\$193 million	\$27.5 million ¹⁵⁰

136. In fact, in response to VTBH's rapidly deteriorating financial condition, PNC forced VTBH to restructure its credit facility with the bank. On January 16, 2014, the day after the Merger, the post-Merger Company filed a current report on Form 8-K disclosing the terms of the credit restructuring with PNC. In pertinent part, the current report stated that PNC had permitted VTBH to incur an additional \$7 million of subordinated debt and extend various repayment deadlines and credit limits in exchange for agreeing to strict and materially unfavorable leverage limits and capital requirements. PNC's restructuring of VTBH's credit facility qualified as a "VTBH Material Adverse Effect" under the terms of the Merger Agreement, yet Stark signed the Merger Agreement notwithstanding.¹⁵¹

137. The misleading summary of VTBH's expected financial results injected a material element of falsity into the Proxy, particularly given that 80% of the proffered Merger consideration—and thus Craig-Hallum's fairness opinion as presented in the Proxy—was based

¹⁴⁹ PAMT0056986; Proxy at 74.

¹⁵⁰ VTBH020033. As contained in the Bank Projections' calculation of EBITDA, which is consistent with, if not conservative relative to, the Proxy's description of Adjusted EBITDA for VTBH used in Craig-Hallum's fairness opinion: "EBITDA is calculated as net income (earnings), plus interest, taxes, depreciation and amortization. Adjusted EBITDA adds back certain additional items and was calculated differently for Parametric and Turtle Beach For Turtle Beach, Adjusted EBITDA included addbacks of amounts for stock-based compensation and business transaction expenses."

¹⁵¹ Pursuant to the Merger Agreement, a "VTBH Material Adverse Event" is defined in pertinent part as follows: "any change, state of facts, circumstance, event or effect that, individually or in the aggregate, is materially adverse to (A) the financial condition, properties, assets, liabilities, obligations (whether accrued, absolute, contingent or otherwise), businesses or results of operations of VTBH and the VTBH Subsidiaries, taken as a whole, and/or (B) the ability of VTBH to perform its obligations under this Agreement"

on inaccurately on inflated figures.

138. In sum, Defendants' internal communications indicate that they were aware that VTBH's projections in the Craig-Hallum fairness opinion and Proxy were false and/or materially misleading.

2. Additional Facts Omitted and/or Misrepresented in the Proxy

139. The Proxy also left shareholders woefully uninformed about multiple issues described herein. These issues include: (a) the distressed financial nature of VTBH; (b) the Board's attempts to angle for personal payments in the hours leading up to, and during, the final Merger vote; (c) the Board's actions in stalling other potential acquirers and licensing discussions; (d) the material updates suppressed by Stripes and Potashner in order to create a fictional and manipulated premium; (e) the detail behind Potashner's threats to the rest of the Board; (f) interest by other parties in a potential transaction with the Company; and (g) the fact that the Board's financial advisors did not provide any opinion, informal or otherwise, on the terms of the Break-Up License, the Company's expected licensing revenues, or the value of the SIIG/Optek project. These issues go to the heart of the shareholders' decision whether to vote in favor of the Merger and in the absence of their disclosure, the shareholder vote could not have been fully informed.

B. Defendants Coerced Parametric Stockholders into Voting in Favor of the Merger

140. In addition to the misleading Proxy, Defendants structurally coerced Parametric stockholders into voting in favor of the Merger. The Merger Agreement contained a draconian "Break-Up License" provision, which prevented other bids and penalized Parametric stockholders in the event they voted against the Merger. If Parametric shareholders had voted against the Merger or Parametric otherwise accepted a better offer, Parametric would have been forced to provide VTBH with (1) an exclusive (even as to Parametric) worldwide license to Parametric's HyperSound technology in the "console audio products field" (i.e., gaming applications), and (2) a non-exclusive worldwide license to Parametric's HyperSound technology in the "computer audio products field." Parametric would have received a 6% royalty on net sales of such products, and 30% from any sublicenses that VTBH negotiated. The term of the Break-Up License was a

1 minimum of ten years, with a minimum royalty payment of \$2.0 million during the first five years
2 and \$1.0 million for each year after that (for a total minimum royalty payment of \$7.0 million). If
3 these minimum royalty payments were not made, Parametric had the right to convert the gaming
4 license to non-exclusive, but Parametric could not otherwise seek recourse from Turtle Beach for
5 any unpaid “minimum” royalties. The Merger Agreement also contained a highly unusual
6 combination of a five business day match-right provision and a 30-day “go-shop” provision.

7 141. The “Break-up License” was coercive. Had Parametric stockholders voted against
8 the Merger, the Company would have been crippled by the one-sided Break-Up License.

9 1. Potashner Negotiated the Break-Up License at Well Below Fair Market
10 Value

11 142. Potashner licensed Parametric’s “crown jewel” intellectual property at less than
12 fair market value and under terms that did not reflect Parametric’s existing licensing strategy.
13 Parametric’s IP commanded higher royalties in other licensing agreements. In fact, all of
14 Parametric’s then-existing licensing agreements existed at a 15% royalty rate, much higher than
15 the paltry 6% rate contained in the Break-Up License. For example, Parametric signed a deal with
16 Epsilon to license HyperSound’s automotive applications for \$1 million for development of a new
17 device and a 15% royalty for revenue over \$6.67 million.¹⁵² Parametric also licensed
18 HyperSound’s health care application to its subsidiary HHI for 15% of revenue.¹⁵³ Given that the
19 latter was an interested transaction with Potashner, the Board cannot argue that 15% HHI royalty
20 was not made on fair terms.

21 143. Potashner confirmed these facts when he admitted to Stark that the Break-Up
22 License’s royalty, then at 5.5%, was “well below the other deals I am working on within the
23 licensing realm.”¹⁵⁴ Potashner also stated: “I am also willing to have a break up consideration that
24

25
26 ¹⁵² PAMT0007031.

27 ¹⁵³ Parametric Sound Corp., Quarterly Report (Form 10-Q), at 14 (May 2, 2013), available at:
28 http://www.sec.gov/Archives/edgar/data/1493761/000101968713001603/pamt_10q-033113.htm.

¹⁵⁴ PAMT0039816.

1 results in you achieving a gaming license at well below market value ...As a demonstration of my
2 conviction towards closing a deal I will offer up gaming in the context of a breakup fee.”¹⁵⁵

3 2. The Break-Up License Was Impermissibly Coercive and Impaired the
4 Shareholder Franchise

5 144. After analyzing the deal protection provisions in the Merger Agreement, Professor
6 Guhan Subramanian of Harvard Business School and Harvard School of Law, concluded as
7 follows:

8 I reach the following conclusions in my assessment of the Turtle Beach-
9 Parametric deal:

10 (1) Asset lockups such as the Break-Up Fee License Agreement are
11 extremely unusual in the modern M&A marketplace;

12 (2) The particular combination of the 5-Day Match Right and the 30-Day
13 Go-Shop Provision is also not typical among comparable transactions;

14 (3) The Break-Up Fee License Agreement is a very potent asset lockup,
15 because it represents a large fraction of the overall value of Parametric,
16 other bidders cannot keep the HyperSound technology out of Turtle
17 Beach’s hands by bidding, and the evidence suggests that it was granted at
18 less than fair market value;

19 (4) The combination of the 5-Day Match Right and the 30-Day Go Shop
20 Provision puts additional “furniture against the door,” creating no clear
21 pathway for success for a third-party bidder; and

22 (5) While the Break-Up Fee License Agreement and the Match Right/Go-
23 Shop Provision each have a deterrent effect on their own, it is my opinion
24 that the combined effect of these three provisions is highly likely to deter
25 other bidders. This conclusion becomes stronger to the extent that the
26 Break-Up Fee License Agreement was struck at less than fair market
27 value.¹⁵⁶

28 145. The Break-Up License coerced Parametric’s shareholders to vote in favor of the
29 Merger. If shareholders had voted against the Merger, the Break-Up License would have triggered
30 and Parametric would have been crippled, having just licensed away its most-crucial intellectual
31 property. This acted as a coercive penalty for a “no” vote. Professor Subramanian explained this
32 scenario as follows:

33 _____
34 ¹⁵⁵ *Id.*; PAMT0039756

35 ¹⁵⁶ Subramanian Decl., ¶ 14.

[A]n asset lockup struck at less than fair market value reduces the stand-alone value of the company in the event of a negative shareholder vote, because the acquirer will exercise the option and siphon value out of the company. Foreseeing this, shareholders may vote for the deal even if they believe it is below fair value.¹⁵⁷

146. That is in fact what happened. Parametric stockholders voted in favor of the Merger, even though it was (and has indisputably proven to be) “below fair value.”

3. The Parametric Board Did Not Rely on Its Advisors in Approving the Terms of the Break-Up License

147. Neither Potashner nor the rest of the Board asked their financial advisors, Houlihan Lokey and Craig-Hallum, to conduct a valuation of the Break-Up License or otherwise analyze its appropriateness as a deal term.¹⁵⁸ Craig-Hallum did not even know the provision existed.¹⁵⁹

148. Potashner and the Board did nothing to value the asset lockup, even though Parametric’s CFO recognized that “[a]n exclusive license has a major impact on valuation, etc. so that needs evaluation.”¹⁶⁰ In addition, Potashner did not take any real effort to consider the value of the Break-Up License to VTBH or any other potential buyer.¹⁶¹

4. Potashner Agreed to the Break-Up License Terms and No Outside Director Had Any Material Impact on the Negotiations

149. Potashner negotiated all major terms of the Break-Up License without Outside Director involvement. Potashner and Stark first conceived the Break-Up License during their initial discussions in March 2013.¹⁶² By April 19, 2013, Stark and Potashner agreed on a term sheet that noted the Break-Up License “still needs discussion,” but specifically described an exclusive license for gaming, exclusive license for “PC audio,” and the same 6% royalty rate and 30% re-license royalty rate that ultimately appeared in the Merger Agreement.¹⁶³

¹⁵⁷ Subramanian Decl., ¶57.

¹⁵⁸ Deposition Transcript of David Wambeke (“Wambeke Tr.”) at 157-58; Deposition Transcript of Kenneth Potashner (“Potashner Tr.”) at 78.

¹⁵⁹ Wambeke Tr. at 157-58

¹⁶⁰ Potashner Depo. Ex. 4.

¹⁶¹ Potashner Tr. at 67-68.

¹⁶² Potashner Depo. Ex. 3; Potashner Depo. Ex. 5; PAMT0039748-49.

¹⁶³ PAMT0049600-07.

1 150. Potashner wrote the following to Stark on April 24, 2013:

2 I am getting substantial push back from counsel on the exclusive license of
3 the element of the breakup fee.

4 The issue is there is a BOD record that we were not interested in segregating
5 exclusive gaming from consumer in that several of the potential licensees
6 had presence in both sectors (i.e. Sony). We have BOD record that states
7 we would want near full market cap exclusive full consumer/gaming.

8 Therefore, the issuance of an exclusive gaming as breakup is deemed well
9 in excess of traditional breakup fees and thus BOD fiduciary issue.¹⁶⁴

10 151. Potashner overcame the resistance from his counsel and convinced the Outside
11 Directors to agree to the Break-Up License without analysis. During a Board telephone
12 conference, the next day, April 25, 2013, Potashner requested and received approval for the Break-
13 Up License.¹⁶⁵

14 152. Over the next two months, the Board continued to allow Potashner to negotiate the
15 terms of the Merger, again, with little supervision or involvement. During this time, no Outside
16 Director was involved in a single discussion with Turtle Beach regarding the Break-Up License.
17 While defendants claimed in this litigation that Wolfe became involved in the matter, it was in
18 fact Potashner—not Wolfe—who finalized the key terms of the Break-Up License. On June 19,
19 2013, Potashner unilaterally approved all of the key terms of the Break-Up License for inclusion
20 into the Merger Agreement.¹⁶⁶

21 153. After that point, the attorneys for both sides simply scribbled non-substantive
22 definitions, while Wolfe sat back as a pedestrian cc'd on emails. Indeed, the core terms finalized
23 by Potashner on June 19, 2013 remained in the drafts circulated throughout July 2013 and made
24 their way into both the final Merger Agreement and the Break-Up License.¹⁶⁷ Wolfe only
25 participated in a single conference call with Turtle Beach and counsel on July 24, 2013, which
26 had already been pre-negotiated by Stark and Potashner “before we engage the lawyers

27 ¹⁶⁴ PAMT0040125; PAMTNV0108234; PAMT0070745-48.

28 ¹⁶⁵ PAMT0000122.

¹⁶⁶ PAMT0040772.

¹⁶⁷ See, e.g., PAMT0065129; PAMT0065220; PAMT0069830.

tomorrow.”¹⁶⁸

154. Potashner never ceded control to Wolfe on Break-Up License negotiations. As late as July 31, 2013, two days before the Board voted on the Merger, Stark attempted to re-trade on the prior 6% license deal and Potashner responded directly before even informing Wolfe.¹⁶⁹ By the time Wolfe found out that there were open issues on the Break-Up License, he deferred to Potashner and asked him to work it out directly with Stark.¹⁷⁰ Potashner then provided final comments and approval.¹⁷¹ Throughout negotiations, Wolfe did not offer a single substantive comment on any material Break-Up License term.

5. Potashner and Stark Met with Parametric Stockholders Individually and Lied to Them to Win Their Votes in Favor of the Merger

155. Following announcement of the Merger on August 5, 2013, Defendants engaged in a fraudulent push to win over Parametric shareholder approval. This campaign included meeting one-on-one with large Parametric shareholders with significant influence over the company’s outstanding, non-insider shares.

156. Defendants held the following meetings with Plaintiff:

- On September 11, 2013, Potashner had dinner with Robert Masterson in Del Mar, California.
- On September 18, 2013, Stark had dinner with Robert Masterson at Mille Fleur in Rancho Sante Fe, California.
- On November 2, 2013, Potashner met with Barry Weisbord in Pasadena, California.
- On November 7, 2013, Stark met with Adam Kahn.

157. During each of the above meetings, Potashner and Stark made the same false and materially misleading statements that ultimately appeared in the Proxy on December 3, 2013. This

¹⁶⁸ PAMT0057667.

¹⁶⁹ PAMT0057413.

¹⁷⁰ VTBH000527.

¹⁷¹ See, e.g., PAMT0066252; PAMT0066296; PAMT0066298.

1 included concealing the fact that VTBH was experiencing a significant financial decline and was
2 not worth as much as Defendants had been representing.

3 158. In the Proxy, Defendants represented that VTBH's net sales and EBITDA for 2013
4 was \$218 million and \$40.6 million, respectively. Just 60 days later, VTBH's net sales and
5 EBITDA had fallen to \$178,741,463 and \$14,932,368. These declines, which amounted to 18%
6 and 63%, were known and already occurring when Stark and Potashner met with Plaintiff on the
7 above-listed dates and fraudulently induced them to vote in favor of the Merger.

8 159. The Proxy also materially overstated VTBH's net sales and EBTIDA for 2014 and
9 2015. Indeed, within just 60 days of the Proxy, the post-Merger Company lowered its Proxy
10 projections for 2014 net sales and EBTIDA from \$268,600,000 (net sales) and \$56,700,000
11 (EBITDA) to \$209,100,000 (net sales) and \$21,879,708 (EBITDA), declines of 22% and 61%,
12 respectively.

13 160. Similarly, for 2015, within 60 days of the Proxy the post-Merger Company lowered
14 its Proxy projections for 2015 net revenue and EBTIDA from \$335,100,000 (net sales) and
15 \$82,800,000 (EBITDA) to \$232,716,000 (net sales) and \$27,960,184 (EBITDA), declines of 30%
16 and 66%, respectively.

17 **VI. PAMTP LLC WAS DAMAGED BASED ON THE EXCESSIVE**
18 **OVERVALUATION OF VTBH AND THE UNDERVALUATION OF**
19 **PARAMETRIC**

20 161. Before Potashner embarked on the value-destroying Merger process, Parametric
21 was a promising young tech company with a valuable intellectual property portfolio and that
22 expected full profitability in 2014. On March 18, 2013, Potashner remarked to a fellow Board
23 member that Parametric was "one of the biggest success stories on NASDAQ this year."¹⁷²
24 Potashner confirmed three days later that Parametric was "one of the best performing companies
25 in the country."¹⁷³ On March 25, 2013, the Company provided outlook for fiscal year 2013. The
26

27 ¹⁷² PAMTNV0113889.

28 ¹⁷³ Id.

Company announced that it was expecting to be cash flow positive from operations for 2014 from its core digital signage and licensing business: “We have been able to advance strategic licensing discussions and we have achieved success on several recent digital signage pilot projects that we expect will translate to high volume customer orders late in 2013 and in 2014. As a result, we anticipate that we will be operating cash flow positive in 2014.” Around that time, however, Potashner began delaying Parametric’s business efforts and licensing activities, thus materially undermining the Company’s future business prospects.

162. As noted, Parametric’s stock closed at \$17.69 per share on August 5, 2013, and at the time the original complaint was filed, the same share of stock sat at less than \$1.00 per share. Defendants knew—but concealed—that they were causing Parametric to grossly overpay for VTBH’s assets.

A. The Parametric Board Grossly Overpaid for VTBH’s Assets

163. When agreeing to the Merger, the Parametric Board applied an excessive valuation for VTBH’s assets, which was not an honest error of judgment, but was the result of a bad faith and reckless indifference to the rights of Parametric stockholders. Parametric shareholders were reduced from full majority ownership to less than a 20% ownership in a deteriorating financial entity. In the months leading to the Merger, VTBH repeatedly tripped its debt covenants with third-party lenders and defendants were forced to scramble in order to figure out how to finalize a transaction where 4/5 of the consideration was allocated to a distressed entity. As Potashner summarized on December 12, 2013, Parametric’s stock price had declined since the Merger because, inter alia, of the perception that “PAMT shareholders are getting 19% of something not worth much.”¹⁷⁴

164. As also described in greater detail above, all Defendants knew that VTBH’s performance was falling to levels well below the numbers presented to Craig-Hallum for its “fairness opinion” on the Merger. For example, regarding VTBH’s anticipated 2013 revenues and

¹⁷⁴ PAMTNV0088100.

cash flows, Defendants knew that the numbers used by Craig-Hallum were inaccurate, outdated, and misleading. These problems of course flowed through the later years of VTBH's financial projections, rendering the 2014-2016 figures used by Craig-Hallum for VTBH inflated and misleading as well. As noted above, Potashner explained that Craig-Hallum's fairness opinion resulted in an opinion of "barely fair." And that was with VTBH's inflated numbers. If Craig-Hallum had utilized VTBH's real financial numbers during pendency of the Merger, the valuations would have shifted entirely outside the range of fairness.

165. Ultimately, on August 2, 2013, conflicted Craig-Hallum gave a fairness opinion that concluded the Per Share Exchange Ratio was fair based on a materially flawed analysis skewed to make the unfair deal look fair.

166. Following the Merger, Stark admitted to investors in private communications that he and other VTBH insiders simply made up impossible numbers in order to steal value from legacy Parametric shareholders and close the merger on their own terms. In particular, Stark at different times admitted that "we just put those numbers out to get the deal done," that "[HyperSound] hasn't hit their numbers either" (referring to VTBH's core product), "the company had no infrastructure," and "those margins were never going to be repeated."

B. The Parametric Board Acted in Bad Faith When It Excluded Licensing Revenues When Valuing Parametric

167. The Board approved the Merger based on Craig-Hallum's analysis that excluded all licensing revenue for Parametric, even though Parametric's CFO admitted that "we fully expect" a licensing revenue stream.¹⁷⁵ Digital signage and HHI were the only sources of revenue included in the final projections.¹⁷⁶ In contrast, however, Parametric's March 2013 investor presentation identified its "Licensing strategy" as a key "Capital Light Business Model" that could generate "Recurring Revenue Streams."¹⁷⁷ The same presentation touted Parametric's

¹⁷⁵PAMT0044589; PAMT0053793

¹⁷⁶ PAMT0044589.

¹⁷⁷ PAMT0000313.

“Strong IP Portfolio” and explained that “Strong IP supports licensing for volume markets.” Similarly, Parametric’s 2012 investor presentation touted “Gaming Consoles/Computers” as part of its 2012-2013 “IP Strategy-Partner and License” and planned a lucrative entry into a \$68 billion annual video gaming market.¹⁷⁸

168. The Board knew that the Company’s licensing activities were viable, but acted in bad faith when it approved the Merger based on flawed financial projections with a material omission. The Board also acted in bad faith when it consciously disregarded a known component of Parametric’s standalone value by engaging and/or permitting Potashner to engage, in the following activity: (a) Potashner sat on Optek Electronics’ offer to pay Parametric a 9% royalty to “aggressive[ly] rollout” Hypersound technology in hundreds of thousands of Optek soundbars and headphones destined for Costco Wholesale Corporation (“Costco”) shelves in time for the 2013 Christmas shopping season; (b) the Board approved the Merger based on Craig-Hallum analysis the Board knew excluded potential Optek revenue; and (c) Potashner encouraged Turtle Beach CEO Stark to negotiate with Optek for Turtle Beach’s benefit two weeks into the Go-Shop process and months before shareholders voted on the Merger.¹⁷⁹

C. Craig-Hallum Was Conflicted

Craig-Hallum was using the fairness opinion, for which it was paid just \$200,000, as an opportunity to pitch a more lucrative role in obtaining \$500,000 to \$700,000 in fees for additional equity financing.¹⁸⁰ In March 2013, Craig-Hallum pitched for a role in an equity offering by Parametric and, days after rendering the fairness opinion, Rick Hartfiel, Director of Investment Banking at Craig-Hallum, recommended a \$10 million offering “at around a 15-20% discount to market.”¹⁸¹ In fact, Craig-Hallum’s representative admitted at deposition that it was “pitching its participation in [an] equity offering” during the August 2013 timeframe.¹⁸² There was no ethical

¹⁷⁸ PAMT0053887.

¹⁷⁹ PAMT0032661; PAMT0000006; PAMT0039019; PAMT0034497; PAMT0058676

¹⁸⁰ PAMT0038785.

¹⁸¹ Wambeke Tr. at 122-23 and Ex. 2; PAMT0047470; PAMT0046980.

¹⁸² Wambeke Tr. at 118.

1 wall to separate the bankers involved in the fairness opinion and those individuals simultaneously
2 pitching the more lucrative work.¹⁸³

3 **VII. THE MERGER WAS NOT APPROVED BY AN INDEPENDENT,**
4 **DISINTERESTED MAJORITY OF DIRECTORS BECAUSE ALL SIX MEMBERS**
5 **WERE CONFLICTED**

6 169. The Merger was not approved by a majority of disinterested and independent
7 directors. At the time of the Board's Merger vote on August 2, 2013, the Board had six members
8 (including Putterman who although at the time was identified as an independent director was in
9 fact not). All six of those individuals were conflicted and/or acted in self-interest when voting on
10 the Merger. Those conflicts are broken down as follows:

11 170. **Kenneth Potashner.** Potashner's fellow Board members and co-defendants here
12 concede that he was conflicted: "Ken [Potashner] is totally conflicted, ignored his fiduciary
13 responsibility to our shareholders, and has been negotiating constantly for his own self-
14 interest."¹⁸⁴

15 171. Potashner suffered from multiple conflicts in connection with the Merger. *First*,
16 Potashner was conflicted in light of his plan to use the Merger as a means to personally profit from
17 Parametric's hearing-related initiatives. Potashner saw great personal "liquidity" in HHI, later
18 admitting that "I believe over time the HHI component will be worth a billion."¹⁸⁵ In fact, at a
19 December 13, 2012 Board meeting, Potashner "outlined the longer-term plans for him to transition
20 more time to HHP' and that, as a result, Parametric itself would need a new CEO."¹⁸⁶

21 172. As noted above, Potashner admitted that the "whole reason that I entered into the
22 deal [with VTBH] in the first place [was] [t]o build a multi-billion dollar HHI and benefit from
23 it"¹⁸⁷ and that "[m]y intent was to sell PAMT at the right time and keep HHi as the foundation of
24

25
26 ¹⁸³ Wambeke Tr. at 119-20, 122-23, 125-26.

27 ¹⁸⁴ PAMTNV0112517.

28 ¹⁸⁵ PAMT004036.

¹⁸⁶ PAMT00000006-07; PAMT00000062

¹⁸⁷ PAMTNV0105035; VTBH009741

a new company.”¹⁸⁸ Potashner also requested a “gentlemen agreement” for a consulting deal.¹⁸⁹ And as noted above, even after the Parametric Board voted on the Merger, Stripes manipulated Potashner into believing that he could monetize his role in HHI.¹⁹⁰

173. **Second**, Potashner received golden parachute compensation of \$2,807,738 in the Merger, which further motivated him to complete the deal. Potashner negotiated his own severance payments and lockup agreements directly with Stark, including the day the Board voted on the Merger.¹⁹¹ Indeed, another Parametric Board member confirmed on August 2, 2013, the morning of the final Board vote on the Merger, that “since [Potashner] has been spending all his time on this merger and not on getting us licenses for the technology, he has negotiated that he get paid his bonus anyway-if the deal goes through.”¹⁹²

174. Analysts observed the conflict these windfall payments created for Potashner. For example, in a November 13, 2013 article posted on the website Seeking Alpha, a writer noted VTBH’s disturbing financial picture and queried, “So why would Parametric pursue an acquisition with a floundering company like Turtle Beach?”¹⁹³ His answer:

Personal enrichment, of course. As a result of the merger, special golden parachute payments will be triggered for the executive management of Parametric. For instance, we can see on page 77 [of the Proxy] that Kenneth Potashner, the Chairman, will be entitled to over \$2.8 million of payments that are triggered on a change of control. The proxy also reveals that he will continue on with a board seat following the merger, which is likely to be a cushy and lucrative endeavor for him.¹⁹⁴

175. **Third**, Potashner also negotiated for himself a continued seat on the Company’s board after the Merger, which he believed would assist in his monetization of HHI. Potashner even snuck also in a reference to his being named to that position to the Merger press release. Stark reported on August 3, 2013, two days before the Merger was announced, that “Ken added a

¹⁸⁸ VTBH000124.

¹⁸⁹ Id.

¹⁹⁰ See also PAMTNV0099274.

¹⁹¹ VTBH000III; VTBH006118; VTBH013231.

¹⁹² PAMTNV0115196.

¹⁹³ VTBH048603.

¹⁹⁴ Id.

sentence to the press release saying he was going to be on the combined company board.”¹⁹⁵ Potashner was forced to apologize three months later, at an October 24, 2013 Parametric Board meeting, for naming himself without Board approval.¹⁹⁶ In response, Putterman reasonably proposed a re-vote to name a different individual.¹⁹⁷ Potashner so coveted the post-Merger board seat that he responded to Putterman later that day: “[Your proposal] hits a nerve with me. It is unlikely that I can work with you in the future or support your involvement on anything I am affiliated with. More important you take on incredible personal liability if it can be demonstrated that you are participating in a plan to deceive our shareholders.”¹⁹⁸ Potashner was right on the latter point.

176. Potashner sought the outside director board seat to avoid the hours required by a chief executive officer. In Potashner’s own words, “[I am] not interested in being CEO...The whole point of me doing the deal was to not have to be a CEO.”¹⁹⁹

177. When Fox of Stripes Group learned that Potashner was named Parametric’s post-Merger board representative, he observed: “Interesting outcome I guess in the end he just cared more than all the directors and won the battle.”²⁰⁰

178. **Fourth**, Potashner was so determined to protect his own interests that he made a series of threats and misrepresentations to the Parametric Board throughout the Merger negotiations. Potashner repeatedly misrepresented and concealed information to the rest of the Parametric Board, defied the Board’s orders not to discuss certain issues with VTBH on several occasions, and threatened to displace the entire Board and sue them all if they did not cave to his personal compensation demands. Defendant and Parametric Board member Norris pleading with Potashner during Merger negotiations: “Please start acting like you are working for PAMT, not

¹⁹⁵ VTBH001587.

¹⁹⁶ PAMTNV0115179.

¹⁹⁷ Id.

¹⁹⁸ PAMTNV0112296.

¹⁹⁹ PAMTNV0086846.

²⁰⁰ VTBH016192

yourself!”²⁰¹ In sum, Potashner’s conduct is not the hallmark of a disinterested, independent director acting with fidelity to corporate interest alone.

179. **Elwood “Woody” Norris.** Norris was also conflicted as a result of his vying for employment in the post-Merger entity, resulting financial interest in completing the Acquisition, and related susceptibility to Potashner’s threats. Potashner recognized these conflicts and pounced, threatening Norris that he would personally lose millions if Norris did not go along with the planned Merger. On March 29, 2013, as Potashner was working out a deal with Stark, Potashner emailed Norris privately to state that the Merger was in doubt and that “[i]f the bod [Board of Directors] costs us this deal I will look for them all to resign or I will resign. The Bod is on the verge of losing you at least \$10m personally.”²⁰² Norris was thus uniquely susceptible to Potashner’s threats.

180. Norris was also conflicted when voting on the Merger because, at the same meeting where he approved the deal, the Board—with Norris present—agreed to pay Norris his maximum target bonus rate of \$81,000, even though the performance conditions had not yet been met.²⁰³

181. Moreover, Norris remained with the Company post-Merger as its “Chief Scientist” at least through the end of 2016.²⁰⁴ Norris was aware of this incentive when he voted on the Merger—by July 1, 2013, Potashner stated that a term of the then-current Merger Agreement stated, “Woody Norris to have an employment contract with ‘Newco’” post-Merger.²⁰⁵

182. **Andrew Wolfe.** Wolfe was beholden to Potashner in light of their prior relationship in threatening boards for personal compensation and Potashner’s continued improper incentivizing of Wolfe to do Potashner’s bidding. Potashner, Wolfe, and Todd worked together, respectively, as CEO, Chief Technology Officer (“CTO”), and Vice President of SonicBlue, Inc. (“SonicBlue”). Potashner promoted Wolfe to CTO and Senior Vice President of Business

²⁰¹ PAMTNV0112541.

²⁰² PAMT0033560.

²⁰³ PAMT0000189.

²⁰⁴ <http://hypersound.com/hypersound-expecting-european-growth-with-directional-audio-systems.php>.

²⁰⁵ PAMT0061388.

Development then procured company-issued loans for himself and Wolfe to purchase shares of a SonicBlue subsidiary, RioPort, Inc. (similar to HHI).

183. When SonicBlue’s board later voted to convert their own loans (but not Potashner’s and Wolfe’s) to non-recourse, Potashner publicly demanded the board pay up or resign. Potashner then sued his own board. Through his lawsuit, Potashner successfully extracted a lump-sum payment for Wolfe of a full ten-month salary in October 2002 and a \$1 million payment for himself.

184. Wolfe was in Potashner’s debt and Potashner continued this pattern by personally luring Wolfe to the Parametric Board in February 2012. When Potashner began angling for a post-Merger board seat with Turtle Beach, Potashner pushed for only two candidates—Potashner and Wolfe. Potashner did so repeatedly, including on April 23, 2013 (Wolfe identified by Stripes as post-close member “recommended by Ken Potashner”); July 1, 2013 (Potashner writes to Stark, “I will be the choice ... I will also recommend we add Andy Wolfe to BOD”); July 3, 2013 (Potashner writes to Stark regarding the post-Merger board, “I highly recommend myself and Andy Wolfe become the 2 from our side. Not one of the other directors is even remotely qualified.”); and July 5, 2013 (Potashner to Stark, Wolfe “will be my recommendation for the 2ND BOD seat should PAMT go to 2”).²⁰⁶ Wolfe currently remains on the post-Merger Turtle Beach board of directors.

185. In light of their mutual history of threats and incentives, Wolfe was in a position to comport with the wishes and interest of Potashner, rather than Parametric stockholders generally.

186. **Dr. Robert Kaplan.** Despite not participating in a single discussion with VTBH, Kaplan voted on the Merger while vying for a personal payment to “get even” with Potashner. Kaplan explained on July 28, 2013 that he should be personally paid because the independent directors “are legally exposed to a lot of the decisions he [Potashner] forces upon us.”²⁰⁷

187. The day of the most significant vote in Parametric’s corporate existence, Kaplan

²⁰⁶ PAMTNV0105448; VTBH013411; VTBH010857; VTBH004242; PAMTNV0105849.
²⁰⁷ PAMTNV0115287.

1 spent his time emailing about the personal bonus he felt the independent directors should receive.
2 The Parametric Board voted on the Merger at a 4 p.m. meeting on August 2, 2013. That morning,
3 Kaplan expressed surprise to Putterman that “Neither the vesting of our options nor the
4 compensation of the independent directors is mentioned in the [Merger Agreement].”²⁰⁸ So, one
5 hour before the meeting, Kaplan wrote to propose the following resolution:

6 “\$50,000 is to be paid to each of the independent directors as compensation
7 for their continuing efforts and activity in Corporate Development. This
8 money is to be paid immediately.” I mentioned this thought to you
9 previously and have discussed it with Seth [Putterman]. Since it should not
10 be tied to the merger, I have described it differently.²⁰⁹

11 188. At the meeting an hour later, a few minutes before the Board actually voted on the
12 Merger, the Board agreed to table the final decision on their bonuses: “The Board next discussed
13 potential cash bonuses for the directors based on their increased level of work related to the Merger
14 Agreement and other contemporaneous matters, but deferred any decision related thereto.”²¹⁰
15 After voting on the Merger, the Board adjourned at 5:00 p.m.²¹¹ Kaplan, however, still believed
16 he would receive a cash bonus. At 7:35 p.m. that evening, Kaplan continued in his personal quest
17 for a Merger-related bonus, upping the ante:

18 I used 50K as a starting point...My real suggestion is to have an average of
19 all the executive bonuses and that figure is what the IDs [Independent
20 Directors] should get. Ken has granted himself rather large bonuses. This
21 will get even with him, not that I want to get even, I really just want
22 equality.²¹²

23 189. Kaplan demonstrated the same money-hungry approach earlier in the Merger
24 negotiation process as well. On July 7, 2013, Kaplan emailed Barnes and Norris stating: “I think
25 the BoD should pass a resolution giving some kind of healthy golden parachutes to all the BoD
26 members upon their termination, e.g., stock options (VTB is issuing an unlimited amount of

27 ²⁰⁸ PAMTNV0115196.

28 ²⁰⁹ PAMT0072324.

²¹⁰ PAMT0000189.

²¹¹ Id.

²¹² PAMT0072292.

options pre merger).”²¹³ As a result, the Board attempted to put a last-minute addition into the Merger schedules that each outside director receive a personal fee for the Merger.²¹⁴

190. These payments were material to Kaplan personally and, as demonstrated above, he was operating under the belief that he would receive the Merger-related bonus at the time he voted on the Merger. In fact, even in the Proxy released on December 3, 2013, Defendants kept the option open, stating that “in connection with the negotiation and execution of the merger agreement, Parametric may elect to pay a fee to each of the non-employee members of the Parametric Board, commensurate to the incremental time devoted by them apart from normal board of director service in 2013, related to review and analysis of strategic transactions and related matters.”²¹⁵

191. **Seth Putterman.** Like Kaplan, Putterman also voted on the Merger with the expectation of receiving a cash bonus. At 4:50 p.m. on August 2, 2013, during the very meeting while Putterman and the rest of the Board were voting on the Merger, Putterman agreed with Kaplan’s bonus request in general, but offered a different rationale: “Can the bonus be made contingent on successfully raising the 5-15M\$ that we seek prior to closing but that we need in any event!”²¹⁶ Putterman knew his proposed rationale had no merit—Putterman was not involved in obtaining the financing and conducted no actual work in doing so. Putterman did not contact any financing sources, did not engage in an independent discussion with the bankers, and did not perform any analysis on the financing documents.

192. Moreover, Putterman held a consulting agreement with Parametric and was forced to resign before the Merger’s close. On November 12, 2013, Parametric notified the NASDAQ Stock Market (“NASDAQ”) that Putterman was not actually “independent” under NASDAQ rules. The Board had earlier failed to disclose that it gave a consulting contract to Putterman and granted him options vesting over three years valued at \$162,775 and, according to Parametric, the

²¹³ PAMT0033288

²¹⁴ VTBH001570.

²¹⁵ Proxy at 75.

²¹⁶ PAMT0072324.

payments “exceeded the \$120,000 compensation limit set forth in NASDAQ Marketplace Rule 5605(a)(2)(B) and therefore precludes Dr. Putterman from being deemed independent according to this rule.”²¹⁷ This meant that Parametric had been operating in violation of NASDAQ rules throughout the Merger process because half of its six-member Board was not independent (Potashner, Norris and Putterman). Consequently, on November 21, 2013, three months after voting on the Merger, Putterman tendered his resignation from the Parametric Board.

193. **James L. Honore.** As with the other Outside Directors, Honore established a lack of independence from Potashner when repeatedly bowing to Potashner’s threats during the sale process. In the face of those threats, Honore agreed to pay Potashner in exchange for agreeing to relinquish options in HHI that Potashner had no legal right to hold; refused to intervene when it became clear that Potashner was pursuing the Merger for improper and self-interested reasons; purposefully disregarded Potashner’s warning that VTBH had undisclosed debt and had misrepresented its finances; and intentionally issued a false and misleading Proxy as described below. And despite realizing that Potashner had committed a fraud on the Board, Honore and the Outside Directors did nothing to revise the terms of the Break-Up License or exchange ratio that Potashner had already negotiated with Turtle Beach. In addition, Honore also expected that he would be paid in connection with the Merger, given Kaplan’s and Putterman’s comments at the final meeting, as well as the Proxy’s inclusion of language allowing the receipt of a Merger-related payment for the Outside Directors.

VIII. STRIPES GROUP SOUGHT TO EFFECTUATE THE MERGER FOR ITS OWN SELF-INTERESTED REASONS

A. Through the Merger, Stripes Group Obtained Access to the Public Markets for Its Failing Investment in VTBH

194. Stripes Group pushed through the Merger in order to obtain liquidity for its failing investment in VTBH. Stripes Group intentionally did so in a way that harmed Parametric

²¹⁷ See <http://www.sec.gov/Archives/edgar/data/1493761/000101968713004399/parametric>

stockholders. As Potashner succinctly put it, “[I] have been going over [VTBH] financials in proxy with Jim. Shitty numbers, money losing negative equity, etc. If Stripes was really interested in doing an IPO next year they never should have replaced cash with debt layer. Anyway glad to rescue your sorry ass and get you public.”²¹⁸

195. In 2013, Stripes Group—through SG VTB—was majority owner of VTBH. Given VTBH’s rapidly deteriorating financial state, Stripes Group knew that it had to take VTBH public to capitalize VTBH and gain liquidity for itself. But Stripes Group also knew it could not do so by way of a traditional IPO. A traditional IPO would have subjected Stripes Group and VTBH to intense financial scrutiny, which would have amounted to a test that VTBH could not pass. In fact, in May 2013, Fox was specifically informed by the Global Head of Equity Sales at Barclays, regarding a potential IPO for VTBH: “Right now, if you came to me and said we need to get an offering done- I would say you can’t get it done.”²¹⁹

196. As a result, Stripes Group found an easier path forward—it pushed through a reverse merger of VTBH into the publicly traded, but smaller, Parametric. By completing a reverse merger with Parametric, Stripes Group was able to gain access to the public markets and take advantage of the Parametric Board’s bad faith unwillingness to properly diligence the financially stressed Turtle Beach. Put differently, rather than complete a traditional IPO, Stripes Group chose the path of least resistance and pushed the Merger through by manipulating a conflicted and ineffective Parametric Board.

197. Potashner stated on several occasions that Stripes Group was using the Merger to go public and all defendants understood this fact.²²⁰ For example, on September 5, 2013, while discussing a closing condition PNC placed on the Merger, Potashner stated to Stark and Barnes:

Its not silly if Stripes group is able to preserve a high market valuation for the entity they are using to go public with and build the value up from there....

²¹⁸ PAMTNV0095569.

²¹⁹ VTBH007665.

²²⁰ PAMT0041988; VTBH004981; PAMTNV0095553

what was silly was for stripes to allow PNC to dictate a term of a requirement to raise \$5M as a closing condition at a time that I cant use my shelf to do a reasonable deal due to my inability to integrate VTB numbers. This drives me down a path of having to sell discounted stock that will take our market cap down further.

When all the smoke settles Stripes will have 80% of something worth \$400M if we are lucky instead of 80% of \$500M. \$80M paper loss. I know we can argue day valuation doesnt matter but if it were me I write a \$5M check to get the \$80M.

I know you are tired of this discussion but I am the one who is taking all the calls from the pissed off investors.²²¹

198. After the Merger closed, Stripes Group engineered a series of post-close transactions whereby SG VTB (Fox), Doornick, and Stark loaned money to the Company at exorbitant interest rates, then forced the Company to issue stock to pay them back, with interest.²²² Some of these were done just to close the merger Even Potashner labeled the 20% yield in year two “way above market” in an email exchange with Stark.²²³

199. Importantly, all repayment came from public offerings and proceeds from a loan drawn on the Company’s post-Merger credit facility- sources that were not available to Stripes Group before the Merger. Stripes Group also repeatedly forced the Company to issue stock to those same Stripes insiders at below-market prices, often purportedly in “consideration” for these one-sided loans.

200. Former VTBH insiders took notice of this scheme. In February 2015, a VTBH preferred stockholder, Dr. John Bonanno, filed a lawsuit in the Delaware Court of Chancery against VTBH in order to force a redemption of Bonanno’s preferred stock as a result of the Merger. In support for his allegation that Stripes Group and the Company had sufficient cash flow to redeem Bonanno’s shares, Bonanno stated:

²²¹PAMT0041988; VTBH004981; PAMTNV0095569.

²²² Doornick’s transactions were executed through various trusts affiliated with Doornick, including the Doornick Revocable Living Trust, the Ronald Doornick2012 Irrevocable Trust, and the Martha M. Doornick 2012 Irrevocable Trust. Doornick is co-trustee of the Doornick Revocable Living Trust and is the beneficial owner of all shares held by that trust.

²²³ PAMTNV0104810.

[O]ver the course of the past year, [VTBHJ and Parametric, which report on a consolidated basis, have paid back to affiliates of Kenneth Fox more than \$17 million. In June 2014, Parametric used funds from a public offering to pay off subordinated notes issued by [VTB Holdings, Inc.] to SG VTB and affiliates, which included \$10 million outstanding principal plus related accrued interest that did not mature until August 22, 2016. In December 2014, Parametric (now Turtle Beach Corporation), [VTB Holdings, Inc.], and related entities entered into an Amendment to Turtle Beach Corporation's Loan, Guaranty and Security Agreement with Turtle Beach Corporation's lenders (the "Amendment"), which permitted the Turtle Beach Corporation to repay approximately \$7.7 million to SG VTB of existing subordinated debt and accrued interest with the proceeds of an additional loan drawn pursuant to the Credit Agreement.

201. Bonanno's allegations represent just the tip of the iceberg. In a series of transactions spanning August 2013 to February 2016, SG VTB, Doornick and Stark purchased \$37.3 million in high-yield notes from the Company at exorbitant interest rates. Specifically, SG VTB purchased \$33,296,975 in notes, Doornick purchased \$3,503,025 in notes, and Stark purchased \$500,000 in notes. The notes generally bore interest at a rate of 10% for the first year, and then ballooned to 20% for all periods thereafter. To date, Turtle Beach has paid \$22,489,000 million on the notes, distributed as follows: \$20,867,386.33 to SG VTB (i.e., Fox), \$1,082,163.67 to Doornick, and \$539,450 to Stark. Moreover, as additional purported "consideration" for purchasing or amending the notes, SG VTB (Fox) and Doornick have been granted a significant number of stock warrants at below-market prices. Specifically, SG VTB (Fox) obtained warrants that allow it to purchase 1,384,884 shares of Post-Close Turtle Beach at \$2.54 and 1,400,000 shares of Post-Close Turtle Beach at \$2.00, and Doornick obtained warrants that allow him to purchase 306,391 shares of Post- Close Turtle Beach at \$2.54. On February 2, 2016, SG VTB (Fox) was able to purchase 2.5 million Post-Close Turtle Beach shares at \$1.00 per share when the stock was trading significantly higher than that. These conflicted transactions included:

- August 30, 2013: as a closing condition for the Merger, the Company issued \$10 million of subordinated notes (the "August 2013 Notes") to SG VTB,

Doornick and Stark that bore interest at a rate of (i) 10% per annum for the first year, and (ii) 20% per annum thereafter.²²⁴

- January 15, 2014: the Company issued a \$7 million subordinated note (the “January 2014 Note”) to SG VTB on substantially similar terms as the August 2013 Notes.
- April 24, 2014: the Company conducted a public offering and used more than \$10 million of the proceeds to pay back the outstanding principal and accrued interest of the August 2013 Notes to SG VTB, Doornick and Stark.
- December 2014: the Company used more than \$7 million from an existing Credit Facility to repay the outstanding principal and accrued interest of the January 2014 Notes to SG VTB.
- April 23, 2015: the Company issued a \$5 million subordinated note (the “April 2015 Note”) to SG VTB on substantially similar terms as the August 2013 Notes.
- May 13, 2015: the Company issued \$3.8 million of subordinated notes (the “May 2014 Notes”) to SG VTB on substantially similar terms as the August 2013 Notes.
- June 17, 2015: the Company issued a \$3 million subordinated note (the “June 2015 Note”) to SG VTB that bore interest at a rate of (i) 10% per annum until September 17, 2015 (roughly three months after its issuance), and (ii) 20% per annum thereafter.
- July 8, 2015: SG VTB advanced the Company an additional \$6 million under the same terms as the June 2015 Note.
- July 22, 2015: the Company amended and restated each of the outstanding above-mentioned subordinated notes (the “Amended Notes”). The maturity date for the Amended Notes was extended to September 29, 2019, and the interest rate was amended so that the Amended Notes bore interest at a rate of LIBOR plus 10.5%. As purported “consideration” for accepting the terms of the Amended Notes, the Company issued warrants to purchase 1.7 million of the Company’s common stock at an exercise price of \$2.54 per share to SG VTB and Doornick.
- November 16, 2015: the Company issued \$2.5 million in a subordinated note (the “November 2015 Note”) to SG VTB that bore interest at a rate of 15% per annum until its maturity. As purported “consideration” for entering into the November 2015 Note, SG VTB received a Guaranty and Security Agreement that, inter alia, provided for a warrant to SG VTB to purchase roughly 1.4

²²⁴ Parametric’s December 3, 2013 Proxy informed Parametric stockholders that “the Stripes Group” received these notes

million shares of the Company's common stock at an exercise price of \$2.00 per share.

- February 2, 2016: the Company entered into an underwriting agreement relating to an underwritten public offering of 5,000,000 shares of common stock at a discounted price of \$1.00 per share. SG VTB purchased 800,000 shares, and Doornick purchased 500,000 shares in the public offering. In a concurrent private placement, the Company offered 1,700,000 shares of common stock at the same discounted price of \$1.00 per share to SG VTB only.

202. Despite the Company's significant decline in value, Stripes Group and SG VTB continued to reap the benefits by usurping the Company's public status. This has remained true to the present day. Fox and Stark, in particular, have rewarded themselves handsomely over the years. Since the Merger, Stark has received over \$12 million in compensation, more than \$6 million of which has been in cash and the rest in equity. The following chart specifies the amount of compensation Stark was able to extract from the post-Merger company as a result of the fraud alleged herein:

2019	2018	2017	2016	2015	2014
\$2,197,200	\$4,928,950	\$1,256,514	\$1,329,178	\$1,508,344	\$820,196

203. Turtle Beach's CFO, John Hanson, also reaped outsized rewards as a result of the Merger. The following chart demonstrates the extent of his profit as a result of the fraud alleged herein:

2019	2018	2017	2016	2015	2014
\$992,043	\$948,417	\$607,908	\$595,499	\$581,644	\$2,822,653

204. Fox, for his part, has sold 3.7 million shares of Turtle Beach for proceeds of more than \$65 million. Meanwhile, Turtle Beach's stock price has declined consistently as the company continues to fall short of market expectations. Turtle Beach's stock traded for over \$55 per share at the start of 2014. By the end of 2019, Turtle Beach's stock was trading for under \$9 per share.

205. The following chart lists Fox's sales of Turtle Beach stock following the Merger:

Transaction	B/S	Amount	Price	Value
5/21/18	Sold	323,792	\$16.52	\$5,349,044
5/22/18	Sold	340,730	\$15.46	\$5,267,686
5/23/18	Sold	57,366	\$15.63	\$896,631
5/23/18	Sold	353,569	\$16.37	\$5,787,925
5/23/18	Sold	124,543	\$17.19	\$2,140,894
9/11/18	Sold	104,186	\$23.49	\$2,447,329
9/11/18	Sold	25,397	\$25.12	\$637,973
9/12/18	Sold	207,107	\$22.40	\$4,639,197
9/13/18	Sold	35,773	\$21.43	\$766,615
9/13/19	Sold	129,053	\$22.44	\$2,895,949
10/15/18	Sold	206,790	\$19.48	\$4,028,269
10/15/18	Sold	18,978	\$20.34	\$386,013
10/16/18	Sold	63,096	\$19.23	\$1,213,336
10/16/18	Sold	51,524	\$19.91	\$1,025,843
10/16/18	Sold	24,444	\$20.89	\$510,635
10/17/18	Sold	14,115	\$20.51	\$289,499
10/17/18	Sold	21,053	\$21.54	\$453,482
10/30/18	Sold	100,302	\$16.50	\$1,654,983
10/31/18	Sold	66,602	\$17.23	\$1,147,552
10/31/18	Sold	55,798	\$17.70	\$987,625
11/1/2018	Sold	47,459	\$18.18	\$862,805
11/1/2018	Sold	29,839	\$18.97	\$566,046
12/11/2018	Sold	91,600	\$17.62	\$1,613,992
12/12/2018	Sold	104,289	\$17.61	\$1,836,529
12/13/2018	Sold	81,579	\$16.57	\$1,351,764
12/13/2018	Sold	12,455	\$17.20	\$214,226
1/15/2019	Sold	59,816	\$15.87	\$949,280
1/16/2019	Sold	56,827	\$15.49	\$880,250
1/16/2019	Sold	5,597	\$16.14	\$90,336
1/17/2019	Sold	58,636	\$15.27	\$895,372
1/18/2019	Sold	499,600	\$16.55	\$8,268,380
1/18/2019	Sold	400	\$17.56	\$7,024
2/14/2019	Sold	111,100	\$18.26	\$2,028,686
2/15/2019	Sold	137,825	\$17.72	\$2,442,259
2/19/2019	Sold	53,239	\$17.07	\$908,790
2/26/2019	Sold	20,014	\$15.85	\$317,222
		3,694,493		\$65,759,438

**Shares
Sold**

**\$ Value
Sold**

B. Relationship Between Fox, Stripes Group, and SG VTB

206. Stripes Group, through Fox, exercises complete control over SG VTB and is responsible for its transactions and investments. Fox is the founder, sole owner, and Managing General Partner of Stripes Group. Fox is also the sole manager of SG VTB. SG VTB has stated in public filings that “Fox ... has voting and investment control over the securities held by SG VTB,” which includes a majority interest in VTBH and now Turtle Beach (through a “control group”).²²⁵ Moreover, according to Fox’s public filings: “SG VTB Holdings, LLC is wholly owned by SG Growth Partners I, LP. SGGP I, LLC is the general partner of SG Growth Partners I, LP. SGGP Holdings, LLC exercises investment discretion and control over securities held by SGGP I, LLC. Stripes Group, LLC, which is wholly owned by [Fox], exercises investment discretion and control over securities held by SGGP Holdings, LLC.”²²⁶ Given their affiliation and overlap in management, SG VTB’s actions can be attributed to Stripes Group.

207. In a lawsuit in the Delaware Court of Chancery (described below), the court found that, with respect to the relationship between Stripes Group and its subsidiaries, including SG VTB, “[t]his is not a case where a parent sat by idly as its subsidiary transacted deals with third parties -Stripes Group played a direct role in consummating the financing through entities that pervaded the [Merger’s] structure and personnel [including Fox] who signed key documents.”

208. Stripes Group and SG VTB also acted in concert with VTBH and Parametric throughout the unfair and unlawful Merger process. Stripes Group and SG VTB principals approved virtually every material decision VTBH made relating to Parametric. Further, Stripes Group and SG VTB principals participated in no less than 15 meetings between Parametric and VTBH in Merger negotiations between March 21, 2013 and August 4, 2013.

²²⁵ <https://www.sec.gov/Archives/cdgar/data/1493761/000119312517152072/d381010ddefl4a.htm>.

²²⁶ <https://www.sec.gov/Archives/edgar/data/1493761/000118143114004004/xs1F345X03/rrd400192.xml>.

209. In committing the wrongful acts alleged herein, Stripes Group, SG VTB, VTBH and the Parametric Board joined in the pursuit of a common course of conduct, and acted in concert with and conspired with one another, in furtherance of their common plan or design. Each of the defendants aided and abetted and rendered substantial assistance in the wrongs complained of herein. In taking such action to substantially assist the commission of the wrongdoing complained of herein, each defendant acted with knowledge of the primary wrongdoing, substantially assisted the accomplishment of that wrongdoing, and was aware of his or her overall contribution to and furtherance of the wrongdoing.

FIRST CAUSE OF ACTION

Breach of Fiduciary Duty (Equity Expropriation) – Individual Defendants

210. Plaintiff repeats and realleges each and every allegation supporting the equity expropriation claims as set forth herein.

211. The Merger constituted a dilutive expropriation of equity whereby the Individual Defendants, in concert with the aiding and abetting defendants, engaged in “actual fraud” under the meaning of NRS 78.200(2) and NRS 78.211 (1). The majority-conflicted Parametric Board applied an excessive valuation for VTBH’s assets, which was not an honest error of judgment, but was the result of a bad faith and reckless indifference to the rights of Parametric’s stockholders. All Defendants conspired to expropriate significant value from the Company, which caused all other stockholders’ equity interests to be diluted.

212. Despite the unattractiveness of the dilutive Merger to Parametric public stockholders, the Parametric Board agreed that Stripes Group and VTBH could acquire Parametric through a stock issuance that specifically diluted plaintiffs’ and the rest of Parametric’s stockholder base. The Board received unique benefits in exchange for this expropriation of equity, not shared by stockholders at large.

213. The Individual Defendants violated fiduciary duties of loyalty, good faith, and honesty owed under Nevada law to the public shareholders of Parametric and acted to put their personal interests ahead of the interests of Parametric shareholders.

217. The Individual Defendants are not exculpated for the acts alleged herein, because each engaged in intentional misconduct, fraud, and a knowing violation of the law.

Aiding and Abetting Breach of Fiduciary Duty (Equity Expropriation) – Fox, Stark, Stripes, SG VTB, and VTBH

221. Despite the unattractiveness of the dilutive Merger to Parametric public stockholders, the Parametric Board agreed that Stripes Group, SG VTB, and VTBH could acquire Parametric through a stock issuance that specifically diluted Parametric's stockholder base. Executives from Stripes Group, SG VTB, and VTBH knowingly induced the Parametric Board to

breach its fiduciary duties and, as a result, Stripes Group, SG VTB, and VTBH benefitted by obtaining control of the Company and usurping its publicly traded status.

222. The Individual Defendants owed to Plaintiff certain fiduciary duties as fully set out herein.

223. By committing the acts alleged herein, the Individual Defendants breached their fiduciary duties owed to Plaintiff.

224. Fox, Stark, Stripes, SG VTB, and VTBH colluded in or aided and abetted the Individual Defendants' breaches of fiduciary duties, and were active and knowing participants in the Individual Defendants' breaches of fiduciary duties owed to Plaintiff.

WHEREFORE, Plaintiff demands judgment in its favor against Defendants as follows:

- a) Declaring and decreeing that the Merger Agreement was unlawfully entered into and that the Merger was consummated in breach of the fiduciary duties of the Individual Defendants;
- b) Awarding damages to Plaintiff sustained as a result of the misconduct set forth above by each of the Defendants, jointly and severally, together with interest thereon;
- c) Determining and awarding Plaintiff exemplary damages in an amount necessary to punish Stripes, Stark, Fox and Potashner and to make an example of Stripes, Stark, Fox and Potashner to the corporate community, according to proof at trial;
- d) Awarding Plaintiff the costs of this action, including a reasonable allowance for the fees and expenses of Plaintiff's attorneys and experts; and
- e) Granting Plaintiff such further relief as the Court deems just and proper.

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DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on all applicable claims.

DATED this 20th day of May, 2020.

McDONALD CARANO LLP

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Andrew Wolfe*

DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE PARAMETRIC SOUND
CORPORATION SHAREHOLDERS'
LITIGATION.

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

**ORDER GRANTING CERTAIN
DIRECTOR DEFENDANTS' MOTION
FOR DETERMINATION OF GOOD
FAITH SETTLEMENT**

This Document Related To:

PAMTP LLC v. KENNETH
POTASHNER, *et. al.*

This matter came before the Court on Defendants' Elwood G. Norris, Seth Putterman, Robert M. Kaplan and Andrew Wolfe ("Director Defendants")¹ Motion for Determination of Good Faith Settlement (the "Motion"). The Motion seeks a determination of good faith settlement for Director Defendants' settlement entered into with Plaintiff PAMTP, LLC ("Plaintiff" or "PAMTP") (collectively with Director Defendants the "Settling Parties")

¹ Reference to the "Director Defendants" in this Order specifically excludes Defendant Kenneth F. Potashner.

1 concerning all claims and allegations that have been asserted or could have been asserted by the
2 Settling Parties against each other in this case. The Motion is unopposed.

3 Having reviewed and considered the Motion, the Court finds that the factors prescribed
4 by the Nevada Supreme Court in *Doctors Co. v. Vincent*, 120 Nev. 644, 98 P.3d 681 (2004)
5 support a determination that the Director Defendants' settlement with Plaintiff was made in good
6 faith pursuant to NRS 17.245. Specifically, the Court finds that the settlement was made in good
7 faith in light of the amount paid in settlement of the claims; the allocation of the settlement
8 proceeds to the single Plaintiff in this case; the insurance policy limits of the Settling Parties; the
9 financial condition of the settling defendants; the liability permutations arising from the merits
10 of any potential contribution and indemnity claims; the non-existence of any collusion, fraud, or
11 tortious conduct by the Settling Parties aimed to injure the interests of any non-settling parties;
12 and the potential liability, relative degree of fault, cost and expense associated with further
13 discovery and litigation, and relative likelihood of success on the merits.

14 The Court having made the foregoing findings, and good cause appearing,

15 **IT IS HEREBY ORDERED** that the settlement between the Director Defendants and
16 Plaintiff is in good faith pursuant to NRS 17.245, and the Director Defendants' Motion for
17 Determination of Good Faith Settlement is **GRANTED**.

18 **IT IS FURTHER ORDERED** that pursuant to NRS 17.245(b), all claims against the
19 Director Defendants that in effect seek contribution or equitable indemnity, regardless of how
20 such a claim may be styled, are barred.

21 **IT IS SO ORDERED.**

22 DATED this 23rd day of August, 2021

Dated this 23rd day of August, 2021

23 
24 DISTRICT COURT JUDGE

25
26 **39A F7B 00EA A8AE**
27 **Elizabeth Gonzalez**
28 **District Court Judge**

1 Respectfully submitted by:

2 HOLLAND & HART LLP

3

By: /s/ Robert J. Cassity

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Attorneys for Defendants

10 *Kenneth Potashner, Elwood Norris, Seth*

Putterman, Robert Kaplan and Andrew Wolfe

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1 **CSERV**

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3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5
6 **Kearney IRRV Trust, Plaintiff(s)** | **CASE NO: A-13-686890-B**
7 **vs.** | **DEPT. NO. Department 11**
8 **Kenneth Potashner, Defendant(s)**
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order Granting was served via the court's electronic eFile system to all
13 recipients registered for e-Service on the above entitled case as listed below:

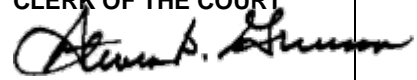
14 Service Date: 8/23/2021

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE PARAMETRIC SOUND
CORPORATION SHAREHOLDERS'
LITIGATION

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

**NOTICE OF ENTRY OF ORDER
GRANTING DEFENDANTS' MOTION FOR
JUDGMENT PURSUANT TO NRCP 52(C),
FINDINGS OF FACT AND CONCLUSIONS
OF LAW, AND JUDGMENT THEREON**

This Document Related to:
ALL ACTIONS

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PLEASE TAKE NOTICE that the *Order Granting Defendants' Motion for Judgment Pursuant to NRCP 52(c), Findings of Fact and Conclusions of Law, and Judgment Thereon* was entered with this Court on September 3, 2021, a copy of which is attached hereto.

Dated: September 8, 2021

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CERTIFICATE OF SERVICE

As an employee of Snell & Wilmer L.L.P., I certify that I served a copy of the foregoing
**NOTICE OF ENTRY OF ORDER GRANTING DEFENDANTS' MOTION FOR
JUDGMENT PURSUANT TO NRCP 52(C), FINDINGS OF FACT AND CONCLUSIONS
OF LAW, AND JUDGMENT THEREON** on the 8th day of September 2021, via e-service
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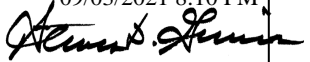
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4827-3995-4426.1


CLERK OF THE COURT

1 **FFCL**

3 **DISTRICT COURT**

4 **CLARK COUNTY, NEVADA**

5 IN RE PARAMETRIC SOUND
6 CORPORATION SHAREHOLDERS'
LITIGATION.

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

**ORDER GRANTING DEFENDANTS'
MOTION FOR JUDGMENT PURSUANT
TO NRCP 52(c), FINDINGS OF FACT
AND CONCLUSIONS OF LAW, AND
JUDGMENT THEREON**

7 This Document Related To:

8 PAMTP LLC v. KENNETH
9 POTASHNER, *et. al.*

10 This matter came on regularly for a non-jury trial beginning on August 16, 2021, and
11 continuing through August 25, 2021. Plaintiff PAMTP, LLC appeared by and through their
12 counsel of record George F. Ogilvie III of McDonald Carano LLP and Adam M. Apton of Levi
13 & Korsinsky, LLP. Defendant Kenneth F. Potashner appeared by and through his counsel of
14 record J. Stephen Peek and Robert J. Cassity of Holland & Hart LLP and John P. Stigi III and
15 Alejandro E. Moreno of Sheppard, Mullin, Richter & Hampton LLP.¹ Defendant VTB
16 Holdings, Inc. ("VTBH"), and Specially Appearing Defendants Stripes Group, LLC, SG VTB
17 Holdings, LLC, Juergen Stark and Kenneth Fox (collectively, the "Non-Director Defendants")
18 appeared by and through their counsel Richard C. Gordon of Snell & Wilmer, LLP and Joshua
19 D.N. Hess, David A. Kotler, Brian Raphel, and Ryan Moore of Dechert LLP.

20 After the conclusion of Plaintiff's case-in-chief, Defendants made motions pursuant to
21 NRCP Rule 52(c). The Court having considered the evidence presented at trial, along with oral
22 and written arguments of counsel on such motions, and with the intent of rendering a decision
23 on all remaining claims² before the Court at this time, the Court GRANTS Defendants' motion
24

25 ¹ Certain Director Defendants (Kaplan, Norris, Putterman and Wolf) ("Settling Directors") announced a
26 settlement on the first day of the trial. The Settling Directors Motion for Good Faith Settlement was granted.

27 ² The Nevada Supreme Court in *Parametric v. Eighth Judicial District Court*, 133 Nev. 417 (2017)
28 determined that a derivative claim of equity dilution survived and the claims could include equity expropriation. In footnote 15, the Nevada Supreme Court determined that **actual fraud** was necessary to prove this type of claim.

1 pursuant to NRCP 52(c) and enters judgment in favor of Defendants, upon the following
2 findings of fact and conclusions of law.

3 **FINDINGS OF FACT**

4 **I. Class and Derivative Litigation**

5 1. The underlying class action and shareholder derivative action was commenced
6 on August 8, 2013.³ The case arose out of the merger between Parametric Sound Corporation
7 (“Parametric”) and VTBH which closed on January 15, 2014.

8 2. The derivative causes of action for breach of fiduciary duty, aiding and abetting
9 and unjust enrichment claims were extinguished by the settlement and judgment entered by this
10 Court on May 18, 2020.

11 3. On May 18, 2021, the Court granted Plaintiff’s motion against Defendants
12 Kenneth Potashner, Juergen Stark, and VTB Holdings, Inc. setting an evidentiary hearing on
13 June 18, 2021 to determine sanctions, if any.

14 4. Following the June 18, 2021 evidentiary hearing, the Court imposed sanctions in
15 the form of adverse inferences. The Court held that: “(1) Potashner having willfully destroyed
16 text messages text messages and emails relevant to this litigation, the Court makes an adverse
17 inference that the lost text messages and emails relevant to this litigation would have shown
18 that Potashner acted in bad faith when supporting and approving the merger. Potashner may
19 testify and contest this at trial, but his testimony will go to his credibility only because an
20 adverse inference of bad faith has already been made by the Court; and; (2) Stark and Fox
21 having negligently failed to preserve text messages, the Court makes an adverse inference that
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26 ³ The claims against Defendants were largely resolved through a Rule 23.1 settlement. On January 17,
27 2020, the Court granted preliminary approval of the settlement. On May 18, 2020, the Court ordered that the class
28 action and derivative settlement was “finally approved in all respects” and entered a final judgment dismissing all
of the Class’ released claims, with prejudice, pursuant to the terms of the Stipulation of Settlement filed on
November 15, 2019. These Plaintiffs opted out of the class settlement.

1 the lost information would have been adverse to them.” See Findings of Fact, Conclusions of
2 Law, and Order Imposing Spoliation Sanctions dated July 15, 2021.

3 **II. Opt-Out Litigation**

4 **A. Plaintiff and Assignors**

5 5. Plaintiff PAMTP, LLC is a Delaware limited liability company formed for the
6 purpose of asserting the claims presented in this lawsuit. It purports to assert claims assigned to
7 it by individuals and entities who held Parametric common stock on the closing date of the
8 merger, January 15, 2014.

10 6. Plaintiff was not a holder of Parametric common stock on January 15, 2014.

11 7. The members of Plaintiff are IceRose Capital Management LLC, Robert
12 Masterson, Richard Santulli, Marcia Patricof (as trustee of Patricof Family LP, Marcia Patricof
13 Revocable Living Trust, and the Jules Patricof Revocable Living Trust), Alan and Anne
14 Goldberg, Barry Weisbord, and Ronald and Muriel Etkin (each, an “Assignor”; collectively, the
15 “Assignors”).

16 8. On April 22, 2020, Plaintiff, on behalf of the following individuals and/or
17 entities, opted out of the class action settlement: IceRose Capital Management, LLC; Robert
18 Masterson; Marcia Patricof, on behalf of the Patricof Family LP, Marcia Patricof Revocable
19 Living Trust, and the Jules Patricof Revocable Living Trust; Alan and Anne Goldberg; Barry
20 Weisbord; Ronald and Muriel Etkin; and Richard Santulli (the “Assignors”). In conjunction
21 with opting out of the class action settlement, the Assignors assigned their claims in the
22 litigation to Plaintiff.
23

24 9. PAMTP is managed by its Members. Assignors Adam Kahn (of IceRose Capital
25 Management, LLC) and Robert Masterson were the Member Managers responsible for day-to-
26 day decisions concerning the management of the litigation. Assignor Barry Weisbord is the
27 Chief Executive Manager of Plaintiff who was designated to resolve any disagreements
28

1 between the Member Managers on any particular decision.

2 10. Each of the Assignors held Parametric common stock on the date the merger
3 closed. Each of them, however, sold that stock prior to assigning their claims to Plaintiff in
4 April 2020. Except for IceRose, none of the Assignors owned any Parametric common stock
5 when they purported to assign their claims to Plaintiff. IceRose owned 28,700 shares of
6 Parametric common stock at the time of the purported assignment, but Plaintiff presented
7 insufficient evidence to allow the Court to determine whether IceRose's stockholding in
8 Parametric at the time of the assignment was composed of any of the shares in Parametric it
9 held as of January 15, 2014.

10 11. The Assignors executed Assignments of Claim in April 2020 "assign[ing],
11 transfer[ring], and set[ing] over unto PAMTP LLC . . . all of the Assignor's right, title and
12 interest in any claim that the Assignor has or could have arising from his/her/its ownership of
13 Parametric . . . stock, including any and all claims arising from or related to the [merger]
14 against Parametric or any other entity or individual that could be liable for the acts and/or
15 omissions alleged in [this litigation]."

16 12. The Assignors notified the Court that they had opted-out of the Class by letter
17 dated April 22, 2020. The Assignors advised the Court that they had "assigned their interests in
18 claims arising from the ownership of Parametric common stock to an entity created for the
19 purposes of opting out of the . . . litigation and pursuing claims independently" and,
20 "[a]ccordingly, that entity, PAMTP LLC, also exclude[d] itself from the Class in the Parametric
21 Settlement."

22 13. On May 20, 2020, Plaintiff filed its Complaint in this action asserting two causes
23 of action against defendants: a direct breach of fiduciary duty claim against the Director
24 Defendants based upon an alleged equity expropriation caused by the merger and a direct claim
25 for aiding and abetting against the Non-Director Defendants in connection with the same
26 alleged breach of fiduciary duty.

27 14. When the Assignors sold the Parametric common stock they owned as of
28 January 15, 2014, the Assignors did not enter into any agreement with purchasers of such

1 shares to retain their rights, titles and interests in any claims arising from the Assignors' prior
2 ownership of Parametric common stock, including the claims asserted by plaintiff in this action.

3 15. On June 23, 2020, the Court consolidated Plaintiff's action with and into the
4 class action under the caption above. *See* Order Granting Defendants' Motion to Consolidate
5 dated June 23, 2020.

6 **B. Pre-Merger Parametric**

7 16. Parametric was founded in 2010. In 2013, it was a publicly traded corporation
8 listed on the NASDAQ stock exchange. Parametric was organized under the laws of the State
9 of Nevada.

10 17. Parametric was a start-up technology company focused on delivering novel
11 audio solutions through its HyperSound™ or "HSS®" technology platform, which pioneered
12 the practical application of parametric acoustic technology for generating audible sound along a
13 directional ultrasonic column. The creation of sound using Parametric's technology created a
14 unique sound image distinct from traditional audio systems. In addition to its commercial
15 digital signage and kiosk product business, Parametric was targeting its technology for new
16 uses in consumer markets, including computers, video gaming, televisions and home audio
17 along with other commercial markets including casino gaming and cinema. Parametric was
18 also focusing development on health applications for persons with hearing loss.

19 **C. Directors and Senior Officer of Pre-Merger Parametric**

20 18. In August 2013, Parametric's Board of Directors ("Board") consisted of six
21 individuals: Potashner, Norris, Kaplan, Putterman, Wolfe and non-party James Honoré.

22 **(1) Potashner**

23 19. Potashner was appointed a director in December 2011 and Executive Chairman
24 (equivalent to chief executive officer) in March 2012. Potashner received his bachelor's degree
25 in electrical engineering at Lafayette College in 1979 and a masters' degree in electrical
26 engineering from Southern Methodist University in 1981.

27 20. Potashner resigned from the Board effective May 12, 2014.
28

1 **(2) Norris**

2 21. Norris was a member of the Board since the incorporation of the company on
3 June 2, 2010 and co-founded the company with James Barnes (“Barnes”), Parametric’s chief
4 financial officer. Norris was Parametric’s President and Chief Scientist. Norris is an inventor
5 and owner of more than 50 U.S. patents, primarily in the fields of electrical and acoustical
6 engineering, and is a frequent speaker on innovation to corporations and government
7 organizations. Norris is the inventor of pre-merger Parametric’s HSS technology.

8 22. Norris resigned from the Board effective January 15, 2014.

9 **(3) Putterman**

10 23. Putterman was appointed a director in May 2011. He has been a full faculty
11 member at UCLA since 1970, where he is a Professor of Physics. His research areas include
12 nonlinear fluid mechanics and acoustics, sonoluminescence, friction, x-ray emission and crystal
13 generated nuclear fusion. He earned a B.S. from the California Institute of Technology in 1966
14 and his Ph.D. from Rockefeller University in 1970.

15 24. Putterman resigned from the Board effective November 21, 2013.

16 **(4) Kaplan**

17 25. Kaplan was appointed a director in May 2011. He is a retired business executive
18 with extensive experience in the financial and retail sectors. Kaplan earned an MBA from
19 Harvard University in 1961 and a Ph.D. in Business Economics from Michigan State University
20 in 1967.

21 26. Kaplan resigned from the Board effective January 15, 2014.

22 **(5) Wolfe**

23 27. Wolfe was appointed a director in February 2012.

24 **(6) Honoré**

25 29. Honoré was appointed a director in March 2012.

26 30. Honoré resigned from the Board effective January 15, 2014.

27 **D. Non-Director Defendants**

28 31. VTBH was a privately held Delaware corporation. VTBH and its subsidiaries,

1 including Voyetra Turtle Beach, Inc., are collectively referred to as “Turtle Beach.” Turtle
2 Beach designs, develops and markets premium audio peripherals for video game, personal
3 computer, and mobile platforms. Turtle Beach had strong market share in established gaming
4 markets, including a 53% share of the U.S. console gaming headset market as of year-end 2012
5 according to The NPD Group. Turtle Beach had a presence in 40 countries and has partnered
6 with major retailers, including Wal-Mart, Carrefour, Tesco, Best Buy, GameStop, Target and
7 Amazon.
8

9 32. VTBH was majority owned by Stripes Group, LLC (“Stripes”) and SG VTB,
10 LLC (“SG VTB”). VTBH is a wholly owned subsidiary of the post-merger Turtle Beach.

11 33. Stripes is a private equity firm focused on internet, software, healthcare, IT and
12 branded consumer products businesses. In 2010, Stripes invested in VTBH and became its
13 majority owner.

14 34. Fox is Stripes Group’s founder. Fox sat on the VTBH board of directors after the
15 merger, stepping down on November 15, 2018.

16 35. SG VTB, LLC is a Delaware LLC and is a wholly owned subsidiary of Stripes
17 Group. Stripes formed SG VTB in 2010 to acquire a majority position in VTBH. SG VTB is
18 an investment vehicle for Stripes.

19 36. Stark was chief executive officer of VTBH during negotiations leading to the
20 merger and was named to that position by Stripes in September 2012. Stark has served as
21 Turtle Beach’s CEO since the merger and continues to serve as its CEO today. Stark also sits
22 on Turtle Beach’s current board of directors, and as of January 1, 2020, became Chairman of
23 the Board.

24 **III. Merger Negotiations and the Parametric Board’s Process**

25 37. As part of Parametric’s ongoing strategic planning process, the Parametric Board
26 and Parametric’s executive officers regularly reviewed and evaluated Parametric’s strategic
27 direction and alternatives in light of the performance of Parametric’s business and operations
28 and market, economic, competitive and other conditions and developments.

1 38. In March 2013, Parametric engaged Houlihan Lokey as its financial advisor to
2 evaluate possible strategic alternatives.

3 39. Between March 2013 and August 2013, Houlihan Lokey (working on behalf of
4 Parametric) contacted a total of 13 parties other than Turtle Beach to explore possible strategic
5 alternatives. None of those other parties expressed any material interest in a competing or
6 alternative transaction.

7 40. During this five-month period, the Board held several formal meetings with
8 financial and legal advisers regarding possible strategic transactions. During these meetings,
9 the Directors engaged in robust discussions among themselves and with the Board’s advisers
10 regarding the risks and benefits of a strategic transaction with Turtle Beach and available
11 alternative strategies and transactions.

12 41. Potashner played a leading role in the negotiation of the merger,
13

14 42. The Court previously adopted an adverse inference against Potashner that he
15 “acted in bad faith when supporting and approving the merger.” *See* Findings of Fact,
16 Conclusions of Law, and Order Imposing Spoliation Sanctions dated July 15, 2021. The
17 evidence at trial supported this conclusion.⁴

18 43. Among the terms being negotiated was an agreement to grant to Turtle Beach an
19 exclusive license to HyperSound technology in both the console gaming and PC audio fields in
20 the event Parametric were to terminate any merger agreement before closing. Parametric
21 offered this “break-up fee license agreement” in order to make the merger more attractive to
22 Turtle Beach and Stripes, which had not yet agreed to move forward with the deal. The Board
23 informed itself of the fiduciary implications of this potential “break-up fee license agreement”
24 by consulting with counsel.
25

26
27 ⁴ The Court declines Plaintiff’s invitation to find that actual fraud is not fraud but simply an intentional act.
28 While the Court finds that Potashner acted in bad faith, that finding does not equate to a finding of fraud under any
analysis currently adopted in Nevada.

1 44. The break-up fee license agreement was viewed as complementary to other
2 licensing activities sought out by Parametric at the time.

3 45. Parametric established HyperSound Health, Inc. (“HHI”), a wholly owned
4 subsidiary of Parametric, in October 2012 to facilitate Food and Drug Administration approval
5 for certain medical applications of HyperSound technology (*e.g.*, hearing devices). In February
6 2013 and March 2013, options were granted to four individuals (Potashner and three
7 consultants) to purchase shares of the common stock of HHI.

8 46. Turtle Beach learned about the existence of these stock options through due
9 diligence in late June 2013, after the core terms of the merger had been negotiated. Upon
10 discovery, Turtle Beach demanded that Parametric cancel the stock options it had issued to
11 these four individuals. Turtle Beach informed each of Parametric’s directors that it would not
12 move forward with the merger until these stock options were cancelled. Turtle Beach issued
13 this demand on multiple occasions in June and July 2013.

14 47. The evidence showed that Potashner made efforts to entrench himself in HHI,
15 and to enrich himself with his options in HHI. To obtain these personal benefits, Potashner
16 attempted to favor Turtle Beach, including by avoiding completing valuable licensing deals and
17 delaying announcements of completed deals.

18 48. When it became apparent to the Board that cancellation of Potashner’s HHI was
19 required to facilitate a merger with Turtle Beach, a majority of the Board demanded that
20 Potashner agree to cancel his HHI stock options. In July 2013, at the demand of the Board,
21 Potashner agreed that his HHI options would cancel upon the closing of the proposed merger
22 with Turtle Beach.

23 49. Potashner entered into this agreement without being provided any payment or
24 additional compensation from Parametric, Turtle Beach, Stripes, or anyone else. Potashner
25 received nothing of value from Turtle Beach and lost stock options that he believed could have
26 held substantial value following the merger.

27 50. Parametric engaged Craig-Hallum Capital Group, LLC (“Craig-Hallum”) to pro-
28 vide an opinion regarding the fairness of the proposed merger. Craig-Hallum’s compensation

1 for preparing a fairness opinion was not contingent upon the closing of any transaction.

2 51. On August 2, 2013, a joint meeting of the Parametric Board and compensation
3 committee was held, with the financial and legal advisors of the Parametric Board. At the
4 meeting, representatives of Craig-Hallum reviewed and discussed with the Parametric Board
5 Craig-Hallum's financial analysis and views regarding the merger with Turtle Beach and the
6 terms of the merger agreement with Turtle Beach (including the "Per Share Exchange Ratio"),
7 with reference to a proposed fairness opinion at the request of the Parametric Board, Craig-
8 Hallum rendered its oral opinion to the effect that, as of August 2, 2013, subject to certain
9 assumptions, qualifications and limitations, the "Per Share Exchange Ratio" contemplated by
10 the merger agreement was fair, from a financial point of view, to Parametric.

11 52. The Per Share Exchange Ratio was determined through arm's-length
12 negotiations between Parametric and Turtle Beach.

13 53. Craig-Hallum utilized Parametric's internal financial projections for fiscal years
14 ended September 30, 2013 through September 30, 2017, prepared by and furnished to Craig-
15 Hallum by the management of Parametric. Information regarding the net cash, number of fully-
16 diluted shares of common stock outstanding and net operating losses for Parametric was
17 provided by management. Craig-Hallum utilized Turtle Beach's internal financial projections
18 for fiscal years ended December 31, 2013 through December 31, 2016 prepared by and
19 furnished to Craig-Hallum by the management of Turtle Beach. Information regarding the net
20 debt, number of fully-diluted shares of common stock outstanding and net operating losses for
21 Turtle Beach was provided by management.

22 54. At the August 2, 2013 meeting of the Board, the Directors engaged in robust
23 discussion with representatives of Craig-Hallum regarding its fairness opinion and the
24 calculations. The Directors relied in good faith upon the competency of the analyses performed
25 and opinions rendered by Craig-Hallum. None of the Settling Directors was made aware of
26 errors, if any, contained in Craig-Hallum's analyses.

27 55. In evaluating the merger agreement and the transactions contemplated, the Board
28 consulted with Parametric's management and legal and financial advisors, reviewed a

1 significant amount of information and considered numerous factors which the Parametric Board
2 viewed as generally supporting its decision to approve the merger agreement and the
3 transactions contemplated. The Board also considered and discussed numerous risks,
4 uncertainties and other countervailing factors in its deliberations relating to entering into the
5 merger agreement and the merger.

6 56. Although the Court made an adverse inference that Potashner acted in bad faith
7 in pursuit of his own self-interest when supporting and approving the merger, the Court finds
8 that the Board nevertheless approved the merger agreement with Turtle Beach on August 2,
9 2013 by a majority of independent and disinterested directors exercising their business
10 judgment in good faith. Norris, Kaplan, Putterman, Wolfe and Honoré exercised their good
11 faith business judgment independent of Potashner.

12 57. A majority of the Board believed in good faith that the potential benefits to
13 Parametric shareholders of the merger agreement and the transactions contemplated outweighed
14 the risks and uncertainties attendant to the proposed merger, as well as risks and uncertainties
15 attendant to remaining as a stand-alone entity. A majority of the Board recognized that the
16 expected benefits of the proposed merger with Turtle Beach vastly outweighed the risks
17 attendant to continuing to attempt to execute on its stand-alone entity business plan.

18 58. Under the merger, a subsidiary of Parametric merged with Turtle Beach, with
19 Turtle Beach continuing as the surviving corporation. As a result of the merger, each share of
20 Turtle Beach common stock and Series A Preferred Stock would be cancelled and converted
21 into the right to receive a number of shares of Parametric stock. The end result of the merger
22 was that the pre-merger security holders of Parametric would own 20.01% of the post-merger
23 Parametric (on a fully-diluted basis), while the security holders of Turtle Beach would own the
24 remaining 79.99% of the post-merger Parametric (on a fully-diluted basis).

25 59. Each of Parametric's directors determined independently that the merger was in
26 the best interests of Parametric and its shareholders. Kaplan, Norris, Putterman, Wolfe, and
27 Honoré conducted their own analysis of the terms of the merger agreement, with the assistance
28 of their legal counsel and financial advisors. Their decisions to vote in favor of the merger

1 were not guided by, let alone controlled by, Potashner's support for the merger.

2 60. Kaplan, Norris, and Putterman testified that they did not trust or believe
3 Potashner at all times but they agreed with him in supporting the merger based on their
4 independent judgment.

5 61. Potashner, Norris and Barnes (along with affiliated entities) entered into voting
6 agreements which required them to vote in favor of the merger and to not sell or otherwise
7 transfer their shares for at least six months following the merger. These agreements were
8 disclosed in the proxy statement and represented approximately 19.2% of the outstanding
9 shares of Parametric common stock as of the record date.

10 62. Under the voting agreements entered into by Potashner, Barnes and Norris, as
11 well as certain entities over which they exercised voting and/or investment control (such
12 stockholders and entities collectively referred to as the "management stockholders"), the
13 management stockholders were subject to a lock-up restriction whereby they agreed not to sell
14 or otherwise transfer the shares of Parametric common stock beneficially owned by them or
15 subsequently acquired by them until six months following the closing of the merger, subject to
16 certain exceptions.

17 **IV. Post-Announcement of the Merger**

18 63. On August 5, 2013, after the close of trading on NASDAQ, Parametric issued a
19 press release announcing the execution of the merger agreement.

20 64. Pursuant to the merger agreement, Parametric conducted a 30-day "go-shop"
21 process to elicit potential "topping bids." As part of the "go shop" process, Houlihan Lokey
22 contacted 49 different parties. None expressed interest in making a "topping bid."

23 65. In a call with Parametric shareholders on August 8, 2013 announcing the
24 merger, Turtle Beach disclosed that it expected 2013 revenues and EBITDA to fall in a range
25 that was below the projections Craig-Hallum had relied upon. Turtle Beach disclosed to
26 Parametric shareholders that although console transitions have led to subsequent industry
27 growth in the past,

28 "we can't guarantee that will occur."

1 “it’s very important that you understand the gaming industry context for 2013. Both
2 Xbox and PlayStation have announced launches of new consoles during the holiday’s
3 this year. As a result, the entire gaming sector is going through what we believe to be a
normal cycle of contraction, prior to these new console release[s].”

4 “our business results in particular will be very much dependent on one; how consumer
5 purchasing behavior for more expensive accessories like headset plays out, heading into
6 the transition. Two; when the new console launches will happen and three; what
quantity of new consoles will be available [and] sold during the weeks between the
launch and the year end.”

7 “rely among other things on successful widespread launch of the new consoles with
8 sufficient selling weeks to impact this year as well as availability of some specific
9 components from Microsoft required for sale of our licensed Xbox One headsets, this
holiday. These specific items by the way are outside of our control.”

10 “these uncertainties are driving the wide range around the expectations for revenues
11 and EBITDA I just talked through, but it’s important to note that our actual results could
12 fall materially outside of these ranges if the aforementioned assumptions turned out to
be inaccurate.”

13 66. Turtle Beach’s actual revenues in 2013 were 18% lower than had been
14 forecasted in the projections provided to Craig-Hallum. Turtle Beach’s financial
15 underperformance caused it to trip certain debt covenants with its lender, which resulted in
16 Turtle Beach renegotiating its credit facility in the second half of 2013.

17 67. Parametric’s actual revenues for fiscal year 2013 were 44% lower than had been
18 forecasted in the projections provided to Craig-Hallum.

19 68. Parametric and Turtle Beach were aware of each other’s respective
20 underperformance in late 2013. Parametric management determined that it was not in the best
21 interest of the company or the shareholders to attempt to renegotiate the terms of the merger.

22 69. On December 3, 2013, Parametric filed a 348-page Definitive Proxy Statement
23 with regard to the merger agreement with the SEC and transmitted it to Parametric’s
24 shareholders. The proxy statement sought shareholder votes on several proposals, including (a)
25 whether to approve the issuance of new shares of Parametric common stock to Turtle Beach
26 pursuant to the merger agreement (in effect, to approve the merger) and (b) whether to approve
27 the change in control compensation awards to Potashner, Norris and Barnes in connection with
28 the merger.

1 70. Parametric disclosed Turtle Beach’s actual revenues for 2013 (through
2 September 28, 2013) in the proxy statement and also disclosed Turtle Beach’s issues with
3 respect to the debt covenants.

4 71. The proxy statement did not contain updated financial projections for either
5 Turtle Beach or Parametric. The proxy statement cautioned readers that the projections that
6 Craig-Hallum relied upon were only current “as of August 2, 2013,” the date the fairness
7 opinion was issued, “based on market data as it existed on or before August 2, 2013 and is not
8 necessarily indicative of current or future market conditions.” The proxy statement also
9 contained a prominent warning in bold text that shareholders

10 “should not regard the inclusion of these projections in this proxy statement as an
11 indication that Parametric, Turtle Beach or any of their respective affiliates, advisors or
12 other representatives considered or consider the projections to be necessarily predictive
 of actual future events.”

13 72. The proxy statement also disclosed the risk Stark had warned about on the
14 August 8, 2013 investor call had been realized. The proxy statement disclosed that

15 “Microsoft has informed its partners in the Xbox One console launch that the Xbox One
16 Headset Adapter, being built by Microsoft and provided to Turtle Beach for inclusion
 with new gaming headsets, will not be available until early 2014.”

17 “[t]his delay will result in a downward revision to the 2013 outlook for revenue and
18 EBITDA provided by Turtle Beach’s management on August 8, 2013.”

19 73. The proxy statement further disclosed that “[t]his delay will result in a
20 downward revision to the 2013 outlook for revenue and EBITDA provided by Turtle Beach’s
21 management on August 8, 2013.” The level of such impact depends on several factors,
22 including the projected launch date for the requisite hardware and software from Microsoft
23 which is still being assessed. Turtle Beach plans to update its 2013 outlook for revenue and
24 EBITDA following completion of this assessment.” In making this disclosure, the proxy
25 statement revealed that Turtle Beach expected its financial forecast to fall below the range
26 disclosed on August 8, 2013, which was already lower than the forecast included in Craig-
27 Hallum’s fairness opinion.
28

1 74. In late 2013, Turtle Beach provided additional financial disclosures showing that
2 Turtle Beach's actual performance in 2013 was materially underperforming Turtle Beach's
3 performance in the same time period in 2012 and its prior guidance for 2013. On November 7,
4 2013, Parametric filed a Form 8-K, which disclosed an investor presentation prepared by
5 Parametric and Turtle Beach that included updated net revenue, EBIDTA, and net income
6 numbers for Turtle Beach for the twelve-month period preceding June 30, 2013. That investor
7 presentation also stated that

9 "Microsoft's delay of the Xbox One hardware and software until early 2014 is expected
10 to result in a deferral of Turtle Beach's Xbox One headset-related revenues and profits
11 for Q4."

12 Parametric shareholders had access to this information when deciding whether to vote in favor
13 of the merger.

14 75. The proxy statement disclosed that Turtle Beach expected to underperform even
15 the lowered guidance provided to Parametric shareholders on August 8, 2013 and explained
16 that this underperformance was due to the unexpected unavailability of the Microsoft
17 component. The proxy statement further disclosed that Turtle Beach would be revising its
18 projections downward, but that it would not be able to provide those projections until that
19 process was completed.

20 76. The proxy statement contained a fair summary of Craig-Hallum's fairness
21 opinion. The proxy statement also contained a fair and complete summary of interests and
22 potential conflicts in the merger held by members of the Board and management of Parametric.
23 No material interest or potential conflicts in the merger held by members of the Board and
24 management of Parametric were undisclosed in the proxy statement.

25 77. Parametric held a special meeting of its shareholders on December 27, 2013.
26 Approximately 95% of the shares voting in that election to approve the transaction. Neither the
27 Settling Directors nor any combination of Parametric insiders owned sufficient shares in the
28 pre-merger Parametric to control the outcome of the vote in favor of the merger.

1 78. The merger closed on January 15, 2014. As consideration for the merger,
2 Parametric issued new shares of its common stock to Stripes and Turtle Beach, the net effect
3 being that Stripes controlled approximately 80.9% of the combined company. Parametric
4 shareholders, including each of the Settling Directors, who owned a combined 100% of
5 Parametric before the merger, were reduced to a minority 19.1% interest.

6 79. Potashner's employment agreement, which came into effect in April 2012,
7 contained certain change in control provisions. Under that agreement, upon a change in control
8 at Parametric, Potashner would be entitled to a severance payment equivalent to twelve months
9 salary and accelerated vesting of unvested incentive stock options regardless of whether he had
10 met the required milestones.

11 **V. No Control or Actual Fraud**

12 80. Prior to January 15, 2014, Parametric was not a "controlled company" pursuant
13 to NASDAQ rules because more than 50% of its voting power was not concentrated in any
14 single shareholder or control group.

15 81. As disclosed in the proxy statement, persons or entities who held shares of
16 commons stock of Parametric on the "record date" of November 11, 2013, were entitled to vote
17 at the special meeting of shareholders to be held on December 27, 2013. Parametric had
18 6,837,321 shares of common stock outstanding on the record date.

19 82. On November 11, 2013, Potashner owned no shares of common stock of
20 Parametric. Accordingly, Potashner was not entitled to vote at the special meeting of
21 shareholders held on December 27, 2013.

22 83. Norris, Putterman and Kaplan often were hostile to Potashner and acted contrary
23 to what they perceived as Potashner's personal interests by causing the Board to, among other
24 things:

- 25 a. cancel Potashner's options in the HHI subsidiary for no consideration;
- 26 b. rebuff Potashner's efforts to cause Kaplan to retire from his position as a
- 27 director of the pre-merger Parametric;
- 28 c. refuse Potashner's request to remove Wolfe from Parametric's audit

1 committee.

2 d. refuse Potashner's request to be allowed to sell Parametric stock after the
3 announcement of the merger; and

4 e. refuse Potashner's request to allow Parametric consultant John Todd to
5 sell Parametric after the announcement of the merger.

6 84. A majority of the Board of Parametric was independent of Potashner. That
7 majority could and did outvote Potashner on any all matters on which that majority disagreed
8 with Potashner.

9 85. Norris, Putterman, Kaplan and Honoré had no business interactions with
10 Potashner prior to Parametric. Norris, Putterman, Kaplan, Wolfe and Honoré had no pre-
11 existing personal or familial relationship with Potashner.

12 86. None of the Settling Directors was unable to freely exercise his judgment as a
13 member of the Board by reason of:

- 14 a. dominion or control of another;
15 b. fear of retribution by another;
16 c. contractual obligations owed to another; or
17 d. employment by or other business relationship with another.

18 87. No one single individual or group had the authority unilaterally to:

- 19 a. elect new directors to the Board;
20 b. cause a break-up of Parametric;
21 c. cause Parametric to merge with another company;
22 d. amend Parametric's certificate of incorporation;
23 e. cause Parametric to sell all or substantially all of the assets of Parametric;
24 f. alter materially the nature of Parametric and the public shareholders'

25 interest therein; or

- 26 g. offer employment to anyone in the post-merger Parametric.

27 88. Potashner did not receive any compensation as a result of the merger that he was
28 not entitled to receive through his employment contract, which included a severance payment,

1 an annual bonus, and accelerated vesting of certain incentive stock options upon a change in
2 control. Potashner could have received the same compensation had Parametric merged with a
3 different partner. Each of these forms of compensation were disclosed in the proxy statement.

4 89. Potashner did not enter any side deals or other agreements with Turtle Beach or
5 Stripes for additional compensation. Other than through his employment agreement, Potashner
6 received nothing of value from Turtle Beach or Stripes in exchange for his support for the
7 merger.

8 90. All directors holding equity in Parametric were diluted by the merger to the
9 same extent as every other public shareholder.

10 **CONCLUSIONS OF LAW**

11 1. NRCF 52(c) allows the district court in a bench trial to enter judgment on partial
12 findings against a party when the party has been fully heard on an issue and judgment cannot be
13 maintained without a favorable finding on that issue.

14 2. The directors of a Nevada corporation “are presumed to act in good faith, on an
15 informed basis and with a view to the interests of the corporation”. NRS 78.138(3). In
16 exercising his or her business judgment, a director is “entitled to rely on information, opinions
17 [and] reports” from, among others, “[o]ne or more directors, officers or employees of the
18 corporation reasonably believed to be reliable and competent in the matters prepared or
19 presented.” NRS 78.138(2)(a). A director may rely upon “information, opinions [and] reports”
20 from “[c]ounsel, public accountants, financial advisers, valuation advisers, investment bankers
21 or other persons as to matters reasonably believed to be within the preparer’s or presenter’s
22 professional or expert competence.” NRS 78.138(2)(b). Directors “are not required to consider
23 the effect of a proposed corporate action upon any particular group having an interest in the
24 corporation as a dominant factor.” NRS 78.138(5). Directors of a Nevada corporation are not
25 required to elevate the short-term interests of stockholders (such as maximizing immediate,
26 short-term share value) ahead of any of the other interests set forth in NRS 78.138(4).

27 3. Under NRS 78.211(1),

28 “the board of directors may authorize shares to be issued for consideration consisting of
any tangible or intangible property or benefit to the corporation, including, but not

1 limited to, cash, promissory notes, services performed, contracts for services to be
2 performed or other securities of the corporation. The nature and amount of such
3 consideration may be made dependent upon a formula approved by the board of
4 directors or upon any fact or event which may be ascertained outside the articles of
5 incorporation or the resolution providing for the issuance of the shares adopted by the
6 board of directors if the manner in which a fact or event may operate upon the nature
7 and amount of the consideration is stated in the articles of incorporation or the
8 resolution. The judgment of the board of directors as to the consideration received for
9 the shares issued is conclusive in the absence of actual fraud in the transaction.”

10 4. Directors “confronted with a change or potential change in control of the
11 corporation” have (a) the normal duties of care and loyalty imposed by operation of NRS
12 78.138(1); (b) the benefit of the business judgment rule presumption established by NRS
13 78.138(3); and (c) the “prerogative to undertake and act upon consideration pursuant to
14 subsections 2, 4 and 5 of NRS 78.138.” NRS 78.139(1). The provisions of NRS 78.139(2) do
15 not apply in this case.

16 5. In *Chur v. Eighth Judicial Dist. Court*, 136 Nev. Adv. Op. 7, 458 P.3d 336, 340
17 (2020), the Court noted that “NRS 78.138(7) requires a two-step analysis to impose individual
18 liability on a director or officer.” First, the presumptions of the business judgment rule must be
19 rebutted. *Id.* Second, the “director’s or officer’s act or failure to act” must constitute “a breach
20 of his or her fiduciary duties,” and that breach must further involve “intentional misconduct,
21 fraud or a knowing violation of law.” NRS 78.138(7)(b)(1)-(2). The *Chur* Court confirmed
22 that NRS 78.138 “provides for the sole circumstance under which a director or officer may be
23 held individually liable for damages stemming from the director's or officer's conduct in an
24 official capacity.” *Chur*, 458 P.3d at 340.

25 6. The *Chur* Court also explained that intentional misconduct and knowing
26 violation of the law under NRS 78.138 is an expansive test:

27 “To give the statute a realistic function, it must protect more than just directors (if any)
28 who did not know what their actions were [wrongful]; it should protect directors who
knew what they did but not that it was wrong.”

Id. at 341. A plaintiff “must establish that the director or officer had knowledge that the alleged
conduct was wrongful in order to show a “knowing violation of law” or “intentional
misconduct” pursuant to NRS 78.138(7)(b).” *Id.*

1 7. The Settling Directors were entitled to the benefit of the business judgment rule
2 presumption in connection with their consideration and approval of the merger with Turtle
3 Beach.

4 8. Plaintiff failed to meet its burden of rebutting the business judgment rule
5 presumption as to a majority of the Board. A majority of the Board (a) reasonably relied upon
6 the advice, information and opinions of other directors, employees and competent professionals
7 (including counsel) and financial advisors and (b) acted in good faith and independently when
8 considering and approving the merger. Plaintiff failed to meet its burden of proving that a
9 majority of the Board engaged in a knowing violation of law or intentional misconduct, or
10 engaged in actual fraud.

11 9. Plaintiff failed to meet its burden of proving that Potashner engaged in actual
12 fraud.

13 10. Plaintiff failed to meet its burden of proving that Houlihan Lokey and/or Craig-
14 Hallum did not have knowledge and competence concerning the matters in question or that any
15 purported conflict of interest would cause the Director Defendants' reliance thereon to be
16 unwarranted.

17 11. In 2017, the Nevada Supreme Court ruled in this litigation that the only direct
18 claim that Parametric shareholders might have standing to assert arising out of the merger was
19 an "equity expropriation" claim. *See Parametric Sound Corp. v. Eighth Jud. Dist. Ct.*, 133
20 Nev. 417, 429, 401 P.3d 1100, 1109 (2017). Any other claim contesting the merger would be
21 derivative in nature, and was extinguished by the settlement and judgment entered by this Court
22 on May 18, 2020.

23 12. The Court in *Parametric* held that "equity expropriation claims involve a
24 controlling shareholder's or director's expropriation of value from the company causing other
25 shareholders' equity to be diluted." *Id.*

26 13. The severance payment and accelerated vesting of incentive stock options
27 provided for under Potashner's April 2012 employment agreement, which were triggered upon
28 the closing of the merger between Parametric and Turtle Beach on January 15, 2014, for

1 purposes of the motion, will be presumed to have constituted an expropriation by Potashner of
2 value from the company causing Parametric shareholders' equity to be diluted.

3 14. Plaintiff failed to meet its burden of proving that Parametric had a controlling
4 shareholder or controlling director.

5 15. Plaintiff has failed to meet its burden to prove that Potashner's receipt of
6 incentive stock options is an expropriation of value by a controlling shareholder. As such,
7 Plaintiff failed to prove an essential element of an equity expropriation claim under Nevada
8 law.

9 16. Plaintiff further failed to meet its burden to prove that the Parametric Board's
10 decision was impacted by actual fraud, intentional misconduct, or bad faith.

11 17. By reason of Plaintiff's failure to meet its burden to prove a primary equity
12 expropriation claim against the Director Defendants, Plaintiff failed to meet its burden to prove
13 a secondary aiding and abetting claim against the Non-Director Defendants.

14 18. Because the Court is granting the NRCP 52(c) motion on the aforementioned
15 substantive grounds, it does not reach the merits of the additional arguments made by
16 Defendants in regard to Plaintiff's standing, the operation of the statute of limitations or the
17 measure of damages proffered by Plaintiff.

18 THEREFORE, IT IS HEREBY ORDERED that defendants' motion pursuant to NRCP
19 52(c) is GRANTED.

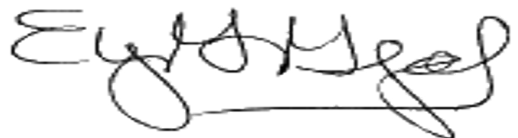
20 **JUDGMENT**

21 The Court having entered the foregoing Findings of Fact and Conclusions of Law, and
22 good cause appearing,

23 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that JUDGMENT is
24 entered in favor of Defendants and against Plaintiff as to all of Plaintiff's remaining claims.

25 DATED this _____ day of September 2021.

Dated this 3rd day of September, 2021

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