

IN THE SUPREME COURT OF THE STATE OF NEVADA

Nos. 83598, 84971, and 85358

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IN RE PARAMETRIC SOUND CORPORATION  
SHAREHOLDERS' LITIGATION.

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PAMTP, LLC,

*Appellant,*

v.

KENNETH F. POTASHNER; VTB HOLDINGS, INC.;  
STRIPE GROUP, LLC; SG VTB HOLDINGS, LLC;  
JUERGEN STARK; and KENNETH FOX,

*Respondents.*

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Consolidated Appeals from Final Judgment and Fees and Costs Awards  
Eighth Judicial District Court Case No. A-13-686890-B

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	Trial Exhibit 376	9	AA 1574- AA 1575
	Trial Exhibit 413	19	AA 3580- AA 3600
	Trial Exhibit 425	17	AA 3088- AA 3106
	Trial Exhibit 428	18	AA 3411- AA 3415
	Trial Exhibit 464	18	AA 3416- AA 3422
	Trial Exhibit 775	13	AA 2388
	Trial Exhibit 776	13	AA 2389- AA 2390
	Trial Exhibit 781	13	AA 2391- AA 2394
	Trial Exhibit 785	13	AA 2395- AA 2411

<u>Date</u>	<u>Document Description</u>	<u>Vol.</u>	<u>Pages</u>
	Trial Exhibit 789	13	AA 2412- AA 2413
	Trial Exhibit 821	13	AA 2414
	Trial Exhibit 837	13	AA 2415- AA 2416
	Trial Exhibit 909	18	AA 3423- AA 3433
	Trial Exhibit 1052	16	AA 2818- AA 2862

## AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Respectfully submitted this 12th day of January, 2023.

MCDONALD CARANO LLP

/s/ Jeff Silvestri

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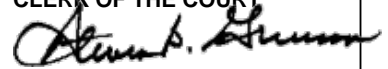
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## **CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of McDonald Carano LLP, and on January 12, 2023, a true and correct copy of the foregoing was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system.

/s/ CaraMia Gerard  
An Employee of McDonald Carano LLP



FFCL

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

IN RE PARAMETRIC SOUND  
CORPORATION SHAREHOLDERS'  
LITIGATION

Case No.: A-13-686890-B

Dept. No.: XI

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER IMPOSING  
SPOILIATION SANCTIONS**

This Document Relates To:

ALL ACTIONS.

On May 18, 2021, the Court entered its Order Granting Plaintiff's Motion Against Defendants Kenneth Potashner, Juergen Stark, and VTB Holdings, Inc. Setting Evidentiary Hearing Re Spoliation Sanctions ("Order"). Pursuant to the Order, on June 18, 2021, the Court conducted an evidentiary hearing to evaluate the factors enumerated in *Young v. Johnny Ribeiro Building, Inc.*, 106 Nev. 88, 787 P.2d 777 (1990), to determine the appropriate evidentiary sanction(s) for Potashner, Stark and VTB Holdings. On June 25, 2021, the Court heard closing arguments. The Court issues the following findings of fact and conclusions of law based upon a review of the record, the evidence adduced at the June 18, 2021 evidentiary hearing, and the arguments made on June 25, 2021:

**FINDINGS OF FACT**

**I. DEFENDANTS DESTROYED EMAILS AND TEXT MESSAGES AFTER RECEIVING LITIGATION HOLD LETTERS**

1. Potashner was Parametric's Executive Chairman and CEO.<sup>1</sup> Stark was CEO of

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<sup>1</sup> Transcript of the June 18, 2021 Evidentiary Hearing ("Evid. Tr.") at 231:4-231:7.



1 Turtle Beach Corporation (f/k/a Voyetra Turtle Beach).<sup>2</sup> Fox controlled Stripes Group, which  
2 was the entity that held the majority interest in Voyetra Turtle Beach's parent company, VTB  
3 Holdings.<sup>3</sup> Given their respective roles in the merger negotiations, text messages between these  
4 defendants contained material information concerning the merger and, in particular, the  
5 negotiation process. Given the text messages that have been produced from another side of a  
6 communication, it is clear that text messages included some relevant material that is now lost.  
7 The amount of that material is unknown and unascertainable because of the loss of that data.

8 2. As part of the discovery process in this matter the parties agreed upon certain  
9 custodians and search terms for electronically stored information,

10 **A. Defendant Kenneth Potashner**

11 3. Potashner received litigation holds from his counsel on August 9, 2013 and  
12 October 14, 2013.<sup>4</sup> The litigation holds identified 11 categories of documents relating to the  
13 merger and called for the preservation of ESI from cell phones. Potashner received additional  
14 warnings concerning his preservation obligations on October 7, 2014, May 13 and 28, 2015, and  
15 September 14, 2017.<sup>5</sup> Potashner understood the nature of the litigation holds he received.

16 4. Potashner sent and received text messages during the January 2013 to January  
17 2014 time period, but did not save the phone he used and, therefore, the text messages were  
18 irreparably lost.<sup>6</sup> Potashner willfully failed to preserve his text messages.

19 5. Potashner testified during his August 8, 2019 deposition and again during the  
20 evidentiary hearing on June 18, 2021 that he did not use text messages to have substantive  
21 discussions about business related matters and that he "didn't delete anything."<sup>7</sup> This testimony  
22

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23 <sup>2</sup> Evid. Tr. at 100:9-100:14.

24 <sup>3</sup> Evid. Tr. at 192:9-193:5.

25 <sup>4</sup> Evid. Tr. at 248:23-252:25.

26 <sup>5</sup> Defendant Kenneth Potashner's Answers to Plaintiff's First Set of Interrogatories, dated  
27 Feb. 1, 2019, pp. 24:24-25:7, 25:13-25:24, 28:23-30:2 (Exhibit 1).

28 <sup>6</sup> *Id.* at 20:16-21:3 (Exhibit 1).

<sup>7</sup> Evid. Tr. at 197:8-198:13, 253:1-253:13, 257:3-258:2.

1 is refuted by the evidence adduced at the June 18, 2021 hearing and is not credible.

2 6. Potashner's deposition and hearing testimony about his text messages was  
3 contradicted by evidence admitted during the evidentiary hearing. Text messages sent by and  
4 between Potashner and defendant Andrew Wolfe showed multiple text messages from Potashner  
5 in July 2013 discussing substantive information relevant to the merger negotiations, including  
6 Potashner's ownership of HyperSound Health, Inc. and side deals involving Wolfe, non-party  
7 John Todd, and others.<sup>8</sup>

8 7. The failure by Potashner to produce relevant Gmail communications is more  
9 disturbing. Potashner sent and received emails relating to the merger using a personal Gmail  
10 account. Potashner testified during his August 8, 2019 deposition and again during the  
11 evidentiary hearing on June 18, 2021 that he did not delete any emails relevant to the litigation.<sup>9</sup>  
12 This testimony is refuted by the evidence adduced at the June 18, 2021 hearing and is not  
13 credible.

14 8. Potashner did not provide all of his emails in the litigation. Potashner's  
15 deposition and hearing testimony about his Gmail account emails was contradicted by evidence  
16 admitted during the evidentiary hearing. Testimony from Plaintiff's ediscovery vendor, Kieran  
17 Grennan on behalf of vdiscovery, and expert statistician, Professor David Madigan, Ph.D.,  
18 established that Potashner destroyed 34.5% of his Gmail emails with non-party John Todd.<sup>10</sup>  
19 Professor Madigan's margin of error was 7.7%, meaning that he was able to conclude with a  
20 95% confidence level that Potashner deleted between 27.1% and 42.5% of his Gmail account  
21 with Mr. Todd (between 360 and 564 emails).<sup>11</sup> The testimony from Mr. Grennan and Dr.  
22 Madigan was credible and persuasive.

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24 <sup>8</sup> Evid. Tr. at 253:19-261:11; *see also* Defendant Andrew Wolfe Text Messages (Exhibit  
25 3).

26 <sup>9</sup> Evid. Tr. at 198:6-198:19.

27 <sup>10</sup> Evid. Tr. at 24:22-25:15, 39:17-45:8.

28 <sup>11</sup> Evid. Tr. at 32:13-33:1.

1           9.       The number of emails in the randomly selected sample group that are relevant to  
2 the litigation are admittedly small but remains significant.

3           10.      The results of this analysis is applied by the Court to apply to recipients other  
4 than those within the sample. It is impossible, given Potashner's actions, to determine the  
5 number of lost emails, the individuals with whom such communications were made, and the  
6 subject matter that has been lost.

7           11.      Potashner self-collected emails from his Gmail account for discovery purposes  
8 without oversight from counsel or his ediscovery vendor.<sup>12</sup> He testified at the June 18, 2021  
9 hearing, however, that he was "not fluent enough on the breadth of the shareholder litigation" to  
10 determine which emails were or were not relevant.<sup>13</sup> His self-collection was therefore inherently  
11 flawed. He did not provide full access to his Gmail account for collection until June 14, 2018.<sup>14</sup>  
12 Gmail does not automatically delete emails.<sup>15</sup>

13           12.      Potashner also had a corporate computer with potentially relevant ESI that he  
14 never returned to Parametric or otherwise provided to counsel for searching and collection of  
15 relevant discovery.<sup>16</sup>

16           13.      Given the limited number of custodians the loss of Potashner's emails is material  
17 and significant.

18           **B.       Defendants VTB Holdings and Juergen Stark**

19           14.      On August 14, 2013, VTB Holdings issued a litigation hold to its officers and  
20 directors.<sup>17</sup> Stark and Fox were directors of VTB Holdings at that time.<sup>18</sup> The litigation hold  
21

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22       <sup>12</sup>       Exhibit 1 at 12:4-12:9.

23       <sup>13</sup>       Evid. Tr. at 265:9-265:14.

24       <sup>14</sup>       Exhibit 1 at 12:14-12:17.

25       <sup>15</sup>       Exhibit 1 at 30:20-30:21.

26       <sup>16</sup>       Evid. Tr. at 197:18-198:4.

27       <sup>17</sup>       Defendant VTB Holdings, Inc.'s Response to Plaintiffs' First Set of Interrogatories,  
28 dated Feb. 6, 2019, p. 15:3-15:7 (Exhibit 6).

<sup>18</sup>       Evid. Tr. at 106:19-106:23.

1 called for the preservation of all documents relating to the shareholder action, including  
2 documents in electronic form, and did not contain any exception for personal devices.<sup>19</sup>

3 15. Stark understood the nature of the litigation hold he received. Stark was familiar  
4 with the litigation hold process based on his prior experience as an executive at Motorola and  
5 knew that the legal hold he received encompassed ESI on his phone, including text messages.<sup>20</sup>  
6 He also testified that his personal phone was subject to VTB Holdings' litigation hold as well as  
7 corporate policies requiring employees to provide their personal devices for litigation and  
8 discovery purposes.<sup>21</sup>

9 16. VTB Holdings asked Stark to provide his text messages in 2014.<sup>22</sup>  
10 Notwithstanding the litigation hold he received from VTB Holdings, Stark no longer possessed  
11 the ESI that was on his phone because he had "cleared" it.<sup>23</sup> Stark did not preserve his text  
12 messages.

13 17. Stark testified during the evidentiary hearing that his text messages would not  
14 have been relevant because he did not use text messaging to engage in substantive business  
15 discussions.<sup>24</sup> This testimony is refuted by the evidence adduced at the June 18, 2021 hearing  
16 and is not credible.

17 18. Stark's hearing testimony about his text messages was contradicted by evidence  
18 admitted during the evidentiary hearing. Text messages sent by and between Stark and non-party  
19 Ronald Doornink showed multiple text messages from Stark in 2014 and 2015 containing  
20 substantive business discussions, including compensation arrangements, stock performance,  
21

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22  
23 <sup>19</sup> Exhibit 6 at 15:3-15:7.

24 <sup>20</sup> Evid. Tr. at 108:4-110:1.

25 <sup>21</sup> Evid. Tr. at 160:15-163:16.

26 <sup>22</sup> Exhibit 6 at 9:13-9:19.

27 <sup>23</sup> Evid. Tr. at 114:25-115:15, 146:16-147:2.

28 <sup>24</sup> Evid. Tr. at 148:16-151:15.

1 revenue metrics, and regulatory investigations.<sup>25</sup>

2 **C. Defendant Kenneth Fox**

3 19. Fox did not preserve his text messages. Despite the August 2013 litigation hold,  
4 Fox replaced his phone on or after February 1, 2015 without preserving its ESI.<sup>26</sup>

5 20. Testimony demonstrated that Fox had substantive business discussions over text  
6 message. Text messages sent by and between Fox and non-party Ronald Doornink showed  
7 multiple text messages from Fox in 2014 discussing opportunities in new businesses and  
8 developments in various investments.<sup>27</sup>

9 21. Fox maintained a Gmail account that he used to discuss the merger with various  
10 individuals.<sup>28</sup> Fox did not produce emails from his Gmail account or recall what efforts he or his  
11 counsel took to preserve the emails.<sup>29</sup>

12 22. The testimony provided by Fox at the June 18, 2021 hearing was not credible.

13 **II. THE SPOLIATED EMAILS AND TEXT MESSAGES RELATED TO**  
14 **DEFENDANTS' SELF-INTEREST AND FRAUD IN APPROVING THE**  
15 **MERGER.**

16 23. Testimony from the June 18, 2021 evidentiary hearing establishes that certain  
17 Defendants spoliated at least two categories of ESI: (1) Potashner's Gmail account emails; and  
18 (2) text messages by or between Potashner, Stark, Fox, and other defendants.

19 24. Potashner's Gmail emails with Mr. Todd were relevant to the litigation.  
20 Potashner described Mr. Todd as a "business partner and friend" who helped take Parametric  
21 "from two guys in a garage to something worth \$100 million" and was responsible for  
22

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23 <sup>25</sup> Evid. Tr. at 151:17-159:4; *see also* Ronald Doornink Text Messages to Defendant  
24 Juergen Stark (Exhibit 13).

25 <sup>26</sup> Defendant Stripes Group, LLC's Response to Plaintiffs' First Set of Interrogatories,  
dated Feb. 6, 2019, p. 3:12-3:16 (Exhibit 8).

26 <sup>27</sup> Evid. Tr. at 185:4-187:23.

27 <sup>28</sup> Evid. Tr. at 180:11-184:11.

28 <sup>29</sup> Evid. Tr. at 176:9-176:18.

1 “furthering the HHI [HyperSound Health, Inc.] agenda.”<sup>30</sup> They frequently emailed during the  
2 merger negotiation process concerning relevant issues. A number of these emails were not  
3 produced in the litigation by Potashner, including emails discussing a “Consulting Services”  
4 agreement for Mr. Todd “prior to the consummation of the pending merger transaction regarding  
5 [HHI]” (Exhibit 446), Potashner’s attempt to “move [Juergen Stark] and his lawyers to  
6 announce . . . bullish [2014]” guidance (Exhibit 452), Potashner’s concerns over “how many  
7 things have already gone wrong in this deal” (Exhibit 459), Potashner’s advice on how to  
8 negotiate with Juergen Stark (Exhibit 538), and Potashner telling Mr. Todd that a “going  
9 concern” warning “should be off the table” because Stark “agreed to the q2 actuals/Q3 forecast  
10 scenario” (Exhibit 492). While other emails were not facially relevant to the litigation, including  
11 those that related to social plans or were outside the relevant period for discovery,<sup>31</sup> many of the  
12 emails admitted into evidence fell into the relevant time period for discovery and contained  
13 search terms agreed upon by the parties.<sup>32</sup>

14 25. Several additional Gmail emails introduced into evidence during the evidentiary  
15 hearing show that Potashner used his Gmail account to make adverse statements, including that  
16 a “going concern” warning was being discussed (Exhibit 492), that Potashner was aware of  
17 “covenants issue” impacting the closing of the merger (Exhibit 548), that Stark “created  
18 unrealistic numbers” to “get a better exchange rate” in the merger (Exhibit 30), and that he was  
19 willing to provide cooperation in the litigation in exchange for modifications to various option  
20 contracts (Exhibit 31).

21 26. Potashner’s text messages were also relevant to the litigation. They contained  
22

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23 <sup>30</sup> Evid. Tr. at 260:8-261:11.

24 <sup>31</sup> Exhibits 483 (forwarding Mr. Todd’s son’s resume), 454 (Mr. Todd thanking Potashner  
25 for dinner), 515 (discussing unrelated company), and 532 (making dinner plans). As these  
26 emails were produced by others they were not lost but are relevant to the subject matter. It is  
27 impossible to determine how many individuals Potashner communicated with by email that  
would have been relevant to the litigation. Given the opinion of Dr. Madigan the number of lost  
emails is clearly a significant number and material.

28 <sup>32</sup> Evid. Tr. at 63:4-63:19, 84:12-84:19.

1 substantive discussions concerning side deals and various arrangements relating to the merger,  
2 including “consulting agreements” offered to co-defendants, efforts to retain equity interests in  
3 HHI, discussion of payments to non-party John Todd, and the risk of “sec and justice dept  
4 forcing disclosures” that would jeopardize the merger.<sup>33</sup> Stark and Fox to a lesser degree than  
5 Potashner used text message to engage in substantive discussions.<sup>34</sup>

6 27. If any findings of fact are properly conclusions of law, they shall be treated as if  
7 appropriately identified and designated.

### 8 CONCLUSIONS OF LAW

9 1. “Spoliation occurs when a party fails to preserve evidence it knows or reasonably  
10 should know is relevant to actual or anticipated litigation.” *MDB Trucking, LLC v. Versa Prods.*  
11 *Co.*, 475 P.3d 397, 406 (Nev. 2020) citing *Fire Ins. Exch. v. Zenith Radio Corp.*, 103 Nev. 648,  
12 651, 747 P.2d 911 (1987).

13 2. NRCP 37(e) provides:

14 **Failure to Preserve Electronically Stored Information.** If electronically  
15 stored information that should have been preserved in the anticipation or conduct  
16 of litigation is lost because a party failed to take reasonable steps to preserve it,  
and it cannot be restored or replaced through additional discovery, the court:

17 (1) upon finding prejudice to another party from loss of the information, may  
18 order measures no greater than necessary to cure the prejudice; or

19 (2) only upon finding that the party acted with the intent to deprive another  
20 party of the information’s use in the litigation may:

21 (A) presume that the lost information was unfavorable to the party;

22 (B) instruct the jury that it may or must presume the information was  
23 unfavorable to the party; or

24 (C) dismiss the action or enter a default judgment.

25 3. Defendants Potashner, VTB Holdings, and Stark failed to preserve emails and  
26

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27 <sup>33</sup> Exhibit 3.

28 <sup>34</sup> Exhibits 11 and 12.

1 text messages. *Young v. Johnny Ribeiro Building, Inc.*, 106 Nev. 88, 787 P.2d 777 (1990),  
2 provides several factors a court may consider to determine the appropriate evidentiary  
3 sanction(s), which include but are not limited to the following:

- 4 a. The degree of willfulness of the offending party;
- 5 b. The extent to which the non-offending party would be prejudiced by a  
6 lesser sanction;
- 7 c. The severity of the sanction relative to the severity of the discovery abuse;
- 8 d. Whether any evidence has been irreparably lost;
- 9 e. The feasibility and fairness of alternative, less severe sanctions;
- 10 f. The policy favoring adjudication on the merits; and
- 11 g. The need to deter both the parties and future litigants from similar abuses.

12 4. “Courts have adopted a variety of measures, short of case-terminating sanctions,  
13 to redress spoliation of evidence. These measures include ‘attorneys’ fees and costs [associated  
14 with curative discovery], monetary sanctions for the cost of reconstructing destroyed evidence, .  
15 . . issue-related sanctions, the exclusion of testimony from the spoliator’s witnesses regarding  
16 the destroyed material, [and] jury instructions on the spoliation inference.” *MDB Trucking*, 475  
17 P.3d at 406 (Nev. 2020). The Nevada Revised Statutes also provide for rebuttable presumption  
18 instructions for willful spoliation. *See* NRS 47.250(3).

19 5. Potashner willfully destroyed text messages and Gmail account emails after  
20 receiving litigation holds from his counsel. He then attempted to conceal his destruction of  
21 evidence by representing during deposition that he did not use text messages to discuss  
22 substantive business matters or delete emails from his Gmail account. The evidence adduced  
23 during the evidentiary hearing demonstrated that this was false and that Potashner, in fact, used  
24 text messages for substantive discussions and did not produce an unknown number of materially  
25 relevant emails from his Gmail account.

26 6. Pursuant to NRS 47.250(3), spoliated evidence may be presumed adverse to the  
27 party or parties responsible for the spoliation. Based on the text messages and Gmail account  
28 emails introduced at the evidentiary hearing, it is likely that the destroyed evidence related



1 similarly to Potashner's self-interest in the merger and knowledge of material information that  
2 was adverse or contrary to information being provided to Parametric's shareholders at the time.  
3 Therefore, it is presumed that Potashner's text messages and Gmail account emails were adverse  
4 to Potashner in this action for these reasons and that he acted in bad faith when supporting and  
5 approving the merger.

6 7. Stark and Fox negligently failed to preserve relevant ESI. They received  
7 litigation holds at the inception of the case and knew they had a duty to preserve ESI. Given the  
8 nature of the lost evidence, the evidence lost is presumed adverse to Stark and Fox under the  
9 negligence standard set forth in *MDB Trucking*.

10 8. If any conclusions of law are properly findings of fact, they shall be treated as if  
11 appropriately identified and designated.

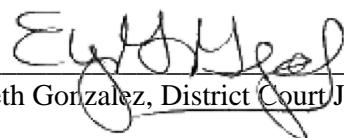
12 **ORDER**

13 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that:

14 1. Potashner having willfully destroyed text messages and emails relevant to this  
15 litigation, the Court makes an adverse inference that the lost text messages and emails relevant  
16 to this litigation would have shown that Potashner acted in bad faith when supporting and  
17 approving the merger. Potashner may testify and contest this at trial, but his testimony will go to  
18 his credibility only because an adverse inference of bad faith has already been made by the  
19 Court; and

20 2. Stark and Fox having negligently failed to preserve text messages, the Court  
21 makes an adverse inference that the lost information would have been adverse to them.

22  
23 DATED this 14<sup>th</sup> day of July, 2021.

24  
25   
26 Elizabeth Gonzalez, District Court Judge  
27  
28

**Certificate of Service**

I hereby certify that on the date filed, a copy of the foregoing Findings of Fact, Conclusions of Law and Order Imposing Spoliation Sanctions was electronically served, pursuant to N.E.F.C.R. Rule 9, to all registered parties in the Eighth Judicial District Court Electronic Filing Program.

/s/ *Dan Kutinac*  
Dan Kutinac, JEA

**ORDER**

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

IN RE PARAMETRIC SOUND  
CORPORATION SHAREHOLDERS'  
LITIGATION

Case No.: A-13-686890-B

Dept. No.: XI

**ORDER DENYING MOTION FOR  
SUMMARY JUDGMENT OF  
DEFENDANT VTB HOLDINGS, INC.  
AND SPECIALLY APPEARING  
DEFENDANTS STRIPES GROUP, LLC,  
SG VTB HOLDINGS, LLC, JUERGEN  
STARK, AND KENNETH FOX**

This Document Relates To:

ALL ACTIONS.

On June 11, 2021, Defendant VTB Holdings, Inc., and Specially Appearing Defendants Stripes Group, LLC, SG VTB Holdings, LLC, Jurgen Stark, and Kenneth Fox ("Defendants") moved for summary judgment (the "Motion"). The Court conducted an in-chambers hearing on Defendants' Motion on July 19, 2021. Having reviewed the record, the briefs in support and opposition, and being fully informed, the Court **DENIES** the Motion and makes the following

findings and conclusions of law:

**BACKGROUND**

1. On June 11, 2021, Defendants filed the Motion seeking summary judgment dismissal arguing that there is insufficient evidence to show that they played any role in causing an underlying breach of fiduciary duty and, therefore, cannot be held liable for aiding and abetting.

2. On July 1, 2021, Plaintiff opposed Defendants' motion arguing that evidence obtained in discovery shows that Defendants encouraged and facilitated the underlying breaches of fiduciary duty by, among other things, offering financial benefits in the form of golden parachutes.

3. On July 14, 2021, Defendants replied in further support of their motion arguing that there is no evidence of collusion between themselves and the defendants who allegedly breached their fiduciary duties.

4. Being fully briefed, the Motion is ripe for decision.

**CONCLUSIONS OF LAW**

1. Summary judgment is only appropriate when the pleadings and other evidence on file demonstrate that no "genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law." NRCP 56; *see also Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). A genuine issue of material facts exists when the "evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Id.* at 1031. When reviewing a motion for summary judgment, the evidence supporting it, and any reasonable inferences draws from it, the court must view it in a light most favorable to the nonmoving part. *Id.* at 1029.

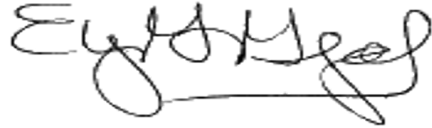
2. Genuine issues of material fact exist as to Defendants' conduct. While Defendants claim the evidence does not show any collusion with the other defendants who allegedly breached their fiduciary duties, Plaintiff cites documents that it argues show the opposite. These documents include correspondence by and between Defendants reflecting discussions over ownership of HyperSound Health, Inc., the delaying of press releases concerning positive business developments, and the avoidance of licensing deals. These materials create genuine issues of fact

concerning Defendants' knowledge of and involvement in the underlying breaches of fiduciary duty.

**ORDER**

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Defendants' Motion Dated this 3rd day of August, 2021 is **DENIED**.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2021.



DISTRICT COURT JUDGE  
**BE8 167 C244 3B5A**  
**Elizabeth Gonzalez**  
Appellate District Court Judge

Submitted by:

McDONALD CARANO LLP

SNELL & WILMER LLP

*/s/ Richard C. Gordon*

By: */s/ Rory T. Kay*

By: \_\_\_\_\_

George F. Ogilvie III (NV Bar #3552)  
Amanda C. Yen (NV Bar #9726)  
Rory T. Kay (NV Bar #12416)  
2300 West Sahara Avenue, Suite 1200  
Las Vegas, NV 89102

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3883 Howard Hughes Pkwy #1100,  
Las Vegas, NV 89169

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Adam M. Apton, Esq. (admitted *pro hac vice*)  
55 Broadway, 10th Floor  
New York, New York 10006  
T: (212) 363-7500  
F: (212) 363-7171  
aapton@zlk.com

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David Kotler, Esq.  
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Washington, D.C. 20006-1110

*Attorneys for Defendant VTB Holdings, Inc. and Specially Appearing Defendants Stripes Group, LLC, SG VTB Holdings, LLC, Kenneth Fox, and Juergen Stark*

*Attorneys for PAMPT LLC*

HOLLAND & HART LLP

*/s/ Robert Cassity*

By: \_\_\_\_\_

J. Stephen Peek, Esq.  
Robert Cassity, Esq.  
9555 Hillwood Drive, 2nd Floor,  
Las Vegas, NV 89134

[Continued on next page]

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SHEPPARD MULLIN

*/s/ Alejandra Moreno*

By: \_\_\_\_\_

John P. Stigi III, Esq.  
Alejandra Moreno, Esq.  
1901 Avenue of the Stars, Suite 1600  
Los Angeles, CA 90067

*Attorneys for Defendants Kenneth  
Potashner, Elwood G. Norris, Seth  
Putterman, Robert Kaplan, and  
Andrew Wolfe*

**From:** [Adam M Apton](#)  
**To:** [Jelena Jovanovic](#)  
**Subject:** Fwd: [External]RE: [External]RE: [External]MIL Proposed Order  
**Date:** Monday, August 2, 2021 2:56:21 PM

---

Adam M. Apton  
Levi & Korsinsky, LLP

----- Original message -----

**From:** "Gordon, Richard" <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>  
**Date:** 7/30/21 5:42 PM (GMT-05:00)  
**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>, Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>, "Raphel, Brian" <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>, "George F. Ogilvie III" <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>, Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>  
**Cc:** "Kotler, David" <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>, "Hess, Joshua" <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>, John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>, Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>, "Moore, Ryan" <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>  
**Subject:** [External]RE: [External]RE: [External]MIL Proposed Order

Hi Adam,

You have authorization to e-sign for me on the draft orders re the NDD motions (with the exception of the MIL to exclude evidence and testimony related to irrelevant or undisclosed measures of damages, for which we will have to submit competing orders). Please add a signature block that states "Approval as to form and content" on the draft orders. You can then e-sign for me and submit. Thanks very much,

Rick

Richard C. Gordon, Esq.  
Snell & Wilmer  
\_\_\_\_\_  
L.L.P.  
3883 Howard Hughes Parkway, Suite 1100  
Las Vegas, NV 89169  
(702) 784-5210 (direct)  
(702) 784-5200 (main)  
(702) 784-5252 (facsimile)  
[rgordon@swlaw.com](mailto:rgordon@swlaw.com)

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---

**From:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>

AA 0712

**Sent:** Friday, July 30, 2021 11:31 AM

**To:** Alejandro Moreno <AMoreno@sheppardmullin.com>; Raphel, Brian <Brian.Raphel@dechert.com>; George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>; Rory Kay <rkay@mcdonaldcarano.com>

**Cc:** Kotler, David <david.kotler@dechert.com>; Hess, Joshua <Joshua.Hess@dechert.com>; John Stigi <JStigi@sheppardmullin.com>; Steve Peek <SPeek@hollandhart.com>; Gordon, Richard <rgordon@swlaw.com>; Moore, Ryan <Ryan.Moore@dechert.com>

**Subject:** RE: [External]RE: [External]MIL Proposed Order

**[EXTERNAL]** [aapton@zlk.com](mailto:aapton@zlk.com)

---

Thanks, so to be clear, we have agreements on every order except defendants' motion in limine to exclude evidence and testimony related to irrelevant or undisclosed measures of damages. These orders are attached for reference here. Do we have defense counsel's permission to file? Rick, please respond again now that we have the entire set of 'consents'. Thanks.

---

**From:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>

**Sent:** Friday, July 30, 2021 2:15 PM

**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[SPeek@hollandhart.com](mailto:SPeek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** [External]RE: [External]MIL Proposed Order

Adam:

Thanks for circulating. Here are small suggested edits to the FFCL directed at the DD's motions.

Best,

**Alejandro (Alex) Moreno**

+1 619-338-6664 | direct

+1 619-721-8718 | cell

[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com) | [Bio](#)

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[www.sheppardmullin.com](http://www.sheppardmullin.com) | [LinkedIn](#) | [Twitter](#)

AA 0713



---

**From:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>

**Sent:** Thursday, July 29, 2021 12:23 PM

**To:** Raphael, Brian <[Brian.Raphael@dechert.com](mailto:Brian.Raphael@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** RE: [External]MIL Proposed Order

Brian, Here are the proposed orders for the rest of the motions. Please let us know if you have comments/edits or if defendants' consent to the orders as written. -Adam

---

**From:** Raphael, Brian <[Brian.Raphael@dechert.com](mailto:Brian.Raphael@dechert.com)>

**Sent:** Thursday, July 29, 2021 3:20 PM

**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** [External]MIL Proposed Order

Counsel,

Attached is a proposed order granting Defendants' motion in limine to exclude evidence and testimony related to irrelevant or undisclosed measures of damages. Please let us know if you any comments or if we can have your authorization to file jointly. Thank you.

**Brian Raphael**

**Dechert LLP**

+1 212 641 5692 Direct

+1 201 615 3550 Mobile

[brian.rafael@dechert.com](mailto:brian.rafael@dechert.com)

[dechert.com](http://dechert.com)

---

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AA 0714

**From:** [Bob Cassity](#)  
**To:** [Alejandro Moreno](#); [Adam M Apton](#); [Raphel, Brian](#); [George F. Ogilvie III](#); [Rory Kay](#)  
**Cc:** [Jelena Jovanovic](#); [Kotler, David](#); [Hess, Joshua](#); [John Stigi](#); [Steve Peek](#); [Gordon, Richard](#); [Moore, Ryan](#); [Amanda K. Baker](#)  
**Subject:** RE: [External]RE: [External]RE: [External]MIL Proposed Order  
**Date:** Tuesday, August 3, 2021 11:26:12 AM  
**Attachments:** [image001.png](#)  
[image002.png](#)  
[image003.png](#)  
[image004.png](#)  
[image005.png](#)  
[image006.png](#)

---

Correct. Thanks. Please also copy Amanda and me on all emails on this matter.

---

## Robert J. Cassity

Partner, Holland & Hart LLP

9555 Hillwood Dr., 2nd Floor, Las Vegas, NV 89134

T 702.669.4600 F 702.669.4650



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---

**From:** Alejandro Moreno <AMoreno@sheppardmullin.com>  
**Sent:** Tuesday, August 3, 2021 11:17 AM  
**To:** Adam M Apton <aapton@zlk.com>; Raphel, Brian <Brian.Raphel@dechert.com>; George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>; Rory Kay <rkay@mcdonaldcarano.com>  
**Cc:** Jelena Jovanovic <jjovanovic@mcdonaldcarano.com>; Kotler, David <david.kotler@dechert.com>; Hess, Joshua <Joshua.Hess@dechert.com>; John Stigi <JStigi@sheppardmullin.com>; Steve Peek <SPeek@hollandhart.com>; Gordon, Richard <rgordon@swlaw.com>; Moore, Ryan <Ryan.Moore@dechert.com>; Bob Cassity <BCassity@hollandhart.com>; Amanda K. Baker <AKBaker@hollandhart.com>  
**Subject:** RE: [External]RE: [External]RE: [External]MIL Proposed Order

External Email

Hi Adam:

I conferred with Bob before we sent you our edits. He is fine with both orders as long as they reflect the edits we sent you.

Best,

AA 0715

**Alejandro (Alex) Moreno**

+1 619-338-6664 | direct

+1 619-721-8718 | cell

[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com) | [Bio](#)

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+1 619-338-6500 | main

[www.sheppardmullin.com](http://www.sheppardmullin.com) | [LinkedIn](#) | [Twitter](#)

---

**From:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>

**Sent:** Tuesday, August 3, 2021 11:16 AM

**To:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Jelena Jovanovic <[jjovanovic@mcdonaldcarano.com](mailto:jjovanovic@mcdonaldcarano.com)>; Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>; 'Bob Cassity' <[BCassity@hollandhart.com](mailto:BCassity@hollandhart.com)>; Amanda K. Baker <[AKBaker@hollandhart.com](mailto:AKBaker@hollandhart.com)>

**Subject:** RE: [External]RE: [External]RE: [External]MIL Proposed Order

Amanda or Bob, If Steve is still on vacation, would you please confirm we have authority to file the orders as agreed below?

---

**From:** Adam M Apton

**Sent:** Monday, August 2, 2021 8:12 PM

**To:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Jelena Jovanovic <[jjovanovic@mcdonaldcarano.com](mailto:jjovanovic@mcdonaldcarano.com)>; Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** RE: [External]RE: [External]RE: [External]MIL Proposed Order

Bob or Steve, Would you please provide your consent to file the orders referred to below? Thank you.

---

**From:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>

**Sent:** Friday, July 30, 2021 5:20 PM

**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>  
**Subject:** [External]RE: [External]RE: [External]MIL Proposed Order

Fine by me on the Director Defendants' orders.

Best,

**Alejandro (Alex) Moreno**

+1 619-338-6664 | direct

+1 619-721-8718 | cell

[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com) | [Bio](#)

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+1 619-338-6500 | main

[www.sheppardmullin.com](http://www.sheppardmullin.com) | [LinkedIn](#) | [Twitter](#)

---

**From:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>

**Sent:** Friday, July 30, 2021 11:31 AM

**To:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** RE: [External]RE: [External]MIL Proposed Order

Thanks, so to be clear, we have agreements on every order except defendants' motion in limine to exclude evidence and testimony related to irrelevant or undisclosed measures of damages. These orders are attached for reference here. Do we have defense counsel's permission to file? Rick, please respond again now that we have the entire set of 'consents'. Thanks.

---

**From:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>

**Sent:** Friday, July 30, 2021 2:15 PM

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**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** [External]RE: [External]MIL Proposed Order

AA 0717

Adam:

Thanks for circulating. Here are small suggested edits to the FFCL directed at the DD's motions.

Best,

**Alejandro (Alex) Moreno**

+1 619-338-6664 | direct

+1 619-721-8718 | cell

[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com) | [Bio](#)

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---

**From:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>

**Sent:** Thursday, July 29, 2021 12:23 PM

**To:** Raphael, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** RE: [External]MIL Proposed Order

Brian, Here are the proposed orders for the rest of the motions. Please let us know if you have comments/edits or if defendants' consent to the orders as written. -Adam

---

**From:** Raphael, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>

**Sent:** Thursday, July 29, 2021 3:20 PM

**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** [External]MIL Proposed Order

Counsel,

Attached is a proposed order granting Defendants' motion in limine to exclude evidence and testimony

related to irrelevant or undisclosed measures of damages. Please let us know if you any comments or if we can have your authorization to file jointly. Thank you.

**Brian Raphel**

**Dechert LLP**

+1 212 641 5692 Direct

+1 201 615 3550 Mobile

[brian.raphel@dechert.com](mailto:brian.raphel@dechert.com)

[dechert.com](http://dechert.com)

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**From:** [Adam M Apton](#)  
**To:** [Jelena Jovanovic](#)  
**Subject:** Fwd: [External]RE: [External]RE: [External]MIL Proposed Order  
**Date:** Monday, August 2, 2021 2:56:09 PM

---

Adam M. Apton  
Levi & Korsinsky, LLP

----- Original message -----

**From:** Alejandro Moreno <AMoreno@sheppardmullin.com>  
**Date:** 7/30/21 5:20 PM (GMT-05:00)  
**To:** Adam M Apton <aapton@zlk.com>, "Raphel, Brian" <Brian.Raphel@dechert.com>, "George F. Ogilvie III" <gogilvie@Mcdonaldcarano.com>, Rory Kay <rkay@mcdonaldcarano.com>  
**Cc:** "Kotler, David" <david.kotler@dechert.com>, "Hess, Joshua" <Joshua.Hess@dechert.com>, John Stigi <JStigi@sheppardmullin.com>, Steve Peek <SPeek@hollandhart.com>, "Gordon, Richard" <rgordon@swlaw.com>, "Moore, Ryan" <Ryan.Moore@dechert.com>  
**Subject:** [External]RE: [External]RE: [External]MIL Proposed Order

Fine by me on the Director Defendants' orders.

Best,

**Alejandro (Alex) Moreno**  
+1 619-338-6664 | direct  
+1 619-721-8718 | cell  
[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com) | [Bio](#)

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+1 619-338-6500 | main  
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**From:** Adam M Apton <aapton@zlk.com>  
**Sent:** Friday, July 30, 2021 11:31 AM  
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AA 0720

**Subject:** RE: [External]RE: [External]MIL Proposed Order

Thanks, so to be clear, we have agreements on every order except defendants' motion in limine to exclude evidence and testimony related to irrelevant or undisclosed measures of damages. These orders are attached for reference here. Do we have defense counsel's permission to file? Rick, please respond again now that we have the entire set of 'consents'. Thanks.

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Attached is a proposed order granting Defendants' motion in limine to exclude evidence and testimony related to irrelevant or undisclosed measures of damages. Please let us know if you any comments or if we can have your authorization to file jointly. Thank you.

**Brian Raphel**  
**Dechert LLP**

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1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

4  
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 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: 8/3/2021

15 "Barbara Clark, Legal Assistant" .	bclark@albrightstoddard.com
16 "Bryan Snyder, Paralegal" .	bsnyder@omaralaw.net
17 "David C. O'Mara, Esq." .	david@omaralaw.net
18 "G. Mark Albright, Esq." .	gma@albrightstoddard.com
19 "Valerie Weis, Paralegal" .	val@omaralaw.net
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24 Karl Riley .	kriley@swlaw.com
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**ORDER**

George F. Ogilvie III, Esq. (NSBN 3552)  
Amanda C. Yen, Esq. (NSBN 9726)  
Rory T. Kay, Esq. (NSBN 12416)  
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*Attorneys for Plaintiff PAMTP LLC*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

IN RE PARAMETRIC SOUND  
CORPORATION SHAREHOLDERS'  
LITIGATION

Case No.: A-13-686890-B

Dept. No.: XI

**ORDER DENYING DEFENDANTS'  
MOTION IN LIMINE TO EXCLUDE  
PLAINTIFF'S DAMAGES**

This Document Relates To:

ALL ACTIONS.

On June 11, 2021, Defendants moved to exclude Plaintiff's evidence of damages (the "Motion"). The Court conducted an in-chambers hearing on Defendants' Motion on July 19, 2021. Having reviewed the record, the briefs in support and opposition, and being fully informed, the Court **DENIES** the Motion and makes the following findings and conclusions of law:

**BACKGROUND**

1. On June 11, 2021, Defendants filed the Motion seeking an order excluding Plaintiff's evidence of damages based upon Plaintiff's failure to comply with the requirements of

1 NRCP 16.1, including by providing a computation of the various categories of damages requested  
2 by Plaintiff.

3 2. On July 1, 2021, Plaintiff opposed Defendants' motion arguing that Plaintiff  
4 disclosed its damages on numerous occasions during discovery by, among other things, providing  
5 brokerage statements specifying the number of Parametric Sound Corporation shares held at the  
6 time of the merger and exchanging expert reports detailing the methodology and calculations of  
7 the per share damages being alleged.

8 3. On July 14, 2021, Defendants replied in further support of their motion arguing  
9 that Plaintiff's disclosures to date were insufficient because they failed to provide a computation  
10 of the alleged damages, including the various categories of damages alleged in the Complaint.

11 4. Being fully briefed, the Motion is ripe for decision.

12 **CONCLUSIONS OF LAW**

13 1. The purpose of NRCP 16.1 is "to place all parties on an even playing field and to  
14 prevent trial by ambush or unfair surprise." *Sanders v. Sears-Page*, 354 P.3d 201, 212, 2015 Nev.  
15 App. LEXIS 8, \*31 (Ct. App., July 16, 2015) (citing *FCH1, Ltd. Liab. Co. v. Rodriguez*, 130 Nev.  
16 425, 434, 335 P.3d 183, 190 (2014)).

17 2. Plaintiff complied with NRCP 16.1 given the disclosures it made during the course  
18 of fact and expert discovery. Plaintiff's damages are based on the number of shares held at the  
19 time of the merger and the per share damages are a calculable number. While a statement of  
20 damages would have been helpful from a procedural standpoint, the information remains the same  
21 as before the court approved the class settlement.

22 **ORDER**

23 **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Defendants' Motion  
24 is **DENIED**.

**Dated this 3rd day of August, 2021**

25 DATED this \_\_\_\_ day of \_\_\_\_\_, 2021.

26   
27 \_\_\_\_\_  
28 DISTRICT COURT JUDGE

**C19 E97 B623 88A6**  
**Elizabeth Gonzalez**  
**District Court Judge**

Submitted by:

McDONALD CARANO LLP

By: /s/ Rory T. Kay

George F. Ogilvie III (NV Bar #3552)  
Amanda C. Yen (NV Bar #9726)  
Rory T. Kay (NV Bar #12416)  
2300 West Sahara Avenue, Suite 1200  
Las Vegas, NV 89102

LEVI & KORSINSKY, LLP

Adam M. Apton, Esq. (admitted *pro*  
*hac vice*)

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aapton@zlk.com

Attorneys for PAMPT LLC

Approved as to form and content:

SNELL & WILMER LLP

/s/ Richard C. Gordon

By: \_\_\_\_\_

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Las Vegas, NV 89169

DECHERT LLP

Brian Raphael, Esq.

David Kotler, Esq.

1900 K Street, NW  
Washington, D.C. 20006-1110

Attorneys for Defendant VTB Holdings,  
Inc. and Specially Appearing

**Dated this 3rd day of August, 2021**  
*Defendants Stripes Group, LLC,  
SG VTB Holdings, LLC, Kenneth Fox,  
and Juergen Stark*

  
HOLLAND & HART LLP

/s/ Robert Cassity

By: \_\_\_\_\_

**ELIZABETH GONZALEZ**  
**District Court Judge**

9555 Hillwood Drive, 2nd Floor,  
Las Vegas, NV 89134

SHEPPARD MULLIN

/s/ Alejandra Moreno

By: \_\_\_\_\_

John P. Stigi III, Esq.  
Alejandra Moreno, Esq.  
1901 Avenue of the Stars, Suite 1600  
Los Angeles, CA 90067

Attorneys for Defendants Kenneth  
Potashner, Elwood G. Norris, Seth  
Puterman, Robert Kaplan, and  
Andrew Wolfe

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You have authorization to e-sign for me on the draft orders re the NDD motions (with the exception of the MIL to exclude evidence and testimony related to irrelevant or undisclosed measures of damages, for which we will have to submit competing orders). Please add a signature block that states "Approval as to form and content" on the draft orders. You can then e-sign for me and submit. Thanks very much,

Rick

Richard C. Gordon, Esq.  
Snell & Wilmer  
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L.L.P.  
3883 Howard Hughes Parkway, Suite 1100  
Las Vegas, NV 89169  
(702) 784-5210 (direct)  
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**[EXTERNAL]** [aapton@zlk.com](mailto:aapton@zlk.com)

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**Brian Raphael**

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[dechert.com](http://dechert.com)

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AA 0731

**From:** [Bob Cassity](#)  
**To:** [Alejandro Moreno](#); [Adam M Apton](#); [Raphel, Brian](#); [George F. Ogilvie III](#); [Rory Kay](#)  
**Cc:** [Jelena Jovanovic](#); [Kotler, David](#); [Hess, Joshua](#); [John Stigi](#); [Steve Peek](#); [Gordon, Richard](#); [Moore, Ryan](#); [Amanda K. Baker](#)  
**Subject:** RE: [External]RE: [External]RE: [External]MIL Proposed Order  
**Date:** Tuesday, August 3, 2021 11:26:12 AM  
**Attachments:** [image001.png](#)  
[image002.png](#)  
[image003.png](#)  
[image004.png](#)  
[image005.png](#)  
[image006.png](#)

---

Correct. Thanks. Please also copy Amanda and me on all emails on this matter.

---

## Robert J. Cassity

Partner, Holland & Hart LLP

9555 Hillwood Dr., 2nd Floor, Las Vegas, NV 89134

T 702.669.4600 F 702.669.4650



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---

**From:** Alejandro Moreno <AMoreno@sheppardmullin.com>  
**Sent:** Tuesday, August 3, 2021 11:17 AM  
**To:** Adam M Apton <aapton@zlk.com>; Raphel, Brian <Brian.Raphel@dechert.com>; George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>; Rory Kay <rkay@mcdonaldcarano.com>  
**Cc:** Jelena Jovanovic <jjovanovic@mcdonaldcarano.com>; Kotler, David <david.kotler@dechert.com>; Hess, Joshua <Joshua.Hess@dechert.com>; John Stigi <JStigi@sheppardmullin.com>; Steve Peek <SPeek@hollandhart.com>; Gordon, Richard <rgordon@swlaw.com>; Moore, Ryan <Ryan.Moore@dechert.com>; Bob Cassity <BCassity@hollandhart.com>; Amanda K. Baker <AKBaker@hollandhart.com>  
**Subject:** RE: [External]RE: [External]RE: [External]MIL Proposed Order

External Email

Hi Adam:

I conferred with Bob before we sent you our edits. He is fine with both orders as long as they reflect the edits we sent you.

Best,

AA 0732

**Alejandro (Alex) Moreno**

+1 619-338-6664 | direct

+1 619-721-8718 | cell

[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com) | [Bio](#)

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+1 619-338-6500 | main

[www.sheppardmullin.com](http://www.sheppardmullin.com) | [LinkedIn](#) | [Twitter](#)

---

**From:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>

**Sent:** Tuesday, August 3, 2021 11:16 AM

**To:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Jelena Jovanovic <[jjovanovic@mcdonaldcarano.com](mailto:jjovanovic@mcdonaldcarano.com)>; Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>; 'Bob Cassity' <[BCassity@hollandhart.com](mailto:BCassity@hollandhart.com)>; Amanda K. Baker <[AKBaker@hollandhart.com](mailto:AKBaker@hollandhart.com)>

**Subject:** RE: [External]RE: [External]RE: [External]MIL Proposed Order

Amanda or Bob, If Steve is still on vacation, would you please confirm we have authority to file the orders as agreed below?

---

**From:** Adam M Apton

**Sent:** Monday, August 2, 2021 8:12 PM

**To:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Jelena Jovanovic <[jjovanovic@mcdonaldcarano.com](mailto:jjovanovic@mcdonaldcarano.com)>; Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** RE: [External]RE: [External]RE: [External]MIL Proposed Order

Bob or Steve, Would you please provide your consent to file the orders referred to below? Thank you.

---

**From:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>

**Sent:** Friday, July 30, 2021 5:20 PM

**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>  
**Subject:** [External]RE: [External]RE: [External]MIL Proposed Order

Fine by me on the Director Defendants' orders.

Best,

**Alejandro (Alex) Moreno**

+1 619-338-6664 | direct

+1 619-721-8718 | cell

[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com) | [Bio](#)

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---

**From:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>

**Sent:** Friday, July 30, 2021 11:31 AM

**To:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** RE: [External]RE: [External]MIL Proposed Order

Thanks, so to be clear, we have agreements on every order except defendants' motion in limine to exclude evidence and testimony related to irrelevant or undisclosed measures of damages. These orders are attached for reference here. Do we have defense counsel's permission to file? Rick, please respond again now that we have the entire set of 'consents'. Thanks.

---

**From:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>

**Sent:** Friday, July 30, 2021 2:15 PM

**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** [External]RE: [External]MIL Proposed Order

AA 0734

Adam:

Thanks for circulating. Here are small suggested edits to the FFCL directed at the DD's motions.

Best,

**Alejandro (Alex) Moreno**

+1 619-338-6664 | direct

+1 619-721-8718 | cell

[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com) | [Bio](#)

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---

**From:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>

**Sent:** Thursday, July 29, 2021 12:23 PM

**To:** Raphael, Brian <[Brian.Raphael@dechert.com](mailto:Brian.Raphael@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** RE: [External]MIL Proposed Order

Brian, Here are the proposed orders for the rest of the motions. Please let us know if you have comments/edits or if defendants' consent to the orders as written. -Adam

---

**From:** Raphael, Brian <[Brian.Raphael@dechert.com](mailto:Brian.Raphael@dechert.com)>

**Sent:** Thursday, July 29, 2021 3:20 PM

**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** [External]MIL Proposed Order

Counsel,

Attached is a proposed order granting Defendants' motion in limine to exclude evidence and testimony

related to irrelevant or undisclosed measures of damages. Please let us know if you any comments or if we can have your authorization to file jointly. Thank you.

**Brian Raphel**

**Dechert LLP**

+1 212 641 5692 Direct

+1 201 615 3550 Mobile

[brian.raphel@dechert.com](mailto:brian.raphel@dechert.com)

[dechert.com](http://dechert.com)

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**From:** [Adam M Apton](#)  
**To:** [Jelena Jovanovic](#)  
**Subject:** Fwd: [External]RE: [External]RE: [External]MIL Proposed Order  
**Date:** Monday, August 2, 2021 2:56:09 PM

---

Adam M. Apton  
Levi & Korsinsky, LLP

----- Original message -----

**From:** Alejandro Moreno <AMoreno@sheppardmullin.com>  
**Date:** 7/30/21 5:20 PM (GMT-05:00)  
**To:** Adam M Apton <aapton@zlk.com>, "Raphel, Brian" <Brian.Raphel@dechert.com>, "George F. Ogilvie III" <gogilvie@Mcdonaldcarano.com>, Rory Kay <rkay@mcdonaldcarano.com>  
**Cc:** "Kotler, David" <david.kotler@dechert.com>, "Hess, Joshua" <Joshua.Hess@dechert.com>, John Stigi <JStigi@sheppardmullin.com>, Steve Peek <SPeek@hollandhart.com>, "Gordon, Richard" <rgordon@swlaw.com>, "Moore, Ryan" <Ryan.Moore@dechert.com>  
**Subject:** [External]RE: [External]RE: [External]MIL Proposed Order

Fine by me on the Director Defendants' orders.

Best,

**Alejandro (Alex) Moreno**  
+1 619-338-6664 | direct  
+1 619-721-8718 | cell  
[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com) | [Bio](#)

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+1 619-338-6500 | main  
[www.sheppardmullin.com](http://www.sheppardmullin.com) | [LinkedIn](#) | [Twitter](#)

---

**From:** Adam M Apton <aapton@zlk.com>  
**Sent:** Friday, July 30, 2021 11:31 AM  
**To:** Alejandro Moreno <AMoreno@sheppardmullin.com>; Raphel, Brian <Brian.Raphel@dechert.com>; George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>; Rory Kay <rkay@mcdonaldcarano.com>  
**Cc:** Kotler, David <david.kotler@dechert.com>; Hess, Joshua <Joshua.Hess@dechert.com>; John Stigi <JStigi@sheppardmullin.com>; Steve Peek <SPeek@hollandhart.com>; Gordon, Richard <rgordon@swlaw.com>; Moore, Ryan <Ryan.Moore@dechert.com>

AA 0737



**Subject:** RE: [External]RE: [External]MIL Proposed Order

Thanks, so to be clear, we have agreements on every order except defendants' motion in limine to exclude evidence and testimony related to irrelevant or undisclosed measures of damages. These orders are attached for reference here. Do we have defense counsel's permission to file? Rick, please respond again now that we have the entire set of 'consents'. Thanks.

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**From:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>

**Sent:** Friday, July 30, 2021 2:15 PM

**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** [External]RE: [External]MIL Proposed Order

Adam:

Thanks for circulating. Here are small suggested edits to the FFCL directed at the DD's motions.

Best,

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**To:** Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** RE: [External]MIL Proposed Order

AA 0738

Brian, Here are the proposed orders for the rest of the motions. Please let us know if you have comments/edits or if defendants' consent to the orders as written. -Adam

---

**From:** Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>

**Sent:** Thursday, July 29, 2021 3:20 PM

**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Steve Peek <[SPEek@hollandhart.com](mailto:SPEek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** [External]MIL Proposed Order

Counsel,

Attached is a proposed order granting Defendants' motion in limine to exclude evidence and testimony related to irrelevant or undisclosed measures of damages. Please let us know if you any comments or if we can have your authorization to file jointly. Thank you.

**Brian Raphel**  
**Dechert LLP**

+1 212 641 5692 Direct

+1 201 615 3550 Mobile

[brian.raphel@dechert.com](mailto:brian.raphel@dechert.com)

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1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

4  
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 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: 8/3/2021

15 "Barbara Clark, Legal Assistant" .	bclark@albrightstoddard.com
16 "Bryan Snyder, Paralegal" .	bsnyder@omaralaw.net
17 "David C. O'Mara, Esq." .	david@omaralaw.net
18 "G. Mark Albright, Esq." .	gma@albrightstoddard.com
19 "Valerie Weis, Paralegal" .	val@omaralaw.net
20 Brian Raphel .	brian.raphel@dechert.com
21 Docket .	Docket_LAS@swlaw.com
22 Gaylene Kim .	gkim@swlaw.com
23 Joshua Hess .	joshua.hess@dechert.com
24 Karl Riley .	kriley@swlaw.com
25 Neil Steiner .	neil.steiner@dechert.com

1	Richard C. Gordon .	rgordon@swlaw.com
2	Robert Cassity .	bcassity@hollandhart.com
3	Steve Peek .	speek@hollandhart.com
4	Traci Bixenmann .	traci@johnaldrichlawfirm.com
5	Valerie Larsen .	vllarsen@hollandhart.com
6	Sonja Dugan	sdugan@swlaw.com
7	Stephanie Morrill	scmorrill@hollandhart.com
8	CaraMia Gerard	cgerard@mcdonaldcarano.com
9	George Ogilvie	gogilvie@mcdonaldcarano.com
10	Amanda Yen	ayen@mcdonaldcarano.com
11	Jelena Jovanovic	jjovanovic@mcdonaldcarano.com
12	Lara Taylor	ljtaylor@swlaw.com
13	David Knotts	dknotts@rgrdlaw.com
14	Randall Baron	randyb@rgrdlaw.com
15	Jaime McDade	jaimem@rgrdlaw.com
16	Lyndsey Luxford	lluxford@swlaw.com
17	Josh Fruchter	jfruchter@wohlfruchter.com
18	Brad Austin	baustin@swlaw.com
19	John Stigi III	JStigi@sheppardmullin.com
20	Jonathan Stein	jstein@saxenawhite.com
21	Karen Surowiec	ksurowiec@mcdonaldcarano.com
22	Alejandro Moreno	AMoreno@sheppardmullin.com
23	Phyllis Chavez	pchavez@sheppardmullin.com
24		
25		
26		
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28		

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7	Elizabeth Tripodi	etripodi@zlk.com
8	Nicole Delgado	nicole.delgado@dechert.com
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10	Adam Warden	awarden@saxenawhite.com
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12	Randall Baron	RandyB@rgrdlaw.com
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**ORDR**

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Amanda C. Yen, Esq. (NSBN 9726)  
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*Attorneys for Plaintiff PAMTP LLC*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

IN RE PARAMETRIC SOUND  
CORPORATION SHAREHOLDERS'  
LITIGATION

Case No.: A-13-686890-B

Dept. No.: XI

**ORDER DENYING THE DIRECTOR  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

This Document Relates To:

ALL ACTIONS.

On June 11, 2021, Defendants Kenneth F. Potashner, Elwood G. Norris, Seth Putterman, Robert M. Kaplan, and Andrew Wolfe ("Defendants") moved for summary judgment (the "Motion"). The Court conducted an in-chambers hearing on Defendants' Motion on July 19, 2021. Having reviewed the record, the briefs in support and opposition, and being fully informed, the Court **DENIES** the Motion and makes the following findings and conclusions of law:

**BACKGROUND**

1. On June 11, 2021, Defendants filed the Motion seeking summary judgment

1 dismissal under NRS 78.138(7), which requires Plaintiff to show that Defendants' conduct  
2 amounted to intentional misconduct, fraud or a knowing violation of the law. Defendants argued  
3 that Plaintiff cannot make the requisite showing under NRS 78.138(7). Defendants also argued  
4 that there was insufficient evidence to show that three or more of the Director Defendants were  
5 conflicted when they approved the merger between Parametric and VTB Holdings, Inc.  
6 ("VTBH").

7 2. On July 1, 2021, Plaintiff opposed Defendants' motion arguing that evidence  
8 obtained in discovery shows that Defendants approved the merger at issue in the lawsuit for self-  
9 interested reasons and in spite of the harm it caused to Parametric Sound Corporation's  
10 shareholders.

11 3. On July 14, 2021, Defendants replied in further support of their motion arguing  
12 that the evidence relied upon by Plaintiff was insufficient to show intentional misconduct, fraud  
13 or a knowing violation of the law.

14 4. On July 14, 2021, the Court ordered an adverse inference against Potashner that he  
15 acted in bad faith when supporting and approving the merger. The Court's adverse inference was  
16 based on the evidence proffered during an evidentiary hearing held on June 18 and 25, 2021.

17 5. Being fully briefed, the Motion is ripe for decision.

#### 18 **CONCLUSIONS OF LAW**

19 1. Summary judgment is only appropriate when the pleadings and other evidence on  
20 file demonstrate that no "genuine issue as to any material fact [remains] and that the moving party  
21 is entitled to a judgment as a matter of law." NRCP 56; *see also Wood v. Safeway, Inc.*, 121 Nev.  
22 724, 729, 121 P.3d 1026, 1029 (2005). A genuine issue of material facts exists when the "evidence  
23 is such that a rational trier of fact could return a verdict for the nonmoving party." *Id.* at 1031.  
24 When reviewing a motion for summary judgment, the evidence supporting it, and any reasonable  
25 inferences draws from it, the court must view it in a light most favorable to the nonmoving part.  
26 *Id.* at 1029.

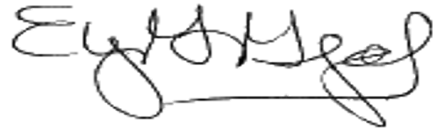
27 2. Genuine issues of material fact exist as to Defendants' conduct. While Defendants  
28 claim the evidence does not show intentional misconduct, fraud or a knowing violation of the law,

the Court already adopted an adverse inference of bad faith against Potashner. In addition, the Court finds there is a triable issue regarding whether each of the Director Defendants was disinterested and independent when each voted to approve the merger, which creates a triable issue under NRS 78.138(7).

**ORDER**

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Defendants' Motion **Dated this 3rd day of August, 2021** is **DENIED**.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2021.



~~DISTRICT COURT JUDGE~~  
~~72A ADD 9E83 C284~~  
**Elizabeth Gonzalez**  
~~District Court Judge~~

Submitted by:

McDONALD CARANO LLP

SNELL & WILMER LLP

*/s/ Richard C. Gordon*

By: */s/ Rory T. Kay*  
George F. Ogilvie III (NV Bar #3552)  
Amanda C. Yen (NV Bar #9726)  
Rory T. Kay (NV Bar #12416)  
2300 West Sahara Avenue, Suite 1200  
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*hac vice*)  
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DECHERT LLP  
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Inc. and Specially Appearing  
Defendants Stripes Group, LLC,  
SG VTB Holdings, LLC, Kenneth Fox,  
and Juergen Stark*

*Attorneys for PAMPT LLC*

HOLLAND & HART LLP

*/s/ Robert Cassity*  
By: \_\_\_\_\_  
J. Stephen Peek, Esq.  
Robert Cassity, Esq.  
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SHEPPARD MULLIN

*/s/ Alejandra Moreno*

By: \_\_\_\_\_  
John P. Stigi III, Esq.  
Alejandra Moreno, Esq.  
1901 Avenue of the Stars, Suite 1600  
Los Angeles, CA 90067

*Attorneys for Defendants Kenneth  
Potashner, Elwood G. Norris, Seth  
Putterman, Robert Kaplan, and  
Andrew Wolfe*

**From:** [Adam M Apton](#)  
**To:** [Jelena Jovanovic](#)  
**Subject:** Fwd: [External]RE: [External]RE: [External]MIL Proposed Order  
**Date:** Monday, August 2, 2021 2:56:21 PM

---

Adam M. Apton  
Levi & Korsinsky, LLP

----- Original message -----

From: "Gordon, Richard" <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>  
Date: 7/30/21 5:42 PM (GMT-05:00)  
To: Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>, Alejandro Moreno  
<[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>, "Raphel, Brian" <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>, "George  
F. Ogilvie III" <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>, Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>  
Cc: "Kotler, David" <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>, "Hess, Joshua"  
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<[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>, "Moore, Ryan" <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>  
Subject: [External]RE: [External]RE: [External]MIL Proposed Order

Hi Adam,

You have authorization to e-sign for me on the draft orders re the NDD motions (with the exception of the MIL to exclude evidence and testimony related to irrelevant or undisclosed measures of damages, for which we will have to submit competing orders). Please add a signature block that states "Approval as to form and content" on the draft orders. You can then e-sign for me and submit. Thanks very much,

Rick

Richard C. Gordon, Esq.  
Snell & Wilmer  
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L.L.P.  
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Las Vegas, NV 89169  
(702) 784-5210 (direct)  
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---

**From:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>

AA 0747

**Sent:** Friday, July 30, 2021 11:31 AM

**To:** Alejandro Moreno <AMoreno@sheppardmullin.com>; Raphel, Brian <Brian.Raphel@dechert.com>; George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>; Rory Kay <rkay@mcdonaldcarano.com>

**Cc:** Kotler, David <david.kotler@dechert.com>; Hess, Joshua <Joshua.Hess@dechert.com>; John Stigi <JStigi@sheppardmullin.com>; Steve Peek <SPeek@hollandhart.com>; Gordon, Richard <rgordon@swlaw.com>; Moore, Ryan <Ryan.Moore@dechert.com>

**Subject:** RE: [External]RE: [External]MIL Proposed Order

**[EXTERNAL]** [aapton@zlk.com](mailto:aapton@zlk.com)

---

Thanks, so to be clear, we have agreements on every order except defendants' motion in limine to exclude evidence and testimony related to irrelevant or undisclosed measures of damages. These orders are attached for reference here. Do we have defense counsel's permission to file? Rick, please respond again now that we have the entire set of 'consents'. Thanks.

---

**From:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>

**Sent:** Friday, July 30, 2021 2:15 PM

**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[SPeek@hollandhart.com](mailto:SPeek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** [External]RE: [External]MIL Proposed Order

Adam:

Thanks for circulating. Here are small suggested edits to the FFCL directed at the DD's motions.

Best,

**Alejandro (Alex) Moreno**

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AA 0748

---

**From:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>

**Sent:** Thursday, July 29, 2021 12:23 PM

**To:** Raphael, Brian <[Brian.Raphael@dechert.com](mailto:Brian.Raphael@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** RE: [External]MIL Proposed Order

Brian, Here are the proposed orders for the rest of the motions. Please let us know if you have comments/edits or if defendants' consent to the orders as written. -Adam

---

**From:** Raphael, Brian <[Brian.Raphael@dechert.com](mailto:Brian.Raphael@dechert.com)>

**Sent:** Thursday, July 29, 2021 3:20 PM

**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** [External]MIL Proposed Order

Counsel,

Attached is a proposed order granting Defendants' motion in limine to exclude evidence and testimony related to irrelevant or undisclosed measures of damages. Please let us know if you any comments or if we can have your authorization to file jointly. Thank you.

**Brian Raphael**

**Dechert LLP**

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AA 0749

**From:** [Bob Cassity](#)  
**To:** [Alejandro Moreno](#); [Adam M Apton](#); [Raphel, Brian](#); [George F. Ogilvie III](#); [Rory Kay](#)  
**Cc:** [Jelena Jovanovic](#); [Kotler, David](#); [Hess, Joshua](#); [John Stigi](#); [Steve Peek](#); [Gordon, Richard](#); [Moore, Ryan](#); [Amanda K. Baker](#)  
**Subject:** RE: [External]RE: [External]RE: [External]MIL Proposed Order  
**Date:** Tuesday, August 3, 2021 11:26:12 AM  
**Attachments:** [image001.png](#)  
[image002.png](#)  
[image003.png](#)  
[image004.png](#)  
[image005.png](#)  
[image006.png](#)

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Correct. Thanks. Please also copy Amanda and me on all emails on this matter.

---

## Robert J. Cassity

Partner, Holland & Hart LLP

9555 Hillwood Dr., 2nd Floor, Las Vegas, NV 89134

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**From:** Alejandro Moreno <AMoreno@sheppardmullin.com>  
**Sent:** Tuesday, August 3, 2021 11:17 AM  
**To:** Adam M Apton <aapton@zlk.com>; Raphel, Brian <Brian.Raphel@dechert.com>; George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>; Rory Kay <rkay@mcdonaldcarano.com>  
**Cc:** Jelena Jovanovic <jjovanovic@mcdonaldcarano.com>; Kotler, David <david.kotler@dechert.com>; Hess, Joshua <Joshua.Hess@dechert.com>; John Stigi <JStigi@sheppardmullin.com>; Steve Peek <SPeek@hollandhart.com>; Gordon, Richard <rgordon@swlaw.com>; Moore, Ryan <Ryan.Moore@dechert.com>; Bob Cassity <BCassity@hollandhart.com>; Amanda K. Baker <AKBaker@hollandhart.com>  
**Subject:** RE: [External]RE: [External]RE: [External]MIL Proposed Order

External Email

Hi Adam:

I conferred with Bob before we sent you our edits. He is fine with both orders as long as they reflect the edits we sent you.

Best,

AA 0750

**Alejandro (Alex) Moreno**

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**From:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>

**Sent:** Tuesday, August 3, 2021 11:16 AM

**To:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Jelena Jovanovic <[jjovanovic@mcdonaldcarano.com](mailto:jjovanovic@mcdonaldcarano.com)>; Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>; 'Bob Cassity' <[BCassity@hollandhart.com](mailto:BCassity@hollandhart.com)>; Amanda K. Baker <[AKBaker@hollandhart.com](mailto:AKBaker@hollandhart.com)>

**Subject:** RE: [External]RE: [External]RE: [External]MIL Proposed Order

Amanda or Bob, If Steve is still on vacation, would you please confirm we have authority to file the orders as agreed below?

---

**From:** Adam M Apton

**Sent:** Monday, August 2, 2021 8:12 PM

**To:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Jelena Jovanovic <[jjovanovic@mcdonaldcarano.com](mailto:jjovanovic@mcdonaldcarano.com)>; Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** RE: [External]RE: [External]RE: [External]MIL Proposed Order

Bob or Steve, Would you please provide your consent to file the orders referred to below? Thank you.

---

**From:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>

**Sent:** Friday, July 30, 2021 5:20 PM

**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>  
**Subject:** [External]RE: [External]RE: [External]MIL Proposed Order

Fine by me on the Director Defendants' orders.

Best,

**Alejandro (Alex) Moreno**

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---

**From:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>

**Sent:** Friday, July 30, 2021 11:31 AM

**To:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** RE: [External]RE: [External]MIL Proposed Order

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**From:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>

**Sent:** Friday, July 30, 2021 2:15 PM

**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

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**Subject:** [External]RE: [External]MIL Proposed Order

AA 0752

Adam:

Thanks for circulating. Here are small suggested edits to the FFCL directed at the DD's motions.

Best,

**Alejandro (Alex) Moreno**

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[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com) | [Bio](#)

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**From:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>

**Sent:** Thursday, July 29, 2021 12:23 PM

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**Subject:** RE: [External]MIL Proposed Order

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**Subject:** [External]MIL Proposed Order

Counsel,

Attached is a proposed order granting Defendants' motion in limine to exclude evidence and testimony



related to irrelevant or undisclosed measures of damages. Please let us know if you any comments or if we can have your authorization to file jointly. Thank you.

**Brian Raphel**

**Dechert LLP**

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**From:** [Adam M Apton](#)  
**To:** [Jelena Jovanovic](#)  
**Subject:** Fwd: [External]RE: [External]RE: [External]MIL Proposed Order  
**Date:** Monday, August 2, 2021 2:56:09 PM

---

Adam M. Apton  
Levi & Korsinsky, LLP

----- Original message -----

**From:** Alejandro Moreno <AMoreno@sheppardmullin.com>  
**Date:** 7/30/21 5:20 PM (GMT-05:00)  
**To:** Adam M Apton <aapton@zlk.com>, "Raphel, Brian" <Brian.Raphel@dechert.com>, "George F. Ogilvie III" <gogilvie@Mcdonaldcarano.com>, Rory Kay <rkay@mcdonaldcarano.com>  
**Cc:** "Kotler, David" <david.kotler@dechert.com>, "Hess, Joshua" <Joshua.Hess@dechert.com>, John Stigi <JStigi@sheppardmullin.com>, Steve Peek <SPeek@hollandhart.com>, "Gordon, Richard" <rgordon@swlaw.com>, "Moore, Ryan" <Ryan.Moore@dechert.com>  
**Subject:** [External]RE: [External]RE: [External]MIL Proposed Order

Fine by me on the Director Defendants' orders.

Best,

**Alejandro (Alex) Moreno**  
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[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com) | [Bio](#)

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---

**From:** Adam M Apton <aapton@zlk.com>  
**Sent:** Friday, July 30, 2021 11:31 AM  
**To:** Alejandro Moreno <AMoreno@sheppardmullin.com>; Raphel, Brian <Brian.Raphel@dechert.com>; George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>; Rory Kay <rkay@mcdonaldcarano.com>  
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AA 0755

**Subject:** RE: [External]RE: [External]MIL Proposed Order

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AA 0756

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---

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1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

4  
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 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: 8/3/2021

15 "Barbara Clark, Legal Assistant" .	bclark@albrightstoddard.com
16 "Bryan Snyder, Paralegal" .	bsnyder@omaralaw.net
17 "David C. O'Mara, Esq." .	david@omaralaw.net
18 "G. Mark Albright, Esq." .	gma@albrightstoddard.com
19 "Valerie Weis, Paralegal" .	val@omaralaw.net
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24 Karl Riley .	kriley@swlaw.com
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**ORDER**

George F. Ogilvie III, Esq. (NSBN 3552)  
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Rory T. Kay, Esq. (NSBN 12416)  
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*Attorneys for Plaintiff PAMTP LLC*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

IN RE PARAMETRIC SOUND  
CORPORATION SHAREHOLDERS'  
LITIGATION

Case No.: A-13-686890-B

Dept. No.: XI

**ORDER DENYING DEFENDANTS'  
MOTION IN LIMINE TO EXCLUDE ALL  
REFERENCE, EVIDENCE, AND  
TESTIMONY REGARDING POST-  
MERGER CONDUCT**

This Document Relates To:

ALL ACTIONS.

On June 11, 2021, Defendants moved to exclude all reference, evidence, and testimony regarding post-merger conduct (the "Motion"). The Court conducted an in-chambers hearing on Defendants' Motion on July 19, 2021. Having reviewed the record, the briefs in support and opposition, and being fully informed, the Court **DENIES** the Motion and makes the following findings and conclusions of law:

...



**BACKGROUND**

1  
2 1. On June 11, 2021, Defendants filed the Motion seeking an order excluding all  
3 reference, evidence, and testimony regarding post-merger conduct, which they defined as  
4 evidence dated after February 1, 2014. Defendants argued that Plaintiff's alleged equity  
5 expropriation occurred on January 15, 2014 and, therefore, anything occurring afterwards was  
6 unrelated to the claims at bar.

7 2. On July 1, 2021, Plaintiff opposed Defendants' motion arguing that it had obtained  
8 materials during discovery that was relevant and post-dated February 1, 2014. These materials,  
9 Plaintiff argued, included documents discussing Turtle Beach Corporation's financial and  
10 operational status after the merger and demonstrated that the company was not as valuable as  
11 represented prior to the merger.

12 3. On July 14, 2021, Defendants replied in further support of their motion by  
13 reiterating the arguments they made in their opening motion, including that documents dated after  
14 the merger would not be relevant to certain of the liability issues at trial.

15 4. Being fully briefed, the Motion is ripe for decision.

**CONCLUSIONS OF LAW**

17 1. Relevant evidence is generally admissible, and evidence is relevant if it has "any  
18 tendency to make the existence of any fact that is of consequence to the determination of the action  
19 more or less probable than it would be without the evidence." NRS 48.025, 48.015. Relevant  
20 evidence may only be excluded if it is cumulative, or if the danger of unfair prejudice substantially  
21 outweighs the probative value. NRS 48.035(1), (2). Indeed, where evidence has significant  
22 probative value, it can be admissible even if prejudicial. *See id.*

23 2. Evidence concerning post-merger conduct could be relevant to Defendant's  
24 motivation and conduct prior to and during the merger. Consequently, while post-merger  
25 documents themselves may have been created after the merger, they still may contain information  
26 that is probative as to Defendants' actions prior to and during the merger.

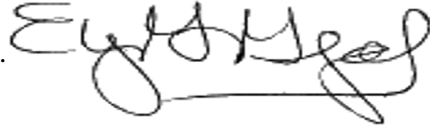
27 ...

28 ...

**ORDER**

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Defendants' Motion  
Dated this 3rd day of August, 2021  
is **DENIED**.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2021.



~~7DB 4CF 2E3B 6A50~~  
DISTRICT COURT JUDGE  
**Elizabeth Gonzalez**  
Appellate District Court Judge

Submitted by:

McDONALD CARANO LLP

SNELL & WILMER LLP

*/s/ Richard C. Gordon*

By: */s/ Rory T. Kay*

By: \_\_\_\_\_

George F. Ogilvie III (NV Bar #3552)  
Amanda C. Yen (NV Bar #9726)  
Rory T. Kay (NV Bar #12416)  
2300 West Sahara Avenue, Suite 1200  
Las Vegas, NV 89102

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*hac vice*)  
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DECHERT LLP  
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David Kotler, Esq.  
1900 K Street, NW  
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*Attorneys for Defendant VTB Holdings,  
Inc. and Specially Appearing  
Defendants Stripes Group, LLC,  
SG VTB Holdings, LLC, Kenneth Fox,  
and Juergen Stark*

*Attorneys for PAMPT LLC*

HOLLAND & HART LLP

*/s/ Robert Cassity*

By: \_\_\_\_\_

J. Stephen Peek, Esq.  
Robert Cassity, Esq.  
9555 Hillwood Drive, 2nd Floor,  
Las Vegas, NV 89134

*[Continued on next page]*

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SHEPPARD MULLIN

*/s/ Alejandra Moreno*

By: \_\_\_\_\_

John P. Stigi III, Esq.  
Alejandra Moreno, Esq.  
1901 Avenue of the Stars, Suite 1600  
Los Angeles, CA 90067

*Attorneys for Defendants Kenneth  
Potashner, Elwood G. Norris, Seth  
Putterman, Robert Kaplan, and  
Andrew Wolfe*

**From:** [Adam M Apton](#)  
**To:** [Jelena Jovanovic](#)  
**Subject:** Fwd: [External]RE: [External]RE: [External]MIL Proposed Order  
**Date:** Monday, August 2, 2021 2:56:21 PM

---

Adam M. Apton  
Levi & Korsinsky, LLP

----- Original message -----

From: "Gordon, Richard" <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>  
Date: 7/30/21 5:42 PM (GMT-05:00)  
To: Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>, Alejandro Moreno  
<[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>, "Raphel, Brian" <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>, "George  
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Subject: [External]RE: [External]RE: [External]MIL Proposed Order

Hi Adam,

You have authorization to e-sign for me on the draft orders re the NDD motions (with the exception of the MIL to exclude evidence and testimony related to irrelevant or undisclosed measures of damages, for which we will have to submit competing orders). Please add a signature block that states "Approval as to form and content" on the draft orders. You can then e-sign for me and submit. Thanks very much,

Rick

Richard C. Gordon, Esq.  
Snell & Wilmer  
\_\_\_\_\_  
L.L.P.  
3883 Howard Hughes Parkway, Suite 1100  
Las Vegas, NV 89169  
(702) 784-5210 (direct)  
(702) 784-5200 (main)  
(702) 784-5252 (facsimile)  
[rgordon@swlaw.com](mailto:rgordon@swlaw.com)

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---

**From:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>

AA 0765

**Sent:** Friday, July 30, 2021 11:31 AM

**To:** Alejandro Moreno <AMoreno@sheppardmullin.com>; Raphel, Brian <Brian.Raphel@dechert.com>; George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>; Rory Kay <rkay@mcdonaldcarano.com>

**Cc:** Kotler, David <david.kotler@dechert.com>; Hess, Joshua <Joshua.Hess@dechert.com>; John Stigi <JStigi@sheppardmullin.com>; Steve Peek <SPeek@hollandhart.com>; Gordon, Richard <rgordon@swlaw.com>; Moore, Ryan <Ryan.Moore@dechert.com>

**Subject:** RE: [External]RE: [External]MIL Proposed Order

**[EXTERNAL]** [aapton@zlk.com](mailto:aapton@zlk.com)

---

Thanks, so to be clear, we have agreements on every order except defendants' motion in limine to exclude evidence and testimony related to irrelevant or undisclosed measures of damages. These orders are attached for reference here. Do we have defense counsel's permission to file? Rick, please respond again now that we have the entire set of 'consents'. Thanks.

---

**From:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>

**Sent:** Friday, July 30, 2021 2:15 PM

**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[SPeek@hollandhart.com](mailto:SPeek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** [External]RE: [External]MIL Proposed Order

Adam:

Thanks for circulating. Here are small suggested edits to the FFCL directed at the DD's motions.

Best,

**Alejandro (Alex) Moreno**

+1 619-338-6664 | direct

+1 619-721-8718 | cell

[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com) | [Bio](#)

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AA 0766

---

**From:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>

**Sent:** Thursday, July 29, 2021 12:23 PM

**To:** Raphael, Brian <[Brian.Raphael@dechert.com](mailto:Brian.Raphael@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

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**Subject:** RE: [External]MIL Proposed Order

Brian, Here are the proposed orders for the rest of the motions. Please let us know if you have comments/edits or if defendants' consent to the orders as written. -Adam

---

**From:** Raphael, Brian <[Brian.Raphael@dechert.com](mailto:Brian.Raphael@dechert.com)>

**Sent:** Thursday, July 29, 2021 3:20 PM

**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** [External]MIL Proposed Order

Counsel,

Attached is a proposed order granting Defendants' motion in limine to exclude evidence and testimony related to irrelevant or undisclosed measures of damages. Please let us know if you any comments or if we can have your authorization to file jointly. Thank you.

**Brian Raphael**

**Dechert LLP**

+1 212 641 5692 Direct

+1 201 615 3550 Mobile

[brian.raphel@dechert.com](mailto:brian.raphel@dechert.com)

[dechert.com](http://dechert.com)

---

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AA 0767

**From:** [Bob Cassity](#)  
**To:** [Alejandro Moreno](#); [Adam M Apton](#); [Raphel, Brian](#); [George F. Ogilvie III](#); [Rory Kay](#)  
**Cc:** [Jelena Jovanovic](#); [Kotler, David](#); [Hess, Joshua](#); [John Stigi](#); [Steve Peek](#); [Gordon, Richard](#); [Moore, Ryan](#); [Amanda K. Baker](#)  
**Subject:** RE: [External]RE: [External]RE: [External]MIL Proposed Order  
**Date:** Tuesday, August 3, 2021 11:26:12 AM  
**Attachments:** [image001.png](#)  
[image002.png](#)  
[image003.png](#)  
[image004.png](#)  
[image005.png](#)  
[image006.png](#)

---

Correct. Thanks. Please also copy Amanda and me on all emails on this matter.

---

## Robert J. Cassity

Partner, Holland & Hart LLP

9555 Hillwood Dr., 2nd Floor, Las Vegas, NV 89134

T 702.669.4600 F 702.669.4650



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---

**From:** Alejandro Moreno <AMoreno@sheppardmullin.com>  
**Sent:** Tuesday, August 3, 2021 11:17 AM  
**To:** Adam M Apton <aapton@zlk.com>; Raphel, Brian <Brian.Raphel@dechert.com>; George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>; Rory Kay <rkay@mcdonaldcarano.com>  
**Cc:** Jelena Jovanovic <jjovanovic@mcdonaldcarano.com>; Kotler, David <david.kotler@dechert.com>; Hess, Joshua <Joshua.Hess@dechert.com>; John Stigi <JStigi@sheppardmullin.com>; Steve Peek <SPeek@hollandhart.com>; Gordon, Richard <rgordon@swlaw.com>; Moore, Ryan <Ryan.Moore@dechert.com>; Bob Cassity <BCassity@hollandhart.com>; Amanda K. Baker <AKBaker@hollandhart.com>  
**Subject:** RE: [External]RE: [External]RE: [External]MIL Proposed Order

External Email

Hi Adam:

I conferred with Bob before we sent you our edits. He is fine with both orders as long as they reflect the edits we sent you.

Best,

AA 0768

**Alejandro (Alex) Moreno**

+1 619-338-6664 | direct

+1 619-721-8718 | cell

[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com) | [Bio](#)

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**From:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>

**Sent:** Tuesday, August 3, 2021 11:16 AM

**To:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Jelena Jovanovic <[jjovanovic@mcdonaldcarano.com](mailto:jjovanovic@mcdonaldcarano.com)>; Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>; 'Bob Cassity' <[BCassity@hollandhart.com](mailto:BCassity@hollandhart.com)>; Amanda K. Baker <[AKBaker@hollandhart.com](mailto:AKBaker@hollandhart.com)>

**Subject:** RE: [External]RE: [External]RE: [External]MIL Proposed Order

Amanda or Bob, If Steve is still on vacation, would you please confirm we have authority to file the orders as agreed below?

---

**From:** Adam M Apton

**Sent:** Monday, August 2, 2021 8:12 PM

**To:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Jelena Jovanovic <[jjovanovic@mcdonaldcarano.com](mailto:jjovanovic@mcdonaldcarano.com)>; Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** RE: [External]RE: [External]RE: [External]MIL Proposed Order

Bob or Steve, Would you please provide your consent to file the orders referred to below? Thank you.

---

**From:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>

**Sent:** Friday, July 30, 2021 5:20 PM

**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>



**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>  
**Subject:** [External]RE: [External]RE: [External]MIL Proposed Order

Fine by me on the Director Defendants' orders.

Best,

**Alejandro (Alex) Moreno**

+1 619-338-6664 | direct

+1 619-721-8718 | cell

[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com) | [Bio](#)

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---

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**Sent:** Friday, July 30, 2021 11:31 AM

**To:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

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**Subject:** [External]RE: [External]MIL Proposed Order

AA 0770

Adam:

Thanks for circulating. Here are small suggested edits to the FFCL directed at the DD's motions.

Best,

**Alejandro (Alex) Moreno**

+1 619-338-6664 | direct

+1 619-721-8718 | cell

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**Sent:** Thursday, July 29, 2021 12:23 PM

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**Subject:** RE: [External]MIL Proposed Order

Brian, Here are the proposed orders for the rest of the motions. Please let us know if you have comments/edits or if defendants' consent to the orders as written. -Adam

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**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** [External]MIL Proposed Order

Counsel,

Attached is a proposed order granting Defendants' motion in limine to exclude evidence and testimony

related to irrelevant or undisclosed measures of damages. Please let us know if you any comments or if we can have your authorization to file jointly. Thank you.

**Brian Raphel**

**Dechert LLP**

+1 212 641 5692 Direct

+1 201 615 3550 Mobile

[brian.raphel@dechert.com](mailto:brian.raphel@dechert.com)

[dechert.com](http://dechert.com)

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**From:** [Adam M Apton](#)  
**To:** [Jelena Jovanovic](#)  
**Subject:** Fwd: [External]RE: [External]RE: [External]MIL Proposed Order  
**Date:** Monday, August 2, 2021 2:56:09 PM

---

Adam M. Apton  
Levi & Korsinsky, LLP

----- Original message -----

**From:** Alejandro Moreno <AMoreno@sheppardmullin.com>  
**Date:** 7/30/21 5:20 PM (GMT-05:00)  
**To:** Adam M Apton <aapton@zlk.com>, "Raphel, Brian" <Brian.Raphel@dechert.com>, "George F. Ogilvie III" <gogilvie@Mcdonaldcarano.com>, Rory Kay <rkay@mcdonaldcarano.com>  
**Cc:** "Kotler, David" <david.kotler@dechert.com>, "Hess, Joshua" <Joshua.Hess@dechert.com>, John Stigi <JStigi@sheppardmullin.com>, Steve Peek <SPeek@hollandhart.com>, "Gordon, Richard" <rgordon@swlaw.com>, "Moore, Ryan" <Ryan.Moore@dechert.com>  
**Subject:** [External]RE: [External]RE: [External]MIL Proposed Order

Fine by me on the Director Defendants' orders.

Best,

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**Sent:** Friday, July 30, 2021 11:31 AM  
**To:** Alejandro Moreno <AMoreno@sheppardmullin.com>; Raphel, Brian <Brian.Raphel@dechert.com>; George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>; Rory Kay <rkay@mcdonaldcarano.com>  
**Cc:** Kotler, David <david.kotler@dechert.com>; Hess, Joshua <Joshua.Hess@dechert.com>; John Stigi <JStigi@sheppardmullin.com>; Steve Peek <SPeek@hollandhart.com>; Gordon, Richard <rgordon@swlaw.com>; Moore, Ryan <Ryan.Moore@dechert.com>

AA 0773

**Subject:** RE: [External]RE: [External]MIL Proposed Order

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**Sent:** Friday, July 30, 2021 2:15 PM

**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** [External]RE: [External]MIL Proposed Order

Adam:

Thanks for circulating. Here are small suggested edits to the FFCL directed at the DD's motions.

Best,

**Alejandro (Alex) Moreno**

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---

**From:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>

**Sent:** Thursday, July 29, 2021 12:23 PM

**To:** Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

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**Subject:** RE: [External]MIL Proposed Order

AA 0774

Brian, Here are the proposed orders for the rest of the motions. Please let us know if you have comments/edits or if defendants' consent to the orders as written. -Adam

---

**From:** Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>

**Sent:** Thursday, July 29, 2021 3:20 PM

**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

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**Subject:** [External]MIL Proposed Order

Counsel,

Attached is a proposed order granting Defendants' motion in limine to exclude evidence and testimony related to irrelevant or undisclosed measures of damages. Please let us know if you any comments or if we can have your authorization to file jointly. Thank you.

**Brian Raphel**  
**Dechert LLP**

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1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

4  
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 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: 8/3/2021

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**ORDER**

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*Attorneys for Plaintiff PAMTP LLC*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

IN RE PARAMETRIC SOUND  
CORPORATION SHAREHOLDERS'  
LITIGATION

Case No.: A-13-686890-B

Dept. No.: XI

**ORDER DENYING DEFENDANTS'  
MOTION IN LIMINE TO EXCLUDE THE  
OPINIONS, TESTIMONY, AND  
REPORTS OF J.T. ATKINS**

This Document Relates To:

ALL ACTIONS.

On June 11, 2021, Defendants moved to exclude the opinions, testimony and reports of Plaintiff's expert, J.T. Atkins (the "Motion"). The Court conducted an in-chambers hearing on Defendants' Motion on July 19, 2021. Having reviewed the record, the briefs in support and opposition, and being fully informed, the Court **DENIES** the Motion and makes the following findings and conclusions of law:

**BACKGROUND**

1. On June 11, 2021, Defendants filed the Motion seeking an order excluding the

1 opinions, testimony and reports of Plaintiff's expert, J.T. Atkins, on the grounds that he did not  
2 properly measure Plaintiff's equity expropriation damages and otherwise failed to provide reliable  
3 expert opinions.

4 2. On July 1, 2021, Plaintiff opposed Defendants' motion arguing that Mr. Atkins'  
5 professional experience qualifies him to provide expert testimony, that his discounted cash flow  
6 methodology for calculating damages was reliable, and that, if anything, Defendants' objections  
7 to Mr. Atkins' opinions went to credibility.

8 3. On July 14, 2021, Defendants replied in further support of their motion by  
9 reiterating the arguments they made in their opening motion.

10 4. Being fully briefed, the Motion is ripe for decision.

11 **CONCLUSIONS OF LAW**

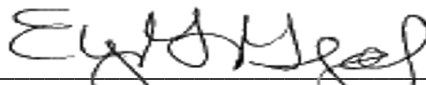
12 1. To be admissible at trial, an expert witness (1) "must be qualified in an area of  
13 'scientific, technical or other specialized knowledge,'" (2) that specialized knowledge "must  
14 'assist the trier of fact to understand the evidence or to determine a fact in issue,'" and (3) the  
15 expert's testimony "must be limited 'to matters within the scope of [the expert's] knowledge.'"  
16 *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008) (quoting NRS 50.275)).

17 2. Defendants have not demonstrated that Mr. Atkins fails to meet the above criteria.  
18 The interpretation of the data evaluated by Mr. Atkins goes to its weight and not its admissibility.  
19 Therefore, Defendants have not established any basis to exclude Mr. Atkins' opinions, testimony  
20 or reports.

21 **ORDER**

22 **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Defendants' Motion  
23 is **DENIED**.

24 DATED this \_\_\_\_ day of \_\_\_\_\_, 2021. **Dated this 3rd day of August, 2021**

25   
26 \_\_\_\_\_  
27 DISTRICT COURT JUDGE

28 **70B BAF FA2A 2CB3**  
**Elizabeth Gonzalez**  
**District Court Judge**

Submitted by:

McDONALD CARANO LLP

By: /s/ Rory T. Kay

George F. Ogilvie III (NV Bar #3552)  
Amanda C. Yen (NV Bar #9726)  
Rory T. Kay (NV Bar #12416)  
2300 West Sahara Avenue, Suite 1200  
Las Vegas, NV 89102

LEVI & KORSINSKY, LLP

Adam M. Apton, Esq. (admitted *pro*  
*hac vice*)

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*Attorneys for PAMPT LLC*

Approved as to form and content:

SNELL & WILMER LLP

*/s/ Richard C. Gordon*

By: \_\_\_\_\_

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Brian Raphael, Esq.

David Kotler, Esq.

1900 K Street, NW  
Washington, D.C. 20006-1110

*Attorneys for Defendant VTB Holdings,  
Inc. and Specially Appearing  
Defendants Stripes Group, LLC,  
SG VTB Holdings, LLC, Kenneth Fox,  
and Juergen Stark*

HOLLAND & HART LLP

*/s/ Robert Cassity*

By: \_\_\_\_\_

J. Stephen Peek, Esq.  
Robert Cassity, Esq.  
9555 Hillwood Drive, 2nd Floor,  
Las Vegas, NV 89134

SHEPPARD MULLIN

*/s/ Alejandra Moreno*

By: \_\_\_\_\_

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Alejandra Moreno, Esq.  
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Los Angeles, CA 90067

*Attorneys for Defendants Kenneth  
Potashner, Elwood G. Norris, Seth  
Putterman, Robert Kaplan, and  
Andrew Wolfe*

**From:** [Adam M Apton](#)  
**To:** [Jelena Jovanovic](#)  
**Subject:** Fwd: [External]RE: [External]RE: [External]MIL Proposed Order  
**Date:** Monday, August 2, 2021 2:56:21 PM

---

Adam M. Apton  
Levi & Korsinsky, LLP

----- Original message -----

From: "Gordon, Richard" <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>  
Date: 7/30/21 5:42 PM (GMT-05:00)  
To: Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>, Alejandro Moreno  
<[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>, "Raphel, Brian" <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>, "George  
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Cc: "Kotler, David" <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>, "Hess, Joshua"  
<[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>, John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>, Steve Peek  
<[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>, "Moore, Ryan" <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>  
Subject: [External]RE: [External]RE: [External]MIL Proposed Order

Hi Adam,

You have authorization to e-sign for me on the draft orders re the NDD motions (with the exception of the MIL to exclude evidence and testimony related to irrelevant or undisclosed measures of damages, for which we will have to submit competing orders). Please add a signature block that states "Approval as to form and content" on the draft orders. You can then e-sign for me and submit. Thanks very much,

Rick

Richard C. Gordon, Esq.  
Snell & Wilmer  
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**From:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>

AA 0782

**Sent:** Friday, July 30, 2021 11:31 AM

**To:** Alejandro Moreno <AMoreno@sheppardmullin.com>; Raphel, Brian <Brian.Raphel@dechert.com>; George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>; Rory Kay <rkay@mcdonaldcarano.com>

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**Subject:** RE: [External]RE: [External]MIL Proposed Order

**[EXTERNAL]** [aapton@zlk.com](mailto:aapton@zlk.com)

---

Thanks, so to be clear, we have agreements on every order except defendants' motion in limine to exclude evidence and testimony related to irrelevant or undisclosed measures of damages. These orders are attached for reference here. Do we have defense counsel's permission to file? Rick, please respond again now that we have the entire set of 'consents'. Thanks.

---

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AA 0783

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**Subject:** RE: [External]MIL Proposed Order

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Counsel,

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**Brian Raphael**

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AA 0784

**From:** [Bob Cassity](#)  
**To:** [Alejandro Moreno](#); [Adam M Apton](#); [Raphel, Brian](#); [George F. Ogilvie III](#); [Rory Kay](#)  
**Cc:** [Jelena Jovanovic](#); [Kotler, David](#); [Hess, Joshua](#); [John Stigi](#); [Steve Peek](#); [Gordon, Richard](#); [Moore, Ryan](#); [Amanda K. Baker](#)  
**Subject:** RE: [External]RE: [External]RE: [External]MIL Proposed Order  
**Date:** Tuesday, August 3, 2021 11:26:12 AM  
**Attachments:** [image001.png](#)  
[image002.png](#)  
[image003.png](#)  
[image004.png](#)  
[image005.png](#)  
[image006.png](#)

---

Correct. Thanks. Please also copy Amanda and me on all emails on this matter.

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## Robert J. Cassity

Partner, Holland & Hart LLP

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**From:** Alejandro Moreno <AMoreno@sheppardmullin.com>  
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**Cc:** Jelena Jovanovic <jjovanovic@mcdonaldcarano.com>; Kotler, David <david.kotler@dechert.com>; Hess, Joshua <Joshua.Hess@dechert.com>; John Stigi <JStigi@sheppardmullin.com>; Steve Peek <SPeek@hollandhart.com>; Gordon, Richard <rgordon@swlaw.com>; Moore, Ryan <Ryan.Moore@dechert.com>; Bob Cassity <BCassity@hollandhart.com>; Amanda K. Baker <AKBaker@hollandhart.com>  
**Subject:** RE: [External]RE: [External]RE: [External]MIL Proposed Order

External Email

Hi Adam:

I conferred with Bob before we sent you our edits. He is fine with both orders as long as they reflect the edits we sent you.

Best,

AA 0785



**Alejandro (Alex) Moreno**

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---

**From:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>

**Sent:** Tuesday, August 3, 2021 11:16 AM

**To:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Jelena Jovanovic <[jjovanovic@mcdonaldcarano.com](mailto:jjovanovic@mcdonaldcarano.com)>; Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>; 'Bob Cassity' <[BCassity@hollandhart.com](mailto:BCassity@hollandhart.com)>; Amanda K. Baker <[AKBaker@hollandhart.com](mailto:AKBaker@hollandhart.com)>

**Subject:** RE: [External]RE: [External]RE: [External]MIL Proposed Order

Amanda or Bob, If Steve is still on vacation, would you please confirm we have authority to file the orders as agreed below?

---

**From:** Adam M Apton

**Sent:** Monday, August 2, 2021 8:12 PM

**To:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Jelena Jovanovic <[jjovanovic@mcdonaldcarano.com](mailto:jjovanovic@mcdonaldcarano.com)>; Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** RE: [External]RE: [External]RE: [External]MIL Proposed Order

Bob or Steve, Would you please provide your consent to file the orders referred to below? Thank you.

---

**From:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>

**Sent:** Friday, July 30, 2021 5:20 PM

**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>  
**Subject:** [External]RE: [External]RE: [External]MIL Proposed Order

Fine by me on the Director Defendants' orders.

Best,

**Alejandro (Alex) Moreno**

+1 619-338-6664 | direct

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---

**From:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>

**Sent:** Friday, July 30, 2021 11:31 AM

**To:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** RE: [External]RE: [External]MIL Proposed Order

Thanks, so to be clear, we have agreements on every order except defendants' motion in limine to exclude evidence and testimony related to irrelevant or undisclosed measures of damages. These orders are attached for reference here. Do we have defense counsel's permission to file? Rick, please respond again now that we have the entire set of 'consents'. Thanks.

---

**From:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>

**Sent:** Friday, July 30, 2021 2:15 PM

**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** [External]RE: [External]MIL Proposed Order

AA 0787

Adam:

Thanks for circulating. Here are small suggested edits to the FFCL directed at the DD's motions.

Best,

**Alejandro (Alex) Moreno**

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---

**From:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>

**Sent:** Thursday, July 29, 2021 12:23 PM

**To:** Raphael, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** RE: [External]MIL Proposed Order

Brian, Here are the proposed orders for the rest of the motions. Please let us know if you have comments/edits or if defendants' consent to the orders as written. -Adam

---

**From:** Raphael, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>

**Sent:** Thursday, July 29, 2021 3:20 PM

**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** [External]MIL Proposed Order

Counsel,

Attached is a proposed order granting Defendants' motion in limine to exclude evidence and testimony

related to irrelevant or undisclosed measures of damages. Please let us know if you any comments or if we can have your authorization to file jointly. Thank you.

**Brian Raphel**

**Dechert LLP**

+1 212 641 5692 Direct

+1 201 615 3550 Mobile

[brian.raphel@dechert.com](mailto:brian.raphel@dechert.com)

[dechert.com](http://dechert.com)

---

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**From:** [Adam M Apton](#)  
**To:** [Jelena Jovanovic](#)  
**Subject:** Fwd: [External]RE: [External]RE: [External]MIL Proposed Order  
**Date:** Monday, August 2, 2021 2:56:09 PM

---

Adam M. Apton  
Levi & Korsinsky, LLP

----- Original message -----

**From:** Alejandro Moreno <AMoreno@sheppardmullin.com>  
**Date:** 7/30/21 5:20 PM (GMT-05:00)  
**To:** Adam M Apton <aapton@zlk.com>, "Raphel, Brian" <Brian.Raphel@dechert.com>, "George F. Ogilvie III" <gogilvie@Mcdonaldcarano.com>, Rory Kay <rkay@mcdonaldcarano.com>  
**Cc:** "Kotler, David" <david.kotler@dechert.com>, "Hess, Joshua" <Joshua.Hess@dechert.com>, John Stigi <JStigi@sheppardmullin.com>, Steve Peek <SPeek@hollandhart.com>, "Gordon, Richard" <rgordon@swlaw.com>, "Moore, Ryan" <Ryan.Moore@dechert.com>  
**Subject:** [External]RE: [External]RE: [External]MIL Proposed Order

Fine by me on the Director Defendants' orders.

Best,

**Alejandro (Alex) Moreno**  
+1 619-338-6664 | direct  
+1 619-721-8718 | cell  
[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com) | [Bio](#)

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**From:** Adam M Apton <aapton@zlk.com>  
**Sent:** Friday, July 30, 2021 11:31 AM  
**To:** Alejandro Moreno <AMoreno@sheppardmullin.com>; Raphel, Brian <Brian.Raphel@dechert.com>; George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>; Rory Kay <rkay@mcdonaldcarano.com>  
**Cc:** Kotler, David <david.kotler@dechert.com>; Hess, Joshua <Joshua.Hess@dechert.com>; John Stigi <JStigi@sheppardmullin.com>; Steve Peek <SPeek@hollandhart.com>; Gordon, Richard <rgordon@swlaw.com>; Moore, Ryan <Ryan.Moore@dechert.com>

**Subject:** RE: [External]RE: [External]MIL Proposed Order

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**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

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Adam:

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Best,

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**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** RE: [External]MIL Proposed Order

AA 0791

Brian, Here are the proposed orders for the rest of the motions. Please let us know if you have comments/edits or if defendants' consent to the orders as written. -Adam

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**Sent:** Thursday, July 29, 2021 3:20 PM

**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Steve Peek <[SPEek@hollandhart.com](mailto:SPEek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** [External]MIL Proposed Order

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Attached is a proposed order granting Defendants' motion in limine to exclude evidence and testimony related to irrelevant or undisclosed measures of damages. Please let us know if you any comments or if we can have your authorization to file jointly. Thank you.

**Brian Raphel**  
**Dechert LLP**

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1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

4  
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 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: 8/3/2021

15 "Barbara Clark, Legal Assistant" .	bclark@albrightstoddard.com
16 "Bryan Snyder, Paralegal" .	bsnyder@omaralaw.net
17 "David C. O'Mara, Esq." .	david@omaralaw.net
18 "G. Mark Albright, Esq." .	gma@albrightstoddard.com
19 "Valerie Weis, Paralegal" .	val@omaralaw.net
20 Brian Raphel .	brian.raphel@dechert.com
21 Docket .	Docket_LAS@swlaw.com
22 Gaylene Kim .	gkim@swlaw.com
23 Joshua Hess .	joshua.hess@dechert.com
24 Karl Riley .	kriley@swlaw.com
25 Neil Steiner .	neil.steiner@dechert.com



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11	Jelena Jovanovic	jjovanovic@mcdonaldcarano.com
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15	Jaime McDade	jaimem@rgrdlaw.com
16	Lyndsey Luxford	lluxford@swlaw.com
17	Josh Fruchter	jfruchter@wohlfruchter.com
18	Brad Austin	baustin@swlaw.com
19	John Stigi III	JStigi@sheppardmullin.com
20	Jonathan Stein	jstein@saxenawhite.com
21	Karen Surowiec	ksurowiec@mcdonaldcarano.com
22	Alejandro Moreno	AMoreno@sheppardmullin.com
23	Phyllis Chavez	pchavez@sheppardmullin.com
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13	Maxwell Huffman	mhuffman@rgrdlaw.com
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**ORDER**

George F. Ogilvie III, Esq. (NSBN 3552)  
Amanda C. Yen, Esq. (NSBN 9726)  
Rory T. Kay, Esq. (NSBN 12416)  
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[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)

Adam M. Apton, Esq. (admitted *pro hac vice*)  
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*Attorneys for Plaintiff PAMTP LLC*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

IN RE PARAMETRIC SOUND  
CORPORATION SHAREHOLDERS'  
LITIGATION

Case No.: A-13-686890-B

Dept. No.: XI

**ORDER DENYING DEFENDANTS'  
MOTION IN LIMINE TO EXCLUDE  
EVIDENCE RELATED TO ALLEGED  
FRAUD BY THE NON-DIRECTOR  
DEFENDANTS**

This Document Relates To:

ALL ACTIONS.

On June 11, 2021, Defendant VTB Holdings, Inc., and Specially Appearing Defendants Stripes Group, LLC, SG VTB Holdings, LLC, Kenneth Fox, and Juergen Stark ("Defendants") moved to exclude evidence related to alleged fraud (the "Motion"). The Court conducted an in-chambers hearing on Defendants' Motion on July 19, 2021. Having reviewed the record, the briefs in support and opposition, and being fully informed, the Court **DENIES** the Motion and makes the following findings and conclusions of law:

**BACKGROUND**

1  
2 1. On June 11, 2021, Defendants filed the Motion seeking an order excluding  
3 evidence relating to their alleged fraud. Defendants argued that Plaintiff did not allege fraud  
4 against them in the complaint and, therefore, evidence showing that they engaged in fraud should  
5 be excluded.

6 2. On July 1, 2021, Plaintiff opposed Defendants' motion arguing that evidence  
7 showing fraud would support a finding that they aided and abetted an underlying breach of  
8 fiduciary duty. Plaintiff referred to materials obtained during discovery showing that Defendants  
9 concealed VTB Holdings' allegedly declining financial condition in an effort to complete the  
10 merger with Parametric Sound Corporation.

11 3. On July 14, 2021, Defendants replied in further support of their motion arguing  
12 that Plaintiff previously denied allegations of fraudulent conduct against them and should  
13 therefore be precluded from offering evidence of such at trial.

14 4. Being fully briefed, the Motion is ripe for decision.

**CONCLUSIONS OF LAW**

16 1. Relevant evidence is generally admissible, and evidence is relevant if it has "any  
17 tendency to make the existence of any fact that is of consequence to the determination of the action  
18 more or less probable than it would be without the evidence." NRS 48.025, 48.015. Relevant  
19 evidence may only be excluded if it is cumulative, or if the danger of unfair prejudice substantially  
20 outweighs the probative value. NRS 48.035(1), (2). Indeed, where evidence has significant  
21 probative value, it can be admissible even if prejudicial. *See id.*

22 2. Evidence showing fraudulent conduct on the part of Defendants could be relevant  
23 to Plaintiff's claims. Such conduct, even if not by Defendants, could be relevant to the aiding and  
24 abetting claim. The probative value of this evidence outweighs the danger of unfair prejudice and  
25 therefore will not be excluded.

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27 ...

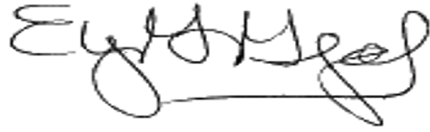
28 ...

**ORDER**

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Defendants' Motion  
is **DENIED**.

**Dated this 3rd day of August, 2021**

DATED this \_\_\_\_ day of \_\_\_\_\_, 2021.



DISTRICT COURT JUDGE

**A0B 870 47C2 C945**

**Elizabeth Gonzalez**

**District Court Judge**

Submitted by:

Approved as to form and content:

McDONALD CARANO LLP

SNELL & WILMER LLP

*/s/ Richard C. Gordon*

By: /s/ Rory T. Kay

By: \_\_\_\_\_

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Richard C. Gordon, Esq.

Amanda C. Yen (NV Bar #9726)

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Brian Raphael, Esq.

LEVI & KORSINSKY, LLP

David Kotler, Esq.

Adam M. Apton, Esq. (admitted *pro*  
*hac vice*)

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Inc. and Specially Appearing  
Defendants Stripes Group, LLC,  
SG VTB Holdings, LLC, Kenneth Fox,  
and Juergen Stark*

*Attorneys for PAMPT LLC*

HOLLAND & HART LLP

*/s/ Robert Cassity*

By: \_\_\_\_\_

J. Stephen Peek, Esq.

Robert Cassity, Esq.

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Las Vegas, NV 89134

*[Continued on next page]*

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SHEPPARD MULLIN

*/s/ Alejandra Moreno*

By: \_\_\_\_\_

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Alejandra Moreno, Esq.  
1901 Avenue of the Stars, Suite 1600  
Los Angeles, CA 90067

*Attorneys for Defendants Kenneth  
Potashner, Elwood G. Norris, Seth  
Putterman, Robert Kaplan, and  
Andrew Wolfe*

**From:** [Adam M Apton](#)  
**To:** [Jelena Jovanovic](#)  
**Subject:** Fwd: [External]RE: [External]RE: [External]MIL Proposed Order  
**Date:** Monday, August 2, 2021 2:56:21 PM

---

Adam M. Apton  
Levi & Korsinsky, LLP

----- Original message -----

From: "Gordon, Richard" <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>  
Date: 7/30/21 5:42 PM (GMT-05:00)  
To: Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>, Alejandro Moreno  
<[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>, "Raphel, Brian" <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>, "George  
F. Ogilvie III" <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>, Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>  
Cc: "Kotler, David" <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>, "Hess, Joshua"  
<[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>, John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>, Steve Peek  
<[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>, "Moore, Ryan" <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>  
Subject: [External]RE: [External]RE: [External]MIL Proposed Order

Hi Adam,

You have authorization to e-sign for me on the draft orders re the NDD motions (with the exception of the MIL to exclude evidence and testimony related to irrelevant or undisclosed measures of damages, for which we will have to submit competing orders). Please add a signature block that states "Approval as to form and content" on the draft orders. You can then e-sign for me and submit. Thanks very much,

Rick

Richard C. Gordon, Esq.  
Snell & Wilmer  
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Las Vegas, NV 89169  
(702) 784-5210 (direct)  
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---

**From:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>

AA 0800

**Sent:** Friday, July 30, 2021 11:31 AM

**To:** Alejandro Moreno <AMoreno@sheppardmullin.com>; Raphel, Brian <Brian.Raphel@dechert.com>; George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>; Rory Kay <rkay@mcdonaldcarano.com>

**Cc:** Kotler, David <david.kotler@dechert.com>; Hess, Joshua <Joshua.Hess@dechert.com>; John Stigi <JStigi@sheppardmullin.com>; Steve Peek <SPeek@hollandhart.com>; Gordon, Richard <rgordon@swlaw.com>; Moore, Ryan <Ryan.Moore@dechert.com>

**Subject:** RE: [External]RE: [External]MIL Proposed Order

**[EXTERNAL]** [aapton@zlk.com](mailto:aapton@zlk.com)

---

Thanks, so to be clear, we have agreements on every order except defendants' motion in limine to exclude evidence and testimony related to irrelevant or undisclosed measures of damages. These orders are attached for reference here. Do we have defense counsel's permission to file? Rick, please respond again now that we have the entire set of 'consents'. Thanks.

---

**From:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>

**Sent:** Friday, July 30, 2021 2:15 PM

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**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[SPeek@hollandhart.com](mailto:SPeek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** [External]RE: [External]MIL Proposed Order

Adam:

Thanks for circulating. Here are small suggested edits to the FFCL directed at the DD's motions.

Best,

**Alejandro (Alex) Moreno**

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AA 0801



---

**From:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>

**Sent:** Thursday, July 29, 2021 12:23 PM

**To:** Raphael, Brian <[Brian.Raphael@dechert.com](mailto:Brian.Raphael@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** RE: [External]MIL Proposed Order

Brian, Here are the proposed orders for the rest of the motions. Please let us know if you have comments/edits or if defendants' consent to the orders as written. -Adam

---

**From:** Raphael, Brian <[Brian.Raphael@dechert.com](mailto:Brian.Raphael@dechert.com)>

**Sent:** Thursday, July 29, 2021 3:20 PM

**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** [External]MIL Proposed Order

Counsel,

Attached is a proposed order granting Defendants' motion in limine to exclude evidence and testimony related to irrelevant or undisclosed measures of damages. Please let us know if you any comments or if we can have your authorization to file jointly. Thank you.

**Brian Raphael**

**Dechert LLP**

+1 212 641 5692 Direct

+1 201 615 3550 Mobile

[brian.raphel@dechert.com](mailto:brian.raphel@dechert.com)

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AA 0802

**From:** [Bob Cassity](#)  
**To:** [Alejandro Moreno](#); [Adam M Apton](#); [Raphel, Brian](#); [George F. Ogilvie III](#); [Rory Kay](#)  
**Cc:** [Jelena Jovanovic](#); [Kotler, David](#); [Hess, Joshua](#); [John Stigi](#); [Steve Peek](#); [Gordon, Richard](#); [Moore, Ryan](#); [Amanda K. Baker](#)  
**Subject:** RE: [External]RE: [External]RE: [External]MIL Proposed Order  
**Date:** Tuesday, August 3, 2021 11:26:12 AM  
**Attachments:** [image001.png](#)  
[image002.png](#)  
[image003.png](#)  
[image004.png](#)  
[image005.png](#)  
[image006.png](#)

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Correct. Thanks. Please also copy Amanda and me on all emails on this matter.

---

## Robert J. Cassity

Partner, Holland & Hart LLP

9555 Hillwood Dr., 2nd Floor, Las Vegas, NV 89134

T 702.669.4600 F 702.669.4650



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---

**From:** Alejandro Moreno <AMoreno@sheppardmullin.com>  
**Sent:** Tuesday, August 3, 2021 11:17 AM  
**To:** Adam M Apton <aapton@zlk.com>; Raphel, Brian <Brian.Raphel@dechert.com>; George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>; Rory Kay <rkay@mcdonaldcarano.com>  
**Cc:** Jelena Jovanovic <jjovanovic@mcdonaldcarano.com>; Kotler, David <david.kotler@dechert.com>; Hess, Joshua <Joshua.Hess@dechert.com>; John Stigi <JStigi@sheppardmullin.com>; Steve Peek <SPeek@hollandhart.com>; Gordon, Richard <rgordon@swlaw.com>; Moore, Ryan <Ryan.Moore@dechert.com>; Bob Cassity <BCassity@hollandhart.com>; Amanda K. Baker <AKBaker@hollandhart.com>  
**Subject:** RE: [External]RE: [External]RE: [External]MIL Proposed Order

External Email

Hi Adam:

I conferred with Bob before we sent you our edits. He is fine with both orders as long as they reflect the edits we sent you.

Best,

AA 0803

**Alejandro (Alex) Moreno**

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---

**From:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>

**Sent:** Tuesday, August 3, 2021 11:16 AM

**To:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Jelena Jovanovic <[jjovanovic@mcdonaldcarano.com](mailto:jjovanovic@mcdonaldcarano.com)>; Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>; 'Bob Cassity' <[BCassity@hollandhart.com](mailto:BCassity@hollandhart.com)>; Amanda K. Baker <[AKBaker@hollandhart.com](mailto:AKBaker@hollandhart.com)>

**Subject:** RE: [External]RE: [External]RE: [External]MIL Proposed Order

Amanda or Bob, If Steve is still on vacation, would you please confirm we have authority to file the orders as agreed below?

---

**From:** Adam M Apton

**Sent:** Monday, August 2, 2021 8:12 PM

**To:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Jelena Jovanovic <[jjovanovic@mcdonaldcarano.com](mailto:jjovanovic@mcdonaldcarano.com)>; Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** RE: [External]RE: [External]RE: [External]MIL Proposed Order

Bob or Steve, Would you please provide your consent to file the orders referred to below? Thank you.

---

**From:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>

**Sent:** Friday, July 30, 2021 5:20 PM

**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

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**Subject:** [External]RE: [External]RE: [External]MIL Proposed Order

Fine by me on the Director Defendants' orders.

Best,

**Alejandro (Alex) Moreno**

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Thanks, so to be clear, we have agreements on every order except defendants' motion in limine to exclude evidence and testimony related to irrelevant or undisclosed measures of damages. These orders are attached for reference here. Do we have defense counsel's permission to file? Rick, please respond again now that we have the entire set of 'consents'. Thanks.

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**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** [External]RE: [External]MIL Proposed Order

AA 0805

Adam:

Thanks for circulating. Here are small suggested edits to the FFCL directed at the DD's motions.

Best,

**Alejandro (Alex) Moreno**

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**Sent:** Thursday, July 29, 2021 12:23 PM

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**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** RE: [External]MIL Proposed Order

Brian, Here are the proposed orders for the rest of the motions. Please let us know if you have comments/edits or if defendants' consent to the orders as written. -Adam

---

**From:** Raphael, Brian <[Brian.Raphael@dechert.com](mailto:Brian.Raphael@dechert.com)>

**Sent:** Thursday, July 29, 2021 3:20 PM

**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

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**Subject:** [External]MIL Proposed Order

Counsel,

Attached is a proposed order granting Defendants' motion in limine to exclude evidence and testimony

AA 0806

related to irrelevant or undisclosed measures of damages. Please let us know if you any comments or if we can have your authorization to file jointly. Thank you.

**Brian Raphel**

**Dechert LLP**

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**From:** [Adam M Apton](#)  
**To:** [Jelena Jovanovic](#)  
**Subject:** Fwd: [External]RE: [External]RE: [External]MIL Proposed Order  
**Date:** Monday, August 2, 2021 2:56:09 PM

---

Adam M. Apton  
Levi & Korsinsky, LLP

----- Original message -----

**From:** Alejandro Moreno <AMoreno@sheppardmullin.com>  
**Date:** 7/30/21 5:20 PM (GMT-05:00)  
**To:** Adam M Apton <aapton@zlk.com>, "Raphel, Brian" <Brian.Raphel@dechert.com>, "George F. Ogilvie III" <gogilvie@Mcdonaldcarano.com>, Rory Kay <rkay@mcdonaldcarano.com>  
**Cc:** "Kotler, David" <david.kotler@dechert.com>, "Hess, Joshua" <Joshua.Hess@dechert.com>, John Stigi <JStigi@sheppardmullin.com>, Steve Peek <SPeek@hollandhart.com>, "Gordon, Richard" <rgordon@swlaw.com>, "Moore, Ryan" <Ryan.Moore@dechert.com>  
**Subject:** [External]RE: [External]RE: [External]MIL Proposed Order

Fine by me on the Director Defendants' orders.

Best,

**Alejandro (Alex) Moreno**  
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+1 619-721-8718 | cell  
[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com) | [Bio](#)

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+1 619-338-6500 | main  
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---

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**Sent:** Friday, July 30, 2021 11:31 AM  
**To:** Alejandro Moreno <AMoreno@sheppardmullin.com>; Raphel, Brian <Brian.Raphel@dechert.com>; George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>; Rory Kay <rkay@mcdonaldcarano.com>  
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Best,

**Alejandro (Alex) Moreno**

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**Dechert LLP**

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1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

4  
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 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: 8/3/2021

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18 "G. Mark Albright, Esq." .	gma@albrightstoddard.com
19 "Valerie Weis, Paralegal" .	val@omaralaw.net
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24 Karl Riley .	kriley@swlaw.com
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**ORDER**

George F. Ogilvie III, Esq. (NSBN 3552)  
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Rory T. Kay, Esq. (NSBN 12416)  
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*Attorneys for Plaintiff PAMTP LLC*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

IN RE PARAMETRIC SOUND  
CORPORATION SHAREHOLDERS'  
LITIGATION

Case No.: A-13-686890-B

Dept. No.: XI

**ORDER DENYING MOTION FOR  
SUMMARY JUDGMENT OF SPECIALLY  
APPEARING DEFENDANTS STRIPES  
GROUP, LLC, SG VTB HOLDINGS, LLC,  
JUERGEN STARK, AND KENNETH FOX**

This Document Relates To:

ALL ACTIONS.

On June 11, 2021, Specially Appearing Defendants Stripes Group, LLC, SG VTB Holdings, LLC, Jurgen Stark, and Kenneth Fox ("Defendants") moved for summary judgment (the "Motion"). The Court conducted an in-chambers hearing on Defendants' Motion on July 19, 2021. Having reviewed the record, the briefs in support and opposition, and being fully informed, the Court **DENIES** the Motion and makes the following findings and conclusions of law:

...

**BACKGROUND**

1. On June 11, 2021, Defendants filed the Motion seeking summary judgment dismissal on the basis that Plaintiff's claims against them were time-barred under the applicable statute of limitations and/or without personal jurisdiction. Defendants argued that Plaintiff's claims against Fox and Stark were subject to a three-year statute of limitation, that the conduct giving rise to the complaint occurred in 2013, and that Plaintiff did not assert claims against Fox and Stark until 2020. Defendants also argued that they are not residents of Nevada, that all communications at issue in the lawsuit occurred outside of Nevada, that they were not officers or directors of any Nevada company, and that they did not conduct business in Nevada.

2. On July 1, 2021, Plaintiff opposed Defendants' motion arguing that a questions of material fact existed as to when Plaintiff had notice of its cause of action and whether Defendants' contact with Nevada was sufficient to establish jurisdiction.

3. On July 14, 2021, Defendants replied in further support of their motion arguing that the facts underlying Plaintiff's claims were discoverable in February 2014. Defendants also argued that they were out-of-state and had no conduct within Nevada.

4. Being fully briefed, the Motion is ripe for decision.

**CONCLUSIONS OF LAW**

1. Summary judgment is only appropriate when the pleadings and other evidence on file demonstrate that no "genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law." NRCP 56; *see also Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). A genuine issue of material facts exists when the "evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Id.* at 1031. When reviewing a motion for summary judgment, the evidence supporting it, and any reasonable inferences draws from it, the court must view it in a light most favorable to the nonmoving part. *Id.* at 1029.

2. Genuine issues of material fact exist as to Plaintiff's date of discovery of the facts underlying the complaint. Plaintiff argues that the facts underlying the complaint were not known until March 2018 at the earliest due to the unsealing of a complaint in the class action phase of

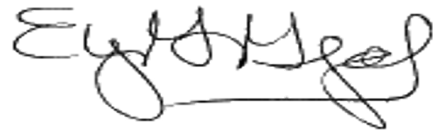
1 this case. Defendants dispute that claim by arguing that facts sufficient to cause a reasonable  
2 stockholder to investigate potential claims were known in February 2014 or earlier. The date of  
3 discovery is therefore materially disputed.

4 3. Genuine issues of material fact also exist as to the Court's jurisdiction over  
5 Defendants. Plaintiff argues that Defendants' conduct with respect to the merger targeted Nevada  
6 and is therefore sufficient to support jurisdiction. Defendants dispute these facts, arguing that  
7 Defendants did not cause any injury to Plaintiff or its assignors through conduct occurring in, or  
8 targeted towards, the State of Nevada.

9 **ORDER**

10 **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Defendants' Motion  
11 **Dated this 3rd day of August, 2021**  
is **DENIED**.

12 DATED this \_\_\_\_ day of \_\_\_\_\_, 2021.



13  
14 **DISTRICT COURT JUDGE**  
**688 35D 29F8 4A49**  
**Elizabeth Gonzalez**  
Appellate District Court Judge:

15 Submitted by:

16 McDONALD CARANO LLP

SNELL & WILMER LLP

/s/ Richard C. Gordon

17 By: /s/ Rory T. Kay

By: \_\_\_\_\_

18 George F. Ogilvie III (NV Bar #3552)  
19 Amanda C. Yen (NV Bar #9726)  
20 Rory T. Kay (NV Bar #12416)  
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23 Adam M. Apton, Esq. (admitted *pro*  
*hac vice*)  
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DECHERT LLP  
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David Kotler, Esq.  
1900 K Street, NW  
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*Attorneys for Defendant VTB Holdings,  
Inc. and Specially Appearing Defendants  
Stripes Group, LLC, SG VTB Holdings,  
LLC, Kenneth Fox, and Juergen Stark*

27 *Attorneys for PAMPT LLC*

[Continued on next page]

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HOLLAND & HART LLP

*/s/ Robert Cassity*

By: \_\_\_\_\_  
J. Stephen Peek, Esq.  
Robert Cassity, Esq.  
9555 Hillwood Drive, 2nd Floor,  
Las Vegas, NV 89134

SHEPPARD MULLIN

*/s/ Alejandra Moreno*

By: \_\_\_\_\_  
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Alejandra Moreno, Esq.  
1901 Avenue of the Stars, Suite 1600  
Los Angeles, CA 90067

*Attorneys for Defendants Kenneth  
Potashner, Elwood G. Norris, Seth  
Putterman, Robert Kaplan, and Andrew  
Wolfe*



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**Subject:** Fwd: [External]RE: [External]RE: [External]MIL Proposed Order  
**Date:** Monday, August 2, 2021 2:56:21 PM

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**Subject:** [External]RE: [External]RE: [External]MIL Proposed Order

Hi Adam,

You have authorization to e-sign for me on the draft orders re the NDD motions (with the exception of the MIL to exclude evidence and testimony related to irrelevant or undisclosed measures of damages, for which we will have to submit competing orders). Please add a signature block that states "Approval as to form and content" on the draft orders. You can then e-sign for me and submit. Thanks very much,

Rick

Richard C. Gordon, Esq.  
Snell & Wilmer  
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L.L.P.  
3883 Howard Hughes Parkway, Suite 1100  
Las Vegas, NV 89169  
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**[EXTERNAL]** [aapton@zlk.com](mailto:aapton@zlk.com)

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**Sent:** Friday, July 30, 2021 2:15 PM

**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[SPeek@hollandhart.com](mailto:SPeek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

**Subject:** [External]RE: [External]MIL Proposed Order

Adam:

Thanks for circulating. Here are small suggested edits to the FFCL directed at the DD's motions.

Best,

**Alejandro (Alex) Moreno**

+1 619-338-6664 | direct

+1 619-721-8718 | cell

[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com) | [Bio](#)

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AA 0819

---

**From:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>

**Sent:** Thursday, July 29, 2021 12:23 PM

**To:** Raphael, Brian <[Brian.Raphael@dechert.com](mailto:Brian.Raphael@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

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**Subject:** RE: [External]MIL Proposed Order

Brian, Here are the proposed orders for the rest of the motions. Please let us know if you have comments/edits or if defendants' consent to the orders as written. -Adam

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**Sent:** Thursday, July 29, 2021 3:20 PM

**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

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**Subject:** [External]MIL Proposed Order

Counsel,

Attached is a proposed order granting Defendants' motion in limine to exclude evidence and testimony related to irrelevant or undisclosed measures of damages. Please let us know if you any comments or if we can have your authorization to file jointly. Thank you.

**Brian Raphael**

**Dechert LLP**

+1 212 641 5692 Direct

+1 201 615 3550 Mobile

[brian.raphel@dechert.com](mailto:brian.raphel@dechert.com)

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---

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**From:** [Bob Cassity](#)  
**To:** [Alejandro Moreno](#); [Adam M Apton](#); [Raphel, Brian](#); [George F. Ogilvie III](#); [Rory Kay](#)  
**Cc:** [Jelena Jovanovic](#); [Kotler, David](#); [Hess, Joshua](#); [John Stigi](#); [Steve Peek](#); [Gordon, Richard](#); [Moore, Ryan](#); [Amanda K. Baker](#)  
**Subject:** RE: [External]RE: [External]RE: [External]MIL Proposed Order  
**Date:** Tuesday, August 3, 2021 11:26:12 AM  
**Attachments:** [image001.png](#)  
[image002.png](#)  
[image003.png](#)  
[image004.png](#)  
[image005.png](#)  
[image006.png](#)

---

Correct. Thanks. Please also copy Amanda and me on all emails on this matter.

---

## Robert J. Cassity

Partner, Holland & Hart LLP

9555 Hillwood Dr., 2nd Floor, Las Vegas, NV 89134

T 702.669.4600 F 702.669.4650



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---

**From:** Alejandro Moreno <AMoreno@sheppardmullin.com>  
**Sent:** Tuesday, August 3, 2021 11:17 AM  
**To:** Adam M Apton <aapton@zlk.com>; Raphel, Brian <Brian.Raphel@dechert.com>; George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>; Rory Kay <rkay@mcdonaldcarano.com>  
**Cc:** Jelena Jovanovic <jjovanovic@mcdonaldcarano.com>; Kotler, David <david.kotler@dechert.com>; Hess, Joshua <Joshua.Hess@dechert.com>; John Stigi <JStigi@sheppardmullin.com>; Steve Peek <SPeek@hollandhart.com>; Gordon, Richard <rgordon@swlaw.com>; Moore, Ryan <Ryan.Moore@dechert.com>; Bob Cassity <BCassity@hollandhart.com>; Amanda K. Baker <AKBaker@hollandhart.com>  
**Subject:** RE: [External]RE: [External]RE: [External]MIL Proposed Order

External Email

Hi Adam:

I conferred with Bob before we sent you our edits. He is fine with both orders as long as they reflect the edits we sent you.

Best,

AA 0821

**Alejandro (Alex) Moreno**

+1 619-338-6664 | direct

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[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com) | [Bio](#)

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**Sent:** Tuesday, August 3, 2021 11:16 AM

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**Subject:** RE: [External]RE: [External]RE: [External]MIL Proposed Order

Amanda or Bob, If Steve is still on vacation, would you please confirm we have authority to file the orders as agreed below?

---

**From:** Adam M Apton

**Sent:** Monday, August 2, 2021 8:12 PM

**To:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

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**Subject:** RE: [External]RE: [External]RE: [External]MIL Proposed Order

Bob or Steve, Would you please provide your consent to file the orders referred to below? Thank you.

---

**From:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>

**Sent:** Friday, July 30, 2021 5:20 PM

**To:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>  
**Subject:** [External]RE: [External]RE: [External]MIL Proposed Order

Fine by me on the Director Defendants' orders.

Best,

**Alejandro (Alex) Moreno**

+1 619-338-6664 | direct

+1 619-721-8718 | cell

[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com) | [Bio](#)

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**From:** Adam M Apton <[aapton@zlk.com](mailto:aapton@zlk.com)>

**Sent:** Friday, July 30, 2021 11:31 AM

**To:** Alejandro Moreno <[AMoreno@sheppardmullin.com](mailto:AMoreno@sheppardmullin.com)>; Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>; George F. Ogilvie III <[gogilvie@Mcdonaldcarano.com](mailto:gogilvie@Mcdonaldcarano.com)>; Rory Kay <[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)>

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**Subject:** RE: [External]RE: [External]MIL Proposed Order

Thanks, so to be clear, we have agreements on every order except defendants' motion in limine to exclude evidence and testimony related to irrelevant or undisclosed measures of damages. These orders are attached for reference here. Do we have defense counsel's permission to file? Rick, please respond again now that we have the entire set of 'consents'. Thanks.

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**Subject:** [External]MIL Proposed Order

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related to irrelevant or undisclosed measures of damages. Please let us know if you any comments or if we can have your authorization to file jointly. Thank you.

**Brian Raphel**

**Dechert LLP**

+1 212 641 5692 Direct

+1 201 615 3550 Mobile

[brian.raphel@dechert.com](mailto:brian.raphel@dechert.com)

[dechert.com](http://dechert.com)

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**From:** [Adam M Apton](#)  
**To:** [Jelena Jovanovic](#)  
**Subject:** Fwd: [External]RE: [External]RE: [External]MIL Proposed Order  
**Date:** Monday, August 2, 2021 2:56:09 PM

---

Adam M. Apton  
Levi & Korsinsky, LLP

----- Original message -----

**From:** Alejandro Moreno <AMoreno@sheppardmullin.com>  
**Date:** 7/30/21 5:20 PM (GMT-05:00)  
**To:** Adam M Apton <aapton@zlk.com>, "Raphel, Brian" <Brian.Raphel@dechert.com>, "George F. Ogilvie III" <gogilvie@Mcdonaldcarano.com>, Rory Kay <rkay@mcdonaldcarano.com>  
**Cc:** "Kotler, David" <david.kotler@dechert.com>, "Hess, Joshua" <Joshua.Hess@dechert.com>, John Stigi <JStigi@sheppardmullin.com>, Steve Peek <SPeek@hollandhart.com>, "Gordon, Richard" <rgordon@swlaw.com>, "Moore, Ryan" <Ryan.Moore@dechert.com>  
**Subject:** [External]RE: [External]RE: [External]MIL Proposed Order

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Best,

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AA 0826

**Subject:** RE: [External]RE: [External]MIL Proposed Order

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**Cc:** Kotler, David <[david.kotler@dechert.com](mailto:david.kotler@dechert.com)>; Hess, Joshua <[Joshua.Hess@dechert.com](mailto:Joshua.Hess@dechert.com)>; John Stigi <[JStigi@sheppardmullin.com](mailto:JStigi@sheppardmullin.com)>; Steve Peek <[S.Peek@hollandhart.com](mailto:S.Peek@hollandhart.com)>; Gordon, Richard <[rgordon@swlaw.com](mailto:rgordon@swlaw.com)>; Moore, Ryan <[Ryan.Moore@dechert.com](mailto:Ryan.Moore@dechert.com)>

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Adam:

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Best,

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**Subject:** RE: [External]MIL Proposed Order

AA 0827

Brian, Here are the proposed orders for the rest of the motions. Please let us know if you have comments/edits or if defendants' consent to the orders as written. -Adam

---

**From:** Raphel, Brian <[Brian.Raphel@dechert.com](mailto:Brian.Raphel@dechert.com)>

**Sent:** Thursday, July 29, 2021 3:20 PM

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**Subject:** [External]MIL Proposed Order

Counsel,

Attached is a proposed order granting Defendants' motion in limine to exclude evidence and testimony related to irrelevant or undisclosed measures of damages. Please let us know if you any comments or if we can have your authorization to file jointly. Thank you.

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1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

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

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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

This Document Related To:  
ALL ACTIONS

**ORDER GRANTING IN PART  
DEFENDANTS' MOTION *IN LIMINE* TO  
EXCLUDE EVIDENCE AND TESTIMONY  
RELATED TO IRRELEVANT OR  
UNDISCLOSED MEASURES OF  
DAMAGES**

On July 19, 2021, this Court conducted an in-chambers hearing on Defendants' Motion to Exclude Evidence and Testimony Related to Irrelevant or Undisclosed Measures of Damages (the "Motion"). Having reviewed the Motion and the briefs filed in support and opposition thereto, this Court GRANTS IN PART the Motion and makes the following findings of fact and conclusions of law:

### **FINDINGS OF FACT**

1) During the class proceedings, the class plaintiffs asserted two direct causes of action on behalf of a class of former Parametric stockholders and six derivative claims on behalf of Turtle Beach. In that context, the class plaintiffs disclosed, pursuant to NRCP 16.1, eight hypothetical categories of damages: three for their derivative claims and five for their direct claims. Defendants settled the direct and derivative claims asserted by the class.

2) Following the settlement, Plaintiff, acting as the purported assignee of a small handful of former Parametric shareholders who opted out of the settlement, filed a new complaint that asserted only a direct equity expropriation claim and an ancillary direct claim for aiding and abetting the same equity expropriation. The Court consolidated Plaintiff's complaint into the class action. Plaintiff chose not to amend the class plaintiffs' damages disclosure.

3) Plaintiff did disclose, pursuant to NRCP 16.1, that it believes that the calculation of damages in this matter requires expert testimony. Like the class plaintiffs, Plaintiff intends to offer expert testimony regarding damages from J.T. Atkins ("Atkins"), who did not issue any updated or amended opinion for the opt-out proceedings brought by the Plaintiff. Instead, Plaintiff and Atkins disclosed that they intend to introduce the same opinions that Atkins offered in the class proceeding, including opinions that purport to address measures of damages for claims that Plaintiff no longer asserts.

4) Defendants filed the present Motion on June 11, 2021 to exclude evidence and testimony that Plaintiff may offer at trial for the sole purpose of establishing measures of damages that are not available to Plaintiff under the claims that remain in this case. Specifically, Defendants argued that evidence or testimony related solely to the following categories of damages should be excluded:



- a) Damages that are not appropriate for equity expropriation claims;
- b) Damages for derivative claims;
- c) Damages based on alleged activities that purportedly occurred after January 15, 2014;
- d) Damages based on the deterioration of Parametric's stock price; and
- e) Damages that were not addressed in Atkins's report.

5) Plaintiff opposed the Motion on July 1, 2021. Plaintiff opposed the Motion on the basis that Plaintiff should not be precluded from introducing evidence and testimony with multiple purposes (e.g., evidence or testimony that might be relevant to an unavailable measure of damages, but that might also be relevant for some other purpose).

6) Defendants filed a reply brief on July 12, 2021, in which Defendants reiterated that the motion sought to exclude only evidence and testimony for which the sole purpose at trial would be to prove one of the unavailable measures of damages set forth above. Defendants noted that Plaintiff had not opposed this specific request.

### CONCLUSIONS OF LAW

1) Relevant evidence is generally admissible, and evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.025, 48.015. Relevant evidence may only be excluded if it is cumulative, or if the danger of unfair prejudice substantially outweighs the probative value. NRS 48.035(1), (2). Indeed, where evidence has significant probative value, it can be admissible even if prejudicial. *See id.*

2) While conduct of some director defendants and financial transaction may be related to that individual's course of dealing and motivation, it is not relevant to any damages argument and may only be used for the limited purpose of demonstrating motivation..

### ORDER

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Defendants' Motion is **GRANTED**. Plaintiff is precluded from introducing evidence or testimony at trial for which the sole purpose would be to support potential measures of damages other than those allowed under

1 *Gentile*, 906 A.2d at 103. This includes evidence or testimony that is related solely to damages for  
2 derivative claims asserted in the class proceedings, damages based on alleged activities that  
3 purportedly occurred after January 15, 2014, damages based on the deterioration of Parametric's  
4 stock price, or any other potential measure of damages that Plaintiff has not disclosed.

5 Dated this \_\_\_\_ day of August, 2021

Dated this 4th day of August, 2021

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7   
DISTRICT COURT JUDGE

8  
9 Submitted by:  
McDONALD CARANO LLP

**B4B 6D6 8BF2 54AA**  
**Elizabeth Gonzalez**  
**District Court Judge**

10  
11 By: /s/ Rory T. Kay

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6 Kearney IRRV Trust, Plaintiff(s) | CASE NO: A-13-686890-B  
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8 Kenneth Potashner, Defendant(s)  
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**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")<sup>1</sup> 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")

<sup>1</sup> 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

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DISTRICT COURT JUDGE

39A F7B 00EA A8AE  
Elizabeth Gonzalez  
District Court Judge

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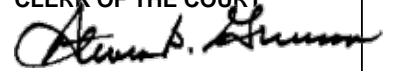
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*Attorneys for Plaintiff PAMTP LLC*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

IN RE PARAMETRIC SOUND  
CORPORATION SHAREHOLDERS'  
LITIGATION

Case No.: A-13-686890-B

Dept. No.: XI

**PLAINTIFF PAMTP LLC'S  
MEMORANDUM OF LAW  
REGARDING NRS 78.200  
AND NRS 78.211**

This Document Relates To:

ALL ACTIONS.

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...

**I. INTRODUCTION**

Footnote 15 of the Nevada Supreme Court’s decision in *Parametric Sound Corporation, et al. v. Eighth Judicial District Court*, 133 Nev. 417, 401 P.3d 1100 (2017) states:

We note that the Nevada Legislature has addressed this issue in part by enacting statutes that give conclusive deference to the directors' judgment as to the consideration received for issued stock absent actual fraud. See NRS 78.200(2); NRS 78.211(1). Thus, the shareholders must show actual fraud in any direct equity dilution claim they may have in order to overcome the statutory deference afforded to the directors.

*Parametric Sound Corp.*, 133 Nev. at 429 n.15 (referred to herein as “Footnote 15”). Given this statement, Plaintiff submits this trial brief to address the meaning of “actual fraud” in the context of NRS 78.200(2) and NRS 78.211(2).

**II. “ACTUAL FRAUD” IN EQUITY EXPROPRIATION CLAIMS**

Shareholders pursuing a claim for equity expropriation or the expropriation of rights to purchase stock must show that the issuance constituted “actual fraud” because Nevada statutes grant directors broad deference with respect to the consideration received for issued stock or stock options absent such “actual fraud.” See *Parametric*, 401 P.3d at 1110 n.15; NRS 78.200(2) (“The judgment of the board of directors as to the consideration for such rights or options issued is conclusive in the absence of actual fraud in the transaction.”); NRS 78.211 (“The judgment of the board of directors as to the consideration received for the shares issued is conclusive in the absence of actual fraud in the transaction.”).

While Nevada courts have yet to define “actual fraud” in the context of NRS 78.200 or NRS 78.211,<sup>1</sup> the Supreme Court of Nevada has held that the term “fraudulent” in the context of a claim for breach of fiduciary duty in connection with a corporation’s merger is not “limited to the elements of common-law fraud; it encompasses a variety of acts involving breach of fiduciary

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<sup>1</sup> The United States District Court for the District of Nevada has, on a single occasion, opined on the meaning of “actual fraud” within NRS 78.211. See *McFarland v. Long*, 2017 WL 4582268, at \*5 (D. Nev. Oct. 7, 2017) (dismissing claims challenging issuance of stock because plaintiff admitted to “not pleading fraud on the part of the Defendants”).

1 duties imposed upon corporate officers, directors, or majority shareholders.” *Cohen v. Mirage*  
2 *Resorts, Inc.*, 119 Nev. 1, 13-14, 62 P.3d 720, 729 (2003).

3 Delaware courts are in accord. Delaware courts have interpreted substantially similar  
4 statutes with respect to the issuance of shares. *See, e.g.*, 8 Del. C. § 152 (“In the absence of actual  
5 fraud in the transaction, the judgment of the directors as to the value of such consideration shall  
6 be conclusive”).<sup>2</sup> As such, Delaware courts provide guidance for the interpretation of NRS  
7 78.200(2) and NRS 78.211.<sup>3</sup>

8 The Court of Chancery in Delaware has noted that, “[o]ur courts have been relatively  
9 flexible in implementing § 152’s ‘actual fraud’ requirement, and for good reason. The term seems  
10 to have little to do with common law fraud.” *Parfi Holding AB v. Mirror Image Internet, Inc.*, 794  
11 A.2d 1211, 1234 (Del. Ch. 2001) *rev’d on other grounds*, 817 A.2d 149 (Del. 2002). While actual  
12 fraud may be shown directly, it also may “be inferred from the attendant circumstances.” *Lewis*  
13 *v. Scotten Dillon Co.*, 306 A.2d 755, 757 (Del. Ch. 1973).

14 While Delaware courts have had only occasional reason to interpret the statute, under the  
15 Delaware precedent, actual fraud exists where the consideration for a stock issuance was “so gross  
16 as to lead the Court to conclude that it was due, not to an honest error of judgment but to bad faith  
17 or a reckless indifference to the rights of others.” *Lewis*, 306 A.2d at 758; *see also Parfi Holding*  
18 *AB v. Mirror Image Internet, Inc.*, 794 A.2d 1211, 1235 (Del. Ch. 2001) (“[w]hen corporate  
19 directors allow the corporation to accept bananas they know to be worth \$10,000 on the open  
20

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21 <sup>2</sup> A provision to the effect of Delaware’s § 152 was adopted in 1899. *See* R. FRANKLIN  
22 BALOTTI & JESSE A. FINKELSTEIN, *THE DELAWARE LAW OF CORPORATIONS &*  
23 *BUSINESS ORGANIZATIONS* § 5.13 at 5–23 (2001). While NRS 78.200 and 78.211 have only  
24 existed since 1949, their use of the identical term “actual fraud” indicates that they arose from the  
same concepts, and appear to have been originally modelled section-for-section on longstanding  
Delaware law. NCL (1949), § 1610.01.

25 <sup>3</sup> *See, e.g., Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 62 P.3d 720 (2003) (reasoning that  
26 Nevada courts will look to the jurisprudence of other states when construing Nevada statutes  
27 derived from those state’s laws); *Brown v. Kinross Gold U.S.A., Inc.*, 531 F. Supp. 2d 1234, 1245  
(D. Nev. 2008) (recognizing that the “Nevada Supreme Court frequently looks to the Delaware  
28 Supreme Court and Delaware Courts of Chancery as persuasive authorities on questions of  
corporation law”); *Hilton Hotels Corp. v. ITT Corp.*, 978 F. Supp. 1342, 1347 (D. Nev. 1997)  
(finding Delaware authority persuasive in absence of Nevada law on point).

1 market from a majority stockholder in exchange for \$100,000 worth of corporate stock, they have  
2 in colloquial terms committed a ‘fraud on the corporation’ they are entrusted to manage”).

3 In *Parfi*, for example, the Court of Chancery found that “actual fraud” in an analogous  
4 stock-issuance statutory provision did not require a material false statement or detrimental  
5 reliance. Moreover, the Court of Chancery stated:

6 our courts have said that § 152 does not bar a challenge to the directors' judgment  
7 on the value of non-cash consideration when an “excessive valuation ... is so gross  
8 as to lead the Court to conclude that it was due, not to an honest error of judgment  
9 but to bad faith or a reckless indifference to the rights of others.” Furthermore, when  
10 § 152 applies, there is authority that suggests that the statutory “actual fraud”  
provision does not provide a defense when the underlying transaction involves  
unfair self-dealing proscribed by equitable fiduciary duty concepts.

11 *Parfi*, 794 A.2d at 1235 (internal citation omitted). While the Plaintiff in *Parfi* had pleaded claims  
12 for fraud and constructive fraud, the court ultimately dismissed the claim for fraud, and ordered  
13 the plaintiff to restate its constructive fraud claim as a breach of fiduciary duty claim because, in  
14 part, the three claims contained identical allegations. *Parfi*, 794 A.2d at 1233 (“*Parfi*'s rationale  
15 for pleading the fraud and constructive fraud counts apparently rests in some fear that it will not  
16 be able to recover unless it can prove a level of wrongdoing amounting to fraud. . . . This fear is,  
17 however, misplaced.”). The kind of “equitable fraud” referred to by § 152’s “actual fraud”  
18 requirement is further distinguished from common law fraud in that it does not require scienter.  
19 See, e.g., *In re Wayport Litig.* 76 A.3d 296, 327 (Del. Ch. 2013) (distinguishing constructive fraud  
20 from common law fraud). Equitable fraud “provides a remedy for negligent or innocent  
21 misrepresentations.” *Zirn v. VLI Corp.*, 681 A.2d 1050, 1061 (Del.1996); see *Stephenson v.*  
22 *Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del.1983) (noting that with equitable fraud, a  
23 “defendant [does] not have to know or believe that his statement was false or to have proceeded  
24 in reckless disregard of the truth”).

25 ...

26 ...

27 ...

28 ...

**III. CONCLUSION**

While the term “actual fraud” in NRS 78.200 and NRS 78.211 appears to raise the standard of proof for equity expropriation claims, an investigation of the history and usage of the term reveals the term to be indistinguishable from a bad faith breach of fiduciary duty. As such, Footnote 15, NRS 78.200, and NRS 78.211 should not be read to heighten Plaintiff’s burden of proof to that of common law fraud.

DATED this 24th day of August, 2021.

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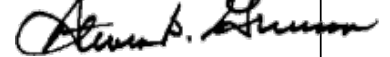


**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of McDonald Carano LLP and that on the 24th day of August, 2021, the foregoing **PLAINTIFF PAMTP LLC'S MEMORANDUM OF LAW REGARDING NRS 78.200 AND NRS 78.211** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

/s/ Jelena Jovanovic

An Employee of McDonald Carano LLP



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22 **DISTRICT COURT**

23 **CLARK COUNTY, NEVADA**

24 IN RE PARAMETRIC SOUND  
25 CORPORATION SHAREHOLDERS'  
26 LITIGATION.

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

**DEFENDANTS' MOTION FOR  
JUDGMENT ON PARTIAL FINDINGS  
PURSUANT TO NRCP 52(c) REGARDING  
LACK OF CONTROL OR  
EXPROPRIATION**

**(HEARING REQUESTED)**

29 This Document Related To:

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

32 Defendants, by and through their respective counsel of record, hereby move the Court  
33 for a judgment on partial findings pursuant to Rule 52(c) of the Nevada Rules of Civil Procedure  
34 based upon Plaintiff's failure to establish that Defendant Kenneth Potashner was a controlling  
35 shareholder or director or that any equity was "expropriated" from the public stockholders of  
36 Parametric Sound Corporation ("Parametric" or the "Company") under the standard enunciated  
37  
38

1 by the Nevada Supreme Court in *Parametric Sound Corp. v. Eighth Judicial Dist. Court*, 133  
2 Nev. 417, 428, 401 P.3d 1100, 1109 (2017).

3 This Motion is supported by the attached Memorandum of Points and Authorities, the  
4 evidence adduced during the trial of this matter, and the oral argument of counsel as the Court  
5 may entertain at the hearing on this Motion.

6 DATED this 24th day of August, 2021

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16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **I. INTRODUCTION**

18 Plaintiff's standing to pursue this direct claim for equity expropriation depends entirely  
19 on (i) the existence of a controlling stockholder or director; (ii) who expropriated equity from  
20 the public stockholders for his own benefit (or the benefit of affiliated entities). Because Plaintiff  
21 has not carried its burden on either point during its case in chief, Plaintiff lacks standing to pursue  
22 its claims for what amounts to simple equity dilution. As a result, the Court should enter  
23 judgment in favor of Defendants.

24 Plaintiff has failed to satisfy its burden of proof with respect to both elements of an equity  
25 expropriation claim. As a threshold matter, Potashner never had actual control over Parametric  
26 by for example owning more than 50% of the Company's voting stock or controlling other  
27 stockholders who together would have held more than 50% of Parametric's voting stock. To the  
28 contrary, Potashner owned exactly none of Parametric's shares entitled to vote on the merger.

1 The evidence is undisputed that Potashner's equity interest in Parametric on the record date of  
2 November 11, 2013 was composed entirely of unexercised, non-voting stock options. At trial,  
3 even Plaintiff's Managing Member Adam Kahn was forced to concede the obvious: One cannot  
4 be a controlling stockholder without owning at least one share.

5 Plaintiff has also failed to show that Potashner exercised *de facto* control over Parametric.  
6 The evidence at trial has established that Parametric's pre-merger Board was fiercely  
7 independent. Directors Robert Kaplan, Seth Putterman and Elwood Norris disagreed with  
8 Potashner on many key issues affecting Parametric's business, dismissed his threats as empty  
9 (and ineffectual) bluster, and regularly took actions contrary to his demands. As for director  
10 James Honoré, no evidence has been introduced that would impugn the independence of  
11 Honoré—indeed, he was never even named as a defendant in this lawsuit. Although the other  
12 directors may have had initial reservations regarding the independence director Andrew Wolfe,  
13 they quickly came to recognize Wolfe as a “straight-shooter” who acted with integrity and could  
14 be trusted. Because the merger was the product of a Board vote and required approval of the  
15 majority of the pre-merger directors, the Court should grant this motion if it finds that any four  
16 of Parametric's directors were independent of Potashner and voted in favor of the merger in good  
17 faith.

18 Even assuming that Plaintiff has introduced evidence sufficient to meet its burden to  
19 show Potashner controlled the Board (it has not), the Court should still enter judgment in favor  
20 of Defendants. There is simply no evidence of any “expropriation” from the public stockholders  
21 as that concept is defined in the caselaw. The structure of the merger between Parametric and  
22 Turtle Beach involved a run-of-the-mill dilutive transaction in favor of an unrelated third-party.  
23 Plaintiff has failed to introduce evidence showing that Potashner, any affiliate of Potashner, or  
24 any other pre-merger insider of Parametric expropriated economic and voting power from the  
25 assignors or any other public stockholder of the pre-merger Company. To the contrary, all pre-  
26 merger Parametric stockholders, including Potashner, were diluted to the same extent.

1 In sum, Plaintiff has failed to meet its burden to establish either one of the two  
2 prerequisites necessary for Plaintiff to proceed with a direct equity expropriation claim. As a  
3 result, the Court should grant this motion and enter judgment in favor of Defendants.

## 4 **II. LEGAL STANDARD**

5 NRCP 52(c) provides as follows:

6 If a party has been fully heard on an issue during a nonjury trial and the  
7 court finds against the party on that issue, the court may enter judgment  
8 against the party on a claim or defense that, under the controlling law, can  
9 be maintained or defeated only with a favorable finding on that issue. The  
10 court may, however, decline to render any judgment until the close of the  
11 evidence. A judgment on partial findings must be supported by findings of  
12 fact and conclusions of law as required by Rule 52(a).

13 NRCP 52(c) allows the district court in a bench trial to enter judgment on partial findings  
14 against a party when the party has been fully heard on an issue and judgment cannot be  
15 maintained without a favorable finding on that issue. *Certified Fire Prot. Inc. v. Precision*  
16 *Constr. Inc.*, 128 Nev. 371, 377, 283 P.3d 250, 254 (2012). In entering a Rule 52(c) judgment,  
17 “[t]he trial judge is not to draw any special inferences in the nonmovant’s favor”; “since it is a  
18 nonjury trial, the court’s task is to weigh the evidence.” *Id.* (citing 9C Charles Alan Wright &  
19 Arthur R. Miller, Federal Practice and Procedure § 2573.1, at 256-60 (3d ed. 2008) (addressing  
20 NRCP 52(c)’s federal counterpart, Fed. R. Civ. P. 52(c)); Robert E. Jones et al., Rutter Group  
21 Practice Guide: Federal Civil Trials and Evidence § 17:92 (2011) (“Because the court acts as the  
22 factfinder when ruling on a [motion] for judgment on partial findings, it need not consider the  
23 evidence in a light favorable to the nonmoving party . . . .”). Further, “[w]here a question of  
24 fact has been determined by the trial court, [the Nevada Supreme Court] will not reverse unless  
25 the judgment is clearly erroneous and not based on substantial evidence.” *Kockos v. Bank of*  
26 *Nevada*, 90 Nev. 140, 143, 520 P.2d 1359, 1361 (1974).

## 27 **III. PLAINTIFF HAS FAILED TO MEET ITS BURDEN AT TRIAL TO SHOW 28 POTASHNER EXPROPRIATED EQUITY FROM THE PUBLIC STOCKHOLDERS AS A CONTROLLING STOCKHOLDER OR DIRECTOR**

Plaintiff presents a classic equity dilution claim, alleging that Parametric issued too many  
shares to Turtle Beach in the merger, which purportedly harmed Parametric’s shareholders by

1 diluting their interest. Under Nevada law established in this case, Plaintiff's claim that  
2 Parametric issued "additional equity for insufficient consideration" must be pursued derivatively  
3 on behalf of the corporation "because any dilution in value of the corporation's stock is merely  
4 the unavoidable result (from an accounting standpoint) of the reduction in value of the entire  
5 corporate entity, of which each share of equity represents an equal fraction." *Parametric*, 133  
6 Nev. at 428, 401 P.3d at 1109 (adopting direct equity expropriation claim recognized in *Gentile*  
7 *v. Rosette*, 906 A.2d 91 (Del. 2006)). As this Court is aware, Plaintiff cannot pursue a derivative  
8 claim for equity dilution because the prior class and derivative plaintiffs asserted such a claim  
9 and, on May 18, 2020, the Court entered final judgment and an order of dismissal on the class  
10 and derivative claims.

11 The settlement of the derivative claim means Plaintiff must lose at trial unless it has met  
12 its burden of proof under an exception recognized by the Nevada Supreme Court in *Parametric*,  
13 which allows stockholders to proceed directly with a claim for breach of fiduciary duty arising  
14 from a dilutive stock issuance by showing "a controlling shareholder's or director's  
15 expropriation of value from the company[] caus[es] other shareholders' equity to be diluted."  
16 *Parametric*, 133 Nev. at 429, 401 P.3d at 1109. The Nevada Supreme Court recognized that  
17 direct equity expropriation claims could exist under Nevada law, and sought to "align" Nevada  
18 "jurisprudence with Delaware's" in this regard. *See id.*

19 A direct equity expropriation claim arises only where (1) "a stockholder having majority  
20 or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for  
21 assets of the controlling stockholder that have a lesser value"; and (2) "the exchange causes an  
22 increase in the percentage of the outstanding shares owned by the controlling stockholder, and a  
23 corresponding decrease in the share percentage owned by the public (minority) shareholders."  
24 *Gentile*, 906 A.2d at 100; *see also El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248,  
25 1263-64 (Del. 2016).

26 **A. Potashner Was Not a Controller of Parametric**

27 A stockholder is a controller where: "the stockholder (1) owns more than 50% of the  
28 voting power of a corporation or (2) owns less than 50% of the voting power of the corporation

1 but *exercises control* over the business affairs of the corporation.” *Sheldon v. Pinto Tech.*  
2 *Ventures, L.P.*, 220 A.3d 245, 251 (Del. 2019) (internal citation omitted). “[D]emonstrating the  
3 kind of control required to elevate a minority [stockholder] to controller status is ‘not easy.’” *In*  
4 *re Rouse Prop., Inc.*, C.A. No. 12194, 2018 WL 1226015, at \*11 (Del. Ch. Mar. 9, 2018). A  
5 minority shareholder can only constitute a controller where he has “such formidable voting and  
6 managerial power that [he], as a practical matter, [is] no differently situated than if [he] had  
7 majority voting control.” *In re PNB Holding Co. S’holders Litig.*, No. Civ. A. No. 28, 2006 WL  
8 2403999, at \*9 (Del. Ch. Aug. 18, 2006). Importantly, even “stockholders with very potent clout  
9 have been deemed, in thoughtful decisions, to fall short of the mark.” *Id.* at \*9. The Nevada  
10 Supreme Court extended this analysis to what it deemed a “controlling director.” *Parametric*,  
11 133 Nev. at 429, 401 P.3d at 1109. Thus, if Parametric did not have a “controlling stockholder  
12 or director” pre-merger, there is no equity expropriation claim and the Court should enter  
13 judgment against Plaintiff and for Defendants.

14 1. Potashner Did Not Have Actual Control of Parametric

15 The evidence adduced at trial has demonstrated that Potashner never held “more than  
16 50% of the voting power” in Parametric. In fact, Potashner did not own a single share of  
17 Parametric stock at the time of the shareholder vote. Potashner’s equity interest in Parametric  
18 was composed exclusively of stock options, which were not entitled to any shareholder vote.  
19 (See PX-244 at 47-48 (listing Potashner as having 417,500 options to purchase Parametric  
20 stock).) As of the record date of November 11, 2013, Potashner owned exactly none of the  
21 6,837,321 outstanding shares in the pre-merger Parametric entitled to vote on the merger. (*Id.*  
22 at 49.) Indeed, when Potashner asked whether his position, composed entirely of “options not  
23 shares,” was entitled to vote on the merger, Parametric’s CFO Jim Barnes responded “[n]o votes  
24 by you” and reminded Potashner that he would “not receive proxies.” (DX-925 at 1.)

25 It is impossible for Potashner to have been a stockholder of Parametric—let alone a  
26 controlling stockholder—if Potashner did not own any voting stock in the Company. Indeed,  
27 even Plaintiff’s Managing Member Adam Kahn agreed with the commonsense proposition:  
28

1 MR. KOTLER: ... Would you agree with me that a controlling  
2 stockholder has to own at least one voting share or not?

3 MR. KAHN: Well, they would not be a shareholder if they did not  
4 own – so, yes, I would agree with you that a controlling shareholder  
5 must own at least one share.

6 (Trial Tr. Day 1 at 144:24-145:4.) Defendants are aware of no authority granting controller status  
7 to a director who owned no voting shares in the company he is alleged to have controlled.

8 Plaintiff has failed to meet its burden at trial to satisfy the threshold requirement of an  
9 equity expropriation claim—the existence of a controlling stockholder. Because Plaintiff has  
10 introduced no evidence to the contrary, the Court should conclude that Potashner was not a  
11 controlling stockholder.

12 2. Potashner Did Not Have *De Facto* Control Over Parametric

13 In *Parametric*, the Nevada Supreme Court held that an equity expropriation claim can  
14 also proceed against a so-called “controlling director” who expropriates value from the public  
15 stockholders. *Parametric*, 133 Nev. at 429, 401 P.3d at 1109. Although the case law does not  
16 define what factors cause a director to become a “controlling director,” the circumstances where  
17 a director is found to exercise control over a company should mirror situations where a minority  
18 stockholder have been deemed to exercise controller status.

19 Potashner did not exercise *de facto* control over Parametric.<sup>1</sup> Of course, Potashner, as  
20 Parametric’s Executive Chairman and practical CEO, participated extensively in the merger  
21 negotiations and the running of Parametric’s day-to-day business. But a director, like a minority  
22 stockholder, should be considered a controller only “through ‘a combination of potent voting  
23 power and management control such that the stockholder could be deemed to have effective  
24 control of the board without actually owning a majority of stock.’” *In re Tesla Motors, Inc.*  
*S’holder Litig.*, C.A. No. 12711, 2020 WL 553902, at \*4 (Del. Ch. Feb. 4, 2020) (quoting *Corwin*

25 <sup>1</sup> No evidence has been presented at trial that Potashner held or exercised common indicia of  
26 control, such as the power to unilaterally: (i) elect new directors; (ii) cause Parametric to dissolve;  
27 (iii) cause Parametric to merge with another company; (iii) cash out public stockholders; (iv)  
28 amend Parametric’s Certificate of Incorporation; (v) sell all or substantially all of Parametric’s  
assets; and/or (vi) offer employment to anyone at Turtle Beach post-merger. (Trial Tr. Day 4, Vol.  
2 at 66:5-21.) Nor has Plaintiff introduced evidence that any of the other directors of Parametric  
were family members or subordinates of Potashner. (*Id.* at 66:22-67:1.)



1 v. *KKR Fin. Holdings LLC*, 125 A.3d 304, 307 (Del. 2015)); *Superior Vision Servs., Inc. v.*  
2 *ReliaStar Life Ins. Co.*, No. Civ. A. 1668, 2006 WL 2521426, at \*4 (Del. Ch. Aug. 25, 2006)  
3 (“[T]he focus of the inquiry has been on the *de facto* power of a significant (but less than  
4 majority) shareholder, which, when coupled with other factors, gives that shareholder the ability  
5 to dominate the corporate decision-making process.”).<sup>2</sup>

6 The proper focus of the “control” inquiry is the shareholder’s “domination of the board  
7 with regard to the transaction at issue.” *In re Crimson Expl. Inc. S’holder Litig.*, C.A. No. 8541,  
8 2014 WL 5449419, at \*12 (Del. Ch. Oct. 24, 2014); *see also id.* (a minority stockholder “will  
9 not be considered a controlling stockholder unless they actually control the board’s decisions  
10 about the challenged transaction”); *Superior Vision*, 2006 WL 2521426, at \*4 (controller inquiry  
11 is “focused on control of the board”). The supposed controller’s “power must be so potent that  
12 independent directors cannot freely exercise their judgment, fearing retribution from the  
13 controlling minority blockholder.” *Rouse*, 2018 WL 1226015, at \*11 (internal quotation marks  
14 omitted). The analysis “turn[s] on the power of the alleged controller to co-opt the board.”  
15 *Sciabacucchi*, 2017 WL 2352152, at \*17.

16 The evidence offered at trial by Parametric’s directors is unanimous: Potashner did not  
17 control the Parametric Board. Each director explained the various independent reasons he  
18 believed the merger with Turtle Beach was in the best interests of Parametric. *See Kaplan v.*  
19 *Centex Corp.*, 284 A.2d 119, 123 (Del. Ch. 1971) (rejecting arguments seeking to establish a  
20 controller where board “exercised independence of judgment and action in agreeing to the terms”  
21 of a transaction). The directors also recounted various instances where they defied Potashner’s  
22 wishes or otherwise successfully pursued a course of action adverse to Potashner. With the

23 \_\_\_\_\_  
24 <sup>2</sup> Potashner’s anxiety over the public stockholder’s approval of the merger, too, shows that he  
25 was not unilaterally driving the course of Parametric’s corporate future, but, instead, was  
26 concerned about whether the Parametric shareholders would approve the merger. (Trial Tr. Day  
27 4, Vol. 2 at 46:21-47:9.) Shareholders who exercise “control” do not typically worry about the  
28 outcome of either board or shareholder votes. *See, e.g., Omnicare, Inc. v. NCS Healthcare, Inc.*,  
818 A.2d 914, 937 (Del. 2003) (explaining where a controller or control group exists, general  
shareholder votes “are likely to become mere formalities”); *Solomon v. Armstrong*, 747 A.2d  
1098, 1116 n.55 (Del. Ch. 1999) (explaining “since the controlling shareholder can force through  
the proposed action/transaction by virtue of his control over the franchise, shareholder  
ratification is self-serving and unremarkable”), *aff’d*, 746 A.2d 277 (Del. 2000).

1 exception of Wolfe, who Plaintiff did not call during its case, none of the directors had any  
2 relationship with Potashner prior to when he joined the pre-merger Parametric Board. Moreover,  
3 all of the directors who provided testimony vehemently defended their independence and the  
4 independence of their fellow board members. *See Beam ex rel. Martha Stewart Living*  
5 *Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1052 (Del. 2004) (discussing director independence  
6 in the context of demand futility and noting a plaintiff is “plead facts that would support the  
7 inference that because of the nature of a relationship or additional circumstances other than the  
8 interested director's stock ownership or voting power, the non-interested director would be more  
9 willing to risk his or her reputation than risk the relationship with the interested director.”).

10 Honoré: Honoré was not named as a defendant in this opt-out action. Plaintiff has  
11 introduced zero evidence showing that Honoré had any pre-existing relationship with Potashner  
12 or was otherwise beholden to or under Potashner’s control. As a result, the evidence before the  
13 Court supports a finding that Honoré was independent of Potashner.

14 Kaplan: Kaplan was perhaps the Board member who was the most antagonistic to  
15 Potashner. He testified that he was initially against hiring Potashner as executive chairman of  
16 the company, voted against the initial grant of options in HHI to Potashner, voted to cancel  
17 Potashner’s options in HHI for no consideration, and rebuffed Potashner’s efforts to cause him  
18 to retire from his position as a director of the pre-merger Parametric. (Trial Tr. Day 5 at 20:21:4,  
19 69:3-16, 70:21-73:18, 84:15-85:5, 110:12-101:4.) Moreover, Kaplan performed his own  
20 financial analysis of the merger and found that the exchange ratio negotiated by Parametric  
21 exceeded his own model of the expected contribution the pre-merger Parametric would provide  
22 to the combined company. (*Id.* at 81:19-83:7, 91:1-92.9 (Kaplan calculated that Parametric’s  
23 contribution to the joint company was 17.4%).) Kaplan shared this analysis with Board members  
24 Norris and Putterman. (*Id.* at 82:24-83:7.) Kaplan did not rely on Potashner when deciding to  
25 vote in favor of the merger and instead relied on Parametric’s CFO James Barnes and the advice  
26 of counsel when he voted in favor of the merger. (*Id.* at 63:24-64:11.)

27 Putterman: Putterman considered Potashner to be a bully and aggressive, but dismissed  
28 the threats as “noise.” The Board appointed Putterman, along with Wolfe, to negotiate the

1 cancellation of Potashner's HHI options. Putterman resisted Potashner's attempt to have him  
2 resign from the Parametric Board for a position as a director of the HHI subsidiary. (*Id.* at  
3 153:12-21.) Putterman also testified that the Board rejected Potashner's suggestion to have  
4 Wolfe resign from the pre-merger Company's audit committee. (*Id.* at 172:17-173:10.)  
5 Putterman strongly supported the merger with Turtle Beach after independently verifying Turtle  
6 Beach's ability to mass produce, distribute, and sell its headsets at locations such as Best Buy.  
7 (*Id.* at 118:14-120:3.) Putterman relied on Kaplan's financial analysis and on the advice of  
8 Barnes when voting to approve the merger. (*Id.* at 129:12-21.) Putterman also memorably  
9 testified that he would not be willing to risk his reputation during his Board service. (*Id.* at  
10 162:6-21 ("I mean, my reputation is my identity. That's why -- you know, my independence is  
11 my identity. It doesn't go for anything."))

12 Norris: Norris was the Company's founder, HyperSound inventor, and the Company's  
13 largest individual stockholder. (PX 244 at 47.) With the exception of Potashner and Wolfe, the  
14 Board was made up of Norris' friends and acquaintances. (Trial Tr. Day 6, Vol. 1 at 47:6-47:18.)  
15 Norris affirmed that he strongly wanted to do the merger with Turtle Beach and that the Board  
16 was fiercely independent, which caused friction with Potashner. (*Id.* at 37:23-39:1.) Norris also  
17 ignored and rejected Potashner's threat to replace the board causing Potashner to back down.  
18 (Trial Tr. Day 5, Vol. 1 at 66:7-67:5.)

19 Wolfe: Wolfe has not yet testified. Wolfe was initially brought to the Board by Potashner.  
20 Although Parametric's directors were initially suspicious of Wolfe's independence, after  
21 interacting with Wolfe they came to recognize that he acted independently of Potashner. (Trial  
22 Tr. Day 5, Vol. 1 at 124:9-125:6; Trial Tr. Day 6, Vol. 1 at 49:17-25.)

23 The Parametric directors were uniform in their independence from Potashner and, in  
24 general, often pushed back against his interests and sometimes aggressive management style  
25 where appropriate. To grant this motion, however, the Court need not conclude that all of  
26 Parametric's directors were independent of Potashner when they voted to approve the merger.  
27 *See Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev. 369, 376, 399 P.3d 334, 342  
28 (2017) (observing that the business judgment rule applies to business decisions made by

individual directors and the board as a collective body). Only an independent majority is required. As Plaintiff has failed to meet his burden to show that Potashner controlled at least four of Parametric's Board members when they voted to approve the merger, the Court should grant the motion and enter judgment in favor of defendants in this action.

**B. No Equity Was Expropriated from Parametric**

Plaintiff has also failed to establish the second threshold element of its equity expropriation claim: that the transaction at issue effectuated "an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders." *Gentile*, 906 A.2d at 100 (emphasis added); *see also Parametric*, 133 Nev. at 429, 401 P.3d at 1109. No evidence supports a conclusion that Potashner expropriated economic or voting power from the legacy Parametric shareholders to himself or any affiliated entity.<sup>3</sup>

As a preliminary matter, "[a] transaction does not fit within the *Gentile* paradigm if the controller itself is diluted by that transaction." *Almond v. Glenhill Advisors LLC*, C.A. No. 10477, 2018 WL 3954733, at \*28 (Del. Ch. Aug. 17, 2018), *aff'd* 224 A.3d 200 (Del. 2019); *see also Daugherty v. Dondero*, C.A. No. 2019-0101, 2019 WL 4740089, at \*3 (Del. Ch. Sept. 27, 2019) (same). Here, the evidence presented at trial shows that the amount of outstanding equity (including shares, options and warrants) held by the pre-merger stockholders remained the same before and after the merger. (*See* DX-756 at 1-2; DX-754 at 7 (listing 6,769,051 shares, 1,365,354 options and 186,864 warrants belonging to the pre-merger Parametric stockholders both pre-transaction and post-transaction).) No pre-merger equity holder of Parametric was issued additional equity as a result of the merger. And no pre-merger equity holder of Parametric was diluted any differently than any other equity holder.

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<sup>3</sup> No evidence has been adduced at trial that Potashner (or anybody else at Parametric) had any pre-existing relationship with Turtle Beach. As a result, this case does not fit the paradigm of an equity expropriation where a controlling stockholder appropriates the benefit of an expropriation after transferring the equity expropriated to a third party. *See Gatz v. Ponsoldt*, 925 A.2d 1265, 1279-1280 (Del. 2007) (discussing a two-step transaction where a controller expropriates equity to himself and then immediately transfers such equity to a third party for the benefit of the controller).

Potashner's stake in Parametric was diluted by the merger just like every other Parametric equity holders. Pre-merger, Potashner held a 5.8% ownership interest in Parametric, composed entirely of stock options. (PX-244 at 47.) When Parametric issued an 81% controlling interest to the shareholders of VTBH pursuant to the terms of the merger, Potashner's position, like those of every pre-merger Parametric shareholder, was diluted. In fact, Plaintiff cannot contest that Potashner's stake in Parametric was diluted far worse than the typical pre-merger Parametric shareholder, given that, as a result of the merger, Potashner lost all his options in HHI for no additional consideration. In addition, Potashner's ultimate position with respect to his Parametric equity interest was also much worse when compared to the public stockholders' position because Potashner was a party to a lock-up agreement that prevented him from selling any Parametric stock for six months following the closing of the merger. (PX 244 at 88.) When the dust ultimately settled, Potashner's stock options in Parametric expired worthless—meaning that his equity stake in the Company was ultimately reduced to 0% as a result of the merger. (Trial Tr. Day 4, Vol. 2 at 117:15-120:6.)

That Potashner received a severance payment and a seat on the combined company's board after the merger's close makes no difference. Those two "benefits" were not the "economic and voting power" once owned by the legacy Parametric shareholders, let alone in any way related to the dilution the merger caused to those shareholders' stakes in Parametric. *See Klein v. H.I.G. Cap., LLC*, C.A. No. 2017-0862, 2018 WL 6719717, at \*8 (Del. Ch. Dec. 19, 2018) (holding case did not involve "the type of transfer of economic value normally contemplated in a *Gentile* claim" because benefit the controller allegedly received for inadequate consideration was a security not held by all shareholders); *Almond*, 2018 WL 3954733, at \*28 ("As a mathematical matter, for a transaction to transfer economic and voting power to Glenhill disproportionately, Glenhill would need to receive in that transaction a percentage of the security to be issued that exceeds the percentage of economic and voting power Glenhill already held in the Company immediately before that transaction. Otherwise, the transaction either would be dilutive to Glenhill or would maintain its percentage ownership." (emphasis in original)). Indeed, the evidence shows that the severance clause in Potashner's employment agreement was

1 negotiated with the Board prior to the commencement of negotiations with Turtle Beach and  
2 would have been triggered upon any change of control, not just the merger with Turtle Beach.  
3 (DX 504; Trial Tr. Day 4 Vol. 1 at 14:17-16:10.)<sup>4</sup>

4 In sum, Plaintiff has failed to meet its burden to show that equity was expropriated from  
5 the public stockholders. Thus, for this additional independent reason, Defendants are entitled to  
6 judgment.

7 **C. The Court Need Only Address Whether Plaintiff Has Met Its Burden**  
8 **Regarding “Actual Fraud” If There Is Evidence To Support an Equity**  
9 **Expropriation Claim**

NRS 78.211(1) provides as follows:

10 The board of directors may authorize shares to be issued for  
11 consideration consisting of any tangible or intangible property or  
12 benefit to the corporation, including, but not limited to, cash,  
13 promissory notes, services performed, contracts for services to be  
14 performed or other securities of the corporation. The nature and  
15 amount of such consideration may be made dependent upon a  
16 formula approved by the board of directors or upon any fact or event  
17 which may be ascertained outside the articles of incorporation or the  
18 resolution providing for the issuance of the shares adopted by the  
19 board of directors if the manner in which a fact or event may operate  
20 upon the nature and amount of the consideration is stated in the  
21 articles of incorporation or the resolution. The judgment of the board  
22 of directors as to the consideration received for the shares issued is  
23 conclusive in the absence of actual fraud in the transaction.

(emphasis added.) In other words, NRS 78.211(1) establishes a conclusive presumption that the  
Board’s judgment with respect to the share issuance to Turtle Beach as a result of the merger must  
be respected in the absence of fraud.

What NRS 78.211(1) does not address, however, is whether shareholders have direct  
standing to assert an equity dilution claim. As is clear from *Parametric*, the only direct claim

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<sup>4</sup> That Plaintiff’s claim is a general, non-direct equity dilution claim is confirmed by the  
testimony of its expert J.T. Atkins. Defendants incorporate by reference the arguments raised in  
the Rule 52(c) motion on damages filed concurrently with this motion to show that Plaintiff has  
failed to meet its burden to show expropriation. The derivative nature of Plaintiff’s claims is  
further confirmed by the fact that its damages are based on the assumption that Parametric was  
harmd as a result of Potashner’s alleged decision to defer Parametric’s licensing efforts in favor  
of the merger with Turtle Beach. (Trial Tr. Day 2, Vo. 1 at 24:13-25:15.) Under binding Nevada  
precedent, allegations that “officers, directors, or majority shareholders mismanaged the  
corporation resulting in a loss of revenue” can only support a derivative claim. See *Cohen v.*  
*Mirage Resorts, Inc.*, 119 Nev. 1, 21, 62 P.3d 720, 734-735 (2003) (“This is harm to the  
corporation, shared by all stockholders and not related to an individual stockholder.”)

1 available to stockholders in connection with a board of director's decision to issue equity is an  
2 equity expropriation claim. *See Parametric*, 133 Nev. at 428-429, 401 P.3d at 1109. Indeed,  
3 footnote 15 in *Parametric* read in context with the sentence giving rise to that footnote is clear  
4 that the only "direct equity dilution claim" available to stockholders is a claim for equity  
5 expropriation. *Id.*, 133 Nev. at 429, 401 P.3d at 1109. If Plaintiff, who is proceeding in this  
6 action directly, has not established the pre-requisites of an equity expropriation claim of (i) a  
7 controlling stockholder or director, and (ii) the expropriation of equity by that controlling  
8 stockholder or director, then Plaintiff's claims necessarily fail irrespective of whether Plaintiff  
9 has met its burden to rebut the presumption in favor of directors set forth in NRS 78.211(1).

10 In any event, Plaintiff has failed to establish that any directors committed actual fraud in  
11 connection with the issuance of shares to Turtle Beach in connection with the merger—let alone  
12 that a majority of the Board committed actual fraud. Plaintiff has not identified a single portion  
13 of the Proxy that was misstated or proved that the directors were aware of any Turtle Beach  
14 financial numbers other than those disclosed in the Proxy. Thus, for this additional reason, the  
15 Court should grant Defendants' motion.

16 **IV. CONCLUSION**

17 Based upon the foregoing, Defendants respectfully request that this Court enter judgment  
18 on partial findings pursuant to NRCP 52(c) in favor of Defendants and against Plaintiff on  
19 Plaintiff's equity expropriation breach of fiduciary duty claim.

20 DATED this 24th day of August, 2021

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 24th day of August 2021, a true and correct copy of the foregoing **DEFENDANTS' MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT - EX PARTE APPLICATION FOR ORDER SHORTENING TIME AND ORDER THEREON** was served by the following method(s):

☒ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

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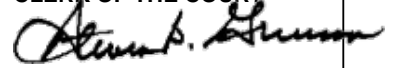
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**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

IN RE PARAMETRIC SOUND  
CORPORATION SHAREHOLDERS'  
LITIGATION

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

**HEARING REQUESTED**

This Document Related To:  
ALL ACTIONS

**DEFENDANTS' MOTION FOR  
JUDGMENT ON STANDING PURSUANT  
TO NRCP 52(C)**

Defendants VTB Holdings, Inc., Kenneth Potashner, Elwood Norris, Seth Putterman, Robert Kaplan, Andrew Wolfe, and Specially Appearing Defendants Stripes Group, LLC, SG VTB Holdings, LLC, Juergen Stark, Kenneth Fox, by and through their counsel of record and pursuant to NRCP 52(c), move for judgment in their favor on all causes of action in Plaintiff's Complaint on the basis that Plaintiff lacks standing to bring the direct equity expropriation claim at issue in this matter. This Motion is based on the pleadings and papers on file, the following Memorandum of Points and Authorities, the Trial Transcripts cited herein, and any argument the Court may entertain on behalf of Defendants.

Dated: August 24, 2021

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

Nowhere in Plaintiff’s affirmative case did it present a single piece of evidence or testimony even suggesting, let alone proving, that any Assignor entered into an agreement with a third-party purchaser of their pre-Merger Parametric shares to preserve the Assignor’s right to assert direct or derivative equity dilution claims against Defendants before selling those pre-Merger Parametric shares to the third party. This is the precise basis upon which Plaintiff avoided a summary judgment ruling for lack of standing. *See* 6/14/2021 Hr’g Tr. 14:23-15:4 (denying summary judgment because “with respect to the standing issue, **here there was a preservation of rights that was actually done prior to the transfer of certain of the shares**.”). For that reason the standing motion has genuine issues of material fact.”) (emphasis added). Following the close of Plaintiff’s case in chief, no such “genuine issues of material fact” exist.

It is undisputed that Plaintiff has the burden to establish its own standing in this case. Further, *Urdan v. WR Capital Partners, LLC*, 244 A.3d 668, 678 (Del. 2020) makes clear that Plaintiff’s Assignors lost any standing they otherwise might have had if they sold their Parametric stock without preserving their legal rights in an agreement with the buyer. Plaintiff offered no evidence that, at the time of their assignments, any Assignor continued to hold the any of the shares of Parametric stock they held on the date of the Merger. Plaintiff also offered no evidence that any Assignor executed some “preservation of rights” with a third-party buyer before selling their stock to that buyer. The factual record is no longer in dispute. Under *Urdan*, Plaintiff has failed to demonstrate that any Assignor had standing to assert an equity expropriation claim at the time of his or her assignment to Plaintiff, and thus Plaintiff, itself, lacks standing to assert its present equity expropriation claim on behalf of any Assignor.

### **II. LEGAL ARGUMENT**

#### **A. Legal Standard**

“If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that

1 issue.” NRCP 52(c). “[I]n entering a Rule 52(c) judgment, the trial judge is not to draw any special  
2 inferences in the nonmovant’s favor; since it is a nonjury trial, the court’s task is to weigh the  
3 evidence.” *Certified Fire Prot. Inc. v. Precision Constr., Inc.*, 128 Nev. 371, 377, 283 P.3d 250,  
4 254 (2012) (internal citations and quotations omitted) (quoting Robert E. Jones et al., RUTTER  
5 GROUP PRACTICE GUIDE: FEDERAL CIVIL TRIALS AND EVIDENCE § 17:92 (2011) for the proposition  
6 that “[b]ecause the court acts as the factfinder when ruling on a [motion] for judgment on partial  
7 findings, it need not consider the evidence in a light favorable to the nonmoving party....”).  
8 “Where a question of fact has been determined by the trial court, [the Nevada Supreme Court] will  
9 not reverse unless the judgment is clearly erroneous and not based on substantial evidence.” *Id.*  
10 (quoting *Kockos v. Bank of Nevada*, 90 Nev. 140, 143, 520 P.2d 1359, 1361 (1974)).

11 **B. Plaintiff Failed To Meet Its Burden Of Proving That The Assignors Preserved Their**  
12 **Right To Sue When Selling Their Parametric Stock Prior To Assigning Their Claims**  
13 **To Plaintiff.**

14 It is Plaintiff’s burden to establish that it has standing to assert its claims. *Nevada Recycling*  
15 *& Salvage, Ltd. v. Reno Disposal Co.*, 134 Nev. 463, 466-67, 423 P.3d 605, 607-08 (2018)  
16 (affirming summary judgment in defendants’ favor because plaintiffs failed to produce sufficient  
17 evidence of standing). Plaintiff was not a shareholder of Parametric and has no independent  
18 standing to assert any claim set forth in the Complaint. To the contrary, it exclusively asserts claims  
19 purportedly assigned to it by former shareholders of Parametric (the “Assignors”) in April 2020.  
20 See PX 475. The Assignors, however, could not assign any claim to Plaintiff in April 2020 that  
21 they did not have standing to assert themselves at that time. Thus, Plaintiff must establish that the  
22 Assignors had standing to assert the claims at issue in April 2020 in order for such standing to have  
23 passed to Plaintiff.

24 Any right the Assignors ever might have had to assert a claim against Defendants arises out  
25 of their ownership of stock in Parametric on the date of the merger, January 15, 2014. As clarified  
26 by the Delaware Supreme Court’s ruling in *Urdan*, longstanding principles of shareholder litigation  
27 dictate that “dilution claims, whether direct”—like those asserted by Plaintiff here—“derivative, or  
28 a combination of the two” arising from the ownership of stock “are not claims personal to the

1 stockholder.” 244 A.3d at 678. Accordingly, shareholders forfeit any right to pursue such claims  
2 in litigation when they sell their stock because the right to assert such a claim passes to the purchaser  
3 of the stock because when a purchaser acquires a share of common stock he “acquires all rights in  
4 [that] security that the transferor had or had power to transfer.” *Id.* at 677. The only way for a  
5 shareholder to sell the stock and retain the right to assert a legal claim is to expressly reserve the  
6 right to sue at the time the stock is sold. *Id.* Thus, the Assignors could not assign any claim to  
7 Plaintiff in April 2020 if (i) they sold their stock prior to April 2020, and (ii) they failed to expressly  
8 preserve their right to sue when those sales occurred. The evidence is now clear that both of these  
9 predicates for Plaintiff’s lack of standing are true.

10 In denying Defendants’ Second Motion for Summary Judgment, this Court ruled as follows:  
11 “With respect to the standing issue, **here there was a preservation of rights that was actually**  
12 **done prior to the transfer of certain of the shares.** For that reason, the standing motion has  
13 genuine issues of material fact. While the Court may ultimately determine that there are problems  
14 with the transfer agreements that were entered into, I am not going to make that at this stage under  
15 the summary judgment standard.” 6/14/2021 Hr’g Tr. 14:23-15:4 (emphasis added).

16 Trial now has confirmed that a “preservation of rights . . . prior to the transfer of certain of  
17 the shares” never occurred. Plaintiff did not present a single piece of evidence or a single line of  
18 testimony suggesting otherwise. To the contrary, the representative for Assignor IceRose Capital  
19 testified that it would be extremely unlikely for any Assignor to have executed such a preservation  
20 of rights. When asked directly about selling stock with any sort of reservation of legal rights, the  
21 representative for Assignor IceRose Capital testified that the Assignors “did not transfer the shares  
22 with any sort of right.” 8/16 Tr. at 165:13-15. Each of the other Assignors to testify concurred that  
23 he sold his pre-Merger Parametric shares in to the open market without any sort of reservation of  
24 rights agreement, i.e., with “no strings attached.” *See* 8/17 PM Tr. at 78:15-18; 8/23 AM Tr. at  
25 72:20-73:4; 102:2-6; 8/23 PM Tr. at 20:13-22; 37:9-18.

26 In short, Plaintiff presented no evidence of the required preservation of rights it led this  
27 Court to believe existed.

28

**C. Plaintiff Has Presented No Evidence Of Any Assignor Still Owning Shares That It Owned On The Date Of The Merger At The Time Of Their Assignment.**

Because the Assignors did not preserve any rights before selling their stock, the only way they could have had standing at the time of their assignments to assert their equity expropriation claim arising out of the merger is if at the time they assigned their claims to Plaintiff, they still held the specific shares of Parametric stock that they held on the date of the merger. Plaintiff has not met its burden of making such a showing.

For all Assignors except IceRose, the undisputed testimony is that they each sold all of their Parametric shares prior to their assignment. *See* 8/17 PM Tr. at 77:14-20; 8/23 AM Tr. at 70:24-71:6; 72:11-14; 100:17-21; 101:6-19; 8/23 PM Tr. at 20:6-8; 37:1-4. Plaintiff presented no evidence to the contrary.

For IceRose, Adam Kahn (the representative for IceRose) testified that he did not know if IceRose continued to hold the specific shares of stock it held on January 15, 2014 (“Original Shares”) when IceRose assigned its purported claims to Plaintiff. Kahn agreed that a determination of whether he held Original Shares at the time of his assignment would depend on whether his broker used FIFO (first in, first out) or LIFO (last in, first out) procedures for selling stock. 8/16 Tr. at 175:5-12. He testified he only could be certain that he still held Original Shares at the time of his assignment if his broker used LIFO. *Id.* This statement is correct, as the brokerage statement confirm that Kahn sold all of his Original Shares—despite the ambiguity surrounding the number of Original Shares actually owned—by the end of 2014 if FIFO was used. *See* Exs. PX 410; DX 1071. But Kahn clarified that he did not know if LIFO or FIFO was used: “I am not certain how it was counted.” *Id.* at 176:3. When asked a second time, he again stated “I don’t know what was used and I don’t know the number of shares that are sold in 2014.” *Id.* at 177:2-3. Because Plaintiff presented no evidence that Kahn’s broker used LIFO instead of FIFO, Plaintiff has not met its burden of demonstrating that IceRose still had Original Shares at the time of his assignment.<sup>1</sup>

<sup>1</sup> Publicly available records from IceRose’s broker specify that FIFO is the “default method” that will apply absent instruction to use something else. *See* Interactive Brokers, *User’s Guide: Tax Optimizer* (available at [https://guides.interactivebrokers.com/ibto\\_pdf/ibtoguide.pdf](https://guides.interactivebrokers.com/ibto_pdf/ibtoguide.pdf)) at 5 (“FIFO is the default method that will be applied if you do not choose another method. Under FIFO, the sale is matched with the earliest purchased lot or lots available.”). The IRS follows the same default procedure. *See* Internal Revenue Service, Publication 550 (Cost Basis) (available at

1 Accordingly, Plaintiff failed to demonstrate standing.

2 **III. CONCLUSION**

3 For the foregoing reasons, the Court should grant judgment in favor of all Defendants and  
4 against Plaintiff on all counts on the basis that Plaintiff lacks standing to bring the direct equity  
5 expropriation claim at issue in this matter.

6 Dated: August 24, 2021

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21 *LLC, SG VTB Holdings, LLC, Kenneth Fox, and*  
22 *Juergen Stark*

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25 https://www.irs.gov/publications/p550#en\_US\_2020\_publink100010385; IRS FAQs (available at  
26 https://www.irs.gov/faqs/capital-gains-losses-and-sale-of-home/stocks-options-splits-  
27 traders/stocks-options-splits-traders-1) (“If you can’t adequately identify the shares you sold and  
28 you bought the shares at various times for different prices, the basis of the stock sold is: The basis  
of the shares you acquired first, then the basis of the stock later acquired, and so forth (first-in first-  
out).”).

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**CERTIFICATE OF SERVICE**

On the date below, as an employee of Snell & Wilmer L.L.P., I certify that I served a copy of the foregoing **DEFENDANTS' MOTION FOR JUDGMENT ON STANDING PURSUANT TO NRCP 52(C)** via e-service through Odyssey to the email addresses listed below:

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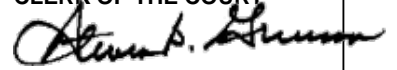
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**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

IN RE PARAMETRIC SOUND  
CORPORATION SHAREHOLDERS'  
LITIGATION

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

**HEARING REQUESTED**

This Document Related To:  
ALL ACTIONS

**DEFENDANTS' MOTION FOR  
JUDGMENT FOR LACK OF EVIDENCE  
ON *GENTILE* DAMAGES PURSUANT TO  
NRCP 52(C)**

Defendants VTB Holdings, Inc., Kenneth Potashner, Elwood Norris, Seth Putterman, Robert Kaplan, Andrew Wolfe, and Specially Appearing Defendants Stripes Group, LLC, SG VTB Holdings, LLC, Juergen Stark, Kenneth Fox, by and through their counsel of record and pursuant to NRCP 52(c), move for judgment in their favor on the second cause of action in Plaintiff PAMTP LLC's ("Plaintiff") Complaint because Plaintiff has not met its burden of proving any valid measure of damages. This Motion is based on the pleadings and papers on file, the following Memorandum of Points and Authorities, the Trial Transcripts cited herein, and any argument the Court may entertain on behalf of Defendants.

Dated: August 24, 2021

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

This Court already has ruled that the only measure of damages permitted for Plaintiff's equity expropriation claim is that set forth in *Gentile v. Rossette*, 906 A.2d 91, 103 (Del. 2006). Although the parties apparently still dispute the precise contours of an equity expropriation claim under *Gentile*,<sup>1</sup> they are in full agreement that (1) Plaintiff must prove that someone expropriated equity from minority shareholders, and (2) the measure of damages that Plaintiff must prove is the value of the expropriated equity in accordance with *Gentile*. Despite the Court's clear ruling, Plaintiff rested its case without putting forth any evidence in support of the required measure of damages. To the contrary, Plaintiff's damages expert, J.T. Atkins, testified that the sole calculation he is offering in this action is not a measure of equity expropriation damages under *Gentile*. In fact, he admitted that he did not calculate any amount that anyone expropriated from Parametric's minority shareholders. Instead, he only attempted to calculate an amount that all shareholders lost "into the ether."

Because Plaintiff has failed to meet its burden of proving any valid measure of damages for an equity expropriation claim, judgment should be entered in Defendants' favor.

### **II. LEGAL ARGUMENT**

#### **A. Legal Standard**

"If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue." NRCP 52(c). "[I]n entering a Rule 52(c) judgment, the trial judge is not to draw any special inferences in the nonmovant's favor; since it is a nonjury trial, the court's task is to weigh the evidence." *Certified Fire Prot. Inc. v. Precision Constr., Inc.*, 128 Nev. 371, 377, 283 P.3d 250, 254 (2012) (internal citations and quotations omitted) (quoting Robert E. Jones et al., RUTTER GROUP PRACTICE GUIDE: FEDERAL CIVIL TRIALS AND EVIDENCE § 17:92 (2011) for the proposition

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<sup>1</sup> Defendants believe, consistent with *Gentile*, that the expropriation must be accomplished by a controlling shareholder. Plaintiff apparently believes that any equity issuance to an unaffiliated third-party will suffice.

1 that “[b]ecause the court acts as the factfinder when ruling on a [motion] for judgment on partial  
2 findings, it need not consider the evidence in a light favorable to the nonmoving party....”).  
3 “‘Where a question of fact has been determined by the trial court, [the Nevada Supreme Court] will  
4 not reverse unless the judgment is clearly erroneous and not based on substantial evidence.’” *Id.*  
5 (quoting *Kockos v. Bank of Nevada*, 90 Nev. 140, 143, 520 P.2d 1359, 1361 (1974)).

6 **B. This Court Already Has Ruled That The Only Measure Of Damages Plaintiff May**  
7 **Pursue Are Those Permitted Under *Gentile*.**

8 On August 4, 2021, this Court precluded Plaintiff from “introducing evidence or testimony  
9 at trial for which the sole purpose would be to support potential measures of damages other than  
10 those allowed under *Gentile*, 906 A.2d at 103.” Aug. 4, 2021 Order. In so ruling, this Court  
11 recognized that *Gentile* sets forth the legal standard for damages in an equity expropriation claim.  
12 Specifically, *Gentile* holds that such a claim exists only where a “minority shareholder” suffered a  
13 “harm” that “resulted from a breach of a fiduciary duty owed to them by the controlling shareholder,  
14 namely, not to cause the corporation to effect a transaction that would benefit the [controlling  
15 shareholder] at the expense of the minority shareholders.” *Gentile v. Rossette*, 906 A.2d 91, 103  
16 (Del. 2006). Accordingly, the only permissible measure of damages for such a claim is “equal to  
17 the fair value of the shares representing the overpayment” to the controlling shareholder in the  
18 transaction at issue. *Id.*

19 Previously, Plaintiff represented to this Court that its \$12.49 per share calculation would be  
20 its sole calculation of damages. *See* July 1, 2021 Pl. Opp. to Def. MIL to Exclude Evidence and  
21 Testimony Related to Irrelevant or Undisclosed Measures of Damages at 5. Plaintiff also made  
22 clear that its damages calculation would be supported by the testimony of its damages expert, J.T.  
23 Atkins. *See* Nov. 2, 2020 Pl. Initial Disclosures at 11 (“the calculation of damages in this type of  
24 action requires expert testimony”). Thus, it was Plaintiff’s burden at trial, consistent with *Gentile*,  
25 to demonstrate that Atkins’s \$12.49 per share damages calculation represents the value that a  
26 controlling shareholder expropriated from Parametric by forcing an “overpayment” to himself “at  
27 the expense of the minority shareholders.” The trial record now demonstrates that this amount has  
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1 nothing to do with any alleged “overpayment” to a controlling shareholder. Indeed, Atkins  
2 admitted that this amount is not a payment, let alone an overpayment, to anyone.

3 **C. Atkins Did Not Calculate Any Overpayment To A Controlling Shareholder**

4 Atkins testified that he was aware of this Court’s order in this action limiting Plaintiff’s  
5 damages to those set forth in *Gentile*. 8/17 AM Tr. at 54:18-23. He also testified about his  
6 familiarity, generally, with Delaware law. *Id.* at 54:8-14. And yet, Atkins admitted that he had  
7 never even read *Gentile*. *Id.* at 54:18-55:6. More importantly, he testified that he had “no idea”  
8 whether the damages opinion he prepared for this matter—the only one Plaintiff is offering—is  
9 consistent in any way with *Gentile*. *Id.*

10 In fact, Atkins’ calculation is not consistent with *Gentile*. He conceded that he is “not  
11 offering an opinion” that his \$12.49 per share calculation represents any overpayment by the  
12 company to a controlling shareholder. *Id.* at 54:2-7. Indeed, although the “harm” that was  
13 recognized in *Gentile* was some benefit received by a controlling shareholder “at the expense of  
14 the minority shareholders,” Atkins conceded that he did not calculate any amount of damages  
15 suffered only by some minority shareholder group, but instead had calculated damages he believes  
16 are applicable to all Parametric shareholders. *See* 8/17 PM Tr. at 14:11-14 (“My opinion is that  
17 there was damages to the whole – the whole shareholder group”). Put simply, Atkins did not testify  
18 as to any amount that a controlling shareholder expropriated from the minority shareholders.  
19 Instead he testified as to the amount he believes that was lost by all shareholders, regardless of  
20 whether any of them held control over Parametric.

21 **D. Atkins Did Not Calculate Any Overpayment To Anyone.**

22 Even though Plaintiff agrees that it must establish, at minimum, that equity was  
23 expropriated by someone (*see supra* note 1), it was defense counsel who asked Atkins the central  
24 question relevant to damages in this case: “this \$12.49 a share that you claim as damages, where  
25 did the money go?” 8/17 PM Tr. at 11:15-16. His answer: “**The money . . . went into the ether.**”  
26 *Id.* at 11:19-20. In other words, Atkins conceded that he had not calculated any value purportedly  
27 expropriated from Parametric by anyone.

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1 This fatal admission was no errant piece of testimony. Atkins then elaborated at length that  
2 his damages calculation represents a purported amount of value that “just went into the ether,  
3 because what happened was the company should have been worth 24.43. And by Mr. Potashner  
4 and whoever else was helping him, changed this business model, they managed to put the company  
5 in a fairly rapid downward trajectory, and as a consequence, that money disappeared.” *Id.* at 11:25-  
6 12:5. Atkins testified conclusively that no one stole any equity from Parametric, and therefore his  
7 damages calculations are not an effort to calculate the value of any stolen equity: “When you ask  
8 that question, what you’re saying is, is this – **did this money get stolen? No.** This money – bad  
9 decisions. These people were acting in their interest, not in the interest of the company, **caused**  
10 **this money to lose value. That’s what happened. That’s what [the] damages are.**” *Id.* at 13:1-  
11 5 (emphasis added). When asked again who received the damages that he had calculated, Atkins  
12 testified again that “no one has it.” *Id.* at 14:7-14.

13 By the repeated admissions of its own damages expert, Plaintiff has failed to meet its burden  
14 of proving any amount that was stolen or expropriated from Parametric’s shareholders by anyone.  
15 Plaintiff instead presents only an amount that was purportedly lost “into the ether.” While such  
16 damages, if supported by evidence, might be available for a derivative dilution or corporate waste  
17 claim—each of which was settled in the class proceedings in which Atkins prepared his opinion—  
18 such damages are not available under *Gentile* for a direct equity expropriation claim. Accordingly,  
19 judgment in Defendants’ favor on Plaintiff’s equity expropriation claim is warranted.

### 20 III. CONCLUSION

21 Plaintiff’s own expert admits that he has not even attempted to calculate damages consistent  
22 with *Gentile v. Rossette*, which this Court already has ruled provides the only measure of damages  
23 for Plaintiff’s equity expropriation claim. Plaintiff has presented no other evidence of damages.  
24 As such, judgment in the Defendants’ favor is now appropriate.

25 Dated: August 24, 2021

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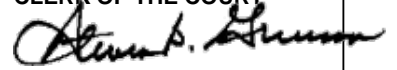
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**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

IN RE PARAMETRIC SOUND  
CORPORATION SHAREHOLDERS'  
LITIGATION

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

**HEARING REQUESTED**

This Document Related To:  
ALL ACTIONS

**SPECIALLY APPEARING DEFENDANTS  
JUERGEN STARK'S AND KENNETH  
FOX'S MOTION FOR JUDGMENT  
UNDER THE STATUTE OF  
LIMITATIONS PURSUANT TO NRCP  
52(C)**

Specially Appearing Defendants Juergen Stark and Kenneth Fox, by and through their counsel of record and pursuant to NRCP 52(c), move for judgment in their favor on the second cause of action in Plaintiff PAMTP LLC's ("Plaintiff") Complaint as barred by the statute of limitations. This Motion is based on the pleadings and papers on file, the following Memorandum of Points and Authorities, the Trial Transcripts cited herein, and any argument the Court may entertain on behalf of Defendants.

1 Dated: August 24, 2021

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14 *Specially Appearing Defendants Stripes Group,*  
15 *LLC, SG VTB Holdings, LLC, Juergen Stark, and*  
16 *Kenneth Fox*

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

Adam Kahn, one of Plaintiff's Managing Members, testified that "publicly available information" in 2014 told him everything he needed to know to assert claims against Defendants Juergen Stark and Kenneth Fox for aiding-and-abetting purported breaches of fiduciary duty by the Parametric Board of Directors in connection with the Parametric-Turtle Beach merger—the same claims asserted today—based on what that "publicly available information" told him about "what happened in that period of time around the merger." Indeed, Kahn retained lawyers in 2014 to draft such a complaint against Stark and Fox (and the other Defendants here), which he sent to Turtle Beach in August 2014.

But neither Kahn nor any other Assignor actually asserted such a claim in 2014. Instead, they waited six years before asserting such a claim. In making this choice, the Assignors allowed their potential claims against Stark and Fox to become untimely. Stark and Fox respectfully request judgment in their favor under NRCP 52(c) because the trial record now demonstrates conclusively that publicly available information in 2014 was more than sufficient to put Parametric shareholders on inquiry notice of aiding-and-abetting breach of fiduciary duty claims against Stark and Fox.

### **II. LEGAL ARGUMENT**

#### **A. Legal Standard**

"If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue." NRCP 52(c). "[I]n entering a Rule 52(c) judgment, the trial judge is not to draw any special inferences in the nonmovant's favor; since it is a nonjury trial, the court's task is to weigh the evidence." *Certified Fire Prot. Inc. v. Precision Constr., Inc.*, 128 Nev. 371, 377, 283 P.3d 250, 254 (2012) (internal citations and quotations omitted) (quoting Robert E. Jones et al., RUTTER GROUP PRACTICE GUIDE: FEDERAL CIVIL TRIALS AND EVIDENCE § 17:92 (2011) for the proposition that "[b]ecause the court acts as the factfinder when ruling on a [motion] for judgment on partial findings, it need not consider the evidence in a light favorable to the nonmoving party....").



1 “Where a question of fact has been determined by the trial court, [the Nevada Supreme Court] will  
2 not reverse unless the judgment is clearly erroneous and not based on substantial evidence.” *Id.*  
3 (quoting *Kockos v. Bank of Nevada*, 90 Nev. 140, 143, 520 P.2d 1359, 1361 (1974)).

4 **B. Plaintiff’s Assignors Have Been On Inquiry Notice Of Their Aiding-And-Abetting**  
5 **Breach Of Fiduciary Duty Claims Against Stark And Fox Since At Least 2014.**

6 In Nevada, a breach of fiduciary duty claim is subject to the three-year statute of limitations  
7 set forth in NRS 11.190, which applies to actions “for relief on the ground of fraud or mistake.” *In*  
8 *re AMERCO Derivative Litig.*, 127 Nev. 196, 228, 252 P.3d 681, 703 (2011) (applying three-year  
9 limitations period to breach of fiduciary duty claim). That three-year clock began to run, and  
10 Plaintiff’s claim against Fox and Stark thus began to accrue, when the Assignors knew “or, through  
11 the use of reasonable diligence, should have known of facts that would put a reasonable person on  
12 inquiry notice of his cause of action.” *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 252-53,  
13 277 P.3d 458, 462 (2012) (emphasis in original) (quoting *Massey v. Litton*, 99 Nev. 723, 728, 669  
14 P.2d 248, 252 (1983)). Inquiry notice exists when a plaintiff “should have known of facts that  
15 ‘would lead an ordinarily prudent person to investigate the matter further.’” *Id.* (quoting BLACK  
16 LAW DICTIONARY 1165 (9th ed. 2009)). “[T]hese facts need not pertain to precise legal theories  
17 the plaintiff may ultimately pursue, but merely to the plaintiff’s general belief that someone’s  
18 negligence may have caused his or her injury.” *Id.*

19 Here, however, the trial record demonstrates conclusively that the Assignors knew or could  
20 have known the “precise legal theories the plaintiff . . . ultimately pursue[d]” against Stark and Fox  
21 far longer than three years before they filed their complaint in May 2020. Indeed, one of the  
22 Assignors **actually asserted identical legal theories based on similar facts against Fox and**  
23 **Stark—discovered exclusively from publicly available sources—in a draft complaint he**  
24 **directed his lawyers to send to Fox and Stark in August 2014.**

25 Adam Kahn, one of Plaintiff’s Managing Members who appeared on behalf of Assignor  
26 IceRose Capital Management, testified at length that in view of his apparent dissatisfaction with  
27 the company, he followed “a certain playbook that’s used in special activist situations” in an effort  
28 to bully Turtle Beach into allowing him onto its board of directors. 8/16 Tr. at 186:24-187:11;

1 187:19-188:15. As part of that “playbook,” he retained the Kirkland & Ellis law firm to threaten  
2 litigation in 2014 against Stark and Fox (as well as several other defendants in this case) for breach  
3 of fiduciary duty and aiding-and-abetting breach fiduciary duty arising out of the Parametric-Turtle  
4 Beach merger—in other words, the same claims that presently are being tried. DX 952 is a letter  
5 from IceRose’s legal counsel to Turtle Beach’s legal counsel, attaching a draft complaint, with the  
6 statement that “absent a prompt amicable resolution, we intend to file the attached complaint.”<sup>1</sup>  
7 Kahn testified that he reviewed this draft complaint before allowing his attorney to communicate  
8 this threat to Turtle Beach. 8/16 Tr. 196:22-24. When asked whether the allegations in the  
9 complaint were “true and accurate to the best of [Kahn’s] knowledge at the time,” he responded  
10 “they were objectively true at the time, based on publicly available information.” 8/16 Tr. 196:22-  
11 197:9 (emphasis added). In other words, Kahn conceded that every allegation contained within  
12 that complaint was known or knowable in August 2014 based on publicly available information.

13 DX 952 demonstrates that public shareholders knew or could have known back in 2014 the  
14 very same facts underlying the claims that Plaintiff waited until May 2020 to assert against Stark  
15 and Fox. The draft complaint expressly names Stark and Fox (as well as Kenneth Potashner,  
16 Elwood Norris, Seth Putterman, Robert Kaplan, Andrew Wolfe, James Honore, SG VTB Holdings,  
17 LLC, and The Stripes Group) and asserts claims for “breach of fiduciary duty and aiding and  
18 abetting breach of fiduciary duty,” which are the exact same claims asserted here. The claims  
19 contemplated by Kahn and IceRose in DX 952 arise out of the same Merger that is at the heart of  
20 this lawsuit. Indeed, Kahn testified that his draft complaint contained “factual statements about  
21 what happened in that period of time around the merger.” 8/16 Tr. 208:18-23. Based on those  
22 purported “factual statements” about the Merger that Kahn had derived exclusively from public  
23 sources, Kahn alleged that the Parametric Board had breached their fiduciary duties to Parametric  
24 shareholders and further alleged that Stark and Fox had aided and abetted those breaches of  
25 fiduciary duty. DX 952 at 12-13. Kahn alleged explicitly that Stark and Fox were attempting to

26 <sup>1</sup> Kahn subsequently testified that this threat was a lie – he had no intention of ever filing this  
27 complaint. 8/16 Tr. 196:8-11. Whether or not the complaint was a genuine threat, a lie, or  
28 something in between (and Kahn’s testimony about his 2014 threats to Turtle Beach, Stark and Fox  
included each of these levels of mendacity), the draft complaint is nonetheless evidence of what  
Kahn knew (or believed he knew) at the time his threats were made.

1 obtain “their own windfall” while “the Parametric Board was negotiating a merger between  
2 Parametric and VTB.” *Id.* at 7. Kahn further alleged that Stark and Fox “were fully aware that  
3 [Turtle Beach] would merge with Parametric, that Parametric would become an obligor and  
4 guarantor of [Turtle Beach’s debt], and that they would control the resulting Company” but  
5 nonetheless “attempted to conceal” financial information about Turtle Beach from Parametric  
6 shareholders. *Id.* at 8. Those allegations are part of the same claim being tried here. *See, e.g.,*  
7 Compl. ¶¶ 11-14.

8 Additionally, trial has confirmed that Plaintiff cannot reasonably dispute that interested  
9 shareholders like Kahn would have been aware of the ongoing merger-related litigation against  
10 every Defendant other than Fox and Stark. Kahn testified that he conducts “thorough due  
11 diligence” on any investment that he makes and “follow[s] those investments through and through  
12 until [he’s] done with the investment.” 8/16 Tr. at 68:9-15. This due diligence included, at  
13 minimum, reading the proxy statement “in detail.” *Id.* at 110:23-111:3. The proxy statement issued  
14 in connection with the Parametric-Turtle Beach merger contained a detailed description of the  
15 ongoing litigation. PX 244 at 19-20. Kahn also testified that he knew “there’s a class action lawsuit  
16 filed in relation to almost every single merger” and that he “knew there was always ongoing class  
17 actions related to the merger.” 8/16 Tr. at 75:16-76:3. Kahn further testified that he knew how to  
18 locate documents from the public docket and, in fact, he did so here after he decided to pay more  
19 attention to the ongoing litigation. *Id.* at 76:12-13.

20 It is indisputable that IceRose and the other Assignors each was capable in 2013 and 2014  
21 of learning about the ongoing litigation against Turtle Beach. It is equally indisputable that IceRose  
22 and the other Assignors each was capable of determining the role Stark and Fox played in  
23 connection with the Merger since IceRose went so far as pleading and threatening aiding-and-  
24 abetting claims against Stark and Fox in 2014 based solely on publicly available information. Thus,  
25 the Assignors had inquiry or actual notice of their claims against Stark and Fox in 2014, which  
26 meant that they needed to file such claims by 2017. They chose not to do so. The fact that IceRose  
27 (and the other Assignors, apparently) chose not to “pay much of any attention to the class action

28 ///

1 until . . . 2019” (*id.* at 75:16-76:3) does not save his claims because actual notice is not required.  
2 *Winn*, 128 Nev. at 252-53.

3 At minimum, Kahn’s testimony and the evidentiary record, including DX 952, demonstrate  
4 that publicly available information in 2014 was more than sufficient to put Parametric shareholders  
5 on inquiry notice of their potential claims against Stark and Fox. Parametric shareholders were  
6 already litigating claims against Parametric’s directors and Turtle Beach at that point and  
7 Kahn/IceRose had no issue at all determining that there may also be a basis to assert similar claims  
8 against Stark and Fox based on publicly available information. IceRose and the other Assignors  
9 waited more than three years to file their claims against Stark or Fox, allowing their claims to  
10 expire. Such claims are barred by the statute of limitations and Plaintiff has presented no evidence  
11 to the contrary. Judgment in Stark and Fox’s favor is now appropriate.

12  
13 Dated: August 24, 2021

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**CERTIFICATE OF SERVICE**

On the date below, as an employee of Snell & Wilmer L.L.P., I certify that I served a copy of the foregoing **SPECIALLY APPEARING DEFENDANTS JUERGEN STARK'S AND KENNETH FOX'S MOTION FOR JUDGMENT ON STATUTE OF LIMITATIONS PURSUANT TO NRCP 52(C)** via e-service through Odyssey to the email addresses listed below:

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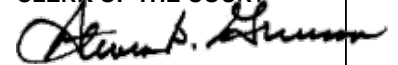
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**EIGHTH JUDICIAL DISTRICT COURT  
CLARK COUNTY, NEVADA**

IN RE PARAMETRIC SOUND  
CORPORATION SHAREHOLDERS'  
LITIGATION

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

**NON-DIRECTOR DEFENDANTS' TRIAL  
BRIEF RE: SECTION 14(A)**

This Document Related To:  
ALL ACTIONS

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**MEMORANDUM OF POINTS AND AUTHORITIES**

This is not a federal securities case. Plaintiff's Complaint does not allege violations of the federal securities laws, let alone Section 14(a) of the Securities Exchange Act of 1934, by any Defendant, especially the Non-Director Defendants. Nor could Plaintiff belatedly advance such a claim now, for the following settled legal reasons:

First, although no Nevada court has ruled on this issue, it is a settled matter of Delaware law that a third-party acquirer has "no duty, fiduciary or otherwise, to ensure that [a] proxy solicitation fully disclosed material facts to [the selling company's] shareholders." *Arnold v. Soc'y for Savs. Bancorp, Inc.*, 1995 WL 376919, at \*7 (Del. Ch. June 15, 1995), *aff'd*, 678 A.2d 533 (Del. 1996). This is true "[r]egardless of the role [the acquirer] played in the drafting of the [proxy] materials." *Id.* at \*8. The Non-Director Defendants are not aware of a single case in which an acquirer was held liable for omissions or misstatements in a target company's proxy solicitation materials—including any alleged failure to update financial projections.<sup>1</sup> This makes sense, given Section 14(a)'s purpose "is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation." *J.I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964), *abrogated on other grounds by Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). That law has no application to any of the Non-Director Defendants, because Section 14(a) applies only to persons who "solicit . . . any proxy or consent or authorization in respect of any security." 15 U.S.C. § 78n. There is no evidence that any Non-Director Defendant "solicit[ed]" any "proxy or consent authorization in respect of" the Parametric proxy statement at issue. The applicability of Section 14(a) is also limited here because that provision does not require issuers to include any forward-looking projections and, if such projections are provided, they are expressly protected by the "safe harbor" under the Private Securities Litigation Reform Act

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<sup>1</sup> Defendants have made this argument repeatedly to this Court and Plaintiff has never once disputed the accuracy of their position. *See, e.g., Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (holding a party that "does not dispute [the opposing party's] arguments" is "conceding the point"); *Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) ("failure to respond" to an argument in an "answering brief" constitutes an admission that the argument is correct); *see also* EDCR 2.20(e) ("Failure of the opposing party to serve and file written opposition may be construed as an admission that the motion and/or joinder is meritorious and a consent to granting the same.").

1 (“PSLRA”), 15 U.S.C. § 78u-5(c)(1)(A)(i). The safe harbor provides that an issuer cannot be held  
2 liable for a forward-looking statement that is “identified as a forward-looking statement, and is  
3 accompanied by meaningful cautionary statements identifying important factors that could cause  
4 actual results to differ materially from those in the forward-looking statement.” *Id.* Moreover,  
5 Section 14 does not require that proxy solicitations contain projections at all. Indeed, where a  
6 company issues projections for a point in time with sufficient cautionary language that they may  
7 not come true, it “certainly [has] no obligation to include additional *projections* based on potentially  
8 inaccurate assumptions about future price trends.” *Heinze v. Tesco Corp.*, 971 F.3d 475, 482 (5th  
9 Cir. 2020) (emphasis in original).

10 Second, putting aside inapplicable federal securities law, Delaware courts notably have  
11 been loathe to imply such duties to anyone other than issuers. *Cf. In re Rural Metro Corp.*  
12 *Stockholders Litig.*, 88 A.3d 54, 97 (Del. Ch. 2014) (“*Rural Metro*”), *aff’d RBC Capital Mkts., LLC*  
13 *v. Jervis*, 129 A.3d 816, 866 n.191 (Del. 2015). The *Rural Metro* line of cases have recognized a  
14 narrow exception where a third party owing a contractual obligation to a seller’s board of directors,  
15 such as the seller’s financial advisor, “knows that the board is breaching its duty of care and  
16 participates in the breach by misleading the board or creating the informational vacuum.” *Rural*  
17 *Metro*, 88 A.3d at 971. The Delaware Supreme Court has made clear that *Rural Metro* liability  
18 arises only where the third party has a contractual “obligation not to act in a manner that is contrary  
19 to the interests of the board of directors, thereby undermining the very advice that it knows the  
20 directors will be relying upon in their decision making process,” and explicitly warned courts not  
21 to “inappropriately expand” its “narrow holding.” *RBC Capital Mkts. LLC*, 129 A.3d at 866 n.191.  
22 Unlike financial advisors, third-party acquirers (like Turtle Beach here) do not have any  
23 obligation—whether contractual or fiduciary—to act in the best interests of the selling company,  
24 and thus *Rural Metro* does not apply to them. *See In re Comverge*, 2014 WL 6686570, at \*19  
25 (dismissing aiding-and-abetting claim against third-party acquirer because it “did not act in this  
26 case as a sort of ‘gatekeeper’ that the [seller’s] Board reasonably would have considered as having  
27 interests in line with those of [the seller]”). Rather, *Rural Metro* and its progeny each were based  
28 on “evidence of a conflict of interest diverting the advisor’s loyalties from its client, such that the

1 advisor . . . is being paid in some fashion something he would not otherwise get in order to assist  
2 in the breach of fiduciary duty.” *Id.* at \*18 (quoting *Rural Metro*, 88 A.3d at 100). No such  
3 situation exists here.

4 The only instance in which *Rural Metro* liability could even arguably attach to a third-party  
5 acquirer is when there is evidence demonstrating that the acquirer conspired with the seller’s  
6 financial advisor to keep the target’s board in the dark. *See, e.g., In re Del Monte Foods Co.*  
7 *S’holders Litig.*, 25 A.3d 813, 837 (Del. Ch. 2011) (finding acquirer liable because it conspired  
8 with target’s advisor and breached confidentiality contracts with target); *Chester Cty. Emps’. Ret.*  
9 *Fund v. KCG Holdings, Inc.*, 2019 WL 2564093, at \*19 (Del. Ch. June 21, 2019) (declining to  
10 dismiss aiding-and-abetting claim against acquirer where plaintiffs alleged conspiracy between  
11 acquirer and advisor). But even then, the focus of such a claim is on the alleged malfeasance of the  
12 advisor. Absent proof of a conspiracy with an unfaithful financial advisor, there is no basis for a  
13 *Rural Metro* claim against a third-party acquirer. *See Diabetes Research Restitution, LLC v.*  
14 *Wachtel*, 2017 WL 2492555, at \*18 (Cal. App. June 9, 2017) (rejecting aiding-and-abetting claim  
15 against acquirer absent evidence that an acquirer had “knowingly participated in the creation of a  
16 conflict of interest for the company’s financial advisor”). There certainly has been no such showing  
17 at trial.

18 DATED this 25 day of August, 2021.

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On the date below, as an employee of Snell & Wilmer L.L.P., I certify that I served a copy of the foregoing **NON-DIRECTOR DEFENDANTS' TRIAL BRIEF RE: SECTION 14(A)** via e-service through Odyssey to the email addresses listed below:

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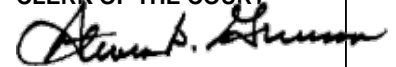
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**EIGHTH JUDICIAL DISTRICT COURT  
CLARK COUNTY, NEVADA**

IN RE PARAMETRIC SOUND  
CORPORATION SHAREHOLDERS'  
LITIGATION

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

This Document Related To:  
ALL ACTIONS

**OPPOSITION TO PLAINTIFF PAMTP  
LLC'S MEMORANDUM OF LAW  
REGARDING NRS 78.200 AND NRS 78.211**

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**MEMORANDUM OF POINTS AND AUTHORITIES**

After determining that the equity dilution claims that Plaintiff continues to assert today are derivative in nature, the Nevada Supreme Court remanded the claims to this Court with specific instructions regarding the elements that a Parametric shareholder would need to prove to proceed with a direct claim. *See Parametric Sound Corporation v. Eighth Jud. Dist. Ct.*, 133 Nev. 417, 429, 401 P.3d 1100, 1109 (2017). In addition to the general elements of a claim for breach of fiduciary duty, Plaintiff also must demonstrate “a controlling shareholder’s or director’s expropriation of value from the company, causing other shareholders’ equity to be diluted.” *Id.* The Court also noted that “shareholders must show actual fraud in any direct equity dilution claim they may have to overcome the statutory deference afforded to the directors[,]” citing to NRS 78.200(2) and NRS 78.211(1). *Id.* at n. 15.

In what amounts to a tacit concession it has been unable to prove “actual fraud,” Plaintiff now erroneously argues that “actual fraud” is “indistinguishable” from a mere showing of “bad faith” or “reckless indifference.” Mem. at 2-4. Plaintiff’s sleight of hand, however, should be rejected. It relies primarily on an overruled decision from the Delaware Chancery Court while, at the same time, ignoring significant contrary authority from Nevada and the U.S. Supreme Courts that require proof of scienter and reliance to establish “actual fraud.”

**I. Under Nevada Law, the Term “Actual Fraud” Requires Proof Of Scienter And Reliance.**

Plaintiff asserts Nevada courts have not yet defined the phrase “actual fraud.” Mem. at 1. This is simply untrue. *See Pacific Maxon, Inc. v. Wilson*, 96 Nev. 867, 871, 619 P.2d 816, 818 (1980) (defining “actual fraud” as “an intentional false representation which is relied upon in fact”); *Northern Nevada Mobile Home Brokers v. Penrod*, 96 Nev. 394, 398, 610 P.2d 724, 727 (1980) (“actual fraud” exists where plaintiff relied on intentionally “untruthful and misleading” statements); *Havas v. Alger*, 85 Nev. 627, 633, 461 P.2d 857, 860 (1969) (defining “actual fraud” as “intentional misrepresentations of material fact . . . resulting in the intended deception”); *accord Friendly Irishman, Inc. v. Ronnow*, 74 Nev. 316, 318, 330 P.2d 497, 498 (1958). Over sixty years

of precedent from the Nevada Supreme Court confirms that “actual fraud” requires proof of actual reliance on intentionally misleading statements.

Plaintiff attempts to sidestep this authority by claiming “actual fraud” has not been defined “in the context of NRS 78.200 or NRS 78.211.” Mem. at 1. But “if the plain meaning of a statute is clear on its face, then this court will not go beyond the language of the statute to determine its meaning.” *See Chur v. Eighth Jud. Dist. Ct.*, 136 Nev. 68, 71 (2020) (citing *Beazer Homes Nev., Inc. v. Eighth Jud. Dist. Ct.*, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004)). Given that Nevada courts have understood the plain meaning of “actual fraud” for decades, the use of this same term in NRS 78.200 and NRS. 78.211 is unambiguous. Indeed, because the courts have carefully defined the term “actual fraud” in the common law, this Court must presume that the legislature was aware of the commonly understood definition when drafting NRS 78.200 and NRS. 78.211. Plaintiff’s failure of proof in this case is not a legitimate basis for upsetting the settled definition of “actual fraud” recognized in Nevada for more than sixty years.

## **II. At Minimum, “Actual Fraud” Requires A Showing That The Directors Had Actual Knowledge That Their Purported Conduct Was Wrongful.**

### **A. U.S. Supreme Court Precedent Holds That “Actual Fraud” Requires “Wrongful Intent”**

Just five years ago, the United States Supreme Court had an opportunity to define the phrase “actual fraud” and confirmed that “wrongful intent” was a necessary element:

“Actual fraud” has two parts: actual and fraud. The word “actual” has a simple meaning in the context of common-law fraud: It denotes any fraud that involves moral turpitude or intentional wrong. “Actual” fraud stands in contrast to “implied” fraud or fraud “in law,” which describes acts of deception that may exist without the imputation of bad faith or immorality. Thus anything that counts as “fraud” and is done with wrongful intent is “actual fraud.”

*Husky Intern. Electronics Inc. v. Ritz*, 578 U.S. 882, 136 S. Ct. 1581, 1586 (2016) (additional internal quotations and citation omitted).

### **B. Plaintiff’s Interpretation Of NRS 78.200 And NRS 78.211 Would Eviscerate NRS 78.138, Which Requires Proof That The Director Knew His Actions Were Wrongful.**

Plaintiff fails to appreciate the multiple levels of “fraud” that Nevada’s Corporate Code requires it to prove in order to state breach of fiduciary duty claims. As a general proposition,

1 directors and officers of Nevada corporations are “not individually liable to the corporation or its  
 2 stockholders or creditors for any damages as a result of any act or failure to act in his or her capacity  
 3 as a director officer” absent proof of “a breach of his or her fiduciary duties” and that “the breach  
 4 of those duties involved intentional misconduct, fraud or a knowing violation of the law.” NRS  
 5 78.138(7)(b). The Nevada Supreme Court has held that litigants must make both showings for both  
 6 breach of loyalty and breach of care claims. *Chur*, 136 Nev. at 72. The Nevada Supreme Court  
 7 further clarified that satisfaction of NRS 78.138(7) requires proof of scienter:

8 We agree with and adopt the Tenth Circuit's definition of “intentional” and  
 9 “knowing,” as enunciated in [*ZAGG Inc. S’holder Derivative Action*, 826 F.3d 1222  
 10 (10th Cir. 2016), for determining whether a “director's or officer’s act or failure to  
 11 act constituted a breach of his or her fiduciary duties ... involving intentional  
 12 misconduct, fraud or a knowing violation of law.” NRS 78.138(7). Accordingly,  
we conclude that the claimant 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).

13 *Chur*, 136 Nev. at 74-75 (emphasis added). Importantly, NRS 78.138(7) is the baseline requirement  
 14 that “provides for the sole circumstance under which a director or officer may be held individually  
 15 liable for damages stemming from the director’s or officer’s conduct in an official capacity.” *Id.* at  
 16 72; *see also Guzman v. Johnson*, 137 Nev. Adv. Op. 13, 483 P.3d 531 (2021) (“NRS 78.138(7)  
 17 provides the sole avenue to hold directors and officers individually liable for damages arising from  
 18 official conduct”) (quoting *Chur*) (emphasis in original).<sup>1</sup>

19 When addressing stock issuances, Nevada’s Corporate Code imposes stricter requirements  
 20 before any claim could be asserted against officers and directors. NRS 78.200, which addresses  
 21 the issuance of stock or options, states that “[t]he judgment of the board of directors as to the  
 22 consideration for such rights or options issued is conclusive in the absence of actual fraud in the  
 23 transaction.” Similarly, NRS 78.211, which addresses the consideration to be received for stock  
 24 issuances, states that “[t]he judgment of the board of directors as to the consideration received for  
 25 the shares issued is conclusive in the absence of actual fraud in the transaction.” Neither statute  
 26

27 <sup>1</sup> *Chur* and *Guzman* were decided after *Parametric*. Although *Parametric* cites NRS 78.200 and  
 28 NRS 78.211 in footnote 15, it is now beyond dispute that Plaintiff also must satisfy NRS 78.138  
 before it can obtain damages from officers or directors of a Nevada company.

1 relies on the same “intentional misconduct, fraud or knowing violation of the law” language found  
2 in NRS 78.138(7)(2). Instead, NRS 78.200 and NRS 78.211 require “actual fraud.”

3 In order for NRS 78.200 and NRS 78.211 to have any meaning at all, “actual fraud” must  
4 require an equal or greater showing of fraud than the “fraud” mentioned in NRS. 78.138(7). Indeed,  
5 if NRS 78.200 and NRS 78.211 are interpreted to require a lesser showing of fraud than NRS  
6 78.138(7), then they would be rendered entirely meaningless because NRS 78.138(7) “provides for  
7 the sole circumstance under which a director or officer may be held individually liable for damages  
8 stemming from the director’s or officer’s conduct in an official capacity.” *Chur*, 136 Nev. at 72.  
9 Because a litigant always must satisfy NRS 78.138(7) before suing a director or officer for damages,  
10 any lesser burden of proof under NRS 78.200 or 78.211 would be meaningless.

11 Thus, the most logical way to reconcile NRS 78.138, NRS.200, and NRS 78.211 with the  
12 voluminous authority cited above is to hold that “actual fraud” requires intentional wrongdoing  
13 whereas the “fraud” described in NRS 78.138 requires knowledge that the conduct at issue was  
14 wrongful. Regardless of whether the Court chooses to impose this distinction, Plaintiff must, at  
15 minimum, satisfy the “knowledge of wrongfulness” standard that applies under NRS 78.138(7).

### 16 **III. Plaintiff’s Reliance On An Overruled Delaware Chancery Court Ruling Is Misplaced**

17 In implicit recognition that it cannot prove scienter or reliance, Plaintiff advocates for a  
18 definition of “actual fraud” that requires neither. Plaintiff cites *Parfi Holding AB v. Mirror Image*  
19 *Internet, Inc.*, 794 A.2d 1211 (Del. Ch. 2001) (“*Parfi*”) for the proposition that “actual fraud” exists  
20 where directors engage in “bad faith” or “reckless indifference to the rights of others.” Mem. at 2-  
21 3. But *Parfi* did not address a breach of fiduciary claim. *Id.* at 1233 (“The defendants have not  
22 moved to dismiss those fiduciary duty counts for failure to state a claim”). Although Plaintiff tries  
23 to draw a comparison between NRS 78.220, NRS 78.211, and 8 Del C. § 152, the *Parfi* court did  
24 not issue any ruling under 8 Del C. § 152 because of the “inapplicability of § 152” to the non-  
25 breach-of-fiduciary-duty claims asserted.<sup>2</sup> *Id.* at 1234. Moreover *Parfi* has been overruled and  
26

27  
28 <sup>2</sup> As such, the limited discussion of 8 Del. C. § 152 in *Parfi* is dicta, at best.

1 holds no precedential value. *See Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149  
2 (Del. 2002) (reversing *Parfi*).<sup>3</sup>

3 In any event, Delaware law is clear that an “excessive valuation” or “gross evaluation” in a  
4 transaction, standing alone, does not constitute actual fraud. *See Haft v. Dart Grp. Corp.*, 841 F.  
5 Supp. 549, 575 (D. Del. 1993).

6 Dated: August 25, 2021

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27 <sup>3</sup> Plaintiff relies on a second Chancery Court case, *Lewis v. Scotten, Dillon Co.*, 306 A.2d 755 (Del.  
28 Ch. 1973), which also did not address a breach of fiduciary duty claim. *Lewis* addressed a dispute  
over compensation for mooted derivative action.

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2 On the date below, as an employee of Snell & Wilmer L.L.P., I certify that I served a copy  
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