IN THE SUPREME COURT OF THE STATE OF NEVADA

Nos. 83598, 84971, and 85358

IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION.

PAMTP, LLC,

Appellant,

v.

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

Respondents.

Consolidated Appeals from Final Judgment and Fees and Costs Awards

Eighth Judicial District Court Case No. A-13-686890-B

APPELLANT'S APPENDIX – VOLUME 20 OF 24

Jeff Silvestri (NSBN 5779)
George F. Ogilvie III (NSBN 3552)
Chelsea Latino (NSBN 14227)
MCDONALD CARANO LLP
2300 W. Sahara Ave., Ste. 1200
Las Vegas, NV 89102
(702) 873-4100
jsilvestri@mcdonaldcarano.com
gogilvie@mcdonaldcarano.com
clatino@mcdonaldcarano.com

Daniel M. Sullivan (Admitted *PHV*)
Scott M. Danner (Admitted *PHV*)
Jordan Pietzsch (*PHV* Forthcoming)
HOLWELL SHUSTER & GOLDBERG LLP
425 Lexington Ave., 14th Fl.
New York, NY 10017
(646) 837-5151
dsullivan@hsgllp.com
sdanner@hsgllp.com
jpietzsch@hsgllp.com

Attorneys for PAMTP, LLC

INDEX TO JOINT APPENDIX

(Chronological)

Date	Document Description	Vol.	Pages
8/3/21	Order Denying Defendants' Motion in Limine to Exclude Plaintiff's Damages	5	AA 0726-AA 0742
8/3/21	Order Denying the Director Defendants' Motion for Summary Judgment	5	AA 0743-AA 0760
8/3/21	Order Denying Defendants' Motion in Limine to Exclude All Reference, Evidence, and Testimony Regarding Post Merger Conduct	5	AA 0761-AA 0778
8/3/21	Order Denying Defendants' Motion in Limine to Exclude the Opinions, Testimony, and Reports of J.T. Atkins	5	AA 0779-AA 0795
8/3/21	Order Denying Defendants' Motion in Limine to Exclude Evidence Related to Alleged Fraud by the Non- Director Defendants	5	AA 0796-AA 0813
8/3/21	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	5	AA 0814-AA 0831
8/3/21	Order Granting in Part Defendants' Motion in Limine to Exclude Evidence and Testimony Related to Irrelevant or Undisclosed Measures of Damages	5	AA 0832-AA 0838
8/23/21	Order Granting Certain Director Defendants' Motion for Determination of Good Faith Settlement	5	AA 0839-AA 0844
8/24/21	Plaintiff PAMTP LLC's Memorandum of Law Regarding NRS 78.200 and NRS 78.211	5	AA 0845-AA 0850
8/24/21	Defendants' Motion for Judgment on Partial Findings Pursuant to NRCP 52(c) Regarding Lack of Control or Expropriation	5	AA 0851-AA 0865
8/24/21	Defendants' Motion for Judgment on Standing Pursuant to NRCP 52(c)	5	AA 0866-AA 0876

Date	Document Description	Vol.	Pages
8/24/21	Defendants' Motion for Judgment for Lack of Evidence on *Gentile* Damages Pursuant to NRCP 52(c)	5	AA 0877-AA 0886
8/24/21	Specially Appearing Defendants Juergen Stark's and Kenneth Fox's Motion for Judgment Under the Statute of Limitations Pursuant to NRCP 52(c)	5	AA 0887-AA 0896
8/25/21	Non-Director Defendants' Trial Brief Re: Section 14(A)	5	AA 0897-AA 0904
8/25/21	Opposition to Plaintiff PAMTP LLC's Memorandum of Law Regarding NRS 78.200 and NRS 78.211	5	AA 0905-AA 0914
8/26/21	Transcript of Proceedings Bench Trial – Day 1 (8/16/21)	6-7	AA 0915-AA 1231
	Trial Exhibit 244	7-8	AA 1232-AA 1573
	Trial Exhibit 376	9	AA 1574-AA 1575
8/26/21	Transcript of Proceedings (8/17/21) Bench Trial – Day 2, Vol. 1	9	AA 1576-AA 1719
8/26/21	Transcript of Proceedings (8/17/21) Bench Trial – Day 2, Vol. 2	10	AA 1720-AA 1888
8/26/21	Transcript of Proceedings (8/18/21) Bench Trial – Day 3, Vol. 1	11	AA 1889-AA 2018
	Trial Exhibit 5	11	AA 2019-AA 2022
	Trial Exhibit 6	11	AA 2023-AA 2029
	Trial Exhibit 26	11	AA 2030
	Trial Exhibit 38	11	AA 2031
	Trial Exhibit 95	11	AA 2032

Date	Document Description	Vol.	Pages
	Trial Exhibit 106	11	AA 2033
	Trial Exhibit 108	11	AA 2034-AA 2037
	Trial Exhibit 109	11	AA 2038-AA 2041
	Trial Exhibit 111	11	AA 2042-AA 2043
	Trial Exhibit 137	11	AA 2044-AA 2047
	Trial Exhibit 142	11	AA 2048
	Trial Exhibit 152	11	AA 2049-AA 2050
	Trial Exhibit 194	11	AA 2051-AA 2092
	Trial Exhibit 277	11	AA 2093-AA 2095
	Trial Exhibit 296	11	AA 2096-AA 2097
8/26/21	Transcript of Proceedings (8/18/21) Bench Trial – Day 3, Vol. 2	12	AA 2098-AA 2238
	Trial Exhibit 78	12	AA 2239-AA 2240
	Trial Exhibit 82	12	AA 2241-AA 2243
	Trial Exhibit 83	12	AA 2244
	Trial Exhibit 87	12	AA 2245-AA 2246
	Trial Exhibit 88	12	AA 2247-AA 2248
	Trial Exhibit 89	12	AA 2249
	Trial Exhibit 90	12	AA 2250-

Date	Document Description	Vol.	Pages
			AA 2251
	Trial Exhibit 94	12	AA 2252
	Trial Exhibit 98	12	AA 2253-AA 2254
	Trial Exhibit 99	12	AA 2255-AA 2256
	Trial Exhibit 113	12	AA 2257-AA 2260
	Trial Exhibit 132	12	AA 2261
	Trial Exhibit 171	12	AA 2262
	Trial Exhibit 293	12	AA 2263-AA 2264
	Trial Exhibit 346	12	AA 2265-AA 2267
8/26/21	Transcript of Proceedings (8/19/21) Bench Trial – Day 4, Vol. 1	13	AA 2268-AA 2387
	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
	Trial Exhibit 789	13	AA 2412-AA 2413
	Trial Exhibit 821	13	AA 2414
	Trial Exhibit 837	13	AA 2415-AA 2416

Date	Document Description	Vol.	Pages
8/26/21	Transcript of Proceedings (8/19/21) Bench Trial – Day 4, Vol. 2	14	AA 2417-AA 2597
	Trial Exhibit 265	14	AA 2598-AA 2599
	Trial Exhibit 345	14	AA 2600-AA 2602
8/26/21	Transcript of Proceedings (8/20/21) Bench Trial – Day 5	15	AA 2603-AA 2800
	Trial Exhibit 17	15	AA 2801-AA 2803
	Trial Exhibit 58	15	AA 2804-AA 2805
	Trial Exhibit 60	15	AA 2806-AA 2807
	Trial Exhibit 116	15	AA 2808
	Trial Exhibit 120	15	AA 2809-AA 2816
	Trial Exhibit 305	15	AA 2817
	Trial Exhibit 1052	16	AA 2818-AA 2862
8/26/21	Transcript of Proceedings (8/23/21) Bench Trial – Day 6, Vol. 1	16	AA 2863-AA 2984
	Trial Exhibit 84	16	AA 2985-AA 3045
	Trial Exhibit 110	17	AA 3046
	Trial Exhibit 143	17	AA 3047-AA 3048
	Trial Exhibit 160	17	AA 3049
	Trial Exhibit 166	17	AA 3050-AA 3058

Date	Document Description	Vol.	Pages
	Trial Exhibit 170	17	AA 3059-AA 3060
	Trial Exhibit 172	17	AA 3061-AA 3064
	Trial Exhibit 267	17	AA 3065-AA 3069
	Trial Exhibit 271	17	AA 3070
	Trial Exhibit 330	17	AA 3071-AA 3073
	Trial Exhibit 338	17	AA 3074-AA 3076
	Trial Exhibit 339	17	AA 3077-AA 3084
	Trial Exhibit 364	17	AA 3085-AA 3087
	Trial Exhibit 425	17	AA 3088-AA 3106
8/26/21	Transcript of Proceedings (8/23/21) Bench Trial – Day 6, Vol. 2	17	AA 3107-AA 3282
8/26/21	Transcript of Proceedings (8/24/21) Bench Trial – Day 7, Vol. 1	18	AA 3283-AA 3410
	Trial Exhibit 428	18	AA 3411-AA 3415
	Trial Exhibit 464	18	AA 3416-AA 3422
	Trial Exhibit 909	18	AA 3423-AA 3433
8/26/21	Transcript of Proceedings (8/24/21) Bench Trial – Day 7, Vol. 2	19	AA 3434-AA 3579
	Trial Exhibit 413	19	AA 3580-AA 3600

Date	Document Description	Vol.	Pages
8/26/21	Transcript of Proceedings (8/25/21) Bench Trial – Day 8	20	AA 3601-AA 3703
9/2/21	Notice of Submission of Proposed Order Granting Defendants' Motion for Judgment Pursuant to NRCP 52(c), Findings of Fact and Conclusions of Law, and Judgment Thereon	20	AA 3704-AA 3735
9/3/21	Notice of Submission of Plaintiff's Objections to Defendants' Proposed Order Granting Defendants' Motion for Judgment Pursuant to NRCP 52(c), Findings of Fact and Conclusions of Law, and Judgment Thereon	20	AA 3736-AA 3771
9/3/21	Order Granting Motion for Judgment Pursuant to NRCP 52(c)	20	AA 3772-AA 3795
9/8/21	Notice of Entry of Order Granting Defendants Motion for Judgment Pursuant to NRCP 52(c), Findings of Fact and Conclusions of Law, and Judgment Thereon	20	AA 3796-AA 3822
9/22/21	Non-Director Defendants' Memorandum of Costs	20	AA 3823-AA 3831
9/22/21	Defendant Kenneth Potashner's Verified Memorandum of Costs	21	AA 3832-AA 3872
9/29/21	Defendants' Motion for Attorneys' Fees	21	AA 3873-AA 3901
9/30/21	Plaintiff PAMTP LLC's Notice of Appeal	21	AA 3902-AA 3929
10/7/21	Motion to Retax Defendant Kenneth Potashner's Verified Memorandum of Costs	21	AA 3930-AA 3945
10/7/21	Motion to Retax Non-Director Defendants' Memorandum of Costs	21	AA 3946-AA 3964
10/13/21	Plaintiff PAMTP LLC's Opposition to Motion for Attorneys' Fees	21	AA 3965-AA 4046

Date	Document Description	Vol.	Pages
10/21/21	Non-Director Defendants' Opposition to Plaintiff's Motion to Retax Costs	21	AA 4047-AA 4069
10/21/21	Opposition to Plaintiff's Motion to Retax Defendant Kenneth Potashner's Verified Memorandum of Costs	22	AA 4070-AA 4131
10/28/21	Reply in Support of Defendants' Motion for Attorneys' Fees	22	AA 4132-AA 4159
11/9/21	PAMTP, LLC's Reply in Support of Motion to Retax Non-Director Defendants' Memorandum of Costs	22	AA 4160-AA 4170
11/9/21	PAMTP, LLC's Reply in Support of Motion to Retax Defendant Kenneth Potashner's Verified Memorandum of Costs	22	AA 4171-AA 4178
12/16/21	Plaintiff PAMTP LLC's Supplemental Brief in Opposition to Motion for Attorneys' Fees	22	AA 4179-AA 4189
12/16/21	Supplemental Brief in Support of Defendants' Motion for Attorneys' Fees	22	AA 4190-AA 4204
12/22/21	Transcript of Hearing re: Defendants' Motion for Attorneys' Fees (12/2/21)	23	AA 4205-AA 4311
1/13/22	Transcript of Hearing re: Plaintiff's Motions to Retax (11/16/21)	23	AA 4312-AA 4369
6/7/22	Order Denying Defendants' Motion for Attorneys' Fees	23	AA 4370-AA 4386
6/15/22	Notice of Entry of Order Denying Defendants' Motion for Attorneys' Fees	23	AA 4387-AA 4407
6/30/22	Notice of Appeal	23	AA 4408-AA 4414
8/29/22	Order re: PAMTP LLC'S Motions to Re-Tax Costs	23	AA 4415-AA 4439
9/2/22	Notice of Entry of Order re: PAMTP, LLC's Motions to Re-Tax Costs	24	AA 4440-AA 4466
9/14/22	Plaintiff PAMTP LLC's Case Appeal Statement	24	AA 4467-AA 4526

Date	Document Description	Vol.	Pages
9/16/22	Amended Judgment	24	AA 4527-AA 4536
10/19/22	Order Granting Plaintiff's Motion to Stay Execution of Amended Judgment on Order Shortening Time	24	AA 4537-AA 4547
12/12/22	Order Granting Defendants' Motion to Amend Judgment	24	AA 4548-AA 4562
12/18/22	Second Amended Judgment	24	AA 4563-AA 4571

INDEX TO JOINT APPENDIX

(Alphabetical)

Date	Document Description	Vol.	Pages
9/22/21	Non-Director Defendants' Memorandum of Costs	20	AA 3823-AA 3831
10/21/21	Non-Director Defendants' Opposition to Plaintiff's Motion to Retax Costs	21	AA 4047-AA 4069
8/25/21	Non-Director Defendants' Trial Brief Re: Section 14(A)	5	AA 0897-AA 0904
6/30/22	Notice of Appeal	23	AA 4408-AA 4414
6/15/22	Notice of Entry of Order Denying Defendants' Motion for Attorneys' Fees	23	AA 4387-AA 4407
9/8/21	Notice of Entry of Order Granting Defendants Motion for Judgment Pursuant to NRCP 52(c), Findings of Fact and Conclusions of Law, and Judgment Thereon	20	AA 3796-AA 3822
9/2/22	Notice of Entry of Order re: PAMTP, LLC's Motions to Re-Tax Costs	24	AA 4440-AA 4466
9/3/21	Notice of Submission of Plaintiff's Objections to Defendants' Proposed Order Granting Defendants' Motion for Judgment Pursuant to NRCP 52(c), Findings of Fact and Conclusions of Law, and Judgment Thereon	20	AA 3736-AA 3771
9/2/21	Notice of Submission of Proposed Order Granting Defendants' Motion for Judgment Pursuant to NRCP 52(c), Findings of Fact and Conclusions of Law, and Judgment Thereon	20	AA 3704-AA 3735
8/25/21	Opposition to Plaintiff PAMTP LLC's Memorandum of Law Regarding NRS 78.200 and NRS 78.211	5	AA 0905-AA 0914
10/21/21	Opposition to Plaintiff's Motion to Retax Defendant Kenneth Potashner's Verified Memorandum of Costs	22	AA 4070-AA 4131
6/7/22	Order Denying Defendants' Motion for Attorneys' Fees	23	AA 4370-AA 4386

Date	Document Description	Vol.	Pages
8/20/20	Order Denying Defendants' Motions to Dismiss Plaintiff's Complaint	2	AA 0271-AA 0280
3/27/18	Order Denying Defendants' Motions to Dismiss the Amended Class Action and Derivative Complaint	1	AA 0079-AA 0090
8/3/21	Order Denying Defendants' Motion in Limine to Exclude All Reference, Evidence, and Testimony Regarding Post Merger Conduct	5	AA 0761-AA 0778
8/3/21	Order Denying Defendants' Motion in Limine to Exclude Evidence Related to Alleged Fraud by the Non- Director Defendants	5	AA 0796-AA 0813
8/3/21	Order Denying Defendants' Motion in Limine to Exclude Plaintiff's Damages	5	AA 0726-AA 0742
8/3/21	Order Denying Defendants' Motion in Limine to Exclude the Opinions, Testimony, and Reports of J.T. Atkins	5	AA 0779-AA 0795
8/3/21	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	5	AA 0814-AA 0831
8/3/21	Order Denying Motion for Summary Judgment of Specially Appearing Defendants Stripes Group, LLC, SG VTB Holdings. LLC Juergen Stark, Kenneth Fox	5	AA 0708-AA 0725
8/3/21	Order Denying the Director Defendants' Motion for Summary Judgment	5	AA 0743-AA 0760
8/23/21	Order Granting Certain Director Defendants' Motion for Determination of Good Faith Settlement	5	AA 0839-AA 0844

Date	Document Description	Vol.	Pages
12/12/22	Order Granting Defendants' Motion to Amend Judgment	24	AA 4548-AA 4562
8/3/21	Order Granting in Part Defendants' Motion in Limine to Exclude Evidence and Testimony Related to Irrelevant or Undisclosed Measures of Damages	5	AA 0832-AA 0838
9/3/21	Order Granting Motion for Judgment Pursuant to NRCP 52(c)	20	AA 3772-AA 3795
5/18/21	Order Granting Plaintiff's Motion Against Defendants Kenneth Potashner, Juergen Stark, and VTB Holdings, inc. Setting Evidentiary Hearing Re Spoilation Sanctions	2	AA 0361-AA 0368
10/19/22	Order Granting Plaintiff's Motion to Stay Execution of Amended Judgment on Order Shortening Time	24	AA 4537-AA 4547
8/29/22	Order re: PAMTP LLC'S Motions to Re-Tax Costs	23	AA 4415-AA 4439
5/20/20	PAMTP LLC's Complaint	2	AA 0204-AA 0270
11/9/21	PAMTP, LLC's Reply in Support of Motion to Retax Defendant Kenneth Potashner's Verified Memorandum of Costs	22	AA 4171-AA 4178
11/9/21	PAMTP, LLC's Reply in Support of Motion to Retax Non-Director Defendants' Memorandum of Costs	22	AA 4160-AA 4170
9/14/22	Plaintiff PAMTP LLC's Case Appeal Statement	24	AA 4467-AA 4526
8/24/21	Plaintiff PAMTP LLC's Memorandum of Law Regarding NRS 78.200 and NRS 78.211	5	AA 0845-AA 0850
9/30/21	Plaintiff PAMTP LLC's Notice of Appeal	21	AA 3902-AA 3929
10/13/21	Plaintiff PAMTP LLC's Opposition to Motion for Attorneys' Fees	21	AA 3965-AA 4046

Date	Document Description	Vol.	Pages
12/16/21	Plaintiff PAMTP LLC's Supplemental Brief in Opposition to Motion for Attorneys' Fees	22	AA 4179-AA 4189
10/28/21	Reply in Support of Defendants' Motion for Attorneys' Fees	22	AA 4132-AA 4159
12/18/22	Second Amended Judgment	24	AA 4563-AA 4571
8/24/21	Specially Appearing Defendants Juergen Stark's and Kenneth Fox's Motion for Judgment Under the Statute of Limitations Pursuant to NRCP 52(c)	5	AA 0887-AA 0896
11/15/19	Stipulation of Settlement	1	AA 0091-AA 0174
12/16/21	Supplemental Brief in Support of Defendants' Motion for Attorneys' Fees	22	AA 4190-AA 4204
6/23/21	Transcript of Evidentiary Hearing re: Spoliation Sanctions (6/18/21)	3-4	AA 0369-AA 0696
12/22/21	Transcript of Hearing re: Defendants' Motion for Attorneys' Fees (12/2/21)	23	AA 4205-AA 4311
1/13/22	Transcript of Hearing re: Plaintiff's Motions to Retax (11/16/21)	23	AA 4312-AA 4369
8/26/21	Transcript of Proceedings Bench Trial – Day 1 (8/16/21)	6-7	AA 0915-AA 1231
8/26/21	Transcript of Proceedings (8/17/21) Bench Trial – Day 2, Vol. 1	9	AA 1576-AA 1719
8/26/21	Transcript of Proceedings (8/17/21) Bench Trial – Day 2, Vol. 2	10	AA 1720-AA 1888
8/26/21	Transcript of Proceedings (8/18/21) Bench Trial – Day 3, Vol. 1	11	AA 1889-AA 2018
8/26/21	Transcript of Proceedings (8/18/21) Bench Trial – Day 3, Vol. 2	12	AA 2098-AA 2238

Date	Document Description	Vol.	Pages
8/26/21	Transcript of Proceedings (8/19/21) Bench Trial – Day 4, Vol. 1	13	AA 2268-AA 2387
8/26/21	Transcript of Proceedings (8/19/21) Bench Trial – Day 4, Vol. 2	14	AA 2417-AA 2597
8/26/21	Transcript of Proceedings (8/20/21) Bench Trial – Day 5	15	AA 2603-AA 2800
8/26/21	Transcript of Proceedings (8/23/21) Bench Trial – Day 6, Vol. 1	16	AA 2863-AA 2984
8/26/21	Transcript of Proceedings (8/23/21) Bench Trial – Day 6, Vol. 2	17	AA 3107-AA 3282
8/26/21	Transcript of Proceedings (8/24/21) Bench Trial – Day 7, Vol. 1	18	AA 3283-AA 3410
8/26/21	Transcript of Proceedings (8/24/21) Bench Trial – Day 7, Vol. 2	19	AA 3434-AA 3579
8/26/21	Transcript of Proceedings (8/25/21) Bench Trial – Day 8	20	AA 3601-AA 3703
	Trial Exhibit 5	11	AA 2019-AA 2022
	Trial Exhibit 6	11	AA 2023-AA 2029
	Trial Exhibit 17	15	AA 2801-AA 2803
	Trial Exhibit 26	11	AA 2030
	Trial Exhibit 38	11	AA 2031
	Trial Exhibit 58	15	AA 2804-AA 2805
	Trial Exhibit 60	15	AA 2806-AA 2807
	Trial Exhibit 78	12	AA 2239-AA 2240

Date	Document Description	Vol.	Pages
	Trial Exhibit 82	12	AA 2241-AA 2243
	Trial Exhibit 83	12	AA 2244
	Trial Exhibit 84	16	AA 2985-AA 3045
	Trial Exhibit 87	12	AA 2245-AA 2246
	Trial Exhibit 88	12	AA 2247-AA 2248
	Trial Exhibit 89	12	AA 2249
	Trial Exhibit 90	12	AA 2250-AA 2251
	Trial Exhibit 94	12	AA 2252
	Trial Exhibit 95	11	AA 2032
	Trial Exhibit 98	12	AA 2253-AA 2254
	Trial Exhibit 99	12	AA 2255-AA 2256
	Trial Exhibit 106	11	AA 2033
	Trial Exhibit 108	11	AA 2034-AA 2037
	Trial Exhibit 109	11	AA 2038-AA 2041
	Trial Exhibit 110	17	AA 3046
	Trial Exhibit 111	11	AA 2042-AA 2043
	Trial Exhibit 113	12	AA 2257-AA 2260
	Trial Exhibit 116	15	AA 2808

Date	Document Description	Vol.	Pages
	Trial Exhibit 120	15	AA 2809-AA 2816
	Trial Exhibit 132	12	AA 2261
	Trial Exhibit 137	11	AA 2044-AA 2047
	Trial Exhibit 142	11	AA 2048
	Trial Exhibit 143	17	AA 3047-AA 3048
	Trial Exhibit 152	11	AA 2049-AA 2050
	Trial Exhibit 160	17	AA 3049
	Trial Exhibit 166	17	AA 3050-AA 3058
	Trial Exhibit 170	17	AA 3059-AA 3060
	Trial Exhibit 171	12	AA 2262
	Trial Exhibit 172	17	AA 3061-AA 3064
	Trial Exhibit 194	11	AA 2051-AA 2092
	Trial Exhibit 244	7-8	AA 1232-AA 1573
	Trial Exhibit 265	14	AA 2598-AA 2599
	Trial Exhibit 267	17	AA 3065-AA 3069
	Trial Exhibit 271	17	AA 3070
	Trial Exhibit 277	11	AA 2093-AA 2095
	Trial Exhibit 293	12	AA 2263-AA 2264

Date	Document Description	Vol.	Pages
	Trial Exhibit 296	11	AA 2096-AA 2097
	Trial Exhibit 305	15	AA 2817
	Trial Exhibit 330	17	AA 3071-AA 3073
	Trial Exhibit 338	17	AA 3074-AA 3076
	Trial Exhibit 339	17	AA 3077-AA 3084
	Trial Exhibit 345	14	AA 2600-AA 2602
	Trial Exhibit 346	12	AA 2265-AA 2267
	Trial Exhibit 364	17	AA 3085-AA 3087
	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

Date	Document Description	Vol.	Pages
	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
Jeff Silvestri (NSBN 5779)
George F. Ogilvie III (NSBN 3552)
Chelsea Latino (NSBN 14227)
2300 W. Sahara Ave., Ste. 1200
Las Vegas, NV 89102
(702) 873-4100
jsilvestri@mcdonaldcarano.com
gogilvie@mcdonaldcarano.com
clatino@mcdonaldcarano.com

Daniel M. Sullivan (Admitted *PHV*)
Scott M. Danner (Admitted *PHV*)
Jordan Pietzsch (*PHV* Forthcoming)
HOLWELL SHUSTER & GOLDBERG LLP
425 Lexington Ave., 14th Fl.
New York, NY 10017
(646) 837-5151
dsullivan@hsgllp.com
sdanner@hsgllp.com
jpietzch@hsgllp.com

Attorneys for PAMTP, LLC

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

Electronically Filed
8/26/2021 11:31 AM
Steven D. Grierson
CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION	CASE NO. A-13-686890-B DEPT NO. XI
This Document Relates to: ALL ACTIONS	**TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

WEDNESDAY, AUGUST 25, 2021

BENCH TRIAL - DAY 8

RULE 52(c) MOTION

APPEARANCES:

FOR PAMPT LLC:	GEORGE F. OGILVIE, III, ESQ. ADAM M. APTON, ESQ.
FOR KENNETH POTASHNER, NORRIS, PUTTERMAN, KAPLAN, & WOLFE:	J. STEPHEN PEEK, ESQ. JOHN P. STIGI, III, ESQ. ROBERT J. CASSITY, ESQ. ALEJANDRO E. MORENO, ESQ.
FOR VTB HOLDINGS, STRIPES GROUP, SG VTB HOLDINGS, KENNETH FOX & JUERGEN STARK:	DAVID A. KOTLER, ESQ. JOSHUA D. N. HESS, ESQ. RYAN MOORE, ESQ.

RECORDED BY: JILL HAWKINS, COURT RECORDER
TRANSCRIBED BY: JD REPORTING, INC.

Case Number: A-13-686890-B

LAS VEGAS, CLARK COUNTY, NEVADA, AUGUST 25, 2021, 8:58 A.M.

*** * * * ***

THE COURT: So how many of you guys are going to argue this morning, three of you?

Okay. Are you going to argue on different issues?

MR. KOTLER: Yes, Your Honor.

THE COURT: Okay. It's all right. You can overlap if you want.

Here comes Mr. Cassity. Mr. Cassity, what did you do with Mr. Peek?

MR. CASSITY: Mr. Peek is on his way, Your Honor. He is held up in 95 traffic.

THE COURT: Oh, really?

MR. KOTLER: That's true, Your Honor.

THE COURT: There's a wreck on 95, huh?

MR. CASSITY: It is.

MR. OGILVIE: Shocking.

THE COURT: Yeah.

MR. OGILVIE: Never happens.

THE COURT: I went around the wreck.

(Pause in the proceedings.)

MR. HESS: Your Honor, while we're all waiting here, we do have two additional pocket briefs, so I can submit courtesy copies to you and serve and we'll file --

THE COURT: Have you served them?

MR. HESS: What's that?
THE COURT: Have you served them?
MR. HESS: I will serve them right now, Your Honor.
THE COURT: You must serve them before you hand them to me.
MR. HESS: I will do that.
THE COURT: Justice Gibbons changed that rule about years ago now.
MR. HESS: All right.
THE COURT: Okay. I'll read them while we're waiting for Mr. Peek.
MR. HESS: Well, that's what I figured. Since we have --
THE COURT: A few minutes?
MR. HESS: (Indiscernible). Thank you, Your Honor.
(Pause in the proceedings.)
THE COURT: Good morning, Mr. Peek. How was traffic? The wreck looked really bad when I got by it, but you know.
MR. PEEK: Yeah. And, you know, everybody panics going into that little bottleneck as well on -- coming into Casino Center and Las Vegas Boulevard.
THE COURT: Casino Center was open.
MR. PEEK: I know.
THE COURT: I know. I hadn't known.
MR. PEEK: But I -- just like -- I'm still going down

Rancho and coming over. So, it's probably the wrong thing but --

THE COURT: Yeah. Well, it's okay. You're here.

MR. PEEK: Yeah.

THE COURT: All right. So we're going to start on the Rule 50 motions. As I said yesterday, I'm not going to impose a time limit.

MR. PEEK: 52(c)?

THE COURT: 50, 50(a), 52(c), whatever it is under this rule. There are all sort of --

MR. PEEK: You're dating yourself like I am. It used to be under --

THE COURT: I know.

MR. PEEK: Rule 50.

THE COURT: So we're going to do the motions. And yes, I am old. Thank you. We're going to do the motions. And I am going to allow as many people who want to speak. I would prefer if you isolate it one to an issue, but if you have overlapping issues you need to comment on, that's okay.

And then if you guys both want to respond, it's okay. If you've divided it up somehow, then we'll do that. Take as much time as you need. And then we'll figure out what we're going to do after we go through it.

I did get a chance to read the two additional briefs that defendants served.

MR. APTON: George has read them and he's been chuckling as he's been going through it. So --

THE COURT: Great. So, I read the two additional briefs, so I had a chance to do that while we were waiting for Mr. Peek. So I've -- I'm ready whenever you guys are ready.

MR. PEEK: I'm ready, Your Honor.

THE COURT: Are you starting?

MR. PEEK: Well, it looks like they kind of put me in the hot seat here.

THE COURT: Yes. They did point at that seat when we said you were in traffic.

MR. PEEK: Yeah. And I will be arguing. Mr. Stigi may have something to add, but I'm -- don't know.

MR. STIGI: Go ahead. You can kick it off.

THE COURT: Are you going to move the thing so we don't beat up the poor Elmo?

MR. PEEK: Yeah. We can take that -- take that down if you'd like.

THE COURT: We don't need the wing up anymore?

MR. PEEK: We don't need the wing, yeah.

THE COURT: I just remember pulling the wires out of the thing one time when we tried to move something and it wasn't easy to get it all plugged back in.

MR. PEEK: Your Honor, we move this Court for judgment on findings pursuant to FRCP 52(c).

THE COURT: NRCP. NRCP.

MR. PEEK: NRCP.

THE COURT: We're in state court.

MR. PEEK: Thank you. I don't know I -- it says NRCP in my thing, too.

THE COURT: Because you're getting old, too.

MR. PEEK: Exactly. You know, Your Honor, where are you and I going to be when we don't have each other to kick around anymore?

THE COURT: I -- you know, I don't know what I'm going to do when I can't tease you and George and Ferrario.

MR. PEEK: Yeah.

THE COURT: And Pisanelli. Because you can't tease Bice.

MR. PEEK: No.

THE COURT: He does not take it well.

MR. PEEK: Anyway, on the ground that plaintiff has not proven that Defendant Potashner was a controlling shareholder or a director of Parametric, under the standard adopted by the Nevada Supreme Court in *Parametric Sound versus Eighth Judicial District Court*.

We know that NRCP 52(c) says, "If a party -- if a party has been fully heard," as have plaintiffs, "on an issue during a non-jury 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 controlling law can be maintained or repeated only with a favorable ruling on that issue."

And as we know, Your Honor, 52(c) and case law informs us that the trial Judge is not to draw any special inferences in the non-movant's favor, unlike a 12(b)(5) or 12(c) motion.

Since it is a non-jury trial, the Court's task is to weigh the evidence, which includes credibility and substantial evidence.

It's also important to remember the framework under which the Court must analyze these claims.

The *Chur* decision, Your Honor, informs us that, "NRS 78.138 provides for the sole circumstance under which a director or officer may be held individually liable for damages stemming from the directors or officer's conduct in a official capacity." That's the quote.

NRS 78.138(7) requires, as we know, a two-step analysis before liability can be imposed on individuals -- on an individual officer or director.

First, the presumption or presumptions of the Business Judgment Rule codified in NRS 78.138, must be rebutted. We know that from *Wynn Resorts*, as well as *Chur*.

The Business Judgment Rule states that, quote, "Directors and officers, in deciding upon matters of business

are presumed to act in good faith on an informed basis, and with a view to the interests of the corporation."

Secondly, in that two-prong test, "The director's or officer's act or failure to act must constitute a breach of his or her fiduciary duties, the duty of care and the duty of loyalty, and that breach must further involve intentional misconduct, fraud, or a knowing violation of the law."

That's in NRS 78 (7)(b)(1) and (2). That overarching framework governs the plaintiff's claims here and imposes the burden on them. The Court must ask itself based on all the evidence presented, has the plaintiff overcome the presumption of good faith on an informed basis, and with a view to the interests of the corporation.

The answer is a -- is clearly a resounding no. You've heard from Bob Kaplan, Seth Putterman, and Elwood Norris, that they and their co-directors, Andy Wolfe and Jim Honore, acted independently and in good faith. That they acted on an informed basis, from the information presented to them, by their independent advisor, Houlihan Lokey, who conducted significant due diligence on Turtle Beach, and also from the information presented to them by Craig-Hallum, that the transaction was fair to Parametric in its shareholders' receipt of 19.1 percent of the merged corporations -- corporation.

Their unrebutted testimony that they were acting in the interests of the corporation, compels a resounding no,

again, that the presumption has not been overcome.

You know, Your Honor, the Business Judgment Rule exists for many purposes. But none is more important of what -- than what we see here. An effort by Adam Kahn, and Barry Weisbord, to substitute their judgment for the judgment of the board of directors. That is what Adam Kahn wants you to do, that is what Barry Weisbord wants you to do, because they say they know better. They know better on what they -- what the split should be. They know better whether the merger should have happened. They know better about the business of Parametric. They know better about whether or not Parametric's commercialization had matured. They know better about Turtle Beach, and Turtle Beach's future.

But they weren't there. Adam Kahn and Barry Weisbord, did not walk in that -- in that proverbial mile, in the moccasins of this independent board of directors. They are the Monday morning quarterback, which they believe to be -- substitute their judgment.

While I do not concede, Your Honor, that the plaintiffs has overcome the conclusive presumption that exists not only in 78.138, but also in 78.200, and NRS 78.211. I'm going to at least talk to you about the next failure of proof, which is, did the directors breach their fiduciary duties, and did the breach involve intentional misconduct, fraud, for a knowing violation of the law?

Again, the answer to that is, no. *Chur*, Your Honor, with which I know Mr. Ogilvie is very familiar, informs us that intentional misconduct and knowing violation under Nevada law is an expansive test.

And quote, Your Honor, in *Chur*, "To give the statute a realistic function, it must protect more than just directors, if any, who did not know what their actions were wrongful, it should," and in this case does, "protect directors who knew what they did, but not that it was wrong."

Nevada does not adopt the Delaware standard cited in plaintiff's brief, that quote, "A defendant does not have to know or believe that his statement was false, or to have proceeded in reckless disregard of the truth."

That reckless disregard, Your Honor, was rejected by *Chur*.

It's -- *Chur* rejected that standard when the Court held that, NRS 78.138(7)(b) is an appreciably higher standard than gross negligence. An appreciably higher standard than gross negligence, as defined by Black's Law Dictionary as reckless disregard of a legal duty.

That was the central part of my argument, Your Honor, in *Chur*, to the Nevada Supreme Court, is let's go with what the statute says, and it applies -- and that statute applies both to duties of care and duties of loyalty.

Judge Hardesty certainly clarified his earlier

decision in *Shoen*, when he said, "When I said gross negligence, I was wrong."

THE COURT: I didn't really mean it then.

MR. PEEK: Yeah. And, Your Honor, Jim has that habit sometimes.

THE COURT: That would be Justice Hardesty.

MR. PEEK: No, that's -- even Justice Hardesty has that habit sometimes, Your Honor. I've -- I've known -- I've known Jim now for -- I don't even want to tell you, Your Honor. It's way too long.

THE COURT: When he used to represent the newspaper.

MR. PEEK: Yeah. And I -- we -- we both went to college -- we both went to school together at the University of Nevada. Not the University of Nevada in Reno, but the University of Nevada.

Anyway, George giggles, because he's reminded how old I am, because there was no UNLV. There was only Nevada Southern when I went to school, which changed its name to UNLV, compelling the University of Nevada to change their name to University of Nevada Reno, or UNR.

My diploma says University of Nevada. It doesn't have the, comma, Reno. Anyway --

MR. OGILVIE: So does my -- so does my grandfather's.

THE COURT: Old Nevada families.

MR. PEEK: Touche.

THE COURT: Old Nevada families.

MR. PEEK: You know, you're going to miss us.

THE COURT: I am going to miss you guys.

MR. PEEK: So, Your Honor, let me turn now --

THE COURT: There are a few things I will miss, you guys are one of them.

MR. PEEK: Yeah. Well, let me turn to the holding of our case, Your Honor. Because --

THE COURT: You mean the Parametric case before the Nevada Supreme Court?

MR. PEEK: The *Parametric Sound Corp. versus Eighth Judicial Court* --

THE COURT: Yeah.

MR. PEEK: -- in Nevada. Because I've -- I've addressed *Chur*, and it -- how it informs us that we don't look, as plaintiff argues, at the concept of gross negligence or reckless disregard. We have a much higher standard imposed upon us by the statute.

But whereas Parametric versus Eighth Judicial District Court informs us on the necessary proof, in a direct claim against the board of directors.

Under the *Gentile* case, adopted by our Nevada Supreme Court in Parametric, direct equity expropriation claim arises only where, one, quote, "The stockholder having majority or effective control causes the corporation to issue excessive

shares of its stock in exchange for assets of the controlling shareholder that have a lesser value."

Those controlling shareholders must have received something more than what all of the other shareholders received and would have therefore expropriated value from those other shareholders.

And secondly, the exchange, as I said, causes that increase in the percentage of the outstanding shares owned by the controlling shareholder, and then corresponding decrease in the share percentage owned by the public, the minority shareholders.

Plaintiff has not met its burden of proof on either of these two factors.

And, Your Honor, as we know in Parametric, it went a little bit further it seemed than *Gentile*, when it said, a controlling shareholder or controlling director. So I'm going to have to address both.

There is no control by Potashner. First, the evidence has established that Potashner was not a controlling shareholder. Potashner did not own a single share of Parametric stock at the time of the shareholder vote on August 2nd, 2013.

Potashner's equity interest in Parametric consisted exclusively of stock options, which Jim Barnes advised him, we're not -- he was not entitled to vote.

And, Your Honor, even Adam Kahn, in his 2020 hindsight, and Monday morning quarterback, has told us that a commonsense proposition is that a person who has no shares cannot be a controlling shareholder.

And I quote: Question, Mr. Kotler, "Would you agree with me that a controlling share stockholder has to own at least one voting share or not?"

Mr. Kahn, "Well, they would not be a shareholder if they did not own, so yes, I would agree with you, that a controlling shareholder must own at least one share."

So we only have to look at the evidence that the plaintiff's representative introduced to make that finding, as required to do, Your Honor, that there has been no controlling shareholder who has expropriated minority shares.

And the Court could therefore conclude that Potashner was not a controlling shareholder.

Second, the evidence has established that Potashner was not a controlling director. Although the case law does not defined what factors cause a director to become a controlling director, Delaware law has provided us with certain circumstances where a minority stockholder has been deemed to exercise controller status.

So a director should be a controller only, quote, "Through a combination of potent voting power and management control, such that the stockholder could be deemed to have

effective control of the board without actually owning a majority of stock."

Now, the plaintiff has gone to great lengths, Your Honor, in its effort, and I will say, to trash Ken Potashner, by providing you with evidence of how he wanted to protect his stock options in HHI. We have spent too much, even, and unknown hours, by plaintiff providing to you that Mr. Potashner wanted to keep those options, they argue, for himself.

But what more could be evidence of lack of control than when during the entire month of July, or June -- June and July, or parts of June and July, Mr. Potashner kept trying to protect HHI options and protect HHI as a standalone subsidiary for the shareholders, and that, plaintiff would argue, for himself.

What more lack of control is there that the board said to Mr. Potashner, after Juergen Stark said, I want the health aspect of your HyperSound. I think it's important. And I will not do this deal without HyperSound, and the -- excuse me -- HyperSound's health application through HHI.

And the directors, over the objections of Potashner and Mr. Potashner's efforts to persuade Juergen Stark otherwise, to persuade the board otherwise, said, look this is a deal to take all of the technology. You don't reserve a little bit of it. So we want to do this deal because we think

it's in the best interests of the shareholders, based on all the information that we have, all of the due diligence that we have done. And you will be giving up your options. And he did.

That's certainly not a controlling shareholder. The other -- you know, the other evidence offered at trial by directors, called by the plaintiff, Your Honor, it is unanimous that Potashner did not control the Parametric board.

And I thank them for calling my board, because the board, starting with Kaplan, testified that he was initially against hiring Potashner as executive chairman, voted against the grant of -- initial grant of options in HHI, Potashner, voted against appointing Potashner to the board of the post-merger company, voted to cancel Potashner's options in HHI, for no consideration, and rebut Potashner's efforts to cause him to retire from his position as a director of the pre- merger Parametric.

All of that, Your Honor, you find in Trial Day 5. Kaplan testified he acted independently, he acted in good faith, and he did not rely on Potashner when he did his own analysis, independent analysis, and decided to vote in favor of the merger, which he believed to be in the best interests of the shareholders.

And remember, this was, I think even Adam Kahn used this expression, a nascent company. It was a nascent company

with no commercial product to sell.

And I think Juergen Stark helped -- or said it better that, "Do you think that going to one McDonald's is going to be that -- is a commercialization of the product or one Build-A-Bear? No. It has to be broader than that."

Putterman, as well, Your Honor, testified that he considered Potashner to be a bully and aggressive, but then he dismissed the threats as noise. And you remember seeing him on the screen, Your Honor, and saying to us repeatedly, noise is what he -- how he referred to Potashner's efforts to maintain the HHI options.

Putterman testified that he resisted Potashner's attempt to have him resign from the Parametric board for a position as a director of the HHI subsidiary. He testified that the board rejected Potashner's suggestion to have Wolfe resign from the pre-merger company's audit committee. And he testified he strongly supported the merger with Turtle Beach after independently verifying Turtle Beach's ability to mass-produce, distribute, and sell its headsets at locations such as Best Buy.

Remember, he told us, I went to Best Buy, I walked into the store, and first thing I saw was this Turtle Beach headphones. That was sort of like pulling him over the line, Your Honor, that, hey, we can make HyperSound -- they -- if anybody can make HyperSound work, it's somebody who is actually

in the business of sound.

Now, Norris, he testified -- and you know that he did not like Mr. Potashner. You could tell that from his testimony. He testified that he strongly wanted to do the merger with Turtle Beach. The board was fiercely independent, and that caused friction with Potashner. That independence caused friction all the time from March all the way through August. He testified that he ignored and rejected Potashner's threat to replace the board, causing Potashner to back down.

That's on, again, from the -- his -- excuse me, from the trial testimony.

So, Your Honor, Norris, I think, said it best when he said, you know, not only did I think it was a good deal, but I got to know Juergen Stark, and I found him to be honest, I found him to be knowledgeable, I found him to be the guy who could take my technology to that next level and commercialize it. Those were his words, the member of the board of directors who voted independently, in good faith, for the approval of the merger.

Now, Andy Wolfe and Jim Honore have not yet testified, but those three directors who did testify, told us that while they were initially suspicious of Wolfe's independence, that after interacting with Wolfe, they observed that he acted independently of Potashner. So he likewise was not controlled, and he likewise approved the merger.

Jim Honore. We have no testimony from plaintiff that Jim Honore was anything other than independent, because we have those who testified, of the three, that Jim Honore was likewise independent, that he did not rely on Potashner, and voted with the three directors to approve the merger.

So they failed to meet the burden to show that Potashner controlled any of the directors, least of all, these four Parametric board members when they voted to approve the merger.

And the Court should grant the motion and enter judgment in favor of defendants in this action.

But let's go on. The plaintiffs still, Your Honor, after -- if --

There is no evidence of control, but let's talk about expropriation, because that is the other element.

The plaintiff has likewise failed to meet its burden that any equity was expropriated from Parametric or any of its shareholders to a controlling shareholder or a controlling director. No evidence has been introduced by plaintiff that supports the conclusion that Potashner expropriated economic or voting power from the legacy Parametric shareholders to himself or any affiliated entity.

Delaware case law, of course, instructs -- instructs us again on *Gentile* that "a transaction does not fit within *Gentile* if the controller itself is diluted by that -- by the

transaction."

Here, the evidence shows that Potashner, along with each of the other directors, including Parametric's founder, Elwood Norris, who held the largest block of the stock, were all diluted by the merger, just like every other Parametric shareholder, just like Adam Kahn, just like Barry Weisbord, and just like Etkin, Masterson, and Santulli.

And in fact, his position, Norris, was much worse because he -- well, excuse me. Potashner, Your Honor, we know, along with -- Potashner lost his options, and Woody Norris lost his value in his shares, if he didn't hang on to them. I don't know. He wasn't asked that question, I don't know the answer. But we do know that Turtle Beach is doing well. We saw its stock. We saw the phone held up to the screen. I know that was not --

THE COURT: That's not part of the record.

MR. PEEK: -- not part of the record.

THE COURT: But --

MR. PEEK: But there was a $4 to $28 as part of the record, so --

THE COURT: He did read some of the data in --

MR. PEEK: He did read --

THE COURT: -- from our phone. Mr. --

MR. PEEK: That's correct.

THE COURT: -- Wolfe's an odd guy. Or, not Wolfe.

MR. PEEK: But, Your Honor, we couldn't -- so I won't argue that --

THE COURT: Ken Wolfe, right?

MR. PEEK: -- but I'll talk about --

MR. STIGI: Wolfe.

MR. PEEK: -- the 4 to 28 from Mr. Fox.

THE COURT: Fox. Ken Fox. Sorry.

MR. PEEK: So each of these directors and shareholders or those who held shares that were on the board of directors, were equally diluted, just like Mr. Kahn, just like Mr. Weisbord, in their group. And we know that whatever options Mr. Potashner had, he lost, he told us that, and we know that the directors who held shares were locked up for six months after the close of the merger.

So, you know, they make much of the severance payment as though it is some extra contractual obligation that Potashner bullied the board of directors to approve, or he wouldn't support the merger. And that each testified -- and the contract itself, Your Honor, supports the testimony, the contract was made in March of 2012, a year and a half before the merger was ever approved. So those terms and provisions of the severance agreement, Your Honor, despite perhaps the board's opposition to it, that he didn't earn it, he didn't do this, he didn't do that, they were bound by the contract, and they honored the contract based on that employment agreement

from March of 2012, long before the merger discussions ever began.

These matters were not in any way related to the dilution that the merger caused on the Parametric shareholder equity interest in Parametric, so it wasn't something he arrogated to himself by getting a contractual severance payment. And that could not form the basis for a benefit expropriated from the shareholders and given to Potashner. And absent control over the other directors, his contractual severance payment was not the basis of any other director's vote in favor of the merger.

So, Your Honor, you asked us to -- you know, reminded us to look at 78.211 because that's our Footnote 15 in the *Parametric Sound vs. Eighth Judicial District Court* case. But I didn't find the citation to 78.211 or 78.200 to be anything other than Justice Hardesty's recognition that, oh, here's a statute that talks about dilution, but that statutory scheme does not change the requirement of the Business Judgment Rule protection. It says -- it establishes a conclusive presumption that the board's judgment with respect to share issuance to Turtle Beach must be respected in the absence of fraud.

Now, 78.200 seems to deal more with options. 78.211 is actually that where they're issuing shares, so I'm going to focus on 211. But they both say the same thing.

They both say that there's a conclusive presumption.

Again, conclusive. That means their burden over here to my left as the plaintiff is that they must again overcome that business judgment conclusive presumption, and then, once -- if they've done that, they must then show that it was procured by fraud.

So, Footnote 15, Your Honor, does not establish an independent basis for a direct claim by plaintiff challenging equity dilution. If it did, it would swallow the text in the paragraph that includes the footnote. Footnote 15 is additive to the text, not an alternative to the text. It is not a separate claim for equity expropriation.

As the Supreme Court explained, "Equity expropriation claims involve a controlling shareholder's or director's expropriation of value from the company, causing the other shareholders' equity to be diluted."

Now, as you know, that footnote doesn't come after that statement.

"Thus, by the express language of the Supreme Court's opinion, a plaintiff pursuing an equity expropriation claim, in addition to proving the existence of a controlling shareholder or director, also will prove that they expropriated value from the company, causing the other shareholders' equity to be diluted, or expropriated. Not just diluted, but expropriated, took value from them to his or herself. And they must prove the actual fraud by the controlling shareholder or director in

any direct equity dilution claim, and they have to overcome that burden of the presumption -- or, excuse me, they have to overcome the statutory deference afforded by the statute to the directors.

Your Honor, there is simply no evidence of a controlling shareholder or director who expropriated value from the company in connection with the merger. No matter how often you talk about the HHI options, no matter how often you talk about the merger agreement and the severance payment, none of those, Your Honor, are evidence of a controlling shareholder who expropriated value.

Yet, as well, Your Honor, plaintiff has not established that any director committed any actual fraud in connection with the issuance of shares to Turtle Beach, in connection with the merger, let alone that a majority of the board committed actual fraud.

The plaintiff seems to argue that there are two -- two acts that caused them harm. First, of course, would be the act of the approval of the merger. That's act one. Was there any fraud in connection with the approval of the merger, or was it, in fact, done by an independent board, in good faith, with the interests of the shareholders? Yes.

Second, was the issuance of the proxy that plaintiff claims contained fraudulent statements made intentionally with the intent that the plaintiff assignors would rely on the

statements, plaintiff assignors who never read the proxy statement, with the exception maybe of Mr. Kahn, who said he read it.

But he also was examined with, Well, did you also read the exculpatory language? Yes, I did.

Same thing with Barry Weisbord. Well, I talked to Ken Potashner at a race, and I sent an e-mail on November 2nd of 2013, and he told me that the merger was good for the shareholders.

Your Honor, the last time I looked, with fraud, is there has to be an intent -- an intent that the plaintiff -- the intent to make a fraudulent statement and an intent that the individual shareholders, in this case, all the assignors, would rely on that statement. There is no showing of any intent in the proxy statement that it was done so that they would rely on that statement when you have all the disclosures that exist there.

So recognizing that it cannot meet its burden of showing actual fraud, plaintiff's brief asks the Court to adopt a relaxed standard for actual fraud, citing the overruled case of *Parfi Holdings AB v. Mirror Image* and *Lewis v. Scotten Dillon*, which suggested, quote, that "actual fraud exists where the consideration for a stock issuance was so gross as to lead the Court to conclude that it was due, not to an honest error of judgment but to bad faith or reckless indifference to the

rights of others."

But the standard described in plaintiff's brief is similar to the standard that was rejected by the Supreme Court in *Chur* when it rejected gross negligence.

And I'm reminded, Your Honor, that we don't always follow Delaware. You may recall that in our *In Re Dish* case, it was argued that the Court should adopt the *Zapata* standard from Delaware, but neither this Court nor the Nevada Supreme Court adopted the *Zapata* standard, which gave, if you will, in *Zapata*, the Court the opportunity to second-guess the actions of the special litigation committee, which is sort of like what they're asking you to do here with the plaintiff, second- guess the actions of the directors.

The Court held in *Chur* that, Knowledge of wrongdoing, as required by NRS 78.138(7)(b), is an appreciably higher standard than gross negligence, again, defined by Black's Law Dictionary as a, quote, "reckless disregard of a legal duty," and found that the breach of fiduciary duty claim failed to state a claim. So we have a higher standard.

More importantly, as we explained in our response brief regarding actual fraud, Nevada Courts have understood the plain meaning of actual fraud for decades and the use of that same term in 78.200 and 78.211, which is unambiguous, actual fraud. The Court must presume that the legislation in 1949 was aware of the commonly understood definition when drafting

78.200 and 78.211.

But under either standard, either the relaxed standard that plaintiff argues, or the standard of actual fraud, there's no such evidence. The plaintiff has failed to rebut the Business Judgment Rule, and the evidence does not demonstrated a breach of fiduciary duties that involve intentional misconduct, fraud, or knowing violation of the law, and it has not met the equity expropriation standards of Parametric.

For these reasons, defendants respectfully request that this Court enter judgment on partial findings pursuant to 52(c) in favor of defendants and, well, in this case, Defendant Potashner, and also our co-defendants, and against plaintiff on plaintiff's equity expropriation breach of fiduciary duty claim.

THE COURT: Thank you.

MR. PEEK: Thank you, Your Honor.

THE COURT: Mr. Stigi, anything you would like to add?

MR. STIGI: No, Your Honor. Other than again, the additive nature of Footnote 15. You need controlling shareholder, plus expropriation, plus a rebuttal of the presumption set forth in 15.

THE COURT: Thank you.

MR. STIGI: Thank you.

THE COURT: Which one of you guys is going next? Mr. Kotler or Mr. Hess? One of you, please.

MR. KOTLER: Thank you, Your Honor. Mr. Peek, you've got to wipe down.

MR. PEEK: I was just coming to do that.

THE COURT: I could tell. You and I thought of it at the same time.

MR. KOTLER: Good morning, Your Honor.

THE COURT: Good morning.

MR. KOTLER: On behalf of all defendants, we move the Court, pursuant to 52(c), for judgment in favor of the equity appropriations claim. And I am going to focus on the lack of damages that the plaintiffs have failed to prove.

The Court already ruled prior to the trial that measure of damages permitted for plaintiffs' equity appropriations claim is that set forth in the Delaware Supreme Court decision in Gentile, 906 A.2d 91 (Del. 2006). And although there is some dispute, as Mr. Peek just laid out, as to certain parameters of what the parties believe equity appropriation means, there is full agreement in that the plaintiffs have to prove, not only that someone expropriated equity from the minority shareholders, but there is full agreement on the measure of damages that the plaintiff must prove, and that is the value of the expropriated equity in accordance with Gentile.

And despite the Court's prior ruling, Plaintiff rested its case without putting forth any evidence in support of this required measure of damages.

To the contrary, and as I will discuss, plaintiffs' damages expert, Mr. Atkins, testified that the sole calculation that he offered, the $12.49 per share, is not a measure of equity expropriation damages under *Gentile*. In fact, he also admitted that he did not calculate any amount that anyone expropriated from any Parametric minority shareholder.

Instead, he only attempted to calculate an amount for all Parametric shareholders, including the directors, that Mr. Atkins told this Court several times, quite colorfully, went into the ether. And as I will get to, because Plaintiff has failed to meet its burden on proving a valid measure of damages, we do believe that judgment should be entered in Defendants' favor.

I will not reprise the 52(c) standard, as Mr. Peek laid it out.

So I will go, now, directly to the argument portion. And as I mentioned at the outset, on August 4th, 2021, this Court ruled that 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 *Gentile*.

In so ruling, this Court recognized that *Gentile* sets

forth the legal standard for damages in an equity expropriation claim. And as *Gentile* recognizes, specifically in the discussion after talking about a derivative dilution claim or a derivative corporate waste claim, which is not at issue here, which was part of the class action and settled.

But with a direct equity expropriation claim, as *Gentile* recognizes, the public shareholders are harmed uniquely and individually to the same extent that the controlling shareholder has correspondingly benefited.

So that is the damages standard. Or put another way, the damages are measured as the fair value of the shares representing the overpayment or issuance of excessive equity to the controlling shareholder in the transaction at issue.

And we know, Your Honor, as Plaintiff has represented, both prior to and during the trial, that it's $12.49 per share calculation would be its sole damages calculation. Mr. Atkins confirmed that on the stand in response to my initial questions.

So thus, it was Plaintiff's burden at trial, consistent with *Gentile*, to demonstrate that this $12.49 per share calculation represents the value that a controlling shareholder expropriated from Parametric by forcing an overpayment to himself at the expense of the minority shareholders.

The trial record demonstrates that what Mr. Atkins

did has nothing to do with any alleged overpayment to a controlling shareholder. Indeed, Mr. Atkins admitted that this amount is not a payment, let alone an overpayment, to anyone.

Mr. Atkins did testify that he was aware of this Court's order. And Mr. Atkins is, as he was kind enough to admit, a recovering lawyer who is familiar with law. And although he had not read *Gentile*, he did understand what his exercise was here. But he testified that he had no idea whether his opinion was in any way consistent with *Gentile* -- and it turns out it's not.

And as he said -- he conceded, I am not offering an opinion that the $12.49 represents an overpayment by the company to a controlling shareholder.

He did not calculate any amount of damages suffered only by some minority shareholder group, but rather calculated damages he believes are applicable to all Parametric shareholders.

And that is on the Tuesday afternoon transcript, at page 14, lines 11 to 14.

Put simply, Mr. Atkins did not offer any evidence as to any amount that a controlling shareholder expropriated from a minority shareholder or anyone.

And he went on from there, as Your Honor will recall -- and this is also in the Tuesday afternoon transcript --

THE COURT: So hold on a second. I don't see that the transcripts are filed.

THE COURT RECORDER: They are not.

THE COURT: Okay. Why not?

THE COURT RECORDER: Because I haven't had time to.

THE COURT: Okay. But they have been done? You've done officials?

THE COURT RECORDER: Yes.

THE COURT: All right. Thanks. Keep going.

MR. KOTLER: Mr. Atkins went on, also in the Tuesday afternoon transcript, page 11, when I asked him the question that Plaintiff's counsel had not asked him.

In an equity expropriation case, the most important question is, Where did the money go? It has to go to the controlling shareholder. So I asked him that very simple question: "This $12.49 a share that you claim is damages, where did the money go?"

Answer, "The money went into the ether."

And then he went on. And he talked about, Well, the business wasn't run the way that he thought it should have been run. And the company should have been worth more. And then Mr. Potashner did what he claims he did, and it put the business in a fairly rapid downward trajectory. And as a consequence, that money disappeared.

So he testified, without a doubt, without any

hesitation, that no one stole, took, any equity from Parametric. And, therefore, his damages calculations are not an effort to calculate the value of any stolen expropriated equity.

So he went on in response to one of my questions: When you asked that question, what you're saying is this, Did the money get stolen?

Answer, No.

That really ends the analysis, Your Honor. By the repeated admissions of Mr. Atkins, Plaintiff has failed to meet its burden of proving any amount that was stolen or expropriated from Parametric shareholders by anyone.

This testimony, as to what went into the ether, while it might -- if it was supported by evidence, might be of interest in a derivative dilution or corporate waste claim -- each of which are no longer at issue here. Those damages are not available under *Gentile* for the direct equity expropriation claim that plaintiff is pursuing.

Accordingly, under 52(c), we submit that judgment in Defendants' favor on Plaintiff's equity expropriation claim is warranted.

Thank you, Your Honor.

THE COURT: Thank you.

Mr. Hess?

Thank you for wiping down.

MR. KOTLER: I'm a slow learner. I'm getting there.

THE COURT: Mr. Hess.

MR. HESS: So I'll start with the first one on behalf of all the directors for -- pursuant to the Rules of Procedure 52(c) that judgment be entered in the defendant's favor of finding the plaintiff does not have standing to assert the claims in the complaint.

It has been established, the plaintiff here did not at any time, itself, own shares in Parametric Sound Corporation, whether on the merger date or any other date. But instead, with the recipient of assignments from certain purported shareholders, assignors who -- they at one time they tell Parametric Sound Corporation shares on the merger date of January the 15th, 2014.

As we argued to this Court previously in summary judgment, the Delaware Supreme Court has held that in the *Urdan v. WR Capital Partners*, LLC case, a unanimous decision confirmed a longstanding principle of Delaware corporate governance law that has recognized that shareholders lose standing to assert direct claims for breaches of fiduciary duties against the company's directors when they, quote, sever their economic relationship with the corporation by selling their company shares into the marketplace.

And so holding -- or not endorsed such cases as *Activision* which held that there is a longstanding rule that

claims are assignable and can be asserted by the acquirer of stock, and persons who sold their shares chose to dissociate their economic interest from the corporation by doing so, forgo the opportunity of the benefit from class claims.

As the Court said in Resorts International, sellers of stock that are subject to pending litigation made a conscious business decision to sell their shares into a market that implicitly reflected the value of the pending in any prospective lawsuits.

Accordingly, shareholders forfeit any right to pursue such claims and litigation when they sell their stock, because the right to assert such claims passes to the purchaser of the stock, because purchasers of common stock acquire all rights in that security that the transferor had or had power to transfer.

And the only way for a shareholder to sell stock and retain the right to assert a legal claim that attaches to that share is to expressly reserve the right to sue at the time the stock is sold.

Now, this Court will recall in June, denied summary judgment holding that with respect to that issue, here there was a preservation of rights. That was actually done prior to the transfer of certain shares. For that reason, the standing motion is a genuine issue of material fact.

Well, the Court may ultimately determine that there are problems with the transfer agreements that were entered

into. I'm not going to make that at this stage under the summary judgment standard.

Well, Your Honor, we've heard the unanimous testimony from the assignors. And what have we learned? We learned that they purported to assign whatever claim they may have had in this case to the plaintiff on April of 2020. All of the assignors, save for Mr. Kahn, testified unanimously that they sold any share of Parametric they have ever owned years in advance of that assignment.

And additionally, they did not enter into any agreement, whatsoever, to reserve those claims. As they all testified, they sold those shares into the marketplace, with no strings attached.

THE COURT: Except Mr. Kahn, who said he kept some.

MR. HESS: Except for Mr. Kahn.

THE COURT: Yeah.

MR. HESS: Now, with respect to Mr. Kahn, he sold all of his shares, save for 27,800.

Now, again, remember the burden is on the plaintiffs to prove that they have the appropriate shares to assert here.

Now, in *Urdan*, it's not just any share of Parametric. This is an equity expropriation --

THE COURT: Well, [indiscernible] is not a publicly traded case, and it's also not a class action.

MR. HESS: Well, yes, Your Honor. And this Court is,

as you recall, in defining the class -- from which they opted out.

THE COURT: I understand. And that's got a whole bunch of different issues I'm going to ask about in a minute.

MR. HESS: Yeah.

THE COURT: Not quite there. I was going to let you finish your argument before I interrupted you. Sorry.

MR. HESS: So the class from which they opted out was limited only to shareholders as of the closing day of the merger, January the 15th, 2014. And that's very common. And indeed in the cases that are *Urdan* endorses: *Activision*, *Prodigy*, *Resorts International*, *Sunshare* -- all those cases where class action cases, such as this one -- involving publicly traded companies, I might add -- where there was a date and there's class shares that are defined. And so those are the only shares that counted.

In fact, in presenting their case, they didn't try to assert a claim on behalf of all the shares of Parametric they owned -- just the ones they held as of January the 15th, 2014.

So in the case of Mr. Kahn, he would have the burden of proving that those shares he still owns, the 27,800 shares, were held as of the merger date.

Now, I have not seen and I have not heard any evidence that they are. Indeed, the brokerage statements that have been submitted into evidence from Mr. Kahn and IceRose

Capital show that, after the merger date, there were more than sufficient number of shares that he held on the merger date that he sold in Parametric by October 2014, and certainly well before April 2020.

The only way Mr. Kahn can attempt to get around this is to claim that his shares were sold last-in, first-out. But there's no evidence of that. He actually, in fact, can't even confirm that's true. That was just a guess, but he doesn't know.

THE COURT: But it is some evidence. Whether it's credible or not, it is some evidence.

MR. HESS: It is. Well, I guess -- I guess by saying, I don't know whether it's that way or the other way -- if that's evidence, then so be it.

But otherwise there's nothing to prove that those were shares that were held. And in fact, if it was done, there is zero dispute that if it's in first-in, first-out that he does not, in fact, hold any class shares anymore.

And I would note, Your Honor, that when the plaintiffs opposed this motion the last time, they made a point of excising the fact that the class definition included, expressly, transferees.

I'll read the class definition here to that: All persons and/or entities that held shares of Parametric common stock on January 15, 2014, at the time Parametric issued shares

in the merger, pursuant to the agreement of plaintiff merger or the beneficiary of record, including the legal representatives, heirs, successors in interests, transferees, and assignees of all such foregoing holders, and excluding the defendants.

So when this Court issued that class certification -- and this is true in *Activision* -- all the cases that we cite -- and they all rely upon it -- transferees aren't expressly included -- and that's what happened here. So those transferees became class members and the plaintiff's assignors ceased to be absent in the agreement which they say they have not entered into.

So correspondingly, there's no evidence in the record that any of the assignors entered into any reservation of rights that this Court wanted to see whether they could prove, in order to avoid summary judgment.

THE COURT: So here's my question -- because *Urdan* is not a class action and it's not publicly traded and --

MR. HESS: Correct.

THE COURT: -- it involves a number of specially negotiated agreements that were part of its framework.

This is an opt-out group --

MR. HESS: Yeah.

THE COURT: -- from a class. Does that, in your opinion, make any difference in how the evaluation has to be made because they were part of the class, held the claims, and

then opted out of the class settlement?

MR. HESS: Uh-huh. Well, they opted out of the whole class, Your Honor; right?

THE COURT: No. They opted out of class settlement.

MR. HESS: Well --

THE COURT: They were part of the class.

MR. HESS: Yeah. That's --

THE COURT: Typically when I have this happen, I don't have a separate complaint that is filed to pursue the claim. It is a claim that is then tried as part of the class action case. It's not usually a separate case.

MR. HESS: Yeah. Well, Your Honor, I think the issue is, though *Urdan* was a private company, the cases upon it which it endorsed --

THE COURT: I got that part.

MR. HESS: Oh, you got that part. And in all those cases incidentally, they --

There was issues, for example, in Resorts International about the settlement. And it was -- it was, in fact, to object to the settlements of those class actions not kind of to opt out of the class of the initial --

THE COURT: Right.

MR. HESS: -- enlistments. And so the courts in Delaware found that, look, when you decide to sell your shares, you make a business decision whether or not to participate or

not. And if you continue -- so you have choices. You can participate in the settlement. You can opt out to continue to pursue your claim, or you can sell it to the marketplace. There's already value in it that the value -- potential value of that litigation. And in all the instances, the assignors here chose the Option Number 3.

THE COURT: Okay. Thank you.

MR. HESS: You're welcome.

THE COURT: Anybody else on the defendants' side wish to say anything else before I go to the plaintiffs?

MR. HESS: I have one more motion, Your Honor.

THE COURT: Oh.

MR. PEEK: If he has one more -- before I want to just add something, Your Honor --

THE COURT: You want to add something? All right, Mr. Hess.

MR. PEEK: -- to what you said.

THE COURT: I'm not part of your argument. I have questions.

Mr. Hess, you had something else? You said there was another motion?

MR. HESS: I had another motion, but I think he would just like to add to this.

MR. PEEK: I was just going to add to the standing issue, Your Honor.

THE COURT: What?

MR. PEEK: Your Honor, just because there is some evidence of the $28,000, that is not your standard.

THE COURT: I know that, Mr. Peek.

MR. PEEK: Okay. Yeah. I know I don't need to remind you. Because you can certainly draw a reasonable inference, Your Honor, from the brokerage statement that those shares that he owned were sold prior to April 20.

THE COURT: I could. Or I could draw an inference the other way.

MR. PEEK: Yeah -- yes, you can, Your Honor.

THE COURT: And either one would be suitable under the standard I have to apply.

Okay. Go.

MR. HESS: All right. Your Honor, actually the last motion is, again, pursuant to Nevada Rules of Civil Procedure 52(c) on behalf of specially appearing defendants Juergen Stark --

THE COURT: Your statute of limitation issues.

MR. HESS: Correct, Your Honor -- and Mr. Fox. I wish Mr. Fox were here to argue it himself.

THE COURT: It would be colorful.

MR. HESS: Instead you are stuck with me today. Your Honor, this is pretty straightforward.

It's a three-year statute of limitations. The claim

accrued on January 15, 2014.

We heard, on our very first day with Mr. Kahn, that he was more than aware.

THE COURT: Kirkland & Ellis.

MR. HESS: You got it.

THE COURT: Okay.

MR. HESS: I was the recipient of many letters from Kirkland & Ellis. And as you will recall, in one of those letters, there was a draft complaint. And in that draft complaint was a claim against Mr. Peek and Mr. Stigi's clients for breach of fiduciary duty in connection with the approval of this very merger.

There is also a claim for aiding and abetting those breaches in regard to approving this merger against the whole host of defendants, including Mr. Stark and Mr. Fox.

And Mr. Kahn testified that all the information he received in order to file that complaint, which he instructed Kirkland & Ellis to do, which, of course, he did under the Rule 11 standard, he got from the public record -- all of it.

And the rule here is inquiry notice. And they have tried to evade statute of

Limitations -- well, we didn't know every little jot in the middle of what Mr. Stark and Mr. Fox did until we read the class action complaint, which, by the way, was public on this Court's docket by February 2014.

But, in any event, that's not the standard. They don't have to note every little thing. He clearly knew enough to know -- which he testified -- he admitted to -- that Mr. Stark and Mr. Fox's potential involvement in connection with an alleged breach of fiduciary duty in connection with the approval of this very merger.

It's hard to think of a stronger argument of inquiry notice. And that was in the summer of 2014.

And we are now -- Your Honor, they did not file a suit against Mr. Stark and Mr. Fox. They've never been named as parties. And this case has been going on a very long time. They were not named as parties until May of 2020, six years after the claim -- more than six years after the claim accrued. And straightforward math, that's more than three years ago. And those claims are not tolled by any class action because Mr. Stark and Mr. Fox were never a party to this case until May of 2020.

THE COURT: Thank you.

Anybody else?

If you would wipe down, Mr. Hess, because now I have got Mr. Ogilvie and Mr. Apton.

You're up.

MR. APTON: Good morning, Your Honor.

THE COURT: Good morning.

MR. APTON: No one -- no one mentioned the findings

of fact and conclusions of law from July 15th.

THE COURT: Oh, I have them right here.

MR. APTON: Okay.

THE COURT: I mentioned them yesterday.

MR. APTON: I'm sorry?

THE COURT: I mentioned them yesterday.

MR. APTON: Yeah, you did. And I felt they should be a part of this conversation obviously. And I just want --

THE COURT: I have made an adverse inference against Mr. Potashner.

MR. APTON: That's right. And on the closing of the evidentiary hearing of June 25th, 2021, Mr. Peek made the argument. And he pointed out that if Your Honor was to grant the evidentiary sanction we were seeking for, he said that you, Your Honor, would be taking away all of those rights that he has which really become case-ending sanctions because he's now lost the defense.

So it's really not necessarily striking the answer, but it striking the defenses that he has under 78.138 and 78.211.

THE COURT: And I did not grant all of the sanctions you asked for. I gave a lesser sanction.

MR. APTON: But the sanction that you did grant, Your Honor, was the finding of bad faith on behalf of Mr. Potashner.

THE COURT: Related to certain issues.

MR. APTON: Understood, Your Honor. So if I could address Mr. Peek's argument first. Equity expropriation claims involve a controlling shareholder or director expropriating value from the company, causing shareholders' equity to be diluted. That's from the *Parametric Sound* case. And cites *Gentile* and *Gatz v. Ponsoldt*.

Now, Potashner had effective control over Parametric -- even by Defendant's articulation of this standard on page 8 of the brief. They cite *Crimson Exploration* and the *Rouse* case.

Potashner had 417,500 options at the time of the merger. He signed a voting agreement with Norris & Barnes, Exhibit 240. He also dominated the board in the merger negotiation, as described in *Basho Technologies*, 2018 WL 3326693; in *Voigt*, 2020 WL 614999; and *FrontFour Capital*, 2019 WL 1313408.

Potashner initially set out to enter into the transaction as part of his claim to spin off HHI for his own purposes, or continue as the leader of HHI following the close of the merger.

He saw his plan through with bullying, insults, and threats. Exhibits 355, 16, 296, 356 -- just examples.

Withholding or misrepresenting information, particularly with respect to merger negotiations. Norris testified to this; pages 19 and 20, 21, 22, 23.

And he also delivered board decisions or decisions he had made to the board as fait accompli -- Kaplan said that; pages 33 to 34 of his transcript.

Potashner exploited the board's inability or unwillingness to stop him. In response to the board telling him to cease communications about HHI, Potashner threatened them with legal action, proceeded with his HHI-related negotiations the very next day, Exhibits 119, 131, and 15.

He also used threats of legal action with John Todd to push other directors around, Exhibits 286, 305. The board was so fed up with his antics that at least two of the directors, that were supposedly standing up to him, decided that they wanted to do the transaction in order just to get rid of Potashner. Kaplan and Norris testified to that, pages 40 and 20 respectively.

Potashner's co-directors considered firing him, but never did, and allowed him to run roughshod over them. Kaplan testified to that, pages 40 to 43.

In fact, Norris testified that the board agreed they could not fire Potashner, but that he could fire them. Norris, 20 and 21.

Potashner also exercised unilateral control over Parametric during the merger negotiation process, with an eye on currying favor with VTB Holdings' decision makers. He single-handedly suspended licensing deals, froze agreements,

delayed positive announcements, all in an effort to depress Parametric stock price in order to make the merger look better to the public.

Norris testified to that 38, 41 -- pages 38 to 41, Exhibit 90, e-mails from Potashner.

He also gave VTB Holdings an exclusive gaming license for Parametric's technology as part of its breakup fee and effectively prevented the company from actually speaking to other interested parties during the Go-Shop period; Exhibit 74, for example.

These actions were intended to influence favorable treatment from VTB Holdings, for example, in the form of a gentleman's agreement to get them a consulting deal if he couldn't talk Stark into keeping HHI. I'm referencing Exhibit 98.

Parametric's directors admitted that he -- they had allowed Potashner to mismanage the company as a dictator, quote/unquote. It comes from Exhibit 58.

He also skewed the votes, in that they didn't need 50 percent of all the stockholders, just 50 percent of those voted -- Exhibit 162.

Potashner engaged a conflicted advisor Houlihan Lokey. When Houlihan Lokey admitted it was conflicted, the board recommended -- I'm sorry -- Houlihan recommended a second advisor, Craig-Hallum, to create a Fairness Opinion.

Despite acknowledging the conflict, Houlihan Lokey continued working for Parametric. After signing the merger agreement, Houlihan Lokey decided it was fine if they went to work for both parties and continued to do so even though the conflict existed.

After the merger agreement was signed, Potashner continued to control the company in order to steer its stockholders towards approval of the merger to make sure the deal went through; to make it appear more favorable to investors. It caused the company to suspend licensing talks, pursue -- not pursue continuation of the business plan, referring to Exhibit 90, 89, 105, 39, 85, 265.

He also hid issues regarding VTB's financial condition from his co-directors and shareholders, referring to Exhibit 154.

All of this led to the expropriation of equity from Parametric shareholders. And under Gatz v. Ponsoldt, Potashner didn't need to be the recipient. It could've been a transferee, a beneficiary, third-party -- Turtle Beach. And that's what happened here.

Damages which are equal to the fair value of the shares representing the overpayment under *Gentile*, equal 12.49 a share.

J.T. Atkins calculated that using his DCF analysis. He valued first Parametric, then Turtle Beach, determined the

excess amount and it divided by the number of estimated shares at the time, to come out to the 12.49 per share.

When asked a hypothetical question by defense, where the money is, he said he didn't know. But that doesn't take away from the fact that he calculated the excess or the value of the excess shares given to Turtle Beach, which is exactly what he was supposed to do.

Now, Your Honor, to address the Business Judgment Rule. It applies. It's a two-pronged standard under Chur. And we first need to show that the presumption of good faith has been rebutted, and that the director or officer's act or failure to act constituted a breach of his or her fiduciary duties, and that such breach involved intentional misconduct, fraud, or a known violation of the law.

In our case, we have this findings of fact, conclusion of law, which I believe satisfies the first Prong of that standard. There is an adverse inference against Potashner that he did act in bad faith with respect to the merger -- negotiating and supporting it.

But even if not, we have a long list of instances which show that he did not act in good faith, that he was [indiscernible].

And if we look at Chur, what we need to show for Prong 2, they adopt the Tenth Circuit's description of the standard. So at the end of Chur, the Nevada Supreme Court

says: We conclude that the claimant must establish that the director or officer had knowledge that the alleged conduct was wrongful. So knowledge that the alleged conduct was wrongful.

Now, we have, I don't know, well over a dozen instances of Potashner doing things he knew he should not have been doing in the face of explicit warnings and reprimands.

Exhibit 121: Kaplan accused Ken Potashner of cheating the company.

Exhibit 277: Potashner telling Stark that delaying or concealing licensing deals was, quote, contrary to the responsibility he had to Parametric.

34: Stockpiling announcements.

137: Intentionally constraining progress for Go-Shop.

32: When discussing the breakup fee, Potashner said it presented a fiduciary issue.

5, Exhibit 5: Lying to the board regarding the status of HHI, misrepresenting merger negotiations.

Exhibit 276: Strategizing with John Todd about how to control HHI -- the negotiations for HHI, even after being told to cease all discussions about it.

Exhibit 99: Forwarding internal board correspondence about HHI to Stark, while knowing that leaking board info was a breach of his fiduciary duty.

He accused Norris of doing the exact same thing in

Exhibit 293.

116: Norris telling Ken Potashner that he should, quote, act like he was working for Pam -- for Parametric shareholders and not himself.

Exhibit 113: Kaplan emphasizing to Ken Potashner that, quote, ignoring fiduciary responsibility to Parametric shareholders.

Exhibit 74: He put, quote, boundaries in place to sabotage the Go-Shop. And in addition to this, we have actual fraud here in the colloquial sense. Potashner had knowledge of the decline of VTB. We'll let the proxy go out anyway. And I'm referring to Exhibit 72, 265, 172, and 78.

And then finally lying directly to shareholders about the status of the merger close, the delays, and the condition of VTB at the time, Exhibit 376.

These all go to satisfy Prong 2, as well as Prong 1, if the adverse inference doesn't satisfy it. But these instances go to show that this was not -- Potashner is not entitled to the Business Judgment Rule.

And moving onto 78.211, Footnote 15. Given the evidence we have in this case, there is not a lot of daylight between the two standards.

78.211 states, as I think Mr. Peek said, 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.

So this defense does not apply where, for example, the underlying transaction involves unfair self-dealing, prescribed by equitable fiduciary duty concepts. Citing Parfi Holdings, 794 A.2d 1211 at 1235.

For the same reasons that Potashner's self-dealing invalidated the Business Judgment Rule, the actual fraud defense also fails.

And as I mentioned previously, in addition to the knowledge of wrongful conduct, we do have extensive testimony concerning material misstatements in the proxy statement, and the fact that Parametric shareholders were not informed to the true value of VTB.

And I'm referring to the August 24th afternoon transcript, pages 11 and 12, 19 to 25. And again, as well, to Exhibit 72, 78, and 265.

I'm prepared to move on to another motion, unless Your Honor wants to --

THE COURT: No.

Mr. APTON: Let me address standing quickly. As Your Honor pointed out, this action arises from a certified class of, quote, all persons and/or entities that held shares of Parametric common stock on Jan. 15, 2014. That's referring to the Court's order regarding class certification on page 7.

Plaintiff's assignors were members of the certified

class, because they own Parametric stock on that day, January 15, 2014. And I'm referring to proof of that -- Exhibits 245, 246, 251, 309, 311, 384, and 410.

Plaintiff and its assignors opt out of the settlement prior to final approval -- Exhibit 474, excuse me.

But at that time, plaintiff's assignors had executed valid assignments of their claims against defendants, Exhibit 475.

And importantly, as defendants have argued during the class certification proceedings in the class action, plaintiffs' equity expropriation claims rested -- quote, rested on the extraction and redistribution of equity from a corporation's then existing minority shareholders.

I'm referring to defendants' Opposition to Plaintiffs' motion for class certification, dated October 9, 2019, page 15, citing *Parametric Sound*, the Supreme Court decision.

The position they take now contradicts their prior position. It should be rejected under the doctrine of judicial estoppel, *Marcuse v. Del Webb Communities* 123 Nev. 278 at 287. It's a 2007 decision.

Further, just to put a point on it, unlike *Urdan*, the Delaware case that Defendants relied upon, Plaintiff and its assignors explicitly reserved their rights against Defendants when opting out of class action.

Urdan involved a privately traded, closely held corporation. The plaintiffs in that case explicitly waived their rights to sue the company. No such waiver occurred here.

And it also bears noting that, as Your Honor pointed out, these shares of Parametric were publicly traded. So the way -- frankly, it would be impossible for anyone who held Parametric stock to have reserved rights, because these were security entitlements, strictly speaking, and not subject to the Uniform Commercial Code provision that *Urdan* relied on.

But even if they wanted to reserved rights, they could not have done so in light of how the security markets work. And I will cite COR Clearing, 2017 US District -- or US DIST LEXIS 183405.

I cite CFS-Related Securities Fraud Litigation 2001 US DIST LEXIS 27387.

And I also cite the transcript from Mr. Kahn's testimony, August 16; pages 166, 168, and 169.

With respect to the statute of limitations, yes, it is a three-year period, but from the date of discovery.

The Kirkland & Ellis complaint did not relate to the approval of the merger. It related to interested or self-dealing transactions after the merger. Specifically, it related to the 10 million subordinated promissory note, 7 million subordinated promissory note, and the April equity offering.

While the word merger is mentioned, it's only done so in the background. And Mr. Kahn's testimony was clear that he did not know the details relating to Stark and Fox's involvement in the merger until the unsealing of the class action amended complaint in 2018. Well, it was unsealed in 2018. But Mr. Kahn testified that he didn't read it until 2019 when the class notice came out. I'm referring to the August 16 transcript, pages 75 to 77.

In the same vein, Mr. Barry Weisbord also did not receive notice or know exactly as to the involvement of Fox and Stark until 2019, once again, when the class notice came out. And I'm referring to the August 17th transcript in the afternoon, pages 63 to 65.

Your Honor, the only one I haven't addressed specifically is damages, though I did cover in my initial presentation.

And I will just mention that the Court's upheld that damages of breaches of fiduciary duty, quote, must be logically and reasonably related to the harm or injury for which compensation is being awarded.

I'm citing *Basho Technologies* which I provided the cite earlier for. But as long as that connection exists, the law does not require certainty in the award of damages where wrong has been proven and injury established. Responsible estimates that will have mathematical certainty are

permissible, so long as the Court has a basis to make a responsible estimate of damages.

Once a breach of fiduciary duty is established, uncertainties in awarding damages are generally resolved against the wrongdoer. And that's just referring to Basho.

Your Honor, I have nothing further unless the Court has any questions.

THE COURT: Okay. So talk to me about the shares that were held at the time of the transfers -- the transfers --

MR. APTON: I'm sorry, Your Honor?

THE COURT: -- to the actual plaintiff. Talk to me about the amount of shares held by Mr. Kahn at the time of the transfer to the plaintiff.

MR. APTON: It would be the 27,000-some-odd shares -- that the rest of the group had sold their shares prior to that.

THE COURT: Okay. So the plaintiff without -- at least in your estimation, regardless of how the standing issue comes out -- at least that amount of shares was owned by the plaintiff at the time?

MR. APTON: Yes. That would be true.

THE COURT: Okay. All right. Can you talk to me about actual fraud in which you believe the true standard for actual fraud in Nevada is, as opposed to bad faith exercise of fiduciary duties, which is what I have to deal with.

MR. APTON: I'm sorry. Can I get that one more time,

ma'am?

THE COURT: Yep. The brief you submitted related to actual fraud. It seems to have an analysis that doesn't comply with the direction I've gotten from the Nevada Supreme Court.

So I'm giving you a chance to verbalize or vocalize anything else you want me to hear about what your spin is on actual fraud and how I should analyze it.

MR. APTON: Yeah. Actual fraud is not fraud in the colloquial sense. It relates to equitable breach of fiduciary duty principles. And so it need not be -- for example, Potashner withholding information from his shareholders -- which we have here, as I mentioned. But it can also be a bad faith arising from self-dealing or self-interested conduct.

So it's not so narrow and limited as to be, like I said, the traditional use of that term. But it expands to include other indicia of bad faith conduct that relates to a bad dealing or sort of a breach of fiduciary duty.

THE COURT: Okay. So you're urging me to get rid of reliance, which would be part of the traditional fraud, and to go to just a breach of fiduciary duty standard in determining what actual fraud is?

MR. APTON: Well, I just want to be clear. Yes, I don't think reliance as part of this.

THE COURT: Well, it is under a traditional fraud analysis.

MR. APTON: Under traditional fraud --

THE COURT: Right.

MR. APTON: -- right. And that's why in this context, it's not.

But I just want to be clear. When Your Honor says I'm urging you to go towards breach of fiduciary duty in the traditional context, that's within Chur and how it's defined. So --

THE COURT: Yeah, I know, which changed the rules in Nevada, because Justice Hardesty decided that what he had said in the Ameristar -- was it *Americo*?

MR. PEEK: *Americo*.

THE COURT: Shoen 1 and Shoen 2 -- according to me.

MR. PEEK: *Americo*. There is no --

THE COURT: Yeah. Those cases -- that he didn't really mean it. And that was dicta that we were all taking the wrong way.

So that's why I'm asking you this question to give you the opportunity to flesh out anything else that you want to say, so that I can make sure that whatever I decide goes -- and when you guys go back up to Carson City, because you're going to go back up to Carson City one way or the other, that Justice Hardesty and his colleagues have the opportunity to know that I considered everything that can possibly considered before I ruled.

MR. APTON: Yeah. I think it's important to note that: Well aware of Chur, so gross negligence -- this is -- I've never said gross negligence has been done here or even recklessness.

I mean, the reason we brought this case to the trial, the reason we are seeking punitive damages, is because of actual knowledge of wrongdoing.

I mean, the evidence is clear that Potashner knew what he was doing, knew it was wrong. He did it anyway to benefit himself.

And that, however you want to define actual fraud, or however Chur describes its definition of knowledge of wrongful conduct -- it meets those standards.

I mean, I don't know of -- I don't want to speak in exaggeration or hyperbole, but the facts in this case are very strong. And so when taking the facts, taking the evidence that we have elicited and it's in the record, you see that Potashner did do each of these things that we have alleged, and that he did act in his own self-interest and in bad faith. And that satisfies both the Business Judgment Rule on Prong 1 and Prong 2, as well as the actual fraud requirement.

And so I don't know what else I could possibly say to show that we have met the standard of, quote, actual fraud. Because, like I said before, even in the colloquial sense, we do have an actual fraud.

I mean, Mr. Kahn e-mailed Mr. Potashner in December or January -- December 13 or January -- whatever the specific date was, I'm blanking -- but he relied on Mr. Potashner, and he relied on Mr. Potashner's misrepresentation. So even in that sense, we have the actual fraud in the colloquial sense.

So my point being is I really hope Your Honor agrees that we have satisfied both 78.138, as well as 78.211, and we can go forward.

THE COURT: Okay. Let's talk about control.

MR. APTON: Okay.

THE COURT: Everybody who testified said they didn't like Potashner, they didn't trust Potashner, and they weren't going to do what he said.

How does that establish that he had control?

MR. APTON: Well, I -- Your Honor, while they testified that, they did do exactly as he wanted. And the pocket brief that we submitted on effective control some days ago --

THE COURT: At the first part of the trial. I have it still here. So --

MR. APTON: -- went through a long list of, you know, what is effective control of what. And effective control can take a number of shapes and forms. It can be effective control over the company, effective control over the board. It could be effective control over a transaction.

And the -- I think, in my opinion, the underlying theme is that if the controller -- stockholder, director, whomever -- if the controller is able to exercise his will over the board, especially through bullying, domineering tactics, threats of litigation, then that satisfies the criteria for, quote, effective control.

And each of the directors that have testified were very much in line with one another. This guy was relentless. This guy threatened us. You know, every time he was there, we knew he was up to something.

And when asked, Did you ever fire him? They all said, Oh, no; we didn't do that. If we did that, that would have been real big trouble for us.

And so, yes, while Potashner did not own 50 percent of the shares -- he didn't.

THE COURT: He owned zero.

MR. APTON: Well, he --

THE COURT: He had options which invested after the change in control, but he didn't own any.

MR. APTON: But, Your Honor, he did have options in a significant amount.

THE COURT: Sure. And they vested after the change in control and accelerated the event.

MR. APTON: But he did have a vote because he assigned his vote to Ken Fox -- that's a separate issue.

THE COURT: You don't get to vote options.

MR. APTON: Well, but, Your Honor --

THE COURT: You could assign your right to vote when it's nothing.

MR. APTON: This case, though, has never been about --

THE COURT: It's got so much bad smell to it. I know; I understand. But -- and that's why you're here is because this case smells so bad.

But at this stage, I have to make hard decisions, which is why we're having this discussion.

MR. APTON: Uh-huh. So, Your Honor, for the reasons I said, though, I mean, he imposed his will on the other directors.

And while defense asked Kaplan, Putterman, and Norris, Were you controlled? And they all said no; the data shows otherwise. They were. They caved. They did what Potashner wanted.

And that's a good point. He also controlled the information that they received. So while each of these director said, Oh, yeah. I voted for the merger because I thought it was a good thing, that was based on misrepresentations from Potashner. It was from -- Potashner filtered the information to the board.

So yeah, it's no surprise that they happened to think

at the time of the vote that the merger was a good deal because Ken Potashner wanted it to be so. And that's how we get to effective control.

THE COURT: All right. Anything else?

MR. APTON: Yeah. I do have one thing. Your Honor asked about Mr. Kahn's shares.

THE COURT: Uh-huh.

MR. APTON: It was 27,000 shares, but that was after a reverse split. So strictly speaking, it should be 27,000 times four.

THE COURT: Okay. At the time of the merger?

MR. APTON: Yeah.

THE COURT: Okay. And that's about what, 110?

MR. APTON: Something --

THE COURT: Something like that. Okay. All right. Anything else that anybody wants to say?

Mr. Apton, you can wipe down for me, please.

Anybody else want to say anything before we take a short break and I think?

MALE SPEAKER: [Indiscernible.]

THE COURT: Yes. You do get to reply.

MALE SPEAKER: [Indiscernible.]

MR. PEEK: I think she said we're going to take a break. Then you can do your reply.

THE COURT: Yeah. I'm asking you. Okay? How long

are you guys going to be? How long?

Your wrap-up, how long?

MR. PEEK: Oh, I'm sorry. I think 15 minutes will do it for me.

THE COURT: That's a half hour. Okay. I'll see you guys in about 10 minutes.

MR. PEEK: We haven't been great about estimating time here lately.

THE COURT: For you, I have. For them, not so much.

(Proceedings recessed at 10:41 a.m., 10:49 a.m)

THE COURT: All right. Mr. Peek, you're up.

MR. PEEK: Your Honor, counsel makes a number of arguments, all of which revolve around, as Mr. Putterman described it, the noise, the noise of Mr. Potashner; that he had options; that there was a voting agreement.

But what was the voting agreement? The voting agreement was very typical of merger transactions in which you lock up, if you will, those who hold shares to vote in favor of the merger, those on the board to vote in favor of the merger. It's not something that is nefarious. It's not something that's unusual.

And then this notion that Potashner dominated the Board I find interesting because of so much evidence to the contrary, so much evidence to rejecting Potashner's requests for options, rejecting his other claims that he wanted to

pursue HHI. All of those were rejected. So how can that -- those seeking of the many perks, all of which were rejected by either the Board or Juergen Stark, lead to control? They do not. Okay.

They say that he had unilateral control over the merger negotiations, and they argue that he controlled the information. But I'm going to put on the screen, if you will, Your Honor, Exhibit 244-56. And you'll see here that this begins in March and then goes through to oh, gosh, all the way up to page, I think, 65 I think.

But in any event, what we see here is there is a recitation of all of the actions that were undertaken and all of the involvement of the Board of Directors that took place in that period of time that show that the Board was an active Board. It wasn't an inactive Board. So your evidence of the background of the merger which starts on 56 --

Go to 57, Brian, if you would, please. And then 58. Blow up 58 just for a moment.

So here we have April 20th, a telephonic meeting of the Parametric Board held with financial and legal advisors at the meeting. So this notion that he controlled the information flow is not supported in the record. It's just something that counsel is arguing and, in fact, is contrary to all of the recitation of the actions that we see in the proxy statement.

Next page, Brian.

Here we are. We're still in April. We're on our third page. Again, a meeting of the Parametric Board was held with its financial and legal advisor at the meeting. Five days later -- we talked about April 20th. Now we're on April 25th. So there is no Potashner controlling the information flow because you have both the financial and legal advisors at these meetings with the Board. The Board discussed the engagement letters. The Board discussed with -- or Houlihan Lokey was present. Their lawyer was present.

Next page if you would, please.

Again, you'll see, Your Honor, that many of these are meetings with the Board. Many of them are what was Mr. Potashner was doing, what Mr. Stark was doing. So this is not a control of the flow of information. All of this information came to the Board.

Next page if you would, please.

So now we have Sheppard Mullin involved with the first draft of the merger agreement in June. (Indiscernible) provided due diligence. Representatives of Sheppard Mullin, and Houlihan Lokey, Dechert and VTB held a telephonic meeting. All of this was provided to the Board, and all of this is recited. So, Your Honor, you have six or seven pages there. So this information flow control has no support in the record. In fact, it is contrary.

And there's this notion that he curried favor with

Mr. Stark. You heard Mr. Stark yourself. You heard what his reaction to the negotiating style of Mr. Potashner was. You heard that, Was there a gentlemen's agreement? No. Did he talk about it? Yes. Did he want the options? Yes. Did I give them to him? No. So there is no currying favor.

In fact, the only thing that Mr. Potashner received was he remained on the Board of Parametric. It wasn't as though he was appointed to the Board. He remained on the Board, and the other four resigned. And was he compensated on the Board? No. So this notion of currying favor with Mr. Stark does not exist. Sure, was Mr. Potashner at times conflicted in negotiating for his options? Yes. But again, that was rejected. That's more noise.

When you look through this merger --

You can take it down now.

-- this proxy statement, Your Honor, you'll see all of the activities that the Board undertook that Potashner undertook, that the meetings that took place with their lawyers, with Houlihan Lokey, there's not a control of the flow of information because you have your lawyers involved. You have Houlihan Lokey involved making presentations to the Board from time to time.

And, Your Honor, none of these actions that they described to you of Potashner overcome the presumption in favor of the Board, that it acted in good faith with a view to the

interests of the corporation and in reliance upon information from third parties. So that noise, while it may cause you concerns about what Mr. Potashner did, it doesn't create liability for Potashner, nor does it create any damages.

Your Honor, in order to show causation, you would have to show that Potashner's actions as described by Mr. Apton are the ones that caused the damage, are the ones that caused the merger to take place. He can't get you there. He can just describe the noise of Mr. Potashner, but he can't then link that noise of Mr. Potashner to control over the Board, and that noise caused the Board to vote in favor.

And even the ruling and the sanctions, Your Honor, itself doesn't create causation. It doesn't give rise to causation that the Board did not act in good faith, that the Board did not act on information from third parties and that the Board did not act in the best interest of the shareholders in approving --

THE COURT: All the other Board members beside Mr. Potashner have settled though; right?

MR. PEEK: Pardon?

THE COURT: All of the other Board members besides Mr. Potashner have settled?

MR. PEEK: Yes.

THE COURT: So we're down to Mr. Potashner and his arguments about how all the Board (video interference).

MR. PEEK: That is correct, Your Honor. But just because they have settled does not change their testimony.

THE COURT: I understand, Mr. Peek.

MR. PEEK: And does not itself give rise to overcoming the presumption. So I don't -- I'm not sure I follow the Court's thinking here as to why that settlement should in any way impact their testimony.

THE COURT: No, it doesn't impact their testimony --

MR. PEEK: And it doesn't overcome the presumption.

THE COURT: Well, okay. Keep going.

MR. PEEK: Your Honor, and not only do you have, as you will, the lack of overcoming the presumption, then you have to get to certainly the causation, and then you have to get to the breach of fiduciary duties. Then you have to get to one of the three elements of that breach of fiduciary duties, which is actual fraud, intentional misconduct or knowing violation of the law.

And not only do you have to do that, Your Honor, you have to, as Mr. Kotler told you, you have to conclude that the damages are not damages for all of the shareholders and therefore damages that are derivative in nature.

And, Your Honor, I do know what *Chur* says. And I do understand *Chur*, I think, a little bit differently than Mr. Apton does. And actual fraud is not the same in the colloquial sense as equitable fraud. And let me read from the

brief.

THE COURT: The brief?

MR. PEEK: The brief of the --

THE COURT: Or the decision.

MR. PEEK: The plaintiffs' brief, Your Honor, if I might. If I can find it.

And so what does Mr. Apton argue to you about equitable fraud that we both know was rejected by Chur? Because he says in his briefing, citing the, I think it's the *Zurn* (phonetic) versus *BLI Corp.* (phonetic) matter, and *Stevenson* (phonetic) versus (video interference) *Development Company*, noting that with equitable fraud, a, quote, "defendant does not have to know or believe that his statement was false or to have proceeded in reckless disregard of the truth." That standard, Your Honor, was rejected by *Chur*.

You only have to look at the citation to the 10th Circuit case where they said, Your Honor, that there has to be a higher standard; there has to be an expansive standard. So it's not just know or believe that his statements were false.

And then it says, Or to have proceeded in reckless disregard of the truth. Reckless disregard was rejected by *Chur*. So this notion that equitable fraud is a standard in Nevada is not supported by our case authority, Your Honor.

It is, as I understand fraud, there has to be a false

statement or omission to a statement that would otherwise make it true. That false statement or omission has to be material. It has to be made in a knowing, knowing that such statement was false or an omission to a material statement. It has to be with the intent that the plaintiff relied on the statement, and it has to be that if plaintiff recently relied, and they had to have separate damages. That is what I understand to be actual fraud.

So if you look at the proxy statement, do you see that in the proxy statement? Well, they argue that Mr. Stark should have provided more projections as opposed to those projections that were approved by the shareholders on the knowledge that they had in August of 2013 when they approved the merger.

THE COURT: You mean the Board?

MR. PEEK: The Board, excuse me. When the Board approved the merger.

And those statements, Your Honor, had to be made with the intent that the plaintiff rely on it. And what do you see in numerous exculpatory statements within the proxy statement? You saw that was shown to Mr. Stark. You saw what he would say about it. He said, look, I can't be making these kinds of statements because I don't know. I don't have enough information, and I would be remiss to try to provide information on a daily basis because that's how much movement

was taking place in December.

The proxy statement did contain the actual financials of Turtle Beach as of September 28, 2013; actual statements as for Parametric as of December 30, 2013. And what we know about those actual financials in the proxy statement of each of these two companies is that not only perhaps was Turtle Beach not meeting its projections, but certainly Parametric wasn't achieving its. So should that also have been there? All of this information was in the proxy statement.

And no one of these individuals can say that they knew of the statement, that they knew the statement was false, that they knew it was a material statement, that they knew that such statement was false when made and that they knew that it was done so with the intent that the plaintiff rely on it because not one of them, not a one of them with the exception maybe of Mr. Khan, who was really a little unclear, actually read the proxy statement; nor, Your Honor, could they show that within the proxy statement there was any expropriation of equity by Mr. Potashner.

All of the perks, if you will, received by each of the directors were laid out in the proxy statement as well. The statement about devoting lockup was there. The statement about Potashner's severance payments were there. The statements about the fact that Potashner was going to remain on the Board were there. So none of those statements, Your Honor,

could have been actual fraud.

They say that Potashner exercised his will over the Board. Wow. That's a pretty strong statement after you listen to Woody, Seth and Bob. Do you really believe that those three individuals, who said I didn't rely on anything he said, were under the will, if you will, of Mr. Potashner? Poppycock.

So, Your Honor, there is not evidence of an overcoming of the presumption, the first prong. There is not evidence of breach of fiduciary duties, coupled with knowing violation, intentional misconduct or fraud and in this case actual fraud. Nor, Your Honor, is there evidence in that breach of fiduciary duties of the foundation for a direct claim of equity expropriation. There is no equity expropriation because, one, there was no controlling shareholder. There was no controlling director, which is a requirement, and there was no taking away of equity of the corporation Parametric that went directly to any of the directors, let alone Mr. Potashner.

You can't say that Mr. Potashner's (indiscernible) -- well, staying on the Board was an equity expropriation taken from the shareholders. You can't say that a contractual obligation for severance payment was expropriating value from the shareholders. That $350,000 in what is a multi-multibillion-dollar merger with one company's value at, what, 2-something, the other one at its 79 or 4-something. I don't remember the exact numbers, but they're there.

And we know that Woody didn't receive anything except the same as everybody else. He was the biggest shareholder. We know that Bob Kaplan did not receive anything, nor did Seth Putterman receive anything. So there is no expropriation by anybody, any of the directors.

So talking about all of the noise of Potashner doesn't lead you to causation, and causation is important; and it also doesn't lead you to damages in the ether.

So, Your Honor, I submit that for all those reasons that plaintiff has not met its burden.

And all of the evidence and the reasonable inferences, and all those inferences have to be reasonable on your part. To make a reasonable inference that there's causation is not there. To make a reasonable inference that noise caused the harm to the plaintiffs is not there.

We may not like it. None of us may like the actions of Potashner, but those actions did not exert will over the remaining directors, did not change Mr. Stark's demand that HHI options be removed, that they be eliminated and that he would only buy the company if those options went away.

So, Your Honor, for all those reasons I would submit that the Rule 52(c) motion should be granted.

THE COURT: Thank you.

Gentlemen.

Can you wipe down, please, Mr. Peek.

MR. PEEK: I will, Your Honor.

MR. STIGI: Yeah. Your Honor, just one supplement to what Mr. Peek just said.

THE COURT: Use your outside voice.

MR. STIGI: One supplement to what Mr. Peek said.

In the excerpt of the proxy that was projected, in addition to the lawyers and the bankers, there are references to direct communications between Mr. Norris and Dr. Putterman to Turtle Beach. And you may recall testimony and handwritten notes from Mr. Norris evidencing direct communications. So the concept of Mr. Potashner being the sole filter of information to the Board is belied by the record.

Thank you.

THE COURT: Thank you.

Mr. Kotler, you're up.

(Pause in the proceedings.)

MR. KOTLER: Your Honor, how long was that?

THE COURT: I didn't count.

MR. KOTLER: I'll be shorter. A few points, Your Honor.

Mr. Apton referenced the *Gatz* case, and while that is interesting, it has no impact on the damages question. *Gatz* talks about equity expropriation to a controlling shareholder, and the controlling shareholder sells to a third party. There's nothing in *Gatz*, A, about damages, or B, that changes

the *Gentile* damages analysis that is referenced in the Court's August order and that I discussed in my prior remarks.

Next point, just to recall that, and Mr. Atkins, when he did his damages calculation, the $12.49 per share was actually, I think it was about a hundred million dollars, give or take. And according to his calculations, it isn't just the assignors who allegedly suffered those damages, but it is each of the directors who own shares. And that again goes to the fault of it, other than Mr. Potashner because as we know, he didn't own any shares as of the time of the merger, any voting shares.

Mr. Apton did say, and I heard this, Mr. Potashner did this to benefit himself. Okay. Mr. Atkins made no calculation as to how Mr. Potashner benefited himself, and that is what *Gentile* requires, and that is on page 100 of the decision, which I read earlier.

Instead, what Mr. Apton cited to are two things, general principles regarding damages that they don't have to be proven with actual certainty and reasonable certainty. I don't disagree with those principles, but they don't change the analysis here that the equity expropriation damages have to measure what the controlling shareholder actually took. So whether, you know, if the issue was whether it was 12.49 or 12.50 a share, I wouldn't be standing here right now, but that's not the issue that we're here on.

And saying that Turtle Beach was now a controlling shareholder because they received the damages, first of all, that's not what Mr. Atkins said. He talked about the ether. But Turtle Beach is not a controlling shareholder. It wasn't a controlling shareholder of Parametric as of the time of the merger. They were the opposite. They were the acquirer, who did not own any shares.

And, lastly, Mr. Apton suggested it was an unfair question to ask Mr. Atkins, Where did the money go, and that it was a hypothetical question, putting aside that it is perfectly appropriate to ask an expert with Mr. Atkins's expertise a hypothetical question. To be honest, Your Honor, it wasn't hypothetical. It was the question. And the fact that I was the one who asked it and not plaintiffs' counsel I think tells us all we need to know about what the answer is with regard to this particular 52(c) motion.

For the reasons previously stated, the plaintiffs have put forth no evidence as to the benefit that any controlling shareholder received and therefore judgment under 52(c) is appropriate here, Your Honor.

THE COURT: Thank you. Can you wipe down so Mr. Hess can come up.

And then, Mr. Apton, I know it is unusual, but I am going to give you the last word.

Don't look at me that way, Mr. Peek.

MR. HESS: Thank you, Your Honor. I too will try to be brief, and I'm going to hit a few, two topics. One is the plaintiff's definition of controlling shareholder that was submitted in their pocket brief is just a radical defining down of what controlling shareholder is for purposes of *Gentile*.

As we noted in our briefing to you, they cited to cases that involve individuals who are not controllers, who did not even owe fiduciary duties to the corporation in the normal course; but in a particular instance of a particular transaction they may be deemed to have such duties. Here we are talking about directors of a corporation (indiscernible) do have those duties, as explained in *Gentile* and expressly confirmed by the Delaware Supreme Court in *El Paso Pipeline GP Company* versus *Brinckerhoff* (phonetic) 152 A.3d 1248.

The kind of control that we're talking about for *Gentile* has to be the controller of the corporation, not a transaction specific control. And everything they've talked about in terms of Mr. Potashner, it's only about a specific transaction. He didn't own a share. Every director that's testified who is not Ken Potashner, including Ken Potashner, I should say, claims he doesn't have control. So the unanimous evidence is that Mr. Potashner is not a controlling shareholder of the entire corporation.

On standing, again, I just want to underscore, as I did before, that when the class was certified it included

transferees, and the settlement agreement; also, the release mirrored the class definition to include transferees as well. And, you know, the complaint that Mr. Apton raises, functionally saying that, well, once the class was determined and, you know, their rights were kind of preserved in amber, but that's basically the same argument that was made by the objector in *Activision*, which I would again commend to the Court's attention.

The objector in *Activision* said -- complained that the class definition does not fit the class who suffered the damages because it treats those who held on the merger date that sold any time after the merger date as having no interest in the claims. But the Court rejected that argument because it recognized that (indiscernible) commonplace for class certification orders entered by this Court and actions involving internal affairs of Delaware corporations to define the relevant class as all persons other than defendants who own shares as of given dates and their transferees, successors and assignors.

The Court went on to recognize that it was correct to treat those who held shares on the merger date that sold any time after as having no interest in the claims because they chose to dissociate their economic interests from the corporation. By doing so to forgo the opportunity to benefit from the class claims. Those claims passed to buyers, who are

properly considered class members with (indiscernible) interest in those claims.

They cannot revive standing that they lost upon sale by opting out of the class. There's just no case for that. And our position on this has not been inconsistent. So judicial estoppel is not even relevant to this point.

Finally, I'd like to address, Your Honor, the actual fraud point. Fundamentally, and with respect to the proxy, it's based upon this fairytale that the statement of the projections as of August 2nd, 2013, that were relied upon by Craig-Hallum were the proxy's projections as of December of 2013. Read the proxy. It's a forecast of a specific point in time. It was merely stating the fact that at that time, when Craig-Hallum performed its analysis and Parametric was explaining to its shareholders the analysis Craig-Hallum performed, it provided the inputs that Craig-Hallum used. It was a fact, an uncontroverted fact. And there's no evidence that the projections that Turtle Beach provided as of that date were false. In fact, the projections that were provided to Craig-Hallum were the same ones provided to their lenders, used to manage their business and provided to Mr. Potashner.

More to the point, even over time, Mr. Stark communicated to the market that those projections -- oh, I should say the proxy said don't rely upon this expressly; they're a point in time. These were forward-looking

statements, and you should not rely upon them. Things are going to change, probably will change, and they do change. And Mr. Stark clearly communicated that back to market. He did so in August by bringing out a new range, 32- to 40 million of EBITDA.

As we saw, that pretty much stayed the same until we had the Xbox deferral decision in October. And what did we see? Mr. Stark told Parametric in its papers one, that it happened; and two, what the impact would be. And not only that, in the preliminary and definitive proxy, Parametric informed it shareholders that wanted the Xbox that deferral happened and that as a result, Turtle Beach believes that its forecast will be below the lower guidance that had already been given in August of 2013.

And finally, what else do we know? That in December, Turtle Beach still believed in those ranges. On the low end, when they communicated to their lender, they thought their EBITDA would be 21 million. After you add the 10 million in impact that Parametric knew would be the Xbox, that puts you squarely in the communicated range to the market.

The fact that the forecasts were missed I think Mr. Stark said many times, it's the future. But he truly believed those forecasts all the way through when the definitive proxy statement was made. He communicated that to Parametric. He relied upon it. And the fact that those

projections didn't end up being true, those forward-looking statements that the proxy said could change is not actual fraud.

As a result, Your Honor, judgment in favor of the defendants is appropriate under Rule 52(c).

THE COURT: Thank you. If you could wipe down, please because I'm going to let Mr. Apton come up.

MR. HESS: Thank you.

(Pause in the proceedings.)

MR. APTON: Thank you, Your Honor. This has turned into kind of like a sprawling closing argument almost.

THE COURT: Yes, it has. Remember, they wanted me to do a -- (indiscernible), and I said no. (Indiscernible) Rule 52 motions, and this is it.

MR. APTON: So, Your Honor, what I did not hear though from any of the defendants is that Ken Potashner did not breach his fiduciary duties. So we can start there. There's a breach of fiduciary duty.

So the next question is okay. Was it intentional? Was it knowing? Yes. There's no two ways about that, and I think defendants would agree with that too. So we have a knowing and intentional breach of fiduciary duty committed by Ken Potashner.

Where did that lead us? It led to the merger every step along the way was trained on getting this merger done.

Why? Because he wanted to benefit from it. He expected the benefits. Whether or not those benefits actually were realized or materialized is a separate issue that does not change his intent. His intent was to benefit. And he continued his pursuit of that benefit to the very last minute. In January of '14 he's still talking to Stark about HHI.

Now, how did he get the merger done? He held back information from the Board. He lied to his shareholders, and he -- those directors who testified. They did not believe what Ken Potashner was saying. There are Board minutes pointing out that he lied, that the information they were receiving was not true and accurate, an e-mail showing.

We see in July, in September, October, November, Ken Potashner is aware that VTB's financial situation has deteriorated significantly.

Counsel points to the proxy, all these risk disclosures. That does not save them. The risk disclosures are only good insofar as actual information at the time that statement was made did not differ materially, and it did. The numbers in that proxy, Turtle Beach's, quote, internal financial projections were not correct and Stark admitted it on the stand. Potashner knew too, and he did not share that with his Board; he did not share that with his stockholders.

He was even asked by Mr. Khan on the verge of the -- on the eve of the merger closed -- or sorry, on the eve of the

vote, he said, if the situation has changed, I will not vote for the merger. Ken wanted the merger to happen. So what did he do? He allowed Mr. Khan to believe that the numbers were as they were, as they always were, and that was not true.

When the merger did close, it resulted in a dilution of Parametric shareholders. And J.T. Atkins calculated that dilution as 12.49 per share.

That's it. That's the case.

THE COURT: Okay.

MR. APTON: Thank you, Your Honor.

THE COURT: Anything else you want to add?

MR. APTON: No.

THE COURT: Thank you.

Equity expropriation required control or equity to be taken from the minority shareholders. For purposes of the motions this morning, the acceleration of the vesting of Potashner's options upon change of control where he had not met the benchmarks that would otherwise entitle him to those options support that that prong of the evaluation has been completed or is adequate.

Despite the adverse inference the Court has made under the July 15th, 2021, order, the plaintiffs have not established that Potashner had control over anyone else at Parametric. The Board members have testified that they didn't believe Mr. Potashner. They didn't trust Mr. Potashner, and

they did their own investigation.

It is clear that Mr. Potashner was acting in his own self-interest, but that does not preclude the determination by the Court that the Board acted in good faith in making the determination.

The plaintiffs have not established actual fraud; or even as plaintiffs have argued, intentional misconduct or bad faith that impacted the decision by the Board.

Based upon the lack of control and the lack of evidence of fraud impacting the Board's decision, the Court grants the Rule 52 motions on the substantive basis.

I am troubled by the standing arguments under *Urdan* and the class situation. I am not addressing those because I've addressed the substantive issues. I do find that at least some of the shares owned by Mr. Khan were transferred to this plaintiff. So they do have standing to make the arguments that they're making.

The aiding and abetting claims that have been alleged cannot survive when a finding that Mr. Potashner had no control is made by the Court.

I want to compliment all of you. This is my last trial, and I truly appreciate the professional way over many, many years that all of you, except for Mr. Apton, who is our recent addition, have presented matters in this Court, and I truly have appreciated working with the quality of lawyers that

I've had the benefit to work with.

If any of you have submitted depositions that have not been published, those will be returned to you so they don't have to take up space in our vault.

Mr. Peek, I'm going to task you with drafting the order, sending it around your team and then forwarding it over to Mr. Ogilvie and Mr. Apton for review.

MR. PEEK: Thank you, Your Honor.

THE COURT: Anything else?

MR. APTON: Thank you very much, Your Honor.

THE COURT: We'll be in recess.

MR. PEEK: Thank you for your patience.

(Proceedings concluded at 11:28 a.m.)

/ / /

/ / /

/ / /

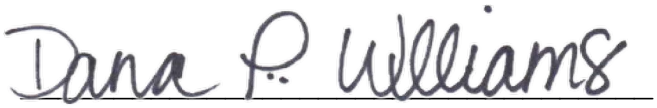
CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER TO THE BEST OF MY ABILITY.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

DANA L. WILLIAMS
LAS VEGAS, NEVADA 89183



DANA L. WILLIAMS, TRANSCRIBER

08/25/2021
DATE

NOTC
J. Stephen Peek, Esq.
Nevada Bar No. 1758
Robert J. Cassity, Esq.
Nevada Bar No. 9779
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
(702) 669-4600
(702) 669-4650 – fax
speek@hollandhart.com
bcassity@hollandhart.com

John P. Stigi III, Esq.
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
(310) 228-3700
(310) 228-3917 – fax
jstigi@sheppardmullin.com

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

DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION. This Document Related To: PAMTP LLC v. KENNETH POTASHNER, *et. al.*.	LEAD CASE NO.: A-13-686890-B DEPT. NO.: XI **NOTICE OF SUBMISSION OF PROPOSED ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT PURSUANT TO NRCP 52(c), FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND JUDGMENT THEREON**

Defendant Kenneth Potashner ("Defendant") by and through his undersigned counsel of record, the law firm of HOLLAND & HART LLP, hereby submits as **Exhibit 1** his proposed

///

Order Granting Defendants' Motion for Judgment Pursuant to NRCP 52(c), Findings of Fact and Conclusions of Law, and Judgment Thereon ("Order"). Defendant submitted the proposed Order to Plaintiff on Tuesday morning and requested comments by close of business on Wednesday. Plaintiff today told Defendant that it has concerns with the attached proposed Order but does not have specific changes at this time but may submit specific objections or a competing Order by close of business on September 3, 2020.

Dated this 2nd day of September 2021.

By: */s/ J. Stephen Peek*
J. Stephen Peek, Esq.
Robert J. Cassity, Esq.
Holland & Hart LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

John P. Stigi III, Esq.
Sheppard, Mullin, Richter & Hampton LLP
1901 Avenue of the Stars, Suite 1600
Los Angeles, California 90067

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

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of September 2021, a true and correct copy of the foregoing **NOTICE OF SUBMISSION OF PROPOSED ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT PURSUANT TO NRCP 52(c), FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND JUDGMENT 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:

ALBRIGHT STODDARD WARNICK & ALBRIGHT
G. Mark Albright
801 South Rancho Drive, Suite D-4
Las Vegas, NV 89106
Attorneys for Kearney IRRV Trust

DECHERT L.L.P.
David A. Kotler *(Admitted Pro Hac Vice)*
Brian Raphel *(Admitted Pro Hac Vice)*
1095 Avenue of the Americas
New York NY 10036

Joshua D. N. Hess, *(Admitted Pro Hac Vice)*
1900 K. Street, N.W.
Washington, D.C. 20006

Attorneys for Defendants VTB Holdings, Inc. and Specially Appearing Defendants Stripes Group, LLC and SG VTB Holdings, LLC

McDONALD CARANO LLP
George F. Ogilvie III
Amanda C. Yen
Rory T. Kay
2300 West Sahara Avenue, Suite 1200
Las Vegas, NV 89102

LEVI & KORSINSKY, LLP
Nicholas I. Porritt (*Pro Hac Pending)*
Adam M. Apton (*Pro Hac Pending)*
Elizabeth Tripodi (*Pro Hac Pending)*
1101 30th Street, Suite 115
Washington, D.C. 20007
Attorneys for PAMTP LLC

THE O'MARA LAW FIRM, P.C.
David C. O'Mara
311 East Liberty St.
Reno, NV 89501

SAXENA WHITE P.A.
Jonathan M. Stein
Adam Warden
Boca Center
5200 Town Center Circle, Suite 601
Boca Raton, FL 33486

ROBBINS GELLER RUDMAN & DOWD LLP
David A. Knotts
Randall Baron
655 West Broadway, Suite 1900
San Diego, CA 92101-8498

Attorneys for Grant Oakes and Derivative Plaintiff Lance Mykita

/s/ Valerie Larsen
An Employee of Holland & Hart

EXHIBIT 1

EXHIBIT 1

FFCL
J. Stephen Peek, Esq.
Nevada Bar No. 1758
Robert J. Cassity, Esq.
Nevada Bar No. 9779
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
(702) 669-4600
(702) 669-4650 – fax
speek@hollandhart.com
bcassity@hollandhart.com

John P. Stigi III, Esq.
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
1901 Avenue of the Stars, Suite 1600
Los Angeles, California 90067

Attorneys for Defendant
Kenneth Potashner

DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION. This Document Related To: PAMTP LLC v. KENNETH POTASHNER, *et. al.*.	LEAD CASE NO.: A-13-686890-B DEPT. NO.: XI **ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT PURSUANT TO NRCP 52(c), FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND JUDGMENT THEREON**

This cause came on regularly for trial starting on August 16, 2021, and continuing through August 25, 2021. Plaintiff PAMTP, LLC appeared by and through their counsel of record George F. Ogilvie III of McDonald Carano LLP and Adam M. Apton of Levi & Korsinsky, LLP. Defendant Kenneth F. Potashner (together with Elwood G. Norris, Seth Putterman, Robert M. Kaplan and Andrew Wolfe, the "Director Defendants") appeared by and through their counsel of record J. Stephen Peek and Robert J. Cassity of Holland & Hart LLP and John P. Stigi III and Alejandro E. Moreno of Sheppard, Mullin, Richter & Hampton LLP. Defendant VTB Holdings, Inc. ("VTBH"), and Specially Appearing Defendants Stripes Group, LLC, SG VTB Holdings, LLC, Juergen Stark and Kenneth Fox (collectively, the "Non-Director Defendants") appeared by and through their counsel Richard C. Gordon of Snell & Wilmer,

LLP and Joshua D.N. Hess, David A. Kotler, Brian Raphel, and Ryan Moore of Dechert LLP.

After the conclusion of Plaintiff's case-in-chief, defendants filed motions pursuant to NRCP 52(c). The Court having considered the evidence presented at trial, along with oral and written arguments of counsel on such motions, hereby GRANTS defendants' motion pursuant to NRCP 52(c) and enters judgment in favor of defendants, upon the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. Class and Derivative Litigation

1. The underlying class action and shareholder derivative action was commenced on August 8, 2013. The case arose out of the merger between Parametric Sound Corporation ("Parametric") and VTBH which closed on January 15, 2014.

2. This action was commenced initially on behalf of a putative class of non-insider holders of Parametric common stock. After the Nevada Supreme Court issued its September 14, 2017 decision dismissing the class plaintiffs' action for lack of standing, with leave to amend, the class plaintiffs amended their complaint on December 1, 2017 to assert both a direct "equity expropriation" class claim and derivative dilution claims.

3. In January 2019, the Court certified the direct equity expropriation class ("Class"), which it defined as follows:

> All persons and/or entities that held shares of Parametric . . . common stock on January 15, 2014, at the time Parametric issued shares in the Merger pursuant to the Agreement and Plan of Merger, whether beneficially or of record, including the legal representatives, heirs, successors-in-interest, transferees, and assignees of all such foregoing holders, but excluding Defendants, executive officers of Parametric as of January 15, 2014, and their legal representatives, heirs, successors-in-interest, transferees, and assignees.

4. The shareholders' derivative claims included causes of action against defendants for breach of fiduciary duty, aiding and abetting and unjust enrichment. Because those claims were brought on behalf of the corporation, no class was certified regarding those claims.

5. After extensive litigation, defendants and the class plaintiffs settled the class and derivative actions in late 2019. Notice of the settlement was provided to the Class members in January 2020.

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

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

7. On May 18, 2020, the Court ordered that the class action and derivative settlement was "finally approved in all respects" and entered a final judgment dismissing all of the Class' released claims, with prejudice, pursuant to the terms of the Stipulation of Settlement filed on November 15, 2019.

II. Opt-Out Litigation

A. Plaintiff and Assignors

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

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

10. The members of plaintiff are IceRose Capital Management LLC, Robert Masterson, Richard Santulli, Marcia Patricof (as trustee of Patricof Family LP, Marcia Patricof Revocable Living Trust, and the Jules Patricof Revocable Living Trust), Alan and Anne Goldberg, Barry Weisbord, and Ronald and Muriel Etkin (each, an "Assignor"; collectively, the "Assignors").

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

12. Assignor IceRose threatened litigation against the Non-Director Defendants, including Stark and Fox, in 2014, on claims arising in part from the merger, but ultimately chose not to file such a lawsuit

13. Each of the Assignors held Parametric common stock on the date the merger

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

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

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

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

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

17. When the Assignors sold the Parametric common stock they owned as of January 15, 2014, the Assignors did not enter into any agreement with purchasers of such shares to retain their rights, titles and interests in any claims arising from the Assignors' prior ownership of Parametric common stock, including the claims asserted by plaintiff in this action.

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

B. Pre-Merger Parametric

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

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

C. Directors and Senior Officer of Pre-Merger Parametric

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

(1) Potashner

21. Potashner was appointed a director in December 2011 and Executive Chairman (equivalent to chief executive officer) in March 2012. He served as chairman of Newport Corporation from 2007 to 2016, after being elected to its board of directors in 1998. From May 2003 to the present, he has been an independent investor in and advisor to technology companies. From 1996 to May 2003, he was chairman of the board of directors of Maxwell Technologies, Inc., a manufacturer of ultracapacitors, microelectronics and high voltage capacitors, and where he also served as president and chief executive officer from 1996 to October 1998. From November 1998 to August 2002, he was president, chief executive officer and chairman of SONICblue Incorporated (formerly S3 Incorporated), a supplier of digital media appliances and services. He was executive vice president and general manager of Disk Drive Operations for Conner Peripherals, a manufacturer of storage systems, from 1994 to

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

1996. From 1991 to 1994, he was vice president, Worldwide Product Engineering, for Quantum Corporation, a manufacturer of disk drives. From 1981 to 1991, he held various engineering management positions with Digital Equipment Corporation, a manufacturer of computers and peripherals, culminating with the position of Vice President of Worldwide Product Engineering in 1991. Potashner received his bachelor's degree in electrical engineering at Lafayette College in 1979 and a masters' degree in electrical engineering from Southern Methodist University in 1981.

22. Potashner resigned from the Board effective May 12, 2014.

(2) Norris

23. Norris was a member of the Board since the incorporation of the company on June 2, 2010 and co-founded the company with James Barnes ("Barnes"), Parametric's chief financial officer. Norris was Parametric's President and Chief Scientist. He was a director of LRAD Corporation from August 1980 to June 2010. He served as Chairman of LRAD Corporation's Board of Directors, an executive position, in which he served in a technical advisory role and acted as a product spokesman from September 2000 to April 2009. From 1988 to November 1999, he was a director and Chairman of e.Digital Corporation, a public company engaged in electronic product development, licensing and sales. During that period, he also held various other executive officer positions at e.Digital. From August 1989 to October 1999, he served as director and held various executive officer positions with Patriot Scientific Corporation, a public company engaged in intellectual property licensing. Norris is an inventor and owner of more than 50 U.S. patents, primarily in the fields of electrical and acoustical engineering, and is a frequent speaker on innovation to corporations and government organizations. Norris is the inventor of pre-merger Parametric's HSS technology.

24. Norris resigned from the Board effective January 15, 2014.

(3) Putterman

25. Putterman was appointed a director in May 2011. He has been a full faculty member at UCLA since 1970, where he is a Professor of Physics. His research areas include nonlinear fluid mechanics and acoustics, sonoluminescence, friction, x-ray emission and crystal

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

generated nuclear fusion. He has served as a consultant to government and industry including the Jet Propulsion Laboratory, TRW and the Aesthetic Surgery Education and Research Foundation. Putterman is a Fellow of the Acoustical Society of America and the American Physical Society and a past recipient of an Alfred P. Sloan Fellowship. He was honored as the UCLA 2010-2011 Faculty Research Lecturer and frequently provides plenary presentations at leading universities. He has also served as a Director of the Julian Schwinger Foundation for Physics Research since 2002 and as a Panel Member for the Department of Defense's Defense Sciences Research Council since 2007. He earned a B.S. from the California Institute of Technology in 1966 and his Ph.D. from Rockefeller University in 1970.

26. Putterman resigned from the Board effective November 21, 2013.

(4) Kaplan

27. Kaplan was appointed a director in May 2011. He is a retired business executive with extensive experience in the financial and retail sectors. Kaplan remains active as a director of a family-owned Canadian-based mortgage lending firm and as Managing Director of Beacon Consulting Group, a private firm specializing in assisting and investing in early stage entrepreneurial entities, that he founded in 1997. Prior business activities include 12 years as a senior financial executive in the investment brokerage industry. He was a founding partner of McCan Franchises Ltd., the original Canadian franchisee of McDonalds Corp. From 2003 to 2009, he was a director of Jet Gold Corp., a public Canadian resource exploration company. In 2010, Kaplan was a Visiting Professor of Business at The University of Warsaw where he assisted in establishing a program in Entrepreneurship. Other prior visiting professorships include the European School of Economics in Italy and The University of Canterbury, N.Z. In 2010, Kaplan was recognized with a European Union Distinguished Scholar Award. Dr. Kaplan earned an MBA from Harvard University in 1961 and a Ph.D. in Business Economics from Michigan State University in 1967.

28. Kaplan resigned from the Board effective January 15, 2014.

(5) Wolfe

29. Wolfe was appointed a director in February 2012. He founded Wolfe Consulting

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

in 2002 and serves as a technology and intellectual property consultant in the consumer electronics, computer, and semiconductor industries. He works with Global 500 corporations and technology startups in developing product strategy, new product technology, and intellectual property strategy. He also testifies and serves as a consulting expert for intellectual property (IP) and other technology-related litigation matters. Dr. Wolfe was Chief Technology Officer for SONICblue, Inc. (formerly S3, Inc.) from 1999 to 2002 and also served as Senior Vice President of Business Development from 2001-2002. He served as a Consulting Professor at Stanford University from 1999 to 2002 and an Assistant Professor at Princeton University from 1991 to 1997. Dr. Wolfe obtained a B.S.E.E. in Electrical Engineering and Computer Science from The John Hopkins University in 1985 and an M.S. in Electrical and Computer Engineering in 1987 and a Ph.D. in Computer Engineering in 1992 both from Carnegie Mellon University.

(6) Honoré

30. Honoré was appointed a director in March 2012. He joined Columbia Pictures in 1988 as Vice President of post-production after previously serving as director of post-production for Home Box Office Pictures and DeLaurentiis Entertainment Group. In 1993, he was promoted to executive vice president post-production for Sony Pictures Entertainment including its Columbia Pictures and TriStar Pictures units. He was also responsible for final post-production quality of all picture and sound for Columbia TriStar Motion Picture Companies, Screen Gems and Stage 6 Productions and feature films acquired by Columbia TriStar Motion Picture Companies, Columbia TriStar Home Video and Sony Pictures Classics. At Sony Pictures he was responsible for completion of pictures budgeted at over $1.5 billion per year and supervised post-production for hundreds of major films including Casino Royale and other Bond movies, Spider-Man series, DaVinci Code, Bugsy, A Few Good Men, Men in Black series and many more. Honoré retired from Sony Pictures in December 2011.

31. Honoré resigned from the Board effective January 15, 2014.

D. Non-Director Defendants

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

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

including Voyetra Turtle Beach, Inc., are collectively referred to as "Turtle Beach." Turtle Beach designs, develops and markets premium audio peripherals for video game, personal computer, and mobile platforms, including its acclaimed line of Ear Force gaming headphones and headsets crafted for Xbox, Playstation, Wii and PC-based gaming. Turtle Beach's advanced products allow video game players to experience high-quality, immersive sound and communicate with others while playing video games. Unlike most traditional stereo headphones, the more advanced headsets from Turtle Beach incorporate sophisticated technology for processing audio and multi-band wires transmission capabilities. Turtle Beach had strong market share in established gaming markets, including a 53% share of the U.S. console gaming headset market as of year-end 2012 according to The NPD Group. Turtle Beach had a presence in 40 countries and has partnered with major retailers, including Wal-Mart, Carrefour, Tesco, Best Buy, GameStop, Target and Amazon.

33. VTBH was majority owned by Stripes Group, LLC ("Stripes") and SG VTB, LLC ("SG VTB"). VTBH is a wholly owned subsidiary of the post-merger Turtle Beach.

34. Stripes is a private equity firm focused on internet, software, healthcare, IT and branded consumer products businesses. In 2010, Stripes invested in VTBH and became its majority owner. Through Stripes's financial support and guidance, VTBH was able to hire new people and better develop its business, resulting in substantial year-over-year growth in 2011 and 2012. Stripes helped Turtle Beach to hire Stark as its new CEO in September 2012.

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

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

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

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

the Board.

III. Parametric, Turtle Beach, and Stripes in Early 2013

38. By the end of 2012 and first quarter of 2013, substantial work still remained to be done at Parametric before HyperSound could satisfy market expectations for a commercial product. Despite years of development that began even before Parametric existed, HyperSound suffered from technical issues that rendered it unsuitable for market consumption in 2013. Focus group testing demonstrated that sound quality was inconsistent outside of ideal testing conditions and Parametric lacked the resources to develop the product properly.

39. In the six months ended March 31, 2013, Parametric had revenues of $264,058 and suffered a net loss of $3,207,655. Parametric's net loss had more than doubled from the same period in 2012.

40. Parametric lacked the financial and personnel resources on its own to develop HyperSound to the point that Parametric could design, manufacture and sell to consumers directly. Accordingly, in the first quarter of 2013 Parametric shifted the focus of its business model to licensing its technology to other companies with the capital and expertise to develop and commercialize Parametric's technology. That strategy, however, still had daunting execution risks.

41. Parametric did not manufacture or sell any gaming console products. For this reason, Parametric had no presence in the gaming console sector. Other than the proposed merger with Turtle Beach, Parametric had no plans to manufacture any gaming console, personal computing audio or other consumer electronics products.

42. In 2010, Turtle Beach earned revenues of $90.5 million and EBITDA of $30.8 million. In 2011, Turtle Beach earned revenues of $168.5 million and EBITDA of $53.7 million. In 2012, Turtle Beach earned revenues of $208.4 million and EBITDA of $48.4 million.

43. Despite Turtle Beach's numerous successes, it was looking to diversify its business. The majority of Turtle Beach's sales would occur in the fourth quarter of each year and, because gaming audio headsets were designed to be used with video game consoles, sales

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

would always be volatile whenever new consoles were released.

44. Initially, Turtle Beach was interested primarily in acquiring a license to incorporate HyperSound into its gaming audio products. Nevertheless, at Parametric's suggestion, Parametric and Turtle Beach began to focus on a reverse triangular merger as a means of merging the two businesses.

45. From the beginning, Stripes was skeptical about any deal between Turtle Beach and Parametric. Stripes was concerned that Parametric was too risky an investment. Further, a reverse triangular merger was particularly unattractive to Stripes because it would result in substantially diluting Stripes's interest in Turtle Beach. Stripes also did not like the reverse merger structure because the post-merger entity would be a public company and Stripes did not believe that it was an advantageous time for Turtle Beach to have to deal with the market expectations of being a public company ahead of the expected transition in console generations for both Microsoft's Xbox and Sony's Playstation.

46. Stark believed, however, that HyperSound had potential for success and advocated in favor of the deal. Between March and June 2013, Stark had numerous conversations with Stripes to try to convince it to support the merger. Fox resisted for months before agreeing to support the merger in June 2013 in order to support Stark (and Turtle Beach's Executive Chairman, Ronald Doornink, who also supported the deal). Two other directors of Turtle Beach, founders Carmine Bonnano and Fred Romano, remained opposed the merger.

IV. Merger Negotiations and the Parametric Board's Process

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

48. In March 2013, Parametric engaged Houlihan Lokey as its financial advisor to evaluate possible strategic alternatives. Houlihan Lokey was recommended by Morgan Stanley. Parametric had initially considered engaging Morgan Stanley as its financial advisor.

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

Morgan Stanley declined the engagement because the proposed transaction was below the monetary value threshold of transactions on which Morgan Stanley typically will advise.

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

50. During this five-month period, the Board held a total of 13 formal meetings with financial and legal advisers regarding possible strategic transactions. During these meetings, the Directors engaged in robust discussions among themselves and with the Board's advisers regarding the risks and benefits of a strategic transaction with Turtle Beach and available alternative strategies and transactions. Similar discussions occurred in email and phone conversations outside of any formally convened Board meeting.

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

52. The break-up fee license agreement was viewed as complementary to other licensing activities sought out by Parametric at the time. At the time that the Turtle Beach break-up fee license agreement was negotiated, the license was believed to be purely accretive to existing licensing efforts. It would have been in Parametric's business interest to issue such a license agreement for less or even zero consideration, without any royalty payment, because publicity of such a license agreement would have been seen by the market and other potential license partners as a significant endorsement of Parametric's technology by a well-known leader in the field of audio technology.

53. Parametric established HyperSound Health, Inc. ("HHI"), a wholly owned

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

subsidiary of Parametric, in October 2012 to facilitate Food and Drug Administration approval for certain medical applications of HyperSound technology (*e.g.*, hearing devices). In February 2013 and March 2013, options were granted to four individuals (Potashner and three consultants) to purchase shares of the common stock of HHI (such options referred to as the "HHI stock options").

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

55. When it became apparent to the Board that the cancellation of Potashner's HHI was required to facilitate a merger with Turtle Beach, a majority of the Board demanded that Potashner agree to cancel his HHI stock options. In July 2013, at the demand of the Board, Potashner agreed that his HHI options would, at Turtle Beach's demand, cancel upon the closing of the proposed merger with Turtle Beach. Potashner entered into this agreement without being provided any payment or additional compensation from Parametric, Turtle Beach, Stripes, or anyone else. As result, Potashner received nothing of value from Turtle Beach and actually lost stock options that he believed could have held substantial value following the merger.

56. Parametric engaged Craig-Hallum Capital Group, LLC ("Craig-Hallum") to provide an opinion regarding the fairness of the proposed merger. Craig-Hallum's compensation for preparing a fairness opinion was not contingent upon the closing of any transaction.

57. On August 2, 2013, a joint meeting of the Parametric Board and compensation committee was held, with the financial and legal advisors of the Parametric Board. At the meeting, representatives of Craig-Hallum reviewed and discussed with the Parametric Board Craig-Hallum's financial analysis and views regarding the merger with Turtle Beach and the terms of the merger agreement with Turtle Beach (including the "Per Share Exchange Ratio" as

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

defined therein, with reference to a proposed fairness opinion and slide presentation distributed to the Parametric Board prior to the meeting; at the request of the Parametric Board, Craig-Hallum rendered its oral opinion to the effect that, as of August 2, 2013, subject to certain assumptions, qualifications and limitations, the "Per Share Exchange Ratio" contemplated by the merger agreement was fair, from a financial point of view, to Parametric.

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

59. The internal management projections provided by Parametric and Turtle Beach to Craig-Hallum in connection with Craig-Hallum's analysis of the merger were not prepared with a view toward public disclosure. These internal management projections were prepared by management and were based upon numerous variables and assumptions that were inherently uncertain and be beyond the control of management, including, without limitation, factors related to general economic and competitive conditions. Accordingly, it was understood that actual results could vary significantly from those set forth in such internal management projections.

60. For purposes of its stand-alone analyses performed on Parametric, Craig-Hallum utilized Parametric's internal financial projections for fiscal years ended September 30, 2013 through September 30, 2017, prepared by and furnished to Craig-Hallum by the management of Parametric. Information regarding the net cash, number of fully-diluted shares of common stock outstanding and net operating losses for Parametric was provided by management. For purposes of its stand-alone analyses performed on Turtle Beach, Craig-Hallum utilized Turtle Beach's internal financial projections for fiscal years ended December 31, 2013 through December 31, 2016 prepared by and furnished to Craig-Hallum by the management of Turtle Beach. Information regarding the net debt, number of fully-diluted shares of common stock outstanding and net operating losses for Turtle Beach was provided by management.

61. At the August 2, 2013 meeting of the Board, the Directors engaged in robust discussion with representatives of Craig-Hallum regarding its fairness opinion and the calculations contained therein. The Directors relied in good faith upon the competency of the

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

analyses performed and opinions rendered by Craig-Hallum. None of the Directors was made aware of errors, if any, contained in Craig-Hallum's analyses.

62. In evaluating the merger agreement and the transactions contemplated thereby, the Board consulted with Parametric's management and legal and financial advisors, reviewed a significant amount of information and considered numerous factors which the Parametric Board viewed as generally supporting its decision to approve the merger agreement and the transactions contemplated. The Board also considered and discussed numerous risks, uncertainties and other countervailing factors in its deliberations relating to entering into the merger agreement and the merger.

63. Although the Court made a rebuttable inference that Potashner acted in bad faith in pursuit of his own self-interest when supporting and approving the merger (per the adverse inference made by the Court pursuant to its Order dated July 14, 2021), the Board nevertheless approved the merger agreement with Turtle Beach on August 2, 2013 by a majority of independent and disinterested directors exercising their business judgment in good faith. Norris, Kaplan, Putterman, Wolfe and Honoré exercised their good faith business judgment independent of Potashner.

64. A majority of the Board believed in good faith that, overall, the potential benefits to Parametric shareholders of the merger agreement and the transactions contemplated thereby outweighed the risks and uncertainties attendant to the proposed merger, as well as risks and uncertainties attendant to remaining as a stand-alone entity. In particular, based upon their experience, a majority of the Board recognized that the expected benefits of the proposed merger with Turtle Beach vastly outweighed the risks attendant to continuing to attempt to execute on its stand-alone entity business plan.

65. Under the merger, a subsidiary of Parametric would merge with Turtle Beach, with Turtle Beach continuing as the surviving corporation. As a result of the merger, each share of Turtle Beach common stock and Series A Preferred Stock would be cancelled and converted into the right to receive a number of shares of Parametric stock. The end result of the merger would be that the pre-merger security holders of Parametric would own 20.01% of the

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

post-merger Parametric (on a fully-diluted basis), while the security holders of Turtle Beach would own the remaining 79.99% of the post-merger Parametric (on a fully-diluted basis).

66. Each of Parametric's directors determined independently that the merger was in the best interests of Parametric and its shareholders. Kaplan, Norris, Putterman, Wolfe, and Honoré conducted their own analysis of the terms of the merger agreement, with the assistance of their legal counsel and financial advisors. Their decisions to vote in favor of the merger were not guided by, let alone controlled by, Potashner's support for the merger.

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

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

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

IV. Post-Announcement of the Merger

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

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

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

72. In a call with Parametric shareholders on August 8, 2013 announcing the merger, Turtle Beach disclosed that it expected 2013 revenues and EBITDA to fall in a range that was below the projections Craig-Hallum had relied upon. Turtle Beach further disclosed to Parametric shareholders that "it's very important that you understand the gaming industry context for 2013. Both Xbox and PlayStation have announced launches of new consoles during the holiday's this year. As a result, the entire gaming sector is going through what we believe to be a normal cycle of contraction, prior to these new console release[s]."

73. Stark further disclosed to Parametric shareholders that "our business results in particular will be very much dependent on one; how consumer purchasing behavior for more expensive accessories like headset plays out, heading into the transition. Two; when the new console launches will happen and three; what quantity of new consoles will be available [and] sold during the weeks between the launch and the year end." Although console transitions have led to subsequent industry growth in the past, Stark disclosed "we can't guarantee that will occur."

74. Stark further disclosed that future sales related to the new Xbox console were particularly uncertain. In his words, forecasted headset sales for the new consoles "rely among other things on successful widespread launch of the new consoles with sufficient selling weeks to impact this year as well as availability of some specific components from Microsoft required for sale of our licensed Xbox One headsets, this holiday. These specific items by the way are outside of our control."

75. Stark concluded with a warning that "these uncertainties are driving the wide range around the expectations for revenues and EBITDA I just talked through, but it's important to note that our actual results could fall materially outside of these ranges if the aforementioned assumptions turned out to be inaccurate."

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

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

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

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

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

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

81. The proxy statement did not contain updated financial projections for either Turtle Beach or Parametric. The proxy statement, however, cautioned readers that the projections that Craig-Hallum relied upon were only current "as of August 2, 2013," the date the fairness opinion was issued, "based on market data as it existed on or before August 2, 2013 and is not necessarily indicative of current or future market conditions." The proxy statement also contained a prominent warning in bold text that shareholders "should not regard the inclusion of these projections in this proxy statement as an indication that Parametric, Turtle Beach or any of their respective affiliates, advisors or other representatives considered or consider the projections to be necessarily predictive of actual future events."

82. The proxy statement also disclosed that the risk Stark had warned about on the August 8, 2013 investor call had been realized. Specifically, the proxy statement disclosed that "Microsoft has informed its partners in the Xbox One console launch that the Xbox One Headset Adapter, being built by Microsoft and provided to Turtle Beach for inclusion with new

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

gaming headsets, will not be available until early 2014."

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

84. In late 2013, Turtle Beach provided additional financial disclosures showing that Turtle Beach's actual performance in 2013 was materially underperforming Turtle Beach's performance in the same time period in 2012 and its prior guidance for 2013. For example, on November 7, 2013, Parametric filed a Form 8-K, which disclosed an investor presentation prepared by Parametric and Turtle Beach that included updated net revenue, EBIDTA, and net income numbers for Turtle Beach for the twelve-month period preceding June 30, 2013. That investor presentation also stated that "Microsoft's delay of the Xbox One hardware and software until early 2014 is expected to result in a deferral of Turtle Beach's Xbox One headset-related revenues and profits for Q4." Parametric shareholders had access to this information when deciding whether to vote in favor of the merger.

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

86. The proxy statement contained a fair summary of Craig-Hallum's fairness opinion. The proxy statement also contained a fair and complete summary of interests and

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

potential conflicts in the merger held by members of the Board and management of Parametric. No material interest or potential conflicts in the merger held by members of the Board and management of Parametric were undisclosed in the proxy statement.

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

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

89. Potashner's employment agreement, which came into effect in April 2012, contained certain change in control provisions. Under that agreement, upon a change in control at Parametric, Potashner would be entitled to a severance payment equivalent to twelve months salary and accelerated vesting of theretofore unvested incentive stock options.

V. Post-Merger

90. Following the merger, Turtle Beach invested tens of millions of dollars into HyperSound and hired Norris as the new Chief Scientist. Even with these substantial resources and Norris's continued involvement, HyperSound was a commercial disappointment. Turtle Beach was never able to generate substantial revenues from the product. Instead, Turtle Beach suffered substantial losses.

91. In recent years, after Turtle Beach stopped investing in the HyperSound technology after sustaining years of losses on its investment in the technology, Turtle Beach has maintained its dominance of the gaming headset market and has achieved considerable financial success. None of this success is attributable to the HyperSound technology.

VI. No Control or Actual Fraud

92. Prior to January 15, 2014, Parametric was not a "controlled company" pursuant

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

to NASDAQ rules because more than 50% of its voting power was not concentrated in any single shareholder or control group.

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

94. On November 11, 2013, Potashner owned no shares of common stock of Parametric. Accordingly, Potashner was not entitled to vote a proxy statement at the special meeting of shareholders held on December 27, 2013.

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

a. cancel Potashner's options in the HHI subsidiary for no consideration;

b. rebuff Potashner's efforts to cause Kaplan to retire from his position as a director of the pre-merger Parametric;

c. refuse Potashner's request to remove Wolfe from Parametric's audit committee.

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

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

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

97. None of Norris, Putterman, Kaplan and Honoré had any business interactions with Potashner prior to Parametric. None of Norris, Putterman, Kaplan, Wolfe and Honoré had any pre-existing personal or familial relationship with Potashner.

98. None of the Director Defendants was unable to freely exercise his judgment as a

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

member of the Board by reason of:

a. dominion or control of another;

b. fear of retribution by another;

c. contractual obligations owed to another; or

d. employment by or other business relationship with another.

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

a. elect new directors to the Board;

b. cause a break-up of Parametric;

c. cause Parametric to merge with another company;

d. amend Parametric's certificate of incorporation;

e. cause Parametric to sell all or substantially all of the assets of Parametric;

f. alter materially the nature of Parametric and the public shareholders' interest therein; or

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

100. Potashner did not receive any compensation as a result of the merger that he was not entitled to receive through his employment contract, which included a severance payment, an annual bonus, and accelerated vesting of certain incentive stock options. Potashner could have received the same compensation had Parametric merged with a different partner or no one at all. Each of these forms of compensation were disclosed in the proxy statement.

101. Potashner briefly served as a director for the post-merger company because Parametric, not Turtle Beach, nominated him for this position. Potashner received no compensation for his participation on the board.

102. Potashner did not enter any side deals or other agreements with Turtle Beach or Stripes for additional compensation. Potashner received nothing of value from Turtle Beach or Stripes in exchange for his support for the merger.

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

104. Due to the loss of his stock options in HHI, which the Parametric Board and

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

Turtle Beach forced him to cancel in order for the merger to occur, Potashner lost more than any other shareholder by voting in favor of the merger.

CONCLUSIONS OF LAW

1. NRCP 52(c) allows the district court in a bench trial to enter judgment on partial findings against a party when the party has been fully heard on an issue and judgment cannot be maintained without a favorable finding on that issue. *Certified Fire Prot. Inc. v. Precision Constr. Inc.*, 128 Nev. 371, 377, 283 P.3d 250, 254 (2012).

2. In entering a Rule 52(c) judgment, "[t]he 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." *Id.* (citing 9C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, Federal Practice and Procedure § 2573.1, at 256-60 (3d ed. 2008) (addressing NRCP 52(c)'s federal counterpart, Fed. R. Civ. P. 52(c)); ROBERT E. JONES ET AL., Rutter Group Practice Guide: Federal Civil Trials and Evidence § 17:92 (2011) ("Because 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 . . . .")).

3. The directors of a Nevada corporation "are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation" (known as the "business judgment rule"). NRS 78.138(3). In exercising his or her business judgment, a director is "entitled to rely on information, opinions [and] reports" from, among others, "[o]ne or more directors, officers or employees of the corporation reasonably believed to be reliable and competent in the matters prepared or presented." NRS 78.138(2)(a). Likewise, a director may rely upon "information, opinions [and] reports" from "[c]ounsel, public accountants, financial advisers, valuation advisers, investment bankers or other persons as to matters reasonably believed to be within the preparer's or presenter's professional or expert competence." NRS 78.138(2)(b). Directors "are not required to consider the effect of a proposed corporate action upon any particular group having an interest in the corporation as a dominant factor." NRS 78.138(5). As a matter of statutory law, directors of a Nevada corporation are not required to elevate the short-term interests of stockholders (such as maximizing immediate, short-term

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

share value) ahead of any of the other interests set forth in NRS 78.138(4).

4. Under NRS 78.211(1), "the board of directors may authorize shares to be issued for consideration consisting of any tangible or intangible property or benefit to the corporation, including, but not limited to, cash, promissory notes, services performed, contracts for services to be performed or other securities of the corporation. The nature and amount of such consideration may be made dependent upon a formula approved by the board of directors or upon any fact or event which may be ascertained outside the articles of incorporation or the resolution providing for the issuance of the shares adopted by the board of directors if the manner in which a fact or event may operate upon the nature and amount of the consideration is stated in the articles of incorporation or the resolution. 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."

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

6. In *Chur v. Eighth Judicial Dist. Court*, 136 Nev. Adv. Op. 7, 458 P.3d 336, 340 (2020), the Court noted that "NRS 78.138(7) requires a two-step analysis to impose individual liability on a director or officer." First, the presumptions of the business judgment rule must be rebutted. *Id.* (citing NRS 78.138(7)(a); *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev. 369, 375, 399 P.3d 334, 342 (2017)). Second, the "director's or officer's act or failure to act" must constitute "a breach of his or her fiduciary duties," and that breach must further involve "intentional misconduct, fraud or a knowing violation of law." NRS 78.138(7)(b)(1)-(2) (emphasis added). The *Chur* Court confirmed that NRS 78.138 "provides for the sole circumstance under which a director or officer may be held individually liable for damages stemming from the director's or officer's conduct in an official capacity." *Chur*, 458 P.3d at

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

340.

7. The *Chur* Court also explained that intentional misconduct and knowing violation of the law under NRS 78.138 is an expansive test: "To give the statute a realistic function, it must protect more than just directors (if any) who did not know what their actions were [wrongful]; it should protect directors who knew what they did but not that it was wrong." *Id.* at 341. Thus, a plaintiff "must establish that the director or officer had knowledge that the alleged conduct was wrongful in order to show a "knowing violation of law" or "intentional misconduct" pursuant to NRS 78.138(7)(b)." *Id.* (concluding that the knowledge of wrongdoing requirement under NRS 78.138 is an "appreciably higher standard than gross negligence," which is defined as a "reckless disregard of a legal duty").

8. The Director Defendants were entitled to the benefit of the business judgment rule presumption in connection with their consideration and approval of the merger with Turtle Beach.

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

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

11. Additionally, in 2017, the Nevada Supreme Court ruled in this litigation that the only direct claim that Parametric shareholders might have standing to assert arising out of the merger was an "equity expropriation" claim. *See Parametric Sound Corp. v. Eighth Jud. Dist. Ct.*, 133 Nev. 417, 429, 401 P.3d 1100, 1109 (2017). Any other claim contesting the merger

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

would be derivative in nature, and was extinguished by the settlement and judgment entered by this Court on May 18, 2020.

12. The Court in *Parametric* held that "equity expropriation claims involve a controlling shareholder's or director's expropriation of value from the company causing other shareholders' equity to be diluted." *Id.* The Court cited only two cases as providing the legal standard for an equity expropriation: *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006), and *Gatz v. Ponsoldt*, 925 A.2d 1265 (Del. 2007).

13. Under *Gentile*, an equity expropriation claim exists where (1) a company has a controlling shareholder or controlling shareholder group prior to the merger and (2) the controlling shareholder or controlling shareholder group uses its control to cause the company to issue economic and voting power to the controlling shareholder or shareholder group for inadequate consideration. *Gentile*, 906 A.2d at 100. *Gatz* does not alter these basic elements of the claim. *Gatz*, 925 A.2d at 1277.

14. The severance payment and accelerated vesting of incentive stock options provided for under Potashner's April 2012 employment agreement, which were triggered upon the closing of the merger between Parametric and Turtle Beach on January 15, 2014, for purposes of the motion, will be presumed to have constituted an expropriation by Potashner of value from the company causing Parametric shareholders' equity to be diluted.

15. Nevertheless, Plaintiff failed to meet its burden of proving that Parametric had a controlling shareholder or controlling director. Accordingly, Plaintiff has failed to meet its burden to prove that Potashner's receipt of incentive stock options is an expropriation of value by a controlling shareholder. As such, Plaintiff failed to prove an essential element of an equity expropriation claim under Nevada law.

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

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

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

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

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

JUDGMENT

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

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

DATED this _____ day of September 2021

HON. ELIZABETH GONZALEZ
DISTRICT COURT JUDGE

Respectfully submitted:

/s/ J. Stephen Peek
J. Stephen Peek, Esq.
Robert J. Cassity, Esq.
Holland & Hart LLP
9555 Hillwood Drive, 2d Floor
Las Vegas, Nevada 89134

John P. Stigi III, Esq. (*Admitted Pro Hac Vice*)
SHEPPARD MULLIN RICHTER &
HAMPTON LLP
1901 Avenue of the Stars, Suite 1600
Los Angeles, CA 90067-6017

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

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

HOLLAND & HART LLP
9555 HILLWOOD DRIVE, 2ND FLOOR
LAS VEGAS, NV 89134

NOTC
George F. Ogilvie III, Esq. (NSBN 3552)
Rory T. Kay, Esq. (NSBN 12416)
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
T: (702) 873-4100
F: (702) 873-9966
gogilvie@mcdonaldcarano.com
rkay@mcdonaldcarano.com

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

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 **NOTICE OF SUBMISSION OF PLAINTIFF'S OBJECTIONS TO DEFENDANTS' PROPOSED ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT PURSUANT TO NRCP 52(C), FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND JUDGMENT THEREON**
This Document Relates To: ALL ACTIONS.	

Notice is hereby given to all parties that, Plaintiff PAMTP LLC, by and through its counsel of record, the law firms of McDonald Carano LLP and Levi & Korsinsky, LLP, has submitted Plaintiff's Objections to Defendants' Proposed Order Granting Defendants' Motion For Judgment Pursuant To NRCP 52(C), Findings Of Fact And Conclusions Of Law, And Judgment Thereon ("Objections"), a copy of which is attached hereto as **Exhibit "A"**, to chambers for consideration.

Plaintiff submits these Objections solely to assist the Court in entering an order consistent with the Court's ruling on the record on August 25, 2021, which granted defendants' Rule 52(c) motion, while not containing factual findings that are either irrelevant, unsupported by the record, or misleading without additional factual context. In submitting its Objections, Plaintiff does not waive, but expressly preserves, all objections to the Court's ruling and to any eventual order and judgment resulting from it, as well as the right to seek such additional relief permitted by the Nevada Rules of Civil Procedure and the Nevada Rules of Appellate Procedure.

Moreover, Plaintiff has not endeavored in its Objections to add all findings of fact or conclusions of law Plaintiff believes are relevant to the correct disposition of Defendants' motion, but stands on the proposed findings of fact and conclusions of law submitted prior to trial and on the evidence and arguments presented at trial, including related to Defendants' Rule 52(c) motion.

Finally, with the exception of one factual finding proposed by Plaintiff that directly contradicts a proposed finding by Defendants, Plaintiff has not provided record citations for its proposed factual findings, consistent with the approach taken by Defendants in their proposed findings of fact and conclusions of law.

DATED this 3rd day of September, 2021.

McDONALD CARANO LLP

By: */s/ George F. Ogilvie III*
George F. Ogilvie III, Esq. (NSBN 3552))
Rory T. Kay, Esq. (NSBN 12416)
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
gogilvie@mcdonaldcarano.com
rkay@mcdonaldcarano.com

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

Attorneys for Plaintiff

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 3rd day of September, 2021, a true and correct copy of the foregoing **NOTICE OF SUBMISSION OF PLAINTIFF'S OBJECTIONS TO DEFENDANTS' PROPOSED ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT PURSUANT TO NRCP 52(C), FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND JUDGMENT THEREON** 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

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

EXHIBIT “A”

FFCL
J. Stephen Peek, Esq.
Nevada Bar No. 1758
Robert J. Cassity, Esq.
Nevada Bar No. 9779
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
(702) 669-4600
(702) 669-4650 – fax
speek@hollandhart.com
bcassity@hollandhart.com

John P. Stigi III, Esq.
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
1901 Avenue of the Stars, Suite 1600
Los Angeles, California 90067

Attorneys for Defendant
Kenneth Potashner

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: PAMTP LLC v. KENNETH POTASHNER, *et. al.*.	**ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT PURSUANT TO NRCP 52(c), FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND JUDGMENT THEREON**

This cause came on regularly for trial starting on August 16, 2021, and continuing through August 25, 2021. Plaintiff PAMTP, LLC appeared by and through their counsel of record George F. Ogilvie III of McDonald Carano LLP and Adam M. Apton of Levi & Korsinsky, LLP. Defendant Kenneth F. Potashner ~~(together with Elwood G. Norris, Seth Putterman, Robert M. Kaplan and Andrew Wolfe, the "Director Defendants")~~ appeared by and through ~~their~~ counsel of record J. Stephen Peek and Robert J. Cassity of Holland & Hart LLP and John P. Stigi III and Alejandro E. Moreno of Sheppard, Mullin, Richter & Hampton LLP. Defendant VTB Holdings, Inc. ("VTBH"), and Specially Appearing Defendants Stripes Group, LLC, SG VTB Holdings, LLC, Juergen Stark and Kenneth Fox (collectively, the "Non-Director Defendants") appeared by

and through their counsel Richard C. Gordon of Snell & Wilmer, LLP and Joshua D.N. Hess, David A. Kotler, Brian Raphel, and Ryan Moore of Dechert LLP.

After the conclusion of Plaintiff's case-in-chief, defendants filed motions pursuant to NRCP 52(c). The Court having considered the evidence presented at trial, along with ~~oral and written~~ arguments of counsel on such motions, hereby GRANTS defendants' motion pursuant to NRCP 52(c) and enters judgment in favor of defendants, upon the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. Class and Derivative Litigation

1. The underlying class action and shareholder derivative action was commenced on August 8, 2013. The case arose out of the merger between Parametric Sound Corporation ("Parametric") and VTBH which closed on January 15, 2014.

2. This action was commenced initially on behalf of a putative class of non-insider holders of Parametric common stock. After the Nevada Supreme Court issued its September 14, 2017 decision dismissing the class plaintiffs' action for lack of standing, with leave to amend, the class plaintiffs amended their complaint on December 1, 2017 to assert both a direct "equity expropriation" class claim and derivative dilution claims.

3. In January 2019, the Court certified the direct equity expropriation class ("Class"), which it defined as follows:

> All persons and/or entities that held shares of Parametric . . . common stock on January 15, 2014, at the time Parametric issued shares in the Merger pursuant to the Agreement and Plan of Merger, whether beneficially or of record, including the legal representatives, heirs, successors-in-interest, transferees, and assignees of all such foregoing holders, but excluding Defendants, executive officers of Parametric as of January 15, 2014, and their legal representatives, heirs, successors-in-interest, transferees, and assignees.

4. The shareholders' derivative claims included causes of action against defendants for breach of fiduciary duty, aiding and abetting and unjust enrichment. Because those claims were brought on behalf of the corporation, no class was certified regarding those claims.

5. After extensive litigation, defendants and the class plaintiffs settled the class and derivative actions in late 2019. Notice of the settlement was provided to the Class members in January 2020.

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

7. On May 18, 2020, the Court ordered that the class action and derivative settlement was "finally approved in all respects" and entered a final judgment dismissing all of the Class' released claims, with prejudice, pursuant to the terms of the Stipulation of Settlement filed on November 15, 2019.

II. Opt-Out Litigation

A. Plaintiff and Assignors

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

9. ~~Plaintiff was not a holder of Parametric common stock on January 15, 2014.~~On April 22, 2020, Plaintiff, on behalf of the following individuals and/or entities, opted out of the class action settlement: IceRose Capital Management, LLC; Robert Masterson; Marcia Patricof, on behalf of the Patricof Family LP, Marcia Patricof Revocable Living Trust, and the Jules Patricof Revocable Living Trust; Alan and Anne Goldberg; Barry Weisbord; Ronald and Muriel Etkin; and Richard Santulli (the "Assignors"). In conjunction with opting out of the class action settlement, the Assignors assigned their claims in the litigation to Plaintiff, as discussed below.

10. The members of plaintiff are IceRose Capital Management LLC, Robert Masterson, Richard Santulli, Marcia Patricof (as trustee of Patricof Family LP, Marcia Patricof Revocable Living Trust, and the Jules Patricof Revocable Living Trust), Alan and Anne Goldberg, Barry Weisbord, and Ronald and Muriel Etkin (each, an "Assignor"; collectively, the "Assignors").

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

~~12. Assignor IceRose threatened litigation against the Non-Director Defendants, including Stark and Fox, in 2014, on claims arising in part from the merger, but ultimately chose not to file such a lawsuit~~

~~13. Each of the Assignors held Parametric common stock on the date the merger closed. Each of them, however, sold that stock prior to assigning their claims to Plaintiff in April 2020. Except for IceRose, none of the Assignors owned any Parametric common stock when they purported to assign their claims to Plaintiff. IceRose owned 28,700 shares of Parametric common stock at the time of the purported assignment, but Plaintiff presented insufficient evidence to allow the Court to determine whether IceRose's stockholding in Parametric at the time of the assignment was composed of any of the shares in Parametric it held as of January 15, 2014.~~

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

~~15. The Assignors notified the Court that they had opted-out of the Class by letter dated April 22, 2020. The Assignors advised the Court that they had "assigned their interests in claims arising from the ownership of Parametric common stock to an entity created for the purposes of opting out of the . . . litigation and pursuing claims independently" and, "[a]ccordingly, that entity, PAMTP LLC, also exclude[d] itself from the Class in the Parametric Settlement."~~

~~16.~~12. On May 20, 2020, plaintiff filed its Complaint in this action asserting two causes of action against defendants: a direct breach of fiduciary duty claim against the ~~Director Defendants~~Parametric directors based upon an alleged equity expropriation caused by the merger and a direct claim for aiding and abetting against the Non-Director Defendants in connection with the same alleged breach of fiduciary duty.

~~17. When the Assignors sold the Parametric common stock they owned as of January 15, 2014, the Assignors did not enter into any agreement with purchasers of such shares to retain their rights, titles and interests in any claims arising from the Assignors' prior ownership of Parametric common stock, including the claims asserted by plaintiff in this action.~~

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

14. A substantial amount of motion practice occurred between the parties during the course of this action. Of significance, on May 18, 2021, the Court granted Plaintiff's motion against Defendants Kenneth Potashner, Juergen Stark, and VTB Holdings, Inc. setting an evidentiary hearing on June 18, 2021 to award spoliation sanctions. *See* Order Granting Plaintiff's Motion Setting Evidentiary Hearing Re Spoliation Sanctions dated May 18, 2021, on file with the Court.

15. Following the June 18, 2021 evidentiary hearing, the Court awarded spoliation sanctions in the form of adverse inferences. Specifically, the Court held that: "(1) Potashner having willfully destroyed text messages and emails relevant to this litigation, the Court makes an adverse inference that the lost text messages and emails relevant to this litigation would have shown that Potashner acted in bad faith when supporting and approving the merger. Potashner may testify and contest this at trial, but his testimony will go to his credibility only because an adverse inference of bad faith has already been made by the Court; and; (2) Stark and Fox having negligently failed to preserve text messages, the Court makes an adverse inference that the lost information would have been adverse to them." *See* Findings of Fact, Conclusions of Law, and Order Imposing Spoliation Sanctions dated July 15, 2021, on file with the Court.

16. On July 26, 2021, the Court set a trial protocol providing Plaintiff and Defendants with forty (40) hours each, eighty (80) hours total, to present their cases.

17. Trial commenced on August 16, 2021.

B. Pre-Merger Parametric

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

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

C. Directors and Senior Officer of Pre-Merger Parametric

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

(1) Potashner

21. Potashner was appointed a director in December 2011 and Executive Chairman (equivalent to chief executive officer) in March 2012. ~~He served as chairman of Newport Corporation from 2007 to 2016, after being elected to its board of directors in 1998. From May 2003 to the present, he has been an independent investor in and advisor to technology companies. From 1996 to May 2003, he was chairman of the board of directors of Maxwell Technologies, Inc., a manufacturer of ultracapacitors, microelectronics and high voltage capacitors, and where he also served as president and chief executive officer from 1996 to October 1998. From November 1998 to August 2002, he was president, chief executive officer and chairman of SONICblue~~

~~Incorporated (formerly S3 Incorporated), a supplier of digital media appliances and services. He was executive vice president and general manager of Disk Drive Operations for Conner Peripherals, a manufacturer of storage systems, from 1994 to 1996. From 1991 to 1994, he was vice president, Worldwide Product Engineering, for Quantum Corporation, a manufacturer of disk drives. From 1981 to 1991, he held various engineering management positions with Digital Equipment Corporation, a manufacturer of computers and peripherals, culminating with the position of Vice President of Worldwide Product Engineering in 1991. Potashner received his bachelor's degree in electrical engineering at Lafayette College in 1979 and a masters' degree in electrical engineering from Southern Methodist University in 1981.~~

22. Potashner resigned from the Board effective May 12, 2014.

(2) Norris

~~23. Norris was a member of the Board since the incorporation of the company on June 2, 2010 and co-founded the company with James Barnes ("Barnes"), Parametric's chief financial officer. Norris was Parametric's President and Chief Scientist. He was a director of LRAD Corporation from August 1980 to June 2010. He served as Chairman of LRAD Corporation's Board of Directors, an executive position, in which he served in a technical advisory role and acted as a product spokesman from September 2000 to April 2009. From 1988 to November 1999, he was a director and Chairman of e.Digital Corporation, a public company engaged in electronic product development, licensing and sales. During that period, he also held various other executive officer positions at e.Digital. From August 1989 to October 1999, he served as director and held various executive officer positions with Patriot Scientific Corporation, a public company engaged in intellectual property licensing. Norris is an inventor and owner of more than 50 U.S. patents, primarily in the fields of electrical and acoustical engineering, and is a frequent speaker on innovation to corporations and government organizations. Norris is the inventor of pre-merger Parametric's HSS technology.~~

23. Defendant Elwood G. Norris was a member of Parametric's Board at the time of the Merger and is Parametric's founder. He served as Parametric's CEO and Chairman of the Board since its incorporation on June 2, 2010, but resigned from these positions concurrent with

the appointment of Potashner as Executive Chairman in March 2012. Norris remained with Parametric post-Merger as its "Chief Scientist" at least through the end of 2016.

24. Norris resigned from the Board effective January 15, 2014.

(3) Putterman

~~25. Putterman was appointed a director in May 2011. He has been a full faculty member at UCLA since 1970, where he is a Professor of Physics. His research areas include nonlinear fluid mechanics and acoustics, sonoluminescence, friction, x-ray emission and crystal generated nuclear fusion. He has served as a consultant to government and industry including the Jet Propulsion Laboratory, TRW and the Aesthetic Surgery Education and Research Foundation. Putterman is a Fellow of the Acoustical Society of America and the American Physical Society and a past recipient of an Alfred P. Sloan Fellowship. He was honored as the UCLA 2010-2011 Faculty Research Lecturer and frequently provides plenary presentations at leading universities. He has also served as a Director of the Julian Schwinger Foundation for Physics Research since 2002 and as a Panel Member for the Department of Defense's Defense Sciences Research Council since 2007. He earned a B.S. from the California Institute of Technology in 1966 and his Ph.D. from Rockefeller University in 1970.~~

25. Defendant Seth Putterman was a member of Parametric's Board at the time of the Merger. He was appointed a director in May 2011.

26. Putterman resigned from the Board effective November 21, 2013.

(4) Kaplan

~~27. Kaplan was appointed a director in May 2011. He is a retired business executive with extensive experience in the financial and retail sectors. Kaplan remains active as a director of a family-owned Canadian-based mortgage lending firm and as Managing Director of Beacon Consulting Group, a private firm specializing in assisting and investing in early stage entrepreneurial entities, that he founded in 1997. Prior business activities include 12 years as a senior financial executive in the investment brokerage industry. He was a founding partner of McCan Franchises Ltd., the original Canadian franchisee of McDonalds Corp. From 2003 to 2009, he was a director of Jet Gold Corp., a public Canadian resource exploration company. In~~

~~2010, Kaplan was a Visiting Professor of Business at The University of Warsaw where he assisted in establishing a program in Entrepreneurship. Other prior visiting professorships include the European School of Economics in Italy and The University of Canterbury, N.Z. In 2010, Kaplan was recognized with a European Union Distinguished Scholar Award. Dr. Kaplan earned an MBA from Harvard University in 1961 and a Ph.D. in Business Economics from Michigan State University in 1967.~~

27. Defendant Robert Kaplan was a member of Parametric's Board at the time of the Merger. He was appointed a director in May 2011.

28. Kaplan resigned from the Board effective January 15, 2014.

(5) Wolfe

~~29. Wolfe was appointed a director in February 2012. He founded Wolfe Consulting in 2002 and serves as a technology and intellectual property consultant in the consumer electronics, computer, and semiconductor industries. He works with Global 500 corporations and technology startups in developing product strategy, new product technology, and intellectual property strategy. He also testifies and serves as a consulting expert for intellectual property (IP) and other technology-related litigation matters. Dr. Wolfe was Chief Technology Officer for SONICblue, Inc. (formerly S3, Inc.) from 1999 to 2002 and also served as Senior Vice President of Business Development from 2001-2002. He served as a Consulting Professor at Stanford University from 1999 to 2002 and an Assistant Professor at Princeton University from 1991 to 1997. Dr. Wolfe obtained a B.S.E.E. in Electrical Engineering and Computer Science from The John Hopkins University in 1985 and an M.S. in Electrical and Computer Engineering in 1987 and a Ph.D. in Computer Engineering in 1992 both from Carnegie Mellon University.~~

29. Defendant Andrew Wolfe was a member of Parametric's Board at the time of the Merger. He was appointed a director in February 2012 and remained a director at all relevant times.

(6) Honoré

~~30. Honoré was appointed a director in March 2012. He joined Columbia Pictures in 1988 as Vice President of post-production after previously serving as director of post-production~~

~~for Home Box Office Pictures and DeLaurentiis Entertainment Group. In 1993, he was promoted to executive vice president post-production for Sony Pictures Entertainment including its Columbia Pictures and TriStar Pictures units. He was also responsible for final post-production quality of all picture and sound for Columbia TriStar Motion Picture Companies, Screen Gems and Stage 6 Productions and feature films acquired by Columbia TriStar Motion Picture Companies, Columbia TriStar Home Video and Sony Pictures Classics. At Sony Pictures he was responsible for completion of pictures budgeted at over $1.5 billion per year and supervised post-production for hundreds of major films including Casino Royale and other Bond movies, Spider-Man series, DaVinci Code, Bugsy, A Few Good Men, Men in Black series and many more. Honoré retired from Sony Pictures in December 2011.~~

30. Honoré was appointed a director in March 2012.

31. Honoré resigned from the Board effective January 15, 2014.

32. The Parametric directors other than Potashner (the "Settling Directors") settled Plaintiff's claims by agreement dated August 15, 2021. The Court dismissed the Settling Directors from the case by order dated August 23, 2021.

D. Non-Director Defendants

~~32.~~33. VTBH was a privately held Delaware corporation. VTBH and its subsidiaries, including Voyetra Turtle Beach, Inc., are collectively referred to as "Turtle Beach." Turtle Beach designs, develops and markets premium audio peripherals for video game, personal computer, and mobile platforms, including its acclaimed line of Ear Force gaming headphones and headsets crafted for Xbox, Playstation, Wii and PC-based gaming. ~~Turtle Beach's advanced products allow video game players to experience high-quality, immersive sound and communicate with others while playing video games. Unlike most traditional stereo headphones, the more advanced headsets from Turtle Beach incorporate sophisticated technology for processing audio and multi-band wires transmission capabilities. Turtle Beach had strong market share in established gaming markets, including a 53% share of the U.S. console gaming headset market as of year-end 2012 according to The NPD Group. Turtle Beach had a presence in 40 countries and has partnered with major retailers, including Wal-Mart, Carrefour, Tesco, Best Buy, GameStop, Target and Amazon.~~

~~33.~~34. VTBH was majority owned by Stripes Group, LLC ("Stripes") and SG VTB, LLC ("SG VTB"). VTBH is a wholly owned subsidiary of the post-merger Turtle Beach.

~~34.~~35. Stripes is a private equity firm focused on internet, software, healthcare, IT and branded consumer products businesses. In 2010, Stripes invested in VTBH and became its majority owner. ~~Through Stripes's financial support and guidance, VTBH was able to hire new people and better develop its business, resulting in substantial year-over-year growth in 2011 and 2012.~~ Stripes helped Turtle Beach to hire Stark as its new CEO in September 2012.

~~35.~~36. Fox is Stripes Group's founder. Fox sat on the VTBH board of directors after the merger, stepping down on November 15, 2018.

~~36.~~37. SG VTB, LLC is a Delaware LLC and is a wholly owned subsidiary of Stripes Group. Stripes formed SG VTB in 2010 to acquire a majority position in VTBH. SG VTB is an investment vehicle for Stripes.

~~37.~~38. Stark was chief executive officer of VTBH during negotiations leading to the merger and was named to that position by Stripes in September 2012. Stark has served as Turtle Beach's CEO since the merger and continues to serve as its CEO today. Stark also sits on Turtle Beach's current board of directors, and as of January 1, 2020, became Chairman of the Board.

~~**III. Parametric, Turtle Beach, and Stripes in Early 2013**~~

~~38. By the end of 2012 and first quarter of 2013, substantial work still remained to be done at Parametric before HyperSound could satisfy market expectations for a commercial product. Despite years of development that began even before Parametric existed, HyperSound suffered from technical issues that rendered it unsuitable for market consumption in 2013. Focus group testing demonstrated that sound quality was inconsistent outside of ideal testing conditions and Parametric lacked the resources to develop the product properly.~~

~~39. In the six months ended March 31, 2013, Parametric had revenues of $264,058 and suffered a net loss of $3,207,655. Parametric's net loss had more than doubled from the same period in 2012.~~

~~40. Parametric lacked the financial and personnel resources on its own to develop HyperSound to the point that Parametric could design, manufacture and sell to consumers directly.~~

Accordingly, in the first quarter of 2013 Parametric shifted the focus of its business model to licensing its technology to other companies with the capital and expertise to develop and commercialize Parametric's technology. That strategy, however, still had daunting execution risks.

41. Parametric did not manufacture or sell any gaming console products. For this reason, Parametric had no presence in the gaming console sector. Other than the proposed merger with Turtle Beach, Parametric had no plans to manufacture any gaming console, personal computing audio or other consumer electronics products.

42. In 2010, Turtle Beach earned revenues of $90.5 million and EBITDA of $30.8 million. In 2011, Turtle Beach earned revenues of $168.5 million and EBITDA of $53.7 million. In 2012, Turtle Beach earned revenues of $208.4 million and EBITDA of $48.4 million.

43. Despite Turtle Beach's numerous successes, it was looking to diversify its business. The majority of Turtle Beach's sales would occur in the fourth quarter of each year and, because gaming audio headsets were designed to be used with video game consoles, sales would always be volatile whenever new consoles were released.

44. Initially, Turtle Beach was interested primarily in acquiring a license to incorporate HyperSound into its gaming audio products. Nevertheless, at Parametric's suggestion, Parametric and Turtle Beach began to focus on a reverse triangular merger as a means of merging the two businesses.

45. From the beginning, Stripes was skeptical about any deal between Turtle Beach and Parametric. Stripes was concerned that Parametric was too risky an investment. Further, a reverse triangular merger was particularly unattractive to Stripes because it would result in substantially diluting Stripes's interest in Turtle Beach. Stripes also did not like the reverse merger structure because the post-merger entity would be a public company and Stripes did not believe that it was an advantageous time for Turtle Beach to have to deal with the market expectations of being a public company ahead of the expected transition in console generations for both Microsoft's Xbox and Sony's Playstation.

~~46. Stark believed, however, that HyperSound had potential for success and advocated in favor of the deal. Between March and June 2013, Stark had numerous conversations with Stripes to try to convince it to support the merger. Fox resisted for months before agreeing to support the merger in June 2013 in order to support Stark (and Turtle Beach's Executive Chairman, Ronald Doornink, who also supported the deal). Two other directors of Turtle Beach, founders Carmine Bonnano and Fred Romano, remained opposed the merger.~~

IV. Merger Negotiations and the Parametric Board's Process

~~47.~~39. As part of Parametric's ongoing strategic planning process, the Parametric Board and Parametric's executive officers regularly reviewed and evaluated Parametric's strategic direction and alternatives in light of the performance of Parametric's business and operations and market, economic, competitive and other conditions and developments.

~~48.~~ In March 2013, Parametric engaged Houlihan Lokey as its financial advisor to evaluate possible strategic alternatives. ~~Houlihan Lokey was recommended by Morgan Stanley. Parametric had initially considered engaging Morgan Stanley as its financial advisor. Morgan Stanley declined the engagement because the proposed transaction was below the monetary value threshold of transactions on which Morgan Stanley typically will advise.~~

~~49.~~40. Between March 2013 and August 2013, Houlihan Lokey (working on behalf of Parametric) contacted a total of 13 parties other than Turtle Beach to explore ~~possible strategic alternatives. None of those other parties expressed any material interest in a competing or alternative transaction.~~such possibilities.

~~50.~~41. During this five-month period, the Board held a total of 13 formal meetings with financial and legal advisers regarding possible strategic transactions. During these meetings, the Directors engaged in ~~robust~~ discussions among themselves and with the Board's advisers regarding the risks and benefits of a strategic transaction with Turtle Beach and available alternative strategies and transactions. ~~Similar discussions occurred in email and phone conversations outside of any formally convened Board meeting.~~

42. ~~Among the terms being negotiated~~Potashner played a leading role in the negotiation of the merger, liasing directly with Turtle Beach's principals, including Stark. For

example, early in the negotiation process, other board members yielded significant control over the process to Potashner, with one (Wolfe) telling Potashner to "[j]ust get the deal" and the board would "make the agreements match whatever deal [he] put together without any substantial delays" because "[n]either the [board] nor the lawyers are going to get in the way of an accretive deal." Similarly, another board member (Kaplan) wrote in an email sent on behalf of other board members days before the board voted on the merger, that he and the other directors felt "legally exposed to a lot of the decisions [Potashner] force[d] upon [them]" during the course of the negotiations. On that basis, he asked that each director be paid $50,000 to compensate them for these legal risks.

43. The Court previously adopted an adverse inference against Potashner that he "acted in bad faith when supporting and approving the merger." *See* Findings of Fact, Conclusions of Law, and Order Imposing Spoliation Sanctions dated July 15, 2021, on file with the Court. The evidence at trial supported this conclusion. Among other things, the evidence showed that Potashner used his leading position in the merger negotiation in an effort to entrench himself in one of Parametric's subsidiaries, HyperSound Health, Inc. ("HHI"), and to enrich himself with options in HHI. To obtain these personal benefits, Potashner attempted to favor Turtle Beach, including by avoiding completing valuable licensing deals and delaying announcements of completed deals, all in order to suppress Parametric's stock price. In addition, Potashner made favorable concessions to Turtle Beach on key transaction terms.

~~51.~~44. One of the terms Potashner negotiated on behalf of Parametric was an agreement to grant to Turtle Beach an exclusive license to HyperSound technology in both the console gaming and PC audio fields in the event Parametric were to terminate any merger agreement before closing. Parametric offered this "break-up fee license agreement" in order to make the merger more attractive to Turtle Beach and Stripes, which had not yet agreed to move forward with the deal. The Board informed itself of the fiduciary implications of this potential "break-up fee license agreement" by consulting with counsel. Citing "pushback" from counsel, Potashner told Stark that the break-up fee license agreement was "well in excess [of] traditional break up fees" and presented a "fiduciary issue" for Parametric's board. The board agreed to proceed with it at

Potashner's urging that the break-up fee license agreement was complementary to other licensing activities sought out by Parametric at the time.

~~52. The break-up fee license agreement was viewed as complementary to other licensing activities sought out by Parametric at the time. At the time that the Turtle Beach break-up fee license agreement was negotiated, the license was believed to be purely accretive to existing licensing efforts. It would have been in Parametric's business interest to issue such a license agreement for less or even zero consideration, without any royalty payment, because publicity of such a license agreement would have been seen by the market and other potential license partners as a significant endorsement of Parametric's technology by a well-known leader in the field of audio technology.~~

~~53. Parametric established HyperSound Health, Inc. ("HHI"), a wholly-owned subsidiary of Parametric, in October 2012 to facilitate Food and Drug Administration approval for certain medical applications of HyperSound technology (*e.g.*, hearing devices). In February 2013 and March 2013, options were granted to four individuals (Potashner and three consultants) to purchase shares of the common stock of HHI (such options referred to as the "HHI stock options").~~

~~54.~~45. Ultimately, Potashner's efforts to enrich himself with HHI options proved unsuccessful. Potashner was successful in overcoming the resistance of Parametric's board, including by threatening to dissolve the board, but his self-interested scheme failed when Turtle Beach learned about the existence of these stock options through due diligence in late June 2013, after the core terms of the merger had been negotiated. Upon discovery, Turtle Beach demanded that Parametric cancel the HHI stock options it had issued to ~~these four~~Potashner and three other individuals. Turtle Beach informed each of Parametric's directors that it would not move forward with the merger until these stock options were cancelled. Turtle Beach issued this demand on multiple occasions in June and July 2013.

~~55.~~46. ~~When~~Only when it became apparent to the Board that the cancellation of Potashner's HHI stock options was required to facilitate a merger with Turtle Beach~~,~~ did a majority of the Board ~~demanded~~demand that Potashner agree to cancel his HHI stock options. In

July 2013~~, at the demand of the Board~~, Potashner agreed that his HHI options would, at Turtle Beach's demand, cancel upon the closing of the proposed merger with Turtle Beach. ~~Potashner entered into this agreement without being provided any payment or additional compensation from Parametric, Turtle Beach, Stripes, or anyone else. As result, Potashner received nothing of value from Turtle Beach and actually lost stock options that he believed could have held substantial value following the merger.~~

~~56.~~47. Parametric engaged Craig-Hallum Capital Group, LLC ("Craig-Hallum") to provide an opinion regarding the fairness of the proposed merger. Craig-Hallum's compensation for preparing a fairness opinion was not contingent upon the closing of any transaction.

~~57.~~48. On August 2, 2013, a joint meeting of the Parametric Board and compensation committee was held, with the financial and legal advisors of the Parametric Board. At the meeting, representatives of Craig-Hallum reviewed and discussed with the Parametric Board Craig-Hallum's financial analysis and views regarding the merger with Turtle Beach and the terms of the merger agreement with Turtle Beach~~(~~, including the "Per Share Exchange Ratio" as defined therein, with reference to a proposed fairness opinion and slide presentation distributed to the Parametric Board prior to the meeting; at the request of the Parametric Board, Craig-Hallum rendered its oral opinion to the effect that, as of August 2, 2013, subject to certain assumptions, qualifications and limitations, the "Per Share Exchange Ratio" contemplated by the merger agreement was fair, from a financial point of view, to Parametric.

~~58. The Per Share Exchange Ratio was determined through arm's-length negotiations between Parametric and Turtle Beach.~~

~~59. The internal management projections provided by Parametric and Turtle Beach to Craig-Hallum in connection with Craig-Hallum's analysis of the merger were not prepared with a view toward public disclosure. These internal management projections were prepared by management and were based upon numerous variables and assumptions that were inherently uncertain and be beyond the control of management, including, without limitation, factors related to general economic and competitive conditions. Accordingly, it was understood that actual results could vary significantly from those set forth in such internal management projections.~~

~~60.~~49. For purposes of its stand-alone analyses performed on Parametric, Craig-Hallum utilized Parametric's internal financial projections for fiscal years ended September 30, 2013 through September 30, 2017, prepared by and furnished to Craig-Hallum by the management of Parametric. Information regarding the net cash, number of fully-diluted shares of common stock outstanding and net operating losses for Parametric was provided by management. For purposes of its stand-alone analyses performed on Turtle Beach, Craig-Hallum utilized Turtle Beach's internal financial projections for fiscal years ended December 31, 2013 through December 31, 2016 prepared by and furnished to Craig-Hallum by the management of Turtle Beach. Information regarding the net debt, number of fully-diluted shares of common stock outstanding and net operating losses for Turtle Beach was provided by management.

~~61.~~50. At the August 2, 2013 meeting of the Board, the Directors engaged in robust discussion with representatives of Craig-Hallum regarding its fairness opinion and the calculations contained therein. The Settling Directors relied ~~in good faith~~ upon ~~the competency~~ of the analyses performed and opinions rendered by Craig-Hallum. ~~None of the Directors was made aware of errors, if any, contained in Craig-Hallum's analyses.~~

~~62. In evaluating the merger agreement and the transactions contemplated thereby, the Board consulted with Parametric's management and legal and financial advisors, reviewed a significant amount of information and considered numerous factors which the Parametric Board viewed as generally supporting its decision to approve the merger agreement and the transactions contemplated. The Board also considered and discussed numerous risks, uncertainties and other countervailing factors in its deliberations relating to entering into the merger agreement and the merger.~~

~~63.~~51. Although the Court made ~~a rebuttable~~an adverse inference that Potashner acted in bad faith in pursuit of his own self-interest when supporting and approving the merger (per the adverse inference made by the Court pursuant to its Order dated July 14, 2021), the Board nevertheless approved the merger agreement with Turtle Beach on August 2, 2013 by a majority of independent and disinterested directors ~~exercising their business judgment in good faith.~~

~~Norris, Kaplan, Putterman, Wolfe and Honoré exercised their good faith business judgment independent of Potashner~~.

~~64.~~52. A majority of the Board believed ~~in good faith~~ that, overall, the potential benefits to Parametric shareholders of the merger agreement and the transactions contemplated thereby outweighed the risks and uncertainties attendant to the proposed merger, as well as risks and uncertainties attendant to remaining as a stand-alone entity. In particular, based upon their experience, a majority of the Board ~~recognized~~believed that the expected benefits of the proposed merger with Turtle Beach ~~vastly~~ outweighed the risks attendant to continuing to attempt to execute on its stand-alone entity business plan.

~~65.~~53. Under the merger, a subsidiary of Parametric would merge with Turtle Beach, with Turtle Beach continuing as the surviving corporation. As a result of the merger, each share of Turtle Beach common stock and Series A Preferred Stock would be cancelled and converted into the right to receive a number of shares of Parametric stock. The end result of the merger would be that the pre-merger security holders of Parametric would own 20.01% of the post-merger Parametric (on a fully-diluted basis), while the security holders of Turtle Beach would own the remaining 79.99% of the post-merger Parametric (on a fully-diluted basis). The approval of Parametric's public shareholders was required to authorize this issuance of the Parametric shares and the resulting dilution of the existing Parametric shareholders.

~~66. Each of Parametric's directors determined independently that the merger was in the best interests of Parametric and its shareholders. Kaplan, Norris, Putterman, Wolfe, and Honoré conducted their own analysis of the terms of the merger agreement, with the assistance of their legal counsel and financial advisors. Their decisions to vote in favor of the merger were not guided by, let alone controlled by, Potashner's support for the merger.~~

~~67.~~54. Kaplan, Norris, and Putterman testified that they did not trust or believe Potashner ~~at all times~~ but they agreed with him in supporting the merger based on their independent judgment.

~~68.~~55. Potashner, Norris and Barnes (along with affiliated entities) entered into voting agreements which require them to vote in favor of the merger and to not sell or otherwise transfer

their shares for at least six months following the merger. These agreements were disclosed in the proxy statement and represented approximately 19.2% of the outstanding shares of Parametric common stock as of the record date.

~~69. Under the voting agreements entered into by Potashner, Barnes and Norris, as well as certain entities over which they exercised voting and/or investment control (such stockholders and entities collectively referred to as the "management stockholders"), the management stockholders were subject to a lock-up restriction whereby they agreed not to sell or otherwise transfer the shares of Parametric common stock beneficially owned by them or subsequently acquired by them until six months following the closing of the merger, subject to certain exceptions.~~

IV. Post-Announcement of the Merger

~~70.~~56. On August 5, 2013, after the close of trading on NASDAQ, Parametric issued a press release announcing the execution of the merger agreement.

~~71.~~57. Pursuant to the merger agreement, Parametric conducted a 30-day "go-shop" process to elicit potential "topping bids." As part of the "go shop" process, Houlihan Lokey contacted 49 different parties. None expressed interest in making a "topping bid."

~~72.~~58. In a call with Parametric shareholders on August 8, 2013 announcing the merger, Turtle Beach disclosed that it expected 2013 revenues and EBITDA to fall in a range ~~that was~~of $190 million to $215 million and $32 million to $40 million, respectively, somewhat below the projections Craig-Hallum had relied upon. Turtle Beach further disclosed to Parametric shareholders that "it's very important that you understand the gaming industry context for 2013. Both Xbox and PlayStation have announced launches of new consoles during the holiday's this year. As a result, the entire gaming sector is going through what we believe to be a normal cycle of contraction, prior to these new console release[s]."

~~73.~~59. Stark further disclosed to Parametric shareholders that "our business results in particular will be very much dependent on one; how consumer purchasing behavior for more expensive accessories like headset plays out, heading into the transition. Two; when the new console launches will happen and three; what quantity of new consoles will be available [and] sold

during the weeks between the launch and the year end." Although console transitions have led to subsequent industry growth in the past, Stark disclosed "we can't guarantee that will occur."

~~74.~~60. Stark further disclosed that future sales related to the new Xbox console were particularly uncertain. In his words, forecasted headset sales for the new consoles "rely among other things on successful widespread launch of the new consoles with sufficient selling weeks to impact this year as well as availability of some specific components from Microsoft required for sale of our licensed Xbox One headsets, this holiday. These specific items by the way are outside of our control."

~~75.~~61. Stark concluded with a warning that "these uncertainties are driving the wide range around the expectations for revenues and EBITDA I just talked through, but it's important to note that our actual results could fall materially outside of these ranges if the aforementioned assumptions turned out to be inaccurate."

~~76.~~62. Turtle Beach's actual revenues in 2013 were 18% lower than had been forecasted in the projections provided to Craig-Hallum. Moreover, its actual 2013 EBITDA was 63% of the Craig-Hallum forecast relied upon by Paramteric's board, and 53% of the low end of the EBITDA range Turtle Beach disclosed to the market after the merger agreement was signed. Additionally, Turtle ~~Beach's~~Beach carried significant debt, and its financial underperformance caused it to ~~trip~~violate certain debt covenants with its lender, which resulted in Turtle Beach renegotiating its credit facility in the second half of 2013.

~~77. Parametric's actual revenues for fiscal year 2013 were 44% lower than had been forecasted in the projections provided to Craig-Hallum.~~

~~78. Parametric and Turtle Beach were aware of each other's respective underperformance in late 2013. Parametric management determined that it was not in the best interest of the company or the shareholders to attempt to renegotiate the terms of the merger.~~

63. Other than Potashner, Parametric's Board was not aware of the extent of Turtle Beach's underperformance in late 2013, or its credit troubles. Potashner, who was aware as a result of his close and continuous contact with Turtle Beach's management, took care to avoid giving the rest of Parametric's Board complete information. For example, Potashner emailed the

Board on December 20, 2013, to report that Turtle Beach was negotiating potential waivers of its debt covenants with its lender, including a covenant that would be breached if Turtle Beach's 2013 EBITDA were less than $32 million, the low range of its revenue projection.[1] But the Parametric Board was not made aware that Turtle Beach's actual 2013 EBITDA would be $14.9 million, less than half the minimum number needed to comply with the debt covenant. Likewise, Parametric's Board was not aware that, as of December 2013, Turtle Beach's projected 2014 EBITDA had been reduced from $56.7 million, the number relied upon by Craig-Hallum, to only $22 million.

64. On November 4, 2013, the Board voted to approve a preliminary proxy statement. On December 3, 2013, the Board voted to approve the final proxy statement.

~~79.~~65. On December 3, 2013, Parametric filed a 348-page Definitive Proxy Statement with regard to the merger agreement with the SEC and transmitted it to Parametric's shareholders. The proxy statement sought shareholder votes on several proposals, including (a) whether to approve the issuance of new shares of Parametric common stock to Turtle Beach pursuant to the merger agreement (in effect, to approve the merger) and (b) whether to approve the change in control compensation awards to Potashner, Norris and Barnes in connection with the merger.

~~80.~~66. Parametric disclosed Turtle Beach's actual revenues for 2013 (through September 28, 2013) in the proxy statement ~~and also disclosed Turtle Beach's issues with respect to the debt covenants.~~. Turtle Beach also disclosed the following with respect to its debt covenants: "The Company was not in compliance with the fixed charge coverage ratio as of June 30, 2013 and December 31, 2012. However, in July 2013 and August 2013, the Company entered into two amendments to the Loan and Security Agreement (collectively the '2013 Amendments') that waived the default of the fixed charge coverage ratio for those periods." The proxy statement did not disclose any other ongoing or anticipated breaches of Turtle Beach's debt covenants.

~~81.~~67. The proxy statement did not contain updated financial projections for either Turtle Beach or Parametric. The proxy statement~~, however, cautioned readers~~ stated that the projections that Craig-Hallum relied upon were only current "as of August 2, 2013," the date the fairness

[1] [*See* DX-931.]

opinion was issued, "based on market data as it existed on or before August 2, 2013 and is not necessarily indicative of current or future market conditions." The proxy statement also ~~contained a prominent warning in bold text~~stated that shareholders "should not regard the inclusion of these projections in this proxy statement as an indication that Parametric, Turtle Beach or any of their respective affiliates, advisors or other representatives considered or consider the projections to be necessarily predictive of actual future events."

~~82.~~68. The proxy statement also disclosed that one of the ~~risk~~risks Stark had warned about on the August 8, 2013 investor call had been realized. Specifically, the proxy statement disclosed that "Microsoft has informed its partners in the Xbox One console launch that the Xbox One Headset Adapter, being built by Microsoft and provided to Turtle Beach for inclusion with new gaming headsets, will not be available until early 2014."

~~83.~~69. The proxy statement further disclosed that "[t]his delay will result in a downward revision to the 2013 outlook for revenue and EBITDA provided by Turtle Beach's management on August 8, 2013~~."~~. The level of such impact depends on several factors, including the projected launch date for the requisite hardware and software from Microsoft which is still being assessed. Turtle Beach plans to update its 2013 outlook for revenue and EBITDA following completion of this assessment." In making this disclosure, the proxy statement revealed that Turtle Beach expected its financial forecast to fall below the range disclosed on August 8, 2013, which was already lower than the forecast included in Craig-Hallum's fairness opinion. The proxy statement further represented that Turtle Beach "believe[d]" that the reduced revenue in 2013 "will be realized in 2014." The proxy statement did not disclose internal Turtle Beach projections for 2014 developed during the Summer and Fall of 2013 that were materially lower than the projections disclosed on August 8, 2013.

~~84. In late 2013, Turtle Beach provided additional financial disclosures showing that Turtle Beach's actual performance in 2013 was materially underperforming Turtle Beach's performance in the same time period in 2012 and its prior guidance for 2013. For example, on November 7, 2013, Parametric filed a Form 8-K, which disclosed an investor presentation prepared by Parametric and Turtle Beach that included updated net revenue, EBIDTA, and net~~

~~income numbers for Turtle Beach for the twelve-month period preceding June 30, 2013. That investor presentation also stated that "Microsoft's delay of the Xbox One hardware and software until early 2014 is expected to result in a deferral of Turtle Beach's Xbox One headset-related revenues and profits for Q4." Parametric shareholders had access to this information when deciding whether to vote in favor of the merger.~~

~~85. The proxy statement further disclosed that Turtle Beach expected to underperform even the lowered guidance provided to Parametric shareholders on August 8, 2013 and explained that this underperformance was due to the unexpected unavailability of the Microsoft component. The proxy statement further disclosed that Turtle Beach would be revising its projections downward, but that it would not be able to provide those projections until that process was completed.~~

~~86. The proxy statement contained a fair summary of Craig-Hallum's fairness opinion. The proxy statement also contained a fair and complete summary of interests and potential conflicts in the merger held by members of the Board and management of Parametric. No material interest or potential conflicts in the merger held by members of the Board and management of Parametric were undisclosed in the proxy statement.~~

70. Parametric held a special meeting of its shareholders on December 27, 2013. ~~Approximately 95% of the~~ For the merger to be approved, Parametric was required to obtain a quorum of 50% of shares voting ~~in that election~~, and approval of 50% of the voting shares.

71. Potashner sought to ensure a quorum by persuading large shareholders to attend the meeting and cast votes to approve the merger. One of those shareholders was Adam Kahn, who spoke with Potashner and Stark on or around December 13, 2013 to confirm that he would vote for the Merger so long as "there's no impairment to [VTB Holdings'] business post merger, i.e. the 2014 and beyond business expectations haven't changed" or, alternatively, if "there's impairment to [VTB Holdings'] business such that those projections [that were used for the fairness opinion] are unlikely to be met, the deal should be recut for a greater share going to current [Parametric] holders as to de facto keep the consideration the same." Consistent with the public guidance Turtle Beach provided the market in August 2013, Stark assured Kahn that Turtle

Beach's expectations for 2014 were not impaired, and that they may even improve as a result of revenue originally anticipated in 2013 being recaptured in 2014.

~~87.~~72. At the December 27, 2013 meeting, votes representing 4,013,274 shares were cast, of the 6,837,321 public shares of Parametric that were then outstanding. Among the votes cast, approximately 95% voted to approve the transaction. Neither the ~~Director Defendants~~Parametric directors nor any combination of Parametric insiders owned sufficient shares in the pre-merger Parametric to control the outcome of the vote in favor of the merger.

~~88.~~73. The merger closed on January 15, 2014. As consideration for the merger, Parametric issued new shares of its common stock to Stripes and Turtle Beach, the net effect being that Stripes controlled approximately 80.9% of the combined company. Parametric shareholders, including each of the ~~Director Defendants~~Parametric directors, who owned a combined 100% of Parametric before the merger, were reduced to a minority 19.1% interest.

~~89.~~74. Potashner's employment agreement, which came into effect in April 2012, contained certain change in control provisions. Under that agreement, upon a change in control at Parametric, Potashner would be entitled to a severance payment equivalent to twelve months salary and accelerated vesting of theretofore unvested incentive stock options.

~~**V. Post-Merger**~~

~~90. Following the merger, Turtle Beach invested tens of millions of dollars into HyperSound and hired Norris as the new Chief Scientist. Even with these substantial resources and Norris's continued involvement, HyperSound was a commercial disappointment. Turtle Beach was never able to generate substantial revenues from the product. Instead, Turtle Beach suffered substantial losses.~~

~~91. In recent years, after Turtle Beach stopped investing in the HyperSound technology after sustaining years of losses on its investment in the technology, Turtle Beach has maintained its dominance of the gaming headset market and has achieved considerable financial success. None of this success is attributable to the HyperSound technology.~~

~~VI. No Control or Actual Fraud~~

VI. Potashner's Relationship with the Settling Directors

~~92.~~75. Prior to January 15, 2014, Parametric was not a "controlled company" pursuant to NASDAQ rules because more than 50% of its voting power was not concentrated in any single shareholder or control group.

~~93.~~76. As disclosed in the proxy statement, persons or entities who held shares of ~~commons~~common stock of Parametric on the "record date" of November 11, 2013, were entitled to vote at the special meeting of shareholders to be held on December 27, 2013~~. Parametric had 6,837,321 shares of common stock outstanding on the record date.~~ to approve the issuance of additional shares to Turtle Beach in order to consummate the merger.

~~94.~~77. On November 11, 2013, Potashner owned no shares of common stock of Parametric. Accordingly, Potashner was not entitled to vote a proxy statement at the special meeting of shareholders held on December 27, 2013.

~~95.~~78. Norris, Putterman and Kaplan often were hostile to Potashner and, at times, acted contrary to what they perceived as Potashner's personal interests by causing the Board to, among other things:

~~a. cancel Potashner's options in the HHI subsidiary for no consideration;~~

~~b.~~a. rebuff Potashner's efforts to cause Kaplan to retire from his position as a director of the pre-merger Parametric;

~~c.~~b. refuse Potashner's request to remove Wolfe from Parametric's audit committee~~.~~;

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

~~e.~~d. refuse Potashner's request to allow Parametric consultant John Todd to sell Parametric stock after the announcement of the merger.

79. On the other hand, board members often acceded to Potashner's requests and demands, often in the face of legal threats and intimidation by Potasher.

~~96.~~80. A majority of the Board of Parametric ~~was independent of Potashner. That majority~~ could and at times did outvote Potashner on any all matters on which that majority disagreed with Potashner.

~~97.~~81. None of Norris, Putterman, Kaplan and Honoré had any business interactions with Potashner prior to Parametric. None of Norris, Putterman, Kaplan, Wolfe and Honoré had any pre-existing personal or familial relationship with Potashner.

~~98.~~82. None of the ~~Director Defendants~~Settling Directors was unable to freely exercise his judgment as a member of the Board by reason of:

~~a. dominion or control of another;~~

~~b. fear of retribution by another;~~

~~c.~~a. contractual obligations owed to another; or

~~d.~~b. employment by or other business relationship with another.

~~99.~~83. No one single individual or group had the authority unilaterally to:

a. elect new directors to the Board;

~~b. cause a break-up of Parametric;~~

~~c. cause Parametric to merge with another company;~~

~~d.~~b. amend Parametric's certificate of incorporation;

~~e.~~c. cause Parametric to sell all or substantially all of the assets of Parametric; or

~~f.~~ alter materially the nature of Parametric and the public shareholders' interest therein~~; or~~

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

~~100.~~84. Potashner did not receive any compensation as a result of the merger that he was not entitled to receive through his employment contract, which included a severance payment, an annual bonus, and accelerated vesting of certain incentive stock options. ~~Potashner could have received the same compensation had Parametric merged with a different partner or no one at all. Each of these forms of compensation were disclosed in the proxy statement.~~However, Potashner had not met the benchmarks for the vesting of those stock options, and would not have received them absent the merger.

~~101.~~85. Potashner briefly served as a director for the post-merger company because Parametric, not Turtle Beach, nominated him for this position. Potashner received no compensation for his participation on the board.

~~102.~~86. Potashner did not enter any side deals or other agreements with Turtle Beach or Stripes for additional compensation. Potashner received nothing of value from Turtle Beach or Stripes in exchange for his support for the merger.

~~103. All directors holding equity in Parametric were diluted by the merger to the same extent as every other public shareholder.~~

~~104. Due to the loss of his stock options in HHI, which the Parametric Board and Turtle Beach forced him to cancel in order for the merger to occur, Potashner lost more than any other shareholder by voting in favor of the merger.~~

CONCLUSIONS OF LAW

1. NRCP 52(c) allows the district court in a bench trial to enter judgment on partial findings against a party when the party has been fully heard on an issue and judgment cannot be maintained without a favorable finding on that issue. *Certified Fire Prot. Inc. v. Precision Constr. Inc.*, 128 Nev. 371, 377, 283 P.3d 250, 254 (2012).

2. In entering a Rule 52(c) judgment, "[t]he 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." *Id.* (citing 9C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, Federal Practice and Procedure § 2573.1, at 256-60 (3d ed. 2008) (addressing NRCP 52(c)'s federal counterpart, Fed. R. Civ. P. 52(c)); ROBERT E. JONES ET AL., Rutter Group Practice Guide: Federal Civil Trials and Evidence § 17:92 (2011) ("Because 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 . . . .")).

3. The directors of a Nevada corporation "are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation" (known as the "business judgment rule"). NRS 78.138(3). In exercising his or her business judgment, a director is

"entitled to rely on information, opinions [and] reports" from, among others, "[o]ne or more directors, officers or employees of the corporation reasonably believed to be reliable and competent in the matters prepared or presented." NRS 78.138(2)(a). Likewise, a director may rely upon "information, opinions [and] reports" from "[c]ounsel, public accountants, financial advisers, valuation advisers, investment bankers or other persons as to matters reasonably believed to be within the preparer's or presenter's professional or expert competence." NRS 78.138(2)(b). Directors "are not required to consider the effect of a proposed corporate action upon any particular group having an interest in the corporation as a dominant factor." NRS 78.138(5). As a matter of statutory law, directors of a Nevada corporation are not required to elevate the short-term interests of stockholders (such as maximizing immediate, short-term share value) ahead of any of the other interests set forth in NRS 78.138(4).

4. Under NRS 78.211(1), "the board of directors may authorize shares to be issued for consideration consisting of any tangible or intangible property or benefit to the corporation, including, but not limited to, cash, promissory notes, services performed, contracts for services to be performed or other securities of the corporation. The nature and amount of such consideration may be made dependent upon a formula approved by the board of directors or upon any fact or event which may be ascertained outside the articles of incorporation or the resolution providing for the issuance of the shares adopted by the board of directors if the manner in which a fact or event may operate upon the nature and amount of the consideration is stated in the articles of incorporation or the resolution. 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."

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

6. In *Chur v. Eighth Judicial Dist. Court*, 136 Nev. Adv. Op. 7, 458 P.3d 336, 340 (2020), the Court noted that "NRS 78.138(7) requires a two-step analysis to impose individual

liability on a director or officer." First, the presumptions of the business judgment rule must be rebutted. *Id.* (citing NRS 78.138(7)(a); *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev. 369, 375, 399 P.3d 334, 342 (2017)). Second, the "director's or officer's act or failure to act" must constitute "a breach of his or her fiduciary duties," and that breach must further involve "intentional misconduct, fraud or a knowing violation of law." NRS 78.138(7)(b)(1)-(2) (emphasis added). The *Chur* Court confirmed that NRS 78.138 "provides for the sole circumstance under which a director or officer may be held individually liable for damages stemming from the director's or officer's conduct in an official capacity." *Chur*, 458 P.3d at 340.

7. The *Chur* Court also explained that intentional misconduct and knowing violation of the law under NRS 78.138 is an expansive test: "To give the statute a realistic function, it must protect more than just directors (if any) who did not know what their actions were ~~[wrongful];~~, it should protect directors who knew what they did but not that it was wrong." *Id.* at 341. Thus, a plaintiff "must establish that the director or officer had knowledge that the alleged conduct was wrongful in order to show a "knowing violation of law" or "intentional misconduct" pursuant to NRS 78.138(7)(b)." *Id.* (concluding that the knowledge of wrongdoing requirement under NRS 78.138 is an "appreciably higher standard than gross negligence," which is defined as a "reckless disregard of a legal duty").

~~8. The Director Defendants were~~Although Potashner, as a director, would have been entitled to the benefit of the business judgment rule presumption in connection with ~~their~~his consideration and approval of the merger with Turtle Beach~~.~~

~~9.~~8. ~~Plaintiff failed to meet its burden of rebutting,~~ the ~~business judgment rule presumption as to a majority of the Board. A majority of the Board (a) reasonably relied upon the advice, information and opinions of other directors, employees and competent professionals (including counsel) and financial advisors and (b) acted in good~~Court has already made "an adverse inference of bad faith ~~and independently when considering and approving the merger. Plaintiff failed to meet its burden of proving that a majority of the Board engaged in a knowing violation of law or intentional misconduct, or engaged in actual fraud~~" against Potashner.

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

~~11.~~9. Additionally, in 2017, the Nevada Supreme Court ruled in this litigation that the only direct claim that Parametric shareholders might have standing to assert arising out of the merger was an "equity expropriation" claim. *See Parametric Sound Corp. v. Eighth Jud. Dist. Ct.*, 133 Nev. 417, 429, 401 P.3d 1100, 1109 (2017). Any other claim contesting the merger would be derivative in nature, and was extinguished by the settlement and judgment entered by this Court on May 18, 2020.

~~12.~~10. The Court in *Parametric* held that "equity expropriation claims involve a controlling shareholder's or director's expropriation of value from the company causing other shareholders' equity to be diluted." *Id.* The Court cited only two cases as providing the legal standard for an equity expropriation: *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006), and *Gatz v. Ponsoldt*, 925 A.2d 1265 (Del. 2007).

~~13.~~11. Under *Gentile*, an equity expropriation claim exists where (1) a company has a controlling shareholder or controlling shareholder group prior to the merger and (2) the controlling shareholder or controlling shareholder group uses its control to cause the company to issue economic and voting power to the controlling shareholder or shareholder group for inadequate consideration. *Gentile*, 906 A.2d at 100. *Gatz* does not alter these basic elements of the claim~~.~~, although Gatz~~, 925 A.2d at 1277~~ does make clear that an expropriated benefit may be bestowed on a third party.

~~14.~~12. ~~The~~In any event, the severance payment and accelerated vesting of incentive stock options provided for under Potashner's April 2012 employment agreement, which were triggered upon the closing of the merger between Parametric and Turtle Beach on January 15, 2014 even though he had not met the benchmarks that would otherwise entitle him to those options, for purposes of the motion, ~~will be presumed to have constituted an~~demonstrate that the expropriation

~~by Potashner~~prong of ~~value from the company causing Parametric shareholders' equity to be diluted~~Plaintiff's claims is satisfied.

~~15.~~13. Nevertheless, Plaintiff failed to meet its burden of proving that Parametric had a controlling shareholder or controlling director. Despite Potashner's misconduct and self-dealing, the other members of the Board testified that they did not believe him and did not trust him and conducted their own investigation in order to approve the merger on August 2, 2013. Accordingly, Plaintiff has failed to meet its burden to prove that Potashner's receipt of incentive stock options is an expropriation of value by a controlling shareholder. As such, Plaintiff failed to prove an essential element of an equity expropriation claim under Nevada law.

~~16.~~14. Plaintiff further failed to meet its burden to prove that the Parametric Board's decision was impacted by actual fraud, intentional misconduct, or bad faith.

~~17.~~15. By reason of Plaintiff's failure to meet its burden to prove a primary equity expropriation claim against ~~the Director Defendants~~Potashner, Plaintiff failed to meet its burden to prove a secondary aiding and abetting claim against the Non-Director Defendants.

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

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

JUDGMENT

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

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

DATED this _____ day of September 2021

HON. ELIZABETH GONZALEZ
DISTRICT COURT JUDGE

~~17288082_v1~~

~~17314253_v1~~

ELECTRONICALLY SERVED
9/3/2021 8:10 PM

Electronically Filed
09/03/2021 8:10 PM
CLERK OF THE COURT

FFCL

DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION. This Document Related To: PAMTP LLC v. KENNETH POTASHNER, *et. al.*.	LEAD CASE NO.: A-13-686890-B DEPT. NO.: XI **ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT PURSUANT TO NRCP 52(c), FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND JUDGMENT THEREON**

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

After the conclusion of Plaintiff's case-in-chief, Defendants made motions pursuant to NRCP Rule 52(c). The Court having considered the evidence presented at trial, along with oral and written arguments of counsel on such motions, and with the intent of rendering a decision on all remaining claims[2] before the Court at this time, the Court GRANTS Defendants' motion

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

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

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

FINDINGS OF FACT

I. Class and Derivative Litigation

1. The underlying class action and shareholder derivative action was commenced on August 8, 2013.[3] The case arose out of the merger between Parametric Sound Corporation ("Parametric") and VTBH which closed on January 15, 2014.

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

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

4. Following the June 18, 2021 evidentiary hearing, the Court imposed sanctions in the form of adverse inferences. The Court held that: "(1) Potashner having willfully destroyed text messages text messages and emails relevant to this litigation, the Court makes an adverse inference that the lost text messages and emails relevant to this litigation would have shown that Potashner acted in bad faith when supporting and approving the merger. Potashner may testify and contest this at trial, but his testimony will go to his credibility only because an adverse inference of bad faith has already been made by the Court; and; (2) Stark and Fox having negligently failed to preserve text messages, the Court makes an adverse inference that

---

[3] The claims against Defendants were largely resolved through a Rule 23.1 settlement. On January 17, 2020, the Court granted preliminary approval of the settlement. On May 18, 2020, the Court ordered that the class action and derivative settlement was "finally approved in all respects" and entered a final judgment dismissing all of the Class' released claims, with prejudice, pursuant to the terms of the Stipulation of Settlement filed on November 15, 2019. These Plaintiffs opted out of the class settlement.

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

II. Opt-Out Litigation

A. Plaintiff and Assignors

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

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

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

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

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

between the Member Managers on any particular decision.

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

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

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

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

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

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

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

B. Pre-Merger Parametric

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

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

C. Directors and Senior Officer of Pre-Merger Parametric

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

(1) Potashner

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

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

(2) Norris

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

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

(3) Putterman

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

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

(4) Kaplan

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

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

(5) Wolfe

27. Wolfe was appointed a director in February 2012.

28. **(6) Honoré**

29. Honoré was appointed a director in March 2012.

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

D. Non-Director Defendants

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

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

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

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

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

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

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

III. Merger Negotiations and the Parametric Board's Process

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

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

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

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

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

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

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

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

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

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

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

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

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

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

50. Parametric engaged Craig-Hallum Capital Group, LLC ("Craig-Hallum") to provide an opinion regarding the fairness of the proposed merger. Craig-Hallum's compensation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Post-Announcement of the Merger

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

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

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

"we can't guarantee that will occur."

> "it's very important that you understand the gaming industry context for 2013. Both Xbox and PlayStation have announced launches of new consoles during the holiday's this year. As a result, the entire gaming sector is going through what we believe to be a normal cycle of contraction, prior to these new console release[s]."
>
> "our business results in particular will be very much dependent on one; how consumer purchasing behavior for more expensive accessories like headset plays out, heading into the transition. Two; when the new console launches will happen and three; what quantity of new consoles will be available [and] sold during the weeks between the launch and the year end."
>
> "rely among other things on successful widespread launch of the new consoles with sufficient selling weeks to impact this year as well as availability of some specific components from Microsoft required for sale of our licensed Xbox One headsets, this holiday. These specific items by the way are outside of our control."
>
> "these uncertainties are driving the wide range around the expectations for revenues and EBITDA I just talked through, but it's important to note that our actual results could fall materially outside of these ranges if the aforementioned assumptions turned out to be inaccurate."

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

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

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

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

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

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

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

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

> "Microsoft has informed its partners in the Xbox One console launch that the Xbox One Headset Adapter, being built by Microsoft and provided to Turtle Beach for inclusion with new gaming headsets, will not be available until early 2014."
>
> "[t]his delay will result in a downward revision to the 2013 outlook for revenue and EBITDA provided by Turtle Beach's management on August 8, 2013."

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

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

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

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

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

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

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

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

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

V. No Control or Actual Fraud

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

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

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

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

a. cancel Potashner's options in the HHI subsidiary for no consideration;

b. rebuff Potashner's efforts to cause Kaplan to retire from his position as a director of the pre-merger Parametric;

c. refuse Potashner's request to remove Wolfe from Parametric's audit

committee.

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

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

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

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

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

a. dominion or control of another;

b. fear of retribution by another;

c. contractual obligations owed to another; or

d. employment by or other business relationship with another.

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

a. elect new directors to the Board;

b. cause a break-up of Parametric;

c. cause Parametric to merge with another company;

d. amend Parametric's certificate of incorporation;

e. cause Parametric to sell all or substantially all of the assets of Parametric;

f. alter materially the nature of Parametric and the public shareholders' interest therein; or

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

3. Under NRS 78.211(1),

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

> limited to, cash, promissory notes, services performed, contracts for services to be performed or other securities of the corporation. The nature and amount of such consideration may be made dependent upon a formula approved by the board of directors or upon any fact or event which may be ascertained outside the articles of incorporation or the resolution providing for the issuance of the shares adopted by the board of directors if the manner in which a fact or event may operate upon the nature and amount of the consideration is stated in the articles of incorporation or the resolution. 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."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUDGMENT

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

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

DATED this _____ day of September 2021.

Dated this 3rd day of September, 2021

7F9 8D2 0FBD 00D8
Elizabeth Gonzalez
District Court Judge

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

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

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Findings of Fact, Conclusions of Law and Judgment was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 9/3/2021

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

Richard C. Gordon .	rgordon@swlaw.com
Robert Cassity .	bcassity@hollandhart.com
Steve Peek .	speek@hollandhart.com
Traci Bixenmann .	traci@johnaldrichlawfirm.com
Valerie Larsen .	vllarsen@hollandhart.com
Sonja Dugan	sdugan@swlaw.com
Stephanie Morrill	scmorrill@hollandhart.com
CaraMia Gerard	cgerard@mcdonaldcarano.com
George Ogilvie	gogilvie@mcdonaldcarano.com
Amanda Yen	ayen@mcdonaldcarano.com
Jelena Jovanovic	jjovanovic@mcdonaldcarano.com
Lara Taylor	ljtaylor@swlaw.com
David Knotts	dknotts@rgrdlaw.com
Randall Baron	randyb@rgrdlaw.com
Jaime McDade	jaimem@rgrdlaw.com
Lyndsey Luxford	lluxford@swlaw.com
Josh Fruchter	jfruchter@wohlfruchter.com
Brad Austin	baustin@swlaw.com
John Stigi III	JStigi@sheppardmullin.com
Jonathan Stein	jstein@saxenawhite.com
Karen Surowiec	ksurowiec@mcdonaldcarano.com
Alejandro Moreno	AMoreno@sheppardmulllin.com
Phyllis Chavez	pchavez@sheppardmullin.com

Rory Kay	rkay@mcdonaldcarano.com
Adam Apton	aapton@zlk.com
Amanda Baker	akbaker@hollandhart.com
Kristina Cole	krcole@hollandhart.com
Esther Lee	elee@rgrdlaw.com
Elizabeth Tripodi	etripodi@zlk.com
Nicole Delgado	nicole.delgado@dechert.com
Ryan Moore	ryan.moore@dechert.com
Adam Warden	awarden@saxenawhite.com
Randall Baron	RandyB@rgrdlaw.com
Maxwell Huffman	mhuffman@rgrdlaw.com
Jane Susskind	jsusskind@mcdonaldcarano.com
Isis Crosby	icrosby@albrightstoddard.com

If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 9/7/2021

George Albright	801 S. Rancho Dr., #D-4 Las Vegas, NV, 89106
Joseph Peek	9555 Hillwood Drive 2nd Floor Las Vegas, NV, 89134
Richard Gordon	Snell & Wilmer LLP Attn: Richard C. Gordon 3883 Howard Hughes Pkwy. - Suite 1100 Las Vegas, NV, 89169

Richard C. Gordon, Esq.
Nevada Bar No. 9036
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Tel. (702) 784-5200
Fax. (702) 784-5252
rgordon@swlaw.com

[Additional counsel on signature page]

Attorneys for Defendants VTB Holdings, Inc. and Specially Appearing Defendants Stripes Group, LLC and SG VTB Holdings, LLC

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION This Document Related to: ALL ACTIONS	LEAD CASE NO.: A-13-686890-B DEPT. NO.: XI **NOTICE OF ENTRY OF ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT PURSUANT TO NRCP 52(C), FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND JUDGMENT THEREON**

///

///

///

///

///

///

///

///

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

Dated: September 8, 2021

SNELL & WILMER L.L.P.

By: /s/ *Richard C. Gordon*
Richard C. Gordon (Bar No. 9036)
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169

DECHERT L.L.P.

Joshua D. N. Hess, Esq. (*Admitted Pro Hac Vice*)
1900 K Street, NW
Washington, DC 20006

David A. Kotler, Esq. (*Admitted Pro Hac Vice*)
Brian C. Raphel, Esq. (*Admitted Pro Hac Vice*)
1095 Avenue of the Americas
New York, NY 10036

Ryan M. Moore (*Admitted Pro Hac Vice*)
2929 Arch Street
Philadelphia, PA 19104

Nicole C. Delgado (*Admitted Pro Hac Vice*)
633 West 5th Street, Suite 4900
Los Angeles, CA 90071

Attorneys for Defendant VTB Holdings, Inc. and Specially Appearing Defendants Stripes Group, LLC and SG VTB Holdings, LLC

HOLLAND & HART LLP

J. Stephen Peek (Bar No. 1758)
955 Hillwood Drive, 2d Floor
Las Vegas, NV 89134

Snell & Wilmer L.L.P.
LAW OFFICES
3883 HOWARD HUGHES PARKWAY, SUITE 1100
LAS VEGAS, NEVADA 89169
(702)784-5200

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

John P. Stigi III (*Admitted Pro Hac Vice*)
Alejandro Moreno
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

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 HOWARD HUGHES PARKWAY, SUITE 1100
LAS VEGAS, NEVADA 89169
(702)784-5200

CERTIFICATE OF SERVICE

As an employee of Snell & Wilmer L.L.P., I certify that I served a copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT PURSUANT TO NRCP 52(C), FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND JUDGMENT THEREON** on the 8th day of September 2021, via e-service through Odyssey File and serve to the email addresses listed below:

SHEPPARD MULLIN RICHTER & HAMPTON LLP
John P. Stigi III, Esq. (*Admitted Pro Hac Vice*)
1901 Avenue of the Stars, Suite 1600
Los Angeles, CA 90067
JStigi@sheppardmullin.com
Attorneys for Kenneth Potashner, Elwood Norris, Seth Putterman, Robert Kaplan, Andrew Wolfe and James Honore

HOLLAND & HART LLP
J. Stephen Peek, Esq.
Robert J. Cassity, Esq.
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
speek@hollandhart.com
bcassity@hollandhart.com
Attorneys for Kenneth Potashner, Elwood Norris Seth Putterman, Robert Kaplan, Andrew Wolfe and James Honore

ALBRIGHT STODDARD WARNICK & ALBRIGHT
G. Mark Albright, Esq.
801 South Rancho Drive, Suite D-4
Las Vegas, NV 89106
Email: gma@albrightstoddard.com
Attorneys for Kearney IRRV Trust

SAXENA WHITE P.A.
Jonathan M. Stein, Esq.
Adam Warden, Esq.
Boca Center
5200 Town Center Circle, Suite 601
Boca Raton, FL 33486
jstein@saxenawhite.com
awarden@saxenawhite.com
Attorneys for Grant Oakes and Derivative Plaintiff Lance Mykita

THE O'MARA LAW FIRM, P.C.
David C. O'Mara, Esq.
311 East Liberty St.
Reno, Nevada 89501
david@omaralaw.net
Attorneys for Grant Oakes and Derivative Plaintiff Lance Mykita
ROBBINS GELLER RUDMAN & DOWD LLP
David A. Knotts, Esq.

Snell & Wilmer L.L.P.
LAW OFFICES
3883 HOWARD HUGHES PARKWAY, SUITE 1100
LAS VEGAS, NEVADA 89169
(702)784-5200

Randall Baron, Esq.
Maxwell Ralph Huffman, Esq.
655 West Broadway, Suite 1900
San Diego, CA 92101-8498
DKnotts@rgrdlaw.com
RandyB@rgrdlaw.com
mhuffman@rgrdlaw.com
Attorneys for Grant Oakes and Derivative Plaintiff Lance Mykita

DECHERT L.L.P.
David A. Kotler, Esq. (*Admitted Pro Hac Vice*)
Brian Raphel, Esq. (*Admitted Pro Hac Vice*)
1095 Avenue of the Americas
New York, NY 10036
Tel. (212) 698-3822
Fax (212) 698-3599
Neil.steiner@dechert.com
Brian.Raphel@dechert.com

Joshua D. N. Hess, Esq. (*Admitted Pro Hac Vice*)
1900 K Street, N.W.
Washington, D.C. 20006
Tel. (202) 261-3438
Fax (202) 261-3333
Joshua.Hess@dechert.com

Ryan M. Moore (*Admitted Pro Hac Vice*)
2929 Arch Street
Philadelphia, PA 19104
Ryan.Moore@dechert.com

Nicole C. Delgado (*Admitted Pro Hac Vice*)
633 West 5th Street, Suite 4900
Los Angeles, CA 90071
Nicole.Delgado@dechert.com
Attorneys for Defendants VTB Holdings, Inc. and Specially Appearing Defendants Stripes Group, LLC and SG VTB Holdings, LLC

Adam M. Apton, Esq.
LEVI & KORSINSKY LLP
1101 30th Street, Suite 115
Washington, D.C. 20007
Attorneys for PAMTP LLC

///

///

///

///

McDONALD CARANO LLP

Snell & Wilmer L.L.P.
LAW OFFICES
3883 HOWARD HUGHES PARKWAY, SUITE 1100
LAS VEGAS, NEVADA 89169
(702)784-5200

George F. Ogilvie III, Esq. (NSBN 3552)
Amanda C. Yen, Esq. (NSBN 9726)
Rory T. Kay, Esq. (NSBN 12416)
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
gogilvie@mcdonaldcarano.com
ayen@mcdonaldcarano.com
rkay@mcdonaldcarano.com
Attorneys for PAMTP LLC

/s/ *Lyndsey Luxford*
An employee of Snell & Wilmer L.L.P.

4827-3995-4426.1

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 HOWARD HUGHES PARKWAY, SUITE 1100
LAS VEGAS, NEVADA 89169
(702)784-5200

ELECTRONICALLY SERVED
9/3/2021 8:10 PM

Electronically Filed
09/03/2021 8:10 PM
CLERK OF THE COURT

FFCL

DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION. This Document Related To: PAMTP LLC v. KENNETH POTASHNER, *et. al.*.	LEAD CASE NO.: A-13-686890-B DEPT. NO.: XI **ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT PURSUANT TO NRCP 52(c), FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND JUDGMENT THEREON**

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

After the conclusion of Plaintiff's case-in-chief, Defendants made motions pursuant to NRCP Rule 52(c). The Court having considered the evidence presented at trial, along with oral and written arguments of counsel on such motions, and with the intent of rendering a decision on all remaining claims[2] before the Court at this time, the Court GRANTS Defendants' motion

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

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

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

FINDINGS OF FACT

I. Class and Derivative Litigation

1. The underlying class action and shareholder derivative action was commenced on August 8, 2013.[3] The case arose out of the merger between Parametric Sound Corporation ("Parametric") and VTBH which closed on January 15, 2014.

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

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

4. Following the June 18, 2021 evidentiary hearing, the Court imposed sanctions in the form of adverse inferences. The Court held that: "(1) Potashner having willfully destroyed text messages text messages and emails relevant to this litigation, the Court makes an adverse inference that the lost text messages and emails relevant to this litigation would have shown that Potashner acted in bad faith when supporting and approving the merger. Potashner may testify and contest this at trial, but his testimony will go to his credibility only because an adverse inference of bad faith has already been made by the Court; and; (2) Stark and Fox having negligently failed to preserve text messages, the Court makes an adverse inference that

---

[3] The claims against Defendants were largely resolved through a Rule 23.1 settlement. On January 17, 2020, the Court granted preliminary approval of the settlement. On May 18, 2020, the Court ordered that the class action and derivative settlement was "finally approved in all respects" and entered a final judgment dismissing all of the Class' released claims, with prejudice, pursuant to the terms of the Stipulation of Settlement filed on November 15, 2019. These Plaintiffs opted out of the class settlement.

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

II. Opt-Out Litigation

A. Plaintiff and Assignors

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

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

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

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

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

between the Member Managers on any particular decision.

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

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

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

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

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

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

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

B. Pre-Merger Parametric

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

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

C. Directors and Senior Officer of Pre-Merger Parametric

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

(1) Potashner

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

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

(2) Norris

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

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

(3) Putterman

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

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

(4) Kaplan

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

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

(5) Wolfe

27. Wolfe was appointed a director in February 2012.

28. **(6) Honoré**

29. Honoré was appointed a director in March 2012.

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

D. Non-Director Defendants

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

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

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

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

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

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

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

III. Merger Negotiations and the Parametric Board's Process

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

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

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

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

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

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

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

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

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

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

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

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

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

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

50. Parametric engaged Craig-Hallum Capital Group, LLC ("Craig-Hallum") to provide an opinion regarding the fairness of the proposed merger. Craig-Hallum's compensation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Post-Announcement of the Merger

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

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

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

"we can't guarantee that will occur."

> "it's very important that you understand the gaming industry context for 2013. Both Xbox and PlayStation have announced launches of new consoles during the holiday's this year. As a result, the entire gaming sector is going through what we believe to be a normal cycle of contraction, prior to these new console release[s]."
>
> "our business results in particular will be very much dependent on one; how consumer purchasing behavior for more expensive accessories like headset plays out, heading into the transition. Two; when the new console launches will happen and three; what quantity of new consoles will be available [and] sold during the weeks between the launch and the year end."
>
> "rely among other things on successful widespread launch of the new consoles with sufficient selling weeks to impact this year as well as availability of some specific components from Microsoft required for sale of our licensed Xbox One headsets, this holiday. These specific items by the way are outside of our control."
>
> "these uncertainties are driving the wide range around the expectations for revenues and EBITDA I just talked through, but it's important to note that our actual results could fall materially outside of these ranges if the aforementioned assumptions turned out to be inaccurate."

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

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

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

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

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

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

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

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

> "Microsoft has informed its partners in the Xbox One console launch that the Xbox One Headset Adapter, being built by Microsoft and provided to Turtle Beach for inclusion with new gaming headsets, will not be available until early 2014."
>
> "[t]his delay will result in a downward revision to the 2013 outlook for revenue and EBITDA provided by Turtle Beach's management on August 8, 2013."

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

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

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

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

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

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

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

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

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

V. No Control or Actual Fraud

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

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

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

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

a. cancel Potashner's options in the HHI subsidiary for no consideration;

b. rebuff Potashner's efforts to cause Kaplan to retire from his position as a director of the pre-merger Parametric;

c. refuse Potashner's request to remove Wolfe from Parametric's audit

committee.

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

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

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

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

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

a. dominion or control of another;

b. fear of retribution by another;

c. contractual obligations owed to another; or

d. employment by or other business relationship with another.

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

a. elect new directors to the Board;

b. cause a break-up of Parametric;

c. cause Parametric to merge with another company;

d. amend Parametric's certificate of incorporation;

e. cause Parametric to sell all or substantially all of the assets of Parametric;

f. alter materially the nature of Parametric and the public shareholders' interest therein; or

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

3. Under NRS 78.211(1),

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

> limited to, cash, promissory notes, services performed, contracts for services to be performed or other securities of the corporation. The nature and amount of such consideration may be made dependent upon a formula approved by the board of directors or upon any fact or event which may be ascertained outside the articles of incorporation or the resolution providing for the issuance of the shares adopted by the board of directors if the manner in which a fact or event may operate upon the nature and amount of the consideration is stated in the articles of incorporation or the resolution. 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."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUDGMENT

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

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

DATED this _____ day of September 2021.

Dated this 3rd day of September, 2021

7F9 8D2 0FBD 00D8
Elizabeth Gonzalez
District Court Judge

Richard C. Gordon, Esq.
Nevada Bar No. 9036
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Tel. (702) 784-5200
Fax. (702) 784-5252
rgordon@swlaw.com

[Additional counsel on signature page]

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

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION This Document Related To: ALL ACTIONS	LEAD CASE NO.: A-13-686890-B DEPT. NO.: XI **NON-DIRECTOR DEFENDANTS' MEMORANDUM OF COSTS**

///

///

///

///

///

///

///

///

This case arose out of a merger between Parametric Sound Corporation ("Parametric") and VTB Holdings, Inc. ("Turtle Beach") that occurred on January 15, 2014 (the "Merger"), but the litigation began prior to the Merger, with the first complaint being filed in August 2013. Over the past eight years, a class of individuals and entities who purported to have owned Parametric stock on the date of the Merger litigated breach of fiduciary duty claims against Parametric's pre-Merger board of directors and aiding-and-abetting claims against Turtle Beach and Stripes Group LLC and SG VTB Holdings, LLC ("Stripes"), which owned a majority interest in Turtle Beach at the time of the Merger (the "Class Action"). The Class Action brought both direct and derivative claims against the Defendants.

In November 2019, on the eve of trial, Defendants settled the Class Action claims. A select group of purported class members decided to opt-out of the Class Action settlement and assign their direct claims to a shell company for the purpose of continuing to pursue these claims. (Since the derivative claims brought in the Class Action belonged to Turtle Beach, those claims were extinguished in the Class Action settlement and class members could only opt-out of the settlement of direct shareholder claims). Accordingly, Defendants were forced to continue to litigate these same direct claims for an additional year and a half before this Court ultimately entered judgment in Defendants' favor at trial under NRCP 52(c) ("Opt-Out Proceedings"). Because the Court entered judgment in Defendants' favor, they are now entitled to recover their costs under NRCP 18.020(3), which states that "costs must be allowed of course to the prevailing party against any adverse party against whom judgment is rendered" in cases, like this one, where the plaintiff sought to recover more than $2,500. Those costs are set forth below and in the supporting materials attached as exhibits to this memorandum.

Turtle Beach and Stripes seek reimbursement of their reasonable costs from both the Opt-Out and the Class Action Proceedings.[1] Plaintiff's Assignors pursued the exact same direct claims in both the Class Action, as class members, and in the Opt-Out Proceedings, as assignors to the Plaintiff, and Turtle Beach and Stripes have incurred costs in defense of these claims since August

[1] Throughout the entirety of these proceedings, Turtle Beach and Stripes were represented by Dechert LLP and Snell & Wilmer LLP. The Plaintiff also named Turtle Beach's CEO, Juergen Stark, and Stripes's Managing Partner, Kenneth A. Fox, as defendants, and they are included in the definitions of Turtle Beach and Stripes, respectively, for purposes of this motion.

Snell & Wilmer
LLP.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

2013. Plaintiff cannot deny that Defendants are entitled to such costs because, when arguing in favor of the calculation of a potential award of prejudgment interest, Plaintiff stated to the Court as follows: "In case the Court decides to use the date of filing of the complaint and summons . . . the date of accrual should be the filing of the initial complaint in the Class Action, August 13, 2013, because this Action arose as a direct result of Plaintiff's opt-out from the settlement of the Class Action and continues under the initial case, number A-13-686890-B." *See* Pl. Pre-Trial Memorandum at 11-12. Given that Plaintiff asserts that the Opt-Out Proceeding was a continuation of the same litigation that began in August 2013, which was litigated on Plaintiff's behalf by prior counsel, Defendants are thus entitled to recover reasonable costs incurred during the entirety of these proceedings.[2]

The reimbursable costs for Turtle Beach and Stripes are as follows:

COSTS INCURRED BY DECHERT LLP

Category	Amount	Supporting Materials
NRS 18.005(2) – Reporters' Fees For Depositions	$74,652.57	Ex. 1
NRS 18.005(5) – Expert Witness Fees[3]	$223,031.19	Ex. 2
NRS 18.005(12) – Cost For Printing / Copying / Scanning	$82,002.66	Ex. 3
NRS 18.005(14) – Postage / Federal Express	$2,443.46	Ex. 4
NRS 18.005(15) – Travel And Lodging For Hearings And Depositions[4]	$102,189.45	Ex. 5
NRS 18.005(17) – Other Reasonable And Necessary Expenses		
• Computerized Legal Research	$85,922.55	Ex. 6
• Electronic Discovery	$309,399.52	Ex. 7
• Access To Court Records	$99.30	Ex. 8
• Costs Related To Pro Hac Vice Admissions	$9,350.00	Ex. 9
• Equipment Rental For Trial	$123,508.80	Ex. 10
TOTAL	**$1,012,571.70**	

[2] In the Class Action, costs incurred by the Non-Director Defendants were generally split in half between Turtle Beach and Stripes. In the Opt-Out Proceedings, costs incurred by the Non-Director Defendants were generally split four-ways between Turtle Beach, Stripes, Kenneth Fox, and Juergen Stark. These divisions, when they occurred, are reflected in the itemized lists of costs contained herein.

[3] NRS 18.005(5) allows the Court to award greater than $1,500 per expert witness "after determining the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee." Such circumstances are warranted here where Plaintiff and Defendants both obtained substantial expert testimony related to a complicated calculation of potential damages in this matter. Retention of Defendants' expert was necessary to rebut the opinions offered by Plaintiff's expert, who was forced to amend his own opinions after being corrected by Defendants' expert. The billing rate for Defendants' expert ($750 per hour) was lower than the billing rate for Plaintiff's expert ($825-925 per hour).

[4] Regarding travel and lodging costs related to depositions, Defendants seek only costs related to depositions of individuals identified in Plaintiff's Pre-Trial Memorandum as potential witnesses for trial (either live or by deposition).

Snell & Wilmer L.L.P. LAW OFFICES 3883 Howard Hughes Parkway, Suite 1100 Las Vegas, Nevada 89169 702.784.5200

COSTS INCURRED BY SNELL & WILMER LLP

Category	Amount	Supporting Materials
NRS 18.005(1) – Clerk's Fees	$4,480.05	Ex. 11
NRS 18.005(2) and (8) – Reporters' Fees For Depositions, Hearings, and Trial	$16,172.38	Ex. 12
NRS 18.005(11) – Telecopies	$1.50	Ex. 13
NRS 18.005(12) – Cost For Printing / Copying / Scanning	$2,675.49	Ex. 14
NRS 18.005(14) – Postage / Federal Express	$167.53	Ex. 15
NRS 18.005(15) – Travel And Lodging For Hearings And Depositions	$1,752.93	Ex. 16
NRS 18.005(17) – Other Reasonable And Necessary Expenses		
• Computerized Legal Research	$2,920.00	Ex. 17
• Conference Calls	$77.39	Ex. 18
• Costs Related To Pro Hac Vice Admissions	$4,900.00	Ex. 19
• Messenger Services	$1,130.95	Ex. 20
TOTAL	**$34,278.22**	

TOTAL COMBINED COSTS: $1,046,849.92

Dated: September 22, 2021

SNELL & WILMER L.L.P.

By: /s/ *Richard Gordon*
Richard C. Gordon (Bar No. 9036)
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169

DECHERT L.L.P.

Joshua D. N. Hess, Esq. (*Pro Hac Vice*)
One Bush Street, Suite 1600
San Francisco, CA 94104

David A. Kotler, Esq. (*Admitted Pro Hac Vice*)
Brian C. Raphel, Esq. (*Admitted Pro Hac Vice*)
1095 Avenue of the Americas
New York, NY 10036

Ryan M. Moore (*Admitted Pro Hac Vice*)
2929 Arch Street
Philadelphia, PA 19104
Attorneys for Defendant VTB Holdings, Inc. and Specially Appearing Defendants Stripes Group, LLC, SG VTB Holdings, LLC, Juergen Stark, and Kenneth Fox

Snell & Wilmer L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

DECLARATION IN SUPPORT OF VERIFIED MEMORANDUM OF COSTS

I, Brian Raphel, affirm the following:

1. I am an associate at Dechert LLP, which is counsel of record for Defendant VTB Holdings, Inc. and Specially Appearing Defendants Stripes Group, LLC, SG VTB Holdings, LLC, Juergen Stark, and Kenneth Fox in the above-entitled matter.

2. I am familiar with the costs by Dechert LLP in defending the above-listed defendants in this matter.

3. I have read the foregoing Verified Memorandum of Costs and Exhibits 1-10. These materials are true and correct to the best of my knowledge and belief.

4. The costs set forth in the foregoing Verified Memorandum of Costs and Exhibits 1-10 have been necessarily and reasonably incurred and paid in this action.

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

Dated: September 22, 2021 */s/ Brian Raphel*

Snell & Wilmer
LLP.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

DECLARATION IN SUPPORT OF VERIFIED MEMORANDUM OF COSTS

I, Richard C. Gordon, affirm the following:

1. I am a partner at Snell & Wilmer LLP, which is counsel of record for Defendant VTB Holdings, Inc. and Specially Appearing Defendants Stripes Group, LLC, SG VTB Holdings, LLC, Juergen Stark, and Kenneth Fox in the above-entitled matter.

2. I am familiar with the costs by Snell & Wilmer LLP in defending the above-listed defendants in this matter.

3. I have read the foregoing Verified Memorandum of Costs and Exhibits 11-20. These materials are true and correct to the best of my knowledge and belief.

4. The costs set forth in the foregoing Verified Memorandum of Costs and Exhibits 11-20 have been necessarily and reasonably incurred and paid in this action.

5. I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 22, 2021 */s/ Richard C. Gordon*

Snell & Wilmer
LLP.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

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 **NON-DIRECTOR DEFENDANTS' MEMORANDUM OF COSTS** via e-service through Odyssey to the email addresses listed below:

SHEPPARD MULLIN RICHTER & HAMPTON LLP
John P. Stigi III, Esq. (*Admitted Pro Hac Vice*)
1901 Avenue of the Stars, Suite 1600
Los Angeles, CA 90067
JStigi@sheppardmullin.com
Attorneys for Kenneth Potashner, Elwood Norris,
Seth Putterman, Robert Kaplan, Andrew Wolfe and James Honore

HOLLAND & HART LLP
J. Stephen Peek, Esq.
Robert J. Cassity, Esq.
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
speek@hollandhart.com
bcassity@hollandhart.com
Attorneys for Kenneth Potashner, Elwood Norris
Seth Putterman, Robert Kaplan, Andrew Wolfe and James Honore

ALBRIGHT STODDARD WARNICK & ALBRIGHT
G. Mark Albright, Esq.
801 South Rancho Drive, Suite D-4
Las Vegas, NV 89106
Email: gma@albrightstoddard.com
Attorneys for Kearney IRRV Trust

SAXENA WHITE P.A.
Jonathan M. Stein, Esq.
Adam Warden, Esq.
Boca Center
5200 Town Center Circle, Suite 601
Boca Raton, FL 33486
jstein@saxenawhite.com
awarden@saxenawhite.com
Attorneys for Grant Oakes and Derivative Plaintiff Lance Mykita

///

///

///

///

///

//

Snell & Wilmer L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

THE O'MARA LAW FIRM, P.C.
David C. O'Mara, Esq.
311 East Liberty St.
Reno, Nevada 89501
david@omaralaw.net
Attorneys for Grant Oakes and Derivative Plaintiff Lance Mykita

ROBBINS GELLER RUDMAN & DOWD LLP
David A. Knotts, Esq.
Randall Baron, Esq.
Maxwell Ralph Huffman, Esq.
655 West Broadway, Suite 1900
San Diego, CA 92101-8498
DKnotts@rgrdlaw.com
RandyB@rgrdlaw.com
mhuffman@rgrdlaw.com
Attorneys for Grant Oakes and Derivative Plaintiff Lance Mykita

DECHERT L.L.P.
David A. Kotler, Esq. (*Admitted Pro Hac Vice*)
Brian Raphel, Esq. (*Admitted Pro Hac Vice*)
1095 Avenue of the Americas
New York, NY 10036
Tel. (212) 698-3822
Fax (212) 698-3599
Neil.steiner@dechert.com
Brian.Raphel@dechert.com

Joshua D. N. Hess, Esq. (*Admitted Pro Hac Vice*)
1900 K Street, N.W.
Washington, D.C. 20006
Tel. (202) 261-3438
Fax (202) 261-3333
Joshua.Hess@dechert.com

Ryan M. Moore (*Admitted Pro Hac Vice*)
2929 Arch Street
Philadelphia, PA 19104
Ryan.Moore@dechert.com

Nicole C. Delgado (*Admitted Pro Hac Vice*)
633 West 5th Street, Suite 4900
Los Angeles, CA 90071
Nicole.Delgado@dechert.com
Attorneys for Defendants VTB Holdings, Inc. and Specially Appearing Defendants Stripes Group, LLC and SG VTB Holdings, LLC

Adam M. Apton, Esq.
LEVI & KORSINSKY LLP
1101 30th Street, Suite 115
Washington, D.C. 20007
Attorneys for PAMTP LLC

///

Snell & Wilmer L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

McDONALD CARANO LLP
George F. Ogilvie III, Esq. (NSBN 3552)
Amanda C. Yen, Esq. (NSBN 9726)
Rory T. Kay, Esq. (NSBN 12416)
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
gogilvie@mcdonaldcarano.com
ayen@mcdonaldcarano.com
rkay@mcdonaldcarano.com
Attorneys for PAMTP LLC

Dated: September 22, 2021

/s/ *Lyndsey Luxford*
An employee of Snell & Wilmer L.L.P.

4829-7124-1724

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200