

IN THE SUPREME COURT OF THE STATE OF NEVADA

Nos. 83598, 84971, and 85358

IN RE PARAMETRIC SOUND CORPORATION
SHAREHOLDERS' LITIGATION.

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Elizabeth A. Brown
Clerk of Supreme Court

PAMTP, LLC,

Appellant,

v.

KENNETH F. POTASHNER; VTB HOLDINGS, INC.;
STRIPE 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

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	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.

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CERTIFICATE OF SERVICE

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

/s/ CaraMia Gerard
An Employee of McDonald Carano LLP



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.

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

2 * * * * *

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

5 Okay. Are you going to argue on different issues?

6 MR. KOTLER: Yes, Your Honor.

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

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

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

13 THE COURT: Oh, really?

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

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

16 MR. CASSITY: It is.

17 MR. OGILVIE: Shocking.

18 THE COURT: Yeah.

19 MR. OGILVIE: Never happens.

20 THE COURT: I went around the wreck.

21 (Pause in the proceedings.)

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

25 THE COURT: Have you served them?

JD Reporting, Inc.

1 MR. HESS: What's that?

2 THE COURT: Have you served them?

3 MR. HESS: I will serve them right now, Your Honor.

4 THE COURT: You must serve them before you hand them
5 to me.

6 MR. HESS: I will do that.

7 THE COURT: Justice Gibbons changed that rule about
8 years ago now.

9 MR. HESS: All right.

10 THE COURT: Okay. I'll read them while we're waiting
11 for Mr. Peek.

12 MR. HESS: Well, that's what I figured. Since we
13 have --

14 THE COURT: A few minutes?

15 MR. HESS: (Indiscernible). Thank you, Your Honor.

16 (Pause in the proceedings.)

17 THE COURT: Good morning, Mr. Peek. How was traffic?
18 The wreck looked really bad when I got by it, but you know.

19 MR. PEEK: Yeah. And, you know, everybody panics
20 going into that little bottleneck as well on -- coming into
21 Casino Center and Las Vegas Boulevard.

22 THE COURT: Casino Center was open.

23 MR. PEEK: I know.

24 THE COURT: I know. I hadn't known.

25 MR. PEEK: But I -- just like -- I'm still going down

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

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

4 MR. PEEK: Yeah.

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

8 MR. PEEK: 52(c)?

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

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

13 THE COURT: I know.

14 MR. PEEK: Rule 50.

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

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

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

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

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

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

7 THE COURT: Are you starting?

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

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

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

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

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

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

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

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

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

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

1 THE COURT: NRCP. NRCP.

2 MR. PEEK: NRCP.

3 THE COURT: We're in state court.

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

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

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

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

12 MR. PEEK: Yeah.

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

15 MR. PEEK: No.

16 THE COURT: He does not take it well.

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

22 We know that NRCP 52(c) says, "If a party -- if a
23 party has been fully heard," as have plaintiffs, "on an issue
24 during a non-jury trial, and the court finds against the party
25 on that issue the Court may enter judgment against the party,

1 on a claim or defense that under controlling law can be
2 maintained or repeated only with a favorable ruling on that
3 issue."

4 And as we know, Your Honor, 52(c) and case law
5 informs us that the trial Judge is not to draw any special
6 inferences in the non-movant's favor, unlike a 12(b) (5) or
7 12(c) motion.

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

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

13 The *Chur* decision, Your Honor, informs us that, "NRS
14 78.138 provides for the sole circumstance under which a
15 director or officer may be held individually liable for damages
16 stemming from the directors or officer's conduct in a official
17 capacity." That's the quote.

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

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

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

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

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

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

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

24 Their un rebutted testimony that they were acting in
25 the interests of the corporation, compels a resounding no,

1 again, that the presumption has not been overcome.

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

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

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

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

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

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

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

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

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

25 Judge Hardesty certainly clarified his earlier

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

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

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

6 THE COURT: That would be Justice Hardesty.

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

11 THE COURT: When he used to represent the newspaper.

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

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

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

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

24 THE COURT: Old Nevada families.

25 MR. PEEK: Touche.

1 THE COURT: Old Nevada families.

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

3 THE COURT: I am going to miss you guys.

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

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

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

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

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

13 THE COURT: Yeah.

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

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

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

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

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

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

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

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

18 There is no control by Potashner. First, the
19 evidence has established that Potashner was not a controlling
20 shareholder. Potashner did not own a single share of
21 Parametric stock at the time of the shareholder vote on August
22 2nd, 2013.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 with no commercial product to sell.

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

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

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

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

1 in the business of sound.

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

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

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

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

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

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

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

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

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

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

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

1 transaction."

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

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

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

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

18 THE COURT: But --

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

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

22 MR. PEEK: He did read --

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

24 MR. PEEK: That's correct.

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

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

3 THE COURT: Ken Wolfe, right?

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

5 MR. STIGI: Wolfe.

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

7 THE COURT: Fox. Ken Fox. Sorry.

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

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

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

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

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

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

25 They both say that there's a conclusive presumption.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 rights of others."

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

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

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

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

1 78.200 and 78.211.

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

10 For these reasons, defendants respectfully request
11 that this Court enter judgment on partial findings pursuant to
12 52(c) in favor of defendants and, well, in this case, Defendant
13 Potashner, and also our co-defendants, and against plaintiff on
14 plaintiff's equity expropriation breach of fiduciary duty
15 claim.

16 THE COURT: Thank you.

17 MR. PEEK: Thank you, Your Honor.

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

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

24 THE COURT: Thank you.

25 MR. STIGI: Thank you.

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

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

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

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

8 MR. KOTLER: Good morning, Your Honor.

9 THE COURT: Good morning.

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

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

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

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

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

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

19 So I will go, now, directly to the argument portion.
20 And as I mentioned at the outset, on August 4th, 2021, this
21 Court ruled that Plaintiff is precluded from introducing
22 evidence or testimony at trial for which the sole purpose would
23 be to support potential measures of damages other than those
24 allowed under *Gentile*.

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

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

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

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

14 And we know, Your Honor, as Plaintiff has
15 represented, both prior to and during the trial, that it's
16 \$12.49 per share calculation would be its sole damages
17 calculation. Mr. Atkins confirmed that on the stand in
18 response to my initial questions.

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

25 The trial record demonstrates that what Mr. Atkins

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

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

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

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

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

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

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

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

3 THE COURT RECORDER: They are not.

4 THE COURT: Okay. Why not?

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

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

8 THE COURT RECORDER: Yes.

9 THE COURT: All right. Thanks. Keep going.

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

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

18 Answer, "The money went into the ether."

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

25 So he testified, without a doubt, without any

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

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

8 Answer, No.

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

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

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

22 Thank you, Your Honor.

23 THE COURT: Thank you.

24 Mr. Hess?

25 Thank you for wiping down.

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

2 THE COURT: Mr. Hess.

3 MR. HESS: So I'll start with the first one on behalf
4 of all the directors for -- pursuant to the Rules of Procedure
5 52(c) that judgment be entered in the defendant's favor of
6 finding the plaintiff does not have standing to assert the
7 claims in the complaint.

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

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

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

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

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

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

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

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

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

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

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

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

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

15 MR. HESS: Except for Mr. Kahn.

16 THE COURT: Yeah.

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

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

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

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

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

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

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

5 MR. HESS: Yeah.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 MR. HESS: Correct.

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

21 This is an opt-out group --

22 MR. HESS: Yeah.

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

1 then opted out of the class settlement?

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

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

5 MR. HESS: Well --

6 THE COURT: They were part of the class.

7 MR. HESS: Yeah. That's --

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

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

15 THE COURT: I got that part.

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

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

22 THE COURT: Right.

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

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

7 THE COURT: Okay. Thank you.

8 MR. HESS: You're welcome.

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

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

12 THE COURT: Oh.

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

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

17 MR. PEEK: -- to what you said.

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

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

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

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

1 THE COURT: What?

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

4 THE COURT: I know that, Mr. Peek.

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

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

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

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

14 Okay. Go.

15 MR. HESS: All right. Your Honor, actually the last
16 motion is, again, pursuant to Nevada Rules of Civil Procedure
17 52(c) on behalf of specially appearing defendants Juergen Stark
18 --

19 THE COURT: Your statute of limitation issues.

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

22 THE COURT: It would be colorful.

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

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

1 accrued on January 15, 2014.

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

4 THE COURT: Kirkland & Ellis.

5 MR. HESS: You got it.

6 THE COURT: Okay.

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

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

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

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

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

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

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

9 And we are now -- Your Honor, they did not file a
10 suit against Mr. Stark and Mr. Fox. They've never been named
11 as parties. And this case has been going on a very long time.
12 They were not named as parties until May of 2020, six years
13 after the claim -- more than six years after the claim accrued.
14 And straightforward math, that's more than three years ago.
15 And those claims are not tolled by any class action because Mr.
16 Stark and Mr. Fox were never a party to this case until May of
17 2020.

18 THE COURT: Thank you.

19 Anybody else?

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

22 You're up.

23 MR. APTON: Good morning, Your Honor.

24 THE COURT: Good morning.

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

1 of fact and conclusions of law from July 15th.

2 THE COURT: Oh, I have them right here.

3 MR. APTON: Okay.

4 THE COURT: I mentioned them yesterday.

5 MR. APTON: I'm sorry?

6 THE COURT: I mentioned them yesterday.

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

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

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

18 So it's really not necessarily striking the answer,
19 but it striking the defenses that he has under 78.138 and
20 78.211.

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

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

25 THE COURT: Related to certain issues.

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

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

11 Potashner had 417,500 options at the time of the
12 merger. He signed a voting agreement with Norris & Barnes,
13 Exhibit 240. He also dominated the board in the merger
14 negotiation, as described in *Basho Technologies*, 2018 WL
15 3326693; in *Voigt*, 2020 WL 614999; and *FrontFour Capital*, 2019
16 WL 1313408.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 He also skewed the votes, in that they didn't need
20 50 percent of all the stockholders, just 50 percent of those
21 voted -- Exhibit 162.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 34: Stockpiling announcements.

13 137: Intentionally constraining progress for
14 Go-Shop.

15 32: When discussing the breakup fee, Potashner said
16 it presented a fiduciary issue.

17 5, Exhibit 5: Lying to the board regarding the
18 status of HHI, misrepresenting merger negotiations.

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

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

25 He accused Norris of doing the exact same thing in

JD Reporting, Inc.

1 Exhibit 293.

2 116: Norris telling Ken Potashner that he should,
3 quote, act like he was working for Pam -- for Parametric
4 shareholders and not himself.

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

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

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

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

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

23 78.211 states, as I think Mr. Peek said, The judgment
24 of the board of directors as to the consideration received for
25 the shares issued is conclusive in the absence of actual fraud

1 in the transaction.

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

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

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

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

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

19 THE COURT: No.

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

25 Plaintiff's assignors were members of the certified

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

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

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

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

14 I'm referring to defendants' Opposition to
15 Plaintiffs' motion for class certification, dated October 9,
16 2019, page 15, citing *Parametric Sound*, the Supreme Court
17 decision.

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

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

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

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

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

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

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

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

20 The Kirkland & Ellis complaint did not relate to the
21 approval of the merger. It related to interested or
22 self-dealing transactions after the merger. Specifically, it
23 related to the 10 million subordinated promissory note,
24 7 million subordinated promissory note, and the April equity
25 offering.

1 While the word merger is mentioned, it's only done so
2 in the background. And Mr. Kahn's testimony was clear that he
3 did not know the details relating to Stark and Fox's
4 involvement in the merger until the unsealing of the class
5 action amended complaint in 2018. Well, it was unsealed in
6 2018. But Mr. Kahn testified that he didn't read it until 2019
7 when the class notice came out. I'm referring to the August 16
8 transcript, pages 75 to 77.

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

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

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

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

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

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

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

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

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

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

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

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

20 MR. APTON: Yes. That would be true.

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

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

1 ma'am?

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

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

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

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

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

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

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

1 MR. APTON: Under traditional fraud --

2 THE COURT: Right.

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

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

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

12 MR. PEEK: *Americo*.

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

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

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

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

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

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

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

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

14 I mean, I don't know of -- I don't want to speak in
15 exaggeration or hyperbole, but the facts in this case are very
16 strong. And so when taking the facts, taking the evidence that
17 we have elicited and it's in the record, you see that Potashner
18 did do each of these things that we have alleged, and that he
19 did act in his own self-interest and in bad faith. And that
20 satisfies both the Business Judgment Rule on Prong 1 and Prong
21 2, as well as the actual fraud requirement.

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

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

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

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

10 MR. APTON: Okay.

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

14 How does that establish that he had control?

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

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

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

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

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

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

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

16 THE COURT: He owned zero.

17 MR. APTON: Well, he --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 THE COURT: All right. Anything else?

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

7 THE COURT: Uh-huh.

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

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

12 MR. APTON: Yeah.

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

14 MR. APTON: Something --

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

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

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

20 MALE SPEAKER: [Indiscernible.]

21 THE COURT: Yes. You do get to reply.

22 MALE SPEAKER: [Indiscernible.]

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

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

1 are you guys going to be? How long?

2 Your wrap-up, how long?

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

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

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

9 THE COURT: For you, I have. For them, not so much.
10 (Proceedings recessed at 10:41 a.m., 10:49 a.m.)

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

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

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

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

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

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

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

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

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

25 Next page, Brian.

1 Here we are. We're still in April. We're on our
2 third page. Again, a meeting of the Parametric Board was held
3 with its financial and legal advisor at the meeting. Five days
4 later -- we talked about April 20th. Now we're on April
5 25th. So there is no Potashner controlling the information
6 flow because you have both the financial and legal advisors at
7 these meetings with the Board. The Board discussed the
8 engagement letters. The Board discussed with -- or Houlihan
9 Lokey was present. Their lawyer was present.

10 Next page if you would, please.

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

16 Next page if you would, please.

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

25 And there's this notion that he curried favor with

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

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

14 When you look through this merger --

15 You can take it down now.

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

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

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

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

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

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

20 MR. PEEK: Pardon?

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

23 MR. PEEK: Yes.

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

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

3 THE COURT: I understand, Mr. Peek.

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

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

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

10 THE COURT: Well, okay. Keep going.

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

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

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

1 brief.

2 THE COURT: The brief?

3 MR. PEEK: The brief of the --

4 THE COURT: Or the decision.

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

7 *And so what does Mr. Apton argue to you about*
8 *equitable fraud that we both know was rejected by Chur?*

9 Because he says in his briefing, citing the, I think it's the
10 *Zurn* (phonetic) versus *BLI Corp.* (phonetic) matter, and
11 *Stevenson* (phonetic) versus (video interference) *Development*
12 *Company*, noting that with equitable fraud, a, quote, "defendant
13 does not have to know or believe that his statement was false
14 or to have proceeded in reckless disregard of the truth." That
15 standard, Your Honor, was rejected by *Chur*.

16 You only have to look at the citation to the
17 10th Circuit case where they said, Your Honor, that there has
18 to be a higher standard; there has to be an expansive standard.
19 So it's not just know or believe that his statements were
20 false.

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

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

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

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

15 THE COURT: You mean the Board?

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

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

1 was taking place in December.

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

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

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

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1 could have been actual fraud.

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

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

18 You can't say that Mr. Potashner's (indiscernible) --
19 well, staying on the Board was an equity expropriation taken
20 from the shareholders. You can't say that a contractual
21 obligation for severance payment was expropriating value from
22 the shareholders. That \$350,000 in what is a multi-
23 multibillion-dollar merger with one company's value at, what,
24 2-something, the other one at its 79 or 4-something. I don't
25 remember the exact numbers, but they're there.

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

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

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

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

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

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

23 THE COURT: Thank you.

24 Gentlemen.

25 Can you wipe down, please, Mr. Peek.

1 MR. PEEK: I will, Your Honor.

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

4 THE COURT: Use your outside voice.

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

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

13 Thank you.

14 THE COURT: Thank you.

15 Mr. Kotler, you're up.

16 (Pause in the proceedings.)

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

18 THE COURT: I didn't count.

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

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

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

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

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

17 Instead, what Mr. Apton cited to are two things,
18 general principles regarding damages that they don't have to be
19 proven with actual certainty and reasonable certainty. I don't
20 disagree with those principles, but they don't change the
21 analysis here that the equity expropriation damages have to
22 measure what the controlling shareholder actually took. So
23 whether, you know, if the issue was whether it was 12.49 or
24 12.50 a share, I wouldn't be standing here right now, but
25 that's not the issue that we're here on.

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

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

17 For the reasons previously stated, the plaintiffs
18 have put forth no evidence as to the benefit that any
19 controlling shareholder received and therefore judgment under
20 52(c) is appropriate here, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

7 Finally, I'd like to address, Your Honor, the actual
8 fraud point. Fundamentally, and with respect to the proxy,
9 it's based upon this fairytale that the statement of the
10 projections as of August 2nd, 2013, that were relied upon by
11 Craig-Hallum were the proxy's projections as of December of
12 2013. Read the proxy. It's a forecast of a specific point in
13 time. It was merely stating the fact that at that time, when
14 Craig-Hallum performed its analysis and Parametric was
15 explaining to its shareholders the analysis Craig-Hallum
16 performed, it provided the inputs that Craig-Hallum used. It
17 was a fact, an uncontroverted fact. And there's no evidence
18 that the projections that Turtle Beach provided as of that date
19 were false. In fact, the projections that were provided to
20 Craig-Hallum were the same ones provided to their lenders, used
21 to manage their business and provided to Mr. Potashner.

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

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

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

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

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

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

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

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

8 MR. HESS: Thank you.

9 (Pause in the proceedings.)

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

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

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

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

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

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

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

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

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

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

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

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

8 That's it. That's the case.

9 THE COURT: Okay.

10 MR. APTON: Thank you, Your Honor.

11 THE COURT: Anything else you want to add?

12 MR. APTON: No.

13 THE COURT: Thank you.

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

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

1 they did their own investigation.

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

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

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

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

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

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

1 I've had the benefit to work with.

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

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

8 MR. PEEK: Thank you, Your Honor.

9 THE COURT: Anything else?

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

11 THE COURT: We'll be in recess.

12 MR. PEEK: Thank you for your patience.

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

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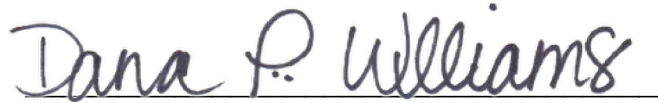
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AA 3689

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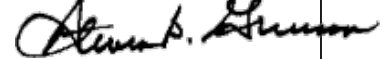
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1 **NOTC**

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21 *Andrew Wolfe*

22 **DISTRICT COURT**

23 **CLARK COUNTY, NEVADA**

24 IN RE PARAMETRIC SOUND
25 CORPORATION SHAREHOLDERS'
26 LITIGATION.

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

29 This Document Related To:

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

32 **NOTICE OF SUBMISSION OF**
33 **PROPOSED ORDER GRANTING**
34 **DEFENDANTS' MOTION FOR**
35 **JUDGMENT PURSUANT TO NRCP 52(c),**
36 **FINDINGS OF FACT AND**
37 **CONCLUSIONS OF LAW, AND**
38 **JUDGMENT THEREON**

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

41 ///

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

7 Dated this 2nd day of September 2021.

8
9
10 By: /s/ J. Stephen Peek

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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:

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EXHIBIT 1

EXHIBIT 1

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DISTRICT COURT
CLARK COUNTY, NEVADA

19 IN RE PARAMETRIC SOUND
20 CORPORATION SHAREHOLDERS'
21 LITIGATION.

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

22 This Document Related To:

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

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

25 This cause came on regularly for trial starting on August 16, 2021, and continuing
26 through August 25, 2021. Plaintiff PAMTP, LLC appeared by and through their counsel of
27 record George F. Ogilvie III of McDonald Carano LLP and Adam M. Apton of Levi &
28 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,

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

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

7 **FINDINGS OF FACT**

8 **I. Class and Derivative Litigation**

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

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

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

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

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

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

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

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

8 **II. Opt-Out Litigation**

9 **A. Plaintiff and Assignors**

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

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

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

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

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

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

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

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

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

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

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

1 **B. Pre-Merger Parametric**

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

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

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

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

17 **(1) Potashner**

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

1 1996. From 1991 to 1994, he was vice president, Worldwide Product Engineering, for
2 Quantum Corporation, a manufacturer of disk drives. From 1981 to 1991, he held various
3 engineering management positions with Digital Equipment Corporation, a manufacturer of
4 computers and peripherals, culminating with the position of Vice President of Worldwide
5 Product Engineering in 1991. Potashner received his bachelor's degree in electrical
6 engineering at Lafayette College in 1979 and a masters' degree in electrical engineering from
7 Southern Methodist University in 1981.

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

9 **(2) Norris**

10 23. Norris was a member of the Board since the incorporation of the company on
11 June 2, 2010 and co-founded the company with James Barnes ("Barnes"), Parametric's chief
12 financial officer. Norris was Parametric's President and Chief Scientist. He was a director of
13 LRAD Corporation from August 1980 to June 2010. He served as Chairman of LRAD
14 Corporation's Board of Directors, an executive position, in which he served in a technical
15 advisory role and acted as a product spokesman from September 2000 to April 2009. From
16 1988 to November 1999, he was a director and Chairman of e.Digital Corporation, a public
17 company engaged in electronic product development, licensing and sales. During that period,
18 he also held various other executive officer positions at e.Digital. From August 1989 to
19 October 1999, he served as director and held various executive officer positions with Patriot
20 Scientific Corporation, a public company engaged in intellectual property licensing. Norris is
21 an inventor and owner of more than 50 U.S. patents, primarily in the fields of electrical and
22 acoustical engineering, and is a frequent speaker on innovation to corporations and government
23 organizations. Norris is the inventor of pre-merger Parametric's HSS technology.

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

25 **(3) Putterman**

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

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

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

11 **(4) Kaplan**

12 27. Kaplan was appointed a director in May 2011. He is a retired business executive
13 with extensive experience in the financial and retail sectors. Kaplan remains active as a
14 director of a family-owned Canadian-based mortgage lending firm and as Managing Director of
15 Beacon Consulting Group, a private firm specializing in assisting and investing in early stage
16 entrepreneurial entities, that he founded in 1997. Prior business activities include 12 years as a
17 senior financial executive in the investment brokerage industry. He was a founding partner of
18 McCan Franchises Ltd., the original Canadian franchisee of McDonalds Corp. From 2003 to
19 2009, he was a director of Jet Gold Corp., a public Canadian resource exploration company. In
20 2010, Kaplan was a Visiting Professor of Business at The University of Warsaw where he
21 assisted in establishing a program in Entrepreneurship. Other prior visiting professorships
22 include the European School of Economics in Italy and The University of Canterbury, N.Z. In
23 2010, Kaplan was recognized with a European Union Distinguished Scholar Award. Dr. Kaplan
24 earned an MBA from Harvard University in 1961 and a Ph.D. in Business Economics from
25 Michigan State University in 1967.

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

27 **(5) Wolfe**

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

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

13 **(6) Honoré**

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

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

27 **D. Non-Director Defendants**

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

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

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

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

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

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

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

1 the Board.

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

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

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

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

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

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

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

1 would always be volatile whenever new consoles were released.

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

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

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

21 **IV. Merger Negotiations and the Parametric Board's Process**

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

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

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

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

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

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

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

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

1 subsidiary of Parametric, in October 2012 to facilitate Food and Drug Administration approval
2 for certain medical applications of HyperSound technology (*e.g.*, hearing devices). In February
3 2013 and March 2013, options were granted to four individuals (Potashner and three
4 consultants) to purchase shares of the common stock of HHI (such options referred to as the
5 “HHI stock options”).

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

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

21 56. Parametric engaged Craig-Hallum Capital Group, LLC (“Craig-Hallum”) to pro-
22 vide an opinion regarding the fairness of the proposed merger. Craig-Hallum’s compensation
23 for preparing a fairness opinion was not contingent upon the closing of any transaction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 gaming headsets, will not be available until early 2014.”

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

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

21 85. The proxy statement further disclosed that Turtle Beach expected to
22 underperform even the lowered guidance provided to Parametric shareholders on August 8,
23 2013 and explained that this underperformance was due to the unexpected unavailability of the
24 Microsoft component. The proxy statement further disclosed that Turtle Beach would be
25 revising its projections downward, but that it would not be able to provide those projections
26 until that process was completed.

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

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

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

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

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

17 **V. Post-Merger**

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

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

27 **VI. No Control or Actual Fraud**

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

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

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

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

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

- 13 a. cancel Potashner’s options in the HHI subsidiary for no consideration;
- 14 b. rebuff Potashner’s efforts to cause Kaplan to retire from his position as a
15 director of the pre-merger Parametric;
- 16 c. refuse Potashner’s request to remove Wolfe from Parametric’s audit
17 committee.
- 18 d. refuse Potashner’s request to be allowed to sell Parametric stock after the
19 announcement of the merger; and
- 20 e. refuse Potashner’s request to allow Parametric consultant John Todd to
21 sell Parametric after the announcement of the merger.

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

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

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

1 member of the Board by reason of:

- 2 a. dominion or control of another;
- 3 b. fear of retribution by another;
- 4 c. contractual obligations owed to another; or
- 5 d. employment by or other business relationship with another.

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

- 7 a. elect new directors to the Board;
- 8 b. cause a break-up of Parametric;
- 9 c. cause Parametric to merge with another company;
- 10 d. amend Parametric's certificate of incorporation;
- 11 e. cause Parametric to sell all or substantially all of the assets of Parametric;
- 12 f. alter materially the nature of Parametric and the public shareholders'
- 13 interest therein; or
- 14 g. offer employment to anyone in the post-merger Parametric.

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

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

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

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

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

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

3 **CONCLUSIONS OF LAW**

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

8 2. In entering a Rule 52(c) judgment, “[t]he trial judge is not to draw any special
9 inferences in the nonmovant’s favor”; “since it is a nonjury trial, the court’s task is to weigh the
10 evidence.” *Id.* (citing 9C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, Federal Practice and
11 Procedure § 2573.1, at 256-60 (3d ed. 2008) (addressing NRCP 52(c)’s federal counterpart,
12 Fed. R. Civ. P. 52(c)); ROBERT E. JONES ET AL., Rutter Group Practice Guide: Federal Civil
13 Trials and Evidence § 17:92 (2011) (“Because the court acts as the factfinder when ruling on a
14 [motion] for judgment on partial findings, it need not consider the evidence in a light favorable
15 to the nonmoving party”)).

16 3. The directors of a Nevada corporation “are presumed to act in good faith, on an
17 informed basis and with a view to the interests of the corporation” (known as the “business
18 judgment rule”). NRS 78.138(3). In exercising his or her business judgment, a director is
19 “entitled to rely on information, opinions [and] reports” from, among others, “[o]ne or more
20 directors, officers or employees of the corporation reasonably believed to be reliable and
21 competent in the matters prepared or presented.” NRS 78.138(2)(a). Likewise, a director may
22 rely upon “information, opinions [and] reports” from “[c]ounsel, public accountants, financial
23 advisers, valuation advisers, investment bankers or other persons as to matters reasonably
24 believed to be within the preparer’s or presenter’s professional or expert competence.” NRS
25 78.138(2)(b). Directors “are not required to consider the effect of a proposed corporate action
26 upon any particular group having an interest in the corporation as a dominant factor.” NRS
27 78.138(5). As a matter of statutory law, directors of a Nevada corporation are not required to
28 elevate the short-term interests of stockholders (such as maximizing immediate, short-term

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

2 4. Under NRS 78.211(1), “the board of directors may authorize shares to be issued
3 for consideration consisting of any tangible or intangible property or benefit to the corporation,
4 including, but not limited to, cash, promissory notes, services performed, contracts for services
5 to be performed or other securities of the corporation. The nature and amount of such
6 consideration may be made dependent upon a formula approved by the board of directors or
7 upon any fact or event which may be ascertained outside the articles of incorporation or the
8 resolution providing for the issuance of the shares adopted by the board of directors if the
9 manner in which a fact or event may operate upon the nature and amount of the consideration is
10 stated in the articles of incorporation or the resolution. The judgment of the board of directors
11 as to the consideration received for the shares issued is conclusive in the absence of actual fraud
12 in the transaction.”

13 5. Directors “confronted with a change or potential change in control of the
14 corporation” have (a) the normal duties of care and loyalty imposed by operation of NRS
15 78.138(1); (b) the benefit of the business judgment rule presumption established by NRS
16 78.138(3); and (c) the “prerogative to undertake and act upon consideration pursuant to
17 subsections 2, 4 and 5 of NRS 78.138.” NRS 78.139(1). The provisions of NRS 78.139(2) do
18 not apply in this case.

19 6. In *Chur v. Eighth Judicial Dist. Court*, 136 Nev. Adv. Op. 7, 458 P.3d 336, 340
20 (2020), the Court noted that “NRS 78.138(7) requires a two-step analysis to impose individual
21 liability on a director or officer.” First, the presumptions of the business judgment rule must be
22 rebutted. *Id.* (citing NRS 78.138(7)(a); *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133
23 Nev. 369, 375, 399 P.3d 334, 342 (2017)). Second, the “director’s or officer’s act or failure to
24 act” must constitute “a breach of his or her fiduciary duties,” and that breach must further
25 involve “intentional misconduct, fraud or a knowing violation of law.” NRS 78.138(7)(b)(1)-
26 (2) (emphasis added). The *Chur* Court confirmed that NRS 78.138 “provides for the sole
27 circumstance under which a director or officer may be held individually liable for damages
28 stemming from the director's or officer's conduct in an official capacity.” *Chur*, 458 P.3d at

1 340.

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

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

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

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

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

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

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

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

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

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

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

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

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

5 THEREFORE, IT IS HEREBY ORDERED that defendants' motion pursuant to NRCP
6 52(c) is GRANTED.

7 **JUDGMENT**

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

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

12 DATED this _____ day of September 2021

13
14 _____
HON. ELIZABETH GONZALEZ
DISTRICT COURT JUDGE

15 Respectfully submitted:

16
17 /s/ J. Stephen Peek

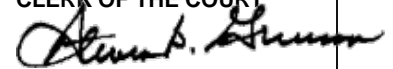
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

IN RE PARAMETRIC SOUND
CORPORATION SHAREHOLDERS'
LITIGATION

Case No.: A-13-686890-B

Dept. No.: XI

**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.

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

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

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

16 DATED this 3rd day of September, 2021.

17 McDONALD CARANO LLP

18
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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

EXHIBIT “A”

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19 **DISTRICT COURT**
20 **CLARK COUNTY, NEVADA**

21 IN RE PARAMETRIC SOUND
22 CORPORATION SHAREHOLDERS'
23 LITIGATION.

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

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

24 This Document Related To:

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

27 This cause came on regularly for trial starting on August 16, 2021, and continuing through
28 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

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

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

8 FINDINGS OF FACT

9 **I. Class and Derivative Litigation**

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

13 2. This action was commenced initially on behalf of a putative class of non-insider
14 holders of Parametric common stock. After the Nevada Supreme Court issued its September 14,
15 2017 decision dismissing the class plaintiffs' action for lack of standing, with leave to amend, the
16 class plaintiffs amended their complaint on December 1, 2017 to assert both a direct "equity
17 expropriation" class claim and derivative dilution claims.

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

20 All persons and/or entities that held shares of Parametric . . . common stock on
21 January 15, 2014, at the time Parametric issued shares in the Merger pursuant to the
22 Agreement and Plan of Merger, whether beneficially or of record, including the
23 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.

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

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

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

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

11 **II. Opt-Out Litigation**

12 **A. Plaintiff and Assignors**

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

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

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

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

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

9 ~~13.—Each of the Assignors held Parametric common stock on the date the merger~~
10 ~~closed. Each of them, however, sold that stock prior to assigning their claims to Plaintiff in April~~
11 ~~2020. Except for IceRose, none of the Assignors owned any Parametric common stock when they~~
12 ~~purported to assign their claims to Plaintiff. IceRose owned 28,700 shares of Parametric common~~
13 ~~stock at the time of the purported assignment, but Plaintiff presented insufficient evidence to allow~~
14 ~~the Court to determine whether IceRose’s stockholding in Parametric at the time of the assignment~~
15 ~~was composed of any of the shares in Parametric it held as of January 15, 2014.~~

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

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

1 ~~16-12.~~ On May 20, 2020, plaintiff filed its Complaint in this action asserting two causes of
2 action against defendants: a direct breach of fiduciary duty claim against the ~~Director~~
3 ~~Defendants~~ Parametric directors based upon an alleged equity expropriation caused by the merger
4 and a direct claim for aiding and abetting against the Non-Director Defendants in connection with
5 the same alleged breach of fiduciary duty.

6 ~~17. When the Assignors sold the Parametric common stock they owned as of January~~
7 ~~15, 2014, the Assignors did not enter into any agreement with purchasers of such shares to retain~~
8 ~~their rights, titles and interests in any claims arising from the Assignors' prior ownership of~~
9 ~~Parametric common stock, including the claims asserted by plaintiff in this action.~~

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

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

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

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

3 17. Trial commenced on August 16, 2021.

4 **B. Pre-Merger Parametric**

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

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

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

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

20 **(1) Potashner**

21 21. Potashner was appointed a director in December 2011 and Executive Chairman
22 (equivalent to chief executive officer) in March 2012. ~~He served as chairman of Newport~~
23 ~~Corporation from 2007 to 2016, after being elected to its board of directors in 1998. From May~~
24 ~~2003 to the present, he has been an independent investor in and advisor to technology companies.~~
25 ~~From 1996 to May 2003, he was chairman of the board of directors of Maxwell Technologies,~~
26 ~~Inc., a manufacturer of ultracapacitors, microelectronics and high voltage capacitors, and where he~~
27 ~~also served as president and chief executive officer from 1996 to October 1998. From November~~
28 ~~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

1 the appointment of Potashner as Executive Chairman in March 2012. Norris remained with
2 Parametric post-Merger as its “Chief Scientist” at least through the end of 2016.

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

4 **(3) Putterman**

5 ~~25. Putterman was appointed a director in May 2011. He has been a full faculty~~
6 ~~member at UCLA since 1970, where he is a Professor of Physics. His research areas include~~
7 ~~nonlinear fluid mechanics and acoustics, sonoluminescence, friction, x ray emission and crystal~~
8 ~~generated nuclear fusion. He has served as a consultant to government and industry including the~~
9 ~~Jet Propulsion Laboratory, TRW and the Aesthetic Surgery Education and Research Foundation.~~
10 ~~Putterman is a Fellow of the Acoustical Society of America and the American Physical Society~~
11 ~~and a past recipient of an Alfred P. Sloan Fellowship. He was honored as the UCLA 2010-2011~~
12 ~~Faculty Research Lecturer and frequently provides plenary presentations at leading universities.~~
13 ~~He has also served as a Director of the Julian Schwinger Foundation for Physics Research since~~
14 ~~2002 and as a Panel Member for the Department of Defense’s Defense Sciences Research Council~~
15 ~~since 2007. He earned a B.S. from the California Institute of Technology in 1966 and his Ph.D.~~
16 ~~from Rockefeller University in 1970.~~

17 25. Defendant Seth Putterman was a member of Parametric’s Board at the time of the
18 Merger. He was appointed a director in May 2011.

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

20 **(4) Kaplan**

21 ~~27. Kaplan was appointed a director in May 2011. He is a retired business executive~~
22 ~~with extensive experience in the financial and retail sectors. Kaplan remains active as a director of~~
23 ~~a family owned Canadian based mortgage lending firm and as Managing Director of Beacon~~
24 ~~Consulting Group, a private firm specializing in assisting and investing in early stage~~
25 ~~entrepreneurial entities, that he founded in 1997. Prior business activities include 12 years as a~~
26 ~~senior financial executive in the investment brokerage industry. He was a founding partner of~~
27 ~~McCan Franchises Ltd., the original Canadian franchisee of McDonalds Corp. From 2003 to~~
28 ~~2009, he was a director of Jet Gold Corp., a public Canadian resource exploration company. In~~

1 ~~2010, Kaplan was a Visiting Professor of Business at The University of Warsaw where he assisted~~
2 ~~in establishing a program in Entrepreneurship. Other prior visiting professorships include the~~
3 ~~European School of Economics in Italy and The University of Canterbury, N.Z. In 2010, Kaplan~~
4 ~~was recognized with a European Union Distinguished Scholar Award. Dr. Kaplan earned an MBA~~
5 ~~from Harvard University in 1961 and a Ph.D. in Business Economics from Michigan State~~
6 ~~University in 1967.~~

7 27. Defendant Robert Kaplan was a member of Parametric's Board at the time of the
8 Merger. He was appointed a director in May 2011.

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

10 **(5) Wolfe**

11 ~~29. Wolfe was appointed a director in February 2012. He founded Wolfe Consulting in~~
12 ~~2002 and serves as a technology and intellectual property consultant in the consumer electronics,~~
13 ~~computer, and semiconductor industries. He works with Global 500 corporations and technology~~
14 ~~startups in developing product strategy, new product technology, and intellectual property~~
15 ~~strategy. He also testifies and serves as a consulting expert for intellectual property (IP) and other~~
16 ~~technology related litigation matters. Dr. Wolfe was Chief Technology Officer for SONICblue,~~
17 ~~Inc. (formerly S3, Inc.) from 1999 to 2002 and also served as Senior Vice President of Business~~
18 ~~Development from 2001-2002. He served as a Consulting Professor at Stanford University from~~
19 ~~1999 to 2002 and an Assistant Professor at Princeton University from 1991 to 1997. Dr. Wolfe~~
20 ~~obtained a B.S.E.E. in Electrical Engineering and Computer Science from The John Hopkins~~
21 ~~University in 1985 and an M.S. in Electrical and Computer Engineering in 1987 and a Ph.D. in~~
22 ~~Computer Engineering in 1992 both from Carnegie Mellon University.~~

23 29. Defendant Andrew Wolfe was a member of Parametric's Board at the time of the
24 Merger. He was appointed a director in February 2012 and remained a director at all relevant
25 times.

26 **(6) Honoré**

27 ~~30. Honoré was appointed a director in March 2012. He joined Columbia Pictures in~~
28 ~~1988 as Vice President of post production after previously serving as director of post production~~

1 ~~for Home Box Office Pictures and DeLaurentiis Entertainment Group. In 1993, he was promoted~~
2 ~~to executive vice president post production for Sony Pictures Entertainment including its~~
3 ~~Columbia Pictures and TriStar Pictures units. He was also responsible for final post production~~
4 ~~quality of all picture and sound for Columbia TriStar Motion Picture Companies, Screen Gems~~
5 ~~and Stage 6 Productions and feature films acquired by Columbia TriStar Motion Picture~~
6 ~~Companies, Columbia TriStar Home Video and Sony Pictures Classics. At Sony Pictures he was~~
7 ~~responsible for completion of pictures budgeted at over \$1.5 billion per year and supervised post~~
8 ~~production for hundreds of major films including Casino Royale and other Bond movies, Spider-~~
9 ~~Man series, DaVinci Code, Bugsy, A Few Good Men, Men in Black series and many more.~~
10 ~~Honoré retired from Sony Pictures in December 2011.~~

11 30. Honoré was appointed a director in March 2012.

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

13 32. The Parametric directors other than Potashner (the “Settling Directors”) settled
14 Plaintiff’s claims by agreement dated August 15, 2021. The Court dismissed the Settling
15 Directors from the case by order dated August 23, 2021.

16 **D. Non-Director Defendants**

17 32.33. VTBH was a privately held Delaware corporation. VTBH and its subsidiaries,
18 including Voyetra Turtle Beach, Inc., are collectively referred to as “Turtle Beach.” Turtle Beach
19 designs, develops and markets premium audio peripherals for video game, personal computer, and
20 mobile platforms, including its acclaimed line of Ear Force gaming headphones and headsets
21 crafted for Xbox, Playstation, Wii and PC-based gaming. ~~Turtle Beach’s advanced products allow~~
22 ~~video game players to experience high quality, immersive sound and communicate with others~~
23 ~~while playing video games. Unlike most traditional stereo headphones, the more advanced~~
24 ~~headsets from Turtle Beach incorporate sophisticated technology for processing audio and multi-~~
25 ~~band wires transmission capabilities. Turtle Beach had strong market share in established gaming~~
26 ~~markets, including a 53% share of the U.S. console gaming headset market as of year-end 2012~~
27 ~~according to The NPD Group. Turtle Beach had a presence in 40 countries and has partnered with~~
28 ~~major retailers, including Wal-Mart, Carrefour, Tesco, Best Buy, GameStop, Target and Amazon.~~

1 ~~33.34.~~ VTBH was majority owned by Stripes Group, LLC (“Stripes”) and SG VTB, LLC
2 (“SG VTB”). VTBH is a wholly owned subsidiary of the post-merger Turtle Beach.

3 ~~34.35.~~ Stripes is a private equity firm focused on internet, software, healthcare, IT and
4 branded consumer products businesses. In 2010, Stripes invested in VTBH and became its
5 majority owner. ~~Through Stripes’s financial support and guidance, VTBH was able to hire new~~
6 ~~people and better develop its business, resulting in substantial year-over-year growth in 2011 and~~
7 ~~2012.~~ Stripes helped Turtle Beach to hire Stark as its new CEO in September 2012.

8 ~~35.36.~~ Fox is Stripes Group’s founder. Fox sat on the VTBH board of directors after the
9 merger, stepping down on November 15, 2018.

10 ~~36.37.~~ SG VTB, LLC is a Delaware LLC and is a wholly owned subsidiary of Stripes
11 Group. Stripes formed SG VTB in 2010 to acquire a majority position in VTBH. SG VTB is an
12 investment vehicle for Stripes.

13 ~~37.38.~~ Stark was chief executive officer of VTBH during negotiations leading to the
14 merger and was named to that position by Stripes in September 2012. Stark has served as Turtle
15 Beach’s CEO since the merger and continues to serve as its CEO today. Stark also sits on Turtle
16 Beach’s current board of directors, and as of January 1, 2020, became Chairman of the Board.

17 **~~III.—Parametric, Turtle Beach, and Stripes in Early 2013~~**

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

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

27 ~~40.—Parametric lacked the financial and personnel resources on its own to develop~~
28 ~~HyperSound to the point that Parametric could design, manufacture and sell to consumers directly.~~

1 Accordingly, in the first quarter of 2013 Parametric shifted the focus of its business model to
2 licensing its technology to other companies with the capital and expertise to develop and
3 commercialize Parametric's technology. That strategy, however, still had daunting execution
4 risks.

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

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

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

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

20 45.—From the beginning, Stripes was skeptical about any deal between Turtle Beach and
21 Parametric. Stripes was concerned that Parametric was too risky an investment. Further, a reverse
22 triangular merger was particularly unattractive to Stripes because it would result in substantially
23 diluting Stripes's interest in Turtle Beach. Stripes also did not like the reverse merger structure
24 because the post-merger entity would be a public company and Stripes did not believe that it was
25 an advantageous time for Turtle Beach to have to deal with the market expectations of being a
26 public company ahead of the expected transition in console generations for both Microsoft's Xbox
27 and Sony's Playstation.
28

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

7 **IV. Merger Negotiations and the Parametric Board's Process**

8 47.39. As part of Parametric's ongoing strategic planning process, the Parametric Board
9 and Parametric's executive officers regularly reviewed and evaluated Parametric's strategic
10 direction and alternatives in light of the performance of Parametric's business and operations and
11 market, economic, competitive and other conditions and developments.

12 48.——In March 2013, Parametric engaged Houlihan Lokey as its financial advisor to
13 evaluate possible strategic alternatives. ~~Houlihan Lokey was recommended by Morgan Stanley.~~
14 ~~Parametric had initially considered engaging Morgan Stanley as its financial advisor. Morgan~~
15 ~~Stanley declined the engagement because the proposed transaction was below the monetary value~~
16 ~~threshold of transactions on which Morgan Stanley typically will advise.~~

17 49.40. Between March 2013 and August 2013, Houlihan Lokey (working on behalf of
18 Parametric) contacted a total of 13 parties other than Turtle Beach to explore possible strategic
19 alternatives. ~~None of those other parties expressed any material interest in a competing or~~
20 ~~alternative transaction such possibilities.~~

21 50.41. During this five-month period, the Board held a total of 13 formal meetings with
22 financial and legal advisers regarding possible strategic transactions. During these meetings, the
23 Directors engaged in robust discussions among themselves and with the Board's advisers
24 regarding the risks and benefits of a strategic transaction with Turtle Beach and available
25 alternative strategies and transactions. ~~Similar discussions occurred in email and phone~~
26 ~~conversations outside of any formally convened Board meeting.~~

27 42. ~~Among the terms being negotiated~~Potashner played a leading role in the
28 ~~negotiation of the merger, liaising directly with Turtle Beach's principals, including Stark. For~~

1 example, early in the negotiation process, other board members yielded significant control over
2 the process to Potashner, with one (Wolfe) telling Potashner to “[j]ust get the deal” and the board
3 would “make the agreements match whatever deal [he] put together without any substantial
4 delays” because “[n]either the [board] nor the lawyers are going to get in the way of an accretive
5 deal.” Similarly, another board member (Kaplan) wrote in an email sent on behalf of other board
6 members days before the board voted on the merger, that he and the other directors felt “legally
7 exposed to a lot of the decisions [Potashner] force[d] upon [them]” during the course of the
8 negotiations. On that basis, he asked that each director be paid \$50,000 to compensate them for
9 these legal risks.

10 43. The Court previously adopted an adverse inference against Potashner that he “acted
11 in bad faith when supporting and approving the merger.” See Findings of Fact, Conclusions of
12 Law, and Order Imposing Spoliation Sanctions dated July 15, 2021, on file with the Court. The
13 evidence at trial supported this conclusion. Among other things, the evidence showed that
14 Potashner used his leading position in the merger negotiation in an effort to entrench himself in
15 one of Parametric’s subsidiaries, HyperSound Health, Inc. (“HHI”), and to enrich himself with
16 options in HHI. To obtain these personal benefits, Potashner attempted to favor Turtle Beach,
17 including by avoiding completing valuable licensing deals and delaying announcements of
18 completed deals, all in order to suppress Parametric’s stock price. In addition, Potashner made
19 favorable concessions to Turtle Beach on key transaction terms.

20 51.44. One of the terms Potashner negotiated on behalf of Parametric was an agreement to
21 grant to Turtle Beach an exclusive license to HyperSound technology in both the console gaming
22 and PC audio fields in the event Parametric were to terminate any merger agreement before
23 closing. Parametric offered this “break-up fee license agreement” in order to make the merger
24 more attractive to Turtle Beach and Stripes, which had not yet agreed to move forward with the
25 deal. The Board informed itself of the fiduciary implications of this potential “break-up fee
26 license agreement” by consulting with counsel. Citing “pushback” from counsel, Potashner told
27 Stark that the break-up fee license agreement was “well in excess [of] traditional break up fees”
28 and presented a “fiduciary issue” for Parametric’s board. The board agreed to proceed with it at

1 Potashner's urging that the break-up fee license agreement was complementary to other licensing
2 activities sought out by Parametric at the time.

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

11 ~~53.—Parametric established HyperSound Health, Inc. ("HHI"), a wholly owned~~
12 ~~subsidiary of Parametric, in October 2012 to facilitate Food and Drug Administration approval for~~
13 ~~certain medical applications of HyperSound technology (e.g., hearing devices). In February 2013~~
14 ~~and March 2013, options were granted to four individuals (Potashner and three consultants) to~~
15 ~~purchase shares of the common stock of HHI (such options referred to as the "HHI stock~~
16 ~~options").~~

17 ~~54.45. Ultimately, Potashner's efforts to enrich himself with HHI options proved~~
18 ~~unsuccessful. Potashner was successful in overcoming the resistance of Parametric's board,~~
19 ~~including by threatening to dissolve the board, but his self-interested scheme failed when~~ Turtle
20 Beach learned about the existence of these stock options through due diligence in late June 2013,
21 after the core terms of the merger had been negotiated. Upon discovery, Turtle Beach demanded
22 that Parametric cancel the HHI stock options it had issued to ~~these four~~ Potashner and three other
23 individuals. Turtle Beach informed each of Parametric's directors that it would not move forward
24 with the merger until these stock options were cancelled. Turtle Beach issued this demand on
25 multiple occasions in June and July 2013.

26 ~~55.46. When Only when~~ it became apparent to the Board that the cancellation of
27 Potashner's HHI stock options was required to facilitate a merger with Turtle Beach, did a
28 majority of the Board ~~demand~~ demand that Potashner agree to cancel his HHI stock options. In

1 July 2013, ~~at the demand of the Board~~, Potashner agreed that his HHI options would, at Turtle
2 Beach's demand, cancel upon the closing of the proposed merger with Turtle Beach. ~~Potashner~~
3 ~~entered into this agreement without being provided any payment or additional compensation from~~
4 ~~Parametric, Turtle Beach, Stripes, or anyone else. As result, Potashner received nothing of value~~
5 ~~from Turtle Beach and actually lost stock options that he believed could have held substantial~~
6 ~~value following the merger.~~

7 ~~56.47.~~ Parametric engaged Craig-Hallum Capital Group, LLC ("Craig-Hallum") to pro-
8 vide an opinion regarding the fairness of the proposed merger. Craig-Hallum's compensation for
9 preparing a fairness opinion was not contingent upon the closing of any transaction.

10 ~~57.48.~~ On August 2, 2013, a joint meeting of the Parametric Board and compensation
11 committee was held, with the financial and legal advisors of the Parametric Board. At the
12 meeting, representatives of Craig-Hallum reviewed and discussed with the Parametric Board
13 Craig-Hallum's financial analysis and views regarding the merger with Turtle Beach and the terms
14 of the merger agreement with Turtle Beach, ~~including the "Per Share Exchange Ratio" as defined~~
15 ~~therein, with reference to a proposed fairness opinion and slide presentation distributed to the~~
16 ~~Parametric Board prior to the meeting; at the request of the Parametric Board, Craig-Hallum~~
17 ~~rendered its oral opinion to the effect that, as of August 2, 2013, subject to certain assumptions,~~
18 ~~qualifications and limitations, the "Per Share Exchange Ratio" contemplated by the merger~~
19 ~~agreement was fair, from a financial point of view, to Parametric.~~

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

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

1 ~~60-49.~~ For purposes of its stand-alone analyses performed on Parametric, Craig-Hallum
2 utilized Parametric's internal financial projections for fiscal years ended September 30, 2013
3 through September 30, 2017, prepared by and furnished to Craig-Hallum by the management of
4 Parametric. Information regarding the net cash, number of fully-diluted shares of common stock
5 outstanding and net operating losses for Parametric was provided by management. For purposes
6 of its stand-alone analyses performed on Turtle Beach, Craig-Hallum utilized Turtle Beach's
7 internal financial projections for fiscal years ended December 31, 2013 through December 31,
8 2016 prepared by and furnished to Craig-Hallum by the management of Turtle Beach.
9 Information regarding the net debt, number of fully-diluted shares of common stock outstanding
10 and net operating losses for Turtle Beach was provided by management.

11 ~~61-50.~~ At the August 2, 2013 meeting of the Board, the Directors engaged in robust
12 discussion with representatives of Craig-Hallum regarding its fairness opinion and the calculations
13 contained therein. The Settling Directors relied ~~in good faith~~ upon ~~the competency~~ of the analyses
14 performed and opinions rendered by Craig-Hallum. ~~None of the Directors was made aware of~~
15 ~~errors, if any, contained in Craig Hallum's analyses.~~

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

23 ~~63-51.~~ Although the Court made a rebuttable an adverse inference that Potashner acted in
24 bad faith in pursuit of his own self-interest when supporting and approving the merger (per the
25 adverse inference made by the Court pursuant to its Order dated July 14, 2021), the Board
26 nevertheless approved the merger agreement with Turtle Beach on August 2, 2013 by a majority
27 of independent and disinterested directors ~~exercising their business judgment in good faith.~~
28

1 ~~Norris, Kaplan, Putterman, Wolfe and Honoré exercised their good faith business judgment~~
2 ~~independent of Potashner.~~

3 ~~64.52.~~ A majority of the Board believed ~~in good faith~~ that, overall, the potential benefits to
4 Parametric shareholders of the merger agreement and the transactions contemplated thereby
5 outweighed the risks and uncertainties attendant to the proposed merger, as well as risks and
6 uncertainties attendant to remaining as a stand-alone entity. In particular, based upon their
7 experience, a majority of the Board ~~recognized~~believed that the expected benefits of the proposed
8 merger with Turtle Beach ~~vastly~~ outweighed the risks attendant to continuing to attempt to execute
9 on its stand-alone entity business plan.

10 ~~65.53.~~ Under the merger, a subsidiary of Parametric would merge with Turtle Beach, with
11 Turtle Beach continuing as the surviving corporation. As a result of the merger, each share of
12 Turtle Beach common stock and Series A Preferred Stock would be cancelled and converted into
13 the right to receive a number of shares of Parametric stock. The end result of the merger would be
14 that the pre-merger security holders of Parametric would own 20.01% of the post-merger Para-
15 metric (on a fully-diluted basis), while the security holders of Turtle Beach would own the remain-
16 ing 79.99% of the post-merger Parametric (on a fully-diluted basis). The approval of Parametric's
17 public shareholders was required to authorize this issuance of the Parametric shares and the
18 resulting dilution of the existing Parametric shareholders.

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

24 ~~67.54.~~ Kaplan, Norris, and Putterman testified that they did not trust or believe Potashner
25 ~~at all times~~ but they agreed with him in supporting the merger based on their independent
26 judgment.

27 ~~68.55.~~ Potashner, Norris and Barnes (along with affiliated entities) entered into voting
28 agreements which require them to vote in favor of the merger and to not sell or otherwise transfer

1 their shares for at least six months following the merger. These agreements were disclosed in the
2 proxy statement and represented approximately 19.2% of the outstanding shares of Parametric
3 common stock as of the record date.

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

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

12 ~~70.56.~~ On August 5, 2013, after the close of trading on NASDAQ, Parametric issued a
13 press release announcing the execution of the merger agreement.

14 ~~71.57.~~ Pursuant to the merger agreement, Parametric conducted a 30-day “go-shop”
15 process to elicit potential “topping bids.” As part of the “go shop” process, Houlihan Lokey
16 contacted 49 different parties. None expressed interest in making a “topping bid.”

17 ~~72.58.~~ In a call with Parametric shareholders on August 8, 2013 announcing the merger,
18 Turtle Beach disclosed that it expected 2013 revenues and EBITDA to fall in a range ~~that was of~~
19 ~~\$190 million to \$215 million and \$32 million to \$40 million, respectively, somewhat~~ below the
20 projections Craig-Hallum had relied upon. Turtle Beach further disclosed to Parametric
21 shareholders that “it’s very important that you understand the gaming industry context for 2013.
22 Both Xbox and PlayStation have announced launches of new consoles during the holiday’s this
23 year. As a result, the entire gaming sector is going through what we believe to be a normal cycle
24 of contraction, prior to these new console release[s].”

25 ~~73.59.~~ Stark further disclosed to Parametric shareholders that “our business results in
26 particular will be very much dependent on one; how consumer purchasing behavior for more
27 expensive accessories like headset plays out, heading into the transition. Two; when the new
28 console launches will happen and three; what quantity of new consoles will be available [and] sold

1 during the weeks between the launch and the year end.” Although console transitions have led to
2 subsequent industry growth in the past, Stark disclosed “we can’t guarantee that will occur.”

3 ~~74.60.~~ Stark further disclosed that future sales related to the new Xbox console were
4 particularly uncertain. In his words, forecasted headset sales for the new consoles “rely among
5 other things on successful widespread launch of the new consoles with sufficient selling weeks to
6 impact this year as well as availability of some specific components from Microsoft required for
7 sale of our licensed Xbox One headsets, this holiday. These specific items by the way are outside
8 of our control.”

9 ~~75.61.~~ Stark concluded with a warning that “these uncertainties are driving the wide range
10 around the expectations for revenues and EBITDA I just talked through, but it’s important to note
11 that our actual results could fall materially outside of these ranges if the aforementioned
12 assumptions turned out to be inaccurate.”

13 ~~76.62.~~ Turtle Beach’s actual revenues in 2013 were 18% lower than had been forecasted
14 in the projections provided to Craig-Hallum. Moreover, its actual 2013 EBITDA was 63% of the
15 Craig-Hallum forecast relied upon by Parametric’s board, and 53% of the low end of the EBITDA
16 range Turtle Beach disclosed to the market after the merger agreement was signed. Additionally,
17 Turtle ~~Beach’s~~Beach carried significant debt, and its financial underperformance caused it to
18 ~~tripviolate~~ certain debt covenants with its lender, which resulted in Turtle Beach renegotiating its
19 credit facility in the second half of 2013.

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

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

25 63. Other than Potashner, Parametric’s Board was not aware of the extent of Turtle
26 Beach’s underperformance in late 2013, or its credit troubles. Potashner, who was aware as a
27 result of his close and continuous contact with Turtle Beach’s management, took care to avoid
28 giving the rest of Parametric’s Board complete information. For example, Potashner emailed the

1 Board on December 20, 2013, to report that Turtle Beach was negotiating potential waivers of its
2 debt covenants with its lender, including a covenant that would be breached if Turtle Beach's 2013
3 EBITDA were less than \$32 million, the low range of its revenue projection.¹ But the Parametric
4 Board was not made aware that Turtle Beach's actual 2013 EBITDA would be \$14.9 million, less
5 than half the minimum number needed to comply with the debt covenant. Likewise, Parametric's
6 Board was not aware that, as of December 2013, Turtle Beach's projected 2014 EBITDA had been
7 reduced from \$56.7 million, the number relied upon by Craig-Hallum, to only \$22 million.

8 64. On November 4, 2013, the Board voted to approve a preliminary proxy statement.
9 On December 3, 2013, the Board voted to approve the final proxy statement.

10 79.65. On December 3, 2013, Parametric filed a 348-page Definitive Proxy Statement
11 with regard to the merger agreement with the SEC and transmitted it to Parametric's shareholders.
12 The proxy statement sought shareholder votes on several proposals, including (a) whether to
13 approve the issuance of new shares of Parametric common stock to Turtle Beach pursuant to the
14 merger agreement (in effect, to approve the merger) and (b) whether to approve the change in
15 control compensation awards to Potashner, Norris and Barnes in connection with the merger.

16 80.66. Parametric disclosed Turtle Beach's actual revenues for 2013 (through September
17 28, 2013) in the proxy statement ~~and also disclosed Turtle Beach's issues with respect to the debt~~
18 ~~covenants.~~ Turtle Beach also disclosed the following with respect to its debt covenants: "The
19 Company was not in compliance with the fixed charge coverage ratio as of June 30, 2013 and
20 December 31, 2012. However, in July 2013 and August 2013, the Company entered into two
21 amendments to the Loan and Security Agreement (collectively the '2013 Amendments') that
22 waived the default of the fixed charge coverage ratio for those periods." The proxy statement did
23 not disclose any other ongoing or anticipated breaches of Turtle Beach's debt covenants.

24 81.67. The proxy statement did not contain updated financial projections for either Turtle
25 Beach or Parametric. The proxy statement, ~~however, cautioned readers stated~~ that the projections
26 that Craig-Hallum relied upon were only current "as of August 2, 2013," the date the fairness
27

28 ¹ [See DX-931.]

1 opinion was issued, “based on market data as it existed on or before August 2, 2013 and is not
2 necessarily indicative of current or future market conditions.” The proxy statement also ~~contained~~
3 ~~a prominent warning in bold text~~ stated that shareholders “should not regard the inclusion of these
4 projections in this proxy statement as an indication that Parametric, Turtle Beach or any of their
5 respective affiliates, advisors or other representatives considered or consider the projections to be
6 necessarily predictive of actual future events.”

7 ~~82-68.~~ The proxy statement also disclosed that one of the ~~risk~~ risks Stark had warned about
8 on the August 8, 2013 investor call had been realized. Specifically, the proxy statement disclosed
9 that “Microsoft has informed its partners in the Xbox One console launch that the Xbox One
10 Headset Adapter, being built by Microsoft and provided to Turtle Beach for inclusion with new
11 gaming headsets, will not be available until early 2014.”

12 ~~83-69.~~ The proxy statement further disclosed that “[t]his delay will result in a downward
13 revision to the 2013 outlook for revenue and EBITDA provided by Turtle Beach’s management on
14 August 8, 2013.” ~~2.~~ The level of such impact depends on several factors, including the projected
15 launch date for the requisite hardware and software from Microsoft which is still being assessed.
16 Turtle Beach plans to update its 2013 outlook for revenue and EBITDA following completion of
17 this assessment.” In making this disclosure, the proxy statement revealed that Turtle Beach
18 expected its financial forecast to fall below the range disclosed on August 8, 2013, which was
19 already lower than the forecast included in Craig-Hallum’s fairness opinion. The proxy statement
20 further represented that Turtle Beach “believe[d]” that the reduced revenue in 2013 “will be
21 realized in 2014.” The proxy statement did not disclose internal Turtle Beach projections for 2014
22 developed during the Summer and Fall of 2013 that were materially lower than the projections
23 disclosed on August 8, 2013.

24 ~~84. — In late 2013, Turtle Beach provided additional financial disclosures showing that~~
25 ~~Turtle Beach’s actual performance in 2013 was materially underperforming Turtle Beach’s~~
26 ~~performance in the same time period in 2012 and its prior guidance for 2013. For example, on~~
27 ~~November 7, 2013, Parametric filed a Form 8-K, which disclosed an investor presentation~~
28 ~~prepared by Parametric and Turtle Beach that included updated net revenue, EBITDA, and net~~

1 income numbers for Turtle Beach for the twelve-month period preceding June 30, 2013. That
2 investor presentation also stated that “Microsoft’s delay of the Xbox One hardware and software
3 until early 2014 is expected to result in a deferral of Turtle Beach’s Xbox One headset-related
4 revenues and profits for Q4.” Parametric shareholders had access to this information when
5 deciding whether to vote in favor of the merger.

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

12 86.—The proxy statement contained a fair summary of Craig Hallum’s fairness opinion.
13 The proxy statement also contained a fair and complete summary of interests and potential
14 conflicts in the merger held by members of the Board and management of Parametric. No
15 material interest or potential conflicts in the merger held by members of the Board and
16 management of Parametric were undisclosed in the proxy statement.

17 70. Parametric held a special meeting of its shareholders on December 27, 2013.
18 Approximately 95% of the For the merger to be approved, Parametric was required to obtain a
19 quorum of 50% of shares voting in that election, and approval of 50% of the voting shares.

20 71. Potashner sought to ensure a quorum by persuading large shareholders to attend the
21 meeting and cast votes to approve the merger. One of those shareholders was Adam Kahn, who
22 spoke with Potashner and Stark on or around December 13, 2013 to confirm that he would vote
23 for the Merger so long as “there’s no impairment to [VTB Holdings’] business post merger, i.e.
24 the 2014 and beyond business expectations haven’t changed” or, alternatively, if “there’s
25 impairment to [VTB Holdings’] business such that those projections [that were used for the
26 fairness opinion] are unlikely to be met, the deal should be recut for a greater share going to
27 current [Parametric] holders as to de facto keep the consideration the same.” Consistent with the
28 public guidance Turtle Beach provided the market in August 2013, Stark assured Kahn that Turtle

1 Beach's expectations for 2014 were not impaired, and that they may even improve as a result of
2 revenue originally anticipated in 2013 being recaptured in 2014.

3 87.72. At the December 27, 2013 meeting, votes representing 4,013,274 shares were cast,
4 of the 6,837,321 public shares of Parametric that were then outstanding. Among the votes cast,
5 approximately 95% voted to approve the transaction. Neither the ~~Director-Defendants~~Parametric
6 directors nor any combination of Parametric insiders owned sufficient shares in the pre-merger
7 Parametric to control the outcome of the vote in favor of the merger.

8 88.73. The merger closed on January 15, 2014. As consideration for the merger,
9 Parametric issued new shares of its common stock to Stripes and Turtle Beach, the net effect being
10 that Stripes controlled approximately 80.9% of the combined company. Parametric shareholders,
11 including each of the ~~Director-Defendants~~Parametric directors, who owned a combined 100% of
12 Parametric before the merger, were reduced to a minority 19.1% interest.

13 89.74. Potashner's employment agreement, which came into effect in April 2012,
14 contained certain change in control provisions. Under that agreement, upon a change in control at
15 Parametric, Potashner would be entitled to a severance payment equivalent to twelve months
16 salary and accelerated vesting of theretofore unvested incentive stock options.

17 **V.——Post-Merger**

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

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

1 ~~VI.— No Control or Actual Fraud~~

2 VI. Potashner's Relationship with the Settling Directors

3 92.75. Prior to January 15, 2014, Parametric was not a "controlled company" pursuant to
4 NASDAQ rules because more than 50% of its voting power was not concentrated in any single
5 shareholder or control group.

6 93.76. As disclosed in the proxy statement, persons or entities who held shares of
7 ~~common~~common stock of Parametric on the "record date" of November 11, 2013, were entitled
8 to vote at the special meeting of shareholders to be held on December 27, 2013. ~~Parametric had~~
9 ~~6,837,321 shares of common stock outstanding on the record date.~~ to approve the issuance of
10 additional shares to Turtle Beach in order to consummate the merger.

11 94.77. On November 11, 2013, Potashner owned no shares of common stock of
12 Parametric. Accordingly, Potashner was not entitled to vote a proxy statement at the special
13 meeting of shareholders held on December 27, 2013.

14 95.78. Norris, Putterman and Kaplan often were hostile to Potashner and, at times, acted
15 contrary to what they perceived as Potashner's personal interests by causing the Board to, among
16 other things:

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

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

20 ~~e.b.~~ _____ refuse Potashner's request to remove Wolfe from Parametric's audit
21 committee;

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

24 ~~e.d.~~ _____ refuse Potashner's request to allow Parametric consultant John Todd to sell
25 Parametric stock after the announcement of the merger.

26 79. On the other hand, board members often acceded to Potashner's requests and
27 demands, often in the face of legal threats and intimidation by Potasher.

1 ~~96.80.~~ A majority of the Board of Parametric ~~was independent of Potashner. That~~
2 ~~majority~~ could and at times did outvote Potashner on any all matters on which that majority
3 disagreed with Potashner.

4 ~~97.81.~~ None of Norris, Putterman, Kaplan and Honoré had any business interactions with
5 Potashner prior to Parametric. None of Norris, Putterman, Kaplan, Wolfe and Honoré had any
6 pre-existing personal or familial relationship with Potashner.

7 ~~98.82.~~ None of the ~~Director Defendants~~Settling Directors was unable to freely exercise his
8 judgment as a member of the Board by reason of:

9 ~~a. — dominion or control of another;~~

10 ~~b. — fear of retribution by another;~~

11 ~~e.a.~~ contractual obligations owed to another; or

12 ~~d.b.~~ employment by or other business relationship with another.

13 ~~99.83.~~ No one single individual or group had the authority unilaterally to:

14 a. elect new directors to the Board;

15 ~~b. — cause a break up of Parametric;~~

16 ~~e. — cause Parametric to merge with another company;~~

17 ~~d.b.~~ amend Parametric's certificate of incorporation;

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

19 ~~f. — alter materially the nature of Parametric and the public shareholders'~~

20 interest therein; ~~or~~

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

22 ~~100.84.~~ Potashner did not receive any compensation as a result of the merger that he
23 was not entitled to receive through his employment contract, which included a severance payment,
24 an annual bonus, and accelerated vesting of certain incentive stock options. ~~Potashner could have~~
25 ~~received the same compensation had Parametric merged with a different partner or no one at all.~~
26 ~~Each of these forms of compensation were disclosed in the proxy statement. However, Potashner~~
27 ~~had not met the benchmarks for the vesting of those stock options, and would not have received~~
28 ~~them absent the merger.~~

1 ~~101-85.~~ Potashner briefly served as a director for the post-merger company because
2 Parametric, not Turtle Beach, nominated him for this position. Potashner received no
3 compensation for his participation on the board.

4 ~~102-86.~~ Potashner did not enter any side deals or other agreements with Turtle
5 Beach or Stripes for additional compensation. Potashner received nothing of value from Turtle
6 Beach or Stripes in exchange for his support for the merger.

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

9 ~~104.—Due to the loss of his stock options in HHI, which the Parametric Board and Turtle~~
10 ~~Beach forced him to cancel in order for the merger to occur, Potashner lost more than any other~~
11 ~~shareholder by voting in favor of the merger.~~

12 CONCLUSIONS OF LAW

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

17 2. In entering a Rule 52(c) judgment, “[t]he trial judge is not to draw any special
18 inferences in the nonmovant’s favor”; “since it is a nonjury trial, the court’s task is to weigh the
19 evidence.” *Id.* (citing 9C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, Federal Practice and
20 Procedure § 2573.1, at 256-60 (3d ed. 2008) (addressing NRCP 52(c)’s federal counterpart, Fed.
21 R. Civ. P. 52(c)); ROBERT E. JONES ET AL., Rutter Group Practice Guide: Federal Civil Trials and
22 Evidence § 17:92 (2011) (“Because the court acts as the factfinder when ruling on a [motion] for
23 judgment on partial findings, it need not consider the evidence in a light favorable to the
24 nonmoving party”).

25 3. The directors of a Nevada corporation “are presumed to act in good faith, on an
26 informed basis and with a view to the interests of the corporation” (known as the “business
27 judgment rule”). NRS 78.138(3). In exercising his or her business judgment, a director is
28

1 “entitled to rely on information, opinions [and] reports” from, among others, “[o]ne or more direc-
2 tors, officers or employees of the corporation reasonably believed to be reliable and competent in
3 the matters prepared or presented.” NRS 78.138(2)(a). Likewise, a director may rely upon “infor-
4 mation, opinions [and] reports” from “[c]ounsel, public accountants, financial advisers, valuation
5 advisers, investment bankers or other persons as to matters reasonably believed to be within the
6 preparer’s or presenter’s professional or expert competence.” NRS 78.138(2)(b). Directors “are
7 not required to consider the effect of a proposed corporate action upon any particular group having
8 an interest in the corporation as a dominant factor.” NRS 78.138(5). As a matter of statutory law,
9 directors of a Nevada corporation are not required to elevate the short-term interests of stockhold-
10 ers (such as maximizing immediate, short-term share value) ahead of any of the other interests set
11 forth in NRS 78.138(4).

12 4. Under NRS 78.211(1), “the board of directors may authorize shares to be issued for
13 consideration consisting of any tangible or intangible property or benefit to the corporation,
14 including, but not limited to, cash, promissory notes, services performed, contracts for services to
15 be performed or other securities of the corporation. The nature and amount of such consideration
16 may be made dependent upon a formula approved by the board of directors or upon any fact or
17 event which may be ascertained outside the articles of incorporation or the resolution providing for
18 the issuance of the shares adopted by the board of directors if the manner in which a fact or event
19 may operate upon the nature and amount of the consideration is stated in the articles of
20 incorporation or the resolution. The judgment of the board of directors as to the consideration
21 received for the shares issued is conclusive in the absence of actual fraud in the transaction.”

22 5. Directors “confronted with a change or potential change in control of the corpora-
23 tion” have (a) the normal duties of care and loyalty imposed by operation of NRS 78.138(1); (b)
24 the benefit of the business judgment rule presumption established by NRS 78.138(3); and (c) the
25 “prerogative to undertake and act upon consideration pursuant to subsections 2, 4 and 5 of NRS
26 78.138.” NRS 78.139(1). The provisions of NRS 78.139(2) do not apply in this case.

27 6. In *Chur v. Eighth Judicial Dist. Court*, 136 Nev. Adv. Op. 7, 458 P.3d 336, 340
28 (2020), the Court noted that “NRS 78.138(7) requires a two-step analysis to impose individual

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

9 7. The *Chur* Court also explained that intentional misconduct and knowing violation
10 of the law under NRS 78.138 is an expansive test: “To give the statute a realistic function, it must
11 protect more than just directors (if any) who did not know what their actions were ~~wrongful~~; it
12 should protect directors who knew what they did but not that it was wrong.” *Id.* at 341. Thus, a
13 plaintiff “must establish that the director or officer had knowledge that the alleged conduct was
14 wrongful in order to show a “knowing violation of law” or “intentional misconduct” pursuant to
15 NRS 78.138(7)(b).” *Id.* (concluding that the knowledge of wrongdoing requirement under NRS
16 78.138 is an “appreciably higher standard than gross negligence,” which is defined as a “reckless
17 disregard of a legal duty”).

18 ~~8. The Director Defendants were~~ Although Potashner, as a director, would have been
19 entitled to the benefit of the business judgment rule presumption in connection with ~~their~~ this
20 consideration and approval of the merger with Turtle Beach.

21 ~~9.8. Plaintiff failed to meet its burden of rebutting~~ the business judgment rule
22 ~~presumption as to a majority of the Board. A majority of the Board (a) reasonably relied upon the~~
23 ~~advice, information and opinions of other directors, employees and competent professionals~~
24 ~~(including counsel) and financial advisors and (b) acted in good~~ Court has already made “an
25 adverse inference of bad ~~faith and independently when considering and approving the merger.~~
26 ~~Plaintiff failed to meet its burden of proving that a majority of the Board engaged in a knowing~~
27 ~~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 and~~demonstrate that the expropriation

1 ~~by Potashner~~prong of ~~value from the company causing Parametric shareholders' equity to be~~
2 ~~diluted~~Plaintiff's claims is satisfied.

3 ~~15.13.~~ Nevertheless, Plaintiff failed to meet its burden of proving that Parametric had a
4 controlling shareholder or controlling director. Despite Potashner's misconduct and self-dealing,
5 the other members of the Board testified that they did not believe him and did not trust him and
6 conducted their own investigation in order to approve the merger on August 2, 2013.

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

10 ~~16.14.~~ Plaintiff further failed to meet its burden to prove that the Parametric Board's
11 decision was impacted by actual fraud, intentional misconduct, or bad faith.

12 ~~17.15.~~ By reason of Plaintiff's failure to meet its burden to prove a primary equity
13 expropriation claim against ~~the Director Defendants~~Potashner, Plaintiff failed to meet its burden to
14 prove a secondary aiding and abetting claim against the Non-Director Defendants.

15 ~~18.16.~~ Because the Court is granting the NRCP 52(c) motion on the aforementioned
16 substantive grounds, it does not reach the merits of the additional arguments made by defendants
17 in regard to Plaintiff's standing, the operation of the statute of limitations or the measure of
18 damages proffered by Plaintiff in this case.

THEREFORE, IT IS HEREBY ORDERED that defendants' motion pursuant to NRC

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~~

1 **FFCL**

3 **DISTRICT COURT**

4 **CLARK COUNTY, NEVADA**

5 IN RE PARAMETRIC SOUND
6 CORPORATION SHAREHOLDERS'
LITIGATION.

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

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

7 This Document Related To:

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

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

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

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

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

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

3 **FINDINGS OF FACT**

4 **I. Class and Derivative Litigation**

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

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

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

14 4. Following the June 18, 2021 evidentiary hearing, the Court imposed sanctions in
15 the form of adverse inferences. The Court held that: “(1) Potashner having willfully destroyed
16 text messages text messages and emails relevant to this litigation, the Court makes an adverse
17 inference that the lost text messages and emails relevant to this litigation would have shown
18 that Potashner acted in bad faith when supporting and approving the merger. Potashner may
19 testify and contest this at trial, but his testimony will go to his credibility only because an
20 adverse inference of bad faith has already been made by the Court; and; (2) Stark and Fox
21 having negligently failed to preserve text messages, the Court makes an adverse inference that
22
23
24

25
26 ³ The claims against Defendants were largely resolved through a Rule 23.1 settlement. On January 17,
27 2020, the Court granted preliminary approval of the settlement. On May 18, 2020, the Court ordered that the class
28 action and derivative settlement was “finally approved in all respects” and entered a final judgment dismissing all
of the Class’ released claims, with prejudice, pursuant to the terms of the Stipulation of Settlement filed on
November 15, 2019. These Plaintiffs opted out of the class settlement.

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

3 **II. Opt-Out Litigation**

4 **A. Plaintiff and Assignors**

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

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

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

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

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

1 between the Member Managers on any particular decision.

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

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

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

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

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

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

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

6 **B. Pre-Merger Parametric**

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

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

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

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

22 **(1) Potashner**

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

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

1 **(2) Norris**

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

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

9 **(3) Putterman**

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

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

16 **(4) Kaplan**

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

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

22 **(5) Wolfe**

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

24 **(6) Honoré**

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

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

27 **D. Non-Director Defendants**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 83. Norris, Putterman and Kaplan often were hostile to Potashner and acted contrary
23 to what they perceived as Potashner's personal interests by causing the Board to, among other
24 things:

- 25 a. cancel Potashner's options in the HHI subsidiary for no consideration;
- 26 b. rebuff Potashner's efforts to cause Kaplan to retire from his position as a
- 27 director of the pre-merger Parametric;
- 28 c. refuse Potashner's request to remove Wolfe from Parametric's audit

1 committee.

2 d. refuse Potashner's request to be allowed to sell Parametric stock after the
3 announcement of the merger; and

4 e. refuse Potashner's request to allow Parametric consultant John Todd to
5 sell Parametric after the announcement of the merger.

6 84. A majority of the Board of Parametric was independent of Potashner. That
7 majority could and did outvote Potashner on any all matters on which that majority disagreed
8 with Potashner.

9 85. Norris, Putterman, Kaplan and Honoré had no business interactions with
10 Potashner prior to Parametric. Norris, Putterman, Kaplan, Wolfe and Honoré had no pre-
11 existing personal or familial relationship with Potashner.

12 86. None of the Settling Directors was unable to freely exercise his judgment as a
13 member of the Board by reason of:

- 14 a. dominion or control of another;
15 b. fear of retribution by another;
16 c. contractual obligations owed to another; or
17 d. employment by or other business relationship with another.

18 87. No one single individual or group had the authority unilaterally to:

- 19 a. elect new directors to the Board;
20 b. cause a break-up of Parametric;
21 c. cause Parametric to merge with another company;
22 d. amend Parametric's certificate of incorporation;
23 e. cause Parametric to sell all or substantially all of the assets of Parametric;
24 f. alter materially the nature of Parametric and the public shareholders'

25 interest therein; or

- 26 g. offer employment to anyone in the post-merger Parametric.

27 88. Potashner did not receive any compensation as a result of the merger that he was
28 not entitled to receive through his employment contract, which included a severance payment,

1 an annual bonus, and accelerated vesting of certain incentive stock options upon a change in
2 control. Potashner could have received the same compensation had Parametric merged with a
3 different partner. Each of these forms of compensation were disclosed in the proxy statement.

4 89. Potashner did not enter any side deals or other agreements with Turtle Beach or
5 Stripes for additional compensation. Other than through his employment agreement, Potashner
6 received nothing of value from Turtle Beach or Stripes in exchange for his support for the
7 merger.

8 90. All directors holding equity in Parametric were diluted by the merger to the
9 same extent as every other public shareholder.

10 **CONCLUSIONS OF LAW**

11 1. NRCP 52(c) allows the district court in a bench trial to enter judgment on partial
12 findings against a party when the party has been fully heard on an issue and judgment cannot be
13 maintained without a favorable finding on that issue.

14 2. The directors of a Nevada corporation “are presumed to act in good faith, on an
15 informed basis and with a view to the interests of the corporation”. NRS 78.138(3). In
16 exercising his or her business judgment, a director is “entitled to rely on information, opinions
17 [and] reports” from, among others, “[o]ne or more directors, officers or employees of the
18 corporation reasonably believed to be reliable and competent in the matters prepared or
19 presented.” NRS 78.138(2)(a). A director may rely upon “information, opinions [and] reports”
20 from “[c]ounsel, public accountants, financial advisers, valuation advisers, investment bankers
21 or other persons as to matters reasonably believed to be within the preparer’s or presenter’s
22 professional or expert competence.” NRS 78.138(2)(b). Directors “are not required to consider
23 the effect of a proposed corporate action upon any particular group having an interest in the
24 corporation as a dominant factor.” NRS 78.138(5). Directors of a Nevada corporation are not
25 required to elevate the short-term interests of stockholders (such as maximizing immediate,
26 short-term share value) ahead of any of the other interests set forth in NRS 78.138(4).

27 3. Under NRS 78.211(1),

28 “the board of directors may authorize shares to be issued for consideration consisting of
any tangible or intangible property or benefit to the corporation, including, but not

1 limited to, cash, promissory notes, services performed, contracts for services to be
2 performed or other securities of the corporation. The nature and amount of such
3 consideration may be made dependent upon a formula approved by the board of
4 directors or upon any fact or event which may be ascertained outside the articles of
5 incorporation or the resolution providing for the issuance of the shares adopted by the
6 board of directors if the manner in which a fact or event may operate upon the nature
7 and amount of the consideration is stated in the articles of incorporation or the
8 resolution. The judgment of the board of directors as to the consideration received for
9 the shares issued is conclusive in the absence of actual fraud in the transaction.”

10 4. Directors “confronted with a change or potential change in control of the
11 corporation” have (a) the normal duties of care and loyalty imposed by operation of NRS
12 78.138(1); (b) the benefit of the business judgment rule presumption established by NRS
13 78.138(3); and (c) the “prerogative to undertake and act upon consideration pursuant to
14 subsections 2, 4 and 5 of NRS 78.138.” NRS 78.139(1). The provisions of NRS 78.139(2) do
15 not apply in this case.

16 5. In *Chur v. Eighth Judicial Dist. Court*, 136 Nev. Adv. Op. 7, 458 P.3d 336, 340
17 (2020), the Court noted that “NRS 78.138(7) requires a two-step analysis to impose individual
18 liability on a director or officer.” First, the presumptions of the business judgment rule must be
19 rebutted. *Id.* Second, the “director’s or officer’s act or failure to act” must constitute “a breach
20 of his or her fiduciary duties,” and that breach must further involve “intentional misconduct,
21 fraud or a knowing violation of law.” NRS 78.138(7)(b)(1)-(2). The *Chur* Court confirmed
22 that NRS 78.138 “provides for the sole circumstance under which a director or officer may be
23 held individually liable for damages stemming from the director’s or officer’s conduct in an
24 official capacity.” *Chur*, 458 P.3d at 340.

25 6. The *Chur* Court also explained that intentional misconduct and knowing
26 violation of the law under NRS 78.138 is an expansive test:

27 “To give the statute a realistic function, it must protect more than just directors (if any)
28 who did not know what their actions were [wrongful]; it should protect directors who
knew what they did but not that it was wrong.”

Id. at 341. A plaintiff “must establish that the director or officer had knowledge that the alleged
conduct was wrongful in order to show a “knowing violation of law” or “intentional
misconduct” pursuant to NRS 78.138(7)(b).” *Id.*

1 7. The Settling Directors were entitled to the benefit of the business judgment rule
2 presumption in connection with their consideration and approval of the merger with Turtle
3 Beach.

4 8. Plaintiff failed to meet its burden of rebutting the business judgment rule
5 presumption as to a majority of the Board. A majority of the Board (a) reasonably relied upon
6 the advice, information and opinions of other directors, employees and competent professionals
7 (including counsel) and financial advisors and (b) acted in good faith and independently when
8 considering and approving the merger. Plaintiff failed to meet its burden of proving that a
9 majority of the Board engaged in a knowing violation of law or intentional misconduct, or
10 engaged in actual fraud.

11 9. Plaintiff failed to meet its burden of proving that Potashner engaged in actual
12 fraud.

13 10. Plaintiff failed to meet its burden of proving that Houlihan Lokey and/or Craig-
14 Hallum did not have knowledge and competence concerning the matters in question or that any
15 purported conflict of interest would cause the Director Defendants' reliance thereon to be
16 unwarranted.

17 11. In 2017, the Nevada Supreme Court ruled in this litigation that the only direct
18 claim that Parametric shareholders might have standing to assert arising out of the merger was
19 an "equity expropriation" claim. *See Parametric Sound Corp. v. Eighth Jud. Dist. Ct.*, 133
20 Nev. 417, 429, 401 P.3d 1100, 1109 (2017). Any other claim contesting the merger would be
21 derivative in nature, and was extinguished by the settlement and judgment entered by this Court
22 on May 18, 2020.

23 12. The Court in *Parametric* held that "equity expropriation claims involve a
24 controlling shareholder's or director's expropriation of value from the company causing other
25 shareholders' equity to be diluted." *Id.*

26 13. The severance payment and accelerated vesting of incentive stock options
27 provided for under Potashner's April 2012 employment agreement, which were triggered upon
28 the closing of the merger between Parametric and Turtle Beach on January 15, 2014, for

1 purposes of the motion, will be presumed to have constituted an expropriation by Potashner of
2 value from the company causing Parametric shareholders' equity to be diluted.

3 14. Plaintiff failed to meet its burden of proving that Parametric had a controlling
4 shareholder or controlling director.

5 15. Plaintiff has failed to meet its burden to prove that Potashner's receipt of
6 incentive stock options is an expropriation of value by a controlling shareholder. As such,
7 Plaintiff failed to prove an essential element of an equity expropriation claim under Nevada
8 law.

9 16. Plaintiff further failed to meet its burden to prove that the Parametric Board's
10 decision was impacted by actual fraud, intentional misconduct, or bad faith.

11 17. By reason of Plaintiff's failure to meet its burden to prove a primary equity
12 expropriation claim against the Director Defendants, Plaintiff failed to meet its burden to prove
13 a secondary aiding and abetting claim against the Non-Director Defendants.

14 18. Because the Court is granting the NRCP 52(c) motion on the aforementioned
15 substantive grounds, it does not reach the merits of the additional arguments made by
16 Defendants in regard to Plaintiff's standing, the operation of the statute of limitations or the
17 measure of damages proffered by Plaintiff.

18 THEREFORE, IT IS HEREBY ORDERED that defendants' motion pursuant to NRCP
19 52(c) is GRANTED.

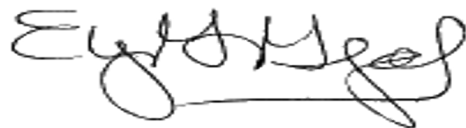
20 **JUDGMENT**

21 The Court having entered the foregoing Findings of Fact and Conclusions of Law, and
22 good cause appearing,

23 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that JUDGMENT is
24 entered in favor of Defendants and against Plaintiff as to all of Plaintiff's remaining claims.

25 DATED this _____ day of September 2021.

Dated this 3rd day of September, 2021

26 

27
28

- 21 - **7F9 8D2 0FBD 00D8**
Elizabeth Gonzalez
District Court Judge

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA
4

5
6 Kearney IRRV Trust, Plaintiff(s) | CASE NO: A-13-686890-B
7 vs. | DEPT. NO. Department 11
8 Kenneth Potashner, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Findings of Fact, Conclusions of Law and Judgment was served via the
13 court's electronic eFile system to all recipients registered for e-Service on the above entitled
case as listed below:

14 Service Date: 9/3/2021

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17 If indicated below, a copy of the above mentioned filings were also served by mail

18 via United States Postal Service, postage prepaid, to the parties listed below at their last

19 known addresses on 9/7/2021

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///

PLEASE TAKE NOTICE that the *Order Granting Defendants' Motion for Judgment Pursuant to NRCP 52(c), Findings of Fact and Conclusions of Law, and Judgment Thereon* was entered with this Court on September 3, 2021, a copy of which is attached hereto.

Dated: September 8, 2021

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By: /s/ Richard C. Gordon

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CERTIFICATE OF SERVICE

As an employee of Snell & Wilmer L.L.P., I certify that I served a copy of the foregoing
**NOTICE OF ENTRY OF ORDER GRANTING DEFENDANTS' MOTION FOR
JUDGMENT PURSUANT TO NRCP 52(C), FINDINGS OF FACT AND CONCLUSIONS
OF LAW, AND JUDGMENT THEREON** on the 8th day of September 2021, via e-service
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4827-3995-4426.1

1 **FFCL**

3 **DISTRICT COURT**

4 **CLARK COUNTY, NEVADA**

5 IN RE PARAMETRIC SOUND
6 CORPORATION SHAREHOLDERS'
LITIGATION.

LEAD CASE NO.: A-13-686890-B
DEPT. NO.: XI

**ORDER GRANTING DEFENDANTS'
MOTION FOR JUDGMENT PURSUANT
TO NRCP 52(c), FINDINGS OF FACT
AND CONCLUSIONS OF LAW, AND
JUDGMENT THEREON**

7 This Document Related To:

8 PAMTP LLC v. KENNETH
9 POTASHNER, *et. al.*

10 This matter came on regularly for a non-jury trial beginning on August 16, 2021, and
11 continuing through August 25, 2021. Plaintiff PAMTP, LLC appeared by and through their
12 counsel of record George F. Ogilvie III of McDonald Carano LLP and Adam M. Apton of Levi
13 & Korsinsky, LLP. Defendant Kenneth F. Potashner appeared by and through his counsel of
14 record J. Stephen Peek and Robert J. Cassity of Holland & Hart LLP and John P. Stigi III and
15 Alejandro E. Moreno of Sheppard, Mullin, Richter & Hampton LLP.¹ Defendant VTB
16 Holdings, Inc. ("VTBH"), and Specially Appearing Defendants Stripes Group, LLC, SG VTB
17 Holdings, LLC, Juergen Stark and Kenneth Fox (collectively, the "Non-Director Defendants")
18 appeared by and through their counsel Richard C. Gordon of Snell & Wilmer, LLP and Joshua
19 D.N. Hess, David A. Kotler, Brian Raphael, and Ryan Moore of Dechert LLP.

20 After the conclusion of Plaintiff's case-in-chief, Defendants made motions pursuant to
21 NRCP Rule 52(c). The Court having considered the evidence presented at trial, along with oral
22 and written arguments of counsel on such motions, and with the intent of rendering a decision
23 on all remaining claims² before the Court at this time, the Court GRANTS Defendants' motion
24

25 ¹ Certain Director Defendants (Kaplan, Norris, Putterman and Wolf) ("Settling Directors") announced a
26 settlement on the first day of the trial. The Settling Directors Motion for Good Faith Settlement was granted.

27 ² The Nevada Supreme Court in *Parametric v. Eighth Judicial District Court*, 133 Nev. 417 (2017)
28 determined that a derivative claim of equity dilution survived and the claims could include equity expropriation. In footnote 15, the Nevada Supreme Court determined that **actual fraud** was necessary to prove this type of claim.

1 pursuant to NRCP 52(c) and enters judgment in favor of Defendants, upon the following
2 findings of fact and conclusions of law.

3 **FINDINGS OF FACT**

4 **I. Class and Derivative Litigation**

5 1. The underlying class action and shareholder derivative action was commenced
6 on August 8, 2013.³ The case arose out of the merger between Parametric Sound Corporation
7 (“Parametric”) and VTBH which closed on January 15, 2014.

8 2. The derivative causes of action for breach of fiduciary duty, aiding and abetting
9 and unjust enrichment claims were extinguished by the settlement and judgment entered by this
10 Court on May 18, 2020.

11 3. On May 18, 2021, the Court granted Plaintiff’s motion against Defendants
12 Kenneth Potashner, Juergen Stark, and VTB Holdings, Inc. setting an evidentiary hearing on
13 June 18, 2021 to determine sanctions, if any.

14 4. Following the June 18, 2021 evidentiary hearing, the Court imposed sanctions in
15 the form of adverse inferences. The Court held that: “(1) Potashner having willfully destroyed
16 text messages text messages and emails relevant to this litigation, the Court makes an adverse
17 inference that the lost text messages and emails relevant to this litigation would have shown
18 that Potashner acted in bad faith when supporting and approving the merger. Potashner may
19 testify and contest this at trial, but his testimony will go to his credibility only because an
20 adverse inference of bad faith has already been made by the Court; and; (2) Stark and Fox
21 having negligently failed to preserve text messages, the Court makes an adverse inference that
22
23
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25
26 ³ The claims against Defendants were largely resolved through a Rule 23.1 settlement. On January 17,
27 2020, the Court granted preliminary approval of the settlement. On May 18, 2020, the Court ordered that the class
28 action and derivative settlement was “finally approved in all respects” and entered a final judgment dismissing all
of the Class’ released claims, with prejudice, pursuant to the terms of the Stipulation of Settlement filed on
November 15, 2019. These Plaintiffs opted out of the class settlement.

1 the lost information would have been adverse to them.” See Findings of Fact, Conclusions of
2 Law, and Order Imposing Spoliation Sanctions dated July 15, 2021.

3 **II. Opt-Out Litigation**

4 **A. Plaintiff and Assignors**

5 5. Plaintiff PAMTP, LLC is a Delaware limited liability company formed for the
6 purpose of asserting the claims presented in this lawsuit. It purports to assert claims assigned to
7 it by individuals and entities who held Parametric common stock on the closing date of the
8 merger, January 15, 2014.

9
10 6. Plaintiff was not a holder of Parametric common stock on January 15, 2014.

11 7. The members of Plaintiff are IceRose Capital Management LLC, Robert
12 Masterson, Richard Santulli, Marcia Patricof (as trustee of Patricof Family LP, Marcia Patricof
13 Revocable Living Trust, and the Jules Patricof Revocable Living Trust), Alan and Anne
14 Goldberg, Barry Weisbord, and Ronald and Muriel Etkin (each, an “Assignor”; collectively, the
15 “Assignors”).

16
17 8. On April 22, 2020, Plaintiff, on behalf of the following individuals and/or
18 entities, opted out of the class action settlement: IceRose Capital Management, LLC; Robert
19 Masterson; Marcia Patricof, on behalf of the Patricof Family LP, Marcia Patricof Revocable
20 Living Trust, and the Jules Patricof Revocable Living Trust; Alan and Anne Goldberg; Barry
21 Weisbord; Ronald and Muriel Etkin; and Richard Santulli (the “Assignors”). In conjunction
22 with opting out of the class action settlement, the Assignors assigned their claims in the
23 litigation to Plaintiff.

24
25 9. PAMTP is managed by its Members. Assignors Adam Kahn (of IceRose Capital
26 Management, LLC) and Robert Masterson were the Member Managers responsible for day-to-
27 day decisions concerning the management of the litigation. Assignor Barry Weisbord is the
28 Chief Executive Manager of Plaintiff who was designated to resolve any disagreements

1 between the Member Managers on any particular decision.

2 10. Each of the Assignors held Parametric common stock on the date the merger
3 closed. Each of them, however, sold that stock prior to assigning their claims to Plaintiff in
4 April 2020. Except for IceRose, none of the Assignors owned any Parametric common stock
5 when they purported to assign their claims to Plaintiff. IceRose owned 28,700 shares of
6 Parametric common stock at the time of the purported assignment, but Plaintiff presented
7 insufficient evidence to allow the Court to determine whether IceRose's stockholding in
8 Parametric at the time of the assignment was composed of any of the shares in Parametric it
9 held as of January 15, 2014.

10 11. The Assignors executed Assignments of Claim in April 2020 "assign[ing],
11 transfer[ring], and set[ing] over unto PAMTP LLC . . . all of the Assignor's right, title and
12 interest in any claim that the Assignor has or could have arising from his/her/its ownership of
13 Parametric . . . stock, including any and all claims arising from or related to the [merger]
14 against Parametric or any other entity or individual that could be liable for the acts and/or
15 omissions alleged in [this litigation]."

16 12. The Assignors notified the Court that they had opted-out of the Class by letter
17 dated April 22, 2020. The Assignors advised the Court that they had "assigned their interests in
18 claims arising from the ownership of Parametric common stock to an entity created for the
19 purposes of opting out of the . . . litigation and pursuing claims independently" and,
20 "[a]ccordingly, that entity, PAMTP LLC, also exclude[d] itself from the Class in the Parametric
21 Settlement."

22 13. On May 20, 2020, Plaintiff filed its Complaint in this action asserting two causes
23 of action against defendants: a direct breach of fiduciary duty claim against the Director
24 Defendants based upon an alleged equity expropriation caused by the merger and a direct claim
25 for aiding and abetting against the Non-Director Defendants in connection with the same
26 alleged breach of fiduciary duty.

27 14. When the Assignors sold the Parametric common stock they owned as of
28 January 15, 2014, the Assignors did not enter into any agreement with purchasers of such

1 shares to retain their rights, titles and interests in any claims arising from the Assignors' prior
2 ownership of Parametric common stock, including the claims asserted by plaintiff in this action.

3 15. On June 23, 2020, the Court consolidated Plaintiff's action with and into the
4 class action under the caption above. *See* Order Granting Defendants' Motion to Consolidate
5 dated June 23, 2020.

6 **B. Pre-Merger Parametric**

7 16. Parametric was founded in 2010. In 2013, it was a publicly traded corporation
8 listed on the NASDAQ stock exchange. Parametric was organized under the laws of the State
9 of Nevada.

10 17. Parametric was a start-up technology company focused on delivering novel
11 audio solutions through its HyperSound™ or "HSS®" technology platform, which pioneered
12 the practical application of parametric acoustic technology for generating audible sound along a
13 directional ultrasonic column. The creation of sound using Parametric's technology created a
14 unique sound image distinct from traditional audio systems. In addition to its commercial
15 digital signage and kiosk product business, Parametric was targeting its technology for new
16 uses in consumer markets, including computers, video gaming, televisions and home audio
17 along with other commercial markets including casino gaming and cinema. Parametric was
18 also focusing development on health applications for persons with hearing loss.

19 **C. Directors and Senior Officer of Pre-Merger Parametric**

20 18. In August 2013, Parametric's Board of Directors ("Board") consisted of six
21 individuals: Potashner, Norris, Kaplan, Putterman, Wolfe and non-party James Honoré.

22 **(1) Potashner**

23 19. Potashner was appointed a director in December 2011 and Executive Chairman
24 (equivalent to chief executive officer) in March 2012. Potashner received his bachelor's degree
25 in electrical engineering at Lafayette College in 1979 and a masters' degree in electrical
26 engineering from Southern Methodist University in 1981.

27 20. Potashner resigned from the Board effective May 12, 2014.
28

1 **(2) Norris**

2 21. Norris was a member of the Board since the incorporation of the company on
3 June 2, 2010 and co-founded the company with James Barnes (“Barnes”), Parametric’s chief
4 financial officer. Norris was Parametric’s President and Chief Scientist. Norris is an inventor
5 and owner of more than 50 U.S. patents, primarily in the fields of electrical and acoustical
6 engineering, and is a frequent speaker on innovation to corporations and government
7 organizations. Norris is the inventor of pre-merger Parametric’s HSS technology.

8 22. Norris resigned from the Board effective January 15, 2014.

9 **(3) Putterman**

10 23. Putterman was appointed a director in May 2011. He has been a full faculty
11 member at UCLA since 1970, where he is a Professor of Physics. His research areas include
12 nonlinear fluid mechanics and acoustics, sonoluminescence, friction, x-ray emission and crystal
13 generated nuclear fusion. He earned a B.S. from the California Institute of Technology in 1966
14 and his Ph.D. from Rockefeller University in 1970.

15 24. Putterman resigned from the Board effective November 21, 2013.

16 **(4) Kaplan**

17 25. Kaplan was appointed a director in May 2011. He is a retired business executive
18 with extensive experience in the financial and retail sectors. Kaplan earned an MBA from
19 Harvard University in 1961 and a Ph.D. in Business Economics from Michigan State University
20 in 1967.

21 26. Kaplan resigned from the Board effective January 15, 2014.

22 **(5) Wolfe**

23 27. Wolfe was appointed a director in February 2012.

24 **(6) Honoré**

25 29. Honoré was appointed a director in March 2012.

26 30. Honoré resigned from the Board effective January 15, 2014.

27 **D. Non-Director Defendants**

28 31. VTBH was a privately held Delaware corporation. VTBH and its subsidiaries,

1 including Voyetra Turtle Beach, Inc., are collectively referred to as “Turtle Beach.” Turtle
2 Beach designs, develops and markets premium audio peripherals for video game, personal
3 computer, and mobile platforms. Turtle Beach had strong market share in established gaming
4 markets, including a 53% share of the U.S. console gaming headset market as of year-end 2012
5 according to The NPD Group. Turtle Beach had a presence in 40 countries and has partnered
6 with major retailers, including Wal-Mart, Carrefour, Tesco, Best Buy, GameStop, Target and
7 Amazon.

9 32. VTBH was majority owned by Stripes Group, LLC (“Stripes”) and SG VTB,
10 LLC (“SG VTB”). VTBH is a wholly owned subsidiary of the post-merger Turtle Beach.

11 33. Stripes is a private equity firm focused on internet, software, healthcare, IT and
12 branded consumer products businesses. In 2010, Stripes invested in VTBH and became its
13 majority owner.

14 34. Fox is Stripes Group’s founder. Fox sat on the VTBH board of directors after the
15 merger, stepping down on November 15, 2018.

16 35. SG VTB, LLC is a Delaware LLC and is a wholly owned subsidiary of Stripes
17 Group. Stripes formed SG VTB in 2010 to acquire a majority position in VTBH. SG VTB is
18 an investment vehicle for Stripes.

19 36. Stark was chief executive officer of VTBH during negotiations leading to the
20 merger and was named to that position by Stripes in September 2012. Stark has served as
21 Turtle Beach’s CEO since the merger and continues to serve as its CEO today. Stark also sits
22 on Turtle Beach’s current board of directors, and as of January 1, 2020, became Chairman of
23 the Board.

24 **III. Merger Negotiations and the Parametric Board’s Process**

25 37. As part of Parametric’s ongoing strategic planning process, the Parametric Board
26 and Parametric’s executive officers regularly reviewed and evaluated Parametric’s strategic
27 direction and alternatives in light of the performance of Parametric’s business and operations
28 and market, economic, competitive and other conditions and developments.

1 38. In March 2013, Parametric engaged Houlihan Lokey as its financial advisor to
2 evaluate possible strategic alternatives.

3 39. Between March 2013 and August 2013, Houlihan Lokey (working on behalf of
4 Parametric) contacted a total of 13 parties other than Turtle Beach to explore possible strategic
5 alternatives. None of those other parties expressed any material interest in a competing or
6 alternative transaction.

7 40. During this five-month period, the Board held several formal meetings with
8 financial and legal advisers regarding possible strategic transactions. During these meetings,
9 the Directors engaged in robust discussions among themselves and with the Board's advisers
10 regarding the risks and benefits of a strategic transaction with Turtle Beach and available
11 alternative strategies and transactions.

12 41. Potashner played a leading role in the negotiation of the merger,

13 42. The Court previously adopted an adverse inference against Potashner that he
14 "acted in bad faith when supporting and approving the merger." *See* Findings of Fact,
15 Conclusions of Law, and Order Imposing Spoliation Sanctions dated July 15, 2021. The
16 evidence at trial supported this conclusion.⁴

17 43. Among the terms being negotiated was an agreement to grant to Turtle Beach an
18 exclusive license to HyperSound technology in both the console gaming and PC audio fields in
19 the event Parametric were to terminate any merger agreement before closing. Parametric
20 offered this "break-up fee license agreement" in order to make the merger more attractive to
21 Turtle Beach and Stripes, which had not yet agreed to move forward with the deal. The Board
22 informed itself of the fiduciary implications of this potential "break-up fee license agreement"
23 by consulting with counsel.

24
25
26
27 ⁴ The Court declines Plaintiff's invitation to find that actual fraud is not fraud but simply an intentional act.
28 While the Court finds that Potashner acted in bad faith, that finding does not equate to a finding of fraud under any
analysis currently adopted in Nevada.

1 44. The break-up fee license agreement was viewed as complementary to other
2 licensing activities sought out by Parametric at the time.

3 45. Parametric established HyperSound Health, Inc. (“HHI”), a wholly owned
4 subsidiary of Parametric, in October 2012 to facilitate Food and Drug Administration approval
5 for certain medical applications of HyperSound technology (*e.g.*, hearing devices). In February
6 2013 and March 2013, options were granted to four individuals (Potashner and three
7 consultants) to purchase shares of the common stock of HHI.

8 46. Turtle Beach learned about the existence of these stock options through due
9 diligence in late June 2013, after the core terms of the merger had been negotiated. Upon
10 discovery, Turtle Beach demanded that Parametric cancel the stock options it had issued to
11 these four individuals. Turtle Beach informed each of Parametric’s directors that it would not
12 move forward with the merger until these stock options were cancelled. Turtle Beach issued
13 this demand on multiple occasions in June and July 2013.

14 47. The evidence showed that Potashner made efforts to entrench himself in HHI,
15 and to enrich himself with his options in HHI. To obtain these personal benefits, Potashner
16 attempted to favor Turtle Beach, including by avoiding completing valuable licensing deals and
17 delaying announcements of completed deals.

18 48. When it became apparent to the Board that cancellation of Potashner’s HHI was
19 required to facilitate a merger with Turtle Beach, a majority of the Board demanded that
20 Potashner agree to cancel his HHI stock options. In July 2013, at the demand of the Board,
21 Potashner agreed that his HHI options would cancel upon the closing of the proposed merger
22 with Turtle Beach.

23 49. Potashner entered into this agreement without being provided any payment or
24 additional compensation from Parametric, Turtle Beach, Stripes, or anyone else. Potashner
25 received nothing of value from Turtle Beach and lost stock options that he believed could have
26 held substantial value following the merger.

27 50. Parametric engaged Craig-Hallum Capital Group, LLC (“Craig-Hallum”) to pro-
28 vide an opinion regarding the fairness of the proposed merger. Craig-Hallum’s compensation

1 for preparing a fairness opinion was not contingent upon the closing of any transaction.

2 51. On August 2, 2013, a joint meeting of the Parametric Board and compensation
3 committee was held, with the financial and legal advisors of the Parametric Board. At the
4 meeting, representatives of Craig-Hallum reviewed and discussed with the Parametric Board
5 Craig-Hallum's financial analysis and views regarding the merger with Turtle Beach and the
6 terms of the merger agreement with Turtle Beach (including the "Per Share Exchange Ratio"),
7 with reference to a proposed fairness opinion at the request of the Parametric Board, Craig-
8 Hallum rendered its oral opinion to the effect that, as of August 2, 2013, subject to certain
9 assumptions, qualifications and limitations, the "Per Share Exchange Ratio" contemplated by
10 the merger agreement was fair, from a financial point of view, to Parametric.

11 52. The Per Share Exchange Ratio was determined through arm's-length
12 negotiations between Parametric and Turtle Beach.

13 53. Craig-Hallum utilized Parametric's internal financial projections for fiscal years
14 ended September 30, 2013 through September 30, 2017, prepared by and furnished to Craig-
15 Hallum by the management of Parametric. Information regarding the net cash, number of fully-
16 diluted shares of common stock outstanding and net operating losses for Parametric was
17 provided by management. Craig-Hallum utilized Turtle Beach's internal financial projections
18 for fiscal years ended December 31, 2013 through December 31, 2016 prepared by and
19 furnished to Craig-Hallum by the management of Turtle Beach. Information regarding the net
20 debt, number of fully-diluted shares of common stock outstanding and net operating losses for
21 Turtle Beach was provided by management.

22 54. At the August 2, 2013 meeting of the Board, the Directors engaged in robust
23 discussion with representatives of Craig-Hallum regarding its fairness opinion and the
24 calculations. The Directors relied in good faith upon the competency of the analyses performed
25 and opinions rendered by Craig-Hallum. None of the Settling Directors was made aware of
26 errors, if any, contained in Craig-Hallum's analyses.

27 55. In evaluating the merger agreement and the transactions contemplated, the Board
28 consulted with Parametric's management and legal and financial advisors, reviewed a

1 significant amount of information and considered numerous factors which the Parametric Board
2 viewed as generally supporting its decision to approve the merger agreement and the
3 transactions contemplated. The Board also considered and discussed numerous risks,
4 uncertainties and other countervailing factors in its deliberations relating to entering into the
5 merger agreement and the merger.

6 56. Although the Court made an adverse inference that Potashner acted in bad faith
7 in pursuit of his own self-interest when supporting and approving the merger, the Court finds
8 that the Board nevertheless approved the merger agreement with Turtle Beach on August 2,
9 2013 by a majority of independent and disinterested directors exercising their business
10 judgment in good faith. Norris, Kaplan, Putterman, Wolfe and Honoré exercised their good
11 faith business judgment independent of Potashner.

12 57. A majority of the Board believed in good faith that the potential benefits to
13 Parametric shareholders of the merger agreement and the transactions contemplated outweighed
14 the risks and uncertainties attendant to the proposed merger, as well as risks and uncertainties
15 attendant to remaining as a stand-alone entity. A majority of the Board recognized that the
16 expected benefits of the proposed merger with Turtle Beach vastly outweighed the risks
17 attendant to continuing to attempt to execute on its stand-alone entity business plan.

18 58. Under the merger, a subsidiary of Parametric merged with Turtle Beach, with
19 Turtle Beach continuing as the surviving corporation. As a result of the merger, each share of
20 Turtle Beach common stock and Series A Preferred Stock would be cancelled and converted
21 into the right to receive a number of shares of Parametric stock. The end result of the merger
22 was that the pre-merger security holders of Parametric would own 20.01% of the post-merger
23 Parametric (on a fully-diluted basis), while the security holders of Turtle Beach would own the
24 remaining 79.99% of the post-merger Parametric (on a fully-diluted basis).

25 59. Each of Parametric's directors determined independently that the merger was in
26 the best interests of Parametric and its shareholders. Kaplan, Norris, Putterman, Wolfe, and
27 Honoré conducted their own analysis of the terms of the merger agreement, with the assistance
28 of their legal counsel and financial advisors. Their decisions to vote in favor of the merger

1 were not guided by, let alone controlled by, Potashner's support for the merger.

2 60. Kaplan, Norris, and Putterman testified that they did not trust or believe
3 Potashner at all times but they agreed with him in supporting the merger based on their
4 independent judgment.

5 61. Potashner, Norris and Barnes (along with affiliated entities) entered into voting
6 agreements which required them to vote in favor of the merger and to not sell or otherwise
7 transfer their shares for at least six months following the merger. These agreements were
8 disclosed in the proxy statement and represented approximately 19.2% of the outstanding
9 shares of Parametric common stock as of the record date.

10 62. Under the voting agreements entered into by Potashner, Barnes and Norris, as
11 well as certain entities over which they exercised voting and/or investment control (such
12 stockholders and entities collectively referred to as the "management stockholders"), the
13 management stockholders were subject to a lock-up restriction whereby they agreed not to sell
14 or otherwise transfer the shares of Parametric common stock beneficially owned by them or
15 subsequently acquired by them until six months following the closing of the merger, subject to
16 certain exceptions.

17 **IV. Post-Announcement of the Merger**

18 63. On August 5, 2013, after the close of trading on NASDAQ, Parametric issued a
19 press release announcing the execution of the merger agreement.

20 64. Pursuant to the merger agreement, Parametric conducted a 30-day "go-shop"
21 process to elicit potential "topping bids." As part of the "go shop" process, Houlihan Lokey
22 contacted 49 different parties. None expressed interest in making a "topping bid."

23 65. In a call with Parametric shareholders on August 8, 2013 announcing the
24 merger, Turtle Beach disclosed that it expected 2013 revenues and EBITDA to fall in a range
25 that was below the projections Craig-Hallum had relied upon. Turtle Beach disclosed to
26 Parametric shareholders that although console transitions have led to subsequent industry
27 growth in the past,

28 "we can't guarantee that will occur."

1 “it’s very important that you understand the gaming industry context for 2013. Both
2 Xbox and PlayStation have announced launches of new consoles during the holiday’s
3 this year. As a result, the entire gaming sector is going through what we believe to be a
normal cycle of contraction, prior to these new console release[s].”

4 “our business results in particular will be very much dependent on one; how consumer
5 purchasing behavior for more expensive accessories like headset plays out, heading into
6 the transition. Two; when the new console launches will happen and three; what
quantity of new consoles will be available [and] sold during the weeks between the
launch and the year end.”

7 “rely among other things on successful widespread launch of the new consoles with
8 sufficient selling weeks to impact this year as well as availability of some specific
components from Microsoft required for sale of our licensed Xbox One headsets, this
9 holiday. These specific items by the way are outside of our control.”

10 “these uncertainties are driving the wide range around the expectations for revenues
11 and EBITDA I just talked through, but it’s important to note that our actual results could
12 fall materially outside of these ranges if the aforementioned assumptions turned out to
be inaccurate.”

13 66. Turtle Beach’s actual revenues in 2013 were 18% lower than had been
14 forecasted in the projections provided to Craig-Hallum. Turtle Beach’s financial
15 underperformance caused it to trip certain debt covenants with its lender, which resulted in
16 Turtle Beach renegotiating its credit facility in the second half of 2013.

17 67. Parametric’s actual revenues for fiscal year 2013 were 44% lower than had been
18 forecasted in the projections provided to Craig-Hallum.

19 68. Parametric and Turtle Beach were aware of each other’s respective
20 underperformance in late 2013. Parametric management determined that it was not in the best
21 interest of the company or the shareholders to attempt to renegotiate the terms of the merger.

22 69. On December 3, 2013, Parametric filed a 348-page Definitive Proxy Statement
23 with regard to the merger agreement with the SEC and transmitted it to Parametric’s
24 shareholders. The proxy statement sought shareholder votes on several proposals, including (a)
25 whether to approve the issuance of new shares of Parametric common stock to Turtle Beach
26 pursuant to the merger agreement (in effect, to approve the merger) and (b) whether to approve
27 the change in control compensation awards to Potashner, Norris and Barnes in connection with
28 the merger.

1 70. Parametric disclosed Turtle Beach’s actual revenues for 2013 (through
2 September 28, 2013) in the proxy statement and also disclosed Turtle Beach’s issues with
3 respect to the debt covenants.

4 71. The proxy statement did not contain updated financial projections for either
5 Turtle Beach or Parametric. The proxy statement cautioned readers that the projections that
6 Craig-Hallum relied upon were only current “as of August 2, 2013,” the date the fairness
7 opinion was issued, “based on market data as it existed on or before August 2, 2013 and is not
8 necessarily indicative of current or future market conditions.” The proxy statement also
9 contained a prominent warning in bold text that shareholders

10 “should not regard the inclusion of these projections in this proxy statement as an
11 indication that Parametric, Turtle Beach or any of their respective affiliates, advisors or
12 other representatives considered or consider the projections to be necessarily predictive
 of actual future events.”

13 72. The proxy statement also disclosed the risk Stark had warned about on the
14 August 8, 2013 investor call had been realized. The proxy statement disclosed that

15 “Microsoft has informed its partners in the Xbox One console launch that the Xbox One
16 Headset Adapter, being built by Microsoft and provided to Turtle Beach for inclusion
 with new gaming headsets, will not be available until early 2014.”

17 “[t]his delay will result in a downward revision to the 2013 outlook for revenue and
18 EBITDA provided by Turtle Beach’s management on August 8, 2013.”

19 73. The proxy statement further disclosed that “[t]his delay will result in a
20 downward revision to the 2013 outlook for revenue and EBITDA provided by Turtle Beach’s
21 management on August 8, 2013.” The level of such impact depends on several factors,
22 including the projected launch date for the requisite hardware and software from Microsoft
23 which is still being assessed. Turtle Beach plans to update its 2013 outlook for revenue and
24 EBITDA following completion of this assessment.” In making this disclosure, the proxy
25 statement revealed that Turtle Beach expected its financial forecast to fall below the range
26 disclosed on August 8, 2013, which was already lower than the forecast included in Craig-
27 Hallum’s fairness opinion.
28

1 74. In late 2013, Turtle Beach provided additional financial disclosures showing that
2 Turtle Beach's actual performance in 2013 was materially underperforming Turtle Beach's
3 performance in the same time period in 2012 and its prior guidance for 2013. On November 7,
4 2013, Parametric filed a Form 8-K, which disclosed an investor presentation prepared by
5 Parametric and Turtle Beach that included updated net revenue, EBIDTA, and net income
6 numbers for Turtle Beach for the twelve-month period preceding June 30, 2013. That investor
7 presentation also stated that

9 "Microsoft's delay of the Xbox One hardware and software until early 2014 is expected
10 to result in a deferral of Turtle Beach's Xbox One headset-related revenues and profits
11 for Q4."

12 Parametric shareholders had access to this information when deciding whether to vote in favor
13 of the merger.

14 75. The proxy statement disclosed that Turtle Beach expected to underperform even
15 the lowered guidance provided to Parametric shareholders on August 8, 2013 and explained
16 that this underperformance was due to the unexpected unavailability of the Microsoft
17 component. The proxy statement further disclosed that Turtle Beach would be revising its
18 projections downward, but that it would not be able to provide those projections until that
19 process was completed.

20 76. The proxy statement contained a fair summary of Craig-Hallum's fairness
21 opinion. The proxy statement also contained a fair and complete summary of interests and
22 potential conflicts in the merger held by members of the Board and management of Parametric.
23 No material interest or potential conflicts in the merger held by members of the Board and
24 management of Parametric were undisclosed in the proxy statement.

25 77. Parametric held a special meeting of its shareholders on December 27, 2013.
26 Approximately 95% of the shares voting in that election to approve the transaction. Neither the
27 Settling Directors nor any combination of Parametric insiders owned sufficient shares in the
28 pre-merger Parametric to control the outcome of the vote in favor of the merger.

1 78. The merger closed on January 15, 2014. As consideration for the merger,
2 Parametric issued new shares of its common stock to Stripes and Turtle Beach, the net effect
3 being that Stripes controlled approximately 80.9% of the combined company. Parametric
4 shareholders, including each of the Settling Directors, who owned a combined 100% of
5 Parametric before the merger, were reduced to a minority 19.1% interest.

6 79. Potashner's employment agreement, which came into effect in April 2012,
7 contained certain change in control provisions. Under that agreement, upon a change in control
8 at Parametric, Potashner would be entitled to a severance payment equivalent to twelve months
9 salary and accelerated vesting of unvested incentive stock options regardless of whether he had
10 met the required milestones.

11 **V. No Control or Actual Fraud**

12 80. Prior to January 15, 2014, Parametric was not a "controlled company" pursuant
13 to NASDAQ rules because more than 50% of its voting power was not concentrated in any
14 single shareholder or control group.

15 81. As disclosed in the proxy statement, persons or entities who held shares of
16 commons stock of Parametric on the "record date" of November 11, 2013, were entitled to vote
17 at the special meeting of shareholders to be held on December 27, 2013. Parametric had
18 6,837,321 shares of common stock outstanding on the record date.

19 82. On November 11, 2013, Potashner owned no shares of common stock of
20 Parametric. Accordingly, Potashner was not entitled to vote at the special meeting of
21 shareholders held on December 27, 2013.

22 83. Norris, Putterman and Kaplan often were hostile to Potashner and acted contrary
23 to what they perceived as Potashner's personal interests by causing the Board to, among other
24 things:

- 25 a. cancel Potashner's options in the HHI subsidiary for no consideration;
- 26 b. rebuff Potashner's efforts to cause Kaplan to retire from his position as a
- 27 director of the pre-merger Parametric;
- 28 c. refuse Potashner's request to remove Wolfe from Parametric's audit

1 committee.

2 d. refuse Potashner's request to be allowed to sell Parametric stock after the
3 announcement of the merger; and

4 e. refuse Potashner's request to allow Parametric consultant John Todd to
5 sell Parametric after the announcement of the merger.

6 84. A majority of the Board of Parametric was independent of Potashner. That
7 majority could and did outvote Potashner on any all matters on which that majority disagreed
8 with Potashner.

9 85. Norris, Putterman, Kaplan and Honoré had no business interactions with
10 Potashner prior to Parametric. Norris, Putterman, Kaplan, Wolfe and Honoré had no pre-
11 existing personal or familial relationship with Potashner.

12 86. None of the Settling Directors was unable to freely exercise his judgment as a
13 member of the Board by reason of:

- 14 a. dominion or control of another;
15 b. fear of retribution by another;
16 c. contractual obligations owed to another; or
17 d. employment by or other business relationship with another.

18 87. No one single individual or group had the authority unilaterally to:

- 19 a. elect new directors to the Board;
20 b. cause a break-up of Parametric;
21 c. cause Parametric to merge with another company;
22 d. amend Parametric's certificate of incorporation;
23 e. cause Parametric to sell all or substantially all of the assets of Parametric;
24 f. alter materially the nature of Parametric and the public shareholders'

25 interest therein; or

- 26 g. offer employment to anyone in the post-merger Parametric.

27 88. Potashner did not receive any compensation as a result of the merger that he was
28 not entitled to receive through his employment contract, which included a severance payment,

1 an annual bonus, and accelerated vesting of certain incentive stock options upon a change in
2 control. Potashner could have received the same compensation had Parametric merged with a
3 different partner. Each of these forms of compensation were disclosed in the proxy statement.

4 89. Potashner did not enter any side deals or other agreements with Turtle Beach or
5 Stripes for additional compensation. Other than through his employment agreement, Potashner
6 received nothing of value from Turtle Beach or Stripes in exchange for his support for the
7 merger.

8 90. All directors holding equity in Parametric were diluted by the merger to the
9 same extent as every other public shareholder.

10 **CONCLUSIONS OF LAW**

11 1. NRCP 52(c) allows the district court in a bench trial to enter judgment on partial
12 findings against a party when the party has been fully heard on an issue and judgment cannot be
13 maintained without a favorable finding on that issue.

14 2. The directors of a Nevada corporation “are presumed to act in good faith, on an
15 informed basis and with a view to the interests of the corporation”. NRS 78.138(3). In
16 exercising his or her business judgment, a director is “entitled to rely on information, opinions
17 [and] reports” from, among others, “[o]ne or more directors, officers or employees of the
18 corporation reasonably believed to be reliable and competent in the matters prepared or
19 presented.” NRS 78.138(2)(a). A director may rely upon “information, opinions [and] reports”
20 from “[c]ounsel, public accountants, financial advisers, valuation advisers, investment bankers
21 or other persons as to matters reasonably believed to be within the preparer’s or presenter’s
22 professional or expert competence.” NRS 78.138(2)(b). Directors “are not required to consider
23 the effect of a proposed corporate action upon any particular group having an interest in the
24 corporation as a dominant factor.” NRS 78.138(5). Directors of a Nevada corporation are not
25 required to elevate the short-term interests of stockholders (such as maximizing immediate,
26 short-term share value) ahead of any of the other interests set forth in NRS 78.138(4).

27 3. Under NRS 78.211(1),

28 “the board of directors may authorize shares to be issued for consideration consisting of
any tangible or intangible property or benefit to the corporation, including, but not

1 limited to, cash, promissory notes, services performed, contracts for services to be
2 performed or other securities of the corporation. The nature and amount of such
3 consideration may be made dependent upon a formula approved by the board of
4 directors or upon any fact or event which may be ascertained outside the articles of
5 incorporation or the resolution providing for the issuance of the shares adopted by the
6 board of directors if the manner in which a fact or event may operate upon the nature
7 and amount of the consideration is stated in the articles of incorporation or the
8 resolution. The judgment of the board of directors as to the consideration received for
9 the shares issued is conclusive in the absence of actual fraud in the transaction.”

10 4. Directors “confronted with a change or potential change in control of the
11 corporation” have (a) the normal duties of care and loyalty imposed by operation of NRS
12 78.138(1); (b) the benefit of the business judgment rule presumption established by NRS
13 78.138(3); and (c) the “prerogative to undertake and act upon consideration pursuant to
14 subsections 2, 4 and 5 of NRS 78.138.” NRS 78.139(1). The provisions of NRS 78.139(2) do
15 not apply in this case.

16 5. In *Chur v. Eighth Judicial Dist. Court*, 136 Nev. Adv. Op. 7, 458 P.3d 336, 340
17 (2020), the Court noted that “NRS 78.138(7) requires a two-step analysis to impose individual
18 liability on a director or officer.” First, the presumptions of the business judgment rule must be
19 rebutted. *Id.* Second, the “director’s or officer’s act or failure to act” must constitute “a breach
20 of his or her fiduciary duties,” and that breach must further involve “intentional misconduct,
21 fraud or a knowing violation of law.” NRS 78.138(7)(b)(1)-(2). The *Chur* Court confirmed
22 that NRS 78.138 “provides for the sole circumstance under which a director or officer may be
23 held individually liable for damages stemming from the director’s or officer’s conduct in an
24 official capacity.” *Chur*, 458 P.3d at 340.

25 6. The *Chur* Court also explained that intentional misconduct and knowing
26 violation of the law under NRS 78.138 is an expansive test:

27 “To give the statute a realistic function, it must protect more than just directors (if any)
28 who did not know what their actions were [wrongful]; it should protect directors who
knew what they did but not that it was wrong.”

Id. at 341. A plaintiff “must establish that the director or officer had knowledge that the alleged
conduct was wrongful in order to show a “knowing violation of law” or “intentional
misconduct” pursuant to NRS 78.138(7)(b).” *Id.*

1 7. The Settling Directors were entitled to the benefit of the business judgment rule
2 presumption in connection with their consideration and approval of the merger with Turtle
3 Beach.

4 8. Plaintiff failed to meet its burden of rebutting the business judgment rule
5 presumption as to a majority of the Board. A majority of the Board (a) reasonably relied upon
6 the advice, information and opinions of other directors, employees and competent professionals
7 (including counsel) and financial advisors and (b) acted in good faith and independently when
8 considering and approving the merger. Plaintiff failed to meet its burden of proving that a
9 majority of the Board engaged in a knowing violation of law or intentional misconduct, or
10 engaged in actual fraud.

11 9. Plaintiff failed to meet its burden of proving that Potashner engaged in actual
12 fraud.

13 10. Plaintiff failed to meet its burden of proving that Houlihan Lokey and/or Craig-
14 Hallum did not have knowledge and competence concerning the matters in question or that any
15 purported conflict of interest would cause the Director Defendants' reliance thereon to be
16 unwarranted.

17 11. In 2017, the Nevada Supreme Court ruled in this litigation that the only direct
18 claim that Parametric shareholders might have standing to assert arising out of the merger was
19 an "equity expropriation" claim. *See Parametric Sound Corp. v. Eighth Jud. Dist. Ct.*, 133
20 Nev. 417, 429, 401 P.3d 1100, 1109 (2017). Any other claim contesting the merger would be
21 derivative in nature, and was extinguished by the settlement and judgment entered by this Court
22 on May 18, 2020.

23 12. The Court in *Parametric* held that "equity expropriation claims involve a
24 controlling shareholder's or director's expropriation of value from the company causing other
25 shareholders' equity to be diluted." *Id.*

26 13. The severance payment and accelerated vesting of incentive stock options
27 provided for under Potashner's April 2012 employment agreement, which were triggered upon
28 the closing of the merger between Parametric and Turtle Beach on January 15, 2014, for

1 purposes of the motion, will be presumed to have constituted an expropriation by Potashner of
2 value from the company causing Parametric shareholders' equity to be diluted.

3 14. Plaintiff failed to meet its burden of proving that Parametric had a controlling
4 shareholder or controlling director.

5 15. Plaintiff has failed to meet its burden to prove that Potashner's receipt of
6 incentive stock options is an expropriation of value by a controlling shareholder. As such,
7 Plaintiff failed to prove an essential element of an equity expropriation claim under Nevada
8 law.

9 16. Plaintiff further failed to meet its burden to prove that the Parametric Board's
10 decision was impacted by actual fraud, intentional misconduct, or bad faith.

11 17. By reason of Plaintiff's failure to meet its burden to prove a primary equity
12 expropriation claim against the Director Defendants, Plaintiff failed to meet its burden to prove
13 a secondary aiding and abetting claim against the Non-Director Defendants.

14 18. Because the Court is granting the NRCP 52(c) motion on the aforementioned
15 substantive grounds, it does not reach the merits of the additional arguments made by
16 Defendants in regard to Plaintiff's standing, the operation of the statute of limitations or the
17 measure of damages proffered by Plaintiff.

18 THEREFORE, IT IS HEREBY ORDERED that defendants' motion pursuant to NRCP
19 52(c) is GRANTED.

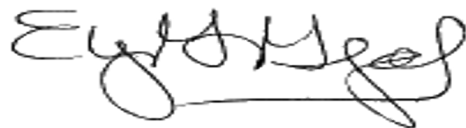
20 **JUDGMENT**

21 The Court having entered the foregoing Findings of Fact and Conclusions of Law, and
22 good cause appearing,

23 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that JUDGMENT is
24 entered in favor of Defendants and against Plaintiff as to all of Plaintiff's remaining claims.

25 DATED this _____ day of September 2021.

Dated this 3rd day of September, 2021

26 

27
28

- 21 - **7F9 8D2 0FBD 00D8**
Elizabeth Gonzalez
District Court Judge

AA 3823

1 This case arose out of a merger between Parametric Sound Corporation (“Parametric”) and
2 VTB Holdings, Inc. (“Turtle Beach”) that occurred on January 15, 2014 (the “Merger”), but the
3 litigation began prior to the Merger, with the first complaint being filed in August 2013. Over the
4 past eight years, a class of individuals and entities who purported to have owned Parametric stock
5 on the date of the Merger litigated breach of fiduciary duty claims against Parametric’s pre-Merger
6 board of directors and aiding-and-abetting claims against Turtle Beach and Stripes Group LLC and
7 SG VTB Holdings, LLC (“Stripes”), which owned a majority interest in Turtle Beach at the time
8 of the Merger (the “Class Action”). The Class Action brought both direct and derivative claims
9 against the Defendants.

10 In November 2019, on the eve of trial, Defendants settled the Class Action claims. A select
11 group of purported class members decided to opt-out of the Class Action settlement and assign their
12 direct claims to a shell company for the purpose of continuing to pursue these claims. (Since the
13 derivative claims brought in the Class Action belonged to Turtle Beach, those claims were
14 extinguished in the Class Action settlement and class members could only opt-out of the settlement
15 of direct shareholder claims). Accordingly, Defendants were forced to continue to litigate these
16 same direct claims for an additional year and a half before this Court ultimately entered judgment
17 in Defendants’ favor at trial under NRCP 52(c) (“Opt-Out Proceedings”). Because the Court
18 entered judgment in Defendants’ favor, they are now entitled to recover their costs under NRCP
19 18.020(3), which states that “costs must be allowed of course to the prevailing party against any
20 adverse party against whom judgment is rendered” in cases, like this one, where the plaintiff sought
21 to recover more than \$2,500. Those costs are set forth below and in the supporting materials
22 attached as exhibits to this memorandum.

23 Turtle Beach and Stripes seek reimbursement of their reasonable costs from both the Opt-
24 Out and the Class Action Proceedings.¹ Plaintiff’s Assignors pursued the exact same direct claims
25 in both the Class Action, as class members, and in the Opt-Out Proceedings, as assignors to the
26 Plaintiff, and Turtle Beach and Stripes have incurred costs in defense of these claims since August

27 ¹ Throughout the entirety of these proceedings, Turtle Beach and Stripes were represented by
28 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.

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).

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

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CERTIFICATE OF SERVICE

On the date below, as an employee of Snell & Wilmer L.L.P., I certify that I served a copy of the foregoing **NON-DIRECTOR DEFENDANTS' MEMORANDUM OF COSTS** via e-service through Odyssey to the email addresses listed below:

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12 Dated: September 22, 2021

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/s/ Lyndsey Luxford
An employee of Snell & Wilmer L.L.P.

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