IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION.	Case No. 83598
PAMTP, LLC, Appellant, vs. KENNETH F. POSTASHNER; VTB HOLDINGS, INC.; STRIPES GROUP, LLC; SG VTB HOLDINGS, LLC; JUERGEN STARK; AND KENNETH FOX, Respondents.	
IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION.	Case No. 84971
KENNETH F. POSTASHNER; VTB HOLDINGS, INC.; STRIPES GROUP, LLC; SG VTB HOLDINGS, LLC; JUERGEN STARK; AND KENNETH FOX, Appellants, vs. PAMTP, LLC, Respondent.	
IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION.	Case No. 85358

PAMTP, LLC,

Appellant,

vs.

KENNETH F. POSTASHNER; VTB HOLDINGS, INC.; STRIPES GROUP, LLC; SG VTB HOLDINGS, LLC; JUERGEN STARK; AND KENNETH FOX,

Respondents.

APPEAL
From the Eighth Judicial District Court
The Honorable Susan Johnson, District Judge

RESPONDENTS' APPENDIX – VOLUME 1 OF 3

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8/26/21	Bench Trial Day 4 (8/19/21) Trial Exhibit 760, Craig-Hallum Fairness Opinion, dated Aug. 2, 2013	3	SA 0515 – SA 0575
8/26/21	Bench Trial Day 5 (8/20/21) Trial Exhibit 665, Parametric Sound Corp. Board of Directors Minutes, dated July 1-2, 2013	3	SA 0576 – SA 0579

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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 23rd day of March, 2023.

SNELL & WILMER L.L.P.

/s/ Richard C. Gordon

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On March 23, 2023, I caused to be served a true and correct copy of the foregoing upon the following by the method indicated:

☐ **BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.

☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

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

/s/ Maricris Williams

An Employee of SNELL & WILMER L.L.P.

IN THE SUPREME COURT OF THE STATE OF NEVADA

PARAMETRIC SOUND CORPORATION, TB HOLDINGS, INC., KENNETH POTASHNER; ELWOOD NORRIS; SETH PUTTERMAN; ROBERT KAPLAN; ANDREW WOLFE; and JAMES HONORE, Petitioners, vs. THE EIGHTH JUDICIAL DISTRICT COURT, in and for the County of Clark, State of Nevada, and THE ELIZABETH GONZALEZ, District Judge, Respondents, and VITIE RAKAUSKAS, individually and on behalf of all others similary situated, and Intervening Plaintiffs RAYMOND BOYTIM and GRANT OAKES, Real parties in interest.	No. 66689 District Court No. A-13-686890-B Dept. No. XI

ANSWER OF REAL PARTIES IN INTEREST TO THE PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Nevada Rule of Appellate Procedure 26.1, the undersigned counsel certifies the following. The Plaintiffs are not corporations.

Lead Counsel for Plaintiffs in the Eighth Judicial District Court and the Nevada Supreme Court consists of Robbins Geller Rudman & Dowd LLP and Saxena White PA. The O'Mara Law Firm PC is Plaintiffs' Liaison Counsel.

DATED: January 16, 2015

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STATUTES, RULES AND REGULATIONS

SECONDARY AUTHORITIES

I. COUNTERSTATEMENT OF ISSUE PRESENTED

> The Supreme Court ruled in *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 62 P.3d 720 (2003) that "if the complaint alleges damages resulting from an improper merger, it should not be dismissed as a derivative claim," in part because the shareholder has lost "his or her interest in a specific corporation." *Id.* at 19. Plaintiffs and the proposed class members were shareholders of the target company in an improper merger transaction that resulted in a different combined company with a different name, different products, different owners, different management, and a different board of directors. Did the district court properly follow *Cohen* in ruling that the Complaint states a direct claim?

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Here is what Defendants claimed this case is about in their Writ Petition: "Parametric Was Not a Party to A 'Merger' . . . Parametric did not merge with any company, nor was it the surviving entity of a merger. Consequently, its shareholders were not asked to approve a merger, but only to approve the issuance of shares to [Turtle Beach's] shareholders. . . . Thus, Plaintiffs necessarily are not, as in *Cohen*, 'dissenting shareholder[s]' to a merger; they are, instead, merely objectors to a dilutive stock issuance." Petition for Writ of Mandamus or, in the Alternative, Writ of Prohibition ("Writ Petition" or "Writ Pet.") at 20, 23.

Here is what the case is really about, in Defendants' own words, from their press release announcing the merger of Parametric Sound Corporation and Turtle Beach (the "Merger"):

> **Parametric Sound Corporation to Merge with Turtle Beach**
>
> ***Combined Company to Bring Advanced Products to Market That Redefine Audio for Consumers and Businesses***
>
> SAN DIEGO, Calif. – August 5, 2013 – Parametric Sound Corporation (NASDAQ: PAMT), a leading innovator of audio products and solutions, and Turtle Beach, the market leader in video game audio, today announced that the companies have reached a Definitive Agreement to merge in a stock for stock transaction. The merger will combine Parametric's audio innovations with Turtle Beach's significant financial, technical, design, sales and marketing resources. . . .
>
> Under the terms of the agreement, former Turtle Beach stockholders are expected to own approximately 80 percent of the combined

> company's shares outstanding at closing, and Parametric stockholders are expected to own approximately 20 percent of the combined company's shares, subject to adjustment as provided in the merger agreement. The new company will continue to operate under the name Parametric Sound Corporation and will be headquartered in San Diego. . . .[1]

And here is what Defendants told Plaintiffs and Parametric's other public shareholders in the Definitive Proxy (the "Proxy") when campaigning for their votes on the Merger:

> The Parametric board of directors, referred to as the "Parametric Board," has determined that the merger agreement and the transactions contemplated thereby, including the issuance of shares pursuant to the merger and the corresponding change of control of Parametric, are fair to, advisable and in the best interests of Parametric and its stockholders. ***The Parametric Board recommends that Parametric stockholders vote "FOR" the merger proposal. . . . Your vote is important. The affirmative vote of the holders of a majority of the votes cast on the merger proposal at the Special Meeting (assuming a quorum is present in person or by proxy), excluding abstentions, is required for approval of the merger proposal.***

PA102 (emphasis added.) Indeed, Defendants used the term "Merger" 1,390 times in the Proxy and related exhibits in connection with asking Parametric shareholders to vote in favor of the Merger with Turtle Beach. PA612:19.

The Writ Petition's inaccurate factual description of the case, while perhaps manufactured to pique the Supreme Court's interest in granting review, cannot support the issuance of a writ. The Supreme Court has defined a direct claim in this context as follows: "A claim brought by a dissenting shareholder that questions the validity of a merger as a result of wrongful conduct on the part of majority shareholders or directors is properly classified as an individual or direct claim. The shareholder has lost unique personal property – his or her interest in a

---

[1] Defendants' Merger Announcement, emphasis in original, is available at the following publicly available link: http://hypersound.com/press_release_details.php?id=83. Plaintiffs request judicial notice of the undisputed fact that Defendants publicly made these statements. *See, e.g., Itcaina v. Marble*, 56 Nev. 420, 437, 55 P.2d 625, 631 (1936) (taking judicial notice of matters of public knowledge).

specific corporation." *Cohen*, 119 Nev. at 19. Thus, "if the complaint alleges damages resulting from an improper merger, it should not be dismissed as a derivative claim." *Id.* Put differently, "allegations [that] involve wrongful conduct in approving the merger and/or valuing the merged corporation's shares . . . are not derivative claims." *Id.* at 7.

The Class Action Complaint in Intervention ("Complaint") fits squarely within that definition of a direct claim. The Complaint alleges that the Merger is invalid and improper, which is a direct claim. A majority of Parametric directors were conflicted and engaged in repeated improprieties when negotiating, structuring, and voting on the Merger. ¶¶22-115.[2] When faithless directors engage in intentional misconduct, fraud, or a knowing violation of the law, as the Parametric Board did here, they are liable to stockholders. NRS 78.138(7) (permitting individual liability of directors or officers to "stockholders" in the event of breach of fiduciary duty involving "intentional misconduct, fraud or a knowing violation of law"); *Cohen*, 119 Nev. at 14.

The Complaint also alleges Defendants, through wrongful conduct, used the Merger to divest Parametric shareholders of their personal interest in a "specific corporation," *id.* at 19, for inadequate consideration. ¶¶91-109. The new combined company is not the same specific corporation as the one in which Plaintiffs invested. After the Merger, the new combined company, renamed as "Turtle Beach," manufactures different products, is controlled by different stockholders, is run by a different board of directors, is operated by a different management team, and is in a different and deteriorating financial state. ¶¶4-7, 26-29, 101-106. As Plaintiffs argued in the district court, as a result of the Merger "you folks who [collectively] are controlling shareholders of a cool sound

[2] All "¶" and "¶¶" references are to the Complaint, which is contained at PA001-49.

company [Parametric] will now be 20 percent owners of a cool headphone company [Turtle Beach] that is not doing nearly as well as that cool sound company was." PA612:14-17.

Defendants choose not to confront these allegations. Instead they argue that by creating a shell entity to effectuate the Merger, they created for themselves full immunity to direct shareholder claims. Not so. The transactional creativity of deal lawyers does not fundamentally alter the pragmatic effect of the Merger, or the duties owed to shareholders in connection with that Merger. As the Supreme Court explained in *Cohen*, "the Model Act and Nevada's statutes are designed to facilitate business mergers, while protecting minority shareholders from being unfairly impacted by the majority shareholders' decision to approve a merger." *Cohen*, 119 Nev. at 10. Under Nevada law, as well as Delaware and New York jurisprudence, the Complaint pleads a direct claim for relief. For the reasons stated herein, the district court did not err in denying Defendants' motions to dismiss.

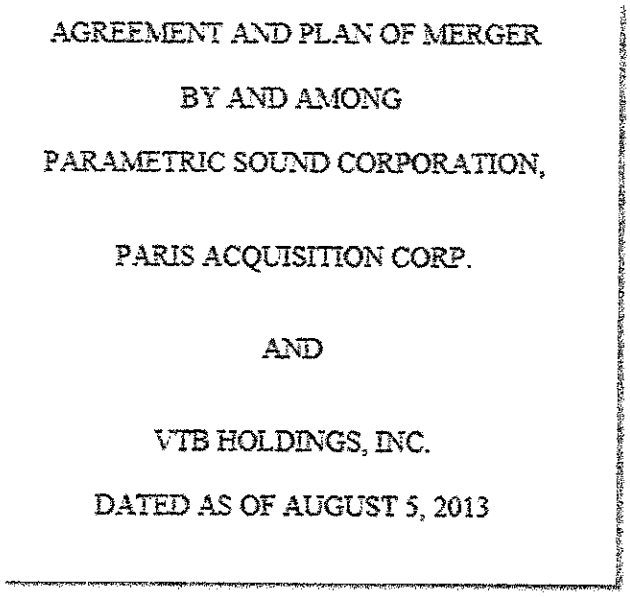
III. FACTUAL AND PROCEDURAL BACKGROUND

This is a shareholder class action brought by Plaintiffs Grant Oakes and Kearney IRRV Trust, as well as multiple other shareholder plaintiffs in the underlying consolidated actions, on behalf of the public shareholders of Parametric common stock against Parametric, its six member Board of Directors, and its now-wholly owned subsidiary VTB Holdings, Inc. ("Turtle Beach" or "VTBH"). The Complaint alleges that the Parametric Board members each breached their fiduciary duties in connection with the Merger between Turtle Beach and Parametric and that Turtle Beach and Parametric aided and abetted in those breaches of duty.

A. Background of the Merger

On August 2, 2013, Parametric's Board voted to cause Parametric – the publicly traded entity in which Plaintiffs held stock – to enter into an Agreement

and Plan of Merger ("the Merger Agreement"). Parametric was a signatory to the Merger Agreement – the following is a screenshot of its opening page:



AGREEMENT AND PLAN OF MERGER

BY AND AMONG

PARAMETRIC SOUND CORPORATION,

PARIS ACQUISITION CORP.

AND

VTB HOLDINGS, INC.

DATED AS OF AUGUST 5, 2013

PA285.

Under the Merger Agreement, Turtle Beach, formerly a privately held company from New York, merged with Parametric, a publicly traded Nevada corporation, in order to provide Turtle Beach with access to the public markets without incurring the expense and governance requirements of a separate Initial Public Offering.[3] The overall Merger transaction involved seven basic steps:

[3] Other jurisdictions have viewed such transactions with skepticism: "[U]sing a defunct Delaware corporation that happens to retain a public listing to evade the regulatory regime established by the federal securities laws is contrary to Delaware public policy. Delaware has no interest in facilitating reverse mergers with defunct but still publicly registered shell corporations as a means to circumvent the regulatory protections provided by the federal securities laws." *In re China Agritech, Inc.*, No. 7163-VCL, 2013 Del. Ch. LEXIS 132, at *3-*4 (Del. Ch. May 21, 2013) (quotations and citations omitted). While Parametric was not a "defunct" company, but was a company with live shareholders and extremely valuable hypersound technology, the egregious destruction in shareholder value present in this transaction is, as a matter of public policy, even more concerning than a merger into a public shell with no assets.

1. Parametric created a shell subsidiary, Paris Acquisition Corp. ("Paris");

2. Turtle Beach merged into Paris;

3. Paris was merged out of existence;

4. Turtle Beach continued as the surviving entity in that aspect of the transaction;

5. Parametric issued millions of shares to Turtle Beach, giving Turtle Beach approximately 80% of the post-Merger entity while relegating Parametric's former shareholders to a 20% minority ownership;

6. Turtle Beach took control of Parametric and instituted its own board of directors and management team; and

7. Turtle Beach changed Parametric's name to "Turtle Beach."[4]

As a result of those steps, "[a]fter the close of the Merger, the [Parametric] shareholders' majority voting interest in the pre-Merger standalone Company ceased to exist." ¶7. Defendants treated Turtle Beach as the acquirer of Parametric for accounting purposes as well. Defendants' Proxy stated:

> Based on the relative voting interests of Parametric and [Turtle Beach] in the combined company whereby the [Turtle Beach] stockholders will have a majority voting interest, that the board of directors of the combined entity will be composed of five board members designated by former [Turtle Beach] stockholders and two directors designated by Parametric stockholders and that the chief executive officer of the combined entity will be the former chief executive officer of [Turtle Beach], ***[Turtle Beach] is considered to be the acquiror of Parametric for accounting purposes.***

PA187 (emphasis added). Defendants also told Parametric shareholders:

> Q: What vote is required to approve the merger proposal?
>
> A: ***Approval of the merger proposal requires the affirmative vote of a majority of the votes cast on the proposal, excluding abstentions, at a meeting at which a quorum is present.***

[4] ¶¶4-7, 26-29, 101-106.

PA121 (emphasis added.)

In connection with that vote, the Merger was effectuated through a fraud on Parametric's shareholders. The Complaint alleges that Defendants misled shareholders about multiple material issues in the Proxy. ¶114. These issues include, as described further below: (a) the value of the SIIG/Optek project; (b) the Board's attempts to angle for personal payments in the hours leading up to, and during, the final Merger vote; (c) the Board's actions in stalling other potential acquirers and licensing discussions; (d) the positive Company announcements the Board chose not to make during Merger negotiations, and their intention that withholding positive news would keep Parametric's stock price down and thus make "the premium on the [Turtle Beach] deal look better"; (e) the details behind Potashner's threats to the rest of the Board; and (f) the fact that the Board's financial advisors did not provide any opinion, informal or otherwise, on the terms of the Break-Up License. *Id.*[5]

B. Abbreviated Procedural Summary of the Litigation

After announcement of the Merger in August 2013, multiple Parametric shareholders viewed the Merger as unfair and filed suit in San Diego, California (Parametric's place of business) and Nevada (Parametric's state of incorporation). Plaintiffs from both jurisdictions cooperated and submitted briefs in support of a motion for preliminary injunction in Nevada. The Honorable Elizabeth Gonzalez,

[5] Defendants' contention that the Merger obtained "overwhelming approval" of Parametric stockholders" (Writ Pet. at 8) is also incorrect. Of 6,837,321 shares eligible to vote on the Merger, only 3,801,508 voted in favor, or just 55.6%. Irrespective of the shares present at the December 2013 meeting, if just Potashner, for example, had not voted in favor of the Merger, it would not have received majority support. To be sure, the Merger was technically approved (as all completed mergers are), but it did not receive the level of support that Defendants imply. In any event, technical approval of a merger is irrelevant to the direct/derivative determination. *See Cohen*, 119 Nev. at 7 ("On May 27, 1998, the Boardwalk convened a special shareholder meeting to consider the offer. A majority of the shareholders approved the merger.").

Eight Judicial District Court Judge, heard the matter on December 26, 2013. Defendants' Writ Petition correctly points out that the district court denied Plaintiffs' motion for preliminary injunction, but omits that, in doing so, Judge Gonzalez stated that "these findings are preliminary as they are based on the limited evidence presented in conjunction with the preliminary injunction hearing after limited discovery conducted by the parties on an expedited basis" and that the ruling was made "without prejudice to pursue any other remedies that are appropriate."

The California plaintiffs intervened in the consolidated Nevada action and the district court designated the Complaint as the operative complaint. PA002. The Complaint incorporated far more facts and substantial allegations than any prior pleading, including the motions for preliminary injunction, even though it was still based on partial, limited expedited discovery. ¶¶22-115. Defendants filed motions to dismiss the Complaint on June 10, 2014, and full briefing ensued. PA503-586. Yet Defendants did not contend – as they do now, for the first time, in their Writ Petition – that Parametric was not a "constituent entity" to the Merger, nor did Defendants argue anything regarding "dissenter's rights." Those issues were never raised or addressed by the trial court. *Id.* Plaintiffs substantively responded with a 39-page Omnibus Opposition to Defendants' Motions to Dismiss. PA529-575. After a hearing on August 28, 2014, the district court entered an order denying Defendants' motions to dismiss on September 10, 2014. PA631-632. By denying all Defendants' motions to dismiss, the district court necessarily ruled that the Complaint sufficiently alleged that Parametric's Board breached their fiduciary duties of loyalty to Parametric's shareholders and engaged in intentional misconduct, fraud, or a knowing violation of the law in connection with their effectuation of the Merger. NRS 78.138(7); 9/10/14 Order Denying Motions to Dismiss. The district court also necessarily ruled that the Complaint sufficiently

alleged that Defendants Turtle Beach and Parametric "knowingly participated" in those intentional breaches of fiduciary duty. *In re AMERCO Derivative Litig.*, 252 P.3d 681, 702 (Nev. 2011); 9/10/14 Order Denying Motions to Dismiss. These issues were briefed and argued extensively at the trial court level. PA529-576, PA587-623. Defendants do not contend that these rulings were in error.[6]

Nonetheless, a review of the claims at issue is necessary to understand the nature of those claims and thus to determine whether they directly challenge wrongful conduct in connection with a merger or, alternatively, derivatively challenge unrelated decisions that independently harmed the corporation itself. Defendants' Writ Petition, in contrast, attempts to characterize the claims for relief without ever facing the substance of the allegations. That is not how the analysis of a claim on a motion to dismiss works. While the description that follows is predominantly factual, certain sections are introduced by this Court's corresponding descriptions of direct allegations from *Cohen.*

C. The Factual Allegations in the Complaint

"Challenges to the validity of a merger based on fraud usually encompass either or both of the following: (1) lack of fair dealing or (2) lack of fair price. Both involve corporate directors' general duties to make independent, fully informed decisions when recommending a merger and to fully disclose material information to the shareholders before a vote is taken on a proposed merger." *Cohen*, 119 Nev. at 11-12. The Complaint pleads both lack of fair dealing and lack of fair price.

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[6] By not addressing the issue in their Writ Petition, Defendants have conceded that the Complaint sets forth viable and non-exculpated claims for breach of the duty of loyalty, as well as aiding and abetting, against each of the defendants. *See, e.g., Wyeth v. Rowatt*, 244 P.3d 765, 778 n.9 (Nev. 2010); *Mainor v. Nault*, 120 Nev. 750, 777, 101 P.3d 308, 326 (2004) (an appellant who fails to provide authority to support an argument abandons the issue).

1. The Merger Is Invalid Because It Was Not Approved by a Majority of Disinterested Directors

"Cases involving [a lack of] fair dealing frequently contain claims that directors . . . had conflicts of interest or were improperly compensated or influenced in return for their approval of the merger . . . ." *Cohen*, 119 Nev. at 12. At the time it voted to approve the Merger, the Parametric Board was comprised of six members, all of whom are Defendants in this case: Kenneth Potashner; Elwood "Woody" Norris; Andrew Wolfe; Dr. Robert Kaplan; Seth Putterman; and James Honore. ¶¶14-19. Each of Parametric's six directors was personally conflicted or was improperly influenced when voting on the Merger. This subjects the transaction to "entire fairness" scrutiny. "Where actual self-interest is present and affects a majority of the directors approving a transaction, a court will apply even more exacting scrutiny to determine whether the transaction is entirely fair to the stockholders." *Paramount Commc'ns v. QVC Network*, 637 A.2d 34, 42 n.9 (Del. 1994).[7]

a. Potashner Was Not "Disinterested" When Negotiating and Voting on the Merger

Executive Chairman Potashner was unquestionably the domineering force in the Parametric boardroom. Potashner was personally conflicted, however, because he attempted to utilize the Merger with Turtle Beach to effectuate his "personal

[7] Nevada has adopted the "entire fairness" standard of review for board-majority-conflicted transactions as well. In *Cohen*, the Court stated that "higher scrutiny" is warranted in "mergers where . . . the majority of . . . directors have conflicts of interest." *Cohen*, 119 Nev. at 17-18; *see also Shoen v. Sac Holding Corp.*, 122 Nev. 621, 640 n.61, 137 P.3d 1171, 1184 (2006) ("Generally, when an interested fiduciary's transactions with the corporation are challenged, the fiduciary must show good faith and the transaction's fairness."). *Cf. Foster v. Arata*, 74 Nev. 143, 155, 325 P.2d 759, 765 (1958) (recognizing an interested fiduciary's burden to prove the good faith and inherent fairness of any transactions with the corporation) (citing *Pepper v. Litton*, 308 U.S. 295, 306, 60 S. Ct. 238, 84 L. Ed. 281 (1939)); *Oberly v. Kirby*, 592 A.2d 445, 469 (Del. 1991) (noting that, when approval of an interested director transaction by an independent committee is not possible, the interested directors carry the burden of proving that transaction's "entire fairness").

plans to transition to a role overseeing Parametric's hearing-related initiatives." ¶23. Potashner had created a subsidiary of Parametric called Hypersound Health, Inc. ("HHI") and saw great personal "liquidity" in that entity, later admitting that "I believe over time the hhi component will be worth a billion." *Id.* In fact, at a December 13, 2012 Board meeting, Potashner "outlined the longer-term plans for him to transition more time to HHI" and that, as a result, Parametric itself would need a new CEO." *Id.* Thus, "[a]t the time Potashner began negotiations and at the time he voted on the Merger, Potashner believed that the Merger would offer a better vehicle for his continued management of Parametric's hearing-related initiatives." *See* ¶¶23-25. Potashner also received golden parachute compensation of a total of $2,807,738 in the Merger, which further motivated him to complete the deal rather than step down as CEO when the Company eventually found a replacement. ¶26. The day the Merger vote took place, "[o]n August 2, as the Board finalized its intent to enter into the Merger Agreement, the 'Compensation Committee' met Potashner's cash demands. It agreed to pay his 2013 bonus payments at the maximum target rate of $210,000." ¶63. This cash severance and change of control package also renders Potashner interested. *Id.*

Potashner was so determined to protect his own interests that he engaged in a disturbing pattern of threats and misrepresentations to the Parametric Board throughout the Merger negotiations. ¶25. During the Merger sale process, after misrepresenting and concealing information from the rest of the Parametric Board, Potashner defied the Board's orders not to discuss certain issues with Turtle Beach on several occasions, threatened to displace the entire Board, and threatened to sue the Board if they did not pay Potashner and one of Potashner's cronies $250,000 in cash. ¶¶23-25, 59-63. At one point in the process, another Board member, referencing Potashner, wrote regarding a draft of the Merger Agreement: "I needed this as I feel we have been left in the dark and have had misrepresentations

presented to us." ¶51. In sum, "Potashner's repeated threats, misrepresentations, concealments, and outright lies to the rest of the Board are not the hallmark of a disinterested, independent director." ¶25.

b. Kaplan and Putterman Were Not "Disinterested" When Voting on the Merger

Defendants Kaplan and Putterman, while subservient to Potashner, were also conflicted in their own right. Rather than stepping up and protecting shareholders against Potashner's obvious misconduct, Kaplan and Putterman demanded their own fee before voting on the Merger. "Despite not participating in a single discussion with Turtle Beach, Kaplan voted on the Merger while vying for a personal payment to 'get even' with Potashner. The day of the most significant vote in Parametric's corporate existence, Kaplan spent his time emailing about the personal bonus he felt the independent directors should receive." ¶30. The Parametric Board voted on the Merger at a 4 p.m. meeting on August 2, 2013. One hour before the meeting, Kaplan wrote to propose the following resolution:

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

Id. "Like Kaplan, Putterman also voted on the Merger with the expectation of receiving a cash bonus. At 4:50 p.m. on August 2, 2013, during the very meeting while Putterman and the rest of the Board were voting on the Merger, Putterman agreed with Kaplan's bonus request in general, but offered a different rationale: 'Can the bonus be made contingent on successfully raising the 5-15M$ that we seek prior to closing but that we need in any event!'" ¶33.

After voting on the Merger, the Board adjourned at 5:00 p.m. *Id.* The directors still believed they would receive a cash bonus. *Id.* At 7:35 p.m. that

evening, Kaplan continued in his personal quest for a Merger-related bonus, upping the ante:

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

Id. Kaplan demonstrated the same self-interested approach earlier in the Merger negotiation process as well, requesting "healthy golden parachutes to all the BoD members." ¶32. The day of the Merger vote, Kaplan and Putterman did not spend their time drafting emails about substantive deal terms, negotiations with Turtle Beach, or the interests of Parametric shareholders; they spent their time drafting requests for personal payouts. Kaplan and Putterman's deliberate actions gave rise to the reasonable inference that these requested payments were a material and motivating factor when voting for the Merger.

c. Norris Was Not "Disinterested" When Voting on the Merger

Defendant Norris was unduly influenced when voting on the Merger. In light of Norris's vying for employment in the post-Merger entity and his resulting financial interest in completing the Merger with Turtle Beach, Norris was particularly susceptible to Potashner's threats. ¶27. The Complaint alleges that "Potashner recognized these conflicts and pounced, threatening Norris that he would personally lose millions if Norris did not go along with the planned Merger. On March 29, 2013, as Potashner was working out a deal with Stark, Potashner emailed Norris privately to state that the Merger was in doubt and that, ***The Bod is on the verge of losing you at least $10m personally***." *Id.* Norris responded, "***Is this blackmail or what[?]***" ¶48. Norris was also conflicted when voting on the Merger because he knew that his employment "was a term of the then-current Merger Agreement." *Id.* Norris fell in line and voted in favor of the Merger,

despite its harmful effect on Parametric stockholders. *Id.* Thus, the deal left Norris "susceptible to Potashner's threats and [Norris's motivations] existed in direct contrast to the impact on Parametric's public shareholders generally, who have all lost significantly." *Id.*

d. Wolfe Was Not "Disinterested" When Voting on the Merger

Potashner held an enhanced influence on Wolfe specifically, which left Wolfe interested in the Merger through Potashner's conflicts. "Wolfe was beholden to Potashner in light of their prior relationship in threating boards for personal compensation and Potashner's continued improper incentivizing of Wolfe to do Potashner's bidding." ¶28. Wolfe previously served as CTO of SonicBlue, a position he owed to Potashner in light of Potashner's position as CEO. *Id.* After promoting Wolfe, Potashner then "procured company-issued loans for himself and Wolfe to purchase 654,717 and 171,179 shares of a SonicBlue subsidiary." *Id.* "When SonicBlue's board later voted to convert their own loans (but not Potashner's and Wolfe's) to non-recourse, Potashner publically demanded the board pay up or resign. Potashner then sued his own board. As a result, SonicBlue agreed to pay Wolfe a ten-month salary when SonicBlue terminated Wolfe in October 2002." *Id.* "Wolfe was in Potashner's debt and Potashner continued this pattern by personally luring Wolfe to the Parametric board in February 2012." ¶29. Potashner continued his pattern of incentivizing Wolfe by repeatedly pushing for himself and Wolfe to occupy the two post-merger board seats during substantive Merger negotiations. *Id.* "In light of their mutual history of bad faith threats and incentives, Wolfe was in a position to comport with the wishes and interest of Potashner, rather than Parametric stockholders generally." *Id.*

e. Potashner Collectively Dominated and Controlled All Other Directors With Respect to the Merger

All five directors, Wolfe, Norris, Kaplan, Putterman and Honore, each also established a lack of independence from the Board Chairman, Potashner, when repeatedly caving to Potashner's threats during the sale process. In addition to the conduct referenced above, Potashner also threatened the Board with "very aggressive claims against individuals" that will "result in substantial corporate and personal legal exposures." ¶58. In light of that threat and "in fear of their jobs, the Board immediately caved and asked Potashner how many Parametric shares he would accept in exchange for his HHI stock options." ¶56. The Board relented and allowed Potashner, Wolfe, and the CFO to jointly call Turtle Beach and convey Potashner's demands, which included "cash payments to Potashner and Todd at 100% of 2013 bonus levels (whether or not they were entitled to such amounts or not) and not to restructure the HHI license agreement." ¶61. Potashner got exactly what he demanded. ¶¶61-63. The Board ultimately complied with Potashner's threats and voted in favor of the deal, but not without requesting their own personal payouts. The Board succumbed to Potashner's control after being cowed by threats and hostile, erratic behavior. *Id.*

2. The Board Breached Its Fiduciary Duties by Unfairly Negotiating and Structuring the Merger

Post-merger damage claims for unfair dealing may involve "merger negotiations [and] how the merger was structured." *Cohen*, 119 Nev. at 12. Where directors "'bias the process' in favor of certain bidders and against others" in furtherance of self-interest, "'they commit a breach of fiduciary duty.'" *In re Rural Metro Corp. Stockholders Litig.*, 88 A.3d 54, 91-92 (Del. Ch. 2014). Indeed, "[t]his is precisely the type of 'evidence of self-interest . . . that calls into question the integrity of the [Merger] process."' *Id.* (citing *In re Del Monte Foods Co.*

S'holders Litig., 25 A.3d 813, 831 (Del. Ch. 2011)). The Parametric Board did just that here.

"In order to roll out the red carpet for his preferred merger partner, Turtle Beach, Potashner – and by their acquiescence, the rest of the Board – stalled discussions with other licensing partners and potential acquirers as soon as Turtle Beach arrived on the scene." ¶36. The Complaint contains significant detail regarding this intentionally wrongful scheme. For example, "[o]n April 7, 2013, Potashner wrote: 'On the positive side I would be able to announce the license and buy additional time both with the parties that we have stalled . . . I have several things going on including defining a financing and the pressures of the license activities we put on hold.'" *Id.* Potashner admitted to the harm caused by his stalling efforts. On April 9, 2013, Potashner wrote to his CFO and Turtle Beach: "***My stock is taking a beating due to me deferring signing licensing deals. Any ideas?***" ¶37. These efforts biased the process away from other existing and "capable buyers interested in purchasing Parametric," including Amazon. ¶39.

All Board members acted with wrongful intent on this issue as well. The rest of the Parametric Board finally noticed Potashner's stalling efforts three months later and, on July 6, 2013, Kaplan wrote to Honore, Norris, Putterman, and Wolfe:

> Personally I think this has gone on far too long. We need to get on with the business of running the business. What has been going on since this [Turtle Beach] idea surfaced? Where are our licensing agreements, where are sales (incremental improvement due to David), Epsilon, Amazon, The Chinese, McDonalds, The Bear stores (still in beta mode), Sony, Samsung, etc.? AND WE HAVE SURE BURNED THROUGH A HELL OF A LOT OF MONEY. . . . It is time for the BOD to step up and take charge! We have been far too passive in the past. It is good to have a strong leader but not a dictator.

¶40 (emphasis in original). Despite that direct challenge, the Board chose not to step up and protect Parametric stockholder interests. Instead, they asked for hush money. "While Kaplan's email demonstrated a brief glimpse of spirit, the next

day, July 7, 2013, Kaplan embarked on his above-described personal quest for an additional bonus in connection with the Merger. After realizing the potential for personal benefit, Kaplan fell in line and never again questioned Potashner's unreasonable and improper hindrance of Company progress in order to effectuate the Merger." ¶41.

Defendants also engaged in a lack of fair dealing when they structured a Merger Agreement that contained a series of draconian deal protection provisions that precluded other bidders and would penalize Parametric shareholders if they were to vote against the Merger. ¶¶64-90. "As a result of the combination of these provisions, Parametric's former stockholders were coerced into voting in favor of the Merger. Had the stockholders voted against the Merger, the former Parametric stockholders would have been crippled by the one-sided Break-Up License." ¶65.

In addition, the Board ran a sham "go-shop" process in bad faith that again impermissibly biased the process towards their preferred acquirer, Turtle Beach. "Indeed, when Parametric's attorneys drafted a paragraph about the go-shop paragraph in the Merger's press release, Stark echoed all defendants' distaste for a higher offer: '***You're not looking for an alternative and neither are we***.'" ¶84. Houlihan Lokey, the Board's financial advisor, did not contact all potential acquirers during the go-shop process. *Id.* "Rather, Potashner referred at least one serious contact directly to Stark and Turtle Beach. Stark would then swat them away in order to usurp the interest post-Merger." *Id.* This misconduct in connection with the Merger "go-shop" process is detailed at length in the Complaint. ¶¶85-90.

3. The Board Breached Its Fiduciary Duties to Parametric Shareholders by Deliberately Undervaluing Parametric Shares in the Merger

"Lack of fair price may involve similar allegations plus claims that the price per share was deliberately undervalued . . . ." *Cohen*, 119 Nev. at 12. Similarly,

allegations that "involve wrongful conduct in . . . valuing the merged corporation's shares" may state a post-close claim for damages. *Id.* at 6-7. The Complaint alleges that "[t]he misconduct described herein resulted in an unfair and inadequate Merger valuation for Parametric's stockholders." ¶6.

The Board "deliberately undervalued" Parametric shares in the Merger and engaged in "wrongful conduct in . . . valuing [Parametric's] shares," *id.*, in at least two crucial respects. First, Potashner delayed positive company announcements in an attempt to create a manipulated and depressed price on the Merger, mislead Parametric stockholders, and appease Turtle Beach. ¶¶43-47. "Potashner knew that the 80%/20% ratio undervalued Parametric, but attempted to keep Parametric's pre-Merger-Announcement stock price low so that the stock would not plummet an even higher percentage when the Merger was announced." ¶46. Potashner did so on multiple occasions, all of which were directly related to the Merger proposal under discussion. ¶¶43-46. The Board has a duty not to "deliberately undervalue" the Merger and is not permitted to manipulate the stockholder vote through misinformation and suppression of Parametric's pre-Merger stock price. *Cohen*, 119 Nev. at 12. The Board violated those duties here.

Second, Potashner, Wolfe, Norris, Kaplan, Putterman and Honore all "deliberately undervalued" Parametric shares in the Merger by approving that valuation through the conscious disregard of a known component of Parametric's standalone value – the so-called "SIIG/Optek Soundbar project." ¶¶92-100. "The Board approved the Merger based on Craig-Hallum analysis the Board knew excluded potential Optek revenue (or any licensing revenue for that matter)." ¶92. Worse, "Potashner encouraged Turtle Beach CEO Stark to negotiate with Optek for Turtle Beach's benefit two weeks into the Go-Shop process and months before shareholders voted on the Merger." *Id.* Like the rest of the Merger-related misconduct, the entire Board was complicit:

> The Board voted on the merger while failing to value the revenue to be received from the Optek soundbar issue. The projections on which Craig-Hallum based its "fairness opinion" included no revenue from Optek, and egregiously, no licensing revenue at all, even though [the Parametric CFO] admitted that "we fully expect" that revenue stream. Digital signage and HHI were the only sources of revenue included in the final projections. The Board knew, or should have known, that the SIIG/Optek soundbar was an existing project likely to generate revenue, but acted in bad faith when it approved the Merger based on flawed financial projections with a gaping omission.

¶98. Kaplan knew that Potashner had buried the project in July 2013, but "never followed up on the issue." ¶99.

4. Parametric and Turtle Beach Aided and Abetted the Parametric Board's Breaches of Fiduciary Duty in Connection with the Merger

The aiding and abetting claims against Parametric are more fully described in the Complaint and Plaintiffs' Motion to Dismiss opposition. PA002-49, PA571-574. In sum, while Potashner and the rest of his Board engaged in repeated bad acts, Turtle Beach and Parametric were involved every step of the way, exploiting, encouraging, emboldening, and assisting.[8]

As a result of the foregoing allegations, the Complaint "alleges damages resulting from an improper Merger." ¶7. The Complaint further alleges that "[u]nder well-established Nevada law, plaintiffs and the shareholder class are entitled to monetary damages including the difference between the Merger valuation and the fair value of their shares." ¶9.

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[8] The Complaint makes clear that only the Individual Defendants, *i.e.*, the Board, owed fiduciary duties to Parametric shareholders. *See, e.g.*, ¶¶2, 119, 125, 127-128, 132-134. Nowhere does it specifically allege that Parametric or Turtle Beach, the corporate entities, owed duties directly to shareholders. Nevertheless, to the extent the First Cause of Action was unclear and stated that it was brought against "All Defendants," Plaintiffs clarified in their Motion to Dismiss Opposition that only the aiding and abetting claim was asserted against the corporate entities, Parametric and Turtle Beach.

IV. STANDARD OF REVIEW

"Normally, this court will not entertain a writ petition challenging the denial of a motion to dismiss but we may do so where . . . the issue is not fact-bound and involves an unsettled and potentially significant, recurring question of law." *Buckwalter v. Eighth Judicial Dist. Court*, 234 P.3d 920, 921 (Nev. 2010). Extraordinary writ relief is purely discretionary with the court to which the application is made. *See Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991) (issuance of writ of mandamus or prohibition is "purely discretionary"). The burden of establishing the propriety of extraordinary relief is "a heavy one." *Paulos v. Eighth Judicial District Court*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982).

The district court's September 10, 2014 Order Denying Motions to Dismiss, which Defendants approved as to form, does not contain the grounds for dismissal, but a trial court's judgment may be affirmed on a ground other than those expressly relied upon by the trial judge. *See Nelson v. Sierra Constr. Corp.*, 77 Nev. 334, 343, 364 P.2d 402, 406 (1961); *Hotel Riviera v. Torres,* 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981). Ultimately, this is still a challenge to a complaint. On a motion to dismiss for failure to state a claim for relief, courts must construe the pleading liberally and draw every fair inference in favor of plaintiff, and allegations in the complaint must be accepted as true. NRCP 12(b)(5); *Brown v. Kellar*, 97 Nev. 582, 636 P.2d 874 (1981). "Nevada is a notice-pleading jurisdiction and pleadings should be liberally construed to allow issues that are fairly noticed to the adverse party." *Nevada State Bank v. Jamison Family P'Ship*, 106 Nev. 792, 801, 801 P.2d 1377, 1383 (1990).[9]

[9] In the district court, without formally requesting judicial notice or attaching a declaration of anyone with supporting knowledge, Defendants included an unexplained "appendix" in support of their briefs, which attached nine exhibits totaling 419 pages of documents in support of their arguments. At both the district

V. THE COMPLAINT PLEADS A DIRECT CLAIM FOR DAMAGES ON BEHALF OF A SHAREHOLDER CLASS

A. The Parametric Board Owed Fiduciary Duties Directly to Parametric Stockholders

Defendants' Writ Petition is premised on a misunderstanding of Nevada corporate governance doctrine regarding the relationship between stockholders and individual corporate fiduciaries. Despite this Court's consistent holdings to the contrary, Defendants call it a "fundamental tenet of [Nevada] corporate law" that directors of a Nevada corporation owe no duties to shareholders. (Writ Pet. at 1.) That is wrong. Nearly a century ago, this Court referred to the rule that corporate fiduciaries owe direct duties to shareholders as "so well defined that it would be a matter of supererogation to incumber [an] opinion with a review of" the issue. *Smith v. Gray*, 50 Nev. 56, 68, 250 P. 369, 373 (1926). This Court went on to state:

> The directors and managing officers of a corporation, says Pomeroy, occupy the position of quasi trustees towards the stockholders alone, and not at all towards the corporation with respect to the shares of stock. Since the stockholders own these shares, and since the value thereof and all their rights connected therewith are affected by the conduct of the directors, a trust relation plainly exists between the stockholders and the directors, which is concerned with, and confined to, the shares of stock held by the stockholders. . . . Undoubtedly it is the law that, where the majority stockholders are oppressively and illegally pursuing a course, in the name of the corporation, which is in violation of the rights of the minority, and which can only be restrained by the aid of a court of equity, a stockholder may sue in equity on behalf of himself and other stockholders who may come in for appropriate relief.

Id. at 68-69 (citing 3 Pomeroy Eq. Jur. §1090 (4th ed.); Clark & Marshall, Private Corporations, §536 at 1661).[10] Later, in 1957, when holding that fiduciary duties

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court level and in the Supreme Court, such hearsay is of course improper on a motion to dismiss and should not be considered.

[10] *Smith* is good law and was cited for the same proposition by this Court in *Cohen*, 119 Nev. at 19, as well as the District of Nevada in *Horwitz v. Southwest Forest Indus., Inc.*, 604 F. Supp. 1130, 1134 (D. Nev. 1985).

did not exist between partners and an assignee, the Supreme Court explained that: "There can be no question of the rule [implementing a fiduciary relationship] in such cases or where a partnership or agency relationship exists ***or that of corporate shareholder and officer***. In such cases the fiduciary duty is clear." *Bynum v. Frisby*, 73 Nev. 145, 149, 311 P.2d 972, 974 (1957) (emphasis added). More recently, the Supreme Court in *Cohen* faithfully applied these principles in holding that directors owe fiduciary duties directly to shareholders. 119 Nev. at 19. And in *Shoen*, the Supreme Court continued to affirm that directors owe fiduciary duties to the stockholders themselves:

> The board's power to act on the corporation's behalf is governed by the directors' fiduciary relationship with the corporation ***and its shareholders***, which imparts upon the directors duties of care and loyalty. In essence, the duty of care consists of an obligation to act on an informed basis; the duty of loyalty requires the board and its directors to maintain, in good faith, the corporation's ***and its shareholders'*** best interests over anyone else's interests.

122 Nev. at 632 (emphasis added) (citing *Foster*, 74 Nev. at 155; *Cede & Co. v. Technicolor*, 634 A.2d 345, 360-61, 367 (Del. 1993); *Horwitz*, 604 F. Supp. at 1134; *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)); *see also AMERCO*, 252 P.3d at 700-01 (same). The decision in *Cohen* did not appear out of the blue and "create[] a narrow exception" to Defendants' supposed – and non-existent – rule that directors owe no fiduciary duties to stockholders. (Writ Pet. at 2-3.) *Cohen* was, and still is, well-rooted in decades of Nevada law.

Defendants proffer unsound support for their "fundamental tenet" that corporations owe duties "to companies, not shareholders." (Writ Pet. at 1.) First, defendants cite an unpublished opinion from the District of Nevada, *Sweeney v. Harbin Elec., Inc.*, No. 3:10-cv-00685-RCJ-VPC, 2011 U.S. Dist. LEXIS 82872 (D. Nev. July 26, 2011), which has never been cited or approved by any recorded decision. The inappositeness of the *Sweeney* decision is addressed in greater detail below. Next, Defendants quote a Delaware case employing this sentence: "It is

well settled that directors owe fiduciary duties to the corporation." *See N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 101 (Del. 2007). But the court in *Gheewalla* also recognized that "[i]t is well established that the directors owe their fiduciary obligations to the corporation and its shareholders . . . shareholders rely on directors acting as fiduciaries to protect their interests . . . while not technically trustees, directors stand in a fiduciary relationship to the corporation and its shareholders." *Id.* at 99 & n.22 (citing *Guth v Loft*, 5 A.2d 503, 510 (Del. 1939)). Last, Defendants rely on a quote from a general Massachusetts practice guide, repeated in *Jernberg v. Mann*, 358 F.3d 131, 134 (1st Cir. 2004), which surmises that officers owe duties to the corporation, rather than shareholders individually. *Id.* (quoting 14A Howard J. Alperin and Lawrence D. Shubow, Massachusetts Practice Series, Summary of Basic Law §8.85 (3d ed. 1996)). *Jernberg*, however, used that quote when declining to hold an officer to a higher burden of proving enhanced scrutiny when purchasing stock directly from an individual stockholder. 358 F.3d at 134-38. No similar facts are present here. Rather, in Massachusetts, like Delaware, New York, and Nevada, corporate fiduciaries owe duties directly to stockholders and permit stockholders to directly enforce those duties, especially in connection with a merger. *Coggins v. New Eng. Patriots Football Club, Inc.*, 492 N.E.2d 1112, 1118-19 (Mass. 1986) ("the right to 'selfish ownership' in a corporation . . . must be balanced against the concept of the majority stockholder's fiduciary obligation to the minority stockholders") (cited in *Cohen*, 119 Nev. at 15 n.44, 19 n.75, 22 n.77, 23 n.82).

In sum, the self-interested conduct of directors and officers of Nevada corporations is governed by fiduciary relationships, both to the company and to its shareholders. *See, e.g.*, NRS 78.138(7). Defendants' request to uproot those longstanding relationships finds no support in Nevada corporate governance doctrine.

B. Under *Cohen*, Plaintiff Shareholders May Pursue their Claims Directly

The parties agree that the Supreme Court's decision in *Cohen* is central to the resolution of this writ. *Cohen* ultimately holds that claims regarding influences of directors' merger votes, improper incentives, and obtaining a fairness opinion on a merger that undervalued the target's stock "go to the validity of the merger" and are "all proper to support a claim for rescission or monetary damages caused by an invalid merger." *Cohen*, 119 Nev. at 22, 24. On the other hand, the claims involving mismanagement resulting in a loss of revenue, overpayment for land acquisitions, the impairment of the target's expansion, and recovery of fees paid for the fairness opinion were derivative, as such claims were plainly directed at "harm to the corporation." *Id.* at 21-22, 24. Put simply, claims on behalf of the shareholders are direct, while claims on behalf of the company are derivative. *Id.* The Court summarized the distinction as follows:

> We conclude that some of the allegations and causes of action seek damages for lost profits, usurpation of corporate opportunities, or mismanagement of the corporation, and that these claims were properly dismissed as derivative claims. However, the remaining allegations involve wrongful conduct in approving the merger and/or valuing the merged corporation's shares. These are not derivative claims. . . .
>
> It is true that a former shareholder has no standing to sue for breach of fiduciary duty on a derivative claim. A derivative claim is one brought by a shareholder on behalf of the corporation to recover for harm done to the corporation. Because a derivative claim is brought on behalf of the corporation, a former shareholder does not have standing to assert a derivative claim. A former shareholder does, however, have standing to seek relief for direct injuries that are independent of any injury suffered by the corporation.
>
> A claim brought by a dissenting shareholder that questions the validity of a merger as a result of wrongful conduct on the part of majority shareholders or directors is properly classified as an individual or direct claim. The shareholder has lost unique personal property – his or her interest in a specific corporation. Therefore, if the complaint alleges damages resulting from an improper merger, it should not be dismissed as a derivative claim. On the other hand, if it seeks damages for wrongful conduct that caused harm to the corporation, it is derivative and should be dismissed.

Id. at 6-7, 19 (footnotes with citations omitted).

Like in *Cohen*, the Complaint alleges: "In addition to their conflicts of interest, the Board engaged in multiple instances of bad faith conduct in breach of their fiduciary duties. All of the bad faith acts described below were directly related to the Merger and its process, impacted negotiations with Turtle Beach, and harmed Parametric shareholders." ¶35. The Complaint further alleges that "[t]he misconduct described herein resulted in an unfair and inadequate Merger valuation for Parametric's stockholders." ¶6. In sum, "[t]his complaint alleges damages resulting from an improper Merger." ¶7. When ruling on the motion to dismiss, the district court was right to credit these allegations. *Brown*, 97 Nev. at 583-84.

And like the shareholders in *Cohen,* Plaintiffs lost their ownership "in a specific corporation." 119 Nev. at 19. As described above, the new combined company is not the same entity in which Plaintiffs invested. The new company is majority controlled by former Turtle Beach stockholders, run by a new board of directors, and its new management team largely consists of former Turtle Beach officers. ¶¶4-7, 26-29. The new company is broadly focused on manufacturing headphones and other video game accessories, while the old Parametric was developing a very specific hypersonic sound technology. ¶¶6, 103-106. The new company is larger than old Parametric but is financially distressed. ¶101. To be clear: Plaintiffs do not bring claims on behalf of that other, new and different entity, which is called "Turtle Beach" and is controlled by Turtle Beach; rather, they bring claims for damages suffered directly by Parametric shareholders as a result of the Merger and Defendants' misconduct in connection therewith.

Defendants ignore these allegations, but make a new argument in their Writ Petition by bootstrapping the phrase "dissenting shareholders" in *Cohen* well beyond the Supreme Court's intended meaning. (Writ Pet. at 16, 22.) Defendants focus on the following two sentences: "This case involves the rights of dissenting

shareholders to challenge the validity of corporate mergers . . . . A claim brought by a dissenting shareholder that questions the validity of a merger as a result of wrongful conduct on the part of majority shareholders or directors is properly classified as an individual or direct claim." *Cohen*, 119 Nev. at 9, 19. Defendants now use those sentences to contend that Parametric shareholders lose standing to challenge the Merger because they are allegedly not "dissenting shareholders" and Parametric was allegedly not a "constituent entity" to the Merger, under Defendants' view of the statutory meaning of both phrases. (Writ Pet. at 16, 22.)

There are several problems with that argument. First, the phrase "constituent entity" is a red herring. The Supreme Court in *Cohen* did not even consider the phrase "constituent entity," nor can Defendants point to any case that has done so when dismissing an otherwise direct claim for relief.

Second, the Supreme Court permitted the plaintiff, Harvey Cohen, to bring a direct claim for relief even though he was not a "dissenting shareholder" under the meaning of the statute. *Compare Cohen*, 119 Nev. at 14 ("Cohen concedes that he and the other class members failed to exercise their dissenters' rights under the statutes.") *with* NRS 92A.315 (defining "[d]issenter" as "a stockholder who is entitled to dissent from a domestic corporation's action under NRS 92A.380 ***and*** who exercises that right when and in the manner required by NRS 92A.400 to 92A.480, inclusive") (emphasis added). Under plain meaning of the word "dissent" in *Cohen*, Plaintiffs here dissented to the Merger by filing a lawsuit challenging the Merger, just like Mr. Cohen. *See* http://www.merriam-webster.com/dictionary/dissent ("dissent: to publicly disagree with an official opinion, decision, or set of beliefs").

Third, a shareholder's *ab initio* eligibility for appraisal is not a condition precedent to a direct claim for breach of fiduciary duty. No such rule can be found in *Cohen* and, if that were the rule, a Nevada board could eliminate liability for a

fraudulent merger simply by enacting an appraisal-exclusion bylaw within ten days of the transaction. Indeed, despite this Merger's initial eligibility for appraisal under NRS 78.3793, the Parametric Board enacted a bylaw the day of the Merger that cut off Plaintiffs' appraisal rights. *See* ¶115. With respect to appraisal-eligible transactions, acceptance of Defendants' argument would eviscerate the Nevada legislature's choice to hold directors liable to "stockholders" for breaches of fiduciary duties that involve "intentional misconduct, fraud or a knowing violation of law." *See* NRS 78.138(7). No matter how egregious their Merger-related malfeasance, if Defendants' arguments were correct – which they are not – then a board could simply create a shell entity to effectuate a transaction, or deprive stockholders of appraisal rights, then obtain a free pass from liability in either scenario. That is not the law in any jurisdiction.

Fourth, Defendants' rigid, formulaic approach fails to consider the pragmatic nature of the transaction as a whole. As the Delaware Supreme Court has recognized when analyzing whether shareholders could directly challenge a similar two-step transaction, the substance of the transaction, rather than its technical form, is what matters:

> That is how equity views the Recapitalization, despite the fact that as a matter of form, the Recapitalization consisted of two transactions that occurred simultaneously, with the result that to an outside observer, the controlling stockholder never held the benefits of the expropriation for any length of time that the naked human eye could discern. ***In our view, that difference in form, which is a product of transactional creativity, should not affect how the law views the substance of what truly occurred, or how the public shareholders' claim for redress should be characterized.*** In both cases the fiduciary exercises its control over the corporate machinery to cause an expropriation of economic value and voting power from the public shareholders. That the fiduciary does not retain the direct benefit from the expropriation but chooses instead to convert that benefit to cash by selling it to a third party, is not a circumstance that can justify depriving the injured public shareholders of the right they would otherwise have to seek redress in a direct action.

Gatz v. Ponsoldt, 925 A.2d 1265, 1281 (Del. 2007) (emphasis added) (finding that stockholders may directly bring claims surrounding stock issuance to third party). Likewise, the Supreme Court's case citations in *Cohen* also demonstrate that precise legal structure of a merger, whether it is reverse, reverse triangular, stock-for-stock, or cash, is not sufficient by itself to deprive plaintiff shareholders of standing. When determining that the merger-related claims were direct, *Cohen* relied on cases involving a variety of merger structures, some of which involved a retaining interest in the "surviving entity" and all of which held that a plaintiff had pleaded a direct claim for relief:

- ***Stock-for-stock merger agreement that involved surviving ownership in the acquiring company.*** *Parnes v. Bally Entm't Corp.*, 722 A.2d 1243, 1246 (Del. 1999) (cited by *Cohen* in support of sentences 2, 3, and 4 above) (holding that claims were direct where claims alleged that "(i) [a domineering CEO] breached his fiduciary duty of loyalty by preferring himself over Bally and its stockholders; and (ii) the other Bally directors breached their fiduciary duties of loyalty by acquiescing in [the CEO's] self-interested negotiations and by approving a merger at an unfair price"). The claims in *Parnes* echo Potashner and the rest of the Board's conflicts here, particularly with regard to Potashner's threats, domination, and multiple Board members' requests for personal incentive payouts in order to support the Merger.

- ***Stock-for-stock proposed merger that would carry surviving ownership in the acquiring company, which minority stockholders rejected, continued to hold their shares, and argued the merger would render their shares worthless.*** *Smith*, 50 Nev. at 72-73 (cited by *Cohen* in support of sentence 3 above) (affirming post-trial judgment for defendants but noting that plaintiffs had standing in light of allegations of fraud and that defendants sought "to oppress plaintiffs and other minority stockholders into exchanging their stock for stock in the [acquirer]").

- ***All-cash freeze-out merger.*** *Coggins*, 492 N.E.2d at 1119-20 (cited by *Cohen* in support of sentence 3 above) (affirming ruling that merger was undertaken "for the personal benefit of" a controlling stockholder, affirming certification of class action of minority stockholders, and remanding for determination on damages).

- ***Merger entitling minority shareholders to "earnout certificates" based on net profits of post-merger entity over a three-year period.*** *Hoggett v. Brown*, 971 S.W.2d 472, 482 (Tex. App. - Houston [14th Dist.] 1997, pet. denied) (cited by *Cohen* in support of sentence 3 above) (holding that plaintiff is "entitled to sue for the fair value of his stock, plus any special damages for losses caused by any alleged fraud

or irregularity in the merger transaction that affected the fair value of his stock" but plaintiff "cannot sue for wrongful acts unconnected to the merger or for wrongs done to [the corporation]").

Fifth, in any event, Defendants did not make this argument at the district court – the phrases "dissenting shareholder" and "constituent entity" appear nowhere in Defendants' briefing below. PA503-523. Defendants therefore waived this argument and it should not be considered on their Writ Petition. *See, e.g., California State Auto. Ass'n Inter-Ins. Bureau v. Eighth Judicial Dist. Court*, 106 Nev. 197, 199, 788 P.2d 1367, 1368 (1990); *Cordova v. State*, 116 Nev. 664, 666, 6 P.3d 481, 482 (2000).

C. The Claims Are Direct Under Delaware and New York Law, Which Follow the Direct/Derivative Definition of *Cohen*

"Because the Legislature relied upon the Model Act and the Model Act relies heavily on New York and Delaware case law, we look to the . . . law of those states in interpreting the Nevada statutes." *Cohen*, 119 Nev. at 9. The parties agree that the Supreme Court should look to Delaware and New York law in the analysis. But Defendants' claim that the district court's ruling represents a "dramatic departure from the corporate law of . . . Delaware and New York" (Writ Pet. at 3) is a dramatic misrepresentation of the law of both Delaware and New York.

In Delaware, like Nevada, "[a] stockholder who directly attacks the fairness or validity of a merger alleges an injury to the stockholders, not the corporation, and may pursue such a claim even after the merger at issue has been consummated." *Parnes*, 722 A.2d at 1245.[11] As the Delaware Court of Chancery recently held in a decision squarely on point, "the Plaintiff directly challenges the

[11] The Supreme Court's decision in *Cohen* frequently cited to *Parnes* when analyzing the direct/derivative issue. 119 Nev. at 19-23 (citing *Parnes*, 722 A.2d 1243 on five occasions).

merger, and alleges that the merger was invalid due to the fact that a majority of the Board was interested or lacked independence. As such, it is a clear case of a direct claim." *N.J. Carpenters Pension Fund v. infoGROUP, Inc.*, No. 5334-VCN, 2011 Del. Ch. LEXIS 147, at *41 (Del. Ch. Sept. 30, 2011). Put simply, "the alleged wrong here was suffered by the shareholders, whose company was sold in an allegedly tainted transaction." *Id.* As in Nevada, this premise holds true regardless of the technical structure of the merger. *Parnes* concerned a stock-for-stock merger where the stockholders retained an interest in the surviving corporation. 722 A.2d at 1245. *infoGROUP* involved an all-cash merger. 2011 Del. Ch. LEXIS 147. And in *In re Celera Corp. S'holder Litig.*, 59 A.3d 418, 425, 437 (Del. 2012) the Delaware Supreme Court recently affirmed the Court of Chancery's grant of class certification on a direct claim on a "reverse triangular merger" and a top-up option issuance of shares in order to effectuate the merger. *Id.*

Moreover, the Complaint pleads a direct claim under Delaware law because it alleges that Defendants impaired the stockholder franchise, coerced minority stockholders, and caused a woefully uninformed shareholder vote. Where a deal protection device, such as the Break-Up License here – "is preclusive of a stockholder-bidder or coercive of stockholder-purchasers as voters, [Delaware] case law would already dictate an individual, as well as derivative, characterization of an attack on the fee." *In re Gaylord Container Corp. S'holders Litig.*, 747 A.2d 71, 81 n.12 (Del. Ch. 1999). Thus, "where plaintiffs challenge the substantive unfairness of a merger protected by defensive measures, their claims are said to be direct." *Id.* Similarly, "[w]ith respect to the disclosure claim, such claims are quite obviously individual as they affect the right to vote or the personal right to determine if one will sell or not one's investment." *Wells Fargo & Co. v. First*

Interstate Bancorp, No. 14696, 1996 Del. Ch. LEXIS 3, at *24 (Del. Ch. Jan. 18, 1996).

While *Parnes* remains good law, the Delaware Supreme Court has since updated the shape of the direct/derivative analysis through a two-part test in *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1039 (Del. 2004).[12] That two-part test asks: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Id.* at 1033. New York courts have followed suit. In 2012, the Supreme Court of New York, First Appellate Division recognized that "New York has lacked a clear approach for determining" the direct/derivative distinction and admitted that, prior to *Tooley*, "our jurisprudence consists of case by case analyses that are sometimes difficult to apply to new fact patterns." *Yudell v. Gilbert*, 949 N.Y.S.2d 380, 381 (N.Y. App. Div. 2012). Consequently, the New York court held: "we adopt the test the Supreme Court of Delaware developed in *Tooley* . . . . The *Tooley* test is consistent with New York law and has the added advantage of providing a clear and simple framework to determine whether a claim is direct or derivative." *Id.*[13]

Tooley is consistent with Nevada law. Indeed, Nevada was a first-mover and deserves the credit for adopting this general framework ahead of Delaware. As

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[12] The Delaware court in *Tooley* also explained that "[t]he proper analysis has been and should remain that stated in . . . *Parnes*." 845 A.2d at 1039.

[13] Despite making dramatic statements about New York law in the introduction of their Writ Petition, Defendants cite to just two New York cases in that section, both of which are irrelevant and predate New York's adoption of the *Tooley* test. In *Auerbach v. Bennett*, 393 N.E.2d 994 (N.Y. 1979), the plaintiffs brought a derivative claim for relief and the court did not even address the direct/derivative distinction. (Writ Pet. at 2 n.2.) Even less persuasive, *Davis v. Magavern*, 654 N.Y.S.2d 517 (N.Y. App. Div. 1997), is a two paragraph decision making the obvious ruling that a claim was derivative when brought by stockholders against a corporation's law firm regarding the law firm's advice during a dissolution proceeding.

quoted above, the Supreme Court explained in *Cohen* it was dismissing derivative claims which "[1] seek damages [on behalf of the corporation] for wrongful conduct [2] that caused harm to the corporation." 119 Nev. at 19. That phrase captures the *Tooley* test in reverse order and was articulated by this Court a year prior to *Tooley* itself.

Importantly, when adopting the two-part test in *Tooley*, the Delaware Supreme Court discarded the old "special injury" test. The "special injury" analysis, which was created in a Delaware Court of Chancery decision from 1953, asked whether the injury was a wrong that was "'separate and distinct from that suffered by other shareholders.'" 845 A.2d at 1035-37. When discarding the "special injury" test, the Delaware Supreme Court called it an "amorphous and confusing concept" and held: "In our view, the concept of 'special injury' that appears in some Supreme Court and Court of Chancery cases is not helpful to a proper analytical distinction between direct and derivative actions. We now disapprove the use of the concept of 'special injury' as a tool in that analysis." *Id.* at 1035.

By repeatedly invoking the "special injury" test in their Writ Petition arguments, Defendants ask this Court to disregard clear legal developments in Nevada, Delaware, and New York rejecting that test. Defendants want the Court to go back in time to resurrect an unclear, confusing, and awkward standard from the archives of Delaware corporate jurisprudence. *See, e.g.*, Writ Pet. at 21 ("every single Parametric shareholder had their voting interest reduced in equal proportions and thus there was no 'unique' and 'personal' harm to any one shareholder"); *id.* at 24 ("But a loss in market value of stock is not a unique harm."). The Supreme Court should decline Defendants' invitation and instead continue to apply the

Cohen standard, which has since evolved into the two-part test from *Tooley* utilized by Delaware and New York.[14]

Under *Tooley*, both prongs weigh heavily in favor of these claims being direct. First, Parametric's shareholders at the time of the Merger suffered the harm. The court in *Tooley* noted that the following question is helpful in analyzing the first prong of the analysis: "'Looking at the body of the complaint and considering the nature of the wrong alleged and the relief requested, has the plaintiff demonstrated that he or she can prevail without showing an injury to the corporation?'" 845 A.2d at 1036. The answer is a resounding "yes." Plaintiffs' claims seek redress for their injuries as a result of the unfair 80%/20% valuation on their individual shares pursuant to the Merger. Plaintiffs could still prevail even if Parametric, as an entity, received an overall benefit by obtaining a larger company, Turtle Beach, as a subsidiary through the Merger.[15] It would not matter to Parametric, the entity, if the ratio on the Merger were 80/20, or 50/50, or 99/1, or vice versa, the dilution ratio valuation of stock is an issue that pertains exclusively to shareholders, not the Company. Thus, the undervaluation of their individual shares, the misrepresentations in connection with the Merger, and the public

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[14] The statement in *Cohen* that "harm to the corporation, shared by all stockholders and not related to an individual stockholder" are "derivative in nature," 119 Nev. at 21, is not inconsistent with *Tooley*. If the harm is "to the corporation" rather than stockholders, *Tooley* would demonstrate that the claim is indeed derivative. But "individual stockholders" suffer the harm, as here, the claims are direct under both *Cohen* and *Tooley*. *Id.*

[15] As it turns out, Parametric did not benefit from the Merger. Turtle Beach's current market capitalization currently stands at just less than $130 million (as of two days prior to the filing of this brief) and it stood at just less than $130 million prior to the Merger announcement.

To put this in perspective, prior to the Merger, Parametric shareholders collectively owned 100% of a nearly $130 million company. As a result of the unfair Merger, those same shareholders collectively own less than 20% (less than $27 million) of Turtle Beach. Plaintiffs, however, are not pursuing injury on behalf of the corporation itself and can recover despite the deteriorated current state of the post-Merger entity.

shareholder class's loss of collective control of Parametric are all injuries to the shareholders – those are not injuries to Parametric, or Turtle Beach, the entity. *See, e.g.*, *infoGROUP*, 2011 Del. Ch. LEXIS 147, at *41-*42 ("If the Plaintiff's loyalty claim succeeds, it is the shareholders who would be entitled to compensatory damages for the value they lost when the Company was improperly sold.").

Second, if continued as a direct stockholder class action, the damages recovered in this case will go specifically to Plaintiffs and Parametric's other public stockholders at the time of the Merger. *See* ¶¶3, 9 ("plaintiffs and the shareholder class are entitled to monetary damages including the difference between the Merger valuation and the fair value of their shares"). Again, *Cohen* was ahead of *Tooley* and recognized that on a direct stockholder claim, if a plaintiff "is successful in proving that the merger was the result of wrongful conduct, his monetary damages may include the difference, if any, between the merger price and the fair value of the shares." *Cohen*, 119 Nev. at 14. This result makes sense, as it squares the recovery with those who were injured. On the other hand, if this case were maintained as a derivative action, damages belonging to the individual stockholders would go back to the corporation, *i.e.*, the current version of the acquired entity now called "Turtle Beach." That different current entity is at least 80% controlled by former-Turtle Beach insiders and, thus, the vast majority of the recovery in a derivative case would be usurped by many of the same parties that wrongfully carried out the Merger. Such a result is not supported by logic nor equity and it is squarely rejected by the analysis in *Tooley* and *Cohen*.

When addressing this issue on page 20 of their Writ Petition, Defendants miscite the holding of *AHW Inv. P'ship v. CitiGroup Inc.*, 980 F. Supp. 2d 510, 525 (S.D.N.Y. 2013). The *AHW* decision, however, is fortuitously illuminating on

the *Tooley* test, as it rejects Defendants' argument that a decline in stockholder value is exclusively a derivative claim:

> Conveniently ignoring the second question [of *Tooley*] entirely, defendants contend that because all shareholders suffered when the price of Citigroup stock fell subsequent to the contemplated May 2007 sale, any claim seeking redress for that loss in value is necessarily derivative. This reasoning invokes the bright-line test that *Tooley* "expressly disapprove[d]," *id.* at 1039: that a suit must be maintained derivatively if the injury falls equally upon all stockholders," *id.* at 1037 (abrogating *Bokat v. Getty Oil Co.*, 262 A.2d 246 (Del. 1970)). That bright line and defendants' argument mistake a necessary condition for a sufficient one. "[A] direct, individual claim of stockholders that does not depend on harm to the corporation can also fall on all stockholders equally, without the claim thereby becoming a derivative claim." *Id.* These are two such direct claims. Defendants' contentions to the contrary ignore *Tooley*'s instruction that a "court should look to the nature of the wrong and to whom the relief should go." *Id.* at 1039. . . . To put it simply, plaintiffs, not Citigroup, are the victims of Citigroup and the officer defendants' alleged deception, and therefore plaintiffs are the ones with standing to sue.

AHW, 980 F. Supp. at 516-17. In contrast, in the portion of the opinion that Defendants cite (Writ Pet. at 20 n.12), the *AHW* court dismissed a common law fraud claim because so-called "'paper "los[ses]" . . . are not actually losses for purposes of New York common law fraud injuries.'" 980 F. Supp. at 525-26.[16] In the more pertinent aspect of the opinion, quoted above, the *AHW* court held that the claims in that case were direct, not derivative. *Id.* at 517-19. So too here, the district court properly held that the claims are direct.

D. The Decision in *Sweeney* Is Unpersuasive

Defendants' only authority concerning a Nevada corporation is factually inapposite and does not employ a contemporary legal analysis of the direct/derivative distinction. In *Sweeney*, 2011 U.S. Dist. LEXIS 82872, the court

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[16] Defendants' related cite to *Starr Found. v American Int'l Group, Inc.*, 901 N.Y.S.2d 246 (N.Y. App. Div. 2010) suffers from the same problem. Defendants' cited language references the "paper loss" rule of a New York common law fraud claim and the New York court specifically held that because the fraud claim was insufficient, "we need not reach the question of whether the claim is direct or derivative." *Id.* at 248 n.2.

held that claims brought in the absence of a merger agreement were derivative. The decision is inapposite factually because no merger agreement had been signed in *Sweeney* and there was no merger, valid or invalid, to challenge – the directors had merely announced that they received an offer for all outstanding shares. *Id.* at *2. The court in *Sweeney* also based its decision on the concern that the "impossibly speculative" nature of computing damages was exacerbated where "there has been no sale." *Id.* at *7. However, where a merger is completed, as here, it is axiomatic that a damages computation "may include the difference, if any, between the merger price and the fair value of the shares." *Cohen*, 119 Nev. at 14.

The *Sweeney* decision also does not contain an updated view of direct/derivative jurisprudence in Nevada or Delaware. In its short analysis, *Sweeney* did cite to *Cohen*, but the *Sweeney* decision did not substantively address *Cohen's* description of the difference between a direct and derivative claim. And after citing to a Delaware case, the *Sweeney* decision resurrected the old "special injury" test that has since been discarded in Delaware. The *Sweeney* decision held: "Plaintiff here does not allege any special injury, but only an injury suffered by all shareholders in proportion to their interest in the corporation. The Complaint is therefore derivative." 2011 U.S. Dist. LEXIS 82872, at *8. *Sweeney* is thus unpersuasive factually and legally and should not impact the analysis here.

E. Even if the Merger Is Viewed as a Dilution, the Claims Are Direct, Not Derivative

Defendants seek to avoid *Parnes, Cohen*, and *Tooley* by framing the Merger as a non-merger related dilutive stock issuance. (Writ Pet. at 26-27.) But this re-framing of the transaction still does not change the result here. While the Supreme Court has yet to address the issue, the Delaware Supreme Court has held that stockholders can bring direct claims challenging a dilutive stock issuance, even

where the ultimate transferee and beneficiary is a third party. *See Gatz*, 925 A.2d at 1280-81 (Del. 2007) (quoted above).[17] Likewise, the Delaware Court of Chancery recently held that with respect to a non-merger-related dilutive stock issuance, direct "[s]tanding will also exist if the board that effectuated the transaction lacked a disinterested and independent majority." *Carsanaro*, 65 A.3d at 618. As noted above, the Complaint adequately alleges that a majority of the Parametric Board was conflicted when structuring and voting upon the Merger. *Supra*, §III.C.1.a.-e. Defendants do not contend the trial court was in error for crediting those allegations. *Supra*, §III.B.

Since the motion to dismiss ruling, the Delaware Chancery Court issued an opinion even further cementing the direct nature of a dilution claim accompanied by a breach of the duty of loyalty. In *Nine Sys.*, 2014 Del. Ch. LEXIS 171, the plaintiff stockholders challenged a recapitalization plan that diluted all of the company's non-insider stockholders on a pro rata, equally shared fashion. *Id.* at *68. After a detailed analysis of the law, the Delaware Chancery Court concluded that, with respect to the non-merger related stock issuance, two alternative grounds for direct stockholder standing existed. The first involves a claim of disloyal expropriation by a control group of stockholders. *Id.* at *69-*77. The second

[17] Defendants' citation to *Feldman v. Cutaia*, 951 A.2d 727 (Del. 2008), is inapposite. In that case, the plaintiff did "not attack the Merger price or the process used by the [target] board in obtaining that price." *Id.* at 735. Rather, that plaintiff attacked certain stock option grants which "do[] not relate to the fairness of the merger itself." *Id.* Those allegations exist in stark contrast to the claims here. Defendants' citation to *Penn Mont Secs v. Frucher*, 502 F. Supp. 2d 443, 464 (E.D. Pa. 2007) also does not assist their argument. In that case, the Pennsylvania court recognized that dilution claims are "typically" derivative claims, but noted that: "Delaware law recognizes an exception to this rule when a controlling shareholder causes minority shareholders to lose share value and voting power." *Id.* at 465. The Pennsylvania Court did address the second exception, as recognized by *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618 (Del. Ch. 2013), and *In re Nine Sys. Corp. S'holders Litig.*, No. 3940-VCN, 2014 Del. Ch. LEXIS 171 (Del. Ch. Sept. 4, 2014), which renders these claims direct – a majority-conflicted Board effectuated the dilutive stock issuance for self-interested reasons.

scenario is implicated here: "as an alternative ground, the Plaintiffs may also establish standing by proving that a majority of the Board was conflicted – here, meaning interested or not independent – when it approved and implemented the Recapitalization." *Id.* at *85-*86. This Complaint so alleges. ¶¶23-34.

Consequently, whether the Merger is framed as a merger or whether, for the sake of argument, the Merger is framed as a dilutive stock issuance in which Plaintiffs retained shares in the Company, the claims are still direct and the district court properly denied Defendants' motions to dismiss.

VI. CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that the Court decline to issue a writ.

DATED: January 16, 2015

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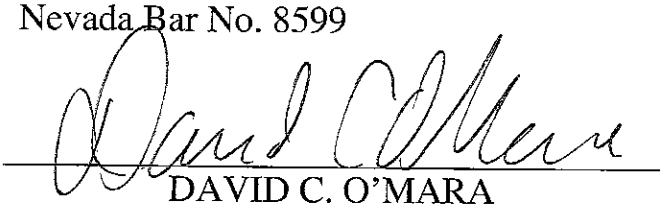

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CERTIFICATE OF COMPLIANCE

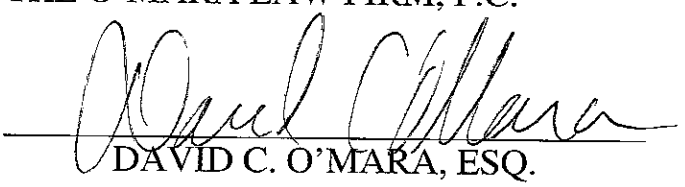
1. I hereby certify that this Answer of Real Parties in Interest to the Petition for Writ of Mandamus or, in the Alternative, Writ of Prohibition, complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this Answer has been prepared in a proportionally spaced typeface using Word in 14 font size and in Times New Roman.

2. I further certify that this Answer complies with the limitations set forth by this Court's Order because, excluding the parts of the Answer exempted by NRAP 32(a)(7)(c), the brief is less than 14,000 words.

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

DATED: January 16, 2015

THE O'MARA LAW FIRM, P.C.



DAVID C. O'MARA, ESQ.

CERTIFICATE OF SERVICE

I hereby certify under penalties of perjury that on this date I served a true and correct copy of the foregoing document by sending the document via email to the addresses listed below.

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DATED: January 16, 2015.

DAVID C. O'MARA

ORDR

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

In re PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION	Lead Case No. A-13-686890-B Dept. No. XI
This Document Relates To: ALL ACTIONS.	CLASS ACTION ORDER REGARDING CLASS CERTIFICATION

This matter concerns the reverse merger wherein VTB Holdings, Inc. ("VTBH") merged into a Parametric Sound Corporation ("Parametric") subsidiary (the "Merger"). Plaintiffs asked this Court to certify this action as a class action within the meaning of Rule 23 of the Nevada Rules of Civil Procedure. Defendants[1] opposed class certification. On Monday, January 7, 2019, this matter came on for hearing. Plaintiffs appeared by and through their counsel of record Randall J. Baron and Timothy Z. LaComb, Esq. of Robbins Geller Rudman & Dowd LLP; Adam Warden of Saxena White P.A.; and David O'Mara, Esq. of The O'Mara Law Firm, P.C. Defendants appeared by and through their counsel of record J. Stephen Peek of Holland & Hart LLP; John P. Stigi III of Sheppard Mullin Richter & Hampton LLP; Joshua D. N. Hess of Dechert LLP; and Richard C. Gordon of Snell & Wilmer LLP. The Court, having reviewed the papers filed by the parties, and considered the written and oral arguments of counsel, finds and orders as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Action Meets the Requirements of NRCP 23(a)

1. Nevada Rule of Civil Procedure 23(a) proscribes the necessary prerequisites for a class action, stating:

[1] The term "Defendants" as used herein refers collectively to Kenneth Potashner, Robert Kaplan, Elwood G. Norris, Seth Putterman, Andrew Wolfe, James L. Honore, VTBH, Stripes Group, LLC ("Stripes Group"), and SG VTB Holdings, LLC ("SG VTB").

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.[2]

2. In determining whether to certify a class, the court should also consider whether a class action is "logistically possible and superior to other actions," and "the court should generally accept the allegations of the complaint as true." *Meyer*, 110 Nev. at 1363-64 (citing *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976)). "[T]he determination to use the class action is a discretionary function wherein the district court must pragmatically determine whether it is better to proceed as a single action, or many individual actions in order to redress a single fundamental wrong." *Deal v. 999 Lakeshore Ass'n*, 94 Nev. 301, 306 (1978). In meeting these requirements, "[a]n extensive evidentiary showing is not required." *Meyer*, 110 Nev. at 1364. As set forth below, this action meets each requirement of NRCP 23(a).

3. The Court determines that "since this an equity expropriation case," it will grant the motion, but limits the Class "to those individuals holding common stock on the day the Merger closed, which is January 15th, 2014."

The "Numerosity" Element Is Satisfied

4. The first requirement of NRCP 23(a) is that "the class is so numerous that joinder of all members is impracticable." NRCP 23(a)(1). Plaintiffs are not required "to state the exact number of class members when the plaintiff's allegations 'plainly suffice' to meet the numerosity requirement." *Gunter v. United Fed. Credit Union*, No. 3:15-CV-00483-MMD-WGC, 2017 WL 4274196, at *4 (D. Nev. Sept. 25, 2017).

5. This action satisfies NRCP 23(a)(1) because, according to the Merger Agreement, there were more than 6.8 million shares of Parametric common stock issued and outstanding. ¶200. These 6.8 million shares were held by hundreds if not thousands of shareholders geographically dispersed across the country. *Id.*

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[2] NRCP 23 is "identical to its federal counterpart." *Meyer v. Eighth Judicial Dist. Court*, 110 Nev. 1357, 1363 (1994).

The "Commonality" Element Is Satisfied

6. The second requirement for class certification under NRCP 23(a) is that there exist "questions of law or fact common to the class." NRCP 23(a)(2).

7. This action satisfies NRCP 23(a)(2) because it identifies several questions of law and/or fact common to the Class, including: (a) whether the Individual Defendants have breached their fiduciary duties of undivided loyalty or independence with respect to Plaintiffs and the other members of the Class in connection with the Merger; (b) whether the Individual Defendants engaged in self-dealing in connection with the Merger; (c) whether the Individual Defendants unjustly enriched themselves and other insiders or affiliates of Parametric; (d) whether the Individual Defendants have breached any of their other fiduciary duties to Plaintiffs and the other members of the Class in connection with the Merger, including the duties of good faith, diligence, honesty and fair dealing; and (e) whether the Defendants, in bad faith and for improper motives, impeded or erected barriers to discourage other offers for the Company or its assets. ¶201.

The "Typicality" Element Is Satisfied

8. The third requirement under NRCP 23(a) is that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." NRCP 23(a)(3). Typicality is satisfied where '"each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability.'" *Jane Roe Dancer I-VII v. Golden Coin, Ltd.*, 124 Nev. 28, 35 (2008) (quoting *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 848-49 (2005)). Typicality generally "concentrates on the defendants' actions, not on the plaintiffs' conduct. Thus, defenses that are unique to a representative party will rarely defeat this prerequisite, unless they 'threaten to become the focus of the litigation.'" *Id.* "[T]he representatives' claims need not be identical, and class action certification will not be prevented by mere factual variations among class members' underlying individual claims." *Id.*

9. In addition, reliance is not an issue in this case, as "[t]he law is settled that there is no reliance requirement in a claim for breach of a fiduciary duty of disclosure." *In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319, 327 n.10 (Del. 1993); *Turner v. Bernstein*, 768 A.2d 24, 31 (Del. Ch. 2000). In other words, "defendant-directors either did or did not breach their fiduciary duty of

disclosure to all or none of the stockholders . . . if the defendant-directors did commit such a breach . . . there is no requirement that any member of the Proposed Class have actually relied upon such breach in order to benefit from a remedy." *Id.*

10. Plaintiffs satisfy NRCP 23(a)(3) because they – like all members of the Class – were allegedly damaged by the same breaches of fiduciary duty by Defendants. As a result, the injuries to the Class all arise from the same course of conduct by Defendants in conjunction with the Merger. Moreover, in order to obtain relief, Plaintiffs and each member of the Class will be required to prove the same set of facts based on the same applicable law. "Typicality" is therefore satisfied for Plaintiffs.

The "Adequacy" Element Is Satisfied

11. The fourth requirement under Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." NRCP 23(a)(4). To satisfy the adequacy requirement, "the class representative must have the same interest in the outcome of the litigation and have the same injury as the other class members." *Golden Coin*, 124 Nev. at 35. This inquiry serves "to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods. v. Windsor*, 521 U.S. 591, 625 (1997) (citing *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 157-58 n.13 (1982)). When a plaintiff "understands his duties and is currently willing and able to perform them," Rule 23(a)(4) "does not require more." *Local Joint Exec. Bd. of Culinary/Bartender Tr. Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001).

12. Plaintiff Kearney IRRV Trust satisfies NRCP 23(a)(4) because it is a member of the Class and will fairly and adequately protect the interests of the Class. Plaintiff Kearney IRRV Trust understands its duties to the Class; produced hundreds of pages of documents; sat for a deposition; hired expert and experienced counsel; communicated with said counsel regarding the litigation; vigorously litigated this action to date; and believes in the merits of its claim. Nothing more is required. In addition, to prove damages, Plaintiff Kearney IRRV Trust will be forced to prove damages to the rest of the Class as well, and the damages alleged by it are not particularized in any way. Plaintiff Grant Oakes, on the other hand, does not satisfy NRCP 23(a)(4) because he did not hold Parametric stock on January 15, 2014 and is therefore not a member of the Class.

13. Plaintiffs' counsel – Robbins Geller Rudman & Dowd LLP and Saxena White P.A. – is qualified, has experience litigating complex merger-related class actions on behalf of target shareholder classes, and has stated that it has the resources available to them to litigate this action.

Neither Plaintiff Kearney IRRV Trust nor Class Counsel Face a Conflict of Interest

14. "[T]he case law is virtually unanimous in holding that one counsel can represent a stockholder bringing both an individual and a derivative action." *In re Dayco Corp. Deriv. Sec. Litig.*, 102 F.R.D. 624, 630 (D. Ohio 1984). *See also In re Ebix, Inc. S'holder Litig.*, No. 8526-VCN, 2014 WL 3696655, at *18 (Del. Ch. July 24, 2014); *see also, e.g.*, *TCW Tech. Ltd. P'ship v. Intermedia Commc'ns, Inc.*, No. 18289, 2000 WL 1654504, at *4 (Del. Ch. Oct. 17, 2000); *Loral Space & Commc'ns, Inc. v. Highland Crusader Offshore Partners, L.P.*, 977 A.2d 867, 870 (Del. 2009); *Veros Software, Inc. v. First America Corp.*, No. 06-1130 JVS, 2008 WL 11338610, at *6 (C.D. Cal. June 13, 2008); *Keyser v. Commonwealth Nat'l Fin. Corp.*, 120 F.R.D. 489, 490 (M.D. Pa. 1988); *In re TransOcean Tender Offer Sec. Litig.*, 455 F. Supp. 999, 1013-15 (N.D. Ill. 1978).

15. The "'theoretical conflict of interest'" created by concurrently litigating direct and derivative claims is "not rooted in the realities of most individual and derivative suits, which usually are 'equally contingent upon the proof of the same nucleus of facts.'" *Dayco*, 102 F.R.D. at 630 (quoting *Bertozzi v. King Louie Int'l, Inc.*, 420 F. Supp. 1166, 1180 (D.R.I. 1976)). "Typically, ***both*** such suits will attack some sort of alleged misconduct by corporate management, and diligent counsel can hardly be expected not 'to attack all fronts with equal vigor.'" *Id.* (emphasis in original).

16. Plaintiff Kearney IRRV Trust and its counsel do not face a conflict of interest in this action. Both the direct and derivative claims are largely based on the same nucleus of facts. And Plaintiff Kearney IRRV Trust and its counsel have vigorously litigated both sets of claims to date.

This Action Satisfies NRCP 23(b)

17. This action also satisfies NRCP 23(b). In addition to satisfying the requirements of NRCP 23(a), an action must be "maintainable" as a class action under NRCP 23(b). Rule 23(b)(3) provides:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . . (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

18. Here, common questions of fact and law related to the actions of Defendants in connection with the subject transaction predominate over the entirety of this action in satisfaction of NRCP 23(b)(3). As such, trying this action as a class action will promote efficiencies of time, effort and expense and will thus ensure the fair and efficient adjudication of the controversy.

19. Defendants also contested the availability of classwide relief in this case. However, Plaintiffs set forth a number of available remedies to the Class in this case, as specified in Plaintiffs' Supplemental Rule 16.1 Disclosure Statement Regarding Available Damages.

Approval of the Notice of Pendency of Class Action

20. Nevada Rule of Civil Procedure 23(c)(2) provides: "[i]n any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through the member's counsel."

21. The Court hereby approves the Notice of Pendency of Class Action attached hereto as Exhibit A, which complies with NRCP 23(c)(2), with the exception that the Notice does not provide a specific date for exclusion requests to be filed, which date will be 45 days after the date that the Notice is mailed to class members.

ORDER

BASED UPON THE FOREGOING, THE COURT HEREBY ORDERS, ADJUDGES AND DECREES as follows:

1. Plaintiffs' Motion for Class Certification is GRANTED in part and DENIED in part. Pursuant to Rule 23 of the Nevada Rules of Civil Procedure, the Court certifies an equity expropriation class in this case consisting of::

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

2. Plaintiff Kearney IRRV Trust is appointed as representative of the Class.

3. Robbins Geller Rudman & Dowd LLP and Saxena White P.A. are appointed as Lead Counsel for the Class and The O'Mara Law Firm, P.C. is appointed Liaison Counsel for the Class.

DATED: January 18, 2019.

THE HONORABLE ELIZABETH GONZALEZ
EIGHTH JUDICIAL DISTRICT COURT

THE O'MARA LAW FIRM, P.C.
DAVID C. O'MARA (Nevada Bar No. 8599)
311 East Liberty Street
Reno, NV 89501
Telephone: 775/323-1321
775/323-4082 (fax)

Liaison Counsel for Plaintiffs

[Additional counsel appear on signature page.]

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

In re PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION	Lead Case No. A-13-686890-B Dept. No. XI
	CLASS ACTION
This Document Relates To: ALL ACTIONS.	JOINT STIPULATED [PROPOSED] NOTICE OF PENDENCY OF CLASS ACTION (TO CLASS)

Exhibit "A"

TO: All holders of Parametric Sound Corporation ("Parametric") common stock who held shares on January 15, 2014, at the time Parametric issued shares in the Merger pursuant to the Agreement and Plan of Merger.[1] Excluded from the Class are Defendants, executive officers of Parametric as of January 15, 2014, and their legal representatives, heirs, successors-in-interest, transferees, and assignees (the "Excluded Parties").[2]

1. This Notice is given pursuant to Rule 23(c) of the Nevada Rules of Civil Procedure and pursuant to an Order of the Eighth Judicial District Court for the State of Nevada, County of Clark (the "Court"). This Notice is not an expression of any opinion by the Court as to the merits of any of the claims or defenses asserted by any party in this litigation. Moreover, this Notice is not intended to suggest any likelihood that Plaintiffs or any other Class member will obtain any relief. If there is any monetary recovery in the form of damages, Class members may be entitled to share in the proceeds, less such costs, expenses, and attorneys' fees as the Court may allow. The purpose of this Notice is to inform you of the pendency of this lawsuit, how it may affect your rights, and what steps you may take in relation to it.

2. A class action lawsuit is a lawsuit in which one or more persons sue on behalf of themselves and others who have similar claims. This litigation is a class action on behalf of all holders of Parametric common stock on January 15, 2014, at the time Parametric issued shares in the Merger pursuant to the Agreement and Plan of Merger, excluding the Excluded Parties. Plaintiff Kearney IRRV Trust is the Class Representative. Defendants are the former members of the Parametric Board and certain entities involved in the Merger.

3. Plaintiffs' Amended Class Action and Derivative Complaint (the "Complaint") alleges (i) that the Individual Defendants breached their fiduciary duties to Plaintiffs and the Class involving fraud and/or intentional misconduct in connection with the reverse merger wherein VTBH

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[1] "Merger" refers to the reverse merger wherein VTB Holdings, Inc. ("VTBH") merged into a Parametric subsidiary.

[2] "Defendants" as used herein refers collectively to Kenneth Potashner, Robert Kaplan, Elwood G. Norris, Seth Putterman, Andrew Wolfe, James L. Honore, VTBH, Stripes Group, LLC ("Stripes Group"), and SG VTB Holdings, LLC ("SG VTB"). Stripes Group and SG VTB are sometimes collectively referred to as "Stripes."

merged into a Parametric subsidiary; (ii) that VTBH and Stripes aided and abetted the Individual Defendants' breaches; and (iii) that Defendants' actions injured Parametric stockholders. Defendants filed an answer denying all material allegations in the Complaint and have asserted affirmative defenses thereto.

4. On _____, 2019, the Court entered an order that this action may be maintained as a class action and defined the Class as follows:

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

5. All nominees who were holders of Parametric common stock on January 15, 2014, at the time Parametric issued shares in the Merger pursuant to the Agreement and Plan of Merger, and are not an Excluded Party are requested to send this Notice to all such beneficial owners no later than ten days after receipt of this Notice. Additional copies of this Notice will be provided to such nominees upon written request sent to the address identified in Paragraph 4 below. In the alternative, all nominees are requested to send an unduplicated list of names and addresses of such beneficial owners to the address identified in Paragraph 4 below. The Notice Administrator will thereafter mail copies of this Notice directly to all such beneficial owners. Plaintiffs' counsel offers to pay the reasonable cost of preparing an unduplicated list of names and addresses of such beneficial owners or of forwarding this Notice to beneficial owners in those cases where a nominee elects to forward this Notice rather than provide a list of names and addresses to the Notice Administrator.

NOW THEREFORE, TAKE NOTICE:

1. If you were a holder of Parametric common stock on January 15, 2014, at the time Parametric issued shares in the Merger pursuant to the Agreement and Plan of Merger, and are not an Excluded Party then you are a member of the Class unless you request exclusion therefrom as provided in Paragraph 3 below.

2. All members of the Class who do not request to be excluded will be bound by any judgment, whether or not favorable to the Class. ***If you wish to remain a member of the Class, you need do nothing*** and your rights in this lawsuit will be represented by Co-Lead Counsel for Plaintiffs and the Class, Robbins Geller Rudman & Dowd LLP, 655 W. Broadway, Suite 1900, San Diego, CA 92101, and Saxena White P.A., 150 E Palmetto Park Rd., Boca Raton, FL 33432. ***If you wish, you may enter an appearance through your own counsel at your own expense.***

3. You may request to be excluded from the Class by mailing a written request for exclusion, addressed to *In re Parametric Sound Corporation Shareholders' Litigation*, EXCLUSIONS, c/o Gilardi & Co. LLC, 3301 Kerner Blvd., San Rafael, CA 94901, postmarked on or before _____, setting forth your name and address. Persons who request exclusion will not be entitled to share in the benefits of any judgment or settlement nor will they be bound by any settlement or judgment. If you elect to be excluded from the Class, you may pursue, at your own expense, whatever legal rights you may have.

4. All communications regarding this Notice should be made in writing, should refer to the name and number of this action – *In re Parametric Sound Corporation Shareholders' Litigation*, Lead Case No. A-13-686890-B, and should be addressed to:

In re Parametric Sound Corporation Shareholders' Litigation
c/o Gilardi & Co. LLC
3301 Kerner Blvd.
San Rafael, CA 94901

DO NOT TELEPHONE THE CLERK OF THE COURT REGARDING THIS NOTICE.

DATED: _____

_____
HON. ELIZABETH GONZALEZ
EIGHTH JUDICIAL DISTRICT COURT

THE O'MARA LAW FIRM, P.C.
DAVID C. O'MARA (Nevada Bar No. 8599)
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Telephone: 775/323-1321
775/323-4082 (fax)

Liaison Counsel for Plaintiffs

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

In re PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION	Lead Case No. A-13-686890-B Dept. No. XI
This Document Relates To: ALL ACTIONS.	CLASS ACTION [PROPOSED] ORDER PRELIMINARILY APPROVING SETTLEMENT AND PROVIDING FOR NOTICE

WHEREAS, a consolidated class and derivative action is pending before this Court entitled *In re Parametric Sound Corporation Shareholders' Litigation*, Lead Case No. A-13-686890-B (the "Litigation");

WHEREAS, on January 18, 2019, the Court certified the following class pursuant to Rule 23 of the Nevada Rules of Civil Procedure:

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

WHEREAS, Plaintiffs Kearney IRRV Trust and Lance Mykita ("Plaintiffs") have made a motion for an order preliminarily approving the settlement of this Litigation. Defendants do not oppose the motion. In accordance with a Stipulation of Settlement dated November 14, 2019 (the "Stipulation"), which, together with the Exhibits annexed thereto, sets forth the terms and conditions for a proposed Settlement of the Litigation between the Settling Parties and for dismissal of the Litigation against the Defendants with prejudice upon the terms and conditions set forth therein; and the Court having read and considered the Stipulation and the Exhibits annexed thereto; and

WHEREAS, only a single objector, Barry Weisbord, filed an opposition to the Motion for Preliminary Approval of the Settlement.

WHEREAS, unless otherwise defined, all terms used herein have the same meanings as set forth in the Stipulation.

NOW, THEREFORE, after reviewing Plaintiffs' motion, Objector Weisbord's opposition, Plaintiffs' and Defendants reply in support of preliminary approval, and argument at the hearing on January 13, 2020, IT IS HEREBY ORDERED:

1. The Court has reviewed all the pleadings and attached exhibits, and the Stipulation and finds that the Stipulation resulted from arm's-length negotiations, and does hereby preliminarily approve the Stipulation and Settlement set forth therein as being fair, reasonable and

adequate to Class Members and the Company subject to further consideration at the hearing described in ¶2 below.

2. A hearing shall be held before this Court on May 18, 2020, at 9 a.m. (the "Final Approval Hearing"), before the Honorable Elizabeth Gonzalez of the Eighth Judicial District Court of Clark County, Nevada, 200 Lewis Avenue, Las Vegas, Nevada, Courtroom 3E, to determine whether the proposed Settlement is fair, reasonable, and adequate and should be approved by the Court; to determine whether an Order and Final Judgment as provided in ¶1.14 of the Stipulation should be entered; to determine whether the proposed Plan of Allocation should be approved; to determine the amount of fees and expenses that should be awarded to Plaintiffs' Counsel; to determine any reimbursement to Plaintiffs; to hear any objections by Class Members or Merger Stockholders to the Settlement or Plan of Allocation, the award of fees and expenses to Plaintiffs' Counsel and/or reimbursement to Plaintiffs; and to consider such other matters the Court deems appropriate. The Court may vacate and reschedule the Final Approval Hearing depending on whether an objection is filed in this case.

3. The Court approves the form, substance, and requirements of the Notice of Proposed Settlement of Class and Derivative Action ("Notice") and Proof of Claim and Release form, substantially in the forms annexed hereto as Exhibits A-1 and A-2, respectively.

4. The Court approves the form of the Summary Notice, substantially in the form annexed hereto as Exhibit A-3.

5. The firm of Gilardi & Co. LLC ("Claims Administrator") is hereby appointed to supervise and administer the notice procedure as well as the processing of claims as more fully set forth below.

6. Not later than five (5) business days from entry of this Order, if they have not already done so, Defendants shall obtain and provide to Co-Lead Counsel, or the Claims Administrator, transfer records in electronic searchable format containing the names and addresses of all Persons who are Class Members.

7. Not later than February 4, 2020 (the "Notice Date") the Claims Administrator shall cause a copy of the Notice and Proof of Claim and Release form, substantially in the forms annexed

hereto, to be mailed by First-Class Mail to all Class Members who can be identified with reasonable effort and to be posted on its website at www.ParametricShareholderLitigation.com.

8. Not later than February 14, 2020, the Claims Administrator shall cause the Summary Notice to be published once in the national edition of *The Wall Street Journal* and once over a national newswire service.

9. Not later than April 27, 2020 Co-Lead Counsel shall serve on Defendants' counsel and file with the Court proof, by affidavit or declaration, of such mailing and publishing.

10. Nominees who held Parametric common stock on January 15, 2014 for the beneficial ownership of Class Members shall be requested to send the Notice and Proof of Claim and Release form to such beneficial owners of Parametric common stock within fifteen (15) calendar days after receipt thereof, or, send a list of the names and addresses of such beneficial owners to the Claims Administrator within fifteen (15) calendar days of receipt thereof, in which event the Claims Administrator shall promptly mail the Notice and Proof of Claim and Release form to such beneficial owners.

11. The form and content of the notice program described herein and the methods set forth herein for notifying the Class/Merger Stockholders of the Settlement and its terms and conditions, the Fee and Expense Application, and the Plan of Allocation meet the requirements of Rules 23 and 23.1 of the Nevada Rules of Civil Procedure, and due process, constitute the best notice practicable under the circumstances, and shall constitute due and sufficient notice to all Persons entitled thereto.

12. All fees, costs, and expenses incurred in notifying Class Members/Merger Stockholders shall be paid from the Settlement Fund and in no event shall any of the Released Defendant Parties bear any responsibility for such fees, costs or expenses. All members of the Class (except Persons who request exclusion pursuant to ¶16 below) shall be bound by all determinations and judgments in the Litigation concerning the Settlement, including, but not limited to, the releases provided for therein, whether favorable or unfavorable to the Class, regardless of whether such Persons seek or obtain by any means, including, without limitation, by

submitting a Proof of Claim and Release form or any similar document, any distribution from the Settlement Fund or the Net Settlement Fund.

13. Class Members/Merger Stockholders who wish to participate in the Settlement shall complete and submit the Proof of Claim and Release form in accordance with the instructions contained therein. Unless the Court orders otherwise, all Proofs of Claim and Release must be postmarked or submitted electronically no later than June 3, 2020 (a date one hundred and twenty (120) calendar days from the Notice Date). Any Class Member/Merger Stockholder who does not submit a Proof of Claim and Release within the time provided shall be barred from sharing in the distribution of the proceeds of the Net Settlement Fund, unless otherwise ordered by the Court, but shall nevertheless be bound by any final judgment entered by the Court. Notwithstanding the foregoing, Co-Lead Counsel shall have the discretion (but not the obligation) to accept late-submitted claims for processing by the Claims Administrator so long as distribution of the Net Settlement Fund is not materially delayed thereby. No person shall have any claim against the Plaintiffs, Co-Lead Counsel, Plaintiffs' Counsel or the Claims Administrator by reason of the decision to exercise or not exercise such discretion.

14. The Proof of Claim and Release submitted by each Class Member/Merger Stockholder must, unless otherwise ordered by the Court: (i) be properly completed, signed and submitted in a timely manner in accordance with the provisions of the preceding paragraph; (ii) be accompanied by adequate supporting documentation, in the form of broker confirmation slips, broker account statements, an authorized statement from the broker, or such other documentation deemed adequate by Co-Lead Counsel or the Claims Administrator; (iii) include in the Proof of Claim and Release a certification of current authority to act on behalf of the Class Member if the person executing the Proof of Claim and Release is acting in a representative capacity; (iv) be complete and contain no material deletions or modifications of any of the printed matter contained therein; and (v) be signed under penalty of perjury.

15. Any member of the Class may enter an appearance in the Litigation, at his, her, or its own expense, individually or through counsel of their own choice. If they do not enter an appearance, they will be represented by Co-Lead Counsel.

16. Any Person falling within the definition of the Class may, upon request, be excluded or "opt out" from the Class. Any such Person must submit to the Claims Administrator a request for exclusion ("Request for Exclusion"), by First-Class Mail such that it is received no later than May 4, 2020. A Request for Exclusion must be signed and state: (a) the name, address, and telephone number of the Person requesting exclusion; (b) the number of shares of Parametric common stock the Person held on January 15, 2014; and (c) that the Person wishes to be excluded from the Class. All Persons who submit valid and timely Requests for Exclusion in the manner set forth in this paragraph shall have no rights under the Stipulation, shall not share in the distribution of the Net Settlement Fund, and shall not be bound by the Stipulation or any final judgment.

17. Co-Lead Counsel shall cause to be provided to Defendants' counsel copies of all Requests for Exclusion and a list of all Class Members who have requested exclusion, and any written revocation of Requests for Exclusion, as expeditiously as possible and in any event no later than May 13, 2020.

18. Any member of the Class and/or Merger Stockholder may appear and object if he, she, or it has any reason why the proposed Settlement of the Litigation should not be approved as fair, reasonable and adequate, or why a judgment should not be entered thereon, why the Plan of Allocation should not be approved, why fees and expenses should not be awarded to Co-Lead Counsel or Plaintiffs; provided, however, that no Class Member or any other Person shall be heard or entitled to contest the approval of the terms and conditions of the proposed Settlement, or, if approved, the Judgment to be entered thereon approving the same, or the order approving the Plan of Allocation, or any fees and expenses to be awarded to Co-Lead Counsel or Plaintiffs, unless written objections and copies of any papers and briefs are received by: Robbins Geller Rudman & Dowd LLP, David Knotts, 655 West Broadway, Suite 1900, San Diego, CA 92101; Sheppard, Mullin, Richter & Hampton LLP, John P. Stigi III, 1901 Avenue of the Stars, Suite 1600, Los Angeles, CA 90067; and Dechert LLP, Joshua D. N. Hess, 1900 K Street, NW, Washington, DC 20006-1110; no later than May 4, 2020, and said objections, papers and briefs are filed with the Court, no later than May 4, 2020. Any member of the Class/Merger Stockholder who does not

make his, her, or its objection in the manner provided for herein shall be deemed to have waived such objection and shall forever be foreclosed from making any objection to the fairness, reasonableness, or adequacy of the proposed Settlement as incorporated in the Stipulation, to the Plan of Allocation, and to the Fee and Expense Application, unless otherwise ordered by the Court. Attendance at the Final Approval Hearing is not necessary. The Court will conduct a hearing within three (3) days of when an objection is filed. Any such objector shall have an additional five (5) days after the relevant objection hearing to submit a Request for Exclusion pursuant to paragraph 16 above. Class Members/Merger Stockholders do not need to appear at the Final Approval Hearing or take any other action to indicate their approval of the Settlement.

19. All funds held by the Escrow Agent shall be deemed and considered to be in *custodia legis* of the Court, and shall remain subject to the jurisdiction of the Court, until such time as such funds shall be distributed pursuant to the Stipulation and/or further order(s) of the Court.

20. All papers in support of the Settlement, Plan of Allocation, any application by Co-Lead Counsel for attorneys' fees and expenses, and any application for reimbursement to Plaintiffs shall be filed and served no later than April 19, 2020 and any supplemental papers shall be filed and served no later than May 11, 2020.

21. Defendants shall have no responsibility for the Plan of Allocation or any application for attorneys' fees and expenses submitted by Co-Lead Counsel or Plaintiffs, and such matters will be considered separately from the fairness, reasonableness, and adequacy of the Settlement.

22. At or after the Final Approval Hearing, the Court shall determine whether the Plan of Allocation proposed by Co-Lead Counsel and any application for attorneys' fees and expenses, should be approved.

23. All reasonable expenses incurred in identifying and notifying Class Members as well as administering the Settlement Fund shall be paid as set forth in the Stipulation. In the event the Court does not approve the Settlement, or it otherwise fails to become effective, none of the Plaintiffs nor any of Plaintiffs' Counsel shall have any obligation to repay any amounts actually and properly incurred or disbursed pursuant to ¶¶2.7 or 2.8 of the Stipulation.

24. Neither the Stipulation, nor any of its terms or provisions, nor any of the negotiations, discussions, proceedings connected with it, nor any act performed or document executed pursuant to or in furtherance of the Stipulation or the Settlement may: be construed as an admission or concession by any of the Released Defendant Parties, any of the Plaintiffs, any Class Member, or any other Person, of the truth or lack of truth of any of the allegations in the Litigation; or be used in any way as an admission, concession or evidence of the existence or the absence of any liability or damages as to any claim alleged or asserted in the Litigation; or be otherwise used by any person in the Litigation, or in any other action or proceeding, whether civil, criminal, or administrative, in any court, administrative agency, or other tribunal, except in connection with any proceeding to enforce the terms of the Stipulation. The Released Defendant Parties and/or Plaintiffs may file the Stipulation of Settlement, the final Court approval of the Settlement, and/or the Order and Final Judgment in any action that may be brought against them in order to support a defense or counterclaim based upon principles of *res judicata*, collateral estoppel, release, good faith settlement, judgment bar or reduction, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim, or as necessary for the prosecution of any other litigation regarding the Merger.

25. All proceedings in the Litigation are stayed until further order of this Court, except as may be necessary to implement the Settlement or comply with the terms of the Stipulation.

26. The Court reserves the right to alter the time or the date of the Final Approval Hearing without further notice to the Class Members/Merger Stockholders, provided that the time or the date of the Final Approval Hearing shall not be set at a time or date earlier than the time and date set forth in ¶2 above, and retains jurisdiction to consider all further applications arising out of or connected with the proposed Settlement. The Court may approve the Settlement, with such modifications as may be agreed to by the Settling Parties, if appropriate, without further notice to the Class.

27. If the Settlement fails to become effective as defined in the Stipulation or is terminated, then, in any such event, the Stipulation, including any amendment(s) thereof, except as expressly provided in the Stipulation, and this Order shall be null and void, of no further force

or effect, and without prejudice to any Settling Party, and may not be introduced as evidence or used in any actions or proceedings by any person or entity against the Settling Parties, and they shall be deemed to have reverted to their respective litigation positions in the Litigation as of October 11, 2019.

IT IS SO ORDERED.

DATED: 17 Jan 2020

THE HONORABLE ELIZABETH GONZALEZ
EIGHTH JUDICIAL DISTRICT COURT

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

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~~EIGHTH JUDICIAL~~ **DISTRICT COURT**

CLARK COUNTY, NEVADA

~~In re PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION~~	PAMPT LLC, ~~)~~Plaintiff, ~~)~~- v - KENNETH POTASHNER, ELWOOD G. NORRIS, SETH PUTTERMAN, ROBERT KAPLAN, ANDREW WOLFE,

~~Lead~~ Case No. ~~A-13-686890-B~~

Dept. No. ~~XI~~:

~~CLASS ACTION~~**COMPLAINT**

DEMAND FOR JURY TRIAL

(Business Court Requested Per EDCR 1.61)

	KENNETH FOX, JUERGEN STARK, VTB HOLDINGS, INC., STRIPES f/k/a STRIPES GROUP, LLC and SG VTB HOLDINGS, LLC, Defendants.)	**EXEMPT FROM ARBITRATION PER NAR 3(A): AMOUNT IN CONTROVERSY OVER $50,000**
~~This Document Relates To:~~ ~~ALL ACTIONS.~~	~~)~~ ~~)~~ ~~)~~ ~~)~~ ~~)~~	~~AMENDED CLASS ACTION AND DERIVATIVE COMPLAINT~~ ~~DEMAND FOR JURY TRIAL~~

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I. ~~I.~~ INTRODUCTION

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

~~1. This is a direct stockholder action brought by Grant Oakes and Kearney IRRV Trust on behalf of the holders of Parametric Sound Corporation ("Parametric" or "PAMT") common stock at the time of the Merger (defined below) against its then-current Board of Directors (the "Board" or the "Parametric Board"), VTB Holdings, Inc. ("VTBH"), Stripes Group, LLC ("Stripes Group"), and SG VTB Holdings, LLC ("SG VTB").~~

~~2. This is also a stockholder derivative action brought by Lance Mykita on behalf of nominal defendant Turtle Beach Corporation ("Turtle Beach" or the "Company") for breach of the fiduciary duties of loyalty and good faith, gross mismanagement, abuse of control, and corporate waste against the Parametric Board, and for aiding and abetting against VTBH, Stripes Group, and SG VTB.~~[1]

2. ~~3.~~ The Merger. Defendants designed the transaction as a dilutive reverse merger wherein the privately-held VTBH merged into a Parametric subsidiary, at which time Stripes Group obtained control over the post-close entity ~~(the "Merger").~~ Defendants announced the Merger on August 5, 2013, and the transaction closed on January 15, 2014. Immediately after close of the Merger, Parametric issued millions of highly dilutive shares to Stripes Group and VTBH insiders, the net effect being that Stripes controlled approximately 81% of the post-Merger Company. Meanwhile, Parametric shareholders, who owned a combined 100% of the

~~[1] As used herein, "Parametric" refers to the publicly traded entity in the time period leading up to, and including, the consummation of the Merger. Thus, "Parametric Board" or the "Board" refers to the Parametric board of directors at the time of the Merger. Several months after the Merger, Parametric was renamed "Turtle Beach Corporation:" Where applicable, Stripes Group and SG VTB are collectively referred to herein as "Stripes."~~

Company before the Merger, were reduced to a minority 19% interest in the post-Merger Company. On May 27, 2014, the Company changed its name from "Parametric Sound Corporation" to "Turtle Beach Corporation." ("Turtle Beach" or the "post-Merger Company").

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

4. ~~5. Today, the Company's stock price sits at a **$0.57 per share** (as of its close on~~As of November 28, 2017~~)~~, the Turtle Beach's stock closed at $0.57 per share. In other words, each Parametric stockholder ~~continuing to hold~~who held shares of as of that date lost over 96% of the value of his or her investment as a result of the Merger. This decline represents over $100 million in destroyed market value between pre-Merger Parametric and the post-Merger entity.

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

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

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

8. Evidence of VTBH's financial decline emerged shortly after the Merger. As disclosed by the post-Merger Company the day after the Merger, VTBH's main lender, PNC

Bank, National Association ("PNC"), forced VTBH to restructure its credit facility at extremely unfavorable terms in response to VTBH's worsening fmancial condition. VTBH also borrowed an additional $7 million from SG VTB (at a rate of 10% per annum until December 31, 2014 and 20% per annum for all periods thereafter) to pay down existing debt. The severity of VTHB' s financial condition preceding the Merger is illustrated by the fact that it missed its projected EBITDA target for 2013 by ***61%*** ($13.852 million actual compared to $36 million estimated midpoint).

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

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

11. ~~6.~~ This ~~remarkable destruction of value was not an accident, nor was it the result of unforeseen problems. Stripes knew that VTBH was under severe financial distress, but forced the deal in order to gain liquidity via~~ , and other evidence described below, shows that Fox, Stark, Stripes Group, SG VTB, and VTBH knowingly participated in the Parametric Board's actual fraud related to the dilutive stock issuance to gain access to the public markets ~~at the expense of Parametric stockholders~~. Since the Merger, Stripes Group insiders have used their control to usurp the Company's ~~publicly traded~~publicly-traded status and extract tens of millions of dollars for themselves, while the Company sinks.

12. Indeed, contemporaneously with the Merger, Stripes Group, Stark, and Fox caused the Company to borrow money from them at exorbitant interest rates to pay down debt held by VTBH from before the Merger. By January 15, 2014, the entirety of the term loan held by VTBH's main lender, PNC, which bore an interest rate of 5.50% to 6.50%, was replaced by notes held by Stripes Group, Stark, Fox, and other insiders at interest rates three times greater.

The only reason why VTBH replaced its term loan debt with these notes at such an exorbitant interest rates was to benefit the insiders at the expense of Parametric's shareholders, including Plaintiff.

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

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

~~7. Throughout the Merger process, Stripes manipulated, encouraged, and emboldened improper and selfish conduct by Parametric's corporate fiduciaries.~~ Kenneth Potashner, Parametric's CEO ("Potashner") and the full Board knew of VTBH's financial problems, but concealed the facts from Parametric stockholders and completed the deal regardless. ~~Here, however, defendants' misconduct is best described in the contemporaneous statements, emails, and words of the defendants themselves, including the following:~~

~~8. Defendant and Parametric Board member Robert Kaplan ("Kaplan"), regarding Parametric's Chief Executive Officer ("CEO") during Merger negotiations: "Ken [Potashner] is totally conflicted, ignored his fiduciary responsibility to our shareholders, and has been negotiating constantly for his own self-interest."[2]~~

~~9. Defendant and Parametric Board member Elwood G. Norris ("Norris") pleading with Potashner during Merger negotiations: "Please start acting like you are working for PAMT, not yourself'!"[3]~~

~~10. Defendant and Parametric CEO Potashner regarding his expectation of personal benefit from the Merger: "[The] whole reason that I entered into the deal in the first place [was]~~

~~[2] PAMTNV0112517.~~

~~[3] PAMTNV0112541.~~

[t]o build a multi-billion dollar [subsidiary] and benefit from it. . . . My intent was to sell PAMT at the right time and keep [the subsidiary] as the foundation of a new company."[4]

11. Defendant and Parametric Board member Kaplan requesting personal payouts for voting on the Merger: "I think the BoD should pass a resolution giving some kind of healthy golden parachutes to all the BoD members upon their termination, e.g., stock options . . . . My real suggestion is to have an average of all the executive bonuses and that figure is what the IDs [Independent Directors] should get. Ken [Potashner] has granted himself rather large bonuses. This will get even with him, not that I want to get even, I really just want equality."[5]

12. Kaplan, regarding Potashner's unilateral Merger discussions with the VTBH: "I feel we [the Board] have been left in the dark and have had misrepresentations presented to us."[6]

13. Potashner, regarding his suppression of positive company announcements in order to create a manipulated premium on the Merger: "[Stripes'] preference is that we don't defend the stock in that premium on deal will look better. . . . Withholding licens[ing] deals and announcements is contrary to the responsibility that I have."[7]

14. Potashner writing to Stripes regarding his stalling of licensing partners during the Merger process (which he continued to stall): "My stock is taking a beating due to me deferring signing licensing deals. Any ideas? . . . I am still in a precarious situation delaying licenses that [would otherwise] bring us economic value and valuation."[8]

15. Potashner upon learning (but not disclosing to stockholders) of VTBH' s distressed financial state: "The biggest issue outstanding in my mind is an issue concerning $12M of debt that VTB [H] has that was not disclosed to us at the time we negotiated the exchange rates. . . . I believe this is indication that their balance sheet wasn't as strong as they represented and we should get something as an offset. . . . I think we (PAMT) are under tremendous pressure in that the [VTBH] numbers keep getting softer, the apparent lack of

[4] VTBH017661; VTBH000124.

[5] PAMT0033288; PAMT0072292.

[6] PAMT0033243.

[7] VTBH001759; PAMT0040595.

[8] PAMT0039840; VTBH002189; VTBH001759; PAMTNV0106815.

controls, and the covenant exposures.... This is getting scary."[9] Yet the Parametric Board did not negotiate any "offset."

16. Potashner to Stripes regarding the Merger proxy: "I have to do some damage control necessary to assure success with shareholder vote. . . . [A]s we discussed, it is critical that the proxy leaves the tone of very positive financial numbers going forward even [if] the actuals are weak for 2013."[10]

17. Potashner to Stripes, again regarding VTBH' s distressed financial state: "Please note I didn't try to renegotiate deal after you did a downward reforecast and then missed that reforecast." "The war is going to be getting shareholder support with deal terms that keep getting worse. . . ." "[I] have been going over [VTBH] financials in proxy with Jim. Shitty numbers. Money losing, negative equity, etc. If Stripes was really interested in doing an 1PO next year they never should have replaced cash with debt layer. Anyway glad to rescue your sorry ass and get you public."[11]

18. Potashner to VTBH regarding the post-singing "go-shop," during which he was supposed to be soliciting competing bids from companies like Amazon.com, Inc. ("Amazon"): "I like our deal. I don't want to be an operating unit of Amazon.. . . You and I are totally aligned. I know the [Parametric] stock price doesn't matter now for your or mine personal liquidity."[12]

19. Potashner to VTBH regarding his work to block competing acquirers from submitting higher all-cash acquisition offers for Parametric stockholders:

> Dolby and Amazon had interest. I will take you through the discussions when we are together. I put boundaries that were very difficult in that I didn't want an exit given that the $150M valuation although good for merger calculations was light in mind for an exit. I would not have let you take us private either. Better to discuss face to face.[13]

[9] PAMTNV0105759; VTBH073092.

[10] PAMTNV0104228; VTBH056534.

[11] PAMTNV0095569; PAMTNV0099861; VTBH062712; PAMTNV0096468.

[12] VTBH004040.

[13] PAMTNV0090998.

~~20. To place that last admission in context, a valuation for Parametric of $150 million would have amounted to above $19.00 per share at the time of the Merger. On August 2, 2013, just prior to announcement of the Merger, for example, Parametric's market capitalization was approximately $135 million.[14] Yet Potashner "put boundaries in place" to prevent $150 million offers because he personally did not want them – a higher price "didn't matter" to his "personal liquidity." Now the Company's stock sits at 57 cents per share and is on the verge of being delisted from the NASDAQ exchange.~~

~~21. Defendants effectuated the Merger by issuing a materially misleading and coercive Definitive Proxy Statement pursuant to Section 14(a) of the Securities Exchange Act of 1934 (the "Proxy"), filed with the SEC on December 3, 2013. The Proxy misrepresented a multitude of information as described herein and painted a particularly misleading picture regarding VTBH's deteriorating finances and actual value.~~

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

~~23. The current board of directors of the Company has not filed suit against Stripes, VTBH, and the former Parametric directors responsible for this debacle, which, to date, has cost the Company over one-hundred million dollars in market value. Indeed, a majority of the Company's board members are presently reaping the benefits, personally and through Stripes, from their usurpation of the Company's publicly traded status. The current directors also will not commence such legal action because a majority of the current directors is beholden to Stripes for their livelihoods and, therefore, will not expose Stripes to significant liability and bring suit against Stripes. Thus, a majority of the current Company board is disabled from fairly and~~

~~[14] PAMTNV0101319.~~

~~objectively considering any pre-suit demand that plaintiff may have made. As such, a pre-suit demand is excused as futile.~~

II. ~~II.~~ JURISDICTION AND VENUE

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

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

18. Parametric was a public corporation incorporated under the laws of the state of Nevada~~; Turtle Beach (the same entity) remains a public corporation incorporated under the laws of the state of Nevada~~.

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

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

21. Stripes Group and SG VTB ~~invoked~~purposefully availed themselves the protection of Nevada law ~~by forcing a merger between a company they controlled, Turtle Beach, and Parametric,~~and this action arises from their conduct targeting Nevada, including the

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

22. Fox and Stark purposefully availed themselves the protection of Nevada law by retaining the Nevada corporate form for the Company, which they control (as described below). Indeed, Kenneth Fox ("and this action arises from their conduct targeting Nevada, including the following: (i) through the Merger, Stripes and SG VTB, with Fox in control, gained control of a Nevada corporation and continue to operate the Company as a Nevada corporation; (ii) Stripes Group and SG VTB, with Fox in control, selected, negotiated for, and consummated the merger of a company they controlled, VTBH, and Parametic, a Nevada corporation; (iii) Stripes Group and SG VTB were involved in negotiating and approving nearly all material decisions concerning the Merger; (iv) Fox"), the founder, sole owner, and Managing General Partner of Stripes Group and sole manager of SG VTB, signed the Agreement and Plan of Merger ("Merger Agreement"). Stripes Group and SG VTB also aided and abetted breaches of fiduciary duty by directors of, which was then filed with the Nevada Secretary of State to consummate the Merger; and (v) VTBH, with Stark in control, merged with a Nevada corporation, which further supports the exercise of jurisdiction by Nevada courts.

III. III. PARTIES AND RELEVANT NON-PARTIES

A. Parties

26. Direct Plaintiff Grant Oakes was a shareholder of Parametric during the Merger process.

27. Direct Plaintiff Kearney IRRV Trust was a shareholder of Parametric during the Merger process.

28. Derivative Plaintiff Lance Mykita was a shareholder at the time of the Merger and is currently a shareholder of the Company.

~~29. Nominal Defendant Turtle Beach is headquartered in San Diego, California and was incorporated in the state of Nevada in 2010. The Company calls itself a "premier audio technology company with expertise and experience in developing, commercializing and marketing innovative products across a range of large addressable markets under the Turtle Beach® and HyperSound® brands." The Company's stock is (as of the date of this filing) traded on NASDAQ Global Market under the symbol HEAR.~~

A. Plaintiff

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

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

a. IceRose Capital Management, LLC;

b. Robert Masterson;

c. Richard T. Santulli;

d. Marcia Patricof, on behalf of the Patricof Family LP, Marcia Patricof Revocable Living Trust, and the Jules Patricof Revocable Living Trust;

e. Alan and Anne Goldberg;

f. Barry L. Weisbord; and

g. Ronald and Muriel Etkin.

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

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

B. Defendants

27. ~~30.~~ Defendant Kenneth Potashner (previously defined as "Potashner") was the Executive Chairman of Parametric's Board at the time of the Merger. He was appointed a

director in December 2011 and Executive Chairman in March 2012. He essentially acted as Parametric's CEO.

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

29. ~~32.~~ Defendant Seth Putterman ("~~Putterman~~Puttennan") was a member of Parametric's Board at the time of the Merger. He was appointed a director in May 2011.

30. ~~33.~~ Defendant Robert Kaplan ("Kaplan") was a member of Parametric's Board at the time of the Merger. He was appointed a director in May 2011.

31. ~~34.~~ Defendant Andrew Wolfe ("Wolfe") was a member of ~~Parametric's~~Parametric's Board at the time of the Merger. He was appointed a director in February 2012.

~~35. Defendant James L. Honore ("Honore") was a member of Parametric's Board at the time of the Merger. He was appointed a director in March 2012.~~

32. ~~36.~~ The Parametric Board members (other than Potashner) named above in ¶¶28-31~~-35~~ are sometimes collectively referred to herein as the "Outside Directors."[~~15~~1]

33. ~~37.~~ The defendants named above in ¶~~30~~¶27-~~35~~31 are sometimes collectively referred to herein as the "Individual Defendants."

34. ~~38.~~ Defendant VTBH was a company that designed and marketed audio peripherals for video game, personal computer, and mobile platforms. It was headquartered in Valhalla, New York. It was majority owned by Stripes Group and SG VTB. VTBH is ~~not~~ a ~~wholly-owned~~wholly-owned subsidiary of the post-Merger Company~~, as its Series B preferred stock currently remain outstanding~~.

35. ~~39.~~ Defendant Stripes~~ Group~~, known as Stripes Group LLC at the time of negotiations leading to the Merger, is a private equity firm focused on ~~Internet~~internet, software,

[~~15~~1] While Norris held the position of "President and Chief Scientist" and was thus a member of Parametric's management during the Merger process, he did not directly participate in Potashner's unilateral Merger negotiations with VTBH and Stripes, and is thus referenced as an "Outside Director" for purposes of this Complaint.

healthcare, IT and branded consumer products businesses. Stripes Group is incorporated in Delaware and headquartered at 402 West 13th Street, New York, NY 10014.

~~40. Defendant SG VTB is a Delaware LLC and is a wholly-owned subsidiary of Stripes Group. Fox is its sole manager. Stripes Group formed SG VTB in 2010 in order to acquire a majority position in VTBH. SG VTB is an investment vehicle for Stripes Group.~~

~~B. Stripes Principals and Other Relevant Non-Defendants~~

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

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

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

C. Relevant Non-Parties

39. Turtle Beach is headquartered in San Diego, California and was incorporated in the state of Nevada in 2010. The Company calls itself a "premier audio technology company with expertise and experience in developing, commercializing and marketing innovative products across a range of large addressable markets under the Turtle Beach® and HyperSound®

brands." The Company's stock is (as of the date of this filing) traded on NASDAQ Global Market under the symbol HEAR.

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

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

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

~~44. Juergen Stark ("Stark") was CEO of VTBH during the sale process, and was named to that position by Stripes in September 2012. During the Merger process, Stripes demanded that Stark continue as CEO of Turtle Beach post-Merger and Stark remains in that position today. Stark also sits on the Company's current board of directors. As with Fox, Doornink, and Kenworthy, Stark frequently interacted with Potashner throughout the Merger process and was fully aware of, and encouraged, Potashner's misconduct as set forth herein.~~

43. ~~45.~~ James Barnes ("Barnes") was Parametric's Chief Financial Officer ("CFO") during the Merger process, but was ousted by Stripes following completion of the Merger.

44. ~~46.~~ John Todd ("Todd") was a Parametric "consultant" during the sales process, was hired by Potashner, and was directly involved (through Potashner) in the Merger. Like Potashner, Todd was one of the few option holders in HyperSound Health, Inc. ("HHI~~"~~'). Todd has been found liable to the SEC for securities fraud. In 2012, the Southern District of California entered final judgment after the Ninth Circuit found substantial evidence in the trial record to support a unanimous 2007 jury verdict that found Todd unlawfully misrepresented a company's financial condition while CFO. In addition to monetary penalties, Todd was banned from acting as an officer of any public company for a ten-year period. Likewise, the State of

California has prohibited Todd from operating a franchise within the state, because, given his history of fraud, "the involvement of Todd in the sale or management of [a] franchise in this State would create unreasonable risk to prospective franchisees."[16][2]

IV. ~~IV.~~ ENCOURAGED BY STRIPES GROUP AND VTBH, THE PARAMETRIC BOARD ENGAGED IN DISLOYAL AND BAD FAITH CONDUCT DURING THE MERGER PROCESS[3]

45. ~~47.~~ Potashner met with ~~Doorninkl~~Doornick, Kenworthy, and Stark throughout March and April 2013 and ironed out a deal on the Merger. During that time, Potashner sought the assistance of bankers at Houlihan Lokey Capital, Inc. ("Houlihan Lokey"), which already harbored a conflicting relationship with Stripes Group. Potashner wasted no time in threatening the Outside Directors to go along with the Merger. On March 30, 2013, regarding his just-commenced negotiations with Stripes Group and VTBH, Potashner wrote to Norris: "If the Board costs us this deal I will look for them all to resign or I will resign." Norris responded to other Board members, "Is this blackmail or what[?]"[17][4]

46. ~~48.~~ On April 19, 2013, Potashner reached an agreement on the Merger with Stripes Group and VTBH without consulting the Outside Directors or conducting any real diligence or audit of ~~VTBH' s~~VTBH's finances. Potashner's initial term sheet contemplated a reverse merger at a 78%/22% split, meaning that Parametric stockholders would receive 22% of the combined company after the Merger.[18][5]

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

48. ~~50.~~ Over the next two months, the Outside Directors continued to allow Potashner to negotiate the Merger with no real oversight, supervision or guidance. For example,

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[16] ~~www.dbo.ca.gov/ENF/pdf/b/BevMaxFranchising_SIS.pdf.~~[2] www.dbo.ca.gov/ENF/pdfi'b/BevMaxFranchising_SIS.pdf.

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

[17][4] PAMT0033560-62.

[18][5] PAMT0049600-07; PAMT0006093 -103.

from April 25, 2013 to June 25, 2013, the Board held just two telephone conferences, one lasting a mere 28 minutes and the other lasting just 45 minutes. The Outside Directors requested a copy of the draft-Merger Agreement for the first time on July 1, 2013. A quick review of Potashner's draft caused Outside Director Kaplan to state that: "I needed this as I feel we have been left in the dark and have had misrepresentations presented to us."[196] During this time, Potashner conceded that the Outside Directors also informed him that he was "'giving the company away.'"[207] Despite those accusations, the Outside Directors did nothing to stop Potashner. Worse, they enabled him.

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

49. 51. Throughout the Merger process, Potashner personally held an ownership interest in a Parametric subsidiary called HyperSound Health, Inc., or "HHI." In 2012, Parametric formed HHI "to develop technology for products targeting persons requiring sound amplification and the more than 36 million Americans who suffer from hearing loss."[218] Potashner saw great value in HHI and, in part, effectuated the Merger because he believed that he could continue to profit from HHI after the deal. Potashner repeatedly stated that he believed HHI was worth $1 billion.[229] Whether or not that valuation was objectively supportable, Potashner believed it and worked to secure that value for himself.

50. 52. This conflict is better described in Potashner's own words. Potashner confided to Stark on July 11, 2013 that the "whole reason that I entered into the deal [with VTBH] in the first place [was] [t]o build a multi-billion dollar HHI and benefit from it."[2310] In the same email, Potashner described his request for a secret post-close consulting agreement, writing: "I . . . said in a gentlemen agreement to give me a consulting deal if I1 couldn't talk you

[196] PAMT0061426.
[207] VTBH008868.
[21] http://corp.turtleb each. com/media-resources/releases/releases-detail/125/parametric-sound-corporation-reports-year-end-fiscal- [8] http://com.turtlebeach.com/media-resources/releases/releases-detail/125/parametric-sound- comoration-reports-year-end-fiscal-2012-results.
[229] VTBH005061; PAMTNV0113764.
[2310] PAMTNV0105035; VTBH009741.

into keeping [~~HIE~~HHI] equal to what you think my stake was worth."[~~24~~11] Stripes was aware of Potashner's confession.[~~25~~12]

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

> As we established ~~ME~~HHi my intention was to hire a new CEO for PAMT and commit my full energies to developing HHi. I got BOD support, we hired a search firm (swbi), and actually were interviewing CEO candidates on the first day I met Juergen [Stark]. . . . My intent was to sell PAMT at the right time and keep ~~HIE~~HHi as the foundation of a new company. . . . The problem very simply is that [you] didn't sign up for buying ~~party~~part of the company, you wanted it ~~all.~~[26]al1.[13]

52. ~~54.~~ Stark considered it remarkable that he was even involved "in a discussion where 2 insiders somehow have a potential future ownership stake in [HHI] that is now driving the dynamics of the [overall] deal. . . it's just crazy."[~~27~~14]

53. ~~55.~~ In fact, when selecting the Merger form, Stark reported that Potashner "said he liked the reverse merger option the best and is happy we are headed in that direction because it 'allows him to participate in the upside of commercial and health [HHI] which he feels is large.'"[~~28~~15] Notably, Fox responded that Potashner's self-interest was "[g]ood news."[~~29~~16]

54. ~~56.~~ This conflict did not exist in a vacuum, as Potashner acted in furtherance of his HHI-related objectives throughout the Merger process. In his first meetings with Stripes and VTBH in March and April 2013, Potashner repeatedly expressed a desire to carve out HHI and "make sure the potential value in health is enabled to occur."[~~30~~17]

55. ~~57.~~ On July 1, 2013, the Parametric Board held a meeting to discuss Potashner's HHI-related conflict. Just before the meeting, Potashner was caught lying to the Board about whether he had reached an agreement with VTBH and Stripes Group regarding his

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[~~24~~11] *Id.*
[~~25~~12] VTBH017661.
[26] ~~VTBH000124.~~

[13] VTBH000124.
[~~27~~14] PAMTNV0104290.
[~~28~~15] VTBH007727.
[~~29~~16] *Id.*
[~~30~~17] VTBH002990; VTBH006603.

HHI options.[31][18] Potashner said an agreement was finalized, but Stark confirmed to the Outside Directors this was false.[32][19] During the July 1, 2013 meeting, the Board gave its first of three instructions to Potashner that he "immediately cease all discussions with [Stripes Group and VTBH] regarding HHI and HHI stock options to avoid any conflict of interest and attain clarity regarding the position of [Stripes Group and VTBH] on this issue."[33][20]

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

- ~~•~~ Tuesday, July 2, 2013: The morning following the instruction to "immediately cease" HHI-related discussions, Potashner emails Stark and ~~Doornink~~Doornick at 6:47 a.m~~.~~. to justify his position on HHI and invite ~~Doornink~~Doornick to discuss the matter at dinner the upcoming Sunday.[34][21] Potashner and Stark also speak by phone that evening about HHI.[35][22]

- ~~•~~ Wednesday~~.~~, July 3~~,~~. 2013: Potashner writes Stark to propose that HHI option-holders (including Potashner) retain their interest in HHI, writing: "At a personal level I believe [retaining HHI] will be supported and avoid scenarios that I believe would put substantial risk and litigation exposures into the PAMT/VTB transaction."[36][23] Stark knew this contact was improper, responding, "Shouldn't I be discussing this with Seth [Putterman] and Jim [Barnes]?"[37][24] Despite that knowledge, Stark continues to discuss ~~HI II~~HHI with Potashner.

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

> Regarding HHI related matters, the Board affirmed its prior direction to you to avoid all discussions with VTB/Juergen/~~S tripes~~Stripes regarding your HHI stock options since you have a conflict of interest. Because your

[31][18] PAMT0000160.
[32][19] *Id.*
[33][20] *Id.*
[34][21] PAMTNV0105781.
[35][22] PAMT0033890.
[36] ~~PAMTNNOl.05854~~[23] PAMTNV0105854.
[37][24] *Id.*

stock options are interrelated with the stock options of John [Todd] and the doctors of HHI, you should also avoid any discussion of their stock options or HHI in genera1.[38][25]

58. 60. Potashner responded, "I understand your request relative [to] HHI negotiations and will comply."[39][26] As one might expect, Potashner was lying. Potashner thereafter engaged in the following prohibited communications:

- Saturday, July 6, 2013: Potashner forwards Stark a proposal from Wolfe (not meant for Stark) providing that Potashner keep all of his HHI shares.[40] .[27] Potashner stated, "[a's]als I mentioned, the bankers are running an analysis as well and I expect it to confirm this view." Potashner concluded by asking Stark to keep the email confidential.[41] confidentia1.[28]

- Sunday, July 7, 2013: Potashner meets with Stark in person to discuss HHI-related issues.

- Tuesday, July 9, 2013: Potashner proposes to meet with Stark, Barnes, and HHI's consulting doctors to discuss an HHI spin-out transaction.[42][29]

- Thursday, July 11, 2013: Potashner and Stark discuss HHI valuation details over email, while Potashner continues to argue his position that HHI be retained as a subsidiary, describing HHI as a "cottage" in which Potashner wanted to "live" post-Merger.[43] post- Merger.[30] Potashner forwards his "HHI as a cottage" email chain with Stark to colleagues at another company, bragging that it showed "[h]ow to harass the CEO of a company that is effectively buying you into an entity structure you require using parables."[44][31]

- Saturday, July 13, 2013: Potashner invites Stark to discuss HHI issues "by phone today and then in person on Sunday."[45][32] Stark responds to

[38][25] PAMT0041051.
[39][26] PAMTNV0115321.
[40] PAMTNV0105120.

[27] PAMTNV0105120.
[41] PAMTNV0105120.

[28] PAMTNV0105120.
[42][29] VTBH001503.
[43] PAMTNV0104270; PAMTNV0104315.

[30] PAMTNV0104270; PAMTNV0104315.
[44][31] PAMTNV0104315.
[45][32] PAMTNV0104228.

confirm a meeting with Potashner regarding HHI the upcoming Wednesday.

- ~~•~~ Sunday, July 14, 2013: Potashner and Stark discuss ~~HI-II~~HHI in detail over email, where Potashner concludes by again explaining, "I am convinced we can't solve [HHI issues] pre-deal because of litigation scenarios plus shareholder vote issue. I am convinced we can solve post deal."~~46~~[33]

- ~~•~~ Monday, July 15, 2013: Potashner emails Stark to negotiate a list of five "[c]oncessions made on HHI," concluding, "hope you can be flexible and we get the deal done."~~47~~[34] Stark keeps Stripes and ~~Doorninkk~~Doornick informed of ~~Potashner's~~Potashner' s improper communications.~~48~~[35]

- ~~•~~ Wednesday, July 17, 2013: Potashner and Stark meet with Barnes and doctors working with HHI to discuss HHI-related issues. Following the meeting, Potashner emails Stark regarding the scope of HHI's license.~~49~~[36]

- ~~•~~ Thursday, July 18, 2013: Potashner and ~~Doorninkk~~Doornick discuss HHI by phone and, as a result, Potashner states that "I will make a proposal to my BOD on HHI Saturday."~~50~~[37]

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

> It turns out you have been speaking with TB folks without Andy in on the conversation(s). I expressly remember the board having stated that you are NOT authorized to do that as it relates to the subject of HHI. Phone calls, emails, texts, etc. You are major conflicted on that matter.
>
> Please start acting like you are working for PAMT, not yourself!~~51~~[38]

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

- ~~•~~ Friday, July 19, 2013: In support of his ownership interest in HHI, Potashner emails Stark to describe an earlier "precedence" where executives at Maxwell Technologies (including Potashner) held interest in

~~46~~[33] PAMTNV0104263.
~~47~~[34] PAMTNV0104268.
~~48~~[35] VTBH013712.
~~49~~[36] VTBH001516.
~~50~~[37] VTBH002140.
~~51~~[38] PAMTNV0112541.

a subsidiary company.[5239] The same day, Potashner, Stark, and others - with no Outside Directors present - conduct a conference call to discuss HHI-related issues. Stark writes Potashner, "geezus, I continue to be stunned that you don't see the significant issues with HHI. [W]hat a gigantic mess. [R]on [~~Doornink~~Doomink] is 100% aligned with this view."[5340]

- ~~•~~ Saturday, July 20, 2013: Potashner writes ~~Doornink~~Doornick, stating that "[a]s we established HHI, my intention was to hire ~~anew~~a new CEO for PAMT and commit my ~~fall~~full energies to developing HHI~~. .~~. My intent was to sell PAMT at the right time and keep HHI as the foundation of a new company."[5441]

- ~~•~~ Sunday, July 21, 2013: Potashner asks Stark for a continued role with ~~HHI~~MI post close, stating: "If I did a good job on HHI and we agreed that there was an options scenario for me there tied to downstream vesting..... By then I plan on having it worth $100m."[5542] Potashner emails ~~Doornink~~Doomink the same day, writing: "Hi Ron[.] Requiring ~~HHI~~Mil options to be canceled unconditionally cancelled prior to the [Merger Agreement] signing, not at close, is an unreasonable request. You are telling us how we have to run our business even in the event we don't close the deal."[5643] Potashner and ~~Doornink~~Doornick hash out a deal on HHI over ensuing emails that day, with no one else copied.[5744]

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

> Further, if the Board were to dissolve HHI, Mr. Potashner stated that he would call a special meeting of stockholders for the purpose of replacing the Board. Mr. Potashner informed the Board that he could obtain proxies for 40% of the Company's outstanding shares to effectuate such a replacement.[5845]

[5239] PAMTNV~~0104836~~01 04836.
[5340] PAMTNV~~0104902~~01 04902.
[5441] PAMTNV0104837.
[5542] PAMTNV0104912.
[5643] VTBH012528.
[5744] VTBH013436.
[5845] PAMT0000164.

62. ~~64.~~ Following that meeting, Potashner confided to Wolfe and outlined his litigation plan against the Outside Directors if they did not comply: "All other choices we face (unilaterally cutting options, limiting license, firing people, etc.) will result in ...very aggressive claims against individuals and the company that I am convinced will not only blow up the [VTBH] deal but result in substantial corporate and personal legal exposures."~~59~~46

63. ~~65.~~ Potashner's threats caused the Company's founder and President, Norris, to threaten to disassociate from the Company, stating that "Potashner's proposed actions would be unacceptable to him and that he would not continue with the Company if the Board were replaced."~~60~~47

64. ~~66.~~ Over the next two days, Potashner laser-focused on Outside Director Putterman. On July 6, 2013, Potashner wrote to Putterman to describe Potashner's prior litigation against individual board members at SonicBlue where "we settled and I received a large check from the Company/BOD."~~61~~48 Potashner concluded his email with the not-so-veiled threat, "[w]ould not like to ever have to go through that again."~~62~~49 The next morning, Potashner informed Putterman by email that cancelling HHI before the deal "will result in lawsuits."~~63~~50 Potashner then picked up the phone to call Putterman, threatening to call a shareholder meeting and "fire" the rest of the Board.~~64~~51 Two days later, Potashner again called Putterman to state that if the Board did not accept his position, in Putterman's words, "the lawsuit from John [Todd] if we do otherwise will be devastating. . . ."~~65~~52

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

- ~~•~~ A cash payment of $250,000 in exchange for Todd's agreement not to sue the Board;

~~59~~46 PAMT0033294.
~~60~~47 PAMT0000164.
~~61~~48 PAMTNV0112643.
~~62~~49 *Id.*
~~63~~50 *Id.*
~~64~~51 PAMTNV0112625.
~~65~~52 PAMTNV0112558.

- A continuation of Todd's consulting agreements with HHI for another fifteen months so that he would continue to receive additional cash and options; and

- An additional cash payment for Potashner, Barnes, and Todd "equal to nine-months salary."[6653]

66. ~~68.~~ At the same meeting, Potashner threatened that if his demands were not met, "Todd would sue the Company and the [VTBH] merger transaction could be derailed in such [a] case."[6754] Interestingly, however, neither Potashner nor Todd had any legal right to demand payment in exchange for cancellation of their HHI options. Their HHI 2013 Equity Incentive Plan provided that in the event of a "change in control" or other merger by Parametric, the merger agreement may provide for all ~~HIE~~HHI options "cancellation with or without consideration, in all cases without the consent of the Participant [i.e., Potashner or Todd]."[6855]

~~69.~~ The Outside Directors saw through Potashner's threats, which he purportedly made on Todd's behalf. During this time, Kaplan confided to the other Outside Directors that Potashner's HHI options

67. were issued because of false representations to the BoD. . . . And of course Ken is using JT [John Todd] as a surrogate for getting as much as he can for his own HHI position. . . . I believe JT is not really the problem. It is Ken pushing him and hiding behind JT's coattails. . . . Yet, as it has been presented to us, we are being held hostage and being blackmailed by this consultant. His strength is a lawsuit that could delay the merger.[6956]

68. Similarly, Norris wrote:

> Since John [Todd] and Ken [Potashner] are threatening now, why should we think they'll be easier after the deal? Juergen [Stark] is asking for a lawsuit if he buys that. John and Ken will force TB to let them run HHI or sue TB. That's the next shoe that'll drop. I guarantee it. I don't think they connected that dot.[7057]

69. ~~70.~~ Despite recognizing the conflict, the Outside Directors caved and allowed Potashner, Wolfe, and Barnes to call VTBH and convey Potashner's demands. The demands

[6653] PAMT0000171.
[6754] *Id.*
[6855] PAMT0000024.
[6956] PAMTNV0115292.
[7057] PAMT0033904.

included that VTBH not shut down or dismantle HHI for six months following the close of a merger, pay cash payments to Potashner and Todd at 100% of 2013 bonus levels (whether or not they earned such amounts), and agree not to restructure the HHI license agreement. In return, Potashner and Todd would agree not to sue VTBH and Parametric (despite their lack of any legal right to do so).[~~71~~58]

70. ~~71.~~ Potashner, Wolfe, and Barnes jointly made these demands to Turtle Beach on July 20, 2013. Notably, the Outside Directors asked Potashner to throw in a gift for themselves in the same call. When reporting back to the Board, Potashner stated, "I also introduced [to Stark] the concept of accelerating BOD options and there was no adverse reactions."[~~72~~59] The next day, Potashner also surreptitiously emailed and called Stark to discuss his position in HHI.[~~73~~60]

71. ~~72.~~ On July 21, 2013, Potashner wrote to Norris, stating: "In the event that the BOD decides to cancel [my ~~HHI~~MI options with no guarantee that the Merger will close,~~"~~] please consider this my formal resignation for the company."[~~74~~61] As noted above, however, Potashner worked out a deal directly with ~~Doornink~~Doornick, whereby VTBH promised that it would postpone any cancellation of HHI. So Potashner followed up the next day after another development: "I am glad that Ron ~~Doornink~~Doornick, VTB Chairman has revised their position so our BOD doesn't need to face the issue of cancelling the options prior to DA [Merger Agreement signing]. I therefore will withdraw the resignation threat and we don't need to get everybody further worked up."[~~75~~62]

72. ~~73.~~ The Parametric Board set another meeting to discuss the issue on July 23, 2013. That morning, Wolfe indicated that Stark wanted HHI options to be cancelled. Rather than stand up to Potashner, Wolfe acted as his mouthpiece, calling Stark's request "unreasonable" and stating, "I think this is the point where we say no."[~~76~~63] Wolfe's ~~solution~~ solution—worked out in advance with Potashner—was to pay Potashner a cash ransom. Wolfe proposed that "[w]e would approve 2013 bonuses for key personnel including ... Ken [Potashner], and John

[~~71~~58] PAMT0000171.
[~~72~~59] PAMTNV0112539.
[~~73~~60] PAMTNV0104912.
[~~74~~61] PAMT0033914.
[~~75~~62] PAMT0033915.
[~~76~~63] PAMTNV0112504.

[Todd]."[77][64] When another Outside Director indicated that Potashner's options should indeed be canceled because "the options are still wrong and not in the best interest of our shareholders," Potashner wrote that any proposal to cancel his options "would blow up the deal, result in a massive amount of lawsuits and personal liability for the BOD, and is the worst thing for our shareholders."[78][65]

73. ~~74.~~ Pressured by Potashner's threats, the Board again caved at the July 23rd meeting. The Board agreed to pay Potashner and Barnes their ~~1112013~~full 2013 cash bonuses (whether entitled or not), but deferred the final approval to a Compensation Committee meeting.[79][66] The Board also agreed to pay Todd $250,000 in exchange for an agreement not to sue Parametric (despite his lack of ~~a~~ legal right to do so).[80][67]

74. ~~75.~~ Stripes Group and VTBH continued to manipulate Potashner and lead him to believe that he would continue with HHI post-close, despite the eventual cancellation of his options. On July 21, 2013, Stripes Group agreed that it would not seek cancellation of Potashner's HHI options before signing the Merger Agreement, but would defer the matter to address in the Merger Agreement itself and postponed until the Merger's close.[81][68] On July 23, 2013, Stark circulated a draft press release announcing the Merger, which contained the following line: "Ken Potashner... will continue a leadership role for Hypersound Health, Inc. (~~'~~`HHI'), the Company's health subsidiary, which continues to demonstrate extraordinary results for those with hearing deficiencies."[82][69]

75. ~~76.~~ While Stripes Group externally manipulated Potashner into believing he would continue to have a role, Stripes Group internally planned to kick him out. On August 5, 2013, Fox wrote regarding the Merger announcement press release: "My reaction to the press release is too much Ken P. [~~Hie~~H]e is going to have effectively no role going forward."[83][70] Stripes Group knew how to manipulate Potashner, however, and kept that plan a secret until ousting him just months after the Merger closed.

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[77] ~~*Id.*~~[64] *id.*
[78] ~~*Id.*~~[65] *id.*
[79][66] PAMT~~0000175; PAMTNV0112625~~00001 75; PAMTNVO1 12625.
[80][67] PAMT~~0000175~~00001 75; PAMTNVO1 12625.
[81][68] VTBH013436~~.~~
[82][69] PAMTNV0103786; VTBH008077~~.~~
[83][70] VTBH000822.

76. ~~77.~~ On January 10, 2014, less than a week before the close, Potashner learned that VTBH's lenders were forcing it to dissolve HHI. Potashner panicked. Potashner asked his CFO to cancel Merger-related payments (but they had already been sent) and wrote to Stark, "lets delay the closing and renegotiate the [HHI] point."~~84~~[71] Potashner asked Stark to "[~~s~~]~~ee~~see if there is another way to push on the bank."~~85~~[72] Potashner admitted that "[~~a~~]~~lt~~alt a personal level and as a shareholder of PAMT, I would not have supported the deal if ~~I~~1 thought HHI was going to be dismantled."~~86~~[73]

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

77. ~~78.~~ Potashner conspired with Stripes Group to illegally manipulate Parametric's stock price by suppressing it in advance of the Merger announcement. In Potashner's and Stripes~~' view~~ Group's views, the 81/19 dilution ratio would look slightly better for stockholders if ~~Parametric' s~~Parametric's stock price were lower upon announcement. In Potashner's words, Fox~~—~~the head of Stripes~~—~~personally expressed a "preference" that Potashner and Parametric "don't defend the stock in that premium on deal will look better."~~87~~[74] Potashner admitted that doing so was in breach of his fiduciary duties. During the process, he confirmed to VTBH that "[w]ithholding licensing deals and announcements is contrary to the responsibility that I have."~~88~~[75] Yet, Potashner continued to delay and suppress several favorable and material announcements keeping Parametric's stock price artificially low.

78. ~~79.~~ Potashner confirmed on March 27, 2013, in one of his first discussions with Stripes Group, that "I expressed to Karen [Kenworthy] that we collectively should not be overly concerned by the stock run up in that we have choices in terms of where we assign the valuation. ~~. . .~~We also have now accumulated unannounced wins that I plan on delaying announcements on for as long as possible."~~89~~[76]

79. ~~80.~~ Just a week later, Potashner informed Stripes Group that his suppression of material information was against the advice of Parametric's outside securities counsel. On

~~84~~[71] PAMTNV0086620.
~~85~~[72] VTBH066656~~.~~
~~86~~[73] PAMTNV0086617~~.~~
~~87~~[74] PAMT0040595.
~~88~~[75] PAMTNV010627.
~~89~~[76] VTBH011084.

April 4, 2013, Potashner wrote to Kenworthy and Stark, stating: "Our ~~corp~~corn counsel said we need to do an 8-k on the McD. If it weren't for our discussion I would do a full press release but I have deemed that it would be bad form. Taking one for the team."[~~90~~77] Potashner was referencing an agreement to place a Hypersound technology installation at McDonald's Disneyland restaurant, which represented a significant development in Parametric's efforts to commercialize and implement its audio technology. But rather than file an 8-K and inform stockholders of the positive news, as company counsel recommended, Potashner concealed this material information.

80. ~~81.~~ Potashner admitted that delaying the positive announcements harmed Parametric. On April 8, 2013, Potashner informed Stark that "[a]lso I wanted to mention that we will do a press release in the morning. Our shares have come under substantial pressure in the last couple days relative to the delay in me announcing licensing deals."[~~91~~78] Stark intervened, however, and Parametric issued no such press release the next morning, nor did Parametric announce any licensing deals at any point thereafter. Instead:

- ~~•~~ On May 17, 2013, Potashner outlined for Stark his plan for a post-Merger-Announcement press strategy: "I also have been stockpiling announcements that we can roll out to solidify price if there is weakness. You and I can strategize on whether we want to lay low or get more aggressive in terms of supporting the stock."[~~92~~79]

- ~~•~~ The same day, John Todd wrote to Potashner: "As I understand they [Stripes and VTBH] believe the stock will drop once we announce and that this will make the deal less favorable than an IPO. . . . If they have announcements and we have announcements [to release after the Merger] we can not only hold price but significantly improve price."[~~93~~80]

81. ~~82.~~ Parametric's stock price declined significantly between May 28 and June 1, 2013. Regarding the McDonald's signage, on May 31, 2013, Potashner wrote to Stark: "I have ... an announcement on our completion of Disneyland McD ~~. . .~~ I am waiting to see if we are a go before making decisions."[~~94~~81] Potashner's draft internal press release stated, in part, as follows:

[~~90~~77] VTBH006261.
[~~91~~78] PAMTNV~~0108985~~01 08985.
[~~92~~79] PAMT0040368.
[~~93~~80] PAMT0040339.
[~~94~~81] PAMT0040576.

> The Company's commercial business focuses on the ability to target communication and create sound zones in various retail sites. The Company completed the scheduled installation of HyperSound technology at a McDonald's Disneyland restaurant last week and continues to grow its commercial product pipeline.[95]82

82. ~~83.~~ This language would have defended the stock and signaled to the markets that the company was executing on its prior promises of commercialization. Indeed, Potashner would later confirm the importance of McDonalds' selection of the HyperSound pilot by reporting to Stark that it "led to McDonald's Channel selecting HyperSound as a premium audio solution for McDonalds Channel restaurant installations." Potashner used this information to ask for a restructured deal, writing to Stark: "[T]ell Ken Fox I want 75-25 deal based on this."[96]83 Potashner confirmed that this specific information, if released, would constitute "powerful~~...~~ stuff' that "will be an exclamation point on what we are doing," demonstrating Parametric's "great hand going forward" if a deal wasn't reached.[97]84

83. ~~84.~~ Fox intervened and, through Stark, asked Potashner to keep the material information from stockholders. As noted, Potashner followed up with a phone call to Stark on June 2, 2013 and wrote: "Just spoke to Juergen [Stark] and his preference (and Ken [Fox's]) preference is that we don't defend the stock in that premium on deal will look better."[98]85 (Parenthesis in original.) Potashner complied with Fox's wishes and deleted the McDonald's Disneyland reference from the final press release.[99]86 On June 5, 2013, Potashner confirmed to Stark, "I will defer the release based on our discussion."[100]87 As a result, Parametric's stock price continued to decline.

84. ~~85.~~ On July 17, 2013, Potashner ultimately confirmed to Stark that, as a result of the suppression of announcements, "[s]tock is under tremendous pressure now."[101]88 Just before the announcement of the Merger on August 5, 2013, Parametric's stock price remained under pressure, which made a terrible deal look slightly better.

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[95]82 PAMT0040591; PAMT0040592.
[96] ~~VTBHO13765~~[83] VTBH013765.
[97]84 PAMTNV0101694.
[98]85 PAMT0040595.
[99]86 See http://www.parametricsound.com/press~~_~~ release~~_~~ details.php?id=82.
[100]87 PAMTNV0106696; PAMT0040658.
[101]88 VTBH008077.

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

85. ~~86.~~ Stripes Group principals (Fox, ~~Doorninkk~~Doornick, and Kenworthy), along with Stark, also successfully encouraged Potashner to undermine the Company's potential corporate opportunities during Merger negotiations. Potashner obliged. As a result, Potashner stalled discussions with other licensing partners and potential acquirers as soon as Stripes Group and VTBH arrived on the scene.

86. ~~87.~~ Potashner admitted that doing so was in breach of his fiduciary duties. Potashner explained to VTBH that "Withholding licens[ing] deals .. is contrary to the responsibility that I have." And during the process, Potashner wrote: "My stock is taking a beating due to me deferring signing licensing deals~~. . .~~ I have intentionally constrained the progress [of Amazon attempting to buy the Company].~~. . .~~ I am still in a precarious situation delaying licenses that [would otherwise] bring us economic value and valuation."[~~102~~89]

87. ~~88.~~ The first time they spoke, Stripes Group made it clear that Potashner should stall other corporate opportunities. On March 12, 2013, Potashner wrote to Kenworthy, stating: "I may need help on how to slow down one of the discussions we have underway. The time urgency is that they are targeting a gaming accessory product for this Xmas and thinking in the 200-300k unit range."[~~103~~90] Potashner was referencing the SIIG/Optek deal described herein.

88. ~~89.~~ On March 27, 2013, Kenworthy reported directly to Fox that Potashner complained "[h]e's receiving substantial pressure from one of his other potential licensing partners to advance their discussion[s] (but claims it would clearly not be in the interest of [VTBH] or Stripes for us to do so.... I assume it's Sony)~~:~~.'"[~~104~~91] (Parentheses in original.) The very next day, March 28, 2013, Potashner confirmed to Kenworthy that "I will suspend any licensing discussions with any parties while we have our discussions with TB/Stripes."[~~105~~92] Kenworthy responded in approval.

[~~102~~89] PAMT0039840; VTBH002189; VTBH001759; ~~PAMTNV~~PAM'TNV0106815.
[~~103~~90] PAMT0039368.
[~~104~~91] VTBH005649.
[~~105~~92] PAMT0039561.

89. ~~90.~~ On April 4, 2013, Potashner confirmed to Stark that he "will slow play" an active and then-promising collaboration with Qualcomm.[~~106~~93] The next day, Qualcomm stated that it "would be interested in a potential licensing discussion" and "will get the NDA taken care of today."[~~107~~94] Potashner did nothing for a week. On April 12, 2013, Potashner wrote to Stark that "it makes sense for me to advance this discussion," but Stark responded that "I would slow-roll a bit."[~~108~~95]

90. ~~91.~~ On April 7, 2013, Potashner confirmed to Stark that "I would be able to announce the license [with VTBH] and buy additional time both with the parties that we have stalled ~~..~~ I have several things going on including defining a financing and the pressures of the license activities we put on hold."[~~109~~96] Stark agreed, responding to Potashner that: "In fact I assumed you would absolutely not want to announce any license deal since you've stalled all the other parties."[~~110~~97]

91. ~~92.~~ Days later, Potashner admitted the harm caused by his stalling efforts. On April 9, 2013, Potashner wrote to Kenworthy and Stark: "My stock is taking a beating due to me deferring signing licensing deals. Any ideas?"[~~111~~98] On April 15, 2013, Potashner forwarded an email to Stark from SIIG/Optek, explaining "[t]his is one of the license deals I have frozen. Very high royalty rate 9% and China [is a] big market. If I signed and announced this deal our stock would be in the 20s."[~~112~~99]

92. ~~93.~~ On April 19, 2013, ~~Doornink~~Doornick reported to Fox, Kenworthy, and Stark, inter alia, and confirmed that "[t]he Parametric guys ...face a lot of pressure from their potential licensing partners (having put several deals on hold)."[~~113~~100]

93. ~~94.~~ During this time, capable buyers were interested in purchasing Parametric. On April 12, 2013, Potashner described a conversation with an Amazon executive as follows: "He declared Amazon is interested in buying the company. . . . He said they are familiar with our

[~~106~~93] PAMTNV0108760.
[~~107~~94] PAMTNV0109178.
[~~108~~95] Id.
[~~109~~96] PAMT0039816.
[~~110~~97] Id.
[~~111~~98] PAMT0039840.
[~~112~~99] PAMTNV0108344.
[~~113~~100] VTBH011638.

technology and believe it will be highly relevant to future products Amazon plans on launching."[114][101] But on May 20, 2013, Potashner forwarded an Amazon email to Stark writing, "I have intentionally constrained the progress here but I don't believe I can further do so. Even though you don't see Amazon as viable I see it as a means of selling PAMT.~~..~~"[115][102]

94. ~~95.~~ On May 25, 2013, Potashner admitted to Stark that "[I] need to get on running my business and getting shareholder value. Withholding license deals and announcements is contrary to the responsibility that I have."[116][103] Despite recognizing the problem, Potashner continued to withhold licensing deals and positive announcements through the Merger.

95. ~~96.~~ Potashner again confirmed that delaying licenses was contrary to his fiduciary duties. On June 2, 2013, Potashner explained to Stark that "I am still in a precarious situation delaying licenses that do [otherwise] bring us economic value and valuation...~~.~~I am not in a position where I can sit back and let stock fall too far."[117][104] Yet Potashner did just that because, as noted, the very same day - June 2, 2013 - VTBH informed Potashner that it was Stripes~~'~~ Group's preference to avoid defending the stock because the "premium on deal will look better."[118][105]

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

> Personally I think this has gone on far too long. We need to get on with the business of running the business. What has been going on since this VTB [Stripes] idea surfaced? Where are our licensing agreements, where are sales (incremental improvement due to David), Epsilon, Amazon, The Chinese, McDonalds, The Bear stores (still in beta mode), Sony, Samsung, etc.? AND WE HAVE SURE BURNED THROUGH A HELL OF A LOT OF MONEY....
>
> It is time for the BOD to step up and take charge! We have been far too passive in the past. It is good to have a strong leader but not a dictator.[119][106]

[114][101] PAMT0039865.
[115][102] VTBH002189.
[116][103] VTBH00175900J759.
[117][104] PAMTNV0106815.
[118][105] PAMT0040595.
[119][106] PAMT0061365.

97. ~~98.~~ While Kaplan's email demonstrated a brief glimpse of spirit, the next day, July 7, 2013, Kaplan embarked on his personal quest for an additional bonus in connection with the Merger (described below). After realizing the potential for personal benefit, Kaplan fell in line. The Outside Directors, through Kaplan's email, were thus informed of Potashner's stalling efforts and by their acquiescence, were complicit in the misconduct.

98. ~~99.~~ Ultimately, before the Board even voted on the Merger, Potashner gave VTBH and Stripes Group "veto rights on all licenses," precluding the Company from entering into a superior licensing agreement before giving control of the Company to Stripes Group.[~~120~~107]

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

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

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

> The key concern I have has been the financing challenges for VTB. They had both covenant issues and the need to increase the credit line to support their growth as well as the inclusion of the PAMT expenses post closing.
>
> * * *
>
> [The] biggest concerns I have highlighted include unaudited financials and a new item around the independence of their [VTB's] auditors.
>
> * * *
>
> The biggest issue outstanding in my mind is an issue concerning $12M of debt that VTB has that was not disclosed to us at the time we negotiated exchange rates...I believe this is indication that their balance sheet wasn't as strong as they represented and we should get something as an offset.[~~121~~108]

101. ~~102.~~ VTBH's balance sheet did not thereafter improve. A month later, on July 31, 2013 (two days before the Parametric Board voted on the Merger), VTBH provided its

[~~120~~107] PAMT0060525.
[~~121~~108] PAMTNV0105759.

second quarter financials to Barnes, Parametric's CFO. Barnes promptly forwarded the numbers to Potashner

writing, "FYI. Proxy may not be pretty. Going to have some selling to do."[122][109]

102. ~~103.~~ Notably, despite their awareness of Turtle Beach's dire financial state and previously undisclosed debt, Potashner and the Outside Directors did not negotiate anything "as an offset," did not renegotiate the exchange rates, and continued to pay no heed to the red flags regarding Turtle Beach's poor financial condition.

103. ~~104.~~ On August 2, 2013, the Board met and voted in favor of the Merger Agreement. This August 2nd meeting took the form of a one-hour conference call. During that call, the Outside Directors met Potashner's cash demands and agreed to pay his 2013 bonus payments at the maximum target rate of $210,000.[123][110] According to the Proxy, Potashner was entitled to receive a "golden parachute" upon a change in control which would result in compensation of more than $2.8 million (including the $210,000 bonus described above plus a cash payment of $350,000 and equity bonus in the form of accelerated vesting of stock options valued at nearly $2.25 million.

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

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

> We did get it but you should know that just barely. With the renegotiation to 81-19 we were below one of the 3 metrics and when you aggregate the 3 metrics the deal is "barely fair."[124]

[122][109] PAMT0057372.
[123][110] PAMT~~0000189~~0000I89.

> The issue with this is that the document goes public and can make the vote harder for the shareholders. I will need to do a good job selling the strategic ramifications. [124]111

106. ~~107.~~ Potashner later lamented to Stark, "If we received 22% of the shares we wouldn't have been out of bounds on the fairness opinion."[125]112 Nevertheless, the Board still approved the Merger at the severely dilutive ratio of 80.9% to 19.1%.[126]113

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

E. ~~E.~~ The Go-Shop Was a Sham

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

109. ~~110.~~ Potashner and Stark's correspondence regarding the go-shop is illuminating. On August 3, 2013, Potashner sent Stark a draft Merger announcement with the following reference to the go-shop: "Parametric, with the assistance of an independent financial advisor, will actively solicit alternative proposals during this period."[127]114 Stark responded right away to demand removal of that sentence, writing, "You're not looking for an alternative and neither are we."[128]115

110. ~~111.~~ Potashner responded minutes later to confirm that he would "soften" that language, because:

> ~~We were not shopping the company,~~

[111] PAMTNV0101203.
[125]112 VTBH068943.
[126]113 PAMTNV0101319.
[127]114 VTBH008036.
[128]115 PAMT0056829.

> We were not shopping the company, Just to [be] 100% transparent there were 2 others that we discussed but I put them on licensing track discussions and anticipate they will stay there - Amazon and Dolby. I have slowed both discussions to get our deal done but this will be a topic for you and I next week.[129]116

111. ~~112.~~ On August 7, 2013, Potashner informed Stark that VTBH should not "invit[e] in/embolden one of the other companies that expressed interest in us" because "I like our deal. I don't want to be an operating unit of Amazon.... You and I are totally aligned. I know the stock price doesn't matter now for your or mine personal liquidity."[130]117

112. ~~113.~~ On August 12, 2013, one week into the go-shop period, Motorola Mobility's Senior Vice President and General Counsel contacted Parametric to "re-engage" because "Motorola wanted to own [Parametric's] IP."[131]118 Even though Motorola was on the "Go Shop Buyers List," Potashner and Houlihan Lokey did not directly respond regarding this serious indication of interest, rather, Potashner leaked the contact to Stark and asked that VTBH respond.[132]119 On August 15, 2013, Stark spoke directly with Motorola to hear that Motorola ~~–~~ a potential acquirer competing with Stark ~~purportedly~~ puiportedly was not interested.[133]120 Stark's contact with Motorola, of course, was highly inappropriate and rife with conflict given the fact that Stark was employed at Motorola for nine years between 2003 and 2012 and served as its former Chief Operating Officer.

113. ~~114.~~ In addition, on August 13, 2013, Potashner thwarted Amazon by informing it that Parametric's video gaming licenses were off limits (despite Amazon's interest in purchasing Parametric as a whole).[134]121

114. ~~115.~~ After the go-shop expired, Potashner confirmed to Stark that he had blocked competing bids. On November 19, 2013, Stark asked Potashner about a negative online article regarding the Merger. Stark quoted the following line in his email: "HL [Houlihan Lokey] contacted 13 parties with no interest and then 49 parties with no interest."[135]122 Stark asked

[129]116 VTBH008036.
[130]117 VTBH004040.
[131]118 PAMT0060361.
[132]119 PAMT0038812; PAMT0060361; PAMT0060361; PAMT0060541.
[133]120 PAMT0052416.
[134]121 PAMT0041742.
[135]122 PAMTNV0090998.

Potashner, "Can you provide the bullets to counter this please?"[136][123] What Stark did not realize —nor did Potashner when he responded— was that the above quoted line was in fact summarizing language from the Proxy itself.[137][124] Regarding the go-shop, after mentioning that 49 parties were contacted, the Proxy stated: "None of these prospective buyers, or any other parties, expressed interest in making an acquisition proposal for Parametric."[138][125]

~~116.~~ Potashner responded with his "counter" to this language, writing to Stark:

115. Dolby and Amazon had interest. I will take you through the discussions when we are together. I put boundaries that were very difficult in that I didn't want an exit given that the $ 150M valuation although good for merger calculations was light in mind for an~~.~~ exit. I would not have let you take us private either. Better to discuss face to face.[139][126]

116. ~~117.~~ For context, a valuation for Parametric of $150 million would have amounted to above $19.00 per share at the time of the Merger. On August 2, 2013, for example, Parametric's market capitalization existed at approximately $135 million.[140][127] Yet Potashner egregiously "put boundaries in place" to prevent $150 million offers because he personally did not want them. ~~Now the Company's stock sits at 57 cents per share.~~

117. ~~118.~~ The go-shop also contained several structural problems. First, the Break-Up License applied fully during the go-shop, which precluded bids (as discussed below). Second, the five day business match-right provision also barred potential bidders by, according to Professor Subramanian of Harvard Business School and Harvard School of Law, "allow[ing] Turtle Beach to slow down, and potentially run out the clock on, a potential third-party bid," resulting in an "infeasible" timeframe for a competing bid. Third, Houlihan Lokey, a conflicted financial advisor, was allowed to participate in the "solicitation" of other bidders in Potashner's "go shop." Like Potashner and Stark, Houlihan Lokey had no incentive to actually find an alternate bidder during the go-shop process, and every incentive not to. Houlihan Lokey's engagement fee had already been curtailed significantly when it was forced to rebate $300,000 to pay for the Craig-Hallum fairness opinion fee after it was discovered that Houlihan Lokey had

[136][123] Id.
[137][124] VTBH048603.
[138][125] Proxy at 58.
[139][126] PAMTNV0090998.
[140][127] PAMTNV0101319.

represented VTBH in its private sales process in 2011 and was thus conflicted.[141][128] Houlihan Lokey also sought a financing role from Stripes Group on the Merger itself.[142][129]

V. ~~V.~~ THE STOCKHOLDER VOTE WAS BOTH UNINFORMED AND COERCIVE

A. ~~A.~~ Defendants Purposefully Submitted a Misleading Proxy to Parametric Stockholders

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

119. ~~120.~~ Defendants designed the Proxy in order to conceal material information from Parametric stockholders and cram through the disastrous Merger for their personal benefit. Unlike most mergers where a pure majority is required for approval, this Merger only required a majority approval of the votes cast at the special meeting. When Kenworthy asked how many non-insider votes were required, Potashner proudly explained, "I skewed the scenario so we don't need 50% of the vote. Just 50% of those in attendance or those who vote their proxy. This should help."[143][130]

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

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

121. ~~122.~~ The Fairness Opinion/Proxy Projections were actually developed in spring 2013. As a result of their age, the Fairness Opinion/Proxy Projections were both over-influenced by VTBH's strong first quarter of 2013 and not influenced at all by VTBH's financial decline in

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[141][128] Deposition Transcript of Daniel Hoverman ("Hoverman Tr.") at 110-11, 154, 213-20.
[142][129] Id.
[143] ~~VTBH~~[130] VTBH015502.

the second half of 2013. Indeed, on October 25, 2013, Stark described the Fairness Opinion/Proxy Projections as follows:

> Our [Fairness Opinion/Proxy Projections] are a bit high and reflect what we believed would happen this year. I believe they were done in the Spring timeframe (May?) though and we had just come off of a very strong ~~QI~~Q1 so there is grounding for these. Since then, the market has clearly slowed much more than we expected. And even by August DA signing, I had adjusted the range down accordingly.[~~144~~131]

122. ~~123.~~ On August 2, 2013, Craig-Hallum relied on these outdated projections to render its fairness opinion.[~~145~~132] Notably, the Fairness Opinion/Proxy Projections contained 2013 Adjusted EBITDA of $40.6 million and 2013 net revenue of $218 million for VTBH.[~~146~~133] Less than a week later, Stark confirmed to Fox, Kenworthy, ~~Doorninkl~~Doornick, and others that those numbers were inaccurate, and that VTBH's "best estimates right now" came to just $32 million to $40 million for 2013 EBITDA, and just $190 million to $215 million for 2013 net revenue, meaning the entire ranges provided by Stark fell below the corresponding values used in the Fairness Opinion/Proxy Projections .[~~147~~134]

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

124. In addition, although the Proxy forecasted $100.4 million EBITDA for 2016, internally Stripes knew that "$100m of EBITDA by 2016 is possible but requires upside scenarios to occur across all of our business segments and for us to become #3 player in high-end stereo/mobile headsets **or** for us to find new audio or gaming markets that can contribute $20-$40m of new EBITDA (=$100 to $200m of new revenue)." In other words, VTBH's estimates were divorced from reality.

[~~144~~131] VTBH093183.
[~~145~~132] PAMT0056986; Proxy at 74.
[~~146~~133] *Id.*
[~~147~~134] VTBH015820.

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

126. ~~125.~~ Potashner knew as of August 8, 2013 that VTBH's latest "best estimates" were below the corresponding values in the Fairness Opinion/Proxy Projections, but was determined to push the Merger through even if it meant standing by the inaccurate values. On August 8, 2013, Potashner told Stark to "be aware that the fairness opinion will become public with proxy so you don't want to be pessimistic to the point you contradict the data you provided that was basis for that opinion."~~148~~135

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

> The more I think about it I don't know how you can go out with any numbers that are lower than fairness opinion unless there has been a material change in business.~~. . .~~ I think we are boxed in that 2013, 2014 first look must match fairness opinion. Otherwise you need to conclude fairness opinion was wrong.~~149~~136

128. On August 9, 2013, notwithstanding Potashner's and Stark's knowledge about VTBH's deteriorating financial condition, the two executives gave a false and materially misleading portrayal of VTBH and what they anticipated from VTBH in terms of future earnings during Parametric's third-quarter 2013 earnings conference call. During the call, Stark told investors that "[they] expect[ed] our 2013 revenues to be in the range of $190 million to $215 million and our EBITDA to be in the range of $32 million to $40 million." VTBH ultimately missed this target by ***61%*** ($13.852 million actual compared to $36 million estimated midpoint).

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

> I recommend we take the long view, don't get greedy and help us sail through the shareholder vote. Please note I didn't try to renegotiate deal after you [VTBH] did a downward reforecast and then missed that reforecast.~~150~~137

~~148~~135 PAMTNV0100953.
~~149~~ ~~*Id.*~~136 *id.*
~~150~~137 PAMTNV0099861.

130. ~~127.~~ VTBH continued its precipitous financial decline in September and October 2013. On October 7, 2013, Potashner explained to Stark that "Jim Barnes has been nervous for a bit that your Q2 numbers show you as losing money and having negative equity value."~~151~~138 On October 14, 2013, Potashner wrote to Stark, "[t]he war is going to be getting shareholder support with deal terms that keep getting worse."~~152~~139 Potashner also stated to Stark, "I have to do some damage control necessary to assure success with shareholder vote."~~153~~140 Similarly, on October 18, 2013, Potashner told Stark that he has "been going over [numbers] with Jim [Barnes]. Shitty numbers. Money losing, negative equity, etc."~~154~~141

131. ~~128.~~ Despite VTBH's deteriorating financial state, Defendants were determined to consummate the Merger, even if it meant defrauding Parametric stockholders. On October 25, 2013, Potashner informed Stark that "[i]nitial input is that changing the numbers might necessitate new fairness opinion. We are discussing implications of simply taking the numbers out of the proxy. Jim is leading this assessment and will [provide] more info later today."~~155~~142 On October 29, 2013, Potashner made the following revealing comment to Stark, Barnes and others:

> As we discussed it is critical that the proxy leaves the tone of very positive financial numbers going forward. Even the actuals are weak for 13. Do you believe you accomplished this? This is the one key determinate of what the company will be valued at the day after the proxy and set the stage going forward.~~156~~143

132. ~~129.~~ Likewise, on October 31, 2013, Potashner explained to Stark that "there is a concern that given you brought down 2013 due to ~~MSFIT~~MSFT and CH [Craig-Hallum] may believe that [20]14 is off as well and thus fairness opinion exposed."~~157~~144

133. ~~130.~~ On November 30, 2013, Potashner explained to Stark that "I think we (pamt) are under tremendous pressure in that the numbers keep getting softer, the apparent lack of controls, and the covenants exposures. The [']does this deal make sense['] question is being

~~151~~138 VTBH095533.
~~152~~ ~~PAMINV~~139 PAMTNV0095569; PAMTNV0099861; PAMTNV0096468.
~~153~~140 PAMTNV0104228.
~~154~~141 PAMTVNV0095570.
~~155~~142 PAMTVNV0094986.
~~156~~143 PAMTNV0095423.
~~157~~144 VTBH089382.

asked."[158][145] Later in the email chain Potashner stated that he has a "CFO who is very nervous and I am trying to get to the bottom of it."[159][146]

134. ~~131.~~ During this period, VTBH developed an updated set of projections that it would ultimately provide to its lender ~~—~~ PNC ~~—~~ to certify its compliance with certain debt covenants (the "Bank Projections"). On December 6, 2013, only three days after filing the Proxy, VTBH circulated a substantially final version of the Bank Projections.[160][147] VTBH ultimately sent the Bank Projections to PNC on December 19, 2013.[161][148]

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

Set of Projections	**2013 Net Revenue**	**2013 ADJUSTED EBITDA**
Fairness Opinion/Proxy Projections	$218 million	$40.6 million[162][149]
Bank Projections Low-End	$179.6 million	$22.2 million
Bank Projections High-End	$193 million	$27.5 million[163][150]

136. In fact, in response to VTBH's rapidly deteriorating financial condition, PNC forced VTBH to restructure its credit facility with the bank. On January 16, 2014, the day after

[158][145] VTBH073092; PAMTNV0088385~~.~~
[159] ~~*Id.*~~[146] *id.*
[160][147] VTBH02263.
[161][148] VTBH020031.
[162][149] PAMT0056986; Proxy at 74.
[163][150] VTBH020033. As contained in the Bank Projections' calculation of EBITDA, which is consistent with, if not conservative relative to, the Proxy's description of Adjusted EBITDA for VTBH used in Craig-Hallum's fairness opinion: "EBITDA is calculated as net income (earnings), plus interest, taxes, depreciation and amortization. Adjusted EBITDA adds back certain additional items~~,~~ and was calculated differently for Parametric and Turtle Beach ~~. . . .~~ For Turtle Beach, Adjusted EBITDA included addbacks of amounts for stock-based compensation and business transaction expenses."

the Merger, the post-Merger Company filed a current report on Form 8-K disclosing the terms of the credit restructuring with PNC. In pertinent part, the current report stated that PNC had permitted VTBH to incur an additional $7 million of subordinated debt and extend various repayment deadlines and credit limits in exchange for agreeing to strict and materially unfavorable leverage limits and capital requirements. PNC's restructuring of VTBH's credit facility qualified as a "VTBH Material Adverse Effect" under the terms of the Merger Agreement, yet Stark signed the Merger Agreement notwithstanding.[151]

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

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

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

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

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

favor of the Merger and in the absence of their disclosure, the shareholder vote could not have been fully informed.

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

140. ~~135.~~ In addition to the misleading Proxy, ~~defendants~~Defendants structurally coerced Parametric stockholders into voting in favor of the Merger. The Merger Agreement contained a draconian "Break-Up License" provision, which prevented other bids and penalized Parametric stockholders in the event they voted against the Merger. If Parametric shareholders had voted against the Merger or Parametric otherwise accepted a better offer, Parametric would have been forced to provide VTBH with (1) an exclusive (even as to Parametric) worldwide license to Parametric's HyperSound technology in the "console audio products field" (i.e., gaming applications), and (2) a non-exclusive worldwide license to Parametric's HyperSound technology in the "computer audio products field." Parametric would have received a 6% royalty on net sales of such products, and 30% from any sublicenses that VTBH negotiated. The term of the Break-Up License was a minimum ~~often~~of ten years, with a minimum royalty payment of $2.0 million during the first five years and $1.0 million for each year after that (for a total minimum royalty payment of $7.0 million). If these minimum royalty payments were not made, Parametric had the right to convert the gaming license to non-exclusive, but Parametric could not otherwise seek recourse from Turtle Beach for any unpaid "minimum" royalties. The Merger Agreement also contained a highly unusual combination of a five business day match-right provision and a 30-day "go-shop" provision.

141. ~~136.~~ The "Break-up License" was coercive. Had Parametric stockholders voted against the Merger, the Company would have been crippled by the one-sided Break-Up License.

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

142. ~~137.~~ Potashner licensed Parametric's "crown jewel" intellectual property at less than fair market value and under terms that did not reflect Parametric's existing licensing strategy. Parametric's ~~LP~~IP commanded higher royalties in other licensing agreements. In fact, all of Parametric's then-existing licensing agreements existed at a 15% royalty rate, much higher than the paltry 6% rate contained in the Break-Up License. For example, Parametric signed a

deal with Epsilon to license HyperSound's automotive applications for $1 million for development of a new device and a 15% royalty for revenue over $6.67 million.[164][152] Parametric also licensed HyperSound's health care application to its subsidiary HHI for 15% of revenue.[165][153] Given that the latter was an interested transaction with Potashner, the Board cannot argue that 15% HHI royalty was not made on fair terms.

143. ~~138.~~ Potashner confirmed these facts when he admitted to Stark that the Break-Up License's royalty, then at 5.5%, was "well below the other deals I am working on within the licensing realm."[166][154] Potashner also stated: "I am also willing to have a break up consideration that results in you achieving a gaming license at well below market value ...As a demonstration of my conviction towards closing a deal I will offer up gaming in the context of a breakup fee."[167][155]

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

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

> I reach the following conclusions in my assessment of the Turtle Beach-Parametric deal:
>
> (1) Asset lockups such as the Break-Up Fee License Agreement are extremely unusual in the modern M&A marketplace;
>
> (2) The particular combination of the 5-Day Match Right and the 30-Day Go-Shop Provision is also not typical among comparable transactions;
>
> (3) The Break-Up Fee License Agreement is a very potent asset lockup, because it represents a large fraction of the overall value of Parametric, other bidders cannot keep the HyperSound technology out of Turtle Beach's hands by bidding, and the evidence suggests that it was granted at less than fair market value;

[164][152] PAMT0007031.

[165][153] Parametric Sound ~~Com~~Corp., Quarterly Report (Form 10-Q), at 14 (May 2, 2013), available at: http://www. sec. gov/Archives/edgar/data/1493761/000101968713001603/pamt_10q-033113.htm.

[166][154] PAMT0039816.

[167][155] *Id.*~~;~~, PAMT0039756~~.~~

> (4) The combination of the 5-~~Day Match Right~~DayMatchRight and the 30-Day Go Shop Provision puts additional "furniture against the door," creating no clear pathway for success for a third-party bidder; and
>
> (5) While the Break-Up Fee License Agreement and the Match Right/Go-Shop Provision each have a deterrent effect on their own, it is my opinion that the combined effect of these three provisions is highly likely to deter other bidders. This conclusion becomes stronger to the extent that the Break-Up Fee License Agreement was struck at less than fair market value.~~168~~156

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

> [A]n asset lockup struck at less than fair market value reduces the ~~stand-alone~~standalone value of the company in the event of a negative shareholder vote, because the acquirer will exercise the option and siphon value out of the company. Foreseeing this, shareholders may vote for the deal even if they believe it is below fair value.~~169~~157

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

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

147. ~~142.~~ Neither Potashner nor the rest of the Board asked their financial advisors, Houlihan Lokey and Craig-Hallum, to conduct a valuation of the Break-Up License or otherwise analyze its appropriateness as a deal term.~~170~~ ~~Craig-Hallam~~ 158 Craig-Hallum did not even know the provision existed.~~171~~159

~~168~~156 Subramanian Decl., ¶ 14.
~~169~~157 Subramanian Decl., ¶57.
~~170 Deposition Transcript of David Wambeke ("Wambeke Tr.") at 157-58; Deposition Transcript of Kenneth Potashner ("Potashner Tr.") at 78.~~

158 Deposition Transcript ofDavid Wambeke ("Wambeke Tr.") at 157-58; Deposition Transcript of Kenneth Potashner ("Potashner Tr.") at 78.
~~171~~159 Wambeke Tr. at 157-58~~.~~

148. ~~143.~~ Potashner and the Board did nothing to value the asset lockup, even though Parametric's CFO recognized that ~~"~~"[a]n exclusive license has a major impact on valuation, ~~etc. so~~ etc. so that needs evaluation."[~~172~~160] In addition, Potashner did not take any real effort to consider the value of the Break-Up License to VTBH or any other potential buyer.[~~173~~161]

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

149. ~~144.~~ Potashner negotiated all major terms of the Break-Up License without Outside Director involvement. Potashner and Stark first conceived the Break-Up License during their initial discussions in March 2013.[~~174~~162] By April 19, 2013, Stark and Potashner agreed on a term sheet that noted the Break-Up License "still needs discussion," but specifically described an exclusive license for gaming, exclusive license for "PC audio," and the same 6% royalty rate and 30% re-license royalty rate that ultimately appeared in the Merger Agreement.[~~175~~163]

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

> I am getting substantial push back from counsel on the exclusive license of the element of the ~~break up~~breakup fee.
>
> The issue is there is a BOD record that we were not interested in segregating exclusive gaming from consumer in that several of the potential licensees had presence in both sectors (i.e. Sony). We have BOD record that states we would want near full market cap exclusive full consumer/gaming.
>
> Therefore, the issuance of an exclusive gaming as breakup is deemed well in excess of traditional ~~break up~~breakup fees and thus BOD fiduciary issue.[~~176~~164]

151. ~~146.~~ Potashner overcame the resistance from his counsel and convinced the Outside Directors to agree to the Break-Up License without analysis. During a Board telephone conference, the next day, April 25, 2013, Potashner requested and received approval for the Break-Up License.[~~177~~165]

[~~172~~160] Potashner Depo. Ex. 4.
[~~173~~161] Potashner Tr. at 67-68.
[~~174~~162] Potashner Depo. Ex. 3; Potashner Depo. Ex. 5; PAMT0039748-49.
[~~175~~163] PAMT0049600-07.
[~~176~~164] PAMT0040125; PAMTNV0108234; PAMT0070745-48.
[~~177~~165] PAMT0000122.

152. ~~147.~~ Over the next two months, the Board continued to allow Potashner to negotiate the terms of the Merger, again, with little supervision or involvement. During this time, no Outside Director was involved in a single discussion with Turtle Beach regarding the Break-Up License. While defendants claimed in this litigation that Wolfe became involved in the matter, it was in fact Potashner ~~—~~ not Wolfe ~~—~~ who finalized the key terms of the Break-Up License. On June 19, 2013, Potashner unilaterally approved all of the key terms of the Break-Up License for inclusion into the Merger Agreement.[~~178~~166]

153. ~~148.~~ After that point, the attorneys for both sides simply scrivened non-substantive definitions, while Wolfe sat back as a pedestrian ~~cc'd~~cc'd on emails. Indeed, the core terms finalized by Potashner on June 19, 2013 remained in the drafts circulated throughout July 2013~~,~~ and made their way into both the final Merger Agreement and the Break-Up License.[~~179~~167] Wolfe only participated in a single conference call with Turtle Beach and counsel on July 24, 2013, which had already been pre-negotiated by Stark and Potashner "before we engage the lawyers tomorrow."[~~180~~168]

154. ~~149.~~ Potashner never ceded control to Wolfe on Break-Up License negotiations. As late as July 31, 2013, two days before the Board voted on the Merger, Stark attempted to re-trade on the prior 6% license deal and Potashner responded directly before even informing Wolfe.[~~181~~169] By the time Wolfe found out that there were open issues on the Break-Up License, he deferred to Potashner and asked him to work it out directly with Stark.[~~182~~170] Potashner then provided final comments and approval.[~~183~~171] Throughout negotiations, Wolfe did not offer a single substantive comment on any material Break-Up License term.

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

155. Following announcement of the Merger on August 5, 2013, Defendants engaged in a fraudulent push to win over Parametric shareholder approval. This campaign included

[~~178~~166] PAMT0040772.
[~~179~~167] *See, e.g.*, PAMT0065129; PAMT0065220; PAMT0069830.
[~~180~~168] PAMT0057667.
[~~181~~169] PAMT0057413.
[~~182~~170] VTBH000527.
[~~183~~171] *See, e.g.*, PAMT0066252; PAMT0066296; PAMT0066298.

meeting one-on-one with large Parametric shareholders with significant influence over the company's outstanding, non-insider shares.

156. Defendants held the following meetings with Plaintiff:

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

157. During each of the above meetings, Potashner and Stark made the same false and materially misleading statements that ultimately appeared in the Proxy on December 3, 2013. This included concealing the fact that VTBH was experiencing a significant financial decline and was not worth as much as Defendants had been representing.

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

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

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

VI. ~~VI. PARAMETRIC SHAREHOLDERS AND THE COMPANY~~PAMTP LLC WAS DAMAGED BASED ON THE EXCESSIVE OVERVALUATION OF VTBH AND THE UNDERVALUATION OF PARAMETRIC

161. ~~150.~~ Before Potashner embarked on the value-destroying Merger process, Parametric was a promising young tech company with a valuable intellectual property portfolio and that expected full profitability in 2014. On March 18, 2013, Potashner remarked to a fellow Board member that Parametric was "one of the biggest success stories on NASDAQ this year."~~184~~172 Potashner confirmed three days later that Parametric was "one of the best performing companies in the country."~~185~~173 On March 25, 2013, the Company provided outlook for fiscal year 2013. The Company announced that it was expecting to be cash flow positive from operations for 2014 from its core digital signage and licensing business: "We have been able to advance strategic licensing discussions and we have achieved success on several recent digital signage pilot projects that we expect will translate to high volume customer orders late in 2013 and in 2014. As a result, we anticipate that we will be operating cash flow positive in 2014." Around that time, however, Potashner began delaying Parametric's business efforts and licensing activities, thus materially undermining the Company's future business prospects.

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

A. ~~A.~~ The Parametric Board Grossly Overpaid for VTBH's Assets

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

~~184~~172 PAMTNV0113889.
~~185~~173 Id.

since the Merger because, inter alia, of the perception that "PAMT shareholders are getting 19% of something not worth much."~~186~~174

164. ~~153.~~ As also described in greater detail above, all ~~defendants~~Defendants knew that VTBH's performance was falling to levels well below the numbers presented to Craig-Hallum for its "fairness opinion" on the Merger. For example, regarding VTBH's anticipated 2013 revenues and cash flows, ~~defendants~~Defendants knew that the numbers used by Craig-Hallum were inaccurate, outdated, and misleading. These problems of course flowed through the later years of VTBH's financial projections, rendering the 2014-2016 figures used by Craig-Hallum for VTBH inflated and misleading as well. As noted above, Potashner explained that Craig-Hallum's fairness opinion resulted in an opinion of "barely fair." And that was with VTBH's inflated numbers. If Craig-Hallum had utilized VTBH's real financial numbers during pendency of the Merger, the valuations would have shifted entirely outside the range of fairness.

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

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

~~155. On December 12, 2013, Potashner wrote to Stark that Parametric's stock price had declined, inter alia, because "PAMT shareholders are getting 19% of something not worth much."~~187

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

167. ~~156.~~ The Board approved the Merger based on Craig-Hallum's analysis that excluded all licensing revenue for Parametric, even though Parametric's CFO admitted that "we

~~186~~174 PAMTNV0088100.
~~187 PAMTNV0088100.~~

fully expect" a licensing revenue stream.[188][175] Digital signage and Hi-IIHHI were the only sources of revenue included in the final projections.[189][176] In contractcontrast, however, Parametric's March 2013 investor presentation identified its "Licensing strategy" as a key "Capital Light Business Model" that could generate "Recurring Revenue Streams."[190][177] The same presentation touted Parametric's "Strong IP Portfolio" and explained that "Strong [PIP supports licensing for volume markets." Similarly, Parametric's 2012 investor presentation touted "Gaming Consoles/Computers" as part of its 2012-2013 "IP Strategy - PartnerStrategy-Partner and License" and planned a lucrative entry into a $68 billion annual video gaming market.[191][178]

The Board knew that the Company's licensing activities were viable, but acted in bad faith when it approved the Merger based on flawed financial projections with a material omission.

168. 157. The Board also acted in bad faith when it consciously disregarded a known component of Parametric'sParametric' s standalone value by engaging and/or permitting Potashner to engage, in the following activity: (a) Potashner sat on Optek Electronics' offer to pay Parametric a 9% royalty to "aggressive[ly] rollout" Hypersound technology in hundreds of thousands of Optek soundbars and headphones destined for Costco Wholesale Corporation ("Costco") shelves in time for the 2013Christmas shopping season; (b) the Board approved the Merger based on Craig-Hallum analysis the Board knew excluded potential Optek revenue; and (c) Potashner encouraged Turtle Beach CEO Stark to negotiate with Optek for Turtle Beach's benefit two weeks into the Go-Shop process and months before shareholders voted on the Merger.[192][179]

C. C. Craig-Hallum Was Conflicted

158. Craig-Hallum was using the fairness opinion, for which it was paid just $200,000, as an opportunity to pitch a more lucrative role in obtaining $500,000 to $700,000 in fees for

[188][175] PAMT0044589; PAMT0053793.
[189][176] PAMT0044589.
[190][177] PAMT0000313.
[191][178] PAMT0053887.
[192][179] PAMT0032661;PAMT0000006;PAMT0039019;PAMT0034497; PAMT0058676; PAMT0060525; PAMT0044589; PAMT0053793; PAMT0061365.

additional equity financing.[193][180] In March 2013, Craig-Hallum pitched for a role in an equity offering by Parametric and, days after rendering the fairness opinion, Rick Hartfiel, Director of Investment Banking at Craig-Hallum, recommended a $10 million offering "at around a 15-20% discount to market."[194][181] In fact, Craig-Hallum's representative admitted at deposition that it was "pitching its participation in [an] equity offering" during the August 2013 ~~timeframe.~~[195] timeframe.[182] There was no ethical wall to separate the bankers involved in the fairness opinion and those individuals simultaneously pitching the more lucrative work.[196][183]

~~**D. Defendants Deprived Stockholders of Appraisal Rights**~~

~~159. Defendants also deprived plaintiffs and the stockholder class of their rights to appraisal. Nevada Revised Statute Section 78.3793 provides dissenting shareholders the right to "dissent in accordance with the provisions of NRS 92A.300 to 92A.500, inclusive, and obtain payment of the fair value of his or her shares" unless the acquired company has "otherwise provided in the articles of incorporation or the bylaws of the issuing corporation in effect on the 10th day following the acquisition of a controlling interest" But on August 2, 2013, the Parametric Board voted to amend Parametric's bylaws so that "the provisions of Nevada Revised Statutes Sections 78.378 to 78.3783, inclusive, shall not apply to the Corporation or to the acquisition of a controlling interest by existing or future stockholders."[197] This definition included the Merger and Parametric shareholders were thus left without rights to appraisal for their shares in connection with the Merger.~~

VII. ~~VII.~~ THE MERGER WAS NOT APPROVED BY AN INDEPENDENT, DISINTERESTED MAJORITY OF DIRECTORS ~~-~~BECAUSE ALL SIX MEMBERS WERE CONFLICTED

169. ~~160.~~ The Merger was not approved by a majority of disinterested and independent directors. At the time of the Board's Merger vote on August 2, 2013, the Board had

[193][180] PAMT0038785.
[194][181] Wambeke Tr. at 122-23 and Ex. 2; PAMT0047470; PAMT0046980.
[195] ~~Wambeke Tr. at 118.~~

[182] Wambeke Tr. at 118.
[196][183] Wambeke Tr. at 119-20, 122-23, 125-26.
[197] ~~PAMT0000189.~~

six members (including Putterman who although at the time was identified as an independent director was in fact not). All six of those individuals were conflicted and/or acted in self-interest when voting on the Merger. Those conflicts are broken down as follows.:

170. ~~161.~~ **Kenneth Potashner.** Potashner's fellow Board members and co-defendants here concede that he was conflicted: "Ken [Potashner] is totally conflicted, ignored his fiduciary responsibility to our shareholders, and has been negotiating constantly for his own self-interest."~~198~~184

171. ~~162.~~ Potashner suffered from multiple conflicts in connection with the Merger. ***First,*** Potashner was conflicted in light of his plan to use the Merger as a means to personally profit from Parametric's hearing-related initiatives. Potashner saw great personal "liquidity" in HHI, later admitting that "I believe over time the HHI component will be worth a billion."~~199~~185 In fact, at a December 13, 2012 Board meeting, Potashner "outlined the longer-term plans for him to transition more time to ~~HHI"~~HHP' and that, as a result, Parametric itself would need a new CEO.~~200~~186

172. ~~163.~~ As noted above, Potashner admitted that the "whole reason that I entered into the deal [with VTBH] in the first place [was] [t]o build a multi-billion dollar HHI and benefit from it"~~201~~187 and that "[m]y intent was to sell PAMT at the right time and keep HHi as the foundation of a new company."~~202~~188 Potashner also requested a "gentlemen agreement" for a consulting deal.~~203~~189 And as noted above, even after the Parametric Board voted on the Merger, Stripes manipulated Potashner into believing that he could monetize his role in ~~HHI~~HTII.~~204~~190

173. ~~164.~~ ***Second,*** Potashner received golden parachute compensation of $2,807,738 in the Merger, which further motivated him to complete the deal. Potashner negotiated his own severance payments and lockup agreements directly with Stark, including the day the Board voted on the Merger.~~205~~191 Indeed, another Parametric Board member confirmed on August 2,

~~198~~184 PAMTNV0112517.
~~199~~185 PAMT004036.
~~200~~186 PAMT0000006-07; PAMT0000062.
~~201~~187 PAMTNV0105035; VTBH009741.
~~202~~188 VTBH000124.
~~203~~189 Id.
~~204~~190 See also PAMTNV0099274.
~~205~~191 VTBH000111; VTBH006118; VTBH013231.

2013, the morning of the final Board vote on the Merger, that "since [Potashner] has been spending all his time on this merger and not on getting us licenses for the technology, he has negotiated that he get paid his bonus ~~anyway if~~anyway-if the deal goes through."[~~206~~192]

174. ~~165.~~ Analysts observed the conflict these windfall payments created for Potashner. For example, in a November 13, 2013 article posted on the website Seeking Alpha, a writer noted ~~VTBH' s~~VTBH's disturbing financial picture and queried, "So why would Parametric pursue an acquisition with a floundering company like Turtle Beach?"[~~207~~193] His answer:

> Personal enrichment, of course. As a result of the merger, special golden parachute payments will be triggered for the executive management of Parametric. For instance, we can see on page 77 [of the Proxy] that Kenneth Potashner, the Chairman, will be entitled to over $2.8 million of payments that are triggered on a change of control. The proxy also reveals that he will continue on with a board seat following the merger, which is likely to be a cushy and lucrative endeavor for him.[~~208~~194]

175. ~~166.~~ ***Third,*** Potashner also negotiated for himself a continued seat on the Company's board after the Merger, which he believed would assist in his monetization of HHI. Potashner even snuck also in a reference to his being named to that position to the Merger press release. Stark reported on August 3, 2013, two days before the Merger was announced, that "Ken added a sentence to the press release saying he was going to be on the combined company board."[~~209~~195] Potashner was forced to apologize three months later, at an October 24, 2013 Parametric Board meeting, for naming himself without Board approval.[~~210~~196] In response, Putterman reasonably proposed a re-vote to name a different individual.[~~211~~197] Potashner so coveted the post-Merger board seat that he responded to Putterman later that day: "[Your proposal] hits a nerve with me. It is unlikely that I can work with you in the future or support your involvement on anything I am affiliated with. More important you take on incredible

[~~206~~192] PAMTNV0115196.
[~~207~~193] VTBH048603.
[~~208~~194] Id.
[~~209~~195] VTBH001587.
[~~210~~196] PAMTNV0115179.
[~~211~~197] Id.

personal liability if it can be demonstrated that you are participating in a plan to deceive our shareholders."[212][198] Potashner was right on the latter point.

176. 167. Potashner sought the outside director board seat to avoid the hours required by a chief executive officer. In Potashner's own words, "[I am] not interested in being CEO... . The whole point of me doing the deal was to not have to be a CEO."[213][199]

177. 168. When Fox of Stripes Group learned that Potashner was named Parametric's post-Merger board representative, he observed: "Interesting outcome . . . I guess in the end he just cared more than all the directors and won the battle."[214][200]

178. 169. ***Fourth,*** Potashner was so determined to protect his own interests that he made a series of threats and misrepresentations to the Parametric Board throughout the Merger negotiations. Potashner repeatedly misrepresented and concealed information to the rest of the Parametric Board, defied the Board's orders not to discuss certain issues with VTBH on several occasions, and threatened to displace the entire Board and sue them all if they did not cave to his personal compensation demands. Defendant and Parametric Board member Norris pleading with Potashner during Merger negotiations: "Please start acting like you are working for PAMT, not yourself!"[201] In sum, Potashner's conduct is not the hallmark of a disinterested, independent director acting with fidelity to corporate interest alone.

179. 170. **Elwood "Woody" Norris.** Norris was also conflicted as a result of his vying for employment in the post-Merger entity, resulting financial interest in completing the Acquisition, and related susceptibility to Potashner's threats. Potashner recognized these conflicts and pounced, threatening Norris that he would personally lose millions if Norris did not go along with the planned Merger. On March 29, 2013, as Potashner was working out a deal with Stark, Potashner emailed Norris privately to state that the Merger was in doubt and that "[i]f the bod [Board of Directors] costs us this deal I will look for them all to resign or I will resign.

[212][198] PAMTNV0112296.
[213][199] PAMTNV0086846.
[214][200] VTBH016192.
[201] PAMTNV0112541.

The Bod is on the verge of losing you at least $10m personally.[215] -"[202] Norris was thus uniquely susceptible to Potashner's threats.

180. 171. Norris was also conflicted when voting on the Merger because, at the same meeting where he approved the deal, the Board — with Norris present — agreed to pay Norris his maximum target bonus rate of $81,000, even though the performance conditions had not yet been met.[216][203]

181. 172. Moreover, Norris remained with the Company post-Merger as its "Chief Scientist" at least through the end of 2016.[217][204] Norris was aware of this incentive when he voted on the Merger byMerger—by July 1, 2013, Potashner stated that a term of the then-current Merger Agreement stated, "Woody Norris to have an. employment contract with '`Newco"' post-Merger.[218][205]

182. 173. **Andrew Wolfe.** Wolfe was beholden to Potashner in light of their prior relationship in threatening boards for personal compensation and Potashner's continued improper incentivizing of Wolfe to do Potashner's bidding. Potashner, Wolfe, and Todd worked together, respectively, as CEO, Chief Technology Officer ("CTO"), and Vice President of SonicBlue, Inc. ("SonicBlue"). Potashner promoted Wolfe to CTO and Senior Vice President of Business Development then procured company-issued loans for himself and Wolfe to purchase shares of a SonicBlue subsidiary, RioPort, Inc. (similar to HHI).

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

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[215] PAMT0033560.

[202] PAMT0033560.

[216][203] PAMT0000189.

[217][204] http://hypersound.com/hypersound-expecting-european-growth-with-directional-audio-systemshypersound-expecting-european-growth-with-directional-audio- systems.php.

https://www.sec.gov/Archives/edgar/data/1493761/000149376116000065/hearinvestorpresentation.htm.

[218][205] PAMT0061388.

184. ~~175.~~ Wolfe was in Potashner's debt and Potashner continued this pattern by personally luring Wolfe to the Parametric Board in February 2012. When Potashner began angling for a post-Merger board seat with Turtle Beach, Potashner pushed for only two candidates—Potashner and Wolfe. Potashner did so repeatedly, including on April 23, 2013 (Wolfe identified by Stripes as post-close member "recommended by Ken Potashner"); July 1, 2013 (Potashner writes to Stark, "I will be the choice ... I will also recommend we add Andy Wolfe to BOD"); July 3, 2013 (Potashner writes to Stark regarding the post-Merger board, "I highly recommend myself and Andy Wolfe become the 2 from our side. Not one of the other directors is even remotely qualified."); and July 5, 2013 (Potashner to Stark, Wolfe "will be my recommendation for the 2ND BOD seat should PAMT go to 2").[~~219~~206] Wolfe currently remains on the post-Merger Turtle Beach board of directors.

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

186. ~~177.~~ **Dr. Robert Kaplan.** Despite not participating in a single discussion with VTBH, Kaplan voted on the Merger while vying for a personal payment to "get even" with Potashner. Kaplan explained on July 28, 2013 that he should be personally paid because the independent directors "are legally exposed to a lot of the decisions he [Potashner] forces upon us."[~~220~~207]

187. ~~178.~~ The day of the most significant vote in Parametric's corporate existence, Kaplan spent his time emailing about the personal bonus he felt the independent directors should receive. The Parametric Board voted on the Merger at a 4 p.m. meeting on August 2, 2013. That morning, Kaplan expressed surprise to Putterman that "Neither the vesting of our options nor the compensation of the independent directors is mentioned in the [Merger Agreement]."[~~221~~208] So, one hour before the meeting, Kaplan wrote to propose the following resolution:

> "$50,000 is to be paid to each of the independent directors as compensation for their continuing efforts and activity in Corporate Development. This money is to be paid immediately." I mentioned this thought to you previously and have discussed it with Seth [Putterman].

[~~219~~206] PAMTNV0105448; VTBH013411; VTBH010857; VTBH004242; PAMTNV0105849.
[~~220~~207] PAMTNV0115287.
[~~221~~208] PAMTNV0115196.

> Since it should not be tied to the merger, I have described it differently.[222][209]

188. ~~179.~~ At the meeting an hour later, a few minutes before the Board actually voted on the Merger, the Board agreed to table the final decision on their bonuses: "The Board next discussed potential cash bonuses for the directors based on their increased level of work related to the Merger Agreement and other contemporaneous matters, but deferred any decision related thereto."[223][210] After voting on the Merger, the Board adjourned at 5:00 p.m.[224][211] Kaplan, however, still believed he would receive a cash bonus. At 7:35 p.m. that evening, Kaplan continued in his personal quest for a Merger-related bonus, upping the ante:

> I used 50K as a starting point..~~.~~.My real suggestion is to have an average of all the executive bonuses and that figure is what the IDs [Independent Directors] should get. Ken has granted himself rather large bonuses. This will get even with him, not that I want to get even, I really just want equality.[225][212]

189. ~~180.~~ Kaplan demonstrated the same money-hungry approach earlier in the Merger negotiation process as well. On July 7, 2013, Kaplan emailed Barnes and Norris stating: "I think the BoD should pass a resolution giving some kind of healthy golden parachutes to all the BoD members upon their termination, e.g., stock options (VTB is issuing an unlimited amount of options ~~premerger~~pre merger)."[226][213] As a result, the Board attempted to put a last-minute addition into the Merger schedules that each outside director receive a personal fee for the Merger.[227][214]

190. ~~181.~~ These payments were material to Kaplan personally and, as demonstrated above, he was operating under the belief that he would receive the Merger-related bonus at the time he voted on the Merger. In fact, even in the Proxy released on December 3, 2013, ~~defendants~~Defendants kept the option open, stating that "in connection with the negotiation and execution of the merger agreement, Parametric may elect to pay a fee to each of the non-employee members of the Parametric Board, commensurate to the incremental time devoted by

[222][209] PAMT0072324.
[223][210] PAMT0000189.
[224][211] Id.
[225][212] PAMT0072292.
[226][213] PAMT0033288~~.~~
[227][214] VTBH001570.

them apart from normal board of director service in 2013, related to review and analysis of strategic transactions and related matters."[228][215]

191. ~~182.~~ **Seth Putterman.** Like Kaplan, Putterman also voted on the Merger with the expectation of receiving a cash bonus. At 4:50 p.m. on August 2, 2013, during the very meeting while Putterman and the rest of the Board were voting on the Merger, Putterman agreed with Kaplan's bonus request in general, but offered a different rationale: "Can the bonus be made contingent on successfully raising the 5-15M$ that we seek prior to closing but that we need in any event!"[229][216] Putterman knew his proposed rationale had no merit—Putterman was not involved in obtaining the financing and conducted no actual work in doing so. Putterman did not contact any financing sources, did not engage in an independent discussion with the bankers, and did not perform any analysis on the financing documents.

192. ~~183.~~ Moreover, Putterman held a consulting agreement with Parametric and was forced to resign before the Merger's close. On November 12, 2013, Parametric notified the NASDAQ Stock Market ("NASDAQ") that Putterman was not actually "independent" under NASDAQ rules. The Board had earlier failed to disclose that it gave a consulting contract to Putterman and granted him options vesting over three years valued at $162,775 and, according to Parametric, the payments "exceeded the $120,000 compensation limit set forth in NASDAQ Marketplace Rule 5605(a)(2)(B) and therefore precludes Dr. Putterman from being deemed independent according to this rule."[230][217] This meant that Parametric had been operating in violation of NASDAQ rules throughout the Merger process because half of its six-member Board was not independent (~~Potashn.er~~Potashner, Norris and Putterman). Consequently, on November 21, 2013, three months after voting on the Merger, Putterman tendered his resignation from the Parametric Board.

193. ~~184.~~ **James L. Honore.** As with the other Outside Directors, Honore established a lack of independence from Potashner when repeatedly bowing to Potashner's threats during the sale process. In the face of those threats, Honore agreed to pay Potashner in exchange for agreeing to relinquish options in HHI that Potashner had no legal right to hold;

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[228][215] Proxy at 75.

[229][216] PAMT0072324.

[230][217] See http://www.~~see~~sec.gov/Archives/edgar/data/1493761/000101968713004399/parametric~~_8k.htm.~~

refused to intervene when it became clear that Potashner was pursuing the Merger for improper and self-interested reasons; purposefully disregarded Potashner's warning that VTBH had undisclosed debt and had misrepresented its finances; and intentionally issued a false and misleading Proxy as described below. And despite realizing that Potashner had committed a fraud on the Board, Honore and the Outside Directors did nothing to revise the terms of the Break-Up License or exchange ratio that Potashner had already negotiated with Turtle Beach. In addition, Honore also expected that he would be paid in connection with the Merger, given Kaplan's and Putterman's comments at the final meeting, as well as the Proxy's inclusion of language allowing the receipt of a Merger-related payment for the Outside Directors.

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

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

194. ~~185.~~ Stripes Group pushed through the Merger in order to obtain liquidity for its failing investment in VTBH. Stripes Group intentionally did so in a way that harmed Parametric stockholders. As Potashner succinctly put it, "[I] have been going over [VTBH] financials in proxy with Jim. Shitty numbers, money losing negative equity, etc. If Stripes was really interested in doing an IPO next year they never should have replaced cash with debt layer. Anyway glad to rescue your sorry ass and get you public."~~231~~218

195. ~~186.~~ In 2013, Stripes Group ~~—~~ through SG VTB ~~—~~ was majority owner of VTBH. Given VTBH's rapidly deteriorating financial state, Stripes Group knew that it had to take VTBH public to capitalize VTBH and gain liquidity for itself. But Stripes Group also knew it could not do so by way of a traditional IPO. A traditional IPO would have subjected Stripes Group and VTBH to intense financial scrutiny, which would have amounted to a test that VTBH could not pass. In fact, in May 2013, Fox was specifically informed by the Global Head of Equity Sales at Barclays, regarding a potential IPO for VTBH: "Right now, if you came to me and said we need to get an offering ~~done —~~ done- I would say you can't get it done."~~232~~219

196. ~~187.~~ As a result, Stripes Group found an easier path forward ~~—~~ it pushed through a reverse merger of VTBH into the publicly traded, but smaller, Parametric. By

~~231 PA1VITNV~~218 PAMTNV0095569.
~~232~~219 VTBH007665.

completing a reverse merger with Parametric, Stripes Group was able to gain access to the public markets and take advantage of the Parametric Board's bad faith unwillingness to properly diligence the financially stressed Turtle Beach. Put differently, rather than complete a traditional IPO, Stripes Group chose the path of least resistance and pushed the Merger through by manipulating a conflicted and ineffective Parametric Board.

197. ~~188.~~ Potashner stated on several occasions that Stripes Group was using the Merger to go public and all defendants understood this fact.[~~233~~220] For example, on September 5, 2013, while discussing a closing condition PNC ~~Bank~~ placed on the Merger, Potashner stated to Stark and Barnes:

> Its not silly if Stripes group is able to preserve a high market valuation for the entity they are using to go public with and build the value up from there....
>
> what was silly was for stripes to allow PNC to dictate a term of a requirement to raise $5M as a closing condition at a time that I cant use my shelf to do a reasonable deal due to my inability to integrate VTB numbers. This drives me down a path of having to sell discounted stock that will take our market cap down further.
>
> When all the smoke settles Stripes will have 80% of something worth $400M if we are lucky instead of 80% of $500M. $80M paper loss. I know we can argue day ~~1~~ valuation doesnt matter but if it were me I write a $5M ~~sheck~~check to get the $80M.
>
> I know you are tired of this discussion but I am the one who is taking all the calls from the pissed off investors.[~~234~~221]

198. ~~189.~~ After the Merger closed, Stripes Group engineered a series of post-close transactions whereby SG VTB (Fox), ~~Doorninkk~~Doornick, and Stark loaned money to the Company at exorbitant interest rates, then forced the Company to issue stock to pay them back,

[~~233~~220] PAMT0041988; VTBH004981; PAMTNV0095553~~.~~

[~~234~~221] PAMT0041988; ~~VTBHO 04981; PAMTNV~~VTBH004981; PAM'TNV0095569.

with interest.[235]222 Some of these were done just to close the merger Even Potashner labeled the 20% yield in year two "way above market" in an email exchange with Stark.[236]223

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

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

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

201. ~~192.~~ Bonanno's allegations represent just the tip of the iceberg. In a series of transactions spanning August 2013 to February 2016, SG VTB, ~~Doornink~~Doornick and Stark purchased $37.3 million in high-yield notes from the Company at exorbitant interest rates. Specifically, SG VTB purchased $33,296,975 in notes, ~~Doornink~~Doornick purchased $3,503,025

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

[236]223 PAMTNV0104810.

in notes, and Stark purchased $500,000 in notes. The notes generally bore interest at a rate of 10% for the first year, and then ballooned to 20% for all periods thereafter. To date, Turtle Beach has paid $22,489,000 million on the notes, distributed as follows: $20,867,386.33 to SG VTB (i.e., Fox), $1,082,163.67 to ~~Doornink~~Doornick, and $539,450 to Stark. Moreover, as additional purported "consideration" for purchasing or amending the notes, SG VTB (Fox) and ~~Doornink~~Doornick have been granted a significant number of stock warrants at below-market prices. Specifically, SG VTB (Fox) obtained warrants that allow it to purchase 1,384,884 shares of Post-Close Turtle Beach at $2.54 and 1,400,000 shares of Post-Close Turtle Beach at $2.00, and ~~Doornink~~Doornick obtained warrants that allow him to purchase 306,391 shares of ~~Post-Close~~Post- Close Turtle Beach at $2.54. On February 2, 2016, SG VTB (Fox) was able to purchase 2.5 million Post-Close Turtle Beach shares at $1.00 per share when the stock was trading significantly higher than that. These conflicted transactions included:

- ~~•~~ August 30, 2013: as a closing condition for the Merger, the Company issued $10 million of subordinated notes (the "August 2013 Notes") to SG VTB, ~~Doornink~~Doornick and Stark that bore interest at a rate of (i) 10% per annum for the first year, and (ii) 20% per annum thereafter.[~~237~~224]
- ~~•~~ January 15, 2014: the Company issued a $7 million subordinated note (the "January 2014 Note") to SG VTB on substantially similar terms as the August 2013 Notes.
- ~~•~~ April 24, 2014: the Company conducted a public offering and used more than $10 million of the proceeds to pay back the outstanding principal and accrued interest of the August 2013 Notes to SG VTB, ~~Doornink~~Doornick and Stark.
- ~~•~~ December 2014: the Company used more than $7 million from an existing Credit Facility to repay the outstanding principal and accrued interest of the January 2014 Notes to SG VTB.
- ~~•~~ April 23, 2015: the Company issued a $5 million subordinated note (the "April 2015 Note") to SG VTB on substantially similar terms as the August 2013 Notes.

[~~237~~224] Parametric's December 3, 2013 Proxy informed Parametric stockholders that "the Stripes Group" received these notes~~.~~

- ~~•~~ May 13, 2015: the Company issued $3.8 million of subordinated notes (the "May 2014 Notes") to SG VTB on substantially similar terms as the August 2013 Notes.

- ~~•~~ June 17, 2015: the Company issued a $3 million subordinated note (the "June 2015 Note") to SG VTB that bore interest at a rate of (i) 10% per annum until September 17, 2015 (roughly three months after its issuance), and (ii) 20% per annum thereafter.

- ~~•~~ July 8, 2015: SG VTB advanced the Company an additional $6 million under the same terms as the June 2015 Note.

- ~~•~~ July 22, 2015: the Company amended and restated each of the outstanding above-mentioned subordinated notes (the "Amended Notes"). The maturity date for the Amended Notes was extended to September 29, 2019, and the interest rate was amended so that the Amended Notes bore interest at a rate ~~of LIBOR~~ofLIBOR plus 10.5%. As purported "consideration" for accepting the terms of the Amended Notes, the Company issued warrants to purchase 1.7 million of the Company's common stock at an exercise price of $2.54 per share to SG VTB and ~~Doornink~~Doornick.

- ~~•~~ November 16, 2015: the Company issued $2.5 million in a subordinated note (the "November 2015 Note") to SG VTB that bore interest at a rate of 15% per annum until its maturity. As purported "consideration"for entering into the November 2015 Note, SG VTB received a Guaranty and Security Agreement that, inter alia,provided for a warrant to SG VTB to purchase roughly 1.4 million shares of the Company's common stock at an exercise price of $2.00 per share.

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

202. ~~193.~~ Despite the Company's significant decline in value, Stripes Group and SG VTB continued to reap the benefits by usurping the Company's public status. ~~Stripes is causing Turtle Beach to pay its affiliates tens of millions of dollars, while the Company's stock price flounders at less than $1.00 per share.~~This has remained true to the present day. Fox and Stark, in particular, have rewarded themselves handsomely over the years. Since the Merger, Stark has received over $12 million in compensation, more than $6 million of which has been in cash and

the rest in equity. The following chart specifies the amount of compensation Stark was able to extract from the post-Merger company as a result of the fraud alleged herein:

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

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

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

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

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

Transaction	B/S	Amount	Price	Value
5/21/18	Sold	323,792	$16.52	$5,349,044
5/22/18	Sold	340,730	$15.46	$5,267,686
5/23/18	Sold	57,366	$15.63	$896,631
5/23/18	Sold	353,569	$16.37	$5,787,925
5/23/18	Sold	124,543	$17.19	$2,140,894
9/11/18	Sold	104,186	$23.49	$2,447,329
9/11/18	Sold	25,397	$25.12	$637,973
9/12/18	Sold	207,107	$22.40	$4,639,197
9/13/18	Sold	35,773	$21.43	$766,615
9/13/19	Sold	129,053	$22.44	$2,895,949
10/15/18	Sold	206,790	$19.48	$4,028,269
10/15/18	Sold	18,978	$20.34	$386,013
10/16/18	Sold	63,096	$19.23	$1,213,336
10/16/18	Sold	51,524	$19.91	$1,025,843
10/16/18	Sold	24,444	$20.89	$510,635
10/17/18	Sold	14,115	$20.51	$289,499
10/17/18	Sold	21,053	$21.54	$453,482
10/30/18	Sold	100,302	$16.50	$1,654,983

10/31/18	Sold	66,602	$17.23	$1,147,552
10/31/18	Sold	55,798	$17.70	$987,625
11/1/2018	Sold	47,459	$18.18	$862,805
11/1/2018	Sold	29,839	$18.97	$566,046
12/11/2018	Sold	91,600	$17.62	$1,613,992
12/12/2018	Sold	104,289	$17.61	$1,836,529
12/13/2018	Sold	81,579	$16.57	$1,351,764
12/13/2018	Sold	12,455	$17.20	$214,226
1/15/2019	Sold	59,816	$15.87	$949,280
1/16/2019	Sold	56,827	$15.49	$880,250
1/16/2019	Sold	5,597	$16.14	$90,336
1/17/2019	Sold	58,636	$15.27	$895,372
1/18/2019	Sold	499,600	$16.55	$8,268,380
1/18/2019	Sold	400	$17.56	$7,024
2/14/2019	Sold	111,100	$18.26	$2,028,686
2/15/2019	Sold	137,825	$17.72	$2,442,259
2/19/2019	Sold	53,239	$17.07	$908,790
2/26/2019	Sold	20,014	$15.85	$317,222
		3,694,493		**$65,759,438**
		Shares Sold		**$ Value Sold**

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

206. ~~194.~~ Stripes Group, through Fox, exercises complete control over SG VTB and is responsible for its transactions and investments. Fox is the founder, sole owner, and Managing General Partner of Stripes Group. Fox is also the sole manager of SG ~~VTB, SG~~ VTB. SG VTB has stated in public filings that "Fox ... has voting and investment control over the securities held by SG VTB," which includes a majority interest in VTBH and now Turtle Beach (through a "control group").[~~238~~225] Moreover, according to Fox's public filings: "SG VTB Holdings, LLC is wholly owned by SG Growth Partners I, LP. SGGP I, LLC is the general partner of SG Growth Partners I, LP. SGGP Holdings, LLC exercises investment discretion and control over securities held by SGGP I, LLC. Stripes Group, LLC, which is wholly owned by [Fox], exercises investment discretion and control over securities held by SGGP Holdings, LLC."[~~239~~226] Given

[~~238~~225] https://www.~~see~~sec.gov/Archives/~~edgar~~cdgar/data/1493761/000119312517152072/d381010ddefl4a.htm.

[~~239~~226] https://www.sec.gov/Archives/edgar/data/1493761/000118143114004004/~~xslF~~xs1F345X03/rrd400192.xml.

their affiliation and overlap in management, SG VTB's actions can be attributed to Stripes Group.

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

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

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

~~IX. CLASS ACTION ALLEGATIONS~~

~~198. Direct Plaintiffs bring this action individually and as a class action on behalf of all holders of Parametric stock harmed by defendants' actions described below (the "Class"). Excluded from the Class are defendants herein and any person, firm, trust, corporation, or other entity related to or affiliated with any defendant.~~

~~199. This action is properly maintainable as a class action.~~

~~200. The Class is so numerous that joinder of all members is impracticable. According to Parametric' s SEC filings, there were 6,837,321 shares of Parametric common stock outstanding as of November 11, 2013, held by hundreds if not thousands of shareholders geographically dispersed across the country.~~

201. There are questions of law and fact which are common to the Class and which predominate over questions affecting any individual Class member. The common questions include, inter alia, the following:

(a) whether the Individual Defendants have breached their fiduciary duties of undivided loyalty or independence with respect to plaintiffs and the other members of the Class in connection with the Merger;

(b) whether the Individual Defendants engaged in self-dealing in connection with the Merger;

(c) whether the Individual Defendants unjustly enriched themselves and other insiders or affiliates of Parametric;

(d) whether the Individual Defendants have breached any of their other fiduciary duties to plaintiffs and the other members of the Class in connection with the Merger, including the duties of good faith, diligence, honesty and fair dealing;

(e) whether the defendants, in bad faith and for improper motives, usurped a corporate opportunity belonging to Parametric; and

(f) whether the defendants, in bad faith and for improper motives, impeded or erected barriers to discourage other offers for the Company or its assets.

202. Direct Plaintiffs' claims are typical of the claims of the other members of the Class and Direct Plaintiffs do not have any interests adverse to the Class.

203. Direct Plaintiffs are adequate representatives of the Class, have retained competent counsel experienced in litigation of this nature, and will fairly and adequately protect the interests of the Class.

204. Direct Plaintiffs anticipate that there will be no difficulty in the management of this litigation. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

205. Direct Defendants have acted on grounds generally applicable to the Class with respect to the matters complained of herein, thereby making appropriate the relief sought herein with respect to the Class as a whole.

X. DEMAND FUTILITY ALLEGATIONS

206. Derivative Plaintiff incorporates herein all of the allegations above, except those exclusively related to equity expropriation direct class action allegations.

207. Derivative Plaintiff brings this action derivatively on behalf of Turtle Beach to redress injuries suffered, and to be suffered, by the Company as a result of defendants' breaches of fiduciary duty, gross mismanagement, abuse of control, corporate waste and unjust enrichment. Derivative Plaintiff will adequately and fairly represent the interests of the Company in enforcing and prosecuting these derivative claims.

208. The current Post-Close Turtle Beach board of directors has six members: Doornink (Chairman), Fox, Stark, Wolfe, William E. Keitel ("Keitel"), and L. Gregory Ballard ("Ballard") (together, the "Current Board"). No pre-suit demand on the Current Board is necessary in this case because a majority of the Board is disabled from fairly, independently and objectively considering such a demand. As VTBH has asserted in other litigation pending in New York: "It is undisputed that, as a result of the Acquisition, pre-merger VTBH stockholders [*i.e.*, Stripes] retained ***unequivocal, overwhelming control*** of the voting power of VTBH through their control of Parametric." Based on the particularized facts set forth in this complaint, a pre-suit demand on the Current Board is legally excused for several reasons.

209. ***First***, at least three Current Board members (half of the Current Board) are inextricably linked and/or employed by Stripes and could not possibly be considered independent of Stripes. Stripes is liable to the Company for massive damages as a result of its principals' conduct in connection with the Merger. If any Current Director investigated a pre-suit demand, it would only increase Stripes' exposure to liability for the severe wrongdoing of Fox, Doornink and Kenworthy in connection with the Merger.

210. As described in greater detail herein, Stripes controls the Company – both through sheer voting power and through the tangible, day-to-day manifestation of that power. Indeed, in its latest proxy, Stripes and the Company concede that out of the six Current Board members, only Keitel, Ballard, and Wolfe are "'independent' as defined in the applicable NASDAQ listing standards and the applicable rules under the Exchange Act."[240] Thus, Stripes and the Company fully concede that Fox, Doornink, and Stark are not independent from Stripes. That concession was presumably based on at least the following facts:

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240 https://www.sec.gov/Archives/edgar/data/1493761/000119312517152072/d381010ddef14a.htm.

211. ***Fox***: As described in greater detail herein, Fox is synonymous with Stripes Group and SG VTB. Fox is Stripes Group's founder, sole owner, and Managing General Partner. The Company's latest proxy states that "Mr. Fox is the sole manager of SG VTB and, as such, has voting and investment control over the securities held by SG VTB."[241] Any liability faced by either Stripes Group or SG VTB is liability suffered by Fox personally; Fox's personal financial interests are inextricably intertwined with that of Stripes Group and SG VTB.

212. ***Doornink***: Doornink is an Operating Partner of Stripes Group and has been a principal at Stripes Group since May 2006. Any liability faced by Stripes will be suffered by Doornink personally; Doornink's personal financial interest is inextricably intertwined with that of Stripes Group and Doornink depends on Stripes Group for his personal livelihood. In addition, the Company concedes that Doornink is part of the "control group" owning a majority interest in the Company, led by Fox and Stripes. Doornink is bound by a Stockholder Agreement to vote for any slate of directors for the Company as designated by SG VTB (Fox), which means that Doornink is legally bound to vote consistent with SG VTB rather than in the interests of the Company or its minority stockholders. Doornink has no power to vote his shares in the interests of stockholders at large, but instead must vote his shares according to however SG VTB and Fox direct him.[242] As a result, the Company concedes in its most recent proxy that SG VTB and Fox are the beneficial owners of Doornink's shares. As illustrated throughout this complaint, during the Merger process, Doornink repeatedly acted at the behest of Fox and Kenworthy, demonstrating his beholdenness to Stripes on a day-to-day basis.

213. ***Stark***: Stripes named Stark the CEO of VTBH in September 2012. During the Merger process, Stripes demanded that Stark continue as CEO of post-Merger Turtle Beach. Stark remains in that position today. Stark depends on Stripes for his personal livelihood. In fact, despite the Company's recent woeful stock performance, Stripes allowed Stark to extract from the Company over $1.5 million in executive compensation in 2015 and over $1.3 million in

241 https://www.sec.gov/Archives/edgar/data/1493761/000119312517152072/d381010ddef14a.htm#tx381010_15.

242 https://www.sec.gov/Archives/edgar/data/1493761/000119312517152072/d381010ddef14a.htm#tx381010_6.

2016. As a result, in its latest proxy, the Company concedes that Stark is not independent from Stripes. In fact, on July 24, 2013, Doornink confirmed that Stripes would retain control of any post-Merger board of directors and that, as was ultimately the case, "Stripes also needs to have the right to hire/fire the CEO [Stark], so he can be counted as a Stripes board appointee . . . "[243] Just as Doornink previewed, Stripes indeed possesses the right to hire and fire Stark through its control over Turtle Beach and its dominance of the Current Board. Moreover, as illustrated throughout this complaint, during the Merger process, Stark repeatedly acted at the behest of Fox, Kenworthy, and Doornink, which also demonstrates his beholdenness to, and control by, Stripes on a day-to-day basis.

214. ***Second,*** Wolfe faces significant personal liability in this lawsuit and is liable to the Company and shareholders for the significant damages caused by his intentional misconduct, fraud, and/or knowing violation of the law. If Wolfe investigated a pre-suit demand, it would only increase his already significant exposure to liability for, inter alia, the following acts: (1) Wolfe personally enabled and facilitated Potashner's self-interested threats and ransom demands for Potashner's HHI options; (2) Wolfe approved the issuance of a misleading Proxy, particularly with respect to VTBH's deteriorating financial state, even though Wolfe was apprised of the real facts; (3) Wolfe intentionally shirked his responsibility to become involved in the Break-Up License while instead allowing the highly conflicted Potashner to negotiate all material terms of that license; and (4) Wolfe intentionally issued a misleading Proxy.

215. ***Third,*** a pre-suit demand is also excused because the entire Current Board – including Keitel and Ballard – is beholden to defendant Stripes for their nomination and election to the Company's board of directors. Stripes controls over 50% of the total voting power of the Company. Defendants freely admit that Turtle Beach is now a "controlled" company under NASDAQ Marketplace Rules, and has been since the day the Merger closed. See 2017 Proxy Statement at 5 ("The Board has elected for the Company to be treated as a 'controlled company' under NASDAQ's listing rules. A 'controlled company' under NASDAQ rules is a listed company more than 50 percent of the voting power of which is held by an individual, a group or

[243] VTBH007979.

another company [and which elects to be treated as a 'controlled company']."). [244] The Company also freely admits that, as the result of an ongoing voting agreement, SG VTB – the Stripes Group shell entity, of which Fox is the sole manager – has the right to designate all seven directors to the Current Board so long as SG VTB and its affiliates collectively beneficially own at least 10% of the Company's outstanding capital stock (as SG VTB continues to do). Indeed, the Company's Nominating Governance Committee consists of Fox (Stripes), Doornink (Stripes), and Wolfe. This is because, lab a 'controlled company,' as defined under NASDAQ rules, the Company is not required to establish a Nominating and Governance Committee comprised entirely of independent directors or otherwise ensure that director nominees are determined, or recommended to the Board, by the independent members of the Board."[245] Therefore, all of the Company's current directors are 100% dependent on Stripes for their seats on the Current Board and would be expelled from their positions, and the perquisites derived therefrom, for bringing the derivative claims against Stripes Group and SG VTB (*i.e.*, Fox).

216. In 2016, the Company paid Keitel $89,000 per year and Ballard is likely receiving a similar amount annually. In addition, each non-employee director receives an annual grant of options to purchase a number of shares of Company common stock with a grant date fair market value of $50,000 ***and*** a grant of restricted shares having a grant date fair market value of $50,000. Keitel and Ballard are thus receiving nearly $200,000 per year for their directorships in a Stripes-controlled entity. Due to the internal dynamics and structural dependencies surrounding the Current Board, the entire Current Board is legally disabled from fairly and objectively considering a pre-suit demand to bring, let alone vigorously prosecute, the claims asserted in this complaint.

217. In fact, Stripes set out to effectuate the Merger in order to gain control of a public company, as it now does. As early as April 23, 2013, Doornink remarked that "[i]f we merge the two companies, we'd definitely want the Newco to be designated as a 'controlled company' so we do not have to comply with the NASDAQ listing standards requiring majority board independence . . . . (A controlled company is defined as a company in which more than 50% of

[244] https://www.sec.gov/Archives/edgar/data/1493761/000119312517152072/d381010ddef14.htm.

[245] *Id.*

the voting power for the election of directors is held by an individual, a group or another company)."[246] (Parentheses, emphasis in original.) Doornink set out to ensure that, with respect to post-Merger Turtle Beach, Stripes would "have the same voting power on the new BOD as it has today on the VTB BOD."[247] Doornink made similar comments throughout the Merger process, openly conceding that under any structure of the post-Merger board, Stripes would retain control.[248]

218. ***Fourth,*** the Company has been and will continue to be exposed to significant losses due to the wrongdoing complained of herein, yet the Current Board has not filed any lawsuits against defendants or others who were responsible for that wrongful conduct to attempt to recover for the Company any part of the damages the Company has suffered and will suffer thereby. Despite the pervasive misconduct in connection with the Merger, the Current Board has turned a blind eye and has not conducted any investigation or initiated any action that would compensate the Company based on defendants' irrefutable and admitted wrongdoing. This is powerful additional evidence of the futility of demand on the Current Board.

XI. CAUSES OF ACTION

FIRST CAUSE OF ACTION

Direct Equity Expropriation Claim for Breach of Fiduciary DutiesDuty (Equity Expropriation) — Individual Defendants

Against the Individual Defendants

210. 219. Direct Plaintiffs repeat and reallegePlaintiff repeats and realleges each and every allegation supporting the equity expropriation claims as set forth herein.

211. 220. The Merger constituted a dilutive expropriation of equity whereby the Individual Defendants, in concert with the aiding and abetting defendants, engaged in "actual fraud" under the meaning of NRS 78.200(2) and NRS 78.211 (1). The majority-conflicted Parametric Board applied an excessive valuation for VTBH's assets, which was not an honest error of judgment, but was the result of a bad faith and reckless indifference to the rights of

[246] VTBH013411.

[247] *Id.*

[248] VTBH007979; VTBH005631.

Parametric's stockholders. All ~~defendants~~Defendants conspired to expropriate significant value from the Company, which caused all other stockholders' equity interests to be diluted.

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

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

214. ~~223.~~ By the acts, transactions and courses of conduct alleged herein, ~~defendants~~Defendants, individually and acting as a part of a common plan, advanced their interests at the expense of ~~plaintiffs and other members of the Class~~Plaintiff.

215. ~~224.~~ The Individual Defendants violated their fiduciary duties by entering into a transaction without regard to the fairness of the transaction to Parametric's shareholders.

216. ~~225.~~ The Individual Defendants engaged in self-dealing, did not act in good faith toward ~~plaintiffs and the other members of the Class~~Plaintiff, and breached their fiduciary duties ~~to the members of the Class~~.

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

SECOND CAUSE OF ACTION

~~Direct Claim For Aiding and Abetting Equity Expropriation Based~~ ~~Breaches~~Aiding and Abetting Breach of Fiduciary Duty ~~Against Defendants~~(Equity Expropriation) — Fox, Stark, Stripes ~~Group~~, SG VTB, and VTBH

218. ~~227.~~ ~~Direct Plaintiffs repeat and reallege~~Plaintiff repeats and realleges each and every allegation supporting the equity expropriation claims as set forth herein.

219. ~~228.~~ Defendants Fox, Stark, Stripes ~~Group~~, SG VTB, and VTBH aided and abetted the Individual Defendants in breaching their fiduciary duties owed to the public shareholders of Parametric, including ~~plaintiffs and the members of the Class~~Plaintiff.

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

221. ~~230.~~ Despite the unattractiveness of the dilutive Merger to Parametric public stockholders, the Parametric Board agreed that Stripes Group, SG VTB, and VTBH could acquire Parametric through a stock issuance that specifically diluted ~~plaintiffs' and the rest of Parametric's~~Parametric's stockholder base. Executives from Stripes Group, SG VTB, and VTBH knowingly induced the Parametric Board to breach its fiduciary duties and, as a result, Stripes Group, SG VTB, and VTBH benefitted by obtaining control of the Company and usurping its publicly traded status.

222. ~~231.~~ The Individual Defendants owed to ~~Direct Plaintiffs and the members of the Class~~Plaintiff certain fiduciary duties as fully set out herein.

223. ~~232.~~ By committing the acts alleged herein, the Individual Defendants breached their fiduciary duties owed to ~~Direct Plaintiffs and the members of the Class~~Plaintiff.

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

~~**THIRD CAUSE OF ACTION**~~

~~**Derivative Claim For Breach of Fiduciary Duties of Loyalty and Good Faith**~~
~~Against The Individual Defendants~~

~~234. Derivative Plaintiff repeats and realleges each and every allegation supporting the derivative claims as set forth herein.~~

~~235. The Individual Defendants violated fiduciary duties of loyalty, good faith, and honesty owed under Nevada law to the Company and acted to put their personal interests ahead of the interests of the Company.~~

236. By the acts, transactions and courses of conduct alleged herein, defendants, individually and acting as a part of a common plan, advanced their interests at the expense of the Company.

237. The Individual Defendants violated their fiduciary duties by entering into a transaction without regard to the fairness of the transaction to the Company.

238. As demonstrated by the allegations above, the Individual Defendants breached their duties of loyalty, good faith, and honesty owed to the Company.

239. The Individual Defendants engaged in self-dealing, did not act in good faith toward the Company, and have breached and breached their fiduciary duties to the Company.

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

FOURTH CAUSE OF ACTION

Derivative Claim For Gross Mismanagement
Against the Individual Defendants

241. Derivative Plaintiff repeats and realleges each and every allegation supporting the derivative claims as set forth herein.

242. The Individual Defendants abandoned and abdicated their responsibilities and fiduciary duties to competently direct and manage the Company's business and engaged in egregious misconduct constituting gross mismanagement in connection with the Merger. As a direct and proximate result of the Individual Defendants' gross mismanagement, the Company has sustained significant damages.

243. Accordingly, the Individual Defendants breached their fiduciary duties of loyalty and good faith owed to the Company by grossly mismanaging its business and affairs. As a result, each of the Individual Defendants is liable to the Company.

FIFTH CAUSE OF ACTION

Derivative Claim For Abuse of Control
Against the Individual Defendants

244. Derivative Plaintiff repeats and realleges each and every allegation supporting the derivative claims as set forth. herein.

245. The Individual Defendants' misconduct alleged herein constitutes a breach of their fiduciary duties because they abused their ability to control and influence the Company, for which they are legally responsible.

246. As a direct and proximate result of the Individual Defendants' abuse of control, the Company has sustained significant damages. As a result of the misconduct alleged herein, the Individual Defendants are liable to the Company.

SIXTH CAUSE OF ACTION

Derivative Claim For Corporate Waste
Against the Individual Defendants

247. Derivative Plaintiff repeats and realleges each and every allegation supporting the derivative claims as set forth herein.

248. By their wrongful acts, the Individual Defendants wasted the Company's valuable corporate assets by, among other things, causing the Company to issue equity to Stripes, SG VTB, and VTBH, which induced the Individual Defendants to breach their fiduciary duties owned to the Company. As a result, the Individual Defendants damaged the Company and are liable to the Company for corporate waste.

SEVENTH CAUSE OF ACTION

Derivative Claim against Stripes Group and SG VTB
for Aiding and Abetting the Individual Defendants' Breaches
of Fiduciary Duty, Gross Mismanagement, and Waste

249. Derivative Plaintiff repeats and realleges each and every allegation supporting the derivative claims as set forth herein.

250. Defendants Stripes Group and SG VTB aided and abetted the Individual Defendants in breaching their fiduciary duties owed to the Company.

251. The Individual Defendants owed to the Company certain fiduciary duties as fully set out herein.

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

253. Stripes Group and SG VTB colluded in and aided and abetted the Individual Defendants' breaches of fiduciary duties, and were active and knowing participants in the Individual Defendants' breaches of fiduciary duties owed to the Company.

~~EIGHTH CAUSE OF ACTION~~

~~For Unjust Enrichment Against the Individual Defendants, Stripes Group, and SG VTB~~

~~254. Derivative Plaintiff repeats and realleges each and every allegation supporting the derivative claims as set forth herein.~~

~~255. By their wrongful acts and omissions, the Individual Defendants, Stripes Group, and SG VTB were unjustly enriched at the expense of and to the detriment of the Company.~~

~~256. All the payments, equity shares, and benefits provided to defendants were at the expense of the Company. The Company received no benefit from these payments.~~

~~257. Derivative Plaintiff, on behalf of the Company, seeks restitution from these defendants, and each of them, and seeks an order of this Court disgorging all profits, benefits and other compensation obtained by these defendants, and each of them, from their wrongful conduct and fiduciary breaches.~~

~~PRAYER FOR RELIEF~~

WHEREFORE, ~~plaintiffs demand~~Plaintiff demands judgment in ~~their~~its favor~~, in favor of the Class and the Company, and~~ against ~~all defendants~~Defendants as follows:

~~A. Declaring that as to the First and Second Causes of Action, this action is properly maintainable as a class action;~~

~~B. Declaring that as to the Third through Eighth Causes of Action, Derivative Plaintiff may maintain this action on behalf of the Company and that Derivative Plaintiff is an adequate representative of the Company;~~

a. ~~C.~~ Declaring and decreeing that the Merger Agreement was unlawfully entered into and that the Merger was consummated in breach of the fiduciary duties of the Individual Defendants;

b. ~~D.~~ Awarding damages to ~~plaintiffs and the Class~~Plaintiff sustained as a result of the misconduct set forth above by each of the ~~defendants~~Defendants, jointly and severally, together with interest thereon;

~~E. Awarding damages to the Company sustained as a result of the misconduct set forth above by each of the defendants, jointly and severally, together with interest thereon;~~

~~F. Awarding the Company restitution from defendants;~~

c. ~~G.~~ Determining and awarding ~~to the Company and the Class~~Plaintiff exemplary damages in an amount necessary to punish Stripes, Stark, Fox and Potashner and to make an example of Stripes, Stark, Fox and Potashner to the corporate community, according to proof at trial;

d. ~~H.~~ Awarding ~~plaintiffs~~Plaintiff the costs of this action, including a reasonable allowance for the fees and expenses of ~~plaintiffs'~~Plaintiff's attorneys and experts; and

e. ~~I.~~ Granting ~~plaintiffs and the other members of the Class~~Plaintiff such further relief as the Court deems just and proper.

~~JURY~~ DEMAND FOR JURY TRIAL

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

DATED this 20th day of May, 2020.

~~DATED: December 1, 2017~~

~~THE O'MARA LAW FIRM, P.C.~~
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Co-Lead Counsel for Plaintiffs

VERIFICATION

I, Lance Mykita, hereby declare as follows:

I am a shareholder of Turtle Beach Corporation ("Turtle Beach"). I was a shareholder at the time of the wrongdoing complained of and I remain a shareholder. I have retained competent counsel and I am ready, willing and able to pursue this action vigorously on behalf of Turtle Beach. I have reviewed the substantially completed Amended Class Action and Derivative Complaint. Based upon discussions with and reliance upon my counsel, and as to those facts of which I have personal knowledge, the Complaint is true and correct to the best of my knowledge, information and belief.

I declare under penalty of perjury under the law of the State of Nevada.

DATED: 11/30/17

LANCE MYKITA

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of The O'Mara Law Firm, P.C., 311 E. Liberty Street, Reno, Nevada 89501, and on this date I served a true and correct copy of the foregoing document via email and the Court's Electronic Filing System on all participants as follows:

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DATED: December 1, 2017

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BRYAN SNYDER

Summary report: Litera® Change-Pro for Word 10.2.0.10 Document comparison done on 3/20/2023 3:07:21 PM	
Style name: Dechert Default	
Intelligent Table Comparison: Active	
Original filename: 3_EN - 2018-03-07 Amended Class Action & Derivative Complaint.docx	
Modified filename: 4_EN - 2020-05-20 PAMTP LLC Complaint version 1.docx	
Changes:	
Add	1205
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~~Move From~~	33
Move To	33
Table Insert	3
~~Table Delete~~	3
Table moves to	0
~~Table moves from~~	0
Embedded Graphics (Visio, ChemDraw, Images etc.)	0
Embedded Excel	0
Format changes	0
Total Changes:	2584

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Attorneys for PAMPT LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION	Case No.: A-13-686890-B Dept. No.: XI **PLAINTIFF PAMTP LLC'S RESPONSE TO DEFENDANTS' MOTION TO CONSOLIDATE**
This Document Relates To: ALL ACTIONS.	

Plaintiff PAMTP LLC ("Plaintiff") is the plaintiff in the opt-out lawsuit styled *PAMTP LLC v. Kenneth Potashner, et al.*, Case No. A-20-815308-B (the "Opt-Out Lawsuit"). On June 5, 2020, Defendants in the above-captioned action ("the "Action") filed a motion seeking to consolidate the Opt-Out Lawsuit into this Action ("Defendants' Motion to Consolidate"). Defendant's Motion to Consolidate recognizes that the Court has granted final approval of the settlement in this Action, and that the Court has entered an Order Statistically Closing the Case. Def. Mot. at 9. Nevertheless, Defendants argue that the September 13, 2013 Consolidation Order

supports their request to reopen the Action, and consolidate the Opt-Out Lawsuit.

Plaintiff does not oppose Defendants' Motion to Consolidate in so far as the principles of judicial economy would be served by the consolidation of the Opt-Out Lawsuit into this Action. Plaintiff accedes that this Court is "extremely familiar with the factual allegations in these cases." *Id*. at 12. This Court's prior rulings in the class action case will narrow the issues going forward. In addition, consolidation of the cases would allow Plaintiff to receive immediately the discovery that has already been conducted in this matter, thus saving additional time, resources and expense in the litigation. *See* N.R.C.P. 26(h). Plaintiff, however, will not be bound by the Court's Final Judgment and Order of Dismissal with Prejudice, dated May 18, 2020, if the motion is granted. Counsel for Defendants have represented to counsel for Plaintiff that they did not intend their Motion for Consolidation to bind Plaintiff to the final judgment in this Action.[1]

Thus, Plaintiff does not oppose Defendants' Motion for Consolidation of the Opt-Out Lawsuit into this Action.

DATED this 11th day of June, 2020.

McDONALD CARANO LLP

By: */s/ Rory T. Kay*
George F. Ogilvie III, Esq. (NSBN 3552)
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[1] On June 9, 2020, counsel for the parties held a conference call to discuss Defendants' motion to consolidate. During a conference, call counsel for Defendants confirmed that Plaintiff would not be bound by the Final Judgment and Order of Dismissal with Prejudice if the Court granted their motion for consolidation.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the law firm of McDonald Carano LLP and on the 11th day June, 2020, the foregoing **PLAINTIFF PAMTP LLC'S RESPONSE TO DEFENDANTS' MOTION TO CONSOLIDATE** was electronically filed with the Clerk of the Court via this Court's electronic filing system and served on counsel electronically in accordance with the E-Service Master List.

/s/ Jelena Jovanovic
An Employee of McDonald Carano LLP

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Dugan, Sonja

From: efilingmail@tylerhost.net
Sent: Thursday, June 11, 2020 4:38 PM
To: Dugan, Sonja
Subject: Notification of Service for Case: A-13-686890-B, Kearney IRRV Trust, Plaintiff(s)vs.Kenneth Potashner, Defendant(s) for filing Opposition to Motion - OPPM (CIV), Envelope Number: 6172818

[EXTERNAL]

Notification of Service

Case Number: A-13-686890-B
Case Style: Kearney IRRV Trust, Plaintiff(s)vs.Kenneth Potashner, Defendant(s)
Envelope Number: 6172818

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Filing Details	
Case Number	A-13-686890-B
Case Style	Kearney IRRV Trust, Plaintiff(s)vs.Kenneth Potashner, Defendant(s)
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Filing Type	Opposition to Motion - OPPM (CIV)
Filing Description	Plaintiff PAMPT LLC's Response to Defendants' Motion to Consolidate
Filed By	Jelena Jovanovic
Service Contacts	Kenneth F Potashner: John Stigi III (JStigi@sheppardmullin.com) Alejandro Moreno (AMoreno@sheppardmulllin.com) Phyllis Chavez (pchavez@sheppardmullin.com) Other Service Contacts not associated with a party on the case: "Barbara Clark, Legal Assistant" . (bclark@albrightstoddard.com) "Bryan Snyder, Paralegal" . (bsnyder@omaralaw.net) "David C. O'Mara, Esq." . (david@omaralaw.net)

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DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION.	Lead Case No. A-13-686890-B Dept. No. XI CLASS ACTION **ORDER GRANTING DEFENDANTS' MOTION TO CONSOLIDATE**

This matter came before the Court on June 15, 2020 on the Defendants' Motion to Consolidate. J. Stephen Peek and Robert J. Cassity of Holland & Hart LLP and John Stigi of Sheppard, Mullin, Richter, & Hampton LLP appeared on behalf of Defendants Kenneth F. Potashner, Elwood G. Norris, Seth Putterman, Robert M. Kaplan, and Andrew Wolfe (the "Director Defendants"). Richard Gordon of Snell & Wilmer LLP and Joshua Hess of Dechert LLP appeared

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on behalf of Defendant VTB Holdings, Inc., and Specially Appearing Defendants Stripes Group, LLC, SG VTB Holdings, LLC, Kenneth Fox, and Juergen Stark (collectively with the Director Defendants, "Defendants"). Rory Kay of McDonald Carano LLP and Adam Apton of Levi & Korsinsky, LLP appeared on behalf of PAMTP, LLC ("Plaintiff"). The Court having considered the Defendants' Motion, the Plaintiff's Response, having heard the oral arguments of counsel, and good cause appearing, finds that there are issues in this action that continue to be monitored by the Court and therefore the case remains open under the decision of *Nalder v. Eighth Judicial Dist. Court*, 136 Nev. Adv. Op. 24, 462 P.3d 677 (2020). The Court further finds that the action styled *PAMTP, LLC v. Potashner*, Case No. A-20-815308-B, Dept. 13 (Clark Cty. Dist. Ct.) (the "PAMTP Action") involves common questions of law and fact such that consolidation is warranted under NRCP 42(a). Based on the foregoing, and good cause appearing,

IT IS HEREBY ORDERED that Defendants' Motion to Consolidate is GRANTED and the PAMTP Action is hereby consolidated with this action for all purposes under NRCP 42(a). All future filings concerning the PAMTP Action shall be filed in this action with the above-caption.

IT IS FURTHER ORDERED that based upon the stipulation of the parties the PAMTP Action is subject to a five-year rule under NRCP 41(e) commencing from the date of filing of the PAMTP Action, May 20, 2020.

IT IS FURTHER ORDERED that Defendants' responses to the complaint must be filed by July 1, 2020; Plaintiff's opposition to Defendants' motions must be filed by July 22, 2020, and any replies must be filed by Defendants by August 6, 2020.

IT IS FURTHER ORDERED that any motions filed by Defendants as set forth above will be heard on August 10, 2020 at 9 a.m.

IT IS FURTHER ORDERED that this action is hereby set for a Rule 16 Conference on August 10, 2020 at 9 a.m.

IT IS SO ORDERED.

DATED this 23rd day of June 2020.

DISTRICT COURT JUDGE

Respectfully submitted by:

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From: efilingmail@tylerhost.net
Sent: Tuesday, June 23, 2020 11:23 AM
To: Dugan, Sonja
Subject: Notification of Service for Case: A-13-686890-B, Kearney IRRV Trust, Plaintiff(s)vs.Kenneth Potashner, Defendant(s) for filing Order Granting - ORDG (CIV), Envelope Number: 6218900

[EXTERNAL]

Notification of Service

Case Number: A-13-686890-B
Case Style: Kearney IRRV Trust, Plaintiff(s)vs.Kenneth Potashner, Defendant(s)
Envelope Number: 6218900

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Filing Details	
Case Number	A-13-686890-B
Case Style	Kearney IRRV Trust, Plaintiff(s)vs.Kenneth Potashner, Defendant(s)
Date/Time Submitted	6/23/2020 11:22 AM PST
Filing Type	Order Granting - ORDG (CIV)
Filing Description	Order Granting Defendants' Motion to Consolidate
Filed By	Jill Hawkins
Service Contacts	Kenneth F Potashner: John Stigi III (JStigi@sheppardmullin.com) Alejandro Moreno (AMoreno@sheppardmulllin.com) Phyllis Chavez (pchavez@sheppardmullin.com) Other Service Contacts not associated with a party on the case: "Barbara Clark, Legal Assistant" . (bclark@albrightstoddard.com) "Bryan Snyder, Paralegal" . (bsnyder@omaralaw.net) "David C. O'Mara, Esq." . (david@omaralaw.net)

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DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION	Lead Case No.: A-13-686890-B Dept. No.: XI **PLAINTIFF PAMTP LLC'S MOTION TO COMPEL DISCOVERY PURSUANT TO RULE 26(h)** **Hearing Requested**
This Document Relates To: ALL ACTIONS.	

Pursuant to Nevada Rules of Civil Procedure 26(h), and Eighth Judicial District Court Rule 2.34, Plaintiff PAMTP LLC ("Plaintiff") moves this Court for an order compelling the parties in this consolidated action to provide Plaintiff with a copy of all prior discovery. Plaintiff files this motion against: (1) Plaintiffs Kearney IRRV Trust and Lance Mykita (the "Class Plaintiffs"); and (2) Kenneth Potashner, Elwood G. Norris, Seth Putterman, Robert Kaplan, Andrew Wolfe,

Kenneth Fox, Juergen Stark, VTB Holdings, Inc., Stripes Group, LLC, and SG VTB Holdings, LLC (collectively, "Defendants").

On June 23, 2020, Plaintiff served its Demand for Prior Discovery on the Class Plaintiffs and Defendants. The prior discovery sought by Plaintiff consists of the discovery taken and exchanged by Class Plaintiffs and Defendants during the pendency of the class action litigation, styled *In re Parametric Sound Corporation Shareholders' Litigation*, No. A-13-686890-B (the "Class Action"), including deposition transcripts and documents productions.

On June 30, 2020, having not received a response from any of the parties, Plaintiff sent a request for a meet-and-confer conference.

On July 1, 2020, Defendants responded by refusing to provide the requested discovery.

On July 7, 2020, Plaintiff again requested that the parties hold a meet-and-confer conference. In response to this second request, Plaintiff was able to schedule a conference for July 9, 2020. Class Plaintiffs refused to participate on the basis that they were no longer parties to the action.

On July 9, 2020, Plaintiff and Defendants were unable to reach an agreement concerning the production of prior discovery in the action. Accordingly, Plaintiff seeks an order compelling Class Plaintiffs and Defendants to produce all prior discovery in the action. Plaintiff makes this motion based upon the pleadings and papers on file in this matter, the Declaration of Adam M. Apton, the attached Memorandum of Points and Authorities and exhibits thereto, and any oral argument entertained by the Court at the hearing on this motion.

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DATED this 17th day of July, 2020.

McDONALD CARANO LLP

By: */s/ Rory T. Kay*

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DECLARATION OF ADAM M. APTON

Adam M. Apton, after being sworn, declares as follows:

1. I am an attorney licensed to practice law in New York, the District of Columbia, and California, and I am a partner in the law firm of Levi & Korsinsky, LLP. I am over the age of 18 years and a resident of Washington, D.C. I make this declaration based upon personal knowledge, except where stated to be upon information and belief, and as to that information, I believe it to be true. If called upon to testify as to the contents of this declaration, I am legally competent to do so in a court of law.

2. I make this declaration in support of Plaintiff's Motion to Compel Discovery Pursuant to Rule 26(h).

3. Attached hereto as **Exhibit A** is a true and correct copy of Plaintiff's request for a meet-and-confer conference dated June 30, 2020. I sent the request to counsel for Class Plaintiffs and Defendants.

4. Attached hereto as **Exhibit B** is a true and correct copy of Defendants' response to my email dated July 1, 2020.

5. Attached here as **Exhibit C** is a true and correct copy of Plaintiff's second request for a meet-and-confer conference dated July 7, 2020. I sent the request to counsel for Class Plaintiffs and Defendants.

6. On July 7 and 8, 2020, various counsel for Defendants confirmed their availability for a meet-and-confer conference on July 9, 2020. Counsel for Class Plaintiffs meanwhile indicated that they would not be participating because they were no longer parties to the action.

7. On July 9, 2020, Plaintiff and Defendants held a meet-and-confer conference via telephone. The parties were unable to reach an agreement concerning the Discovery Demand during the conference.

8. As of the execution of this declaration, Class Plaintiffs and Defendants have still not produced the prior discovery in this action pursuant to Rule 26(h).

9. As reflected herein and by the attached correspondence, Plaintiff has attempted to gain the parties' compliance with their discovery obligations. The parties and their counsel have

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disregarded these efforts.

I declare under penalty of perjury under the laws of the State of Nevada that the above is true and correct.

Dated this 17th day of July, 2020.

/s/Adam M. Apton
ADAM M. APTON, ESQ.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF RELEVANT FACTS

Class Plaintiffs and Defendants (with the exception of Kenneth Fox and Juergen Stark) had been litigating the Class Action for approximately six (6) years before reaching a tentative settlement on November 15, 2019. During that period of time, the parties engaged in "extensive fact and expert discovery," including the production of over 100,000 documents and deposition of 17 fact and expert witnesses. *See* Joint Declaration of David A. Knotts and Adam D. Warden filed by Class Plaintiffs in support of their motion for final approval of the class action settlement dated April 17, 2020 (the "Class Plaintiffs Declaration") at ¶¶46-67, on file with the Court.

On April 22, 2020, Plaintiff "opted out" of Class Plaintiffs' and Defendants' proposed settlement and, on May 20, 2020, filed a complaint (the "Complaint") styled *PAMTP LLC v. Kenneth Potashner, et al.*, No. A-20-815308-B (the "Opt-Out Action"). *See* Complaint dated May 20, 2020, on file with the Court.

On June 4, 2020, Defendants moved to consolidate the Opt-Out Action with the Class Action on the basis that the Opt-Out Action and the Class Action involved the same issues of fact and law. In pertinent part, Defendants stated in their motion that "[Plaintiff's] Complaint brings identical claims and allegations to those that were asserted in the [Class Action]"; that "[Plaintiff's] Complaint arises out of the same operative facts as alleged in the [Class Action]"; that "[Plaintiff's] Complaint is virtually identical to the Amended Complaint in the [Class Action]"; that "nearly all of the questions of law and fact are common between the [Opt-Out Action] and this [Class Action]"; etc. *See* Defendants' Motion to Consolidate dated June 4, 2020 at p. 6, on file with the Court; *see also id*. at pp. 9, 11-12 (arguing for consolidation on the basis that "the Court has already overseen extensive document and deposition discovery, which would similarly be applicable to the [Opt-Out Action]").

On June 23, 2020, the Court granted Defendants' Motion to Consolidate. *See* Order Granting Defendants' Motion to Consolidate dated June 23, 2020, on file with the Court.

On June 23, 2020, following the Court's Order Granting Defendants' Motion to Consolidate, Plaintiff served its Demand for Prior Discovery (the "Discovery Demand"). The

Discovery Demand asked the Class Plaintiffs and Defendants to immediately produce, in pertinent part, "all discovery in this action, including but not limited to, . . . requests for production of documents and the responses to each of the foregoing" and "deposition transcripts." *See* Discovery Demand, on file with the Court.

To date, Class Plaintiffs and Defendants refuse to produce the discovery Plaintiff demanded in the Discovery Demand. This is in spite of written correspondence dated June 30 and July 7, and a substantive meet-and-confer conference held on July 9, 2020. *See* Plaintiff Correspondence, Exhibits A, B, and C; Declaration of Adam M. Apton, ¶¶8-9.

As a result of the foregoing, Plaintiff seeks an order compelling Class Plaintiffs and Defendants to produce all prior discovery in this action, *i.e.*, the discovery produced and exchanged in the Class Action.

II. ARGUMENT

A. Legal Standard.

Rule 26(h) of the Nevada Rules of Civil Procedure provides a party with the right to "make[] a written demand for disclosures or discovery that took place before the demanding party became a party to the action . . . ." In pertinent part, the Rule requires that: "each party who has previously made disclosures or responded to a request for admission or production or answered interrogatories must make available to the demanding party each document in which the disclosures and responses to discovery are contained for inspection and copying, or furnish the demanding party a list identifying each such document by title. Upon further demand from the demanding party, at the expense of the demanding party, the recipient of such demand must furnish a copy of any listed discovery disclosure or response specified in the demand or, in the case of document disclosure or request for production, must make available for inspection by the demanding party all documents and things previously produced. Further, each party who has taken a deposition must make a copy of the transcript available to the demanding party at its expense."

Rule 37(a) of the Nevada Rules of Civil Procedure states, in pertinent part, "a party may move for an order compelling disclosure or discovery."

. . .

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B. Plaintiff Is Entitled to an Order Compelling Class Plaintiffs and Defendants to Produce Prior Discovery from the Class Action.

Plaintiff demanded the production of prior discovery pursuant to Rule 26(h). Class Plaintiffs and Defendants refuse to comply. Consequently, Plaintiff seeks a court-order directing them to produce the discovery immediately.

Rule 26(h) Requires Production. Rule 26(h) explicitly allows for a party to demand and receive all discovery that has been produced and exchanged in an action prior to that party's involvement. In response to Plaintiff's Discovery Demand, Class Plaintiffs and Defendants were required to either provide the Class Action discovery or "a list identifying each such document by title." Where a party opts to provide a "list," the discovery must still be produced "[u]pon further demand." This includes documents productions as well as deposition transcripts.

Class Plaintiffs and Defendants did neither. Instead, Class Plaintiffs declined to participate in the meet-and-confer conference on July 9 (on the basis that they are no longer involved in the case) and Defendants raised several objections to the Discovery Demand (though none of which relieves them of their obligation to comply with the Rule, as discussed below).

Nearly one month after the Discovery Demand, Plaintiff remains without any of the prior discovery from the Class Action. Class Plaintiffs' and Defendants' unwillingness to comply with the demand is in clear violation of Rule 26(h).

The Demand for Prior Discovery Is Timely. Pursuant to Rule 26(h), a party who enters a case after discovery has taken place, like Plaintiff, is entitled to receive all prior discovery that has been produced and/or exchanged prior to that point. Application of the rule is especially important here where there has already been "extensive fact and expert discovery," including the production of over 100,000 documents and deposition of 17 fact and expert witnesses. *See* Class Plaintiffs Declaration at ¶¶46-67, on file with the Court. Assuming that the purpose of Rule 26(h) is to place litigants on equal footing and prevent prejudice that could otherwise arise from informational disadvantages, Defendants should be compelled to produce all prior discovery to Plaintiff immediately.

In spite of the foregoing and in violation of Rule 26(h)'s plain language, Defendants argued during the parties' July 9 meet-and-confer conference that their obligations under the rule had not

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yet begun because the Court had not yet held a Rule 16 conference. Defendants are incorrect. First, there is no timing element within Rule 26(h) that allows a party to hold back prior discovery in an action from a new party; indeed, as discussed above, such a requirement would run contrary to the purpose of the rule itself.

Second, even if a Rule 16 conference were required, the Court consolidated Plaintiff's Opt-Out Action with the Class Action prior to Plaintiff serving the Discovery Demand. *See* Order Granting Defendants' Motion to Consolidate dated June 23, 2020, on file with the Court ("the [Opt-Out] Action is hereby consolidated with this action [the Class Action] for all purposes under NRCP 42(a)"). A Rule 16 conference was held in the Class Action on October 17, 2014. Thus, Defendants' supposed Rule 16 conference requirement has already been fulfilled.

The Prior Discovery Is Relevant. There should be no doubt that the Class Action discovery is relevant for the purposes of Plaintiff's Opt-Out Action. Plaintiff's claims are identical to the Class Plaintiffs' claims, given that their injuries arose out of the same facts and alleged breaches of fiduciary duty. Defendants admitted this point (emphatically) when moving to consolidate the Opt-Out Action with the Class Action. Indeed, on no less than eight (8) occasions, Defendants stressed the similarities between the cases:

- "PAMTP's Complaint brings identical claims and allegations to those that were asserted in the Amended Complaint in this case." (p. 6)
- "PAMTP's opt-out Complaint is virtually identical to the Amended Complaint in this action, asserting two claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty that are identical to the claims asserted in the Amended Complaint. PAMTP asserts the same factual allegations against the same Defendants, adding two parties in its Complaint who served as executives of VTB Holdings and Stripes Group. Accordingly, nearly all of the questions of law and fact are common between the Opt-out Case and this action . . . ." (p. 6)
- "PAMTP's Complaint largely consists of a "cut-and-paste job" lifted from the allegations that are contained in Plaintiffs' Amended Complaint in this action." (p. 9)
- "PAMTP asserts two claims for relief: the first claim for breach of fiduciary duty based upon equity expropriation is the same claim that was asserted against the same individual Defendants in this action. Similarly, PAMTP's second claim in its opt-out Complaint is identical to the claim for aiding and abetting

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breach of fiduciary duty against the same defendants in this action, ..." (p. 9 (citations omitted))

- "[T]he alleged conduct supposedly giving rise to liability for aiding and abetting a breach of fiduciary duty is the same between the two complaints. Because the allegations in PAMTP's Complaint and the Amended Complaint are identical in all material respects, common—even identical—questions of law and fact are present and predominate between the two actions . . . ." (pp. 9-10)

- "***It cannot be disputed that PAMTP's Complaint arises out of the same operative facts that are alleged in this Action***. Indeed, as discussed in detail above, the allegations in PAMTP's Complaint are virtually identical to the allegations in the Amended Complaint in this action." (p. 11 (emphasis added))

- "All questions of law and fact are common between the PAMTP Action and the instant action. . . . . the claims and allegations in PAMTP's Complaint are virtually identical to the allegations in the Amended Complaint in this action. Both PAMTP's Complaint and the Amended Complaint arise from the same merger transaction and concern the same alleged wrongdoing in connection with the merger." (p. 11)

- "[T]he factual allegations upon which the breach of fiduciary duty claim and the aiding and abetting breach of fiduciary claim are predicated are the same in the two actions. Accordingly, virtually all questions of law and fact with regard to the two claims asserted by PAMTP are the same as those presented in the Amended Complaint in this action." (pp. 11-12)

Defendants' Motion to Consolidate, on file with the Court.

Notwithstanding the foregoing, Defendants suggested during the July 9 meet-and-confer conference that they might be entitled to withhold a portion of the Class Action discovery because the Class Action was broader in scope than the Opt-Out Action. The Court should reject this argument, if made. It lacks all credibility and runs contrary to the representations made in connection with their Motion to Consolidate, including in particular that the "extensive document and deposition discovery . . . would similarly be applicable to the PAMTP Action [the Opt-Out Action]." *Id*. at p. 12. The claims asserted by Plaintiff and Class Plaintiffs arose from the same alleged fraudulent conduct and, therefore, the discovery taken is as applicable and important now as it was during the pendency of the Class Action.

The Protective Order Will Apply to the Production. Defendants also raised a concern during the July 9 meet-and-confer conference about the confidentiality of the discovery, if provided. The Court should reject this argument, too, if it is raised. The Stipulated Confidentiality

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Agreement and Protective Order Regarding the Sealing of Court Records dated October 9, 2013 (the "Protective Order") already serves to protect unlawful or harmful dissemination of confidential documents in this matter. *See* Protective Order, on file with the Court. Nothing has changed about the facts of the case or the sensitivity of the documents warranting different protections or confidentiality procedures; if anything, the passage of additional time has only lessened the need for confidential treatment as the information contained in the materials has grown stale. Plaintiff stands ready, willing and able to sign the Protective Order and abide by its terms.

III. CONCLUSION

For the foregoing reasons, Plaintiff requests the Court enter an order compelling Class Plaintiffs and Defendants to produce all prior discovery.

DATED this 17th day of July, 2020.

McDONALD CARANO LLP

By: */s/ Rory T. Kay*

George F. Ogilvie III, Esq. (NSBN 3552)
Amanda C. Yen, Esq. (NSBN 9726)
Rory T. Kay, Esq. (NSBN 12416)
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Las Vegas, Nevada 89102
gogilvie@mcdonaldcarano.com
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rkay@mcdonaldcaranoa.com

Nicholas I. Porritt (to be admitted *pro hac vice*)
Adam M. Apton, Esq. (admitted *pro hac vice*)
Elizabeth Tripodi (to be admitted *pro hac vice*)
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aapton@zlk.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the law firm of McDonald Carano LLP and on the 17th day July, 2020, the foregoing **PLAINTIFF PAMTP LLC'S MOTION TO COMPEL DISCOVERY PURSUANT TO RULE 26(h)** was electronically filed with the Clerk of the Court via this Court's electronic filing system and served on counsel electronically in accordance with the E-Service Master List.

/s/ Jelena Jovanovic
An Employee of McDonald Carano LLP

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
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EXHIBIT “A”

Adam M. Apton

From: Adam M. Apton
Sent: Tuesday, June 30, 2020 9:59 PM
To: Bob Cassity
Cc: Rory Kay; Steve Peek; John Stigi; Hess, Joshua; Gordon, Richard; Raphel, Brian; Valerie Larsen; Randall Baron; Adam Warden; David Knotts; Elizabeth K. Tripodi
Subject: In re Parametric Sound Corp. - Demand for Discovery
Attachments: Discovery Demand 6.23.20.pdf

Messrs. Stigi, Hess, and Baron:

Our office represents plaintiff PAMTP LLC in the consolidated action referenced above. On June 23, 2020, we served the attached demand for discovery via the Clark County District Court Electronic Filing Program. We have not receive anything in response to the demand as of close of business today.

Given the long history of this case, we are eager to obtain the discovery to which we are entitled under NRCP 26(h) and proceed with the litigation immediately. Accordingly, please advise whether you are available on Thursday (July 2) or Friday (July 3) to meet and confer regarding the demand per EDCR 2.34.

Regards,

Adam M. Apton
Levi & Korsinsky, LLP

EXHIBIT “B”

Adam M. Apton

From: Hess, Joshua <Joshua.Hess@dechert.com>
Sent: Wednesday, July 1, 2020 5:21 PM
To: Adam M. Apton; Bob Cassity
Cc: Rory Kay; Steve Peek; John Stigi; Gordon, Richard; Raphel, Brian; Valerie Larsen; Randall Baron; Adam Warden; David Knotts; Elizabeth K. Tripodi
Subject: [External]RE: In re Parametric Sound Corp. - Demand for Discovery

Mr. Apton,

I write on behalf of all of the Defendants in this matter. Your demand for production of "all discovery in this action" is premature, since discovery is not permitted until the Rule 16 conference, which, as you know, the Court has scheduled for August 10, the same day it will hear Defendants' motions to dismiss.

Additionally, your reliance on Rule 26(h) to demand immediate production of "all discovery in this action" is also misplaced. Rule 26 requires parties only to provide a list of prior discovery. Only after such a list has been compiled, "[u]pon further demand from the demanding party, *at the expense of the demanding party*," is production required. NRCP 26(h) (emphasis added). Thus, your immediate demand for "all" discovery without provision for payment of such discovery is improper for this additional reason.

Finally, your complaint quotes and cites to myriad documents purportedly produced by the parties in this case. Consistent with your obligations under Rule 11, in order to verify the authenticity of those allegations, you presumably have access to large amounts of the discovery record already, otherwise you would not have extensively quoted/cited purported documents from the record in your complaint. To that end, to avoid unnecessary burden or expense on any of the parties, please let us know what documents you already possess from the record in this case, the source of that information, and the date you received it.

Regards,
Josh

Joshua D. N. Hess
Partner

Dechert LLP
202.261.3438 direct (DC)
415.262.4583 direct (SF)
joshua.hess@dechert.com
http://www.dechert.com

From: Adam M. Apton [mailto:aapton@zlk.com]
Sent: Tuesday, June 30, 2020 9:59 PM
To: Bob Cassity <BCassity@hollandhart.com>
Cc: Rory Kay <rkay@mcdonaldcarano.com>; Steve Peek <SPeek@hollandhart.com>; John Stigi <JStigi@sheppardmullin.com>; Hess, Joshua <Joshua.Hess@dechert.com>; Gordon, Richard <rgordon@swlaw.com>; Raphel, Brian <Brian.Raphel@dechert.com>; Valerie Larsen <VLLarsen@hollandhart.com>; Randall Baron <RandyB@rgrdlaw.com>; Adam Warden <awarden@saxenawhite.com>; David Knotts <DKnotts@rgrdlaw.com>; Elizabeth K. Tripodi <etripodi@zlk.com>
Subject: In re Parametric Sound Corp. - Demand for Discovery

[EXTERNAL EMAIL]

Messrs. Stigi, Hess, and Baron:

Our office represents plaintiff PAMTP LLC in the consolidated action referenced above. On June 23, 2020, we served the attached demand for discovery via the Clark County District Court Electronic Filing Program. We have not receive anything in response to the demand as of close of business today.

Given the long history of this case, we are eager to obtain the discovery to which we are entitled under NRCP 26(h) and proceed with the litigation immediately. Accordingly, please advise whether you are available on Thursday (July 2) or Friday (July 3) to meet and confer regarding the demand per EDCR 2.34.

Regards,

Adam M. Apton
Levi & Korsinsky, LLP

EXHIBIT “C”

Adam M. Apton

From: Adam M. Apton
Sent: Tuesday, July 7, 2020 8:59 PM
To: Hess, Joshua; Bob Cassity
Cc: Rory Kay; Steve Peek; John Stigi; Gordon, Richard; Raphel, Brian; Valerie Larsen; Randall Baron; Adam Warden; David Knotts; Elizabeth K. Tripodi
Subject: RE: [External]RE: In re Parametric Sound Corp. - Demand for Discovery

Mr. Hess:

Plaintiff disagrees with defendants' position in response to our demand for discovery under Rule 26(h) and, once again, requests that the parties (ie, the class action plaintiffs and defendants) make themselves available for a meet/confer conference.

Rule 26(h) does not limit or preclude plaintiff from obtaining discovery prior to a Rule 16 conference. Assuming that the purpose of Rule 26(h) is to give all parties in an action equal access to existing discovery, defendants' position would be contrary to the spirit of the rule. Moreover, given the fact that defendants' motions to dismiss make reference to information exchanged in discovery, waiting to provide discovery until after defendants' motions are decided would potentially be prejudicial to plaintiff. In any event, a Rule 16 conference has already occurred in the case prior to plaintiff's opt-out, so there is no basis for delay on that ground.

Defendants also misconstrue their obligations under Rule 26(h). The rule requires all parties to "make available to the demanding party each document in which the disclosures and responses to discovery are contained . . . ." The rule continues, stating in the alternative that the parties may "furnish the demanding party a list identifying each such document by title," but the end result is the same: "the recipient of such demand must furnish a copy of any listed discovery . . . ." In other words, plaintiff is entitled to the discovery, regardless of whether Defendants want to waste time providing a list of it before ultimately producing it. Note that when it comes to deposition transcripts, Rule 26(h) appears to short-circuit this process entirely stating simply that "each party who has taken a deposition must make a copy of the transcript available to the demanding party at its expense." Payment for production of the discovery should not cause any delay. Plaintiff is willing to pay for the materials in accordance with Rule 26(h).

Please let me know what time you, Mr. Stigi, and counsel for the class action plaintiffs are able to speak on Thursday, July 9. This will be our second and final attempt at scheduling a meet/confer pursuant to EDCR 2.34(d).

Adam M. Apton
Levi & Korsinsky, LLP

From: Hess, Joshua
Sent: Wednesday, July 1, 2020 5:21 PM
To: Adam M. Apton; Bob Cassity
Cc: Rory Kay; Steve Peek; John Stigi; Gordon, Richard; Raphel, Brian; Valerie Larsen; Randall Baron; Adam Warden; David Knotts; Elizabeth K. Tripodi
Subject: [External]RE: In re Parametric Sound Corp. - Demand for Discovery

Mr. Apton,

I write on behalf of all of the Defendants in this matter. Your demand for production of "all discovery in this action" is premature, since discovery is not permitted until the Rule 16 conference, which, as you know, the Court has scheduled for August 10, the same day it will hear Defendants' motions to dismiss.

Additionally, your reliance on Rule 26(h) to demand immediate production of "all discovery in this action" is also misplaced. Rule 26 requires parties only to provide a list of prior discovery. Only after such a list has been compiled, "[u]pon further demand from the demanding party, *at the expense of the demanding party*," is production required. NRCP 26(h) (emphasis added). Thus, your immediate demand for "all" discovery without provision for payment of such discovery is improper for this additional reason.

Finally, your complaint quotes and cites to myriad documents purportedly produced by the parties in this case. Consistent with your obligations under Rule 11, in order to verify the authenticity of those allegations, you presumably have access to large amounts of the discovery record already, otherwise you would not have extensively quoted/cited purported documents from the record in your complaint. To that end, to avoid unnecessary burden or expense on any of the parties, please let us know what documents you already possess from the record in this case, the source of that information, and the date you received it.

Regards,
Josh

Joshua D. N. Hess
Partner

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202.261.3438 direct (DC)
415.262.4583 direct (SF)
joshua.hess@dechert.com
http://www.dechert.com

From: Adam M. Apton [mailto:aapton@zlk.com]
Sent: Tuesday, June 30, 2020 9:59 PM
To: Bob Cassity <BCassity@hollandhart.com>
Cc: Rory Kay <rkay@mcdonaldcarano.com>; Steve Peek <SPeek@hollandhart.com>; John Stigi <JStigi@sheppardmullin.com>; Hess, Joshua <Joshua.Hess@dechert.com>; Gordon, Richard <rgordon@swlaw.com>; Raphel, Brian <Brian.Raphel@dechert.com>; Valerie Larsen <VLLarsen@hollandhart.com>; Randall Baron <RandyB@rgrdlaw.com>; Adam Warden <awarden@saxenawhite.com>; David Knotts <DKnotts@rgrdlaw.com>; Elizabeth K. Tripodi <etripodi@zlk.com>
Subject: In re Parametric Sound Corp. - Demand for Discovery

[EXTERNAL EMAIL]

Messrs. Stigi, Hess, and Baron:

Our office represents plaintiff PAMTP LLC in the consolidated action referenced above. On June 23, 2020, we served the attached demand for discovery via the Clark County District Court Electronic Filing Program. We have not receive anything in response to the demand as of close of business today.

Given the long history of this case, we are eager to obtain the discovery to which we are entitled under NRCP 26(h) and proceed with the litigation immediately. Accordingly, please advise whether you are available on Thursday (July 2) or Friday (July 3) to meet and confer regarding the demand per EDCR 2.34.

Regards,

Adam M. Apton
Levi & Korsinsky, LLP

=

ORDR

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

Adam M. Apton, Esq. (admitted *pro hac vice*)
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1101 30th Street, Suite 115
Washington, D.C. 20007
T: (202) 524-4859
F: (212) 363-7171
aapton@zlk.com

Attorneys for Plaintiff PAMTP LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION	Case No.: A-13-686890-B Dept. No.: XI **ORDER GRANTING IN PART PLAINTIFF PAMTP LLC'S MOTION TO ENFORCE COURT ORDER AND COMPEL DISCOVERY**
This Document Relates To: ALL ACTIONS.	

On December 18, 2020, the Court heard Plaintiff PAMTP LLC's ("Plaintiff") Motion to Enforce Court Order and Compel Discovery ("Motion"). The Court, having reviewed the record and the briefs submitted in support of and in opposition to the Motion, rules as follows:

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FINDINGS OF FACT

1. Plaintiff filed the Motion seeking to compel Turtle Beach Corporation ("Turtle Beach") to comply with the Court's prior Order dated October 7, 2019 by producing all non-privileged documents from the *Weisbord* litigation in California against Turtle Beach and a log of all other documents that Turtle Beach withholds from its production.

2. On November 24, 2020, Turtle Beach produced 299 documents, though none of them were dated after April 30, 2014. Turtle Beach produced a log with 83,737 entries, all dated from May 2, 2014 through February 14, 2019.

3. Despite the parties' efforts to work through issues related to the completeness of this production, they were unable to reach a resolution, at which time the Plaintiff filed the Motion.

4. Plaintiff argues in its Motion that Turtle Beach intentionally violated the Court's October 7, 2019 Order by failing to produce all relevant documents and logging the remainder. Plaintiff claims that Turtle Beach categorically refused to review and/or produce documents dated after April 30, 2014 on the basis of relevancy even though such documents could contain relevant information. Plaintiff also argues that Turtle Beach's log does not contain the entirety of the materials from the *Weisbord* litigation in California, providing several examples of document custodians that appear to be missing emails. Plaintiff requests attorneys' fees and costs incurred in connection with filing the Motion.

5. In opposition to the Motion, Turtle Beach argues that documents created between May 1, 2014 and February 1, 2015 are irrelevant to Plaintiff's claims because they post-date the Merger that occurred on January 15, 2014. Turtle Beach claims that it reviewed a "randomized sampling of 5%" of the documents from this time period that "contained one or more of the agreed upon search terms" in this matter, and that this review revealed no relevant documents. Turtle Beach claims it then logged all documents that it understood were produced by Mr. Weisbord in the *Weisbord* litigation that Turtle Beach did not produce here, as required.

6. Plaintiff filed a reply in further support of the Motion arguing that, by conducting a "randomized sampling" instead of reviewing all documents, Turtle Beach did not comply with

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=

its obligations under this Court's previous order. Plaintiff further challenged Turtle Beach's representations about the completeness of its log, claiming that discrepancies existed between the number of documents produced in the *Weisbord* litigation and the log.

CONCLUSIONS OF LAW

1. NRCP 37(a) gives the Court discretion to enter an order compelling disclosure or discovery. NRCP 37(b) further allows the Court to sanction another party where it fails to comply with a previous discovery order. *See Valley Health Sys., Ltd. Liab. Co. v. Estate of Doe*, 427 P.3d 1021, 1033 (Nev. 2018) (affirming striking of answer).

2. The Court **GRANTS IN PART** the Motion. Though a document may be dated after the merger at issue in this case, Turtle Beach must produce it if the substance of the document refers to Turtle Beach's financial and operational status before, during, or just after the merger regardless of the date of creation.

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion is **GRANTED IN PART** as follows:

1. Within twenty-one (21) days of this Order, Turtle Beach shall review each of the 83,737 documents produced by Mr. Weisbord in the *Weisbord* litigation that have not already been produced in this matter by Turtle Beach and produce those that refer to Turtle Beach's financial and operational status before, during, or just after the January 15, 2014 merger (*i.e.*, from March 1, 2013 through February 1, 2015) regardless of the date of creation. Turtle Beach shall produce a log containing all documents not produced consistent with the Court's October 7, 2019 Order.

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=

2. Plaintiff shall submit an affidavit in support of its requested fees within ten (10) judicial days, and Defendant may object to any entry on the affidavit within five (5) judicial days thereafter. A further hearing in chambers to decide Plaintiff's application for attorneys' fees is set for January 15, 2021.

DATED this ~~6th~~ 7th day of January, 2021.

DISTRICT COURT JUDGE

Submitted By:

McDONALD CARANO LLP

By: /s/ Rory T. Kay
George F. Ogilvie III, Esq. (NSBN 3552)
Amanda C. Yen, Esq. (NSBN 9726)
Rory T. Kay, Esq. (NSBN 12416)
2300 West Sahara Avenue, Suite 1200
Las Vegas, NV 89102

Adam M. Apton, Esq.
(admitted *pro hac vice*)
LEVI & KORSINSKY, LLP
1101 30th Street, Suite 115
Washington, D.C. 20007

Attorneys for Plaintiff PAMTP LLC

Approved as to Form and Content:

SNELL & WILMER L.L.P.

By: */s/ Richard C. Gordon*
Richard C. Gordon, Esq. (NSBN 9036)
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169

Joshua D. N. Hess, Esq.
(admitted *pro hac vice*)
DECHERT LLP
1900 K Street, NW
Washington, DC 20006

David A Kotler, Esq.
Brian C. Raphel, Esq.
(admitted *pro hac vice*)
DECHERT LLP
1095 Avenue of the Americas
New York, NY 10036

Attorneys for Defendant VTB Holdings, Inc. and Specially Appearing Defendants Stripes Group, LLC, SG VTB Holdings, LLC, Kenneth Fox, and Juergen Stark and Non-Party Turtle Beach Corporation

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CaraMia Gerard

From: Rory Kay
Sent: Wednesday, January 6, 2021 1:57 PM
To: CaraMia Gerard
Subject: Fw: [External]RE: [External]Re: [External]RE: [External]Notification of Service for Case: A-13-686890-B, Kearney IRRV Trust, Plaintiff(s)vs.Kenneth Potashner, Defendant(s) for filing Service Only, Envelope Number: 7139361

From: Gordon, Richard <rgordon@swlaw.com>
Sent: Wednesday, January 6, 2021 12:12 PM
To: Hess, Joshua; Adam M Apton
Cc: Raphel, Brian; John Stigi; Alejandro Moreno; Steve Peek; Bob Cassity; Kotler, David; Delgado, Nicole; Nicholas I. Porritt; Elizabeth K Tripodi; George F. Ogilvie III; Rory Kay
Subject: RE: [External]RE: [External]Re: [External]RE: [External]Notification of Service for Case: A-13-686890-B, Kearney IRRV Trust, Plaintiff(s)vs.Kenneth Potashner, Defendant(s) for filing Service Only, Envelope Number: 7139361

Adam,

You have permission to sign on my behalf. Thanks very much.

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

From: Hess, Joshua <Joshua.Hess@dechert.com>
Sent: Wednesday, January 6, 2021 11:15 AM
To: Adam M Apton <aapton@zlk.com>
Cc: Raphel, Brian <Brian.Raphel@dechert.com>; John Stigi <JStigi@sheppardmullin.com>; Alejandro Moreno <AMoreno@sheppardmullin.com>; Steve Peek <SPeek@hollandhart.com>; Bob Cassity <BCassity@hollandhart.com>; Gordon, Richard <rgordon@swlaw.com>; Kotler, David <david.kotler@dechert.com>; Delgado, Nicole <Nicole.Delgado@dechert.com>; Nicholas I. Porritt <nporritt@zlk.com>; Elizabeth K Tripodi <etripodi@zlk.com>; gogilvie@mcdonaldcarano.com; Rory Kay <rkay@mcdonaldcarano.com>
Subject: RE: [External]RE: [External]Re: [External]RE: [External]Notification of Service for Case: A-13-686890-B, Kearney IRRV Trust, Plaintiff(s)vs.Kenneth Potashner, Defendant(s) for filing Service Only, Envelope Number: 7139361

[EXTERNAL] joshua.hess@dechert.com

This looks fine. Rick, can you confirm permission to sign on your behalf?

Joshua D. N. Hess
Partner

Dechert LLP
202.261.3438 direct (DC)
415.262.4583 direct (SF)
joshua.hess@dechert.com
http://www.dechert.com

From: Adam M Apton [mailto:aapton@zlk.com]
Sent: Wednesday, January 06, 2021 12:05 PM
To: Hess, Joshua <Joshua.Hess@dechert.com>
Cc: Raphel, Brian <Brian.Raphel@dechert.com>; John Stigi <JStigi@sheppardmullin.com>; Alejandro Moreno <AMoreno@sheppardmullin.com>; Steve Peek <SPeek@hollandhart.com>; Bob Cassity <BCassity@hollandhart.com>; Gordon, Richard <rgordon@swlaw.com>; Kotler, David <david.kotler@dechert.com>; Delgado, Nicole <Nicole.Delgado@dechert.com>; Nicholas I. Porritt <nporritt@zlk.com>; Elizabeth K Tripodi <etripodi@zlk.com>; gogilvie@mcdonaldcarano.com; Rory Kay <rkay@mcdonaldcarano.com>
Subject: RE: [External]RE: [External]Re: [External]RE: [External]Notification of Service for Case: A-13-686890-B, Kearney IRRV Trust, Plaintiff(s)vs.Kenneth Potashner, Defendant(s) for filing Service Only, Envelope Number: 7139361

[EXTERNAL EMAIL]

Here is a copy of the final proposed order. Please confirm we have permission to sign.

From: Hess, Joshua <Joshua.Hess@dechert.com>
Sent: Wednesday, January 6, 2021 12:00 PM
To: Adam M Apton <aapton@zlk.com>
Cc: Raphel, Brian <Brian.Raphel@dechert.com>; John Stigi <JStigi@sheppardmullin.com>; Alejandro Moreno <AMoreno@sheppardmullin.com>; Steve Peek <SPeek@hollandhart.com>; Bob Cassity <BCassity@hollandhart.com>; Gordon, Richard <rgordon@swlaw.com>; Kotler, David <david.kotler@dechert.com>; Delgado, Nicole <Nicole.Delgado@dechert.com>; Nicholas I. Porritt <nporritt@zlk.com>; Elizabeth K Tripodi <etripodi@zlk.com>; gogilvie@mcdonaldcarano.com; Rory Kay <rkay@mcdonaldcarano.com>
Subject: [External]RE: [External]Re: [External]RE: [External]Notification of Service for Case: A-13-686890-B, Kearney IRRV Trust, Plaintiff(s)vs.Kenneth Potashner, Defendant(s) for filing Service Only, Envelope Number: 7139361

Adam,

Turtle Beach agrees to that proposal.

Josh

Joshua D. N. Hess
Partner

Dechert LLP
202.261.3438 direct (DC)
415.262.4583 direct (SF)
joshua.hess@dechert.com
http://www.dechert.com

Dugan, Sonja

From: efilingmail@tylerhost.net
Sent: Thursday, January 7, 2021 3:40 AM
To: Dugan, Sonja
Subject: Notification of Service for Case: A-13-686890-B, Kearney IRRV Trust, Plaintiff(s)vs.Kenneth Potashner, Defendant(s) for filing Order - ORDR (CIV), Envelope Number: 7189960

[EXTERNAL] efilingmail@tylerhost.net

Notification of Service

Case Number: A-13-686890-B
Case Style: Kearney IRRV Trust, Plaintiff(s)vs.Kenneth Potashner, Defendant(s)
Envelope Number: 7189960

This is a notification of service for the filing listed. Please click the link below to retrieve the submitted document.

Filing Details	
Case Number	A-13-686890-B
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION This Document Related To: ALL ACTIONS	LEAD CASE NO.: A-13-686890-B DEPT. NO.: XI **DEFENDANTS' FIRST MOTION FOR SUMMARY JUDGMENT** **[Hearing Requested]**

Defendants VTB Holdings, Inc., Stripes Group, LLC, SG VTB Holdings, LLC, Juergen Stark, Kenneth Fox (collectively, the "Non-Director Defendants"), Kenneth F. Potashner, Elwood G. Norris, Seth Putterman, Robert M. Kaplan, and Andrew Wolfe (collectively, the "Director Defendants"), by and through their respective undersigned counsel, move for summary judgment on all causes of action in Plaintiff PAMTP LLC's Complaint. This Motion is based on the pleadings and papers on file, the following Memorandum of Points and Authorities, the Declaration of Ryan M. Moore, Esq., in Support, and any argument the Court may entertain.

Dated: May 5, 2021

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Discovery in this case—which now has spanned nearly eight years—confirms that Plaintiff PAMTP LLC ("Plaintiff") cannot establish the elements of the only fiduciary breach claim remaining in this action: a direct "equity expropriation" claim arising out of the January 15, 2014 merger (the "Merger") between Parametric Sound Corporation ("Parametric") and VTB Holdings, Inc. ("VTBH" or "Turtle Beach"). Compl. ¶ 1. *See Parametric Sound Corp. v. Eighth Jud. Dist. Ct.*, 133 Nev. 417, 429, 401 P.3d 1100, 1109 (2017) (adopting direct equity expropriation claim recognized in *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006)). The crux of Plaintiff's claim is that the legacy Parametric shareholders received inadequate consideration from the Merger, which allegedly resulted in the dilution of their stakes in the post-Merger company's equity. After thorough and comprehensive discovery, Plaintiff cannot establish the elements of its direct equity expropriation claim, which requires an expropriation of economic and voting power by a controlling shareholder from minority shareholders to that controller. *See Parametric*, 133 Nev. at 429, 401 P.3d at 1109.[1]

First, discovery has confirmed that Parametric had no controlling shareholder before the Merger. All pre-Merger directors of Parametric (*i.e.*, the company's "insiders"), collectively, only held approximately 21% of Parametric's outstanding equity pre-Merger, which is far less than required to prove the existence of a controlling shareholder under settled jurisprudence. In any event, there is no evidence that the pre-Merger directors were acting in unison. To the contrary, the evidence establishes that the pre-Merger Board was fiercely independent and frequently sparred on issues concerning the conduct of Parametric's business. Moreover, Defendant Kenneth Potashner ("Potashner"), Parametric's Executive Chairman whom Plaintiff has sought to paint as Parametric's pre-Merger controller, held a less than 6% interest in the pre-Merger company (composed entirely of unexercised options). Defendants are unaware of any case in any jurisdiction that has found a shareholder who owned such a tiny percentage of a company acted as a controller.

[1] The undisputed material facts show that Plaintiff cannot establish the elements of its equity expropriation claim. Nevertheless, if necessary, Defendants also will be filing summary judgment motions showing that Plaintiff cannot prove any claim for breach of fiduciary duty or aiding-and-abetting breach of fiduciary duty, whether framed as an "equity expropriation" claim or otherwise.

In any event, the record confirms that Potashner did not exercise *de facto* control over Parametric. For the Merger to close, Parametric's other directors forced Potashner to give up his prized Parametric-related possession—his stock options in Parametric's health-based subsidiary, HyperSound Health Inc. ("HHI"), for no consideration. Although Plaintiff likes to focus on Potashner's efforts to retain his interest in HHI and preserve the overall HHI structure post-Merger, and his dispute with the rest of the Parametric Board over those issues, this same dispute—and, most importantly, Potashner's abject failure to get his way—confirms that Potashner did not wield effective control over Parametric. Simply put, the undisputed evidence confirms that Plaintiff cannot establish the most basic element of its equity expropriation claim: the existence of a pre-Merger controlling Parametric shareholder. *Parametric*, 133 Nev. at 429, 401 P.3d at 1109; *see Gentile*, 906 A.2d at 100.

Second, Plaintiff cannot establish that any putative controller effectuated "an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders." *Gentile*, 906 A.2d at 100; *see Parametric*, 133 Nev. at 429, 401 P.3d at 1109 (similar). Rather, all legacy Parametric shareholders—including Potashner, Parametric's directors, and Plaintiff's Assignors[2]—experienced an identical dilution of their stake in Parametric as a result of the Merger. Where, as here, all shareholders' equity stake in the company is diluted in the same manner, a stockholder cannot prevail on an equity expropriation claim. *See Almond v. Glenhill Advisors LLC*, 2018 WL 3954733, at *28 (Del. Ch. Aug. 17, 2018), *aff'd* 224 A.3d 200 (Del. 2019). Thus, although Plaintiff accuses Potashner of allegedly acting in a self-interested manner (particularly around his HHI options, which, ironically, worked against the Merger), that accusation never leads to a meaningful legal conclusion. Plaintiff can point to no additional economic compensation or voting power in Parametric that Potashner received at the expense of other shareholders due to the Merger with Turtle Beach. Indeed, as a result of the uncompensated loss of his HHI options, no Parametric shareholder lost more potential economic value as a result of the Merger than Potashner. Moreover,

[2] "Assignor" and "Assignors" refer to those persons or entities who have opted out of the class settlement in this case and claim to have assigned their rights to the claims contained in the Complaint to Plaintiff PAMTP LLC. *See* Compl. ¶ 24.

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as a result of Potashner's lock-up following the Merger, Potashner was unable to exercise any of his Parametric options. The post-Merger performance of the stock means that Potashner's entire interest in Parametric expired with his options—all of them—ultimately expiring worthless.

Over eight years, Plaintiff and the former class plaintiffs have conducted wide-ranging discovery and advanced numerous challenges to the Merger. They have cited many emails between Potashner and the other Parametric directors, arguing in heated and personal terms about Potashner's options in HHI and potential obstacles to the Merger. They have claimed that Turtle Beach lied to Parametric about its business prospects. Although none of this smoke establishes any claim, it most certainly does not provide any legal basis for the only claim Plaintiff has been permitted to pursue: an equity expropriation claim that a controlling shareholder of Parametric stole economic and voting power from the legacy Parametric shareholders for itself. There is no reason to hold a lengthy trial on a claim for which Plaintiff has no evidence and for which no evidence has ever existed. The Court should grant summary judgment in Defendants' favor.[3]

STATEMENT OF UNDISPUTED FACTS

I. Before And During Merger Negotiations, Potashner And The Other Parametric Directors Independently Pursued Their Views Of The Company's Best Interest.

During the months before the Merger, Parametric's Board evaluated whether to transfer Potashner to head up the new HHI initiative at the company. At Parametric's annual meeting on February 21, 2013, just prior to the company's introduction to Turtle Beach, Potashner suggested that he should step down as Executive Chairman of Parametric to instead serve in a new role with the company's HHI subsidiary. HHI would focus on licensing Parametric's proprietary technology, HyperSound, in the medical field.[4] Potashner also received stock options in HHI, as did a Parametric consultant, John Todd ("Todd"), which would grant them each a 5% ownership interest in HHI once exercised.[5] After approving this business initiative, the Board began searching for a new CEO to replace Potashner.[6]

[3] Because Plaintiff cannot establish the basic elements of its equity expropriation claim asserted in Count I of its Complaint, it also cannot establish the basic elements of its aiding-and-abetting claim in Count II, which is necessarily dependent upon the viability of Count I of Plaintiff's Complaint.
[4] Ex. 1 (PAMTNV0078200-13) at PAMTNV0078203; Ex. 2 (TB0070029-30) at TB0070029-30.
[5] Ex. 2 at TB0070029.
[6] Ex. 1 at PAMTNV0078203.

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The Parametric Board welcomed this change. In particular, Parametric's founder and chief scientist, Elwood "Woody" Norris ("Norris"), had a contentious relationship with Potashner and repeatedly sparred with him.[7] The other Board members, too, repeatedly pushed back on Potashner and questioned him.[8] In fact, Director Seth Putterman ("Putterman") testified his "first instinct [was] to delay" when the Board was asked to do something proposed by Potashner.[9]

Potashner himself was "tired of getting sabotaged at every BOD meeting," and viewed the Board as naïve and not as experienced with public company work, believing "the sooner we all distance ourselves the better."[10] And although the directors "disregarded" Potashner's bombast as "meaningless outburst[s]" or negotiation strategy,[11] Norris testified that whether the Board should "fire" Potashner eventually "came up."[12] At the least, the Board knew it would have to "clip[] Mr. Potashner's wings" if the Merger did not go through.[13]

Word about the conflict between Potashner and the Parametric Board reached Parametric shareholders as well. Indeed, one (the son of Assignor Barry Weisbord) reached out, on behalf of himself and a number of the Assignors, to Parametric's Board twice over the course of the first week of July 2013 to express certain Assignors' support for Potashner and the HHI initiative, and to offer his services as a "mediator" to help resolve the conflict between Potashner and Norris.[14]

[7] Ex. 3 (Deposition of Elwood Norris, taken Sept. 6, 2019) ("Norris Dep.") 55:5-12 (testifying that "very quickly" after hiring Potashner "I realized I had to be careful with him because I could see that he did not have the best interests of the company at heart sometimes"), 81:1 ("I didn't have any faith in this Potashner guy."), 98:16-17 (testifying he "didn't trust" Potashner).

[8] Ex. 4 (Deposition of Robert Kaplan, taken May 17, 2019) ("Kaplan Dep.") 28:20-24 ("He tried to force everything through the board. And that's not the way I like to operate at a board level. So I said—you know, and I kept arguing with him or asking questions at the board meetings."), 29:21-25 ("He would come in with the decisions made in certain situations and try to force us to accept the decisions. I said, 'You know, wait a minute. You're preempting our right to discuss this and to vote on it.'"), 38:21-39:3 ("He let everybody know he ran the company. I felt the board should run the company. We hired him. The board hired him. And he shouldn't be dictating to us what we should be doing. There were situations where there was [*sic*] disputes in the board meeting and we had a number of disputes. We would question him.").

[9] Ex. 5 (Deposition of Seth Putterman, taken July 2, 2019) ("Putterman Dep.") 206:5-8.

[10] Ex. 6 (PAMTNV0112296-97) at PAMTNV0112296.

[11] Ex. 7 (Deposition of Andrew Wolfe, taken Sept. 5, 2019) ("Wolfe Dep.") 39:6-40:18; *see id.* 41:6-24 (testifying Potashner's threats to Stark about the deal falling through was "posturing" by "being very exuberant in discussions"), 160:20-170:19 (testifying he "didn't take everything that" Potashner "said in anger seriously," including "radical" things like statements that he would "have a shareholder's meeting to oust the board").

[12] Ex. 3 (Norris Dep.) 76:23-24.

[13] Ex. 4 (Kaplan Dep.) 133:1-13.

[14] Ex. 8 (Deposition of Joshua Weisbord, taken Mar. 23, 2021) ("J. Weisbord Dep.") 106:14-19, 115:14-18, 119:12-120:3, 121:18-25; *see* Ex. 9 (PAMTNV0105340-41) at PAMTNV0105341

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Individual Board members also made "many efforts" to "find a smooth middle path between" Potashner and Norris, to no avail.[15]

II. The Conflict Between Potashner And The Board Concerned Potashner's Interest In HHI And Not The Merger.

Turtle Beach learned of Potashner's options in HHI in late June 2013, which was after the terms of the Merger, including the exchange ratio, had been negotiated.[16] Turtle Beach believed that "HHI was a wholly owned subsidiary," meaning Turtle Beach "could dissolve or keep it at [their] discretion post close with no economic impact."[17] But the existence of these options meant HHI would not be wholly owned by the post-Merger entity, given that the option-holders would be "entitle[d] . . . to a portion of the economic value" of HHI.[18] Turtle Beach negotiated the terms of the Merger expecting that the post-Merger entity would own all of HHI; as Turtle Beach's CEO, Juergen Stark ("Stark"), testified, "it didn't seem right" that Turtle Beach would pay the negotiated ratio, but "not get all of what [it] w[as] buying," and that Potashner, "personally," "would have still a stake in this legal entity"—such a result "didn't work at all" for Turtle Beach.[19]

Stark disapproved of the HHI options and told Parametric that "we need a clear mechanism to unwind HHI and/or terminate the HHI license at close or at our discretion in the future with a clear and quantifiable set of economics of doing that."[20] When Parametric still had not resolved this issue in late July, Stark again warned that Turtle Beach would not "move ahead with the acquisition of [Parametric] unless the HHI ownership issues are completely eliminated."[21] Parametric had to solve these issues "at or prior to signing the Definitive Agreement."[22] In short,

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("[W]ithout Ken, I would not have invested, or still be invested. I hope the board understands what he has, and continues to bring to the public shareholders confidence."); Ex. 10 (PAMTNV0112577-78) at PAMTNV011257 ("[I]t is of my belief that if Ken Potashner was to leave the company, get fired, or resign, the equity of the company would be severely devalued due to the markets perceived lack of leadership. It is a fact that no other board member or person(s) of management has ever lead [*sic*] a public company before.").

[15] Ex. 6 (PAMTNV0112296-97) at PAMTNV0112296.

[16] Ex. 11 (VTBH 010763-64) at VTBH 010763 (Potashner agreeing on June 25, 2013 that his stock options had not previously been disclosed).

[17] Ex. 12 (TB0074962-63) at TB0074962.

[18] *Id.*

[19] Ex. 13 (Deposition of Juergen Stark, taken Aug. 15, 2019) ("Stark Dep.") 23:22-24:1.

[20] Ex. 12 (TB00074962-63) at TB00074962.

[21] Ex. 14 (TB00063624-25) at TB00063624.

[22] *Id.*

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Turtle Beach was prepared to walk away from the Merger if Parametric did not remove Potashner's interest in HHI.[23]

Initially, Potashner objected to giving up his options in HHI.[24] Indeed, the threat of losing his options in HHI caused Potashner contemporaneously to write that "if it weren't for my fiduciary responsibility" to Parametric and its shareholders, he "wouldn't do the deal."[25] Potashner knew the only way for him to retain his stock options in HHI would be to find some alternative to the Merger.[26] But because Potashner always supported the Merger[27] and viewed it as the best (if not only) path forward for Parametric and its shareholders, he agreed to Turtle Beach's demands, which included having his HHI stock options "cancelled upon closing of the [Turtle Beach] transaction," which Potashner viewed "as a demonstration of [his] commitment to the transaction."[28]

Before doing so, however, Potashner tried to use HHI as a bargaining chip during Merger negotiations. Potashner believed that retaining the separate HHI structure "was in the benefit of the shareholders," and thus pushed for HHI's structure to remain as part of the post-Merger entity.[29] When that was not possible, Potashner fought hard to leverage Turtle Beach's desire to unwind HHI as a means to negotiate a higher valuation for Parametric.[30] Some Parametric Board members,

[23] Ex. 4 (Kaplan Dep.) 261:20-262:8 (Turtle Beach's "only" position was that Potashner's options had to be "totally cancelled"); Ex. 7 (Wolfe Dep.) 57:4-24 (cancelling the options was necessary for "the merger to move forward"); Ex. 15 (Deposition of James Barnes, taken July 25, 2019) ("Barnes Dep.") 243:21-244:6 (same); Ex. 5 (Putterman Dep.) 277:2-11 (Potashner's options had to be "totally terminated"); Ex. 3 (Norris Dep.) 60:22-25 ("And at some point—I don't remember exactly when—in a conversation I had with Juergen Stark, he said if there isn't HHI, everything folded in together, we don't have a merger."), 75:18-21 ("I had occasion to have a conversation with Juergen Stark, CEO. And he said, absolutely not. If we don't buy the whole thing, there's no deal, period."); Ex. 16 (Deposition of Kenneth Potashner, taken Aug. 8, 2019) ("2019 Potashner Dep.") 251:18-21 (Turtle Beach deal required Potashner to lose his stock options in HHI); Ex. 14 at TB00063624 (Stark informing Potashner, Barnes, and Wolfe that "we are not going to move ahead with the acquisition of PAMT unless the HHI ownership issues are completely eliminated").

[24] Ex. 17 (PAMTNV0105035-36) at PAMTNV0105035.

[25] *Id.*

[26] Ex. 16 (2019 Potashner Dep.) 252:14-17.

[27] *Id.* at 254:16-18.

[28] Ex. 18 (PAMTNV0041262).

[29] Ex. 19 (Deposition of Kenneth Potashner, taken Dec. 11, 2013) ("2013 Potashner Dep.") 133:4-19.

[30] Ex. 20 (Deposition of John Todd, taken Aug. 16, 2019) ("Todd Dep.") 52:6-10 ("Ken didn't feel that Juergen was valuing HHI in the up—in the valuation. And so holding HHI out or making HHI seem like it might be off the table was a way for him to drive valuation."), *id.* 54:10-13 ("He was making it seem that HHI was a standalone entity and that it prefer that it stay off the deal, stay out of the deal, or make it more difficult to be part of the deal."), *id.* 75:15-23 (testifying that Potashner was "holding [HHI] hostage from Juergen [Stark]," because Stark "wasn't giving us enough value for HHI" and Potashner was "using that as a vehicle to create more value for the shareholders").

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however, feared that Potashner's negotiation tactics were "interfering" with the consummation of the Merger.[31] Eventually, Potashner "gave up"[32] when "he finally came to the realization he was not going to get [the Board] to cave" on his desire to play hardball.[33] Simply put, even given Potashner's efforts to "hold[] [HHI] hostage from Juergen [Stark] . . . as a vehicle to create more value for the [Parametric] shareholders,"[34] Turtle Beach never wavered in its position that Potashner's HHI options must be dissolved before the Merger's close.[35] Moreover, the other Parametric directors firmly required Potashner to relinquish his interests in HHI promptly and without compensation.[36]

As per the terms of the Merger, Potashner was paid nothing for his cancelled HHI options.[37] And, although Potashner lamented that the Parametric Board did not permit him "to play chicken" with Turtle Beach,[38] he remained convinced that the Merger was a "good deal for [Parametric] shareholders," despite it being "a bad deal for [him]."[39]

III. Because Public, Non-Insider Shareholders Were Required To Approve The Merger, Parametric Sought Outside Shareholder Approval Of The Merger.

The Parametric Board unanimously approved the terms of the Merger on August 2, 2013.[40] Although each of the Director Defendants owned Parametric shares or stock options before the Merger, they never collectively owned a majority of the issued and outstanding shares of Parametric

[31] Ex. 15 (Barnes Dep.) 93:13-24; *see* Ex. 3 (Norris Dep.) 109:3-13 (testifying Potashner was "the biggest obstacle to our success" because "he was making such a big deal about HHI").
[32] Ex. 3 (Norris Dep) 84:22-24 (testifying Potashner "gave up" on "trying to get some of HHI" "because we did the merger").
[33] *Id.* 111:18-112:5 (testifying Potashner "was desperate because he finally came to the realization he was not going to get Parametric to cave on the HHI").
[34] Ex. 20 (Todd Dep.) 75:15-23.
[35] Ex. 4 (Kaplan Dep.) 262:2-8; Ex. 7 (Wolfe Dep.) 49:18-22 (Turtle Beach's stance on HHI was "nonnegotiable"); Ex. 15 (Barnes Dep.) 243:21-244:6; Ex. 5 (Putterman Dep.) 277:2-11.
[36] Ex. 5 (Putterman Dep.) 105:4-8 ("[I]n order to make HHI go away, which was a criterion for the merger and for which we had to pay off John Todd approximately 250,000 and we told Ken Potashner you get nothing, period."); Ex. 7 (Wolfe Dep.) 150:1-12 (testifying the Board would "have to take away" Potashner's and Todd's "options in order to create an ownership structure that was satisfactory for Mr. Stark" and "Mr. Potashner agreed to no further compensation").
[37] Ex. 21 (Form Schedule 14A dated Dec. 3, 2013) ("Proxy") at 38, 55-57, 76 ("Pursuant to such amendments to the HHI stock option, in the event the merger or any alternative transaction closes, the HHI stock option held by Mr. Potashner would terminate in full and no vesting under such option would occur prior to such closing.").
[38] Ex. 22 (PAMTNV0091853-55) at PAMTNV0091853.
[39] Ex. 16 (2019 Potashner Dep.) 252:5-6.
[40] Ex. 21 (Proxy) at 57.

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stock. Rather, the Director Defendants owned roughly 21% of Parametric's outstanding stock, with the remainder held by private investors and shareholders, including the Assignors.[41] Potashner, himself, held a less than 6% ownership interest in Parametric.[42] Accordingly, Potashner knew that securing public shareholder support for the Merger was crucial.[43] So too did Parametric's Board.[44]

Given the overwhelming majority of non-insider shares, once the Board approved the terms of the Merger, Potashner, with the help of Stark, focused on promoting the benefits of the Merger to Parametric's shareholders. Part of these efforts involved convincing unaffiliated individual shareholders that the Merger was right for Parametric, including one-on-one meetings or conversations between Potashner or Stark and some of Parametric's largest individual shareholders.[45] Potashner and Stark also communicated with a purported shareholder (the son of Assignor Barry Weisbord) who volunteered to reinforce shareholder support for the Merger among major shareholders (including the Assignors).[46] This individual often would email this group of Parametric shareholders (including the Assignors), expressing positive support for the Merger; he then would report back to Potashner and Stark on his efforts. For example, he reported to Potashner and Stark that he tried to "stop the bleeding" by explaining to his shareholder group that certain

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[41] *Id.* at 38.
[42] *Id.*
[43] Ex. 23 (PAMTNV0091494-95) at PAMTNV0091494 ("I am much less confident about the vote now and I can no longer present it as a fair accomplis [*sic*][.]").
[44] Ex. 5 (Putterman Dep.) 201:11-15 (testifying "there was a chance the shareholders would vote no").
[45] Ex. 24 (PAMTNV0098631-35) at PAMTNV0098631 (Stark and Potashner setting up meeting between Stark and large shareholder); Ex. 25 (Deposition of Robert Masterson, taken on Apr. 8, 2021) ("Masterson Dep") at 37:9-17, 39:24-40:5 (Potashner played golf and had dinner with Masterson on September 11, 2013 and Stark had dinner with Masterson on September 18, 2013); Ex. 26 (Deposition of Barry Weisbord, taken Mar. 11, 2021) ("B. Weisbord Dep.") 24:3-10 (testifying he met with Potashner, who assured him the Merger "was the right move for . . . Parametric"); Ex. 27 (Deposition of Adam Kahn, taken Mar. 10, 2021) ("Kahn Dep.") 90:6-10 (testifying he had a telephone conversation with Stark); Ex. 28 (VTBH068852-53) at VTBH068852 (setting up phone conversation between Stark and large shareholder); Ex. 29 (VTBH066675-77) at VTBH066675-76 (large shareholder saying conversation with Stark reinforced shareholder's "excite[ment] about the long-term prospects of the combined entity, particularly at the current valuation").
[46] Ex. 30 (PAMTNV0099906); *see* Ex. 26 (B. Weisbord Dep.) 184:12-16 (testifying "it was important for the two companies to try to get Josh [Weisbord] and people he was associated with on board for this merger"). In fact, Joshua Weisbord testified to having close, personal relationships with each of the Assignors in this action. Ex. 8 (J. Weisbord Dep.) at 49:4-55:9; *see* Ex. 25 (Masterson Dep.) 40:19-22; Ex. 31 (Deposition of Alan Goldberg, taken Mar. 5, 2021) ("Goldberg Dep.") 73:7-18; Ex. 32 (Deposition of Richard Santilli, taken Mar. 31, 2021) ("Santulli Dep.") 13:5-8; Ex. 33 (Deposition of Marcia Patricof, taken Apr. 1, 2021) ("Patricof Dep.") 16:1-3.

negative market turns with regard to Parametric's stock had "NOTHING to do with the company fundamentals/valuation/or risk to merger," confirming that he had "never been more excited about the companies [*sic*] position."[47] Nevertheless, throughout the period between the Merger's announcement and closing, Potashner often was worried about losing shareholder support for the Merger, given he did not consider shareholder approval a "fait accompli[]."[48]

IV. Parametric Shareholders Overwhelmingly Approved The Merger.

Ultimately, Parametric shareholders overwhelmingly approved the Merger on December 27, 2013, with over 95% of the voting shares in favor of the Merger.[49] Accordingly, the Merger closed on January 15, 2014. Due to the lock-up of management's shares negotiated as part of the Merger Agreement, Potashner was unable to exercise any of his options in Parametric and his interest in the Company ultimately expired worthless when the post-Merger company's stock price declined.[50]

ARGUMENT

"Summary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). "The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant." *Id.* When opposing a motion for summary judgment, "the non-moving party may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue." *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 713, 57 P.3d 82, 87 (2002).

[47] Ex. 34 (VTBH095062-63) at VTBH095063.
[48] *See, e.g.*, Ex. 23 (PAMTNV0091494-95) at PAMTNV0091494 ("The trigger point for my email outburst yesterday was receiving word from my biggest investor that he may no longer vote for the deal. . . . I am much less confident about the vote now and I can [no] longer present it as a fait accomplis [*sic*]."); Ex. 24 (PAMTNV0098631-33) at 98632 (discussing Assignor Richard Santulli and worrying that if "[w]e lose him, its [*sic*] all over," and explaining one of Parametric's "3 large infividual [*sic*] holders" dropped out of supporting the Merger).
[49] Ex. 35 (Form 8-K dated Dec. 30, 2013) at 3.
[50] Ex. 21 (Proxy) at 79; Ex. 16 (2019 Potashner Dep.) 22:5-19.

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Under this settled standard, Defendants are entitled to summary judgment on all counts in their favor because Plaintiff cannot establish the elements of its equity expropriation claim.

I. Defendants Are Entitled To Summary Judgment Because Plaintiff Cannot Prove The Elements Of Its Direct Equity Expropriation Claim.

The clear, undisputed record evidence in this case unequivocally establishes that Plaintiff cannot prove the fundamental element of its equity expropriation claim: that Parametric had a pre-Merger controlling shareholder. Rather, it is undisputed that Parametric did not have a controlling shareholder at any point in time before the Merger. The undisputed record evidence also shows that the equity held by all Parametric shareholders was diluted identically by the Merger, thus further dooming Plaintiff's equity expropriation claim. Defendants therefore are entitled to summary judgment in their favor on all counts.

A. Without Evidence That Parametric Had A Pre-Merger Controlling Shareholder, Plaintiff Cannot Proceed With Its Direct Equity Expropriation Claim.

The central thesis of Plaintiff's claims is that Parametric "overpaid" for Turtle Beach by issuing too many shares to Turtle Beach in the Merger, thereby unduly diluting Parametric's shareholders. Compl. ¶¶ 5, 163 & p. 46.[51] But the Nevada Supreme Court held that where a shareholder claims a company issued "additional equity for insufficient consideration," such claims must be asserted derivatively on behalf of the corporation "because any dilution in value of the corporation's stock is merely the unavoidable result (from an accounting standpoint) of the reduction in value of the entire corporate entity, of which each share of equity represents an equal fraction." *Parametric*, 133 Nev. at 428, 401 P.3d at 1109 (quoting *Gentile*, 906 A.2d at 99).

On the other hand, a direct equity expropriation claim arises only in the rare case where "a controlling shareholder's or director's expropriation of value from the company[] caus[es] other

[51] *See* Ex. 36 (Deposition of Ronald Etkin, taken Mar. 18, 2021) ("Etkin Dep.") 6:24-7:5 ("When we made the merger on January 15, 2014 we got an unfair amount of the company, our percentage of the company was unfair, wasn't right. It was not right."); Ex. 31 (Goldberg Dep.) 9:11-12 (testifying the claims in this case are based on the fact that "Turtle Beach bought Parametrics for not enough money"); Ex. 25 (Masterson Dep.) 12:25-13:2 (testifying the claims in this case were that Parametric "overvalued Turtle Beach and we [*i.e.*, the shareholders] didn't get the proper share of the combined company"); Ex. 32 (Santulli Dep.) 10:4-11 (testifying that the legacy Parametric shareholders "were treated unfairly" because they "[s]hould have got a larger share" of the post-Merger company).

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shareholders' equity to be diluted." *Id*. at 429, 401 P.3d at 1109. In *Parametric*, the Nevada Supreme Court recognized that direct equity expropriation claims could exist under Nevada law, and sought to "align" Nevada "jurisprudence with Delaware's" in this regard. *See id*.

Delaware, and therefore Nevada, law is clear that a direct equity expropriation claim arises only where (1) "a stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value"; and (2) "the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders." *Gentile*, 906 A.2d at 100; *see also El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1263-64 (Del. 2016).

In *Gentile*, a corporation's CEO and controlling shareholder forgave a portion of the company's debt he held in exchange for equity. *Gentile*, 906 A.2d at 94-95. The company's board of directors did not disclose the debt-forgiveness transaction between the company and the controller, but secured a shareholder vote approving the issuance of the additional shares to the controller, thereby increasing his equity position from 61.19% to 93.49% and decreasing the remaining shareholders' position from 31.81% to 6.51%. *Id.* at 95. The Delaware Supreme Court held that "[b]ecause the shares representing the 'overpayment' embody both economic value and voting power, the end result of this type of transaction is an improper transfer—or expropriation—of economic value and voting power from the public shareholders to the majority or controlling stockholder," which creates "an extraction from the public shareholders, and a redistribution to the controlling shareholder, of a portion of the economic value and voting power embodied in the minority interest." *Id.* at 100. Consequently, "the public shareholders are harmed, uniquely and individually, to the same extent that the controlling shareholder is (correspondingly) benefited," and a direct claim arises. *Id.*

The Delaware Supreme Court has rejected explicitly the "invitation to further expand the universe of claims that can be asserted" under *Gentile* beyond that case's specific facts. *El Paso*, 152 A.3d at 1264. In fact, the *El Paso* court cautioned that reading *Gentile* beyond its facts "would

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deviate from the *Tooley* framework,"[52] and "swallow the rule that claims of corporate overpayment are derivative by permitting stockholders to maintain a suit directly whenever the corporation transacts with a controller on allegedly unfair terms." *Id.* (internal quotation marks and citation omitted). Given this direction (and notwithstanding recent criticism of the *Gentile* doctrine, generally[53]), post-*El Paso* Delaware decisions uniformly have rejected earlier Delaware Court of Chancery cases holding that plaintiffs could bring direct equity expropriation claims in certain circumstances not involving a controlling shareholder. *See, e.g.*, *In re TerraForm Power, Inc. S'holder Litig.*, 2020 WL 6375859, at *14 (Del. Ch. Oct. 30, 2020) (explaining cases like *Carsanaro*[54] and *Nine Systems*[55] were abrogated by *El Paso*), *cert. granted*, 2020 WL 6889189 (Del. Nov. 24, 2020); *Sheldon v. Pinto Tech. Ventures, L.P.*, 2019 WL 336985, at *11 (Del. Ch. Jan. 25, 2019), *aff'd*, 220 A.3d 245 (Del. Oct. 4, 2019) (same); *Sciabacucchi v. Liberty Broadband Corp.*, 2018 WL 3599997, at *10 (Del. Ch. July 26, 2018) (same). These cases clearly establish that the essential elements of an equity expropriation claim are the existence of a controlling shareholder prior to the challenged transaction, who, through that transaction, transfers to itself equity from the other shareholders for an inadequate price. *See TerraForm Power*, 2020 WL 6375859, at *16 ("*Gentile* and its progeny should be construed narrowly, . . . *Gentile* must be limited to its facts, which involved a dilutive stock issuance to a controlling stockholder." (internal quotation marks and citation omitted)); *Markusic v. Blum*, 2020 WL 4760348, at *4 (Del. Ch. Aug. 18, 2020) ("The Delaware Supreme Court has since narrowly construed the *Gentile* doctrine . . . and declined to apply its holding where the challenged transactions did not result in an improper

[52] The Nevada Supreme Court, in *Parametric*, explicitly adopted the *Tooley* framework for distinguishing between direct and derivative claims. 133 Nev. at 419, 401 P.3d at 1102 (adopting test for direct harm from *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004)).

[53] Former Delaware Chief Justice Strine has described *Gentile* as "a confusing decision, which muddies the clarity of [Delaware] law in an important context," and thus "ought to be overruled," at least with respect to certain circumstances. *El Paso*, 152 A.3d at 1265-66 (Strine, C.J., concurring). Some trial courts in Delaware question whether *Gentile* is still good law. *See, e.g.*, *ACP Master, Ltd. v. Sprint Corp.*, 2017 WL 3421142, at *26 n.206 (Del. Ch. 2017) ("Whether *Gentile* is still good law is debatable."), *aff'd*, 184 A.3d 1291 (Del. 2018). In any case, the question of whether even *Gentile* itself remains good law certainly counsels against any expansion of it.

[54] *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618 (Del. Ch. 2013).

[55] *In re Nine Sys. Corp. S'holders Litig.*, 2014 WL 4383127 (Del. Ch. Sept. 4, 2014), *aff'd sub nom.*, *Fuchs v. Wren Holdings, LLC*, 129 A.3d 882 (Del. 2015).

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transfer of both economic and voting power from the minority stockholders to the controlling stockholder." (cleaned up) (emphasis in original)).[56]

B. Parametric Did Not Have A Pre-Merger Controlling Shareholder Or Control Group.

A stockholder is a controller where: "the stockholder (1) owns more than 50% of the voting power of a corporation or (2) owns less than 50% of the voting power of the corporation but exercises control over the business affairs of the corporation." *Sheldon*, 220 A.3d at 251 (cleaned up). "[D]emonstrating the kind of control required to elevate a minority [stockholder] to controller status is 'not easy.'" *In re Rouse Prop., Inc.*, 2018 WL 1226015, at *11 (Del. Ch. Mar. 9, 2018). A minority shareholder can only constitute a controller where he has "such formidable voting and managerial power that [he], as a practical matter, [is] no differently situated than if [he] had majority voting control." *In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *9 (Del. Ch. Aug. 18, 2006). Importantly, even "stockholders with very potent clout have been deemed, in thoughtful decisions, to fall short of the mark." *Id.*

Discovery has confirmed that Parametric had neither a controlling shareholder nor a control group before the Merger for the following three reasons:

First, Plaintiff can point to no evidence that Parametric had a controlling shareholder holding "more than 50% of the voting power" pre-Merger. Rather, the undisputed evidence is that the Director Defendants, together, held about 21% of Parametric's outstanding shares.[57] Potashner, himself, owned less than 6%.[58]

Second, there is no evidence that any one Parametric director or executive exercised *de facto* control over Parametric. Of course, Potashner, as Parametric's Executive Chairman and practical CEO, participated extensively in the Merger negotiations and the running of Parametric's day-to-day business.[59] But a minority shareholder transforms into a controller only "through 'a combination of potent voting power and management control such that the stockholder could be

[56] For further exploration of and citation to the relevant Delaware case law, Defendants refer the Court to their Motion to Dismiss for Failure to State a Claim, filed on July 1, 2020 (on file with Court), at pages 8 through 15.
[57] Ex. 21 (Proxy) at 38.
[58] *Id.*
[59] *See supra* at 3-9.

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deemed to have effective control of the board without actually owning a majority of stock.'" *In re Tesla Motors, Inc. S'holder Litig.*, 2020 WL 553902, at *4 (Del. Ch. Feb. 4, 2020) (quoting *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 307 (Del. 2015)); *Superior Vision Servs., Inc. v. ReliaStar Life Ins. Co.*, 2006 WL 2521426, at *4 (Del. Ch. Aug. 25, 2006) ("[T]he focus of the inquiry has been on the *de facto* power of a significant (but less than majority) shareholder, which, when coupled with other factors, gives that shareholder the ability to dominate the corporate decision-making process.").

The proper focus of the "control" inquiry is the shareholder's "domination of the board with regard to the transaction at issue." *In re Crimson Expl. Inc. S'holder Litig.*, 2014 WL 5449419, at *16 (Del. Ch. Oct. 24, 2014); *see id.* at *12 (a minority stockholder "will not be considered a controlling stockholder unless they actually control the board's decisions about the challenged transaction"); *Superior Vision*, 2006 WL 2521426, at *4 (controller inquiry is "focused on control of the board"). The supposed controller's "power must be so potent that independent directors cannot freely exercise their judgment, fearing retribution from the controlling minority [stockholder]." *Rouse*, 2018 WL 1226015, at *11 (internal quotation marks and citation omitted). The analysis "turn[s] on the power of the alleged controller to co-opt the board." *Sciabacucchi*, 2017 WL 2352152, at *17.

After eight years of litigation and extensive discovery, it is clear that Potashner did not dominate Parametric's "corporate decision-making process" such that he can be considered a controlling shareholder. To the contrary, the record is replete with evidence that the Parametric Board not only feuded with Potashner frequently but often rejected his decisions or suggestions, the most notable example being the Board's independent assessment and rejection of Potashner's pleas to preserve the structure of HHI post-Merger.[60] The Parametric directors were uniform in their independence from Potashner and, in general, often pushed back against his interests and sometimes aggressive management style.[61] And multiple Parametric directors rejected Potashner's threats of their ouster as being simply hot air.[62] But with regard to Potashner's opposition to Turtle

[60] *See supra* at 4-7.
[61] *See id.*
[62] *See supra* at 4.

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Beach's demands with respect to HHI, specifically, the record is unequivocally clear that the Parametric Board rejected Potashner's position and demanded he meet the demands of Turtle Beach.[63] At the end of the day, the Merger went through at the Board's insistence and both Potashner's and Todd's stake in Parametric were diluted in the same manner as every other Parametric shareholder. Potashner's economic interest, in turn, was affected adversely by the Merger to a greater proportion than the interests of the public shareholders.

Additionally, Potashner's anxiety over the public shareholders' approval of the Merger further shows that he was not unilaterally driving the course of Parametric's corporate future. Instead, he was concerned about whether the Parametric shareholders would approve the Merger.[64] Shareholders who exercise "control" do not typically worry about the outcome of either board or shareholder votes.[65] *See, e.g.*, *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 937 (Del. 2003) (explaining where a controller or control group exists, general shareholder votes "are likely to become mere formalities"); *Solomon v. Armstrong*, 747 A.2d 1098, 1116 n.55 (Del. Ch. 1999) (explaining "since the controlling shareholder can force through the proposed action/transaction by virtue of his control over the franchise, shareholder ratification is self-serving and unremarkable"), *aff'd*, 746 A.2d 277 (Del. 2000).

Nor do controllers worry that their boards will oust them. As discussed above, however, the conflict between Potashner and the Board reached its peak in July 2013, at which point the Board seriously considered firing Potashner.[66] The risk that Potashner would be fired by the Board was so real that a Potashner-friendly Parametric shareholder—a son of one and a close family friend of most of the Assignors—personally reached out to the Board twice in the same week to voice support for Potashner and offer that he act as a "mediat[or]" over the dispute between Potashner

[63] *See supra* at 5-7.
[64] *See supra* at 7-9.
[65] Ex. 26 (B. Weisbord Dep.) 189:21-190:4 (agreeing "as a master [*sic*] of logic it would seem that would be correct" that Potashner and Stark would not have tried to influence shareholder votes if it was not "relevant to the outcome of the merger"); Ex. 32 (Santulli Dep.) 87:12-88:3 (testifying that it would be "hard to overturn" a controlling shareholder and that controlling shareholders do not "lose the vote").
[66] *See supra* at 4-5.

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and the Board.[67] And, had the Merger not been consummated, at the very least, the Parametric Board would have "clipped Mr. Potashner's wings" going forward.[68]

At bottom, Potashner's boisterous personality and management style, although certainly colorful, does not transform him into a controller, especially where the Parametric Board commonly exercised independent judgment—particularly in ways antithetical to Potashner's own interests—and rejected Potashner's positions throughout the Merger negotiations. Potashner himself lamented that the Board would not allow him "to play chicken" with Turtle Beach, like he wanted.[69] That the Parametric Board exercised independent judgment and rejected Potashner's attempts at overreach throughout the Merger precludes Plaintiff from painting him as a controlling shareholder. *See, e.g.*, *Kaplan v. Centex Corp.*, 284 A.2d 119, 123 (Del. Ch. 1971) (rejecting arguments seeking to establish a controller where board "exercised independence of judgment and action in agreeing to the terms" of a transaction).

Indeed, it would be a "striking" low watermark for this Court to hold that Potashner's 5.8% ownership of Parametric, on the facts in the record here, could establish him as the *de facto* controller of Parametric. No court of which counsel are aware ever has granted controller status to a minority shareholder with such a miniscule equity interest in a company under any set of facts; not even close.[70]

Third, Plaintiff cannot avoid *Gentile*'s requirement of a controlling shareholder by pointing to a non-existent control group comprised of either "Stripes Group, VTBH, SG VTB, and the Parametric Board," Compl. ¶ 15, or Potashner and any combination of Parametric directors or

[67] *See supra* at 4.
[68] *See id.*
[69] Ex. 22 (PAMTNV0091853-55) at PAMTNV0091853.
[70] *Cf*, *In re USG Corp. S'holder Litig.*, 2020 WL 5126671, at *17 (Del. Ch. Aug. 31, 2020) ("[A] 10.6% voting stake leaves a steep uphill climb to plead the Knauf was USG's controlling stockholder."), *appeal dismissed sub nom.*, *Fitzgerald v. Leer*, 2021 WL 568494 (Del. Feb. 16, 2021); *Crimson*, 2014 WL 5449419, at *15 (finding "controlling stockholder" based on 33.7% stock ownership "would be an aggressive instance of finding a blockholder to be a controller in a third-party merger"); *Hokanson v. Petty*, 2008 WL 5169633, at *8 (Del. Ch. Dec. 10, 2008) (rejecting the "striking argument" that a 17% stockholder, without evidence of the "actual exercise of control over corporate conduct," could possibly be considered a controlling shareholder); *PNB*, 2006 WL 2403999, at *10 (finding no controlling shareholder after noting "plaintiffs start[ed] from an overall level of ownership that [was] relatively low" because the purported control group only owned 33.5% of the company's outstanding stock); *In re Western Nat'l Corp. S'holders Litig.*, 2000 WL 710192, at *29 (Del. Ch. May 22, 2000) (holding that 46% stockholder was not a controlling shareholder).

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executives. To prove the existence of a control group, Plaintiff must establish the supposed group members are "connected in some legally significant way—*e.g.*, by contract, common ownership, agreement, or other arrangement—to work together toward a shared goal." *Gilbert v. Perlman*, 2020 WL 2062285, at *6 (Del. Ch. Apr. 29, 2020); *see Sheldon*, 220 A.3d at 251-52. This requires "more than a mere concurrence of self-interest among certain stockholders." *Sheldon*, 220 A.3d at 252 (internal quotation marks and citation omitted); *see Gilbert*, 2020 WL 2062285, at *6 ("[I]t is insufficient to identify a group of stockholders that merely shares parallel interests."). "Rather, 'there must be some indication of an actual agreement.'" *Sheldon*, 220 A.3d at 252 (quoting *Crimson*, 2014 WL 5449419, at *15).

Stripes Group, VTBH, and SG VTB did not own shares of Parametric stock until after the Merger closed, and thus they cannot form any pre-Merger Parametric control group. *See Klein v. H.I.G. Cap., LLC*, 2018 WL 6719717, at *13 (Del. Ch. Dec. 19, 2018). And Plaintiff cannot point to any evidence in the record establishing that any Parametric director or executive, much less a controlling group of them, was "'beholden' to [Potashner] or so under [his] influence that their discretion would be sterilized," *DiRienozo v. Lichtenstein*, 2013 WL 5503034, at *12 (Del. Ch. Sept. 30, 2013); or that they entered into a pre-Merger voting agreement; or that they were otherwise "involved in a blood pact to act together," *Almond*, 2018 WL 3954733, at *26. Here, by contrast, the record is replete with instances where Parametric's directors and Potashner were at sharp odds with each other. Indeed, disagreements between Potashner and the other Parametric directors during the period leading up to the Merger appear to have been the norm, not the exception.

In sum, the well-developed factual record confirms that the omission from Plaintiff's Complaint of the existence of a controlling pre-Merger shareholder of Parametric was not an oversight. Parametric clearly did not have a controlling shareholder before the Merger. Because Plaintiff cannot establish this threshold element of its equity expropriation claim, Defendants are entitled to summary judgment on all counts in their favor.

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C. Even If Plaintiff Could Identify A Pre-Merger Parametric Controller—Which It Cannot—No Controller Expropriated Economic Or Voting Power From The Parametric Shareholders To Itself.

Even if Plaintiff could establish that Potashner was Parametric's pre-Merger controlling shareholder or a member of a pre-Merger control group (which it cannot), the record evidence in this case precludes Plaintiff from establishing the second threshold element of its equity expropriation claim: that the transaction at issue effectuated "an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders." *Gentile*, 906 A.2d at 100 (emphasis added); *see Parametric*, 133 Nev. at 429, 401 P.3d at 1109.

1. Potashner Did Not Expropriate Economic Or Voting Power From The Parametric Shareholders.

Even assuming Potashner was Parametric's pre-Merger controller, no evidence supports a conclusion that he expropriated economic or voting power (much less both, as required) from the legacy Parametric shareholders to himself. Only where a transaction results in the unique harm constituting "an extraction from the public shareholders, and a redistribution to the controlling shareholder, of a portion of the economic value and voting power embodied in the minority interest," does an equity expropriation claim lie. *TerraForm Power*, 2020 WL 6375859, at *12 (quoting *Gentile*, 906 A.2d at 100) (emphasis added). In contrast, "a transaction does not fit within the *Gentile* paradigm if the controller itself is diluted by that transaction." *Almond*, 2018 WL 3954733, at *28; *see Daugherty v. Dondero*, 2019 WL 4740089, at *3 (Del. Ch. Sept. 27, 2019) (same).

Potashner's stake in Parametric was diluted by the Merger just like every other Parametric shareholder. Pre-Merger, Potashner held only a 5.8% ownership interest in Parametric, comprised entirely of unexercised stock options.[71] When Parametric issued an 81% controlling interest to the shareholders of VTBH pursuant to the terms of the Merger, Potashner's position, like those of every pre-Merger Parametric shareholder, was diluted. In fact, Plaintiff cannot contest that Potashner's stake in Parametric was diluted far worse than the typical pre-Merger Parametric shareholder, given

[71] Ex. 21 (Proxy) at 38.

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that, as a result of the Merger, Potashner lost all his options in HHI for no additional consideration.[72] In addition, Potashner's ultimate position with respect to his Parametric equity interest was also much worse when compared to the public shareholders' position because Potashner was a party to a lock-up agreement that prevented him from selling any Parametric stock for six months following the closing of the Merger.[73] When the dust ultimately settled, Potashner's stock options in Parametric expired worthless, meaning that his equity stake in the Company ultimately was reduced to 0% as a result of the Merger.[74]

That Potashner received a severance payment and a seat on the combined company's board after the Merger's close makes no difference. Those two "benefits" were not the "economic and voting power" once owned by the legacy Parametric shareholders, let alone in any way related to the dilution the Merger caused to those shareholders' stakes in Parametric. *See Klein*, 2018 WL 6719717, at *8 (holding case did not involve "the type of transfer of economic value normally contemplated in a *Gentile* claim" because benefit the controller allegedly received for inadequate consideration was a security not held by all shareholders); *Almond*, 2018 WL 3954733, at *28 ("As a mathematical matter, for a transaction to transfer economic and voting power to Glenhill disproportionately, Glenhill would need to receive in that transaction a percentage of the security to be issued that exceeds the percentage of economic and voting power Glenhill already held in the Company immediately before that transaction. Otherwise, the transaction either would be dilutive to Glenhill or would maintain its percentage ownership." (emphasis in original)). Accordingly, given that eight-years' worth of discovery has not uncovered any "economic and voting power" that Potashner expropriated for himself from the other legacy Parametric shareholders, even assuming he was a pre-Merger controller (which he was not), Plaintiff cannot establish the threshold elements of its equity expropriation claim.

[72] *See supra* at 6-7.
[73] *See supra* at 6-7, 9.
[74] *See supra* at 9.

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2. Plaintiff Cannot Save Its Direct Equity Expropriation Claim By Pointing To An Equity Transfer To A Previously Unrelated Third Party.

Plaintiff is expected to repeat its prior argument that its direct equity expropriation claim is valid under Nevada law because Potashner expropriated value from the legacy Parametric shareholders by causing Parametric to (1) overpay for a 19% interest in the post-Merger Parametric and (2) issue too many dilutive shares to VTBH's shareholders.[75] This is not the law in Nevada or Delaware. And if Plaintiff's formulation were the law, shareholders could bring direct equity expropriation claims challenging any merger involving the issuance of shares, drastically expanding the bounds of the intentionally narrow *Gentile* doctrine without limit. *See, e.g.*, *TerraForm Power*, 2020 WL 6375859, at *16; *Markusic*, 2020 WL 4760348, at *4. The Nevada Supreme Court already ruled in this case that such "pure equity dilution claim[s]" are derivative, not direct. *Parametric*, 133 Nev. at 428-29, 401 P.3d at 1109.

Gatz v. Ponsoldt, 925 A.2d 1265 (Del. 2007), upon which Plaintiff solely relied in opposition to Defendants' motion to dismiss, does not excuse Plaintiff's obligation to establish that this case involves "an extraction from the public shareholders, and a redistribution to the controlling shareholder, of a portion of the economic value and voting power embodied in the minority interest." *TerraForm Power*, 2020 WL 6375859, at *12 (emphasis added) (quoting *Gentile*, 906 A.2d at 100). *Gatz* does not hold that a direct equity expropriation claim arises whenever corporate fiduciaries issue dilutive shares to a third party for insufficient consideration. Rather, that is a classic derivative claim, *Parametric*, 133 Nev. at 428-29, 401 P.3d at 1109, which Plaintiff (correctly) has not asserted in this case because it was released as part of the class settlement.[76]

In *Gatz*, the Delaware Supreme Court applied *Gentile* to hold that minority shareholders of a company could bring direct claims against its directors, its prior controlling shareholder, and its new majority shareholder in a uniquely structured recapitalization involving a third party that previously owned no company stock. 925 A.2d at 1279. In analyzing *Gentile*'s applicability to the recapitalization, the court recognized that the recapitalization constituted two separate transactions

[75] *See* Pl. PAMTP LLC's Opp. to Defs.' Mot. to Dismiss for Failure to State a Claim at 19-21 (July 22, 2020), on file with Court.
[76] *See* Final Judgment & Order of Dismissal with Prejudice (May 19, 2020), on file with Court.

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that the controlling shareholder, "by creative timing and coordination, caused simultaneously to be rolled into one." *Id.* The first transaction "was a [*Gentile*] expropriation of voting power and economic value from the public shareholders by and to the controlling shareholder." *Id.* After the first transaction, the *de facto* controller of the company became "the absolute majority stockholder," "to the corresponding detriment of the [company's] public shareholders." *Id.* The second transaction "was a transfer of the benefits of that expropriation by the controlling shareholder to the third party," whereby the controller "transfer[ed] his newly-acquired controlling stock interest" to the third party in exchange for the third party's cancellation of $4.75 million in debt owed by the controller. *Id.* at 1280. Thus, the controlling shareholder obtained the full benefits of the recapitalization and the public shareholders did not.

Gatz does not hold that stock issuances by companies to unaffiliated third parties give rise to direct equity expropriation claims. Rather, *Gatz*'s holding is contingent upon the existence of "a [*Gentile*] expropriation of voting power and economic value from the public shareholders by and to the controlling shareholder." *Id.* at 1279. The reason the court "look[ed] beyond form to the substance of the arrangement" was to prevent the controlling shareholder from inoculating his equity expropriation from direct challenge simply because he subsequently sold that equity to a formerly unaffiliated third party. *Id.* at 1280; *see Feldman v. Cutaia*, 956 A.2d 644, 656 (Del. Ch. 2007) (describing *Gatz* involved "an intricate two-step transaction" in which "Ponsoldt increased his stock ownership of Regency to an absolute majority interest, while simultaneously selling that majority stake for cash to a third party"), *aff'd*, 951 A.2d 727 (Del. 2008). As the Delaware Court of Chancery later explained in *Feldman*, "the harm *Gentile* and *Gatz* seek to remedy can only arise when a controlling stockholder, with sufficient power to manipulate the corporate processes, engineers a dilutive transaction whereby that stockholder receives an exclusive benefit of increased equity ownership and voting power for inadequate consideration." *Id.* at 657 (emphasis added)).

Plaintiff cannot show that the Merger "result[ed] in an improper transfer of both economic and voting power from the minority to the controlling stockholders." *Markusic*, 2020 WL 4760348, at *4 (first emphasis added). Plaintiff, indeed, cannot prove the transfer of either of those to Potashner. Plaintiff therefore cannot establish this required element of its equity expropriation

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claim under either *Gentile* or *Gatz*. Accordingly, Defendants are entitled to summary judgment in their favor on Plaintiff's equity expropriation claim.

CONCLUSION

For the foregoing reasons, Defendants are entitled to summary judgment in their favor on all of Plaintiffs' claims.

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On the date below, as an employee of Snell & Wilmer L.L.P., I certify that I served a copy of the foregoing **DEFENDANTS' FIRST MOTION FOR SUMMARY JUDGMENT** via e-service through Odyssey File and serve to the email addresses listed below:

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