IN THE SUPREME COURT OF THE STATE OF NEVADA

Nos. 83598, 84971, and 85358

IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION.

PAMTP, LLC,

Appellant,

v.

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

Respondents.

Consolidated Appeals from Final Judgment and Fees and Costs Awards

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

APPELLANT'S REPLY APPENDIX

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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 8th day of May, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano LLP, and on May 8, 2023, a true and correct copy of the foregoing was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system.

/s/ *CaraMia Gerard*
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

In re PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION	Lead Case No. A-13-686890-B Dept. No. XI
	CLASS ACTION
This Document Relates To: ALL ACTIONS.	PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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MOTION

Plaintiffs Kearney IRRV Trust and Grant Oakes (collectively "Plaintiffs"), by and through their counsel, hereby move the Court to certify this action as a class action and appoint Plaintiffs as class representatives within the meaning of Rule 23 of the Nevada Rules of Civil Procedure.

This Motion is made pursuant to NRCP 23, is supported by the papers and pleadings on file herein, as well as the following Memorandum of Points and Authorities, and such argument as the Court may entertain at the hearing on said Motion.

DATED: June 25, 2018

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NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that Plaintiffs' Motion for Class Certification will be heard at the Regional Justice Center, 200 Lewis Avenue, Courtroom 14C, Las Vegas, Nevada 89101, on the 27 day of July 2018, at In Chambers .m. A copy of the above referenced Motion is on file with and available from the clerk of the Eighth Judicial District Court.

DATED: June 25, 2018

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I. INTRODUCTION

By this motion, Plaintiffs Kearney IRRV Trust and Grant Oakes (collectively "Plaintiffs"), shareholders of Parametric Sound Corporation ("Parametric" or the "Company") during the relevant period, respectfully request that the Court certify this action as a class action and appoint Plaintiffs as class representatives within the meaning of Rule 23 of the Nevada Rules of Civil Procedure ("NRCP"). Plaintiffs seek an order certifying the following class:

> All persons and/or entities that held shares of Parametric Sound Corporation ("Parametric") common stock at any time from and including August 5, 2013 through and including January 15, 2014 (the "Class Period"), whether beneficially or of record, including the legal representatives, heirs, successors-in-interest, transferees, and assignees of all such foregoing holders, but excluding Defendants,[1] executive officers of Parametric who served in those capacities during the Class Period, and their legal representatives, heirs, successors-in-interest, transferees, and assignees (the "Class").

Stockholder challenges of corporate mergers, such as this case, "are quintessential examples of class actions." *In re JCC Holding Co. S'holder Litig.*, 843 A.2d 713, 722 n.20 (Del. Ch. 2003).[2] This is so because the Class' claims for breach of fiduciary duty and aiding and abetting said breaches "involve one set of actions by defendants creating a uniform type of impact upon the class of stockholders." *Turner v. Bernstein*, 768 A.2d 24, 31 (Del. Ch. 2000). Nevada courts agree. In fact, just ten months after the Nevada Supreme Court issued the leading opinion on merger-related stockholder litigation in Nevada, this Court certified the class of stockholders. *See Cohen v. Mirage Resorts, Inc.*, No. A408662, 2003 WL 25798758 (Nev. Dist. Ct. Dec. 4, 2003) ("ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion to Certify Class is GRANTED"). More recently, this Court certified the post-merger shareholder classes in the *Force Protection* and

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

[2] Nevada law applies to this case because Parametric was incorporated in Nevada, but "the Nevada Supreme Court frequently looks to the Delaware Supreme Court and the Delaware Court of Chancery as persuasive authorities on questions of corporation law . . . ." *See, e.g., Brown v. Kinross Gold U.S.A., Inc.*, 531 F. Supp. 2d 1234, 1245 (D. Nev. 2008). Unless otherwise noted, all emphasis is added and citations and footnotes are omitted.

Liberator actions. *In re Force Protection, Inc. S'holder Litig.*, No. A-11-651336-B, Order Granting Motion for Class Certification (Nev. Dist. Ct. Oct. 18, 2012) ("*Force Protection* Order") (Ex. A attached); *Schmidt v. Liberator Medical Holdings, Inc.*, No. A-15-728234-B, 2018 WL 1558803 (Nev. Dist. Ct. Feb. 21, 2018). And in just the fourteen years since *Cohen*, this Court and Washoe County have certified ten additional classes of stockholders concerning merger-related claims. *See* Exhibits B-C attached.[3]

This litigation is perfectly suited for class treatment because Defendants' conduct affects ***all*** non-Defendant Parametric stockholders uniformly, including Plaintiffs and the rest of the Class. Indeed, here, there were more than ***6.8 million shares*** of Parametric common stock outstanding at the time of the Merger. While any creative and well-capitalized defendant can attempt to conjure up "unique defenses" and "atypicalities" in a class certification opposition, no defendant can escape the following indisputable black-letter rule of corporate M&A law: "In challenges to corporate mergers brought on behalf of the stockholders not affiliated with the defendants, it is virtually never the case that there is any legitimate basis that a defendant might be found liable to some plaintiffs and not to others." *Turner*, 768 A.2d at 33. In fact, in this case, "'the particularities of any holder would have no bearing on the appropriate remedy' and every material issue in the case would affect all of the class equally." *Id.* at 31 n.15.

Moreover, Plaintiffs held their Parametric shares during the relevant time period. Plaintiffs also intend to vigorously pursue the interests of all Class members, are producing documents, will sit for depositions, and expect to provide material input into any appropriate litigation decisions and, should the situation manifest itself, any settlement decisions on behalf of the entire Class.

In sum, this action is the quintessential example of an action deserving of certification under NRCP 23. Specifically: (a) the Class of Parametric shareholders is sufficiently numerous so as to make joinder impracticable; (b) the questions of law and fact surrounding the Merger of Parametric and VTBH are identical; (c) the breach of fiduciary duty and aiding and abetting claims and defenses

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[3] Exhibit B is a chart that provides information about the classes certified in *Cohen*, *Force Protection*, *Liberator*, and the ten additional certified classes, including the class definitions. Exhibit C includes the thirteen trial court orders certifying these classes.

brought by Plaintiffs are typical to the Class; and (d) Plaintiffs suffer from no conflict and will fairly and adequately protect the interests of the Class. *See* NRCP 23(a). In addition, the proposed Class is maintainable because the questions of law and fact common to the Class predominate over any issues affecting individual Class members and the proposed class action is far superior to other methods for adjudicating the Class members' claims. *See* NRCP 23(b). Accordingly, Plaintiffs' motion should be granted.

II. BRIEF SUMMARY OF THE ALLEGATIONS

"In analyzing whether it should certify a class, the court should generally accept the allegations of the complaint as true." *Meyer v. Eighth Judicial Dist. Court*, 110 Nev. 1357, 1363-64 (1994).

Defendants designed the Merger as a dilutive reverse merger wherein the privately-held VTBH merged into a Parametric subsidiary, at which time Stripes 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 and VTBH insiders, the net effect being that Stripes controlled approximately 81% of the post-Merger Company. Meanwhile, Parametric shareholders, who owned a combined 100% of the Company before the Merger, were reduced to a minority 19% interest in the post-Merger Company. On May 27, 2014, the Company changed its name from "Parametric Sound Corporation" to "Turtle Beach Corporation."

It is now irrefutable that the Merger was, and still is, a disaster for the Company and its 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. Parametric's stock continued to decline precipitously, hovering slightly above or below ***$1.00 per share*** for most of 2016 and 2017. Although Parametric's stock price has recently increased, its stock price is still more than ***70% below*** its value immediately before the Merger was announced, representing a loss of tens of millions of dollars in value compared to pre-Merger Parametric.

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 Merger in order to gain liquidity via the public markets at the expense of Parametric stockholders. Since the Merger, Stripes insiders have used their control of Parametric to usurp the Company's publicly traded status and extract tens of millions of dollars for themselves, while the Company sinks.

Throughout the Merger process, Stripes manipulated, encouraged, and emboldened improper and selfish conduct by Parametric's corporate fiduciaries. Kenneth Potashner ("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:

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."[4]

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!"[5]

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] [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."[6]

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

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[4] PAMTNV0112517.

[5] PAMTNV0112541.

[6] VTBH017661; VTBH000124.

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."[7]

Kaplan, regarding Potashner's unilateral Merger discussions with VTBH: "I feel we [the Board] have been left in the dark and have had misrepresentations presented to us."[8]

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."[9]

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."[10]

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 controls, and the covenant exposures. . . . This is getting scary."[11] Yet the Parametric Board did not negotiate any "offset."

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[7] PAMT0033288; PAMT0072292.

[8] PAMT0033243.

[9] VTBH001759; PAMT0040595.

[10] PAMT0039840; VTBH002189; VTBH001759; PAMTNV0106815.

[11] PAMTNV0105759; VTBH073092.

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."[12]

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 IPO next year they never should have replaced cash with debt layer. Anyway glad to rescue your sorry ass and get you public."[13]

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."[14]

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.[15]

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

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[12] PAMTNV0104228; VTBH056534.

[13] PAMTNV0095569; PAMTNV0099861; VTBH062712; PAMTNV0096468.

[14] VTBH004040.

[15] PAMTNV0090998.

$135 million.[16] 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."

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 and painted a particularly misleading picture regarding VTBH's deteriorating finances and actual value.

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, VTBH, 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.

III. ARGUMENT

A. Legal Standard Governing a Motion for Class Certification

As courts throughout the country have long recognized, the class action construct promotes a number of social and judicial precepts, such as the avoidance of inconsistent rulings and the conservation of judicial and party resources. *See, e.g.*, *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 155 (1982) ("'the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23'"), *accord Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979). The Nevada Supreme Court stated in *Marcuse v. Del Webb Communities, Inc.*, 123 Nev. 278 (2007) that "the class action framework promotes efficiency and justice by reducing the possibility that courts will have to adjudicate several separate suits that all arise from a single wrong." *Id.* at 286.

[16] PAMTNV0101319.

Cases such as this one are particularly well-suited for treatment as class actions because they involve claims common to all Parametric shareholders that arise from Defendants' alleged improper actions in connection with the Merger. *See, e.g.*, *Emerald Partners v. Berlin*, No. 9700, 1991 WL 244230, at *2-*5 (Del. Ch. Nov. 15, 1991) (granting class certification in a case challenging a merger and holding inter alia that "there [were] claims that [were] common to all stockholders who held their shares on the date of the merger"); *Zirn v. VLI Corp.*, No. 9488, 1991 WL 20378, at *6 (Del. Ch. Feb. 15, 1991) (granting class certification in action challenging merger and holding that: "The proposed amended complaint alleges breaches of duty owed to all stockholders and alleges that all stockholders, whether they tendered or were cashed out, were wrongfully coerced into surrendering their shares. Therefore, the central issue is whether the defendants' conduct constituted a breach of duty. Certification of this class under Chancery Rule 23(b)(3) is therefore appropriate.").

B. This Action Meets the Requirements of NRCP Rule 23(a)

Rule 23 of the Nevada Rules of Civil Procedure, which is identical to Rule 23 of the Federal Rules of Civil Procedure, proscribes the necessary prerequisites of a class suit, and states that:

> 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.

NRCP 23(a); *see also Meyer*, 110 Nev. at 1363 ("NRCP 23, identical to its federal counterpart, governs the process of class certification."). 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, the Nevada Supreme Court has held that "[a]n extensive evidentiary showing is not required." *Meyer*, 110 Nev. at 1364.

As explained in more detail below, all of the requirements set forth in NRCP 23(a) are satisfied in this case. Plaintiffs seek to assert claims on behalf of hundreds or thousands of similarly situated Parametric shareholders, all of whom have suffered the same injury as a result of breaches of fiduciary duty or aiding and abetting said breaches of fiduciary duty on the part of Defendants. As the United States Supreme Court stated in *Amchem*:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Amchem Products Inc. v. Windsor, 521 U.S. 591, 617 (1997). The same rationale supports the certification of a class in this case.

1. Numerosity of the Class of Parametric Shareholders Supports Certification

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). "'[I]t is not necessary 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). Thus, "[w]here the exact size of the class is unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied." 1 Robert Newberg, *Newberg on Class Actions*, §3:3 (4th ed. 2002). Indeed, whether joinder is impracticable depends upon the facts and circumstances of each case. *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994); *Cummings v. Charter Hosp.*, 111 Nev. 639, 643-44 (1995).

Here, "[a]ccording 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.* While Nevada courts have held that putative classes of three and five plaintiffs are too small so as to make joinder easy and practical, class certification is plainly warranted in class certifications where, as here, the shareholders of a publicly traded company likely number in the thousands. *Compare Kane*

v. Sierra Lincoln-Mercury, Inc., 91 Nev. 178 (1975) (five class members); *Charter Hosp.*, 111 Nev. at 643-44 (three class members) *with Cohen*, 2003 WL 25798758 (certifying public stockholder class); *Force Protection* Order (certifying public stockholder class); *Liberator*, 2018 WL 1558803 at *2 (certifying public stockholder class). Given the number of outstanding shares and potential Class members here, the sheer enormity of the individual parties which would be entitled to bring suit individually is sufficient to satisfy the requirement that joinder of all absent Class members would be impractical. Indeed, numerosity is generally presumed in class action suits involving securities of nationally traded corporations. *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1038 (5th Cir. 1981).

Other factors also support a finding that joinder would be impracticable in this case. For example, the individual size of many investors' claims is comparatively small in relation to the excessive cost of bringing and maintaining this suit. Accordingly, individual shareholders would be disinclined to bring suit individually due to the prohibitive cost of doing so, weighing in favor of class certification. *See Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 852 (2005) (acknowledging that the class action construct "also helps class members obtain relief when they might be unable or unwilling to individually litigate an action for financial reasons or for fear of repercussion").

2. The Questions of Law and Fact Involved in This Case Are Identical Among the Putative Class Members

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). In *Meyer*, the Supreme Court of Nevada confronted the issue of commonality in the context of a corporate policy under which tenants were locked out of their apartments for late payment of rent. 110 Nev. at 1358-60. In concluding that the district court committed clear error by failing to certify the class on the grounds of commonality, the court concluded that the requirement of NRCP 23(a)(2) is met whenever a "common thread" exists between the claims of various class members. *Id.* at 1365. In doing so, the court also ratified the plaintiffs' argument that class status is presumed appropriate where corporate policy is the focus of the litigation. *See id.* at 1363-64 (citing *Bowling v. Pfizer, Inc.*, 143 F.R.D.

141, 158 (S.D. Ohio 1992)). While this case does not deal with the "general policy" of Parametric, it does concern a particular decision of the Board, *i.e.*, its members' breach of fiduciary duty in approving a merger of the Company, and the same rationale weighs in favor of certification in this case.

Indeed, in this action, it is clear that there are questions of law and/or fact common to all class members, 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.

These claims, shared by the entire class of Parametric shareholders, are precisely the type of "common thread" that the Supreme Court of Nevada was referring to in *Meyer*. *See Meyer*, 110 Nev. at 1365. Stated differently, there is no "inherent uniqueness" among the causes of action or potential causes of action, for they all arise out of the same set of facts (the Board's approval of the Merger) and all exhibit identical questions of law (*e.g.*, whether the Defendants breached their fiduciary duties or aided and abetted in those breaches). *See id.*; NRCP 23(a)(2). And as noted, "[i]n challenges to corporate mergers brought on behalf of the stockholders not affiliated with the defendants, it is virtually never the case that there is any legitimate basis that a defendant might be found liable to some plaintiffs and not to others." *Turner*, 768 A.2d at 33. As here, "the particularities of any holder would have no bearing on the appropriate remedy and every material issue in the case would affect all of the class equally." *Id.* at 31 n.15.

3. The Claims and Defenses of Plaintiffs Are Identical to Those of the Class

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 generally requires that the class representative "'be part of the class and possess the same interest and suffer the same injury as the class member.'" *Gen. Tel. Co.*, 457 U.S. at 156 (internal quotations omitted). However, the claims of the class representative need not be identical to those of absent class members. *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). Instead, "representative claims are 'typical' if they are reasonably coextensive with those of absent class members." *Id.* (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)). "'Generally, the typicality prerequisite 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."'" *Jane Roe Dancer I-VII v. Golden Coin, Ltd.*, 124 Nev. 28, 35, 176 P.3d 271, 275-76 (2008). The typicality requirement can be 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 defendants' liability.'" *Id.*

Plaintiffs' damages claims are fully typical of the Class. Plaintiffs -- like each and every member of the Class -- were damaged by identical breaches of fiduciary duty and aiding and abetting of those breaches 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. Accordingly, the nature of the claims advanced by Plaintiffs and shared by the Class demonstrate typicality pursuant to the meaning of NRCP 23(a)(3).

As noted, just ten months after the Nevada Supreme Court issued its leading opinion on the adjudication of merger-related stockholder litigation in Nevada, this Court certified the class of stockholders. *See Cohen*, 2003 WL 25798758. The Court in *Cohen* certified the following class:

> This action is hereby certified as a class action on behalf of all Boardwalk shareholders, other than named Defendants, who tendered their shares pursuant to

> Boardwalk's Merger with Mirage Acquisition Sub, Inc. on or about June 30, 1998, and Plaintiff, Harvey Cohen, is hereby confirmed as the Class Representative.

Id.; *see also* Force Protection Order.[17]

In addition, reliance is not an issue in this case, as claims for breach of the fiduciary duties of loyalty and good faith do not involve an element of reliance – Defendants "did or did not breach" those duties and whether individual shareholders relied on the Proxy (or any other document) is irrelevant. *Turner*, 768 A.2d at 31. In fact, this Court recently made this exact finding in Liberator:

> [R]eliance is not an issue in this case. The 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). As stated in *Turner*:
>
> > "In this case, (1) the defendant-directors either did or did not breach their fiduciary duty of disclosure to all or none of the ... stockholders in the Proposed Class; (2) 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. . . ."

Thus, Plaintiffs' claims are typical of the claims of the Class since Plaintiffs, like each of the other Class members, were directly harmed by Defendants' self-dealing, breaches of fiduciary duty, and aiding and abetting of those breaches in connection with the Merger.

4. Plaintiffs Will Fairly and Adequately Represent the Interests of the Class

The fourth and final requirement under Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." NRCP 23(a)(4). As the United States Supreme Court stated in *Amchem*, this inquiry serves "to uncover conflicts of interest between named parties and the class they seek to represent." 521 U.S. at 625 (citing *Gen. Tel. Co.*, 457 U.S.

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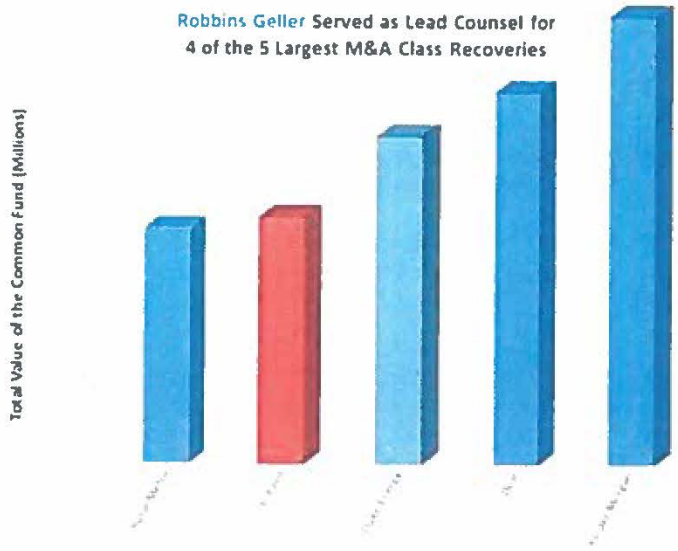
[17] In *Force Protection*, this Court certified the following class:

> All record holders and beneficial owners of Force Protection, Inc. ("Force Protection" or the "Company") common stock as of November 6, 2011 [the date the merger was announced] through and including December 19, 2011 [the date the merger closed] and their successors in interest and/or their transferees, excluding defendant Michael Moody ("Defendant") and any person, firm, trust, corporation or other entity related to or affiliated with the Defendant.

at 157-58, n.13). In other words, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)); *Jane Roe*, 124 Nev. at 35 (holding that 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").

The proposed class representatives – Plaintiffs Kearney IRRV Trust and Grant Oakes – will fairly and adequately represent the interests of the Class because their interests are not antagonistic to those of other Class members and their attorneys are qualified, have experience litigating complex class action cases in this Court (particularly involving merger transactions of this type), and have ample resources available to be able to conduct the litigation. Again, as Parametric shareholders who were damaged in the same manner and by the same actions of the Defendants, Plaintiffs' interests are parallel to those of the Class. Indeed, in order to prove damages to themselves, Plaintiffs will also be required to prove damage to the rest of the class as well, for the damages alleged here are not particularized in any way. *See, e.g.*, *Meyer*, 110 Nev. at 1365 (overturning district court's decision not to certify class where a "common thread" existed between the claims of the plaintiff and the class). Stated differently, Plaintiffs' prosecution of this case and eventual establishment of Defendants' illegal conduct will benefit the entire Class, not just Plaintiffs. *See id.*; *see also Schlagal v. Learning Tree Int'l*, No. CV-98-6384, 1999 WL 672306, at *3 (C.D. Cal. Feb. 23, 1999) ("Representation will most likely be adequate where the representative's interests are comparable to those of the absent class members. . . .").

Moreover, in this case, Lead Counsel is comprised of the most experienced attorneys in the country in prosecuting shareholder class actions for common fund damages after the close of a merger. As shown in the following chart, Robbins Geller has been lead counsel in four out of the five largest post-merger common funds ever achieved in M&A litigation across the country:



Robbins Geller also achieved what is believed to be the largest post-merger common fund recovery in Nevada state court history in the *Force Protection* matter. *See In re Force Protection, Inc. S'holder Litig.*, No. A-11-651336-B (Nev. Dist. Ct.) ($11 million recovery). In addition, Co-Lead Counsel Saxena White P.A. has also experienced significant success in stockholder litigation. *See* https://www.saxenawhite.com. In short, the Class is in very good hands when represented by Plaintiffs and Plaintiffs' chosen Lead Counsel.

Furthermore, Lead Counsel in this case suffers from no conflict, as the direct and derivative claims asserted herein "are not internally inconsistent." *In re Ebix, Inc. Stockholder Litigation*, 2014 WL 3696655, at *18 (Del. Ch. July 24, 2014); *TCW Tech. Ltd. P'ship v. Intermedia Commc'ns, Inc.*, 2000 WL 1654504, at *4 (Del. Ch. Oct. 17, 2000) (consolidating several derivative and class action complaints and appointing lead counsel because "[t]he derivative and class claims all arise from the same basic facts and none of the claims are internally inconsistent or conflict with the legal theories supporting any other claim.").

Moreover, Plaintiffs' claims are typical of the Class and they do not possess any conflicts of interest with the other Class members. In fact, Plaintiffs' claims are the same and the damages are the same type as each Class member, meaning Plaintiffs' interests are ***aligned*** with the rest of the

public shareholder Class. *See, e.g., Turner*, 768 A.2d at 31 ("any monetary remedy due to the Proposed Class will be calculated on a per share, rather than per shareholder, basis").

Plaintiffs will tenaciously protect the Class' interests in this litigation. Plaintiffs were Parametric shareholders during the Class Period; will vigorously pursue the interests of all Class members; are taking seriously their responsibilities as class representatives; are producing documents; will sit for depositions; and expect to provide material input into both any appropriate litigation decisions and, should the situation manifest itself, any settlement decisions on behalf of the entire Class. This further supports their adequacy as class representatives. *See In re United Energy Corp. Solar Power Modules Tax Shelter Inv. Sec. Litig.*, 122 F.R.D. 251, 258 (C.D. Cal. 1988) ("Plaintiffs have further shown that others, although not involving themselves in the day-to-day proceedings, have produced numerous documents, participated in many depositions, and evinced an understanding that recovery is for the class as a whole . . . ."). Plaintiffs are adequate and the Class should be certified for this additional reason. Therefore, the adequacy requirement of NRCP 23(a)(4) is satisfied.

C. This Action Is Maintainable as a Class Action Pursuant to Rule 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) provides in pertinent part:

> 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.

NRCP 23(b). A purported class need only satisfy one of the prongs of Rule 23(b) in order to be properly certified. *See* NRCP Rule 23(b). As the Ninth Circuit Court of Appeals stated in *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*:

> In contrast to Rule 23(a)(2), Rule 23(b)(3) focuses on the relationship between the common and individual issues. When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis.

244 F.3d 1152, 1162 (9th Cir. 2001).

As noted above, "common questions" of fact and law predominate over the entirety of this action sufficient to satisfy Rule 23(b)(3). Indeed, there is essentially only two questions of law at issue in the class case: (i) whether the Individual Defendants breached their fiduciary duties to Parametric shareholders in connection with the negotiation and approval of the Merger, and (ii) whether Stripes and VTBH aided and abetted in those breaches of fiduciary duty. Therefore, "[a] common nucleus of facts and potential legal remedies dominates this litigation," making class certification is appropriate. *Hanlon*, 150 F.3d at 1022.

Moreover, instead of risking inconsistent rulings or adversely affecting the interests of the Class, trying this action as a class action will promote efficiencies of time, effort and expense and thus ensure the "'fair and efficient adjudication of the controversy.'" *See, e.g., Local Joint Executive Bd. of Culinary/Bartender Trust Fund*, 244 F.3d at 1162 ("When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis.").

Further, even if the remedies for shareholders were slightly different from class member to class member – based on their different levels of share ownership or timing of disposition of Parametric stock – any difference in the individual recoveries is wholly insufficient to preclude a finding of class certification. *See Hanlon*, 150 F.3d at 1022-23 ("In this case, although some class members may possess slightly differing remedies based on state statute or common law, the actions asserted by the class representatives are not sufficiently anomalous to deny class certification. On the contrary, to the extent distinct remedies exist, they are local variants of a generally homogenous collection of causes . . . ."). Accordingly, Plaintiffs satisfy the requirements of NRCP 23(b) and this action should proceed as a class action.

IV. CONCLUSION

For the reasons state herein, Plaintiffs respectfully request that the Court grant this motion for class certification pursuant to NRCP 23.

DATED: June __, 2018

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CERTIFICATE OF SERVICE

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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
This Document Relates To: ALL ACTIONS.	**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

Defendants Kenneth F. Potashner, Elwood G. Norris, Seth Putterman, Robert M. Kaplan, Andrew Wolfe and James L. Honoré (the "Director Defendants"), and defendants VTB Holdings, Inc. ("VTBH"), SG VTB Holdings, LLC ("SG VTB") and Stripes Group LLC ("Stripes"), respectfully submit this Opposition to the Motion for Class Certification filed by plaintiffs Kearney IRRV Trust ("Kearney") and Grant Oakes ("Oakes").

///

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The direct "equity expropriation" claims in this case cannot proceed as class claims for the following reasons: (1) the proposed class representatives, Oakes and Kearney, and their proposed class counsel are subject to a serious, ongoing and non-waivable conflict of interest, (2) the proposed class definition is overbroad and invalid on its face, (3) plaintiffs offer no valid measure of damages for the class, (4) Oakes lacks standing to serve as a plaintiff and class representative and (5) Kearney has demonstrated its inability to adequately protect the class.

(1) Conflict of Interest. It is a hornbook principle that no action can proceed as a class action unless the named plaintiff can adequately represent the proposed class and protect it from conflicts of interest. There is no such plaintiff here. The two proposed class representatives, Oakes and Kearney, have courted and exposed the putative equity expropriation class to an ongoing conflict of interest and, going forward, are in no position to protect that putative class from this ongoing conflict.

This ongoing conflict of interest is perilous and involves an attempt to recover mutually exclusive remedies on behalf of different constituencies of former and current stockholders of Turtle Beach Corporation ("Turtle Beach").[1] Oakes and Kearney seek to represent a class consisting of holders of the common stock of Turtle Beach from August 5, 2013 through January 15, 2014 who, as a result of purported breaches of fiduciary duty by the then-current board of directors of Turtle Beach, allegedly expropriated equity from other Turtle Beach shareholders upon the close of the merger between Turtle Beach and VTBH on January 15, 2014. They seek to recover damages on behalf of this class from the Director Defendants and, on an aiding-and-abetting theory, from VTBH, Stripes Group and SG VTB. The putative class includes both current shareholders *and former*

[1] On May 20, 2014, Turtle Beach Corporation (formerly known as Parametric Sound Corporation) amended its Articles of Incorporation to change its name from "Parametric Sound Corporation" to "Turtle Beach Corporation." (Turtle Beach Form 8-K, filed with the Securities and Exchange Commission on May 28, 2014.) For sake of consistency, all references to Parametric have been changed to Turtle Beach.

shareholders who sold their Turtle Beach shares over the past five years. Oakes and Kearney, however, have teamed up with a current Turtle Beach shareholder, Lance Mykita ("Mykita"), who is asserting derivative breach of fiduciary duty claims on behalf of Turtle Beach for the benefit its *current shareholders only* in connection with the very same Merger, against the very same defendants, arising from the very same alleged misconduct and seeking the very same economic value as damages.

The interests of the putative class directly conflict with the interests of Turtle Beach. Turtle Beach (through Mykita's derivative claims) seeks to recover the same economic value the Director Defendants purportedly expropriated from Turtle Beach's other shareholders on January 15, 2014. Yet, Oakes and Kearney have allied themselves with Mykita (acting on behalf of Turtle Beach) in a profound way. They have brought their conflicting claims together in the same lawsuit. They are using the same counsel, Robbins Geller Rudman & Dowd LLP and The O'Mara Law Firm, P.C., whom Oakes and Kearney now propose to act as lead counsel on behalf of the putative class of current and former shareholders. They are doing so despite the fact that their counsel is continuing to represent Mykita as he pursues his derivative claims against the same defendants for the benefit of Turtle Beach and only its current shareholders. Having retained counsel that is representing a party suing the same defendants with interests diametrically opposed to those of any valid equity expropriation class, Oakes and Kearney have already endangered the putative class. Indeed, in the event defendants are found liable, the proposed class would expect to receive all of the recovery. Mykita (on behalf of current shareholders) would as well. If the class had independent counsel, they would advocate diligently to insure that the class received its full measure of damages. Instead, because proposed class counsel has interests in both cases, that will not happen. Thus, the class has already ceded any possibility of a full recovery as a result of this conflict.

Their decision to embrace Mykita and share counsel with him is difficult to fathom. Whatever their precise strategy in uniting forces with Mykita in bringing their joint Amended Class Action and Derivative Complaint ("Amended Complaint" or "AC"), Oakes and Kearney apparently did not anticipate that their claims, and Mykita's derivative claims, would *both* survive the pleading

stage.[2] In any event, the direct claims have now reached the more critical (and more-scrutinizing) class certification stage. The inherent conflict of interest that Oakes and Kearney courted from the start now manifests itself starkly. It confirms that Oakes and Kearney are in no position to act, along with their chosen and conflicted counsel, as fiduciaries to any putative equity expropriation class.

(2) Proposed Class Definition Is Overbroad. Oakes and Kearney both fundamentally misapprehend the nature of an equity expropriation event and the shareholder-level injury that allows a shareholder to sue directly rather than derivatively. This infects the class definition, which purports to include persons who held Turtle Beach shares at any point in time during a span of five months and ten days. But "equity expropriation" as recognized in Delaware, and as adopted by the Nevada Supreme Court in this case, is an event occurring at the moment a corporation issues excess shares for inadequate consideration. This excess issuance extracts economic value and voting power from one set of shareholders and *transfers* it to another set of stockholders.[3] It is this transfer and redistribution that marks the expropriating event, which, as alleged in this case, occurred instantly upon the close of the merger on January 15, 2014.[4] Those who held Turtle Beach stock on August 6, 2013, for example, but sold it the next day (or any day thereafter but before January 15, 2014) necessarily suffered no expropriation, even under the logic of plaintiffs' complaint. Hence the class definition on its face is overbroad and invalid. Without a valid class definition, it is impossible for the direct plaintiffs to show, and for this Court to find, that their claim is typical of those of other class members or that common questions of law and fact predominate over issues affecting individual class members.

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[2] Among other things, Oakes and Kearney's claim lacked the hallmark of equity expropriation because they did not allege, and will be unable to prove, that any of the Director Defendants received shares, economic value or voting power at the expense of Turtle Beach's pre-Merger shareholders as a result of the Merger.

[3] A direct equity expropriation claim can only exist where a controlling shareholder extracts equity or voting power from minority shareholders for itself, which is not alleged here. *Gentile v. Rossette*, 906 A.2d 91, 100 (Del. 2006). Instead, here, plaintiffs challenge the valuation of an issuance of stock to VTBH, a third party, that caused them a dilution. (AC ¶ 220.) Although this does not, as a matter of law, state an equity expropriation case, defendants do not here seek to reargue that point. *Gentile*, 906 A.2d at 100.

[4] Only in Kearney's recent deposition does he now admit that the proposed class consists of those persons who held Turtle Beach shares at the time the merger closed on January 15, 2014.

(3) Plaintiffs Offer No Valid Damages Measure. Oakes and Kearney fail to offer any valid measure of equity expropriation damages. Rule 23(b)(3) of the Nevada Rules of Civil Procedure ("NRCP"), which tracks its federal counterpart and associated federal precedents, requires at a minimum that a plaintiff at the class certification stage offer a damages measure that is consistent with the liability theory. Here, however, the direct plaintiffs make no effort in their moving papers to provide this Court with any information on how they intend to prove equity expropriation damages. In discovery, direct plaintiffs have revealed five potential measures, but none bear a logical relationship to the alleged January 15, 2014 equity expropriation or show how such expropriation injury to the class would in fact be measured.

(4) Oakes Lacks Standing. Discovery has confirmed that Oakes was not a Turtle Beach shareholder at the time of the alleged January 15, 2014 "expropriating" event, and so he held no shares from which any economic or voting power could have been extracted. He has no standing to pursue a claim for himself, much less on behalf of any proposed class.

(5) Kearney Demonstrated Lack of Ability to Serve Class Interests. Discovery confirms that Kearney, acting through its trustee, lacks a basic understanding of the difference between the direct and derivative claims in this lawsuit and so has no ability to monitor, investigate, and protect the class from the conflict of interest arising from its selection of counsel and that counsel's dual and conflicted representation.

For these reasons discussed in more detail below, defendants respectfully request that the Court deny plaintiffs' motion for class certification.

II. STATEMENT OF RELEVANT FACTS

A. The Merger

On January 15, 2014, Turtle Beach, a publicly traded company with fiscal year 2012 revenues of just $233,649, merged with VTBH, a privately held company with more than $200 million in fiscal year 2012 revenues. Immediately upon closing, Turtle Beach issued, and VTBH's stockholders received, shares of Turtle Beach common stock in an amount representing approximately 81% of post-merger Turtle Beach, with the pre-merger Turtle Beach shareholders retaining approximately 19% in the new, much larger, combined entity. (AC ¶ 3.)

B. Oakes and Kearney's Purported Direct Claims

The Amended Complaint purports to assert two direct claims arising from the Director Defendants' alleged "equity expropriation" conduct on January 15, 2014. They claim that the Director Defendants, in breach of their fiduciary duties, caused Turtle Beach to issue Turtle Beach common stock to Stipes and SG VTB with a value that exceeded the value of VTBH. (AC ¶ 220.) In a separate claim, they allege VTBH, Stripes and SG VTB aided and abetted this breach. (AC ¶ 229.) These claims arise from the Nevada Supreme Court's earlier decision in this action holding that Turtle Beach's shareholders lacked standing to pursue direct claims challenging the dilutive effect of the merger (which is a derivative claim), but could file an amended complaint "to articulate equity expropriation claims, if any such claims existed." *See Parametric Sound Corp. v. Eighth Judicial Dist. Court*, 133 Nev. Adv. Op. 59, 401 P.3d 1100, 1109 (2017).

C. The Proposed Class Representatives and the Alleged Class Definition

The proposed class representatives, Kearney and Oakes, held stock in Turtle Beach in the months leading up to the merger. While Kearney continued to hold shares as of the Merger's January 15, 2014 effective date, Oakes sold his entire interest by November 25, 2013. They each seek to represent a class consisting of:

> All persons and/or entities that held shares of [Turtle Beach] common stock at any time from and including August 5, 2013 through and including January 15, 2014 (the "Class Period"), 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 [Turtle Beach] who served in those capacities during the Class Period, and their legal representatives, heirs, successors-in-interest, transferees, and assignees (the "Class").

(Plaintiffs' Motion for Class Certification ("Mot.") at 1 (footnote omitted).)

D. Proposed Class Counsel

Oakes and Kearney selected Robbins Geller Rudman & Dowd LLP and The O'Mara Law Firm, P.C. to serve as co-lead counsel for the class. Both law firms also represent plaintiff Mykita who, in this same action, asserts a variety of derivative breach of fiduciary duty and aiding-and-abetting claims related to the Merger against the same defendants and arising out of the same alleged misconduct.

E. The Alleged Class Claims and Derivative Claims Compete to Recover Damages Based Upon the Same Underlying Economic Injury

Oakes and Kearney, in support of the purported class claims, allege a "majority-conflicted [Turtle Beach] Board applied an excessive valuation for VTBH's assets." (AC ¶ 220.) In exchange for these assets, the Director Defendants, acting in bad faith, on January 14, 2014, issued excessive stock that "expropriated significant value from [Turtle Beach], which caused all other stockholders' equity interests to be diluted." (AC ¶¶ 220, 221.). The Director Defendants caused this exchange to occur "without regard to the fairness of the transaction." (AC ¶ 224.)

These purported class claims seek to recover the same underlying economic value that Mykita's derivative claims (alleging, among other claims, breach of fiduciary duty, waste, and unjust enrichment) purport to seek on behalf of Turtle Beach. Mykita's claims for damages encompass and include alleged economic harm specifically arising from Turtle Beach's January 14, 2014 issuance of additional Turtle Beach stock to VTBH's shareholders. (*See* AC ¶ 248 (alleging derivative "Corporate Waste" claim seeking to hold the Director Defendants liable for "wast[ing] the Company's valuable corporate assets by, among other things, *causing the Company to issue equity to Stripes, SG VTB, and VTBH*") (emphasis added).)

III. ARGUMENT

A. Oakes and Kearney, Along With Their Counsel, Suffer From a Disabling Conflict of Interest

Oakes and Kearney have subjected the purported "equity expropriation" class to a serious, ongoing conflict of interest, and so they have already failed to adequately represent it. NRCP 23(a)(4) provides that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if . . . the representative parties will fairly and adequately protect the interests of the class." A movant for class certification in Nevada bears the burden of showing that this prerequisite is met. *See Sargeant v. Henderson Taxi*, 394 P.3d 1215, 1219 (Nev. 2017); *Shuette v. Beazer Homes Holdings Corp.*, 124 P.3d 530, 537 (Nev. 2005); *Cummings v. Charter Hosp.*, 896 P.2d 1137, 1140 (Nev. 1995). Hence, Oakes and Kearney must demonstrate an ability to adequately protect the class and "vigorously" prosecute the action on behalf of the class. *See Dancer v. Golden*

Coin, Ltd., 124 Nev. 28, 35 (2008); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998); *Bridge v. Credit One Fin.*, 294 F. Supp. 3d 1019, 1034 (D. Nev. 2018).

Moreover, to ensure the named plaintiff is adequate, a court must look not only to conflicts of interest among the class representatives and the class, but also conflicts of interest among chosen class counsel and the class. *Hanlon*, 150 F.3d at 1020; *see also Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) ("Whether the class representatives satisfy the adequacy requirement depends on the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive") (internal citations omitted). The class representative's foremost obligation is to choose counsel that will adequately represent the interests of the class.

Oakes and Kearney cannot meet their NRCP 23(a)(4) burden. They are inadequate class representatives because they have aligned themselves with Mykita, who is pursuing derivative claims on behalf of Turtle Beach against the same defendants that are inimical to the interests of the proposed class. They have also selected and continue to retain as proposed class counsel the same lawyers who also represent Mykita. As demonstrated below, this proposed class counsel faces a fundamental conflict of interest in simultaneously representing the putative class and Mykita in pursuit of his derivative claim.

1. The Conflict of Interest Is Unavoidable Because the Direct and Derivative Recoveries Overlap and Chase the Same Pool of Assets

Proposed class counsel face a sharp conflict of interest where they represent clients with divergent incentives with respect to the allocation and distribution of any recovery. *See Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 959 (9th Cir. 2009). Nevada courts recognize that class representatives (or their counsel) may be unable to advance the interests of the class when circumstances create "conflicting views on how a limited amount of recovery should be divided, dispersed, and otherwise dealt with." *Shuette*, 124 P.3d at 539; *see LeBeau v. United States*, 222 F.R.D. 613, 618 (D.S.D. 2004) (counsel dually representing individuals and class was impermissibly conflicted where all would pull from a single fund if they prevailed).

Where individual plaintiffs and class members seek recovery from a single pool of assets, courts have regularly held that the class representative is inadequate if it accepts representation by the same counsel as the individual plaintiffs. *See*, *e.g.*, *Kuper v. Quantum Chem. Corp.*, 145 F.R.D. 80, 83 (S.D. Ohio 1992) (where class and individual plaintiffs utilized same counsel to seek recovery in different jurisdictions but from same company, affecting significant company assets, class plaintiffs did not vigorously represent interests of class). Class representatives who accept counsel with dual representation are therefore only deemed adequate where there is "no evidence that a limited fund for damages exists." *Ruderman v. Wash. Nat'l Ins. Co.*, 263 F.R.D. 670, 685 (S.D. Fla. 2010) ("Defendant has not alleged that the proposed class members and individual plaintiffs seek recovery from a single pool of assets. The Court, therefore, perceives no conflict.").

When applied to the claims asserted in this matter, these standards show that the pool of overlapping damages creates a conflict between the derivative plaintiff and direct class members. Through his derivative claims — which challenge "the fairness of the transaction" and seek damages for "corporate waste" — Mykita seeks recovery for alleged injuries Turtle Beach suffered as a result of the purportedly "overvalued" merger consideration from VTBH, arising from the same Merger and asserted against the same defendants. Any recovery by Oakes and Kearney on behalf of the proposed class of those who held shares five years ago, whether obtained by settlement or by final judgment, would pull from the same directors and officers insurance coverage currently pursued by Mykita on behalf of Turtle Beach and, indirectly, solely on behalf of Turtle Beach's *current* (but not former) shareholders. (*See* Ex. B[5] (Report of John D. Montgomery, Ph.D., dated Oct. 8, 2018 ("Montgomery Report"), ¶ 6).) For this reason, the direct expropriation claimants compete with the derivative claimant for recovery from the same set of funds.[6]

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[5] The exhibits to this Opposition are authenticated in the Declaration of Robert J. Cassity, attached as Exhibit A.

[6] In their "damages disclosure," class counsel stated that the derivative plaintiff is seeking the "intrinsic value of all Company shares *received* by Defendants. . . in the merger" and the class plaintiffs are seeking the "intrinsic value of all Company shares *expropriated* by Defendants through the merger." Ex. C (emphases added). Substituting the word "expropriated" for "received" does not change the fact that both claims are seeking the same damages on behalf of different clients. Plaintiffs have not suggested any principled way of dividing these damages in

Indeed, it is the recognized "dual nature" of equity dilution claims as both derivative and, in some instances, also direct that guarantees that those plaintiffs who pursue the claim directly will compete head-on with those who pursue it derivatively. *See Dubroff v. Wren Holdings, LLC*, 2009 Del. Ch. LEXIS 89, at *7-8 (Del. Ch. May 22, 2009) (citing *Gentile*, 906 A.2d at 99-100). Mykita is, in effect, pursuing the same equity dilution claim as Oakes and Kearney, but his success will necessarily operate to the detriment of the direct plaintiffs. If Mykita succeeds with his equity dilution claims, then the recovery would go to Turtle Beach and the *current* shareholders of Turtle Beach would indirectly benefit. If, however, Oakes and Kearney succeed, then the recovery would go to the class (which, as explained below, can only include stockholders of Turtle Beach as of the January 15, 2014 dilutive issuance). Oakes and Kearney cannot adequately represent an expropriation class by way of the same counsel that concurrently represents Mykita. For these reasons, Oakes and Kearney's assertions that the direct and derivative claims in this litigation raise no conflict issues because they "are not internally inconsistent" and because "Plaintiffs' interests are parallel to those of the Class" (*see* Mot. at 14-15) do not persuasively explain away the conflicts created by the dual representation. These assertions are only true to the extent they both seek to establish the same theory of liability, but they do nothing to dispel the conflict that necessarily exists between them over who will get any recovery here, and in what amount. Here, the proposed class has already ceded any prospect of a full recovery because it will implicitly share any recovery with the current shareholders of Turtle Beach, who are also represented by class counsel.

2. Proposed Class Counsel Cannot Represent Both the Class and Mykita At the Same Time

It is generally recognized that counsel cannot simultaneously adequately represent a class and other clients — whether a class or an individual — in pursuit of separate claims against the same defendants, even if there is partial overlap among the plaintiffs or class members in the cases. *See Ortiz v. Fireboard Corp.*, 527 U.S. 815, 856 (1999). Indeed, conflicts between the class and other clients of class counsel can affect even minor litigation decisions. "Every decision to hasten

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the event that both the direct and derivative claims are successful (nor could they since class counsel cannot "give" these damages to one client without "taking" from the other).

or delay the litigation on behalf of one set of plaintiffs could alternately harm or benefit the other set of plaintiffs." *Kurczi v. Eli Lilly & Co.*, 160 F.R.D. 667, 679 (N.D. Ohio 1995); *see also Moore v. Margiotto*, 581 F. Supp. 649, 653 (E.D.N.Y. 1984) ("The interests need not conflict directly, but the mere fact of adjusting or compromising legal tactics or arguments to accommodate both classes of plaintiffs obviously impairs counsel's use of independent professional judgment as to each class."). As *Ortiz* demonstrates, the dual representation here necessarily defeats Oakes and Kearney's efforts to certify a class represented by Robbins Geller Rudman & Dowd LLP and The O'Mara Law Firm, P.C.

Ortiz arose from the mass of asbestos litigation making its way through the judicial system in the 1970s, 80s and 90s. *See Ortiz*, 527 U.S. at 832-33. The trial court certified a settlement class consisting of all persons with personal injury claims who had not yet brought suit or had previously settled their claims; those who had dismissed their claims, but retained the right to bring future claims against defendant; and the past, present, and future survivors of the personal injury claimants. *Id.* at 826. Excluded from the class were personal injury claimants with actions presently pending against defendant. *Id.* As part of the settlement, one of the firms that was part of class counsel agreed to settle separately 45,000 pending actions for a higher amount per claim, with a portion of the settlement amount contingent upon the approval of the global class action settlement of the non-pending claims. *Id.* at 824. The Fifth Circuit affirmed on appeal. *Id.* at 828-30.

The Supreme Court reversed. As relevant here, the Court reasoned that class counsel's pursuit of settlement for the class claims may have been perversely influenced by the separate pending claims, the settlement of which was dependent on securing a successful settlement of the class claims. *Id.* at 852-53. As a result, class counsel had been "laboring under an impermissible conflict of interest":

> In this case, certainly, any assumption that plaintiffs' counsel could be of a mind to do their simple best in bargaining for the benefit of the settlement class is patently at odds with the fact that at least some of the same lawyers representing plaintiffs and the class had also negotiated the separate settlement of 45,000 pending claims . . . the full payment of which was contingent on a successful global settlement agreement. . . . Class counsel thus had great incentive to reach any agreement in the global settlement negotiations that they thought might survive a Rule 23(e) fairness hearing, rather than the best possible arrangement for the substantially unidentified global settlement class.

Id. at 852-53. Thus, the conflict interest was structural and required the "separate representation to eliminate the conflicting interest of counsel." *Id.* at 856.

The same conflict identified in *Ortiz* exists here. Oakes and Kearney, by their claims, and Mykita, by his, both sue for the same alleged misconduct — *i.e.*, the issuance of additional, excessive shares — but represent different constituencies. Oakes and Kearney seeks to represent a class of certain pre-merger Turtle Beach shareholders, while Mykita seeks to represent current Turtle Beach (and, indirectly, Turtle Beach's current stockholders). Oakes and Kearny are therefore conflicted because its chosen counsel also represents Mykita and proposed class counsel may make litigation decisions that further the interest of Mykita at the expense of the putative class.

Consistent with *Ortiz*, in the context of direct and derivative shareholder litigation, the general rule is that the same counsel cannot represent a class including former shareholders against corporate insiders and also represent the company (and, indirectly, the current shareholders) against the same corporate insiders. *See*, *e.g.*, *Koenig v. Benson*, 117 F.R.D. 330, 335 (E.D.N.Y. 1987) (where class action "seeks to bypass the corporation itself and obtain damages from the directors for people who are mainly former shareholders," it has "interests in conflict with those of the present shareholders" and thus counsel representing both are conflicted); *Stull v. Baker*, 410 F. Supp. 1326, 1336-37 (S.D.N.Y. 1976) ("It is difficult to understand how an attorney can properly represent the interests of a corporation and its present shareholders in a derivative action brought on their behalf, and, at one and the same time, properly represent its present and/or former shareholders in a class action against the corporation, without compromising his independence of professional judgment and loyalty to these two groups of clients with potentially conflicting interests.").

Because proposed class counsel also represents derivative plaintiff Mykita, class counsel will no doubt find itself in a position of advancing derivative theories of liability and/or recovery on behalf of Turtle Beach that necessarily conflict with the interests of the putative class. Indeed, given that both Mykita, by his claims, and Oakes and Kearney, by theirs, seek to recover for the same underlying alleged misconduct from the same defendants, there is an admitted overlap between claims and damages sought by each of those representative plaintiffs. (*See* Ex. D (Mykita Dep. Tr.) at 165:13-167:5.) When concurrently representing derivative plaintiffs pursuing both similar and

distinct theories of recovery against defendants, class counsel will be required to consider the strategy of the derivative plaintiff's claims in these and other areas to ensure that the two are not inconsistent or working against one another. For many such decisions, including those discussed above and others both foreseeable and unforeseeable, this weighing of arguments cannot be done with the best interests of the class — and only the class — in mind. The conflict here is deep and unavoidable and stems directly from counsel's divided loyalties. Oakes and Kearney cannot advance the interests of the proposed class with the counsel they have selected.

Plaintiffs cite to two Delaware cases to argue that the class should be certified because the claims of the direct plaintiffs Kearney and Oakes are not "internally inconsistent" with the claims of derivative plaintiff Mykita. (*See* Mot. at 15 (citing *In re Ebix, Inc. S'holder Litig.*, 2014 Del. Ch. LEXIS 132 (Del. Ch. July 24, 2014); *TCW Tech. Ltd. P'ship v. Intermedia Communs.*, 2000 Del. Ch. LEXIS 147 (Del. Ch. Oct. 17, 2000)).) Neither case is applicable here.

In *Ebix*, plaintiffs alleged a multitude of direct and derivative claims arising from the company's decision to enter a stock incentive bonus agreement with the company's CEO (Robin Rania). *Ebix*, 2014 Del. Ch. LEXIS 132, at *4-5. *Ebix* was decided at the motion to dismiss stage and did *not* consider principles applicable to the Court's class certification inquiry here. *See id.* at *5. In fact, the Chancery Court expressly left the door open to reconsidering whether an inherent conflict existed between the direct and derivative claims later in the proceedings. *Id.* at *54 n.144. *Ebix* is also distinguishable because the limited direct and derivative claims that survived defendants' motion to dismiss were not overlapping. There, the *only* claims for damages that survived defendants' motion to dismiss were a claim that Mr. Rania's incentive bonus agreement may constitute an "unreasonable anti-takeover device" (for which it was "immaterial" whether the claim was direct or derivative) and a derivative claim to recover compensation paid to the directors because such compensation was allegedly the product of an uniformed stockholder vote. *See id.* at *44-47, 78-79, 87-88. There was no conflict between the *possibly* direct claim attacking the anti-takeover measure and the separate, wholly derivative claim to recover the improperly authorized

compensation paid to the directors. Unlike here, the direct and derivative plaintiffs were not bringing identical, mutually exclusive claims seeking to recover *identical* damages on behalf of different constituencies.

TCW is even less helpful for plaintiffs. The Court of Chancery's decision in *TCW* concerned an order to consolidate various class actions and derivative actions all arising from the merger of Intermedia Communications and WorldCom. *TCW*, 2000 Del. Ch. LEXIS 147, at *1-2. As with *Ebix*, *TCW* did not address class certification, the putative class representative's adequacy or conflicts of interests affecting a putative class representative. Taken in context, it is clear that in *TCW* the court ordered consolidation for purposes of judicial efficiency and to relieve prejudice to defendants arising from various sets of plaintiffs' counsel seeking burdensome and duplicative discovery from defendants. *See id.* at *4. *TCW* has nothing to do with class certification and provides no guidance with respect to the Court's inquiry here.[7]

B. The Proposed Class Definition Is Overbroad

In deciding whether to certify a class, the proposed definition of the class is crucial, because absent a cognizable class, "determining whether Plaintiffs or the putative class satisfy the other Rule 23(a) and (b) requirements is unnecessary." *Robinson v. Gillespie*, 219 F.R.D. 179, 183-84 (D. Kan. 2003); *see In re Toys "R" Us – Delaware, Inc. – Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 300 F.R.D. 347, 355 (C.D. Cal. 2013) (court considers four requirements of Rule 23(a) only after determining that an ascertainable and identifiable class has been defined).[8]

The proposed class is defined (in pertinent part) as "All persons and/or entities that held shares of [Turtle Beach] common stock at any time from and including August 5, 2013 through and

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[7] The Court consolidated the various actions in *TCW* in part because "[t]he derivative and class claims all arise from the same basic facts and *none of the claims are internally inconsistent or conflict with the legal theories supporting any other claims*." *TCW*, 2000 Del. Ch. LEXIS 147, at *11-12. Here, in contrast, the direct plaintiffs' expropriation claims directly conflict with the derivative plaintiff's dilution claim for the reasons explained above.

[8] When applying NRCP 23, Nevada courts rely on federal precedents applying Federal Rule of Civil Procedure 23 and, like federal courts, perform a "rigorous analysis" of the prerequisites. *See*, *e.g.*, *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 124 P.3d 530, 544 n.3 (2005).

including January 15, 2014 . . . ." (Mot. at 1.) This class definition fails as a matter of law because it includes persons who suffered no expropriation injury and who thus lack standing.

Under Nevada law, courts have no power to order relief to a plaintiff who has not been injured. *See Doe v. Bryan*, 102 Nev. 523, 728 P.2d 443, 444 (1986) ("Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief."). This standing requirement applies to the claims of putative class members. A class must be defined in a manner that includes only persons or entities who have standing. *See*, *e.g.*, *Mazza v. American Honda Motor*, 666 F.3d 581, 594 (9th Cir. 2012). Numerous federal courts interpreting Federal Rule of Civil Procedure 23 have held that the Rule imposes an implicit prerequisite that the class be sufficiently definite.[9] A class that is overbroad because it would include a substantial number of persons who have no claim under the theory advanced by the named plaintiff is not sufficiently definite. *See*, *e.g.*, *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513, 514 (7th Cir. 2006).

Oakes and Kearney's claims demonstrate the class definition's overbreadth. Their claims purport to seek recovery based on the "dilutive expropriation of equity" arising from the issuance of Turtle Beach shares in exchange for "excessive[ly] valu[ed]" assets. (AC ¶ 229.) The claims are starkly delineated in this manner for a reason. Plain or "pure" equity dilution is a derivative claim belonging only to the corporation. *See Parametric*, 401 P.3d at 1109. The only "class of equity dilution claims" that a shareholder can assert directly are "equity expropriation" claims. *See id*. The Nevada Supreme Court allowed the Amended Complaint for the purpose of asserting this "class" of claim only. *See id.* By definition, such a claim must rest on the extraction and redistribution of equity from a corporation's *then-existing (minority) shareholders*. *See id.* (describing misappropriation theory as "wrongful equity dilution . . . [that] made the complaining stockholder's stake less valuable") (internal quotations omitted). If a plaintiff is not a shareholder of the corporation when the dilutive issuance occurs, no equity can be expropriated from that plaintiff.

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[9] *See*, *e.g.*, *In re Petrobras Sec. Litig.*, 862 F.3d 250, 267 (2d Cir. 2017); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591-92 (3d Cir. 2012); *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537-38 (6th Cir. 2012); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006).

In addition, although the alleged expropriation claims here purport to arise in the context of a merger transaction, expropriation liability can rest only on expropriation conduct, *i.e.*, the corporation's actual issuance of additional, excessive shares. Delaware precedents, including those cited by the Nevada Supreme Court, describe "equity expropriation" as a "species of corporate overpayment claim" where a majority shareholder or other controller "causes the corporation to issue 'excessive' shares of its stock in exchange for assets of lesser value." *Gentile*, 906 A.2d at 100; *see also Gatz v. Ponsoldt*, 925 A.2d 1265, 1278 (Del. 2007). The expropriation claims asserted here do not — and cannot — challenge the Merger itself, nor can they challenge the break-up license, the go-shop period conduct, or the proxy disclosures. (*See* AC ¶¶ 219-233.)

Accordingly, to have suffered actual expropriation harm, an alleged class member must have held shares on January 15, 2014, the date Turtle Beach allegedly issued the additional, excessive shares. A class definition that identifies shareholders at any other point in time would automatically include plaintiffs who lack standing and would therefore fail for lack of definiteness. At his deposition, the trustee for Kearney admitted that the proposed class consisted only of those who held stock at the effective time of the merger on January 15, 2014, which is different from the class definition offered by Kearney and Oakes in the Motion. (Ex. E (Kearney Dep. Tr.) at 98:3-99:6, 130:6-11.) Significantly, any correction is not a matter of simply editing or adjusting the present definition. Nothing short of an entirely new proposed definition can resolve this problem. *See*, *e.g.*, *In re Libor-Based Fin. Instruments Antitrust Litig.*, 299 F. Supp. 3d 430, 546-47 (S.D.N.Y. 2018) (modification of class definition by the court at class certification stage is futile where the underlying problems raised by the proposed definition would not be ameliorated by the revision); *Mueller v. CBS*, 200 F.R.D. 227, 234 (W.D. Pa. 2001) (same). Because the defined class includes those who held Turtle Beach shares *at any time between August 5, 2013 and January 15, 2014*, the definition is fatally overbroad and no class can be certified based on it.[10]

[10] Without first presenting a valid class definition, Oakes and Kearney cannot show that their claims are "typical" of those of the other alleged class members as required by NRCP 23(a)(3).

C. Plaintiffs Propose No Valid Expropriation Damages Method As Required Under NRCP 23(b)(3)

In addition to meeting all NRCP 23(a) prerequisites, a Nevada plaintiff must further justify class treatment by satisfying at least one Rule 23(b) provision. *See* NRCP 23. Oakes and Kearney purport to satisfy NRCP 23(b)(3). That subsection requires a showing that "questions of law or fact common to the members of the class predominate over any questions affecting only class members" and that the class action is "superior" to other available methods of adjudication. NRCP 23(b)(3). Hence, Oakes and Kearney must "affirmatively demonstrate" its compliance with NRCP 23(b)(3). *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) ("Rule 23 does not set forth a mere pleading standard.").[11]

Oakes and Kearney fail to proffer a *valid* class-wide damages measure, and so necessarily fail to satisfy Rule 23(b)(3)'s predominance requirement.[12] They seek to litigate and resolve all issues (both liability and damages) in a single class action. Notably, they do not seek to certify just liability-specific issues for class treatment. *See* NRCP 23(c)(4) (allowing "[w]hen appropriate" class actions "with respect to particular issues"). To satisfy this Court's predominance inquiry, Oakes and Kearney *must* propose at the Rule 23 stage a valid damages measure that can be applied on a class-wide basis. *See Lambert v. Nutraceutical Corp.*, 870 F.3d 1170, 1182 (9th Cir. 2017)

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[11] This burden is significant. NRCP 23(b)(3), like its federal counterpart, requires that Nevada courts take a "close look" and perform a "rigorous analysis" to determine whether its predominance requirement is in fact met. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013). The Court "must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate." *In re Wells Fargo Home Mortgage Overtime Pay Litig.*, 268 F.R.D. 604, 609 (N.D. Cal. 2010) (internal quotations omitted). It may not "rely merely on assurances of counsel that any problems with predominance or superiority can be overcome." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001) (citing *Castano v. The Am. Tobacco Co.*, 84 F.3d 734, 742 (5th Cir. 1996)).

[12] This is because NRCP 23(b)(3) is the only Rule 23(b) subsection through which a court aggregates claims seeking divisible, individualized amounts of money. *See Wal-Mart*, 564 U.S. at 362 (confirming that "individualized monetary claims belong in Rule 23(b)(3)"). And this aggregation is justified only if class treatment through trial will serve judicial economy. Advancing invalid class damages measures cannot show that a trial can feasibly and efficiently resolve the class claims. *See Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1334 (9th Cir. 1996); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001) (observing that under Rule 23(b)(3), plaintiffs bear the burden of demonstrating "a suitable and realistic plan for trial of the class claims") (internal quotation marks omitted).

("A Rule 23(b)(3) plaintiff must show a class wide method for damages calculations as a part of the assessment of whether common questions predominate over individual questions.").

One fundamental, threshold test for validity is whether the proposed class-wide method actually measures damages that "stemmed from the defendant's actions that created the legal liability." *See Leyva v. Medline Indus.*, 716 F.3d 510, 514 (9th Cir. 2013). If not, the method is inconsistent with the liability case and necessarily fails to shed light on the feasibility of litigating the claims as class claims. *See Comcast*, 569 U.S. at 36 (rejecting, under Rule 23(b)(3), proposed damages method that failed to measure damages resulting from the injury "on which petitioners' liability [was] premised"); *Lambert*, 870 F.3d at 1183 (finding proposed "full refund" damages measure valid where liability theory based on unlawful sale of valueless product).

Here, however, the moving papers are silent on any class-wide damages measure. Only in recent supplemental NRCP 16.1 disclosures did Oakes and Kearney purport to identify any measure. (Ex. C (Pls.' Supp. Rule 16.1 Discl.) at 1-2.) Oakes and Kearney purport to identify five alternative direct damages measures. None is valid, especially given the definition of the putative class.

As discussed above, any injury arising from the alleged equity expropriation occurred, if at all, on January 15, 2014, in the single instant when Turtle Beach allegedly issued excessive shares. But proposed damages measures (a), (b) and (d) purport to calculate damages based upon sales of Turtle Beach's shares by class members "following announcement of the merger [on August 5, 2013] through the date of the filing of the operative complaint [on December 1, 2017]." (*Id.* at 2.) By purporting to measure injuries occurring before and after January 15, 2014, none measures damages stemming just from the alleged misconduct that created the purported direct liability here: Turtle Beach's issuance of "excessive" shares on January 15, 2014. Any measure that seeks to calculate damages other than based upon an injury caused by that specific January 15, 2014 event is necessarily invalid.[13]

[13] For example, any damages theory that turns on changes in the market value of the stock in response to company-related news (*i.e.*, the type of damages that are typical of a federal securities fraud claim under Rule 10(b) of the Securities and Exchange of 1934 and Rule 10b-5 promulgated thereunder) would be completely irrelevant to a claim that defendants expropriated equity in connection with the Merger. (*See* Ex. B (Montgomery Report) ¶ 7.)

Other flaws confirm the invalidity of these damages theories. On their face, they purport to measure damages based upon Turtle Beach stock price declines over extended periods of time — indeed, over five years and counting — in a manner that does not specifically connect any price decline to any alleged conduct by the defendants. (*See* Ex. B (Montgomery Report) ¶¶ 5, 9.) To the extent that any measures purport to attribute all stock price decline from the August 2013 announcement of the Merger to the present to the defendants' actions, that is inconsistent with the way an efficient market immediately impounds available information into stock prices. (*See id.* ¶ 10.)[14]

Proposed measure (c), which purports to measure damages based on the "[t]he intrinsic value of pre-merger [Turtle Beach] less the Turtle Beach stock trading price upon the close of the merger" also fails. On its face, it does not purport to measure shareholder-level injury but rather a "a reduction in the value of the entire corporate entity," which is the injury *the corporation suffers* as a result of the "overpayment." *Gentile*, 906 A.2d at 99. It is by definition not a description of harm "to specific shareholders individually." *Id.* Moreover, the term "intrinsic value" is not clear in this context. (*See* Ex. B (Montgomery Report) ¶ 7.) "Intrinsic value" may differ from market value as determined by the market price for Turtle Beach's shares and so, as discussed above, depending on how it differs could increase or decrease damages independent of defendants' alleged conduct. (*See id.* ¶ 7.)

Lastly, proposed measure (e) is not a measure at all. By purporting to assess damages based upon "[t]he intrinsic value of all Company shares expropriated by defendants through the merger," it is "definitional," and so does nothing more than use the term "expropriation" to link itself to the alleged "conduct that created the liability." (Ex. C at 2.) It does not offer any measure, much less a measure that captures the "separate harm" at the shareholder level caused by an alleged "extraction

[14] These damages theories also fail to meet the standards of basic common sense. It strains credulity beyond the breaking point to infer that the actions of former directors of a company more than five years ago explain current movements of the company's stock. The absence of any rational legal or economic basis for plaintiffs' sweeping damages theories is emblematic of plaintiffs' inability to allege actual "equity expropriation" and correspondingly prevents them from defining a manageable class that has any actual damages under such a theory.

and redistribution" of the economic value and voting power "embodied" in the shares held by the alleged class on January 15, 2018. *See Gentile*, 906 A.2d at 100. Here, there is no proposed method to link any losses the shareholders allegedly incurred and any gains the defendants realized. (*See* Ex. B (Montgomery Report) ¶ 12.) At this stage, Plaintiffs should now be put to the burden of identifying specifically what was expropriated from them, if not its value. Without a clear identification of what was allegedly expropriated, the Court cannot assess whether that damage is appropriate for class-wide measurement. If the "expropriation" is nothing more than the dilution of their shares, Plaintiffs should say so.

If the "expropriation" is merely the dilution of their shares by "overpayment" to VTBH, however, they have no claim. The value of excessive shares allegedly issued by Turtle Beach measures only Turtle Beach's overpayment and only Turtle Beach has standing to compel "the restoration of the value of the overpayment." *Id.* While a corporate overpayment can signal (and encompass) a concurrent shareholder-level injury, it does not measure it. A shareholder-level injury is a "relative" injury reflecting the transfer of economic power from one block of shareholders to an existing or new shareholder or block of shareholders. *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 655-56 (Del. Ch. 2013). Oakes and Kearney advance no proposed calculation that purports to measure that. As corporations are not pass-through entities, such that a dollar recovered by a corporation for a corporate injury is disbursed immediately to shareholders on a *pro rata* basis, Oakes and Kearney must articulate some class-wide measure of damages to certify a class. They have thus far failed to do so.

In sum, each disclosed measure of damages fails to align with the limited expropriation-based, direct-liability theory the Nevada Supreme Court afforded to Oakes and Kearney (*see Parametric*, 401 P.3d at 1109) and is otherwise invalid on its face. Hence, they fail to satisfy NRCP 23(b)(3).

D. Oakes Lacks Standing to Pursue an Equity Expropriation Claim

"Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief." *Doe*, 728 P.2d at 444. The concept of standing is universally viewed as an "indispensable part" of any claim and must be present at each stage in the litigation. *Lujan v. Defenders*

of Wildlife, 504 U.S. 555, 561 (1992); *see also In re Zappos.com, Inc.*, 108 F. Supp. 3d 949, 953 (D. Nev. 2015) ("Standing is an indispensable part of a plaintiff's case rather than a pleading requirement."). A standing challenge may be raised in opposition to a motion for class certification because "[a] litigant must be a member of the class he or she seeks to represent at the time the class action is certified." *Nelsen v. King Cty.*, 895 F.2d 1248, 1249 (9th Cir. 1990). "[S]tanding is a jurisdictional element that must be satisfied prior to class certification . . . . A litigant must be a member of the class he or she seeks to represent at the time the class action is certified." *Id.* at 1249-50 (internal quotations omitted).

Here, as demonstrated above, to have suffered actual expropriation harm, Kearney and Oakes must show that they each held Turtle Beach shares stock at the moment Turtle Beach issued the allegedly additional, excessive shares on January 15, 2014. The trading records produced by Oakes, however, confirm that he owned no Turtle Beach shares as of that date. (Ex. G.) These records also confirm that Oakes sold all Turtle Beach shares he previously held by November 25, 2013, nearly two months before the alleged expropriation occurred. (*Id.*) Oakes therefore lacks legal standing to bring the direct equity expropriation claims, and therefore cannot act as a representative of the putative class.[15]

E. Kearney Cannot Adequately Represent the Class Because It Is Unable to Protect Absent Class Members So Its Claims Cannot Proceed as Class Claims

A class representative is an inadequate representative of the class where that representative ignores and/or fails to investigate conflicts of interest. *See In re Kosmos Energy Ltd. Sec. Litig.*, 299 F.R.D. 133, 147-50 (N.D. Tex. 2014) (certification denied in securities class action where class representative only reviewed documents provided by counsel, was unfamiliar with business

[15] Oakes further brings into relief the fatal flaw in plaintiffs' class definition. During the proposed class period (August 5, 2013-January 15, 2014), Oakes sold out of and then re-purchased Turtle Beach stock repeatedly, even to the point of completely eliminating his position in Turtle Beach, only to rebuild it, then liquidate it again. (Ex. F (Oakes Dep. Tr.) at 113:8-130:13.) Oakes testified that he sought to trade "ups and downs." *Id.* Any "damages" he might have suffered through his short-term arbitrage play in Turtle Beach stock — and those similarly situated — could not possibly be attributed entirely, if at all, to defendants' alleged conduct.

documents underlying her claim, and did not recognize names of certain parties); *In re Cal. Micro Devices Sec. Litig.*, 168 F.R.D. 257, 274-75 (N.D. Cal. 1996) ("Permitting class counsel who are not effectively monitored to prosecute a class action is the functional equivalent of allowing that counsel to serve as both class representative and class attorney."). Class representatives are expected to be actively involved in the litigation so as to protect the interests of the absent class members by actually directing the litigation. *Kosmos Energy*, 299 F.R.D. at 147-50; *see Berger v. Compaq Computer Corp.*, 257 F.3d 475, 482-83 (5th Cir. 2001).

Discovery shows that Kearney has failed to adequately evaluate the extent to which the interests of the class will differ from the interests of the derivative plaintiffs. In fact, Kearney's trustee is unaware of the differences between the direct and derivative claims, and he believes that Kearney is alleging the derivative causes of action and may recover from them. (Ex. E (Kearney Dep. Tr.) at 119:5-122:10.) In order to protect the class, Kearney's trustee must be crystal clear as to the fundamental distinction between the direct and derivative claims. If he does not appreciate that difference, then he cannot capably or competently protect the class from the conflict.[16] Here, however, Kearney's trustee failed to engage in any amount of investigation to inform itself of potential conflicts affecting the class, and has no plans to do so.[17] (*Id.* at 94:18-100:6.) While Kearney's trustee reviewed documents provided by counsel and claims to spend ten hours per month monitoring the litigation, he does not actively seek information about the litigation. Instead, he makes himself available to proposed class counsel as needed by counsel. (*Id.*) He has no specific plans to do more. (*Id.*)

Proposed class counsel's actions are relevant in explaining Kearney's inadequacy in appreciating and understanding counsel's conflict. The Nevada Rules of Professional Conduct require

[16] Oakes stated that he believes there to be no conflict of interest between his and Mykita's claims. (Ex. F (Oakes Dep. Tr.) at 86:19-24.) Oakes does not know whether Mykita is a plaintiff in the action or what his claims are, and he has not been informed about Mykita's claims. (*Id.* at 85:24-86:18.)

[17] Even if Oakes had standing to remain in this action, his failure to investigate and lack of plans to further investigate would also render him an inadequate representative. (Ex. F (Oakes Dep. Tr.) at 90:7-91:18.)

that counsel with concurrent conflicts disclose the conflict to all clients and obtain their informed consent to continue in the representation.[18] However, where one party affected by the conflict is a class, the conflict is not waivable. *See Scholes v. Tomlinson*, 1991 U.S. Dist. LEXIS 10486, at *21-23 (N.D. Ill. July 26, 1991). Kearney's trustee is therefore not alone to blame for the fact that he is not aware of potential and actual conflicts between its claims and Mykita's claims. (Ex. E (Kearney Dep. Tr.) at 94:18-96:12.) Proposed class counsel appears not to have informed the class representatives of conflicts related to the dual representation, let alone attempted to obtain some form of informed consent as to the class members. *See United States v. Jefferson Cty.*, 2008 U.S. Dist. LEXIS 129748, at *84-85 (N.D. Ala. Jan. 16, 2008) (class representative's acceptance of dual representation because he saw no conflicts failed to constitute waiver for the class where counsel did not consult the client regarding implications of conflict, even though client was a sophisticated attorney); (Ex. E (Kearney Dep. Tr.) at 94:18-96:12.). Apparently, Kearney does not act independently of counsel but is rather controlled by counsel. The agent/principal roles here are reversed.

Kearney's selection of Mykita's counsel as class counsel has already prejudiced the proposed class in crafting and carrying out its litigation strategy. Class counsel filed a consolidated complaint pursuing both the class claims and derivative claims as part of the same action. As explained above, the remedies of the direct and derivative plaintiffs are mutually exclusive. Hence, substitution of a new class representative would not resolve the conflict. *See Dancer v. Golden Coin, Ltd.*, 124 Nev. 28, 176 P.3d 271, 275 (2008) (court determines whether substitution of a class representative is appropriate in order to render the class certifiable). Rather, a new class representative who agreed to representation by the same lawyers, in the same circumstances, would be evincing the same lack of management and protection over the class that Kearney currently is

[18] Under Nevada Rule of Professional Conduct 1.7(a), a conflict of interest between concurrent clients exists where the representation of one client will be directly adverse to another client, or where there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client. Where a concurrent conflict of interest exists, counsel must disclose the dual representation and secure the informed consent of all affected clients in writing before engaging in the dual representation. Nev. Rules of Prof'l Conduct r. 1.7(b)(4); Model Rules of Prof'l Conduct r. 1.7, 1.8.

demonstrating. Proposed class counsel's failure to educate the class representatives on the existence of potential and actual conflicts suggest that a replacement class representative may similarly fail to understand and protect against these problems. Thus, a substituted class representative in this action would no more fairly and adequately represent the class than Kearney.

IV. CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court deny plaintiffs' motion for class certification.

Dated this 9th day of October 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of October 2018, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING MOTION TO ASSOCIATE COUNSEL (ALEJANDRO E. MORENO)** was served by the following method(s):

☒ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

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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 REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

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STATUTES, RULES AND REGULATIONS

I. INTRODUCTION

The Amended Class Action and Derivative Complaint (the "Amended Complaint") includes the following allegations, which the Court must accept as true at the class certification stage:

- Defendant Robert Kaplan contemporaneously writing about Defendant Ken Potashner ("Potashner"): "Ken is totally conflicted, ignored his fiduciary responsibility to our shareholders, and has been negotiating constantly for his own self-interest." ¶¶8, 161.[1]

- Potashner writing before the close of the Merger: "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. . . . This is getting scary." ¶¶15, 127, 189.

- All told, the Merger amounted to "over $100 million in destroyed market value," a "remarkable destruction of value." ¶¶5-6.

In the face of such damaging evidence, Defendants seek an escape hatch by purporting to advise the Court that it would be in the bests interests of the class of Parametric shareholders to have no class at all. This is not a novel tactic:

> [I]t is often the defendant, preferring not to be successfully sued by anyone, who supposedly undertakes to assist the court in determining whether a putative class should be certified. When it comes, for instance, to determining whether "the representative parties will fairly and adequately protect the interests of the class," . . . it is a bit like permitting a fox, although with a pious countenance, to take charge of the chicken house.

Eggleston v. Chi. Journeymen Plumbers' Local Union No. 130, U.A., 657 F.2d 890, 895 (7th Cir. 1981).

Each of Defendants' challenges to certification is meritless. ***First***, Plaintiffs' proposed class definition is proper and supported by ample precedent. This Court has recently and repeatedly approved virtually-identical definitions in class actions challenging corporate transactions. The Delaware Supreme Court has also labeled Plaintiffs' proposed definition "in accord with the 'commonplace' definitions in similar class action cases." *In re Celera Corp. S'holder Litig.*, 59 A.3d 418, 428-30 (Del. 2012). This remains true in stock-for-stock mergers similar to this case.

[1] Unless otherwise noted, capitalized terms carry the same meaning as ascribed to them in the Amended Complaint. All "¶" and "¶¶" references are to the Amended Complaint. All emphasis is added, and citations and footnotes are omitted throughout unless otherwise noted.

Plaintiffs directed Defendants to this mountain of relevant authority in their opening brief. Defendants ignored it. Defendants do not argue that these decisions were wrongly decided, attempt to distinguish this authority, or present any relevant case that contradicts it. They just argue for a different result without relevant support. The Court should not accept Defendants' invitation to upend years of established law, particularly where Defendants provide no good reason or legal support to do so.

Second, Plaintiffs' claims are typical of the Class, something Defendants do not seriously contest as to Plaintiff Kearney IRRV Trust ("Kearney"). Defendants argue that Plaintiff Grant Oakes ("Oakes") is atypical however, because he sold his shares before the Merger closed. But Defendants' exact argument has been considered and rejected on multiple occasions. Likewise, Defendants' argument, which rests solely on Oakes' actions, is inconsistent with black-letter law in Nevada, which states that "the typicality prerequisite concentrates ***on the defendants' actions***, not on the plaintiffs' conduct." *Jane Doe Dancer I-VII v. Golden Coin, Ltd*., 124 Nev. 28, 35, 176 P.3d 271, 276 (2008).

Third, Plaintiffs are adequate class representatives. Under both Nevada and federal law, "[w]hen '[p]laintiffs understand [their] duties and [are] currently willing and able to perform them, Rule 23(a)(4) does not require more.'" *Schmidt v. Liberator Medical Holdings, Inc.*, No. A-15-728234-B, 2018 WL 1558803, at *3 (Nev. Dist. Ct. Feb. 21, 2018); *Local Joint Exec. Bd. of Culinary/Bartender Tr. Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001) (same). Both Plaintiffs easily meet this standard. Kearney understands his duties to the Class, has spent 10 hours per month on this litigation in 2018, has communicated with his attorneys 30-plus times in 2018 alone, has produced nearly 300 pages of documents, sat for a deposition, and plans to remain active in this case through trial. Oakes too is adequate. Oakes understands his duties to the Class, has produced nearly 250 pages of trading records, sat for deposition, and has committed to "spend whatever time's necessary" on this litigation moving forward.

Fourth, Lead Counsel does not face a conflict of interest by concurrently litigating the direct and derivative claims in this action. Again, Defendants' argument has been considered and rejected by the Delaware Supreme Court, Delaware Court of Chancery, and numerous federal courts. *See,*

e.g., *In re Ebix, Inc. S'holder Litig.*, No. CIV. A. 8526-VCN, 2014 WL 3696655, at *18 (Del. Ch. July 24, 2014); *see also, e.g.*, *Veros Software, Inc. v. First Am. Corp.*, No. SACV 06-1130 JVS (ANx), 2008 WL 11338610, at *6 (C.D. Cal. June 13, 2008). And Plaintiffs' and Lead Counsel's vigorous representation of the Class over the past five years in this case further proves that they will continue to do so going forward. Defendants may prefer different, less-aggressive, and less-determined counsel to litigate this case against, but that is not their call.

Fifth, Plaintiffs satisfy Rule 23(b)(3) because common questions of fact and law predominate over the entirety of this action. Defendants ignore this legal standard and argue without support that Plaintiffs do not satisfy Rule 23(b)(3) because they have not set forth a viable damages theory. Defendants' argument is both premature and, even if timely, incorrect. The Court has wide latitude to fashion any equitable remedy where a loyalty breach is alleged. *Bomarko, Inc. v. Int'l Telecharge, Inc.,* 794 A.2d 1161, 1184 (Del. Ch. 1999), *as revised* (Nov. 16, 1999), *aff'd*, 766 A.2d 437 (Del. 2000) ("*Bomarko I*"); *Int'l Telecharge, Inc. v. Bomarko, Inc.,* 766 A.2d 437, 440-41 (Del. 2000) ("*Bomarko II*"). Moreover, Defendants' argument ignores that in *Gentile v. Rosette* – which the Nevada Supreme Court primarily relied on when identifying the scope of Plaintiffs' equity expropriation claim ***in this action*** – the Delaware Supreme Court articulated the following methodology for calculating damages for an equity expropriation claim: "the public shareholders are entitled to recover the value represented by that overpayment – an entitlement that may be claimed by the public shareholders directly and without regard to any claim the corporation may have." *Gentile v. Rossette*, 906 A.2d 91, 100 (Del. 2006). Plaintiffs here have proposed the following virtually-identical damages theory: "[t]he instrinsic value of all Company shares expropriated by Defendants through the merger." *See* Ex. A (Plaintiffs' Supplemental Rule 16.1 Disclosure Statement Regarding Available Damages) at 2. Defendants fail to confront the fact that both the Nevada and Delaware Supreme Courts have approved this damages measure.

But Plaintiffs do not stop at just one viable damages theory; rather, Plaintiffs provide the Court with ***five*** such theories. And each damages theory is pulled from relevant case law and provides the Court with a reasonable basis to calculate damages in this action. This is particularly true given the Court's very broad discretion to fashion remedies in this context. Finally, Defendants'

purported damages expert – John D. Montgomery ("Dr. Montgomery") – does not assist their argument, as he is utterly ill-equipped to opine on viable theories of damages for equity expropriation claims or this action generally.

For the reasons stated herein and in Plaintiffs' opening class certification brief, Plaintiffs respectfully request that the Court grant the motion, certify the class, and appoint both Plaintiffs as class representatives.

II. ARGUMENT

A. Plaintiffs' Class Definition is Proper, Commonplace, and Supported by Ample Precedent

Plaintiffs ask this Court to certify a class of Parametric shareholders consisting of all non-insider holders of Parametric common stock at any time from August 5, 2013 (announcement of the Merger) through and including January 15, 2014 (close of the Merger).

In breach of fiduciary duty litigation challenging corporate transactions, such class definitions that include all non-insider shareholders from announcement through close are "in accord with the 'commonplace' definitions in similar class actions." *Celera*, 59 A.3d at 430. This is true where transactions involve a stock-for-stock component as well. *See In re Jefferies Group, Inc. S'holders Litig.*, C.A. No. 8059-CB (Del. Ch.) (stock-for-stock merger that defined the class as all shareholders who held from announcement through close); *see also In re Arena Resources, Inc.*, C.A. No. 8059-CB, Dkt. No. 73049423 (Nev. Dist. Ct. 2010) (same; primarily stock-for-stock merger); *Etter v. Hibernia Corp.,* 2006-0646 (La. App. 4 Cir. 2/14/07), 952 So.2d 782, 786, *writ denied*, 2007-0559 (La. 5/4/07), 956 So.2d 615 (upholding class certification in primarily stock-for-stock merger and finding class of all stockholders from announcement through vote "was clearly and objectively defined").

For example, in *Celera*, the Delaware Supreme Court approved the following broad class definition in a class action challenging a corporate transaction (59 A.3d at 430):

> "[a]ny and all record holders and beneficial owners of share(s) of Celera common stock who held any such share(s) ***at any time*** [between February 3, 2010 and May 17, 2011, inclusive], but excluding the Defendants."

Id. at 427.

In this Court, Judge Allf recently certified a class of former Newport Corporation ("Newport") shareholders consisting of all non-insider holders of Newport common stock at any time from announcement through close of the merger. *See* Ex. B (Order Regarding Class Certification and Joinder) at 1. As here, the defendants in *Newport* argued that the class definition was overly broad because it included class members that lacked standing. Judge Allf rejected this argument, finding Plaintiffs' class definition "proper." *Id.*

Judge Allf is not alone, as Nevada courts routinely certify classes of shareholders challenging corporate transactions that include all holders from announcement through close of the subject transaction. *See, e.g.*, *Toni Eisentstein v. Harrahs's Entertainment, Inc.*, A-531963 (Clark Cty.); *see also, e.g.*, *In re China TransInfo Technology Corp. Shareholder Litigation*, 12-A-657022 (Clark Cty.); *In re NV Energy, Inc., S'holder Litig.*, 13-A-693080 (Clark Cty.); *In re Trunkbow Int'l Holdings Limited S'holders' Litig.*, 12-A-671652 (Clark Cty.); *Michael Lauren v. The Sands Regent, et al.*, CV-06-01275 (Washoe Cty.).

Plaintiffs' proposed Class definition also makes sense based on the facts of this case. Parametric announced the undervalued Merger after the market closed on August 5, 2013, at which time its stock stood at $17.69 per share. ¶108. The market immediately reacted negatively to the announcement, and Parametric's stock dropped to just $14.08 per share by August 6, 2013 – a 20% decline in shareholder value. *Id.* As of January 15, 2014, the day the Merger closed, Parametric's stock stood at just $14.19 per share. ¶4. Parametric's stock continued its precipitous decline as a result of Defendants' misconduct, and, as of November 28, 2017, stood at just $0.57 per share. ¶5. Stockholders were harmed over time, which comports with the Class definition of holders from announcement to close. *Id*.

Without addressing the above authority, Defendants argue that the Class definition is overbroad and can only include holders of Parametric stock as of January 15, 2014 – the date the Merger closed. Defs' Opp. at 14-16. But Defendants cannot distinguish the several analogous Nevada and Delaware cases that certified identical classes to the proposed Class here.[2] Nor can

[2] Without citing any relevant corporate transactional authority, Defendants are left to piece together their argument using soundbites from a series of inapposite cases. *See, e.g.*, *Mazza v. Am.*

Defendants' proffered expert, Dr. Montgomery, intelligently opine on this subject, as he acknowledged that he has no understanding as to typical class definitions for breach of fiduciary duty cases and paid no meaningful attention to any of the class definitions discussed above (despite purportedly reviewing Plaintiffs' opening brief). *See* Ex. C (Deposition Transcript of John Montgomery, Ph.D. ("Montgomery Tr.")) at 93:10-16, 94:14-17. As noted above, the Court should not accept Defendants' invitation to upend years of established law, particularly where Defendants provide no good reason or legal support to do so.[3]

B. Plaintiffs' Claims are Typical of the Class

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.'" *Golden Coin,* 124 Nev. at 35 (quoting *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 848-49, 124 P.3d 530, 538-39 (2005)); *Schmidt*, 2018 WL 1558803 (same). 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.'" *Golden Coin*, 124 Nev. at 35. "[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*.

Honda Motor Co., 666 F.3d 581, 596 (9th Cir. 2012) (false advertising action where the proposed definition included individuals who were not exposed to the purportedly false advertisement); *see also, e.g.*, *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 509-10 (7th Cir. 2006) (consumer fraud class action involving statements about the sweetener used in Diet Coke and seeking to certify a class of all persons who purchased a fountain Diet Coke from March 12, 1999 forward, which potentially included "millions" of uninjured class members).

[3] Defendants' argument that the Class definition is not sufficiently definite is contradicted by even their own cases, which make clear that a class definition is sufficiently definite where (as here) it provides objective criteria the court can use to determine who is a member. *See In re Petrobras Sec.*, 862 F.3d 250, 264 (2d Cir. 2017) ("The ascertainability doctrine that governs in this Circuit requires only that a class be defined using objective criteria that establish a membership with definite boundaries"); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591 (3d Cir. 2012) (requiring only that a class be "'readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified'"); *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537-38 (6th Cir. 2012) ("'[T]he class definition must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class.'").

The Amended Complaint alleges that Plaintiffs Oakes and Kearney were injured by the same misconduct by Defendants as every other member of the Class. ¶¶201, 205. Therefore, Plaintiffs and the Class suffered injuries resulting from the same course of conduct by Defendants in conjunction with the Merger. *Turner v. Bernstein*, 768 A.2d 24, 33 (Del. Ch. 2000). And, to obtain relief, Plaintiffs and the Class will be required to prove the same set of facts based on the same applicable law. *Id.* Plaintiffs have thus shown their claims are typical of those of the Class. *Id.*; *Schmidt*, 2018 WL 1558803, at *3.

Defendants appear to argue that Oakes is atypical because he lacks standing given that he sold his shares before the Merger closed. Defs' Opp. at 20-21. Yet, Defendants again do not cite to a single case that has applied their proposed rule. *Id.* In addition, Defendants' exact argument has been considered and rejected on multiple occasions in analogous situations. *See Celera*, 59 A.3d at 428-31; *see also New Jersey Carpenters Pen. Fund v. infoGROUP, Inc.*, No. 5334-VCN, 2013 WL 610143, at *6 (Del. Ch. Jan. 17, 2013) (finding that a shareholder who sold 99.75% of its shares after announcement but before the close of a merger had standing to assert its breach of fiduciary duty claims and that the sale "does not make its claims or defenses atypical or render it an inadequate class representative").

Celera is instructive. In *Celera*, a party opposing class certification argued that a class representative was atypical and lacked standing to assert merger-related breach of fiduciary duty claims because the representative sold its shares before the merger closed. *Celera*, 59 A.3d at 428. The Delaware Supreme Court rejected the argument and held that the representatives had standing, finding in relevant part:

> ***NOERS did sell its shares in Celera four days before the merger was consummated, and approximately ten months before the settlement was approved. But NOERS still owned its stock at the time the Board approved the merger and when the MOU was executed, and it fits squarely within the broad definition of the class contained in the Settlement Agreement. Thus, NOERS satisfies the three-prong test of standing***: it had a cognizable injury in fact at the time the merger was approved; the alleged breach of fiduciary duties was traceable to the defendants, and the Court of Chancery could address that injury in the form of a preliminary injunction and the subsequent settlement.
>
> * * *

> Based on our precedent and the broad definition of the proposed class in the Settlement Agreement, we conclude that NOERS has legal standing to represent the class because it held Celera stock at the time the merger was approved.

Id. at 430-31; *see also* Ex. B at 4 (rejecting the defendants' argument that a proposed class representative was atypical and lacked standing because he sold his shares after the announcement and before the close of the merger).

Just like the class representatives in *Celera* and *Newport*, Oakes owned Parametric shares "at the time the Board approved the [M]erger" and "fits squarely" within the Class definition. *Celera*, 59 A.3d at 430-31; Ex. B at 4. Thus, Oakes has standing and his claims are typical. *Id.*; *Golden Coin*, 124 Nev. at 34-36.

C. Plaintiffs and Lead Counsel Will Fairly and Adequately Protect the Interests of the Class

Adequacy requires that "the representative parties will fairly and adequately protect the interests of the class." NRCP 23(a)(4). "[T]he 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. As explained below, Plaintiffs and Lead Counsel are more than adequate to continue to represent the class. Indeed, their vigorous representation of the Class in this case for the past five-plus years unquestionably demonstrates that there is no better group to continue to press this case against Defendants, and on behalf of the Class, than these Plaintiffs and this Lead Counsel. And Plaintiffs and Lead Counsel do not suffer from a conflict with the Class.

1. Plaintiff Kearney Will Adequately Represent the Class

When a plaintiff "understands his duties and is currently willing and able to perform them," Rule 23(a)(4) "does not require more." *Las Vegas Sands*, 244 F.3d at 1162; *Schmidt*, 2018 WL 1558803, at *3 (same); Ex. B at 4-5. Kearney meets this standard, as demonstrated by the following unredacted testimony from his deposition:

> Q. Okay. Do you have a layman's understanding of what a class action lawsuit is?
>
> [objection] . . .
>
> A. ***As a representative for the class action, it's my responsibility to recover the damages that our stockholders have experienced.***

* * *

Q. Okay. Do you understand what a fiduciary responsibility is?

A. Yes.

Q. And what's your layman's understanding?

A. ***To represent the stockholders in a fair, amicable procedure.***

Q. ***And are you aware that as a putative class representative plaintiff, you have a fiduciary responsibility to the class?***

A. ***Yes.***

* * *

Q. ***All right. Do you plan on -- assuming this case goes to trial, do you plan on remaining actively involved in this case through trial?***

A. ***Yes***.

Ex. D (Deposition Transcript of Kearney IRRV Trust ("Kearney Tr.")) at 84:11-20, 98:3-12, 100:24-101:2.

Adequacy is also satisfied where the plaintiffs have "produced documents, have sat for depositions, have hired expert and experienced counsel, and have communicated with counsel regarding the litigation." *Schmidt*, 2018 WL 1558803, at *3. Kearney meets this standard as well, as he spends roughly ten hours ***per month*** on this litigation, has communicated with his attorneys – in person, on the phone, and via email – routinely throughout this litigation (including more than 30 times in 2018 alone), has produced 293 pages of documents, and sat through a lengthy and arduous deposition. Ex. D (Kearney Tr.) at 87:21-88:13, 99:12-25. And again, Kearney's testimony speaks for itself:

Q. And looking back at this past year, how much time per month do you estimate you've devoted to monitoring this lawsuit?

A. The past year?

Q. Yes, 2018.

A. ***10 hours a month.***

> Q. And do you have any plans for how much time you're going to devote monitoring this lawsuit going forward?
>
> A. Yes.
>
> Q. Okay. And what's -- what's your -- what's your plan?
>
> A. ***Same statement I told my team: I'm available when you need me.***

Id. at 99:12-25. Kearney has thus done far more than is required to satisfy Rule 23(a)(4). *Brown v. Brewer*, No. CV 06-3731-GHK(JTLx), 2009 WL 1574556, at *4 (C.D. Cal. May 29, 2009) (finding representative adequate in corporate transaction case where "[h]e has spoken to his lawyers in person three times, and on the phone 8-10 times").

Finally, Kearney will vigorously litigate these claims on behalf of the Class, as he independently initiated his action and strongly believes in the merit of his claims:

> Q. So the question is whether you have an understanding of what Parametric would get -- or the Parametric stockholder would get in exchange for agreeing to the merger.
>
> A. Oh, yes.
>
> Q. Okay. And what's your understanding?
>
> A. We got screwed.
>
> Q. I'm assuming that's not a technical merger term, but I'm –
>
> A. I can clarify that if you like.
>
> Q. Yeah, go ahead.
>
> A. I tell you I have an idea, and you hand me $10, and then I turn around to him (indicating), and I say, I've got a better idea: I'm going to give you this $80, but he's not getting anything (indicating). I mean, I'm trying to grasp where you're going with your thought process. It's pretty simple, cut and dry. We, as investors, invested. We saw the reverse stock split merger, boom, we lost 80 percent value.

Ex. D (Kearney Tr.) at 82:7-25.

Defendants argue, without legal or factual support, that Kearney is inadequate because he "is unaware of the differences between the direct and derivative claims, and he believes Plaintiff Kearney is alleging the derivative causes of action and may recover from them." Defs' Opp. at 22.

While the legal basis for this requirement is left unstated, Kearney's actual testimony directly contradicts Defendants' claim:

> Q. ***Okay. Do you know what a shareholder derivative action is*?**
>
> A. ***Yes***.
>
> * * *
>
> Q. ***Okay.· Do you -- and do you have a layperson's understanding of what -- of the available damages for the derivative claims*?**
>
> [objection] . . .
>
> A. ***Derivative claims will go to the company – Parametric***.
>
> Q. ***Okay***.
>
> A. ***-- Parametric***.
>
> Q. ***Okay. And with that understanding, do you believe that you would receive any benefit if there's a recovery from the derivative claims*?**
>
> [objection]
>
> A. ***No*.**
>
> Q. ***Okay. Okay. And then on the next page, you have, "Available Damages for Direct Claims." Do you see that*?**
>
> A. ***Yes*.**
>
> Q. ***Okay. And do you believe that you will receive a personal benefit if you recover on the direct claims*?**
>
> A. ***Yes*.**

Ex. D (Kearney Tr.) at 85:4-6, 127:14-128:17.

Defendants appear to attack Oakes' adequacy, but only do so in two footnotes. Defs' Opp. at 22. While the brevity and placement of this argument is indicative of its value, Oakes too is adequate, as he has produced nearly 250 pages of documents, sat for a deposition, hired expert and experienced counsel, and communicated with counsel regarding the litigation on numerous occasions. Ex. E (Deposition Transcript of Grant Oakes ("Oakes Tr.")) at 12:20-13:11; *Schmidt*, 2018 WL 1558803, at *3. Oakes is also adequate because he understands his duties to the Class and

is currently willing and able to perform them. Ex. E (Oakes Tr.) at 89:7-16, 91:13-18; *Las Vegas Sands*, 244 F.3d at 1162; *Schmidt*, 2018 WL 1558803, at *3 (same). As with Kearney, Oakes' testimony proves these facts:

> Q. [D]o you know whether a representative Plaintiff, such as yourself, owes fiduciary duties to the class?
>
> [objection]
>
> A. Absolutely, I do.
>
> Q. Okay. And what's your understanding of that?
>
> A. I have an obligation to represent those who were harmed that were Parametric Technology shareholders.
>
> * * *
>
> Q. Okay. What's your plan moving forward to remain involved in this litigation?
>
> A. Well, I will spend whatever time's necessary, based on, you know, the situations that come up. I'm pretty much semiretired, so I've got time to invest in this as the time is needed.

Ex. E (Oakes Tr.) at 89:7-16, 91:13-18.

2. Plaintiffs Have Selected Competent Counsel

"The competence of counsel seeking to represent a class is also an appropriate consideration under Rule 23(a)(4)." *Las Vegas Sands*, 244 F.3d at 1162. The corporate "legal system has long recognized that lawyers take a dominant role in prosecuting litigation on behalf of clients. A conscientious lawyer should indeed take a leadership role and thrust herself to the fore of a lawsuit. This maxim is particularly relevant in cases involving fairly abstruse issues of corporate governance and fiduciary duties." *In re Fuqua Indus., Inc. S'holder Litig.*, 752 A.2d 126, 135 (Del. Ch. 1999).

Plaintiffs have further demonstrated their adequacy by selecting competent and experienced counsel to conduct this complex litigation governed by nuanced Nevada corporate law. *Las Vegas Sands*, 244 F.3d at 1162. Plaintiffs have selected the most experienced attorneys in the country in prosecuting shareholder class actions for damages after the close of the challenged corporate transaction, including in this Court. Opening Br. at 14-15. Defendants do not contest these facts.

3. Class Representatives and Lead Counsel Do Not Face a Conflict of Interest

"[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). 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.'" *Id*. (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.*

Defendants concede, as they must, that the direct and derivative claims in this action are largely based on the same misconduct by Defendants and contingent on proving the same nucleus of facts. Defs' Opp. at 3 (acknowledging that the claims arise "from the very same alleged misconduct"). Even so, Defendants argue that Plaintiffs and Lead Counsel cannot adequately represent the Class because they face a theoretical conflict at the remedy stage of the litigation. *Id.* Once again, Defendants' argument has been considered and rejected on numerous occasions by the Delaware Supreme Court, Delaware Court of Chancery, and federal courts. *See, e.g.*, *Ebix*, 2014 WL 3696655, at *18; *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*, 2008 WL 11338610, at *6; *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).

a. Delaware Courts Have Repeatedly Rejected Defendants' Argument

The Delaware Court of Chancery has expressly rejected Defendants' conflict argument, finding that no conflict exists where (as here) the same issues underlie the direct and derivative claims. In *Ebix*, the defendants argued that the plaintiffs could not simultaneously bring direct class and derivative claims due to a purported conflict between the claims. *Ebix*, 2014 WL 3696655, at

*18. The court rejected the argument "because the same factual issue underlies all the claims." *Id.*[4] Likewise, in *TCW*, the court consolidated derivative and direct claims because they "all arise from the same basic facts and none of the claims are internally inconsistent or conflict with the legal theories supporting any other claim." *TCW*, 2000 WL 1654504, at *4. The court then appointed lead plaintiffs because they "assert ***both*** class and derivative claims, so their interests are strategically aligned with the small shareholder class and derivative lawsuits." *Id*.

Likewise, the Delaware Supreme Court has expressly held that the presence of concurrently-litigated dual-nature claims (*i.e.*, equity expropriation claims) does not bar class certification for dual-nature claims. *See Loral*, 977 A.2d at 870. In *Loral*, the appellant argued that the trial court erred in certifying the class because the stockholders could not concurrently pursue direct and derivative claims. *Id*. The court rejected the argument, holding in relevant part:

> More recently, in *Gatz v. Ponsoldt*, this Court held that claims arising from a recapitalization could be brought directly and derivatively. The Court did not discuss the fact that both claims were included in one action, probably because neither the parties nor the Court found that to be legally significant. *Loral* offers no authority in support of its position that the pendency of a derivative action precluded Loral's stockholders from bringing a direct action, and we are aware of none. ***Accordingly, we conclude that there was no bar to Highland's direct action, and the trial court committed no error in granting class certification***.

Id.

The Delaware Supreme Court and Court of Chancery have also implicitly rejected Defendants' conflict argument on numerous occasions by permitting direct and derivative claims brought by the same counsel and/or plaintiffs to proceed concurrently without issue. Just recently in *Tesla*, the Delaware Court of Chancery denied a motion to dismiss direct and derivative claims based on Tesla's alleged unfair stock-for-stock acquisition of SolarCity Corporation. *In re Tesla Motors, Inc. S'holder Litig.*, No. CV 12711-VCS, 2018 WL 1560293 (Del. Ch. Mar. 28, 2018). Likewise, in

[4] Defendants' argument that there was no conflict between the direct and derivative actions in *Ebix* ignores that the plaintiffs both sued the company directly and sued on behalf of the company derivatively (Plaintiffs here do not sue Parametric directly). *See Ebix*, 2014 WL 3696655. Thus, any recovery by the class from the company would violate Defendants' proposed conflict rule, as it would be inconsistent with the recovery sought in the derivative claims, which would flow to the company. Even so, the court determined there was no conflict that prevented concurrent litigation. *Id*.

Franklin, the court appointed the same ***class and derivative counsel*** and certified a class where the plaintiffs brought direct and derivative breach of fiduciary duty claims based on the same underlying misconduct. *See Franklin Balance Sheet Inv. Fund v. Crowley*, No. CIV. A. 888-VCP (Del. Ch.).[5]

b. Federal Courts Have Repeatedly Rejected Defendants' Argument

Numerous federal courts have also rejected Defendants' conflict argument. In *Veros*, the defendants argued that a plaintiff could not bring both direct and derivative "'because only one of the two parties could be entitled to the [damages].'" *Veros*, 2008 WL 11338610, at *6. The court disagreed, noting that "[a]s a general rule, the mere fact that a plaintiff asserts direct and derivative claims in a single action does not constitute a conflict of interest," and finding it "significant" that the operative complaint premises "recovery of damages on the same allegedly wrongful conduct" because this makes the direct and derivative recoveries "'equally contingent upon the proof of the same nucleus of facts.'" *Id*. at *5. The court also held that "'the potential conflict troubling the [defendants] can arise only at the remedy stage of litigation, and only if the basic question of the defendants' liability is first resolved in the plaintiffs' favor,'" and that "any conflict that may arise in conjunction with allocation of damages can be corrected, e.g., pursuant to Rule 23.1(c)." *Id.* at *6.

Likewise, in *Keyser*, the defendants opposed class certification on the same grounds as Defendants here. *Keyser*, 120 F.R.D. at 490. The court rejected this argument, finding that the "better reasoned and predominant rule of law is to look behind the 'surface duality' of these two types of actions and allow them to proceed together unless an actual conflict emerges." *Id*. at 492. The court also found that "defendants have failed to establish an actual conflict; rather, it appears that both the derivative and direct actions are 'equally contingent upon the proof of the same nucleus of facts.'" *Id.* And, as in *Veros*, the court made clear that "[i]f and when plaintiffs prove their allegations and the remedy stage is reached, the court may take corrective measures to resolve any

[5] *See also Nottingham Partners v. Dana*, 564 A.2d 1089 (Del. 1989) (the Delaware Supreme Court upheld class certification and settlement of direct claims and permitted the derivative claims to proceed in the same action); *Louisiana Mun. Police Employees' Ret. Sys. v. Fertitta*, No. CIV. A. 4339-VCL (approving a settlement of concurrently-litigated class and derivative claims brought by same counsel); *Bigelow/Diversified Secondary P'ship Fund 1990 v. Damson/Birtcher Partners*, No. CIV. A. 16630-NC, 2001 WL 1641239, at *5 (Del. Ch. Dec. 4, 2001) (denying motion to dismiss direct class and derivative claims brought by same plaintiff and counsel).

actual conflicts which arise at that time." *Id*. at 492 n.8; *see also TransOcean,* 455 F. Supp. at 1013-15 (same).

c. Lead Counsel's Performance in This Case Belies Defendants' Assertion of Inadequacy

In addition to the above legal authority, Plaintiffs' and Lead Counsel's own actions in this case demonstrate their commitment to the Class. In just the fourteen months since the Nevada Supreme Court's decision in this matter, Plaintiffs and Lead Counsel have: (i) filed a detailed 76-page Amended Complaint; (ii) successfully defended against a second round motion to dismiss briefing; (iii) successfully defended against a motion to stay; (iv) successfully litigated a discovery dispute with Stripes; (v) sought and obtained (or will receive in the near future) discovery from Parametric, VTBH, Stripes, John Todd, J.P. Morgan (VTBH's banker in the Merger), Houlihan Lokey and Craig-Hallum; (vi) reviewed tens of thousands of pages of documents; (vii) defended Plaintiffs at deposition; and (viii) litigated the instant motion, which required deposing Defendants' expert. Clearly, the Class is well-represented.

d. Defendants' Position is Not Supported by Their Authority Nor Their Proffered Expert

Defendants' authority does not warrant a different result. Defendants spend multiple pages attempting to analogize *Ortiz v. Fireboard Corp*. to this action. Defs' Opp. at 10-12. But *Ortiz* is both factually and legally inapposite. *Ortiz* does not involve a derivative claim, a class of shareholders, a corporate transaction, or the purported conflict that Defendants attack here. *Ortiz v. Fibreboard Corp*., 527 U.S. 815 (1999). Instead, *Ortiz* involves mass-tort asbestos litigation in the limited fund context. *Id.* The conflict in *Ortiz* arose where counsel charged with negotiating the global settlement was concurrently litigating 45,000 separate claims, and full payment for the separate claims was contingent on the global settlement. *Id.* Based largely on this conflict, the Supreme Court determined there was insufficient evidence to determine whether the fund was actually limited. *Id. Ortiz* simply has no application here and certainly does not updend the decades of on-point authority discussed above.[6]

[6] Defendants' two cases that actually involve direct and derivative claims are also readily distinguishable. *See Stull v. Baker*, 410 F. Supp. 1326 (S.D.N.Y. 1976) (the derivative and direct

Defendants' reliance on Dr. Montgomery's expert report as support for their conflict argument is similarly misplaced. As with his conclusions concerning damages theories (discussed in detail below), Dr. Montgomery has no relevant basis for concluding that a conflict exists in this action, as he has neither seen analysis on this issue previously nor seen any economist or court conclude that conflicts exist in this situation. *See* Ex. C (Montgomery Tr.) at 106:14-108:15. As the above makes clear, under controlling law, the Plaintiffs and Lead Counsel are more than adequate to represent the Class, and neither faces any disqualifying conflict of interest.[7]

D. Plaintiffs Satisfy Rule 23(b)(3)

Under Rule 23(b)(3), "[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Las Vegas Sands*, 244 F.3d at 1162. This is true even though "important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Kingsbury v. U.S. Greenfiber, LLC*, No. CV0800151AHMJTLX, 2009 WL 10655254, at *6 (C.D. Cal. Mar. 30, 2009); *see also Las Vegas Sands*, 244 F.3d at 1163 (holding Rule 23(b)(3) predominance requirement was satisfied despite individualized issues related to calculation of damages); *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1135 (9th Cir. 2016) (upholding determination that Rule 23(b)(3) was satisfied where the individualized questions "nearly all go to the issue of damages rather than liability").

As noted in Plaintiffs' opening brief, "common questions" of fact and law predominate over the entirety of this action, as there is essentially only two questions of law at issue in the class case:

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claims were facially inconsistent and the court approved the settlement of the direct claims and dismissal of the derivative claims even after identifying the theoretical conflict); *see also Koenig v. Benson*, 117 F.R.D. 330, 338 (E.D.N.Y. 1987) (securities fraud action that did not involve a corporate transaction; there was no indication that the derivative and direct claims were based on the same underlying misconduct; the company at issue was in bankruptcy, meaning a derivative recovery would flow to creditors and bondholders first; and the disqualified plaintiffs were atypical and inadequate for reasons separate from their purported conflict).

[7] Defendants' argument that Lead Counsel is violating Nevada's Rules of Professional Conduct by concurrently litigating the class and derivative claims is nonsensical given the wealth of authority cited above that finds no conflict in this situation.

(i) whether the Individual Defendants breached their fiduciary duties to Parametric shareholders in connection with the negotiation and approval of the Merger, and (ii) whether Stripes and VTBH aided and abetted in those breaches of fiduciary duty. Therefore, "[a] common nucleus of facts and potential legal remedies dominates this litigation," making class certification is appropriate under Rule 23(b)(3). *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022-23 (9th Cir. 1998). The Rule 23(b)(3) inquiry should stop here.

Defendants ignore this law and argue that Plaintiffs have not satisfied Rule 23(b) because none of their five damages theories are viable on a class-wide basis. Defs' Opp. at 17-20. Yet Defendants cite no corporate fiduciary case in Nevada or Delaware to ***ever*** deny class certification on these grounds. That is likely because this argument is premature. In fact, Defense Counsel conceded the prematurity of this issue when making the following objection at Dr. Montgomery's deposition: "***[Mr. Stigi] Of course we're not at the damages phase and so of course he has not done a damages analysis, nor do you have an expert that has done a damages analysis.***" Ex. C (Montgomery Tr.) at 71:10-13.

Even if ripe, Defendants' damages argument fails on multiple fronts. First, Defendants ignore the analytical framework courts use to measure damages in this context, which the Delaware Court of Chancery and Delaware Supreme Court articulated in *Bomarko I* and *II*. In *Bomarko I*, plaintiffs alleged that the defendant breached his fiduciary duty of loyalty by effectuating an undervalued merger. *Bomarko I*, 794 A.2d at 1164. While discussing "the process of assessing damages in cases of this nature," the Delaware Court of Chancery stated:

> First, significant discretion is given to the Court in fashioning an appropriate remedy. In determining damages, the Court's "powers are complete to fashion any form of equitable and monetary relief as may be appropriate. . . ."
>
> Second, unlike the more exact process followed in an appraisal action, the "law does not require certainty in the award of damages where a wrong has been proven and injury established. Responsible estimates that lack mathematical certainty are permissible long as the Court has a basis to make a responsible estimate of damages."
>
> Third, where, as is true here, issues of loyalty are involved, potentially harsher rules come into play. "Delaware law dictates that the scope of recovery for a

> breach of the duty of loyalty is not to be determined narrowly. . . . The strict imposition of penalties under Delaware law are designed to discourage disloyalty."

Id. at 1183-84. The court ultimately awarded plaintiffs damages of $1.51 per share. *Id.* at 1190. On appeal, the Delaware Supreme Court affirmed the measure of damages as legally and factually sound, finding that "[i]n determining damages, the powers of the Court of Chancery are very broad in fashioning equitable and monetary relief under the entire fairness standard as may be appropriate, including rescissory damages. . . . The question faced by the trial court in the instant action was determining what ITI's stockholders' 'shares would have been worth at the time of the Merger if Haan had not breached his fiduciary duties.'" *Bomarko II,* 766 A.2d at 440-41.

Consistent with this framework, Plaintiffs have provided five theories of damages for their equity expropriation claim, allowing the Court to exercise its broad powers to fashion an appropriate post-trial remedy. *See* Ex. A at 2. Each of these theories attempts to measure the value of Parametric's shares but-for Defendants' misconduct (*i.e.* the damages caused by Defendants' misconduct) and provide the Court with a "basis to make a responsible estimate of damages." *Id.*; *Bomarko I*, 794 A.2d at 1184. Nothing more is required of Plaintiffs, particularly at the class certification stage.

Second, Defendants' argument ignores that several of Plaintiffs' damages theories are derived directly from damages methodologies articulated in relevant Nevada and Delaware cases. Notably, when articulating the scope of Plaintiffs' equity expropriation claim, the Nevada Supreme Court looked primarily to one decision – *Gentile*. *See Parametric Sound Corp. v. Eighth Judicial Dist. Court in & for Cty. of Clark,* 401 P.3d 1100, 1109 (Nev. 2017). And in *Gentile*, the Delaware Supreme Court articulated the following methodology for calculating damages for an equity expropriation claim: "the public shareholders are entitled to recover the value represented by that overpayment – an entitlement that may be claimed by the public shareholders directly and without regard to any claim the corporation may have." *Gentile*, 906 A.2d at 100.[8] On remand, the Delaware Court of Chancery calculated damages in this manner in its post-trial order. *Gentile v.*

[8] This language has been subsequently adopted in the class context as well. *See Gatz v. Ponsoldt*, 925 A.2d 1265, 1267 (Del. 2007); *see also Loral Space & Commc'ns, Inc. v. Highland Crusader Offshore Partners, L.P.*, 977 A.2d 867 (Del. 2009).

Rossette, No. CIV. A. 20213-VCN, 2010 WL 2171613, at *12 (Del. Ch. May 28, 2010).[9] Plaintiffs here provided the following virtually-identical measure of damages for their equity expropriation claims in their Supplemental Rule 16.1 Disclosure Statement: "[t]he instrinsic value of all Company shares expropriated by Defendants through the merger." Ex. A at 2.[10]

Likewise, in *Cohen*, the Nevada Supreme Court articulated the following methodology for calculating damages that stem from misconduct related to an unfair corporate transaction: "[i]f [Cohen] 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 v. Mirage Resorts, Inc*., 119 Nev. 1, 14, 62 P.3d 720, 729 (2003).[11] This damages methodology was applicable on a class-wide basis, as this Court subsequently certified the shareholder class in *Cohen*. *See* Opening Br., Ex. C. This Court has also applied *Cohen*'s methodology when calculating damages in this context. *See EXX, Inc. v Stabosz*, No. 10A627976, 2014 WL 10251999, at *5 (Nev. Dist. Ct. Feb. 10, 2014). And again, Plaintiffs here provided the following virtually-identical measure of damages in their Supplemental Rule 16.1 Disclosure Statement: "the intrinsic value of pre-merger Parametric less the Parametric stock trading price upon the close of the merger." Ex. A at 2.[12]

Third, Defendants' argument ignores that analogous measures of damages to those provided by Plaintiffs are routinely determined on a class-wide basis in state and federal courts nationwide.

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[9] The Delaware Supreme was limited to this method of recovery because the company was acquired before determining damages, which is not a limiting factor here. *Gentile*, 906 A.2d at 103.

[10] Highlighting their confusion on this issue, Defendants actually argue that this damages theory "is not a measure at all" despite the fact it was articulated by the Delaware Supreme Court, subsequently applied by the Delaware Court of Chancery, and implicitly adopted by the Nevada Supreme Court through its significant reliance on *Gentile* in this case. Defs' Opp. at 19.

[11] Nevada courts have made clear that "fair value" has been construed to mean "intrinsic value," which is "'determined from the assets and liabilities of the corporation considered in the light of every factor bearing on value.'" *Am. Ethanol, Inc. v. Cordillera Fund, L.P.*, 127 Nev. 147, 152-53, 252 P.3d 663, 666-67 (2011) (quoting *Southdown, Inc. v. McGinnis*, 89 Nev. 184, 190, 510 P.2d 636, 640 (1973)).

[12] Even Dr. Montgomery admitted at deposition that if Plaintiffs' damages measures could be calculated for one shareholder, then they could also be calculated for all then-current shareholders. Ex. C (Montgomery Tr.) at 80:16-85:9.

See, e.g., CNL Hotels & Resorts, Inc. v. Twin City Fire Ins. Co., 291 F. App'x 220, 224 (11th Cir. 2008) ("Damages are measured under section 11 by the difference between the price the plaintiff paid for the security and the value of the security when the suit was brought"); *Pruitt v. Rockefeller Ctr. Props., Inc.,* 167 A.D.2d 14, 23, 574 N.Y.S. 2d 672, 677 (N.Y. App. Div. 1991) ("Damage calculation for a Securities Act §11 violation is neither complex nor complicated . . . damages under section 11(e) are measured by the difference between the purchase and sales price."). Such damages for each class member are "subject to a simple arithmetic calculation" that can be addressed in a "claims process that will follow the plenary trial." *In re WorldCom Inc. Sec. Litig.,* No. 02-CV-3288, 2005 WL 491397, at *3 (S.D.N.Y. Mar. 3, 2005).

In a last ditch effort to bolster their argument, Defendants hired an economist – Dr. Montgomery – to attempt to poke holes in Plaintiffs' damages theories. But Defendants' reliance on Dr. Montgomery for "expert" assistance on these class claims for equity expropriation is head scratching. Dr. Montgomery admitted that he: (i) has never calculated damages for an equity expropriation claim; (ii) is not aware of the standards for calculating damages on an equity expropriation claims; (iii) has not seen an economist or a court calculate damages for an equity expropriation claim; and (iv) ***had not heard the term "equity expropriation" until this action***. Ex. C (Montgomery Tr.) at 6:18-21, 24:14-18, 26:5-11, 31:25-32:24, 33:9-19, 34:16-21. Specifically, Dr. Montgomery testified as follows:

> Q. Have you ever offered an opinion or testimony in a breach of fiduciary duty case with an equity expropriation claim?
>
> A. No, I don't believe I have.
>
> * * *
>
> Q. Okay. How would you -- how do you calculate damages on equity expropriation claims generally?
>
> [objection]
>
> A. I do not think I've ever calculated a damage on ex – equity expropriation.
>
> * * *
>
> Q. Have you ever seen an economist measure damages in an equity expropriation case?

A. No.

Q. And you've never seen a court analyze or calculate damages in an equity expropriation case, correct?

A. Not that I recall.

* * *

Q. . . . Have you reviewed that *Gentile* case?

A. No. I don't think so, no.

Q. Do you have an understanding how the Delaware Supreme Court articulated the methodology for valuing equity expropriation claims in that case?

[objection]

A. I didn't review that case. I really don't know anything about it.

* * *

Q. Okay. Do you believe that public stockholders can recover the value represented by the overpayment for equity that the company issued in the equity expropriation event?

A. I don't know what they can do or can't do.

Id. at 6:18-21, 26:5-11, 31:25-32:6, 33:9-19, 34:16-21.

Likewise, Dr. Montgomery cannot intelligently opine about viable damages theories in this action generally, as he: (i) does not know how he would calculate damages for even individual plaintiffs; (ii) has not analyzed damages or tried to estimate damages in this action; (iii) does not have an understanding as to the typical measure of damages in merger or transactional cases for breach of fiduciary duty in Nevada; (iv) is not sure whether he has seen any court from any jurisdiction calculate damages on a breach of fiduciary duty case in connection with a merger; (v) was not retained to give a damages analysis; (vi) does not believe he is testifying on methodology for damages; and (vii) does not know whether or when Parametric stockholders were harmed even assuming allegations in the Amended Complaint were true. *Id*. at 27:21-28:4, 42:17-24, 50:22-25, 59:24-60:6, 61:24-62:4, 71:21-23, 72:5-15. Again, Dr. Montgomery's testimony speaks volumes:

Q. Okay. Do you see a claim – a coherent claim for damages as it relates to the individual plaintiffs, the individual class plaintiffs, the Kearney IRV Trust and Mr. Oaks?

A. I haven't analyzed that.

* * *

Q. And you haven't analyzed how you would calculate damages on [the equity expropriation] claim if the defendants were in fact liable; is that right?

A. That's right.

* * *

Q. You haven't done a careful expert analysis of damages in this case, correct?

A. Correct.

* * *

Q. So you're an expert on damages issues, but you have not calculated damages and you have not attempted to come up with a methodology for damaging the – sorry, for analyzing the value of the claims in this case, correct?

A. That's correct.

* * *

Q. Do you have an understanding as to the typical measure of damages in a merger case in Nevada?

[objection]

A. I do not know what Nevada courts do in these cases or in any cases. I believe I've told you I don't – I'm not an expert in Nevada courts.

* * *

Q. Okay. Have you – so we talked about equity expropriation cases. Have you reviewed any case in Nevada that has calculated damages on a transactional case for breach of fiduciary duty?

[objection]

A. No.

* * *

Q. Have you seen any court from any jurisdiction calculate damages on a breach of fiduciary duty case in connection with a merger?

[objection]

A. I'm simply not sure.

* * *

Q. Have you been retained to give a damages analysis?

A. No, I have not.

* * *

Q. Okay. Accepting the allegations in the complaint as true, do you agree that any Parametric stockholder was harmed?

A. I do not know and I haven't performed that analysis.

* * *

Q. Okay. How do you propose that those stockholders who were harmed, if the allegations in the Complaint are true, are provided some redress?

[objections]

A. I haven't done that analysis.

Id. at 39:13-17, 50:22-25, 56:5-7, 56:13-18, 59:24-60-6, 61:13-19, 61:24-62:4, 71:21-23, 72:5-9, 117:6-11. As the above makes clear, Plaintiffs have provided viable theories of damages, and Defendants' arguments to the contrary are ill-founded and premature.

III. CONCLUSION

For the reasons stated herein and in their opening brief, Plaintiffs respectfully request that the Court certify the Class pursuant to NRCP 23, name Plaintiffs Class Representatives.

DATED: November 13, 2018

Respectfully submitted,

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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: November 13, 2018

/s/ Bryan Snyder
BRYAN SNYDER

EXHIBIT INDEX

Exhibit No.	Description	Pages
A	Plaintiffs' Supplemental Disclosure Statement	6
B	Order Regarding Class Certification	16
C	Deposition of John Montgomery	158
D	Deposition of Stephen L. Kearney	14
E	Deposition of Grant Oakes	6

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

In re PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION	Lead Case No. A-13-686890-B Dept. No. XI
	CLASS ACTION
This Document Relates To: ALL ACTIONS.	PLAINTIFFS' UNOPPOSED MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES FOR PRELIMINARY APPROVAL OF SETTLEMENT
	HEARING REQUESTED

MOTION

Plaintiffs, by and through undersigned counsel, hereby submit this Unopposed Motion for Preliminary Approval of Settlement.

This Unopposed Motion is based on Plaintiffs' Memorandum of Points and Authorities in support of this motion (filed concurrently herewith), the Stipulation of Settlement dated November 14, 2019 and all exhibits attached thereto (filed concurrently herewith), all pleadings and papers filed in these class and derivative actions, any arguments made before the Court at the hearing of this Unopposed Motion, and any other matter that the Court may consider at the hearing of this Unopposed Motion.

Plaintiffs hereby apply for entry of the Order Preliminarily Approving Settlement and Providing for Notice, substantially in the form of Exhibit A attached to the Stipulation of Settlement dated November 14, 2019, submitted concurrently herewith, requesting that the Court: (i) preliminarily approve the proposed Settlement; (ii) approve the proposed form of the Notice of Proposed Settlement of Class and Derivative Action and the Summary Notice (attached as Exhibits A-1 and A-3 to the accompanying Stipulation), and approve the proposed methods of disseminating notice as provided in the Order Preliminarily Approving Settlement and Providing for Notice; (iii) set a date for the Final Approval Hearing; and (iv) rule on such other matters as the Court may deem appropriate.

DATED: November 14, 2019

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Kearney IRRV Trust and Lance Mykita respectfully submit this memorandum in support of Plaintiffs' unopposed motion for preliminary approval of the proposed Settlement of this Litigation.[1] The terms of the Settlement are set forth in the Stipulation concurrently filed herewith. The Settlement resolves the claims pending in the Litigation arising from a reverse merger wherein privately-held VTB Holdings, Inc. ("VTBH") merged into a Parametric Sound Corporation ("Parametric") subsidiary (the "Merger") and provides an immediate $9.65 million cash benefit in exchange.

This Settlement represents an outstanding result for Parametric and its stockholders at the time of the Merger. The $9.65 million Settlement would represent an additional $1.65 per share benefit, assuming a complete response from all claimants and before deduction of attorneys' fees and costs. This Settlement therefore provides for a cash premium of nearly 12% above Parametric's stock price of $13.96 per share just prior to the close of the Merger, which is a rare and almost unprecedented figure in merger litigation nationwide.

The Settling Parties request that the Court enter the accompanying Order Preliminarily Approving Settlement and Providing for Notice, which will: (a) preliminarily approve the Settlement set forth in the Stipulation; (b) direct mailing of the Notice of Proposed Settlement of Class and Derivative Action ("Notice") and the Proof of Claim and Release form ("Proof of Claim"), materially in the forms of Exhibits A-1 and A-2 to the Stipulation; (c) approve publication of the Summary Notice, materially in the form of Exhibit A-3 to the Stipulation; (d) set deadlines for Class Members to submit claim forms and object to any aspect of the Settlement; and (e) set a date for the Final Approval Hearing at which the Court will consider final approval of the Settlement set forth in the Stipulation, the proposed Plan of Allocation of the Settlement proceeds, and Co-Lead Counsel's request for an award of attorneys' fees and expenses.

[1] All capitalized terms that are not otherwise defined shall have the same definitions as set forth in the Stipulation of Settlement dated November 14, 2019 ("Stipulation"), and filed concurrently herewith.

As explained herein, Co-Lead Counsel believe that the proposed Settlement is an excellent resolution. The proposed Settlement was reached after over six years of contentious litigation, and was negotiated by well-informed, experienced counsel who had the additional insight from a prior mediation with the Honorable Philip Pro (Ret.). The Settlement provides immediate monetary benefits. For these reasons, and the reasons discussed below, Plaintiffs respectfully request that the Court preliminarily approve the Settlement and enter the Order Preliminarily Approving Settlement and Providing for Notice as submitted.

II. THE LITIGATION

After Defendants announced the Merger on August 5, 2013, multiple Parametric shareholders filed suit in San Diego, California (the "California Cases") and in Nevada (the "Nevada Cases").[2]

In December 2013, Defendants filed their Definitive Proxy. Plaintiffs in the Nevada Cases then filed a Motion for Preliminary Injunction and expedited discovery ensued. Defendants produced documents and Plaintiffs' Counsel conducted three depositions: Parametric CEO Kenneth Potashner (December 11, 2013); Craig Hallum VP David Wambeke (December 13, 2013); and Houlihan Lokey Director Daniel Hoverman (December 17, 2013). Ultimately, after full briefing and a lengthy hearing, the Court denied Plaintiffs' Motion for Preliminary Injunction and the Merger closed on January 15, 2014.

Defendants filed a motion to dismiss in June 2014, which the Court denied in September 2014. Defendants subsequently appealed the Court's order to the Nevada Supreme Court, which after briefing and oral argument, issued a Writ of Mandamus on September 14, 2017, instructing the Court to "dismiss the complaint without prejudice to the shareholders' ability to file an amended complaint." In its published opinion, the Supreme Court "[took] this opportunity to clarify *Cohen* and in doing so adopt a clearer standard for recognizing the distinction between direct and derivative corporate shareholder claims in this context." *See Parametric Sound Corp. v. Eighth Judicial Dist. Court of Nev.*, 401 P.3d 1100, 1104 (Nev. 2017).

[2] The California Cases have since been dismissed.

Meanwhile, in August 2016, Lance Mykita filed a complaint for Aiding and Abetting Breach of Fiduciary Duty against Stripes Group, LLC and SG VTB Holdings, LLC, which the Court consolidated into the Litigation in November 2016.

Following remand to this Court, on December 1, 2017, Plaintiffs filed their Amended Class Action and Derivative Complaint (later unsealed in March 2018). Defendants moved to dismiss, which the Court denied on March 27, 2018. In April, Defendants again appealed to the Nevada Supreme Court, which denied Defendants' Petition for a Writ of Mandamus or Prohibition in June 2018.

The Court certified the Class on January 18, 2019. On February 19, 2019, the parties mediated before the Honorable Philip Pro (Ret.), but did not reach a settlement.

The parties engaged in extensive fact discovery. In addition to a massive document production, the parties conducted numerous depositions including: Stephen L. Kearney on behalf of Plaintiff Kearney IRRV Trust (September 18, 2018); Plaintiff Lance Mykita (September 28, 2018); Defendants' valuation expert, John Montgomery (October 31, 2018 and August 21, 2019); Parametric Director James Honore (May 10, 2019); Parametric Director Robert Kaplan (May 17, 2019); Stripes Partner Karen Kenworthy (May 29, 2019); VTBH CFO Bruce Murphy (June 27, 2019); Parametric Director Seth Putterman (July 2, 2019); VTBH Director and Stripes Operating Partner Ronald Doornink (July 11, 2019); Houlihan Lokey Director Mark Dufilho (July 23, 2019); Parametric CFO James Barnes (July 25, 2019); Parametric CEO Kenneth Potashner (deposed a second time on August 8, 2019); VTBH CEO Juergen Stark (August 15, 2019); Parametric Consultant John Todd (August 16, 2019); Plaintiffs' valuation expert, John T. Atkins (August 20, 2019); Stripes Founder and Partner Kenneth Fox (August 22, 2019); Parametric Director Andrew Wolfe (September 5, 2019); and Parametric Director Elwood Norris (September 6, 2019).

On September 27, 2019, Defendants filed motions for summary judgment and seven motions in limine. The same day, Plaintiffs filed a Motion for Sanctions Against Defendants Kenneth Potashner and VTBH for Willful Spoliation of Evidence.

Oppositions to the motions for summary judgment and motions in limine were due on October 15, 2019. Following the previous mediation with Judge Pro, the parties had engaged in

extensive, vigorous, and arm's-length settlement discussions over the course of multiple in-person meetings and conversations. These discussions culminated in a global agreement-in-principle to settle the Litigation in exchange for a combined $9.65 million, reached during the afternoon of Friday, October 11th, the last business day prior to the summary judgment and motion in limine opposition deadline. The parties negotiated the terms over that weekend and on October 15, 2019, the parties executed the Settlement Term Sheet. The parties continued to engage in multiple rounds of arm's-length negotiations regarding the Stipulation of Settlement and related documents, and finalized those papers on November 14, 2019.

III. TERMS OF THE PROPOSED SETTLEMENT

As a result of Plaintiffs' efforts, and in consideration for the Settlement and dismissal with prejudice of the Litigation and the release of the Released Claims, Defendants have agreed to cause the payment of $9.65 million into an interest-bearing escrow account for the benefit of Merger Stockholders. Plaintiffs believe that this is a favorable result that deserves final approval. At this juncture, however, the Court is only asked to preliminarily approve the Settlement and approve the forms and manner of notice.

IV. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL

Rule 23(f) of the Nevada Rules of Civil Procedure provides that a class action shall not be dismissed or compromised without the approval of the court and notice of the proposed compromise must be given to all members of the class in such a manner as the court directs. Similarly, Nevada Rule of Civil Procedure 23.1 requires that a derivative action "not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise must be given to shareholders or members in such manner as the court directs." This is a two-step process: (1) an early (preliminary) review by the trial court, and (2) a final review after notice has been distributed to class members for their comment and objections. *See In re M.L. Stern Overtime Litig.*, No. 07-CV-0118-BTM (JMA), 2009 WL 995864, at *3 (S.D. Cal. Apr.

13, 2009).[3] The "'[s]ettlements of shareholder derivative actions are particularly favored because such litigation "is notoriously difficult and unpredictable."'" *Cohn v. Nelson*, 375 F. Supp. 2d 844, 852 (E.D. Mo. 2005) (citations omitted).

At the first preliminary approval step – where the proposed Settlement is at now – the Court does not make a full and final determination regarding the fairness of the settlement. "Because class members will subsequently receive notice and have an opportunity to be heard," the court "need not review the settlement in detail at this juncture." *M.L. Stern*, 2009 WL 995864, at *3; *see also id*. (citing *Manual for Complex Litigation* §21.632 (4th ed. 2004) ("The judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing.")). The court in *Young v. Polo Retail, LLC*, No. C-02-4546 VRW, 2006 WL 3050861, at *5 (N.D. Cal. Oct. 25, 2006) (quoting from *Newberg on Class Actions*, §11.25 (1992)), explained the preliminary approval guideposts as follows:

> If the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that the notice be given to the class members of a formal fairness hearing. Manual for Complex Litigation, Second §30.44 (1985).

See also Rosenburg v. IBM, No. CV06-00430 PJH, 2007 WL 128232, at *5 (N.D. Cal. Jan. 11, 2007) (preliminary approval granted where "Settlement has no obvious defects and is within the ranges of possible Settlement approval such that notice to the Class is appropriate"); *Satchell v. Fed. Express Corp.*, No. C03-2659 SI, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007) (preliminarily approving non-collusive settlement that had no obvious defects and was within the range of fairness); *Barth v. Heart Check America*, No. 11A646233, 2012 WL 10130292, at *2

[3] Nevada courts, recognizing that Rule 23 is patterned after Rule 23 of the Federal Rules of Civil Procedure, have found that federal authorities and decisions are persuasive in reaching a determination as to whether to approve a proposed class action settlement. *See In re Arena Resources, Inc.*, No. CV10-01069, 2010 WL 7877145 (Nev. Dist. Ct. Sept. 30, 2010) (noting that Rule 23 "mirrors its federal counterpart").

(Nev. Dist. Ct. June 22, 2012) (preliminarily approving settlement that appeared to be "the product of informed arms-length bargaining by counsel" with "no obvious deficiencies").

The proposed Settlement certainly meets these standards.

A. The Proposed Settlement Was the Result of Serious, Informed, Non-Collusive Negotiations

The approval of a proposed class action and derivative settlement is a matter within the sound discretion of the court. *Velsicol Chem. Corp. v. Davidson*, 107 Nev. 356, 357, 811 P.2d 561, 561 (1991) (determination of good faith for purposes of approving a settlement "should be left to the trial court, and the trial court's decision should not be disturbed absent an abuse of discretion"); *see also Maher v. Zapata Corp.*, 714 F.2d 436, 455 (5th Cir. 1983) (when evaluating the fairness of a derivative settlement, "the district court enjoys wide discretion, and in exercising its discretion, the court should not decide the merits of the action or attempt to substitute its own judgment for that of the parties"). There is an initial presumption of fairness for a proposed settlement that results from arm's-length negotiations. *In re OmniVision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2007); *Garner v. State Farm Mut. Auto. Ins. Co.*, No. CV 08 1365 CW (EMC), 2010 WL 1687832, at *13 (N.D. Cal. Apr. 22, 2010) (citing *4 Newberg* §11.41).

Here, the record demonstrates that the proposed Settlement was the product of arm's-length negotiations. The Settling Parties reached the Settlement after over six years of contentious litigation, after analysis of hundreds of thousands of pages of non-public documents, after eliciting testimony from Defendants and numerous witnesses, after extensive motion practice, and during briefing Defendants' motions for summary judgment and motions in limine, which were pending at the time the parties entered into the Settlement Term Sheet. Moreover, the terms of the Settlement were negotiated by well-informed, experienced counsel who had the additional insight from a prior, unsuccessful mediation with the Honorable Philip Pro (Ret.). *See, e.g.*, *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 967 (9th Cir. 2009) (finding the fact that experienced counsel negotiated the settlement as a factor in favor of approval; "'[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation"') (citation omitted); *Satchell*, 2007 WL 1114010, at *4 ("The

assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive."). Thus, the proposed Settlement is entitled to the presumption of fairness.

B. The Settlement Has No Obvious Deficiencies

There is nothing in the record that suggests any, much less any obvious, defects with the Settlement. To the contrary, as demonstrated by the background of this Litigation, the record demonstrates the Settlement was reached only after six years of hard-fought litigation, was negotiated by well-informed, experienced counsel and is the best course of action in this case. And as noted above, the $9.65 million Settlement would represent a cash premium of nearly 12% above Parametric's stock price of $13.96 per share just prior to the close of the Merger, which is an almost unprecedented cash result in merger litigation nationwide.

C. The Settlement Falls Within the Range of Possible Approval

Plaintiffs and Co-Lead Counsel believe that their claims have merit, but they have concluded that the best course of action is to settle the Litigation after considering, without limitation, the following factors: (1) the immediate benefits provided in the Settlement; (2) the fact that Defendants have aggressively challenged liability and damages, and would continue to do so through summary judgment, trial and appeals; (3) the defenses asserted by and available to the Defendants, including their position throughout the Litigation that the allegations in this action had no merit; and (4) the risks and uncertainties in continuing this complex litigation, including an unfavorable decision on Defendants' pending motions for summary judgment, which could have resulted in no monetary recovery at all. These factors, combined with the other factors discussed above (*e.g.*, that the proposed Settlement was the result of serious, informed, non-collusive negotiations, has no obvious deficiencies, and does not grant preferential treatment), demonstrate that the $9.65 million Settlement falls within the range of possible approval and should be preliminarily approved.

V. THE PROPOSED NOTICE SATISFIES DUE PROCESS AND NRCP 23

NRCP 23(d)(3) requires that the court "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 Order Preliminarily Approving Settlement and

Providing for Notice contemplates that within 21 calendar days after its entry (*i.e.*, the Notice Date), the Claims Administrator will mail a copy of the Notice and Proof of Claim to all Class Members and Merger Stockholders who can be identified with reasonable effort, and will post the same documents on www.ParametricShareholderLitigation.com. Not later than 10 calendar days after the Notice Date, the Claims Administrator will cause the Summary Notice to be published once in the national edition of *The Wall Street Journal* and once over a national newswire service. At least 7 business days prior to the Final Approval Hearing, Co-Lead Counsel shall serve on Defendants' counsel and file with the Court proof, by affidavit or declaration, of such mailing and publishing.

The Notice is drafted in plain and easily understood language, clearly and concisely describes the nature of the Litigation and the claims alleged, the definition of the Class, the terms of the proposed Settlement, including the amount of attorneys' fees and litigation expenses to be sought by Co-Lead Counsel, and the reasons for the Settlement. In addition, the Notice explains that any Class Member or Merger Stockholder that so desires may enter an appearance through an attorney, explains the process by which they may object to the Settlement should they so desire, and explains that any judgment entered by the Court will include all Class Members who do nothing. The Notice and Proof of Claim also inform Class Members and Merger Stockholders of the deadline for filing claim forms. This method of notice is reasonable and satisfies NRCP 23, NRCP 23.1, and constitutional due process standards.

VI. CONCLUSION

In the judgment of Co-Lead Counsel, the proposed Settlement is a favorable result. After weighing the benefits of the proposed Settlement against the uncertainty and risks of continued litigation, Co-Lead Counsel believe that the proposed $9.65 million Settlement is fair, reasonable, and adequate, and warrants preliminary approval. Plaintiffs therefore respectfully request the Court to enter the Order Preliminarily Approving Settlement and Providing for Notice.

DATED: November 14, 2019

Respectfully submitted,

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DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION	Case No.: A-13-686890-B Dept. No.: XI **OBJECTOR BARRY WEISBORD'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT**
This Document Relates To: ALL ACTIONS.	

I. INTRODUCTION

The Court should deny Plaintiffs' Motion for Preliminary Approval of the Settlement. Fundamental information, such as why the case is settling for $9.65 million and what percentage of overall class damages this amount represents, is absent from Plaintiffs' proposed notices. Unless the Court believes that this information is unimportant, immaterial or otherwise unnecessary for the purposes of enabling an informed and fair evaluation of the settlement, then this Court is duty bound

to deny the motion without prejudice unless and until Plaintiffs revise their notices to address the glaring deficiencies currently at hand.

While Plaintiffs describe the settlement as "outstanding" and "almost unprecedented," there is no indication as to what percentage of overall damages is being recovered. The $9.65 million may be 99% of total recoverable damages, or less than 1%. Additionally, there is no detail as to why Plaintiffs are settling the lawsuit at this juncture of the litigation or whether Plaintiffs faced any truly unique risks if they proceeded with the litigation. Having just won a major victory over the subpoena directed at whistleblower Joshua Weisbord, Plaintiffs' failure to even mention Mr. Weisbord's documents raises questions. These questions are especially poignant given what Plaintiffs represented about the Weisbord documents in their motion to compel briefing; indeed, according to Plaintiffs, Mr. Weisbord was privy to an internal "full description of [Defendants'] issues and discussions including the ugly transgressions. This is an incredible violation of your fiduciary responsibility to our shareholders . . . You were accurate in what you told him [Weisbord] but there simply is no reason to air our dirty laundry . . . It will get around and kill our stock." Reply in Support of Plaintiff's Motion to Compel at p. 3, on file with the Court. What the Weisbord documents said and how strong they were for Plaintiffs' case remains completely unknown.

Without this and other information, the Court and class members are left at a severe informational disadvantage that effectively precludes them from evaluating the fairness, adequacy, or reasonableness of this settlement. Accordingly, through counsel, Barry Weisbord and several other class members attempted to obtain this information from Plaintiffs.[1] Their efforts were met with obstinate resistance. Instead of cooperating, Class Counsel delayed, obfuscated, and ultimately provided them with a list of reasons why the information being requested was not "necessary." Plaintiffs, as Class Representatives, and Class Counsel, as their attorneys, owe a duty to the unnamed

[1] Robert Masterson, Adam Kahn, and Richard Santulli have expressly supported Barry Weisbord's efforts to obtain information from Plaintiffs and Class Counsel about the proposed settlement. Together with Mr. Weisbord, they owned over 600,000 shares of Parametric Sound Corporation stock as of January 15, 2014. According to the company's Definitive Proxy Statement dated December 3, 2013, the company had approximately 3.4 million shares of common stock outstanding (excluding shares owned or controlled by Defendants and other corporate insiders).

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members of the class. These duties include, among other things, properly informing the class as to the reasons for a proposed, binding settlement. Plaintiffs and Class Counsel have ***not*** fulfilled these duties.

Unnamed class members are currently being forced to blindly decide whether to join or opt out of a settlement. If, as Plaintiffs and Class Counsel claim, the settlement is truly "outstanding," then they should have had no hesitation in providing the information requested. The fact that they refuse speaks volumes. The Court should not allow this settlement to proceed without first ensuring that it and unnamed class members are given all the information to which they are entitled at the preliminary approval stage.

II. RELEVANT BACKGROUND

Plaintiffs filed their motion for preliminary approval of the settlement on November 15, 2019. Plaintiffs also filed a stipulation of settlement with notices that would be sent to class members if the motion was granted. They styled the motion as "unopposed."

On November 18, 2019, Barry Weisbord notified the Court of his preliminary concerns with the notices and requested additional time to review and potentially oppose the motion. Plaintiffs and Defendants were copied on this communication. A copy of the November 18 letter is attached as **Exhibit A**.

On November 25, 2019, having not heard anything in response to their previous letter (other than a reply from the Court), Barry Weisbord (with additional class member support from Robert Masterson) contacted Plaintiffs and Defendants again. The letter reiterated the concerns over the proposed notices. The letter asked for a response by December 2, 2019. A copy of the November 25 letter is attached as **Exhibit B**.

On December 4, 2019, Plaintiffs responded to the November 18 and 25 letters. Their letter did not provide any information (other than confirming that no "side" agreements existed). Instead, Plaintiffs listed several settlements that they claimed did not include the information being requested. The settlements listed were ones in which the Barry Weisbord's counsel was involved. A copy of the December 4 letter is attached as **Exhibit C**.

. . .

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On December 6, 2019, Barry Weisbord, now with support from Robert Masterson, Adam Kahn, and Richard Santulli, contacted the Court again. Their letter described the above correspondence and requested a scheduling conference to set a hearing on Plaintiffs' motion for preliminary approval of the settlement. A copy of the December 6 letter is attached as **Exhibit D**.

On December 9, 2019, Defendants submitted a short response to the December 6 letter. The response effectively supported Plaintiffs' efforts to withhold information from Barry Weisbord and voiced a desire to move forward with the settlement as quickly as possible.

On December 11, 2019, the Court held the telephonic scheduling conference requested by Barry Weisbord, Robert Masterson, Adam Kahn, and Richard Santulli. At that time, the Court set a hearing on the motion for January 13, 2020.

III. ARGUMENT

A. Legal Standard.[2]

While there has historically been a "strong judicial policy" that favors the settlement of class action cases, *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992), the Court must still "carefully scrutinize the settlement to ensure its fairness, adequacy and reasonableness . . . ." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001). "Since the court acts as a fiduciary serving as guardian of the rights of absent class members, it must exercise its independent judgment to protect the interests of class absentees." *Zink v. First Niagara Bank, N.A.*, 155 F. Supp. 3d 297, 308 (W.D.N.Y. 2017) (*citing In re Agent Orange Prod. Liab. Litig.*, 597 F.Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), and *In re Traffic Exec. Ass'n-E. Railroads*, 627 F.2d 631 (2d Cir. 1980)) (internal quotations omitted).

Accordingly, preliminary approval "is not simply a judicial 'rubber stamp' of the parties' agreement." *Id.* (*quoting Martin v. Cargill, Inc.*, 295 F.R.D. 380, 383-84 (D.Minn. 2013)). Instead, "the Court must be particularly scrupulous because preliminary approval establishes an initial

[2] Plaintiffs correctly note in their motion that Nevada courts look to federal law when addressing issues under Rule 23. *See* Plaintiffs' Unopposed Motion and Memorandum of Points and Authorities for Preliminary Approval of Settlement at p. 5 n.3 (citing *In re Arena Resources, Inc.*, No. CV10-01069, 2010 WL 7877145 (Nev. Dist. Ct. Sept. 30, 2010)), on file with the Court.

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presumption of fairness." *Id*. While it is "unusual to deny an application for preliminary approval of a class action settlement," *Brown v. Sega Amusements, U.S.A., Inc.*, 2015 WL 1062409, at 1 n.2 (S.D.N.Y. Mar. 9, 2015), denial is required where the proposed settlement contains "obvious deficiencies" and "fails to adequately protect the interest of absent class members." *Oladapo v. Smart Energy, LLC*, 2017 WL 5956907, at *7 (S.D.N.Y. Nov. 9, 2018), *report and recommendation adopted*, 2017 WL 5956770 (Nov. 30, 2017) (*quoting Karvaly v. eBay, Inc.*, 245 F.R.D. 71, 86 (E.D.N.Y. 2007), and *Zink*, 155 F. Supp. 3d at 314).

Preliminary approval should also be denied where the parties "offer no viable way to gauge the reasonableness of the [proposed settlement]." *Brown*, 2015 WL 1062409, at *4. This may occur where the parties seeking preliminary approval fail "to furnish the court with enough information and evidence to enable it to rationally assess the reasonableness of the proposed consideration." *Zink*, 155 F. Supp. 3d at 313 (*quoting* Rubenstein, *Newberg on Class Actions*, § 13:15 (5th ed.)); *see also Oladapo*, 2017 WL 5956907, at *7.

B. The Parties Offer No Viable Way to Gauge the Reasonableness of the Proposed Settlement.

To satisfy due process, the notice must be "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *In re Prudential Secs. Inc. Ltd. P'Ships Litig.,* 164 F.R.D. 362, 368 (S.D.N.Y. 2006). A notice should contain "information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class." *Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328, 338 (2d Cir. 2006) (*quoting In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1105 (5th Cir.1977)). The proposed notice to the class is inadequate, as explained in the following sections.

1. Plaintiffs are concealing their estimate of the total damages recoverable at trial.

Courts have "more than once denied motions for approval where the plaintiffs 'provide[d] no information about the maximum amount that the putative class members could have recovered if they ultimately prevailed on the merits of their claims.'" *K.H. v. Sec'y of Dep't of Homeland Sec.*, No. 15-

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CV-02740-JST, 2018 WL 3585142, at *5 (N.D. Cal. July 26, 2018) (quoting *Cordy v. USS-Posco Indus.*, No. 12-CV-00553-JST, 2013 WL 4028627, at *4 (N.D. Cal. Aug. 1, 2013)). This is because "any fraction has a denominator, and without knowing what it is the Court cannot balance plaintiffs' expected recovery against the proposed settlement amount." *Cordy*, 2013 WL 4028627, at *4. (citation omitted)). This is "perhaps the most important factor to consider" in preliminary approval. *Cotter v. Lyft, Inc.*, 176 F. Supp. 3d 930, 935 (N.D. Cal. 2016). This requires the court "to explore the facts sufficiently to make an intelligent comparison between the amount of the compromise and the probable recovery." *Id*. (*citing City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974); *Saylor v. Lindsley*, 456 F.2d 896, 904 (2d Cir. 1972)); *see also In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y. 2004) (the Court's "primary concern is with the substantive terms of the settlement and how they compare to the likely result of a trial") (*internal citations and quotations omitted*). Therefore, "the Court must . . . insist that the parties present evidence that would enable possible outcomes to be estimated, so that it can at least come up with a ballpark valuation." *Zink*, 155 F. Supp. 3d at 312 (*quoting Martin*, 295 F.R.D. at 384).

Plaintiffs have utterly failed to do this. They extol the benefits of their $9.65 million settlement but make no disclosure as to exactly what this number represents relative to overall recoverable damages. Unquestionably, if total damages in this matter are $10 million, then the settlement would represent nearly a complete recovery and should be approved immediately. That is extremely unlikely though and, if the settlement is only 1% or 2% of total damages, then the class is certainly entitled to know this. *See Zink*, 155 F. Supp. 3d at 314 ("In determining whether to accept the proposed settlement, a class member would presumably want to know how the proposed settlement amount would compare to his or her maximum potential recovery, yet the notice fails to disclose the maximum possible [recovery].").[3]

Surely the information exists, as Plaintiffs would not have given their consent to Class Counsel to settle the case without knowing it. Accordingly, Barry Weisbord, Robert Masterson,

[3] Indeed, this specific information is required under the PSLRA to be included in a settlement notice, but it is omitted here. *See* 15 U.S.C. §78u-4(a)(7)(B).

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Adam Kahn, Richard Santulli, and other class members and the Court are being left completely in the dark about the reasonableness or fairness of the proposed settlement. Without any indication of what the class might expect to recover at trial, the Court simply cannot "make an intelligent comparison between the amount of the compromise and the probable recovery" as it is required to do before granting preliminary approval. *In re Traffic Exec.*, 627 F.2d at 633.

2. Plaintiffs provide only a boilerplate description of the risks they faced with continued litigation.

Plaintiffs have also failed to supply "enough information to evaluate the strengths and weaknesses of [their] case." *Eddings v. DS Servs. of Am., Inc.*, No. 15-CV-02576-VC, 2016 WL 3390477, at *1 (N.D. Cal. May 20, 2016). Instead, when explaining "why" they are settling the action, Plaintiffs provide a cursory and conclusory statement that "Stockholders will receive compensation, and because Plaintiffs (advised by Plaintiffs' Counsel) considered the Settlement Amount to be a favorable recovery compared to the risk-adjusted possibility of recovery after trial and any appeals." Stipulation, Exhibit A-1, p. 4. More is required. *See K.H.*, 2018 WL 3585142, at *5 (denying preliminary approval of FLSA settlement where "[p]laintiffs have not even attempted to provide 'hypothetical scenarios,' that could produce various expected recoverable damages to measure against the proposed settlement amount" (quoting *Stovall-Gusman v. W.W. Grainger, Inc.*, No. 13-CV-02540-JD, 2014 WL 5492729, at *2 (N.D. Cal. Oct. 30, 2014)); *Hunt v. VEP Healthcare, Inc.*, No. 16-CV-04790-VC, 2017 WL 3608297, at *1 (N.D. Cal. Aug. 22, 2017) ("The motion for preliminary approval makes abstract gestures to the uncertainties of litigation, rather than offering a careful analysis of the claims and the strength or weakness of any potential defenses."); *Eddings*, 2016 WL 3390477, at *1 ("The plaintiffs list legal issues that this case might present and positions that the defendants might take, but they don't analyze those issues or evaluate the strength or weakness of defendants' positions. A party moving for preliminary approval should cite case law and apply it to explain why each claim or defense in the case is more or less likely to prove meritorious.").

In particular, Plaintiffs spent months litigating a subpoena directed to Joshua Weisbord, a former employee of Turtle Beach Corporation. According to motion papers, Mr. Weisbord held

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documents bearing directly on the issues at hand and that proved evidence of fraud.[4] These documents included materials he acquired while working for Turtle Beach Corporation and, importantly, materials from ***before*** his employment showing that various Defendants knew that the merger was based on false financial information and materially misleading disclosures by Parametric Sound Corporation's board of directors. This Court granted Plaintiffs' motion to compel those materials on October 7, 2019; yet, it appears that Plaintiffs settled the case shortly thereafter (October 11, 2019) without even having seen Mr. Weisbord's documents. For such a key piece of evidence, Plaintiffs owe the class some description of how these materials factored into their decision to settle.

Similarly, despite deposing key defendants and witnesses in the litigation (some more than once), Plaintiffs provide no indication as to whether the testimony was favorable or adverse. Stripes Founder and Partner Kenneth Fox, Turtle Beach CEO Juergen Stark, and Craig-Hallum Managing Director David Wambeke, arguably three of the most important witnesses in the case, are hardly mentioned. While their testimony may be confidential, Plaintiffs do not even attempt to describe the impact of that testimony on their theory of the case or whether these witnesses were likely to testify favorably at trial.

These are just two examples of key pieces of information that need to be addressed in the notice. *See Haralson v. U.S. Aviation Servs. Corp.*, 383 F. Supp. 3d 959, 970-71 (N.D. Cal. 2019) (denying motion where notice did not "articulate particularized reasons why the proposed discount is appropriate" in light of strengths and weaknesses of case). Without proper disclosure, the class will be left to guess over whether these materials supported or undermined Plaintiffs' case and, in turn, whether it makes sense to support or opt out of the settlement. If this information is not provided,

[4] Plaintiffs' counsel described the Weisbord documents in their motion to compel dated September 4, 2019 as showing that, "[b]efore voting on the Merger, Potashner and the Outside Directors ***knew*** that VTBH's finances 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." Plaintiffs' Motion to Compel at pp. 2-3, on file with the Court. Plaintiffs' counsel elaborated on the strength and relevancy of the Weisbord documents in reply. In particular, Plaintiffs' counsel points out that, "Weisbord does not state that the allegations of financial misconduct in his whistleblower complaint are limited to issues he discovered while employed by Turtle Beach. Thus, there is evidence that Plaintiffs' request for the Weisbord's documents complies with NRCP Rule 26(b)(1), as it is relevant to Plaintiffs' claims in this case." Reply in Support of Plaintiffs' Motion to Compel at pp. 4, on file with the Court.

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class members may be left with no choice but to intervene and obtain Mr. Weisbord's documents and other materials in order to evaluate the evidence for themselves.

3. There is no discussion of Defendants' ability to satisfy a larger settlement or judgment.

Plaintiffs similarly fail to provide information concerning whether and to what extent Defendants can satisfy a larger judgment. Such a factor is routinely considered by courts when evaluating settlements and, as such, is also one of the main concerns. *See Cabiness v. Educ. Fin. Sols., LLC*, No. 16-cv-01109-JST, 2019 U.S. Dist. LEXIS 50817, at *11-12 (N.D. Cal. Mar. 26, 2019) (recognizing risk to collecting larger judgment); *Ciuffitelli v. Deloitte & Touche Lp*, No. 3:16-cv-00580-AC, 2019 U.S. Dist. LEXIS 61386, at *39 (D. Or. Mar. 19, 2019) (considering available insurance proceeds and other assets to satisfy judgment if case went to trial).

To illustrate, class members who are dissatisfied with the current settlement may ultimately choose to accept it if Defendants are unable to satisfy a larger judgment through trial. No one is interested in litigating a case to completion if, at the end of the day, Defendants do not have assets to satisfy the judgment. However, if Defendants and/or their insurers can pay more, then that fact weighs in favor of pushing forward with the litigation. Plaintiffs' proposed notice makes no mention of an inability to pay or wasting insurance policies on the part of Defendants, thus suggesting that no such issue exists.

4. The Court should allow for objections before the deadline for opting-out of the settlement.

Finally, the schedule for objections and opting out is prejudicial. The current schedule requires class members to file objections and requests for exclusion on the same day (*i.e.*, 21 calendar days before the final approval hearing). *See* Proposed Preliminary Approval Order, ¶¶16, 17. This is problematic because once a class member opts out of a settlement, he no longer has standing to object. *See, e.g.*, *Glass v. UBS Fin. Servs.*, No. C-06-4068 MMC, 2007 U.S. Dist. LEXIS 8476, at *26 (N.D. Cal. Jan. 26, 2007) (citing cases). Accordingly, class members who are dissatisfied with the settlement as it currently stands must exclude themselves if they want to avoid being bound to an agreement that they cannot fully support.

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This is prejudicial. Class action litigation allows individuals to band together to litigate claims that otherwise would not be litigated if left to pursue them alone. "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997). This key policy is no less important now than it was at the beginning of this case.

If the Court allows for the resolution of objections ***before*** the deadline for opting out of the settlement, class members will have the opportunity to raise concerns with the settlement. Depending on the outcome of those objections, class members will ***then*** be able to decide whether to stay in the settlement. Objections may result in better settlement terms for the class or, if overruled by the Court, objecting class members will at least have raised their concerns without prejudice to their ability to exclude themselves later.

C. Plaintiffs and Class Counsel Are Violating Duties Owed to the Class.

The Court, Plaintiffs, and Class Counsel have a duty to represent the best interests of unnamed class members, including Barry Weisbord. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998); *see also Diaz v. Tr. Territory of Pac. Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989) ("The district court must ensure that the representative plaintiff fulfills his fiduciary duty toward the absent class members . . ."). To date, Plaintiffs' responses to requests for information have utterly failed to fulfill that duty.

Plaintiffs' only substantive response was the letter they wrote on December 4, 2019. Aside from waiting more than two weeks to respond to Barry Weisbord, the response contained none of the information requested (except for denying the existence of any "side" or "supplemental" agreements to the settlement). Instead, Plaintiffs devoted nearly six pages to listing examples of past settlements that they said did not include the information being requested. Plaintiffs' reliance on these past settlements is misplaced for two reasons.

First, contrary to Plaintiffs' belief, several settlements cited included the information being sought here. For example, in *Levin v. Resource Capital Corporation*, the plaintiffs again provided the

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total amount of class damages that they believed were recoverable at trial. The plaintiffs also explained why they were opting to settle the case given the litigation risks they faced. A copy of the plaintiffs' settlement notice is attached as **Exhibit E**, p. 5, ¶ 9. Similarly, in *In re Illumina, Inc. Securities Litigation*, the plaintiffs submitted a detailed declaration in support of their request for preliminary approval which, among other things, included the total amount of damages for the class and provided detailed reasons why the settlement was justified in light of particular litigation risks. A copy of the plaintiffs' declaration (without exhibits) is attached as **Exhibit F**, pp. 7-8, ¶¶ 21-24.

Second, whether and to what extent these past settlements included the information currently being requested is irrelevant. Barry Weisbord, Robert Masterson, Adam Kahn, and Richard Santulli were not involved in those cases and, therefore, cannot and should not be bound by circumstances entirely unrelated to the ones at hand. As previously explained, a significant portion of the class is currently requesting more information about a settlement which, for reasons unknown, is not being provided. For the same reasons these class members are unable to evaluate the reasonableness of the settlement, the Court cannot either.

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IV. CONCLUSION

For the reasons set forth above, Barry Weisbord respectfully requests that the Court deny Plaintiffs' Motion for Preliminary Approval of the Settlement; or, in the alternative, order Plaintiffs to supplement the proposed notices to include the following information:

a) Estimated recoverable damages at trial;

b) Substantive description of risks and/or benefits if litigation continued;

c) Defendants' ability to satisfy a larger judgment through personal assets and/or primary and excess insurance policies;

d) Modification of deadlines for objecting and requesting exclusion.

DATED this 23rd day of December, 2019.

McDONALD CARANO LLP

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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 23rd day December, 2019, the foregoing **OBJECTOR BARRY WEISBORD'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT** 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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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.	REPLY IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

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STATUTES, RULES AND REGULATIONS

I. INTRODUCTION

Preliminary Approval is certainly warranted here. This $9.65 million settlement, which is historic in terms of nationwide merger settlements on a percentage basis, is within the range of fairness and was not the product of collusion amongst counsel. Indeed, Barry Weisbord ("Weisbord") does not substantively contend otherwise. Weisbord does argue, however, that the Notice is inadequate. Yet Weisbord submits no relevant authority in support of his arguments.

"'[S]ettlement notices must 'present information about a proposed settlement neutrally, simply, and understandably'. . . . 'Notice is satisfactory if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'" *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 567 (9th Cir. 2019).[1] The proposed Notice is perfectly adequate and is consistent with federal authority, similar notices approved by this Court, as well as notices drafted and represented as adequate by the same counsel now representing Weisbord. This reasonable and customary Notice should be approved.

In contrast, Weisbord makes a number of unusual and unsupported arguments about what he thinks should also go into the Notice. He does not, however, contend that any aspect of the Notice is misleading, unfair, or inaccurately presented. Instead, he demands that more than twenty depositions in this case each be summarized and described in the Notice, despite no known class notice ever doing so. He asks that expert discovery as to damages be provided in the Notice, despite the lack of authority for his request. He contends that the Notice should contain private information about the Individual Defendants' resources to satisfy a judgment, notwithstanding that he cannot identify any notice to contain similar material.

Weisbord also makes an unusual personal request when opposing Preliminary Approval. Barry Weisbord, the individual filing the opposition, is the father of Joshua Weisbord, a third party subject of an earlier motion to compel in this case. Joshua Weisbord is currently embroiled in employment litigation with nominal defendant Turtle Beach Corporation. Here, Barry Weisbord primarily argues that documents held by his son Joshua should be described in the Notice as well.

[1] Unless otherwise noted, all emphasis is added, and citations and footnotes are omitted.

The Weisbords' unique request, whatever the motivation, is likewise supported by no relevant authority. And like his other demands, Weisbord makes no showing that such information in the Notice would be in the interests of the Class at large.

In sum, Preliminary Approval is warranted, the Notice is satisfactory, and Weisbord presents no valid argument to the contrary. Plaintiffs respectfully request that the Court grant the Motion so that the Class can be informed of the Settlement and the process can proceed without further delay.

II. RELEVANT BACKGROUND OF EVENTS SUBSEQUENT TO THE MOTION

Plaintiffs filed the Motion on November 18, 2019. Weisbord sent an initial letter on November 15, 2019 addressed to the Court, not to Co-Lead Counsel, and sought no response from Co-Lead Counsel. The letter identified three areas of "concern" and requested 14 days "to review the stipulation and motion and submit opposition, if necessary." Weisbord chose against filing a timely response to the Motion, which would have been due on November 25, 2019.

On the afternoon of November 25, 2019, the Monday before Thanksgiving, Weisbord sent a letter to Co-Lead Counsel and demanded that a revised notice be provided by the following Monday, December 2, 2019. Co-Lead Counsel responded to the letter five business days later, on December 4, 2019. The response letter provided numerous examples of notices, including notices approved by this Court, that contained similar disclosures as the proposed notice in this case and that did not contain the information cited as "lacking" by Weisbord.

On December 5, 2019, Co-Lead Counsel proposed a reasonable briefing schedule for Weisbord to file an opposition to Plaintiffs' Motion. Weisbord's counsel rejected the proposed schedule and instead sought the Court's intervention in rescheduling the hearing on preliminary approval. Remarkably, Weisbord initially sought to push out a preliminary approval hearing until ***February 2020***. The Court declined Weisbord's invitation for such a lengthy delay and set this hearing.

III. LEGAL ARGUMENT

A. Weisbord Concedes the Settlement Substantively Warrants Preliminary Approval

"At [the] preliminary approval stage, 'the court need only determine whether the proposed settlement is within the range of possible approval.'" *Acuna v. So. Nev. TBA Supply Co.*, 324 F.R.D. 367, 379 (D. Nev. 2018) (citing *Murillo v. Pac. Gas & Elec. Co*., 266 F.R.D. 468, 470 (E.D. Cal. 2010)) (additional quotations omitted). "'The court is really only concerned with whether the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys . . . .'" *Id.* (additional quotations omitted). "Once the court is satisfied as to the certifiability of the class and the results of the initial inquiry into fairness, reasonableness and adequacy of the settlement, notice of a formal Rule 23(e) fairness hearing is given to the class members." *Id.*

Weisbord has presented nothing to cast doubt on whether the settlement is within the range of possible approval, nor has he argued that class representatives or segments of the class received preferential treatment or that attorneys will be excessively compensated. His arguments are limited to the form of the notice. Preliminary approval of the Settlement is therefore warranted here.

B. The Proposed Notice Is Proper

A notice is satisfactory where it "'describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'" *Sinanyan v. Luxury Suites Int'l, LLC*, No. 2:15-cv-00225, 2017 WL 3087278, at *8 (D. Nev. July 20, 2017).

While Co-Lead Counsel could locate no Nevada Supreme Court case law describing what is required in a class action settlement notice, several Nevada federal court opinions confirm that the proposed settlement notice in this case is sufficiently detailed. *See Sinanyan*, 2017 WL 3087278, at *8 (approving notice which "adequately describes the terms of the settlement, informs the class of the proposed award, provides information concerning the time, place, and date of the final approval hearing, and informs absent class members that they may enter an appearance through counsel"; further noting that a class action settlement notice "'is satisfactory if it generally describes the terms

of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard'"); *Acuna*, 324 F.R.D. at 387-88 (approving notice which adequately described the nature of the Rule 23 class and FLSA subclasses, the proposed amounts to be paid to the class members who participate in the settlement, the right to opt-in or request exclusion from the FLSA and Rule 23 classes, and the rights of class members to object to the reasonableness and fairness of the settlement).[2]

The proposed notice in this case:

- Describes the terms of the settlement and informs the class of the proposed award. The notice informs class members that, in exchange for the settlement and a release, Defendants have agreed to pay the settlement amount of $9,650,000, to be distributed pro rata to class members. If 100% of non-insider shares outstanding immediately prior to the close of the Merger submit a claim, each share's average distribution under the settlement will be approximately $1.65 per share, before deductions for taxes, administrative costs, and attorney's fees and expenses. *See* Notice at 2, 5.

- Provides information concerning the time, place, and date of the final approval hearing. *See* Notice at 9.

- Informs absent class members they may enter an appearance through counsel. *See* Notice at 8.

- Describes the nature of the class. *See* Notice at 1-2.

- Informs class members of the right to request exclusion. *See* Notice at 7-8.

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[2] *See also Ruch v. AM Retail Group, Inc*., No. 14-cv-05352-MEJ, 2016 WL 1161453, at *5 (N.D. Cal. Mar. 24, 2016) (court directed that "'Class Notice shall set forth a brief description of the Action, provide the definition of the Settlement Class, inform Potential Class Members of the nature and scope of the settlement of claims, disclose key terms of the settlement including each Potential Class Member's potential individual award, the basis for the calculation of the award, attorneys' fees, and Service Award, inform Potential Class Members of their opportunity to be heard at the Final Settlement Hearing, inform Potential Class Members of their right to submit an objection to any term of the Settlement Agreement, to opt-out of the settlement, and the procedures for doing so, and explain the res judicata effect of not opting out'"); *Jaffe v. Morgan Stanley & Co.*, No. 06-3903-TEH, 2008 WL 346417, at *12 (N.D. Cal. Feb. 7, 2008) (court held that class notice was reasonable where it informed class members of: (1) information about the nature of the litigation, the settlement class, the identity of class counsel, and the essential terms of the settlement agreement; (2) information about class counsel's forthcoming application for attorneys' fees, the proposed service payments to class representative and other payments that will be deducted from the settlement fund; (3) information about how to participate in the settlement; (4) information about the court's procedures for final approval of the settlement agreement and settlement, and about class members' right to appear through counsel if they desire; (5) information about how to challenge or opt-out of the settlement; and (6) instructions as to how to obtain additional information regarding the litigation and the settlement agreement).

- Informs class members of the right to object to the reasonableness and fairness of the settlement. *See* Notice at 9.

The cases cited by Weisbord on the issue of the total potential damages recoverable at trial are distinguishable. The opinions in *K.H. v. Sec'y of Dep't of Homeland Sec*., No. 15-CV-02740-JST, 2018 WL 3585142, at *5 (N.D. Cal. July 26, 2018) and *In re Traffic Exec. Ass'n-E. Railroad*s, 627 F.2d 631, 633 (2d Cir. 1980) were at the ***final*** approval stage, and contained no relevant discussion of the contents of a settlement notice. Similarly, *Saylor v. Lindsley*, 456 F.2d 896, 904 (2d Cir. 1972) involved a plaintiff objecting to a derivative action settlement at the *final* approval stage, and the opinion said nothing about requiring disclosure in the settlement notice of the total potential damages recoverable at trial. *Cordy v. USS-Posco Indus*., No. 12-CV-00553-JST, 2013 WL 4028627, at *4 (N.D. Cal. Aug. 1, 2013), a wage-and-hour proposed class action, and *Cotter v. Lyft, Inc*., 176 F. Supp. 3d 930, 935 (N.D. Cal. 2016), a class action involving monetary damages to Lyft drivers, also contained no discussion of the requirements of a settlement notice. *In re Glob. Crossing Sec. & ERISA Litig*., 225 F.R.D. 436, 455 (S.D.N.Y. 2004) was a securities class action governed by the Private Securities Litigation Reform Act (the "PSLRA"). The PSLRA specifically requires that settlement notices must contain:

> Statement of potential outcome of case – amount of damages per share recoverable if plaintiffs were to prevail on every claim. If the parties are unable to agree on damages, a statement concerning the issues on which the parties disagree.

Id. at 449 (citing 15 U.S.C. §§78u–4(a)(7), 77z-1(a)(7)). The requirements of the PSLRA are not at issue in the present case. In sum, Weisbord has cited no Nevada authority requiring information related to the total potential damages recoverable at trial be disclosed in a settlement notice, and Plaintiffs' counsel has found no Nevada state court authority requiring this information.

The notice approved by this Court in *In re Yongye International, Inc. Shareholder Litigation*, Case No. A-12-670468-B, a shareholder class action involving a merger, is instructive. In that case, co-lead counsel for plaintiffs, which included Levi & Korsinsky, Weisbord's counsel in the instant matter, submitted a proposed notice to this Court. That notice contained none of the information that Levi & Korsinsky and Weisbord now demand be disclosed. The notice in *Yongye* (attached hereto as Ex. A) did not contain a discussion of the class's potential recovery at trial; nor the defendants'

ability to satisfy a judgment; nor a substantive description of the parties' competing outlooks on liability; nor descriptions of key points of evidence. Yet Levi & Korsinsky represented to the Court that the notice was:

> sufficient to inform Settlement Class members about, inter alia: (1) the Settlement Class definition; (2) the terms of the proposed Settlement; (3) the proposed award of attorneys' fees and expenses to Plaintiffs' Counsel; (4) Settlement Class members' right to object to any aspect of the Settlement and the procedures for doing so; (5) the date and time of the Settlement Hearing and Settlement Class members' right to attend the Settlement Hearing; and (6) how to obtain additional information.

See Yongye Motion for Preliminary Approval at 17-18 (Ex. B). This Court approved the proposed order in *Yongye*. *See* Ex. C. The same firm now reverses course and contradicts itself here.

A number of other settlement notices approved in Nevada state and federal courts contain the same level of detail as the proposed notice here. These notices, which are attached, include the following:

- *In re Bally Technologies, Inc. Stockholders Litigation*, Lead Case No. A-14-705012-B (Eighth Judicial Dist. Ct., Clark County). Shareholder class action involving a merger, with Levi & Korsinsky on the executive committee (Ex. D);
- *In re International Game Technology Shareholders' Litigation*, Lead Case No. A-14-704058-B (Eighth Judicial Dist. Ct., Clark County). Shareholder class action involving a merger (Ex. E);
- *Joseph Smith v. One Nevada Credit Union*, Case No. 2:16-cv-02156-GMN-NJK (D. Nev.) (Ex. F);
- *Daniel Acuna v. Southern Nevada T.B.A. Co.*, Case No. 2:16-cv-00457-GMN-(GWF) (D. Nev.) (Ex. G);
- *Alice Sinanyan, et al. v. Luxury Suites International, LLC, et al.*, Case No. 2:15-cv-00225-GMN-VCF (D. Nev.) (Ex. H);
- *Tonya DiMuzio, et al. v. Blazin Wings, Inc. et al.*, Case No. A-18-771424-C (Eighth Judicial Dist. Ct., Clark County) (Ex. I); and
- *In re Aspen Series BB Evaporator Coil Litigation*, Case No. A-14-710463-D (Eighth Judicial Dist. Ct., Clark County) (Ex. J).

C. Weisbord's Arguments Related to Litigation Risks Are Incorrect

Weisbord's argument with respect to Plaintiffs' description of litigation risks is flawed. According to Weisbord, Plaintiffs' "cursory" explanation for settling the action is: "'Stockholders

will receive compensation, and because Plaintiffs (advised by Plaintiffs' Counsel) considered the Settlement Amount to be a favorable recovery compared to the risk-adjusted possibility of recovery after trial and any appeals.'" Opposition at 7. Weisbord then goes on to cite three cases, *Sec'y of Dep't of Homeland Sec*., 2018 WL 3585142, at *5, *Hunt v. VEP Healthcare, Inc*., No. 16-CV-04790-VC, 2017 WL 3608297, at *1 (N.D. Cal. Aug. 22, 2017), and *Eddings v. DS Servs. of Am., Inc*., No. 15-CV-02576-VC, 2016 WL 3390477, at *1 (N.D. Cal. May 20, 2016), for the proposition that "more is required" in a settlement notice. But none of the cited cases even discusses settlement notices to class members.

Instead, those three cases discuss the court's review of preliminary approval motions (not settlement notices). Weisbord fails to cite a single opinion which requires that a settlement notice to class members contain the kind of voluminous evidentiary discussion that he believes should be contained in this notice. That is because such a lengthy evidentiary discussion would run contrary to the requirement that settlement notices present information "neutrally, simply and understandably." *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d at 567.

Barry Weisbord also focuses on a recent motion to compel regarding his son, former Turtle Beach employee Joshua Weisbord. Barry Weisbord argues that "Plaintiffs' failure to even mention [Joshua] Wesibord's documents raises questions. . . . What the Weisbord documents said and how strong they were for Plaintiffs' case remains completely unknown." Opposition at 2. Whatever Barry Weisbord's motivation for this request, this is not a legal basis to deny preliminary approval. The Court granted Plaintiffs' motion to compel on October 7, 2019, ordering Defendants to produce responsive documents to Plaintiffs. Plaintiffs were forced to file the motion because Joshua Weisbord would not identify the subset of relevant documents responsive to the subpoena. During this time, the parties were briefing motions for summary judgment and motions in limine, with Defendants having filed three motions for summary judgment and seven motions in limine on September 27, 2019, and Plaintiffs' oppositions to same due on October 14, 2019. Throughout the week of October 7, the parties were engaged in settlement discussions, and Plaintiffs agreed to the settlement on October 11, 2019. With this posture in mind, Co-Lead Counsel believed it was proper

to "'take the bird in the hand instead of a prospective flock in the bush.'" *Oppenlander v. Standard Oil Co*., 64 F.R.D. 597, 624 (D. Colo. 1974).

Weisbord also takes issue with the fact that Plaintiffs do not describe each of 20+ deponents' deposition testimony and the impact of each deposition testimony on the case. Opposition at 8. Again, Weisbord cites to no legal authorities requiring such disclosures in a settlement notice, and none of the settlement notices cited in §III(A) above provided such information.

D. Weisbord's Additional Arguments Are Also Meritless

Weisbord also faults Plaintiffs for failing "to provide information concerning whether and to what extent Defendants can satisfy a larger judgment." Motion at 9. But, again, Weisbord provides no case law holding that this information should be contained in a settlement notice, and the cases cited in the Opposition are not helpful to his cause. *Cabiness v. Educ. Fin. Sols., LLC*, No. 16-cv-01109-JST, 2019 WL 1369929, at *4-*5 (N.D. Cal. Mar. 26, 2019) involved a motion for ***final*** approval of class action settlement and did not discuss the contents of the settlement notice. *Ciuffitelli v. Deloitte & Touche LP*, No. 3:16-cv-00580-AC, 2019 WL 1441634, at *10 (D. Or. Mar. 19, 2019) did not discuss the issue of whether a settlement notice should contain information related to the defendants' ability to satisfy a judgment. Moreover, none of the notices cited in §III(A) above discussed the defendants' ability to satisfy a judgment.

Weisbord also states that the proposed schedule should allow for the resolution of objections before the deadline for opting out of the settlement. Opposition at 9-10. But the deadlines proposed by Plaintiffs are customary in class actions, and none of the settlement notices referenced in section III(A) provide for an opt-out deadline after the resolution of objections. The objection and exclusion deadline proposed by Weisbord would unnecessarily delay the final resolution of this case, as the Court would have to hold a final approval hearing and consider objections, then delay entry of the final judgement until some unknown later date for stockholders to decide whether to opt-out. There is simply no precedent for this procedural quagmire. Allowing Weisbord to both object and then decide later whether to opt-out is patently unfair to other class members, who deserve a fair and efficient resolution to this action.

Finally, as noted in §II above, Weisbord's argument that Plaintiffs and Class Counsel are violating duties owed to the Class is frivolous. Aside from the six years of vigorous litigation that preceded the settlement, Co-Lead Counsel has timely communicated with Weisbord's counsel and proposed a reasonable briefing schedule for filing an opposition to the Motion, which allowed Weisbord more time than would be allowed under the local rules. Weisbord rejected the offer. Plaintiffs and Co-Lead Counsel have vigorously litigated this case for the past six years at significant expense and have obtained a considerable and highly favorable result in this litigation.

E. Weisbord Fails to Discuss His Counsel's Prior Role in This Litigation

Weisbord's Opposition fails to apprise the Court of his counsel, Levi & Korsinsky's, prior role in this litigation. On September 6, 2013, Levi & Korsinsky, counsel for a representative plaintiff in this case, Vitie Rakauskas, was appointed as Co-Lead Counsel in this action, along with current Co-Lead Counsel Saxena White P.A. ("Saxena White"). After Robbins Geller Rudman & Dowd LLP ("Robbins Geller") intervened, the Court appointed a new leadership structure. On April 29, 2014, the Court named Robbins Geller and Saxena White as Co-Lead Counsel, removing Levi & Korsinsky as Co-Lead Counsel and placing them on the Executive Committee. Levi & Korsinsky later removed itself from the Executive Committee after its client chose not to sit for deposition or be actively involved in the litigation going forward. It is unclear whether Levi & Korsinsky still represents Rakauskas and whether Rakauskas also now opposes receiving notice of the settlement.

IV. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court enter the Order Preliminarily Approving Settlement and Providing Notice, and approve the proposed notice.

DATED: January 6, 2020

Respectfully submitted,

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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 the Court's Electronic Filing System on all participants as follows:

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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' RESPONSE TO OBJECTOR BARRY WEISBORD'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT**

Director Defendants,[1] Defendant VTB Holdings, Inc., Specially Appearing Defendants Stripes Group, LLC and SG VTB Holdings, LLC (collectively, "Defendants"), respectfully submit this Response to Objector Barry Weisbord's ("Objector Weisbord") Opposition to Plaintiffs' Motion for Preliminary Approval of Settlement. To avoid burdening the Court with a repetition of arguments, Defendants respectfully join in Plaintiffs' Reply in Support of Motion for Preliminary Approval of Settlement and incorporate the arguments made therein by reference. Defendants submit this short supplement to highlight one specific shortcoming in the Opposition: its reliance on documents related to Plaintiffs' subpoena directed to Objector Weisbord's son, Joshua Weisbord (the "Weisbord Documents").

Objector Weisbord is not just any purported absent class member. His son, Joshua Weisbord, is a former employee of nominal defendant Turtle Beach Corporation ("Turtle Beach") and is currently suing the company in California state court regarding the termination of his employment in May 2016. Trial in that case was scheduled to begin on January 6, 2020, but was continued until April. Turtle Beach hired Joshua Weisbord as an employee in May 2014—more than three months after the close of the Merger—and he worked for Turtle Beach for two years. Turtle Beach fired Joshua Weisbord in May 2016 because he had developed a history of inappropriate behavior around other employees and had repeatedly refused to remedy that behavior. *See* Turtle Beach's Opp. Pls.' Mot. to Compel at 2 (Sept. 20, 2019), on file with the Court. Joshua Weisbord then filed suit against Turtle Beach, in which he alleged his firing was in retaliation for filing a whistleblower complaint in 2016—over two years after the Merger. *Id.* at 2–3. Joshua Weisbord's complaint against Turtle Beach does not mention the Merger, Parametric, HyperSound, HHI, Stripes, any of the Director Defendants, or any of the facts that appear in the Amended Complaint in this case. *See* App. Exs. Pls.' Mot. to Compel Def. Turtle Beach to Produce or Allow Production of Weisbord Documents, at Ex. A (Sept. 4, 2019), on file with the Court.

Objector Weisbord mischaracterizes the Weisbord Documents as "key pieces of evidence" Plaintiffs have a duty to describe to the class. Obj. Barry Weisbord's Opp. to Pls.' Mot. for Prelim.

[1] Director Defendants are Defendants Kenneth F. Potashner, Elwood G. Norris, Seth Putterman, Robert M. Kaplan, and Andrew Wolfe.

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Approval of Settlement, at 7–8 (Dec. 26, 2019), on file with the Court. Nothing could be further from the truth. The Weisbord Documents constitute more than 400,000 pages of documents produced by Joshua Weisbord in his unrelated employment action that arose years after the Merger at issue here. As such, describing the Weisbord Documents in the class notice would inject irrelevant information into an already complicated document, waste the time of the parties and the Court, and likely confuse the class members. *See, e.g.*, *Tinoco v. Hajoca Corp.*, No. 17-6187, 2019 WL 4239130, at *11 (C.D. Cal. June 18, 2019) ("As a general rule, class notice must strike a balance between thoroughness and the need to avoid unduly complicating the content of the notice and confusing class members.").[2] The fact that Objector Weisbord purports to be curious about what those documents contain (although it is hard to believe he does not know their contents given his undoubted access to them for many years) does not under any circumstances warrant denial of Plaintiffs' Motion for Preliminary Approval. *See, e.g.*, *Melito v. Am. Eagle Outfitters, Inc.*, No. 14-2440, 2017 WL 3995619, at *15 (S.D.N.Y. Sept. 11, 2017) ("If [the objector] has objected that the release was confusingly worded or that the terms of the settlement were unclear, then her objection might have gained more traction. Instead, her objection appears to be that she did not receive all the information she wanted in the Class Notice. But that is not the standard for the adequacy of a Class Notice.").

At bottom, Objector Weisbord's motives in opposing Plaintiffs' Motion for Preliminary Approval are suspect.[3] Additionally, as amply described in Plaintiffs' Reply, his arguments in

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[2] Given that Rule 23 of the Nevada Rules of Civil Procedure is patterned after its Federal equivalent, Nevada courts find federal authorities and decisions persuasive in analyzing the sufficiency of a proposed class action settlement. *See In re Arena Resources, Inc.*, No. 10-01069, 2010 WL 7877145, at * (D. Nev. Sept. 30, 2010).

[3] In fact, it appears that Objector Weisbord may be filing his Objection to further his son's interests in his employment-related litigation with Turtle Beach rather than to further any interest of the class members.

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opposition are unsupported legally and factually. Plaintiffs' Motion for Preliminary Approval should therefore be granted.

Dated: January 7, 2020

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As an employee of Snell & Wilmer L.L.P., I certify that I served a copy of the foregoing **DEFENDANTS' RESPONSE TO OBJECTOR BARRY WEISBORD'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT** on the 7th day of January 2020, via e-service through Odyssey File and served to the email addresses listed below:

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

In re PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION	Lead Case No. A-13-686890-B Dept. No. XI
	CLASS ACTION
This Document Relates To: ALL ACTIONS.	PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION, AND AN AWARD OF ATTORNEYS' FEES AND EXPENSES
	HEARING REQUESTED

MOTION

COMES NOW Plaintiffs Kearney IRRV Trust and Lance Mykita, by and through their counsel of record, and hereby submit this Motion for Final Approval of Settlement and Approval of Plan of Allocation, and an Award of Attorneys' Fees and Expenses.

This Motion is made and based upon the attached Memorandum of Points and Authorities, the declarations submitted in support thereof, the Stipulation of Settlement filed November 15, 2019, and all exhibits attached thereto, all papers and pleadings on file herein, and any and all oral arguments this Court may entertain at the time of hearing.

DATED: April 17, 2020

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Kearney IRRV Trust and Lance Mykita in the above-captioned Litigation[1] respectfully submit this memorandum in support of their motion for: (1) final approval of the Settlement of this Litigation; (2) approval of the Plan of Allocation; and (3) a Fee and Expense Award to Co-Lead Counsel and a service award for Plaintiffs.[2]

This Settlement – the result of over six years of contentious litigation – represents an outstanding result for Parametric and its stockholders. At a relatively early stage in this case, the Nevada Supreme Court opted to "clarify" the law on direct/derivative claims and essentially left this case for dead. Plaintiffs and Co-Lead Counsel, however, brought the claims back to life and then aggressively and efficiently prosecuted this matter to the brink of trial and obtained what we believe to be the second largest post-merger class action settlement in Nevada state court history and the largest in Nevada history on a percentage-of-deal-size-basis. Plaintiffs and Co-Lead Counsel prosecuted every stage of the litigation against multiple defendants, who were represented by some of the best capitalized and most respected law firms in the world. Plaintiffs and Co-Lead Counsel refused to settle at lesser amounts and were prepared to take this case to trial. But after lengthy arms-length settlement negotiations, Plaintiffs reached a resolution of the Litigation that appropriately balances the risk of trial with the strong claims built through wide-ranging discovery.

The $9.65 million Settlement would represent an additional $1.65 per share benefit, assuming a complete response from all claimants and before deduction of attorneys' fees. This represents a cash premium of nearly 12% above Parametric's stock price of $13.96 per share just prior to the close of the Merger, which is an almost unprecedented figure in merger litigation

[1] This memorandum incorporates by reference the definitions in the Stipulation of Settlement filed with the Court on November 15, 2019 (the "Stipulation"). Unless otherwise defined, all capitalized terms used herein shall have the same meanings as set forth in the Stipulation.

[2] The Court is respectfully referred to the accompanying Joint Declaration of David A. Knotts and Adam D. Warden in Support of Plaintiffs' Motion for Final Approval of Settlement and Approval of Plan of Allocation, and an Award of Attorneys' Fees and Expenses ("Joint Declaration" or "Joint Decl.") for a full factual background and litigation history.

nationwide. *See* Joint Decl., ¶¶14-15 (providing examples where Delaware courts have recognized recent settlements of stockholder merger cases with price bumps in the 2% range as "excellent" and "noteworthy").

This Settlement is also a remarkable achievement considering the size and revenues of Parametric. In its 2012 fiscal year, Parametric had revenues of $233,649 and recorded $113,507 in gross profit. Parametric had not recognized a total of more than $1 million in annual revenues in its entire corporate existence prior to the Merger. In fact, this $9.65 million Settlement more than ***doubled*** the total revenues generated from Parametric's HyperSound technology for the entirety of its decade-long existence as a publicly traded company, including to the present day. A settlement of $9.65 million in additional cash for a Company that had recognized $233,649 in annual revenues for the fiscal year preceding the Merger is a truly extraordinary litigation recovery.

More generally, it is rare that post-merger litigation results in ***any*** monetary recovery at all. *See* Ravi Sinha, *Shareholder Litigation Involving Acquisitions of Public Companies – Review of 2015 and 1H 2016 M&A Litigation*, at 5 (Cornerstone Research 2016) (Joint Decl., Ex. B) (reporting that, among the hundreds of stockholder merger-related lawsuits filed during 2015 and the first half of 2016, only six of those cases resulted in any monetary recovery for stockholders). Double-digit percentage recoveries are even more uncommon. *Id*. This cash Settlement's standing amongst such few others highlights the favorable nature of this result, relative to the extreme risk in litigating post-merger cases.

The clear benefits of the Settlement, weighed against the significant risks for this case if Plaintiffs took this case to trial, demonstrate that the Settlement is a favorable result that deserves final approval. Further, Co-Lead Counsel respectfully submit that the requested attorneys' fees are fair and reasonable and, in light of the risks undertaken, the diligent efforts of counsel, and the outstanding results obtained, should be approved by the Court. The costs and expenses requested by Co-Lead Counsel are similarly reasonable, were necessary for the successful prosecution of the Litigation, and should be awarded. Finally, the service award requested for Plaintiffs is reasonable, given their robust involvement in the multi-year litigation, and should be granted.

For the reasons set forth herein and in the declarations submitted concurrently herewith, Plaintiffs respectfully request that the Court grant this Motion.

II. THE SETTLEMENT IS FAIR AND REASONABLE AND MERITS THE COURT'S APPROVAL

The approval of a proposed class action and derivative settlement is a matter within the sound discretion of the court. *Doctors Co. v. Vincent*, 120 Nev. 644, 650-51, 98 P.3d 681, 686 (2004) ("[T]he determination of a good-faith settlement 'should be left to the discretion of the trial court based upon all relevant facts available.'") (quoting *Velsicol Chem. Corp. v. Davidson*, 107 Nev. 356, 360, 811 P.2d 561, 563 (1991)); *In re Hewlett-Packard Co. S'holder Derivative Litig.*, 716 F. App'x 603, 605 (9th Cir. 2017).[3]

In approving a class and derivative action settlement, the Court considers whether the settlement was "fair, adequate, and reasonable." *Pincay Invs. Co. v. Covad Commc'ns Grp., Inc.*, 90 F. App'x 510, 511 (9th Cir. 2004); *Clarke v. Advanced Private Networks, Inc.*, 173 F.R.D. 521, 524 (D. Nev. 1997). Relevant factors guiding the Court's review include the risk, expense, complexity, and likely duration of further litigation, the benefits achieved in the settlement, the stage of the proceedings, the experience and views of counsel, and the reaction of class members to the proposed settlement. *Pincay*, 90 F. App'x at 511; *Hewlett-Packard*, 716 F. App'x at 605.

Nevada courts recognize, as do federal courts, that the law and public policy favor settlements and compromises, entered into fairly and in good faith between competent persons. *Malfabon v. Garcia*, 111 Nev. 793, 797, 898 P.2d 107, 109 (1995) (recognizing "the benefits provided by the settlement of cases and the laudable policy to effectuate them"); *see also Browning v. MCI*, No. 3:00-cv-00633-ECR-VPC, 2010 U.S. Dist. LEXIS 75736, at *20-*21 (D. Nev. June 30, 2010) (citing *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 626 (9th Cir. 1982)); *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) (the Ninth Circuit "has long deferred to the private consensual decision of the parties"). Thus, courts reviewing settlements recognize that:

[3] Unless otherwise noted, all emphasis is added, and citations and footnotes are omitted.

> [T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.

Officers for Justice, 688 F.2d at 625. "'In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.'" *Nat'l Rural Telecommc'ns Coop. v. DIRECTV, Inc*., 221 F.R.D. 523, 526 (C.D. Cal. 2004). The Ninth Circuit defines the limits of the inquiry to be made by the court in the following manner:

> [T]he settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits. Neither the trial court nor this court is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what ***might*** have been achieved by the negotiators.

Officers for Justice, 688 F.2d at 625; *see also Maher v. Zapata Corp.*, 714 F.2d 436, 455 (5th Cir. 1983) (when evaluating the fairness of a derivative settlement, "in exercising its discretion, the court should not decide the merits of the action or attempt to substitute its own judgment for that of the parties").

Class actions readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation. It is beyond question that "the public has 'overriding interest in securing "the just, speedy, and inexpensive determination of every action."'" *Browning*, 2010 U.S. Dist. LEXIS 75736, at *21 (quoting *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1227 (9th Cir. 2006); Fed. R. Civ. P. 1). This is "'particularly true in class action suits.'" *Gong-Chun v. Aetna Inc.*, No. 1:09-cv-01995-SKO, 2012 U.S. Dist. LEXIS 96828, at *38 (E.D. Cal. July 12, 2012).

Similarly, "'[s]ettlements of shareholder derivative actions are particularly favored because such litigation "is notoriously difficult and unpredictable."'" *Cohn v. Nelson*, 375 F. Supp. 2d 844, 852 (E.D. Mo. 2005). "As the Ninth Circuit has recognized, '[T]he odds of winning [a] derivative

lawsuit [are] extremely small.'" *In re Atmel Corp. Derivative Litig*., No. C 06-4592 JF (HRL), 2010 U.S. Dist. LEXIS 145551, at *42 (N.D. Cal. Mar. 31, 2010).

A. The Benefit Achieved in the Settlement

Here, the Settlement provides a $9.65 million all-cash recovery. Plaintiffs' counsel believes this Settlement is the second largest post-merger class settlement in Nevada state court history.[4] This benefit is significant in light of the risks present in the instant case and in stockholder merger-related litigation generally.

By way of background, Parametric owned patents in a single technology called HyperSound, which was supposed to beam sound at listeners, similar to how a flashlight directs rays of light. Joint Decl., ¶8. The commercial opportunities for such a technology, if it worked, were endless. As this Litigation progressed over the years, however, it became clear that the technology was not as commercially viable as promised. *Id*. The following chart identifies the total publicly reported revenues of Parametric since its inception as a publicly traded Company, both as an independent entity and as recorded through its HyperSound segment revenues following the Merger:

Parametric/HyperSound Total Revenue 2010-2019	
Fiscal Year	Revenue
FY2010	$607,037
FY2011	$79,167
FY2012	$233,649
FY2013	$562,902
FY2014	$707,000
FY2015	$912,000
FY2016	$655,000
FY2017	$307,000
FY2018	$59,000
FY2019	$0.00

[4] Co-Lead Counsel believes the largest post-merger settlement in Nevada state court was *In re Force Protection, Inc. S'holder Litig.*, Case No. A-11-651336-C (Clark Cnty. Dist. Ct. Mar. 17, 2015), which was a $11 million settlement on a merger valued at about $360 million, representing a common fund recovery of roughly 3% of the deal size.

TOTAL REVENUES ALL-TIME	$4,122,755

Id.

In sum, Parametric's technology has delivered a grand total of $4,122,755 in revenues through the Company's decade-long existence as a publicly traded entity. *Id*., ¶9. This settlement of $9,650,000, however, has produced an asset over twice that total amount. While Co-Lead Counsel believed that the misconduct by the Defendant fiduciaries and their aiders and abettors was severe and warranted liability, we also believe that this Settlement represents an excellent result in a case where the damages ultimately depended upon the value of HyperSound technology. *Id*.

Generally, monetary recoveries of ***any*** size in merger-related stockholder actions are rare. For example, a study concerning stockholder litigation over corporate mergers and acquisitions of public companies, Cornerstone Research reported that, among the hundreds of lawsuits filed during 2015 and the first half of 2016, only six of those cases resulted in any monetary recovery for stockholders. *See id*., ¶13. The study found that, in merger-related litigation, "[m]onetary consideration paid to shareholders has remained relatively rare." *Id*.

Moreover, the monetary recovery here exceeds the average recovery in shareholder merger litigation. The Settlement provides for a cash premium of nearly 12% above Parametric's stock price of $13.96 per share just prior to the close of the Merger. To provide some data points of comparison, in the case believed to be the largest post-merger class settlement in Nevada state court history, *Force Protection*, the price bump was approximately 3%. *Id*., ¶12 n.2.

In addition, the post-merger case in *Starz* concluded with a $92.5 million settlement. *Id*., ¶14. At the settlement hearing, plaintiffs' counsel explained that the settlement was approximately $0.75 per share on a $35.52 deal price, representing a price bump of about 2.1%. *Id*. The Delaware Court of Chancery recognized that this was an "excellent settlement" and explained "it is apparent to me that it would be unreasonable to oppose this settlement on grounds that it was insufficient to the class." *Id*.

The post-merger claims in *Del Monte* were resolved in an $89.4 million settlement. *Id*., ¶15. That was about $0.45 per share on a deal price of $19.00 per share, or approximately 2.4%. *Id*. The

Delaware Chancery court explained: "In my view, the monetary consideration obtained here was considerable, noteworthy, and is certainly adequate for the purposes of settlement." *Id*.

Examworks was another recent settlement reflecting approximately a 7% price bump. *Id*., ¶16. The Delaware Court of Chancery described *Examworks* as "a meaningful bump over the deal price." *Id*.

In this context, the Settlement provides immediate monetary benefits that represents an uncommon ***double-digit*** percentage recovery. Accordingly, this factor favors the Court granting final approval of the Settlement.

B. The Settlement Represents a Significant Amount of the Potential Damages, which Further Warrants Approval

"'It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair.'" *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (finding one-sixth of the potential recovery as fair and adequate). This settlement is well above the typical results in complex stockholder litigation. In fact, the District of Nevada has explained that ***3.5%*** of the total amount recoverable at trial is a reasonable recovery in a securities case:

> At oral argument, counsel for Plaintiffs Brian O'Mara represent that the Settlement Amount is about 3.5% of the maximum damages that Plaintiffs believe could be recovered at trial. This amount is within the median recovery in securities class actions settled in the last few years and not unreasonable in light of the risks, expenses, and likely duration of further litigation in this action. *See SEC v. Cioffi*, 868 F. Supp. 2d 65, 2012 U.S. Dist. LEXIS 84195, 2012 WL 2304274, at *6 n.5 (E.D.N.Y. June 18, 2012) (citing to a recent article that estimated that median recovery in settled securities-fraud class actions hovered between 2% and 3% of median loss from 2002-2010, and fell to 1.3% of median loss in 2011). Settlement here yields immediate and certain recovery for the Settlement Class Members thereby eliminating the risks associated with continued litigation.

IBEW Local 697 Pension Fund v. Int'l Game Tech., Inc., No. 3:09-cv-00419, 2012 U.S. Dist. LEXIS 151498, at *9-*10 (D. Nev. Oct. 19, 2012). Similarly, in *Wells Fargo*, the Northern District of California noted the following when approving a $480 million common fund settlement:

> Even accepting the high estimate that the class is settling claims worth $3.063 billion, the Settlement provides the class with a greater than 15 percent recovery. This recovery is higher than recoveries achieved in other securities fraud class actions of similar size (over $1 billion in estimated damages), which settled for

> median recoveries of 2.5 percent between 2008 and 2016, and 3 percent in 2017. *Id.* (citing Cornerstone Research, Securities Class Action Settlements, 2017 Review and Analysis, at 8 (2018)). Accordingly, the amount of the Settlement also weighs in favor of approval.

Hefler v. Wells Fargo & Co., No. 16-cv-5479-JST, 2018 U.S. Dist. LEXIS 213045, at *24-*25 (N.D. Cal. Dec. 17, 2018); *see also, e.g.*, *In re Extreme Networks, Inc. Sec. Litig*., No. 15-cv-4883, 2019 U.S. Dist. LEXIS 121886, at *27 (N.D. Cal. July 22, 2019) (based on expert calculations, "[t]he gross settlement amount thus represents a recovery of between 5% and 9.5% of non-disaggregated damages and between 19% to 54% if disaggregated arguments are credited," approving settlement).

Here, Plaintiffs' expert J.T. Atkins, Managing Director and head of Cypress Associates LLC, determined that "[a]s of January 15, 2014, the Merger Date, the intrinsic value of Parametric was approximately $203.6 million or $24.43 per share. As of that date, the value of Turtle Beach was approximately $300.5 million." Joint Decl., ¶77. Atkins determined that "[b]y obtaining 80.3% of the combined company, Turtle Beach shareholders received approximately $404.6 million in value, when Turtle Beach was valued at approximately $300.5 million. The $104.1 million difference represents damages incurred by Parametric shareholders and the Company. This equates to damages of approximately $12.49 per share." *Id.*[5]

On the other hand, Defendants utilized John Montgomery, Ph.D., Senior Managing Director at Ankura Consulting Group, also in New York. Montgomery purported to accept all allegations in the operative complaint as true and, based on those allegations and the underlying evidence, concluded as follows:

> [M]y estimates of alleged damages are based on the alleged failure of defendants involved in merger negotiations in early August 2013 to take into account VTBH's weakening financial outlook, specifically the decline in the outlook for the second half of 2013 alleged in the Amended Complaint paragraphs 122-123. I calculate the impact the weaker outlook for VTBH would have had on the valuation metrics calculated by Craig-Hallum. Assuming that a reduced equity value for VTBH should have led to a reduced number of shares issued by PAMT to purchase VTBH,

[5] Atkins also calculated an aggregate damages figure for the Company of $163.4 million if the Court or jury awards damages based on the total intrinsic value of all Company shares received and/or expropriated by Defendants in the Merger. *Id*.

> I calculate the implied reduction in the number of shares issued and the impact that fewer shares outstanding would have had on the price of PAMT shares. This impact on the share price is my estimate of maximum alleged dilution or equity expropriation per share, and I calculate this impact as $1.26 per share.

Id., ¶81.

As noted above, this Settlement (assuming a complete response) would represent an additional $1.65 per share cash recovery for stockholders. This represents over 132% of Defendants' maximum estimated recoverable damages and 13% of Plaintiffs' estimated recoverable damages. Taking the average of the two estimates of maximum recoverable damages ($6.88 per share), this settlement would represent about ***25% of recoverable damages***. *Id*., ¶82.

Under any metric, this represents an outstanding result. Take, for instance, the only two successful post-trial verdicts for plaintiffs on breach of fiduciary duty class cases in the past decade in the Delaware Court of Chancery: *Dole* and *Rural/Metro*. In *Dole*, the plaintiffs' expert calculated damages at $11.77 per share and after a prevailing at trial, the court awarded the plaintiffs $2.74 per share, or 23.2% of the damages sought. *See In re Dole Food Co., Stockholder Litig.*, No. 9079-VCL, 2015 Del. Ch. LEXIS 223 (Del. Ch. Aug. 27, 2015). In *Rural/Metro*, the plaintiffs' expert calculated midpoint damages at $7.99 per share and after prevailing at trial, the court awarded the plaintiffs $4.17 per share, or 52% of the damages sought. *See In re Rural/Metro Corp. Stockholders Litig.*, 102 A.3d 205 (Del. Ch. 2014). That is, even if Plaintiffs had taken this case to trial and won (which is never certain), it would have been an uphill battle to obtain even the majority of the damages their expert estimated. And, as noted above, when compared to other pre-trial settlements, the recovery obtained in this settlement is ***well above*** what is typically approved as fair and reasonable in complex stockholder litigation. *See, e.g.*, *Int'l Game Tech.*, 2012 U.S. Dist. LEXIS 151498, at *9 (approving 3.5% recovery of potential damages). The Settlement should be approved for this additional reason.

C. The Risk, Expense, Complexity and Likely Duration of Further Litigation

In weighing the clear benefits of the Settlement, Plaintiffs – with the assistance of Co-Lead Counsel – considered the substantial risks with respect to both liability and damages. The risks of further litigation, which are detailed in the Joint Declaration, are discussed below.

1. Potashner

A Nevada court will reach the merits of a director's decision only if a plaintiff can '"rebut the presumption that a director's decision was valid by showing either that the decision was the product of fraud or self-interest or that the director failed to exercise due care in reaching the decision.'" *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev. 369, 377, 399 P.3d 334, 343 (2017).

Here, Plaintiffs and Co-Lead Counsel believed that they had amassed enough evidence to make this showing with respect to Ken Potashner, Parametric's Executive Chairman. Joint Decl., ¶60. Plaintiffs and Co-Lead Counsel were prepared to demonstrate that Potashner was a disloyal and self-interested executive, who neglected his fiduciary duties to the Company and its shareholders in order to advance his interests in Parametric's subsidiary HHI, in which he had an equity stake. *Id*. Among other things, Plaintiffs obtained a number of telling emails demonstrating that Potashner entered the Merger "in the first place" just to "build a multi-billion dollar HHI and benefit from it." *Id*., ¶61.

At the same time, Plaintiffs and Co-Lead Counsel were aware of the risk posed by Defendants' counterarguments. *Id*., ¶62. For instance, Potashner testified that he still ultimately personally lost millions of dollars in the Merger in light of his ownership in Parametric stock. *Id*. The Corporate Defendants thus argued that, "if anything" Potashner was incentivized not to pursue the Merger in order to keep his HHI stock options intact. *Id*.

Further, Potashner agreed to cancel his HHI stock options before the Board voted on the Merger. *Id*., ¶63. Thus, the Director Defendants argued that Potashner's HHI stock options "in no way induced the Director Defendants to vote in favor of the merger." *Id*. Indeed, the Director Defendants filed a motion *in limine* seeking to exclude evidence concerning the HHI stock options.

Id. While Plaintiffs argued that Potashner's Merger negotiations were tainted by his focus on the HHI issue, if Director Defendants' motion *in limine* on this issue was granted, or if the Court determined at trial that Potashner was not tainted by his interest in HHI, Plaintiffs' claims would have been significantly undercut. *Id*.

In addition to the above, Potashner argued that his various acts of misconduct had no causal impact on the Merger's exchange ratio, and Plaintiffs would still have to prove damages at trial (which was an uncertain endeavor as discussed below). *Id*., ¶¶63-64. While Plaintiffs would have strenuously disputed Defendants' arguments, it was far from certain that a finder of fact, or the Nevada Supreme Court, would ultimately agree with Plaintiffs. The Settlement eliminates this risk.

2. The Outside Director Defendants

Under Nevada's business judgment rule, "directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation." NRS 78.138(3). And even if that presumption is rebutted, a director will only be liable for damages if it is proven that the director's action, or failure to act, constituted a breach of his fiduciary duties and involved intentional misconduct, fraud, or a knowing violation of law. NRS 78.138(7).

In light of these statutes, after deposing Outside Director James Honore, Plaintiffs agreed to dismiss him for no compensation after Co-Lead Counsel concluded that there was not enough evidence of personal misconduct by Honore sufficient to overcome Nevada's statutory protections. Joint Decl., ¶66. As for the other Outside Directors, emails and Board records indicated that, at the same meeting they were voting on the Merger, some of the directors requested a bonus of $50,000 (or some average of the bonuses granted to Parametric's executives) in connection with their work during the evaluation of Parametric's strategic alternatives. *Id*., ¶67. These were troubling actions. Defendants, however, argued that these requests were not material. *Id*. The Director Defendants even filed a motion *in limine* to exclude evidence concerning these bonus discussions which, if granted, may have eliminated the breach of fiduciary duty claims against these directors. *Id*. In addition, like Potashner, other Outside Directors, including Norris, also lost

significant sums of money on the Merger. *Id*. Holding these directors personally liable on a Merger where they already lost money may have been an uphill battle, even despite the misconduct at issue.

3. VTBH, Stripes, and SG VTB

To succeed in their aiding and abetting claim, Plaintiffs would be required to show that the Corporate Defendants "knowingly and substantially participated in or encouraged that breach" of fiduciary duty. *Guilfoyle v. Old Monmouth Stock Transfer Co*., 130 Nev. 801, 812-13, 335 P. 3d 190, 198 (2014).

In this regard, Plaintiffs were prepared to show that the Corporate Defendants manipulated Potashner by leading him to believe that he still had a shot at obtaining a role with the Company and/or its HHI subsidiary post-close. Joint Decl., ¶¶68-69. On the other hand, Defendants repeatedly claimed "no collusion" and argued that discovery had failed to yield any such evidence of collusion. *Id*.

Plaintiffs were also prepared to show that that the Corporate Defendants concealed VTBH's deteriorating financial picture leading up to the Merger. *Id*., ¶¶68, 70. While no clear Nevada law was on point, Delaware cases have held that a target company's financial advisor can be held liable for aiding and abetting when it "knows that the board is breaching its duty of care and participates in the breach by misleading the board or creating the informational vacuum." *RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 862 (Del. 2015). This theory has never been applied to a third-party acquirer and it is unknown whether this Court would agree to apply *RBC* in the context of this case. Joint Decl., ¶70.

In addition, the Corporate Defendants argued that they were not liable for including allegedly misleading financial disclosures in Parametric's proxy statement, that Parametric's proxy statement in fact informed shareholders about VTBH's declining financial performance in late 2013, and that the Parametric Board (or, at least Potashner) already knew all about VTBH's financial troubles. *Id*., ¶71. Although Plaintiffs were prepared to and did make counterarguments to each of these positions, there was a risk that the fact-finder may have found Defendant's factual and legal arguments persuasive. *Id*.

4. Equity Expropriation Legal Issues

In this Litigation, Defendants also raised a threshold argument against liability, which if successful, would have resulted in the dismissal of the direct claims in this action, no matter how extreme the underlying misconduct. *Id*., ¶73. Specifically, Defendants argued that an equity expropriation claim – which was the only direct claim available here – required a pre-existing majority or controlling stockholder to receive the benefit of the expropriated equity. *Id*. Defendants argued: "Even under the most expansive view of equity expropriation espoused by older Delaware Chancery Court cases – which the Delaware courts now treat as abrogated by a more recent Delaware Supreme Court decision – a shareholder plaintiff would need to prove that a majority of the corporation's board of directors issued shares to a third party with whom they had a pre-existing affiliation, to whom they owed fiduciary duties and/or from whom they lacked independence." *Id*.; *see, e.g.*, *See Feldman v. Cutaia*, 956 A.2d 644, 657 (Del. Ch. 2007) (an equity expropriation claim "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").

Co-Lead Counsel believed that Plaintiffs would prevail on these legal arguments, but the evolving state of Delaware law presented an uncertain risk. Joint Decl., ¶73. For example, if Plaintiffs prevailed at trial, Defendants would appeal. *Id*. In that instance, and based on the time to resolve the previous appeal, Plaintiffs' success may very well depend on the state of Delaware law as it exists two or three years from now. *Id*. It is impossible to tell where Delaware law will end up years from now on an evolving issue like equity expropriation. *Id*.

5. Damages

In addition to the risks of losing on liability, there was a risk that Plaintiffs could lose on the issue of damages. *Id*., ¶¶74-83. As noted above, in its 2012 fiscal year, Parametric had revenues of $233,649 and recorded $113,507 in gross profit. The Corporate Defendants argued that the Merger was the "only means of saving their nearly insolvent company, whose prospects were growing worse with each passing day." *Id*., ¶74. In contrast to these arguments, Parametric's

contemporaneous long-term projections showed promising growth and Defendants stood behind these projections in the proxy they issued to Parametric stockholders. *Id*. Nevertheless, Parametric's lack of commercial success was a factor in the settlement decision. *Id*.

Moreover, while Plaintiffs and Co-Lead Counsel were confident that the Merger presented an unfair exchange ratio, they would have to win the "battle of experts." *Id*., ¶¶75-83. The damages assessments of the parties' experts varied substantially. *Id*. Defendants also received a fairness opinion from a respected financial advisor, Craig Hallum, regarding the deal price. *Id*., ¶83. If Plaintiffs' expert's opinion were accepted, damages could be significant. *Id*. If Defendants' expert or Craig Hallum's calculations were accepted, damages would be zero. *Id*. Plaintiffs thus faced the prospect of winning the liability phase at trial, but recovering nothing and losing the case. *Id*. That is precisely what happened in the *Trados* litigation – plaintiffs proved breaches of fiduciary duty in a merger at trial, but the Court of Chancery found that the price was fair and damages were zero. *See In re Trados Inc. S'holder Litig.*, 73 A.3d 17 (Del. Ch. 2013). The same thing happened more recently in *PLX*. *See In re PLX Tech. Stockholders Litig.*, No. 9880-VCL, 2018 Del. Ch. LEXIS 336, at *6-*7 (Del. Ch. Oct. 16, 2018) ("The plaintiffs proved that Potomac, through Singer, knowingly participated in the directors' breaches of duty. . . . The plaintiffs did not prove any causally related damages. . . . Judgment is therefore entered in favor of Potomac."). Joint Decl., ¶83.

6. The Risk of Appeal

Finally, even if Plaintiffs were to prevail at trial, the risks would not end there. *See In re Mfrs. Life Ins. Co. Premium Litig*., MDL No. 1109, 1998 U.S. Dist. LEXIS 23217, at *17 (S.D. Cal. Dec. 21, 1998) (explaining that "even if it is assumed that a successful outcome for plaintiffs at summary judgment or at trial would yield a greater recovery than the Settlement – which is not at all apparent – there is easily enough uncertainty in the mix to support settling the dispute rather than risking no recovery in future proceedings"). There are many cases in the class action context in which a successful verdict has been overturned either by motion after trial or an appeal. *See, e.g.*, *Glickenhaus & Co. v. Household Int'l, Inc*., 787 F.3d 408 (7th Cir. 2015) (reversing a jury verdict in a securities fraud class action after 13 years of litigation on loss causation grounds and

error in jury instructions); *Hubbard v. BankAtlantic Bancorp, Inc*., 688 F.3d 713 (11th Cir. 2012) (finding trial court erred, but defendants nevertheless entitled to judgment as a matter of law based on lack of loss causation in securities fraud class action); *El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248 (Del. 2016) (reversing post-trial judgment that awarded $171 million in damages to shareholder class). Derivative suits are also notoriously difficult to achieve success after final appeals are exhausted. *See Atmel Corp.*, 2010 U.S. Dist. LEXIS 145551, at *42.

The risk was heightened in this matter. *See* Joint Decl., ¶¶84-86. As discussed in the Joint Declaration, the Nevada Supreme Court had already sided once with the Defendants in 2017 when it overturned this Court's denial of the Defendants' motions to dismiss. *Id*., ¶84. When ruling in Defendants' favor on the appeal, the Nevada Supreme Court made concerning statements about the merits of the case *in dicta*. *Id*., ¶86. For example, regarding Plaintiffs' claim for damages, the Supreme Court stated: "We note that, according to the proxy statement, in Parametric's fiscal year ending September 30, 2013, Parametric had a gross profit of approximately $271,000. Turtle Beach's gross profit for the same period totaled approximately $63,725,000. Thus, Parametric shareholders were retaining a 20 percent interest in a combined entity expected to be significantly more profitable." *Parametric Sound Corp. v. Eighth Jud. Dist. Court of Nev*., 133 Nev. 417, 420 n.5, 401 P.3d 1100, 1102 n.5 (2017). Regarding the Break-Up License, the Supreme Court likewise stated: "Go-shop provisions are included in many merger agreements, providing sellers an opportunity to solicit other buyers for a certain time period." *Id*. at 420 n.8. While these observations were non-dispositive, they were concerning regarding the Nevada Supreme Court's overall outlook for this case. In other words, to prevail here, Plaintiffs would not only need to win at trial, but they would also have to prevail on Defendants' inevitable appeal before a Nevada Supreme Court that already expressed skepticism on these very claims for relief.

D. The Parties Have Engaged in Sufficient Pretrial Discovery and Proceedings to Identify the Strengths and Weaknesses of Their Cases

The stage of the proceedings and the amount of discovery completed is another factor which courts consider in determining the fairness, reasonableness, and adequacy of a settlement. *Officers for Justice*, 688 F.2d at 625. While formal discovery is ""not a necessary ticket to the

bargaining table,"'" *Mego Fin.*, 213 F.3d at 459, here the parties have conducted significant fact and expert discovery sufficient to permit an informed decision about the Settlement.

As detailed above and in the Joint Declaration, by the time the parties reached the Settlement, Plaintiffs had thoroughly investigated and researched the merits of their claims and the potential defenses to determine that the terms of the Settlement are fair, reasonable, and adequate. Joint Decl., ¶¶21-57.

The Settlement was reached only after Co-Lead Counsel completed full fact and expert discovery, which allowed them to develop a deep understanding of the relevant factual and legal issues underlying the claims in this case. *Id*. The Settling Parties reached the Settlement after over six years of contentious litigation, after analysis of over 700,000 pages of non-public documents, after eliciting testimony from Defendants and numerous witnesses, after extensive motion practice including litigating this case to the Nevada Supreme Court and then reviving the claims after the Supreme Court reversed this Court's denial of a motion to dismiss, after drafting and filing a 72-page post-Supreme Court complaint that contained 248 citations to documents and record-evidence obtained through discovery to that point, after expert discovery, and after briefing Defendants' three motions for summary judgment and seven motions *in limine*, which were pending at the time the parties entered into the Settlement. *Id*. Moreover, the terms of the Settlement were negotiated by well-informed, experienced counsel who had the additional insight from a prior, unsuccessful mediation with the Honorable Philip Pro (Ret.). *Id*., ¶45.

There is no question that the parties reached an agreement to settle the Litigation at a point when they had a fully informed understanding of the legal and factual issues involved in the case. *See Mego Fin.*, 213 F.3d at 459. Having sufficient information to properly evaluate the case, Plaintiffs agreed to settle the Litigation on favorable terms without the substantial expense, risks, uncertainty, and delay of continued litigation. Where, as here, the settlement is the product of serious, informed, and non-collusive negotiations, "'the trial judge . . . should be hesitant to substitute its own judgment for that of counsel.'" *Nat'l Rural*, 221 F.R.D. at 528.

E. The Opinion of Experienced Counsel

Experienced counsel, negotiating adversarially and at arm's length, have weighed the factors discussed above and endorse the Settlement. "'Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation.'" *Id.*

Courts give considerable weight to counsel's view because the settlement represents the result of a process by which opposing parties attempt to weigh and balance the factual and legal issues that neither chooses to risk litigating to final resolution. *See In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995); *see also Kirkorian v. Borelli*, 695 F. Supp. 446, 451 (N.D. Cal. 1988) ("The recommendation of experienced counsel carries significant weight in the court's determination of the reasonableness of the settlement."). "The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980) ("the fact that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight"), *aff'd*, 661 F.2d 939 (9th Cir. 1981); *see also In re NVIDIA Corp. Derivative Litig.*, No. C-06-06110-SBA (JCS), 2008 U.S. Dist. LEXIS 117351, at *12 (N.D. Cal. Dec. 22, 2008) ("significant weight should be attributed to counsel's belief that settlement is in the best interest of those affected by the settlement").

Here, Co-Lead Counsel are skilled M&A litigators with vast experience in litigating corporate takeover class and derivative actions on behalf of aggrieved shareholders. *See* Declaration of David A. Knotts Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Robbins Geller Decl."); Declaration of David C. O'Mara Filed on Behalf of the O'Mara Law Firm, P.C. in Support of Application for Award of Attorneys' Fees and Expenses ("O'Mara Law Firm Decl."); Declaration of Adam D. Warden Filed on Behalf of Saxena White P.A. in Support of Application for Award of Attorneys' Fees and Expenses ("Saxena White Decl."). Defendants were likewise represented by experienced and accomplished counsel – according to the *National Law Journal*'s 2019 NLJ 500 ranking of firms based on size, Holland & Hart, L.L.P. has 404 attorneys and is ranked 110th

in the United States; Dechert L.L.P. has 940 attorneys and is ranked 41st in the United States; and Sheppard Mullions Richter & Hampton, L.L.P. has 714 attorneys and is ranked 61st in the United States.

Co-Lead Counsel for Plaintiffs and counsel for Defendants negotiated the Settlement at arm's length and jointly entered into and submitted the Stipulation to the Court. All parties' counsel believe that the Settlement is fair and reasonable.

F. The Reaction of the Class

"[T]he fact that the overwhelming majority of the class willingly approved the offer and stayed in the class presents at least some objective positive commentary as to its fairness." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). While the time to object has not yet expired, Plaintiffs have not yet received a substantive objection to the financial terms of the settlement. Plaintiffs will respond to any such objections under the terms of the Court's Preliminary Approval order.

III. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE

Assessment of a plan of allocation of settlement proceeds is governed by the same standards of review applicable to the settlement as a whole – the plan must be fair and reasonable. *See In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000); *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1284 (9th Cir. 1992). Courts enjoy "broad supervisory powers over the administration of class-action settlements to allocate the proceeds among the claiming class members . . . equitably." *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978). An allocation formula need only have a reasonable, rational basis, particularly if recommended by "experienced and competent" class counsel. *White v. NFL*, 822 F. Supp. 1389, 1420 (D. Minn. 1993); *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 596 (S.D.N.Y. 1992).

The Plan of Allocation here provides an equitable basis to allocate the Net Settlement Fund. This Litigation involved one inextricably intertwined "dual natured" direct class claim for equity expropriation and a derivative dilution claim based on the same merger. *See, e.g.*, *Parametric*, 133 Nev. at 429 ("Delaware courts . . . have recognized that a certain class of equity dilution claims, equity expropriation claims, have a dual nature, being both direct and derivative

shareholder claims."). Under the terms of this Merger, on January 15, 2014, Parametric issued millions of shares to Turtle Beach stockholders, which had a *pro rata* dilutive impact on the pre-Merger Parametric stockholders. The Plan of Allocation therefore works to match the recovery with those harmed, *i.e.*, Parametric stockholders the moment before the Merger closed on January 15, 2014. As a result, the Net Settlement Fund will be distributed *pro rata* to those very same Parametric stockholders diluted in the Merger.

Especially under a "dual natured" derivative and direct claim, as here, "substantial authority supports a court's ability to grant a *pro rata* recovery [to former stockholders] on a derivative claim." *In re El Paso Pipeline, L.P. Derivative Litig.*, 132 A.3d 67, 75, 120-29, n.72 (Del. Ch. 2015) (collecting dozens of cases across multiple jurisdictions awarding *pro rata* stockholder recovery in derivative cases), *rev'd on other grounds*, 152 A.3d 1248 (Del. 2016). As noted above, the Nevada Supreme Court looked to Delaware law to define the contours of these dual natured claims. *See Parametric*, 133 Nev. at 428-29. Delaware courts, in turn, frequently approve dual natured direct and derivative settlements through a *pro rata,* or "pass through," recovery directly to the harmed stockholders. *See, e.g.*, *Gerber v. EPE Hldgs. LLC*, C.A. Nos. 5989-VCN and 3543-VCN (Del. Ch. July 1, 2014) (dual natured direct and derivative claims; settlement involved direct payment to unit-holders at the time of the merger); *In re Clear Channel Outdoor Hldgs. Inc., Deriv. Litig.*, Consol. C.A. No. 7315-CS (Del. Ch. Sept. 9, 2013 (derivative action settled through dividend paid directly to stockholders); *Davis v. Holmes*, C.A. No. 638-N (Del. Ch. June 23, 2006) (derivative action created a $3.2 million settlement fund distributed to unaffiliated stockholders); *In re Freeport-McMoran Copper & Gold Inc. Deriv. Litig.*, Consol. C.A. No. 8145-VCN (Del. Ch. Apr. 7, 2015) (derivative action settled through $147.5 million special dividend payment to affected stockholders). The Plan of Allocation distributes, *pro rata*, the Net Settlement Fund to those Authorized Claimants; thus, the plan should be approved.

IV. THIS SETTLEMENT SATISFIES THE FACTORS FOR A GOOD FAITH SETTLEMENT UNDER NEVADA LAW

In *Doctors Co.*, the Nevada Supreme Court held that a good faith settlement determination is within the sound discretion of the District Court. In assessing the settlement, the Court should

consider all relevant facts and may consider "the amount paid in settlement, the allocation of the settlement proceeds among plaintiffs, the insurance policy limits of settling defendants, the financial condition of settling defendants, and the existence of collusion, fraud or tortious conduct aimed to injure the interests of non-settling defendants." *See Doctors Co.*, 98 P.3d at 651-52 (citing *In re MGM Grand Hotel Fire Litig.*, 570 F. Supp. 913, 927 (D. Nev. 1983)). Although the *MGM* factors may be relevant, they are not exclusive. For example, the Court can also consider the "strengths and weaknesses of the contribution or indemnity claims." *Doctors Co.*, 98 P.3d at 652.

As described extensively herein, all relevant factors are satisfied. In particular: (1) the Settlement Amount of $9.65 million is reasonable in light of the Defendants' potential liability; (2) the *pro rata* allocation of the Settlement proceeds; (3) the lack of any collusion, fraud, or tortious conduct in the Settlement; and (4) the Settlement was reached after lengthy, arm's-length negotiations that included mediation conducted by a retired U.S. District Court Judge. This Settlement therefore meets all relevant factors for the Court to determine it a good faith settlement under Nevada law.

V. CO-LEAD COUNSEL'S FEE AND EXPENSE REQUEST AND A SERVICE AWARD FOR PLAINTIFFS IS REASONABLE

Co-Lead Counsel have succeeded in obtaining a $9.65 million cash settlement. As detailed herein and in the accompanying Joint Declaration, the recovery was achieved solely through the skill, hard work, and effective advocacy of Co-Lead Counsel in the face of considerable risk. As compensation for their efforts in achieving this result, Co-Lead Counsel seek an award of attorneys' fees of 25% of the Settlement Amount, plus expenses incurred in the prosecution of the above-captioned litigation of $741,064.49. The requested fee is consistent with numerous decisions in this Court and throughout the United States, and is warranted in light of the recovery obtained, the efforts of counsel in obtaining this favorable result, and the significant risks in bringing and prosecuting this action.

A. A Reasonable Percentage of the Fund Recovered Is the Appropriate Method for Awarding Attorneys' Fees in Common Fund Cases

It has long been recognized that a '"litigant "who expends attorneys" fees in winning a suit which creates a fund from which others derive benefits [to] require those passive beneficiaries to

bear a fair share of the litigation costs.'" *Guild, Hagen & Clark, Ltd. v. First Nat'l Bank*, 95 Nev. 621, 623, 600 P.2d 238, 239 (1979). The purpose of this doctrine is '"fairness to the successful litigant, who might otherwise receive no benefit because his recovery might be consumed by expenses; correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; encouragement of the attorney for the successful litigant, who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that he will be promptly and directly compensated should his efforts be successful.'" *Id.*; *see also In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) ("*WPPSS*") (the purpose of this doctrine is to avoid unjust enrichment so that "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it"). This rule, known as the "common fund" doctrine, is firmly rooted in American jurisprudence. *See, e.g.*, *Trustees v. Greenough*, 105 U.S. 527, 529, 26 L. Ed. 1157, 1159 (1882); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 124-25, 5 S. Ct. 387, 391-92 (1885).

Similarly, in Nevada, "'the method upon which a reasonable fee is determined is subject to the discretion of the court,'" which "'is tempered only by reason and fairness.'" *Shuette v. Beazer Homes Holdings Corp*., 121 Nev. 837, 864, 124 P.3d 530, 548-49 (2005). "Accordingly, in determining the amount of fees to award, the court is not limited to one specific approach; its analysis may begin with any method rationally designed to calculate a reasonable amount, including those based on a 'lodestar' amount or a contingency fee." *Id.*

For their efforts in obtaining the monetary recovery in this Litigation, Co-Lead Counsel seek a reasonable percentage of the fund recovered as attorneys' fees. The rationale for compensating counsel in common fund cases on a percentage basis is sound. First, the percentage method of awarding fees has become an accepted, if not the prevailing, method for awarding fees in common fund cases. In *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989), *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990), *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370 (9th Cir. 1993), and *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002), the Ninth Circuit expressly approved the use of the percentage

method in common fund cases. Supporting authority for the percentage method in other Circuits is overwhelming.[6] Since *Paul, Johnson* and its progeny, district courts in the Ninth Circuit have almost uniformly shifted to the percentage method in awarding fees in common fund class actions. Second, it is consistent with the practice in the private marketplace where contingent fee attorneys are customarily compensated by a percentage of the recovery. Third, it more closely aligns the lawyers' interests in being paid a fair fee with the interests of the class in achieving the maximum possible recovery in the shortest amount of time.

B. The Legal Standards Governing the Award of Attorneys' Fees in Common Fund Cases Support the Requested Award

Regardless of the method used to determine a fair fee, the guiding principle is that a fee award be "'reasonable under the circumstances.'" *WPPSS*, 19 F.3d at 1296. In Nevada, the basic elements to be considered in determining the reasonable value of an attorney's services are: "the advocate's professional qualities, the nature of the litigation, the work performed, and the result." *Shuette*, 121 Nev. at 865. An award of 25% of the recovery obtained is entirely "reasonable" under these criteria.

1. The Result Achieved

Courts have consistently recognized that the result achieved is a major factor to be considered in making a fee award. *Morales v. Stevco, Inc*., No. 1:09-cv-00704 AWI JLT, 2012 U.S. Dist. LEXIS 68640, at *41 (E.D. Cal. May 16, 2012); *Hensley v. Eckerhart*, 461 U.S. 424, 436, 103 S. Ct. 1933, 1941 (1983) ("most critical factor is the degree of success obtained"); *In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 630 (D. Colo. 1976) ("the amount of the recovery, and end result achieved are of primary importance, for these are the true benefit to the client"); *Behrens*

[6] Courts in other Circuits favor or require the percentage-of-recovery approach for the award of attorneys' fees in common fund cases. Two Circuits have ruled that the percentage method is mandatory in common fund cases. *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774-75 (11th Cir. 1991). Other Circuits and commentators have expressly approved the use of the percentage method. *Gottlieb v. Barry*, 43 F.3d 474, 483 (10th Cir. 1994); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988) (citing footnote 16 of *Blum* recognizing both "implicitly" and "explicitly" that a percentage recovery is reasonable in common fund cases); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000); Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 254 (3d Cir. Oct. 8, 1985).

v. Wometco Enters., Inc., 118 F.R.D. 534, 547-48 (S.D. Fla. 1988) ("The quality of work performed in a case that settles before trial is best measured by the benefit obtained."), *aff'd*, 899 F.2d 21 (11th Cir. 1990).

Here, a significant and certain recovery of $9.65 million in cash has been obtained through the substantial efforts of Co-Lead Counsel. As detailed in §II.C above and in the Joint Declaration, there were significant legal and factual roadblocks to obtaining a more favorable outcome in the Litigation. Despite these obstacles to recovery, Co-Lead Counsel secured an outstanding result. The result obtained supports the requested fee.

2. The Nature of the Litigation – the Risks of the Litigation and the Novelty and Difficulty of the Questions Presented

Numerous cases have recognized that the risk, novelty, and difficulty of the issues presented are important factors in determining a fee award. *E.g.*, *Vizcaino*, 290 F.3d at 1048; *WPPSS*, 19 F.3d at 1299-1301. Uncertainty that an ultimate recovery would be obtained is highly relevant in determining risk. *WPPSS*, 19 F.3d at 1300; *see also In re Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.*, No. 02-ML-1475-DT (RCx), 2005 U.S. Dist. LEXIS 13627, at *44 (C.D. Cal. June 10, 2005) ("The risks assumed by Class Counsel, particularly the risk of non-payment or reimbursement of expenses, is a factor in determining counsel's proper fee award.").

There is no question that from the outset the litigation presented a number of sharply contested issues of both fact and law and that Plaintiffs faced formidable defenses to liability and damages. *See* §II.C, above. The Settlement is a favorable result given these risks. This is a rare monetary settlement in a stockholder class action challenging the merger of a public company, which underscores the uniquely favorable outcome of this Litigation.

3. The Skill Required and the Quality and Efficiency of the Work

The "'prosecution and management of a complex national class action requires unique legal skills and abilities.'" *Heritage Bond*, 2005 U.S. Dist. LEXIS 13627, at *39. Co-Lead Counsel are nationally known in the fields of merger and complex litigation. *See, e.g.*, Robbins Geller Decl.; O'Mara Law Firm Decl.; Saxena White Decl. The quality of the representation is demonstrated by the certain and substantial benefit achieved and the efficient and effective

prosecution and resolution of the Litigation under difficult and challenging circumstances. From the outset of the Litigation, Co-Lead Counsel engaged in a concerted effort to obtain the maximum recovery achievable. Co-Lead Counsel committed considerable resources and time in the research, investigation, and prosecution of this case. Based upon Co-Lead Counsel's diligent efforts and their skill and reputation, Co-Lead Counsel were able to negotiate a favorable result under difficult and challenging circumstances. Such quality, efficiency, and dedication support the requested fee.

The quality of opposing counsel is also important in evaluating the quality of the work done by Co-Lead Counsel. *See, e.g.*, *In re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977); *King Res.*, 420 F. Supp. at 634. Co-Lead Counsel were opposed in the Litigation by skilled defense counsel from top 100 U.S. law firms with well-deserved reputations for vigorous advocacy in the defense of complex civil cases such as this. In the face of this opposition, Co-Lead Counsel were able to develop their case so as to persuade Defendants to settle the Litigation for a substantial sum of money. The requested award of attorneys' fees is also reasonable considering these efforts and results.

4. The Contingent Fee Nature of the Case and the Financial Burden Carried by Co-Lead Counsel

A determination of a fair fee must include consideration of the contingent nature of the fee and the difficulties which were overcome in obtaining the Settlement.

> It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases. *See* Richard Posner, *Economic Analysis of Law* §21.9, at 534-35 (3d ed. 1986). Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose. . . .

WPPSS, 19 F.3d at 1299. Courts thus recognize that "[c]ounsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed and counsel faced serious risks since both trial and judicial review are unpredictable. Counsel advanced all of the costs of litigation, a not insubstantial amount, and bore the additional risk of unsuccessful prosecution." *In re Prudential-Bache Energy Income P'ships Sec. Litig.*, MDL No. 888, 1994 U.S. Dist. LEXIS 6621, at *16 (E.D. La. May 18, 1994).

Indeed, the risk of no recovery in complex cases of this type is very real. There are numerous stockholder actions in which plaintiffs' counsel expended thousands of hours and yet received no remuneration whatsoever despite their diligence and expertise. "Precedent is replete with situations in which attorneys representing a class have devoted substantial resources in terms of time and advanced costs yet have lost the case despite their advocacy." *In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 994 (D. Minn. 2005). Even plaintiffs who get past summary judgment and succeed at trial may find a judgment in their favor overturned on appeal or on a post-trial motion. For example, as noted above, in the *Trados* litigation, plaintiffs proved breaches of fiduciary duty in a merger at trial, but the Court of Chancery found that the price was fair and damages were zero. Joint Decl., ¶83. The same thing happened more recently in *PLX*. *Id*.

Because the fee in this matter was entirely contingent, the only certainties were that there would be no fee without a successful result and that such a result would be realized only after considerable and difficult effort. Co-Lead Counsel committed significant resources of both time and money to the vigorous and successful prosecution of this post-close merger action. Co-Lead Counsel advanced all the time and expenses in this action – which were substantial – for over six years, assuming all of the risks of the litigation during that time without being paid a dime. The contingent nature of counsel's representation and its staying power for an extended period of time strongly favors approval of the requested fee.

C. A 25% Fee Award Is Consistent with Awards in Similar Complex, Contingent Litigation

Courts often look to fees awarded in comparable cases to determine if the fee requested is reasonable. *See Vizcaino*, 290 F.3d at 1050 n.4. If this case was non-representative, contingent litigation, the customary fee would be in the range of 30% to 40% of the recovery. As the Supreme Court observed in *Blum*: "In tort suits, an attorney might receive ***one-third of whatever amount the plaintiff recovers***." *Blum v. Stenson*, 465 U.S. 886, 903*, 104 S. Ct. 1541, 1551* (1984) (concurring); *Ikon*, 194 F.R.D. at 194 ("in private contingency fee cases, particularly in tort matters, plaintiffs' counsel routinely negotiate agreements providing for ***between thirty and forty percent of any recovery***"); *In re M.D.C. Holdings Sec. Litig.*, No. CV 89-0090 E (M), 1990 U.S.

Dist. LEXIS 15488, at *22 (S.D. Cal. Aug. 30, 1990) ("In private contingent litigation, fee contracts have traditionally ranged ***between 30% and 40% of the total recovery***.").

Here, the requested fee is below that customary range and below recent awards by this Court and others in similar stockholder actions. *See, e.g.*, *In re Force Protection, Inc. S'holder Litig.*, Case No. A-11-651336-C (Clark Cty. Dist. Ct.) (awarding 30% fee in merger-related stockholder class action); *In re ClubCorp Holdings LLC S'holders Litig*., Case No. A-17-758912-B (Clark Cty. Dist. Ct.) (awarding 33.3% fee in merger-related stockholder class action); *In re Epicor Software Corp. S'holder Litig*., No. 30-2011-00465495-CU-BT-CXC, slip op. (Orange Cnty. Super. Ct. Oct. 24, 2014) (awarding 30% fee in merger-related stockholder class action); *In re ITC Holdings Corp. S'holder Litig*., No. 2016-151852-CB, slip op. (Oakland Cnty. Cir. Ct. Sept. 25, 2017) (awarding 30% fee in merger-related stockholder class action).

D. The Reaction of the Class and the Approval of the Requested Percentage by Plaintiffs Support the Award of a 25% Fee

While the objection deadline has not yet passed, to date, no Class Members have objected to the requested fee.

E. The Requested Fee Is More Than Reasonable Under a Lodestar Cross-Check Analysis

Although Co-Lead Counsel seek a fee based on a percentage of the recovery, "[a]s a final check on the reasonableness of the requested fees, courts often compare the fee counsel seeks as a percentage with what their hourly bills would amount to under the lodestar analysis." *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1048 (N.D. Cal. 2007).

Here, Plaintiffs' counsel committed 15,387.05 hours of attorney and paraprofessional time prosecuting this action. The resulting lodestar is $8,036,895.25.[7] The requested fee of 25% equals $2,412,500.00. Thus, the requested fee represents a ***negative*** 0.3 multiplier of counsel's lodestar.

[7] Plaintiffs' counsel have submitted time and expense declarations setting forth their hours expended on the Litigation and the fees incurred in prosecuting the action. *See* Robbins Geller Decl.; O'Mara Law Firm Decl.; Saxena White Decl.; Declaration of Richard A. Maniskas Filed on Behalf of RM Law, P.C. in Support of Application for Award of Attorneys' Fees and Expenses ("RM Decl."); Declaration of Joshua E. Fruchter Filed on Behalf of Wohl & Fruchter LLP, in Support of Application for Award of Attorneys' Fees and Expenses ("Wohl Fruchter Decl.").

The negative 0.3 multiplier of Plaintiffs' counsel's time over the last six years confirms the reasonableness of the requested fee. *See In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 399 (S.D.N.Y. 1999) ("'In recent years multipliers of between 3 and 4.5 have been common' in federal securities cases."); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 371 (S.D.N.Y. 2002) ("modest multiplier of 4.65 is fair and reasonable"). Thus, under the lodestar cross-check, the requested fee is more than fair and reasonable.

F. Co-Lead Counsel's Expenses Are Reasonable and Were Necessarily Incurred to Achieve the Benefit Obtained

Co-Lead Counsel also request payment of expenses incurred by Plaintiffs' counsel in connection with the prosecution of the Litigation. Plaintiffs' counsel have incurred expenses in the amount of $741,064.49 in prosecuting the Litigation. These expenses are set forth in the various declarations of counsel, submitted to the Court herewith.

The appropriate analysis to apply in deciding which expenses are compensable in a common fund case of this type is whether the particular expenses are of the type typically billed by attorneys to paying clients in the private legal marketplace. *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) ("Harris may recover as part of the award of attorney's fees those out-of-pocket expenses that 'would normally be charged to a fee paying client.'"). Therefore, it is proper to pay reasonable expenses even though they are greater than taxable costs. *Id.*; *see also Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42*, 8 F.3d 722, 725-26 (10th Cir. 1993) (expenses reimbursable if they would normally be billed to client); *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995) (expenses recoverable if customary to bill clients for them); *Miltland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they 'were incidental and necessary to the representation' of those clients."). The categories of expenses for which counsel seek payment here are the type of expenses routinely charged to hourly clients in the private legal marketplace and therefore should be paid out of the common fund.

Plaintiffs' counsel incurred expenses associated with: (1) experts; (2) access to various computer databases for factual and legal research; (3) hotels; (4) meals; (5) transportation costs

associated with travel for court hearings, depositions, document productions; and (6) mediation. Plaintiffs' counsel further incurred expenses for photocopying, filing or witness fees, transcripts of court hearings and depositions, postage, overnight delivery services, and long distance telephone or facsimile charges. As attested to by Plaintiffs' counsel, all of these expenses were reasonable in amount and necessary for the effective prosecution of the Litigation. Co-Lead Counsel respectfully request that the Court award $741,064.69 for such expenses. *See* Robbins Geller Decl.; O'Mara Law Firm Decl.; Saxena White Decl.; RM Decl.; Wohl Fruchter Decl.

G. A Service Award to Plaintiffs is Reasonable

Plaintiffs each seek $3,000 in payment for their time incurred in monitoring and participating in the Litigation. "Enhancement 'awards are fairly typical in class actions' and are intended to 'compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action and, sometimes, to recognize their willingness to act as a private attorney general.'" *Dent v. ITC Serv. Grp., Inc*., No. 2:12-CV-00009-JCM, 2013 U.S. Dist. LEXIS 139363, at *15 (D. Nev. Sept. 27, 2013). Such a service award is allowed because it "encourages participation of plaintiffs in the active supervision of their counsel." *Varljen v. H.J. Meyers & Co.*, No. 97 CIV. 6742 (DLC), 2000 U.S. Dist. LEXIS 16205, at *14 n.2 (S.D.N.Y. Nov. 6, 2000). Here, Stephen L. Kearney on behalf of plaintiff Kearney IRRV Trust supervised and monitored this action for over six years. *See* Declaration of Stephen L. Kearney, ¶¶2-3. Mr. Kearney actively participated in all stages of this Litigation, including engaging in meetings and communications with counsel, reviewing numerous lengthy pleadings and memoranda filed by counsel, responding to discovery requests, producing documents to defendants, preparing and sitting for a deposition, and consulting with counsel and providing input regarding litigation and settlement strategy. *Id*. Mr. Kearney conservatively estimated that he devoted approximately 150 hours to these litigation-related activities. *Id*., ¶3. Plaintiff Lance M. Mykita similarly devoted a significant amount of time and effort into bringing about a favorable resolution to this Litigation. *See* Declaration of Lance M. Mykita, ¶2. Among other things, Mr. Mykita discussed the case with counsel numerous times, conducted his own research about the case and related strategies, attended the Nevada Supreme Court hearing in this matter, reviewed

the complaints and other various pleadings in this case, produced documents to defendants, prepared for and sat for deposition conducted by defense counsel, and provided input into the settlement negotiations that ultimately resulted in the Settlement. *Id*., ¶3. Approving a service award to Plaintiffs is warranted as a public policy consideration and has ample precedent under the law.

VI. CONCLUSION

For the reasons set forth herein, Co-Lead Counsel respectfully request that the Court approve the Settlement and Plan of Allocation as fair, reasonable and adequate, award fees and expenses to Co-Lead Counsel, and approve the service awards for Plaintiffs.

DATED: April 17, 2020

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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 **DIRECTOR DEFENDANTS' LIMITED JOINDER TO PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION, AND AN AWARD OF ATTORNEYS' FEES AND EXPENSES**

Defendants Kenneth Potashner, Andrew Wolfe, Elwood Norris, Seth Putterman, and Robert Kaplan (collectively, the "Director Defendants") by and through their counsel of record, hereby submit this limited joinder to the Plaintiffs' Motion for Final Approval of Settlement and Approval of Plan of Allocation, and an Award of Attorneys' Fees and Expenses.

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The Director Defendants join in the Plaintiffs' request for final approval of the settlement entered in this case on the grounds that the settlement was entered in good faith and is fair, adequate and reasonable. However, the Director Defendants take no position with respect to the Plaintiffs' proposed Plan of Allocation or the Plaintiffs' request for an award of attorneys' fees and expenses.

Dated this 4th day of May 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2020, an accurate copy of the foregoing **DIRECTOR DEFENDANTS' LIMITED JOINDER TO PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION, AND AN AWARD OF ATTORNEYS' FEES AND EXPENSES** was served by the following method(s):

☑ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

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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 **CORPORATE DEFENDANTS' LIMITED JOINDER TO PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION, AND AN AWARD OF ATTORNEYS' FEES AND EXPENSES**

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Defendant VTB Holdings, Inc. and Specially Appearing Defendants Stripes Group, LLC and SG VTB Holdings, LLC (collectively, the "Corporate Defendants") join the Plaintiffs' Motion for Final Approval of Settlement and Approval of Plan of Allocation, and an Award of Attorneys' Fees and Expenses only to the extent that it seeks final approval of the settlement in this case, which represents a good faith agreement amongst the parties. The Corporate Defendants take no position with respect to Plaintiffs' proposed Plan of Allocation or the Plaintiffs' request for an award of attorneys' fees and expenses.

Dated: May 5, 2020

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CERTIFICATE OF SERVICE

As an employee of Snell & Wilmer L.L.P., I certify that I served a copy of the foregoing **CORPORATE DEFENDANTS' LIMITED JOINDER TO PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION, AND AN AWARD OF ATTORNEYS' FEES AND EXPENSES** on the 5th day of May 2020, via e-service through Odyssey File and serve to the email addresses listed below:

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

In re PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION	Lead Case No. A-13-686890-B Dept. No. XI CLASS ACTION
This Document Relates To: ALL ACTIONS.	NOTICE OF NON-OPPOSITION AND REPLY IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION, AND AN AWARD OF ATTORNEYS' FEES AND EXPENSES

Plaintiffs respectfully submit this notice of non-opposition and reply in further support of their Motion for Final Approval of Settlement and Approval of Plan of Allocation, and an Award of Attorneys' Fees and Expenses (the "Motion").[1] Plaintiffs report that no objections have been received as to any aspect of the Settlement and no stockholders have submitted a notice to appear at the upcoming Final Approval Hearing. This includes the small group of stockholders that previously opposed preliminary approval – they have chosen to opt out of the Class and are therefore ***not*** objecting.

"'The reaction of the class members to the proposed settlement further supports the . . . finding that the Settlement was fair, adequate and reasonable.'" *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458-59 (9th Cir. 2000) (referencing only "a handful of objectors at the fairness hearing" out of 5,400 potential class members).[2] "'It is established that the absence of a large number of objections to a proposed class action settlement raises a ***strong presumption*** that the terms of a proposed class settlement action are favorable to the class members'" and that "'[t]he absence of a single objection to the Proposed Settlement provides further support for final approval of the Proposed Settlement.'" *Harris v. United States Physical Therapy, Inc.*, No. 2:10-cv-01508-JCM-VCF, 2012 WL 6900931, at *9 (D. Nev. Dec. 26, 2012) (quoting *Nat'l Rural Telecommc'ns Coop. v. DIRECTV, Inc*., 221 F.R.D. 523, 529 (C.D. Cal. 2004)). As noted, Plaintiffs advise the Court that they have received no objections to the proposed $9.65 million Settlement, Plan of Allocation, Co-Lead Counsel's fee and expense application, and service award for Plaintiffs.

The Claims Administrator widely disseminated the settlement notice and claim forms, pursuant to the Court's Preliminary Approval Order. As detailed in ¶¶4-11 of the Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Murray Decl.") (filed April 24, 2020), the Claims Administrator mailed 13,289 copies of the Notice of Proposed Settlement of Class and Derivative Action (the "Settlement

[1] All capitalized terms that are not defined herein have the same meanings as set forth in the Stipulation of Settlement filed with the Court on November 15, 2019.

[2] Unless otherwise noted, all emphasis is added, and citations and footnotes are omitted.

Notice") and Proof of Claim and Release form (collectively, "Claim Package") to potential Class Members and nominees. In addition, the Claims Administrator caused the Summary Notice to be published in the national edition of *The Wall Street Journal* and over *Business Wire* on February 24, 2020. Murray Decl., ¶12. The Claims Administrator established a website at www.ParametricShareholderLitigation.com with information regarding the Litigation and the Settlement, including the exclusion, objection, and claim filing deadlines, the date and time of the Court's Final Approval Hearing, as well as copies of the Settlement Notice, Proof of Claim, Stipulation of Settlement, and Preliminary Approval Order.

The Settlement Notice advised stockholders that "[r]equests to speak [at the Final Approval Hearing] must be received by the Court and counsel for the Settling Parties on or before May 4, 2020." Settlement Notice at 1. No stockholder filed any such request to speak.

The Court also set an objection deadline and request for exclusion deadline of May 4, 2020 (unless stockholders objected, in which case the request for exclusion would occur later). *Id.* No stockholder filed any objection.

The Claims Administrator, however, received one joint request for exclusion subsequent to the announcement of the Settlement. *See* Murray Decl., ¶15.[3] This request for exclusion was submitted by the same stockholder group, led by Barry L. Weisbord, that opposed Plaintiff's motion for preliminary approval (the "Weisbord Stockholder Group"). The Weisbord Stockholder Group was informed of the options to exclude themselves or object to the Settlement (or object and then opt-out), but they chose to exclude themselves from the Settlement without submitting any objection. By excluding themselves from the Settlement, the Weisbord Stockholder Group agreed that they "will not get any payment, and . . . cannot object to the Settlement." *See* Settlement Notice at 5-6. *See also* Court's Order Preliminarily Approving Settlement and Providing Notice, ¶18 (providing 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

[3] The additional opt-out forms attached to the Murray Decl. were submitted by stockholders in response to the Notice of Pendency, issued after the class was certified, but before the settlement was announced.

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 are received . . . no later than May 4, 2020 . . . .”). Consistent with their decision not to object to the Settlement, the Weisbord Stockholder Group did not submit a Notice of Intention to Appear or request to speak at the fairness hearing.

In sum, the lack of a single objection to any aspect of the Settlement, after an extensive notice process, confirms that the overall Class and Merger Stockholders support the Settlement, the Plan of Allocation, the fee and expense application, and service award to Plaintiffs, and that they should all be approved as fair and reasonable. We look forward to discussing the Settlement with the Court on May 18th.

DATED: May 8, 2020

Respectfully submitted,

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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 a true and correct copy of the foregoing document was served on all parties to this action via the Court's electronic filing system.

DATED: May 8, 2020

/s/ Bryan Snyder
BRYAN SNYDER