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2
3 EIGHTH JUDICIAL DISTRICT COURT
4 CLARK COUNTY, NEVADA

5 In re PARAMETRIC SOUND)
6 CORPORATION SHAREHOLDERS')
7 LITIGATION)

) Lead Case No. A-13-686890-B
) Dept. No. XI

) CLASS ACTION

8 This Document Relates To:
9 ALL ACTIONS.

) ORDER REGARDING CLASS
) CERTIFICATION

10 This matter concerns the reverse merger wherein VTB Holdings, Inc. ("VTBH") merged into
11 a Parametric Sound Corporation ("Parametric") subsidiary (the "Merger"). Plaintiffs asked this
12 Court to certify this action as a class action within the meaning of Rule 23 of the Nevada Rules of
13 Civil Procedure. Defendants¹ opposed class certification. On Monday, January 7, 2019, this matter
14 came on for hearing. Plaintiffs appeared by and through their counsel of record Randall J. Baron and
15 Timothy Z. LaComb, Esq. of Robbins Geller Rudman & Dowd LLP; Adam Warden of Saxena
16 White P.A.; and David O'Mara, Esq. of The O'Mara Law Firm, P.C. Defendants appeared by and
17 through their counsel of record J. Stephen Peek of Holland & Hart LLP; John P. Stigi III of
18 Sheppard Mullin Richter & Hampton LLP; Joshua D. N. Hess of Dechert LLP; and Richard C.
19 Gordon of Snell & Wilmer LLP. The Court, having reviewed the papers filed by the parties, and
20 considered the written and oral arguments of counsel, finds and orders as follows:

21 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

22 **This Action Meets the Requirements of NRCP 23(a)**

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

25
26
27 ¹ The term "Defendants" as used herein refers collectively to Kenneth Potashner, Robert Kaplan,
28 Elwood G. Norris, Seth Putterman, Andrew Wolfe, James L. Honore, VTBH, Stripes Group, LLC
("Stripes Group"), and SG VTB Holdings, LLC ("SG VTB").

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

5 2. In determining whether to certify a class, the court should also consider whether a
6 class action is “logistically possible and superior to other actions,” and “the court should generally
7 accept the allegations of the complaint as true.” *Meyer*, 110 Nev. at 1363-64 (citing *Blackie v.*
8 *Barrack*, 524 F.2d 891, 901 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976)). “[T]he
9 determination to use the class action is a discretionary function wherein the district court must
10 pragmatically determine whether it is better to proceed as a single action, or many individual actions
11 in order to redress a single fundamental wrong.” *Deal v. 999 Lakeshore Ass’n*, 94 Nev. 301, 306
12 (1978). In meeting these requirements, “[a]n extensive evidentiary showing is not required.” *Meyer*,
13 110 Nev. at 1364. As set forth below, this action meets each requirement of NRCP 23(a).

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

17 The “Numerosity” Element Is Satisfied

18 4. The first requirement of NRCP 23(a) is that “the class is so numerous that joinder of
19 all members is impracticable.” NRCP 23(a)(1). Plaintiffs are not required “to state the exact
20 number of class members when the plaintiff’s allegations ‘plainly suffice’ to meet the numerosity
21 requirement.” *Gunter v. United Fed. Credit Union*, No. 3:15-CV-00483-MMD-WGC, 2017 WL
22 4274196, at *4 (D. Nev. Sept. 25, 2017).

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

27 ² NRCP 23 is “identical to its federal counterpart.” *Meyer v. Eighth Judicial Dist. Court*, 110 Nev.
28 1357, 1363 (1994).

1 **The “Commonality” Element Is Satisfied**

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

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

14 **The “Typicality” Element Is Satisfied**

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

25 9. In addition, reliance is not an issue in this case, as “[t]he law is settled that there is no
26 reliance requirement in a claim for breach of a fiduciary duty of disclosure.” *In re Tri-Star Pictures,*
27 *Inc. Litig.*, 634 A.2d 319, 327 n.10 (Del. 1993); *Turner v. Bernstein*, 768 A.2d 24, 31 (Del. Ch.
28 2000). In other words, “defendant-directors either did or did not breach their fiduciary duty of

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

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

10 **The “Adequacy” Element Is Satisfied**

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

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

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

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

5 14. “[T]he case law is virtually unanimous in holding that one counsel can represent a
6 stockholder bringing both an individual and a derivative action.” *In re Dayco Corp. Deriv. Sec.*
7 *Litig.*, 102 F.R.D. 624, 630 (D. Ohio 1984). *See also In re Ebix, Inc. S'holder Litig.*, No. 8526-
8 VCN, 2014 WL 3696655, at *18 (Del. Ch. July 24, 2014); *see also, e.g., TCW Tech. Ltd. P'ship v.*
9 *Intermedia Commc'ns, Inc.*, No. 18289, 2000 WL 1654504, at *4 (Del. Ch. Oct. 17, 2000); *Loral*
10 *Space & Commc'ns, Inc. v. Highland Crusader Offshore Partners, L.P.*, 977 A.2d 867, 870 (Del.
11 2009); *Veros Software, Inc. v. First America Corp.*, No. 06-1130 JVS, 2008 WL 11338610, at *6
12 (C.D. Cal. June 13, 2008); *Keyser v. Commonwealth Nat'l Fin. Corp.*, 120 F.R.D. 489, 490 (M.D.
13 Pa. 1988); *In re TransOcean Tender Offer Sec. Litig.*, 455 F. Supp. 999, 1013-15 (N.D. Ill. 1978).

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

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

24 **This Action Satisfies NRCP 23(b)**

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

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

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

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

13 **Approval of the Notice of Pendency of Class Action**

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

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

25 **ORDER**

26 **BASED UPON THE FOREGOING, THE COURT HEREBY ORDERS, ADJUDGES AND**
27 **DECREEES as follows:**
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1 1. Plaintiffs' Motion for Class Certification is GRANTED in part and DENIED in part.
2 Pursuant to Rule 23 of the Nevada Rules of Civil Procedure, the Court certifies an equity
3 expropriation class in this case consisting of::

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

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

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

14 DATED: January 16, 2019.

15 
16 THE HONORABLE ELIZABETH GONZALEZ
17 EIGHTH JUDICIAL DISTRICT COURT
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1 THE O'MARA LAW FIRM, P.C.
 2 DAVID C. O'MARA (Nevada Bar No. 8599)
 3 311 East Liberty Street
 Reno, NV 89501
 4 Telephone: 775/323-1321
 775/323-4082 (fax)

5 Liaison Counsel for Plaintiffs

6 [Additional counsel appear on signature page.]

7 EIGHTH JUDICIAL DISTRICT COURT

8 CLARK COUNTY, NEVADA

9 In re PARAMETRIC SOUND
 CORPORATION SHAREHOLDERS'
 LITIGATION

) Lead Case No. A-13-686890-B
) Dept. No. XI

10 CLASS ACTION

11 This Document Relates To:

) JOINT STIPULATED [PROPOSED]
) NOTICE OF PENDENCY OF CLASS
) ACTION (TO CLASS)

12 ALL ACTIONS.

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Exhibit "A"

01-17-18 03:43 RCVD

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

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

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

21 3. Plaintiffs' Amended Class Action and Derivative Complaint (the "Complaint")
 22 alleges (i) that the Individual Defendants breached their fiduciary duties to Plaintiffs and the Class
 23 involving fraud and/or intentional misconduct in connection with the reverse merger wherein VTBH
 24

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

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

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

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

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

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

26 NOW THEREFORE, TAKE NOTICE:

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

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

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

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

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

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

21 DATED: _____ HON. ELIZABETH GONZALEZ
 22 EIGHTH JUDICIAL DISTRICT COURT

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