

IN THE SUPREME COURT OF THE STATE OF NEVADA

AEROGROW INTERNATIONAL,
INC.,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF
NEVADA, IN AND FOR CLARK
COUNTY, THE HONORABLE
ELIZABETH GONZALEZ,

Respondents,

and

BRADLEY LOUIS RADOFF, FRED
M. ADAMCYZK, THOMAS C.
ALBANESE, WILLIAM A.
ALMOND, III, MICHAEL S.
BARISH, GEORGE C. BETKE, JR.
2019 TRUST, DIANA BOYD, ANNE
CAROL DECKER, THOMAS H.
DECKER, THE DEUTSCH FAMILY
TRUST, JOHN C. FISCHER,
ALFREDO GOMEZ, ALFREDO
GOMEZ FMT CO CUST IRA
ROLLOVER, LAWRENCE
GREENBERG, PATRICIA
GREENBERG, KAREN HARDING,
H.L. SEVERANCE, INC. PROFIT
SHARING PLAN & TRUST, H.L.
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& TRUST, DANIEL G. HOFSTEIN,
KEVIN JOHNSON, CANDICE
KAYE, LAURA J. KOBAY, CAROLE

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**AEROGROW INTERNATIONAL,
INC.'S EMERGENCY MOTION
UNDER NRAP 27(e) FOR
EXPEDITED REVIEW AND
STAY OF ORDER GRANTING
JOINT MOTION TO COMPEL**

Action Requested By: May 16, 2021

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STEPHEN KAYE, THE MICHAEL S.
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Real Parties in Interest.

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Petitioner AEROGROW INTERNATIONAL, INC. (“AeroGrow”), by and through its counsel of record, hereby submits its Emergency Motion Under NRAP 27(e) for Expedited Review and Stay of Order Granting Joint Motion to Compel (the “Motion”). The Motion is made and based on the papers and pleadings on file, including the Petition for Writ of Mandamus to Reverse District Court’s Order Granting Joint Motion to Compel (the “Petition”) and related Appendix, and the following Memorandum of Points and Authorities and exhibits attached thereto.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The issue before the Court on the Petition is whether NRS Chapter 92A requires a beneficial stockholder to submit to the company the consent of the stockholder of record prior to the vote on the transaction to participate in the dissenter’s rights process. On May 5, 2021, the District Court determined that it did not, finding that “[b]eneficial stockholders must provide written consent [of] the stockholder[] of record not later than the time the beneficial stockholder asserts dissenter’s rights,’ which is when a dissenter demands payment pursuant to NRS 92A.440.” Appellate Record (“AR”) at PA01702. As a result, the District Court compelled AeroGrow to permit Plaintiff Radoff and the Plaintiff-Intervenors (collectively, “Plaintiffs”) to proceed in the dissenter’s rights process by providing them with dissenter’s notices *no later than 10 days* after entry of the Order, or *May*

16, 2021, thereby resuming the dissenter’s rights process as to Plaintiffs. *Id.*

This Motion must be considered before the expiration of the 10-day deadline to serve dissenter’s notices on May 16, 2021.¹ A stay is necessary and warranted because AeroGrow satisfies NRAP 8(c). Thus, this Motion should be granted.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

The proceedings below stem from a declaratory relief action filed by Plaintiff Radoff, a putative former beneficial stockholder of AeroGrow, concerning his right to participate in the dissenter’s rights process following the vote of AeroGrow’s stockholders approving AeroGrow’s acquisition by SMG Growing Media, Inc. through a cash-out merger (the “Merger”), which closed February 26, 2021. AR at PA00777; PA00781; PA00079–PA00134 (adding count for declaratory relief to fiduciary duty lawsuit against AeroGrow and others). Plaintiff-Intervenors (56 purported former beneficial stockholders of AeroGrow) moved to intervene for the purpose of seeking the same relief. AR at PA00135–PA00273; PA01670–PA01673.

A. The Merger Vote; Plaintiffs’ Failure to Assert Dissenter’s Rights

Prior to the vote on the Merger on February 23, 2021, Plaintiffs submitted notices of intent to demand payment under NRS 92A.420(1)(a) to AeroGrow. AR at PA00278; PA00416. It is undisputed that Plaintiffs failed to submit “the written

¹ AeroGrow complied with NRAP 8(a)(c) and NRAP 27(e)(4) by requesting a stay from the District Court on May 10, 2021 on an order shortening time. AR at PA01723–1740. The motion is set for hearing on May 14, 2021. AR at PA01726.

consent of the stockholder of record to the dissent” “*before* the vote [was] taken” on the Merger. *See* NRS 92A.400(2)(a) & 92A.420(1)(a) (emphasis added). Such timely submission of the record stockholder consents, however, was required for Plaintiffs to assert their dissenter’s rights and participate in the dissenter’s rights process. As a result of their failure to comply with the statute, Plaintiffs were not entitled to payment under NRS Chapter 92A. NRS 92A.420(3). Instead, they received the merger consideration of \$3.00 per share of common stock that AeroGrow paid to all non-dissenting stockholders after closing. AR at PA00421.

AeroGrow has since continued to comply with the dissenter’s rights process. Pursuant to NRS 92A.430, AeroGrow mailed written dissenter’s notices to all beneficial stockholders who (1) delivered notices of intent to demand payment (per NRS 92A.420(1)(a)) *and* (2) delivered record stockholder consents (per NRS 92A.400(2)). AR at PA00760. Because Plaintiffs failed to deliver record stockholder consents, AeroGrow did not send dissenter’s notices to them. Stockholders in receipt of the dissenter’s notices had until April 12, 2021 to submit the demand for payment form and related materials to AeroGrow. AR at PA00760.

B. Plaintiffs Sought Court Intervention to Participate in the Dissenter’s Process Without Satisfying the Statutory Prerequisites

Below, Plaintiffs sought to force AeroGrow to include them in the dissenter’s rights process. AR at PA00008–PA00062; PA00135–PA00273. On March 15, 2021, Plaintiff Radoff amended his complaint to add a count for declaratory relief,

seeking the Court to determine: “(1) the rights and obligations of the parties under NRS Chapter 92A; and (2) that AeroGrow has violated the statute[.]” AR at PA00133. Plaintiff-intervenors sought to join that count. AR at PA00148.

Plaintiffs then jointly filed a motion titled “Motion to Compel/Determine Compliance with NRS 92A, or Alternatively, Injunctive Relief” (the “Motion to Compel”). On an order shortening time, Plaintiffs effectively asked the Court to enter final judgment on Plaintiffs’ claim for declaratory relief and supplemental relief in the form of a permanent injunction. AR at PA00413–PA00432. AeroGrow opposed the Motion to Compel. AR at PA00750–PA00774.

C. The District Court Granted Plaintiffs’ Motion to Compel

After an in-chambers hearing on April 19, 2021, the District Court granted Plaintiffs’ Motion to Compel. AR at PA01710–1722; PA01723–PA01740. The Order compelled AeroGrow to provide Plaintiffs with dissenter’s notices under NRS 92A.420 no later than 10 days after entry of the Order—*i.e.*, **May 16, 2021**.

On May 10, 2021, AeroGrow filed a Motion to Stay Order Granting Joint Motion to Compel Pending Resolution of Writ Pursuant to NRAP 8 on Order Shortening Time with the District Court. AR at PA01723–PA01740. Shortly thereafter, AeroGrow filed the instant Motion and, contemporaneously, the Petition.

III. ARGUMENT

A. The Facts And Circumstances Warrant Expedited Review.

A party may seek an emergency motion upon certification that “to avoid

irreparable harm relief is needed in less than 14 days.” NRAP 27. This Court has the authority to expedite its decisions and has invoked this authority for time-sensitive and other critical matters. NRAP 2; *see, e.g., Kraus v. Cegavske*, No. 82018, 2020 WL 6483971, at *1 (Nev. Nov. 3, 2020).

Here, expedited review of the Motion is warranted because of the irreparable harm that AeroGrow will suffer if it is forced to comply with the District Court’s order by May 16, 2021. Providing dissenter’s rights notices to the Plaintiffs—57 former beneficial stockholders who failed to submit prerequisite consents to their dissents—resumes the dissenter’s rights process as to them and triggers subsequent statutory deadlines. Thus, this Motion should be considered on an expedited basis, and the Court should stay the Order pending resolution of the Petition.

B. Standard Of Decision

This Court considers the four enumerated factors in NRAP 8(c) in deciding whether to grant a stay pending the outcome of a petition for extraordinary writ relief. *See also* NRAP 8(a)(2)(A)(i)-(ii). No “one factor carries more weight than the others” but this Court instead has “recognized that if one or two factors are especially strong, they may counterbalance other weak factors.” *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004).

C. A Stay Is Warranted Pending The Outcome Of The Writ Petition.

AeroGrow satisfies each NRAP 8(c) factor for the following reasons:

First, AeroGrow will suffer irreparable harm without a stay because it will have no choice but to comply with the Order and allow beneficial stockholders to dissent even though it has no record stockholder consents to the dissents. By the terms of the Order, AeroGrow must start the process as to Plaintiffs by **May 16, 2021**, which is well before this Court will have the opportunity to decide whether the statute permits Plaintiffs’ participation in the process. In addition, AeroGrow will further suffer irreparable harm without a stay because the Petition may not be decided prior to the statutory deadline for AeroGrow to file its petition for appraisal against Plaintiffs pursuant to NRS 92A.490. In light of the Order’s deadline for AeroGrow to send dissenter’s notices by May 16, 2021, the latest AeroGrow could file a petition against Plaintiffs under NRS 92A.490 would be approximately November 12, 2021—which is based on the longest time periods allowed by NRS 92A.440 and .460. Thus, the entire appraisal process may very well be completed and resolved before this Court has even had the opportunity to consider the Petition.

Additionally, AeroGrow has no choice but to pursue the Petition now—before the dissenter’s rights process resumes for Plaintiffs—to avoid the risk that the Petition could be barred by the equitable doctrine of laches. *See, e.g., Bldg. & Const. Trades Council of N. Nev. v. State ex rel. Pub. Works Bd.*, 108 Nev. 605, 611, 836 P.2d 633, 637 (1992) (finding the doctrine of laches barred the writ because the petitioner “failed to take immediate legal action”). Further, no other avenue for relief

would address whether these “new dissenters” are entitled to resume the dissenter’s process because, by the time such an appeal could be heard, the dissenter’s process would already be complete. Because the Petition is AeroGrow’s only means to seek relief and clarification from this Court on this important and novel Nevada legal issue, a stay is warranted. AeroGrow should not be prejudiced by having to allow Plaintiffs to participate in the dissenter’s rights process while the Petition is pending. *Cf. Archon Corp.*, 133 Nev. at 820, 407 P.3d at 706 (stating that advisory mandamus may be appropriate “to provide occasional appellate guidance on matters that often elude ordinary appeal, without establishing rules of appealability that will bring a flood of less important appeals in their wake.” (citations omitted)).

Second, Plaintiffs will not be harmed by a stay because their rights vis-à-vis the dissenter’s rights process would be preserved pending the stay and the Petition. Additionally, AeroGrow already paid Plaintiffs, just as it paid all other non-dissenting stockholders, the merger consideration of \$3.00 per share of common stock. AR at PA00421. To the extent the Writ Petition is denied and to the extent legal proceedings to determine fair value conclude that value exceeds the merger consideration, Plaintiffs are further protected here because during the pendency of the Petition, they will also be entitled to interest on any amount over the merger consideration they already hold. *See* NRS 92A.340. Thus, Plaintiffs will suffer no cognizable, much less irreparable, injury if the stay is granted.

Third, although the object of the Petition—to obtain a determination as to whether NRS Chapter 92A requires a beneficial stockholder to submit to the subject corporation the written consent of the stockholder of record to the dissent prior to the vote on the transaction, in compliance with NRS 92A.400, in order to proceed in the dissenter’s rights process—will not be defeated if a stay is denied, a key purpose of the Petition (namely, precluding Plaintiffs from reentering the dissenter’s right process) would be defeated. Without a stay, Plaintiffs would be proceeding in the dissenter’s rights statutory process, which AeroGrow will be forced to initiate by **May 16, 2021**. Indeed, Plaintiffs will be permitted to participate in the dissenter’s rights process without satisfying the prerequisite in NRS 92A.400—thereby rendering that limitation on the right of dissent a nullity—and before this Court could consider the Petition. Because this key purpose of the Petition will be defeated without a stay, this Court should immediately stay the Order. For avoidance of doubt, and although AeroGrow would suffer irreparable harm, as noted above, the Petition merits consideration even if the Court denies this Motion.

Fourth, AeroGrow will likely prevail on the Petition because the Order’s finding that the time beneficial stockholders must submit record stockholder consents is when a dissenter demands payment under NRS 92A.440 contravenes the plain and unambiguous language of the dissenter’s rights statute. As explained in the Petition, the language of NRS Chapter 92A precludes the Order’s interpretation.

NRS 92A.400 limits the right of beneficial stockholders to assert dissenter's rights, and requires them to submit record stockholder consents "not later than the time the beneficial stockholder *asserts* dissenter's rights." NRS 92A.400(2)(a) (emphasis added). NRS 92A.430 makes it clear that the time a "stockholder *asserts* dissenter's rights" (NRS 92A.400) precedes a company's delivery of dissenter's notices. A company must send dissenter's notices to "any beneficial stockholder who has previously asserted dissenter's rights pursuant to NRS 92A.400." NRS 92A.430(1). A stockholder must, thus, submit record stockholder consents pursuant to NRS 92A.400 prior to the time the company delivers dissenter's notices.

To give full force and effect to NRS 92A.400–.430, the timing outlined in NRS 92A.420 (*i.e.*, "before the vote is taken")—which sets the deadline for "a stockholder who wishes to assert dissenter's rights" to submit a notice of intent to demand payment—controls and applies to NRS 92A.400. *See Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 370, 252 P.3d 206, 209 (requiring courts to read statutory provisions "in a way that would not render words or phrases superfluous"); *see also Figueroa-Beltran v. United States*, 136 Nev. Adv. Op. 45, 467 P.3d 615, 621 (2020) ("[Courts] avoid statutory interpretation that renders language meaningless or superfluous.") (citations omitted). NRS 92A.420(3), which expressly references NRS 92A.400, confirms that timing. *See* NRS 92A.420(3) ("A stockholder who does not satisfy the requirements of . . . NRS 92A.400 is not entitled to payment for

his or her shares under this chapter.”). This straightforward reading of the statute—which gives meaning to all words, accounts for all statutory steps of the dissenter’s rights process, and does not create a conflict among statutory provisions—controls the legal issue. *See Edington v. Edington*, 119 Nev. 577, 582–83, 80 P.3d 1282, 1286 (2003) (“[W]hen a statute’s language is clear and unambiguous, the apparent intent must be given effect, as there is no room for construction.”). Thus, as further explained in the Petition, AeroGrow is likely to succeed on the merits of the Petition.

IV. CONCLUSION

As set forth herein, a stay of the Order pending this Court’s decision of the Petition is appropriate under the controlling four-factor test. Accordingly, AeroGrow respectfully requests that this Court grant the Motion and stay the Order pending the resolution of the Petition.

DATED this 13th day of May, 2021.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

BY: /s/ Maximilien D. Fetaz
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*Attorneys for Petitioner AeroGrow International,
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NRAP 27(e) CERTIFICATE

Pursuant to NRAP 27(e), I hereby certify that I am counsel to AeroGrow International, Inc. (“AeroGrow”) and further certify:

1. The contact information of the attorneys for the parties in the instant Emergency Motion are:

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2. The facts showing the nature and cause of the emergency are set forth in the Memorandum of Points and Authorities herein. These facts include the following:

- a. On May 5, 2021, the District Court granted in full Plaintiffs' Motion to Compel. The Order, in part, compelled AeroGrow to provide Plaintiffs with dissenter's notices in accordance with NRS 92A.420 *no later than 10 days* after entry of the Order, or May 16, 2021. Further, the Court ordered that the dissenter's notices must identify new deadlines by which demand for payment forms must be submitted pursuant to NRS 92A.430(2)(d).
- b. Absent an emergency stay from this Court, AeroGrow will be irreparably harmed because AeroGrow will be forced to provide dissenter's notices to Plaintiffs and include Plaintiffs in the ongoing dissenter's rights process when they otherwise would not be forced to do so per Nevada law.
- c. All grounds for a stay being advanced in this Emergency Motion were previously submitted to the District Court.
- d. Prior to the filing of this Emergency Motion, the undersigned called and spoke to the Clerk of the Supreme Court, giving notice of the filing of

this Emergency Motion and request for relief on an emergency basis.

- e. Also prior to filing this Emergency Motion, the undersigned called Terry A. Coffing, Esq., counsel for Real Parties in Interest, and called J. Robert Smith, Esq., counsel for Real Parties in Interest, giving them both notice of the filing of this Emergency Motion and request for relief on an emergency basis.
- f. As noted in the Certificate of Service, a copy of this Emergency Motion is being served through this Court's electronic filing system and through the Eighth Judicial District Court's electronic filing system. If applicable, those attorneys who are not signed up through either electronic filing system will receive a copy of this Emergency Motion via U.S. Mail, first class postage prepaid. The District Court will be served with a copy of this Emergency Motion via hand delivery.
- g. Out of an abundance of caution, the undersigned will email a copy of this Emergency Motion to all counsel for all parties to this litigation immediately after filing same with this Court.

I declare under the penalty of perjury that the foregoing is true and correct.

Dated: May 13, 2021

/s/ Maximilien D. Fetaz
MAXIMILIEN D. FETAZ

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing **AEROGROW INTERNATIONAL, INC.’S EMERGENCY MOTION UNDER NRAP 27(e) FOR EXPEDITED REVIEW AND STAY OF ORDER GRANTING JOINT MOTION TO COMPEL** was filed electronically with the Nevada Supreme Court and through the Eighth Judicial District Court’s electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address on May 13, 2021. Electronic or mail service of the foregoing document shall be made in accordance with the Master Service List as follows:

Court:

Judge Elizabeth Gonzalez
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/s/ Wendy Cosby

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