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. SEVERANCE, INC. PENSION PLAN & TRUST, DANIEL G. HOFSTEIN, KEVIN JOHNSON, CANDICE KAYE, LAURA J. KOBY, CAROLE

Case Number:

District Court Case Number: A-21-827665-B (**Lead Case**), Dept. XI

PETITIONERS' APPENDIX (VOLUME 7 OF 12)

FOR WRIT OF MANDAMUS TO REVERSE DISTRICT COURT'S ORDER GRANTING JOINT MOTION TO COMPEL

L. MCLAUGHLIN, BRIAN PEIERLS, JOSEPH E. PETER, ALEXANDER PERELBERG, AMY PERELBERG, DANA PERELBERG, GARY PERELBERG, LINDA PERELBERG, THE REALLY COOL GROUP, RICHARD ALAN RUDY REVOCABLE LIVING TRUST, JAMES D. RICKMAN, JR., JAMES D. RICKMAN, JR. IRREVOCABLE TRUST, PATRICIA D. RICKMAN IRREVOCABLE TRUST, ANDREW REESE RICKMAN TRUST, SCOTT JOSEPH RICKMAN IRREVOCABLE TRUST, MARLON DEAN ALESSANDRA TRUST, BRYAN ROBSON, WAYNE SICZ IRA, WAYNE SICZ ROTH IRA, THE CAROL W. SMITH REVOCABLE TRUST, THOMAS K. SMITH, SURAJ VASANTH, CATHAY C. WANG, LISA DAWN WANG, DARCY J. WEISSENBORN, THE MARGARET S. WEISSENBORN REVOCABLE TRUST, THE STANTON F. WEISSENBORN IRA, THE STANTON F. WEISSENBORN REVOCABLE TRUST, THE STANTON F. WEISSENBORN IRREVOCABLE TRUST, THE NATALIE WOLMAN LIVING TRUST, ALAN BUDD ZUCKERMAN, JACK WALKER, STEPHEN KAYE, THE MICHAEL S. BARISH IRA, AND THE ALEXANDER PERELBERG IRA,

Real Parties in Interest.

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25, I certify that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and that on this 13th day of May, 2021, I electronically filed, served, and sent via United States Mail a true and correct copy of the above and forgoing that, in accordance therewith, I caused a copy of the **PETITIONERS' APPENDIX (VOLUME 7 of 12) FOR WRIT OF MANDAMUS TO REVERSE DISTRICT COURT'S ORDER GRANTING JOINT MOTION TO COMPEL** to be hand delivered, in a sealed envelope, on the date and to the addressee(s) shown below:

Court:

Judge Elizabeth Gonzalez
Eighth Judicial District of Clark County
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89155

Real Parties in Interest:

Terry A. Coffing, Esq.
Marquis Aurbach Coffing
10001 Park Run Drive
Las Vegas, Nevada 89145

Attorneys for Real Party in Interest BRADLEY LOUIS RADOFF

J. Robert Smith
SIMONS HALL JOHNSTON PC
6490 S. McCarran Blvd., Ste. F-46
Reno, Nevada 89509

Attorneys for Real Parties in Interest 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. SEVERANCE, INC. PENSION PLAN & TRUST, DANIEL G. HOFSTEIN, KEVIN JOHNSON, CANDICE KAYE, LAURA J. KOBY, CAROLE L. MCLAUGHLIN, BRIAN PEIERLS, JOSEPH E. PETER, ALEXANDER PERELBERG, AMY PERELBERG, DANA PERELBERG, GARY PERELBERG, LINDA PERELBERG, THE REALLY COOL GROUP, RICHARD ALAN RUDY REVOCABLE LIVING TRUST, JAMES D. RICKMAN, JR., JAMES D. RICKMAN, JR. IRREVOCABLE TRUST, PATRICIA D. RICKMAN IRREVOCABLE TRUST, ANDREW REESE RICKMAN TRUST, SCOTT JOSEPH RICKMAN IRREVOCABLE TRUST, MARLON DEAN ALESSANDRA TRUST, BRYAN ROBSON, WAYNE SICZ IRA, WAYNE SICZ ROTH IRA, THE CAROL W. SMITH REVOCABLE TRUST, THOMAS K. SMITH, SURAJ VASANTH, CATHAY C. WANG, LISA DAWN WANG, DARCY J. WEISSENBORN, THE MARGARET S. WEISSENBORN REVOCABLE TRUST, THE STANTON F. WEISSENBORN IRA, THE STANTON F. WEISSENBORN REVOCABLE

TRUST, THE STANTON F. WEISSENBORN IRREVOCABLE TRUST, THE NATALIE WOLMAN LIVING TRUST, ALAN BUDD ZUCKERMAN, JACK WALKER, STEPHEN KAYE, THE MICHAEL S. BARISH IRA, AND THE ALEXANDER PERELBERG IRA

/s/ Wendy Cosby
An employee of Brownstein Hyatt Farber Schreck, LL

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CLERK OF THE COURT

NTSO

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Attorneys for Defendants AGI Acquisition Sub, Inc., SMG Growing Media, Inc., The Scotts Miracle-Gro Company, AeroGrow International, Inc., Chris Hagedorn, Cory Miller, Patricia M. Ziegler, James Hagedorn, and Peter Supron

DISTRICT COURT

CLARK COUNTY, NEVADA

OVERBROOK CAPITAL LLC, on Behalf of Itself and All Others Similarly Situated,

Plaintiffs,

v.

AEROGROW INTERNATIONAL, INC., CHRIS HAGEDORN, H. MACGREGOR CLARKE, DAVID B. KENT, CORY MILLER, PATRICIA M. ZIEGLER, SMG GROWING MEDIA, INC., and SCOTTS MIRACLE-GRO COMPANY,

Defendants.

CASE NO.: A-21-827665-B (**Lead Case**)
DEPT NO.: XI

NOTICE OF ENTRY OF STIPULATION AND ORDER

NICOYA CAPITAL, LLC, on behalf of itself and all other similarly situated, *Plaintiffs,* v. CHRIS HAGEDORN, H. MACGREGOR CLARKE, DAVID B. KENT, CORY MILLER, PATRICIA M. ZIEGLER, JAMES HAGEDORN, PETER SUPRON, and AEROGROW INTERNATIONAL, INC., a Nevada Corporation, and AGI ACQUISITION SUB, INC., a Nevada Corporation, SMG GROWING MEDIA, INC., an Ohio Corporation, and SCOTTS MIRACLE-GRO COMPANY, an Ohio Corporation, *Defendants.*	CASE NO.: A-21-827745-B
BRADLEY LOUIS RADOFF, *Plaintiff,* v. CHRIS HAGEDORN, an individual; H. MACGREGOR CLARKE, an individual; DAVID B. KENT, an individual; CORY MILLER, an individual; PATRICIA M. ZIEGLER, individual; JAMES HAGEDORN, an individual; PETER SUPRON, an individual; AEROGROW INTERNATIONAL, INC., a Nevada Corporation; AGI ACQUISITION SUB, INC., a Nevada Corporation; SMG GROWING MEDIA, INC., an Ohio Corporation; THE SCOTTS MIRACLE-GRO COMPANY, an Ohio Corporation; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive. *Defendants.*	CASE NO.: A-21-829854-B

NOTICE OF ENTRY OF STIPULATION AND ORDER

PLEASE TAKE NOTICE that a Stipulation and Order Consolidating Related Cases, Appointing Lead Plaintiff and Lead and Liaison Counsel, and Providing for Filing of Consolidated Complaint was entered on the 18th day of February, 2021.

A copy of said Order is attached hereto.

DATED this 25th day of March, 2021.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

BY: */s/ Maximilien D. Fetaz*
KIRK B. LENHARD, ESQ.
MAXIMILIEN D. FETAZ, ESQ.
TRAVIS F. CHANCE, ESQ.

MARJORIE P. DUFFY, ESQ.
(*pro hac vice* forthcoming)
ASHLEY F. HEINTZ, ESQ.
(*pro hac vice* forthcoming)
JONES DAY

Attorneys for Defendants AGI Acquisition Sub, Inc., SMG Growing Media, Inc., The Scotts Miracle-Gro Company, AeroGrow International, Inc., Chris Hagedorn, Cory Miller, Patricia M. Ziegler, James Hagedorn, and Peter Supron

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP and pursuant to NRCP 5(b), EDCR 8.05, Administrative Order 14-2, and NEFCR 9, I caused a true and correct copy of the foregoing **NOTICE OF ENTRY OF STIPULATION AND ORDER** to be submitted electronically to all parties currently on the electronic service list on March 25, 2021.

/s/ Wendy Cosby
an employee of Brownstein Hyatt Farber Schreck, LLP

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02/18/2021 5:11 PM
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Counsel for Plaintiff Nicoya Capital LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

OVERBROOK CAPITAL LLC, on Behalf of Itself and All Others Similarly Situated, Plaintiff, vs. AEROGROW INTERNATIONAL, INC., CHRIS HAGEDORN, H. MACGREGOR CLARKE, DAVID B. KENT, CORY MILLER, PATRICIA M. ZIEGLER, SMG GROWING MEDIA, INC., and SCOTTS MIRACLE-GRO COMPANY, Defendants.	Case No.: A-21-827665-B Dept. No.: XVI **STIPULATION AND [PROPOSED] ORDER CONSOLIDATING RELATED CASES, APPOINTING LEAD PLAINTIFF AND LEAD AND LIAISON COUNSEL, AND PROVIDING FOR FILING OF CONSOLIDATED COMPLAINT**
NICOYA CAPITAL LLC, on Behalf of Itself and All Others Similarly Situated, Plaintiff, vs.	Case No.: A-21-827745-B Dept. No.: XVI

CHRIS HAGEDORN, H. MACGREGOR CLARKE, DAVID B. KENT, CORY MILLER, PATRICIA M. ZIEGLER, JAMES HAGEDORN, PETER SUPRON,

- and -

AEROGROW INTERNATIONAL, INC., a Nevada Corporation, and AGI ACQUISITION SUB, INC., a Nevada Corporation, SMG GROWING MEDIA, INC., an Ohio Corporation, AND SCOTTS MIRACLE-GRO COMPANY, an Ohio Corporation,

Defendants.

STIPULATION AND [PROPOSED] ORDER CONSOLIDATING RELATED CASES, APPOINTING LEAD PLAINTIFF AND LEAD AND LIAISON COUNSEL, AND PROVIDING FOR FILING OF CONSOLIDATED COMPLAINT

WHEREAS, Plaintiff Overbrook Capital LLC ("Overbrook Capital") filed a complaint in this Court on January 11, 2021;

WHEREAS, Nicoya Capital LLC ("Nicoya Capital") filed a complaint in this Court on January 13, 2021;

WHEREAS, both complaints allege related facts concerning a pending offer to acquire the stock held by the minority shareholders of Aerogrow International, Inc., name similar defendants, and assert the same or substantially similar claims; thus, Overbrook Capital and Nicoya Capital agree that the complaints are related and warrant consolidation;

WHEREAS, Overbrook Capital and Nicoya Capital desire to appoint a leadership structure for Plaintiffs; and

WHEREAS, Overbrook Capital and Nicoya Capital desire to establish a schedule for the filing of a consolidated complaint.

/ / /

THEREFORE, Overbrook Capital and Nicoya Capital stipulate as follows:

1. The *Overbrook Capital LLC* and *Nicoya Capital LLC* cases are hereby consolidated for all purposes, including trial.

2. Nicoya Capital LLC shall serve as Lead Plaintiff.

3. Bottini & Bottini, Inc. shall serve as Plaintiffs' Lead Counsel, and Kemp Jones, LLP shall serve as Plaintiffs' Liaison Counsel. Plaintiffs' Lead Counsel shall have authority over the following matters on behalf of all plaintiffs: (a) convening meetings of plaintiffs' counsel; (b) making assignments regarding initiating, responding to, scheduling, and briefing of motions, determining the scope, order, and conduct of all discovery proceedings, and assigning work to plaintiffs' counsel in such a manner as to avoid duplication of effort and inefficiencies; (c) retaining experts; and (d) other matters concerning the prosecution of or settlement of the cases.

4. Plaintiffs' Lead Counsel shall have authority to communicate with Defendants' counsel and the Court on behalf of plaintiffs. Defendants' counsel may rely on all agreements made with Plaintiffs' Lead Counsel, and such agreements shall be binding.

5. Plaintiffs shall file a Consolidated Complaint by February 26, 2021.

6. This Order shall apply to each subsequently filed action that arises out of the same or substantially same transactions or events as this consolidated action that is subsequently filed in or transferred to this Court. Plaintiffs' Lead Counsel shall call to the attention of the Court the filing or transfer of any related action arising out of similar facts and circumstances as are alleged in this consolidated action and that therefore might properly be consolidated with this action.

/ / /

IT IS SO STIPULATED.

DATED this 17th day of February, 2021.

KEMP JONES, LLP

/s/ Don Springmeyer

Don Springmeyer, Esq. (#1021)
Michael J. Gayan, Esq. (#11135)
3800 Howard Hughes Parkway, 17th Floor
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(P) (858) 914-2001

Attorneys for Nicoya Capital LLC

DATED this 17th day of February, 2021.

MUEHLBAUER LAW OFFICE, LTD.

/s/ Andrew R. Muehlbauer

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7915 West Sahara Ave., Suite 104 Las Vegas, Nevada 89117
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Attorneys for Overbrook Capital LLC

* * *

ORDER

THE COURT, having reviewed the parties' stipulation and good cause appearing, orders as follows:

1. The *Overbrook Capital LLC* and *Nicoya Capital LLC* cases are hereby consolidated for all purposes, including trial.

2. Nicoya Capital LLC shall serve as Lead Plaintiff.

3. Bottini & Bottini, Inc. shall serve as Plaintiffs' Lead Counsel, and Kemp Jones, LLP shall serve as Plaintiffs' Liaison Counsel. Plaintiffs' Lead Counsel shall have authority over

the following matters on behalf of all plaintiffs: (a) convening meetings of plaintiffs' counsel; (b) making assignments regarding initiating, responding to, scheduling, and briefing of motions, determining the scope, order, and conduct of all discovery proceedings, and assigning work to plaintiffs' counsel in such a manner as to avoid duplication of effort and inefficiencies; (c) retaining experts; and (d) other matters concerning the prosecution of or settlement of the cases.

4. Plaintiffs' Lead Counsel shall have authority to communicate with Defendants' counsel and the Court on behalf of plaintiffs. Defendants' counsel may rely on all agreements made with Plaintiffs' Lead Counsel, and such agreements shall be binding.

5. Plaintiffs shall file a Consolidated Complaint by February 26, 2021.

6. This Order shall apply to each subsequently filed action that arises out of the same or substantially same transactions or events as this consolidated action that is subsequently filed in or transferred to this Court. Plaintiffs' Lead Counsel shall call to the attention of the Court the filing or transfer of any related action arising out of similar facts and circumstances as are alleged in this consolidated action and that therefore might properly be consolidated with this action.

Dated this 18th day of February, 2021

7FB DE4 7734 0FAC
Timothy C. Williams
District Court Judge

ZJ

Respectfully submitted,

KEMP JONES, LLP

/s/ Don Springmeyer
Don Springmeyer, Esq. (#1021)
Michael J. Gayan, Esq. (#11135)
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169

Attorneys for Nicoya Capital LLC

From: Andrew Muehlbauer
To: Michael Gayan
Cc: Don Springmeyer
Subject: RE: [External] Aerogrow Matters
Date: Wednesday, February 17, 2021 9:43:03 AM
Attachments: image002.png

Hey Michael. Looks good. Please affix my e-signature.

Thanks,

Andrew R. Muehlbauer, Esq.
Muehlbauer Law Office, Ltd.
7915 West Sahara Ave., Suite 104
Las Vegas, Nevada 89117
Telephone: 702.330.4505
Facsimile: 702.825.0141

Licensed in Nevada, Illinois, and Arizona

From: Michael Gayan <m.gayan@kempjones.com>
Sent: Wednesday, February 17, 2021 9:42 AM
To: Andrew Muehlbauer <Andrew@mlolegal.com>
Cc: Don Springmeyer <d.springmeyer@kempjones.com>
Subject: Aerogrow Matters

Hi Andrew,

Please let me know if we may submit this stipulation and order to the Court with your esignature.

Thanks,

Michael Gayan, Esq.

KEMP | JONES
ATTORNEYS AT LAW

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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Overbrook Capital, LLC, Plaintiff(s) vs. Aerogrow International, Inc., Defendant(s)	CASE NO: A-21-827665-B DEPT. NO. Department 16

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Stipulation and Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 2/18/2021

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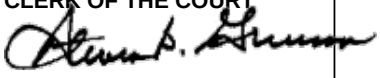
3/25/2021 2:54 AM
Steven D. Grierson
CLERK OF THE COURT



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Attorneys for Defendants AeroGrow International, Inc., AGI Acquisition Sub, Inc., SMG Growing Media, Inc., The Scotts Miracle-Gro Company, Chris Hagedorn, Cory Miller, Patricia M. Ziegler, James Hagedorn, and Peter Supron

DISTRICT COURT

CLARK COUNTY, NEVADA

OVERBROOK CAPITAL LLC, on Behalf of Itself and All Others Similarly Situated,

Plaintiffs,

v.

AEROGROW INTERNATIONAL, INC., CHRIS HAGEDORN, H. MACGREGOR CLARKE, DAVID B. KENT, CORY MILLER, PATRICIA M. ZIEGLER, SMG GROWING MEDIA, INC., and SCOTTS MIRACLE-GRO COMPANY,

Defendants.

CASE NO.: A-21-827665-B (**Lead Case**)
DEPT NO.: XI

STIPULATION AND ORDER REGARDING CONSOLIDATED CASE

NICOYA CAPITAL, LLC, on behalf of itself and all other similarly situated, *Plaintiffs,* v. CHRIS HAGEDORN, H. MACGREGOR CLARKE, DAVID B. KENT, CORY MILLER, PATRICIA M. ZIEGLER, JAMES HAGEDORN, PETER SUPRON, and AEROGROW INTERNATIONAL, INC., a Nevada Corporation, and AGI ACQUISITION SUB, INC., a Nevada Corporation, SMG GROWING MEDIA, INC., an Ohio Corporation, and SCOTTS MIRACLE-GRO COMPANY, an Ohio Corporation, *Defendants*.	CASE NO.: A-21-827745-B
BRADLEY LOUIS RADOFF, *Plaintiff,* v. CHRIS HAGEDORN, an individual; H. MACGREGOR CLARKE, an individual; DAVID B. KENT, an individual; CORY MILLER, an individual; PATRICIA M. ZIEGLER, individual; JAMES HAGEDORN, an individual; PETER SUPRON, an individual; AEROGROW INTERNATIONAL, INC., a Nevada Corporation; AGI ACQUISITION SUB, INC., a Nevada Corporation; SMG GROWING MEDIA, INC., an Ohio Corporation; THE SCOTTS MIRACLE-GRO COMPANY, an Ohio Corporation; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive. *Defendants.*	CASE NO.: A-21-829854-B

Lead Plaintiff Nicoya Capital, LLC ("Lead Plaintiff") and Defendants James Hagedorn, Peter Supron, AGI Acquisition Sub, Inc., SMG Growing Media, Inc., The Scotts Miracle-Gro Company, Chris Hagedorn, H. Macgregor Clarke, David B. Kent, Cory Miller, Patricia M. Ziegler, and AeroGrow International, Inc. ("AeroGrow") (collectively, "Defendants"), and (together with Lead Plaintiff, the "Parties"), by and through their respective counsel of record, stipulate and agree as follows:

WHEREAS, on January 11, 2021, plaintiff Overbrook Capital ("Overbrook") filed a putative class action lawsuit on behalf of AeroGrow shareholders, captioned *Overbrook Capital, LLC v. AeroGrow International, Inc., et al.*, No. A-21-827665-B (Dist. Ct. Nev.) ("*Overbrook*").

WHEREAS, on January 14, 2021, Lead Plaintiff filed a putative class action lawsuit on behalf of AeroGrow shareholders, captioned *Nicoya Capital, LLC v. Hagedorn*, et al., No. A-21-827745-B (Dist. Ct. Nev.) ("*Nicoya*").

WHEREAS, on February 18, 2021, pursuant to a stipulation among plaintiffs, this Court consolidated *Overbrook* and *Nicoya* for all purposes, naming Nicoya as Lead Plaintiff, and naming Bottini & Bottini, Inc. as Lead Counsel and Kemp Jones LLP as Plaintiffs' Liaison Counsel. Pursuant to the February 18, 2021 Order, "Lead Counsel shall have authority over the following matters on behalf of all plaintiffs: (a) convening meetings of plaintiffs' counsel; (b) making assignments regarding initiating, responding to, scheduling, and briefing of motions, determining the scope, order, and conduct of all discovery proceedings, and assigning work to plaintiffs' counsel in such a manner as to avoid duplication of effort and inefficiencies; (c) retaining experts; and (d) other matters concerning the prosecution of or settlement of the cases." Lead Counsel has the "authority to communicate with Defendants' counsel and the Court on behalf of plaintiffs" and "Defendants' counsel may rely on all agreements made with Plaintiffs' Lead Counsel, and such agreements shall be binding."

WHEREAS, the February 18, 2021 Order "appl[ies] to each subsequently filed action that arises out of the same or substantially same transactions or events as this consolidated action that is subsequently filed in or transferred to this Court."

WHEREAS, on February 22, 2021, plaintiff Bradley Louis Radoff filed a lawsuit captioned *Radoff v. Hagedorn, et al.*, No. A-21-829854-B (Dist. Ct. Nev.) ("*Radoff*").

WHEREAS, on February 24, 2021, Liaison Counsel provided notice to the Court of *Radoff*, a related, subsequently filed action arising out of similar facts and circumstances, and requested that *Radoff* be consolidated for all purposes, including trial.

WHEREAS, on February 24, 2021, the Court consolidated *Radoff* with *Nicoya* and *Overbrook* for all purposes, including trial.

WHEREAS, on February 26, 2021, Plaintiffs filed a Consolidated Class Action Complaint against Defendants, asserting claims for breach of fiduciary duty against Scotts Miracle-Gro Company, James Hagedorn, and SMG Growing Media, Inc., as controlling stockholders, for breach of fiduciary duty against Chris Hagedorn, H. MacGregor Clarke, David B. Kent, Cory Miller, and Patricia M. Ziegler, and for aiding and abetting breach of fiduciary duty against James Hagedorn, Peter Supron, AeroGrow International, Inc., AGI Acquisition Sub, Inc., Chris Hagedorn, H. MacGregor Clarke, David B. Kent, Cory Miller, and Patricia M. Zielger.

WHEREAS, on March 1, 2021, Defendants' Counsel provided counsel for Radoff the Order consolidating *Radoff* with *Nicoya* and *Overbrook.*

WHEREAS, on March 2, 2021, counsel for Radoff disputed the relevance of the Consolidated Class Action Complaint filed on February 26, 2021, took the position that Defendants must respond to the *Radoff* complaint, and stated an intent to serve the *Radoff* complaint and has done so as to certain Defendants.

WHEREAS, on March 15, 2021, counsel for Radoff filed a First Amended Complaint only in case No. A-21-829854-B, which is not the consolidated action. Radoff's First Amended Complaint contains the same allegations and counts as the original *Radoff* complaint and asserts an additional count for declaratory relief and allegations related thereto.

ACCORDINGLY, IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned counsel for Lead Plaintiff and Defendants that:

. . .

. . .

1. The Parties agree that Defendants need not answer, respond, or otherwise address the first three counts of the *Radoff* First Amended Complaint, in light of the fact that the Court has consolidated the *Radoff* action with *Nicoya* and *Overbrook* for all purposes.

2. Defendants will confer with counsel for Radoff or otherwise seek relief from the Court as to the fourth count of the *Radoff* First Amended Complaint.

3. The Parties further agree that this Stipulation shall not operate to waive, release, compromise, or prejudice any rights, defenses, arguments or claims Plaintiffs and Defendants may have, including any concerning the ability of this Court to assert jurisdiction over Defendants.

[SIGNATURE BLOCKS ON THE FOLLOWING PAGE]

IT IS SO STIPULATED.

DATED this 24th day of March, 2021.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

/s/ Maximilien D. Fetaz
KIRK B. LENHARD, ESQ.
Nevada Bar No. 1437
MAXIMILIEN D. FETAZ, ESQ.
Nevada Bar No. 12737
TRAVIS F. CHANCE, ESQ.
Nevada Bar No. 13800

JONES DAY
MARJORIE P. DUFFY, ESQ.
(*pro hac vice* forthcoming)
ASHLEY F. HEINTZ, ESQ.
(*pro hac vice* pending)

Attorneys for Defendants AeroGrow International, Inc., AGI Acquisition Sub, Inc., SMG Growing Media, Inc., The Scotts Miracle-Gro Company, Chris Hagedorn, Cory Miller, Patricia M. Ziegler, James Hagedorn, and Peter Supron

DATED this 24th day of March, 2021.

PISANELLI BICE PLLC

/s/ M. Magali Mercera
JAMES J. PISANELLI, ESQ.
Nevada Bar No. 4027
M. MAGALI MERCERA, ESQ.
Nevada Bar No. 11742

BRYAN CAVE LEIGHTON PAISNER LLP
TIMOTHY R. BEYER, ESQ.
(*pro hac vice* forthcoming)

Attorneys for Defendants H. Macgregor Clarke and David B. Kent

DATED this 24th day of March, 2021.

KEMP JONES LLP

/s/ Don Springmeyer
DON SPRINGMEYER, ESQ.
Nevada Bar No. 1021
MICHAEL GAYAN, ESQ.
Nevada Bar No. 11135

BOTTINI & BOTTINI, INC.
FRANCIS A. BOTTINI, JR., ESQ.
(*pro hac vice* forthcoming)
YURY A. KOLESNIKOV, ESQ.
(*pro hac vice* forthcoming)

Attorneys for Lead Plaintiff Nicoya Capital LLC

ORDER

The above stipulation having been considered and good cause appearing therefore,

IT IS HEREBY ORDERED that Defendants need not answer, respond, or otherwise address the first three counts of the *Radoff* First Amended Complaint, in light of the fact that the Court has consolidated the *Radoff* action with *Nicoya* and *Overbrook* for all purposes.

IT IS SO ORDERED.

DATED this 24th day of March, 2021.

DISTRICT COURT JUDGE

Submitted By

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: */s/ Maximilien D. Fetaz*
KIRK B. LENHARD, ESQ., Nevada Bar No. 1437
MAXIMILIEN D. FETAZ, ESQ., Nevada Bar No. 12737
TRAVIS F. CHANCE, ESQ., Nevada Bar No. 13800

JONES DAY
MARJORIE P. DUFFY, ESQ.
(*pro hac vice* forthcoming)
ASHLEY F. HEINTZ, ESQ.
(*pro hac vice* pending)

Attorneys for Defendants AeroGrow International, Inc., AGI Acquisition Sub, Inc., SMG Growing Media, Inc., The Scotts Miracle-Gro Company, Chris Hagedorn, Cory Miller, Patricia M. Ziegler, James Hagedorn, and Peter Supron

Cosby, Wendy C.

From: Magali Mercera <mmm@pisanellibice.com>
Sent: Wednesday, March 24, 2021 12:19 PM
To: Fetaz, Maximilien; 'd.springmeyer@kempjones.com'; Michael Gayan; James Pisanelli
Cc: Chance, Travis F.; Lenhard, Kirk B.; Cosby, Wendy C.
Subject: RE: Scotts/Aero: SAO re Consolidated Case

Thanks, Max. You may apply my e-signature.

M. Magali Mercera
PISANELLI BICE, PLLC
Telephone: (702) 214-2100
mmm@pisanellibice.com | www.pisanellibice.com

From: Fetaz, Maximilien <MFetaz@BHFS.com>
Sent: Wednesday, March 24, 2021 11:56 AM
To: 'd.springmeyer@kempjones.com' <d.springmeyer@kempjones.com>; Magali Mercera <mmm@pisanellibice.com>; Michael Gayan <m.gayan@kempjones.com>; James Pisanelli <jjp@pisanellibice.com>
Cc: Chance, Travis F. <tchance@bhfs.com>; Lenhard, Kirk B. <KLenhard@BHFS.com>; Cosby, Wendy C. <wcosby@bhfs.com>
Subject: Scotts/Aero: SAO re Consolidated Case

CAUTION: External Email

All,

Please see attached Stipulation and Order Regarding Consolidated Case. Please confirm you approve us affixing your e-signature to the attached. Thank you,

Maximilien D. Fetaz
Brownstein Hyatt Farber Schreck, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106
702.464.7083 tel
MFetaz@BHFS.com

Cosby, Wendy C.

From: Don Springmeyer <d.springmeyer@kempjones.com>
Sent: Wednesday, March 24, 2021 1:37 PM
To: Fetaz, Maximilien; 'M. Magali Mercera'; Michael Gayan; James Pisanelli
Cc: Chance, Travis F.; Lenhard, Kirk B.; Cosby, Wendy C.
Subject: RE: Scotts/Aero: SAO re Consolidated Case

Max,

You are authorized to affix my e-signature to the SAO and file.

Don Springmeyer, Esq.

KEMP | JONES
ATTORNEYS AT LAW

3800 Howard Hughes Pkwy., 17th Floor | Las Vegas, NV 89169
(P) 702-385-6000 | (F) 702 385-6001| d.springmeyer@kempjones.com
(profile) **(vCard)**

From: Fetaz, Maximilien [MFetaz@BHFS.com]
Sent: Wednesday, March 24, 2021 11:56 AM
To: Don Springmeyer; 'M. Magali Mercera'; Michael Gayan; James Pisanelli
Cc: Chance, Travis F.; Lenhard, Kirk B.; Cosby, Wendy C.
Subject: [External] Scotts/Aero: SAO re Consolidated Case

All,

Please see attached Stipulation and Order Regarding Consolidated Case. Please confirm you approve us affixing your e-signature to the attached. Thank you,

Maximilien D. Fetaz
Brownstein Hyatt Farber Schreck, LLP
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702.464.7083 tel
MFetaz@BHFS.com

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3/31/2021 12:13 PM
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NEOJ

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Telephone: 404.521.3939

Attorneys for Defendants AGI Acquisition Sub, Inc., SMG Growing Media, Inc., The Scotts Miracle-Gro Company, AeroGrow International, Inc., Chris Hagedorn, Cory Miller, Patricia M. Ziegler, James Hagedorn, and Peter Supron

DISTRICT COURT

CLARK COUNTY, NEVADA

OVERBROOK CAPITAL LLC, on Behalf of Itself and All Others Similarly Situated,

Plaintiffs,

v.

AEROGROW INTERNATIONAL, INC., CHRIS HAGEDORN, H. MACGREGOR CLARKE, DAVID B. KENT, CORY MILLER, PATRICIA M. ZIEGLER, SMG GROWING MEDIA, INC., and SCOTTS MIRACLE-GRO COMPANY,

Defendants.

CASE NO.: A-21-827665-B (**Lead Case**)
DEPT NO.: XI

NOTICE OF ENTRY OF STIPULATION AND ORDER REGARDING CONSOLIDATED CASE

NICOYA CAPITAL, LLC, on behalf of itself and all other similarly situated, *Plaintiffs,* v. CHRIS HAGEDORN, H. MACGREGOR CLARKE, DAVID B. KENT, CORY MILLER, PATRICIA M. ZIEGLER, JAMES HAGEDORN, PETER SUPRON, and AEROGROW INTERNATIONAL, INC., a Nevada Corporation, and AGI ACQUISITION SUB, INC., a Nevada Corporation, SMG GROWING MEDIA, INC., an Ohio Corporation, and SCOTTS MIRACLE-GRO COMPANY, an Ohio Corporation, *Defendants*.	CASE NO.: A-21-827745-B
BRADLEY LOUIS RADOFF, *Plaintiff,* v. CHRIS HAGEDORN, an individual; H. MACGREGOR CLARKE, an individual; DAVID B. KENT, an individual; CORY MILLER, an individual; PATRICIA M. ZIEGLER, individual; JAMES HAGEDORN, an individual; PETER SUPRON, an individual; AEROGROW INTERNATIONAL, INC., a Nevada Corporation; AGI ACQUISITION SUB, INC., a Nevada Corporation; SMG GROWING MEDIA, INC., an Ohio Corporation; THE SCOTTS MIRACLE-GRO COMPANY, an Ohio Corporation; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive. *Defendants.*	CASE NO.: A-21-829854-B

PLEASE TAKE NOTICE that a Stipulation and Order Regarding Consolidated Case was entered on March 25, 2021. A copy of said order is attached hereto.

DATED this 31st day of March, 2021.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

BY: */s/ Maximilien D. Fetaz*
KIRK B. LENHARD, ESQ.
MAXIMILIEN D. FETAZ, ESQ.
TRAVIS F. CHANCE, ESQ.

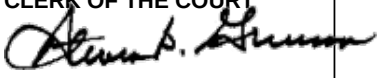
MARJORIE P. DUFFY, ESQ.
(*pro hac vice* forthcoming)
ASHLEY F. HEINTZ, ESQ.
(*pro hac vice*)
JONES DAY

Attorneys for Defendants AGI Acquisition Sub, Inc., SMG Growing Media, Inc., The Scotts Miracle-Gro Company, AeroGrow International, Inc., Chris Hagedorn, Cory Miller, Patricia M. Ziegler, James Hagedorn, and Peter Supron

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP and pursuant to NRCP 5(b), EDCR 8.05, Administrative Order 14-2, and NEFCR 9, I caused a true and correct copy of the foregoing **NOTICE OF ENTRY OF STIPULATION AND ORDER REGARDING CONSOLIDATED CASE** to be submitted electronically to all parties currently on the electronic service list on March 31, 2021.

/s/ Wendy Cosby
an employee of Brownstein Hyatt Farber Schreck, LLP



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Attorneys for Defendants AeroGrow International, Inc., AGI Acquisition Sub, Inc., SMG Growing Media, Inc., The Scotts Miracle-Gro Company, Chris Hagedorn, Cory Miller, Patricia M. Ziegler, James Hagedorn, and Peter Supron

DISTRICT COURT

CLARK COUNTY, NEVADA

OVERBROOK CAPITAL LLC, on Behalf of Itself and All Others Similarly Situated,

Plaintiffs,

v.

AEROGROW INTERNATIONAL, INC., CHRIS HAGEDORN, H. MACGREGOR CLARKE, DAVID B. KENT, CORY MILLER, PATRICIA M. ZIEGLER, SMG GROWING MEDIA, INC., and SCOTTS MIRACLE-GRO COMPANY,

Defendants.

CASE NO.: A-21-827665-B (**Lead Case**)
DEPT NO.: XI

STIPULATION AND ORDER REGARDING CONSOLIDATED CASE

NICOYA CAPITAL, LLC, on behalf of itself and all other similarly situated, *Plaintiffs,* v. CHRIS HAGEDORN, H. MACGREGOR CLARKE, DAVID B. KENT, CORY MILLER, PATRICIA M. ZIEGLER, JAMES HAGEDORN, PETER SUPRON, and AEROGROW INTERNATIONAL, INC., a Nevada Corporation, and AGI ACQUISITION SUB, INC., a Nevada Corporation, SMG GROWING MEDIA, INC., an Ohio Corporation, and SCOTTS MIRACLE-GRO COMPANY, an Ohio Corporation, *Defendants*.	CASE NO.: A-21-827745-B
BRADLEY LOUIS RADOFF, *Plaintiff,* v. CHRIS HAGEDORN, an individual; H. MACGREGOR CLARKE, an individual; DAVID B. KENT, an individual; CORY MILLER, an individual; PATRICIA M. ZIEGLER, individual; JAMES HAGEDORN, an individual; PETER SUPRON, an individual; AEROGROW INTERNATIONAL, INC., a Nevada Corporation; AGI ACQUISITION SUB, INC., a Nevada Corporation; SMG GROWING MEDIA, INC., an Ohio Corporation; THE SCOTTS MIRACLE-GRO COMPANY, an Ohio Corporation; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive. *Defendants.*	CASE NO.: A-21-829854-B

Lead Plaintiff Nicoya Capital, LLC ("Lead Plaintiff") and Defendants James Hagedorn, Peter Supron, AGI Acquisition Sub, Inc., SMG Growing Media, Inc., The Scotts Miracle-Gro Company, Chris Hagedorn, H. Macgregor Clarke, David B. Kent, Cory Miller, Patricia M. Ziegler, and AeroGrow International, Inc. ("AeroGrow") (collectively, "Defendants"), and (together with Lead Plaintiff, the "Parties"), by and through their respective counsel of record, stipulate and agree as follows:

WHEREAS, on January 11, 2021, plaintiff Overbrook Capital ("Overbrook") filed a putative class action lawsuit on behalf of AeroGrow shareholders, captioned *Overbrook Capital, LLC v. AeroGrow International, Inc., et al.*, No. A-21-827665-B (Dist. Ct. Nev.) ("*Overbrook*").

WHEREAS, on January 14, 2021, Lead Plaintiff filed a putative class action lawsuit on behalf of AeroGrow shareholders, captioned *Nicoya Capital, LLC v. Hagedorn*, et al., No. A-21-827745-B (Dist. Ct. Nev.) ("*Nicoya*").

WHEREAS, on February 18, 2021, pursuant to a stipulation among plaintiffs, this Court consolidated *Overbrook* and *Nicoya* for all purposes, naming Nicoya as Lead Plaintiff, and naming Bottini & Bottini, Inc. as Lead Counsel and Kemp Jones LLP as Plaintiffs' Liaison Counsel. Pursuant to the February 18, 2021 Order, "Lead Counsel shall have authority over the following matters on behalf of all plaintiffs: (a) convening meetings of plaintiffs' counsel; (b) making assignments regarding initiating, responding to, scheduling, and briefing of motions, determining the scope, order, and conduct of all discovery proceedings, and assigning work to plaintiffs' counsel in such a manner as to avoid duplication of effort and inefficiencies; (c) retaining experts; and (d) other matters concerning the prosecution of or settlement of the cases." Lead Counsel has the "authority to communicate with Defendants' counsel and the Court on behalf of plaintiffs" and "Defendants' counsel may rely on all agreements made with Plaintiffs' Lead Counsel, and such agreements shall be binding."

WHEREAS, the February 18, 2021 Order "appl[ies] to each subsequently filed action that arises out of the same or substantially same transactions or events as this consolidated action that is subsequently filed in or transferred to this Court."

WHEREAS, on February 22, 2021, plaintiff Bradley Louis Radoff filed a lawsuit captioned *Radoff v. Hagedorn, et al.*, No. A-21-829854-B (Dist. Ct. Nev.) ("*Radoff*").

WHEREAS, on February 24, 2021, Liaison Counsel provided notice to the Court of *Radoff*, a related, subsequently filed action arising out of similar facts and circumstances, and requested that *Radoff* be consolidated for all purposes, including trial.

WHEREAS, on February 24, 2021, the Court consolidated *Radoff* with *Nicoya* and *Overbrook* for all purposes, including trial.

WHEREAS, on February 26, 2021, Plaintiffs filed a Consolidated Class Action Complaint against Defendants, asserting claims for breach of fiduciary duty against Scotts Miracle-Gro Company, James Hagedorn, and SMG Growing Media, Inc., as controlling stockholders, for breach of fiduciary duty against Chris Hagedorn, H. MacGregor Clarke, David B. Kent, Cory Miller, and Patricia M. Ziegler, and for aiding and abetting breach of fiduciary duty against James Hagedorn, Peter Supron, AeroGrow International, Inc., AGI Acquisition Sub, Inc., Chris Hagedorn, H. MacGregor Clarke, David B. Kent, Cory Miller, and Patricia M. Zielger.

WHEREAS, on March 1, 2021, Defendants' Counsel provided counsel for Radoff the Order consolidating *Radoff* with *Nicoya* and *Overbrook.*

WHEREAS, on March 2, 2021, counsel for Radoff disputed the relevance of the Consolidated Class Action Complaint filed on February 26, 2021, took the position that Defendants must respond to the *Radoff* complaint, and stated an intent to serve the *Radoff* complaint and has done so as to certain Defendants.

WHEREAS, on March 15, 2021, counsel for Radoff filed a First Amended Complaint only in case No. A-21-829854-B, which is not the consolidated action. Radoff's First Amended Complaint contains the same allegations and counts as the original *Radoff* complaint and asserts an additional count for declaratory relief and allegations related thereto.

ACCORDINGLY, IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned counsel for Lead Plaintiff and Defendants that:

. . .

. . .

1. The Parties agree that Defendants need not answer, respond, or otherwise address the first three counts of the *Radoff* First Amended Complaint, in light of the fact that the Court has consolidated the *Radoff* action with *Nicoya* and *Overbrook* for all purposes.

2. Defendants will confer with counsel for Radoff or otherwise seek relief from the Court as to the fourth count of the *Radoff* First Amended Complaint.

3. The Parties further agree that this Stipulation shall not operate to waive, release, compromise, or prejudice any rights, defenses, arguments or claims Plaintiffs and Defendants may have, including any concerning the ability of this Court to assert jurisdiction over Defendants.

[SIGNATURE BLOCKS ON THE FOLLOWING PAGE]

IT IS SO STIPULATED.

DATED this 24th day of March, 2021.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

/s/ Maximilien D. Fetaz
KIRK B. LENHARD, ESQ.
Nevada Bar No. 1437
MAXIMILIEN D. FETAZ, ESQ.
Nevada Bar No. 12737
TRAVIS F. CHANCE, ESQ.
Nevada Bar No. 13800

JONES DAY
MARJORIE P. DUFFY, ESQ.
(*pro hac vice* forthcoming)
ASHLEY F. HEINTZ, ESQ.
(*pro hac vice* pending)

Attorneys for Defendants AeroGrow International, Inc., AGI Acquisition Sub, Inc., SMG Growing Media, Inc., The Scotts Miracle-Gro Company, Chris Hagedorn, Cory Miller, Patricia M. Ziegler, James Hagedorn, and Peter Supron

DATED this 24th day of March, 2021.

PISANELLI BICE PLLC

/s/ M. Magali Mercera
JAMES J. PISANELLI, ESQ.
Nevada Bar No. 4027
M. MAGALI MERCERA, ESQ.
Nevada Bar No. 11742

BRYAN CAVE LEIGHTON PAISNER LLP
TIMOTHY R. BEYER, ESQ.
(*pro hac vice* forthcoming)

Attorneys for Defendants H. Macgregor Clarke and David B. Kent

DATED this 24th day of March, 2021.

KEMP JONES LLP

/s/ Don Springmeyer
DON SPRINGMEYER, ESQ.
Nevada Bar No. 1021
MICHAEL GAYAN, ESQ.
Nevada Bar No. 11135

BOTTINI & BOTTINI, INC.
FRANCIS A. BOTTINI, JR., ESQ.
(*pro hac vice* forthcoming)
YURY A. KOLESNIKOV, ESQ.
(*pro hac vice* forthcoming)

Attorneys for Lead Plaintiff Nicoya Capital LLC

ORDER

The above stipulation having been considered and good cause appearing therefore,

IT IS HEREBY ORDERED that Defendants need not answer, respond, or otherwise address the first three counts of the *Radoff* First Amended Complaint, in light of the fact that the Court has consolidated the *Radoff* action with *Nicoya* and *Overbrook* for all purposes.

IT IS SO ORDERED.

DATED this 24th day of March, 2021.

DISTRICT COURT JUDGE

Submitted By

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: */s/ Maximilien D. Fetaz*
KIRK B. LENHARD, ESQ., Nevada Bar No. 1437
MAXIMILIEN D. FETAZ, ESQ., Nevada Bar No. 12737
TRAVIS F. CHANCE, ESQ., Nevada Bar No. 13800

JONES DAY
MARJORIE P. DUFFY, ESQ.
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ASHLEY F. HEINTZ, ESQ.
(*pro hac vice* pending)

Attorneys for Defendants AeroGrow International, Inc., AGI Acquisition Sub, Inc., SMG Growing Media, Inc., The Scotts Miracle-Gro Company, Chris Hagedorn, Cory Miller, Patricia M. Ziegler, James Hagedorn, and Peter Supron

Cosby, Wendy C.

From: Magali Mercera <mmm@pisanellibice.com>
Sent: Wednesday, March 24, 2021 12:19 PM
To: Fetaz, Maximilien; 'd.springmeyer@kempjones.com'; Michael Gayan; James Pisanelli
Cc: Chance, Travis F.; Lenhard, Kirk B.; Cosby, Wendy C.
Subject: RE: Scotts/Aero: SAO re Consolidated Case

Thanks, Max. You may apply my e-signature.

M. Magali Mercera
PISANELLI BICE, PLLC
Telephone: (702) 214-2100
mmm@pisanellibice.com | www.pisanellibice.com

From: Fetaz, Maximilien <MFetaz@BHFS.com>
Sent: Wednesday, March 24, 2021 11:56 AM
To: 'd.springmeyer@kempjones.com' <d.springmeyer@kempjones.com>; Magali Mercera <mmm@pisanellibice.com>; Michael Gayan <m.gayan@kempjones.com>; James Pisanelli <jjp@pisanellibice.com>
Cc: Chance, Travis F. <tchance@bhfs.com>; Lenhard, Kirk B. <KLenhard@BHFS.com>; Cosby, Wendy C. <wcosby@bhfs.com>
Subject: Scotts/Aero: SAO re Consolidated Case

CAUTION: External Email

All,

Please see attached Stipulation and Order Regarding Consolidated Case. Please confirm you approve us affixing your e-signature to the attached. Thank you,

Maximilien D. Fetaz
Brownstein Hyatt Farber Schreck, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106
702.464.7083 tel
MFetaz@BHFS.com

Cosby, Wendy C.

From: Don Springmeyer <d.springmeyer@kempjones.com>
Sent: Wednesday, March 24, 2021 1:37 PM
To: Fetaz, Maximilien; 'M. Magali Mercera'; Michael Gayan; James Pisanelli
Cc: Chance, Travis F.; Lenhard, Kirk B.; Cosby, Wendy C.
Subject: RE: Scotts/Aero: SAO re Consolidated Case

Max,

You are authorized to affix my e-signature to the SAO and file.

Don Springmeyer, Esq.

KEMP | JONES
ATTORNEYS AT LAW

3800 Howard Hughes Pkwy., 17th Floor | Las Vegas, NV 89169
(P) 702-385-6000 | (F) 702 385-6001| d.springmeyer@kempjones.com
(profile) **(vCard)**

From: Fetaz, Maximilien [MFetaz@BHFS.com]
Sent: Wednesday, March 24, 2021 11:56 AM
To: Don Springmeyer; 'M. Magali Mercera'; Michael Gayan; James Pisanelli
Cc: Chance, Travis F.; Lenhard, Kirk B.; Cosby, Wendy C.
Subject: [External] Scotts/Aero: SAO re Consolidated Case

All,

Please see attached Stipulation and Order Regarding Consolidated Case. Please confirm you approve us affixing your e-signature to the attached. Thank you,

Maximilien D. Fetaz
Brownstein Hyatt Farber Schreck, LLP
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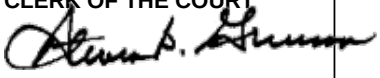

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Attorneys for Defendants AeroGrow International, Inc., AGI Acquisition Sub, Inc., SMG Growing Media, Inc., The Scotts Miracle-Gro Company, Chris Hagedorn, Cory Miller, Patricia M. Ziegler, James Hagedorn, and Peter Supron

DISTRICT COURT

CLARK COUNTY, NEVADA

OVERBROOK CAPITAL LLC, on Behalf of Itself and All Others Similarly Situated,

Plaintiffs,

v.

AEROGROW INTERNATIONAL, INC., CHRIS HAGEDORN, H. MACGREGOR CLARKE, DAVID B. KENT, CORY MILLER, PATRICIA M. ZIEGLER, SMG GROWING MEDIA, INC., and SCOTTS MIRACLE-GRO COMPANY,

Defendants.

CASE NO.: A-21-827665-B (**Lead Case**)
DEPT NO.: XI

JOINT NOTICE OF LIMITED NON-OPPOSITION TO MOTION TO INTERVENE

NICOYA CAPITAL, LLC, on behalf of itself and all other similarly situated, *Plaintiffs*, v. CHRIS HAGEDORN, H. MACGREGOR CLARKE, DAVID B. KENT, CORY MILLER, PATRICIA M. ZIEGLER, JAMES HAGEDORN, PETER SUPRON, and AEROGROW INTERNATIONAL, INC., a Nevada Corporation, and AGI ACQUISITION SUB, INC., a Nevada Corporation, SMG GROWING MEDIA, INC., an Ohio Corporation, and SCOTTS MIRACLE-GRO COMPANY, an Ohio Corporation, *Defendants*.	CASE NO.: A-21-827745-B
BRADLEY LOUIS RADOFF, *Plaintiff* CHRIS HAGEDORN, an individual; H. MACGREGOR CLARKE, an individual; DAVID B. KENT, an individual; CORY MILLER, an individual; PATRICIA M. ZIEGLER, individual; JAMES HAGEDORN, an individual; PETER SUPRON, an individual; AEROGROW INTERNATIONAL, INC., a Nevada Corporation; AGI ACQUISITION SUB, INC., a Nevada Corporation; SMG GROWING MEDIA, INC., an Ohio Corporation; THE SCOTTS MIRACLE-GRO COMPANY, an Ohio Corporation; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive. *Defendants.*	CASE NO.: A-21-829854-B

In advance of the Court's April 12, 2021 hearing on the Motion to Intervene, Defendants in the above-captioned cases hereby provide notice that they do not oppose the intervention of proposed plaintiff-intervenors Fred M. Adamczyk, Thomas C. Albanese, William A. Almond, III, Michael S. Barish, George C. Betke, Jr 2019 Trust, Diana Boyd, Anne Carrol 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 Severance, Inc. Pension Plan & Trust, Daniel G. Hofstein, Kevin Johnson, Candice Kaye, Laura J. Koby, Carole L. McLaughlin, Brian Peierls, Joseph E. Peter, Alexander Perelberg, Amy Perelberg, Dana Perelberg, Gary Perelberg, Linda Perelberg, The Really Cool Group, Richard Alan Rudy Revocable Living Trust, James D. Rickman, Jr., James D. Rickman, Jr. Irrevocable Trust, Patricia D. Rickman Irrevocable Trust, Andrew Reese, Rickman Trust, Scott Joseph Rickman Irrevocable Trust, Marlon Dean Alessandra Trust, Bryan Robson, Wayne Sicz IRA, Wayne Sicz Roth IRA, The Carol W. Smith Revocable Trust, Thomas K. Smith, Suraj Vasanth, Cathay C. Wang, Lisa Dawn Wang, Darcy J. Weissenborn, The Margaret S. Weissenborn Revocable Trust, The Stanton F. Weissenborn IRA, The Stanton F. Weissenborn Revocable Trust, The Stanton F. Weissenborn Irrevocable Trust, The Natalie Wolman Living Trust, and Alan Budd Zuckerman in the actions pending in this Court. Defendants take no position on whether the Plaintiff-Intervenors' intervention is permissive or mandatory in this action and reserve all arguments that intervention by any or all of the movants is improper under Nevada law.[1]

Defendants deny all allegations and legal conclusions in the Motion to Intervene, including, among other things, that they failed to comply with the applicable provisions of NRS Chapter 92A

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[1] Defendants do note the impropriety of Plaintiff-Intervenors' attempt to intervene ***only*** in the matter of *Radoff v Hagedorn, et al.*, Case No. A-21-829854-B (the "Radoff Action"). The Radoff Action has been consolidated into the lead action, *Overbrook Capital, LLC v. AeroGrow Int'l, Inc.*, Case No. A-21-827665-B. *See* Order Consolidating Related Case, dated Feb. 24, 2021, on file herein. Thus, Defendants oppose Plaintiff-Intervenors' attempt to intervene ***only*** in the Radoff Action and submit that any intervention efforts should be made in the lead action.

and refer the Court to their forthcoming Opposition to Plaintiff and Plaintiff-Intervenors' Joint Motion to Compel/Determine Compliance with NRS 92A to be filed on April 7, 2021.

DATED this 6th day of April, 2021.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

/s/ Maximilien D. Fetaz
KIRK B. LENHARD, ESQ.
MAXIMILIEN D. FETAZ, ESQ.
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PISANELLI BICE PLLC

/s/ M. Magali Mercera
JAMES J. PISANELLI, ESQ.
M. MAGALI MERCERA, ESQ.

BRYAN CAVE LEIGHTON PAISNER LLP
TIMOTHY R. BEYER, ESQ.
(*pro hac vice* forthcoming)

Attorneys for Defendants H. Macgregor Clarke and David B. Kent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP and pursuant to NRCP 5(b), EDCR 8.05, Administrative Order 14-2, and NEFCR 9, I caused a true and correct copy of the foregoing **JOINT NOTICE OF LIMITED NON-OPPOSITION TO MOTION TO INTERVENE** to be submitted electronically to all parties currently on the electronic service list on April 6, 2021.

/s/ Wendy Cosby
an employee of Brownstein Hyatt Farber Schreck, LLP

Electronically Filed
4/6/2021 4:07 PM
Steven D. Grierson
CLERK OF THE COURT

NOTC

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Attorneys for Defendants AeroGrow International, Inc., AGI Acquisition Sub, Inc., SMG Growing Media, Inc., The Scotts Miracle-Gro Company, Chris Hagedorn, Cory Miller, Patricia M. Ziegler, James Hagedorn, and Peter Supron

DISTRICT COURT

CLARK COUNTY, NEVADA

OVERBROOK CAPITAL LLC, on Behalf of Itself and All Others Similarly Situated,

Plaintiffs,

v.

AEROGROW INTERNATIONAL, INC., CHRIS HAGEDORN, H. MACGREGOR CLARKE, DAVID B. KENT, CORY MILLER, PATRICIA M. ZIEGLER, SMG GROWING MEDIA, INC., and SCOTTS MIRACLE-GRO COMPANY,

Defendants.

CASE NO.: A-21-827665-B (**Lead Case**)
DEPT NO.: XI

JOINT NOTICE OF NON-COMPLIANCE WITH CONSOLIDATION ORDER

NICOYA CAPITAL, LLC, on behalf of itself and all other similarly situated, *Plaintiffs*, v. CHRIS HAGEDORN, H. MACGREGOR CLARKE, DAVID B. KENT, CORY MILLER, PATRICIA M. ZIEGLER, JAMES HAGEDORN, PETER SUPRON, and AEROGROW INTERNATIONAL, INC., a Nevada Corporation, and AGI ACQUISITION SUB, INC., a Nevada Corporation, SMG GROWING MEDIA, INC., an Ohio Corporation, and SCOTTS MIRACLE-GRO COMPANY, an Ohio Corporation, *Defendants*.	CASE NO.: A-21-827745-B
BRADLEY LOUIS RADOFF, *Plaintiff*, v. CHRIS HAGEDORN, an individual; H. MACGREGOR CLARKE, an individual; DAVID B. KENT, an individual; CORY MILLER, an individual; PATRICIA M. ZIEGLER, individual; JAMES HAGEDORN, an individual; PETER SUPRON, an individual; AEROGROW INTERNATIONAL, INC., a Nevada Corporation; AGI ACQUISITION SUB, INC., a Nevada Corporation; SMG GROWING MEDIA, INC., an Ohio Corporation; THE SCOTTS MIRACLE-GRO COMPANY, an Ohio Corporation; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive. *Defendants.*	CASE NO.: A-21-829854-B

TO: THIS HONORABLE COURT AND ALL PARTIES AND COUNSEL OF RECORD

PLEASE TAKE NOTICE of the following:

1. On January 11, 2021, plaintiff Overbrook Capital filed a putative class action lawsuit on behalf of AeroGrow shareholders, captioned *Overbrook Capital, LLC v. AeroGrow*

International, Inc., et al., No. A-21-827665-B (Dist. Ct. Nev.) ("***Overbrook***").

2. On January 14, 2021, plaintiff Nicoya Capital, LLC ("***Lead Plaintiff***") filed a putative class action lawsuit on behalf of AeroGrow shareholders, captioned *Nicoya Capital, LLC v. Hagedorn*, et al., No. A-21-827745-B (Dist. Ct. Nev.) ("***Nicoya***").

3. On February 18, 2021, pursuant to a stipulation among plaintiffs, this Court consolidated *Overbrook* and *Nicoya* for all purposes, naming Nicoya as Lead Plaintiff, and naming Bottini & Bottini, Inc. as Lead Counsel and Kemp Jones LLP as Plaintiffs' Liaison Counsel. Pursuant to the February 18, 2021 Order, "Lead Counsel shall have authority over the following matters on behalf of all plaintiffs: (a) convening meetings of plaintiffs' counsel; (b) making assignments regarding initiating, responding to, scheduling, and briefing of motions, determining the scope, order, and conduct of all discovery proceedings, and assigning work to plaintiffs' counsel in such a manner as to avoid duplication of effort and inefficiencies; (c) retaining experts; and (d) other matters concerning the prosecution of or settlement of the cases." Lead Counsel has the "authority to communicate with Defendants' counsel and the Court on behalf of plaintiffs" and "Defendants' counsel may rely on all agreements made with Plaintiffs' Lead Counsel, and such agreements shall be binding."

4. The February 18, 2021 Order "appl[ies] to each subsequently filed action that arises out of the same or substantially same transactions or events as this consolidated action that is subsequently filed in or transferred to this Court."

5. On February 22, 2021, plaintiff Bradley Louis Radoff filed a lawsuit captioned *Radoff v. Hagedorn, et al.*, No. A-21-829854-B (Dist. Ct. Nev.) ("***Radoff***").

6. On February 24, 2021, the Court consolidated *Radoff* with *Nicoya* and *Overbrook* for all purposes, including trial.

7. On February 26, 2021, Plaintiffs filed a Consolidated Class Action Complaint against Defendants in *Overbrook*, the lead case, asserting claims for breach of fiduciary duty against Scotts Miracle-Gro Company, James Hagedorn, and SMG Growing Media, Inc., as controlling stockholders, for breach of fiduciary duty against Chris Hagedorn, H. MacGregor Clarke, David B. Kent, Cory Miller, and Patricia M. Ziegler, and for aiding and abetting breach of fiduciary duty

against James Hagedorn, Peter Supron, AeroGrow International, Inc. ("***Aerogrow***"), AGI Acquisition Sub, Inc., Chris Hagedorn, H. MacGregor Clarke, David B. Kent, Cory Miller, and Patricia M. Ziegler.

8. On March 1, 2021, Defendants' counsel provided counsel for Radoff the Order consolidating *Radoff* with *Nicoya* and *Overbrook.*

9. On March 2, 2021, counsel for Radoff disputed the relevance of the Consolidated Class Action Complaint filed on February 26, 2021, took the position that Defendants must respond to the *Radoff* complaint, and stated an intent to serve the *Radoff* complaint and has done so as to certain Defendants.

10. On March 15, 2021, Radoff filed a First Amended Complaint only in *Radoff*, which is not the consolidated, lead case. Radoff's First Amended Complaint contains the same allegations and counts as the original *Radoff* complaint and asserts an additional count for declaratory relief and allegations related thereto.

11. On March 24, 2021, 52 stockholders of AeroGrow International, Inc. filed a Motion to Intervene on Order Shortening Time in *Radoff* and ***not*** in the consolidated, lead case.

12. Also on March 24, 2021, Radoff and certain of the Radoff Intervenors filed a Joint Motion to Compel/Determine Compliance with NRS 92A, or Alternatively, Injunctive Relief (the "***Motion to Compel***") on an Order Shortening Time in *Radoff* and ***not*** in the consolidated, lead case.

13. On March 25, 2021, pursuant to the February 18, 2021 stipulation and order, this Court entered an order upon the stipulation of Lead Plaintiff and all Defendants that states that Defendants need not answer or respond to the first three counts in the *Radoff* First Amended Complaint and that Defendants would confer with counsel for Radoff as to answering the fourth count.

14. Because the Motion to Compel will resolve the fourth cause of action in the *Radoff* First Amended Complaint and AeroGrow will timely oppose the Motion to Compel in accordance with the Court Ordered briefing schedule, no further response to that cause of action would be required. For those reasons reason, on March 31, 2021, Defendants proposed an agreement with

Radoff, whereby the parties would agree that no further response to that cause of action would be required.

15. On April 5, 2021, Radoff declined to agree to this proposal or discuss the matter further.

16. As a result, Radoff contends that Defendants must answer or respond to the fourth cause of action in the *Radoff* First Amended Complaint pursuant to NRCP 12(a)(1) as each Defendant is served, some of which responses Radoff believes to be due April 6 and April 8, 2021, respectively.

17. Radoff's position in paragraph 16 is incorrect for the reasons stated in paragraph 14, namely that the Court's resolution of the Motion to Compel will resolve the fourth cause of action in the *Radoff* First Amended Complaint. To the extent any response to the fourth cause of action in the *Radoff* First Amended Complaint is necessary, Defendants' Oppositions to the Motion to Compel will be filed on or before April 7, 2021, and those Oppositions shall serve as the responsive pleadings.

18. To date, Defendants have sought to comply with the Court's Orders and engage in good faith discussions with Lead Plaintiffs, and even with Radoff in order to ensure compliance with the Court's Orders.

19. Radoff's attempt to dictate deadlines or agreements with Defendants violates the February 18, 2021 Order, as such authority is vested with Lead Plaintiff. And Radoff's continued filing in a non-lead case similarly violates that order, as all filings are required to be made in the lead case.

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20. Defendants expressly reserve all rights, defenses, arguments, or claims that they may have to the Consolidated Complaint and any other pleading filed in any of the consolidated *Nicoya*, *Overbrook,* and *Radoff* actions. Defendants further expressly reserve any defenses as to personal jurisdiction under NRCP 12(b)(2).

DATED this 6th day of April, 2021.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

/s/ Maximilien D. Fetaz
KIRK B. LENHARD, ESQ.
MAXIMILIEN D. FETAZ, ESQ.
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Attorneys for Defendants AeroGrow International, Inc., AGI Acquisition Sub, Inc., SMG Growing Media, Inc., The Scotts Miracle-Gro Company, Chris Hagedorn, Cory Miller, Patricia M. Ziegler, James Hagedorn, and Peter Supron

PISANELLI BICE PLLC

/s/ M. Magali Mercera
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TIMOTHY R. BEYER, ESQ.
(*pro hac vice* forthcoming)

Attorneys for Defendants H. Macgregor Clarke and David B. Kent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP and pursuant to NRCP 5(b), EDCR 8.05, Administrative Order 14-2, and NEFCR 9, I caused a true and correct copy of the foregoing **JOINT NOTICE OF NON-COMPLIANCE WITH CONSOLIDATION ORDER** to be submitted electronically to all parties currently on the electronic service list on April 6, 2021.

/s/ Wendy Cosby
an employee of Brownstein Hyatt Farber Schreck, LLP

OPPS

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DISTRICT COURT

CLARK COUNTY, NEVADA

OVERBROOK CAPITAL LLC, on Behalf of Itself and All Others Similarly Situated,

Plaintiffs,

v.

AEROGROW INTERNATIONAL, INC., CHRIS HAGEDORN, H. MACGREGOR CLARKE, DAVID B. KENT, CORY MILLER, PATRICIA M. ZIEGLER, SMG GROWING MEDIA, INC., and SCOTTS MIRACLE-GRO COMPANY,

Defendants.

CASE NO.: A-21-827665-B (**Lead Case**)
DEPT NO.: XI

AEROGROW INTERNATIONAL, INC.'S OPPOSITION TO JOINT MOTION TO COMPEL/DETERMINE COMPLIANCE WITH NRS 92A, OR ALTERNATIVELY, INJUNCTIVE RELIEF, ON AN ORDER SHORTENING TIME

Hearing Date: April 19, 2021
Hearing Time: 9:00 A.M.

NICOYA CAPITAL, LLC, on behalf of itself and all other similarly situated, *Plaintiffs,* v. CHRIS HAGEDORN, H. MACGREGOR CLARKE, DAVID B. KENT, CORY MILLER, PATRICIA M. ZIEGLER, JAMES HAGEDORN, PETER SUPRON, and AEROGROW INTERNATIONAL, INC., a Nevada Corporation, and AGI ACQUISITION SUB, INC., a Nevada Corporation, SMG GROWING MEDIA, INC., an Ohio Corporation, and SCOTTS MIRACLE-GRO COMPANY, an Ohio Corporation, *Defendants*.	CASE NO.: A-21-827745-B
BRADLEY LOUIS RADOFF, *Plaintiff* CHRIS HAGEDORN, an individual; H. MACGREGOR CLARKE, an individual; DAVID B. KENT, an individual; CORY MILLER, an individual; PATRICIA M. ZIEGLER, individual; JAMES HAGEDORN, an individual; PETER SUPRON, an individual; AEROGROW INTERNATIONAL, INC., a Nevada Corporation; AGI ACQUISITION SUB, INC., a Nevada Corporation; SMG GROWING MEDIA, INC., an Ohio Corporation; THE SCOTTS MIRACLE-GRO COMPANY, an Ohio Corporation; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive. *Defendants.*	CASE NO.: A-21-829854-B

Defendant AEROGROW INTERNATIONAL, INC., by and through its counsel of record, the law firms of Brownstein Hyatt Farber Schreck, LLP and Jones Day, hereby submits its Opposition to the Joint Motion to Compel/Determine Compliance with NRS 92A, or Alternatively, Injunctive Relief on an Order Shortening Time (the "Motion to Compel"). This Opposition is made and based upon the attached memorandum of points and authorities, the exhibits attached hereto, the pleadings and papers on file herein, and the argument of counsel to be made at the hearing on the Motion.

DATED this 7th day of April, 2021.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

BY: */s/ Maximilien D. Fetaz*
KIRK B. LENHARD, ESQ.
MAXIMILIEN D. FETAZ, ESQ.
TRAVIS F. CHANCE, ESQ.

MARJORIE P. DUFFY, ESQ.
(*pro hac vice* submitted)
ASHLEY F. HEINTZ, ESQ.
(*pro hac vice*)
JONES DAY

Attorneys for Defendants AeroGrow International, Inc., AGI Acquisition Sub, Inc., SMG Growing Media, Inc., The Scotts Miracle-Gro Company, Chris Hagedorn, Cory Miller, Patricia M. Ziegler, James Hagedorn, and Peter Supron

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT[1]

Plaintiff Bradley Louis Radoff and Plaintiff-Intervenors (together, "Movants") seek judicial resolution of one narrow question: at what point in the dissenter's process, as outlined in NRS Chapter 92A, must beneficial stockholders of a Nevada corporation submit "the written consent of the stockholder of record to the dissent," as required by NRS 92A.400(2)(a)? As the plain language of NRS 92A.400(2)(a) and 420(1)(a) make clear, the time for the submission of that written consent is "before the vote" on the corporate transaction. That deadline is reinforced by the fact that the Nevada Legislature declined to adopt the Model Business Corporation Act's deadline that record stockholder consents be submitted with the beneficial stockholder's form demanding payment—*i.e.*, the deadline Movants advocate for here. That reading is also consistent with statutory interpretation principles and practical considerations. Moreover, even if the statute permitted belated record stockholder consents, that would not entitle Movants to the relief they seek here—to proceed in the dissenter's rights process—because the Movants accepted payment of the merger consideration and by doing so abandoned any right to obtain payment under NRS Chapter 92A.

On February 23, 2021, the stockholders of AeroGrow International, Inc. ("AeroGrow" or the "Company") voted to approve the cash-out merger between AeroGrow and SMG Growing Media, Inc., among others (the "Transaction"), which closed on February 26, 2021.[2] Ex. A, Form 8-K (filed Feb. 23, 2021); Ex. B, Form 8-K (filed Feb. 26, 2021). Dissenter's rights are available for the Transaction, and AeroGrow has properly complied with the requirements for the dissenter's rights process, as set forth in NRS Chapter 92A. AeroGrow has followed the plain language of the statutes in applying the limitations on the right of dissent for beneficial

[1] AeroGrow International, Inc. reserves all rights, defenses, arguments, and claims that it may have to the Consolidated Complaint and any other complaints filed in the consolidated *Nicoya*, *Overbrook*, and *Radoff* actions.

[2] The Transaction was effectuated pursuant to an Agreement and Plan of Merger (the "Merger Agreement") by and among AeroGrow, SMG Growing Media, Inc., AGI Acquisition Sub, Inc., and, solely for the purposes stated in Section 6.4 of the Merger Agreement, The Scotts Miracle-Gro Company. Ex. C, Form 8-K (Nov. 11, 2020) at Item 1.01.

stockholders and the prerequisites to demand payment for shares, outlined in NRS 92A.400 and NRS 92A.420, and in determining to whom it should send dissenter's notices pursuant to NRS 92A.430.

Movants were 53 purported ***beneficial stockholders*** of AeroGrow prior to the close of the Transaction. *See generally* Mot. to Compel. Movants submitted notices of intent to demand payment under NRS Chapter 92A to AeroGrow before the vote on the Transaction on February 23, 2021. *Id.* at 8. The plain language of NRS 92A.400(2)(a) makes clear that Movants also had to submit "the written consent of the stockholder of record to the dissent" "***before*** the vote is taken" on the transaction at issue. *See* NRS 92A.400(2)(a) & 92A.420(1)(a) (emphasis added). That means that all beneficial stockholders, including Movants, must have submitted record stockholder consents ***before*** February 23, 2021 at 10:00 a.m. Mountain Time, when stockholders voted on the Transaction. Ex. D, Definitive Proxy (Jan. 22, 2021) ("Proxy"). Movants admit that they did ***not*** meet this statutory deadline. As a result, they are not entitled to payment under NRS Chapter 92A. *See* NRS 92A.420(3).

Nevertheless, with the Motion to Compel, Movants attempt to cure their failure to comply with the statutory requirement. They contend that the record stockholder consents specified in NRS 92A.400(2)(a)—which unambiguously must have been delivered "before" the vote—instead may be delivered more than a month ***after*** the vote and at the later time in the dissenter's rights process when they submit their demands for payment under NRS 92A.440(1)(a). *See* Mot. to Compel. at 9. That interpretation contravenes the plain language and intent of the statutes and makes compliance with the statutory provisions impracticable. Indeed, Movants' own predicament underscores that their interpretation is untenable: they complain that it is now impossible for them to obtain the record stockholder consents, even while they contend that the statute permits them to submit consents now, long after the vote.

For these reasons, as further explained below, the Motion to Compel and the relief Movants request should be denied.

II. SUMMARY OF RELEVANT BACKGROUND

A. AeroGrow International, Inc.

Before the consummation of the Transaction, AeroGrow was a public company traded under the ticker AERO on the OTCQB Marketplace. The Company is a developer, marketer, direct-seller, and wholesaler of advanced indoor garden systems designed for consumer use. *See* Ex. E, AeroGrow Form 10-K (June 23, 2020), at 1. AeroGrow offers multiple lines of proprietary indoor gardens, grow lights, a patented nutrient formula, more than 40 corresponding proprietary seed pod kits, and various cooking, gardening and décor accessories, primarily in the United States and Canada. *Id.*

As of January 8, 2021 (the "Record Date" for the Transaction), AeroGrow had 34,328,036 shares of common stock outstanding. Ex. D, Proxy at 86. At that time, SMG Growing Media, Inc. ("SMG Growing Media") was the Company's controlling stockholder, owning 27,639,292 shares (or 80.5%) of the common shares outstanding.[3] *See* Ex. F, Decl. of B. Asirifi, Exs. 1-2, Share Balance Summaries for AeroGrow shares held by SMG Growing Media, Inc. as of Jan. 8, 2021. Of the remaining 6,688,744 shares of AeroGrow stock, senior executives and officers owned a total of 155,465 shares. *See id.*, Exs. 3-4, Share Balance Summary for John K. Thompson as of Jan. 8, 2021, and Non-Objecting Beneficial Owners Summary for Joseph Michael Wolfe, John K. Thompson, and Grey H. Gibbs as of Jan. 8, 2021.

B. Dissenter's Rights Are Available For The Transaction[4]

NRS Chapter 92A provides the statutory framework by which stockholders may dissent from a planned corporate action. AeroGrow first provided notice of the availability of dissenter's rights for the Transaction in its Preliminary Proxy, filed on December 4, 2020, over two-and-a-

[3] SMG Growing Media is an Ohio corporation and a direct, wholly-owned subsidiary of The Scotts Miracle-Gro Company ("Scotts"), an Ohio corporation headquartered in Ohio and publicly traded under the ticker "SMG" on the New York Stock Exchange. Proxy at 2. SMG Growing Media serves as a holding company for Scotts' growing media and hydroponic business. *Id.*

[4] The Motion to Compel parrots allegations in the Consolidated Complaint relating to the Transaction, the negotiation process, and the price, among other things. Those allegations are irrelevant to the matter before the Court here. AeroGrow disputes such allegations, and will respond to those allegations in its forthcoming motion to dismiss the Consolidated Complaint due on April 16, 2021.

half months before the vote on the Transaction. Ex. G, Prelim. Proxy (Dec. 4, 2020), at 8. In the Preliminary Proxy, the Company specified that, upon completion of the Transaction, stockholders "would ***no longer own any shares*** of the capital stock of the surviving corporation or have any other rights as a stockholder of the Company." *Id.* at 6 (emphasis added). The Company also provided stockholders with notice that the Transaction would be subject to approval and vote at a special meeting of the stockholders (the "Special Meeting"). *Id*. at i. The Company filed a Second Preliminary Proxy on January 12, 2021. Ex. H, Second Prelim. Proxy (Jan. 12, 2021). The Second Preliminary Proxy reminded stockholders that the Transaction would be subject to approval by a majority vote of stockholders at the Special Meeting. *Id*. at i.

The Company filed its Definitive Proxy (the "Proxy") on January 22, 2021, notifying stockholders that the Special Meeting would take place on February 23, 2021 at 10:00 a.m., Mountain Time. Ex. D, Proxy at i. The Company also again informed stockholders of their right to dissent from the Transaction. *See id.*, at 8 and 80. Specifically, the Proxy informed the Company's stockholders that they will have dissenter's rights if they do not vote for the Transaction, provide "written notice of the [their] intent to demand payment," and "compl[y] with all other applicable requirements [] under the [Nevada] Dissenter's Rights Statutes." *Id*. at 80. In addition, the Company appended the Nevada dissenter's rights statutes to the Proxy. *Id*. at Annex C. The Company recommended that "due to the complexity of the procedures for exercising dissenter's rights, stockholders who are considering exercising [dissenter's] rights are encouraged to seek the advice of legal counsel." *Id*. at 9.

The Transaction squarely falls within the types of transactions for which Nevada law permits dissenter's rights—and squarely falls outside of the so-called "market exception" to dissenter's rights—because the operative "market value" is less than $20,0000,000. *See* NRS 92A.390(1)(b) (providing that there is no right to dissent when shares are "[t]raded in an organized market and has at least 2,000 stockholders and a market value of at least $20,000,000, exclusive of the value of such shares held by the corporation's subsidiaries, senior executives, directors and beneficial stockholders owning more than 10 percent of such shares").

As defined by NRS 92A.390(1)(b), as of the Record Date, the Company had a market

value of **$19,534,498.20**—well short of the $20 million threshold to trigger the "market exception." A breakdown of that market value follows:

- The Record Date for the Transaction was January 8, 2021. Ex. D, Proxy at 86.
- On the Record Date, AeroGrow had 34,328,036 shares outstanding. *Id*. at 10.
- Combined, the senior executives, officers, directors, and SMG Growing Media held 27,794,759 shares of AeroGrow stock on the Record Date. Per NRS 92A.390(1)(b), the market value calculation excludes those shares.
    - Three senior AeroGrow executives (Joseph Michael Wolfe, Grey H. Gibbs, and John Kelly Thompson) owned a combined 155,465 shares of AeroGrow Stock as of the Record Date. *See* Ex. F, Decl. of B. Asirifi, Exs. 3-4.
    - No AeroGrow directors owned shares of AeroGrow stock as of the Record Date.
    - SMG Growing Media owned more than 10 percent of the outstanding shares of AeroGrow stock as of the Record Date, holding 27,639,294 shares. *Id*., Exs. 1-2.[5]
- The closing price on the Record Date was $2.99 per share. Ex. I, *AeroGrow International, Inc. Historical Price Table for Jan. 8, 2021*, BLOOMBERG L.P. TERMINAL (accessed April 7, 2021) (showing AeroGrow "last price" for Jan. 8, 2021).
- Based on the $2.99 closing price, the value of the qualifying shares outstanding on the Record Date (6,533,277) was $19,534,498.20.

C. AeroGrow Stockholders Voted And Approved The Transaction

On February 23, 2021, during the Special Meeting, the Transaction was approved by a majority vote of the Company's common stock. Ex. A, Form 8-K (Feb. 23, 2021), at Item 5.07.

On February 26, 2021, in accordance with the Merger Agreement, the Transaction was consummated, with AeroGrow continuing as a direct, wholly-owned subsidiary of SMG Growing Media and an indirect, wholly-owned subsidiary of Scotts. Ex. B, Form 8-K (Feb. 26, 2021), at Item 2.01. As of market close on February 26, AeroGrow's common stock was delisted. *Id*.

On March 1, 2021, AeroGrow paid all non-dissenting stockholders, including the Movants, the merger consideration of $3.00 per share of common stock. *See* Proposed Pl.-

[5] *See also* Ex. D, Proxy at 3 ("As of January 20, 2021, the Purchaser Parties [i.e., Parent and Merger Sub] and their respective affiliates (including Scotts Miracle-Gro) may be deemed to beneficially own approximately 80.5% of the outstanding shares of our common stock.").

Intervenor's Mot. to Intervene on an Order Shortening Time ("Mot. to Intervene"), filed in Case No. A-21-829854-B on March 23, 2021, at 11. Each Movant accepted the merger consideration.

D. The Statutory Dissenter's Rights Process Is Ongoing

NRS Chapter 92A outlines certain "prerequisites to demand payment for shares" (NRS 92A.420) and "limitations on right of dissent" (NRS 92A.400). Among other things, the statute requires that beneficial stockholders send "the subject corporation the written consent of the ***stockholder of record*** to the dissent not later than the time the beneficial stockholder asserts dissenter's rights." NRS 92A.400(2)(a) (emphasis added).

Certain stockholders sent compliant notices of intent to demand payment (per NRS 92A.420) to AeroGrow. Certain stockholders (some of who are clients of counsel for Movants, but who have not attempted to intervene here), who, like Movants, were beneficial stockholders of AeroGrow, also properly obtained and submitted written consents of the record stockholder. *See, e.g.*, Ex. J, Nidax Limited Partnership Notice & Consent of Cede & Co; Ex. K, Lewis & Eletise Wolman Notice & Consent of Cede & Co.; Ex. L, The Peierls Foundation, Inc. Notice & Consent of Cede & Co.

Movants, however, admit that they ***did not*** send record stockholder consents before the vote. *See* Mot. to Intervene at 9 ("[Movants] did not provide a Consent Letter from the stockholder of record, which is Cede & Company, Inc., the nominee of DTC, at the time of submitting [their] notice[s] [before the vote]"). None of the Movants were stockholders of record. According to Movants, DTC/Cede & Co. was the stockholder of record for each of them. *See id.* ¶ 14. Yet no Movant timely submitted consents from DTC/Cede & Co., as required by the statute. Movants complain that it is now "impossible" to comply with the statute, as they are unable to obtain the requisite consents. Mot. to Compel at 9-10 ("providing the Consent Letter now is impossible"); *see also id.* at 8 ("Both DTC/Cede and brokers have stated that they cannot provide consent letters…").

In the meantime, AeroGrow continued to comply with the dissenter's process. Within ten days of the effective date of the Transaction, NRS 92A.430 required AeroGrow to "deliver a written dissenter's notice to all stockholders of record entitled to assert dissenter's rights in whole

or in part, and any beneficial stockholder who has previously asserted dissenter's rights pursuant to NRS 92A.400." NRS 92A.430(1). AeroGrow complied. On March 5, 2021, AeroGrow mailed dissenter's notices to all stockholders of record who submitted compliant notices of intent to demand payment (per NRS 92A.420(1)(a)) and 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)). Because Movants failed to deliver record stockholder consents, the Company did not send dissenter's notices to them.

A stockholder in receipt of a dissenter's notice must, among other things, "demand payment or withdraw dissent by the date included in the notice." NRS 92A.440. Here, the dissenter's notice sets April 12, 2021 as the date by which the demand for payment form, and related materials, must be received by AeroGrow.[6] *See* Mot. to Compel, Ex. B, AeroGrow International, Inc. Dissenter's Notice.

E. Movants Seek To Join The Dissenter's Process Despite Their Noncompliance With The Process

On March 15, 2021, Plaintiff Radoff amended his complaint to add a new 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[.]" First Am. Compl. ¶ 201, *Radoff v. Hagedorn, et al.*, No. A-21-829854-B (Dist. Ct. Nev. filed Mar. 15, 2021).

On March 17, 2021, in response to outreach from counsel for Movants, AeroGrow's counsel sent letters explaining that the Movants had been excluded from the dissenter's process due to their failure to comply with the statutory requirement to submit record stockholder consents. *See* Mot. to Intervene, Ex. F; Mot. to Compel, Ex. C.

On March 24, Movants filed the instant Motion to Compel.[7]

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[6] Within 30 days of receiving a demand for payment form from a dissenting stockholder who is in compliance with NRS 92A.300 *et seq.*, AeroGrow will pay "fair value of the dissenter's shares, plus accrued interest" in compliance with NRS 92A.460. AeroGrow has not made any payments pursuant to NRS 92A.460—nor have any such payments yet come due.

[7] Plaintiff makes the same allegations and seeks the same relief requested in the Motion to Compel that he made and alleged in the fourth count of his First Amended Complaint. *See* First Am. Compl. ¶¶ 170-73, 196-201, *Radoff v. Hagedorn, et al.*, No. A-21-829854-B (Dist. Ct. Nev. filed Mar. 15, 2021). That count will, thus, be resolved by the Court's decision on the Motion to Compel. For the same reasons stated herein, Plaintiff fails to sufficiently plead that AeroGrow

III. LEGAL STANDARDS

Though styled as a Motion to Compel, Movants seek a declaration of their rights (or lack thereof) under the dissenter's rights statute. Under Nevada law, this Court has the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." NRS 30.030. A "declaratory judgment in essence does not carry with it the element of coercion as to either party. Rather, it determines their legal rights ***without undertaking to compel either party*** to pay money ***or take some other action*** to satisfy such rights as determined to exist by the declaratory judgment." *Aronoff v. Katleman*, 75 Nev. 424, 432, 345 P.2d 221, 225 (1959) (emphasis added). The Court is empowered to grant further and supplemental relief once such a judgment issues. *See* NRS 30.100. This includes the power to grant permanent injunctive relief, which Movants seek here. Movants, however, do not—and cannot—meet the standard for issuance of that extraordinary relief.

It is axiomatic that a "[permanent] injunction will not issue 'to restrain an act which does not give rise to a cause of action....'" *State Farm Mut. Auto. Ins. Co. v. Jafbros Inc.*, 109 Nev. 926, 928, 860 P.2d 176, 178 (1993) (quoting 43 C.J.S. § 18 Injunctions (1978)). "Permanent injunctive relief is available where there is no adequate remedy at law ... where the balance of equities favors the moving party, and where success on the merits ***has been demonstrated***." *Id.* (emphasis added). Moreover, injunctive relief is extraordinary—indeed, it is "an extraordinary writ" under Nevada law. *Dangberg Holdings Nevada, L.L.C. v. Douglas Cnty. & its Bd. of Cnty. Com'rs*, 115 Nev. 129, 144, 978 P.2d 311, 320 (1999) (internal citations and quotations omitted). As a result, it should therefore be granted sparingly and only where the evidence clearly demonstrates entitlement to such relief.

Movants do not meet these standards. Not only have they failed to show success on the merits of the declaratory relief claim, they also have also failed to provide this Court with any governing standard or authority for granting the Motion or its requested relief. Despite its creative styling, what the Motion ultimately asks from this Court is a final judgment on Movants'

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violated NRS Chapter 92A or put forth any basis for the relief he seeks. Thus, that count should be dismissed.

claim for declaratory relief and supplemental relief in the form of a permanent injunction. But the Movants have not, and cannot, demonstrate that this Court's extraordinary, equitable intervention is warranted by addressing the requisite elements of such relief. Accordingly, the Motion should be denied.

IV. ARGUMENT

Any beneficial stockholder of AeroGrow who wished to participate in the dissenter's rights process for the Transaction had to submit the written consent of the stockholder of record before the vote on the Transaction.[8] NRS 92A.400 and 420. Because Movants were beneficial stockholders of AeroGrow, they were subject to that requirement. Mot. to Compel at 7. Movants do not dispute that they failed to submit record stockholder consents prior to the vote. Indeed, their failure to do so forms the entire basis for their Motion to Compel.

To remedy their mistake, Movants ask the Court—after the fact—to delay their deadline to submit record stockholder consents until the time a compliant dissenting stockholder must demand payment under NRS 92A.440. The Court should refuse to do so for three primary reasons. ***First,*** the plain language of NRS Chapter 92A confirms that the deadline for beneficial stockholders to submit record stockholder consents to the Company was "before the vote." ***Second,*** contrary to Movants' argument, the Model Business Corporation Act ("Model Act") does not support a different deadline because the Nevada Legislature did not to adopt the Model Act's deadline that record stockholder consents be submitted with the stockholder's form demanding payment. ***Third***, even if the statutes are ambiguous as to the operative deadline, which they are not, the Court should conclude that Movants had to submit record stockholder consents before the vote because that conclusion balances the Legislature's interest in protecting minority stockholders with its interest in facilitating corporate mergers.

AeroGrow respectfully requests that the Court give the statute its plain meaning, rather

[8] A "stockholder of record" is defined as "the person in whose name shares are registered in the records of a domestic corporation or the beneficial owner of shares to the extent of the rights granted by a nominee's certificate on file with the domestic corporation." NRS 92A.330. A "beneficial stockholder" is defined as "a person who is a beneficial owner of shares held in a voting trust or by a nominee as the stockholder of record." NRS 92A.305.

than adopt the convoluted interpretation offered by Movants in their attempt to evade a clear statutory deadline. Because of their admitted failure to comply with the requirement to submit a record stockholder consent before the vote, Movants are not entitled to participate in the dissenter's rights process and their Motion to Compel must be denied.

A. The Plain Language of NRS Chapter 92A Requires Beneficial Stockholders To Submit Record Stockholder Consents Before The Vote On The Transaction.

Under Nevada law, "when a statute's language is plain and its meaning clear, the courts will apply that plain language." *Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007); *see also Andrews v. State*, 134 Nev. 95, 97, 412 P.3d 37, 38 (2018) ("When interpreting a statute, this court begins with the statute's text."). In doing so, the Court "'must give [a statute's] terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory.'" *Arguello v. Sunset Station, Inc*., 127 Nev. 365, 370, 252 P.3d 206, 209 (2011) (internal citations omitted).

Here, the Court should look to the plain language of the operative provisions of NRS Chapter 92A to determine the deadline by which Movants, as beneficial stockholders, must submit the record stockholder consents required by NRS 92A.400(2)(a). Nevada imposes restrictions on the right of beneficial stockholders to assert dissenter's rights:

> A beneficial stockholder may assert dissenter's rights as to shares held on his or her behalf ***only if*** the beneficial stockholder:
>
> > (a) Submits to the subject corporation the written consent of the stockholder of record to the dissent ***not later than the time the beneficial stockholder asserts dissenter's rights***; and
> >
> > (b) Does so with respect to all shares of which he or she is the beneficial stockholder or over which he or she has power to vote.

NRS 92A.400(2)(a)–(b) (emphasis added).

As explained below, the plain text of NRS Chapter 92A required Movants, as beneficial stockholders, to submit the record stockholder's consent ***before the vote*** on the Transaction.

1. The plain text of NRS 92A.400-430 makes it clear that beneficial stockholders must submit record stockholder consents before the vote on the Transaction.

NRS 92A.400 limits the right of beneficial stockholders who wish to ***assert*** dissenter's rights, and requires that beneficial stockholders 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 submission of dissenter's notices. Critically, a company must deliver dissenter's notices to "any beneficial stockholder ***who has previously asserted dissenter's rights pursuant to NRS 92A.400***." NRS 92A.430(1) (emphasis added). The submission of record stockholder consents pursuant to NRS 92A.400, thus, must occur prior to the company's delivery of dissenter's notices.

The only deadline that NRS Chapter 92A imposes on stockholder submissions before the company sends dissenter's notices is the deadline for "a stockholder who wishes to ***assert*** dissenter's rights" to submit notices of intent to demand payment under NRS 92A.420. It sets the deadline for that requirement "***before the vote is taken***." NRS 92A.420(1)(a) (emphasis added). Thus, "before the vote is taken" is the only deadline NRS Chapter 92A provides for the submission of record stockholder consents under NRS 92A.400.

To give full force and effect to NRS 92A.400, NRS 92A.420, and NRS 92A.430, the timing outlined in NRS 92A.420 controls and applies to NRS 92A.400. *See Arguello*, 127 Nev. at 370 (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.") (internal citations omitted).

The plain language of NRS 92A.420(3), which expressly references NRS 92A.400, confirms that the timing outlined in NRS 92A.420 applies to the record stockholder consent in NRS 92A.400:

> A stockholder who does not satisfy the requirements of subsection 1 or 2 and **NRS 92A.400** is not entitled to payment for his or her shares under this chapter.

In sum, under a straightforward reading of the statute, which gives meaning to all words, statutory steps of the dissenter's rights process, and does not create a conflict among statutory provisions, a beneficial stockholder who wishes to assert dissenter's rights must submit to the corporation the written record stockholder consent "before the vote is taken." *See, e.g.*, *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.").

2. Movants' argument that beneficial stockholders need not submit record stockholder consents until they demand payment defies the plain language of NRS 92A.

Movants contend that the deadline for a stockholder to demand payment under NRS 92A.440 is also the deadline for beneficial stockholders to submit record stockholder consents. That interpretation, however, defies the plain language of NRS Chapter 92A, including NRS 92A.440 itself, and runs counter to the statutory process set forth in the dissenter's rights statutes.

Movants' interpretation conflates two different stages of the dissenter's process: (1) the prerequisite step of submitting a record stockholder consent—which occurs before the vote, before closing, and before the company sends dissenter's notices (NRS 92A.400-430); and (2) the step of a stockholder demanding payment later in the dissenter's process—which occurs after the vote, after closing, and after the company sends dissenter's notices (NRS 92A.430 and NRS 92A.440). Movants' interpretation, thus, finds no support in the plain language of or process outlined in NRS Chapter 92A.

NRS 92A.400 and NRS 92A.420 relate to a beneficial stockholder's ***assertion*** of dissenter's rights—*i.e.*, how to invoke them. In contrast, NRS 92A.440 relates to "exercise" of those rights—*i.e.*, how to use them once invoked. In other words, the "exercise" of rights set forth in NRS 92A.440 necessarily assumes that the rights have been properly "assert[ed]" in the first place under NRS 92A.400 and NRS 92A.420. Indeed, they must have been because the delivery of dissenter's notices under NRS 92A.430 ***precedes*** the steps in NRS 92A.440. NRS 92A.430 only applies to "any beneficial stockholder who has previously asserted dissenter's rights pursuant to NRS 92A.400." And NRS 92A.440 only applies to a "stockholder who receives a dissenter's notice pursuant to NRS 92A.430."

This interpretation is confirmed by the ordinary meanings of these words. *E.g.*, *compare Assert* ("to invoke or enforce a legal right") *with Exercise* ("to make use of; put into action") (BLACK'S LAW DICTIONARY (11th ed. 2019). As Movants point out, "[t]he use of different terminology in a statute 'evinces the legislature's intent that different meanings apply to the two terms[.]" Mot. to Compel at 13 (citing cases).[9] The distinction in use of "assert" and "exercise" cannot be ignored. *Arguello*, 127 Nev. at 370*; see also Valenti v. State, Dep't of Motor Vehicles*, 131 Nev. 875, 883, 362 P.2d 83, 87–88 (2015) ("Generally, [n]o part of a statute should be rendered nugatory, nor any language turned to mere surplusage.") (internal citations omitted).

B. The Model Act Does Not Compel A Different Result Than The Plain Language Of NRS Chapter 92A Because The Nevada Legislature Did Not Adopt The Model Act's Deadline For Submissions of Record Stockholder Consents.

Movants contend that the Model Act supports their contention that the deadline for record stockholder consents is the date stockholders demand payment under NRS 92A.440. Mot. to Compel at 14–16. Their reliance on the Model Act is misplaced. In fact, differences between Nevada's dissenter's rights statutes and the Model Act make it clear that under Nevada law—and in keeping with the intent of the Nevada Legislature—record stockholder consents are due ***before*** the vote on the Transaction.

Although the Nevada's dissenter's rights statutes generally track the language of the Model Act, NRS 92A.400 and NRS 92A.420 differ materially from the Model Act. NRS 92A.400 does not include the same language used in Section 13.03 of the Model Act. NRS 92.400(2)(a) states that the beneficial stockholder must provide the "written consent of the stockholder of record to the dissent not later than the time the beneficial stockholder ***asserts*** dissenter's rights." *Id.* (emphasis added). In contrast, Section 13.03 of the Model Act sets the

[9] Movants claim that NRS 92A.420's inclusion of the word "intent" means that a stockholder's submission of a "notice of intent to demand payment" cannot be an assertion of dissenter's rights. Mot. to Compel at 12. For the reasons explained above, that argument ignores the plain language of NRS 92A.400 as well as the statutes laying out the subsequent steps in the dissenter's rights process. Simply stated, the submission of the "notice of intent to demand payment" in compliance with NRS 92A.420 is ***how*** a stockholder "asserts dissenter's rights." That meaning is supported by the Legislature's use of the term "intent." *See Intent*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining intent as "the state of mind accompanying an act").

deadline for consent of the record stockholder as "no later than the date referred to in section 13.22(b)(2)(ii)." Mot. to Compel, Ex. E, Model Act §13.03(b)(2)(ii). Section 13.22(b)(2)(ii) requires that a company's appraisal notice (*i.e.*, dissenter's notice) state "a date by which the corporation shall receive the [stockholder demand] form, which date may not be fewer than 40 nor more than 60 days after the date the subsection (a) appraisal notice is sent[.]" That, however, is ***not*** the law in Nevada. If the Nevada Legislature wanted to require stockholders to submit record stockholder consents at the time their demands for payment are due under NRS 92A.440 (as Movants wish), then it could have adopted the Model Act's provisions wholesale and included that deadline in NRS 92A.400. It did not. And its decision not to do so must be enforced here. *See Arguello*, 127 Nev. at 370 ("Our goal in construing statutes is to effectuate the Legislature's intent.").

Also, unlike Section 13.21 of the Model Act, which makes no reference to Section 13.03, the Nevada Legislature specifically links compliance with NRS 92A.400 to NRS. 92A.420. *Compare* NRS 92A.420(3) ("[a] stockholder who does not satisfy the requirements of subsection 1 or 2 ***and NRS 92A.400*** is not entitled to payment for his or her shares under this chapter") (emphasis added) *with* Model Act Section 13.21(d) ("[a] shareholder who fails to satisfy the requirements of subsection (a) [notice of intent to demand and not voting for or otherwise consenting to the proposed transaction], (b) [shareholder does not provide written consent in a transaction to be approved by written consent], (c) [shareholder must provide notice of intent to dissent and "not tender, or cause or permit to be tendered, any shares of such class or series in response to such offer."]). This addition by the Nevada Legislature, as discussed above, supports the application of NRS 92A.420's deadline—"before the vote"—to the submission of record stockholder consents in compliance with NRS 92A.400.

The Nevada Legislature's decision to use different language from the Model Act vitiates Movants' attempt to apply the Model Act's deadline for record stockholder consents. These differences are even more telling because with the 1995 Amendment to NRS 92A.300 to 92A.500, "[t]he Legislature [] added new provisions to bring Nevada more in line with the Model Business Corporation Act." *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, n.8, 62 P.3d 720, n.8

(2003). Thus, the distinctions from the Model Act reflect the affirmative intent of the Legislature to depart from the Model Act in those aspects of NRS Chapter 92A. To adopt Movants' interpretation would, consequently, rewrite Nevada law and contravene the Legislature's intent.

C. Even If The Court Finds Ambiguity In NRS Chapter 92A, Nevada's Principles Of Statutory Construction And Practical Considerations Mandate A Finding That Movants Had To Submit The Record Stockholder Consents Before The Vote Because Movant's Interpretation Creates Impracticable And Absurd Results.

The Court should view with skepticism any claim by Movants that the deadline to submit record stockholder consents under NRS 92A.400 is ambiguous. Several stockholders also represented by counsel for Plaintiff-Intervenors complied with the statutory requirement to submit record stockholder consents before the vote on the Transaction. *See* Ex. J, Nidax Notice & Consent of Cede & Co.; Ex. K, Wolman Notice & Consent of Cede & Co.; Ex. L, The Peierls Foundation, Inc. Notice & Consent of Cede & Co. The fact that these stockholders timely obtained and submitted written consents of the record owners belies any claim by Plaintiff-Intervenors—other stockholders represented by the same lawyers—that the deadline was unclear.

In the event the Court finds any ambiguity in the statute, it must "determine[] the meaning of the words used in a statute by 'examining the context and spirit of the law or the causes which induced the Legislature to enact it. The entire subject matter and policy may be involved as an interpretative aid.'" *Leven*, 168 P.3d at 716 (quoting *McKay v. Bd. of Supervisors*, 102 Nev. 644, 650–51, 730 P.2d 438, 443 (1986)). In statutory interpretation, Nevada courts "seek to avoid an interpretation that leads to an ***absurd*** result." *City Plan Dev. v. State, Labor Comm'r*, 121 Nev. 419, 435, 117 P.3d 182, 192 (2005) (emphasis added).

Applying that standard, the Court should resolve any ambiguity in favor of submitting record stockholder consents before the vote because Movants' reading of the statute (which would have a beneficial stockholder submit record stockholder consents after the vote on the transaction and closing) would render the appraisal process impracticable for the majority of beneficial stockholders. And, as a result, adoption of their approach would be inconsistent with the dissenter's statute's balanced objective to "facilitate business mergers, while protecting minority shareholders from being unfairly impacted by the majority shareholders' decision to

approve a merger." *Cohen*, 62 P.3d at 726–27.

1. Movants' interpretation of NRS 92A.400(2) makes compliance impracticable for beneficial stockholders in direct contravention of the statute's goal to give recourse to minority stockholders through appraisal.

Movants' interpretation of NRS 92A.400(2)(a) to allow beneficial stockholders to provide record stockholder consent ***after*** the vote and Transaction's close is the reason they now say it is impossible to obtain such consent. Indeed, Movants allege that "AeroGrow's repurchase of the beneficial stockholders' shares made it ***impossible*** to obtain consent letters as required by NRS 92A.400(2)," Mot. to Intervene at 6 (emphasis added), and that it is now "impossible" to acquire record stockholder consents. Mot. to Compel at 9. Yet, this is precisely the time that they now advocate all beneficial stockholders should do so.

The problems Movants now face did not exist before the vote. In fact, beneficial stockholders sought, received, and submitted record stockholder consents before the vote. Those dissenting stockholders, including clients of counsel for the Plaintiff-Intervenors, are proceeding in the dissenter's rights process.

Movants' interpretation of the statute to require record stockholder consent ***after*** the vote could lead to problems each time beneficial stockholders are involved in a cash-out merger. As Movants note, "the vast majority of stockholders in publicly traded corporations are beneficial stockholders, as they purchased the shares through brokerages." Mot. to Intervene at 9. Thus, Movants' reading of the statute would mean that a "vast majority of stockholders" could face a potentially impossible scenario each time a cash-out merger occurs if they cannot obtain record stockholder consents after the closing. Such a result undercuts Nevada's goal of allowing appraisal to "protect[] minority shareholders from being unfairly impacted by the majority shareholders' decision to approve a merger, " *Cohen*, 62 P.3d at 726–27, and surely creates an "absurd result." *City Plan Dev., Inc.*, 121 Nev. at 435.

. . .

. . .

Further, Movants presume that the consent of the record stockholder would be uniformly and automatically given, which might not always be the case.[10] Under Movants' interpretation, a record stockholder would have up to 70 days to consent to the dissent after the effective date of the transaction. *See* NRS 92A.430 (requiring a company to deliver dissenter's notices "no later than 10 days after the effective date of the corporate action" and set a date for receipt of the "demand for payment, which may not be less than 30 nor more than 60 days after the date the notice is delivered"). Thus, under Movants' interpretation, a non-consenting record stockholder would cause a beneficial stockholder to suffer an unreasonable delay in receiving the merger consideration to which it was entitled under the law.

2. Movants' interpretation also cuts against Nevada's countervailing objective to facilitate business mergers by impeding a company from expeditiously completing a cash-out merger.

As Movants admit, the statutory prerequisites "allow the corporation to, among other things, ascertain the universe of possible dissenting stockholders." Mot. to Intervene at 6. The requirements set forth in NRS 92A.420(3), including submission of record stockholder consent pursuant to NRS 92A.400(2) before the vote, create a process by which the Company may identify dissenter's shares with certainty in order to (i) promptly pay merger consideration to stockholders who are statutorily entitled to it and (ii) administer the dissenter's rights process for stockholders who have properly asserted dissenter's rights in accordance with Nevada law. The same is true for the Transaction. *See* Ex. G, Prelim. Proxy at 3 ("Upon Completion of the Merger, the Company will cease to be a publicly traded company and at the effective time of the Merger [] each share of common stock (other than Excluded Shares and ***Dissenting Shares***[11] [] issued and outstanding immediately [before close] will be automatically converted into the right to receive $3.00 in cash … and will cease to be outstanding, will be cancelled and will cease to

[10] Although here, Movants all had the same record stockholder (Cede & Co.) that is not the case for all beneficial stockholders, as they may hold through other individuals and entities. When shares are not held by Cede & Co., obtaining record stockholder consent may be a more difficult hurdle as the record stockholder may deny consent.

[11] Defined in the Proxy as those shares held by a person who "has duly preserved, demanded and perfected, and has not otherwise waived or lost, dissenter's rights pursuant to NRS 92A.300 through NRS 92A.500…" Ex. G, Prelim. Proxy (Dec. 3, 2020), at 28.

exist.") (emphasis added). Movants' request to delay the time at which a corporation can determine the full list of dissenters would reduce the certainty of this process for corporations and leave merger payment in limbo.

Plaintiffs mischaracterize the nature and fair notice of the payment made by AeroGrow to non-dissenting stockholders. Almost two-and-a-half months before the close of the Transaction, the Company provided details on the mechanics of the Transaction, including payment. On December 4, 2020, AeroGrow explained that stockholders who did not properly dissent "would no longer own all shares of the capital stock of the surviving corporation or have any other rights as a stockholder of the Company" upon conversion of their shares for a right to $3.00 in cash. Ex. G, Prelim. Proxy at 8. The Company informed all stockholders of their dissenter's rights, including the ability to avoid the Movants' predicament if they "provided written notice of [their] intent to demand payment" and "complied with all other applicable requirements [] under the Dissenter's Rights Statutes." *Id*. Beneficial stockholders, including Movants, had 81 days from the date of the Preliminary Proxy (December 4, 2020) until the date of the vote (February 23, 2021) to obtain record stockholder consents.

As another consideration, a company has 10 days from closing to send dissenter's notices. NRS 92A.430. To do so, the company must determine to whom it must send those notices. It makes no practical sense to have a corporation expend time and resources to send out dissenter's notices to beneficial stockholders who may be excluded from the dissenter's process for failing to comply with the prerequisite step of obtaining record stockholder consent.

Simply put, requiring submission of record stockholder consent prior to the vote provides needed certainty for beneficial stockholders who wish to dissent—whom the Nevada Legislature sought to protect as they are usually minority stockholders—and corporations—for whom the Nevada Legislature designed statutes "to facilitate business mergers." *Cohen*, 62 P.3d at 726–27.

D. Even If The Court Finds Movants Complied With NRS Chapter 92A, Movants Have Waived Dissenter's Rights By Accepting The Merger Consideration.

As noted in Movant's Motion to Compel, NRS 92A.300 through 92.500 is "patterned after" to the Model Act, which "is based upon case law from Delaware and New York." *Cohen*,

62 P.3d at 726. Under Delaware law, a stockholder using the appraisal process as set forth in Delaware General Corporation Law § 262 cannot accept payment without forfeiting her rights under § 262. *See Gilliland v. Motorola, Inc.*, 873 A.2d 305, 312 (Del. Ch. 2005) ("[A] stockholder who seeks appraisal must forego all of the transactional consideration and essentially place his investment in limbo until the appraisal action is resolved.").

Similarly, Nevada has recognized that when a stockholder accepts the merger consideration "prior to bringing a suit challenging the merger," including related to the assertion of dissenter's rights, the stockholder is deemed to have "acquiesced." *See Tiberius Cap., LLC v. PetroSearch Energy Corp.*, 485 F. App'x 490, 493 (2d Cir. 2012) (interpreting Nevada law and barring plaintiff's claims under "Nevada's dissenters' rights statute, NRS § 92A.390"). The concept of the appraisal process necessarily "contains certain risks for the minority shareholder" because there is no guarantee that the court's ultimate determination of the fair value of the shares will exceed the transaction price. *Gilliland*, 873 A.2d at 312. Thus, in accepting the merger consideration, a stockholder no longer has the risk and does not bear the opportunity cost associated with tying up her investment.

Here, Movants received the merger consideration of $3.00 per share. Therefore, given their acceptance of the Transaction's consideration, the Court should find that Movants have failed to "forego all of the transactional consideration" and have not borne any of the risk associated with appraisal, *i.e.*, they have had the opportunity to invest the cash into other securities. Consequently, Movants have waived their dissenter's rights and their claims under the Nevada's dissenter's rights statutes are barred.

V. CONCLUSION

This Court should deny the remedies that Movants seek in their Motion to Compel because the Company did not violate NRS Chapter 92A. As explained above, AeroGrow has complied with the dissenter's rights statutes, including sending dissenter's notices to stockholders who properly asserted their rights. It is Movants who failed to comply with the plain prerequisites set forth in NRS 92A.400 and NRS 92A.420 by failing to provide record stockholder consents before the stockholder vote on the Transaction. As a result of Movants'

non-compliance, the Company did not and does not have any obligation to send Movants dissenter's notices per NRS 92A.430. Also as a result of Movants' non-compliance, Movants lost their entitlement to payment under NRS Chapter 92A. *See* NRS 92A.420(3) ("[a] stockholder who does not satisfy the requirements of subsection 1 or 2 and NRS 92A.400 is not entitled to payment for his or her shares under this chapter."). Further reinforcing their exclusion from the dissenter's process here, Movants also waived their dissenter's rights by accepting the merger consideration. Movants have given the Court no basis for the relief they seek, and their motion should be denied.

DATED this 7th day of April, 2021.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

BY: */s/ Maximilien D. Fetaz*
KIRK B. LENHARD, ESQ.
MAXIMILIEN D. FETAZ, ESQ.
TRAVIS F. CHANCE, ESQ.

MARJORIE P. DUFFY, ESQ.
(*pro hac vice* submitted)
ASHLEY F. HEINTZ, ESQ.
(*pro hac vice*)
JONES DAY

Attorneys for Defendants AGI Acquisition Sub, Inc., SMG Growing Media, Inc., The Scotts Miracle-Gro Company, Chris Hagedorn, Cory Miller, Patricia M. Ziegler, James Hagedorn, and Peter Supron

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP and pursuant to NRCP 5(b), EDCR 8.05, Administrative Order 14-2, and NEFCR 9, I caused a true and correct copy of the foregoing **OPPOSITION TO JOINT MOTION TO COMPEL/DETERMINE COMPLIANCE WITH NRS 92A, OR ALTERNATIVELY, INJUNCTIVE RELIEF, ON AN ORDER SHORTENING TIME** to be submitted electronically to all parties currently on the electronic service list on April 7, 2021.

/s/ Wendy Cosby
an employee of Brownstein Hyatt Farber Schreck, LLP

Exhibit A

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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 8-K

CURRENT REPORT
PURSUANT TO SECTION 13 OR 15(d)
OF THE SECURITIES EXCHANGE ACT OF 1934

Date of Report (Date of earliest event reported): February 23, 2021

AeroGrow International, Inc.
(Exact name of registrant as specified in its charter)

Nevada	001-33531	46-0510685
(State or other jurisdiction of incorporation)	(Commission File Number)	(I.R.S. Employer Identification No.)

5405 Spine Rd Boulder, Colorado	80301
(Address of principal executive offices)	(Zip Code)

(303) 444-7755
(Registrant's telephone number, including area code)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

☐ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)

☐ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)

☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))

☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Securities registered pursuant to Section 12(b) of the Act: **None**

Securities registered pursuant to Section 12(g) of the Act:

Title of each class	Trading Symbol(s)	Name of each exchange on which registered
Common Stock, par value $0.001 per share	**AERO**	**OTCQB**

Indicate by check mark whether the registrant is an emerging growth company as defined in Rule 405 of the Securities Act of 1933 (§230.405 of this chapter) or Rule 12b-2 of the Securities Exchange Act of 1934 (§240.12b-2 of this chapter).

Emerging growth company ☐

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act. ☐

Item 5.07. Submission of Matters to a Vote of Security Holders.

On February 23, 2021, AeroGrow International, Inc. (the "Company") held a Special Meeting of Stockholders of the Company (the "Special Meeting") held exclusively online via live webcast. As of January 8, 2021, the Company's record date for the Special Meeting (the "Record Date"), there were 34,328,036 shares of the Company's common stock outstanding, each entitled to one vote per share. At the Special Meeting, 29,466,652 shares of the Company's common stock outstanding and entitled to vote at the Special Meeting were represented via the virtual Special Meeting website or by proxy, constituting approximately 86% of the outstanding shares entitled to vote and a quorum to conduct business at the Special Meeting.

The final results for the proposal submitted to a vote of stockholders at the Special Meeting, as certified by the inspector of elections, is set forth below:

Proposal 1: To approve the merger agreement and the transactions contemplated thereby (including the merger).

For	Against	Abstain
27,968,993	1,487,407	10,252

No other proposals were submitted for stockholder action.

The proposal was approved by the requisite vote of the Company's common stock.

The consummation of the merger remains subject to the satisfaction or waiver of certain closing conditions set forth in the merger agreement approved by the Company's stockholders and is expected to close on or about February 26, 2021.

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

Dated: February 24, 2021

AeroGrow International, Inc.
(Registrant)
By: /s/ J. Michael Wolfe
Name: J. Michael Wolfe
Title: President and Chief Executive Officer

Exhibit B

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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 8-K

CURRENT REPORT
PURSUANT TO SECTION 13 OR 15(d)
OF THE SECURITIES EXCHANGE ACT OF 1934

Date of Report (Date of earliest event reported): February 26, 2021

AeroGrow International, Inc.
(Exact name of registrant as specified in its charter)

Nevada	001-33531	46-0510685
(State or other jurisdiction of incorporation)	(Commission File Number)	(I.R.S. Employer Identification No.)

5405 Spine Rd Boulder, Colorado	80301
(Address of principal executive offices)	(Zip Code)

(303) 444-7755
(Registrant's telephone number, including area code)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

☐ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)

☐ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)

☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))

☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Securities registered pursuant to Section 12(b) of the Act: **None**

Indicate by check mark whether the registrant is an emerging growth company as defined in Rule 405 of the Securities Act of 1933 (§230.405 of this chapter) or Rule 12b-2 of the Securities Exchange Act of 1934 (§240.12b-2 of this chapter). ☐ Emerging growth company

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act. ☐

Introductory Note

As previously disclosed in the Current Report on Form 8-K (the "Prior 8-K") filed with the Securities and Exchange Commission (the "SEC") on November 12, 2020 by AeroGrow International, Inc., a Nevada corporation (the "Company"), the Company entered into an Agreement and Plan of Merger (the "Merger Agreement") with SMG Growing Media, Inc., an Ohio corporation ("Parent"), AGI Acquisition Sub, Inc., a Nevada corporation and direct, wholly-owned subsidiary of Parent ("Merger Sub"), and, solely for the purposes stated in Section 6.4 of the Merger Agreement, The Scotts Miracle-Gro Company, an Ohio corporation ("Scotts Miracle-Gro"), relating to the proposed acquisition of the Company by Parent.

Item 2.01. Completion of Acquisition or Disposition of Assets.

In accordance with the terms of the Merger Agreement, on February 26, 2021, Merger Sub merged with and into the Company (the "Merger"), with the Company continuing as the surviving corporation in the Merger as a direct, wholly-owned subsidiary of Parent and an indirect, wholly-owned subsidiary of Scotts Miracle-Gro.

On February 25, 2021, the Company filed the Articles of Merger with the Secretary of State of Nevada, pursuant to which the Merger became effective at 10:00 a.m., Pacific Time, on February 26, 2021 (the "Effective Time").

At the Effective Time, each share of common stock of the Company, par value $0.001 per share (the "Common Stock") (other than Excluded Shares and Dissenting Shares (each as defined in the Merger Agreement)), issued and outstanding immediately prior to the Effective Time was automatically converted into the right to receive $3.00 in cash, without interest thereon and subject to any required withholding of taxes (the "Merger Consideration"), and was cancelled.

Furthermore, in accordance with the Merger Agreement, at the Effective Time, as a result of the Merger, each share of common stock, par value $0.001 per share, of Merger Sub, issued and outstanding immediately prior to the Effective Time (all of which shares were held of record by Parent), was automatically converted into one share of common stock, par value $0.001 per share, of the Company, as the survivor of the Merger (the "Survivor Common Stock"), which share of Survivor Common Stock, as a result of the Merger, (i) comprises all of the issued and outstanding capital stock of the Company as the survivor of the Merger, and (ii) is held of record by Parent.

The total amount of funds required to complete the Merger and the transactions contemplated thereby and pay related fees and expenses was approximately $20.3 million, consisting of approximately $20.1 million in cash Merger Consideration and approximately $0.2 million in transaction related fees and expenses. Parent funded this amount through available cash on hand.

The foregoing summary of the Merger and the Merger Agreement does not purport to be complete and is subject to, and qualified in its entirety by, the full text of the Merger Agreement, which was attached as Exhibit 2.1 to the Prior 8-K and incorporated by reference herein.

The information set forth under "Introductory Note" of this Current Report on Form 8-K is incorporated by reference into this Item 2.01.

Item 3.01. Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing.

In connection with the consummation of the Merger, the Common Stock is no longer quoted on The OTCQB Marketplace operated by OTC Markets Group Inc., effective as of market close on February 26, 2021. The Company intends to file with the SEC a certification on Form 15 under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), requesting the termination of the registration of the Common Stock under Section 12(g) of the Exchange Act and the suspension of the Company's reporting obligations under Section 13(a) and Section 15(d) of the Exchange Act.

The information set forth under "Introductory Note" and Item 2.01 of this Current Report on Form 8-K is incorporated by reference into this Item 3.01.

Item 3.03. Material Modification to Rights of Security Holders.

As set forth under Item 2.01 of this Current Report on Form 8-K, as of the Effective Time, all issued and outstanding shares of the Common Stock, other than Excluded Shares and Dissenting Shares, ceased to be outstanding and were automatically converted into the right to receive the Merger Consideration. At the Effective Time, all holders of Common Stock ceased to have any rights with respect thereto other than the right to receive the Merger Consideration pursuant to the Merger Agreement.

The information set forth under "Introductory Note," Item 2.01 and Item 3.01 of this Current Report on Form 8-K is incorporated by reference into this Item 3.03.

Item 5.02. Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers.

Upon consummation of the Merger, (i) at the Effective Time, H. MacGregor Clarke, Chris J. Hagedorn, David B. Kent, Cory T. Miller and Patricia M. Ziegler ceased service as directors of the Company and (ii) as of 5:00 p.m. Mountain Time on February 26, 2021, J. Michael Wolfe, Grey H. Gibbs and John K. Thompson ceased to be officers of the Company. Simultaneously, Ivan C. Smith, the sole director of Merger Sub immediately prior to the Effective Time, became the director of the Company as the survivor of the Merger, to hold office until his successor has been duly elected or appointed and qualified or until his death, resignation or removal, and Michael C. Lukemire and Kelly S. Berry, the President and Vice President and Treasurer, respectively, of Merger Sub immediately prior to the Effective Time, became the President and Vice President and Treasurer of the Company as the survivor of the Merger, each to hold office until his or her successor has been duly elected or appointed and qualified or until his or her earlier death, resignation or removal, in each case, in accordance with the Amended and Restated Articles of Incorporation and the Amended and Restated Bylaws (each as defined herein) and applicable law.

Item 5.03. Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year.

Pursuant to the Merger Agreement, at the Effective Time and as a result of the Merger, the articles of incorporation of the Company, as in effect immediately prior to the Effective Time were amended and restated to read in their entirety and such amended and restated articles of incorporation (the "Amended and Restated Articles of Incorporation") were filed as Exhibit A to the Articles of Merger with the Nevada Secretary of State and became the Amended and Restated Articles of Incorporation of the Company as the survivor of the Merger. Also pursuant to the Merger Agreement and resolutions adopted immediately after the Effective Time by the new directors of the Company as the surviving corporation, the amended and restated bylaws of the Company as in effect immediately prior to the Effective Time were amended and restated to read in their entirety as the bylaws of Merger Sub immediately prior to the Effective Time (except all references therein to the name of Merger Sub were replaced with the name of the Company) (the "Amended and Restated Bylaws"). A copy of the Amended and Restated Articles of Incorporation and a copy of the Amended and Restated Bylaws are attached as Exhibit 3.1 and Exhibit 3.2 to this Current Report on Form 8-K, respectively, and incorporated by reference herein.

Item 9.01. Financial Statements and Exhibits.

(d) *Exhibits*

Exhibit No.	Description of Exhibit
2.1*	Agreement and Plan of Merger, dated as of November 11, 2020, by and among AeroGrow International, Inc., SMG Growing Media, Inc., AGI Acquisition Sub, Inc., and, solely for the purposes stated in Section 6.4, The Scotts Miracle-Gro Company (filed as Exhibit 2.1 to AeroGrow International, Inc.'s Current Report on Form 8-K, filed on November 12, 2020, and incorporated by reference herein).
3.1	Amended and Restated Articles of Incorporation of AeroGrow International, Inc.
3.2	Amended and Restated Bylaws of AeroGrow International, Inc.

* Schedules have been omitted pursuant to Item 601(b)(2) of Regulation S-K. The Company hereby undertakes to supplementally furnish copies of any omitted schedules to the Securities and Exchange Commission upon request.

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

Dated: February 26, 2021

AeroGrow International, Inc.
(Registrant)

By: /s/ J. Michael Wolfe
Name: J. Michael Wolfe
Title: President and Chief Executive Officer

Exhibit C

8-K 1 aerogrow20201111_8k.htm FORM 8-K

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 8-K

CURRENT REPORT
PURSUANT TO SECTION 13 OR 15(d) OF
THE SECURITIES EXCHANGE ACT OF 1934

Date of Report (Date of earliest event reported): **November 11, 2020**

AeroGrow International, Inc.
(Exact name of registrant as specified in its charter)

Nevada	**001-33531**	**46-0510685**
(State or other jurisdiction of incorporation)	(Commission File Number)	(I.R.S. Employer Identification No.)

5405 Spine Rd **Boulder, Colorado**	**80301**
(Address of principal executive offices)	(Zip Code)

(303) 444-7755
(Registrant's telephone number, including area code)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

☐ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)

☒ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)

☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))

☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Securities registered pursuant to Section 12(b) of the Act: **None**

Securities registered pursuant to Section 12(g) of the Act:

Title of each class	**Trading Symbol(s)**	**Name of each exchange on which registered**
Common Stock, par value $0.001 per share	AERO	OTCQB

Indicate by check mark whether the registrant is an emerging growth company as defined in Rule 405 of the Securities Act of 1933 (§230.405 of this chapter) or Rule 12b-2 of the Securities Exchange Act of 1934 (§240.12b-2 of this chapter). ☐ Emerging growth company

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act. ☐

Item 1.01. Entry into a Material Definitive Agreement.

Merger Agreement

On November 11, 2020 (the "Signing Date"), AeroGrow International, Inc., a Nevada corporation (the "Company"), entered into an Agreement and Plan of Merger (the "Merger Agreement") with SMG Growing Media, Inc., an Ohio corporation ("Parent"), AGI Acquisition Sub, Inc., a Nevada corporation and direct, wholly-owned subsidiary of Parent ("Merger Sub" and, together with Parent, the "Purchaser Parties"), and, solely for the purposes stated in Section 6.4 of the Merger Agreement, The Scotts Miracle-Gro Company, an Ohio corporation ("Scotts Miracle-Gro"), relating to the proposed acquisition of the Company by Parent.

The Merger Agreement provides that, upon the terms and subject to the conditions set forth therein, Merger Sub will be merged with and into the Company (the "Merger") with the Company continuing as the surviving corporation in the Merger, and, at the effective time of the Merger (the "Effective Time") each share of common stock of the Company, par value $0.001 per share (the "Common Stock") (other than Excluded Shares and Dissenting Shares (each as defined in the Merger Agreement)), issued and outstanding immediately prior to the Effective Time will be automatically converted into the right to receive $3.00 in cash, without interest thereon and subject to any required withholding of taxes (the "Merger Consideration"), and will be cancelled.

Based on the recommendation of the special committee (the "Special Committee") of the board of directors of the Company (the "Board"), consisting solely of independent and disinterested directors, the Board unanimously (i) adopted and approved the Merger Agreement and the transactions contemplated by the Merger Agreement (including the Merger), (ii) determined the Merger Agreement and the transactions contemplated by the Merger Agreement (including the Merger) to be in the best interests of, and fair to, the Company and its stockholders and (iii) determined the Merger Consideration to be the "fair value" of the Common Stock as of the date of the Merger Agreement, having been determined by the Special Committee's independent financial advisor and the Special Committee using customary and current valuation concepts and techniques generally employed for similar businesses in the context of a merger and without discounting for lack of marketability or minority status. Stockholders of the Company will be asked to vote on the approval of the Merger Agreement at a special stockholders meeting that will be held on a date to be announced (the "Special Meeting"). The closing of the Merger is subject to, among other conditions, the approval of the Merger Agreement by a majority of the outstanding shares of Common Stock entitled to vote on such matter (the "Company Stockholder Approval"). Purchaser Parties and their respective affiliates currently beneficially own approximately 80% of the Company's outstanding shares of Common Stock. Approval of the holders of at least a majority of the shares of Common Stock not beneficially owned by the Purchaser Parties and their respective affiliates is not required under Nevada law for the Company to complete the Merger. Consummation of the Merger is not subject to a financing condition.

In addition to the Company Stockholder Approval condition, consummation of the Merger is also subject to various customary conditions, including, but not limited to, the obtainment of any necessary regulatory approvals.

The Company is subject to customary restrictions on its ability to initiate, solicit, propose or knowingly encourage or otherwise knowingly facilitate Acquisition Proposals (as defined in the Merger Agreement) from third parties and to provide any information or data concerning the Company or access to the Company's properties, books and records to any person in connection with any Acquisition Proposal or any inquiry, proposal or offer that would reasonably be expected to lead to an Acquisition Proposal, with customary exceptions regarding the Board's fiduciary duties under applicable law. The Board has recommended that the Company's stockholders vote to adopt and approve the Merger Agreement and the transactions contemplated thereby (including the Merger), subject to certain customary exceptions regarding the Board's fiduciary duties under applicable law.

The Merger Agreement contains certain termination rights, including the right of the Company to terminate the Merger Agreement to accept a Superior Proposal (as defined in the Merger Agreement). In addition, subject to certain exceptions and limitations set forth in the Merger Agreement, either party may terminate the Merger Agreement if the Merger is not consummated by March 31, 2021.

The Company has made customary representations, warranties and covenants in the Merger Agreement, including, among others, covenants (1) to conduct its business in the ordinary course during the period between the Signing Date and the Effective Time, (2) not to engage in certain types of transactions during this period unless agreed to in writing by Parent, (3) to convene and hold the Special Meeting for the purpose of obtaining the Company Stockholder Approval, (4) subject to certain conditions, not to withhold, withdraw, qualify or modify (or publicly propose or resolve to withhold, withdraw, qualify or modify), in a manner adverse to Parent, the recommendation of the Board that the Company's stockholders vote affirmatively at the Special Meeting to approve the Merger Agreement and the Merger, and (5) to cooperate with Parent to use their respective reasonable best efforts to take or cause to be taken all actions necessary or advisable to obtain any required antitrust approval for the Merger.

The foregoing summary of the Merger Agreement does not purport to be complete and is subject to, and qualified in its entirety by, the full text of the Merger Agreement, which is attached as Exhibit 2.1 to this Current Report on Form 8-K and incorporated by reference herein.

The Merger Agreement has been included to provide investors with information regarding its terms. It is not intended to provide any other factual information about the Company. The representations, warranties and covenants contained in the Merger Agreement were made only for purposes of the Merger Agreement as of the specific dates therein, were solely for the benefit of the parties to the Merger Agreement, may be subject to limitations agreed upon by the contracting parties, including being qualified by confidential disclosures made for the purposes of allocating contractual risk between the parties to the Merger Agreement instead of establishing these matters as facts, and may be subject to standards of materiality applicable to the contracting parties that differ from those applicable to investors.

Investors are not third-party beneficiaries under the Merger Agreement and should not rely on the representations, warranties and covenants or any descriptions thereof as characterizations of the actual state of facts or condition of the parties thereto or any of their respective subsidiaries or affiliates. Moreover, information concerning the subject matter of representations and warranties may change after the date of the Merger Agreement, which subsequent information may or may not be fully reflected in the Company's public disclosures.

Item 9.01. Financial Statements and Exhibits.

(d) *Exhibits*

Exhibit No.	Description of Exhibit
2.1*	Agreement and Plan of Merger, dated as of November 11, 2020, by and among AeroGrow International, Inc., SMG Growing Media, Inc., AGI Acquisition Sub, Inc., and, solely for the purposes stated in Section 6.4, The Scotts Miracle-Gro Company.

* Schedules have been omitted pursuant to Item 601(b)(2) of Regulation S-K. The Company hereby undertakes to supplementally furnish copies of any omitted schedules to the Securities and Exchange Commission upon request.

Additional Information and Where to Find It

In connection with the proposed Merger, the Company will file a preliminary proxy statement and the Purchaser Parties, Scotts Miracle-Gro and the Company will jointly file a transaction statement on Schedule 13e-3 (the "Schedule 13e-3"), and file or furnish other relevant materials, in each case, with the Securities and Exchange Commission (the "SEC"). Once the SEC completes its review of the preliminary proxy statement and the Schedule 13e-3, a definitive proxy statement, a form of proxy and the Schedule 13e-3 will be filed with the SEC and mailed or otherwise furnished to the stockholders of the Company. **BEFORE MAKING ANY VOTING DECISION, THE COMPANY'S STOCKHOLDERS ARE URGED TO READ THE PROXY STATEMENT AND THE SCHEDULE 13E-3 IN THEIR ENTIRETY WHEN THEY BECOME AVAILABLE AND ANY OTHER DOCUMENTS TO BE FILED WITH THE SEC IN CONNECTION WITH THE PROPOSED MERGER OR INCORPORATED BY REFERENCE IN THE PROXY STATEMENT AND THE SCHEDULE 13E-3, IF ANY, BECAUSE THEY WILL CONTAIN IMPORTANT INFORMATION ABOUT THE PROPOSED MERGER AND THE PARTIES TO THE PROPOSED MERGER. This communication is not a substitute for the proxy statement, THE SCHEDULE 13E-3 or any other document that may be filed by the Company with the SEC.**

Investors and stockholders may obtain a free copy of documents filed by the Company with the SEC at the SEC's website at www.sec.gov. In addition, investors and stockholders may obtain a free copy of the Company's filings with the SEC from the Company's website at www.aerogrow.com or by directing a request by mail or telephone to: AeroGrow International, Inc., 5405 Spine Road, Boulder, Colorado 80301, Attention: Corporate Secretary, (303) 444-7755.

Participants in the Solicitation

The Company, Scotts Miracle-Gro and certain of their respective directors, executive officers, certain other members of management and employees of the Company and Scotts Miracle-Gro and agents retained by the Company may be deemed to be participants in the solicitation of proxies from stockholders of the Company in favor of the proposed Merger. Information about directors and executive officers of the Company and their beneficial ownership of the Company's common stock is set forth in the Company's Annual Report on Form 10-K for the fiscal year ended March 31, 2020, as filed with the SEC on June 23, 2020. Information about directors and executive officers of Scotts Miracle-Gro is also included in its definitive proxy statement on Schedule 14A for its 2020 annual meeting of shareholders, as filed with the SEC on December 18, 2019. Certain directors, executive officers, other members of management and employees of the Company may have direct or indirect interests in the proposed Merger due to securities holdings and rights to severance payments. Additional information regarding the direct and indirect interests of these individuals and other persons who may be deemed to be participants in the solicitation will be included in the proxy statement with respect to the Merger the Company will file with the SEC and furnish to the Company's stockholders.

Forward-Looking Statements

Statements about the expected timing, completion and effects of the proposed Merger and related transactions and all other statements in this Current Report on Form 8-K and the exhibits furnished or filed herewith, other than historical facts, constitute forward-looking statements. When used in this report, the words "expect," "believe," "anticipate," "goal," "plan," "intend," "estimate," "may," "will" or similar words are intended to identify forward-looking statements. Readers are cautioned not to place undue reliance on these forward-looking statements and any such forward-looking statements are qualified in their entirety by reference to the following cautionary statements. All forward-looking statements speak only as of the date hereof and are based on current expectations and involve a number of assumptions, risks and uncertainties that could cause the actual results to differ materially from such forward-looking statements. The Company may not be able to complete the proposed Merger on the terms described above or other acceptable terms or at all because of a number of factors, including, but not limited to: (1) the occurrence of any event, change or other circumstances that could give rise to the termination of the Merger Agreement, (2) the failure to obtain the Company Stockholder Approval or the failure to satisfy the closing conditions in the Merger Agreement, (3) the potential for regulatory authorities to require divestitures, behavioral remedies or other concessions in order to obtain their approval of the Merger, (4) risks related to disruption of management's attention from the Company's ongoing business operations due to the Merger, (5) the effect of the announcement of the Merger on the ability of the Company to retain and hire key personnel and maintain relationships with its customers, suppliers, operating results and business generally, (6) the Merger may involve unexpected costs, liabilities or delays, (7) the Company's business may suffer as a result of the uncertainty surrounding the Merger, including the timing of the consummation of the Merger, (8) the outcome of any legal proceeding relating to the Merger, (9) the Company may be adversely affected by other economic, business and/or competitive factors, including, but not limited to, those related to COVID-19, and (10) other risks to consummation of the Merger, including the risk that the Merger will not be consummated within the expected time period or at all, which may adversely affect the Company's business and the price of its common stock.

Actual results may differ materially from those indicated by such forward-looking statements. In addition, the forward-looking statements represent the Company's views as of the date on which such statements were made. The Company anticipates that subsequent events and developments may cause its views to change. However, although the Company may elect to update these forward-looking statements at some point in the future, it specifically disclaims any obligation to do so. These forward-looking statements should not be relied upon as representing the Company's views as of any date subsequent to the date hereof. Additional factors that may affect the business or financial results of the Company are described in the risk factors included in the Company's filings with the SEC, including the Company's Annual Report on Form 10-K for the fiscal year ended March 31, 2020, filed with the SEC on June 23, 2020, as updated by the Company's subsequent filings with the SEC. The Company expressly disclaims a duty to provide updates to forward-looking statements, whether as a result of new information, future events or other occurrences.

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

Dated: November 12, 2020

AeroGrow International, Inc.
(Registrant)
By: /s/ Grey H. Gibbs
Name: Grey H. Gibbs
Title: Principal Accounting Officer

EX-2.1 2 ex_213593.htm EXHIBIT 2.1

Exhibit 2.1

EXECUTION VERSION

AGREEMENT AND PLAN OF MERGER

by and among

AEROGROW INTERNATIONAL, INC.,

SMG GROWING MEDIA, INC.

and

AGI ACQUISITION SUB, INC.

Dated as of November 11, 2020

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AGREEMENT AND PLAN OF MERGER

This AGREEMENT AND PLAN OF MERGER (this "**Agreement**"), dated as of November 11, 2020, is entered into by and among AeroGrow International, Inc., a Nevada corporation (the "**Company**"), SMG Growing Media, Inc., an Ohio corporation ("**Parent**"), and AGI Acquisition Sub, Inc., a Nevada corporation and Wholly Owned Subsidiary of Parent ("**Merger Sub**" and, together with the Company and Parent, the "**Parties**" and each, a "**Party**").

RECITALS

WHEREAS, the Parties intend that, subject to the terms and conditions of this Agreement, Merger Sub shall merge with and into the Company (the "**Merger**"), with the Company surviving the Merger, pursuant to the provisions of the NRS;

WHEREAS, pursuant to NRS 78.125(1) and resolutions of the Company Board heretofore adopted and currently in effect, the Company Board has granted the Special Committee the power to review the proposed Merger and any alternative transaction among the Company, Parent and Merger Sub, and the Company has engaged Stifel, Nicolaus & Company, Incorporated to provide financial advice to the Special Committee to assist in that review;

WHEREAS, the Special Committee has unanimously (a) determined that this Agreement and the transactions contemplated by this Agreement (including the Merger) are fair to, and in the best interests of, the Company and the Unaffiliated Stockholders, and (b) recommended that the Company Board approve this Agreement and the Merger;

WHEREAS, the Company Board has unanimously (a) adopted, pursuant to NRS 92A.120, and approved this Agreement and the transactions contemplated by this Agreement (including the Merger), (b) determined that this Agreement and the transactions contemplated by this Agreement (including the Merger) are fair to, and in the best interests of, the Company and the Unaffiliated Stockholders, (c) directed that this Agreement and the Merger be submitted for approval by a vote of the holders of Shares at the Company Stockholders' Meeting, and (d) recommended that the holders of Shares affirmatively vote to approve this Agreement and the Merger;

WHEREAS, the board of directors of Merger Sub has unanimously (a) adopted, pursuant to NRS 92A.120, and approved this Agreement and the transactions contemplated by this Agreement (including the Merger), (b) determined that this Agreement and the transactions contemplated by this Agreement (including the Merger) are fair to, and in the best interests of Merger Sub and Parent (as Merger Sub's sole stockholder), and (c) recommended that Parent (as Merger Sub's sole stockholder) approve this Agreement and the Merger;

WHEREAS, the board of directors of Parent has unanimously authorized and approved the entry by Parent into this Agreement;

WHEREAS, Parent owns 27,639,294 shares of Common Stock, which represents approximately 80.5% of the shares of Common Stock outstanding as of the date hereof; and

WHEREAS, the Parties desire to make certain representations, warranties, covenants and agreements in connection with the transactions contemplated by this Agreement.

NOW, THEREFORE, in consideration of the foregoing premises and the representations, warranties, covenants and agreements set forth in this Agreement, the Parties, intending to be legally bound, agree as follows:

ARTICLE I
Definitions; Interpretation and Construction

1.1. Definitions. For the purposes of this Agreement, except as otherwise specifically provided herein, the following terms have meanings set forth in this Section 1.1:

"**Acquisition Proposal**" means any proposal, offer, inquiry or indication of interest (other than one made or submitted to the Company by Ultimate Parent, Parent or Merger Sub) relating to (a) a merger, joint venture, partnership, consolidation, dissolution, liquidation, tender offer, recapitalization, reorganization, spin-off, share exchange, business combination or similar transaction involving the Company, (b) a sale, lease or other disposition, directly or indirectly, of any business or assets of the Company outside of the Ordinary Course of Business, or (c) any issuance, sale or other disposition, directly or indirectly, to any Person (or the stockholders of any Person) or group (as such term is defined in Rule 13d-3 under the Exchange Act) of securities representing five percent (5%) or more of the voting power of the Company (or options, rights or warrants to purchase, or securities convertible into or exchangeable for, such securities).

"**Affiliate**" means, with respect to any Person, any other Person directly or indirectly controlling, controlled by, or under common control with such Person as of the date on which, or at any time during the period for which, the determination of affiliation is being made (for purposes of this definition, the term "control" (including the correlative meanings of the terms "controlled by" and "under common control with"), as used with respect to any Person, means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities, by Contract or otherwise); provided, that (i) with respect to Parent, the term "Affiliate" means only Ultimate Parent and its Subsidiaries (and, for the avoidance of doubt, does not include the Company or any other Persons that are not controlled by Ultimate Parent) and (ii) with respect to the Company, the term "Affiliate" does not include Ultimate Parent or its Subsidiaries.

"**Agreement**" has the meaning set forth in the Preamble.

"**Alternative Acquisition Agreement**" means any letter of intent, memorandum of understanding, agreement in principle, acquisition agreement, merger agreement, option agreement, joint venture agreement, partnership agreement or other similar agreement (other than a Permitted Confidentiality Agreement) relating to any Acquisition Proposal.

"**Applicable Date**" means March 31, 2020.

"**Affiliated Group**" means an affiliated group as defined in Section 1504 of the Code (or any analogous combined, consolidated or unitary group defined under any state, local or non-U.S. Law) of which the Company is or has been a member.

"**Articles of Merger**" means the articles of merger pursuant to NRS 92A.200 relating to the Merger to be filed at or prior to the Effective Time with the Nevada Secretary of State.

"**Audit Committee**" means the audit committee of the Company Board.

"**Bankruptcy and Equity Exception**" has the meaning set forth in Section 5.4(a).

"**Book-Entry Share**" means each book-entry account formerly representing any non-certificated Eligible Shares.

"**Business Day**" means any day ending at 11:59 p.m. (New York time) other than a Saturday or Sunday or a day on which (a) banks in Las Vegas, Nevada or New York, New York are required or authorized by Law to close, or (b) for purposes of determining the Closing Date only, the Nevada Secretary of State is required or authorized by Law to close or has indicated that it will be unable to accept or process, or will be materially delayed in accepting or processing, filings of a nature including the Articles of Merger.

"**Bylaws**" has the meaning set forth in Section 3.2.

"**Certificate**" means each certificate formerly representing any of the Eligible Shares.

"**Change of Recommendation**" has the meaning set forth in Section 7.2(d)(i)(F).

"**Charter**" has the meaning set forth in Section 3.1.

"**Chosen Courts**" means the state courts and federal courts sitting in Clark County, Nevada.

"**Closing**" means the closing of the transactions contemplated by this Agreement.

"**Closing Date**" means such date on which the Closing actually occurs.

"**Code**" means the Internal Revenue Code of 1986, as amended.

"**Common Stock**" means the common stock, par value $0.001 per share, of the Company and any other class of securities into which such stock may hereafter be reclassified or changed.

"**Company**" has the meaning set forth in the Preamble.

"**Company 401(k) Plan**" means the AeroGrow International 401(k) Plan, effective March 31, 2014.

"**Company Benefit Plan**" means any benefit or compensation plan, program, policy, practice, Contract or other obligation, whether or not in writing and whether or not funded, in each case, which is sponsored or maintained by, or required to be contributed to, or with respect to which any potential liability is borne by, the Company, including "employee benefit plans"

within the meaning of Section 3(3) of ERISA ("**ERISA Plans**"), employment, consulting, retirement, severance, termination or "change of control" agreements, deferred compensation, equity-based, incentive, bonus, supplemental retirement, profit sharing, insurance, medical, welfare, fringe or other benefits or remuneration of any kind.

"**Company Board**" means the board of directors of the Company.

"**Company Compensation Committee**" means the compensation committee of the Company Board.

"**Company Disclosure Schedule**" has the meaning set forth in Article V.

"**Company Employee**" means any current or former employee (whether full- or part-time and, including any officer), director or independent contractor (who is a natural person) of the Company.

"**Company Intellectual Property Rights**" means any and all Intellectual Property Rights that are held or owned by or exclusively licensed to the Company, or claimed or purported to be held or owned by or exclusively licensed to the Company.

"**Company Material Contract**" has the meaning set forth in Section 5.12(a)(xix).

"**Company Option**" means any outstanding option to purchase Shares granted under the Equity Plan.

"**Company Recommendation**" has the meaning set forth in Section 5.4(b).

"**Company Reports**" means the forms, statements, certifications, reports and documents required to be filed with or furnished by the Company to the SEC pursuant to the Exchange Act or the Securities Act since the Applicable Date (other than any documents filed by the Company with the SEC on a voluntary basis by means of a Current Report on Form 8-K and other than the Schedule 13E-3 and the Proxy Statement; such excepted filings being referred to collectively as the "**Excluded Filings**"), including financial statement notes, exhibits and schedules thereto and all other information incorporated by reference therein and any amendments and supplements thereto and those forms, statements, certifications, reports and documents filed with or furnished to the SEC by the Company subsequent to the date of this Agreement (other than the Excluded Filings), including financial statement notes, exhibits and schedules thereto and all other information incorporated by reference and any amendments and supplements thereto.

"**Company Stockholders Meeting**" means the special meeting of stockholders of the Company to be held for the purpose of submitting this Agreement to the holders of record of the Common Stock entitled to vote thereon for their consideration and approval.

"**Confidentiality Agreement**" means the Confidentiality Agreement, dated as of June 3, 2020, by and between The Scotts Company LLC and the Company.

"**Contract**" means any legally binding contract, agreement, lease, license, note, mortgage, indenture, arrangement or other obligation.

"**Covered Tax Returns**" means, with respect to the Company, Tax Returns *other than* any Scotts Consolidated Return.

"**Covered Taxes**" means, with respect to the Company, Taxes *other than* income or franchise Taxes reflected on a Scotts Consolidated Return

"**Data Security Requirements**" means, collectively, all of the following to the extent relating to personal, sensitive, or confidential information, including, without limitation, Personal Information, or data or otherwise relating to privacy, security, or security breach notification requirements and applicable to the Company, the conduct of its business, or any system: (i) the Company's rules, policies, and procedures (whether physical or technical in nature, or otherwise), (ii) all applicable Laws, and all industry standards applicable to the Company's industry (including the Payment Card Industry Data Security Standard (PCI DSS)), and (iii) agreements the Company has entered into or by which it is bound.

"**D&O Insurance**" has the meaning set forth in Section 7.13(b).

"**Dissenter's Rights Statutes**" means NRS 92A.300 through NRS 92A.500, inclusive.

"**Dissenting Share**" means each Share outstanding immediately prior to the Effective Time and held immediately prior to the Effective Time by a Dissenting Stockholder.

"**Dissenting Stockholder**" means a Person which (i) immediately prior to the Effective Time is the holder of Dissenting Shares and (ii) has duly demanded and perfected, and has not withdrawn or otherwise waived or lost, dissenter's rights pursuant to the Dissenter's Rights Statutes.

"**DTC**" means The Depositary Trust Company.

"**Effective Time**" means the date and time when the Articles of Merger have been duly filed with and accepted by the Nevada Secretary of State, or such later date and time as may be agreed by the Parties in writing and specified in the Articles of Merger in accordance with the NRS.

"**Eligible Shares**" has the meaning set forth in Section 4.1(a).

"**Encumber**" has the meaning set forth in the definition of "Encumbrance."

"**Encumbrance**" means any pledge, lien, charge, option, hypothecation, mortgage, security interest, adverse right, prior assignment, or any other encumbrance of any kind or nature whatsoever, whether contingent or absolute, or any agreement, option, right or privilege (whether by Law, Contract or otherwise) capable of becoming any of the foregoing (and any action of correlative meaning, to "**Encumber**").

"**Environmental Law**" means any Law relating to: (a) the protection, investigation, remediation or restoration of the environment, health, safety or natural resources; (b) the handling, labeling, management, recycling, generation, use, storage, treatment, transportation, presence, disposal, release or threatened release of any Hazardous Substance; or (c) any noise, odor, indoor air, employee exposure, wetlands, pollution, contamination or any injury or threat of injury to persons or property relating to any Hazardous Substance.

"**Equity Awards**" has the meaning set forth in Section 5.3(e).

"**Equity Plan**" means the Company's 2005 Equity Compensation Plan, as amended.

"**ERISA**" means the Employee Retirement Income Security Act of 1974.

"**ERISA Plans**" has the meaning set forth in the definition of "Company Benefit Plan."

"**Exchange Act**" means the Securities Exchange Act of 1934.

"**Exchange Fund**" has the meaning set forth in Section 4.2(a)(i).

"**Excluded Filings**" has the meaning set forth in the definition of "Company Reports."

"**Excluded Shares**" means, collectively, (a) the Shares owned by Parent and (b) any Shares owned by the Company.

"**Export and Sanctions Regulations**" means all applicable sanctions and export control Laws in jurisdictions in which the Company does business or is otherwise subject to jurisdiction, including the Export Administration Regulations and U.S. sanctions Laws and regulations administered by the U.S. Department of the Treasury's Office of Foreign Assets Control.

"**FCPA**" means the U.S. Foreign Corrupt Practices Act of 1977.

"**GAAP**" means the generally accepted accounting principles set forth in the opinions and pronouncements of the Accounting Principles Board of the American Institute of Certified Public Accountants and statements and pronouncements of the Financial Accounting Standards Board, as applicable, as of the time of the relevant financial statements referred to herein.

"**Governmental Entity**" means any U.S., non-U.S., or supranational governmental (including public international organizations), quasi-governmental, regulatory or self-regulatory authority, agency, commission, body, department or instrumentality, or any court, tribunal or arbitrator or other entity or subdivision thereof or other legislative, executive or judicial entity or subdivision thereof, in each case of competent jurisdiction.

"**Hazardous Substance**" means any substance that (a) is listed, designated, classified or regulated pursuant to any Environmental Law; (b) is a petroleum product or by-product, asbestos-containing material, lead-containing paint or plumbing, polychlorinated biphenyls, mold, radioactive material or radon; and (c) poses a risk of harm or may be the subject of regulation or liability in connection with any Environmental Law.

"**Indebtedness**" means, with respect to the Company, without duplication, all obligations or undertakings by the Company (a) for borrowed money (including deposits or advances of any kind to the Company), (b) evidenced by bonds, debentures, notes or similar instruments, (c) for capitalized leases (as determined in accordance with GAAP) or to pay the deferred and unpaid purchase price of property or equipment, (d) pursuant to securitization or factoring programs or arrangements, (e) to maintain or cause to be maintained the financing, financial position or covenants of others or to purchase the obligations or property of others, (f) net cash payment obligations of the Company under swaps, options, forward sales contracts, derivatives and other hedging Contracts, financial instruments or arrangements that will be payable upon termination thereof (assuming termination on the date of determination), (g) letters of credit, performance bonds, bank guarantees, and other similar Contracts or arrangements entered into by or on behalf of the Company, (h) all obligations under conditional sale or other title retention agreements relating to property or assets or (i) pursuant to guarantees and arrangements having the economic effect of a guarantee of any obligation or undertaking of any other Person contemplated by the foregoing clauses (a) through (h) of this definition, in each case including all interest, penalties and other payments due with respect thereto.

"**Indemnification Agreements**" means that certain Indemnification Agreement, dated April 12, 2019, between the Company and David Kent and that certain Indemnification Agreement, dated April 12, 2019, between the Company and Greg Clarke.

"**Insurance Policies**" means any insurance policy pursuant to which the Company is a party, an insured or a beneficiary or that pertains to the Company's assets, employees or operations, *other than* the insurance policies maintained by Ultimate Parent or any of its Subsidiaries for the benefit of the Company.

"**Intellectual Property Rights**" means all rights anywhere in the world, in or to: (a) Trademarks; (b) patents, patent applications, registrations and invention disclosures, including divisionals, revisions, supplementary protection certificates, continuations, continuations-in-part, renewals, extensions, substitutes, re-issues and re-examinations; (c) Trade Secrets; (d) published and unpublished works of authorship, whether copyrightable or not (including software, website and mobile content, data, databases and other compilations of information), copyrights therein and thereto, and registrations and applications therefor, and all renewals, extensions, restorations and reversions thereof; (e) Internet domain names and URLs; and (f) rights of privacy, publicity and all other intellectual property, industrial or proprietary rights.

"**IRS**" means the U.S. Internal Revenue Service.

"**Knowledge**" or any similar phrase means the collective actual knowledge of; (a) J. Michael Wolfe, Grey H. Gibbs, John Thompson and Jessica Hodge; (b) any individuals that, following the date of this Agreement, replace or share the employment responsibilities of any such individuals, in each case after reasonable inquiry of such individuals' direct reports; and (c) solely with respect to Sections 5.10 and 7.16, the members of the Special Committee.

"**Law**" means any U.S. or non-U.S. federal, state, provincial, local, municipal or other law, statute, constitution, principle of common law, ordinance, code, standard, rule, regulation, ruling or requirement issued, enacted, adopted, promulgated, implemented or otherwise put into effect by or under the authority of any Governmental Entity or any Order.

"**Leased Real Property**" means all leasehold or subleasehold estates and other rights to use and occupy any land, buildings, structures, improvements, fixtures or other interest in real property held by the Company.

"**Licenses**" means all licenses, permits, certifications, approvals, registrations, consents, authorizations, franchises, variances and exemptions issued or granted by a Governmental Entity.

"**Material Adverse Effect**" means any event, change, effect, development, state of facts, condition, circumstance or occurrence that has a material adverse effect on the business, assets, liabilities condition (financial or otherwise), results of operation of the Company; provided, however, in no event shall any of the following events, changes, effects, developments, states of facts, conditions, circumstances or occurrences be deemed to constitute, nor be taken into account in determining whether there has been or may be, a Material Adverse Effect: (a) changes in or affecting general political or economic conditions or the financial, credit, or securities markets in the United States; (b) changes in or conditions generally affecting the industry in which the Company operates; or (c) resulting from or arising out of (i) the announcement of, or taking any action expressly required by this Agreement or the transactions contemplated by this Agreement, (ii) any taking of any action at the written request of Parent or Merger Sub, solely to the extent so requested, (iii) change in Law, GAAP, or accounting standards or interpretations thereof after the date hereof, (iv) any outbreak or escalation of hostilities or acts of war or terrorism or epidemics or pandemics (including the novel coronavirus COVID-19 but only to the extent that there is a material worsening of such outbreak that actually occurs after the date hereof in the markets in which the Company operates), (v) weather or climate conditions, including any earthquakes, floods, hurricanes, tropical storms, fires or other natural disasters, or (vi) any action initiated or threatened on or after the date hereof by any stockholder of the Company against the Company or any of its directors or officers arising out of this Agreement or the transactions contemplated by this Agreement, (vii) any change in the pricing or trading volume of the Company's Common Stock or the failure of the Company to meet any projections or forecasts (provided in the case of this clause (vii), the event, change, effect, development, condition, circumstance, cause or occurrence underlying such change or failure shall not be excluded and may be taken into account, in determining whether there has been or may be a Material Adverse Effect); provided, that any event, change, effect, development, state of facts, condition, circumstance or occurrence referred to in clauses (a), (b) or (c)(iii), (iv), or (v) shall not be excluded, and may be taken into account, in determining whether there has been or may be a Material Adverse Effect to the extent the Company is adversely affected thereby in a disproportionate manner relative to other similarly-situated participants in the industry in which the Company operates.

"**Material Licenses**" has the meaning set forth in Section 5.6(b).

"**Merger**" has the meaning set forth in the Recitals.

"**Merger Sub**" has the meaning set forth in the Preamble.

"**NRS**" means the Nevada Revised Statutes.

"**Order**" means any order, award, judgment, injunction, writ, decree (including any consent decree or similar agreed order or judgment), directive, settlement, stipulation, ruling, determination, decision or verdict, whether civil, criminal or administrative, in each case, that is entered, issued, made or rendered by any Governmental Entity.

"**Ordinary Course of Business**" means conduct that is (a) consistent in nature, scope and magnitude with the past business practices of the Company prior to the date of this Agreement and taken in the ordinary course of normal, day-to-day operations of the Company and (b) similar in nature, scope and magnitude to actions customarily taken, without any separate or special authorization, in the ordinary course of normal, day-to-day operations of other companies of similar size to the Company.

"**Organizational Documents**" means (a) with respect to any Person that is a corporation, its articles or certificate of incorporation, memorandum and articles of association, as the case may be, and its bylaws, or comparable documents, (b) with respect to any Person that is a partnership, its certificate of partnership, if any, and partnership agreement, or comparable documents, (c) with respect to any Person that is a limited liability company, its certificate of formation or articles of organization and limited liability company or operating agreement, or comparable documents and (d) with respect to any other Person that is not an individual, its comparable organizational documents.

"**Other Anti-Bribery Laws**" means, other than the FCPA, all anti-bribery, anti-corruption, anti-money-laundering and similar applicable laws of each jurisdiction in which the Company operates or has operated and in which any agent thereof is conducting or has conducted business involving the Company.

"**Outside Date**" has the meaning set forth in Section 9.2(a).

"**Parent**" has the meaning set forth in the Preamble.

"**Parent Disclosure Schedule**" has the meaning set forth in Article VI.

"**Parent Material Adverse Effect**" means any event, change, development, circumstance, fact or effect that, individually or taken together with any other events, changes, developments, circumstances, facts or effects, is or would reasonably be expected to prevent, materially delay or materially impair the consummation by Parent or Merger Sub of the Merger or the transactions contemplated hereby.

"**Parties**" and "**Party**" have the meanings set forth in the Preamble.

"**Paying Agent**" has the meaning set forth in Section 4.2(a)(i).

"**Paying Agent Agreement**" has the meaning set forth in Section 4.2(a)(ii).

"**Per Share Merger Consideration**" means $3.00 per Share in cash.

"**Permitted Confidentiality Agreement**" has the meaning set forth in Section 7.2(b)(i).

"**Person**" means any individual, corporation (including not-for-profit), general or limited partnership, limited liability company, joint venture, estate, trust, association, organization, Governmental Entity or other entity of any kind or nature.

"**Personal Information**" means any information that identifies or could reasonably be used to identify an individual, and any other personal information that is subject to any applicable Laws or the Company's privacy policies, including an individual's first and last name, address, telephone number, fax number, email address, social security number or other identifier issued by a Governmental Entity (including any state identification number, driver's license number, or passport number), geolocation information of an individual or device, biometric data, medical or health information, payment or credit card or other financial information (including bank account information), cookie identifiers, or any other browser- or device-specific number or identifier, or any web or mobile browsing or usage information that is linked to the foregoing.

"**Preferred Stock**" means the preferred stock of the Company, par value $0.001 per share.

"**Proceeding**" means any action, cause of action, claim, controversy, complaint, demand, litigation, suit, investigation, review, mediation, grievance, citation, summons, subpoena, inquiry, audit, hearing, originating application or legal proceeding of any nature (whether sounding in Contract, tort or otherwise, and whether civil or criminal or brought at law or in equity) that is brought, asserted, instituted, commenced, tried, heard or reviewed by a Governmental Entity.

"**Proxy Statement**" has the meaning set forth in Section 7.6(a)(i).

"**Registered**" means issued by, registered with, renewed by or the subject of a pending application before any Governmental Entity.

"**Representative**" means, with respect to any Person, any director, principal, partner, manager, member (if such Person is a member-managed limited liability company or similar entity), employee (including any officer), consultant, investment banker, financial advisor, legal counsel, authorized attorneys-in-fact, accountant or other advisor, agent or representative of such person, in each case acting in their capacity as such.

"**Requisite Company Vote**" means the approval of this Agreement by the holders of a majority of the outstanding Shares entitled to vote on such matter at a meeting of the holders of Common Stock duly called, noticed and held for such purpose.

"**Sarbanes-Oxley Act**" means the Sarbanes-Oxley Act of 2002.

"**Schedule 13E-3**" has the meaning set forth in Section 7.6(a)(i).

"**Scotts Consolidated Return**" means any federal or state income or franchise Tax Return that was filed on a unitary, combined or consolidated basis for the Affiliated Group the common parent of which is the Ultimate Parent, and which Tax Return included the Company (and the separate tax return for the Company filed in Missouri) for a taxable period beginning after Nov. 29, 2016.

"**SEC**" means the U.S. Securities and Exchange Commission.

"**Securities Act**" means the Securities Act of 1933.

"**Share**" means a share of Common Stock.

"**SMG Transaction Documents**" means: (a) the Technology License Agreement, dated April 22, 2013, between the Company and OMS Investments, Inc., as amended; (b) the Supply Chain Services Agreement, dated April 22, 2013, among the Company, The Scotts Company LLC and OMS Investments, Inc., as amended; (c) the Collaboration Services Agreement, dated April 22, 2013, among the Company, The Scotts Company LLC and OMS Investments, Inc., as amended; (d) the Brand License Agreement, dated April 1, 2018, between the Company and OMS Investments, Inc.; (e) the Real Estate Term Loan Agreement, dated June 20, 2019, between the Company and Ultimate Parent; and (f) the Term Loan and Security Agreement, dated August 3, 2020, between the Company and The Scotts Company LLC.

"**Special Committee**" means the special committee of independent and disinterested directors of the Company Board heretofore constituted, established and authorized on March 26, 2020, pursuant to duly adopted resolutions of the Company Board and NRS 78.125(1) for the purposes of reviewing any proposed transaction between the Company and Parent, and engaging Stifel, Nicolaus & Company, Incorporated to provide financial advice in connection with the review.

"**Subsidiary**" means, with respect to any Person, any other Person of which at least a majority of the securities or ownership interests having by their terms ordinary voting power to elect a majority of the board of directors or other individuals performing similar functions is directly or indirectly owned or controlled by such Person and/or by one or more of its Subsidiaries; provided, that with respect to Ultimate Parent and its Subsidiaries, the term "Subsidiary" does not include the Company.

"**Superior Proposal**" means an unsolicited, *bona fide* written Acquisition Proposal (provided that for purposes of this definition of "Superior Proposal", all references to 5% contained in the definition of "Acquisition Proposal" shall be deemed to be references to 75%) which the Special Committee determines in good faith, after consultation with outside legal counsel and its financial advisor, that (a) if consummated, would result in a transaction more favorable to the Unaffiliated Stockholders from a financial point of view than the Merger (after taking into account any revisions to the terms of this

Agreement proposed by Parent pursuant to Section 7.2(d)(ii)) and (b) for purposes of any determination to be made or action to be taken by the Special Committee pursuant to Sections 7.2(d)(ii) and 9.3(b), is reasonably likely to be consummated on the terms proposed, taking into account all legal, financial, regulatory and approval requirements (including receipt of the requisite approval of the holders of Shares), the sources, availability and terms of any required financing and the existence of a financing contingency, and the identity of the Person or Persons making the proposal. For the avoidance of doubt, if the transactions contemplated by this Agreement (after taking into account any revisions to the terms of this Agreement proposed by Parent pursuant to Section 7.2(d)(ii)) contain substantially identical financial and other terms and conditions to those contained in an Acquisition Proposal, such Acquisition Proposal cannot be deemed by the Special Committee to be a "Superior Proposal" as compared to the proposal then provided by Parent.

"**Superior Proposal Notice Period**" has the meaning set forth in Section 7.2(d)(ii).

"**Surviving Corporation**" has the meaning set forth in Section 2.1.

"**Takeover Statute**" means any "fair price," "moratorium," "interested stockholder," "control share acquisition," "business combination" or other anti-takeover Law or similar Law enacted under state or federal Law, including NRS 78.378 through 78.3793, inclusive, and NRS 78.411 through 78.444, inclusive.

"**Tax**" means any (a) federal, state, provincial, local or non-U.S. income, gross receipts, franchise, estimated, alternative minimum, add-on minimum, sales, use, transfer, registration, value added, excise, natural resources, severance, stamp, occupation, premium, windfall profit, environmental, customs, import duties and fees, real property, personal property, escheat, unclaimed and abandoned property, capital stock, social security, unemployment, disability, payroll, license, employee or other withholding, or other tax, fee, assessment, levy, tariff, charge or duty, of any kind whatsoever, including any interest, penalties or additions to tax or additional amounts in respect of the foregoing, imposed, assessed or collected by or under the authority of any Governmental Entity, or (b) liability of any other Person for the payment of any amounts of the type described in the foregoing clause (a) arising as a result of being (or ceasing to be) a member of any Affiliated Group, and (c) liability of any other Person for the payment of any amounts of the type described in the foregoing clause (a) as a result of any express or implied obligation to indemnify or otherwise assume or succeed to the liability of any other Person.

"**Tax Returns**" means returns, declarations, reports, claims for refund, information returns or other documents or information (including any related or supporting schedules, statements or information and any amendments thereof) filed with or submitted to, or required to be filed with or submitted to, any Governmental Entity in connection with the determination, assessment, collection or payment of any Tax of any party or in connection with the administration, implementation or enforcement of or compliance with any Law relating to any Tax.

"**Taxing Authority**" means any Governmental Entity having competent jurisdiction over the assessment, determination, collection or imposition of any Tax.

"**Trade Secrets**" means, collectively, confidential or proprietary trade secrets, inventions, discoveries, ideas, improvements, information, know-how, data and databases, including processes, schematics, business methods, formulae, drawings, specifications, prototypes, models, designs, customer lists and supplier lists, that, in each case, is protected under applicable trade secret Law.

"**Trademarks**" means, collectively, trademarks, service marks, brand names, certification marks, collective marks, d/b/a's, logos, symbols, trade dress, trade names, and other indicia of origin, all applications and registrations for the foregoing, and all goodwill associated therewith and symbolized thereby, including all renewals of the same.

"**Transaction Litigation**" has the meaning set forth in Section 7.16.

"**Ultimate Parent**" means The Scotts Miracle-Gro Company, an Ohio corporation.

"**Unaffiliated Stockholders**" means the holders of outstanding Shares, other than Excluded Shares.

"**Wholly Owned Subsidiary**" means, with respect to any Person, any other Person of which all of the equity or ownership interests of such other Person are directly or indirectly owned or controlled by such first Person.

1.2. Other Terms. Each of the other capitalized terms used in this Agreement has the meaning set forth where such term is first used or, if no meaning is set forth, the meaning required by the context in which such term is used.

1.3. Interpretation and Construction.

(a) The table of contents and headings herein are for convenience of reference only, do not constitute part of this Agreement and shall not be deemed to limit or otherwise affect any of the provisions of this Agreement.

(b) All Preamble, Recital, Article, Section, Subsection, Schedule, and Exhibit references used in this Agreement are to the preamble, recitals, articles, sections, subsections, schedules and exhibits to this Agreement unless otherwise specified herein.

(c) Unless the context expressly otherwise requires, for purposes of this Agreement:

(i) if a term is defined as one part of speech (such as a noun), it shall have a corresponding meaning when used as another part of speech (such as a verb);

(ii) the terms defined in the singular have a comparable meaning when used in the plural and *vice versa*;

(iii) words importing the masculine gender shall include the feminine and neutral genders and *vice versa*;

(iv) whenever the words "includes" or "including" are used, they shall be deemed to be followed by the words "without limitation";

(v) the words "hereto," "hereof," "hereby," "herein," "hereunder" and similar terms in this Agreement shall refer to this Agreement as a whole and not any particular provision of this Agreement; and

(vi) the word "extent" in the phrase "to the extent" shall mean the degree to which a subject or other thing extends and such phrase shall not mean simply "if."

(d) Except as otherwise specifically provided herein or the context expressly otherwise requires, the term "dollars" and the symbol "$" mean United States Dollars and all amounts in this Agreement shall be paid in United States Dollars.

(e) Except as otherwise specifically provided herein, to the extent this Agreement refers to information or documents having been "made available" (or words of similar import) by or on behalf of one or more Parties to another Party or Parties such obligation shall be deemed satisfied if (i) such Parties or Representatives thereof made such information or document available to such other Party or Parties or its or their Representatives, including by posting the information in a virtual data room, or (ii) such information or document is publicly available without substantive redactions in the Electronic Data Gathering, Analysis and Retrieval (EDGAR) database of the SEC, in each case, at least one Business Day prior to the date of this Agreement.

(f) Except as otherwise specifically provided herein, when calculating the period of time within which, or following which, any action is to be taken pursuant to this Agreement, the date that is the reference day in calculating such period shall be excluded. References to a number of days shall refer to calendar days unless Business Days are specified.

(g) Except as otherwise specifically provided herein, (i) all references to any statute in this Agreement include the rules and regulations promulgated thereunder, and unless the context otherwise requires, all applicable guidelines, bulletins or policies made in connection therewith, and (ii) all references to any Law in this Agreement shall be a reference to such Law as amended, re-enacted, consolidated or replaced as of the applicable date or period of time.

(h) Except as otherwise specifically provided herein, (i) all references in this Agreement to any Contract, other agreement, document or instrument (excluding this Agreement) mean such Contract, other agreement, document or instrument as amended, supplemented or otherwise modified from time to time in accordance with the terms thereof and, unless otherwise specified therein, include all schedules, annexes, addendums, exhibits and any other documents attached thereto or incorporated therein, and (ii) all references to this Agreement mean this Agreement (taking into account the provisions of Section 10.10(a)) as amended, supplemented or otherwise modified from time to time in accordance with Section 10.4.

(i) The Company Disclosure Schedule or the Parent Disclosure Schedule may include items and information the disclosure of which is not required either in response to an express disclosure requirement set forth in a provision of this Agreement or as an exception to one or more representations or warranties or covenants set forth in this Agreement. Inclusion of any such items or information shall not be deemed to be an acknowledgement or agreement that any such item or information (or any non-disclosed item or information of comparable or greater significance) is "material" or has had a Material Adverse Effect.

(j) The Parties have participated jointly in negotiating and drafting this Agreement. In the event that an ambiguity or a question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the Parties, and no presumption or burden of proof shall arise favoring or disfavoring any Party by virtue of the authorship of any provision of this Agreement.

ARTICLE II
The Merger; Closing; Effective Time

2.1. The Merger. Subject to the terms and conditions of this Agreement and the applicable provisions of the NRS, (a) at the Effective Time, Merger Sub shall be merged with and into the Company and the separate corporate existence of Merger Sub shall thereupon cease; (b) the Company shall be the surviving corporation in the Merger (sometimes referred to as the "**Surviving Corporation**") and, from and after the Effective Time, shall be a Subsidiary of Parent and the separate corporate existence of the Company with all of its rights, privileges, immunities, powers and franchises shall continue unaffected by the Merger; and (c) the Merger shall have such other effects as provided in the NRS.

2.2. Closing. The Closing will take place by the exchange of documents by facsimile, PDF or other electronic means at 10:00 a.m. Eastern Time on the third Business Day following the satisfaction or waiver of the last of the conditions set forth in Article VIII to be satisfied (other than those conditions that by their nature are to be satisfied at the Closing, but subject to the satisfaction or, to the extent permitted by Law, waiver of those conditions) or at such other date, time and place as the Company and Parent may agree in writing.

2.3. Effective Time. As promptly as practicable following the Closing, but on the Closing Date, the Parties shall cause the Articles of Merger to be executed and filed with the Nevada Secretary of State as provided in NRS Chapter 92A. The Merger shall become effective at the Effective Time.

ARTICLE III
Articles of Incorporation and Bylaws; Directors and Officers of the Surviving Corporation

3.1. Articles of Incorporation of the Surviving Corporation. At the Effective Time, the articles of incorporation of the Company as in effect immediately prior to the Effective Time shall be amended and restated to read in their entirety as set forth in Exhibit A hereto, which, as so amended and restated, shall be the articles of incorporation of the Surviving Corporation (the "**Charter**"), until thereafter amended in accordance with their terms and applicable Law.

3.2. The Bylaws of the Surviving Corporation. At the Effective Time, the bylaws of the Company as in effect immediately prior to the Effective Time shall be amended and restated to read in their entirety as the bylaws of the Merger Sub immediately prior to the Effective Time (except all references therein to the name of Merger Sub shall be replaced with the name of the Company), which, as so amended and restated, shall be the bylaws of the Surviving Corporation (the "**Bylaws**"), until thereafter amended in accordance with the terms of the Charter, such bylaws and applicable Law.

3.3. Directors and Officers of the Surviving Corporation. At the Effective Time, (i) the directors of Merger Sub immediately prior to the Effective Time shall become and constitute the only directors of the Surviving Corporation, each to hold office until his or her successor has been duly elected or appointed and qualified or until his or her death, resignation or removal in accordance with the Organizational Documents of the Surviving Corporation and applicable Law, and (ii) the officers of Merger Sub immediately prior to the Effective Time shall become and

constitute the only officers of the Surviving Corporation, each to hold office until his or her successor has been duly elected or appointed and qualified or until his or her earlier death, resignation or removal in accordance with the Organizational Documents of the Surviving Corporation and applicable Law. The Parties shall take all actions necessary to give effect to the foregoing provision, including the delivery of all applicable instruments and notices of resignation.

ARTICLE IV
Effect of the Merger on Capital Stock; Exchange of Certificates

4.1. Effect of the Merger on Capital Stock. At the Effective Time, by virtue of the Merger and without any action on the part of the holder of any capital stock of the Company or on the part of Parent, in its capacity as the sole stockholder of Merger Sub:

(a) Common Stock. Each Share (other than the Excluded Shares and Dissenting Shares) issued and outstanding immediately prior to the Effective Time (such Shares, the "**Eligible Shares**") shall be automatically converted into the right to receive the Per Share Merger Consideration in cash, without interest thereon and subject to any required withholding of Taxes, shall cease to be outstanding, shall be cancelled and shall cease to exist, and each Certificate representing Eligible Shares, and each Book-Entry Share representing Eligible Shares, shall thereafter only represent the right to receive the Per Share Merger Consideration, payable pursuant to Section 4.2.

(b) Treatment of Excluded Shares. Each Excluded Share shall cease to be outstanding, shall be cancelled without payment of any consideration therefor and shall cease to exist.

(c) Treatment of Dissenting Shares. Each Dissenting Share shall cease to be outstanding, shall be cancelled and shall cease to exist, and shall be subject to the provisions of Section 4.2(g).

(d) Merger Sub. Each share of common stock, par value $0.001 per share, of Merger Sub, issued and outstanding immediately prior to the Effective Time shall be automatically converted into one share of common stock, par value $0.001 per share, of the Surviving Corporation.

4.2. Exchange of Certificates and Delivery of Merger Consideration.

(a) Deposit of Merger Consideration and Paying Agent.

(i) As promptly as practicable after the Effective Time, but on the Closing Date, Parent shall deposit, or cause to be deposited, with a paying agent selected and engaged by Parent prior to the Closing Date that is reasonably acceptable to the Special Committee (the "**Paying Agent**"), an amount in cash in immediately available funds sufficient in the aggregate to provide all funds necessary for the Paying Agent to make payments in respect of the Eligible Shares pursuant to Section 4.2(b) (the aggregate amount of cash deposited, the "**Exchange Fund**").

(ii) The agreement pursuant to which Parent appoints the Paying Agent (the "**Paying Agent Agreement**") shall be in form and substance reasonably acceptable to the Company (such acceptance not to be unreasonably conditioned, withheld or delayed). Pursuant to the Paying Agent Agreement, among other things, the Paying Agent shall (A) act as the paying agent for the payment and delivery of the Per Share Merger Consideration pursuant to the terms of this Agreement and (B) invest the Exchange Fund, if and as directed by Parent; provided, however, that any investment shall be in obligations of or guaranteed as to principal and interest by the U.S. government in commercial paper obligations rated A-1 or P-1 or better by Moody's Investors Service, Inc. or Standard & Poor's Financial Services, LLC, respectively, in certificates of deposit, bank repurchase agreements or banker's acceptances of commercial banks with capital exceeding $10 billion (based on the most recent financial statements of such bank that are then publicly available), or in money market funds having a rating in the highest investment category granted by a recognized credit rating agency at the time of acquisition or a combination of the foregoing and, in any such case, no such instrument shall have a maturity exceeding 30 days. To the extent that there are losses with respect to such investments, or the Exchange Fund diminishes for any other reason below the level required to make prompt payment and delivery of the aggregate Per Share Merger Consideration as contemplated by Section 4.1(a), Parent shall promptly replace or restore or cause the replacement or restoration of the cash in the Exchange Fund lost through such investments or other events so as to ensure that the Exchange Fund is at all times maintained at a level sufficient to make such cash payments in full as required by this Agreement. Any interest and other income resulting from such investment (if any) in excess of the amounts payable pursuant to Section 4.2(b) and Section 4.3(b) shall be promptly returned to Parent or the Surviving Corporation, as determined by Parent in accordance with the terms and conditions of the Paying Agent Agreement.

(b) Procedures for Surrender.

(i) As promptly as reasonably practicable after the Effective Time (but in any event within three Business Days thereafter), Parent shall cause the Paying Agent to mail or otherwise provide each former holder of record of Eligible Shares that are held in the form of (A) Certificates or (B) Book-Entry Shares not held through DTC notice advising such holders of the effectiveness of the Merger, which notice shall include (1) appropriate transmittal materials (including a customary letter of transmittal) specifying that delivery shall be effected, and risk of loss and title to such Certificates and Book-Entry Shares shall pass only upon delivery of the Certificates (or affidavits of loss in lieu of the Certificates, as provided in Section 4.2(e)) or the surrender of such Book-Entry Shares, as applicable, to the Paying Agent such materials to be in such form and have such other provisions as Parent and the Company may reasonably agree and (2) instructions for effecting the surrender of the Certificates (or affidavits of loss in lieu of the Certificates, as provided in Section 4.2(e)) or such Book-Entry Shares (which shall be deemed to have been effected upon the delivery of a customary "agent's message" with respect to such Book-Entry Shares or such other reasonable evidence, if any, of such surrender as the Paying Agent may reasonably request pursuant to the terms and conditions of the Paying Agent Agreement) to the Paying Agent in exchange for the Per Share Merger Consideration that such holder is entitled to receive as a result of the Merger pursuant to Section 4.1.

(ii) With respect to Book-Entry Shares held through DTC, Parent and the Company shall cooperate to establish procedures with the Paying Agent, DTC and such other

necessary or desirable third-party intermediaries to ensure that the Paying Agent will transmit to DTC or its nominees as promptly as practicable after the Effective Time, upon surrender of Book-Entry Shares held of record by DTC or its nominees in accordance with DTC's customary surrender procedures and such other procedures as agreed by Parent, the Company, the Paying Agent, DTC and such other necessary or desirable third-party intermediaries, the Per Share Merger Consideration to which the beneficial owners thereof are entitled pursuant to the terms of this Agreement.

(iii) Upon surrender to the Paying Agent of Certificates or Book-Entry Shares in accordance with the instructions set forth in Section 4.2(b)(i) and Section 4.2(b)(ii), as applicable, the holder of such Certificate or Book-Entry Share shall be entitled to receive in exchange therefor, and Parent shall cause the Paying Agent to pay and deliver, out of the Exchange Fund, as promptly as practicable to such holder, an amount in cash in immediately available funds (after giving effect to any required Tax withholdings as provided in Section 4.2(f)) equal to the aggregate Per Share Merger Consideration that such holder is entitled to receive as a result of the Merger pursuant to Section 4.1.

(iv) For the avoidance of doubt, no interest will be paid or accrued for the benefit of any former holder of Eligible Shares on any amount payable upon the surrender of any Certificates or Book-Entry Shares.

(v) In the event of a transfer of ownership of any Certificate that is not registered in the stock transfer books or ledger of the Company, or if the consideration payable is to be paid in a name other than that in which the Certificate or Certificates surrendered or transferred in exchange therefor are registered in the stock transfer books or ledger of the Company, a check for any cash to be exchanged upon due surrender of any such Certificate or Certificates may be issued to such a transferee if the Certificate is or the Certificates are properly endorsed and otherwise in proper form for surrender and presented to the Paying Agent, accompanied by all documents required to evidence and effect such transfer and to evidence that any applicable transfer Taxes have been paid or are not applicable, in each case, in form and substance reasonably satisfactory to Parent and the Paying Agent. Payment of the applicable Per Share Merger Consideration with respect to Book-Entry Shares shall only be made to the Person in whose name such Book-Entry Shares are registered in the stock transfer books or ledger of the Company.

(c) Transfers. From and after the Effective Time, there shall be no transfers on the stock transfer books or ledger of the Company of any Shares. If, after the Effective Time, any Certificate or acceptable evidence of a Book-Entry Share formerly representing any Eligible Shares is presented to the Surviving Corporation, Parent or the Paying Agent for transfer, it shall be cancelled and exchanged for the cash amount in immediately available funds to which the holder thereof is entitled pursuant to this Article IV and in accordance with Section 4.2(b)(v).

(d) Termination of Exchange Fund.

(i) Any portion of the Exchange Fund (including the proceeds of any investments thereof (if any)) that remains unclaimed by the holders of Shares for one year from and after the Closing Date shall be delivered to Parent or the Surviving Corporation, as determined

by Parent. Any former holder of Eligible Shares who has not theretofore complied with the procedures, materials and instructions contemplated by this Section 4.2 shall thereafter look only to the Surviving Corporation as a general creditor thereof for such payments (after giving effect to any required Tax withholdings as provided in Section 4.2(f)) in respect thereof.

(ii) Notwithstanding anything to the contrary set forth in this Article IV, none of the Surviving Corporation, Parent, the Paying Agent or any other Person shall be liable to any former holder of Eligible Shares or Company Options for any amount properly delivered to a public official pursuant to applicable abandoned property, escheat or similar Laws.

(e) Lost, Stolen or Destroyed Certificates. In the event any Certificate shall have been lost, stolen or destroyed, upon the making of an affidavit of that fact by the Person claiming such Certificate to be lost, stolen or destroyed and, if required by Parent, the posting by such Person of a bond in customary amount and upon such terms as may be required by Parent as indemnity against any claim that may be made against it or the Surviving Corporation with respect to such Certificate, the Paying Agent shall issue in exchange for such Certificate an amount in cash (after giving effect to any required Tax withholdings as provided in Section 4.2(f)) equal to the product obtained by *multiplying* (i) the number of Eligible Shares formerly represented by such lost, stolen or destroyed Certificate by (ii) the Per Share Merger Consideration.

(f) Withholding Rights. Each of Parent, the Surviving Corporation and the Paying Agent (and any of their Affiliates) shall be entitled to deduct and withhold from the consideration otherwise payable pursuant to this Agreement to any Person such amounts as it is required to deduct and withhold with respect to the making of such payment under any applicable Tax Law. To the extent that amounts are so withheld, such withheld amounts (i) shall be remitted to the applicable Governmental Entity, and (ii) shall be treated for all purposes of this Agreement as having been paid to the Persons in respect of which such deduction and withholding was made.

(g) Dissenter's Rights. No Dissenting Stockholder shall be entitled to receive the Per Share Merger Consideration with respect to the Dissenting Shares formerly owned by such Dissenting Stockholder. Each Dissenting Stockholder shall be entitled to receive only the payment of the fair value (as defined in NRS 92A.320) of the Dissenting Shares formerly owned by such Dissenting Stockholder in accordance with the NRS, solely to the extent such Dissenting Stockholder has perfected and not withdrawn or otherwise lost, and is otherwise entitled to, dissenter's rights in accordance with the NRS. The Company shall give Parent (i) prompt notice and copies of any written demands for dissenter's rights, attempted or purported withdrawals of such demands and any other instruments received by the Company relating to any Person's assertion of or demand for dissenter's rights and (ii) the opportunity to participate in and, if Parent elects, direct all negotiations and Proceedings with respect to any such assertions and demands. The Company shall not, except with the prior written consent of Parent, make any payment with respect to any demands for dissenter's rights, offer to settle or settle any such demands or approve any withdrawal of any such demands, or agree, authorize or commit to do any of the foregoing. If any Dissenting Stockholder withdraws its assertion or demand for dissenter's rights or otherwise waives or loses its dissenter's rights under the Dissenter's Rights Statutes with respect to any Dissenting Shares, such Dissenting Shares shall be deemed to have been Eligible Shares and thereupon be converted into the right to receive, without any interest thereon, the aggregate Per Share Merger Consideration with respect to such Eligible Shares pursuant to this Article IV.

4.3. Treatment of Company Options.

No Company Options are outstanding.

4.4. Adjustments to Prevent Dilution. Notwithstanding anything to the contrary set forth in this Agreement, if, from the date of this Agreement to the earlier of the Effective Time and the termination of this Agreement pursuant to Article IX, the issued and outstanding Shares or securities convertible or exchangeable into or exercisable for Shares shall have been changed into a different number of Shares or securities of a different class by reason of any reclassification, stock split (including a reverse stock split), stock dividend or distribution, recapitalization, merger, issuer tender or exchange offer, or other similar transaction, or a stock dividend with a record date within such period shall have been declared, then the Per Share Merger Consideration shall be appropriately adjusted to provide the holders of Shares the same economic effect as contemplated by this Agreement prior to such event, and such items so adjusted shall, from and after the date of such event, be the Per Share Merger Consideration; provided, however, that nothing in this Section 4.4 shall be construed to permit the Company or any other Person to take any action except to the extent consistent with, and not otherwise prohibited by, this terms of this Agreement.

ARTICLE V
Representations and Warranties of the Company

The Company hereby represents to Parent and Merger Sub that, except as set forth in (i) the corresponding sections of any confidential Disclosure Schedule delivered to Parent by the Company prior to or concurrently with the execution and delivery of this Agreement (the "**Company Disclosure Schedule**") (it being agreed that for the purposes of the representations and warranties made by the Company in this Agreement, disclosure of any item in any section of the Company Disclosure Schedule shall be deemed disclosure with respect to any other section to the extent the relevance of such item is reasonably apparent on its face), (ii) the SMG Transaction Documents, or (iii) any Company Report filed by the Company with the SEC after March 31, 2020:

5.1. Organization, Good Standing and Qualification. The Company is a corporation duly incorporated and organized, validly existing and in good standing under the Laws of the State of Nevada and has all requisite corporate power and authority to own, lease and operate its properties and assets and to carry on its business as currently conducted and is qualified to do business and, to the extent such concept is applicable, is in good standing as a foreign corporation in each jurisdiction where the ownership, leasing or operation of its assets or properties or conduct of its business requires such qualification. The Company has made available to Parent correct and complete copies of the Company's Organizational Documents in the forms that are in full force and effect as of the date of this Agreement.

5.2. Subsidiaries. The Company does not own, directly or indirectly, any capital stock, voting securities, partnership interests or equity securities of any Person.

5.3. Capital Structure.

(a) The authorized capital stock of the Company consists of 750,000,000 shares of Common Stock and 20,000,000 shares of Preferred Stock. As of the date of this Agreement, the only issued and outstanding capital stock of the Company consists of 34,328,036 shares of Common Stock. All of the outstanding shares of Common Stock have been duly authorized and are validly issued, fully paid and nonassessable and are free and clear of any Encumbrance. No shares of Common Stock are available for issuance under the Equity Plan, and the Company currently has no shares of Common Stock reserved for future issuance. The Company does not have outstanding any bonds, debentures, notes or other obligations under which the holders thereof have the right to vote or that are convertible into or exercisable for securities having the right to vote with the stockholders of the Company on any matter. There are no equity awards outstanding under the Equity Plan.

(b) None of the outstanding shares of capital stock of the Company was issued in violation of any preemptive rights or similar rights to subscribe for, purchase or otherwise acquire securities. There are no stockholders agreements, voting agreements or other similar agreements with respect to the Company's capital stock to which the Company is a party or, to the Knowledge of the Company, between or among any of the Company's stockholders.

(c) There are no outstanding Company Options. There are no preemptive or other outstanding rights, options, warrants, conversion rights, stock appreciation rights, redemption rights, repurchase rights, agreements, arrangements, calls, commitments or rights of any kind that obligate the Company to issue or to sell any shares of capital stock or other securities of the Company or any securities or obligations convertible or exchangeable into or exercisable for, valued by reference to or giving any Person a right to subscribe for or acquire, any securities of the Company, and no securities or obligations evidencing such rights are authorized, issued or outstanding. There are no outstanding securities or instruments of the Company that contain any redemption or similar provisions, and there are no contracts, commitments, understandings or arrangements by which the Company is or may become bound to redeem a security of the Company. Since the close of business on August 30, 2017, the Company has not issued any capital stock.

(d) The Equity Plan is the only plan or program maintained by the Company under which stock options, restricted stock, restricted stock units, stock appreciation rights or other compensatory equity or equity-based awards ("**Equity Awards**") have been granted. No Equity Awards have been granted under the Equity Plan and remain outstanding. The Equity Plan expired pursuant to its terms on August 30, 2015 and no further action or authorization on the part of the Company, the Company Board or the Company Compensation Committee is necessary to terminate the Equity Plan.

5.4. Corporate Authority; Approval and Fairness Opinion.

(a) The Company has all requisite corporate power and authority and has taken all corporate action necessary to execute, deliver and perform its obligations under this Agreement and to consummate the transactions contemplated by this Agreement, subject only to obtaining the Requisite Company Vote. This Agreement has been duly executed and delivered by the Company

and constitutes a valid and binding agreement of the Company enforceable against the Company in accordance with its terms, subject to bankruptcy, insolvency, fraudulent transfer, reorganization, moratorium and similar Laws of general applicability relating to or affecting creditors' rights and remedies and to general equitable principles (the "**Bankruptcy and Equity Exception**").

(b) At a meeting duly called and held on or prior to the date hereof, the Special Committee duly adopted resolutions whereby the Special Committee (i) unanimously (A) determined that this Agreement and the transactions contemplated by this Agreement (including the Merger) are advisable, fair to and in the best interests of the Company and the Unaffiliated Stockholders, and (B) recommended that the Company Board adopt and approve this Agreement and the transactions contemplated by this Agreement (including the Merger). As of the date hereof, such resolutions have not been withdrawn or modified.

(c) At a meeting duly called and held on or prior to the date hereof, the Company Board duly adopted resolutions whereby the Company Board (A) adopted, pursuant to NRS 92A.120, and approved this Agreement and the transactions contemplated by this Agreement, (B) directed that this Agreement be submitted for approval by a vote of the holders of Shares at the Company Stockholders Meeting and (C) recommended that the holders of Shares vote affirmatively at the Company Stockholders Meeting to approve this Agreement and the Merger (the "**Company Recommendation**"). As of the date hereof, such resolutions have not been withdrawn or modified.

(d) The Special Committee has received a fairness opinion from Stifel, Nicolaus & Company, Incorporated, financial advisor to the Special Committee, in such form as is acceptable to the Special Committee and to the effect that, as of the date of such opinion, and subject to the qualifications, exceptions and limitations set forth therein, the Per Share Merger Consideration to be paid by Parent under this Agreement is fair, from a financial point of view, to the Unaffiliated Stockholders. A copy of such opinion will be delivered to Parent solely for informational purposes not later than 24 hours after the execution and delivery of this Agreement.

5.5. Governmental Filings; No Violations; Certain Contracts.

(a) Other than the filing of the Articles of Merger with the Nevada Secretary of State and the expirations of waiting periods and the filings, notices, reports, consents, registrations, approvals, permits and authorizations with, to or from any Governmental Entity under the Exchange Act and pursuant to the rules and regulations of OTC Markets Group Inc., as applicable, no expirations of waiting periods are required and no filings, notices, reports, consents, registrations, approvals, permits or authorizations are required to be made by the Company with, nor are any required to be made or obtained by the Company with or from, any Governmental Entity in connection with the execution, delivery and performance of this Agreement by the Company and the consummation of the transactions contemplated by this Agreement, or in connection with the continuing operation of the business of the Company following the Effective Time, except where the failure to satisfy such waiting period or to make, give or obtain such filing, notice, report, consent, registration, approval, permit or authorization would not have a Material Adverse Effect or prevent, materially delay or materially impair the ability of the Company to consummate the transactions contemplated by this Agreement.

(b) The execution, delivery and performance of this Agreement by the Company do not, and the consummation of the transactions contemplated by this Agreement will not, constitute or result in (i) a breach or violation of, or a default under the Organizational Documents of the Company, (ii) with or without notice, lapse of time or both, a breach or violation of, a termination (or right of termination) of or default under, the loss of any benefit under, the creation or acceleration of any obligations under or the creation of an Encumbrance on any of the rights or assets of the Company pursuant to, or any change in the substantive rights or obligations of any party under any Contract binding upon the Company or (iii) under any Law or Order applicable to the Company, except, in the case of clause (ii) or (iii) of this Section 5.5(b), any such items that, individually or in the aggregate, have not have, and would not have, a Material Adverse Effect (it being agreed that for purposes of this Section 5.5(b), effects resulting from or arising in connection with the matters set forth in clause (c) of the definition of the term "Material Adverse Effect" shall not be excluded in determining whether a Material Adverse Effect has occurred) or prevent, materially delay or materially impair the ability of the Company to consummate the transactions contemplated by this Agreement.

5.6. Compliance with Laws; Licenses.

(a) Compliance with Laws.

(i) To the Knowledge of the Company, the business of the Company has not been, and is not being, conducted in violation of any applicable Law. No investigation, review or Proceeding by any Governmental Entity with respect to the Company, any of its assets or properties or any of its officers or directors arising out of their service to the Company is pending or, to the Knowledge of the Company, threatened.

(ii) Neither the Company nor any of its Affiliates has made, arranged or modified (in any material respect) any extensions of credit in the form of a personal loan to any executive officer or director of the Company.

(b) Licenses. To the Knowledge of the Company, the Company has obtained, holds and is in compliance in all material respects with all Licenses necessary to conduct its business as currently conducted (collectively, "**Material Licenses**"). The Company has not received any notice of Proceedings relating to the revocation or modification of any Material License.

5.7. Company Reports.

(a) The Company has filed with or furnished to the SEC, as applicable, on a timely basis (giving effect to all extensions of any periods to so file that were obtained pursuant to filings by the Company on Form 12b-25 under the Exchange Act), all Company Reports.

(b) Each of the Company Reports, at the time of its filing with or being furnished to the SEC complied, or if not yet filed or furnished, will comply, with the applicable requirements of the Securities Act, the Exchange Act and the Sarbanes-Oxley Act. As of their respective dates (or, if amended or supplemented, as of the date of such amendment or supplement), the Company Reports did not, and any Company Reports filed with or furnished to the SEC subsequent to the date of this Agreement, will not, contain any untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements made therein, in light of the circumstances in which they were made, not misleading.

5.8. Disclosure Controls and Procedures and Internal Control Over Financial Reporting.

(a) The Company maintains disclosure controls and procedures (as defined in the Exchange Act) reasonably designed to ensure that all information required to be disclosed by the Company is recorded and reported on a timely basis to the individuals responsible for the preparation of the Company's filings with the SEC and other public disclosure documents.

(b) The Company maintains internal controls over financial reporting (as such term is defined in the Exchange Act) designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with GAAP.

(c) The Company's management has completed an assessment of the effectiveness of the internal control over financial reporting of the Company in compliance with the requirements of Section 404 of the Sarbanes-Oxley Act for the fiscal year ended March 31, 2020, and such assessment concluded that such system was effective. Since such date, there have been no changes in the internal control over financial reporting of the Company that have materially affected, or would reasonably be likely to materially affect, the internal control over financial reporting of the Company.

(d) Since the Applicable Date, the Company has not become aware of (i) any significant deficiencies or material weaknesses in the design or operation of its internal controls over financial reporting that are reasonably expected to adversely affect the Company's ability to record, process, summarize and report financial information and has identified for the Company's auditors and Audit Committee any material weaknesses in internal control over financial reporting, (ii) any allegation of fraud, whether or not material, that involves management or other employees who have a significant role in the Company's internal control over financial reporting or (iii) any material violation of or failure to comply in all material respects with United States federal securities laws.

(e) The Company has made available to Parent (i) a summary of all written disclosures made by management to the Company's auditors and Audit Committee since the Applicable Date and (ii) any material communication since the Applicable Date made by management or the Company's auditors to the Audit Committee required or contemplated by the Audit Committee's charter or professional standards of the Public Company Accounting Oversight Board. Since the Applicable Date, no material complaints from any source regarding accounting, internal accounting controls or auditing matters, and no concerns from Company Employees regarding questionable accounting or auditing matters, have been received by the Company. The Company has made available to Parent a summary of all material complaints or concerns made since the Applicable Date through the Company's whistleblower hotline or equivalent system for receipt of employee concerns regarding possible violations of Law.

5.9. Financial Statements; No Undisclosed Liabilities; "Off-Balance Sheet Arrangements"; Books and Records.

(a) Financial Statements. Each of the balance sheets included in or incorporated by reference in the Company Reports fairly presents, or, in the case of Company Reports filed after the date of this Agreement, will fairly present the financial position of the Company as of its date and each of the statements of operations, comprehensive loss, changes in stockholders' (deficit) equity and cash flows included in, or incorporated by reference in, the Company Reports fairly presents, or, in the case of Company Reports filed after the date of this Agreement, will fairly present the results of operations, retained earnings (loss), changes in financial position and cash flows, as the case may be, of the Company for the periods set forth therein (subject, in the case of unaudited statements, to notes and normal year-end audit adjustments that are not or will not be material in amount or effect), in each case in accordance with GAAP consistently applied during the periods involved.

(b) No Undisclosed Liabilities. Except for obligations, liabilities and Indebtedness (i) reflected or reserved against in the Company's most recent balance sheets included in or incorporated by reference in the Company Reports filed prior to the date of this Agreement, (ii) that would be incurred in connection with the transactions contemplated by this Agreement, or (iii) incurred in the Ordinary Course of Business since the date of such balance sheet, there are no obligations, liabilities or Indebtedness of the Company, whether or not accrued, contingent or otherwise and whether or not required to be disclosed or any other facts or circumstances that would reasonably be expected to result in any material claims against, or obligations, liabilities or Indebtedness of, the Company.

(c) "Off-Balance Sheet Arrangements". The Company is not a party to, and is not subject to any commitment to become a party to, any joint venture, off-balance sheet partnership or any similar Contract or any "off-balance sheet arrangements" (as defined in Item 303(a) of Regulation S-K of the Securities Act).

(d) Books and Records. The books of account of the Company have been kept accurately in all material respects in the Ordinary Course of Business, the transactions entered therein represent *bona fide* transactions, and the revenues, expenses, assets and liabilities of the Company have been properly recorded therein in all material respects. The corporate records and minute books of the Company have been maintained in accordance with all applicable Laws in all material respects, and such corporate records and minute books are correct and complete in all material respects. The financial statements of the Company have been prepared in a manner consistent in all material respects with the books of account and other records of the Company.

5.10. Litigation.

(a) There are no Proceedings pending or, to the Knowledge of the Company, threatened against the Company (except as set forth in 5.10(c) below).

(b) The Company is not a party to or subject to the provisions of any Order that restricts the manner in which the Company conduct its business in any material respect, or that would, individually or in the aggregate, reasonably be expected to prevent, materially delay or materially impair the ability of the Company to consummate the transactions contemplated by this Agreement.

(c) None of the Company, or any director or officer thereof, is or has been the subject of any Proceeding involving a claim of violation of or liability under federal or state securities laws or a claim of breach of fiduciary duty nor, to the Knowledge of the Company, is any such Proceeding threatened. Since the Applicable Date, the Company has not been the subject of any investigation by the SEC involving the Company or any current or former director or officer of the Company, nor, to the Knowledge of the Company, is any such investigation threatened. The Company shall inform Parent of any such investigation promptly after it receives any notice thereof.

5.11. Absence of Certain Changes. Since the Applicable Date and through the date of this Agreement, (i) the Company has conducted its business only in the Ordinary Course of Business; and (ii) there has not occurred any event, change, development, circumstance or fact that, individually or taken together with any other events, changes, developments, circumstances, facts or effects, have had or could reasonably be expected to have a Material Adverse Effect.

5.12. Company Material Contracts.

(a) Except for this Agreement, the SMG Transaction Documents, the compensation for the Special Committee approved by resolution of the Company Board on June 5, 2020, and the Contracts provided to Parent by the Company in connection with the due diligence related to this Agreement, including any Company Benefit Plan, as of the date of this Agreement, the Company is not a party to, bound by or subject to any Contract:

(i) related to any settlement of any Proceeding within the past three years;

(ii) constituting a collective bargaining arrangement or with a labor union, labor organization, works council or similar organization;

(iii) evidencing financial or commodity hedging or similar trading activities, including any interest rate swaps, financial derivatives master agreements or confirmations, or futures account opening agreements and/or brokerage statements or any similar Contract to which the Company is a party;

(iv) for any Leased Real Property or the lease of personal property providing, in each case, for annual payments thereunder of $50,000 or more, individually, or $250,000 or more, in the aggregate;

(v) involving the payment or receipt of (x) royalties, licensing fees or advances of more than $50,000 in the aggregate or (y) any other amounts of more than $25,000 in the aggregate, in each case in the 12-month period ending on March 31, 2020 and March 31, 2019, or reasonably expected to be paid or received in the 12-month period ending on March 31, 2021;

(vi) with any equity holder of the Company;

(vii) between the Company, on the one hand, and any director or officer of the Company or any Person beneficially owning five percent or more of the outstanding Shares, on the other hand;

(viii) relating to Indebtedness of the Company of $100,000 or more;

(ix) containing any standstill or similar agreement pursuant to which the Company has agreed not to acquire assets or securities of another Person or any of its affiliates;

(x) providing for indemnification by the Company of any Person or pursuant to which any indemnification obligations of the Company remain outstanding or otherwise survive as of the date of this Agreement;

(xi) that grants any right of first refusal, right of first offer or similar right with respect to any material assets, rights or properties of the Company;

(xii) relating to the acquisition or disposition of any assets or business (whether by merger, purchase or sale of stock, purchase or sale of assets or otherwise) pursuant to which the Company reasonably expects to be required to pay any earn-out, deferred or other contingent payments;

(xiii) that prohibits the payment of dividends or distributions in respect of the capital stock of the Company, the pledging of the capital stock of the Company or the incurrence of Indebtedness by the Company;

(xiv) that (1) purports to limit in any material respect either the type of business in which the Company may engage or the manner or locations in which any of them may so engage in any business, (2) could require the disposition of any material assets or line of business of the Company, (3) grants "most favored nation" status or (4) prohibits or limits the right of the Company in any material respect to make, sell or distribute any products or services or use, transfer, license, distribute or enforce any of their respective Intellectual Property Rights;

(xv) that contains a put, call or similar right pursuant to which the Company could be required to purchase or sell, as applicable, any equity interests of any Person or assets that have a fair market value or purchase price of more than $100,000;

(xvi) providing for a joint venture, partnership, limited liability company or similar arrangement involving the sharing of profits, losses, costs or liabilities with any third party;

(xvii) that includes a "change in control" provision or similar provision that that would be "triggered" by the consummation of the transactions contemplated by this Agreement or that requires the approval or consent of any other party thereto in connection with the consummation of the transactions contemplated by this Agreement or that will terminate or result in the loss of benefits to the Company thereunder as a result of such transactions;

(xviii) that would be binding on Parent or any Affiliate of Parent or effect of the properties, assets or business of Parent or any Affiliate of Parent after the Effective Date; or

(xix) any other Contract or group of related Contracts not otherwise described in the foregoing clauses (i) through (xviii) of this Section 5.12(a) that is material to the Company, taken as a whole (together with each Contract constituting any of the foregoing types of Contract described in clauses (i) through (xviii) of this Section 5.12(a) and together with any Contract that has been or would be required to be filed by the Company as a "material contract" pursuant to Item 601(b)(10) of Regulation S-K under the Securities Act or disclosed as a "material contract" on a Current Report on Form 8-K or pursuant to Item 404 of Regulation S-K under the Securities Act, the "**Company Material Contracts**" and, each, a "**Company Material Contract**").

(b) A correct and complete copy of each Company Material Contract has been made available to Parent. Each Company Material Contract is valid and binding on the Company and, to the Knowledge of the Company, each other party thereto, and is in full force and effect, except as would not have a Material Adverse Effect or prevent, materially delay or materially impair the ability of the Company to consummate the transactions contemplated by this Agreement. Except as, individually or in the aggregate, has not had, and will not have, a Material Adverse Effect and will not prevent, materially delay or materially impair the ability of the Company to consummate the transactions contemplated by this Agreement, there is no breach or event of default under any Material Company Contract by the Company or, to the Knowledge of the Company, any other party thereto, and no event has occurred that with the lapse of time or the giving of notice or both would constitute a default thereunder by the Company or, to the Knowledge of the Company, any other party thereto.

5.13. Affiliate Transactions.

As of the date hereof, no relationship, direct or indirect (including any transaction or series of transactions, taken as a whole), exists between the Company, on the one hand, and any officer, director or Affiliate (other than Parent and its Affiliates) of the Company, on the other hand, that is required to be described under Item 404 of Regulation S-K under the Securities Act in Company Reports, which is not described therein.

5.14. Employee Benefits.

(a) The Company has provided to Parent in connection with the due diligence related to this Agreement a correct and complete list of each Company Benefit Plan.

(b) With respect to each Company Benefit Plan, the Company has made available to Parent, to the extent applicable, (i) if any material Company Benefit Plan is not set forth in a written document, a written description of such plan; and (ii) correct and complete copies of, (A) the Company Benefit Plan document, including any amendments or supplements thereto, and all related trust documents, insurance contracts or other funding vehicles, (B) the most recently prepared actuarial report and (C) all material correspondence to or from any Governmental Entity received in the last three years with respect to any Company Benefit Plan.

(c) (i) Each Company Benefit Plan (including any related trusts) has been established, operated and administered in material compliance with its terms and applicable Laws, including ERISA and the Code, (ii) all material contributions or other material amounts payable

by the Company with respect to each Company Benefit Plan in respect of current or prior plan years have been paid or accrued in accordance with GAAP, and (iii) there are no claims or Proceedings (other than routine claims for benefits) pending or, to the Knowledge of the Company, threatened, by, on behalf of or against any Company Benefit Plan or any trust related thereto which could reasonably be expected to result in any material liability to the Company.

(d) With respect to each ERISA Plan, the Company has made available to Parent, to the extent applicable, correct and complete copies of (i) the most recent summary plan description together with any summaries of all material modifications and supplements thereto, (ii) the most recent IRS determination or opinion letter and (iii) the two most recent annual reports (Form 5500 or 990 series and all schedules and financial statements attached thereto).

(e) Each ERISA Plan that is intended to be qualified under Section 401(a) of the Code has received a favorable determination letter, opinion letter, or advisory letter from the Internal Revenue Service upon which it may rely as to its qualification and, to the Knowledge of the Company, nothing has occurred that would adversely affect the qualification or tax exemption of any such ERISA Plan. With respect to any ERISA Plan, the Company has not engaged in any transaction in connection with which the Company reasonably could be subject to either a material civil penalty assessed pursuant to Section 409 or 502(i) of ERISA or a material tax imposed pursuant to Section 4975 or 4976 of the Code.

(f) Except as required by applicable Law, no Company Benefit Plan provides retiree or post-employment medical, disability, life insurance or other welfare benefits to any Person, and the Company has no obligation to provide such benefits. To the extent that the Company sponsors such plans, the Company has reserved the right to amend, terminate or modify at any time each Company Benefit Plan that provides retiree or post-employment disability, life insurance or other welfare benefits to any Person.

5.15. Labor Matters.

(a) The Company is not a party to any collective bargaining agreement or other agreement with a labor union, labor organization, works council or similar organization, and to the Knowledge of the Company, there are no activities or Proceedings by any individual or group of individuals, including representatives of any labor unions, labor organizations, works councils or similar organizations, to organize any employees of the Company.

(b) There is no, and has not been any, strike, lockout, slowdown, work stoppage, unfair labor practice or other labor dispute, arbitration or grievance pending or, to the Knowledge of the Company, threatened, that has interfered or may interfere in any material respect with the business activities of the Company. The Company is in compliance with all applicable Laws respecting labor, employment and employment practices, terms and conditions of employment, wages and hours (including classification of employees and equitable pay practices) and occupational safety and health. The Company has not incurred any liability or obligation under the Worker Adjustment and Retraining Notification Act and the regulations promulgated thereunder or any similar state or local Law that remains unsatisfied.

(c) To the Knowledge of the Company, in the last ten (10) years, (i) no allegations of sexual harassment have been made against any officer of the Company, and (ii) the Company has not entered into any settlement agreements related to allegations of sexual harassment or misconduct by an officer of the Company.

5.16. Environmental Matters.

(a) To the Knowledge of the Company, the Company (i) has complied at all times with all applicable Environmental Laws; (ii) has received all permits, licenses or other approvals required of it under applicable Environmental Laws to conduct its business and is in compliance in all material respects with all terms and conditions of any such permit, license or approval; (iii) does not own, occupy or operate any property (including soils, groundwater, surface water, buildings and surface and subsurface structures) and, to the Knowledge of the Company, has not previously owned, occupied or operated and property that is contaminated with any Hazardous Substance; (iv) is not subject to liability for any Hazardous Substance disposal or contamination on any third-party property; (v) has not received any notice, demand, letter, claim or request for information alleging that the Company may be in violation of or subject to liability under any Environmental Law and is not subject to any pending or threatened Proceeding relating to Environmental Law; and (vi) is not subject to any Order or other agreement with any Governmental Entity or any indemnity or other agreement with any third party relating to liabilities or obligations under any Environmental Law.

(b) The Company has no Knowledge of any other circumstances or conditions involving the Company that could reasonably be expected to result in any claim, liability, investigation, cost or restriction on the ownership, use, or transfer of any property pursuant to any Environmental Law.

5.17. Tax Matters.

(a) The Company (i) has prepared in good faith and duly and timely filed (taking into account any extension of time within which to file) all Covered Tax Returns required to be filed by the Company with the appropriate Taxing Authority and all such filed Covered Tax Returns are true, correct and complete in all respects, (ii) has paid all Covered Taxes that are required to have been paid by the Company (whether or not shown on any Covered Tax Return), (iii) has withheld and paid all Taxes required to have been withheld and paid by the Company in connection with amounts paid or owing to any employee, stockholder, creditor, independent contractor, director or other third party (each as determined for Tax purposes), (iv) has complied with all information reporting (and related withholding) and record retention requirements, (v) has not consented to, or been requested to consent to, give a waiver or extension (or is subject to a waiver or extension that has been given by, or would be subject to a waiver or extension that has been requested from, any other Person) of time in which any Covered Tax may be assessed or collected by any Taxing Authority, and (vi) has not requested or been granted an extension of time for filing any Covered Tax Return which has not yet been filed.

(b) No federal, state, provincial, local, or non-U.S. tax audits or administrative or judicial Proceedings for or relating to Covered Taxes have been threatened are pending or being conducted with respect to the Company, there are no matters under discussion with the IRS or

other Taxing Authority relating to any Covered Tax Return of the Company, and all such past audits, Proceedings and other matters have been fully and irrevocably settled and/or satisfied without any pending, ongoing or future liability. The Company has not received from any federal, state, provincial, local, or non-U.S. Taxing Authority any (i) notice indicating an intent to open an audit or other review with respect to Covered Taxes or (ii) notice of deficiency, proposed adjustment or other claim for any amount of Covered Tax proposed, asserted, or assessed by any Taxing Authority against the Company.

(c) No written claim has ever been made by any Governmental Authority in a jurisdiction where the Company does not file Tax Returns claiming that the Company is or may be subject to Taxes assessed by such jurisdiction.

(d) The Company has made available to Parent correct and complete copies of any private letter ruling requests, closing agreements or gain recognition agreements with respect to Taxes requested or executed in the prior six-year period.

(e) There are no Encumbrances for Taxes (except for current Taxes not yet due and payable) on any of the assets of the Company.

(f) The Company is not a party to and is not bound by any Tax sharing, allocation or indemnification agreement or arrangement (other than (i) such an agreement or arrangement between the Company and a member of the Affiliated Group the common parent of which is the Ultimate Parent, or (ii) such an agreement entered into in the ordinary course of business, the principal purpose of which is not to indemnify for Taxes).

(g) The Company (i) has not been a member of an Affiliated Group filing a consolidated federal income Tax Return (other than an Affiliated Group the common parent of which was the Ultimate Parent) and (ii) does not have any liability for the Taxes of any other person (other than a member of the Affiliated Group the common parent of which is the Ultimate Parent) under Treasury Regulation Section 1.1502-6 (or any similar provision of law), as a transferee or successor, by Contract or otherwise.

(h) The Company has not distributed stock of another Person, or had its stock distributed by another Person, in a transaction that was purported or intended to be governed in whole or in part by Sections 355 or 361 of the Code.

(i) The Company has not agreed, and is not required, to make any adjustment under Section 481 of the Code, and no Taxing Authority has proposed any such adjustment or change in accounting method.

(j) The Company has not executed or entered into a closing agreement pursuant to Section 7121 of the Code or any similar provision of state, local or foreign law, and the Company is not subject to any private letter ruling of the IRS or comparable ruling of any other Taxing Authority.

(k) The Company is not the beneficiary of any Tax incentive, Tax rebate, Tax holiday or similar arrangement or agreement with any Taxing Authority.

(l) The Company is not formed, and is not resident for Tax purposes, outside of the United States. The Company does not have, and has never had, a permanent establishment within the meaning of any applicable Tax treaty, an office or fixed place of business or any other presence in a country other than the United States that subjects it to taxation by such country.

(m) The Company is not a party to a joint venture, partnership or other arrangement that is treated as a partnership for Tax purposes.

(n) Except for powers of attorney granted to KPMG in connection with certain state filings, the Company has not granted, and no other Person on behalf of the Company has granted, to any Person any power of attorney that is currently in force with respect to any Tax matter.

(o) The Company is not, and has never been, a party to any "reportable transaction" or "listed transaction" as defined in Treasury Regulation Section 1.6011-4(b)(1) and (2), respectively.

(p) At no time during the past five years has the Company been a United States real property holding corporation within the meaning of Section 897(c)(2) of the Code.

(q) The Company will not be required to include any item of income in, or exclude any item of deduction from, taxable income for any taxable period (or portion thereof) ending on or after the Closing Date as a result of any: (i) change in method of accounting for a taxable period (or portion thereof) ending prior to the Closing Date; (ii) use of an improper method of accounting for a taxable period (or portion thereof) ending prior to the Closing Date, (iii) installment sale or open transaction disposition made on or prior to the Closing Date; (iv) prepaid amount received on or prior to the Closing Date; or (v) as a result of any election under Section 108(i) of the Code (or any similar provision of state, local or foreign law) with respect to the discharge of any indebtedness on or prior to the Closing Date.

(r) The information provided by the Company for purposes of preparing the Scotts Consolidated Returns was true, correct and complete in all respects and the Company is not aware of any changes or corrections to such information that have not been reported to Parent or Ultimate Parent and adequately reserved for in the Company's financial statements.

5.18. Real Property.

(a) The Company does not own any real property.

(b) With respect to the Company's Leased Real Property, (i) the lease or sublease for such property is valid, legally binding, enforceable and in full force and effect in accordance with its terms, (ii) the Company is not in breach of or default under such lease or sublease, and no event has occurred, which, with notice, lapse of time or both, would constitute a breach or event of default by the Company or permit termination, modification or acceleration by any third party thereunder, or prevent, materially delay or materially impair the consummation of the transactions contemplated by this Agreement, (iii) there are no written or oral subleases, concessions or other Contracts or arrangements granting to any Person other than the Company the right to use or occupy any such property, and (iv) such property and all buildings, structures, improvements and fixtures located thereon have been maintained in accordance with normal industry practice, are in good operating condition and repair, and are suitable for the purposes for which they are currently used.

(c) The Company has not received any notice of any pending or threatened condemnation of any Leased Real Property by any Governmental Entity, nor, to the Knowledge of the Company, are there any public improvements or re-zoning measures proposed or in progress that could result in special assessments against or otherwise adversely affect the Leased Real Property, in each case, that would reasonably be expected to materially interfere with the business or operations of the Company as currently conducted.

5.19. Title to Tangible Property.

(a) The Company has good and valid title to, or a valid leasehold interest in, all the tangible properties and assets which it purports to own or lease, including all the tangible properties and assets reflected on balance sheets included in or incorporated by reference in the Company Reports filed with the SEC and publicly available prior to the date of this Agreement.

(b) All tangible properties and assets reflected in the balance sheets included in or incorporated by reference in the Company Reports filed with the SEC are held free and clear of all Encumbrances, except for Encumbrances reflected on such balance sheets, Encumbrances for current Taxes not yet due and other Encumbrances that do not and will not materially impair the use or value of the property or assets subject thereto.

(c) The machinery, equipment, furniture, fixtures and other tangible personal property and assets owned, leased or used by the Company are sufficient to carry on its business in all material respects as conducted as of the date of this Agreement, and the Company is in possession of and has good title to, or valid leasehold interests in or valid rights under contract to use, all machinery, equipment, furniture, fixtures and other tangible personal property and assets that are material to the business of the Company, free and clear of all Encumbrances, except for Encumbrances that do not and will not materially impair the use or value of such property and assets.

5.20. Intellectual Property.

(a) The Company has provided to Parent in connection with the due diligence under this Agreement a true and complete list of all registrations and applications for registration for all Registered Company Intellectual Property Rights. All registration, maintenance and renewal fees and filings in respect of the Registered Company Intellectual Property Rights have been paid to and/or filed with, if and when due, the relevant Governmental Entities for the purpose of registering, maintaining and renewing such Registered Company Intellectual Property Rights.

(b) To the Knowledge of the Company, the business of the Company does not infringe on and has not infringed on the Intellectual Property Rights of any Person, and there is no Proceeding pending against, or, to the Knowledge of the Company, threatened alleging any of the foregoing.

(c) To the Knowledge of the Company, no Person is infringing, misappropriating or otherwise violating or has infringed, misappropriated or otherwise violated any Company Intellectual Property Right and no Company Intellectual Property Right is subject to any outstanding Order adversely affecting or restricting the validity or enforceability of, or the Company's ownership or use of, or rights in or to, any such Company Intellectual Property Right.

(d) To the Knowledge of the Company, the Company owns or otherwise has sufficient and valid rights to use all Intellectual Property Rights material to, and used in or necessary for, the conduct of its business as currently conducted and as currently planned to be conducted, all of which rights will survive the consummation of the transactions contemplated by this Agreement, without modification, cancellation, termination, suspension of, or acceleration of any right, obligation or payment with respect to any such Intellectual Property Right. The Company solely and exclusively owns, free and clear of any Encumbrances, all Company Intellectual Property Rights.

(e) The Company (i) has taken reasonable steps in accordance with normal industry practice to maintain the confidentiality of any Company Intellectual Property Rights which require confidentiality for the preservation of such rights and (ii) has obtained and is in possession of written agreements from all Persons, including all past and current employees and independent contractors, who have contributed to, developed or conceived any Company Intellectual Property Rights requiring that such Persons assign such Company Intellectual Property Rights to the Company and prohibiting such Persons from disclosing the Trade Secrets of the Company.

(f) The Company (i) maintains written policies and procedures reasonably designed to ensure the security, integrity and privacy of Personal Information, and card account, bank account and other financial information collected from consumers and customers that is received, transmitted or stored by the Company in accordance with Data Security Requirements and that are commercially reasonable; and (ii) is in material compliance with, and since January 1, 2017 has materially complied with, all applicable Data Security Requirements. The Company has not experienced any incident in which Personal Information was or may have been stolen or improperly accessed, including any breach of security and the Company has not received any written notices or complaints from any Person with respect thereto.

(g) The Company uses commercially reasonable efforts to protect the confidentiality, integrity and security of the information technology systems used by the Company from any unauthorized use, access, interruption, or modification.

5.21. Insurance. All Insurance Policies are maintained with reputable insurance carriers. The Insurance Policies, together with the insurance policies maintained by Ultimate Parent or any of its Subsidiaries for the benefit of the Company, provide full and adequate coverage for all normal risks incident to the business of the Company and its properties and assets, and are in character and amount at least equivalent to that carried by Persons engaged in similar businesses and subject to the same or similar risks. Each Insurance Policy is in full force and effect and, to the extent applicable, all premiums due with respect to all Insurance Policies have been paid, and, to the extent applicable, the Company has not taken any action or failed to take any action that (including with respect to the transactions contemplated by this Agreement), with notice or lapse of time or both, would constitute a breach or event of default, or permit a termination of any of the Insurance Policies. The Company has made available to Parent correct and complete copies or summary descriptions of the Insurance Policies.

5.22. Takeover Statutes. The Company has taken all action, if any, necessary to render inapplicable any control share acquisition, business combination, or other similar anti-takeover provision under the Company's Organizational Documents or any applicable Takeover Statute that is or could become applicable to Parent, Merger Sub, this Agreement, the Merger or the other transactions contemplated hereby. The Company does not have a shareholder rights plan, poison pill or similar plan.

5.23. Brokers and Finders. Neither the Company nor any of its directors or employees (including any officers) has employed any broker, finder or investment bank or incurred any liability for any brokerage fees, commissions or finders fees in connection with the transactions contemplated by this Agreement, except that the Company has employed Stifel, Nicolaus & Company, Incorporated as financial advisor to the Special Committee, whose fees and expenses will be paid by the Company. The Company has made available to Parent a correct and complete copy of each Contract pursuant to which Stifel, Nicolaus & Company, Incorporated is entitled to any fees and expenses in connection with the transactions contemplated by this Agreement. Prior to or at the Closing, Parent and Merger Sub shall have no obligation with respect to any fees or with respect to any claims made by or on behalf of other Persons for fees of a type contemplated in this Section 5.23 that may be due in connection with the transactions contemplated by this Agreement.

5.24. No Other Representations or Warranties. Except for the express written representations and warranties made by the Company, neither the Company nor any of its Representatives or any other Person makes any express or implied representation or warranty with respect to the Company or any of its Affiliates or any of their respective businesses, operations, assets, liabilities, conditions (financial or otherwise) or prospects in connection with this Agreement, the Merger or any of the other transactions contemplated by this Agreement, and the Company hereby expressly disclaims making any such other representations or warranties. Notwithstanding the foregoing provisions of this Section 5.24, nothing in this Section 5.24 shall limit Parent's or Merger Sub's remedies with respect to claims against the Company for fraud or intentional or willful misrepresentation by the Company or any of its Affiliates in connection with, arising out of or otherwise related to this Agreement and the transactions contemplated by this Agreement.

ARTICLE VI
Representations and Warranties of Parent and Merger Sub

Except as set forth in the corresponding sections of the confidential Disclosure Schedule delivered to the Company by Parent prior to or concurrently with the execution and delivery of this Agreement (the "**Parent Disclosure Schedule**") (it being agreed that for the purposes of the representations and warranties set forth in this Agreement, disclosure of any item in any section of the Parent Disclosure Schedule shall be deemed disclosure with respect to any other section to the extent the relevance of such item is reasonably apparent on its face), Parent and Merger Sub each hereby represent and warrant to the Company that:

6.1. Organization, Good Standing and Qualification. Each of Parent and Merger Sub is a legal entity duly organized, validly existing and, to the extent such concept is applicable, in good standing under the Laws of its respective jurisdiction of organization and has all requisite corporate or similar power and authority to consummate the transactions contemplated by this Agreement. Merger Sub has been organized for the sole purpose of consummating the Merger and the other transactions contemplated by this Agreement and, since its date of incorporation, has conducted no business activities or operations other than as necessary to facilitate the consummation of the Merger and the other transactions contemplated by this Agreement.

6.2. Corporate Authority.

Each of Parent and Merger Sub has all requisite corporate power and authority and has taken all corporate action necessary in order to execute, deliver and perform its obligations under this Agreement and to consummate the transactions contemplated by this Agreement, subject only to approval of this Agreement by Parent (as the sole stockholder of Merger Sub). This Agreement has been duly executed and delivered by Parent and Merger Sub and constitutes a valid and binding agreement of Parent and Merger Sub, enforceable against them in accordance with its terms, subject to the Bankruptcy and Equity Exception.

6.3. Governmental Filings; No Violations; No Litigation.

(a) Other than the expirations of waiting periods and the filings, notices, reports, consents, registrations, approvals, permits and authorizations with, to or from any Governmental Entity pursuant to the NRS or under the Exchange Act, no expirations of waiting periods are required and no filings, notices, reports, consents, registrations, approvals, permits or authorizations are required to be made or obtained by Parent or Merger Sub with, nor are any required to be obtained by Parent or Merger Sub from, any Governmental Entity, in connection with the execution, delivery and performance of this Agreement by Parent and Merger Sub and the consummation of the transactions contemplated by this Agreement, except where the failure to comply with such waiting period or to make or obtain such filing, notice, report, consent, registration, approval, permit or authorization would not have a Parent Material Adverse Effect.

(b) The execution, delivery and performance of this Agreement by Parent and Merger Sub do not, and the consummation by Parent or Merger Sub of the transactions contemplated by this Agreement, will not, constitute or result in (i) a breach or violation of, or a default under, the Organizational Documents of Parent or Merger Sub, (ii) a breach or violation of, or default under, any Contract binding upon Parent or Merger Sub, or (iii) conflict with or result in a violation of any Law or Order to which either Parent or Merger Sub is subject, except in the case of clauses (ii) or (iii) as would not have a Parent Material Adverse Effect.

(c) There are no Proceedings pending or, to the knowledge of Parent or Merger Sub, threatened against Parent or Merger Sub that would, individually or in the aggregate, reasonably be expected to prevent, materially delay or materially impair the ability of Parent or Merger Sub to consummate the transactions contemplated by this Agreement.

6.4. Available Funds. At the Closing, Parent will have available to it, or will cause Merger Sub to have available to it, immediately available cash funds sufficient to pay, in full, all

amounts required to be paid by Parent and Merger Sub pursuant to Article IV of this Agreement and otherwise to consummate the transactions contemplated by this Agreement (including the payment of all fees and expenses payable by Parent and Merger Sub in respect thereof). Ultimate Parent is executing this Agreement solely for the purpose of guaranteeing (a) the representation of Parent set forth in the immediately preceding sentence and (b) the performance of the obligations of (i) the Company and the Surviving Corporation under the Indemnification Agreements and the exculpation, indemnification and advancement of expenses provisions of the Company's Organizational Documents in effect as of the date of this Agreement and (ii) the insurer under the D&O Insurance. The foregoing notwithstanding, Ultimate Parent may assert as a defense to such payment and performance any defense to any such payment and performance that Parent, the Company, the Surviving Corporation or the insurer could assert pursuant to the terms of this Agreement, the Indemnification Agreements, the Company's Organizational Documents or the D&O Insurance, as applicable. Except for the guarantee of Ultimate Parent set forth in this Section 6.4, Ultimate Parent does not make any express or implied guarantee, representation or warranty with respect to itself, any of its Affiliates or any of their respective businesses, operations, assets, liabilities, conditions (financial or otherwise) or prospects in connection with this Agreement or the transactions contemplated by this Agreement. Ultimate Parent expressly disclaims any such other guaranties, representations or warranties, and the Company acknowledges and agrees that none of the Company or its Affiliates or Representatives has relied on or are relying on any such other guaranties, representations or warranties.

6.5. Brokers and Finders. Neither Parent nor any of its directors or employees (including any officers) has employed any broker, finder or investment bank or incurred any liability for any brokerage fees, commissions or finders, fees in connection with the transactions contemplated by this Agreement.

6.6. No Other Representations or Warranties. Except for the express written representations and warranties made by Parent and Merger Sub, none of Parent, Merger Sub or any of their Representatives or any other Person makes any express or implied representation or warranty with respect to Parent, Merger Sub or any of their Affiliates or any of their respective businesses, operations, assets, liabilities, conditions (financial or otherwise) or prospects in connection with this Agreement, the Merger or any of the other transactions contemplated by this Agreement, and Parent and Merger Sub each hereby expressly disclaims making any such other representations or warranties. Notwithstanding the foregoing, nothing in this Section 6.6 shall limit the Company's remedies against Parent or Merger Sub with respect to claims against Parent or Merger Sub for fraud or intentional or willful misrepresentation by Parent, Merger Sub or any of their Affiliates in connection with, arising out of or otherwise related to this Agreement and the transactions contemplated by this Agreement.

ARTICLE VII
Covenants

7.1. Interim Operations.

(a) The Company shall, from and after the date of this Agreement and prior to the Effective Time (unless Parent shall otherwise approve in writing, with such approval not to be unreasonably withheld, conditioned or delayed), and except as otherwise expressly required by

this Agreement or as required by applicable Law, conduct its business in the Ordinary Course of Business and, to the extent consistent therewith, shall use its reasonable best efforts to, preserve its business organization intact and maintain satisfactory relations and goodwill with Governmental Entities, customers, suppliers, licensors, licensees, distributors, creditors, lessors, employees and business associates and keep available the services of its present employees and agents. Without limiting the generality of and in furtherance of the foregoing sentence, from the date of this Agreement until the Effective Time, except as otherwise expressly required by this Agreement, required by applicable Law, required by the express terms of any Company Material Contract made available to Parent prior to the date of this Agreement, or approved in writing by Parent, the Company shall not:

(i) adopt or propose any change in its Organizational Documents;

(ii) merge or consolidate the Company with any other Person or restructure, reorganize or completely or partially liquidate or otherwise enter into any agreements or arrangements imposing material changes or restrictions on its assets, operations or business;

(iii) acquire assets from any other Person, other than acquisitions of raw materials, inventory, equipment, tooling, and supplies in the Ordinary Course of Business;

(iv) issue, sell, pledge, dispose of, grant, transfer, lease, license, guarantee, Encumber, or otherwise enter into any Contract or understanding with respect to the voting of, any shares of capital stock of the Company, securities convertible or exchangeable into or exercisable for any such shares of capital stock, or any options, warrants or other rights of any kind to acquire any such shares of capital stock or such convertible or exchangeable securities (other than in respect of Company Options outstanding as of the date of this Agreement in accordance with their terms and, as applicable, the Equity Plan as in effect on the date of this Agreement);

(v) enter into any Contracts or other arrangements between the Company, on the one hand, and any director or officer of the Company or any Person beneficially owning one percent or more of the outstanding Shares, on the other hand, except for compensatory arrangements entered into in the Ordinary Course of Business with Company Employees consistent with Section 7.1(a)(xxiii) and transactions with Parent or its Affiliates;

(vi) create or incur any Encumbrance that is not incurred in the Ordinary Course of Business on any of the assets of the Company;

(vii) make any loans, advances, guarantees or capital contributions to or investments in any Person;

(viii) declare, set aside, make or pay any dividend or other distribution, payable in cash, stock, property or otherwise, with respect to its Common Stock;

(ix) reclassify, split, combine, subdivide or redeem, purchase or otherwise acquire, directly or indirectly, any of its Common Stock or securities convertible or exchangeable into or exercisable for any shares of its Common Stock;

(x) incur any Indebtedness (including the issuance of any debt securities, warrants or other rights to acquire any debt security);

(xi) enter into any Contract that would have been a Company Material Contract had it been entered into prior to this Agreement;

(xii) other than with respect to Company Material Contracts related to Indebtedness, which shall be governed by Section 7.1(a)(x), terminate or amend, modify, supplement or waive, or assign, convey, Encumber or otherwise transfer, in whole or in part, rights or interest pursuant to or in any Company Material Contract, except for (x) expirations of any such Contract in the Ordinary Course of Business and in accordance with the terms of such Contract with no further action by the Company or other party to such Contract, except for any ministerial actions, (y) non-exclusive licenses under Intellectual Property Rights owned or purported to be owned by the Company granted in the Ordinary Course of Business or (z) terminations, amendments, modifications, assignments, conveyances, transfers or expirations where, concurrent therewith, the Company enters into a replacement Contract providing substantially similar property, products or services on substantially similar terms;

(xiii) cancel, modify or waive any debts or claims held by the Company or waive any material rights;

(xiv) except as expressly provided for by Section 7.13, amend, modify, terminate, cancel or let lapse an Insurance Policy, unless simultaneous with such termination, cancellation or lapse of any such Insurance Policy, a replacement self-insurance program is established by the Company or a replacement policy underwritten by an insurance company of nationally recognized standing is in full force and effect, in each case, providing coverage equal to or greater than the coverage under the terminated, canceled or lapsed Insurance Policy for substantially similar premiums, as applicable, as in effect as of the date of this Agreement;

(xv) other than with respect to Transaction Litigation, which shall be governed by Section 7.16, and settlement of trade accounts payable in the Ordinary Course of Business, settle or compromise any Proceeding for an amount in excess of $100,000 individually or $250,000 in the aggregate during any calendar year;

(xvi) make any changes with respect to the legal structure of the Company or to the Company's accounting policies or procedures, except as required by changes in GAAP or Law;

(xvii) enter into any line of business in any geographic area other than the existing lines of business of the Company and lines of products and services reasonably ancillary to any existing line of business;

(xviii) make any material changes to the existing lines of business of the Company or adopt or make any material modifications to the Company's strategic plan;

(xix) make, change or revoke any Tax election, change an annual Tax accounting period, adopt or change any Tax accounting method, file any amended Tax Return, enter into any closing agreement with respect to Taxes, settle any Tax claim, audit, assessment or

dispute, surrender any right to claim a refund or take any action which would be reasonably expected to result in an increase in the Tax liability of the Company, or, in respect of any taxable period (or portion thereof) ending after the Closing Date, the Tax liability of Parent or its Affiliates;

(xx) transfer, sell, lease, divest, cancel, allow to lapse or expire, or otherwise dispose of or transfer, or permit or suffer to exist the creation of any Encumbrance upon, any assets (tangible or intangible, including any Company Intellectual Property Rights), Licenses, product lines or business of the Company, except in connection with services provided in the Ordinary Course of Business or sales of obsolete assets;

(xxi) cancel, abandon or otherwise allow to lapse or expire any Company Intellectual Property Rights, except in the Ordinary Course of Business with respect to Company Intellectual Property Rights that are not material to any business of the Company;

(xxii) adopt or implement any shareholder rights plan or similar arrangement;

(xxiii) except as required pursuant to the terms of any Company Benefit Plan in effect as of the date of this Agreement or as required by Law, (A) increase in any manner the compensation or fees, bonus, pension, welfare, fringe or other benefits, severance or termination pay of any Company Employee, except reasonable holiday bonuses payable to all employees, reasonable compensation adjustments for customer service employees, and reasonable compensation adjustments required for exceptional performance or specific needs not to exceed $100,000 in the aggregate unless approved in advance by the Board, (B) become a party to, establish, adopt, amend, commence participation in or terminate any Company Benefit Plan or any arrangement that would have been a Company Benefit Plan had it been entered into prior to the date of this Agreement, (C) grant any new awards, or amend or modify the terms of any outstanding awards, under any Company Benefit Plan, (D) take any action to accelerate the vesting or lapsing of restrictions or payment, or fund or in any other way secure the payment, of compensation or benefits under any Company Benefit Plan, (E) forgive any loans or make any extensions of credit in the form of a personal loan to any Company Employee (other than routine travel advances issued in the Ordinary Course of Business), (F) hire any employee or engage any independent contractor (who is a natural person) with an annual salary or wage rate or consulting fees and target cash bonus opportunity in excess of $100,000 or (G) terminate the employment of any executive officer other than for cause;

(xxiv) become a party to, establish, adopt, amend, commence participation in or terminate any collective bargaining agreement or other agreement with a labor union, labor organization, works council or similar organization;

(xxv) fail to maintain policies and procedures designed to ensure compliance with the FCPA and Other Anti-Bribery Laws;

(xxvi) fail to maintain policies and procedures designed to ensure compliance with the Export and Sanctions Regulations in each jurisdiction in which the Company operates or is otherwise subject to jurisdiction;

(xxvii) take any action or fail to take any action that is reasonably expected to result in any of the conditions to the Merger set forth in Article VIII not being satisfied;

(xxviii) create a Subsidiary of the Company; or

(xxix) agree, authorize or commit to do any of the foregoing.

(b) Nothing set forth in this Agreement shall give Parent, directly or indirectly, the right to control or direct the Company's operations prior to the Effective Time

7.2. Acquisition Proposals; Change of Recommendation.

(a) No Solicitation. At all times during the period commencing with the execution and delivery of this Agreement and continuing until the earlier to occur of the termination of this Agreement pursuant to Article IX and the Effective Time, except as expressly permitted by this Section 7.2, the Company shall not, and shall direct its directors, employees (including officers) and Representatives not to, directly or indirectly:

(i) initiate, solicit, propose or knowingly encourage or otherwise knowingly facilitate any inquiry or the making of any proposal or offer that constitutes or, would reasonably be expected to lead to, an Acquisition Proposal;

(ii) engage in, continue or otherwise participate in any discussions or negotiations relating to any Acquisition Proposal or any inquiry, proposal or offer that would reasonably be expected to lead to an Acquisition Proposal (other than to inform any Person who has made any inquiry with respect to, or who has made, an Acquisition Proposal of the provisions of this Section 7.2);

(iii) provide any information or data concerning the Company or access to the Company‘s properties, books and records to any Person in connection with any Acquisition Proposal or any inquiry, proposal or offer that would reasonably be expected to lead to an Acquisition Proposal;

(iv) enter into any Alternative Acquisition Agreement;

(v) take any action to exempt any third party from the restrictions on "business combinations" or acquisitions or voting of Common Stock under any applicable Takeover Statute or otherwise cause such restrictions not to apply;

(vi) grant any waiver, amendment or release under any standstill or confidentiality agreement concerning an Acquisition Proposal; or

(vii) agree, authorize or commit to do any of the foregoing.

(b) Window Shop Exceptions. Notwithstanding anything to the contrary set forth in Section 7.2(a), but subject to the provisions of Section 7.2(c), prior to the time, but not after, the Requisite Company Vote is obtained, in response to an unsolicited, *bona fide* written Acquisition Proposal, the Company (only through the Special Committee and its Representatives) may:

(i) provide non-public Company and other information and data concerning the Company and access to the Company's properties, books and records in response to a request to the Person who made such Acquisition Proposal; provided that such information or data has previously been made available to Parent or its Representatives in connection with the transactions contemplated by this Agreement, or if not previously made available to Parent or its Representatives, such information or data is made available to Parent not later than 24 hours after the time such information and data is made available to such Person, and that, prior to furnishing any such information, the Company receives from the Person making such Acquisition Proposal an executed confidentiality agreement with terms not less restrictive to the other party than the terms in the Confidentiality Agreement are on Parent (it being understood that such confidentiality agreement need not contain any "standstill" or other similar provisions, and provided that such confidentiality agreement shall not include any restrictions that could restrain the Company from satisfying its information and Parent notification obligations contemplated by Section 7.2(c)) (any confidentiality agreement satisfying such criteria, a "**Permitted Confidentiality Agreement**"); and

(ii) engage or otherwise participate in any discussions or negotiations with any such Person who made such Acquisition Proposal regarding such unsolicited, *bona fide* written Acquisition Proposal (including to request from such Person or its Representatives clarification of the terms and conditions of such Acquisition Proposal to the extent necessary for the Special Committee and its Representatives to become fully informed with respect to such proposed terms and conditions), if, and only if, prior to taking any action described in clause (i) or clause (ii) of this Section 7.2(b), the Special Committee determines in good faith, after consultation with outside legal counsel, that (A) based on the information then available and after consultation with its financial advisor, that such Acquisition Proposal either constitutes a Superior Proposal or is reasonably expected to result in a Superior Proposal and (B) based on the information then available, including the terms and conditions of such Acquisition Proposal and those of this Agreement, the failure to take such action would violate the fiduciary duties of the Company's directors constituting the Special Committee under applicable Law.

(c) Notice of Acquisition Proposals. The Company shall promptly (but, in any event, within 48 hours) give notice to Parent of (i) any inquiries, proposals or offers with respect to an Acquisition Proposal or that would reasonably be expected to lead to an Acquisition Proposal received by the Company or the Special Committee (or its Representatives), (ii) any request for non-public information or data concerning the Company or access to the Company's properties, books or records in connection with any Acquisition Proposal or any inquiry, proposal or offer that would reasonably be expected to lead to an Acquisition Proposal received by the Company, the Special Committee (or its Representatives), or (iii) any new substantive developments or discussions or negotiations relating to an Acquisition Proposal or any inquiry, proposal or offer that would reasonably be expected to lead to an Acquisition Proposal, setting forth in such notice, to the extent not theretofore publicly disclosed or previously disclosed to Parent, the name of the applicable Persons who made the Acquisition Proposal and the material terms and conditions of any such Acquisition Proposal or inquiry, proposal or offer and the request for the information or data (including, if applicable, correct and complete copies of any written Acquisition Proposals

and other proposed transaction documentation (or where no written proposed transaction documentation have been provided to the Company, a reasonably detailed written summary of the proposed transaction terms then-known by the Company or Special Committee), and thereafter shall keep Parent reasonably informed, on a prompt basis (but, in any event, within 24 hours of any substantive development or change in status) of the status and terms and conditions of any such Acquisition Proposals, inquiries, proposals or offers, or information requests (including any amendments or supplements thereto) and the status of any such substantive developments or discussions, or negotiations. The Company shall provide to Parent as soon as practicable after receipt or delivery thereof copies of all correspondence and other written material sent by or provided to the Company or the Special Committee (or their Representatives) from any Person that describes any of the terms or conditions of any Acquisition Proposal.

(d) Change of Recommendation Permitted in Certain Circumstances.

(i) Except as permitted by Section 7.2(d)(ii) and Section 7.2(e), none of the Company Board, the Special Committee or any other committee of the Company Board shall:

(A) withhold, withdraw, qualify or modify (or publicly propose or resolve to withhold, withdraw, qualify or modify) the Company Recommendation in a manner adverse to Parent;

(B) fail to include the Company Recommendation in the Proxy Statement;

(C) at any time following receipt of an Acquisition Proposal (other than a tender or exchange offer as contemplated by clause (D) below that has been publicly disclosed), fail to reaffirm its approval or recommendation of this Agreement and the Merger as promptly as practicable (but in any event within five Business Days) after receipt of any written request to do so from Parent;

(D) fail to recommend rejection (pursuant to Rule 14e-2(a)(1) under the Exchange Act and under cover of Schedule 14D-9 filed by the Company with the SEC) of any tender offer or exchange offer for outstanding Shares that has been commenced by any Person (other than by Parent or an Affiliate of Parent) pursuant to Rule 14d-2 under the Exchange Act on or prior to the 10th Business Day after such commencement;

(E) approve, authorize or recommend (or determine to approve, authorize or recommend) or publicly declare advisable any Acquisition Proposal or other proposal that would be reasonably expected to lead to an Acquisition Proposal or any Alternative Acquisition Agreement; or

(F) agree, authorize or commit to do any of the foregoing (any action described in clauses (A) through (E) of this Section 7.2(d)(i) being referred to as a "Change of Recommendation").

(ii) Notwithstanding anything to the contrary set forth in this Section 7.2(d) or elsewhere in this Agreement, at any time prior to the time the Requisite Company

Vote is obtained, the Special Committee may make a Change of Recommendation and the Company may terminate this Agreement pursuant to Section 9.3(b) if: (A) an unsolicited, *bona fide* written Acquisition Proposal that was not obtained in breach of Section 7.2 is received by the Company and has not been withdrawn, and (B) the Special Committee determines in good faith, after consultation with outside legal counsel and its financial advisor, that such Acquisition Proposal constitutes a Superior Proposal; provided, however, that (x) a Change of Recommendation and termination by the Company of Agreement pursuant to Section 9.3(b) may not be made unless and until the Company has given Parent written notice that the Special Committee intends to convene a meeting of the Special Committee to consider or take any other action with respect to making such Change of Recommendation together with a reasonably detailed description of the Superior Proposal (it being hereby acknowledged and agreed that the provision to Parent of all proposed definitive transaction documentation providing for such Superior Proposal shall be deemed to satisfy such description requirement pursuant to this Section 7.2(d)(ii)) at least four Business Days in advance of convening such meeting of the Special Committee or taking such other action (the "**Superior Proposal Notice Period**"), which notice shall also comply with the provisions of Section 7.2(c); (y) during the pendency of the Superior Proposal Notice Period, if requested by Parent, the Special Committee shall, and shall authorize and instruct its Representatives to, negotiate in good faith with Parent and its Representatives to revise this Agreement (in the form of a proposed binding amendment to this Agreement) to enable the Special Committee to determine in good faith, after consultation with its outside legal counsel and its financial advisor, that after giving effect to the modifications contemplated by such proposed amendment, such Acquisition Proposal would no longer constitute a Superior Proposal; and (z) at the expiration of the Superior Proposal Notice Period, and at such meeting of the Special Committee, the Special Committee, after having taken into account the modifications to this Agreement proposed by Parent in the manner and form described in clause (y) above, shall have determined in good faith, after consultation with outside legal counsel and its financial advisor, that a failure to make a Change of Recommendation and to terminate this Agreement pursuant to Section 9.3(b) and to abandon the Merger would violate the fiduciary duties of the Company's directors constituting the Special Committee under applicable Law (it being understood that any revisions to the financial terms of, or any material revisions to any of the other substantive terms of, any Acquisition Proposal shall be deemed to be a new Acquisition Proposal for purposes of Section 7.2(c) and this Section 7.2(d)(ii), including for purposes of commencing a new Superior Proposal Notice Period, except that subsequent to the initial Superior Proposal Notice Period, the subsequent Superior Proposal Notice Period shall be reduced to two Business Days).

(e) Certain Permitted Disclosure. Nothing set forth in this Section 7.2 or elsewhere in this Agreement shall prohibit the Company from (i) making any disclosure to the holders of Common Stock if the Special Committee determines in good faith, after consultation with its outside legal counsel, that the failure to make any such disclosure would violate the fiduciary duties of the Company's directors constituting the Special Committee under applicable Law, (ii) disclosing a position contemplated by Rule 14d-9, Rule 14e-2(a)(2) or (3) or Item 1012(a) of Regulation M-A under the Exchange Act, or (iii) making any "stop, look and listen" communication of the type contemplated by Rule 14d-9(f) under the Exchange Act. For the avoidance of any doubt, notwithstanding any provision of this Agreement, a factually accurate public or other statement or disclosure made by the Company (including in response to any unsolicited inquiry, proposal or offer made by any Person to the Company not in violation of Section 7.2(a)) that describes the existence and operation of the terms and provisions of this

Section 7.2 shall not, in itself, constitute a Change of Recommendation for any purpose of this Agreement; provided that if any disclosures or communications of the type described in clauses (i) and (ii) of this Section 7.2(e) fail to expressly reaffirm therein the Company Recommendation, such disclosure or communication shall constitute a Change of Recommendation for all purposes of this Agreement.

(f) Existing Discussions. The Company (i) has, as of the date hereof, ceased and caused to be terminated any activities, solicitations, discussions and negotiations with any Person conducted prior to the date hereof with respect to any Acquisition Proposal, or proposal that would reasonably be expected to lead to an Acquisition Proposal, and (ii) shall promptly (but in any event within 24 hours of the execution and delivery of this Agreement) (A) deliver a written notice to each such Person (1) providing that the Company is ending all discussions and negotiations with such Person with respect to any potential transaction and (2) if such Person has executed a confidentiality agreement, requesting the prompt return or destruction of all confidential information concerning the Company pursuant to the terms of such agreement, and (B) if applicable, terminate any physical and electronic data or other diligence access previously granted to such Persons.

(g) Anti-Takeover and Standstill Provisions. From the date of this Agreement and continuing until the earlier to occur of the termination of this Agreement pursuant to Article IX and the Effective Time, the Company shall not take any action to exempt any Person (other than Ultimate Parent, Parent and Merger Sub) from the restrictions, prohibitions and provisions of any Takeover Statute or to terminate, amend or otherwise modify or waive any provision of any confidentiality, "standstill" or similar agreement to which the Company is a party and shall enforce, to the fullest extent permitted under applicable Law, the provisions of any such agreement, including by seeking to obtain injunctions to prevent any breaches of such agreements and to enforce specifically the terms and provisions thereof; provided that irrespective of the foregoing, the Company shall be permitted to exempt any such Person from the restrictions, prohibitions and provisions of any Takeover Statute and to terminate, amend or otherwise modify, waive or fail to enforce any provision of any such confidentiality, "standstill" or similar agreement if the Special Committee determines in good faith, after consultation with its outside legal counsel, that the failure to take such action would violate the fiduciary duties of the Company's directors constituting the Special Committee under applicable Law.

7.3. Company Stockholders Meeting.

(a) Unless a Change in Recommendation shall have been made by the Special Committee in accordance with Section 7.2(d) or this Agreement shall have been terminated pursuant to Article IX, the Company shall, as promptly as practicable after the later of (x) the 10-day waiting period prescribed by Rule 14a-6(a) under the Exchange Act and (y) the date on which the SEC's staff orally confirms to the Company or its Representatives that the SEC will not have any, or that it has no further, comments with respect to the Proxy Statement (such later date, the "**Clearance Date**"), duly call, give notice of and convene (in accordance with the Company's Organizational Documents and applicable Law, including NRS 92A.120(4) and all applicable provisions of the Dissenter's Rights Statutes, including NRS 92A.410(1)) the Company Stockholders Meeting for the purpose of submitting this Agreement to the holders of Common Stock for their consideration and to seek to obtain the Requisite Company Vote; it being hereby

acknowledged and agreed that the date of the Company Stockholders Meeting shall not be less than 30 days after notice of the Company Stockholders Meeting is first published, sent or given by the Company to the holders of Common Stock. The Company shall, as promptly as reasonably practicable after the Clearance Date and the setting of the Record Date (as defined below), cause the Proxy Statement (and all related materials) to be mailed in definitive form to holders of Common Stock and, subject to Section 7.2(d), use its reasonable best efforts (including by means of engagement by the Company of a nationally recognized proxy solicitation firm) to solicit proxies from the holders of Shares to seek to obtain the Company Requisite Vote.

(b) The record date for holders of Common Stock entitled to notice of and to vote at the Company Stockholders Meeting (the "**Record Date**") shall be mutually agreed to by Parent and the Company. Once the Record Date has been established, the Company shall not change the Record Date or establish a different such date without the prior written consent of Parent, which consent shall not be unreasonably withheld, conditioned or delayed. Notwithstanding anything in this Section 7.3(b) or elsewhere in this Agreement to the contrary, nothing shall prohibit the Company from postponing, adjourning or otherwise delaying the Company Stockholders Meeting if (and only if) the Special Committee has determined in good faith, after consultation with its outside counsel, that the Company is required to postpone, adjourn or delay the Company Stockholders Meeting pursuant to any request by the SEC's staff or in order to update, correct or otherwise make any necessary additional disclosures to the holders of Common Stock such that the Proxy Statement does not contain any untrue statement of material fact, or omit to state any material fact necessary, in order to make the statements made, in the light of the circumstances under which they were made, not misleading; provided, however, that the Company Stockholders Meeting shall not be postponed, adjourned or delayed for more than ten Business Days in the aggregate without the prior written consent of Parent, which consent shall not be unreasonably withheld, conditioned or delayed. The Company agrees that, unless the Special Committee has made a Change of Recommendation pursuant to and in accordance with the terms and conditions of Section 7.2(d) or this Agreement is terminated pursuant to Article IX, its obligations to hold the Company Stockholders Meeting pursuant to this Section 7.3 shall not be affected by the commencement, announcement or disclosure of or communication to the Company of any Acquisition Proposal, and the Company shall continue to take all lawful action to obtain the Requisite Company Vote in the manner set forth in this Section 7.3.

(c) The Company agrees to provide Parent reasonably detailed periodic updates concerning proxy solicitation results on a timely basis.

(d) Without the prior written consent of Parent, which consent shall not be unreasonably withheld, conditioned or delayed, matters related to the approval of this Agreement and matters required by SEC regulations shall be the only matters that the Company may propose to be acted on by the Company's stockholders at the Company Stockholders Meeting.

7.4. Parent Vote. So long as there has been no Change of Recommendation, Parent shall vote or cause to be voted any Shares beneficially owned by it or any of its Affiliates or with respect to which it or any of its Affiliates has the power (by agreement, proxy or otherwise) to cause to be voted in favor of the approval of this Agreement at any meeting of stockholders of the Company at which this Agreement shall be submitted for approval and at all adjournments, recesses or postponements thereof.

7.5. Approval of Sole Stockholder of Merger Sub. As promptly as practicable after the execution and delivery of this Agreement, Parent (in its capacity as Merger Sub's sole stockholder) shall execute and deliver, in accordance with applicable Law and Merger Sub's Organizational Documents, a written consent or similar binding authorization approving Merger Sub's execution and delivery of this Agreement and the consummation by Merger Sub of the transactions contemplated by this Agreement, including the Merger.

7.6. Disclosure Documents; Other Regulatory Matters.

(a) Disclosure Documents.

(i) As promptly as reasonably practicable after the date of this Agreement, but in any event within fifteen Business Days after the date of this Agreement, (A) the Company shall prepare and file with the SEC a proxy statement in preliminary form relating to the Company Stockholders Meeting (such proxy statement, including any amendments or supplements thereto, the "**Proxy Statement**") and (B) the Company and Parent shall jointly prepare and file with the SEC a Rule 13e-3 Transaction Statement on Schedule 13E-3 relating to the Merger (such Rule 13e-3 Transaction Statement, including any amendments or supplements thereto, the "**Schedule 13E-3**"). Except under the circumstances expressly permitted by Section 7.2(d)(ii), the Proxy Statement shall include the Company Recommendation.

(ii) The Company shall ensure that the Proxy Statement at the time it is first mailed to the holders of Common Stock complies in all material respects as to form and substance with the provisions of the Exchange Act, and the Company and Parent shall ensure that the Schedule 13E-3 complies in all material respects as to form and substance with the provisions of the Exchange Act. The Company shall ensure that the Proxy Statement complies in all respects with the applicable provisions of the NRS, including NRS 92A.120(4) and all applicable provisions of the Dissenter's Rights Statutes, including NRS 92A.410(1).

(iii) The Company and Parent each shall ensure that none of the information supplied by it or any of its Affiliates for inclusion or incorporation by reference in the Proxy Statement and the Schedule 13E-3 will contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading (A) in the case of the Proxy Statement, at the date of mailing to stockholders of the Company and at the time of the Company Stockholders Meeting, and (B) in the case of the Schedule 13E-3, at the time of filing with the SEC; provided, however, that the Company, on the one hand, and Parent and Merger Sub, on the other hand, assume no responsibility with respect to information supplied by or on behalf of the other Party or its Affiliates for inclusion or incorporation by reference in the Proxy Statement or Schedule 13E-3.

(iv) If at any time prior to the Company Stockholders Meeting, any information relating to the Company or Parent, or any of their respective Affiliates, is discovered by a Party, which information should be set forth in an amendment or supplement to the Proxy Statement or the Schedule 13E-3 so that either the Proxy Statement or the Schedule 13E-3 would not include any misstatement of a material fact or omit to state any material fact necessary to make the statements therein, in light of the circumstances under which they are made, not misleading,

the Party that discovers such information shall as promptly as reasonably practicable following such discovery notify the other Party or Parties. After any such notification relating to the Proxy Statement, the Company shall, as and to the extent required by applicable Law, promptly (A) prepare and file an amendment or supplement to the Proxy Statement and (B) cause the Proxy Statement as so amended or supplemented to be disseminated to its stockholders. After any such notification relating to the Schedule 13E-3, the Company and Parent shall, to the extent required by applicable Law, promptly prepare and file with the SEC an amendment or supplement to the Schedule 13E-3.

(v) Prior to filing or mailing the Proxy Statement and any other documents and communications related to the Company Stockholders Meeting or filing the Schedule 13E-3, the Company and Parent (as the case may be) shall provide the other Party and its outside legal counsel and other Representatives with a reasonable opportunity to review and comment on drafts of such documents and shall consider in good faith all such comments promptly and reasonably proposed by the other Party.

(vi) Without limiting the generality of the provisions of Section 7.7, the Company and Parent shall (A) promptly notify the other Party of the receipt of all comments from the SEC with respect to the Proxy Statement and Schedule 13E-3 and of any request by the SEC for any amendment or supplement to the Proxy Statement or Schedule 13E-3 or for additional information, (B) as promptly as practicable following receipt thereof provide the other Party with copies of all correspondence with the SEC with respect to the Proxy Statement and Schedule 13E-3 and (C) provide the other Party's outside legal counsel and its other applicable Representatives a reasonable opportunity to participate in any discussions or meetings with the SEC relating to the Proxy Statement or Schedule 13E-3. Each of the Company and Parent shall, as applicable and subject to the requirements of Section 7.6(a)(v), use its best efforts to promptly provide responses to the SEC with respect to all comments and requests received on the Proxy Statement and Schedule 13E-3 by the SEC.

(b) Other Regulatory Matters.

(i) Except to the extent a different standard of efforts has been expressly agreed to and set forth in any provision of this Agreement, the Company and Parent shall cooperate with each other and use (and shall cause their respective Affiliates to use) their respective reasonable best efforts to take or cause to be taken all actions necessary or advisable on its part under this Agreement and applicable Laws to consummate the transactions contemplated by this Agreement as promptly as practicable after the date of this Agreement, including preparing and filing, as promptly as practicable after the date of this Agreement, documentation to effect all necessary notices, reports, consents, registrations, approvals, permits, authorizations, expirations of waiting periods and other filings and to obtain, as promptly as practicable after the date of this Agreement, all consents, registrations, approvals, permits and authorizations necessary or advisable to be obtained from any Governmental Entity in order to consummate the transactions contemplated by this Agreement.

(ii) Notwithstanding anything to the contrary set forth in this Agreement:

(A) in no event shall (1) any Party or any of its Affiliates be required to agree to any term, condition, liability, obligation, requirement, limitation, qualification, remedy, commitment, sanction or other action imposed, required or requested by a Governmental Entity in connection with its grant of any consent, registration, approval, permit or authorization necessary or advisable in order to consummate the transactions contemplated by this Agreement to be obtained from any Governmental Entity that is not conditioned upon the consummation of the transactions contemplated by this Agreement or (2) the Company or any of its Affiliates agree to any term, condition, liability, obligation, requirement, limitation, qualification, remedy, commitment, sanction or other action in connection with the obtaining of any such consent, registration, approval, permit or authorization necessary that is not conditioned upon the consummation of the transactions contemplated by this Agreement or that would result in any restrictions, limitations or requirements on the Company or its business or assets following the consummation of the transactions contemplated by this Agreement without the prior written consent of Parent and subject to Section 7.6(b)(ii)(B); and

(B) the Parties hereby acknowledge and agree that neither this Section 7.6(b) nor the "reasonable best efforts" standard shall require, or be construed to require, Parent or any of its Affiliates, (1) to resist, vacate, limit, reverse, suspend or prevent, through litigation, any actual, anticipated or threatened Order seeking to delay, restrain, prevent, enjoin or otherwise prohibit or make unlawful the consummation of the transactions contemplated by this Agreement or (2) in order to obtain any consent, registration, approval, permit or authorization necessary or advisable in order to consummate the transactions contemplated by this Agreement to be obtained from any Governmental Entity, to agree to any term, condition, liability, obligation, requirement, limitation, qualification, remedy, commitment, sanction or other action that would be reasonably likely to have a material adverse effect on the anticipated benefits to Parent and its Affiliates of the transactions contemplated by this Agreement; provided that Parent may compel the Company to (and to cause its Subsidiaries to) agree to any such term or condition or take any such actions (or agree to take such actions) so long as the effectiveness of such term or condition or action is conditioned upon the consummation of the Merger.

(iii) Cooperation. Parent shall have the right to direct all matters with any Governmental Entity consistent with its obligations hereunder; provided that Parent and the Company shall have the right to review in advance and, to the extent practicable, each will consult with the other on and consider in good faith the views of the other in connection with, all of the information relating to Parent or the Company, as the case may be, any of their respective Affiliates and any of their respective Representatives, that appears in any filing made with, or written materials submitted to any Governmental Entity in connection with the transactions contemplated by this Agreement. Neither the Company nor Parent shall permit any of its or Affiliates or Representatives to participate in any discussions or meetings with any Governmental Entity in respect of any documentation to effect all necessary notices, reports, consents, registrations, approvals, permits, authorizations, expirations of waiting periods and other filings or any investigation or other inquiry relating thereto or to the transactions contemplated by this Agreement unless it consults with the other in advance and, to the extent permitted by such Governmental Entity, gives the other the opportunity to attend and participate. Each of the Company and Parent, as applicable, shall (and shall cause their respective Affiliates to) promptly provide or cause to be provided to each Governmental Entity furnish all non-privileged or protected information and documents reasonably requested by any Governmental Entity or that are necessary or advisable to permit consummation of the transactions contemplated by this Agreement.

7.7. Status and Notifications.

The Company and Parent each shall keep the other reasonably apprised of the status of matters relating to the consummation of the transactions contemplated by this Agreement (including in connection with the Proxy Statement and Schedule 13E-3) and shall, as promptly as practicable, (i) notify the other of any notices or communication from or with any Governmental Entity concerning such transactions, (ii) furnish the other with copies of written notices or other communications received by Parent or the Company, as the case may be, or any of its Affiliates from any third party, including any Governmental Entity, with respect to such transactions and (iii) furnish the other with all information as may be necessary or advisable to effect such notices and communications. The Company and Parent shall give prompt notice to each other of any events, changes, developments, circumstances or facts that individually or in the aggregate, has had or would reasonably be expected to (x) in the case of the Company, have a Material Adverse Effect or prevent, materially delay or materially impair the consummation by the Company of the transactions contemplated by this Agreement, (y) in the case of Parent, have a Parent Material Adverse Effect, or (z) in the case of either the Company or Parent, result in any non-compliance or violation of any of the respective representations, warranties or covenants of the Company, Parent or Merger Sub, as applicable, set forth in this Agreement, to the extent that any such non-compliance or violation would reasonably be expected to result in a failure of any of the conditions set forth in Sections 8.2(a), 8.2(b), 8.3(a) or 8.3(b), as applicable.

7.8. Third-Party Consents and Encumbrance Terminations.

(a) No notices, acknowledgments, waivers, amendments or other modification are required under any Company Material Contract to which Company is a party or otherwise bound (the "**Third-Party Consents**") in connection with the Transactions contemplated by this Agreement.

(b) No Encumbrances exist other than Encumbrances created by or resulting from the SMG Transaction Documents.

7.9. Information and Access.

(a) The Company shall, upon reasonable prior notice, afford Parent and its Representatives reasonable access throughout the period prior to the Effective Time, to the Company Employees, agents, properties, offices and other facilities, Contracts, books and records, and, during such period, the Company shall furnish promptly to Parent all other information and documents (to the extent not publicly available) concerning or regarding its business, properties and assets (including Intellectual Property Rights) and personnel as may reasonably be requested by Parent; provided, however, that subject to compliance with the obligations set forth in Section 7.9(b), the Company shall not be required to provide such access or furnish such information and documents to the extent it reasonably determines in good faith, after consultation with the Company's outside counsel, that doing so would be reasonably likely to (i) result in a violation of applicable Law or (ii) waive the attorney-client privilege or similar protections.

(b) In the event that the Company objects to any request submitted pursuant to Section 7.9(a) on the basis of one or both of the matters set forth in the proviso in Section 7.9(a), it must do so by providing Parent, in reasonable detail, the nature of what is being withheld and the reasons and reasonable support therefor, and prior to preventing such access or withholding such information or documents from Parent and its Representatives, the Company shall cooperate with Parent to make appropriate substitute arrangements to permit reasonable disclosure that does not suffer from any of the impediments expressly set forth in the proviso in Section 7.9(a), including using reasonable best efforts to take such actions and implement appropriate and mutually agreeable measures to permit such access, including through appropriate "counsel-to-counsel" disclosure, clean room procedures, redaction and other customary procedures.

7.10. Deregistration. Prior to the Closing Date, the Company shall cooperate with Parent and use reasonable best efforts to take, or cause to be taken, all actions necessary or advisable on its part under applicable Laws to enable the deregistration of the Shares under the Exchange Act as promptly as practicable after (and only after) the Effective Time and the Surviving Corporation shall file with the SEC a Form 15 on or as promptly as practicable following the Effective Time.

7.11. Publicity. The initial press release with respect to the transactions contemplated by this Agreement shall be a joint press release. Subject to 7.2(e), and unless and until a Change of Recommendation has occurred and has not been rescinded, Parent and the Company shall consult with each other before issuing, and give each other the reasonable opportunity to review and comment upon, any press release or other public statements with respect to the transactions contemplated by this Agreement, including the Merger, and shall not issue any such press release or make any such public statement prior to such consultation, except as such Party may reasonably conclude may be required by applicable Law or court process. Nothing in this Section 7.11 shall limit the ability of any Party to make internal announcements to their respective employees in accordance with Section 7.12 that are consistent in all material respects with the prior public disclosures regarding the transactions contemplated by this Agreement.

7.12. Employee Benefits.

Prior to making any written or oral communications to Company Employees pertaining to compensation or benefit matters that are affected by the transactions contemplated by this Agreement, the Company shall provide Parent with a copy of the intended communication, Parent shall have a reasonable period of time to review and comment on the communication, and the Company shall consider any such comments in good faith. Parent and Merger Sub agree that all rights in effect as of the date of this Agreement (or the benefits provided by the plans) under the Company's Long Term Incentive Plan and 2021 Annual Bonus Plan (including the Employee Retention Memorandum implementing those plans) and the Company's Severance Policy shall be assumed by the Surviving Corporation in the Merger, without further action, and shall not be modified or terminated by the Surviving Corporation within 12 months after the Closing unless otherwise required by applicable Law.

7.13. Indemnification; Directors' and Officers' Insurance.

(a) Parent and Merger Sub agree that all rights to exculpation, indemnification or advancement of expenses arising from, relating to or otherwise in respect of, acts or omissions

occurring prior to the Effective Time now existing in favor of the current or former directors or officers of the Company as provided in the Company's Organizational Documents or the Indemnification Agreements shall be assumed by the Surviving Corporation in the Merger, without further action, at the Effective Time, and shall survive the Merger and shall continue in full force and effect in accordance with their terms. For a period of no less than six years from the Effective Time, Parent shall, or shall cause the Surviving Corporation to, maintain in effect the exculpation, indemnification and advancement of expenses provisions of the Company's Organizational Documents in effect as of the date of this Agreement, and shall not amend, repeal or otherwise modify any such provisions in any manner that would adversely affect the rights thereunder of any individuals who immediately before the Effective Time were current or former directors or officers of the Company.

(b) At or prior to the Effective Time, the Company shall purchase a prepaid (or "**tail**") directors' and officers' insurance and indemnification policy that provides coverage for events occurring prior to the Effective Time for an aggregate period of not less than six years from the Effective Time, that does not result in gaps or lapses of coverage with respect to matters occurring prior to the Effective Time and that is no less favorable with respect to limits, deductibles and other terms compared to the Company's existing directors' and officers' insurance and indemnification policy or policies or, if such insurance coverage is unavailable, the best available similar coverage (the "**D&O Insurance**").

(c) If Parent, the Surviving Corporation or any of their respective successors or assigns (i) consolidates with or merges into any other Person and is not the continuing or surviving corporation or entity of such consolidation or merger or (ii) transfers or conveys all or substantially all of its properties and assets, then, and in each case, Parent and the Surviving Corporation (or their respective successors or assigns) shall ensure that such surviving corporation or entity or the transferees of such properties or assets assume the obligations set forth in this Section 7.13.

(d) The rights of each indemnified party under this Section 7.13 shall be in addition to any rights such indemnified party may have under any agreement of any indemnified party with the Company in effect as of immediately prior to the Effective Time, or under applicable Law. Except as otherwise set forth herein, these rights shall survive consummation of the Merger in accordance with their terms and are intended to benefit, and shall be enforceable by, each indemnified party.

7.14. Takeover Statutes. If any Takeover Statute is or may become applicable to the transactions contemplated by this Agreement, each of Parent and the Company, the respective members of their boards of directors and the Special Committee shall grant such approvals and take such actions as are necessary so that such transactions may be consummated as promptly as practicable on the terms contemplated by this Agreement and shall use their reasonable best efforts to otherwise act to eliminate or minimize the effects of such Takeover Statute on such transactions.

7.15. Section 16 Matters. The Company, and the Company Board (or a duly formed committee thereof consisting of non-employee directors, as such term is defined for the purposes of Rule 16b-3 promulgated under the Exchange Act), shall, prior to the Effective Time, take all such actions as may be necessary or appropriate to cause the transactions contemplated by this Agreement and any other dispositions of equity securities of the Company (including derivative securities) in connection with the transactions contemplated by this Agreement by any individual who is subject to the reporting requirements of Section 16(a) of the Exchange Act with respect to the Company to be exempt under Rule 16b-3 promulgated under the Exchange Act, to the extent permitted by applicable Law.

7.16. Transaction Litigation. In the event that any stockholder litigation (whether asserted derivatively in the name and right of the Company, directly by any holder of Shares, in the nature of a class action, or otherwise) arising out of or in connection with the transactions contemplated by this Agreement is brought, or, to the Knowledge of the Company, threatened, against the Company, the officers of the Company, or any members of the Company Board from and following the date of this Agreement and prior to the Effective Time (such litigation, "**Transaction Litigation**"), the Company shall as promptly as practicable notify Parent of such Transaction Litigation and shall keep Parent reasonably informed with respect to the status thereof. The Company shall give Parent a reasonable opportunity to participate in the defense and/or settlement of any Transaction Litigation and shall consider in good faith Parent and its outside legal counsel's advice with respect to such Transaction Litigation unless the Company determines in good faith, after consultation with its outside counsel or counsel to the Special Committee, that there may be certain defenses available to it and/or to one or more of the Company's officers or directors that are different from or in addition to the defenses available to Parent and its Affiliates such that it would not be appropriate for all such defendants to participate jointly in the defense of such Transaction Litigation or to be represented jointly by the same legal counsel in such Transaction Litigation; provided that, the Company shall not settle or agree to settle any Transaction Litigation without the prior written consent of Parent. In the event that any stockholder litigation arising out of or in connection with the transactions contemplated by this Agreement is brought, or, to the knowledge of Parent, threatened, against Parent or any of its Affiliates, Parent shall as promptly as practicable notify the Company of such litigation or threatened litigation and shall keep the Company reasonably informed with respect thereto. Parent shall consider in good faith the Company and its outside legal counsel's advice with respect to such litigation or threatened litigation.

ARTICLE VIII
Conditions

8.1. General Conditions.

The respective obligation of each Party to effect the Merger is subject to the satisfaction or waiver at or prior to the Effective Time of each of the following conditions:

(a) Company Stockholder Approval. The Requisite Company Vote shall have been obtained at the Company Stockholders Meeting.

(b) No Legal Prohibition. No Order or Law (whether temporary, preliminary or permanent) shall be in effect which enjoins, prevents or otherwise prohibits, restrains or makes unlawful the consummation of the Merger and the other transactions contemplated by this Agreement.

(c) Regulatory Approvals. All authorizations, consents, orders, declarations or approvals of, notifications to or filings or registrations with, or terminations or expirations of waiting periods imposed by Governmental Entities in connection with the Merger shall have been obtained, shall have been made or shall have occurred, as the case may be, in each case, without the imposition by the applicable Governmental Entity of any material condition thereto that has not been waived by Parent in its sole discretion.

8.2. Conditions to Obligations of Parent and Merger Sub.

The obligations of Parent and Merger Sub to effect the Merger are also subject to the satisfaction or waiver by Parent at or prior to the Effective Time of the following conditions:

(a) Representations and Warranties. Each of the representations and warranties of the Company set forth in: (i) Section 5.1 (*Organization, Good Standing and Qualification*), Section 5.3 (*Capital Structure*), and Section 5.4 (*Corporate Authority; Approval and Fairness*) shall have been true and correct as of the date of this Agreement and shall be true and correct at and as of the Closing Date as though made on and as of such date and time (except to the extent that any such representation and warranty expressly speaks as of a particular date or period of time, in which case such representation and warranty shall be so true and correct as of such particular date or period of time); (ii) Section 5.5(a) (*Governmental Filings; No Violations; Certain Contracts, Etc.*), Section 5.7 (*Company Reports*), Section 5.8 (*Disclosure Controls and Procedures and Internal Control Over Financial Reporting*), Section 5.9 (*Financial Statements; No Undisclosed Liabilities; "Off-Balance Sheet Arrangements"; Books and Records*), Section 5.11 (*Absence of Certain Changes*), Section 5.22 (*Takeover Statutes*) and Section 5.23 (*Brokers and Finders*) shall have been true and correct in all material respects as of the date of this Agreement and shall be true and correct in all material respects at and as of the Closing Date as though made on and as of such date and time (except to the extent that any such representation and warranty expressly speaks as of a particular date or period of time, in which case such representation and warranty shall be so true and correct in all material respects as of such particular date or period of time) (without giving effect to any qualification by "materiality" or "Material Adverse Effect" and words of similar import set forth therein); and (iii) Article V (other than those sections set forth in the foregoing clauses (i) and (ii) of this Section 8.2(a)) shall have been true and correct as of the date of this Agreement and shall be true and correct at and as of the Closing Date as though made on and as of such date and time (except to the extent that any such representation and warranty expressly speaks as of a particular date or period of time, in which case such representation and warranty shall be so true and correct as of such particular date or period of time), except, in the case of this clause (iii), for any failure of any such representation and warranty to be so true and correct (without giving effect to any qualification by "materiality" or "Material Adverse Effect" and words of similar import set forth therein) that would not have a Material Adverse Effect.

(b) Performance of Obligations of the Company. The Company shall have performed or complied in all material respects with its agreements and covenants required by this Agreement to be performed or complied with by it on or prior to the Effective Time.

(c) No Material Adverse Effect. Since the date of this Agreement, there shall not have occurred any event, change, development, circumstance, fact or effect that has had or would reasonably be expected to have a Material Adverse Effect.

(d) Company Closing Certificate. Parent shall have received at the Closing a certificate signed on behalf of the Company by the Chief Executive Officer of the Company certifying that the conditions set forth in Section 8.2(a), Section 8.2(b) and Section 8.2(c) are satisfied.

(e) FIRPTA Certification.

(i) Parent shall have received a statement executed on behalf of the Company, dated as of the Closing Date, satisfying the requirements of Treasury Department regulations Section 1.1445-2(c)(3) (and complying with Treasury Department regulations Section 1.897-2(h)) in a form reasonably acceptable to Parent certifying that the Company is a U.S. person, and that the Company Shares do not represent United States real property interests within the meaning of Section 897 of the Code and the Treasury Department regulations promulgated thereunder.

(ii) The Company shall deliver to the Internal Revenue Service the notification required under Treasury Department regulation Section 1.897-2(h)(2) on the date hereof, which notification shall (A) be in a form reasonably satisfactory to Parent, (B) satisfy the requirements of Treasury Department regulation Section 1.897-2(h), and (C) indicate that the certificate described in clause (i) above is provided to Parent pursuant to Treasury Regulation Section 1.1445-2(c)(3) in connection with the Merger on the date hereof

8.3. Conditions to Obligation of the Company.

The obligation of the Company to effect the Merger is also subject to the satisfaction or waiver by the Company at or prior to the Effective Time of the following conditions:

(a) Representations and Warranties. Each of the representations and warranties of Parent and Merger Sub set forth in (i) Section 6.1 (*Organization, Good Standing and Qualification*), Section 6.2 (*Corporate Authority*) and Section 6.4 (*Available Funds*) shall have been true and correct as of the date of this Agreement and shall be true and correct at and as of the Closing Date as though made on and as of such date and time (except to the extent that any such representation and warranty expressly speaks as of a particular date or period of time, in which case such representation and warranty shall be so true and correct as of such particular date or period of time); and (ii) Article VI (other than those sections set forth in the foregoing clause (i) of this Section 8.3(a)) shall have been true and correct as of the date of this Agreement and shall be true and correct at and as of the Closing Date as though made on and as of such date and time (except to the extent that any such representation and warranty expressly speaks as of a particular date or period of time, in which case such representation and warranty shall be so true and correct as of such particular date or period of time), except, in the case of this clause (ii), for any failure of any such representation and warranty to be so true and correct (without giving effect to any qualification by "materiality" or "Parent Material Adverse Effect" and words of similar import set forth therein) that would not have a Parent Material Adverse Effect.

(b) Performance of Obligations of Parent and Merger Sub. Each of Parent and Merger Sub shall have performed or complied in all material respects with its agreements and covenants required by this Agreement to be performed or complied with by it on or prior to the Effective Time.

(c) Parent and Merger Sub Closing Certificate. The Company shall have received at the Closing a certificate signed on behalf of Parent and Merger Sub by an executive officer of Parent certifying that the conditions set forth in Section 8.3(a) and Section 8.3(b) are satisfied.

ARTICLE IX
Termination

9.1. Termination by Mutual Written Consent. This Agreement may be terminated and the transactions contemplated by this Agreement may be abandoned at any time prior to the Effective Time, whether before or after the Requisite Company Vote has been obtained, by mutual written consent of the Company and Parent.

9.2. Termination by Either Parent or the Company. This Agreement may be terminated and the transactions contemplated by this Agreement may be abandoned at any time prior to the Effective Time, by action of either the Company or Parent if:

(a) the Merger shall not have been consummated by 5:00 p.m. local time on March 31, 2021 (the "**Outside Date**"); provided, that the right to terminate this Agreement pursuant to this Section 9.2(a) shall not be available to any Party if it is then in material breach of any of its representations, warranties, obligations or agreements hereunder; or

(b) any Order permanently restraining, enjoining or otherwise prohibiting consummation of the Merger shall become final and non-appealable; provided that the right to terminate this Agreement pursuant to this Section 9.2(b) shall not be available to any Party that has breached in any material respect its obligations set forth in this Agreement in any manner that shall have proximately contributed to the occurrence of the failure of a condition to the consummation of the Merger.

9.3. Termination by the Company. This Agreement may be terminated and the transactions contemplated by this Agreement may be abandoned by the Company:

(a) if either Parent or Merger Sub breaches or fails to perform in any material respect any of its representations, warranties, covenants or agreements in this Agreement, or if any representation or warranty of Parent or Merger Sub in this Agreement shall have become untrue following the date of this Agreement, in either case such that the condition in Section 8.3(a) or Section 8.3(b) would not be satisfied (and such breach or failure to be true and correct is not curable prior to the Outside Date, or if curable prior to the Outside Date, has not been cured within the earlier of (i) thirty days after the giving of notice thereof by the Company to Parent and (ii) three Business Days prior to the Outside Date); provided, however, that the right to terminate this Agreement pursuant to this Section 9.3(a) shall not be available to the Company if it is then in material breach of any of its representations, warranties, obligations or agreements hereunder; or

(b) prior to the time the Requisite Company Vote is obtained, following a Change of Recommendation, but only if (i) the Company is not then in breach of Section 7.2 of this Agreement and (ii) the Change of Recommendation occurred pursuant to and in accordance with the terms and conditions of Section 7.2(d)(ii).

9.4. Termination by Parent. This Agreement may be terminated and the transactions contemplated by this Agreement may be abandoned by the board of directors of Parent:

(a) if there has been a breach of any representation, warranty, covenant or agreement made by the Company set forth in this Agreement, or if any representation or warranty of the Company shall have become untrue following the date of this Agreement in either case such that the conditions in Section 8.2(a) or Section 8.2(b) would not be satisfied (and such breach or failure to be true and correct is not curable prior to the Outside Date, or if curable prior to the Outside Date, has not been cured within the earlier of (i) thirty days after the giving of notice thereof by Parent to the Company and (ii) three Business Days prior to the Outside Date); provided, however, that the right to terminate this Agreement pursuant to this Section 9.4(a) shall not be available to Parent if it is then in material breach of any of its representations, warranties, obligations or agreements hereunder; or

(b) following a Change of Recommendation, if the Requisite Company Vote has not yet been obtained at the Company Stockholders Meeting.

9.5. Effect of Termination and Abandonment.

In the event of termination of this Agreement pursuant to this Article IX, this Agreement shall become void and of no effect with no liability to any Person on the part of any Party (or any of its Representatives or Affiliates); provided, however, that (i) no such termination shall relieve any Party of any liability or damages to any other Party resulting from any knowing and intentional breach of this Agreement and (ii) the provisions set forth in this Section 9.5 and the second sentence of Section 10.1 shall survive the termination of this Agreement.

ARTICLE X
Miscellaneous and General

10.1. Survival. Article I, this Article X and the agreements of the Company, Parent and Merger Sub set forth in Article IV, Section 5.24 (*No Other Representations or Warranties; Non-Reliance*), Section 6.6 (*No Other Representations or Warranties; Non-Reliance*), Section 7.12 (*Employee* Benefits), Section 7.13 (*Indemnification; Directors' and Officers' Insurance*), Section 10.3 (*Expenses*), and the provisions that substantively define any related defined terms not substantively defined in Article I and those other covenants and agreements set forth in this Agreement that by their terms apply, or that are to be performed in whole or in part, after the Effective Time, shall survive the Effective Time. Article I, this Article X, the agreements of the Company, Parent and Merger Sub set forth in Section 10.3 (*Expenses*), Section 9.5 (*Effect of Termination and Abandonment*) and the provisions that substantively define any related defined terms not substantively defined in Article I and the Confidentiality Agreement shall survive the termination of this Agreement. All other representations, warranties, covenants and agreements in this Agreement or in any instrument or other document delivered pursuant to this Agreement, including rights arising out of any breach of such representations, warranties, covenants and agreements, shall not survive the Effective Time or the termination of this Agreement.

10.2. Notices. All notices, requests, instructions, consents, claims, demands, waivers, approvals and other communications to be given or made hereunder by one or more Parties to another Party shall be in writing and shall be deemed to have been duly given or made on the earliest of: (a) the date of transmission, if such notice or communication is delivered via email (i) at or prior to 5:30 p.m. (New York City time) on a Business Day or (ii) on a day that is not a Business Day or after 5:30 p.m. (New York City time) on a Business Day if such transmission is confirmed by the recipient, (b) the second Business Day following the date of mailing, if sent by U.S. nationally recognized overnight courier service or (c) upon actual receipt by the Party to whom such notice is required to be given. Such communications must be sent to the respective Parties at the following street addresses, facsimile numbers or email addresses (or at such other address or number previously made available as shall be specified in a notice given in accordance with this Section 10.2):

(A) If to the Special Committee, to:

c/o AeroGrow International, Inc.
5405 Spine Road
Boulder, CO 80301
Attention: Special Committee
Email: chris.hazlitt@bclplaw.com

with a copy to (which shall not constitute notice pursuant to this Section 10.2) to:

Bryan Cave Leighton Paisner LLP
1801 13th Street, Suite 300
Boulder, CO 80302
Attention: Chris Hazlitt
Email: chris.hazlitt@bclplaw.com

(B) If to the Company, to:

AeroGrow International, Inc.
5405 Spine Road
Boulder, CO 80301
Attention: J. Michael Wolfe
President and Chief Executive Officer
Email: mike@aerogrow.com

with a copy to (which shall not constitute notice pursuant to this Section 10.2):

Hutchinson Black and Cook, LLC
921 Walnut, Suite 200
Boulder, CO 80302
Attention: James L. Carpenter, Jr.
Email: carpenter@hbcboulder.com

and to the Special Committee and to its counsel indicated in Section 10.2(A) above

(C) If to Parent or Merger Sub, to:

SMG Growing Media, Inc.
AGI Acquisition Sub, Inc.
c/o The Scotts Miracle-Gro Company
14111 Scottslawn Road
Marysville, Ohio 43041
Attention: Bernard K. Asirifi, Esq.
Facsimile: 937-578-5031
Email: bernard.asirifi@scotts.com

with a copy to (which shall not constitute notice pursuant to this Section 10.2):

Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
Columbus, Ohio 43215
Attention: Adam L. Miller, Esq.
Facsimile: (614) 464-6250
Email: almiller@vorys.com

10.3. Expenses. Whether or not the Merger is consummated, all costs, fees and expenses incurred in connection with this Agreement and the transactions contemplated by this Agreement, including all costs, fees and expenses of its Representatives, shall be paid by the Party incurring such cost, fee or expense, except as otherwise expressly provided herein.

10.4. Modification or Amendment; Waiver.

(a) Subject to the provisions of applicable Law, at any time prior to the Effective Time, this Agreement may be modified or amended only by an instrument in writing that is executed by each of the Parties.

(b) The conditions to each of the respective Parties' obligations to consummate the transactions contemplated by this Agreement are for the sole benefit of such Party and may be waived by such Party in whole or in part to the extent permitted by applicable Law; provided, however, that any such waiver shall only be effective if made in writing and executed by the Party against whom the waiver is to be effective. No failure or delay by any Party in exercising any right, power or privilege hereunder or under applicable Law shall operate as a waiver of such rights and, except as otherwise expressly provided herein, no single or partial exercise thereof shall preclude any other or further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies herein provided shall be cumulative and not exclusive of any rights or remedies provided by Law.

10.5. Governing Law and Venue; Submission to Jurisdiction; Selection of Forum; Waiver of Trial by Jury.

(a) THIS AGREEMENT SHALL BE DEEMED TO BE MADE IN AND IN ALL RESPECTS SHALL BE INTERPRETED, CONSTRUED AND GOVERNED BY AND IN ACCORDANCE WITH THE INTERNAL PROCEDURAL AND SUBSTANTIVE LAWS OF THE STATE OF NEVADA WITHOUT REGARD TO THE CONFLICT OF LAWS RULES OR PRINCIPLES THEREOF (OR ANY OTHER JURISDICTION) TO THE EXTENT THAT SUCH LAWS, RULES AND PRINCIPLES WOULD DIRECT A MATTER TO ANOTHER JURISDICTION.

(b) Each of the Parties agrees that: (i) it shall bring any Proceeding in connection with, arising out of or otherwise relating to this Agreement or the transactions contemplated by this Agreement exclusively in the Chosen Courts; and (ii) solely in connection with such Proceedings, (A) irrevocably and unconditionally submits to the exclusive jurisdiction of the Chosen Courts, (B) irrevocably waives any objection to the laying of venue in any such Proceeding in the Chosen Courts, (C) waives any objection that the Chosen Courts are an inconvenient forum or do not have jurisdiction over any Party, (D) agrees that mailing of process or other papers in connection with any such Proceeding in the manner provided in Section 10.2 or in such other manner as may be permitted by applicable Law shall be valid and sufficient service thereof and (E) it shall not assert as a defense any matter or claim waived by the foregoing clauses (A) through (D) of this Section 10.5(b) or that any Order issued by the Chosen Courts may not be enforced in or by the Chosen Courts.

(c) EACH PARTY ACKNOWLEDGES AND AGREES THAT ANY CONTROVERSY WHICH MAY BE CONNECTED WITH, ARISE OUT OF OR OTHERWISE RELATE TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT IS EXPECTED TO INVOLVE COMPLICATED AND DIFFICULT ISSUES, AND THEREFORE EACH PARTY KNOWINGLY AND INTENTIONALLY, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY WITH RESPECT TO ANY PROCEEDING, DIRECTLY OR INDIRECTLY, CONNECTED WITH, ARISING OUT OF OR OTHERWISE RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT. EACH PARTY HEREBY ACKNOWLEDGES AND CERTIFIES THAT (i) NO REPRESENTATIVE OF THE OTHER PARTIES HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTIES WOULD NOT, IN THE EVENT OF ANY PROCEEDING, SEEK TO ENFORCE THE FOREGOING WAIVER, (ii) IT UNDERSTANDS AND HAS CONSIDERED THE IMPLICATIONS OF THIS WAIVER, (iii) IT MAKES THIS WAIVER VOLUNTARILY AND (IV) IT HAS BEEN INDUCED TO ENTER INTO THIS AGREEMENT AND THE TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS, ACKNOWLEDGMENTS AND CERTIFICATIONS SET FORTH IN THIS SECTION 10.5(c).

10.6. Specific Performance.

(a) Each of the Parties acknowledges and agrees that the rights of each Party to consummate the transactions contemplated by this Agreement are special, unique and of extraordinary character and that if for any reason any of the provisions of this Agreement are not performed in accordance with their specific terms or are otherwise breached, immediate and irreparable harm or damage may be caused for which money damages would not be an adequate remedy. Accordingly, each Party agrees that, in addition to any other available remedies a Party may have in equity or at law, each Party shall be entitled to enforce specifically the terms and provisions of this Agreement and to obtain an injunction restraining any breach or violation or threatened breach or violation of the provisions of this Agreement, consistent with the provisions of Section 10.5(b), in the Chosen Courts without necessity of posting a bond or other form of security. In the event that any Proceeding should be brought in equity to enforce the provisions of this Agreement, no Party shall allege, and each Party hereby waives the defense, that there is an adequate remedy at law.

10.7. Third-Party Beneficiaries. Except, from and after the Effective Time, for the rights of the indemnified parties as provided in Section 7.13, the Parties hereby agree that their respective representations, warranties and covenants set forth in this Agreement are solely for the benefit of the other, subject to the terms and conditions of this Agreement, and this Agreement is not intended to, and does not, confer upon any Person other than the Parties and their respective successors, legal representatives and permitted assigns any rights or remedies, express or implied, hereunder, including the right to rely upon the representations and warranties set forth in this Agreement.

10.8. Non-Recourse. Other than in any Proceeding for fraud or intentional or willful misrepresentation, this Agreement may only be enforced against, and any Proceeding in connection with, arising out of or otherwise resulting from this Agreement, any instrument or other document delivered pursuant to this Agreement or the transactions contemplated by this Agreement may only be brought against the Persons expressly named as Parties (or any of their respective successors, legal representatives and permitted assigns) in, and who have executed and delivered, this Agreement, and then only with respect to the specific obligations set forth herein with respect to such Party. No past, present or future director, employee (including any officer), incorporator, manager, member, partner, stockholder, other equity holder or persons in a similar capacity, controlling person, Affiliate or other Representative of any Party or of any Affiliate of any Party, or any of their respective successors, legal representatives and permitted assigns, shall have any liability or other obligation for any obligation of any Party under this Agreement or for any Proceeding in connection with, arising out of or otherwise resulting from this Agreement or the transactions contemplated by this Agreement; provided, however, that nothing in this Section 10.8 shall limit any liability or other obligation of any Party for any breaches by any such Party of the terms and conditions of this Agreement.

10.9. Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors, legal representatives and permitted assigns. Except as may be required to satisfy the obligations contemplated by Section 7.13, no Party may assign any of its rights or interests or delegate any of its obligations under this Agreement, in whole or in part, by operation of Law or otherwise, without the prior written consent of the other Parties not seeking to assign any of its rights or interests or delegate any of its

obligations, and any attempted or purported assignment or delegation in violation of this Section 10.9 shall be null and void; provided, however, that Parent may designate any of its Affiliates to be a constituent corporation in lieu of Merger Sub, in which event all references to Merger Sub in this Agreement shall be deemed references to such other Affiliate of Parent, except that all representations and warranties made in this Agreement with respect to Merger Sub as of the date of this Agreement shall be deemed representations and warranties made with respect to such other Affiliate as of the date of such designation.

10.10. Entire Agreement.

(a) This Agreement (including Exhibits), any Company Disclosure Schedule, the Parent Disclosure Schedule and the Confidentiality Agreement constitute the entire agreement among the Parties with respect to the subject matter of this Agreement and supersede all other prior and contemporaneous agreements, negotiations, understandings, representations and warranties, whether oral or written, with respect to such subject matter, except for the SMG Transaction Documents, which shall remain in full force and effect to the extent provided in this Agreement.

(b) In the event of any inconsistency between the statements in the body of this Agreement, on the one hand, and any of the Exhibits, any Company Disclosure Schedule, the Parent Disclosure Schedule (other than an exception expressly set forth in any Company Disclosure Schedule or the Parent Disclosure Schedule) and the Confidentiality Agreement, on the other hand, the statements in the body of this Agreement shall control.

10.11. Severability. The provisions of this Agreement shall be deemed severable and the illegality, invalidity or unenforceability of any provision shall not affect the legality, validity or enforceability of the other provisions of this Agreement. If any provision of this Agreement, or the application of such provision to any Person or any circumstance, is illegal, invalid or unenforceable, (a) a suitable and equitable provision shall be substituted therefor in order to carry out, so far as may be legal, valid and enforceable, the intent and purpose of such legal, invalid or unenforceable provision, and (b) the remainder of this Agreement and the application of such provision to other Persons or circumstances shall not be affected by such illegality, invalidity or unenforceability, nor shall such illegality, invalidity or unenforceability affect the legality, validity or enforceability of such provision, or the application of such provision, in any other jurisdiction.

10.12. Counterparts; Effectiveness. This Agreement may be executed in any number of counterparts, each such counterpart being deemed to be an original instrument, and all such counterparts shall together constitute the same agreement. A signed copy of this Agreement delivered by facsimile, email or other means of electronic transmission shall be deemed to have the same legal effect as delivery of an original signed copy of this Agreement. This Agreement shall become effective when each Party shall have received one or more counterparts hereof signed by each of the other Parties.

[*Signature Pages Follow*]

IN WITNESS WHEREOF, this Agreement has been duly executed and delivered by the duly authorized officers of the Parties as of the date first written above.

AEROGROW INTERNATIONAL, INC.

By: _____
J. Michael Wolfe
President and Chief Executive Officer

SMG GROWING MEDIA, INC.

By: _____
Name:
Title:

AGI ACQUISITION SUB, INC.

By: _____
Name:
Title:

Ultimate Parent executes this Agreement solely for the purpose of guaranteeing the representation of Parent under Section 6.4.

THE SCOTTS MIRACLE-GRO COMPANY

By: _____

Exhibit D

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

SCHEDULE 14A INFORMATION

Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934

Filed by the Registrant X Filed by a Party other than the Registrant ☐

Check the appropriate box:

☐ Preliminary Proxy Statement

☐ **Confidential, for Use of the Commission Only (as permitted by Rule 14a-6(e)(2))**

X Definitive Proxy Statement

☐ Definitive Additional Materials

☐ Soliciting Material under §240.14a-12

AEROGROW INTERNATIONAL, INC.
(Name of Registrant as Specified In Its Charter)

(Name of Person(s) Filing Proxy Statement, if other than the Registrant)

Payment of Filing Fee (Check the appropriate box):

☐ No fee required.

☐ Fee computed on table below per Exchange Act Rules 14a-6(i)(1) and 0-11.

(1) Title of each class of securities to which transaction applies:

(2) Aggregate number of securities to which transaction applies:

(3) Per unit price or other underlying value of transaction computed pursuant to Exchange Act Rule 0-11 (set forth the amount on which the filing fee is calculated and state how it was determined):

(4) Proposed maximum aggregate value of transaction:

(5) Total fee paid:

X Fee paid previously with preliminary materials.

☐ Check box if any part of the fee is offset as provided by Exchange Act Rule 0-11(a)(2) and identify the filing for which the offsetting fee was paid previously. Identify the previous filing by registration statement number, or the Form or Schedule and the date of its filing.

(1) Amount Previously Paid:

(2) Form, Schedule or Registration Statement No.:

(3) Filing Party:

(4) Date Filed:

Table of Contents

AeroGrow International, Inc.
5405 Spine Road
Boulder, Colorado 80301

January 22, 2021

To the Stockholders of AeroGrow International, Inc.:

You are cordially invited to attend a special meeting of the stockholders (the "Special Meeting") of AeroGrow International, Inc., a Nevada corporation (the "Company," "we," "us," or "our"), to be held on February 23, 2021, at 10:00 a.m., Mountain Time. The Special Meeting is scheduled to be held exclusively online via live webcast. There will not be a physical meeting location. The Special Meeting can be accessed by visiting www.virtualshareholdermeeting.com/AERO2021SM (the "Virtual Special Meeting Website"), where you will be able to attend the Special Meeting, vote and submit your questions during the Special Meeting. Please note you will not be able to attend the Special Meeting in person. We have chosen to hold a virtual rather than an in-person Special Meeting given the current public health implications of the novel coronavirus (COVID-19) and our desire to promote the health and welfare of our directors, officers and stockholders.

At the Special Meeting, you will be asked to consider and vote on a proposal to approve the Agreement and Plan of Merger (as it may be amended from time to time, the "Merger Agreement"), dated as of November 11, 2020, by and among the Company, SMG Growing Media, Inc., an Ohio corporation ("Parent"), AGI Acquisition Sub, Inc., a Nevada corporation and wholly-owned subsidiary of Parent ("Merger Sub" and, together with Parent, the "Purchaser Parties"), and, solely for the purposes stated in Section 6.4 of the Merger Agreement, The Scotts Miracle-Gro Company, an Ohio corporation ("Scotts Miracle-Gro"), and the transactions contemplated thereby (including the Merger (as defined below)), relating to the proposed acquisition of the Company by Parent, a direct, wholly-owned subsidiary of Scotts Miracle-Gro. Pursuant to the terms of the Merger Agreement, Merger Sub will merge with and into the Company (the "Merger"), with the Company continuing as the surviving corporation in the Merger as a direct, wholly-owned subsidiary of Parent and an indirect, wholly-owned subsidiary of Scotts Miracle-Gro.

If the Merger is completed, you will be entitled to receive $3.00 in cash, without interest and subject to any required withholding of taxes, for each share of our common stock, par value $0.001 per share (the "common stock"), that you own (unless you have properly asserted and preserved your dissenter's rights pursuant to and in accordance with Nevada Revised Statutes 92A.300 through 92A.500, inclusive).

The special committee (the "Special Committee") of the board of directors of the Company (the "Board"), consisting solely of independent and disinterested directors, evaluated the Merger Agreement and the Merger in consultation with the Special Committee's legal and financial advisors and unanimously recommended the Merger Agreement and the Merger to the Board. The Special Committee unanimously (i) determined that the Merger Agreement and the transactions contemplated thereby (including the Merger) were fair to, and in the best interests of, the Company and the holders of shares of common stock (including unaffiliated security holders, but excluding Parent and the Company), and (ii) recommended that the Board adopt and approve the Merger Agreement and approve the Merger. The Board (including Patricia M. Ziegler, Chris J. Hagedorn and Cory T. Miller, who reminded the Board of their affiliation with Scotts Miracle-Gro), on behalf of the Company, based on the recommendation of the Special Committee and after consultation with the Company's legal and financial advisors, unanimously (i) adopted and approved the Merger Agreement and the transactions contemplated by the

Merger Agreement (including the Merger), (ii) determined that the Merger Agreement and the transactions contemplated by the Merger Agreement (including the Merger) were fair to, and in the best interests of, the Company and the holders of shares of common stock (including unaffiliated security holders, but excluding Parent and the Company), (iii) directed that the Merger Agreement and the Merger be submitted for approval by a vote of the holders of common stock at the Special Meeting and (iv) recommended that the holders of common stock affirmatively vote to approve the Merger Agreement and the Merger. The approval of the proposal to approve the Merger Agreement and the transactions contemplated thereby (including the Merger) requires the vote of a majority of the outstanding shares of common stock entitled to vote on such matter at the Special Meeting. The transaction has not been structured to require the approval of the holders of at least a majority of the shares of common stock beneficially owned by security holders unaffiliated with the Purchaser Parties and their respective affiliates (including Scotts Miracle-Gro and our directors who are affiliated with Scotts Miracle-Gro, to the extent such directors beneficially own any shares of common stock). Furthermore, such approval is not required under Nevada law for us to complete the Merger.

The Board unanimously recommends that you vote "FOR" the approval of the Merger Agreement and the transactions contemplated thereby (including the Merger).

The Merger Agreement provides that Parent will vote or cause to be voted any shares of common stock beneficially owned by it or any of its affiliates or with respect to which it or any of its affiliates has the power (by agreement, proxy or otherwise) to cause to be voted in favor of the approval of the Merger Agreement and the transactions contemplated thereby (including the Merger) at the Special Meeting and at all adjournments, recesses or postponements thereof. As of January 20, 2021, the Purchaser Parties and their respective affiliates (including Scotts Miracle-Gro) may be deemed to beneficially own approximately 80.5% of the outstanding shares of our common stock.

Whether or not you plan to attend the Special Meeting via the Virtual Special Meeting Website, please sign, date and return, as promptly as possible, the enclosed proxy card in the accompanying prepaid reply envelope. You also may submit a proxy electronically over the Internet or by telephone. We have provided instructions on the proxy card for using these convenient services. Submitting a proxy will not prevent you from voting your shares via the Virtual Special Meeting Website if you subsequently choose to attend the Special Meeting via the Virtual Special Meeting Website. Your proxy may be revoked at any time before the vote at the Special Meeting by following the procedures outlined in the accompanying proxy statement. If you attend the Special Meeting and vote via the Virtual Special Meeting Website, your vote will revoke any proxy that you have previously submitted. We cannot complete the Merger unless the proposal to approve the Merger Agreement and the transactions contemplated thereby (including the Merger) is approved by a majority of the outstanding shares of common stock entitled to vote on such matter at the Special Meeting as of **January 8, 2021**, **the record date for the Special Meeting (the "Record Date"). The transaction has not been structured to require the approval of the holders of at least a majority of the shares of common stock beneficially owned by security holders unaffiliated with the Purchaser Parties and their respective affiliates (including Scotts Miracle-Gro and our directors who are affiliated with Scotts Miracle-Gro, to the extent such directors beneficially own any shares of common stock). Furthermore, such approval is not required under Nevada law for us to complete the Merger. Because the Purchaser Parties and their respective affiliates (including Scotts Miracle-Gro) may be deemed to beneficially own more than a majority of our outstanding shares of common stock as of the Record Date, they can satisfy the required vote under Nevada law and the Merger Agreement to approve the Merger Agreement and the transactions contemplated thereby (including the Merger) without the affirmative vote of any of our unaffiliated security holders. Despite the fact that the Purchaser Parties and their respective affiliates (including Scotts Miracle-Gro) can satisfy the required vote, we are soliciting proxies and furnishing a proxy statement to our stockholders to give unaffiliated security holders the opportunity to express their views on the Merger, even though their approval is not required as a condition to the completion of the Merger. Please note that any abstention or other failure to vote your shares will have the same effect as a vote "AGAINST" the proposal to approve the Merger Agreement and the transactions contemplated thereby (including the Merger).**

If you hold your shares in "street name" through a broker, bank, trustee or other nominee, you should instruct your broker, bank, trustee or other nominee how to vote your shares in accordance with the voting instruction form that you will receive from your broker, bank, trustee or other nominee. **Your broker, bank, trustee or other nominee cannot vote on the proposal to approve the Merger Agreement and the transactions contemplated thereby (including the Merger) without your instructions. Without those instructions, your shares will not be voted, which will have the same effect as a vote "AGAINST" the proposal to approve the Merger Agreement and the transactions contemplated thereby (including the Merger).**

The accompanying proxy statement provides detailed information about the Special Meeting, the Merger Agreement and the Merger. In addition, you may obtain information about us from documents that we have filed with the Securities and Exchange Commission. See "Where You Can Find More Information" in the accompanying proxy statement. A copy of the Merger Agreement is attached as Annex A to the proxy statement. The proxy statement also describes the actions and determinations of the Special Committee and the Board in connection with their evaluation of the Merger Agreement and the Merger. I encourage you to read the proxy statement and its annexes, including the Merger Agreement, carefully and in their entirety, as they contain important information related to the Merger Agreement and the Merger.

If you have any questions or need assistance voting your shares, please contact the Company at:

AeroGrow International, Inc.
Attention: Senior Vice President of Finance and Administration
5405 Spine Road
Boulder, Colorado 80301
grey@aerogrow.com
(303) 444-7755

On behalf of the Company, I thank you for your continued support and appreciate your consideration of this matter.

Sincerely,

J. Michael Wolfe
President and Chief Executive Officer

The accompanying proxy statement is dated January 22, 2021 and, together with the enclosed form of proxy card, is first being mailed to stockholders on or about January 22, 2021.

Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of the Merger, passed upon the merits or fairness of the Merger Agreement or the transactions contemplated thereby, including the proposed Merger, or passed upon the adequacy or accuracy of the information contained in the accompanying proxy statement. Any representation to the contrary is a criminal offense.

AeroGrow International, Inc.
5405 Spine Road
Boulder, Colorado 80301

NOTICE OF SPECIAL MEETING OF STOCKHOLDERS
To Be Held February 23, 2021

To the Stockholders of AeroGrow International, Inc.:

Notice is hereby given that a special meeting of the stockholders (the "Special Meeting") of AeroGrow International, Inc., a Nevada corporation (the "Company," "we," "us," or "our"), will be held on February 23, 2021, at 10:00 a.m., Mountain Time. The Special Meeting will be held exclusively online via live webcast and can be accessed by visiting www.virtualshareholdermeeting.com/AERO2021SM (the "Virtual Special Meeting Website"), where you will be able to attend the Special Meeting, vote and submit your questions during the Special Meeting. There will not be a physical meeting location.

The Special Meeting will be held to consider and vote on a proposal to approve the Agreement and Plan of Merger (as it may be amended from time to time, the "Merger Agreement"), dated as of November 11, 2020, by and among the Company, SMG Growing Media, Inc., an Ohio corporation ("Parent"), AGI Acquisition Sub, Inc., a Nevada corporation and wholly-owned subsidiary of Parent ("Merger Sub" and, together with Parent, the "Purchaser Parties"), and, solely for the purposes stated in Section 6.4 of the Merger Agreement, The Scotts Miracle-Gro Company, an Ohio corporation ("Scotts Miracle-Gro"), and the transactions contemplated thereby (including the Merger (as defined below)), relating to the proposed acquisition of the Company by Parent, a direct, wholly-owned subsidiary of Scotts Miracle-Gro (the "Merger Agreement Proposal"). Pursuant to the terms of the Merger Agreement, Merger Sub will merge with and into the Company (the "Merger"), with the Company continuing as the surviving corporation in the Merger as a direct, wholly-owned subsidiary of Parent and an indirect, wholly-owned subsidiary of Scotts Miracle-Gro. A copy of the Merger Agreement is attached as Annex A to the proxy statement.

Any action on the item of business described above may be considered at the Special Meeting or at any time and date to which the Special Meeting may be properly adjourned or postponed.

Only holders of record of our common stock, par value $0.001 per share (the "common stock"), as of the close of business on January 8, 2021 (the "Record Date"), are entitled to notice of, and to vote at, the Special Meeting or any adjournment or postponement thereof.

A list of stockholders of record will be available for inspection at our corporate headquarters located at 5405 Spine Road, Boulder, Colorado 80301, during ordinary business hours during the 10-day period before the Special Meeting.

The special committee (the "Special Committee") of the board of directors of the Company (the "Board"), consisting solely of independent and disinterested directors, evaluated the Merger Agreement and the Merger in consultation with the Special Committee's legal and financial advisors and unanimously recommended the Merger Agreement and the Merger to the Board. The Special Committee unanimously (i) determined that the Merger Agreement and the transactions contemplated thereby (including the Merger) were fair to, and in the best interests of, the Company and the holders of shares of common stock (including unaffiliated security holders, but

excluding Parent and the Company), and (ii) recommended that the Board adopt and approve the Merger Agreement and approve the Merger. The Board (including Patricia M. Ziegler, Chris J. Hagedorn and Cory T. Miller, who reminded the Board of their affiliation with Scotts Miracle-Gro), on behalf of the Company, based on the recommendation of the Special Committee and after consultation with the Company's legal and financial advisors, unanimously (i) adopted and approved the Merger Agreement and the transactions contemplated by the Merger Agreement (including the Merger), (ii) determined that the Merger Agreement and the transactions contemplated by the Merger Agreement (including the Merger) were fair to, and in the best interests of, the Company and the holders of shares of common stock (including unaffiliated security holders, but excluding Parent and the Company), (iii) directed that the Merger Agreement and the Merger be submitted for approval by a vote of the holders of common stock at the Special Meeting and (iv) recommended that the holders of common stock affirmatively vote to approve the Merger Agreement and the Merger. The approval of the Merger Agreement Proposal requires the vote of a majority of the outstanding shares of common stock entitled to vote on such matter at the Special Meeting. The transaction has not been structured to require the approval of the holders of at least a majority of the shares of common stock beneficially owned by security holders unaffiliated with the Purchaser Parties and their respective affiliates (including Scotts Miracle-Gro and our directors who are affiliated with Scotts Miracle-Gro, to the extent such directors beneficially own any shares of common stock). Furthermore, such approval is not required under Nevada law for us to complete the Merger.

The Board unanimously recommends that you vote "FOR" the Merger Agreement Proposal.

The Merger Agreement provides that Parent will vote or cause to be voted any shares of common stock beneficially owned by it or any of its affiliates or with respect to which it or any of its affiliates has the power (by agreement, proxy or otherwise) to cause to be voted in favor of the Merger Agreement Proposal at the Special Meeting and at all adjournments, recesses or postponements thereof. As of January 20, 2021, the Purchaser Parties and their respective affiliates (including Scotts Miracle-Gro) may be deemed to beneficially own approximately 80.5% of the outstanding shares of our common stock.

Whether or not you plan to attend the Special Meeting via the Virtual Special Meeting Website, please sign, date and return, as promptly as possible, the enclosed proxy card in the accompanying prepaid reply envelope. You also may submit a proxy electronically over the Internet or by telephone. We have provided instructions on the proxy card for using these convenient services. Submitting a proxy will not prevent you from voting your shares via the Virtual Special Meeting Website if you subsequently choose to attend the Special Meeting via the Virtual Special Meeting Website. Your proxy may be revoked at any time before the vote at the Special Meeting by following the procedures outlined in the proxy statement. If you attend the Special Meeting and vote via the Virtual Special Meeting Website, your vote will revoke any proxy that you have previously submitted. **We cannot complete the Merger unless the Merger Agreement Proposal is approved by a majority of the outstanding shares of common stock entitled to vote on such matter at the Special Meeting as of the Record Date. The transaction has not been structured to require the approval of the holders of at least a majority of the shares of common stock beneficially owned by security holders unaffiliated with the Purchaser Parties and their respective affiliates (including Scotts Miracle-Gro and our directors who are affiliated with Scotts Miracle-Gro, to the extent such directors beneficially own any shares of common stock). Furthermore, such approval is not required under Nevada law for us to complete the Merger. Because the Purchaser Parties and their respective affiliates (including Scotts Miracle-Gro) may be deemed to beneficially own more than a majority of our outstanding shares of common stock as of the Record Date, they can satisfy the required vote under Nevada law and the Merger Agreement to approve the Merger Agreement and the transactions contemplated thereby (including the Merger) without the affirmative vote of any of our unaffiliated security holders. Despite the fact that the Purchaser Parties and their respective affiliates (including Scotts Miracle-Gro) can satisfy the required vote, we are soliciting proxies and furnishing a proxy statement to our stockholders to give unaffiliated security holders the opportunity to express their views on the Merger, even though their approval is not required as a condition to the completion of the Merger. Please note that any abstention or other failure to vote your shares will have the same effect as a vote "AGAINST" the Merger Agreement Proposal.**

If you hold your shares in "street name" through a broker, bank, trustee or other nominee, you should instruct your broker, bank, trustee or other nominee how to vote your shares in accordance with the voting instruction form that you will receive from your broker, bank, trustee or other nominee. **Your broker, bank, trustee or other nominee cannot vote on the Merger Agreement Proposal without your instructions. Without those instructions, your shares will not be voted, which will have the same effect as a vote "AGAINST" the Merger Agreement Proposal.**

Any stockholder who does not vote (and who does not cause or permit the stockholder's shares to be voted) in favor of the Merger Agreement Proposal will have the right to dissent from the Merger and, in lieu of receiving the consideration prescribed under the Merger Agreement, obtain payment of the fair value (as defined in Nevada Revised Statutes 92A.320) of the stockholder's shares, but only if (1) the stockholder delivers to the Company, before the vote on the Merger Agreement Proposal is taken at the Special Meeting, written notice of the stockholder's intent to demand payment for the stockholder's shares if the Merger is effectuated, and (2) the stockholder complies with all other applicable requirements of Nevada law, which are summarized in the proxy statement and reproduced in their entirety in Annex C to the proxy statement.

You are encouraged to read the proxy statement and its annexes, including all documents incorporated by reference into the proxy statement, carefully and in their entirety. If you have any questions concerning the Merger, the Special Meeting or the proxy statement, would like additional copies of the accompanying proxy statement or need help voting your shares, please contact the Company at:

AeroGrow International, Inc.
Attention: Senior Vice President of Finance and Administration
5405 Spine Road
Boulder, Colorado 80301
grey@aerogrow.com
(303) 444-7755

Whether or not you plan to attend the Special Meeting via the Virtual Special Meeting Website, please sign, date and return, as promptly as possible, the enclosed proxy card in the accompanying prepaid reply envelope. You also may submit a proxy electronically over the Internet or by telephone. Submitting a proxy will not prevent you from voting your shares via the Virtual Special Meeting Website if you subsequently choose to attend the Special Meeting via the Virtual Special Meeting Website. Your proxy may be revoked at any time before the vote at the Special Meeting by following the procedures outlined in the proxy statement.

By Order of the Board of Directors,

J. Michael Wolfe
President and Chief Executive Officer

Dated: January 22, 2021

The accompanying proxy statement is dated January 22, 2021 and, together with the enclosed form of proxy card, is first being mailed to stockholders on or about January 22, 2021.

Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of the Merger, passed upon the merits or fairness of the Merger Agreement or the transactions contemplated thereby, including the proposed Merger, or passed upon the adequacy or accuracy of the information contained in the accompanying proxy statement. Any representation to the contrary is a criminal offense.

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Annexes

This proxy statement contains information related to a special meeting of the stockholders (the "Special Meeting") of AeroGrow International, Inc., a Nevada corporation ("AeroGrow," the "Company," "we," "us," or "our"), to be held on February 23, 2021, at 10:00 a.m., Mountain Time. The Special Meeting is scheduled to be held exclusively online via live webcast. There will not be a physical meeting location. The Special Meeting can be accessed by visiting www.virtualshareholdermeeting.com/AERO2021SM (the "Virtual Special Meeting Website"), where you will be able to attend the Special Meeting, vote and submit your questions during the Special Meeting. Please note you will not be able to attend the Special Meeting in person. We have chosen to hold a virtual rather than an in-person Special Meeting given the current public health implications of the novel coronavirus (COVID-19) and our desire to promote the health and welfare of our directors, officers and stockholders.

We are furnishing this proxy statement to our stockholders as part of the solicitation of proxies by the board of directors of the Company (the "Board") for use at the Special Meeting. At the Special Meeting you will be asked to consider and vote on a proposal to approve the Agreement and Plan of Merger (as it may be amended from time to time, the "Merger Agreement"), dated as of November 11, 2020, by and among the Company, SMG Growing Media, Inc., an Ohio corporation ("Parent"), AGI Acquisition Sub, Inc., a Nevada corporation and wholly-owned subsidiary of Parent ("Merger Sub" and, together with Parent, the "Purchaser Parties"), and, solely for the purposes stated in Section 6.4 of the Merger Agreement, The Scotts Miracle-Gro Company, an Ohio corporation ("Scotts Miracle-Gro"), and the transactions contemplated thereby (including the Merger (as defined below)), relating to the proposed acquisition of the Company by Parent, a direct, wholly-owned subsidiary of Scotts Miracle-Gro (the "Merger Agreement Proposal"). Pursuant to the terms of the Merger Agreement, Merger Sub will merge with and into the Company (the "Merger"), with the Company continuing as the surviving corporation in the Merger as a direct, wholly-owned subsidiary of Parent and an indirect, wholly-owned subsidiary of Scotts Miracle-Gro. A copy of the Merger Agreement is attached as Annex A to this proxy statement.

This proxy statement is dated January 22, 2021 and, together with the enclosed form of proxy card, is first being mailed to stockholders on or about January 22, 2021.

Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of the Merger, passed upon the merits or fairness of the Merger Agreement or the transactions contemplated thereby, including the proposed Merger, or passed upon the adequacy or accuracy of the information contained in this proxy statement. Any representation to the contrary is a criminal offense.

SUMMARY TERM SHEET

This summary term sheet, together with the following section entitled "Questions and Answers," highlights selected information from this proxy statement, including with respect to the Merger Agreement and the transactions contemplated thereby (including the Merger), and may not contain all of the information that may be important to you. To understand the Merger more fully and for a more complete description of the legal terms of the Merger and the Merger Agreement, you should carefully read this entire proxy statement, the annexes to this proxy statement and the documents that we refer to, or incorporate by reference, in this proxy statement. Each item in this summary term sheet includes a page reference directing you to a more complete description of that topic. You may obtain the information incorporated by reference in this proxy statement without charge by following the instructions under "Where You Can Find More Information" beginning on page 136. The Merger Agreement is attached as Annex A to this proxy statement. We encourage you to read the Merger Agreement, which is the legal document that governs the Merger, carefully and in its entirety.

Parties Involved in the Merger (Page 27)

AeroGrow International, Inc.

AeroGrow is a Nevada corporation. AeroGrow is a developer, marketer, direct-seller, and wholesaler of advanced indoor garden systems designed for consumer use and priced to appeal to the gardening, cooking, healthy eating, and home and office decor markets. We offer multiple lines of proprietary indoor gardens, grow lights, a patented nutrient formula, more than 40 corresponding proprietary seed pod kits, and various cooking, gardening and decor accessories, primarily in the United States and Canada, as well as selected countries in Europe. Please see "Where You Can Find More Information" beginning on page 136 for additional information regarding us.

Our common stock is listed on The OTCQB Marketplace operated by OTC Markets Group Inc. ("OTCQB") under the symbol "AERO."

Our principal executive office is located at 5405 Spine Road, Boulder, Colorado 80301, and our telephone number is (303) 444-7755.

The Scotts Miracle-Gro Company

Scotts Miracle-Gro, an Ohio corporation, is the leading manufacturer and marketer of branded consumer lawn and garden products in North America. Scotts Miracle-Gro products are marketed under some of the most recognized brand names in the industry. Scotts Miracle-Gro's key consumer lawn and garden brands include Scotts® and Turf Builder® lawn and grass seed products; Miracle-Gro® soil, plant food and insecticide, LiquaFeed® plant food and Osmocote® (Osmocote® is a registered trademark of Everris International B.V., a subsidiary of Israel Chemicals Ltd.) gardening and landscape products; and Ortho®, Home Defense® and Tomcat® branded insect control, weed control and rodent control products. Scotts Miracle-Gro is the exclusive agent of the Monsanto Company, a subsidiary of Bayer AG ("Monsanto"), for the marketing and distribution of certain of Monsanto's consumer Roundup® branded products within the United States and certain other specified countries. Scotts Miracle-Gro has a presence in similar branded consumer products in China. Scotts Miracle-Gro's common shares are listed on the New York Stock Exchange (the "NYSE") under the symbol "SMG."

Scotts Miracle-Gro's principal executive office is located at 14111 Scottslawn Road, Marysville, Ohio 43041, and its telephone number is (937) 644-0011.

SMG Growing Media, Inc.

Parent is an Ohio corporation and a direct, wholly-owned subsidiary of Scotts Miracle-Gro and serves as a holding company for Scotts Miracle-Gro's growing media and hydroponic businesses.

Parent's principal executive office is located at 14111 Scottslawn Road, Marysville, Ohio 43041, and its telephone number is (937) 644-0011.

AGI Acquisition Sub, Inc.

Merger Sub is a Nevada corporation and a direct, wholly-owned subsidiary of Parent. Merger Sub was incorporated in 2020 by Parent solely for the purpose of entering into the transactions contemplated by the Merger Agreement, and has not entered into any business activities other than in connection with the transactions contemplated by the Merger Agreement. Upon completion of the Merger, Merger Sub will cease to exist as a separate entity and the Company will continue as the surviving corporation in the Merger.

Merger Sub's principal executive office is located at 14111 Scottslawn Road, Marysville, Ohio 43041, and its telephone number is (937) 644-0011.

Each of the Purchaser Parties is an affiliate of Scotts Miracle-Gro. As of January 20, 2021, the Purchaser Parties and their respective affiliates (including Scotts Miracle-Gro) may be deemed to beneficially own approximately 80.5% of the outstanding shares of our common stock. See "Other Important Information Regarding the Purchaser Parties and Scotts Miracle-Gro" beginning on page 121.

Special Factors (Page 27)

Merger Consideration (Page 28)

Upon completion of the Merger, the Company will cease to be a publicly traded company and at the effective time of the Merger (the "Effective Time") each share of common stock (other than Excluded Shares and Dissenting Shares (each as defined in "Special Factors—Merger Consideration" beginning on page 28)) issued and outstanding immediately prior to the Effective Time will be automatically converted into the right to receive $3.00 in cash, without interest thereon and subject to any required withholding of taxes (the "Merger Consideration"), and will cease to be outstanding, will be cancelled and will cease to exist.

Following the completion of the Merger, you will no longer own any shares of the capital stock of the surviving corporation or have any other rights as a stockholder of the Company. You will, however, have the right to receive the Merger Consideration (except stockholders who have duly preserved, demanded and perfected, and not withdrawn or otherwise waived or lost, dissenter's rights pursuant to and in accordance with Nevada Revised Statutes ("NRS") 92A.300 through NRS 92A.500, inclusive) (as described in "Special Factors—Dissenter's Rights" beginning on page 80), who will instead have the rights available pursuant to those statutes).

Treatment of Equity Awards (Page 64)

The Company has no outstanding equity awards.

Background of the Merger (Page 28)

A description of the background of the Merger, including our discussions with the Purchaser Parties and Scotts Miracle-Gro, is included in "Special Factors—Background of the Merger" beginning on page 28.

Recommendation of the Board and Reasons for the Merger; Fairness of the Merger (Page 43)

The special committee (the "Special Committee") of the Board evaluated the Merger Agreement and the Merger in consultation with the Special Committee's legal and financial advisors and unanimously recommended the Merger Agreement and the Merger to the Board. The Special Committee unanimously (i) determined that the Merger Agreement and the transactions contemplated thereby (including the Merger) were fair to, and in the best interests of, the Company and the holders of shares of common stock (including unaffiliated security holders, but excluding Parent and the Company), and (ii) recommended that the Board adopt and approve the Merger Agreement and approve the Merger. The Board (including Ms. Ziegler and Messrs. Hagedorn and Miller, who reminded the Board of their affiliation with Scotts Miracle-Gro), on behalf of the Company, based on the recommendation of the Special Committee and after consultation with the Company's legal and financial advisors, unanimously (i) adopted and approved the Merger Agreement and the transactions contemplated by the Merger Agreement (including the Merger), (ii) determined that the Merger Agreement and the transactions contemplated by the Merger Agreement (including the Merger) were fair to, and in the best interests of, the Company and the holders of shares of common stock (including unaffiliated security holders, but excluding Parent and the Company), (iii) directed that the Merger Agreement and the Merger be submitted for approval by

a vote of the holders of common stock at the Special Meeting and (iv) recommended that the holders of common stock affirmatively vote to approve the Merger Agreement and the Merger. The approval of the Merger Agreement Proposal requires the vote of a majority of the outstanding shares of common stock entitled to vote on such matter at the Special Meeting. The transaction has not been structured to require the approval of the holders of at least a majority of the shares of common stock beneficially owned by security holders unaffiliated with the Purchaser Parties and their respective affiliates (including Scotts Miracle-Gro and our directors who are affiliated with Scotts Miracle-Gro, to the extent such directors beneficially own any shares of common stock). Furthermore, such approval is not required under Nevada law for us to complete the Merger.

For a discussion of the material factors considered by the Board in reaching its conclusions, please refer to "Special Factors—Recommendation of the Board and Reasons for the Merger; Fairness of the Merger" beginning on page 43.

The Board unanimously recommends that you vote "**FOR**" the Merger Agreement Proposal.

Position of the Purchaser Parties and Scotts Miracle-Gro as to the Fairness of the Merger (Page 51)

The Purchaser Parties and Scotts Miracle-Gro did not participate in the deliberations of the Special Committee or the Board regarding, or receive advice from the Company's legal or financial advisors as to, the fairness of the proposed Merger to the Company's unaffiliated stockholders. The Purchaser Parties and Scotts Miracle-Gro have not performed, or engaged a financial advisor to perform, any valuation or other analysis for the purpose of assessing the fairness of the Merger to the Company's unaffiliated stockholders. However, based on the knowledge and analysis by the Purchaser Parties and Scotts Miracle-Gro of available information regarding the Company, its business and the factors considered by, and the analysis and resulting conclusions of, the Board, as discussed in the section "Special Factors—Purpose and Reasons of the Company for the Merger" beginning on page 62, the Purchaser Parties and Scotts Miracle-Gro believe that the Merger is substantively and procedurally fair to the Company's unaffiliated stockholders.

Opinion of Stifel, Nicolaus & Company, Incorporated (Page 54 and Annex B)

At the November 10, 2020 meeting of the Special Committee, Stifel, Nicolaus & Company, Incorporated ("Stifel") rendered its oral opinion to the Special Committee, confirmed by the delivery of a written opinion dated November 11, 2020, that, subject to the qualifications, assumptions, exceptions and limitations set forth therein, the Merger Consideration to be paid by Parent under the Merger Agreement was fair, from a financial point of view, to the holders of shares of common stock of the Company, other than (i) Parent, Parent's affiliates and the Company and (ii) Dissenting Shares.

The full text of Stifel's written opinion dated November 11, 2020, which sets forth the assumptions made, procedures followed, matters considered and limitations on the review undertaken in connection with the opinion, is attached as Annex B to this proxy statement and is incorporated herein by reference. Stifel's opinion was provided for the use and benefit of the Special Committee (solely in its capacity as such) in its evaluation of the Merger. Stifel's opinion is limited solely to the fairness of the Merger Consideration to be paid by Parent under the Merger Agreement, from a financial point of view, to the holders of the Company's common stock (other than (i) Parent, Parent's affiliates and the Company and (ii) Dissenting Shares) and does not address the Company's underlying business decision to effect the Merger or the relative merits of the Merger as compared to any alternative business strategies or transactions that might be available to the Company. Stifel's opinion does not constitute a recommendation as to how any holder of securities should vote or act with respect to the Merger or any other matter.

For a more complete description and additional information, see the section entitled "Special Factors—Opinion of Stifel, Nicolaus & Company, Incorporated" beginning on page 54 and Annex B to this proxy statement.

Purpose and Reasons of the Company for the Merger (Page 62)

The Company's purpose for engaging in the Merger is to enable its stockholders (other than holders of Excluded Shares and Dissenting Shares) to receive the Merger Consideration. The Board considered the Merger Agreement, as well as strategic alternatives, including sale to a third party or continuation as an independent company, consistent with its fiduciary duties under NRS 78.138. The Company has determined to undertake the Merger at this time based on the analyses, determinations and conclusions of the Special Committee and the Board described in detail under "Special Factors—Recommendation of the Board and Reasons for the Merger; Fairness of the Merger" beginning on page 43.

Purpose and Reasons of the Purchaser Parties and Scotts Miracle-Gro for the Merger (Page 63)

Under the Securities and Exchange Commission (the "SEC") rules governing "going private" transactions, each of the Purchaser Parties and their respective affiliates (including Scotts Miracle-Gro) may be deemed to be an "affiliate" (as defined under Rule 13e-3 of the Securities Exchange Act of 1934, as amended (the "Exchange Act")) of the Company engaged in the "going private" transaction and, therefore, each of the Purchaser Parties and their respective affiliates (including Scotts Miracle-Gro) is required to express its purposes and reasons for the Merger to the Company's "unaffiliated security holders" (as defined under Rule 13e-3 of the Exchange Act). The Purchaser Parties and their respective affiliates (including Scotts Miracle-Gro) are making the statements included in this section solely for the purpose of complying with the requirements of Rule 13e-3 and related rules under the Exchange Act. The views of the Purchaser Parties and their respective affiliates (including Scotts Miracle-Gro) should not be construed as a recommendation to any unaffiliated stockholder as to how that stockholder should vote on the Merger Agreement Proposal.

The Purchaser Parties and Scotts Miracle-Gro have undertaken to pursue the Merger at this time in light of the opportunities they perceive to enhance Parent's and, in turn, Scotts Miracle-Gro's, financial performance by means of acquiring the Company's brands and other assets through the Merger. For the Purchaser Parties and Scotts Miracle-Gro, the purpose of the Merger is to enable them to exercise complete control of the Company, through a transaction in which the stockholders of the Company (other than the (i) Purchaser Parties and their respective affiliates (including Scotts Miracle-Gro) and (ii) holders of Dissenting Shares) will be entitled to receive $3.00 in cash, without interest and subject to any required withholding of taxes, per share of common stock, and bear the rewards and risks of the ownership of the Company after becoming its sole stockholder. In the opinion of the Purchaser Parties and Scotts Miracle-Gro, the Merger will provide a number of benefits to the Purchaser Parties and Scotts Miracle-Gro and the Company that would follow from the Company becoming an indirect, wholly-owned subsidiary of Scotts Miracle-Gro, including, but not limited to, those set forth in "Special Factors—Purpose and Reasons of the Purchaser Parties and Scotts Miracle-Gro for the Merger" beginning on page 63.

The transaction has been structured as a cash merger to provide the Company's unaffiliated security holders with cash for their shares of common stock and to provide a prompt and orderly transfer of ownership of the Company in a single step, without the necessity of financing separate purchases of shares of common stock in a tender offer and implementing a second-step merger to acquire any shares of common stock not tendered into any such tender offer, and without incurring any additional transaction costs associated with such activities.

Certain Effects of the Merger (Page 64)

Upon the terms and subject to the conditions of the Merger Agreement, if the Merger is completed, Merger Sub will merge with and into the Company, and the Company will continue as the surviving corporation and as a

direct, wholly-owned subsidiary of Parent and an indirect, wholly-owned subsidiary of Scotts Miracle-Gro. Following the completion of the Merger, you will no longer own any shares of the capital stock of the surviving corporation or have any other rights as a stockholder of the Company. You will, however, have the right to receive the Merger Consideration (except stockholders who have duly preserved, demanded and perfected, and not withdrawn or otherwise waived or lost, dissenter's rights pursuant to NRS 92A.300 through NRS 92A.500, inclusive (as described in "Special Factors—Dissenter's Rights" beginning on page 80) who will instead have the rights available pursuant to those statutes). For a further discussion of the effects of the Merger, see "Special Factors—Certain Effects of the Merger" beginning on page 64.

Certain Effects on the Company if the Merger is Not Completed (Page 66)

If the Merger Agreement Proposal is not approved by the required vote of our stockholders, or if the Merger is not completed for any other reason, our stockholders will not receive any payment for their shares. Instead, we will remain an independent public company, our common stock will continue to be listed and traded on the OTCQB and registered under the Exchange Act, and we will continue to file periodic and current reports with the SEC. If the Merger is not completed, depending on the circumstances that caused the Merger not to be completed, the price of our common stock may decline significantly, and if that were to occur, it is uncertain when, if ever, the price of our common stock would return to the price at which it traded as of the date of this proxy statement. For more details, see "Special Factors— Certain Effects on the Company if the Merger is Not Completed" beginning on page 66.

Interests of the Company's Directors and Executive Officers in the Merger; Potential Conflicts of Interest (Page 72)

When considering the unanimous recommendation of the Board that you vote to approve the Merger Agreement Proposal, you should be aware that our directors and executive officers may have interests in the Merger that are different from, or in addition to, the interests of stockholders generally, as more fully described below. In (i) evaluating and negotiating the Merger Agreement; (ii) adopting and approving the Merger Agreement and approving the Merger; and (iii) recommending that the Merger Agreement Proposal be approved by stockholders, the Special Committee and the Board, as applicable, were aware of and considered these interests to the extent that they existed at the time, among other matters. These interests include the following:

- the significant commercial relationships and loans among the Company and affiliates of the Purchaser Parties;
- the cash payments to the members of the Special Committee for their Special Committee service, which compensation was not contingent upon the Special Committee's recommendation regarding the Merger;
- the fact that certain executive officers of the Company are anticipated to remain executive officers of the surviving corporation;
- certain severance payments available to certain executive officers of the Company in connection with a termination of employment on or following the Merger;
- our directors and executive officers will receive the Merger Consideration for any shares of common stock that they own;
- that Ms. Ziegler and Messrs. Hagedorn and Miller are affiliated with Scotts Miracle-Gro and that as of January 20, 2021, the Purchaser Parties and their respective affiliates (including Scotts Miracle-Gro) beneficially owned 27,639,294 shares of common stock, representing approximately 80.5% of the outstanding shares of common stock; and
- the continued rights to exculpation, indemnification and advancement of expenses and directors' and officers' liability insurance.

If the Merger Agreement Proposal is approved, the shares held by our directors and executive officers will be treated in the same manner as outstanding shares held by all other stockholders. For more information, see "Special Factors—Interests of the Company's Directors and Executive Officers in the Merger; Potential Conflicts of Interest" beginning on page 72.

Intent to Vote in Favor of the Merger (Page 75)

As of the close of business on January 8, 2021 (the "Record Date"), the directors and executive officers of the Company beneficially owned and were entitled to vote, in the aggregate, 155,437 shares of common stock, or less than 1.0% of the aggregate shares of common stock entitled to vote at the Special Meeting. The directors have informed the Company that they currently intend to vote all of their shares "**FOR**" the Merger Agreement Proposal. Furthermore, although none of Ms. Ziegler and Messrs. Hagedorn and Miller holds voting or investment power over the shares owned by Parent and therefore each disclaims beneficial ownership over such shares, Parent is required to vote all of its shares "**FOR**" the Merger Agreement Proposal. The executive officers have not informed the Company of their intent to vote their shares on the Merger Agreement Proposal. However, the Proxy Holders (as defined in "Questions and Answers" beginning on page 17), who are both executive officers of the Company, intend to vote all of the shares over which they have proxy authority, "**FOR**" the Merger Agreement Proposal.

Parent's Obligation to Vote in Favor of the Merger (Page 75)

The Merger Agreement provides that Parent will vote or cause to be voted any shares of common stock beneficially owned by it or any of its affiliates or with respect to which it or any of its affiliates has the power (by agreement, proxy or otherwise) to cause to be voted in favor of the Merger Agreement Proposal at the Special Meeting and at all adjournments, recesses or postponements thereof. As of January 20, 2021, the Purchaser Parties and their respective affiliates (including Scotts Miracle-Gro) beneficially owned 27,639,294 shares of common stock, representing approximately 80.5% of the outstanding shares of common stock.

Material U.S. Federal Income Tax Consequences of the Merger (Page 75)

For U.S. federal income tax purposes, the receipt of cash by a U.S. Holder (as defined in "Special Factors—Material U.S. Federal Income Tax Consequences of the Merger" beginning on page 75) in exchange for such U.S. Holder's shares in the Merger generally will result in the recognition of gain or loss in an amount measured by the difference, if any, between the amount of cash that such U.S. Holder receives in the Merger (computed as if there were no applicable withholding taxes) and such U.S. Holder's adjusted tax basis in the shares surrendered in the Merger. Gain or loss realized generally must be calculated separately for each block of shares (i.e., shares acquired at the same cost in a single transaction) surrendered pursuant to the Merger. A Non-U.S. Holder (as defined in "Special Factors—Material U.S. Federal Income Tax Consequences of the Merger" beginning on page 75) generally will not be subject to U.S. federal income tax with respect to the exchange of shares for cash in the Merger, unless such Non-U.S. Holder has certain connections to the United States.

The determination of actual tax consequences of the Merger to a holder will depend on the holder's specific situation. For more information, see "Special Factors—Material U.S. Federal Income Tax Consequences of the Merger" beginning on page 75. Holders of shares should consult their own tax advisors concerning the U.S. federal income tax consequences relating to the Merger in light of their particular circumstances and any consequences arising under U.S. federal non-income tax laws or the laws of any state, local or foreign taxing jurisdiction.

Financing of the Merger (Page 78)

The consummation of the Merger is not subject to a financing condition. The Company and Parent estimate that the total amount of funds required to complete the Merger and the transactions contemplated thereby and pay

related fees and expenses will be approximately $20.3 million, consisting of approximately $20.1 million in cash Merger Consideration and approximately $0.2 million in transaction related fees and expenses. Parent expects this amount to be funded through available cash on hand. See "Special Factors—Financing of the Merger" beginning on page 78.

Litigation Relating to the Merger

On January 11, 2021, an alleged stockholder of the Company, Overbrook Capital, LLC, filed a putative class action complaint in the Eighth Judicial District Court, Clark County Nevada, against the Company, each of the members of the Board, Parent and Scotts-Miracle Gro, purportedly in relation to the Company's entry into the Merger Agreement. The complaint asserts claims for breach of fiduciary duty against the defendants. The complaint alleges, among other things, that (i) the directors breached their fiduciary duties in connection with the Merger due to, among other things, the fairness and adequacy of Merger Consideration for the Company's unaffiliated minority stockholders and a lack of certain measures in the Merger Agreement that the complaint alleges would have better protected the interests of Company's unaffiliated minority stockholders, (ii) Parent and Scotts Miracle-Gro (as controlling stockholders) breached their fiduciary duties to the Company's unaffiliated minority stockholders in connection with the Merger due to, among other things, an alleged lack of fairness to the Company's unaffiliated stockholders, both in terms of price and process, and (iii) Parent, Scotts Miracle-Gro and the Company breached their fiduciary duties in connection with the Merger by, among other things, allegedly aiding and abetting the foregoing alleged breaches of fiduciary duty by the directors. The complaint seeks, among other things, in the event the Merger is consummated, an order rescinding it and setting it aside or awarding rescissory damages, and unspecified attorneys' and experts' fees.

On January 12, 2021, an alleged stockholder of the Company, Nicoya Capital, LLC, filed a putative class action complaint in the Eighth Judicial District Court, Clark County Nevada, against each of the members of the Board, James Hagedorn, Chairman and Chief Executive Officer of Scotts Miracle-Gro, Peter Supron, Chief of Staff to the President of Scotts Miracle-Gro, the Company, Merger Sub, Parent and Scotts-Miracle Gro, purportedly in relation to the Company's entry into the Merger Agreement. The complaint asserts a claim for breach of fiduciary duty against the defendants. The complaint alleges, among other things, that (i) Scotts Miracle-Gro, James Hagedorn and Parent (as controlling stockholders) breached their fiduciary duties of loyalty and care to the Company's unaffiliated minority stockholders in connection with the Merger due to, among other things, an alleged lack of fairness to the Company's unaffiliated stockholders, (ii) James Hagedorn, Peter Supron, the Company, Merger Sub and the directors breached their fiduciary duties in connection with the Merger due by, among other things, allegedly aiding and abetting a breach of fiduciary duty via selling the Company for what was alleged to be an unfair price, and (iii) the directors breached their fiduciary duties in connection with the Merger by, among other things, allegedly failing to protect the Company's unaffiliated minority stockholders. The complaint seeks, among other things, an award of damages and unspecified attorneys', accountant's and experts' fees.

Dissenter's Rights (Page 80)

Any stockholder who does not vote (and who does not cause or permit the stockholder's shares to be voted) in favor of the Merger Agreement Proposal will have the right to dissent from the Merger and, in lieu of receiving the Merger Consideration, obtain payment of the fair value (as defined in NRS 92A.320) of the stockholder's shares, but only if (1) the stockholder delivers to the Company, before the vote on the Merger Agreement Proposal is taken at the Special Meeting, written notice of the stockholder's intent to demand payment for the stockholder's shares if the Merger is effectuated, and (2) the stockholder complies with all other applicable requirements of under NRS 92A.300 through NRS 92A.500, inclusive (the "Dissenter's Rights Statutes"), which are summarized in this proxy statement and reproduced in their entirety in Annex C to this proxy statement. If the Company and a former stockholder that remains entitled to and properly asserts

dissenter's rights cannot agree on as to the fair value, the Company must then commence a proceeding in Nevada state district court to determine the fair value, which may be more than, equal to, or less than the Merger Consideration.

A copy of the full text of the Dissenter's Rights Statutes is included as Annex C to this proxy statement. Failure to follow the procedures set forth in the Dissenter's Rights Statutes will result in the forfeiture of dissenter's rights. You are encouraged to read these provisions carefully and in their entirety. Moreover, due to the complexity of the procedures for exercising dissenter's rights, stockholders who are considering exercising such rights are encouraged to seek the advice of legal counsel. Any stockholder who submits a proxy indicating a vote "**FOR**" the Merger Agreement Proposal will waive dissenter's rights unless, prior to the taking of the vote at the Special Meeting, the stockholder (1) revokes the proxy, if revocable, (2) delivers to the Company, before the vote on the Merger Agreement Proposal is taken at the Special Meeting, written notice of the stockholder's intent to demand payment for the stockholder's shares if the Merger is effectuated, and (3) otherwise complies with the Dissenter's Rights Statutes.

If you currently hold your shares in "street name" and wish to avoid loss of rights resulting from the registered owner's failure to follow the mandated procedural steps under the Dissenter's Rights Statutes, prior to the Record Date you may wish to instruct the registered owner of your shares (i.e., your broker, bank, trustee or other nominee) to transfer your security position in such shares to a direct registration system book-entry registered directly in your name on the Company's books with its transfer agent. Please contact your broker, bank, trustee or other nominee for further information.

Anticipated Date of Completion of the Merger (Page 83)

As of the date of this proxy statement, assuming timely satisfaction of necessary closing conditions, including the approval by our stockholders of the Merger Agreement Proposal, the Merger is expected to be completed in the first calendar quarter of 2021. There are no governmental approvals needed to effectuate the Merger or consummate the other transactions contemplated by the Merger Agreement. However, the exact timing of completion of the Merger cannot be predicted because the Merger is subject to the closing conditions described in "The Merger Agreement—Conditions to Completion of the Merger" beginning on page 109, many of which are outside of our control.

The Special Meeting of Stockholders (Page 86)

Date, Time and Place

The Special Meeting will be held on February 23, 2021, at 10:00 a.m., Mountain Time. The Special Meeting is scheduled to be held exclusively online via live webcast and can be accessed by visiting www.virtualshareholdermeeting.com/AERO2021SM, where you will be able to attend the Special Meeting, vote and submit your questions during the Special Meeting. Please note that you will not be able to attend the Special Meeting in person. Please have your 16-digit control number (which is included on your proxy card if you are a stockholder of record of shares of common stock or with your voting instruction card and voting instructions you received from your broker, bank, trustee or other nominee of your shares if you hold your shares of common stock in "street name") to join the Special Meeting. Instructions on how to attend and participate online are also posted online at www.proxyvote.com. We have chosen to hold a virtual rather than an in-person Special Meeting given the current public health implications of the novel coronavirus (COVID-19) and our desire to promote the health and welfare of our directors, officers and stockholders.

Purpose of the Special Meeting

At the Special Meeting, we will ask stockholders to vote on the Merger Agreement Proposal.

Record Date; Shares Entitled to Vote

Holders of the outstanding shares of common stock as of the close of business on January 8, 2021, the Record Date for the Special Meeting, are entitled to notice of, and to vote at, the Special Meeting.

As of the Record Date, there were 34,328,036 shares of our common stock outstanding, of which the Purchaser Parties and their respective affiliates (including Scotts Miracle-Gro) beneficially owned 27,639,294 shares of common stock, representing approximately 80.5% of the outstanding shares of common stock.

Quorum

As of the Record Date, there were 34,328,036 shares of common stock outstanding and entitled to vote at the Special Meeting. A majority of the shares of common stock entitled to vote, represented via the Virtual Special Meeting Website or by proxy, regardless of whether the proxy has authority to vote on the Merger Agreement Proposal, will constitute a quorum at the Special Meeting. Abstentions will be counted as present for the purpose of determining whether a quorum is present, however "broker non-votes" (described in more detail below in "—Voting of Proxies" beginning on page 10), if any, will not be counted as present for the purpose of determining whether a quorum is present at the Special Meeting.

Vote Required

For us to complete the Merger, under NRS 92A.120, holders of a majority of the outstanding shares of common stock at the close of business on the Record Date must vote "**FOR**" the Merger Agreement Proposal. The transaction has not been structured to require the approval of the holders of at least a majority of the shares of common stock beneficially owned by security holders unaffiliated with the Purchaser Parties and their respective affiliates (including Scotts Miracle-Gro and our directors who are affiliated with Scotts Miracle-Gro, to the extent such directors beneficially own any shares of common stock). Furthermore, such approval is not required under Nevada law for us to complete the Merger. As of the Record Date, there were 34,328,036 shares of common stock outstanding, of which the Purchaser Parties and their respective affiliates (including Scotts Miracle-Gro) beneficially owned 27,639,294 shares of common stock, representing approximately 80.5% of the outstanding shares of common stock. Subject to the terms of the Merger Agreement, Parent has agreed to vote all shares of common stock it beneficially owns in favor of the Merger Agreement Proposal. See "Special Factors—Parent's Obligation to Vote in Favor of the Merger" beginning on page 75. The failure of any stockholder to vote their shares, abstentions, and broker non-votes, if any, will have the same effect as a vote "**AGAINST**" the Merger Agreement Proposal.

Each share of common stock is entitled to one vote per share.

Voting of Proxies

Any stockholder of record entitled to vote at the Special Meeting may submit a proxy by returning a signed proxy card by mail in the accompanying prepaid reply envelope or granting a proxy electronically over the Internet or by telephone, or may vote via the Virtual Special Meeting Website at the Special Meeting. If you are a beneficial owner and hold your shares in "street name" through a broker, bank, trustee or other nominee, you should instruct your broker, bank, trustee or other nominee on how you wish to vote your shares using the instructions provided by your broker, bank, trustee or other nominee. Under applicable stock exchange rules, brokers, banks, trustees and other nominees have the discretion to vote on routine matters. The Merger Agreement Proposal is a non-routine matter, and brokers, banks, trustees and other nominees cannot vote on the Merger Agreement Proposal without your instructions. As a result, absent specific instructions from the beneficial owner of such shares, brokers are not empowered to vote those shares, referred to generally as "broker non-votes." Broker non-votes, if any, will not be treated as shares that are present at the Special Meeting for

purposes of determining whether a quorum exists and will have the same effect as votes "**AGAINST**" the Merger Agreement Proposal. Because the Merger Agreement Proposal is a non-routine matter for which brokers do not have discretionary authority to vote, we do not expect any broker non-votes at the Special Meeting. **Therefore, it is important that you cast your vote or instruct your broker, bank, trustee or other nominee on how you wish to vote your shares.**

All shares represented by properly executed proxies received in time for the Special Meeting will be voted at the Special Meeting in the manner specified by the proxy holders. Properly executed proxies that do not contain voting instructions will be voted "**FOR**" the Merger Agreement Proposal.

Shares represented at the Special Meeting but not voted, including shares for which proxies have been received but for which stockholders have abstained, will be treated as present at the Special Meeting for purposes of determining the presence or absence of a quorum for the transaction of all business.

Only shares affirmatively voted for the Merger Agreement Proposal, including properly executed proxies that do not contain specific voting instructions, will be counted "**FOR**" that proposal.

If you abstain from voting, it will have the same effect as a vote "**AGAINST**" the Merger Agreement Proposal.

If you do not execute a proxy card, it will have the same effect as a vote "**AGAINST**" the Merger Agreement Proposal.

Revocability of Proxies

If you are a stockholder of record on the Record Date, you may change your vote or revoke your proxy at any time before it is voted at the Special Meeting by: (i) signing another proxy card with a later date and returning it to us prior to the Special Meeting; (ii) submitting a new proxy electronically over the Internet or by telephone after the date of the earlier submitted proxy; (iii) delivering a written notice of revocation to our Secretary at 5405 Spine Road, Boulder, Colorado 80301; or (iv) attending the Special Meeting and voting via the Virtual Special Meeting Website (however, simply attending the Special Meeting will not cause your proxy to be revoked).

If you hold your shares in "street name," you should contact your broker, bank, trustee or other nominee for instructions regarding how to change your vote. You may also vote at the Special Meeting via the Virtual Special Meeting Website if you obtain a valid proxy from your broker, bank, trustee or other nominee.

The Merger Agreement (Page 92)

A summary of the material provisions of the Merger Agreement, which is attached as Annex A to this proxy statement and incorporated by reference herein, is described under "The Merger Agreement" beginning on page 92. Among other things, the Merger Agreement includes the following terms:

Acquisition Proposals; Change of Recommendation (Page 101)

Under the Merger Agreement, except as provided therein, the Company must not, and must direct its directors, employees (including officers) and representatives not to, directly or indirectly:

- initiate, solicit, propose or knowingly encourage or otherwise knowingly facilitate any inquiry or the making of any proposal or offer that constitutes, or would reasonably be expected to lead to, an Acquisition Proposal (as defined in "The Merger Agreement—Covenants and Agreements— Acquisition Proposals; Change of Recommendation" beginning on page 101);

- engage in, continue or otherwise participate in any discussions or negotiations relating to any Acquisition Proposal or any inquiry, proposal or offer that would reasonably be expected to lead to an Acquisition Proposal;
- provide any information or data concerning the Company or access to the Company's properties, books and records to any person in connection with any Acquisition Proposal or any inquiry, proposal or offer that would reasonably be expected to lead to an Acquisition Proposal;
- enter into any Alternative Acquisition Agreement (as defined in "The Merger Agreement—Covenants and Agreements— Acquisition Proposals; Change of Recommendation" beginning on page 101);
- take any action to exempt any third party from the restrictions on "business combinations" or acquisitions or voting of shares of common stock under any applicable takeover statutes or otherwise cause such restrictions to not apply;
- grant any waiver, amendment or release under any standstill or confidentiality agreement concerning an Acquisition Proposal; or
- agree, authorize or commit to do any of the foregoing.

However, subject to certain requirements regarding confidentiality and providing certain notifications, information and materials to Parent, prior to obtaining the approval of the Merger Agreement by the holders of a majority of the outstanding shares of common stock entitled to vote on such matter at the Special Meeting (the "Requisite Company Vote"), in response to an unsolicited, *bona fide* written Acquisition Proposal, the Company (only through the Special Committee and its representatives) may:

- provide non-public Company and other information and data concerning the Company and access to the Company's properties, books and records to the person who made such Acquisition Proposal, subject to certain exceptions;
- engage or otherwise participate in any discussions or negotiations with any such person who made such Acquisition Proposal regarding such Acquisition Proposal (including to request clarification of the terms and conditions of such Acquisition Proposal); and
- if, and only if, prior to taking any action described in the first two bullets above, the Special Committee determines in good faith, after consultation with outside legal counsel that (i) based on the information then available and after consultation with its financial advisor, that such Acquisition Proposal either constitutes a Superior Proposal (as defined in "The Merger Agreement—Covenants and Agreements— Acquisition Proposals; Change of Recommendation" beginning on page 101) or is reasonably expected to result in a Superior Proposal and (ii) based on the information then available (including the terms and conditions of such Acquisition Proposal and the Merger Agreement), the failure to take such action would violate the fiduciary duties of the Company's directors constituting the Special Committee under applicable law.

Parent has advised the Special Committee that it will not vote any shares of common stock beneficially owned by the Purchaser Parties and their respective affiliates (including Scotts Miracle-Gro) in favor of approval of any Acquisition Proposal. As of the Record Date, there were 34,328,036 shares of common stock outstanding, of which the Purchaser Parties and their respective affiliates (including Scotts Miracle-Gro) beneficially owned 27,639,294 shares of common stock, representing approximately 80.5% of the outstanding shares of common stock, which is sufficient to disapprove any Acquisition Proposal. Therefore, the Company believes it is unlikely that any Acquisition Proposal will be received by the Company.

Except as provided in the Merger Agreement, none of the Board, the Special Committee or any other committee of the Board may:

- withhold, withdraw, qualify or modify (or publicly propose or resolve to withhold, withdraw, qualify or modify) the Board's recommendation that the holders of shares of common stock vote affirmatively at

the Special Meeting to approve the Merger Agreement and the Merger (the "Company Recommendation"), in a manner adverse to Parent;

- fail to include the Company Recommendation in the Company's proxy statement relating to the Special Meeting;
- at any time following the receipt of an Acquisition Proposal (other than a tender or exchange offer as contemplated by the following bullet that has been publicly disclosed), fail to reaffirm its approval or recommendation of the Merger Agreement and the Merger as promptly as practicable (but in any event within five business days) after receipt of any written request to do so from Parent;
- fail to recommend rejection of any tender offer or exchange offer for outstanding shares of common stock that has been commenced by any person (other than by Parent or an affiliate of Parent) on or prior to the 10th business day after such commencement;
- approve, authorize or recommend (or determine to approve, authorize or recommend) or publicly declare advisable any Acquisition Proposal or other proposal that would be reasonably expected to lead to an Acquisition Proposal or any Alternative Acquisition Agreement; or
- agree, authorize or commit to do any of the foregoing (any such action, a "Change of Recommendation").

However, prior to obtaining the Requisite Company Vote, the Special Committee may make a Change of Recommendation and the Company may terminate the Merger Agreement if:

- an unsolicited, *bona fide* written Acquisition Proposal that was not obtained in breach of the Merger Agreement is received by the Company and not withdrawn; and
- the Special Committee determines in good faith, after consultation with outside legal counsel and its financial advisor, that such Acquisition Proposal constitutes a Superior Proposal; provided, however, that (i) a Change of Recommendation and termination by the Company of the Merger Agreement may not be made unless and until prior to taking such action, the Company gives Parent advance written notice that the Special Committee intends to convene a meeting to consider or take any other action with respect to making such Change in Recommendation, together with a reasonably detailed description of the Superior Proposal, at the least four business days in advance of convening such meeting of the Special Committee or taking such other action (the "Superior Proposal Notice Period"); (ii) during the pendency of the Superior Proposal Notice Period, if requested by Parent, the Special Committee and its representatives negotiate in good faith with Parent and its representatives to revise the Merger Agreement (in the form of a proposed binding amendment) to enable the Special Committee to determine in good faith, after consultation with its outside legal counsel and its financial advisor, that after giving effect to such modifications, such Acquisition Proposal would no longer constitute a Superior Proposal; and (iii) at the expiration of the Superior Proposal Notice Period, the Special Committee, after having taken into account the modifications to the Merger Agreement proposed by Parent, has determined in good faith, after consultation with outside legal counsel and its financial advisor, that a failure to make a Change of Recommendation and terminate the Merger Agreement and abandon the Merger would violate the fiduciary duties of the Company's directors constituting the Special Committee directors under applicable law.

Governmental and Regulatory Approvals (Page 79)

There are no governmental approvals needed to effectuate the Merger or consummate the other transactions contemplated by the Merger Agreement.

Subject to certain exceptions, the Company and Parent are required to cooperate with each other and use their respective reasonable best efforts to take or cause to be taken all actions necessary or advisable on its part

under the Merger Agreement and applicable laws to consummate the transactions contemplated by the Merger Agreement as promptly as practicable after the date of the Merger Agreement, including preparing and filing, as promptly as practicable after the date of the Merger Agreement, documentation to effect all necessary notices, reports, consents, registrations, approvals, permits, authorizations, expirations of waiting periods and other filings and to obtain, as promptly as practicable after the date of the Merger Agreement, all consents, registrations, approvals, permits and authorizations necessary or advisable to be obtained from any governmental entity in order to consummate the transactions contemplated by the Merger Agreement.

Conditions to Completion of the Merger (Page 109)

The respective obligations of each party to consummate the Merger are subject to the satisfaction or waiver of the following customary conditions:

- the Requisite Company Vote having been obtained at the Special Meeting;
- the absence of certain orders or laws enjoining, preventing or otherwise prohibiting, restraining or making unlawful the consummation of the Merger and the other transactions contemplated by the Merger Agreement; and
- the obtainment or occurrence, as the case may be, of all authorizations, consents, orders, declarations or approvals of, notifications to or filings or registrations with, or terminations or expirations of waiting periods imposed by governmental entities in connection with the Merger without the imposition of any material condition thereto, subject to certain exceptions.

The Merger Agreement provides that the obligations of Parent and Merger Sub to effect the Merger are also subject to the satisfaction or waiver by Parent at or prior to the Effective Time of the following conditions:

- each of the representations and warranties made by us in the Merger Agreement is true and correct at and as of the date of the Merger Agreement and as of the date on which the closing of the transactions contemplated by the Merger Agreement (the "Closing") actually occurs (the "Closing Date"), subject to certain exceptions (including material adverse effect qualifications regarding their accuracy and matters contained in any confidential disclosure schedule delivered to Parent by the Company prior to or concurrently with the execution and delivery of the Merger Agreement (the "Company Disclosure Schedule"));
- we have performed or complied in all material respects with our agreements and covenants required by the Merger Agreement to be performed or complied with by us on or prior to the Effective Time;
- since the date of the Merger Agreement, there has not occurred any event, change, development, circumstance, fact or effect that has had or would reasonably be expected to have a Material Adverse Effect (as defined in "The Merger Agreement—Material Adverse Effect Definitions" beginning on page 97);
- we have delivered to Parent a certificate signed on our behalf by our Chief Executive Officer certifying that conditions set forth in the foregoing three bullets have been satisfied; and
- we have delivered certain Foreign Investment in Real Property Tax Act certifications and notifications to Parent and the Internal Revenue Service, as applicable.

The Merger Agreement provides that the obligation of the Company to effect the Merger is also subject to the satisfaction or waiver by the Company at or prior to the Effective Time of the following conditions:

- each of the representations and warranties of Parent and Merger Sub in the Merger Agreement is true and correct at and as of the date of the Merger Agreement and as of the Closing Date, subject to certain exceptions (including material adverse effect qualifications regarding their accuracy);

- each of Parent and Merger Sub has performed or complied in all material respects with its agreements and covenants required by the Merger Agreement to be performed or complied with by it on or prior to the Effective Time; and
- Parent has delivered to us a certificate signed on behalf of Parent and Merger Sub by an executive officer of Merger Sub certifying that the conditions set forth in the foregoing two bullets have been satisfied.

For more information, please see "The Merger Agreement—Conditions to Completion of the Merger" beginning on page 109.

Termination of the Merger Agreement (Page 111)

The Merger Agreement may be terminated and the transactions contemplated by the Merger Agreement may be abandoned at any time prior to the Effective Time, whether before or after the Requisite Company Vote has been obtained, by mutual written consent of the Company and Parent.

The Merger Agreement may be terminated and the transactions contemplated by the Merger Agreement may be abandoned at any time prior to the Effective Time, by action of either the Company or Parent, in each case, subject to certain exceptions, if:

- the Merger is not consummated by 5:00 p.m. local time on March 31, 2021 (the "Outside Date"); or
- any order permanently restraining, enjoining or otherwise prohibiting consummation of the Merger has become final and non-appealable.

The Merger Agreement may be terminated and the transactions contemplated by this Agreement may be abandoned by the Company, in each case, subject to certain exceptions, if:

- either Parent or Merger Sub breaches or fails to perform in any material respect any of its representations, warranties, covenants or agreements in the Merger Agreement, or if any representation or warranty of Parent or Merger in the Merger Agreement has become untrue following the date of the Merger Agreement, in either case, such that the conditions to our obligation to effect the Merger would not be satisfied and such breach is either not curable prior to the Outside Date or has not been cured within the earlier of (i) 30 days of written notice thereof and (ii) three business days prior to the Outside Date; or
- prior to the time the Requisite Company Vote is obtained, following a Change of Recommendation, but only if (i) we are not then in breach of our non-solicitation obligations under the Merger Agreement and (ii) such Change of Recommendation is made in accordance with the applicable terms and conditions of the Merger Agreement.

The Merger Agreement may be terminated and the transactions contemplated by the Merger Agreement may be abandoned by Parent, if:

- subject to certain exceptions, we have breached any representation, warranty, covenant or agreement made by us in the Merger Agreement, or if any representation or warranty made by us has become untrue, in each case, such that the conditions to Parent's obligation to effect the Merger would not be satisfied and such breach is either not curable prior to the Outside Date or has not been cured within the earlier of (i) 30 days of written notice thereof and (ii) three business days prior to the Outside Date; or
- following a Change of Recommendation, if the Requisite Company Vote has not yet been obtained at the Special Meeting.

Specific Performance (Page 112)

In the event of breach or violation or threatened breach or violation of the provisions of the Merger Agreement, the non-breaching party will be entitled (in addition to any other remedy that may be available to it whether in law or equity, including monetary damages) to specific performance and the issuance of injunctive and other equitable relief without the necessity of proving the inadequacy of money damages as a remedy.

Market Price of the Company's Common Stock and Dividends (Page 117)

The closing price of our common stock on the OTCQB, on November 11, 2020, the last trading day prior to the announcement of the Merger, was $2.82 per share. On January 21, 2021, the most recent practicable date before this proxy statement was mailed to our stockholders, the closing price of our common stock on the OTCQB was $3.02 per share. You are encouraged to obtain current market quotations for our common stock in connection with voting your shares.

On November 29, 2016, the Board declared a cash distribution of $1.21 per share of common stock as a special one-time dividend based on Parent's exercise of the Warrant (as defined in "Other Important Information Regarding the Purchaser Parties and Scotts Miracle-Gro—Significant Past Transactions and Contracts" beginning on page 126). The dividend was paid on January 3, 2017 to stockholders of record on December 20, 2016. Otherwise, we have never declared or paid dividends or distributions on our common stock. We have agreed in the Merger Agreement not to declare, set aside, make or pay any dividend or other distribution, payable in cash, stock, property or otherwise on our common stock.

Deregistration of AeroGrow Common Stock (Page 84)

If the Merger is completed, our common stock will no longer be quoted on the OTCQB and will be deregistered under the Exchange Act. Thereafter, we will no longer file periodic reports with the SEC.

Where You Can Find More Information (Page 136)

You can find more information about us in the periodic reports and other information we file with the SEC. The information is available, free of charge, on the SEC's website at *www.sec.gov*. In addition, you may obtain free copies of the documents we file with the SEC by going to our Internet website at *www.aerogrow.com*. Our Internet website address is provided as an inactive textual reference only. The information provided on our Internet website is not part of this proxy statement and, therefore, is not incorporated herein by reference. For a more detailed description of the additional information available, see "Where You Can Find More Information" beginning on page 136.

QUESTIONS AND ANSWERS

The following questions and answers address some commonly asked questions regarding the Merger, the Merger Agreement and the Special Meeting. These questions and answers may not address all questions that may be important to you. We encourage you to read carefully the more detailed information contained elsewhere in this proxy statement, the annexes to this proxy statement and the documents we refer to, or incorporate by reference, in this proxy statement. You may obtain the information incorporated by reference in this proxy statement without charge by following the instructions in "Where You Can Find More Information" beginning on page 136.

Q: Why am I receiving this proxy statement and proxy card or voting instruction form?

A: On November 11, 2020, the Company entered into the Merger Agreement providing for the merger of Merger Sub, a direct, wholly-owned subsidiary of Parent, with and into the Company, with the Company surviving the Merger as a direct, wholly-owned subsidiary of Parent and an indirect, wholly-owned subsidiary of Scotts Miracle-Gro. You are receiving this proxy statement and form of proxy card or voting instruction form in connection with the solicitation of proxies by the Board in favor of the Merger Agreement Proposal. This proxy statement describes the Merger Agreement Proposal on which we urge you to vote and is intended to assist you in deciding how to vote your shares with respect to the Merger Agreement Proposal.

Q: What is the proposed transaction?

A: The proposed transaction is the merger of Merger Sub with and into the Company pursuant to the Merger Agreement. Following the Effective Time, the Company would be privately held as a direct, wholly-owned subsidiary of Parent and an indirect, wholly-owned subsidiary of Scotts Miracle-Gro.

Q: What will I receive in the Merger?

A: If the Merger is completed, you will be entitled to receive $3.00 in cash, without interest and subject to any required withholding of taxes, for each share of our common stock that you own (unless you have properly preserved, demanded and perfected your dissenter's rights pursuant to the Dissenter's Rights Statutes). For example, if you own 100 shares of common stock at the Effective Time and do not assert dissenter's rights, you will be entitled to receive $300 in cash in exchange for your shares of common stock, without interest and subject to any required withholding of taxes. You will not be entitled to receive shares in the surviving corporation or in Parent.

Q: What will the holders of the Company's equity awards receive in the Merger?

A: The Company has no outstanding equity awards.

Q: Where and when is the Special Meeting?

A: The Special Meeting will take place on February 23, 2021, at 10:00 a.m., Mountain Time. The Special Meeting is scheduled to be held exclusively online. There will not be a physical meeting location. The Special Meeting can be accessed by visiting www.virtualshareholdermeeting.com/AERO2021SM, where you will be able to attend the Special Meeting, vote and submit your questions during the Special Meeting. We encourage you to allow ample time for online check-in, which will open at 9:45 a.m., Mountain Time. Please note that you will not be able to attend the Special Meeting in person. We have chosen to hold a virtual rather than an in-person Special Meeting given the current public health implications of the novel coronavirus (COVID-19) and our desire to promote the health and welfare of our directors, officers and stockholders.

Q: May I attend the Special Meeting and vote via the Virtual Special Meeting Website? What do I need in order to be able to attend the Special Meeting online?

A: Yes. All stockholders of record as of the Record Date or their duly authorized proxies may attend the Special Meeting and vote via the Virtual Special Meeting Website. Beneficial owners of shares are invited to attend the Special Meeting via the Virtual Special Meeting Website.

The Special Meeting will be held via live webcast only. Any stockholder can attend the Special Meeting live online at www.virtualshareholdermeeting.com/AERO2021SM. The webcast will start at 10:00 a.m., Mountain Time on February 23, 2021. Stockholders may vote and submit questions while attending the Special Meeting online. In order to be able to enter the Special Meeting, you will need the 16-digit control number, which is included on your proxy card if you are a stockholder of record of shares of common stock or included with your voting instruction card and voting instructions you received from your broker, bank, trustee or other nominee of your shares if you hold your shares of common stock in "street name." Instructions on how to attend and participate online are also posted online at www.proxyvote.com.

Even if you plan to attend the Special Meeting via the Virtual Special Meeting Website, to ensure that your shares will be represented at the Special Meeting, we encourage you to sign, date and return the enclosed proxy card in the accompanying prepaid reply envelope or grant your proxy prior to the Special Meeting electronically over the Internet at www.proxyvote.com or by telephone at 1-800-690-6903. If you attend the Special Meeting and vote via the Virtual Special Meeting Website, your vote will revoke any proxy previously submitted by you with respect to the shares you vote via the Virtual Special Meeting Website.

If you hold your shares in "street name," you should instruct your broker, bank, trustee or other nominee how to vote your shares in accordance with the voting instruction form that you will receive from your broker, bank, trustee or other nominee. Your broker, bank, trustee or other nominee cannot vote on the Merger Agreement Proposal without your instructions. If you hold your shares in "street name," you may not vote your shares via the Virtual Special Meeting Website at the Special Meeting unless you obtain a valid proxy from your broker, bank, trustee or other nominee.

Q: Who is entitled to vote at the Special Meeting?

A: Holders of the outstanding shares of common stock as of the Record Date are entitled to notice of, and to vote at, the Special Meeting. Each share of common stock is entitled to one vote per share.

Q: What matter will be voted on at the Special Meeting?

A: You will be asked to consider and vote on a proposal to approve the Merger Agreement and the transactions contemplated thereby (including the Merger).

Q: What vote of our stockholders is required to approve the Merger Agreement Proposal?

A: For us to complete the Merger, under NRS 92A.120, holders of a majority of the outstanding shares of common stock at the close of business on the Record Date must vote "**FOR**" the Merger Agreement Proposal. The transaction has not been structured to require the approval of the holders of at least a majority of the shares of common stock beneficially owned by security holders unaffiliated with the Purchaser Parties and their respective affiliates (including Scotts Miracle-Gro and our directors who are affiliated with Scotts Miracle-Gro, to the extent such directors beneficially own any shares of common stock). Furthermore, such approval is not required under Nevada law for us to complete the Merger. As of the Record Date, there were 34,328,036 shares of common stock outstanding, of which the Purchaser Parties and their respective affiliates (including Scotts Miracle-Gro) beneficially owned 27,639,294 shares of common stock, representing approximately 80.5% of the outstanding shares of common stock. Subject to the terms of the Merger Agreement, Parent has agreed to vote all shares of common stock it beneficially owns in favor of the Merger Agreement Proposal. See "Special Factors—Parent's Obligation to Vote in Favor of the Merger" beginning on page 75. In addition, under the Merger Agreement, the receipt of approval of the Merger Agreement Proposal is a condition to the consummation of the Merger.

A failure to vote your shares, an abstention from voting or a broker non-vote will have the same effect as a vote "**AGAINST**" the Merger Agreement Proposal. Because the Merger Agreement Proposal is a non-routine matter for which brokers do not have discretionary authority to vote, we do not expect any broker non-votes at the Special Meeting.

Q: How will Parent vote the shares of common stock it holds?

A: Subject to the terms of the Merger Agreement, Parent has agreed to vote all shares of common stock it beneficially owns in favor of the Merger Agreement Proposal. As of January 20, 2021, there were 34,328,036 shares of common stock outstanding, of which the Purchaser Parties and their respective affiliates (including Scotts Miracle-Gro) beneficially owned 27,639,294 shares of common stock, representing approximately 80.5% of the outstanding shares of common stock.

Q: Why am I not being asked to cast a vote to approve, on a non-binding, advisory basis, any agreements or understandings and compensation that will or may be paid by the Company to its named executive officers in connection with the Merger?

A: SEC rules would require us to seek a non-binding, advisory vote to approve any agreements or understandings and compensation that will or may be paid by us to our named executive officers in connection with the Merger. However, consummation of the Merger will not trigger any such compensation because our named executive officers do not have any outstanding equity awards, the Employment Agreements (as defined in "Special Factors—Interests of the Company's Directors and Executive Officers in the Merger—Employment Agreements" beginning on page 73) do not provide for any payments upon a change in control of the Company and any amounts payable pursuant to the Retention Memorandum and the Severance Policy (each as defined in "Special Factors—Interests of the Company's Directors and Executive Officers in the Merger—Retention Program and Severance Policy" beginning on page 74) are not based on and do not otherwise relate to the Merger. Accordingly, there is no compensation that will or may be paid by us to our named executive officers in connection with the Merger and, therefore, we are not asking our stockholders to approve any such compensation.

Q: How many votes am I entitled to cast for each share that I own?

A: Each share of common stock is entitled to one vote per share.

Q: What is a quorum?

A: A quorum is necessary to hold a valid Special Meeting. A quorum will be present if a majority of the shares of common stock entitled to vote at the Special Meeting are represented via the Virtual Special Meeting Website or by proxy, regardless of whether the proxy has authority to vote on the Merger Agreement Proposal. If a quorum is not present at the Special Meeting, the Special Meeting may be adjourned or postponed from time to time until a quorum is obtained.

If you submit a proxy but abstain or fail to provide voting instructions on the proposal listed on the proxy card, your shares will be counted for the purpose of determining whether a quorum is present at the Special Meeting.

If your shares are held in "street name" by your broker, bank, trustee or other nominee and you do not tell your broker, bank, trustee or other nominee how to vote your shares, these shares will not be counted for purposes of determining whether a quorum is present for the transaction of business at the Special Meeting.

Q: How does the Board recommend that I vote?

A: The Board unanimously recommends that our stockholders vote "**FOR**" the Merger Agreement Proposal.

Q: Why is the Board recommending that I vote "FOR" the Merger Agreement Proposal?

A: The Special Committee, consisting solely of independent and disinterested directors, evaluated the Merger Agreement and the Merger in consultation with the Special Committee's legal and financial advisors and unanimously recommended the Merger Agreement and the Merger to the Board. The Special Committee unanimously (i) determined that the Merger Agreement and the transactions contemplated thereby (including the Merger) were fair to, and in the best interests of, the Company and the holders of shares of common stock (including unaffiliated security holders, but excluding Parent and the Company), and (ii) recommended that the Board adopt and approve the Merger Agreement and approve the Merger. The Board (including Ms. Ziegler and Messrs. Hagedorn and Miller, who reminded the Board of their affiliation with Scotts Miracle-Gro), on behalf of the Company, based on the recommendation of the Special Committee and after consultation with the Company's legal and financial advisors, unanimously (i) adopted and approved the Merger Agreement and the transactions contemplated by the Merger Agreement (including the Merger), (ii) determined that the Merger Agreement and the transactions contemplated by the Merger Agreement (including the Merger) were fair to, and in the best interests of, the Company and the holders of shares of common stock (including unaffiliated security holders, but excluding Parent and the Company), (iii) directed that the Merger Agreement and the Merger be submitted for approval by a vote of the holders of common stock at the Special Meeting and (iv) recommended that the holders of common stock affirmatively vote to approve the Merger Agreement and the Merger. For a discussion of the material factors considered by the Board in reaching its conclusions, please refer to "Special Factors—Recommendation of the Board and Reasons for the Merger; Fairness of the Merger" beginning on page 43.

Q: What effects will the Merger have on the Company?

A: Our common stock is currently registered under the Exchange Act and is quoted on the OTCQB under the symbol "AERO." As a result of the Merger, the Company will cease to be a publicly traded company and will be directly, wholly-owned by Parent and indirectly wholly-owned by Scotts Miracle-Gro. Following the consummation of the Merger, the registration of our common stock and our reporting obligations under the Exchange Act will be terminated. In addition, upon the consummation of the Merger, our common stock will no longer be listed on any stock exchange or quotation system, including OTCQB.

Q: What happens if the Merger is not consummated?

A: If the Merger Agreement Proposal is not approved by the required vote of our stockholders, or if the Merger is not consummated for any other reason, our stockholders will not receive any payment for their shares in connection with the Merger. Instead, we will remain an independent public company and shares of our common stock will continue to be listed and traded on the OTCQB and registered under the Exchange Act and we will continue to file periodic and current reports with the SEC. In addition, if the Merger is not completed, we expect that management will operate the business in a manner similar to that in which it is being operated today and that stockholders will continue to be subject to the same risks and opportunities to which they are currently subject, including, among other things, the risks described in the risk factors included in our filings with the SEC, including our Annual Report on Form 10-K for the fiscal year ended March 31, 2020, filed with the SEC on June 23, 2020, which is incorporated by reference herein, as updated by our subsequent filings with the SEC.

Furthermore, depending on the circumstances that caused the Merger not to be completed, the price of our common stock may decline significantly, and if that were to occur, it is uncertain when, if ever, the price of our common stock would return to the price at which it traded as of the date of this proxy statement or reach the price level of the Merger Consideration.

Accordingly, if the Merger is not completed, there can be no assurance as to the effect of these risks and opportunities on the future value of your shares. If the Merger is not completed, the Board will continue to evaluate and review our business operations, strategic direction and capitalization, among other things, and will make such changes, if any, as are deemed appropriate. If the Merger Agreement Proposal is not

approved by stockholders or if the Merger is not completed for any other reason, there can be no assurance that any other transaction acceptable to the Board will be offered or that our business, prospects or results of operations will not be adversely impacted.

Q: What do I need to do now? How do I vote my shares?

A: We urge you to read this proxy statement carefully, including its annexes and the documents referred to, or incorporated by reference, in this proxy statement, and to consider how the Merger affects you. If you are a stockholder of record (*i.e.*, if your shares are registered in your name with EQ Shareowner Services, our transfer agent), there are four ways to vote:

- by signing, dating and returning the enclosed proxy card in the accompanying prepaid reply envelope;
- by visiting the Internet at the address on your proxy card;
- by calling toll-free (within the U.S. or Canada) the phone number on your proxy card; or
- by attending the Special Meeting and voting via the Virtual Special Meeting Website (however, simply attending the Special Meeting will not cause your proxy to be revoked).

A 16-digit control number, located on your proxy card, is designed to verify your identity and confirm that your voting instructions have been properly recorded when voting electronically over the Internet or by telephone. Please be aware that, although there is no charge for voting your shares, if you vote electronically over the Internet or by telephone, you may incur costs such as Internet access and telephone charges for which you will be responsible.

To vote your shares during the Special Meeting, click on the vote button provided on the screen and follow the instructions provided. If you encounter any difficulties accessing the Special Meeting during the check-in or Special Meeting time, please call the technical support number that will be posted on the log in page.

Even if you plan to attend the Special Meeting via the Virtual Special Meeting Website, you are strongly encouraged to vote your shares by proxy. If you are a record holder or if you obtain a valid proxy to vote shares that you beneficially own, you may still vote your shares at the Special Meeting via the Virtual Special Meeting Website even if you have previously voted by proxy. If you are present at the Special Meeting and vote via the Virtual Special Meeting Website, your previous vote by proxy will not be counted.

If your shares are held in "street name" through a broker, bank, trustee or other nominee, you may vote through your broker, bank, trustee or other nominee by completing and returning the voting form provided by your broker, bank, trustee or other nominee, or, if such a service is provided by your broker, bank, trustee or other nominee, electronically over the Internet or by telephone. To vote over the Internet or by telephone through your broker, bank, trustee or other nominee, you should follow the instructions on the voting form provided by your broker, bank, trustee or other nominee. Your broker, bank, trustee or other nominee cannot vote on the Merger Agreement Proposal without your instructions. If you hold your shares in "street name," you may not vote your shares at the Special Meeting via the Virtual Special Meeting Website unless you obtain a valid proxy from your broker, bank, trustee or other nominee.

Q: What happens if I do not vote?

A: The vote on the Merger Agreement Proposal is based on the total number of outstanding shares of common stock entitled to vote at the Special Meeting as of the Record Date, not just the shares that are voted. If you do not vote, it will have the same effect as a vote "**AGAINST**" the Merger Agreement Proposal.

Q: Should I send in my stock certificates or other evidence of ownership now?

A: No. If you hold your shares in certificated form and in your name as a stockholder of record, then shortly after the Merger is completed, you will receive a letter of transmittal from the paying agent for the Merger with detailed written instructions for exchanging your shares for the Merger Consideration. If your shares are held in "street name" by your broker, bank, trustee or other nominee, you may receive instructions from your broker, bank, trustee or other nominee as to what action, if any, you need to take to effect the surrender of your "street name" shares in exchange for the Merger Consideration. Do not send in your certificates, if any, now or with your proxy card.

Q: I hold my shares in certificated form but do not know where my stock certificate is—how will I get the Merger Consideration for my shares?

A: If the Merger is completed, the transmittal materials you will receive after the completion of the Merger will include the procedures that you must follow if you cannot locate your stock certificate, including signing an affidavit attesting to the loss of your stock certificate. The paying agent may also require that you provide a bond in customary amount or an indemnity agreement to cover any potential loss.

Q: What happens if I sell my shares before completion of the Merger?

A: If you transfer your shares, you will have transferred your right to receive the Merger Consideration in the Merger. In order to receive the Merger Consideration, you must hold your shares through completion of the Merger.

The Record Date for stockholders entitled to vote at the Special Meeting is earlier than the consummation of the Merger. If you transfer your shares after the Record Date but before the closing of the Merger, you will have transferred your right to receive the Merger Consideration in the Merger, but retained the right to vote at the Special Meeting.

Q: Am I entitled to exercise dissenter's rights instead of receiving the Merger Consideration for my shares?

A: Yes. Under Nevada law, holders of common stock are entitled to assert dissenter's rights in connection with the Merger, but only if they comply with all requirements of the Dissenter's Rights Statutes, which are summarized in this proxy statement. Any stockholder who does not vote (and who does not cause or permit the stockholder's shares to be voted) in favor of the Merger Agreement Proposal will have the right to dissent from the Merger and, in lieu of receiving the Merger Consideration, obtain payment of the fair value (as defined in NRS 92A.320) of the stockholder's shares, but only if (1) the stockholder delivers to the Company, before the vote on the Merger Agreement Proposal is taken at the Special Meeting, written notice of the stockholder's intent to demand payment for the stockholder's shares if the Merger is effectuated, and (2) the stockholder complies with all other applicable requirements of under the Dissenter's Rights Statutes. If the Company and a former stockholder that remains entitled to and properly asserts dissenter's rights cannot agree on as to the fair value, the Company must then commence a proceeding in Nevada state district court to determine the fair value, which may be more than, equal to, or less than the Merger Consideration. A copy of the full text of the Dissenter's Rights Statutes is included as Annex C to this proxy statement. Failure to follow the procedures set forth in the Dissenter's Rights Statutes will result in the forfeiture of dissenter's rights. You are encouraged to read these provisions carefully and in their entirety. Moreover, due to the complexity of the procedures for exercising dissenter's rights, stockholders who are considering exercising such rights are encouraged to seek the advice of legal counsel. Any stockholder who submits a proxy indicating a vote "**FOR**" the Merger Agreement Proposal will waive dissenter's rights unless, prior to the taking of the vote at the Special Meeting, the stockholder (1) revokes the proxy, if revocable, (2) delivers to the Company, before the vote on the Merger Agreement Proposal is taken at the Special Meeting, written notice of the stockholder's intent to demand payment for the stockholder's shares if the Merger is effectuated, and (3) otherwise complies with the Dissenter's Rights Statutes. Failure to follow

exactly the procedures specified under the Dissenter's Rights Statutes will result in the forfeiture of dissenter's rights. Because of the complexity of the Nevada law relating to dissenter's rights, if you are considering exercising your dissenter's rights, we encourage you to seek the advice of your own legal counsel. For more information, see "Special Factors—Dissenter's Rights" beginning on page 80. In addition, a copy of the full text of the Dissenter's Rights Statutes is attached as Annex C to this proxy statement. You are encouraged to read these provisions carefully and in their entirety.

Q: What is the difference between holding shares as a stockholder of record and as a beneficial owner?

A: If your shares are registered directly in your name with our transfer agent, EQ Shareowner Services, you are considered, with respect to those shares, to be the "stockholder of record." In this case, this proxy statement and your proxy card have been sent directly to you by the Company.

If your shares are held through a broker, bank, trustee or other nominee, you are considered the "beneficial owner" of shares held in "street name." In that case, this proxy statement has been forwarded to you by your broker, bank, trustee or other nominee who is considered, with respect to those shares, to be the stockholder of record. As the beneficial owner, you have the right to direct your broker, bank, trustee or other nominee how to vote your shares by following their instructions for voting. You are also invited to attend the Special Meeting via the Virtual Special Meeting Website. However, because you are not the stockholder of record, you may not vote your shares at the Special Meeting via the Virtual Special Meeting Website unless you obtain a valid proxy from your broker, bank, trustee or other nominee.

Q: If my broker holds my shares in "street name," will my broker vote my shares for me?

A: No. Your broker, bank, trustee or other nominee is permitted to vote your shares on the Merger Agreement Proposal only if you instruct your broker, bank, trustee or other nominee how to vote. You should follow the procedures provided by your broker, bank, trustee or other nominee to vote your shares. Without instructions, your shares will not be voted on the Merger Agreement Proposal, which will have the same effect as a vote "**AGAINST**" the Merger Agreement Proposal.

Q: What is a proxy?

A: A proxy is your legal designation of another person, which we refer to as a "proxy holder," to vote your shares. The written document describing the matter to be considered and voted on at the Special Meeting is called a "proxy statement." The document used to designate a proxy to vote your shares is called a "proxy card." J. Michael Wolfe, our President and Chief Executive Officer, and Grey H. Gibbs, our Senior Vice President of Finance and Administration, are the proxy holders for the Special Meeting, with full power of substitution (together, the "Proxy Holders").

Q: Can I revoke my proxy?

A: Yes. You can revoke your proxy at any time before the vote is taken at the Special Meeting. If you are a stockholder of record, you may revoke your proxy by notifying the Company's Secretary in writing at 5405 Spine Road, Boulder, Colorado 80301, or by submitting a new proxy by telephone, the Internet or mail, in each case, dated after the date of the proxy being revoked. In addition, you may revoke your proxy by attending the Special Meeting and voting via the Virtual Special Meeting Website (however, simply attending the Special Meeting will not cause your proxy to be revoked). Please note that if you hold your shares in "street name" and you have instructed a broker, bank, trustee or other nominee to vote your shares, the above-described options for revoking your voting instructions do not apply, and instead you must follow the instructions received from your broker, bank, trustee or other nominee to revoke your voting instructions.

Q: If a stockholder gives a proxy, how are the shares voted?

A: Regardless of the method you use to vote, the Proxy Holders will vote your shares in the way that you indicate. When completing the Internet or telephone process or the proxy card, you may specify whether your shares should be voted "**FOR**," "**AGAINST**" or "**ABSTAIN**" from voting on the Merger Agreement Proposal.

If you properly sign your proxy card but do not mark the boxes showing how your shares should be voted on a matter, the shares represented by your properly signed proxy will be voted "**FOR**" the Merger Agreement Proposal.

Q: How are votes counted?

A: For the Merger Agreement Proposal, you may vote "**FOR**," "**AGAINST**" or "**ABSTAIN**." Abstentions and broker non-votes, if any, will have the same effect as votes "**AGAINST**" the Merger Agreement Proposal.

Because the Merger Agreement Proposal is a non-routine matter for which brokers do not have discretionary authority to vote, we do not expect any broker non-votes at the Special Meeting.

Q: What should I do if I receive more than one set of voting materials?

A: Please sign, date and return (or grant your proxy electronically over the Internet or by telephone) each proxy card and voting instruction card that you receive.

You may receive more than one set of voting materials, including multiple copies of this proxy statement and multiple proxy cards or voting instruction cards. For example, if you hold your shares in more than one brokerage account, you will receive a separate voting instruction card for each brokerage account in which you hold shares. If you are a stockholder of record and your shares are registered in more than one name, you will receive more than one proxy card.

Q: Who will solicit and pay the cost of soliciting proxies?

A: We will bear all expenses incurred in connection with the solicitation of proxies. We may also reimburse brokers, banks and other custodians, nominees and fiduciaries representing beneficial owners of shares for their expenses in forwarding soliciting materials to beneficial owners and in obtaining voting instructions from those owners. Our directors, officers and employees may also solicit proxies by telephone, by facsimile, by mail, on the Internet or in person. They will not be paid any additional amounts for soliciting proxies.

Q: Where can I find the voting results of the Special Meeting?

A: We intend to publish the final voting results of the Special Meeting in a Current Report on Form 8-K to be filed with the SEC within four business days after the Special Meeting. All reports that we file with the SEC are publicly available when filed. See "Where You Can Find More Information" beginning on page 136.

Q: Will I have to pay taxes on the Merger Consideration I receive?

A: The receipt of cash in exchange for shares pursuant to the Merger generally will be a taxable transaction for U.S. federal income tax purposes if you are a U.S. Holder (as defined in "Special Factors—Material U.S. Federal Income Tax Consequences of the Merger" beginning on page 75). If you are a Non-U.S. Holder (as defined in "Special Factors—Material U.S. Federal Income Tax Consequences of the Merger" beginning on page 75) the receipt of cash in exchange for shares pursuant to the Merger generally will not be a taxable transaction for U.S. federal income tax purposes, unless you have certain connections to the United States. You are urged to read "Special Factors—Material U.S. Federal Income Tax Consequences of the Merger" beginning on page 75 for a more detailed discussion of the U.S. federal income tax consequences of the

Merger. Because individual circumstances may differ, you are urged to consult your own tax advisors regarding the particular tax consequences to you of the exchange of shares for cash, pursuant to the Merger, in light of your particular circumstances (including the application and effect of any state, local or foreign income and other tax laws).

Q: What is householding and how does it affect me?

A: The SEC permits companies to send a single set of proxy materials to any household at which two or more stockholders reside, unless contrary instructions have been received and only if the applicable stockholder provides advance notice and follows certain procedures.

In such cases, each stockholder continues to receive a separate notice of the meeting and proxy card. Certain brokerage firms may have instituted householding for beneficial owners of common stock held through brokerage firms. If your family has multiple accounts holding common stock, you may have already received a householding notification from your broker. Please contact your broker directly if you have any questions or require additional copies of this proxy statement. The broker will arrange for delivery of a separate copy of this proxy statement promptly upon your written or oral request. You may decide at any time to revoke your decision to household, and thereby receive multiple copies.

For more information, please see "Householding" beginning on page 135.

Q: When do you expect the Merger to be completed?

A: We are working toward completing the Merger as quickly as reasonably practicable. Assuming timely satisfaction of necessary closing conditions, including the approval by our stockholders of the Merger Agreement Proposal, we currently expect to complete the Merger in the first calendar quarter of 2021. There are no governmental approvals needed to effectuate the Merger or consummate the other transactions contemplated by the Merger Agreement. However, the exact timing of completion of the Merger cannot be predicted because the Merger is subject to the closing conditions described in "The Merger Agreement—Conditions to Completion of the Merger" beginning on page 109, many of which are outside of our control.

Q: If the Merger is completed, how will I receive the cash for my shares?

A: If the Merger is completed and you are not exercising dissenter's rights and your shares are held in book-entry, the paying agent will issue and deliver to you a check or wire transfer for your shares without any further action on your part. If the Merger is completed and you are not exercising dissenter's rights, and you are a stockholder of record with your shares held in certificated form, you will receive a letter of transmittal with instructions on how to send your shares to the paying agent in connection with the Merger. The paying agent will issue and deliver to you a check or wire transfer for your shares after you comply with these instructions. **Please do not send your stock certificates with your proxy card.** See "The Merger Agreement—Exchange and Payment Procedures" beginning on page 95.

If the Merger is completed and you are not exercising dissenter's rights, and your shares are held in "street name" by your broker, bank, trustee or other nominee, you will receive instructions from your broker, bank, trustee or other nominee as to how to effect the surrender of, and receive payment for, your shares held in "street name."

Q: What happens if the market price of shares our common stock significantly changes before the Closing?

A: Parent is not obligated to change the Merger Consideration as a result of a change in the market price of our common stock.

Q: Do any of the Company's directors or officers have interests in the Merger that may differ from those of the Company's stockholders generally?

A: In considering the unanimous recommendation of each of the Special Committee and the Board with respect to the Merger Agreement Proposal, you should be aware that our directors and executive officers may have interests in the Merger that are different from, or in addition to, the interests of stockholders generally. In (i) evaluating and negotiating the Merger Agreement; (ii) adopting and approving the Merger Agreement and approving the Merger; and (iii) recommending that the Merger Agreement and the transactions contemplated thereby (including the Merger) be approved by stockholders, the Special Committee and the Board, as applicable, were aware of and considered these interests to the extent that they existed at the time, among other matters. For more information, see "Special Factors—Interests of the Company's Directors and Executive Officers in the Merger; Potential Conflicts of Interest" beginning on page 72.

Q: Are there any other risks to me from the Merger that I should consider?

A: Yes. There are risks associated with all business combinations, including the Merger. For further details, see "Cautionary Note Regarding Forward-Looking Statements" beginning on page 85.

Q: Who can help answer my other questions?

A: If you have more questions about the Merger, require assistance in submitting your proxy or voting your shares or need additional copies of the proxy statement or the enclosed proxy card, please contact the Company at:

AeroGrow International, Inc.
Attention: Senior Vice President of Finance and Administration
5405 Spine Road
Boulder, Colorado 80301
grey@aerogrow.com
(303) 444-7755

If your broker, bank, trustee or other nominee holds your shares, you should also contact your broker, bank, trustee or other nominee for additional information.

SPECIAL FACTORS

This discussion of the Merger is qualified in its entirety by reference to the Merger Agreement, which is attached to this proxy statement as Annex A. You should read the entire Merger Agreement carefully as it is the legal document that governs the Merger.

Parties Involved in the Merger

AeroGrow International, Inc.

AeroGrow is a Nevada corporation and a developer, marketer, direct-seller, and wholesaler of advanced indoor garden systems designed for consumer use and priced to appeal to the gardening, cooking, healthy eating, and home and office decor markets. We offer multiple lines of proprietary indoor gardens, grow lights, a patented nutrient formula, more than 40 corresponding proprietary seed pod kits, and various cooking, gardening and decor accessories, primarily in the United States and Canada, as well as selected countries in Europe. Please see "Where You Can Find More Information" for additional information regarding us.

Our common stock is listed on the OTCQB under the symbol "AERO."

Our principal executive office is located at 5405 Spine Road, Boulder, Colorado 80301, and our telephone number is (303) 444-7755.

The Scotts Miracle-Gro Company

Scotts Miracle-Gro, an Ohio corporation, is the leading manufacturer and marketer of branded consumer lawn and garden products in North America. Scotts Miracle-Gro products are marketed under some of the most recognized brand names in the industry. Scotts Miracle-Gro's key consumer lawn and garden brands include Scotts® and Turf Builder® lawn and grass seed products; Miracle-Gro® soil, plant food and insecticide, LiquaFeed® plant food and Osmocote® (Osmocote® is a registered trademark of Everris International B.V., a subsidiary of Israel Chemicals Ltd.) gardening and landscape products; and Ortho®, Home Defense® and Tomcat® branded insect control, weed control and rodent control products. Scotts Miracle-Gro is the exclusive agent of Monsanto, a subsidiary of Bayer AG, for the marketing and distribution of certain of Monsanto's consumer Roundup® branded products within the United States and certain other specified countries. Scotts Miracle-Gro has a presence in similar branded consumer products in China. Scotts Miracle-Gro's common shares are listed on the NYSE under the symbol "SMG."

Scotts Miracle-Gro's principal executive office is located at 14111 Scottslawn Road, Marysville, Ohio 43041, and its telephone number is (937) 644-0011.

SMG Growing Media, Inc.

Parent is an Ohio corporation and a direct, wholly-owned subsidiary of Scotts Miracle-Gro and serves as a holding company for Scotts Miracle-Gro's growing media and hydroponics business.

Parent's principal executive office is located at 14111 Scottslawn Road, Marysville, Ohio 43041, and its telephone number is (937) 644-0011.

AGI Acquisition Sub, Inc.

Merger Sub is a Nevada corporation and a direct, wholly-owned subsidiary of Parent. Merger Sub was incorporated in 2020 by Parent solely for the purpose of entering into the transactions contemplated by the Merger Agreement, and has not entered into any business activities other than in connection with the transactions contemplated by the Merger Agreement. Upon completion of the Merger, Merger Sub will cease to exist as a separate entity and the Company will continue as the surviving corporation in the Merger.

Merger Sub's principal executive office is located at 14111 Scottslawn Road, Marysville, Ohio 43041, and its telephone number is (937) 644-0011.

Merger Consideration

At the Effective Time, each share of common stock (other than (i) the shares of common stock owned by Parent and any shares of common stock owned by the Company (collectively, the "Excluded Shares") and (ii) each share of common stock (the "Dissenting Shares") outstanding immediately prior to the Effective Time and held immediately prior to the Effective Time by a person which (a) immediately prior to the Effective Time is the holder of Dissenting Shares and (b) has duly preserved, demanded and perfected, and has not withdrawn or otherwise waived or lost, dissenter's rights pursuant to NRS 92A.300 through NRS 92A.500, inclusive (such person, a "Dissenting Stockholder")) issued and outstanding immediately prior to the Effective Time (such shares of common stock, the "Eligible Shares") will be automatically converted into the right to receive $3.00 in cash, without interest thereon and subject to any required withholding of taxes, will cease to be outstanding, will be cancelled and will cease to exist, and each certificate representing Eligible Shares, and each book-entry share of stock representing Eligible Shares, will thereafter only represent the right to receive $3.00 in cash (the "Merger Consideration").

Background of the Merger

The Board, with input from AeroGrow's management team, regularly reviews AeroGrow's performance, prospects and strategy in light of current business and economic conditions, as well as developments in its industry. These regular reviews have, from time to time, included evaluation of potential opportunities for commercial arrangements, potential changes to the AeroGrow's strategy and strategic opportunities. The Board also regularly discusses and evaluates potential risks that AeroGrow faces in executing its current strategy, including, among other things, its dependence on sales through Amazon.com, Inc. ("Amazon"), its ability to market and sell its product offerings and the seasonality of its sales. The Board evaluates the benefits and risks of strategic alternatives based upon what they believe will create stockholder value, further AeroGrow's strategic objectives, and better serve, satisfy and grow AeroGrow's customer base.

Scotts Miracle-Gro has held a significant equity ownership interest in AeroGrow since 2013. In 2016, when Scotts Miracle-Gro increased its equity ownership interest in AeroGrow above 80% (on a fully diluted basis), the Board was reconstituted, with three members affiliated with Scotts Miracle-Gro (currently, Ms. Ziegler and Messrs. Hagedorn and Miller) and two independent directors (currently, Messrs. Clarke and Kent) comprising AeroGrow's current five-member Board.

At all relevant times during 2020 through the date of this proxy statement, Scotts Miracle-Gro and its affiliates held 27,639,294 shares of our common stock (representing approximately 80.5% of the outstanding shares of common stock as of January 20, 2021). Affiliates of Scotts Miracle-Gro are also party to several agreements with AeroGrow, including the Brand License Agreement, the Technology License Agreement, the Supply Chain Services Agreement, the Collaboration Services Agreement and the 2020 Loan Agreement (each as defined and described in "Other Important Information Regarding the Purchaser Parties and Scotts Miracle-Gro—Significant Past Transactions and Contracts").

Following a regularly scheduled in-person Board meeting on February 27, 2020, the Board, with all Board members present, met in executive session without representatives of AeroGrow's management present. The Board was joined by Peter Supron, Chief of Staff at Scotts Miracle-Gro and a former member of the Board, who was present at the invitation of the Board Chair, Mr. Hagedorn. Mr. Supron presented to the Board a proposed framework that included restructuring AeroGrow's operations by consolidating substantially all business operations into Scotts Miracle-Gro and reducing the number of AeroGrow's stockholders through a reverse stock split in order to eliminate the expense associated with AeroGrow's public reporting obligations, possibly followed by a parent-subsidiary merger in which unaffiliated minority stockholder approval would not be

required. As a result of the proposed consolidation of substantially all of AeroGrow's business operations with operations of Scotts Miracle-Gro (with or without a subsequent merger), AeroGrow's future revenues would come primarily from royalties on Scotts Miracle-Gro's sales of AeroGrow products. Mr. Supron indicated that the framework presented was designed to reduce AeroGrow's operational burdens and complexity, and consequently improve and stabilize AeroGrow's profitability. Mr. Supron postulated that the consummation of a reverse stock split would reduce the number of record stockholders to a number that would allow the common stock to (i) cease being quoted on the OTCQB and (ii) become eligible for termination of registration under the Exchange Act, which would reduce the operating and compliance costs that AeroGrow incurs as a result of being a publicly-traded and SEC-reporting company. Pursuant to the Scotts Miracle-Gro framework, if, after giving effect to the reverse stock split, any stockholders would hold fractional shares of common stock, AeroGrow would pay to such holders in exchange for their fractional shares an amount in cash based on the value of the common stock. Mr. Supron conveyed to the Board that Scotts Miracle-Gro would seek alignment from the non-Scotts Miracle-Gro affiliated Board members on the advisability of implementing its suggested operational adjustments and consummating a reverse stock split and recommended that the Board discuss the Scotts Miracle-Gro framework with independent legal counsel. Mr. Supron also noted that Scotts Miracle-Gro would be filing an amendment to their Schedule 13D with the SEC describing the proposed framework later on February 27, 2020 or on the morning of February 28, 2020.

During the meeting, members of the Board discussed the Scotts Miracle-Gro framework along with various alternatives, including the sale of all or part of AeroGrow or the potential for the repurchase of outstanding shares of AeroGrow common stock held by non-Scotts Miracle-Gro affiliates. The Board also asked Scotts Miracle-Gro to provide additional information, such as an analysis of the value of its proposal, and Scotts Miracle-Gro agreed to prepare this information and share it with AeroGrow's outside directors. Mr. Supron recommended that the Board engage an outside advisor to evaluate the Scotts Miracle-Gro framework and other alternatives, confirmed that Scotts Miracle-Gro would cooperate with the advisor in its process, and indicated that Scotts Miracle-Gro might be willing to consider viable strategic alternatives other than the proposed framework. Messrs. Clarke and Kent encouraged Mr. Supron to consider a stockholder liquidity event for AeroGrow's unaffiliated minority stockholders.

Mr. Wolfe, AeroGrow's Chief Executive Officer, rejoined the Board at the end of the executive session and the discussion was recapped to him by Mr. Supron. In addition, given the pending filing of the amendment to Scotts Miracle-Gro's Schedule 13D, Mr. Supron encouraged Mr. Wolfe to immediately begin communication with AeroGrow's employees regarding the Scotts Miracle-Gro framework and the impact it would have on AeroGrow employees, including potential severance and retention bonus considerations.

On February 27, 2020, AeroGrow's common stock closed trading on the OTCQB at $1.62 per share.

On February 28, 2020, Messrs. Clarke and Kent held a telephonic meeting with AeroGrow's outside legal counsel, Hutchinson Black and Cook, LLC ("HBC") and initiated communications with Bryan Cave Leighton Paisner LLP ("Bryan Cave") to represent the independent directors and a special committee of the Board should such special committee be approved by the Board. Representatives of HBC and Bryan Cave advised Messrs. Clarke and Kent of their legal and fiduciary duties.

On March 1, 2020, a representative of Bryan Cave contacted Scotts Miracle-Gro regarding the proposed Schedule 13D amendment and discussed issues with internal counsel at Scotts Miracle-Gro.

On March 2, 2020, Scotts Miracle-Gro and its affiliates filed an amendment to their Schedule 13D with the SEC describing the above-outlined framework.

Between February 27, 2020 and March 4, 2020, Messrs. Clarke and Kent discussed a response to Scotts Miracle-Gro's proposed framework and appropriate next steps, including, potentially, the formation of a special committee, as described below.