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 THE COUNTY OF CLARK COUNTY; AND THE HONORABLE ELIZABETH GOFF GONZALEZ, DISTRICT JUDGE,

Respondents,

and

BRADLEY LOUIS RADOFF, *et al.*

Real Parties in Interest.

Supreme Court Case No.: 82895

REAL PARTIES IN INTEREST'S JOINT ANSWER TO PETITION FOR WRIT OF MANDAMUS TO REVERSE DISTRICT COURT'S ORDER GRANTING JOINT MOTION TO COMPEL

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MAC:16419-0014370947_1

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. The following Real Parties in Interest are individuals: BRADLEY L. RADOFF; FRED M. ADAMCYZK; THOMAS C. ALBANESE; WILLIAM A. ALMOND, III; MICHAEL S. BARISH; DIANA BOYD; ANNE CAROL DECKER; THOMAS H. DECKER; JOHN C. FISCHER; ALFREDO GOMEZ; LAWRENCE GREENBERG; PATRICIA GREENBERG; KAREN HARDING; 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; JAMES D. RICKMAN, JR.; BRYAN ROBSON; THOMAS K. SMITH; SURAJ VASANTH; CATHAY C. WANG; LISA DAWN WANG; DARCY J. WEISSENBORN; ALAN BUDD ZUCKERMAN; JACK WALKER; and STEPHEN KAYE.

2. The following Real Parties in Interest are trust entities: GEORGE C. BETKE, JR. 2019 TRUST; THE DEUTSCH FAMILY TRUST; ALFREDO

GOMEZ FMT CO CUST IRA ROLLOVER; H.L. SEVERANCE, INC. PROFIT SHARING PLAN & TRUST; H.L. SEVERANCE, INC. PENSION PLAN & TRUST; RICHARD ALAN RUDY REVOCABLE LIVING TRUST; JAMES D. RICKMAN, JR. IRREVOCABLE TRUST; PATRICIA D. RICKMAN IRREVOCABLE TRUST; ANDREW REESE RICKMAN TRUST; SCOTT JOSEPH RICKMAN IRREVOCABLE TRUST; MARLON DEAN; ALESSANDRA TRUST; WAYNE SICZ IRA; WAYNE SICZ ROTH IRA; THE CAROL W. SMITH REVOCABLE TRUST; 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; THE MICHAEL S. BARISH IRA; and THE ALEXANDER PERELBERG IRA.

3. Real Party in Interest THE REALLY COOL GROUP is a corporation with no parents nor subsidiaries, and no publicly held company owns 10% or more of its stock.

4. The following law firms have appeared for the Real Parties in Interest or are expected to appear in this Court: (1) Marquis Aurbach Coffing, (2) Simons Hall Johnston PC, and (3) Baker Botts LLP.

Dated this 21st day of May, 2021.

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I. OVERVIEW

This action concerns Nevada's Dissenter's Rights Statute – NRS 92A.300, *et seq.* That Statute allows stockholders to dissent from certain corporate actions, such as a merger, and seek the fair value of their shares. That statute sets forth an orderly process for initial notices, demand, payment, and ultimately fair value determination for the shares.

Petitioner AeroGrow International, Inc. ("AeroGrow") was a publicly traded company that was recently acquired by SMG Growing Media, Inc. through a merger (the "Merger"). The Real Parties in Interest are a group of AeroGrow stockholders who are pursuing dissenters' rights under NRS 92A. At issue is the deadline by which a beneficial stockholder must submit a written consent from the stockholder of record as set forth in NRS 92A.400(2)(a).

Importantly, Nevada's Dissenter's Rights Statute is based upon and virtually identical to the Model Business Corporation Act (the "Model Act"). Just like the Model Act, Nevada's Statute distinguishes between "stockholders of record" and "beneficial stockholders." NRS 92A.305 and 92A.330. Stockholders of record are those in whose name shares are registered in the records of the corporation, while beneficial stockholders are those whose shares are held in a voting trust or by a nominee as the stockholder of record. *Id.* In general, stockholders of record hold

stock certificates while beneficial stockholders purchased their shares through brokerages and other financial institutions, but whose legal title to the shares are registered in the name of Cede & Co., which is the nominee of the Depository Trust Company ("DTC") (hereinafter "DTC/Cede").[1] The vast majority of stockholders in publicly traded corporations are beneficial stockholders, as they purchased the shares through brokerages. The Real Parties in Interest are all beneficial stockholders.

Under Nevada's Dissenter's Rights Statute, before a stockholder can actually exercise dissenter's rights, a stockholder (both stockholders of record and beneficial stockholders) must first notify the corporation (i.e., AeroGrow) in writing of the stockholder's "***intent***" to demand payment for shares "before the [merger] vote is taken." NRS 92A.420(1)(a) (emphasis added). This is merely a "prerequisite" notice to allow the corporation to, among other things, ascertain the universe of possible dissenting stockholders and to estimate how much of a cash payment may be required.[2]

[1] For a concise history of DTC/Cede and some of the issues it causes in dissenter's rights proceedings, *see In re Appraisal of Dell Inc.*, No. CV 9322-VCL, 2015 WL 4313206, at *1-3 (Del. Ch. July 13, 2015), as revised (July 30, 2015).

[2] 4 PA00470 (Model Business Corporation Act, Section 13.21, *official comments*).

After receiving the prerequisite notices of intent to demand payment of shares from its stockholders, the company is required to send a "dissenter's notice" to all stockholders of record entitled to assert dissenter's rights (including to DTC/Cede on behalf of the beneficial owners who delivered their notice of intent to demand payment).[3] NRS 92A.430. The stockholders (including beneficial owners) then must decide whether to assert dissenter's rights by making a Demand for Payment. NRS 92A.440. Stockholders of record who elect to assert dissenter's rights must turn in their stock certificates with their Demand for Payment by the deadline identified in the company's dissenter's notice. NRS 92A.440(1)(c). Beneficial stockholders who elect to assert dissenter's rights must certify in their Demand for Payment whether they acquired their shares before or after the first announcement of the merger. NRS 92A.440(1)(b). In addition, beneficial stockholders must provide a letter of consent from the stockholders of record, such as DTC/Cede, "not later than the time the beneficial stockholder ***asserts dissenter's rights.***" NRS 92A.400(2)(a) (emphasis added).

After receiving the Demands for Payment, certificates from the record holders, and a consent letter from the beneficial stockholders, the company must then pay the

[3] DTC/Cede is to then provide the dissenter's notices to the beneficial stockholders on behalf of whom they hold the shares.

amount it estimates to be the fair value of its shares to these dissenting stockholders. NRS 92A.460. If a dissenting stockholder is dissatisfied with the amount paid, the dissenter must then submit their own estimate of fair value of the shares. NRS 92A.480. If the parties cannot agree on the fair value, the company is required to file an action in the Nevada District Court. NRS 92A.490.

As explained above, the issue before this Court is the deadline by which a beneficial stockholder must submit a written consent from the stockholder of record. NRS 92A.400(2) requires the beneficial stockholder to provide such written consent "not later than the time the beneficial stockholder ***asserts*** dissenter's rights." NRS 92A.400(2)(a) (emphasis added). AeroGrow, however, has taken the nonsensical position that the written consents were due before the action giving rise to dissenter's rights even occurred – in this case before the vote approving of the merger. Specifically, AeroGrow argues that the deadline to submit written consents under NRS 92A.400(2)(a) is the same as the deadline for stockholders to provide their prerequisite notice of intent to demand payment under NRS 92A.420(1)(a), which is "before the vote is taken." Simply stated, despite the Nevada Legislature using vastly different language regarding the different deadlines set forth in NRS 92A.400(2)(a) and NRS 92.420(1)(a), AeroGrow maintained (and continues to maintain) that the deadlines were the same.

Based on its erroneous interpretation, and despite the beneficial stockholders timely submitting their notices of intent to demand payment for shares, AeroGrow refused to provide the beneficial stockholders dissenter's notices as required by NRS 92A.430.[4] After failing to receive dissenter's notices from AeroGrow, the Real Parties in Interest brought a motion seeking to compel AeroGrow to comply with the requirements of NRS 92A and provide the dissenter's notices.[5] AeroGrow argued that beneficial stockholders who did not provide written consents from DTC/Cede before the vote on the merger lost their dissenter's rights.[6] The Eighth Judicial District Court disagreed.[7]

After extensive briefing, Business Court Judge Gonzales concluded that the deadline to submit written consents from the stockholder of record is when the stockholder makes a demand for payment under NRS 92A.430.[8] The District Court ordered, among other things, that AeroGrow provide the beneficial stockholders

[4] 12 PA01702.

[5] 3 PA 00413 – 6 PA00704.

[6] 7 PA 00750 – 11 PA01633.

[7] 12 PA01700 – 12 PA0173.

[8] 12 PA01702.

dissenter's notices pursuant to NRS 92A.430.[9] AeroGrow now seeks to overturn the District Court's Order finding AeroGrow in violation of NRS 92A and compelling it to comply with the statute.

II. ISSUES PRESENTED

1. Whether the District Court properly concluded that the deadline for a beneficial stockholder to provide written consent from the stockholder of record under NRS 92A.400(2)(a) is when the demand for payment is due.

2. Whether the District Court properly concluded that AeroGrow violated NRS 92A when it failed to provide dissenter's notices to those beneficial stockholders who provided their notices of intent to demand payment prior to the vote on the merger in compliance with NRS 92A.420.

III. RELEVANT FACTS

In November 2020, AeroGrow entered into an Agreement and Plan of Merger ("Merger Agreement") with Scotts Miracle-Gro Company ("SMG"), its wholly owned subsidiary, SMG Growing Media, Inc. ("SMG Growing Media"), and AGI Acquisition Sub, Inc. ("Merger Sub"), a direct, wholly owned subsidiary of SMG

[9] 12 PA01703.

Growing Media (collectively "Scotts").[10] The consideration to be paid by Scotts to acquire AeroGrow's shares was $3.00 per share.[11]

On or about January 22, 2021, AeroGrow provided public notice of the meeting to vote on the merger by filing a Schedule 14A with the United States Securities and Exchange Commission (the "Proxy").[12] In that Proxy, AeroGrow announced that it would pay its shareholders the merger consideration of $3.00 per share.[13] It also confirmed that its stockholders were entitled to exercise dissenter's rights.[14] AeroGrow further announced that the shareholder's meeting to vote on the merger would be February 23, 2021, and that any stockholder wishing to exercise dissenter's rights would need to submit their notice of intent to demand payment prior to the vote.[15]

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[10] 3 PA00417.

[11] *Id.*

[12] 4 PA00482.

[13] 4 PA00484.

[14] *Id.*

[15] 4 PA00489.

Prior to the vote on the merger, the Real Parties in Interest each timely submitted a notice of intent to demand payment as required by NRS 92A.420.[16] On February 23, 2021, the Merger was approved.[17]

Almost immediately thereafter, AeroGrow disregarded the notices of intent to demand payment and unilaterally tendered the merger consideration of $3.00 per share to the brokers of the beneficial stockholders, including the Real Parties in Interest, thereby eliminating their status as shareholders.[18] Consequently, the shares were no longer owned by the Real Parties in Interest or the stockholder of record, DTC/Cede.[19] As a result, DTC/Cede refused to provide a letter of consent.[20]

AeroGrow also failed to provide the Real Parties in Interest with the required dissenter's notices and demand for payment form as required by NRS 92A.430.[21] The dissenter's notice was important because it triggered timelines for the Real

[16] 3 PA00434; *see also* 1 PA00154 – 2 PA00230.

[17] 7 PA00777

[18] 3 PA00421.

[19] *Id.*

[20] 3 PA00452-00456.

[21] 12 PA01702. AeroGrow, however, did provide stockholders who held certificated shares a dissenter's notice, along with a demand for payment form**.**

Parties in Interest to act in order to preserve their right to contest AeroGrow's value of the shares under NRS 92A.

On March 17, 2021, AeroGrow's counsel sent a letter to counsel for the Real Parties in Interest.[22] In that letter, AeroGrow took the position that the Real Parties in Interest, despite timely providing their notice of intent to demand payment for shares, were not entitled to assert their rights under NRS 92A because they did not provide a written consent from DTC/Cede as the record stockholder at the time of submitting their notices of intent to demand payment for their shares.[23] AeroGrow's conduct adversely and substantially prejudiced the rights of the Real Parties in Interest, who were now at risk of losing their dissenter's rights.[24]

Real Party in Interest Bradley L. Radoff had previously filed suit against AeroGrow, Scotts, and AeroGrow's officers and directors for, among other things, breach of fiduciary duties in connection with the Merger.[25] On March 15, 2021,

[22] 3 PA00448-00450; 2 PA00265-00273.

[23] *Id.*

[24] 12 PA01702.

[25] Clark County District Court, Case No. A-21-829854-B. *See* 1 PA00008-000062. As pointed out in AeroGrow's Petition, Radoff's Complaint was the third of three complaints making similar allegations, and it was consolidated with *Overbrook Cap.*

Radoff amended his Complaint to add a separate cause of action for violation of NRS 92A, alleging that AeroGrow violated Nevada's Dissenter's Rights statute for the above-described conduct.[26] On March 23, 2021, the other Real Parties in Interest intervened in the action.[27]

On March 24, 2021, Radoff and the Intervenors (who are now the Real Parties in Interest herein) filed a "Joint Motion to Compel/Determine Compliance with NRS Chapter 92A, or Alternatively, Injunctive Relief."[28] The Real Parties in Interest sought an order from the District Court: (1) declaring AeroGrow in violation of the provisions of NRS 92A; (2) waiving the obligation of beneficial stockholders to obtain the consent letters – which became impossible due to AeroGrow's unlawful conduct; and (3) compelling the Defendants' performance with the statute and providing the requisite dissenter's notice so that there can be an orderly resolution and determination of fair value. AeroGrow filed an opposition to the Motion to

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LLC v. AeroGrow, et al., No. A-21-827665-B and *Nicoya Cap. LLC v. Hagedorn, et al.*, No. A-21-827745-B. *See* AR at PA00070-PA00078.

[26] 1 PA00133.

[27] 7 PA01670-01673.

[28] 3 PA00413-00423.

Compel on April 7, 2021.[29] The Real Parties in Interest filed their Reply on April 13, 2021.[30] On May 5, 2021, Judge Gonzales issued an Order granting the Motion in its entirety.[31]

AeroGrow now seeks to overturn Judge Gonzales' Order as part of its continuing effort to disenfranchise the beneficial stockholders from pursuing their dissenter's rights.

IV. REASONS WHY THE WRIT PETITION SHOULD BE DENIED

It is well established that the "dissenters' rights statute exists to protect minority shareholders from oppressive conduct by the majority." *Pueblo Bancorporation v Lindoe, Inc.*, 63 P 3d 353, 365 (2003); *accord Cohen v. Mirage Resorts, Inc*., 119 Nev. 1, 10, 62 P.3d 720, 726-727 (2003) (the Model Act and Nevada's dissenter's rights statute are designed to protect "minority shareholders from being unfairly impacted by the majority shareholders' decision to approve a merger."). Significantly, "dissenter's rights statutes are construed favorably toward the shareholder" and are to be "given a reasonable construction rather than a rigid

[29] 7 PA00750 – 11 PA01633.

[30] 11 PA01646-01668.

[31] 12 PA01700-01709.

and technical one." *Matter of Fair Value of Shares of Bank of Ripley*, 184 W. Va. 96, 100, 399 S.E.2d 678, 682 (1990) (citations omitted). "Doubts arising from a lack of precision or accuracy in the statute should, where possible, be resolved in favor of the dissenting shareholder." *Id.*; *see also Sarrouf v. New England Patriots Football Club, Inc.*, 397 Mass. 542, 552, 492 N.E.2d 1122, 1129–30 (1986) (dissenter's rights statutes are "designed to provide an equitable, simple, and expeditious remedy to dissenting stockholders" and "should not be construed strictly against them").

AeroGrow's position that the written consents were due before the merger vote was taken is incorrect. AeroGrow is attempting to conflate the deadlines to deliver the prerequisite notice of intent to demand payment for shares under NRS 92A.420(1)(a), which is "before the vote is taken," with the deadline to actually "assert dissenter's rights," which is the date the demand for payment is due under NRS 92A.440. AeroGrow's position is contrary to the plain language of the statute, other principles of statutory interpretation, and the Model Act upon which Nevada's Dissenter's Rights Statute is based. Accordingly, AeroGrow's position must be rejected.

A. THE DEADLINE TO DELIVER WRITTEN CONSENT FROM THE STOCKHOLDER OF RECORD IS THE DATE THE DEMAND FOR PAYMENT IS DUE, ***NOT*** BEFORE THE VOTE ON THE MERGER.

1. The Plain Language of the Statute Makes It Clear that the Deadline to Submit the Consent Letter Is When the Demand for Payment Is Due.

AeroGrow is attempting to equate the language "before the vote is taken" in NRS 92A.420(1)(a), with the language "not later than the time the beneficial stockholder asserts dissenter's rights" in NRS 92A.400(2). On their faces, these deadlines reflect two separate time periods.

"'The goal of statutory interpretation is to give effect to the Legislature's intent.'" *Figueroa-Beltran v. United States*, 136 Nev. Adv. Op. 45, 467 P.3d 615, 621 (2020) (quoting *Williams v. State, Dep't of Corr.*, 133 Nev. 594, 596, 402 P.3d 1260, 1262 (2017)) (internal quotations omitted). "'To ascertain the Legislature's intent, [courts] look to the statute's plain language.'" *Id.* "[W]hen a statute's language is clear and unambiguous, the apparent intent must be given effect, as there is no room for construction." *Edgington v. Edgington*, 119 Nev. 577, 582–83, 80 P.3d 1282, 1286 (2003). *Williams v. State, Dep't of Corr.*, 133 Nev. 594, 596, 402 P.3d 1260, 1262 (2017). "'[Courts] avoid statutory interpretation that renders language meaningless or superfluous.'" *Figueroa-Beltran*, 467 P.3d at 621 (quoting

Hobbs v. State, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011)). "'If the statute's language is clear and unambiguous, [courts] will enforce the statute as written.'" *Id.*

The statutes at issue in this case are clear and unambiguous. NRS 92A.420(1)(a) identifies the "prerequisite" requirement that any stockholder (both stockholders of record and beneficial stockholders) "who ***wishes*** to assert dissenter's rights" must provide, "before the vote is taken," written notice of their "***intent*** to demand payment" of their shares if the "***proposed*** action" (i.e., merger) is effectuated. (Emphasis added). As that statute states in relevant part:

> **NRS 92A.420 Prerequisites to demand for payment for shares.**
> 1. If a proposed corporate action creating dissenter's rights is submitted to a vote at a stockholders' meeting, a stockholder who wishes to assert dissenter's rights with respect to any class or series of shares:
> (a) Must deliver to the subject corporation, before the vote is taken, written notice of the stockholder's intent to demand payment for his or her shares if the proposed action is effectuated; . . ..

In contrast, NRS 92A.400(2)(a) explains that a beneficial stockholder is entitled to assert dissenter's rights, but must submit a written consent from the stockholder of record (i.e., DTC/Cede) "not later than the time the beneficial stockholder assert's dissenter's rights." As that statute states in relevant part:

> 2. 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; . . ..

First, the plain language of NRS 92A.420 shows that the "prerequisite" notice was merely a notice of ***"intent"*** to demand payment in the event the merger was approved, as opposed to actually ***asserting*** dissenter's rights, which comes later in the process and after the merger is approved.

Second, the language "before the vote is taken," and "not later than the time the beneficial stockholder asserts dissenter's rights," are not the same. In fact, while NRS 92A.420(1)(a) uses the language "before the vote is taken," it only does so in the context of filing an ***intent*** to demand payment of shares ***if*** the merger is approved. In contrast, NRS 92A.400(2)(a) uses entirely different language to describe the deadline to submit the written consent in the context of actually asserting dissenter's rights.

Third, it is axiomatic that an intention is not the same thing as an assertion. To be sure, intending to do something is not the equivalent of actually doing or asserting it. "Intent" is defined as "the act, fact, or an instance of intending: purpose, design." *Webster's Third New International Dictionary* (1993). "Intending" is defined as "prospective, aspiring." *Id.* In contrast, "assert" is defined as "to state or affirm positively, assuredly, plainly or strongly; to demonstrate the existence of." *Id.* NRS 92A.420 is merely a deadline of ***"intent,"*** rather than the deadline to

"assert" or "exercise" dissenter's rights. The Legislature's use of the word "intent" in NRS 92A.420 entirely undermines AeroGrow's arguments.

Moreover, as the comments to the Model Act make clear, the notice of intent is simply to allow the corporation to ascertain the universe of ***potential*** dissenters, who then may or may not elect to assert dissenter's rights when the demand for payment form is due.[32] That is it. It is, therefore, illogical to interpret a deadline to submit one's ***notice of intent*** to demand payment as the same deadline to ***actually assert*** dissenter's rights. Thus, the plain language of the two statutes reveals that the deadline to "***assert***" dissenter's rights set forth in NRS 92A.400(2) cannot be the same deadline as the one to submit the notice of "***intent***" under NRS 92A.420. (Emphasis added).

Finally, it cannot be overlooked that AeroGrow misleads this Court on the plain language. Specifically, AeroGrow makes the untrue statement that "[b]ased on the plain language of NRS 92A, any beneficial stockholder of AeroGrow who wished to participate in the dissenter's rights process for the Merger had to submit a written consent of the stockholder of record before the vote on the merger."[33]

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[32] 4 PA00470.

[33] Pet. for Writ of Mandamus to Reverse Dist. Ct.'s Order Granting Joint Mot. to Compel, at pgs. 16-17.

Remarkably, AeroGrow combines language from both NRS 92A.420(1) and 92A.400(2)(a) into one sentence to make it appear that written consents were due before the vote on the merger.[34] That is not at all what the statutes state – and AeroGrow's argument is a complete spin of the truth.

2. A Stockholder Cannot Assert Dissenter's Rights Before the Merger Vote Because Dissenter's Rights Do Not Yet Exist.

The plain language of NRS 92A.420(1)(a) and NRS 92A.400(2)(a) also reveals an important fact that is fatal to AeroGrow's position: a stockholder cannot assert dissenter's rights before the proposed corporate action giving rise to dissenter's rights occurs. Yet AeroGrow argues that a beneficial stockholder must assert dissenter's rights before the merger vote is even taken. If that were the case, then a beneficial stockholder would need to assert dissenter's rights before knowing whether the merger will be approved, and, therefore, whether dissenter's rights will even exist. Such argument is nonsensical.

Until the merger is approved, dissenter's rights do not exist. It is, therefore, impossible to assert dissenter's rights before the merger vote because the vote to approve the merger could fail. And, if the vote failed, there are no dissenter's rights. The Legislature could not have intended that the deadline to assert dissenter's rights

[34] *See id.*

lapse before anyone knows if there will even be a merger giving rise to dissenter's rights. Accordingly, the plain language of NRS 92A.400(2)(a) reveals that the deadline to submit the consent letters must be ***after*** the merger. The next and only other deadline for stockholders is the deadline to submit the demand for payment. Thus, the only logical deadline to submit the written consent is the deadline to demand payment of shares under NRS 92A.440.

Further demonstrating AeroGrow's illogical position is that fact that it would be a waste of time and resources to require a beneficial stockholder to obtain written consent from DTC/Cede & Co. prior to even knowing whether the merger will be approved. Under AeroGrow's interpretation, a beneficial stockholder must take the time to contact his broker and request that the broker obtain written consent from DTC/Cede. The broker must then spend time and money preparing a request letter to DTC/Cede for the written consent. DTC/Cede must then prepare a consent letter to AeroGrow regarding the beneficially owned shares. This would all be for naught if the merger vote fails, which is always possible. Thus, the only reasonable interpretation is that written consents are due when the demand for payment forms are due. No other interpretation makes sense.

3. Other Principles of Statutory Interpretation Show the Deadline to Deliver the Consent Letter is When the Demand for Payment is Due.

"'Only when the statute is ambiguous, meaning that it is subject to more than one reasonable interpretation, do [courts] look beyond the language [of the statute] to consider its meaning in light of its spirit, subject matter, and public policy.'" *Figueroa-Beltran*, 136 Nev. Adv. Op. 45, 467 P.3d at 621 (2020) (alteration in original) (internal quotations omitted); *see also State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011) (explaining that when a statute is ambiguous, this court may then look to legislative history and construe the statute in a manner consistent with reason and public policy). "'Likewise, [a] court will interpret a rule or statute in harmony with other rules and statutes.'" *Id*. (quoting *Clay v. Eighth Judicial Dish Court*, 129 Nev. 445, 451, 305 P.3d 898, 902 (2013)) (internal quotations omitted). Moreover, the use of different terminology in a statute "evinces the legislature's intent that different meanings apply to the two terms." *Labastida v. State*, 115 Nev. 298, 302–03, 986 P.2d 443, 446 (1999).

a. The Legislature Used Different Terminology in The Statute Regarding the Deadlines Evidencing a Different Legislative Intent.

Also fatal to AeroGrow's position is the fact that the Nevada Legislature chose to use the language "before the vote is taken" with respect to the Notice of Intent

(NRS 92A.420(2)), while using the language "not later than the time the beneficial stockholder asserts dissenter's rights" (NRS 92A.400(2)) with respect to the written consents. The Legislature's use of different language makes it clear that the two time periods are different. *Labastida*, 115 Nev. at 302–03. In fact, if the Legislature intended the deadlines to be the same, it could have easily used the same language of "before the vote is taken" with respect to the deadline for the written consents in NRS 92A.400(2). The fact that it used different language is dispositive of this issue.

b. The Statute Refers to Stockholders as "Dissenters" Only After They Submit Their Demand for Payment Forms.

NRS 92A refers to stockholders as either "stockholders," "stockholders of record," or "beneficial stockholders" prior to them submitting demand for payment forms under NRS 92A.440. After the deadline to submit the demand for payment forms, the language in the statute changes and refers to the stockholders, stockholders of record, and beneficial stockholders as "dissenters." This drastic change in language further demonstrates the Legislature's intent that it is the submission of the ***demand*** for payment forms under NRS 92A.440 that is the triggering event for the assertion and/or exercise of dissenter's rights.

c. Public Policy Considerations Mandate the Deadline to Assert Dissenter's Rights is When the Demand for Payment is Due.

Finally, this interpretation naturally makes sense and is consistent with public policy. Most beneficial stockholders who purchase their shares through brokerages, are unaware that their shares are in the name of DTC/Cede. It takes time for a beneficial stockholder to contact a broker to request the consent letter, who must then prepare its own letter to DTC/Cede to request the consent letter. DTC/Cede must then prepare the actual consent letter to submit to the corporation. Often, beneficial owners do not become aware that they may have the right to dissent until shortly before the merger vote. Some never even received proxy materials.

In such instances it would be impossible for them to obtain a consent letter prior to the vote on the merger. By making the deadline to deliver the consent letter as the date the beneficial stockholder delivers the demand for payment form, and thus actually exercises dissenter's rights, the Legislature provided time for the beneficial stockholders to not only decide whether to exercise dissenter's rights, but time to obtain the consent letters from the stockholders of record, such as DTC/Cede.

B. THE MODEL ACT MAKES CLEAR THAT THE DEADLINE TO SUBMIT WRITTEN CONSENTS ARE WHEN THE DEMAND FOR PAYMENT FORMS ARE DUE.

The Model Corporation Business Act further informs when the written consents are due under NRS 92A. The provisions of NRS 92A.300–92A.500 "are patterned after, or are identical to, the provisions of the 1984 Model Business Corporation Act ("Model Act")." *Cohen*, 119 Nev. at 10, 62 P.3d at 726. Specifically, Chapter 13 of the Model Act sets forth "Appraisal Rights."[35]

Just like NRS 92A.440, Section 13.21 of the Model Act requires a shareholder to submit, "***before the vote is taken***, written notice of the shareholder's intent to demand payment if the proposed action is effectuated."[36] Likewise, Section 13.03 of the Model Act is virtually identical to NRS 92A.400(b). That section of the Model Act states:

> (b) A beneficial shareholder and a voting trust beneficial owner may assert appraisal rights as to shares of any class or series held on behalf of the shareholder only if such shareholder:
>
> (1) submits to the corporation the record shareholder's written consent to the assertion of such rights ***not later than date referred to in Section 13.22(b)(2)(ii)***; . . . [Emphasis added].

[35] 3 PA004458.

[36] 4 PA00470 (emphasis added).

Section 13.22 of the Model Act is also virtually equivalent to NRS 92A.420, which requires the corporation to send an "appraisal notice" – which is equivalent to a dissenter's notice under NRS 92A.420 – to the stockholders along with a form containing instructions on where and where to deliver the form.[37] Significantly, Section 13.22(b)(2)(ii) states that the appraisal notice must provide: "a date by which the corporation shall receive the form, which date may not be fewer than 40 nor more than 60 days after the date the subsection (a) appraisal notice is sent . . ."[38]

Therefore, the deadline to submit written consent under Section 13.03 is the deadline to submit the form under Section 13.22(b)(2) – ***which is the date set by the corporation <u>after</u> the dissenter's notice is sent, which is well after, and completely different from, the deadline to submit the notice of intent to demand payment (aka the merger vote date).***[39]

Therefore, given that Nevada's Statute is based on, and virtually identical to, the Model Act, there can be no question that the deadline to submit written consents under NRS 92A.400(2) is the date set by AeroGrow in its dissenter's notice to submit

[37] 4 PA00471.

[38] *Id.*

[39] *Id.*

the Demand for Payment Forms. Consequently, AeroGrow's interpretation of the deadline in NRS 92A.400(2) is entirely inconsistent with the Model Act upon which Nevada's law is based.

Recognizing that the Model Act is fatal to their argument, AeroGrow takes the absurd position that Nevada follows the Model Act – ***except*** for the deadline when written consents are due. Remarkably, despite acknowledging that Nevada follows the Model Act, and that the Legislature even amended NRS 92A in 1995 to bring it more in line with the Model Act, AeroGrow argues that the Legislature decided – for unspecified and unknown reasons – not to follow the Model Act only with respect to the deadline to submit written consents. Even more absurd, AeroGrow's contention is that this Court would need to accept that the Legislature not only: (1) wanted to carve out the written consent deadline from the Model Act; but (2) decided to make the deadlines to submit a written consent and to file a notice of intent to demand payment the exact same time, yet for some mysterious reason decided to use two entirely different sets of terminology to describe the deadlines.[40]

The reality is that if the Legislature intended to make the deadline to submit a consent letter to be "before the vote is taken" it would have (and could have) said

[40] Compare "before the vote is taken" with "not later than the time to assert dissenter's rights." *C.f.* NRS 92A.420 and NRS 92A.400.

so. The fact the Legislature used "not later than the time to assert dissenter's rights" for the consent letters unequivocally demonstrates a different legislative intent. NRS 92A.400(2)(b).

It also should not be overlooked that the heading to §13.23 of Model Act, which is equivalent to NRS 92A.440, refers to the time of submitting the form from the corporation as "Perfection of Rights,"[41] The fact that it is the submission of the form provided by the corporation with the dissenter's notice that is deemed the time for the "perfection" of dissenter's rights, as opposed to submitting a notice of ***intent*** to demand payment of shares, further demonstrates dissenter's rights are not asserted until the demand for payment form is submitted.

Further, in its attempt to argue that Nevada follows the Model Act except for NRS 92A.400, AeroGrow falsely states that "[t]he statutory provision at issue, NRS 92A.400, is unique to Nevada."[42] It is not. By way of example, the following states, which all follow the Model Act, use the ***exact*** same language in their dissenter's rights statutes as Nevada uses in NRS 92A.400: Alabama: AL Code §10A-2-13.03(b)(1); Arizona: AZ Rev. Stat. §10-1303(B)(1); Colorado: CO Rev. Stat. §7-

[41] 4 PA00472.

[42] Pet. for Writ of Mandamus to Reverse Dist. Ct.'s Order Granting Joint Mot. to Compel, at pgs. 13.

113-103(2)(a); Idaho: ID Code §30-29-1303(2)(a); Indiana: IC 23-1-44-9(b)(1); Kentucky: KY Rev. Stat. §271B.13-030(2)(a); Missouri: MO Rev. Stat. §351.880(2)(1); New Hampshire: NH Rev. Stat. §293-A:13.03(b)(1); North Carolina: NC Code §55-13-03(b)(1)**;** Oregon: ORC 60.557(2)(a); Utah: UT Code §16-10a-1303(2)(a); Vermont: 11 V.S.A. §13.03(b)(1); Washington: RCW 23B13.030(2)(a); Wisconsin: WI Stat. §180.1303(2)(a).

Given the foregoing, Nevada's statute is hardly unique. And AeroGrow's statement to the contrary only reflects its inability to legitimately justify its position.

C. AEROGROW TAKES A CONVOLUTED AND TORTURED INTERPRETATION PATH.

The Real Parties in Interest have explained Nevada's dissenter's rights statute in a logical straightforward manner. AeroGrow, on the other hand, has taken a convoluted and illogical approach in attempting to interpret NRS 92A.400(2).

1. AeroGrow's Reliance on NRS 92A.430 Is Not Only Misplaced, it is Inconsistent with Nevada Case Law.

Initially, because AeroGrow cannot reconcile the Legislature's use of different language within the same statute, AeroGrow makes an illogical argument that has already been rejected by this Court. Specifically, AeroGrow desperately latches on to a clause in NRS 92A.430 as support for its convoluted interpretation. That statute states that the corporation "shall 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." AeroGrow contends that because it only needs to deliver dissenter notices to those beneficial stockholders who previously provided consent letters under NRS 92A.400, that this somehow means the deadline for all beneficial owners to deliver the written consents was prior the merger vote. Not only does the statute not say that, but AeroGrow's interpretation is wrong.

NRS 92A.430 simply requires a corporation who has obtained the notices of intent from stockholders to then deliver dissenter notice packets to: (i) the stockholders of record; and (ii) any beneficial stockholders who had previously obtained consent letters from DTC/Cede before the corporation mails the dissenter's notice. Significantly, with respect to those beneficial stockholders who had not yet obtained a consent letter from DTC/Cede, the corporation is still required to send the dissenter's notice packet to DTC/Cede (as the stockholder of record on behalf of the beneficial stockholder). DTC/Cede is then supposed to provide the dissenter notice packet to the beneficial stockholder. The beneficial stockholder can then request that DTC/Cede provide the consent letter required by NRS 92A.400(2). That is how the process is supposed to work.

In fact, this Court has already explained this process in *Smith v. Kisorin USA, Inc.*, 127 Nev. 444, 254 P.3d 636, 641 (2011). In *Kisorin*, the Nevada Supreme Court declared that the proper procedure under NRS 92A.430 is for the corporation to deliver the dissenter notice packet to Cede (as the stockholder of record for the beneficial owners who submitted their notices of intent to demand payment of shares), who is then supposed to deliver the dissenter notice packet to the beneficial owners. *Kisorin USA, Inc*., 127 Nev. at 449, 254 P.3d at 640. As this Court stated:

> [W]e conclude that the Legislature, in NRS 92A.410 and ***NRS 92A.430***, could not have intended to require corporations to send notices to stockholders for whom they have no information. Thus, the ***only reasonable interpretation of those statutes is that they require corporations to send dissenters' rights notices only to record stockholders, who then, in turn, can provide notice to the beneficial stockholders for whom they hold the stock in street name***. [Emphasis added].

Id. at 449, 640.

In *Kisorin*, the issue before the Court was whether the corporation properly provided the dissenter notices. *Id*. at 448, 639. This Court concluded that it had. *Id.* at 449, 640. In affirming the district court's order granting summary judgment, this Court stated: "we affirm the summary judgment of the district court because ***Kisorin properly provided the dissenters' rights notice to Cede & Co***. as required by Nevada law." *Id*. at 451, 641 (emphasis added).

This process was reiterated in *China Energy Corp. v. Hill*, No. 3:13-CV-00562-MMD, 2014 WL 4831940, at *4 (D. Nev. Sept. 29, 2014). Although this decision is unpublished, there the United States District Court for the District of Nevada addressed solely the issue of sending the dissenter notice packet under NRS 92A.430(2) – the statute AeroGrow hangs its hat on. There the court stated:

> Section 92A.430 specifies that "no later than 10 days after the effective date of the corporate action" giving rise to dissenter's rights, the corporation must send a "dissenter's notice." NRS § 92A.430(2). Corporations ***"need only ... directly provide[ ] [these notices] to the holder of record, who holds the stock in trust for or as an agent of the beneficial stockholder."***

Id. (quoting *Kisorin USA, Inc*., 127 Nev. at 449, 254 P.3d at 640) (emphasis added).

The foregoing cases demonstrate that with respect to the beneficial stockholders who had submitted their notices of intent to demand payment of shares, but not yet obtained the consent letter, the proper process was for AeroGrow to send dissenter notice packets to DTC/Cede (as the stockholder of record), who was then supposed to provide the dissenter notice to the beneficial stockholders. The beneficial stockholders could then request the consent letters from DTC/Cede. This of course makes logical sense, which this Court has already recognized in *Kisorin.* But, because of its flawed interpretation, AeroGrow never sent the dissenter's notices to DTC/Cede, which is directly at odds with this Court's prior holding.

It must also be pointed out that under AeroGrow's interpretation, there would never be a circumstance in which a corporation needed to send a dissenter's notice packet to DTC/Cede on behalf of a beneficial stockholder. That is because, according to AeroGrow, if the beneficial stockholder did not obtain the written consent prior to the merger vote, they lose their dissenter's rights. But, if that were the case, then this Court's holding in *Kisorin* – that the corporation must send dissenter notice packets to Cede – would be meaningless. It is not. This Court, just like the District Court below, is correct.

Furthermore, AeroGrow's reliance on NRS 92A.420(3) is equally baseless. That statute merely states that a stockholder who does not provide a notice of intent to demand payment of shares, votes in favor of the merger, or does not provide a written consent (with respect to a beneficial stockholder), is not entitled to payment for their shares. That statute says nothing about, or even suggests, when the written consent is due.

It also cannot be overlooked that under AeroGrow's interpretation, a beneficial stockholder must assert dissenter's rights ***before*** stockholders of record are required to assert dissenter's rights. For example, a stockholder of record who holds certificated shares does not need to turn in their shares until a demand for payment is due. But strangely, under AeroGrow's interpretation, a beneficial owner

must still provide written consent and assert dissenter's rights prior to the merger vote. Such interpretation would subject beneficial stockholders to shorter deadlines and more stringent requirements. That cannot be the Legislature's intent. Rather, the timing for the submission of a consent letter for beneficial owners and the submission of certificates for stockholders of record should be the same deadline – when the demand for payment is due. No other interpretation makes sense.

2. AeroGrow's Attempt to Distinguish Between the Words "Assert" and "Exercise" also Fails.

AeroGrow also attempts to make a distinction between the words "assertion" and "exercise." AeroGrow contends that "assertion" involves how to invoke a right, while "exercise" involves how to use the right once invoked.

First, AeroGrow is improperly comparing a noun (assertion) and a verb (exercise). Instead, it must compare the two verbs "assert" and "exercise." In doing so, it can only be concluded that they are essentially the same. To "assert" one's rights and to "exercise" one's rights are synonymous in this context.

Second, even if AeroGrow's philosophical contention that to "assert" one's rights involves how to invoke a right while the "exercise" of rights involves how to use the rights once invoked were correct, the argument still fails. Under such interpretation, the deadline to assert dissenter's rights can still only be the deadline to demand payment. That is because one cannot invoke dissenter's rights if the

corporate conduct giving rises to those rights does not yet exist. As explained above, those rights only come into play after the merger is approved, not before. Consequently, AeroGrow's argument fails even based on its bizarre interpretation.

Additional support that AeroGrow's position is absurd comes from the statutory language itself. The language in NRS 92A.430 demonstrates that the dissenter notice packets from AeroGrow are to be sent "to all stockholders of record ***entitled to assert*** dissenter's rights." The language "entitled to assert" can only mean that such rights have not yet been asserted. Similarly, NRS 92A.440(1) states that "[a] stockholder who receives a dissenter's notice pursuant to NRS 92A.440 and ***who wishes to exercis****e* dissenter's rights must: . . .." The language "wishes to exercise" further demonstrates that even at the time a stockholder receives a dissenter's notice packet they have not yet exercised dissenter's rights. They still have a choice, they can either: (1) make a demand for payment; or, (2) even if they submitted a notice of intent to demand payment, they "***may nevertheless decline to exercise dissenter's right***s."

The fact that a stockholder can either elect or decline to exercise dissenter's rights after receiving a dissenter notice packet from AeroGrow unequivocally establishes that the initial deadline to deliver a written notice of intent to demand payment cannot be the same deadline to assert or exercise dissenter's rights.

3. The Fact That Stockholders Can Purchase Shares Immediately Prior to the Merger Vote Is Also Fatal to AeroGrow's Position.

Finally, to further demonstrate the absurdity of AeroGrow's position, and which if not already done should put this matter to rest, the Court only need consider NRS 92A.470, which involves "after acquired" shares. That statute allows a person to purchase shares ***after*** the announcement of the merger, and up until the vote on the merger, and still exercise dissenter's rights.[43] Of course, those new stockholders must still provide a written notice of intent to demand payment of shares prior to the vote. But, it would be an impossibility to have those beneficial stockholders, who purchase shares shortly before the vote through their brokerage, to also provide written consent from Cede ***prior*** to the vote.[44] The Nevada Legislature could not have intended to allow beneficial stockholders who purchased shares shortly before the merger vote to exercise dissenter's rights (which the statute allows), but then subject them to the impossible task of obtaining written consents from Cede prior to

[43] Because AeroGrow's shares were publicly traded, it is possible for someone to purchase shares through their on-line brokerage minutes before the vote on the merger and still pursue dissenter's rights.

[44] In fact, depending on when the stockholder purchased the shares, Cede may not even have a record of such transaction before the vote it taken.

the vote. Such an absurd result entirely undermines AeroGrow's interpretation of NRS 92A.400.

V. CONCLUSION

The Real Parties in Interest respectfully request that this Court exercise its discretion and reject consideration of AeroGrow's Petition. However, in the event this Court does exercise its discretion and considers the Petition, for the reasons explained above the Real Parties in Interest request this Court deny AeroGrow's Petition.

Dated this 21st day of May, 2021.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **REAL PARTIES IN INTEREST'S JOINT ANSWER TO PETITION FOR WRIT OF MANDAMUS TO REVERSE DISTRICT COURT'S ORDER GRANTING JOINT MOTION TO COMPEL** was filed electronically with the Nevada Supreme Court on the 21st day of May, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

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