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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 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.

Docket No.: 82895

District Court Case No.: A-21-829854-B
Dept. XI

REAL PARTIES IN INTEREST'S PETITION FOR REHEARING

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Real Parties in Interest.

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PETITION FOR REHEARING

Pursuant to NRAP 40, the above-captioned Real Parties in Interest ("RPI") respectfully Petition this Court for Rehearing of the Court's December 9, 2021 Opinion granting Writ of Mandamus. The RPI seek rehearing on the grounds that the Court misapprehended and overlooked several critical facts, arguments, legal principles and public policy considerations in reaching its decision. The Court decided that despite the Legislature's use of completely different language to describe deadlines for submitting different information within the same statute, that those two time periods are nevertheless the same. Specifically, the Court decided that the language "before the [merger] vote is taken" in NRS 92A.420(1)(a) with respect to submitting an "intent to demand payment for shares" is the same deadline as "the time to assert dissenter's rights" in NRS 92A.400(2). Consequently, the Court ruled that under Nevada's dissenter's rights statute (NRS 92A.300 - .500) the deadline for a beneficial stockholder to submit a consent from the record stockholder is before the merger vote. Not only does the plain language evidence a different deadline, but requiring consents prior to a merger produces inconsistent, illogical and at times absurd results. Consequently, the Legislature could not have intended consents to be submitted before a merger occurs. Ultimately, the Court's Opinion, if left unchanged, will result in a decision that: (1) discriminates against a class of stockholders; (2) is inconsistent with the Model Business Act upon which NRS 92A is based; (3) creates an illogical and inconsistent reading of Chapter 92A; and (4) violates the statute's

public policy to protect minority shareholders from oppressive conduct by the majority. As explained below, the Court should revisit and reconsider its decision granting the Writ of Mandamus.

A. THE COURT'S DECISION RESULTS IN A DISCRIMINATORY IMPACT ON A CLASS OF STOCKHOLDERS

The Court did not address RPI's argument regarding "after acquired shares." *JA*, at 30. As pointed out in RPI's Joint Answer to Petition for Writ of Mandamus (hereinafter "JA"), Nevada's dissenter's rights statute permits an investor to purchase a corporation's stock *after* the announcement of a merger and until the vote on the merger is taken, and still exercise dissenter's rights. Specifically, NRS 92A.470 explains the procedure that the corporation must follow with respect to the payment for shares acquired after the "announcement to the news media or to the stockholders of the terms of the [merger]." NRS 92A.470(1). This statute grants the corporation the option to withhold payment from such beneficial stockholders. However, the corporation must still provide those beneficial stockholders specific information "within 30 days *after receiving a demand for payment* pursuant to NRS 92A.440." NRS 92A.470(2) (Emphasis added). Thus, NRS 92A.470 permits a beneficial stockholder to acquire shares after the announcement of the merger and until the merger vote and still make a demand for payment and exercise dissenter's rights.

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On today's stock trading platforms, stock purchases can be performed virtually instantly. Consequently, an investor can purchase shares days, minutes or even seconds before the merger vote. Investors who purchase such stock through their stock trading platforms become beneficial stockholders. As explained above, and in the JA, these beneficial stockholders are still permitted to exercise dissenter's rights and be paid the fair value of their shares. Yet, under the Court's interpretation, those beneficial stockholders must still submit a consent from the stockholder of record, the Depository Trust Company and its nominee Cede &Co. (hereinafter "DTC/Cede"), prior to the merger vote or lose their statutory dissenter's rights. It is impossible, however, for those stockholders who purchased their shares days, minutes, or even seconds before the merger vote to obtain consents from DTC/Cede prior to the merger vote.

It generally takes at least two business days for a trade to "settle" after being placed with a broker. See www.sec.gov/news/press-release/2017-68-0. As a result, it can take days before DTC/Cede even has information regarding a beneficial stockholder after a trade is executed. With respect to consents from DTC/Cede, the beneficial stockholder must request the consent via their broker, who must contact DTC/Cede who then must prepare and mail such letter to the broker who then sends the letter to the stockholder, who then mails it to the corporation. The reality is that the process can take several weeks after the trade is executed to obtain the record stockholder's consent. Consequently, the Court's decision that consents from

DTC/Cede must be submitted to the corporation prior to the merger vote prevents beneficial stockholders who purchased shares shortly before the merger from exercising their dissenter's rights. And if the Court's decision is correct, then Nevada's dissenter's rights statute necessarily discriminates against such a class of stockholders. This cannot be the intent of the Legislature.

Given the impracticability and impossibility of even obtaining a consent letter when a stock is purchased shortly before the merger vote, the only reasonable interpretation is that the deadline to submit a consent is when the demand for payment is made. As this Court has previously stated in a dissenter's rights case:

> [T]his court has a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized." "[W]e consider 'the policy and spirit of the law and will seek to avoid an interpretation that leads to an absurd result.'"

Smith v. Kisorin USA, Inc., 127 Nev. 444, 448, 254 P.3d 636, 639 (2011) (internal citations omitted).

As explained in the JA, the policy and spirit of Nevada's dissenter's rights statute is "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."). Accordingly, "dissenter's rights statutes are construed favorably toward

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the shareholder" and are to be "given a reasonable construction rather than a rigid 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").

Given these principles, the Legislature could not have intended to grant stockholders who acquire their shares after the announcement of the merger dissenter's rights but then make it impossible for them to comply with the consent obligation. That would produce an illogical and absurd result. The Court apparently overlooked or misapprehended this fundamental point. And unless the Court's decision is changed, the decision will make it impossible for those beneficial stockholders who purchased their shares after the announcement of the merger but shortly before the merger vote to exercise their statutorily provided dissenter's rights.

B. THE COURT'S DECISION IS INCONSISTENT WITH THE MODEL BUSINESS ACT UPON WHICH NRS 92A IS BASED.

The Court also misapprehended the significance of the language in the Model Business Corporation Act ("MBA") with respect to understanding the Legislature's intent in NRS Chapter 92A. As explained and argued in the JA, at

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22, this Court previously declared that the provisions of NRS 92A.300–92A.500 "are patterned after, or are identical to, the provisions of the 1984 Model Business Corporation Act." *Cohen*, 119 Nev. at 10, 62 P.3d at 726. The MBA's Section 13.03(b)(1) states that the deadline for beneficial owners to submit written consents from the stockholder of record is "not later than date referred to in Section 13.22(b)(2)(ii); . . ." Section 13.22(b)(2)(ii) is the date for submitting a demand for payment, *not* the date for submitting the notice of intent to demand payment prior to the merger vote.

As further explained, the MBA's Section 13.03(b)(1) is virtually identical to NRS 92A.400(2)(a), except that instead of stating "not later than the date referred to in Section 13.22(b)(2)(ii), NRS 92A.400(2)(a) states "not later than the time to assert dissenter's rights." Instead of harmonizing NRS 92A.400(2)(a) with the MBA, the Court merely noted in a footnote that the Nevada Legislature must have intended a different time period to submit the consent than that set forth in the MBA because instead of stating "not later than date referred to in Section 13.22(b)(2)(ii); . . ." the Nevada Legislature stated "not later than the time to assert dissenter's rights." But the fact that the Legislature substituted the language "not later than the time to assert dissenter's rights" for "the date referred to in Section 13.22(b)(2)(ii)" is of no consequence. The provisions of the MBA, and thus NRS Chapter 92A, only make sense if the deadline to submit consents from the stockholders of record is the date the stockholder must make a demand for

payment. It is inconceivable that the Nevada Legislature would follow the MBA with respect to Nevada's dissenter's rights statute, but decide not to follow it with respect to the date consents are due so as to make it more difficult and confusing for beneficial stockholders, and as explained above, impossible for stockholders who acquired their shares shortly before the merger to even comply with the statute.

Furthermore, it should not be overlooked that in deciding not to adopt RPI's argument regarding the MBA, the Court cited Norman Singer & Shambie Singer, *2B Sutherland Statutory Construction*, § 52.5 (7th ed. 2016), observing that "when a legislature models a statute after a uniform act, but does not adopt particular language, courts conclude the omission was 'deliberate,' or 'intentional.'" *Opinion*, at 11, n. 3. Although the Court relies on this particular rule for statutory interpretation, the Court completely ignored another well-established rule of statutory construction that "***when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.***" *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (quoting 2A Norman Singer, *Statutes and Statutory Construction*, § 46:06 at 194 (6th rev. ed. 2000)) (internal quotation marks omitted); *Russello v. U.S.*, 464 U.S. 16, 23 (1983); *S.E.C. v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003). Inexplicably, the Court did not apply this fundamental rule with respect to the use of the language "before the vote is taken" in NRS 92A.420(1)(a) and "not later than the time to assert dissenter's rights" in 92A.400(2).

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Instead, the Court decided that despite the Legislature's use of completely different language in the same statute, the Legislature intended the deadlines to be the same. Not only is this contrary to fundamental statutory interpretation rules, as explained in the underlying JA, if the Legislature intended for consents to be submitted "before the vote is taken" it would have used the exact same language in NRS 92A.400(2)(a) as it used in NRS 92A.420(1)(a). The fact that the Legislature used entirely different language in NRS 92A.400(2)(a) ("not later than the time to assert dissenter's rights") demonstrates that the Legislature intended a different deadline than "before the vote is taken." The Court apparently overlooked that the Legislature's use of different language in these two statutes evidenced an intent that two different deadlines apply.

C. THE COURT'S DECISION CREATES AN ILLOGICAL READING OF NRS 92A.300 ET SEQ.

The Court's decision that a stockholder must assert dissenter's rights before the vote on the merger is taken also creates a nonsensical and illogical reading of the statute. As explained in the JA, at 17, it is illogical and nonsensical to have a stockholder "assert" dissenter's rights before they know whether dissenter's rights will even exist. At minimum, and fundamentally, dissenter's rights do not exist until *after* the vote to approve a merger. In fact, NRS 92A.380(1) states:

> 1. Except as otherwise provided in NRS 92A.370 and 92A.390 and subject to the limitation in paragraph (f), ***any stockholder is entitled to dissent from, and obtain payment of the fair value of the stockholder's shares in the event of any of the following corporate actions:***
>
> ***(a) Consummation of a plan of merger to which the domestic corporation is a constituent entity[.]*** *(Emphasis added).*

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Thus, the plan of merger must be *consummated* before a stockholder is entitled to dissent. Consummation of a plan of merger only occurs when there is an affirmative vote to approve the merger. Consequently, if the vote to merge is not approved, a stockholder is not entitled to dissent because there are no dissenter's rights. A stockholder cannot possibly "assert" dissenter's rights before they know if the plan of merger has been approved. The Court does not explain, or at least misapprehended, the absurdity of a stockholder asserting dissenter's rights prior to the existence of dissenter's rights.

Given this absurdity, the only reasonable reading of the statute that avoids the illogical result of having a stockholder assert dissenter's rights before knowing whether dissenter's rights even exist is that the assertion of dissenter's rights must come after the vote to approve the merger. In fact, that is precisely the reason a stockholder is only required to submit their ***"intent"*** to demand payment for their shares prior to the vote on the merger. NRS 92A.420. Only if the merger is approved do the stockholders then have the opportunity to assert their right to dissent by demanding payment for their shares. Simply put, the Legislature could not have intended the illogical and nonsensical requirement that a stockholder assert dissenter's rights prior to knowing whether dissenter's rights even exist.

Further, if the Court's decision is correct, then beneficial stockholders will be forced to incur expense and time that could turn out to be for naught, while record

stockholders will not be subject to such unnecessary hardships. For instance, if beneficial stockholders must submit consents prior to the merger vote, then those beneficial stockholder must contact their broker, who then must contact the stock transfer agent or DTC/Cede to request written consent. DTC/Cede must then spend time preparing the written consent and send that to the beneficial stockholder. The beneficial stockholder must then submit the consent to the corporation, all before the merger vote, which may fail, resulting in no dissenter's rights. This would create an unduly burdensome procedure solely on the beneficial stockholders that could be for nothing. The Legislature could not have intended to create such an undue burden on beneficial stockholders when the purpose of the statute is to protect them.

D. THE COURT'S READING OF NRS 92A.430 IS INCONSISTENT WITH THIS COURT'S PRIOR DECISION AND PRODUCES AN ABSURD RESULT

In its decision, the Court described a four-step process by which a beneficial stockholder who objects to a proposed merger may seek the fair value of the stockholder's shares from the corporation. The Court placed substantial emphasis on the third step set forth in NRS 92A.430 to conclude that a beneficial stockholder must submit a written consent from the stockholder of record before the merger vote. The Court, however, misapprehended the purpose of NRS 92A.430 and overlooked that the clause relied upon by the Court produces an inconsistent and absurd result.

In reaching its conclusion that a beneficial stockholder must submit a consent from DTC/Cede prior to merger vote, the Court declared that because the Legislature's

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used the term "assert" in NRS 92A.400 and "exercise" in 92A.440 that this evidences the Legislature's intent that different meanings apply to the two terms. The Court then stated that the distinctive use of the language "exercise" and "assert" "is most prevalent in NRS 92A.430's step three, which requires corporations to 'deliver a written dissenter's notice to … *any beneficial stockholder who has previously asserted dissenter's rights pursuant to NRS 92A.400.*'" (Emphasis in original). The Court then went on to state that the "Legislature expressly provided that at step three, a corporation must only send dissenter's notices to . . . any beneficial stockholders who have *already asserted* dissenter's rights, which makes it impossible for a beneficial stockholder to a *first assert dissenter's rights at step four.*"

This logical sequence problem, however, is not remedied by the Court's interpretation. Rather, the Court's interpretation only creates a different logical sequence problem that the Court apparently misapprehended or overlooked. In fact, the reason for the sequencing problem – which occurs either way this statute is interpreted – is because the Legislature attempted, through poor word choice and the complexities of the statute, to correct an ambiguity issue raised in *Smith v. Kisorin USA, Inc.*, 127 Nev. 444, 254 P.3d 636, 641 (2011).

In *Kisorin,* the Smiths were beneficial stockholders. Like the beneficial stockholders here, the Smiths' stock was held in the name of DTC/Cede. The Smiths never received notice from the corporation (Kisorin USA, Inc.) regarding dissenter's rights. Instead, the corporation sent the dissenter's notices to DTC/Cede rather to the

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beneficial stockholders, such as the Smiths. Because the Smiths did not get notice, they did not timely comply with the deadline for demanding payment for their shares.

The issue in *Kisorin* was whether under NRS 92A.410 and .430 the corporation was required to give notice to beneficial stockholders or only to record stockholders. At the time *Kisorin* was decided, NRS 92.430(1) simply stated that "[t]he subject corporation shall deliver a written dissenter's notice to all stockholders entitled to assert dissenters' rights." The Smiths argued that the language in the statute required the corporation to send them dissenter's notices directly. This Court recognized an ambiguity with this statute because a corporation may not know the contact information of beneficial stockholders, and therefore could not send the notices to them. Consequently, this Court held a corporation must only send dissenter's notices *to the stockholder of record* (i.e. DTC/Cede), 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.

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Id. at 449, 640. Because the corporation in *Kisorin* sent the notice to DTC/Cede, the Court held that the corporation complied with the statute and the Smiths lost their dissenter's rights.

Shortly after *Kisorin*, the Legislature amended NRS 92A.430(1) presumably to avoid the harsh result imposed on beneficial stockholders such as the Smiths. In its apparent attempt to require the corporation to send dissenter's notices directly to beneficial stockholders, the Legislature changed to NRS 92A.430(1) to add the following highlighted language:

> 1. The subject corporation shall deliver a written dissenter's notice 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*.

Unfortunately, the language added by the Legislature in its 2013 amendments created more ambiguity and confusion, as well as inconsistent treatments between the two classes of stockholders.

First, it is important to point out that under the MBA, Section 13.22 is the equivalent section to NRS 92A.430. Section 13.22 of the MBA states that the "corporation shall deliver a written appraisal notice and form required by subsection (b) to all shareholders who satisfy the requirement of sections 13.21(a), (b), or (c)." Sections 13.21 deals with submitting a "Notice of Intent to Demand Payment." Thus, under the MBA the intent is to have the corporation send the dissenter's notice to all stockholders who submitted an intent to demand payment for their shares. This of

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course makes logical sense because after the corporation receives the Notice of Intent to Demand Payment of Shares from a stockholder (which includes both stockholders of record and beneficial stockholders), the corporation knows to whom the dissenter's notices should be sent. This is precisely how NRS 92A.430 was supposed to work. Unfortunately, the 2013 amendment defeated the purpose of that statute and has made NRS 92A.430(1) even more ambiguous, problematic, and absurd.

For instance, a corporation must still send dissenter's notices to stockholders of record entitled to assert dissenter's rights. Those entitled to assert dissenter's rights are those who submitted a notice of intent to demand payment under NRS 92A.420. This, according to *Kisorin*, necessarily includes DTC/Cede who must then send the notice to beneficial stockholders who presumably submitted their notices of intent to demand payment. But, here, there is no evidence that AeroGrow sent any dissenter's notices to DTC/Cede for those beneficial stockholders who submitted their notices of intent to demand payment under NRS 92A.420.

The reason AeroGrow did not send dissenter's notices to DTC/Cede is because AeroGrow takes the position, which the Court adopted, that a corporation only need send dissenter's notices to beneficial stockholders who submitted a written consent from DTC/Cede prior to the merger vote. If that is correct, then this Court's holding in *Kisorin* that a corporation must send the dissenter's notice to DTC/Cede who must then send the notice to the beneficial stockholder, is wrong. In fact, under the Court's decision in the present matter, there will never be a situation when a corporation had

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to submit a dissenter's notice to DTC/Cede on behalf of a beneficial stockholder because a beneficial stockholder must have already "asserted" dissenter's rights prior to the merger. Thus, the Court's decision in the present matter is inconsistent with the holding in *Kisorin*.

Also problematic is that under the Court's interpretation of NRS 92A.430(1) a corporation is strangely required to send dissenter's notices to "stockholders of record *entitled to assert dissenter's rights,*" and to beneficial stockholders who have *"previously asserted dissenter's rights."* Thus, under the Court's interpretation, a beneficial stockholder must have already asserted dissenter's rights before they even receive the notice containing information regarding dissenter's rights, including a copy of the dissenter's rights statute to help enable them to make a decision on whether to assert dissenter's rights. In contrast, stockholders of record can wait to receive the dissenter's notice prior to deciding whether to assert dissenter's rights. That, however, is nonsensical. It cannot be the Legislature's intent that beneficial stockholders must assert dissenter's rights *before* they receive the dissenter's notice, while stockholders of record can wait for months until *after* they receive dissenter's notice to assert dissenter's rights. Such interpretation likewise produces an inconsistent, illogical and absurd result.

In addition, reading NRS 92A.430(1) to require a beneficial stockholder to assert dissenter's rights before the merger vote is undermined by the language in NRS 92.440(1). That statute states that *after* receiving a dissenter's notice, a "stockholder"

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(which includes both beneficial and stockholders of record)[1] and "who wishes to exercise dissenter's rights" must make a demand for payment. But according to the Court's interpretation, a beneficial stockholder must have already asserted dissenter's rights well before they "wish[] to exercise dissenter's rights," which would make that language superfluous, illogical and absurd.

The plain meaning of the word "wishes" is "to have a desire for: want, crave." Webster's Third New International Dictionary (1993). Thus, the plain language of NRS 92A.440(1) is that a beneficial stockholder who receives a dissenter's notice and *wants* or *desires* to exercise dissenter's rights must submit a demand for payment. Thus, a beneficial stockholder cannot be required to "assert" dissenter's rights months before they are provided a dissenter's notice which enables them to decide whether they "wish" to exercise dissenter's rights by submitting a demand for payment at a later date.

And even if the language was ambiguous as the Court suggests, then such ambiguity should be construed in favor of the stockholders. *Matter of Fair Value of Shares of Bank of Ripley*, 184 W. Va. at 100. Notably, the Court agreed with the RPI that the language "wishes to assert" as used in NRS 92A.420 could connote actually asserting at a later point in time. *Opinion*, at 11, n. 2. Thus, the Court has

[1] See NRS 92A.325

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acknowledged the statute is ambiguous.[2] The Court, however, pointed out that NRS 92A.440 also uses the terms "wishes to assert" and contends that RPI's construction of "wishes to" would render it impossible for a stockholder ever to exercise his or her dissenter's rights. *Id.* According to the Court, the language "wishes to" connotes present, not future action. But that cannot be correct.

The use of the language "wishes to assert" in NRS 92A.440 actually supports RPI's interpretation. The statute states that a stockholder who receives a dissenter's notice and wishes to assert dissenter's rights must submit a demand for payment. The deadline to submit the demand for payment *is a future date* identified in the dissenter's notice. Thus, it is this future date on which the demand for payment is due that the stockholder actually asserts dissenter's rights. And the date for demanding payment comes *after* the stockholder's wish, which is when they receive the dissenter's notice. Thus, the language "wishes to" actually connotes future action, not present action. The Court misapprehended the difference in the timing of the "wish" upon receiving the dissenter's notice and the future time for submitting the demand for payment.

[2] Despite this acknowledged ambiguity, the Court inconsistently held that "we conclude that NRS 92A.400-.440 unambiguously provide that a beneficial stockholder "asserts" dissenter's rights at step two (before the merger vote) and that the stockholder must provide the consent from his or her stockholder of record at that point."

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E. THE COURT'S DECISION IS CONTRARY TO PUBLIC POLICY AS IT LEAVES MANY STOCKHOLDERS WITHOUT A REMEDY.

Finally, public policy mandates that the Court re-hear its decision. It is well established than "[a]n ambiguous statute should be interpreted consistent with legislative intent, taking into account reason and public policy." *Pope Invs., LLC v. China Yida Holding, Co.,* 137 Nev. Adv. Op. 33, 490 P.3d 1282, 1287 (2021) (addressing dissenter's rights). As pointed out above, the "dissenters' rights statute exists to protect minority shareholders from oppressive conduct by the majority." *Pueblo Bancorporation,* 63 P.3d at 353. Further, dissenter's rights statutes are to be construed favorably toward the shareholder, and "[d]oubts arising from a lack of precision or accuracy in the statute should, where possible, be resolved in favor of the dissenting shareholder." *Matter of Fair Value of Shares of Bank of Ripley*, 184 W. Va. at100. The Court's decision overlooked these fundamental principles and, consequently, will leave numerous stockholders without a remedy.

The RPI sought to comply with the requirements of NRS 92A and reasonably understood that written consents from DTC/Cede were due when they made the demand for payment, rather than before the merger vote. This understanding was consistent with the language in NRS Chapter 92A, the MBA, the purpose behind the statute, and how Business Court Judge Gonzales understood it. The RPI maintain the merger consideration was woefully low, and that AeroGrow engaged in bad faith to suppress the price paid to the stockholders. If the Court's decision stands,

AeroGrow's bad faith conduct and artificially low merger consideration will benefit AeroGrow to the tune of tens of millions of dollars, while simultaneously harming the RPI who invested in the company with the expectation that their investment would not be manipulated and suppressed by the majority. The Court should, therefore, also reconsider its decision in light of the public policy behind the dissenter's rights statute.

CONCLUSION

The Legislature could not have intended Nevada's dissenter's rights statute, which is meant to protect stockholders, from the inconsistent, illogical, and absurd results that will occur if the Court's decision is left unchanged. Therefore, given the foregoing, the Court should re-hear its decision granting AeroGrow's Petition for Writ of Mandamus.

DATED this 26th day of January, 2022.

MARQUIS AURBACH CHTD.

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 40

I hereby certify that this petition for rehearing 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font. I further certify that this petition for rehearing complies with the type-volume limitations of NRAP 40 because, excluding the parts of the petition exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 4,630 words.

DATED this 26th day of January, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of January, 2022, I submitted the foregoing **REAL PARTIES IN INTEREST'S PETITION FOR REHEARING** for filing via the Court's eFlex electronic filing system to all parties of record.

DATED this 26th day of January, 2022.

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