IN THE SUPREME COURT 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 L. MCLAUGHLIN, BRIAN PEIERLS, JOSEPH E. PETER, ALEXANDER PERELBERG, AMY PERELBERG,

Docket No. 82895

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

PETITIONER'S ANSWER TO REAL PARTIES IN INTEREST'S PETITION FOR REHEARING

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, THE ALEXANDER PERELBERG IRA

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I. INTRODUCTION

This Court has already decided the discrete issue of statutory interpretation at issue in AeroGrow's Petition for Writ of Mandamus (the "Petition for Writ"). The only question before this Court was when, under NRS Chapter 92A, beneficial stockholders like the Real Parties in Interest (the "RPIs") must obtain and submit the consent of their stockholder of record to assert their dissenter's rights. After considering the briefs submitted by both parties, along with the relevant facts, law, and policy considerations, the Court found that "NRS 92A.400-.440 unambiguously provide that a beneficial stockholder 'asserts' dissenter's rights at step two and that the stockholder must provide the consent from his or her stockholder of record at that point." *AeroGrow Int'l, Inc. v. Eighth Jud. Dist. Ct.*, 137 Nev., Adv. Op. 76, 499 P.3d 1193, 1196 (Dec. 9, 2021) (the "Order"). In so concluding, the Court did not overlook or misapprehend any point of law or fact. RPIs' Petition for Rehearing (the "Petition for Rehearing"), which repeats the same arguments raised in RPIs' Answer to the Petition for Writ (the "Answer"), does not show otherwise. There is no reason for the Court to rehear this matter. RPIs' Petition for Rehearing should be denied.

II. LEGAL STANDARD

Nevada Rule of Appellate Procedure 40 allows a party to petition the Court for a rehearing only in two limited situations. Under NRAP 40(c)(2), the Court "may consider rehearings in the following circumstances: (A) When the court has

overlooked or misapprehended a material fact in the record or a material question of law in the case, or (B) When the court has overlooked, misapplied, or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case." *City of N. Las Vegas v. 5th & Centennial*, 130 Nev. 619, 622, 331 P.3d 896, 898 (2014) ("NRAP 40(c)(2) permits this court to grant a petition for rehearing when it has overlooked or misapprehended a material fact or has overlooked or misapplied controlling law."); *Huckabay Props. v. NC Auto Parts*, 130 Nev. 196, 205 n.5, 322 P.3d 429, 435 n.5 (2014) (stating that NRAP 40 "allows rehearing of an appeal only upon demonstration that the court overlooked or misapprehended points of law or fact").

Under NRAP 40, parties may not reargue "matters presented in the briefs and oral arguments … and no point may be raised for the first time on rehearing." NRAP 40(c)(1). *See also Gordon v. Eighth Jud. Dist. Ct. of State of Nev. In & For Cty. of Clark*, 114 Nev. 744, 745, 961 P.2d 142, 143 (1998) ("A petition for rehearing may not be utilized as a vehicle to reargue matters considered and decided in the court's initial opinion. Nor may a litigant raise new legal points raise new legal points for the first time on rehearing.").

III. ARGUMENT

RPIs do not (and cannot) meet the requirements for rehearing under NRAP 40. RPIs "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." Petition for Rehearing at 4. But, they use their Petition for Rehearing merely to rehash arguments this Court has already considered—and rejected. That is improper. *Clem v. State*, 120 Nev. 307, 314, 91 P.3d 35, 39 (2004) ("Appellants' current attempt to reargue the issue does not provide a basis for rehearing, and they have failed to show that our decision … overlooked or misapplied controlling authority."). RPIs are ***not*** entitled to a rehearing simply because they disagree with this Court's decision and reasoning. Their Petition for Rehearing must be denied.

A. This Court Did Not Overlook The Significance Of The Model Business Corporation Act.

RPIs contend that this Court's decision is inconsistent with the Model Business Corporation Act upon which NRS 92A is based. Not only did RPIs raise this argument in their Answer, *see* Answer at 22–23, but this Court expressly rejected this argument in its Order. *See* Order at 1199 n.3 ("RPIs contend that despite the Legislature's express distinction between 'assert' and 'exercise,' we should construe NRS 92A.400-.440 consistently with the 1984 Model Business Corporation Act, which provides that a beneficial stockholder need not submit the stockholder of record's consent until step four … We are not persuaded by this contention."). The Court can hardly have overlooked an argument it explicitly rejected in its opinion. And its rejection of it was for good reason. As the Court noted, "the Legislature expressly provided that, at step

three, a corporation must only send dissenter's notices to beneficial stockholders who have *already asserted* their dissenter's rights, which makes it impossible for a beneficial stockholder to *first assert* dissenter's rights at step four." Order at 1199 (emphasis in original).

B. This Court's Decision Does Not Create An Illogical Reading Of NRS Chapter 92A.

RPIs also argue that this Court's decision creates an illogical reading of NRS 92A.300 *et seq.* RPIs contend that the "Court does not explain, or least misapprehended, the absurdity of a stockholder asserting dissenter's rights prior to the existence of dissenter's rights." Petition for Rehearing at 12. Not only did RPIs raise this argument in their Answer, *see* Answer at 17, but this Court expressly rejected it. In its Order, the Court stated that "[w]hile RPIs' proffered construction is not wholly unreasonable, we are not persuaded by it, as it treats 'assert' as being synonymous with 'exercise,' even though NRS 92A.400–.440 use those terms distinctly." Order at 1198.

RPIs argue—just as they did in their Answer—that the Court overlooked the Legislature's use of different language throughout the statute that, under RPIs' reading, would evidence an intent for two different deadlines to apply. Petition for Rehearing at 11. But, again, this Court directly addressed that argument. In its Order, the Court stated, "RPIs' proffered construction of 'wishes' would render it impossible for a stockholder ever to 'exercise' his or her dissenter's rights. Thus, the most

sensible reading of 'wishes to' connotes present, not future, action." Order at 1198 n.2. RPIs give no reason—and certainly not one permissible under NRAP 40—for the Court to change their well-reasoned analysis now.

C. This Court Did Not Overlook Or Misapprehend Its Prior Decision In *Smith v. Kisorin USA, Inc*.

RPIs argue that the Court's decision is inconsistent with *Smith v. Kisorin USA, Inc.*, 127 Nev. 444, 254 P.3d 636 (2011). RPIs specifically raised these arguments regarding *Smith* in their Answer. Answer at 28. While the Court did not address this specific argument in its Order, that is far from evidence that it overlooked its prior decision. *See Oliver Sagebrush Drive Tr. v. Nationstar Mortg. LLC*, 2020 WL 407056, 455 P.3d 842 (Table), n.2 (Nev. 2020) (noting that, "to the extent that this disposition does not expressly address each of appellant's arguments, we are not persuaded that any of those arguments warrant reversal."); *Kirman v. Powning*, 25 Nev. 378, 61 P. 1090, 1090 (1900) (denying petition for rehearing where the Court "considered the … cases cited, but did not deem it necessary to discuss them"). In fact, there was no reason for the Court to address *Smith* here. The Court's decision in *Smith* has no bearing on the questions presented in the Petition. *See* Petition for Writ at n.1. As RPIs acknowledge, the Court in *Smith* considered only the limited question of who the corporation was required to send dissenter's notices to—namely beneficial stockholders from whom it had no information or their record stockholders—under a prior version of NRS 92A.430. Petition for Rehearing at 16; *Smith*, 127 Nev. at 450,

254 P.3d at 641. *Smith* did ***not*** address the question raised here—the timing for beneficial stockholders to submit record stockholder consents to the corporation.

Recycling another argument from their Answer, RPIs attempt to impose ambiguity onto the Legislature's revision of NRS 92A.430(1) as evidence that this Court has somehow treated two classes of stockholders differently. But there is no such ambiguity in the current statute. *Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007) ("[W]hen a statute's language is plain and its meaning clear, the court will apply that plain language."). Indeed, the Legislature amended the statute in 2013, after *Smith*, to clarify the procedural requirements at issue in *Smith*. *See* NRS 92A.430. Regardless, *Smith* and the Legislature's subsequent revisions to NRS 92A.430(1) have no bearing on the issues in this case and are irrelevant for purposes of AeroGrow's Petition for Writ.[1]

D. This Court Did Not Overlook The Practical Implications Of The Limitations On The Right To Dissent In NRS Chapter 92A.

RPIs argue that the Court's decision would make it impossible for beneficial stockholders who purchased their shares after the announcement of the merger but shortly before the vote to exercise their dissenter's rights and would thus discriminate

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[1] Contrary to RPIs' assertion, and in accordance with the plain language of the statute, AeroGrow delivered dissenter's notices to both the beneficial stockholders who had properly asserted their dissenter's rights (including by submitting their stockholder of record's consents) prior to the vote on the Merger and to the stockholders of record. Petition for Writ at 7.

against stockholders who purchased in that timeframe. RPIs already raised this argument in their Answer. *See* Answer at 33–38. Admitting they have reproduced this argument, they complain that the "Court did not address" it expressly in its Order. Petition for Rehearing at 5. Again, that is far from evidence that this Court overlooked the argument or misapprehended the effects of its decision. *See Kirman*, 25 Nev. at 378, 61 P. at 1090.

The Court interpreted the provision at issue in the context of NRS Chapter 92A, which includes a series of limitations on the right of dissent, including, among other things, the requirement to submit the "written consent of the stockholder of record to the dissent." NRS 92A.400(2); *see also* NRS 92A.380–.440. Contrary to RPIs' position, NRS 92A.470 does not excuse any beneficial stockholder, including one who acquires shares after the merger announcement, from these limitations. *See* NRS 92A.470 (merely permitting a corporation to "elect to withhold payment [required per NRS 92A.460] from a dissenter unless the dissenter was the beneficial owner of the shares before the date set forth in the dissenter's notice as the first date of any announcement to the news media or to the stockholders of the terms of the proposed action"). As RPIs noted in the Petition for Rehearing, "this 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." Petition for Rehearing at 7 (quoting *Smith*, 127 Nev. at 448, 254 P.3d at 639). This Court properly considered NRS

Chapter 92A as a whole and gave the statutes their plain meaning within that context. *Haney v. State*, 124 Nev. 408, 411–12, 185 P.3d 350, 353 (2008) ("When interpreting a statute, this court will give the statute its plain meaning and will examine the statute as a whole[.]").

E. This Court Did Not Overlook The Relevant Public Policy Considerations.

RPIs argue that this Court's decision is contrary to public policy because it "leaves many stockholders without a remedy." Petition for Rehearing at 21. Like their other supposed arguments for rehearing, RPIs already raised this argument in their Answer. *See* Answer at 21, 33–34. Regardless, the premise is mistaken.

RPIs are not left without a remedy. They had a remedy—dissenter's rights. But ***they failed*** to take the necessary steps to claim their remedy. Unlike RPIs here, 32 stockholders (all of whom are clients of counsel for RPIs) who were beneficial stockholders of AeroGrow (like RPIs) properly obtained and submitted written consents from their stockholders of record prior to the vote on the Merger. *See, e.g.*, PA01632–PA01633. Those dissenters who properly asserted their dissenter's rights are proceeding through the dissenter's rights process outlined in NRS Chapter 92A.

RPIs' non-compliance with the plain language of the statute does not entitle them to an order compelling AeroGrow to allow them to participate in the dissenter's rights process. In fact, the statute explicitly states as much: "[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." NRS 92A.420(3). If the Nevada Legislature had intended the dissenter's rights remedy to be available even where stockholders failed to comply with the statutory scheme, it would not have included provisions that explicitly provide that stockholders who fail to comply with the required statutory steps are not entitled to payment. *See id*.; NRS 92A.440 (providing that a "stockholder who does not demand payment or deposit his or her certificates where required, each by the date set forth in the dissenter's notice, is not entitled to payment for his or her shares under this chapter.").

RPIs' arguments that such a result is in conflict with public policy and the Legislature's intent similarly fall flat. As this Court stated in *Cohen*, the Nevada dissenter's rights statute serves the ***dual objective*** of "facilitat[ing] business mergers, while protecting minority shareholders from being unfairly impacted by the majority shareholders' decision to approve a merger." *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 10, 62 P.3d 720, 726–27 (2003). RPIs insist that this Court should blindly favor minority stockholders even where the plain language of the statute belies their interpretation of the law. That is not the public policy of this state, nor does any Nevada law support such a position.

IV. CONCLUSION

This Court should deny the Petition for Rehearing because RPIs have failed to satisfy the requirements of NRAP 40. As expressly prohibited by NRAP 40, RPIs use

their Petition for Rehearing to reargue the same points already raised in their Answer. RPIs' disagreement with the Court's Order does not entitle them to a rehearing. Because RPIs have given the Court no basis to grant the relief they seek, their Petition for Rehearing should be denied.

DATED: February 22, 2022

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition 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 2016 in 14-point Times New Roman font. I further certify that this petition complies with type-volume limitations of NRAP 40 because, excluding the parts of the petition exempted by NRAP 32(a)(7(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 2,277 words.

DATED: February 22, 2022

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VERIFICATION

I, Maximilien D. Fetaz, hereby declare as follows:

I am an attorney at the law firm of Brownstein Hyatt Farber Schreck LLP, and counsel for the Petitioner in the matter herein; that I have read the foregoing **PETITIONER'S ANSWER TO REAL PARTIES IN INTEREST'S PETITION FOR REHEARING** and know the content thereof; that the same is true of my own knowledge, except for those matters therein stated on information and belief, and as to those matters, I believe them to be true.

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

Executed this 22nd day of February, 2022, in Las Vegas, Nevada.

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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 22nd day of February, 2022, 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 **PETITIONER'S ANSWER TO REAL PARTIES IN INTEREST'S PETITION FOR REHEARING** to be hand delivered, in a sealed envelope, on the date and to the addressee(s) shown below:

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