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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 EN BANC RECONSIDERATION

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Real Parties in Interest.

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II. INTRODUCTION

Real Parties in Interest ("RPI") respectfully Petition this Court for en banc reconsideration of the Panel's December 9, 2021 Opinion (the "Opinion") granting Writ of Mandamus.[1] The Opinion does not maintain the uniformity of this Court's decisions and involves substantial precedential and public policy issues surrounding Nevada's Dissenter's Rights Statute, NRS Chapter 92A. The Opinion failed to address several key arguments, ignored fundamental rules of statutory interpretation, and created new law that will make it impossible for certain shareholders to ever exercise their statutory dissenter's rights. If left unchanged, the Opinion will have a negative impact not only on RPI, but on all stockholders of Nevada corporations for whom the Statute was meant to protect. In fact, if not overturned, the Panel's Order will eviscerate the statutory rights of a class of stockholders, will contradict the Model Corporation's Business Act upon which the Statute is based, and will result in an illogical and absurd reading of the Statute. Therefore, to maintain uniformity of this Court's decisions and for precedential and public policy reasons, this Court should reconsider the Panel's Opinion to ensure that the rights of stockholders of Nevada corporations are protected.

[1] RPI filed a Petition for Rehearing of the Opinion on January 26, 2022, which was denied on March 15, 2022. RPI obtained an extension until April 28, 2022 to file the present Petition.

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III. BRIEF BACKGROUND OF ISSUE ON APPEAL

This case concerns the interpretation of Nevada's Dissenter's Rights Statute, NRS 92A.300, *et seq.* ("Statute"). That Statute allows stockholders to dissent from certain corporate actions, such as a merger, and seek the fair value of their shares. AeroGrow International, Inc. was a publicly traded company that was acquired through a merger. RPI are a group of AeroGrow stockholders who are pursuing dissenters' rights under the Statute.

Nevada's Statute is based upon and virtually identical to the Model Business Corporation Act (the "MBCA"). Just like the MBCA, Nevada's Statute distinguishes between "stockholders of record" and "beneficial stockholders." NRS 92A.305 and 92A.330. 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").[2] Today, the overwhelming majority of stockholders of publicly traded corporations are beneficial stockholders. RPI are all beneficial stockholders.

At issue is the deadline by which a beneficial stockholder must submit a written consent from the stockholder of record (i.e. DTC/Cede) as set forth in NRS

[2] For a concise history of DTC/Cede, *see In re Appraisal of Dell Inc.*, No. CV 9322-VCL, 2015 WL 4313206 (Del. Ch. July 13, 2015), as revised (July 30, 2015).

92A.400(2)(a). That statute requires the beneficial stockholder to provide a consent "not later than the time the beneficial stockholder *asserts* dissenter's rights." (Emphasis added). RPI maintain that the deadline is when dissenter's rights are asserted, which is when the demand for payment is made under NRS 92A.430. In contrast, AeroGrow maintains that the deadline is when stockholders provide their prerequisite notice of "*intent* to demand payment" under NRS 92A.420(1)(a), which is "before the [merger] vote is taken."

After extensive briefing, Business Court Judge Elizabeth Gonzales agreed with RPI and concluded that the deadline to submit consents is when the stockholder makes a demand for payment. Dissatisfied with the decision, AeroGrow filed a Petition for Writ of Mandamus to overturn Judge Gonzales' Order. On December 9, 2021, a three judge Panel granted AeroGrow's Writ Petition. The Panel 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 Panel ruled that the deadline to submit consents 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.

The Panel's Opinion negatively impacts shareholders for whom the Statute was meant to protect. If not overturned, the Panel's Opinion will eviscerate the statutory rights of a class of stockholders, will contradict the MBCA upon which the Statute is

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based, and will result in an illogical and nonsensical reading of the Statute. The rules of statutory interpretation and public policy mandate that this Court reconsider the Panel's decision to ensure that the rights of stockholders are protected.

IV. SUPPORTING LAW AND ARGUMENT

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." *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 10, 62 P.3d 720, 726-727 (2003). Accordingly, "dissenter's rights statutes are construed favorably toward 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"); *Lawson Mardon Wheaton, Inc. v. Smith*, 160 N.J. 383, 400, 734 A.2d 738, 748 (1999) (dissenter's rights statutes "should be liberally construed in favor of the dissenting shareholders.").

Instead of applying these fundamental principles, the Panel's decision applied a rigid, technical, inconsistent and erroneous interpretation of the Nevada's Statute

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in favor of the corporation, rather than the dissenting shareholders. As a result of the Panel's decision: (1) it is now impossible for certain stockholders to exercise their statutory right to dissent; (2) Nevada's Statute is now inconsistent with the MBCA upon which Nevada's Statute was modeled; and (3) the reading of the Statute now produces an illogical and preposterous result. The Nevada Legislature could not have intended any of these results. En banc reconsideration is, therefore, necessary to prevent a disastrous interpretation of Nevada's Statute that not only impacts RPI, but will adversely impact all shareholders of Nevada corporations wishing to exercise dissenter's rights in the future.

A. THE PANEL'S INTERPRETATION OF NRS 92A.400 EVISCERATES THE STATUTORY RIGHTS OF CERTAIN STOCKHOLDERS

In Nevada, like the MBCA, a stockholder who purchased a corporation's shares *after* the announcement of a merger but before the merger vote is still entitled to exercise dissenter's rights. The purchased shares are known as "after acquired shares." NRS 92A.470 explains the procedure that the corporation must follow with respect to after acquired shares. Significantly, 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 beneficial stockholder to exercise dissenter's rights with respect to their after acquired shares. Unfortunately, the Panel's Opinion, if left unchanged, will eviscerate the statutory rights of these beneficial stockholders.

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On today's trading platforms, an investor can purchase shares days, minutes or even seconds before the merger vote. Investors who purchase such stock through their trading platforms become beneficial stockholders. Under the Panel's interpretation, beneficial stockholders who purchased "after acquired shares" must still submit a consent from DTC/Cede prior to the merger vote or lose their statutory dissenter's rights. It is impossible, however, for stockholders who purchased their shares days, minutes, or even seconds before the merger vote to obtain such consents 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 DTC/Cede's consent. Consequently, under the Panel's interpretation, beneficial stockholders who purchased shares shortly before the merger will be precluded from exercising their dissenter's rights. 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.

Given the impracticability and impossibility of obtaining consents when a stock is purchased shortly before the merger vote, the only reasonable interpretation is that the deadline to submit consents 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). The Panel's decision failed to follow this fundamental principle. Because the Panel's decision results in an interpretation that leads to an absurd result when applied to after acquired shares, it should be reconsidered and overturned.

B. THE PANEL'S OPINION CONTRADICTS THE MODEL BUSINESS ACT UPON WHICH NRS 92A IS BASED.

This Court has 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 MBCA's Section 13.03(b)(1) is virtually identical to NRS 92A.400(2)(a). Both sections pertain to the deadline to submit consents. The only exception between the two is 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."

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Significantly, Section 13.22(b)(2)(ii) is the date for submitting a demand for payment, *not* the date for submitting the prerequisite notice of intent to demand payment prior to the merger vote. Thus, under the MBCA the deadline to submit a consent is the date the demand for payment is due. Because the MBCA identifies the deadline to submit consents as the date demand for payment is due, and because Nevada's Statute is based upon and follows the MBCA, RPI maintain that Legislature intended the same deadline to apply for submitting the consents.

Instead of harmonizing NRS 92A.400(2)(a) with the MBCA, the Panel merely noted in a footnote that the Nevada Legislature must have intended a different deadline to submit consents than that set forth in the MBCA 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 "not later than the date referred to in Section 13.22(b)(2)(ii)" does not show a different Legislative intent. In fact, the Legislature could not have used the same language as the MBCA as it would be nonsensical to refer to "Section 13.22(b)(2)(ii)." Moreover, it is inconceivable that the Legislature would follow the MBCA in all other respects, 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 in some cases even impossible, to comply with the Statute.

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Furthermore, in concluding that the Legislature must have intended a different deadline for submitting consents than stated in the MBCA, the Panel 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 Panel relied on this particular rule for statutory interpretation, the Panel 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) (emphasis added) (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).

The Panel ignored 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 NRS 92A.400(2). If the Legislature intended that consents 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) ("before the vote is taken"). 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."

C. THE PANEL'S OPINION CREATES AN ILLOGICAL READING OF NRS CHAPTER 92A WHICH LEADS TO ABSURD RESULTS

1. The Panel's Decision Nonsensically Requires Stockholders To Assert Dissenter's Rights Before Dissenter's Rights Even Exist.

By declaring consents are due prior to the merger vote, the Panel's Opinion necessarily means that the time to "assert dissenter's rights" is also before the merger vote. This cannot logically be the case. Before a stockholder can assert dissenter's rights, such rights must exist. Dissenter's rights do not exist until *after* the merger is approved by the stockholders. *See* NRS 92A.380(1) (stockholders are only entitled to dissent in the event there is a consummation of a plan of merger). Significantly, if the merger is *not* approved, dissenter's rights do not exist. Thus, a stockholder cannot possibly "assert" dissenter's rights before they know if the plan of merger has been approved. Therefore, because the Opinion requires stockholders to "assert" dissenter's rights before such rights even exist – and ultimately may not exist – the Opinion is illogical and nonsensical.

Given this absurdity, the only reasonable reading of the statute is that the assertion of dissenter's rights must come after the vote to approve the merger. In fact, that is precisely the reason stockholders are only required to submit their ***"intent"*** to demand payment for their shares prior to the merger vote. NRS 92A.420. Only if the merger is approved do stockholders then have the opportunity to assert their right to dissent by demanding payment for their shares. The Legislature could not have

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intended stockholders assert dissenter's rights prior to knowing whether dissenter's rights even exist.

Further, if the Panel's Opinion 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 stockholders must jump through all the hoops to obtain consents from DTC/Cede prior to the merger vote, which may fail, resulting in no dissenter's rights. The Legislature could not have intended to create such an undue and wasteful burden on beneficial stockholders when the purpose of the statute is to protect them.

2. The Panel's Opinion is Inconsistent With This Court's Prior Decision and Misunderstands the Purpose of NRS 92A.430.

In its Opinion, the Panel described a four-step process for pursuing dissenter's rights. The Panel placed substantial emphasis on the third step set forth in NRS 92A.430 to conclude that a beneficial stockholder must submit the consent before the merger vote. The Panel, however, misapprehended the purpose of NRS 92A.430 and that its Opinion is inconsistent with a prior decision of this Court.

Initially, the Panel attempted to distinguish the words "assert" and "exercise." The Panel declared that because the Legislature's used the term "assert" in NRS 92A.400 and "exercise" in 92A.440 that this evidences the Legislature's intent that

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different meanings apply to the two terms.[3] The Panel further 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 Panel 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 sequence problem, however, is not remedied by the Panel's interpretation. Rather, the Panel's interpretation creates a different but equally problematic and illogical sequence problem. 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 simply clarify that both stockholders of record and beneficial stockholders are entitled to receive dissenter's notice.

The issue with respect to persons entitled to receive a dissenter's notice appears

[3] The Panel's argument, however, is undermined because the MBCA likewise uses the terms "assert" and "exercise" interchangeably. *Compare* MBCA Sections 13.03 and 13.23(a), and the equivalent statutes NRS 92A.400 and 92A.440.

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to have arisen because of this Court's decision in *Kisorin, supra*. There, 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 Kisorin regarding dissenter's rights. 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.[4] 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 to the beneficial owners. *Kisorin*, 127 Nev. at 449. Because the corporation in *Kisorin* sent the notice to DTC/Cede, this 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) to "clarify the

[4] This issue no longer exists because the prerequisite notice of intent to demand payment contains the beneficial stockholder's contact information. *See* NRS 92A.420(1)(a).

persons entitled receive written dissenter's notice and to acknowledge the difference between a stockholder of record and a beneficial stockholder," because the classes of stockholders are defined individually in other sections. *See Minutes of the Senate Committee on Judiciary, Seventy-Seventh Session*, April 2, 2013, SB 441, Exhibit C (https://www.leg.state.nv.us/Session/77th2013/Exhibits/Senate/JUD/SJUD709C.pdf)

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:

> 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*.

Thus, the amendment had nothing to do with the deadline to provide written consents under NRS 92A.400(2)(a). It was merely meant to clarify who is to receive notice from the corporation. Unfortunately, the language added by the Legislature in 2013 created ambiguity and confusion, as well as inconsistent treatments between the two classes of stockholders.

First, under the MBCA, Section 13.22 is the equivalent section to NRS 92A.430. Section 13.22 of the MBCA 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 MBCA the

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intent is to have the corporation send the dissenter's notice to all stockholders (both beneficial and stockholders of record) who submitted an intent to demand payment for their shares. This of course makes logical sense because after the corporation receives the Notice of Intent to Demand Payment, the corporation knows the contact information for such stockholders. This is precisely how NRS 92A.430 was supposed to work. Unfortunately, the 2013 amendment unintentionally defeated the purpose of that statute and has made NRS 92A.430(1) ambiguous.

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 erroneous position, which the Panel adopted, that a corporation only need send dissenter's notices to beneficial stockholders who submitted consents prior to the merger vote. If that is correct, then this Court's holding in *Kisorin* is wrong. In fact, if the Panel's Opinion is correct, there will never be a situation when a corporation had to submit a dissenter's notice to DTC/Cede on behalf of a beneficial

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stockholder because a beneficial stockholder must have already "asserted" dissenter's rights prior to the merger.

The Panel's Opinion is also problematic because it strangely requires a corporation 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 Panel's interpretation, a beneficial stockholder must have already asserted dissenter's rights before they even receive the notice containing information regarding 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 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.

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" (which includes both beneficial and stockholders of record)[5] "who wishes to exercise dissenter's rights" must make a demand for payment. But according to the Panel's

[5] See NRS 92A.325

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 and nonsensical.

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.

Notably, the Panel agreed with 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 Panel has acknowledged the statute is ambiguous. The Panel, 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 Panel, 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

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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 Panel 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. And even if the language was ambiguous as the Panel suggests, then such ambiguity should have been construed in favor of the stockholders. *Matter of Fair Value of Shares of Bank of Ripley*, 184 W. Va. at 100.

3. The Panel's Decision is Contrary to the Declared Public Policy of NRS Chapter 92A.

Finally, public policy mandates that the Court reconsider the Panel's 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 *Cohen*, 119 Nev. at 10, and should be construed favorably toward the shareholder. *Matter of Fair Value of Shares of Bank of Ripley*, 184 W. Va. at100. Statutes must also be construed as a whole to reconcile and harmonize its provisions to avoid an interpretation that leads to an absurd result. *Kisorin,* at 448. The Panel's Opinion overlooked these fundamental

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principles and, consequently, will leave numerous stockholders without a remedy.

Not only will RPI be negatively impacted by the Opinion, but all beneficial stockholders of publicly traded Nevada corporations will be impacted in the future. As explained above, the vast majority of stockholders in public traded companies are beneficial stockholders. Unlike stockholders of record, beneficial stockholders must now "assert" dissenter's rights before the merger is approved, and therefore before they know whether dissenter's rights exist. Moreover, they must assert dissenter rights before they receive any information from the corporation to enable them to decide whether to pursue dissenter's rights.

Further, such stockholders must obtain consents from DTC/Cede before they know whether dissenter's rights exist, thus incurring substantial time and expense that may be for naught. And for those stockholders who acquired shares shortly before the merger, they will lose their statutorily granted rights. Given that Nevada's Statute was enacted to protect minority stockholders from oppressive conduct by the majority, the Legislature could not have intended to make it more difficult, and some cases impossible, to exercise dissenter's rights.

VI. CONCLUSION

For the reasons set forth above, RPI respectfully request that the en banc Court

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reconsider and overturn the Panel's Opinion.

Respectfully submitted this 28th day of April, 2022.

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 40

I hereby certify that this petition for en banc reconsideration 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 en banc reconsideration 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 4,592 words.

DATED this 28th day of April, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of April, 2022, I submitted the foregoing **REAL PARTIES IN INTEREST'S PETITION FOR EN BANC RECONSIDERATION** for filing via the Court's eFlex electronic filing system to all parties of record.

DATED this 28th day of April, 2022.

An Employee of Simons Hall Johnston PC

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