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Smith v. Kisorin USA, Inc., 127 Nev. Adv. Op. No. 37
(July 7, 2011)¹

CORPORATE LAW – DISSENTERS’ RIGHTS

Summary

An appeal of a district court summary judgment challenging whether a corporation’s decision to deliver dissenters’ rights notice to all stockholders that hold stock in street name² and not to all beneficial stockholders is sufficient under NRS Chapter 92A.

Disposition/Outcome

The Supreme Court of Nevada affirmed the district court’s summary judgment because a corporation fully complies with NRS Chapter 92A when sending only the stockholders of record dissenters’ rights notices. Moreover, it would be unreasonable to require corporations to notify beneficial owners when corporations cannot identify all beneficial owners.

Factual and Procedural History

Wade and Brenda Sue Smith owned shares of common stock in Pachinko World, Inc. The Smiths’ shares were held in street name by Cede & Co., nominee of the Depository Trust Company. In August 2008, Pachinko World and Kisorin USA, Inc. (“Kisorin”), merged in accordance with NRS 92A.180.³ Under NRS Chapter 92A, a minority stockholder could dissent from this action and obtain payment for the fair value of his or her shares.⁴ To notify minority owners of their dissenters’ rights as required by NRS 92A.410(2), Kisorin mailed a notice to all record stockholders, including Cede & Co., on September 5, 2008. Kisorin had contact information for the Smiths, who had not objected to their information being provided, but Kisorin did not send a notice directly to either of the Smiths.

The notice informed minority stockholders that no action was required for the merger to become effective, and that the merger became effective August 28, 2008. The notice also stated that each share issued and outstanding was canceled and converted into the right to receive \$.20 in cash. However, the minority holder could make a written demand for a “fair value” appraisal to Kisorin within 45 days after the date of the mailing of the notice. If the minority stockholder then wished to receive a cash payment for the appraised value, the stockholder had to complete a letter of transmittal with any required signature guarantees and present this document along with the stock certificates to the paying agent. Without these documents, or if the demand was not timely, Kisorin could terminate the minority stockholder’s rights.

¹ By Cayla Witty

² “Street name” is the term that denotes a “brokerage firm’s name in which securities owned by another are registered.” BLACK’S LAW DICTIONARY 1557 (9th ed. 2009).

³ NRS 92A.180 controls short-form mergers which occur when one of the merging companies owns at least 90 percent of the other company’s shares. NEV. REV. STAT. § 92A.180 (2009).

⁴ NEV. REV. STAT. § 92A.380 & § 92A.410.

Mr. Smith stated he did not know about the merger until November 2008, at which time he requested the notice from a representative of Kisorin. The representative provided the documents to Mr. Smith for his convenience on November 27, 2008, and informed him that Cede & Co. had previously received the notice.

Mr. Smith sent a dissenter's demand on December 4, 2008. Ms. Smith had also sent a dissenters' demand form on December 5, 2008. Neither Mr. or Mrs. Smith provided their stock certificates or a written consent from the stockholder of record with their dissenters' demand forms. On January 2, 2009, Mr. Smith sent a letter to Kisorin insisting that its fair-value offer was unacceptable, reasserting his dissenter's rights, and stating the fair value of his shares at \$4.27 per share, totaling \$3,702,944. The Smiths' attorney sent another letter containing a reminder of the Smiths' contentions on January 6, 2009, but the letter did not include the required documents. Kisorin responded by informing the Smiths that notice had been delivered to all stockholders of record on September 5, 2008, and that their demands were made outside of the prescribed 45 days, so they would be paid in accordance with the merger consideration.

Kisorin then filed a petition asking the district court to determine the fair value of the stock under NRS 92A.490(1) and for a declaratory judgment. After an answer, reply, and cross motions for summary judgment were filed, the district court entered summary judgment against the Smiths. The district court found that Kisorin complied fully with Nevada law in sending notice to the stockholders of record, and those stockholders that chose to hold shares through a nominee, as the Smiths did, bore the burden of exercising their rights through their nominees. Thus, the district court found that the Smiths waived their right to demand payment for their stock in an amount exceeding \$.20 per share, the consideration in the merger agreement. The Smiths appealed.

Discussion

The Smiths argued that Kisorin's failure to contact them directly excused their failure to demand payment within the 45 day period. The Smiths read NRS 92A.430 to require Kisorin to notify all stockholders, regardless of whether the stockholder were stockholders in street name or beneficial stockholders.

In reviewing NRS 92A.430, the Court noted that it construes statutes "as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized."⁵ The Court decided that, based on its interpretation of the statute, a dissenters' rights notice only needed to be provided directly to the stockholder of record who holds the stock in trust for the beneficial stockholder, thus directly and indirectly providing notice to all stockholders as required by the statutes. The Court further reasoned that, because Kisorin cannot obtain information for all beneficial owners unless the beneficial owners do not object, the Legislature could not have intended to require corporations to contact beneficial stockholders directly. Even though Kisorin did have contact information for the Smiths because they allowed

⁵ Wood v. Safeway, Inc., 121 Nev. 724 (2005).

it, because Kisorin could not obtain information for objecting beneficial stockholders,⁶ the corporation could not be required to directly reach all beneficial stockholders.

Conclusion

The Supreme Court of Nevada affirmed the district court's summary judgment because Kisorin properly provided dissenters' rights notice by directing its notice to Cede & Co., the stockholder of record and the firm through which the Smiths owned Kisorin stock. The Court held that the only reasonable interpretation of NRS Chapter 92A only requires corporations to provide a dissenters' rights notice to stockholders of record.

⁶ Seventy-five percent of beneficial owners object to their information being provided. Marcel Kahan & Edward Rock, *The Hanging Chads of Corporate Voting*, 96 GEO. L.J. 1227, 1244-45 (2008).