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Pope Invs, LLC v. China Yida Holding Co., 137 Nev. Adv. Op. 33 (July 8, 2021)

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MARKET-OUT EXCEPTION: DEVIATIONS

Summary

This is an appeal from a district court order granting summary judgment regarding the market-out exception, which is a limitation that generally does not give shareholders a right to dissent to corporate mergers when the shares are publicly traded securities.² The Court held that the board reached a resolution that showed intent to bind the corporation to a specific course of action. The Court further held that a shareholder can dissent from a corporate merger even when the market-out exception applies if the resolution expressly states something other than “there is no right to dissent.”³

PROCEDURAL HISTORY AND FACTS

China Yida Holding, Co. (CY) merged with a private company in 2016, resulting in its removal from the NASDAQ stock exchange. A Special Committee for CY ultimately recommended a merger where the Principal Shareholders would hold new shares while all outstanding CY shares would be cancelled, and the shareholders paid cash compensation. The Special Committee determined the appropriate value of that compensation to be \$3.32 per share.

The merger agreement asserted that CY’s Company Board unanimously approved the merger agreement and recommended that the Company Shareholders authorize the merger in accordance with Nevada law.⁴ The merger agreement also delineated four classes of shares that result from the merger, including the dissenting shares. Under this class delineation, the

¹ Jay Brunner.

² NEV. REV. STAT. § 92A.390.

³ *Id.*

⁴ NEV. REV. STAT. § 92A.380 (providing that stockholders are entitled to dissent from and obtain payment of fair value of the stockholder’s shares in the event of a corporate merger); Nev. Rev. Stat. § 92A.390 (providing limitations on a stockholder’s right to dissent, including the market-out exception where a stockholder has no right of dissent for stockholders in a security covered by the Securities Act of 1933).

dissenting shares could not be traded or otherwise sold, leaving the fair value of the dissenting shares determined by Nevada law as the sole payment for dissenting shareholders. CY filed a proxy statement with the U.S. Securities Exchange Commission that stated shareholders had a right to dissent from the merger and demand fair value payment for their shares.

In late June of 2016, Pope Investments, LLC (Pope), dissented from the merger and requested payment for its shares. CY rejected Pope's fair-value estimate of \$23.28 per share and instead paid Pope the pre-determined \$3.32 per share. CY petitioned the District Court to determine the fair value for the shares.

The Court granted summary judgment for CY in 2019, finding that CY was a covered security and therefore the market-out exception applied. The District Court further found that the meetings, merger agreement, and proxy statements collectively did not provide a right to dissent. The District Court awarded CY attorney fees under NRCP 68. Pope appealed both rulings.

DISCUSSION

Pope argued that it had the right to dissent and obtain a fair-value payout for shares because the board approved this right to dissent. CY contends that the market-out exception precluded Pope from dissenting and that there were no exceptions to the market-out exception at play.

The Court reviews matters of statutory interpretation *de novo*, using the plain language meaning of the statute where it is not ambiguous.⁵ Ambiguous statutes are interpreted with consideration to the legislative intent, including reason for the statute and applicable public policy.⁶

⁵ Irving v. Irving, 122 Nev. 494, 496, 134 P.3d 718, 720 (2006).

⁶ Valdez v. Emp'rs Ins. Co. of Nev., 123 Nev. 170, 174, 162 P.3d 148, 151 (2007).

CY's shares were covered securities, and Pope had dissenting rights only if it demonstrated an exception to the market-out exception.

A shareholder does not have the right to dissent in a “covered security,” which is a security registered under the relevant sections of the Securities Act of 1933, 15 U.S.C. § 77r(b)(1).⁷ Under the Securities Act, CY’s shares were covered securities as they were traded through NASDAQ.

The market-out exception provides that “there is no right of dissent...unless the articles of incorporation of the corporation issuing the class or series or the resolution of the board of directors approving the plan or merger, conversion, or exchange expressly provide otherwise.”⁸ “Resolution” is not clearly defined under Nevada law. Accordingly, the Court concluded that a board resolution is an act by the board of directors that authorizes the corporation to undertake a particular course of conduct, unless otherwise defined by the articles of incorporation or bylaws. *CY's board resolution provided a right to dissent.*

The Court acknowledged that a resolution approving the merger existed because the merger agreement and the proxy statement indicated that the board agreed to approve the merger on April 12, 2016. Because there are no minutes on the record regarding this resolution, the Court used the contents of the merger agreement itself that describe the board’s actions and determine what was included in the board resolution.

The merger agreement indicated that the board unanimously approved the merger agreement, its execution and delivery, and CY’s performance of the agreement. The agreement further addressed the treatment of dissenting shareholders where they have validly exercised and not lost their rights to dissent.

⁷ NEV. REV. STAT. § 92A.390(1)(A).

⁸ NEV. REV. STAT. § 92A.390(1).

The Court held that the board resolution expressly provided otherwise than “there is no right to dissent” because the introduction stated that it approved the merger agreement and its terms, and a term of the agreement provided there was a right to dissent that could be validly exercised. This created an exception to the market-out exception for dissenting shareholders.⁹ *CY’s arguments that dissenters’ rights were not available are not persuasive.*

CY argued that the merger’s treatment of dissenting shareholders did not influence the matter because the agreement does not clearly waive the market-out exception or expressly state a right to dissent. The Court disagreed and held that CY incorrectly interpreted the plain language of the statute; requiring that a resolution provide otherwise does not mean that it must expressly provide a right to dissent.¹⁰

CY further argues that the provisions detailing the treatment of dissenting shareholders are merely a description of the statutes. The Court finds this unpersuasive because this interpretation would render whole sections of the agreement meaningless.

CONCLUSION

The Court held that the resolution here provided a right to dissent because the merger agreement envisioned that there was authority to dissent that could be validly executed. Accordingly, Pope is entitled to a fair-value appraisal for their shares. The Court thus reversed the District Court’s summary judgment and award of attorney fees and remanded the matter for further proceedings.

⁹ NEV. REV. STAT. 92A.390(1).

¹⁰ *Id.*