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AeroGrow Int'l Inc. v. Radoff, 137 Nev. Op. 76 (Dec. 9, 2021)

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Asserting Dissenter's Rights at Step Two of NRS 92A's Four-Step Process

Summary

NRS §§ 92A.410 - .440 establishes a four-step process by which a stockholder who objects to a proposed merger may seek the fair value of the stockholder's shares if the stockholder believes the proposed price of those shares in the proposed merger is inadequate. A beneficial stockholder must obtain consent of the stockholder of records at step two of the process, which is before the vote on the merger is held.

Background

SMG Growing Media, Inc. ("SMG"), which is wholly owned by Scotts Miracle-Gro Company ("Scotts"), owned approximately 80-percent of common stock in AeroGrow International, Inc. ("AeroGrow"). In 2020, Scotts and SMG decided to merge AeroGrow with SMG, by SMG buying the roughly 20-percent remaining shares of the stock from AeroGrow's minority shareholders for \$3 per share. AeroGrow informed its shareholders in January 2021 that the proposed merger agreement would take place February 2021.

Prior to the vote, AeroGrow received dozens of notices from minority shareholders, including RPIs, indicating that under the second step of NRS 92A.420, they intended to dissent from the merger and demand a greater share buyout price. Some notices from included written consents from the stockholders of record, but the RPIs' notices did not.

Shareholders voted to approve the merger, and AeroGrow promptly tendered the \$3-per share payments to the RPIs. AeroGrow then sent step-three notices to the dissenting shareholders who provided written consents but did not send the notices to the RPIs. The RPIs filed a lawsuit against AeroGrow and its directors claiming that they breached their fiduciary duties. RPIs then filed an amended complaint asserting a claim for declaratory relief alleging AeroGrow violated the Dissenter's Rights Statutes. RPIs then filed a "Joint Motion to Compel/Determine Compliance with NRS Chapter 92A, or Alternatively, Injunctive Relief." In the motion, RPIs sought an order from the district court (1) declaring AeroGrow violated the Dissenter's Rights Statutes by not sending RPIs the step-three notices, (2) waiving RPIs' obligation to obtain consents from the stockholders of records, and (3) compelling AeroGrow to send RPIs the notices so they can exercise their dissenter's rights under step-four. The motion was granted in its entirety. Shortly after, AeroGrow filed a petition for a writ of mandamus, and AeroGrow filed a motion to stay enforcement of the district court's order. The Supreme Court granted AeroGrow's stay motion and directed RPIs to file an answer.

Discussion

The Court held that, although AeroGrow may eventually be able to challenge RPIs' ability to participate in the dissenter's rights process, not allowing RPIs to participate in a protracted process would cause AeroGrow irreparable harm. Therefore, the court elected to entertain AeroGrow's writ petition and review it de novo.

¹ By Valarie Kuschel.

AeroGrow's petition presented an issue regarding the structure of NRS 92A.400-.440. The statute provides that a beneficial stockholder may assert dissenter's rights as to shares held on their behalf only if the beneficial stockholder submits to the corporation written consent of the stockholder of record to the dissent. The issue before the Court was when in the four-step process does a beneficial stockholder need to assert their dissenter's rights and when a beneficial stockholder must obtain the consent of the stockholder of record.

AeroGrow argued that the beneficial stockholder needs to assert their dissenter's rights at step-two. In contrast, RPIs argue that the actual asserting comes at step-four.

The Court agreed with AeroGrow that the beneficial stockholder asserts their dissenter's rights at step-two and must submit their consent form from the stockholder of record at that point. The Court relies on step three, which requires the corporation to "deliver a written dissenter's notice to ... any beneficial stockholder *who has previously asserted dissenter's rights pursuant to NRS 92A.400.*" NRS § 92A.430 (emphasis added). Since the legislature expressly provided that the corporation may only send notices to beneficial stockholders who have already asserted their rights in step three, it is impossible for beneficial stockholders to first assert their dissenter's rights at step four.

The Court further relied on NRS § 92A.420(3), which provides that "[a] stockholder who does not satisfy the requirement of NRS 92A.400 is not entitled to payment for his or her shares under this statute." The Court determined that if the legislature intended for the stockholder of record's consent to be obtained at step four, it would not have clarified that failure to obtain such consent would preclude the stockholder from being paid for their shares.

Conclusion

The district court erred in construing the statutes as permitting RPIs to submit their consents after the merger vote was taken and waiving RPIs statutory obligation to obtain those consents. As such, the Supreme Court granted the petition and directs the court of the clerk to issue a writ of mandamus directing the district court to vacate its order and proceed with the underlying litigation using the Court's analysis.