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DISTRICT COURT

CLARK COUNTY, NEVADA

OVERBROOK CAPITAL LLC, on Behalf of Itself and All Others Similarly Situated, *Plaintiffs*, v. AEROGROW INTERNATIONAL, INC., CHRIS HAGEDORN, H. MACGREGOR CLARKE, DAVID B. KENT, CORY MILLER, PATRICIA M. ZIEGLER, SMG GROWING MEDIA, INC., and SCOTTS MIRACLE-GRO COMPANY, *Defendants*.	CASE NO.: A-21-827665-B (**Lead Case**) DEPT NO.: XIII Coordinated With: A-21-836612-B **ORDER DENYING DEFENDANTS' MOTION TO DISMISS FIRST AMENDED CONSOLIDATED COMPLAINT IN CASE NOS. A-21-827665-B AND A-21-827745-B**
NICOYA CAPITAL, LLC, on behalf of itself and all other similarly situated,	CASE NO.: A-21-827745-B

Plaintiffs,

v.

CHRIS HAGEDORN, H. MACGREGOR CLARKE, DAVID B. KENT, CORY MILLER, PATRICIA M. ZIEGLER, JAMES HAGEDORN, PETER SUPRON,

and

AEROGROW INTERNATIONAL, INC., a Nevada Corporation, and AGI ACQUISITION SUB, INC., a Nevada Corporation, SMG GROWING MEDIA, INC., an Ohio Corporation, and SCOTTS MIRACLE-GRO COMPANY, an Ohio Corporation,

Defendants.

BRADLEY LOUIS RADOFF,

CASE NO.: A-21-829854-B

Plaintiff,

v.

CHRIS HAGEDORN, an individual; H. MACGREGOR CLARKE, an individual; DAVID B. KENT, an individual; CORY MILLER, an individual; PATRICIA M. ZIEGLER, individual; JAMES HAGEDORN, an individual; PETER SUPRON, an individual; AEROGROW INTERNATIONAL, INC., a Nevada Corporation; AGI ACQUISITION SUB, INC., a Nevada Corporation; SMG GROWING MEDIA, INC., an Ohio Corporation; THE SCOTTS MIRACLE-GRO

COMPANY, an Ohio Corporation; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive.

Defendants.

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Defendants'[1] Motion to Dismiss Plaintiffs' First Amended Consolidated Complaint in Lead Case No. A-21-827665-B and Case No. A-21-827745-B came on for hearing on September 30, 2021 at 9:00 a.m. before the Hon. Mark R. Denton. Appearances were as stated on the record. Having heard and taken under advisement said motion on September 30, 2021, and being fully advised in the premises, and it being acknowledged by counsel during the hearing that the pleading to which the Motion is directed, the First Amended Consolidated Complaint filed June 28, 2021, is deemed to be the Overbrook Plaintiffs' operative and effective pleading, and being unpersuaded that such pleading fails to pass muster under NRCP 12(b)(5) and/or 9(b), and being persuaded otherwise by Plaintiffs' contentions relative thereto, the Court DENIES Defendants' Motion without prejudice to further development and motion practice under NRCP 56 or otherwise.

Defendants move to dismiss the First Amended Consolidated Complaint ("First Amended Complaint") on the grounds that Plaintiffs' claims are barred by Nevada's dissenters' rights statute. Defendants also argue that Plaintiffs have failed to rebut the presumptions in NRS 78.138(3), Nevada's "business judgment rule," and have failed to adequately allege aiding and abetting claims. This is a stockholder class action (the "Action") brought by Plaintiffs on behalf of themselves and all other similarly situated minority stockholders of AeroGrow International, Inc. against (a) AeroGrow's Board of Directors (Defendants) (the "Board"); (b) the Company's majority and controlling shareholders Scotts Miracle-Gro Company ("Scotts"), James Hagedorn, and SMG Growing Media, Inc. for breaches of fiduciary duty; and (c) James Hagedorn, Peter

[1] "Defendants" include AeroGrow International, Inc. ("AeroGrow" or the "Company") and its directors Chris Hagedorn, H. MacGregor Clarke, David B. Kent, Cory Miller, and Patricia M. Ziegler (the "Aerogrow Directors"), as well as The Scotts Miracle-Gro Company, James Hagedorn, Peter Supron, and AGI Acquisition Sub, Inc., and SMG Growing Media, Inc.

Supron, the Aerogrow Directors, Aerogrow, and AGI Acquisition Sub for aiding and abetting breaches of fiduciary duty. Plaintiffs Nicoya Capital LLC and Overbrook Capital LLC are minority stockholders of AeroGrow International, Inc., were stockholders at the time of the Record Date for the Merger, and had the right to receive the Merger consideration. ¶¶53-54.[2] Defendant AeroGrow International, Inc. is a Nevada corporation. As of December 1, 2020, AeroGrow had outstanding 34,328,036 shares of common stock, of which 27,639,294 shares (80.5%) were beneficially owned by Scotts and its affiliated entities. ¶55. Defendants Ziegler, Chris Hagedorn, James Hagedorn, and Miller were appointed to Aerogrow's Board by Scotts and are affiliated with Scotts through their positions at Hawthorne, a wholly owned subsidiary of Scotts affiliate SMG Growing Media, Inc. ("SMG"). ¶3.[3]

With respect to Defendants' argument that Plaintiffs' claims are precluded by the allegedly exclusive remedy of Nevada's dissenters rights' statute, such argument is without merit. NRS 92A.380(2) allows a shareholder to bring a claim if the defendants' "action is unlawful or constitutes or is the result of actual fraud against the stockholder or the domestic corporation." *Id.* Our Supreme Court has held that "We conclude that the exclusive remedy provisions of NRS 92A.380(2) permit a shareholder to challenge the validity of a merger based upon fraud or unlawful conduct in the merger process." *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 23 (2003). *See also Guzman v. Johnson*, 483 P.3d 531, 2021 Nev. LEXIS 12, *17 (Nev. Mar. 25, 2021). ("a minority

[2] All citations to "¶" or "¶¶" refer to paragraphs in the First Amended Consolidated Complaint filed June 28, 2021.

[3] In 2016, when Scotts increased its equity ownership interest in AeroGrow above 80% (on a fully diluted basis), the Board was reconstituted and Scotts appointed Ziegler, Chris Hagedorn and Miller to the Board. ¶3.

shareholder may allege that the merger was accomplished through the wrongdoing of majority shareholders and 'attempt to hold those individuals liable for money damages.'").

Defendants argue that the Legislature amended the dissenters rights statute after *Cohen* was decided, and that a shareholder now must allege "actual fraud." While the statute was amended, the statute still permits a shareholder to allege either "unlawful conduct" or "actual fraud" as the basis to support an invalid merger claim. *See* NRS 92A.380(2). The Supreme Court has recognized the continuing viability of a *Cohen* claim even after the amendment of NRS 92A.380. *Guzman v. Johnson*, 483 P.3d 531, 2021 Nev. LEXIS 12, *7 (Nev. Mar. 25, 2021).

The First Amended Complaint adequately alleges that the merger was the result of actual fraud. *See, e.g.,* ¶¶10-11, 19, 25, 118, 217-222, 226-231, and 233. Plaintiffs allege that Defendants represented that the Merger and the $3.00 per share price were fair, when they had actual knowledge that it was not because, among other things, they knowingly manipulated the original forecasts prepared by Aerogrow's management downward to attempt to make the $3.00 merger price — which represented a discount of 48% from where the stock was trading when the initial offer was made — look less egregious. ¶¶10, ¶¶175-201. The Merger and the $3.00 per share price were arrived at through intentional, unlawful, fraudulent, and bad faith conduct by the Defendants. *See* ¶10, 11, 19, 25, 118, 217–222, 226–231, and 233. Defendants used their control to ensure an unfair share price at the expense of Plaintiffs and the other minority shareholders. *See* ¶¶218, 222. Moreover, the AeroGrow Directors knew that Stifel's fairness opinion relating to the $3.00 merger price was not accurate, trustworthy, or reliable for a number of reasons. *See* ¶228. Defendants acted with the intent to induce Plaintiffs and the other minority shareholders to effectuate the Merger and accept the $3.00 per share price. ¶¶10, 11. As a result of Defendants' unlawful and fraudulent conduct, the proposed Merger was effectuated and Plaintiffs and the other

minority shareholders were divested of their stock in AeroGrow at an unfair price and pursuant to an unlawful process, and substantially damaged. ¶25.

The First Amended Complaint also adequately alleges "unlawful conduct" sufficient to state a *Cohen* claim and to rebut the business judgment rule. In analyzing an invalid merger claim, a court considers the "the timing of the merger, merger negotiations, how the merger was structured, and the approval process." *Cohen*, 119 Nev. at 12, 62 P.3d at 728. Here, the structure, "negotiation" process, and timing of the Merger demonstrate wrongful conduct by the Aerogrow Directors, a majority of whom are admittedly not independent and who failed to adopt any meaningful procedures to protect the Company's minority shareholders.

A central component of the *Cohen* inquiry about whether there was "fair dealing" is whether there were independent board members who approved the merger. Here, Plaintiffs allege that conflicts existed and that the Aerogrow Board was not independent because a majority of its members (C. Hagedorn, Miller, and Ziegler) were appointed by Scotts, the entity that made the Merger offer. ¶3. This fact alone establishes a lack of fair dealing.[4] Defendants argue that a Special Committee was appointed, but do not deny that the Committee was not given authority to reject the Merger, which distinguishes this case from others where plaintiffs failed to allege a lack of fair dealing. *Compare Guzman v. Johnson*, 483 P.3d 531, 2021 Nev. LEXIS 12, *7 (Nev. Mar. 25, 2021) (the Board "had given the Special Committee full authority to determine whether to merge with AMC."). Here, in contrast, "the Committee had no authority to approve or reject the

[4] Even if Aerogrow had not admitted that a majority of its Board is not independent, Plaintiffs plead facts concerning the relationships between Scotts and certain AeroGrow directors which demonstrates that these directors lacked independence. *See* ¶¶59, 100 (facts pled re Defendant Chris Hagedorn); ¶62 (facts pled re Defendant Miller); ¶63 (facts pled re Defendant Ziegler).

transaction." ¶111.[5] In addition, the merger price in *Guzman* was "higher than the 52-week high stock price" (*id*. at *18), whereas here it is 70% *below* the 52-week high. ¶¶7-8.[6]

Under *Cohen*, the court considers whether procedures or safeguards were put in place to protect minority shareholders and ensure the transaction was not completed at their expense. *Cohen*, 119 Nev. at 11, 62 P.3d. at 727. The complaint also alleges the following unfair terms and structure:

- At the end of the initial 2/27/20 meeting, Scotts' Chief of Staff summarily instructed AeroGrow's CEO "to immediately begin communication with AeroGrow's employees regarding the Scotts Miracle-Gro framework and the impact it would have on AeroGrow employees, including potential severance and retention bonus considerations." Scotts' Chief of Staff Supron issued this directive at the very first meeting to discuss the proposal, before the AeroGrow Board had even met to discuss the proposal, and thus before it had approved any transaction with Scotts." ¶103.

- To ward off other potential suitors who might be willing to pay more, "in the ensuing months, Scotts told AeroGrow's bankers, who were ostensibly tasked with the job of shaking the bushes to see if any other suitors would be interested in AeroGrow, that Scotts owned AeroGrow's key IP, which it was allowing AeroGrow to use pursuant to a licensing agreement, but that Scotts would not sell the IP to any third party." ¶104.

- The Aerogrow Directors did not appoint an independence Committee with plenary authority. "The Board appointed a Special Committee but the Committee had no authority to approve or reject the transaction. ¶111.

- The AeroGrow Board did not insist on a majority of the minority vote. ¶112.

- The Aerogrow Directors failed to provide sufficient indemnification for the Committee members. ¶¶42, 115.

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[5] Moreover, in *Guzman*: "the district court asked Guzman what allegations in her complaint supported her claim that the Special Committee was not disinterested in the transaction." Guzman responded that, "they were at risk of being ousted and that's not a good footing." Guzman then conceded, however, that she had no specific allegations implicating the Special Committee." *Guzman*, 2021 Nev. LEXIS at *7.

[6]In addition, in *Guzman* the plaintiff's allegations against the majority shareholder "comprise[d] fewer than two pages in an almost 60-page complaint." *Id.* at *26 n.10. And the plaintiff there was given leave to amend but declined to do so.

- The Aerogrow Directors allowed Scotts to participate in all aspects of the AeroGrow Board's deliberations. ¶117.

- The Aerogrow Directors allowed Scotts to interfere with the projections used by AeroGrow for the discounted cash flow analysis. They also allowed Scotts to condition a line of credit to AeroGrow upon the success of the Merger proposal, assuring that AeroGrow could not survive without Scotts. ¶119.

Defendants also failed to ensure the Committee had independent legal advisors and bankers[7] (¶¶115–121; ¶¶ 156–161, 167–169). In addition, Plaintiffs allege facts demonstrating breaches of fiduciary duty with respect to both an unfair price and the timing of the Merger. Despite Aerogrow reporting record financial results just weeks before the initial offer was made and projections that showed an increase in revenues from $92 million in fiscal 2021 to $188.2 million by 2023 (¶11), and projections that valued the stock at between $5.90 per share and $8.20 per share (¶182), the Aerogrow Directors ultimately approved a $3.00 Merger price that was 48% below the stock's price on the date the initial August 2020 offer was made. ¶¶20–48.[8] *See also* ¶¶86, 95, 205. Scotts caused Wells Fargo to heavily discount AeroGrow's forecasts to arrive at lower numbers "without performing any due diligence with [AeroGrow's] management." ¶13.

The absence of real price negotiations may also be indicative of breaches of fiduciary duty by the Aerogrow Directors. The complaint contains 23 paragraphs of fact-specific allegations alleging that there was no real effort to shop Aerogrow, that the Special Committee was toothless

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[7] The Special Committee (Clarke and Kent) also improperly conditioned the vast majority of Stifel's fee ($2,687,000) on the successful completion of the Merger, thus compromising its objectiveness. If Stifel did not find the transaction fair, it would receive only $450,000. ¶47.

[8] AeroGrow's former Chairman issued a press release stating that "SMG indulged the AeroGrow Special Committee sales process in order to create the impression of legitimacy, but that SMG's thumb was on the scale throughout the entire process" and that "the fairness opinion described in the proxy statement was based on inaccurate and incomplete information, including: inappropriate comparable companies; a flawed discounted cash flow analysis; and misleadingly low forecast numbers influenced by SMG, which differed materially from management's initial forecast." ¶17.

and formed merely to rubber stamp Scotts' offer, and that the price was egregiously unfair. ¶¶172-195. In addition to not properly shopping Aerogrow, the Defendants sabotaged Stifel's efforts to obtain better offers. ¶¶145– 148.

Allegations regarding improper conduct associated with a fairness opinion are sufficient to allege an "invalid merger" claim. In *Cohen*, the Court held that "The same is true of the allegations that an excessive fee was paid for the fairness opinion in order to obtain an opinion that undervalued the Boardwalk's stock. These allegations are all proper to support a claim for rescission or monetary damages caused by an invalid merger." *Cohen*, 119 Nev. at 22. Here, the alleged wrongdoing, as detailed above, goes beyond paying an excessive fee for the fairness opinion, and involves manipulation of the opinion by Defendants. These detailed allegations of an unfair price and process state a claim under *Cohen*.

The Defendants' argument that Plaintiffs have not adequately alleged a claim against Scotts, SMG Growing Media, and James Hagedorn for breach of fiduciary duty, and against James Hagedorn, Supron, AeroGrow International, AGI, Chris Hagedorn, Clarke, Kent, Miller, and Ziegler for aiding and abetting breach of fiduciary duty, are also without merit for the reasons stated in Plaintiffs' opposition brief. *See, e.g.,* ¶¶111-197, 219, 231-239.

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It is, therefore, ORDERED, ADJUDGED, and DECREED that Defendants motion to dismiss the First Amended Complaint is denied in all respects.

~~DATED this ___ day of October, 2021.~~

Dated this 21st day of October, 2021

DISTRICT COURT JUDGE

ABG

239 CF6 F505 2293
Mark R. Denton
District Court Judge

Respectfully submitted by:

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DISTRICT COURT
CLARK COUNTY, NEVADA

Overbrook Capital, LLC, Plaintiff(s) vs. Aerogrow International, Inc., Defendant(s)	CASE NO: A-21-827665-B DEPT. NO. Department 13

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