

1 **SAO**

2 KIRK B. LENHARD, ESQ., NV Bar No. 1437

3 klenhard@bhfs.com

4 MAXIMILIEN D. FETAZ, ESQ., NV Bar No. 12737

5 mfetaz@bhfs.com

6 TRAVIS F. CHANCE, ESQ., NV Bar No. 13800

7 tchance@bhfs.com

8 BROWNSTEIN HYATT FARBER SCHRECK, LLP

9 100 North City Parkway, Suite 1600

10 Las Vegas, NV 89106-4614

11 Telephone: 702.382.2101

12 Facsimile: 702.382.8135

13 MARJORIE P. DUFFY, ESQ. (admitted *pro hac vice*)

14 mpduffy@jonesday.com

15 JONES DAY

16 325 John H. McConnell Boulevard, Suite 600

17 Columbus, OH 43215

18 Telephone: 614.469.3939

19 ASHLEY F. HEINTZ, ESQ. (admitted *pro hac vice*)

20 aheintz@jonesday.com

21 ROBERT WATTS, ESQ. (admitted *pro hac vice*)

22 rwatts@jonesday.com

23 JONES DAY

24 1221 Peachtree Street, N.E., Suite 400

25 Atlanta, GA 30361

26 Telephone: 404.521.3939

27 *Attorneys for Defendants AeroGrow International, Inc.,
Chris Hagedorn, Cory Miller, Patricia M. Ziegler, SMG
Growing Media, Inc., AGI Acquisition Sub, Inc., The Scotts
Miracle-Gro Company, James Hagedorn, and Peter
Supron*

28 **ADDITIONAL COUNSEL LISTED BELOW**

29 **DISTRICT COURT**

30 **CLARK COUNTY, NEVADA**

31 OVERBROOK CAPITAL LLC, on Behalf of
32 Itself and All Others Similarly Situated,

33 *Plaintiffs,*

34 v.

35 CASE NO.: A-21-827665-B (Lead Case)
36 DEPT NO.: XIII

37 Coordinated With A-21-836612-B

1 AEROGROW INTERNATIONAL, INC.,
2 CHRIS HAGEDORN, H. MACGREGOR
3 CLARKE, DAVID B. KENT, CORY
4 MILLER, PATRICIA M. ZIEGLER, SMG
GROWING MEDIA, INC., and SCOTTS
MIRACLE-GRO COMPANY,
5 *Defendants.*

6
7 NICOYA CAPITAL, LLC, on behalf of itself
and all other similarly situated,

8 *Plaintiffs,*
9
10 v.
11
12 CHRIS HAGEDORN, H. MACGREGOR
CLARKE, DAVID B. KENT, CORY
MILLER, PATRICIA M. ZIEGLER, JAMES
HAGEDORN, PETER SUPRON,
13
14 and
15 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,
16
17
18
19 *Defendants.*
20
21 BRADLEY LOUIS RADOFF,
22
23 *Plaintiff,*
24
25 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;
26 AEROGROW
27 INTERNATIONAL, INC., a Nevada
28

STIPULATION AND ORDER
REGARDING CLASS
CERTIFICATION AND
RESERVATION OF RIGHTS

CASE NO.: A-21-827745-B

CASE NO.: A-21-829854-B

1 Corporation; AGI ACQUISITION SUB, INC.,
2 a Nevada Corporation; SMG GROWING
3 MEDIA, INC., an Ohio Corporation; THE
4 SCOTTS MIRACLE-GRO COMPANY, an
Ohio Corporation; DOES I through X,
inclusive; and ROE CORPORATIONS I
through X, inclusive.

5
6 *Defendants.*

7
8 Defendants AEROGROW INTERNATIONAL, INC. (“AeroGrow”), CHRIS
9 HAGEDORN, CORY MILLER, PATRICIA M. ZIEGLER, SMG GROWING MEDIA, INC.,
10 AGI ACQUISITION SUB, INC., THE SCOTTS MIRACLE-GRO COMPANY, JAMES
11 HAGEDORN, PETER SUPRON, DAVID B. KENT, and H. MACGREGOR CLARKE
12 (collectively, the “Defendants”) by and through their undersigned counsel of record, and Lead
13 Plaintiff NICOYA CAPITAL LLC, by and through its undersigned counsel of record, hereby
14 stipulate and agree as follows:

15 1. On January 11, 2021, Plaintiff Overbrook Capital LLC (“Overbrook”) filed a
16 putative class action lawsuit on behalf of AeroGrow stockholders, captioned *Overbrook Capital,*
17 *LLC v. AeroGrow International, Inc.*, No. A-21-827665-B, asserting claims for breach of fiduciary
18 duty and aiding and abetting breach of fiduciary duty (the “*Overbrook Action*”).

19 2. On January 12, 2021, Lead Plaintiff Nicoya Capital LLC (“Nicoya”) filed a putative
20 class action lawsuit on behalf of AeroGrow stockholders, captioned *Nicoya Capital, LLC v.*
21 *Hagedorn*, No. A-21-827745-B, asserting claims for breach of fiduciary duty and aiding and
22 abetting breach of fiduciary duty (the “*Nicoya Action*”).

23 3. On February 18, 2021, the Court consolidated the *Overbrook Action* and the *Nicoya*
24 Action for all purposes, including trial, into the *Overbrook Action*, with the lead case number being
25 A-21-827665-B, appointed Nicoya to serve as Lead Plaintiff, and appointed Bottini & Bottini, Inc.
26 to serve as Lead Counsel and Kemp Jones, LLP to serve as Liaison Counsel.

27 4. On February 22, 2021, Plaintiff Bradley Louis Radoff (“Radoff”) filed a lawsuit
28 captioned *Radoff v. Hagedorn*, No. A-21-829854-B, asserting claims for breach of fiduciary duty

1 (the “*Radoff* Action”).

2 5. On February 24, 2021, the Court consolidated the *Radoff* Action for all purposes,
3 including trial, into the *Overbrook* Action (the *Overbrook* Action, the *Nicoya* Action, and the
4 *Radoff* Action, as consolidated, are collectively referred to as the “Fiduciary Action”).

5 6. On June 28, 2021, Plaintiffs filed their First Amended Consolidated Complaint.

6 7. On July 12, 2021, Defendants moved to dismiss the First Amended Consolidated
7 Complaint.

8 8. On October 4, 2021, this Court denied Defendants’ motion to dismiss the First
9 Amended Consolidated Complaint.

10 9. On November 24, 2021, Defendants filed a Petition for Writ of Mandamus (the
11 “Petition”) in the Nevada Supreme Court seeking review of the Court’s order denying Defendants’
12 motion to dismiss the First Amended Consolidated Complaint.

13 10. On December 17, 2021, the Nevada Supreme Court ordered Plaintiffs to answer
14 Defendants’ Petition. Briefing on the Petition was completed on February 18, 2022.

15 11. On March 15, 2022, Plaintiffs Nicoya and Overbrook filed a motion for class
16 certification (the “Motion for Class Certification”).

17 12. The Motion for Class Certification is set for hearing on April 18, 2022, at 9:00 a.m.

18 13. In the Motion for Class Certification, Plaintiffs seek certification of a class
19 consisting of:

20 All minority shareholders of AeroGrow International, Inc. who held AeroGrow stock
21 as of the Effective Date for the Merger and had the right to receive the Merger
22 consideration, as well as their successors and assigns (the “Class”). The Class
23 specifically excludes the following persons and entities: (a) any of the Defendants
24 named in the complaint; (b) any of the Defendants’ parent companies, subsidiaries,
and affiliates, (c) any of the Defendants’ officers, directors, management, employees,
subsidiaries, affiliates or agents; (d) all governmental entities; and (e) the judges and
chambers staff in this case, as well as any members of their immediate families.”

25 14. The Motion for Class Certification further seeks appointment of Plaintiffs
26 Overbrook and Nicoya as Class Representatives and appointment of Plaintiffs’ Lead Counsel
27 (Bottini & Bottini, Inc.) as Class Counsel.

1 15. Defendants deny and dispute the assertions set forth in the Motion for Class
2 Certification. Defendants specifically dispute and deny that the proposed Class meets the
3 requirements for certification under Rule 23 of the Nevada Rules of Civil Procedure and Nevada
4 law. As such, Defendants contend that the Class should not be certified.

5 16. Notwithstanding Defendants' position in the foregoing paragraph, in order to avoid
6 consuming the resources of this Court and the parties through motion practice and hearings at this
7 time, the parties have met and conferred and have agreed to stipulate to certification of the Class
8 in the Fiduciary Action and to the appointment of Class Representatives and Class Counsel.

9 17. Defendants enter into this stipulation in good faith. All parties specifically reserve
10 and do not waive any rights, arguments, claims, or defenses with respect to the certification of the
11 Class.

12 18. Defendants specifically reserve all rights to seek decertification of the Class in whole
13 or in part; reserve all rights with regard to their ability to challenge certification or the inclusion of
14 any member in the Class via dispositive motion practice; reserve the right to challenge certification
15 or the inclusion of any member in the Class in any pre-trial and post-trial proceedings; and reserve
16 all rights, arguments, claims, or defenses relating to the Petition currently pending before the
17 Nevada Supreme Court.¹

18 19. The parties have further agreed that the Motion for Class Certification should be
19 taken off this Court's hearing calendar as moot.

20 ///

21 ///

22 ///

23 ///

25 1 Defendants also reserve all rights with regard to a separate prior petition for writ of
26 mandamus ("Prior Petition") filed by Defendant AeroGrow with the Nevada Supreme Court
27 seeking review of this Court's order granting the "Motion to Compel/Determine Compliance with
28 NRS 92A, or Alternative, Injunctive Relief" filed by Plaintiff Radoff and certain additional
plaintiffs-intervenors. The Nevada Supreme Court granted AeroGrow's Prior Petition on
December 9, 2021, and denied the intervenors' petition for rehearing on March 15, 2022.

1 **IT IS SO STIPULATED.**

2 DATED this 29th day of March, 2022.

3 **BROWNSTEIN HYATT FARBER**
4 **SCHRECK, LLP**

5 By: /s/ Maximilien D. Fetaz

6 KIRK B. LENHARD, ESQ.
7 Nevada Bar No. 1437
8 MAXIMILIEN D. FETAZ, ESQ.
9 Nevada Bar No. 12737
10 TRAVIS F. CHANCE, ESQ.
11 Nevada Bar No. 13800

12 **JONES DAY**

13 MARJORIE P. DUFFY, ESQ.
14 (admitted *pro hac vice*)
15 ASHLEY F. HEINTZ, ESQ.
16 (admitted *pro hac vice*)
17 ROBERT A. WATTS, ESQ.
18 (admitted *pro hac vice*)

19 *Attorneys for Defendants AeroGrow
20 International, Inc., AGI Acquisition Sub, Inc.,
21 SMG Growing Media, Inc., The Scotts
22 Miracle-Gro Company, Chris Hagedorn,
23 Cory Miller, Patricia M. Ziegler, James
24 Hagedorn, and Peter Supron*

25 DATED this 29th day of March, 2022.

26 **PISANELLI BICE PLLC**

27 By: /s/ M. Magali Mercera

28 JAMES J. PISANELLI, ESQ.
29 Nevada Bar No. 4027
30 M. MAGALI MERCERA, ESQ.
31 Nevada Bar No. 11742
32 400 South 7th Street, Suite 300
33 Las Vegas, NV 89101

34 **BRYAN CAVE LEIGHTON
35 PAISNER LLP**

36 TIMOTHY R. BEYER, ESQ.
37 (admitted *pro hac vice*)
38 *Attorneys for Defendants H. MacGregor Clarke
39 and David B. Kent*

40 DATED this 29th day of March, 2022.

41 **KEMP JONES, LLP**

42 By: /s/ Don Springmeyer

43 DON SPRINGMEYER, ESQ.
44 Nevada Bar No. 1021
45 MICHAEL GAYAN, ESQ.
46 Nevada Bar No. 11135

47 **BOTTINI & BOTTINI, INC.**
48 FRANCIS A. BOTTINI, JR., ESQ.
49 (admitted *pro hac vice*)
50 YURY A. KOLESNIKOV, ESQ.
51 (admitted *pro hac vice*)

52 *Attorneys for Lead Plaintiff Nicoya Capital
53 LLC*

ORDER

The Court having reviewed the foregoing stipulation in the above-entitled matter, and good cause appearing therefor,

IT IS HEREBY ORDERED that the following Class is certified pursuant to Nevada Rule of Civil Procedure 23(a) and 23(c)(1), (2), and (3):

All minority shareholders of AeroGrow International, Inc. who held AeroGrow stock as of the Effective Date for the Merger and had the right to receive the Merger consideration, as well as their successors and assigns (the “Class”). The Class specifically excludes the following persons or entities: (a) any of the Defendants named in the complaint; (b) any of the Defendants’ parent companies, subsidiaries, and affiliates; (c) any of the Defendants’ officers, directors, management, employees, subsidiaries, affiliates or agents; (d) all governmental entities; and (e) the judges and chambers staff in this case, as well as any members of their immediate families.

Plaintiffs Overbrook Capital LLC and Nicoya Capital LLC are certified as the Class Representatives, Plaintiffs' Lead Counsel (Bottini & Bottini, Inc.) is designated as Class Counsel, and Plaintiffs' Liaison Counsel (Kemp Jones, LLP) is designated as Liaison Class Counsel.

Nothing in this Order shall affect the reservation of rights of the parties set forth in Paragraphs 17 and 18 of the foregoing stipulation; all such rights shall be reserved.

Class members shall be provided with a Court-approved notice of the pendency of this class action case and an opportunity to opt out of the Class. Plaintiffs shall file a motion for approval of notice to the Class members on or before April 29, 2022.

• • •

IT IS FURTHER ORDERED that the hearing on the Motion for Class Certification set for April 18, 2022, is hereby vacated. **Dated this 29th day of March, 2022**

Dated this 29th day of March, 2022

DISTRICT COURT JUDGE

ABG

Submitted by:

429 D3E 7DF7 F6BD
Mark R. Denton
District Court Judge

BROWNSTEIN HYATT FARBER SCHRECK, LLP

/s/ Maximilien D. Fetaz

KIRK B. LENHARD, ESQ., NV Bar No. 1437

MAXIMILIEN D. FETAZ, ESQ., NV Bar No. 12737

MAXIMILIEN D. PELAZ, ESQ., NV Bar No. 1234567890
TRAVIS E. CHANCE, ESQ., NV Bar No. 13800

JONES DAY

MARJORIE P. DUFFY, ESQ.

(admitted *pro hac vice*)

ASHLEY E. HEINTZ, ESQ.

ROBERT F. HENRY,
(admitted *pro hac vice*)

(admitted p.c. Nov. 1965)

(admitted *pro hac vice*)

Attorneys for Defendants AeroGrow, Chris Hagedorn, Cory Miller, Patricia M. Ziegler, SMG Growing Media, Inc., AGI Acquisition Sub, Inc., The Scotts Miracle-Gro Company, James Hagedorn, and Peter Supron

Cosby, Wendy C.

From: Magali Mercera <mmm@isanellibice.com>
Sent: Tuesday, March 29, 2022 2:54 PM
To: Chance, Travis F.; Yury Kolesnikov; Frank Bottini; Don Springmeyer; James Pisanelli; tim.beyer@bclplaw.com
Cc: Watts, Robert A.; Benshoff, Elizabeth A.; Duffy, Marjorie P.; Fetaz, Maximilien; Heintz, Ashley F.; Lenhard, Kirk B.; Robert Smith
Subject: RE: Aerogrow Class Cert. Stipulation

Thanks, Travis. You may apply my e-signature.

Best,

M. Magali Mercera

PISANELLI BICE, PLLC
Telephone: (702) 214-2100
mmm@isanellibice.com | www.pisanellibice.com

 Please consider the environment before printing.

This transaction and any attachment is attorney-client privileged and confidential. Any dissemination or copying of this communication is prohibited. If you are not the intended recipient, please notify us immediately by replying and delete the message. Thank you.

From: Chance, Travis F. <tchance@bhfs.com>
Sent: Tuesday, March 29, 2022 11:06 AM
To: Yury Kolesnikov <ykolesnikov@bottinilaw.com>; Frank Bottini <fbottini@bottinilaw.com>; Don Springmeyer <d.springmeyer@kempjones.com>; Magali Mercera <mmm@isanellibice.com>; James Pisanelli <jjp@isanellibice.com>; tim.beyer@bclplaw.com
Cc: Watts, Robert A. <rwatts@jonesday.com>; Benshoff, Elizabeth A. <ebenshoff@jonesday.com>; Duffy, Marjorie P. <mpduffy@jonesday.com>; Fetaz, Maximilien <MFetaz@BHFS.com>; Heintz, Ashley F. <aheintz@jonesday.com>; Lenhard, Kirk B. <KLenhard@BHFS.com>; Robert Smith <rsmith@shjnevada.com>
Subject: Aerogrow Class Cert. Stipulation

CAUTION: This message is from an EXTERNAL SENDER.

All –

Attached please find a clean copy of the proposed SAO Regarding Class Certification, incorporating Plaintiffs' comments circulated yesterday. Please let us know if we can submit today with your signature.

Thanks,

Travis F. Chance

Brownstein Hyatt Farber Schreck, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106
702.464.7096 tel
423.355.2635 cell
tchance@bhfs.com

Cosby, Wendy C.

From: Don Springmeyer <d.springmeyer@kempjones.com>
Sent: Tuesday, March 29, 2022 11:25 AM
To: Chance, Travis F.
Cc: Yury Kolesnikov; Frank Bottini; Magali Mercera; James Pisanelli; tim.beyer@bclplaw.com; Watts, Robert A.; Benshoff, Elizabeth A.; Duffy, Marjorie P.; Fetaz, Maximilien; Heintz, Ashley F.; Lenhard, Kirk B.; Robert Smith
Subject: Re: [External]Aerogrow Class Cert. Stipulation
Attachments: Proposed SAO Regarding Class Certification FINAL(23963582.1).docx

Travis - we concur and you may use my esignature to file.

Don

Don Springmeyer, Esq.



3800 Howard Hughes Pkwy., 17th Floor | Las Vegas, NV 89169
(P) 702-385-6000 | (F) 702 385-6001 | d.springmeyer@kempjones.com
[\(profile\)](#) [\(vCard\)](#)

This e-mail transmission, and any documents, files, or previous e-mail messages attached to it may contain confidential information that is legally privileged. If you have received this transmission in error, please immediately notify us by reply e-mail, by forwarding this to sender, or by telephone at (702) 385-6000, and destroy the original transmission and its attachments without reading or saving them in any manner. Thank you.

On Mar 29, 2022, at 11:06 AM, Chance, Travis F. <tchance@bhfs.com> wrote:

All –

Attached please find a clean copy of the proposed SAO Regarding Class Certification, incorporating Plaintiffs' comments circulated yesterday. Please let us know if we can submit today with your signature.

Thanks,

Travis F. Chance

Brownstein Hyatt Farber Schreck, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106
702.464.7096 tel
423.355.2635 cell
tchance@bhfs.com

STATEMENT OF CONFIDENTIALITY & DISCLAIMER: The information contained in this email message is

1 CSERV
2

3 DISTRICT COURT
4 CLARK COUNTY, NEVADA
5

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

11 **AUTOMATED CERTIFICATE OF SERVICE**
12

13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Stipulation and Order was served via the court's electronic eFile system
15 to all recipients registered for e-Service on the above entitled case as listed below:

16 Service Date: 3/29/2022

17 Cally Hatfield chatfield@maclaw.com
18 Ashley Ellison are@pisanellibice.com
19 Ali Augustine a.augustine@kempjones.com
20 Michael Gayan m.gayan@kempjones.com
21 Tye Hanseen thanseen@maclaw.com
22 Rosie Wesp rwesp@maclaw.com
23 Travis Chance tchance@bhfs.com
24 Maximillen Fetaz mfetaz@bhfs.com
25 Andrew Muehlbauer andrew@mlolegal.com
26 Sean Connell sean@mlolegal.com
27

1	Pamela Montgomery	p.montgomery@kempjones.com
2	Witty Huang	witty@mlolegal.com
3	Nicole McLeod	n.mcleod@kempjones.com
4	Alexander Calaway	acalaway@maclaw.com
5	Kirk Lenhard	klenhard@bhfs.com
6	Don Springmeyer	d.springmeyer@kempjones.com
7	M Mercera	mmm@pisanellibice.com
8	James Pisanelli	lit@pisanellibice.com
9	Cinda Towne	cct@pisanellibice.com
10	J. Smith	rsmith@shjnevada.com
11	Kendra Jepsen	kjepsen@shjnevada.com
12	Ashley Heintz	aheintz@jonesday.com
13	Marjorie Duffy	mpduffy@jonesday.com
14	Elizabeth Benshoff	ebenshoff@jonesday.com
15	Roxanne Argabrite	rfargabrite@jonesday.com
16	Patricia Avery	pavery@wolfpopper.com
17	Chet Waldman	cwaldman@wolfpopper.com
18	Antoinette Adesanya	aadesanya@wolfpopper.com
19	Cinda Towne	Cinda@pisanellibice.com
20	Frank Bottini	fbottini@bottinilaw.com
21	Yury Kolesnikov	YKolesnikov@bottinilaw.com
22	Stephanie Ammirati	sammirati@bottinilaw.com
23	Timothy Beyer	tim.beyer@bclplaw.com

1 Bob Watts rwatts@jonesday.com
2 Wendy Cosby wcosby@bhfs.com
3 Diane Barton db@pisanellibice.com
4 Jackie Guedry jeg@pisanellibice.com
5 Teresa Beiter tnb@pisanellibice.com
6 Lisa McMillan l.mcmillan@kempjones.com
7 Debra Spinelli dls@pisanellibice.com
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28