IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL KIRSCH; AND SIU YIP, Appellants, v. PETER G. TRABER; JAMES C. CZIRR; JACK W. CALLICUTT; GILBERT F. AMELIO; KEVIN D. FREEMAN; ARTHUR R. GREENBERG; ROD D. MARTIN; JOHN F. MAULDIN; STEVEN PRELACK; HERMAN PAUL PRESSLER, III; DR. MARC RUBIN; AND GALECTIN THERAPEUTICS, INC., A NEVADA CORPORATION, Respondents.	**Supreme Court No. 70854** Appeal from District Court Case No. A-14-706397-B

APPELLANT'S OPENING BRIEF

Submitted by:

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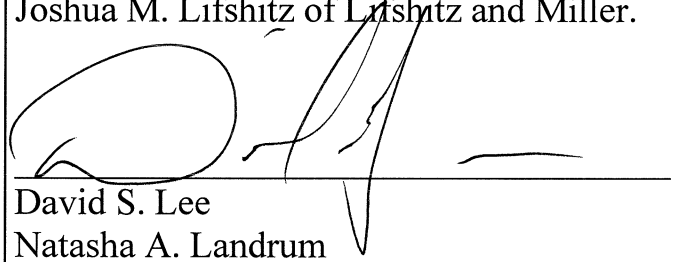
NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Respondent has no parent corporation and is not owned by any publicly held corporation owning 10% of more of its stock.

All current and former counsel appearing for the Respondent in the Eighth Judicial District Court include David S. Lee, Natasha A. Landrum, and Dirk W. Gaspar of Lee, Hernandez, Landrum & Garofalo, A.P.C. and Edward W. Miller and Joshua M. Lifshitz of Lifshitz and Miller.



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I.

JURISDICTIONAL STATEMENT

The Nevada Supreme Court has jurisdiction pursuant to NRAP 3A(b)(1).

On March 3, 2016, the Honorable Elizabeth Gonzalez of the Nevada District Court for Clark County granted Respondents'/Defendants' Motions to Dismiss Plaintiff-Appellant Michael Kirsch's ("Appellant") shareholder derivative action and the shareholder derivative action filed by Intervenor Plaintiffs David L. Hasbrouck and Siu Yip. The Order granting the motions to dismiss was entered on April 1, 2016. (*See* Appellant's Appendix, Vol. I, APP000001-APP000004). On April 5, 2016, Respondents/Defendants filed a Motion to Correct Order relating to the Order dismissing the shareholder derivative action. On May 27, 2016, Judge Gonzalez denied Defendants' Motion to Correct Order, and the Order denying the Motion to Correct Order was entered on June 16, 2016. (*See* Appellant's Appendix, Vol. I, APP000005-APP000010). Judge Gonzalez' denial of the Motion to Correct Order rendered the April 1, 2016 Order dismissing the shareholder derivative action a final order or judgment pursuant to NRAP 28(a)(4)(C) and is the order from which this appeal is taken.

Notice of appeal was filed on July 15, 2016 by Appellant Kirsch and Intervenor Plaintiff Siu Yip. (*See* Appellant's Appendix, Vol. I, APP000011-APP000019). As such, Appellant's appeal was timely pursuant to NRAP 4(a).

II.

ROUTING STATEMENT

Appellant submits that this matter is presumptively retained by the Nevada Supreme Court pursuant to NRAP 17(a)(7), (13) and (14). The present cases raise an issue of first impression in two regards. First, there is no Nevada case determining whether a denial of a motion to dismiss is considered a "final judgment" for purposes of having preclusive effect in general. Second, there is no Nevada case holding that a later federal court's grant of a motion to dismiss has reverse-preclusive effect upon a prior Nevada district court denial of a motion to dismiss a similar case.

This case presents a further issue of public policy and law regarding the respect one court must give the rulings of another and, specifically, whether a federal court which ignores a prior state court ruling and issues an opposite ruling than the prior state court, can in effect reverse the prior state court ruling. Although Article IV, Section 1 of the U.S. Constitution (the "Full Faith and Credit Clause") requires each state to recognize the judicial decisions of other states, the courts have applied the doctrine to federal courts respecting state court decisions. The present case raises the issue of whether or not a federal court can in effect reverse the ruling of a Nevada court.

III.

STATEMENT OF THE ISSUES

(1) Whether a Nevada district court (the "Nevada District Court") which issues an Order denying a motion to dismiss after full briefing and oral argument, must reverse its Order and dismiss the case, in deference to a United States District Court from the Northern District of Georgia (the "Federal Court") which subsequent to the Nevada District Court Order denying the motion to dismiss, grants a motion to dismiss a similar case?

(2) Whether a later issued Federal Court grant of a motion to dismiss a shareholder derivative action on the basis of failure to adequately plead demand futility has reverse-preclusive effect upon a prior Nevada District Court denial of a motion to dismiss a similar case?

(3) Whether a later issued Federal Court grant of a motion to dismiss a shareholder derivative action on the basis of failure to adequately plead demand futility has reverse-preclusive effect upon a prior Nevada District Court denial of a motion to dismiss a similar case where the Nevada District Court action's factual allegations supporting demand futility were not identical to those raised in the Federal Court action?

(4) Whether the Nevada District Court's Order denying a motion to dismiss a shareholder derivative action based upon the Nevada District Court's finding –

after full briefing and oral argument – that the derivative action adequately pled demand futility, is considered a 'final order' under Nevada preclusion law?

(5) Does the Federal Court's dismissal have reverse-preclusive effect when that ruling was based upon an incorrect finding that the Nevada District Court's August 10, 2015 dismissal was not on the merits and was merely based upon "mootness," when the Nevada District Court specifically ruled that its August 10, 2015 denial of the motion to dismiss was "a substantive ruling on the issue of demand futility, which was reached following briefing and oral argument on that issue."

IV.

STATEMENT OF THE CASE

On August 29, 2014, Appellant Michael Kirsch filed his Verified Shareholder Derivative Complaint for breaches of fiduciary duty, unjust enrichment and corporate waste in connection with Galectin Therapeutics Inc.'s ("Galectin" or the "Company") board of directors' ("Board") involvement in the publication of false and misleading claims that Galectin had discovered a new and effective drug treatment of pre-cancerous early stage liver fibrosis or "NASH." (*See* Appellant's Appendix, Vol. I, APP000020-APP000045).

On November 17, 2014, the Individual Defendants[1] and Nominal Defendant Galectin (together, with the Individual Defendants, the "Defendants"), filed a Motion to Stay the Case in Deference to the prior-filed Parallel Derivative Litigation.[2] (*See* Appellant's Appendix, Vol. I, APP000046-APP000165). On December 19, 2014, the Honorable Elizabeth Gonzalez ("Judge Gonzalez" or "the lower court") issued an order denying Defendants' Motion to Stay the Case in Deference to prior-filed Parallel Georgia Derivative Litigation. (*See* Appellant's Appendix, Vol. I, APP000166). On January 8, 2015, Defendants filed a Motion for Reconsideration of Ruling Denying Defendants' Motion to Stay the Case, which the lower court denied on February 6, 2015. (*See* Appellant's Appendix, Vol. I, APP000167-APP000189).

On March 19, 2015, Appellant filed a motion for leave to file Plaintiff's Second Amended Shareholder Derivative Complaint, in order to add allegations concerning a Company director who was one of the nation's largest stock promoters who personally published repeated false representations that Galectin had

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[1] Peter G. Traber, James C. Czirr, Jack W. Callicutt, Gilbert F. Amelio, Kevin D. Freeman, Arthur R. Greenberg, Rod D. Martin, John F. Mauldin, Steven Prelack, Herman Paul Pressler, III and Marc Rubin.

[2] "Parallel Georgia Derivative Litigation" refers to the case pending before the United States District Court for the Northern District of Georgia captioned *In re Galectin Therapeutics, Inc. Derivative Litigation*, Lead Case No.: 1:15-CV-00208-SCJ (N.D. Ga.).

discovered a scientific "breakthrough" cure to certain forms of cancer, to entice investors. (*See* Appellant's Appendix, Vol. I, APP000190-APP000285). On March 27, 2015, the Court granted Appellant's motion for leave to file a Second Amended Shareholder Derivative Complaint and Appellant filed his Second Amended Shareholder Derivative Complaint ("SAC") that same day. (*See* Appellant's Appendix, Vol. II, APP000186-APP000368).

The SAC alleged that the Director Defendants added a directorship to the Company's already bloated Board in order to appoint defendant Mauldin, who has no scientific, medical, or biopharmaceutical education or experience, but is the owner and Chief Executive Officer ("CEO") of Mauldin Economics, LLC ("Mauldin Economics"), one of the largest stock promotion operations in the United States. (Appellant's Appendix, Vol. II, APP000303, ¶53, APP000305, ¶59, APP000307, ¶67). These allegations lead to the reasonable inference that Defendants added Mauldin to the Board so that defendant Mauldin could utilize his websites and their newsletters to pump Galectin stock. (Appellant's Appendix, Vol. II, APP000305, ¶ 59).

Indeed, in the months and years after being brought onto the Galectin Board, Mauldin published a barrage of articles promising investors huge profits based on false claims that Galectin had made major transformative scientific breakthrough discoveries of medications for the treatment of cancer. (Appellant's Appendix, Vol.

II, APP000307-APP000308, ¶¶67-72, APP000309 ¶¶74-75, APP000312 ¶84, APP000314-APP000318 ¶¶91-93, APP000321 ¶97 and ¶99, APP000322 ¶101, APP000324-APP000327 ¶¶103-111, APP000329-APP000333 ¶¶116-118, APP000335-APP000337 ¶¶123-125, APP000345 ¶153).

Appellant's SAC sets forth unique and alarming allegations going beyond accusing the Board of knowing the Company was planting false articles pumping the Company's stock; the SAC alleges that a member of the Board himself was penning and planting the false articles and that Czirr and Martin had added him to the Board precisely for that purpose.

On April 22, 2015, the Individual Defendants and Nominal Defendant Galectin each filed their Motions to Dismiss the Second Amended Shareholder Derivative Complaint and Memorandum of Points and Authorities. (*See* Appellant's Appendix, Vol. III, APP000369-APP000559 and Appellant's Appendix, Vol. IV, APP000560-APP000759, respectively). On May 20, 2015, Appellant filed his Combined Memorandum of Law in Opposition to the Nominal Defendant and Individual Defendants' Motions to Dismiss the Second Amended Shareholder Derivative Complaint. (*See* Appellant's Appendix, Vol. IV, APP000760-APP000798). On May 29, 2015, plaintiffs David L. Hasbrouck and Siu Yip filed their Motion to Intervene. (*See* Appellant's Appendix, Vol. V, APP000799-APP000992). On June 4, 2015, the Individual Defendants and

Nominal Defendant Galectin filed their Reply Memorandums in Support of their Motions to Dismiss the Second Amended Shareholder Derivative Complaint. (*See* Appellant's Appendix, Vol. V, APP000993-APP000999 and Appellant's Appendix, Vol. V, APP001000-APP001043, respectively).

On June 11, 2015, the lower court conducted an oral hearing on the Motions to Dismiss the Second Amended Shareholder Derivative Complaint and on the Motion to Intervene. During the hearing, Judge Gonzalez indicated that she had read and carefully considered the briefs she had received from the parties on the subject of demand futility. Each party was provided the opportunity to make an initial oral presentation and to then engage in further argument, debate and interaction with the Judge on the issue of demand futility.

Appellant argued that because Mauldin was one of the nation's largest stock promoters, it was reasonable to infer that the Board had added the directorship and appointed Mauldin as a director in order for Mauldin to pump Galectin's stock through false and misleading claims presented as if they were independent commentary upon the Company. On August 5, 2015, Judge Gonzalez entered an Order denying Defendants' Motions to Dismiss the Second Amended Shareholder Derivative Complaint and granting a 180 day stay. (*See* Appellant's Appendix, Vol. VI, APP001044-APP001049).

On January 19, 2016, Nominal Defendant Galectin and the Individual Defendants each filed a Second Motion to Dismiss Shareholder Derivative Action, this time on the basis of *res judicata* in favor of a December 30, 2015 order issued in the U.S. District Court for the Northern District of Georgia (the "Georgia federal district court"), dismissing the Parallel Georgia Derivative Litigation. *In re Galectin Therapeutics, Inc. Derivative Litigation*, Lead Case No.: 1:15-CV-00208-SCJ (N.D. Ga.) (Dkt. No. 90). (*See* Appellant's Appendix, Vol. VI, APP001050-APP001054 and Appellant's Appendix, Vol. VI and VII, APP001055-APP001470, respectively).

On March 3, 2016, Judge Gonzalez granted Defendants' Motions to Dismiss[3] on the basis that Judge Gonzalez's August 5, 2015 Order denying Defendants' Motions to Dismiss was not a "final order" under Nevada law. (Appellant's Appendix, Vol. VIII, APP001550-APP001560). Reasoning that an order denying a motion to dismiss is not a final order, the lower court concluded that it was bound to reverse its August 5, 2015 ruling in light of the later December 30, 2015 grant of a motion to dismiss by the Georgia federal district court in the Parallel Georgia Derivative Litigation. On May 27, 2016, Judge Gonzalez denied Defendants'

[3] The Order granting the motions to dismiss was entered on April 1, 2016, and a final order denying a Motion to Correct the Order was entered on June 16, 2016. (*See* Appellant's Appendix, Vol. I, APP000001-APP000004 and APP000005-APP000010).

Motion to Correct Order, and the Order was entered on June 16, 2016. (*See* Appellant's Appendix, Vol. II, APP000005-APP000010).

In issuing the June 16, 2016 Order, Judge Gonzalez took issue with two representations made by Defendants – in whose favor the Order ruled – noting that Defendants misrepresented to the Georgia federal district court what had occurred in the lower court, and misrepresented to the lower court what was occurring in the Georgia federal district court. First, Judge Gonzalez noted in the March 3, 2016 Minutes of the oral hearing, that the lower court had granted a 180 day stay on August 5, 2015 after denying Defendants Motions to Dismiss, based upon a misrepresentation by Defendants as to what was occurring in the Georgia federal district court:

> "[T]he Court is concerned that the representations made to the Court by Mr. Smith at the last time this motion was argued, in June 2015, were that issues raised in Georgia relate to class representation issues, and the Court stayed the case based on those representations,…."

(*See* Appellant's Appendix, Vol. VII, APP001471-APP001472).

Second, Judge Gonzalez noted in the lower court's June 16, 2016 Order that the lower court's August 5, 2015 denial of Defendants' Motions to Dismiss had been a "substantive ruling on the issue of demand futility, which was reached following briefing and oral argument regarding that issue…." (*See* Appellant's Appendix, Vol. IV, APP000003, Paragraph 6). However, in the Parallel Georgia Derivative Litigation, Defendants misrepresented to the Georgia federal district

court that the lower court had not issued a ruling on the issue of demand futility. Defendants wrongly convinced the Georgia federal district court that the lower court merely denied Defendants' Motions to Dismiss on procedural grounds and did not issue a substantive ruling on the issue of demand futility:

> [Defendants] view of that is that it was a *procedural ruling, essentially a denial based on mootness grounds* because they *had to amend* their complaint in Nevada.....[The Northern District of Georgia] can read it just the way [Defendants] read it, which is that it's *simply a denial based on mootness* because [Judge Gonzalez] knows another complaint is coming and because [Judge Gonzalez] doesn't have to take up the merits and because she wants to defer to [the Northern District of Georgia][.]

In re Galectin Therapeutics, Inc. Securities Litigation, Civil Action No. 1:15-cv-29-SCJ (November 3, 2015) at 63:1-4 and 74:10-14. (*See* Appellant's Appendix, Vol. VIII, APP001473-APP001549, APP001535 & APP001546).

Defendants convinced the Georgia federal district court to rule upon the issue of demand futility, by convincing the Georgia federal district court that the lower court had not done so. Defendants accomplished this by selectively citing the transcript of the lower court oral argument and never referencing the lower court's written August 5, 2015 Order, even though under well-settled Nevada law a Court's written order is the ***sole controlling source*** defining the Court's ruling. *Canterino v. Mirage Casino-Hotel*, 42 P.3d 808, 810 (Nev. 2002). None the less, following Defendants' lead, the Georgia federal court relied entirely upon the transcript of the hearing on the Motions to Dismiss before Judge Gonzalez:

> Review of the transcript (Doc. No. [79-4]) and subsequent order prepared by the parties does not indicate whether Judge Gonzalez denied the motion to dismiss based on the merits of the case or mootness....The Court cannot conclude whether Judge Gonzalez issued a final ruling on the merits with respect to the issue of demand futility. Because it is unclear whether issue preclusion applies, the Court is not precluded from considering demand futility."

In re Galectin Therapeutics, Inc. Derivative Litigation, Lead Case No.: 1:15-CV-00208-SCJ (N.D. Ga. Dec. 30, 2015) at 11, citing Doc. Nos. [79-4; and, 81-1]. (Appellant's Appendix, Vol. VIII, APP001571).

The lower court set the record straight in its April 1, 2016 order by explicitly stating that, contrary to Defendants' representations to the Georgia federal district court, "the Court's August 10, 2015 order was a substantive ruling on the issue of demand futility." (*See* Appellant's Appendix, Vol. I, APP000003, Paragraph 6).

Despite the lower court's distaste with the misrepresentations Defendants utilized to convince her to stay the case, and then to convince the Georgia federal district court that the lower court had not ruled upon demand futility, the lower court felt compelled to defer to the later Georgia federal district court ruling regardless of how it had been obtained.

In fact, the lower court was in error to feel compelled to reverse itself since under Nevada preclusion law, Judge Gonzalez's denial of Defendants' Motions to Dismiss entered on August 5, 2015, had sufficient finality so as to constitute an order with preclusive effect. Otherwise stated, Judge Gonzalez was not bound –

and in essence overruled – by the later dismissal of the Parallel Georgia Derivative Litigation.

V.

STATEMENT OF FACTS

Galectin is a development-stage biopharmaceutical company which, though it never made a profit or developed a drug approved by the U.S. Food and Drug Administration ("FDA"), describes itself as "a clinical stage biopharmaceutical company that is applying its leadership in galectin science and drug development to create new therapies for fibrotic disease and cancer." By 2009, after nearly a decade of fruitless efforts to move towards FDA approval of its sole drug candidate, GM-CT-01 (originally titled "Davanat"), the Company's stock was trading at under $1 per share, after having traded at over $20 per share for several years after the Company went public in 2003. (Appellant's Appendix, Vol. II, APP000298, ¶35).

On February 12, 2009, Defendants Czirr and Martin engaged in a self-described "take-over" of Galectin in which they (through the 10X Fund, L.P., of which Defendants Czirr and Martin are the co-founders) acquired all of the Company's Series B preferred stock, enabling Czirr and Martin to appoint themselves Chairman and Vice Chairman of the Board. (Appellant's Appendix, Vol. II, APP000298, ¶34). With no medical, scientific or biopharmaceutical education, Czirr and Martin focused on marketing and appointed and nominated a

board devoid of scientific or medical experience or education. (Appellant's Appendix, Vol. II, APP000297, ¶32, APP000300-APP000301, ¶¶43-45). The day Czirr and Martin took over the Company, virtually the entire scientific leadership of the Company resigned, leaving the Company with six employees, only two of which were involved in research and development at all. (Appellant's Appendix, Vol. II, APP000298-APP000299, ¶¶ 36-38; APP000300, ¶43; APP000606, ¶¶64-65; APP000322, ¶¶101-102).

The Company's dominant focus on marketing, to the virtual exclusion of science and medicine and development of effective medications, was reflected in the appointment of Defendants Greenberg and Mauldin to the Board. *Id.*

Defendant Greenberg was a marketing expert with no medical, scientific or biopharmaceutical background whatsoever - "[h]e is the President, Founder and owner of Prism Technologies, Inc. since 1983, which provides professional sales and marketing services." (Appellant's Appendix, Vol. II, APP000299, ¶41).

Similarly, Defendant Mauldin, had no scientific, biopharmaceutical or medical education or experience. (Appellant's Appendix, Vol. II, APP000303, ¶53). Nonetheless, on May 26, 2011, Defendants created a tenth directorship position for the Company, which already had more directors than employees, to which they appointed John Mauldin, one of the nation's largest stock promoters. (Appellant's Appendix, Vol. II, APP000301, ¶45).

Prior to his appointment to the Galectin Board, Mauldin had been censured and fined by the Financial Industry Regulatory Authority ("FINRA") for "exaggerated and unwarranted claims," "unwarranted projection of future performance," and "failure to disclose his affiliation with the member firm." (Appellant's Appendix, Vol. II, APP000302, ¶52). It was precisely this type of deceptive stock promotion activity that Mauldin engaged in on behalf of Galectin. *Id.* None of the above facts were disclosed to shareholders.

Operating on a skeleton staff and having lost virtually its entire scientific leadership, by 2013 the Company had halted testing on its lead drug candidate GM-CT-01 (intended to cure cancer) to which the Company had devoted ten years and $100 million. (Appellant's Appendix, Vol. II, APP000289-APP000290, ¶¶2-3, APP000305, ¶¶60-62; APP000306, ¶65; APP000310, ¶¶77-78; APP000313, ¶88; APP000314, ¶91; APP000322, ¶100). Galectin was left with a $100 million deficit, no substantial progress towards FDA approval of any drug candidate, just two employees in research and development and $5.1 million in cash, enough to fund operations through the first quarter of 2014. (Appellant's Appendix, Vol. II, APP000290, ¶¶ 3-4; APP000300, ¶43).

Desperate to raise cash and increase its stock price in the face of its ten year $100 million failure to develop the Company's lead drug candidate, in October 2013, the Company engaged in a public offering of its securities. At the same time,

Defendants supported the offering with a deceptive stock promotion campaign promoting the renamed Company[4] and its "new" lead drug candidate, GR-MD-02 (intended to treat pre-cancerous early stage liver fibrosis or "NASH"). (Appellant's Appendix, Vol. II, APP000305, ¶¶60-62).

The above described deceptive stock promotion campaign reflected and directly involved the directors which defendants Czirr and Martin appointed and/or nominated and appointed to the Board. (Appellant's Appendix, Vol. II, APP000292, ¶13). Through his *Transformational Technology* newsletter, from November 2013 through March 2015, defendant Mauldin published a stream of false and misleading statements and material omissions in a year and a half barrage of monthly and sometimes weekly campaign praising Galectin and GR-MD-02 and encouraging subscribers to invest in Galectin, "***to make you wealthier than you ever imagined...and release you from worries about struggles in retirement...***" (Appellant's Appendix, Vol. II, APP000307, ¶68).

In his unrestrained pumping of Galectin, Mauldin presented virtually every rise in Galectin stock price as a confirmation of value and reason to invest more money in Galectin, while presenting every decline as "a great buying opportunity." (Appellant's Appendix, Vol. II, APP000309, ¶74).

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[4] In an unusual move, the Company changed its name from Pro-Pharmaceuticals, Inc. to Galectin Therapeutics, Inc. (Appellant's Appendix, Vol. II, APP000305, 61).

Mauldin did not operate in a vacuum, but was part of a coordinated stock promotion campaign executed by Defendants, consisting of false and misleading statements and material omissions in Company press releases, and articles by Defendant Mauldin's company Mauldin Economics, and stock promotion firm Emerging Growth Corporation ("Emerging Growth"). (Appellant's Appendix, Vol. II, APP000289-APP000290, ¶¶ 1-4).

The deceptive stock promotion campaign led investors to believe: (1) that the Company's clinical tests indicated its drug candidates were effective treatments for cancer and fibrosis (Appellant's Appendix, Vol. II, APP000311-APP000312, ¶¶83-84; APP000321, ¶98; APP000328-APP000329, ¶¶113-115; APP000337, ¶125), (2) that a major pharmaceutical company had partnered with the Company (APP000318-APP000321, ¶¶94-97), (3) that the Company had a staff of renowned scientists (APP000298, ¶¶36, APP000306, ¶¶63-64; APP000322, ¶¶101-102), and, (4) that Galectin and its lead drug candidate had been favorably reviewed by independent stock analysts and "experts" (APP000291, ¶8, APP000292, ¶12, APP000308, ¶71, APP000321, ¶99, APP000322, ¶101, APP000325, ¶105, APP000337, ¶121, APP000345, ¶153, APP000359, ¶186, APP000365, ¶219), none of which was true.

Additionally, through Mauldin Economics and Emerging Growth, Defendants issued a continuous flow of optimistic opinions about the Company and

its drug candidate's prospects. Specifically, while projecting miraculous things for Galectin's future, Emerging Growth and Mauldin never informed readers that: (1) the Company had halted testing on its lead drug candidate to which it had devoted ten years and $100 million (Appellant's Appendix, Vol. II, APP000289, ¶2, APP000290, ¶3, APP000305-APP000306, ¶¶61-63, APP000310, ¶77, APP000313-APP000314, ¶¶88-89, APP000314, ¶90 and ¶91, APP000339, ¶135, APP000340, ¶141); and, (2) virtually the entire scientific leadership of the Company had resigned on the day Czirr and Martin took over the Company. (Appellant's Appendix, Vol. II, APP000289, ¶2, APP000290, ¶3; APP000298-APP000299, ¶35-38; APP000293, ¶13 f.n.7; APP000300, ¶43; APP000306, ¶65; APP000314, ¶91; APP000322-APP000324, ¶¶101-102; APP000353, ¶171).

On July 28, 2014, in articles published on *SeekingAlpha.com* by Bleecker Street Research and *TheStreet.com* by Adam Feuerstein, it became public knowledge that the glowing reports concerning the Company published by *Transformational Technology* and Emerging Growth, had been generated by the Company. (Appellant's Appendix, Vol. II, APP000342-APP000344, ¶¶147-149). On this news, the Company's stock price collapsed, with Galectin shares opening on July 29, 2014 at a price of $7.10 per share, down over 50% from the previous day's close at $14.54, decreasing Galectin's market cap by more than $170 million. (Appellant's Appendix, Vol. II, APP000345, ¶ 150).

VI.

SUMMARY OF ARGUMENT

The lower court's April 1, 2016 order dismissing the action should be reversed because a final judgment from a Nevada court "takes precedence" over a later issued conflicting final judgment from non-Nevada state court. *Stuart v. Lilves*, 210 Cal. App.3d 1215, 1220 (Cal. App. 1st Dist. 1989); *Colby v. Colby*, 78 Nev. 150, 157 (Nev. 1962).

In issuing its April 1, 2016 order, the lower court reversed its August 5, 2015 order (denying Defendants' Motions to Dismiss) under the mistaken understanding that, "it was not a final order under Nevada law." There is no Nevada case ruling on whether a denial of a motion to dismiss is a "final judgment" for purposes of preclusion law.

However, the Nevada Supreme Court has expressly adopted the Restatement (Second) of Judgments §13 (1982) broad definition for "final judgment" for issue preclusion ("sufficiently firm to be accorded conclusive effect"). *University of Nevada v. Tarkanian*, 110 Nev. 581, 599 (1994). Non-Nevada state courts following the Restatement view universally find that a denial of a motion to dismiss is "sufficiently firm to be accorded conclusive effect" as a "final order." In *Gilldorn Sav. Ass'n v. Commerce Sav. Ass'n*, 804 F.2d 390 (7th Cir. 1986), the district court's denial of a motion to dismiss was a final judgment for collateral estoppel purposes,

since nothing in lower court's "order itself or in the record indicates that the order was tentative," and the parties received a sufficient hearing on the motion and that the losing party had "ample incentive" to litigate the issue vigorously in the prior action. *Id.* at 393-94.

As the U.S. District Court for the Northern District of Georgia succinctly put it, "[i]n the context of issue preclusion, finality 'may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again.'" *Jones v. Wells Fargo Bank, N.A.*, 2014 U.S. Dist. LEXIS 42264, at *20-21 (N.D. Ga. Feb. 10, 2014). The U.S. Court of Appeals for the Ninth Circuit also concluded that the denial of a motion to dismiss is a final judgment for purposes of issue preclusion because, the judgment was "sufficiently final so as to be accorded preclusive effect." *Pellerin v. Nev. County*, 2015 U.S. App. LEXIS 11341, at *5-7 (9th Cir. Cal. 2015).[5]

Accordingly, the lower court's April 1, 2016 order dismissing the action should be reversed.

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[5] *See also United States v. McGann*, 951 F. Supp. 372 (E.D.N.Y. 1997); *In re Jaynes*, 377 B.R. 880, 884 (Bankr. W.D. Wis. 2007) (The question of whether a denial of a motion to dismiss can be "sufficiently firm to be accorded preclusive effect" appears to be an issue of first impression in Wisconsin); *McClendon v. Continental Group*, 660 F. Supp. 1553, 1562 (D.N.J. 1987).

VII.

LEGAL ARGUMENT

A. STANDARD OF REVIEW

"An order granting an NRCP 12(b)(5) motion to dismiss 'is subject to a rigorous standard of review on appeal.'" *Stubbs v. Strickland*, 297 P.3d 326, 328 (2013) (quoting *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28 (2008)). "This Court presumes all factual allegations in the complaint are true and draws all inferences in favor of the plaintiff." *Id.* at 228. Further, "[This Court] review[s] all legal conclusions *de novo*." *Id.*

Because the present appeal includes a pure legal question – whether a non-Nevada state court may not reverse a judgment of a Nevada state court; and, whether or not a denial of a motion to dismiss in the present circumstances constitutes a "final judgment" for purposes of preclusion law – this Court should apply the *de novo* review.

B. A NON-NEVADA STATE COURT MAY NOT REVERSE THE FINAL JUDGMENT OF A NEVADA STATE COURT

It is a basic premise that the courts of one state may not overrule a final judgment rendered by the courts of another state. The reason that a later conflicting judgment from a sister state has no effect in the jurisdiction of the court which issued the initial judgment is that no state is required to give a ruling from another

state "greater credit and respect than the prior decree of our own state lawfully entered":

> Analysis demands the conclusion that Benjamin does not here ask us to merely accord full faith and credit to the Maryland decree. Instead, we are asked to give it greater credit and respect than the prior decree of our own state lawfully entered. Full faith and credit does not require, nor does it contemplate, such action from us.

Colby, 78 Nev. at 157 (citing *Perry v. Perry*, 51 Wash.2d 358 (1957); *Hammell v. Britton*, 19 Cal.2d 72 (1941); *Martin Bros. Box Co. v. Fritz*, 228 Iowa 482 (1940)).

Regardless of its potential preclusive effect on future cases brought in other states (under the "last in time" rule), a judgment from a second state which conflicts with a prior judgment from another is not given "precedence" in the state whose court issued the original judgment:

> The full faith and credit clause does not compel this court to set aside a judgment rendered in this state in an action involving the same issue as that subsequently adjudicated by a court of a sister state. . . . Last-in-time rule notwithstanding, when "one of the conflicting decisions was entered by a court of the state in which the current action is pending, *that decision takes precedence over the court of a sister state."*

Stuart v. Lilves, 210 Cal. App.3d 1215, 1220 (Cal. App. 1st Dist. 1989) (emphasis added).

However, while a "final judgment" (as defined for purposes of preclusion law) of a Nevada court may not be reversed by the court of another state, another

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state's later conflicting "final judgment" (as defined for purposes of preclusion law), may have a reverse-preclusive effect upon an earlier "non-final judgment" issued by a Nevada court.

Indeed, the basis of the lower court's March 3, 2016 decision granting Defendants' Motions to Dismiss (entered on June 16, 2016), was that the December 30, 2015 Georgia federal district court order granting of defendants' motions to dismiss, constituted a "final judgment," while the lower court's previous August 5, 2015 denial of the same motion, did not. In the words of the lower court:

> Although the Court's August 10, 2015 order was a substantive ruling on the issue of demand futility, which was reached following briefing and oral argument regarding that issue, it was not a final order under Nevada law.

(*See* Appellant's Appendix, Vol. VIII, APP001583).

Thus, the core question presented by the present appeal is whether or not the lower court's August 5, 2015 order denying Defendants' Motions to Dismiss, constituted a "final judgment" under Nevada preclusion law.

C. THE LOWER COURT'S AUGUST 5, 2015 ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS CONSTITUTED A "FINAL JUDGMENT" UNDER NEVADA ISSUE PRECLUSION LAW

The lower court's August 5, 2015 order denying Defendants' Motions to Dismiss was not a ruling upon the merits of Appellant's shareholder derivative action for breach of fiduciary duty. Rather, the lower court's order was a ruling

upon the single issue of standing, and specifically, whether or not demand was futile in the Appellant's shareholder derivative action.

The "finality" of an order on a single issue, as opposed to an order on the underlying merits of a cause of action, is controlled by the issue preclusion standard, as opposed to the claim preclusion standard. The Nevada Supreme Court has recently noted that there is a distinction between the "finality" requirement for issue preclusion and the finality requirement for claim preclusion:

> It is widely recognized that the finality requirement is **less stringent** for issue than for claim preclusion.

Garcia v. Prudential Ins. Co. of America, 293 P.3d 869, 874, n.7 (Nev. 2013) (emphasis added).

In determining whether or not a judgement is "final" for issue preclusion purposes, the Nevada Supreme Court applies the Restatement (Second) of Judgments §13 (1982) (the "Restatement") and its broad definition for "final judgment":

> The general rule of issue preclusion is that if an issue of fact or law was actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action between the parties . . . . ***For purposes of issue preclusion, a final judgment includes any prior adjudication of an issue in another action that is "determined to be sufficiently firm to be accorded conclusive effect.***

Univ. of Nevada v Tarkanian, 110 Nev. 581, 599 (1994) (emphasis added).

The Nevada Supreme Court's "sufficiently firm to be accorded conclusive effect" definition of a judgment's finality in the issue preclusion context – which clearly controls the preclusive effect of the lower court's August 5, 2015 ruling on the issue of standing/demand futility, is a direct quote of the Restatement Second of Judgments:

> § 13 Requirement of Finality
>
> The rules of res judicata are applicable only when a final judgment is rendered. However, for purposes of issue preclusion (as distinguished from merger and bar), "final judgment" includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.

Restatement (Second) of Judgments §13 (1982).

The Restatement view of the finality of judgments for issue preclusion has also been described as when "the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again." *Jones v. Wells Fargo Bank, N.A.*, 2014 U.S. Dist. LEXIS 42264, *20-21 (N.D. Ga. Feb. 10, 2014).

Here, in connection with the lower court's order denying Defendants' Motions to Dismiss, there was "no really good reason for permitting it to be litigated again." Accordingly, the lower court's August 5, 2015, judgment was a "final judgment" for purposes of issue preclusion on the issue of standing/demand futility. As a consequence, Appellant submits that no judgment from a court of another state

on the same issue overruled or reversed the Nevada District Court's final judgment on the issue of standing/demand futility in this case.

While no Nevada court has ruled on whether a denial of a motion to dismiss constitutes a "final judgment" for purposes of issue preclusion, courts like Nevada, which have adopted the Restatement (Second) of Judgment's expansive definition of "final judgment" for purposes of issue preclusion ("sufficiently firm to be accorded conclusive effect"), have uniformly concluded that the denial of a fully briefed and argued motion to dismiss, generally constitutes a "final judgment" for purposes of issue preclusion:

> [T]he Seventh Circuit ruled that a district court's denial of a motion to dismiss was a final judgment for collateral estoppel purposes. The court pointed out that nothing in lower court's 'order itself or in the record indicates that the order was tentative,' and also noted that the parties received a sufficient hearing on the motion and that the losing party had "ample incentive" to litigate the issue vigorously in the prior action. Regardless of whether Judge Castillo's denial of defendant's motion for return of funds was interlocutory, it was sufficiently firm to preclude further litigation of the limitations issue. Judge Castillo's commitment to his ruling, including his resolution of the limitations period, is demonstrated by his subsequent denial of defendant's motion for reconsideration.

United States v. Cleveland, 1995 U.S. Dist. LEXIS 12885, at *11-12 (N.D. Ill. 1995).

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Similarly, in the present case, the parties had "sufficient hearing" and "incentive to vigorously litigate the issue" and the lower court's denial of defendants' motions to dismiss was "demonstrated by [its] subsequent denial of defendants' motion for reconsideration."

Here, the lower court conducted oral argument after complete briefing of the issue of demand futility. The U.S. Court of Appeals for the Seventh Circuit held in *Gilldorn Savings Ass'n v. Commerce Savings Ass'n*, 804 F.2d 390 (7th Cir. 1986), that a denial of a motion to dismiss is a "final judgment" for preclusion purposes, regardless of whether or not the court conducted oral argument or issued a reasoned decision, so long as the matter was fully briefed.

> Gilldorn argues that the Texas order is not a "final judgment" for collateral estoppel purposes. Gilldorn contends that the Texas order is not "firm and stable enough" because no oral argument preceded the court's ruling, the Texas court did not support its decision with an opinion, and the denial of the dismissal motion was not appealable. Commerce contends that the interlocutory nature of the order does not prevent it from precluding relitigation of issues actually decided. Commerce asserts that the only relevant question is whether the issue was actually resolved in the prior action. Both parties agree that finality for collateral estoppel is not the same as that required to appeal under 28 U.S.C. § 1291 (1982), and both cite *Miller Brewing Co. v. Joseph Schlitz Brewing Co.*, 605 F.2d 990 (7th Cir. 1979), *cert. denied*, 444 U.S. 1102, 205 U.S.P.Q. (BNA) 96, 100 S. Ct. 1067, 62 L. Ed. 2d 787 (1980), as support for their arguments.
>
> .....The *Miller* court discussed several factors to be considered to determine whether a decision is "final" for collateral estoppel purposes: that the decision was not "avowedly tentative," that the hearing was adequate and the parties were fully heard, that the court supported its decision with a reasoned opinion, and that the decision was appealable

or had been appealed. 605 F.2d at 996. The ultimate question is whether the "'prior adjudication . . . is determined to be sufficiently firm to be accorded conclusive effect.'" *Id.* (quoting Restatement (Second) of Judgments § 41 comment g (Tent. Draft No. 1 1973)). *Accord In re Cenco Inc. Securities Litigation*, 529 F. Supp. 411, 416 n.5 (N.D. Ill. 1982) ("The relevant question is whether the issue has been resolved in the prior action so that the Court has no good reason to permit it to be litigated again."); *American Postal Workers Union v. United States Postal Service*, 736 F.2d 317, 319 (6th Cir. 1984)(final judgment in the case as a whole is not necessary; motion to dismiss decision can be given preclusive effect as long as issue finally decided).

The Texas court's decision here is sufficiently firm to preclude further litigation of the compulsory counterclaim issue. Nothing in the order itself or in the record indicates that the order was tentative. Although the motion was not orally argued, the issue was fully briefed. In support of its motion, Gilldorn filed three briefs totaling approximately thirty pages, one-third of which addressed the compulsory counterclaim issue. Commerce filed two briefs totaling approximately twenty-one pages, half of which addressed the counterclaim issue. The Texas court's order indicates that the court "considered the arguments and authorities submitted on behalf of the parties." The parties thus had sufficient opportunity to be heard on the issue, and the judge was amply advised of the arguments on both sides of the issue to allow him to make a reasoned decision. *See Jones*, 757 F.2d at 885.

Gilldorn also had ample incentive to vigorously assert the compulsory counterclaim argument as success would have meant dismissal of Commerce's action in Texas. *See Kunzelman*, at 1177 ("Critical to the application of collateral estoppel is the guarantee that the party sought to be estopped had the opportunity and the incentive to litigate the issue aggressively.");...Although the Texas order was interlocutory and therefore not subject to appeal, "the need for a final judgment [in the case as a whole] is not as compelling when the question is whether the determination of a single issue actually decided in the first action should be given conclusive effect in a later action between the parties on a different claim." *In re Electric Weld Steel Tubing Antitrust Litigation*, 512 F. Supp. 81, 83 (N.D. Ill. 1981) (denial of motion to disclose grand jury documents in criminal case given preclusive effect in later civil antitrust litigation).

Gilldorn, 804 F.2d at 393 (following the Restatement approach in finding sufficiently final a non-appealable denial of a motion to dismiss).

Similarly, the U.S. District Court for the District of Colorado applied the broad Restatement definition of finality for issue preclusion and concluded that a denial of a motion to dismiss was a "final order" for purposes of preclusion:

> I am not persuaded by the Fifth Circuit's reasoning, at least as it applies here. Although Rule 54(b) provides that an order that is not explicitly made final if it is subject to later revision, it would be pedantic to contend that all interlocutory orders are therefore "tentative" in any real sense. It presupposes that a party will move for reconsideration of the order and that the court would grant it....
>
> In addition, the Fifth Circuit has recently recognized an inconsistency in its own decisions. Jury verdicts, like partial summary judgment orders, are subject to revision under Fed.R.Civ.P. 54(b) until they are entered as final. The Fifth Circuit, however, gives preclusive effect to such non-final jury verdicts. RecoverEdge L.P. v. Pentecost, 44 F.3d 1284, 1295 (5th Cir. 1995). The court has recognized this incongruity but has not yet addressed it. Marine Shale Processors. Inc. v. United States Environmental Protection Agency, 81 F.3d 1371, 1380 n. 2 (5th Cir. 1996).
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> Further, the Fifth Circuit's rationale ignores other policy concerns. If a partial summary judgment is never to have preclusive effect, a party involved in a series of suits against different litigants will have the option to avoid preclusive effects in future suits simply by settling the current suit whenever an unfavorable summary judgment order is issued. This would be directly contrary to the goal of judicial economy that [issue preclusion] is designed to promote. Parklane, 439 U.S. at 326. So long as it would not be inequitable to do so, it makes inimitable sense to preserve and use whatever firm judicial decisions have been made previously on a particular issue. To accomplish that, however, the power to determine the preclusive effect of judgments must not be left in the hands of parties who are interested in avoiding such effects.

Siemens Med. Sys., Inc. v. Nuclear Cardiology Sys., Inc., 945 F. Supp. 1421 (D. Colo. 1996).[6]

There is a world of difference between Nevada's definition of a "final order" for purposes of the Nevada Rules of Appellate Procedure, Rule 3A(b)(1) "Appealable Determinations," and Nevada's definition of "final judgment" for purposes of issue preclusion. Under the Nevada Rules of Appellate Procedure, to be appealable as a "final judgment," the order must be one "that disposes of the issues presented in the case, determines the costs, and leaves nothing for the future consideration of the court." *Lee v. GNLV Corp.*, 116 Nev. 424, 426 (2000).

Clearly, Nevada recognizes a "final" judgment for purposes of issue preclusion that does not match the definition of "final judgment" for appeal since in Nevada (like all Restatement states), "[i]t is widely recognized that the finality requirement is less stringent for issue than for claim preclusion." *Garcia*, 293 P.3d at 874, n.7.

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[6] *See also Pellerin v. Nev. County*, 2015 U.S. App. LEXIS 11341, at *5-7 (9th Cir. Cal. 2015) (denial of a motion to dismiss is a final order for preclusion purposes); *United States v. McGann*, 951 F. Supp. 372 (E.D.N.Y. 1997); *In re Jaynes*, 377 B.R. 880, 884 (Bankr. W.D. Wis. 2007) (The question of whether a denial of a motion to dismiss can be "sufficiently firm to be accorded preclusive effect" appears to be an issue of first impression in Wisconsin); *McClendon v. Continental Group*, 660 F. Supp. 1553, 1562 (D.N.J. 1987).

Thus, while an interlocutory order is by definition not an appealable "final order," it may readily meet the Nevada standard for a "final order" in the preclusion context by being, "sufficiently firm to be accorded conclusive effect."

The denial of a motion to dismiss has been considered a "final judgment" for purposes of issue preclusion by all courts adopting the Restatement's broad "sufficiently firm to be accorded conclusive effect" definition of "final judgment" for purposes of issue preclusion. Since Nevada adopts the same definition of "final judgment" for purposes of issue preclusion as these courts, Nevada should reach the same result that the denial of a motion to dismiss constitutes a final judgment for purposes of issue preclusion.

VIII.

CONCLUSION

For all of the above reasons, Appellant respectfully submits that the lower court's April 1, 2016 order dismissing the action should be reversed, as the lower

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court erred by mistakenly determining that its August 5, 2015 order denying Defendants' Motions to Dismiss was not a final judgment for purposes of issue preclusion.

DATED this 14th day of March, 2017.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief, complies with the formatting requirements of NRAP 32(a)(4), the type requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6)because:

[X] This brief has been prepared in a proportionally spaced typeface using Word in 14- point New Times Roman font; or

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference

to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 14th day of March, 2017.

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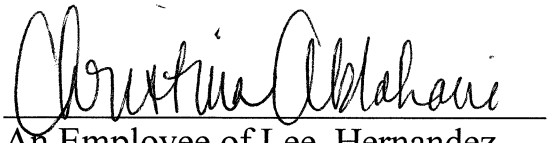

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