IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL KIRSCH and SIU YIP, Appellants, v. PETER G. TRABER; JAMES C. CZIRR; JACK 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 Case No. A-14-706397-B in the Eighth Judicial District Court of Clark County, Nevada

RESPONDENTS' ANSWERING BRIEF

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And Respondent/Nominal Defendant Galectin Therapeutics, Inc.

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/Nominal Defendant Galectin Therapeutics, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock. The remaining Respondents/Defendants—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 Dr. Marc Rubin—are natural persons.

During this litigation, Respondents have been represented by Lyssa S. Anderson and Ryan W. Daniels of Kaempfer Crowell and Michael R. Smith, B. Warren Pope, and Benjamin Lee of King & Spalding LLP.

Dated this 28th day of April, 2017.

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s/ Ryan W. Daniels

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STATEMENT OF THE ISSUES

(1) Did the district court correctly apply governing issue preclusion principles by holding that the final order and judgment of the United States District Court for the Northern District of Georgia (the "Federal Final Judgment") dismissing with prejudice a prior-filed and substantively identical shareholder derivative action for failure to adequately plead the "futility" under Nevada law of a pre-suit demand on Galectin Therapeutics, Inc.'s ("Galectin" or the "Company") Board of Directors was entitled to preclusive effect, requiring dismissal of this action?

(2) Did the district court correctly hold in its April 1, 2016 order (the "April 2016 Order") that its August 2015 order denying earlier motions to dismiss (the "August 2015 Order") was not a "final" judgment or order entitled to preclusive effect under Nevada law?

(3) Alternatively, should the district court's order dismissing this action be affirmed because Plaintiffs' allegations failed to adequately plead that a majority of Galectin's directors face a "substantial likelihood" of liability under Nevada law and therefore failed to plead the "futility" of a pre-suit demand on Galectin's Board?

STATEMENT OF THE CASE

This case is the last filed of three related shareholder litigation suits asserting claims against certain current and former officers and directors of Galectin, a biotechnology company headquartered in Atlanta, Georgia focused on drug development. All three cases asserted claims based on an alleged "deceptive stock promotion campaign" in 2014 in which various third-parties published positive reports about Galectin and its progress towards development of a drug intended to treat fibrotic liver disease. The two other earlier filed suits—(i) a securities class action (the "Federal Securities Case") and (ii) a companion shareholder derivative case (the "Federal Derivative Case") were previously pending in the United States District Court for the Northern District of Georgia, where Galectin is located, but both of those cases have been dismissed with prejudice. The United States Court of Appeals for the Eleventh Circuit affirmed the dismissal of the Federal Securities Case by order dated December 15, 2016. The Eleventh Circuit dismissed the appeal of the Federal Derivative Case on July 7, 2016, after the plaintiffs there (one of whom is Plaintiff Yip in this appeal) failed to file their appeal brief despite several extensions.

In its April 2016 Order dismissing this action with prejudice, the district court held that the December 30, 2015 Federal Final Judgment was entitled to preclusive effect in this action, requiring its dismissal. The Federal Final Judgment

held that allegations made in the Federal Derivative Case failed to adequately plead that a pre-suit demand on Galectin's board of directors was "futile" and therefore excused under substantive principles of Nevada corporation law. Specifically, the Federal Final Judgment held that the allegations regarding the so-called "stock promotion scheme" and other matters failed to satisfy Nevada corporation law standards for adequately pleading that a majority of Galectin's directors were legally disabled from considering a demand because they purportedly faced a "substantial likelihood" of liability for the claims alleged. In her April 2016 Order, the district court held that her prior August 2015 Order was not "final" under Nevada law and that the Federal Final Judgment was entitled to preclusive effect and dismissed this action with prejudice.

In this appeal, Plaintiffs do not challenge the district court's conclusion that the Federal Final Judgment dismissing the substantively identical Federal Derivative Case with prejudice for failure to plead demand futility was a "final judgment" that satisfies the standards for issue preclusion articulated by this Court in decisions such as *Bower v. Harrah's Laughlin, Inc*., 125 Nev. 470, 480, 215 P.3d 709, 717 (Nev. 2009). Instead, Plaintiffs argue that the district court's prior August 2015 Order denying earlier motions to dismiss the SAC "at this point," authorizing the filing of superseding complaints, warning Plaintiff Kirsch that he should "beef up" his demand futility allegations, and staying this case in deference

to the Federal Derivative Case was itself a "final judgment" under Nevada law that must "take precedence" over the Federal Final Judgment. This, according to Plaintiffs, is "the core question presented by the present appeal," because Plaintiffs concede that another court's "later conflicting final judgment," may "reverse" the outcome of a Nevada court's earlier "non-final" order. Thus, under Plaintiffs' own logic, if the district court correctly concluded in the April 2016 Order that her prior August 2015 Order was not a "final judgment," the district court's judgment of dismissal with prejudice must be affirmed.

As Defendants show herein, the district court correctly held that (i) her August 2015 Order was "not a final order under Nevada law," and (ii) dismissal of this action was required in light of the preclusive effect of the Federal Final Judgment dismissing the earlier filed, substantively identical Federal Derivative Case with prejudice for failure to plead demand futility. For these reasons, and as shown more fully below, the district court's order and judgment dismissing this case with prejudice should therefore be affirmed.

STATEMENT OF FACTS

A. Galectin And The Individual Defendants

Nominal Defendant Galectin is a pharmaceutical company engaged in drug research and development to create new therapies for fibrotic liver disease. *See* APP000289, ¶ 1; APP000290, ¶ 4. Galectin's lead product in development is GR-

MD-02, a drug intended to be used for the treatment of fatty liver disease with advanced fibrosis. APP000290, ¶ 4. Galectin is incorporated under Nevada law and has its headquarters and principal place of business in suburban Atlanta, Georgia. APP000293, ¶ 17.

Defendants Traber, Czirr, Amelio, Freeman, Greenberg, Martin, Mauldin, Prelack, Pressler, and Rubin (collectively, the "Director Defendants") were all members of Galectin's Board of Directors at the time the SAC was filed. APP000294-95, ¶¶ 18-27. Defendant Traber has, since March 2011, also served as Galectin's President, Chief Executive Officer, and Chief Medical Officer. APP000295, ¶ 23. Defendant Czirr served as Galectin's Executive Chairman from February 2010 through January 2016 and remains a member of Galectin's Board. APP000294, ¶ 18. The remaining Director Defendants are not, and were not at the time the SAC was filed, employees of Galectin. APP000294-95, ¶¶ 19-22, 24-27. Defendant Callicutt is, and was at the time the SAC was filed, Galectin's Chief Financial Officer. APP000295-96, ¶ 28. Collectively, Defendant Callicutt and the Director Defendants are referred to hereinafter as the "Individual Defendants."

B. The Related Shareholder Actions

This action is the last filed of three related shareholder litigation cases asserting claims against Galectin directors and officers arising out of an alleged

"stock promotion scheme" involving third-party publications discussing Galectin and its progress towards development of GR-MD-02.

1. The Federal Securities Case

The first-filed complaint was filed on July 30, 2014 in the United States District Court for the District of Nevada and asserted claims that Galectin and Defendants Traber, Czirr, and Callicutt violated the federal securities laws in connection with the Galectin's alleged engagement of third parties to publish positive but allegedly misleading reports about the Company and clinical trials results for GR-MD-02. *See* APP000063-81. After additional complaints were filed in federal court in Nevada alleging substantially identical claims under the federal securities laws, the cases were consolidated, and the Federal Securities case was transferred to the Northern District of Georgia, where Galectin has its headquarters and principal place of business. *See* APP000083-89; APP000177-89. Thereafter, a lead plaintiff was appointed in the Federal Securities Case, and the lead plaintiff filed a Consolidated Class Action Complaint that alleged claims for purported violations of the federal securities laws by Galectin and Defendants Czirr, Martin, Mauldin, Traber, and Callicutt in connection with Galectin's alleged engagement of Mauldin Economics, LLC ("Mauldin Economics"), Emerging Growth Corporation/TDM Financial ("Emerging Growth") and others to

"promote" Galectin through publication of positive reports about the Company and clinical trials of GR-MD-02. APP001259-320.

Following full briefing and oral argument of the defendants' motion to dismiss, Judge Steve C. Jones of the Northern District of Georgia issued an order dated December 30, 2015, dismissing the Federal Securities Case with prejudice. APP001344-66. A judgment dismissing the Federal Securities Case with prejudice was entered the same day. APP001324. Among other things, Judge Jones held that Galectin's alleged engagement of third parties, including Mauldin Economics and Emerging Growth, to publish positive reports about Galectin was entirely permissible under the federal securities laws and that the plaintiffs' allegations failed to state a claim for alleged misrepresentations or omissions of material fact, "manipulation" of Galectin's stock price, engaging in an alleged "scheme" to defraud investors, or for any violation of law. APP001359-66.

The plaintiffs in the Federal Securities Case appealed Judge Jones's ruling to the United States Court of Appeals for the Eleventh Circuit. APP001884-1920. Following full briefing and oral argument, the Eleventh Circuit affirmed the order and judgment dismissing the Federal Securities Case with prejudice by a 37-page published opinion dated December 15, 2016. *Id.*

2. The Derivative Cases

Shortly after the filing of the first complaint in the Federal Securities Case, plaintiffs claiming to be shareholders of Galectin began filing shareholder derivative actions in federal court asserting claims for breach of fiduciary duties, waste and unjust enrichment against current and former directors and officers of Galectin arising out of substantially the same alleged facts and circumstances as the claims asserted in the Federal Securities Case. The first two such derivative cases were filed on August 1, and 25, 2014, respectively in the United States District Court for the District of Nevada. *See* APP000091-121; APP000123-53. Those two cases were consolidated, transferred to the Northern District of Georgia, and assigned to Judge Jones, who also had the Federal Securities Case. APP000155-60; APP000177-89; APP001562-63. Plaintiff Yip in this action filed the second-filed federal derivative case and served as one of two named plaintiffs in the consolidated Federal Derivative Case. *See* APP000123-53.

This action, the last-filed of the three substantively identical Galectin derivative actions, was filed in the Clark County, Nevada district court on August 29, 2014. APP000020-45.

a) The motions preceding the district court's August 2015 Order

On November 17, 2014, Defendants in this action moved to stay this action in favor of the earlier filed Federal Derivative Case. APP000046-163. The district

court denied the motion to stay and denied a motion for reconsideration of that ruling. APP000166; APP000193. Plaintiff Kirsch then filed a first amended complaint and subsequently a second amended complaint. APP000193; APP000286-368. On April 22, 2015, Defendants filed motions to dismiss the SAC. *See* APP000560-759; APP000369-559. Galectin's motion sought dismissal of the SAC under NRCP 12(b)(5) and 23.1 on the grounds that (i) Plaintiff Kirsch had failed to make a pre-suit demand on Galectin's Board and (ii) the SAC failed to adequately allege that such a pre-suit demand was "futile" and therefore excused under Nevada law. *See* APP000560-95. The Individual Defendants joined in Galectin's request to dismiss the SAC for failure to adequately plead demand futility and also asserted that the SAC should be dismissed for failure to state a claim for relief pursuant to NRCP 12(b)(5). *See* APP000369-96.

On May 29, 2015, with briefing of the motions to dismiss still in progress, Plaintiffs Yip and David L. Hasbrouck (the other plaintiff in the consolidated Federal Derivative Case and, together with Yip, "Intervenors") moved to intervene in this action. *See* APP000799-992. Among other things, the Intervenors argued that Plaintiff Kirsch appeared to not to have owned Galectin stock at all times relevant for purposes of the claims alleged in the SAC, and therefore lacked standing to bring some or all of those claims under Nevada law requiring derivative plaintiffs to own stock at the time of the occurrence of the events about

which they complain and continuously through the conclusion of the case to have standing to assert claims derivatively on a company's behalf. *See* APP000801-02; APP000808-09; *see also Keever v. Jewelry Mountain Mines, Inc.*, 100 Nev. 576, 577-78, 688 P.2d 317, 317-18 (1984); NRCP 23.1. In addition to requesting leave to intervene, the Intervenors asked the district court to stay this action in deference to the Federal Derivative Case. *See* APP000800; APP000811.

On June 4, 2015, just one week before the scheduled June 11, 2015 hearing date on Defendants' motions to dismiss the SAC, Plaintiff Kirsch filed a motion requesting leave to join three additional alleged Galectin shareholders as nominal plaintiffs. APP001585-96. In his reply brief filed in support of the motion to join additional plaintiffs, Kirsch admitted that he did not purchase Galectin stock until June 26, 2014, which was well after virtually all of the conduct challenged in the SAC. APP001599. This admission confirmed that Kirsch could not satisfy the contemporaneous and continuous stock ownership requirement imposed by NRCP 23.1 and therefore lacked standing to pursue claims derivatively on behalf of Galectin. *See Keever*, 100 Nev. at 577, 688 P.2d at 317; NRCP 23.1.

b) The June 11, 2015 hearing and ensuing orders

On June 11, 2015, the district court held oral argument on Defendants' motions to dismiss the SAC and the Intervenors' motion to intervene. APP001627-53. The district court inquired about the status of the prior-filed

Federal Derivative Case, specifically whether "Rule 23.1" demand futility issues had yet been decided in that case, and Defendants' counsel informed the district court that motion practice on those issues was scheduled to begin in the Federal Derivative Case in early July 2015:

> THE COURT: Okay. So the Georgia litigation is a shareholder derivative action.
>
> MR. SMITH: It is.
>
> THE COURT: Has it had – I don't know if the federal system if they do the same thing we do here. Under Rule 23.1 of our rules there's a process we go through. Have they gone through that process?
>
> MR. SMITH: Well, the federal derivative cases were filed before these cases.
>
> THE COURT: Absolutely.
>
> MR. SMITH: They were originally filed in Nevada.
>
> THE COURT: Then they were transferred.
>
> MR. SMITH: Then they were transferred, and we're in the process of going through the –
>
> THE COURT: So the answer is it hasn't happened yet.
>
> MR. SMITH: Hasn't gone to ruling. But we're in the process of raising the 23.1 issues.
>
> THE COURT: Okay.
>
> MR. SMITH: The motion is due July 1st.

APP001630-31.

Turning to the pleadings in Nevada, the district court acknowledged Mr. Kirsch's standing "problems," but declined to dismiss the SAC on that basis, instead reasoning that Mr. Kirsch's lack of standing could be "fixed" by (i) the district court's decision (announced earlier during the hearing) to grant the Intervenors' motion to intervene and (ii) the possible joinder of other additional plaintiffs. APP001650. Addressing the SAC's demand futility allegations, the district court stated:

> ***The allegations*** related to the conflicted directors who may face personal liability are not the best I've ever seen, but they ***are not enough to merit dismissal at this point. Given the fact I'm already going to deal with some pleading issues in a different fashion in a minute,*** is there anything else?

Id. at (emphasis added). The district court then advised Mr. Kirsch that his request to join additional plaintiffs "needs to be filed as a motion to amend the complaint, it needs to include the proposed amended complaint, and it needs to also include a verification from the proposed people you want to add." *Id.* The district court then added: "So if when you make the amendment that adds those people and you submit that motion, ***you may want to beef up your factual allegations***." *Id.* (emphasis added). The district court also ruled that Intervenors could file a complaint in intervention and stated: "Other than those two things, a complaint in intervention and a motion to amend to add additional plaintiffs, the case is stayed

for 180 days pending the Georgia court doing something, since they were first filed." APP001650-51.

The minutes of the June 11, 2015 hearing also reflect: (i) defense counsel's representation to the district court that a motion raising Rule 23.1 issues was due to be filed in the Federal Derivative Case in early July 2015; (ii) the district court's view that Kirsch's demand futility allegations "are not the best but are not enough to merit dismissal ***at this point***"; (iii) that Kirsch and the Intervenors could file additional complaints; and (iv) that other than the filing of those complaints, this case was "STAYED for ONE HUNDRED EIGHTY (180) DAYS pending the Georgia Court." APP001626 (emphasis added).

Following the June 11, 2015 hearing, the district court issued two separate written orders addressing the motions argued at the hearing. APP001044-49; APP001771-73. Both orders confirmed that the appealed case was stayed for 180 days pending developments in the Federal Derivative Case. APP001048; APP001772.

c) The Final Judgment in the Federal Derivative Case

On July 8, 2015, the defendants in the Federal Derivative Case filed motions to dismiss the Verified First Consolidated Amended Shareholder Derivative Complaint (the "Amended Complaint") in that case, asserting that the Amended Complaint should be dismissed under FRCP 12(b)(6) and 23.1 for failure to

adequately (i) plead demand futility under FRCP 23.1 and substantive Nevada corporation law and (ii) state a claim for relief. APP001561-62; APP001566.[1] Following full briefing and oral argument of the motions, Judge Jones of the Northern District of Georgia held that the allegations in the Federal Derivative Case failed to adequately plead demand futility and therefore dismissed the Amended Complaint. APP001566; APP001571-75.

In opposing the motions to dismiss in the Federal Derivative Case, Plaintiff Yip argued, among other things, that the Nevada district court's August 2015 Order had a preclusive effect on the issue of demand futility in the Federal Derivative Case to which Judge Jones should defer. APP001570. After carefully considering the circumstances surrounding the August 2015 Order, including (i) that the August 2015 Order *denied* rather than granted motions to dismiss; (ii) that the August 2015 Order contemplated the filing of additional complaints; (iii) that the Nevada district court stated that it was denying Defendants' motions to dismiss "at this point" and suggested that Plaintiff Kirsch "beef up [his] factual allegations" when filing his anticipated further amended complaint; and (iv) that the August 2015 Order stayed the appealed case for 180 days pending action in the

[1] When derivative claims are brought in federal court, FRCP 23.1 supplies the pleading standard that must be satisfied, but the substantive law of the state of incorporation—here, Nevada—establishes the standards for assessing whether a pre-suit demand would be futile. *See, e.g., Fosbre v. Matthews*, 2010 WL 2696615, at *3 (D. Nev. July 2, 2010).

first-filed Federal Derivative Case, Judge Jones held that there was "not a sufficient basis for the Court to find that [the Nevada district court] issued a final ruling on the merits with respect to the identical issue of demand futility presently before the Court" and that the August 2015 Order therefore did not preclude him from considering the sufficiency of the plaintiffs' demand futility allegations. APP001570-71.

Judge Jones then held the plaintiffs had failed to adequately plead demand futility under applicable substantive principles of Nevada law. APP001571-75. Specifically, Judge Jones held that plaintiffs failed to allege particularized facts demonstrating that a majority of Galectin's directors faced a substantial likelihood of liability in connection with the alleged "scheme" to promote Galectin's stock through optimistic and allegedly misleading publications by Mauldin Economics and other third parties. APP001572-74. Judge Jones also held that the core conduct at issue in the Federal Derivative Case—the so-called "stock promotion scheme"—did not entail any illegal or improper conduct or any breach of fiduciary duty. APP001573-74. Judge Jones also held that plaintiffs' allegations of purported "insider selling" by three of Galectin's ten directors could not excuse demand under Nevada law because they implicated, at most, only a minority of the board. APP001574. Because plaintiffs had not satisfied the standards for pleading demand futility under Nevada law and had failed to make a pre-suit demand on

Galectin's Board, Judge Jones dismissed the Federal Derivative Case. APP001574-75. Finding that any further amendment of plaintiffs' demand futility allegations would be futile, Judge Jones dismissed the Federal Derivative Case "with prejudice." APP001575-76. Judgment dismissing the Federal Derivative Case with prejudice was entered the same day. *See* APP001322.

C. Defendants' January 2016 Motions To Dismiss The Nevada State Derivative Case

At a January 5, 2016 Status Check before the district court in this case, counsel for Defendants notified the district court of the dismissal with prejudice of the Federal Derivative Case and Defendants' intention to move for dismissal of this action on preclusion grounds. APP001775-76. The district court then lifted the stay of this action to permit that motion practice to proceed, stating: "[M]y recollection is that everybody moved to dismiss [this action] last February and that I was waiting for someone in Georgia to act. And they've now acted, and so now we're going to go to the next step." APP001776-77.

Thereafter, counsel for Plaintiff Kirsch stated that Mr. Kirsch intended to file a motion for leave to file a further amended complaint by the end of that same week:

> MR. MILLER: Judge, for plaintiff, we were planning to file a motion for leave to amend and an amended complaint. Which we have prepared, so it would be –

> THE COURT: ***So you want to better plead demand futility, huh***?
>
> MR. MILLER: ***We're taking the Judge's suggestion at the end of the last hearing***. But we have it ready. We would be ready to file by the end of the week, just get back to the office and file.

APP001777 (emphasis added). Plaintiff Kirsch never filed the promised amended complaint.

On January 19, 2016, Defendants filed motions to dismiss this action in its entirety, arguing, among other things, that the Federal Final Judgment dismissing the Federal Derivative Case with prejudice was entitled to preclusive effect on the issue of demand futility in this action. APP001055-470; APP001050-54.

D. The April 2016 Order

Following full briefing and oral argument, the district court dismissed this action based on the Federal Final Judgment. APP000001-4. At the hearing on Defendants' motions to dismiss, Plaintiff Kirsch urged the district court to find that its August 2015 Order had been "final" for purposes of issue preclusion under the Restatement (Second) of Judgments § 13 (1982) (the "Restatement") "sufficiently firm" test. APP001558. The district court rejected that argument. APP000003, ¶ 6 ("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***.") (emphasis added). The district court held that the Federal Final Judgment had preclusive

effect on the identical issue of demand futility in this action and that, accordingly, this action must be dismissed with prejudice. APP000004, ¶¶ 8-9.[2]

SUMMARY OF THE ARGUMENT

Plaintiffs' appeal boils down to a single and demonstrably incorrect argument: that the district court's August 2015 Order denying Defendants' motions to dismiss was a "final judgment." It was not, as the district court correctly held. The August 2015 Order was not a "judgment" of any kind, nor was it in any sense a "final" ruling on the issue of demand futility. The August 2015 Order denied motions to dismiss Plaintiff Kirsch's SAC "at this point," but contemplated the filing of additional superseding pleadings as to which demand futility issues would need to be addressed and warned Mr. Kirsch that he should "beef up" his allegations in any amended complaint. APP001650; APP001626. The district court also stayed this case in deference to the prior-filed Federal Derivative Case, where a Rule 23.1 demand futility motion challenging Plaintiff Yip's substantively identical allegations in the Federal Derivative Case had been pending since July 8, 2015. APP001626; APP001651; APP001048; APP001566.

[2] Although the April 2016 Order also stated that "[t]his Court's August 10, 2015 order staying the case for 180 days was based upon representations made to the Court by [Defendants' counsel] at the June 11, 2015 hearing that issues raised in Georgia relate to class representations issues" (APP000003, ¶ 5), the district court's basis for making that assertion is unclear. Indeed, as the transcript of the June 11, 2015 hearing confirms, Defendants' counsel made no such representations. APP001627-53; APP001785-88; APP001791-93; APP001874-76.

Nothing in the record suggests that the district court intended the August 2015 Order to be "final" or conclusive of the issue of demand futility, either in this case or the Federal Derivative Case.

This Court and the Ninth Circuit Court of Appeals (applying Nevada law) have held that an order denying a motion to dismiss is not a "final" order or judgment. The April 2016 Order ruling is consistent with those precedents. Plaintiffs do not cite a single Nevada case holding that an order denying a motion to dismiss is a final judgment for preclusion purposes. This alone is sufficient basis on which to reject Plaintiffs' misguided argument that the August 2015 Order was a "final judgment" that must "take precedence" over the Northern District of Georgia's undisputedly final judgment dismissing the Federal Derivative Case with prejudice for failure to plead demand futility.

Plaintiffs argue, however, that the district court's August 2015 Order should be deemed a "final judgment" for purposes of issue preclusion under the Restatement § 13 definition of "final judgment" as including "any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." Not only has no Nevada court adopted this "sufficiently firm" test of "finality" for issue preclusion purposes, the August 2015 Order clearly fails to satisfy the test for finality articulated in Restatement § 13.

Under the Restatement test, an order or judgment must not be "tentative"; it must be "firm," "procedurally definite," and must reflect the issuing court's "last word" on the subject in order to be deemed final. The record here does not support a conclusion that the district court's 2015 demand futility rulings were intended as the district court's "last word" on the issue of demand futility. To the contrary, the district court's statement that it would not dismiss Plaintiffs' claims "at this point" (APP001650; APP001626) indicates that the ruling was tentative, and subject to later revision, rather than firm, procedurally definite, and the district court's "last word" on demand futility. The district court's admonition that Kirsch should "beef up" his demand futility allegations should he file an amended complaint attempting to cure his lack of standing further confirms that the district court was fully prepared to further address demand futility, and that the August 2015 order did not reflect the district court's "last word" on that subject. APP001650.[3] What need

[3] This Court's observation in *Canterino v. Mirage Casino-Hotel* that "until the entry of a final judgment, the district court remains free to reconsider and issue a written judgment different from its oral pronouncement; thus, only a final judgment has any effect and only a final judgment may be appealed" does not preclude this Court from considering the complete record in this case in assessing Plaintiffs' argument that the August 2015 Order was "sufficiently firm" to be deemed a "final judgment" under the Restatement § 13 test. 118 Nev. 191, 194, 42 P.3d 808, 810 (2002). Plaintiffs' own cases applying the Restatement § 13 test confirm that courts should consider the complete record in assessing whether a prior order was "sufficiently firm." *See, e.g., Gilldorn Sav. Ass'n v. Commerce Sav. Ass'n*, 804 F.2d 390, 393 (7th Cir. 1986) (finding prior ruling "sufficiently firm" for issue preclusion purposes where "[n]othing in the order itself ***or in the record*** indicates that the order was tentative") (emphasis added).

would there be to "beef up" Kirsch's demand futility allegations if the district court considered the demand futility issue conclusively and "finally" decided? Finally, the August 2015 Order stayed this case in deference to the prior-filed Federal Derivative Case, where the district court knew a demand futility motion was being briefed. Nothing about the circumstances of these 2015 rulings suggest that those rulings meet the Restatement § 13 definition of finality of a judgment—a definition which no Nevada court has adopted.

Because the August 2015 Order was not a "final judgment," it does not take "precedence" over the Northern District of Georgia's Final Judgment dismissing the Federal Derivative Case with prejudice for failure to plead demand futility. Accordingly, the sole basis on which Plaintiffs seek reversal of the district court's order and judgment dismissing this case is meritless. The district court correctly applied governing issue preclusion principles to hold that the Federal Final Judgment—which Plaintiffs did not dispute below and do no dispute in this appeal was final and determined demand futility issues identical to those presented in this case—was conclusive of the demand futility issue in this case. The April 2016 Order and judgment of dismissal should be affirmed.

LEGAL ARGUMENT

A. The District Court's August 2015 Order Was Not A "Final Judgment."

1. The August 15 Order was not a final judgment under existing Nevada law.

Nevada law is clear that, for issue preclusion to apply, a final judgment is required. *See Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054-55, 194 P.3d 709, 713 (2008). This Court has held that an order or judgment is "final" only if it "disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs." *Lee v. GNLV Corp*., 116 Nev. 424, 426, 996 P.2d 416, 417 (2000). Clearly, the August 2015 Order does not satisfy that definition of "finality," as Plaintiffs tacitly concede. This Court has also repeatedly distinguished "interlocutory district court orders denying motions to dismiss" from "final judgment[s]" in denying writ relief from such orders. *See, e.g., Int'l Game Tech., Inc. v. Second Judicial Dist. Ct. of Cty. of Washoe*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) ("[B]ecause an appeal from the final judgment typically constitutes an adequate and speedy legal remedy, we generally decline to consider writ petitions that challenge interlocutory district court orders denying motions to dismiss."). In addition, in a decision applying Nevada law, the Ninth Circuit Court of Appeals has held that the denial of a motion to dismiss a derivative suit based on demand futility grounds (in contrast to an order *granting* such a motion) is *not* a

final order. *See Arduini v. Hart*, 774 F.3d 622, 632 (9th Cir. 2014). The district court's holding that the August 2015 Order "was not a final order under Nevada law" (APP000003, ¶ 6) is fully consistent with these precedents.

In contrast, Plaintiffs cite no Nevada case (nor any case applying Nevada law) holding that the denial of a motion to dismiss attacking the legal sufficiency of allegations in a complaint—much less one that, like the August 2015 Order, also contemplates the filing of additional superseding complaints and orders a case stayed in deference to parallel proceedings in another court where a substantively identical motion to dismiss is pending—constitutes a "final" judgment or order.[4]

2. The August 2015 Order was not "final" under the Restatement § 13 definition.

Although no Nevada court has so held, Plaintiffs contend that an order denying a motion to dismiss may be deemed "final" under the Restatement § 13 definition, stating that "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

[4] This Court's observation in *Garcia v. Prudential Ins. Co. of America* that "the finality requirement is less stringent for issue than for claim preclusion" does not help Plaintiffs. 293 P.3d 869, 874 n.7 (Nev. 2013) (quoting *Christo v. Padgett*, 223 F.3d 1324, 1339 (11th Cir. 2000)). The Court made that statement in response to the appellant's argument that a without-prejudice dismissal should not be afforded preclusive effect and in no way suggests that an order like the August 2015 Order should be deemed "final" for issue preclusion purposes. *Id.*

effect." Restatement (Second) of Judgments § 13 (1982); *see* Pl. Br. at 24.[5] As shown below, however, even if Nevada were to adopt the Restatement § 13 approach providing that, under the right circumstances, an interlocutory order denying a motion to dismiss *can* be deemed "final" for issue preclusion purposes, this Court should affirm the district court's correct conclusion that the August 2015 Order in this case was not "final" for purposes of issue preclusion, or any purpose.

The comments to § 13 of the Restatement provide that, to be deemed "final" for purposes of issue preclusion, a decision must not be "tentative," but instead must be the "last word" of the rendering court on the issue in question. Restatement (Second) of Judgments § 13 (1982), comment a. Here, the record is clear that the August 2015 Order was *not* intended to be the district court's "last word" or "final" determination of the issue of demand futility.

The August 2015 Order's lack of finality on this point is apparent from the district court's statements at the June 11, 2015 hearing that (i) it would not dismiss the SAC "at this point" and (ii) should Mr. Kirsch seek to amend his complaint yet again to remedy his standing "problems," he should "beef up" his demand futility

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5 Although this Court cited Restatement § 13 in *University of Nevada v. Tarkanian*, that decision did not examine the finality of an earlier ruling for issue preclusion purposes, nor did it adopt or apply the "sufficiently firm" test of Restatement § 13, but instead held that issue preclusion did not apply because it was not sufficiently clear from the record that the issue for which preclusion was asserted had in fact been decided. *See* 110 Nev. 581, 599-601, 879 P.2d 1180, 1191-92 (1994).

allegations. APP001650; APP001626. The statement that the SAC would not be dismissed "at this point" implicitly contemplates that dismissal on demand futility grounds could be addressed at a future point, which is inconsistent with finality. *See Ten Mile Indus. Park v. Western Plains Serv. Corp.*, 810 F.2d 1518, 1523-24 (10th Cir. 1987) (holding that denial of a motion to dismiss for lack of personal jurisdiction was not a final ruling where the ruling court authorized movants to renew their motion later in the proceedings; declining to give preclusive effect to order); *Drake v. Whaley*, 355 Fed. Appx. 315, 317 (11th Cir. 2009) (holding that order denying motion to dismiss but leaving dispositive issue regarding equitable tolling to be decided at trial was not "final" for issue preclusion purposes). The district court's warning that Kirsch should "beef up" his demand futility allegations in any further amended complaint supplies additional confirmation that the district court envisioned further addressing demand futility issues later in the proceedings (if it did not, what need would there be for Kirsch to "beef up" his allegations?) and that the August 2015 Order, therefore would not be the district court's "last word" on the subject. APP001650.

The following exchange between counsel for Plaintiff Kirsch and the district court at the January 2016 Status Check in this case further underscores the point that the district court envisioned further consideration of demand futility issues and did not view its August 2015 Order as having conclusively decided such issues:

> MR. MILLER: Judge, for plaintiff, ***we were planning to file a motion for leave to amend and an amended complaint***. Which we have prepared, so it would be –
>
> THE COURT: ***So you want to better plead demand futility, huh***?
>
> MR. MILLER: ***We're taking the Judge's suggestion at the end of the last hearing***. But we have it ready. We would be ready to file by the end of the week, just get back to the office and file.

APP001777 (emphasis added).

That the district court (i) was twice advised that Mr. Kirsch intended to amend his complaint (although he never did); (ii) twice commented that Kirsch should improve his demand futility allegations in any such amended complaint; (iii) stated in 2015 that it would not dismiss the case "at this point"; and (iv) stayed the case in deference to the prior-filed Federal Derivative Case where demand futility briefing was underway also indicate that the August 2015 Order was "tentative," which further cuts against a finding of finality under the Restatement and cases on which Plaintiffs rely. *See* Restatement (Second) of Judgments § 13 (1982), comment a ("conclusive carry-over effect should not be accorded a judgment which is considered merely tentative in the very action in which it was rendered"); *id.* comment g ("preclusion should be refused if the decision was avowedly tentative"); *but see Pellerin v. Nev. Cty.*, 635 Fed. Appx. 345, 346-47 (9th Cir. July 1, 2015) (giving preclusive effect to factual findings made following two-day evidentiary hearing where, among other things, those findings were *not*

"tentative"); *Gilldorn*, 804 F.2d at 393 (finding prior ruling "sufficiently firm" for issue preclusion purposes where "[n]othing in the order itself or the record indicates that the order was tentative").

In short, far from there being "no really good reason for permitting [the issue of demand futility] to be litigated again"—which Plaintiffs posit as another standard for assessing "finality" of a ruling for issue preclusion purposes (Pl. Br. at 25), the record here indicates that the district court anticipated further addressing demand futility if necessary. There also is no indication in the record that the district court believed or intended that its August 2015 Order would preclude the Northern District of Georgia from undertaking its own assessment of demand futility in the Federal Derivative Case. To the contrary, the August 2015 Order stayed proceedings in this action in deference to the prior-filed Federal Derivative Case, where motions to dismiss asserting demand futility and other arguments for dismissal were pending. APP001048; APP001566. Thus, application of the precise standards Plaintiffs advocate—(i) the Restatement § 13 definition of "final judgment" and (ii) the test of whether there is "really no good reason for permitting [demand futility] to be litigated again"—compel the same conclusion that the district court reached in its April 2016 Order: that the August 2015 Order was not a "final" judgment that (i) bound that Northern District of Georgia or (ii) must "take precedence" over the Federal Final Judgment.

3. Plaintiffs' cases do not support a conclusion that the August 2015 Order should be deemed "final."

None of the out-of-state decisions Plaintiffs cite support reversal of the district court's determination that the August 2015 was not a "final" order for any purpose. To the contrary, the outcome in the *Jones v. Wells Fargo Bank, N.A.* case supports affirmance of the April 2016 Order and judgment dismissing this action. The decision cited at page 25 of Plaintiffs' Brief was a magistrate judge's report and recommendation that the federal district court rejected and declined to adopt. *Compare Jones v. Wells Fargo Bank, N.A.*, 2014 WL 1256086, at *11 (N.D. Ga. Feb. 10, 2014) (magistrate's report and recommendation) *with Jones v. Wells Fargo Bank, N.A.*, 2014 WL 1256396, at *4 (N.D. Ga. Mar. 25, 2014) (opinion and order declining to adopt report and recommendation). The federal district court overruled the magistrate's recommendation that a prior bankruptcy court ruling denying a motion to annul the automatic stay of litigation against the petitioner should be given issue preclusive effect. *Jones*, 2014 WL 1256396, at *3. Because the bankruptcy court ruling authorized the movant to renew the denied motion to annul the stay later in the proceedings, the federal district court determined that the bankruptcy court's order was not a "final determination" to which issue preclusive effect should be given. *Id.* (analogizing the bankruptcy court ruling to the order in *Ten Mile* denying a motion to dismiss but contemplating further litigation of the personal jurisdictional issues raised therein). Similarly, the August 2015 Order,

which contemplated further litigation of the demand futility both in the district court and in the Northern District of Georgia, was not a "final" ruling with issue preclusive effect.

Unlike the August 2015 Order and the bankruptcy court ruling the federal district court in *Jones* declined to give preclusive effect, the rulings in the other cases Plaintiffs cite were in no way "tentative" and were regarded as reflecting the issuing courts' "last words" on the topics in question. *See Gilldorn*, 804 F.2d at 393 ("Nothing in the order itself or in the record indicates that the order was tentative."); *Pellerin*, 635 Fed. Appx. at 346-47 (giving preclusive effect to factual findings made following two-day evidentiary hearing where, among other things, those findings were not "tentative"); *Siemens Medical Sys., Inc. v. Nuclear Cardiology Sys. Inc.*, 945 F. Supp. 1421, 1435 (D. Colo. 1996) (applying issue preclusive effect to decision partially granting summary judgment where the issuing court "expressed no reservations as to [the ruling's] finality."); *In re Jaynes*, 377 B.R. 880, 886 (W.D. Wis. 2007) (holding that prior decision rejecting standing defense was "procedurally definite" and thus entitled to preclusive effect where "the transcript shows that [the issuing court] had no plans to revisit the issue of standing"); *McLendon v. Continental Grp., Inc.*, 660 F. Supp. 1553, 1560-64 (D.N.J. 1987) (addressing preclusive effect of liability determination made following bifurcated bench trial and affirmed on appeal); *United States v. McGann*,

951 F. Supp. 372, 382 (E.D.N.Y. 1997) (holding that prior order granting partial summary judgment based on statute of limitations was "not tentative" and was entitled to issue preclusion effect, requiring dismissal of new complaint that was virtually identical to the one previously dismissed); *United States v. Cleveland*, 1995 WL 535110, at *4-*5 (N.D. Ill. Sept. 1, 1995) (finding denial of motion for return of funds sufficiently firm to preclude further litigation of statute of limitations issue addressed therein where the issuing judge's commitment to his ruling was demonstrated by his subsequent denial of defendant's motion for reconsideration).[6] These cases offer Plaintiffs no help. None of them supports a conclusion that the district court erred in holding that its August 2015 Order was not a "final" order that should take precedence over the Federal Final Judgment.

Finally, and critically, unlike Plaintiffs' cases, in which the courts had to assess whether *other* judge's prior rulings were "sufficiently firm" for issue preclusive effect, here that question was put directly to the district court judge who had issued the prior ruling. APP001558 (Kirsch's counsel arguing that the district court should find that its August 2015 Order was "sufficiently firm" to be deemed "final" under the Restatement § 13 test). The district court rejected that argument, and held instead that her August 2015 Order was not "final" and that she was bound to defer to the Federal Final Judgment. *Id.*; APP000003-4 (holding that the

[6] Contrary to the incorrect assertion in Plaintiffs' brief (at p. 27), Defendants did *not* move for reconsideration of the August 2015 Order.

August 2015 Order "was not a final order under Nevada law" and that the Federal Final Judgment was entitled to preclusive effect in this case). Plaintiffs have not shown any error in that ruling, and it should be affirmed.

B. Plaintiffs' "Full Faith and Credit" Cases Are Inapposite.

Plaintiffs also cite several cases holding that the full faith and credit clause of the United States Constitution does not require a state court that has issued a final judgment on some matter to give effect to a later conflicting judgment entered by another state court. Pl. Br. at 21-22. These cases have no application in the present appeal because, as shown above, the district court's August 2015 Order was not a final judgment or order for issue preclusion, or any, purposes. Thus, there was no prior final Nevada judgment in existence at the time the Northern District of Georgia issued the Federal Final Judgment on the issue of demand futility, and even Plaintiffs concede that a later *final* judgment issued by a non-Nevada court takes precedence over an earlier "conflicting" but "non-final" order issued by a Nevada court. Pl. Br. at 22-23. Plaintiffs' argument that a non-Nevada court "may not reverse the final judgment of a Nevada state court" is a red herring that should not dissuade this Court from affirming the April 2016 Order and judgment of dismissal of this case.

C. The District Court Properly Applied Governing Issue Preclusion Law To Dismiss This Case.

Having correctly held that the August 2015 Order was not a "final" judgment or order, the district court then analyzed the preclusive effect of the Federal Final Judgment dismissing the Federal Derivative Case with prejudice on demand futility grounds. APP000004, ¶¶ 8-9. The district correctly applied the governing issue preclusion standards this Court articulated in *Bower*,[7] found those standards satisfied, and held that the appealed case must be dismissed in light of the Federal Final Judgment's preclusive effect on the demand futility issue in this action. APP000004, ¶¶ 8-9; *see also, e.g.*, *Arduini v. Hart*, 2012 WL 893874, at *2-*3 (D. Nev. Mar. 14, 2012) (dismissing derivative case based on issue preclusion after court in parallel derivative case dismissed action on demand futility grounds), *aff'd Arduini*, 774 F.3d at 629-32; *In re Career Educ. Corp. Deriv. Litig.*, 2007 WL 2875203, at *10-*11 (Del. Ch. Sept. 28, 2007) (same).[8]

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[7] As this Court held in *Bower*, federal common law determines the preclusive effect of a final judgment issued by a federal court. 125 Nev. at 482, 215 P.3d at 718.

[8] Although the April 2016 Order relied solely on issue preclusion as the basis for dismissing the appealed case, this Court has recognized that "both claim and issue preclusion could apply in some lawsuits." *Five Star*, 124 Nev. at 1055, 194 P.3d at 714. A final judgment dismissing derivative claims with prejudice for failure to plead demand futility is entitled to claim preclusive effect as well. *See In re Bed Bath & Beyond Inc. Deriv. Litig.*, 2007 WL 4165389, at *7 (D.N.J. Nov. 19, 2007) (applying claim preclusion to judgment dismissing derivative case on demand futility grounds); *Henik ex rel. LeBranche & Co. v. LaBranche*, 433 F. Supp. 2d 372, 379 (S.D.N.Y. 2006) (same).

Plaintiffs do not argue that the district court failed to correctly apply the *Bower* test for issue preclusion, instead resting their appeal entirely on the patently incorrect assertion that the August 2015 Order was a "final judgment" that must "take precedence" over the Federal Final Judgment. *See* Pl. Br. at 21-31. Because, for reasons shown above, Plaintiffs' argument is incorrect (*see supra* at 22-31) and because Plaintiffs do not otherwise take issue with the district court's proper application of governing issue preclusion standards, the April 2016 Order and judgment dismissing this action with prejudice should be affirmed.

D. In the Alternative, This Court Should Affirm The April 2016 Order and Judgment On Grounds The District Court Did Not Reach.

Finally, even if this Court were to conclude that the April 2016 Order and judgment of dismissal should not be affirmed based on principles of issue preclusion, the district court's rulings should still be affirmed on grounds Defendants presented to the district court that were not addressed in the April 2016 Order. Specifically, even if Plaintiffs could somehow avoid the preclusive effect of the Federal Final Judgment, Plaintiffs' allegations still fall far short of demonstrating legal excuse for their failure to make a pre-suit demand on Galectin's board of directors. This Court can affirm the April 2016 Order on grounds not reached by the district court. *See, e.g.*, *Bower*, 125 Nev. at 479, 215 P.3d at 716 (holding that district court order can be affirmed on alternate grounds

not reached by the district court); *LVCVA v. Sec'y of State*, 124 Nev. 669, 689 n.58, 191 P.3d 1138, 1151 n.58 (2008) ("[W]e will affirm the district court if it reaches the right result, even when it does so for the wrong reason."). For reasons shown below, the Court should do so here if it does not affirm on issue preclusion grounds.

As the district court correctly held, a plaintiff seeking to assert claims derivatively on behalf of a Nevada company like Galectin must either (i) make a pre-suit demand on the company's board of directors or (ii) plead particularized facts establishing legal excuse for the failure to do so. *See* APP000002-3, ¶ 2; *see also* NRCP 23.1; *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 633, 137 P.3d 1171, 1179 (2006). Plaintiffs did not make a pre-suit demand, but instead attempted to plead in their complaints that such a demand was excused under Nevada law because a majority of Galectin's directors purportedly faced a "substantial likelihood of liability" in connection with the alleged "stock promotion scheme" that also formed the basis of the claims asserted in the Federal Derivative Case and the Federal Securities Case. *See* APP000003, ¶ 3; APP000359-62; APP001751-57.

Per Nevada's director exculpation statute and Galectin's Articles of Incorporation fully adopting the statute's protections, the members of the Galectin Board are absolved of any monetary liability "unless it is proven that" they breached fiduciary duties to the Company "and [that the] breach of those duties

involved intentional misconduct, fraud or a knowing violation of law." N.R.S. § 78.138(7) (emphasis added); APP001369. Thus, to allege that demand was futile because a majority of directors purportedly faced a "substantial likelihood of liability," Plaintiffs were required to plead particularized facts showing a substantial likelihood that a majority of the Director Defendants engaged in intentional misconduct, fraud or knowing violation of law. *See, e.g., In re General Motors Co. Deriv. Litig.*, 2015 WL 3958724, at *13 (Del. Ch. June 26, 2015) ("[A] serious threat of liability may only be found to exist if the plaintiff pleads a non-exculpated claim against the directors based on particularized facts.") (quoting *DiRienzo v. Lichtenstein,* 2013 WL 5503034, at *28 (Del. Ch. Sept. 30, 2013)).

Here, the Northern District of Georgia's orders and judgments dismissing with prejudice the Federal Derivative Case and the Federal Securities Case confirm that Plaintiffs' allegations challenging the same conduct as the federal suits fail to establish *any* likelihood, much less the required "substantial likelihood" that the Defendants engaged in any intentional misconduct, fraud or knowing violation of law. As the Northern District of Georgia ruled, there was nothing illegal, fraudulent, or in any way improper about the challenged conduct underlying the so-called "stock promotion scheme" (which was the same in the Federal Derivative Case, the Federal Securities Case, and in this action). APP001573; APP001359-

61. The Northern District of Georgia specifically held that (i) "Galectin and members of its board of directors did not engage in illegal or impermissible conduct through the use of third party stock promoters" (APP001573); (ii) "Plaintiffs have not identified any failure to disclose by the board of directors that constitutes a breach of fiduciary duty" (*id.*); (iii) Galectin and its directors and officers did not make misleading statements or omissions regarding the Company's engagement of "stock promoters" (APP001359); and (iv) "[b]ecause it is permissible to use stock promoters, Defendants did not impermissibly manipulate [Galectin's] stock price" (APP001360). The Northern District of Georgia's judgments dismissing the Federal Securities Case and the Federal Derivative Case with prejudice on these and other grounds confirm that Plaintiffs' allegations challenging the same alleged core conduct in this case fail to sufficiently plead that a majority of the Director Defendants face a substantial likelihood of liability for non-exculpated claims, which under N.R.S. § 78.138(7) require "intentional misconduct, fraud, or a knowing violation of law."

Although Plaintiffs also alleged that three of Galectin's ten directors—a clear minority—faced liability on allegations that those directors had engaged in insider trading, as the Northern District of Georgia correctly held, even assuming these allegations raised a reasonable doubt that the three directors accused of insider trading faced a substantial likelihood of liability, pleading that a minority of

a corporate board faces such liability does not excuse demand. *See Fosbre*, 2010 WL 2696615, at *7 (plaintiffs failed to plead demand futility where allegations of insider trading related only to three of nine directors); *see also* APP001574.

The April 2016 Order and judgment of dismissal should be affirmed for these reasons as well.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court affirm the April 2016 Order and judgment dismissing this action with prejudice.

DATED this 28th day of April, 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 typeface 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 Microsoft Word in 14-point Times New Roman; or

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2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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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 28th day of April, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that Respondents' Answering Brief and Appendix were filed electronically with the Nevada Supreme Court on the 28th day of April, 2017. Electronic service shall be made in accordance with the Master Service List as follows:

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