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 District Court Case No. A-14-706397-B

APPENDIX TO RESPONDENTS' ANSWERING BRIEF VOLUME II

Submitted by:

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RESPONDENTS' APPENDIX

DOCUMENT DESCRIPTION	DATE	BATES NUMBER	VOL.
Court Minutes, June 11, 2015, All Pending Motions	06/11/2015	APP001625 – APP001626	I
David L. Hasbrouck's and Siu Yip's Verified Shareholder Derivative Complaint-In-Intervention	07/09/2015	APP001654 – APP001770	I
Defendants' Motion to Correct Order Re: Motions to Dismiss Shareholder Derivative Action Pursuant to NRCP 60	04/05/2016	APP001780 – APP001867	II
Entry of Dismissal Pursuant to the 11th Cir. R. 42-2(c) for Want of Prosecution	07/07/2016	APP001882 – APP001883	II
Opinion, U.S. Court of Appeals for the Eleventh Circuit, No. 16-10324	12/15/2016	APP001884 – APP001920	II
Opposition to Motion to Correct Order Re: Motions to Dismiss Shareholder Derivative Action Pursuant to NRCP 60	04/22/2016	APP001868 – APP001872	II
Order Re: Appellants' Motion for a Sixty (60) Day Extension of Time for Filing Their Opening Brief	07/07/2016	APP001880 – APP001881	II
Order Re: David L. Hasbrouck's and Siu Yip's Motion to Intervene	07/27/2015	APP001771 – APP001773	I
Plaintiff's Motion to Join Additional Parties on Order Shortening Time	06/04/2015	APP001585 – APP001596	I

DOCUMENT DESCRIPTION	DATE	BATES NUMBER	VOL.
Plaintiff's Reply in Support of Motion to Join Additional Parties on Order Shortening Time	06/09/2015	APP001597 – APP001624	I
Reply Memorandum in Support of Defendants' Motion to Correct Order Re: Motions to Dismiss Shareholder Derivative Action Pursuant to NRCP 60	05/20/2016	APP001873 – APP001879	II
Transcript of Proceedings Before the Hon. Elizabeth Gonzalez, Hearing on Motions , June 11, 2015	06/11/2015	APP001627 – APP001653	I
Transcript of Proceedings Before the Hon. Elizabeth Gonzalez, Status Check, January 5, 2016	01/05/2016	APP001774 – APP001779	I

DATED this 28th day of April, 2017.

s/ Lyssa S. Anderson

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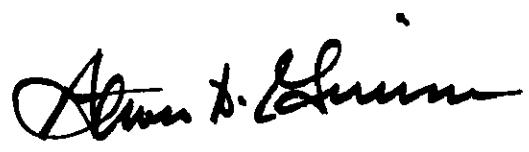

CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL KIRSCH, derivatively on behalf of GALECTIN THERAPEUTICS, INC., Plaintiff, vs. 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, Defendants, -and- GALECTIN THERAPEUTICS, INC., a Nevada Corporation, Nominal Defendant.	Case No. A-14-706397-B Dept. No. XI **DEFENDANTS' MOTION TO CORRECT ORDER RE: MOTIONS TO DISMISS SHAREHOLDER DERIVATIVE ACTION PURSUANT TO NRCP 60**

[captions continued on following page]

DAVID L. HASBROUCK and SIU YIP, derivatively on behalf of GALECTIN THERAPEUTICS, INC.,

Plaintiff,

vs.

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 10X FUND, L.P.,

Defendants,

-and-

GALECTIN THERAPEUTICS, INC., a Nevada Corporation,

Nominal Defendant.

Case No. A-14-706397-B

Dept. No. XI

DEFENDANTS' MOTION TO CORRECT ORDER RE: MOTIONS TO DISMISS SHAREHOLDER DERIVATIVE ACTION PURSUANT TO NRCP 60

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 (the "Individual Defendants") together with Defendant 10X Fund L.P. ("10X Fund")[1] and Nominal Defendant Galectin Therapeutics, Inc. ("Galectin" or the "Company") (collectively, the Individual Defendants, 10X Fund and Galectin are referred to herein as "Defendants") hereby respectfully move this Court, pursuant to Rule 60(a)&(b) of the Nevada Rules of Civil Procedure, to correct a factual mistake contained in the Court's Order Re: Motions to Dismiss Shareholder Derivative Action dated April 1, 2016 (the "Order").

The Court's Order includes an incorrect statement adopting language from a proposed order that Plaintiffs apparently submitted to the Court without either serving or informing Defendants they had done so. The incorrect language states that the Court's "August 10, 2015 order staying this case for 180 days was based on representations made to the Court by [Defendants' counsel] at the June 11, 2015 hearing that issues raised in Georgia relate to class representations issues." As clearly reflected in the transcript of the June 11, 2015 hearing and accompanying minutes, that that statement is patently incorrect, because ***Defendants' counsel did not make any such representation at the June 11, 2015 hearing***. *See* June 11, 2015 Hr'ing Tr. at 4-5 (referencing the "derivative" litigation pending in Georgia and "Rule 23.1" issues—not class representation/certification issues—being raised in the Georgia action); *see also* Minutes of June 11, 2015 Hr'ing (same). As a result, Defendants respectfully request that the Court correct its April 1, 2016 Order by striking paragraph 5 thereof, which states: "This Court's August 10, 2015 order staying the case for 180 days was based upon representations made to the Court by

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[1] 10X Fund is named as a defendant only in the Verified Shareholder Complaint-In-Intervention (the "IC") which was filed by Intervenor Plaintiffs David L. Hasbrouck and Siu Yip ("Intervenor Plaintiffs").

Mr. Smith at the June 11, 2015 hearing that issues raised in Georgia relate to class representations issues."

This motion is made pursuant to NRCP 60(a)&(b) and is supported by the attached Memorandum of Points and Authorities, the exhibits, the files and pleadings in this matter, such other papers as may be filed at or before any hearing of this motion, oral argument of counsel, and any other matters properly before the Court.

Respectfully submitted this 5th day of April, 2016.

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NOTICE OF MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that the undersigned will bring the above and foregoing Motion to Dismiss on hearing before the Court, at the courtroom of the above-entitled Court, on the 27 day of May, 2016 at the hour of In Chambers, or as soon thereafter as counsel may be heard, in Department XI of said Court.

DATED this 5th day of April, 2016

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

At a hearing held in this action on March 3, 2016, the Court granted Defendants' motions to dismiss the action with prejudice and directed Defendants to submit a proposed order. Defendants promptly prepared a draft and shared it with Plaintiffs' counsel. Unfortunately after discussion, the parties were not able to agree on certain contents of the proposed order. Defendants submitted their proposed order to the Court via e-mail on March 17, 2016, copying Plaintiffs' counsel and noting that the parties had not reached agreement as to the language to be contained in certain paragraphs thereof.

Thereafter—and unbeknownst to Defendants, whose counsel Plaintiffs did not copy on their communication to the Court—Plaintiffs apparently submitted a different proposed order, portions of which the Court adopted and included in its order entered on April 1, 2014 (the "Order"). The language at issue includes an erroneous assertion that the Court's prior order staying this case in deference to a substantively identical, prior-filed derivative action pending in federal court in Georgia was "based upon representations" by Defendants' counsel at a June 11, 2015 hearing (the "June 11 Hearing") that "class representations" or class certification issues were then pending in the parallel Georgia derivative action. That assertion is incorrect, because—as the transcript of the June 11 Hearing confirms—Defendants' counsel did not make any such representation at the June 11 Hearing. Nor did Defendants make any such representation in any of the briefing Defendants submitted in connection with the June 11 Hearing.

Defendants promptly raised these issues with Plaintiffs' counsel after receiving a draft order from Plaintiffs containing the erroneous statement about representations at the June 11 Hearing. Because Plaintiffs' counsel did not copy Defendants' counsel on the communication

forwarding Plaintiffs' proposed order to the Court and did not otherwise inform Defendants counsel that the proposed order had been submitted, however, Defendants were not aware that the Court had Plaintiffs' proposed order and therefore did not have an opportunity to raise the issues relating to the erroneous language contained therein with the Court until now.

Pursuant to NRCP 60, the Court should correct this mistake in the April 1, 2016 Order by striking paragraph 5 of the Order, which states: "This Court's August 10, 2015 order staying the case for 180 days was based upon representations made to the Court by Mr. Smith at the June 11, 2015 hearing that issues raised in Georgia relate to class representations issues."

II. RELEVANT BACKGROUND

A. The June 11, 2015 Hearing

On June 11, 2015, this Court held a hearing to address the following motions in this case: (i) Nominal Defendant Galectin Therapeutics, Inc.'s Motion To Dismiss The Second Amended Complaint And Memorandum Of Points And Authorities; (ii) Individual Defendants' Motion To Dismiss The Second Amended Complaint And Memorandum Of Points And Authorities; (iii) David L. Hasbrouck's And Siu Yip's Motion To Intervene; (iv) Intervenors David L. Hasbrouck's And Siu Yip's *Ex Parte* Motion For Order Shortening Time And (Proposed) Order Shortening Time; and (v) Plaintiff's Motion To Join Additional Plaintiffs On Order Shortening Time.

At the June 11 Hearing, the Court asked Defendants' counsel about a parallel and prior-filed ***derivative*** action filed by Intervenors David L. Hasbrouck and Siu Yip, which was pending in the United State District Court for the Northern District of Georgia at the time of the June 11 Hearing (the Georgia Action). The following colloquy ensued:

> THE COURT: Are you involved in the Georgia litigation?
>
> MR. SMITH: Yes, I am.

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.

June 11, 2015 Hr'ing Tr. at 4-5 (emphasis added).

The foregoing discussion at the June 11 Hearing pertained to "Rule 23.1" issues, *i.e.*, issues pertaining to whether persons claiming to be shareholders of a company have adequately alleged the prerequisites to pursue claims derivatively on the company's behalf, including whether demand futility had been adequately alleged (*see, e.g.*, NRCP 23.1)—not class certification or "class representations" issues. Indeed, in response to the Court's question, Defendants' counsel confirmed the Court's correct understanding that the Georgia Action was a "shareholder derivative action"—not a putative class action.[2] June 11, 2015 Hr'ing Tr. at 4. The

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[2] This Court's minutes of the June 11 Hearing also confirm that Defendants' counsel referred to "23.1 issues" that were being raised in the "derivative cases" in Georgia—again, not class

June 11 Hearing transcript contains no record of Defendants' counsel making any representation to the Court that this case should be stayed pending a decision on class certification or "class representations" issues in the Georgia Action.[3] Defendants also made no such representation in any briefs Defendants submitted in connection with the June 11 Hearing.

B. The March 3, 2016 Hearing

While this action was stayed, the Court in the Georgia Action entered a final order and judgment dismissing the Georgia Action with prejudice for failure to adequately allege demand futility under Federal Rule of Civil Procedure 23.1 and Nevada corporation law. Thereafter, Defendants filed motions to dismiss this action based on the preclusive effect of the final judgment in the Georgia Action. This Court held a hearing on the motions to dismiss on March 3, 2016, and granted the motions. *See* March 3, 2016 Corrected Hr'ing Tr. at 9. The Court directed Defendants' counsel to prepare a proposed order. *Id.* at 9-10.

C. Submission Of Proposed Orders

On March 7, 2016, Defendants forwarded a draft of a proposed order granting their motions to dismiss to Plaintiffs' counsel. *See* Mar. 7, 2016 e-mail, copy attached as Exhibit B. Plaintiffs sent proposed edits to the draft order on March 16, 2016. *See* Mar. 16, 2016 e-mail, copy attached as Exhibit C. Defendants responded and proposed further edits on March 17, 2016. *See* Mar. 17, 2016 e-mail, copy attached as Exhibit D. Later on March 17, 2016, Plaintiffs sent a further revised version of the proposed order and stated that "Attached is what we propose to submit . . . In the event we cannot agree, we plan to submit our own order with a cover letter expressing our position." *See* Mar. 17, 2016 e-mail, copy attached as Exhibit E.

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certification or "class representations" issues. *See* Minutes of June 11, 2015 Hr'ing, copy attached as Exhibit A.

[3] Indeed, it was Intervenors and not Defendants who advocated for a stay of this case in deference to the Georgia Action at the June 11 Hearing. *See* June 11, 2015 Hr'ing Tr. at 21.

Thereafter, Defendants confirmed that Plaintiffs' proposed draft was not agreeable and that Defendants would submit their last draft of the proposed order and notify the Court that the parties had been unable to agree on certain of its contents. *See* Mar. 17, 2016 e-mail, copy attached as Exhibit F. Defendants then submitted their proposed order to the Court via e-mail, copying Plaintiffs' counsel of record. *See* Mar. 17, 2016 e-mail, copy attached as Exhibit G.

On March 18, 2016, Plaintiffs forwarded to Defendants a further revised draft proposed order. *See* Mar. 18, 2016 e-mail with attached draft order, copy attached as Exhibit H. Plaintiffs' March 18 draft was the first version of their proposed order to include language asserting that Defendants counsel had made representations to the Court about "class representations issues" at the June 11 Hearing. Paragraph 5 of Plaintiffs' March 18 draft proposed order stated:

> 5. This Court's August 10, 2015 order staying the case for 180 days was based upon representations made to the Court by Mr. Smith at the June 11, 2015 hearing that issues raised in Georgia relate to class representations issues. See Court Minutes for March 3, 2016 Hearing.

Id., attached draft order.

Also on March 18, 2016, Defendants wrote back to Plaintiffs' counsel regarding Plaintiffs' draft order. *See* Mar. 18, 2016 e-mail, copy attached as Exhibit I (June 11 Hr'ing Tr. omitted). Defendants identified a significant error in paragraph 6 of the draft and explained that Plaintiffs' proposed paragraph 5 regarding purported representations by Defendants' counsel at the June 11 Hearing was incorrect and inconsistent with the transcript of the June 11 Hearing, a copy of which Defendants attached for Plaintiffs' review, because, as shown therein, Defendants' counsel did not make such representations at the June 11 Hearing. *Id.* Defendants requested that Plaintiffs fix the error in paragraph 6 and remove paragraph 5 and further noted that, should Plaintiffs "submit a proposed order containing the above discussed (or similar)

inaccurate language, Defendants reserve all rights to bring the discrepancies to the Court's attention and pursue appropriate relief." *Id.*

Thereafter, Plaintiffs and Defendants exchanged several additional e-mails regarding Plaintiffs' March 18 draft order. *See* Mar. 18, 2016 e-mail string, copy attached as Exhibit J. In these e-mails, Plaintiffs did not dispute that the June 11 Hearing transcript contains no record of any representation by Defendants' counsel pertaining to class representations/certification issues in the Georgia litigation. *Id.* Nor did Plaintiffs inform Defendants that they had submitted their proposed order to the Court. *Id.* In the last of these e-mails, Defendants reiterated their view that the proposed language contained in paragraph 5 of Plaintiffs' draft order was incorrect, unfounded and should be removed. *Id.*

Until Defendants' counsel received a copy of the Court's April 1, 2016 Order via the Court's ECF notification system and noted that the Order contained language mirroring contents of paragraph 5 of Plaintiffs' draft order, Defendants did not suspect that Plaintiffs had in fact submitted their proposed order to the Court. Plaintiffs did not copy Defendants' counsel on or serve Defendants with the communication by which Plaintiffs transmitted their proposed order to the Court. Nor did Plaintiffs file their proposed order via the Court's ECF system.

D. The Court's April 1, 2016 Order

The Court's April 1, 2016 Order included the erroneous language proposed by Plaintiffs asserting that "This Court's August 10, 2015 order staying the case for 180 days was based upon representations made to the Court by Mr. Smith at the June 11, 2015 hearing that issues raised in Georgia relate to class representations issues." *See* April 1, 2016 order at ¶ 5.

III. ARGUMENT

Rule 60 of the Nevada Rules of Civil Procedure provides, in relevant part:

> **(a) Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.
>
> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; or, (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that an injunction should have prospective application. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than 6 months after the proceeding was taken or the date that written notice of entry of the judgment or order was served. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

NRCP 60.

Defendants respectfully submit that, pursuant to one or both of the above subsections of NRCP 60, this Court should correct the portion of its April 1, 2016 Order that mistakenly attributes the Court's earlier decision to stay this case for 180 days following the June 11 Hearing to purported "representations made to the Court by Mr. Smith at the June 11, 2015 hearing that issues raised in Georgia relate to class representations issues." As clearly reflected

in the June 11 Hearing transcript (and as set forth in the minutes of the June 11 Hearing and summarized in Section II.a above), ***Defendants' counsel did not make any such representations at or in connection with the June 11 Hearing***.

During the June 11 Hearing, the Court asked Defendants' counsel whether the parallel, prior-filed Georgia ***derivative*** action (not the related class action) in deference to which this case was eventually stayed had completed the "Rule 23.1" process (*i.e.*, the briefing and adjudication of whether the plaintiffs in the Georgia derivative case had adequately pled the demand futility pre-requisite for prosecuting derivative claims). June 11, 2015 Hr'ing Tr. at 4; *accord* Minutes of June 11, 2015 Hr'ing. Defendants' counsel responded by stating that the parties to the Georgia derivative action were "in the process of raising the 23.1 issues" but that those issues had not been decided in Georgia. June 11, 2015 Hr'ing Tr. at 4-5; *accord* Minutes of June 11, 2015 Hr'ing.

At no point during the June 11 Hearing did Defendants counsel represent that this case should be stayed due to the pendency of class certification or "class representations issues" in the Georgia derivative action or related class action. *See generally* June 11, 2015 Hr'ing Tr. At no point in the hearing did Defendants counsel utter the words "class certification" or "class representations." Nor did Defendants make such representations in their briefing of any of the motions argued at the June 11 Hearing. Indeed, there would have been no reason to raise any such "class certification/representation" issues, as there was not even a class certification motion either pending or even scheduled to be filed in the Georgia federal class action securities suit related to the derivative suit. In light of the complete absence of any mention or reference whatsoever to class certification or class representation at the June 11 Hearing, the language in paragraph 5 of the Order proposed by Plaintiff's counsel and adopted by the Court is facially incorrect in asserting that Defendants' counsel made such representations at or in connection

with the June 11 Hearing. As a result, pursuant to NRCP 60(a) and/or (b), the Court should correct that mistake.

Finally, Defendants are deeply troubled that Plaintiffs' counsel apparently submitted their proposed order containing the above-described erroneous language despite Defendants' counsel having raised all of the above issues with Plaintiffs' counsel in e-mails exchanged on March 18, 2016. Further, Plaintiffs' counsel neither served Defendants with nor copied Defendants' counsel on the communication by which the proposed order was transmitted to the Court. As a result, Defendants' counsel were unaware that Plaintiffs' counsel had submitted the proposed order to the Court and did not have an opportunity to raise the issues discussed in this motion with the Court prior to its entry of the Order. Had Defendants known Plaintiffs had submitted the proposed order containing the factually-incorrect assertion, Defendants would have promptly raised these issues with the Court and requested that the Court's Order not include the incorrect statement.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court correct its April 1, 2016 Order by striking paragraph 5 thereof, which states: "This Court's August 10, 2015 order staying the case for 180 days was based upon representations made to the Court by Mr.

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Smith at the June 11, 2015 hearing that issues raised in Georgia relate to class representations issues."

Respectfully submitted this 5th day of April, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2016, I forwarded copies of the foregoing **DEFENDANTS' MOTION TO CORRECT ORDER RE: MOTIONS TO DISMISS SHAREHOLDER DERIVATIVE ACTION PURSUANT TO NRCP 60** by ECF and/or U.S. Mail to the following attorneys of record:

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Exhibit A

REGISTER OF ACTIONS

CASE NO. A-14-706397-B

Michael Kirsch, Plaintiff(s) vs. Peter Traber, Defendant(s)

Case Type:	**Other Business Court Matters**
Date Filed:	**08/29/2014**
Location:	**Department 11**
Cross-Reference Case Number:	**A706397**

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Defendant	**Freeman, Kevin D**	**Lyssa M. Simonelli** *Retained* 7027927000(W)
Defendant	**Galectin Therapeutics, Inc.**	**Lyssa M. Simonelli** *Retained* 7027927000(W)
Defendant	**Greenberg, Arthur R**	**Lyssa M. Simonelli** *Retained* 7027927000(W)
Defendant	**Martin, Ron D**	**Lyssa M. Simonelli** *Retained* 7027927000(W)
Defendant	**Mauldin, John F**	**Lyssa M. Simonelli** *Retained* 7027927000(W)
Defendant	**Prelack, Steven**	**Lyssa M. Simonelli** *Retained* 7027927000(W)
Defendant	**Pressler, Herman Paul, III**	**Lyssa M. Simonelli** *Retained* 7027927000(W)
Defendant	**Rubin, Marc**	**Lyssa M. Simonelli** *Retained* 7027927000(W)
Defendant	**Traber, Peter G**	**Lyssa M. Simonelli**

REGISTER OF ACTIONS

CASE NO. A-14-706397-B

Michael Kirsch, Plaintiff(s) vs. Peter Traber, Defendant(s)

Case Type:	**Other Business Court Matters**
Date Filed:	**08/29/2014**
Location:	**Department 11**
Cross-Reference Case Number:	**A706397**

PARTY INFORMATION

Defendant	**Amelio, Gilbert F**	**Lead Attorneys** **Lyssa M. Simonelli** *Retained* 7027927000(W)
Defendant	**Callicutt, Jack W**	**Lyssa M. Simonelli** *Retained* 7027927000(W)
Defendant	**Czirr, James C**	**Lyssa M. Simonelli** *Retained* 7027927000(W)
Defendant	**Freeman, Kevin D**	**Lyssa M. Simonelli** *Retained* 7027927000(W)
Defendant	**Galectin Therapeutics, Inc.**	**Lyssa M. Simonelli** *Retained* 7027927000(W)
Defendant	**Greenberg, Arthur R**	**Lyssa M. Simonelli** *Retained* 7027927000(W)
Defendant	**Martin, Ron D**	**Lyssa M. Simonelli** *Retained* 7027927000(W)
Defendant	**Mauldin, John F**	**Lyssa M. Simonelli** *Retained* 7027927000(W)
Defendant	**Prelack, Steven**	**Lyssa M. Simonelli** *Retained* 7027927000(W)
Defendant	**Pressler, Herman Paul, III**	**Lyssa M. Simonelli** *Retained* 7027927000(W)
Defendant	**Rubin, Marc**	**Lyssa M. Simonelli** *Retained* 7027927000(W)
Defendant	**Traber, Peter G**	**Lyssa M. Simonelli** *Retained* 7027927000(W)

Plaintiff	**Kirsch, Michael**		**Natasha A. Landrum** *Retained* 7028809750(W)

EVENTS & ORDERS OF THE COURT

06/11/2015 **All Pending Motions** (8:00 AM) (Judicial Officer Gonzalez, Elizabeth)

Minutes
06/11/2015 8:00 AM
- INDIVIDUAL DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED SHAREHOLDER DERIVATIVE COMPLAINT AND MEMORANDUM OF POINTS AND AUTHORITIES... ...PLAINTIFF'S MOTION TO JOINT ADDITIONAL PLAINTIFFS ON ORDER SHORTENING TIME... ...DAVID L. HASBROUK AND SIU YIP'S MOTION TO INTERVENE...INTERVENORS, DAVID L. HASBROUCK AND SIU YIP'S EX PARTE MOTION FOR ORDER SHORTENING TIME AND (PROPOSED) ORDER SHORTENING TIME... ...NOMINAL DEFENDANT GALECTIN THERAPEUTICS, INC.'S MOTION TO DISMISS THE SECOND AMENDED SHAREHOLDER DERIVATIVE COMPLAINT AND MEMORANDUM OF POINTS AND AUTHORITIES Also present: Counsel for Proposed Intervenors Catherine Hernandez, Esq. of the Aldrich Law Firm (local); Michael Fistel, Esq. of Johnson & Weaver, LLC, and Kathleen Herkenhoff, Esq. of the Weiser Law Firm, P.C., Pro Hac Vice pending. Mr. Smith stated the threshold issue here is that Defendants filed a motion to dismiss while motions to intervene and a joinder have been filed. Mr. Smith objected to the motion to intervene as there have been fundamental issues in Plaintiff's standing in this case; he confirmed he is involved in the Georgia litigation and that the federal derivative cases were filed before these cases and they were transferred; it has not gone to ruling but they are in the process of raising 23.1 issues; the motion is due July 1st. COURT ORDERED, motion to intervene GRANTED. Arguments by Mr. Smith, Mr. Miller, and Mr. Fistel regarding the motions to dismiss. COURT ORDERED, motions DENIED; the allegations related to conflict of directors who may face personal liability are not the best but are not enough to merit dismissal at this point. COURT FURTHER ORDERED, the way the joinder is being done is not appropriate and needs to be filed as a motion to amend complaint to add Plaintiffs; the motion needs to include the proposed amended complaint as well as a verification from the proposed people counsel is seeking to add; in the meantime, if the intervenors want to file a complaint in intervention they may. Finally, COURT ODERED, aside from those two things - a motion to amend to add Plaintiffs and a complaint in intervention - CASE STAYED for ONE HUNDRED EIGHTY (180) DAYS pending the Georgia Court. Status Check SET on the December 11, 2015 Chambers calendar. CLERK'S NOTE: Motion to Intervene ADVANCED to today's date from the 7/10/15 Chambers calendar.

Parties Present

Return to Register of Actions

Exhibit B

Lee, Ben

From: Lee, Ben
Sent: Monday, March 07, 2016 6:38 PM
To: edmilleresq@aol.com; NLandrum@lee-lawfirm.com; ddavis@lee-lawfirm.com; Michael Fistel Jr.; James Ficaro (jmf@weiserlawfirm.com); 'Brett Stecker' (bds@weiserlawfirm.com); 'jaldrich@johnaldrichlawfirm.com' (jaldrich@johnaldrichlawfirm.com)
Cc: Smith, Michael; Pope, Warren
Subject: Kirsch_ [Proposed] Order granting motions to dismiss.DOC
Attachments: Kirsch_ [Proposed] Order granting motions to dismiss (4).DOC

Counsel:

Pursuant to the Court's direction at the March 3, 2016 hearing that Defendants prepare a proposed order granting their motions to dismiss, please see the attached and let us know if we may submit it with your approval.

Benjamin Lee | King & Spalding LLP | 1180 Peachtree Street, NE | Atlanta, Georgia 30309-3521 | 404-572-2820 | fax: 404-572-5139 | blee@kslaw.com

ORDER

LYSSA S. ANDERSON
Nevada Bar No. 5781
KAEMPFER CROWELL
8345 West Sunset Road, Suite 250
Las Vegas, Nevada 89113
Telephone: (702) 792-7000
Fax: (702) 796-7181
landerson@kcnvlaw.com

Attorney for Defendants

DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL KIRSCH, derivatively on behalf of GALECTIN THERAPEUTICS, INC., Plaintiff, vs. 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, Defendants, -and- GALECTIN THERAPEUTICS, INC., a Nevada Corporation, Nominal Defendant.	Case No. A-14-706397-B Dept. No. XI **[PROPOSED] ORDER AND FINAL JUDGMENT RE:** **MOTIONS TO DISMISS SHAREHOLDER DERIVATIVE ACTION** Date of Hearing: March 3, 2016 Time of Hearing: 8:30 a.m.

This matter having come before the Court on March 3, 2016 at 8:30 a.m. on Nominal Defendant Galectin Therapeutics Inc.'s Motion to Dismiss Shareholder Action and the Individual Defendants' and 10X Fund L.P.'s Motion to Dismiss Shareholder Action (the "Motions"), the Court having reviewed the Motions, all briefing thereon and supporting exhibits, having heard

oral argument, and other good cause appearing, the Court holds that the Motions are GRANTED. As grounds for its ruling, the Court finds:

1. This is a shareholder derivative action brought by Plaintiff Michael Kirsch and Intervenor Plaintiffs David L. Hasbrouck and Siu Yip (collectively, "Plaintiffs") who allege that they are shareholders of Nominal Defendant Galectin Therapeutics Inc. ("Galectin"), a Nevada corporation.

2. A shareholder seeking to assert claims derivatively on behalf of a Nevada corporation must, among other things, 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* NRCP 23.1; *Shoen v. SAC Holding Corp.*, 137 P.3d 1171, 1179 (Nev. 2006).

3. Plaintiffs did not make a pre-suit demand upon Galectin's board of directors, but instead asserted in their complaints that such a demand was excused under Nevada law.

4. On December 30, 2015, United States District Court Judge Steven C. Jones of the United States District Court for the Northern District of Georgia, entered a final order and judgment (the "Prior Final Judgment") (i) holding that under Nevada law, Intervenor Plaintiffs David L. Hasbrouck and Siu Yip failed to adequately plead the futility of a pre-suit demand on Galectin's board of directors in their prior-filed and substantively identical derivative action styled *In re Galectin Therapeutics, Inc. Derivative Litigation*, Civil Action No. 1:15-CV-208-SCJ, U.S. Dist. Ct., N.D. Ga. (the "Georgia Action") and (ii) dismissing the Georgia Action with prejudice.

5. A prior final judgment by a United States District Court in a case based on federal question jurisdiction like the Georgia Action has preclusive effect in Nevada as to an

issue that: (1) is "identical to the one alleged in the prior litigation;" (2) was "actually litigated in the prior litigation," and (3) was "a critical and necessary part of the earlier judgment," provided that the person against whom preclusion is sought to be applied was either a party to the prior final judgment or a nonparty who was "adequately represented by someone with the same interest who [wa]s a party to the suit." *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 480, 215 P.3d 709, 717 (Nev. 2009) (citation and internal quotation marks omitted).

6. The Court finds that each of the above requirements for application of issue preclusion is satisfied with respect to the issue of whether Plaintiffs have adequately pled demand futility in their complaints in this action. Based on this finding and the standards set forth above, this Court determines that it must give preclusive effect to the Prior Final Judgment's ruling on demand futility and grant Defendants' motions to dismiss Plaintiffs' complaints and this entire action. *See Bower,* 125 Nev. at 480-82; *Arduini v. Hart*, 774 F.3d 622, 629-630, 638 (9th Cir. 2014) (holding that prior final judgment dismissing complaint on demand futility grounds under Nevada law precluded further litigation of issue of demand futility and required dismissal of parallel derivative action, relying on *Alcantra v. Wal-Mart Stores, Inc.*, 321 P.3d 912, 916-17 (Nev. 2014) and *Five Star Capital Corp. v. Ruby*, 194 P.3d 709 (Nev. 2008)).

For the foregoing reasons, IT IS HEREBY ORDERED AND ADJUDGED that this action is dismissed with prejudice.

Dated this ____ day of March, 2016.

_____
DISTRICT COURT JUDGE

Respectfully submitted by:

KAEMPFER CROWELL

s/ Lyssa S. Anderson
LYSSA S. ANDERSON
Nevada Bar No. 5781
8345 West Sunset Road, Suite 250
Las Vegas, Nevada 89113
Tel: (702) 792-7000
Fax: (702) 796-7181
landerson@kcnvlaw.com

Attorneys for Nominal Defendant Galectin Therapeutics, Inc. and Individual 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

Approved as to form and content:

LEE, HERNANDEZ, LANDRUM & GAROFALO

_____
Natasha A. Landrum
David S. Davis
7575 Vegas Drive, Suite 150
Las Vegas, Nevada 89128

Attorneys for Plaintiff Michael Kirsch

ALDRICH LAW FIRM, LTD.

_____
John P. Aldrich
1601 S. Rainbow Drive, Suite 160
Las Vegas, Nevada 89146

Attorney for Intervenor Plaintiffs David L. Hasbrouck and Siu Yip

Exhibit C

Lee, Ben

From: EdMillerEsq@aol.com
Sent: Wednesday, March 16, 2016 5:13 PM
To: Lee, Ben
Cc: Smith, Michael; Pope, Warren; NLandrum@lee-lawfirm.com; ddavis@lee-lawfirm.com; MichaelF@johnsonandweaver.com; jmf@weiserlawfirm.com; bds@weiserlawfirm.com; jaldrich@johnaldrichlawfirm.com; joshualifshitz@gmail.com
Subject: Re: Kirsch_ [Proposed] Order granting motions to dismiss.DOC
Attachments: ProposedOrder20150315.doc

Here it is Ben.

Edward W. Miller, Esq.
Lifshitz & Miller
821 Franklin Avenue, Suite 209
Garden City, New York 11530
(516) 493-9780
Direct (516) 280-7377
Fax (516) 280-7376

-----Original Message-----
From: Lee, Ben <BLee@KSLAW.com>
To: edmilleresq <edmilleresq@aol.com>
Cc: Smith, Michael <mrsmith@KSLAW.com>; Pope, Warren <WPope@KSLAW.com>; NLandrum <NLandrum@lee-lawfirm.com>; ddavis <ddavis@lee-lawfirm.com>; Michael Fistel Jr. <MichaelF@johnsonandweaver.com>; James Ficaro (jmf@weiserlawfirm.com) <jmf@weiserlawfirm.com>; 'Brett Stecker' (bds@weiserlawfirm.com) <bds@weiserlawfirm.com>; 'jaldrich@johnaldrichlawfirm.com' (jaldrich@johnaldrichlawfirm.com) <jaldrich@johnaldrichlawfirm.com>; Josh Lifshitz (joshualifshitz@gmail.com) <joshualifshitz@gmail.com>
Sent: Wed, Mar 16, 2016 5:08 pm
Subject: RE: Kirsch_ [Proposed] Order granting motions to dismiss.DOC

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Subject: Kirsch_ [Proposed] Order granting motions to dismiss.DOC

Counsel:

Pursuant to the Court's direction at the March 3, 2016 hearing that Defendants prepare a proposed order granting their motions to dismiss, please see the attached and let us know if we may submit it with your approval.

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ORDER

LYSSA S. ANDERSON
Nevada Bar No. 5781
KAEMPFER CROWELL
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Telephone: (702) 792-7000
Fax: (702) 796-7181
landerson@kcnvlaw.com

Attorney for Defendants

DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL KIRSCH, derivatively on behalf of GALECTIN THERAPEUTICS, INC.,

Plaintiff,

vs.

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,

Defendants,

-and-

GALECTIN THERAPEUTICS, INC., a Nevada Corporation,

Nominal Defendant.

Case No. A-14-706397-B

Dept. No. XI

[PROPOSED]
ORDER AND FINAL JUDGMENT RE:

MOTIONS TO DISMISS SHAREHOLDER DERIVATIVE ACTION

Date of Hearing: March 3, 2016
Time of Hearing: 8:30 a.m.

This matter having come before the Court on March 3, 2016 at 8:30 a.m. on Nominal Defendant Galectin Therapeutics Inc.'s Motion to Dismiss Shareholder Action and the Individual Defendants' and 10X Fund L.P.'s Motion to Dismiss Shareholder Action (the "Motions"), the Court having reviewed the Motions, all briefing thereon and supporting exhibits, having heard

oral argument, and other good cause appearing, the Court holds that the Motions are GRANTED. As grounds for its ruling, the Court finds:

1. This is a shareholder derivative action brought by Plaintiff Michael Kirsch and Intervenor Plaintiffs David L. Hasbrouck and Siu Yip (collectively, "Plaintiffs") who allege that they are shareholders of Nominal Defendant Galectin Therapeutics Inc. ("Galectin"), a Nevada corporation.

2. A shareholder seeking to assert claims derivatively on behalf of a Nevada corporation must, among other things, 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* NRCP 23.1; *Shoen v. SAC Holding Corp.*, 137 P.3d 1171, 1179 (Nev. 2006).

3. Plaintiffs did not make a pre-suit demand upon Galectin's board of directors, but instead asserted in their complaints that such a demand was excused under Nevada law.

4. On August 10, 2015, this Court's July 30, 2015 written order was entered (the "July 30, 2015 Written Order") (i) denying Defendants' Motion to Dismiss Plaintiff's Second Amended Shareholder Derivative Complaint on the basis of Plaintiff's failure to adequately plead the futility of a pre-suit demand on Galectin's board of directors and that Plaintiff had adequately pled demand futility. The July 30, 2015 Written Order was a substantive ruling on the issue of demand futility which was reached following briefing and oral argument regarding demand futility by the parties.

5. Although, there is no Nevada State court precedent upon the question of whether a denial of a motion to dismiss has preclusive effect, this Court finds that the denial of a motion to dismiss is never a final order for purposes of preclusion in Nevada and

therefore has no preclusive effect.

6. On December 30, 2015, United States District Court Judge Steven C. Jones of the United States District Court for the Northern District of Georgia, entered a final order and judgment (the "Prior Final Judgment") (i) holding that under Nevada law, Intervenor Plaintiffs David L. Hasbrouck and Siu Yip failed to adequately plead the futility of a pre-suit demand on Galectin's board of directors in their prior-filed and substantively identical derivative action styled *In re Galectin Therapeutics, Inc. Derivative Litigation*, Civil Action No. 1:15-CV-208-SCJ, U.S. Dist. Ct., N.D. Ga. (the "Georgia Action") and (ii) dismissing the Georgia Action with prejudice.

7. A prior final judgment by a United States District Court in a case based on federal question jurisdiction like the Georgia Action has preclusive effect in Nevada as to an issue that: (1) is "identical to the one alleged in the prior litigation;" (2) was "actually litigated in the prior litigation," and (3) was "a critical and necessary part of the earlier judgment," provided that the person against whom preclusion is sought to be applied was either a party to the prior final judgment or a nonparty who was "adequately represented by someone with the same interest who [wa]s a party to the suit." *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 480, 215 P.3d 709, 717 (Nev. 2009) (citation and internal quotation marks omitted).

8. The Court finds that each of the above requirements for application of issue preclusion is satisfied with respect to the issue of whether Plaintiffs have adequately pled demand futility in their complaints in this action. Based on this finding and the standards set forth above, this Court determines that it must give preclusive effect to the Prior Final Judgment's ruling on demand futility and grant Defendants' motions to dismiss Plaintiffs' complaints and this entire action. *See Bower,* 125 Nev. at 480-

82; *Arduini v. Hart*, 774 F.3d 622, 629-630, 638 (9th Cir. 2014) (holding that prior final judgment dismissing complaint on demand futility grounds under Nevada law precluded further litigation of issue of demand futility and required dismissal of parallel derivative action, relying on *Alcantra v. Wal-Mart Stores, Inc.*, 321 P.3d 912, 916-17 (Nev. 2014) and *Five Star Capital Corp. v. Ruby*, 194 P.3d 709 (Nev. 2008)).

For the foregoing reasons, IT IS HEREBY ORDERED AND ADJUDGED that this action is dismissed with prejudice.

Dated this ____ day of March, 2016.

_____

DISTRICT COURT JUDGE

Respectfully submitted by:

KAEMPFER CROWELL

s/ Lyssa S. Anderson

LYSSA S. ANDERSON
Nevada Bar No. 5781
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Approved as to form and content:

LEE, HERNANDEZ, LANDRUM & GAROFALO

_____

Natasha A. Landrum
David S. Davis
7575 Vegas Drive, Suite 150
Las Vegas, Nevada 89128

Attorneys for Plaintiff Michael Kirsch

ALDRICH LAW FIRM, LTD.

_____

John P. Aldrich
1601 S. Rainbow Drive, Suite 160
Las Vegas, Nevada 89146

Attorney for Intervenor Plaintiffs David L. Hasbrouck and Siu Yip

Exhibit D

Lee, Ben

From: Lee, Ben
Sent: Thursday, March 17, 2016 11:21 AM
To: EdMillerEsq@aol.com
Cc: Smith, Michael; Pope, Warren; NLandrum@lee-lawfirm.com; ddavis@lee-lawfirm.com; MichaelF@johnsonandweaver.com; jmf@weiserlawfirm.com; bds@weiserlawfirm.com; jaldrich@johnaldrichlawfirm.com; joshualifshitz@gmail.com
Subject: RE: Kirsch_ [Proposed] Order granting motions to dismiss.DOC
Attachments: Clean K&S Proposed Order 03172016.doc; Redline 03172016.docx

Ed:

Please see our further edits to the document you sent last night. I have attached clean revised and redlined versions. Please let us know if this version is acceptable or send any further comments as soon as possible, as we would like to get the proposed order to the Court today.

Regards,
Ben

From: EdMillerEsq@aol.com [mailto:edmilleresq@aol.com]
Sent: Wednesday, March 16, 2016 5:13 PM
To: Lee, Ben
Cc: Smith, Michael; Pope, Warren; NLandrum@lee-lawfirm.com; ddavis@lee-lawfirm.com; MichaelF@johnsonandweaver.com; jmf@weiserlawfirm.com; bds@weiserlawfirm.com; jaldrich@johnaldrichlawfirm.com; joshualifshitz@gmail.com
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Counsel:

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ORDER

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Attorney for Defendants

DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL KIRSCH, derivatively on behalf of GALECTIN THERAPEUTICS, INC., Plaintiff, vs. 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, Defendants, -and- GALECTIN THERAPEUTICS, INC., a Nevada Corporation, Nominal Defendant.	Case No. A-14-706397-B Dept. No. XI **[PROPOSED] ORDER AND FINAL JUDGMENT RE:** **MOTIONS TO DISMISS SHAREHOLDER DERIVATIVE ACTION** Date of Hearing: March 3, 2016 Time of Hearing: 8:30 a.m.

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oral argument, and other good cause appearing, the Court holds that the Motions are GRANTED. As grounds for its ruling, the Court finds:

1. This is a shareholder derivative action brought by Plaintiff Michael Kirsch and Intervenor Plaintiffs David L. Hasbrouck and Siu Yip (collectively, "Plaintiffs") who allege that they are shareholders of Nominal Defendant Galectin Therapeutics Inc. ("Galectin"), a Nevada corporation.

2. A shareholder seeking to assert claims derivatively on behalf of a Nevada corporation must, among other things, 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* NRCP 23.1; *Shoen v. SAC Holding Corp.*, 137 P.3d 1171, 1179 (Nev. 2006).

3. Plaintiffs did not make a pre-suit demand upon Galectin's board of directors, but instead asserted in their complaints that such a demand was excused under Nevada law.

4. On June 11, 2015, the Court held a hearing on various motions filed by the parties and proposed Intervenors. As memorialized in the Court's June 11, 2015 Minute Order, the June 11, 2015 hearing transcript, and in subsequent written orders of the Court entered on July 30, 2015 and August 10, 2015, the Court: (i) granted Intervenor Plaintiffs Hasbrouck's and Yip's motion to intervene in this case;[1] (ii) denied Defendants' motion to dismiss Mr. Kirsch's Second Amended Shareholder Derivative Complaint (the "SAC") "at this point"; (iii) stayed this action for 180 days pending *In re Galectin Therapeutics, Inc. Derivative Litigation*, Lead Case No.: 1:15-CV-00208-SCJ in the United States District Court for the Northern District of

[1] Intervenor Plaintiffs Hasbrouck and Yip filed their Verified Shareholder Complaint-in-Intervention (the "Complaint-in-Intervention") on July 9, 2015.

Georgia (the "Georgia Action"); and (iv) ordered the parties to file a status report by December 11, 2015 addressing the status of the Georgia Action..

5. This Court finds that its denial of Defendants' earlier motion to dismiss heard at the June 11, 2015 hearing was not a final order under Nevada law.

6. On December 30, 2015, United States District Court Judge Steven C. Jones of the United States District Court for the Northern District of Georgia, entered a final order and judgment (the "Prior Final Judgment") (i) holding that under Nevada law, Intervenor Plaintiffs David L. Hasbrouck and Siu Yip failed to adequately plead the futility of a pre-suit demand on Galectin's board of directors in their prior-filed and substantively identical Georgia Action and (ii) dismissing the Georgia Action with prejudice.

7. A prior final judgment by a United States District Court in a case based on federal question jurisdiction like the Georgia Action has preclusive effect in Nevada as to an issue that: (1) is "identical to the one alleged in the prior litigation;" (2) was "actually litigated in the prior litigation," and (3) was "a critical and necessary part of the earlier judgment," provided that the person against whom preclusion is sought to be applied was either a party to the prior final judgment or a nonparty who was "adequately represented by someone with the same interest who [wa]s a party to the suit." *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 480, 215 P.3d 709, 717 (Nev. 2009) (citation and internal quotation marks omitted).

8. The Court finds that each of the above requirements for application of issue preclusion is satisfied with respect to the issue of whether Plaintiffs have adequately pled demand futility in their complaints in this action. Based on this finding and the standards set forth above, this Court determines that it must give preclusive effect to

the Prior Final Judgment's ruling on demand futility and grant Defendants' motions to dismiss the SAC, the Complaint-in-Intervention and this entire action. *See Bower,* 125 Nev. at 480-82; *Arduini v. Hart*, 774 F.3d 622, 629-630, 638 (9th Cir. 2014) (holding that prior final judgment dismissing complaint on demand futility grounds under Nevada law precluded further litigation of issue of demand futility and required dismissal of parallel derivative action, relying on *Alcantra v. Wal-Mart Stores, Inc.*, 321 P.3d 912, 916-17 (Nev. 2014) and *Five Star Capital Corp. v. Ruby*, 194 P.3d 709 (Nev. 2008)).

For the foregoing reasons, IT IS HEREBY ORDERED AND ADJUDGED that this action is dismissed with prejudice.

Dated this ____ day of March, 2016.

_____
DISTRICT COURT JUDGE

Respectfully submitted by:

KAEMPFER CROWELL

s/ Lyssa S. Anderson
LYSSA S. ANDERSON
Nevada Bar No. 5781
8345 West Sunset Road, Suite 250
Las Vegas, Nevada 89113
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Attorneys for Nominal Defendant Galectin Therapeutics, Inc. and Individual 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

Approved as to form and content:

LEE, HERNANDEZ, LANDRUM & GAROFALO

_____
Natasha A. Landrum
David S. Davis
7575 Vegas Drive, Suite 150
Las Vegas, Nevada 89128

Attorneys for Plaintiff Michael Kirsch

ALDRICH LAW FIRM, LTD.

_____
John P. Aldrich
1601 S. Rainbow Drive, Suite 160
Las Vegas, Nevada 89146

Attorney for Intervenor Plaintiffs David L. Hasbrouck and Siu Yip

Date: 4/5/2016 Job: 182 Time: 9:56:16 AM

King & Spalding

4943

ORDER

LYSSA S. ANDERSON
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8345 West Sunset Road, Suite 250
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Attorney for Defendants

DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL KIRSCH, derivatively on behalf of GALECTIN THERAPEUTICS, INC., Plaintiff, vs. 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, Defendants, -and- GALECTIN THERAPEUTICS, INC., a Nevada Corporation, Nominal Defendant.	Case No. A-14-706397-B Dept. No. XI **[PROPOSED] ORDER AND FINAL JUDGMENT RE:** **MOTIONS TO DISMISS SHAREHOLDER DERIVATIVE ACTION** Date of Hearing: March 3, 2016 Time of Hearing: 8:30 a.m.

This matter having come before the Court on March 3, 2016 at 8:30 a.m. on Nominal Defendant Galectin Therapeutics Inc.'s Motion to Dismiss Shareholder Action and the Individual Defendants' and 10X Fund L.P.'s Motion to Dismiss Shareholder Action (the "Motions"), the Court having reviewed the Motions, all briefing thereon and supporting exhibits, having heard

oral argument, and other good cause appearing, the Court holds that the Motions are GRANTED. As grounds for its ruling, the Court finds:

1. This is a shareholder derivative action brought by Plaintiff Michael Kirsch and Intervenor Plaintiffs David L. Hasbrouck and Siu Yip (collectively, "Plaintiffs") who allege that they are shareholders of Nominal Defendant Galectin Therapeutics Inc. ("Galectin"), a Nevada corporation.

2. A shareholder seeking to assert claims derivatively on behalf of a Nevada corporation must, among other things, 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* NRCP 23.1; *Shoen v. SAC Holding Corp.*, 137 P.3d 1171, 1179 (Nev. 2006).

3. Plaintiffs did not make a pre-suit demand upon Galectin's board of directors, but instead asserted in their complaints that such a demand was excused under Nevada law.

~~4. On August 10, 2015, this Court's July 30, 2015 written order was entered (the "July 30, 2015 Written Order") (i) denying Defendants' Motion to Dismiss Plaintiff's Second Amended Shareholder Derivative Complaint on the basis of Plaintiff's failure to adequately plead the futility of a pre-suit demand on Galectin's board of directors and that Plaintiff had adequately pled demand futility. The July 30, 2015 Written Order was a substantive ruling on the issue of demand futility which was reached following briefing and oral argument regarding demand futility by the parties.~~

4. ~~Although, there is no Nevada State court precedent upon the question of whether a denial of a motion to dismiss has preclusive effect, this~~ On June 11, 2015, the Court held a hearing on various motions filed by the parties and proposed Intervenors. As

memorialized in the Court's June 11, 2015 Minute Order, the June 11, 2015 hearing transcript, and in subsequent written orders of the Court entered on July 30, 2015 and August 10, 2015, the Court: (i) granted Intervenor Plaintiffs Hasbrouck's and Yip's motion to intervene in this case;[1] (ii) denied Defendants' motion to dismiss Mr. Kirsch's Second Amended Shareholder Derivative Complaint (the "SAC") "at this point"; (iii) stayed this action for 180 days pending *In re Galectin Therapeutics, Inc. Derivative Litigation*, Lead Case No.: 1:15-CV-00208-SCJ in the United States District Court for the Northern District of Georgia (the "Georgia Action"); and (iv) ordered the parties to file a status report by December 11, 2015 addressing the status of the Georgia Action..

5. This Court finds that ~~the~~its denial of a~~D~~efendants' earlier motion to dismiss ~~is never~~heard at the June 11, 2015 hearing was not a final order ~~for purposes of preclusion in Nevada and therefore has no preclusive effect~~under Nevada law.

6. On December 30, 2015, United States District Court Judge Steven C. Jones of the United States District Court for the Northern District of Georgia, entered a final order and judgment (the "Prior Final Judgment") (i) holding that under Nevada law, Intervenor Plaintiffs David L. Hasbrouck and Siu Yip failed to adequately plead the futility of a pre-suit demand on Galectin's board of directors in their prior-filed and substantively identical ~~derivative action styled *In re Galectin Therapeutics, Inc. Derivative Litigation*, Civil Action No. 1:15-CV-208-SCJ, U.S. Dist. Ct., N.D. Ga. (the "Georgia Action")~~Georgia Action and (ii) dismissing the Georgia Action with prejudice.

---

[1] Intervenor Plaintiffs Hasbrouck and Yip filed their Verified Shareholder Complaint-in-Intervention (the "Complaint-in-Intervention") on July 9, 2015.

7. A prior final judgment by a United States District Court in a case based on federal question jurisdiction like the Georgia Action has preclusive effect in Nevada as to an issue that: (1) is "identical to the one alleged in the prior litigation;" (2) was "actually litigated in the prior litigation," and (3) was "a critical and necessary part of the earlier judgment," provided that the person against whom preclusion is sought to be applied was either a party to the prior final judgment or a nonparty who was "adequately represented by someone with the same interest who [wa]s a party to the suit." *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 480, 215 P.3d 709, 717 (Nev. 2009) (citation and internal quotation marks omitted).

8. The Court finds that each of the above requirements for application of issue preclusion is satisfied with respect to the issue of whether Plaintiffs have adequately pled demand futility in their complaints in this action. Based on this finding and the standards set forth above, this Court determines that it must give preclusive effect to the Prior Final Judgment's ruling on demand futility and grant Defendants' motions to dismiss ~~Plaintiffs' complaints~~the SAC, the Complaint-in-Intervention and this entire action. *See Bower,* 125 Nev. at 480-82; *Arduini v. Hart*, 774 F.3d 622, 629-630, 638 (9th Cir. 2014) (holding that prior final judgment dismissing complaint on demand futility grounds under Nevada law precluded further litigation of issue of demand futility and required dismissal of parallel derivative action, relying on *Alcantra v. Wal-Mart Stores, Inc.*, 321 P.3d 912, 916-17 (Nev. 2014) and *Five Star Capital Corp. v. Ruby*, 194 P.3d 709 (Nev. 2008)).

For the foregoing reasons, IT IS HEREBY ORDERED AND ADJUDGED that this action is dismissed with prejudice.

Dated this ____ day of March, 2016.

DISTRICT COURT JUDGE

Respectfully submitted by:

KAEMPFER CROWELL

s/ Lyssa S. Anderson
LYSSA S. ANDERSON
Nevada Bar No. 5781
8345 West Sunset Road, Suite 250
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Approved as to form and content:

LEE, HERNANDEZ, LANDRUM & GAROFALO

Natasha A. Landrum
David S. Davis
7575 Vegas Drive, Suite 150
Las Vegas, Nevada 89128

Attorneys for Plaintiff Michael Kirsch

ALDRICH LAW FIRM, LTD.

John P. Aldrich
1601 S. Rainbow Drive, Suite 160
Las Vegas, Nevada 89146

Attorney for Intervenor Plaintiffs David L. Hasbrouck and Siu Yip

Exhibit E

Lee, Ben

From: EdMillerEsq@aol.com
Sent: Thursday, March 17, 2016 1:36 PM
To: Lee, Ben
Cc: Smith, Michael; Pope, Warren; NLandrum@lee-lawfirm.com; ddavis@lee-lawfirm.com; MichaelF@johnsonandweaver.com; jmf@weiserlawfirm.com; bds@weiserlawfirm.com; jaldrich@johnaldrichlawfirm.com; joshualifshitz@gmail.com
Subject: Re: Kirsch_ [Proposed] Order granting motions to dismiss.DOC
Attachments: Galectin Proposed Order 03172016_Plaint Edits FinalRedline.doc

Ben,

Attached is what we propose to submit which leaves intact the vast majority of your initial proposed order. In the event we cannot agree, we plan to submit our own order with a cover letter expressing our position.

Edward W. Miller, Esq.
Lifshitz & Miller
821 Franklin Avenue, Suite 209
Garden City, New York 11530
(516) 493-9780
Direct (516) 280-7377
Fax (516) 280-7376

-----Original Message-----
From: Lee, Ben <BLee@KSLAW.com>
To: EdMillerEsq@aol.com <edmilleresq@aol.com>
Cc: Smith, Michael <mrsmith@KSLAW.com>; Pope, Warren <WPope@KSLAW.com>; NLandrum <NLandrum@lee-lawfirm.com>; ddavis <ddavis@lee-lawfirm.com>; MichaelF <MichaelF@johnsonandweaver.com>; jmf <jmf@weiserlawfirm.com>; bds <bds@weiserlawfirm.com>; jaldrich <jaldrich@johnaldrichlawfirm.com>; joshualifshitz <joshualifshitz@gmail.com>
Sent: Thu, Mar 17, 2016 11:22 am
Subject: RE: Kirsch_ [Proposed] Order granting motions to dismiss.DOC

Ed:

Please see our further edits to the document you sent last night. I have attached clean revised and redlined versions. Please let us know if this version is acceptable or send any further comments as soon as possible, as we would like to get the proposed order to the Court today.

Regards,
Ben

From: EdMillerEsq@aol.com [mailto:edmilleresq@aol.com]
Sent: Wednesday, March 16, 2016 5:13 PM
To: Lee, Ben
Cc: Smith, Michael; Pope, Warren; NLandrum@lee-lawfirm.com; ddavis@lee-lawfirm.com; MichaelF@johnsonandweaver.com; jmf@weiserlawfirm.com; bds@weiserlawfirm.com; jaldrich@johnaldrichlawfirm.com;

joshualifshitz@gmail.com
Subject: Re: Kirsch_ [Proposed] Order granting motions to dismiss.DOC

Here it is Ben.

Edward W. Miller, Esq.
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Sent: Wed, Mar 16, 2016 5:08 pm
Subject: RE: Kirsch_ [Proposed] Order granting motions to dismiss.DOC

Ed:

Based on our telephone call yesterday, my understanding is that Plaintiffs are generally in agreement with the contents of the proposed order we circulated last week but wish to proposed some additional language tracking the Court's statements at the March 3 hearing to the effect that its earlier order denying prior motions to dismiss Mr. Kirsch's Second Amended Complaint was not a final order. Do you still anticipate sending the proposed additional language today?

Benjamin Lee | King & Spalding LLP | 1180 Peachtree Street, NE | Atlanta, Georgia 30309-3521 | 404-572-2820 | fax: 404-572-5139 | blee@kslaw.com

From: Lee, Ben
Sent: Monday, March 07, 2016 6:38 PM
To: edmilleresq@aol.com; NLandrum@lee-lawfirm.com; ddavis@lee-lawfirm.com; Michael Fistel Jr.; James Ficaro (jmf@weiserlawfirm.com); 'Brett Stecker' (bds@weiserlawfirm.com); 'jaldrich@johnaldrichlawfirm.com' (jaldrich@johnaldrichlawfirm.com)
Cc: Smith, Michael; Pope, Warren
Subject: Kirsch_ [Proposed] Order granting motions to dismiss.DOC

Counsel:

Pursuant to the Court's direction at the March 3, 2016 hearing that Defendants prepare a proposed order granting their motions to dismiss, please see the attached and let us know if we may submit it with your approval.

Benjamin Lee | King & Spalding LLP | 1180 Peachtree Street, NE | Atlanta, Georgia 30309-3521 | 404-572-2820 | fax: 404-572-5139 | blee@kslaw.com

ORDER

LYSSA S. ANDERSON
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Telephone: (702) 792-7000
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landerson@kcnvlaw.com

Attorney for Defendants

DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL KIRSCH, derivatively on behalf of GALECTIN THERAPEUTICS, INC., Plaintiff, vs. 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, Defendants, -and- GALECTIN THERAPEUTICS, INC., a Nevada Corporation, Nominal Defendant.	Case No. A-14-706397-B Dept. No. XI **[PROPOSED] ORDER AND FINAL JUDGMENT RE:** **MOTIONS TO DISMISS SHAREHOLDER DERIVATIVE ACTION** Date of Hearing: March 3, 2016 Time of Hearing: 8:30 a.m.

This matter having come before the Court on March 3, 2016 at 8:30 a.m. on Nominal Defendant Galectin Therapeutics Inc.'s Motion to Dismiss Shareholder Action and the Individual Defendants' and 10X Fund L.P.'s Motion to Dismiss Shareholder Action (the "Motions"), the Court having reviewed the Motions, all briefing thereon and supporting exhibits, having heard

oral argument, and other good cause appearing, the Court holds that the Motions are GRANTED. As grounds for its ruling, the Court finds:

1. This is a shareholder derivative action brought by Plaintiff Michael Kirsch and Intervenor Plaintiffs David L. Hasbrouck and Siu Yip (collectively, "Plaintiffs") who allege that they are shareholders of Nominal Defendant Galectin Therapeutics Inc. ("Galectin"), a Nevada corporation.

2. A shareholder seeking to assert claims derivatively on behalf of a Nevada corporation must, among other things, 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* NRCP 23.1; *Shoen v. SAC Holding Corp.*, 137 P.3d 1171, 1179 (Nev. 2006).

3. Plaintiffs did not make a pre-suit demand upon Galectin's board of directors, but instead asserted in their complaints that such a demand was excused under Nevada law.

4. On June 11, 2015, the Court held a hearing on various motions filed by the parties and proposed Intervenors. Subsequently, ~~As memorialized in the Court's June 11, 2015 Minute Order, the June 11, 2015 hearing transcript, and in subsequent written orders of the Court entered~~ on ~~July 30, 2015 and~~ August 10, 2015, the Court entered an order: (i) grant~~inged~~ Intervenor Plaintiffs Hasbrouck's and Yip's motion to intervene in this case;[1] (ii) deny~~ingied~~ Defendants' motion to dismiss Mr. Kirsch's Second Amended Shareholder Derivative Complaint (the "SAC") ~~"at this point"~~; (iii) stay~~inged~~ this action for 180 days pending *In re Galectin Therapeutics, Inc. Derivative Litigation*, Lead Case No.: 1:15-CV-00208-SCJ in the United States

[1] Intervenor Plaintiffs Hasbrouck and Yip filed their Verified Shareholder Complaint-in-Intervention (the "Complaint-in-Intervention") on July 9, 2015.

District Court for the Northern District of Georgia (the "Georgia Action"); and (iv) orderinged the parties to file a status report by December 11, 2015 addressing the status of the Georgia Action..

5. 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, Tthis Court finds that its denial of Defendants' earlier motion to dismiss heard at the June 11, 2015 hearing was not a final order under Nevada law.

6. On December 30, 2015, United States District Court Judge Steven C. Jones of the United States District Court for the Northern District of Georgia, entered a final order and judgment (the "Prior Final Judgment") (i) holding that under Nevada law, Intervenor Plaintiffs David L. Hasbrouck and Siu Yip failed to adequately plead the futility of a pre-suit demand on Galectin's board of directors in their prior-filed and substantively identical Georgia Action and (ii) dismissing the Georgia Action with prejudice.

7. A prior final judgment by a United States District Court in a case based on federal question jurisdiction like the Georgia Action has preclusive effect in Nevada as to an issue that: (1) is "identical to the one alleged in the prior litigation;" (2) was "actually litigated in the prior litigation," and (3) was "a critical and necessary part of the earlier judgment," provided that the person against whom preclusion is sought to be applied was either a party to the prior final judgment or a nonparty who was "adequately represented by someone with the same interest who [wa]s a party to the suit." *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 480, 215 P.3d 709, 717 (Nev. 2009) (citation and internal quotation marks omitted).

8. The Court finds that each of the above requirements for application of issue

preclusion is satisfied with respect to the issue of whether Plaintiffs have adequately pled demand futility in their complaints in this action. Based on this finding and the standards set forth above, this Court determines that it must give preclusive effect to the Prior Final Judgment's ruling on demand futility and grant Defendants' motions to dismiss the SAC, the Complaint-in-Intervention and this entire action. *See Bower,* 125 Nev. at 480-82; *Arduini v. Hart*, 774 F.3d 622, 629-630, 638 (9th Cir. 2014) (holding that prior final judgment dismissing complaint on demand futility grounds under Nevada law precluded further litigation of issue of demand futility and required dismissal of parallel derivative action, relying on *Alcantra v. Wal-Mart Stores, Inc.*, 321 P.3d 912, 916-17 (Nev. 2014) and *Five Star Capital Corp. v. Ruby*, 194 P.3d 709 (Nev. 2008)).

For the foregoing reasons, IT IS HEREBY ORDERED AND ADJUDGED that this action is dismissed with prejudice.

Dated this ____ day of March, 2016.

_____
DISTRICT COURT JUDGE

Respectfully submitted by:

KAEMPFER CROWELL

s/ Lyssa S. Anderson
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Approved as to form and content:

LEE, HERNANDEZ, LANDRUM & GAROFALO

_____
Natasha A. Landrum
David S. Davis
7575 Vegas Drive, Suite 150
Las Vegas, Nevada 89128

Attorneys for Plaintiff Michael Kirsch

ALDRICH LAW FIRM, LTD.

_____
John P. Aldrich
1601 S. Rainbow Drive, Suite 160
Las Vegas, Nevada 89146

Attorney for Intervenor Plaintiffs David L. Hasbrouck and Siu Yip

DMSLIBRARY01\22566\177001\28517444.v1-3/17/16

Exhibit F

Lee, Ben

From: Lee, Ben
Sent: Thursday, March 17, 2016 2:37 PM
To: EdMillerEsq@aol.com
Cc: Smith, Michael; Pope, Warren; NLandrum@lee-lawfirm.com; ddavis@lee-lawfirm.com; MichaelF@johnsonandweaver.com; jmf@weiserlawfirm.com; bds@weiserlawfirm.com; jaldrich@johnaldrichlawfirm.com; joshualifshitz@gmail.com
Subject: RE: Kirsch_ [Proposed] Order granting motions to dismiss.DOC

Ed:

Unfortunately, it appears that we are at an impasse regarding the contents of paragraphs 4 and 5 of the proposed order. Defendants will submit their proposed order with a note that the parties could not reach agreement regarding paragraphs 4 and 5.

Regards,
Ben

From: EdMillerEsq@aol.com [mailto:edmilleresq@aol.com]
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Cc: Smith, Michael; Pope, Warren; NLandrum@lee-lawfirm.com; ddavis@lee-lawfirm.com; MichaelF@johnsonandweaver.com; jmf@weiserlawfirm.com; bds@weiserlawfirm.com; jaldrich@johnaldrichlawfirm.com; joshualifshitz@gmail.com
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Ben,

Attached is what we propose to submit which leaves intact the vast majority of your initial proposed order. In the event we cannot agree, we plan to submit our own order with a cover letter expressing our position.

Edward W. Miller, Esq.
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Sent: Wed, Mar 16, 2016 5:08 pm
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Ed:

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Counsel:

Pursuant to the Court's direction at the March 3, 2016 hearing that Defendants prepare a proposed order granting their motions to dismiss, please see the attached and let us know if we may submit it with your approval.

Benjamin Lee | King & Spalding LLP | 1180 Peachtree Street, NE | Atlanta, Georgia 30309-3521 | 404-572-2820 | fax: 404-572-5139 | blee@kslaw.com

Exhibit G

Lee, Ben

From: Lee, Ben
Sent: Thursday, March 17, 2016 3:01 PM
To: Dept11LC@clarkcountycourts.us; dept11EA@clarkcountycourts.us
Cc: EdMillerEsq@aol.com; MichaelF@johnsonandweaver.com; bds@weiserlawfirm.com; traci@johnaldrichlawfirm.com; joshualifshitz@gmail.com; jml@jlclasslaw.com; Pope, Warren; Smith, Michael; Natasha Landrum; David S. Davis; Landerson@kcnvlaw.com; kah@weiserlawfirm.com; James Ficaro (jmf@weiserlawfirm.com); 'jaldrich@johnaldrichlawfirm.com' (jaldrich@johnaldrichlawfirm.com); Ryan Daniels
Subject: Kirsch v. Traber, et al. (In Re: Galectin Therapeutics, Inc.) - Case No. A-14-706397 - [Proposed] Order Granting Motions to Dismiss
Attachments: Kirsch v. Traber - Defendants_ Proposed Order Granting Motions to Dismis....doc

Dear Judge Gonzalez:

Following the hearing in the above-referenced matter held on March 3, 2016, at which the Court granted Defendants' motions to dismiss the case, the parties have conferred and attempted to reach agreement on the contents of a proposed order reflecting the Court's ruling. Although the parties reached agreement on all other contents of the proposed order, they could not agree upon the language to be included in paragraphs 4 and 5.

A Microsoft Word format version of the order proposed by Defendants is attached for your consideration.

Kind regards,

Benjamin Lee | King & Spalding LLP | 1180 Peachtree Street, NE | Atlanta, Georgia 30309-3521 | 404-572-2820 | fax: 404-572-5139 | blee@kslaw.com

Counsel for Defendants (*admitted pro hac vice*)

ORDER

LYSSA S. ANDERSON
Nevada Bar No. 5781
KAEMPFER CROWELL
1980 Festival Plaza Drive, Suite 650
Las Vegas, Nevada 89135
Telephone: (702) 792-7000
Fax: (702) 796-7181
landerson@kcnvlaw.com

Attorney for Defendants

DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL KIRSCH, derivatively on behalf of GALECTIN THERAPEUTICS, INC., Plaintiff, vs. 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, Defendants, -and- GALECTIN THERAPEUTICS, INC., a Nevada Corporation, Nominal Defendant.	Case No. A-14-706397-B Dept. No. XI **[PROPOSED] ORDER AND FINAL JUDGMENT RE:** **MOTIONS TO DISMISS SHAREHOLDER DERIVATIVE ACTION** Date of Hearing: March 3, 2016 Time of Hearing: 8:30 a.m.

This matter having come before the Court on March 3, 2016 at 8:30 a.m. on Nominal Defendant Galectin Therapeutics Inc.'s Motion to Dismiss Shareholder Action and the Individual Defendants' and 10X Fund L.P.'s Motion to Dismiss Shareholder Action (the "Motions"), the Court having reviewed the Motions, all briefing thereon and supporting exhibits, having heard

oral argument, and other good cause appearing, the Court holds that the Motions are GRANTED. As grounds for its ruling, the Court finds:

1. This is a shareholder derivative action brought by Plaintiff Michael Kirsch and Intervenor Plaintiffs David L. Hasbrouck and Siu Yip (collectively, "Plaintiffs") who allege that they are shareholders of Nominal Defendant Galectin Therapeutics Inc. ("Galectin"), a Nevada corporation.

2. A shareholder seeking to assert claims derivatively on behalf of a Nevada corporation must, among other things, 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* NRCP 23.1; *Shoen v. SAC Holding Corp.*, 137 P.3d 1171, 1179 (Nev. 2006).

3. Plaintiffs did not make a pre-suit demand upon Galectin's board of directors, but instead asserted in their complaints that such a demand was excused under Nevada law.

4. On June 11, 2015, the Court held a hearing on various motions filed by the parties and proposed Intervenors. As memorialized in the Court's June 11, 2015 Minute Order, the June 11, 2015 hearing transcript, and in subsequent written orders of the Court entered on July 30, 2015 and August 10, 2015, the Court: (i) granted Intervenor Plaintiffs Hasbrouck's and Yip's motion to intervene in this case;[1] (ii) denied Defendants' motions to dismiss Mr. Kirsch's Second Amended Shareholder Derivative Complaint (the "SAC") "at this point"; (iii) stayed this action for 180 days pending *In re Galectin Therapeutics, Inc. Derivative Litigation*, Lead Case No.: 1:15-CV-00208-SCJ in the United States District Court for the Northern District of

[1] Intervenor Plaintiffs Hasbrouck and Yip filed their Verified Shareholder Complaint-in-Intervention (the "Complaint-in-Intervention") on July 9, 2015.

KAEMPFER CROWELL RENSHAW GRONAUER & FIORENTINO
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Las Vegas, Nevada 89135

Georgia (the "Georgia Action"); and (iv) ordered the parties to file a status report by December 11, 2015 addressing the status of the Georgia Action.

5. This Court finds that its denial of Defendants' earlier motions to dismiss heard at the June 11, 2015 hearing was not a final order under Nevada law.

6. On December 30, 2015, United States District Court Judge Steven C. Jones of the United States District Court for the Northern District of Georgia, entered a final order and judgment (the "Prior Final Judgment") (i) holding that under Nevada law, Intervenor Plaintiffs David L. Hasbrouck and Siu Yip failed to adequately plead the futility of a pre-suit demand on Galectin's board of directors in their prior-filed and substantively identical Georgia Action and (ii) dismissing the Georgia Action with prejudice.

7. A prior final judgment by a United States District Court in a case based on federal question jurisdiction like the Georgia Action has preclusive effect in Nevada as to an issue that: (1) is "identical to the one alleged in the prior litigation;" (2) was "actually litigated in the prior litigation," and (3) was "a critical and necessary part of the earlier judgment," provided that the person against whom preclusion is sought to be applied was either a party to the prior final judgment or a nonparty who was "adequately represented by someone with the same interest who [wa]s a party to the suit." *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 480, 215 P.3d 709, 717 (Nev. 2009) (citation and internal quotation marks omitted).

8. The Court finds that each of the above requirements for application of issue preclusion is satisfied with respect to the issue of whether Plaintiffs have adequately pled demand futility in their complaints in this action. Based on this finding and the standards set forth above, this Court determines that it must give preclusive effect to

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Las Vegas, Nevada 89135

the Prior Final Judgment's ruling on demand futility and grant Defendants' motions to dismiss the SAC, the Complaint-in-Intervention and this entire action. *See Bower*, 125 Nev. at 480-82; *Arduini v. Hart*, 774 F.3d 622, 629-630, 638 (9th Cir. 2014) (holding that prior final judgment dismissing complaint on demand futility grounds under Nevada law precluded further litigation of issue of demand futility and required dismissal of parallel derivative action, relying on *Alcantra v. Wal-Mart Stores, Inc.*, 321 P.3d 912, 916-17 (Nev. 2014) and *Five Star Capital Corp. v. Ruby*, 194 P.3d 709 (Nev. 2008)).

For the foregoing reasons, IT IS HEREBY ORDERED AND ADJUDGED that this action is dismissed with prejudice.

Dated this ____ day of March, 2016.

_____
DISTRICT COURT JUDGE

KAEMPFER CROWELL RENSHAW
GRONAUER & FIORENTINO
1980 Festival Plaza Drive
Suite 650
Las Vegas, Nevada 89135

Respectfully submitted by:

KAEMPFER CROWELL

s/ Lyssa S. Anderson

LYSSA S. ANDERSON
Nevada Bar No. 5781
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KING & SPALDING LLP

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Attorneys for Nominal Defendant Galectin Therapeutics, Inc. and Individual 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

Exhibit H

Lee, Ben

From: EdMillerEsq@aol.com
Sent: Friday, March 18, 2016 12:48 PM
To: Lee, Ben
Subject: Re: Kirsch v. Traber, et al. (In Re: Galectin Therapeutics, Inc.) - Case No. A-14-706397 - [Proposed] Order Granting Motions to Dismiss
Attachments: Galectin Proposed Order 03172018_Plaint Edits FinalRedline.doc

Edward W. Miller, Esq.
Lifshitz & Miller
821 Franklin Avenue, Suite 209
Garden City, New York 11530
(516) 493-9780
Direct (516) 280-7377
Fax (516) 280-7376

-----Original Message-----
From: Lee, Ben <BLee@KSLAW.com>
To: EdMillerEsq@aol.com <edmilleresq@aol.com>
Sent: Fri, Mar 18, 2016 12:24 pm
Subject: RE: Kirsch v. Traber, et al. (In Re: Galectin Therapeutics, Inc.) - Case No. A-14-706397 - [Proposed] Order Granting Motions to Dismiss

Left the attachment off.

From: EdMillerEsq@aol.com [mailto:edmilleresq@aol.com]
Sent: Friday, March 18, 2016 12:23 PM
To: Lee, Ben
Subject: Re: Kirsch v. Traber, et al. (In Re: Galectin Therapeutics, Inc.) - Case No. A-14-706397 - [Proposed] Order Granting Motions to Dismiss

Ben,

Please find attached the proposed order we intend to submit to the court today, with redline showing additional edits since last circulated order.

Edward W. Miller, Esq.
Lifshitz & Miller
821 Franklin Avenue, Suite 209
Garden City, New York 11530
(516) 493-9780
Direct (516) 280-7377
Fax (516) 280-7376

-----Original Message-----
From: Lee, Ben <BLee@KSLAW.com>
To: Dept11LC <Dept11LC@clarkcountycourts.us>; dept11EA <dept11EA@clarkcountycourts.us>

Cc: EdMillerEsq <EdMillerEsq@aol.com>; MichaelF <MichaelF@johnsonandweaver.com>; bds <bds@weiserlawfirm.com>; traci <traci@johnaldrichlawfirm.com>; joshualifshitz <joshualifshitz@gmail.com>; jml <jml@jlclasslaw.com>; Pope, Warren <WPope@KSLAW.com>; Smith, Michael <mrsmith@KSLAW.com>; Natasha Landrum <nlandrum@lee-lawfirm.com>; David S. Davis <ddavis@lee-lawfirm.com>; Landerson <Landerson@kcnvlaw.com>; kah <kah@weiserlawfirm.com>; James Ficaro (jmf@weiserlawfirm.com) <jmf@weiserlawfirm.com>; 'jaldrich@johnaldrichlawfirm.com' (jaldrich@johnaldrichlawfirm.com) <jaldrich@johnaldrichlawfirm.com>; Ryan Daniels <RDaniels@kcnvlaw.com>
Sent: Thu, Mar 17, 2016 3:01 pm
Subject: Kirsch v. Traber, et al. (In Re: Galectin Therapeutics, Inc.) - Case No. A-14-706397 - [Proposed] Order Granting Motions to Dismiss

Dear Judge Gonzalez:

Following the hearing in the above-referenced matter held on March 3, 2016, at which the Court granted Defendants' motions to dismiss the case, the parties have conferred and attempted to reach agreement on the contents of a proposed order reflecting the Court's ruling. Although the parties reached agreement on all other contents of the proposed order, they could not agree upon the language to be included in paragraphs 4 and 5.

A Microsoft Word format version of the order proposed by Defendants is attached for your consideration.

Kind regards,

Benjamin Lee | King & Spalding LLP | 1180 Peachtree Street, NE | Atlanta, Georgia 30309-3521 | 404-572-2820 | fax: 404-572-5139 | blee@kslaw.com

Counsel for Defendants (*admitted pro hac vice*)

ORDER

LYSSA S. ANDERSON
Nevada Bar No. 5781
KAEMPFER CROWELL
8345 West Sunset Road, Suite 250
Las Vegas, Nevada 89113
Telephone: (702) 792-7000
Fax: (702) 796-7181
landerson@kcnvlaw.com

Attorney for Defendants

DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL KIRSCH, derivatively on behalf of GALECTIN THERAPEUTICS, INC., Plaintiff, vs. 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, Defendants, -and- GALECTIN THERAPEUTICS, INC., a Nevada Corporation, Nominal Defendant.	Case No. A-14-706397-B Dept. No. XI **[PROPOSED] ORDER AND FINAL JUDGMENT RE:** **MOTIONS TO DISMISS SHAREHOLDER DERIVATIVE ACTION** Date of Hearing: March 3, 2016 Time of Hearing: 8:30 a.m.

This matter having come before the Court on March 3, 2016 at 8:30 a.m. on Nominal Defendant Galectin Therapeutics Inc.'s Motion to Dismiss Shareholder Action and the Individual Defendants' and 10X Fund L.P.'s Motion to Dismiss Shareholder Action (the "Motions"), the Court having reviewed the Motions, all briefing thereon and supporting exhibits, having heard

oral argument, and other good cause appearing, the Court holds that the Motions are GRANTED. As grounds for its ruling, the Court finds:

1. This is a shareholder derivative action brought by Plaintiff Michael Kirsch and Intervenor Plaintiffs David L. Hasbrouck and Siu Yip (collectively, "Plaintiffs") who allege that they are shareholders of Nominal Defendant Galectin Therapeutics Inc. ("Galectin"), a Nevada corporation.

2. A shareholder seeking to assert claims derivatively on behalf of a Nevada corporation must, among other things, 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* NRCP 23.1; *Shoen v. SAC Holding Corp.*, 137 P.3d 1171, 1179 (Nev. 2006).

3. Plaintiffs did not make a pre-suit demand upon Galectin's board of directors, but instead asserted in their complaints that such a demand was excused under Nevada law.

4. On June 11, 2015, the Court held a hearing on various motions filed by the parties and proposed Intervenors. Subsequently, ~~As memorialized in the Court's June 11, 2015 Minute Order, the June 11, 2015 hearing transcript, and in subsequent written orders of the Court entered~~ on ~~July 30, 2015 and~~ August 10, 2015, the Court entered an order: (i) grant~~inged~~ Intervenor Plaintiffs Hasbrouck's and Yip's motion to intervene in this case;[1] (ii) deny~~ingied~~ Defendants' motion to dismiss Mr. Kirsch's Second Amended Shareholder Derivative Complaint (the "SAC") ~~"at this point"~~; (iii) stay~~inged~~ this action for 180 days pending *In re Galectin Therapeutics, Inc. Derivative Litigation*, Lead Case No.: 1:15-CV-00208-SCJ in the United States

[1] Intervenor Plaintiffs Hasbrouck and Yip filed their Verified Shareholder Complaint-in-Intervention (the "Complaint-in-Intervention") on July 9, 2015.

District Court for the Northern District of Georgia (the "Georgia Action"); and (iv) ordering~~ed~~ the parties to file a status report by December 11, 2015 addressing the status of the Georgia Action~~.~~.

~~4.~~5. This Court's August 10, 2015 order staying the case for 180 days was based upon representations made to the Court by Mr. Smith at the June 11, 2015 hearing that issues raised in Georgia relate to class representations issues. See Court Minutes for March 3, 2016 Hearing.

~~5.~~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, ~~T~~this Court finds that its denial of Defendants' earlier motion to dismiss heard at the June 11, 2015 hearing was ~~not~~ a final order under Nevada law.

~~6.~~7. On December 30, 2015, United States District Court Judge Steven C. Jones of the United States District Court for the Northern District of Georgia, entered a final order and judgment (the "Prior Final Judgment") (i) holding that under Nevada law, Intervenor Plaintiffs David L. Hasbrouck and Siu Yip failed to adequately plead the futility of a pre-suit demand on Galectin's board of directors in their prior-filed and substantively identical Georgia Action and (ii) dismissing the Georgia Action with prejudice.

~~7.~~8. A prior final judgment by a United States District Court in a case based on federal question jurisdiction like the Georgia Action has preclusive effect in Nevada as to an issue that: (1) is "identical to the one alleged in the prior litigation;" (2) was "actually litigated in the prior litigation," and (3) was "a critical and necessary part of the earlier judgment," provided that the person against whom preclusion is sought to be applied was either a party to the prior final judgment or a nonparty who was

"adequately represented by someone with the same interest who [wa]s a party to the suit." *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 480, 215 P.3d 709, 717 (Nev. 2009) (citation and internal quotation marks omitted).

~~8.~~9. The Court finds that each of the above requirements for application of issue preclusion is satisfied with respect to the issue of whether Plaintiffs have adequately pled demand futility in their complaints in this action. Based on this finding and the standards set forth above, this Court determines that it must give preclusive effect to the Prior Final Judgment's ruling on demand futility and grant Defendants' motions to dismiss the SAC, the Complaint-in-Intervention and this entire action. *See Bower*, 125 Nev. at 480-82; *Arduini v. Hart*, 774 F.3d 622, 629-630, 638 (9th Cir. 2014) (holding that prior final judgment dismissing complaint on demand futility grounds under Nevada law precluded further litigation of issue of demand futility and required dismissal of parallel derivative action, relying on *Alcantra v. Wal-Mart Stores, Inc.*, 321 P.3d 912, 916-17 (Nev. 2014) and *Five Star Capital Corp. v. Ruby*, 194 P.3d 709 (Nev. 2008)).

For the foregoing reasons, IT IS HEREBY ORDERED AND ADJUDGED that this action is dismissed with prejudice.

Dated this ____ day of March, 2016.

_____
DISTRICT COURT JUDGE

Respectfully submitted by:

KAEMPFER CROWELL

s/ Lyssa S. Anderson
LYSSA S. ANDERSON
Nevada Bar No. 5781
8345 West Sunset Road, Suite 250
Las Vegas, Nevada 89113
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Attorneys for Nominal Defendant Galectin Therapeutics, Inc. and Individual 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

Approved as to form and content:

LEE, HERNANDEZ, LANDRUM & GAROFALO

_____
Natasha A. Landrum
David S. Davis
7575 Vegas Drive, Suite 150
Las Vegas, Nevada 89128

Attorneys for Plaintiff Michael Kirsch

ALDRICH LAW FIRM, LTD.

_____
John P. Aldrich
1601 S. Rainbow Drive, Suite 160
Las Vegas, Nevada 89146

Attorney for Intervenor Plaintiffs David L. Hasbrouck and Siu Yip

DMSLIBRARY01\22566\177001\28517444.v1-3/17/16

Exhibit I

Lee, Ben

From: Lee, Ben
Sent: Friday, March 18, 2016 3:36 PM
To: EdMillerEsq@aol.com
Cc: Smith, Michael; Pope, Warren
Subject: RE: Kirsch v. Traber, et al. (In Re: Galectin Therapeutics, Inc.) - Case No. A-14-706397 - [Proposed] Order Granting Motions to Dismiss
Attachments: 20150618 Transcript of June 11 Hearing.pdf

Ed:

Your proposal to include language in new paragraph 6 that the "Court finds that its denial of Defendants' earlier motion to dismiss heard at the June 11, 2015 hearing ***was*** a final order under Nevada law" (emphasis added) is directly contrary to the Court's many statements at the March 3, 2016 hearing that its denial of earlier motions to dismiss ***was not*** a final order under Nevada law. *See, e.g.*, 3/3/2016 Hr'ing Tr. at 3 ("[M]y order can't be final, because it's a denial of a motion to dismiss."); *id.* at 2-3 "[A] denial of a motion to dismiss is never a final order in Nevada. Never."). Thus, because your elimination of the word "not" in Paragraph 6 is directly contrary to the March 3 hearing transcript, we ask that you reinstate the word "not".

Furthermore, your new Paragraph 5 stating that the stay of the case in Nevada was based on statements Mr. Smith made at the June 11 hearing regarding "class representations [sic] issues" in the Georgia litigation is inconsistent with the transcript of the June 11 hearing. At the June 11 hearing, Mr. Smith did not make any comments regarding class certification/representation issues, but instead said that the parties in the Georgia litigation were in the process of raising Rule "23.1" issues, *i.e.*, demand futility issues, with the Georgia Court (*see* 6/11/2015 Hr'ing Tr. at 4-5). For your convenience, I have attached the June 11 hearing transcript so you can confirm that for yourself. Further, none of the briefing submitted by Defendants in connection with the June 11 hearing advocated that the Nevada case should be stayed based on class certification (or "class representations") issues in Georgia. Accordingly, you have no basis to represent to the Court (as your proposed new Paragraph 5 does) that Mr. Smith made such statements. We therefore ask that you remove your new Paragraph 5.

Should you choose to submit a proposed order containing the above discussed (or similar) inaccurate language, Defendants reserve all rights to bring the discrepancies to the Court's attention and pursue appropriate relief.

Obviously, we also continue to disagree that the other changes you made to the proposed order we submitted are appropriate.

Benjamin Lee | King & Spalding LLP | 1180 Peachtree Street, NE | Atlanta, Georgia 30309-3521 | 404-572-2820 | fax: 404-572-5139 | blee@kslaw.com

From: EdMillerEsq@aol.com [mailto:edmilleresq@aol.com]
Sent: Friday, March 18, 2016 12:48 PM
To: Lee, Ben
Subject: Re: Kirsch v. Traber, et al. (In Re: Galectin Therapeutics, Inc.) - Case No. A-14-706397 - [Proposed] Order Granting Motions to Dismiss

Edward W. Miller, Esq.
Lifshitz & Miller
821 Franklin Avenue, Suite 209
Garden City, New York 11530
(516) 493-9780
Direct (516) 280-7377
Fax (516) 280-7376

-----Original Message-----
From: Lee, Ben <BLee@KSLAW.com>
To: EdMillerEsq@aol.com <edmilleresq@aol.com>
Sent: Fri, Mar 18, 2016 12:24 pm
Subject: RE: Kirsch v. Traber, et al. (In Re: Galectin Therapeutics, Inc.) - Case No. A-14-706397 - [Proposed] Order Granting Motions to Dismiss

Left the attachment off.

From: EdMillerEsq@aol.com [mailto:edmilleresq@aol.com]
Sent: Friday, March 18, 2016 12:23 PM
To: Lee, Ben
Subject: Re: Kirsch v. Traber, et al. (In Re: Galectin Therapeutics, Inc.) - Case No. A-14-706397 - [Proposed] Order Granting Motions to Dismiss

Ben,

Please find attached the proposed order we intend to submit to the court today, with redline showing additional edits since last circulated order.

Edward W. Miller, Esq.
Lifshitz & Miller
821 Franklin Avenue, Suite 209
Garden City, New York 11530
(516) 493-9780
Direct (516) 280-7377
Fax (516) 280-7376

-----Original Message-----
From: Lee, Ben <BLee@KSLAW.com>
To: Dept11LC <Dept11LC@clarkcountycourts.us>; dept11EA <dept11EA@clarkcountycourts.us>
Cc: EdMillerEsq <EdMillerEsq@aol.com>; MichaelF <MichaelF@johnsonandweaver.com>; bds <bds@weiserlawfirm.com>; traci <traci@johnaldrichlawfirm.com>; joshualifshitz <joshualifshitz@gmail.com>; jml <jml@jlclasslaw.com>; Pope, Warren <WPope@KSLAW.com>; Smith, Michael <mrsmith@KSLAW.com>; Natasha Landrum <nlandrum@lee-lawfirm.com>; David S. Davis <ddavis@lee-lawfirm.com>; Landerson <Landerson@kcnvlaw.com>; kah <kah@weiserlawfirm.com>; James Ficaro (jmf@weiserlawfirm.com) <jmf@weiserlawfirm.com>; 'jaldrich@johnaldrichlawfirm.com' (jaldrich@johnaldrichlawfirm.com) <jaldrich@johnaldrichlawfirm.com>; Ryan Daniels <RDaniels@kcnvlaw.com>
Sent: Thu, Mar 17, 2016 3:01 pm

Subject: Kirsch v. Traber, et al. (In Re: Galectin Therapeutics, Inc.) - Case No. A-14-706397 - [Proposed] Order Granting Motions to Dismiss

Dear Judge Gonzalez:

Following the hearing in the above-referenced matter held on March 3, 2016, at which the Court granted Defendants' motions to dismiss the case, the parties have conferred and attempted to reach agreement on the contents of a proposed order reflecting the Court's ruling. Although the parties reached agreement on all other contents of the proposed order, they could not agree upon the language to be included in paragraphs 4 and 5.

A Microsoft Word format version of the order proposed by Defendants is attached for your consideration.

Kind regards,

Benjamin Lee | King & Spalding LLP | 1180 Peachtree Street, NE | Atlanta, Georgia 30309-3521 | 404-572-2820 | fax: 404-572-5139 | blee@kslaw.com

Counsel for Defendants (*admitted pro hac vice*)

Exhibit J

Lee, Ben

From: Lee, Ben
Sent: Friday, March 18, 2016 8:38 PM
To: EdMillerEsq@aol.com
Cc: ddavis@lee-lawfirm.com; michaelf@johnsonandweaver.com; joshualifshitz@gmail.com; bds@weiserlawfirm.com; Smith, Michael; Pope, Warren; jaldrich@johnaldrichlawfirm.com
Subject: Re: Kirsch v. Traber, et al. (In Re: Galectin Therapeutics, Inc.) - Case No. A-14-706397 - [Proposed] Order Granting Motions to Dismiss

Ed:

The arguments Defendants made in Georgia were consistent with the Nevada Court's rulings at the June 11 Hearing that (i) Defendants' motions to dismiss were denied "at this point" in light of the Court's decisions to grant the Intervenors' motion to intervene and permit Intervenors and Mr. Kirsch to file further pleadings that it was anticipated would supersede and moot Mr. Kirsch's pending complaint (all of which the Court indicated was being done to cure "problems" with Mr. Kirsch's standing in light of his eventual admission, contrary to his verified allegations in *two* complaints, that he first purchased Galectin stock well after nearly all of the alleged conduct challenged in his complaints); and (ii) the Nevada case was stayed in deference to the prior-filed Georgia case, where Defendants informed the Nevada Court the Georgia parties were in the process addressing Rule 23.1/demand futility issues with the Georgia Court. The Georgia Court looked at the record in Nevada, determined that it could not conclude that the Nevada Court's order denying motions to dismiss was a "final ruling on the merits" entitled to preclusive effect, and issued its decision. The Nevada Court has now confirmed its agreement that its prior ruling denying the motions to dismiss was not a final order, and therefore was not entitled to preclusive effect under settled Nevada law.

What you are now proposing to do – ask the Nevada Court to issue a ruling that includes a statement that you have conceded you know is erroneous and unfounded – is another matter entirely and has nothing whatsoever to do with the arguments Defendants made in Georgia. Moreover, your proposal that the Nevada Court include this demonstrably erroneous and unfounded statement – which, in any event, was not part of the basis for the Court's ruling granting Defendants' motion to dismiss – in its order is in no way "essential" to possible future appellate review of that ruling. Should you proceed with this course of action, our position is as stated in my e-mails below.

Ben

On Mar 18, 2016, at 5:12 PM, EdMillerEsq@aol.com <edmilleresq@aol.com> wrote:

> None the less, this accurately reflects the court's position as stated at the hearing. Look Ben, Defendants represented to the Georgia court that Judge Gonzales denied your motion to dismiss because it was moot, which she never said and is not accurate. Would you like to find a way to go to the Judge on this issue and jointly ask for clarification on whether or not she dismissed for "mootness" as you said. I suspect not. I suspect you don't want clarification on that at all. If not, and if you oppose clarifying that point, it is essential that the appeals court understand that the Judge made a statement on the record to the effect that she was led to believe that there was a class cert going on.....You have represented to the Georgia Federal Court that the judge did something for a reason that she never indicated in any way shape or form, i.e. mootness - we want merely a record of what the Judge said on the record. So please, just clarify, were you just

threatening us with a Rule 11 Motion for proposing the Court to include its own words in the Order?

Edward W. Miller, Esq.
Lifshitz & Miller
821 Franklin Avenue, Suite 209
Garden City, New York 11530
(516) 493-9780
Direct (516) 280-7377
Fax (516) 280-7376

-----Original Message-----
From: Lee, Ben <BLee@KSLAW.com>
To: Edward Miller <EdMillerEsq@aol.com>
Cc: Smith, Michael <mrsmith@KSLAW.com>; Pope, Warren <WPope@KSLAW.com>
Sent: Fri, Mar 18, 2016 4:45 pm
Subject: RE: Kirsch v. Traber, et al. (In Re: Galectin Therapeutics, Inc.) - Case No. A-14-706397 - [Proposed] Order Granting Motions to Dismiss

Regarding paragraph 5: Notwithstanding the confusing and unclear statement the Court made near the end of the March 3 hearing concerning "class certification" issues in Georgia, there is absolutely no support in the June 11 hearing transcript or related briefing for a representation to the Court that Mr. Smith advocated a stay of the Nevada action based on class certification/representation issues in Georgia. Your response below tacitly acknowledges this. For complete clarity, Defendants' position is that submitting a proposed order to the Court that includes language such as your proposed paragraph 5 adopting a statement that you know to be factually incorrect would constitute a violation of NRCP 11.

Regarding paragraph 6: I take it you will correct the typo, prior to submitting your proposed order?

From: Edward Miller [mailto:EdMillerEsq@aol.com]
Sent: Friday, March 18, 2016 3:58 PM
To: Lee, Ben
Subject: Re: Kirsch v. Traber, et al. (In Re: Galectin Therapeutics, Inc.) - Case No. A-14-706397 - [Proposed] Order Granting Motions to Dismiss

When is the typo and the other is what the judge said

Sent from my iPhone

On Mar 18, 2016, at 3:36 PM, Lee, Ben <BLee@KSLAW.com> wrote:

> Ed:
>
> Your proposal to include language in new paragraph 6 that the "Court finds that its denial of Defendants' earlier motion to dismiss heard at the June 11, 2015 hearing ***was*** a final order under Nevada law" (emphasis added) is directly contrary to the Court's many statements at the March 3, 2016 hearing that its denial of earlier motions to dismiss ***was not*** a final order under Nevada law. *See, e.g.*, 3/3/2016 Hr'ing Tr. at 3 ("[M]y order can't be final, because it's a denial of a motion to dismiss."); *id.* at 2-3 "[A] denial of a motion to dismiss is never a final order in Nevada. Never."). Thus, because your elimination of the word "not" in

Paragraph 6 is directly contrary to the March 3 hearing transcript, we ask that you reinstate the word "not".

Furthermore, your new Paragraph 5 stating that the stay of the case in Nevada was based on statements Mr. Smith made at the June 11 hearing regarding "class representations [sic] issues" in the Georgia litigation is inconsistent with the transcript of the June 11 hearing. At the June 11 hearing, Mr. Smith did not make any comments regarding class certification/representation issues, but instead said that the parties in the Georgia litigation were in the process of raising Rule "23.1" issues, *i.e.*, demand futility issues, with the Georgia Court (*see* 6/11/2015 Hr'ing Tr. at 4-5). For your convenience, I have attached the June 11 hearing transcript so you can confirm that for yourself. Further, none of the briefing submitted by Defendants in connection with the June 11 hearing advocated that the Nevada case should be stayed based on class certification (or "class representations") issues in Georgia. Accordingly, you have no basis to represent to the Court (as your proposed new Paragraph 5 does) that Mr. Smith made such statements. We therefore ask that you remove your new Paragraph 5.

Should you choose to submit a proposed order containing the above discussed (or similar) inaccurate language, Defendants reserve all rights to bring the discrepancies to the Court's attention and pursue appropriate relief.

Obviously, we also continue to disagree that the other changes you made to the proposed order we submitted are appropriate.

Benjamin Lee | King & Spalding LLP | 1180 Peachtree Street, NE | Atlanta, Georgia 30309-3521 | 404-572-2820 | fax: 404-572-5139 | blee@kslaw.com

From: EdMillerEsq@aol.com [mailto:edmilleresq@aol.com]
Sent: Friday, March 18, 2016 12:48 PM
To: Lee, Ben
Subject: Re: Kirsch v. Traber, et al. (In Re: Galectin Therapeutics, Inc.) - Case No. A-14-706397 - [Proposed] Order Granting Motions to Dismiss

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-----Original Message-----
From: Lee, Ben <BLee@KSLAW.com>
To: EdMillerEsq@aol.com <edmilleresq@aol.com>
Sent: Fri, Mar 18, 2016 12:24 pm

Subject: RE: Kirsch v. Traber, et al. (In Re: Galectin Therapeutics, Inc.) - Case No. A-14-706397 - [Proposed] Order Granting Motions to Dismiss

Left the attachment off.

From: EdMillerEsq@aol.com [mailto:edmilleresq@aol.com]
Sent: Friday, March 18, 2016 12:23 PM
To: Lee, Ben
Subject: Re: Kirsch v. Traber, et al. (In Re: Galectin Therapeutics, Inc.) - Case No. A-14-706397 - [Proposed] Order Granting Motions to Dismiss

Ben,

Please find attached the proposed order we intend to submit to the court today, with redline showing additional edits since last circulated order.

Edward W. Miller, Esq.
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(516) 493-9780
Direct (516) 280-7377
Fax (516) 280-7376

-----Original Message-----
From: Lee, Ben <BLee@KSLAW.com>
To: Dept11LC <Dept11LC@clarkcountycourts.us>; dept11EA <dept11EA@clarkcountycourts.us>
Cc: EdMillerEsq <EdMillerEsq@aol.com>; MichaelF <MichaelF@johnsonandweaver.com>; bds <bds@weiserlawfirm.com>; traci <traci@johnaldrichlawfirm.com>; joshualifshitz <joshualifshitz@gmail.com>; jml <jml@jlclasslaw.com>; Pope, Warren <WPope@KSLAW.com>; Smith, Michael <mrsmith@KSLAW.com>; Natasha Landrum <nlandrum@lee-lawfirm.com>; David S. Davis <ddavis@lee-lawfirm.com>; Landerson <Landerson@kcnvlaw.com>; kah <kah@weiserlawfirm.com>; James Ficaro (jmf@weiserlawfirm.com) <jmf@weiserlawfirm.com>; 'jaldrich@johnaldrichlawfirm.com' (jaldrich@johnaldrichlawfirm.com) <jaldrich@johnaldrichlawfirm.com>; Ryan Daniels <RDaniels@kcnvlaw.com>
Sent: Thu, Mar 17, 2016 3:01 pm
Subject: Kirsch v. Traber, et al. (In Re: Galectin Therapeutics, Inc.) - Case No. A-14-706397 - [Proposed] Order Granting Motions to Dismiss

Dear Judge Gonzalez:

Following the hearing in the above-referenced matter held on March 3, 2016, at which the Court granted Defendants' motions to dismiss the case, the parties have conferred and attempted to reach agreement on the contents of a proposed order reflecting the Court's ruling. Although the parties reached agreement on all other contents of the proposed order, they could not agree upon the language to be included in paragraphs 4 and 5.

A Microsoft Word format version of the order proposed by Defendants is attached for your consideration.

Kind regards,

Benjamin Lee | King & Spalding LLP | 1180 Peachtree Street, NE | Atlanta, Georgia 30309-3521 | 404-572-2820 | fax: 404-572-5139 | blee@kslaw.com

Counsel for Defendants (*admitted pro hac vice*)

<20150618 Transcript of June 11 Hearing.pdf>

OPPM
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jml@jlclasslaw.com

Attorneys for Plaintiff Michael Kirsch

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL KIRSCH, derivatively on behalf of GALECTIN THERAPEUTICS, INC.,

Plaintiff,

-vs-

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,

Defendants,

-and-

GALECTIN THERAPEUTICS, INC., a Nevada corporation,

Nominal Defendant.

CASE NO. A-14-706397-B

DEPT. NO. XI

OPPOSITION TO MOTION TO CORRECT ORDER RE: MOTION TO DISMISS SHAREHOLDER DERIVATIVE ACTION PURSUANT TO NRCP 60

Date of Hearing: May 27, 2016
Time of Hearing: In Chambers

DAVID L. HASBROUCK and SIU YIP, derivatively on behalf of GALECTIN THERAPEUTICS, INC.,

Plaintiffs-Intervenors,

-vs-

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 10X FUND, L.P.,

Defendants,

-and-

GALECTIN THERAPEUTICS, INC., a Nevada corporation,

Nominal Defendant.

LEE, HERNANDEZ, LANDRUM & GAROFALO
7575 VEGAS DRIVE, SUITE 150
LAS VEGAS, NV 89128
(702) 880-9750

OPPOSITION TO MOTION TO CORRECT ORDER RE: MOTION TO DISMISS SHAREHOLDER DERIVATIVE ACTION PURSUANT TO NRCP 60

COMES NOW Plaintiff, by and through his attorneys, LEE, HERNANDEZ, LANDRUM & GAROFALO, and LIFSHITZ & MILLER (Edward W. Miller, Esq. admitted *pro hac vice*) and hereby submits his Opposition to Defendants' Motion to Correct Order Re: Motion to Dismiss Shareholder Derivative Action Pursuant to NRCP 60.

Defendants have moved for Relief for Judgment under Nevada Rules of Civil Procedure Rule 60, but have moved for nothing more than a proposed rewording of the Order that results in no change whatsoever to the legal consequences, meaning, scope or impact of the ruling set forth in the order. As such, Plaintiff respectfully requests the Court to deny Defendants' motion.

In addition to the above, Plaintiff provides additional information in response to Defendants' assertion that Plaintiff submitted proposed Order language to the Court without Defendants' knowledge. At the outset, Plaintiff's counsel acknowledges that, due to an oversight, Plaintiff's proposed Order was submitted to the Court on March 18, 2016 without a courtesy copy to all counsel. Indeed, the Court noticed the lack of indication in the cover letter that all counsel

was copied. The Court Clerk contacted Plaintiff's local counsel on March 22, 2016 to inquire if Plaintiff's proposed Order language had been previously circulated to Defense counsel for review. As evidenced by prior e-mails among the parties wherein Defense counsel was provided an opportunity to review Plaintiff's proposed Order and objected to same, Plaintiff's counsel informed the Court that the language had been reviewed by all counsel prior to submission to the Court. This explanation appeared to satisfy the Court in that there was no question Defense counsel had reviewed Plaintiff's proposed Order language prior to submission to the Court. Thus, while Plaintiff accepts the error of not providing a courtesy copy of the actual submission document to all parties, Defendants' suggestion that they were somehow misled or disadvantaged by the oversight is disingenuous.

Lastly, Defendants' suggestion that, had they known Plaintiff submitted his proposed Order, they would have addressed the issue with the Court perhaps through a Motion is rather irrational. Plaintiff is not aware of any Motion that would be properly made to request that the Court limit what it can consider and include while preparing to issue an Order. The reality is that the Court could have ignored both proposed Orders and prepared its own. Clearly, the Court is well aware of the facts and circumstances surrounding this matter and chose to prepare an Order adopting language from each proposed Order. Defendants appear to suggest that the Court would

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be bound to adopt one proposed Order or the other without the authority to make revisions as it sees fit. Plaintiff submits that the Court is more than able to determine which findings of fact, conclusions of law, and any other observations it wishes to include in an Order.

For these reasons, Defendants' Motion should be denied.

Dated this 22nd day of April, 2016.

LEE, HERNANDEZ, LANDRUM & GAROFALO

By: _____

NATASHA A. LANDRUM, ESQ.
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CERTIFICATE OF MAILING

Michael Kirsch v. Peter Traber, et al.
In Re: Galectin Therapeutics

I HEREBY CERTIFY that on the 22nd day of April, 2016, I served a copy of the above and foregoing **OPPOSITION TO MOTION TO CORRECT ORDER RE: MOTION TO DISMISS SHAREHOLDER DERIVATIVE ACTION PURSUANT TO NRCP 60**, by electronic service via Wiznet/Odyssey, pursuant to Administrative Order 174-2, to the following party(ies) of record:

Lyssa S. Anderson, Esq. Ryan W. Daniels, Esq.. KAEMPFER CROWELL 8345 W. Sunset Road, Ste. 250 Las Vegas, NV 89113 Telephone: (702) 792-7000 Fax:(702) 796-7181 landerson@kcnvlaw.com **ATTORNEY FOR DEFENDANT**	Michael R. Smith, Esq. B. Warren Pope, Esq. Benjamin Lee, Esq. KING & SPAULDING, LLP 1180 Peachtree Street, NE Atlanta, GA 30309 **ATTORNEY FOR DEFENDANT**
John P. Aldrich, Esq. ALDRICH LAW FIRM, LTD 1601 S. Rainbow Blvd., Ste. 160 Las Vegas, NV 89146 (702) 853-5490 Fax: (702) 227-1975 jaldrich@johnaldricklawfirm.com **ATTORNEY FOR INTERVENORS**	Michael I. Fistel, Jr., Esq. JOHSON & WEAVER, LLP 40 Powder Springs St. Marietta, GA 30064 (770)200-3104 michaelf@johnsonandweaver.com **ATTORNEY FOR INTERVENORS**
Kathleen A. Herkenhoff, Esq. THE WEISER LAW FIRM, P.C. 12707 High Bluff Drive, Suite 200 San Diego, CA 92130 (858) 794-1441 kah@weiserlawfirm.com **Attorneys for INTERVENOR – Sui Yip**	

By: Christina Abraham
An employee of LEE, HERNANDEZ, LANDRUM & GAROFALO

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1980 Festival Plaza Drive, Suite 650
Las Vegas, Nevada 89135
Telephone: (702) 792-7000
Fax: (702) 796-7181
landerson@kcnvlaw.com

Attorney for Defendants

DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL KIRSCH, derivatively on behalf of GALECTIN THERAPEUTICS, INC., Plaintiff, vs. 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, Defendants, -and- GALECTIN THERAPEUTICS, INC., a Nevada Corporation, Nominal Defendant. DAVID L. HASBROUCK and SIU YIP, derivatively on behalf of GALECTIN THERAPEUTICS, INC., Plaintiff, vs. PETER G. TRABER; JAMES C. CZIRR; JACK W. CALLICUTT; GILBERT F. AMELIO; KEVIN D. FREEMAN; ARTHUR R. GREENBERG; ROD D. MARTIN; JOHN	Case No. A-14-706397-B Dept. No. XI **REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO CORRECT ORDER RE: MOTIONS TO DISMISS SHAREHOLDER DERIVATIVE ACTION PURSUANT TO NRCP 60**

F. MAULDIN; STEVEN PRELACK; HERMAN PAUL PRESSLER, III; DR. MARC RUBIN, and 10X FUND, L.P.,

Defendants,

-and-

GALECTIN THERAPEUTICS, INC., a Nevada Corporation,

Nominal Defendant.

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 (the "Individual Defendants") together with Defendant 10X Fund L.P. ("10X Fund")[1] and Nominal Defendant Galectin Therapeutics, Inc. ("Galectin" or the "Company") (collectively, the Individual Defendants, 10X Fund and Galectin are referred to herein as "Defendants") hereby respectfully submit this reply memorandum in support of Defendants motion (the "Motion"), pursuant to Rule 60(a)&(b) of the Nevada Rules of Civil Procedure, to correct a factual mistake contained in the Court's Order Re: Motions to Dismiss Shareholder Derivative Action dated April 1, 2016 (the "Order").

Significantly, Plaintiff makes no effort to argue that the erroneous statement in paragraph 5 of the Order identified in Defendants' Motion is in fact correct or worthy of reliance. It is beyond dispute that neither Mr. Smith nor any counsel for Defendant represented that "class representations" or class certification issues were pending in the parallel Georgia Derivative Action. *See generally* June 11, 2015 Hr'ing Tr. Nor did Defendants make any such representation in their briefs submitted in connection with the motions argued at the June 11,

[1] 10X Fund was named as a defendant only in the Verified Shareholder Complaint-In-Intervention (the "IC") which was filed by Intervenor Plaintiffs David L. Hasbrouck and Siu Yip ("Intervenor Plaintiffs").

2015 hearing. Because Defendants' counsel made no such representation, it could not have formed the basis for this Court's prior order staying this case. Accordingly, the statement in the Court's April 1, 2016 Order that "[t]his Court's August 10, 2015 order staying the case for 180 days was based upon representations made to the Court by Mr. Smith at the June 11, 2015 hearing that issues raised in Georgia relate to class representations issues" is mistaken and should be corrected pursuant to NRCP 60.

Instead, Plaintiff argues that Defendants' Motion should be denied merely because the correction Defendants request purportedly would "result[] in no change whatsoever to the legal consequences, meaning, scope or impact of the ruling set forth in the order." Pl. Opp. at 2. This argument fails for at least two key reasons. *First*, if not corrected, the erroneous statement in the Order may impact the course of appellate proceedings in this case or the Georgia Derivative Action. Defendants expect that plaintiffs would use the erroneous statement to (incorrectly) argue that Defendants procured a stay of this action or other advantage by misrepresenting the procedural posture of the Georgia Derivative Action. Although any such argument would be meritless and would find no support in the June 11, 2015 hearing transcript, Defendants (and any appellate court reviewing the dismissal of the derivative claims asserted here and/or in the Georgia Derivative Action) should not be put to the burden of sorting through the confusion created by the Order's erroneous statement that this case was stayed based on a representation that "class representations" or class certification issues were pending in the Georgia Derivative Action. Thus, the premise of Plaintiff's argument—that the erroneous statement does not matter—is incorrect. *Second*, irrespective of its lack of merit, Plaintiff's argument that the factual mistake in the Order is immaterial simply provides no basis upon which to deny Defendants' Motion. Rule 60 provides for correction of "clerical" and other mistakes such as the one this Motion addresses. NRCP 60. This Court should correct the mistake of fact rather than

leave in the record of this case an incorrect statement and implication that Defendants' counsel inaccurately described the procedural posture of the parallel Georgia Derivative Action to improperly secure a stay of this case.

Plaintiffs' opposition is also noteworthy for its admission that Plaintiff did not notify Defendants that he had in fact submitted his proposed order containing the factually erroneous language regarding "class representations" issues—***even after the Clerk raised the matter with Plaintiff's counsel***. "No harm, no foul," Plaintiff says in effect (Opp. at 3); but he is again mistaken. Had Defendants known Plaintiff had submitted his proposed order containing the incorrect and unsupported statement regarding "class representations" issues, Defendants would have raised the matter with the Court before it issued its Order with the erroneous language from Plaintiff's version. Instead, Plaintiff's failure to provide proper notice of his submission and lack of candor with the Court have required both Defendants and the Court to expend additional time and resources addressing the factual error in Plaintiff's proposed order which the Court incorporated into its own Order.

In sum, Plaintiffs' opposition wholly fails to rebut Defendants' showing that the Order contains a clear factual error that should be corrected pursuant to NRCP 60. Defendants therefore respectfully request that the Court correct the Order by either (1) striking paragraph 5 thereof, which states: "This Court's August 10, 2015 order staying the case for 180 days was based upon representations made to the Court by Mr. Smith at the June 11, 2015 hearing that

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issues raised in Georgia relate to class representations issues."; or (2) correcting the paragraph to reflect that the representations made by Mr. Smith at the June 11, 2015 hearing "related to Rule 23.1 issues" rather than "class representations" issues.

DATED this 20th day of May, 2016.

KAEMPFER CROWELL

/s/ Lyssa S. Anderson
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blee@kslaw.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2016, I forwarded copies of the foregoing **REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO CORRECT ORDER RE: MOTIONS TO DISMISS SHAREHOLDER DERIVATIVE ACTION PURSUANT TO NRCP 60** by ECF and/or U.S. Mail to the following attorneys of record:

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jmf@weiserlawfirm.com

/s/ Heather R. Suter
an employee of Kaempfer Crowell

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-10359-EE

DAVID L. HASBROUCK,
SUI YIP,

Plaintiffs - Appellants,

versus

PETER G. TRABER,
JAMES C. CZIRR,
JACK W. CALLICUTT,
GILBERT F. AMELIO,
KEVIN D. FREEMAN, et al.,

Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

ORDER:

Appellants' motion for a sixty (60) day extension of time for filing their opening brief is DENIED.

/s/ William H. Pryor Jr.
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

July 07, 2016

Michael Ira Fistel Jr.
Johnson & Weaver, LLP
40 POWDER SPRINGS ST
MARIETTA, GA 30064

Appeal Number: 16-10359-EE
Case Style: David Hasbrouck, et al v. Peter Traber, et al
District Court Docket No: 1:15-cv-00208-SCJ

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.

The following action has been taken in the referenced case:

Appellants' Motion for Extension to file their brief is DENIED.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Sandra Brasselmon, EE
Phone #: (404) 335-6181

EXT-1 Extension of time

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

July 07, 2016

James N. Hatten
Richard B. Russell Bldg & US Courthouse
2211 UNITED STATES COURTHOUSE
75 TED TURNER DR SW
STE 2211
ATLANTA, GA 30303-3309

Appeal Number: 16-10359-EE
Case Style: David Hasbrouck, et al v. Peter Traber, et al
District Court Docket No: 1:15-cv-00208-SCJ

The enclosed copy of the Clerk's Entry of Dismissal for failure to prosecute in the above referenced appeal is issued as the mandate of this court. See 11th Cir. R. 41-4. Pursuant to 11th Cir. R. 42-2(c) and 42-3(c), when an appellant fails to timely file or correct a brief or appendix, the appeal shall be treated as dismissed on the first business day following the due date. This appeal was treated as dismissed on 07/07/2016.

Counsel and pro se parties are advised that pursuant to Fed.R.App.P. 25(a)(2)(A), a motion to set aside the dismissal and remedy the default "is not timely unless the clerk receives the papers within the time fixed for filing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Sandra Brasselmon, EE
Phone #: (404) 335-6181

Enclosure(s)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-10359-EE

DAVID L. HASBROUCK,
SUI YIP,

Plaintiffs - Appellants,

versus

PETER G. TRABER,
JAMES C. CZIRR,
JACK W. CALLICUTT,
GILBERT F. AMELIO,
KEVIN D. FREEMAN, et al.,

Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

ENTRY OF DISMISSAL: Pursuant to the 11th Cir.R. 42-2(c), this appeal is hereby DISMISSED for want of prosecution because the appellant David L. Hasbrouck and Sui Yip has failed to file an appellant's brief within the time fixed by the rules, effective July 07, 2016.

DAVID J. SMITH
Clerk of Court of the United States Court
of Appeals for the Eleventh Circuit

by: Sandra Brasselmon, EE, Deputy Clerk

FOR THE COURT - BY DIRECTION

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-10324

D.C. Docket No. 1:15-cv-00029-SCJ

In Re: Galectin Therapeutics, Inc. Securities Litigation,

MARISSA BALLESTEROS, et al.,

Plaintiffs,

GLYN HOTZ,
Lead Plaintiff,

Plaintiff - Appellant,

versus

GALECTIN THERAPEUTICS, INC.,
JAMES C. CZIRR,
PETER G. TRABER,
JACK W. CALLICUTT,
3:14-cv-402-RCJ-WGC,
ROD D. MARTIN,
JOHN F. MAULDIN, 10x FUND L.P.
Member Case 3:14-cv-402-RCJ-WGC, et al.,

Defendants - Appellees,

GILBERT F. AMELIO,
Member Case 3:14-cv-402-RCJ-WGC, et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Georgia

(December 15, 2016)

Before TJOFLAT and HULL, Circuit Judges, and BYRON,[*] District Judge.

HULL, Circuit Judge:

Appellee-defendant Galectin Therapeutics, Inc. ("Galectin") is a small biopharmaceutical company headquartered in Norcross, Georgia. On February 26, 2014, Appellant-plaintiff Glynn Hotz purchased 16,000 shares of Galectin common stock at $17.90 per share. On July 25, 2014, news outlets began to report that Galectin had paid promotional firms to write flattering articles about Galectin and to "tout" Galectin's stock price. On July 28, 2014, Galectin's stock price crashed. Galectin's stock lost over half its value, falling from a price of $15.91 per share to $7.10 per share in one day.

[*]Honorable Paul G. Byron, United States District Judge, for the Middle District of Florida, sitting by designation.

After suffering stock losses, Hotz filed a consolidated class action complaint against Galectin on May 8, 2015. Hotz now appeals the district court's Rule 12(b)(6) dismissal of his complaint for failure to state a claim.

This appeal involves two causes of action. First, Hotz alleges that Galectin, along with several of its officers and directors, committed securities fraud in violation of § 10(b) of the Securities and Exchange Act of 1934 (the "Exchange Act") and implementing Rule 10b-5(b). There is no allegation that the articles were false. Rather, Hotz argues that Galectin made material misstatements and omissions of fact by not disclosing that it had paid the promotional firms to tout Galectin stock. Second, Hotz alleges that certain Galectin officers and directors were liable for the company's actions in their personal capacity as "controlling persons" of Galectin under § 20(a) of the Exchange Act.

After thorough review, and with the benefit of oral argument, we affirm.

I. BACKGROUND

Because this appeal involves a Rule 12(b)(6) dismissal, we outline in detail the allegations in the complaint.

A. The Parties

Plaintiff Glynn Hotz represents the putative class of similarly situated Galectin shareholders. The Class Period runs from October 24, 2013 to July 28, 2014. The defendants are: (1) Galectin Therapeutics, Inc. ("Galectin") and 10X

Fund L.P. (the "10X Fund"), and; (2) five individuals, James C. Czirr ("Czirr"), Rod D. Martin ("Martin"), Peter G. Traber ("Traber"), Jack W. Callicutt ("Callicutt"), and John F. Mauldin ("Mauldin").

Galectin conducts protein research in an effort to combat cancer and non-alcoholic steatohepatitis ("NASH"), or "fatty liver disease." Galectin has been developing GR-MD-02 ("the drug") as its lead drug to combat NASH.

B. Pro-Pharma

Galectin first began as a business under a different name—Pro-Pharmaceuticals, Inc. ("Pro-Pharma"). From 2003 to 2011, Pro-Pharma developed a separate drug, Davanat. Pro-Pharma designed Davanat to improve the effectiveness of certain colon cancer chemotherapy treatments. Pro-Pharma struggled to obtain Food and Drug Administration ("FDA") approval of Davanat throughout its development.

In 2008, defendants Czirr and Martin co-founded defendant 10X Fund as a technology-focused hedge fund, headquartered in Niceville, Florida. In 2009, the 10X Fund conducted a takeover and restructuring of the struggling Pro-Pharma. In 2011, Pro-Pharma changed its name to Galectin and phased out the Davanat study. Galectin did this in an attempt to revamp its image. In 2013, Galectin began development of the GR-MD-02 drug.

C. Galectin's Stock

During the October 24, 2013-July 28, 2014 Class Period, Galectin remained a small company. It faced pressure to compete from rival biotechnology firms. Before Galectin began its GR-MD-02 development, competitor Intercept Pharmaceuticals ("Intercept") had already submitted a similar drug for FDA approval. Over a one-month period in January 2013, Intercept's stock price had skyrocketed from $20 per share to $445 per share.

During the Class Period, the five individual defendants—Czirr, Martin, Traber, Callicutt, and Mauldin—served as directors and senior officers of Galectin. Within this period, each individual defendant allegedly exercised control over—and held a financial interest in—Galectin. Each individual defendant also owned various shares of Galectin common stock. As of March 2015, each individual defendant owned the following approximate number of shares: Czirr—817,000 shares; Martin—175,000 shares; Traber—1,405,276 shares; Callicutt—99,035 shares; Mauldin—53,662 shares.

Apart from these individual owners, as of March 2015, the 10X Fund owned "all of the issued and outstanding shares of Galectin Series B preferred stock, which are convertible into 2,000,000 shares of Galectin's common stock, as well as

warrants exercisable to purchase an aggregate of 4,000,000 shares of Galectin common stock."[1]

Separately, according to Hotz's complaint, the 10X Fund had the right "at all relevant times" to elect three Galectin directors in a class vote and to nominate three directors for election. The 10X Fund had these rights by virtue of its ownership of Galectin preferred stock. The complaint does not allege that the 10X Fund ever exercised these rights.

D. Galectin's Two "ATM" Offerings

Because Galectin was developing drugs pending FDA approval, Galectin did not generate revenues during the Class Period. Instead, Galectin financed its research and production operations through stock and debt issuances.

Between 2013 and 2014, Galectin announced two issuances of common stock "for the continued development of [its] drug research and development programs, including the current clinical trial for GR-MD-02." Galectin announced the offerings on October 25, 2013 and March 21, 2014, respectively. In each

[1]After describing each defendant's ownership of Galectin stock, Hotz's complaint alleges that the defendants "[b]y reason of their control of Galectin . . . control the day-to-day conduct of Galectin's business and are liable for any false and misleading statements and omissions alleged herein that are attributable to Galectin." However, the complaint does not allege that the defendants collectively owned a majority stake in Galectin common stock during the Class Period. Indeed, the complaint fails to allege any percentage of Galectin common stock collectively owned by the defendants during the Class Period. The complaint's only factual allegation concerning the percentage of ownership in Galectin is that, "as of December 31, 2014 [assuming exercise of all outstanding stock options] . . . the 10X Fund would own approximately 31% of Galectin's then-outstanding shares of common stock."

issuance, Galectin authorized the sale of up to $30 million in shares in an "at the market" ("ATM") agreement, wherein Galectin could sell shares at its sole discretion.

In the first ATM offering, Galectin sold 2,763,589 shares of common stock. The sale generated net proceeds of approximately $29,011,000. For the period of October 25, 2013 through December 31, 2013, Hotz's complaint alleged an average sale price of $9.02 per share from the first ATM offering. Hotz's complaint did not allege a final average price per share from the first ATM offering, which concluded in February 2014. Hotz's complaint also did not allege sales figures from the second ATM offering that Galectin announced on March 21, 2014.

E. The Stock Promoters

While Galectin was making these ATM offerings, it allegedly retained several promoters to "recommend or 'tout'" Galectin's stock and raise the stock price. Galectin worked with four promoters: (1) The Dream Team/Mission IR ("The Dream Team"); (2) Patrick Cox; (3) TDM Financial/Emerging Growth Corporation ("TDM"), and; (4) Acorn Management Partners, LLC ("Acorn").

All four stock promoters frequently published articles about stocks and investments. There is no Securities and Exchange Commission ("SEC") rule

requiring a company (like Galectin) to disclose that it pays a stock promoter for promotional material.

Rather, the duty to disclose payments for promotional articles is on the author who receives the payment. See 15 U.S.C. § 77q(b). This way, the payment disclosure will be right in the article itself. Specifically, § 17(b) of the Securities Act of 1933 (the "Securities Act") requires stock promoters to disclose any payment they receive as consideration for their promotional material. See id. In Hotz's complaint, there is no claim brought against the promoters themselves for failure to disclose the receipt of any such payments from Galectin. But, as outlined below, there are allegations that two of the promoters did not disclose their payments.

F. The Dream Team and Cox Did Not Disclose Payments

One promoter was The Dream Team. Between the fall of 2012 and December 2014, The Dream Team published seven articles touting Galectin and its stock with titles such as, "Investors Should Consider Galectin Therapeutics (GALT)." Galectin paid The Dream Team for these articles, but The Dream Team's articles did not disclose the payments. Galectin did not disclose that it paid The Dream Team.

A second promoter was Patrick Cox. During the Class Period, Cox

wrote twenty-three articles about Galectin and its drug development. Galectin paid Cox for these articles, but Cox's articles did not disclose the payments, and Galectin did not disclose them either.

Further, before Hotz filed his complaint, Cox denied that he had ever received any payment from Galectin. On July 29, 2014, Cox wrote an open letter to the readers of the Transformational Technology Alert, a newsletter Mauldin owned. In the letter, Cox wrote that "neither I nor the analyst team has ever had any direct or indirect financial arrangement with Galectin Therapeutics."[2]

G. TDM and Acorn Disclosed Payments

The other two stock promoters were TDM and Acorn, who did disclose their payments from Galectin. On its website, TDM wrote and published six articles about Galectin during the Class Period. Galectin paid TDM for the articles, but Galectin did not disclose that it paid TDM.

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[2]Hotz also alleges that, before the Class Period, Cox and Galectin management had a preexisting fraudulent relationship. In March 2011, defendant Mauldin independently employed Cox to write a research article on BioTime, a small biotechnology company. Mauldin owned shares in BioTime. Cox published the research article in the Tranformational Technology Alert. The article caused BioTimes's shares to jump 14% the day the article was published.

There is no allegation, however, that either Cox or Mauldin failed to disclose payment from Cox to Mauldin for the BioTime article. Or, rather, Hotz includes the BioTime episode to suggest that Cox and a Galectin director (Mauldin) enjoy a "deep-rooted relationship." Hotz suggests that this relationship could have led Cox to be "easily . . . manipulated" during the Class Period.

TDM, however, made two disclosures that Galectin paid it for services. First, at least one of the TDM articles included a "[F]ull [D]isclaimer" link at the bottom of the article. If a user clicked the "[F]ull [D]isclaimer" link, he or she would be taken to a separate "Legal Disclaimer" webpage. On the "Legal Disclaimer" webpage, TDM listed Galectin as a paying client and showed receipt of eleven separate payments from Galectin. The payments from Galectin to TDM on the "Legal Disclaimer" webpage ranged from $3,500 to $7,000 each. TDM's disclosure did not describe what each payment was for.

Second, in a "Case Studies" section on its website, TDM stated that Galectin paid it to promote Galectin's stock and "to broaden and enhance [Galectin's] shareholder base . . . through a combination of dedicated list mailings, targeted content syndication, and other forms of measurable and effective outreach."

Hotz charged that TDM's disclosure was "minimal" and so difficult to find—whether in TDM's articles or on its website—that TDM's disclosure was ineffective in stopping the defendants' stock-promotion scheme.

The fourth promoter was Acorn. During the Class Period, Acorn published two promotional articles about Galectin, including a March 10, 2014 "Company Profile" detailing the drug's "blockbuster potential" and Galectin's competitiveness with Intercept. Galectin paid Acorn for these articles, and Acorn made disclosures. Acorn disclosed that its March 10, 2014 Company Profile

"should be viewed as a paid advertisement, to enhance the public awareness of Galectin Therapeutics (Nasdaq: GALT) and its securities."

Galectin itself did not disclose that it paid Acorn to write and publish the articles, even though Galectin did disclose that it paid Acorn for unspecified business services.

On May 13, 2014, Galectin filed an SEC Form 10-Q financial report. In the report, Galectin disclosed that it paid Acorn 3,000 shares of common stock as part of a "consulting agreement." The disclosure did not provide details about what the consulting agreement was for.

According to Hotz, the "consulting agreement" language was: (1) untimely, appearing two months after Acorn's March 10, 2014 Company Profile, and; (2) too vague to be considered as Galectin's disclosure that it paid Acorn to write and publish the promotional articles.

H. The Promotional Scheme

According to the complaint, the stock promoters timed the publication of their Galectin-related articles to coincide with Galectin's own press releases and "pump" Galectin's stock price. Following the publication of the flattering articles, defendant Galectin made the two ATM offerings to "[c]apitaliz[e] on the artificially inflated price of its common stock" and minimize the dilution of the defendants' "investment" in Galectin.

Hotz's complaint offers several examples of "market timing." First, on January 13, 2014, Galectin filed an SEC Form 8-K which discussed Galectin's competitiveness with Intercept. On January 28, 2014, TDM published an article which stated that, "if conclusions are to be drawn so early in the game, it's arguable that Intercept's peer Galectin Therapeutics may actually have a better NASH/fibrosis drug in GR-MD-02."

Second, on March 21, 2014, Galectin made its second ATM offering. On March 27, 2014, TDM published an article which described Galectin as "only a clinical data set away from a potential leap forward with GR-MD-02."

Third, on July 24, 2014, a TDM article discussed how Galectin was "nipping at Intercept's heels." The next day, Galectin issued a press release, announcing that it would soon present results from its latest drug study.

Whether due to the articles or not, Galectin's stock price increased during the drug's development cycle. When Galectin announced the beginning of its drug development program in January 2013, Galectin stock was trading at roughly $2 per share. By the time Galectin made its first ATM offering in October 2013, Galectin's stock had risen to "an all-time high of $12.45 per share." This price continued to climb to $15.31 per share by the time of Galectin's second ATM offering in March 2014.

Notably, there is no allegation that the defendants pumped the stock price and then sold it, which is called a "pump-and-dump" scheme. Rather, and as previously mentioned, Hotz claims the defendants pumped the stock price in order to minimize the dilution of their "investment" in Galectin when Galectin raised capital through its two ATM offerings.

I. Galectin's Stock Collapse

In late July 2014, several months after Galectin's second ATM offering, investment commentators began publishing articles and messages regarding suspected ties between Galectin and the stock promoters. The messages charged promotional touting; some included language such as, "[Galectin] paying penny stock promoters to issue misleading PRs" and "[o]nly someone being paid to shill would claim Galectin is 'nipping at Intercept's heels.'" On July 28, 2014, after the investment commentators published these articles and messages, Galectin's stock price began to fall. Over a one-day period from July 28, 2014 to July 29, 2014, Galectin's stock price fell from $15.91 per share to $7.10 per share, generating a loss of $8.81 per share (a 55% loss in the stock price).

The stock-price crash was a market reaction to the "revelation" of a stock-promotion scheme. Hotz alleges that, had Galectin disclosed its promoter relationships from the start, he and other class members would not have purchased

the stock. As it was, Hotz and other class members purchased the stock during the Class Period and suffered losses resulting from the stock price's decline in value.

J. Galectin's Representations in its ATM Offerings

In both the October 25, 2013 and March 21, 2014 ATM offerings, Galectin stated that it had not taken any action that caused or resulted in the "manipulation" of its stock price, as follows:

> Neither the Company, nor any Subsidiary, nor any of their respective directors, officers or controlling persons has taken, directly or indirectly, any action designed, or that has constituted or would reasonably be expected to cause or result in, under the Exchange Act or otherwise, the stabilization or manipulation of the price of any security of the Company to facilitate the sale or resale of the placement shares.

In those ATM offerings, Galectin also stated that it would not "directly or indirectly" manipulate its stock price in the future. Galectin publicly disseminated these assurances in its October 24, 2013 and March 21, 2014 SEC filings.

According to Hotz, Galectin broke this "no manipulation" promise because it "engaged in conduct designed to manipulate the price of its securities in order to generate capital with as little dilution as possible." Further, Galectin had hired stock promoters to "(i) embellish[] the putative effectiveness of GR-MD-02 . . . and (ii) overstat[e] Galectin's competitiveness with its so-called 'peer' Intercept."

In sum, Hotz's complaint alleges that the defendants' representation that they had not manipulated the stock price was false and actionable because: (1) the defendants paid promoters to tout the stock, and; (2) the defendants then were able to raise capital at higher stock prices to prevent dilution of their own "investments" in Galectin.[3]

K. Galectin's Omissions in SEC Form 10-K and 10-Q Reports

In addition to the "no manipulation" representations in the ATM offerings, Hotz's complaint faults the defendants for omitting that Galectin paid promoters when Galectin filed its SEC Form 10-K and 10-Q reports that described the results of its October 25, 2013 ATM offering. We set forth the complaint's allegations about those reports.

On November 12, 2013, Galectin filed an SEC Form 10-Q report. That quarterly report stated that Galectin, at that point, had issued 50,643 shares of common stock from the October 25, 2013 ATM offering. This sale had raised net proceeds of "approximately $531,000" at "an average price of $10.82 per share."

On March 21, 2014, Galectin filed an SEC Form 10-K report. That annual report provided updated and final sales figures as to the same October 25, 2013

[3]In response to the defendants' motion to dismiss, Hotz states, "Plaintiff does not challenge under § 10(b) a single substantive statement in the Stock Promoters' articles." Hotz also states, "Plaintiff's claims are not premised on the actual statements made in the Stock Promoters' articles."

ATM offering. The 10-K report stated that, as of December 31, 2013, Galectin had issued 99,942 shares from the October 25, 2013 ATM offering at an average price of $9.02 per share, resulting in net proceeds of approximately $944,000. The 10-K report also stated that, in January and February 2014, Galectin had issued an additional 2,663,647 shares from the October 25, 2013 offering, resulting in additional net proceeds of approximately $28,178,000. The January and February 2014 issuances had "completed the At Market Agreement."

On May 13, 2014, Galectin filed an SEC Form 10-Q report. That quarterly report provided the same final sales figures for the October 25, 2013 ATM offering as those provided in the March 21, 2014 annual 10-K report.

Hotz's complaint alleges that these reports failed to disclose "that Galectin had raised the above funds by secretly hiring the stock promoters to publish highly exaggerated and manipulative articles." Hotz's complaint also alleges that failing to disclose the use of stock promoters constituted a material omission in the reports, in violation of the securities laws.

L. Claim that Stock Promoters Are Agents of Galectin

As mentioned, § 17(b) of the Exchange Act requires stock promoters to disclose any consideration that they receive in exchange for their promotional material. 15 U.S.C. § 77q(b). Because Galectin paid the stock promoters to write the articles, Hotz's complaint alleges that the stock promoters became the "agents

of the Company," and that Galectin itself therefore assumed the stock promoters' disclosure responsibilities.

Because the stock promoters' articles did not disclose that Galectin paid for their publication, Hotz's complaint alleges that these articles were materially misleading. Accordingly, Hotz's complaint alleges that the defendants violated the securities laws by "recklessly disregarding" the material omissions of their agents.

M. Procedural History

On July 30, 2014, prior to this litigation, Marissa Ballesteros filed a complaint, individually and on behalf of others similarly situated, in the United States District Court for the District of Nevada against Galectin, Czirr, Traber, and Callicutt, alleging violations of §§ 10(b) and 20(a) of the Exchange Act. Hotz was a putative class member in this action by virtue of his purchase of Galectin stock during the putative Class Period.

On August 21, 2014, the parties in the Nevada case stipulated to consolidate that action with two other putative securities class actions brought by Galectin shareholders against the same defendants. On August 22, 2014, the District Court of Nevada issued an order consolidating the cases under the caption, "In re Galectin Therapeutics, Inc. Securities Litigation."

On September 29, 2014, Hotz filed a Motion for Appointment as Lead Plaintiff in the District of Nevada. Hotz claimed he was the "most adequate plaintiff" for the class because his monetary loss during the Class Period represented the largest known financial interest in the relief sought by the class.

On September 3, 2014, before Hotz had filed this motion for Appointment as Lead Plaintiff, defendants Galectin, Czirr, Traber, and Callicutt had separately filed a motion in the District of Nevada to transfer the consolidated class action to the Northern District of Georgia. On January 5, 2015, before ruling on Hotz's Motion for Appointment as Lead Plaintiff, the District Court of Nevada granted the defendants' motion to transfer and transferred the case to the Northern District of Georgia.

On March 24, 2015, the Northern District of Georgia granted Hotz's Motion for Appointment as Lead Plaintiff that he had filed in the District of Nevada. The Northern District of Georgia issued a schedule allowing Hotz forty-five days to file a consolidated complaint against the defendants, which Hotz did.

On May 8, 2015, Hotz filed the consolidated class action complaint here, which includes three counts. In Count I, Hotz alleges that defendants Galectin, Callicutt, and Traber misrepresented that they had not acted to manipulate Galectin's stock price, in violation of § 10(b) of the Exchange Act and Rule 10b-5(b).

In Count II, Hotz alleges that defendants Galectin, Czirr, Martin, Traber, Callicutt, and Mauldin defrauded the market by paying for a stock-promotion scheme without disclosing that scheme, in violation of § 10(b) of the Exchange Act and Rules 10b-5(a) and (c).

In Count III, Hotz alleges that defendants Czirr, Martin, Traber, Callicutt, Mauldin, and the 10X Fund are each liable in an individual capacity for Galectin's material omissions and misrepresentations, in violation of § 20(a) of the Exchange Act. This is a claim of derivative liability, alleging that defendants Czirr, Martin, Traber, Callicutt, Mauldin, and the 10X Fund are "controlling persons" of Galectin by virtue of their positions in Galectin's corporate structure and participation in its day-to-day operations.

N. District Court's Order

On June 26, 2015, the defendants moved to dismiss Hotz's complaint for failure to state a claim. On December 30, 2015, the district court granted the motion.

As to Count I, the district court determined that Galectin did not materially mislead investors by failing to disclose defendants' payment to the stock promoters. First, the district court noted that paying for promotional articles does not constitute price "manipulation." The district court ruled that, because it is permissible to use stock promoters, the defendants did not impermissibly

manipulate the company's stock price. Therefore, the defendants did not contradict themselves when they publicly represented that they had not manipulated Galectin's stock price.

Second, under interpretive Supreme Court law, the defendants did not make, and are not liable for, the stock promoters' own statements. Relying on Janus Capital Group, Inc. v. First Derivative Traders, the district court reasoned that one must "make" a material misstatement or omission in order to be liable for that misstatement or omission under the securities laws. 564 U.S. 135, 141, 131 S. Ct. 2296, 2301 (2011). According to the district court, the defendants' mere payment to the stock promoters was "insufficient" to suggest that, under Janus, Galectin "made" the statements in the stock promoters' articles. Therefore, the district court dismissed Count I.

As to Count II, the district court determined that Hotz's complaint failed to allege conduct different from that in Count I. Because this alleged conduct—making payments to promoters—was clearly permissible under Rules 10b5-(a) and (c), the district court dismissed Count II. In this appeal, Hotz does not challenge the district court's Count II ruling.

As to Count III, the district court dismissed Hotz's § 20(a) derivative claim because the lack of liability under § 10(b) of the Exchange Act could leave "no secondary liability under section 20(a)."

Hotz appeals the district court's ruling as to his § 10(b) and Rule 10b-5(b) claims in Count I and his § 20(a) claims in Count III.[4]

II. DISCUSSION

A. Pleading Requirements for a Rule 10b-5(b) Claim

To survive a motion to dismiss, a claim brought under Rule 10b–5(b) must satisfy: (1) the federal notice pleading requirements in Federal Rule of Civil Procedure 8(a)(2) ("Rule 8(a)(2)"); (2) the special fraud pleading requirements in Federal Rule of Civil Procedure 9(b) ("Rule 9(b)"), and; (3) the additional pleading requirements in the Private Securities Litigation Reform Act of 1995 ("PSLRA"). See Phillips v. Scientific–Atlanta, Inc., 374 F.3d 1015, 1016 (11th Cir. 2004) (reviewing a Rule10b-5(b) claim for a company's alleged exaggeration of product demand); Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1197, 1202 (11th Cir. 2001) (reviewing a Rule 10b-5(b) claim for a company's alleged misrepresentation of its profits).

Under Rule 8(a)(2), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The complaint must allege "enough facts to state a claim to relief that is plausible on its face," and the factual allegations "must be enough to raise a right to relief above

[4]We review de novo the district court's order dismissing a complaint. Garfield v. NDC Health Corp., 466 F.3d 1255, 1261 (11th Cir. 2006). In deciding a Rule 12(b)(6) motion, "all well-pleaded facts are accepted as true, and the reasonable inferences therefrom are construed in the light most favorable to the plaintiff." Id. (quoting Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1273 n.1 (11th Cir. 1999)).

the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 570, 127 S. Ct. 1955, 1965, 1974 (2007).

In addition to the Rule 8(a)(2) requirements, Rule 9(b) requires that, for complaints alleging fraud or mistake, "a party must state with particularity the circumstances constituting fraud or mistake," although "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). While Rule 9(b) does not abrogate the concept of notice pleading, it plainly requires a complaint to set forth: (1) precisely what statements or omissions were made in which documents or oral representations; (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) them; (3) the content of such statements and the manner in which they misled the plaintiff, and; (4) what the defendant obtained as a consequence of the fraud. Garfield v. NDC Health Corp., 466 F.3d 1255, 1262 (11th Cir. 2006); Ziemba, 256 F.3d at 1202. The "[f]ailure to satisfy Rule 9(b) is a ground for dismissal of a complaint." Corsello v. Lincare, Inc., 428 F.3d 1008, 1012 (11th Cir. 2005) (per curiam).

The PSLRA imposes additional heightened pleading requirements for Rule 10b–5(b) actions. For Rule 10b–5(b) claims predicated on allegedly false or misleading statements or omissions, the PSLRA provides that "the complaint shall specify each statement alleged to have been misleading, the reason or reasons why

the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u–4(b)(1). And for all private Rule 10b–5(b) actions requiring proof of scienter, "the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind [i.e., scienter]." Id., § 78u–4(b)(2). Although factual allegations may be aggregated to infer scienter, scienter must be alleged with respect to each defendant and with respect to each alleged violation of the statute. Phillips, 374 F.3d at 1016–18. If these PSLRA pleading requirements are not satisfied, the court "shall" dismiss the complaint. 15 U.S.C. § 78u–4(b)(3)(A).

B. General Legal Principles

"Section 10(b) of the Securities and Exchange Act of 1934 and the Securities and Exchange Commission's Rule 10b-5 prohibit making any material misstatement or omission in connection with the purchase or sale of any security." Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2407 (2014). Rule 10b-5(b) prohibits the making of any "untrue statement of a material fact" in connection with the purchase or sale of securities, as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

> . . . .
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . .
>
> . . . .
>
> in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

The Supreme Court has "long recognized an implied private cause of action to enforce the provision and its implementing regulation." Halliburton, 134 S. Ct. at 2405, 2407 (reviewing a Rule 10b-5(b) claim against the defendant for failure to disclose potential litigation costs and the expected revenue from certain contracts in public filings). To recover under Rule 10b-5(b), the plaintiff must prove: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss, and; (6) loss causation." Id. at 2407 (quotation omitted).

C. "Maker" of a Statement Under Janus

In part, Hotz claims that the defendants committed securities laws violations not by virtue of their own statements, but rather based upon the statements of the third-party stock promoters in their articles. Before addressing Hotz's other claims

here, we note the Supreme Court's treatment of whether, under Rule 10b-5(b), a company (Galectin) can be held liable for the false statement of a third party (the stock promoters).

Janus concerned statements in a prospectus made by the Janus Investment Fund ("the Fund"), a mutual fund. Janus Capital Group ("JCG") had created the Fund and had a wholly owned subsidiary, Janus Capital Management ("JCM"). These were all separate legal entities throughout all relevant periods of the case. Janus, 564 U.S. at 138, 131 S. Ct. at 2299-2300. In return for service fees, JCM provided advice and management services to the Fund. Id. at 138-140, 131 S. Ct. at 2299-2300. The Fund compensated JCM with fees calculated as a percentage of the Fund's net value. Id.

In 2002, the Fund filed public prospectuses stating that its fund was "not intended for market timing or excessive trading."[5] Id. at 139, 131 S. Ct. at 2300. The Fund's prospectuses also indicated that "[JCG and JCM] would implement

[5]Market timing is "a trading strategy that exploits time delay in mutual funds' daily valuation system." Janus, 564 U.S. at 139 n.1, 131 S. Ct. 2300 n.1. The price of a mutual fund's shares is ordinarily determined by a calculation that "usually happens once a day, at the close of most major U.S. markets." Id. A market-timing investor will make trades to exploit the differences in value between a mutual fund's calculated daily share price and the true value of its underlying assets, which may fluctuate at various times throughout the day. Id. For a more complete discussion, see Janus Capital Group, Inc. v. First Derivative Traders, 564 U.S. 135, 139 n.1, 131 S. Ct. 2296, 2300 n.1 (2011), and Disclosure Regarding Market Timing and Selective Disclosure of Portfolio Holdings, 68 Fed. Reg. 70402 (proposed Dec. 17, 2003) (to be codified at 17 C.F.R. pts. 239, 274). There is no allegation of market timing in this case.

measures to curb market timing in the Janus [mutual funds]." Id. at 139-40, 131 S. Ct. at 2299-2300.

In 2003, the Attorney General of the State of New York filed a complaint alleging that JCG and JCM had in fact entered into secret negotiations to permit market timing in funds managed by JCM. Id. at 139, 131 S. Ct. at 2300. The negotiations allegedly included discussion of permitting market timing in the Fund. Id.

While market timing is otherwise legal, this activity, if true, would have contradicted the Fund's prospectus disclosure that JCG and JCM were combating market timing. Id. at 139-40, 131 S. Ct. at 2299-2300. Therefore, investors allegedly pulled their money from the Fund once they learned that the Fund was likely participating in this kind of activity. Id. at 139, 131 S. Ct. at 2300. These monetary withdrawals lowered the value of the Fund, which in turn reduced the amount of fees paid to JCM. Id. And since JCM is a wholly owned subsidiary of JCG, the reduced fees coming in to JCM also lowered JCG's revenues. Id. at 139-40, 131 S. Ct. at 2299-2300.

Shortly after the filing of the New York state complaint, JCG's stock price fell nearly twenty-five percent. Id. at 140, 131 S. Ct. at 2300.

A representative of a class of JCG shareholders (the "shareholder representative") then filed suit against defendants JCG and JCM for violations of

§ 10(b) of the Exchange Act and Rule 10b-5(b). Id. The shareholder representative alleged that: (1) JCG and JCM were "significantly involved" in preparing the Fund's prospectuses, and; (2) therefore, JCG and JCM effectively "made" the statements appearing in the Fund's prospectuses. Id. at 147-48, 131 S. Ct. at 2305. The shareholder representative alleged that JCG and JCM were liable for the statements in the Fund's prospectuses, which misrepresented that JCG and JCM would combat market timing. Id. at 139-40, 131 S. Ct. at 2300-01.

The Fourth Circuit held that the shareholder representative "had sufficiently alleged that 'JCG and JCM, by participating in the writing and dissemination of the prospectuses [of the Fund], made the misleading statements contained in the [Fund] documents.'" Id. at 141, 131 S. Ct. at 2301 (quotation omitted).

Reversing, the Supreme Court held that the defendants JCG and JCM were not the "makers" of the statements in the Fund's prospectuses. The Supreme Court concluded that, "[f]or purposes of Rule 10b-5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." Id. at 142, 131 S. Ct. at 2302. "Without control, a person or entity can merely suggest what to say, not 'make' a statement in its own right." Id. Thus, one who even "prepares or publishes a statement on behalf of another is not its maker." Id.

Applying this Rule 10b-5 "statement-maker" test, the Supreme Court reversed the Fourth Circuit's decision, effectively reinstating the district court's order of dismissal of the § 10(b) and Rule 10b-5(b) claims against defendants JCG and JCM. Although JCG and JCM maintained a "well-recognized and uniquely close relationship" with the Fund as "its investment adviser," the Supreme Court concluded that the shareholder representative failed to allege sufficiently that JCG or JCM had "made" the statements in the Fund's prospectuses. Id. at 145, 147-48, 131 S. Ct. at 2303-05. Neither JCG nor JCM "filed the prospectuses," nor had the shareholder representative shown that any prospectus language "came from [JCG and JCM] rather than Janus Investment Fund." Id. at 147, 131 S. Ct. at 2305. Therefore, even if the defendants JCG and JCM assisted the Fund in crafting those statements, "this assistance, subject to the ultimate control of Janus Investment Fund, [did] not mean that [JCG and JCM] 'made' any statements in the prospectuses." Id. at 148, 131 S. Ct. at 2305.

To the extent that Hotz bases his Rule 10b-5(b) claim on the content of, or the omissions in, the articles by the stock promoters, the Supreme Court has foreclosed that claim. The Supreme Court has held that a defendant must have "made" the statement to be liable for a violation of Rule 10b-5(b). Id. at 141, 131 S. Ct. at 2301. While Hotz has set forth allegations that the defendants worked in conjunction with stock promoters to promote Galectin's stock, particularly with

respect to the timing of articles by the stock promoters and company press releases, Hotz has not included sufficient allegations to support a finding that Galectin had "ultimate authority" or "control" over the stock promoters' statements. Id. at 142, 131 S. Ct. at 2302. Even though Galectin paid for the stock promoters' articles, that is not sufficient to support a claim under Rule 10b-5(b). See id. at 148, 131 S. Ct. at 2305. Payment for the promotional articles does not mean that Galectin is the maker of the statements in the articles.[6] Given the bereft factual allegations here, Galectin is not liable for any statements or omissions in the stock promoters' articles.

D. Representation of No Manipulation of Stock Price

The next question is whether Galectin's statement in the ATM offerings—that it has not taken action that caused or resulted in manipulation of its stock price—is an "untrue statement of a material fact," given that Galectin paid stock promoters to "tout" the stock and did not disclose those payments in the ATM offerings. For several reasons, we conclude that Galectin's "no manipulation" statement is not an "untrue statement of a material fact" in violation of § 10(b) of the Exchange Act or Rule 10b-5(b).

[6]We also see no allegation in the complaint that any statement in the articles was false. Rather, the complaint describes the articles as "exceedingly boastful." Even so, without ultimate authority or control over the final content, none of the defendants is the "maker" of the statements in the articles authored by the third-party promoters. Janus, 564 U.S. at 142, 131 S. Ct. at 2302.

We start with the premise that nothing in the securities laws prohibits Galectin as a company (issuing a regulated security) from hiring analysts to promote Galectin, circulating positive articles about its drug development, or recommending the purchase of Galectin's stock. Under § 17(b) of the Securities Act, the duty to disclose promotional payments lies with the parties that receive the payments for promotional activities. 15 U.S.C. § 77q(b). There is no statutory duty to disclose imposed on the issuer—here defendant Galectin—which paid for the promotional articles or activities. Garvey v. Arkoosh, 354 F. Supp. 2d 73, 83 (D. Mass. 2005).

"It may seem odd to the uninitiated, but nothing in the securities laws bars the issuer of a regulated security from paying an analyst for a stock recommendation." Id. "[T]he approach taken by the securities laws-in [sic] practical recognition of the fact that most market research is performed by analysts who are paid by brokerage firms, investment banks, and other marketers of securities—is to require disclosure of the fact that the analyst has been paid" by the analyst or the stock promoter in the article itself. Id. This way, the disclosure is visible to the reader in the article. Id. Galectin's engagement of third parties to promote awareness of its stock and to encourage investment in its business was legal and did not constitute stock-price manipulation. Because the securities laws otherwise place the duty to disclose payments only on the stock promoters here,

the defendants had no additional duty to disclose their payments to the stock promoters.

We recognize Hotz's contention that Galectin represented that it had not taken any action designed to cause "manipulation" of its stock price. What Hotz ignores, however, is the nuanced meaning of "manipulation" as that term is used in the securities laws. Manipulation "is virtually a term of art when used in connection with securities markets," generally referring "to practices, such as wash sales, matched orders or rigged prices, that are intended to mislead investors by artificially affecting market activity." Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 476, 97 S. Ct. 1292, 1302 (1977) (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199, 96 S. Ct. 1375, 1384 (1976)). "[Manipulation] connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities." Ernst & Ernst, 425 U.S. at 199, 96 S. Ct. at 1384.

Here, there is no allegation that defendant Galectin or the other defendants engaged in any kind of simulated market activity or transactions designed to "create an unnatural and unwarranted appearance of market activity," which is required to constitute market manipulation. Santa Fe, 403 U.S. at 476-77, 97 S. Ct. at 1302 (quoting Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 43, 97 S. Ct. 926, 950 (1977)). The defendants' lawfully engaging third parties to "promote" the

Galectin stock through publications of boastful but truthful articles is not stock price "manipulation" as a matter of law. But cf. Levy v. United States, 626 F. App'x 319, 322 (2d Cir. 2015) (unpublished) (quotation omitted) (holding that the coordinated pre-promotion buying of stock was manipulation because potential investors "would check the activity and it would entice [them] to buy the stock," and the purchases would "artificially affect[] market activity in order to mislead investors"). As the district court correctly held, the defendants' lawful engagement of promotional firms to publicize Galectin and encourage investment in its shares was legal and did not constitute impermissible actions to manipulate the price of its shares.

Moreover, the complaint alleges only that Galectin did not disclose that it hired third parties to publish information that Hotz concedes was neither false nor misleading. As the district court correctly determined, that conduct is not "manipulation"; to the contrary, it is both contemplated and permitted under the securities laws. See 15 U.S.C. § 77q(b) (addressing the publication of stock recommendations in exchange for consideration and requiring disclosure of such compensation by the person who receives it, but not prohibiting such payments or requiring any disclosure by the issuer). Because the complaint fails to allege conduct by the defendants amounting to "manipulation" of Galectin's stock price, the complaint similarly fails to allege that Galectin's "no manipulation" statements

were untrue. As the "no manipulation" statement was not false or misleading (either standing alone, or in the absence of disclosure regarding engagement of the promotional firms), there was no Rule 10b-5(b) violation. The district court did not err in dismissing Hotz's misrepresentation claim.[7]

E. Fraud by Omission

"Silence, absent a duty to disclose, is not misleading under Rule 10b-5." Basic Inc. v. Levinson, 485 U.S. 224, 239 n.17, 108 S. Ct. 978, 987 n.17 (1988). Section 10(b) of the Exchange Act and Rule 10b-5(b) do not create an affirmative duty to disclose any and all material information. Nevertheless, Rule 10b-5(b) does

[7]Because there is no circuit precedent in this area, Hotz relies heavily on the decisions in In re CytRx Corp. Securities Litigation, No. CV 14-1956-GHK (PJWx), 2015 WL 5031232 (C.D. Cal. July 13, 2015) and in In re Galena Biopharma, Inc. Securities Litigation, 117 F. Supp. 3d 1145 (D. Or. 2015). Besides being non-precedential here, those decisions have materially different facts from this case. In both CytRx and Galena, the company's executive officers edited, approved, and controlled the content of the articles before payment and publication. CytRx, 2015 WL 5031232 at *2; Galena, 117 F. Supp. 3d at 1158, 1187 (concluding that the defendants had "ultimate authority" over the content). The articles were described as "misleading" and were written under different aliases without disclosing that the companies controlled the content and paid for the articles. CytRx, 2015 WL 5031232 at *9; Galena, 117 F. Supp. 3d at 1158. In Galena, some articles falsely disclaimed that they were not paid promotions. Galena, 117 F. Supp. 2d at 1158. In CytRx, the district court concluded that the defendants' plan was "not simple marketing" by an independent third party, but rather a purposeful campaign in which the defendants reviewed, edited, approved, and controlled the "misleading" articles before publication. CytRx, 2015 WL 5031232 at *8.

In addition, in Galena, the officers "pumped and dumped" (sold their stock after the price rose). Galena, 117 F. Supp. 3d at 1160. In CytRx, the directors allegedly took advantage of the inflated stock prices and "award[ed] themselves . . . with massive amounts of perfectly-timed stock option grants." 2015 WL 5031232 at *2 (alteration in original). This case is, at most, a "pump" without a "dump." Cf. Stephens v. Uranium Energy Corp., Civil Action No. H-15-1862, 2016 WL 3855860, at *1-2 (S.D. Tex. July 15, 2016) (determining that the plaintiff failed to allege a "pump and dump" scheme against a uranium production company where the company paid third-party promoters for company advertisements but the company directors did not sell the company stock while the price was inflated).

"prohibit[] not only literally false statements, but also any omissions of material fact 'necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.'" FindWhat Investor Grp. v. FindWhat.com, 658 F.3d 1282, 1305 (11th Cir. 2011) (quoting 17 C.F.R. § 240.10b-5(b)). See also Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 44, 131 S. Ct. 1309, 1321 (2011) (quoting same).

Hotz claims that Galectin's 10-K and 10-Q reports of the results of its October 25, 2013 ATM offering were misleading because Galectin omitted that it had paid third parties to write articles promoting its stock. The reports showed the number of new shares issued in that ATM offering, the price per share, and the net proceeds raised. There is no allegation that those financial figures were inaccurate. Rather, Hotz alleges that by reporting those financial facts—even if they were true—a duty arose for Galectin to disclose that it had paid third parties for stock-promotion articles.[8]

"By voluntarily revealing one fact about its operations, a duty arises for the corporation to disclose such other facts, if any, as are necessary to ensure that what was revealed is not 'so incomplete as to mislead.'" FindWhat, 658 F.3d at 1305 (quoting Backman v. Polaroid Corp., 910 F.2d 10, 16 (1st Cir. 1990) (en banc)).

[8]Hotz's complaint does not allege that Galectin's 10-K and 10-Q reports otherwise made boastful or misleading statements about Galectin's market competitiveness. The portions of Galectin's reports cited in Hotz's complaint are limited to Galectin's disclosures of the financial figures from its October 23, 2013 ATM offering.

"[E]ven absent a duty to speak, a party who discloses material facts in connection with securities transactions assumes a duty to speak fully and truthfully on those subjects." Id. (alteration in original) (quoting In re K-tel Intern., Inc. Sec. Litig., 300 F.3d 881, 898 (8th Cir. 2002)). In sum, "a defendant may not deal in half-truths." Id. (quoting First Va. Bankshares v. Benson, 559 F.2d 1307, 1314 (5th Cir. 1977)).[9]

Given that Galectin's 10-K and 10-Q reports did no more than accurately report the number of shares sold, the price per share, and the net proceeds, we cannot say that Galectin, by reporting those figures, created a duty for itself to disclose that it had engaged and paid third parties to promote its stock. Notably too, for the same reasons that there was no duty on Galectin to disclose in the ATM offerings that it had paid third parties to write articles about Galectin, there was no duty on Galectin to disclose in the 10-K and 10-Q reports that it had paid the same third parties to write the same articles.[10]

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[9]This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

[10]As an alternative and independent ground, we conclude that Hotz's complaint also fails to state sufficient facts that, if true, establish the requisite scienter. Under the PSLRA, the plaintiff must state with particularity facts giving rise to a "strong inference" that the defendant acted with scienter. 15 U.S.C. § 78u-4(b)(2)(A). "[S]cienter consists of intent to defraud or 'severe recklessness' on the part of the defendant." Edward J. Goodman Life Income Trust v. Jabil Circuit, Inc. 594 F.3d 783, 790 (11th Cir. 2010) (quoting McDonald v. Alan Bush Brokerage Co., 863 F.3d 809, 814 (11th Cir. 1989)). Severe recklessness is "limited to those highly unreasonable omissions or misrepresentations that involve . . . an extreme departure from the standards of ordinary care" that are so likely to mislead that "the defendant must have been aware of it." Mizzaro v. Home Depot, Inc., 544 F.3d 1230, 1238 (11th Cir. 2008) (quoting Bryant, 187 F.3d at 1284). Under the PSLRA's heightened pleading standard, the factual

The omission of facts is actionable only to the extent that the absence of those facts would, under the circumstances, render another reported statement misleading to the "reasonable investor, in the exercise of due care." Id. at 1305 (quoting Sec. & Exch. Comm'n v. Texas Gulf Sulphur Co., 401 F.2d 833, 863 (2d Cir. 1968)). Commercial analysts are routinely paid to promote stocks. It cannot be said that the reasonable securities investor would conclude, based on Galectin's reporting of the number of shares sold, price per share, and net proceeds of its October 25, 2013 ATM offering, without more, that Galectin was in some way certifying or representing that it had not paid promoters to tout its stock to potential investors. It follows that Galectin's silence on this separate payment issue in its 10-K and 10-Q reports did not render the true facts in those reports misleading within the meaning of Rule 10b-5(b).

F. Count III—Claim Under § 20(a) of the Exchange Act

Section 20(a) of the Exchange Act imposes joint and several liability on "[e]very person who, directly or indirectly, controls any person liable" for violation of the securities laws. 15 U.S.C. § 78t(a). "Control person liability is secondary only and cannot exist in the absence of a primary violation." Southland Sec. Corp.

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allegations in Hotz's complaint are insufficient to state a claim of scienter. See Stephens, 2016 WL 3855860 at *14 (concluding that, absent an affirmative duty to disclose the payments to third-party companies promoting the company's stock, the defendant company officers' general knowledge of the promotional campaign did not support an inference that they acted with scienter).

v. Inspire Ins. Sols., Inc., 365 F.3d 353, 383 (5th Cir. 2004). For control-person liability, a plaintiff must allege: "(1) a primary violation of federal securities laws," and; "(2) that the defendant exercised actual power or control over the primary violator." Howard v. Everex Sys., Inc., 228 F.3d 1057, 1065 (9th Cir. 2000).[11] Because Hotz's complaint does not allege a primary violation, Hotz's § 20(a) claim fails.

III. CONCLUSION

For all of these reasons, we affirm the district court's dismissal of Hotz's complaint.

AFFIRMED.

[11]"Control" is defined by the SEC as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." 17 C.F.R. § 230.405; see also Howard, 228 F.3d at 1065 n.9 (accepting the SEC's definition of control). Whether an individual defendant is a "controlling person 'is an intensely factual question,' involving scrutiny of the defendant's participation in the day-to-day affairs of the corporation and the defendant's power to control corporate actions." Kaplan v. Rose, 49 F.3d 1363, 1382 (9th Cir. 1994) (quoting Arthur Children's Trust v. Keim, 994 F.2d 1390, 1396-97 (9th Cir. 1993)).