

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

MICHAEL KIRSCH and SIU YIP,

Appellants,

v.

PETER G. TRABER; JAMES C. CZIRR;  
JACK CALLICUTT; GILBERT F.  
AMELIO; KEVIN D. FREEMAN;  
ARTHUR R. GREENBERG;  
ROD D. MARTIN; JOHN F. MAULDIN;  
STEVEN PRELACK; HERMAN PAUL  
PRESSLER, III; DR. MARC RUBIN;  
AND GALECTIN THERAPEUTICS,  
INC., A NEVADA CORPORATION,

Respondents.

**Supreme Court No. 70854**

Appeal from Case No. A-14-706397-B  
in the Eighth Judicial District Court  
of Clark County, Nevada

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**RESPONDENTS' RESPONSE IN OPPOSITION TO  
APPELLANT'S MOTION FOR LEAVE TO FILE A NOTICE OF  
SUPPLEMENTAL AUTHORITIES PURSUANT TO NRAP 31(e)**

*Submitted by:*

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and Respondent/Nominal Defendant Galectin Therapeutics, Inc.*

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 and Nominal Defendant Galectin Therapeutics, Inc. (collectively, “Defendants”) oppose Plaintiff-Appellant Michael Kirsch’s (“Plaintiff” or “Kirsch” and, together with Plaintiff-Appellant Siu Yip, “Plaintiffs”) Motion for Leave to File a Notice of Supplemental Authorities Pursuant to NRAP 31(e) (the “Motion”). Plaintiff’s Motion seeks to inject a new (and previously waived) “due process” argument into this appeal, and therefore must be denied under the clear language of NRAP 31(e) prohibiting parties from raising “new points or issues” via notice of supplemental authorities.

**I. PLAINTIFF’S PROPOSED NOTICE OF SUPPLEMENTAL AUTHORITIES IMPROPERLY RAISES “NEW POINTS AND ISSUES” THAT ARE NOT BEFORE THIS COURT.**

NRAP 31(e), pursuant to which Plaintiff Kirsch seeks leave to submit two opinions from a lower Delaware court addressing issues of Delaware law as purported “supplemental authorities,” provides in pertinent part that:

When pertinent and significant authorities come to a party’s attention after the party’s brief has been filed, but before a decision, a party may promptly advise the Supreme Court or Court of Appeals by filing and serving a notice of supplemental authorities, setting forth the citations. The notice shall provide references to the page(s) of the brief that is being supplemented. The notice shall further state concisely and without argument

the legal proposition for which each supplemental authority is cited. ***The notice may not raise any new points or issues.***

NRAP 31(e) (emphasis added).

Plaintiff's Motion runs directly afoul of NRAP 31(e)'s provision stating that a notice of supplemental authorities "may not raise any new points or issues." Plaintiff requests leave to address two Delaware Court of Chancery opinions (one published more than a full year before Plaintiffs filed their opening brief) concerning a "due process" issue that Plaintiffs have never before raised, either in this Court or below. *See* Motion at 3-4 (citing *In re Wal-Mart Stores, Inc. Delaware Derivative Litigation*, 167 A.3d 415 (Del. Ch. 2017) and *In re EZCORP Consulting Agreement Derivative Litigation*, 130 A.3d 934 (Del. Ch. 2016)); *see also* Motion Ex. A (the "Proposed Notice"); Plaintiffs' Opening Brief and Reply Brief. Instead, Plaintiffs' appeal has focused entirely on a separate and distinct question of *Nevada* law on which *Wal-Mart* and *EZCORP* shed no light whatsoever—whether an August 2015 order issued by the district court in this case constituted a "final judgment" for purposes of *Nevada* issue preclusion law. *See, e.g.*, Reply Brief at 1 (stating that "the remaining issue of this appeal is whether or not the lower court's August 5, 2015 written Order (denying Respondents' motion to dismiss for lack of sufficient allegations of demand futility) met the standard of judgment finality for issue preclusion under Nevada law"); *see also* Opening Brief at 21 (characterizing the appeal as turning on the following "pure legal question—

whether a non-Nevada state court may not reverse a judgment of a Nevada state court; and, whether or not a denial of a motion to dismiss in the present circumstances constitutes a ‘final judgment’ for purposes of preclusion law”); *id.* at 23 (“Thus, the core question presented by the present appeal is whether or not the lower court’s August 5, 2015 order denying Defendants’ Motion to Dismiss, constituted a ‘final judgment’ under Nevada preclusion law.”). The plain text of NRAP 31(e) forbids Plaintiffs from now seeking to inject a new and never before argued “due process” issue into this appeal via Mr. Kirsch’s Motion.

Further, Plaintiffs clearly waived this new due process argument by failing to raise it in the trial court or in their prior briefing on this appeal. Plaintiffs never cited *EZCORP* or asserted the due process issue addressed therein below or on appeal, even though *EZCORP* was published *before* Plaintiffs filed their brief in opposition to Defendants’ January 2016 Motion to Dismiss in the district court and more than one year before Plaintiffs filed their Opening Brief in this appeal.<sup>1</sup> Because Plaintiffs never raised this due process argument, the due process issue addressed in *EZCORP* and *Wal-Mart* has been waived, *see, e.g., Old Aztec Mine, Inc. v. Brown*, 623 P.2d 981, 983 (Nev. 1981) (holding that “a point not urged in

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<sup>1</sup> Plaintiff Yip was also a party plaintiff in the Georgia case in which the dismissal judgment given preclusive effect by the Nevada district court here was entered, and, thus, would have no grounds to assert any denial of “due process” based on the Nevada district court’s decision to afford preclusive effect to the Georgia judgment.

the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal”).

## **II. THE MOTION AND PROPOSED NOTICE MISCHARACTERIZE THE *WAL-MART* OPINION.**

In addition to improperly seeking to inject a new issue that has been waived, Plaintiff mischaracterizes the *Wal-Mart* opinion by asserting that *Wal-Mart* (1) “rul[ed] that a dismissal of a derivative action for failure to adequately plead demand futility cannot bind another non-party claimant seeking derivative standing in a different case” and (2) “h[eld] that preclusion of the second derivative claimant’s action violates due process.” Motion at 3-4; *see also* Proposed Notice at 2. No such “ruling” or “holding” appears in the *Wal-Mart* opinion. Instead, *Wal-Mart* makes a “recommend[ation] that the [Delaware] Supreme Court adopt the rule proposed in *EZCORP*”—a “rule” *Wal-Mart* describes as having “stated in *dictum* that, both as a matter of Delaware law and as a matter of due process, a judgment cannot ‘bind the corporation or other stockholders in a derivative action until the action has survived a Rule 23.1 motion to dismiss, or the board of directors has given the plaintiff authority to proceed by declining to oppose the suit.’” 167 A.3d at 516. Immediately following this recommendation, however, *Wal-Mart* acknowledges that “no court has done so [adopted the rule proposed in *EZCORP*] to date” and that “the [Delaware] Supreme Court previously declined to

embrace such a rule in the context of considering the question of privity in derivative litigation.” *Id.* *Wal-Mart* also states that:

Courts that have considered whether a stockholder plaintiff in a second derivative action is barred from relitigating the issue of demand futility based on the failure of a plaintiff to demonstrate demand futility in a first derivative action—in particular two federal circuit courts—have found that due process is satisfied if the plaintiff in the first action adequately represented other stockholders of the corporation who were not parties to the first action. In doing so, those courts have applied principles from the Restatement (Second) of Judgments (the “Restatement”).

*Id.* at 515.<sup>2</sup> Finally, *Wal-Mart* expressly states that if the Delaware Supreme Court disagrees with the recommendation to “adopt the rule proposed in *EZCORP*,” then the Delaware Chancery Court’s earlier ruling in the *Wal-Mart* case, dismissing the complaint on preclusion grounds in light of a prior judgment of dismissal entered by an Arkansas federal district court is “consistent with prevailing law and should be affirmed.” 167 A.3d at 530.

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<sup>2</sup> One of the “two federal circuit courts” referenced in the *Wal-Mart* passage quoted above is the Ninth Circuit’s decision in *Arduini v. Hart*, 774 F.3d 622 (9th Cir. 2014)—a decision Defendants cited in their Answering Brief in this Court in support of an affirmance of the appealed judgment. *See* 167 A.3d at 521-23 (discussing *Arduini*); Answering Brief at 32. Further, Plaintiffs here never argued to the Nevada district court or this Court that they were not “adequately represented” by the plaintiffs in the Georgia case in which the judgment of dismissal given preclusive effect by the Nevada district court was entered. Indeed, Plaintiff Yip *was* one of the plaintiffs in the Georgia case.

**III. THE DELAWARE SUPREME COURT’S RULING ON THE *WAL-MART* RECOMMENDATION TO “ADOPT THE RULE PROPOSED IN *EZCORP*” WILL NOT IMPACT ANY ISSUE BEFORE THE COURT IN THIS APPEAL.**

As of the date of this filing, the Delaware Supreme Court has not ruled on the *Wal-Mart* appeal. But even if the Delaware Supreme Court were subsequently to adopt the proposed *EZCORP* “rule,” as discussed above, that “rule” relates to issues of Delaware law and due process that are not before this Court in this appeal. Instead, as Plaintiffs themselves have framed this appeal, the lone “remaining issue of this appeal is whether or not the lower court’s August 5, 2015 written Order (denying Respondents’ motion to dismiss for lack of sufficient allegations of demand futility) met the standard of judgment finality for issue preclusion under Nevada law.” Reply Brief at 1. As such, the Delaware Supreme Court’s ultimate disposition of the recommendation in *Wal-Mart* will not impact any issue that Plaintiff has asked the Court to decide in adjudicating the present appeal.

#### IV. CONCLUSION

For all of the above reasons, Defendant respectfully request that the Court deny Plaintiff Kirsch's Motion.

Dated this 13th day of November, 2017.

s/ Ryan W. Daniels

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## **CERTIFICATE OF SERVICE**

I hereby certify that Respondents' Response in Opposition to Appellant's Motion for Leave to File a Notice of Supplemental Authorities Pursuant to NRAP 31(e) was filed electronically with the Nevada Supreme Court on the 13th day of November, 2017. Electronic service shall be made in accordance with the Master Service List as follows:

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