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

NRAP 31(e) RESPONSE TO
APPELLANT'S NOTICE OF SUPPLEMENTAL AUTHORITIES

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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") hereby submit this Response, pursuant to NRAP 31(e), to Plaintiff-Appellant Kirsch's (hereinafter, "Plaintiff") Notice of Supplemental Authorities filed on December 6, 2017.[1]

I. PLAINTIFF'S SUPPLEMENTAL AUTHORITIES ADDRESS ISSUES THAT ARE NOT BEFORE THIS COURT AND HAVE BEEN WAIVED.

Plaintiffs' "supplemental authorities"—two Delaware Court of Chancery opinions (one published more than a full year before Plaintiffs filed their opening brief in this appeal)—address issues of *Delaware* state law and "due process" that are not before the Court in this appeal. Indeed, Plaintiffs have waived the "due process" issue discussed in these Delaware opinions (*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)) and Plaintiff's notice, having never before raised it, either in the district court below or

[1] Defendants are mindful of the Court's December 6, 2017 Order indicating that the Court considered certain of the points made herein in deciding Plaintiff's motion for leave to file the notice supplemental authorities. Now that the notice has been filed, Defendants submit this response, pursuant to NRAP 31(e), to ensure a complete record.

in briefs filed in this appeal.[2] *See Carrigan v. Comm'n on Ethics*, 129 Nev. 894, 905 n.6, 313 P.3d 880, 887 n.6 (2013) ("Arguments not raised . . . in the district court normally cannot be raised for the first time on appeal."); *accord Old Aztec Mine, Inc. v. Brown*, 623 P.2d 981, 983 (Nev. 1981). 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

[2] Plaintiff 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.

order denying Defendants' Motion to Dismiss, constituted a 'final judgment' under Nevada preclusion law.").

II. THE NOTICE MISCHARACTERIZES 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." 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.[3] 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.

[3] 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. 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 noted 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

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disposition of the recommendation in *Wal-Mart* will not impact any issue for decision in the present appeal.

Dated this 7th day of December, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing NRAP 31(e) Response to Appellant's Notice of Supplemental Authorities was filed electronically with the Nevada Supreme Court on the 7th day of December, 2017. Electronic service shall be made in accordance with the Master Service List as follows:

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I further certify that I served copies of Respondents' Answering Brief and Appendix upon the following other counsel of record, postage prepaid, addressed as follows:

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