IN THE SUPREME COURT OF THE STATE OF NEVADA

ARCHON CORPORATION, PAUL W. LOWDEN, and SUZANNE LOWDEN, Petitioners, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JOE HARDY, DISTRICT COURT JUDGE Respondents, *and* STEPHEN HABERKORN, an individual, Real Party in Interest.	Supreme Court No. State Court Case No. A-16-738260-B

PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

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NRAP 26.1 DISCLOSURE

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

1. Archon Corporation ("Archon") is a Nevada corporation with no parent or subsidiary. No publicly held company owns ten percent or more of Archon's stock.

2. Paul W. Lowden and Suzanne Lowden are individuals.

3. Petitioners are currently represented by the law firm of Dickinson Wright PLLC in both the District Court and in this Court.

DATED this 1st day of December, 2016.

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Archon Corporation ("Archon"), Paul W. Lowden, and Suzanne Lowden (collectively, "Petitioners"), by and through their counsel of record, Dickinson Wright PLLC, hereby petition this Court for a writ of prohibition or mandamus. This Petition is made pursuant to NRAP 21 and is supported and verified by the attached affidavit of Mr. Lowden and Petitioners' Appendix, which are being submitted concurrently.

ROUTING STATEMENT

Petitioners' writ petition does not fall into one of the categories of cases presumptively assigned to the Court of Appeals pursuant to NRAP 17(b).

STATEMENT OF RELIEF SOUGHT

Petitioners respectfully request that the Court grant this writ petition and issue a decision that (1) vacates the District Court's decision applying cross-jurisdictional tolling; and (2) directs the District Court to reconsider Petitioners' Motion to Dismiss without applying cross-jurisdictional tolling.

STATEMENT OF ISSUE PRESENTED

Did the District Court err by applying the doctrine of cross-jurisdictional tolling when that doctrine is not recognized in Nevada and conflicts with Nevada statutes?

FACTUAL AND PROCEDURAL BACKGROUND

1. The Parties

Archon, formerly known as Sahara Gaming Corporation, is a Nevada

corporation with its principal place of business in Clark County, Nevada. Petitioners' Appendix ("PA") 019 ¶ 12. Paul W. Lowden is a director and the President of Archon. PA 020 ¶ 4. Suzanne Lowden is a director, the Secretary, and Treasurer of Archon. *Id.* ¶ 6.

Plaintiff Stephen Haberkorn is an individual who claims to have been the beneficial owner of 2,254 shares of Archon's Exchangeable Redeemable Preferred Stock ("EPS") prior to the time it was redeemed on August 31, 2007. *See* PA 019 ¶ 1; PA 022 ¶¶ 16, 17. Haberkorn also claims to be the beneficial owner of 40,000 shares of Archon's common stock. *Id.* ¶ 16.

2. Archon's Redemption of its EPS

In 1993, Archon adopted a resolution creating nine million shares of EPS. PA 021 ¶ 12. The rights of the holders of Archon's EPS, including dividends, redemption and voting rights are described in, among other documents, the 1993 Certificate of Designation of Exchangeable Redeemable Preferred Stock (the "Certificate"). PA 022 ¶ 13 and PA 038-045. Pursuant to the Certificate, the shares had no maturity date or mandatory redemption date. *Id.* Pursuant to the express terms of the Certificate, Archon elected to pay dividends in the form of additional shares of preferred stock for the first six dividend dates, ending September 30, 1996. PA 092-093 ¶ 27. Thereafter, Archon never declared dividends. PA 093 ¶ 29. As such, Archon accrued dividends. PA 092-093 ¶¶ 25-31.

On July 31, 2007, Archon issued a Notice of Redemption announcing that it would redeem the outstanding Preferred Stock on August 31, 2007, at the redemption price of $5.241 per share. PA 022 ¶17. The redemption price of $5.241 per share was calculated in accordance with Archon's audited financial statements and SEC filings. On July 31, 2007, Archon gave notice that it would redeem the outstanding EPS on August 31, 2007, and the shares were redeemed on that day. *Id.*

3. Archon's corporate actions following Redemption of the EPS

The *Haberkorn* Complaint contains several allegations regarding Archon's corporate actions following the redemption of Archon's EPS, including the following:

- During the quarter ended June 30, 2008, Archon offered to purchase up to 600,000 shares of its common stock at a price of $40.00 per share. PA 023 ¶ 20.

- In December 2008 and June 2010, Paul Lowden and Suzanne Lowden approved of plans for Archon to make periodic open market purchases of its common stock. PA 023 ¶ 21. Archon ultimately purchased a total of 225,000 shares on November 3, 2010. *Id.*

- In March of 2011, Archon implemented a reverse stock split. *Id.* ¶ 22. As a result of this split, stockholders who had fewer than 250 shares were paid the market value of their shares of stock as of the close of trading on February 15, 2011. *Id.* ¶ 23. A forward split then restored the remaining stockholders to their pre-reverse-split holdings. *Id.* ¶ 22. This action was intended to reduce the number of shareholders below three hundred, which in turn would eliminate Archon's obligation to file certain periodic financial reports with the Securities and Exchange Commission. *Id.*

- On March 31, 2011, Archon filed a Form 15 with the SEC, which resulted in the termination of Archon's registration with the SEC and suspended Archon's duty to file periodic financial reports with the SEC. *Id.* ¶ 24.

These factual allegations are unique to the *Haberkorn* Complaint and do not appear in any of the actions discussed below, namely, *Rainero*, *Raider*, *D.E. Shaw* or *Leeward*.

4. 2007 lawsuits challenging the redemption price

Following the redemption of the EPS, three actions were instituted against Archon by preferred shareholders in the United States District Court for the District of Nevada challenging the redemption price: (1) an August 27, 2007, Complaint filed by a group of hedge funds, D.E. Shaw Laminar Portfolios, LLC et al., case number 2:07-cv-01146-PMP-(LRL) ("*D.E. Shaw*"); (2) a November 20, 2007, Complaint filed by David Rainero on behalf of himself and all preferred shareholders including Mr. Haberkorn, case number 2:07-cv-01553-GMN-(PAL) ("*Rainero*"); and (3) a January 2, 2008, Complaint filed by another hedge fund, Leeward Capital, LP, case number 2:08-cv-00007-PMP-(LRL) ("*Leeward*").

In 2010, the federal District Court granted summary judgment in favor of the plaintiffs in the *D.E. Shaw* and *Leeward* actions, determining that the EPS redemption price should have been $8.69 per share. PA 024 ¶ 27. This

determination was affirmed by the Ninth Circuit Court of Appeals on September 19, 2012. PA 024 at ¶ 28.

Two years after the Ninth Circuit's affirmance in *D.E. Shaw* and *Leeward*, on September 29, 2014, the federal District Court dismissed the *Rainero* action for lack of subject matter jurisdiction after the parties briefing on the issue. PA 054:19-23. Mr. Rainero has appealed the Court's Order to the Ninth Circuit Court of Appeals, and the appeal has been argued and is fully briefed and pending. *Id.*

5. Mr. Haberkorn files this lawsuit.

After *Rainero* was dismissed, Mr. Haberkorn initiated this case on February 29, 2016. In very limited ways, Mr. Haberkorn asserted similar claims to those made in *Rainero*. Even though contrary to fourteen years of accounting audits and GAAP standards, both *Haberkorn* and *Rainero* alleged that Archon did not properly calculate the redemption price of the EPS, claiming that the redemption price should have been $8.69 per share instead of $5.241. PA 003 ¶ 13, 005 ¶ 26; PA 022-023 ¶¶ 17-19. On the basis of such factual allegations, both *Haberkorn* and *Rainero* alleged damages of $3.45 per share of EPS. PA 007 ¶ 42; PA 027 ¶ 46-47.

However, *Haberkorn* also asserted numerous factual allegations and legal claims that were never asserted in *Rainero*. Unlike *Rainero*, *Haberkorn* challenged Archon's decision to offer to purchase 225,000 shares of Archon's common stock in 2010, *claiming that this purchase was a breach of the*

Certificate. PA 023 ¶ 21; PA 028 ¶ 52. *Haberkorn* challenged Archon's 2011 reverse stock split, claiming the split violated the terms of the Certificate and constituted a breach of fiduciary duty. PA 023 ¶ 22; PA 026 ¶ 41; PA 028 ¶ 53, and PA 032 ¶ 77. Finally, *Haberkorn* challenged the termination of Archon's de-registration with the SEC in 2011, claiming that the de-registration of Archon with the SEC constituted a breach of fiduciary duty. PA 023 ¶ 24; PA 025 ¶ 38; PA 031-032 ¶¶ 75-78. None of these allegations or claims were asserted in *Rainero*. Indeed, the *Rainero* Complaint made no mention of Archon's common stock, and Mr. Rainero never owned any shares of Archon's common stock.

6. The District Court finds that cross-jurisdictional tolling applies to the *Haberkorn* lawsuit.

On April 6, 2016, Petitioners filed a motion to dismiss the *Haberkorn* Complaint, arguing that the District Court should dismiss the action because it was untimely and filed outside the statute of limitations period found in NRS 11.190. Petitioners argued that because Mr. Haberkorn knew or should have known of his claims against Archon on or about August 31, 2007, his Complaint filed in 2016 was clearly untimely. In response, Mr. Haberkorn did not dispute that his claims were filed beyond the six-year limitations period but argued that the running of the statute of limitations on his claims was tolled based on the doctrine of class action tolling as articulated in *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). Mr. Haberkorn argued that his claims were

"substantially the same claims" as were asserted in *Rainero*, and that Nevada should adopt the doctrine of cross-jurisdictional tolling, in which the filing of a class action in a federal District Court would toll the statute of limitations for Mr. Haberkorn's state law claims in Nevada's state courts. PA 059:3-26.

Petitioners noted that no court, including this Court, had found that Nevada would adopt cross-jurisdictional, class action tolling. PA 119-120. Petitioners further argued that the District Court should reject Haberkorn's request to adopt cross-jurisdictional tolling as the doctrine is controversial and has been rejected by many jurisdictions. PA 121-122. Petitioners noted that cross-jurisdictional tolling should be rejected because it (1) would increase the burden on Nevada's state court system without providing any benefit to Nevada; (2) would cause the commencement of Nevada's statute of limitations to depend on the determinations of other state and federal courts; and (3) was contrary to the Nevada Legislature's authority and intent in enacting certain statutes of limitations and repose. PA 121-123.

The District Court denied Petitioners' Motion to Dismiss without prejudice. The District Court noted that although Mr. Haberkorn's claims would not be tolled by the doctrine of equitable tolling, his claims could be tolled by the doctrine of cross-jurisdictional tolling. PA 160-161. The District Court stated that it would deny Petitioners' motion to dismiss "based primarily on (its prediction that) . . . the Nevada Supreme Court would (adopt cross-jurisdictional tolling).")

(parenthetical statement added). Thus, the District Court found that "(1) general class action tolling applies; (2) under these circumstances, cross jurisdictional tolling also applies . . . ." PA 161:1-2.

SUMMARY OF ARGUMENT

This Petition challenges the District Court's finding that the controversial doctrine of cross-jurisdictional, class action tolling applies in this case. That doctrine has been adopted by only a small minority of courts, and it has been rejected by others because it (1) increases the burden on a state's court system while providing no benefit to the state; (2) causes the running of a state's statutes of limitation and repose to depend on the actions of every federal District Court in the United States; and (3) undermines the authority and intent of the Nevada Legislature to determine periods of limitation and repose. All of these reasons for rejecting the doctrine of cross-jurisdictional tolling are implicated in this case.

Further, Mr. Haberkorn's allegations and claims are especially inappropriate for any type of tolling, including cross-jurisdictional tolling. An essential element of tolling is that defendants were put on notice of any claims against them by an earlier action asserting the same claims. This requires that any claims that are purportedly tolled must be the same claims as those made in an earlier action against the defendants: otherwise, the defendants will not have been put on notice of those claims by the earlier action, making tolling an unjust violation of the principles of repose. Here, in his 2016 Complaint, Mr. Haberkorn

alleges many facts and claims that were never made in the 2007 case, *Rainero*, which Mr. Haberkorn argues tolled the statutes of limitation and repose for his current claims. Indeed, a review of Mr. Haberkorn's Complaint reveals that his claims are very different than those made in the *Rainero* action. Thus, regardless of the merits of cross-jurisdictional tolling, Mr. Haberkorn cannot avail himself of that doctrine to assert new claims against Petitioners. In fact, even those few jurisdictions which have adopted cross-jurisdictional tolling have been careful to emphasize that a plaintiff, like Mr. Haberkorn, who did not provide notice of his claims to a defendant via an earlier class action cannot use cross-jurisdictional tolling. Notice is absolutely essential to any form of class action tolling, and Mr. Haberkorn provided no notice of his claims to Petitioners.

For these reasons, Petitioners request that the Nevada Supreme Court reject the doctrine of cross-jurisdictional tolling and direct the District Court to reconsider Petitioners' Motion to Dismiss in light of such a decision.

ARGUMENT

1. Propriety of extraordinary relief

This Court has original jurisdiction to issue writs of mandamus, prohibition, and certiorari. Nev. Const. Art. 6 § 4. The petitioner bears the burden of demonstrating extraordinary relief is warranted. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

This Court has determined that extraordinary relief is appropriate when a petition presents an issue of law of statewide importance requiring clarification, and sound judicial economy and administration favor the granting of the petition. *See, e.g.*, *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39-40, 175 P.3d 906, 908 (2008); *Child v. Lomax*, 124 Nev. 600, 605, 188 P.3d 1103, 1107 (2008); *Stromberg v. Second Judicial Dist. Court*, 125 Nev. 1, 4–5, 200 P.3d 509, 511 (2009); *MountainView Hosp. v. Dist. Ct.*, 128 Nev. Adv. Op. 17, 273 P.3d 861, 864–65 (2012) ("Normally, this court will not entertain a writ petition challenging the denial of a motion to dismiss but ... may do so where ... the issue is not fact-bound and involves an unsettled and potentially significant, recurring question of law."). All of these policy considerations are present in this Petition.

This writ petition presents the issue of whether the District Court erred by applying the doctrine of cross-jurisdictional tolling even though that doctrine is not recognized in Nevada and conflicts with Nevada statutes. Many state supreme courts have expressly rejected this doctrine because of its likely adverse impact on a state's court system. The doctrine is considered not only to incentivize forum-shopping, but also to invite plaintiffs with stale claims to take advantage of a generous tolling doctrine which the large majority of other states have not adopted.[1] Thus, the question presented by this writ petition will affect courts and

[1] States that have considered it are split on the doctrine of cross-jurisdictional tolling. *See Dow Chem. Corp. v. Blanco*, 67 A.3d 392, 395 (Del. 2013) (adopting cross-jurisdictional tolling), *Lee v. Grand Rapids Bd. of Educ.*, 148 Mich.App.

litigants throughout Nevada, as the current ruling by the District Court may expose Nevada courts, citizens, and entities to excessive, untimely claims. Further, this issue affects not only Nevada state courts, but also federal courts in Nevada, which would likely wait to receive guidance from the Nevada Supreme Court on this issue before applying cross-jurisdictional tolling. *See, e.g., Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025 (9th Cir. 2008) (noting several federal courts have declined to permit cross-jurisdictional tolling absent state law addressing the subject); *see also Schwartz v. Pella Corp.*, No. 2:14-CV-00556-DCN, 2014 WL 7264948, at *5 (D.S.C. Dec. 18, 2014) ("The Fourth Circuit has been reluctant to read cross-jurisdictional tolling into state law where it is otherwise silent.").

The Nevada Supreme Court recently considered a similar writ petition in *PN II, Inc. v. Eighth Judicial Dist. Court of State ex rel. Johnson*, No. 63474, 2014 WL 1679042, at *1 (Nev. Apr. 23, 2014) and only declined to issue a

(continued)
364, 370, 384 N.W.2d 165, 168 (1986) (same), *Hyatt Corp. v. Occidental Fire & Cas. Co. of N.C.*, 801 S.W.2d 382, 389 (Mo.Ct.App.W.Dist.1990) (same), *Stevens v. Novartis Pharm. Corp.*, 358 Mont. 474, 486–91, 247 P.3d 244, 253–56 (2010) (same), *Vaccariello v. Smith & Nephew Richards, Inc.*, 94 Ohio St.3d 380, 382–83, 390, 763 N.E.2d 160, 163, 168-69 (2002) (plurality of two out of seven justices and partial concurrence of two additional justices) (same); *but see Portwood v. Ford Motor Co.*, 183 Ill.2d 459, 465–67, 233 Ill.Dec. 828, 701 N.E.2d 1102, 1104–05 (1998) (rejecting cross-jurisdictional tolling), *Maestas v. Sofamor Danek Grp., Inc.*, 33 S.W.3d 805, 808 (Tenn. 2000) (same), *Bell v. Showa Denko K.K.*, 899 S.W.2d at 758 (Tex.App.Amarillo 1995) (same), *Casey v. Merck & Co.*, 283 Va. 411, 722 S.E.2d 842 (2012) (same), *Ravitch v. Pricewaterhouse*, 793 A.2d 939 (Pa.Super.Ct.2002) (same), and *Quinn v. Louisiana Citizens Prop. Ins. Corp.*, 2012-0152 (La. 11/2/12), 118 So. 3d 1011, 1022 (same).

decision because there were unresolved fact issues in the record. There, the petition presented "the question of whether the class-action tolling doctrine . . . can toll a statute of repose." *PN II, Inc. v. Eighth Judicial Dist. Court of State ex rel. Johnson*, No. 63474, 2014 WL 1679042, at *1 (Nev. Apr. 23, 2014). The petitioner asked the Supreme Court to order the District Court to enter summary judgment in its favor, however the Supreme Court declined because, *inter alia*,

> [T]he applicability of these statutes to real parties in interest's claims **requires factual determinations** that are unique as to each real party in interest. **Because the district court did not make any of these factual determinations** in denying summary judgment, the record before this court is inadequate to meaningfully consider the overarching issues presented by this writ petition.

Id. (emphasis added). Despite the presence of those unresolved factual issues, Justice Hardesty, in dissent, stated that the issue presented by the writ of whether the class-action tolling doctrine tolled a statute of repose should be heard "on the basis that this court's intervention is warranted to clarify an important and recurring issue of law." *Id.* Justice Hardesty noted that:

> [T]his class-action tolling issue is not simply one that is isolated to the underlying litigation, but is a recurring issue arising in many construction defect cases in this state's court system . . . . Thus, I disagree with my colleagues' decision to deny interlocutory writ relief and require the parties to wait to have this court address the important and recurring issue presented here. This delay increases the cost of this litigation to the parties and fails to promote judicial economy.

Id. Here, in contrast to *PN II*, the issue of cross-jurisdictional, class action tolling **presents no factual issues**, but only a pure question of law. *See Rader v. Greenberg Traurig, LLP*, 352 P.3d 465, 467 (Ariz. Ct. App. 2015) (whether Arizona should permit cross-jurisdictional tolling is a "purely legal issue"). Regardless of any factual determinations or discoveries that may be made by the District Court in the future, the discrete legal issue presented in this writ petition, whether Nevada should adopt the doctrine of cross-jurisdictional tolling, will remain exactly the same. Thus, there is nothing to gain from waiting until the completion of the case for this Court to decide this issue. In fact, a decision by the Supreme Court on this controversial question-of-first-impression will promote judicial economy in several ways.

First, judicial economy will be promoted in the instant case by allowing the parties to proceed with litigation without the underlying uncertainty of whether Mr. Haberkorn's claims are time-barred. The Nevada Supreme Court recently considered a petition because "resolving this writ petition may affect the course of the litigation, thus promoting sound judicial economy and administration." *See John Peter Lee, Ltd. v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark*, No. 66465, 2016 WL 327869, at *1 (Nev. Jan. 22, 2016). This is especially true here. The District Court's primary basis for not dismissing Mr. Haberkorn's claims was that it believed this Court would adopt cross-jurisdictional tolling. Therefore, the consideration of this writ petition will clearly affect the course of

the *Haberkorn* litigation. Further, it would be a waste of resources for this action to proceed in the District Court if the Nevada Supreme Court is likely to conclude that Mr. Haberkorn's claims are time-barred because Nevada should not, in fact, adopt or recognize cross-jurisdictional tolling.

Second, this is at least the second time[2] since 2015 that this same issue has been raised in the Supreme Court as well as a Nevada District Court in actions against Petitioners, and thus it is clear that the uncertainty about whether Nevada would adopt cross-jurisdictional tolling is already burdening Nevada courts and litigants. A decision from the Supreme Court on the issue presented in this petition would resolve this uncertainty and reduce litigation in both these cases as well as any other pending cases that involve cross-jurisdictional tolling.

Third, a decision from this Court on the merits of this petition would create certainty throughout Nevada and the United States on the issue of whether Nevada accepts cross-jurisdictional tolling and thereby reduce future litigation over this currently uncertain area of law.

The Supreme Court's consideration of this Petition would be similar to its answering a question of law certified to it by a federal court as described in NRAP 5(a). Many federal courts have considered whether a particular state

[2] *See generally*, Case No.: 68995, *Archon Corporation, et al. vs. The Eighth Judicial Court of the State of Nevada, et al*, (Petitioners' Petition for Writ of Prohibition, Mandamus and/or Certiorari at 35).

would be likely to adopt the doctrine of cross-jurisdictional tolling,[3] and given that there is currently no precedential guidance on the issue of cross-jurisdictional tolling, the question would likely be certified if it were presented by a federal court to the Nevada Supreme Court. There is no reason in principle for the Supreme Court to abstain from answering the question because it is presented in a writ petition, particularly since the Supreme Court has original jurisdiction over questions of law of statewide importance. Thus, Petitioners respectfully submit that they are entitled to have their petition considered by this Court at this time.

2. Nevada should reject cross-jurisdictional tolling.

This Petition presents an issue-of-first impression: whether the District Court erred by applying the doctrine of cross-jurisdictional tolling even though that doctrine is not recognized in Nevada and conflicts with Nevada statutes. Petitioners submit that the Nevada Supreme Court should join courts in Virginia,

[3] *See Wade v. Danek Med.*, Inc., 182 F.3d 281, 287 (4th Cir. 1999); *see also* 1 McLaughlin on Class Actions § 3:15, n. 23 (13th ed.) (citing *Hatfield v. Halifax PLC*, 564 F.3d 1177, 1187 (9th Cir. 2009) (noting that "California has not adopted ... American Pipe tolling where the class action was filed in a foreign jurisdiction" and that cross-jurisdictional tolling has been rejected because "[u]nless all states simultaneously adopt the rule of cross-jurisdictional class action tolling, any state which independently does so will invite into its courts a disproportionate share of suits which the federal courts have refused to certify as class actions after the statute of limitations has run."); *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025 (9th Cir. 2008) (same); *In re Bear Stearns Companies, Inc. Securities, Derivative, and ERISA Litigation*, 995 F. Supp. 2d 291, 311 (S.D.N.Y. 2014) ("New York currently does not recognized tolling where that class action is filed outside New York state court (so-called 'cross-jurisdictional tolling.')"); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 2014 WL 1092293, *4 (N.D. Cal. 2014); *Wang v. Bear Stearns Companies LLC*, 2014 WL 1512032, *11 (S.D.N.Y. 2014).)

Pennsylvania, Tennessee, Illinois, Louisiana, and Texas and reject the doctrine of cross-jurisdictional tolling.[4]

These courts have observed that the adoption of cross jurisdictional tolling exposes a state's court system to a flood of filings from forum-shopping plaintiffs, who possibly bring only stale claims. Further, the doctrine of cross-jurisdictional tolling would cause Nevada's statutes of limitation and repose to be subject to indefinite suspension, forcing a Nevada state court to await the outcome of the class certification as to any litigant in any putative class action filed in any federal court in the United States. This would undermine the Nevada Legislature's prerogative to determine periods of limitation and repose, as well as any tolling of the same. Indeed, Petitioners submit that the District Court's adoption of cross-jurisdictional tolling contravenes the Nevada Legislature's specific intent in enacting NRS 11.500. For these reasons, Nevada should reject the doctrine of cross-jurisdictional, class action tolling.

a. Mr. Haberkorn does not qualify for any form of class action tolling because his claims are different than those in *Rainero*.

Before considering the compelling policy reasons why Nevada should reject cross-jurisdictional tolling, it should be observed that the statutes of limitation and repose on Mr. Haberkorn's claims cannot possibly be tolled by any form of class action tolling, let alone the controversial doctrine of cross-jurisdictional

[4] *See* footnote 1.

tolling. This is because his primary claims are different from those asserted in *Rainero*, and consequently *Rainero* did not provide Petitioners with notice of Mr. Haberkorn's claim. Notice is essential to any form of tolling, and its absence in this case means that Mr. Haberkorn's claims cannot be deemed tolled by his purported reliance on *Rainero*.

The doctrine of class action tolling was announced in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756 (1974). There, the United States Supreme Court held that the filing of a class action in federal district court tolls the running of the statute of limitations for all purported members of the class who make timely motions to intervene after the federal court has found the suit inappropriate for class action status. *Id.*, at 553, 766. Subsequently, the United States Supreme Court extended *American Pipe* by holding that the filing of a class action in a federal district court tolls the statute of limitations not just for those who move to intervene in the original suit after class status is denied, but also for those who subsequently file their own individual suits in federal court. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350, 103 S.Ct. 2392, 2395-96 (1983). The *American Pipe* rule is often described as "class action tolling."[5] The Nevada Supreme Court applies a similar rule, as class actions filed pursuant to NRCP 23 "toll the statute of limitations on all potential unnamed

[5] *See Madani v. Shell Oil Co.*, No. CV081283GHKJWJX, 2008 WL 7856015, at *1 (C.D. Cal. July 11, 2008), *aff'd*, 357 F. App'x 158 (9th Cir. 2009).

plaintiffs' claims." *Jane Roe Dancer I-VII v. Golden Coin, Ltd.*, 124 Nev. 28, 34, 176 P.3d 271, 275 (2008).

However, class action tolling cannot be applied to claims such as Mr. Haberkorn's because, as described above, Mr. Haberkorn makes many allegations and claims that were never asserted in *Rainero*, and thus Petitioners were never put on notice of Mr. Haberkorn's claims by *Rainero*. The following chart summarizes major differences between *Haberkorn* and *Rainero*.

	Haberkorn **Claims & Supporting Allegations** **PA 019-037**		**Parallel Claims & Supporting Allegations in *Rainero*** **PA 001-018**
	FIRST CLAIM FOR RELIEF **(Declaratory Relief)**		**CLAIM FOR RELIEF**
¶33	Pursuant to the Certificate, the Liquidation Preference (and hence the redemption value) of the Preferred Stock as of August 31, 2007 was not $5,241 per share, but rather $8.69 per share.	¶39	Defendant Archon calculated the Liquidation Preference was $5.241 per share.
¶34	Archon failed, as of August 31, 2007, to set aside (or deposit) in trust such funds as were necessary for the redemption of the Preferred Stock at a redemption price of $8.69 per share.	¶40	Defendant Archon did not calculate the Liquidation Preference in the manner required by the Resolution and the Certificate
		¶41	Calculated in the manner required by the Resolution and the Certificate, the Liquidation Preference is $8.69 per share.
¶37	The March 23, 2011 reverse stock split/forward split was		

¶38	invalid because the holders of the Preferred Stock were not afforded their right to vote on the stock splits separately as a class, as provided for in the Certificate. Archon's subsequent de-registration with the SEC was invalid as the number of shareholders of record exceeded the Securities and Exchange Commission's limit of three hundred share-holders.			
	SECOND CLAIM FOR RELIEF **(Breach of Contract)**			
¶52	Archon's purchase of 225,000 shares of its common stock constituted a breach of Section 2(b)(ii) of the Certificate.			
¶53	Archon's March 2011 payments to the Archon stockholders who held fewer than 250 shares of Archon common stock before the reverse stock split constituted a breach of Section 2(b)(ii) of the Certificate.			

	THIRD CLAIM FOR RELIEF **(Breach of Fiduciary Duty - Unequal Treatment of Preferred Stockholders)**			
¶57	Pursuant to NRS 78.195, as Archon officers and directors, the Individual Defendants had a statutory and fiduciary duty to treat all holders of the Preferred Stock, including Plaintiff Haberkorn, equally.			
¶58	Defendants breached their statutory and fiduciary duty to treat all holders of the Preferred Stock equally by discriminating against Plaintiff Haberkorn by causing Archon to pay the unpaid balance of the redemption price to certain large institutional holders of the Preferred Stock, but failing to cause Archon to pay the unpaid balance of the redemption price to Plaintiff Haberkorn.			
¶62	The conduct of the Individual Defendants, as described above, was despicable conduct which was engaged in with conscious disregard of the rights of Plaintiff Haberkorn and the Individual Defendants are otherwise			

	guilty of oppression, fraud, malice and bad faith, entitling Plaintiff Haberkorn to punitive and/or exemplary damages pursuant to NRS 42.005.			
	FIFTH CLAIM FOR RELIEF **(Breach of Fiduciary Duty -Wrongful Deregistration)**			
¶77	Archon's purported de-registration with the SEC was invalid as the number of shareholders of record exceeded the Securities and Exchange Commission's limit of three hundred shareholders.			
¶78	The Individual Defendants have breached their fiduciary duties owed to Plaintiff in that their conduct resulted in the invalid deregistration of Archon's shares, which has adversely affected Plaintiff because said deregistration has curtailed the national market for Archon's shares and adversely affected Plaintiffs ability to liquidate his shares at a fair price.			
	NINTH CLAIM FOR RELIEF **(Injunctive Relief)**			
¶105	Defendants' conduct, alleged herein, has and will continue			

	to cause harm and irreparable damage to Plaintiff Haberkorn.			
¶106	Plaintiff Haberkorn respectively requests that Archon be required to hold a separate class vote for the holders of the Preferred Stock to elect two special directors to the Archon Board of Directors as provided in the Certificate.			
¶107	Injunctive relief is appropriate as monetary damages are insufficient to protect the rights and privileges of Plaintiff Haberkorn to vote to elect two special directors to the Archon Board of Directors			

This chart demonstrates that *Haberkorn* contains numerous allegations and claims that never appeared in the earlier class action *Rainero*, and consequently *Rainero* did not give Petitioners any notice of such claims. Indeed, the *Rainero* Complaint presented a single breach of contract claim whereas the *Haberkorn* Complaint includes nearly a dozen separate claims.

An essential element of class action tolling is that the initial filing of the class action put defendants on notice of the claims against them in the subsequent action, yet, here, a large majority of *Haberkorn*'s allegations and claims were never made in *Rainero* and have no relationship to the single claim

in *Rainero*. Therefore, *Rainero* provided Petitioners with no notice of *Haberkorn*'s claims, making the application of class action tolling to such claims wholly inappropriate and unjust.

"[T]he underpinning of the tolling rule is a defendant's awareness that claims are being asserted against it." 1 McLaughlin on Class Actions § 3:15. When defendants are not aware of the claims now being asserted against them, it is unfair to allow an earlier, unrelated action to toll the statute of limitations on the unrelated claims. "The tolling rule of American Pipe is a generous one, inviting abuse . . . . The rule should not be read, however, as leaving a plaintiff free to raise different or peripheral claims following denial of class status." *Crown, Cork & Seal Co.*, 462 U.S. at 354, 103 S. Ct. at 2398 (Powell, J., concurring).

This is precisely what Mr. Haberkorn is attempting to do: use *American Pipe* tolling to raise different or peripheral claims against Petitioners which were never alleged in *Rainero*. On one hand, *Rainero* was filed on November 20, 2007 and raised a single claim that Petitioners had miscalculated the price of the EPS at $5.241. On the other hand, in his suit filed on February 29, 2016, almost nine years after *Rainero*, Mr. Haberkorn, through nine separate causes of action, challenges: (1) Archon's offer to purchase 225,000 shares of Archon's common stock; (2) Archon's 2011 reverse stock split; and (3) the termination of Archon's registration with the SEC in 2011. PA 023 ¶¶ 21, 22, 24; PA 025 ¶ 38; PA 026 ¶

41; PA 028 ¶¶ 52, 53; and PA 031-32 ¶¶ 75-78. Literally, none of these allegations was made in *Rainero*. Yet, Haberkorn seeks to have the periods of limitation and repose on his unique claims tolled based on the 2007 filing of *Rainero*.

Mr. Haberkorn's position violates *American Pipe*'s purpose and progeny. "Limitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights . . . ." *Crown, Cork & Seal Co.*, 462 U.S. at 354, 103 S. Ct. at 2398 (Powell, J., concurring). Justice Powell warned that the *American Pipe* rule should not be abused by allowing plaintiffs to toll the statute of limitations for peripheral claims on the basis of the filing of an earlier class action. *Id.* Yet, this is exactly what Mr. Haberkorn is seeking to do. He seeks to toll the statute of limitations for his 2016 claims based on the 2007 filing of *Rainero*, yet *Rainero* provided no notice to Petitioners of Mr. Haberkorn's 2016 claims.

The fact that *Haberkorn* asserts completely different allegations and claims than *Rainero* makes this case particularly inappropriate for the application of the controversial doctrine of cross-jurisdictional, class action tolling. In subsequent sections of this brief, Petitioners will argue why, as a matter of general policy, the Nevada Supreme Court should join those jurisdictions which have rejected cross-jurisdictional tolling. However, Petitioners emphasize that even those few states which have adopted cross-jurisdictional tolling would reject the

application of that doctrine to the facts of the case because *Rainero* in no way provided Petitioners with notice of Mr. Haberkorn's allegations and claims.

The small minority of states that have adopted cross-jurisdictional tolling have uniformly emphasized that cross-jurisdictional tolling can only apply if a defendant was put on notice of a plaintiff's claims by a prior class action. For example, in applying cross-jurisdictional tolling, the Supreme Court of Delaware stated that "[f]irst, all of the defendants to be bound by the ultimate decision in this case were clearly on notice of the action at the outset." *Dow Chem. Corp. v. Blanco*, 67 A.3d 392, 394 (Del. 2013). Similarly, the Court of Appeals of Michigan observed that "defendants received notice of the state claims against them four years prior to the filing of this action." *Lee v. Grand Rapids Bd. of Educ.*, 148 Mich. App. 364, 368, 384 N.W.2d 165, 167 (1986). The Supreme Court of Ohio has stated that "a tolling rule for class actions is not inconsistent with the purposes served by statutes of limitations [which are] intended to put defendants on notice of adverse claims . . . ." *Vaccariello v. Smith & Nephew Richards, Inc.*, 94 Ohio St. 3d 380, 382, 763 N.E.2d 160, 162 (2002) (quoting *Crown, Cork & Seal Co., Inc.*, 462 U.S. at 352, 103 S.Ct. at 2397).

Thus, even in the few jurisdictions where cross-jurisdictional tolling has been adopted, it is clear that tolling would be utterly inappropriate in this case because Petitioners were not put on notice of *Haberkorn*'s new allegations and claims by the complaint filed in the *Rainero* class action. The Supreme Court of

Montana, adopting cross-jurisdictional tolling for limited circumstances, noted that it would not extend cross-jurisdictional tolling to a plaintiff who had not put a defendant on notice of its claims: "We recognize that in some instances a class action suit may not fairly put the defendants on notice. Our adoption of the rule is therefore limited to situations in which defendants are fairly put on notice of the substantive claims against them." *Stevens v. Novartis Pharm. Corp.*, 358 Mont. 474, 491, 247 P.3d 244, 256 (2010). The Montana Court noted that tolling could only be extended to allegations that were "the same or substantially similar." *Id.* at 485, 253.

Haberkorn's allegations are not in any way the same or substantially similar to *Rainero*'s. The only overlap between these two cases is the allegation that the EPS was miscalculated by $3.45 per share. PA 007 ¶ 42; PA 025 ¶ 33. Yet, this claim regarding the EPS is not the core of Mr. Haberkorn's claims. Mr. Haberkorn only alleges that he owned 2,254 shares of the EPS, meaning that he claims Archon underpaid him for his shares of EPS by about $7,776. However, Mr. Haberkorn also alleges that he owns 40,000 shares of Archon common stock, and that Petitioners damaged the value of these 40,000 shares by reducing public demand for them when Archon de-registered with the SEC. PA 022 ¶ 16; PA 031 ¶ 74; PA 032 ¶ 78. Mr. Haberkorn has not specified his alleged damages for his 40,000 shares of common stock, but clearly such alleged damages would be substantially larger than the $7,776 in damages he claims related to his EPS,

as such claimed damages would likely be in the range of $1,000,000. Thus, Mr. Haberkorn's primary claims are *not based* on his 2,254 shares of EPS, which is the only overlap between *Haberkorn* and *Rainero*. Thus, *Haberkorn* and *Rainero* are not "the same or substantially similar," and *Haberkorn* is ineligible for any form of class action tolling.

It is also important to note that *Haberkorn*'s claims regarding the EPS essentially have no relationship to his other claims regarding Archon's decision to offer to purchase 225,000 shares of its common stock in 2010, the 2011 reverse stock split, or the 2011 de-registration with the SEC. PA 023 ¶¶ 21, 22, 24; PA 025 ¶ 38; PA 026 ¶ 41; PA 028 ¶¶ 52, 53; and PA 031-032 ¶¶ 75-78. These claims do not arise "from a common nucleus of operative fact." *Cf. Kalinauskas v. Wong*, 808 F. Supp. 1469, 1472 (D. Nev. 1992) (discussing federal court supplemental jurisdiction). *Haberkorn*'s claims are not based on an "interlocked series of transactions": each challenged transaction happened years apart and was independent of the others, and thus the claims are "separate and independent." *Cf. Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 14, 71 S. Ct. 534, 540 (1951) (discussing separate causes of action under 28 U.S.C. § 1441).

Because the claims in *Haberkorn* and *Rainero* regarding the EPS are essentially unrelated to *Haberkorn*'s other claims, which clearly predominate his Complaint, Mr. Haberkorn absolutely cannot avail himself of any type of class action tolling because the claims in *Rainero* did not put Petitioners on notice of

the gravamen of *Haberkorn*'s claims. Even those few courts which have adopted cross-jurisdictional tolling have stressed that a defendant must have been put on notice of a plaintiff's claims by the earlier class action; otherwise, the fundamental purpose of statutes of limitation and repose – to protect defendants from untimely claims – is defeated. Here, Mr. Haberkorn gave Petitioners no such notice, and he cannot use class action tolling to revive his stale claims.

b. Cross-jurisdictional tolling should be rejected in Nevada as its adoption would increase the burden on Nevada's courts.

In addition to the specific reasons why *Haberkorn* is ineligible for any form of class action tolling, there are compelling policy reasons for Nevada to reject cross-jurisdictional tolling in general. It has been frequently observed that the adoption of *intra-jurisdictional* class action tolling (class action tolling within the same court system, such as in *American Pipe* and *Jane Roe Dancer*) does not necessarily support the adoption of "cross-jurisdictional" class action tolling.[6] And the reasons for rejecting cross-jurisdictional tolling arise because of problems specifically created by tolling statutes of limitation and repose *across* federal and state jurisdictions, as opposed to within the same court system.

[6] "The doctrine allowing tolling within the federal court system in federal question class actions does not require cross-jurisdictional tolling (i.e. tolling based on a prior class action filed in a different jurisdiction) as a matter of state procedure. California and New York have rejected *American Pipe*'s application to cross-jurisdictional actions." 1 McLaughlin on Class Actions § 3:15 (13th ed.).

"Tolling the statute of limitations for individual actions filed after the dismissal of a class action is sound policy when both actions are brought in the same court system. In such instances, failing to suspend the limitation period would burden the subject court system with the protective filings described by the Supreme Court in *American Pipe* . . . ." *Portwood v. Ford Motor Co.*, 183 Ill. 2d 459, 464–65, 701 N.E.2d 1102, 1104 (1998). However, when two actions are brought in different court systems:

> Tolling a state statute of limitations during the pendency of a federal class action, however, may actually increase the burden on that state's court system, because plaintiffs from across the country may elect to file a subsequent suit in that state solely to take advantage of the generous tolling rule. Unless all states simultaneously adopt the rule of cross-jurisdictional class action tolling, any state which independently does so will invite into its courts a disproportionate share of suits which the federal courts have refused to certify as class actions after the statute of limitations has run . . . . Given this state of affairs, it is clear that adoption of cross-jurisdictional class tolling in Illinois would encourage plaintiffs from across the country to bring suit here following dismissal of their class actions in federal court. We refuse to expose the Illinois court system to such forum shopping.

Id. The situation described in *Portwood* remains largely unchanged today, as only six states[7] have adopted cross-jurisdictional tolling, while six have rejected it, and

[7] Cases in which courts have recognized such cross-jurisdictional tolling include *Stevens v. Novartis Pharmaceuticals Corp.*, 358 Mont. 474, 247 P.3d 244 (2010); *Vaccariello v. Smith & Nephew Richards*, 94 Ohio St.3d 380, 763 N.E.2d 160

others such as California and New York have refused to adopt cross-jurisdictional tolling despite being presented with the opportunity to do so.[8]

Thus, if Nevada were to adopt cross-jurisdictional tolling, it would be one of a very few jurisdictions to give forum-shopping plaintiffs certainty that any time limit on their claims has been tolled during their failed attempts to obtain class certification in a federal District Court. The situation would be precisely what Fourth Circuit Judge Luttig determined would be undesirable for the Commonwealth of Virginia:

> [I]f Virginia were to adopt a cross-jurisdictional tolling rule, Virginia would be faced with a flood of subsequent filings once a class action in another forum is dismissed, as forum-shopping plaintiffs from across the country rush into the Virginia courts to take advantage of its cross-jurisdictional tolling rule, a rule that would be shared by only a few other states . . . .

Wade v. Danek Med., Inc., 182 F.3d 281, 287 (4th Cir. 1999). Adopting the doctrine of cross-jurisdictional tolling would make Nevada one of a few clearinghouses for untimely claims that should have been initiated in other jurisdictions – but cannot be – because more than forty other states do not embrace cross-jurisdictional tolling. As Judge Luttig observed, "[T]he

(continued)

(2002); *Staub v. Eastman Kodak Co.*, 320 N.J.Super. 34, 726 A.2d 955 (App.Div.1999); *Hyatt Corp. v. Occidental Fire & Cas. Co. of N.C.*, 801 S.W.2d 382 (Mo.Ct.App.1990); and *Lee v. Grand Rapids Bd. of Educ.*, 148 Mich.App. 364, 384 N.W.2d 165 (1986); *Patrickson v. Dole Food Co., Inc.*, 137 Haw. 217, 226, 368 P.3d 959, 968 (2015), as corrected (Nov. 18, 2015).

[8] *See* footnote 3, *supra*.

Commonwealth of Virginia simply has no interest, except perhaps out of comity, in furthering the efficiency and economy of the class action procedures of another jurisdiction, whether those of the federal courts or those of another state." *Id.* Likewise, inviting forum-shopping plaintiffs to Nevada's courts simply provides no benefit to the state.

Montana, one of the few states, that has adopted cross-jurisdictional tolling, acknowledged the likelihood that the doctrine would burden its courts with forum-shopping plaintiffs. "[W]e acknowledge that our holding today may indeed encourage plaintiffs with 'no relationship to Montana' to file suit in our courts, if their claims are stale elsewhere." *Stevens*, 358 Mont. at 490, 247 P.3d at 256. Nevertheless, the Montana Supreme Court adopted cross-jurisdictional tolling because it was required to do so by the Montana Constitution: "Our state's policy is plainly stated in the Montana Constitution: '[c]ourts of justice shall be open to every person, and speedy remedy afforded for every injury to person, property, or character.' Mont. Const. art. II, § 16. The right of access to our court system is 'unrestricted by reference to residence or citizenship,' and an out-of-state plaintiff has 'the same rights and duties as a citizen of this state.'" *Id.* Thus, even in one of the few states to adopt cross-jurisdictional tolling, the burden on the state courts is acknowledged, and that burden is only accepted because it was required by the Montana Constitution. However, the Nevada Constitution has no such language, nor does Nevada have a policy that its courts be open to every

person regardless of citizenship. Thus, if Nevada were for some reason to consider adopting a policy that opened its courts to forum-shopping plaintiffs, such a policy must be weighed and enacted by the Nevada Legislature, which, as discussed below, has instead clearly indicated that it would reject cross-jurisdictional tolling.

Those in favor of cross-jurisdictional tolling argue that the doctrine may provide some efficiency for states which adopt it by reducing "protective filings"; claims which supposedly would be filed by plaintiffs seeking to prevent their claims from becoming stale during the pendency of class-certification proceedings in federal court. However, both in theory and in fact, it is likely that the burden of any protective filings would be outweighed by the burden of filings that would be made by those who had failed to timely have their claims brought in a different jurisdiction and subsequently sought a jurisdiction that had promised to toll the statute of limitations or repose on their otherwise stale claims. First, this case, as well as the *Raider*[9] case brought against Petitioners just this year, is instructive: neither Mr. Haberkorn nor Mr. Raider made "protective filings"; instead, they both filed suit after *Rainero*'s case was dismissed, and they did so knowing that their claims were plainly time-barred under Nevada law. This evidence supports the predictions of the courts which have rejected cross-

[9] *Raider v. Archon Corporation, et al.*, Case No. A-15-712113-B, District Court, Clark County, Nevada.

jurisdictional tolling due to the burdens it would place on their state court systems. As the Illinois Supreme Court stated:

> Plaintiffs contend that our rejection of cross-jurisdictional tolling will necessitate numerous protective filings in Illinois by plaintiffs who have class actions pending in other jurisdictions, thus burdening our state court system and inconveniencing the affected litigants. We are convinced, however, that any potential increase in filings occasioned by our decision today would be far exceeded by the number of new suits that would be brought in Illinois were we to adopt the generous tolling rule advocated by plaintiffs. By rejecting cross-jurisdictional tolling, we ensure that the protective filings predicted by plaintiffs will be dispersed throughout the country rather than concentrated in Illinois.

Portwood, 183 Ill. 2d at 466–67, 701 N.E.2d at 1105. Fourth Circuit Judge Luttig reasoned similarly:

> Although, in the absence of a cross-jurisdictional tolling rule, in-state plaintiffs would engage in "protective" filing before the statute of limitations expires, thus leading to some increase in the amount of litigation, any such increase would presumably be smaller than the increase in filings that would result from a cross-jurisdictional tolling rule, because out-of-state plaintiffs would simply engage in "protective" filing in their own states' courts (provided their states lacked cross-jurisdictional tolling rules themselves).

Wade, 182 F.3d at 287. Here, during the pendency of *Rainero*, no "protective filings" were made by Mr. Haberkorn or Mr. Raider. Instead, it was only after *Rainero*'s federal court complaint was dismissed for lack of subject matter

jurisdiction that they filed their time-barred claims in Nevada's state courts, and it is precisely these types of filings that cross-jurisdictional tolling encourages.

Further, even if rejecting cross-jurisdictional tolling would encourage "protective filings," that is a problem more easily solved than hosting the claims of former putative class members whose claims were dismissed or whose classes were rejected by federal courts across the country. First, "protective filings" would be distributed across all other state jurisdictions, diminishing the potential burden on Nevada's state courts. Second, as the Tennessee Supreme Court explained in its decision rejecting cross-jurisdictional tolling:

> We understand that our ruling may promote "protective" filings by plaintiffs who wish to preserve their right to file suit in Tennessee while they seek class certification elsewhere. Any administrative burdens Tennessee courts will suffer from those protective filings are greatly outweighed by the burdens presented by the mass exodus of rejected putative class members from federal court to Tennessee. Any risk of duplicative litigation resulting from the protective filings may be avoided by grant of a stay by the state court until the federal ruling on class certification is made.

Maestas v. Sofamor Danek Grp., Inc., 33 S.W.3d 805, 808–09 (Tenn. 2000). Therefore, even if rejecting cross-jurisdictional tolling encouraged "protective filings" in Nevada (which it did not here or in *Raider*), such cases would be fairly distributed across all state jurisdictions, and then could easily be stayed during the litigation in the federal court, avoiding any duplicative litigation.

However, there is no easy way to alleviate the burden imposed on a state's courts which have adopted cross-jurisdictional tolling, which essentially invites litigants from different jurisdictions to use Nevada as a forum of last resort after their cases have been dismissed or their putative classes have been rejected:

> If certification is ultimately denied, the forum state may find itself with an avalanche of individual filings, precisely because its statute was tolled, thereby undermining the efficiency that the class action vehicle was designed to promote. It would therefore appear that whatever the forum state gains in efficiency by tolling its statute of limitations based on an extra-jurisdictional class action is outweighed by the risk of an avalanche of filings should the class not be certified.

David Bober, *Cross-Jurisdictional Tolling: When and Whether A State Court Should Toll Its Statute of Limitations Based on the Filing of A Class Action in Another Jurisdiction*, 32 SETON HALL L. REV. 617, 642 (2002). Thus, on this controversial question-of-first impression, the burden that it would place on Nevada's courts is reason enough for rejecting cross-jurisdictional tolling.

c. Cross-jurisdictional tolling would make Nevada's statutes of limitation and repose depend on the actions of every federal District Court in the United States, contrary to the expressed intent of the Nevada Legislature.

An additional reason for rejecting cross-jurisdictional tolling is that it would require Nevada's legislatively determined statutes of limitations and repose to depend on the actions of literally any and every federal District Court in the

United States. This is another reason states such as Illinois have declined to adopt cross-jurisdictional tolling:

> [B]ecause state courts have no control over the work of the federal judiciary, we believe it would be unwise to adopt a policy basing the length of Illinois limitation periods on the federal courts' disposition of suits seeking class certification. State courts should not be required to entertain stale claims simply because the controlling statute of limitations expired while a federal court considered whether to certify a class action.

Portwood, 183 Ill. 2d at 466, 701 N.E.2d at 1104.

The unnecessary injection of uncertainty and delay into Nevada's legislative scheme of limitations and repose is an important reason to reject cross-jurisdictional tolling. Nevada's statutes of limitation and repose represent a legislative determination that legal claims must be subject to time limits in order to promote predictability and finality. "Statutes of limitation rest upon the premise that the right to be free of stale claims in time comes to prevail over the right to prosecute them . . . . Statutes of limitation thus promote predictability and finality." *Portwood*, 183 Ill. 2d at 463, 701 N.E.2d at 1103.

The Fourth Circuit reasoned that "if Virginia were to allow cross-jurisdictional tolling, it would render the Virginia limitations period effectively dependent on the resolution of claims in other jurisdictions, with the length of the limitations period varying depending on the efficiency (or inefficiency) of courts in those jurisdictions." *Wade*, 182 at 288. Nevada would not benefit from having

the running of its statutes of limitations and repose depend on the actions of courts in other jurisdictions, which would be the necessary result of adopting cross-jurisdictional tolling. This is yet another reason the doctrine is controversial and should be rejected.[10]

d. Cross-jurisdictional tolling would undermine the authority and intent of the Nevada Legislature.

The Nevada Legislature has specifically addressed the outer-most time limits when certain claims are viable in Nevada state courts, and the adoption of cross-jurisdictional tolling would directly undermine the period of repose that has been established by NRS 11.500 which provides that:

> 1. Notwithstanding any other provision of law, and except as otherwise provided in this section, if an action that is commenced within the applicable period of limitations is dismissed because the court lacked jurisdiction over the subject matter of the action, the action may be recommenced in the court having jurisdiction within:

[10] *See Quinn v. Louisiana Citizens Prop. Ins. Corp.*, 2012-0152 (La. 11/2/12), 118 So. 3d 1011, 1022 ("We believe the rationale of the courts rejecting "cross-jurisdictional tolling" is the one most consistent with our interpretation of the provisions of Louisiana's tolling statute, La. C.C.P. art. 596, and is the rationale which most effectively balances the twin concerns of judicial efficiency and protection against stale claims. These cases, and particularly *Portwood,* underscore the unfairness to defendants, and to the state itself, of permitting another jurisdiction's laws and the efficiency (or inefficiency) of its operations to control the commencement of a statute of limitations, potentially suspending it indefinitely into the future and, in the process, undermining the very purpose of statutes of limitation. As the *Portwood* court noted, any resultant blow to judicial efficiency occasioned by the necessity of protective filings in state court pending the resolution of the certification issue in federal court can be ameliorated by measures available to the state courts: "[E]arly filings in state court by plaintiffs who are pursuing a class action elsewhere could not be entirely undesirable, as such filings would put that state's court system on notice of the potential claim. If necessary, the state suit could be stayed pending proceedings elsewhere.").

(a) The applicable period of limitations; or

(b) Ninety days after the action is dismissed;
whichever is later.

2. An action may be recommenced only one time pursuant to paragraph (b) of subsection 1.

3. An action may not be recommenced pursuant to paragraph (b) of subsection 1 more than 5 years after the date on which the original action was commenced.

....

Thus, the Legislature enacted a saving statute, which grants a plaintiff a specific time beyond the statute of limitations to refile an action, and a statute of repose, which sets the mandatory outer time-limit to refile such an action. The Legislature made a statutory determination that, when a plaintiff recommences an action, a statute of limitations can be extended by 90 days, but no extension is permitted for actions that are recommenced more than five years after the commencement of the original action. NRS 11.500. The Legislative history of NRS 11.500 demonstrates that the Legislature contemplated a specific time frame for the recommencement of certain actions.

During hearings before the Assembly Committee on Judiciary, Nevada's Solicitor General explained that NRS 11.500 "provided in essence a statute of repose." Minutes of the Assembly Committee on Judiciary on A.B. 40, 72nd Leg. (Nev., Feb. 13, 2003). In Senate discussions, Senator Terry Care stated that the bill "allows a plaintiff whose case has been dismissed in federal court for lack of jurisdiction to recommence the action in State district court as long as it is done

within 90 days[11] after dismissal from the federal court. The refiling must still begin within five years [of the date of filing the original action]." Minutes of the Senate Committee on Judiciary on S.B. 266, 73rd Leg. (Nev., April 15, 2005) (emphasis added). So, on one hand, the Legislature intended to give certain plaintiffs the opportunity to re-file claims that had been dismissed because of a lack of subject matter jurisdiction. On the other hand, the Legislature also understood that "statutes of limitations were fundamental to the judicial system" and that NRS 11.500 would set an absolute time limit for the recommencement of certain claims. Minutes of the Assembly Committee on Judiciary on A.B. 40, 72nd Leg. (Nev., Feb. 13, 2003). By enacting NRS 11.500, the Legislature exercised its authority to create a savings statute as well as a statute of repose.

Statutes of repose and limitation fall particularly within the province of the legislature.[12] This well-established principle was specifically recognized by the United States Supreme Court in relation to class action tolling. "The proper test

[11] Ninety days was a meaningful period of time to the Nevada Legislature: it deliberately contemplated and debated the appropriate amount of days for an extension, amending the bill before it was finalized to reflect extensions of six months, 30 days, and 90 days. See Minutes of the Assembly Committee on Judiciary on A.B. 40, 72nd Leg. (Nev., Feb. 13, 2003) (discussing a six-month extension); Minutes of the Assembly Committee on Judiciary on A.B. 40, 72nd Leg. (Nev., Feb. 25, 2003) (discussing whether the statute should allow for a six-month, 30-day, or 90-day extension).

[12] *Farber v. Lok-N-Logs*, Inc., 270 Neb. 356, 369, 701 N.W.2d 368, 378 (2005) (repose); *Molloy v. Meier*, 660 N.W.2d 444, 456 (Minn. Ct. App. 2003), *aff'd*, 679 N.W.2d 711 (Minn. 2004) (repose); *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996, 1006 (Ala. 1982) (repose) *Lambert v. Commonwealth Land Title Ins. Co.*, 228 Cal. App. 3d 1569, 269 Cal. Rptr. 256, 258 (Ct. App.) (statute of limitations) (reversed on other grounds); *Miller By & Through Sommer v. Kretz*, 191 Wis. 2d 573, 580, 531 N.W.2d 93, 96 (Ct. App. 1995) (statutes of limitation); *Mitchell v. Progressive Ins. Co.*, 965 So. 2d 679, 683 (Miss. 2007) (limitation).

(for whether the legislature intended a statute of limitations to be tolled) is . . . whether tolling the limitation in a given context is consonant with the legislative scheme." *Am. Pipe*, 414 U.S. at 557–58, 94 S. Ct. at 768 (parenthetical statement added). Petitioners submit that the adoption of cross-jurisdictional tolling would be inconsistent with the legislative intent evinced by the Nevada Legislature's enactment of NRS 11.500 and the legislative history thereto.

The adoption of cross-jurisdictional tolling would effectively eviscerate the Legislature's determination by causing the time-limit on a plaintiff's claims to be tolled indefinitely. This is clearly contrary to both the explicit language of NRS 11.500 and its legislative history, in which the Legislature stated that statutes of limitation and repose cannot be tolled indefinitely. For example, the Office of the Attorney General testified that, under NRS 11.500, "**in no event would a case proceed** 11.5 years after it had original been filed." Minutes of the Assembly Committee on Judiciary on A.B. 40, 72nd Leg. (Nev., Feb. 13, 2003) (emphasis added). It was further observed that statutes of limitation "should not be tampered with lightly." *Id.* Yet, cross-jurisdictional tolling clearly could cause Nevada's statutes of limitation and repose to be tolled indefinitely depending on the actions of the federal District Courts. Such a scenario was never contemplated or approved by the Legislature, and the legislative history of NRS 11.500 strongly suggests that the Legislature would have rejected such a result. Therefore, because cross-jurisdictional tolling is inconsistent with the Nevada Legislature's

intent as demonstrated in NRS 11.500 and its legislative history, the doctrine of cross-jurisdictional tolling must be rejected.

Courts which have declined to adopt cross-jurisdictional tolling have noted that relevant state law was inconsistent with cross-jurisdictional tolling. As the Fourth Circuit stated observed:

> Virginia has no statute providing that the statute of limitations in a subsequently filed state action should be equitably tolled during the pendency of either a state or a federal class action, and no Virginia court has ever applied such a rule.

Wade, 182 F.3d at 286. Likewise, Nevada has no statute tolling a putative class's claims during the pendency of a federal District Court action, except NRS 11.500, which positively provides an absolute time-limit for the filing of claims in Nevada state courts, regardless of the circumstances. Further, the principle that tolling must be consonant with Nevada legislative scheme is even more important when considering a statute of repose, which creates a substantive right in a defendant to be free of liability, and thus falls outside the ambit of *American Pipe* class action tolling. As one leading commentator has expressed:

> A growing number of thoroughly reasoned decisions, including by the Sixth and Second Circuit Courts of Appeal (which abrogated numerous district court decisions allowing tolling of statutes of repose) have determined that a federal statute of repose using categorical language foreclosing maintenance of a suit after a certain time period must be enforced according to its plain meaning and therefore is not subject to

> American Pipe tolling. A statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action. A statute of repose, in contrast, creates a substantive right to be free from liability definitively once the prescribed period expires; it does not merely bar a remedy, it extinguishes the underlying cause of action.

1 McLaughlin on Class Actions § 3:15. Here, NRS 11.500 establishes a substantive right in defendants to have claims extinguished after certain periods of time, an intent and result discussed explicitly by the Nevada Legislature. But the adoption of cross-jurisdictional tolling could prolong certain claims indefinitely, allowing the actions of the courts of different jurisdictions to undermine the clear intent of the Nevada Legislature in enacting NRS 11.500.

Even when applied only to statutes of limitation, and not to a statute of repose like NRS 11.500, the Tennessee Supreme Court found such an outcome potentially offensive to principles of federalism:

> [T]he practical effect of our adoption of cross-jurisdictional tolling would . . . . grant to federal courts the power to decide when Tennessee's statute of limitations begins to run. Such an outcome is contrary to our legislature's power to adopt statutes of limitations . . . and would arguably offend the doctrines of federalism . . . . **If the sovereign state of Tennessee is to cede such power to the federal courts, we shall leave it to the legislature to do so.**

Maestas, 33 S.W.3d at 809 (emphasis added). Far from ceding its power to determine periods of limitation and repose to the federal courts, the Nevada

Legislature has positively asserted its authority to determine the outer time-limits of certain claims by enacting NRS 11.500. The adoption of cross-jurisdictional tolling would undermine the Legislature's authority and intent by causing Nevada's periods of limitation and repose to depend on the actions of the federal District Courts across the country.

In one of the few jurisdictions where cross-jurisdictional tolling has been accepted, this outcome occasioned strong dissent:

> A class action filed in a court system outside Ohio should not toll the Ohio statute of limitations so that an otherwise stale suit may be filed in an Ohio court. Ohio law does not support cross-jurisdictional class action tolling, and it would not promote the purposes of Ohio's statutes of limitations. Statutes of limitations are exclusively matters of state law. . . . They are legislatively created periods of time in which an injured party may assert a claim in a court in Ohio. Once expired, the statute forecloses the claim and provides repose for potential defendants. . . . Tolling rules are also a matter of state, not federal, law . . . . The General Assembly has elected not to enact a tolling rule that applies to class actions. Ohio law provides for another form of tolling that extends, rather than suspends, a statute of limitations. R.C. 2305.19, known as the savings statute, gives a plaintiff who timely filed an action that was dismissed on procedural grounds a specific amount of time in which to file a second action. If a plaintiff has commenced or attempted to commence an action in Ohio, and the plaintiff fails otherwise than on the merits, and if the applicable limitation period for the action has expired, R.C. 2305.19 permits the plaintiff to commence a new action (provided that it is the

> same as the original action) within one year. R.C. 2305.19. . . . The savings statute is Ohio's tolling mechanism that is available for putative class members who want to file an individual action when class certification is denied in a proposed class action filed in Ohio.

Vaccariello v. Smith & Nephew Richards, Inc., 94 Ohio St. 3d at 391–93, 763 N.E.2d at 170–71 (Stratton, J., dissenting).

This reasoning applies with great force to the question of whether Nevada should adopt cross-jurisdictional, class action tolling. Periods of limitation and repose are particularly within the province of the Nevada Legislature, and the Legislature has spoken definitively on both of these issues, particularly in its adoption of NRS 11.500, in which the Legislature has affirmatively granted plaintiffs such as Mr. Haberkorn a certain, fixed time period to recommence an action, while also granting defendants such as Petitioners a substantive right to repose by establishing an outer time-limit for when such an action can be recommenced. The Legislature has not enacted any other tolling or saving statute that is consonant with cross-jurisdictional, class action tolling, and therefore NRS 11.500 directly conflicts with the potential adoption of cross-jurisdictional tolling and as such, this Court should reject the doctrine and remand this action to the District Court to reconsider Petitioners' motion to dismiss.

The adoption of cross-jurisdictional, class action tolling would effectively eviscerate NRS 11.500. Therefore, the doctrine must be rejected out of deference to the Nevada Legislature's authority over periods of limitation and repose.

CONCLUSION

For the foregoing reasons, Petitioners request that the Nevada Supreme Court vacate the District Court's order applying cross-jurisdictional, class action tolling and order the District Court to reconsider Petitioners' motion to dismiss in light of such a decision.

DATED this 1st day of December, 2016.

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AFFIDAVIT OF PAUL W. LOWDEN

STATE OF NEVADA)

COUNTY OF CLARK)

I, Paul W. Lowden, declare and state as follows:

1. I am over the age of 18 years and have personal knowledge of each of the matters stated herein and could testify competently to the same if called upon by this Court.

2. I make this affidavit in support of my Petition for Writ of Prohibition and/or Mandamus as required by NRS 34.030.

3. I am a citizen and resident of the State of Nevada, and the President and a Director of Archon Corporation.

4. I have read the contents of the present Petition for Writ of Prohibition and/or Mandamus, and they are true and correct to the best of my knowledge. The Petition is being filed in good faith.

FURTHER AFFIANT SAYETH NAUGHT.

DATED this _____day of November, 2016.

Paul W. Lowden

PAUL W. LOWDEN

State of Nevada
County of Clark

SUBSCRIBED and SWORN to before me
This 20th day of November, 2016, by
Paul W. Lowden.

Agnieszka K. Parker

NOTARY PUBLIC

AGNIESZKA K. PARKER
NOTARY PUBLIC
STATE OF NEVADA
Appt. No. 00-64827-1
My Appt. Expires August 4, 2018

CERTIFICATE OF COMPLIANCE

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

[x] This petition has been prepared in a proportionally spaced typeface using Microsoft Word version 14.0.6129.5000 (2010) in 14 point Times New Roman font;

2. This petition complies with the page – or type – volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7), it is:

[x] Proportionately spaced, has a typeface of 14 points or more and contains 11,142 words.

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DATED this 1st day of December, 2016.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), the undersigned, an employee of Dickinson Wright PLLC, hereby certifies that on the 1st day of December, 2016, she served a copy of the foregoing **PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS** by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Reno, Nevada, said envelope addressed to:

Honorable Joe Hardy
Eighth Judicial District Court
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Whitney Jones
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