

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

ARCHON CORPORATION, PAUL  
W. LOWDEN, and SUZANNE  
LOWDEN,

Petitioner,

vs.

THE EIGHTH JUDICIAL  
DISTRICT COURT FOR 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 Parties in Interest,

Supreme Court No.

State Court Case No. A-16-732619-B

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**PETITIONER'S APPENDIX TO PETITION FOR**  
**WRIT OF PROHIBITION OR MANDAMUS**  
**PA001-PA161**

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### **CHRONOLOGICAL INDEX**

<b>Document</b>	<b>Date</b>	<b>Vol.</b>	<b>Bates Range</b>
David Rainero vs. Archon Corporation's Complaint	11/20/2007	I	PA001-PA018
Stephen Haberkorn v. Archon Corporation, et al., Complaint	2/29/2016	I	PA019-PA049
Plaintiff Stephen Haberkorn's Opposition to Defendants' Motion to Dismiss Complaint	5/13/2016	I	PA050-PA117
Reply to Plaintiff Stephen Haberkorn's Opposition to Defendants' Motion to Dismiss Complaint	6/01/2016	I	PA118-PA159
Stephen Haberkorn vs. Archon Corporations, et al., Order Denying Motion to Dismiss Without Prejudice	8/04/2016	I	PA160-PA161

### **ALPHABETICAL INDEX**

<b>Document</b>	<b>Date</b>	<b>Vol.</b>	<b>Bates Range</b>
David Rainero vs. Archon Corporation's Complaint	11/20/2007	I	PA001-PA018
Plaintiff Stephen Haberkorn's Opposition to Defendants' Motion to Dismiss Complaint	5/13/2016	I	PA050-PA117
Reply to Plaintiff Stephen Haberkorn's Opposition to Defendants' Motion to Dismiss Complaint	6/01/2016	I	PA118-PA159
Stephen Haberkorn v. Archon Corporation, et al., Complaint	2/29/2016	I	PA019-PA049
Stephen Haberkorn vs. Archon Corporations, et al., Order Denying Motion to Dismiss Without Prejudice	8/04/2016	I	PA160-PA161

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DAVID RAINERO, an individual,  
7 on behalf of himself and on behalf  
of others similarly situated  
8

9 UNITED STATES DISTRICT COURT

10 DISTRICT OF NEVADA

11 DAVID RAINERO, an individual,  
on behalf of himself and on behalf  
12 of others similarly situated,

Case No.

COMPLAINT

13 Plaintiff,

JURY DEMAND

14 vs.

NOTICE OF RELATED CASE<sup>1</sup>

15 ARCHON CORPORATION, a Nevada  
corporation,

16 Defendant.  
17 \_\_\_\_\_/

18 Plaintiff DAVID RAINERO, by his attorney, Steven J. Parsons of LAW OFFICES OF STEVEN  
19 J. PARSONS, as an individual on behalf of himself and on behalf of others similarly situated,  
20 complains of Defendant ARCHON CORPORATION ("Archon") a Nevada corporation, and as  
21 causes of action, complains and alleges as follows:

22 PARTIES, JURISDICTION and VENUE

23 1. Plaintiff David Rainero is a resident of the State of Pennsylvania.

24 2. Defendant Archon is a Nevada corporation whose principal place of business is  
25 Las Vegas, Clark County, Nevada.

26 \_\_\_\_\_

27 <sup>1</sup>A related case is pending in southern division of this District: D. E. Shaw Laminar Portfolios, L.L.C., et.  
Al., v. Archon Corporation; Case No. 2:07-cv-01146-PMP-(LRL)

1           3.     The amount in controversy exceeds Five million dollars (\$5,000,000.00)  
2 exclusive of interest and costs.

3           4.     This Court has jurisdiction under 28 U.S.C. § 1332(d)(2).

4           5.     Venue lies in this District of Nevada under 28 U.S.C. § 1391 because Defendant  
5 Archon is domiciled in and conducts business within the District and because a substantial  
6 part of the events or omissions giving rise to the claim occurred in this district. Further, venue  
7 properly lies in the so-called southern division of this Court.

8                                 STATEMENT OF THE CASE

9           6.     On or about August 20, 1993, Defendant Archon, then known as "Sahara  
10 Gaming Corporation," adopted a resolution ("Resolution") creating Nine million (9,000,000)  
11 shares of the Preferred Stock.

12           7.     On or about September 30, 1993, Defendant Archon filed a Certificate of  
13 Designation ("Certificate") for the Preferred Stock with the Secretary of State of the State of  
14 Nevada. The Resolution was set forth in the Certificate. A copy of the Certificate is attached  
15 hereto and incorporated herein as set forth fully, Exhibit "1."

16           8.     Defendant Archon subsequently issued shares of the Preferred Stock,  
17 denominated as Exchangeable Redeemable Preferred Stock ("Preferred Stock").

18           9.     Defendant Archon recently redeemed its outstanding Preferred Stock. The  
19 redemption price was required to be \$2.14 per share plus the amount of all accrued and  
20 unpaid dividends. Defendant Archon did not properly calculate the redemption price and each  
21 shareholder has been damaged in the amount of \$3.45 per share.

22           10.    Plaintiff David Rainero was an owner of Archon Preferred Stock as of the close  
23 of business on August 31, 2007.

24           11.    According to the Proxy Statement filed by Defendant Archon on June 1, 2007  
25 with the Securities and Exchange Commission, as of May 11, 2007, there were Four million  
26 four hundred thirteen thousand seven hundred seventy-seven (4,413,777) shares of the  
27 Preferred Stock issued and outstanding. According to the Proxy Statement, as of May 1,

1 2007, Paul Lowden, Chairman and CEO of Archon owned 18.4% of the Preferred Stock and  
2 74.7% of Defendant Archon's common stock. All directors and officers of Defendant Archon  
3 owned 18.9% of the Preferred Stock and 75.4% of the common stock.

4 THE REDEMPTION OF THE PREFERRED STOCK

5 12. Paragraph 3(a)(i) of the Resolution and Certificate provided that the shares of  
6 the Preferred Stock could be redeemed at any time or from time to time, in whole or in part,  
7 at the election of Defendant Archon.

8 13. On July 31, 2007, Defendant Archon issued a Notice of Redemption ("Notice")  
9 to the holders of outstanding shares of the Preferred Stock announcing its intent to "redeem  
10 all of the outstanding shares of the Preferred Stock issued and outstanding as of the close of  
11 business on August 31, 2007". The Notice stated that issued and outstanding shares of the  
12 Preferred Stock would be redeemed at "the redemption price of \$5.241 per share".

13 14. The Notice also stated that upon redemption, the Preferred Stock would "be  
14 delisted from further trading."

15 15. The Preferred Stock has since been redeemed as provided in the Notice.

16 THE REDEMPTION PRICE

17 16. Paragraph 3(a)(i) of the Resolution and the Certificate provided that the  
18 redemption price is "equal to the Liquidation Preference".

19 17. The "Liquidation Preference", in turn, was defined in paragraph 7 of the  
20 Resolution and the Certificate to be equal to "the sum of (i) \$2.14, plus (ii) an amount equal  
21 to all accrued and unpaid dividends for the then current Dividend Period, through the date of  
22 liquidation, dissolution or winding up, plus all prior Dividend Periods, whether or not declared".  
23 Paragraph 2(a) of the Resolution and the Certificate provided that semi-annual dividend  
24 periods "(each a 'Dividend Period') shall commence on and include the 31st day of March  
25 and the 30th day of September of each year and shall end on and include the date next  
26 preceding the following Dividend Payment Date." Paragraph 2(a) of the Resolution and the  
27 Certificate also provided that Dividend Payment Dates were March 31<sup>st</sup> and September 30<sup>th</sup>

1 or the next business day, if the date was a non-business day.

2 18. The amount of the accrued and unpaid dividends must be determined to  
3 calculate and determine the Redemption Price.

4 THE AMOUNT OF THE ACCRUED AND UNPAID DIVIDENDS

5 19. Paragraph 2(a) of the Resolution and the Certificate provided for payment to  
6 holders of the Preferred Stock of cumulative cash dividends calculated as follows:

7 "a rate per annum per share (the 'Dividend Rate') initially set at 8% of (i)  
8 \$2.14 plus (ii) accrued but unpaid dividends as to which a Dividend Payment  
9 Date has occurred. Dividends shall accrue from the date of issuance and are  
10 payable semi-annually on...[the Dividend Payment Date]".

11 20. Paragraph 2 of the Resolution and the Certificate further provided that initial  
12 Dividend Rate was 8% per annum and that after the tenth Dividend Payment Date, the  
13 Dividend Rate would increase periodically to a maximum of 16% per annum. The Dividend  
14 Rate reached 16% per annum prior to the redemption of the Preferred Stock.

15 21. Paragraph 2(a) of the Resolution and the Certificate also provided the dividends  
16 "shall be fully cumulative and shall accrue (whether or not declared), on a daily basis...."

17 22. Paragraph 2 of the Resolution and the Certificate also provided that "on any or  
18 all of the first six Dividend Payment Dates [Defendant Archon] may, at its option, pay dividends  
19 on the Exchangeable [Redeemable] Preferred Stock in the form of additional shares of  
20 Exchangeable [Redeemable] Preferred Stock at the rate per annum of 0.08 shares of  
21 additional Exchangeable [Redeemable] Preferred Stock for every share entitled to receive a  
22 dividend. On the first six Dividend Payment Dates, Archon elected to pay dividends in the form  
23 of additional shares of the Preferred Stock as provided in Paragraph 2 of the Resolution and  
24 the Certificate.

25 23. After the sixth Dividend Payment Date, Defendant Archon did not pay any  
26 dividends on the Preferred Stock and, in particular, did not pay any cash dividends.

27 24. Because Defendant Archon did not pay any cash dividends on the Preferred

1 Stock, all dividends due subsequent to the sixth Dividend Payment Date accumulated.

2 25. Paragraph 2(a) of the Resolution and the Certificate requires that each of the  
3 accrued and unpaid dividends be calculated by applying the applicable Dividend Rate (8-16%  
4 annually) to the sum of \$2.14 and the accrued but unpaid dividends as to which a Dividend  
5 Payment Date had then occurred.

6 26. Calculated as required by the Resolution and the Certificate, the unpaid and  
7 accrued dividends total \$6.55. The required Redemption Price is therefore \$8.69 (\$2.14 +  
8 \$6.55).

9 27. In calculating the respective accrued and unpaid dividends, Defendant Archon  
10 applied the Dividend Rate only to \$2.14, not to the sum of \$2.14 and the accrued but unpaid  
11 dividends as to which a Dividend Payment Date had occurred. As a result, the Redemption  
12 Price calculated by Defendant Archon was \$3.45 lower than it would have been had it been  
13 calculated as required the Resolution and the Certificate.

14 CLASS ACTION ALLEGATIONS

15 28. Plaintiff David Rainero brings this action on behalf of himself and on behalf of  
16 a class defined as all holders of outstanding Preferred Stock as of the close of business on  
17 August 31, 2007, except:

18 a. Paul W. Lowden, Suanne Lowden, John W. Delaney,  
19 William J. Raggio, Howard Foster, Richard H. Taggart, and  
20 any other officer or director of Archon Corporation.

21 b. D. E. Shaw Laminar Portfolios, LLC, LC Capital Master  
22 Fund, Ltd., LC Capital/Capital Z SPV, LP, Magten Asset  
23 Management Corp, Mercury Real Estate Securities Fund  
24 LP, Mercury Real Estate Securities Offshore Fund Limited,  
25 Black Horse Capital LP, Black Horse Capital (QP) LP, Black  
26 Horse Capital Offshore Ltd. and Plainfield Special  
27 Situations Master Fund Limited.

29. The class is so numerous that joinder of all members is impractical. On information and belief, there were approximately 1,483,270 outstanding shares of the Preferred Stock held by members of the Class as of August 31, 2007.

4            30.    There are questions of law and fact common to the class.

5           **31.** Plaintiff's claims are typical of the claims of the class. The claims all arise from  
6 the same operative facts and are based on the same legal theories.

7        32. Plaintiff will fairly and adequately protect the interests of the class.

33. The prosecution of separate actions by individual members of the class would create a risk of:

10           a.     Inconsistent or varying adjudications with respect to individual members  
11 of the class which would establish incompatible standards of conduct for Defendants;

b. Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

15           34. Defendant Archon has acted on grounds generally applicable to the class,  
16 thereby making appropriate final injunctive relief or corresponding declaratory relief with  
17 respect to the class as whole.

18           35.    The questions of law or fact common to the members of the class predominate  
19 over any questions affecting any individual members and a class action is superior to other  
20 available methods for the fair and efficient adjudication of the controversy.

21        36. There is one central and overriding issue in this case: "What is the proper  
22 method under the Resolution and the Certificate for calculating the Liquidation Preference?"

**CLAIM FOR RELIEF**

24           37. Defendant Archon was required by the Resolution and the Certificate and  
25 otherwise by law to pay Plaintiff and each member of the Class an amount equal to the  
26 Liquidation Preference for each share of Preferred Stock it redeemed.

27 38. Defendant Archon was required by the Resolution and the Certificate and

1 otherwise by law to calculate the Liquidation Preference in the manner required by the  
2 Resolution and the Certificate.

3 39. Defendant Archon calculated the Liquidation Preference was \$5.241 per share.

4 40. Defendant Archon did not calculate the Liquidation Preference in the manner  
5 required by the Resolution and the Certificate.

6 41. Calculated in the manner required by the Resolution and the Certificate, the  
7 Liquidation Preference is \$8.69 per share.

8 42. Plaintiff and each of the members of the Class has been damaged in the amount  
9 of \$3.45 per share.

10 PRAYER FOR RELIEF

11 WHEREFORE, Plaintiff DAVID RAINERO, on his own behalf and on behalf of others  
12 similarly situated, prays that this Honorable Court enter judgment against Defendant ARCHON  
13 CORPORATION in the amount to which he and the members of the Class are found to be  
14 entitled, together with costs of the litigation, all interest as provided for by law, including pre-  
15 judgment interest, and attorney's fees.

16 DEMAND FOR JURY TRIAL

17 Plaintiff hereby demands a jury trial as provided by Rule 38(a) of the Federal Rules of  
18 Civil Procedure, or as otherwise may be provided for by law.

19 Dated: Tuesday, November 20, 2007.

20 LAW OFFICES OF STEVEN J. PARSONS

21 /s/ Steven J. Parsons

22 STEVEN J. PARSONS

23 Nevada Bar No. 363

24 Attorney for Plaintiff

25 DAVID RAINERO, an individual, on behalf of  
26 himself and others similarly situated  
27

AO 440 (Rev. 8/01) Summons in a Civil Action

UNITED STATES DISTRICT COURT

District of Nevada

David Rainero, an individual on behalf of himself  
and on behalf of others similarly situated,

SUMMONS IN A CIVIL ACTION

V.

Archon Corporation, a Nevada corporation,

CASE NUMBER: 2:07-cv-01553-RCJ-PAL

TO: (Name and address of Defendant)

Archon Corporation

YOU ARE HEREBY SUMMONED and required to serve on PLAINTIFF'S ATTORNEY (name and address)

Steven J. Parsons, Esq.  
Law Offices of Steven J. Parsons  
City Center West, Suite 108  
7201 W. Lake Mead Blvd.  
Las Vegas, NV 89128-8354

an answer to the complaint which is served on you with this summons, within 20 days after service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Any answer that you serve on the parties to this action must be filed with the Clerk of this Court within a reasonable period of time after service.

LANCE S. WILSON

CLERK

*Lance S. Wilson*

(By) DEPUTY CLERK



November 21, 2007

DATE

AO 440 (Rev. 8/01) Summons in a Civil Action

<b>RETURN OF SERVICE</b>		
Service of the Summons and complaint was made by me <sup>(1)</sup>	DATE	
NAME OF SERVER ( <i>PRINT</i> )	TITLE	
<i>Check one box below to indicate appropriate method of service</i>		
<input type="checkbox"/> Served personally upon the defendant. Place where served:  <input type="checkbox"/> Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein. Name of person with whom the summons and complaint were left:  <input type="checkbox"/> Returned unexecuted:  <input type="checkbox"/> Other (specify):		
<b>STATEMENT OF SERVICE FEES</b>		
TRAVEL	SERVICES	TOTAL \$0.00
<b>DECLARATION OF SERVER</b>		
<p>I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.</p> <p>Executed on _____ Date _____ Signature of Server _____</p> <p style="text-align: center;">_____ Address of Server</p>		

(1) As to who may serve a summons see Rule 4 of the Federal Rules of Civil Procedure.

# Exhibit “1”

# Exhibit “1”

EX-99.2 3 dex992.htm CERTIFICATE OF DESIGNATION

EXHIBIT 99.2

**FILED**  
IN THE OFFICE OF THE  
CLERK OF THE STATE OF NEVADA  
**SEP 30 1993**  
CLARENCE A. LAU, SECRETARY OF STATE  
*Clarence A. Lau*  
No. 7679-93

CERTIFICATE OF DESIGNATION  
OF THE  
EXCHANGEABLE REDEEMABLE PREFERRED  
STOCK  
(Par Value \$.01 Per Share)  
OF  
SAHARA GAMING CORPORATION

Pursuant to Section 78.195 of the  
Nevada Revised Statutes

The undersigned duly authorized officers of Sahara Gaming Corporation, a corporation organized and existing under the Nevada Revised Statutes, as amended (the "Company"), in accordance with the provisions of Section 78.195 therefore, DO HEREBY CERTIFY;

That pursuant to the authority conferred upon the Board of Directors by the Articles of Incorporation of the Company, the Board of Directors of the Company (the "Board of Directors") on August 20, 1993, adopted the following resolution creating a series of 9,000,000 shares of Preferred Stock, \$.01 per share par value;

RESOLVED, that pursuant to the authority expressly granted to and vested in the Board of Directors by provisions of the Articles of Incorporation of the Company (the "Articles of Incorporation"), and the Nevada Revised Statutes, as amended, the issuance of a series of the Company's preferred stock, par value \$.01 per share (the "Preferred Stock"), which shall consist of 9,000,000 of the 20,000,000 shares of Preferred Stock that the Company now has authority to issue, be and the same hereby is, authorized, and the Board of Directors hereby fixes the voting powers, designations, preferences, limitations, restrictions and relative rights, and the qualifications, limitations and restrictions of such rights, of the shares of such series (in addition to the voting powers, designations, preferences, limitations, restrictions and relative rights and the qualifications, limitations and restrictions of such rights, set forth in the Articles of Incorporation that may be applicable to the Preferred Stock) as follows:

1. *Designation and Rank.* The designation of such series of the Preferred Stock authorized by this resolution shall be the Exchangeable Redeemable Preferred Stock (the "Exchangeable Preferred Stock"). The maximum number of shares of Exchangeable Preferred Stock shall be 9,000,000. Shares of the Exchangeable Preferred Stock shall have a liquidation preference of \$2.14 per share plus accrued and unpaid dividends, thereon, subject to Section 7(a). The Exchangeable Preferred Stock shall rank prior to the common stock, par value \$0.01 per share (the "Common Stock") and to all other classes and series of equity securities of the Company now or hereafter authorized, issued or outstanding (the Common Stock and such other classes and series of equity securities collectively may be referred to herein as the "Junior Stock"), other than any class or series of equity securities of the Company ranking on a parity with (the "Parity Stock") or senior to (the "Senior Stock") the Exchangeable Preferred Stock as to dividend rights and/or rights upon liquidation, dissolution or winding up of the Company. The Exchangeable Preferred Stock shall be subordinate to and rank junior to all indebtedness of the Company now or hereafter outstanding. The Exchangeable Preferred Stock shall be subject to creation of Senior Stock, Parity Stock and Junior Stock, to the extent not expressly prohibited by the Company's Articles of Incorporation, with respect to the payment of dividends and/or rights upon liquidation, dissolution or winding up of the company.

2. *Cumulative Dividends Priority.*

(a) *Payment of Dividends.* The holders of record of shares of Exchangeable Preferred Stock shall be entitled to receive, when, as and if declared by the Board of Directors out of funds legally available therefore, cumulative cash dividends at a rate

per annum per share (the "Dividend Rate") initially set at 8% of (i) \$2.14 plus (ii) accrued but unpaid dividends as to which a Dividend Payment Date (as defined below) has occurred. Dividends shall accrue from the date of issuance and be payable semi-annually in arrears on the 31st day of March and the 30th day of September in each year (or if such day is a non-business day, on the next business day), commencing on March 31, 1994 (each of such dates a "Dividend Payment Date"); provided, however, that on any or all of the first six Dividend Payment Dates the Company may, at its option, pay dividends on the Exchangeable Preferred Stock in the form of additional shares of Exchangeable Preferred Stock at the rate per annum of 0.08 shares of additional Exchangeable Preferred Stock for every share of Exchangeable Preferred Stock entitled to receive a dividend. If all Exchangeable Preferred Stock has not been redeemed prior to the tenth Dividend Payment Date, the Dividend Rate will increase on the tenth Dividend Payment Date to the rate per annum per share of 11% and will thereafter increase by an additional 0.50% per annum per share on each Dividend Payment Date until either the Dividend Rate reaches a rate per annum per share of 16% or the Exchangeable Preferred Stock is redeemed or exchanged by the Company as set forth herein. In no circumstances will the Dividend Rate exceed 16% per annum per share. Each declared dividend shall be payable to holders of record as they appear on the stock books of the Company at the close of business on such record dates as are determined by the Board of Directors or a duly authorized committee thereof (each of such dates a "Record Date"), which Record Dates shall be not more than 45 calendar days nor fewer than 10 calendar days preceding the Dividend Payment Dates therefor. Semi-annual dividend periods (each a "Dividend Period") shall commence on and include the 31st day of March and the 30th day of September of each year and shall end on and include the date next preceding the next following Dividend Payment Date. Dividends on the Exchangeable Preferred Stock shall be fully cumulative and shall accrue (whether or not declared), on a daily basis, from the first day of each Dividend Period; provided, however, that the initial semi-annual dividend payable on March 31, 1994 and the amount of any dividend payable for any other Dividend Period shorter than a full Dividend Period shall be computed on the basis of a 360-day year composed of twelve 30-day months and the actual number of days elapsed in the relevant Dividend Period.

*(b) Priority as a Dividends.*

(i) No dividends in any form shall be declared or paid or set apart for payment on any Preferred Stock that constitutes Parity Stock with respect to dividends for any period unless full dividends on the Exchangeable Preferred Stock for the immediately preceding Dividend Period have been or contemporaneously are declared and paid. No cash dividends shall be declared or paid or set apart for payment on any Parity Stock for any period unless full cash dividends on the Exchangeable Preferred Stock for the immediately preceding Dividend Period have been or contemporaneously are declared and paid (or declared and a sum sufficient for the payment thereof set apart for such payment). When dividends are not paid in full (or not declared and a sum sufficient for such full payment not so set apart) upon the Exchangeable Preferred Stock and any Parity Stock all dividends declared upon shares of Exchangeable Preferred Stock and any Parity Stock shall be declared pro rata with respect thereto, so that in all cases the amount of dividends declared per share on the Exchangeable Preferred Stock and such Parity Stock shall bear to each other the same ratio that accrued dividends per share for the then-current Dividend Period on the shares of Exchangeable Preferred Stock (which shall include any accumulation in respect of unpaid dividends for prior Dividend Periods) and dividends, including accumulations, if any, on such Parity Stock, bear to each other.

(ii) Before (1) any dividend or other distribution (other than in Common Stock or other Junior Stock) shall be declared or paid or set aside for payment upon the Common Stock or any other Junior Stock or (2) any Common Stock or any other Junior Stock is redeemed, purchased or otherwise acquired by the Company for any consideration (or any moneys are paid to or made available for a sinking fund for the redemption of any shares of any such stock) except by conversion into or exchange for Common Stock or any other Junior Stock, (A) full cash dividends on the Exchangeable Preferred Stock must be declared and paid or funds paid over to the dividend disbursing agent of the Company for payment

of such dividends for the immediately preceding two Dividend Periods (or such lesser number of Dividend Periods during which the shares of Exchangeable Preferred Stock have been outstanding) and (B) a full cash dividend on the Exchangeable Preferred Stock must be declared at the annual Dividend Rate for the current Dividend Period, and sufficient funds paid over to the dividend disbursing agent of the Company for the payment of a cash dividend at the end of such Dividend Period. The Company shall not permit any subsidiary of the Company to purchase or otherwise acquire for consideration any shares of stock of the Company if under the preceding sentence the Company would be prohibited from purchasing or otherwise acquiring such shares at such time and in such manner.

(iii) No dividend shall be paid or set aside for holders of Exchangeable Preferred Stock for any Dividend Period unless full dividends on any Preferred Stock that constitutes Senior Stock with respect to dividends for that period have been or contemporaneously are declared and paid (or declared and a sum sufficient for the payment thereof set apart for such payment).

### 3. *Optional Redemption.*

#### (a) *General.*

(i) Subject to the applicable restrictions set forth in this Section 3 and applicable law, the shares of Exchangeable Preferred Stock may be redeemed, in whole or in part, at the election of the Company, upon notice as provided in Section 3(b), by resolution of the Board of Directors, at any time or from time to time, at a redemption price equal to the Liquidation Preference. On and after any such redemption date, dividends shall cease to accrue on the shares redeemed, and such shares shall be deemed to cease to be outstanding, provided that the redemption price (including any accrued and unpaid dividends to the date fixed for redemption) has been duly paid or provided for.

(ii) If less than all the outstanding shares of Exchangeable Preferred Stock are to be redeemed, the Company shall select at its absolute discretion the shares to be redeemed pro rata or by lot.

#### (b) *Notice of Redemption.*

(i) Notice of any redemption of shares of Exchangeable Preferred Stock, setting forth (1) the date and place fixed for said redemption, (2) the redemption price, (3) a statement that dividends on the shares to be redeemed will cease to accrue on such redemption date and (4) the method(s) by which the holders may surrender their redeemed shares and obtain payment therefor, shall be mailed, postage prepaid, at least 30 days but not more than 90 days prior to said redemption date to each holder of record of the Exchangeable Preferred Stock to be redeemed at his or her address as the same shall appear on the books of the Company. If less than all the shares of the Exchangeable Preferred Stock owned by such holder are then to be redeemed, the notice shall specify the number of shares thereof are to be redeemed and the numbers of the certificates representing such shares.

(ii) If such notice of redemption shall have been so mailed, and if on or before the redemption date specified in such notice all funds necessary for such redemption shall have been set aside by the Company separate and apart from its funds, in trust for the account of the holders of the shares so to be redeemed, so as to be and continue to be available therefor, then, on and after said redemption date, notwithstanding that any certificate for shares of the Exchangeable Preferred Stock so called for redemption shall not have been surrendered for cancellation, the shares represented thereby so called for redemption shall be deemed to be no longer outstanding, the dividends thereon shall cease to accrue, and all rights with respect to such shares of the Exchangeable Preferred Stock, so called for redemption shall forthwith cease and terminate, except only the right of the holders thereof to receive out of the funds so set aside in trust the amount payable on redemption thereof, but without interest, upon surrender (and endorsement or assignment for transfer, if required by the Company) of their certificates.

(iii) If such notice of redemption shall have been so mailed, and if on or before the date of redemption specified in such notice all said funds necessary for such redemption shall have been irrevocably deposited in trust, for the account of the holders of the shares of the Exchangeable Preferred Stock to be redeemed (and so as to be and continue to be available therefor), with a bank or trust company named in such notice doing business in the City of New York or the State of Nevada and having combined capital and surplus of at least \$50,000,000, thereupon and without awaiting the redemption date, all shares of the Exchangeable Preferred Stock with respect to which such notice shall have been so mailed and such deposit shall have been so made, shall be deemed to be no longer outstanding, and all rights with respect to such shares of the Exchangeable Preferred Stock shall forthwith upon such deposit in trust cease and terminate, except only the right of the holders thereof on, or after the redemption date to receive from such deposit the amount payable on redemption thereof, but without interest, upon surrender (and endorsement or assignment to transfer, if required by the Company) of their certificates. In case the holders of shares of the Exchangeable Preferred Stock that shall have been redeemed shall not within two years (or any longer period if required by law) after the redemption date claim any amount to deposited in trust for the redemption of such shares, such bank or trust company shall, upon demand and if permitted by applicable law, pay over to the Company any such unclaimed amount so deposited with it, and shall thereupon be relieved of all responsibility in respect thereof, and thereafter the holders of such shares shall, subject to applicable escheat laws, look only to the Company for payment of the redemption price thereof, but without interest.

(c) *Status of Shares Redeemed.* Shares of Exchangeable Preferred Stock redeemed, purchased or otherwise acquired for value by the Company, shall, after such acquisition, have the status of authorized and unissued shares of Preferred Stock and may be reissued by the Company at any time as shares of any series of Preferred Stock other than as shares of Exchangeable Preferred Stock.

#### 4. *Optional Exchange.*

(a) *Exchange; Terms of Subordinated Notes.* Any Exchangeable Preferred Stock that has not been redeemed on or prior to the tenth Dividend Payment Date may be exchanged, in whole or in part, at the election of the Company, upon notice as provided in Section 4(c), by resolution of the Board of Directors, at any time or from time to time on or after the Tenth Dividend Payment Date, for Junior Subordinated Notes (the "Junior Subordinated Notes") issued by the Company. If any Exchangeable Preferred Stock is exchanged in part by the Company, such exchange shall be pro rata or by lot. The principal amount of any Junior Subordinated Notes issued in exchange for Exchangeable Preferred Stock shall be equal to the Liquidation Preference of such Exchangeable Preferred Stock. The Junior Subordinated Notes will mature on the 15th anniversary of the date of the original issuance of the Exchangeable Preferred Stock and will best interest at an annual rate of 11%, payable semi-annually on the Dividend Payment Dates. The Junior Subordinated Notes may be redeemed, in whole or in part, at the election of the Company, by resolution of the Board of Directors, at any time and from time to time for an amount equal to the principal amount plus accrued but unpaid interest at the date of redemption. No sinking fund payments will be required with respect to the Junior Subordinated Notes.

(b) *Other Terms.* The Junior Subordinated Notes will be governed by an indenture containing in addition to the terms described in Section 4(a), such terms and conditions as the Board of Directors may approve and such terms and conditions as may be required by then applicable law.

#### (c) *Notice of Exchange.*

(i) Notice of any such exchange, setting forth (1) the date and place fixed for said exchange, (2) the principal value of the Junior Subordinated Notes to be exchanged for outstanding Exchangeable Preferred Stock, (3) a statement that dividends on the shares to be exchanged will cease to accrue on such exchange date and (4) the method(s) by which the holders may surrender their shares of Exchangeable Preferred Stock and obtain Junior Subordinated Notes in exchange therefor, shall be mailed, postage prepaid, at least 30 days but not more than 90 days prior to said exchange date so each holder of record of the Exchangeable Preferred Stock to be redeemed at his or her address as the same shall appear on the books of the Company.

(ii) If such notice of exchange shall have been so mailed and on or before the exchange date specified in the notice, the Company has delivered the Junior Subordinated Notes to an exchange agent then, on and after said exchange date, notwithstanding that any certificate for shares of the Exchangeable Preferred Stock so called for exchange shall not have been surrendered for cancellation, the shares represented thereby so called for exchange shall be deemed to be no longer outstanding, the dividends thereon shall cease to accrue, and all rights with respect to such shares of the Exchangeable Preferred Stock so called for exchange shall forthwith cease and terminate, except only the right of the holders thereof to receive Junior Subordinated Notes in exchange therefor upon surrender of their certificates.

(d) *Status of Shares Exchanged.* Shares of Exchangeable Preferred Stock exchanged for Junior Subordinated Notes shall, after such exchange, have the status of authorized and unissued shares of Preferred Stock and may be reissued by the Company at any time as shares of any series of Preferred Stock other than as shares of Exchangeable Preferred Stock.

#### 5. Voting Rights.

(a) *General Voting Rights.* Except as expressly provided hereinafter in this Section 5, or at otherwise from time to time required by applicable law, the Exchangeable Preferred Stock shall have no voting rights.

(b) *Voting Rights on Extraordinary Matters.* So long as any shares of Exchangeable Preferred Stock are outstanding and unless the consent or approval of a greater number of shares shall then be required by applicable law, without first obtaining the approval of the holders of at least two-thirds of the number of shares of Exchangeable Preferred Stock at the time outstanding (voting separately as a class) given in person or by proxy at a meeting at which the holders of such shares shall be entitled to vote separately as a class or, by written consent in lieu thereof, the Company shall not, either directly or indirectly or through merger, consolidation, reorganization or other business combination with any other company, (i) authorize, create, issue or increase the authorized or issued amount of any Preferred Stock that constitutes Senior Stock or Parity Stock, or any warrants, options or other rights convertible or exchangeable into Senior Stock or Parity Stock or (ii) amend, alter, repeal, or otherwise change any provision of its Articles of Incorporation or this resolution so as to materially and adversely affect the rights, preferences, power or privileges of the Exchangeable Preferred Stock. The creation or issuance of Preferred Stock that constitutes Exchangeable Preferred Stock or Junior Stock, or a merger, consolidation or reorganization or other business combination in which the Company is not the surviving entity, or any amendment that increases the number of authorized shares of Preferred Stock that constitutes Exchangeable Preferred Stock or Junior Stock or substitutes the surviving entity in a merger, consolidation, reorganization or other business combination for the Company, shall not be considered to be such a material and adverse change requiring a separate vote of the holders of the Exchangeable Preferred Stock.

(c) *Election of special directors.* If dividends in an amount equal to dividend payments for one Dividend Period have accrued and remain unpaid for two years, holders of Sahara Gaming Preferred Stock will have the right to a separate class vote to elect two special directors to the board of Sahara Gaming (in addition to the then authorized number of directors) at the next annual meeting of stockholders. Upon payment of all dividend arrearages, holders of Sahara Gaming Preferred Stock will be divested of such voting rights until any future time when dividends in an amount equal to dividend payments for one Dividend Period have accrued and remained unpaid for two years. The terms of the special directors will thereupon nominate and the authorized number of directors will be reduced by two.

(d) *One Vote Per Share.* In connection with any matter on which holders of the Exchangeable Preferred Stock are entitled to vote as provided in subparagraphs (b) or (c) above, or any matter on which the holders of the Exchangeable Preferred Stock are entitled to vote as one class or otherwise pursuant to law or the provisions of the Articles of Incorporation, each holder of Exchangeable Preferred Stock shall be entitled to one vote for each share of Exchangeable Preferred Stock held by such holder.

6. *No Sinking Fund.* No sinking fund will be established for the retirement or redemption of shares of Exchangeable Preferred Stock.

7. *Liquidation Rights; Priority.*

(a) In the event of the liquidation, dissolution or winding up of the affairs of the Company, whether voluntary or involuntary, after payment or provision for payment of the debts and other liabilities of the Company and after payment or provision for payment of Preferred Stock that constitutes Senior Stock with respect to the liquidation, dissolution or winding up of the affairs of the Company, the holders of shares of the Exchangeable Preferred Stock shall be entitled to receive, out of the assets of the Company, whether such assets are capital or surplus, whether or not any dividends as such are declared and before any distribution shall be made to the holders of the Common Stock or any other class of stock or series thereof ranking junior to the Exchangeable Preferred Stock with respect to the distribution of assets, an amount (the "Liquidation Preference") per share equal to the sum of (i) \$2.14, plus (ii) an amount equal to all accrued and unpaid dividends for the then current Dividend Period, through the date of liquidation, dissolution or winding up, plus all prior Dividend Periods, whether or not declared, plus (iii) if, within five years of the initial issuance of the Exchangeable Preferred Stock, all or substantially all of the assets of the Company are sold or the Company merges with or into any entity as a result of which the stockholders of the Company hold less than 50% of the equity interests of the surviving entity, an amount equal to the lesser of (1) the Designated Amount (as defined below) divided by the total number of shares of Exchangeable Preferred Stock then outstanding and (2) \$0.7143. The "Designated Amount" shall be an amount equal to \$5 million less the result of (x) the aggregate amount distributable to all holders of shares of Exchangeable Preferred Stock pursuant to (i) above minus (y) \$14.98 million. Unless specifically designated as junior or senior to the Exchangeable Preferred Stock with respect to the distribution of assets, all other series or classes of Preferred Stock of the Company shall rank on a parity with the Exchangeable Preferred Stock with respect to the distribution of assets.

(b) Nothing contained in this Section 7 shall be deemed to prevent redemption or exchange of shares of the Exchangeable Preferred Stock by the Company in the manner provided in Section 3 or Section 4, as the case may be. Neither the merger nor consolidation of the Company into or with any other company, nor the merger or consolidation of any other company into or with the Company, nor a sale, transfer or lease of all or any part of the assets of the Company, shall be deemed to be a liquidation, dissolution or winding up of the Company within the meaning of this Section 7.

(c) Written notice of any voluntary or involuntary liquidation, dissolution or winding up of the affairs of the Company, stating a payment date and the place where the distributable amounts shall be payable, shall be given by mail, postage prepaid, no less than 30 days prior to the payment date stated therein, to the holders of record of the Exchangeable Preferred Stock at their respective addresses as the same shall appear on the books of the Company.

(d) If the amounts available for distribution with respect to the Exchangeable Preferred Stock and all other outstanding stock of the Company ranking on a parity with the Exchangeable Preferred Stock upon liquidation are not sufficient to satisfy the full liquidation rights of all the outstanding Exchangeable Preferred Stock and stock ranking on a parity therewith, then the holders of each series of such stock will share ratably in any such distribution of assets in proportion to the full respective preferential amount (which in the case of the Exchangeable Preferred Stock shall mean the amounts specified in Section 7(a) and in the case of any other series of Preferred Stock may include accumulated dividends if contemplated by such series) to which they are entitled.

IN WITNESS WHEREOF, this certificate has been signed by Paul W. Lowden and Stephen J. Szapor, Jr. as of September 30, 1993.

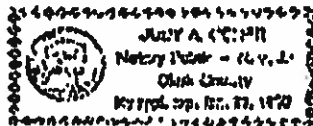
**SAHARA GAMING CORPORATION**

By: Paul W. Lowden  
Name: Paul W. Lowden  
Title: President and Chairman of the Board

By: \_\_\_\_\_  
Name: Stephen J. Szapor, Jr.  
Title: Assistant Secretary

STATE OF NEVADA )  
 ) ss.  
COUNTY OF CLARK )

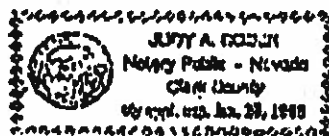
On 9-30-93, personally appeared before me, a notary public, Paul W. Lowden, personally known (or proved) to me to be the person whose name is subscribed to the above instrument who acknowledged that he executed the instrument.



Quincy G. Carter  
Notary Public

STATE OF NEVADA )  
 ) ss.  
COUNTY OF CLARK )

On 9-30-93, personally appeared before me, a notary public, Stephen J. Szapor, Jr., personally known (or proved) to me to be the person whose name is subscribed to the above instrument who acknowledged that he executed the instrument.



Judy J. Coen  
Notary Public

JS 44 (Rev. 11/04)

## CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

## I. (a) PLAINTIFFS

David Rainero

(b) County of Residence of First Listed Plaintiff \_\_\_\_\_  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Steven J. Parsons, Esq., 7201 W. Lake Mead Blvd., Ste. 108  
Las Vegas, NV 89128-8354, (702) 384-9900

## DEFENDANTS

Archon Corporation

County of Residence of First Listed Defendant \_\_\_\_\_  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE  
LAND INVOLVED.

Attorneys (If Known)

## II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff ☐ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   |                                       |                            |   |                            |                                       |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
|   | PTF                                   | DEF                        |   | PTF                        | DEF                                   |
| Citizen of This State                   | <input type="checkbox"/> 1            | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State     | <input type="checkbox"/> 4 | <input checked="" type="checkbox"/> 4 |
| Citizen of Another State                | <input checked="" type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5            |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3            | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6            |

## IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input checked="" type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury  <b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 363 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability  <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability  <b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Madamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other  <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Emp'l. Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157  <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark  <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395m) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))  <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property					

## V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

## VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
28:1332ss (28:1332 Diversity - Stockholders Suits)

Brief description of cause:  
Stockholders' Suits

## VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION DEMAND \$  
UNDER F.R.C.P. 23 In excess of \$75,000.00

CHECK YES only if demanded in complaint.  
JURY DEMAND: ☒ Yes ☐ No

## VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE Philip M. Pro

DOCKET NUMBER 2:07-cv-01146-PMP-LRL

DATE

11/20/2007

SIGNATURE OF ATTORNEY OF RECORD

Steven J. Parsons

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

  
CLERK OF THE COURT

STEPHEN R. HACKETT, ESQ.  
Nevada Bar No. 5010  
JOHNATHON FAYEGHI, ESQ.  
Nevada Bar No. 12736  
SKLAR WILLIAMS PLLC  
410 South Rampart Boulevard, Suite 350  
Las Vegas, Nevada 89145  
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Facsimile 706-360-0000  
E-mail: [shackett@sklar-law.com](mailto:shackett@sklar-law.com)  
[jfayeghi@sklar-law.com](mailto:jfayeghi@sklar-law.com)

*Attorneys for Plaintiff Stephen Haberkorn*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

STEPHEN HABERKORN, an individual,  
Plaintiff,  
vs.

CASE NO.: A- 16 - 732619 - B  
DEPT. NO.: XXI X

**COMPLAINT**

ARCHON CORPORATION, a Nevada  
Corporation; PAUL W. LOWDEN, an  
individual; SUZANNE LOWDEN, an individual;  
UNKNOWN DOE DIRECTORS OF ARCHON  
CORPORATION; DOES 1 through 10; and ROE  
ENTITIES 1 through 10, inclusive,

**REQUEST FOR ASSIGNMENT TO  
BUSINESS COURT (EDCR 1.61(a)(1) AND  
1.61(a)(2)(iii))**

**EXEMPT FROM ARBITRATION  
(NAR 3(A) – Declaratory Relief)**

Defendants.

**JURY TRIAL DEMANDED**

Plaintiff STEPHEN HABERKORN, by and through his attorneys, the law firm of  
SKLAR WILLIAMS PLLC, alleges upon personal knowledge as to his own acts and upon  
information and belief as to all other matters, as follows:

**PARTIES, JURISDICTION and VENUE**

1. Plaintiff STEPHEN HABERKORN ("Plaintiff" and/or "Haberkorn") is and at all  
times relevant was a resident of Clark County, Nevada.

2. Plaintiff is informed and believes and thereon alleges that Defendant ARCHON  
CORPORATION ("Defendant" and/or "Archon") is and at all times relevant was a Nevada  
corporation whose principal place of business is in Las Vegas, Clark County, Nevada.

1           3.     Plaintiff is informed and believes and thereon alleges that Defendant  
2 PAUL W. LOWDEN is and at all times relevant was a resident of Clark County, Nevada.

3           4.     Plaintiff is informed and believes and thereon alleges that Defendant  
4 PAUL W. LOWDEN:

- 5           a.     Has been the president of Defendant Archon since September 1993;
- 6           b.     Has been a director of Defendant Archon since September 1993;
- 7           c.     Was the Chairman of the Board of Defendant Archon from September  
8                 1993 through at least September 2010 and, upon information and belief,  
9                 has continued to be the Chairman of the Board;
- 10          d.     Was the Chief Executive Officer of Defendant Archon from September  
11                 1993 through at least September 2010 and, upon information and belief,  
12                 has continued to be its Chief Executive Officer; and
- 13          e.     Together with LICO, a company wholly owned by him, owned a  
14                 substantial majority of the common stock of Defendant Archon between at  
15                 least September 2006 and September 2010, ranging from approximately  
16                 70 percent to 80 percent and, upon information and belief, has continued  
17                 to own a substantial majority of the common stock of Archon.

18          5.     Plaintiff is informed and believes and thereon alleges that Defendant  
19 SUZANNE LOWDEN is and at all times relevant was a resident of Clark County,  
20 Nevada.

21          6.     Plaintiff is informed and believes and thereon alleges that Defendant  
22 SUZANNE LOWDEN:

- 23           a.     Has been the secretary of Defendant Archon since at least May 30, 2008;
- 24           b.     Has been the treasurer of Defendant Archon since at least July 27, 2007;
- 25           c.     Has been a director of Defendant Archon since September 1993;
- 26           d.     Was the Executive Vice President of Defendant Archon from September  
27                 1993 through at least September 2010 and, upon information and belief,  
28                 has continued to be its executive vice president; and

1 e. Was an owner of Archon common stock from at least September 2006  
2 through September 2010 and, upon information and belief, has continued  
3 to be an owner of its common stock.

4 7. The true names and capacities, whether individual, corporate, associate, or  
5 otherwise of the Defendants named herein as UNKNOWN DOES 1 through 10, inclusive, are  
6 unknown to Plaintiff at this time. Therefore, Plaintiff sues said Defendants by fictitious names  
7 and will ask the Court to amend this Complaint to show the true names and capacities of each  
8 UNKNOWN DOE at such time when the same are ascertained. Plaintiff is informed and  
9 believes that said UNKNOWN DOES are responsible in some manner for the damages suffered  
10 by Plaintiff; therefore, Plaintiff sues said Defendants by such fictitious names.

11 8. Defendants Paul W. Lowden, Suzanne Lowden and the UNKNOWN DOES are  
12 collectively referred to throughout this Complaint as the "Individual Defendants."

13 9. The Individual Defendants, by reason of their corporate directorship and/or  
14 executive positions, stand in a fiduciary position relative to Archon's shareholders, which  
15 fiduciary relationship, at all times relevant herein, required them to exercise their best judgment,  
16 to act in a prudent manner and on an informed basis, and to act with candor and utmost good  
17 faith in dealing with Archon's shareholders.

18 10. Plaintiff's Complaint states a controversy over which this Court has jurisdiction,  
19 and venue is properly in this Court as both Plaintiff and Defendants are residents of or domiciled  
20 in Clark County, Nevada, or doing business principally in Clark County, Nevada, and many of  
21 the acts and omissions complained of by Plaintiff occurred in Clark County, Nevada.

22 11. The matters in controversy exceed, exclusive of interest and costs, the minimum  
23 jurisdictional amount of the Court of TEN THOUSAND AND NO/100 DOLLARS  
24 (\$10,000.00).

25 **STATEMENT OF THE CASE**

26 12. On or about September 30, 1993, Archon (then known as Sahara Gaming  
27 Corporation) adopted a resolution ("Resolution") creating nine million (9,000,000) shares of  
28 preferred stock.

1           13.    On or about September 30, 1993, Archon filed its Certificate of  
2 Designation of the Exchangeable Redeemable Preferred Stock of Archon (the  
3 "Certificate") with the Secretary of State of Nevada. The Resolution was set forth in the  
4 Certificate. A copy of the Certificate is attached hereto and incorporated as if set forth  
5 fully herein as **Exhibit 1**.

6           14.    Archon subsequently issued shares of its Exchangeable Redeemable  
7 Preferred Stock (the "Preferred Stock") pursuant to the Certificate.

8           15.    According to the Proxy Statement filed by Defendant Archon on June 1,  
9 2007 with the Securities and Exchange Commission, as of May 11, 2007 there were four  
10 million four hundred thirteen thousand seven hundred seventy-seven (4,413,777) shares  
11 of the Preferred Stock issued and outstanding. According to the Proxy Statement, as of  
12 May 1, 2007, Defendant Paul W. Lowden, Chairman and CEO of Archon, owned 18.4  
13 percent of the Preferred Stock and 74.7 percent of Defendant Archon's common stock  
14 and all directors and officers of Defendant Archon, collectively, owned 18.9 percent of  
15 the Preferred Stock and 75.4 percent of the common stock.

16           16.    Plaintiff Haberkorn is the beneficial owner of 2,254 shares of the Preferred  
17 Stock and 40,000 shares of Archon common stock.

18           17.    On July 31, 2007, Archon issued a Notice of Redemption and related  
19 Letter of Transmittal to the holders of outstanding shares of the Preferred Stock  
20 announcing its intent to "redeem all of the outstanding shares of the Preferred Stock  
21 issued and outstanding as of the close of business on August 31, 2007" (the "Notice of  
22 Redemption"). The Notice of Redemption states that issued and outstanding shares of the  
23 Preferred Stock will be redeemed at "the redemption price of \$5.241 per share." A copy  
24 of the Notice of Redemption is attached hereto and incorporated as if set forth fully  
25 herein as **Exhibit 2**.

26           18.    Archon set aside in trust such funds, but only such funds, as were  
27 necessary for the redemption of the Preferred Stock at a redemption price of \$5.241 per  
28 share.

1           19. As set forth more fully below, it has been determined judicially, authoritatively  
2 and with finality that Archon miscalculated the redemption price and that the correct redemption  
3 price for the Preferred Stock, at the time the Notice of Redemption was issued on July 31, 2007,  
4 was \$8.69 per share.

5           20. During the quarter ended June 30, 2008, Archon offered to purchase up to  
6 600,000 shares of its common stock, par value \$.01 per share, at a price of \$40.00 per share. A  
7 total of 62,604 shares of the Archon common stock were tendered in response to Archon's offer  
8 to purchase. On June 20, 2008, Archon purchased all 62,604 shares of the common stock for a  
9 total price of approximately \$2.5 million.

10           21. In December 2008 and June 2010, the Individual Defendants approved Archon's  
11 adoption of plans, effective January 5, 2009 and June 30, 2010, for Archon to make periodic and  
12 ongoing open market purchases of up to 5.0% of its own common stock (up to 319,539 shares of  
13 common stock). On November 3, 2010, Archon purchased 225,000 shares under this program.

14           22. In March of 2011, Archon implemented a 1 for 250 reverse stock split. This had  
15 the effect of cashing out all stockholders with fewer than 250 shares, leaving only larger  
16 shareholders in place. An immediate forward split of 250 for 1 restored the remaining  
17 stockholders to their pre-reverse-split holdings. The effect of the reverse stock split/forward split  
18 was intended to reduce the number of shareholders of record below three hundred, which in turn  
19 would eliminate Archon's obligation to file certain periodic financial reports with the SEC.

20           23. In conjunction with the March 2011 reverse stock split/forward split, the Archon  
21 stockholders who held fewer than 250 shares of Archon common stock before the reverse stock  
22 split were paid the market value of the pre-reverse stock split shares as of the close of trading on  
23 February 15, 2011, in an amount equal to \$12.00 per pre-reverse stock split share in lieu of  
24 receiving a fractional post-reverse stock split share.

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

28       ///

1                   **Prior Judicial Decisions Regarding the Calculation of the Redemption Price**

2                   25.     On August 27, 2007, D.E. Shaw Laminar Portfolios, L.L.C., *et al.*,  
3 initiated a lawsuit in the U.S. District Court for the District of Nevada docketed as case  
4 number 2:07-cv-01146-PMP-(LRL) against Archon alleging a miscalculation of the  
5 Redemption Price ("D.E. Shaw").

6                   26.     Then, on January 2, 2008 Leeward Capital, L.P., initiated a lawsuit in the  
7 U.S. District Court for the District of Nevada docketed as case number 2:08-cv-00007-  
8 PMP-(LRL) against Archon alleging a miscalculation of the Redemption Price  
9 ("Leeward").

10                  27.     In both the D.E. Shaw and Leeward cases, summary judgment was granted  
11 in favor of the plaintiffs. The Court determined and entered judgments for the plaintiffs  
12 that the redemption price should have been \$8.69 per share, calculated as the sum of  
13 \$2.14 and the unpaid dividends in the amount of \$6.55 that had accrued to August 31,  
14 2007.

15                  28.     Defendant Archon appealed both the D.E. Shaw and Leeward judgments  
16 to the U.S. Court of Appeals for the Ninth Circuit. On September 19, 2012, the  
17 judgments in D.E. Shaw and Leeward were affirmed by the U.S. Court of Appeals for the  
18 Ninth Circuit in case numbers 11-15406 and 11-15482.

19                  29.     After the judgments in D.E. Shaw and Leeward were affirmed by the U.S.  
20 Court of Appeals for the Ninth Circuit, Archon filed a petition for panel rehearing which  
21 was denied. Following the U.S. Court of Appeals for the Ninth Circuit's denial of  
22 Archon's petition for panel rehearing, Archon did not file a petition for rehearing, *en*  
23 *banc*, a petition for *certiorari*, or otherwise challenge or appeal the judgments further  
24 such that they became final judgments against Archon.

25                  30.     Upon information and belief, Archon paid the judgments in D.E. Shaw  
26 and Leeward in approximately January or February 2013.

27                  31.     Archon never paid any of the other Preferred stockholders the correct  
28 amount of the Redemption Price and instead, withheld those sums for itself.

**FIRST CLAIM FOR RELIEF**

**(Declaratory Relief)**

32. Plaintiff incorporates by reference each of the allegations previously stated in this Complaint as though set forth fully herein.

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.

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. Since that date, Archon has not at any time set aside (or deposited) in trust such funds as would be necessary for the redemption of the Preferred Stock as of the date of such setting aside or deposit.

35. The conditions necessary for the Preferred Stock to be deemed to be no longer outstanding, for the dividends thereon to cease to accrue, and for all rights with respect to the Preferred Stock to cease and terminate, except for the right to receive the amount payable upon redemption, have therefore never been satisfied as to Plaintiff's shares. The Plaintiff's Preferred Stock therefore remains outstanding and continues to accrue dividends.

36. As of the date of this Complaint, the redemption value of the Preferred Stock is \$30.42 per share.

37. Due to the fact that the Preferred Stock remained outstanding after August 31, 2007, the March 23, 2011 reverse stock split/forward split was 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.

38. Similarly, 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 shareholders.

39. An actual controversy exists between Plaintiff Haberkorn on the one hand and Defendant Archon on the other hand concerning: (a) whether the Preferred Stock remains

1 outstanding and continues to accrue dividends; (b) whether the holders of the Preferred Stock are  
2 entitled to all of the rights and privileges of the Preferred Stockholders under the Certificate and  
3 under Archon's Articles of Incorporation; (c) whether the March 23, 2011 reverse stock split-  
4 forward split was invalid; (d) whether the March 31, 2011 de-registration with the SEC was  
5 invalid; and (e) the current redemption value of the Preferred Stock.

6 40. Plaintiff is informed and believes and based thereon alleges that Defendant  
7 Archon disagrees with and disputes these contentions.

8 41. Plaintiff Haberkorn is entitled to a declaratory judgment that: (a) the Preferred  
9 Stock remains outstanding and continues to accrue dividends; (b) the holders of the Preferred  
10 Stock are entitled to all of the rights and privileges of the Preferred Stockholders under the  
11 Certificate and under Archon's Articles of Incorporation; (c) the March 23, 2011 reverse stock  
12 split-forward split was invalid and therefore void *ab initio*; (d) the March 31, 2011 de-  
13 registration with the SEC was invalid and therefore void *ab initio*; (e) Archon is required to issue  
14 corrective reports with the SEC for all reporting periods from 2011 to the present; and (f) that the  
15 redemption value of the Preferred Stock is \$30.42 per share as of the date of this Complaint, plus  
16 semiannual 8 percent dividends computed on a compound basis between the date of this  
17 Complaint and the date of final judgment herein.

18 42. Plaintiff Haberkorn has been forced to retain the services of an attorney for which  
19 Plaintiff Haberkorn is entitled to an award of his reasonable attorneys' fees and costs incurred  
20 herein.

## 21 SECOND CLAIM FOR RELIEF

### 22 (Breach of Contract)

23 43. Plaintiff incorporates by reference each of the allegations previously stated in this  
24 Complaint as though set forth fully herein.

25 44. Defendant Archon was required by the Resolution and the Certificate and  
26 otherwise by law to pay Plaintiff Haberkorn an amount equal to the Liquidation Preference for  
27 each share of Preferred Stock at the time of redemption.  
28

1           45. Defendant Archon was required by the Resolution and the Certificate and  
2 otherwise by law to calculate the Liquidation Preference in the manner required by the  
3 Resolution and the Certificate.

4           46. Calculated as required by the Resolution and the Certificate, the unpaid and  
5 accrued dividends to August 31, 2007 totaled \$6.55. Therefore, the required Redemption Price,  
6 at the time the Notice of Redemption was issued was \$8.69 (\$2.14 + \$6.55).

7           47. Archon failed to calculate the Liquidation Preference in the manner required by  
8 the Resolution and the Certificate and instead stated that the issued and outstanding shares of the  
9 Preferred Stock will be redeemed at "the redemption price of \$5.241 per share."

10          48. By giving notice of the purported redemption of the Preferred Stock without  
11 satisfying the conditions therefor (*i.e.*, failing to calculate the Liquidation Preference in the  
12 manner required by the Resolution and the Certificate), Archon breached the Certificate.

13          49. As a result of said breach, the conditions necessary for the Preferred Stock to be  
14 deemed to be no longer outstanding, for the dividends thereon to cease to accrue, and for all  
15 rights with respect to the Preferred Stock to cease and terminate, except for the right to receive  
16 the amount payable upon redemption, have not been satisfied. Therefore, the Preferred Stock  
17 remains outstanding and continues to accrue dividends.

18          50. Section 2(b)(ii) of the Certificate provides the following:

19           "Before (1) any dividend or other distribution (other than in  
20 Common Stock or other Junior Stock) shall be declared or paid or  
21 set aside for payment upon the Common Stock or any other Junior  
22 Stock or (2) any Common Stock or any other Junior Stock is  
23 redeemed, purchased or otherwise acquired by the Company for  
24 any consideration (or any moneys are paid to or made available for  
25 a sinking fund for the redemption of any shares of any such stock)  
26 except by conversion into or exchange for Common Stock or any  
27 other Junior Stock, (A) full cash dividends on the Exchangeable  
28 Preferred Stock must be declared and paid or funds paid over to the  
dividend disbursing agent of the Company for payment of such  
dividends for the immediately preceding two Dividend Periods (or  
such lesser number of Dividend Periods during which the shares of  
Exchangeable Preferred Stock have been outstanding) and (B) a  
full cash dividend on the Exchangeable Preferred Stock must be  
declared at the annual Dividend Rate for the current Dividend

1 Period, and sufficient funds paid over to the dividend disbursing  
2 agent of the Company for the payment of a cash dividend at the  
3 end of such Dividend Period..."

4 51. As the Preferred Stock remained outstanding after August 31, 2007, Archon's  
5 June 2008 purchase of 62,604 shares of its common stock constituted a breach of Section 2(b)(ii)  
6 of the Certificate as Archon failed to declare and pay the full cash dividends on the Preferred  
7 Stock for the immediately preceding two Dividend Periods prior to the June 2008 purchase.

8 52. Similarly, Archon's November 3, 2010 purchase of 225,000 shares of its common  
9 stock constituted a breach of Section 2(b)(ii) of the Certificate as Archon failed to declare and  
10 pay the full cash dividends on the Preferred Stock for the immediately preceding two Dividend  
11 Periods prior to the November 2010 purchase.

12 53. Similarly, Archon's March 2011 payments to the Archon stockholders who held  
13 fewer than 250 shares of Archon common stock before the reverse stock split constituted a  
14 breach of Section 2(b)(ii) of the Certificate as Archon failed to declare and pay the full cash  
15 dividends on the Preferred Stock for the immediately preceding two Dividend Periods prior to  
16 the March 2011 payments.

17 54. As a proximate result of Defendant Archon's breaches described above, Plaintiff  
18 Haberkorn has been damaged in an amount in excess of TEN THOUSAND AND NO/100  
19 DOLLARS (\$10,000.00).

20 55. As a further proximate result of Defendant Archon's breaches described above,  
21 Plaintiff Haberkorn has been forced to retain the services of an attorney for which Plaintiff  
22 Haberkorn is entitled to an award of his reasonable attorneys' fees and costs incurred herein.

### 23 **THIRD CLAIM FOR RELIEF**

#### 24 **(Breach of Fiduciary Duty - Unequal Treatment of Preferred Stockholders)**

25 56. Plaintiff incorporates by reference each of the allegations previously stated in this  
26 Complaint as though set forth fully herein.

27 ///

28 ///

1           57. Pursuant to NRS 78.195, as Archon officers and directors, the Individual  
2 Defendants had a statutory and fiduciary duty to treat all holders of the Preferred Stock,  
3 including Plaintiff Haberkorn, equally.

4           58. The Individual Defendants breached their statutory and fiduciary duty to treat all  
5 holders of the Preferred Stock equally by discriminating against Plaintiff Haberkorn by causing  
6 Archon to pay the unpaid balance of the redemption price to certain large institutional holders of  
7 the Preferred Stock, but failing, neglecting and refusing to cause Archon to pay the unpaid  
8 balance of the redemption price to Plaintiff Haberkorn, or even to notify him of the unpaid  
9 balance of the redemption price.

10          59. Specifically, after it had been determined judicially, authoritatively and with  
11 finality in the D.E. Shaw and Leeward cases that the redemption price should have been \$8.69  
12 per share, the Individual Defendants caused Defendant Archon to pay the unpaid balance of the  
13 redemption price in January or February 2013 to plaintiffs in D.E. Shaw and Leeward. However,  
14 the Individual Defendants failed, neglected and refused to cause Defendant Archon to pay the  
15 unpaid balance of the redemption price to Plaintiff Haberkorn, or even to notify him of the  
16 unpaid balance of the redemption price.

17          60. As a result of the Individual Defendants' breaches of their statutory and fiduciary  
18 duties described above, Plaintiff Haberkorn has been damaged in an amount in excess of TEN  
19 THOUSAND AND NO/100 DOLLARS (\$10,000.00).

20          61. As a further proximate result of the Individual Defendants' breaches of statutory  
21 and fiduciary duties described above, Plaintiff Haberkorn has been forced to retain the services  
22 of an attorney for which Plaintiff Haberkorn is entitled to an award of his reasonable attorneys'  
23 fees and costs incurred herein.

24          62. The conduct of the Individual Defendants, as described above, was despicable  
25 conduct which was engaged in with conscious disregard of the rights of Plaintiff Haberkorn and  
26 the Individual Defendants are otherwise guilty of oppression, fraud, malice and bad faith,  
27 entitling Plaintiff Haberkorn to punitive and/or exemplary damages pursuant to NRS 42.005.

28       ///

**FOURTH CLAIM FOR RELIEF**

**(Breach of Fiduciary Duty -Nondisclosure of Material Information)**

63. Plaintiff incorporates by reference each of the allegations previously stated in this Complaint as though set forth fully herein.

64. As Archon officers and directors, the Individual Defendants owed fiduciary duties to all shareholders of Archon, including the duty to deal with the Archon shareholders with utmost candor, honesty and good faith.

65. The Individual Defendants breached their fiduciary duty to deal with the Archon shareholders with utmost candor, honesty and good faith by failing to disclose material information related to the redemption price for the Preferred Stock.

66. Specifically, in the Notice of Redemption, Defendant Archon and the Individual Defendants represented that the redemption price for the Preferred Stock was \$5.241 per share.

67. However, on September 19, 2012, it was determined judicially, authoritatively and with finality that the correct redemption price for the Preferred Stock, at the time the Notice of Redemption was issued, was \$8.69 per share.

68. Despite the fact that it had been determined judicially, authoritatively and with finality that the correct redemption price for the Preferred Stock, at the time the Notice of Redemption was issued, was \$8.69 per share, the Individual Defendants have failed and, as of the date of this Complaint, continue to fail to disclose to and/or notify the holders of the Preferred Stock, including Plaintiff Haberkorn, of the correct redemption price for the Preferred Stock and to pay Plaintiff Haberkorn and the other Preferred Stockholders the proper redemption price for their Preferred Stock.

69. As a result of the Individual Defendants' misstatements, omissions and failures to disclose and their breaches of fiduciary duties described above, Plaintiff Haberkorn has been damaged in an amount in excess of TEN THOUSAND AND NO/100 DOLLARS (\$10,000.00).

70. As a further proximate result of the Individual Defendants' breaches of fiduciary duties described above, Plaintiff Haberkorn has been forced to retain the services of an attorney for which Plaintiff Haberkorn is entitled to an award of his reasonable attorneys' fees and costs

1 incurred herein.

2 71. The conduct of the Individual Defendants, as described above, was despicable  
3 conduct which was engaged in with conscious disregard of the rights of Plaintiff Haberkorn, and  
4 the Individual Defendants were otherwise guilty of oppression, fraud, malice and bad faith,  
5 entitling Plaintiff Haberkorn to punitive and/or exemplary damages pursuant to NRS 42.005.

6 **FIFTH CLAIM FOR RELIEF**

7 **(Breach of Fiduciary Duty – Wrongful Deregistration)**

8 72. Plaintiff incorporates by reference each of the allegations previously stated in this  
9 Complaint as though set forth fully herein.

10 73. Prior to March 2011, Archon's shares of common stock were publicly traded and  
11 registered under the Securities Exchange Act of 1934, as amended. As a result, Archon was  
12 subject to the periodic reporting requirements of the Securities and Exchange Commission under  
13 the Securities Exchange Act of 1934 for the protection of Archon's shareholders. As a reporting  
14 company, Archon was also subject to federal securities laws requiring an independent Board of  
15 Directors, and specified accounting rules and reporting procedures, also for the protection of its  
16 shareholders.

17 74. On March 31, 2011, Archon announced it would de-register its stock. De-  
18 registration allows Archon to operate unrestricted by the oversight provided by the federal  
19 securities laws. The de-registration diminished the value of Archon's stock for outside holders  
20 by limiting information and denying markets the independent assurance of material and timely  
21 disclosures, while giving insiders, such as controlling shareholders Paul and Suzanne Lowden  
22 and the other Individual Defendants, the advantage of superior knowledge and the opportunity to  
23 operate safe from outside shareholder scrutiny.

24 75. Archon was not required to de-register. Rather, it was a decision made by an  
25 Archon Board of Directors dominated by controlling shareholders, Defendants Paul and Suzanne  
26 Lowden. Insiders like Defendants Paul and Suzanne Lowden can benefit from a company de-  
27 registering because they have information the public shareholders do not, and can engage in  
28 transactions and receive compensation without revealing the details the federal securities laws

1 would require.

2 76. On March 23, 2011, in an attempt to qualify for de-registered status, Archon  
3 purported to conduct a reverse stock split, followed immediately afterward by a forward stock  
4 split. Archon's stated purpose was to reduce the number of its shareholders to less than 300.

5 77. However, as previously stated, the Preferred Stock remained outstanding after  
6 August 31, 2007 due to Archon's breach of the Certificate. As such, Archon's purported de-  
7 registration with the SEC was invalid as the number of shareholders of record exceeded the  
8 Securities and Exchange Commission's limit of three hundred shareholders.

9 78. The Individual Defendants have breached their fiduciary duties owed to Plaintiff  
10 in that their conduct resulted in the invalid deregistration of Archon's shares, which has  
11 adversely affected Plaintiff because said deregistration has curtailed the national market for  
12 Archon's shares and adversely affected Plaintiff's ability to liquidate his shares at a fair price.

13 79. In addition, by de-registering, the elimination of the ability of shareholders to be  
14 assured to receive, on a routine basis, consistently prepared financial and other information  
15 normally available through public filings, and the removal of the SEC as a watchdog to ensure  
16 full and proper disclosure to shareholders, also adversely affects the value of Plaintiff's shares.

17 80. By contrast, Defendants Paul and Suzanne Lowden, who are majority  
18 shareholders, are not affected adversely because they will continue to have full access to  
19 Archon's information unavailable to non-majority shareholders. Moreover, because Defendants  
20 Paul and Suzanne Lowden control significantly more than 50% of the voting power of Archon  
21 common stock, they easily can sell their interest in Archon if they decide to do so and do not  
22 need an active market to consummate a sale at a fair price. This is a luxury not shared by the  
23 minority shareholders, including Plaintiff, absent a visible market.

24 81. As a result of the Individual Defendants' invalid and wrongful de-registration of  
25 Archon and their breaches of fiduciary duties described above, Plaintiff Haberkorn has been  
26 damaged in an amount in excess of TEN THOUSAND AND NO/100 DOLLARS (\$10,000.00).

27 82. As a further proximate result of the Individual Defendants' breaches of fiduciary  
28 duties described above, Plaintiff Haberkorn has been forced to retain the services of an attorney

1 for which Plaintiff Haberkorn is entitled to an award of his reasonable attorneys' fees and costs  
2 incurred herein.

3 83. The conduct of the Individual Defendants, as described above, was despicable  
4 conduct which was engaged in with conscious disregard of the rights of Plaintiff Haberkorn, and  
5 the Individual Defendants were otherwise guilty of oppression, fraud, malice and bad faith,  
6 entitling Plaintiff Haberkorn to punitive and/or exemplary damages pursuant to NRS 42.005.

7 **SIXTH CLAIM FOR RELIEF**

8 **(Nondisclosure)**

9 84. Plaintiff incorporates by reference each of the allegations previously stated in this  
10 Complaint as though set forth fully herein.

11 85. As Archon officers and directors, the Individual Defendants owe fiduciary duties  
12 to all shareholders of Archon, including Plaintiff Haberkorn.

13 86. As a result of their fiduciary relationship with Plaintiff Haberkorn, the Individual  
14 Defendants had a duty of loyalty and a duty of care to disclose all material information in  
15 connection with the redemption of the Preferred Stock.

16 87. The Individual Defendants failed to disclose material facts regarding the  
17 redemption of the Preferred Stock to Plaintiff Haberkorn.

18 88. On July 31, 2007, Archon through the Individual Defendants represented that the  
19 redemption price for the Preferred Stock was \$5.241 per share.

20 89. However, on September 19, 2012, it was determined judicially, authoritatively  
21 and with finality that the correct redemption price for the Preferred Stock, at the time the Notice  
22 of Redemption was issued, was \$8.69 per share.

23 90. Despite the fact that it had been determined judicially, authoritatively and with  
24 finality that the correct redemption price for the Preferred Stock, at the time the Notice of  
25 Redemption was issued, was \$8.69 per share, the Individual Defendants failed and continue to  
26 fail, to disclose and/or notify Plaintiff Haberkorn of the correct redemption price for the  
27 Preferred Stock.

28 91. The Individual Defendants engaged in the aforementioned nondisclosure knowing

1 that the calculation of the redemption price contained in the Notice of Redemption was  
2 misleading and with the intent to defraud Plaintiff Haberkorn and the other Preferred  
3 Stockholders.

4 92. Plaintiff Haberkorn has been damaged by the Individual Defendants'  
5 nondisclosure by: (1) never being paid the unpaid balance of the redemption price; (2) never  
6 having the unpaid dividends accrued on each share of the Preferred Stock after August 31, 2007;  
7 and (3) never being allowed to vote to elect two special directors to the Archon Board of  
8 Directors as provided for in the Certificate.

9 93. As a proximate result of the Individual Defendants' improper conduct, as  
10 described above, Plaintiff Haberkorn incurred actual damages consisting of: (1) the unpaid  
11 balance of the redemption price of \$3.449 per share plus the unpaid dividends which have  
12 continued to accrue since August 31, 2007; and (2) the lost opportunity to vote to elect two  
13 special directors to the Archon Board of Directors, since at least August 31, 2007.

14 94. The Individual Defendants' improper conduct, as described above, was done  
15 intentionally, through malice, fraud and oppression, and with the intention to deprive Plaintiff  
16 Haberkorn of his rights as a holder of shares of the Preferred Stock without fair and adequate  
17 compensation. This was calculated and despicable conduct that subjected Plaintiff Haberkorn to  
18 cruel and unjust hardship in conscious disregard of his rights, so as to justify an award of  
19 exemplary and punitive damages pursuant to NRS 42.005.

20 **SEVENTH CLAIM FOR RELIEF**

21 **(Unjust Enrichment)**

22 95. Plaintiff incorporates by reference each of the allegations previously stated in this  
23 Complaint as though set forth fully herein.

24 96. Once it had been determined judicially, authoritatively and with finality in the  
25 D.E. Shaw and Leeward cases that the redemption price should have been \$8.69 per share, and  
26 the time for filing a petition for rehearing, *en banc* and a petition for *certiorari* had passed, there  
27 was no basis in law or equity for Defendant Archon to retain the unpaid balance of the  
28 redemption price and the dividends which continued to accrue.

97. Defendant Archon has unjustly retained money belonging to Plaintiff Haberkorn and the other Preferred Stockholders against the fundamental principles of justice and equity, good faith and good conscience.

98. As a result of Defendant Archon's conduct as described above, Plaintiff Haberkorn has been damaged in an amount in excess of TEN THOUSAND AND NO/100 DOLLARS (\$10,000.00).

99. As a further proximate result of Defendant Archon's conduct as described above, Plaintiff Haberkorn has been forced to retain the services of an attorney for which Plaintiff Haberkorn is entitled to an award of his reasonable attorneys' fees and costs incurred herein.

### EIGHTH CLAIM FOR RELIEF

**(Accounting)**

100. Plaintiff incorporates by reference each of the allegations previously stated in this Complaint as though set forth fully herein.

101. As a result of the Defendants' breaches of contract, breaches of fiduciary duties, nondisclosure, and unjust enrichment, Plaintiff Haberkorn is entitled to a full accounting of Defendant Archon's retention of the unpaid balance of the redemption price and the dividends which have continued to accrue.

102. Furthermore, Plaintiff Haberkorn is entitled to a full accounting of the following:

- a. Any dividends paid to holders of Archon common stock made after August 31, 2007;
- b. Any bonuses or extraordinary compensation paid to Defendants Paul W. Lowden and Suzanne Lowden, or any other Archon officer or director after August 31, 2007;
- c. Any transfers of Archon assets made after August 31, 2007; and
- d. Any debts incurred by Archon after August 31, 2007.

103. Plaintiff Haberkorn has been forced to retain the services of an attorney for which Plaintiff Haberkorn is entitled to an award of his reasonable attorneys' fees and costs incurred herein.

1 **NINTH CLAIM FOR RELIEF**

2 **(Injunctive Relief)**

3 104. Plaintiff incorporates by reference each of the allegations previously stated in this  
4 Complaint as though set forth fully herein.

5 105. Defendants' conduct, alleged herein, has and will continue to cause harm and  
6 irreparable damage to Plaintiff Haberkorn.

7 106. Plaintiff Haberkorn respectfully requests that Archon be required to hold a  
8 separate class vote for the holders of the Preferred Stock to elect two special directors to the  
9 Archon Board of Directors as provided in the Certificate.

10 107. Plaintiff Haberkorn has a likelihood of success on the merits as the Preferred  
11 Stock remains outstanding.

12 108. Injunctive relief is appropriate as monetary damages are insufficient to protect the  
13 rights and privileges of Plaintiff Haberkorn to vote to elect two special directors to the Archon  
14 Board of Directors.

15 **PRAYER FOR RELIEF**

16 WHEREFORE, Plaintiff Stephen Haberkorn prays for the following relief:

- 17 1. That this Court declare the following:
- 18 a. the Preferred Stock remains outstanding and continues to accrue dividends;
  - 19 b. the holders of the Preferred Stock are entitled to all of the rights and privileges of  
20 the Preferred Stockholders under the Certificate and under Archon's Articles of  
21 Incorporation;
  - 22 c. the March 23, 2011 reverse stock split-forward split was invalid and therefore  
23 void *ab initio*;
  - 24 d. the March 31, 2011 de-registration with the SEC was invalid and therefore void  
25 *ab initio*;
  - 26 e. Archon is required to issue corrective reports with the SEC for all reporting  
27 periods from 2011 to the present; and
  - 28 f. that the redemption value of the Preferred Stock is \$30.42 per share as of the date  
of this Complaint, plus semiannual 8 percent dividends computed on a compound  
basis between the date of this Complaint and the date of final judgment herein.

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# **EXHIBIT 1**

EX-99.2 3 dex992.htm CERTIFICATE OF DESIGNATION

EXHIBIT 99.2

**FILED**  
IN THE OFFICE OF THE  
SECRETARY OF STATE OF THE  
STATE OF NEVADA  
SEP 30 1993  
CHRIS A. LAU, SECRETARY OF STATE  
*Chris Lau*  
No. 7679-93

CERTIFICATE OF DESIGNATION  
OF THE  
EXCHANGEABLE REDEEMABLE PREFERRED  
STOCK  
(Par Value \$.01 Per Share)  
OF  
SAHARA GAMING CORPORATION

Pursuant to Section 78.195 of the  
Nevada Revised Statutes

The undersigned duly authorized officers of Sahara Gaming Corporation, a corporation organized and existing under the Nevada Revised Statutes, as amended (the "Company"), in accordance with the provisions of Section 78.195 therefore, DO HEREBY CERTIFY;

That pursuant to the authority conferred upon the Board of Directors by the Articles of Incorporation of the Company, the Board of Directors of the Company (the "Board of Directors") on August 20, 1993, adopted the following resolution creating a series of 9,000,000 shares of Preferred Stock, \$.01 per share par value;

**RESOLVED**, that pursuant to the authority expressly granted to and vested in the Board of Directors by provisions of the Articles of Incorporation of the Company (the "Articles of Incorporation"), and the Nevada Revised Statutes, as amended, the issuance of a series of the Company's preferred stock, par value \$.01 per share (the "Preferred Stock"), which shall consist of 9,000,000 of the 20,000,000 shares of Preferred Stock that the Company now has authority to issue, be and the same hereby is, authorized, and the Board of Directors hereby fixes the voting powers, designations, preferences, limitations, restrictions and relative rights, and the qualifications, limitations and restrictions of such rights, of the shares of such series (in addition to the voting powers, designations, preferences, limitations, restrictions and relative rights and the qualifications, limitations and restrictions of such rights, set forth in the Articles of Incorporation that may be applicable to the Preferred Stock) as follows:

1. *Designation and Rank.* The designation of such series of the Preferred Stock authorized by this resolution shall be the Exchangeable Redeemable Preferred Stock (the "Exchangeable Preferred Stock"). The maximum number of shares of Exchangeable Preferred Stock shall be 9,000,000. Shares of the Exchangeable Preferred Stock shall have a liquidation preference of \$2.14 per share plus accrued and unpaid dividends, thereon, subject to Section 7(a). The Exchangeable Preferred Stock shall rank prior to the common stock, par value \$.01 per share (the "Common Stock") and to all other classes and series of equity securities of the Company now or hereafter authorized, issued or outstanding (the Common Stock and such other classes and series of equity securities collectively may be referred to herein as the "Junior Stock"), other than any class or series of equity securities of the Company ranking on a parity with (the "Parity Stock") or senior to (the "Senior Stock") the Exchangeable Preferred Stock as to dividend rights and/or rights upon liquidation, dissolution or winding up of the Company. The Exchangeable Preferred Stock shall be subordinate to and rank junior to all indebtedness of the Company now or hereafter outstanding. The Exchangeable Preferred Stock shall be subject to creation of Senior Stock, Parity Stock and Junior Stock, to the extent not expressly prohibited by the Company's Articles of Incorporation, with respect to the payment of dividends and/or rights upon liquidation, dissolution or winding up of the company.

2. *Cumulative Dividends Priority.*

(a) *Payment of Dividends.* The holders of record of shares of Exchangeable Preferred Stock shall be entitled to receive, when, as and if declared by the Board of Directors out of funds legally available therefore, cumulative cash dividends at a rate

per annum per share (the "Dividend Rate") initially set at 8% of (i) \$2.14 plus (ii) accrued but unpaid dividends as to which a Dividend Payment Date (as defined below) has occurred. Dividends shall accrue from the date of issuance and be payable semi-annually in arrears on the 31st day of March and the 30th day of September in each year (or if such day is a non-business day, on the next business day), commencing on March 31, 1994 (each of such dates a "Dividend Payment Date"); provided, however, that on any or all of the first six Dividend Payment Dates the Company may, at its option, pay dividends on the Exchangeable Preferred Stock in the form of additional shares of Exchangeable Preferred Stock at the rate per annum of 0.08 shares of additional Exchangeable Preferred Stock for every share of Exchangeable Preferred Stock entitled to received a dividend. If all Exchangeable Preferred Stock has not been redeemed prior to the tenth Dividend Payment Date, the Dividend Rate will increase on the tenth Dividend Payment Date to the rate per annum per share of 11% and will thereafter increase by an additional 0.50% per annum per share on each Dividend Payment Date until either the Dividend Rate reaches a rate per annum per share of 16% or the Exchangeable Preferred Stock is redeemed or exchanged by the Company as set forth herein. In no circumstances will the Dividend Rate exceed 16% per annum per share. Each declared dividend shall be payable to holders of record as they appear on the stock books of the Company at the close of business on such record dates as are determined by the Board of Directors or a duly authorized committee thereof (each of such dates a "Record Date"), which Record Dates shall be not more than 45 calendar days nor fewer than 10 calendar days preceding the Dividend Payment Dates therefor. Semi-annual dividend periods (each a "Dividend Period") shall commence on and include the 31st day of March and the 30th day of September of each year and shall end on and include the date next preceding the next following Dividend Payment Date. Dividends on the Exchangeable Preferred Stock shall be fully cumulative and shall accrue (whether or not declared), on a daily basis, from the first day of each Dividend Period; provided, however, that the initial semi-annual dividend payable on March 31, 1994 and the amount of any dividend payable for any other Dividend Period shorter than a full Dividend Period shall be computed on the basis of a 360-day year composed of twelve 30-day months and the actual number of days elapsed in the relevant Dividend Period.

*(b) Priority as a Dividends.*

(i) No dividends in any form shall be declared or paid or set apart for payment on any Preferred Stock that constitutes Parity Stock with respect to dividends for any period unless full dividends on the Exchangeable Preferred Stock for the immediately preceding Dividend Period have been or contemporaneously are declared and paid. No cash dividends shall be declared or paid or set apart for payment on any Parity Stock for any period unless full cash dividends on the Exchangeable Preferred Stock for the immediately preceding Dividend Period have been or contemporaneously are declared and paid (or declared and a sum sufficient for the payment thereof set apart for such payment). When dividends are not paid in full (or not declared and a sum sufficient for such full payment not so set apart) upon the Exchangeable Preferred Stock and any Parity Stock all dividends declared upon shares of Exchangeable Preferred Stock and any Parity Stock shall be declared pro rata with respect thereto, so that in all cases the amount of dividends declared per share on the Exchangeable Preferred Stock and such Parity Stock shall bear to each other the same ratio that accrued dividends per share for the then-current Dividend Period on the shares of Exchangeable Preferred Stock (which shall include any accumulation in respect of unpaid dividends for prior Dividend Periods) and dividends, including accumulations, if any, on such Parity Stock, bear to each other.

(ii) Before (1) any dividend or other distribution (other than in Common Stock or other Junior Stock) shall be declared or paid or set aside for payment upon the Common Stock or any other Junior Stock or (2) any Common Stock or any other Junior Stock is redeemed, purchased or otherwise acquired by the Company for any consideration (or any moneys are paid to or made available for a sinking fund for the redemption of any shares of any such stock) except by conversion into or exchange for Common Stock or any other Junior Stock, (A) full cash dividends on the Exchangeable Preferred Stock must be declared and paid or funds paid over to the dividend disbursing agent of the Company for payment

of such dividends for the immediately preceding two Dividend Periods (or such lesser number of Dividend Periods during which the shares of Exchangeable Preferred Stock have been outstanding) and (B) a full cash dividend on the Exchangeable Preferred Stock must be declared at the annual Dividend Rate for the current Dividend Period, and sufficient funds paid over to the dividend disbursing agent of the Company for the payment of a cash dividend at the end of such Dividend Period. The Company shall not permit any subsidiary of the Company to purchase or otherwise acquire for consideration any shares of stock of the Company if under the preceding sentence the Company would be prohibited from purchasing or otherwise acquiring such shares at such time and in such manner.

(iii) No dividend shall be paid or set aside for holders of Exchangeable Preferred Stock for any Dividend Period unless full dividends on any Preferred Stock that constitutes Senior Stock with respect to dividends for that period have been or contemporaneously are declared and paid (or declared and a sum sufficient for the payment thereof set apart for such payment).

### 3. *Optional Redemption.*

#### (a) *General.*

(i) Subject to the applicable restrictions set forth in this Section 3 and applicable law, the shares of Exchangeable Preferred Stock may be redeemed, in whole or in part, at the election of the Company, upon notice as provided in Section 3(b), by resolution of the Board of Directors, at any time or from time to time, at a redemption price equal to the Liquidation Preference. On and after any such redemption date, dividends shall cease to accrue on the shares redeemed, and such shares shall be deemed to cease to be outstanding, provided that the redemption price (including any accrued and unpaid dividends to the date fixed for redemption) has been duly paid or provided for.

(ii) If less than all the outstanding shares of Exchangeable Preferred Stock are to be redeemed, the Company shall select at its absolute discretion the shares to be redeemed pro rata or by lot.

#### (b) *Notice of Redemption.*

(i) Notice of any redemption of shares of Exchangeable Preferred Stock, setting forth (1) the date and place fixed for said redemption, (2) the redemption price, (3) a statement that dividends on the shares to be redeemed will cease to accrue on such redemption date and (4) the method(s) by which the holders may surrender their redeemed shares and obtain payment therefor, shall be mailed, postage prepaid, at least 30 days but not more than 90 days prior to said redemption date to each holder of record of the Exchangeable Preferred Stock to be redeemed at his or her address as the same shall appear on the books of the Company. If less than all the shares of the Exchangeable Preferred Stock owned by such holder are then to be redeemed, the notice shall specify the number of shares thereof are to be redeemed and the numbers of the certificates representing such shares.

(ii) If such notice of redemption shall have been so mailed, and if on or before the redemption date specified in such notice all funds necessary for such redemption shall have been set aside by the Company separate and apart from its funds, in trust for the account of the holders of the shares so to be redeemed, so as to be and continue to be available therefor, then, on and after said redemption date, notwithstanding that any certificate for shares of the Exchangeable Preferred Stock so called for redemption shall not have been surrendered for cancellation, the shares represented thereby so called for redemption shall be deemed to be no longer outstanding, the dividends thereon shall cease to accrue, and all rights with respect to such shares of the Exchangeable Preferred Stock, so called for redemption shall forthwith cease and terminate, except only the right of the holders thereof to receive out of the funds so set aside in trust the amount payable on redemption thereof, but without interest, upon surrender (and endorsement or assignment for transfer, if required by the Company) of their certificates.

(iii) If such notice of redemption shall have been so mailed, and if on or before the date of redemption specified in such notice all said funds necessary for such redemption shall have been irrevocably deposited in trust, for the account of the holders of the shares of the Exchangeable Preferred Stock to be redeemed (and so as to be and continue to be available therefor), with a bank or trust company named in such notice doing business in the City of New York or the State of Nevada and having combined capital and surplus of at least \$50,000,000, thereupon and without awaiting the redemption date, all shares of the Exchangeable Preferred Stock with respect to which such notice shall have been so mailed and such deposit shall have been so made, shall be deemed to be no longer outstanding, and all rights with respect to such shares of the Exchangeable Preferred Stock shall forthwith upon such deposit in trust cease and terminate, except only the right of the holders thereof on, or after the redemption date to receive from such deposit the amount payable on redemption thereof, but without interest, upon surrender (and endorsement or assignment to transfer, if required by the Company) of their certificates. In case the holders of shares of the Exchangeable Preferred Stock that shall have been redeemed shall not within two years (or any longer period if required by law) after the redemption date claim any amount to deposited in trust for the redemption of such shares, such bank or trust company shall, upon demand and if permitted by applicable law, pay over to the Company any such unclaimed amount so deposited with it, and shall thereupon be relieved of all responsibility in respect thereof, and thereafter the holders of such shares shall, subject to applicable escheat laws, look only to the Company for payment of the redemption price thereof, but without interest.

(c) *Status of Shares Redeemed.* Shares of Exchangeable Preferred Stock redeemed, purchased or otherwise acquired for value by the Company, shall, after such acquisition, have the status of authorized and unissued shares of Preferred Stock and may be reissued by the Company at any time as shares of any series of Preferred Stock other than as shares of Exchangeable Preferred Stock.

#### 4. *Optional Exchange.*

(a) *Exchange; Terms of Subordinated Notes.* Any Exchangeable Preferred Stock that has not been redeemed on or prior to the tenth Dividend Payment Date may be exchanged, in whole or in part, at the election of the Company, upon notice as provided in Section 4(c), by resolution of the Board of Directors, at any time or from time to time on or after the Tenth Dividend Payment Date, for Junior Subordinated Notes (the "Junior Subordinated Notes") issued by the Company. If any Exchangeable Preferred Stock is exchanged in part by the Company, such exchange shall be pro rata or by lot. The principal amount of any Junior Subordinated Notes issued in exchange for Exchangeable Preferred Stock shall be equal to the Liquidation Preference of such Exchangeable Preferred Stock. The Junior Subordinated Notes will mature on the 15th anniversary of the date of the original issuance of the Exchangeable Preferred Stock and will bear interest at an annual rate of 11%, payable semi-annually on the Dividend Payment Dates. The Junior Subordinated Notes may be redeemed, in whole or in part, at the election of the Company, by resolution of the Board of Directors, at any time and from time to time for an amount equal to the principal amount plus accrued but unpaid interest at the date of redemption. No sinking fund payments will be required with respect to the Junior Subordinated Notes.

(b) *Other Terms.* The Junior Subordinated Notes will be governed by an indenture containing in addition to the terms described in Section 4(a), such terms and conditions as the Board of Directors may approve and such terms and conditions as may be required by then applicable law.

#### (c) *Notice of Exchange.*

(i) Notice of any such exchange, setting forth (1) the date and place fixed for said exchange, (2) the principal value of the Junior Subordinated Notes to be exchanged for outstanding Exchangeable Preferred Stock, (3) a statement that dividends on the shares to be exchanged will cease to accrue on such exchange date and (4) the method(s) by which the holders may surrender their shares of Exchangeable Preferred Stock and obtain Junior Subordinated Notes in exchange therefor, shall be mailed, postage prepaid, at least 30 days but not more than 90 days prior to said exchange date so each holder of record of the Exchangeable Preferred Stock to be redeemed at his or her address as the same shall appear on the books of the Company.

(ii) If such notice of exchange shall have been so mailed and on or before the exchange date specified in the notice, the Company has delivered the Junior Subordinated Notes to an exchange agent then, on and after said exchange date, notwithstanding that any certificate for shares of the Exchangeable Preferred Stock so called for exchange shall not have been surrendered for cancellation, the shares represented thereby so called for exchange shall be deemed to be no longer outstanding, the dividends thereon shall cease to accrue, and all rights with respect to such shares of the Exchangeable Preferred Stock so called for exchange shall forthwith cease and terminate, except only the right of the holders thereof to receive Junior Subordinated Notes in exchange therefor upon surrender of their certificates.

(d) *Status of Shares Exchanged.* Shares of Exchangeable Preferred Stock exchanged for Junior Subordinated Notes shall, after such exchange, have the status of authorized and unissued shares of Preferred Stock and may be reissued by the Company at any time as shares of any series of Preferred Stock other than as shares of Exchangeable Preferred Stock.

#### 5. Voting Rights.

(a) *General Voting Rights.* Except as expressly provided hereinafter in this Section 5, or at otherwise from time to time required by applicable law, the Exchangeable Preferred Stock shall have no voting rights.

(b) *Voting Rights on Extraordinary Matters.* So long as any shares of Exchangeable Preferred Stock are outstanding and unless the consent or approval of a greater number of shares shall then be required by applicable law, without first obtaining the approval of the holders of at least two-thirds of the number of shares of Exchangeable Preferred Stock at the time outstanding (voting separately as a class) given in person or by proxy at a meeting at which the holders of such shares shall be entitled to vote separately as a class or, by written consent in lieu thereof, the Company shall not, either directly or indirectly or through merger, consolidation, reorganization or other business combination with any other company, (i) authorize, create, issue or increase the authorized or issued amount of any Preferred Stock that constitutes Senior Stock or Parity Stock, or any warrants, options or other rights convertible or exchangeable into Senior Stock or Parity Stock or (ii) amend, alter, repeal, or otherwise change any provision of its Articles of Incorporation or this resolution so as to materially and adversely affect the rights, preferences, power or privileges of the Exchangeable Preferred Stock. The creation or issuance of Preferred Stock that constitutes Exchangeable Preferred Stock or Junior Stock, or a merger, consolidation or reorganization or other business combination in which the Company is not the surviving entity, or any amendment that increases the number of authorized shares of Preferred Stock that constitutes Exchangeable Preferred Stock or Junior Stock or substitutes the surviving entity in a merger, consolidation, reorganization or other business combination for the Company, shall not be considered to be such a material and adverse change requiring a separate vote of the holders of the Exchangeable Preferred Stock.

(c) *Election of special directors.* If dividends in an amount equal to dividend payments for one Dividend Period have accrued and remain unpaid for two years, holders of Sahara Gaming Preferred Stock will have the right to a separate class vote to elect two special directors to the board of Sahara Gaming (in addition to the then authorized number of directors) at the next annual meeting of stockholders. Upon payment of all dividend arrearages, holders of Sahara Gaming Preferred Stock will be divested of such voting rights until any future time when dividends in an amount equal to dividend payments for one Dividend Period have accrued and remained unpaid for two years. The terms of the special directors will thereupon nominate and the authorized number of directors will be reduced by two.

(d) *One Vote Per Share.* In connection with any matter on which holders of the Exchangeable Preferred Stock are entitled to vote as provided in subparagraphs (b) or (c) above, or any matter on which the holders of the Exchangeable Preferred Stock are entitled to vote as one class or otherwise pursuant to law or the provisions of the Articles of Incorporation, each holder of Exchangeable Preferred Stock shall be entitled to one vote for each share of Exchangeable Preferred Stock held by such holder.

6. *No Sinking Fund.* No sinking fund will be established for the retirement or redemption of shares of Exchangeable Preferred Stock.

7. *Liquidation Rights; Priority.*

(a) In the event of the liquidation, dissolution or winding up of the affairs of the Company, whether voluntary or involuntary, after payment or provision for payment of the debts and other liabilities of the Company and after payment or provision for payment of Preferred Stock that constitutes Senior Stock with respect to the liquidation, dissolution or winding up of the affairs of the Company, the holders of shares of the Exchangeable Preferred Stock shall be entitled to receive, out of the assets of the Company, whether such assets are capital or surplus, whether or not any dividends as such are declared and before any distribution shall be made to the holders of the Common Stock or any other class of stock or series thereof ranking junior to the Exchangeable Preferred Stock with respect to the distribution of assets, an amount (the "Liquidation Preference") per share equal to the sum of (i) \$2.14, plus (ii) an amount equal to all accrued and unpaid dividends for the then current Dividend Period, through the date of liquidation, dissolution or winding up, plus all prior Dividend Periods, whether or not declared, plus (iii) if, within five years of the initial issuance of the Exchangeable Preferred Stock, all or substantially all of the assets of the Company are sold or the Company merges with or into any entity as a result of which the stockholders of the Company hold less than 50% of the equity interests of the surviving entity, an amount equal to the lesser of (1) the Designated Amount (as defined below) divided by the total number of shares of Exchangeable Preferred Stock then outstanding and (2) \$0.7143. The "Designated Amount" shall be an amount equal to \$5 million less the result of (x) the aggregate amount distributable to all holders of shares of Exchangeable Preferred Stock pursuant to (i) above minus (y) \$14.98 million. Unless specifically designated as junior or senior to the Exchangeable Preferred Stock with respect to the distribution of assets, all other series or classes of Preferred Stock of the Company shall rank on a parity with the Exchangeable Preferred Stock with respect to the distribution of assets.

(b) Nothing contained in this Section 7 shall be deemed to prevent redemption or exchange of shares of the Exchangeable Preferred Stock by the Company in the manner provided in Section 3 or Section 4, as the case may be. Neither the merger nor consolidation of the Company into or with any other company, nor the merger or consolidation of any other company into or with the Company, nor a sale, transfer or lease of all or any part of the assets of the Company, shall be deemed to be a liquidation, dissolution or winding up of the Company within the meaning of this Section 7.

(c) Written notice of any voluntary or involuntary liquidation, dissolution or winding up of the affairs of the Company, stating a payment date and the place where the distributable amounts shall be payable, shall be given by mail, postage prepaid, no less than 30 days prior to the payment date stated therein, to the holders of record of the Exchangeable Preferred Stock at their respective addresses as the same shall appear on the books of the Company.

(d) If the amounts available for distribution with respect to the Exchangeable Preferred Stock and all other outstanding stock of the Company ranking on a parity with the Exchangeable Preferred Stock upon liquidation are not sufficient to satisfy the full liquidation rights of all the outstanding Exchangeable Preferred Stock and stock ranking on a parity therewith, then the holders of each series of such stock will share ratably in any such distribution of assets in proportion to the full respective preferential amount (which in the case of the Exchangeable Preferred Stock shall mean the amounts specified in Section 7(a) and in the case of any other series of Preferred Stock may include accumulated dividends if contemplated by such series) to which they are entitled.

IN WITNESS WHEREOF, this certificate has been signed by Paul W. Lowden and Stephen J. Szapor, Jr. as of September 30, 1993.

## SAHARA GAMING CORPORATION

By: 

Name: Paul W. Lowden

Title: President and Chairman of the Board

By: 

Name: Stephen J. Szapor, Jr.


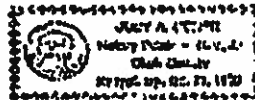
Title: Assistant Secretary

STATE OF NEVADA )

) ss.

COUNTY OF CLARK )

On 9-30-93, personally appeared before me, a notary public, Paul W. Lowden, personally known (or proved) to me to be the person whose name is subscribed to the above instrument who acknowledged that he executed the instrument.

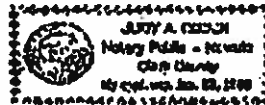
  
Notary Public

STATE OF NEVADA )

) ss.

COUNTY OF CLARK )

On 9-30-93, personally appeared before me, a notary public, Stephen J. Szapor, Jr., personally known (or proved) to me to be the person whose name is subscribed to the above instrument who acknowledged that he executed the instrument.

  
Notary Public

# EXHIBIT 2

EX-99.1 2 dex991.htm NOTICE/TRANSMITTAL

EXHIBIT 99.1

## ARCHON CORPORATION

## NOTICE OF REDEMPTION OF PREFERRED STOCK

NOTICE IS HEREBY GIVEN that Archon Corporation, a Nevada corporation (the "Company"), has called for and will redeem each share of its Exchangeable Redeemable Preferred Stock ("Preferred Stock") outstanding on and as of August 31, 2007 (the "Redemption Date") for the sum of \$5.241, which sum includes all accrued and unpaid dividends to the Redemption Date (the "Redemption Price"). The sum to be paid, depending on the shares redeemed, will be rounded to the nearest cent.

NOTICE IS FURTHER GIVEN that from and after the Redemption Date all certificates representing shares of Preferred Stock held will be cancelled and will have no rights or privileges other than the right to receive the Redemption Price in exchange for each share, net of any withholding tax. All shares of Preferred Stock will also cease to accrue dividends or any other sums as of the Redemption Date.

As stated in the Letter of Transmittal that accompanies this Notice (and should be filled out and returned), in order to receive payment you must redeem your shares of Preferred Stock at any time on or after August 31, 2007 by submitting the original certificate(s) representing shares of Preferred Stock. If you have lost or misplaced your shares of Preferred Stock, please follow the directions in the Letter of Transmittal.

Upon receipt by The Nevada Agency And Trust Company (on behalf of the Company) of the surrender of your shares of Preferred Stock, the Company will issue payment as you direct in the amount equal to the Redemption Price multiplied by the actual number of shares of Preferred Stock you delivered for surrender. The Company has set aside funds necessary to accomplish the redemption of Preferred Stock at Bank of Nevada, located in North Las Vegas, Nevada, as required by the Certificate of Designation of the Exchangeable Redeemable Preferred Stock ("Certificate") and as further required by Nevada law.

We feel it may be helpful to our investors to note that litigation regarding the liquidation preference related to the Preferred Stock was commenced in 2006 in the State of Connecticut and that litigation has recently been dismissed, without prejudice to refile. If you wish to learn more about the basis of this litigation, you may refer to our latest Form 10-K, dated, September 30, 2006 and our latest Form 10-Q, dated May 15, 2007. Both reports may be obtained from the website of the U.S. Securities and Exchange Commission, <http://www.sec.gov/edgar/searchedgar/webusers.htm> or either report may be requested directly from the Company.

Should you have any questions about the redemption of your shares of Preferred Stock, please contact the Company's representative for stock redemption matters at the following telephone number: (702) 639-2246.

DATED this 31<sup>st</sup> day of July, 2007.

ARCHON CORPORATION

Paul W. Lowden  
Chairman of the Board and President

**REDEMPTION OF  
ARCHON CORPORATION  
EXCHANGEABLE REDEEMABLE PREFERRED STOCK**

**LETTER OF TRANSMITTAL**

This form, together with your Exchangeable Redeemable Preferred Stock ("Preferred Stock") share certificate(s), should be promptly delivered or sent by registered mail to *The Nevada Agency and Trust Company* at the address set forth in the instructions.

The undersigned hereby surrenders for redemption pursuant to notice the following certificate(s) representing the Preferred Stock at the price of \$5.241 per share, which sum includes accrued and unpaid dividends. The sum to be paid, depending on the shares redeemed, will be rounded to the nearest cent.

Certificate Number

Number of Shares

Registered In the Name of

**DIRECTION TO THE NEVADA AGENCY AND TRUST COMPANY**

The undersigned Preferred Stock shareholder represents and warrants that:

- (a) it has full power and authority to surrender the share(s) of Preferred Stock;
- (b) the share(s) of Preferred Stock have not been sold, assigned or transferred, nor has any agreement been entered into to sell, assign or transfer any of the shares of Preferred Stock to any other person or entity; and,
- (c) it has good title to and is the beneficial owner of the Preferred Stock free and clear of all liens, restrictions, charges, encumbrances, claims and rights of others.

The undersigned covenants to execute upon request of Archon Corporation any additional documents, transfers and other assurances as may be necessary or desirable to complete the surrender of the Preferred Stock to Archon Corporation.

Please forward the check for the proceeds of the redemption of the above-referenced Preferred Stock share(s) represented by the above certificate(s) as follows:

Name (please print)

Address

City

State

Postal Code

Telephone (Office)

(Home)

Social Security Number

Tax Identification Number

( )

( )

Date:

Signature Of Shareholder(s)

## INSTRUCTIONS FOR LETTER OF TRANSMITTAL

1. This Letter of Transmittal should be completed and signed and returned together with the appropriate certificate(s) representing the Preferred Stock redeemed to The Nevada Agency and Trust Company (NATCO) at the office address listed below. The method of delivery to NATCO is at the option and risk of the shareholder, but if USPS mail is used, registered mail is recommended.

By Mail:

Archon Corporation  
c/o The Nevada Agency and Trust Company  
50 West Liberty Street, Suite 880  
Reno, NV 89501

By Registered Mail, Hand or by Courier:

Archon Corporation  
c/o The Nevada Agency and Trust Company  
50 West Liberty Street, Suite 880  
Reno, NV 89501

2. Archon Corporation reserves the right, if it so elects, in its absolute discretion to instruct NATCO to waive any defect or irregularity contained in any Letter of Transmittal received by it without waiving that same defect as to any or all of the remaining Letters of Transmittal received.
3. Share certificate(s) registered in the name of the person by whom (or on whose behalf) the Letter of Transmittal is signed need not be endorsed or accompanied by any share transfer power of attorney.
4. Share certificate(s) not registered in the name of the person by whom (or on whose behalf) the Letter of Transmittal is signed must be endorsed by the registered holder thereof or deposited together with share transfer power of attorney properly completed by the named, registered holder. Such signature must be guaranteed by an "Eligible Institution" or in some other manner satisfactory to NATCO. An "Eligible Institution" means a bank or a member of the Securities Transfer Agent Medallion Program (STAMP) or member of the New York Stock Exchange Inc Medallion Signature Program (MSP). Members of these programs are usually members of a recognized stock exchange in the United States, members of the National Association of Securities Dealers or banks and trust companies in the United States.
5. Where the Letter of Transmittal is executed on behalf of a entity (corporation, partnership or association) or by a fiduciary (an agent, executor, administrator, trustee, guardian or any person acting in a representative capacity), the Letter of Transmittal must be accompanied by satisfactory evidence of authority to act in that capacity, such as resolutions or an order of appointment.
6. Additional copies of the Letter of Transmittal may be obtained from NATCO at the address listed above or this form may be photocopied if additional pages are needed.
7. If one or more Preferred Stock share certificate(s) have been lost or destroyed, this Letter of Transmittal should be completed as fully as possible and forwarded to NATCO together with a letter stating the nature of the loss. NATCO will respond with the replacement requirements, which must be properly completed and returned prior to NATCO being able to process payment.
8. Any questions should be directed to the Company, Archon Corporation at (702) 639-2246.
9. If you return this Letter of Transmittal and your Preferred Stock before the Redemption Date, the items will be processed by NATCO on or after the Redemption Date. Please allow adequate processing time of at least ten (10) bank business days after receipt of this form, or the Redemption Date, whichever is later, before making inquiring to NATCO or the Company about your payment. If your request is in order, the payment for your Preferred Stock will be mailed to you using USPS first class mail at the address noted on the first page of this form. This payee will also be used for any reporting forms that must be filed regarding payment.

  
CLERK OF THE COURT

STEPHEN R. HACKETT, ESQ.  
Nevada Bar No. 5010  
JOHNATHON FAYEGHI, ESQ.  
Nevada Bar No. 12736  
SKLAR WILLIAMS PLLC  
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Las Vegas, Nevada 89145  
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[jfayeghi@sklar-law.com](mailto:jfayeghi@sklar-law.com)

*Attorneys for Plaintiff Stephen Haberkorn*

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

STEPHEN HABERKORN, an individual,  
Plaintiff,

vs.

ARCHON CORPORATION, a Nevada  
Corporation; PAUL W. LOWDEN, an  
individual; SUZANNE LOWDEN, an individual;  
UNKNOWN DOE DIRECTORS OF ARCHON  
CORPORATION; DOES 1 through 10; and ROE  
ENTITIES 1 through 10, inclusive,  
Defendants.

CASE NO.: A-16-732619-B  
DEPT. NO.: XV

**PLAINTIFF STEPHEN HABERKORN'S  
OPPOSITION TO DEFENDANTS'  
MOTION TO DISMISS COMPLAINT**

**Date of Hearing: June 9, 2016**  
**Time of Hearing: 9:00 a.m.**

Plaintiff STEPHEN HABERKORN ("Plaintiff"), by and through his attorneys,  
STEPHEN R. HACKETT, ESQ., and JOHNATHON FAYEGHI, ESQ., of the law firm SKLAR  
WILLIAMS PLLC, hereby submits his Opposition to Defendants' Motion to Dismiss Complaint.

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1 This Opposition is made and based upon all of the pleadings and papers on file herein,  
2 the attached Memorandum of Points and Authorities and upon any oral argument at the hearing  
3 on this Motion.

4 DATED this 13<sup>th</sup> day of May, 2016.

5 SKLAR WILLIAMS PLLC

6 

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendants' Motion to Dismiss ("Motion") seeks to dismiss Plaintiff's Complaint in its  
4 entirety pursuant to NRCP 12(b)(5). The entire basis for the Motion is Defendants' contention  
5 that "because this action (and the factual basis for each of the claims for relief) is fundamentally  
6 based on Archon's alleged error in 2007, Plaintiff's claims for relief necessarily accrued in 2007  
7 and are barred by the applicable statutes of limitation." However, Defendants' Motion ignores  
8 the fact that any applicable statutes of limitation on Plaintiff's claims were tolled by class action  
9 tolling and equitable tolling based upon the previously filed (and still pending) class action cases  
10 against Archon for the same conduct. Furthermore, Plaintiff's breach of contract and breach of  
11 fiduciary duty claims arise from a continuing and ongoing wrong due to Defendants' failure to  
12 pay the dividends that have accrued since the failure to properly redeem Plaintiff's shares in  
13 2007. Finally, Plaintiff's unjust enrichment claim did not commence to run until the judgments  
14 in *D.E. Shaw* and *Leeward* became final after they had been affirmed on appeal. Accordingly,  
15 Defendants' Motion to Dismiss should be denied in its entirety.  
16

17 **II. STATEMENT OF FACTS**

18 All of the allegations of Plaintiff's Complaint must be accepted as true for purposes of  
19 this Motion to Dismiss. The following facts are alleged in Plaintiffs Complaint.  
20

21 **A. The Attempted Redemption of Archon Preferred Stock**

22 In September 1993, Defendant Archon issued preferred stock. A Certificate of  
23 Designation was filed for the preferred stock on or about September 30, 1993. Comp., ¶¶ 12-14.  
24 The Certificate of Designation provided that the preferred stock could be redeemed at the  
25 election of Archon. Defendant Archon purported to redeem its outstanding preferred stock as of  
26 the close of business on August 31, 2007. Comp., ¶ 17. Pursuant to the Certificate of  
27 Designation, the redemption price was required to be \$2.14 per share plus the amount of all  
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1 accrued and unpaid dividends to August 31, 2007. Defendant Archon did not properly calculate  
2 the redemption price and paid its preferred shareholders only \$5.241 per share. Comp., ¶ 18.  
3 However, the redemption price should have been \$8.69 per share. Comp., ¶ 27.

4 **B. Prior Federal Court Litigation Against Defendant Archon**

5 Three actions were filed against Defendant Archon in the United States District Court for  
6 the District of Nevada challenging Defendant Archon's calculation of the redemption price. On  
7 August 27, 2007, D.E. Shaw Laminar Portfolios, LLC., et al, filed the first action against  
8 Defendant Archon alleging a miscalculation of the redemption price. Case No. 2:07-CV-01146-  
9 PMP-LRL ("*D.E. Shaw*"). Comp., ¶ 25. The second action was filed as a class action by David  
10 Rainero on November 20, 2007 and was brought on behalf of all of the preferred shareholders  
11 except the plaintiffs in *D.E. Shaw* and the officers and directors of Archon. Case No. 2:07-CV-  
12 01553-GMN-PAL ("*Rainero*"). A copy of the *Rainero* complaint is attached hereto as Exhibit  
13 1.<sup>1</sup> The third action was filed by Leeward Capital, L.P. on January 2, 2008. Case No. 2:08-CV-  
14 00007-PMP-LRL ("*Leeward*"). Comp., ¶ 26. Each of the foregoing actions are explained in  
15 detail below.  
16

17 **1. D.E. Shaw and Leeward**

18 In both the *D.E. Shaw* and *Leeward* cases, summary judgment was granted in favor of the  
19 plaintiffs. The Court determined in published opinions that the redemption price should have  
20 been \$8.69 per share, calculated as the sum of \$2.14 and the unpaid dividends in the amount of  
21 \$6.55 that had accrued to August 31, 2007. See *D.E. Shaw Laminar Portfolios, LLC v. Archon*  
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23

24 <sup>1</sup> Plaintiff requests the Court take judicial notice of the publicly filed class action complaints  
25 attached hereto as Exhibits 1 and 2. NRS 47.130 permits this Court to take judicial notice of  
26 facts that are "[c]apable of accurate and ready determination by resort to sources whose accuracy  
27 cannot reasonably be questioned... so that the fact is not subject to reasonable dispute." NRS  
28 47.130. Complaints filed in related to court actions are the proper subject of judicial notice.  
*Opoka v. Immigration & Naturalization Services*, 94 F.3d 392 (7th Cir. 1996); see also  
*Stockmeier v. Nevada Department of Corrections Psychological Review Pan*, 124 Nev. 313, 183  
P.3d 133 (2008)

1 Corp., 570 F. Supp. 2d 1262 (D. Nev. 2008); *D.E. Shaw Laminar Portfolios, LLC v. Archon*  
2 Corp., 755 F. Supp. 2d 1122 (D. Nev. 2010).

3 Defendant Archon appealed both the *D.E. Shaw* and *Leeward* judgments to the U.S.  
4 Court of Appeals for the Ninth Circuit. On September 19, 2012, the judgments in *D.E. Shaw* and  
5 *Leeward* were affirmed by the U.S. Court of Appeals for the Ninth Circuit in case numbers 11-  
6 15406 and 11-15482. Comp., ¶ 28.

7 After the judgments in *D.E. Shaw* and *Leeward* were affirmed by the U.S. Court of  
8 Appeals for the Ninth Circuit, Archon paid the judgments sometime around January of February  
9 of 2013. Comp., ¶ 30. However, Archon failed to pay Plaintiff or any of the other preferred  
10 shareholders. Comp., ¶ 31.

## 11 **2. The Rainero Class Action**

12 On November 7, 2013, after the judgments in *D.E. Shaw* and *Leeward* were affirmed,  
13 partial summary judgment was granted in favor of the plaintiff in *Rainero*. Finding that Archon  
14 was collaterally estopped by the judgments in *D.E. Shaw* and *Leeward*, the Court held “that the  
15 issue of how to construe the Certificate [of Designation] so as to determine the correct method of  
16 calculating the redemption price is settled” and held that the redemption price should have been  
17 \$8.69. *See* Exhibit 2, ¶ 47.

18 Subsequently, on September 29, 2014 the Court held that it did not have subject matter  
19 jurisdiction and *Rainero* was dismissed without prejudice. At the time *Rainero* was dismissed,  
20 the plaintiff’s amended motion for class certification was pending. *Rainero* is now on appeal to  
21 the United States Court of Appeals for the Ninth Circuit. *See* Exhibit 2, ¶ 48.

## 22 **3. Nevada State Court Litigation Against Defendants Archon, Paul Lowden** 23 **and Suzanne Lowden**

24 Following the federal court’s dismissal of *Rainero*, a fourth action was filed by Dan  
25 Raider against Defendants Archon, Paul Lowden and Suzanne Lowden in this Court. Raider’s  
26 complaint was filed on January 9, 2015 and was brought as a purported class action on behalf of  
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1 all of the preferred shareholders except the plaintiff's in *D.E. Shaw* and *Leeward* and the officers  
2 and directors of Archon who were preferred shareholders. Case No. A-15-712113-B ("*Raider*").  
3 A copy of the *Raider* complaint is attached hereto as Exhibit 2. The *Raider* complaint alleged  
4 the following six counts:

- 5 • Count I-declaratory relief;
- 6 • Count II-breach of contract claim for the unpaid balance of the redemption  
7 price;
- 8 • Count III-breach of contract claim for the dividends which accrued since  
9 August 31, 2007 redemption date;
- 10 • Count IV-unjust enrichment based on the fact that once the judgments in *D.E.*  
11 *Shaw* and *Leeward* were affirmed and paid, Archon was obligated to pay the  
12 remaining preferred shareholders what they had paid the plaintiffs in *D.E.*  
13 *Shaw* and *Leeward*;
- 14 • Count V-constructive trust and other equitable relief; and
- 15 • Count VI-breach of fiduciary duty against Defendant Paul and Suzanne  
16 Lowden for failing to pay the remaining preferred shareholders what was paid  
17 to the plaintiffs in *D.E. Shaw* and *Leeward*.

18 It was not until filing of the *Raider* complaint that plaintiff had notice that the judgments  
19 in *D.E. Shaw* and *Leeward* cases had been paid by Defendant Archon. See Exhibit 2, ¶ 48.

20 **C. Archon Has Not Paid Plaintiff the Full Redemption Price**

21 Archon has yet to pay Plaintiff the full redemption price of \$8.69 per share. Section  
22 3(a)(i) of the Certificate of Designation specifically provides:

23 "On and after any such redemption date, dividends shall  
24 cease to accrue on the shares redeemed and such shares  
25 shall be deemed to cease to be outstanding, provided that  
26 the redemption price (including any accrued and unpaid  
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dividends to the date fixed for redemption) has been duly paid or provided for.”

Because Archon failed to pay Plaintiff the full redemption price of \$8.69 per share, the conditions necessary for Plaintiff’s preferred stock to be deemed to be no longer outstanding have not been satisfied. Thus, under the plain language of Section 3(a)(i) of the Certificate of Designation, Plaintiff’s preferred stock remains outstanding and continues to accrue dividends. Comp., ¶¶ 34-36.

#### **D. Procedural History of This Case**

Plaintiff filed the present Complaint on February 29, 2016 alleging the following claims for relief against Defendants Archon, Paul Lowden and Suzanne Lowden: declaratory relief; breach of contract; breach of fiduciary duty-unequal treatment of preferred stockholders; breach of fiduciary duty-nondisclosure of material information; breach of fiduciary duty-wrongful deregistration; fraud by nondisclosure; unjust enrichment; accounting; and injunctive relief.

On or about April 6, 2016, Defendants filed their Motion to Dismiss Complaint. In their Motion, Defendants claim that each of Plaintiff’s claims are barred by the applicable statute of limitations. Plaintiff now opposes Defendants’ Motion to Dismiss.

### **III. LEGAL STANDARD**

Defendants have moved this Court for an Order dismissing Plaintiff’s Complaint pursuant to NRCP 12(b)(5). In considering a motion to dismiss pursuant to Rule 12(b)(5), the Court is to construe the pleading “liberally [.]” *See Simpson v. Mars Inc.*, 113 Nev. 188, 190, 929 P.2d 966 (1997) (noting that the “standard of review [for the Supreme Court] for a dismissal under NRCP 12(b)(5) is rigorous as this court must construe the pleading liberally and draw every fair inference in favor of the non-moving party.”) In addition, the Court must “recognize all factual allegations in [the Plaintiffs] complaint as true and draw all inferences in its favor.” *See Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670 (2008) (citing *Seput v. Lacayo*, 122 Nev. 499, 501, 134 P.3d 733, 734 (2006)). Accordingly, this Court

1 may grant Defendants' Motion to Dismiss only if it appears "beyond a doubt" that Plaintiff  
2 would be unable to prove any set of facts, which, if true, would entitle it to relief. *Buzz Stew,*  
3 *LLC*, 124 Nev. at 228. Defendants have failed to carry this heavy burden and, as a result, their  
4 Motion to Dismiss should be denied.

#### 5 IV. LEGAL ARGUMENT

##### 6 A. None of Plaintiff's Claims Are Barred By The Statute Of Limitations

##### 7 1. The Statute of Limitations on All of Plaintiff's Claims Are Tolloed By Class 8 Action Tolling

9 Courts throughout the country widely accept the doctrine of class action tolling. See *Am.*  
10 *Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974) ("[T]he commencement of a class action  
11 suspends the applicable statute of limitations as to all asserted members of the class who would  
12 have been parties had the suit been permitted to continue as a class action.") "It is well-settled  
13 that would-be class members are justified – even encouraged – in relying on a class action to  
14 represent their interests with respect to a particular claim or claims, and in refraining from filing  
15 of repetitious claims." *Yang v. Odom*, 392 F.3d 97, 111 (3rd Cir. 2004). "Once the statute of  
16 limitations has been tolled, it remains tolled for all members of the putative class until class  
17 certification is denied." *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 353 (1983).

18  
19 The Nevada Supreme Court follows the doctrine of class action tolling. In *Jane Roe*  
20 *Dancer I-VII v. Golden Coin, Ltd.*, 124 Nev. 28, 176 P.3d 271 (2008), the Nevada Supreme  
21 Court allowed a new class representative to be added even though her individual claim was  
22 barred by the Fair Labor Standards Act statute of limitations. The Nevada Supreme Court held  
23 that "NRCP 23 provides an "opt-out" class action construct, under which the original filing of  
24 the complaint tolls any applicable statute of limitations." *Id.* at 34.

25  
26 Class action tolling has also been applied in Nevada's Federal Courts and in the Ninth  
27 Circuit. In *McDonagh v. Harrah's Las Vegas, Inc.*, 2014 WL 2742874 (D. Nev. 2014) the  
28 Nevada federal district court held that the statute of limitations was tolled during the period of

1 time that a prior class action against Harrah's was pending. In the prior class action, class  
2 certification was never requested and the named plaintiff was dismissed as a result of her failure  
3 to disclose the litigation on her bankruptcy schedule. The subsequently filed case was allowed to  
4 proceed even though the statute of limitations would have expired except for the class action  
5 tolling.

6 Similarly, in *Catholic Social Services, Inc. v. I.N.S.*, 232 F.3d 1139, 1149 (9<sup>th</sup> Cir. 2000),  
7 the Ninth Circuit Court of Appeals held that the statute of limitations "was tolled during the  
8 pendency of [a previous] class action for the class members and would be class members in the  
9 action now before us." The Court held the filing of successive class actions tolled in the statute  
10 of limitations during the period when both cases were pending. *See also Yang v. Odom*, 392 F.  
11 3d 97, 111-12 (3<sup>rd</sup> Cir. 2004) (applying class action tolling to successive class actions).  
12

13 In this case, Plaintiff's claims are timely because the commencement of *Rainero* in 2007  
14 tolled the applicable statutes of limitations. In their Motion, Defendants assert that "every claim  
15 made by Plaintiff in this case is fundamentally based on the assumption that Archon did not  
16 validly redeem its EPS on August 31, 2007." The *Rainero* complaint challenged the validity of  
17 Archon's calculation of the redemption price. *See Exhibit 1*. As such, the *Rainero* complaint  
18 clearly provided Defendants with sufficient notice of the facts underlying Plaintiff's claims.  
19 *Rainero* was commenced on November 20, 2007 and remained pending in the federal court until  
20 September 29, 2014, at which time the federal court dismissed *Rainero* based on a lack of subject  
21 matter jurisdiction. At the time *Rainero* was dismissed, the class had not been certified and  
22 Plaintiff had not opted out. The *Rainero* case even now is still pending in that it is now on  
23 appeal to the United States Court of Appeals for the Ninth Circuit. *See Exhibit 2*, ¶ 48.  
24

25 At the very least, the *Rainero* litigation resulted in a class action toll for the period of  
26 time through September 29, 2014, if not through to today. Plaintiff's Complaint in this case was  
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1 filed 17 months later, on February 29, 2016. The statute of limitations on Plaintiff's claims did  
2 not expire during this 17 month time period.

3 Defendants may argue that class action tolling is not appropriate in this case because the  
4 prior cases were filed in federal court, not state court. Therefore, Defendants may contend such  
5 "cross-jurisdictional tolling" is not applicable in Nevada. However, there are several reasons this  
6 argument cannot prevail. First, most of the "cross-jurisdictional tolling" cases involve filings in  
7 different states, not just different court systems in the same state. Here, the prior cases were filed  
8 in Nevada federal court and all involved Archon, a Nevada corporation. Under these  
9 circumstances, there is no compelling reason for a Nevada state court to not recognize tolling  
10 based upon a Nevada federal court action encompassing substantially the same claims.  
11

12 Second, even if the court were to consider the Nevada's federal district court a separate  
13 jurisdiction, numerous cases recognize and adopt cross-jurisdictional tolling under similar  
14 circumstances. *See, e.g., Dow Chemical Corp. v. Blanco*, 67 A.3d 392 (Del. 2013); *Stevens v.*  
15 *Novartis Pharm. Corp.*, 358 Mont. 474, 247 P.3d 244, 249 (2010); *Vaccariello v. Smith &*  
16 *Nephew Richards, Inc.*, 94 Ohio St.3d 380, 763 N.E.2d 160 (2002). As the Delaware Supreme  
17 Court stated in *Dow Chemical Corp. v. Blanco*:

18 While *American Pipe* and its progeny all involved class actions  
19 and subsequent suits brought in the same jurisdiction, this factual  
20 distinction makes no legal difference. *American Pipe* considered  
21 the competing interests of class actions and statutes of limitation—  
22 efficiency and economy of litigation balanced against notice to the  
23 defendants. Balancing these two interests, the Supreme Court  
24 found that the relevant statute of limitations was tolled during the  
25 pendency of the class action. That analysis is equally sound  
26 regardless of whether the original class action is brought in the  
27 same or in a different jurisdiction as the later individual action.

28 *Id.* 67 A.3d at 397. Accordingly, the court here should recognize cross jurisdictional tolling for  
identical reasons.

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1       **2.       The Statute of Limitations on Plaintiff's Claims is also Topped by Equitable Topping**

2           Equitable topping is recognized in Nevada. *Copeland v. Desert Inn Hotel*, 99 Nev. 823,  
3 673 P.2d 490 (1984). In *Copeland*, the Nevada Supreme Court applied equitable topping to an  
4 employment discrimination action that otherwise would have been barred by non-compliance  
5 with the applicable limitations period. In *O'Lane v. Spinney*, 110 Nev. 496, 874 P.2d 754  
6 (1994), the Nevada Supreme Court stated that "there would be a basis for invoking the doctrine  
7 of equitable topping during the period of plaintiff's bankruptcy proceedings if it could be shown  
8 that O'Lane had no legitimate basis for seeking protection under the Bankruptcy Act." *Id.* at  
9 501.

10           More recently, the Nevada Supreme Court applied equitable topping in a case where a  
11 taxpayer had failed to file a written claim for a refund of overpaid sales tax where the statute of  
12 limitations was a defense. *State Dept. of Taxation v. Masco Building Cabinet Group*, 127 Nev.  
13 Adv. Op. 67, 265 P.3d 666, 671 (2011). The Court explained:

14                   Equitable topping operates to suspend the running of a statute of  
15 limitations when the only bar to a timely filed claim is a procedural  
16 technicality. *Copeland v. Desert Inn Hotel*, 99 Nev. 823, 826, 673  
17 P.2d 490, 492 (1983) ("We therefore adopt the doctrine of  
18 equitable topping ...; procedural technicalities that would bar claims  
19 ... will be looked upon with disfavor."); *Lantzy v. Centex Homes*,  
20 31 Cal.4th 363, 2 Cal.Rptr.3d 655, 73 P.3d 517, 523 (2003) ("This  
21 court has applied equitable topping in carefully considered  
22 situations to prevent the unjust technical forfeiture of causes of  
23 action...."). Even when the claim's untimeliness is due to a  
24 procedural technicality, application of the doctrine is appropriate  
25 only when " 'the danger of prejudice to the defendant is absent' "  
26 and " 'the interests of justice so require.' " *Seino v. Employers Ins.*  
27 *Co. of Nevada*, 121 Nev. 146, 152, 111 P.3d 1107, 1112 (2005)  
28 (quoting *Azer v. Connell*, 306 F.3d 930, 936 (9th Cir.2002)).

29           In applying the doctrine of equitable topping in *Masco*, the Court looked at the following  
30 non-exclusive factors: (1) the diligence of the claimant; (2) the claimant's knowledge of the  
31 relevant facts; (3) the claimant's reliance on authoritative statements made by the administrative

1 agency; and (4) whether these statements misled the claimant. *Masco*, 265 P.3d at 672 (citing  
2 *Copeland*, 99 Nev. at 826).

3 When considering these factors within the context of this case, it becomes clear that to  
4 prevent an injustice, equitable tolling should be applied. Here, the interests of justice require  
5 equitable tolling because:

- 6 • It was determined with finality in *D.E. Shaw* and *Leeward* that the redemption  
7 price should have been \$8.69, not \$5.241;
- 8 • Defendant Archon is bound by the determinations in *D.E. Shaw* and *Leeward*;
- 9 • Plaintiff was entitled to and did reply upon the filing of the *Rainero* case to  
10 protect his rights as a member of the putative class;
- 11 • *Rainero* was not dismissed on the merits and therefore, the dismissal did not  
12 in any way relieve Defendant Archon of its obligation to pay Plaintiff \$8.69  
13 per share;
- 14 • Defendant Archon paid some of the preferred shareholders \$8.69 per share;  
15 but
- 16 • Defendant Archon has not paid Plaintiff \$8.69 per share and failed to ever  
17 notify Plaintiff of its obligation to do so.

18  
19  
20 Furthermore, there is absolutely no danger of prejudice to Defendants in the instant  
21 matter. Defendant Archon has been in continuous litigation over the redemption price since the  
22 preferred stock was purportedly redeemed in August 2007. In fact, at least three actions raising  
23 these same issues are presently pending, the appeal in *Rainero*, the *Raider* action and this action.

24 Accordingly, based on the foregoing, the statute of limitations should be equitably tolled,  
25 allowing Plaintiff to pursue his claims against Defendants.

26 **B. The Statute of Limitations Has Not Run On Several of Plaintiff's Claims**  
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1 Even if the statute of limitations on Plaintiff's claims were not tolled as set forth above,  
2 they were the applicable statute of limitations has yet to run on several of Plaintiff's Claims.

3 **1. The Statute of Limitations Has Not Run On Plaintiff's Breach of Contract**  
4 **and Breach of Fiduciary Duty Claims**

5 Statutes of limitation generally prohibit the commencement of causes of action after a  
6 fixed period of time following a given occurrence. *Davenport v. Comstock Hills-Reno*, 118 Nev.  
7 389, 391, 46 P.3d 62, 64 (2002). In determining whether a statute of limitations has run against  
8 an action, the time must be computed from the day the cause of action accrued. *Clark v. Robison*,  
9 113 Nev. 949, 951, 944 P.2d 788, 789 (citing *White v. Sheldon*, 4 Nev. 280, 288-89 (1868)). A  
10 cause of action "accrues" when a suit may be maintained thereon. *Id.* Furthermore, a cause of  
11 action accrues when a litigant discovers or should have discovered every element of the cause of  
12 action. *Siragusa v. Brown*, 114 Nev. 1384, 1392, 971 P.2d 801, 807 (1998). An action does not  
13 even accrue until the litigant discovers or should have discovered the existence of damages.  
14 *Gonzales v. Steward Title of Northern Nevada*, 111 Nev. 1350, 1353, 905 P.2d 176, 178 (1995).  
15 Dismissal on statute of limitations grounds is only appropriate when "uncontroverted evidence  
16 irrefutably" demonstrates a plaintiff discovered the facts that support all elements of a claim.  
17 *Bemis*, 114 Nev. at 1025, 967 P.2d at 440.

18  
19 Defendants argue that Plaintiff's breach of contract claim is time barred because the  
20 claim is allegedly based entirely on the fact that Archon incorrectly calculated the proper  
21 redemption price for the preferred shares at the time of the purported redemption on August 31,  
22 2007. The argument ignores the fact that Plaintiff's claim for breach of contract alleges multiple  
23 ongoing breaches of the Certificate of Designation on the part of Archon.

24 The Court must evaluate each of the alleged breaches of the Certificate of Designation on  
25 the part of Archon to determine its respective timeliness. "There are contracts... that have been  
26 said to require continuing (or continuous) performance for some specified period of time, a  
27 period that may be definite or indefinite when the contract is made." *Hi-Lite Products Co. v. Am.*  
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1 *Home Products Corp.*, 11 F.3d 1402, 1408 (7th Cir. 1993) (citing 4 Corbin on Contracts § 956 at  
2 841 (1951)). Contracts requiring continuous performance are capable of being breached on  
3 numerous occasions. *Id.* Accordingly, because each breach of a continuous duty has its own  
4 accrual date, a plaintiff may sue on any breach which occurred within the limitation's period,  
5 even if earlier breaches occurred outside the limitation period. *Id.*; see also *State ex rel. Dept. of*  
6 *Transp. v. Cent. Tel. Co. of Nevada*, 107 Nev. 898, 901, 822 P.2d 1108, 1110 (1991) (continuing  
7 duty to "maintain [an] underground conduit in good and safe condition" gave rise to liability for  
8 injury that occurred nineteen years later). Furthermore, it is well established that where, as here,  
9 contract obligations are payable in installments, the six year statute of limitations commences to  
10 run against each installment as it becomes due. *Clayton v. Gardner*, 107 Nev. 468, 470, 813  
11 P.2d 997 (1991) (each failure to pay an installment on a loan constituted a separate breach and  
12 the period of limitations began to run on each installment only when the installment became  
13 due); *Bongiovi v. Bongiovi*, 94 Nev. 321, 321, 579 P.2d 1246 (1978) (alimony installments).

15 The first breach of the Certificate of Designation was Archon's improper calculation of  
16 the redemption price which occurred at the time of the purported redemption on August 31,  
17 2007. As a result of Defendant Archon's first breach, Plaintiff's preferred shares remained  
18 outstanding and continued to accrue dividends after August 31, 2007. Because Plaintiff's  
19 preferred shares remain outstanding, Defendant Archon's obligations pursuant to the Certificate  
20 of Designation continue in full force to this day. Moreover, the first breach subsequently lead to  
21 the three later breaches of the Certificate of Designation alleged by Plaintiff in his Complaint:  
22 (1) Archon's June 2008 purchase of 62,604 shares of its common stock; (2) Archon's November  
23 3, 2010 purchase of 225,000 shares of its common stock; and (3) Archon's March 2011  
24 payments to the Archon stockholders who held fewer than 250 shares of Archon common stock  
25 before the reverse stock split. Plaintiff alleges that these three events constituted breaches of  
26 Section 2(b)(ii) of the Certificate of Designation because Archon did not declare and pay full  
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1 cash dividends on Plaintiff's preferred stock for the immediately preceding two dividend periods  
2 prior to the aforementioned purchases and payments.

3 However, none of these breaches could have been discovered by Plaintiff and did not  
4 accrue until the judgments in *D.E. Shaw* and *Leeward* were declared final in by the Ninth Circuit  
5 and paid by Archon in late 20102 or early 2013. Only at that time did refusal by Archon to pay  
6 Plaintiff occur and only then did it become apparent that Plaintiff had been injured by the  
7 corporate events because he had been stripped of his rights as a shareholder even though no stock  
8 was ever properly redeemed. It is the ongoing failure of Defendant Archon to properly redeem  
9 Plaintiff's shares that continues to cause damages to Plaintiff.

10  
11 **2. The Discovery Rule Protects Plaintiff's Breach of Fiduciary Duty and Non-Disclosure Claims**

12 Plaintiff's third claim for relief for breach of fiduciary duty alleges that Defendants Paul  
13 and Suzanne Lowden breached their statutory and fiduciary duty to treat all holders of the  
14 preferred stock equally by causing Archon to pay the unpaid balance of the redemption price to  
15 D.E. Shaw and Leeward but failing to cause Archon to pay the unpaid balance of the redemption  
16 price to Plaintiff. Plaintiff's fourth claim for relief for breach of fiduciary duty and sixth claim  
17 for relief for non-disclosure alleges that Defendants Paul and Suzanne Lowden breached their  
18 fiduciary duty by failing to disclose to and/or notify shareholders of the correct redemption price.

19  
20 A breach of fiduciary duty is a fraud giving rise to the application of the three year statute  
21 of limitations. NRS 11.190(3)(d); *Shupe v. Ham*, 98 Nev. 61, 64, 639 P.2d 540, 542 (1982). For  
22 an action of fraud or breach of fiduciary duty, the cause of action in either case does not accrue  
23 until the discovery by the aggrieved party of facts constituting the fraud or mistake. *Id.* A  
24 fiduciary has a duty to make full and fair disclosure of all facts which materially affect the rights  
25 and interests of the parties, and, where a fiduciary relationship exists, facts which would  
26 ordinarily require investigation may not excite suspicion. *Golden Nugget, Inc. v. Ham*, 98 Nev.  
27 311, 314-15, 646 P.2d 1221, 1223-24 (1982). Under the discovery rule, the statutory period of  
28

1 limitations is tolled until the injured party discovery or reasonably should have discovered facts  
2 supporting a cause of action. *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1024 (1998) (citing  
3 *Peterson v. Bruen*, 106 Nev. 271, 274 (1990)). The rationale behind the discovery rule is that the  
4 policies served by statutes of limitation do not outweigh the equitable concern that a plaintiff  
5 should not be barred from recovering for wrongdoing before he knew that he was injured and can  
6 reasonably discover the cause of his injuries. *Bemis*, 114 Nev. at 1024. Moreover, the Nevada  
7 Supreme Court has often stated that “[w]hen the plaintiff knew or in the exercise of proper  
8 diligence should have known of the facts constituting the elements of his cause of action is a  
9 question of fact for the trier of fact.” See *In re Amerco Derivative Litig.*, 252 P.3d at 703; *Havas*  
10 *v. Engebregson*, 97 Nev. 408, 411-12, 633 P.2d 682, 684 (1981); *Millspaugh v. Millspaugh*, 96  
11 Nev. 446, 449, 611 P.2d 201, 202 (1980); *Golden Nugget, Inc. v. Ham*, 95 Nev. 45, 48-49, 589  
12 P.2d 173, 175-76 (1979); *Oak Grove Investors v. Bell & Gossett Co.*, 99 Nev. 616, 623, 668 P.2d  
13 1075, 1079 (1983), *disapproved of on other grounds by Calloway v. City of Reno*, 116 Nev. 250,  
14 993 P.2d 1259 (2000).

15  
16 In their Motion, Defendants make inappropriate factual arguments as to when the statutes  
17 of limitations on Plaintiff’s claims began to run. With regard to Plaintiff’s third claim for relief,  
18 Defendants argue that as of October 15, 2012, and no later than January 4, 2013, Plaintiff was on  
19 notice that the *D.E. Shaw* and *Leeward* plaintiffs were being paid the correct redemption price  
20 based upon the fact that Writs of Execution were issued by the federal court on those dates. See  
21 Exhibits 2 and 3 to Plaintiff’s Motion. To the contrary, these Writs of Execution indicated that  
22 the judgments in *D.E. Shaw* and *Leeward* had *not* been paid as of those dates. *Id.* Nothing in the  
23 Writs of Execution or any other documents produced by Defendants shows that Archon paid  
24 these judgments or when those payments were made.

25  
26 Plaintiff’s third claim for relief arises out of the Defendants payment to the plaintiffs in  
27 *D.E. Shaw* and *Leeward* and failure to pay the same to Plaintiff. As such, the statutes of  
28

1 limitations on Plaintiff's third claim for relief only began to run once Plaintiff knew or  
2 reasonably should have known that Defendants had paid the *D.E. Shaw* and *Leeward* plaintiffs  
3 the correct redemption price without paying Plaintiff the same amount. Plaintiff did not  
4 reasonably know that the *D.E. Shaw* and *Leeward* plaintiffs had been paid the correct redemption  
5 price until at the earliest, January 2015, when the *Raider* complaint was filed making such  
6 allegations. See Exhibit 2, at ¶ 46. As such, Plaintiff had no basis for knowing that Defendants  
7 breached their statutory and fiduciary duty to treat all holders of the preferred stock equally until  
8 at the earliest, January 2015.

9  
10 With regard to Plaintiff's fourth and sixth claim for relief, Defendants argue that at a  
11 minimum, Plaintiff knew or should have known of the facts regarding Archon's alleged  
12 miscalculation of the redemption price no later than the time of Archon's Form 10-Q was filed  
13 on February 18, 2011. Defendants' factual argument is incorrect. Plaintiff's fourth and sixth  
14 claim for relief allege that Defendants breached their fiduciary and statutory duties by failing to  
15 notify and or disclose the correct redemption price after the decisions in *D.E. Shaw* and *Leeward*  
16 became final. The Ninth Circuit's decision was issued on September 19, 2012 and Archon had  
17 until December 17, 2012 to pursue its remaining appellate remedies. It cannot be said that before  
18 the judgments in *D.E. Shaw* and *Leeward* were affirmed, that Plaintiff's claims for non-  
19 disclosure accrued. Defendants argue to the contrary by making factual assertions about what  
20 Plaintiff should have known from reading SEC filings over a year earlier. However, whether a  
21 plaintiff exercised reasonable diligence in discovering their causes of action "is a question of fact  
22 to be determined by the jury or trial court after a full hearing." *Bemis*, 114 Nev. At 1025.  
23 Dismissal on statute of limitations grounds is only appropriate "when uncontroverted evidence  
24 irrefutably demonstrates plaintiff discovered or should have discovered" the facts giving rise to  
25 the cause of action. *Id.* (quoting *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873, 977  
26 (9th Cir. 1984)).  
27  
28

1 For the reasons stated above, Plaintiff did not have reason to suspect he was not being  
2 paid the correct redemption price to which he was entitled until after the Defendants actually  
3 paid the correct redemption price to the plaintiff's in *D.E. Shaw* and *Leeward*. Further, Plaintiff  
4 was precluded from discovering whether the correct redemption price had been paid due to the  
5 Defendants conduct in this action, the deregistration of Archon. In fact, plaintiff didn't find out  
6 about the alleged payment of the *D.E. Shaw* and *Leeward* plaintiffs until until he read the *Raider*  
7 complaint filed in January 2015. Not only does this further misconduct by Defendants toll any  
8 applicable statutes of limitations, but the fact intensive nature of this "reasonability"  
9 determination makes it inappropriate to decide as a matter of law when Plaintiff should have  
10 realized that he was the victim of wrongdoing.

11  
12 **3. Plaintiff's Claim for Unjust Enrichment Is Not Barred By The Statute Of**  
13 **Limitations. The Four (4) Year Statute Of Limitations Did Not Commence**  
14 **To Run Until The Judgments In D.E. Shaw and Leeward Became Final After**  
15 **They Had Been Affirmed On Appeal**

16 Plaintiff's claim for relief for unjust enrichment alleges that once the Ninth Circuit  
17 affirmed the judgments in *D.E. Shaw* and *Leeward* and the time for filing a petition for  
18 rehearing, en banc and a petition for certiorari had passed, there was no basis in law or equity for  
19 Defendant Archon to retain the unpaid balance of the redemption price and the dividends which  
20 continued to accrue. In their Motion, Defendants argue that Plaintiff's claim for unjust  
21 enrichment necessarily accrued no later than August 31, 2007, the date of the purported  
22 redemption of the preferred shares, and as a result Plaintiff's claim is barred by the four-year  
23 statute of limitations set forth in NRS 11.190(2)(c). Plaintiff agrees with Defendants that the  
24 applicable statute of limitations is four (4) years. However, the four year statute of limitations  
25 did not commence to run at the earliest, December 19, 2012.

26 Unjust enrichment is "the unjust retention...of money or property of another against the  
27 fundamental principles of justice or equity and good conscience." *Topaz Mutual Co. v. Marsh*,  
28 108 Nev. 845, 856, 839 P.2d 606 (1992). A cause of action "accrues" when a suit may be

1 maintained thereon. *Id.* Furthermore, a cause of action accrues when a litigant discovers or  
2 should have discovered every element of the cause of action. *Siragusa v. Brown*, 114 Nev. 1384,  
3 1392, 971 P.2d 801, 807 (1998). In this case, Plaintiff's unjust enrichment claim did not arise  
4 until Defendant Archon retained money "against the fundamental principles of justice and  
5 equity, good faith, and good conscience." This occurred when Archon's obligation to pay the  
6 correct redemption price of \$8.69 was determined authoritatively and with finality. This  
7 obligation occurred after the judgments in *D.E. Shaw* and *Leeward* were affirmed, September 19,  
8 2012, and the time for pursuing any further appellate remedies had passed, December 19, 2012.  
9 As such, the four (4) year statute of limitations does not provide Defendants any cover, as  
10 Plaintiff's Complaint was filed well before the nominal bar date of December 19, 2016.  
11

12 **4. Plaintiff's Claims For Declaratory Relief and Injunctive Relief are Timely**

13 In their Motion, Defendants argue that "because Plaintiff's claim for declaratory relief is  
14 based on the same time-barred claims for relief discussed above, it is barred by the applicable  
15 statutes of limitations and must be dismissed." Similarly, with regard to Plaintiff's claims for  
16 injunctive relief and accounting, Defendants argue that because Plaintiff failed to timely  
17 challenge Archon's redemption of the EPS, Plaintiff has no viable claim upon which to seek  
18 injunctive relief and/or an accounting. However, as set forth in detail above, none of Plaintiff's  
19 claims are barred by the statute of limitations, including those claims that are the basis for  
20 Plaintiff's claims for declaratory relief, an accounting, and injunctive relief. Plaintiff's claims  
21 for declaratory relief, an accounting, and injunctive relief, which are based on the same facts and  
22 circumstances as Plaintiff's other claims, were tolled by the prior and currently pending class  
23 actions. Based on the foregoing, Defendants' Motion should be denied as it relates to Plaintiff's  
24 claims for declaratory, an accounting, and injunctive relief.  
25

26 ///

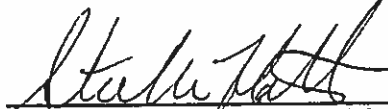
27 ///

V. CONCLUSION

For all of the reasons set forth above, Plaintiff respectfully requests that this Court deny Defendants' Motion to Dismiss in its entirety and require Defendants to file an Answer on the merits of this case.

Dated this 13<sup>th</sup> day of May, 2016.

SKLAR WILLIAMS PLLC



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JOHNATHON FAYEGHI, ESQ.  
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Las Vegas, Nevada 89145

*Attorneys for Plaintiff Stephen Haberkorn*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 13<sup>th</sup> day of May, 2016, a true and correct copy of the above and forgoing **PLAINTIFF STEPHEN HABERKORN'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT** was submitted electronically for filing and/ or service with the Eighth Judicial District Court. Electronic Service of the foregoing document shall be made to all parties listed on the **MASTER SERVICE LIST** in accordance with the Electronic Service.

Service was also made upon the following, by depositing a copy of same in the *United States Mail*, postage prepaid, addressed to:

John P. Desmond, Esq.  
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*Attorneys for Defendants  
Archon Corporation  
Paul W. Loweden, and Suzanne Lowden*

  
An employee of SKLAR WILLIAMS PLLC

## **Exhibit 1-**

**Complaint**

**Rainero v. Archon Corporation**

**Federal Court Case No. 2:07-cv-01553-GMN-PAL**

1 Steven J. Parsons  
Nevada Bar No. 363  
2 LAW OFFICES OF STEVEN J. PARSONS  
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5 SteveSJP@pclv.com

6 Attorney for Plaintiff  
DAVID RAINERO, an individual,  
7 on behalf of himself and on behalf  
of others similarly situated  
8

9 UNITED STATES DISTRICT COURT

10 DISTRICT OF NEVADA

11 DAVID RAINERO, an individual,  
on behalf of himself and on behalf  
12 of others similarly situated,

Case No.

COMPLAINT

13 Plaintiff,

JURY DEMAND

14 vs.

NOTICE OF RELATED CASE<sup>1</sup>

15 ARCHON CORPORATION, a Nevada  
corporation,

16 Defendant.  
17 \_\_\_\_\_/

18 Plaintiff DAVID RAINERO, by his attorney, Steven J. Parsons of LAW OFFICES OF STEVEN  
19 J. PARSONS, as an individual on behalf of himself and on behalf of others similarly situated,  
20 complains of Defendant ARCHON CORPORATION ("Archon") a Nevada corporation, and as  
21 causes of action, complains and alleges as follows:

22 PARTIES, JURISDICTION and VENUE

- 23 1. Plaintiff David Rainero is a resident of the State of Pennsylvania.  
24 2. Defendant Archon is a Nevada corporation whose principal place of business is  
25 Las Vegas, Clark County, Nevada.

26 \_\_\_\_\_

27 <sup>1</sup>A related case is pending in southern division of this District: D. E. Shaw Laminar Portfolios, L.L.C., et.  
Al., v. Archon Corporation; Case No. 2:07-cv-01146-PMP-(LRL)

3           4.     This Court has jurisdiction under 28 U.S.C. § 1332(d)(2).

4           5.       Venue lies in this District of Nevada under 28 U.S.C. § 1391 because Defendant  
5 Archon is domiciled in and conducts business within the District and because a substantial  
6 part of the events or omissions giving rise to the claim occurred in this district. Further, venue  
7 properly lies in the so-called southern division of this Court.

8 STATEMENT OF THE CASE

9           6.       On or about August 20, 1993, Defendant Archon, then known as "Sahara  
10 Gaming Corporation," adopted a resolution ("Resolution") creating Nine million (9,000,000)  
11 shares of the Preferred Stock.

7. On or about September 30, 1993, Defendant Archon filed a Certificate of Designation ("Certificate") for the Preferred Stock with the Secretary of State of the State of Nevada. The Resolution was set forth in the Certificate. A copy of the Certificate is attached hereto and incorporated herein as set forth fully, Exhibit "1."

16 8. Defendant Archon subsequently issued shares of the Preferred Stock,  
17 denominated as Exchangeable Redeemable Preferred Stock ("Preferred Stock").

9. Defendant Archon recently redeemed its outstanding Preferred Stock. The redemption price was required to be \$2.14 per share plus the amount of all accrued and unpaid dividends. Defendant Archon did not properly calculate the redemption price and each shareholder has been damaged in the amount of \$3.45 per share.

22           10. Plaintiff David Rainero was an owner of Archon Preferred Stock as of the close  
23 of business on August 31, 2007.

11. According to the Proxy Statement filed by Defendant Archon on June 1, 2007 with the Securities and Exchange Commission, as of May 11, 2007, there were Four million four hundred thirteen thousand seven hundred seventy-seven (4,413,777) shares of the Preferred Stock issued and outstanding. According to the Proxy Statement, as of May 1,

1 2007, Paul Lowden, Chairman and CEO of Archon owned 18.4% of the Preferred Stock and  
2 74.7% of Defendant Archon's common stock. All directors and officers of Defendant Archon  
3 owned 18.9% of the Preferred Stock and 75.4% of the common stock.

4 THE REDEMPTION OF THE PREFERRED STOCK

5 12. Paragraph 3(a)(i) of the Resolution and Certificate provided that the shares of  
6 the Preferred Stock could be redeemed at any time or from time to time, in whole or in part,  
7 at the election of Defendant Archon.

8 13. On July 31, 2007, Defendant Archon issued a Notice of Redemption ("Notice")  
9 to the holders of outstanding shares of the Preferred Stock announcing its intent to "redeem  
10 all of the outstanding shares of the Preferred Stock issued and outstanding as of the close of  
11 business on August 31, 2007". The Notice stated that issued and outstanding shares of the  
12 Preferred Stock would be redeemed at "the redemption price of \$5.241 per share".

13 14. The Notice also stated that upon redemption, the Preferred Stock would "be  
14 delisted from further trading."

15 15. The Preferred Stock has since been redeemed as provided in the Notice.

16 THE REDEMPTION PRICE

17 16. Paragraph 3(a)(i) of the Resolution and the Certificate provided that the  
18 redemption price is "equal to the Liquidation Preference".

19 17. The "Liquidation Preference", in turn, was defined in paragraph 7 of the  
20 Resolution and the Certificate to be equal to "the sum of (i) \$2.14, plus (ii) an amount equal  
21 to all accrued and unpaid dividends for the then current Dividend Period, through the date of  
22 liquidation, dissolution or winding up, plus all prior Dividend Periods, whether or not declared".  
23 Paragraph 2(a) of the Resolution and the Certificate provided that semi-annual dividend  
24 periods "(each a 'Dividend Period') shall commence on and include the 31st day of March  
25 and the 30th day of September of each year and shall end on and include the date next  
26 preceding the following Dividend Payment Date." Paragraph 2(a) of the Resolution and the  
27 Certificate also provided that Dividend Payment Dates were March 31<sup>st</sup> and September 30<sup>th</sup>

1 or the next business day, if the date was a non-business day.

2 18. The amount of the accrued and unpaid dividends must be determined to  
3 calculate and determine the Redemption Price.

4 THE AMOUNT OF THE ACCRUED AND UNPAID DIVIDENDS

5 19. Paragraph 2(a) of the Resolution and the Certificate provided for payment to  
6 holders of the Preferred Stock of cumulative cash dividends calculated as follows:

7 "a rate per annum per share (the 'Dividend Rate') initially set at 8% of (i)  
8 \$2.14 plus (ii) accrued but unpaid dividends as to which a Dividend Payment  
9 Date has occurred. Dividends shall accrue from the date of issuance and are  
10 payable semi-annually on...[the Dividend Payment Date]".

11 20. Paragraph 2 of the Resolution and the Certificate further provided that initial  
12 Dividend Rate was 8% per annum and that after the tenth Dividend Payment Date, the  
13 Dividend Rate would increase periodically to a maximum of 16% per annum. The Dividend  
14 Rate reached 16% per annum prior to the redemption of the Preferred Stock.

15 21. Paragraph 2(a) of the Resolution and the Certificate also provided the dividends  
16 "shall be fully cumulative and shall accrue (whether or not declared), on a daily basis...."

17 22. Paragraph 2 of the Resolution and the Certificate also provided that "on any or  
18 all of the first six Dividend Payment Dates [Defendant Archon] may, at its option, pay dividends  
19 on the Exchangeable [Redeemable] Preferred Stock in the form of additional shares of  
20 Exchangeable [Redeemable] Preferred Stock at the rate per annum of 0.08 shares of  
21 additional Exchangeable [Redeemable] Preferred Stock for every share entitled to receive a  
22 dividend. On the first six Dividend Payment Dates, Archon elected to pay dividends in the form  
23 of additional shares of the Preferred Stock as provided in Paragraph 2 of the Resolution and  
24 the Certificate.

25 23. After the sixth Dividend Payment Date, Defendant Archon did not pay any  
26 dividends on the Preferred Stock and, in particular, did not pay any cash dividends.

27 24. Because Defendant Archon did not pay any cash dividends on the Preferred

1 Stock, all dividends due subsequent to the sixth Dividend Payment Date accumulated.

2 25. Paragraph 2(a) of the Resolution and the Certificate requires that each of the  
3 accrued and unpaid dividends be calculated by applying the applicable Dividend Rate (8-16%  
4 annually) to the sum of \$2.14 and the accrued but unpaid dividends as to which a Dividend  
5 Payment Date had then occurred.

6 26. Calculated as required by the Resolution and the Certificate, the unpaid and  
7 accrued dividends total \$6.55. The required Redemption Price is therefore \$8.69 (\$2.14 +  
8 \$6.55).

9 27. In calculating the respective accrued and unpaid dividends, Defendant Archon  
10 applied the Dividend Rate only to \$2.14, not to the sum of \$2.14 and the accrued but unpaid  
11 dividends as to which a Dividend Payment Date had occurred. As a result, the Redemption  
12 Price calculated by Defendant Archon was \$3.45 lower than it would have been had it been  
13 calculated as required the Resolution and the Certificate.

14 CLASS ACTION ALLEGATIONS

15 28. Plaintiff David Rainero brings this action on behalf of himself and on behalf of  
16 a class defined as all holders of outstanding Preferred Stock as of the close of business on  
17 August 31, 2007, except:

- 18 a. Paul W. Lowden, Suanne Lowden, John W. Delaney,  
19 William J. Raggio, Howard Foster, Richard H. Taggart, and  
20 any other officer or director of Archon Corporation.
- 21 b. D. E. Shaw Laminar Portfolios, LLC, LC Capital Master  
22 Fund, Ltd., LC Capital/Capital Z SPV, LP, Magten Asset  
23 Management Corp, Mercury Real Estate Securities Fund  
24 LP, Mercury Real Estate Securities Offshore Fund Limited,  
25 Black Horse Capital LP, Black Horse Capital (QP) LP, Black  
26 Horse Capital Offshore Ltd. and Plainfield Special  
27 Situations Master Fund Limited.

29. The class is so numerous that joinder of all members is impractical. On information and belief, there were approximately 1,483,270 outstanding shares of the Preferred Stock held by members of the Class as of August 31, 2007.

4            30.    There are questions of law and fact common to the class.

31. Plaintiff's claims are typical of the claims of the class. The claims all arise from the same operative facts and are based on the same legal theories.

7            32. Plaintiff will fairly and adequately protect the interests of the class.

33. The prosecution of separate actions by individual members of the class would create a risk of:

10           a.       Inconsistent or varying adjudications with respect to individual members  
11 of the class which would establish incompatible standards of conduct for Defendants;

b. Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

15           34. Defendant Archon has acted on grounds generally applicable to the class,  
16 thereby making appropriate final injunctive relief or corresponding declaratory relief with  
17 respect to the class as whole.

18           35.     The questions of law or fact common to the members of the class predominate  
19 over any questions affecting any individual members and a class action is superior to other  
20 available methods for the fair and efficient adjudication of the controversy.

21           36. There is one central and overriding issue in this case: “What is the proper  
22 method under the Resolution and the Certificate for calculating the Liquidation Preference?”

### CLAIM FOR RELIEF

37. Defendant Archon was required by the Resolution and the Certificate and otherwise by law to pay Plaintiff and each member of the Class an amount equal to the Liquidation Preference for each share of Preferred Stock it redeemed.

27 38. Defendant Archon was required by the Resolution and the Certificate and

1 otherwise by law to calculate the Liquidation Preference in the manner required by the  
2 Resolution and the Certificate.

3 39. Defendant Archon calculated the Liquidation Preference was \$5.241 per share.

4 40. Defendant Archon did not calculate the Liquidation Preference in the manner  
5 required by the Resolution and the Certificate.

6 41. Calculated in the manner required by the Resolution and the Certificate, the  
7 Liquidation Preference is \$8.69 per share.

8 42. Plaintiff and each of the members of the Class has been damaged in the amount  
9 of \$3.45 per share.

10 PRAYER FOR RELIEF

11 WHEREFORE, Plaintiff DAVID RAINERO, on his own behalf and on behalf of others  
12 similarly situated, prays that this Honorable Court enter judgment against Defendant ARCHON  
13 CORPORATION in the amount to which he and the members of the Class are found to be  
14 entitled, together with costs of the litigation, all interest as provided for by law, including pre-  
15 judgment interest, and attorney's fees.

16 DEMAND FOR JURY TRIAL

17 Plaintiff hereby demands a jury trial as provided by Rule 38(a) of the Federal Rules of  
18 Civil Procedure, or as otherwise may be provided for by law.

19 Dated: Tuesday, November 20, 2007.

20 LAW OFFICES OF STEVEN J. PARSONS

21 /s/ Steven J. Parsons  
22 STEVEN J. PARSONS  
23 Nevada Bar No. 363

24 Attorney for Plaintiff  
25 DAVID RAINERO, an individual, on behalf of  
26 himself and others similarly situated  
27

**Exhibit “1”**

**Exhibit “1”**

EX-99.2 3 dex992.htm CERTIFICATE OF DESIGNATION

EXHIBIT 99.2

**FILED**  
IN THE OFFICE OF THE  
SECRETARY OF STATE OF THE  
STATE OF NEVADA  
**SEP 30 1993**  
CHERYL A. LUI, SECRETARY OF STATE  
*Cheryl A. Lui*  
No. 7679-93

CERTIFICATE OF DESIGNATION  
OF THE  
EXCHANGEABLE REDEEMABLE PREFERRED  
STOCK  
(Par Value \$.01 Per Share)  
OF  
SAHARA GAMING CORPORATION

Pursuant to Section 78.195 of the  
Nevada Revised Statutes

The undersigned duly authorized officers of Sahara Gaming Corporation, a corporation organized and existing under the Nevada Revised Statutes, as amended (the "Company"), in accordance with the provisions of Section 78.195 thereof, DO HEREBY CERTIFY;

That pursuant to the authority conferred upon the Board of Directors by the Articles of Incorporation of the Company, the Board of Directors of the Company (the "Board of Directors") on August 20, 1993, adopted the following resolution creating a series of 9,000,000 shares of Preferred Stock, \$.01 per share par value;

RESOLVED, that pursuant to the authority expressly granted to and vested in the Board of Directors by provisions of the Articles of Incorporation of the Company (the "Articles of Incorporation"), and the Nevada Revised Statutes, as amended, the issuance of a series of the Company's preferred stock, par value \$.01 per share (the "Preferred Stock"), which shall consist of 9,000,000 of the 20,000,000 shares of Preferred Stock that the Company now has authority to issue, be and the same hereby is, authorized, and the Board of Directors hereby fixes the voting powers, designations, preferences, limitations, restrictions and relative rights, and the qualifications, limitations and restrictions of such rights, of the shares of such series (in addition to the voting powers, designations, preferences, limitations, restrictions and relative rights and the qualifications, limitations and restrictions of such rights, set forth in the Articles of Incorporation that may be applicable to the Preferred Stock) as follows:

1. *Designation and Rank.* The designation of such series of the Preferred Stock authorized by this resolution shall be the Exchangeable Redeemable Preferred Stock (the "Exchangeable Preferred Stock"). The maximum number of shares of Exchangeable Preferred Stock shall be 9,000,000. Shares of the Exchangeable Preferred Stock shall have a liquidation preference of \$2.14 per share plus accrued and unpaid dividends, thereon, subject to Section 7(a). The Exchangeable Preferred Stock shall rank prior to the common stock, par value \$.01 per share (the "Common Stock") and to all other classes and series of equity securities of the Company now or hereafter authorized, issued or outstanding (the Common Stock and such other classes and series of equity securities collectively may be referred to herein as the "Junior Stock"), other than any class or series of equity securities of the Company ranking on a parity with (the "Parity Stock") or senior to (the "Senior Stock") the Exchangeable Preferred Stock as to dividend rights and/or rights upon liquidation, dissolution or winding up of the Company. The Exchangeable Preferred Stock shall be subordinate to and rank junior to all indebtedness of the Company now or hereafter outstanding. The Exchangeable Preferred Stock shall be subject to creation of Senior Stock, Parity Stock and Junior Stock, to the extent not expressly prohibited by the Company's Articles of Incorporation, with respect to the payment of dividends and/or rights upon liquidation, dissolution or winding up of the company.

2. *Cumulative Dividends Priority.*

(a) *Payment of Dividends.* The holders of record of shares of Exchangeable Preferred Stock shall be entitled to receive, when, as and if declared by the Board of Directors out of funds legally available therefore, cumulative cash dividends at a rate

per annum per share (the "Dividend Rate") initially set at 8% of (i) \$2.14 plus (ii) accrued but unpaid dividends as to which a Dividend Payment Date (as defined below) has occurred. Dividends shall accrue from the date of issuance and be payable semi-annually in arrears on the 31st day of March and the 30th day of September in each year (or if such day is a non-business day, on the next business day), commencing on March 31, 1994 (each of such dates a "Dividend Payment Date"); provided, however, that on any or all of the first six Dividend Payment Dates the Company may, at its option, pay dividends on the Exchangeable Preferred Stock in the form of additional shares of Exchangeable Preferred Stock at the rate per annum of 0.08 shares of additional Exchangeable Preferred Stock for every share of Exchangeable Preferred Stock entitled to receive a dividend. If all Exchangeable Preferred Stock has not been redeemed prior to the tenth Dividend Payment Date, the Dividend Rate will increase on the tenth Dividend Payment Date to the rate per annum per share of 11% and will thereafter increase by an additional 0.50% per annum per share on each Dividend Payment Date until either the Dividend Rate reaches a rate per annum per share of 16% or the Exchangeable Preferred Stock is redeemed or exchanged by the Company as set forth herein. In no circumstances will the Dividend Rate exceed 16% per annum per share. Each declared dividend shall be payable to holders of record as they appear on the stock books of the Company at the close of business on such record dates as are determined by the Board of Directors or a duly authorized committee thereof (each of such dates a "Record Date"), which Record Dates shall be not more than 45 calendar days nor fewer than 10 calendar days preceding the Dividend Payment Dates therefor. Semi-annual dividend periods (each a "Dividend Period") shall commence on and include the 31st day of March and the 30th day of September of each year and shall end on and include the date next preceding the next following Dividend Payment Date. Dividends on the Exchangeable Preferred Stock shall be fully cumulative and shall accrue (whether or not declared), on a daily basis, from the first day of each Dividend Period; provided, however, that the initial semi-annual dividend payable on March 31, 1994 and the amount of any dividend payable for any other Dividend Period shorter than a full Dividend Period shall be computed on the basis of a 360-day year composed of twelve 30-day months and the actual number of days elapsed in the relevant Dividend Period.

*(b) Priority as a Dividends.*

(i) No dividends in any form shall be declared or paid or set apart for payment on any Preferred Stock that constitutes Parity Stock with respect to dividends for any period unless full dividends on the Exchangeable Preferred Stock for the immediately preceding Dividend Period have been or contemporaneously are declared and paid. No cash dividends shall be declared or paid or set apart for payment on any Parity Stock for any period unless full cash dividends on the Exchangeable Preferred Stock for the immediately preceding Dividend Period have been or contemporaneously are declared and paid (or declared and a sum sufficient for the payment thereof set apart for such payment). When dividends are not paid in full (or not declared and a sum sufficient for such full payment not so set apart) upon the Exchangeable Preferred Stock and any Parity Stock all dividends declared upon shares of Exchangeable Preferred Stock and any Parity Stock shall be declared pro rata with respect thereto, so that in all cases the amount of dividends declared per share on the Exchangeable Preferred Stock and such Parity Stock shall bear to each other the same ratio that accrued dividends per share for the then-current Dividend Period on the shares of Exchangeable Preferred Stock (which shall include any accumulation in respect of unpaid dividends for prior Dividend Periods) and dividends, including accumulations, if any, on such Parity Stock, bear to each other.

(ii) Before (1) any dividend or other distribution (other than in Common Stock or other Junior Stock) shall be declared or paid or set aside for payment upon the Common Stock or any other Junior Stock or (2) any Common Stock or any other Junior Stock is redeemed, purchased or otherwise acquired by the Company for any consideration (or any moneys are paid to or made available for a sinking fund for the redemption of any shares of any such stock) except by conversion into or exchange for Common Stock or any other Junior Stock, (A) full cash dividends on the Exchangeable Preferred Stock must be declared and paid or funds paid over to the dividend disbursing agent of the Company for payment

of such dividends for the immediately preceding two Dividend Periods (or such lesser number of Dividend Periods during which the shares of Exchangeable Preferred Stock have been outstanding) and (B) a full cash dividend on the Exchangeable Preferred Stock must be declared at the annual Dividend Rate for the current Dividend Period, and sufficient funds paid over to the dividend disbursing agent of the Company for the payment of a cash dividend at the end of such Dividend Period. The Company shall not permit any subsidiary of the Company to purchase or otherwise acquire for consideration any shares of stock of the Company if under the preceding sentence the Company would be prohibited from purchasing or otherwise acquiring such shares at such time and in such manner.

(iii) No dividend shall be paid or set aside for holders of Exchangeable Preferred Stock for any Dividend Period unless full dividends on any Preferred Stock that constitutes Senior Stock with respect to dividends for that period have been or contemporaneously are declared and paid (or declared and a sum sufficient for the payment thereof set apart for such payment).

### 3. *Optional Redemption.*

#### (a) *General.*

(i) Subject to the applicable restrictions set forth in this Section 3 and applicable law, the shares of Exchangeable Preferred Stock may be redeemed, in whole or in part, at the election of the Company, upon notice as provided in Section 3(b), by resolution of the Board of Directors, at any time or from time to time, at a redemption price equal to the Liquidation Preference. On and after any such redemption date, dividends shall cease to accrue on the shares redeemed, and such shares shall be deemed to cease to be outstanding, provided that the redemption price (including any accrued and unpaid dividends to the date fixed for redemption) has been duly paid or provided for.

(ii) If less than all the outstanding shares of Exchangeable Preferred Stock are to be redeemed, the Company shall select at its absolute discretion the shares to be redeemed pro rata or by lot.

#### (b) *Notice of Redemption.*

(i) Notice of any redemption of shares of Exchangeable Preferred Stock, setting forth (1) the date and place fixed for said redemption, (2) the redemption price, (3) a statement that dividends on the shares to be redeemed will cease to accrue on such redemption date and (4) the method(s) by which the holders may surrender their redeemed shares and obtain payment therefor, shall be mailed, postage prepaid, at least 30 days but not more than 90 days prior to said redemption date to each holder of record of the Exchangeable Preferred Stock to be redeemed at his or her address as the same shall appear on the books of the Company. If less than all the shares of the Exchangeable Preferred Stock owned by such holder are then to be redeemed, the notice shall specify the number of shares thereof are to be redeemed and the numbers of the certificates representing such shares.

(ii) If such notice of redemption shall have been so mailed, and if on or before the redemption date specified in such notice all funds necessary for such redemption shall have been set aside by the Company separate and apart from its funds, in trust for the account of the holders of the shares so to be redeemed, so as to be and continue to be available therefor, then, on and after said redemption date, notwithstanding that any certificate for shares of the Exchangeable Preferred Stock so called for redemption shall not have been surrendered for cancellation, the shares represented thereby so called for redemption shall be deemed to be no longer outstanding, the dividends thereon shall cease to accrue, and all rights with respect to such shares of the Exchangeable Preferred Stock, so called for redemption shall forthwith cease and terminate, except only the right of the holders thereof to receive out of the funds so set aside in trust the amount payable on redemption thereof, but without interest, upon surrender (and endorsement or assignment for transfer, if required by the Company) of their certificates.

(iii) If such notice of redemption shall have been so mailed, and if on or before the date of redemption specified in such notice all said funds necessary for such redemption shall have been irrevocably deposited in trust, for the account of the holders of the shares of the Exchangeable Preferred Stock to be redeemed (and so as to be and continue to be available therefor), with a bank or trust company named in such notice doing business in the City of New York or the State of Nevada and having combined capital and surplus of at least \$50,000,000, thereupon and without awaiting the redemption date, all shares of the Exchangeable Preferred Stock with respect to which such notice shall have been so mailed and such deposit shall have been so made, shall be deemed to be no longer outstanding, and all rights with respect to such shares of the Exchangeable Preferred Stock shall forthwith upon such deposit in trust cease and terminate, except only the right of the holders thereof on, or after the redemption date to receive from such deposit the amount payable on redemption thereof, but without interest, upon surrender (and endorsement or assignment to transfer, if required by the Company) of their certificates. In case the holders of shares of the Exchangeable Preferred Stock that shall have been redeemed shall not within two years (or any longer period if required by law) after the redemption date claim any amount to deposited in trust for the redemption of such shares, such bank or trust company shall, upon demand and if permitted by applicable law, pay over to the Company any such unclaimed amount so deposited with it, and shall thereupon be relieved of all responsibility in respect thereof, and thereafter the holders of such shares shall, subject to applicable escheat laws, look only to the Company for payment of the redemption price thereof, but without interest.

(c) *Status of Shares Redeemed.* Shares of Exchangeable Preferred Stock redeemed, purchased or otherwise acquired for value by the Company, shall, after such acquisition, have the status of authorized and unissued shares of Preferred Stock and may be reissued by the Company at any time as shares of any series of Preferred Stock other than as shares of Exchangeable Preferred Stock.

#### 4. *Optional Exchange.*

(a) *Exchange; Terms of Subordinated Notes.* Any Exchangeable Preferred Stock that has not been redeemed on or prior to the tenth Dividend Payment Date may be exchanged, in whole or in part, at the election of the Company, upon notice as provided in Section 4(c), by resolution of the Board of Directors, at any time or from time to time on or after the Tenth Dividend Payment Date, for Junior Subordinated Notes (the "Junior Subordinated Notes") issued by the Company. If any Exchangeable Preferred Stock is exchanged in part by the Company, such exchange shall be pro rata or by lot. The principal amount of any Junior Subordinated Notes issued in exchange for Exchangeable Preferred Stock shall be equal to the Liquidation Preference of such Exchangeable Preferred Stock. The Junior Subordinated Notes will mature on the 15th anniversary of the date of the original issuance of the Exchangeable Preferred Stock and will bear interest at an annual rate of 11%, payable semi-annually on the Dividend Payment Dates. The Junior Subordinated Notes may be redeemed, in whole or in part, at the election of the Company, by resolution of the Board of Directors, at any time and from time to time for an amount equal to the principal amount plus accrued but unpaid interest at the date of redemption. No sinking fund payments will be required with respect to the Junior Subordinated Notes.

(b) *Other Terms.* The Junior Subordinated Notes will be governed by an indenture containing in addition to the terms described in Section 4(a), such terms and conditions as the Board of Directors may approve and such terms and conditions as may be required by then applicable law.

#### (c) *Notice of Exchange.*

(i) Notice of any such exchange, setting forth (1) the date and place fixed for said exchange, (2) the principal value of the Junior Subordinated Notes to be exchanged for outstanding Exchangeable Preferred Stock, (3) a statement that dividends on the shares to be exchanged will cease to accrue on such exchange date and (4) the method(s) by which the holders may surrender their shares of Exchangeable Preferred Stock and obtain Junior Subordinated Notes in exchange therefor, shall be mailed, postage prepaid, at least 30 days but not more than 90 days prior to said exchange date so each holder of record of the Exchangeable Preferred Stock to be redeemed at his or her address as the same shall appear on the books of the Company.

(ii) If such notice of exchange shall have been so mailed and on or before the exchange date specified in the notice, the Company has delivered the Junior Subordinated Notes to an exchange agent then, on and after said exchange date, notwithstanding that any certificate for shares of the Exchangeable Preferred Stock so called for exchange shall not have been surrendered for cancellation, the shares represented thereby so called for exchange shall be deemed to be no longer outstanding, the dividends thereon shall cease to accrue, and all rights with respect to such shares of the Exchangeable Preferred Stock so called for exchange shall forthwith cease and terminate, except only the right of the holders thereof to receive Junior Subordinated Notes in exchange therefor upon surrender of their certificates.

(d) *Status of Shares Exchanged.* Shares of Exchangeable Preferred Stock exchanged for Junior Subordinated Notes shall, after such exchange, have the status of authorized and unissued shares of Preferred Stock and may be reissued by the Company at any time as shares of any series of Preferred Stock other than as shares of Exchangeable Preferred Stock.

#### 5. Voting Rights.

(a) *General Voting Rights.* Except as expressly provided hereinafter in this Section 5, or at otherwise from time to time required by applicable law, the Exchangeable Preferred Stock shall have no voting rights.

(b) *Voting Rights on Extraordinary Matters.* So long as any shares of Exchangeable Preferred Stock are outstanding and unless the consent or approval of a greater number of shares shall then be required by applicable law, without first obtaining the approval of the holders of at least two-thirds of the number of shares of Exchangeable Preferred Stock at the time outstanding (voting separately as a class) given in person or by proxy at a meeting at which the holders of such shares shall be entitled to vote separately as a class or, by written consent in lieu thereof, the Company shall not, either directly or indirectly or through merger, consolidation, reorganization or other business combination with any other company, (i) authorize, create, issue or increase the authorized or issued amount of any Preferred Stock that constitutes Senior Stock or Parity Stock, or any warrants, options or other rights convertible or exchangeable into Senior Stock or Parity Stock or (ii) amend, alter, repeal, or otherwise change any provision of its Articles of Incorporation or this resolution so as to materially and adversely affect the rights, preferences, power or privileges of the Exchangeable Preferred Stock. The creation or issuance of Preferred Stock that constitutes Exchangeable Preferred Stock or Junior Stock, or a merger, consolidation or reorganization or other business combination in which the Company is not the surviving entity, or any amendment that increases the number of authorized shares of Preferred Stock that constitutes Exchangeable Preferred Stock or Junior Stock or substitutes the surviving entity in a merger, consolidation, reorganization or other business combination for the Company, shall not be considered to be such a material and adverse change requiring a separate vote of the holders of the Exchangeable Preferred Stock.

(c) *Election of special directors.* If dividends in an amount equal to dividend payments for one Dividend Period have accrued and remain unpaid for two years, holders of Sahara Gaming Preferred Stock will have the right to a separate class vote to elect two special directors to the board of Sahara Gaming (in addition to the then authorized number of directors) at the next annual meeting of stockholders. Upon payment of all dividend arrearages, holders of Sahara Gaming Preferred Stock will be divested of such voting rights until any future time when dividends in an amount equal to dividend payments for one Dividend Period have accrued and remained unpaid for two years. The terms of the special directors will thereupon nominate and the authorized number of directors will be reduced by two.

(d) *One Vote Per Share.* In connection with any matter on which holders of the Exchangeable Preferred Stock are entitled to vote as provided in subparagraphs (b) or (c) above, or any matter on which the holders of the Exchangeable Preferred Stock are entitled to vote as one class or otherwise pursuant to law or the provisions of the Articles of Incorporation, each holder of Exchangeable Preferred Stock shall be entitled to one vote for each share of Exchangeable Preferred Stock held by such holder.

**6. No Sinking Fund.** No sinking fund will be established for the retirement or redemption of shares of Exchangeable Preferred Stock.

**7. Liquidation Rights; Priority.**

(a) In the event of the liquidation, dissolution or winding up of the affairs of the Company, whether voluntary or involuntary, after payment or provision for payment of the debts and other liabilities of the Company and after payment or provision for payment of Preferred Stock that constitutes Senior Stock with respect to the liquidation, dissolution or winding up of the affairs of the Company, the holders of shares of the Exchangeable Preferred Stock shall be entitled to receive, out of the assets of the Company, whether such assets are capital or surplus, whether or not any dividends as such are declared and before any distribution shall be made to the holders of the Common Stock or any other class of stock or series thereof ranking junior to the Exchangeable Preferred Stock with respect to the distribution of assets, an amount (the "Liquidation Preference") per share equal to the sum of (i) \$2.14, plus (ii) an amount equal to all accrued and unpaid dividends for the then current Dividend Period, through the date of liquidation, dissolution or winding up, plus all prior Dividend Periods, whether or not declared, plus (iii) if, within five years of the initial issuance of the Exchangeable Preferred Stock, all or substantially all of the assets of the Company are sold or the Company merges with or into any entity as a result of which the stockholders of the Company hold less than 50% of the equity interests of the surviving entity, an amount equal to the lesser of (1) the Designated Amount (as defined below) divided by the total number of shares of Exchangeable Preferred Stock then outstanding and (2) \$0.7143. The "Designated Amount" shall be an amount equal to \$5 million less the result of (x) the aggregate amount distributable to all holders of shares of Exchangeable Preferred Stock pursuant to (i) above minus (y) \$14.98 million. Unless specifically designated as junior or senior to the Exchangeable Preferred Stock with respect to the distribution of assets, all other series or classes of Preferred Stock of the Company shall rank on a parity with the Exchangeable Preferred Stock with respect to the distribution of assets.

(b) Nothing contained in this Section 7 shall be deemed to prevent redemption or exchange of shares of the Exchangeable Preferred Stock by the Company in the manner provided in Section 3 or Section 4, as the case may be. Neither the merger nor consolidation of the Company into or with any other company, nor the merger or consolidation of any other company into or with the Company, nor a sale, transfer or lease of all or any part of the assets of the Company, shall be deemed to be a liquidation, dissolution or winding up of the Company within the meaning of this Section 7.


(c) Written notice of any voluntary or involuntary liquidation, dissolution or winding up of the affairs of the Company, stating a payment date and the place where the distributable amounts shall be payable, shall be given by mail, postage prepaid, no less than 30 days prior to the payment date stated therein, to the holders of record of the Exchangeable Preferred Stock at their respective addresses as the same shall appear on the books of the Company.

(d) If the amounts available for distribution with respect to the Exchangeable Preferred Stock and all other outstanding stock of the Company ranking on a parity with the Exchangeable Preferred Stock upon liquidation are not sufficient to satisfy the full liquidation rights of all the outstanding Exchangeable Preferred Stock and stock ranking on a parity therewith, then the holders of each series of such stock will share ratably in any such distribution of assets in proportion to the full respective preferential amount (which in the case of the Exchangeable Preferred Stock shall mean the amounts specified in Section 7(a) and in the case of any other series of Preferred Stock may include accumulated dividends if contemplated by such series) to which they are entitled.

IN WITNESS WHEREOF, this certificate has been signed by Paul W. Lowden and Stephen J. Szapor, Jr. as of September 30, 1993.

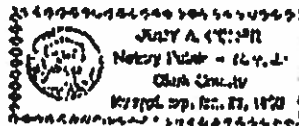
SAHARA GAMING CORPORATION


By:   
Name: Paul W. Lowden  
Title: President and Chairman of the Board

By:   
Name: Stephen J. Szapor, Jr.  
Title: Assistant Secretary

STATE OF NEVADA )  
                          ) ss.  
COUNTY OF CLARK )

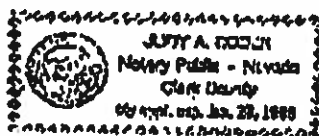
On 9-30-93, personally appeared before me, a notary public, Paul W. Lowden, personally known (or proved) to me to be the person whose name is subscribed to the above instrument who acknowledged that he executed the instrument.



  
Notary Public

STATE OF NEVADA )  
                          ) ss.  
COUNTY OF CLARK )

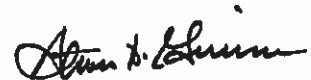
On 9-30-93, personally appeared before me, a notary public, Stephen J. Szapor, Jr., personally known (or proved) to me to be the person whose name is subscribed to the above instrument who acknowledged that he executed the instrument.



  
Notary Public

## **Exhibit 2-**

Complaint  
Raider v. Archon Corporation  
District Court Case No. A-15-712113-B



CLERK OF THE COURT

1 COMPB  
Steven J. Parsons  
2 Nevada Bar No. 363  
LAW OFFICES OF STEVEN J. PARSONS  
3 7201 W Lake Mead Blvd Ste 108  
Las Vegas, NV 89128-8354  
4 (702)384-9900  
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5 [Steve@SJPlawyer.com](mailto:Steve@SJPlawyer.com)

6 Steven E. Goren  
Michigan Bar No. P36581  
7 pending admission SCR 49  
GOREN, GOREN & HARRIS, P.C.  
8 30400 Telegraph Rd Ste 470  
Bingham Farms, MI 48025-5818  
9 (248) 540-3100  
(248) 540-3136 (fax)  
10 [sgoren@gorenlaw.com](mailto:sgoren@gorenlaw.com)

11 Attorneys for Plaintiff  
DAN RAIDER, an individual  
12 on his own behalf and on behalf  
of others similarly situated

DISTRICT COURT

CLARK COUNTY, NEVADA

15 DAN RAIDER, an individual on his own  
behalf and on behalf of others similarly  
16 situated,

Case No.: A-15-712113-B

Dept. No.: XIII

17 Plaintiff,  
v.

COMPLAINT

18 ARCHON CORPORATION, a Nevada  
19 corporation; PAUL W. LOWDEN, an  
individual; and SUZANNE LOWDEN, an  
20 individual,

BUSINESS COURT - EDCR 1.61(a)(1)

JURY DEMAND

21 Defendants.

EXEMPT FROM ARBITRATION:  
(NAR 3(A) - Declaratory Relief;  
NAR 3(A) - Value Exceeds \$50,000)

- 22
- 23 1. DECLARATORY RELIEF;
  - 24 2. BREACH OF CONTRACT (UNPAID BALANCE OF THE REDEMPTION PRICE);
  - 25 3. BREACH OF CONTRACT (POST-AUGUST 31, 2007 DIVIDENDS)
  4. UNJUST ENRICHMENT;
  5. CONSTRUCTIVE TRUST AND OTHER EQUITABLE RELIEF; and
  6. BREACH OF FIDUCIARY DUTY.

26 Plaintiff DAN RAIDER, an individual on his own behalf and on behalf of others similarly  
27 situated, by his attorneys, Steven J. Parsons of LAW OFFICES OF STEVEN J. PARSONS and Steven

1 E. Goren, of GOREN, GOREN & HARRIS, P.C., a Member of the Michigan Bar, pending admission  
2 to this Court, Pro Hac Vice, within SCR 49, complains of Defendant ARCHON CORPORATION,  
3 a Nevada corporation, PAUL W. LOWDEN, an individual; and SUZANNE LOWDEN, an  
4 individual, and as causes of action against Defendants, complains and alleges as follows:

5 PARTIES, JURISDICTION and VENUE

6 1. Plaintiff Dan Raider ("Plaintiff and/or "Raider") is a resident of California.

7 2. Defendant Archon Corporation ("Defendant" and/or "Archon") is a Nevada  
8 corporation whose principal place of business is in Las Vegas, Clark County, Nevada.

9 3. Defendant Paul W. Lowden is a resident of Clark County, Nevada.

10 4. Defendant Suzanne Lowden is a resident of Clark County, Nevada.

11 5. Plaintiff's Complaint states a controversy over which this Honorable Court has  
12 jurisdiction and venue is properly in this Court as Defendants are residents and domiciliaries  
13 of Clark County, Nevada, doing business principally in Clark County, Nevada; the wrongful  
14 conduct complained of by Plaintiff all allegedly occurred in Clark County, Nevada; relevant  
15 benefits due from the Redemption, supra, and damages claimed by Plaintiff Raider on behalf  
16 of himself and the other members of the putative class were due and payable in Clark County,  
17 Nevada.

18 6. The matters in controversy exceed, exclusive of interest and costs, the minimum  
19 jurisdictional amount of the Court of Ten Thousand Dollars (\$10,000.00).

20 a. Plaintiff Raider was the owner of 7,000 shares of Archon preferred stock  
21 that Archon purported to redeem and claims damages, inter alia, of \$3.449 per share (the  
22 unpaid balance of the redemption price, infra) and dividends that have continued to accrue  
23 since August 31, 2007 on each share.

24 b. The members of the putative class on whose behalf this action has been  
25 brought collectively owned a total of at least 1,432,270 shares of the Archon preferred stock  
26 and each member of the putative class is entitled to damages inter alia of \$3.449 per share  
27 (the unpaid balance of the redemption price, infra) and dividends that have continued to

1 accrue since August 31, 2007 on each share.

2 STATEMENT OF THE CASE

3 7. On or about August 20, 1993, Defendant Archon, formerly and then known as  
4 "Sahara Gaming Corporation," adopted a resolution ("Resolution") creating nine million  
5 (9,000,000) shares of Preferred Stock.

6 8. On or about September 30, 1993, Defendant Archon filed a Certificate of  
7 Designation ("Certificate") for the Preferred Stock with the Secretary of State of the State of  
8 Nevada. The Resolution was set forth in the Certificate. A copy of the Certificate is attached  
9 hereto and incorporated herein as if set forth fully, as Exhibit "1."

10 9. Defendant Archon subsequently issued shares of Preferred Stock, denominated  
11 as Exchangeable Redeemable Preferred Stock ("Preferred Stock").

12 10. Defendant Archon purported to redeem its outstanding Preferred Stock as of the  
13 close of business on August 31, 2007 ("Redemption").

14 11. The Redemption price was required by the Certificate to be \$2.14 per share plus  
15 the amount of all accrued and unpaid dividends to August 31, 2007. Defendant Archon did  
16 not properly calculate the amount of the redemption price and paid its preferred shareholders  
17 only \$5.241 per share.

18 12. As set forth more fully, infra, it has been determined judicially, authoritatively  
19 and with finality that Defendant Archon should have paid its preferred shareholders \$8.69 per  
20 share. In addition, under the Certificate, dividends have continued to accrue in favor of any  
21 shareholder who was not paid in full.

22 13. Plaintiff Raider was an owner of Archon Preferred Stock as of the close of  
23 business on August 31, 2007.

24 14. According to the Proxy Statement filed by Defendant Archon on June 1, 2007  
25 with the Securities and Exchange Commission, as of May 11, 2007, there were four million  
26 four hundred thirteen thousand seven hundred seventy-seven (4,413,777) shares of the  
27 Preferred Stock issued and outstanding. According to the Proxy Statement, as of May 1,

1 2007, Defendant Paul W. Lowden, Chairman and CEO of Archon owned 18.4% of the  
2 Preferred Stock and 74.7% of Defendant Archon's common stock and all directors and officers  
3 of Defendant Archon, collectively, owned 18.9% of the Preferred Stock and 75.4% of the  
4 common stock.

5 THE REDEMPTION OF THE PREFERRED STOCK

6 15. Paragraph 3(a)(i) of the Resolution and Certificate provided that the shares of  
7 the Preferred Stock could be redeemed at any time or from time to time, in whole or in-part,  
8 at the election of Defendant Archon.

9 16. On July 31, 2007, Defendant Archon issued a Notice of Redemption ("Notice")  
10 to the holders of outstanding shares of the Preferred Stock announcing its intent to "redeem  
11 all of the outstanding shares of the Preferred Stock issued and outstanding as of the close of  
12 business on August 31, 2007". The Notice stated that issued and outstanding shares of the  
13 Preferred Stock would be redeemed at "the redemption price of \$5.241 per share".

14 17. The Notice also stated that upon redemption, the Preferred Stock would "be  
15 delisted from further trading."

16 18. Archon paid its preferred shareholders \$5.241, the amount stated in the Notice.

17 THE REDEMPTION PRICE

18 19. Paragraph 3(a)(i) of the Resolution and the Certificate provided that the  
19 redemption price is "equal to the Liquidation Preference".

20 20. The "Liquidation Preference", in turn, was defined in paragraph 7 of the  
21 Resolution and the Certificate to be equal to "...the sum of (i) \$2.14, plus (ii) an amount  
22 equal to all accrued and unpaid dividends for the then current Dividend Period, through the  
23 date of liquidation, dissolution or winding up, plus all prior Dividend Periods, whether or not  
24 declared".

25 21. Paragraph 2(a) of the Resolution and the Certificate provided that semi-annual  
26 dividend periods "(each a 'Dividend Period') shall commence on and include the 31st day of  
27 March and the 30th day of September of each year and shall end on and include the date next

1 preceding the following Dividend Payment Date.” Paragraph 2(a) of the Resolution and the  
2 Certificate also provided that Dividend Payment Dates were March 31st and September 30th  
3 or the next business day, if the date was a non-business day.

4 22. The amount of the accrued and unpaid dividends must be determined to  
5 calculate and determine the Redemption Price.

6 THE AMOUNT OF THE ACCRUED AND UNPAID DIVIDENDS

7 23. Paragraph 2(a) of the Resolution and the Certificate provided for payment to  
8 holders of the Preferred Stock of cumulative cash dividends calculated as follows:

9 “a rate per annum per share (the ‘Dividend Rate’”) initially set at  
10 8% of (i) \$2.14 plus (ii) accrued but unpaid dividends as to  
11 which a Dividend Payment Date has occurred. Dividends shall  
12 accrue from the date of issuance and are payable semi-annually  
13 on...[the Dividend Payment Date]”.

14 24. Paragraph 2 of the Resolution and the Certificate further provided that Initial  
15 Dividend Rate was eight percent (8%) per annum and that after the tenth (10<sup>th</sup>) Dividend  
16 Payment Date, the Dividend Rate would increase periodically to a maximum of sixteen percent  
17 (16%) per annum. The Dividend Rate was sixteen percent (16%) per annum prior to the  
18 redemption of the Preferred Stock.

19 25. Paragraph 2(a) of the Resolution and the Certificate also provided the dividends  
20 “shall be fully cumulative and shall accrue (whether or not declared), on a daily basis...”

21 26. Paragraph 2 of the Resolution and the Certificate also provided that “on any or  
22 all of the first six Dividend Payment Dates [Defendant Archon] may, at its option, pay dividends  
23 on the Exchangeable [Redeemable] Preferred Stock in the form of additional shares of  
24 Exchangeable [Redeemable] Preferred Stock at the rate per annum of 0.08 shares of  
25 additional Exchangeable [Redeemable] Preferred Stock for every share entitled to receive a  
26 dividend.

27 27. On the first six (6) Dividend Payment Dates, Archon elected to pay dividends in

1 the form of additional shares of the Preferred Stock as provided in Paragraph 2 of the  
2 Resolution and the Certificate.

3 28. After the sixth (6<sup>th</sup>) Dividend Payment Date, Defendant Archon did not pay any  
4 dividends on the Preferred Stock and, in particular, did not pay any cash dividends.

5 29. Because Defendant Archon did not pay any cash dividends on the Preferred  
6 Stock, all dividends due subsequent to the sixth (6<sup>th</sup>) Dividend Payment Date accumulated.

7 30. Paragraph 2(a) of the Resolution and the Certificate requires that each of the  
8 accrued and unpaid dividends be calculated by applying the applicable Dividend Rate of eight  
9 to sixteen percent (8 to 16%) annually to the sum of \$2.14 and the accrued but unpaid  
10 dividends as to which a Dividend Payment Date had then occurred.

11 31. Calculated as required by the Resolution and the Certificate, the unpaid and  
12 accrued dividends to August 31, 2007 totaled \$6.55. The required Redemption Price was  
13 therefore \$8.69 (\$2.14 + \$6.55).

14 32. In calculating the respective accrued and unpaid dividends, Defendant Archon  
15 applied the Dividend Rate only to \$2.14, not to the sum of \$2.14 and the accrued but unpaid  
16 dividends as to which a Dividend Payment Date had occurred. As a result, the Redemption  
17 Price calculated by Defendant Archon was \$3.45 lower than it would have been had it been  
18 calculated properly, as required by the Resolution and the Certificate.

19 CLASS ACTION ALLEGATIONS

20 33. Plaintiff Raider brings this action on his own behalf and on behalf of a class of  
21 those similarly situated, defined as all holders of outstanding Preferred Stock as of the close  
22 of business on August 31, 2007, except:

- 23 a. Paul W. Lowden, Suzanne Lowden, John W. Delaney,  
24 William J. Raggio, Howard Foster, Richard H. Taggart, and  
any other officer or director of Archon Corporation;
- 25 b. D. E. Shaw Laminar Portfolios, LLC, LC Capital Master  
26 Fund, Ltd., LC Capital/Capital Z SPV, LP, Magten Asset  
27 Management Corp, Mercury Real Estate Securities Fund  
LP, Mercury Real Estate Securities Offshore Fund Limited,  
Black Horse Capital LP, Black Horse Capital (QP) LP, Black

Horse Capital Offshore Ltd. and Plainfield Special  
Situations Master Fund Limited; and

c. Leeward Capital, L.P.

34. The Class is so numerous that joinder of all members is impractical. There are over five hundred sixty (560) members of the Class.

35. There are questions of law and fact common to the Class.

36. Plaintiff's claims are typical of the claims of the Class. The claims all arise from the same operative facts and are based on the same legal theories.

37. Plaintiff will fairly and adequately protect the interests of the Class.

38. The prosecution of separate actions by individual members of the Class would create a risk of:

a. Inconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for Defendants;

b. Adjudications with respect to individual members of the Class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

39. Defendants have acted on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as whole.

40. The questions of law or fact common to the members of the Class predominate over any questions affecting only individual members and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

41. There is one central and overriding issue in this case: "What is the proper method under the Resolution and the Certificate for calculating the Liquidation Preference?" As explained in the following section, that issue has been decided adverse to Defendant Archon judicially, authoritatively and with finality. All of the other liability issues are issues common to the Class. Furthermore, the damages per share are the same for each share and

1 the damages of each member of the Class is simply equal to the damages per share multiplied  
2 by the number of shares held by the class member.

3 PRIOR LITIGATION REGARDING THE CALCULATION OF THE REDEMPTION PRICE

4 42. Three actions by Archon preferred shareholders were filed against Archon in the  
5 U.S. District Court for the District of Nevada:

6 a. The first action was filed by D. E. Shaw Laminar Portfolios, L.L.C. et al.,  
7 on August 27, 2007 and was assigned to Philip M. Pro, U.S. District Judge, docketed as case  
8 number 2:07-cv-01146-PMP-(LRL).

9 b. The second action was filed by David Rainero on November 20, 2007  
10 and was brought on behalf of all of the preferred stockholders except the plaintiffs in D. E.  
11 Shaw and officers and directors of Archon who were preferred shareholders. It was assigned  
12 to Robert Clive Jones, U.S. District Judge and later reassigned to Gloria M. Navarro, U.S.  
13 District Judge, docketed as case number 2:07-cv-01553-GMN-(PAL).

14 c. The third action was filed by Leeward Capital, L.P. on January 2, 2008  
15 and was also assigned to Judge Pro, docketed as case number 2:08-cv-00007-PMP-(LRL).

16 43. In both D. E. Shaw and Leeward, summary judgment was granted in favor of  
17 Plaintiffs and final judgment was entered in each. Judge Pro determined and entered  
18 Judgment that the redemption price should have been of \$8.69 per share, the sum of \$2.14  
19 and the unpaid dividends in the amount of \$6.55 that had accrued to August 31, 2007.

20 44. Defendant Archon appealed both judgments to the U.S. Court of Appeals for the  
21 Ninth Circuit. On September 19, 2012, the judgments in D.E. Shaw and Leeward were  
22 affirmed by the U.S. Court of Appeals for the Ninth Circuit.

23 45. After the judgments in D.E. Shaw and Leeward were affirmed by the U.S. Court  
24 of Appeals for the Ninth Circuit, Archon did not file a petition for panel rehearing, a petition for  
25 rehearing, en banc, a petition for certiorari or otherwise challenge or appeal the judgments  
26 further.

27 46. Upon information and belief, Plaintiff alleges Archon paid the judgments in D.E.

1 Shaw and Leeward.

2 47. On November 7, 2013, partial summary judgment was granted in favor of the  
3 plaintiff in Rainero. Finding that Archon was collaterally estopped, Judge Navarro ruled:

4 "Because the Court finds that the D.E. Shaw and Leeward  
5 summary judgment decisions should have preclusive effect on the  
6 issue presented here, the Court accordingly finds that the issue  
7 of how to construe the Certificate so as to determine the correct  
8 method of calculating the redemption price is settled. The  
Certificate's terms are unambiguous. The Liquidation Preference  
is \$8.69, as calculated by adding the total amount of accrued  
but unpaid dividends on August 31, 2007 (\$6.55), plus \$2.14,  
as provided in the Certificate."

9 48. However, subsequently in Rainero, on September 11, 2014, nearly seven (7)  
10 years after the action was filed, the U.S. District Court, sua sponte, issued a show cause order  
11 questioning whether it was divested of jurisdiction by 28 U.S.C. § 1332(d)(9). Briefs were  
12 submitted by the parties. On September 29, 2014, the U.S. District Court issued an order  
13 holding that it did not have subject matter jurisdiction and a judgment dismissing the action  
14 without prejudice was entered in favor of Archon. An appeal to the U.S. Court of Appeals for  
15 the Ninth Circuit has been taken by the Plaintiff Rainero and is pending.

16 49. At the time Rainero was dismissed, Plaintiff's Amended Motion for Class  
17 Certification and his Motion for Partial Summary Judgment as to Post-August 31, 2007  
18 Damages were pending.

19 50. Archon has not paid Plaintiff Raider and the members of the putative class the  
20 unpaid balance of the redemption price or the dividends which have continued to accrue since  
21 August 31, 2007.

22 COUNT I – DECLARATORY RELIEF

23 51. Plaintiff incorporates by reference the balance of the Complaint as though set  
24 forth fully in this claim for relief.

25 52. An actual controversy exists between Plaintiff Raider and the members of the  
26 putative class on the one-hand and Defendant Archon on the other-hand, arising out of the  
27 events, as alleged herein.

1           53. Specifically, Plaintiff Raider contends on behalf of himself and the members of  
2 the putative class that Defendant Archon has no legal basis for refusing to pay fully the  
3 benefits due Plaintiff Raider and the members of the putative class in accordance with the  
4 terms of the Redemption and within Nevada law as determined by the U.S. District Court for  
5 the District of Nevada and the U.S. Court of Appeals for the Ninth Circuit in D.E. Shaw and  
6 Leeward.

7           54. Plaintiff is informed and believes and based thereon alleges that Defendant  
8 disputes its contentions, as evidenced by Defendant's failure to tender Plaintiff benefits due  
9 from the Redemption.

10          55. Plaintiff Raider seeks on behalf of himself and the members of the putative class  
11 -a declaration from this Court with respect to said controversies, and a judicial determination  
12 of the rights and responsibilities of the parties and of all appropriate remedies available to  
13 them.

14                                   COUNT II – BREACH OF CONTRACT

15                                   (UNPAID BALANCE OF THE REDEMPTION PRICE)

16          56. Plaintiff incorporates by reference the balance of the Complaint as though set  
17 forth fully in this claim for relief.

18          57. Defendant Archon was required by the Resolution and the Certificate and  
19 otherwise by law to pay Plaintiff Raider and the members of the putative class an amount  
20 equal to the Liquidation Preference for each share of Preferred Stock it redeemed.

21          58. Defendant Archon was required by the Resolution and the Certificate and  
22 otherwise by law to calculate the Liquidation Preference in the manner required by the  
23 Resolution and the Certificate.

24          59. Defendant Archon calculated the Liquidation Preference was \$5.241 per share.

25          60. Defendant Archon did not calculate the Liquidation Preference in the manner  
26 required by the Resolution and the Certificate.

27          61. Calculated in the manner required by the Resolution and the Certificate, the

1 Liquidation Preference is \$8.69 per share.

2 62. Plaintiff Raider and the members of the putative class have been damaged in  
3 the amount of \$3.45 per share.

4 COUNT III – BREACH OF CONTRACT (POST-AUGUST 31, 2007 DIVIDENDS)

5 63. Plaintiff incorporates by reference the balance of the Complaint as though set  
6 forth fully in this claim for relief.

7 64. Section 3(a)(i) of the Certificate of Redemption provides in pertinent part:

8 "On and after such redemption date, dividends shall cease to  
9 accrue on the shares redeemed, and such shares shall be  
10 deemed to cease to be outstanding, provided that the  
11 redemption price (including any accrued and unpaid dividends  
to the date fixed for redemption) has been duly paid or provided  
for." (Emphasis added.)

12 65. The "redemption price (including any accrued and unpaid dividends)" has yet  
13 to be "duly paid or provided for."

14 66. Under Section 3(a)(i), dividends have continued to accrue.

15 67. Under Section 2(a) of the Certificate of Redemption, the dividend rate is sixteen  
16 percent (16%) payable semi-annually on March 31 and September 30.

17 68. Since the redemption price has yet to be "duly paid or provided for", dividends  
18 have continued to accrue.

19 69. Plaintiff Raider and the members of the putative class have been damaged in  
20 the amount of the unpaid dividends which have accrued on each share since August 31,  
21 2007.

22 COUNT IV – UNJUST ENRICHMENT

23 70. Plaintiff incorporates by reference the balance of the Complaint as though set  
24 forth fully in this claim for relief.

25 71. Once the time for filing a petition for panel rehearing, a petition for rehearing en  
26 banc and a petition for certiorari had passed after the U.S. Court of Appeals for the Ninth  
27 Circuit's affirming the judgments in D.E. Shaw and Leeward, there was no basis in law or equity

1 for Defendant Archon to retain the unpaid balance of the redemption price and the dividends  
2 which continued to accrue.

3 72. Defendant Archon has unjustly retained money belonging to Plaintiff Raider and  
4 the members of the putative class against the fundamental principles of justice and equity,  
5 good faith and good conscience.

6 73. Defendant Archon has retained the unpaid balance of the redemption price and  
7 the dividends which continued to accrue which in equity and good conscience belong to  
8 Plaintiff Raider the members of the putative class.

9 74. Plaintiff Raider and the members of the putative class have been damaged in  
10 the amount per share equal to the unpaid balance of the redemption price of \$3.449 plus the  
11 unpaid dividends which have accrued since August 31, 2007.

12 COUNT V – CONSTRUCTIVE TRUST AND OTHER EQUITABLE RELIEF

13 75. Plaintiff incorporates by reference the balance of the Complaint as though set  
14 forth fully in this claim for relief.

15 76. There is a confidential relationship between Plaintiff Raider and the members  
16 of the putative class on the one hand and Archon on the other hand within the meaning of the  
17 rule enunciated in Locken v. Locken, 98 Nev. 369, 650 P.2d 303 (1982).

18 77. Archon's retention of the unpaid balance of the redemption price and the  
19 dividends which have continued to accrue would be inequitable.

20 78. The imposition of a constructive trust is essential to the effectuation of justice.

21 79. Plaintiff Raider, individually and on behalf of the members of the putative class,  
22 requests that:

23 a. This Court declare that Archon is indebted to Plaintiff Raider and the  
24 members of the putative class in the amount per share equal to \$3.449 plus the unpaid  
25 dividends which have accrued since August 31, 2007.

26 b. A constructive trust be imposed on the assets of Defendant Archon  
27 Corporation for the benefit of Plaintiff Raider and the members of the putative class in an

1 amount per share equal to the unpaid balance of the redemption price of \$3.449 plus the  
2 unpaid dividends which have accrued since August 31, 2007.

3 c. Archon be enjoined from paying any dividends to the holders of its  
4 common stock until Plaintiff Raider and the members of the putative class have been paid in  
5 full.

6 d. Archon be enjoined from paying any bonuses or any extraordinary  
7 compensation to Defendants Paul W. Lowden and Suzanne Lowden, any other Archon officer  
8 or director and any Archon executive until Plaintiff Raider and the members of the putative  
9 class have been paid in full.

10 e. Archon be enjoined from transferring any assets except in the ordinary  
11 course of business until Plaintiff Raider and the members of the putative class have been paid  
12 in full.

13 f. Archon be ordered to pay to Plaintiff Raider and the members of the  
14 putative class an amount per share equal to \$3.449 plus the unpaid dividends which have  
15 accrued since August 31, 2007 together with interest.

16 g. Plaintiff Raider and the members of the putative class be awarded costs,  
17 interest and attorney's fees.

18 COUNT VI - BREACH OF FIDUCIARY DUTY

19 80. Plaintiff incorporates by reference the balance of the Complaint as though set  
20 forth fully in this claim for relief.

21 81. Defendant Paul W. Lowden:

22 a. Has been the president of Defendant Archon since September 1993.

23 b. Has been a director of Defendant Archon since September 1993.

24 c. Was the chairman of the board of Defendant Archon from September  
25 1993 through at least September 2010 and, upon belief, has continued to be the chairman  
26 of the board.

27 d. Was the chief executive officer of Defendant Archon from September

1 1993 through at least September 2010 and, upon belief, has continued to be its chief  
2 executive officer.

3 e. Together with LICO, a company wholly owned by him, owned a substantial  
4 majority of the common stock of Defendant Archon between at least September 2006 and  
5 September 2010, ranging from approximately 70% to 80%, and, upon belief, has continued  
6 to own a substantial majority of the common stock of Archon.

7 82. Defendant Suzanne Lowden:

8 a. Has been the secretary of Defendant Archon since at least May 30,  
9 2008.

10 b. Has been the treasurer of Defendant Archon since at least July 27, 2007.

11 c. Has been a director of Defendant Archon since September 1993.

12 d. Was the executive vice president of Defendant Archon from September  
13 1993 through at least September 2010 and, upon belief, has continued to be its executive  
14 vice president.

15 e. Was an owner of Archon common stock from at least September 2006  
16 through September 2010 and, upon belief, has continued to be an owner of its common  
17 stock.

18 83. Defendants Paul W. Lowden and Suzanne Lowden have been married to each  
19 other since approximately 1983, and in all apparent respects, act with unanimity of intent and  
20 purpose such as to have merged into one unit or entity, acting in concert.

21 84. Defendants Paul W. Lowden and Suzanne Lowden have at all relevant times  
22 been controlling shareholders.

23 85. As an Archon officer and director, majority shareholder and controlling  
24 shareholder, Defendant Paul W. Lowden had a fiduciary duty to Archon's preferred  
25 shareholders, including Plaintiff Raider and the members of the putative class.

26 86. As an Archon officer and director and controlling shareholder, Defendant  
27 Suzanne Lowden had a fiduciary duty to Archon's preferred shareholders, including Plaintiff

1 Raider and the members of the putative class.

2 87. All other Archon officers and directors had a fiduciary duty to Archon's preferred  
3 shareholders, including Plaintiff Raider and the members of the putative class.

4 88. Defendant Archon had a fiduciary duty to Archon's preferred shareholders,  
5 including Plaintiff Raider and the members of the putative class.

6 89. Once the time had passed in D.E. Shaw and Leeward for filing a petition for  
7 panel rehearing, a petition for rehearing en banc and a petition for certiorari, supra, otherwise  
8 challenging the judgment, Archon's obligation to pay the unpaid balance of the redemption  
9 price and to continue to pay dividends until all accrued dividends had been paid became fixed  
10 and indisputable.

11 90. Defendants Paul W. Lowden and Suzanne Lowden breached the fiduciary duties  
12 of loyalty and good faith to Plaintiff Raider and the members of the putative class in numerous  
13 respects including, without limitation, by:

14 a. Failing, neglecting and refusing to cause Archon to pay Plaintiff Raider  
15 and the members of the putative class the unpaid balance of the redemption price after it had  
16 been determined judicially, authoritatively and with finality in D.E. Shaw and Leeward that the  
17 redemption price should have been \$8.69;

18 b. Discriminating against Plaintiff Raider and the members of the putative  
19 class by causing Archon to pay the unpaid balance of the redemption price to some of the  
20 largest holders of Archon preferred stock, the plaintiffs in D.E. Shaw and Leeward (holders of  
21 approximately 2,259,311 shares of the Archon preferred stock, approximately 51% of the total  
22 number of shares), but failing, neglecting and refusing to cause Archon to pay the unpaid  
23 balance of the redemption price to Plaintiff Raider and the members of the putative class;

24 c. Failing, neglecting and refusing to cause Archon to pay Plaintiff Raider  
25 and the members of the putative class the dividends which have continued to accrue since  
26 August 31, 2007 when it had been determined judicially, authoritatively and with finality in  
27 D.E. Shaw and Leeward that the \$5.241 redemption price that had been paid by Archon to

1 Plaintiff Raider and the members of the putative class did not include all accrued and unpaid  
2 dividends to August 31, 2007 and the Certificate of Designation provided that dividends would  
3 cease to accrue "provided that the redemption price (including any accrued and unpaid  
4 dividends to the date fixed for redemption) has been duly paid or provided for";

5 d. Acting with a conflict of interest and putting their personal financial  
6 interests as majority and controlling holders of common stock ahead of the interests of Plaintiff  
7 Raider and the members of the putative class by refusing to cause Archon to pay Plaintiff  
8 Raider and the members of the putative class the unpaid balance of the redemption price and  
9 the dividends which have continued to accrue since August 31, 2007 because it would have  
10 been against their self-interests and detrimental to their personal financial interests to do so;

11 e. Otherwise failing to act with loyalty and in good faith.

12 91. Defendants Paul W. Lowden and Suzanne Lowden breached the fiduciary duty  
13 of care owed to Plaintiff Raider and the members of the putative class in numerous respects  
14 including without limitation, by:

15 a. Disregarding the judicial, authoritative and final decisions in D.E. Shaw  
16 and Leeward that the redemption price had not been properly calculated and paid;

17 b. Disregarding the judicial, authoritative and final decisions in D.E. Shaw  
18 and Leeward that the \$5.241 per share paid by Archon did not include all accrued and unpaid  
19 dividends to August 31, 2007 and disregarding the provision in the Certificate of Designation  
20 that dividends would cease to accrue "provided that the redemption price (including any  
21 accrued and unpaid dividends to the date fixed for redemption) has been duly paid or provided  
22 for";

23 c. Otherwise failing to act on an informed basis.

24 92. All other Archon officers and directors breached the fiduciary duties of loyalty  
25 and good faith to Plaintiff Raider and the members of the putative class in numerous respects  
26 including, without limitation, by:

27 a. Failing, neglecting and refusing to cause Archon to pay Plaintiff Raider

1 and the members of the putative class the unpaid balance of the redemption price after it had  
2 been determined judicially, authoritatively and with finality in D.E. Shaw and Leeward that the  
3 redemption price should have been \$8.69;

4 b. Discriminating against Plaintiff Raider and the members of the putative  
5 class by causing Archon to pay the unpaid balance of the redemption to some of the largest  
6 holders of Archon preferred stock, the plaintiffs in D.E. Shaw and Leeward (holders of  
7 approximately 2,259,311 shares of the Archon preferred stock, approximately 51% of the total  
8 number of shares), but failing, neglecting and refusing to cause Archon to pay the unpaid  
9 balance of the redemption price to Plaintiff Raider and the members of the putative class;

10 c. Failing, neglecting and refusing to cause Archon to pay Plaintiff Raider  
11 and the members of the putative class the dividends which have continued to accrue since  
12 August 31, 2007 when it had been determined judicially, authoritatively and with finality in  
13 D.E. Shaw and Leeward that the \$5.241 redemption price that had been paid by Archon to  
14 Plaintiff Raider and the members of the putative class did not include all accrued and unpaid  
15 dividends to August 31, 2007 and the Certificate of Designation provided that dividends would  
16 cease to accrue "provided that the redemption price (including any accrued and unpaid  
17 dividends to the date fixed for redemption) has been duly paid or provided for";

18 d. Allowing Defendants Paul W. Lowden and Suzanne Lowden to put their  
19 personal financial interests as majority and controlling holders of common stock ahead of the  
20 interests of Plaintiff Raider and the members of the putative class by refusing to cause Archon  
21 to pay Plaintiff Raider and the members of the putative class the unpaid balance of the  
22 redemption price and the dividends which have continued to accrue since August 31, 2007  
23 because it would have been detrimental to the self-interests and the personal financial  
24 interests of Defendants Paul W. Lowden and Suzanne Lowden to do so;

25 e. Otherwise failing to act with loyalty and in good faith.

26 93. All other Archon officers and directors breached the fiduciary duty of care to  
27 Plaintiff Raider and the members of the putative class in numerous respects including without

1 limitation, by:

2 a. Disregarding the judicial, authoritative and final decisions in D.E. Shaw  
3 and Leeward that the redemption price had not been properly calculated;

4 b. Disregarding the judicial, authoritative and final decisions in D.E. Shaw  
5 and Leeward that the \$5.241 per share paid by Archon did not include all accrued and unpaid  
6 dividends to August 31, 2007 and disregarding the provision in the Certificate of Designation  
7 that dividends would cease to accrue "provided that the redemption price (including any  
8 accrued and unpaid dividends to the date fixed for redemption) has been duly paid or provided  
9 for";

10 c. Otherwise failing to act on an informed basis.

11 94. The breaches of their fiduciary duty by Archon's officers and directors involved  
12 a knowing violation of the law because, inter alia, they knew that it had been determined  
13 judicially, authoritatively and with finality that under the law, the redemption price should have  
14 been \$8.69 per share.

15 95. Defendant Archon breached the fiduciary duties of loyalty and good faith to  
16 Plaintiff Raider and the members of the putative class in numerous respects including, without  
17 limitation, by:

18 a. Failing, neglecting and refusing to pay Plaintiff Raider and the members  
19 of the putative class the unpaid balance of the redemption price after it had been determined  
20 judicially, authoritatively and with finality in D.E. Shaw and Leeward that the redemption price  
21 should have been \$8.69;

22 b. Discriminating against Plaintiff Raider and the members of the putative  
23 class by paying the unpaid balance of the redemption to some of the largest holders of Archon  
24 preferred stock, the plaintiffs in D.E. Shaw and Leeward (holders of approximately 2,259,311  
25 shares of the Archon preferred stock, approximately 51% of the total number of shares), but  
26 failing, neglecting and refusing to pay the unpaid balance of the redemption price to Plaintiff  
27 Raider and the members of the putative class;

1                   c.       Failing, neglecting and refusing to pay Plaintiff Raider and the members  
2 of the putative class the dividends which have continued to accrue since August 31, 2007  
3 when it had been determined judicially, authoritatively and with finality in D.E. Shaw and  
4 Leeward that the \$5.241 redemption price that had been paid by Archon to Plaintiff Raider  
5 and the members of the putative class did not include all accrued and unpaid dividends to  
6 August 31, 2007 and the Certificate of Designation provided that dividends would cease to  
7 accrue "provided that the redemption price (including any accrued and unpaid dividends to the  
8 date fixed for redemption) has been duly paid or provided for";

9                   d.       Putting the personal financial interests of Defendants Paul W. Lowden  
10 and Suzanne Lowden, the majority and controlling holders of its common stock, ahead of the  
11 interests of Plaintiff Raider and the members of the putative class by refusing to pay Plaintiff  
12 Raider and the members of the putative class the unpaid balance of the redemption price and  
13 the dividends which have continued to accrue since August 31, 2007 because it would have  
14 been detrimental to the self-interests and personal financial interests of Defendants Paul W.  
15 Lowden and Suzanne Lowden to do so;

16                   e.       Otherwise failing to act with loyalty and in good faith.

17               96.       Defendant Archon breached the fiduciary duty of care to Plaintiff Raider and the  
18 members of the putative class in numerous respects including without limitation, by:

19                   a.       Disregarding the decisions in D.E. Shaw and Leeward that the redemption  
20 price had not been properly calculated;

21                   b.       Disregarding the decisions in D.E. Shaw and Leeward that the \$5.241  
22 per share paid by Archon did not include all accrued and unpaid dividends to August 31, 2007  
23 and disregarding the provision in the Certificate of Designation that dividends would cease to  
24 accrue "provided that the redemption price (including any accrued and unpaid dividends to the  
25 date fixed for redemption) has been duly paid or provided for";

26                   c.       Otherwise failing to act on an informed basis.

27               97.       Plaintiff Raider and the members of the putative class have been damaged in

1 an amount per share equal to the unpaid balance of the redemption price of \$3.449 plus the  
2 unpaid dividends which have accrued since August 31, 2007.

3 98. As a further proximate result of the wrongful conduct of Defendants and its  
4 wrongful denial of Plaintiff's claims and claims of the members of the putative class, Plaintiff  
5 was compelled to retain legal counsel to obtain the benefits due under the Redemption.  
6 Defendants are liable to Plaintiff Raider and the members of the putative class for attorney's  
7 fees and costs reasonably necessary and incurred by Plaintiff Raider and the members of the  
8 putative class to enforce the terms of the Redemption, in a sum to be determined at the time  
9 of trial.

10 99. Defendants' conduct described herein was intended to cause injury to Plaintiff  
11 Raider and the members of the putative class, was despicable conduct which was engaged  
12 in with conscious disregard of the rights of Plaintiff Raider and the members of the putative  
13 class and was conduct in conscious disregard for the rights of Plaintiff Raider and the members  
14 of the putative class which constituted an act of subjecting them to cruel and unjust hardship  
15 and Defendants were otherwise guilty of oppression, malice and bad faith, entitling Plaintiff  
16 Raider and the members of the putative class to punitive and/or exemplary damages within  
17 Nev. Rev. Stat. §42.005, in an amount appropriate to punish and/or set an example of  
18 Defendants.

19 WHEREFORE, Plaintiff Dan Raider on behalf of himself and others similarly situated,  
20 prays for the following relief:

21 1. That this Court declare that Defendant Archon Corporation is indebted to Plaintiff  
22 Raider and the members of the putative class in the amount per share equal to \$3.449 plus  
23 the unpaid dividends which have accrued since August 31, 2007.

24 2. That the Court certify the class as prayed for, herein, within Nev. R. Civ. P., Rule  
25 23.

26 3. That a constructive trust be imposed on the assets of Defendant Archon  
27 Corporation for the benefit of Plaintiff Raider and the members of the putative class in an

1 amount per share equal to the unpaid balance of the redemption price of \$3.449 plus the  
2 unpaid dividends which have accrued since August 31, 2007.

3 4. That Defendant Archon Corporation be enjoined from paying any dividends to  
4 the holders of its common stock until Plaintiff Raider and the members of the putative class  
5 have been paid in full.

6 5. That Defendant Archon Corporation be enjoined from paying any bonuses or any  
7 extraordinary compensation or distributions to Defendants Paul W. Lowden and Suzanne  
8 Lowden, any other Archon officer or director and any Archon executive until Plaintiff Raider and  
9 the members of the putative class have been paid in full.

10 6. That Defendant Archon Corporation be enjoined from transferring any assets  
11 except in the ordinary course of business until Plaintiff Raider and the members of the putative  
12 class have been paid in full.

13 7. That Defendant Archon Corporation be ordered to pay to Plaintiff Raider and the  
14 members of the putative class an amount per share equal to \$3.449 plus the unpaid  
15 dividends which have accrued since August 31, 2007 together with interest.

16 8. In the alternative, that a judgment be entered in favor of Plaintiff Raider and the  
17 members of the putative class against Defendants Archon Corporation, Paul W. Lowden and  
18 Suzanne Lowden, jointly and severally, in an amount per share equal to \$3.449 plus the  
19 unpaid dividends which have accrued since August 31, 2007 together with all accrued  
20 interest.

21 9. That Plaintiff Raider and the members of the putative class be awarded punitive  
22 and/or exemplary damages pursuant to Nev. Rev. Stat. §42.005 in an amount appropriate to  
23 punish and/or set an example of Defendants (Fifth Claim for Relief).

24 10. That Plaintiff Raider and the members of the putative class be awarded  
25 attorney's fees pursuant to applicable law including Nev. Rev. Stat. §§18.010 and 689A.410.

26 11. That Plaintiff Raider and the members of the putative class be awarded costs  
27 of suit.

12. That such further relief as the Court may deem appropriate be granted.

JURY DEMAND

Plaintiff, DAN RAIDER, and the members of the putative class, by his attorneys, Steven J. Parsons of LAW OFFICES OF STEVEN J. PARSONS, hereby demands a jury trial as provided by Nev. R. Civ. P., Rule 38(a), or as otherwise may be provided for by law.

**Dated: Friday, January 9, 2015.**

STEVEN E. GOREN  
GOREN, GOREN & HARRIS, P.C.; and  
LAW OFFICES OF STEVEN J. PARSONS

/s/ Steven J. Parsons  
STEVEN J. PARSONS  
Nevada Bar No. 363

**Attorney for Plaintiff**  
**DAN RAIDER, an individual on his own behalf and**  
**on behalf of others similarly situated**

Exhibit “1”

Exhibit “1”

EX-99.2 3 dex992.htm CERTIFICATE OF DESIGNATION

EXHIBIT 99.2

**FILED**  
IN THE OFFICE OF THE  
SECRETARY OF STATE OF THE  
STATE OF NEVADA  
**SEP 30 1993**  
CHERYL A. LAU, SECRETARY OF STATE  
*Cheryl A. Lau*  
No. 7679-93

**CERTIFICATE OF DESIGNATION  
OF THE  
EXCHANGEABLE REDEEMABLE PREFERRED  
STOCK  
(Par Value \$.01 Per Share)  
OF  
SAHARA GAMING CORPORATION**

Pursuant to Section 78.195 of the  
Nevada Revised Statutes

The undersigned duly authorized officers of Sahara Gaming Corporation, a corporation organized and existing under the Nevada Revised Statutes, as amended (the "Company"), in accordance with the provisions of Section 78.195 therefore, DO HEREBY CERTIFY;

That pursuant to the authority conferred upon the Board of Directors by the Articles of Incorporation of the Company, the Board of Directors of the Company (the "Board of Directors") on August 20, 1993, adopted the following resolution creating a series of 9,000,000 shares of Preferred Stock, \$.01 per share par value;

RESOLVED, that pursuant to the authority expressly granted to and vested in the Board of Directors by provisions of the Articles of Incorporation of the Company (the "Articles of Incorporation"), and the Nevada Revised Statutes, as amended, the issuance of a series of the Company's preferred stock, par value \$.01 per share (the "Preferred Stock"), which shall consist of 9,000,000 of the 20,000,000 shares of Preferred Stock that the Company now has authority to issue, be and the same hereby is, authorized, and the Board of Directors hereby fixes the voting powers, designations, preferences, limitations, restrictions and relative rights, and the qualifications, limitations and restrictions of such rights, of the shares of such series (in addition to the voting powers, designations, preferences, limitations, restrictions and relative rights and the qualifications, limitations and restrictions of such rights, set forth in the Articles of Incorporation that may be applicable to the Preferred Stock) as follows:

1. *Designation and Rank.* The designation of such series of the Preferred Stock authorized by this resolution shall be the Exchangeable Redeemable Preferred Stock (the "Exchangeable Preferred Stock"). The maximum number of shares of Exchangeable Preferred Stock shall be 9,000,000. Shares of the Exchangeable Preferred Stock shall have a liquidation preference of \$2.14 per share plus accrued and unpaid dividends, thereon, subject to Section 7(a). The Exchangeable Preferred Stock shall rank prior to the common stock, par value \$.01 per share (the "Common Stock") and to all other classes and series of equity securities of the Company now or hereafter authorized, issued or outstanding (the Common Stock and such other classes and series of equity securities collectively may be referred to herein as the "Junior Stock"), other than any class or series of equity securities of the Company ranking on a parity with (the "Parity Stock") or senior to (the "Senior Stock") the Exchangeable Preferred Stock as to dividend rights and/or rights upon liquidation, dissolution or winding up of the Company. The Exchangeable Preferred Stock shall be subordinate to and rank junior to all indebtedness of the Company now or hereafter outstanding. The Exchangeable Preferred Stock shall be subject to creation of Senior Stock, Parity Stock and Junior Stock, to the extent not expressly prohibited by the Company's Articles of Incorporation, with respect to the payment of dividends and/or rights upon liquidation, dissolution or winding up of the company.

2. *Cumulative Dividends Priority.*

(a) *Payment of Dividends.* The holders of record of shares of Exchangeable Preferred Stock shall be entitled to receive, when, as and if declared by the Board of Directors out of funds legally available therefore, cumulative cash dividends at a rate

per annum per share (the "Dividend Rate") initially set at 8% of (i) \$2.14 plus (ii) accrued but unpaid dividends as to which a Dividend Payment Date (as defined below) has occurred. Dividends shall accrue from the date of issuance and be payable semi-annually in arrears on the 31st day of March and the 30th day of September in each year (or if such day is a non-business day, on the next business day), commencing on March 31, 1994 (each of such dates a "Dividend Payment Date"); provided, however, that on any or all of the first six Dividend Payment Dates the Company may, at its option, pay dividends on the Exchangeable Preferred Stock in the form of additional shares of Exchangeable Preferred Stock at the rate per annum of 0.08 shares of additional Exchangeable Preferred Stock for every share of Exchangeable Preferred Stock entitled to receive a dividend. If all Exchangeable Preferred Stock has not been redeemed prior to the tenth Dividend Payment Date, the Dividend Rate will increase on the tenth Dividend Payment Date to the rate per annum per share of 11% and will thereafter increase by an additional 0.50% per annum per share on each Dividend Payment Date until either the Dividend Rate reaches a rate per annum per share of 16% or the Exchangeable Preferred Stock is redeemed or exchanged by the Company as set forth herein. In no circumstances will the Dividend Rate exceed 16% per annum per share. Each declared dividend shall be payable to holders of record as they appear on the stock books of the Company at the close of business on such record dates as are determined by the Board of Directors or a duly authorized committee thereof (each of such dates a "Record Date"), which Record Dates shall be not more than 45 calendar days nor fewer than 10 calendar days preceding the Dividend Payment Dates therefor. Semi-annual dividend periods (each a "Dividend Period") shall commence on and include the 31st day of March and the 30th day of September of each year and shall end on and include the date next preceding the next following Dividend Payment Date. Dividends on the Exchangeable Preferred Stock shall be fully cumulative and shall accrue (whether or not declared), on a daily basis, from the first day of each Dividend Period; provided, however, that the initial semi-annual dividend payable on March 31, 1994 and the amount of any dividend payable for any other Dividend Period shorter than a full Dividend Period shall be computed on the basis of a 360-day year composed of twelve 30-day months and the actual number of days elapsed in the relevant Dividend Period.

*(b) Priority as a Dividends.*

(i) No dividends in any form shall be declared or paid or set apart for payment on any Preferred Stock that constitutes Parity Stock with respect to dividends for any period unless full dividends on the Exchangeable Preferred Stock for the immediately preceding Dividend Period have been or contemporaneously are declared and paid. No cash dividends shall be declared or paid or set apart for payment on any Parity Stock for any period unless full cash dividends on the Exchangeable Preferred Stock for the immediately preceding Dividend Period have been or contemporaneously are declared and paid (or declared and a sum sufficient for the payment thereof set apart for such payment). When dividends are not paid in full (or not declared and a sum sufficient for such full payment not so set apart) upon the Exchangeable Preferred Stock and any Parity Stock all dividends declared upon shares of Exchangeable Preferred Stock and any Parity Stock shall be declared pro rata with respect thereto, so that in all cases the amount of dividends declared per share on the Exchangeable Preferred Stock and such Parity Stock shall bear to each other the same ratio that accrued dividends per share for the then-current Dividend Period on the shares of Exchangeable Preferred Stock (which shall include any accumulation in respect of unpaid dividends for prior Dividend Periods) and dividends, including accumulations, if any, on such Parity Stock, bear to each other.

(ii) Before (1) any dividend or other distribution (other than in Common Stock or other Junior Stock) shall be declared or paid or set aside for payment upon the Common Stock or any other Junior Stock or (2) any Common Stock or any other Junior Stock is redeemed, purchased or otherwise acquired by the Company for any consideration (or any moneys are paid to or made available for a sinking fund for the redemption of any shares of any such stock) except by conversion into or exchange for Common Stock or any other Junior Stock, (A) full cash dividends on the Exchangeable Preferred Stock must be declared and paid or funds paid over to the dividend disbursing agent of the Company for payment

of such dividends for the immediately preceding two Dividend Periods (or such lesser number of Dividend Periods during which the shares of Exchangeable Preferred Stock have been outstanding) and (B) a full cash dividend on the Exchangeable Preferred Stock must be declared at the annual Dividend Rate for the current Dividend Period, and sufficient funds paid over to the dividend disbursing agent of the Company for the payment of a cash dividend at the end of such Dividend Period. The Company shall not permit any subsidiary of the Company to purchase or otherwise acquire for consideration any shares of stock of the Company if under the preceding sentence the Company would be prohibited from purchasing or otherwise acquiring such shares at such time and in such manner.

(iii) No dividend shall be paid or set aside for holders of Exchangeable Preferred Stock for any Dividend Period unless full dividends on any Preferred Stock that constitutes Senior Stock with respect to dividends for that period have been or contemporaneously are declared and paid (or declared and a sum sufficient for the payment thereof set apart for such payment).

### 3. *Optional Redemption.*

#### (a) *General.*

(i) Subject to the applicable restrictions set forth in this Section 3 and applicable law, the shares of Exchangeable Preferred Stock may be redeemed, in whole or in part, at the election of the Company, upon notice as provided in Section 3(b), by resolution of the Board of Directors, at any time or from time to time, at a redemption price equal to the Liquidation Preference. On and after any such redemption date, dividends shall cease to accrue on the shares redeemed, and such shares shall be deemed to cease to be outstanding, provided that the redemption price (including any accrued and unpaid dividends to the date fixed for redemption) has been duly paid or provided for.

(ii) If less than all the outstanding shares of Exchangeable Preferred Stock are to be redeemed, the Company shall select at its absolute discretion the shares to be redeemed pro rata or by lot.

#### (b) *Notice of Redemption.*

(i) Notice of any redemption of shares of Exchangeable Preferred Stock, setting forth (1) the date and place fixed for said redemption, (2) the redemption price, (3) a statement that dividends on the shares to be redeemed will cease to accrue on such redemption date and (4) the method(s) by which the holders may surrender their redeemed shares and obtain payment therefor, shall be mailed, postage prepaid, at least 30 days but not more than 90 days prior to said redemption date to each holder of record of the Exchangeable Preferred Stock to be redeemed at his or her address as the same shall appear on the books of the Company. If less than all the shares of the Exchangeable Preferred Stock owned by such holder are then to be redeemed, the notice shall specify the number of shares thereof are to be redeemed and the numbers of the certificates representing such shares.

(ii) If such notice of redemption shall have been so mailed, and if on or before the redemption date specified in such notice all funds necessary for such redemption shall have been set aside by the Company separate and apart from its funds, in trust for the account of the holders of the shares so to be redeemed, so as to be and continue to be available therefor, then, on and after said redemption date, notwithstanding that any certificate for shares of the Exchangeable Preferred Stock so called for redemption shall not have been surrendered for cancellation, the shares represented thereby so called for redemption shall be deemed to be no longer outstanding, the dividends thereon shall cease to accrue, and all rights with respect to such shares of the Exchangeable Preferred Stock, so called for redemption shall forthwith cease and terminate, except only the right of the holders thereof to receive out of the funds so set aside in trust the amount payable on redemption thereof, but without interest, upon surrender (and endorsement or assignment for transfer, if required by the Company) of their certificates.

(iii) If such notice of redemption shall have been so mailed, and if on or before the date of redemption specified in such notice all said funds necessary for such redemption shall have been irrevocably deposited in trust, for the account of the holders of the shares of the Exchangeable Preferred Stock to be redeemed (and so as to be and continue to be available therefor), with a bank or trust company named in such notice doing business in the City of New York or the State of Nevada and having combined capital and surplus of at least \$50,000,000, thereupon and without awaiting the redemption date, all shares of the Exchangeable Preferred Stock with respect to which such notice shall have been so mailed and such deposit shall have been so made, shall be deemed to be no longer outstanding, and all rights with respect to such shares of the Exchangeable Preferred Stock shall forthwith upon such deposit in trust cease and terminate, except only the right of the holders thereof on, or after the redemption date to receive from such deposit the amount payable on redemption thereof, but without interest, upon surrender (and endorsement or assignment to transfer, if required by the Company) of their certificates. In case the holders of shares of the Exchangeable Preferred Stock that shall have been redeemed shall not within two years (or any longer period if required by law) after the redemption date claim any amount to be deposited in trust for the redemption of such shares, such bank or trust company shall, upon demand and if permitted by applicable law, pay over to the Company any such unclaimed amount so deposited with it, and shall thereupon be relieved of all responsibility in respect thereof, and thereafter the holders of such shares shall, subject to applicable escheat laws, look only to the Company for payment of the redemption price thereof, but without interest.

(c) *Status of Shares Redeemed.* Shares of Exchangeable Preferred Stock redeemed, purchased or otherwise acquired for value by the Company, shall, after such acquisition, have the status of authorized and unissued shares of Preferred Stock and may be reissued by the Company at any time as shares of any series of Preferred Stock other than as shares of Exchangeable Preferred Stock.

#### 4. *Optional Exchange.*

(a) *Exchange; Terms of Subordinated Notes.* Any Exchangeable Preferred Stock that has not been redeemed on or prior to the tenth Dividend Payment Date may be exchanged, in whole or in part, at the election of the Company, upon notice as provided in Section 4(c), by resolution of the Board of Directors, at any time or from time to time on or after the Tenth Dividend Payment Date, for Junior Subordinated Notes (the "Junior Subordinated Notes") issued by the Company. If any Exchangeable Preferred Stock is exchanged in part by the Company, such exchange shall be pro rata or by lot. The principal amount of any Junior Subordinated Notes issued in exchange for Exchangeable Preferred Stock shall be equal to the Liquidation Preference of such Exchangeable Preferred Stock. The Junior Subordinated Notes will mature on the 15th anniversary of the date of the original issuance of the Exchangeable Preferred Stock and will bear interest at an annual rate of 11%, payable semi-annually on the Dividend Payment Dates. The Junior Subordinated Notes may be redeemed, in whole or in part, at the election of the Company, by resolution of the Board of Directors, at any time and from time to time for an amount equal to the principal amount plus accrued but unpaid interest at the date of redemption. No sinking fund payments will be required with respect to the Junior Subordinated Notes.

(b) *Other Terms.* The Junior Subordinated Notes will be governed by an indenture containing in addition to the terms described in Section 4(a), such terms and conditions as the Board of Directors may approve and such terms and conditions as may be required by then applicable law.

#### (c) *Notice of Exchange.*

(i) Notice of any such exchange, setting forth (1) the date and place fixed for said exchange, (2) the principal value of the Junior Subordinated Notes to be exchanged for outstanding Exchangeable Preferred Stock, (3) a statement that dividends on the shares to be exchanged will cease to accrue on such exchange date and (4) the method(s) by which the holders may surrender their shares of Exchangeable Preferred Stock and obtain Junior Subordinated Notes in exchange therefor, shall be mailed, postage prepaid, at least 30 days but not more than 90 days prior to said exchange date so each holder of record of the Exchangeable Preferred Stock to be redeemed at his or her address as the same shall appear on the books of the Company.

(ii) If such notice of exchange shall have been so mailed and on or before the exchange date specified in the notice, the Company has delivered the Junior Subordinated Notes to an exchange agent then, on and after said exchange date, notwithstanding that any certificate for shares of the Exchangeable Preferred Stock so called for exchange shall not have been surrendered for cancellation, the shares represented thereby so called for exchange shall be deemed to be no longer outstanding, the dividends thereon shall cease to accrue, and all rights with respect to such shares of the Exchangeable Preferred Stock so called for exchange shall forthwith cease and terminate, except only the right of the holders thereof to receive Junior Subordinated Notes in exchange therefor upon surrender of their certificates.

(d) *Status of Shares Exchanged.* Shares of Exchangeable Preferred Stock exchanged for Junior Subordinated Notes shall, after such exchange, have the status of authorized and unissued shares of Preferred Stock and may be reissued by the Company at any time as shares of any series of Preferred Stock other than as shares of Exchangeable Preferred Stock.

#### 5. *Voting Rights.*

(a) *General Voting Rights.* Except as expressly provided hereinafter in this Section 5, or at otherwise from time to time required by applicable law, the Exchangeable Preferred Stock shall have no voting rights.

(b) *Voting Rights on Extraordinary Matters.* So long as any shares of Exchangeable Preferred Stock are outstanding and unless the consent or approval of a greater number of shares shall then be required by applicable law, without first obtaining the approval of the holders of at least two-thirds of the number of shares of Exchangeable Preferred Stock at the time outstanding (voting separately as a class) given in person or by proxy at a meeting at which the holders of such shares shall be entitled to vote separately as a class or, by written consent in lieu thereof, the Company shall not, either directly or indirectly or through merger, consolidation, reorganization or other business combination with any other company, (i) authorize, create, issue or increase the authorized or issued amount of any Preferred Stock that constitutes Senior Stock or Parity Stock, or any warrants, options or other rights convertible or exchangeable into Senior Stock or Parity Stock or (ii) amend, alter, repeal, or otherwise change any provision of its Articles of Incorporation or this resolution so as to materially and adversely affect the rights, preferences, power or privileges of the Exchangeable Preferred Stock. The creation or issuance of Preferred Stock that constitutes Exchangeable Preferred Stock or Junior Stock, or a merger, consolidation or reorganization or other business combination in which the Company is not the surviving entity, or any amendment that increases the number of authorized shares of Preferred Stock that constitutes Exchangeable Preferred Stock or Junior Stock or substitutes the surviving entity in a merger, consolidation, reorganization or other business combination for the Company, shall not be considered to be such a material and adverse change requiring a separate vote of the holders of the Exchangeable Preferred Stock.

(c) *Election of special directors.* If dividends in an amount equal to dividend payments for one Dividend Period have accrued and remain unpaid for two years, holders of Sahara Gaming Preferred Stock will have the right to a separate class vote to elect two special directors to the board of Sahara Gaming (in addition to the then authorized number of directors) at the next annual meeting of stockholders. Upon payment of all dividend arrearages, holders of Sahara Gaming Preferred Stock will be divested of such voting rights until any future time when dividends in an amount equal to dividend payments for one Dividend Period have accrued and remained unpaid for two years. The terms of the special directors will thereupon nominate and the authorized number of directors will be reduced by two.

(d) *One Vote Per Share.* In connection with any matter on which holders of the Exchangeable Preferred Stock are entitled to vote as provided in subparagraphs (b) or (c) above, or any matter on which the holders of the Exchangeable Preferred Stock are entitled to vote as one class or otherwise pursuant to law or the provisions of the Articles of Incorporation, each holder of Exchangeable Preferred Stock shall be entitled to one vote for each share of Exchangeable Preferred Stock held by such holder.

6. *No Sinking Fund.* No sinking fund will be established for the retirement or redemption of shares of Exchangeable Preferred Stock.

7. *Liquidation Rights; Priority.*

(a) In the event of the liquidation, dissolution or winding up of the affairs of the Company, whether voluntary or involuntary, after payment or provision for payment of the debts and other liabilities of the Company and after payment or provision for payment of Preferred Stock that constitutes Senior Stock with respect to the liquidation, dissolution or winding up of the affairs of the Company, the holders of shares of the Exchangeable Preferred Stock shall be entitled to receive, out of the assets of the Company, whether such assets are capital or surplus, whether or not any dividends as such are declared and before any distribution shall be made to the holders of the Common Stock or any other class of stock or series thereof ranking junior to the Exchangeable Preferred Stock with respect to the distribution of assets, an amount (the "Liquidation Preference") per share equal to the sum of (i) \$2.14, plus (ii) an amount equal to all accrued and unpaid dividends for the then current Dividend Period, through the date of liquidation, dissolution or winding up, plus all prior Dividend Periods, whether or not declared, plus (iii) if, within five years of the initial issuance of the Exchangeable Preferred Stock, all or substantially all of the assets of the Company are sold or the Company merges with or into any entity as a result of which the stockholders of the Company hold less than 50% of the equity interests of the surviving entity, an amount equal to the lesser of (1) the Designated Amount (as defined below) divided by the total number of shares of Exchangeable Preferred Stock then outstanding and (2) \$0.7143. The "Designated Amount" shall be an amount equal to \$5 million less the result of (x) the aggregate amount distributable to all holders of shares of Exchangeable Preferred Stock pursuant to (i) above minus (y) \$14.98 million. Unless specifically designated as junior or senior to the Exchangeable Preferred Stock with respect to the distribution of assets, all other series or classes of Preferred Stock of the Company shall rank on a parity with the Exchangeable Preferred Stock with respect to the distribution of assets.


(b) Nothing contained in this Section 7 shall be deemed to prevent redemption or exchange of shares of the Exchangeable Preferred Stock by the Company in the manner provided in Section 3 or Section 4, as the case may be. Neither the merger nor consolidation of the Company into or with any other company, nor the merger or consolidation of any other company into or with the Company, nor a sale, transfer or lease of all or any part of the assets of the Company, shall be deemed to be a liquidation, dissolution or winding up of the Company within the meaning of this Section 7.


(c) Written notice of any voluntary or involuntary liquidation, dissolution or winding up of the affairs of the Company, stating a payment date and the place where the distributable amounts shall be payable, shall be given by mail, postage prepaid, no less than 30 days prior to the payment date stated therein, to the holders of record of the Exchangeable Preferred Stock at their respective addresses as the same shall appear on the books of the Company.

(d) If the amounts available for distribution with respect to the Exchangeable Preferred Stock and all other outstanding stock of the Company ranking on a parity with the Exchangeable Preferred Stock upon liquidation are not sufficient to satisfy the full liquidation rights of all the outstanding Exchangeable Preferred Stock and stock ranking on a parity therewith, then the holders of each series of such stock will share ratably in any such distribution of assets in proportion to the full respective preferential amount (which in the case of the Exchangeable Preferred Stock shall mean the amounts specified in Section 7(a) and in the case of any other series of Preferred Stock may include accumulated dividends if contemplated by such series) to which they are entitled.

IN WITNESS WHEREOF, this certificate has been signed by Paul W. Lowden and Stephen J. Szapor, Jr. as of September 30, 1993.

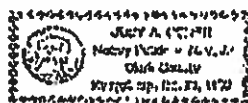
## SAHARA GAMING CORPORATION

By:   
Name: Paul W. Lowden  
Title: President and Chairman of the Board

By:   
Name: Stephen J. Szapor, Jr.  
Title: Assistant Secretary

STATE OF NEVADA )  
                          ) ss.  
COUNTY OF CLARK )

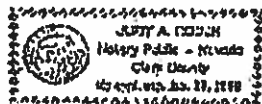
On 9-30-93, personally appeared before me, a notary public, Paul W. Lowden, personally known (or proved) to me to be the person whose name is subscribed to the above instrument who acknowledged that he executed the instrument.



  
Notary Public

STATE OF NEVADA )  
                          ) ss.  
COUNTY OF CLARK )

On 9-30-93, personally appeared before me, a notary public, Stephen J. Szapor, Jr., personally known (or proved) to me to be the person whose name is subscribed to the above instrument who acknowledged that he executed the instrument.



  
Notary Public

  
CLERK OF THE COURT

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14 Attorneys for Defendants  
15 Archon Corporation,  
16 Paul W. Lowden, and  
17 Suzanne Lowden

18 **DISTRICT COURT**  
19 **CLARK COUNTY, NEVADA**

20 STEPHEN HABERKORN, an individual,  
21 Plaintiff,

CASE NO. A-16-732619-B  
DEPT. XV

22 vs.

23 ARCHON CORPORATION, a Nevada  
24 corporation; PAUL W. LOWDEN, an  
25 individual; and SUZANNE LOWDEN, an  
26 individual; UNKNOWN DOE DIRECTORS  
27 OF ARCHON CORPORATION; DOES 1  
28 through 10; and ROE ENTITIES 1 through 10,  
inclusive

Defendants.

**REPLY TO PLAINTIFF STEPHEN HABERKORN'S OPPOSITION TO**  
**DEFENDANTS' MOTION TO DISMISS COMPLAINT**

24 Defendants Archon Corporation ("Archon"), Paul W. Lowden, and Suzanne Lowden  
25 (collectively, "Defendants"), by and through their attorneys of record, Dickinson Wright  
26 PLLC, respectfully submits their Reply to Plaintiff Stephen Haberkorn's ("Plaintiff")  
27 Opposition to Motion to Dismiss Complaint.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Court should dismiss Plaintiff's Complaint in its entirety. Plaintiff's Complaint is  
4 fundamentally based on one single event – Archon's alleged miscalculation of the  
5 redemption price of its Preferred Stock on August 31, 2007. Plaintiff's remaining allegations  
6 merely describe inactionable continuing "ill effects" of this alleged breach of the Certificate.  
7 Plaintiff desperately reaches for irrelevant acts later in time in an attempt to save his clearly  
8 time-barred claims.

9 At the time of redemption, August 31, 2007, Plaintiff knew or should have known of  
10 all the facts giving rise to his Complaint. Nevertheless, Plaintiff did not initiate this suit until  
11 February 29, 2016, more than eight years later. Each and every claim in Plaintiff's Complaint  
12 is barred by the statute of limitations and this case should be dismissed in its entirety.

13 **II. DISCUSSION**

14 **A. Nevada Does Not Recognize and Plaintiff is Not Entitled to Cross-Jurisdictional**  
15 **Class Action Tolling**

16 Plaintiff first argues that the statute of limitations should be tolled based on the  
17 doctrine of class action tolling. However, in reality, Plaintiff is seeking to apply the  
18 controversial doctrine of cross-jurisdictional class action tolling, i.e. tolling during the  
19 pendency of a class action in federal court that is later filed in state court.

20 At the outset, it is important to distinguish cross-jurisdictional class action tolling  
21 from intra-jurisdictional class action tolling. Plaintiff is correct that courts throughout the  
22 county widely accept the doctrine of intra-jurisdictional class action tolling. See (Pl.'s Opp'n  
23 at 13.) However, contrary to the normal intra-jurisdictional class action tolling, cross-  
24 jurisdictional tolling is not widely accepted, has never been adopted by the Nevada Supreme  
25 Court, and raises significant concerns that are not present with intra-jurisdictional tolling.

26 Plaintiff cites to Jane Roe Dancer I-VII v. Golden Coin, Ltd., 124 Nev. 28, 176 P.3d  
27 271 (2008), in support of his argument that tolling should apply in this case. However, Jane  
28 Roe Dancer does not stand for the proposition that Nevada courts toll the statute of

1 limitations for cases filed in other jurisdictions or in federal court. Instead, the Nevada  
2 Supreme Court in *Jane Roe Dancer* considered two entirely different issues. First, the Court  
3 in *Jane Roe Dancer* considered whether class action claims of unpaid minimum wage  
4 balances brought under Nevada law are preempted by federal law. *Id.* at 30, 176 P.3d at 272-  
5 73. On this issue, the Court determined that federal law does not preempt Nevada law. *Id.* at  
6 32-33, 176 P.3d at 274-75.

7 Second, in light of its conclusion, the Court considered whether the dispute should  
8 proceed under NRCP 23 with a proposed substitute class representative. *Id.* at 30, 176, P.3d  
9 at 273. The Nevada Supreme Court first noted that the district court had denied the  
10 appellants' motion to substitute the class representative because, once it converted the case  
11 into a Federal Fair Labor Standards Act proceeding, the effect was that the federal statute of  
12 limitations had run on any further class plaintiffs. *Id.* at 34, 124 Nev. at 275. However,  
13 because the Nevada Supreme Court determined Nevada law governed, it applied the rule that  
14 "class actions brought under NRCP 23 toll the statute of limitations on all potential unnamed  
15 plaintiffs' claims" and tolled the statute of limitations. *Id.*

16 Thus, *Jane Roe Dancer* presented an entirely different question of intra-jurisdictional  
17 tolling and simply does not address the issue presented in this case, i.e., whether the Nevada  
18 Supreme Court would adopt cross-jurisdictional class action tolling. Because this case was  
19 first brought in federal court, not in a Nevada state court, *Jane Roe Dancer* does not support  
20 the cross-jurisdictional class action tolling requested by Plaintiff.

21 Similarly, Plaintiff's citation to federal authorities for the proposition that class action  
22 tolling has been applied in Nevada's federal courts and the Ninth Circuit is equally  
23 misplaced. See (Pl's Opp'n at 8-9) (citing *McDonagh v. Harrah's Las Vegas, Inc.*, 2014 WL  
24 2742874 (D. Nev. 2014); *Catholic Social Services, Inc. v. I.N.S.*, 232 F.3d 1139, 1149 (9th  
25 Cir. 2000)). Like *Jane Roe Dancer*, these cases are factually distinct from this action. These  
26 decisions only apply to cases filed in federal court and then refiled in a different federal  
27 court. They do not involve the situation of an action originally brought in federal court being  
28 subsequently re-filed in state court. In adopting general class action tolling, the United States

1 Supreme Court specifically explained that this rule was limited and derived from “the  
2 relationship between a statute of limitations and the provisions of Federal Rules of Civil  
3 Procedure 23 regulating class actions in federal courts.” *American Pipe & Const. Co. v.*  
4 *Utah*, 414 U.S. 538, 540, 94 S. Ct. 756, 759 (1974). American Pipe “did not purport to  
5 announce a rule that would apply to state law claims.” *Vincent v. Money Store*, 915 F. Supp.  
6 2d 553, 560 (S.D. N.Y. 2013). Plaintiff’s efforts to blur the distinctions in this area should be  
7 rejected as the critical question is whether the second action is filed in state court, not federal  
8 court.

9 In addition to advocating for the application of general class action tolling principles,  
10 Plaintiff, in the alternative, asks this Court to apply cross-jurisdictional tolling. This Court  
11 should not adopt cross jurisdictional tolling for numerous reasons. “[C]ross-jurisdictional  
12 tolling is a controversial doctrine, and has, to date, been accepted by few states.” *In re BP*  
13 *p.l.c. Sec. Litig.*, 51 F. Supp. 3d 693, 700 (S.D. Tex. 2014) (citing *In re Fosamax Prods.*  
14 *Liability Litig.*, 694 F.Supp.2d 253, 258 (S.D.N.Y.2010) (“Only a small fraction of states  
15 have addressed the cross-jurisdictional tolling issue, though, and there is no clear consensus  
16 among them.”)); *Portwood v. Ford Motor Co.*, 183 Ill. 2d 459, 466, 701 N.E.2d 1102, 1104  
17 (1998) (“[I]t is apparent that very few states to date have even considered the issue of cross-  
18 jurisdictional tolling, let alone adopted it.”).

19 This Court should reject Plaintiff’s request to adopt cross-jurisdictional tolling for  
20 several reasons. First, while class action tolling in the same court system serves to reduce the  
21 number of filings brought within that system, cross-jurisdictional tolling could “increase the  
22 burden on the state’s system, because plaintiffs from across the country may elect to file a  
23 subsequent suit in that state solely to take advantage of the generous tolling rule.” *Portwood*,  
24 183 Ill. 2d at 465, 701 N.E.2d at 1104. Thus, “[u]nless all states simultaneously adopt the  
25 rule of cross-jurisdictional class action tolling, any state which independently does so will  
26 invite into its courts a disproportionate share of suits which the federal courts have refused to  
27 certify as class actions after the statute of limitations has run.” *Id.*; *Maestas v. Sofamor Danek*  
28 *Grp., Inc.*, 33 S.W.3d 805, 808 (Tenn. 2000).

1 A second concern is the preservation of the state's judicial resources in a situation in  
2 which the state itself does not necessarily benefit from the tolling. As succinctly stated by the  
3 Tennessee Supreme Court, cross-jurisdictional tolling "could, in a general sense, benefit the  
4 federal court system in its disposition of class actions. Nevertheless, Tennessee simply has no  
5 interest, except perhaps out of comity, in furthering the efficiency and economy of the class  
6 action procedures of another jurisdiction, whether those of the federal courts or those of  
7 another state." *Maestas*, 33 S.W.3d at 808.

8 Third, cross-jurisdictional tolling adversely impacts Nevada's statute of limitations  
9 scheme as enacted by the Nevada Legislature: "the practical effect of [permitting] cross-  
10 jurisdictional tolling would be to make the commencement of the [state's] statute of  
11 limitations contingent on the outcome of class certification as to any litigant who is part of a  
12 putative class action filed in any federal court in the United States." *Id.* at 809; *Adedje v.*  
13 *Westat, Inc.*, 75 A.3d 401, 418 (Md. Ct. App. 2013) (permitting cross-jurisdictional tolling  
14 would put state courts "at the mercy of other jurisdictions, waiting on them to rule on the  
15 cases"); see also *Portwood*, 701 N.E.2d at 1104 ("State courts should not be required to  
16 entertain stale claims simply because the controlling statute of limitations expired while a  
17 federal court considered whether to certify a class action."). The *Maestas* court opined that  
18 such tolling "would essentially grant to federal courts the power to decide when Tennessee's  
19 statute of limitations begins to run, contrary to our legislature's power to adopt statutes of  
20 limitations and the exceptions to those statutes, and would arguably offend the doctrines of  
21 federalism and dual sovereignty. If the sovereign state of Tennessee is to cede such power to  
22 the federal courts, we shall leave it to the legislature to do so." *Maestas*, 33 S.W.3d at 809.

23 Despite the foregoing, Plaintiff argues that "most of the 'cross-jurisdictional tolling'  
24 cases involve filings in different states, not just different court systems in the same state."  
25 (Pl.'s Opp'n a 10.) However, the fact that the Rainero action was filed in Nevada federal  
26 court rather than a federal court in a different state is wholly irrelevant. See *Newport v. Dell,*  
27 *Inc.*, 2008 WL 4347311, at \*5 (D. Ariz. Aug. 21, 2008) ("[N]umerous other jurisdictions  
28 have held that tolling only applies based on a previous action in a Court of the same state and

forum.”); Portwood, 701 N.E.2d at 1104; Wade v. Danek Med., Inc., 182 F.3d 281, 287 (4th Cir. 1999) (rejecting the doctrine of cross-jurisdictional tolling because, among other things, “the 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.”) (emphasis added). Instead, the determinative factor for rejecting cross-jurisdictional class action tolling is that the case is filed in a different court system. *Id.* That is precisely what occurred in this case.

For all of the reasons discussed above, Defendants submit that compelling reasons necessitate rejection of cross-jurisdictional class action tolling.

**B. Plaintiff is Not Entitled to the Application of Broad Equitable Tolling**

Plaintiff next argues that the statute of limitations should be tolled based on the doctrine of equitable tolling. However, equitable tolling is unavailable to Plaintiff due to Plaintiff’s lack of any excusable delay. Plaintiff’s argument for the broad application of equitable tolling principles would eviscerate the statute of limitations altogether. Indeed, Plaintiff’s argument in support of equitable tolling is nothing more than a back door attempt to have this court apply the doctrine of cross-jurisdictional class action tolling. Plaintiff’s argument should be rejected.

“[E]quitable tolling ‘focuses on ‘whether there was excusable delay by the plaintiff.’” *City of N. Las Vegas v. State Local Gov’t Employee-Mgmt. Relations Bd.*, 127 Nev. Adv. Op. 57, 261 P.3d 1071, 1077 (2011) (quoting *Lukovsky v. City and County of San Francisco*, 535 F.3d 1044, 1051 (9th Cir. 2008)). The Nevada Supreme Court considers several factors in determining the applicability of the doctrine of equitable tolling:

Those factors include: the diligence of the claimant; the claimant’s knowledge of the relevant facts; the claimant’s reliance on authoritative statements by the administrative agency that misled the claimant about the nature of the claimant’s rights; any deception or false assurances on the part of the employer against whom the claim is made; the prejudice to the employer that would actually result from delay during the time that the limitations period is tolled; and any other equitable considerations appropriate in the particular case.

*Copeland v. Desert Inn Hotel*, 99 Nev. 823, 826, 673 P.2d 490, 492 (1983).

1 Plaintiff relies on the Nevada Supreme Court's decision in *State Dep't of Taxation v.*  
2 *Masco Builder Cabinet Grp.*, 127 Nev. Adv. Op. 67, 265 P.3d 666 (2011), in support of his  
3 argument that equitable tolling should apply. However, Masco does not support equitable  
4 tolling in this case.

5 In Masco, a taxpayer articulated his request for a refund to the Department of  
6 Taxation's auditor, but failed to follow up with a letter because of the auditor's assurance that  
7 the refund request would be considered within the context of the audit. Masco, 265 P.3d at  
8 672. On appeal, the Court explained that the only shortcoming in the taxpayer's request for a  
9 refund was his failure to send the Tax Department a letter setting forth the refund request. *Id.*  
10 The Court concluded that equitable tolling was appropriate because there was no danger of  
11 prejudice to the Tax Department due to their appraisal of the taxpayer's refund request and  
12 the fact that the Tax Department had already fully investigated the matter. *Id.* The interest of  
13 justice required tolling because the taxpayer was "lulled [] into a false sense of security" by  
14 the auditor's assurances that the refund request would be considered within the context of the  
15 audit. *Id.* Further, the taxpayer attempted to contact the Tax Department on multiple  
16 occasions, and the Tax Department "actively participated in and contributed to" the delay. *Id.*

17 In sharp contrast to Masco, Plaintiff cannot identify any excusable delay in this case  
18 nor proffer any reason for this untimely filing. Plaintiff waited more than eight years after  
19 Archon redeemed its Preferred Stock before filing his Complaint in this case. This lengthy  
20 delay was not induced by any assurances (or any conduct at all) by Defendants that Plaintiff  
21 would continue to be able to assert a claim for relief against Defendants. And, this delay was  
22 in no way caused by Defendants. It was entirely a product of Plaintiff's conduct (or lack  
23 thereof).

24 Moreover, contrary to Plaintiff's argument, Defendants have suffered prejudice as a  
25 result of Plaintiff's inexcusable delay. Specifically, Plaintiff is attempting to invalidate  
26 Archon's redemption of the Preferred stock (in 2007) along with corporate actions taken by  
27 Archon in 2011. (Compl. ¶ 41, on file herein.) In connection with invalidating these  
28

1 corporate actions, Plaintiff is seeking to require Archon to issue corrective reports with the  
2 SEC for all reporting periods from 2011 to the present. Id.

3         Given the length of time since the Preferred Stock was redeemed, it would be  
4 impossible to invalidate the redemption and the subsequent corporate actions taken by  
5 Archon. In the event the Preferred Stock redemption were invalidated, it is entirely unclear  
6 how Archon could notify former preferred shareholders of this action more than eight years  
7 after it occurred. It is unlikely that all of the preferred shareholders could be located given the  
8 significant time that has occurred since redemption. Moreover, it is unclear whether preferred  
9 shareholders would then be required to return the redemption price that was paid to them by  
10 Archon such that Archon could re-issue shareholders their preferred shares and re-register the  
11 preferred shares so that they could resume public trading.

12         Similarly, the subsequent corporate actions Plaintiff is seeking to invalidate occurred  
13 more than five years ago. At this time, it would be difficult if not entirely impossible to undo  
14 or unwind these corporate actions. For example, if Archon's March 23, 2011, reverse stock  
15 split/forward split were invalidated, it is entirely unclear whether shareholders who were paid  
16 for their shares of common stock could be located and whether those shareholders would  
17 then be required to return to Archon the payment they received for their shares. By waiting  
18 more than eight years since the redemption occurred and more than five years after the  
19 corporate actions at issue occurred, tolling the statute of limitations would severely prejudice  
20 Defendants.

21         Finally, Plaintiff argues that the interests of justice somehow require equitable tolling.  
22 In reality, however, Plaintiff is merely seeking to bypass any ruling by this Court that cross-  
23 jurisdictional class action tolling does not apply. The interests of justice simply do not favor  
24 Plaintiff in this case. Plaintiff was not in any way diligent in pursuing his claims. Plaintiff  
25 knew or should have known of the facts giving rise to his Complaint in August of 2007. No  
26 extraordinary circumstances hindered Plaintiff from filing his Complaint. For these reasons,  
27 equitable tolling does not apply to this case.

28 ///

1     **C.     The Statute of Limitations Bars All of Plaintiff's Claims for Relief**

2             Plaintiff argues that even if the statute of limitations were not tolled, the applicable  
3     statute of limitations has not run on several of the claims for relief. However, Plaintiff does  
4     not dispute that the statute of limitations bars his fifth claim for breach of fiduciary duty  
5     based on the alleged wrongful deregistration of Archon's common stock. See generally (Pl's  
6     Opp'n.) As such, the fifth claim for relief should be dismissed. And, as to the other claims,  
7     Plaintiff is relying on irrelevant events in an effort to claim a later triggering date for statute  
8     of limitation purposes. Plaintiff's remaining arguments will be addressed in turn below.

9             **1.     Plaintiff's Claim for Breach of Contract is Time Barred**

10            Plaintiff next argues that the Certificate constitutes a "continuing contract" such that  
11     Plaintiff's claim for breach of contract is not barred by the statute of limitations. Plaintiff is  
12     incorrect. To the extent Archon's redemption of Preferred Stock constitutes a breach of  
13     contract, that breach is total such that the entire contract was repudiated. Archon's  
14     subsequent corporate actions flow from the original redemption in August of 2007 and do not  
15     in any way constitute separate actionable breaches.

16            "The continuing claims doctrine often operates to save parties who have pled a series  
17     of distinct events – each of which gives rise to a separate cause of action – as a single  
18     continuing event. In such cases, the continuing claims doctrine operates to save later arising  
19     claims even if the statute of limitations has lapsed for earlier events." *Ariadne Financial*  
20     *Services Pty. Ltd. v. United States*, 133 F.3d 874 (Fed. Cir. 1998). "However, the continuing  
21     claims doctrine does not apply to a claim based on a single distinct event which has ill effects  
22     that continue to accumulate over time." *Id.* Indeed, "[i]f a single breach occurs, either by  
23     repudiation or material failure of performance, the claim accrues at that time and the statute  
24     of limitations begins to run for all claims on that contract." *Hi-Lite Products Co. v. Am.*  
25     *Home Products Corp.*, 11 F.3d 1402 (7th Cir. 1993).

26            The Federal Circuit's decision in *Ariadne Financial Services* is instructive as to the  
27     application of the doctrine and its limitations. In 1987, the appellant in *Ariadne Financial*  
28     *Services* entered into a contract with the government to purchase a failing savings and loan

1 from government receivership. Id. at 877. In exchange, the appellant was permitted to use  
2 special accounting rules that created a paper asset called “supervisory goodwill” that could  
3 be used to meet the regulatory capital requirements. Id. In 1989, the Legislature enacted the  
4 Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”), which  
5 prohibited the use of supervisory goodwill. Id. at 877. As a result of FIRREA, the appellant  
6 ended the year 1989 with inadequate capital. Id. at 878.

7 The appellant subsequently engaged in a series of recapitalizations which culminated  
8 in the 1995 liquidation of the savings and loan it had acquired in 1987. Id. at 878. The  
9 appellant subsequently filed a breach of contract action in the Court of Federal Claims in  
10 1996. Id. The Court of Federal Claims determined that the appellant should have known it  
11 had lost the asset of supervisory goodwill more than six years before filing its complaint. Id.  
12 at 878.

13 In affirming the decision, the Federal Circuit addressed whether the continuing claims  
14 doctrine served to postpone the accrual of the appellant’s claim. Id. at 879. The Federal  
15 Circuit rejected the application of the doctrine, reasoning as follows:

16 There was a single repudiation by which the government made clear its  
17 intent to reject the terms of the contracts. Each subsequent denial of the  
18 use of supervisory goodwill does not give rise to a separate cause of  
19 action. Rather, the government’s continued refusal to allow the use of  
20 supervisory goodwill flows from its original repudiation. Because  
[appellant’s] claim does not involve a series of distinct events, each giving  
rise to an independent cause of action, the continuing claims doctrine does  
not act to preserve its claim.

21 Id. The Court specifically found that the government’s liability was fixed when it refused to  
22 allow the use of supervisory goodwill by enacting a statutory prohibition. Id. at 879-80.

23 Similar to Ariadne Financial Services, Archon unequivocally notified shareholders on  
24 July 31, 2007, that it would “redeem all of the outstanding shares of the Preferred Stock  
25 issued and outstanding as of the close of business on August 31, 2007.” (Compl. ¶ 17.) The  
26 Notice of Redemption provided that “[a]ll shares of Preferred Stock will also cease to accrue  
27 dividends or any other sums as of the Redemption Date.” (Exhibit 2 to the Compl.) Archon  
28

1 further set aside in trust such funds as were necessary for the redemption of the Preferred  
2 Stock at a redemption price of \$5.241 per share. Id. ¶ 18.

3 By providing shareholders with the Notice of Redemption and subsequently paying  
4 shareholders in accordance with the terms of the Notice of Redemption, Archon made its  
5 intent clear that it was no longer going to be subject to the terms of the Certificate. On  
6 August 31, 2007, Archon's liability became fixed and if Plaintiff believed the incorrect  
7 redemption price had been paid, the alleged breach occurred at that time. The alleged  
8 subsequent breach that occurred when Archon purchased shares of common stock without  
9 first paying cash dividends to preferred shareholders merely constitutes alleged ill effects that  
10 accumulated over time. However, similar to Ariadne Financial Services, these alleged  
11 subsequent breaches do not give rise to an independent cause of action.

12 Similarly, contrary to Plaintiff's assertion, the Certificate is not in any way an  
13 installment contract. Installment contracts involve contract obligations that are payable in  
14 installments. See Clayton v. Gardner, 107 Nev. 468, 470, 813 P.2d 997, 999 (1991).  
15 Dividends payable under the Certificate are not installments because there is no requirement  
16 that they be paid on a certain date. Instead, dividends are only payable to shareholders  
17 "when, as and if declared by the Board of Directors." (Certificate § 2(a), Exhibit 1 to the  
18 Compl.) Thus, "[i]n general, courts have held that the statute of limitations begins to run on a  
19 cause of action to recover dividends on the date the board of directors authorizes the dividend  
20 or, if the board of directors has fixed a record date, from the date when the dividend becomes  
21 payable." 11 Fletcher Cyc. Corp. § 5370. In this case, the Certificate is not an installment  
22 contract and Plaintiff has not alleged that any dividends have been declared since the  
23 redemption date.

24 Because the alleged breach of Section 2(b)(ii) of the Certificate constitute nothing  
25 more than the alleged "ill effects" from the alleged miscalculation of the redemption price,  
26 Plaintiff's entire claim is barred by the statute of limitations.

27 ///

28 ///

1           **2.     Plaintiff's Claims for Breach of Fiduciary Duty and Non-Disclosure are**  
2           **Time Barred**

3           Plaintiff opposes Defendants' Motion by claiming that the discovery rule somehow  
4           saves Plaintiff's untimely claims. Plaintiff further argues that Defendants make inappropriate  
5           factual arguments as to when the statute of limitation on Plaintiff's claims began to run.  
6           Plaintiff's arguments are untenable. The allegations in the Complaint combined with those  
7           facts properly considered by the Court in ruling on a motion to dismiss irrefutably  
8           demonstrate that Plaintiff's claims are barred by the statute of limitations.

9           Plaintiff admits that, pursuant to the discovery rule, the statute of limitations begins to  
10          run once the injured party discovers or reasonably should have discovered facts supporting a  
11          cause of action. (Pl.'s Opp'n at 15-16.) Here, it cannot be disputed that Plaintiff should have  
12          known of the facts giving rise to his Complaint years ago. As such, each claim is barred by  
13          the applicable statute of limitations.

14          First, Plaintiff claims that he did not know that Archon paid the D.E. Shaw and  
15          Leeward plaintiffs until January of 2015, when the Raider complaint was filed. Regardless of  
16          whether or not Plaintiff had actual knowledge, he should have known that the D.E. Shaw and  
17          Leeward Judgments were paid pursuant to Writs of Execution that were publicly available.  
18          Plaintiff claims that the Writs of Execution show that D.E. Shaw and Leeward had not been  
19          paid. However, Plaintiff fails to mention that Archon posted Letters of Credit in both cases in  
20          order to stay the judgments pending appeal. (D.E. Shaw Notice, **Exhibit 1**; Leeward Notice,  
21          **Exhibit 2**.) Thus, once the Writs of Execution were issued, Plaintiff knew or should have  
22          known that the judgments would be satisfied from the filed Letters of Credit. At a minimum,  
23          Plaintiff was placed on inquiry notice at that time.

24          With respect to Plaintiff's fourth and sixth claims for relief, Plaintiff argues that his  
25          claim for non-disclosure did not accrue until after D.E. Shaw and Leeward were affirmed by  
26          the Ninth Circuit. Plaintiff's argument is nonsensical. The date the Ninth Circuit affirmed the  
27          District Court is entirely meaningless from a statute of limitations analysis. Indeed, Plaintiff  
28          cannot cherry-pick factual predicates for his alleged injury to manipulate the statute of

1 limitations.<sup>1</sup> Plaintiff only selected this event and date as being meaningful because it suits  
2 his statute of limitation argument.

3 As demonstrated in the Motion to Dismiss, Archon disclosed to shareholders that the  
4 District Court entered summary judgment against Archon and that the redemption price  
5 should have been \$8.69 per share. (Exhibit 4 to Motion to Dismiss.) Thus, Plaintiff, as with  
6 all shareholders of Archon, was placed on Notice that a Court had found Archon  
7 miscalculated the redemption price. The fact that the Ninth Circuit later agreed with the  
8 District Court does not trigger a new claim for relief based on the same adverse ruling  
9 entered by the District Court. It cannot be disputed that the alleged miscalculation of the  
10 redemption price was communicated to Plaintiff. Similarly, it cannot be disputed that  
11 Plaintiff knew or should have known of the facts regarding the alleged miscalculation<sup>2</sup> of the  
12 redemption price no later than February 18, 2011. Id.

13 **3. Plaintiff's Claim for Unjust Enrichment is Time Barred**

14 Plaintiff next argues that the statute of limitations for his unjust enrichment claim did  
15 not commence to run until December 19, 2012, the date the Ninth Circuit affirmed the  
16 Judgments in D.E. Shaw and Leeward. There is no factual or legal basis for this assertion. To  
17 the contrary, the statute of limitations necessary began to run on the date Archon redeemed  
18 its Preferred Stock, August 31, 2007.

19  
20  
21 <sup>1</sup> See generally *Wallace v. Kato*, 549 U.S. 384, 391 (2007) ("[T]he tort cause of action accrues, and the statute of  
22 limitations commences to run, when the wrongful act or omission results in damages. The cause of action  
23 accrues even though the full extent of the injury is not then known or predictable. Were it otherwise, the statute  
24 would begin to run only after a plaintiff became satisfied that he had been harmed enough, placing the supposed  
25 statute of repose in the sole hands of the party seeking relief."); *Stark v. Dynascan Corp.*, No. 89 C 0616, 1989  
26 WL 64727, at \*3 (N.D. Ill. June 6, 1989), *aff'd*, 902 F.2d 549 (7th Cir. 1990) ("[A]llowing plaintiffs to  
27 manipulate limitations periods by picking and choosing between different methods of prosecuting the same claim  
28 would inject substantial uncertainty into the judicial system and frustrate the goal of encouraging the prompt  
resolution of disputes.").

21 <sup>2</sup> Defendants maintain that Archon did not miscalculate the redemption price. Archon's dividend calculation was  
22 audited and certified as correct for each year that the Preferred Stock was outstanding by two of the nation's  
23 largest and most respected accounting firms. In reaching a contrary result in D.E. Shaw and Leeward, the District  
24 Court calculated damages based on a formula that does not exist and is not contained in the Certificate. Thus, the  
25 District Court in D.E. Shaw and Leeward effectively rewrote the terms of the contract and restructured the  
26 Preferred Stock.

1 Plaintiff knew or should have known of his claim for unjust enrichment no later than  
2 August 31, 2007. On that date, Archon redeemed its Preferred Stock and became obligated to  
3 pay its shareholders the redemption price. To the extent the full redemption price was not  
4 paid on August 31, 2007, Archon would have arguably unjustly retained the full redemption  
5 price as of that date.

6 The date the Ninth Circuit affirmed the District Court's judgment is utterly irrelevant  
7 for determining when the alleged wrongful conduct occurred. Again, the only relevance of  
8 the 2012 date is that it suits Plaintiff's statute of limitations argument. On August 31, 2007,  
9 Plaintiff had all the information he needed to calculate the correct redemption price. Indeed,  
10 as Plaintiff has admitted, other shareholders filed suit shortly after August 31, 2007, and  
11 alleged that Archon miscalculated the redemption price. Plaintiff's claim for unjust  
12 enrichment is clearly barred by the statute of limitations.

13 **4. Plaintiff's Claims for Injunctive Relief and Declaratory Relief**

14 Finally, with respect to Plaintiff's claims for injunctive relief and declaratory relief,  
15 Plaintiff argues that these claims should not be dismissed because none of Plaintiff's claims  
16 are barred by the statute of limitations. Yet, in his response, Plaintiff admits that his claims  
17 for declaratory relief, an accounting, and injunctive relief are "based on the same facts and  
18 circumstances as Plaintiff's other claims." Thus, if the Court agrees with Defendants that  
19 Plaintiff's other claims for relief are time barred, it must also dismiss Plaintiff's claims for  
20 injunctive relief, an accounting, and declaratory relief as Plaintiff concedes that there is no  
21 different statute of limitations analysis on those claims separate and apart from his other  
22 claims.

23 **III. CONCLUSION**

24 For all the reasons stated in Defendants' Motion to Dismiss and above, Defendants  
25 respectfully request that Plaintiff's Complaint be dismissed in its entirety.

26 ///

27 ///

28 ///

**AFFIRMATION**  
**Pursuant to NRS 239B.030**

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 1st day of June, 2016.

DICKINSON WRIGHT PLLC

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DICKINSON WRIGHT PLLC

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Suzanne Lowden

1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of DICKINSON WRIGHT PLLC, and that on this  
3 date, pursuant to NRCP 5(b), I am serving a true and correct copy of the **REPLY TO**  
4 **PLAINTIFF STEPHEN HABERKORN'S OPPOSITION TO DEFENDANTS'**  
5 **MOTION TO DISMISS COMPLAINT** on the parties as set forth below:

6           X           Placing an original or true copy thereof in a sealed envelope  
7 placed for collection and mailing in the United States Mail,  
8 Reno, Nevada, postage prepaid, following ordinary business  
9 practices

10                      Certified Mail, Return Receipt Requested

11                      CM/ECF Electronic Notification

12                      Via Facsimile (Fax)

13                      Placing an original or true copy thereof in a sealed envelope  
14 and causing the same to be personally Hand Delivered

15                      Federal Express (or other overnight delivery)

16 addressed as follows:

17 Stephen R. Hackett, Esq.  
18 Johnathon Fayeghi, Esq.  
19 SKLAR WILLIAMS PLLC  
20 410 South Rampart Blvd.  
Suite 350  
Las Vegas, NV 8914501

21 DATED this 1st day of June, 2016.

22  
23           /s/ Cindy S. Grinstead            
An Employee of DICKINSON WRIGHT PLLC

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**EXHIBIT TABLE**

<b>Exhibit</b>	<b>Description</b>	<b>Pages</b>
1	D.E. Shaw Notice	11
2	Leeward Notice	11

RENO 65655-5 8677v1

# **EXHIBIT 1**

# **EXHIBIT 1**

1 JOHN P. DESMOND  
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8 *Archon Corporation*

9 UNITED STATES DISTRICT COURT

10 DISTRICT OF NEVADA

11 D.E. SHAW LAMINAR PORTFOLIOS,  
12 L.L.C.; LC CAPITAL MASTER FUND,  
LTD.; LC CAPITAL/CAPITAL Z SPV, LP;  
13 MAGTEN ASSET MANAGEMENT  
CORP; MERCURY REAL ESTATE  
14 SECURITIES FUND LP; MERCURY  
REAL ESTATE SECURITIES OFFSHORE  
15 FUND LIMITED; BLACK HORSE  
CAPITAL LP; BLACK HORSE CAPITAL  
16 (QP) LP; BLACK HORSE CAPITAL  
OFFSHORE LTD; PLAINFIELD SPECIAL  
17 SITUATIONS MASTER FUND LIMITED;  
and PAUL K. VOIGT,

Case No. 2:07-CV-01146-PMP-LRL

18 Plaintiffs,

19 vs.

20 ARCHON CORPORATION,

21 Defendant.

22  
23 **NOTICE OF POSTING ORIGINAL IRREVOCABLE**  
**STANDBY LETTER OF CREDIT**

24 PLEASE TAKE NOTICE that on the 24<sup>th</sup> day of March, 2010, Defendant ARCHON  
25 CORPORATION caused to be posted an original Irrevocable Standby Letter of Credit with the  
26 Clerk of the Court in the amount of Nine Million, Five Hundred Seventy-Five Thousand, Five  
27 Hundred Seventy-Nine and 50/100ths Dollars (\$9,575,479.50), pursuant to FRCP 62(d) and the  
28

JONES VARGAS  
100 West Liberty Street, Twelfth Floor  
P.O. Box 281  
Reno, NV 89504-0281  
Tel: (775) 786-5000 Fax: (775) 786-1177

1 Court's March 22, 2011, Order (#178) granting Archon's Motion to Stay Execution of Judgment and  
2 Pending Appeal. A copy of the Irrevocable Standby Letter of Credit is attached hereto as Exhibit A  
3 and a copy of the Certificate of Deposit for Irrevocable Standby Letter of Credit is attached hereto as  
4 Exhibit B.

5 DATED this 24<sup>th</sup> day of March, 2011.

6 JONES VARGAS

7  
8 By: /s/ John P. Desmond  
9 JOHN P. DESMOND  
10 Nevada Bar No. 5618  
11 JUSTIN J. BUSTOS  
12 Nevada Bar. No. 10320  
13 JONES VARGAS  
14 100 West Liberty Street, 12th Floor  
15 P.O. Box 281  
16 Reno, NV 89504-0281  
17 Telephone: (775) 786-5000  
18 Facsimile: (775) 786-1177  
19 E-mail: [jpd@jonesvargas.com](mailto:jpd@jonesvargas.com)

20 *Attorneys for Defendant*  
21 *Archon Corporation*  
22  
23  
24  
25  
26  
27  
28

JONES VARGAS  
100 West Liberty Street, Twelfth Floor  
P.O. Box 281  
Reno, NV 89504-0281  
Tel: (775) 786-5000 Fax: (775) 786-1177

**CERTIFICATE OF SERVICE**

I certify that I am an employee of Jones Vargas, and that on this date, pursuant to FRCP 5 (b), I am serving a true copy of the attached NOTICE OF POSTING ORIGINAL IRREVOCABLE STANDBY LETTER OF CREDIT on the party(s) set forth below by:

XXX Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, postage prepaid, following ordinary business practices

           Certified Mail, Return Receipt Requested

           Via Facsimile (Fax)

           Placing an original or true copy thereof in a sealed envelope and causing the same to be personally Hand Delivered

           Federal Express (or other overnight delivery)

addressed as follows:

Jonathan D. Schiller, DC  
Jonathan Sherman, DC  
Jack A. Simms, DC  
BOIES, SCHILLER & FLEXNER LLP  
5301 Wisconsin Avenue, NW  
Washington, DC 20015

Richard J. Pocker,  
BOIS, SCHILLER & FLEXNER, LLP  
300 South Fourth Street, Suite 800  
Las Vegas, NV 89101

DATED this 24<sup>th</sup> day of March, 2011.

/s/ Cindy S. Grinstead  
An Employee of Jones Vargas

JONES VARGAS  
100 West Liberty Street, Twelfth Floor  
P.O. Box 281  
Reno, NV 89504-0281  
Tel: (775) 786-5000 Fax: (775) 786-1177

# **EXHIBIT A**

# **EXHIBIT A**

2011 MAR 24 A 10:12

1 JOHN P. DESMOND  
Nevada Bar No. 5618  
2 JUSTIN J. BUSTOS  
Nevada Bar No. 10320  
3 JONES VARGAS  
100 West Liberty Street, 12th Floor  
4 P.O. Box 281  
Reno, NV 89504-0281  
5 Telephone: (775) 786-5000  
Facsimile: (775) 786-1177  
6 E-mail: jnd@jonesvargas.com

7 *Attorneys for Defendant*  
8 *Archon Corporation*

9  
10 UNITED STATES DISTRICT COURT  
11 DISTRICT OF NEVADA

12 D.E. SHAW LAMINAR PORTFOLIOS,  
L.L.C.; LC CAPITAL MASTER FUND,  
13 LTD.; LC CAPITAL/CAPITAL Z SPV, LP;  
MAGTEN ASSET MANAGEMENT  
14 CORP.; MERCURY REAL ESTATE  
SECURITIES FUND LP; MERCURY  
15 REAL ESTATE SECURITIES OFFSHORE  
FUND LIMITED; BLACK HORSE  
16 CAPITAL LP; BLACK HORSE CAPITAL  
(QP) LP; BLACK HORSE CAPITAL  
17 OFFSHORE LTD; PLAINFIELD SPECIAL  
SITUATIONS MASTER FUND LIMITED;  
18 and PAUL K. VOIGT,

19 Plaintiffs,

20 vs.

21 ARCHON CORPORATION,

22 Defendant.

Case No. 2:07-CV-01146-PMP-LRL

23 **CERTIFICATE OF DEPOSIT - ORIGINAL LETTER OF CREDIT**

24 Archon Corporation, by and through its counsel of record, Jonas Vargas, hereby tenders to  
25 the Clerk of the Court for deposit into the Court's registry the original Irrevocable Standby Letter of  
26 Credit No. 201102 dated February 23, 2011.

27 This Letter of Credit:

28 a. Is tendered on behalf of: Archon Corporation;

JONES VARGAS  
100 West Liberty Street, Twelfth Floor  
P.O. Box 281  
Reno, NV 89504-0281  
Tel: (775) 786-5000 Fax: (775) 786-1177

JONES VARGAS  
100 West Liberty Street, Twelfth Floor  
P.O. Box 281  
Reno, NV 89504-0281  
Tel: (775) 786-5000 Fax: (775) 786-1177

b. Is issued by: Nevada State Bank

c. Is in the nature of the following: Security for the Court's issuance of a stay of execution of Judgment pending appeal.

d. It is tendered pursuant to the following Statute, Rule or Court Order: Fed. R. Civ. P. 62(d) and the Court's March 22, 2011, Order (# 178) granting Archon's Motion to Stay Execution of Judgment Pending Appeal.

DATED this 24<sup>th</sup> day of March, 2011.

JONES VARGAS

By: 

JOHN P. DESMOND  
Nevada Bar No. 5618  
JUSTIN J. BUSTOS  
Nevada Bar. No. 10320  
JONES VARGAS  
100 West Liberty Street, 12th Floor  
P.O. Box 281  
Reno, NV 89504-0281  
Telephone: (775) 786-5000  
Facsimile: (775) 786-1177  
E-mail: [jpd@jonesvargas.com](mailto:jpd@jonesvargas.com)

*Attorneys for Defendant  
Archon Corporation*

**RECEIPT:**

Original Letter of Credit is hereby acknowledged as being received this date.

DATED: Mar. 24, 2011

CLERK, U.S. DISTRICT COURT

By: 

Deputy Clerk

ACR 58500A  
(Rev. 4/98)

ORIGINAL  
RECEIPT FOR PAYMENT  
UNITED STATES DISTRICT COURT  
for the  
DISTRICT OF NEVADA

No 55336

Fund		at <u>Las Vegas, NV</u>
88550X	Deposit Funds	
804708	Registry Funds	
	General and Special Funds	Irrevocable Standby Letter
508800	Immigration Fees	of Credit #201102
088000	Attorney Admission Fees	in the amount of
088000	Filing Fees	\$9,575,579.50
322340	Sale of Publications	re stay of execution
322350	Copy Fees	OBO defendant ARCHON CORP.
322380	Miscellaneous Fees	
143500	Interest	
322180	Recovery of Court Costs	Nevada State Bank
322188	Restitution to U.S. Government	P.O. Box 990
121000	Conscience Fund	Las Vegas, NV 89125-0990
129800	Gifts	
504100	Crime Victims Fund	
813300	Unclaimed Monies	
510000	Civil Filing Fee (1/2)	
810100	Registry Fee	

CASE REFERENCE:

D.E. Shaw Laminar Portfolios, et al., v.  
Case #2:07-cv-01146-PMP-LRL Archon Corp.

RECEIVED FROM

John P. Desmond

Justin J. Bustos

Jones Vargas

100 W. Liberty St., 12th floor

P.O. Box 281

Reno, NV 89504-0281

775-786-5000

NOTE: THIS ORIGINAL RECEIPT  
MUST BE RETURNED TO THE  
CLERK OF COURT WHEN  
THIS BOND/COLLATERAL IS  
REFUSED

DEPUTY CLERK

March 24, 2011

Checks and drafts are accepted subject to collection and (if)  
draft will only be given when the check or draft has been  
accepted by the financial institution on which it was drawn.

# **EXHIBIT B**

# **EXHIBIT B**

**NEVADA STATE BANK**  
THE DOOR TO YOUR FUTURE



P.O. Box 990  
Las Vegas, Nevada 89125-0990  
www.nsbank.com

**IRREVOCABLE STANDBY LETTER OF CREDIT**

Date: February 23, 2011

Letter of Credit No. 201102

Boies, Schiller & Flexner LLP  
5301 Wisconsin Avenue, NW  
Washington D.C., 20015  
Attn: Jonathan D. Schiller  
Jonathan Sherman

Gentlemen:

We, Nevada State Bank, a Nevada corporation ("Issuer"), hereby issue this Irrevocable Standby Letter of Credit ("Letter of Credit") in favor of Boies, Schiller & Flexner LLP, 5301 Wisconsin Avenue, NW, Washington D.C., 20015, for the benefit of the persons identified on Exhibit A, attached hereto and incorporated herein by this reference (collectively, the "Beneficiaries"), for the account of Archon Corporation, a Nevada corporation, ("Account Party") up to the aggregate amount of **NINE MILLION, FIVE HUNDRED SEVENTY-FIVE THOUSAND, FIVE HUNDRED SEVENTY-NINE AND 50/100THS DOLLARS (9,575,579.50)**, available at sight by a draft of Beneficiary on the Issuer.

The draft drawn under this Letter of Credit ("Site Draft") may be presented to Issuer only upon the later to occur of: (i) issuance by the United States District Court of the Order on Mandate ("Rule 41 Mandate Order") following the mandate issued by the United States Court of Appeals for the Ninth Circuit pursuant to Rule 41 of the Federal Rules of Appellate Procedure ("Rule 41 Mandate") in *Archon Corporation v. D.E. Shaw Laminar Portfolios, L.L.C., et al.*, Case No. 09-80165, United States Court of Appeals for the Ninth Circuit ("Appeal") and no petition for writ of certiorari being filed; or (ii) issuance by the United States Supreme Court of a denial of any petition for writ of certiorari; or (iii) a final decision issued by the United States Supreme Court in the Appeal in the event a writ of certiorari is granted.

The Site Draft must be accompanied by: (x) a certified copy of the Rule 41 Mandate Order issued and filed in *D.E. Shaw Laminar Portfolios, L.L.C., et al. v. Archon Corporation*, Case No. 2:07-CV-01146-PMP-LRL, United States District Court for the District of Nevada, if the Rule 41 Mandate is the later to occur and no petition for writ of certiorari being filed; (y) a certified copy of the order denying the petition for writ of certiorari, if the denial is the later to occur; or (z) a final decision by the United States Supreme Court in the Appeal, in the event a writ of certiorari is granted. The Site Draft must be signed by authorized representatives of the Beneficiaries, must certify that the Beneficiaries are entitled to draw on this Letter of Credit under the terms of this Letter of Credit, and must certify the monetary amount to which the Beneficiaries are

entitled under this Letter of Credit. Issuer shall not be obligated to honor the Site Draft with respect to any amounts that exceed amounts decided upon or otherwise upheld in the Appeal. The Site Draft must bear on its face the clause "Drawn under Nevada State Bank Letter of Credit No. 201102, Dated February 23, 2011." The Site Draft must be an original, and must be accompanied by the original of this Letter of Credit.

Multiple and partial drafts or draws shall not be permitted under this Letter of Credit. This Letter of Credit is not assignable or transferable, and may not be pledged or encumbered. This Letter of Credit may not be revoked without the agreement of the Beneficiaries and Account Party. Except as otherwise expressly provided herein, this Letter of Credit is subject to the Uniform Customs and Practices for Documentary Credits (2007 Revision) International Chamber of Commerce, Publication No. 600.

The Issuer hereby agrees with the Beneficiaries that the Site Draft drawn by reason of this Letter of Credit and in accordance with the above conditions, will meet with due honor when presented at the office of the Issuer located at 750 Warm Springs Road, 4th Floor, Dept. 4100, Las Vegas, Nevada 89119.

This Letter of Credit shall expire one (1) year from the date hereof, provided, however, this Letter of Credit shall be automatically extended without amendment for one (1) year from the date hereof or any future extended expiration date unless, at least ninety (90) days in advance of the then present expiration date, the Issuer notifies the Beneficiary and the Account Party in writing that the Issuer elects not to consider this credit extended for such additional period. Subject to the foregoing, this Letter of Credit shall otherwise terminate thirty (30) days after the later to occur of subsection (i), subsection (ii), and subsection (iii) above.

This Letter of Credit contains the entire agreement between Issuer and Beneficiary relating to the obligations of Issuer hereunder.

**NEVADA STATE BANK**

By: 

Name: James T. Rimp

Title: SVP Corporate Lending Manager

In the event you have any questions regarding the Letter of Credit, please contact Shannon Petersen at the following number (702) 855-4720.

**Exhibit A**

**Beneficiaries**

**D.E. SHAW LAMINAR PORTFOLIOS, L.L.C.**

**LC CAPITAL MASTER FUND, LTD.**

**LC CAPITAL/CAPITAL Z SPV, LP**

**MAGTEN ASSET MANAGEMENT CORP.**

**MERCURY REAL ESTATE SECURITIES FUND LP**

**MERCURY REAL ESTATE SECURITIES OFFSHORE FUND LIMITED**

**BLACK HORSE CAPITAL LP**

**BLACK HORSE CAPITAL (QP) LP**

**BLACK HORSE CAPITAL OFFSHORE LTD**

**PLAINFIELD SPECIAL SITUATIONS MASTER FUND LIMITED**

# **EXHIBIT 2**

# **EXHIBIT 2**

1 JOHN P. DESMOND, ESQ.  
State Bar No. 5618  
2 JUSTIN J. BUSTOS, ESQ.  
State Bar No. 10320  
3 JONES VARGAS  
100 West Liberty Street, 12th Fl.  
4 P.O. Box 281  
Reno, NV 89504-0281  
5 Tel: (775) 786-5000  
Fax: (775) 786-1177  
6

7 *Attorneys for Defendant*  
8 *Archon Corporation*

9 UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

10 LEEWARD CAPITAL, L.P.,

11 Plaintiff,

12 v.

13 ARCHON CORPORATION,

14 Defendant.

Case No. 2:08-CV-00007

15 **NOTICE OF POSTING ORIGINAL IRREVOCABLE**  
16 **STANDBY LETTER OF CREDIT**

17 PLEASE TAKE NOTICE that on the 11<sup>th</sup> day of April, 2011, Defendant ARCHON  
18 CORPORATION caused to be posted an original Irrevocable Standby Letter of Credit with the  
19 Clerk of the Court in the amount of TWO HUNDRED EIGHTY-SIX THOUSAND SIX  
20 HUNDRED SEVENTY-FOUR AND 43/100ths Dollars (\$286,674.43), pursuant to FRCP 62(d)  
21 and the Court's April 8, 2011, Order (#75) granting Archon's Motion to Stay Execution of  
22 Judgment and Pending Appeal. A copy of the Irrevocable Standby Letter of Credit is attached  
23  
24  
25  
26  
27  
28

JONES VARGAS  
100 West Liberty Street - Twelfth Floor  
PO Box 281  
Reno, Nevada 89504-0281  
Tel: (775) 786-5000 Fax: (775) 786-1177

1 hereto as Exhibit A and a copy of the Certificate of Deposit for Irrevocable Standby Letter of  
2 Credit is attached hereto as Exhibit B.

3 DATED this 11<sup>th</sup> day of April, 2011.

4 JONES VARGAS

5  
6 By: 

7 JOHN P. DESMOND  
8 Nevada Bar No. 5618  
9 JUSTIN J. BUSTOS  
10 Nevada Bar. No. 10320  
11 JONES VARGAS  
12 100 West Liberty Street, 12th Floor  
13 P.O. Box 281  
14 Reno, NV 89504-0281  
15 Telephone: (775) 786-5000  
16 Facsimile: (775) 786-1177  
17 E-mail: [jpd@jonesvargas.com](mailto:jpd@jonesvargas.com)

18 *Attorneys for Defendant*  
19 *Archon Corporation*  
20  
21  
22  
23  
24  
25  
26  
27  
28

JONES VARGAS  
100 West Liberty Street - Twelfth Floor  
P.O. Box 281  
Reno, Nevada 89504-0281  
Tel: (775) 786-5000 Fax: (775) 786-1177

**CERTIFICATE OF SERVICE**

I certify that I am an employee of Jones Vargas, and that on this date, pursuant to FRCP 5 (b), I am serving a true copy of the attached NOTICE OF POSTING ORIGINAL IRREVOCABLE STANDBY LETTER OF CREDIT on the party(s) set forth below by:


- XXX Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, postage prepaid, following ordinary business practices
- Certified Mail, Return Receipt Requested
- Via Facsimile (Fax)
- Placing an original or true copy thereof in a sealed envelope and causing the same to be personally Hand Delivered
- Federal Express (or other overnight delivery)

addressed as follows:

Mark M. Jones  
Kemp, Jones & Coulthard  
3800 Howard Hughes Parkway  
17<sup>th</sup> Floor  
Las Vegas, NV 89169

Robert W. Brownlee, Esq.  
DLA Piper, US LLP  
401 B Street, Suite 1700  
San Diego, CA 92101

DATED this 11<sup>th</sup> day of April, 2011.

  
An Employee of Jones Vargas

JONES VARGAS  
100 West Liberty Street - Twelfth Floor  
PO Box 281  
Reno, Nevada 89501-0281  
Tel: (775) 786-5000 Fax: (775) 786-1177

# **EXHIBIT A**

# **EXHIBIT A**

NEVADA STATE BANK

THE BANK OF THE FUTURE

P.O. Box 990  
Las Vegas, Nevada 89125-0990  
www.nsbank.com

IRREVOCABLE STANDBY LETTER OF CREDIT

Date: February 23, 2011

Letter of Credit No. 201103

Mark M. Jones, Esq.  
Kemp, Jones & Coulthard  
3800 Howard Hughes Parkway  
17<sup>th</sup> Floor  
Las Vegas, NV 89169

Gentlemen:

We, Nevada State Bank, a Nevada corporation ("Issuer"), hereby issue this Irrevocable Standby Letter of Credit ("Letter of Credit") in favor of Kemp, Jones & Coulthard, 3800 Howard Hughes Parkway, 17<sup>th</sup> Floor, Las Vegas, NV 89169, for the benefit of the persons identified on Exhibit A, attached hereto and incorporated herein by this reference (the "Beneficiary"), for the account of Archon Corporation, a Nevada corporation, ("Account Party") up to the aggregate amount of **TWO HUNDRED EIGHTY SIX THOUSAND SIX HUNDRED SEVENTY FOUR AND 43/100THS DOLLARS (\$286,674.43)**, available at sight by a draft of Beneficiary on the Issuer.

The draft drawn under this Letter of Credit ("Site Draft") may be presented to Issuer only upon the later to occur of: (i) issuance by the United States District Court of the Order on Mandate ("Rule 41 Mandate Order") following the mandate issued by the United States Court of Appeals for the Ninth Circuit pursuant to Rule 41 of the Federal Rules of Appellate Procedure ("Rule 41 Mandate") in *Archon Corporation v. Leeward Capital, L.P.*, Case No. \_\_\_\_\_, United States Court of Appeals for the Ninth Circuit ("Appeal") and no petition for writ of certiorari being filed; or (ii) issuance by the United States Supreme Court of a denial of any petition for writ of certiorari; or (iii) a final decision issued by the United States Supreme Court in the Appeal in the event a writ of certiorari is granted.

The Site Draft must be accompanied by: (x) a certified copy of the Rule 41 Mandate Order issued and filed in *Leeward Capital L.P. v. Archon Corporation*, Case No. 2:08-CV-00007-PMP-LRL, United States District Court for the District of Nevada, if the Rule 41 Mandate is the later to occur and no petition for writ of certiorari being filed; (y) a certified copy of the order denying the petition for writ of certiorari, if the denial is the later to occur; or (z) a final decision by the United States Supreme Court in the Appeal, in the event a writ of certiorari is granted. The Site Draft must be signed by authorized

representatives of the Beneficiary, must certify that the Beneficiary is entitled to draw on this Letter of Credit under the terms of this Letter of Credit, and must certify the monetary amount to which the Beneficiary is entitled under this Letter of Credit. Issuer shall not be obligated to honor the Site Draft with respect to any amounts that exceed amounts decided upon or otherwise upheld in the Appeal. The Site Draft must bear on its face the clause "Drawn under Nevada State Bank Letter of Credit No. 201103, Dated February 23, 2011." The Site Draft must be an original, and must be accompanied by the original of this Letter of Credit.


Multiple and partial drafts or draws shall not be permitted under this Letter of Credit. This Letter of Credit is not assignable or transferable, and may not be pledged or encumbered. This Letter of Credit may not be revoked without the agreement of the Beneficiary and Account Party. Except as otherwise expressly provided herein, this Letter of Credit is subject to the Uniform Customs and Practices for Documentary Credits (2007 Revision) International Chamber of Commerce, Publication No. 600.

The Issuer hereby agrees with the Beneficiary that the Site Draft drawn by reason of this Letter of Credit and in accordance with the above conditions, will meet with due honor when presented at the office of the Issuer located at 750 Warm Springs Road, 4th Floor, Dept. 4100, Las Vegas, Nevada 89119.

This Letter of Credit shall expire one (1) year from the date hereof; provided, however, this Letter of Credit shall be automatically extended without amendment for one (1) year from the date hereof or any future extended expiration date unless, at least ninety (90) days in advance of the then present expiration date, the Issuer notifies the Beneficiary and the Account Party in writing that the Issuer elects not to consider this credit extended for such additional period. Subject to the foregoing, this Letter of Credit shall otherwise terminate thirty (30) days after the later to occur of subsection (i), subsection (ii), and subsection (iii) above.

This Letter of Credit contains the entire agreement between Issuer and Beneficiary relating to the obligations of Issuer hereunder.

**NEVADA STATE BANK**

By:   
Name: James T. Rimp  
Title: SVP/Corporate Lending Manager

In the event you have any questions regarding the Letter of Credit, please contact Shannon Petersen at the following number (702) 839-4380.

**Exhibit A**

**Beneficiary**

**LEEWARD CAPITAL, L.P.**

# **EXHIBIT B**

# **EXHIBIT B**

1 JOHN P. DESMOND, ESQ.  
State Bar No. 5618  
2 JUSTIN J. BUSTOS, ESQ.  
State Bar No. 10320  
3 JONES VARGAS  
100 West Liberty Street, 12th Fl.  
4 P.O. Box 281  
Reno, NV 89504-0281  
5 Tel: (775) 786-5000  
Fax: (775) 786-1177  
6

7 *Attorneys for Defendant*  
8 *Archon Corporation*

9 UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

10 LEEWARD CAPITAL, L.P.,

11 Plaintiff,

12 v.

13 ARCHON CORPORATION,

14 Defendant.

Case No. 2:08-CV-00007

15 CERTIFICATE OF DEPOSIT - ORIGINAL LETTER OF CREDIT

16 Archon Corporation, by and through its counsel of record, Jones Vargas, hereby tenders to  
17 the Clerk of the Court for deposit into the Court's registry the original Irrevocable Standby Letter  
18 of Credit No. 201103 dated February 23, 2011.

19 This Letter of Credit:

- 20 a. Is tendered on behalf of: Archon Corporation;  
21 b. Is issued by: Nevada State Bank  
22 c. Is in the nature of the following: Security for the Court's issuance of a stay of  
23 execution of Judgment pending appeal.

24 ///

25 ///

26 ///


27 ///

JONES VARGAS  
100 West Liberty Street - Twelfth Floor  
PO Box 281  
Reno, Nevada 89504-0281  
Tel: (775) 786-5000 Fax: (775) 786-1177

1 d. It is tendered pursuant to the following Statute, Rule or Court Order: Fed. R. Civ.  
2 P. 62(d) and the Court's April 8, 2011, Order (#75) granting Archon's Motion to Stay Execution of  
3 Judgment Pending Appeal.

4 DATED this 11<sup>th</sup> day of April, 2011.

5 JONES VARGAS

6  
7 By:   
8 JOHN P. DESMOND  
9 Nevada Bar No. 5618  
10 JUSTIN J. BUSTOS  
11 Nevada Bar. No. 10320  
12 JONES VARGAS  
13 100 West Liberty Street, 12th Floor  
14 P.O. Box 281  
15 Reno, NV 89504-0281  
16 Telephone: (775) 786-5000  
17 Facsimile: (775) 786-1177  
18 E-mail: [jnd@jonesvargas.com](mailto:jnd@jonesvargas.com)

19 *Attorneys for Defendant*  
20 *Archon Corporation*

21 **RECEIPT:**

22 Original Letter of Credit is hereby acknowledged as being received this date.

23 DATED: 4-11-11

24 CLERK, U.S. DISTRICT COURT

25 By:   
26 Deputy Clerk

JONES VARGAS  
100 West Liberty Street - Twelfth Floor  
P.O. Box 281  
Reno, Nevada 89504-0281  
Tel: (775) 786-5000 Fax: (775) 786-1177

AC22 BWEDA  
(Rev. 4/99)

ORIGINAL  
RECEIPT FOR PAYMENT  
UNITED STATES DISTRICT COURT  
for the  
DISTRICT OF NEVADA

No 55339

Fund  
6855XX Deposit Funds  
604700 Registry Funds  
General and Special Funds  
508800 Immigration Fees  
085000 Attorney Admission Fees  
086900 Filing Fees  
322340 Sale of Publications  
322350 Copy Fees  
322360 Miscellaneous Fees  
143500 Interest  
322380 Recoveries of Court Costs  
322386 Restitution to U.S. Government  
121000 Conscience Fund  
129900 Gifts  
504100 Crime Victims Fund  
613300 Unclaimed Monies  
510000 Civil Filing Fee (1/2)  
510100 Registry Fee

Irrevocable Standby Letter  
of Credit #201103  
in the amount of  
\$286,674.43  
re stay of execution pending  
appeal  
OBO def. ARCHON CORP.

Nevada State Bank  
P.O. Box 990  
Las Vegas, NV 89125-0990

CASE REFERENCE:

Edward Capital v. Archon Corp.

2:08-cv-0007-PMP

RECEIVED FROM

John P. Desmond

Furkin J. Bustos

Jones Vargas

100 W. Liberty St., 12th floor

P.O. Box 10320

Reno, NV 89504-0281

775-786-5000

NOTE: THIS ORIGINAL RECEIPT  
MUST BE RETURNED TO THE  
CLERK OF COURT WHEN  
THIS BOND/COLLATERAL IS  
RELEASED.

DEPUTY CLERK S. V. HAYES April 11, 2011

Checks and drafts are accepted subject to collection and  
credit will only be given when the check or draft has been  
accepted by the financial institution on which it was drawn



CLERK OF THE COURT

Stephen R. Hackett, Esq.  
Nevada Bar No. 5010  
Email: [shackett@sklar-law.com](mailto:shackett@sklar-law.com)  
Johnathon Fayeghi, Esq.  
Nevada Bar No. 12736  
Email: [jfayeghi@sklar-law.com](mailto:jfayeghi@sklar-law.com)  
SKLAR WILLIAMS PLLC  
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*Attorney for Plaintiff*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

STEPHEN HABERKORN, an individual,  
Plaintiff,

vs.

ARCHON CORPORATION, a Nevada  
corporation; PAUL W. LOWDEN, an  
individual; and SUZANNE LOWDEN, an  
individual; UNKNOWN DOE DIRECTORS  
OF ARCHON CORPORATION; DOES 1  
through 10; and ROE ENTITIES 1 through 10,  
inclusive

Defendants.

CASE NO. A-16-732619-B

DEPT. XV

**ORDER DENYING MOTION TO  
DISMISS WITHOUT PREJUDICE**

**Date of Hearing: June 22, 2016**

**Time of Hearing: 9:00 a.m.**

This matter came before the Court on June 22, 2016 at 9:00 a.m., upon Defendants ARCHON CORPORATION, PAUL W. LOWDEN, and SUZANNE LOWDEN'S (collectively, "Defendants") Motion to Dismiss Complaint. Plaintiff STEPHEN HABERKORN ("Plaintiff") appeared, by and through his counsel of record, Stephen R. Hackett, Esq. of SKLAR WILLIAMS PLLC and Defendants appeared, by and through their counsel of record, Justin J. Bustos, Esq. of DICKINSON WRIGHT, PLLC.

Based upon the all the papers and pleadings on file herein, the briefs of the parties and the arguments of counsel and good cause appearing therefore, the Court has determined that the Motion to Dismiss the Complaint should be DENIED WITHOUT PREJUDICE, and finds

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1 as follows: (1) general class action tolling applies; (2) under these circumstances, cross  
2 jurisdictional tolling also applies; (3) the remaining arguments in favor of, or against,  
3 dismissal, would be more appropriately raised in a Motion for Summary Judgment, in  
4 particular Defendants' argument that Plaintiff knew or should have known of various public  
5 record filings; (4) the Court could not rule on NRS 11.500 at this time, as it was not raised in  
6 the briefs; and (5) in the alternative, the Motion should also be denied because of the ongoing  
7 harm as alleged in Plaintiff's Opposition, generally set forth on pages 13 -19 of the opposition  
8 brief. Accordingly, for all the foregoing reasons,

9 IT IS HEREBY ORDERED that the Defendants' Motion to Dismiss the Complaint is  
10 DENIED WITHOUT PREJUDICE.

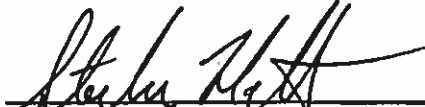
11 IT IS SO ORDERED.

12 DATED this 4th day of August, 2016.

13  
14   
15 DISTRICT COURT JUDGE

16 Submitted by:


17 SKLAR WILLIAMS PLLC

18   
19  
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