IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JOE HARDY, DISTRICT COURT JUDGE

Respondents

and

STEPHEN HABERKORN, an individual,

Real Party in Interest.

Supreme Court Case No. 71802

Eighth Judicial District
Court Case No. A-16-732619-B

REAL PARTY IN INTEREST STEPHEN HABERKORN'S ANSWER TO PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

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NRAP 26.1 (a) DISCLOSURE

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

1. Real Party in Interest Stephen Haberkorn is an individual
2. Real Party in Interest Stephen Haberkorn is represented by Stephen R. Hackett and Johnathon Fayeghi of the law firm of Sklar Williams PLLC, who are the same attorneys that have been representing Mr. Haberkorn in the Eighth Judicial District Court below.

Dated: February 27, 2017.

SKLAR WILLIAMS PLLC

By: _____
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I. INTRODUCTION

This Writ of Prohibition or Mandamus ("Writ Petition") seeks interlocutory review of a District Court order denying a motion to dismiss Real Party in Interest Stephen Haberkorn's ("Haberkorn" or "Plaintiff") Complaint pursuant to NRCP 12(b)(5). On August 4, 2016, the District Court denied the motion of Defendants Archon Corporation ("Archon"), Paul W. Lowden, and Suzanne Lowden (collectively "Petitioners") to dismiss this case on grounds that Plaintiff's claims were barred by the applicable statutes of limitations. After inexplicably waiting almost four months, Petitioners filed the present Writ Petition on December 2, 2016, requesting this Court issue a decision: (1) vacating the District Court's decision finding, in part, that cross-jurisdictional class action tolling applies to this case; and (2) directing the District Court to reconsider Defendants' Motion to Dismiss without applying cross-jurisdictional class action tolling. Writ Petition, at p. 1.

The untimely Writ Petition should not be granted. First, Petitioners have an adequate legal remedy through direct appeal after final judgment and thus mandamus or prohibition is inappropriate here. Second, Petitioners are barred by both laches and judicial estoppel from pursuing the merits of their Writ Petition. Third, the issues raised in the Writ Petition are premature and undeveloped on this record because the cross-jurisdictional tolling issue was only one of several bases

for the District Court's decision to deny the motion to dismiss, many of which involve factual issues that require further development below. Fourth, Petitioners have not and cannot demonstrate that the balance of equities weighs heavily in favor of granting writ relief in this case because they can identify no harm from the case proceeding other than legal fees and costs, which do not constitute irreparable harm. Finally, on the merits, the District Court correctly ruled that cross-jurisdictional class action tolling applied under the circumstances of this case. Accordingly, Petitioners have not met the extremely high burden necessary to justify extraordinary writ review of an interlocutory order denying a motion to dismiss.

II. COUNTER-STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Should a Writ of Prohibition or Mandamus issue to review a District Court Order denying a motion to dismiss without prejudice when the Order is reviewable upon appeal after final judgment and where the Order is in part based upon factual matters that require further discovery?

2. Should a Writ of Prohibition or Mandamus issue to review a District Court Order in part applying cross-jurisdictional class action tolling where the determination of that legal issue will not resolve all of the claims in the case and will require remand to the District Court for further proceedings?

III. COUNTER-STATEMENT OF FACTS

The Factual and Procedural Background section contained in the Writ Petition is very misleading with regard to the bases for both the underlying motion to dismiss and the lower Court's denial of the motion to dismiss. The entire basis for the motion to dismiss was Petitioners' contention that "because this action (and the factual basis for each of the claims for relief) is fundamentally based on Archon's alleged error in 2007, Plaintiff's claims for relief necessarily accrued in 2007 and are barred by the applicable statutes of limitation." *See* Real Party in Interest Stephen Haberkorn's Appendix of Exhibits in Support of Answer to Petition for Writ of Mandamus or Prohibition ("Haberkorn Appendix"), at pp. HA004. Curiously, Petitioners failed to include their motion to dismiss in the Appendix of Exhibits submitted with their Writ Petition. Had Petitioners included this critical motion – the denial of which the entire Petition is based upon – it would have been readily apparent that Petitioners are now taking a directly contrary position that the "primary claims [raised by Haberkorn's Complaint] are different from those asserted in *Rainero,* and consequently *Rainero* did not provide Petitioners with notice of Mr. Haberkorn's claim." *See* Petition, at p. 17. Indeed, Petitioners spend many pages distinguishing Haberkorn's claims from the prior class action case *Rainero* in order to support their argument that class action tolling and cross jurisdictional tolling cannot apply based upon this previously filed class

action case brought against Archon for the same conduct. *See* Writ Petition, at pp. 16-28. Petitioners should be estopped from taking such inconsistent positions.

Furthermore, the Writ Petition implies that the Court's decision to deny Petitioners' motion to dismiss was primarily based on the following two conclusions: (1) general class action tolling applies; and (2) under the circumstances, cross-jurisdictional tolling also applies. *See* Writ Petition, at p. 8. However, this is a misleading characterization of the District Court's findings. In reality, the Court's denial of Petitioners' motion to dismiss was based on the following:

> (1) general class action tolling applies; (2) under these circumstances, cross jurisdictional tolling also applies; (3) the remaining arguments in favor of, or against, dismissal, would be more appropriately raised in a Motion for Summary Judgment, in particular Defendants' argument that Plaintiff knew or should have known of various public record filings; (4) the Court could not rule on NRS 11.500 at this time, as it was not raised in the briefs; and (5) in the alternative, the Motion should also be denied because of the ongoing harm as alleged in Plaintiff's Opposition, generally set forth on pages 13-19 of the opposition brief...

See Order Denying Motion to Dismiss Without Prejudice, dated August 4, 2016, at PA 161, lines 1-8.

Based on the express language of the District Court's August 4, 2016 Order Denying Motion to Dismiss Without Prejudice, the Court's decision to deny

Plaintiff's motion to dismiss was based upon multiple factors in addition to cross-jurisdictional tolling; including a factual dispute as to when Plaintiff knew or should have known of various public record filings and a factual finding that ongoing harm (as alleged in detail in Plaintiff's Opposition) rendered dismissal as a matter of law based upon the running of the statute of limitations inappropriate. *See* PA 160-161; PA 062-068. These factual issues provide more than enough support for the District Court's denial of the motion to dismiss, separate and apart from the cross-jurisdictional tolling issue. As this Court has often stated: "[w]hen the plaintiff knew or in the exercise of proper diligence should have known of the facts constituting the elements of his cause of action is a question of fact for the trier of fact." *See, e.g., Havas v. Engebregson*, 97 Nev. 408, 411-12, 633 P.2d 682, 684 (1981); *Millspaugh v. Millspaugh*, 96 Nev. 446, 449, 611 P.2d 201, 202 (1980); *Golden Nugget, Inc. v. Ham*, 95 Nev. 45, 48-49, 589 P.2d 173, 175-76 (1979); *Oak Grove Investors v. Bell & Gossett Co.*, 99 Nev. 616, 623, 668 P.2d 1075, 1079 (1983), *disapproved of on other grounds by Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000). These factual issues make writ review of the order below improper because the Writ Petition only challenges one basis for the District Court's denial of the motion to dismiss.

IV. THE ALLEGATIONS OF HABERKORN'S COMPLAINT

All of the allegations of Plaintiff's Complaint must be accepted as true for purposes of this Court's review of a denial of a motion to dismiss. *See Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670 (2008). The following facts are alleged in Plaintiff's Complaint.

A. The Attempted Redemption of Archon Preferred Stock

In September 1993, Defendant Archon issued preferred stock. A Certificate of Designation was filed for the preferred stock on or about September 30, 1993. Comp., ¶¶ 12-14 (PA 021-022). The Certificate of Designation provided that the preferred stock could be redeemed at the election of Archon. Defendant Archon purported to redeem its outstanding preferred stock as of the close of business on August 31, 2007. Comp., ¶ 17 (PA 022). Pursuant to the Certificate of Designation, the redemption price was required to be $2.14 per share plus the amount of all accrued and unpaid dividends to August 31, 2007. Defendant Archon did not properly calculate the redemption price and paid its preferred shareholders only $5.241 per share. Comp., ¶ 18 (PA 022). However, the redemption price should have been $8.69 per share. Comp., ¶ 27 (PA024).

B. Prior Federal Court Litigation Against Defendant Archon

Three actions were filed against Defendant Archon in the United States District Court for the District of Nevada challenging Defendant Archon's

calculation of the redemption price. On August 27, 2007, D.E. Shaw Laminar Portfolios, LLC., et al, filed the first action against Defendant Archon alleging a miscalculation of the redemption price. Case No. 2:07-CV-01146-PMP-LRL ("*D.E. Shaw*"). Comp., ¶ 25 (PA 024). The second action was filed as a class action by David Rainero on November 20, 2007 and was brought on behalf of all of the preferred shareholders except the plaintiffs in *D.E. Shaw* and the officers and directors of Archon. Case No. 2:07-CV-01553-GMN-PAL ("*Rainero*"). A copy of the *Rainero* complaint was attached to Haberkorn's Complaint below as Exhibit 1.[1] The third action was filed by Leeward Capital, L.P. on January 2, 2008. Case No. 2:08-CV-00007-PMP-LRL ("*Leeward*"). Comp., ¶ 26 (PA024). Each of these prior cases are explained in detail below.

1. D.E. Shaw and Leeward

In both the *D.E. Shaw* and *Leeward* cases, summary judgment was granted in favor of the plaintiffs. The Court determined in published opinions that the redemption price should have been $8.69 per share, calculated as the sum of $2.14 and the unpaid dividends in the amount of $6.55 that had accrued to August 31,

[1] Plaintiff requested the Court take judicial notice of the publicly filed class action complaint attached to the Complaint as Exhibit 1. NRS 47.130 permits the Court to take judicial notice of facts that are "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned... so that the fact is not subject to reasonable dispute." NRS 47.130. Complaints filed in related 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 Panel*, 124 Nev. 313, 183 P.3d 133 (2008).

2007. *See D.E. Shaw Laminar Portfolios, LLC v. Archon Corp.*, 570 F. Supp. 2d 1262 (D. Nev. 2008); *D.E. Shaw Laminar Portfolios, LLC v. Archon Corp.*, 755 F. Supp. 2d 1122 (D. Nev. 2010).

Defendant Archon appealed both the *D.E. Shaw* and *Leeward* judgments to the U.S. Court of Appeals for the Ninth Circuit. On September 19, 2012, the judgments in *D.E. Shaw* and *Leeward* were affirmed by the U.S. Court of Appeals for the Ninth Circuit in case numbers 11-15406 and 11-15482. Comp., ¶ 28 (PA024).

After the judgments in *D.E. Shaw* and *Leeward* were affirmed by the U.S. Court of Appeals for the Ninth Circuit, Archon paid the judgments sometime around January or February of 2013. Comp., ¶ 30 (PA024). However, Archon failed to pay Plaintiff or any of the other preferred shareholders. Comp., ¶ 31 (PA024).

2. The Rainero Class Action

On November 7, 2013, after the judgments in *D.E. Shaw* and *Leeward* were affirmed, partial summary judgment was granted in favor of the plaintiff in *Rainero*. Finding that Archon was collaterally estopped by the judgments in *D.E. Shaw* and *Leeward*, the Court held "that the issue of how to construe the Certificate [of Designation] so as to determine the correct method of calculating the redemption price is settled" and held that the redemption price should have been

$8.69. *See* Daniel Raider's Complaint, ¶ 47, attached to Haberkorn's Opposition to Motion to Dismiss as Exhibit 2 (PA096).

Subsequently, on September 29, 2014 the Court held that it did not have subject matter jurisdiction and *Rainero* was dismissed without prejudice. At the time *Rainero* was dismissed, the plaintiff's amended motion for class certification was pending. *See* Haberkorn's Opposition, Exhibit 2, ¶ 48-49 (PA096). *Rainero* was on appeal to the United States Court of Appeals for the Ninth Circuit at the time the motion to dismiss was decided below. The dismissal of *Rainero* for lack of subject matter jurisdiction has now been affirmed by the Ninth Circuit. *See Rainero v. Archon Corporation*, 844 F.3d 832 (9th Cir. 2016).

3. Nevada State Court Litigation Against Defendants Archon, Paul Lowden and Suzanne Lowden

Following the federal district court's dismissal of *Rainero*, a fourth action was filed by Daniel Raider against Defendants Archon, Paul Lowden and Suzanne Lowden in the Eighth Judicial District Court. Raider's complaint was filed on January 9, 2015 and was brought as a purported class action on behalf of all of the preferred shareholders except the plaintiff's in *D.E. Shaw* and *Leeward* and the officers and directors of Archon who were preferred shareholders. Case No. A-15-712113-B ("*Raider*"). *See* copy of Raider attached to Haberkorn's Opposition to Motion to Dismiss as Exhibit 2 (PA088). The *Raider* complaint alleged the following six counts:

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

See Haberkorn's Opposition, Exhibit 2 (PA096-107).

It was not until the filing of the *Raider* complaint that Haberkorn had notice that the judgments in *D.E. Shaw* and *Leeward* cases had been paid by Defendant Archon. *See* Haberkorn's Opposition, Exhibit 2, ¶ 48 (PA096).

C. Archon Has Not Paid Plaintiff the Full Redemption Price

Archon has yet to pay Plaintiff Haberkorn the full redemption price of $8.69 per share. (PA024). Section 3(a)(i) of the Certificate of Designation specifically provides:

> "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."

(PA042). 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 (PA025).

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 (PA019).

On or about April 6, 2016, Petitioners filed their Motion to Dismiss Complaint. In their Motion, Petitioners claimed that each of Plaintiff's claims were barred by the applicable statute of limitations. The Court denied Petitioners' motion to dismiss without prejudice (PAO160-161). Petitioners sought writ review approximately four months later.

V. STANDARDS OF REVIEW

In reviewing 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 may grant a motion to dismiss only if it appears "beyond a doubt" that Plaintiff would be unable to prove any set of facts, which, if true, would entitle it to relief. *Buzz Stew, LLC*, 124 Nev. at 228. Petitioners have failed to carry this heavy burden and, as a result, their Writ Petition should be denied.

VI. LEGAL ARGUMENT

A. Writ Relief is Not Appropriate in This Case

Writs of prohibition and mandamus are extraordinary remedies and the burden is on Petitioners to demonstrate that such extraordinary relief is warranted. *Pan v. Eighth Judicial District Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). Here, writ review is improper. The order denying the motion to dismiss is interlocutory and can be appealed after final judgment. Defendants will not waive their argument that Plaintiff's claims are barred by the statute of limitations. Indeed, in its August 4, 2016 Order Denying Motion to Dismiss Without Prejudice, the District Court specifically found that "the remaining arguments in favor of, or against, dismissal, would be more appropriately raised in a Motion for Summary Judgment." (PA0161). If the Petition is denied, Defendants will still have the opportunity to seek summary judgment pursuant to NRCP 56, raise the same arguments and possibly prevail.

Moreover, the Petition conveniently fails to acknowledge the fact that Plaintiff's Complaint contains several causes of action that would remain pending even if Defendants prevail on their Writ Petition and ultimately, prevail on their argument that some claims are barred by the statute of limitations. In fact, this Court's Order Denying Motion to Dismiss Without Prejudice specifically found that in addition to cross jurisdictional tolling, denial of Defendants' Motion to

Dismiss is warranted because: "(3) the remaining arguments in favor of, or against, dismissal, would be more appropriately raised in a Motion for Summary Judgment, in particular Defendants' argument that Plaintiff knew or should have known of various public record filings;...and (5) in the alternative, the Motion should also be denied because of the ongoing harm as alleged in Plaintiff's Opposition, generally set forth on pages 13-19 of the opposition brief." *See* Order Denying Motion to Dismiss Without Prejudice, at p. 2, lines 1-8 (PA160-161). Thus, even if Defendants prevail on their Writ Petition, many of Plaintiff's claims against Defendants will remain to be adjudicated in this case. Specifically, Plaintiff's second claim for relief for breach of contract; third, fourth and fifth claims for relief for breach of fiduciary duty; sixth claim for relief for nondisclosure; and seventh claim for relief for unjust enrichment, all are timely based upon ongoing breaches by Defendants well within the statute of limitations. And whether such claims are barred is itself a factual question. As the Petition itself admits, at best Petitioners will get a remand and order to reconsider the motion to dismiss. *See* Petition, at p. 1 (asking for remand to reconsider motion to dismiss without cross jurisdictional tolling). Simply stated, there is no reason for this Court to grant the Writ Petition to review the interlocutory order in this case.

For these reasons, mandamus does not generally lie to correct a district court's legal error in denying a motion to dismiss for failure to state a claim upon

which relief can be granted. *See State ex rel. Dep't of Transp. v. Thompson*, 99 Nev. 358, 361–62, 662 P.2d 1338, 1340 (1983); *see also Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. (UAW) v. Nat'l Caucus of Labor Comms.*, 525 F.2d 323, 326 (2d Cir.1975) ("It is not the function of mandamus to allow ad hoc appellate review of interlocutory orders when only error is alleged."). Such an error, if one occurs, is correctable by the district court as the case proceeds and by this Court on direct appeal from the eventual final judgment. *See Reno Hilton Resort Corp. v. Verderber*, 121 Nev. 1, 5–6, 106 P.3d 134, 136–37 (2005) (emphasizing that the final judgment rule, which withholds appellate review until final judgment is reached in the district court, plays "a crucial part of an efficient justice system": "[f]or the trial court, it inhibits interference from the appellate court during the course of preliminary and trial proceedings, and for the appellate court, it prevents an increased caseload and permits the court to review the matter with the benefit of a complete record").

Consequently, this Court has held that it will generally not intervene to consider writ petitions challenging district court orders denying motions to dismiss. "[S]uch petitions rarely have merit, often disrupt district court case processing, and consume an 'enormous amount' of this court's resources." *International Game Tech., Inc. v. Second Judicial Dist. Court,* 124 Nev. 193, 197, 179 P.3d 556, 558–59 (*quoting State ex rel. Dep't Transp. v. Thompson*, 99 Nev. 358, 361–62, 662

P.2d 1338, 1340 (1983)). In addition, mandamus "requires not only a clear error but one that unless immediately corrected will wreak irreparable harm." *In re Linee Aeree Italiane (Alitalia)*, 469 F.3d 638, 640 (7th Cir.2006); *see* NRS 34.170 (allowing for mandamus in cases "where there is not a plain, speedy and adequate remedy in the ordinary course of law"). "[B]ecause an appeal from the final judgment typically constitutes an adequate and speedy legal remedy, we generally decline to consider writ petitions that challenge interlocutory district court orders denying motions to dismiss." *International Game Tech.,* 124 Nev. at 197, 179 P.3d at 558.

The present Writ Petition meets none of the criteria for justifying extraordinary intervention in this case through immediate review of the denial of a motion to dismiss. Petitioners simply assert legal error in the denial of their motion to dismiss in the application of class action tolling and cross-jurisdictional tolling. But the error not only is not "clear," as mandamus relief requires; it is nonexistent. As discussed above, there were multiple bases upon which the motion to dismiss was denied, including factual issues, apart from the class action and cross-jurisdictional tolling issues. Nor do Petitioners even attempt to establish that an eventual appeal will not afford them an adequate legal remedy. The only harm alleged from proceeding is the expense associated with the Petitioners having to defend themselves in district court while the Writ Petition is pending. But this

harm inheres in any order denying a motion to dismiss and, by itself, is not enough to justify writ relief. "Postponing appeal to the end of litigation, rather than interrupting it in *medias res* with a mandamus proceeding that would require this court to conduct interlocutory appellate review, is as likely to reduce as to increase the total expense of the litigation." *In re Linee Aeree Italiane*, 469 F.3d at 640.

Plaintiff acknowledges that this Court has held that advisory or supervisory mandamus is permissible when needed to resolve "an important issue of law [that] needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *International Game Tech.*, 124 Nev. at 197–98, 179 P.3d at 559. However, "proper occasions for employing advisory mandamus are hen's-teeth rare: it is reserved for blockbuster issues, not merely interesting ones." *In re Bushkin Assocs., Inc.*, 864 F.2d 241, 247 (1st Cir.1989). "These limitations need to be observed, or the narrow exception to the rules governing extraordinary writ relief set forth in *International Game Technology* will overrun the final judgment rule." *Double Diamond v. Second Jud. Dist. Ct.*, 131 Nev. Adv. Op. 57, 354 P.3d 641, 646-47 (2015) (Pickering, J., concurring).

In this case, Petitioners have not established their Writ Petition is even remotely close to meeting these standards and it certainly doesn't impact public policy to such an extent necessary to justify granting the writ. In fact,

"considerations of sound judicial economy and administration" weigh in favor of denying the stay and allowing this case to proceed.

1. The Petitioners' Writ is Barred by Laches

"As an extraordinary remedy, a writ of mandamus is subject to the doctrine of laches." *Bldg. & Constr. Trades Council of N. Nev. v. State*, 108 Nev. 605, 611, 836 P.2d 633, 637 (1992); *accord Cheney v. United States Dist. Ct. for Dist. Of Columbia*, 542 U.S. 367, 379 (2004) ("Laches might bar a petition for a writ of mandamus if the petitioner 'slept on his rights . . ., and especially if the delay has been prejudicial to the [other party] . . . .") (*quoting Chapman v. County of Douglas*, 107 U.S. 348, 355 (1883)). "Laches is an equitable doctrine which may be invoked when delay by one party works to the disadvantage of the other, causing a change of circumstances which would make the grant of relief to the delaying party inequitable." *Carson City v. Price,* 114 Nev. 409, 412, 934 P.2d 1042, 1043 (1997). "In deciding whether the doctrine of laches should be applied to preclude consideration of a petition for a writ of mandamus, a court must determine: (1) whether there was an inexcusable delay in seeking the petition, (2) whether an implied waiver arose from the petitioner's knowing acquiescence in existing conditions, and (3) whether there were circumstances causing prejudice to the respondent." *Bldg. & Constr. Trades Council of N. Nev.*, 108 Nev. at 611, 836 P.2d at 637.

This is a clear-cut case of laches. The district court entered its order denying the motion to dismiss on August 4, 2016, almost four months before Petitioners filed their Writ. In the meantime, the case has been proceeding in the district court and the court just denied Petitioners' motion to stay pending this Writ Petition. Accordingly, this Court should apply controlling precedent and dismiss the Petition due to Petitioners' inexplicable delay. *See Bldg. & Constr. Trades Council of N. Nev.*, 108 Nev. at 611, 836 P.2d at 637 (one month delay in seeking writ review is too long when the parties were proceeding).

Moreover, the balance of hardships here favors allowing this case to proceed because Petitioners cannot identify any irreparable harm from the case proceeding. In contrast, Plaintiff will be harmed because the Writ Petition will not resolve all the issues in the case; thus, any delay will be without any basis. In fact, Defendants here already were denied a similar Writ Petition by the Nevada Supreme Court in a related case raising similar issues. As in that case, here the district court has not definitively ruled upon the issues of limitations, repose and tolling. *See, e.g.,* Order Denying Writ of Prohibition, Mandamus, or Certiorari in *Archon Corporation v. Eighth Judicial District Court (Raider)*, Case No. 68995, 2016 WL 1106992 (Nev. S. Ct. March 18, 2016) ("we conclude that our extraordinary intervention is not warranted at this stage of the proceedings, when the district court has yet to definitively rule upon the jurisdiction, limitations,

repose, and tolling issues."). Thus, Petitioner's likelihood of prevailing on the merits in this virtually identical situation is low.

2. The Writ Petition is Barred by Judicial Estoppel

The doctrine of judicial estoppel generally applies "when (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." *Marcuse v. Del Webb Communities, Inc.*, 123 Nev. 278, 287-88, 163 P.3d 462, 468-69 (2007) (internal citations omitted); *see also Mainor v. Nault*, 120 Nev. 750, 765, 101 P.3d 308, 318 (2004).

The entire basis for the motion to dismiss below was Petitioners' contention that "because this action (and the factual basis for each of the claims for relief) is fundamentally based on Archon's alleged error in 2007, Plaintiff's claims for relief necessarily accrued in 2007 and are barred by the applicable statutes of limitation." *See* Real Party in Interest Stephen Haberkorn's Appendix of Exhibits in Support of Answer to Petition for Writ of Mandamus or Prohibition ("Haberkorn Appendix"), at pp. HA004. But in the Petition, Petitioners take a directly contrary position that the "primary claims [raised by Haberkorn's Complaint] are different from those asserted in *Rainero,* and consequently *Rainero* did not provide Petitioners with

notice of Mr. Haberkorn's claim." *See* Petition, at p. 17. Indeed, Petitioners spend many pages distinguishing Haberkorn's claims from the prior class action case *Rainero* in order to support their argument that class action tolling and cross jurisdictional tolling cannot apply based upon this previously filed class action case brought against Archon for the same conduct. *See* Writ Petition, at pp. 16-28. Petitioners should be estopped from taking such inconsistent positions when its suits their litigation advantage.

B. Cross-Jurisdictional Class Action Tolling Applies to this Case

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

This Court follows the doctrine of class action tolling. In *Jane Roe Dancer I-VII v. Golden Coin, Ltd.,* 124 Nev. 28, 176 P.3d 271 (2008), the Nevada Supreme Court allowed a new class representative to be added even though her individual claim was barred by the Fair Labor Standards Act statute of limitations. This Court held that "NRCP 23 provides an "opt-out" class action construct, under which the original filing of the complaint tolls any applicable statute of limitations." *Id.* at 34, 176 P.3d at 275.

In contrast, the Writ Petition here seeks to deny class action tolling. But in this case, Plaintiff's claims are timely because the commencement of a prior class action in 2007 tolled the applicable statutes of limitations for the period of time through September 29, 2014, when the prior class action was dismissed in federal court. Plaintiff's Complaint in this case was filed 17 months later, on February 29, 2016. The statute of limitations on Plaintiff's claims did not expire during this brief 17 month time period.

Petitioners therefore are left to argue that class action tolling is not appropriate in this case merely because the prior case was filed in Nevada federal court, not Nevada state court. Petitioners contend such "cross-jurisdictional tolling" is not applicable in Nevada. However, there are several reasons this argument will not prevail. First, most of the "cross-jurisdictional tolling" cases involve filings in different states, not just different court systems in the same state.

Here, the prior cases were filed in Nevada federal court and all involved the same defendant, Archon Corporation, a Nevada corporation. Under these circumstances, there is no compelling reason for a Nevada state court to not recognize tolling based upon a Nevada federal court action encompassing substantially the same claims and the exact same defendant, which is itself a Nevada corporation.

Second, even if the Court were to consider Nevada's federal district court a separate jurisdiction, numerous cases have recognized and adopted cross-jurisdictional tolling under similar circumstances. *See, e.g., Patrickson v. Dole Food Company, Inc.,* 137 Hawaii 217, 368 P.3d 959, 968-70 (Hawaii 2015); *Dow Chemical Corp. v. Blanco*, 67 A.3d 392 (Del. 2013); *Stevens v. Novartis Pharmaceuticals Corp.,* 358 Mont. 474, 247 P.3d 244 (2010); *Vaccariello v. Smith & Nephew Richards,* 94 Ohio St.3d 380, 763 N.E.2d 160 (2002); *Staub v. Eastman Kodak Co.,* 320 N.J.Super. 34, 726 A.2d 955 (App.Div.1999); *Hyatt Corp. v. Occidental Fire & Cas. Co. of N.C.,* 801 S.W.2d 382 (Mo.Ct.App.1990) and Lee *v. Grand Rapids Bd. of Educ.,* 148 Mich.App. 364, 384 N.W.2d 165 (1986). As the Delaware Supreme Court stated in *Dow Chemical Corp. v. Blanco*:

> While *American Pipe* and its progeny all involved class actions and subsequent suits brought in the same jurisdiction, this factual distinction makes no legal difference. *American Pipe* considered the competing interests of class actions and statutes of limitation—efficiency and economy of litigation balanced against notice to the defendants. Balancing these two interests, the Supreme Court found that the relevant statute of

> limitations was tolled during the pendency of the class action. That analysis is equally sound regardless of whether the original class action is brought in the same or in a different jurisdiction as the later individual action.

Id. 67 A.3d at 397. This reasoning is in accord with this Court's position as set forth in *Jane Roe Dancer*, 124 Nev. at 34, 176 P.3d at 275 (Nevada has an opt in scheme whereby statutes of limitations are tolled during the pendency of a class action). Accordingly, the court here properly recognized cross jurisdictional tolling for identical reasons and the Writ Petition is without merit.

Petitioners argues that Haberkorn's claims are not similar enough to the prior *Rainero* claims to give proper notice to Petitioners. However, as Petitioners argued below, the claims in both cases arise from the Certificate of Designation and Archon's failure to pay the proper redemption amount to its minority shareholders, such as Rainero and Haberkorn. (HA004-021). As the Court noted in rejecting a similar claim in *Stevens v. Novartis, supra*: "While we may later encounter a situation in which a class action suit does not afford sufficient notice to the defendants of subsequent plaintiffs' claims, we do not believe we are faced with such an instance today. Novartis' alleged failure to warn, and the injury caused as a result, serve as the underpinning for both the class action suit and Stevens' claim, and the warnings issued by Novartis to healthcare professionals around the country were presumably the same or substantially similar. More importantly, it is not necessary that the claims be identical. *Tosti v. L.A.*, 754 F.2d 1485, 1489 (9th

Cir.1985) ("[w]e find no persuasive authority for a rule which would require that the individual suit must be identical in every respect to the class suit for the statute to be tolled.")." *Stevens*, 358 Mont. at 485, 247 P.3d at 253 While the claims made in this case and Rainero are not identical, they all arise from a common set of facts as a result of Archon's failure to properly redeem its preferred shares. Haberkorn alleges ongoing wrongs as a result of the failure to redeem, while Rainero merely alleged the failure to pay the amounts due under the Certificate, but otherwise the cases are very similar. Moreover, the claims in both case do not need to be identical to give adequate notice for tolling purposes. Petitioners had adequate notice, just as in *Stevens v. Novartis, supra.*

Petitioners also argue that cross jurisdictional class action tolling violates the policy behind Nevada's statues of limitations and repose; specifically NRS 11.500. First, it should be noted this is the identical argument this Court already refused to review in *Archon Corporation v. Eighth Judicial District Court (Raider)*, Case No. 68995, 2016 WL 1106992 (Nev. S. Ct. March 18, 2016) ("we conclude that our extraordinary intervention is not warranted at this stage of the proceedings, when the district court has yet to definitively rule upon the jurisdiction, limitations, repose, and tolling issues."). Secondly, as the District Court noted, Petitioner did not even raise NRS 11.500 below and therefore this argument should not be considered. (PA161).

Even if it is considered, NRS 11.500 has no application to this case because this case is not a "recommencement" of a prior action. And tolling the statutes of limitations during a pending class action is not inconsistent with the policies behind statutes of limitations in any case. *See Staub*, 726 A.2d at 967.

Most recently, in *Patrickson v. Dole Food Company*, *supra*, the Hawaii Supreme Court surveyed the existing case law on cross jurisdictional class action tolling as of November 2015 and held that cross jurisdictional tolling would be applied in that case. The Court noted the split of the courts on the issue and specifically noted that it found "the reasoning of those states adopting cross-jurisdictional tolling to be more persuasive" and that such a policy was more in keeping with Hawaii's interpretation of the purposes of tolling. *Id.* 368 P.3d at 970; *See also Yang v. Odom*, 392 F.3d 97, 112 (3d Cir. 2004) (downplaying forum shopping concerns from adopting cross-jurisdictional class action tolling). Thus, contrary to Petitioner's claims, there is no overwhelming tide against adopting cross-jurisdictional tolling in the states. In fact, it is the opposite, with the more recent cases adopting it. Further, many of the federal cases relied upon by Petitioners as rejecting the doctrine actually look to existing state law and, finding no authority on way or the other, simply decline to import the doctrine into state law without guidance from a state Supreme Court. *See, e.g., Stevens*, 247 P.3d at

253 (noting this limitation upon the federal cases declining to adopt cross jurisdictional tolling).

As for the forum shopping concerns raised by Petitioner, the state courts adopting cross jurisdictional tolling have rejected those fears as speculative and not "a realistic potential problem." *Patrickson,* 668 P.3d at 969*;* *Vaccariello*, 763 N.E. 2d at 163; *Staub*, 726 A.2d at 966. In fact, while a flood of lawsuits is the main concern of courts rejecting the doctrine, no evidence of any such problems actually occurring has been provided by Petitioners. In this case, such concerns are completely unfounded because Archon is a Nevada corporation and plaintiff is a shareholder in a Nevada corporation and resident of Nevada. There is no rush of filings from out-of-state plaintiffs present in this case and Archon should have always expected to be sued in federal or state court in the state of its incorporation.

C. The Statute of Limitations Has Not Run On Several of Plaintiff's Claims

Even if the statute of limitations on Plaintiff's claims were not tolled by cross jurisdictional class action tolling as set forth above, the applicable statute of limitations has yet to run on several of Plaintiff's Claims, making writ review improper here.

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

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

Petitioners argue that Plaintiff's breach of contract claim is time barred because the claim is allegedly based entirely on the fact that Archon incorrectly calculated the proper redemption price for the preferred shares at the time of the purported redemption on August 31, 2007. The argument ignores the fact that

Plaintiff's claim for breach of contract alleges multiple ongoing breaches of the Certificate of Designation on the part of Archon.

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

of limitations began to run on each installment only when the installment became due); *Bongiovi v. Bongiovi,* 94 Nev. 321, 321, 579 P.2d1246 (1978) (alimony installments).

The first breach of the Certificate of Designation was Archon's improper calculation of the redemption price which occurred at the time of the purported redemption on August 31, 2007. As a result of Defendant Archon's first breach, Plaintiff's preferred shares remained outstanding and continued to accrue dividends after August 31, 2007. Because Plaintiff's preferred shares remain outstanding, Defendant Archon's obligations pursuant to the Certificate of Designation continue in full force to this day. Moreover, the first breach subsequently lead to the three later breaches of the Certificate of Designation alleged by Plaintiff in his Complaint: (1) Archon's June 2008 purchase of 62,604 shares of its common stock; (2) Archon's November 3, 2010 purchase of 225,000 shares of its common stock; and (3) Archon's March 2011 payments to the Archon stockholders who held fewer than 250 shares of Archon common stock before the reverse stock split. Plaintiff alleges that these three events constituted breaches of Section 2(b)(ii) of the Certificate of Designation because Archon did not declare and pay full cash dividends on Plaintiff's preferred stock for the immediately preceding two dividend periods prior to the aforementioned purchases and payments. (PA025-028).

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

2. The Discovery Rule Protects Plaintiff's Breach of Fiduciary Duty, Non-Disclosure and Unjust Enrichment Claims

Plaintiff's third claim for relief for breach of fiduciary duty alleges that Defendants Paul and Suzanne Lowden breached their statutory and fiduciary duty to treat all holders of the preferred stock equally by causing Archon to pay the unpaid balance of the redemption price to D.E. Shaw and Leeward but failing to cause Archon to pay the unpaid balance of the redemption price to Plaintiff. (PA028-029). Plaintiff's fourth claim for relief for breach of fiduciary duty and sixth claim for relief for non-disclosure alleges that Defendants Paul and Suzanne Lowden breached their fiduciary duty by failing to disclose to and/or notify shareholders of the correct redemption price. (PA030-031; PA033-034).

A breach of fiduciary duty is a fraud giving rise to the application of the three year statute of limitations. NRS 11.190(3)(d); *Shupe v. Ham*, 98 Nev. 61, 64,

639 P.2d 540, 542 (1982). For an action of fraud or breach of fiduciary duty, the cause of action in either case does not accrue until the discovery by the aggrieved party of facts constituting the fraud or mistake. *Id.* A fiduciary has a duty to make full and fair disclosure of all facts which materially affect the rights and interests of the parties, and, where a fiduciary relationship exists, facts which would ordinarily require investigation may not excite suspicion. *Golden Nugget, Inc. v. Ham*, 98 Nev. 311, 314-15, 646 P.2d 1221, 1223-24 (1982). Under the discovery rule, the statutory period of limitations is tolled until the injured party discovery or reasonably should have discovered facts supporting a cause of action. *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1024 (1998) (*citing Peterson v. Bruen*, 106 Nev. 271, 274 (1990)). The rationale behind the discovery rule is that the policies served by statutes of limitation do not outweigh the equitable concern that a plaintiff should not be barred from recovering for wrongdoing before he knew that he was injured and can reasonably discover the cause of his injuries. *Bemis*, 114 Nev. at 1024.

Plaintiff's third claim for relief arises out of the Defendants payment to the plaintiffs in *D.E. Shaw* and *Leeward* and failure to pay the same to Plaintiff. (PA028-029) As such, the statutes of limitations on Plaintiff's third claim for relief only began to run once Plaintiff knew or reasonably should have known that Defendants had paid the *D.E. Shaw* and *Leeward* plaintiffs the correct redemption

price without paying Plaintiff the same amount. Plaintiff did not reasonably know that the *D.E. Shaw* and *Leeward* plaintiffs had been paid the correct redemption price until at the earliest, January 2015, when the *Raider* complaint was filed making such allegations. *See* Raider Complaint, at ¶ 46 (PA088). As such, Plaintiff had no basis for knowing that Defendants breached their statutory and fiduciary duty to treat all holders of the preferred stock equally until at the earliest, January 2015.

With regard to Plaintiff's fourth and sixth claim for relief, Defendants argue that at a minimum, Plaintiff knew or should have known of the facts regarding Archon's alleged miscalculation of the redemption price no later than the time of Archon's Form 10-Q was filed on February 18, 2011 (PA088). Defendants' factual argument is incorrect. Plaintiff's fourth and sixth claim for relief allege that Defendants breached their fiduciary and statutory duties by failing to notify and or disclose the correct redemption price after the decisions in *D.E. Shaw* and *Leeward* became final. The Ninth Circuit's decision was issued on September 19, 2012 and Archon had until December 17, 2012 to pursue its remaining appellate remedies. It cannot be said that before the judgments in *D.E. Shaw* and *Leeward* were affirmed, that Plaintiff's claims for non-disclosure accrued. Defendants argue to the contrary by making factual assertions about what Plaintiff should have known from reading SEC filings over a year earlier. However, whether a plaintiff

exercised reasonable diligence in discovering their causes of action "is a question of fact to be determined by the jury or trial court after a full hearing." *Bemis,* 114 Nev. at 1025. Dismissal on statute of limitations grounds is only appropriate "when uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered" the facts giving rise to the cause of action. *Id.* (*quoting Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873, 977 (9th Cir. 1984)). The evidentiary basis for such a decision is a further reason not to grant the Writ Petition.

VII. CONCLUSION

For all of the forgoing reasons, the Writ Petition should be denied.

DATED: February 27, 2017.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Answer to Petition for Writ of Prhibition or Mandamus complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type Style requirements of NRAP 32(a)(6) because this Answer has been prepared in a proportionally spaced typeface using Office Word 2007 in size 14 font in double spaced Times New Roman type.

I further certify that I have read this Answer and that it complies with the page or type-volume limitations of NRAP (27)(b)(2) and/or NRAP 32(a)(7) because, excluding the parts of the Answer exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and has 9,625 words.

Finally, I hereby certify that I have read this Answer and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Answer complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 23(e)(1), which requires that every assertion in this Answer regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be

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subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: February 27, 2017.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), the undersigned, an employee of Sklar Williams PLLC hereby certifies that on the 27th day of February 2017, she served a copy of the forgoing REAL PARTY IN INTEREST STEPHEN HABERKORN'S ANSWER TO PETITION FOR WRIT OF PROHIBITION OR MANDAMUS upon the following, by depositing a copy of same in the United States Mail, postage prepaid, addressed to:

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