

EXHIBIT 2

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TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

STEPHEN HABERKORN,)	
)	CASE NUMBER: A-16-732619
Plaintiff,)	
)	
vs.)	DEPT. NUMBER: XV
)	
ARCHON CORPORATION, SUZANNE)	Transcript of Proceedings
LOWDEN, PAUL LOWDEN,)	
)	
Defendants.)	

BEFORE THE HONORABLE JOE HARDY, DISTRICT COURT JUDGE

DEFENDANTS' MOTION TO DISMISS

WEDNESDAY, JUNE 22, 2016

APPEARANCES:

For the Plaintiff: STEPHEN R. HACKETT, ESQ.

For the Defendants: JUSTIN J. BUSTOS, ESQ.

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1 WEDNESDAY, JUNE 22, 2016 AT 9:58 A.M.

2

3 THE CLERK: A732619, *Stephen Haberkorn versus*
4 *Archon Corporation.*

5 MR. HACKETT: Good morning, Your Honor. Stephen
6 Hackett for the plaintiff.

7 MR. BUSTOS: Good morning, Your Honor. Justin
8 Bustos on behalf of the defendants.

9 THE COURT: Good morning. So, be grateful I'm
10 paying attention. No. So this is Defendants' Motion to
11 Dismiss Complaint, which I've reviewed, along with
12 Plaintiff's Opposition and the Reply. I don't know if I
13 mentioned when you guys were here before, but just so you
14 know and if you need time to consider what I'm going to
15 say, you're welcome to it. I don't know Mr. Bustos at all
16 but one of the partners in his law firm, Michael Fetter,
17 and I are friends and Mr. Fetter's on my recusal list,
18 which I don't think should affect -- well, it would not
19 affect my judgment in this case.

20 Additionally, I know the Lowdens, although that's
21 just through various events on the campaign trails. So,
22 Mr. Hackett, you would probably be the one affected by
23 that. If you need time to consider that, let me know.
24 Otherwise, I'm ready to go forward.

25 MR. HACKETT: I have no problem with Your Honor

1 hearing the case.

2 THE COURT: Okay. Thank you.

3 Like I said, I reviewed the briefs. Let me -- I
4 think the class action tolling is something I definitely
5 want to hear from and the subparts of that such as the --
6 what did you call it? Cross-jurisdictional or whatever the
7 term was that I was not familiar with. And then on the
8 other arguments, whether those are for a Motion to Dismiss
9 or more properly on a summary judgment type of issue. But,
10 Mr. Bustos, you're welcome to go.

11 MR. BUSTOS: Thank you, Your Honor.

12 Our Motion to Dismiss seeks to dismiss the entire
13 Complaint. The only issue we've raised is the statute of
14 limitations. It's our position that all of these claims
15 are time-barred and should be dismissed.

16 So, preliminarily, Your Honor, I'll state that
17 this entire case is based on Archon's redemption of its
18 preferred stock. As part of that redemption, Archon was
19 required to calculate the amount of the accrued but unpaid
20 dividends that had accumulated on the preferred stock. And
21 that calculation was done pursuant to the Certificate of
22 Designation, which is the contract that sets forth how this
23 is going to work. That document is a publically filed
24 document. It was filed with the Nevada Secretary of State
25 in 1993, Your Honor.

1 So because every single claim in this case is
2 fundamentally based on the argument that that calculation,
3 the time of redemption, August 31st, 2007, was incorrect,
4 it's our position that every claim in this case is well
5 time-barred, many years.

6 And, so, Your Honor, based on your preliminary
7 comments, I will jump ahead to the topics that the Court
8 was most concerned about and, at the end, I'll circle
9 around to the other arguments in case there's anything
10 specific that you would like me to address.

11 So, the issue that was primarily raised in the
12 Opposition to the Motion to Dismiss was this concept of
13 cross-jurisdictional tolling.

14 THE COURT: So I got the phrase -- the term right?

15 MR. BUSTOS: Absolutely, Your Honor.

16 THE COURT: Okay.

17 MR. BUSTOS: So, in the -- in Mr. Hackett's brief,
18 he starts off with the argument that the Court should apply
19 class action tolling. Now the concept of class action
20 tolling, in general, Your Honor, is well settled. It
21 originated from a United States Supreme Court case called
22 *American Pipe* and that case has been universally adopted by
23 the Federal Courts and every State Court, that I'm aware
24 of, has adopted the general concept of class action
25 tolling.

1 But, a separate concept has arisen in case law, a
2 fairly recent development of intra-jurisdiction -- or
3 excuse me, of cross-jurisdictional tolling.

4 THE COURT: Well I don't feel too bad if I hadn't
5 heard of it before. So, --

6 MR. BUSTOS: Not at all, Your Honor. I hadn't
7 before until I --

8 THE COURT: Okay.

9 MR. BUSTOS: -- did the research associated with
10 these individuals.

11 So, when we're talking about the *American Pipe*
12 line of cases, the courts have generally referred to that
13 as what they call intra-jurisdictional tolling. So tolling
14 when a case is filed in one court system and one
15 jurisdiction, dismissed, and subsequently refiled within
16 that same system. That's not controversial. We don't
17 dispute that that's accepted doctrine.

18 But the concept of cross-jurisdictional tolling
19 is, at this point, a very, you know, is a doctrine that
20 hasn't been widely accepted, it hasn't been widely decided
21 by the State Courts, frankly. So the concept -- so we have
22 a concept of cross-jurisdictional tolling. What we're
23 talking about is a case that was filed in one jurisdiction,
24 dismissed from that jurisdiction, and then subsequently
25 refiled in another jurisdiction.

1 So, Mr. Hackett is correct that there are a couple
2 of states that have adopted, you know, this concept. And I
3 have it my notes here that the jurisdiction that he refers
4 to were Delaware and Ohio. When we did the research, it
5 actually appeared though that the majority of State Courts
6 to actually consider this issue have rejected it and the
7 cases that I've cited in the briefs are from Illinois,
8 Texas, and Tennessee. And in the briefs, we've summarized
9 three main reasons why the doctrine of cross-jurisdictional
10 tolling should not be adopted.

11 And, by the way, Your Honor, in my research, the
12 Nevada Supreme Court has never touched upon this issue.

13 THE COURT: For better or worse, huh?

14 MR. BUSTOS: For better or worse. The *Jane Roe*
15 *Dancer* case was cited, but, as we explained in the briefs,
16 that clearly was a concept of intra-jurisdictional tolling.

17 So, when we're talking about cross-jurisdictional
18 tolling, Your Honor, the first point is that there is no
19 added efficiency to a State Court by adopting this
20 doctrine, as opposed to when we're talking about intra-
21 jurisdictional tolling. With intra-jurisdictional tolling,
22 the idea is that it leads to efficiencies within the court
23 system because people aren't running to file placeholder
24 suits while the main suit is still pending in the
25 jurisdiction.

1 Now, when we have intra-jurisdictional -- or
2 cross-jurisdictional tolling, you don't have that same
3 efficiency because, at that point, the State is not
4 interested in what's hearing in Federal Court. And, so, as
5 -- I believe it was the *Mastas* [phonetic] Court, the case
6 we cited in the brief, unless every jurisdiction was to
7 adopt this concept at the same time, the fear is that there
8 would be a run of cases to the jurisdiction that has the
9 more favorable tolling rules and they would get a
10 disproportionate number of cases that were not certified as
11 class actions. And, so, the idea that courts have feared
12 is that would actually burden a single state to adopt this
13 doctrine unless it was one of these uniform laws that apply
14 to every state.

15 The second concept is that Nevada simply doesn't
16 have an interest in furthering the efficiencies of other
17 court systems except out of maybe comity.

18 But the most important point, Your Honor, that we
19 discussed in the brief, which, I think, is really -- is key
20 as to why this Court should not be the first Court in
21 Nevada to adopt this doctrine is that when we're talking
22 about limitations periods, it really is the role of the
23 Legislature to determine what limitation period applies to
24 a specific case. And when we're talking about cross-
25 jurisdictional tolling and, of this case, from a federal

1 case ultimately to a State Court case, really what the
2 Nevada -- Nevada would be doing is it would be
3 [indiscernible] the ability of the Legislature to decide a
4 limitations period to the federal system because the
5 limitations period would then be determined entirely by how
6 long the Federal Court decided to deny class certification.
7 And, Your Honor, we really believe that that is an issue
8 that's best left to the Nevada Legislature.

9 Now I didn't make this point in the briefs, it's a
10 little bit of a comparison, it's not directly on point, but
11 Nevada has a statute, NRS 11.500, and that talks about the
12 concept of if a case is dismissed in Federal Court for lack
13 of jurisdiction, it can only be refiled within the state
14 system within the original limitations period on the claim
15 or within 90 days. So it serves as a statute of repose and
16 as a savings provision.

17 And, so, in that situation, the Nevada Legislature
18 has shown that if it has cases filed in one jurisdiction
19 going to another, it can decide what to set the time period
20 to when those cases should be applied. And so we would
21 submit that in the event that a Nevada Legislature wanted
22 to have this doctrine of cross-jurisdictional class action
23 tolling, it could adopt a similar statute to 11.500 to deal
24 with that directly and we believe that this issue really is
25 more appropriately decided from the Legislature considering

1 that the Nevada Supreme Court has not adopted it, the
2 majority of State Courts to decide it have not adopted it,
3 and, at this point, it still is a controversial doctrine.

4 So, is Your Honor interested in the equitable
5 tolling [indiscernible]?

6 THE COURT: You know, on that one, I don't think
7 it applies, but --

8 MR. BUSTOS: Okay. I would agree with you.

9 THE COURT: You can save and see if Mr. Hackett
10 can persuade me otherwise and you can --

11 MR. BUSTOS: I will do that to save time, Your
12 Honor. Thank you.

13 So the second point you mentioned in your opening
14 comments is whether the arguments are made by defendants in
15 this case are really appropriate for a Motion to Dismiss.
16 We believe they are, Your Honor. The case we cited in the
17 briefs is the *Breliant* case, B-R-E-L-I-E-N-T, which talks
18 about the appropriate types of information that a Court can
19 consider on a Motion to Dismiss.

20 THE COURT: Now on -- yeah, I -- I mean, on that
21 specific ground, I agree with you. I think some of your
22 colleagues, some of my colleagues may not realize that's
23 the case but I think it's fair and settled and appropriate.

24 MR. BUSTOS: And, so, in this case, we're talking
25 about the documents that are attached to the Complaint,

1 which are incorporated by reference under *Breliant*, and
2 then also the defendants have asked you to take judicial
3 notice of a few things. We've asked you to take judicial
4 notice of the public docket in the previous cases filed in
5 Federal Court. That was the *D.E. Shaw* [phonetic] case and
6 the *Lewar* [phonetic] case. That was -- those are all
7 public filings, which is clearly a subject matter of which
8 this Court can take judicial notice. And we've also asked
9 this Court to take judicial notice of SEC filings. The SEC
10 filings are also matters of public record that are
11 assessable online through the SEC's EDGAR database.

12 And, so, I don't dispute, Your Honor, that, you
13 know, as with any question of judicial notice, you
14 certainly have discretion in deciding whether or not to
15 take judicial notice of a fact, but every single fact that
16 we're asking the Court to consider as a part of the Motion
17 to Dismiss is a matter of public record and is something
18 that's verifiable of sources whose accuracy cannot be
19 reasonably questioned. So we think that this is an
20 appropriate matter for judicial notice.

21 And, Your Honor, given the time period that -- the
22 events in question that we're talking about, we think that
23 this is an issue that needs to be decided at the outset.
24 We're talking about facts that occurred in 2007 and, since
25 that time, our client has taken numerous actions that have

1 been based off of its redemption of the preferred stock.
2 Some of those are discussed in the Complaint. Archon has
3 repurchased shares. Archon has deregistered its common
4 stock with the SEC. And Archon has not been -- you know,
5 as a result, Archon has not been reporting with the SEC and
6 it hasn't kept track of its previous shareholders because,
7 in Archon's view, we redeemed the stock back in 2007.

8 So we think that this issue is something that's --
9 that should be decided now. We believe that as a matter of
10 economy and efficiency, we should have a decision on the
11 statute of limitations and we believe the Court has all the
12 facts it needs to have in front of it to determine whether
13 or not Mr. Haberkorn knew or should have known of the facts
14 giving rise to its cause of action.

15 THE COURT: Thank you very much.

16 MR. BUSTOS: And if you'd like me to discuss any
17 of the specific causes of action, I'm happy to do it.

18 THE COURT: No. Thank you though.

19 MR. BUSTOS: Thank you.

20 MR. HACKETT: Thank you, Your Honor.

21 Let me just first address the last thing that was
22 stated, which is that -- and I think this goes back to the
23 whole premise of the Motion to Dismiss, which is that all
24 of these claims arose from the redemption of the stock in
25 2007. A plain reading of the Complaint belies that

1 characterization. As just admitted by defense counsel,
2 Archon to this day takes the position that all of the
3 shareholders were properly redeemed in 2007. Now that
4 flies with --

5 THE COURT: Hasn't another Court found otherwise?

6 MR. HACKETT: Yes.

7 THE COURT: Okay.

8 MR. HACKETT: That flies in the face of the
9 Federal Court decisions in *D.E. Shaw* [phonetic] and *Lewar*
10 [phonetic] that they appealed all the way to the Ninth
11 Circuit and yet they still maintain that position.

12 I didn't supply it because it's outside of the
13 pleadings, but when we get into the merits of this case,
14 the Court will see that this is not the only case pending
15 before the State Court involving these same issues. We
16 attached the Complaint in the *Rader* case, which was
17 recently filed in 2015, and, in that case, they take the
18 position that the redemption occurred in 2007 and was valid
19 and they are taking that position irregardless of the prior
20 findings in the other cases.

21 So, it's not correct that all of these breaches
22 and causes of action that are asserted by my client arose
23 in 2007. Most of these claims, and the reason we brought
24 this as a separate case instead of just joining into the
25 class action or, you know, waiting to see what happened in

1 those cases, was that the ongoing breaches of the rights of
2 the preferred shareholders are continuing to be committed
3 to this day by Archon Corporation and those claims are
4 breach of fiduciary duty claims. We believe the officers
5 and the directors are bound by -- they were bound, in our
6 opinion, to pay the redemption to all of the preferred
7 shareholders once it was determined that they had
8 improperly paid the shareholders back in 2007. Now that
9 didn't occur until 2012 when the Ninth Circuit affirmed,
10 but they, to this day, have not paid any of the preferred
11 shareholders and we contend that's a continuing wrong that
12 continues to harm our client to this day.

13 And, in fact, under the Certificate, the amounts
14 continue to accrue. If you accept our position that the
15 stock was not properly redeemed in 2007 and has never been
16 properly redeemed because they didn't do what was required,
17 which is pay the current amount due to all of the
18 shareholders, then that amount is accruing because the
19 dividends accrue every quarter. So, it's just not -- it's
20 simply not correct to characterize our claims as arising in
21 2007.

22 Now, going back to the Court's question about the
23 cross-jurisdictional tolling, it's actually the defendants
24 that are asking the Court to do something unique and do
25 something different. They say: We want you to adopt a

1 strange doctrine that's not universally accepted. That's
2 not necessary because, in fact, the *Jane Roe Dancer* case, I
3 think, pretty much addresses this situation --

4 THE COURT: Where is that in your brief so I can
5 follow you?

6 MR. HACKETT: In our Opposition, that is -- starts
7 on page 8. It's actually page 8, line 19.

8 THE COURT: Okay.

9 MR. HACKETT: And we go onto discuss it for the
10 next three pages, through page 10. But the focus of this
11 part of the argument is at the bottom of page 8 or page 8,
12 line 19. In *Jane Roe Dancer*, the Nevada Supreme Court
13 expressly adopted class action tolling. Now, --

14 THE COURT: Which I think they agreed --

15 MR. HACKETT: They concede that.

16 THE COURT: Okay.

17 MR. HACKETT: They concede that, but they try to
18 then characterize that that's somehow far different than
19 this cross-jurisdictional tolling between a Federal Court
20 action and a later State Court action and that, therefore,
21 because it's -- they're in different jurisdictions, these
22 doctrines are completely different and unique. And I think
23 that the facts of *Jane Roe Dancer* show that they're not.
24 And the reason why is in the *Jane Roe Dancer* case, the
25 question was: Does the Fair Labor Standards Act, a federal

1 law, apply to these wage claims of these dancers such that
2 the Fair Labor Standard Act procedural device, which was
3 the opt-in of the plaintiffs into the class, should bar the
4 substitution of the class representative in that case for
5 the original class representative.

6 So there was no question the first case was timely
7 filed, but by the time they wanted to substitute the class
8 rep, they said: Well, her claims are barred under the
9 FLSA. So the federal law would have barred the
10 substitution and the Nevada Supreme Court said: No, in
11 Nevada, these cases are governed by NRCP 23, which is an
12 opt-out procedure. In other words, -- and here it is on
13 page 275 -- let me see. Page 275 of P.3d in that case,
14 176. The Supreme Court said:

15 NRCP 23 provides an opt-out class action construct
16 under which the original filing of the Complaint tolls
17 any applicable statute of limitations.

18 And there's a footnote 21 where they go and they
19 cite footnote 2, which goes back and says: This is in
20 contrast to the opt-in under the FLSA. And, therefore, the
21 federal law didn't apply. The Nevada state law did.

22 In this circumstance, a similar analysis is
23 applicable because under FRCP, the Federal Rules of Civil
24 Procedure 23, not the Fair Labor Standards Act, that's also
25 an opt-out provision, as the Court is probably aware. And,

1 therefore, the same analysis would apply in this case. The
2 original Federal Court class action, which is called the
3 *Renero* [phonetic] case was filed in August or -- no, I'm
4 sorry. November of 2007. And there's been no question
5 that that was filed within the applicable statute of
6 limitations. And my client was a member of that class.
7 There's no question about that either.

8 So the only question is: Should his claim have
9 been stayed by that opt-out Rule 23 filing? And our
10 position is that *Jane Roe Dancer* shows clearly the Nevada
11 Supreme Court would apply the same analysis to our
12 subsequent claim and that case was pending in Federal Court
13 without class certification up until 2014 when it was
14 dismissed on different grounds, lack of subject matter
15 jurisdiction. The same attorneys then filed the *Rader* case
16 in 2015 and that case is in State Court here and that case
17 is in front of Judge Denton.

18 So, -- and, interestingly, almost an identical
19 motion was denied by Judge Denton in that case claiming
20 that cross-jurisdictional tolling shouldn't apply and that
21 the filing of *Renero* [phonetic], the Federal Court class
22 action, didn't apply to *Rader's* later claim and they argued
23 these are the same lawyers, they knew about it. And Judge
24 Denton didn't accept that argument there.

25 So, getting back to the cross-jurisdictional

1 tolling analysis, even if you accept the defendants', you
2 know, argument that this is somehow different -- and, by
3 the way, there are three State Courts that have expressly -
4 - that we cited in our brief -- that's at page 10, lines 14
5 through 17 of our Opposition. The three State Courts --
6 Supreme Courts are Delaware, Montana, and Ohio. So they
7 have Illinois, Texas, and Tennessee. I mean, take your
8 pick, but we think the better reasoned cases are the cases
9 that accept cross-jurisdictional tolling.

10 And we have the quote from the Delaware Supreme
11 Court, which we think is most applicable, on page 10 and it
12 points out that based on *American Pipe*, which is the Nevada
13 -- the U.S. Supreme Court class action tolling case, the
14 exact same interests in efficiency, economy of litigation,
15 and notice to the defendants all weigh in favor of
16 recognizing cross-jurisdictional tolling and this
17 presumption of a parade of horrors that will follow if a
18 State Court recognizes this doctrine just hasn't happened
19 in those jurisdictions.

20 THE COURT: So wouldn't part of that parade be me
21 still having this case?

22 MR. HACKETT: Well, if you considered that, Your
23 Honor, I -- we are asking you to keep the case, yes.

24 Now, interestingly though, I will mention that,
25 again, there are numerous other cases involving these same

1 issues pending. As I said, the *Rader* case is before Judge
2 Denton and that is a class action. I think my client would
3 opt-out, which is why we filed this separate case because
4 we raise some other issues. But I think that case could
5 have a bearing on this case.

6 THE COURT: Okay.

7 MR. HACKETT: I would point out that --

8 THE COURT: How about I give you another minute to
9 wrap up?

10 MR. HACKETT: Okay. I'll try and wrap it up.

11 I just want to point out that their argument on
12 the class action tolling not applying that he tried to rely
13 on it's the duty of the Legislature or the obligation of
14 the Legislature to set the limitations period and this
15 would be abandoning that and they cited NRS 11.500. That's
16 the same statute that they tried to rely on in the *Rader*
17 case, which Judge Denton didn't apply. In that case, they
18 said that was a statute of repose and it set an outside
19 limit when you can bring these claims. They took that on a
20 writ to the Nevada Supreme Court and they weren't
21 successful in that argument.

22 So, again, raising the argument that the
23 Legislature set a specific limitation here for this type of
24 case I think has pretty well been determined in this
25 jurisdiction as not applicable.

1 Just moving on quickly to the other aspect, I
2 agree with your comment that a lot of these factual issues
3 that they're raising are more appropriate for summary
4 judgment than a Motion to Dismiss. I don't quarrel to the
5 citation of the *Breliant* case, the *Breliant* versus
6 *Preferred Equities*. I'm familiar with that case. I worked
7 on it. In that decision, the Nevada Supreme Court said:
8 Yeah, public records, things that can't reasonably be
9 disputed, like SEC filings, you can take judicial notice
10 of. And we don't quarrel with that aspect, but when --

11 THE COURT: It's the next step that you quarrel
12 with?

13 MR. HACKETT: Right. The next step --

14 THE COURT: Okay.

15 MR. HACKETT: The next step is take those filings
16 and then make inferences about what the plaintiff knew and
17 when the plaintiff should have known it and when the
18 plaintiff should have discovered his cause of action and
19 that's what they're asking you to do in the Motion to
20 Dismiss and that's what you can't do on a Motion to
21 Dismiss.

22 Just as an example, they say --

23 THE COURT: Oh there's no need.

24 MR. HACKETT: Okay. You know, and -- I even cite
25 in the documents they attached, you can see that they're

1 subject to different inferences, as we point out.

2 Unless the Court has other questions, --

3 THE COURT: No. Thank you very much.

4 MR. BUSTOS: Your Honor, I'll limit my reply
5 comments to three or four points.

6 THE COURT: Thank you.

7 MR. BUSTOS: So, the first one, Your Honor, and
8 Mr. Hackett's initial statements, something incorrect was
9 stated and this had to do with the findings in *D.E. Shaw*
10 [phonetic]. The Court in *D.E. Shaw* [phonetic] and *Lewar*
11 [phonetic] did not find that stock wasn't redeemed. To the
12 contrary, the Court relied on the fact that the stock was
13 redeemed in ruling in favor of the *D.E. Shaw* [phonetic] and
14 *Lewar* [phonetic] plaintiffs. Yes, the Court found that
15 Archon did not calculate it correctly, but the Court based
16 that finding on the fact that stock was redeemed on August
17 31st, 2007. Absent that finding, the *D.E. Shaw* [phonetic]
18 and *Lewar* [phonetic] plaintiffs could not have prevailed in
19 those cases.

20 But, Your Honor, we're not here talking about, you
21 know, the entities that Archon certainly disagrees with
22 what occurred there, but really we're talking about the
23 timing of the -- of this case.

24 So the second case I wanted to raise, Your Honor,
25 was with respect to the cross-jurisdictional tolling and

1 the citation to *Jane Roe Dancer*. Mr. Hackett made the
2 distinction that *Jane Roe Dancer* was talking about the
3 differences between federal law and Nevada law. That's not
4 the issue of cross-jurisdictional tolling. It's that
5 jurisdiction --

6 THE COURT: I agree with you on that.

7 MR. BUSTOS: Okay. And then I would just cite the
8 Court to a quote from that case:

9 Class actions brought under NRCP 23 toll the
10 limitations period on all potential.

11 So it was referring to Nevada procedure.

12 The third point, Your Honor, is the issue of what
13 was before Judge Denton and Mr. Hackett --

14 THE COURT: And that, I have no idea. So, I
15 wouldn't worry too much about that.

16 MR. BUSTOS: Well all I wanted to point out, Your
17 Honor, is that Judge Denton did not decide these issues and
18 neither did the Nevada Supreme Court. Judge Denton did
19 decide that he had -- he essentially said he was going to
20 rule on these issues at a later time. He declined to
21 decide whether or not cross-jurisdictional tolling would
22 apply. We think it needs to be decided at the outset. We
23 did take a writ. The Nevada Supreme Court said: Well,
24 Judge Denton has to decide it conclusively first before
25 they're going to do anything. So it still is an open

1 question. As far as I know, no Court in Nevada has
2 conclusively ruled on the issue.

3 And then the final point I'll make, Your Honor,
4 with respect -- is to the *Breliant* case. Apparently, I
5 guess, I've been pronouncing it wrong. Is that what we're
6 talking about, Your Honor, when we have matters of public
7 record, it doesn't require an inference. If something is
8 the matter of public record, that as a matter of law, you
9 can say somebody should -- knew or should have known of
10 that fact. And that's all I'll comment about that point,
11 Your Honor, unless you have further questions.

12 THE COURT: No. Thank you very much. Thank you
13 both for your briefs and arguments. Very helpful and, as I
14 like to tell people, I enjoy it when attorneys do a good
15 job. SO, thank you.

16 Having said that, at the end of the day, somebody
17 wins on some points and somebody loses and may win later,
18 but -- and there's a first time for everything.

19 I'm going to deny the Motion to Dismiss without
20 prejudice based primarily on -- looking into my crystal
21 ball, I think that the Nevada Supreme Court would agree
22 with the Delaware Supreme Court as stated in that *Dow*
23 *Chemical versus Blanco* case in these circumstances of this
24 case. I'm not sure about whether it would on state to
25 state or -- but, under these circumstances, with a Federal

1 Court case being in Nevada and now this court case being in
2 Nevada State Court, I think under those circumstances it
3 makes sense and I will apply and rule that class action
4 tolling applies, as both parties have agreed, but the
5 subpart of that, that being the cross-jurisdictional
6 tolling, I believe also applies and so I'll make that
7 ruling.

8 And, Mr. Hackett, I'll continue to give you
9 further reasons, but you'll be preparing the Order. Submit
10 it to Mr. Bustos for review and approval and put that in
11 there.

12 The other arguments in favor or against dismissal,
13 to me, are better addressed, if at all, on a Motion for
14 Judgment. In particular, as defense counsel stated,
15 whether plaintiff knew or should have known of these
16 various public record filings. Yeah, they were public
17 records, but I think even then, under these circumstances,
18 not appropriate to base a dismissal on those. And, so, I'm
19 -- the denial of the Motion is without prejudice under the
20 Motion to Dismiss standards as set forth in the parties'
21 briefs.

22 Let's see. As to NRS 11.500, that's one of those
23 where it's hard for me, if not impossible, for me to rule
24 on in terms of don't recall it being raised and I'm not
25 familiar with it off the top of my head. And if it wasn't

1 raised, it's not appropriate for me to base a decision on
2 because it wasn't raised.

3 Alternatively, the -- so the main basis is the
4 cross-jurisdictional tolling. Alternatively is the,
5 quote/unquote, I forget the term of art now, but the
6 ongoing harm as alleged in plaintiff's Opposition,
7 generally set forth on pages 13 through 19. That's an
8 alternative because I don't think we even get to that based
9 on the cross-jurisdictional tolling. I'm trying to read my
10 writing up here.

11 So, yes, I agree that based on the *Renero*
12 [phonetic] case being a class action in Nevada Federal
13 Court, tolled under the cross-jurisdictional, I agree *Jane*
14 *Roe Dancer* doesn't necessarily apply given the cross-
15 jurisdictional tolling argument, but, I think, at the same
16 time, it's indicative that tolling issue, which isn't
17 necessarily addressed explicitly in the statute by the
18 Legislature, may be addressed by the Court judicially.
19 And, so, I think that kind of supports my finding that
20 cross-jurisdictional tolling would apply.

21 Thank you both.

22 MR. HACKETT: Thank you, Your Honor.

23 MR. BUSTOS: Thank you, Your Honor.

24 PROCEEDING CONCLUDED AT 10:24 A.M.

25 * * * * *

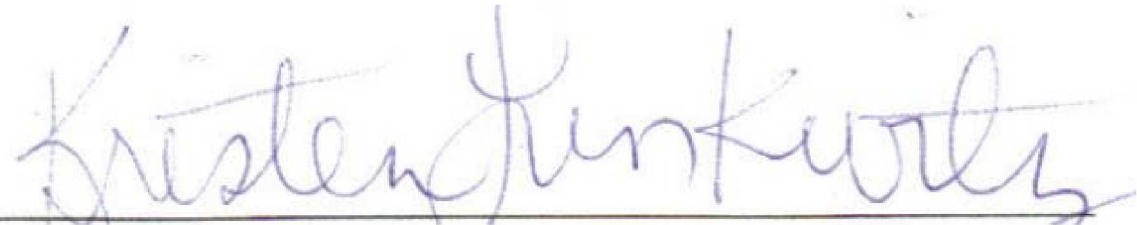
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CERTIFICATION

I certify that the foregoing is a correct transcript from the audio-visual recording of the proceedings in the above-entitled matter.

AFFIRMATION

I affirm that this transcript does not contain the social security or tax identification number of any person or entity.

A handwritten signature in blue ink, reading "Kristen Lunkwitz", is written over a horizontal line.

KRISTEN LUNKWITZ
INDEPENDENT TRANSCRIBER

EXHIBIT 1

EXHIBIT 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

<p>ARCHON CORPORATION, PAUL W. LOWDEN, and SUZANNE LOWDEN, Petitioners,</p> <p>vs.</p> <p>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,</p> <p>and</p> <p>STEPHEN HABERKORN, an individual,</p> <p>Real Party in Interest.</p>	<p>Supreme Court No. 71802</p> <p>State Court Case No. A-16-732619-B</p>
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**DECLARATION OF KENNETH K. CHING IN SUPPORT OF
PETITIONER ARCHON CORPORATION'S REPLY TO REAL PARTY IN
INTEREST STEPHEN HABERKORN'S RESPONSE TO NRAP 8 MOTION
TO STAY PROCEEDINGS IN THE DISTRICT COURT**

I, Kenneth K. Ching, declare and state as follows:

1. I am licensed to practice law in the State of Nevada and am an attorney at the law firm of Dickinson Wright PLLC, attorneys of record for Petitioners Archon Corporation, Paul W. Lowden, and Suzanne Lowden (collectively, "Petitioners") in the above-captioned matter.

2. I have personal knowledge of and am competent to testify concerning the facts stated herein.

3. Attached to Petitioner Archon Corporation's Reply to Real Party in Interest Stephen Haberkorn's Response to NRAP 8 Motion to Stay Proceedings in the District Court ("Response") as **Exhibit 2** is a true and correct copy of the June 22, 2016 Transcript of Proceedings of the hearing on Defendants' Motion to Dismiss.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED this 1st day of May, 2017.



KENNETH K. CHING

RENO 65655-5 15851v1

IN THE SUPREME COURT OF THE STATE OF NEVADA

<p>ARCHON CORPORATION, PAUL W. LOWDEN, and SUZANNE LOWDEN,</p> <p style="text-align: right;">Petitioners,</p> <p>vs.</p> <p>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</p> <p>Respondents,</p> <p>and</p> <p>STEPHEN HABERKORN, an individual,</p> <p>Real Party in Interest.</p>	<p>Supreme Court No. 71802</p> <p>State Court Case No. A-16-732619-B</p> <p>Electronically Filed May 01 2017 04:17 p.m. Elizabeth A. Brown Clerk of Supreme Court</p>
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PETITIONER ARCHON CORPORATION'S REPLY TO REAL PARTY IN INTEREST STEPHEN HABERKORN'S RESPONSE TO NRAP 8 MOTION TO STAY PROCEEDINGS IN THE DISTRICT COURT

DICKINSON WRIGHT PLLC
JOHN P. DESMOND
Nevada Bar No. 5618
Email: jdesmond@dickinsonwright.com
JUSTIN J. BUSTOS
Nevada Bar No: 10320
Email: jbustos@dickinsonwright.com
KENNETH K. CHING
Nevada Bar No: 10542
Email: kching@dickinsonwright.com
100 West Liberty St. Suite 940
Reno, NV 89501
Tel: (775) 343-7500
Fax: (775) 786-0131

Attorneys for Petitioners

MEMORANDUM OF POINTS AND AUTHORITIES

FACTUAL BACKGROUND

Mr. Haberkorn states that the Motion to Stay is misleading because it “implies that the Court’s decision to deny Petitioners’ Motion to Dismiss was **primarily based**” on cross-jurisdictional tolling. Response at 2:8-15 (emphasis added). However, the District Court’s actual decision was “**based primarily** on [its prediction that] . . . the Nevada Supreme Court would [adopt cross-jurisdictional tolling].” (emphasis and brackets added). **Exhibit 2**, Transcript of Proceedings, June 22, 2016, at 22:19-24. Mr. Haberkorn’s attempt to distort the fact that cross-jurisdictional tolling is the lynchpin of his case is contrary to recorded fact as espoused by the District Court.

DISCUSSION

1. The object of the Petition will be defeated if a stay is not granted.

The object of the Petition is the scope and application of NRS 11.500, a statute which is meant to give repose to parties like Petitioners after a fixed period of time. The legislative history of NRS 11.500 states that the statute establishes an absolute outer limit for when claims such as Mr. Haberkorn’s could be filed. Yet, the adoption of cross-jurisdictional tolling by the District Court means that NRS 11.500 would be eviscerated and claims can be tolled indefinitely by any federal District Court in the United States. Motion to Stay at 14-17. Thus, the District

Court's application of cross-jurisdictional tolling has directly undermined NRS 11.500. The object of the Petition is to vindicate the repose provided by the Legislature in NRS 11.500.

Courts have described the denial of repose as "irreparable harm." *See e.g., Zagano v. Fordham University*, 720 F.Supp. 266, 268 (S.D.N.Y.1989). Thus, the harm suffered by Petitioners absent a stay is not simply having to endure litigation. It is that the Nevada Legislature intended to give Petitioners a right of repose and did so in 2003, and that right has been denied. To the extent that right continues to be denied, the object of the Petition, to vindicate NRS 11.500, is defeated. Therefore, a stay of the proceedings in the District Court is necessary to prevent the abrogation of the repose the Legislature intended to provide in NRS 11.500.

Relatedly, Mr. Haberkorn is incorrect to claim that the arguments in the Petition should be heard on appeal. Such a delay would entail further denial of Petitioners' right to repose under NRS 11.500 and would further contravene the Legislature's intent. Petitioners are not asking for a new privilege; they are seeking the recognition and application of a right that was given to them when NRS 11.500 was adopted in 2003. Petitioners should not have to wait for an appeal to see the already enacted intent of the Legislature effectuated.

Additionally, awaiting appeal on the issues presented by the Petition could result in an enormous waste of time and resources for the parties and the District

Court. The District Court proceedings are currently premised on cross-jurisdictional tolling applying in Nevada. If this Court ultimately rejects that controversial doctrine, then the proceedings below would be dramatically altered if not altogether dismissed.

In its Reply in Support of its Petition, Petitioners have explained why each of Mr. Haberkorn's claims should be dismissed if cross-jurisdictional tolling is rejected by this Court. Reply at 20-27. However, even if some of Mr. Haberkorn's claims survive without cross-jurisdictional tolling, the primary reason the District Court preserved Mr. Haberkorn's claims was because of its belief that this Court would adopt cross-jurisdictional tolling. **Exhibit 2**, Transcript. Thus, if cross-jurisdictional tolling is later rejected by this Court on appeal, the District Court case will have proceeded through discovery, dispositive motions, and trial based upon an erroneous premise, and all the resources expended would be wasted. If this Court resolves the Petition at this time, it will provide clarity in the District Court proceedings and likely result in disposition of the entire District Court action.

Therefore, granting the Motion to Stay will actually provide significant judicial economy. Virtually no resources will be expended during a stay; however, absent a stay, litigation will continue on the potentially erroneous theory that Nevada allows cross-jurisdictional tolling.

The object of the Petition, the vindication of NRS 11.500, will be defeated if

the Motion to Stay is not granted. And given that a stay will be efficient for all of the parties and courts, this Court should grant the Motion to Stay while it considers the Petition.

2. The Petition presents a substantial question of law and therefore is appropriate for review.

Mr. Haberkorn argues that “Petitioners cannot demonstrate a likelihood of success on the merits of their Writ Petition because the cross-jurisdictional tolling issue was only one basis for the lower Court’s decision to deny the Motion to Dismiss.” Response at 1:23-26. This argument is erroneous for two reasons.

First, “likelihood of success on the merits” is not the standard for the Petition; instead, the question is whether the Petition presents “a substantial case on the merits when a serious legal question is involved” *Hansen v. Eighth Judicial Dist. Court ex rel. County of Clark*, 6 P.3d 982, 987, 116 Nev. 650, 659 (Nev. 2000). The Petition clearly presents a substantial case on the merits regarding a serious legal question. The Petition argues (and Mr. Haberkorn does not deny) that cross-jurisdictional tolling conflicts with the text and legislative intent of NRS 11.500. Additionally, the Petition demonstrates that cross-jurisdictional tolling is a controversial doctrine, adopted by only a small minority of courts, and explicitly rejected by many courts in states whose legislative policy is similar to Nevada’s. Petition at 28-44. This Court should resolve this important legal question for the benefit of litigants, lawyers, and courts in Nevada.

Second, cross-jurisdictional tolling was not simply “one basis for the lower Court’s decision to deny the Motion to Dismiss.” *See* Response at 1:23-26. It was the primary basis. **Exhibit 2**, Transcript. Thus, removing the primary legal theory sustaining Mr. Haberkorn’s claims would, at a minimum, substantially clarify and simplify the case below.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioners’ Motion to Stay.

DATED this 1st day of May, 2017.

DICKINSON WRIGHT, PLLC

/s/ Kenneth K. Ching

JOHN P. DESMOND

Nevada Bar No. 5618

Email: jdesmond@dickinsonwright.com

JUSTIN J. BUSTOS

Nevada Bar No: 10320

Email: jbustos@dickinsonwright.com

KENNETH K. CHING

Nevada Bar No: 10542

Email: kching@dickinsonwright.com

100 West Liberty St. Suite 940

Reno, NV 89501

Tel: (775) 343-7500

Fax: (775) 786-0131

Attorneys for Petitioners

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), the undersigned, an employee of Dickinson Wright PLLC, hereby certifies that on the 1st day of May, 2017, she served a copy of the foregoing **PETITIONER ARCHON CORPORATION'S REPLY TO REAL PARTY IN INTEREST STEVEN HABERKORN'S RESPONSE TO NRAP 8 MOTION TO STAY PROCEEDINGS IN THE DISTRICT COURT** by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Reno, Nevada, said envelope addressed to:

Stephen R. Hackett, Esq.
Johnathon Fayeghi, Esq.
SKLAR WILLIAMS PLLC
410 South Rampart Blvd.
Suite 350
Las Vegas, NV 89145

Honorable Joe Hardy
Eighth Judicial District Court
Dept. XV
200 Lewis Avenue
Las Vegas, NV 89155

/s/ Whitney M. Jones
An Employee of DICKINSON WRIGHT PLLC

EXHIBIT TABLE

Exhibit	Description	Pages ¹
1	Declaration of Kenneth Ching	2
2	Transcript of Proceedings of Hearing on Defendants' Motion to Dismiss on June 22, 2016	25

¹ Exhibit page counts are exclusive of exhibit slip sheets.