

1 **THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 GRUPO FAMSA, S.A. de C.V.,

4 Petitioner and Defendant,

5 v.

6 THE EIGHTH JUDICIAL DISTRICT
7 COURT of the State of Nevada, in and
8 for the County of Clark, and THE
 HONORABLE ROB BARE, District
 Court Judge,

9 Respondents,

10 and

11
12 B.E. UNO, LLC,

13 Plaintiff and Real Party in Interest.

SUPREME COURT CASE NO.:

 Electronically Filed
 Aug 14 2015 04:31 p.m.
DISTRICT COURT CASE NO.:
A-14-706336-Tracie K. Lindeman
 Clerk of Supreme Court

**PETITION FOR WRIT OF
PROHIBITION**

14
15 **PETITION FOR WRIT OF PROHIBITION**

16 Pursuant to NRS 34.320, Petitioner Grupo FAMSA, S.A. de C.V. ("Grupo")
17 petitions this Court for the issuance of a peremptory Writ of Prohibition and/or other
18 relief prohibiting the district court from exercising jurisdiction over Grupo due to real
19 party in interest, B.E. Uno, LLC's insufficient service of process on Grupo, and
20 directing the district court to vacate its August 4, 2015 Order Denying Defendant
21 Grupo FAMSA's Motion for Order to Quash Service of Process and Setting Deadline
22 to File Answer to Complaint ("Order").

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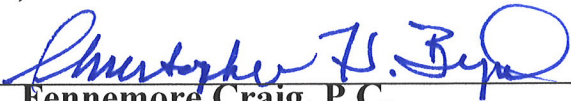
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1 This Petition is supported by the following Memorandum of Points and
2 Authorities and the Appendix of Record filed concurrently herewith.

3 DATED this 14th day of August, 2015.

4 
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1 **NRAP 26.1 DISCLOSURE**

2 The undersigned counsel of record certifies that the following are persons
3 and entities as described in NRAP 26.1(a) and must be disclosed:

4 There are no entities to be disclosed.

5 These representations are made in order that the judges of this court may
6 evaluate possible disqualification or recusal.

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

The issue is whether attempted service of process under the Hague Convention must satisfy due process. Judge Bare ruled that Plaintiff and Real Party in Interest, B.E. Uno, LLC (“Uno” or “Plaintiff”) properly effectuated service of a Summons and Complaint on Defendant and Petitioner Grupo FAMSA, S.A. de C.V. (“Grupo”), a large, publicly-traded Mexican company, by serving Claudia Paloma Martinez, a hostess/greeter at one of Grupo’s stores in Mexico. Judge Bare held as a matter of law that Uno’s service under the Hague Convention and Mexican law satisfied due process.

This legal conclusion regarding due process, however, is flawed because it relies upon a Certificate from the Mexican Court containing false information about the capacity of the person served. The Certificate indicates Grupo was served through Claudia Paloma Martinez, but incorrectly identifies her as an employee in Grupo’s legal department. Grupo presented two sworn affidavits that Claudia Paloma Martinez was a hostess greeter and not authorized to accept service of process for Grupo. Judge Bare, Uno and Uno’s Mexican counsel, who provided an opinion about the effectiveness of service, all relied upon false information to find compliance with Mexican law and the Hague Convention, and, thus conclude due process had been satisfied. Moreover, even upon valid proof of compliance with the Hague Convention, there must still be an independent analysis of due process, so that a foreign company, like Grupo, can ascertain whether it has been properly served and must respond in a foreign court.

Due process requires service upon a “representative so integrated with the organization that he will know what to do with the papers.” Serving a hostess/greeter of a retail conglomerate does not meet that standard and certainly does not satisfy due process. By analogy, would service on a greeter at Wal-Mart be

1 effective service on the Wal-Mart corporate entity? The answer is “No” and the
2 same answer applies, even though the service occurred in Mexico utilizing the
3 procedures of the Hague Convention. Grupo is entitled to the due process
4 protections afforded by the Constitution before being forced to defend itself in a
5 foreign jurisdiction.

6 As Grupo has no plain, adequate and speedy legal remedy if it is forced to
7 answer and participate in the litigation, Grupo asks this Court to issue a Writ of
8 Prohibition prohibiting the district court from exercising jurisdiction over Grupo, and
9 directing the district court to vacate the Order Denying Defendant Grupo FAMSA’s
10 Motion for Order to Quash Service of Process and Setting Deadline to File Answer to
11 Complaint (“Order”), which was filed August 4, 2015.

12 II.

13 ISSUE PRESENTED

14 Did Uno’s service of process on Grupo by leaving a copy of the summons and
15 complaint with a greeter at the front of Grupo’s store in Mexico satisfy
16 Constitutional due process?

17 III.

18 STATEMENT OF RELIEF SOUGHT

19 Petitioner respectfully requests that this Court issue a peremptory writ of
20 prohibition prohibiting the district court from exercising jurisdiction over Grupo and
21 directing the district court to vacate its Order.

22 IV.

23 STATEMENT OF FACTS

24 A. The Person Served On Behalf of Grupo Is a Hostess/Greeter at one of 25 Grupo’s Stores.

26 This is an action for breach of a lease by Famsa, Inc. App. 0001-0008. Grupo
27 is the guarantor of the lease. App. 0002. Uno claims to have served Grupo through
28 Claudia Paloma Martinez (“Ms. Martinez”). App. 0002. Grupo presented unrefuted

1 evidence, however, that Ms. Martinez is employed by Grupo as a greeter/hostess to
2 greet individuals coming into the store. App. 0009-0010, Amended Declaration of
3 Humberto Loza, ¶4. Equally undisputed is that Ms. Martinez was not authorized to
4 accept legal documents on Grupo's behalf. App. 0009-0010, Declaration of
5 Humberto Loza, ¶3.

6 In contrast, Uno offered a Certificate and the opinion of Mexican counsel that
7 service on Claudia Paloma Martinez complied with the Hague Convention and
8 Mexican law. App. 0049-0067 at 0058. This was the basis for the district court's
9 conclusion that service satisfied Mexican law, the Hague Convention and due
10 process. Aside from the fact that Mexican counsel's legal opinions are
11 inadmissible, the Certificate contains false information. According to Mexican
12 counsel, the Certificate is based upon a report from the process server. App. 0049-
13 0067 at 0058. The process server's report was not produced and the Certificate
14 contains false information about Ms. Martinez's status with Grupo. The Certificate
15 falsely identifies Ms. Martinez as an employee in Grupo's legal department. App.
16 0002. Therefore, the district court's finding that the service of process under the
17 Hague Convention and Mexican law satisfied due process has no basis in law or in
18 fact.

19 **B. Procedural Background.**

20 Uno served Ms. Martinez with the Summons and Complaint on March 17,
21 2015. App. 0028-0034. Grupo filed its Motion for Order to Quash Service of
22 Process ("Motion") on or about June 1, 2015, after Uno filed the Notice of Service.
23 App. 0037-0048. After briefing by the parties, the Court decided the motion based
24 upon the pleadings and the affidavits presented. The district court filed its order on
25 August 4, 2015. App. 0078-0081.

26 **C. The Order On Review.**

27 In its Order, the respondent district court held that Nevada law regarding
28 service of process is preempted by the Hague Convention and Mexican law in this

1 case. App. 0078-0081 at 0079. The district court further held that Uno properly
2 served Grupo under the laws of Mexico as well as the Hague Convention and that
3 such service efforts satisfied Constitutional standards of due process. App. 0078-
4 0081 at 0079.

5 V.

6 LEGAL ARGUMENT

7 A. Jurisdictional Statement.

8 This Court has original jurisdiction to consider this Petition and should
9 exercise its discretion to issue a Writ of Prohibition. *See* Nev. Const. art. 6, § 4. A
10 Writ of Prohibition may issue to “arrest[] the proceedings of any tribunal . . . when
11 such proceedings are without or in excess of the jurisdiction of such tribunal.”
12 NRS 34.320. A petition for writ of prohibition is the proper vehicle to challenge
13 the denial of a motion to quash service...” *Dahya v. Second Judicial Dist. Court ex*
14 *rel. Cnty. of Washoe*, 117 Nev. 208, 211, 19 P.3d 239, 241 (2001).

15 “When the district court acts without or in excess of its jurisdiction, a writ of
16 prohibition may issue to curb the extra jurisdictional act”. *Las Vegas Sands v.*
17 *Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Rep. 13, 319 P.3d 618, 621 (2014)(quoting
18 *Club Vista Fin. Servs., L.L.C. v. Eighth Judicial Dist. Court*, 128 Nev. Ad. Op. 21,
19 276 P.3d 246, 249 (2012)). A writ of prohibition may issue when, as here, “there is
20 not a plain, speedy and adequate remedy in the ordinary course of law.” NRS
21 34.330.

22 For the reasons set forth below, the Court should issue a peremptory writ of
23 prohibition and/or other appropriate relief prohibiting the district court from
24 exercising jurisdiction over Grupo due to insufficient service of process and
25 vacating its Order.

26 B. Standard Of Review.

27 In considering a writ petition, this Court gives deference to a district court's
28 factual determinations but reviews questions of law de novo. *Gonski v. Second*

1 *Judicial Dist. Court*, 126 Nev. Ad. Op. 51, 245 P.3d 1164, 1168 (2010).

2 **C. The District Court Erred In Denying Grupo's Motion to Quash**
3 **Service of Grupo Because Service Failed to Comply With Due**
4 **Process.**

5 **1. An Overview of the Hague Convention and its Applicability**
6 **Here.**

7 The Hague Convention on the Service Abroad of Judicial and Extrajudicial
8 Documents in Civil or Commercial Matters (the "Hague Convention") is designed
9 to provide "a mechanism by which a plaintiff authorized to serve process under the
10 laws of its country can effect service that will give appropriate notice to the party
11 being served and will not be objectionable to the country in which the party is
12 served." *Dahya, supra* at 211.

13 The Hague Convention applies "in all cases, in civil or commercial matters,
14 where there is occasion to transmit a judicial or extrajudicial document for service
15 abroad." *Id.* at 241-42; *see also* Hague Convention Art. 1. The United States and
16 Mexico are both parties to the Hague Convention. *McCarty v. Roos*, 2012 WL
17 6138313, at *10 (D. Nev. Dec. 7, 2012) ("The United States [and] Mexico . . . are
18 signatories to the Convention of Service Abroad of Judicial and Extrajudicial
19 Documents in Civil or Commercial Matters").

20 Since both the United States and Mexico are signatories to the Hague
21 Convention, service of process on a foreign defendant "must conform to the
22 requirements of the Hague Convention." *Unite Nat'l Ret. Fund v. Ariela, Inc.*, 643 F.
23 Supp. 2d 328, 333 (S.D.N.Y. 2008); *see also Volkswagenwerk Aktiengesellschaft v.*
24 *Schlunk*, 486 U.S. 694, 705 (1988)("[C]ompliance with the Hague Convention is
25 mandatory in all cases to which it applies").

26 One method of service under the Hague Convention is service through the
27 Central Authority of the receiving country. *Dahya, supra* at 212 ("service may go
28 through the central authority of the receiving country") (citing Hague Convention
Art. 5). Once the Central Authority determines that the request for service is valid it

1 must serve the document “by a method prescribed by its internal law for the service
2 of documents in domestic actions upon persons who are within its territory.” Hague
3 Convention Art. 5. The Hague Convention lays out very clearly the process which
4 the Central Authority must undertake in serving the documents. The Central
5 Authority must serve the documents and then “complete a Certificate detailing how,
6 where, and when service was made, or explaining why service did not occur.” *Unite*
7 *Nat'l Ret. Fund*, 643 F. Supp. 2d 328 at 333 (S.D.N.Y. 2008) (citing Hague
8 Convention Art. 6).

9 The problem in this case, however, is that the Certificate of the Central
10 Authority relied upon by Uno to prove service contained false information on its
11 face. Grupo does not dispute here that Uno attempted to follow the procedural rules
12 of the Hague Convention to serve Grupo, but the district court’s conclusion that the
13 service in this case satisfied Mexican law, the Hague Convention and thus due
14 process, was based upon false information in the Certificate presented from the
15 Mexican court.

16 **2. In Addition to Compliance with the Procedures of Hague**
17 **Convention, Service Must Also Satisfy Constitutional Due**
Process¹.

18 While the Hague Convention defines the procedures for service of process,
19 “the legal sufficiency of a formal delivery of documents must be measured against
20 some standard. The Hague Convention does not prescribe a standard, so we almost
21 necessarily must refer to the internal law of the forum state.” *Volkswagenwerk*
22 *Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 694-95 (1988).

23 In the United States, “service of process must comply with both constitutional
24 and statutory requirements.” *R. Griggs Grp. Ltd. v. Filanto Spa*, 920 F. Supp. 1100,
25 1103 (D. Nev. 1996). The United States Supreme Court has emphasized that “as a

26 ¹ This rule of law somewhat moots the district court’s holding that the Hague
27 Convention preempts Nevada law, as the court must, in any event, undertake a due
28 process analysis. The district court did so here, but erred in its analysis because of
the false information provided in the Mexican Court’s Certificate.

1 legal matter, the Due Process Clause requires every method of service to provide
2 ‘notice reasonably calculated, under all circumstances, to apprise interested parties
3 of the pendency of the action.” *Volkswagenwerk Aktiengesellschaft*, at 707.

4 Thus, in addition to complying with the Hague Convention procedural
5 requirements, service of process must also comport to the requirements of the
6 United States Constitution. *See Heredia v. Transp. S.A.S., Inc.*, 101 F. Supp. 2d 158,
7 162 (S.D.N.Y. 2000) (“in addition to the Hague Convention, service of process must
8 also satisfy constitutional due process”); *see also Ackermann v. Levine*, 788 F.2d
9 830, 838 (2d Cir. 1986) (“service of process must satisfy both the statute under
10 which service is effectuated and constitutional due process”).

11 To constitutionally effectuate service on a foreign corporation, service must be
12 made upon an agent, officer, or representative of that corporation. *See Tara*
13 *Minerals Corp. v. Carnegie Min. & Exploration, Inc.*, 2012 WL 760653, at *1 (D.
14 Nev. Mar. 7, 2012) (“service can be made ‘upon a representative so integrated with
15 the organization that he will know what to do with the papers”).

16 Generally, service is sufficient when made upon an individual who stands in
17 such a position as to render it fair, reasonable and just to imply the authority on his
18 part to receive service”) (quoting *Direct Mail Specialists, Inc. v. Eclat Computerized*
19 *Techs., Inc.*, 840 F.2d 685, 688 (9th Cir. 1988)); *see also Cont'l Convention & Show*
20 *Mgmt. v. Am. Broad. Co.*, 230 Minn. 217, 220, 41 N.W.2d 263, 265 (1950) (“in
21 order to maintain an action against a foreign corporation . . . service of process upon
22 it must be made upon its agent, officer, or representative here acting in such
23 capacity, so that notice to him will be deemed notice to the corporation”); *see also*
24 *Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Breeders' & Exhibitors' Ass'n*
25 *of Am.*, 344 F.2d 860, 866 (9th Cir. 1965) (“the rationale of all rules for service of
26 process on corporations is that service must be made on a representative so
27 integrated with the corporation sued as to make it a priori supposable that he will
28 realize his responsibilities and know what he should do with any legal papers served

on him”).

3. The District Court Erred in Finding That Uno’s Service of Process on Grupo Satisfied Constitutional Due Process.

While Grupo cannot dispute that Uno use of the Hague Convention was the proper procedure to serve Grupo through Mexico’s Central Authority, the issue for the district court was whether the service satisfied Constitutional due process. The district court erred in finding that Constitutional due process was satisfied because the Certificate from the Mexican court contained false information as discussed above and the person served had no authority to accept service.

Under the cited authorities, it is clear that Uno’s service of the Summons on Claudia Palomo Martinez did not satisfy Constitutional due process, as (1) Ms. Martinez was not so integrated with the organization that she would know what to do with the papers; (2) it is not fair, reasonable and just to imply the authority on Ms. Martinez’ part to receive service; (3) notice to Ms. Martinez could not be deemed notice to the corporation; and (4) notice to Ms. Martinez is not reasonably calculated, under all circumstances, to apprise Grupo of the pendency of the action.

In *R. Griggs Grp. Ltd.*, at 1102, a defendant foreign corporation filed a motion to quash alleging that the plaintiff had failed to serve an agent, officer, or representative of the defendant foreign corporation. The corporation filed an affidavit stating that the employee plaintiff served with process was not an officer, agent, or representative appointed to accept process on its behalf. *Id.* at 1102. Plaintiff in that case provided only the affidavit of the individual that served process, which stated that the person served was a “legal representative” of the defendant foreign corporation. *Id.* Given these facts, the court discussed plaintiff’s burden to establish that the person served had the necessary relationship with the defendant corporation:

Plaintiff has made no showing that [the individual served] was sufficiently integrated with the organization to render service upon him fair, reasonable and just. *Cf. Direct Mail Specialists, Inc. v. Eclat*

1 *Computerized Technologies, Inc.*, 840 F.2d 685 (9th Cir.1988). While
2 the process server may have thought he was serving a legal
3 representative of [defendant foreign corporation], no facts have been
4 presented to the court to support this assumption and that assessment
5 has no bearing on the court's determination. Plaintiff freely admits that
6 it has yet to conduct discovery and does not know the extent or nature
7 of [the individual served] involvement with [defendant foreign
8 corporation], yet asks the court to share its view that “considering the
9 circumstances surrounding the service, it is apparent that [the
10 individual served] represented [defendant foreign corporation] during
11 the WSA show” and that “clearly some formal relationship existed”
12 between them. This the court declines to do. The burden is on the
13 plaintiff to establish the propriety of the service. *Id.* at 1102-1103,
14 citing *Aetna Business Credit, Inc. v. Universal Decor & Interior
15 Design, Inc.* 635 F.2d 434, 435 (5th Cir.1981).

16 The Court in *R. Griggs* found service of process on this individual improper
17 because the plaintiff failed to show that the individual served was “an officer,
18 director, employee, managing agent, or general agent of [defendant foreign
19 corporation]” or that the individual served was an “agent authorized by appointment
20 or by law to receive service of process on behalf of [defendant foreign corporation]”.
21 *Id.* at 1102-03.

22 On the other hand, in *Burda Media, Inc. v. Viertel*, 417 F.3d 292, 303 (2d
23 Cir. 2005), the court found that service on a foreign corporation complied with both
24 the Hague Convention and the United States Constitution because “[plaintiff] had
25 proof that [the individual served] was a managing director of [Defendant] and
26 therefore served as its representative.”

27 Uno’s claim that due process was satisfied in this case depends exclusively
28 on the false Certificate from the Mexican court. Here, Ms. Martinez, who Uno
served, is indisputably a hostess or greeter at a Grupo’s store with no authority to
accept service on Grupo’s behalf. She is not an agent, officer, or representative so
integrated with Grupo that service of process upon her could sufficiently comport
with the Constitution.

Furthermore, Uno cannot substitute notice of the underlying lawsuit for due
process. Uno will undoubtedly argue that it is “fair” to force Grupo to appear and

1 defend regardless of whether service was proper, because Grupo's subsidiary,
2 Famsa, Inc., has already appeared in the case. Nevada law expressly provides that
3 actual notice of a suit is not an effective substitute for service of process. *Abreu v.*
4 *Gilmer*, 115 Nev. 308, 314, 985 P.2d 746, 750 (1999); see also, *Moulton v. Eugene*
5 *Burger Mgmt. Corp.*, No. 3:08-CV-00176-BES-VPC, 2009 WL 205053, at *3 (D.
6 Nev. Jan. 26, 2009). Parties obtain notice about lawsuits in many different ways;
7 but, that does not excuse the plaintiff from following the service rules and
8 complying with due process. In this case, Uno served a greeter/hostess in an effort
9 to serve Grupo. Grupo's knowledge of the litigation, however, does not excuse Uno
10 from effecting service that comports with Constitutional due process. Until Uno
11 accomplishes proper service the district court has no jurisdiction over Grupo.

12 VI.

13 CONCLUSION

14 The district court's analysis of due process based upon compliance with the
15 Hague Convention or Mexican law was flawed because it is based upon false
16 information provided to the Mexican Court about the employee status of Ms.
17 Martinez, the person receiving service. Ms. Martinez is a lower-level employee who
18 greets people as they enter into a retail store. While her position may be helpful to
19 Grupo's operations, she is not an officer, director or agent who would know what to
20 do if served legal process, and who could reasonably and fairly be adjudged to be
21 representing the company for purposes of legal process. Therefore, Grupo
22 respectfully requests that this Court issue a peremptory writ of prohibition
23 prohibiting the district court from exercising jurisdiction over Grupo and directing

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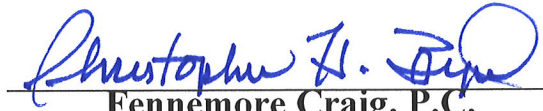
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1 the district court to enter an order quashing service of process as to Grupo.

2 DATED this 14th day of August, 2015.

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VII.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word version 2010 in Times New Roman with a font size of 14; or

☐ This brief has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☐ Proportionately spaced, has a typeface of 14 points or more, and contains _____ words; or

☐ Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

☒ Does not exceed 30 pages.

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3. I hereby certify that I am counsel of record for Petitioner-Defendant, Grupo FAMSA, S.A. de C.V. in this matter, that I have read the foregoing Petition for Writ of Prohibition and that to the best of my knowledge, information and belief, it is not frivolous or imposed for any improper purpose. I further certify that this Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P 28(e), which requires every assertion in the Petition regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be 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 this 14th day of August, 2015.


Christopher H. Byrd

VIII.

VERIFICATION

STATE OF NEVADA)
COUNTY OF CLARK) ss

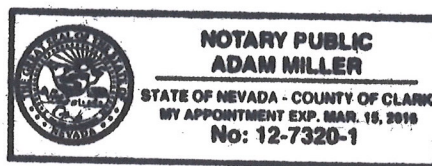
Under penalty of perjury, undersigned counsel declares that: he is an attorney of record for Petitioner Grupo FAMSA, S.A. de C.V.; he has read the foregoing Memorandum of Points and Authorities in support of their Petition for Writ of Prohibition and is familiar with its contents; the facts contained therein are within counsel's knowledge and are true of his own knowledge, except as to those matters which are stated upon information and belief, and as to those matters, he believes them to be true.

Undersigned counsel further declares that he makes this verification because Petitioner is a Mexican company, absent from the county where undersigned counsel resides.

Dated: August 14, 2015


Christopher H. Byrd

SUBSCRIBED AND SWORN
TO ME THIS 14th DAY OF
AUGUST, 2015



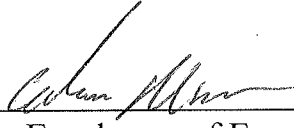

Notary Public

1 **CERTIFICATE OF SERVICE**

2 Pursuant to Nevada Rule of Appellate Procedure 25(c)(1), I hereby certify
3 that I am an employee of Fennemore Craig, P.C. and that on this 14th day of
4 August, 2015, I caused the foregoing EMERGENCY MOTION UNDER NRAP
5 27(e) TO STAY PROCEEDINGS AGAINST PETITIONER PENDING
6 RESOLUTION OF WRIT PETITION CHALLENGING SERVICE OF PROCESS
7 ON DUE PROCESS GROUND to be served by submission to the electronic filing
8 service for the Nevada Supreme Court upon the following to the email address on
9 file and by depositing same for mailing in the Unites States Mail, in a sealed
10 envelope addressed to:

11 Kelly J. Brinkman, Esq.
12 Goold Patterson
13 1975 Village Center Circle #140
14 Las Vegas, NV 89134
15 kbrinkman@gooldpatterson.com
16 *Attorneys for Plaintiff*

District Court Judge Rob Bare
Department 32
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155

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18 _____
19 An Employee of Fennemore Craig, P.C.

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