

EXHIBIT D


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1 **OPPM**
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11 **DISTRICT COURT**
12 **CLARK COUNTY, NEVADA**

13 B.E. UNO, LLC, a Nevada limited liability
14 company,

15 Plaintiff,

16 vs.

17 FAMSA, INC., a California corporation;
18 GRUPO FAMSA, S.A. de C.V., a Mexican
19 corporation,

20 Defendants.

CASE NO.: A-15-706336-C

DEPT. NO.: XXXII

**PLAINTIFF'S OPPOSITION TO
GRUPO FAMSA MOTION TO STAY
PROCEEDINGS PENDING OUTCOME
OF PETITION FOR WRIT OF
PROHIBITION; DECLARATION OF
KELLY J. BRINKMAN IN SUPPORT**

**Hearing Date: August 11, 2015
Hearing Time: 9:00 a.m.**

21 Plaintiff, B.E. Uno, LLC ("Plaintiff"), by and through its attorney, Kelly J. Brinkman,
22 hereby files its opposition to Defendant Grupo Famsa, S.A. de C.V.'s ("Grupo") Motion to Stay
23 Proceedings Relating to Grupo Famsa, S.A. de C.V. Pending Outcome of Petition for Writ of
24 Prohibition ("Motion to Stay"). This opposition is made and based upon the following Points
25 and Authorities and exhibits, Declaration in Support, pleadings, papers, and records on file, and
26 any oral argument presented at the time of the hearing on Grupo's Motion to Stay.

27 **I.**
28 **INTRODUCTION¹**

On July 14, 2015, this Court held a hearing on Grupo's Motion to Quash. At that hearing, this Court denied the Motion to Quash finding that Grupo had been properly served under both the Hague Convention as well as the internal laws of Mexico and the Grupo's due process rights were not violated. At the end of the hearing, Grupo, through its counsel, made an

¹ This Opposition is supported by the Declaration of Kelly Brinkman attached hereto.

1 oral motion to stay the ruling, which was denied. **TWENTY-FOUR DAYS LATER**, Grupo
2 filed this Motion to Stay. Leaving aside the issues with the lack of cause and notice, the Motion
3 to Stay must be denied. First and foremost, there is nothing to stay as Grupo has not yet filed
4 (and may never file) a writ of prohibition with the Nevada Supreme Court. Second, Grupo has
5 failed to satisfy the standards for a stay – an extraordinary remedy that should not be lightly
6 granted. Third, there is no prejudice to Grupo in having to defend itself in this case as Grupo’s
7 attorneys are the exact same attorneys already intimately involved in representing Famsa, Inc., a
8 company wholly-owned by Grupo. The issue in this case, damages, will be the same issue that
9 both Grupo and Famsa will have to defend. This issue does not change depending on who is a
10 defendant. On the other hand, great prejudice will be suffered by Plaintiff if a stay is granted as
11 Grupo is likely the only defendant with assets sufficient to cover any and all judgments awarded
12 Plaintiff. Fourth, this appears to be nothing more than another delay tactic by defendants in
13 avoiding paying damages following the breach of lease and guaranty. Fifth, to the extent this
14 Court is inclined to grant a stay, such stay should only issue upon the posting of a bond in the
15 amount of \$1,000,000.00. Finally, Grupo failed to comply with EDCR 2.26 and 8.06(a),
16 requiring denial of the Motion to Stay.

17 **II.**

18 **LEGAL ARGUMENT**

19 **A. There is Nothing to Stay as Grupo Has Yet to File Any Writ of Prohibition.**

20 Despite having 24-days to file a writ of prohibition, Grupo has yet to file such writ,
21 merely alleging that Grupo is “**preparing**” such a writ. Thus, **there is nothing to stay**. That is,
22 even if the standards for a stay could be satisfied – which Plaintiff disputes – Grupo has yet to
23 file such a writ and may never do so. Is this another stalling tactic by Grupo? Who knows?
24 Nevertheless, the “potential” filing of a writ cannot be grounds for the issuance of a stay.

25 **B. Grupo Has Failed to Satisfy the Standards for Issuance of a Stay.**

26 First, the issuance of a stay is an extraordinary remedy that should only be granted when
27 the circumstances are clearly warranted. Here, Grupo sat on its rights for 24-days following this
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1 Court's ruling denying its Motion to Quash. Further, Grupo has yet to file any writ. Grupo was
2 also granted, at their request, thirty (30) rather than the standard twenty (20) days to file an
3 answer. See NRCP 12(a). Additionally, service of the Summons and Complaint was made on
4 Grupo in Mexico on March 17, 2015, almost 5 months ago. Other than the Motion to Quash,
5 Grupo has yet to challenge service in Mexico or otherwise.

6 Despite Grupo's contention, prior to issuance of a stay, Grupo must still show some
7 likelihood of success. As stated in Fritz Hansen A/S v. Dist. Ct., 6 P.3d 982, 986, 116 Nev. 650
8 (2000), Grupo must "present a substantial case on the merits . . . and show that the balances of
9 equities weighs heavily in favor of granting the stay." Here, Grupo has not demonstrated that its
10 writ (not yet filed) demonstrates a substantial legal question or that equities weigh in its favor.²

11 Grupo's argument is that its due process rights have been violated. In essence, the
12 question is whether it is reasonable to require Grupo to defend a suit in Nevada following the
13 breach of lease and guaranty for a Nevada commercial premises where Famsa and Grupo elected
14 to do business (and then elected to abandon the leased premises and breach the lease and
15 guaranty)? As previously briefed, Grupo's due process rights have not been violated. Due
16 Process simply requires notice reasonably calculated to apprise interested parties of the pendency
17 of the action. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). There is no
18 dispute that Grupo has notice of this proceeding (as well as the prior proceeding, in which they
19 participated in a formal mediation with their wholly-owned subsidiary). Plaintiff has made
20 efforts to avoid taking a default against Grupo and has requested that they actively participate in
21 this case. Plaintiff requested that Grupo's attorneys agree to accept service on behalf of Grupo –
22 which was denied. Thus, Plaintiff was forced to go through the time-consuming and expensive
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25 ² The service provisions of the Hague Convention take precedence over conflicting Nevada procedural
26 rules. Article VI of the United States Constitution establishes that treaties are the supreme law of the land, binding
27 upon states. The Hague Convention is recognized with status equivalent to a treaty. See Volkswagenwerk
28 Aktiengesellschaft, 443 So.2d 880 (Ala. 1983). Thus, when state service of process procedures have been found to
be in direct conflict with the Hague Convention, courts have been compelled to recognize the supremacy of the
Convention's provisions. See generally Ackermann v. Levine, 788 F.2d 830, 840-41 (2d Cir. 1986). Further, the
Central Authority's return of a Certificate of Service is *prima facie* evidence that service was made in compliance
with Mexican law. Unite Nat'l Retirement Fund v. Ariela, Inc., 643 F.Supp. 2d 328, 334 (S.D.N.Y. 2008).

1 process of serving Grupo in Mexico pursuant to the Hague Convention and the internal laws of
2 Mexico. Due process merely requires notice and the opportunity to be heard. These protections
3 have been satisfied in this case. Grupo's continual efforts for delay must be stopped.

4 In Hansen, Hansen *filed* a writ of prohibition challenging the district court order that
5 denied its motion to quash service of process for lack of personal jurisdiction. Hansen, 6 P.3d
6 982, 983, 116 Nev. 650 (2000). Hansen then filed a motion for stay of the district court
7 proceedings pending resolution of the petition. The Nevada Supreme Court held that a stay was
8 not warranted. Id. Applying the factors under NRAP 8(c), the Supreme Court held that
9 participating in the proceedings and incurring litigation expenses are neither irreparable nor
10 serious harm. Further, the Court found that Hansen had not shown it was likely to prevail on the
11 merits since Hansen's argument was contrary to well-established case law and that such
12 extraordinary relief was unwarranted. Id. at 987. This case is no different and, in fact, even
13 more deserving of a denial of a stay given that a writ of prohibition has not yet been filed. The
14 fact that a portion of this case discussed a general and special appearance does not mean that this
15 case, which is binding on this Court, is distinguishable or irrelevant.

16
17 C. There is No Harm to Grupo by Denying the Stay Given that Damages Are
18 Already Being Litigated by the Same Set of Attorneys for Famsa.

19 The ultimate issue in this case is the amount of damages Plaintiff is entitled to following
20 Famsa and Grupo's breach of lease and guaranty (and Plaintiff's mitigation efforts). Given that
21 Famsa and Grupo have identical attorneys and the damage issue is the same as to both Famsa, as
22 tenant, and Grupo, as guarantor, there is little or no harm to Grupo in having this litigation
23 proceed without a stay. Grupo is not subject to any special or additional defense separate and
24 apart from Famsa. Further, Nevada courts have already held that "litigation expenses, while
25 potentially substantial, are neither irreparable nor serious." Hansen, 6 P.3d at 986-87. See also
26 Wisconsin Gas Co. v. F.E.R.C., 758 F.2d 669, 674 (D.C. Cir. 1985) ("[m]ere injuries, however
27 substantial, in terms of money, time and energy necessarily expended in the absence of a stay are
28 not enough" to show irreparable harm).

1 Further, and despite Grupo's contention, Plaintiff will be harmed if a stay is granted as it
2 still has yet to be compensated following Famsa and Grupo's breach of lease and guaranty (no
3 rent having been paid since November 2012 – close to three years). Famsa has indicated on
4 numerous occasions that all of their assets are encumbered by a loan made by Grupo. Thus,
5 Plaintiff's only real chance of recovery in this matter is to obtain a judgment against Grupo.
6 Thus, any stay of the proceedings against Grupo will frustrate Plaintiff's efforts to pursue Grupo
7 for its obligations under the Guaranty and following Famsa's breach of lease.

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9 D. Even if Grupo Can Somehow Claim it Satisfied the Standards for a Stay, Such
Stay Cannot Issue Unless a Bond is Posted.

10 Even if Grupo could somehow claim a stay was appropriate, such a stay should not issue
11 unless and until Grupo posts a bond with this Court. Pursuant to NRAP 8(2)(E), the filing of a
12 bond is appropriate whenever a stay may be issued. Although Plaintiff disputes that a stay
13 should issue, if this Court is somehow inclined to grant any such stay, Plaintiff requests that a
14 bond in the minimum amount of \$1,000,000.00 be required as a condition to the granting of any
15 stay. This amount is based on the Judgment obtained in the prior litigation (Case No. A-12-
16 672870-C) in the amount of \$748,394.19 plus attorney fees (\$126,712.50) and costs (\$7,577.02)
17 awarded for a total of \$882,683.71. See Judgment and Order on Attorney on Attorney Fees and
18 Costs attached hereto as Exhibit A, which Plaintiff requests this Court take judicial notice. This
19 Judgment, all of which remains outstanding, was awarded in April of 2014, and continues to bear
20 interest. Thus, a bond in the amount of \$1,000,000.00 is reasonable.

21 E. A Stay Cannot Issue Given Grupo's Failure to Comply with EDCR 2.26 and 8.06.

22 First off, the order shortening time should never have been granted given that Grupo is
23 the party that created the circumstances requiring that this matter be heard on shortened time.
24 That is, for some unknown reason, Grupo waited **24-days** before filing its Motion for Stay (and
25 has yet to file any writ of prohibition). Thus, what "good cause" did Grupo have to justify this
26 matter being heard on shortened time under EDCR 2.26? Further, EDCR 2.26 requires that if an
27 order shortening time "*shortens the notice of a hearing to less than 10 days,*" such order "*may*
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1 *not be served by mail.*” See EDCR 2.26 (“An order which shortens the notice of a hearing to less
2 than 10 days may not be served by mail.”). Further, EDCR 8.06(a) provides that electronic
3 service is the equivalent of mail service – requiring three (3) calendar days to be added. See
4 EDCR 8.06(a) (“ . . . whenever a party has the right or is required to do some act or file same
5 within the prescribed period after service of the notice or other paper, other than process, and the
6 notice or paper is electronically served upon the party, three (3) calendar days must be added to
7 the prescribed period.”). As the filing of this Opposition, Grupo has yet to hand-deliver Plaintiff
8 with the Motion to Stay. Plaintiff only learned about this Motion to Stay when it received a
9 service notification email from the electronic-court-filing-system on Friday afternoon (August
10 7th). Given that the hearing on the Motion to Stay is set for Tuesday, August 11, 2015 (less than
11 10 days), Grupo was required to serve the Motion to Stay on Plaintiff via hand-delivery.
12 Therefore, Grupo has failed to comply with both EDCR 2.26 – “good cause” to justify
13 shortening the time for hearing this Motion to Stay, as well as EDCR 8.06(a) by properly serving
14 this Motion to Stay on Plaintiff. Additionally, as of the filing of this Opposition, a review of the
15 Court Docket fails to show that Grupo even filed a separate Ex Parte Motion for Order
16 Shortening Time relating to its Motion to Stay. Instead, Grupo apparently created some sort of
17 hybrid motion, ex parte application, affidavit and order (none of which were properly and timely
18 served on Plaintiff). See Court Docket attached hereto as Exhibit B.

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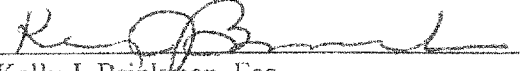
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**IV.
CONCLUSION**

Given that: (a) there is no actual writ of prohibition filed; (b) the standards for a stay have not be met; (c) there is no harm to Grupo in defending this matter as the damage issue is already being defended by the same set of attorneys representing Famsa (its wholly owned entity); and (d) service of the Motion to Stay has not been properly and timely made, Plaintiff requests that Grupo's Motion to Stay be denied. If, however, this Court is inclined to grant a stay, Plaintiff requests that a bond in the amount of \$1,000,000.00 be required before any such stay may be issued.

DATED this 10th day of August, 2015.

GOOLD PATTERSON

By: 
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Attorneys for Plaintiff

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1 agree to accept service on behalf of Grupo – which was denied. Thus, Plaintiff was forced to go
2 through the time-consuming and expensive process of serving Grupo in Mexico pursuant to the
3 Hague Convention and the internal laws of Mexico.


4 10. Neither Famsa nor Grupo have paid rent (or any amounts on the prior Judgment)
5 to Plaintiff since November 2012 (the last time Famsa paid rent to Plaintiff). Famsa's
6 representative has informed Plaintiff that all of Famsa's assets are encumbered by a loan made
7 by Grupo. Plaintiff's only real chance of recovery in this matter is to obtain a judgment against
8 Grupo. Thus, any stay of the proceedings against Grupo will frustrate Plaintiff's efforts to
9 pursue Grupo for its obligations under the Guaranty and following Famsa's breach of lease.

10 11. In the prior litigation with Famsa over the breach of lease and guaranty (Case No.
11 A-12-672870-C), Plaintiff was awarded a Judgment in the amount of \$748,394.19 plus attorney
12 fees (\$126,712.50) and costs (\$7,577.02) for a total of \$882,683.71.

13 12. Grupo failed to comply with EDCR 2.26 and 8.06(a). As of the filing of this
14 Opposition, Plaintiff has yet to been properly served with the Motion to Stay, only receiving an
15 electronic notification through the court electronic service on Friday afternoon, August 7, 2015 –
16 for a hearing scheduled for Tuesday morning, August 11, 2015. A hand-deliver of the Motion to
17 Stay has yet to be served on this office on behalf of Plaintiff.

18 I declare under the penalty of perjury that the foregoing is true and correct.

19 DATED this 10th day of August, 2015.

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22 Kelly J. Brinkman
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of the law firm of Goold Patterson, and on the 10th
3 day of August, 2015, I served the foregoing PLAINTIFF'S OPPOSITION TO DEFENDANT
4 GRUPO FAMSA, S.A. de C.V.'s MOTION TO STAY PROCEEDINGS RELATING TO
5 GRUPO FAMSA, S.A. DE C.V. PENDING OUTCOME OF PETITION FOR WRIT OF
6 PROHIBITION; DECLARATION OF KELLY J. BRINKMAN IN SUPPORT by electronic
7 mail and facsimile, addressed as follows:

8 Christopher Byrd, Esq.
9 FENNEMORE CRAIG JONES VARGAS
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14 LEVINSON ARSHONSKY & KURTZ, LLP
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EXHIBIT A

**JUDGMENT
AND
AWARD OF ATTORNEY FEES AND COSTS**

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LEVINSON ARSHONSKY & KURTZ, LLP

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DISTRICT COURT DEPT. XIII

1 JUDGE
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17 Attorneys for Defendant FAMSA, INC.

10 DISTRICT COURT
11 CLARK COUNTY, NEVADA

13 B.E. UNO, LLC, a Nevada limited liability
14 company,

14 Plaintiff,

15 vs.

16 FAMSA, INC., a California corporation;
17 GRUPO FAMSA, S.A. DE C.V., a Mexican
18 corporation.

18 Defendants.

CASE NO. A-12-672870-C

DEPT. NO. XIII

JUDGMENT

20 This matter having come before the Court on a non-jury Trial on February 25 and 26, 2014
21 (the "Trial"), and the Court having entered Findings of Fact and Conclusions of Law, and good
22 cause appearing.

23 IT IS ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of
24 Plaintiff and against Defendant FAMSA, Inc., in the principal amount of Seven hundred forty-^{eight}
25 thousand ^{two} ^{ninety-four} ^{nineteen} ^{748,394.19} ~~eight~~ hundred ~~sixty-seven~~ dollars and ~~sixteen~~ cents (\$~~742,867.16~~), which amount shall bear
26 interest at the contract rate until satisfied in full; and

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff shall recover its costs and reasonable attorneys' fees, the amount of which shall be determined pursuant to separate motion.

DATED this 27th day of April 2014.

DISTRICT COURT JUDGE

Submitted by:

FENNEMORE CRAIG JONES VARGAS

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9 *Attorneys for Defendant FAMSA, INC.*

10 **DISTRICT COURT**
11 **CLARK COUNTY, NEVADA**

12
13 B.E. UNO, LLC, a Nevada limited liability
company,

14 Plaintiff,

15 vs.

16 FAMSA, INC., a California corporation;
17 GRUPO FAMSA, S.A. DE C.V., a Mexican
corporation,

18 Defendants.
19

CASE NO. A-12-672870-C

DEPT. NO. XIII

ORDER

20 THIS MATTER having come before the Court on June 5, 2014 for hearing on Defendant FAMSA, Inc.'s
21 Motion to Retax and Settle Costs, and on Plaintiff's Motion for Award of Attorneys' Fees, Costs, and
22 Disbursements, Plaintiff appearing by and through Kelly J. Brinkman, Esq. of the firm of Goold Patterson, and
23 said Defendant appearing by and through Christopher H. Byrd, Esq. of the firm of Fennemore Craig Jones Vargas,
24 and the Court having heard argument of counsel and having then taken the matter under advisement for further
25 consideration, and being now fully advised in the premises, ² and having rendered its Decision of June 30, 2014
26 hereby finds as follows:
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LEVINSON ARSHONSKY & KURTZ, LLP

DISTRICT COURT DEPT#13

JUL 10 2014

A. Defendant's Motion re Costs

The Court is persuaded by Defendant's Motion regarding the following costs and, it is GRANTED IN PART as to the same:

Los Angeles Superior Court filing Fees in the amount of \$110.09 are not properly taxable herein;

• Mediation costs in the amount of \$2,175.75 are not properly taxable herein; and

• Expert witness fee is reduced from \$12,300.00 to \$1,500.00 per NRS 18.005(5).

In all other respects, the Motion is DENIED IN PART.

B. Plaintiff's Motion re Attorneys' Fees, Costs, and Disbursements

The Motion is GRANTED IN PART to the extent of the costs that the Court has allowed to remain in A. above, but DENIED IN PART as to those which have not been allowed in A. above.

Regarding attorneys' fees, the Court is persuaded by Defendant's points as to the attorneys' fees sought pertaining to the Fullerton firm, the Buckner firm, and the Ashworth firm in the total amount of \$12,772.25, and the Motion is DENIED IN PART as to those fees. To the extent that any of those fees may have previously been allowed in the Court's Order of September 27, 2013, their allowance therein is rescinded.

On the other hand, in giving due application to the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), the Court is persuaded by Plaintiff's position regarding the remainder of the attorneys' fees which have been incurred with the firm of Gould Patterson, \$126,712.50, and the Motion is GRANTED IN PART as to those fees. The fact that the Court did not adopt Plaintiff's positions on the acceleration and anticipatory repudiation issues after trial does not obviate the significance of those interesting issues going into trial and the place that they took in trying the case. The same is true of the time and effort of Gould Patterson in endeavoring to set the case up against Defendant's parent, Grupo Famsa.

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Based upon the foregoing the Court concludes:

1. Plaintiff shall recover costs from Defendant in the amount of \$7,577.02.
2. Plaintiff shall recover attorneys' fees from Defendant in the amount of \$126,712.50.

IT IS HEREBY ORDERED.


DATED this 22nd day of July, 2014.


DISTRICT COURT JUDGE

Submitted by:

FENNEMORE CRAIG JONES VARGAS

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EXHIBIT B

COURT DOCKET
A-14-706336-C

REGISTER OF ACTIONS

CASE NO. A-14-706336-C

BE Uno LLC, Plaintiff(s) vs. FAMSA Inc, Defendant(s)

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Case Type: Other Contract

Date Filed: 08/29/2014

Location: Department 32

Cross-Reference Case Number: A706336

PARTY INFORMATION

Defendant	FAMSA Inc	Lead Attorneys Christopher H. Byrd Retained 702-692-8000(W)
Defendant	Grupo Famsa SA de CV	
Plaintiff	BE Uno LLC	Kelly J. Brinkman Retained 7026997500(W)

EVENTS & ORDERS OF THE COURT

	OTHER EVENTS AND HEARINGS
08/29/2014	Case Opened
08/29/2014	Complaint Complaint
09/04/2014	Initial Appearance Fee Disclosure Initial Appearance Fee Disclosure (NRS Chapter 19)
12/03/2014	Ex Parte Application to Extend Time for Service Ex Parte Application for Extension of Time in which to Effectuate Service upon Grupo Famsa, S.A. de C.V.; Declaration of Kelly J. Brinkman and Celso Najera in Support
12/11/2014	Order Extending Time to Serve Order on Ex Parte Application for Extension of Time in Which to Effectuate Service Upon Grupo Famsa, S.A. de C.V.
12/11/2014	Notice of Entry of Order Notice of Entry of Order for Extension of Time in Which to Effectuate Service Upon Grupo Famsa, S.A. de C.V.
12/29/2014	Summons Issued Summons - Civil
01/07/2015	Answer to Complaint Defendant FAMSA, Inc.'s Answer to Complaint of Plaintiff B.E. Uno, LLC
01/07/2015	Initial Appearance Fee Disclosure Initial Appearance Fee Disclosure
01/23/2015	Consent Consent to Service by Electronic Means
02/04/2015	Notice of Early Case Conference
03/05/2015	Joint Case Conference Report Joint Case Conference Report
03/27/2015	Scheduling Order Scheduling Order
04/08/2015	Order Setting Civil Non-Jury Trial Order Setting Civil Non-Jury Trial, Pre-Trial/Calendar Call
05/21/2015	Certificate of Service Certificate of Service Re: Defendant Grupo Famsa, S.A. de C.V.

05/21/2015	Three Day Notice of Intent to Default <i>Three (3) Day Notice of Intent to Take Default Upon Defendant Grupo Famsa, S.A. de C.V.</i>
06/01/2015	Motion to Quash <i>Defendant Group FAMSA, S.A., DE C.V.'s Motion to Quash Service of Process</i>
06/02/2015	Certificate of Service <i>Certificate of Service</i>
06/16/2015	Opposition to Motion <i>Plaintiff's Opposition to Defendant Grupo Famsa, S.A. de C.V.'s Motion to Quash Service of Process; Declaration of Kelly J. Brinkman in Support; Declaration of Celso Njera Gonzalez in Support</i>
06/29/2015	Stipulation and Order to Extend Discovery Deadlines <i>Stipulation and Order to Extend Initial and Rebuttal Expert Disclosures [First Request]</i>
06/29/2015	Notice of Entry of Stipulation and Order <i>Notice of Entry of Stipulation and Order</i>
07/02/2015	Affidavit of Service <i>Affidavit of Service</i>
07/07/2015	Reply in Support <i>Reply in Support of Defendant Grupo FAMSA, S.A., DE C.V.'s Motion to Quash Service of Process</i>
07/14/2015	Motion to Quash Service (9:00 AM) (Judicial Officer Bare, Rob) <i>Defendant Group FAMSA, S.A., DE C.V.'s Motion to Quash Service of Process</i> <u>Parties Present</u> <u>Minutes</u> Result: Denied
07/20/2015	Supplemental List of Documents <i>Plaintiff's First Supplemental Production of Documents Pursuant to N.R.C.P. 16.1</i>
07/21/2015	Stipulation and Order <i>Stipulation and Order to Extend Initial and Rebuttal Expert Disclosures [Second Request]</i>
07/21/2015	Notice of Entry of Stipulation and Order <i>Notice of Entry of Stipulation and Order</i>
08/04/2015	Order Denying Motion <i>Order Denying Defendant Grupo Famsa's Motion for Order to Quash Service of Process and Setting Deadline to File an Answer to Complaint</i>
08/05/2015	Notice of Entry of Order <i>Notice of Entry of Order</i>
08/07/2015	Motion to Stay <i>Defendant Grupo Famsa, S.A. De C.V.'s Motion to Stay all Proceedings Relating to Grupo Famsa, S.A. De CV Pending Outcome of Petition for Writ of Prohibition on an Order Shortening Time</i>
08/11/2015	Motion to Stay (9:00 AM) (Judicial Officer Bare, Rob) <i>Defendant Grupo Famsa, S.A. De C.V.'s Motion to Stay all Proceedings Relating to Grupo Famsa, S.A. De CV Pending Outcome of Petition for Writ of Prohibition on an Order Shortening Time</i>
12/17/2015	Pretrial/Calendar Call (11:00 AM) (Judicial Officer Bare, Rob)
01/04/2016	Bench Trial (9:00 AM) (Judicial Officer Bare, Rob)

FINANCIAL INFORMATION

| Defendant FAMSA Inc

	Total Financial Assessment			251.00
	Total Payments and Credits			251.00
	Balance Due as of 08/10/2015			0.00
01/07/2015	Transaction Assessment			226.50
01/07/2015	Wiznet	Receipt # 2015-01591-CCCLK	FAMSA Inc	(223.00)
01/07/2015	Wiznet	Receipt # 2015-01592-CCCLK	FAMSA Inc	(3.50)
01/07/2015	Transaction Assessment			3.50
01/07/2015	Wiznet	Receipt # 2015-01595-CCCLK	FAMSA Inc	(3.50)
06/29/2015	Transaction Assessment			3.50
06/29/2015	Wiznet	Receipt # 2015-67882-CCCLK	FAMSA Inc	(3.50)
06/29/2015	Transaction Assessment			3.50
06/29/2015	Wiznet	Receipt # 2015-67978-CCCLK	FAMSA Inc	(3.50)
07/07/2015	Transaction Assessment			3.50
07/07/2015	Wiznet	Receipt # 2015-70798-CCCLK	FAMSA Inc	(3.50)
07/21/2015	Transaction Assessment			3.50
07/21/2015	Wiznet	Receipt # 2015-76493-CCCLK	FAMSA Inc	(3.50)
07/21/2015	Transaction Assessment			3.50
07/21/2015	Wiznet	Receipt # 2015-76595-CCCLK	FAMSA Inc	(3.50)
08/07/2015	Transaction Assessment			3.50
08/07/2015	Wiznet	Receipt # 2015-83261-CCCLK	FAMSA Inc	(3.50)
	Defendant Grupo Famsa SA de CV			
	Total Financial Assessment			3.50
	Total Payments and Credits			3.50
	Balance Due as of 08/10/2015			0.00
06/01/2015	Transaction Assessment			3.50
06/01/2015	Wiznet	Receipt # 2015-57264-CCCLK	Grupo Famsa SA de CV	(3.50)
	Plaintiff BE Uno LLC			
	Total Financial Assessment			315.50
	Total Payments and Credits			315.50
	Balance Due as of 08/10/2015			0.00
01/26/2015	Transaction Assessment			3.50
01/26/2015	Wiznet	Receipt # 2015-08079-CCCLK	BE Uno LLC	(3.50)
03/05/2015	Transaction Assessment			3.50
03/05/2015	Wiznet	Receipt # 2015-23103-CCCLK	BE Uno LLC	(3.50)
05/22/2015	Transaction Assessment			3.50
05/22/2015	Wiznet	Receipt # 2015-54015-CCCLK	BE Uno LLC	(3.50)
06/16/2015	Transaction Assessment			3.50
06/16/2015	Wiznet	Receipt # 2015-63096-CCCLK	BE Uno LLC	(3.50)
07/21/2015	Transaction Assessment			3.50
07/21/2015	Wiznet	Receipt # 2015-76292-CCCLK	BE Uno LLC	(3.50)
08/04/2015	Transaction Assessment			3.50
08/04/2015	Wiznet	Receipt # 2015-81895-CCCLK	BE Uno LLC	(3.50)
08/05/2015	Transaction Assessment			3.50
08/05/2015	Wiznet	Receipt # 2015-82085-CCCLK	BE Uno LLC	(3.50)
08/29/2014	Transaction Assessment			273.50
08/29/2014	Wiznet	Receipt # 2014-99835-CCCLK	BE Uno LLC	(270.00)
08/29/2014	Wiznet	Receipt # 2014-99836-CCCLK	BE Uno LLC	(3.50)
09/04/2014	Transaction Assessment			3.50
09/04/2014	Wiznet	Receipt # 2014-101422-CCCLK	BE Uno LLC	(3.50)
12/03/2014	Transaction Assessment			3.50
12/03/2014	Wiznet	Receipt # 2014-135027-CCCLK	BE Uno LLC	(3.50)
12/11/2014	Transaction Assessment			3.50
12/11/2014	Wiznet	Receipt # 2014-137864-CCCLK	BE Uno LLC	(3.50)
12/11/2014	Transaction Assessment			3.50
12/11/2014	Wiznet	Receipt # 2014-138189-CCCLK	BE Uno LLC	(3.50)
12/29/2014	Transaction Assessment			3.50
12/29/2014	Wiznet	Receipt # 2014-143521-CCCLK	BE Uno LLC	(3.50)

EXHIBIT C

BONANZA EAST SHOPPING CENTER

SHOPPING CENTER LEASE

BY AND BETWEEN

B.E. UNO, LLC, a Nevada limited liability company,

AS LANDLORD

AND

FAMSA, INC., a California corporation,

AS TENANT

BONANZA EAST SHOPPING CENTER

SHOPPING CENTER LEASE

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ADDENDUM

GUARANTY

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EXHIBIT A	PARCEL MAP
EXHIBIT A-1	SITE PLAN
EXHIBIT B	COMMENCEMENT DATE
EXHIBIT C	DESCRIPTION OF WORK (APPROVED CONSTRUCTION PLANS)
EXHIBIT D	RULES AND REGULATIONS
EXHIBIT E	SUBORDINATION, NONDISTURBANCE AND ATTORNMENT AGREEMENT
EXHIBIT F	MEMORANDUM OF LEASE
EXHIBIT G	TENANT'S PROMOTIONAL EVENTS
EXHIBIT H	SIGN CRITERIA

GUARANTY

GUARANTY OF LEASE dated June 3, 2005, by and between B.E. UNO, LLC, a Nevada limited liability company, as Landlord and FAMSA, INC., a California corporation, d/b/a FAMSA, as Tenant.

FOR VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, the undersigned Guarantor hereby unconditionally and irrevocably guarantees the full and faithful performance by Tenant of all the terms, covenants and conditions of the above referenced Lease. This Guaranty shall remain in full force and effect regardless of any amendment, modification, extension, compromise or release of any term, covenant or condition of the Lease or of any party thereto, as the case may be.

Guarantor waives any right or claim or rights to cause a marshalling of Tenant's assets or to proceed against Guarantor or Tenant or any security for the Lease or this Guaranty in any particular order and Guarantor agrees that any payments or performance required to be made hereunder shall become due upon demand in accordance with the terms hereof immediately upon the happening of a default (which remains uncured after any applicable notice and cure periods) under the Lease whether or not Guarantor has been given notice of such default, and Guarantor hereby expressly waives and relinquishes all rights and remedies accorded by applicable law to guarantors, including, but not limited to, notice of demand, notice of default, any failure to pursue Tenant or its property, any defense arising out of the absence, impairment or loss of any right of reimbursement or subrogation and any defense arising by reason of any defense of Tenant or by reason of the cessation of the liability of Tenant or any defense by reason of the assertion by Landlord against Tenant of any of the rights or remedies reserved to Landlord pursuant to the provisions of the Lease, or by reason of summary or other proceedings against Tenant.

No delay on Landlord's part in exercising any right, power or privilege under this Guaranty or any other document executed in connection herewith shall operate as a waiver of any such privilege, power or right, unless Guarantor is prejudiced thereby.

Guarantor agrees that any judgment rendered against Tenant for monies or performance due Landlord shall in every and all aspects bind and be conclusive against Guarantor to the same extent as if Guarantor had appeared in any such proceedings and judgment herein had been rendered against Guarantor.

So long as Tenant has any remaining obligations under the Lease, Guarantor subordinates to Tenant's obligations to Landlord all indebtedness of Tenant to Guarantor, whether now existing or hereafter contracted, whether direct or indirect, contingent or determined. With respect to any such indebtedness of Tenant to Guarantor, Guarantor further agrees to make no claim therefor until any and all obligations of Tenant to Landlord shall have been discharged in full and Guarantor further covenants and agrees not to assign all or any part of such indebtedness while this Guaranty remains in effect.

Guarantor shall provide Landlord with annual consolidated financial statements, which Landlord agrees to hold in strict confidence and subject to confidentiality requested by Guarantor.

The terms, covenants and conditions contained in this Guaranty shall inure to the benefit of the successors and assigns of Landlord.

If any term, covenant or condition of this Guaranty, or any application thereof, should be held by a court of competent jurisdiction to be invalid, void or unenforceable, all terms, covenants and conditions of this Guaranty, and all applications thereof not held invalid, void or unenforceable shall continue in full force and effect and shall in no way be affected, impaired or invalidated thereby.

In this Guaranty, whenever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

This Guaranty shall be construed in accordance with its intent and without regard to any presumption or other rule requiring construction against the party causing the same to be drafted.

The laws of the State of Nevada shall govern the validity, construction, performance and effect of this Guaranty.

Should Guarantor consist of more than one person or entity, then, in such event, all such persons and entities shall be jointly and severally liable as Guarantor hereunder. In any action brought by Landlord to enforce any of its rights under or arising from this Guaranty, Landlord shall be entitled to receive its costs and legal expenses including reasonable attorneys' fees, whether such action is prosecuted to judgment or not.

Any other provision of this Guaranty to the contrary notwithstanding, following an assignment and assumption of the Lease to a person or entity other than an affiliate of Tenant, the following provisions shall apply:

(a) No amendment, modification, or supplement to the Lease entered into after the assignment shall be binding on Guarantor without Guarantor's prior written approval, in Guarantor's reasonable discretion; and

(b) Following such assignment, Landlord shall give Guarantor notice of any default by the then tenant under the Lease of which Landlord has knowledge, simultaneously upon giving such notice of default to such tenant. If the default is for failure to pay rent or any other sum which the Lease requires such tenant to pay, Guarantor shall have ten (10) days from the receipt of such notice to cure the default before Landlord can terminate the Lease, re-enter, or exercise any other remedy for default. If the default is of any other type, Guarantor shall have ten (10) days beyond the date by which such tenant could reasonably have cured the default to undertake to cure the default before

Landlord can terminate the Lease, re-enter, or exercise any other remedy for default. Notwithstanding anything herein to the contrary (including without limitation, any time limits for cure of default set forth herein), Landlord shall not terminate the Lease, re-enter, or exercise any other remedy for default (unless the default is for failure to pay rent or any other sum which the Lease requires such tenant to pay), if (i) Guarantor is making good faith efforts to correct such default or (ii) Guarantor is proceeding in a timely manner to foreclose a deed of trust in the Lease granted by such tenant to Guarantor.

Dated this 31 day of JUNE, 2005.

GUARANTOR:

GRUPO FAMSA, S.A. DE C.V.,
a Mexican corporation

By: 
Luis Gerardo Villareal,
Chief Financial Officer

EXHIBIT B

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CLERK OF THE COURT

LEVINSON ARSHONSKY & KURTZ, LLP

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APR 15 2014

DISTRICT COURT DEPT. XIII

1 JUDGE
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17 Attorneys for Defendant FAMSA, INC.

10 DISTRICT COURT
11 CLARK COUNTY, NEVADA

13 B.E. UNO, LLC, a Nevada limited liability
14 company,

14 Plaintiff,

15 vs.

16 FAMSA, INC., a California corporation;
17 GRUPO FAMSA, S.A. DE C.V., a Mexican
18 corporation,

18 Defendants.

CASE NO. A-12-672870-C

DEPT. NO. XIII

JUDGMENT

20 This matter having come before the Court on a non-jury Trial on February 25 and 26, 2014
21 (the "Trial"), and the Court having entered Findings of Fact and Conclusions of Law, and good
22 cause appearing,

23 IT IS ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of
24 Plaintiff and against Defendant FAMSA, Inc., in the principal amount of Seven hundred forty-two
25 thousand ^{three} ^{ninety-four} ^{nineteen} ^{748,394.19} dollars and ^{sixteen} cents (\$748,394.16), which amount shall bear
26 interest at the contract rate until satisfied in full; and

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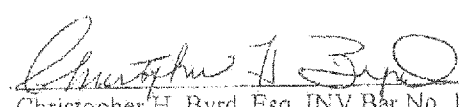
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff shall recover its costs and reasonable attorneys' fees, the amount of which shall be determined pursuant to separate motion.

DATED this 27th day of Aug, 2014.


DISTRICT COURT JUDGE

Submitted by:

FENNEMORE CRAIG JONES VARGAS

By: 
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Attorneys for Defendant FAMSA, INC.

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17 *Attorneys for Defendant FAMSA, INC.*

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

20 B.E. UNO, LLC, a Nevada limited liability
21 company,

22 Plaintiff,

23 vs.

24 FAMSA, INC., a California corporation;
25 GRUPO FAMSA, S.A. DE C.V., a Mexican
26 corporation,

27 Defendants.

CASE NO. A-12-672870-C

DEPT. NO. XIII

ORDER

28 THIS MATTER having come before the Court on June 5, 2014 for hearing on Defendant FAMSA, Inc.'s
29 Motion to Retax and Settle Costs, and on Plaintiff's Motion for Award of Attorneys' Fees, Costs, and
30 Disbursements, Plaintiff appearing by and through Kelly J. Brinkman, Esq. of the firm of Goold Patterson, and
31 said Defendant appearing by and through Christopher H. Byrd, Esq. of the firm of Fennemore Craig Jones Vargas,
32 and the Court having heard argument of counsel and having then taken the matter under advisement for further
33 consideration, and being now fully advised in the premises, ^{and having rendered its Decision of June 30, 2014} good cause appearing therefore, the Court
34 hereby finds as follows:

35 ///

36 ///

LEVINSON ARSHONSKY & KURTZ, LLP

JUL 10 2014

DISTRICT COURT DEPT#13

A. Defendant's Motion re Costs

The Court is persuaded by Defendant's Motion regarding the following costs and, it is GRANTED IN PART as to the same:

Los Angeles Superior Court filing Fees in the amount of \$110.09 are not properly taxable herein;

• Mediation costs in the amount of \$2,175.75 are not properly taxable herein; and

• Expert witness fee is reduced from \$12,300.00 to \$1,500.00 per NRS 13.005(5).

In all other respects, the Motion is DENIED IN PART.

B. Plaintiff's Motion re Attorneys' Fees, Costs, and Disbursements

The Motion is GRANTED IN PART to the extent of the costs that the Court has allowed to remain in A. above, but DENIED IN PART as to those which have not been allowed in A. above.

Regarding attorneys' fees, the Court is persuaded by Defendant's points as to the attorneys' fees sought pertaining to the Fullerton firm, the Buckner firm, and the Ashworth firm in the total amount of \$12,772.25, and the Motion is DENIED IN PART as to those fees. To the extent that any of those fees may have previously been allowed in the Court's Order of September 27, 2013, their allowance therein is rescinded.

On the other hand, in giving due application to the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), the Court is persuaded by Plaintiff's position regarding the remainder of the attorneys' fees which have been incurred with the firm of Gould Patterson, \$126,712.50, and the Motion is GRANTED IN PART as to those fees. The fact that the Court did not adopt Plaintiff's positions on the acceleration and anticipatory repudiation issues after trial does not obviate the significance of those interesting issues going into trial and the place that they took in trying the case. The same is true of the time and effort of Gould Patterson in endeavoring to set the case up against Defendant's parent, Grupo Famsa.

///

///

1 Based upon the foregoing the Court concludes:

2 1. Plaintiff shall recover costs from Defendant in the amount of \$7,577.02.

3 2. Plaintiff shall recover attorneys' fees from Defendant in the amount of \$126,712.50.

4 **IT IS HEREBY ORDERED.**

5 DATED this 22nd day of July, 2014.

6
7 
DISTRICT COURT JUDGE

8 Submitted by:

9 FENNEMORE CRAIG JONES VARGAS

10 By: 

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25 Attorneys for Defendant FAMSA, INC.

26

27

28

EXHIBIT A


CLERK OF THE COURT

1 **OPPM**
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10 *Attorneys for Plaintiff*

11 **DISTRICT COURT**
12 **CLARK COUNTY, NEVADA**

13 B.E. UNO, LLC, a Nevada limited liability
14 company,

15 Plaintiff,

16 vs.

17 FAMSA, INC., a California corporation;
18 GRUPO FAMSA, S.A. de C.V., a Mexican
19 corporation,

20 Defendants.

CASE NO.: A-15-706336-C

DEPT. NO.: XXXII

**PLAINTIFF'S OPPOSITION TO
DEFENDANT GRUPO FAMSA, S.A. de
C.V.'s MOTION TO QUASH SERVICE
OF PROCESS; DECLARATION OF
KELLY J. BRINKMAN IN SUPPORT;
DECLARATION OF CELSO NÀJERA
GONZALEZ IN SUPPORT**


**Hearing Date: July 14, 2015
Hearing Time: 9:00 a.m.**

21 Plaintiff, B.E. Uno, LLC ("Plaintiff"), by and through its attorney, Kelly J. Brinkman, of
22 the law firm Goold Patterson, hereby files its opposition to Defendant Grupo Famsa, S.A. de
23 C.V.'s ("Grupo") Motion to Quash Service of Process ("Mot. to Quash").

24 Plaintiff's opposition is made and based upon the following Points and Authorities and
25 exhibits, the Declarations in Support filed herewith, the pleadings, papers, and records on file in
26 this case, and any oral argument to be presented at the time of the hearing on the Grupo's Motion
27 to Quash.

28 DATED this 16th day of June, 2015.

GOOLD PATTERSON

By: 
Kelly J. Brinkman, Esq.
Nevada Bar No. 6238
1975 Village Center Circle, Suite 140
Las Vegas, Nevada 89134
Attorneys for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

On August 29, 2014, Plaintiff filed suit against Famsa, Inc. ("Famsa") and Grupo for breach of a lease and a related guaranty for a commercial premises located in Las Vegas, Nevada. In prior litigation (Case No. A-12-672870-C), filed in Clark County, Nevada, Judge Denton ruled that Famsa breached the lease and was liable for damages through the date of trial (February 2014). After extensive efforts to relet the premises, Plaintiff was successful in re-leasing the premises to Ross Dress for Less, Inc. As a result, Plaintiff has filed this instant action to recover additional damages against both Famsa and Grupo.

Grupo, however, has taken every conceivable effort to avoid service of process of both this litigation as well as the prior litigation, even though Grupo was well aware of the prior litigation and even participated in a mediation related to the damages due Plaintiff following Famsa and Grupo's breach of lease and guaranty. Nevertheless, here we are once again, wasting additional time, money and resources responding to Grupo's Motion.

Given Grupo's prior efforts to avoid service in the earlier litigation, Plaintiff went through great time and expense to send Plaintiff's summons and complaint to the Mexican Central Authority in conformity with the Hague Service Convention. On or about April 17, 2015, that service was confirmed by the Mexican court, who issued a Certificate evidencing proper service under the Hague Service Convention.

Notwithstanding, Grupo filed this Motion to Quash essentially arguing that, despite compliance with the Hague Service Convention, Nevada law requires Plaintiff to effectuate personal service on "an authorized representative of Grupo" pursuant to Nevada law. For the reasons set forth below, this argument is unavailing.

II.

LEGAL ARGUMENT

A. Service of Process Under the Hague Service Convention and Preemption of Nevada Law.

Service of process on a defendant in Mexico is governed by the Hague Service Convention. *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698-99, 108 S.Ct. 2104, 2107 (1988) (The Hague Service Convention applies in all civil or commercial matters “where there is occasion to transmit a judicial or extrajudicial document for service abroad.”). The purpose of this treaty is “to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad. *Id.* at 698. The United States Supreme Court has said that the Hague Service Convention “*pre-empts*” inconsistent methods of service prescribed by state law in all cases to which it applies.” *Id.* at 699.

The Hague Service Convention authorizes several different mechanisms for effectuating service of process. The primary vehicle, established in Articles 2 through 7, requires each participating country to set up a “Central Authority” for receiving and processing requests for service from parties abroad. *See* Hague Service Convention, Art. 2-7; *see also Schlunk*, 486 U.S. at 699. Under this method, an applicant must send a request for service directly to the “Central Authority” designated by the government of the receiving country, who then serves the document or arranges to have it served by the appropriate agency. *See* Hague Service Convention, Art. 2-5. The Central Authority checks the documents for compliance with the Hague Service Convention and serves such documents in accordance with its own laws. *See* Art 4-6. The Central Authority must then complete a Certificate detailing how, where, and when service was made, or explaining why service did not occur. *Id.* Art. 5-6. Finally, the completed Certificate is returned to the applicant. *Id.*

Grupo does not dispute that Plaintiff “utilized the correct channels of process when they sent the judicial documents to Mexico’s Central Authority.” *See* Mot. to Quash, p. 4, ¶ 5-6. Instead, Grupo alleges that service on Ms. Martinez was improper, *even though done in compliance with Mexican law and signed off by and approved by the Court in Mexico*, since

Ms. Martinez was not “authorized” to accept service nor was such service reasonably calculated to apprise Grupo of the pendency of this action. *Id.*, p. 4.

B. The Interplay between Mexican Law, Nevada Law and the Hague Service Convention.

Grupo contends that, even though the Hague Service Convention applies and it was served in conformity with it, it was not properly served under Nevada law, which requires service on an individual authorized to receive service for Grupo. Grupo’s contention, however, misapprehends the interplay between the relevant provisions of Mexican Law, Nevada law and the Hague Service Convention, and discounts the effect of the Supremacy Clause contained in Article VI, Clause 2 of the United States Constitution.

When process is served and return of process is completed by an official of a country that is a signatory to the Hague Service Convention in accordance with Article 6 of the Convention, as is was here, that service is sufficient, and any additional requirement which may be imposed by Nevada law is pre-empted. *See Macivor v. Volvo Penta of America, Inc.*, 471 So.2d 187 (Florida 1985) (reversing order quashing service, finding that Supremacy Clause preempts Florida statute governing service, and service was made under the Hague Service Convention); *Volkswagenwerk*, 486 U.S. at 699 (stating that by virtue of the Supremacy Clause of the United States Constitution, the Hague Convention “pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies.”). Rather, the internal laws of Mexico apply as to service upon Grupo, which laws have been satisfied in this matter. *See Declaration of Celso Nájera Gonzalez (“Nájera Declaration”), ¶ 11, attached hereto.*

C. Service upon Grupo Under the Hague Service Convention and Mexican Law.

Under the Hague Service Convention, service may be made by any method permitted by the internal law of the receiving state (Mexico). Therefore, if service is proper under Mexican law then the service is valid even if the service would not be valid under Nevada law. So, the question is whether service of Grupo complied with the Hague Service Convention and the internal laws of Mexico.

1 1. Hague Service Convention Procedures in Mexico.

2 As discussed above, under the Hague Service Convention, a request for service abroad is
3 submitted to the Central Authority. *See* Nájera Declaration, ¶4. The Central Authority reviews
4 the service request, approves it and sends the process to the local court in the State of Nuevo
5 Leon, where Grupo maintains its headquarters. *Id.* Service is performed by a “court official”,
6 who prepares an official report of the service (use of a private process server is not permitted).
7 *Id.*, ¶¶2, 3, & 7. This report is then submitted to the Mexican court. The court prepares a
8 Certificate of Service. *Id.*, ¶8. The Certificate in this case was signed by Jehu Ezequiel Echartea
9 Hernandez, Esq., a Clerk of the Court – for Letters Rogatory for the State of Nuevo Leon. *See*
10 Certificate attached as Exhibit A to the Nájera Declaration. The Certificate states the service of
11 the summons and complaint was served on Grupo on March 17, 2015, by delivering to the
12 addressee (Grupo), who accepted service voluntarily. *See* Certificate, Exhibit A and Nájera
13 Declaration, ¶7. Under both the Hague Service Convention and Mexican law (discussed below),
14 service is such a manner is appropriate and valid. *See* Nájera Declaration, ¶11.

15 2. Mexican Rules of Service of Process.

16 Under Mexican law, service upon a corporation is not required to be made by someone
17 who is “authorized” by the corporation to receive service of process. *Id.*, ¶¶ 9-10. Rather, under
18 Mexican law, service of process is governed by civil procedure rules, including Articles 66, 67,
19 69 and 70 of the Civil Procedures Code for the State of Nuevo Leon. *See* Nájera Declaration,
20 ¶¶2, 3 & 10. As detailed in ¶7 of the Nájera Declaration, the court-appointed process server
21 delivered the Summons and Complaint to Grupo at the address approved by the Mexican court,
22 which was the same address listed in the Summons. Thus, by all standards, service upon Grupo
23 was made in compliance not only with the Hague Service Convention, but the internal
24 procedural laws of Mexico. *Id.*, ¶ 11.

25 D. The Central Authority’s Return of the Certificate of Service is Prima Facie Evidence that
26 Service on Grupo was Made in Compliance with Mexican Law.

27 The Mexican court appointed Jehu Ezequiel Echartea Hernandez, Esq., a clerk of the
28 court of Mexico, to serve the summons and complaint (which had been transcribed into Spanish)

1 on Grupo. On March 17, 2015, Mr. Hernandez, the “court-appointed” officer of the Mexican
2 court, served Grupo in compliance with Article 6 of the Hague Convention and on or about April
3 17, 2015, the Mexican Central Authority delivered to Plaintiff a Certificate titled “Hague
4 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or
5 Commercial Matters” (“Certificate”). This Certificate was thereafter filed with the Clerk of the
6 Court of the District Court, Clark County, Nevada on May 21, 2015. A copy of the Certificate
7 was attached to Plaintiff’s Certificate of Service on Grupo and is also attached to the Nàjera
8 Declaration as Exhibit A. The Certificate details the steps taken to serve Grupo. The
9 Certificate, which was approved by the Mexican court, is *prima facie* evidence that Grupo was
10 properly served in accordance with the laws of Mexico.

11 In *Unite Nat’l Retirement Fund v. Ariela, Inc.*, 643 F. Supp. 2d 328, 334 (S.D.N.Y.
12 2008), the court determined that the certificate filed with the New York court:

13 “establishes a prima facie case that this service complied with
14 Mexico’s internal laws. By not objecting to the documents and by
15 certifying service, the Central Authority indicated that the
16 documents complied with the [Hague] Convention and that it had
17 served them in compliance with the [Hague] Convention, i.e., that
18 it had made service as Mexican law required. This Court declines
19 to look behind the certificate of service to adjudicate issues of
20 Mexican procedural law that the parties have raised through their
21 submission of conflicting expert statements on the issue.” *Id.*
22 *citing Northrup King Co. v. Compania Productora Semillas*
23 *Algodoneras Selectas*, 51 F.3d 1383, 1390 (8th Cir. 1995).”

24 *Id.* at 334. See also *Resource Trade Finance, Inc. v. PMI Alloys, LLC*, 2002 WL 1836818, 4
25 (S.D.N.Y. Aug. 12, 2002) (it is well settled that the return of a completed certificate of service by
26 a Central Authority establishes *prima facie* evidence that the Central Authority’s service was
27 made in compliance with the convention); *Zions First Nat’l Bank v. Moto Diesel Mexicana, S.A.*
28 *de C.V.*, 2011 WL 2669608, at *2 (E.D. Mich., July 7, 2011) (U.S. court should not second-guess
the foreign central authority’s interpretation of its own law, and thus an argument that although
the defendant received the summons and complaint the method of service did not comply with
the law of the foreign state should be unsuccessful). Similarly, in this case, the Mexican court

1 certified that service was completed in accordance with the laws of Mexico. See Nájera
2 Declaration, ¶ 8.

3 Although a *prima facie* showing of proper service may be rebutted by a lack of actual
4 notice or some showing of prejudice, Grupo has not made such a showing here. *See Ariela*, 643
5 F. Supp. 2d at 335, *Northrup*, 51 F.3d at 1390. Grupo has neither disputed that it received actual
6 notice nor has it articulated any prejudice. Indeed, it is undisputed that Grupo was aware that
7 Plaintiff had filed a lawsuit against both Famsa, Inc. (“Famsa”), as tenant under the lease, and
8 Grupo, as guarantor of such lease. In fact, both Famsa and Grupo participated in a Mediation
9 over the breach of lease and guaranty on January 8, 2014. *See* Declaration of Kelly Brinkman
10 attached hereto, ¶ 4. Further, Grupo and Famsa both have the same sets of attorneys involved in
11 this breach of lease litigation (and in the prior litigation with Famsa in which Judge Denton
12 already ruled that Famsa breached its Lease with Plaintiff). *See* Judgment issued in case A-12-
13 672870-C, entered on April 24, 2014.¹ Further, there is no evidence that Grupo is unfairly
14 prejudiced by service under the Hague Service Convention or Mexican law. Indeed, the record
15 shows that the Mexican court-appointed process server served Grupo and that Plaintiff received
16 the Certificate, which did not note any problems with the adequacy of service of process.
17 Accordingly, Grupo has actual notice of this litigation and thus the ability to defend the claims
18 presented in Plaintiff’s complaint. Therefore, Grupo’s motion to quash must be denied.

19 Further, the denial of service on an “authorized representative of Grupo” does not rebut
20 the presumption of proper service established by the Certificate. Grupo’s objections simply do
21 not refute the detailed, sworn statements of the court officer in the Certificate nor under Mexican
22 law. *See Old Republic Ins. Co. v. Pacific Fin. Services of America, Inc.*, 301 F.3d 54, 57-58 (2d
23 Cir. 2002) (*quoting Simonds v. Grobman*, 277 A.D.2d 369, 716 N.Y.S.2d 692 (2d Dept. 2000))
24 (“[N]o hearing is required where the defendant fails to swear to ‘specific facts to rebut the
25 statements in the process server’s affidavits.’”).

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28 ¹ Plaintiff requests that this Court take judicial notice of the Court Docket in the prior litigation between Plaintiff and Famsa pursuant to NRS 47.130.

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IV.

CONCLUSION

Service of process is not intended to be a game of cat and mouse. Rather, "[t]he purpose of service of process is to apprise the defendant that suit has been brought against him and to give him an opportunity to defend." *National Equipment Rental, Ltd. v. Szukhent*, 311 F.2d 79, 83 (2d Cir. 1962). Here, there is no question that those aims have been fulfilled. The Mexican courts' return of the Certificate is *prima facie* evidence that service on Grupo was made in compliance with Mexican law. The Hague Service Convention requires that the Central Authority serve the documents by a method specified by its own law (i.e., Mexico). By not objecting to the documents and by certifying service, the Mexican court indicated that the documents complied with the Hague Service Convention and that it had served them in compliance with the Convention, i.e., that is made service as Mexican law required. This Court must decline to look behind the Certificate to adjudicate the issues of Mexican procedural law that Grupo has raised in its Motion to Quash.

DATED this 16th day of June, 2015.

GOOLD PATTERSON

By: 
Kelly J. Brinkman, Esq.
Nevada Bar No. 6238
1975 Village Center Circle, Suite 140
Las Vegas, Nevada 89134
Attorneys for Plaintiff

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DECLARATION OF CELSO NAJERA GONZALEZ IN SUPPORT OF
PLAINTIFF'S OPPOSITION TO GRUPO FAMSA'S
MOTION TO QUASH SERVICE OF PROCESS

I, Celso E. Najera Gonzalez. Declare under penalty of perjury, as follows:

1. I am an attorney duly licensed to practice in Mexico. My main area of expertise involves civil litigation in State and Federal forums. My offices are in the city of Monterrey, Mexico, which is located in the Mexican state of Nuevo Leon.

2. Service of process in Mexico is performed entirely through the Mexican Courts. All process is served by court officials. Service of process is considered a "Court supervised process" subject to specific rules set by the corresponding procedural codes.

3. In general, process service is performed by a Court officer or Court-appointed server who delivers the summons and complaint on the named party. Once this is done, the server drafts a written record of what transpired during service, so as to establish that all formalities were met as provided by law.

4. Service of process in Mexico relating to lawsuits filed in the United States is governed by the Hague Convention. It requires all process to first be filed with the Central Authority which is located in Mexico City. The Central Authority reviews the documents to make sure that all requirements have been met and then transmits them to the local court. In this case, the Central Authority sent the documents to the court in the state of Nuevo Leon for service.

5. I was retained to assist B.E. UNO, LLC in connection with service of process on Grupo Famsa, S.A. de C.V. ("Grupo Famsa"). B.E. Uno initially encountered obstacles presented by Grupo Famsa's in-house counsel who denied that Grupo Famsa was located at the address given for service. Grupo Famsa even went as far as to produce a tax registration form which stated that a different company was settled there. Even though this definitely is not

1 evidence of Grupo Famsa no longer functioning in said domicile, the court server refused to
2 perform service on two occasions.

3 6. During the course of my research for evidence to show the Court that B.E. Uno
4 had the correct address for service, we found a summons published in the most important
5 newspaper in Monterrey for a shareholders meeting of Grupo Famsa. The summons clearly
6 stated that the meeting would be held precisely at the address where we had been trying to
7 perform service. This evidence was provided to the Court which eventually agreed with us and
8 ordered the process server to carry out service at the assigned place.

9
10 7. After service was complete, the court official who delivered the process prepared
11 a two page written report to the court as to what transpired. The report states that the appointed
12 server made sure that he was at the right place both by the signs placed at the exterior of the
13 building and by the information provided by the person who received the process, who fully
14 identified herself and stated that she was an employee of Grupo Famsa. The process server
15 delivered the process to this individual.

16
17 8. After reviewing the report of the process server, the court signed a Certificate of
18 Service which is attached to this declaration as Exhibit A. It is the court certification that service
19 was completed in conformance with Mexican law.

20
21 9. Mexican law does not require that service of process on a corporation be made by
22 service on someone who is authorized by the corporation to receive service of process.

23 10. Articles 66, 67, 69 and 70 of the Civil Procedures Code for the State of Nuevo
24 Leon are applicable to the topic of service of process and read as follows:

25 "Article 66.- Consent of the person being served is not required for the validity
26 of the notification (service of process)."

27 "Article 67.- The mandate ordering service will express the matter or subject of
28 service to be performed and the person or persons with whom it should be
carried out."

1 "Article 69.- Service of process to defendant, except in cases specified in the
2 Law, must be made personally at the domicile assigned for such effect, by the
Court appointed server or Court Clerk. (...)"

3 If the interested (looked for) party is not present and after the server has made
4 sure, with information provided by two neighbors, that the person to be served
5 in fact lives at the assigned domicile, all of which he will state in a written
6 record. (...); service will be performed through the delivery of a written
7 instructive which will state the file number, name and last name of the person
petitioning service, subject and nature of the petition, of the judge or tribunal
that ordered service, a full copy of the decree to be notified, the date and time
when the written instructive is delivered and the name and last names of the
person to whom it was delivered."

8 "Article 70.- The written instructive referred to in the previous article will be
9 delivered to family members, household members or to any other legally able
person that is found at the house where service is performed. (...)"

10 11. Based on my review of applicable Mexican law and the records of the court
11 pertaining to service on Grupo Famsa, I conclude that Grupo Famsa was validly served in
12 accordance with Mexican law.

13 I declare under penalty of perjury under the laws of the State of Nevada that the facts
14 contained in this declaration are true and correct.

15 Executed this 15th day of June, 2015, at Monterrey, Mexico.


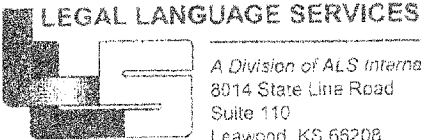
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18 _____
19 Celso E. Najera Gonzalez.
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EXHIBIT A



Telephone (913) 341-3167
Toll Free (800) 755-5775
Telefax (913) 341-3168
www.legallanguage.com

May 20, 2015

To whom it may concern:

This is to certify that the attached translation from Spanish into English is an accurate representation of the documents received by this office. These documents are designated as:

**Proof of International Service of Process in Mexico upon the Defendant:
GRUPO FAMSA, S.A. DE C.V.**

Maria Victoria Portuguez, Manager of this company, certifies that Addy Miro, who translated this document, is fluent in Spanish and standard North American English and qualified to translate. She attests to the following:

"To the best of my knowledge, the accompanying text is a true, full and accurate translation of the specified document".

A handwritten signature in black ink, appearing to read "Maria Victoria Portuguez", written over a horizontal line.

Signature of Maria Victoria Portuguez

Subscribed and sworn to before me this May 20, 2015.

Vicki Farron
Notary Public, State of Kansas
Qualified in Johnson County
My commission expires December 9, 2016

Sincerely,

Victor J. Hertz
President





"2015, the Year of the General José María Morelos and Pavón."

RESERVED AND CONFIDENTIAL INFORMATION	
Classified Date:	April 17, 2015
Responsible Unit:	Legal Affairs General Administration
Reserve Period:	6 years
Legal Grounds:	Articles 13, Sections IV and V; 14, Sections III and IV and the Federal Transparency Law and Access to Government Public Information
Classified Sections:	ALL SECTIONS AND ANNEXES

ASJ Matter Number- 12808

File: ASJ/541/1/2885/2013

Mexico, D.F., April 17, 2015

Case: A-14-706336-C.

B.E. UNO, LLC

Vs.

FAMSA, INC. AND GRUPO FAMSA, S.A. DE C.V.

Victoria Portuguese
International Litigation Support Services,
Legal Language Services
8014 State Line Road, Suite 110,
Leawood, Kansas, 66208, U.S.A.
(United States of America)

This concerns the letter rogatory issued by the District Court for Clark County, Nevada, United States of America, under case number A-14-706336-C, requested by **B.E. UNO, LLC** against **FAMSA, INC** and **GRUPO FAMSA, S.A. DE C.V.**

Regarding said matter, I am sending that office the letter rogatory, proof of action taken and the attached certificate titled "*Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*", completed, signed, and sealed by the Letters Rogatory Judge for the State of Nuevo Leon.

I am notifying and sending you the above pursuant to the provisions of Articles 28, Section XI of the Federal Public Administration Organic Law, 14 Section VI and 33 Section IX of the Internal Rules of the Foreign Affairs Secretary, all in full force.

Sincerely,
Letters Rogatory Department Director

[Signature]

Nancy Rocio Alanis Arredondo.

ANNEX: Letter rogatory, completed, signed, and sealed proof of service

(DC) 09464

* The letter rogatory is being returned due to unfulfilled requirements by the requesting authority.

CERTIFICATE

The undersigned authority has the honour to certify, in conformity with article 6 of the Convention,

1) that the document has been served*

- the date MARCH 17, 2015
 - at (place, street, number) PINO SUAREZ AVENUE #1202, NORTH, CENTRAL MONTERREY, NUEVO LEON, MEXICO

in one of the following methods authorized by article 5

- ☐ (a) in accordance with the provisions of sub paragraph (a) of the first paragraph of article 5 of the Convention*,
☐ (b) in accordance with the following particular method* _____
☒ (c) by delivery to the addressee, who accepted it voluntarily.

The documents referred to in the request have been delivered to:

- (identity and description of person) CLAUDIA PALOMO MARTINEZ
 - relationship to the addressee (family, business, or other): EMPLOYEE IN THE DEFENDANTS LEGAL DEPARTMENT

2) that the document has not been served, by reason of the following facts*:

In conformity with the second paragraph of article 12 of the Convention, the applicant is requested to pay or reimburse the expenses detailed in the attached statement*.

Annexes

Documents returned:

**LETTER ROGATORY AND
 CERTIFICATE OF COMPLETION**

Done at UNITED MEXICAN STATES, the _____

In appropriate cases, documents establishing the service:

**LETTER ROGATORY AND
 CERTIFICATE OF COMPLETION**

STATE OF NUEVO LEON
 LETTERS ROGATORY COURT

[Signature]
 JEHU EZEQUIEL ECHARTEA HERNANDEZ, ESQ.
 CLERK OF THE COURT - FOR LETTERS ROGATORY
 FOR THE STATE OF NUEVO LEON.

*Delete if inappropriate



"2015, Año del Generalísimo José María Morelos y Pavón".

INFORMACIÓN RESERVADA Y CONFIDENCIAL	
Fecha de Clasificación:	17 de abril del 2015
Unidad Responsable:	Dirección General de Asuntos Jurídicos
Periodo de Reserva:	6 años
Fundamento Legal:	Artículos 13, fracciones IV y V; 14, fracciones III y IV de la Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental.
Partes Clasificadas:	1,000 y Anexos

Oficio Número ASJ- 12808

Expediente: ASJ/541/1/2885/2013.

México, D.F., a 17 de abril de 2015

Caso: A-14-706336-C.
B.E. UNO, LLC
Vs
FAMSA, INC y GRUPO FAMSA, S.A. DE C.V.

Victoria Portuguez
International Litigation Support Services,
Legal Language Services
8014 State Line Road, Suite 110,
Leawood, Kansas, 66208, U.S.A.
(Estados Unidos de América)

Me refiero a la carta rogatoria librada Tribunal de Distrito, Condado de Clark, Nevada, Estados Unidos de América, deducida del caso número A-14-706336-C, promovido por **B.E. UNO, LLC** en contra de **FAMSA, INC y GRUPO FAMSA, S.A. DE C.V.**

Al respecto, envío a esa oficina la carta rogatoria, las constancias de lo actuado y el certificado anexo al "Convenio de la Haya Sobre la Notificación o el Traslado de Documentos Judiciales o Extrajudiciales en Materia Civil o Comercial", llenado, firmado y sellado por el Juez de Exhortos y Cartas Rogatorias del Estado de Nuevo León.

Lo anterior lo comunico y remito a usted de conformidad con lo dispuesto en los artículos 28 fracción XI de la Ley Orgánica de la Administración Pública Federal, 14 fracción VI y 33, fracción IX del Reglamento Interior de la Secretaría de Relaciones Exteriores, todos los ordenamientos en vigor.

Atentamente,

La Jefa del Departamento de Exhortos y Cartas Rogatorias.


Nancy Rocío Alanís Arredondo.

ANEXO: Carta rogatoria, constancias de lo actuado y certificado llenado, firmado y sellado.

(D.G. 09464)

*Se devuelve carta rogatoria por falta de requisitos a la autoridad exhortante.

CERTIFICACIÓN
CERTIFICATE
ATTESTATION

La autoridad infrascripta tiene el honor de certificar, conforme al artículo 6 de dicho Convenio.
The undersigned authority has the honour to certify, in conformity with article 6 of the Convention.
L'autorité soussignée a l'honneur d'attester conformément à l'article 6 de ladite Convention.

1. que la petición ha sido ejecutada*
1) that the document has been served*
1. que la demanda o sea exhibida*

- el (fecha)
- the (date)
- la (date)

17 DE MARZO DE 2015

- en (localidad, calle, número)
- at (place, street, number)
- à (localité, rue, numéro)

AVENIDA PINO SUAREZ #1202, NORTE, CENTRO DE MONTERREY
NUEVO LEON, MEXICO

- en una de las formas siguientes previstas en el artículo 5:
- in one of the following methods authorised by article 5:
- dans une des formes suivantes prévues à l'article 5:

☐ a) según las formas legales (artículo 5, párrafo primero, letra a)) *

(a) in accordance with the provisions of sub-paragraph (a) of the first paragraph of article 5 of the Convention*.
a) selon les formes légales (article 5, alinea premier, lettre a). *

☐ b) según la forma particular siguiente*

(b) in accordance with the following particular method*:
b) selon la forme particulière suivante : *

☒ c) por simple entrega *

(c) by delivery to the addressee, who accepted it voluntarily. *
c) par remise simple. *

Los documentos mencionados en la petición han sido entregados a:

The documents referred to in the request have been delivered to:

Les documents mentionnés dans la demande ont été remis à:

- (identidad y calidad de la persona)

- (identity and description of person)

- (identité et qualité de la personne)

CLAUDIA PALOMO MARTINEZ.

- Vínculos de parentesco, subordinación u otros, con el destinatario del documento:

- relationship to the addressee (family, business, or other):

- liens de parenté, de subordination ou autres, avec le destinataire de l'acte

EMPLEADA DEL AREA JURIDICA

DE LA PARTE DEMANDADA

2. que la petición no ha sido ejecutada en razón a los hechos siguientes*:

2) that the document has not been served, by reason of the following facts*:

2. que la demanda no se ha exhibido, en razón de los hechos siguientes*:

Conforme al artículo 12, párrafo 2, de dicho Convenio, se ruega al requerente el pago o reembolso de los gastos cuyos detalles figuran en la declaración adjunta*.

In conformity with the second paragraph of article 12 of the Convention, the applicant is requested to pay or reimburse the expenses detailed in the attached statement*.

Conformément à l'article 12 alinea 2, de ladite Convention, le requérant est prié de payer ou de rembourser les frais dont le détail figure au récépissé ci-joint*.

Anexo
Annexes
Annexes

Documentos recibidos:

Documents returned:

Piezas devueltas:

CARTA ROGATORIA Y

CERTIFICADO DE

CUMPLIMIENTO

En su caso, los documentos justificativos de la ejecución:
In appropriate cases, documents establishing the service:
Les cas échéant, les documents justificatifs de l'exécution:

CARTA ROGATORIA Y

CERTIFICADO DE

CUMPLIMIENTO

Hecho en _____ el _____ de _____ de _____
Done _____, the _____
Fait à _____, le _____

Firma y sello
Signature and stamp

SEAL OF THE JUDICIAL AUTHORITY OF THE STATE OF NUEVO LEON

JUEZ DE PRIMERA INSTANCIA

DE EXHORTOS Y CARTAS ROGATORIAS

EN EL ESTADO DE NUEVO LEON.

* Fichas de expediente judicial.
Docket of the proceedings.
Fiches de procédure judiciaire.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the law firm of Goold Patterson, and on the
10th day of June, 2015, I served the foregoing PLAINTIFF'S OPPOSITION TO
DEFENDANT GRUPO FAMSA, S.A. de C.V.'s MOTION TO QUASH SERVICE OF
PROCESS; DECLARATION OF KELLY J. BRINKMAN IN SUPPORT; DECLARATION OF
CELSO NÀJERA GONZALEZ IN SUPPORT by enclosing a true and correct copy of the same
in a sealed envelope, postage fully pre-paid thereon, and depositing said envelope in a mailbox
of the United States Post Office, addressed as follows:

Christopher Byrd, Esq.
FENNEMORE CRAIG JONES VARGAS
300 S. Fourth Street, Suite 1400
Las Vegas, NV 89101
Attorneys for Defendants

Richard I. Arshonsky, Esq.
LEVINSON ARSHONSKY & KURTZ, LLP
15303 Ventura Blvd., Suite 1650
Sherman Oaks, CA 91403
Attorneys for Defendants


An Employee of Goold Patterson

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

2 GRUPO FAMSA, S.A. DE C.V., a
3 Mexican corporation,

4 Petitioner and Defendant,

5 vs.

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

11 Respondents.

12 B.E. UNO, LLC, a Nevada limited
13 liability company,

14 Real Party in Interest and
15 Plaintiff.

SUPREME COURT
68626

Electronically Filed
Aug 21 2015 11:48 a.m.
Tara K. Lindeman
Clerk of Supreme Court

DISTRICT COURT CASE NO.:
A-14-706336-C

16 **REAL PARTY IN INTEREST/PLAINTIFF'S OPPOSITION TO
17 PETITIONER'S EMERGENCY MOTION UNDER NRAP 27(e) TO
18 STAY PROCEEDINGS AGAINST PETITIONER PENDING
19 RESOLUTION OF WRIT PETITION CHALLENGING SERVICE OF
20 PROCESS ON DUE PROCESS GROUNDS**

21 B.E. Uno, LLC, as Real Party in Interest and Plaintiff ("Plaintiff"),
22 files its opposition to Petitioner's Emergency Motion Under NRAP 27(e) to
23 Stay Proceedings Pending Resolution of Writ Petition Challenging Service.

24 **I. INTRODUCTION**

25 Service of process is not intended to be a game of cat and mouse.
26 Rather, "[t]he purpose of service of process is to apprise the defendant that
27 suit has been brought against him and to give him an opportunity to defend."
28 Nat'l Equip. Rental, Ltd. v. Szukhent, 311 F.2d 79, 83 (2d Cir. 1962). Here,
 there is no question that those aims have been fulfilled. The Mexican courts'
 return of a Certificate of Service is *prima facie* evidence that service on
 Grupo was made in compliance with the Hague Convention ("Convention")

1 as well as Mexican law. Further, and despite Grupo Famsa, S.A. de C.V.'s
2 ("Grupo") argument, Nevada law is inapplicable as such procedural laws are
3 preempted by the Convention.

4 The Eighth Judicial District Court denied Grupo's Motion to Quash,
5 expressly finding that Grupo was properly served under the Convention and
6 internal laws of Mexico. Notwithstanding, Grupo files this Emergency
7 Motion for Stay pending a ruling on the Writ. Leaving aside the fact that this
8 "emergency" was a creation of Grupo's own doing, this Stay Motion must
9 be denied. First, Due Process has been satisfied, which simply requires
10 reasonable notice and the opportunity to be heard. Second, service of
11 process need only satisfy the Convention and/or internal laws of Mexico
12 (which Grupo concedes occurred), not inconsistent state laws of Nevada, a
13 fundamental concept Grupo miscomprehends. Third, Grupo has failed to
14 satisfy the standards for a stay – an extraordinary remedy that should not be
15 lightly granted. Fourth, there is no prejudice to Grupo in having to defend
16 itself in this case as Grupo's attorneys are the exact same attorneys already
17 intimately involved in representing Defendant Famsa, Inc. ("Famsa"), a
18 company wholly-owned by Grupo. The issue in this case, damages, is the
19 same issue for both Grupo and Famsa. This issue does not change
20 depending on who is a defendant. On the other hand, great prejudice will be
21 suffered by Plaintiff if a stay is granted as Grupo is likely the only defendant
22 with assets sufficient to cover any and all judgments awarded Plaintiff.
23 Fifth, this is yet another delay tactic by Grupo to avoid paying damages
24 following the breach of lease and guaranty. Sixth, to the extent this Court is
25 inclined to grant a stay, such stay should only issue upon a bond in the
26 minimum amount of \$1,000,000.00.

27 ///

28 ///

II. LEGAL ARGUMENT

A. Grupo Has Failed to Satisfy the Standards for a Stay.

The issuance of a stay is an extraordinary remedy granted only if clearly warranted. Fritz Hansen A/S v. Dist. Ct., 6 P.3d 982, 986, 116 Nev. 650 (2000). Despite Grupo's contention, prior to issuance of a stay, Grupo must still show some likelihood of success. As stated in Hansen, Grupo must "present a substantial case on the merits . . . and show that the balances of equities weighs heavily in favor of granting the stay." Here, Grupo has made no such showing.

In Hansen, Hansen filed a writ challenging the district court order denying its motion to quash service of process for lack of personal jurisdiction. Hansen, 6 P.3d 982, 983, 116 Nev. 650 (2000). Hansen then filed a motion to stay the district court proceedings pending resolution of the petition. The Nevada Supreme Court held that a stay was not warranted. Id. Applying the NRAP 8(c) factors, the Court held that participating in the proceedings and incurring litigation expenses are neither irreparable nor serious harm. Further, the Court found that Hansen was not likely to prevail on the merits since Hansen's argument was contrary to well-established case law and that such extraordinary relief was unwarranted. Id. at 987. This case is no different. The fact that a portion of this case discussed a general and special appearance does not make this case inapplicable, as Grupo would like this Court to believe.

B. Grupo Should Not Prevail Since Service Need Not Satisfy Nevada Law, Only the Convention, Which Grupo Concedes Occurred.

The service provisions of the Convention take precedence over conflicting Nevada procedural rules. Article VI of the U.S. Constitution establishes that treaties are the supreme law of the land, binding upon states. The Convention is recognized with status equivalent to a treaty. See

1 Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988).

2 Thus, when state service of process procedures are in conflict with the
3 Convention, courts are compelled to recognize the supremacy of the
4 Convention's provisions. See Griggs Group Ltd. v. Filanto Spa, 920 F.Supp.
5 1100, 1102 (D. Nev. 1996) (the service provisions of the Convention take
6 precedence over any conflicting Nevada procedural rules); Ackermann v.
7 Levine, 788 F.2d 830, 840-41 (2d Cir. 1986).¹ This comports with the basic
8 purpose of the Convention - to create expediency and uniformity by
9 eliminating following fifty different sets of service regulations. Dayha v. 2nd
10 Jud. Distr. Ct., 19 P.3d 239, 243, 17 Nev. 208 (2001).²

11 Grupo does not dispute that Plaintiff "utilized the correct channels of
12 process when they sent the judicial documents to Mexico's Central
13 Authority." See Mot. to Quash, p. 4. Rather, Grupo alleges that service was
14 improper, **even though done in compliance with Mexican law and signed**
15 **off by and approved by the Court in Mexico**, since Ms. Martinez was not
16 "authorized" to accept service nor was such service reasonably calculated to
17 apprise Grupo of the pendency of this action under Nevada law. Id. Grupo
18 misapprehends the preemption impact of the Convention and the
19 inapplicability of Nevada procedural rules in this case. As a result, the cases
20 cited by Grupo (Tara Min. Corp. v. Carnegie Min. & Exploration, Inc., 2012
21 WL 760653 (D. Nev. 2012) and Direct Mail Specialists, Inc. v. Eclat

23
24 ¹ In Ackermann, a foreign plaintiff served process on a New York
25 defendant through mail, as permitted by Article 10(a) of the Convention.
26 Service upheld even though New York service of process law only allowed
mail service in conjunction with personal delivery. New York law not
applied since Convention deemed dispositive.

27 ² Nevada service rules could apply had Plaintiff not gone through the
28 Convention.

1 Computerized Tech., Inc.,³ 840 F.2d 685 (9th Cir. 1988)) for the proposition
2 that due process is satisfied only by serving an agent, officer or
3 representative highly integrated within Grupo, are inapplicable and
4 irrelevant. See, e.g., Marcantonia v. Primorsk Shipping Corp., 206
5 F.Supp.2d 54 (Mass. 2002) (country in which service is being made is
6 country whose laws should be obeyed; since Russian corporation was served
7 in Canada, Canadian law governed service of process); Macivor v. Volvo
8 Penta of America, Inc., 471 So.2d 187 (Florida 1985) (reversed order
9 quashing service, finding Supremacy Clause preempts Florida statute
10 governing service; service made under Convention); Volkswagenwerk, 486
11 U.S. at 699 (by virtue of the Supremacy Clause of U.S. Constitution, the
12 Convention “pre-empts inconsistent methods of service prescribed by state
13 law in all cases to which it applies.”).

14 As indicated above, it is undisputed that Plaintiff complied with both
15 the Convention as well as the internal laws of Mexico when it served Grupo.
16 Further, the Central Authority’s return of a Certificate of Service (which is
17 blessed by the Mexican court) is *prima facie* evidence that service was made
18 in compliance with Mexican law. Northrup King Co. v. Compania
19 Productora Semillas Algodoneras Selectas, S.A., 51 F.3d 1383 (8th Cir.
20 1995) (a completed certificate returned by Spanish Central Authority is
21 *prima facie* evidence that process was served in compliance with the
22 Convention); Unite Nat’l Retirement Fund v. Ariela, Inc., 643 F.Supp. 2d
23 328, 334 (S.D.N.Y. 2008) (Certificate is *prima facie* evidence that service
24 complied with Mexico’s internal laws).

26 ³ Although inapplicable, in Eclat, court affirmed a default judgment served
27 upon a “receptionist” after receptionist claimed no one was at Eclat’s office
28 to accept service, stating that FRCP 4 is a flexible rule that is liberally
construed so long as a party receives sufficient notice of the complaint.

1 1. Due Process Guarantees.

2 For service of process to be upheld in Nevada, the provisions of the
3 Convention and constitutional due process requirements must be satisfied.
4 Grupo's argument it not that the Convention was not followed, but instead
5 that its due process rights have been violated. The standard used to
6 determine whether due process is violated was set out in Mullane v. Central
7 Hanover Bank & Trust Co., 339 U.S. 306 (1950): "[A] fundamental
8 requirement of due process . . . is notice reasonably calculated, under all the
9 circumstances, to apprise interested parties of the pendency of the action and
10 afford them an opportunity to present their objections" The Mullane
11 due process considerations are incorporated into the Convention. See Shoei
12 Kako v. Superior Court, 33 Cal. App. 3d 808, 820 (1973) ("[a]rticle 15 of
13 the Convention is the equivalent of our national due process concept."). See
14 also Preamble and Article 1 of Convention (Convention simplifies and
15 expedites the service of documents abroad and guarantees that service will
16 be brought to the notice of the recipient in time to defend); Burda Media,
17 Inc. v. Viertel, 417 F.3d 292, 299 (2d Cir. 2005) (service of process is
18 permitted "by any internationally agreed means reasonably calculated to
19 give notice, such as those means authorized by the Convention."). Further,
20 the reasonable standard is not grounded in perfection. Mullane, 339 U.S. at
21 317-18. It only requires that a party apply the best efforts practicable for
22 giving notice. Mullane therefore does not require that service of process
23 assure receipt of notice, but instead holds that service must be reasonably
24 calculated to reach the defendant after considering the particular
25 circumstances of each case.

26 Here, Grupo has sufficient notice of this action such that the purpose
27 of service is fulfilled. Grupo's prompt filing and activity in this case
28 indicates Grupo has sufficient notice of the Complaint and claims alleged

1 therein. Moreover, Grupo was also aware of the prior action and participated
2 in a formal mediation with their wholly-owned subsidiary - Famsa. Plaintiff
3 has made efforts to avoid a default against Grupo and has requested that they
4 actively participate in this case. Plaintiff requested that Grupo's attorneys
5 agree to accept service on behalf of Grupo – which was denied. Thus,
6 Plaintiff was forced to go through the time-consuming and expensive
7 process of serving Grupo in Mexico under the Convention and internal laws
8 of Mexico. In addition, and as more particularly detailed in the Gonzalez
9 Declaration attached as Exhibit A to Plaintiff's Opposition to the Motion to
10 Quash, the court process server in Mexico refused to perform service on two
11 occasions until Plaintiff provided additional evidence to the Mexican court –
12 which court then authorized service at the address listed in the Summons.
13 See Gonzalez Declaration, ¶¶ 5-6. Due process merely requires notice and
14 the opportunity to be heard. These protections have been more than satisfied
15 in this case. Grupo's dilatory tactics to evade service and delay must be
16 stopped. It is certainly reasonable to require Grupo to defend a suit in
17 Nevada following the breach of lease and guaranty for a Nevada commercial
18 premises where Famsa and Grupo elected to do business.

19 Finally, it is uncontroverted by Grupo that service of process
20 comported with the internal laws of Mexico. See Mot. to Quash, p.4 as well
21 as the Declaration of Celso Gonzalez, ¶¶ 9-11, Exhibit A (Mexican law does
22 not require service on a corporation be made on someone who is authorized
23 by the corporation to receive service of process and Article 69 of the Civil
24 Procedure Code for the State of Nuevo Leon permits service at the domicile
25 assigned for such effect by Court appointed process service).

26 C. There is No Harm by Denying a Stay Since Damages Are Already
27 Being Litigated by the Same Set of Attorneys for Famsa.

28 The ultimate issue in this case is damages following Famsa and

1 Grupo's breach of lease and guaranty (and Plaintiff's mitigation efforts and
2 Grupo's liability under its Guaranty). Given that Famsa and Grupo have
3 identical attorneys and the damage issue is the same as to both Famsa and
4 Grupo, there is little or no harm to Grupo in having this litigation proceed
5 without a stay. Grupo is not subject to any special or additional defense
6 separate and apart from Famsa. Further, Nevada courts have already held
7 that "litigation expenses, while potentially substantial, are neither irreparable
8 nor serious." Hansen, 6 P.3d at 986-87. See also Wisconsin Gas Co. v.
9 F.E.R.C., 758 F.2d 669, 674 (D.C. Cir. 1985) ("[m]ere injuries, however
10 substantial, in terms of money, time and energy necessarily expended in the
11 absence of a stay are not enough" to show irreparable harm).

12 Further, despite Grupo's contention, Plaintiff will be harmed if a
13 stay is granted as it has yet to be compensated following the breach of lease
14 and guaranty (no rent having been paid since late 2012 – close to three
15 years). Famsa has indicated on numerous occasions that all of their assets
16 are encumbered by a loan made by Grupo. Plaintiff's only real chance of
17 recovery in this matter is to obtain a judgment against Grupo. Thus, any
18 stay of the proceedings against Grupo will frustrate Plaintiff's efforts to
19 pursue Grupo for its obligations under the Guaranty.

20 D. Even if Grupo Can Somehow Claim it Satisfied the Standards for a
21 Stay, a Bond Must be Posted.

22 Even if Grupo could persuade this Court that a stay is appropriate,
23 such a stay must not issue unless Grupo posts a bond. Under NRAP 8(2)(E),
24 a bond is appropriate whenever a stay may be issued. Although Plaintiff
25 disputes that a stay should issue, if this Court is somehow inclined to grant
26 any such stay, Plaintiff requests that a bond in the minimum amount of
27 \$1,000,000.00 be required as a condition to the granting of any stay. This
28 amount is based on the \$882,683.71 Judgment obtained in the prior litigation

(Case # A-12-672870-C) (\$748,394.19 plus fees (\$126,712.50) and costs (\$7,577.02)). See Judgment and Order on Attorney Fees and Costs attached as Exhibit B, which Plaintiff requests this Court take judicial notice. This Judgment, all of which remains outstanding, was awarded in April of 2014, and continues to bear interest. Pursuant to Grupo's Guaranty with Plaintiff, any judgment rendered against Famsa is binding and conclusive against Grupo to the same extent as if Grupo had appeared in such proceedings and judgment has been rendered against it. See Guaranty attached as Exhibit C. Thus, a bond in the minimum amount of \$1,000,000.00 is reasonable.

E. A Stay Must Not Issue Since Grupo Created Its Own Emergency.

Grupo is the party that created the circumstances requiring that this matter be heard on an emergency basis. For some unknown reason, Grupo waited 24-days after the lower court denied its motion to quash before filing its motion to stay with the lower court and 30-days before it filed this Emergency Motion for Stay and Writ. Additionally, service of the Complaint was made on Grupo in Mexico on March 17, 2015, almost 5 months ago. Other than the Motion to Quash, Grupo has yet to challenge service in Mexico or otherwise. Thus, given that Grupo has sat on its rights, there is no emergency nor any reason to stay any proceedings pending a hearing on Grupo's Writ of Prohibition.

III. CONCLUSION

Given that: (a) Grupo's due process rights have been satisfied; (b) Grupo has both reasonable notice and the opportunity to defend; (c) service upon Grupo was proper under both the Convention and the internal laws of Mexico (the Certificate being *prima facie* evidence service was valid); (d) the standards for a stay have not been met; and (e) there is no harm to Grupo in defending this matter as the damage issue is already being defended by Grupo's same set of attorneys representing Famsa (its wholly owned entity),

1 Grupo's Motion to Stay must be denied. If this Court, however, is inclined
2 to grant a stay, Plaintiff requests that a bond in the minimum amount of
3 \$1,000,000.00 before any such stay issue.

4 DATED this 21st day of August, 2015.

5 GOOLD PATTERSON

6
7 By: 
8 Kelly J. Brinkman, Esq.
9 Nevada Bar No. 6238
10 1975 Village Center Circle, Suite 140
11 Las Vegas, Nevada 89134
12 Telephone: (702) 436-2600
13 Email: kbrinkman@gooldpatterson.com
14 *Attorneys for Real Party in*
15 *Interest/Plaintiff*
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1 **AFFIDAVIT OF KELLY J. BRINKMAN IN SUPPORT**

2 STATE OF NEVADA)

3 COUNTY OF CLARK)

4 I, Kelly J. Brinkman, being first duly sworn on oath states under
5 penalty of perjury that the following assertions are true and correct of my
6 own personal knowledge:

7 1. I am an attorney duly licensed to practice law in the State of
8 Nevada and am a partner at the law firm Goold Patterson, attorneys for
9 Plaintiff, B.E. Uno, LLC. This Affidavit is submitted in support of Real
10 Party in Interest/Plaintiff's Opposition to Petitioner's Emergency Motion
11 Under NRAP 27(e) to Stay Proceedings Pending Resolution of Writ petition
12 Challenging Service.

13 2. Service of the Summons and Complaint was made on Grupo
14 in Mexico on March 17, 2015, almost 5 months ago. Other than the Motion
15 to Quash, Grupo has yet to challenge service in Mexico or otherwise.

16 3. On June 1, 2015, Grupo filed its Motion to Quash Service of
17 Process, to which Plaintiff filed its opposition. See Plaintiff's Opposition to
18 Grupo's Motion to Quash Service of Process attached as Exhibit A.

19 4. On July 14, 2015, the Eighth Judicial District Court denied
20 Grupo's Motion to Quash, finding that Grupo was properly served under
21 both the Convention as well as the internal laws of Mexico (and Grupo's due
22 process rights were not violated). At the end of that hearing, Grupo's oral
23 motion to stay was also denied.

24 5. 24-days later, Grupo filed a Motion to Stay with the lower
25 court (on shortened time), to which Plaintiff filed its opposition. Plaintiff
26 filed its opposition thereto (which was not included in Grupo's Appendix
27 with the Writ) and attached hereto as Exhibit D. On July 11, 2015, the
28 Eighth Judicial District Court denied Grupo's Motion to Stay.

1 6. Both Famsa and Grupo have the identical set of attorneys (two
2 different firms) defending them in this case (as well as other cases where
3 Famsa breached its lease with different landlords in California and Grupo
4 was also a guarantor).

5 7. The remaining issue in this case is one of damages following
6 the breach of lease (and guaranty). That issue is the same, whether litigated
7 by tenant or guarantor.

8 8. Grupo has notice of this proceeding as well as the prior
9 litigation with Famsa. In fact, Grupo participated in a mediation in the prior
10 litigation (Case No. A-12-672870-C).

11 9. Plaintiff has made efforts to avoid taking a default against
12 Grupo and has requested that they actively participate in this case. Plaintiff
13 requested that Grupo's attorneys agree to accept service on behalf of Grupo
14 – which was denied. Thus, Plaintiff was forced to go through the time-
15 consuming and expensive process of serving Grupo in Mexico pursuant to
16 the Convention and the internal laws of Mexico.

17 10. Neither Famsa nor Grupo have paid rent (or any amounts on
18 the prior Judgment) to Plaintiff since late 2012. Famsa's representative has
19 informed Plaintiff that all of Famsa's assets are encumbered by a loan made
20 by Grupo. Plaintiff's only real chance of recovery in this matter is to obtain
21 a judgment against Grupo. Thus, any stay of the proceedings against Grupo
22 will frustrate Plaintiff's efforts to pursue Grupo for its obligations under the
23 Guaranty and following Famsa's breach of lease.

24 11. In the prior litigation with Famsa over the breach of lease and
25 guaranty (Case No. A-12-672870-C), Plaintiff was awarded a Judgment in
26 the amount of \$748,394.19 plus attorney fees (\$126,712.50) and costs
27 (\$7,577.02) for a total of \$882,683.71. See Exhibit B.

12. Pursuant to Grupo's Guaranty, any judgment rendered against Famsa is binding and conclusive against Grupo to the same extent as if Grupo had appeared in such proceedings and judgment had been rendered against Grupo. See Guaranty attached hereto as Exhibit C.

EXECUTED this 21st day of August, 2015.

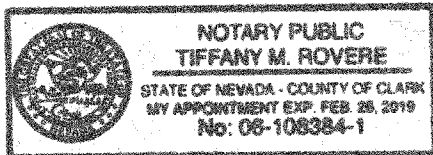

Kelly J. Brinkman

STATE OF NEVADA)

COUNTY OF CLARK)

Signed and affirmed before me this 21st day of August, 2015 by
Kelly J. Brinkman.

Inja M. Raven
Notary Public



1 **DISCLOSURE STATEMENT PUSUANT TO NRAP 26.1**

2 The undersigned counsel of record certifies that the following are
3 persons and entities as describe 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
6 court may evaluate possible disqualification or recusal.

7 **GOOLD PATTERSON**

8 Kelly J. Brinkman, Esq.

9 Nevada Bar No. 6238

10 1975 Village Center Circle, Suite 140

11 Las Vegas, Nevada 89134

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14 Email: kbrinkman@gooldpatterson.com

15 *Attorneys for Real Party in Interest*
16 *and Plaintiff*
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TO: Christopher Byrd, Esq.
FENNEMORE CRAIG, P.C.
300 S. Fourth Street, Suite 1400
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*Attorneys for Defendant, Famsa, Inc.
and Grupo Famsa, S.A. de C.V.*

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

Stephen M. Raven
An employee of Goold Patterson