IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioner and Defendant,

vs.

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

Respondents,

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

Real Party in Interest and Plaintiff.

SUPREME COURT CASE NO.: 68626

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

ANSWER TO PETITION FOR WRIT OF PROHIBITION

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B.E. Uno, LLC, as Real Party in Interest and Plaintiff ("Plaintiff"), submits this Answer to Petitioner's, Grupo Famsa, S.A. de C.V.'s ("Petitioner") Writ of Prohibition under NRAP 21(a) ("Writ").

I. INTRODUCTION

Petitioner, through its wholly-owned subsidiary Famsa, Inc., came to Nevada and executed a lease and guaranty. Petitioner and Famsa both defaulted under their respective lease/guaranty obligations. Petitioner's wholly-owned subsidiary has been served and is actively participating in this case.

Petitioner now seeks this Writ as a result of the district court's order denying its motion to quash service of process upon it pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents ("Convention") and/or the laws of Mexico. Petitioner contends that service of the Summons and Complaint did not comport with due process since service did not comply with Nevada's service of process procedural laws (service was not made on an officer, director or authorized representative). Writ, p. 7. Since service of process was performed under the Convention, however, Nevada laws relating to service of process are preempted. In fact, Nevada's own courts confirm service need only comply with the Convention or internal laws of the receiving state (Mexico). Petitioner should not be allowed to escape service of process by fabricated due process arguments in an effort to avoid addressing the merits of a straight forward breach of lease and guaranty action. With that in mind, the following points are important:

- The Convention **preempts** Nevada service of process rules, a concept petitioner miscomprehends.
- The service of process laws in Mexico do not require service upon an officer, directly or authorized representative.

- Petitioner **concedes** that service complied with both the Convention and the laws of Mexico, which is all that is required.
- The Mexican Court's return of a Certificate of Service is *prima facie* evidence of proper service.
- Due Process, a concept integrated into the Convention, simply requires reasonable notice and opportunity to be heard. Petitioner does not allege that the method of service did not provide it with actual notice of suit.

II. STATEMENT OF LAW

A. The Hague Convention Applies to All Methods of Service that Require Transmittal of a Summons Abroad.

Service of process on a defendant in Mexico is governed by the Convention. The Convention applies in all civil or commercial matters "where there is occasion to transmit a judicial or extrajudicial document for service abroad." Dahya v. Second Judicial District Ct. County of Washoe, 17 Nev. 208, 211, 19 P.3d 239, 241 (2001) (quoting the Convention Art. 1); Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 698-99, 108 S.Ct. 2104, 2107 (1988). The purpose of the Convention 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 Convention authorizes several liberal mechanisms for effectuating service of process. The primary vehicle, established in Articles 2-7, requires each participating country to set up a "Central Authority" for receiving and processing requests for service from parties abroad. See Convention, Art. 2-7; see also Dahya, 17 Nev. at 212; 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 Convention, Art. 2-5. The Central Authority checks the documents for compliance with the Convention and serves such documents in accordance with its own laws. Id., Art. 4-6. The Central Authority then completes and delivers to the requesting party a Certificate, in this case "Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters" ("Certificate") detailing how, where, and when service was made, or explaining why service did not occur. Id., Art. 5-6. The completed Certificate is then returned to the applicant to evidence service. Id.

B. Preemption of Nevada Service of Process 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 Schlunk, 486 U.S. at 699. Thus, when state service of process procedures are in conflict with the Convention, courts are compelled to recognize the supremacy of the Convention's provisions. See R. Griggs Group Ltd. v. Filanto Spa, 920 F.Supp. 1100, 1102 (D. Nev. 1996) (the service provisions of the Convention take precedence over any conflicting Nevada procedural rules); Schlunk, 486 U.S. at 699 ("the Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies."); Ackermann v. Levine, 788 F.2d 830, 840-41 (2d Cir. 1986).[1] This comports with the basic purpose of the Convention – to create expediency and uniformity by eliminating fifty different sets of service regulations. Dahya, 17 Nev. at 208.

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

III. LEGAL ARGUMENT

A. Service Need Not Comply with Nevada Procedural Law, Only the Convention or Mexican Law, Which Petitioner Concedes Occurred.

Petitioner does not dispute that Plaintiff "utilized the correct channels of process when they sent the judicial documents to Mexico's Central Authority." See Pet. Appx., 0040-0043. Rather, Petitioner alleges that service 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 Petitioner of the pendency of this action under Nevada law. Pet. Appx., 0069 & 0072-0073. Petitioner again misstates as well as misapprehends the preemptive impact of the Convention and inapplicability of Nevada procedural rules in this case. Petitioner's entire premises for its Writ is that this Court must refer to "the internal law of the forum state" citing Schlunk, 486 U.S. at 694-95. See Writ, p.6. This premise is incorrect. Instead Petitioner cherry-picked a summary portion of the decision in Schlunk to reach the illogical conclusion that Nevada law (i.e., the law of the forum state) applies. When the context of this statement is read in its entirety, it is easy to see the fallacy of Petitioner's state law argument. Rather, Schlunk merely held that the internal laws of the forum state initially determine if the Convention applies, a fact that neither party disputes. See Schlunk, 486 U.S. at 700 and 701 ("the forum's internal law would govern whether service implicated the Convention."). Once the Convention applies, Schlunk clearly states that "it must serve the documents by a method prescribed by the internal laws of the **receiving** state . . . ." Schlunk, 486 U.S. at 699 (emphasis added). Therefore, it is clear here that applied since Convention deemed dispositive.

Mexico's internal laws (which does not require service of process on a corporation to be made on someone authorized) control and Petitioner's entire basis for its writ goes out the door. In fact, Petitioner acknowledges that "service upon a hostess at a Grupo address may be sufficient in Mexico." Pet. Appx. at 0069 and 0072-0073.

Given that Petitioner's initial premises is incorrect, the cases cited by Petitioner (Tara Min. Corp. v. Carnegie Min. & Exploration, Inc., 2012 WL 760653 (D. Nev. 2012) and Direct Mail Specialists, Inc. v. Eclat Computerized Tech., Inc.,[2] 840 F.2d 685 (9th Cir. 1988)) cannot logically be expanded to require service of process upon an agent, officer or director of Petitioner where such law is inconsistent and conflicts with Mexico's procedural law. Moreover, these cases simply do not address the interplay of the Convention and the receiving state's internal laws since these cases dealt with domestic service of process within the State of Nevada (and not abroad).[3] Accordingly, these cases have no bearing in this matter.

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[2] Although inapplicable, in Eclat, court affirmed a default judgment served upon a "receptionist" after receptionist claimed no one was at Eclat's office 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.

3 Shockingly, Petitioner cites to Burda Media, Inc. v. Viertal, 417 F.3d 292, 299 (2d Cir. 2005), for the proposition that service on a foreign corporation complied with the Convention since plaintiff "had proof that [the individual served] was a managing director of [Defendant] and therefore served as its representative." See Writ, p.9. First, this quote is found in a footnote. Second, Petitioner's reference to this footnote is taken out of context. In Burda Media, plaintiff obtained a default judgment against both Viertel as well as TPL, one of Viertel's companies. 417 F.3d at 297. The entire case relates to the motion to set aside the default judgment against Viertel (who was served with the motion for default judgment in both France and Florida) and not TPL. In fact, Viertel did not seek to vacate the default judgment as to TPL. Id., footnote 3. Thus, Petitioner's reference to service upon TPL through Viertel as the managing director of TPL, is irrelevant and misleading. In fact, in Burda Media, the court found that

Instead, Petitioner simply ignores the wealth of case law, including in Nevada, which preempts state law when service of process is made under the Convention and internal laws of the receiving state. For example, in R. Griggs Group Ltd. v. Filanto Spa, 920 F.Supp. 1100 (D. Nev. 1996), plaintiff filed suit against defendant, an Italian company, for trademark infringement.[4] Plaintiff served defendant by mailing (via FedEx) the summons and complaint to Antonio Filograna, commercial president commander, at defendant's offices in Italy. Id. at 1102. Defendant moved to quash service by establishing that Mr. Filograna was not an officer, director or agent authorized to receive service of process. Id. at 1103. Despite the fact that Mr. Filograna was not an officer, director or authorized agent of defendant, the Nevada district court ruled that service by mail was proper if allowed either by the Convention or internal laws of Italy. Although neither side presented evidence of Italian law relating to the

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plaintiff had properly served Viertel under both the Convention (even though the French authorities never returned a formal certificate of service) and due process concepts since Viertel was served process by personal delivery through the French authorities. Id. at 303.

4 In Filanto Spa, plaintiff attempted service in two ways: (1) by serving Giorgio Lumo (the relationship to defendant Filanto Spa being unclear) when he was present in Las Vegas for a trade show; and (2) by mail. Filanto Spa, 920 F.Supp. at 1102. Petitioner cites to Filanto for the proposition that service must be made upon Mr. Lumo according to Nevada law (i.e., Mr. Lumo must be an officer, director or agent authorized to receive service). Whether or not that is correct, this portion of the case has no bearing given that service upon Mr. Lumo was made domestically (in Nevada) and not abroad. Thus, Petitioner's entire quote of this case is inappropriate and misleading. Further, Petitioner fails to reference the applicable portion of this case, which dealt with service of process under the Convention (and as fully briefed above) and held that the issue of whether nor not Mr. Filograna (and not Mr. Lumo) was an agent, officer or director of defendant was not controlling and, in fact, was irrelevant since service of process was accomplished by mail service under the Convention. 920 F.Supp. at 1103.

propriety of service by mail, the district court considered whether service by mail was permitted under the Convention. Id. The court started by acknowledging that the purpose of the Convention was "to ensure timely notice to litigants and multilateral judicial efficiency." Id. at 1104. The court then ruled that Article 10 of the Convention provided for mail service. Therefore, the court denied defendant's motion to quash FedEx service on defendant through Mr. Filograna even though he was not an officer, director or agent of defendant. Id. at 1107-1108.

This Court reached a similar conclusion in Dahya v. Second Judicial District Ct. County of Washoe, 17 Nev. 208, 211, 19 P.3d 239, 241 (2001), where defendant was served by a Spanish attorney at his home in Spain. Defendant moved to quash service alleging service did not comply with the Convention and failed to satisfy Spanish procedural law. Id. The lower court denied defendant's motion. Defendant then petitioned this Court for a writ of prohibition. Two issues were presented: (1) did service on defendant comply with the Convention; and (2) if not, did such service comply with Spanish civil procedural? Although distinguishable from the facts present in this case, the plaintiff in Dahya bypassed service through both the Spanish Central Authority and diplomatic channels. 19 P.3d at 242. The lower court, however, found that service on defendant by a Spanish attorney was proper under Article 19 of the Convention (the internal laws of the contracting state). Id. In determining defendant's writ, this Court stated that the Convention was adopted to:

> "creat[e] uniformity when effecting service abroad. Thus, **rather than relying on the procedural service of process mechanisms espoused by fifty separate states** in this country, and countless nations abroad, the Hague Convention sought to avoid the hidden pitfalls that inevitably closed courtroom doors to unwary foreign litigants by adopting a uniform set of service rules."

Id. at 243 (citations omitted) (emphasis added). This Court then had to determine whether service was effected in accordance with the receiving nation's internal law. Both sides submitted affidavits from Spanish counsel as to whether foreign service can be performed by a private party. Id. at 244. Under Spanish law, personal service must be performed by an authorized Marshall or judicial officer. Since service was performed by an attorney, who was not a Marshall or judicial officer, service was not in accordance with Spain's procedural requirements and was thus ineffective. Id. Having failed to comply with either the Convention or Spanish law, the lower court never acquired jurisdiction over defendant. Accordingly, defendant's writ was granted.

Additionally, the Nevada Supreme Court recently decided Loeb ex rel. Group v. First Judicial Dist. Court of State, 129 Nev. Adv. Op. 62, 309 P.3d 47 (Nev. 2013). In Loeb, plaintiff brought a shareholder derivate suit against a defendant company and its officers and directors. The individual defendants resided in China. Rather than go through the Convention, plaintiff sought to serve the individual defendants by publication under NRCP 4(e)(1). Defendants opposed the publication motion, instead arguing that plaintiff was required to comply with the Convention since defendants lived in China and their addresses were known. Id. at 49. The lower court denied plaintiff's publication concluding that such service was not allowed by the Convention when a defendant's address was known. Thus, plaintiff was ordered to serve defendants in compliance with the terms of the Convention. Rather than comply with the Convention, Plaintiff filed a writ of petition with the Nevada Supreme Court arguing that the Convention did not apply. Id. The Nevada Supreme Court found that the Convention applied since documents were to be transmitted abroad. The Court went on to note that if the "Convention applies, any inconsistent state law methods of

service are preempted." Id. at 50 (citing Dahya). Thus, this Court denied plaintiff's petition, holding that if a party resides outside of the United States and such party's address is known, service must be made according to the Convention and not this state's procedural rules for service. Id. at 52.

Here, it is undisputed that Petitioner resides outside of the United States and that service is appropriate under the Convention. Pet. Appx., 0037. Moreover, Petitioner fails to set forth any evidence of the service of process laws in Mexico (instead attempting to apply Nevada's inapplicable and preempted procedural rules).[5] Further, Petitioner does not dispute Plaintiff's unrebutted evidence of Mexico's procedural laws regarding service, which permits service upon a legal representative of Petitioner, or if no such representative is available or refuses to show, any other party. Pet. Appx., 0058-0060 & 0069. In addition, the Mexican court blessed the service of process upon Petitioner by issuing the Certificate. Pet. Appx., 0028-0034. Such Certificate is *prima facie* evidence that service of process complied with the Convention and Mexico's procedural laws for service. See Northrup King Co. v. Compania Productora Semillas Algodoneras Selectas, S.A., 51 F.3d 1383 (8th Cir. 1995) (a completed certificate returned by Spanish Central Authority is *prima facie* evidence that process was served in compliance with the Convention). Finally, given the preemptive nature of the Convention and the desire for uniformity, due process concepts are governed by the Convention and/or internal laws of Mexico. Schlunk, 486 U.S. at 699 (by virtue of the Supremacy Clause, the "Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies."); see also Marcantonia v. Primorsk Shipping Corp., 206 F.Supp.2d 54 (Mass. 2002) (country in which service is made is country

[5] In fact, Petitioner concedes that "service upon a hostess at a Grupo

whose laws should be obeyed; since Russian corporation was served in Canada, Canadian law governed service); Macivor, 471 So.2d at 187 (Florida 1985) (reversed order quashing service, finding Supremacy Clause preempts Florida statute governing service since service made under the Convention).

B. Nevada's Rules for Service of Process are Preempted by the Convention and Mexico's Service of Process Rules.

Petitioner contends that, even though the Convention applies and it was served in conformity with it (Pet. Appx., 0043), it was not properly served pursuant to Nevada procedural law (requiring service on an officer, director or authorized individual). Writ, p.7. Petitioner's contention, however, is belied by the rules for preemption, the effect of the Supremacy Clause contained in Article VI, Clause 2 of the United States Constitution, as well as the cases cited herein.

In other words, when process is served and return of process is completed by an official of a country that is a signatory to the Convention in accordance with Article 6 of the Convention, as it was here, that service is sufficient, and any additional requirement which may be imposed by Nevada law is preempted. See Volkswagenwerk, 486 U.S. at 699 (stating that by virtue of the Supremacy Clause of the United States Constitution, the Convention "pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies."); 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 Convention).

Here, Plaintiff complied with both the Convention as well as the

address may be sufficient in Mexico." Pet. Appx., 0069.

internal laws of Mexico (a fact which Petitioner admits), which are the only laws applicable where service of Petitioner was performed in Mexico. The Mexican court verified that service upon Petitioner was valid. Pet. Appx., 0031-0035. In addition, counsel in Mexico (Celso Najera) provided evidence of Mexico's service of process rules, their applicability to Petitioner, and compliance with the same. Pet. Appx., 0058-0060. Petitioner's attempt to cite cases where service must be made upon an officer, director or someone authorized or "highly integrated" within Petitioner's company and cannot be made on a "hostess" – are simply a red herring and are not applicable when service is performed aboard (i.e., under the Convention or internal laws of the receiving state).

C. Under Mexican Law, Service Need Only Be Addressed to a Legal Representative and Can Be Delivered to Anyone if a Legal Representative is Not Present or Refuses to Appear.

Under Mexican law,[6] service upon a corporation is not required to be made by someone who is "authorized" by the corporation to receive service of process. See Nàjera Declaration, ¶¶ 9-10, Pet. Appx. 0058-0060. Rather, under Mexican law, service of process is governed by civil procedure rules, including Articles 66, 67, 69 and 70 of the Civil Procedures Code for the State of Nuevo Leon. Id. Further, in Mexico, service of process is performed entirely through the Mexican courts. Id.

Here, the Mexican court appointed Jehu Ezequiel Echartea Hernandez, Esq., a clerk of the court of Mexico, to serve the summons and

[6] Without any support, Petitioner claims that "Mexican's counsel's legal opinions are inadmissible." Writ, p.3. Petitioner, however, failed to object to the admissibility of the Declaration of Celso Najera Gonzalez or the contents thereof and has therefore waived the right to object to the admission of such evidence. See Clark v. Jdi Loans, LLC (In re Clubs), 130 Nev. Adv. Op. 92, *20 (Nev. 2014); See Whalen v. State,100 Nev. 192, 195-96, 679 P.2d 248, 250 (1984) (considering otherwise inadmissible evidence with respect to a summary judgment because the issue of admissibility was waived for lack of an objection).

complaint (which had been transcribed into Spanish) on Petitioner. Pet. Appx., 00031-0032. On March 17, 2015, Mr. Hernandez, the "court-appointed" officer of the Mexican court, served Petitioner in compliance with Article 6 of the Convention and on or about April 17, 2015, the Mexican Central Authority delivered to Plaintiff the Certificate. Pet. Appx., 0031-0032. This Certificate was thereafter filed with the Clerk of the Court of the District Court, Clark County, Nevada on May 21, 2015. See Certificate attached to Plaintiff's Certificate of Service on Petitioner, Pet. Appx., 0028-0034. The Certificate details the steps taken to serve Petitioner.

Further, as more fully detailed in the Nàjera Declaration, Plaintiff initially encountered obstacles by Petitioner when attempting service in Mexico. The court-appointed process server thus refused to perform service on two separate occasions. Pet. Appx. 0058-0060. After several appearances in front of the Mexican court, the court-appointed process server delivered the Summons and Complaint to Petitioner at the address approved by the Mexican court, which was the same address listed in the Summons. See Nàjera Declaration, ¶¶ 5-7, Pet. Appx. 0058-0060. Thereafter, the Mexican court issued the Certificate showing service was in conformance with Mexican law. See Nàjera Declaration, ¶ 8, Pet. Appx. 0058-0066. Thus, by all standards, service upon Petitioner was made in compliance not only with the Convention, but the internal procedural laws of Mexico (a fact conceded to by Petitioner). Id.

D. The Central Authority's Return of the Certificate is Prima Facie Evidence that Service on Petitioner was Proper.

As indicated above, it is undisputed that Plaintiff complied with both the Convention as well as the internal laws of Mexico when it served Petitioner. Pet. Appx., 0043 & 0069. Further, the Central Authority's return

of the Certificate, which was approved by the Mexican court, is *prima facie* evidence that Petitioner was properly served in accordance with the laws of Mexico and the Convention. See Unite Nat'l Retirement Fund v. Ariela, Inc., 643 F. Supp. 2d 328, 334 (S.D.N.Y. 2008).

In Ariela, the court determined that the certificate filed with the New York court:

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

Id. at 334. See also Northrup King Co., 51 F.3d at 1383 (a completed certificate returned by Spanish Central Authority is *prima facie* evidence that process was served in compliance with the Convention); Resource Trade Finance , Inc. v. PMI Alloys, LLC, 2002 WL 1836818, 4 (S.D.N.Y. Aug. 12, 2002) (it is well settled that the return of a completed certificate of service by a Central Authority establishes *prima facie* evidence that the Central Authority's service was made in compliance with the Convention); Zions First Nat'l Bank v. Moto Diesel Mexicana, S.A. 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 certified that service was completed in accordance with the laws of Mexico.

See Nàjera Declaration, ¶ 8, Pet. Appx., 0058-0060.

Although a *prima facie* showing of proper service may be rebutted by a lack of actual notice or some showing of prejudice, Petitioner made no such showing here. See Ariela, 643 F. Supp. 2d at 335, Northrup, 51 F.3d at 1390. Petitioner has neither disputed that it received actual notice nor has it articulated any prejudice. Indeed, it is undisputed that Petitioner was aware that Plaintiff had filed a lawsuit against both Famsa, Inc. ("Famsa"), as tenant under the lease, and Petitioner, as guarantor of such lease. In fact, both Famsa and Petitioner participated in a Mediation over the breach of lease and guaranty on January 8, 2014. See Declaration of Kelly Brinkman, ¶ 4, Pet. Appx., 0057. Further, Petitioner and Famsa both have the same sets of attorneys involved in this breach of lease litigation (and in the prior litigation with Famsa in which Judge Denton already ruled that Famsa breached its Lease with Plaintiff). See Judgment issued in case A-12-672870-C, entered on April 24, 2014.[7] Further, there is no evidence that Petitioner is unfairly prejudiced by service under the Convention or Mexican law. Indeed, the record shows that the Mexican court-appointed process server served Petitioner and that Plaintiff received the Certificate, which did not note any problems with the adequacy of service of process. Accordingly, Petitioner clearly has actual notice of this suit and the ability to defend the claims presented in Plaintiff's complaint. Therefore, Petitioner's writ of prohibition must be denied.

Further, the denial of service on an "authorized representative of Petitioner" does not rebut the presumption of proper service established by the Certificate. Petitioner's objections simply do not refute the detailed,

[7] Plaintiff requests that this Court take judicial notice of the Court Docket in the prior litigation (Case No. A-12-672870) between Plaintiff and Famsa pursuant to NRS 47.130.

sworn statements of the court officer in the Certificate nor under Mexican law. See Old Republic Ins. Co. v. Pacific Fin. Services of America, Inc., 301 F.3d 54, 57-58 (2d Cir. 2002) (quoting Simonds v. Grobman, 277 A.D.2d 369, 716 N.Y.S.2d 692 (2d Dept. 2000)) ("[N]o hearing is required where the defendant fails to swear to 'specific facts to rebut the statements in the process server's affidavits.'").

E. The Minimal Due Process Requirements for Service of Process Are Easily Satisfied as to Petitioner; Especially Given Petitioner Was Personally Served and Has Actual Notice of This Suit.

For service of process to be upheld in Nevada, the provisions of the Convention and constitutional due process requirements must be satisfied. Although Petitioner agrees the Plaintiff followed the terms of the Convention and the internal laws of Mexico, Petitioner contends that its due process rights have been violated. The standard used to determine whether due process is violated was set out in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950): "[A] fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . ." See also R. Griggs Group Ltd. v. Filanto Spa, 920 F.Supp. 1100 (D. Nev. 1996) ("Constitutional due process requires that service of process be reasonably calculated to provide actual notice.") (citing Mullane). The Mullane due process considerations are incorporated into the Convention. See Shoei Kako v. Superior Court, 33 Cal. App. 3d 808, 820 (1973) ("[a]rticle 15 of the Convention is the equivalent of our national due process concept."). See also Convention, Preamble & Article 1 (Convention simplifies and expedites the service of documents abroad and guarantees that service will be brought to the notice of the recipient in time to defend); Burda Media, Inc. v. Viertel, 417 F.3d

292, 299 (2d Cir. 2005) (service of process is permitted "by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Convention."). Further, the "reasonable standard" is not grounded in perfection. Mullane, 339 U.S. at 317-18. It only requires that a party apply the best efforts practicable for giving notice. Mullane therefore does not require that service of process assure receipt of notice, but instead holds that service must be reasonably calculated to reach the defendant after considering the particular circumstances of each case.

Here, Petitioner has sufficient notice of this action such that the purpose of service is fulfilled. Most importantly, Petitioner was personally served under the Convention and Mexican law when a copy of the Summons and Complaint was delivered to Petitioner at the address set forth in the Summons. This fact is confirmed by the Certificate approved by the Mexican court. Pet. Appx., 0030-0034.

Petitioner's prompt filing and activity in this case also indicates Petitioner has sufficient notice of the Complaint and claims alleged therein. Moreover, Petitioner was also aware of the prior action and participated in a formal mediation with their wholly-owned subsidiary - Famsa. Pet. Appx., 0057. Plaintiff has made efforts to avoid a default against Petitioner and has requested that they actively participate in this case. Plaintiff's Appx., 0126. Plaintiff requested that Petitioner's attorneys agree to accept service on behalf of Petitioner – which was denied. Plaintiff's Appx., 0126. Thus, Plaintiff was forced to go through the time-consuming and expensive process of serving Petitioner in Mexico under the Convention and internal laws of Mexico. Plaintiff's Appx., 0126. In addition, and as more particularly detailed in the Nàjera Declaration, Pet. Appx., 0058-0060, the court process server in Mexico refused to perform service on two occasions until Plaintiff provided additional evidence to the Mexican court – which

court then authorized service at the address listed in the Summons. See Nàjera Declaration, ¶¶ 5-6, Pet. Appx., 0058-0060. Due process merely requires notice and the opportunity to be heard. These protections have been more than satisfied in this case. Petitioner's dilatory tactics to evade service and delay must be stopped. It is certainly reasonable to require Petitioner to defend a suit in Nevada following the breach of lease and guaranty for a Nevada commercial premises where Famsa and Petitioner elected to do business.

Finally, it is uncontroverted by Petitioner that service of process comported with the internal laws of Mexico as well as the Convention. Pet. Appx., 0043 & 0069, as well as the Nàjera Declaration, ¶¶ 9-11, Pet. Appx., 0059-0060 (Mexican law does not require service on a corporation be made on someone who is authorized by the corporation to receive service of process and Article 69 of the Civil Procedure Code for the State of Nuevo Leon permits service at the domicile assigned for such effect by Court appointed process service). Due Process has been satisfied and Petitioner's writ must be denied.

IV. CONCLUSION

Service of process is not intended to be a game of cat and mouse. Rather, the 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. Here, there is no question that those aims have been fulfilled. In fact, Petitioner concedes service complied with the Convention and Mexico's internal laws governing service of process. The inquiry simply ends there.

Nevertheless, the Mexican courts' return of the Certificate is *prima facie* evidence that service on Petitioner was made in compliance with Mexican law. The 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 Convention and that it had served them in compliance with the Convention, i.e., that it made service as Mexican law required. Further, and despite Petitioner's argument, Nevada law is inapplicable as such procedural laws are preempted by the Convention. Accordingly, Petitioner's writ of prohibition must be denied.

DATED this 28th day of August, 2015.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this answering brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this answering brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 Times New Roman 14-point font.

2. I further certify this answering brief complies with the page or type-volume limitations of NRAP 32(a)(7)(ii). Excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 5,559 words, and does not exceed 30 pages.

3. I hereby certify that I have read this answering brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this answering brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 28th of August, 2015.

GOOLD PATTERSON

By: _____

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PROOF OF SERVICE

I hereby certify that I am an employee of the law firm of Goold Patterson, and on the 28th day of August, 2015 I served the foregoing ANSWER TO WRIT OF PROHIBITION 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:

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