

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
 HONORABLE ROB BARE, District
 Court Judge,

9 Respondents,

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

13 Real Party in Interest and
14 Plaintiff.

Electronically Filed
Sep 04 2015 02:17 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

SUPREME COURT CASE NO.:
68626

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

16 **REAL PARTY IN INTEREST'S MOTION FOR**
17 **CLARIFICATION OF ORDER GRANTING TEMPORARY STAY**
18 **AND DIRECTING ANSWER**

21 KELLY J. BRINKMAN, ESQ.
22 GOOLD PATTERSON
23 Nevada Bar No. 6238
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25 Las Vegas, Nevada 89134
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28 Email: kbrinkman@gooldpatterson.com
 Attorneys for Real Party in Interest/Plaintiff

1 B.E. Uno, LLC, as Real Party in Interest and Plaintiff ("Plaintiff"),
2 moves this Court to clarify this Court's Order Granting Temporary Stay and
3 Directing Answer ("Temporary Stay Order").

4 I. FACTS

5 1. On or about August 7, 2015, Petitioner, Grupo Famsa, S.A.
6 de C.V. ("Grupo") filed a Motion to Stay All Proceedings Relating to
7 Grupo Pending Outcome of Petition for Writ of Prohibition ("Motion to
8 Stay"), to which Plaintiff filed an opposition and requested a supersedeas
9 bond amount be set at \$1,000,000. See Petitioner's Appendix filed August
10 14, 2015 ("Pet. Appx."), 0089-0095 and Plaintiff's Supplemental Appendix
11 filed August 31, 2015, 00124-0143.

12 2. On August 11, 2015, a hearing was held in district court and
13 Petitioner's Motion to Stay was denied. An Order Denying Stay was
14 entered in the district court on August 19, 2015. A copy of the District
15 Court Order Denying the Stay is attached hereto as Exhibit 2.

16 3. On August 14, 2015, Petitioner filed an Emergency Motion
17 Under NRAP 27(e) to Stay Proceedings Against Petitioner Pending
18 Resolution of Writ Petition Challenging Service of Process on Due Process
19 Grounds ("Emergency Motion"). [*Docket Entry 15-24688*]

20 4. On August 21, 2015, Plaintiff filed its Opposition to Grupo's
21 Emergency Motion. [*Docket Entry 15-25351*]

22 5. On August 21, 2015, this Court entered an Order Granting
23 Temporary Stay and Directing Answer ("Temporary Stay Order"). [*Docket*
24 *Entry 15-25461*]. A copy of the Temporary Stay Order is attached hereto as
25 Exhibit 1 for the convenience of the Court.

26 6. As of the date of filing, Petitioner has failed to timely file any
27 sort of reply to Plaintiff's Opposition to Petitioner's stay request. Petitioner
28 had until August 31, 2015, to file a reply.

1 7. Pursuant to footnote 1 of the Temporary Stay Order, on
2 August 31, 2015, Plaintiff has also filed with the district court an Ex Parte
3 Application for Order Shortening Time Regarding Plaintiff's Motion for
4 Order Fixing Supersedeas Bond in Connection with Temporary Stay
5 Pending Writ Of Prohibition in Favor of Grupo Famsa, S.A. de C.V.
6 ("Bond Motion"). A copy of the Bond Motion is attached hereto as Exhibit
7 3.

8 8. Although filed on shortened time, a hearing has not yet been
9 set on the Bond Motion. Plaintiff's counsel has contacted the district
10 court's clerk regarding the Bond Motion and was informed by the court
11 clerk that the district court has concerns as to whether it could entertain a
12 hearing on the Bond Motion in light of the Temporary Stay Order.

13 II. ARGUMENT

14 Plaintiff requests clarification of two matters set forth in the
15 Temporary Stay Order:

16 1. Since the temporary stay was granted "pending receipt and
17 consideration of Petitioner's reply", and no such reply being timely filed, is
18 the temporary stay still in place?

19 2. If the temporary stay is still in place, does the district court
20 have the authority to consider the proper amount of a supersedeas bond?

21 1. The Stay Granted by This Court was Expressly Conditioned Upon
22 "Receipt and Consideration" of Petitioner's Reply, Which Was
23 Never Filed; Therefore, The Temporary Nature of the Stay Must Be
Terminated.

24 The Temporary Stay Order provides: ". . . a temporary stay is
25 warranted **pending receipt and consideration of petitioner's reply.**" See
26 Temporary Stay Order, Exhibit 1, p.1 (emphasis added). NRAP 27(a)(4)
27 governs the timeframe for filing a reply, and provides:

28 "Any reply to a response shall be filed within 5 days after

1 service of the response. . .”

2 NRAP 27(a)(4). Since Plaintiff filed its Opposition on August 21, 2015,
3 Petitioner’s reply was due on or before August 31, 2015 (5 business days
4 after service of Plaintiff’s Opposition, plus 3-calendar days for mailing). As
5 of today’s date (September 4, 2015), Petitioner has failed to file a reply. See
6 Brinkman Declaration, ¶ 2. Given that the temporary stay was expressly
7 conditioned upon the filing of a reply by Petitioner and no such reply has
8 been filed, Plaintiff requests clarification from this Court that Petitioner
9 failed to comply with the conditional nature of the temporary stay and that
10 therefore, the stay is no longer in effect.

11 2. If The Stay is Still in Effect, Does the District Court Have the
12 Authority to Determine the Amount of the Supersedeas Bond?

13 Under NRAP 8(a)(1)(B), a supersedeas bond is required whenever
14 a stay is granted. In the Temporary Stay Order, this Court, in footnote 1,
15 did not set the amount of the supersedeas bond, instead suggesting that the
16 “district court is better suited for making supersedeas bond determinations.”
17 See Temporary Stay Order, footnote 1. In particular, footnote 1 of the
18 Temporary Stay Order provides:

19 “The opposition requests that a bond of \$1,000,000 be
20 required as a condition of any stay. It is not clear whether
21 the district court has yet considered the proper amount of
22 any supersedeas bond. NRAP 8(a)(1)(B). We have
23 routinely recognized that the district court is better suited
24 for making supersedeas bond determinations. *See Nelson*
v. Heer, 121 Nev. 832, 836, 122 P.3d 1252, 1254 (2005).”

25 As indicated above, Petitioner originally moved for a stay of the
26 order denying the motion to quash service on Petitioner with the district
27 court. See Pet. Appx. 0089-0095. Petitioner’s motion for a stay was
28 denied. See Order Denying Stay issued by the district court attached hereto

1 as Exhibit 2. Thus, there was no need for the district court to address
2 Plaintiff's earlier request for a bond or the amount thereof.

3 Petitioner again moved for an emergency motion for a stay before
4 this Court. [*Docket Entry 15-24688*]. Plaintiff timely filed its opposition,
5 requesting that the stay be denied outright, or in the alternative, if this Court
6 was inclined to grant the stay (still disputing that a stay should be issued),
7 that no stay be granted unless and until a supersedeas bond in the minimum
8 amount of \$1,000,000 was posted. [*Docket Entry 15-25351*] This amount
9 was based upon the existing \$882,683.71 Judgment obtained in the related
10 litigation (Case No. A-12-672870). See Plaintiff's Appx. 0122-0123. This
11 Judgment is conclusive and binding upon Petitioner pursuant to Petitioner's
12 Guaranty with Plaintiff. See Guaranty attached to Plaintiff's Appx. 0113-
13 0117 ("Guaranty agrees that any judgment rendered against Tenant for
14 monies or performance due Landlord shall in every and all aspects bind
15 and be conclusive against Guarantor to the same extent as if Guarantor had
16 appeared in any such proceedings and judgment herein had been rendered
17 against Guarantor.").

18 On August 31, 2015, Plaintiff filed its Bond Motion with the district
19 court (Exhibit 3), requesting that the district court set a hearing to determine
20 the appropriate amount of bond required to be posted by Petitioner in
21 connection with the granting of the stay by this Court. Given that this
22 Court, however, imposed a temporary stay on all proceedings against
23 Petitioner, the district court is hesitant to hold a hearing to determine the
24 appropriate amount of bond that Petitioner should be required to post. See
25 Brinkman Declaration, ¶¶ 3 and 4.

26 Thus, Plaintiff either requests clarification from this Court: (a)
27 directing the district court to determine, even though a stay may be in place,
28 the amount of the bond required to be posted by Petitioner; with the posting


1 of such bond as an express condition to the continuation of any stay (i.e., a
2 stay is not effective unless and until such bond is posted); or (b) that this
3 Court set the bond amount (in the minimum amount of \$1,000,000) and
4 require Petitioner to post such bond as a condition to any stay.

5 Absent a determination by either this Court or the district court of
6 the appropriate bond amount and the posting of such bond, Petitioner has
7 been allowed a temporary stay without meeting the requirements for the
8 stay.

9 WHEREFORE, Plaintiff respectfully requests an order clarifying:
10 (1) whether a stay is still in place given that such stay was conditioned upon
11 the filing of a reply by Petitioner, which was never filed: and (2) if a stay is
12 still in place, that either this Court determine the amount of such bond, or
13 authorize the lower court to determine such bond amount even though a
14 stay is in place.

15 DATED this 4th day of September, 2015.

16 GOOLD PATTERSON

17
18 By: 
19 Kelly J. Brinkman, Esq.
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21 1975 Village Center Circle, Suite 140
22 Las Vegas, Nevada 89134
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24 Email: kbrinkman@gooldpatterson.com
25 *Attorneys for Real Party in*
26 *Interest/Plaintiff*
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TO: Christopher Byrd, Esq.
FENNEMORE CRAIG, P.C.
300 S. Fourth Street, Suite 1400
Las Vegas, NV 89101
Attorneys for Petitioner

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

Stephen M. Pavey
An employee of Goold Patterson

EXHIBIT 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

GRUPO FAMSA, S.A. DE C.V.,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE ROB
BARE, DISTRICT JUDGE,
Respondents,
and
B.E. UNO, LLC,
Real Party in Interest.

No. 68626

FILED

AUG 21 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER GRANTING TEMPORARY STAY AND DIRECTING ANSWER

This original petition for a writ of prohibition challenges a district court order denying a motion to quash service of process and setting a deadline to file an answer to a complaint. Petitioner has filed an emergency motion to stay the district court's order pending this court's resolution of the writ petition, and real party in interest has filed an opposition.¹ Having considered the motion and opposition, we conclude that a temporary stay is warranted pending receipt and consideration of petitioner's reply. *See* NRAP 8(c); *Fritz Hansen A/ S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 6 P.3d 982 (2000). Accordingly, we temporarily

¹The opposition requests that a bond of \$1,000,000 be required as a condition of any stay. It is not clear whether the district court has yet considered the proper amount of any supersedeas bond. NRAP 8(a)(1)(B). We have routinely recognized that the district court is better suited for making supersedeas bond determinations. *See Nelson v. Heer*, 121 Nev. 832, 836, 122 P.3d 1252, 1254 (2005).

stay the district court's "Order Denying Defendant Grupo Famsa's Motion for Order to Quash Service of Process and Setting Deadline to File an Answer to Complaint" in Eighth Judicial District Court Case No. A-14-706336-C pending further order of this court.

Additionally, having considered the petition and reviewed the documents submitted with it, it appears that an answer to the petition will assist this court in resolving the matter.² Therefore, real party in interest, on behalf of respondents, shall have 30 days from the date of this order within which to file an answer, including authorities, against issuance of the requested writ. Petitioner shall have 15 days from service of the answer to file and serve any reply.

It is so ORDERED.

T. Hardesty, C.J.
Hardesty

Douglas, J.
Douglas

²It appears the district court ruled as a matter of law that service was sufficient based upon the Mexican court's certificate that the service complied with Mexican law and the Hague Convention, but did not resolve the factual dispute over the authority of Ms. Martinez to accept service or resolve whether service satisfied due process under Nevada law. Therefore, we have concerns as to the documents submitted that bear on the issue of due process not shared by our dissenting colleague.

CHERRY, J., dissenting:

While the majority relies solely upon Grupo's affidavits to dispute whether Ms. Martinez was authorized to accept service on Grupo's behalf, the record indicates that this evidence, along with evidence to the contrary, was presented to the district court and the district court nonetheless found as a matter of fact that Uno properly effectuated service pursuant to the Hague Service Convention's procedures.

In considering a writ petition, this court gives deference to a district court's factual determinations and reviews questions of law de novo. *Gonski v. Second Judicial Dist. Court*, 126 Nev. 551, 557, 245 P.3d 1164, 1168 (2010). Grupo argued Ms. Martinez's employment status to the district court and presented a declaration from Grupo's legal director that Ms. Martinez did not have the authority to accept service of process on Grupo's behalf. Uno presented the official certificate from the Mexican authority stating that Ms. Martinez was part of Grupo's legal department. After considering both parties' arguments and evidence, the district court found that Uno properly served Grupo. The district court then ordered Grupo to file an answer by August 13, 2015; instead Grupo filed a petition with this court on August 14, 2015.

Further, Grupo does not dispute that Uno followed proper Hague Convention procedure and properly relied upon the certificate presented from the Mexican authority. If Uno had failed to follow the Hague Convention and/or constitutional due process it would have required a different set of facts or a new factual interpretation, which this court simply cannot provide. See *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) (explaining that "an

appellate court is not an appropriate forum in which to resolve disputed questions of fact").

Given the district court's factual findings, the only tenable legal conclusion is that Uno properly served Grupo. I would accordingly deny the writ and the motion to stay. For these reasons, I respectfully dissent.

Cherry J.
Cherry

cc: Hon. Rob Bare, District Judge
Fennemore Craig Jones Vargas/Las Vegas
Levinson Arshonsky & Kurtz, LLP
Goold Patterson
Eighth District Court Clerk

EXHIBIT 2


CLERK OF THE COURT

1 ODM
2 Kelly J. Brinkman, Esq.
3 Nevada Bar No. 6238
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9 kbrinkman@gooldpatterson.com
10 *Attorneys for Plaintiff*

11
12 DISTRICT COURT
13 CLARK COUNTY, NEVADA

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

16 Plaintiff,

17 vs.

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

21 Defendants.

Case No. A-14-706336-C

Dept. No. XXXII

22 **ORDER DENYING DEFENDANT**
23 **GRUPO FAMSA'S MOTION TO STAY**
24 **ALL PROCEEDINGS RELATED TO**
25 **GRUPO FAMSA, S.A. DE C.V.**
26 **PENDING OUTCOME OF WRIT OF**
27 **PROHIBITION**

28 This matter having come before the Honorable Rob Bare, on August 11, 2015, on the Motion to Stay All Proceedings Related to Grupo Famsa, S.A. de C.V. Pending Outcome of Writ of Prohibition ("Motion") filed by Defendant, Grupo Famsa, S.A. de C.V., a Mexican corporation ("Defendant Grupo Famsa"), against Plaintiff, B.E. Uno, LLC, a Nevada limited liability company ("Plaintiff"); Kelly Brinkman of the law firm of Goold Patterson, appearing on behalf of Plaintiff, and Christopher H. Byrd of the law firm of Fennemore Craig, P.C., appearing on behalf of Defendant Grupo Famsa; the Court having reviewed the pleadings and papers on file herein, considered the arguments of counsel, being fully advised of the premises, finding no genuine issues of material fact, and good cause appearing therefore, the Court hereby finds as follows:

A. Taking into account all of the factors under NRCP 8(c) and given this Court's prior ruling denying Grupo Famsa's Motion to Quash, this Court finds that Defendant Grupo Famsa has not demonstrated that it is likely to prevail on the merits in its Writ of Prohibition.

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B. In particular, the Mexican court previously approved the service of the Summons and Complaint upon Defendant Grupo Famsa and issued a "Certificate" approving such service of process.

C. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant Grupo Famsa's Motion is DENIED.

ORDER

IT IS SO ORDERED this 18 day of August, 2015.


DISTRICT COURT JUDGE

Submitted by:

ROB BARE
JUDGE, DISTRICT COURT, DEPARTMENT 32

GOOLD PATTERSON

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

REVIEWED BY:

FENNEMORE CRAIG, P.C.

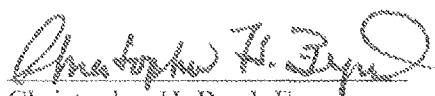
By: 
Christopher H. Byrd, Esq.
Nevada Bar No. 1633
300 S. Fourth Street, Suite 1400
Las Vegas, NV 89101
Attorney for Defendants

EXHIBIT 3


CLERK OF THE COURT

1 **EXMT**
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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-14-706336-C

DEPT. NO.: XXXII

**EX PARTE APPLICATION FOR ORDER
SHORTENING TIME REGARDING
PLAINTIFF'S MOTION FOR ORDER
FIXING SUPERSEDEAS BOND IN
CONNECTION WITH TEMPORARY
STAY PENDING WRIT OF
PROHIBITION IN FAVOR OF GRUPO
FAMSA, S.A. DE C.V.; DECLARATION
OF KELLY J. BRINKMAN IN SUPPORT**

21 Plaintiff, B.E. Uno, LLC ("Plaintiff") by and through its attorney, Kelly J. Brinkman of the
22 law firm of Goold Patterson, respectfully moves this Court to shorten the time for hearing of
23 Plaintiff's Motion for Order Fixing Supersedeas Bond in Connection with Temporary Stay
24 Pending Writ of Prohibition ("Bond Motion") in Favor of Grupo Famsa, S.A. de C.V. ("Grupo") in
25 the above referenced action. This Ex Parte Motion is based upon the attached Declaration of Kelly
26 J. Brinkman in Support.

27 **POINTS AND AUTHORITIES**

28 EDCR 2.26 provides in part:

"Ex Parte motions to shorten time shall not be granted except upon affidavit . . . of counsel
describing the circumstances claimed to constitute good cause and justify shortening . . ."

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LAS VEGAS, NEVADA 89134
(702) 436-2600 FAX (702) 436-2650

Plaintiff requests that its Bond Motion (a draft copy of which is attached hereto as Exhibit 1) be heard on shortened time given that the Nevada Supreme Court has **already granted** Grupo a temporary stay pending a ruling on Grupo's recently filed writ of prohibition. See Order Granting Temporary Stay and Directing Answer ("Stay Order") attached hereto as Exhibit 2. Given this Court's familiarity with the facts underlying this breach of lease/guaranty dispute, the Nevada Supreme Court did not make a determination as to the appropriate amount of a supersedeas bond. Instead, the Nevada Supreme Court suggested that this Court should decide the bond amount. In particular, the Supreme Court stated in footnote 1 of the Stay Order as follows:

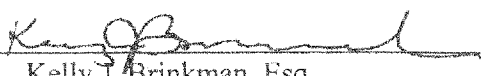
"The opposition requests that a bond of \$1,000,000 be required as a condition of any stay. It is not clear whether the district court has yet considered the proper amount of any supersedeas bond. NRAP 8(a)(1)(B). We have routinely recognized that the district court is better suited for making supersedeas bond determinations. *See Nelson v. Heer*, 121 Nev. 832, 836, 122 P.3d 1252, 1254 (2005)."

See Stay Order attached hereto as Exhibit 2.

Neither a ruling nor a hearing have been set for Grupo's writ of prohibition — the matter is still in the briefing stages. Notwithstanding, a temporary stay has been put in place — thus requiring an immediate determination of the appropriate bond amount. Therefore, Plaintiff requests that this Court shorten the time for hearing on Plaintiff's Bond Motion to the earliest possible date for this Court and potentially before September 11, 2015.

DATED this 31st day of August, 2015.

GOOLD PATTERSON

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

DECLARATION OF KELLY J. BRINKMAN IN SUPPORT

I, Kelly J. Brinkman, under penalty of perjury, declare as follows

1. I am the attorney for the Plaintiff in the above entitled matter. I have personally knowledge of all of the facts and circumstances set forth therein. This Ex Parte Application is made and based upon EDCR 2.26.

2. Plaintiff makes this request for hearing on shortened time as the outcome of the hearing on Plaintiff's motion for order setting supersedeas bond amount effects the proceedings in the Supreme Court of Nevada case filed by Defendant, Grupo Famsa, S.A. de C.V. in the Supreme Court of Nevada; Case No. 68626.

3. In particular, Plaintiff requests that its Bond Motion (a draft copy of which is attached hereto as Exhibit 1) be heard on shortened time given that the Nevada Supreme Court has **already granted** Grupo a temporary stay pending a ruling on Grupo's recently filed writ of prohibition. See Order Granting Temporary Stay and Directing Answer ("Stay Order") attached hereto as Exhibit 2. Given this Court's familiarity with the facts underlying this breach of lease/guaranty dispute, the Nevada Supreme Court did not make a determination as to the appropriate amount of a supersedeas bond. Instead, the Nevada Supreme Court suggested that this Court should decide the bond amount. In particular, the Supreme Court stated in footnote 1 of the Stay Order as follows:

"The opposition requests that a bond of \$1,000,000 be required as a condition of any stay. It is not clear whether the district court has yet considered the proper amount of any supersedeas bond. NRAP 8(a)(1)(B). We have routinely recognized that the district court is better suited for making supersedeas bond determinations. See *Nelson v. Heer*, 121 Nev. 832, 836, 122 P.3d 1252, 1254 (2005)."

See Stay Order attached hereto as Exhibit 2.

4. Neither a ruling nor a hearing have been set for Grupo's writ of prohibition – the matter is still in the briefing stages. Notwithstanding, a temporary stay has been put in place – thus requiring an immediate determination of the appropriate bond amount.

5. Plaintiff requests that this Court shorten the time for hearing on Plaintiff's Bond

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1 Motion to the earliest possible date for this Court and potentially before September 11, 2015.

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

3 DATED this 31st day of August, 2015.

4 
5 Kelly J. Brinkman

EXHIBIT 1

1 **MBAP**
2 Kelly J. Brinkman, Esq.
3 Nevada Bar No. 6238
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9 kbrinkman@gouldpatterson.com
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-14-706336-C

DEPT. NO.: XXXII

**PLAINTIFF'S MOTION FOR ORDER
FIXING SUPERSEDEAS BOND IN
CONNECTION WITH TEMPORARY
STAY PENDING WRIT OF
PROHIBITION IN FAVOR OF GRUPO
FAMSA, S.A. DE C.V. ON AN ORDER
SHORTENING TIME; DECLARATION
OF KELLY J. BRINKMAN IN SUPPORT**

Hearing Date:

Hearing Time:

21 Plaintiff, B.E. Uno, LLC ("Plaintiff"), by and through its attorneys, Goold Patterson,
22 hereby moves this Court for an order fixing supersedeas bond amount in connection with the
23 Nevada Supreme Court order granting a temporary stay pending writ of prohibition ("Stay Order")
24 in favor of Grupo Famsa, S.A. de C.V. ("Grupo"). This motion is made and based upon the
25 following Points and Authorities and exhibits, Declaration in Support, pleadings, papers, and
26 records on file, and any oral argument presented at the time of the hearing.
27
28

NOTICE OF MOTION

TO: Christopher Byrd, Esq., FENNEMORE CRAIG, P.C.
Attorney Defendants, Famsa Inc. and Grupo Famsa, S.A. de C.V.

PLEASE TAKE NOTICE that the undersigned will bring the foregoing Plaintiff's Motion for Order Fixing Supersedeas Bond in Connection with Temporary Stay Pending Writ of Prohibition in Favor of Grupo Famsa, S.A. de C.V. on an Order Shortening Time on for hearing on the ____ day of _____, 2015, at the hour of _____, in Department XXXII, located at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada 89155, or as soon thereafter as counsel may be heard.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL BACKGROUND

On August 7, 2015, Grupo filed its Motion to Stay All Proceedings Related to Group on shortened time, to which Plaintiff filed its Opposition on August 10, 2015. A hearing on Grupo's Motion to Stay was held on August 11, 2015. This Court denied Grupo's stay request. Given that the stay was denied, there was no need to address Plaintiff's earlier request for a supersedeas bond, or the amount thereof.

On August 14, 2015, Grupo filed an emergency motion to stay with the Supreme Court of Nevada (Case No. 68626) along with its Writ of Prohibition. Plaintiff filed its opposition to Grupo's emergency motion to stay on August 21, 2015, and later that same day the Supreme Court of Nevada issued an order granting temporary stay. See Order Granting Temporary Stay and Directing Answer ("Stay Order") attached hereto as Exhibit 1. The Nevada Supreme Court, however, suggested that this Court was in a better position to determine the amount of the supersedeas bond given this Court's familiarity with the underlying factual proceedings. See Stay Order, footnote 1, attached hereto as Exhibit 1. Accordingly, Plaintiff requests that this Court determine the amount of bond required in connection with the Stay Order pending Grupo's writ of prohibition pending with the Nevada Supreme Court.

II. LEGAL ARGUMENT

The Supreme Court of Nevada stated in its Stay Order that the district court is better suited for making supersedeas bond determinations. In particular, the Supreme Court stated:

"The opposition requests that a bond of \$1,000,000 be required as a condition of any stay. It is not clear whether the district court has yet considered the proper amount of any supersedeas bond. NRAP 8(a)(1)(B). We have routinely recognized that the district court is better suited for making supersedeas bond determinations. *See Nelson v. Heer*, 121 Nev. 832, 836, 122 P.3d 1252, 1254 (2005)."

See Exhibit 1, footnote 1.

NRAP 8(a)(1)(B) provides in pertinent part that:

"A party must ordinarily move first in the district court for the following relief:

(B) approval of a supersedeas bond..."

Pursuant to NRAP 8(2)(E), the filing of a bond is appropriate whenever a stay may be issued. Plaintiff requests that a bond in the minimum amount of \$1,000,000.00 be required in connection with the Stay Order. This amount is based on the Judgment obtained in the prior litigation (Case No. A-12-672870-C) in the amount of \$748,394.19 plus attorney fees (\$126,712.50) and costs (\$7,577.02) awarded for a total of \$882,683.71. See Judgment and Order on Attorney on Attorney Fees and Costs attached as Exhibit 2.¹ This Judgment, all of which remains outstanding, was awarded in April of 2014, and continues to bear interest.

Further, under Plaintiff's Guaranty with Grupo executed in connection with the subject lease, Plaintiff's prior Judgment is both binding and conclusive against Grupo to the same extent that Grupo has appeared in the prior litigation and Judgment had been rendered against it directly. See Guaranty, attached hereto as Exhibit 3. Although Grupo may argue that the accruing of interest may be sufficient to protect Plaintiff, such contention fails to recognize the difference between money in-hand versus the right to collect upon such Judgment. As we have already seen in this case, Grupo is utilizing every conceivable road-block to prevent Plaintiff from collecting

¹ Plaintiff requests this Court take judicial notice of these documents filed in Case. No. A-12-672870-C, pursuant to NRS 47.130.

1 money due it following both Famsa, Inc.'s and Grupo's breach of lease and guaranty. Grupo must
2 be held responsible for the consequences of its business-decision to breach. Imposing a
3 supersedeas bond on the minimum amount of \$1,000,000 simply requires Grupo to answer for its
4 breach.

5 **III. CONCLUSION**

6 Plaintiff requests that a bond in the amount of \$1,000,000.00 be required and that such
7 bond be posted with this Court on or before September 11, 2015, in order for the temporary stay to
8 remain in place.

9 DATED this _____ day of September, 2015.

10 GOOLD PATTERSON

11
12 By: _____

13 Kelly J. Brinkman, Esq.
14 Nevada Bar No. 6238
15 1975 Village Center Circle, Suite 140
16 Las Vegas, Nevada 89134
17 *Attorneys for Plaintiff*
18
19
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DECLARATION OF KELLY J. BRINKMAN IN SUPPORT

1. Kelly J. Brinkman, under penalty of perjury, declare as follows:

1. I have personal knowledge of the facts set forth herein, except as otherwise stated, and if called to do so, I could and would competently testify thereto. I make this Declaration in support of Plaintiff's Motion for Order Fixing Supersedeas Bond in Connection with Temporary Stay Pending Writ Of Prohibition in favor of Grupo Famsa, S.A. de C.V.

2. 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 has 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 that hearing, Grupo, through its counsel, made an oral motion to stay the ruling, which was denied.

3. Defendants have previously informed Plaintiff that Famsa's assets are fully encumbered by a loan made by Grupo to Famsa. Thus, it is reasonable to infer that Group is the only defendant with unencumbered assets sufficient to cover Plaintiff's judgment (both in the prior litigation and any judgment obtained in this matter).

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

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

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

DATED this ____ day of September, 2015.

Kelly J. Brinkman

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the law firm of Goold Patterson, and on the _____ day of September, 2015, I served the foregoing PLAINTIFF'S MOTION FOR ORDER FIXING SUPERSEDEAS BOND IN CONNECTION WITH TEMPORARY STAY PENDING WRIT OF PROHIBITION IN FAVOR OF GRUPO FAMSA, S.A. DE C.V. ON AN ORDER SHORTENING TIME; DECLARATION OF KELLY J. BRINKMAN 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, P.C.
300 S. Fourth Street, Suite 1400
Las Vegas, NV 89101
*Attorneys for Defendants, Famsa, Inc.
and Grupo Famsa, S.A. de C.V.*

An employee of Goold Patterson

EXHIBIT 2

IN THE SUPREME COURT OF THE STATE OF NEVADA

GRUPO FAMSA, S.A. DE C.V.,
Petitioner,
vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE ROB
BARE, DISTRICT JUDGE,
Respondents,
and
B.E. UNO, LLC,
Real Party in Interest.

No. 68626

FILED

AUG 21 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER GRANTING TEMPORARY STAY AND DIRECTING ANSWER

This original petition for a writ of prohibition challenges a district court order denying a motion to quash service of process and setting a deadline to file an answer to a complaint. Petitioner has filed an emergency motion to stay the district court's order pending this court's resolution of the writ petition, and real party in interest has filed an opposition.¹ Having considered the motion and opposition, we conclude that a temporary stay is warranted pending receipt and consideration of petitioner's reply. See NRAP 8(c); *Fritz Hansen A/ S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 6 P.3d 982 (2000). Accordingly, we temporarily

¹The opposition requests that a bond of \$1,000,000 be required as a condition of any stay. It is not clear whether the district court has yet considered the proper amount of any supersedeas bond. NRAP 8(a)(1)(B). We have routinely recognized that the district court is better suited for making supersedeas bond determinations. See *Nelson v. Heer*, 121 Nev. 832, 836, 122 P.3d 1252, 1254 (2005).

stay the district court's "Order Denying Defendant Grupo Famsa's Motion for Order to Quash Service of Process and Setting Deadline to File an Answer to Complaint" in Eighth Judicial District Court Case No. A-14-706336-C pending further order of this court.

Additionally, having considered the petition and reviewed the documents submitted with it, it appears that an answer to the petition will assist this court in resolving the matter.² Therefore, real party in interest, on behalf of respondents, shall have 30 days from the date of this order within which to file an answer, including authorities, against issuance of the requested writ. Petitioner shall have 15 days from service of the answer to file and serve any reply.

It is so ORDERED.

T. Hardesty, C.J.
Hardesty

Douglas, J.
Douglas

²It appears the district court ruled as a matter of law that service was sufficient based upon the Mexican court's certificate that the service complied with Mexican law and the Hague Convention, but did not resolve the factual dispute over the authority of Ms. Martinez to accept service or resolve whether service satisfied due process under Nevada law. Therefore, we have concerns as to the documents submitted that bear on the issue of due process not shared by our dissenting colleague.

CHERRY, J., dissenting:

While the majority relies solely upon Grupo's affidavits to dispute whether Ms. Martinez was authorized to accept service on Grupo's behalf, the record indicates that this evidence, along with evidence to the contrary, was presented to the district court and the district court nonetheless found as a matter of fact that Uno properly effectuated service pursuant to the Hague Service Convention's procedures.

In considering a writ petition, this court gives deference to a district court's factual determinations and reviews questions of law de novo. *Gonski v. Second Judicial Dist. Court*, 126 Nev. 551, 557, 245 P.3d 1164, 1168 (2010). Grupo argued Ms. Martinez's employment status to the district court and presented a declaration from Grupo's legal director that Ms. Martinez did not have the authority to accept service of process on Grupo's behalf. Uno presented the official certificate from the Mexican authority stating that Ms. Martinez was part of Grupo's legal department. After considering both parties' arguments and evidence, the district court found that Uno properly served Grupo. The district court then ordered Grupo to file an answer by August 13, 2015; instead Grupo filed a petition with this court on August 14, 2015.

Further, Grupo does not dispute that Uno followed proper Hague Convention procedure and properly relied upon the certificate presented from the Mexican authority. If Uno had failed to follow the Hague Convention and/or constitutional due process it would have required a different set of facts or a new factual interpretation, which this court simply cannot provide. See *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) (explaining that "an

appellate court is not an appropriate forum in which to resolve disputed questions of fact").

Given the district court's factual findings, the only tenable legal conclusion is that Uno properly served Grupo. I would accordingly deny the writ and the motion to stay. For these reasons, I respectfully dissent.

Cherry J.
Cherry

cc: Hon. Rob Bare, District Judge
Fennemore Craig Jones Vargas/Las Vegas
Levinson Arshonsky & Kurtz, LLP
Goold Patterson
Eighth District Court Clerk

EXHIBIT 3

OST
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kbrinkman@gooldpatterson.com
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

CASE NO.: A-14-706336-C

DEPT. NO.: XXXII

**ORDER GRANTING EX PARTE
MOTION FOR ORDER SHORTENING
TIME**

Upon reviewing the Ex Parte Motion for an Order Shortening Time of Plaintiff herein, and
good cause appearing therefore, it is hereby

ORDERED that the time for hearing of the Plaintiff's Motion for Order Fixing Supersedeas
Bond in Connection with Temporary Stay Pending Writ of Prohibition in Favor of Grupo Famsa,
S.A. de C.V. is hereby is shortened to the _____ day of _____, 2015, at
_____ am/pm in Dept. XXXII of the above-entitled Court.

DATED this _____ day of _____, 2015.

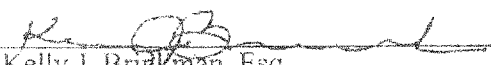
DISTRICT COURT JUDGE

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Submitted by:
GOOLD PATTERSON

By: 
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