

EXHIBIT “2”

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CLERK OF THE COURT

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9 *Attorneys for Defendant FAMSA, INC.*

10 **DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

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

14 Plaintiff,

15 vs.

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

18 Defendants.

CASE NO. A-12-672370-C

DEPT. NO. XIII

19
20 **ORDER GRANTING MOTION TO**
21 **QUASH SERVICE**

22 An oral motion having come before the Honorable Mark R. Denton, on February 26, 2014,
23 on special appearance by Christopher Byrd, Esq. of the law firm of Fennemore Craig Jones Vargas
24 and Richard I. Arshonsky, Esq. of the law firm of Levinson, Arshonsky & Kurtz, LLP, for GRUFO
25 FAMSA, S.A. DE C.V. ("Grupo"), a Mexican corporation, for the sole purpose of challenging
26 jurisdiction and to quash purported service of process on Grupo; and Kelly Brinkman, Esq. and
27 Bryan Day, Esq., of the law firm of Gould Patterson, appearing on behalf of Plaintiff; and the Court
28 having taken judicial notice of the pleadings on file and having considered the documents purporting
to demonstrate service and oral argument from counsel and being fully advised of the premises, and
good cause appearing therefore, the Court hereby finds as follows:

LEVINSON ARSHONSKY & KURTZ, LLP

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CLERK OF DISTRICT COURT

1 1. Plaintiff alleges service in this case was proper on several grounds: including but not
2 limited to: service on FAMSA Inc. ("FAMSA") should substitute for service on Grupo because
3 FAMSA is Grupo's subsidiary in the United States and Grupo had knowledge of the lawsuit once
4 FAMSA was served; and service on Grupo under the terms of Hague Convention was complete
5 when a process server went to the address on the Summons and there was no Grupo Famsa at that
6 address and he was told by an unidentified individual that the Grupo office was in Mexico City and
7 later Plaintiff's law firm sent process by federal express to Grupo at the same address in Mexico
8 visited by the process server.

9 2. Plaintiff did not file a return of service on Grupo prior to trial of this matter. The only
10 return of service filed was an acceptance of service on behalf of FAMSA, Inc.

11 3. Although the parties had different versions of the effort to serve process on Grupo
12 personally in Mexico and the reasons for non-delivery of process, Grupo was not personally served
13 by the process server in Mexico. Plaintiff did not provide any explanation for not sending the
14 process server back to attempt personal service on Grupo a second time after the package was
15 delivered to the Mexico address.

16 4. There was no evidence that FAMSA, Inc. was authorized to accept service for Grupo
17 in the United States, regardless of relationship that Plaintiff claims exists between FAMSA and
18 Grupo.

19 5. FAMSA is not an officer, general partner, member, manager, trustee or director of
20 Grupo for purposes of service of process under NRCP 4(d)(2), although Mr. Ignacio Ortiz is the
21 president of FAMSA and a director of Grupo.

22 6. There was no evidence that Mr. Arshonsky or his firm were authorized to accept
23 service of process for Grupo, even though they may represent FAMSA Inc. and Grupo in other
24 litigation outside Nevada.

25 7. The Court takes judicial notice of the fact that Plaintiff had until December 6, 2013 to
26 serve Grupo pursuant to order of the this Court and there has been no request for additional time to
27 complete service.
28

8. The federal express receipt for the package addressed to Grupo indicates the package was mailed by the law firm representing Plaintiff in this case.

9. In order for service of process to be effective a party has to comply strictly with NRCP 4. Plaintiff did not comply with the requirements of NRCP 4 for personal service of Grupo either under the Hague Convention or substitute service on a foreign corporation.

Based upon the foregoing the Court concludes:

1. Plaintiff had the burden to prove service of process was properly effected. Under Nevada law, notice of a lawsuit does not substitute for compliance with the requirements of NRCP 4 for service of process. Even if Grupo had notice of the suit from its subsidiary FAMSA Inc. or from attorneys that represent Grupo in other litigation, such notice cannot substitute for service under NRCP 4.

2. Plaintiff did not satisfy NRCP 4(d)(2) because FAMSA was not an officer, general partner, member, manager, trustee or director of Grupo. NRS 14.065 does change the rules for substitute service of a foreign corporation and there is no Nevada statute that would permit serving a United States subsidiary of a foreign corporation in a lawsuit involving breach of a lease.

3. The rules of Mexico would control whether mailing can be used to complete service under the Hague Convention. Based upon *Cardona v. Kraemer*, 235 P. 3d 1026 (Ariz. 2010) Mexico does not permit mailing as a method for completing service under the Hague Convention.

4. An attorney for a party cannot serve process. The participation by Plaintiff's attorney in the attempt to complete the service by mailing would have made service under the Hague Convention defective, even if mailing were permitted.

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5. NRCP 4(i) requires dismissal without prejudice if timely service of process is not made on a party.

Based upon the above Findings of Fact and Conclusions of Law, and good cause appearing,
IT IS HEREBY ORDERED that the Motion to Quash Service on Grupo is hereby GRANTED and the Complaint against Grupo is dismissed without prejudice.

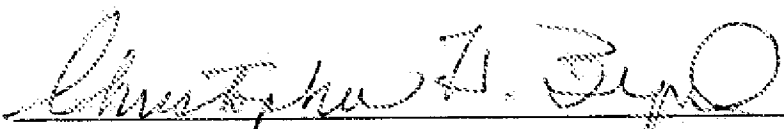
DATED this 14th day of March, 2014.


 DISTRICT COURT JUDGE

Submitted by:

FENNEMORE CRAIG JONES VARGAS

By:


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Attorneys for Defendant FAMSA, INC.

EXHIBIT "1"

1 **AFFIDAVIT OF CHRISTOPHER H. BYRD, ESQ. IN SUPPORT OF**
2 **GRUPO'S OPPOSITION TO UNO'S MOTION FOR CLARIFICATION OF**
 ORDER GRANTING TEMPORARY STAY AND DIRECTING ANSWER

3 STATE OF NEVADA }
4 } ss.
5 COUNTY OF CLARK }

6 I, CHRISTOPHER H. BYRD, ESQ., being first duly sworn states under
7 penalty of perjury that the following assertions are true and correct of my own
8 personal knowledge:

9 1. I am an attorney licensed to practice law in the State of Nevada and am
10 a director at the law firm of Fennemore Craig, P.C., attorneys for Grupo Famsa,
11 S.A. DE C.V. ("Grupo"). This Affidavit is submitted in support of Grupo's
12 Opposition to Uno's Motion for Clarification of Order Granting Temporary Stay
13 and Directing Answer.

14 2. In reading this Court's Order Granting Temporary Stay and Directing
15 Answer, I apparently misinterpreted the Order. I assumed that the "reply"
16 referenced on page 1 referred to Grupo's reply to the Answer to the Writ not
17 Grupo's original Motion. The Court had already granted a stay and directed an
18 answer to the Writ. I had read the Opposition to the Motion, which the Court

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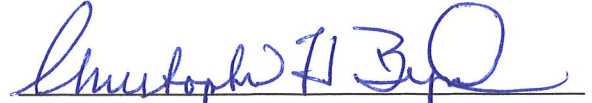
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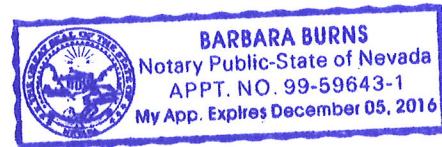
1 considered and referenced in the Order. The majority of that Opposition was
2 directed to the merits of the Writ. These factors contributed to my interpretation of
3 the Order.

4 DATED this 11th day of September, 2015.

5 
6 CHRISTOPHER H. BYRD

7 SUBSCRIBED and SWORN to before me
8 this 11th day of September, 2015.

9 
10 Notary Public



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 v.

6 THE EIGHTH JUDICIAL DISTRICT
7 COURT of the State of Nevada, in and for
8 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 Plaintiff,

CASE NO: 68626

District Court Case No.: A-14-706336-C

15 **PETITIONER'S APPENDIX IN SUPPORT OF OPPOSITION TO REAL**
16 **PARTY IN INTEREST'S MOTION FOR**
17 **CLARIFICATION OF ORDER GRANTING TEMPORARY STAY AND**
18 **DIRECTING ANSWER**

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35 Attorneys for Petitioner

1 **PETITIONER’S APPENDIX IN SUPPORT OF**
2 **OPPOSITION TO REAL PARTY IN INTEREST’S MOTION FOR**
3 **CLARIFICATION OF ORDER GRANTING TEMPORARY STAY AND**
 DIRECTING ANSWER

4 **DOCUMENTS**

BATES STAMP
 NO.

- 5 1. Affidavit of Christopher H. Byrd 0001-0003
6 2. Order Granting Motion to Quash Service dated March 0004-0008
7 18, 2014

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 v.

6 THE EIGHTH JUDICIAL DISTRICT
7 COURT of the State of Nevada, in and for
8 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 CASE NO.:
68626

Electronically Filed
Sep 11 2015 10:42 a.m.
Tracie K. Lindeman
DISTRICT COURT CASE NO. A-14-706336-
Clerk of Supreme Court

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

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36 *Attorneys for Petitioner and Defendant*
37 *Grupo FAMSA, S.A. de C.V.*

1 Petitioner GRUPO FAMSA, S.A. DE C.V., a Mexican corporation (“Grupo”)
2 submits this Reply in Support of its Emergency Motion Under NRAP 27(e) to Stay
3 Proceedings and Opposition to Real Party in Interest’s Motion for Clarification of
4 Order Granting Temporary Stay and Directing Answer. On August 21, 2015, this
5 Court granted Grupo’s emergency motion to stay the district court’s proceedings
6 pending resolution of the Writ Petition. This Reply will address the arguments
7 asserted by B.E. UNO, LLC (“Uno”) in its Opposition to Grupo’s Emergency Motion,
8 as well as oppose Uno’s pending Motion for Clarification, which was filed with this
9 Court on September 4, 2015.

10 I. Grupo made a good faith mistake interpreting this Court’s stay order.

11 Uno argues that Grupo’s temporary stay is no longer in effect because Grupo
12 did not submit a reply on or before August 31, 2015. As demonstrated by the Affidavit
13 of Christopher H. Byrd, attached as **Exhibit 1**, Grupo believed that the reply
14 referenced in this Court’s Order Granting Temporary Stay and Directing Answer was
15 a reply to Uno’s eventual answer to the writ. The order states that Uno shall have 30
16 days from the date of the order to file an answer and that Grupo shall have 15 days
17 thereafter to file a reply. Grupo believed that this was the reply the Court requested in
18 the Order when it stated its conclusion that “a temporary stay is warranted pending
19 receipt and consideration of petitioner’s reply.”

20 The confusion about the reply will be remedied when Grupo files its reply in
21 support of the Writ. Grupo’s reply is due on Monday, September, 14, 2015. Any
22 issue with respect to the length of the stay is inconsequential, particularly since the
23 litigation continues as to all other parties. Moreover, the majority of Uno’s opposition
24 to the motion to stay focused on the merits of the writ, which will be addressed in
25 Grupo’s reply. Uno’s position that service complied with Mexican law and the Hague
26 Convention is based upon the mistaken notion that the person served was someone
27 other than a hostess at a Grupo store. Moreover, Uno’s reliance on the opinion of
28 Mexican counsel is also misplaced. “Relying on paid witnesses to spoon feed judges

1 is justifiable only when the foreign law is the law of a country with such an obscure or
2 poorly developed legal system that there are no secondary materials to which the
3 judge could turn.” *Sunstar, Inc. v. Alberto-Culver Co.*, 586 F.3d 487, 495-96 (7th Cir.
4 2009). Mexico is not one of those jurisdictions. Therefore, Grupo requests that the
5 stay remain in effect until this Court addresses the merits of Grupo’s writ.

6 II. A supersedeas bond is not required for a stay because Grupo is not
7 appealing a judgment and UNO has no damages from a stay.

8 Uno misstates the law in its Motion for Clarification when it states that “under
9 NRAP 8(a)(1)(B), a supersedeas bond is required whenever a stay is granted.” *See*
10 Uno’s Motion for Clarification, p. 3, ll. 13-14. To the contrary, NRAP states that “the
11 court may condition relief on a party’s filing a bond or other appropriate security in
12 the district court.” NRAP(a)(2)(E). In fact, requiring a supersedeas bond in this
13 instance would contradict the purpose of such a bond. A supersedeas bond is
14 appropriate only on appeals to stay execution of a judgment. *See SUPERSEDEAS*
15 *BOND*, Black’s Law Dictionary (10th ed. 2014) (defining supersedeas bond as “an
16 appellant’s bond to stay execution on a judgment during the pendency of the appeal”);
17 *see also Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005) (“a
18 supersedeas bond posted under NRCP 62 should usually be set in an amount that will
19 permit full *satisfaction of the judgment*”). In this case, Grupo is appealing the district
20 court’s denial of its Motion to Quash, not a judgment. Since this is a preliminary
21 matter in the case, and not a judgment, a supersedeas bond cannot be required here.

22 Further, Uno’s request for Grupo to post a \$1,000,000.00 supersedeas bond
23 because of a judgment against Famsa, Inc., in a prior case arising from the same lease
24 in which Grupo was not served with process, has no legal basis. *See Order Granting*
25 *Motion to Quash Service* dated March 18, 2014, attached as **Exhibit 2**. To create a
26 basis for its bond claim, Uno wants to bypass litigation about the validity of the
27 guaranty and have this Court conclude, as a matter of law, that the guaranty is valid
28 and that Grupo is responsible for the prior judgment. Uno supplies no legal basis for

1 this Court to take such action.

2 Finally, there is no damage to Uno from a stay because any damages ultimately
3 imposed continue to accrue interest while this matter is resolved. Thus, there is no
4 reason for a bond and no legal authority to require a bond in this type of preliminary
5 matter.

6 **CONCLUSION**

7 Grupo requests that the stay remain until the court considers Grupo's reply to
8 the writ and that no bond be required for the stay.

9 DATED this 11th day of September, 2015.

10 **FENNEMORE CRAIG, P.C.**

11
12 

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Attorneys for Petitioner and Defendant

1 **CERTIFICATE OF COMPLIANCE**

2 1. I hereby certify that this brief complies with the formatting requirements
3 of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style
4 requirements of NRAP 32 (a)(6) because:

5 ☒ This brief has been prepared in a proportionally spaced typeface using
6 Microsoft Word version 2010 in Times New Roman with a font size of 14; or

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

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

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

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

17 ☒ Does not exceed 15 pages.

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3. Finally, I hereby certify that I have read this appellate 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 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 11th day of September, 2015.

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Attorneys for Petition and Defendants

1 **CERTIFICATE OF SERVICE**

2 Pursuant to Nevada Rule of Appellate Procedure 25(c)(1), I hereby certify that I
3 am an employee of Fennemore Craig, P.C. and that on this 10th day of September,
4 2015, I caused the foregoing **OPPOSITION TO REAL PARTY IN INTEREST'S**
5 **MOTION FOR CLARIFICATION OF ORDER GRANTING TEMPORARY**
6 **STAY AND DIRECTING ANSWER** to be served by submission to the electronic
7 filing service for the Nevada Supreme Court upon the following to the email address
8 on file and by depositing same for mailing in the United States Mail, in a sealed
9 envelope addressed to:

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15 *Attorneys for Plaintiff*

District Court Judge Rob Bare
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16 
17 An employee of Fennemore Craig, P.C.
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