

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

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16 **REPLY IN SUPPORT OF WRIT OF PROHIBITION**

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1 **NRAP 26.1 DISCLOSURE**

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

4 There are no entities to be disclosed.

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

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INTRODUCTION

B.E. UNO, LLC's ("Uno") Answer frames the issue as one of preemption of Nevada law by the Hague Convention. But preemption is not the issue; the real issue is whether service of a hostess at a Grupo store complied with constitutional due process.

Uno cannot use the Certificate from the Mexican Central Authority as a substitute for a due process analysis. The law is clear, in addition to the Hague Convention, service of process must also satisfy constitutional due process. Moreover, the Certificate is based upon false information. Grupo rebutted any prima facie case of proper service based upon the Certificate or the opinion of Uno's Mexican counsel with specific evidence that the person served was a hostess/greeter at a store, not an employee in the legal department as the Mexican Central Authority and Mexican counsel was led to believe.

Grupo's evidence that the Certificate contained false information also rebuts Uno's repeated claims that Grupo conceded that service complied with the Hague Convention and Mexican law. Proper service has not occurred in this case and the documents Uno relies upon to prove service are defective because they are based upon false information about the status of the person served.

Finally, notice of the lawsuit does not make up for lack of due process or improper service, regardless of how difficult or expensive it may be to serve a party. Grupo's insistence on proper service and due process does not mean that Grupo is evading service or engaging in a game of "cat and mouse" as Uno claims. Uno is required to properly serve process before jurisdiction can be obtained over Grupo.

I. UNO ONCE AGAIN MISSES THE POINT THAT THIS IS A CONSTITUTIONAL ISSUE, NOT AN ISSUE OF NEVADA STATE PROCEDURAL LAW.

In its Answer, Uno repeatedly emphasizes that the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (the "Convention") preempts

1 Nevada law. The Answer devotes an exorbitant amount of time to this argument,
2 which is perplexing given that Grupo has never argued otherwise. Grupo's position
3 is, and always has been, that service in this case did not comply with the United States
4 Constitution, not that Uno did not comply with Nevada's state procedural laws.
5 Indeed, it is fundamental that service of process must satisfy both the Convention and
6 the United States Constitution. See *Burda Media, Inc. v. Viertel*, 417 F.3d 292, 303
7 (2d Cir. 2005) ("in addition to the Hague Convention, service of process must also
8 satisfy constitutional due process"). By repeatedly emphasizing that the Convention
9 preempts Nevada law, Uno is misdirecting the Court towards an issue that Uno can
10 prevail upon, but one that is not in dispute.

11 **II. UNO'S ATTEMPTED SERVICE FAILS TO COMPORT WITH THE**
12 **DUE PROCESS REQUIREMENTS OF THE UNITED STATES**
13 **CONSTITUTION.**

14 Uno's Answer spends no time discussing the central issue of the Writ, which is
15 whether Uno's attempt at service on a Grupo hostess complied with the United States
16 Constitution. As Uno admits in its Answer, the provisions of the Hague Convention
17 and constitutional due process must be satisfied for service of process to be upheld in
18 Nevada. Answer at 16, citing *Burda Media, Inc. v. Viertel, Id.*; see also *Heredia v.*
19 *Transp. S.A.S., Inc.*, 101 F. Supp. 2d 158, 162 (S.D.N.Y. 2000) ("in addition to the
20 Hague Convention, service of process must also satisfy constitutional due process").

21 Service on a hostess at a Grupo store does not satisfy due process because it is
22 highly probable that a hostess will not recognize the significance of the papers or
23 timely deliver them to the proper party. To constitutionally effectuate service on a
24 foreign corporation, service must be made upon an agent, officer, or representative of
25 that corporation, so that the person receiving the papers knows what to do with them.
26 See *Tara Minerals Corp. v. Carnegie Min. & Exploration, Inc.*, 2012 WL 760653, at
27 *1 (D. Nev. Mar. 7, 2012) ("service can be made 'upon a representative so integrated
28 with the organization that he will know what to do with the papers. Generally, service

1 is sufficient when made upon an individual who stands in such a position as to render
2 it fair, reasonable and just to imply the authority on his part to receive service”)
3 (quoting *Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc.*, 840 F.2d
4 685, 688 (9th Cir. 1988)); see also *Courtesy Chevrolet, Inc. v. Tennessee Walking*
5 *Horse Breeders' & Exhibitors' Ass'n of Am.*, 344 F.2d 860, 866 (9th Cir. 1965) (“the
6 rationale of all rules for service of process on corporations is that service must be
7 made on a representative so integrated with the corporation sued as to make it a priori
8 supposable that he will realize his responsibilities and know what he should do with
9 any legal papers served on him”) (emphasis added). Uno cites *Mullane v. Central*
10 *Hanover Bank*, 339 U.S. 306 (1950) for the proposition that due process requires a
11 party to use the “the best efforts practicable for giving notice”. Answer at 16.
12 Certainly there is a better process available for giving notice to Grupo than handing
13 important legal documents to a hostess at a Grupo store.

14 Uno’s attempt at service here failed to comply with the United States
15 Constitution because Uno served a hostess who is not so integrated within Grupo for
16 service to be deemed constitutional. Because Uno’s attempt at service does not
17 comport with the requirements of the United States Constitution, service must be
18 quashed.

19 Alternatively, Uno argues Grupo’s actual notice of the lawsuit is sufficient to
20 satisfy due process. Answer at 16. Uno claims Grupo had actual notice of this lawsuit
21 based upon filing of the motion to quash, which occurred after service of a Notice of
22 Intent to Take Default and an appearance at a mediation in a prior lawsuit. *Id.* Uno,
23 however, fails to demonstrate any nexus between Grupo’s activities and service of the
24 hostess/greeter. Moreover, actual notice of a suit is not an effective substitute for
25 service of process. See *Abreu v. Gilmer*, 115 Nev. 308, 314, 985 P.2d 746, 750 (1999)
26 (“We reiterate, however, that actual notice of a suit is not an effective substitute for
27 service of process”); see also *Moulton v. Eugene Burger Mgmt. Corp.*, 2009 WL
28 205053, at *3 (D. Nev. Jan. 26, 2009) (“Moreover, it should be noted that Nevada law

1 expressly provides that actual notice of a suit is not an effective substitute for service
2 of process”). “Similarly, it is an established principle that actual knowledge of a
3 lawsuit’s filing and lack of prejudice resulting from the use of a legally insufficient
4 method of service do not excuse a plaintiff’s failure to comply the Civil Rules [of
5 service].” *LaNeve v. Atlas Recycling, Inc.* 894 N.E.2d 25, 30 (Ohio 2008). Proper
6 service, not just notice, is necessary for the court to acquire jurisdiction over the
7 party. *Id.* Thus, compliance with the service rules is not just a game of cat and mouse
8 as Uno claims. Answer at 17.

9 Furthermore, if notice of a claim was all that was required for valid service,
10 there would be no need for motions to quash. A person filing a motion to quash
11 necessarily has actual notice of the claim and the lawsuit. Therefore, Grupo’s
12 knowledge of the litigation has no bearing on whether service of process was proper
13 or complied with due process.

14 **III. THE DISTRICT COURT ERRED IN ASSUMING THAT UNO’S**
15 **ATTEMPT AT SERVICE OF PROCESS COMPLIED WITH THE**
16 **HAGUE CONVENTION AND MEXICO’S INTERNAL LAWS BY**
17 **RELYING EXCLUSIVELY ON THE CERTIFICATE WHICH WAS**
18 **REBUTTED BY GRUPO’S DECLARATION.**

19 Finally, Uno argues that due process was satisfied because service of process
20 was proper under the Hague Convention and Mexico’s internal law. Answer at
21 Answer 12-14 and 16. The Mexican Central Authority’s Certificate, stating that
22 Grupo was served, is not dispositive on whether Uno complied with the Convention
23 and Mexico’s internal procedural law or due process. Answer at 15-16. Contrary to
24 Uno’s Answer, Grupo has never conceded that service complied with Mexican law
25 and the Hague Convention. Answer at 2 and 17. Grupo only conceded that use of the
26 Hague Convention was the proper process. App. at 43. Grupo’s has always
27 contended that the service on Ms. Martinez was not proper.

28 Uno’s compliance argument is based upon the mistaken belief that the person

1 served was a member of Grupo's legal department as stated in the Certificate, not a
2 hostess at a Grupo store. This deficiency is not cured by Uno's reliance on the
3 Certificate or the opinion of Mexican counsel. Answer at 13-14 and 17.

4 Grupo presented evidence to the District Court that rebutted the Certificate's
5 primary factual underpinning for service—that Ms. Matinez worked in the legal
6 department for Grupo, when in fact she was a hostess. The District Court was not
7 entitled to rely solely on the Certificate and ignore the evidence presented by Grupo to
8 avoid a due process analysis. *Labelle v. Martin*, 2012 WL 3704717, at *1 (W.D.N.C.
9 Aug. 27, 2012). In *Labelle*, the court found service of process improper despite a
10 completed certificate from the Quebec Central Authority. There, the plaintiff sent a
11 request for service under the Convention to Quebec's Central Authority to serve the
12 defendant. *Id.* The Quebec Central Authority completed a certificate stating that
13 service had been left with the defendant's roommate at the address listed by the
14 plaintiff. *Id.* In a subsequent motion to quash service of process, the defendant filed
15 an affidavit stating that he does not have a roommate and that he did not reside at that
16 address. *Id.* The affidavit further stated that the individual served was his brother's
17 electrician, and therefore did not reside in the premises. *Id.* The court ultimately
18 quashed service, despite the Quebec Central Authority's completed certificate,
19 because the plaintiff did not dispute the factual allegations that rebutted the certificate.
20 *Id.* at *2. Further, the court found that the defendant having actual notice of the
21 lawsuit did not excuse its failure to properly service process. *Id.*

22 Similar to *Labelle*, Grupo has provided the court with an affidavit which clearly
23 states that the individual served by the Mexican Central Authority is a hostess at a
24 Grupo store. Thus, any conclusion by the Mexican Central Authority that service
25 complied with internal Mexican law must be disregarded here because it was based on
26 a false premise. The individual served is not an employee in Grupo's legal
27 department, as is stated in the Certificate, and Uno has not provided any evidence to
28 contradict this fact. For these reasons, Uno cannot rely upon the deficient Mexican

1 Central Authority's Certificate to demonstrate that service of process was proper on
2 Grupo or foreclose the required due process analysis.

3 Uno cites several cases for the proposition that the Court cannot look behind the
4 Certificate to find due process. Answer at 13. See, *Unite Nat'l Retirement Fund v.*
5 *Ariela, Inc.*, 643 F. Supp. 328, 334 (S.D.N.Y. 2008); *Res. Trade Fin., Inc. v. PMI*
6 *Alloys, LLC*, 2002 WL 1836818, at *4 (S.D.N.Y. Aug. 12, 2002); and *Zions First Nat.*
7 *Bank v. Moto Diesel Mexicana, S.A., de C.V.*, 2011 WL 2669608, at *1 (E.D. Mich.
8 July 7, 2011). But, the Certificate is not irrefutable. *Labelle, Id.* In Uno's cited cases
9 the issue was whether there was sufficient evidence to rebut the affidavit of the
10 process server involved in the actual service or the certificate. In this case, Grupo has
11 detailed evidence of the deficiency in the Certificate that makes service improper and
12 there is no statement from the process server or anyone else to rebut Grupo's evidence
13 that service was not as stated in the Certificate.

14 Alternatively, Uno relies upon the opinion of Mexican counsel that service
15 complied with Mexican law and, therefore, due process. The opinion of counsel,
16 however, is also based upon the Certificate. Thus the opinion is not sufficient
17 evidence of due process or proper service under Mexican law.

18 In addition, Mexican counsel's opinion is limited. The opinion never states
19 what Mexican law requires to serve a corporation. *App.* 59. Nor did Uno present any
20 legal authority defining a "legally able person" under Articles 69 and 70 of the Civil
21 Procedures of the State of Nuevo Leon, referenced in counsel's opinion. *Id.* Mexican
22 counsel certainly does not opine that service of the hostess was proper because his
23 opinion is based upon the false information in the Certificate that the person served
24 worked in the legal department. Thus, Uno cannot use the opinion of counsel to prove
25 that service of a hostess at a Grupo store satisfies due process or Mexican law. Courts
26 are also reluctant to rely upon opinions of retained counsel that opine on the law.
27 "Relying on paid witnesses to spoon feed judges is justifiable only when the foreign
28 law is the law of a country with such an obscure or poorly developed legal system that

1 there are no secondary materials to which the judge could turn.” *Sunstar, Inc. v.*
2 *Alberto-Culver Co.*, 586 F.3d 487, 495-96 (7th Cir. 2009). Mexico is not one of those
3 jurisdictions. Moreover, on its face, service on a hostess clearly does not satisfy due
4 process.

5 **IV. CONCLUSION**

6 Grupo’s argument has always been that Uno failed to comply with
7 constitutional due process requirements when Uno served an individual that was a
8 hostess at a Grupo store. Grupo submitted specific evidence that rebutted the
9 Certificate and demonstrated that service in this case failed to comply with due
10 process under anyone’s definition.

11 Since Uno failed to comply with constitutional due process by serving a
12 hostess, this Court should grant the Writ and enter an order directing the District Court
13 to quash the service on Grupo.

14 DATED this 18th day of September, 2015.

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V. CERTIFICATE OF COMPLIANCE

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

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word version 2010 in Times New Roman with a font size of 14; or
[] This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

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

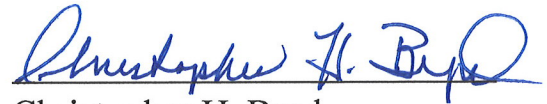
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[X] Does not exceed 15 pages.

3. I hereby certify that I am counsel of record for Petitioner-Defendant, Grupo FAMSA, S.A. de C.V. in this matter, that I have read the foregoing Petition for Writ of Prohibition and that to the best of my knowledge, information and belief, it is not frivolous or imposed for any improper purpose. I further certify that this Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P 28(e), which requires every assertion in the Petition regarding matters in the

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1 record to be supported by a reference to the page of the transcript or appendix where
2 the matter relied on is to be found. I understand that I may be subject to sanctions in
3 the event that the accompanying brief is not in conformity with the requirements of
4 the Nevada Rules of Appellate Procedure.

5 DATED this 18th day of September, 2015.

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8 Christopher H. Byrd
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CERTIFICATE OF SERVICE

Pursuant to Nevada Rule of Appellate Procedure 25(c)(1), I hereby certify that I am an employee of Fennemore Craig, P.C. and that on this 18th day of September, 2015, I caused the foregoing **REPLY IN SUPPORT OF WRIT OF PROHIBITION** to be served by submission to the electronic filing service for the Nevada Supreme Court upon the following to the email address on file and by depositing same for mailing in the United States Mail, in a sealed envelope addressed to:

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