

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,

10
11 B.E. UNO, LLC, a Nevada limited
12 liability company,

13 Real Party in Interest and
14 Plaintiff.

Electronically Filed
Oct 27 2015 03:42 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

SUPREME COURT CASE NO.:
68626

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

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16 **REAL PARTY IN INTEREST'S OPPOSITION TO MOTION TO**
17 **STRIKE, OR IN THE ALTERNATIVE, MOTION TO SUPPLEMENT**
18 **ANSWER TO WRIT OF PROHIBITION AND SUPPLEMENTAL**
APPENDIX WITH DETAILED EVIDENCE OF PROPER SERVICE
UPON GRUPO FAMSA, S.A. DE C.V.

19 B.E. Uno, LLC, as Real Party in Interest and Plaintiff ("Plaintiff"), files its
20 Opposition to Grupo Famsa, S.A. DE C.V.'s ("Petitioner") Motion to Strike,
21 or in the Alternative, Motion to Supplement Petitioner's Answer to Writ of
22 Prohibition and Supplemental Appendix.

23 **I. INTRODUCTION**

24 Petitioner's Writ to this Court is based on whether or not Petitioner
25 was properly served in Mexico under the Hague Convention. For the benefit
26 of all parties and this Court, Plaintiff seeks to introduce factual documents
27 and details regarding service upon Petitioner. This Court should consider this
28 relevant evidence.

II. LEGAL ARGUMENT

1. This Court Should Consider All Relevant Authority in Adjudicating this Matter, Including the International Service Documents, which Explain in Detail All Steps Taken by Plaintiff to Serve Petitioner.

In support of its Motion to Strike, Petitioner contends that Plaintiff is attempting to raise “new matters” and create a “new record” before this Court. See Motion to Strike, p. 1. Petitioner further argues that “the timing of [Plaintiff’s] Supplemental Authorities is manifestly unfair to [Petitioner],” since briefing is complete. Id., p.2, ll 6-7. Each of these arguments is unavailing and hides the true purpose and actual merits of Petitioner’s Writ of Prohibition – whether or not Petitioner has notice of and the opportunity to respond to Plaintiff’s complaint for breach of lease and commercial guaranty.

First, Plaintiff is not trying to introduce new evidence or make new arguments. The International Service Documents (as defined in the Plaintiff’s Supplemental Authorities and Supplemental Appendix (collectively, “Supplemental Authorities”)) simply provides the entire history and background of the extensive steps taken by Plaintiff to serve Petitioner. Further, these documents supplement the evidence previously presented in the state-court hearing on Petitioner’s motion to quash service. Introduction of this information does nothing more than paint a full picture for the benefit of this Court.

Plaintiff has previously submitted both the Certificate of Service, blessed by the Mexican court, as well as the Declaration of Celso Najera (Plaintiff’s Mexican counsel), which not only details the steps taken to serve Petitioner, but the obstacles encountered during such service attempts. Further, the Najera Declaration also sets forth the legal requirements for service of process under Mexican law (the applicable law in this case). The

1 International Service Documents are merely a court-authorized translation
2 of these-above steps that have already been submitted into evidence.

3 Although Petitioner may not like the results gleaned from a careful
4 review and consideration by this Court of these documents (given that these
5 documents confirm service upon Petitioner, and show that service was
6 made upon a legal representative (to the extent that is even necessary under
7 Mexican law)), such disdain for what these documents confirm is not, and
8 should not, be grounds to deny submission of this Court's record in this
9 matter.

10 Second, there is **no prejudice** to Petitioner in permitting this
11 Court's review of the International Service Documents. Oral argument has
12 not yet been set. Nor has this Court issued a ruling on Petitioner's Writ. In
13 fact, this matter is in its early stages, Petitioner just submitting its Reply on
14 September 18, 2015. Simply put, there is no harm in permitting a full and
15 complete record before this Court.

16 Third, these International Service Documents go to the heart of the
17 matter -- service upon Petitioner. This Court should consider all relevant
18 authority provided by the parties.¹

19 Fourth, as a result of the **temporary stay** that has been issued in
20 this case (and which has been pending since August 21, 2015), Plaintiff has
21 not been able to conduct any discovery upon Petitioner to determine if the
22 statements made by Humberto Loza are accurate or misleading. For
23 example, Petitioner initially claimed that Claudia Palomo Martinez was not
24 even an employee of Petitioner. See Pet. Appx. 0040 and 0043 ("...the
25 summons was served upon [Claudia Palomo Martinez], a person with no
26 relation to Grupo.") and ("In this case Plaintiff caused the judicial
27

28 ¹ Plaintiff has no issue with Petitioner being permitted ten (10) days
from entry of this Opposition to submit any contrary or supplemental
evidence based on the International Service Documents.

documents to be served upon a person completely unrelated to Grupo.”)
Later, Petitioner suddenly changed its story by claiming she worked for
Petitioner but defined her role as a “greeter” or “hostess”. See Pet. Appx.
0068-0077. In essence, Petitioner is trying to concoct a story that Plaintiff
merely walked into the retail store for Famsa (much like a Walmart) and
delivered service of the Summons and Complaint on the first person that
greeted the process server when he walked into the store. Nothing can be
farther from the truth, which is evident by a reading of the International
Service Documents. See Plaintiff’s Supp. Appx. 0144-0200.

Fifth, it is important to keep in mind the fundamental due process
concept behind **service of process** – which is merely to provide a party
with “notice” of a lawsuit and the “opportunity to defend.” See Mullen v.
Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). It is abundantly
clear here that Petitioner has both notice of this lawsuit and the opportunity
to defend.

Sixth, it was both unnecessary and costly to submit the entire
International Service Documents in the state-court hearing on Petitioner’s
motion to quash. Plaintiff had already submitted the Certificate of Service,
blessed by the Mexican court, which is *prima facie* evidence of proper
service. See Northrup King Co. v. Compania Productora Semillas
Algodoneras Selectas, 51 F.3d 1383, 1390 (8th Cir. 1995). Further, Plaintiff
had submitted a declaration from its Mexican attorney (Celso Najera)
setting forth the requirements for service of process in Mexico as well as
detailing the hurdles Plaintiff had to overcome in serving Petitioner. See
Pet. Appx. 0028-0034, and 0058-0066. All of this evidence is already
before this Court. The International Service Documents do not change
what has been submitted, but help clarify and provide the full-picture in
support of the validity of service (undermining Petitioner’s contentions).

1 These documents go to the heart of Petitioner's Writ and should be
2 considered by this Court.

3 Finally, this Court has already permitted Petitioner to submit
4 evidence and pleadings even though such evidence and pleadings were
5 untimely. For example, Petitioner was required to submit a reply to
6 Plaintiff's Opposition to Petitioner's stay request, but failed to timely do so,
7 claiming it misunderstood this Court's Order on August 21, 2015. See
8 Petitioner's Opposition to Real Party in Interest's Motion for Clarification
9 of Order Granting Temporary Stay and Directing Answer [*Document 2015-*
10 *7554*], Page 2, Section I.

11 2. Alternatively, Plaintiff Requests Leave of this Court to File a
12 Supplemental Brief and/or Supplemental Authorities Introducing
13 Into Evidence these International Service Documents.

14 In the interests of justice and so that the Writ is decided based on
15 the facts and not the mischaracterizations or falsehoods represented by
16 Petitioner, Plaintiff moves this Court for leave to file a supplement to its
17 Answer to the Writ of Prohibition and/or Supplemental Authorities.
18 Permitting such request will allow this Court to consider all such relevant
19 authorities in adjudicating this matter.

20 Petitioner's motion to strike is the very definition of blind
21 opportunism, and an attempted exercise in avoiding having the Writ
22 decided on its merits. Law and equity do not support Petitioner's position.
23 This Court has long held that cases should be decided on their merits, not
24 upon technicalities and incomplete evidence. In 1894, the Nevada Supreme
25 Court wrote in Beck v. Thompson, 22 Nev. 109, 36 P. 562, 564 (1894):

26 This court, the same as all other courts, was created for the
27 *purpose of reviewing the merits* of the controversies of men,
28 and of determining them upon the broad principles of justice,
and not upon technicalities, and it is always a matter of sincere
regret to be compelled to do the latter. *In every possible way*

1 *this should be avoided.*

2 Even earlier in the history of the jurisprudence of Nevada, the Nevada
3 Supreme Court acknowledged that merits must triumph over technicalities:

4 The power of the court should be freely and liberally exercised,
5 under this and other sections of the act, to mould and direct its
6 proceedings so as to dispose of cases upon their substantial
7 merits, and without unreasonable delay, regarding mere
8 technicalities as obstacles to be avoided, rather than as
9 principles to which effect is to be given in derogation of
10 substantial right. While formal requirements of pleading and
11 practice cannot be dispensed with by the court, it can usually
12 make such orders or grant such amendments in the progress of
13 the cause as will avoid the effect of petty exceptions, and
14 dispose of the case upon its legal merits. It can also usually
15 prevent unjust or unfair advantages or serious injury arising
16 from casualties or inadvertences.

13 Horton v. New Pass Gold & Silver Min. Co., 21 Nev. 184, 27 P. 376, 377-78
14 (1891).

16 The Nevada Supreme Court routinely finds axiomatic in Nevada:
17 “We are not to exalt form over substance.” Lagrange Const. Inc. v. Del E.
18 Webb Corp., 83 Nev. 524, 530, 435 P.2d 515 (1967). See also Marcuse v.
19 Del Webb Communities, Inc., 163 P.3d 462, 468 (Nev. 2007) (“We conclude
20 that the minority case authority exalts form over substance and impedes
21 judicial economy”); Derouen v. City of Reno, 87 Nev. 606, 609, 491 P.2d
22 989 (1971); Carter v. State, 121 Nev. 759, 121 P.3d 592, 595 (2005);
23 Desimone v. State, 116 Nev. 195, 202, 996 P.2d 405, 410 (2000) (warning
24 against elevating form over substance and practicality); Gallego v. State, 117
25 Nev. 348, 357-58, 23 P.3d 227, 234 (2001); Singleton v. Sheriff, Clark
26 County, 86 Nev. 590, 592, 471 P.2d 247, 249 (1970) (finding against exalting
27 form over substance); Kelly v. State, 84 Nev. 332, 337, 440 P.2d 889, 892
28 (1968) (refusing to exalt form over substance and ritual over purpose).

1 Here, Petitioner's opportunistic attempts to prevail on perceived
2 (but absent) technical advantages over merits and exalt form over
3 substance, is directly contrary to the great weight of Nevada Supreme Court
4 authority. Plaintiff must be entitled to have its claims and the Supplemental
5 Authorities decided on the merits. Equity, and Nevada Supreme Court
6 precedent, require this Honorable Court to consider the International
7 Service Documents as part of the merits of this case.

8 III. CONCLUSION

9 Plaintiff respectfully requests that this Court consider its
10 Supplemental Authorities and the corresponding documents in support of
11 Service of Process upon Petitioner (identified as Bates Stamp No. 0144-
12 0200) in adjudicating this matter. There is no legitimate reason for striking
13 Plaintiff's Supplemental Authorities, and this Court should deny
14 Petitioner's request. Alternatively, this Court should grant Plaintiff's
15 request for leave to file its Supplemental Authorities so that a full-picture
16 can be presented relating to service of process.

17 DATED this 27th day of October, 2015.

18 GOOLD PATTERSON

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