

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  
8       for 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.:

                                  Electronically Filed  
DISTRICT COURT CASE NO. 29 p.m.  
A-14-706336-C  
Tracie K. Lindeman  
Clerk of Supreme Court

16                                   **PETITION FOR WRIT OF MANDAMUS**

17       **FENNEMORE CRAIG, P.C.**

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34       *Attorneys for Defendant and Petitioner*

35       *Grupo FAMSA, S.A. de C.V.*

1 Pursuant to NRS 34.160, Petitioner Grupo FAMSA, S.A. de C.V. ("Grupo")  
2 petitions this Court for a Writ of Mandamus and/or other relief directing the district  
3 court to vacate the order requiring Grupo to post a supersedeas bond of \$1,000,000  
4 by November 12, 2015, to satisfy a judgment to which Grupo was not a party or the  
5 potential judgment in the pending case, as condition for the stay granted by this  
6 Court on August 21, 2015, ("Stay Order") in Supreme Court case no. 68626.

7 This Petition is supported by the following Memorandum of Points and  
8 Authorities, the Stay Order, the Declaration of Christopher H. Byrd and the  
9 Appendix of Record filed with this petition.

10 Dated this 6th day of November, 2015.

11 **FENNEMORE CRAIG, P.C.**

12 

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27 *Attorneys for Defendants*

1 **NRAP 26.1 DISCLOSURE**

2 The undersigned counsel of record certifies that the following are persons  
3 and 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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1 that the prior judgment against Famsa can be satisfied or any future judgment in  
2 the pending case can be satisfied.

3 As such, Grupo respectfully requests that this Court issue an alternative writ  
4 of mandamus directing the district court to vacate the order setting a bond as an  
5 abuse of discretion and keeping the stay in effect, until this Court decides the issue  
6 of whether Grupo was properly served with the summons and complaint. Grupo  
7 has no other legal means to challenge the district court's improper prejudgment  
8 attachment of its property.

## 9 **II. ISSUE PRESENTED**

10 Did the district court abuse its discretion in requiring Grupo to post a  
11 \$1,000,000 supersedeas bond, as a condition for the stay granted by this Court,  
12 based upon a prior judgment, to which Grupo was not a party, and a potential  
13 judgment in the underlying case, before the jurisdiction question is finally decided?

## 14 **III. STATEMENT OF RELIEF SOUGHT**

15 Petitioner respectfully requests that this Court issue an alternative writ of  
16 mandamus directing the district court to vacate the order setting a bond as an abuse  
17 of discretion and keeping the stay in effect until this Court decides the issue of  
18 whether Grupo was properly served.

## 19 **IV. STATEMENT OF FACTS**

### 20 **A. The Prior Action**

21 On December 3, 2012, Uno, the owner of commercial property, filed a  
22 Complaint, assigned Case No. A-12-672870-C, against its tenant, Famsa, Inc.  
23 ("Famsa") for breach of lease, and against Grupo, as the guarantor under the lease  
24 (the "Prior Action"). **App. 0001-0009.** In the Prior Action, the district court  
25 granted Grupo's motion to quash service of the summons and complaint and Grupo  
26 was dismissed from the Prior Action. **App. 0010-0013.** The Prior Action  
27 proceeded to trial against Famsa. Uno obtained a Judgment against Famsa in the  
28 total amount of \$882,683.71. **App. 0014-0018.** Since the lease did not contain an

1 acceleration clause, Uno could not recover the full amount it contended was due  
2 under the lease. *Id.*

3 **B. The Current Action**

4 On August 29, 2014, Uno filed this action, asserting the same causes of  
5 action against the same parties, for damages occurring after the date of the  
6 damages covered by the Judgment in the Prior Action. **App. 0019-0027.**

7 **C. Grupo's Motion to Quash Service in this Action.**

8 On or about June 1, 2015, Grupo filed a Motion for Order to Quash Service  
9 of Process ("Motion to Quash"). **App. 0028-0035.** After briefing by the parties, the  
10 district court decided the motion based upon the pleadings and the affidavits  
11 presented and, on August 4, 2015, filed its Order Denying Defendant Grupo  
12 FAMSA's Motion for Order to Quash Service of Process and Setting Deadline to  
13 File Answer to Complaint ("Order Denying Motion to Quash"). **App. 0036-0039.**

14 **D. The District Court's Denial of Grupo's Motion to Stay**

15 On August 7, 2015, in the district court, Grupo filed a motion to stay all  
16 proceedings against Grupo pending the outcome of Grupo's petition for a writ of  
17 prohibition in this Court. **App. 0040-0046.** The district court denied the stay  
18 request. **App. 0068-0069.**

19 **E. This Court's Issuance of a Stay Order**

20 On August 14, 2015, in this Court Grupo filed a Petition for Writ of  
21 Prohibition regarding the district court's Order Denying Motion to Quash and an  
22 Emergency Motion to Stay Proceedings. **App. 0047-0067.** On August 21, 2015,  
23 this Court issued an Order Granting Temporary Stay and Directing Answer ("Stay  
24 Order"). **App. 0070-0073.** Uno demanded a \$1,000,000 bond in its opposition to  
25 the Motion to Stay. **App. 0078.** The Stay Order addressed Uno's request for a  
26 supersedeas bond. In the first footnote of the Stay Order, this Court stated that "it is  
27 not clear whether the district court has yet considered the proper amount of any  
28 supersedeas bond." The footnote added that the Court has "routinely recognized



1 that the district court is better suited for making supersedeas bond determinations.”  
2 **App. 0071.** This Court has not yet ruled on Grupo’s Petition for Writ of Prohibition  
3 regarding the service issue, although the matter is fully briefed.

4 **F. The District Court Issues the Bond Order**

5 On or about October 14, 2015, Uno filed a Motion for Order Fixing  
6 Supersedeas Bond in Connection with Temporary Stay Pending Writ of Prohibition  
7 in Favor of Grupo FAMSA, S.A. de C.V. (the “Bond Motion”). **App. 0082-0087.**  
8 On October 23, 2015, Grupo filed its Opposition to the Bond Motion. **App. 0088-**  
9 **0092.** Uno filed its Reply in support of the Bond Motion on October 27, 2015.  
10 **App. 0093-0099.** After briefing and argument by the parties, on October 29, 2015  
11 (the “Bond Hearing”), the district court granted Uno’s Bond Motion. **App. 0113-**  
12 **0116.**

13 **G. The Bond Order on Review and Abuse of Discretion.**

14 The district court conditioned the stay granted by this Court upon Grupo’s  
15 posting a \$1,000,000 supersedeas bond. **App. 0117-0121.** The district court held  
16 that the Judgment obtained against FAMSA (not Grupo) in the Prior Action and  
17 Grupo’s liability for the anticipated judgment in the pending action, along with the  
18 language in the lease guaranty purportedly binding Grupo, which has not been  
19 litigated, was sufficient to order a \$1,000,000 supersedeas bond. **App. 0120.** This  
20 order is an abuse of the district court’s discretion because there is no judgment  
21 against Grupo.

22 **V. LEGAL ARGUMENT**

23 **A. Jurisdictional Statement.**

24 This Court has jurisdiction to grant Grupo’s request for a writ of mandamus  
25 pursuant to Article 6, Section 4 of the Nevada Constitution: “[t]he court shall also  
26 have power to issue writs of mandamus, certiorari, prohibition, quo warranto, and  
27 habeas corpus and also all writs necessary or proper to the complete exercise of its  
28 appellate jurisdiction.” Nev. Const. art. 6 § 4. “A writ of mandamus is available to

1 compel the performance of an act that the law requires as a duty resulting from an  
2 office, trust, or station or to control an arbitrary or capricious exercise of  
3 discretion.” *D.R. Horton, Inc. v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 86  
4 (2015)(Internal citations and quotes omitted). Further, a writ of mandate “shall be  
5 issued in all cases where there is not a plain, speedy and adequate remedy in the  
6 ordinary course of law.” NRS 34.170. Here, the district court has abused its  
7 discretion by setting a bond to enforce a judgment from a prior action against  
8 Grupo, a non-party to that action, and a potential judgment in the pending case, as a  
9 condition to this Court’s stay.

10 The Court should issue a writ of mandamus and/or other appropriate relief  
11 directing the district court to vacate the order requiring Grupo to post a supersedeas  
12 bond, while this Court decides whether service upon Grupo was proper.

13 **B. Standard Of Review.**

14 In considering a writ petition, this court gives deference to a district court's  
15 factual determinations; however, it reviews questions of law de novo. *Gonski v. Dist.*  
16 *Ct.*, 126 Nev. Adv. Op. 51, 245 P.3d 1164, 1168 (2010). This Court will find an  
17 abuse of discretion when a district court’s findings of fact “are clearly erroneous and  
18 not based upon substantial evidence.” *Int’l Fid. Ins. Co. ex rel. Blackjack Bonding v.*  
19 *State*, 122 Nev. 39, 43, 126 P.3d 1133, 1135-36 (2006).

20 The facts are not in dispute here. There is no dispute that Grupo was not a  
21 party in the Original Action that culminated in a judgment against Famsa. There is  
22 also no dispute that the pending action has not been tried, no evidence has been  
23 offered concerning mitigation of damages or on the issue of the guaranty and there is  
24 no judgment, although discovery against Famsa continues. Thus, Grupo’s writ only  
25 presents a question of law: whether Grupo can be forced to post a supersedeas bond  
26 to secure collection on a prior judgment to which Grupo was not a party and a  
27 potential judgment in the pending case, as a condition to a stay imposed to decide  
28 whether Grupo was properly served.

1           **C.   The District Court Abused its Discretion In Granting the Bond**  
2           **Motion and Grupo has no Remedy other than a Writ of**  
3           **Mandamus.**

4           **1.    The Purpose of a Supersedeas Bond.**

5           It is black letter law that a supersedeas bond is appropriate only on appeals  
6 to stay execution of a judgment. *See* SUPERSEDEAS BOND, Black's Law  
7 Dictionary (10th ed. 2014) (defining supersedeas bond as “an appellant’s bond to  
8 stay execution on a judgment during the pendency of the appeal”); *see also Nelson*  
9 *v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005) (“a supersedeas bond  
10 posted under NRCP 62 should usually be set in an amount that will permit full  
11 *satisfaction of the judgment*”). Indeed, “the purpose of the supersedeas bond is to  
12 preserve the status quo.” *Quiroz v. Dickerson*, 2013 WL 5947459, at \*1 (D. Nev.  
13 Nov. 1, 2013); *see also Bemo USA Corp. v. Jake's Crane, Rigging & Transp. Int'l*  
14 *Inc.*, 2010 WL 4604496, at \*1 (D. Nev. Nov. 5, 2010) (stating that a supersedeas  
15 bond “is a purely procedural mechanism to preserve the status quo during a stay  
16 pending appeal”). When no judgment exists against the party seeking appellate  
17 relief, a supersedeas bond is improper.

18           **2.    A Supersedeas Bond is Procedurally Improper and**  
19           **Constitutes an Improper Writ of Attachment.**

20           There is no statute or case law for the district court to require a supersedeas  
21 bond as a condition of this Court’s stay of the proceedings as to Grupo while this  
22 Court decides the service issue. Uno cannot point to any such authority and Grupo  
23 has found none. This is because there is no judgment against Grupo from which  
24 Grupo is appealing<sup>3</sup>. Rather, Grupo’s writ of prohibition seeks decision on a  
25  
26

27           <sup>3</sup>The District Court is relying on language in the Guaranty that states that any  
28 Judgment against Famsa will bind Grupo, but the Court has heard no evidence or  
argument on the validity or interpretation of that provision.

1 preliminary issue about service of process for which the requirement of a  
2 supersedeas bond is wholly improper.

3 *Beverly Enterprises-Arkansas, Inc. v. Circuit Court of Independence Cnty.*,  
4 367 Ark. 13, 16, 238 S.W.3d 108, 110 (2006) provides a similar example where a  
5 court abused its discretion when it imposed a supersedeas bond despite the plaintiff  
6 having no underlying judgment against the defendant. In that case, the court  
7 granted plaintiffs' motion for class action certification. *Id.* at 15. The district court  
8 required defendant to post a \$25,000,000.00 supersedeas bond to appeal this  
9 preliminary issue. *Id.* Upon the defendant's writ of prohibition, the Supreme Court  
10 of Arkansas found the district court's imposition of a supersedeas bond was an  
11 abuse of discretion. *Id.* at 16. The court noted that "there was no judgment for  
12 monetary or injunctive relief to be protected by a supersedeas bond." *Id.* Further,  
13 "a supersedeas bond under Rule 8 is not imposed to protect appellees against  
14 alleged financial instability of an appellant prior to an entry of judgment *for*  
15 *damages that might never be obtained.*" *Id.* (emphasis added). The court  
16 concluded by stating, "in the present case, there was no judgment for damages on  
17 which to stay execution. *The case is yet to be tried.* The [district court] erred in  
18 granting the request for a supersedeas bond under Rule 8." *Id.* (emphasis added).  
19 Similar to *Beverly*, the district court in this case abused its discretion in imposing a  
20 \$1,000,000.00 on Grupo when Uno has no judgment against Grupo to protect. The  
21 pending case has not been tried and Grupo was not a party to the original Action.  
22 Supersedeas bonds are used to protect judgments already secured against a  
23 defendant, not those which may or may not be obtained in the future.

24 A supersedeas bond in the pending case does not "preserve the status quo"  
25 while Grupo appeals the district court's ruling regarding service; it does the exact  
26 opposite by effectively granting Uno a prejudgment writ of attachment so that it can  
27 collect on a potential *future* judgment against Grupo or satisfy its judgment against  
28 Famsa from the Prior Action. If the district court was correct in imposing a bond

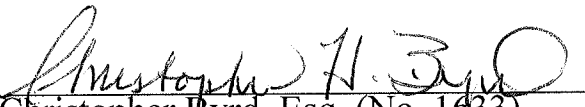
1 requirement in this factual situation, then an appeal of any pre-judgment procedural  
2 issue will result in a defendant having to post a bond to satisfy a potential judgment,  
3 and the procedure for obtaining a prejudgment writ of attachment can be easily  
4 circumvented; this can be neither the law, nor the correct result.

## 5 VI. CONCLUSION

6 Therefore, Grupo respectfully requests that this Court issue an alternative  
7 writ of mandamus directing the district court to vacate the order setting the  
8 \$1,000,000 bond or to show cause at a specified date and time why it refuses to do  
9 so.

10 Dated this 6th day of November, 2015.

11 FENNEMORE CRAIG, P.C.

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25 *Attorneys for Defendants*

1                   **AFFIDAVIT OF CHRISTOPHER H. BYRD, ESQ. IN SUPPORT OF**  
2                   **PETITION FOR WRIT OF MANDAMUS**

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

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

9           1.     I am an attorney duly licensed to practice law in the State of Nevada  
10           and am a director at the law firm of Fennemore Craig, P.C., attorneys for Grupo  
11           Famsa, S.A. DE C.V. ("Grupo"). This Affidavit is submitted on behalf of Grupo  
12           and in support of Grupo's Writ of Mandamus.

13           2.     I attended the district court hearing on B.E. Uno, LLC's ("Uno")  
14           Motion for Order Fixing Supersedeas Bond in Connection with Temporary Stay  
15           Pending Writ of Prohibition in Favor of Grupo Famsa, S.A. DE C.V. (the  
16           "Motion"). This hearing was held on Thursday, October 29, 2015 at 9:00 a.m.  
17           During this hearing, the district court announced its ruling that Grupo would be  
18           required to post a supersedeas bond in the amount of \$1,000,000.00. The district  
19           court further stated that Grupo must post the bond by November 12, 2015.

20           3.     This Writ of Mandamus is necessary because the district court's order  
21           is not appealable, and, therefore, Grupo has no plain, speedy and effective remedy at  
22           law.

23           4.     I have personal knowledge of the facts stated in the foregoing Petition  
24           for Writ of Mandamus, except those stated upon information and belief, and as to  
25           those, I believe them to be true.

26           ///

27           ///

1 I declare under penalty of perjury under the laws of the State of Nevada, that  
2 the foregoing is true and correct.

3 DATED this 6th day of November, 2015.

4  
5   
6 CHRISTOPHER H. BYRD

1 **CERTIFICATE OF COMPLIANCE**

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

5 [X] This brief has been prepared in a proportionally spaced typeface  
6 using 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*  
9 *per 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 [X] Does not exceed 30 pages.

18 3. I hereby certify that I am counsel of record for Petitioner-Defendant,  
19 Grupo FAMSA, S.A. de C.V. in this matter, that I have read the foregoing Petition  
20 for Writ of Mandamus and that to the best of my knowledge, information and  
21 belief, it is not frivolous or imposed for any improper purpose. I further certify that  
22 this Petition complies with all applicable Nevada Rules of Appellate Procedure, in  
23 particular N.R.A.P 28(e), which requires every assertion in the Petition regarding  
24 matters in the record to be supported by a reference to the page of the transcript or  
25 appendix where the matter relied on is to be found. I understand that I may be

26 ///

27 ///

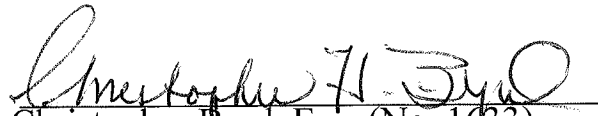
28 ///



1 subject to sanctions in the event that the accompanying brief is not in conformity  
2 with the requirements of the Nevada Rules of Appellate Procedure.

3 Dated this 6th day of November, 2015.

4 **FENNEMORE CRAIG, P.C.**

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17 *Attorneys for Defendants*

VIII.

VERIFICATION


STATE OF NEVADA )

COUNTY OF CLARK )<sup>ss</sup>

Under penalty of perjury, undersigned counsel declares that: he is an attorney of record for Petitioner Grupo FAMSA, S.A. de C.V.; he has read the foregoing Memorandum of Points and Authorities in support of their Petition for Writ of Mandamus and is familiar with its contents; the facts contained therein are within counsel's knowledge and are true of his own knowledge, except as to those matters which are stated upon information and belief, and as to those matters, he believes them to be true.

Undersigned counsel further declares that he makes this verification because Petitioner is a Mexican company, absent from the county where undersigned counsel resides.

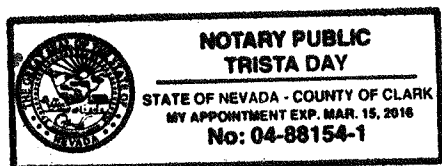
Dated this 6th day of November, 2015.

  
Christopher H. Byrd

Signed and sworn to (or affirmed) before  
me on this 6th day of November, 2015  
by Christopher H. Byrd, Esq.

  
NOTARY PUBLIC in and for said County and State.

My appointment expires 3-15-16



1 **CERTIFICATE OF SERVICE**

2 Pursuant to Nevada Rule of Appellate Procedure 25(c)(1), I hereby certify  
3 that I am an employee of Fennemore Craig, P.C. and that on this 6th day of  
4 November, 2015, I caused the foregoing **PETITION FOR WRIT OF**  
5 **MANDAMUS** to be served by submission to the electronic filing service for the  
6 Nevada Supreme Court upon the following to the email address on file and by  
7 depositing same for mailing in the United States Mail, in a sealed envelope  
8 addressed to:

9 Kelly J. Brinkman, Esq.  
10 Goold Patterson  
11 1975 Village Center Circle #140  
12 Las Vegas, NV 89134  
13 kbrinkman@gooldpatterson.com  
14 Attorneys for Plaintiff

15 District Court Judge Rob Bare  
16 Department 32  
17 Regional Justice Center  
18 200 Lewis Avenue  
19 Las Vegas, NV 89155  
20 Respondent



21 \_\_\_\_\_  
22 An employee of Fennemore Craig, P.C.  
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