

1 Computerized Tech., Inc.,<sup>3</sup> 840 F.2d 685 (9<sup>th</sup> Cir. 1988)) for the proposition  
2 that due process is satisfied only by serving an agent, officer or  
3 representative highly integrated within Grupo, are inapplicable and  
4 irrelevant. See, e.g., Marcantonia v. Primorsk Shipping Corp., 206  
5 F.Supp.2d 54 (Mass. 2002) (country in which service is being made is  
6 country whose laws should be obeyed; since Russian corporation was served  
7 in Canada, Canadian law governed service of process); Macivor v. Volvo  
8 Penta of America, Inc., 471 So.2d 187 (Florida 1985) (reversed order  
9 quashing service, finding Supremacy Clause preempts Florida statute  
10 governing service; service made under Convention); Volkswagenwerk, 486  
11 U.S. at 699 (by virtue of the Supremacy Clause of U.S. Constitution, the  
12 Convention “pre-empts inconsistent methods of service prescribed by state  
13 law in all cases to which it applies.”).

14 As indicated above, it is undisputed that Plaintiff complied with both  
15 the Convention as well as the internal laws of Mexico when it served Grupo.  
16 Further, the Central Authority’s return of a Certificate of Service (which is  
17 blessed by the Mexican court) is *prima facie* evidence that service was made  
18 in compliance with Mexican law. Northrup King Co. v. Compania  
19 Productora Semillas Algodoneras Selectas, S.A., 51 F.3d 1383 (8<sup>th</sup> Cir.  
20 1995) (a completed certificate returned by Spanish Central Authority is  
21 *prima facie* evidence that process was served in compliance with the  
22 Convention); Unite Nat’l Retirement Fund v. Ariela, Inc., 643 F.Supp. 2d  
23 328, 334 (S.D.N.Y. 2008) (Certificate is *prima facie* evidence that service  
24 complied with Mexico’s internal laws).

25  
26 <sup>3</sup> Although inapplicable, in Eclat, court affirmed a default judgment served  
27 upon a “receptionist” after receptionist claimed no one was at Eclat’s office  
28 to accept service, stating that FRCP 4 is a flexible rule that is liberally  
construed so long as a party receives sufficient notice of the complaint.

1 therein. Moreover, Grupo was also aware of the prior action and participated  
2 in a formal mediation with their wholly-owned subsidiary - Famsa. Plaintiff  
3 has made efforts to avoid a default against Grupo and has requested that they  
4 actively participate in this case. Plaintiff requested that Grupo's attorneys  
5 agree to accept service on behalf of Grupo -- which was denied. Thus,  
6 Plaintiff was forced to go through the time-consuming and expensive  
7 process of serving Grupo in Mexico under the Convention and internal laws  
8 of Mexico. In addition, and as more particularly detailed in the Gonzalez  
9 Declaration attached as Exhibit A to Plaintiff's Opposition to the Motion to  
10 Quash, the court process server in Mexico refused to perform service on two  
11 occasions until Plaintiff provided additional evidence to the Mexican court --  
12 which court then authorized service at the address listed in the Summons.  
13 See Gonzalez Declaration, ¶¶ 5-6. Due process merely requires notice and  
14 the opportunity to be heard. These protections have been more than satisfied  
15 in this case. Grupo's dilatory tactics to evade service and delay must be  
16 stopped. It is certainly reasonable to require Grupo to defend a suit in  
17 Nevada following the breach of lease and guaranty for a Nevada commercial  
18 premises where Famsa and Grupo elected to do business.

19 Finally, it is uncontroverted by Grupo that service of process  
20 comported with the internal laws of Mexico. See Mot. to Quash, p.4 as well  
21 as the Declaration of Celso Gonzalez, ¶¶ 9-11, Exhibit A (Mexican law does  
22 not require service on a corporation be made on someone who is authorized  
23 by the corporation to receive service of process and Article 69 of the Civil  
24 Procedure Code for the State of Nuevo Leon permits service at the domicile  
25 assigned for such effect by Court appointed process service).

26 C. There is No Harm by Denying a Stay Since Damages Are Already  
27 Being Litigated by the Same Set of Attorneys for Famsa.

28 The ultimate issue in this case is damages following Famsa and

(Case # A-12-672870-C) (\$748,394.19 plus fees (\$126,712.50) and costs (\$7,577.02)). See Judgment and Order on Attorney Fees and Costs attached as Exhibit B, which Plaintiff requests this Court take judicial notice. This Judgment, all of which remains outstanding, was awarded in April of 2014, and continues to bear interest. Pursuant to Grupo's Guaranty with Plaintiff, any judgment rendered against Famsa is binding and conclusive against Grupo to the same extent as if Grupo had appeared in such proceedings and judgment has been rendered against it. See Guaranty attached as Exhibit C. Thus, a bond in the minimum amount of \$1,000,000.00 is reasonable.

E. A Stay Must Not Issue Since Grupo Created Its Own Emergency.

Grupo is the party that created the circumstances requiring that this matter be heard on an emergency basis. For some unknown reason, Grupo waited 24-days after the lower court denied its motion to quash before filing its motion to stay with the lower court and 30-days before it filed this Emergency Motion for Stay and Writ. Additionally, service of the Complaint was made on Grupo in Mexico on March 17, 2015, almost 5 months ago. Other than the Motion to Quash, Grupo has yet to challenge service in Mexico or otherwise. Thus, given that Grupo has sat on its rights, there is no emergency nor any reason to stay any proceedings pending a hearing on Grupo's Writ of Prohibition.

III. CONCLUSION

Given that: (a) Grupo's due process rights have been satisfied; (b) Grupo has both reasonable notice and the opportunity to defend; (c) service upon Grupo was proper under both the Convention and the internal laws of Mexico (the Certificate being *prima facie* evidence service was valid); (d) the standards for a stay have not been met; and (e) there is no harm to Grupo in defending this matter as the damage issue is already being defended by Grupo's same set of attorneys representing Famsa (its wholly owned entity),

1                    AFFIDAVIT OF KELLY J. BRINKMAN IN SUPPORT  
2     STATE OF NEVADA     )  
3     COUNTY OF CLARK     )

4            I, Kelly J. Brinkman, being first duly sworn on oath states under  
5     penalty of perjury that the following assertions are true and correct of my  
6     own personal knowledge:

7            1.     I am an attorney duly licensed to practice law in the State of  
8     Nevada and am a partner at the law firm Goold Patterson, attorneys for  
9     Plaintiff, B.E. Uno, LLC. This Affidavit is submitted in support of Real  
10    Party in Interest/Plaintiff's Opposition to Petitioner's Emergency Motion  
11    Under NRAP 27(e) to Stay Proceedings Pending Resolution of Writ petition  
12    Challenging Service.

13           2.     Service of the Summons and Complaint was made on Grupo  
14    in Mexico on March 17, 2015, almost 5 months ago. Other than the Motion  
15    to Quash, Grupo has yet to challenge service in Mexico or otherwise.

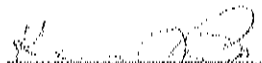
16           3.     On June 1, 2015, Grupo filed its Motion to Quash Service of  
17    Process, to which Plaintiff filed its opposition. See Plaintiff's Opposition to  
18    Grupo's Motion to Quash Service of Process attached as Exhibit A.

19           4.     On July 14, 2015, the Eighth Judicial District Court denied  
20    Grupo's Motion to Quash, finding that Grupo was properly served under  
21    both the Convention as well as the internal laws of Mexico (and Grupo's due  
22    process rights were not violated). At the end of that hearing, Grupo's oral  
23    motion to stay was also denied.

24           5.     24-days later, Grupo filed a Motion to Stay with the lower  
25    court (on shortened time), to which Plaintiff filed its opposition. Plaintiff  
26    filed its opposition thereto (which was not included in Grupo's Appendix  
27    with the Writ) and attached hereto as Exhibit D. On July 11, 2015, the  
28    Eighth Judicial District Court denied Grupo's Motion to Stay.

1           12. Pursuant to Grupo's Guaranty, any judgment rendered against  
2 Farnsa is binding and conclusive against Grupo to the same extent as if  
3 Grupo had appeared in such proceedings and judgment had been rendered  
4 against Grupo. See Guaranty attached hereto as Exhibit C.

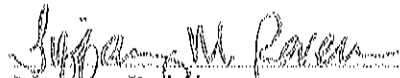
5           EXECUTED this 21<sup>st</sup> day of August, 2015.

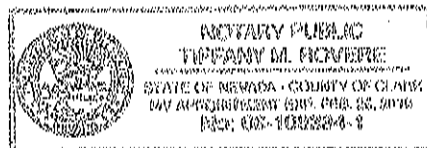
6  
7   
8 Kelly J. Brinkman

9  
10  
11 STATE OF NEVADA     )

12  
13 COUNTY OF CLARK     )

14           Signed and affirmed before me this 21<sup>st</sup> day of August, 2015 by  
15 Kelly J. Brinkman.

16  
17   
18 Notary Public



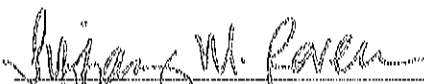
1 PROOF OF SERVICE

2 I hereby certify that I am an employee of the law firm of Goold  
3 Patterson, and on the 21<sup>st</sup> day of August, 2015 I served the foregoing REAL  
4 PARTY IN INTEREST/PLAINTIFF'S OPPOSITION TO PETITIONER'S  
5 EMERGENCY MOTION UNDER NRAP 27(e) TO STAY  
6 PROCEEDINGS AGAINST PETITIONER PENDING RESOLUTION OF  
7 WRIT PETITION CHALLENGING SERVICE OF PROCESS ON DUE  
8 PROCESS GROUNDS by enclosing a true and correct copy of the same in a  
9 sealed envelope, postage fully pre-paid thereon, and depositing said  
10 envelope in a mailbox of the United States Post Office, addressed as follows:

11 TO: Christopher Byrd, Esq.  
12 FENNEMORE CRAIG, P.C.  
13 300 S. Fourth Street, Suite 1400  
14 Las Vegas, NV 89101  
15 *Attorneys for Defendant, Famsa, Inc.*  
*and Grupo Famsa, S.A. de C.V.*

16 I further certify that on the 21<sup>st</sup> day of August I served the foregoing  
17 REAL PARTY IN INTEREST/PLAINTIFF'S OPPOSITION TO  
18 PETITIONER'S EMERGENCY MOTION UNDER NRAP 27(e) TO STAY  
19 PROCEEDINGS AGAINST PETITIONER PENDING RESOLUTION OF  
20 WRIT PETITION CHALLENGING SERVICE OF PROCESS ON DUE  
21 PROCESS GROUNDS by hand delivering a true and correct copy of the  
22 same, addressed as follows:

23 TO: District Court Judge Rob Bare  
24 Department 32  
25 Regional Justice Center  
26 200 Lewis Avenue  
Las Vegas, NV 89155

27   
28 An employee of Goold Patterson

1 **MBAP**  
2 Kelly J. Brinkman, Esq.  
3 Nevada Bar No. 6238  
4 GOOLD PATTERSON  
5 1975 Village Center Circle, Suite 140  
6 Las Vegas, Nevada 89134  
7 (702) 436-2600 (Telephone)  
8 (702) 436-2650 (Fax)  
9 kbrinkman@gooldpatterson.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: October 29, 2015

Hearing Time: 9:00 a.m.

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 29<sup>th</sup> day of October, 2015, at the hour of 9:00 a.m., in Department XXXII, located at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada 89101, 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.<sup>1</sup> 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

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

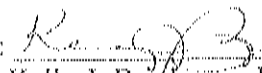
1 money due it following both Famsa, Inc.'s and Grupo's breach of lease and guaranty. Grupo must  
2 be held responsible for the consequences of its business-decision to breach. Imposing a  
3 supersedeas bond on the minimum amount of \$1,000,000 simply requires Grupo to answer for its  
4 breach.

### 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 no later than three (3) business days following the hearing on  
8 Plaintiff's cost bond request (i.e., by November 3, 2015).

9 DATED this 14<sup>th</sup> day of October, 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**

I, 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.

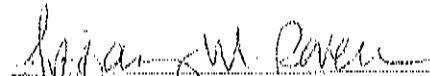
DATED this 14<sup>th</sup> day of October, 2015.

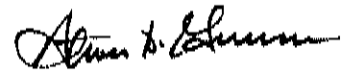
  
Kelly J. Brinkman

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the law firm of Goold Patterson, and on the 14<sup>th</sup> day of October, 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



CLERK OF THE COURT

**OPPS**

Christopher Byrd, Esq., NV Bar No. 1633

**FENNEMORE CRAIG, P.C.**

300 S. Fourth Street Suite 1400

Las Vegas, NV 89101

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-and-

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Sherman Oaks, CA 91403

Telephone: (818) 382-3434

Facsimile: (818) 382-3433

E-Mail: rarshonsky@laklawyers.com

*Attorneys for Defendant FAMSA, INC. and Specially Appearing  
For Defendant Grupo FAMSA, S.A. de C.V.*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

B.F.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

**DEFENDANT GRUPO FAMSA, S.A. de  
C.V.'S OPPOSITION TO PLAINTIFF B.F.E.  
UNO, LLC'S MOTION FOR ORDER  
FIXING SUPERSEDEAS BOND IN  
CONNECTION WITH TEMPORARY STAY  
PENDING WRIT OF PROHIBITION**

Defendant GRUPO FAMSA, S.A. de C.V. ("Grupo"), by and through its undersigned  
counsel of record, Fennemore Craig Jones Vargas in association with Levinson Arshonsky & Kurtz,  
LLP, hereby opposes Plaintiff BE UNO, LLC's ("Plaintiff") Motion for Order Fixing Supersedeas  
Bond in Connection with Temporary Stay Pending Writ of Prohibition ("Motion") as follows:

**I. INTRODUCTION**

In 2014, Plaintiff obtained a judgment against the Defendant FAMSA, Inc. ("FAMSA"), a  
tenant of a commercial property, for FAMSA's breach of the lease with Plaintiff. Grupo, the  
guarantor under the lease, was dismissed from the earlier action after the Court granted Grupo's

1 motion to quash service of the summons and complaint. Importantly, Plaintiff proceeded to  
2 judgment against FAMSA and *not* against Grupo.

3 Plaintiff then filed this action seeking additional damages against FAMSA (occurring after  
4 the last judgment because the lease contained no acceleration clause) and again named Grupo as the  
5 guarantor under the lease. Grupo moved to quash service, which this Court denied. After this  
6 Court denied Grupo's motion to stay the action, Grupo filed a Writ of Prohibition to the Nevada  
7 Supreme Court, which granted a stay.

8 By this Motion, Plaintiff is asking this Court for an order fixing a supersedeas bond while  
9 the Supreme Court decides the issue of whether service on Grupo was proper. For several reasons,  
10 the Court should deny Plaintiff's Motion. First, the purpose of a supersedeas bond is to preserve the  
11 status quo while a party appeals a judgment. Here, Grupo's appeal is not of a judgment; rather,  
12 Grupo has appealed the preliminary issue of service of the summons and complaint. Requiring a  
13 supersedeas bond will not preserve the status quo; it will secure a judgment for a case against Grupo  
14 that has not proceeded past the pleading stage. *See* §§IIA and IIB, *infra*.

15 Moreover, Plaintiff's attempt to tie its Motion to a prior judgment obtained against a third  
16 party (the tenant, FAMSA, Inc.) is equally improper. If FAMSA was appealing that prior judgment  
17 and seeking a stay, perhaps a supersedeas bond would be proper. Here, Grupo was not a party to  
18 the prior action and, therefore, no bond is authorized. *See* §IIC, *infra*.

19 Finally, the law cited by Plaintiff is misstated. A supersedeas bond, even when procedurally  
20 proper (which it is not here) is not mandatory but discretionary. Moreover, Plaintiff's suggestion  
21 that the Nevada Supreme Court is somehow directing this Court to decide the bond issue at this  
22 time is unavailing. *See* §IID, *infra*. For those reasons, the Court must deny Plaintiff's Motion in its  
23 entirety.

## 24 II. LEGAL ARGUMENT

### 25 A. THE COURT SHOULD DENY PLAINTIFF'S MOTION

#### 26 1. The Purpose of a Supersedeas Bond

27 It is black letter law that a supersedeas bond is appropriate only on appeals to stay execution  
28 of a judgment. *See* SUPERSEDEAS BOND, Black's Law Dictionary (10th ed. 2014) (defining

1 supersedeas bond as “an appellant’s bond to stay execution on a judgment during the pendency of  
2 the appeal”); *see also Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005) (“a  
3 supersedeas bond posted under NRCp 62 should usually be set in an amount that will permit full  
4 *satisfaction of the judgment*”).

5 Indeed, “the purpose of the supersedeas bond is to preserve the status quo.” *Quiroz v.*  
6 *Dickerson*, 2013 WL 5947459, at \*1 (D. Nev. Nov. 1, 2013); *see also Bemo USA Corp. v. Jake's*  
7 *Crane, Rigging & Transp. Int'l Inc.*, 2010 WL 4604496, at \*1 (D. Nev. Nov. 5, 2010) (stating that a  
8 supersedeas bond “is a purely procedural mechanism to preserve the status quo during a stay  
9 pending appeal”).

10 **2. A Supersedeas Bond is Procedurally Improper Because Grupo is Not Appealing**  
11 **From a Judgment**

12 Here, Grupo is not appealing from a Judgment; rather, it is appealing from this Court’s denial  
13 of Grupo’s motion to quash. Therefore, by definition, a supersedeas bond is procedurally improper  
14 in this action at this time. Since this is a preliminary matter in the case, and not a judgment, a  
15 supersedeas bond cannot be required here, and imposing a supersedeas bond would not “preserve the  
16 status quo,” but would instead require Grupo to secure a judgment for which no court has found it to  
17 be liable. This completely contradicts the purpose of a supersedeas bond.

18 **3. Plaintiff’s Attempt to Use a Prior Judgment Against a Third Party is Improper**

19 It appears that Plaintiff is attempting to use the prior judgment it obtained against FAMSA  
20 to somehow persuade the Court that a supersedeas bond is proper. Plaintiff’s argument is wholly  
21 without merit. As Plaintiff knows, Grupo was *not* a party to the case Plaintiff mentions in its  
22 Motion (Case No. A-12-672870-C) because the district court found that Grupo was not served  
23 properly. *See* Order Granting Motion to Quash Service dated March 18, 2014, attached as **Exhibit**  
24 **A**. Therefore, there has never been any judgment against Grupo.

25 **4. Plaintiff Misstates the Law in its Motion**

26 Plaintiff misstates the law in its Motion when it states, “pursuant to NRAP 8(2)(E), the filing  
27 of a bond is appropriate whenever a stay may be issued.” *See* Uno’s Motion, p. 3, ll. 12-13. To the  
28 contrary, that rule states “the court may condition relief on a party’s filing a bond or other

1 appropriate security in the district court." NRAP(a)(2)(E). Thus, it is within this court's discretion  
2 to determine whether a supersedeas bond is appropriate in this case. As set forth, *supra*, no basis  
3 exists to impose a bond upon Grupo.

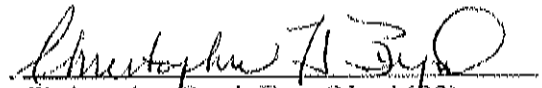
4 Moreover, Plaintiff's suggestion that the Supreme Court is directing this Court to decide this  
5 issue is misplaced. The Supreme Court, in its footnote, merely stated that it was unclear whether  
6 this Court made such a determination.

7 **III. CONCLUSION**

8 A supersedeas bond pending Grupo's appeal of this Court's denial of Grupo's motion to  
9 quash service is improper. Grupo is not appealing a judgment and no judgment against Grupo  
10 exists. Therefore, the purpose of a supersedeas bond is not served. As Plaintiff's attempt to  
11 "secure" a potential judgment with a supersedeas bond is without legal or factual basis, Grupo  
12 requests that this Court deny Plaintiff's Motion.

13 DATED this 23<sup>rd</sup> day of October, 2015.

14 **FENNEMORE CRAIG, P.C.**

15 

16 Christopher Byrd, Esq. (No. 1693)  
17 300 S. Fourth Street Suite 1400  
18 Las Vegas, NV 89101  
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21 E-Mail: [cbyrd@fclaw.com](mailto:cbyrd@fclaw.com)

22 -and-

23 Richard I. Arshonsky, Esq., NV Bar No. 4518  
24 **LEVINSON ARSHONSKY & KURTZ, LLP**  
25 15303 Ventura Blvd., Suite 1650  
26 Sherman Oaks, CA 91403  
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*Attorneys for Defendant FAMSA, INC. and  
Specially Appearing For Defendant Grupo  
FAMSA, S.A. de C.V.*



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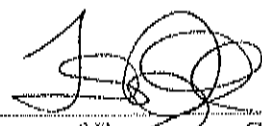
CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the law firm of FENNEMORE CRAIG, P.C.; that on 23<sup>rd</sup> day of October, 2015, I served a true and correct copy of the document described below on the parties listed by the method indicated at the addresses set forth for said parties:

**Document Served:** DEFENDANT GRUPO FAMSA, S.A. de C.V.'S OPPOSITION TO PLAINTIFF B.E. UNO, LLC'S MOTION FOR ORDER FIXING SUPERSEDEAS BOND IN CONNECTION WITH TEMPORARY STAY PENDING WRIT OF PROHIBITION

Kelly J. Brinkman, Esq.  
Goold Patterson  
1975 Village Center Circle #140  
Las Vegas, NV 89134

☒ Via E-service  
☐ Via U.S. Mail (Not registered with CM/ECF Program)

  
\_\_\_\_\_  
Employee of Fennemore Craig, P.C.

1 RIS  
 2 Kelly J. Brinkman, Esq.  
 3 Nevada Bar No. 6238  
 4 GOOLD PATTERSON  
 5 1975 Village Center Circle, Suite 140  
 6 Las Vegas, Nevada 89134  
 7 (702) 436-2600 (Telephone)  
 8 (702) 436-2650 (Fax)  
 9 [kbrinkman@gouldpatterson.com](mailto:kbrinkman@gouldpatterson.com)  
 10 *Attorneys for Plaintiff*

## DISTRICT COURT

## CLARK COUNTY, NEVADA

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

11 Plaintiff,

12 vs.

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

16 Defendants.

CASE NO.: A-14-706336-C

DEPT. NO.: XXXII

PLAINTIFF'S REPLY IN SUPPORT OF  
 ITS MOTION FOR ORDER FIXING  
 SUPERSEDEAS BOND IN CONNECTION  
 WITH TEMPORARY STAY;  
 DECLARATION OF WARREN  
 KELLOGG IN SUPPORT

Hearing Date: October 29, 2015

Hearing Time: 9:00 a.m.

17 Plaintiff, B.E. Uno, LLC ("Plaintiff"), by and through its attorneys, Goold Patterson,  
 18 hereby files this Reply in Support of its Motion for an Order Fixing Supersedeas Bond Amount in  
 19 connection with the Nevada Supreme Court order granting a temporary stay pending writ of  
 20 prohibition ("Stay Order") in favor of Grupo Famsa, S.A. de C.V. ("Grupo"). This reply is made  
 21 and based upon the following Points and Authorities and exhibits, Declaration in Support,  
 22 pleadings, papers, and records on file, and any oral argument presented at the time of the hearing.

23 MEMORANDUM OF POINTS AND AUTHORITIES

24 I. INTRODUCTION

25 Despite the denial of an order quashing service upon it as well as the denial of a stay in this  
 26 Court, Grupo obtained a stay in the Nevada Supreme Court in connection with its Writ of  
 27 Prohibition. Such stay, which has been pending since August 21, 2015, has stayed all proceedings  
 28

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1 against Grupo relating to a breach of lease case (liability already determined). Grupo has so far  
 2 obtained this stay without the posting of a bond. Pursuant to NRAP 8(2)(E), the filing of a bond is  
 3 warranted.

## 4 II. FACTUAL BACKGROUND<sup>1</sup>

5 1. On February 25-February 26, 2014, Judge Mark Denton conducted a bench trial in  
 6 Case No. A-12-672870, by and between Plaintiff and Famsa, Inc. ("Famsa"), the subsidiary of  
 7 Grupo (and tenant under the lease guaranteed by Grupo).

8 2. During the litigation, Judge Denton found that the tenant was liable for breach of  
 9 lease to Plaintiff and awarded Plaintiff damages in the amount of \$882,683.71 (which amount  
 10 includes attorney fees and costs). See Exhibit 2 to Plaintiff's Motion.

11 3. The amount awarded was based on the fact that Famsa had failed to pay any rent to  
 12 Plaintiff since November 2012, about the time Famsa vacated the leased premises. See Findings of  
 13 Fact and Conclusions of Law, attached hereto as Exhibit 4, ¶¶ 3 & 7.

14 4. The amount awarded in the initial litigation, however, was only from November  
 15 2012 through February 2014, the date of the trial (finding Plaintiff could not accelerate the rent  
 16 through the remaining lease term of October 2020). See Findings of Fact and Conclusions of Law,  
 17 Exhibit 4, ¶¶ 2, 5 and 7.

18 5. This second litigation was brought to permit Plaintiff to collect rent from March  
 19 2014 through the date of trial (subject to offset for new rent received), and to confirm Grupo's  
 20 liability for its breach under the Guaranty to Lease, which expressly holds that any judgment  
 21 obtained against its tenant "shall in every and all aspects bind and be conclusive against Guarantor  
 22 to the same extent as if Guarantor had appeared in any such proceeding and judgment herein had  
 23 been rendered against Guarantor." See Guaranty attached to Plaintiff's Motion as Exhibit 3.

24 6. Neither Famsa nor Grupo have paid any rent to Plaintiff since November 2012, a  
 25 period of almost three years. Nor has any amount been paid to Plaintiff on account of the  
 26 Judgment obtained in April 2014 – issued a little over 18 months ago. See Declaration of Warren

27 <sup>1</sup> Plaintiff requests that this Court take judicial notice of the events occurring in the prior  
 28 litigation (case No. A-12-672870-C), as referenced herein pursuant to NRS 47.130.

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1 Kellogg, ¶¶4 & 5, filed contemporaneously herewith.

2 7. Three years later, and despite not seeing a dime from either Famsa or Grupo, Grupo  
3 (as well as Famsa) continues to play games and delay honoring its obligations following the breach  
4 of lease and abandonment of the subject leased premises.

5 8. On August 21, 2015, Grupo obtained a stay of the Order Denying its Motion to  
6 Quash entered by this Court. See Order Granting Temporary Stay and Directing Answer ("Stay  
7 Order") attached to the Motion as Exhibit 1.

8 9. In that Stay Order, the Nevada Supreme Court suggested that this Court was in a  
9 better position to determine the amount of the supersedeas bond given this Court's familiarity with  
10 the underlying factual proceedings. See Stay Order, fn 1, attached to the Motion as Exhibit 1.

11 10. Accordingly, Plaintiff requests that this Court determine the amount of bond  
12 required in connection with the Stay Order.

### 13 III. LEGAL STANDARD

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

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

22 See Exhibit 1, footnote 1.

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

24 "A party must ordinarily move first in the district court for the  
25 following relief:  
26 (B) approval of a supersedeas bond..."

27 Pursuant to NRAP 8(2)(E), the filing of a bond is appropriate whenever a stay may be  
28 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

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1 (\$126,712.50) and costs (\$7,577.02) awarded for a total of \$882,683.71. See Judgment (Exhibit 2)  
2 and Order on Attorney Fees and Costs. This Judgment, all of which remains outstanding, was  
3 awarded in April of 2014, and continues to bear interest.

#### 4 IV. LEGAL ARGUMENT

5 This is nothing but a game of cat-and-mouse by Grupo (and Famsa) to delay the inevitable  
6 – paying damages to Plaintiff following the business decision by Grupo to abandon the subject  
7 leased premises (a breach) prior to the end of the lease term. Liability for the breach of lease has  
8 already been determined. Further, a Judgment in the amount of \$882,683.71 (which includes  
9 attorney fees and costs) has already been issued. See Judgment, Exhibit 2 to the Motion and  
10 Exhibit 4, Findings of Fact and Conclusions of Law. The last and only payment to Plaintiff was  
11 made for rent due in October 2012 – more than three (3) years ago. Absolutely no payments  
12 have been made on account of the Judgment. See Kellogg Declaration, ¶¶4 & 5. By Grupo's  
13 game playing and legal maneuvers, Grupo, and its subsidiary, have avoided paying anything to  
14 Plaintiff as a result of their breach/default. Enough is Enough! These games must stop.

15 To the extent Grupo elects to continue this gamesmanship, it must put up a stake in the  
16 game – namely, a bond to protect Plaintiff for the damages it has accrued and continues to accrue  
17 following such breach.

18 Pursuant to NRAP 8(2)(E) as well as the Stay Order issued by the Nevada Supreme Court,  
19 a bond determination is not only appropriate but warranted. Plaintiff has waited over three (3)  
20 years without seeing a dime. A stay has already issued and been in place since August 2015,  
21 without a bond having been posted. How much longer is Grupo going to be able to avoid the  
22 consequences of its own actions?

23 In reviewing the Stay Order, the Nevada Supreme Court has already provided its initial  
24 guidance to this Court about the issuance of a bond. In particular, the Nevada Supreme Court  
25 stated: "It is not clear whether the district court has yet considered the proper amount of any  
26 supersedeas bond." See Stay Order, flnt 1 (emphasis added), Exhibit 1 to the Motion. Implied in  
27 this footnote, is the notion that a bond is appropriate and that this Court merely needs to determine  
28 the amount of such bond. Grupo has failed to introduce any evidence to counter the requested

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1 bond amount of \$1,000,000 (instead putting all of its eggs in one basket by claiming a bond is not  
2 required despite having been issued a stay). Moreover, NRAP 8(2)(E) clearly permits this Court to  
3 condition the issuance of a stay upon the posting of a bond. See NRAP 8(2)(E) ("The court may  
4 condition relief on a party's filing a bond or other appropriate security in the district court.").

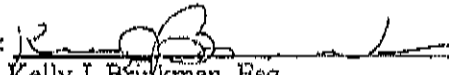
5 Further, the cases cited by Grupo to avoid the posting of a bond are inapplicable as such  
6 cases all relate to a bond determination under NRCP 62 and not NRAP 8. NRAP 8 specifically  
7 deals with a stay pending resolution of writ proceedings. To permit Grupo to avoid the posting of  
8 a bond yet still obtain the benefits of a stay, especially without having to show why a waiver of the  
9 bond requirement is justified, cannot and should not be condoned. Plaintiff has been forced to  
10 forgo discovery as well as being prevented from taking other action against Grupo since issuance  
11 of the stay. See Kellogg Declaration, ¶6. Meanwhile, both Grupo and Famsa have been allowed  
12 to avoid paying rent and damages to Plaintiff since October 2012 – 3 years and counting. It is  
13 entirely appropriate to hold Grupo accountable to Plaintiff by ordering Grupo to post a bond in the  
14 minimum amount of \$1,000,000.00. Let's put a stop to Grupo's games!

#### 15 V. CONCLUSION

16 Plaintiff requests that a bond in the amount of \$1,000,000.00 be required and that such  
17 bond be posted with this Court no later than three (3) business days following the hearing on  
18 Plaintiff's cost bond request (i.e., by November 3, 2015).

19 DATED this 27<sup>th</sup> day of October, 2015.

20 GOOLD PATTERSON

21 By:   
22 Kelly J. Brinkman, Esq.  
23 Nevada Bar No. 6238  
24 1975 Village Center Circle, Suite 140  
25 Las Vegas, Nevada 89134  
26 *Attorneys for Plaintiff*  
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# DECLARATION OF WARREN KELLOGG IN SUPPORT

I, Warren Kellogg, declare and state:

1. I have personal knowledge of the facts set forth herein; I am competent to testify to those facts; and I make this Declaration in support of Plaintiff's Reply in Support of its Motion for Order Fixing a Bond in Connection with the Stay Pending Writ of Prohibition, of which this Declaration is attached.

2. I am the managing member of B.E. Uno, LLC ("Landlord"), the owner and landlord of a shopping center located south of the southeast corner of Bonanza Road and Eastern Avenue known as Bonanza East Shopping Center (the "Shopping Center") in Las Vegas, Nevada. I have served in the capacity of a managing member since April, 3, 2003.

3. In my capacity as a managing member of Landlord, I have access to and personal knowledge of the matters stated herein, and, if necessary, could and would testify thereto.

4. Neither Famsa nor Grupo have paid any rent to Plaintiff since November 2012, a period of almost three years.

5. Further, no amount has been paid to Plaintiff on account of the Judgment obtained in April 2014 — issued a little over 18 months ago.

6. Plaintiff has been forced to forgo discovery as well as being prevented from taking other action against Grupo since issuance of the stay.

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

Executed this 27<sup>TH</sup> day of October, 2015.

*Warren R. Kellogg*  
/s/ Warren Kellogg  
WARREN KELLOGG

GOULD PATTERSON  
1975 VILLAGE CENTER CIRCLE, SUITE 140  
LAS VEGAS, NEVADA 89134  
(702) 436-2600 FAX (702) 436-2650

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the law firm of Goold Patterson, and on the 27<sup>th</sup> day of October, 2015, I served the foregoing PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR ORDER FIXING SUPERSEDEAS BOND IN CONNECTION WITH TEMPORARY STAY; DECLARATION OF WARREN KELLOGG 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.*

I FURTHER CERTIFY that on the 27<sup>th</sup> day of October, 2015, I served the foregoing PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR ORDER FIXING SUPERSEDEAS BOND IN CONNECTION WITH TEMPORARY STAY; DECLARATION OF WARREN KELLOGG IN SUPPORT by facsimile transmission, addressed as follows:

Christopher Byrd, Esq.  
FENNEMORE CRAIG, P.C.  
Facsimile: (702) 692-8099  
*Attorneys for Defendants, Famsa, Inc.  
and Grupo Famsa, S.A. de C.V.*

  
An Employee of Goold Patterson

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CLERK OF THE COURT

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

\* \* \* \* \*

BE UNO, LLC,	)	
	)	CASE NO. A-14-706336
Plaintiff,	)	
	)	
vs.	)	DEPT. NO. XXXII
	)	
FAMSA, INC., GRUPO FAMSA, S.A.)	)	
DE C.V.,	)	Transcript of Proceedings
	)	
Defendants.	)	

BEFORE THE HONORABLE ROB BARE, DISTRICT COURT JUDGE

PLAINTIFF'S MOTION FOR ORDER FIXING SUPERSEDEAS BOND IN  
CONNECTION WITH TEMPORARY STAY PENDING WRIT OF PROHIBITION  
IN FAVOR OF GRUPO FAMSA, SA DE CV

THURSDAY, OCTOBER 29, 2015

APPEARANCES:

For the Plaintiff: KELLY J. BRINKMAN, ESQ.

For the Defendants: CHRISTOPHER H. BYRD, ESQ.

RECORDED BY: CARRIE HANSEN, DISTRICT COURT  
TRANSCRIBED BY: KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording, transcript  
produced by transcription service.

1 THURSDAY, OCTOBER 29, 2015 AT 9:28 A.M.

2

3 THE CLERK: *BE Uno, LLC versus FAMSA, Inc.*, case  
4 number A706336.

5 MR. BYRD: Good morning, Your Honor. Christopher  
6 Byrd appearing for -- specially appearing for Grupo.

7 MS. BRINKMAN: Good morning, Your Honor. Kelly  
8 Brinkman on behalf of the plaintiff and with me present is  
9 Warren Kellogg, one of the managing members.

10 THE COURT: All right. Well, I want to ask you  
11 guys a question and if you need time to talk, we can. Do  
12 you guys want to make an agreement on what the supersedeas  
13 bond should be? I mean, I'll give you an opportunity to  
14 talk with each other and just do something reasonable and  
15 we'll continue on.

16 MR. BYRD: Given the amount that they're seeking,  
17 Your Honor, I -- we can go out and discuss it but if it's  
18 anywhere close to \$1,000,000, my client is not prepared to  
19 do that.

20 THE COURT: Understood. I think there's a  
21 compromise position here in that there's a good -- there's  
22 an argument, it's a technical one, having to do with: Is  
23 there a bond associated at all, for one thing?

24 I'm not sure that Supreme Court Order was entirely  
25 clear for one thing on that. I mean, it seemed to -- to,

1 you know, paraphrase the Nevada Supreme Court Order, I'd  
2 say they certainly indicated it's a District Court function  
3 to set it, but I don't think they -- I don't think, unless  
4 somebody shows me some language in there right on point  
5 that they said that I have to do that, but if it is done, I  
6 would do it. That's one thing.

7           And there's this interesting conceptual argument  
8 that could be made having to do with what would the bond be  
9 associated with? Is it associated with the outstanding,  
10 you know, seven hundred and some thousand dollar judgment  
11 and costs and everything else, which does get us to about a  
12 million bucks or are we talking about just the  
13 jurisdictional issue that we're dealing with? And if so,  
14 then you wouldn't use the judgment, is the argument, as a  
15 basis upon which to set a supersedeas bond. So that's a  
16 decent argument.

17           You know, that's what I have to figure out if --  
18 and I would, of course, because somebody has got to do it  
19 and that's what I'm here to try to do, but since there's, I  
20 think, valid arguments and there's this, you know, stuff to  
21 think about, I've -- you know, it would be good, I think,  
22 I'm not telling you you have to do it, because I don't have  
23 that authority, but I'd give you an opportunity certainly  
24 to say: Look, let's go ahead and put some kind of bond  
25 together that makes sense, that's reasonable, that can

1 actually be put in place, I mean, practically speaking, and  
2 let's just continue on with what we're doing.

3 But you don't have to. If you want to tell me,  
4 no, you don't want to do that, that's fine. I will just  
5 hear argument from both of you to try to figure it out.  
6 It's up to you all.

7 MS. BRINKMAN: I'm happy to trail this to see if  
8 we can come to an agreement on the bond. I don't --

9 THE COURT: Okay.

10 MS. BRINKMAN: I don't know if it will be  
11 successful. It might only --

12 THE COURT: His --

13 MS. BRINKMAN: -- take a minute.

14 THE COURT: Your physical reaction is not so good,  
15 but go ahead.

16 MR. BYRD: Your Honor, that's fine. We're happy  
17 to talk to --

18 THE COURT: Oh.

19 MR. BYRD: -- Ms. Brinkman. We've tried to work  
20 things out in the past, so --

21 THE COURT: Okay.

22 MR. BYRD: Let's --

23 THE COURT: All right. While you guys -- there's  
24 a couple -- Dominique, can you make sure the room is open?  
25 She'll take you back to the little conference room there.

1 MS. BRINKMAN: Great. Thank you, Your Honor.  
2 THE COURT: Yeah.  
3 [Case trailed at 9:31 a.m.]  
4 [Case recalled at 9:40 a.m.]  
5 THE LAW CLERK: A706336.  
6 THE COURT: Grupo.  
7 MS. BRINKMAN: Welcome back, Your Honor. We  
8 haven't made much progress other --  
9 THE COURT: Okay.  
10 MS. BRINKMAN: -- than tomorrow is Nevada Day.  
11 So, --  
12 THE COURT: Yeah. That's my moving day.  
13 MS. BRINKMAN: Oh, is it Monday?  
14 THE COURT: No. I'm moving tomorrow.  
15 MS. BRINKMAN: Oh. I'm trying to bring humor to  
16 the Court. Didn't you ask for that when we first started?  
17 THE COURT: I didn't ask for it, --  
18 MS. BRINKMAN: We were all so quiet --  
19 THE COURT: -- I just do it.  
20 Okay. So, anyway, did you guys make any progress?  
21 MR. BYRD: No, Your Honor.  
22 THE COURT: Okay. I don't have a preference who -  
23 - as to who wants to say anything at this point. Either  
24 one of you can go first.  
25 MR. BYRD: It's her motion, Your Honor.

1 THE COURT: It's Plaintiff's Motion -- I know it's  
2 Plaintiff's Motion, but okay. Go ahead then, Ms. Brinkman.

3 MS. BRINKMAN: Sure, Your Honor. So, this case  
4 has been pending since August of 2014. The -- so, slightly  
5 over a year. The last rent that has been paid to my client  
6 was for rent due October of 2012. It was paid in November  
7 of 2012.

8 THE COURT: Yeah.

9 MS. BRINKMAN: So, for over three years, my client  
10 has not been paid any rent. The breach has already been  
11 determined. Liability has been determined.

12 THE COURT: Well you re-leased the premises to  
13 this Ross Dress for Less though, right?

14 MS. BRINKMAN: That is correct and --

15 THE COURT: Yeah.

16 MS. BRINKMAN: -- I believe the rent kicked in in  
17 June of this year.

18 MR. KELLOGG: June 25<sup>th</sup>.

19 THE COURT: Yeah. Okay.

20 MS. BRINKMAN: So, the premises has been re-leased  
21 and our damage calculation absolutely takes into account  
22 the amount of the Ross rent, which is less than the amount  
23 that FAMSА was paying for --

24 THE COURT: Right.

25 MS. BRINKMAN: -- rent, but it -- I think that's

1 about a \$5,000 a month shortfall.

2 THE COURT: Okay.

3 MS. BRINKMAN: So and -- so, despite litigating  
4 this since 2014 in this case, let alone the earlier case,  
5 the landlord had not seen a dime. This is not a Fortune  
6 500 landlord. This is a group of older gentlemen, one of  
7 which has recently passed away, who would -- the remaining  
8 partners would like to actually see a dime in their time  
9 here.

10 This is Grupo that went in and actually sought the  
11 stay. We have been prevented from taking any discovery  
12 against Grupo, including making a determination in this  
13 Court that Grupo is liable under its guaranty. We've  
14 attached the Guaranty to our original Motion. It's -- has  
15 very strong language that says even if Grupo wasn't  
16 involved in the first litigation, any litigation is  
17 conclusive and binding as if they had appeared in the  
18 litigation.

19 And I can pull the exact language out from the  
20 Guaranty, if necessary, but the stay that was granted --  
21 originally denied in this Court, and then granted by the  
22 Supreme Court, is an extraordinary remedy and they had to  
23 go through several factors to determine whether or not a  
24 stay was appropriate and the Court made the determination --  
25 -- the Supreme Court made the determination that the stay

1 was an -- was appropriate, but that stay comes with costs.  
2 And, under Rule 8, you have the discretion to award a bond  
3 for the stay that is in place. We had suggested that it be  
4 in a minimum amount of \$1,000,000, based on the prior  
5 judgment, attorneys' fees, interest, and costs.

6 THE COURT: Now that prior judgment, it's against  
7 FAMSA and not Grupo?

8 MS. BRINKMAN: That's correct, Your Honor. But,  
9 again, under the Guaranty, that Guaranty says they are  
10 liable as if they had appeared in that action. It is --  
11 and I'll actually pull the language, but to give you one  
12 other --

13 THE COURT: Let me have that. That's --

14 MS. BRINKMAN: Sure. So, in our Motion, it was  
15 Exhibit 3 to our Motion. The language in the Guaranty, and  
16 it is the fifth paragraph of that Guaranty, says, quote:

17 Guarantor agrees that any judgment rendered  
18 against tenant for monies or performances due landlord  
19 shall in every and all aspect bind and be conclusive  
20 against guarantor to the same extent as if guarantor  
21 had appeared in any such proceedings and judgment  
22 herein had been rendered against guarantor.

23 THE COURT: Okay.

24 MS. BRINKMAN: It's pretty clear.

25 THE COURT: Yeah.



1 MS. BRINKMAN: It's binding and conclusive even if  
2 they didn't appear.

3 And, Your Honor, one additional piece of  
4 information is the rent is from August of 2014, when this  
5 case was filed, and Grupo has been served. They're  
6 fighting the writ. Right now they have been served.

7 THE COURT: Yeah.

8 MS. BRINKMAN: The Supreme Court will decide, yes  
9 there's service, or, no, there's not service, but if you  
10 were to just take a look -- and one of my ways to try to  
11 compromise on this was to say if you take the rent that is  
12 due from when this action was filed, which is approximately  
13 \$33,000 a month plus [indiscernible] fees. So we're  
14 looking at approximately 40,000, and I'm just rounding off  
15 the numbers. If you were to multiply that by the 13 months  
16 that this case is pending, you're looking at approximately  
17 520 -- a little over a half a million dollars.

18 THE COURT: Yeah.

19 MS. BRINKMAN: So, at a minimum, if we want to go  
20 on this case only and not the prior case, which I think you  
21 have to consider the prior case because of the language in  
22 the Guaranty, then you're looking at a half a million  
23 dollars in just -- for this case and we have been prevented  
24 by the stay from taking any discovery against Grupo as well  
25 as from seeking determination in this Court as to their

1 liability under the Guaranty. And, therefore, if we had a  
2 liability determination, the judgment will be valid and we  
3 can pursue the judgment against Grupo.

4 THE COURT: So what's the total amount then?  
5 500,000 plus --

6 MS. BRINKMAN: 500,000 plus the prior judgment of  
7 --

8 THE COURT: Yeah.

9 MS. BRINKMAN: -- 882,683.71 not including  
10 interest and that was awarded in April of 2014.

11 THE COURT: Yeah.

12 MS. BRINKMAN: So it would include another year  
13 and a half worth of interest.

14 THE COURT: All right. Mr. Byrd.

15 MR. BYRD: Your Honor, what the plaintiff is  
16 seeking here is some sort of prejudgment writ of attachment  
17 on Grupo. What they want Grupo to do is to create a fund  
18 from which, if they ever get a judgment against Grupo, they  
19 can satisfy out of that fund. Now there are procedures for  
20 prejudgment writs of attachment for forcing people to  
21 provide a fund for collection of a judgment, but it doesn't  
22 come from a stay in the Supreme Court over a procedural  
23 matter involving jurisdiction.

24 I mean, my client's position with the Supreme  
25 Court, Your Honor, is that this Court does not have

1 jurisdiction over it and it does not have to appear and  
2 defend itself. That's the issue that the Supreme Court is  
3 going to decide. And if the Supreme Court decides that  
4 there is no proper service here, then my client will not be  
5 a party to this action and shouldn't have to create a fund  
6 out of which Ms. Brinkman can eventually satisfy whatever  
7 judgments she gets against FAMSA.

8           Now, two things. First of all, there's two things  
9 that Ms. Brinkman raises. One is that there is this prior  
10 judgment for a million dollars and the language of the  
11 Guaranty makes it appear that Grupo is bound to that  
12 judgment as if it had appeared in the prior action. If  
13 that's the case, Your Honor, if that's her legal theory,  
14 then she should be taking the judgment to Mexico and  
15 executing on that judgment in Mexico. If she believes that  
16 this Guaranty, without any further litigation, requires  
17 Grupo to pay the judgment, then that's her remedy. So she  
18 has a remedy there.

19           Secondly, with respect to not being able to take  
20 discovery from Grupo on the guaranty, well, plaintiff has  
21 already told the Court that Grupo is the parent of FAMSA.  
22 There's been no effort to depose anyone at FAMSA. For  
23 example, you can notice up the person most knowledgeable  
24 with respect to the guaranty that was signed in connection  
25 with the lease, serve that on me, and have someone from

1 FAMESA appear and begin discovery on that basis if you  
2 wanted to know about the guaranty.

3           Secondly, with respect to how long this action has  
4 been pending, the biggest impediment -- for the first time  
5 today, I heard what the total damage calculation is, but  
6 the biggest impediment in this case has been the refusal by  
7 the new tenant to turn over any of the lease documents so  
8 that my client can evaluate whether or not there was proper  
9 mitigation of damages. It was only last Friday that we  
10 finally, after months of wrangling with Ross, were able to  
11 get those documents. So it's not like we've been  
12 stonewalling discovery or not participating in good faith  
13 to move this litigation forward. We're here to contest a  
14 jurisdictional issue.

15           Now, in terms of the appropriateness of a bond, I  
16 mean, under plaintiff's theory, any time someone  
17 procedurally challenged jurisdiction, they would be  
18 required to put up a bond in order to go to the Supreme  
19 Court so that they don't have to appear and mitigate at the  
20 same time they're contesting jurisdiction. It seems to be  
21 turning the whole situation on its head. The whole reason  
22 you challenge jurisdiction --

23           THE COURT: Well, if that were the case, why would  
24 the Supreme Court talk about this bond issue, if it were so  
25 clear that there is really no bond required --

1 MR. BYRD: Well, --

2 THE COURT: -- if you're challenging a  
3 jurisdictional issue?

4 MR. BYRD: Well, first of all, the Supreme Court  
5 is not a fact finder and my interpretation of the Supreme  
6 Court's Order was: Ms. Brinkman, if you think there's a  
7 basis for a bond and an amount of the bond, then that needs  
8 to be decided by this Court. But they certainly weren't  
9 saying that a bond is required.

10 And there's not a single case that we could find  
11 or that Ms. Brinkman could find where a bond was required  
12 to maintain the status quo when there is no judgment. If  
13 the purpose of the bond is to maintain status quo, what's  
14 the status quo here? Well, the status quo is my client is  
15 at the Supreme Court claiming that there is no  
16 jurisdiction, discovery of the other -- on the rest of the  
17 case is going forward, what's the monetary harm from  
18 allowing the case to proceed in discovery while my client  
19 challenges the jurisdictional issue?

20 THE COURT: Okay. Understand the argument.

21 MR. BYRD: There is none.

22 THE COURT: Okay.

23 MR. BYRD: So, the Supreme Court's Order wasn't  
24 saying that a bond is required, Judge Bare you set that  
25 amount. It was simply saying: Plaintiff, if you think

1 that you are entitled to it and there's some amount that  
2 you're seeking, you need to -- have that discussion with  
3 Judge Bare, but --

4 THE COURT: Okay.

5 MR. BYRD: -- the whole basis here -- there is no  
6 legal basis for maintaining the status quo on a procedural  
7 issue. It's no different than a discovery dispute.

8 THE COURT: Okay.

9 MR. BYRD: Thank you, Your Honor.

10 THE COURT: I understand.

11 Well, here's the way I see it. I'm going to tell  
12 you how I see it. Okay?

13 MS. BRINKMAN: Sure.

14 THE COURT: The analysis is not the easiest one  
15 but this is what I think. The Nevada Supreme Court, in its  
16 initial Order, dated August 21<sup>st</sup>, 2015, Granting a Temporary  
17 Stay and Directing an Answer, indicated in a footnote:

18 The opposition requested a bond of \$1,000,000 be  
19 required as a condition of any stay. It's not clear  
20 whether the District Court has yet considered a proper  
21 amount of any supersedeas bond.

22 I mean, that's an indication to me that if it were  
23 the case, that since you're challenging jurisdiction,  
24 there's no bond requirement, clearly as a matter of law,  
25 that the Court wouldn't -- they would know that and they

1 would not entertain this footnote or any discussion in  
2 dicta or otherwise as to the appropriateness of a  
3 supersedeas bond. I mean, if that were a matter of Nevada  
4 law that was clear, then the Supreme Court would know it.  
5 So, that -- to me, that starts the thought process going  
6 forward.

7           In addition to that, I mean, I look at what's  
8 going on here. It's not simply a jurisdictional issue at  
9 the end of the day. I mean, it certainly is a  
10 jurisdictional issue, but we have the Judge Denton prior  
11 Order and Judgment and then we have, as Ms. Brinkman's  
12 pointed out, an argument -- it's just an argument, but  
13 nonetheless, I do recognize that there was a period of time  
14 prior to the Ross Dress for Less coming in there where the  
15 rent that was owed, conceptually, I'm not saying I have a  
16 finding that it was owed and I don't know about mitigation  
17 and, of course, Mr. Byrd, I'd give your client a chance to  
18 show that maybe they could have done better to get a tenant  
19 in there or whatever else you wanted to do to try to show  
20 that the mitigation efforts were less than terrific.

21           But, in any event, just as far as the idea of rent  
22 not being paid until such time as a new tenant went in  
23 there, that added up to another piece of change that, in my  
24 world, is a lot of money, I mean, a half a million bucks.  
25 So, you requested \$1,000,000. You've got a prior judgment

1 that almost comes to that. You've got this \$500,000 amount  
2 that we've talked about. The idea is that a supersedeas  
3 bond is designed to protect the prevailing party in  
4 litigation from a loss that could and would accrue when  
5 there's a stay of execution of a judgment. So, a  
6 supersedeas bond, under Rule 62, should usually be set in  
7 an amount that will permit full satisfaction of a judgment.

8 In this situation, I think \$1,000,000 is  
9 reasonable, given the prior judgment, given the accumulated  
10 theory in this case, the fact that the Nevada Supreme Court  
11 seems to be of an opinion that a bond amount should be set  
12 by me. I mean, it's a lot, but it does seem reasonable  
13 given the law in this area and given the fact that this is  
14 not simply a jurisdictional issue. You do have this prior  
15 judgment and the stay is affecting collection. So, for all  
16 those reasons, Ms. Brinkman, you can prepare the order and  
17 submit it to me.

18 MS. BRINKMAN: And I'll run it by the other side  
19 as well.

20 MR. BYRD: Your Honor, how long does my client  
21 have to post the bond?

22 THE COURT: Well, I was just getting ready to ask  
23 that actually. I mean, it's -- I know you have to consult  
24 with your client and figure it all out. How much time do  
25 you want?



1 MR. BYRD: Two weeks.

2 THE COURT: I think that's reasonable for  
3 \$1,000,000 bond. Two weeks.

4 MS. BRINKMAN: Sure. If we could just have a --  
5 with that -- two weeks from today? I can calculate that  
6 date --

7 THE COURT: Two weeks from today.

8 MS. BRINKMAN: -- and put that --

9 THE COURT: What is that date?

10 MS. BRINKMAN: -- in the order.

11 THE CLERK: That will be November 12.

12 THE COURT: November 12<sup>th</sup>. You can put that in the  
13 order, Ms. Brinkman.

14 MR. BYRD: Your Honor, could I just ask for some  
15 clarifications with respect to the Court's thinking on why  
16 the writ proceeding in the Supreme Court is affecting the  
17 collection of the judgment in the prior case when Uno  
18 wasn't a party?

19 THE COURT: Yeah, well, it's exactly what Ms.  
20 Brinkman has told me. I mean, it's the guaranty and I  
21 think there's enough of a nexus there. Ms. Brinkman, you  
22 can put that in the Order, too. Okay?

23 MS. BRINKMAN: Great. Thank you, --

24 THE COURT: Okay.

25 MS. BRINKMAN: -- Your Honor.

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MR. BYRD: Thank you, Your Honor.

PROCEEDING CONCLUDED AT 9:57 A.M.

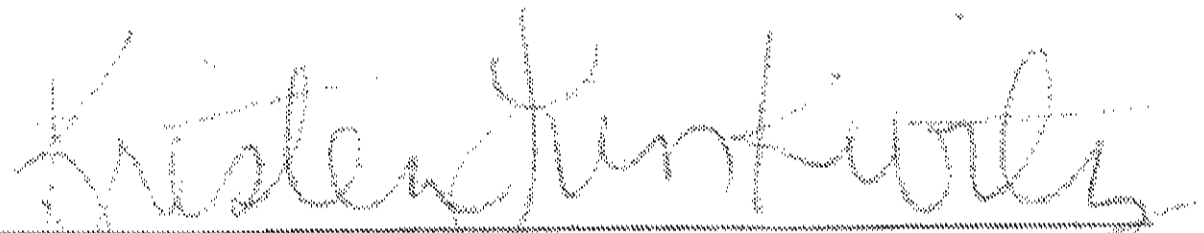
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1 CERTIFICATION

2  
3  
4 I certify that the foregoing is a correct transcript from  
5 the audio-visual recording of the proceedings in the  
6 above-entitled matter.  
7

8 AFFIRMATION

9  
10 I affirm that this transcript does not contain the social  
11 security or tax identification number of any person or  
12 entity.  
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22 KRISTEN LUNKWITZ  
23 INDEPENDENT TRANSCRIBER  
24  
25

**ORDR**

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*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 FIXING SUPERSEDEAS BOND  
IN CONNECTION WITH TEMPORARY  
STAY PENDING WRIT OF  
PROHIBITION IN FAVOR OF GRUPO  
FAMSA, S.A. DE C.V.**

This matter having come before the Honorable Rob Barc, on an order shortening time on October 29, 2015, on the 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. ("Motion") filed by Plaintiff, B.E. Uno, LLC, a Nevada limited liability company ("Plaintiff"), against Grupo Famsa, S.A. de C.V., a Mexican corporation ("Defendant Grupo Famsa"); 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., specially 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. At Defendant Grupo Famsa's request, Defendant Grupo Famsa sought and obtained a stay with the Nevada Supreme Court of this Court's Order denying the Motion to Quash Service

1 of Process. Such stay was granted effective as of August 21, 2015. The stay applies only to Grupo  
2 Famsa. The case continues against the other Defendant, Famsa Inc.

3 B. In the Nevada Supreme Court's order granting the stay, the Supreme Court stated  
4 that the District Court should determine whether a bond was appropriate and the amount of the  
5 bond:

6 "The opposition requests that a bond of \$1,000,000 be required as a  
7 condition of any stay. It is not clear whether the district court has yet  
8 considered the proper amount of any supersedeas bond. NRAP  
9 8(a)(1)(B). We have routinely recognized that the district court is better  
10 suited for making supersedeas bond determinations. See Nelson v. Heer,  
11 121 Nev. 832, 836, 122 P.3d 1252, 1254 (2005)."

12 C. In making its decision about the appropriate bond amount, this Court considered the  
13 fact that Plaintiff had already obtained a judgment against Defendant Famsa, Inc., a company  
14 wholly owned by Defendant Grupo Famsa, in the amount of \$748,394.19, plus costs in the amount  
15 of \$7,577.02 and attorneys' fees of \$126,712.50 for a total amount of \$882,683.71 ("Judgment"),  
16 which Judgment was entered on April 28, 2014, and continues to bear interest. Grupo Famsa was  
17 not a party to the litigation resulting in the Judgment

18 D. The Court also considered the fact that damages for rent and operating costs  
19 continue to accrue in this current litigation at approximately \$40,000 per month (subject to any  
20 successful argument by Defendants relating to Plaintiff's mitigation efforts as well as any offset  
21 from rent received from the new lease with Ross Dress for Less).

22 E. Additionally, the Court considered that the Guaranty between Plaintiff and  
23 Defendant Grupo Famsa includes language as follows:

24 "Guarantor agrees that any judgment rendered against Tenant for monies  
25 or performance due Landlord shall in every and all aspects bind and be  
26 conclusive against Guarantor to the same extent as if Guarantor had  
27 appeared in any such proceedings and judgment herein had been rendered  
28 against Guarantor."

29 F. The above-quoted Language in the Guaranty creates a sufficient nexus to support  
30 the amount of the bond to be posted by Defendant Grupo Famsa based upon the prior Judgment and  
31 given the likelihood that Defendant Grupo Famsa will also be liable to Plaintiff for any judgment

1 obtained in the future against Defendant Famsa, Inc. and Defendant Grupo Famsa (once service is  
2 deemed made).

3 G. This supersedeas bond is appropriate and necessary to protect Plaintiff in this  
4 litigation for loss that could or would accrue and to permit full satisfaction of the prior Judgment  
5 and any judgment obtained by Plaintiff in this case.

6 H. This Court has the right and discretion, under NRAP 8(2)(E), to condition the stay  
7 upon Defendant Grupo Famsa filing a bond or other appropriate security with this Court. Having  
8 exercised such discretion, this Court orders as follows:

9 1. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion  
10 is GRANTED;

11 2. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant  
12 Grupo Famsa's stay with the Nevada Supreme Court is conditioned upon Defendant Grupo Famsa  
13 posting a bond in the amount of \$1,000,000.00 on or before November 12, 2015.

14 IT IS SO ORDERED.

15 DATED this \_\_\_\_\_ day of November, 2015.

\_\_\_\_\_  
DISTRICT COURT JUDGE

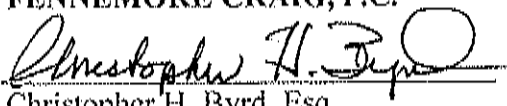
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17 Respectfully submitted by:

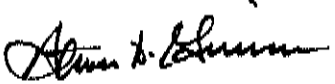
18 **GOOLD PATTERSON**

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*Attorneys for Plaintiff*

23 REVIEWED BY:

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25   
26 Christopher H. Byrd, Esq.  
27 300 S. Fourth Street, Suite 1400  
28 Las Vegas, NV 89101  
*Attorney for Defendant Grupo Famsa*

  
CLERK OF THE COURT

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10 *For Defendant Grupo FAMSA, S.A. de C.V.*

11 **DISTRICT COURT**  
12 **CLARK COUNTY, NEVADA**  
13

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

15 Plaintiff,

16 vs.

17 FAMSA, INC., a California corporation;  
18 GRUPO FAMSA, S.A. DE C.V., a Mexican  
corporation,

19 Defendants.  
20

Case No.: A-14-706336-C

Dept. No.: XXXII

**NOTICE OF ENTRY OF ORDER**

21 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

22 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that a Stipulated

23 ///

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25 ///

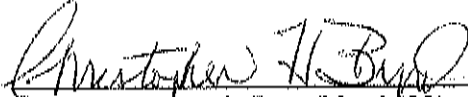
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1 Protective Order and Order Thereon was entered in the above-referenced matter on the 4th day of  
2 November, 2015 a copy of which is attached hereto.

3 DATED this 5 day of November, 2015.

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

5 

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20 *Attorneys for Defendant FAMSA, INC. and*  
21 *Specially Appearing For Defendant Grupo*  
22 *FAMSA, S.A. de C.V.*  
23  
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28



1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of the law firm of  
3 FENNEMORE CRAIG, P.C.; that on the 5<sup>th</sup> day of November, 2015, I served a true and correct  
4 copy of the document described below on the parties listed by the method indicated at the addresses  
5 set forth for said parties:

6 **Document Served:** **NOTICE OF ENTRY OF ORDER**

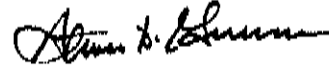
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8 Kelly J. Brinkman, Esq.  
9 Goold Patterson  
10 1975 Village Center Circle #140  
11 Las Vegas, NV 89134

[X] Via E-service  
[ ] Via U.S. Mail (Not registered with  
CM/ECF Program)

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13 Employee of Fennemore Craig, P.C.  
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CLERK OF THE COURT

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9 *Attorneys for Defendant, FAMSA, INC.*

10  
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;  
GRUPO FAMSA, S.A. de C.V., a Mexican  
18 corporation,

19 Defendants.

Case No.: A-14-706336-C

Dept. No.: XXXII

**STIPULATED PROTECTIVE ORDER**  
**AND ORDER THEREON**

20  
21 Plaintiff, B.E. UNO, LLC ("Plaintiff") and Defendant, FAMSA, INC. ("Defendant")<sup>1</sup>, by and  
22 through their respective counsel of record, understand and agree that during the course of discovery  
23 and trial of the above-captioned action (the "Action") the Parties or third parties may be required to  
24 disclose confidential, proprietary, privileged and/or trade secret material generally protected from  
25 disclosure by various privileges including the Constitutional right to privacy, proprietary rights and  
26 trade secret protections.

27  
28 <sup>1</sup>Plaintiff and Defendant are referred to herein as a "Party" or, collectively, as the "Parties".

1 The Parties mutually wish to keep such information protected from disclosure to the general public  
2 in compliance with the law and the interests of the Parties during the course of the Action.

3 **NOW THEREFORE, the Parties HEREBY STIPULATE AND AGREE TO TERMS OF**  
4 **THE FOLLOWING PROTECTIVE ORDER:**

5 1. This Joint Stipulation and Protective Order ("Protective Order") applies to  
6 confidential documents, the contents thereof, and any other information produced or disclosed by the  
7 Parties to one another pursuant to this Protective Order. The term "Document(s)" means those  
8 materials defined as documents in the Parties' respective discovery requests, subject to any  
9 objections a Party may make with respect to such definitions. The term "Information" includes  
10 information disclosed by testimony at the hearing in this matter as well as responses made, in any  
11 non-documentary form whatsoever, to the Parties' respective discovery requests.

12 2. The Parties extend this Protective Order and the protections herein to any non-party  
13 producing discovery in this Action, including but not limited to Ross Dress for Less, Inc. Lisa J.  
14 Callahan and Sage Commercial Advisors (collectively, the "Ross Parties"). The Ross Parties, by  
15 and through its attorneys, hereby consent, pursuant to the terms and subject to this Protective Order,  
16 to the delivery by Plaintiff to Defendant if a copy of the finalized lease with Ross Dress for less, Inc.  
17 with an effective date of October 31, 2014, which lease shall be designated "Confidential" before  
18 production,. Such acknowledgement and consent are reflected on the signature page of this  
19 Protective Order.

20 3. The Parties shall use confidential Information and Documents obtained from each  
21 other pursuant to this Protective Order solely for the purpose of prosecuting, defending or settling  
22 the claims made in this Action, including without limitation, discovery, motions, briefs, and  
23 preparation for trial, and for another purpose, except as otherwise stated in this Protective Order.

24 4. Information and Documents produced or disclosed by any Party, including the Ross  
25 Parties, in this Action may be designated as "Confidential" and thereby become subject to the  
26 provisions of this Protective Order if such Documents and Information constitute: (a) trade secrets;  
27 or (b) confidential personal, commercial or proprietary Information of a sensitive nature, the  
28 disclosure of which threatens or would likely cause injury to the business or commercial or personal

1 relationships of the producing or disclosing Party; or (c) the Parties otherwise agree (which  
2 agreement is presumed by the disclosure or turnover of such Documents or Information).

3 5. Designation of Documents or Information as "Confidential" shall be made, in the  
4 case of written or other graphic materials and tangible things, by stamping the appropriate  
5 designation on the face of the materials or labeling them prior to either: (a) the production of such  
6 Documents or Information; or (b) the use or submission of such materials by the disclosing Party in  
7 this Action. In the case of testimony or oral disclosures, such designation shall be made either at the  
8 trial or otherwise on the record or within thirty (30) days following receipt of the transcript of the  
9 record by notifying opposing counsel and the court reporter in writing. Those portions of a  
10 transcript that are designated as "Confidential" shall be transcribed apart from the regular transcript  
11 and said "Confidential" portion of the transcript shall be marked "Confidential."

12 6. Subject to the use restrictions set forth herein, Documents and Information produced  
13 or disclosed by a Party pursuant to this Protective Order and which is designated as "Confidential"  
14 may be disclosed only to the following persons, and in the manner described below:

15 a. Counsel of record in this Action and their partners, associates and support staff, including  
16 but not limited to stenographic, paralegal and clerical employees to whom disclosure is  
17 deemed necessary by said counsel of record and in-house counsel for the Parties;

18 b. Any non-party expert who is consulted or retained by a Party or its counsel in order to  
19 assist in the conduct of this Action, but only to the extent that, and for the time during which,  
20 such disclosure is necessary for the performance of such assistance; provided however, such  
21 experts agree to abide by this Protective Order and sign a copy of Exhibit "A" hereto to  
22 evidence that agreement; and provided counsel disclosing confidential Information and  
23 Documents maintains a list of the name, title and business address of each such non-party  
24 expert to whom the Information and Document are disclosed as well as the copies they  
25 execute.

26 c. Witnesses (other than employees of the producing Party) at trial, and such witnesses'  
27 counsel (provided such persons and all persons present agree to abide by the terms and  
28 conditions of this Protective Order and sign a copy of Exhibit "A" hereto) and provided such

1 witnesses shall not retain confidential Documents and/or Information subsequent to their  
2 testimony;

3 d. Employees of the Parties, but only to the extent that, and for the time during which, such  
4 disclosure is necessary for said employees to assist counsel in the conduct of this Action;

5 7. All persons who obtain Documents and/or Information designated as "Confidential"  
6 pursuant to this Protective Order are prohibited from disclosing all or part of such Documents and  
7 Information to any person who is not also authorized to receive such Documents and Information.

8 8. Prior to the disclosure of Documents and/or Information designated as "Confidential"  
9 to any person, such person shall be furnished a copy of this Protective Order, shall be informed that  
10 the material is designated as "Confidential," shall agree to comply with the provisions of this  
11 Protective Order and shall sign a confidentiality understanding in the form of Exhibit "A" hereto to  
12 evidence such agreement. A copy of the confidentiality understandings collected by counsel shall be  
13 made available to the producing Party or to the Ross Parties prior to such disclosure of Documents  
14 and/or Information.

15 9. No later than thirty days after the termination of this Action (including any post-trial  
16 proceedings, counsel shall destroy or permanently obliterate or excise all material designated as  
17 "Confidential".

18 10. All persons to whom Documents and Information designated as "Confidential" are  
19 disclosed shall be bound by the terms of this Protective Order provided, however, that no provision  
20 of this Protective Order shall be construed so as to restrict the disclosure or use by the producing  
21 Party of any Documents or Information produced or provided by it.

22 11. Any agreement or order signed by counsel for each of the Parties subsequent to the  
23 date of this Protective Order which specifically modifies the terms hereof shall be deemed to  
24 constitute a part of this Protective Order from the date of executing such order or agreement.

25 12. Any Party may, at any time, seek a modification of this Protective Order from the  
26 Court, and the execution of this Protective Order shall not be deemed a waiver of the right of any  
27 Party to seek such modification as the circumstances may warrant.

28 13. By agreeing to this Protective Order, or requesting the protections of this Protective

1 Order, the Parties and the Ross Parties shall not waive their right to object to producing any  
2 Document, Information or other discovery materials.

3 14. This Protective Order shall remain in effect until such time as it is modified,  
4 superseded, or terminated by Order of the Court.

5 15. Nothing in this Protective Order shall prevent the use of Documents or Information  
6 designated as "Confidential" at the trial or any pre-hearing conference or other proceeding permitted  
7 by law or any post-trial court proceeding, provided that, with respect to any such court proceedings,  
8 the Party seeking to use such Documents or Information shall, in accordance with applicable law and  
9 rules of court, file such materials under seal in an envelope conspicuously marked in a manner to  
10 alert the court to the confidential nature of such materials.

11 16. The Parties affirmatively represent that they will use their best efforts to limit  
12 confidentiality designations to those Documents and that Information which, in accordance with  
13 paragraph 4 hereof constitute (a) trade secrets; or (b) confidential personal, commercial or  
14 proprietary Information of a sensitive nature, the disclosure of which threatens or would likely cause  
15 injury to the business or commercial or personal relationships of the producing or disclosing Party;  
16 or (c) the Parties otherwise agree (which agreement is presumed by the disclosure or turnover of  
17 such Documents or Information).

18 17. In the event that a person subject to this Protective Order receives any subpoena or  
19 other process relating to confidential Documents or Information received pursuant to this Protective  
20 Order, such person shall give counsel for the Party or the Ross Parties, who produced such  
21 Documents or Information reasonable notice before furnishing or permitting inspection of such  
22 Documents or Information to persons not subject to this Protective Order.

23 18. The failure of a Party to exercise any right under this Protective Order shall not be  
24 deemed a waiver of any right to the future exercise of the provisions herein with respect to other  
25 Documents or Information.

26 19. If, after execution of this Protective Order, any Confidential Documents or  
27  
28

1 Information submitted by a designating party or the Ross Parties under the terms of this Protective  
2 Order is disclosed by a non-designating party to any person other than in the manner authorized by  
3 this Protective Order, the non-designating party responsible for the disclosure shall bring all  
4 pertinent facts relating to the disclosure of such Confidential Documents or Information to the  
5 immediate attention of the designating party or the Ross Parties.

6 20. The Parties shall meet and confer regarding the procedures for use of Confidential  
7 Documents and Information at trial and shall move the Court for entry of an appropriate order.

8 21. After this Protective Order has been signed by counsel for all Parties, it shall be presented to  
9 the Court for entry. Counsel agree to be bound by the terms set forth herein with regard to any Confidential  
10 Information and Documents that have been produced before the Court signs this Protective Order.

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22. This Protective Order shall be binding on all Parties and their officers, directors, shareholders and other agents to whom confidential Documents or Information are produced or disclosed pursuant to this Protective Order.

**IT IS SO STIPULATED:**

Dated: October 15, 2015

**FENNEMORE CRAIG, P.C.**

Christopher H. Byrd  
Christopher H. Byrd (No. 1633)  
300 S. Fourth Street, Suite 1400  
Las Vegas, Nevada 89101  
-and-  
Richard I. Arshonsky, Esq. (No. 4518)  
LEVINSON ARSHONSKY & KURTZ, LLP  
15303 Ventura Boulevard, Suite 1650  
Sherman Oaks, CA 91403  
*Attorneys for Defendant, FAMSA, INC.*

Dated: September, 2015

Shimon Law Firm, APC

Randal D. Shimon  
Randal D. Shimon, Esq. (6122)  
6415 S. Tenaya Way, #125  
Las Vegas, Nevada 89113  
*Attorney for Ross Dress For Less, Inc., Sage  
Commercial Advisors, and Lisa Callahan*

Dated: October 9, 2015

**GOOLD PATTERSON**

Kelly J. Brinkman  
Kelly J. Brinkman (No. 6238)  
1975 Village Center Circle, Suite 140  
Las Vegas, Nevada 89134  
*Attorneys for Plaintiff B.E. UNO, LLC*

**ORDER**

**IT IS SO ORDERED.**

DATED this 3 day of Nov, 2015.

ROB BARE  
**DISTRICT COURT JUDGE**

Respectfully submitted by:

**FENNEMORE CRAIG, P.C.**

Christopher H. Byrd  
Christopher H. Byrd (No. 1633)  
300 S. Fourth Street, Suite 1400  
Las Vegas, Nevada 89101  
*Attorneys for Defendant, FAMSA, INC.*

ROB BARE  
JUDGE, DISTRICT COURT, DEPARTMENT 30



22. This Protective Order shall be binding on all Parties and their officers, directors, shareholders and other agents to whom confidential Documents or Information are produced or disclosed pursuant to this Protective Order.

**IT IS SO STIPULATED:**

Dated: September \_\_\_\_, 2015

Dated: September \_\_\_\_, 2015

**FENNEMORE CRAIG, P.C.**

**GOOLD PATTERSON**

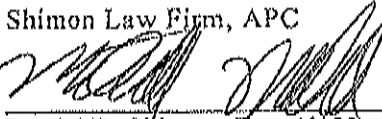
Christopher H. Byrd (No. 1633)  
300 S. Fourth Street, Suite 1400  
Las Vegas, Nevada 89101  
-and-

Kelly J. Brinkman (No. 6238)  
1975 Village Center Circle, Suite 140  
Las Vegas, Nevada 89134  
*Attorneys for Plaintiff B.E. UNO, LLC*

Richard I. Arshonsky, Esq. (No. 4518)  
LEVINSON ARSHONSKY & KURTZ, LLP  
15303 Ventura Boulevard, Suite 1650  
Sherman Oaks, CA 91403  
*Attorneys for Defendant, FAMSA, INC.*

Dated: ~~September~~ <sup>October</sup> \_\_\_\_, 2015

Shimon Law Firm, APC

 #13201  
Randal D. Shimon, Esq. (6122)  
6415 S. Tenaya Way, #125  
Las Vegas, Nevada 89113  
*Attorney for Ross Dress For Less, Inc., Sage  
Commercial Advisors, and Lisa Callahan*

**ORDER**

**IT IS SO ORDERED.**

DATED this \_\_\_\_ day of \_\_\_\_, 2015.

**DISTRICT COURT JUDGE**

Respectfully submitted by:

**FENNEMORE CRAIG, P.C.**

Christopher H. Byrd (No. 1633)  
300 S. Fourth Street, Suite 1400  
Las Vegas, Nevada 89101  
*Attorneys for Defendant, FAMSA, INC.*

1 EXHIBIT "A" TO PROTECTIVE ORDER

2 DISCLOSURE AGREEMENT AND

3 UNDERTAKING TO COMPLY WITH PROTECTIVE ORDER

4 I, \_\_\_\_\_, have read and reviewed the Protective Order  
5 Regarding Designation, Protection and Nondisclosure of Confidential Information (the "Protective  
6 Order") issued by the Court in the case captioned *B.E. Uno, LLC v. FAMSA, Inc., et al.*, pending in  
7 the District Court, Clark County, Nevada and bearing Case No. A-14-706336-C (the "Action"). I  
8 understand that information and/or documents which are to be disclosed to me by counsel of record  
9 for \_\_\_\_\_ (name of Party), have been designated "Confidential" under the  
10 Protective Order and are to be used by me solely to assist in the Action.

11 I further understand and agree that the Protective Order, a copy of which has been given to  
12 me, prohibits me from either using such information or documents for any purpose or disclosing  
13 such information or documents to any person other than counsel of record in the Action or persons  
14 assisting them. By my signature below, I agree to be bound by the Protective Order, to abide by its  
15 terms, and to be subject to the jurisdiction of the District Court, Clark County, Nevada for the  
16 purposes of its enforcement and the enforcement of my obligations under this Protective Order.

17  
18 NAME: \_\_\_\_\_

19 ADDRESS: \_\_\_\_\_

20 \_\_\_\_\_

21  
22 Dated: \_\_\_\_\_

By: \_\_\_\_\_  
Signature

## CIVIL COVER SHEET

Clark County, Nevada

Case No. \_\_\_\_\_

(Assigned by Clerk's Office)

A- 12- 672870- C

XIII

**I. Party Information**

Plaintiff(s) (name/address/phone): B.E. Uno, LLC, a Nevada limited liability company

Attorney (name/address/phone):

Kelly J. Brinkman, Gould Patterson

1975 Village Center Circle, Suite 140, Las Vegas, NV 89134

Defendant(s) (name/address/phone): FAMSA, INC., a California corporation; GRUPO FAMSA, S.A. DE C.V., a Mexican corporation

Attorney (name/address/phone):

**II. Nature of Controversy** (Please check applicable bold category and applicable subcategory, if appropriate)☐ Arbitration Requested**Civil Cases**

Real Property	Torts	
<input type="checkbox"/> Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Title to Property <input type="checkbox"/> Foreclosure <input type="checkbox"/> Liens <input type="checkbox"/> Quiet Title <input type="checkbox"/> Specific Performance <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property <input type="checkbox"/> Partition <input type="checkbox"/> Planning/Zoning	<b>Negligence</b> <input type="checkbox"/> Negligence - Auto <input type="checkbox"/> Negligence - Medical/Dental <input type="checkbox"/> Negligence - Premises Liability (Slip/Fall) <input type="checkbox"/> Negligence - Other	<input type="checkbox"/> Product Liability <input type="checkbox"/> Product Liability/Motor Vehicle <input type="checkbox"/> Other Torts/Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Torts/Defamation (Libel/Slander) <input type="checkbox"/> Interfere with Contract Rights <input type="checkbox"/> Employment Torts (Wrongful termination) <input type="checkbox"/> Other Torts <input type="checkbox"/> Anti-trust <input type="checkbox"/> Fraud/Misrepresentation <input type="checkbox"/> Insurance <input type="checkbox"/> Legal Tort <input type="checkbox"/> Unfair Competition
Probate	Other Civil Filing Types	
Estimated Estate Value: _____ <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside Estates <input type="checkbox"/> Trust/Conservatorships <input type="checkbox"/> Individual Trustee <input type="checkbox"/> Corporate Trustee <input type="checkbox"/> Other Probate	<input type="checkbox"/> Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> General <input checked="" type="checkbox"/> Breach of Contract <input type="checkbox"/> Building & Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Other Contracts/Agmt/Judgment <input type="checkbox"/> Collection of Actions <input type="checkbox"/> Employment Contract <input type="checkbox"/> Guarantee <input type="checkbox"/> Sale Contract <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Civil Petition for Judicial Review <input type="checkbox"/> Foreclosure Mediation <input type="checkbox"/> Other Administrative Law <input type="checkbox"/> Department of Motor Vehicles <input type="checkbox"/> Worker's Compensation Appeal	<input type="checkbox"/> Appeal from Lower Court (also check applicable civil case box) <input type="checkbox"/> Transfer from Justice Court <input type="checkbox"/> Justice Court Civil Appeal <input type="checkbox"/> Civil Writ <input type="checkbox"/> Other Special Proceeding <input type="checkbox"/> Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Conversion of Property <input type="checkbox"/> Damage to Property <input type="checkbox"/> Employment Security <input type="checkbox"/> Enforcement of Judgment <input type="checkbox"/> Foreign Judgment - Civil <input type="checkbox"/> Other Personal Property <input type="checkbox"/> Recovery of Property <input type="checkbox"/> Stockholder Suit <input type="checkbox"/> Other Civil Matters

**III. Business Court Requested** (Please check applicable category, for Clark or Washoe Counties only.)
☐ NRS Chapters 78-88  
☐ Commodities (NRS 90)  
☐ Securities (NRS 90)

☐ Investments (NRS 104 Art. 8)  
☐ Deceptive Trade Practices (NRS 598)  
☐ Trademarks (NRS 600A)

☐ Enhanced Case Mgmt/Business  
☐ Other Business Court Matters

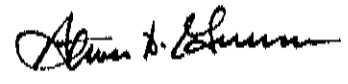
December 3, 2012

Date

/s/ Kelly J. Brinkman

Signature of initiating party or representative

See other side for family-related case filings.

  
CLERK OF THE COURT

**COMP**  
Kelly J. Brinkman, Esq.  
Nevada Bar No. 6238  
GOOLD PATTERSON  
1975 Village Center Circle, Suite 140  
Las Vegas, Nevada 89134  
(702) 436-2600 (Telephone)  
(702) 436-2650 (Fax)  
[kbrinkman@gooldpatterson.com](mailto:kbrinkman@gooldpatterson.com) (Email)  
*Attorneys for B.E. Uno, LLC*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

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

Plaintiff,

v.

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

Defendants.

Case No. **A- 12- 672870- C**  
Dept. No.

**COMPLAINT**

**X I I I**

**ARBITRATION EXEMPT - AMOUNT IN  
CONTROVERSY IN EXCESS OF \$50,000;  
EQUITABLE RELIEF SOUGHT;  
DECLARATORY RELIEF SOUGHT**

B.E. Uno, LLC, a Nevada limited liability company ("Plaintiff"), by and through its  
attorneys, Goold Patterson, for its Complaint states and alleges as follows:

**PARTIES**

1. Plaintiff is, and at all times relevant herein was, a Nevada limited liability  
company duly authorized to conduct business in the State of Nevada.

2. Plaintiff is informed and believes, and upon such information and belief alleges  
that Defendant Famsa, Inc. ("FAMSA") is, and at all times relevant herein was, a California  
corporation duly authorized to conduct business in the State of Nevada.

3. Plaintiff is informed and believes, and upon such information and belief alleges  
that Defendant Grupo Famsa, S.A. de C.V. ("GRUPO FAMSA") is, and at all times relevant  
herein was, a Mexican corporation but is subject to the jurisdiction of the Nevada courts, as more  
fully set forth below.

**GOOLD PATTERSON**  
1975 VILLAGE CENTER CIRCLE, SUITE 140  
LAS VEGAS, NEVADA 89134  
(702) 436-2600 FAX: (702) 436-2650

GENERAL ALLEGATIONS

4. Plaintiff owns a shopping center commonly known as Bonanza East Shopping Center located south of the southeast corner of Bonanza Road and Eastern Avenue in the City of Las Vegas, County of Clark, State of Nevada (the "Shopping Center").

5. On or about June 3, 2005, Plaintiff, as landlord, and Defendant FAMSA, as tenant, entered into a lease agreement for commercial retail space at the Shopping Center in exchange for monthly rents and other charges (the "Lease").

6. The leased premises is located at 562 North Eastern Avenue, Las Vegas, Nevada 89109 (the "Leased Property")

7. The Lease was for a term of fifteen (15) years, with the rent commencement date on or about October 29, 2005, with a current base monthly rent of Thirty-One Thousand Six Hundred Sixty-Two and 90/100 Dollars (\$31,662.90), subject to increases as set forth in Sections 1.07 and 4.02 of the Lease.

8. Pursuant to the terms of the Lease, Defendant FAMSA agreed to faithfully perform each of the terms, covenants and conditions of the Lease, including payment of all rents and other charges accrued thereunder.

9. Pursuant to the Lease terms, Defendant FAMSA agreed that if it failed to make payments as set forth in the Lease, or if it vacated or abandoned the Leased Property and ceased paying rent and/or additional rent, such events would constitute a default under the Lease.

10. Concurrently with the execution of the Lease, Defendant GRUPO FAMSA agreed to unconditionally and irrevocably guaranty the performance and obligations of the Lease terms by tenant, Defendant FAMSA, and accordingly, Defendant GRUPO FAMSA executed a Guaranty ("Guaranty") covenanting thereto.

11. As part of the Lease, Defendant FAMSA agreed that the Lease would be governed by, interpreted under the laws of, and enforced in the courts of the situs of the Leased Property and thus, Defendant FAMSA is subject to the jurisdiction of the courts of the State of Nevada with respect to this legal action.

12. As part of the Guaranty, Defendant GRUPO FAMSA agreed that the Guaranty would be governed by, interpreted under the laws of, and enforced in the courts of the situs of the Leased Property and thus, Defendant GRUPO FAMSA is subject to the jurisdiction of the courts of the State of Nevada with respect to this legal action.

13. Defendant FAMSA failed and/or refused to pay monthly rents, its share of the Parcel's Operating Costs (as defined in the Lease) (*i.e.*, common area charges, insurance, utilities) and Impositions (as defined in the Lease) attributed to the Leased Property, monthly pylon sign fee, and late fees to Plaintiff as required by the Lease.

14. On or about November 16, 2012, Defendant FAMSA indicated its intent to vacate the Leased Property on or about November 30, 2012, prior to expiration of the Lease term.

15. Defendant FAMSA also damaged the Leased Property when it abandoned the premises in violation of the terms of the Lease, including, but not limited to damage to the roof of the Leased Property and to otherwise return the Leased Property in good condition and repair (normal wear and tear excepted), all of such damages will be subject to proof at the time of trial.

16. Defendant GRUPO FAMSA failed and/or refused to pay monthly rents, its share of the Parcel's Operating Costs (as defined in the Lease) (*i.e.*, common area charges, insurance, utilities) and Impositions (as defined in the Lease) attributed to the Leased Property, monthly pylon sign fee, and late fees to Plaintiff as required by the Guaranty.

17. The amounts due and owing to Plaintiff continue to increase each month pursuant to the terms of the Lease and/or Guaranty.

18. As a result of Defendants' conduct, Plaintiff has been required to retain the services of Goold Patterson to prosecute this action and to protect its rights under the Lease and Guaranty, and is therefore entitled to reasonable attorneys' fees and costs as set forth in the Lease and Guaranty, as well as by law.

#### FIRST CAUSE OF ACTION

#### **(Breach of Contract Against FAMSA)**

19. Plaintiff repeats and re-alleges each and every allegation contained in the above

1 paragraphs as though fully set forth herein.

2 20. The Lease is a valid and enforceable agreement.

3 21. Defendant FAMSA has breached the terms of the Lease as more fully set forth  
4 above.

5 22. As a direct and proximate cause of Defendant FAMSA's breach, Plaintiff has  
6 been damaged in an amount in excess of Ten Thousand Dollars (\$10,000.00), the total of which  
7 cannot yet be affixed, and thus, will be subject to proof at the time of trial.

8 **SECOND CAUSE OF ACTION**

9 **(Unjust Enrichment Against FAMSA)**

10 23. Plaintiff repeats and re-alleges each and every allegation contained in the above  
11 paragraphs as though fully set forth herein.

12 24. Defendant FAMSA represented and covenanted that it would perform according  
13 to the terms of the Lease, including payment of the above-described fees according to the terms  
14 of the Lease.

15 25. Plaintiff conferred a benefit upon Defendant FAMSA by giving it access to and  
16 possession of the premises pursuant to the terms of the Lease in expectation that Plaintiff would  
17 be paid by Defendant FAMSA according to the terms of the Lease.

18 26. Defendant FAMSA failed to pay the monthly rent, the Parcel's Operating Costs  
19 (as defined in the Lease), and Impositions (as defined in the Lease) attributed to the Leased  
20 Property, and the monthly pylon sign fee despite the representations and covenants to Plaintiff  
21 that it would pay the same.

22 27. If Defendant FAMSA is permitted to retain the benefit of the use of the premises  
23 and services provided by Plaintiff on Defendant FAMSA's behalf without having to pay for  
24 those benefits, Defendant FAMSA will have been unjustly enriched.

25 28. Accordingly, Plaintiff has been damaged in the amount of the reasonable value of  
26 the premises and services provided and as set forth in the Lease, which amount is greater than  
27 Ten Thousand Dollars (\$10,000.00) and will be subject to proof at the time of trial.

28

**THIRD CAUSE OF ACTION**

**(Breach of Covenant of Good Faith and Fair Dealing Against FAMSA)**

29. Plaintiff repeats and re-alleges each and every allegation contained in the above paragraphs as though fully set forth herein.

30. The Lease referred to above is and was contractual, and as such, there existed an implied in law term imposing an obligation of good faith and fair dealing. Said term obligates each party to refrain from taking any action which would otherwise interfere with the lawful and legal rights of the other party to carry out the terms of the Lease. Further, said term requires that the parties refrain from carrying out any acts which would otherwise cause undue hardship on the other party.

31. Defendant FAMSA breached the covenant of good faith and fair dealing in the Lease.

32. As a direct and proximate result of the breach of the implied covenant of good faith and fair dealing, Plaintiff has been damaged in an amount in excess of Ten Thousand Dollars (\$10,000.00), the total amount of which cannot yet be determined, and thus, will be subject to proof at the time of trial.

**FOURTH CAUSE OF ACTION**

**(Declaratory Relief Against FAMSA and GRUPO FAMSA)**

33. Plaintiff repeats and re-alleges each and every allegation contained in the above paragraphs as though fully set forth herein.

34. A dispute now exists between Plaintiff and Defendant FAMSA as to the rights and obligations of the parties concerning the allegations set forth herein as well as the terms and conditions of said Lease and Guaranty. Therefore, under NRS §30.040, et seq., Plaintiff is entitled to have this Court enter a declaratory judgment setting forth the respective rights, duties and obligations of the parties hereto.

**FIFTH CAUSE OF ACTION**

**(Monies Due on Account Against FAMSA and GRUPO FAMSA)**

35. Plaintiff repeats and re-alleges each and every allegation contained in the above



1 paragraphs as though fully set forth herein.

2 36. Defendants owe Plaintiff an amount which is in excess of Ten Thousand Dollars  
3 (\$10,000.00), which amount increases monthly, according to the tenant account ledger attached  
4 hereto and incorporated herein as Exhibit 1.

5 37. Accordingly, Plaintiff demands judgment in an amount in excess of Ten  
6 Thousand Dollars (\$10,000.00) according to the tenant account ledger, and which will be subject  
7 to proof at the time of trial.

8 **SIXTH CAUSE OF ACTION**

9 **(Breach of Contract Against GRUPO FAMSA)**

10 38. Plaintiff repeats and re-alleges each and every allegation contained in the above  
11 paragraphs as though fully set forth herein.

12 39. The Guaranty is a valid and enforceable agreement.

13 40. Defendant GRUPO FAMSA has breached the terms of the Guaranty as more fully  
14 set forth above.

15 41. As a direct and proximate cause of Defendant GRUPO FAMSA's breach,  
16 Plaintiff has been damaged in an amount in excess of Ten Thousand Dollars (\$10,000.00), the  
17 total of which cannot yet be affixed, and thus, will be subject to proof at the time of trial.

18 **SEVENTH CAUSE OF ACTION**

19 **(Unjust Enrichment Against GRUPO FAMSA)**

20 42. Plaintiff repeats and re-alleges each and every allegation contained in the above  
21 paragraphs as though fully set forth herein.

22 43. Defendant GRUPO FAMSA represented and covenanted that it would perform  
23 according to the terms of the Guaranty, including payment of the above-described fees according  
24 to the terms of the Guaranty.

25 44. Plaintiff conferred a benefit upon Defendant GRUPO FAMSA by giving it access  
26 to and possession of the premises pursuant to the terms of the Guaranty in expectation that  
27 Plaintiff would be paid by Defendant GRUPO FAMSA according to the terms of the Guaranty.

28 45. Defendant GRUPO FAMSA failed to pay the monthly rent, the Parcel's

1 Operating Costs (as defined in the Lease), and Impositions (as defined in the Lease) attributed to  
2 the Leased Property, and the monthly pylon sign fee despite the representations and covenants to  
3 Plaintiff that it would pay the same.

4 46. If Defendant GRUPO FAMSA is permitted to retain the benefit of the use of the  
5 premises and services provided by Plaintiff on Defendant GRUPO FAMSA's behalf without  
6 having to pay for those benefits, Defendant GRUPO FAMSA will have been unjustly enriched.

7 47. Accordingly, Plaintiff has been damaged in the amount of the reasonable value of  
8 the premises and services provided and as set forth in the Lease, which amount is greater than  
9 Ten Thousand Dollars (\$10,000.00) and will be subject to proof at the time of trial.

10 **EIGHTH CAUSE OF ACTION**

11 **(Breach of Covenant of Good Faith and Fair Dealing Against GRUPO FAMSA)**

12 48. Plaintiff repeats and re-alleges each and every allegation contained in the above  
13 paragraphs as though fully set forth herein.

14 49. The Guaranty referred to above is and was contractual, and as such, there existed  
15 an implied in law term imposing an obligation of good faith and fair dealing. Said term obligates  
16 each party to refrain from taking any action which would otherwise interfere with the lawful and  
17 legal rights of the other party to carry out the terms of the Guaranty. Further, said term requires  
18 that the parties refrain from carrying out any acts which would otherwise cause undue hardship  
19 on the other party.

20 50. Defendant GRUPO FAMSA breached the covenant of good faith and fair dealing  
21 in the Guaranty.

22 51. As a direct and proximate result of the breach of the implied covenant of good  
23 faith and fair dealing, Plaintiff has been damaged in an amount in excess of Ten Thousand  
24 Dollars (\$10,000.00), the total amount of which cannot yet be determined, and thus, will be  
25 subject to proof at the time of trial.

26 **PRAYER FOR RELIEF**

27 WHEREFORE, Plaintiff B.E. Uno, LLC prays for judgment, damages and other relief  
28 from Defendants Famsa, Inc., a California corporation, and Grupo Famsa, S.A. de C.V., a

Mexican corporation, as follows:

1. For compensatory, incidental and consequential damages in an amount in excess of Ten Thousand Dollars (\$10,000.00), computed in accordance with the provisions of the Lease;
2. For a sum in excess of \$10,000 for general and special damages for the Plaintiff;
3. For legal pre-judgment interest at the highest rate allowable under the Lease and/or by law;
4. For the value of the Lease;
5. For the costs of reletting the premises;
6. For reasonable attorneys' fees and costs incurred;
7. For declaratory judgment setting forth the respective rights, duties and obligations of the parties; and
8. For such other relief as the Court deems just and proper.

DATED this 3<sup>rd</sup> day of December, 2012.

GOOLD PATTERSON

By: /s/ Kelly J. Brinkman  
Kelly J. Brinkman  
Nevada Bar No. 6238  
1975 Village Center Circle, Suite 140  
Las Vegas, Nevada 89134

*Attorneys for B.E. Uno, LLC*

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CLERK OF THE COURT

1 **ORDG**  
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9  
10 *Attorneys for Defendant FAMSA, INC.*

11 **DISTRICT COURT**  
12 **CLARK COUNTY, NEVADA**

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

14 Plaintiff,

15 vs.

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

18 Defendants.  
19

CASE NO. A-12-672370-C

DEPT. NO. XII

**ORDER GRANTING MOTION TO**  
**QUASH SERVICE**

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

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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.

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.

///

///

///

///

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 14<sup>th</sup> day of March, 2014.

DISTRICT COURT JUDGE

Submitted by:

**FENNEMORE CRAIG JONES VARGAS**

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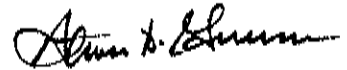
-and-

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*Attorneys for Defendant FAMSA, INC.*

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CLERK OF THE COURT

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*Attorneys for Defendant FAMSA, INC.*

**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-12-672870-C

DEPT. NO. XIII

**JUDGMENT**

This matter having come before the Court on a non-jury Trial on February 25 and 26, 2014 (the "Trial"), and the Court having entered Findings of Fact and Conclusions of Law, and good cause appearing,

IT IS ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Plaintiff and against Defendant FAMSA, Inc., in the principal amount of Seven hundred forty-two thousand <sup>three</sup> <sup>ninety-four</sup> <sup>nineteen</sup> <sup>748,394.19</sup> dollars and sixteen cents (\$742,394.16), which amount shall bear interest at the contract rate until satisfied in full; and

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DISTRICT COURT



IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff shall recover its costs and reasonable attorneys' fees, the amount of which shall be determined pursuant to separate motion.

DATED this 27<sup>th</sup> day of April, 2014.

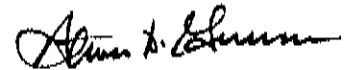
DISTRICT COURT JUDGE

Submitted by:

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*Attorneys for Defendant FAMSA, INC.*



CLERK OF THE COURT

1 **ORD**

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## DISTRICT COURT

## CLARK COUNTY, NEVADA

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

14 Plaintiff,

15 vs.

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

18 Defendants.

CASE NO. A-12-672870-C

DEPT. NO. XIII

ORDER

20 THIS MATTER having come before the Court on June 5, 2014 for hearing on Defendant FAMSA, Inc.'s  
 21 Motion to Retax and Settle Costs, and on Plaintiff's Motion for Award of Attorneys' Fees, Costs, and  
 22 Disbursements, Plaintiff appearing by and through Kelly J. Brinkman, Esq. of the firm of Goold Patterson, and  
 23 said Defendant appearing by and through Christopher H. Byrd, Esq. of the firm of Fennemore Craig Jones Vargas,  
 24 and the Court having heard argument of counsel and having then taken the matter under advisement for further  
 25 consideration, and being now fully advised in the premises, <sup>20</sup>and having rendered its decision of June 30, 2014,  
 26 hereby finds as follows:

27 ///

28 ///

LEVINSON ARSHONSKY &amp; KURTZ, LLP

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DISTRICT COURT (CLERK'S OFFICE)

1           A.     Defendant's Motion re Costs

2           The Court is persuaded by Defendant's Motion regarding the following costs and, it is GRANTED  
3 IN PART as to the same:

4           Los Angeles Superior Court Filing Fees in the amount of \$110.69 are not  
5 properly taxable herein;

6           •       Mediation costs in the amount of \$2,175.75 are not properly taxable herein;  
7 and

8           •       Expert witness fee is reduced from \$12,300.00 to \$1,500.00 per NRS  
9 13.005(5).

10          In all other respects, the Motion is DENIED IN PART.

11          B.     Plaintiff's Motion re Attorneys' Fees, Costs, and Disbursements

12          The Motion is GRANTED IN PART to the extent of the costs that the Court has allowed to  
13 remain in A. above, but DENIED IN PART as to those which have not been allowed in A. above.

14          Regarding attorneys' fees, the Court is persuaded by Defendant's points as to the attorneys' fees  
15 sought pertaining to the Fullerton firm, the Buckner firm, and the Ashworth firm in the total amount of  
16 \$12,772.25, and the Motion is DENIED IN PART as to those fees. To the extent that any of those fees  
17 may have previously been allowed in the Court's Order of September 27, 2013, their allowance therein is  
18 rescinded.

19          On the other hand, in giving due application to the factors set forth in *Branzell v. Golden Gate National*  
20 *Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), the Court is persuaded by Plaintiff's position regarding the  
21 remainder of the attorneys' fees which have been incurred with the firm of Gould Patterson, \$126,712.50, and  
22 the Motion is GRANTED IN PART as to those fees. The fact that the Court did not adopt Plaintiff's positions  
23 on the acceleration and anticipatory repudiation issues after trial does not obviate the significance of those  
24 interesting issues going into trial and the place that they took in trying the case. The same is true of the time  
25 and effort of Gould Patterson in endeavoring to set the case up against Defendant's parent, Grupo Fansa.

26       ///

27  
28       ///

Based upon the foregoing the Court concludes:

1. Plaintiff shall recover costs from Defendant in the amount of \$7,577.02.

2. Plaintiff shall recover attorneys' fees from Defendant in the amount of \$126,712.50.

**IT IS HEREBY ORDERED.**

DATED this 22<sup>nd</sup> day of July, 2014.

DISTRICT COURT JUDGE

Submitted by:

**FENNEMORE CRAIG JONES VARGAS**

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*Attorneys for Defendant FAMSA, INC.*

## CIVIL COVER SHEET

Clark County, Nevada

A-14-706336-C

Case No.

XXXII

(Assigned by Clerk's Office)

**I. Party Information**

Plaintiff(s) (name/address/phone): B.E. Uno, LLC, a Nevada limited liability company

Defendant(s) (name/address/phone): FAMSA, INC., a California corporation; GRUPO FAMSA, S.A. de C.V., a Mexican corporation

Attorney (name/address/phone):

Attorney (name/address/phone):

Kelly J. Brinkman, Goold Patterson

1975 Village Center Circle, Suite 140, Las Vegas, NV 89134

**II. Nature of Controversy** (Please check applicable bold category and applicable subcategory, if appropriate)☐ **Arbitration Requested****Civil Cases**

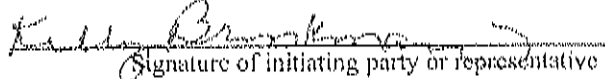
Real Property	Negligence	Torts
<input type="checkbox"/> <b>Landlord/Tenant</b> <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> <b>Title to Property</b> <input type="checkbox"/> Foreclosure <input type="checkbox"/> Liens <input type="checkbox"/> Quiet Title <input type="checkbox"/> Specific Performance <input type="checkbox"/> <b>Condemnation/Eminent Domain</b> <input type="checkbox"/> <b>Other Real Property</b> <input type="checkbox"/> Partition <input type="checkbox"/> Planning/Zoning	<input type="checkbox"/> <b>Negligence</b> <input type="checkbox"/> Negligence - Auto <input type="checkbox"/> Negligence - Medical/Dental <input type="checkbox"/> Negligence - Premises Liability (Slip/Fall) <input type="checkbox"/> Negligence - Other	<input type="checkbox"/> <b>Product Liability</b> <input type="checkbox"/> Product Liability/Motor Vehicle <input type="checkbox"/> Other Torts/Product Liability <input type="checkbox"/> <b>Intentional Misconduct</b> <input type="checkbox"/> Torts/Defamation (Libel/Slander) <input type="checkbox"/> Interfere with Contract Rights <input type="checkbox"/> <b>Employment Torts</b> (Wrongful termination) <input type="checkbox"/> <b>Other Torts</b> <input type="checkbox"/> Anti-trust <input type="checkbox"/> Fraud/Misrepresentation <input type="checkbox"/> Insurance <input type="checkbox"/> Legal Tort <input type="checkbox"/> Unfair Competition
Probate	Other Civil Filing Types	
Estimated Estate Value: _____ <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside Estates <input type="checkbox"/> Trust/Conservatorships <input type="checkbox"/> Individual Trustee <input type="checkbox"/> Corporate Trustee <input type="checkbox"/> Other Probate	<input type="checkbox"/> <b>Construction Defect</b> <input type="checkbox"/> Chapter 40 <input type="checkbox"/> General <input checked="" type="checkbox"/> <b>Breach of Contract</b> <input type="checkbox"/> Building & Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Other Contracts/Agmt/Judgment <input type="checkbox"/> Collection of Actions <input type="checkbox"/> Employment Contract <input type="checkbox"/> Guarantee <input type="checkbox"/> Sale Contract <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> <b>Civil Petition for Judicial Review</b> <input type="checkbox"/> Foreclosure Mediation <input type="checkbox"/> Other Administrative Law <input type="checkbox"/> Department of Motor Vehicles <input type="checkbox"/> Worker's Compensation Appeal	
	<input type="checkbox"/> <b>Appeal from Lower Court</b> (also check applicable civil case box) <input type="checkbox"/> Transfer from Justice Court <input type="checkbox"/> Justice Court Civil Appeal <input type="checkbox"/> <b>Civil Writ</b> <input type="checkbox"/> Other Special Proceeding <input type="checkbox"/> <b>Other Civil Filing</b> <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Conversion of Property <input type="checkbox"/> Damage to Property <input type="checkbox"/> Employment Security <input type="checkbox"/> Enforcement of Judgment <input type="checkbox"/> Foreign Judgment - Civil <input type="checkbox"/> Other Personal Property <input type="checkbox"/> Recovery of Property <input type="checkbox"/> Stockholder Suit <input type="checkbox"/> Other Civil Matters	

**III. Business Court Requested** (Please check applicable category; for Clark or Washoe Counties only.)

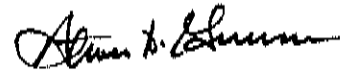
- |   |  |   |
|---|--|---|
| <input type="checkbox"/> NRS Chapters 78-88   | <input type="checkbox"/> Investments (NRS 104 Art. 8)        | <input type="checkbox"/> Enhanced Case Mgmt/Business  |
| <input type="checkbox"/> Commodities (NRS 90) | <input type="checkbox"/> Deceptive Trade Practices (NRS 598) | <input type="checkbox"/> Other Business Court Matters |
| <input type="checkbox"/> Securities (NRS 90)  | <input type="checkbox"/> Trademarks (NRS 600A)               |   |

8/29/14

Date


 Signature of initiating party or representative

See other side for family-related case filings.

  
CLERK OF THE COURT

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*Attorneys for B.E. Uno, LLC*

**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

**COMPLAINT**

**ARBITRATION EXEMPT - AMOUNT IN  
CONTROVERSY IN EXCESS OF \$50,000;  
EQUITABLE RELIEF SOUGHT;  
DECLARATORY RELIEF SOUGHT**

B.E. Uno, LLC ("Plaintiff"), by and through its attorney, Kelly J. Brinkman, Esq. of Goold  
Patterson, for its Complaint states and alleges as follows:

**PARTIES**

1. Plaintiff is, and at all times relevant herein was, a Nevada limited liability company  
duly authorized to conduct business in the State of Nevada.

2. Plaintiff is informed and believes, and upon such information and belief alleges,  
that Defendant Famsa, Inc. ("FAMSA") is, and at all times relevant herein was, a California  
corporation duly authorized to conduct business in the State of Nevada.

3. Plaintiff is informed and believes, and upon such information and belief alleges,  
that Defendant Grupo Famsa, S.A. de C.V. ("GRUPO FAMSA") is, and at all times relevant  
herein was, a Mexican corporation but is subject to the jurisdiction of the Nevada courts, as more  
fully set forth below.

GOOLD PATTERSON  
1975 VILLAGE CENTER CIRCLE, SUITE 140  
LAS VEGAS, NEVADA 89134  
(702) 436-2600 FAX: (702) 436-2652

GENERAL ALLEGATIONS

4. Plaintiff owns a shopping center commonly known as Bonanza East Shopping Center located south of the southeast corner of Bonanza Road and Eastern Avenue in the City of Las Vegas, County of Clark, State of Nevada (the "Shopping Center").

5. On or about June 3, 2005, Plaintiff, as landlord, and Defendant FAMSA, as tenant, entered into a lease agreement for commercial retail space at the Shopping Center in exchange for monthly rents and other charges (the "Lease").

6. The leased premises is located at 562 North Eastern Avenue, Las Vegas, Nevada 89109 (the "Leased Property")

7. The Lease was for a term of fifteen (15) years, with the rent commencement date on or about October 29, 2005, with a current base monthly rent of Thirty-Two Thousand Eight Hundred Fifty-Three and 56/100 Dollars (\$32,853.56), subject to increases as set forth in Sections 1.07 and 4.02 of the Lease.

8. Pursuant to the terms of the Lease, Defendant FAMSA agreed to faithfully perform each of the terms, covenants and conditions of the Lease, including payment of all rents and other charges accrued thereunder.

9. Pursuant to the Lease terms, Defendant FAMSA agreed that if it failed to make payments as set forth in the Lease, or if it vacated or abandoned the Leased Property and ceased paying rent and/or additional rent, such events would constitute a default under the Lease.

10. Concurrently with the execution of the Lease, Defendant GRUPO FAMSA agreed to unconditionally and irrevocably guaranty the performance and obligations of the Lease terms by tenant, Defendant FAMSA, and accordingly, Defendant GRUPO FAMSA executed a Guaranty ("Guaranty") covenanting thereto.

11. As part of the Lease, Defendant FAMSA agreed that the Lease would be governed by, interpreted under the laws of, and enforced in the courts of the situs of the Leased Property and thus, Defendant FAMSA is subject to the jurisdiction of the courts of the State of Nevada with respect to this legal action.

12. As part of the Guaranty, Defendant GRUPO FAMSA agreed that the Guaranty would be governed by, interpreted under the laws of, and enforced in the courts of the situs of the Leased Property and thus, Defendant GRUPO FAMSA is subject to the jurisdiction of the courts of the State of Nevada with respect to this legal action.

13. Defendant FAMSA failed and/or refused to pay monthly rents, its share of the Parcel's Operating Costs (as defined in the Lease) (*i.e.*, common area charges, insurance, utilities) and Impositions (as defined in the Lease) attributed to the Leased Property, monthly pylon sign fee, and late fees to Plaintiff as required by the Lease.

14. On or about November 16, 2012, Defendant FAMSA indicated its intent to vacate the Leased Property on or about November 30, 2012, prior to expiration of the Lease term.

15. Defendant GRUPO FAMSA failed and/or refused to pay monthly rents, its share of the Parcel's Operating Costs (as defined in the Lease) (*i.e.*, common area charges, insurance, utilities) and Impositions (as defined in the Lease) attributed to the Leased Property, monthly pylon sign fee, and late fees to Plaintiff as required by the Guaranty.

16. The amounts due and owing to Plaintiff continue to increase each month pursuant to the terms of the Lease and/or Guaranty.

17. As a result of Defendants' conduct, Plaintiff has been required to retain the services of Goold Patterson to prosecute this action and to protect its rights under the Lease and Guaranty, and is therefore entitled to reasonable attorneys' fees and costs as set forth in the Lease and Guaranty, as well as by law.

18. Plaintiff, on such abandonment of the Leased Property by FAMSA, using care, made reasonable and diligent efforts and endeavors to relet the Leased property; that such efforts and endeavors were unsuccessful, and that said Leased Property has remained unrented and vacant since November 2012 to date.

19. On April 28, 2014, this Court awarded Plaintiff a Judgment against Defendant FAMSA, Inc. in the amount of \$748,394.19 for its failure to pay for rent and other charges due from November 2012 through February 2014.



20. The Court also found for Plaintiff that liability of Defendant FAMSA under the subject lease will continue to be binding upon Defendant FAMSA in the future.

**FIRST CAUSE OF ACTION**

**(Breach of Contract Against FAMSA)**

21. Plaintiff repeats and re-alleges each and every allegation contained in the above paragraphs as though fully set forth herein.

22. The Lease is a valid and enforceable agreement.

23. Defendant FAMSA has breached the Lease as more fully set forth above.

24. As a direct and proximate cause of Defendant FAMSA's breach, Plaintiff has been damaged in an amount in excess of Ten Thousand Dollars (\$10,000.00), the total of which cannot yet be affixed, and thus, will be subject to proof at the time of trial.

**SECOND CAUSE OF ACTION**

**(Unjust Enrichment Against FAMSA)**

25. Plaintiff repeats and re-alleges each and every allegation contained in the above paragraphs as though fully set forth herein.

26. Defendant FAMSA represented and covenanted that it would perform according to the terms of the Lease.

27. Plaintiff conferred a benefit upon Defendant FAMSA by giving it access to and possession of the premises pursuant to the terms of the Lease in expectation that Plaintiff would be paid by Defendant FAMSA according to the terms of the Lease.

28. Defendant FAMSA failed to pay the monthly rent, the Parcel's Operating Costs (as defined in the Lease), and Impositions (as defined in the Lease) attributed to the Leased Property, despite representations and covenants to Plaintiff that it would pay the same.

29. If Defendant FAMSA is permitted to retain the benefit of the services provided by Plaintiff on Defendant FAMSA's behalf without having to pay for those benefits, Defendant FAMSA will have been unjustly enriched.

30. Accordingly, Plaintiff has been damaged in the amount of the reasonable value of the premises and services provided and as set forth in the Lease, which amount is greater than Ten

Thousand Dollars (\$10,000.00) and will be subject to proof at the time of trial.

**THIRD CAUSE OF ACTION**

**(Breach of Covenant of Good Faith and Fair Dealing Against FAMSA)**

31. Plaintiff repeats and re-alleges each and every allegation contained in the above paragraphs as though fully set forth herein.

32. The Lease referred to above is and was contractual, and as such, there existed an implied in law term imposing an obligation of good faith and fair dealing. Said term obligates each party to refrain from taking any action which would otherwise interfere with the lawful and legal rights of the other party to carry out the terms of the Lease. Further, said term requires that the parties refrain from carrying out any acts which would otherwise cause undue hardship on the other party.

33. Defendant FAMSA breached the covenant of good faith and fair dealing in the Lease.

34. As a direct and proximate result of the breach of the implied covenant of good faith and fair dealing, Plaintiff has been damaged in an amount in excess of Ten Thousand Dollars (\$10,000.00), the total amount of which cannot yet be determined, and thus, will be subject to proof at the time of trial.

**FOURTH CAUSE OF ACTION**

**(Declaratory Relief Against FAMSA and GRUPO FAMSA)**

35. Plaintiff repeats and re-alleges each and every allegation contained in the above paragraphs as though fully set forth herein.

36. A dispute now exists between Plaintiff and Defendant FAMSA as to the rights and obligations of the parties concerning the allegations set forth herein as well as the terms and conditions of said Lease and Guaranty. Therefore, under NRS §30.040, et seq., Plaintiff is entitled to have this Court enter a declaratory judgment setting forth the respective rights, duties and obligations of the parties hereto.

### FIFTH CAUSE OF ACTION

## (Monies Due on Account Against FAMSA and GRUPO FAMSA)

37. Plaintiff repeats and re-alleges each and every allegation contained in the above paragraphs as though fully set forth herein.

38. Defendants owe Plaintiff an amount which is in excess of Ten Thousand Dollars (\$10,000.00), which amount increases monthly.

39. Accordingly, Plaintiff demands judgment in an amount in excess of Ten Thousand Dollars (\$10,000.00) according to the tenant account ledger, and which will be subject to proof at the time of trial.

### SIXTH CAUSE OF ACTION

**(Breach of Contract Against GRUPO FAMSA)**

40. Plaintiff repeats and re-alleges each and every allegation contained in the above paragraphs as though fully set forth herein.

4). The Guaranty is a valid and enforceable agreement.

42. Defendant GRUPO FAMSA has breached the terms of the Guaranty as more fully set forth above.

43. As a direct and proximate cause of Defendant GRUPO FAMSA's breach, Plaintiff has been damaged in an amount in excess of Ten Thousand Dollars (\$10,000.00), the total of which cannot yet be affixed, and thus, will be subject to proof at the time of trial.

### SEVENTH CAUSE OF ACTION

**(Unjust Enrichment Against GRUPO FAMSA)**

44. Plaintiff repeats and re-alleges each and every allegation contained in the above paragraphs as though fully set forth herein.

45. Defendant GRUPO FAMSA represented and covenanted that it would perform according to the terms of the Guaranty, including payment of the above-described fees according to the terms of the Guaranty.

46. Plaintiff conferred a benefit upon Defendant GRUPO FAMSA by giving Defendant FAMSA access to and possession of the premises in expectation that Plaintiff would be paid by

1 Defendant FAMSA and/or Defendant GRUPO FAMSA according to the terms of the Guaranty.

2 47. Defendant GRUPO FAMSA failed to pay the monthly rent, the Parcel's Operating  
3 Costs (as defined in the Lease), and Impositions (as defined in the Lease) attributed to the Leased  
4 Property, despite the representations and covenants to Plaintiff that it would pay the same.

5 48. If Defendant GRUPO FAMSA is permitted to retain the benefit of the services  
6 provided by Plaintiff on Defendant GRUPO FAMSA's behalf without having to pay for those  
7 benefits, Defendant GRUPO FAMSA will have been unjustly enriched.

8 49. Accordingly, Plaintiff has been damaged in the amount of the reasonable value of  
9 the premises and services provided and as set forth in the Lease, which amount is greater than Ten  
10 Thousand Dollars (\$10,000.00) and will be subject to proof at the time of trial.

11 **EIGHTH CAUSE OF ACTION**

12 **(Breach of Covenant of Good Faith and Fair Dealing Against GRUPO FAMSA)**

13 50. Plaintiff repeats and re-alleges each and every allegation contained in the above  
14 paragraphs as though fully set forth herein.

15 51. The Guaranty is and was contractual, and as such, there existed an implied in law  
16 term imposing an obligation of good faith and fair dealing. Said term obligates each party to  
17 refrain from taking any action which would otherwise interfere with the lawful and legal rights of  
18 the other party to carry out the terms of the Guaranty. Further, said term requires that the parties  
19 refrain from carrying out any acts which would otherwise cause undue hardship on the other party.

20 52. Defendant GRUPO FAMSA breached the covenant of good faith and fair dealing in  
21 the Guaranty.

22 53. As a direct and proximate result of the breach of the implied covenant of good faith  
23 and fair dealing, Plaintiff has been damaged in an amount in excess of Ten Thousand Dollars  
24 (\$10,000.00), the total amount of which cannot yet be determined, and thus, will be subject to  
25 proof at the time of trial.

26 ///

27 ///

28 ///

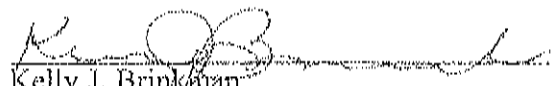
PRAYER FOR RELIEF

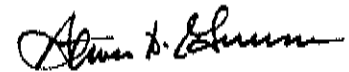
WHEREFORE, Plaintiff B.E. Uno, LLC prays for judgment, damages and other relief from Defendants Famsa, Inc., a California corporation, and Grupo Famsa, S.A. de C.V., a Mexican corporation, as follows:

1. For compensatory, incidental and consequential damages in an amount in excess of Ten Thousand Dollars (\$10,000.00), computed in accordance with the provisions of the Lease;
2. For a sum in excess of \$10,000 for general and special damages for the Plaintiff;
3. For legal pre-judgment interest at the highest rate allowable under the Lease and/or by law;
4. For the value of the Lease;
5. For the costs of recovering possession of and reletting the subject premises;
6. For reasonable attorneys' fees and costs incurred;
7. For declaratory judgment setting forth the respective rights, duties and obligations of the parties; and
8. For such other relief as the Court deems just and proper.

DATED this 29<sup>th</sup> day of August, 2014.

GOOLD PATTERSON

By:   
Kelly J. Brinkman  
Nevada Bar No. 6238  
1975 Village Center Circle, Suite 140  
Las Vegas, Nevada 89134  
*Attorneys for B.E. Uno, LLC*



CLERK OF THE COURT

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2 Daniel Nubel, Esq. (No. 13553)  
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12 Attorneys for Defendants

14 **DISTRICT COURT**

15 **CLARK COUNTY, NEVADA**

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

17 Plaintiff,

18 vs.

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

21 Defendants.

Case No.: A-14-706336-C

Dept. No.: XXXII

**DEFENDANT GRUPO FAMSA, S.A. DE**  
**C.V.'s MOTION TO QUASH SERVICE OF**  
**PROCESS**

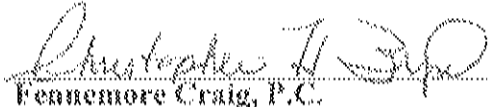
Complaint Filed: 08/29/14

23 Defendant GRUPO FAMSA, S.A. DE C.V., a Mexican corporation ("Grupo"), by and  
24 through its counsel of record, FENNEMORE CRAIG, P.C., and Levinson Arshonsky & Kurtz,  
25 LLP, moves the Court for an order quashing service of process.

26 Grupo bases this Motion on the pleadings and papers on file herein, the Memorandum of  
27 Points and Authorities submitted in support hereof, all other exhibits attached hereto, and any oral  
28

1 argument which the Court may entertain at the time of Hearing. Grupo reserves the right to offer  
2 additional support for this motion.

3 DATED this 1st day of June, 2015.

4  
5 

6 Fenemore Craig, P.C.  
7 Christopher Byrd, Esq. (No. 1633)  
8 Daniel Nubel, Esq. (No. 13553)  
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25 Attorneys for Defendants  
26  
27  
28

1 NOTICE OF MOTION

2 TO: ALL INTERESTED PARTIES; and  
3 TO: THEIR ATTORNEYS.

4 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will  
5 bring the foregoing DEFENDANT GRUPO FAMSA, S.A., DE C.V.'s MOTION TO QUASH  
6 SERVICE OF PROCESS on for hearing before Department XXXII of the above-entitled Court  
7 on the 14 day of JULY, 2015, at the hour of 9:00A o'clock  m. on said  
8 date, or as soon thereafter as counsel can be heard.

9 DATED this 1st day of June, 2015.

10  
11   
12 **Fennemore Craig, P.C.**  
13 Christopher Byrd, Esq. (No. 1633)  
14 Daniel Nubel, Esq. (No. 13553)  
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21 Attorneys for Defendants

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Attorneys for Defendants



## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

Uno failed to properly serve Grupo when it left a copy of the summons with Claudia Palomo Martinez, a person not authorized to accept service of process on Grupo's behalf. Although Plaintiff utilized the correct channels for service of process when they sent the judicial documents to Mexico's Central Authority, Plaintiff failed to ensure that the person served had any relation to Grupo. The United States Supreme Court has emphasized that "as a legal matter, the Due Process Clause requires every method of service to provide notice reasonably calculated, under all circumstances, to appraise interested parties of the pendency of the action." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 707 (1988). Uno's attempt at service here was not reasonably calculated to appraise Grupo of the pendency of this action because the summons was served upon a person with no relation to Grupo. This is made clear in the Declaration of Humberto Loza, a Legal Director at Grupo. Please find a copy of the Declaration of Humberto Loza attached to this Motion as **Exhibit I**. Since Uno failed to serve Grupo in a manner reasonably calculated to appraise Grupo if this action, Grupo asks that this Court quash Uno's attempt at service of process.

### II. FACTUAL BACKGROUND

On August 29, 2014, Uno filed its Complaint in the above-entitled action, naming Grupo as a defendant. On December 3, 2014, Uno filed an ex parte application for an extension of time to effectuate service upon Grupo. On December 11, 2014, this Court granted Uno's application and permitted Uno additional time, through and including April 30, 2015) to serve process upon Grupo. On May 21, 2015, Uno filed its Certificate of Service regarding Grupo. This Certificate of Service includes a Certificate from the person that completed the alleged service of process on Grupo. In that Certificate, the person serving process lists March 17, 2015, as the date process was served, and lists "Claudia Palomo Martinez" as the identity of the person on whom it served the documents. The Certificate further lists Ms. Martinez's relationship to Grupo as being "an employee in the Defendants legal department." The relationship listed in that Certificate is incorrect. The Declaration of Humberto Loza, Legal Director at Grupo, demonstrates that Ms.

1 Martinez is not a person authorized to accept legal documents on Grupo's behalf. Please find a  
2 copy of the Declaration of Humberto Loza attached to this Motion as **Exhibit 1**. On May 21,  
3 2015, the same day Uno filed its Certificate of Service, it filed a Three (3) Day Notice of Intent to  
4 Take Default upon Defendant Grupo.

5 **III. LEGAL ARGUMENT**

6 The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in  
7 Civil or Commercial Matters (the "Hague Convention") is designed to provide "a mechanism by  
8 which a plaintiff authorized to serve process under the laws of its country can effect service that  
9 will give appropriate notice to the party being served and will not be objectionable to the country  
10 in which the party is served." *Dahya v. Second Judicial Dist. Court ex rel. Cnty. of Washoe*, 17  
11 Nev. 208, 211, 19 P.3d 239, 241 (2001). The Hague Convention applies "in all cases, in civil or  
12 commercial matters, where there is occasion to transmit a judicial or extrajudicial document for  
13 service abroad." *Id.* at 241-42; *see also* Hague Convention Art. 1. The United States and Mexico  
14 are both parties to the Hague Convention. *McCarty v. Roos*, 2012 WL 6138313, at \*10 (D. Nev.  
15 Dec. 7, 2012) ("The United States [and] Mexico . . . are signatories to the Convention of Service  
16 Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters"). Since both the  
17 United States and Mexico are signatories to the Hague Convention, service of process on a  
18 foreign defendant "must conform to the requirements of the Hague Convention." *Unite Nat'l Ret.*  
19 *Fund v. Artela, Inc.*, 643 F. Supp. 2d 328, 333 (S.D.N.Y. 2008); *see also Volkswagenwerk*  
20 *Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988)("[C]ompliance with the Hague  
21 Convention is mandatory in all cases to which it applies").

22 One method of service under the Hague Convention is service through the Central  
23 Authority of the receiving country. *Dahya*, 17 Nev. at 212, 19 P.3d at 242 (2001) ("service may  
24 go through the central authority of the receiving country") (citing Hague Convention Art. 5). This  
25 was Plaintiff's chosen method to attempt service in this case. Once the Central Authority  
26 determines that the request for service is valid it must serve the document "by a method  
27 prescribed by its internal law for the service of documents in domestic actions upon persons who  
28 are within its territory." Hague Convention Art. 5. The Hague Convention lays out very clearly

1 the process which the Central Authority must undertake in serving the documents. The Central  
2 Authority must serve the documents and then "complete a Certificate detailing how, where, and  
3 when service was made, or explaining why service did not occur." *Unite Nat'l Ret. Fund*, 643 F.  
4 Supp. 2d 328 at 333 (S.D.N.Y. 2008) (citing Hague Convention Art. 6). On May 21, 2015,  
5 Plaintiff filed the Certificate it received back from the Mexican Central Authority. In that  
6 Certificate, the affiant states that service was made upon Claudia Palomo Martinez. The  
7 Certificate lists Ms. Martinez as being an "employee in the Defendants legal department." As  
8 demonstrated by the declaration of Humberto Loza, Claudia Palomo Martinez is not authorized to  
9 accept legal documents on Grupo's behalf. Please find a copy of the Declaration of Humberto  
10 Loza attached to this Motion as Exhibit 1.

11 While the Hague Convention defines the procedures for service of process, "the legal  
12 sufficiency of a formal delivery of documents must be measured against some standard. The  
13 Convention does not prescribe a standard, so we almost necessarily must refer to the internal law  
14 of the forum state." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 694-95 (1988).  
15 In the United States, "service of process must comply with both constitutional and statutory  
16 requirements." *R. Griggs Grp. Ltd. v. Filanto Spa*, 920 F. Supp. 1100, 1103 (D. Nev. 1996). The  
17 United States Supreme Court has emphasized that "as a legal matter, the Due Process Clause  
18 requires every method of service to provide 'notice reasonably calculated, under all  
19 circumstances, to appraise interested parties of the pendency of the action.'" *Volkswagenwerk*  
20 *Aktiengesellschaft*, 486 U.S. at 707. Thus, in addition to complying with the Hague Convention  
21 procedural requirements, service of process must also comport to the requirements of the United  
22 States Constitution. See *Heredia v. Transp. S.A.S., Inc.*, 101 F. Supp. 2d 158, 162 (S.D.N.Y.  
23 2000) ("in addition to the Hague Convention, service of process must also satisfy constitutional  
24 due process"); see also *Ackermann v. Levine*, 788 F.2d 830, 838 (2d Cir. 1986) ("service of  
25 process must satisfy both the statute under which service is effectuated and constitutional due  
26 process"). To constitutionally effectuate service on a foreign corporation, service must be made  
27 upon an agent, officer, or representative of that corporation. See *Tara Minerals Corp. v. Carnegie*  
28 *Min. & Exploration, Inc.*, 2012 WL 760653, at \*1 (D. Nev. Mar. 7, 2012) ("service can be made

1 'upon a representative so integrated with the organization that he will know what to do with the  
2 papers. Generally, service is sufficient when made upon an individual who stands in such a  
3 position as to render it fair, reasonable and just to imply the authority on his part to receive  
4 service") (quoting *Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc.*, 840 F.2d 685,  
5 688 (9th Cir. 1988)); see also *Cont'l Convention & Show Mgmt. v. Am. Broad. Co.*, 230 Minn.  
6 217, 220, 41 N.W.2d 263, 265 (1950) ("in order to maintain an action against a foreign  
7 corporation . . . service of process upon it must be made upon its agent, officer, or representative  
8 here acting in such capacity, so that notice to him will be deemed notice to the corporation"); see  
9 also *Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Breeders' & Exhibitors' Ass'n of Am.*,  
10 344 F.2d 860, 866 (9th Cir. 1965) ("the rationale of all rules for service of process on  
11 corporations is that service must be made on a representative so integrated with the corporation  
12 sued as to make it a priori supposable that he will realize his responsibilities and know what he  
13 should do with any legal papers served on him").

14 In this case, Plaintiff caused the judicial documents to be served upon a person completely  
15 unrelated to Grupo. The person that the judicial documents were served upon, Claudia Palomo  
16 Martinez, is not authorized to accept judicial documents on Grupo's behalf because she is not an  
17 agent, officer, or representative of Grupo. Since Uno's service of process cannot be found  
18 reasonably calculated to apprise Grupo of the pendency of this action, it is constitutionally  
19 insufficient. Thus, while Plaintiff did pursue the correct channels for service of process when they  
20 sent the judicial documents to Mexico's Central Authority, Plaintiff still failed to ensure that the  
21 person served had any relation to Grupo. For this reason, Plaintiff's service of process on Grupo  
22 was insufficient and Grupo requests that it be quashed.

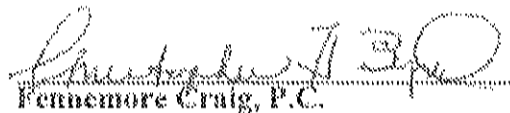
#### 23 IV. CONCLUSION

24 Uno's attempt at service here was not reasonably calculated to appraise Grupo of the  
25 pendency of this action because the summons was served upon Claudia Palomo Martinez, a  
26 person with no relation to Grupo. Since Uno failed to serve Grupo in a manner reasonably  
27 calculated to appraise Grupo of this action, Grupo asks that this Court quash Uno's attempt at

28 ///

1 service of process.

2 DATED this 1 day of June, 2015.



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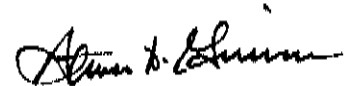
12 Attorneys for Defendants

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CLERK OF THE COURT

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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 FOR**  
24 **ORDER TO QUASH SERVICE OF**  
25 **PROCESS AND SETTING DEADLINE**  
26 **TO FILE AN ANSWER TO**  
27 **COMPLAINT**

28 This matter having come before the Honorable Rob Bare, on July 14, 2015, on the Motion to Quash Service of Process ("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"), regarding the issue of service of process upon Defendant Grupo Famsa; Kelly Brinkman, Esq., of the law firm of Goold Patterson, appearing on behalf of Plaintiff, and Christopher H. Byrd, Esq., of the law firm of Fennemore Craig, P.C., appearing on behalf of Defendant Grupo Famsa to contest service; 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:

29 **FINDINGS OF FACTS**

30 1. On or about August 29, 2014, Plaintiff filed its Complaint against Defendants for breach of a commercial lease and guaranty.

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LAS VEGAS, NEVADA 89134  
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2. On or about December 3, 2014, Plaintiff applied to this Court for an Order extending time to effectuate service upon Defendant Grupo Famsa. An Order extending time was thereby granted and entered on or about December 11, 2014, which extended time to Serve Defendant Grupo Famsa through and including April 30, 2015.

3. On or about March 17, 2015, service was effectuated upon Defendant Grupo Famsa through the Hague Service Convention.

4. On or about June 1, 2015, Defendant's counsel filed a Motion to Quash Service of Process alleging service upon Defendant Grupo Famsa was improper. Defendant Grupo Famsa presented evidence that the person allegedly served on behalf of Grupo Famsa was a hostess or greeter at a Grupo Famsa address and that she was not authorized to accept service on behalf of Grupo Famsa. Defendant Grupo Famsa argued that service of the hostess did not satisfy due process, even if Plaintiff could demonstrate that it arguably complied with the Hague Convention.

5. On or about June 16, 2015, Plaintiff filed its Opposition to Defendant's Motion to Quash. Plaintiff presented evidence that service upon Defendant Grupo Famsa was properly made according to the internal laws of Mexico and the Hague Convention and that Nevada laws relating to service of process were preempted.

6. Plaintiff's counsel thereafter filed its Reply in Support of Defendant Grupo Famsa, S.A. de C.V.'s Motion to Quash Service of Process.

#### CONCLUSION OF LAW

Based upon the foregoing findings:

A. Plaintiff properly served Defendant Grupo Famsa under the laws of Mexico as well as the Hague Convention and that such service efforts satisfied constitutional standards of Due Process;

B. Nevada law regarding service of process is preempted by the Hague Convention and Mexican law in this case.

C. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant Grupo Famsa, S.A. de C.V.'s Motion to Quash Service of Process is DENIED;

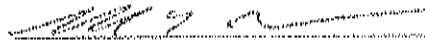
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1 D. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant Grupo  
2 Famsa has thirty (30) days from the date of this hearing (July 14, 2015) in which to file an Answer  
3 to the Complaint (i.e., through and including August 13, 2015).

4 **ORDER**

5 IT IS SO ORDERED this 3 day of July, 2015.


6  
7   
8 DISTRICT COURT JUDGE

9 ROB BARE  
JUDGE, DISTRICT COURT, DEPARTMENT 32

10 Submitted by:

11 Dated this 30<sup>th</sup> day of July, 2015

12 GOOLD PATTERSON

13 By:   
14 Kelly J. Brinkman, Esq.  
15 Nevada Bar No. 6238  
16 1975 Village Center Circle, Suite 140  
17 Las Vegas, Nevada 89134  
18 *Attorneys for Plaintiff*

19 REVIEWED BY:

20 Dated this 30th day of July, 2015

21 FENNEMORE CRAIG, P.C.

22 By: \_\_\_\_\_  
23 Christopher H. Byrd, Esq.  
24 Nevada Bar No. 1633  
25 300 S. Fourth Street, Suite 1400  
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27 *Attorney for Defendants*  
28



GOOLD PATTERSON  
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(702) 438-2630 FAX: (702) 438-2650

1 D. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant Grupo  
2 Famsa has thirty (30) days from the date of this hearing (July 14, 2015) in which to file an Answer  
3 to the Complaint (i.e., through and including August 13, 2015).

4 ORDER

5 IT IS SO ORDERED this \_\_\_\_ day of \_\_\_\_\_, 2015.

6  
7  
8 \_\_\_\_\_  
DISTRICT COURT JUDGE

9 Submitted by:

10 Dated this 30<sup>th</sup> day of July, 2015

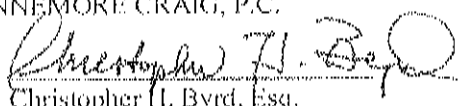
11 GOOLD PATTERSON

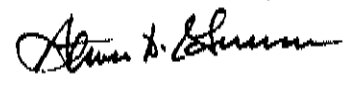
12 By: \_\_\_\_\_  
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16 REVIEWED BY:

17 Dated this 30th day of July, 2015

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19 By:   
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CLERK OF THE COURT

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*Attorneys for Defendants FAMSA, INC.,  
and GRUPO FAMSA, S.A. DE C.V.*

**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

**DEFENDANT GRUPO FAMSA, S.A. DE  
C.V.'S MOTION TO STAY ALL  
PROCEEDINGS RELATING TO GRUPO  
FAMSA, S.A. DE C.V. PENDING  
OUTCOME OF PETITION FOR WRIT OF  
PROHIBITION ON AN ORDER  
SHORTENING TIME**

COMES NOW Defendant GRUPO FAMSA, S.A. DE C.V. ("Grupo"), by and through its  
attorneys of record, Christopher Byrd, Esq. of the law firm of Fennemore Craig, P.C. and Richard I.  
Arshonsky, Esq. of the law firm of Levinson Arshonsky & Kurtz, LLP, and hereby moves this Court  
for an order to stay all proceedings relating to Grupo, pending the outcome of Grupo's Writ of  
Prohibition on an Order Shortening Time ("Motion").

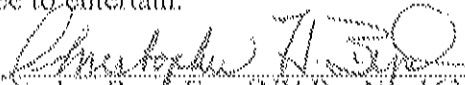
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///

1 This Motion is based upon the papers and pleadings on file, the attached points and  
2 authorities and any oral argument that this Court may agree to entertain.

3 Dated: August 6, 2015

By:   
Christopher Byrd, Esq. [NV Bar No. 1633]  
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*Attorneys for Defendants FAMSA, INC.,  
and GRUPO FAMSA, S.A. DE C.V.*

11 ORDER SHORTENING TIME

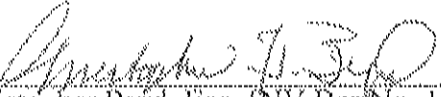
12 It appearing to the satisfaction of the Court, and good cause appearing therefore, IT IS  
13 HEREBY ORDERED that the foregoing Motion to Stay All Proceedings Relating to GRUPO  
14 FAMSA, S.A. de C.V. Pending Outcome of Petition for Writ of Prohibition On An Order Shortening  
15 Time shall be heard on August 11, 2015 at 9:00 a.m. in Dept. XXXII of the  
16 Eighth Judicial District Court.

17   
DISTRICT COURT JUDGE

18 JUDGE, DISTRICT COURT, DEPARTMENT 12

19 Respectfully submitted by:

20 FENNEMORE CRAIG, P.C.

21 By:   
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25 Richard I. Arshonsky, Esq. [NV Bar No. 4518]  
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*Attorneys for Defendants FAMSA, INC.,  
28 and GRUPO FAMSA, S.A. DE C.V.*

1  
2 **AFFIDAVIT OF CHRISTOPHER H. BYRD, ESQ. IN SUPPORT OF MOTION TO STAY**  
3 **ALL PROCEEDINGS AGAINST GRUPO FAMSA, S.A. de C.V. PENDING THE**  
4 **OUTCOME OF PETITION FOR WRIT OF PROHIBITION**  
5

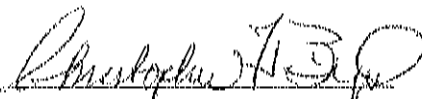
6 STATE OF NEVADA                    )  
7 COUNTY OF CLARK                ) ss.

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

10 1. I am an attorney duly licensed to practice law in the State of Nevada and am a  
11 director at the law firm of Fennemore Craig, P.C., attorneys for Grupo. This Affidavit is submitted  
12 in support of Grupo's Motion to Stay all Proceedings Against Grupo Pending Outcome of Petition  
13 for Writ of Prohibition (the "Motion").

14 2. This Ex Parte Application is made and based upon Eighth Judicial District Court Rule  
15 2.26.

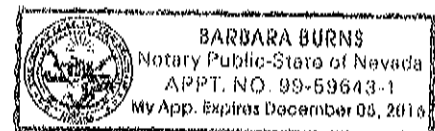
16 3. Grupo respectfully requests that the Motion be heard on shortened time to prevent  
17 Grupo from being forced to file a responsive pleading and engage in discovery while it  
18 simultaneously seeks to prosecute a Writ with the Nevada Supreme Court. Pursuant to the Order  
19 submitted to this Court Grupo is required to file a responsive pleading on August 13, 2015.  
20 Therefore, Grupo respectfully requests that this matter be heard before the responsive pleading date.

21  
22  
23   
24 CHRISTOPHER H. BYRD

25 SUBSCRIBED AND SWORN to before me this  
26 6 day of August, 2015.

27 

28 NOTARY PUBLIC in and for the  
County of Clark, State of Nevada.



1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 FACTUAL BACKGROUND

4 Plaintiff filed this action on August 29, 2014. Grupo filed a Motion to Quash Service of  
5 Process ("Motion to Quash") on the ground that Plaintiff did not properly serve Grupo. This  
6 Honorable Court denied Grupo's Motion to Quash on July 14, 2015. Grupo respectfully disagrees  
7 with this Court's finding and is preparing a Writ of Prohibition to the Nevada Supreme Court to  
8 challenge the constitutional insufficiency of the purported service on Grupo. Trial of this matter is  
9 not set until January 4, 2016 and discovery is not presently scheduled to end until October 9, 2015.  
10 Thus, there is time for the Supreme Court to consider the Writ without any prejudice to Plaintiff if  
11 the Writ is denied.

12 II.

13 ARGUMENT

14 Under NRAP 8(c), a Court will generally consider four factors in determining whether to  
15 stay the proceedings: (1) whether the object of the [moving party's] writ petition will be defeated if  
16 the stay or injunction is denied; (2) whether the [moving party] will suffer irreparable or serious  
17 injury if the stay is denied; (3) whether the [opposing party] will suffer irreparable or serious injury  
18 if the stay is granted; and (4) whether the [moving party] is likely to prevail on the merits in the  
19 appeal or writ petition.

20 It is not necessary for Grupo to satisfy each of these four factors. The Nevada Supreme  
21 Court has "recognize[d] that if one or two factors are especially strong, they may counterbalance  
22 other weak factors." *Mikon Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P. 3d 36, 38 (2004),  
23 citing *Hansen v. District Court*, 116 Nev. 650, 659, 6 P. 3d 982, 987 (2000).

24 A. **ALL FOUR FACTORS FAVOR A STAY.**

25 **1. Factors 1-2: The object of the Writ Petition will be defeated if this Court**  
26 **does not grant a Stay. Furthermore, if the Stay is denied, Grupo's due process**  
27 **rights will be violated by having to defend on the merits without being properly**  
28 **served with the summons and complaint in this matter.**

Grupo is preparing a Writ of Prohibition (the "Writ Petition") challenging this Honorable  
Court's Order Denying Defendant Grupo FAMSA's Motion for Order to Quash Service of Process

1 and Setting Deadline to File Answer to Complaint ("Order"). In that Order, this Court found that  
2 Grupo was properly served with process under the Hague Convention and Mexican law. The object  
3 of the Writ Petition is to keep Grupo out of this litigation in accord with the principles of due  
4 process. The violation of due process cannot be compensated in money or otherwise repaired in the  
5 event the Nevada Supreme Court agrees due process was not satisfied when purportedly serving  
6 Grupo.

7 A denial of this Motion will defeat the object of the Writ Petition, as such a denial will  
8 require Grupo to actively appear in, participate in, and be subject to, discovery and motion practice  
9 in, a case which ultimately the Nevada Supreme Court may decide Grupo was never properly served  
10 with process. Consequently, the first of the NRAP 8(c) factors has been met and the Court should  
11 grant Grupo's motion and order a stay.

12 *Hansen*, 116 Nev. At 658-659, 6 P.3d 986-987, would seem to suggest that a stay is not  
13 warranted, but that case is distinguishable. In *Hansen*, the Court was focused on the now outdated  
14 distinction between a general and special appearance, not the effect of the failure to comply with due  
15 process. The Court concluded no stay was necessary because the moving party could still challenge  
16 jurisdiction even if an answer was filed because the trial court had only made a preliminary finding  
17 of jurisdiction. Thus, the party seeking a writ to challenge jurisdiction was given leave to challenge  
18 jurisdiction again at trial. Here, the Court made findings of fact, apparently leaving nothing for  
19 Grupo to contest at trial. Grupo's only remedy is the Writ Petition. Certainly, if Plaintiff believes  
20 that the issue of jurisdiction can still be tried with the rest of the case, then Grupo is prepared to  
21 withdraw the Motion.

22 **2. Factor (3): Plaintiff will not suffer irreparable or serious injury if a stay**  
23 **is granted.**

24 Plaintiff will not suffer irreparable injury if this matter is stayed as to Grupo. A stay will not  
25 adversely affect Plaintiff's remaining claims against FAMSA, which has not sought to stay these  
26 proceedings. There is still adequate time to complete discovery—the discovery cut-off date is  
27 presently October 9, 2015, and trial is not scheduled until January 4, 2016. Moreover, "a mere delay  
28 in in pursuing discovery and litigation normally does not constitute irreparable harm." *Mikon*  
*Gaming*, 120 Nev. at 253, 89 P. 39 at 39. Even with a stay as to Grupo, Plaintiff can proceed with

1 discovery, and even try the case as it did in the prior litigation, when Plaintiff failed to serve Grupo.  
2 Plaintiff's damages in this case are also capped and interest continues to accrue on those claims.  
3 Thus, thus Plaintiff cannot demonstrate any cognizable harm from the issuance of a stay, much less  
4 irreparable harm. This element of NRAP 8(c) strongly favors Grupo.

5 **3. Factor (4): Grupo is likely to prevail on the merits**

6 This factor does not require a showing of probability of success on the merits. *See Hansen*,  
7 116 Nev. at 659, 6 P. 3d at 987 (2000). Instead, the party seeking a stay must present its case on the  
8 merits whenever a serious legal question is involved and the balance of the equities should weigh in  
9 favor of granting a stay. *Id.*

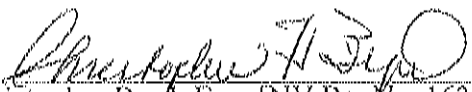
10 In the present case, Grupo certainly believes that a serious constitutional question is  
11 presented given that it is undisputed that service was left with a hostess at a Grupo store. Under no  
12 interpretation of due process is such service effective on a corporate entity, regardless of whether it  
13 occurred in Mexico or the United States.

14 **III.**

15 **CONCLUSION**

16 The equities for a stay strongly favor Grupo. A stay allows Grupo to avoid the expense of  
17 appearing in an action in a foreign country until it has an opportunity to address the constitutionality  
18 of service before the Nevada Supreme Court. The matter can still continue as to FAMSA, so there is  
19 no prejudice to Plaintiff from such a stay. Thus, Grupo requests a stay be entered while the Nevada  
20 Supreme Court considers its Writ Petition.

21 Dated: August 6, 2015

22 By:   
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*Attorneys for Defendants FAMSA, INC.,*  
*and GRUPO FAMSA, S.A. DE C.V.*

1 CERTIFICATE OF SERVICE

2 I hereby certify that a copy of the foregoing **DEFENDANT GRUPO FAMSA, S.A. DE**  
3 **C.V.'S MOTION TO STAY ALL PROCEEDINGS RELATING TO GRUPO FAMSA, S.A.**  
4 **DE C.V. PENDING OUTCOME OF PETITION FOR WRIT OF PROHIBITION ON AN**  
5 **ORDER SHORTENING TIME** was served upon the following person(s) either by electronic  
6 transmission through the Wiznet system pursuant to NEFCR 9, NRCP 5(b) and EDCR 7.26 or by  
7 mailing a copy to their last known address, first class mail, postage prepaid for non-registered users,  
8 on this 7<sup>th</sup> day of August, 2015, as follows:

9 Kelly J. Brinkman, Esq.  
10 Goold Patterson  
11 1975 Village Center Circle #140  
Las Vegas, NV 89134

[X] Via E-service  
[ ] Via U.S. Mail (Not registered with  
CM/ECF Program)

12 Barbara Burns  
13 An employee of Fennemore Craig, P.C.  
14  
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1                   **THE SUPREME COURT OF THE STATE OF NEVADA**

2  
3           GRUPO FAMSA, S.A. de C.V.,

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  
          HONORABLE ROB BARE, District  
          Court Judge,

9                   Respondents,

10                  and

11  
12          B.E. UNO, LLC,

13          Plaintiff and Real Party in Interest.

SUPREME COURT CASE NO.:

                          Electronically Filed  
DISTRICT COURT NO. A-14-706336-  
A-14-706336-Tracie K. Lindeman  
                          Clerk of Supreme Court

**PETITION FOR WRIT OF  
PROHIBITION**

14  
15                   **PETITION FOR WRIT OF PROHIBITION**

16           Pursuant to NRS 34.320, Petitioner Grupo FAMSA, S.A. de C.V. ("Grupo")  
17 petitions this Court for the issuance of a peremptory Writ of Prohibition and/or other  
18 relief prohibiting the district court from exercising jurisdiction over Grupo due to real  
19 party in interest, B.E. Uno, LLC's insufficient service of process on Grupo, and  
20 directing the district court to vacate its August 4, 2015 Order Denying Defendant  
21 Grupo FAMSA's Motion for Order to Quash Service of Process and Setting Deadline  
22 to File Answer to Complaint ("Order").

23    ///

24    ///

25    ///

26    ///

27    ///

28    ///

1 This Petition is supported by the following Memorandum of Points and  
2 Authorities and the Appendix of Record filed concurrently herewith.

3 DATED this 14<sup>th</sup> day of August, 2015.

4   
5 Fennemore Craig, P.C.  
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10 *In association with:*

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12 **LLP**

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16 *Attorneys for Defendant and Petitioner*  
17 *Grupo FAMSA, S.A. de C.V.*  
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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.

7 **Fennemore Craig, P.C.**

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17 *Attorneys for Defendant and Petitioner*

18 *Grupo FAMSA, S.A. de C.V.*

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 INTRODUCTION

4 The issue is whether attempted service of process under the Hague  
5 Convention must satisfy due process. Judge Bare ruled that Plaintiff and Real Party  
6 in Interest, B.E. Uno, LLC ("Uno" or "Plaintiff") properly effectuated service of a  
7 Summons and Complaint on Defendant and Petitioner Grupo FAMSA, S.A. de C.V.  
8 ("Grupo"), a large, publicly-traded Mexican company, by serving Claudia Paloma  
9 Martinez, a hostess/greeter at one of Grupo's stores in Mexico. Judge Bare held as a  
10 matter of law that Uno's service under the Hague Convention and Mexican law  
11 satisfied due process.

12 This legal conclusion regarding due process, however, is flawed because it  
13 relies upon a Certificate from the Mexican Court containing false information about  
14 the capacity of the person served. The Certificate indicates Grupo was served  
15 through Claudia Paloma Martinez, but incorrectly identifies her as an employee in  
16 Grupo's legal department. Grupo presented two sworn affidavits that Claudia  
17 Paloma Martinez was a hostess greeter and not authorized to accept service of  
18 process for Grupo. Judge Bare, Uno and Uno's Mexican counsel, who provided an  
19 opinion about the effectiveness of service, all relied upon false information to find  
20 compliance with Mexican law and the Hague Convention, and, thus conclude due  
21 process had been satisfied. Moreover, even upon valid proof of compliance with the  
22 Hague Convention, there must still be an independent analysis of due process, so  
23 that a foreign company, like Grupo, can ascertain whether it has been properly  
24 served and must respond in a foreign court.

25 Due process requires service upon a "representative so integrated with the  
26 organization that he will know what to do with the papers." Serving a  
27 hostess/greeter of a retail conglomerate does not meet that standard and certainly  
28 does not satisfy due process. By analogy, would service on a greeter at Wal-Mart be

1 effective service on the Wal-Mart corporate entity? The answer is “No” and the  
2 same answer applies, even though the service occurred in Mexico utilizing the  
3 procedures of the Hague Convention. Grupo is entitled to the due process  
4 protections afforded by the Constitution before being forced to defend itself in a  
5 foreign jurisdiction.

6 As Grupo has no plain, adequate and speedy legal remedy if it is forced to  
7 answer and participate in the litigation, Grupo asks this Court to issue a Writ of  
8 Prohibition prohibiting the district court from exercising jurisdiction over Grupo, and  
9 directing the district court to vacate the Order Denying Defendant Grupo FAMSA’s  
10 Motion for Order to Quash Service of Process and Setting Deadline to File Answer to  
11 Complaint (“Order”), which was filed August 4, 2015.

## 12 II.

### 13 ISSUE PRESENTED

14 Did Uno’s service of process on Grupo by leaving a copy of the summons and  
15 complaint with a greeter at the front of Grupo’s store in Mexico satisfy  
16 Constitutional due process?

## 17 III.

### 18 STATEMENT OF RELIEF SOUGHT

19 Petitioner respectfully requests that this Court issue a peremptory writ of  
20 prohibition prohibiting the district court from exercising jurisdiction over Grupo and  
21 directing the district court to vacate its Order.

## 22 IV.

### 23 STATEMENT OF FACTS

#### 24 A. The Person Served On Behalf of Grupo Is a Hostess/Greeter at one of 25 Grupo’s Stores.

26 This is an action for breach of a lease by Famsa, Inc. App. 0001-0008. Grupo  
27 is the guarantor of the lease. App. 0002. Uno claims to have served Grupo through  
28 Claudia Paloma Martinez (“Ms. Martinez”). App. 0002. Grupo presented unrefuted



1 evidence, however, that Ms. Martinez is employed by Grupo as a greeter/hostess to  
2 greet individuals coming into the store. App. 0009-0010, Amended Declaration of  
3 Humberto Loza, ¶4. Equally undisputed is that Ms. Martinez was not authorized to  
4 accept legal documents on Grupo's behalf. App. 0009-0010, Declaration of  
5 Humberto Loza, ¶3.

6 In contrast, Uno offered a Certificate and the opinion of Mexican counsel that  
7 service on Claudia Paloma Martinez complied with the Hague Convention and  
8 Mexican law. App. 0049-0067 at 0058. This was the basis for the district court's  
9 conclusion that service satisfied Mexican law, the Hague Convention and due  
10 process. Aside from the fact that Mexican counsel's legal opinions are  
11 inadmissible, the Certificate contains false information. According to Mexican  
12 counsel, the Certificate is based upon a report from the process server. App. 0049-  
13 0067 at 0058. The process server's report was not produced and the Certificate  
14 contains false information about Ms. Martinez's status with Grupo. The Certificate  
15 falsely identifies Ms. Martinez as an employee in Grupo's legal department. App.  
16 0002. Therefore, the district court's finding that the service of process under the  
17 Hague Convention and Mexican law satisfied due process has no basis in law or in  
18 fact.

19 **B. Procedural Background.**

20 Uno served Ms. Martinez with the Summons and Complaint on March 17,  
21 2015. App. 0028-0034. Grupo filed its Motion for Order to Quash Service of  
22 Process ("Motion") on or about June 1, 2015, after Uno filed the Notice of Service.  
23 App. 0037-0048. After briefing by the parties, the Court decided the motion based  
24 upon the pleadings and the affidavits presented. The district court filed its order on  
25 August 4, 2015. App. 0078-0081.

26 **C. The Order On Review.**

27 In its Order, the respondent district court held that Nevada law regarding  
28 service of process is preempted by the Hague Convention and Mexican law in this

1 case. App. 0078-0081 at 0079. The district court further held that Uno properly  
2 served Grupo under the laws of Mexico as well as the Hague Convention and that  
3 such service efforts satisfied Constitutional standards of due process. App. 0078-  
4 0081 at 0079.

5 V.

6 LEGAL ARGUMENT

7 A. Jurisdictional Statement.

8 This Court has original jurisdiction to consider this Petition and should  
9 exercise its discretion to issue a Writ of Prohibition. *See* Nev. Const. art. 6, § 4. A  
10 Writ of Prohibition may issue to “arrest[] the proceedings of any tribunal . . . when  
11 such proceedings are without or in excess of the jurisdiction of such tribunal.”  
12 NRS 34.320. A petition for writ of prohibition is the proper vehicle to challenge  
13 the denial of a motion to quash service...” *Dahya v. Second Judicial Dist. Court ex*  
14 *rel. Cnty. of Washoe*, 117 Nev. 208, 211, 19 P.3d 239, 241 (2001).

15 “When the district court acts without or in excess of its jurisdiction, a writ of  
16 prohibition may issue to curb the extra jurisdictional act”. *Las Vegas Sands v.*  
17 *Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Rep. 13, 319 P.3d 618, 621 (2014)(quoting  
18 *Club Vista Fin. Servs., L.L.C. v. Eighth Judicial Dist. Court*, 128 Nev. Ad. Op. 21,  
19 276 P.3d 246, 249 (2012)). A writ of prohibition may issue when, as here, “there is  
20 not a plain, speedy and adequate remedy in the ordinary course of law.” NRS  
21 34.330.

22 For the reasons set forth below, the Court should issue a peremptory writ of  
23 prohibition and/or other appropriate relief prohibiting the district court from  
24 exercising jurisdiction over Grupo due to insufficient service of process and  
25 vacating its Order.

26 B. Standard Of Review.

27 In considering a writ petition, this Court gives deference to a district court's  
28 factual determinations but reviews questions of law de novo. *Gonski v. Second*

1 *Judicial Dist. Court*, 126 Nev. Ad. Op. 51, 245 P.3d 1164, 1168 (2010).

2 **C. The District Court Erred In Denying Grupo's Motion to Quash**  
3 **Service of Grupo Because Service Failed to Comply With Due**  
4 **Process.**

5 **1. An Overview of the Hague Convention and its Applicability**  
6 **Here.**

7 The Hague Convention on the Service Abroad of Judicial and Extrajudicial  
8 Documents in Civil or Commercial Matters (the "Hague Convention") is designed  
9 to provide "a mechanism by which a plaintiff authorized to serve process under the  
10 laws of its country can effect service that will give appropriate notice to the party  
11 being served and will not be objectionable to the country in which the party is  
12 served." *Dahya, supra* at 211.

13 The Hague Convention applies "in all cases, in civil or commercial matters,  
14 where there is occasion to transmit a judicial or extrajudicial document for service  
15 abroad." *Id.* at 241-42; *see also* Hague Convention Art. 1. The United States and  
16 Mexico are both parties to the Hague Convention. *McCarty v. Roos*, 2012 WL  
17 6138313, at \*10 (D. Nev. Dec. 7, 2012) ("The United States [and] Mexico . . . are  
18 signatories to the Convention of Service Abroad of Judicial and Extrajudicial  
19 Documents in Civil or Commercial Matters").

20 Since both the United States and Mexico are signatories to the Hague  
21 Convention, service of process on a foreign defendant "must conform to the  
22 requirements of the Hague Convention." *Unite Nat'l Ret. Fund v. Ariela, Inc.*, 643 F.  
23 Supp. 2d 328, 333 (S.D.N.Y. 2008); *see also Volkswagenwerk Aktiengesellschaft v.*  
24 *Schlunk*, 486 U.S. 694, 705 (1988)("[C]ompliance with the Hague Convention is  
25 mandatory in all cases to which it applies").

26 One method of service under the Hague Convention is service through the  
27 Central Authority of the receiving country. *Dahya, supra* at 212 ("service may go  
28 through the central authority of the receiving country") (citing Hague Convention  
Art. 5). Once the Central Authority determines that the request for service is valid it

1 must serve the document “by a method prescribed by its internal law for the service  
2 of documents in domestic actions upon persons who are within its territory.” Hague  
3 Convention Art. 5. The Hague Convention lays out very clearly the process which  
4 the Central Authority must undertake in serving the documents. The Central  
5 Authority must serve the documents and then “complete a Certificate detailing how,  
6 where, and when service was made, or explaining why service did not occur.” *Unite*  
7 *Nat’l Ret. Fund*, 643 F. Supp. 2d 328 at 333 (S.D.N.Y. 2008) (citing Hague  
8 Convention Art. 6).

9 The problem in this case, however, is that the Certificate of the Central  
10 Authority relied upon by Uno to prove service contained false information on its  
11 face. Grupo does not dispute here that Uno attempted to follow the procedural rules  
12 of the Hague Convention to serve Grupo, but the district court’s conclusion that the  
13 service in this case satisfied Mexican law, the Hague Convention and thus due  
14 process, was based upon false information in the Certificate presented from the  
15 Mexican court.

16 **2. In Addition to Compliance with the Procedures of Hague**  
17 **Convention, Service Must Also Satisfy Constitutional Due**  
18 **Process.**

19 While the Hague Convention defines the procedures for service of process,  
20 “the legal sufficiency of a formal delivery of documents must be measured against  
21 some standard. The Hague Convention does not prescribe a standard, so we almost  
22 necessarily must refer to the internal law of the forum state.” *Volkswagenwerk*  
23 *Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 694-95 (1988).

24 In the United States, “service of process must comply with both constitutional  
25 and statutory requirements.” *R. Griggs Grp. Ltd. v. Filanto Spa*, 920 F. Supp. 1100,  
26 1103 (D. Nev. 1996). The United States Supreme Court has emphasized that “as a

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27 <sup>1</sup> This rule of law somewhat moots the district court’s holding that the Hague  
28 Convention preempts Nevada law, as the court must, in any event, undertake a due  
process analysis. The district court did so here, but erred in its analysis because of  
the false information provided in the Mexican Court’s Certificate.

1 legal matter, the Due Process Clause requires every method of service to provide  
2 'notice reasonably calculated, under all circumstances, to apprise interested parties  
3 of the pendency of the action.' *Volkswagenwerk Aktiengesellschaft*, at 707.

4 Thus, in addition to complying with the Hague Convention procedural  
5 requirements, service of process must also comport to the requirements of the  
6 United States Constitution. *See Heredia v. Transp. S.A.S., Inc.*, 101 F. Supp. 2d 158,  
7 162 (S.D.N.Y. 2000) ("in addition to the Hague Convention, service of process must  
8 also satisfy constitutional due process"); *see also Ackermann v. Levine*, 788 F.2d  
9 830, 838 (2d Cir. 1986) ("service of process must satisfy both the statute under  
10 which service is effectuated and constitutional due process").

11 To constitutionally effectuate service on a foreign corporation, service must be  
12 made upon an agent, officer, or representative of that corporation. *See Tara*  
13 *Minerals Corp. v. Carnegie Min. & Exploration, Inc.*, 2012 WL 760653, at \*1 (D.  
14 Nev. Mar. 7, 2012) ("service can be made 'upon a representative so integrated with  
15 the organization that he will know what to do with the papers").

16 Generally, service is sufficient when made upon an individual who stands in  
17 such a position as to render it fair, reasonable and just to imply the authority on his  
18 part to receive service") (quoting *Direct Mail Specialists, Inc. v. Eclat Computerized*  
19 *Techs., Inc.*, 840 F.2d 685, 688 (9th Cir. 1988)); *see also Cont'l Convention & Show*  
20 *Mgmt. v. Am. Broad. Co.*, 230 Minn. 217, 220, 41 N.W.2d 263, 265 (1950) ("in  
21 order to maintain an action against a foreign corporation . . . service of process upon  
22 it must be made upon its agent, officer, or representative here acting in such  
23 capacity, so that notice to him will be deemed notice to the corporation"); *see also*  
24 *Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Breeders' & Exhibitors' Ass'n*  
25 *of Am.*, 344 F.2d 860, 866 (9th Cir. 1965) ("the rationale of all rules for service of  
26 process on corporations is that service must be made on a representative so  
27 integrated with the corporation sued as to make it a priori supposable that he will  
28 realize his responsibilities and know what he should do with any legal papers served

1 on him”).

2 **3. The District Court Erred in Finding That Uno’s Service of**  
3 **Process on Grupo Satisfied Constitutional Due Process.**

4 While Grupo cannot dispute that Uno use of the Hague Convention was the  
5 proper procedure to serve Grupo through Mexico’s Central Authority, the issue for  
6 the district court was whether the service satisfied Constitutional due process. The  
7 district court erred in finding that Constitutional due process was satisfied because  
8 the Certificate from the Mexican court contained false information as discussed  
9 above and the person served had no authority to accept service.

10 Under the cited authorities, it is clear that Uno’s service of the Summons on  
11 Claudia Palomo Martinez did not satisfy Constitutional due process, as (1) Ms.  
12 Martinez was not so integrated with the organization that she would know what to do  
13 with the papers; (2) it is not fair, reasonable and just to imply the authority on Ms.  
14 Martinez’ part to receive service; (3) notice to Ms. Martinez could not be deemed  
15 notice to the corporation; and (4) notice to Ms. Martinez is not reasonably calculated,  
16 under all circumstances, to apprise Grupo of the pendency of the action.

17 In *R. Griggs Grp. Ltd.*, at 1102, a defendant foreign corporation filed a  
18 motion to quash alleging that the plaintiff had failed to serve an agent, officer, or  
19 representative of the defendant foreign corporation. The corporation filed an  
20 affidavit stating that the employee plaintiff served with process was not an officer,  
21 agent, or representative appointed to accept process on its behalf. *Id.* at 1102.  
22 Plaintiff in that case provided only the affidavit of the individual that served process,  
23 which stated that the person served was a “legal representative” of the defendant  
24 foreign corporation. *Id.* Given these facts, the court discussed plaintiff’s burden to  
25 establish that the person served had the necessary relationship with the defendant  
26 corporation:

27 Plaintiff has made no showing that [the individual served] was  
28 sufficiently integrated with the organization to render service upon him  
fair, reasonable and just. *Cf. Direct Mail Specialists, Inc. v. Eclat*

1        *Computerized Technologies, Inc.*, 840 F.2d 685 (9th Cir.1988). While  
2        the process server may have thought he was serving a legal  
3        representative of [defendant foreign corporation], no facts have been  
4        presented to the court to support this assumption and that assessment  
5        has no bearing on the court's determination. Plaintiff freely admits that  
6        it has yet to conduct discovery and does not know the extent or nature  
7        of [the individual served] involvement with [defendant foreign  
8        corporation], yet asks the court to share its view that "considering the  
9        circumstances surrounding the service, it is apparent that [the  
10       individual served] represented [defendant foreign corporation] during  
11       the WSA show" and that "clearly some formal relationship existed"  
12       between them. This the court declines to do. The burden is on the  
13       plaintiff to establish the propriety of the service. *Id.* at 1102-1103,  
14       citing *Aetna Business Credit, Inc. v. Universal Decor & Interior  
15       Design, Inc.* 635 F.2d 434, 435 (5th Cir.1981).

16       The Court in *R. Griggs* found service of process on this individual improper  
17       because the plaintiff failed to show that the individual served was "an officer,  
18       director, employee, managing agent, or general agent of [defendant foreign  
19       corporation]" or that the individual served was an "agent authorized by appointment  
20       or by law to receive service of process on behalf of [defendant foreign corporation]".  
21       *Id.* at 1102-03.

22       On the other hand, in *Burda Media, Inc. v. Viertel*, 417 F.3d 292, 303 (2d  
23       Cir. 2005), the court found that service on a foreign corporation complied with both  
24       the Hague Convention and the United States Constitution because "[plaintiff] had  
25       proof that [the individual served] was a managing director of [Defendant] and  
26       therefore served as its representative."

27       Uno's claim that due process was satisfied in this case depends exclusively  
28       on the false Certificate from the Mexican court. Here, Ms. Martinez, who Uno  
served, is indisputably a hostess or greeter at a Grupo's store with no authority to  
accept service on Grupo's behalf. She is not an agent, officer, or representative so  
integrated with Grupo that service of process upon her could sufficiently comport  
with the Constitution.

Furthermore, Uno cannot substitute notice of the underlying lawsuit for due  
process. Uno will undoubtedly argue that it is "fair" to force Grupo to appear and

1 defend regardless of whether service was proper, because Grupo's subsidiary,  
2 Famsa, Inc., has already appeared in the case. Nevada law expressly provides that  
3 actual notice of a suit is not an effective substitute for service of process. *Abreu v.*  
4 *Gilmer*, 115 Nev. 308, 314, 985 P.2d 746, 750 (1999); see also, *Moulton v. Eugene*  
5 *Burger Mgmt. Corp.*, No. 3:08-CV-00176-BES-VPC, 2009 WL 205053, at \*3 (D.  
6 Nev. Jan. 26, 2009). Parties obtain notice about lawsuits in many different ways;  
7 but, that does not excuse the plaintiff from following the service rules and  
8 complying with due process. In this case, Uno served a greeter/hostess in an effort  
9 to serve Grupo. Grupo's knowledge of the litigation, however, does not excuse Uno  
10 from effecting service that comports with Constitutional due process. Until Uno  
11 accomplishes proper service the district court has no jurisdiction over Grupo.

## 12 VI.

## 13 CONCLUSION

14 The district court's analysis of due process based upon compliance with the  
15 Hague Convention or Mexican law was flawed because it is based upon false  
16 information provided to the Mexican Court about the employee status of Ms.  
17 Martinez, the person receiving service. Ms. Martinez is a lower-level employee who  
18 greets people as they enter into a retail store. While her position may be helpful to  
19 Grupo's operations, she is not an officer, director or agent who would know what to  
20 do if served legal process, and who could reasonably and fairly be adjudged to be  
21 representing the company for purposes of legal process. Therefore, Grupo  
22 respectfully requests that this Court issue a peremptory writ of prohibition  
23 prohibiting the district court from exercising jurisdiction over Grupo and directing

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1 the district court to enter an order quashing service of process as to Grupo.

2 DATED this 14<sup>th</sup> day of August, 2015.

3  
4 

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26 Petitioner Grupo FAMSA, S.A. de  
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28

VII.

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:

☒ 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:

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

☐ Monospaced, has 10.5 or fewer characters per inch, and contains \_\_\_\_\_ words or \_\_\_\_\_ lines of text; or

☒ Does not exceed 30 pages.

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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 record to be supported by a reference to the page 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 14<sup>th</sup> day of August, 2015.

Christopher H. Byrd

VIII.  
VERIFICATION

STATE OF NEVADA     )  
COUNTY OF CLARK    } ss

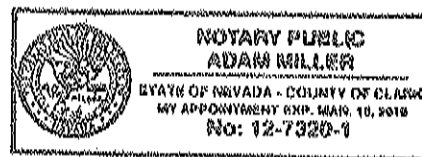
Under penalty of perjury, undersigned counsel declares that: he is an attorney of record for Petitioner Grupo FAMSA, S.A. de C.V.; he has read the foregoing Memorandum of Points and Authorities in support of their Petition for Writ of Prohibition and is familiar with its contents; the facts contained 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.

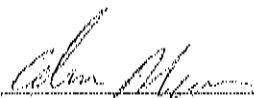
Undersigned counsel further declares that he makes this verification because Petitioner is a Mexican company, absent from the county where undersigned counsel resides.

Dated: August 14, 2015

  
Christopher H. Byrd

SUBSCRIBED AND SWORN  
TO ME THIS 14th DAY OF  
AUGUST, 2015



  
Notary Public

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*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 DENYING DEFENDANT  
GRUPO FAMSA'S MOTION TO STAY  
ALL PROCEEDINGS RELATED TO  
GRUPO FAMSA, S.A. DE C.V.  
PENDING OUTCOME OF WRIT OF  
PROHIBITION**

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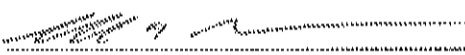
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1 B. In particular, the Mexican court previously approved the service of the Summons  
2 and Complaint upon Defendant Grupo Famsa and issued a "Certificate" approving such service of  
3 process.

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

6 ORDER

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

8  
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10   
DISTRICT COURT JUDGE

11 Submitted by:

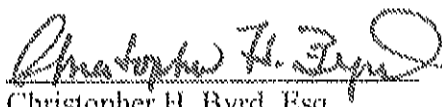
ROB BARE  
JUDGE, DISTRICT COURT, DEPARTMENT 22

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RECEIVED C. BYRD

AUG 21 2015

IN THE SUPREME COURT OF THE STATE OF NEVADA

ACTION

Rec 66

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. LINDHEMAN  
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.<sup>1</sup> 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

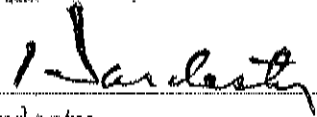
<sup>1</sup>The opposition requests that a bond of \$1,000,000 be required as a condition of any stay. It is not clear whether the district court has yet considered the proper amount of any supersedeas bond. NRAP 8(a)(1)(B). We have routinely recognized that the district court is better suited for making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



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.<sup>2</sup> 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.

 C.J.  
Hardesty

 J.  
Douglas

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<sup>2</sup>It 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

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

12 Real Party in Interest and  
Plaintiff.

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AUG 24 2015

ACTION *llc BARE*

SUPREME COURT CASE NO.:  
68626

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

13  
14 REAL PARTY IN INTEREST/PLAINTIFF'S OPPOSITION TO  
15 PETITIONER'S EMERGENCY MOTION UNDER NRAP 27(c) TO  
16 STAY PROCEEDINGS AGAINST PETITIONER PENDING  
RESOLUTION OF WRIT PETITION CHALLENGING SERVICE OF  
PROCESS ON DUE PROCESS GROUNDS

17 B.E. Uno, LLC, as Real Party in Interest and Plaintiff ("Plaintiff"),  
18 files its opposition to Petitioner's Emergency Motion Under NRAP 27(c) to  
19 Stay Proceedings Pending Resolution of Writ Petition Challenging Service.

20 I. INTRODUCTION

21 Service of process is not intended to be a game of cat and mouse.  
22 Rather, "[t]he purpose of service of process is to apprise the defendant that  
23 suit has been brought against him and to give him an opportunity to defend."  
24 Nat'l Equip. Rental, Ltd. v. Szukhent, 311 F.2d 79, 83 (2d Cir. 1962). Here,  
25 there is no question that those aims have been fulfilled. The Mexican courts'  
26 return of a Certificate of Service is *prima facie* evidence that service on  
27 Grupo was made in compliance with the Hague Convention ("Convention")  
28

## III. LEGAL ARGUMENT

### A. Grupo Has Failed to Satisfy the Standards for a Stay.

The issuance of a stay is an extraordinary remedy granted only if clearly warranted. Fritz Hansen A/S v. Dist. Ct., 6 P.3d 982, 986, 116 Nev. 650 (2000). Despite Grupo's contention, prior to issuance of a stay, Grupo must still show some likelihood of success. As stated in Hansen, Grupo must "present a substantial case on the merits . . . and show that the balances of equities weighs heavily in favor of granting the stay." Here, Grupo has made no such showing.

In Hansen, Hansen filed a writ challenging the district court order denying its motion to quash service of process for lack of personal jurisdiction. Hansen, 6 P.3d 982, 983, 116 Nev. 650 (2000). Hansen then filed a motion to stay the district court proceedings pending resolution of the petition. The Nevada Supreme Court held that a stay was not warranted. Id. Applying the NRAP 8(c) factors, the Court held that participating in the proceedings and incurring litigation expenses are neither irreparable nor serious harm. Further, the Court found that Hansen was not likely to prevail on the merits since Hansen's argument was contrary to well-established case law and that such extraordinary relief was unwarranted. Id. at 987. This case is no different. The fact that a portion of this case discussed a general and special appearance does not make this case inapplicable, as Grupo would like this Court to believe.

### B. Grupo Should Not Prevail Since Service Need Not Satisfy Nevada Law, Only the Convention, Which Grupo Concedes Occurred.

The service provisions of the Convention take precedence over conflicting Nevada procedural rules. Article VI of the U.S. Constitution establishes that treaties are the supreme law of the land, binding upon states. The Convention is recognized with status equivalent to a treaty. See

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: 69119**

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District Court Case No. A-14-766316-C  
Tracie K. Lindeman  
Clerk of Supreme Court

15                   **PETITIONER'S APPENDIX TO PETITION FOR WRIT OF MANDAMUS**

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**PETITIONER'S APPENDIX TO PETITION FOR WRIT OF MANDAMUS**

**DOCUMENTS**

**BATES  
STAMP NO.**

- |   |           |
|---|-----------|
| 1. Complaint dated December 3, 2012   | 0001-0009 |
| 2. Order Granting Motion to Quash dated March 18, 2014  | 0010-0013 |
| 3. Judgment dated April 28, 2014  | 0014-0018 |
| 4. Complaint dated August 29, 2014  | 0019-0027 |
| 5. Defendant Grupo FAMSA, S.A., DE C.V.'s Motion to<br>Quash Service of Process dated June 1, 2015  | 0028-0035 |
| 6. Order Denying Defendant Grupo FAMSA's Motion for<br>Order to Quash Service of Process and Setting Deadline to<br>File an Answer to Complaint dated August 4, 2015  | 0036-0039 |
| 7. Defendant Grupo FAMSA, S.A. DE C.V.'s Motion to Stay<br>All Proceedings Relating to Grupo FAMSA, S.A. DE C.V.<br>Pending Outcome of Petition for Writ of Prohibition on an<br>Order Shortening Time dated August 7, 2015                   | 0040-0046 |
| 8. Petition for Writ of Prohibition dated August 14, 2015   | 0047-0067 |
| 9. Order Denying Defendant Grupo FAMSA's Motion to Stay<br>All Proceedings Related to Grupo FAMSA, S.A. DE C.V.<br>Pending Outcome of Writ of Prohibition dated August 19,<br>2015  | 0068-0069 |
| 10. Order Granting Temporary Stay and Directing Answer dated<br>August 21, 2015   | 0070-0073 |
| 11. Real Party in Interest/Plaintiff's Opposition to Petitioner's<br>Emergency Motion Under NRAP 27(e) to Stay Proceedings<br>Against Petitioner Pending Resolution of Writ Petition<br>Challenging Service of Process on Due Process Grounds | 0074-0081 |

- 1       dated August 24, 2015
- 2       12. Plaintiff's Motion for Order Fixing Supersedeas Bond in       0082-0087
- 3       Connection With Temporary Stay Pending Writ of
- 4       Prohibition in Favor of Grupo FAMSA, S.A. DE C.V. on an
- 5       Order Shortening Time; Declaration of Kelly J. Brinkman in
- 6       Support dated October 14, 2015
- 7       13. Defendant Grupo FAMSA, S.A. de C.V.'s Opposition to       0088-0092
- 8       Plaintiff B.E. Uno, LLC's Motion for Order Fixing
- 9       Supersedeas Bond in Connection with Temporary Stay
- 10      Pending Writ of Prohibition dated October 23, 2015
- 11      14. Plaintiff's Reply in Support of its Motion for Order Fixing       0093-0099
- 12      Supersedeas Bond in Connection with Temporary Stay;
- 13      Declaration of Warren Kellogg in Support dated October 27,
- 14      2015
- 15      15. Transcript of Proceedings dated November 2, 2015       0100-0118
- 16      16. Order Fixing Supersedeas Bond in Connection with       0119-0121
- 17      Temporary Stay Pending Writ of Prohibition in Favor of
- 18      Grupo FAMSA, S.A. DE C.V. dated November 3, 2015
- 19      17. Notice of Entry of Order regarding Stipulated Protective       0122-0133
- 20      Order dated November 5, 2015
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