IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioner and Defendant,

v.

THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark, and THE HONORABLE ROB BARE, District Court Judge,

Respondents

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

Real Party in Interest and Plaintiff,

SUPREME COURT CASE NO.: 69119

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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NRAP 26.1 DISCLOSURE

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

There are no entities to be disclosed.

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

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MEMORANDUM OF POINTS AND AUTHORITIES

Petitioner GRUPO FAMSA, S.A. DE C.V., a Mexican corporation ("Grupo") submits this Reply in Support of its Petition for Writ of Mandamus. Grupo's Writ Petition challenges the district court's Order Fixing Supersedeas Bond in Connection with Temporary Stay Pending Writ of Prohibition in Favor of Grupo (the "Order"). On November 12, 2015, this Court issued its Order Directing Answer regarding Grupo's Writ Petition. This Reply will address the arguments asserted by B.E. UNO, LLC ("Uno") in its Answer to the Writ Petition (the "Answer").

I. A SUPERSEDEAS BOND IS NOT PERMITTED BECAUSE THERE IS NO UNDERLYING JUDGMENT AGAINST GRUPO TO PROTECT.

Uno confuses the requirement for a supersedeas bond with cost bonds that are required by rule to be filed with the notice of appeal. NRAP 7(a). In this case neither type of bond is required. There is no judgment, which is a condition precedent for a supersedeas bond, and, the Nevada Rules of Appellate Procedure do not require a cost bond in an extraordinary writ proceeding. NRAP 21(e)(The only requirement for filing a writ is a $250 filing fee).

A bond for costs on appeal "should not be confused with a supersedeas bond, which sometimes must be filed to obtain a stay of execution of a judgment pending appeal." 16A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper Federal Practice and Procedure, § 3953 (4th ed. 2008). "A supersedeas bond is retrospective, covering sums related to the merits of the underlying judgment (and stay of its execution), whereas a 'cost bond' is prospective, relating to the potential expenses of litigating an appeal." This is because "a supersedeas bond is not appropriate in the absence of a judgment." *Jewell v. Fletcher*, 2010 Ark. 195, 19, 377 S.W.3d 176, 188-89 (2010).

A supersedeas bond is clearly not required in this case because ***there is no***

judgment being appealed[1]. This is an extraordinary writ proceeding to challenge a preliminary procedural issue. The parties have yet to litigate the merits of this case, including any issues related to the Grupo guaranty.

Nevertheless, the district court prejudged the merits, leading to the erroneous bond requirement. Without any trial or evidence about affirmative defenses that might exist, the district court converted the guaranty into a judgment against Grupo in order to arrive at the $1,000,000 bond amount. The district court also accepted counsel's argument that Uno would be entitled to additional rents, without any evidence, except argument of counsel, as to the amount and no evidence on the mitigation issue. App. p. 114 and 135. This is not how the litigation process works, however. It is clear from the Order and the transcript of the hearing that the district court's erroneous preconceived notions about what the evidence might be led to the imposition of a supersedeas bond. App. 114. Thus, the district court abused its discretion in basing the bond amount on the potential judgment that Uno might obtain in the future. *See D.B. v. Bedford Cty. Sch. Bd.*, 2010 WL 3323489, at *9 (W.D. Va. Aug. 23, 2010) ("no judgment has been entered in the case, and there is no dollar amount to be stayed by entry of a supersedeas bond. Defendant's contentions involving specific dollar amounts are speculative").

Uno supports its bond demand with a string citation in a footnote to a series of Arkansas cases in which the court required a "supersedeas" bond post judgment. These cases are distinguishable[2] because of the absence of a judgment; but more importantly,

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[1] Uno has improperly tried to rectify its lack of judgment by serving Grupo's counsel with a 3 Day Notice of Intent to Take Default in the underlying case without seeking any relief from the stay from this Court and knowing full well that this Court will not have time to decide the bond issue before the time runs. App.137-138.

[2] Uno cited to the following cases to demonstrate "a prime example of the majority's error:"

(1) *Wayne Alexander Trust v. City of Bentonville*, 345 Ark. 577, 578, 47 S.W.3d 262 (2001) dealt with an appeal of the district court's **final order** to condemn structures. Thus, the appealing party was appealing a judgment, not a preliminary issue.

(2) *Breckenridge v. Givens*, 344 Ark. 419, 419, 39 S.W.3d 798, 799 (2001) also dealt with a court's final order suspending an attorney's license to practice law, and not a

Uno ignored the most recent analysis and holding on the issue from the same court. In *Jewell*, the Arkansas court recognized that a supersedeas is only proper post judgment:

> The purpose or effect of a supersedeas bond is to secure the payment of a judgment following its affirmance on appeal. Rule 8(c) affords the court sufficient discretion to marshal security, so long as security remains the ultimate goal. We have further held that the bond must be sufficient in amount to guarantee that the appellant will pay the appellee "all costs and damages that shall be affirmed against appellant on appeal." [citations omitted]. **In other words, we have consistently recognized the purpose of a supersedeas bond to be securing the payment of a judgment following affirmance on appeal**. Thus, by the plain language of the rules and our case law addressing them, neither Rule 62 nor Appellate Rule 8 are applicable to this case. JMFH did not have a judgment against Sims. Sims owed JMFH nothing. It was Sims who sought to prove a claim against JMFH.

Jewell, supra. at 188 (emphasis added). The court concluded its analysis by emphasizing, "**this court has recognized that a supersedeas bond is not appropriate in the absence of a judgment**." *Id.* at 189-90. Thus, Uno's argument that

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preliminary issue. Further, the court issued a $5,000.00 bond "**to cover the cost of appeal**." In the present case, the court did not issue a bond to "cover the cost of appeal," but rather one recognizing a previous judgment in a case to which Grupo was not even a party.

(3) Once again, *First Nat. Bank of Izard Cty. v. Arkansas State Bank Com'r*, 301 Ark. 1, 3-4, 781 S.W.2d 744, 745 (1989) involved an appeal of a final order. Additionally, Uno's contention that a supersedeas bond was issued "to protect Bank of North Arkansas's potential economic loss occasioned by the delay" is not supported by the decision. The court only states that the court conditioned the stay upon the appellant's "filing a proper supersedeas bond." The court does not elaborate on the amount or purpose of the bond.

(4) *Jones v. Carney*, 264 Ark. 405, 406, 572 S.W.2d 585, 585 (1978) was an appeal "from the circuit court's judgment." In the present case, *Uno has no judgment against Grupo*.

(5) *Duncan v. Crowder*, 232 Ark. 628, 629, 339 S.W.2d 310, 311 (1960) was an appeal of a lower court's final decree regarding custody of a child. The court approved a $1,000.00 bond but did not elaborate on the basis for that bond.

(6) As is the pattern with the cases Uno cited to, *Bradley v. Jones*, 227 Ark. 574, 575, 300 S.W.2d 1, 2 (1957) was an appeal of a judgment, not a preliminary jurisdictional issue.

a supersedeas bond is appropriate despite Uno not having any underlying judgment against Grupo, is not supported by case law.

Uno's argument about delay in enforcement of the prior judgment against Famsa also provides no grounds for the bond. Uno has not attempted to execute against Grupo to satisfy the Famsa judgment previously obtained, even though Uno claims the guaranty would allow it to do so. App. p. 110. Thus, any delay in execution against Grupo is the fault of Uno, not the result of the stay. Furthermore, the district court's Order is in effect a prejudgment writ of attachment. Uno fails to address this issue in the Answer. Uno also fails to address why it should be relieved from posting a written undertaking by two or more sureties in an amount not less than the amount sought by Plaintiff, costs that might be awarded to the defendant, and damages the defendant might sustain, including fees. NRS 31.030(1). The surety bond protects the defendant when no trial has occurred, as in this case. If Uno wants security to collect a future judgment, it must post the required security as set forth in NRS 31.030.

Uno asserts that this Court's issuance of a stay has damaged Uno because Uno "has been forced to forgo discovery." Uno provides no evidence of what discovery it would have taken in the absence of a stay. Uno has never been prevented from taking discovery from co-defendant Famsa as pointed out at the hearing. App. p. 110-111. Moreover, Uno does not suggest how the discovery issue has any relation to a bond amount of $1,000,000. Likewise, Uno presented no evidence of any damages directly related to having to respond to the writ. Thus, the bond is not "akin to a restraining order in which a bond or other security is required as a condition to a stay" as Uno argues. Answer p. 10. "[T]he primary purpose of [a temporary restraining order bond] is to safeguard defendants from costs and damages incurred as a result of a temporary restraining order." *V'Guara Inc. v. Dec*, 925 F. Supp. 2d 1120, 1127 (D. Nev. 2013). But, the problem with this argument is that Uno has not shown any potential monetary damage from not being able to obtain discovery from Grupo during the time the stay is in effect or any damages from having to respond to the writ.

In addition, there has been no delay of any kind in the underlying case because of the stay. This action was filed on August 29, 2014. App. p. 20. It was not until October 9, 2015, however, that the parties, along with the new tenant for the property, were able to agree upon a protective order that allowed the disclosure of the new lease on the property. The Court did not sign the protective order until November 3, 2015. App. p. 131. Without the new lease and the documents related to the negotiations for that lease, Uno could not properly calculate its damages and Famsa could not prove Uno's failure to mitigate. As pointed out to the district court, the first time Uno attempted to provide a calculation of its damages, albeit without any supporting documentation, was at the hearing on the bond on October 29, 2015. App. p. 111. (Uno tries to provide a similar summary in its brief, again without any supporting documents. Answer p. 7.) This delay in the case in order to obtain discovery necessary to complete the damage analysis for trial was not related to the stay in any way, despite Uno's arguments to the contrary.

II. THE DISTRICT COURT ERRED IN CONSIDERING THE PRIOR JUDGMENT TO WHICH GRUPO WAS NOT A PARTY.

Although one would think this point would be obvious to Uno, "to become a judgment debtor, a person or entity must be a party to an action." Nevada Civil Practice Manual (5th) § 24.11[1] (citing *Brown v. Brown*, 101 Nev. 144, 696 P.2d 999 (1985)). It is a fundamental doctrine of law that "a court does not have jurisdiction to enter judgment against one who is not a party to the action." *Young v. Nevada Title Co.*, 103 Nev. 436, 442, 744 P.2d 902, 905 (1987). But, that is exactly what the district court did in this case. The district court explicitly based its determination of bond amount on a prior judgment Uno obtained against Grupo's subsidiary. App. p. 135 ¶ C. This was despite the district court acknowledging that "Grupo Famsa was not a party to the litigation resulting in the Judgment." *Id.* The district court found that it was allowed to consider the previous judgment because the Guaranty between Uno and Grupo "creates a sufficient nexus to support the amount of the bond to be posted by

[Grupo] based upon the prior Judgment." *Id.* at ¶ F. The court's analysis assumes the validity of the guaranty, without any trial on the issue.

There is a mechanism under Nevada law for applying a judgment to a joint obligor who was not a party to an earlier case. *See* Nevada Civil Practice Manual (5th) § 24.11[1]. As provided in NRS § 17.030 "when a judgment is recovered against one or more of several persons jointly indebted upon an obligation . . . those who were not originally served with the summons and did not appear to the action may be summoned to show cause why they should not be bound by the judgment in the same manner as though they had been originally served with the summons." The party against whom enforcement is attempted "may answer within the time specified therein, denying the judgment or setting up any defense which may have arisen subsequently, or the defendant may deny his or her liability on the obligation upon which the judgment was recovered." NRS § 17.060. Uno has not taken any steps to comply with this procedure, however. Instead, Uno appears to assert that it already has a judgment against Grupo despite Grupo not being a party to the earlier action. Thus, the court abused its discretion when it considered the amount of a judgment in a prior case to which Grupo was not a party when determining the appropriate amount of a bond.

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III. CONCLUSION

In determining the amount of the bond in this case, the district court considered a prior judgment in a case to which Grupo was not a party. For this reason alone, the district court abused its discretion. In addition, there was no evidence of any harm to Uno by the brief stay against only one of the Defendants in the case. A cost bond is not required to contest jurisdiction by a writ. Thus, the district court's order setting a $1,000,000 bond must be vacated as should any future default entered against Grupo for not posting the bond erroneously ordered by the district court.

Dated this 20th day of November, 2015.

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CERTIFICATE OF COMPLIANCE

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

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

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

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

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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

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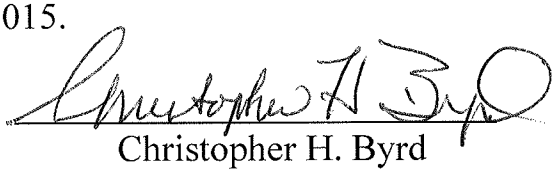
the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 20th day of November, 2015.



Christopher H. Byrd

CERTIFICATE OF SERVICE

Pursuant to Nevada Rule of Appellate Procedure 25(c)(1), I hereby certify that I am an employee of Fennemore Craig, P.C. and that on this 20th day of November, 2015, I caused the foregoing REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS to be served by submission to the electronic filing service for the Nevada Supreme Court upon the following to the email address on file and by depositing same for mailing in the Unites States Mail, in a sealed envelope addressed to:

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