

IN THE SUPREME COURT OF THE STATE OF NEVADA

PACIFIC WESTERN BANK, a California
banking corporation,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT
COURT, in and for the County of Clark,
State of Nevada, and THE HONORABLE
SUSAN W. SCANN, District Judge,

Respondent,

and

JOHN A. RITTER, an individual; DARREN
D. BADGER, an individual; VINCENT T.
SCHETTLER, an individual; and DOES 1
THROUGH 50,

Real Parties in Interest.

Case No. 69048 Electronically Filed
Oct 23 2015 02:04 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

District Court No: A-14-710645-B
Dept. No. 29

PETITION

**From the Eighth Judicial District Court
The Honorable Elizabeth Gonzalez, District Judge¹**

**EMERGENCY MOTION TO STAY PENDING
WRIT REVIEW**

RELIEF REQUESTED BY OCTOBER 30, 2015

¹ Serving for the Honorable Judge Susan Scann.

BOB L. OLSON, ESQ.
Nevada Bar No. 6019
KELLY H. DOVE
Nevada Bar No. 10569
KARL O. RILEY, ESQ.
Nevada Bar No. 12077
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
Telephone: (702) 784-5200
E-mail: bolson@swlaw.com
kdove@swlaw.com
kriley@swlaw.com

Attorneys for Petitioners

NRAP 27(e) Certificate of Counsel

I, Kelly H. Dove, declare and state:

1. I make this declaration in support of Petitioners' Motion To Stay Pending Writ Review.
2. I am an attorney with the law firm of Snell and Wilmer, L.L.P. and counsel of record for Petitioners in the above-entitled action.
3. On September 1, 2015, Petitioner moved to stay the underlying proceedings in the district court, in compliance with NRAP 8.
4. On October 21, 2015, the district court granted Petitioner's motion to stay only for 5 days after notice of entry of the respective order.
5. Petitioner's counsel's office contacted the Clerk of the Nevada Supreme Court on October 23, 2015 to alert the Clerk's Office of the filing of this Emergency Motion.

6. The contact information of the attorneys for the parties is as follows:

Attorneys for Petitioners:

BOB L. OLSON, ESQ.
Nevada Bar No. 6019
KELLY H. DOVE
Nevada Bar No. 10569
KARL O. RILEY, ESQ.
Nevada Bar No. 12077
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
Telephone: (702) 784-5200
E-mail: bolson@swlaw.com
kdove@swlaw.com
kriley@swlaw.com

Attorneys for Petitioners

Attorneys for Real Parties in Interest:

Corey Eschweiler, Esq.
Glen Lerner
4795 S. Durango Drive
Las Vegas, NV 89147
Attorney for Vincent T. Schettler

Mark J. Connot, Esq.
Fox Rothschild, LLP
3800 Howard Hughes Parkway,
Suite 500
Las Vegas, NV 89169
702-699-5924

Timothy S. Cory
Timothy S. Cory & Associates
3016 W. Charleston Blvd.
Las Vegas, NV 89102
702-388-1996

Charles M. Vlasic III
702-776-7000

*Attorney for John A. Ritter and
Darren D. Badger*

7. I notified Mark Connot, Timothy Cory, and Charles Vlastic of its filing of this Motion by phone, leaving voicemails for Mrs. Cory and Vlastic, and speaking directly with Mr. Connot.
8. This Request is made in good faith and will not result in prejudice to any party.

/s/ Kelly H. Dove
Attorney

I. Introduction

Petitioner, Pacific Western Bank, obtained a judgment against John A. Ritter (“Ritter”), Darren D. Badger (“Badger”), and Vincent T. Schettler (“Schettler,” with Ritter and Badger, “Defendants”) of over \$3,000,000.00. Since Pacific Western Bank domesticated the judgment in Nevada on December 4, 2014, Defendants evaded their obligation to pay at every turn.

Pacific Western Bank’s Petition seeks review of the district court’s erroneous ruling that it must execute against Badger’s three New Mexico 529 accounts (the “529 Accounts”) in a New Mexico Court.² Pacific Western Bank moves for a stay pending writ review to maintain the status quo. Specifically, it seeks an order prohibiting withdrawal of funds from the 529 Accounts during the pendency of the Petition.

As detailed below, Pacific Western Bank satisfies the standard for a stay. A stay will not prejudice Defendants, as it will simply require that the money remain in the Accounts, where it is currently, until this Court determines whether: (1) Nevada courts can determine the 529 Accounts’ exempt nature, and (2) if so, if they are exempt from execution. Absent a stay, Badger may empty those accounts before this Court resolves these issues, rendering any ruling from this Court moot

² As this Court is likely aware, 529 accounts are tax-advantaged savings accounts designed for application toward future college costs. *See, e.g.*, <http://www.sec.gov/investor/pubs/intro529.htm> (last visited September 22, 2015).

and severely prejudicing Pacific Western Bank. Therefore, the requested stay is amply justified.

II. Relevant Background

On November 14, 2007, Pacific Western Bank loaned Defendants \$10,000,000.00 (the “Loan”) to be repaid in one year. Through various changes in terms agreements, the Loan matured on December 5, 2012. Defendants, however, refused to repay the Loan. On December 19, 2012, Pacific Western Bank sued Defendants in California to recover the unpaid Loan balance of \$2,497,568.73. On September 26, 2014, the California Court entered judgment in Pacific Western Bank’s favor against Defendants, jointly and severally, in the amount of \$2,717,490.79,³ with daily interest at the rate of \$346.88 to accrue until paid in full. PA 2-3.

Pacific Western Bank domesticated the Judgment in Nevada on December 4, 2014. On May 6, 2015, the California Court amended the Judgment (“Amended Judgment”) to include \$549,891.10 in attorneys’ fees against the Defendants, \$80,000 attributable to Schettler and the remaining \$469,891.10 attributable to Ritter and Badger. PA 16-17. Defendants failed to make any payments to Pacific Western Bank since entry of either the Judgment or Amended Judgment.

³ That amount included the principal sum of \$2,497,568.73, plus accrued interest through December 5, 2012 in the amount of \$10,406.54, and *per diem* interest, at the daily rate of \$346.88, from December 5, 2012 through August 1, 2014 in the amount of \$209,515.52.

Badger has no connection or contacts with New Mexico, other than his ownership of the 529 Accounts. On July 22, 2015, Pacific Western Bank caused the constable to serve writs of execution and garnishment to Wells Fargo Advisors, LLC in Nevada, seeking to execute against Badger's 529 Accounts. In response, Badger initially claimed exemptions under Nevada law, and later, New Mexico law.

Pacific Western Bank's Writ Petition challenges the district court's erroneous ruling quashing the writ and holding that Pacific Western Bank must seek to execute on the 529 accounts in a New Mexico court. This Court should maintain the status quo by prohibiting the withdrawal of funds from the 529 Accounts during the pendency of the writ.

III. Argument

A. Pacific Western Bank Satisfied NRAP 8(a)(1) By First Moving For A Stay Before The District Court.

Under NRAP 8(a)(1), a party must ordinarily move first in the district court for a stay of proceedings pending the adjudication of an extraordinary writ. *State ex rel. Public Serv. Comm'n v. First Judicial Dist. Court*, 94 Nev. 42, 44, 574 P.2d 272, 273 (1978). Here, Pacific Western Bank moved for a stay before the district court on September 1, 2015. PA 189. The district court denied the request for stay, except to issue a temporary 5-day stay while Pacific Western Bank seeks a stay from this Court. PA 189, 194. That order was filed on October 21, 2015. PA

192. Pacific Western Bank has thus satisfied its obligation under NRAP 8(a)(1) to first move for a stay before the district court. As Pacific Western Bank exhausted any hope of obtaining relief from the district court, its request for stay is now properly before this Court.

B. Pacific Western Bank Satisfies NRAP 8(c).

Under Nevada Rule of Appellate Procedure 8(c), Nevada courts consider four factors to determine whether to grant a stay pending the resolution of a writ petition:⁴ “(1) whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied; (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.” NRAP 8(c); *see also Hansen v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116 Nev. 650, 657 (2000). All four factors favor granting the stay.

1. The Object of the Petition Will Be Defeated if the Stay Is Denied.

Quite simply, absent a stay to maintain the status quo, Badger could

⁴ Although this rule specifically addresses a stay of proceedings pending an appeal, the Nevada Supreme Court has recognized that this rule also applies to writ petitions challenging orders issued by the district courts. *See Hansen*, 116 Nev. at 657.

withdraw funds from the 529 Accounts, rendering them worthless for execution. This would defeat the object of the Petition – whether Pacific Western Bank may execute against the accounts. Thus, this factor favors a stay.

2. Pacific Western Bank Will Likely Suffer Serious Injury If the Stay Is Denied.

As articulated in (1) above, absent a stay to maintain the status quo, Badger could withdraw funds from the 529 accounts and further unjustly thwart Pacific Western Bank's right to execute on its judgment. The accounts contain approximately \$231,742.17. Withdrawal of those funds before this Court determines whether they can be executed upon and are exempt would deprive Pacific Western Bank of recovery of this substantial amount. Thus, this factor favors a stay.

3. Defendants Will Not Be Prejudiced by a Stay

Pacific Western Bank requests that no funds be withdrawn from the 529 Accounts during the pendency of the appeal. Ordering that the money merely remain in the accounts – which are specifically maintained for long term savings – in no way prejudices Defendants.

4. Pacific Western Bank Is Likely To Prevail on the Merits

Pacific Western Bank respectfully submits that it has established at least a substantial likelihood that they will prevail on the merits. As set forth in more detail in the Petition, the district court's ruling is clearly erroneous.

First, the accounts are not exempt under Nevada law, which is the only law that applies here. Badger, who lives in Nevada, may only utilize exemptions available in Nevada. It is black letter law that the law of a judgment debtor's domicile controls what exemptions the judgment debtor may claim. *See In re Watson*, 192 B.R. 238, 244 (Bankr. D. Nev. 1996). As Badger lives in Nevada, he may utilize only Nevada's exemptions.

Nevada law only exempts Nevada-qualified tuition programs. NRS 21.090(1)(r)(5) exempts from execution:

trust[s] forming part of a qualified tuition program pursuant to chapter 353B of NRS, any applicable regulations adopted pursuant to chapter 353B of NRS and section 529 of the Internal Revenue Code, 26 U.S.C. § 529, unless the money is deposited after the entry of a judgment against the purchaser or account owner or the money will not be used by any beneficiary to attend a college or university.

The statute's plain language exempts only 529 Accounts qualified under NRS 353B. As it is undisputed that the 529 Accounts are not qualified under NRS 353B, they are not exempt under NRS 21.090(1)(r)(5).

Second, regardless of whether Badger may utilize New Mexico exemptions, he waived his right to assert this claim, as it was not timely raised in his initial claim of exemption. *Dodge City Healthcare Group, LP v. Chaudhry*, No. 09-00091, 2010 WL 2399578, at *2 (D. Nev. June 9, 2010) ("Pursuant to NRS 21.075 and 21.112(1), the failure to timely file an exemption operates as a waiver of exemption rights."). In any event, the 529 Accounts are not exempt under New

Mexico law because New Mexico's laws of exemptions do not apply to Nevada residents, like Badger. *See In re Arrol*, 170 F.3d 934 (9th Cir. 1999) (holding that California exemption law applies to a debtor domiciled in California, regardless of where the property claimed as exempt was located); *see also In re Watson*, 192 B.R. 238, 244 (Bankr. D. Nev. 1996).

Third, the district court's ruling that Pacific Western Bank must execute against the 529 Accounts in New Mexico is likewise clearly erroneous, for at least two reasons. First, Pacific Western Bank properly garnished the 529 Accounts by executing against Wells Fargo Advisors, a broker doing business in Nevada. Indeed, the accounts were opened in Nevada. This is because any deposit in an account is essentially a debt owed by that broker, regardless of the account's location. As the court has jurisdiction over the broker, it may properly order the garnishment of any accounts held by the broker. *See, e.g., Country Bank v. Broderick*, 120 A.D. 3d 463, 464-65 (Sup. Ct. 2d App. Div. 2014) (holding a creditor possessing Connecticut judgment, which was domesticated in New York, may execute against 529 accounts that were established under New Hampshire law if the broker does business in New York).

Second, the district court has the authority simply to order Badger to turn the funds from the 529 accounts over to Pacific Western Bank. There is no dispute that Badger is within the district court's jurisdiction. Nothing prevents the court

from enforcing an order directing Badger to give the money in 529 accounts to Pacific Western Bank. *See* NRS 31.400-410. Accordingly, the district court's ruling that Pacific Western Bank must execute against the accounts in New Mexico even though Badger opened them in Nevada, and executing against them is well within the district court's jurisdiction and power was clearly erroneous.

C. No Bond Is Required for the Stay Pacific Western Bank Requests.

Often, a party seeking a stay or injunction must post a bond. *See* NRCp 62(d). However, under the circumstances of this case, a bond is not required, and indeed, does not even make sense. “The purpose of security for a stay pending appeal is to protect the *judgment creditor's* ability to collect the judgment . . . by preserving the status quo and preventing prejudice to the *creditor* arising from the stay.” *Nelson v. Heer*, 121 Nev. 832, 835, 122 P.3d 1252, 1254 (2005), *as modified* (Jan. 25, 2006) (emphasis added).

It is typically the case that a judgment debtor seeks a stay of execution pending appeal, thereby preventing a judgment creditor from executing until the appeal concludes. In contrast, here, Pacific Western Bank is the judgment creditor undisputedly entitled to collect a multi-million dollar judgment. The stay Pacific Western Bank seeks is to protect its ability to collect that judgment by maintaining the status quo. That entails nothing more than ordering that the funds remain in the 529 accounts for the duration of this Court's appellate review, and prohibiting any

withdrawal. Requiring Pacific Western Bank – the judgment creditor – to post a bond would be nonsensical, as it is the one entitled to collect on its judgment, and it is not asking to take possession of the funds, but rather only to ensure the money stays in the accounts.

Because the stay sought here involves only assuring that the money at issue remains where it is for the duration of appellate review, no bond is warranted.

IV. Conclusion

For the foregoing reasons, Pacific Western Bank requests that this Court maintain the status quo by ordering Badger not withdraw funds from Badger's 529 accounts for the duration of this Court's appellate review.

Dated: October 23, 2015

SNELL & WILMER L.L.P.

By: /s/ Kelly H. Dove

BOB L. OLSON, ESQ.

Nevada Bar No. 6019

KELLY H. DOVE

Nevada Bar No. 10569

KARL O. RILEY, ESQ.

Nevada Bar No. 12077

3883 Howard Hughes Parkway, Suite 1100

Las Vegas, NV 89169

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On September 23, 2015, I caused to be served a true and correct copy of the foregoing **EMERGENCY MOTION TO STAY PENDING WRIT REVIEW - RELIEF REQUESTED BY OCTOBER 30, 2015** upon the following by the method indicated:

- ☐ **BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.
- ☒ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.
- ☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

The Honorable Susan Scann, Dept. 29
The Honorable Elizabeth Gonzalez,
Dept. 11
Regional Justice Center, Courtroom 14C
200 Lewis Ave.
Las Vegas, NV 89155
Respondent

Mark J. Connot, Esq.
Fox Rothschild, LLP
3800 Howard Hughes Parkway, Suite
500
Las Vegas, NV 89169
*Attorney for John A. Ritter and Darren
D. Badger, Real Party in Interest*

Corey Eschweiler, Esq.
Glen Lerner
4795 S. Durango Drive
Las Vegas, NV 89147
*Attorney for Vincent T. Schettler,
Real Party in Interest*

22541708

/s/ Ruby Lengsavath

An Employee of Snell & Wilmer L.L.P.