

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

PACIFIC WESTERN BANK, A  
CALIFORNIA BANKING  
CORPORATION,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF  
NEVADA, IN AND FOR THE  
COUNTY OF CLARK; AND THE  
HONORABLE SUSAN SCANN,  
DISTRICT JUDGE,

Respondents,

and

JOHN A. RITTER, AN INDIVIDUAL;  
DARRIN D. BADGER, AN  
INDIVIDUAL; AND VINCENT T.  
SCHETTLER, AN INDIVIDUAL,

Real Parties in Interest.

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Case No. 69048

District Court No: A-14-710645-E

Dept. 29

**RESPONSE TO EMERGENCY MOTION TO STAY PENDING WRIT REVIEW**

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## **I. INTRODUCTION**

The underlying Writ Petition is all about money. Money that was placed in legitimate 529 college savings accounts at least six years before the underlying judgment was issued, by a person that has only ever used such funds for legitimate educational expenses for his children. Money that, by definition, cannot serve as the basis for a claim of potential “irreparable injury” for purposes of a requested stay, but that, if frozen, will cause serious and irreparable injury to children who are not even parties to this action and who have been relying, and continue to rely, upon it for their college education. Money that, respectfully, this Court does not have jurisdiction over, and that even if it did, would be exempt under New Mexico (and Nevada) law.

Put simply, there is absolutely no basis for a stay in this case. As set forth in more detail below, PWB’s Motion for a Stay must be denied in its entirety. At the very minimum, the Court must allow Mr. Badger and his children to continue utilizing the funds contained in these accounts for the children’s legitimate educational expenses during the pendency of this Writ Petition.

## **II. UNDISPUTED RELEVANT PROCEDURAL BACKGROUND**

On September 26, 2014, PWB obtained a judgment against Defendants in the Orange County Superior Court, State of California, in the amount of \$2,682,455.81.<sup>1</sup> On or around December 3, 2014, PWB filed an Application of Foreign Judgment with this Court to domesticate the September 26, 2014 Judgment in Nevada.<sup>2</sup> On or about May 6, 2015, PWB filed an Amended Judgment with this Court, to include an additional award of \$549,891.10 in attorney’s fees and costs (“Judgment”).<sup>3</sup>

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<sup>1</sup> 1 Petitioner’s Appendix (“PA”) 1-6.

<sup>2</sup> 1 Real Party In Interest’s Appendix (“RPIIA”) 1-15.

<sup>3</sup> 1 PA 116-119.

On April 29, 2015, the Clark County Constable's office, on behalf of PWB, served a Writ of Execution and Writ of Garnishment ("April 29, 2015 Writ") on Wells Fargo Advisors ("WFA").<sup>4</sup> On May 15, 2015, Mr. Badger filed an Affidavit Claiming Exempt Property, claiming an exemption of all the funds in the WFA accounts.<sup>5</sup> On May 22, 2015, PWB filed an Objection to Mr. Badger's May 15, 2015 Affidavit Claiming Exempt Property.<sup>6</sup> On June 5, 2015, Mr. Badger's three children – Brooke, Tatum and Gage Badger each filed Affidavits Claiming Exempt Property, with respect to the 529 Accounts.<sup>7</sup>

On July 9, 2015, the District Court heard threshold arguments made by another Respondent/Defendant in this case – Vincent T. Schettler, regarding the validity of the April 29, 2015 Writ.<sup>8</sup> Based upon these threshold arguments, the District Court found, among other things, that Plaintiff's April 29, 2015 Writ was invalid and unenforceable.<sup>9</sup>

Thereafter, on July 22, 2015, the Clark County Constable's office, on behalf of PWB, served another Writ of Execution and Writ of Garnishment ("July 22, 2015 Writ") on WFA.<sup>10</sup> On August 6, 2015, Mr. Badger filed a second Affidavit Claiming Exempt Property, again claiming an exemption of all the funds in the WFA accounts.<sup>11</sup> Also on August 6, 2015, Mr. Badger's three children – Brooke, Tatum and Gage Badger again

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<sup>4</sup> 1 PA 13-15.

<sup>5</sup> 1 PA 20-23.

<sup>6</sup> 1 RPIIA 16-53.

<sup>7</sup> 1 RPIIA 54-68.

<sup>8</sup> 1 RPIIA 69.

<sup>9</sup> 1 RPIIA 69.

<sup>10</sup> 1 RPIIA 70-93.

<sup>11</sup> 1 PA 76-81.

each filed Affidavits Claiming Exempt Property, with respect to the 529 Accounts.<sup>12</sup> On August 14, 2015, PWB filed a second Objection to Mr. Ritter's Affidavit Claiming Exempt Property.<sup>13</sup> On August 28, Badger filed a Response to PWB's Objection to Affidavits Claiming Exempt Property.<sup>14</sup>

On September 1, 2015, the District Court again heard arguments made by counsel for the Respondents/Defendants.<sup>15</sup> With respect to the 529 Accounts, the District Court sustained Mr. Badger's Claims of Exemption, ordering, in relevant part "that because the funds held in the three 26 U.S.C. § 529 Accounts for the benefit of Darrin D. Badger's children - Account Nos. XXXXXX-9892, XXXXXX-7767, XXXXXX-6082, are physically located in New Mexico with Scholar's Edge, a New Mexico court must decide whether these funds are exempt from execution."<sup>16</sup> Accordingly, the District Court did not reach the remainder of the arguments the other issues raised by Badger and the Badger children in response to the July 22, 2015 Writ.<sup>17</sup>

The underlying Writ and Emergency Motion for Stay Pending Writ Review followed the entry of the District Court's Order on Mr. Badger's Claims of Exemption.

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<sup>12</sup> 1 RPIIA 94-111.

<sup>13</sup> 1 PA 82-96.

<sup>14</sup> 1 RPIIA 112-169.

<sup>15</sup> 1 RPIIA 170-171.

<sup>16</sup> 1 PA 192-194.

<sup>17</sup> For example, even if the District Court had jurisdiction over the 529 Accounts and the District Court somehow looked past the New Mexico law prohibiting creditors from executing on these funds, these funds would be completely exempt under Nevada law because the amounts of Badger's claimed exemptions are below the \$500,000 threshold contained in NRS 21.090(1)(r), a large portion of the funds contained in the 529 Accounts were paid pursuant to a Court Order, and because no deposits have been made to the 529 Accounts since 2008. See 1 RPIIA 112-169.

### **III. LEGAL ARGUMENT**

#### **A. A STAY IS NOT WARRANTED IN THIS CASE.**

In Hansen v. Eighth Judicial Dist. Court ex rel. County of Clark, this Court set forth a number of factors which must be considered in determining whether the granting of a stay is appropriate during this Court's review of a writ petition. 116 Nev. 650, 657, 6 P.3d 982, 986 (2000); see NRAP 8(c). In Hansen, this Court explained: "[g]enerally, in determining whether to issue a stay, this court considers the following factors: (1) whether the object of the appeal or writ will be defeated if the stay is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay is denied; (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay is granted; and (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition." Id. In Mikohn Gaming Corp. v. McCrea, this Court further explained, "[w]e have not indicated that any one factor carries more weight than the others, although . . . if one or two factors are especially strong, they may counterbalance other weak factors." 120 Nev. 248, 251, 89 P.3d 36, 38 (2004). In this case, none of the forgoing factors support the issuance of a stay in favor of PWB.

##### **1. The Object Of PWB's Writ Will Not Be Defeated If The Stay Is Denied.**

The first factor this Court must consider in determining whether or not to grant a stay, is whether the object of the writ petition will be defeated if the stay is denied. In the underlying Motion for Stay, PWB argues in favor of this factor by claiming that absent a stay, Mr. Badger *could* withdraw funds from the 529 Accounts, rendering them worthless for execution.<sup>18</sup> There is absolutely no basis for PWB's concern, however.

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<sup>18</sup> See October 23, 2015 Emergency Motion for Stay Pending Writ Review at p. 4-5.

The funds at issue have been in those respective 529 Accounts for at least seven years now.<sup>19</sup> In other words, the funds at issue have been in the respective 529 Accounts approximately six years before PWB obtained the Judgment against Mr. Badger. There is not a shred of evidence that Mr. Badger has ever utilized any of the funds contained in the 529 Accounts for anything other than legitimate, qualified educational expenses for his children. In the absence of a stay, Mr. Badger will simply continue to do what he has always done in the past - utilize the funds contained in the 529 Accounts for legitimate, qualified educational expenses for his children's education.<sup>20</sup> For this reason, the first factor weighs in favor of **not** granting a stay to PWB.

**2. PWB Will Not Suffer Irreparable Or Serious Injury If A Stay Is Denied.**

The second factor this Court must consider in determining whether to grant a stay, is whether the petitioner will suffer irreparable or serious injury if the stay is denied. In an attempt to demonstrate this factor, PWB claims that “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.”<sup>21</sup> This argument is also without merit.

In Hansen, this Court already addressed and rejected this very argument – that potential money damages can be characterized as an irreparable injury. In Hansen, while specifically considering what qualified as irreparable or serious harm in the context of determining whether or not to grant a stay, this Court noted “[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in

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<sup>19</sup> 1 RPIIA 125 ¶ 9.

<sup>20</sup> 1 RPIIA 126 ¶ 10-13.

<sup>21</sup> See October 23, 2015 Emergency Motion for Stay Pending Writ Review at p. 5.

**the absence of a stay are not enough” to show irreparable harm.** 116 Nev. at 658, 6 P.3d at 986-87 (emphasis added).<sup>22</sup>

In this case, the **only** potential injury PWB has identified, and could theoretically suffer in the event a stay is not granted, is monetary in nature.<sup>23</sup> Given the foregoing authority, however, the potential for monetary damages, however substantial, simply cannot be characterized as an irreparable or serious injury. For this reason, the second factor weighs heavily in favor of **not** granting a stay to PWB.

**3. Mr. Badger And His Children Will Suffer Irreparable And Serious Injury If A Stay Is Granted.**

The third factor this Court must consider in determining whether to grant a stay, is whether the real party in interest and/or the public will suffer irreparable or serious injury if the stay is granted. This factor weighs strongly in favor of **not** granting a stay to PWB.

For example, Mr. Badger’s two daughters, Brooke Badger and Tatum Badger are currently, and have been enrolled in college since 2011 and 2013, respectively.<sup>24</sup> Mr. Badger’s son, Gage Badger is currently enrolled in high school, although it is Gage’s intention to attend college following his graduation from high school.<sup>25</sup> Without access to the funds contained in the 529 Accounts, it is unlikely that Mr. Badger’s children,

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<sup>22</sup> Citing Dixon v. Thatcher, 103 Nev. 414, 415, 742 P.2d 1029, 1029–30 (1987); Berryman v. Int’l Bhd. Elec. Workers, 82 Nev. 277, 280, 416 P.2d 387, 389 (1966); Wisc. Gas Co. v. F.E.R.C., 758 F.2d 669, 674 (D.C. Cir. 1985); Va. Petroleum Job. Ass’n v. Fed. Power Com’n, 259 F.2d 921, 925 (D.C. Cir. 1958); Sobol v. Cap. Mgmt., 102 Nev. 444, 446, 726 P.2d 335, 337 (1986)).

<sup>23</sup> See October 23, 2015 Emergency Motion for Stay Pending Writ Review on file herein generally.

<sup>24</sup> 1 RPIIA 95-105;125-126.

<sup>25</sup> 1 RPIIA 106-111.

who are not parties to any aspect of this proceeding, will be able to pay their educational expenses, including, but not limited to tuition, fees, books, supplies, room and board. This potential interruption, termination and/or prevention of their education would, obviously, cause serious and irreparable harm not only to Mr. Badger, but also to his children who are not parties to this proceeding. Given the foregoing, the third factor also weighs heavily in favor of **not** granting a stay to PWB.

**4. PWB Has Almost No Chance Of Prevailing On The Merits Of Their Writ Petition.**

The fourth and final factor this Court must consider in determining whether to grant a stay, is whether the petitioner is likely to prevail on the merits in the writ. Naturally, PWB proclaims that it has at least a substantial likelihood that they will prevail on the merits of their writ petition.<sup>26</sup> PWB is incorrect, however. For the reasons set forth below, the District Court was absolutely correct when it determined “that because the funds held in the three [529 Accounts] are physically located in New Mexico with Scholar’s Edge, a New Mexico court must decide whether these funds are exempt from execution.”<sup>27</sup>

**a. The Funds Held In The 529 Accounts Are Outside The Jurisdiction Of Nevada Courts.**

With respect to the enforcement of judgments, Nevada law provides in relevant part: “[w]here the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county in [Nevada]. Where it requires the delivery of real or personal property, it shall be issued to the sheriff of the county where the property, or some part thereof, is situated.” NRS 21.070 (emphasis added). Given the foregoing, it

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<sup>26</sup> See October 23, 2015 Emergency Motion for Stay Pending Writ Review on file herein at p. 5.

<sup>27</sup> 1 PA 192-194.



is clear that a Nevada judgment is enforceable in Nevada only to the extent the judgment debtor's real or personal property is located in Nevada. Id.

Here, WFA does not hold the funds contained in the 529 Accounts. It is undisputed that WFA merely administers the 529 Accounts which are held with Scholar's Edge, a college savings program **located in New Mexico**. In fact, WFA specifically acknowledged this fact in its July 24, 2015 response to Plaintiff's Writ ("These shares are actually maintained at Scholar NM custom, a mutual funds company through the 529 Plan accounts. Since these assets are not held at [WFA], they are not restricted subject to the Writ of Garnishment.").<sup>28</sup>

Accordingly, because the funds in the 529 Accounts are held out of state in New Mexico, these funds are beyond the reach of PWB's Writ, and are respectfully, outside the jurisdiction of Nevada Courts. See NRS 21.070.

**b. The Funds Held In The 529 Accounts Are Exempt Pursuant To NMS § 21-21K-6.**

Even if the funds held in the 529 Accounts were not outside the jurisdiction of Nevada Courts, they would be exempt pursuant to NMS § 21-21K-6. New Mexico Statute ("NMS"), § 21-21k-6 provides in relevant part:

Money credited to or expended from any account in the education trust fund by or on behalf of an account owner or beneficiary is exempt from all claims of creditors of the account owner, the beneficiary or the board.

This Statute is crystal clear: **under New Mexico law, all money held in a New Mexico 529 account is exempt from all claims of creditors.** Id. (emphasis added).

Given the foregoing, even if the funds held in the 529 Accounts were not outside the jurisdiction of Nevada Courts, they would be exempt pursuant to NMS § 21-21K-6 because they are held in New Mexico. For this additional reason, PWB enjoys no

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<sup>28</sup> 1 RPIIA 158-169.

likelihood of success on the merits of its Writ Petition, and this fourth and final factor also weighs heavily in favor of **not** granting a stay to PWB.

**B. IN THE UNLIKELY EVENT THIS COURT IS INCLINED TO GRANT A STAY, MR. BADGER SHOULD STILL BE PERMITTED TO UTILIZE THE FUNDS CONTAINED IN THE 529 ACCOUNTS FOR HIS CHILDREN'S EDUCATIONAL EXPENSES DURING THE PENDENCY OF THIS WRIT PETITION.**

For all the reasons set forth herein, in the unlikely event the Court is inclined to grant a stay with respect to the funds held in the 529 Accounts, Mr. Badger respectfully requests this Court to enter an Order allowing the funds contained in the 529 Accounts to be used to pay for the Badger children's educational expenses during the pendency of this Writ Petition.

**IV. CONCLUSION**

Based upon the foregoing, PWB's Motion for a Stay must be denied in its entirety. At the very minimum, the Court must allow the funds contained in the 529 accounts to be used to pay for the Badger children's legitimate educational expenses during the pendency of this Writ Petition.

Dated this 19th day of November, 2015.

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## **CERTIFICATE OF SERVICE**

I hereby certify that on the 19th day of November, 2015, I served a copy of the foregoing **RESPONSE TO EMERGENCY MOTION TO STAY PENDING WRIT REVIEW** upon each of the following parties electronically, through the Nevada Supreme Court's e-filing system where applicable, and otherwise, through the United States Mail:

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