

**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 PETITION FOR WRIT OF MANDAMUS**

**From The Eighth Judicial District Court  
The Honorable Susan W. Scann, District Judge<sup>1</sup>**

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<sup>1</sup> This case is assigned to Judge Scann's Department; however, for a brief period Judge Gonzalez has handled portions of Judge Scann's docket, including this matter, and Judge Gonzalez made the ruling at issue in the underlying Writ Proceeding.

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## **DISCLOSURE STATEMENT**

Pursuant to Nevada Rule of Appellate Procedure 26.1, the undersigned counsel certifies the following:

1. Only Respondents/Defendants John A. Ritter and Darrin D. Badger have an interest in the outcome of this litigation.

2. The law firms of Bogatz Law Group, Reid Rubinstein & Bogatz, and Fox Rothschild, LLP have represented Respondents/Defendants John A. Ritter and Darrin D. Badger in this litigation.

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## **I. INTRODUCTION**

There is only one issue properly before this Court - whether the District Court properly determined that PWB's writ of execution issued to Wells Fargo Advisors ("WFA") in Nevada, is ineffective against funds held in three 529 college savings accounts held by Scholar's Edge - a wholly separate and distinct entity located in New Mexico. As set forth in more detail below, the District Court was correct, and therefore, this Writ Petition should be denied. Indeed, just as PWB could not execute on funds held by any other entity located outside Nevada with a writ of execution directed to WFA located in Nevada, PWB cannot execute on funds held by Scholar's Edge in New Mexico, by directing a writ of execution to WFA in Nevada.

The District Court did not reach the remaining issues related to whether the funds at issue would actually be exempt under New Mexico and/or Nevada law (although they would be). Accordingly, because the District Court did not make a determination on these exemption-related issues, they are not properly before this Court. Given the foregoing, and as set forth in more detail below, the District Court's decision with respect to the Court's lack of jurisdiction over Scholar's Edge and the funds it holds in New Mexico was correct, and therefore, PWB's Writ Petition must be denied.

## **II. ISSUE PRESENTED**

- A. WHETHER THE DISTRICT COURT PROPERLY HELD THAT THE FUNDS HELD IN THE 529 ACCOUNTS ARE BEYOND THE REACH OF PWB'S WRIT OF EXECUTION BECAUSE THESE FUNDS ARE BEING HELD IN NEW MEXICO BY SCHOLAR'S EDGE, NOT IN NEVADA BY WFA?

### **III. 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>2</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>3</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>4</sup>

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 of Execution") on Wells Fargo Advisors ("WFA").<sup>5</sup> On May 15, 2015, Mr. Badger filed a timely<sup>6</sup> Affidavit Claiming Exempt Property, claiming an exemption of all the funds in the accounts which WFA administered.<sup>7</sup> On May 22, 2015, PWB filed an Objection to

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<sup>2</sup> 1 Petitioner's Appendix ("PA") 1-6.

<sup>3</sup> 1 Real Party In Interest's Appendix ("RPIIA") 1-15.

<sup>4</sup> 1 PA 116-19.

<sup>5</sup> 1 PA 13-15.

<sup>6</sup> In its May 22, 2015 Objection, PWB erroneously argued that Mr. Badger's Claim of Exemption was untimely. RPIIA 16-53. After Mr. Badger explained in his June 5, 2015 Response to the May 22, 2015 Objection why PWB's novel timing scheme whereby they suddenly utilized calendar days to count time periods less than 11 days was incorrect under NRCPC 6(a), NRS 21.112(1) and Winston Products Co. v. DeBoer, 122 Nev. 517, 524, 134 P.3d 726, 731 (2006), PWB abandoned its erroneous argument. 1 PA 24-75. It is therefore surprising and disappointing to see that PWB has once again advanced what it knows or should know is a baseless and misleading argument in its Writ Petition. See October 23, 2015 Writ Petition at p. 5.

<sup>7</sup> 1 PA 20-23.



Mr. Badger's May 15, 2015 Affidavit Claiming Exempt Property.<sup>8</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 Internal Revenue Code, 26 U.S.C. § 529 Accounts ("529 Accounts").<sup>9</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 of Execution.<sup>10</sup> Based upon these threshold arguments, the District Court found, among other things, that PWB's April 29, 2015 Writ of Execution was invalid and unenforceable.<sup>11</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 of Execution") on WFA.<sup>12</sup> On August 6, 2015, Mr. Badger filed a second Affidavit Claiming Exempt Property, again claiming an exemption of all the funds held in the accounts administered by WFA.<sup>13</sup> Also on August 6, 2015, Mr. Badger's three children – Brooke, Tatum and Gage Badger again each filed Affidavits Claiming Exempt Property, with respect to the 529 Accounts.<sup>14</sup> On August 14, 2015, PWB filed a second

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<sup>8</sup> 1 RPIIA 16-53.

<sup>9</sup> 1 RPIIA 54-68.

<sup>10</sup> 1 RPIIA 69.

<sup>11</sup> 1 RPIIA 69.

<sup>12</sup> 1 RPIIA 70-93.

<sup>13</sup> 1 PA 76-81.

<sup>14</sup> 1 RPIIA 94-111.

Objection to Mr. Ritter’s Affidavit Claiming Exempt Property.<sup>15</sup> On August 28, Badger filed a Response to PWB’s Objection to Affidavits Claiming Exempt Property.<sup>16</sup>

On September 1, 2015, the District Court again heard arguments made by counsel for the Respondents/Defendants.<sup>17</sup> With respect to the 529 Accounts, the District Court correctly determined, 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>18</sup> Accordingly, the District Court did not reach the remainder of the arguments regarding the other issues raised by Badger and the Badger children in response to the July 22, 2015 Writ.<sup>19</sup>

The underlying Writ Petition and Emergency Motion for Stay Pending Writ Review followed.

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<sup>15</sup> 1 PA 82-96.

<sup>16</sup> 1 RPIIA 112-169.

<sup>17</sup> 1 RPIIA 170-71.

<sup>18</sup> 1 PA 192-94.

<sup>19</sup> Id.

#### IV. LEGAL ARGUMENT<sup>20</sup>

**A. THE FUNDS HELD IN THE 529 ACCOUNTS ARE HELD IN NEW MEXICO BY SCHOLAR'S EDGE, NOT IN NEVADA BY WFA; THEREFORE, THESE FUNDS ARE BEYOND THE REACH OF PWB'S WRIT OF EXECUTION.**

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 Nevada law, it 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, contrary to what PWB suggests throughout much of its briefing,<sup>21</sup> it is important to note that **WFA is not a bank, and the funds at issue are not being held by WFA.**<sup>22</sup> WFA “is a **non-bank** subsidiary of Wells Fargo & Company, providing

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<sup>20</sup> To be clear, Mr. Badger is not conceding any of the **exemption-based arguments** which are improperly contained in PWB’s Writ Petition. For example, PWB argues that Mr. Badger waived his right to claim exemptions under New Mexico law because these exemptions were not timely raised, that Mr. Badger cannot claim exemptions under New Mexico law because he is a resident of Nevada, that the 529 Accounts located in New Mexico do not qualify under NRS 21.112, etc. Mr. Badger is confident he will prevail on each and every one of these arguments if/when they are ever actually decided by the District Court. At this point, however, the District Court did not make a determination on anything other than the **jurisdictional arguments** presented in the parties’ briefing, so it was not proper for PWB to include these exemption-based arguments in their Writ Petition, and it would not be proper for Mr. Badger to include them in this Response.

<sup>21</sup> See October 23, 2015 Writ Petition at pp. 12-19.

<sup>22</sup> A company profile for WFA can be found at: <https://www.wellsfargoadvisors.com/about-wells-fargo-advisors/company-highlights.htm>

advisory services, asset management, [securities] brokerage services, estate planning strategies, retirement planning, portfolio analysis and monitoring, and other financial services through more than 18,000 registered representatives.”<sup>23</sup> In other words, WFA provides investment and advisory-related services, it does not hold, nor is it a custodian of customer funds.<sup>24</sup>

Scholar’s Edge is the entity who holds the funds contained in the 529 Accounts at issue in this dispute. In fact, PWB acknowledged this fact in its briefing at the District Court level (“Initially, it bears noting that the 529 Accounts are maintained at ‘Scholar NM Custom,’ a New Mexico sponsored 529 plan. . . . [A]ll the evidence shows that this is merely a college savings plan made under the laws of New Mexico that complies with 26 U.S.C. § 529.”).<sup>25</sup> WFA itself also specifically acknowledged this fact in its July 24, 2015 response to PWB’s Writ of Execution (“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 [Execution].”).<sup>26</sup>

“Scholar’s Edge is a New Mexico[] tax-advantaged 529 college savings plan, designed to help families and individuals nationwide save for future higher education

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<sup>23</sup> Id.

<sup>24</sup> See Consolidated Statement of Financial Condition for WFA at: [https://www.wellsfargoadvisors.com/pdf/wfa\\_statement\\_of\\_financial\\_condition\\_audited.pdf](https://www.wellsfargoadvisors.com/pdf/wfa_statement_of_financial_condition_audited.pdf)

<sup>25</sup> 1 PA 88 : ¶¶ 21 – 22.

<sup>26</sup> 1 RPIIA 153-54.

expenses.”<sup>27</sup> “It is offered by The Education Trust Board of New Mexico and **is available to all U.S. residents ages 18 and older.**”<sup>28</sup>

In its Writ Petition, PWB cites a string of non-binding authority for the incorrect proposition that PWB “properly garnished the 529 Accounts by executing against [WFA].”<sup>29</sup> To support its erroneous position, PWB first cites a number of cases dealing with the inapplicable situation where an entity is holding funds for the debtor in one jurisdiction, but is served with a writ of execution in a different jurisdiction where the funds are not physically located.<sup>30</sup> Next, PWB cites pages of authority in an attempt to support the incorrect presumption that “[t]he 529 Accounts with [WFA] are, technically speaking, a debt owned by [WFA].”<sup>31</sup> This authority is all misplaced, however, because as WFA itself explained to PWB, the funds at issue are not being held by WFA in

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<sup>27</sup> A company profile for Scholar’s Edge can be found at: <https://www.scholarsedge529.com/OFI529/theme/NMAdvisorSold/layout/aboutUs.jsp>

<sup>28</sup> Id. (emphasis added).

<sup>29</sup> See October 23, 2015 Writ Petition at p. 12.

<sup>30</sup> Id. at pp. 12-13. See Country Bank v. Broderick, 991 N.Y.S.2d 100 (N.Y. App. Div. 2014); Hicks v. Midwest Transit, Inc., 03-CV-4004-JPG, 2006 WL 644814 (S.D. Ill. Mar. 9, 2006); In re Marriage of Kosmond, 830 N.E.2d 596, 600 (Ill. Ct. App. 2005); Bank of Montreal v. Clark, 108 Ill. App. 163, 164 (Ill. App. Ct. 1903).

<sup>31</sup> See October 23, 2015 Writ Petition at p. 14-18. See Ellsworth Land & Livestock Inc. v. Bush, 233 P.3d 655, 657 (Ariz. Ct. App. 2010); Cohen v. de la Cruz, 523 U.S. 213, 218 (1998); 11 U.S.C. § 101(12); Citizens Bank of Md. v. Strumpf, 516 U.S. 16 (1995); Allen v. Bank of Am. Nat. Trust & Sav. Ass’n, 136 P.2d 345 (Cal. Ct. App. 1943); Smith Barney, Inc. v. Ekinici, 937 F.Supp. 59 (D. Maine 1996); Restatement (Second) of Conflict of Laws, §68.

Nevada.<sup>32</sup> They are held by a completely separate entity - Scholar's Edge in New Mexico.<sup>33</sup>

Put simply, PWB served WFA in Nevada with the Writ of Execution. However, there is no dispute that WFA does not maintain these funds. Scholar's Edge – a wholly separate company located in New Mexico, maintains the funds contained in the subject 529 Accounts.<sup>34</sup> Just as PWB could not execute on any funds held by any other separate entity located outside Nevada with a writ of execution directed to WFA located in Nevada, PWB cannot execute on funds held by Scholar's Edge in New Mexico by directing a writ of execution to WFA in Nevada. See NRS 21.070.

Accordingly, given that the held in the 529 Accounts at issue are being held out of state in New Mexico with Scholar's Edge, rather than in Nevada by WFA, the District Court correctly determined these funds are beyond the reach of PWB's Writ of Execution.

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<sup>32</sup> 1 RPIIA 153-54.

<sup>33</sup> Id.

<sup>34</sup> Id.

**V. CONCLUSION**

The only issue properly before this Court is whether the District Court correctly determined that PWB's Writ of Execution issued to WFA in Nevada, is ineffective against funds held in the 529 Accounts held by Scholar's Edge - a wholly separate and distinct entity located in New Mexico. As set forth in more detail above, the District Court's decision was correct, and therefore, this Writ Petition should be denied.

Dated this 14th day of December, 2015.

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### **CERTIFICATE OF COMPLIANCE**

I hereby certify that I have read this Response to Petition for a Writ of Mandamus, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief 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 14th day of December, 2015.

/s/ Charles M. Vlasic III, Esq.  
CHARLES M. VLASIC III, Esq.



## **CERTIFICATE OF SERVICE**

I hereby certify that on the 14th day of December, 2015, I served a copy of the foregoing **RESPONSE TO PETITION FOR WRIT OF MANDAMUS** 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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