

IN THE SUPREME COURT  
REPUBLIC OF THE MARSHALL ISLANDS

Supreme Court Case 2015-001

JOHN MARTIN NIEDENTHAL )  
(a/k/a Jack Niedenthal), )  
 )  
Plaintiff/Appellee, )  
 )  
vs. )  
 )  
ROBSON YASHIO ALMEN (in his )  
capacity as Chief Electoral Officer), )  
 )  
Defendant/Appellant. )  
\_\_\_\_\_ )

ORDER DENYING “MOTION FOR  
STAY”

**FILED**

JUN 03 2015



ASST. CLERK OF COURTS  
REPUBLIC OF THE MARSHALL ISLANDS

BEFORE CADRA, C.J., SEABRIGHT, A.J.,<sup>1</sup> and KURREN, A.J.<sup>2</sup>

CADRA, C.J., with whom SEABRIGHT, A.J. and KURREN, A.J., concur:

The Court has before it Appellant’s “Second Motion for Stay of Judgment and Bond (sic.)” (hereinafter “motion for stay”) filed April 24, 2015.

The Court has, by previous order, determined that oral argument will not substantially aid the Court in resolving the issues raised by Appellant’s “motion for stay” and has dispensed with oral argument. The parties briefing and existing record has been considered.

As discussed herein, Appellant has not demonstrated it will suffer irreparable harm. Additionally, the Court finds that any harm to Appellant does not outweigh the harm to Appellee, that the public interest favors neither party, and that Appellant has not demonstrated a substantial

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<sup>1</sup> J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

<sup>2</sup> Barry Kurren, Magistrate Judge, District of Hawaii, sitting by appointment of Cabinet.

likelihood or probability of success on the issues raised in its underlying appeal. Therefore, Appellant's "motion for stay" is DENIED.

#### I. FACTUAL AND PROCEDURAL BACKGROUND.

This case concerns the eligibility of Appellee, Jack Niedenthal, to run as a candidate for the Nitijela in the upcoming 2015 general election. Appellant, Robson Yashio Almen, in his capacity as Chief Electoral Officer, denied Niedenthal's eligibility based on provisions of Elections and Referenda Act (1980). Niedenthal sought relief before the High Court. On February 25, 2015, the High Court entered an Order Granting Summary Judgment in favor of Niedenthal. The High Court found that Niedenthal met all constitutional qualifications to run as a candidate for the Nitijela in the upcoming general election. The court further held that the Nitijela did not have the constitutional authority to change or add to those qualifications set forth by the Constitution by legislation (e.g. through provisions in the Elections & Referenda Act).

On March 26, 2015, Appellant filed a Notice of Appeal in the Supreme Court.<sup>3</sup> On April 2, 2015, Appellant filed a "Motion for Stay of Judgment & Bond" in the Supreme Court. On April 7, 2015, the Supreme Court denied Appellant's "Motion for Stay" without prejudice due to Appellants failure to comply with requirements of Supreme Court Rule of Procedure 8 and failure to show "good cause" for dispensing with the requirements of that Rule. Appellant then filed a "motion for stay" with the High Court. On April 24, 2015, the High Court, Associate Justice Dinsmore Tuttle, issued a thorough and well reasoned "Order Denying Motion For Stay of Judgment." The High Court addressed each of the four factors referenced by the Supreme

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<sup>3</sup> Niedenthal points to a deficiency in Appellant's Notice of Appeal as it was filed in the Supreme Court rather than in the High Court as is required by Supreme Court Rule of Procedure 3(a)(1). *See* Opposition, p. 2. This procedural anomaly is not addressed in this decision.

Court in *Nuka v. Morelik*, 3 MILR 39 (2009) and found that under either the “traditional test” or “alternative (sliding scale) test,” the Republic (Appellant) had failed to demonstrate that a stay of judgment pending appeal should issue. The instant motion for stay before the Supreme Court followed on April 24, 2015.

## II. LEGAL STANDARD

The purpose of a stay is to preserve the status quo pending the outcome of an appeal. *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10<sup>th</sup> Cir. 1996). Because a stay intrudes into ordinary judicial review, it is generally not a matter of right even if irreparable injury might otherwise result. *Nken v. Holder*, 556 U.S. 418, 427 (2009). The party requesting the stay bears the heavy burden of showing the circumstances justify a stay. *Id.* at 433-34.

Although there have been various formulations of the “traditional test” for granting a stay, it is generally held that the moving party must show (1) that the moving party will suffer “irreparable injury” if the relief is not granted, (2) the moving party will probably prevail on the merits or has “a substantial likelihood of success on the merits,” (3) the balance of hardships favors the moving party, and (4) the public interest favors granting relief. *See, e.g. Nuka v. Morelik, supra, citing Cassim v. Bowen*, 824 F.2d 791, 795 (9<sup>th</sup> Cir. 1987); *Nken v. Holder*, 556 U.S. 418 (2009)<sup>4</sup>.

The courts have also recognized an alternative standard for granting preliminary relief, such a stay pending appeal. Under the “alternative standard,” the moving party may meet its

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<sup>4</sup> The United States Supreme Court articulated the four-factor test as (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) where the public interest lies. *Nken*, at 434.

burden by demonstrating either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions exist and the balance of hardships tips sharply in its favor. This last formulation represents two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. *Nuka v. Morelik, supra, citing Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1376 (9<sup>th</sup> Cir. 1985).

### III. ANALYSIS

A, Appellant has failed to make a showing it will suffer “irreparable injury” if the stay is not granted.

Appellant asserts that irreparable injury will be sustained absent a stay but does not identify what that irreparable injury may be.

In order to demonstrate irreparable harm, it must be shown there is an injury that is “certain, great, actual, and not theoretical,” and not “merely serious or substantial.” *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10<sup>th</sup> Cir. 2003). It must also be shown that the harm is “imminent.” *Id.* The key word in considering irreparable harm is *irreparable*, which means that mere harm - even if substantial- in terms of money, time, and energy that would be expended is not enough. *Sampson v. Murray*, 415 U.S. 61, 90 (1974). In short, “irreparable harm, as the name suggests, is harm that cannot be undone.” *Salt Lake Tribune Publ’g Co. LLC v. AT&T Corp.*, 320 F.3d 1081, 1105 (10<sup>th</sup> Cir. 2003).

Appellant has not demonstrated irreparable harm. There is a remedy available to Appellant if the stay is denied and Appellant ultimately prevails on appeal. If a stay does not issue and if Niedenthal is elected into office but it is later determined that he is constitutionally

ineligible to hold office then Niedenthal's seat would be vacated and a new election for that seat would be held pursuant to Article IV, Section 6(2) of the Constitution. The Constitution, itself, provides a remedy if Niedenthal is found not eligible to hold office and, therefore, any alleged injury is not irreparable.

On the other hand, if a stay issues and Niedenthal is not allowed to be on the ballot and if this appeal is later determined in his favor, there is irreparable injury to Niedenthal and to those voting members of the public who would have chosen Niedenthal as their representative. In such a case there is no mechanism for a re-do of the election.

Because there is a remedy if the stay does not issue, the Court finds Appellant has failed to demonstrate irreparable injury.

B. Appellant Has Failed To Make A Showing Of Probable Success On the Merits.

Appellant repeatedly asserts that the Elections & Referenda Act's requirement of possession of traditional land rights and having either a mother or father of Marshallese descent with customary "jowi" is constitutional and that Niedenthal meets neither of these requirements. Additionally, Appellant asserts Niedenthal is not qualified as a candidate under the Constitution, Article IV, Sections 3 and 4. Appellant, however, cites absolutely no authority or reasoning in support of these assertions.

Appellant argues that Articles I, IV, and X of the Constitution convey the authority to the Nitijela to legislate additional requirements to matters addressed by the Constitution concerning the qualifications of Nitijela candidates.<sup>5</sup> Appellant cites no authority in support of its argument. While there may be a method for amending the Constitution regarding candidate qualifications,

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<sup>5</sup> See 4/22/15 Reply, pp. 2-4.

the Nitijela has not utilized such methods available to it. In light of the supremacy clause of Section 1(2), the procedures for amending the Constitution found in Article XII, and in the absence of any authority in support of Appellant's argument, the Court finds Appellant's arguments do not meet the requirement of demonstrating probable success on the merits.

Under the *Nken* and *Nuka* tests, the Court does not find there is a probability or substantial likelihood Appellant will prevail on the merits of its appeal based on the arguments presently before the Court.

C. Balance Of Hardships.

Appellant does not address the balance of hardships criteria. Because Appellant will not suffer irreparable harm if a stay does not issue and because Niedenthal may be left without remedy should a stay issue and he later prevail on appeal after the election is held, the balance of hardship favors Niedenthal.

D. The Public Interest Favors Neither Party.

The final factor under *Nken* and *Nuka* asks for a determination of where the public interest lies. There is undoubtedly great public interest in how this appeal is resolved. It cannot be said, however, that the public interest favors one litigant over the other. The public interest is rather that the election and all candidates' qualifications to run for office be determined and comply with the Constitution and other laws as may be applicable. Appellant has failed to show that the public interest supports its stay application.

III. CONCLUSION

Appellant has failed to demonstrate it is entitled to a stay of judgment pending resolution of this appeal. Appellant's motion for stay is DENIED.

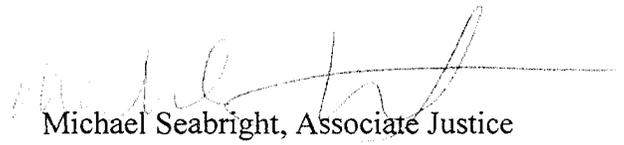
Because a stay is not issued, unless the Supreme Court rules otherwise on the merits of the pending appeal before the election, Neidenthal shall not be prohibited from running in the November 2015 general election.

Dated: 6/5/15



Daniel Cadra, Chief Justice

Dated: June 5, 2015



Michael Seabright, Associate Justice

Dated: June 5, 2015



Barry Kurren, Associate Justice