PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
FTC DOCKET NO. D-9448

ADMINISTRATIVE LAW JUDGE:

IN THE MATTER OF:

DR. DONALD MCCROSKY **APPELLANT**

BOOK OF AUTHORITIES

March 17, 2026

Respectfully submitted,

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Reporter

758 F.2d 669 *; 1985 U.S. App. LEXIS 28527 **; 244 U.S. App. D.C. 349

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Prior History: **[**1]** On Motions for Stay filed by Arkansas Louisiana Gas Company, MIGC, Inc., and Transwestern Pipeline Company. Order Filed December 18, 1984.

Elimination of Variable Costs, 24 F.E.R.C. P61254, 1983 FERC LEXIS 3903 (F.E.R.C., Aug. 25, 1983)

Counsel: Platt W. Davis, III, was on the motion for partial stay filed by petitioner Arkansas Louisiana Gas Company.

David L. Huard, Norman A. Pedersen and Roger B. Coven, were on the motion for stay filed by Petitioner MIGC, Inc.

Bolivar C. Anderews, Cheryl Foley, James W. McCartney, Judy M. Johnson and David T. Andril, were on the motion for partial stay filed by Petitioner Transwestern Pipeline Company.

Barbara J. Weller, Deputy Solicitor and A. Karen Hill, Attorney, Federal Energy Regulatory Commission, were on the Response of Federal Energy Regulatory Commission in opposition to the motions for stay.

Judges: WRIGHT, * MIKVA and BORK, Circuit Judges.

Opinion by: PER CURIAM

Opinion

[*672] The petitioners, MIGC, Inc. ("MIGC"), Arkansas Louisiana Gas Company ("Arkla"), and Transwestern Pipeline Company ("Transwestern"), have moved this court to stay the operation and effect of three orders issued by the Federal Energy Regulatory Commission (the "Commission"). This **[**2]** court denied the motions for stay by an order dated December 18, 1984. [1] Petitioners have made allegations of irreparable injury which are speculative, unsubstantiated and of a nature which clearly does not warrant the issuance of a stay. The filing of these motions, therefore, has been an abuse of the judicial process and has wasted the time and resources of this court. We are issuing this opinion for the guidance of the bar because

* Circuit Judge Wright took no part in the deposition of this motion.

[1] Order, *Wisconsin Gas Co. v. FERC*, No. 84-1358 (D.C. Cir. Dec. 18, 1984).

many essentially frivolous stay applications are being filed. Counsel know or may easily learn the requirements for a stay. Applications that do not even arguably meet those requirements, as the present ones do not, should not be filed.

I.

The petitioners are interstate pipelines which sell natural gas under contracts, tariffs, and certificates approved by the Commission. These contracts and tariffs, and those of other interstate pipelines, often contain minimum commodity bill and minimum take **[**3]** provisions. A minimum commodity bill requires a pipeline customer to pay the full commodity charge for a minimum volume of gas, whether or not the customer purchases that amount of gas. A minimum take provision requires a pipeline customer to take physically a certain amount of gas and does not offer a pipeline customer an option to pay for gas not taken. On August 25, 1983, the Commission issued a Notice of Proposed Rulemaking [2] **[**5]** pursuant to which it proposed to adopt a regulation that would eliminate variable costs from natural gas pipeline minimum commodity bill provisions. Following the submission of comments, the Commission concluded that minimum commodity **[*673]** bills enable a pipeline to recover purchased gas costs in cases where the pipeline does not actually incur such costs. Additionally, the Commission found that if a customer must pay for the gas, whether or not it actually takes the gas, then the customer will not seek lower-priced gas supplies but will continue to purchase gas from the same supplier. To alleviate these problems, the Commission issued Order No. 380 [3] which declares inoperative any minimum bills which allow recovery of purchased gas costs from **[**4]** a customer who does not take the gas. [4] Several parties filed applications with the Commission for a rehearing and for a stay of the Order. These applications also sought clarification of the Order with respect to whether it applies to minimum take provisions. On July 30, 1984, the Commission issued Order No. 380-A [5] in which it granted a stay with respect to the application of the final rule to minimum take provisions, and denied the petitions for rehearing. [6] Several parties then petitioned this court for review of the Orders. [7] ANR Pipeline Company and Great Lakes Gas Transmission Company moved this court for a stay of the Orders. These parties argued that they would suffer irreparable harm in the absence of a stay because if their customers did not meet their minimum bill obligations, then the pipelines would incur increased liability under the take-or-pay provisions [8] **[**6]** in their

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[2] *48 Fed. Reg. 39,238 (1983)*.

[3] Final Rule, Elimination of Variable Costs from Certain Natural Gas Pipeline Minimum Commodity Bill Provisions, 27 F.E.R.C. para. 61,318 (1984), *49 Fed. Reg. 22,778 (1984)*.

[4] Order No. 380 provides in relevant part:

Any pipeline rate schedule governing the sale of natural gas shall be inoperative and of no effect at law to the extent it provides for recovery of purchased gas costs for gas not taken by the buyer.

49 Fed. Reg. 22,778, 22,792 (1984).

[5] Order Denying Rehearing and Granting in Part Applications for Stay, 28 F.E.R.C. para. 61,175 (1984), ***49 Fed. Reg. 31,259 (1984)***.

[6] The Commission decided to reconsider the minimum take question because the Notice of Proposed Rulemaking and Order No. 380 specifically addressed the issue of gas "not taken" by a customer and pursuant to a minimum take provision, the customer must actually take the gas.

[7] *Wisconsin Gas Co. v. FERC*, No. 84-1358 (D.C. Cir. filed July 30, 1984).

[8] Take-or-pay provisions require a pipeline to take a specified percentage of the gas which it is contractually obligated to purchase, or to pay for such gas. These provisions differ from minimum bills in several respects. First, minimum bills usually must be paid on a monthly basis, whereas take-or-pay obligations accrue on an annual basis. Second, the take-or-pay provisions often permit the purchaser to "make-up"

contracts with producers of natural gas. A motions panel of this court denied the motion on the ground that the petitioners had not demonstrated that in the absence of a stay they would suffer irreparable harm. [9]

On October 24, 1984, the Commission issued Order No. 380-C [10] which affirmed the application of Order No. 380 to minimum take provisions. Petitioner MIGC then moved this court to stay the effect of these Orders to the extent that they apply to the minimum bill and minimum take provisions in its contracts and tariffs. Petitioners Arkla and Transwestern have moved this court to stay the operation and effect of these Orders only to the extent that they apply to minimum take provisions.

II.

The factors to be considered in determining whether a stay is warranted are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; **[**7]** **[*674]** (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. *Virginia Petroleum Jobbers Ass'n v. FPC, 104 U.S. App. D.C. 106, 259 F.2d 921, 925 (D.C. Cir. 1958)*. We believe that analysis of the second factor disposes of these motions and, therefore, address only whether the petitioners have demonstrated that in the absence of a stay, they will suffer irreparable harm.

"The basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Sampson v. Murray, 415 U.S. 61, 88, 39 L. Ed. 2d 166, 94 S. Ct. 937 (1974)*. Although the concept of irreparable harm does not readily lend itself to definition, the courts have developed several well known and indisputable principles to guide them in the determination of whether this requirement has been met.

First, the injury must be both certain and great; it must be actual and not theoretical. Injunctive relief "will not be granted against something merely feared as liable to occur at some indefinite time," *Connecticut v. Massachusetts **[**8]** , 282 U.S. 660, 674, 75 L. Ed. 602, 51 S. Ct. 286 (1931)*; the party seeking injunctive relief must show that "the injury complained of [is] of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Ashland Oil, Inc. v. FTC, 409 F. Supp. 297, 307* (D.D.C.), *aff'd*, *179 U.S. App. D.C. 22, 548 F.2d 977 (D.C. Cir. 1976)* (citations and internal quotations omitted).

It is also well settled that economic loss does not, in and of itself, constitute irreparable harm. As this court has noted:

> The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm.

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deficient purchases over a period of years. This allows the purchaser to take the excess above his minimum contractual requirement, at a later time, to the extent that he has already paid for the gas. Finally, the pipeline is entitled to treat prudently incurred take-or-pay prepayment as an investment which may be included in a general rate increase filing under section 4 of the Natural Gas Act, *15 U.S.C. § 717 (c) (1982)*.

[9] *See* Order, *Wisconsin Gas Co. v. FERC*, No. 84-1358 (D.C. Cir. Sept. 19, 1984).

[10] Order on Rehearing Reaffirming Application of Rule to Minimum Take Provisions and Denying Requests for Waiver, 29 F.E.R.C. para. 61,077 (1984), *49 Fed. Reg. 43,625 (1984)*.

F.2d at 925. Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business. *See* Washington Metropolitan Area Transit Commission **[**9]** v. Holiday Tours, Inc., 182 U.S. App. D.C. 220, 559 F.2d 841, 843 n.2 (D.C. Cir. 1977).

Implicit in each of these principles is the further requirement that the movant substantiate the claim that irreparable injury is "likely" to occur. *See* WMATC v. Holiday Tours, Inc., 559 F.2d 841 at 843 n.3. Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur. The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future. Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin.

III.

Despite these well-settled principles, the petitioners have premised their motions for stay upon unsubstantiated and speculative allegations of recoverable economic injury.

The petitioners' first allegation of irreparable injury is that if their customers are not contractually obligated to purchase a minimum amount of gas, then the petitioners cannot ensure that they will be able to purchase gas on a reliable basis, and their suppliers will therefore probably **[**10]** refuse to contract with them for the sale of gas. In addition to the fact that it would be extremely difficult to prove that petitioners' alleged loss of supply would be a result of the Commission's Orders, none of the petitioners has provided any evidence that a single supplier has stated an intention to cease contracting, or even that any supplier believes that any of the petitioners is now an unreliable purchaser. Therefore, this allegation is purely hypothetical and will not be considered by this court.

[*675] Arkla and Transwestern argue next, that if their customers do not purchase a minimum volume of gas, then they may be forced to reduce their takes from suppliers and thus may be exposed to increased take-or-pay liability. In addition, Transwestern alleges that it may be exposed to liability for breach of the minimum take provisions in its contracts. Basically, each of the petitioners is arguing that if its customers reduce their takes, and if it is unable to find other customers to replace the reduced takes, and if this results in increased take-or-pay liability which the petitioner is unable to recover during the make-up period, then it will suffer irreparable injury **[**11]** in that it will not be able to recover the money spent on the prepayments for gas.

Even if petitioners could prove that this purely hypothetical chain of events would occur, this type of recoverable economic harm does not warrant the issuance of a stay. There are several possible means by which the petitioners could recover these prepayments. First, it is as likely as not that the pipelines will recover the payments during the make-up period. Second, neither petitioner has presented any evidence that any pipeline has ever forfeited a prepayment. Indeed, in those cases where make-up periods have expired, the parties have renegotiated their contracts so that the payment would not be forfeited. [11] Finally, the Commission has stated that the Orders do not prohibit recovery of take-or-pay costs, [12] and that it will review each case on its

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[11] *See, e.g.*, Natural Gas Supply Ass'n, Statements on Take-or-Pay Obligations, Reported in the 1983 Annual Reports of Interstate Pipelines, *reprinted in* Response of Federal Energy Regulatory Commission in Opposition to Stay of Commission Order Nos. 380 and 380-A (Nos. 84-1359, 84-1360), *Wisconsin Gas Co. v. FERC*, No. 84-1358 (D.C. Cir. filed July 30, 1984).

[12] *See* Order No. 380-A, ***49 Fed. Reg. 31,259, 31,262 (1984)***.

own facts to determine whether any liability for breach of contract is recoverable in the pipeline's rates. [13] Thus, neither party has shown that the alleged loss is unrecoverable, and neither petitioner has alleged that in the interim they will be forced out of business by the loss. Instead, they have merely speculated that they will suffer **[**12]** a financial loss. This is the type of "mere economic loss" which will not support a finding of irreparable injury. *See* *Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d at 925*.

The petitioners have also failed to show that the first step in this scenario is likely to occur. To prove that the injury is likely to occur, petitioners would at a minimum have to show that their customers are going radically to reduce their takes, and that the pipelines cannot mitigate this loss by selling the gas to other **[**13]** pipeline customers. Neither petitioner alleges that its customers have reduced their takes to such an extent that it has incurred increased take-or-pay liability or that this liability is presently a real possibility. In fact, Transwestern concedes that one of its customers is now taking more than it was obligated to purchase under its minimum take contractual provision. [14] Further, neither petitioner alleges that it has unsuccessfully attempted to find other purchasers to alleviate the possible reduced takes.

Finally, the allegations made by petitioners are so speculative and hypothetical that it would be difficult to conclude that irreparable injury would occur even if the allegations were supported by evidence. The fact that petitioners have not attempted to provide any substantiation is a clear abuse of this court's time and resources.

Arkla and Transwestern **[**14]** further argue that they will suffer from wide swings in takes as a result of the Commission Orders. Transwestern alleges that it does not have the facilities to serve as a swing supplier and thus will suffer irreparable injury. Arkla does not state what harm it will incur from these wide swings. We find these allegations to be the most specious. **[*676]** The are totally unsubstantiated in the face of the common knowledge that customer takes will depend on innumerable variables including weather conditions, overall demand and the price of alternate fuels. To ask this court to find that wide swings in demand will injure the petitioners, without any evidence to support such a finding, is to ask this court to act on pure conjecture. This we refuse to do.

Petitioners have not demonstrated that they will suffer irreparable injury in the absence of a stay. Indeed, the showings made fall so far short that these petitions should not have been filed. The motions for stays are denied.

End of Document

[13] *See* Order No. 380-C, *49 Fed. Reg. 43,625, 43,633 (1984)*.

[14] Motion of Transwestern Pipeline Company for Partial Stay at 19, *Wisconsin Gas Co. v. FERC*, No. 84-1358 (D.C. Cir. filed July 30, 1984).

TAB 2

Los Angeles Memorial Coliseum Com. v. National Football League

United States Court of Appeals for the Ninth Circuit

May 7, 1980, Argued and Submitted ; December 12, 1980, Decided

Nos. 80-5156, 80-5159

Reporter
634 F.2d 1197 *; 1980 U.S. App. LEXIS 11488 **; 1980-81 Trade Cas. (CCH) P63,674

LOS ANGELES MEMORIAL COLISEUM COMMISSION, Plaintiff-Appellee, vs. NATIONAL FOOTBALL LEAGUE, an unincorporated association; BALTIMORE FOOTBALL CLUB, INC.; BUFFALO BILLS, INC.; CHARGERS FOOTBALL COMPANY; CHICAGO BEARS FOOTBALL CLUB, INC.; CINCINATTI BENGALS, INC.; CLEVELAND BROWNS, INC.; etc., et al., Defendants-Appellants; LOS ANGELES MEMORIAL COLISEUM COMMISSION Plaintiff-Appellee, vs. NATIONAL FOOTBALL LEAGUE, etc., et al. Defendants, and LOS ANGELES RAMS FOOTBALL COMPANY, Defendant-Appellant

Prior History: [1]** Appeal from the United States District Court for the Central District of California.

Counsel: Rodney E. Nelson, Nelson, Ritchie & Gill, Los Angeles, Cal., for L. A. rams.

Joseph L. Alioto, Alioto & Alioto, San Francisco, Cal., Maxwell M. Blecher, Los Angeles, Cal., for Raiders.

Patrick Lynch, Los Angeles, Cal., for NFL.

Judges: Before WALLACE and POOLE, Circuit Judges, and MacBRIDE, * Senior District Judge.

Opinion by: POOLE

Opinion

[*1198] The National Football League (NFL) and certain of its members appeal from a preliminary injunction which restrained them from applying section 4.3 of the League's Constitution and Bylaws to a proposed transfer by the Oakland Raiders Ltd., football team (Raiders) of their home game playing site from Oakland to the Los Angeles Memorial Coliseum (the Coliseum). Suit was filed by the appellee, the Los Angeles Memorial Coliseum Commission (Commission), seeking an adjudication that by adopting and enforcing section 4.3 the League and its members had violated the antitrust laws of the United States and asking **[**2]** that the defendants be enjoined from applying that rule. The district court granted a preliminary injunction prohibiting the League from invoking section 4.3 to prevent transfer of an NFL franchise to Los Angeles.

After careful consideration of the decision and the record in this case, we reverse because the district court abused its discretion in granting the preliminary injunction under circumstances where there was no showing of irreparable injury. We decline at this time to consider the merits of the antitrust claims, although that is strenuously urged by the parties. Those issues have not yet been fully addressed or finally decided by the district court.

FACTS

* The Honorable Thomas J. MacBride, Senior United States District Judge for the Eastern District of California, sitting by designation.

NFL is an unincorporated association of 28 member teams, each located in a designated metropolitan area where its "home games" are played. The League's Constitution and Bylaws provide that most important decisions must be approved by a vote of three-fourths of the owners of the member teams. Appellants estimate that 95% of NFL's decisions require such a vote, and **[*1199]** counsel for the Commission concede that a three-quarters majority vote requirement "is now relatively uniform" in NFL matters. Several provisions **[**3]** of the Bylaws relate to matters affecting the home locations of the member teams. Section 4.3, the rule involved here, requires a three-fourths vote of team owners before any member club may transfer the location of its franchise or playing site to a different city. [1] Section 3.1 requires similar approval before a new member club may be admitted to NFL.

[4]** In July 1978 the Los Angeles Rams football team announced its intention to move from the Los Angeles Coliseum where it had played since 1946 to Anaheim Stadium in Orange County. Anaheim is less than 40 miles from the Coliseum and is within the same greater metropolitan area. The move was to commence at the beginning of the 1980-81 football season. Faced with the prospect of having no professional football tenant in the Coliseum for the first time in many years, the Commission which operates the facility began to seek a replacement team. It perceived sections 4.3 and 3.1 as potential obstacles to its attainment of a new tenant either through a new franchise or relocation of an existing one.

The Commission brought an antitrust action against the NFL and its member teams under Section 16 of the Clayton Act, *15 U.S.C. § 26*, [2] to enjoin enforcement of these provisions, charging that they violate *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2*. In February 1979 the district court denied the Commission's motion for partial summary judgment and dismissed the complaint for lack of standing, with leave to amend. *Los Angeles Memorial Coliseum Commission v. National Football **[**5]** League, 468 F. Supp. 154 (C.D.Cal.1979)*. [3]

After filing an amended complaint which contained language tracking the Court's suggested cure of the standing defects, the Commission **[**6]** moved in January 1980 for a preliminary injunction to restrain defendants from invoking section 4.3 or taking other action specifically to prevent transfer of the Oakland

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[1] Since October 1978, § 4.3 has provided as follows:

The League shall have exclusive control of the exhibition of football games by member clubs within the home territory of each member. No member club shall have the right to transfer its franchise or playing site to a different city, either within or outside its home territory, without prior approval of the affirmative vote of three-fourths of the existing member clubs of the League.

At the time the Commission filed this action, § 4.3 required three-fourths approval of a transfer to a city outside the existing team's "home territory" and unanimous approval if the new city was within the home territory of another NFL franchise. In October 1978, at least partly in response to the lawsuit, the NFL amended this section to require three-fourths approval of all transfers. Appellee and amicus Oakland Raiders, Ltd., now dispute the validity of this amendment; however, that issue is not dispositive since the district court considered and ruled upon the section as amended, not as previously stated.

[2] This section in pertinent part authorizes any person to sue for injunctive relief:

against threatened loss or damage by a violation of the antitrust laws … when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, … and upon … a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue …. ***15 U.S.C.A. § 26 (1979)***.

[3] The court held that the Commission had failed to allege a significant threat of injury from an impending violation of the antitrust laws, as required by section 16 of the *Clayton Act and Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*; *Los Angeles Memorial Coliseum, supra, 468 F. Supp. at 158-62*.

Raiders' home site to the Los Angeles Coliseum. There had been negotiations in late 1979 between the Coliseum and Raiders' officials which contemplated a transfer effective for the 1980 season. The Commission's motion alleged that enforcement of section 4.3 threatened to block final agreement on the transfer. Neither the Raiders nor the Coliseum ever requested a vote or other action by the League before the preliminary injunction was sought; nor had the League taken action one way or the other.

On February 21, 1980, after a hearing, the district court granted the Commission's motion and entered an order enjoining defendants **[*1200]** from enforcing section 4.3, as then "currently written," to prevent the Raiders or any other NFL team from transferring the location of its home games to the Coliseum. The order was accompanied by a memorandum Opinion indicating that the allegations of the amended complaint were sufficient to overcome the standing problem, that the plaintiff's showing on the motion satisfied the **[**7]** conditions for a preliminary injunction, but that the record was insufficient to permit summary judgment. *Los Angeles Memorial Coliseum Commission v. National Football League, 484 F. Supp. 1274 (C.D.Cal.1980)*.

Defendants immediately appealed and obtained from this Court an order staying the preliminary injunction. [4] We have jurisdiction under *28 U.S.C. § 1292(a)(1)*. Shortly thereafter, the Commission and Raiders signed a memorandum of agreement on lease terms, and Raiders' officials publicly announced their intention to proceed with the move to Los Angeles. Following the appointment of a special committee to evaluate the proposed move, the League took a formal vote of its members which disapproved the transfer by 22 against, none in favor, and five abstaining.

[8]** LEGAL STANDARDS FOR GRANTING AND REVIEWING THE PRELIMINARY INJUNCTION

We deem it important to emphasize at the outset in this highly publicized dispute that we are reviewing the grant of a preliminary injunction, not a final decision on the merits. We start with the general principle that an order issuing or denying a preliminary injunction will normally be reversed only if the lower court abused its discretion or based its decision upon erroneous legal premises. *City of Anaheim v. Kleppe, 590 F.2d 285, 288 n.4 (9th Cir. 1978)*; *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 526 F.2d 86, 88 (9th Cir. 1975)*. The reviewing court must determine whether the district court employed the proper legal standard in issuing the injunction and whether it abused its discretion in applying that standard. *Miss Universe, Inc. v. Flesher, 605 F.2d 1130, 1133-34 (9th Cir. 1979)*; *Benda v. Grand Lodge of International Association of Machinists, etc., 584 F.2d 308, 315 (9th Cir. 1978)*, cert. dismissed, *441 U.S. 937, 99 S. Ct. 2065, 60 L. Ed. 2d 667 (1979)*. An injunction may also be set aside if the court relied on erroneous legal premises in its application of the standard, such as **[**9]** in its preliminary review of the merits. *Kennecott Copper Corp., etc. v. Costle, 572 F.2d 1349, 1357 (9th Cir. 1978)*; *California ex rel. Younger v. Tahoe Regional Planning Agency, 516 F.2d 215, 217* (9th Cir.) cert. denied, *423 U.S. 868, 96 S. Ct. 131, 46 L. Ed. 2d 97 (1975)*; *Douglas v. Beneficial Finance Co. of Anchorage, 469 F.2d 453, 454 (9th Cir. 1972)*; cf. *Miss Universe Inc. v. Flesher, supra, 605 F.2d at 1133 n.5*.

[4] Appellee's subsequent motion to vacate the stay was denied. After the lifting of the injunction, NFL commenced an action in the state court against the Raiders for breach of contract. The district court restrained prosecution of the NFL's state suit. This court granted NFL's petition for a writ of mandamus to discharge the restraining order.

Under the Clayton Act which is involved here injunctive relief is provided under the same conditions and principles as such relief is granted generally by courts of equity. *15 U.S.C.A. § 26 (1979)*. A fundamental principle applied in such courts is that the basic function of a preliminary injunction is to preserve the status quo ante litem pending a determination of the action on the merits. *Larry P. v. Riles, 502 F.2d 963, 965 (9th Cir. 1974)*; *Washington Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472, 476 (9th Cir. 1969)*; *Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F.2d 804* (9th Cir.) cert. denied, *375 U.S. 821, 84 S. Ct. 59, 11 L. Ed. 2d 55 (1963)*. The traditional equitable criteria for granting preliminary injunctive relief are (1) a strong likelihood **[**10]** of success on the merits, (2) the possibility of irreparable injury to plaintiff if the preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases). *Sierra Club v. Hathaway, 579 F.2d 1162, 1167 (9th Cir. 1978)*; *Munoz v. County of Imperial, 604 F.2d 1174, 1175-76 (9th Cir. **[*1201]** 1979)*, cert. granted *445 U.S. 903, 100 S. Ct. 1077, 63 L. Ed. 2d 318 (1980)*; *County of Alameda v. Weinberger, 520 F.2d 344, 349 (9th Cir. 1975)*. In this circuit, the moving party may meet its burden by demonstrating either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in its favor. *Inglis, supra, 526 F.2d at 88*. These are not separate tests, but the outer reaches "of a single continuum." *Benda, supra, 584 F.2d at 315*.

The district court concluded that the plaintiff was unlikely to show that the balance of hardships tipped sharply in its favor, and it therefore rested its grant of preliminary injunction on a finding that plaintiff qualified for relief under the first half of this alternate **[**11]** formulation. *Los Angeles Memorial Coliseum, supra, 484 F. Supp. at 1275-76*. We conclude that the court erred in issuing a preliminary injunction because there was no showing of irreparable injury. In so holding, we treat the two reported opinions of the district court so far as pertinent to this decision as its findings of fact and conclusions of law pursuant to *Rule 52 of the Federal Rules of Civil Procedure*.

Irreparable Injury

The Commission demonstrated no real and concrete injury or even threat thereof when it sought the preliminary injunction. As the district court recognized, section 16 of the Clayton Act authorizes injunctive relief in reasonable anticipation of threatened as well as actual injury. *15 U.S.C. § 26*; *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, 89 S. Ct. 1562, 1580, 23 L. Ed. 2d 129 (1969)*. However, the party seeking such relief must demonstrate "a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." Id. The court ruled that the Commission met the standing requirements of section 16 by alleging that it was "reasonably likely" that an existing NFL **[**12]** team was "seriously interested" in moving to Los Angeles; that a transfer team would decide to play its home games in the Coliseum; that lease terms would be agreed upon; and that "pursuant to section 4.3, the NFL members (would) not approve the transfer of an existing team to Los Angeles and the Coliseum before the 1980-81 season." *484 F. Supp. at 1275*. Even assuming that these allegations might suffice to establish standing, they would not, alone, satisfy the plaintiff's burden of demonstrating immediate threatened injury as a prerequisite to preliminary injunctive relief. The Commission's "evidence" of a threat of disapproval of the transfer consisted mainly of an affidavit of a Commission member stating that the Raiders' owner had said he was convinced he could not obtain League

approval; that two other team owners predicted the Raiders would not get the votes; and that one of these owners said the NFL Commissioner was opposed to the transfer. Affidavit of William Robertson (Jan. 18, 1980). Defendants moved to strike these unsupported factual allegations. But even were this sufficient to justify some apprehension of disapproval, it did not establish on any factual basis that **[**13]** section 4.3's requirement of a three-fourths vote was a realistic block to transfer, as alleged, or otherwise, for both Coliseum and the Raiders deliberately refrained from seeking a vote. They attacked Section 4.3 as applied to this particular transfer, [5] claiming it to be an unreasonable **[*1202]** obstacle without first determining whether that perceived barrier was shadow or substance.

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[5] That the Coliseum's challenge of section 4.3 was "as applied" to this specific Raider transfer, and not "on its face," is clear. Its Opposition Brief criticized both the NFL and the trial court for evaluating section 4.3 "in the abstract." (Red Br., 23-24) Its brief states in part:

The critical task in applying the Sherman Act here is to define the conduct at issue. Defendants prefer to debate the abstract question of the justification for any rule regulating any possible transfer of a franchise. In effect, they are seeking an advisory opinion from the Court as to their right to have some say in a transfer to an unspecified location in unknown circumstance which might occur in the future.

Plaintiff contends that the issue before the Court is the purpose and effect of the conduct actually engaged in by the defendants. The question for decision is the right of the NFL owners to block the Raiders from relocating to Los Angeles by applying § 4.3 of their By-laws. The issue is not whether § 4.3 in some other form could be used to block some other transfer at some other time. (Red Br., 23-24)

When the focus is directed to the actual conduct by defendants, instead of hypothetical abstractions as defendants prefer, it becomes readily apparent that the refusal to permit the Raiders' transfer is manifestly illegal under either a per se or a rule of reason analysis. As applied to the conduct at issue in this case, both approaches turn on the same factors and lead to the same result …." (Red Br., 23-24)

Since the rule had not yet been applied to the proposed transfer when the injunction was sought, it was the Coliseum, not NFL, that was seeking an advisory opinion on the rule's validity "as applied."

[14]** Even if some significant threat of injury be hypothesized, it was neither found nor shown to be irreparable. The basis of injunctive relief in the federal courts is irreparable harm and inadequacy of legal remedies. *Sampson v. Murray, 415 U.S. 61, 88, 94 S. Ct. 937, 951, 39 L. Ed. 2d 166 (1974)*. The district court specifically stated that the reason plaintiff had demonstrated the requisite possibility of irreparable injury was:

> because the managing partner of the Raiders has indicated both that his club desires to play its home games in Los Angeles, and that the only significant obstacle to reaching an agreement with the Coliseum is the possible invocation of section 4.3. *484 F. Supp. at 1276*.

The court identified "the alleged injury to the Coliseum in the absence of an injunction" as "lost revenues due to its failure to acquire an NFL team." *Id. at 1275*. It is well established, however, that such monetary injury is not normally considered irreparable. The Supreme Court has stated:

> "(T)he temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury … "The key word in this consideration is irreparable. Mere injuries, however **[**15]** substantial, in terms of money, time and energy necessarily expended … are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.' "

Sampson v. Murray, supra, 415 U.S. at 90, 94 S. Ct. at 952, quoting *Virginia Petroleum Jobbers Association v. Federal Power Commission, 104 U.S.App.D.C. 106, 110, 259 F.2d 921, 925 (D.C.Cir.1958)*. The Coliseum's lost revenues would be compensable by a

damage award should the Commission ultimately prevail on the merits. The district court, therefore, proceeded upon the further erroneous legal premise that the type of injury it identified was irreparable and abused its discretion in improperly granting a preliminary injunction on the basis of such threatened injury.

Other than the threat of lost revenues, the plaintiff did not demonstrate any threat of harm that would have supported a finding of irreparable injury. The amended complaint alleged that without injunctive relief, the Commission would suffer "a diminution of revenues, a diminution of the market value of plaintiff's property and **[**16]** the loss of substantial goodwill normally attached to a profitable enterprise." In support of its motion the Commission argued that without a preliminary injunction it would be unable to enter into a lease agreement, begin stadium renovations, obtain financing for the renovations, or respond to the Raiders' alleged demand for a nonrefundable advance payment to cover transfer expenses. All of these are but monetary injuries which could be remedied by a damage award. The Commission also claimed that it would lose its only opportunity to obtain a professional football tenant, since the Raiders were the only team not already committed by long-term leases and would have to enter into another long-term lease in Oakland if not allowed to move to Los Angeles. There was, however, no factual showing that the Raiders would indeed **[*1203]** be forced into a long-term commitment in Oakland or that the Coliseum would be unable in the near future to obtain another transfer team or new franchise as a tenant. Nor did the Commission contend or show that loss of the Raiders as a tenant threatened to put it or the Coliseum out of business. [6] Compare *Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d **[**17]** 1197, 1205 (2d Cir. 1970)*; *Foremost International Tours, Inc. v. Qantas Airways, Ltd., 379 F. Supp. 88, 97 (D.Haw.1974)*, aff'd, *525 F.2d 281 (9th Cir. 1975)*, cert. denied, *429 U.S. 816, 97 S. Ct. 57, 50 L. Ed. 2d 75 (1976)*. It was undisputed that the Coliseum continues to have strong football attractions including the teams of the University of Southern California and the University of California, Los Angeles. The plaintiff simply did not make the requisite showing of irreparable harm.

Balancing Hardships

The district court not **[**18]** only failed to identify the essential of irreparable injury to plaintiff, but also failed to identify the harms which a preliminary injunction might cause to defendants and to weigh these against plaintiff's threatened injury. In its only finding on the balance of hardships, the court stated:

> Under the second standard (of Inglis,) plaintiff is required to show that the balance of hardships tips sharply in its favor. Such a showing seems unlikely in this case since the alleged injury to the Coliseum in the absence of an injunction, i. e., lost revenues due to its failure to acquire an NFL team, is nearly evenly balanced by the financial injury that granting the injunction could cause to a third party, the Oakland Coliseum, due to its possible loss of the Raiders. (Emphasis added.)

484 F. Supp. at 1275. Whatever may be the rationale of balancing the injury of a third party against plaintiff's, the court could have reached

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[6] On this appeal, the Commission now alleges that loss of revenue to the Coliseum could cause a default on bonds which financed the Sports Arena. It also points to its inability to fulfill its legal responsibilities to the community and the loss of various other intangible and nonquantifiable benefits. These threatened injuries were not specifically presented to the district court and were not grounds for its finding of irreparable injury and decision to grant the injunction.

no balance of harms favoring the Commission without considering the potential injury to the NFL and its members. [7] This it did not do.

[19]** Traditional standards for granting a preliminary injunction impose a duty on the court to balance the interests of all parties and weigh the damage to each, mindful of the moving party's burden to show the possibility of irreparable injury to itself and the probability of success on the merits. *Doran v. Salem Inn, Inc., 422 U.S. 922, 931, 95 S. Ct. 2561, 2567, 45 L. Ed. 2d 648 (1975)*; *Constructors Association of Western Pennsylvania v. Kreps, 573 F.2d 811, 815 (3rd Cir. 1978)*; *Friends of the Earth, Inc. v. Coleman, 518 F.2d 323, 330 (9th Cir. 1975)*; *Sierra Club v. Hickel, 433 F.2d 24, 33 (9th Cir. 1970)* aff'd, *405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972)*. Inglis clarified and added flexibility to understanding the burden carried by the moving party; it did not eliminate the requirement that some balance of hardships favoring that party be established by the record. [8]

[20]** Under the continuum or sliding scale articulated in Benda a minimal showing on the merits is required even when the balance of harms tips decidedly toward the moving party. [9] Conversely, at least a minimal **[*1204]** tip in the balance of hardships must be found even when the strongest showing on the merits is made. Here a preliminary injunction was granted "(a)lthough the court consider(ed) the question (on the merits) to be close," *484 F. Supp. at 1278*, and without finding a balance of harms favoring plaintiff. Such a combination is clearly insufficient under Benda.

[21]** CONCLUSION

For the reasons we have set forth above the order granting preliminary injunction is reversed and the case is remanded to the district court for further proceedings consistent with this Opinion.

REVERSED.

Concur by: WALLACE

Concur

WALLACE, Circuit Judge, concurring in result:

I concur in the result reached by the majority, but I go no farther than to decide the one dispositive issue. The district judge granted the injunction after finding a combination of probability of success on the merits and the possibility of irreparable injury pursuant to the Inglis formulation. *Los Angeles Memorial Coliseum Comm'n v. National Football League, 484 F. Supp. 1274, 1276-78 (C.D.Cal.1980)*. I would reverse solely on the ground that the Commission has not shown that it will suffer any injury apart from economic injury. The Commission's injury is, therefore, not irreparable, and the district court abused its discretion in granting the preliminary injunction. Because failure to show irreparable injury is a clear and sufficient

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[7] For example, the League and its members may have been forced to realign teams and divisions in disregard of their business judgment and may have suffered loss of goodwill resulting from the Raiders' departure from a city whose fans are claimed consistently to have supported the team over the years.

[8] Cases in this circuit since Inglis have continued to include a balance of harms test in the traditional formulation. *Munoz v. County of Imperial, supra, 604 F.2d at 1175-76*; *Sierra Club v. Hathaway, supra, 579 F.2d at 1167*; *Warm Springs Dam Task Force v. Gribble, 565 F.2d 549, 551 (9th Cir. 1977)*.

[9] This court said in *Benda, 584 F.2d at 315*:

(T)here are not really two entirely separate tests, but … merely extremes of a single continuum …. The critical element in determining the test to be applied is the relative hardship to the parties. If the balance of harm tips decidedly toward the plaintiff, then the plaintiff need not show as robust a likelihood of success on the merits as when the balance tips less decidedly. No chance of success at all, however, will not suffice. (citations omitted)

ground for reversal, I would not reach the other issues addressed by the majority.

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TAB 3

Janvey v. Alguire

United States Court of Appeals for the Fifth Circuit

July 22, 2011, Filed

No. 10-10617

Reporter
647 F.3d 585 *; 2011 U.S. App. LEXIS 15262 **

RALPH S. JANVEY, Plaintiff-Appellee v. JAMES R. ALGUIRE; VICTORIA ANCTIL; TIFFANY ANGELLE; SYLVIA AQUINO; JONATHAN BARRACK; ET AL. 1; TERAL BENNETT, SUSANA CISNEROS; RON CLAYTON; JAMES FONTENOT; MARK GROESBECK; ET AL. 2; and JASON GREEN, Defendants-Appellants

Subsequent History: On remand at, Motion denied by *Janvey v. Alguire, 2011 U.S. Dist. LEXIS 157538 (N.D. Tex., Aug. 26, 2011)*

Prior History: **[**1]** Appeals from the United States District Court for the Northern District of Texas.

Janvey v. Alguire, 628 F.3d 164, 2010 U.S. App. LEXIS 25526 (5th Cir. Tex., 2010)

Disposition: AFFIRMED and REMANDED.

Counsel: For RALPH S. JANVEY, Plaintiff - Appellee: Kevin M. Sadler, David Todd Arlington, Baker Botts, L.L.P., Austin, TX; Timothy Stuart Durst, Esq., Baker Botts, L.L.P., Dallas, TX; Ben L. Krage, Esq., Krage & Janvey, L.L.P., Dallas, TX.

For JAMES R. ALGUIRE, VICTORIA ANCTIL, TIFFANY ANGELLE, SYLVIA AQUINO, JONATHAN BARRACK, ET AL 1, Defendants - Appellants: Bradley Wayne Foster, Esq., Counsel, Matthew Griffith Nielsen, Esq., Andrews Kurth, L.L.P., Dallas, TX.

For TERAL BENNETT, SUSANA CISNEROS, RON CLAYTON, JAMES FONTENOT, MARK GROESBECK, ET AL 2, Defendants - Appellants: Michael John Stanley, Stanley, Frank & Rose, L.L.P., Houston, TX.

For JASON GREEN, Defendant - Appellant: John Patrick Kincade, Esq., Winstead, P.C., Dallas, TX.

For SECURITIES AND EXCHANGE COMMISSION, Amicus Curiae: Michael Laurence Post, Esq., Senior Litigation Counsel, U.S. Securities & Exchange Commission, Washington, DC.

Judges: Before STEWART, PRADO, and ELROD, Circuit Judges.

Opinion by: EDWARD C. PRADO

Opinion

[*589] EDWARD C. PRADO, Circuit Judge:

We withdraw our prior opinion, *Janvey v. Alguire, 628 F.3d 164 (5th Cir. 2010)*, and substitute the opinion **[**2]** that follows:[1]

The Securities Exchange Commission ("SEC")

[1] There are no substantive changes to our previous conclusions and reasoning concerning whether the district court had the power to grant a preliminary injunction; whether the district court abused its discretion when it granted the preliminary injunction; whether the district court's preliminary injunction was overbroad; and whether the district court properly granted a preliminary injunction rather than a writ of attachment. We find, however, that we do not have jurisdiction to decide the motion to compel arbitration. We substitute the entire opinion, although our conclusions in Parts II.B—II.E remain the same.

brought suit against Stanford Group Company ("SGC"), along with various other Stanford corporate entities, including Stanford International Bank ("SIB"), for allegedly perpetrating a massive Ponzi scheme.[2] The district court appointed Robert Janvey (the "Receiver") to marshal the Stanford estate. In November, this Court heard *Janvey v. Adams, 588 F.3d 831 (5th Cir. 2009)*,[3] a case concerning the frozen accounts of Stanford investors. Although the Fifth Circuit ordered the district court to thaw the accounts of the Stanford **[**3]** investors, the Receiver subsequently obtained a preliminary injunction against numerous former financial advisors and employees of SGC, freezing the accounts of those individuals pending the outcome of trial.[4]

In **[**4]** this interlocutory appeal, the Employee Defendants contend that the district court should have granted their motion to compel arbitration, and that the district court had no power to grant the preliminary injunction when the motion to compel arbitration was pending. Additionally, the Employee Defendants claim that the district court abused its discretion when it granted the preliminary injunction, and that the Receiver's calculation of the amounts subject to the injunction was overly broad. The Bennett Defendants appeal separately, claiming that the district court erroneously found that SGC operated as a Ponzi scheme.

We hold that (1) the district court had the power to decide the motion for preliminary injunction before deciding the motion to compel arbitration; (2) the district court did not abuse its discretion in granting a preliminary injunction; (3) the preliminary injunction was not overbroad; and (4) the district court acted within its power to grant a Texas Uniform Fraudulent Transfer Act ("TUFTA") injunction rather than an attachment. We further hold that we do not have jurisdiction to rule on the motion to compel arbitration.

[*590] I. FACTUAL AND PROCEDURAL BACKGROUND

A. Stanford, [**5] the Receiver, and *Adams*

This appeal shares its background facts with this Court's prior *Adams* opinion:

> This case arises out of an alleged multi-billion-dollar Ponzi scheme perpetrated by the Stanford companies . . . . According to the SEC, the companies' core objective was to sell certificates of deposit ("CDs") issued by [SIB]. Stanford achieved and maintained a high volume of CD sales by promising above-market returns and falsely assuring investors that the CDs were backed by safe, liquid investments. For almost 15 years, [SIB] represented that it consistently earned high returns on its investment of CD sales proceeds, ranging from 12.7% in 2007 to 13.93% in 1994. In fact, however, [SIB] had to use new CD sales proceeds to make interest and redemption payments on pre-existing CDs, because it did not have sufficient assets,

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[2] The alleged Ponzi scheme concerned more than 100 corporate entities controlled by R. Allen Stanford. The Receiver obtained a preliminary injunction maintaining a freeze on accounts that belong to 117 of the defendants. Where the distinction is of no moment, we will refer to the corporate entities collectively as "Stanford."

[3] Judge Dennis authored the opinion, joined by Judge Garwood and Judge Prado.

[4] There are numerous appellants, represented by various counsel. The district court describes the approximately 330 former Stanford employees collectively as "Employee Defendants." We will continue this practice for the appellants in this proceeding. When we have need to refer to the specific arguments by a particular group of defendants or a single defendant, we will refer to the seventy-six financial advisor defendants who together filed a brief as "FA Defendants," to the defendants who filed the Teral Bennett *et al*. brief as the "Bennett Defendants," and to Jason Green as "Green."

> reserves and investments to cover its liabilities.
>
> The SEC filed suit against R. Allen Stanford, [SIB], and related companies on February 16, 2009. At the SEC's request, the district court issued a temporary order restraining the payment or expenditure of funds belonging to the Stanford parties. The district court also appointed [the Receiver] for the Stanford interests **[**6]** and granted him the power to conserve, hold, manage, and preserve the value of the receivership estate.

588 F.3d at 833. At the time the SEC filed suit, Stanford should have held assets of greater than $7 billion, but actually held assets of less than $1 billion.

Post-appointment, the Receiver froze millions of dollars in assets. These frozen accounts allegedly contained funds dispersed by Stanford as purported interest on CDs, reimbursement of CD principal, or compensation to former Stanford employees. After time for review and assessment, the district court set a date to thaw the frozen assets and ordered the Receiver to complete his review. *Id*. The Receiver subsequently filed a series of claims, naming hundreds of CD investors and the Employee Defendants as "relief defendants," and seeking to recover funds from the frozen accounts. The district court severed the investor defendants from the Employee Defendants.

The Receiver sought a preliminary injunction to continue the freeze as to the investor defendants, which the district court granted in part and denied in part, maintaining the freeze of the accounts of various CD investors who had received payments of interest on their CDs. **[**7]** In *Adams*, the Fifth Circuit vacated the district court's grant of a preliminary injunction. *Id. at 835*. The *Adams* Court found that the CD investors could not be properly named as "relief defendants" because the CD investors had actual ownership interests in the CDs and any proceeds of the CDs. *Id. at 834-35*. This Court did not address the Employee Defendants' frozen accounts.

B. Post-*Adams* Developments, the Employee Defendants, and the Instant Appeal

The remaining frozen accounts represent accounts held at Pershing LLC and JP Morgan Clearing Corp. by the Employee Defendants. After *Adams*, the Receiver amended his complaint against the Employee Defendants, leaving claims only for fraudulent transfer or unjust enrichment.

The Receiver subsequently reached a series of compromises with the Employee Defendants, allowing for partial releases of their frozen assets. The district court **[*591]** eventually entered an agreed order (the "April 6th Order"), releasing all but "(1) commissions earned from the sale of SIB CDs; (2) SIB quarterly bonuses; and (3) branch managing-director quarterly compensation."

With the account freeze due to expire, the Receiver moved for a preliminary injunction to continue the **[**8]** freeze as to the funds named in the April 6th Order. The Receiver claimed that the three named classes of funds represented payments by Stanford to the Employee Defendants from the proceeds of the Ponzi scheme and therefore constituted fraudulent transfers, entitling the Receiver to disgorgement of those assets.

The Employee Defendants opposed the preliminary injunction and moved to compel arbitration. They based their motion to compel on the existence of Promissory Notes between the Employee Defendants and SGC. The Promissory Notes concerned upfront loan payments that SGC paid to the Employee

Defendants when they joined Stanford. The Promissory Notes contained a broad arbitration clause, which provided that any dispute "arising out of or relating to this Note . . . would be submitted and settled by arbitration pursuant to the constitution, bylaws, rules, and regulations of the Financial Industry Regulation Authority (FINRA)" or the National Association of Securities Dealers ("NASD"), FINRA's predecessor. The Employee Defendants argued that because the Receiver "stood in the shoes" of SGC, the Receiver was also bound by the arbitration clause between the Employee Defendants and SGC.

The **[**9]** district court granted a temporary restraining order, and then granted the preliminary injunction. The district court did not decide the merits of the motion to compel arbitration, finding that it had the power to issue a preliminary injunction pending resolution of that matter. Additionally, the district court distinguished between a preliminary injunction under TUFTA and a writ of attachment, expressly granting the former. In granting the preliminary injunction, the district court continued the account freeze as to the amounts named in the April 6th Order. Various Employee Defendants appealed.

II. DISCUSSION

Various groups of the Employee Defendants have set forth five issues on appeal: (1) whether the district court had the power to grant a preliminary injunction before deciding the motion to compel arbitration; (2) whether the district court abused its discretion when it granted the preliminary injunction; (3) whether the district court's preliminary injunction is overbroad; (4) whether the district court properly granted a preliminary injunction rather than a writ of attachment; and (5) whether the Receiver's claims against the Employee Defendants are subject to arbitration. We **[**10]** address the five issues in turn.

A. Jurisdiction and Standard of Review for the Preliminary Injunction Order

We have jurisdiction over the appeal of the district court's preliminary injunction under *28 U.S.C. § 1292(a)(1)*.[5]

While "the standard to be applied by the district court in deciding whether a plaintiff is entitled to a preliminary injunction is stringent, the standard of appellate review is simply whether the issuance of the injunction, in the light of **[*592]** the applicable standard, constituted an abuse of discretion." *Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32, 95 S. Ct. 2561, 45 L. Ed. 2d 648 (1975)*. Despite this deferential standard, "a decision grounded in erroneous legal principles is reviewed de novo." *Byrum v. Landreth, 566 F.3d 442, 445 (5th Cir. 2009)* (citations and quotation marks omitted). As to each element of the district court's preliminary-injunction analysis, the district court's findings of fact "are subject to a clearly-erroneous standard of review," while conclusions of law "are subject to broad review and will **[**11]** be reversed if incorrect." *White v. Carlucci, 862 F.2d 1209, 1211 (5th Cir. 1989)* (citations and quotation omitted).

B. Power to Grant Preliminary Injunction

1. The Parties' Arguments

The Employee Defendants argue that the district court lacked power to issue a preliminary injunction because the Receiver's claims against them are subject to arbitration.

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[5] The parties dispute whether the district court retained the power to grant the preliminary injunction while the motion to compel arbitration was pending. We address this dispute below.

The Receiver argues that case law, the FINRA rules, and common sense allows the district court to issue a preliminary injunction pending its resolution of a motion to compel arbitration. The district court found that it had power to grant preliminary injunctive relief before deciding whether to compel arbitration. We agree with the district court.

While the Employee Defendants acknowledge that the grant of a preliminary injunction lies within a district court's discretion, they posit that a motion to compel arbitration strips the district court of its power to grant an injunction. The Employee Defendants contend that (1) SGC is and was subject to arbitration for this dispute at all relevant times because it is a member of FINRA and it is bound under the broad arbitration clause of each Promissory Note, which requires that any controversy **[**12]** arising out of or related to the Note be submitted to arbitration pursuant to FINRA rules; (2) the dispute in this action is arbitrable because the Receiver became subject to the FINRA rules and the arbitration clauses when he stepped into the shoes of the received entity he represents; and (3) the FINRA rules do not contemplate pre-arbitration injunctive relief nor allow court-ordered injunctions lasting longer than 15 days. The Employee Defendants argue that because the dispute is arbitrable and subject to the FINRA rules, the district court did not have the discretion to issue injunctive relief; it only had the power to decide the motion to compel arbitration. *See* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985) ("By its terms, the Act leaves no room for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.").

The Employee Defendants also argue that cases from both sides of a circuit split support their contention that the district court does not have power to enter an injunction. The circuit split concerns the power of **[**13]** a district court to issue an injunction while arbitration is pending. The Fifth Circuit acknowledged the circuit split in RGI, Inc. v. Tucker & Associates, Inc., 858 F.2d 227, 229 (5th Cir. 1988), but did not enter the fray.[6] The Employee Defendants contend that once again we may avoid the fray and still decide the issue in **[*593]** their favor because both the Eighth Circuit, on one side of the split, and the Seventh Circuit, on the other side of the split, would not permit an injunction here. The Eighth Circuit held that "where the [Federal Arbitration Act ("FAA")] is applicable to the dispute between the parties and no qualifying language has been alleged, the district court errs in granting injunctive relief" because the judicial inquiry required to determine "the propriety of injunctive relief necessarily would inject the court into the merits of issues more appropriately left to the arbitrator." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey, 726 F.2d 1286, 1292 (8th Cir. 1984). The Seventh Circuit held that the district court may only issue injunctive relief that is effective only until the arbitration panel is able to address whether the equitable relief should remain in effect. **[**14]** *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano, 999 F.2d 211, 215-16 (7th Cir. 1993).

The Receiver responds that the district court's broad power to preserve the status quo is well-established and supported by case law, FINRA rules, and common sense. The Receiver notes that "even after a district court decides that a case is subject to arbitration, most federal authority permits the district court to issue a preliminary injunction to maintain the status

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[6] In *RGI*, we found that we need not decide whether a district court may issue a preliminary injunction while arbitration is pending because the agreement in that case clearly provided for preliminary injunctions. Id. at 230. The parties do not attempt to establish or distinguish similar facts here.

quo pending arbitration." Further, the Receiver points out that under FINRA Rule 13804, (1) parties can seek court-ordered temporary injunctive relief even where the case is subject to mandatory arbitration, and (2) if a court issues a temporary injunction in a dispute subject to arbitration, an arbitration panel will hold a hearing within 15 days to determine whether to continue the injunctive relief. The Receiver argues that if **[**15]** FINRA rules allow court-ordered injunctive relief when a party loses on the motion to compel arbitration, then he is entitled to such relief while the motion is still pending. Finally, the Receiver notes that a rule that would prohibit the district court from preserving the status quo when a motion to compel arbitration is filed would enable any party "to strip the trial court of its authority to enjoin the party's conduct simply by filing a motion to compel arbitration."

2. Analysis

In its order, the district court relied on its equitable powers to preserve the status quo, and expressly reserved the question of whether the Receiver's claims were subject to arbitration. In so doing, the district court noted that the cases in the circuit split did not specifically address the issue in this case: whether a court may preserve the status quo *pending its resolution of a motion to compel arbitration*, not pending the actual arbitration itself. We agree with the district court that it court can grant preliminary relief before deciding whether to compel arbitration.

The language of the FAA does not touch on the ancillary power of the federal court to act before it decides whether the dispute is **[**16]** arbitrable. The federal law of arbitration is governed by the FAA. 9 U.S.C. §§ 1-16. As the Employee Defendants note, the Supreme Court has consistently expressed a strong preference for arbitration. *See* Southland Corp. v. Keating, 465 U.S. 1, 10, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984) ("In enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration . . . ."). However, these sections do not provide guidance on the issue of whether a court may issue a preliminary injunction before deciding whether the dispute is arbitrable. Section 3 provides:

> If any suit or proceeding be brought in any of the courts of the United States **[*594]** upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, *upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement*, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (emphasis added). Similarly, § 4 provides:

> A party aggrieved by the **[**17]** alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and *upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue*, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4 (emphasis added). Section 3 only speaks to what the court should do once it is satisfied that the issue is referable to arbitration. Similarly, § 4 mandates that the

court must direct the parties to proceed to arbitration *only after it is satisfied* that there is no issue as to whether a party failed to comply with the arbitration agreement. Both of these sections speak only to situations after the court has decided arbitration must ensue.

Here, the district court has yet to make up its mind as to arbitrability. The district court relied on its equitable powers to preserve the status quo, but expressly reserved the issue of whether the Receiver's **[**18]** claims were subject to arbitration for resolution at a later date. Nothing in the FAA controls a district court's approach to its docket. While the Supreme Court has stated that "Congress'[s] clear intent, in the [FAA], [was] to move the parties to an *arbitrable* dispute out of court and into arbitration as quickly and easily as possible[,]" there is nothing to control the district court's expeditious determination of arbitrability. *Moses H. Cone Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 22, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)* (emphasis added).

The cases cited by the Employee Defendants also do not bar the exercise of the district court's equitable powers here. The *RGI* Court found that "[t]he crux of the problem [in the circuit split] is whether the commands of the [FAA] require that a federal court immediately divest itself of any power to act to maintain the status quo *once it decides that the case before it is arbitrable*." *RGI, 858 F.2d at 228-29* (emphasis added). Here, however, the district court has not yet decided whether the case is arbitrable and thus the circuit-split cases are not applicable. The Receiver's request for a preliminary injunction was entered before the motion to compel arbitration. We agree **[**19]** with the district court that if we were to reverse and hold that the district court must stop everything and consider the motion to compel arbitration, such a holding

> would create a harsh procedural rule: in order to avoid irreparable injury, motions to compel arbitration where a request for injunctive relief is involved must be resolved before any temporary restraining order expires. Such a rule would be both burdensome for district courts and impracticable, given the time it takes motions to compel arbitration to become ripe for ruling, even if no discovery is required.

[*595] *Janvey v. Alguire*, No. 3:09-CV-724-N, at 6 n.5 (N.D. Tex June 6, 2010) (order granting preliminary injunction).

Though the circuit-split cases do not apply here, the reasoning of those circuits holding that a court may issue an injunction pending arbitration applies here.[7] As explained by the First Circuit, "the congressional desire to enforce arbitration agreements would frequently be frustrated if the courts were precluded from issuing preliminary injunctive relief to preserve the status quo pending arbitration and, *ipso facto*, the meaningfulness of the arbitration process." *Teradyne v. Mostek Corp., 797 F.2d 43, 51 (1st Cir.1986)*. **[**20]** Here, the district court merely sought to preserve the status quo *before* deciding the motion to compel arbitration, and by doing so they sought to preserve the meaningfulness of any arbitration that might take place.

Even if applicable to the facts here, the Seventh Circuit case cited by the Employee Defendants would not bar the preliminary injunction issued by the district court. In *Salvano*, the Seventh Circuit held that the district court may issue injunctive relief only until the arbitration panel is able to address whether the equitable relief should remain in

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[7] Given that the facts at issue here do not require us to enter the circuit split, we reserve for another day the issues of whether a district court divests itself of the discretion to maintain the status quo once it decides the case before it is arbitrable and, if not, what the limits of that discretion may be.

effect. 999 F.2d at 215-16. In the instant case, the district court expressly stated that if it decides to compel arbitration, the defendants may ask the district court to reconsider the preliminary injunction in light of Fifth Circuit precedent and the terms of the contracts.

The matter of arbitrability has not yet been **[**21]** decided, and the district court did not overreach when it decided the preliminary injunction motion.

C. Decision to Grant Preliminary Injunction

The four elements a plaintiff must establish to secure a preliminary injunction are:

> (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.

Byrum, 566 F.3d at 445 (quotation marks omitted). The Receiver bore the burden of establishing each element. Bluefield Water Ass'n, Inc. v. City of Starkville, Miss., 577 F.3d 250, 253 (5th Cir. 2009). The district court analyzed each of the elements in its grant of the preliminary injunction to the Receiver. The Employee Defendants challenge all aspects of the district court's analysis. We disagree with the Employee Defendants that the district court abused its discretion in issuing the preliminary injunction. We address each element in turn, reviewing the district court's ultimate decision to grant the preliminary injunction **[**22]** and its findings of fact for abuse of discretion and its legal determinations de novo. Byrum, 566 F.3d at 445.

1. Likelihood of Success on the Merits

The district court did not err in finding that the Receiver carried his burden of proving likelihood of success on the merits. To satisfy the first element of likelihood of success on the merits, the Receiver's evidence in the preliminary injunction proceeding "is not required to prove **[*596]** [his] entitlement to summary judgment." Byrum, 566 F.3d at 446; *see also* CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, 11A FEDERAL PRACTICE & PROCEDURE § 2948.3 (2d ed. 1995) ("All courts agree that plaintiff must present a prima facie case but need not show that he is certain to win." (footnote omitted)). To assess the likelihood of success on the merits, we look to "standards provided by the substantive law." Roho, Inc. v. Marquis, 902 F.2d 356, 358 (5th Cir. 1990) (citation omitted). Here, the Receiver contends that there is liability under TUFTA. Under TUFTA, the trial court may find substantial likelihood of success on the merits when it is "presented with evidence of intent to defraud the creditor." *See* Tanguy v. Laux, 259 S.W.3d 851, 858 (Tex. App.—Houston [1st Dist.] 2008, no pet.) **[**23]** (citing Tel. Equip. Network, Inc. v. TA/Westchase Place, Ltd., 80 S.W.3d 601, 609 (Tex.App.—Houston [1st Dist.] 2002, no pet.)).

The Receiver and the Employee Defendants offer competing versions of what evidence is necessary to satisfy TUFTA's requirements. The Bennett Defendants contend that the Receiver failed to establish that Stanford operated as a Ponzi scheme.[8] The FA Defendants argue that because they received their compensation from SGC and not SIB, they did not receive compensation from the

[8] The Bennett Defendants do not tie this argument to any element of the preliminary injunction standard, instead lodging a general objection to the district court's determination that Stanford operated as a Ponzi scheme. Because the Ponzi scheme determination has the greatest impact on the likelihood of success element, we address the Bennett Defendants' argument in this section.

Ponzi scheme. The Employee Defendants contend that the district court erred by allowing the Receiver to group all the former employees of Stanford together rather than requiring the Receiver to prove that each individual Defendant received fraudulent transfers of money from the Stanford scheme. Finally, the Employee Defendants also contend that the Receiver failed to follow the heightened pleading requirements of *Federal Rule of Civil Procedure 9(b)*. The Receiver responds that (1) there is sufficient evidence to prove Stanford operated as a Ponzi scheme from the very beginning; (2) the Receiver has presented sufficient evidence to prove that each individual Defendant received transfers of **[**24]** money from the Stanford Ponzi scheme; and (3) this Court does not need to decide whether the Receiver's pleading satisfies the rules, and even if it did, *Rule 9(b)* does not apply to fraudulent transfer cases.

The district court agreed with the Receiver. It found that there was a Ponzi scheme and held that "'transfers made from a Ponzi scheme are presumptively made with intent to defraud, because a Ponzi scheme is, as a matter of law, insolvent from inception.'" *Janvey v. Alguire*, No. 3:09-CV-724-N, at 10 (N.D. Tex June 6, 2010) (order granting preliminary injunction) (quoting *Quilling v. Schonsky, 247 F. App'x 583, 586 (5th Cir. 2007)* (unpublished) (citing *Warfield v. Byron, 436 F.3d 551, 559 (5th Cir. 2006))*). Therefore, the district court found that the Receiver satisfied his obligation to show an actual intent **[**25]** to defraud under TUFTA. The district court further found that the Receiver presented sufficient evidence that the assets implicated by the injunction request "represented transfers of Stanford CD proceeds."

We address first whether the Receiver presented sufficient evidence that Stanford operated as a Ponzi scheme, then discuss whether the Receiver adequately established that the Employee Defendants received **[*597]** proceeds of a fraudulent transfer, and finally address whether this satisfies the requirements of this element.

a. Whether Stanford Operated as a Ponzi Scheme

The Bennett Defendants spend the bulk of their brief disputing whether Stanford operated as a Ponzi scheme *ab initio*. The FA Defendants separate SGC from SIB, and claim that the Receiver failed to establish that SGC, the entity that provided compensation to the FA Defendants, was a Ponzi scheme. In large part, the Receiver relies upon the guilty plea of James Davis (the "Davis Plea"), the former Chief Financial Officer of SIB, to demonstrate that the Stanford enterprise operated as a Ponzi scheme. The district court relied upon the Davis Plea in its order, along with the declarations of the Receiver's forensic accountant, Karyl **[**26]** Van Tassel, to find that a Ponzi scheme existed. We find that the district court did not err in finding that the Stanford enterprise operated as a Ponzi scheme.

A Ponzi scheme is a "fraudulent investment scheme in which money contributed by later investors generates artificially high dividends or returns for the original investors, whose example attracts even larger investments." BLACK'S LAW DICTIONARY 1198 (8th ed. 2004); *see also U.S. v. Setser, 568 F.3d 482, 486 (5th Cir. 2009)* ("[I]n a classic Ponzi scheme, as new investments [come] in . . . , some of the new money [is] used to pay earlier investors."). The Second Circuit also provides a good description of a Ponzi scheme:

> A [P]onzi scheme is a scheme whereby a corporation operates and continues to operate at a loss. The corporation gives the appearance of being profitable by obtaining new investors and using those

> investments to pay for the high premiums promised to earlier investors. The effect of such a scheme is to put the corporation farther and farther into debt by incurring more and more liability and to give the corporation the false appearance of profitability in order to obtain new investors.

Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1088 n.3 (2d Cir. 1995). **[**27]** This Circuit has found that a Ponzi scheme "is, as a matter of law, insolvent from its inception." *Warfield, 436 F.3d at 558* (citing *Cunningham v. Brown, 265 U.S. 1, 7-8, 44 S. Ct. 424, 68 L. Ed. 873 (1924)*).

The Davis Plea and the Van Tassel Declarations provide sufficient evidence to support a conclusion that there is a substantial likelihood of success on the merits that the Stanford enterprise operated as Ponzi scheme. In his plea, Davis, who is singularly positioned to provide insight into the workings of Stanford, admitted that the "continued routine false reporting . . . upon which CD investors routinely relied in making their investment decisions, in effect, created an ever-widening hole between reported assets and actual liabilities, causing the creation of a massive Ponzi scheme whereby CD redemptions ultimately could only be accomplished with new infusions of investor funds." This statement reflects a classic Ponzi scheme and directly contradicts the Bennett Defendants' assertion that the district court relied upon a novel definition of a Ponzi scheme in its order. The Van Tassel Declarations also provide clear, numerical support for the creative reverse engineering undertaken by Stanford executives to **[**28]** accomplish the Ponzi scheme:

> We found within SIB's accounting records worksheets used to derive fictitious SIB revenues back to 2004. The Ponzi scheme conspirators would simply determine what level of revenues SIB needed to report in order to both look good to investors and regulators and to purport **[*598]** to cover CD obligations and other expenses. They would then back into that total amount by assigning equally fictitious revenue amounts to each category (equity, fixed income, precious metals, alternative) of a fictitious investment allocation.

Van Tassel then goes on to specifically itemize how specific returns were based on fictitious asset totals.

The Bennett Defendants' argument that the Receiver failed to establish, and that the district court incorrectly assumed, that the Stanford entities constituted a Ponzi scheme *ab initio* is unavailing. The Davis Plea, when read as a whole, provides sufficient evidence for the district court to assume that the Stanford enterprise constituted a Ponzi scheme *ab initio*. In outlining the factual basis for the guilty plea, the Davis Plea describes how in 1988, Stanford directed Davis to "make false entries into the general ledger for the purpose of reporting **[**29]** false revenues and false investment portfolio balances to the banking regulators" shortly after opening Guardian International Bank, as SIB was then known, in Montserrat. The Plea further states that Stanford closed Guardian's operations in Montserrat in 1989 and moved the banking operations to Antigua under the name of SIB to avoid heightened scrutiny from bank regulators in Montserrat.

Finally, the FA Defendants' position that SGC should be separated from SIB is of no moment. As made clear by the Van Tassel Declarations, SGC received the bulk of its revenue from commissions for the sale of the SIB CDs and fees for other services it provided to SIB related to the CD investment portfolio. The Receiver seeks to recoup those proceeds because they were the assets of the alleged

Ponzi scheme. The district court did not err when it found, for the purposes of this preliminary injunction proceeding, that Stanford operated as a Ponzi scheme.

b. Whether the Receiver Offered Sufficient Proof of the Source of the Frozen Accounts.

The Employee Defendants also argue that the district court erred in grouping all the transactions rather than examining evidence of claims against individuals. Contrary **[**30]** to the Employee Defendants' assertion, the district court found that the Receiver came forward with "competent evidence that each individual [Employee Defendant] received transfers of money representing CD sale proceeds from the Stanford Ponzi scheme." We agree. The Receiver's evidence is a spreadsheet in the Van Tassel Declarations that lists each former employee, the form of compensation (loan, commission, or quarterly bonus), and the amount that Stanford paid each employee. The Van Tassel Declarations sufficiently establish that Stanford paid the Employee Defendants from the alleged Ponzi scheme for the purposes of the preliminary injunction proceeding.

c. Likelihood of Success on the Merits

The district court did not err in finding the Receiver carried his burden of proving a substantial likelihood of success on the merits for his TUFTA claim. TUFTA requires that the debtor *transferor* make the transfer "with actual intent to . . . defraud any creditor of the debtor." *Tex. Bus. & Com. Code Ann. § 24.005(a)(1)*. "In this circuit, proving that [a transferor] operated as a Ponzi scheme establishes the fraudulent intent behind the transfers it made." *SEC v. Res. Dev. Int'l, LLC, 487 F.3d 295, 301 (5th Cir. 2007)* **[**31]** (citing *Warfield, 436 F.3d at 558*). In other words, "'the transferees' knowing participation is irrelevant under the statute' for purposes **[*599]** of establishing the premise (as opposed to liability for) a fraudulent transfer." *Id*. (analyzing TUFTA) (quoting *Warfield, 436 F.3d at 559* (analyzing Washington state law)). The Receiver carried his burden of proving that he is likely to succeed in his prima facie case by providing sufficient evidence that a Ponzi scheme existed—thereby obviating the need to prove fraudulent intent of the *transferees*—and sufficient proof that each individual received transfers of money from the Ponzi scheme. The Defendants did not refute this by showing that they are likely to succeed in proving a TUFTA statutory affirmative defense. Consequently, the district court did not err in finding a substantial likelihood of success.

The parties dispute whether *Rule 9(b)* applies to this case and whether this affects the district court's finding of a substantial likelihood of success. The Employee Defendants argue that the Receiver was obligated to abide by *Rule 9(b)*'s heightened pleading standards for his fraud claims, and that he failed to meet this standard when he "lump[ed] **[**32]** together" the claims against all former Stanford employees. The Receiver asserts that *Rule 9(b)* does not apply to fraudulent transfer cases. We need not and do not address the issue of whether heightened pleading is required. As the district court noted in its Preliminary Injunction Order, it has not yet ruled on the defendants' pending motions to dismiss. The only question that the district court had to decide on this element in the preliminary injunction proceeding was whether the Receiver had shown a substantial likelihood of *ultimately* succeeding on the merits, *see* *Doe v. Marshall, 622 F.2d 118, 119 n.2 (5th Cir. 1980)*, potential procedural hurdles notwithstanding. The Receiver carried this burden.

2. Threat of Irreparable Harm

The Employee Defendants argue that the Receiver did not carry his burden of proving the second element of the preliminary injunction standard: threat of irreparable harm. The Employee Defendants argue that because the Receiver merely seeks a return of the fraudulently transferred CD proceeds, there is no threat of irreparable harm. The Employee Defendants contend that difficulty securing economic damages is insufficient to demonstrate irreparable harm. The **[**33]** Employee Defendants further argue that the Receiver was required to establish a likelihood that each individual defendant would remove or dissipate the frozen assets but for a preliminary injunction. The Receiver replies that TUFTA itself creates a presumption of dissipation. The Receiver then argues that its inability to collect a money judgment should the Employee Defendants dissipate the frozen accounts is sufficient to show a threat of irreparable harm. Finally, the Receiver agrees with the district court that he is not required to make an individualized showing of likely dissipation.

The district court found that "dissipation of the assets that are the subject of this suit . . . would impair the Court's ability to grant an effective remedy," particularly because much of the relief the Receiver seeks under TUFTA is "equitable in nature and involves the assets that are . . . frozen." The district court further held that the Receiver need not show that each individual defendant would dissipate the frozen assets absent an injunction. The court reasoned that the Receiver was entitled to a presumption that the Employee Defendants would dissipate the frozen assets absent a preliminary **[**34]** injunction because the assets were fraudulently transferred as part of a Ponzi scheme. We find **[*600]** that the Receiver carried his burden of proving this element.

To satisfy the second element of the preliminary injunction standard, the Receiver must demonstrate that if the district court denied the grant of a preliminary injunction, irreparable harm would result. *Holland Am. Ins. Co. v. Succession of Roy, 777 F.2d 992, 997 (5th Cir. 1985)*.[9] In general, a harm is irreparable where there is no adequate remedy at law, such as monetary damages. *Deerfield Med. Ctr. v. City of Deerfield Beach, 661 F.2d 328, 338 (5th Cir. Unit B 1981)*; *Parks v. Dunlop, 517 F.2d 785, 787 (5th Cir. 1975)*. However, the mere fact that economic damages may be available does not always mean that a remedy at law is "adequate." For example, some courts have found that a remedy at law is inadequate if legal redress may be obtained only by pursuing a multiplicity of actions. *See, e.g., Lee v. Bickell, 292 U.S. 415, 421, 54 S. Ct. 727, 78 L. Ed. 1337 (1934)* ("we are not in doubt, the multiplicity of actions necessary for redress at law [is] sufficient . . . to uphold the remedy by injunction"). We have previously stated that where a district court has **[**35]** determined that a meaningful decision on the merits would be impossible without an injunction, the district court may maintain the status quo and issue a preliminary injunction to protect a remedy, including a damages remedy, when the freezing of the assets is limited to the property in dispute or its direct, traceable proceeds. *See Productos Carnic, S.A. v. Cent. Amer.*

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[9] The Receiver argues that TUFTA effectively creates a statutory presumption of irreparable harm. We disagree. TUFTA specifically provides that the claimant may obtain "an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred." *Tex. Bus. & Com. Code § 24.008(a)(3)(A)*. However, the statute explicitly states that this remedy is "subject to applicable principles of equity and in accordance with applicable rules **[**36]** of civil procedure." *Id*. Clearly, TUFTA contemplates the application of equitable standards, encompassing the usual elements necessary to obtain a preliminary injunction.

Beef & Seafood Trading Co., 621 F.2d 683, 686-87 (5th Cir. 1980) ("[E]ven were [plaintiff's] remedy limited to damages, an injunction may issue to protect that remedy."). Finally, a showing of "[s]peculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant." *Id*. (citing *Carter v. Heard, 593 F.2d 10, 12 (5th Cir.1979))*.

We agree with the district court that the Receiver carried his burden of proving this element. First, we agree with the district court that the "Receiver successfully show[ed] that the threatened harm—dissipation of the assets that are the subject of this suit—would impair the [district court's] ability to grant an effective remedy." The relief that the Receiver ultimately seeks is equitable in nature; the Receiver seeks "avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim." *Tex. Bus. & Com. Code § 24.008(a)(1)*. In his complaint, the Receiver asks the court for an order (1) establishing that the CD proceeds received by the Employee Defendants are property of the Receivership Estate held pursuant to a constructive trust for the benefit of the creditors, and (2) allowing him to withdraw proceeds from the segregated escrow account and add them to the Receivership Estate. He does not seek damages for breach of contract or tort. If the defendants were to dissipate or transfer **[**37]** these assets out of the jurisdiction, the district court would not be able to grant the effective remedy, either in equity or in law, that the Receiver seeks. The assets that the Receiver requests stay frozen are assets that are directly traceable to the **[*601]** Stanford Ponzi scheme and are the subject of this dispute. The Receiver merely asks that those assets continue to be held immovable while his case proceeds to judgment. We do not find that the district court erred in determining that a preliminary injunction was appropriate to protect against monetary asset dissipation.

The party seeking a preliminary injunction must also show that the threatened harm is more than mere speculation. *Succession of Roy, 777 F.2d at 997*. Here, the Receiver provided evidence of a massive Ponzi scheme and proof that each individual received proceeds from the fraudulent scheme. This is sufficient to prove the likelihood of each individual removing or dissipating the frozen assets but for the preliminary injunction. Accordingly, we find that the district court did not err in finding that irreparable harm would result in the absence of a preliminary injunction.

3. [**38] Balance of Harms and Service of the Public Interest

On these elements, the district court weighed the interests of the Employee Defendants against the interests represented by the Receiver (*i.e*., the interests of the creditors) and looked to the broader ramifications of any potential recovery by the Receiver. The district court noted the extremely limited array of assets remaining to provide compensation to Stanford Ponzi scheme victims. The record supports the fact that Stanford, when it entered receivership, was grossly undercapitalized. Additionally, the Receiver and the Employee Defendants reached consent agreements to thaw all but certain discrete categories of compensation. These last elements of the district court's preliminary injunction analysis implicate the discretion of that court to craft a remedy and weigh the evidence. We do not believe that the district court abused its discretion when it found that these elements weighed in favor of the Receiver.

D. Scope of District Court's Grant of Preliminary Injunction

The Employee Defendants also challenge the breadth of the injunction. On appeal, the

Employee Defendants renew a number of arguments that they brought before the district **[**39]** court. First, the Employee Defendants contend that any frozen IRA account is exempt from the Receiver's claim. Second, the FA Defendants argue that the account freeze improperly extends to pre-tax amounts because they already paid taxes on those earnings. Third, the FA Defendants argue that they are entitled to an offset of amounts they lost on their personal investments in Stanford CDs. We address each of the Employee Defendants' arguments in turn.

1. Frozen IRA Accounts

According to Texas law, IRA accounts are exempt from seizure. *Tex. Prop. Code § 42.0021(a)*. However, the party claiming the exemption must establish that she has a legal right to the funds in the IRA to be entitled to the exemption. *Jones v. Am. Airlines, Inc., 131 S.W.3d 261, 270 (Tex. App.—Fort Worth 2004, no pet.)*. It is undisputed that some of the frozen accounts are IRA accounts. The Employee Defendants had the burden of proving that they have a right to the funds in the accounts, particularly in light of the Receiver's extensive evidence that the Employee Defendants received these funds as a fraudulent transfer from the Stanford Ponzi scheme. The mere fact that an account is an IRA account does not automatically **[**40]** entitle the Employee Defendants to the exemption; it does not relieve the Employee Defendants of carrying the burden of proving they have a legal right to the **[*602]** account. Consequently, the district court did not err when it kept the IRA accounts frozen under the preliminary injunction.

2. Tax Matters

The FA Defendants argue that the Receiver improperly calculated the amounts represented by the account freeze because the Receiver did not account for taxes paid by the Employee Defendants on the compensation. The district court rejected this argument, relying heavily on *Donell v. Kowell*, in which the Ninth Circuit declined to offset for taxes paid. *533 F.3d 762, 779 (9th Cir. 2008)*. The Ninth Circuit first reasoned that if it allowed offsets for amounts paid in good faith as taxes, logic would suggest that the court also permits offsets for bank transfer fees, other fund management fees, and a myriad of other expenses. The court went on to state, "There is simply no principle by which to limit such offsets . . . . If each net winner could shield his gains in their entirety in this manner, the purpose of UFTA would be defeated, and the multitude of victims who lost their entire investment would **[**41]** receive no recovery." *Id. at 779*. Second, the court found that allowing offsets in even a few areas like taxes paid would "introduce complex problems of proof and tracing into each case," thereby "severely reduc[ing] the receiver's ability to gather what few assets can be located in the wake of a failed Ponzi scheme." *Id*.

Although, as the FA Defendants note, the *Donell* case involved taxes paid by an investor after receiving fraudulent funds, *id. at 778*, we find the *Donell* reasoning persuasive, particularly because there is no basis for this offset in TUFTA. We do not find the district court erred in declining to offset the prepaid tax amounts with respect to the preliminary injunction.

3. Losses on Personal Investments

The **[**42]** FA Defendants also argue that the Receiver's figures do not account for the Defendants' losses on their own investments in Stanford CDs. The defendants have not offered any case law or statutory language on point, nor did we find any authority entitling the

Employee Defendants to offsets for their personal losses on Stanford investments. We agree with the district court that the Defendants must seek these amounts through the Receiver's claims process like other creditors.

E. Type of Equitable Relief Granted

The Employee Defendants also renew their contention that the Receiver obtained, in essence, a writ of attachment, arguing that the "substance" of the Receiver's suit was a request to hold assets "in order to satisfy a money judgment." While the Receiver also requested an attachment, the district court did not consider this request and expressly granted an injunction. In doing so, the district court differentiated between a TUFTA injunction and a writ of attachment.

As the district court noted, TUFTA provides for both injunctions and attachments. *See* Tex. Bus. & Com. Code § 24.008(a)(2) (attachment); *id*. § 24.008(a)(3)(A) (injunction). The district court relied upon *Telephone Equipment* ***[**43]*** *Network, Inc. v. TA/Westchase Place, Ltd*. for the proposition that a claim for fraudulent transfer under Texas law contemplates the issuance of a preliminary injunction. 80 S.W.3d at 610.[10] The district court's reliance was well placed. TUFTA provides that the **[*603]** claimant "may obtain an injunction against further disposition of 'the asset transferred or of other property.'" *Id*. (quoting Tex. Bus. & Com. Code Ann. § 24.008(a)(3)). Furthermore, the district court's order granting the preliminary injunction lacks the hallmarks of an attachment: namely, a "seizure" or "lien."

The Receiver claims that Stanford fraudulently transferred proceeds from the alleged Ponzi scheme to the Employee Defendants and sought an injunction to prevent the dissipation of those proceeds, now held in the frozen accounts. TUFTA expressly provides for an injunction **[**44]** and the district court exercised its discretion to grant that injunction.

F. Motion to Compel Arbitration

The parties also dispute whether the Receiver's claims against the Employee Defendants are subject to arbitration. The district court did not decide the motion to compel arbitration. Both parties ask this Court to decide the motion in the first instance. "We have appellate jurisdiction where an order is final, [the order] falls within a specific class of interlocutory orders made appealable by statute, or the issue falls within some jurisprudential exception." *Silver Star Enters., Inc. v. M/V Saramacca, 19 F.3d 1008, 1013 (5th Cir. 1994)*. As there was no final or interlocutory order, and we could find no jurisprudential exception, we do not have jurisdiction to decide the motion to compel arbitration. WRIGHT, MILLER & COOPER, FED. PRACTICE & PROCEDURE: JURISDICTION 2D § 3291.1 (2011) ("Ordinarily the scope of appellate review under § 1292(a)(1) is confined to the issues necessary to determine the propriety of the interlocutory order itself. The curtailed nature of most preliminary injunction proceedings means that the broad issues of the action are not apt to be ripe for review, most **[**45]** obviously as to issues that have not yet been decided by the trial court . . . ."); *see also* Equal Emp't Opportunity Comm'n v. Recruit U.S.A., Inc., 939 F.2d 746, 757 (9th Cir. 1991) (declining to rule on sanctions motion on an interlocutory appeal of a preliminary injunction where the district court

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[10] Although the *Telephone Equipment* court used the acronym "UFTA," it is apparent that the court cited to and analyzed provisions of TUFTA. *Id. at 607* ("UFTA lists 11, non-exhaustive 'badges of fraud' to assist in determining whether the debtor made the transfer with the requisite fraudulent intent.") (citing Tex. Bus. & Com. Code Ann. § 24.005(a)(1)).

had yet to rule on the sanctions motion).

There is no final order here. There is no ruling on the motion to compel arbitration. Further, even if there were a ruling on the motion to compel arbitration, such a ruling is not a final judgment ending litigation on the merits and leaving nothing for the court to do but execute judgment. *Silver Star Enters., 19 F.3d at 1013*. Thus, even if the district court had ruled on the motion and issued an order, it would not be a final order.

Because there is no order, there is also no statutory basis for interlocutory appellate review. Section 1292(a) provides appellate jurisdiction for the appeal of the grant of the preliminary injunction, but it does not provide appellate jurisdiction for the motion to compel arbitration. *See* 28 U.S.C. § 1292. Section 16 of the FAA also does not give this Court appellate jurisdiction to rule on the motion to compel arbitration. **[**46]** 9 U.S.C. § 16. Section 16 describes when a party may appeal an arbitrability determination. Here, the district court did not decide or issue an order on the motion to compel arbitration. Consequently, it does not fall under any of the enumerated § 16 situations in which an immediate appeal of an arbitrability determination is allowed. There is no *order* denying a petition under section 4 of FAA to order arbitration to proceed, nor is there a *final decision* with respect to an arbitration. *See* 9 U.S.C. § 16(a)(1), (3) (stating when an appeal may be taken from an arbitrability determination).

Finally, we cannot find any case that sets forth a jurisprudential exception with **[*604]** facts similar to the instant case that would allow us to exercise appellate jurisdiction.[11] There is language, however, in *In re Lease Oil Antitrust Litigation* (*No. II*), that potentially could be applicable here. 200 F.3d 317 (5th Cir. 2000). In that case, we stated that it was permissible to decide "certain related issues that have been sufficiently developed so as not to require further development at the trial court level." *Id. at 319-20*. In that case, we considered an interlocutory appeal of a preliminary injunction **[**47]** prohibiting the defendant from settling federal claims in other cases without the court's approval. *Id. at 319*. In the same interlocutory appeal, we also considered the district court's denial of the defendant's motion to dismiss, which had been pending at the time of the district court's preliminary injunction decision. *Id. at 319-20*.

The instant case, however, is distinguishable from *In re Lease Oil*. First, by the time we considered the appeal in *In re Lease Oil*, the lower court had already come to a decision on the motion to dismiss. Here, the district **[**48]** court has not decided the motion to compel arbitration. If we decided the motion to compel arbitration, we would not be acting as an appellate court, but as a trial court.

Second, in *In re Lease Oil*, we reviewed the nonappealable order because the defendant only became a party to the preliminary injunction because its motion to dismiss was denied. 200 F.3d at 319 ("The court subsequently denied the motion, thereby including Mobil in the injunction.") Thus, the two issues were so entangled that they both merited decision on interlocutory appeal. *See Byrum, 566 F.3d at 449* (holding that this Court may only exercise pendent appellate jurisdiction in "rare and exceptional

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[11] The 76 FA Defendants cite *Moses H. Cone Memorial Hospital v. Mercury Construction Corp*. for the proposition that the Supreme Court had expressly approved an appellate court *sua sponte* determination that the underlying dispute is arbitrable. (76 FA Defendant Br. at 35 (citing Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)).) *Moses H. Cone*, however, was decided before Section 16 of the FAA was enacted in 1988. Section 16 delineates when the courts of appeals may review arbitrability determinations. 9 U.S.C. § 16. As we note above, the current procedural posture does not fall under any of the enumerated § 16 situations.

circumstances" where "an appellate order is inextricably intertwined with an unappealable order or where review of the unappealable order is necessary to ensure meaningful review of the appealable order" (internal quotation marks and citation omitted)).

Here, even if the district court had subsequently decided the motion to compel arbitration in the Employee Defendants' favor, the Employee Defendants would still be subject to the preliminary injunction until the district court or the arbitration panel reconsidered the preliminary **[**49]** injunction. Meaningful review of the main issues on appeal—the district court's power to issue a preliminary injunction and whether the district court abused its discretion in granting the preliminary injunction—are not dependent upon the outcome of the motion to compel arbitration or vice versa. Thus, the motion to compel arbitration is not inextricably intertwined with the preliminary injunction. We do not find that this issue falls within a jurisprudential exception, and we refuse to carve out a new exception here.

Because we do not have appellate jurisdiction under any of the criteria set forth in *Silver Star Enterprises*, we remand this issue back to the district court for a ruling in the first instance.

[*605] CONCLUSION

The Receiver is in an unenviable position: although the Stanford estate has many thousands of claimants, there are startlingly few assets to disperse to the Stanford victims. In this appeal concerning the Receiver's attempt to marshal estate assets, we hold: (1) The district court acted within its power when it considered and decided the motion for preliminary injunction before deciding the outstanding motion to compel arbitration; (2) The district court did not abuse its **[**50]** discretion in issuing the preliminary injunction; and (3) The preliminary injunction was not an attachment, nor was it overly broad. We remand the motion to compel arbitration for a ruling in the first instance.

AFFIRMED and REMANDED.

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