No. 13-______

IN THE

Supreme Court of the United States

RALPH S. JANVEY,

Petitioner,

v.

JAMES R. ALGUIRE, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

KEVIN M. SADLER
Counsel of Record
BAKER BOTTS L.L.P.
1001 Page Mill Road
Building One, Suite 200
Palo Alto, California 94304
(650) 739-7518
kevin.sadler@bakerbotts.com

SCOTT D. POWERS
DAVID T. ARLINGTON
EVAN A. YOUNG
STEPHANIE F. CAGNIART
BAKER BOTTS L.L.P.
98 San Jacinto Blvd.
Suite 1500
Austin, Texas 78701
(512) 322-2500

Counsel for Petitioner Ralph S. Janvey

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

In *McCandless* v. *Furlaud*, 296 U.S. 140, 159 (1935), this Court held that a federal equity receiver can function "as the representative of creditors" generally (as opposed to representing a particular individual or group of creditors) and has standing to sue "in their behalf * * * ." The judgment below, by contrast, holds that receivers never have standing to sue on behalf of creditors, but are limited "to assert[ing] claims of the entities in receivership * * * ." App., *infra*, 5a. Cases from the courts of appeals vary greatly on this issue.

The question presented is whether a federal equity receiver has standing to assert claims on behalf of the receivership's creditors generally.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Ralph S. Janvey was the plaintiff in the U.S. District Court for the Northern District of Texas and the appellee in the U.S. Court of Appeals for the Fifth Circuit.

Respondents were the defendants in the district court and the appellants in the court of appeals. They are:

1. Jim Alguire
2. Orlando Amaya
3. Victoria Anctil
4. Tiffany Angelle (Degeyter)
5. Sylvia Aquino
6. George Arnold
7. Mike Arthur
8. Donal Bahrenburg
9. Brown Baine
10. Stephen Barber
11. John Barrack
12. Andrea Berger (Freedman)
13. Norman Blake
14. Michael Bober
15. Nigel Bowman
16. Julian "Brad" Bradham
17. Alexandre Braune
18. Alan Brookshire
19. Nancy Brownlee
20. George Cairnes
21. Frank Carpin
22. Scott Chaisson
23. James C. Chandley
24. Neal Clement
25. Jay Comeaux
26. Michael Conrad
27. John Cravens
28. Patrick Cruickshank
29. Greg Day
30. Bill Decker
31. Mike DeGolier
32. Arturo Diaz
33. Matt Drews
34. Tom Espy
35. Jason Fair
36. Nolan Farhy
37. Evan Farrell
38. Bianca Fernandez
39. Roger Fuller
40. Attlee Gaal
41. David Braxton Gay
42. Gregg Gelber
43. Gregory C. Gibson
44. Michael Gifford

45. Steven Glasgow
46. John Glennon
47. Susan Glynn
48. Ward Good
49. John Grear
50. Stephen Greenhaw
51. Billy Ray Gross
52. Virgil Harris
53. Patricia Herr
54. John Mark Holliday
55. Nancy Huggins
56. Charles Hughes
57. Wiley Carter Hutchins, Jr
58. David Innes
59. Allen Johnson
60. Bruce Lang
61. Jim LeBaron
62. Bill Leighton
63. Robert (Bobby) Lenoir
64. Jason Likens
65. Trevor Ling
66. Chris Long
67. Robert Long
68. Humberto Lopez
69. Michael Macdonald
70. Maria Manerba
71. Mike Mansur
72. Bert "Deems" May
73. Doug McDaniel
74. Matt McDaniel
75. Pamela McGowan
76. Lawrence Messina
77. Bill Metzinger
78. Trent Miller
79. Peter Montalbano
80. David Morgan
81. Jonathan Mote
82. Carroll Mullis
83. Jon Nee
84. Aaron Nelson
85. Norbert Nieuw
86. Scott Notowich
87. Monica Novitsky
88. Kale Olson
89. Bill Peerman
90. Saraminta Perez
91. Randy Pickett
92. Edward Prieto
93. Christopher Prindle
94. Andrew Pritsios
95. Judith Quinones
96. Sumeet Rai
97. Michael Ralby
98. Nelson Ramirez
99. Steven Restifo
100. Jeff Ricks
101. Alan Riffle
102. Steve Robinson

103. Timothy D. Rogers
104. Eddie Rollins
105. Rosana "Rocky" Roys
106. John Santi
107. Lou Schaufele
108. Bill Scott
109. Haygood Seawell
110. Leonard Seawell IV
111. Doug Shaw
112. Nick Sherrod
113. Steve Slewitzke
114. Paul Stanley
115. Sandy Steinberg
116. David Heath Stephens
117. William O. Stone, Jr.
118. Paula Sutton
119. Brent Sutton
120. Scot Thigpen
121. Jose Torres
122. Al Trullenque
123. Audrey Truman
124. Roberto Ulloa
125. Eric Urena
126. Tim Vanderver
127. Pete Vargas
128. Ed Ventrice
129. Maria Villanueva
130. Charles Vollmer
131. Bill Whitaker
132. Donald Whitley
133. Hunter Widener
134. John Whitfield Wilks
135. Tom Woolsey

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ralph S. Janvey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-6a) was not designated for publication, and is available at 2013 WL 4647293. The district court's opinion (App., *infra*, 7a-16a) was unreported. The two previous opinions of the court of appeals (*id.* at 17a-84a) are reported at 647 F.3d 585 and 628 F.3d 164. The district court's initial opinion (App., *infra*, 85a-116a) was unreported but is available at 2011 WL 10893950.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was filed on August 30, 2013. The court denied rehearing *en banc* on October 24, 2013. App., *infra*, 117a-118a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PRELIMINARY STATEMENT

Petitioner is the receiver appointed to unwind the Stanford Ponzi scheme, a global $7 billion fraud that resulted in thousands more victims than even the infamous Madoff Ponzi scheme. One of the Stanford Receiver's core duties under his order of appointment is to reclaim assets that were fraudulently transferred from the Stanford Estate to third parties, so that these assets can be distributed to the victims. To date, the Receiver has asserted claims against more than 1,800 defendants for an aggregate of over $1 billion. This litigation is the largest single source of potential recovery for the victims.

The Stanford Receiver's efforts, however, have been bedeviled by a simple question: Does a federal equity receiver have standing to assert claims on behalf of the receivership's creditors? Contrary to this Court's decision in *McCandless* v. *Furlaud*, 296 U.S. 140 (1935), the Fifth Circuit has answered "no," holding that a receiver may only stand in the shoes of the receivership entities. See App., *infra*, 4a-5a. This holding will significantly impede the Receiver's ability to effectively marshal the receivership's assets for the benefit of the thousands of creditors he represents. Other receivers face similar problems, and courts across the country have demonstrated intractable confusion about this issue.

This confusion and misunderstanding of this Court's precedent has also occurred in the related bankruptcy context. Thus, now pending before the Court are petitions from both the Stanford Receiver and the Madoff Trustee, the individuals charged with unwinding the two largest Ponzi schemes in history. Both raise the common issue of their standing to pursue claims on behalf of creditors at large. See Pet. in *Picard* v. *JPMorgan Chase &*

Co., No. 13-448, at ii, 32-36. The Court has already recognized the importance of the issue by calling for the views of the Solicitor General in *Picard*. Only this Court's resolution of the dispute will end it, and allow receivers and bankruptcy trustees to effectively pursue their mission of restoring assets to creditors.

The question presented is of exceptional importance to the Receiver's ongoing work, and to other receivers and trustees throughout the country. The judgment below has effectively overruled this Court's decision in *McCandless*. Left undisturbed, that judgment would present grave consequences. If the Receiver cannot pursue claims on behalf of the creditors at large, then he will be forced to litigate claims in piecemeal fashion, subject to defenses and arguments by defendants that would not apply in suits on behalf of the creditors, and may be unable to litigate other claims at all. Hundreds of defendants, in fact, have challenged the Receiver's standing to assert claims against them or have raised defensive issues to which the Receiver's standing is relevant. Such uncertainty will unjustly delay the Stanford Receivership's resolution and will divert scarce resources from Stanford's victims. The Court should grant the petition and reverse the judgment below.

STATEMENT

I. BACKGROUND

A. The Stanford Ponzi scheme

This case arises out of the most complex Ponzi scheme in history, and one with which this Court is already familiar.[1] The global fraud was perpetrated by R. Allen Stanford, his co-conspirators, and the Stanford Financial

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[1] The background of this case is discussed in the briefing in *Chadbourne & Parke LLP* v. *Troice*, No. 12-79, and related cases (Nos. 12-86 and 12-88), which were argued on October 7, 2013.

Group that comprised approximately 130 entities incorporated in 14 countries (the "Entities"). App., *infra*, 52a. Over the course of almost two decades, the Stanford Ponzi scheme defrauded over 18,000 investors out of billions of dollars. See *SEC* v. *Stanford Int'l Bank Ltd.*, Case No. 3:09-CV-0298-N, Doc. 1951 at 8 (N.D. Tex.).

The Ponzi scheme was based on the sale of fraudulent certificates of deposit issued by the Stanford International Bank. Investors purchased the CDs and deposited their money with the Bank because they believed "the CDs were backed by safe, liquid investments." App., *infra*, 52a. In fact, those deposits were used to pay off other investors. *Id.* at 86a. Because the Stanford International Bank did not have sufficient assets to cover its expenses, it relied on sales of new CDs to innocent investors by Stanford employees to grow the Ponzi scheme, thereby maintaining the illusion that the Stanford Entities together formed a successful and legitimate financial services company. *Ibid.*

Instead of being used for lawful purposes, investors' funds financed Allen Stanford's opulent lifestyle and enabled his highly speculative and illiquid investments. Beyond functioning as a revenue stream that Stanford directed to his own use, the CD proceeds also supported extravagant salaries, bonuses, and above-market commissions to compensate and incentivize the Stanford employees who convinced investors to buy the CDs in the first place. App., *infra*, 86a.

B. The SEC's suit and the appointment of the Receiver

On February 17, 2009, the SEC filed a lawsuit against Allen Stanford, James M. Davis, Laura Pendergest-Holt, and various corporate entities that were owned, either directly or indirectly, by Allen Stanford, and used to perpetuate the Ponzi scheme. *Stanford Int'l Bank Ltd.*, Case No. 3:09-CV-0298-N. In an order filed on the same day, and at the SEC's request, the district court appointed Ralph S. Janvey as Receiver for the Stanford Receivership Estate. App., *infra*, 87a. The Receivership Order gave the Receiver "the full power of an equity receiver under common law." *Ibid.* The Order also authorized the Receiver to "[i]nstitute such actions or proceedings" to recover Stanford assets held by third parties, and to preserve those assets so that a "maximum * * * disbursement" can be made to compensate Stanford's creditors. *Stanford Int'l Bank*, Case No. 3:09-CV-0298-N, Doc. 1130 at 5.

When the Receiver took control of the Entities, the total book value of outstanding CDs was approximately $7.2 billion, but the Entities' combined assets were valued at less than $1 billion. App., *infra*, 86a. The missing funds had been, for years, systematically and fraudulently transferred by Stanford to third parties, including, the Receiver contends, respondents here. See *id.* at 8a-9a. To recover those assets, the Receiver has filed fraudulent-transfer claims against more than 1,800 defendants. See *Stanford Int'l Bank*, No. 3:09-CV-0298-N, Docs. 1850, 1890. This litigation is the largest source of potential recovery for the victims, who have filed over 18,000 CD claims with the Receivership representing approximately $5 billion in losses. *Id.*, Doc. 1766-1 at 6.

II. PROCEEDINGS BELOW

A. The district court's injunction

As part of his efforts to recover the Stanford assets, the Receiver asserted fraudulent-transfer claims against more than 300 Stanford employees ("Employees"). These Employees received fraudulent transfers from the Stanford Ponzi scheme, including compensation for their efforts in selling the scheme's fraudulent CDs, large upfront forgivable loans, and proceeds from their own investments with the Stanford International Bank. App., *infra*, 95a-96a. The Receiver determined that a substantial majority of the payments made to the Employees came directly from the proceeds of fraudulent CD sales to investors, and that the Employees collectively received "a minimum of approximately $215 million in CD proceeds." App., *infra*, 9a. In connection with his fraudulent-transfer claims, the Receiver requested a preliminary injunction freezing certain accounts, and the Employees moved to compel arbitration. The district court granted the injunction but did not rule on the motions to compel. *Id.* at 89a-91a, 106a.

B. The court of appeals' conflicting initial opinions

On interlocutory appeal, the Receiver and the Employees asked the Fifth Circuit to decide both the standing dispute and the merits of the Employees' motions to compel arbitration, because the issue had been fully briefed and both sides agreed it was in their best interests to have the issue resolved expeditiously. App., *infra*, 78a. Concluding that the Receiver had standing to assert fraudulent-transfer claims on behalf of the creditors, who were not party to the alleged arbitration agreements between Stanford and the Employees, the Fifth Circuit held that the Receiver was not bound to arbitrate. The court of appeals affirmed the injunction and denied the Employees' motions to compel arbitration. *Id.* at 84a.

The first step of the "arbitrability assessment," the panel explained, required it to answer "a simple question: in what capacity is the Receiver suing the Employee Defendants?" App., *infra*, 79a. The Employees contended that the Receiver stood in the shoes of the Entities. *Id.* at 80a. The court disagreed. "[R]eceivers have long held the power of assert creditor claims," it explained, and in bringing fraudulent-transfer claims against the Employees, "the Receiver [was] acting *on behalf of creditors*."

Id. at 82a, 84a (emphasis added). Because the alleged arbitration agreements were between the Employees and the Entities, and not between the Employees and the creditors, the court held that they were not binding on the Receiver. *Id.* at 84a. For convenience, this decision is referred to as "*Alguire I*."

Seven months later, the same panel withdrew its opinion and substituted a new opinion, which changed only as to the arbitrability question. App., *infra*, 17a-49a (*Alguire II)*. The panel's new conclusion was that it altogether lacked jurisdiction to rule on the motions to compel arbitration because the district court had not yet decided the matter. *Id.* at 46a-49a. The court of appeals replaced its previous analysis with its new jurisdictional conclusion, and remanded the case for the district court to decide the arbitrability question. *Id.* at 49a. The court did not express any substantive reservations about its previous rationale, and indeed reiterated that the Receiver represented the interests of the creditors. See *id.* at 42a.

C. The district court holds that the Receiver can assert claims on behalf of creditors

On remand, the district court noted that the court of appeals "ha[d] withdrawn the portion of its opinion dealing with arbitration," but the district court "nonetheless finds [the withdrawn portion's] logic and reasoning convincing. Accordingly, the Court adopts that reasoning," and on that basis denied the motions to compel arbitration. App., *infra*, 8a, 15a-16a. The Employees again appealed to the Fifth Circuit.

D. The Fifth Circuit reverses, holding that receivers lack standing to assert creditors' claims

1. Before the court of appeals issued its third decision in this case, another panel of the Fifth Circuit issued two other opinions addressing a receiver's standing that

ultimately governed the outcome of this appeal. In another Stanford Receivership case, styled *Janvey* v. *Democratic Senatorial Campaign Committee, Inc.*, the Receiver challenged fraudulent transfers made by the Ponzi scheme to several political committees. 699 F.3d 848 (5th Cir. 2012) (*DSCC I*). The court explained that *Alguire II* had not overruled or disapproved of *Alguire I*, and it therefore followed the reasoning of *Alguire I* to find, this time with jurisdiction, that the receiver "represent[ed] the creditors in the [fraudulent-transfer] context." *Id.* at 853 & n.4. Based on *Alguire I*, preexisting Fifth Circuit precedent, and authorities from other circuits, the court of appeals again "conclude[d] that the Receiver represents the creditors, via the Stanford corporations, in pursuing the [fraudulent-transfer] claims." *Id.* at 853. It affirmed the district court's judgment in favor of the Receiver, which the political committees paid shortly thereafter.

Five months later, however, the same panel *sua sponte* withdrew its opinion and substituted another one that was based on fundamentally different reasoning. See *Janvey* v. *Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 188 (5th Cir. 2013) (*DSCC II*). Relying principally on a Seventh Circuit case, and without discussion of any Fifth Circuit or Supreme Court authority, the panel held in *DSCC II* that "a federal equity receiver has standing to assert only the claims of the entities in receivership." *Id.* at 190. Because the court concluded that the Receiver nonetheless *could* bring fraudulent-transfer claims against the political committees on behalf of the Entities, this new theory of standing did not affect the outcome of the appeal. *Id.* at 192. Moreover, with the judgment already having been satisfied, no party sought rehearing.

2. Five and a half months after *DSCC II*, the Fifth Circuit, for the third time, decided the present case. See

App., *infra*, 1a-6a (*Alguire III*). Instead of following the prior panels' reasoning, the panel determined that *DSCC II* was governing circuit law and applied it. Because *DSCC II* concluded that the Receiver never has standing to represent creditors (other than the entities themselves), even when asserting fraudulent-transfer claims, the court of appeals reversed the district court's denial of the motions to compel arbitration. *Id.* at 5a-6a. It remanded the case to the district court to reconsider the motions to compel arbitration in light of this new standing analysis, yet again delaying resolution of a group of multi-million dollar claims that represent one of the most significant sources of potential recovery for the defrauded Stanford creditors. *Id.* at 6a.

The Receiver sought rehearing *en banc*, arguing that the court erred under controlling Supreme Court and Fifth Circuit precedent by holding that a federal equity receiver can never stand in the shoes of the receivership's creditors. The court denied rehearing. App., *infra*, 118a.

REASONS FOR GRANTING THE PETITION

THE COURT SHOULD GRANT REVIEW TO RESTORE CLARITY AS TO WHEN RECEIVERS HAVE STANDING TO BRING CLAIMS ON BEHALF OF CREDITORS

This Court's only clear statement about the standing of federal equity receivers to assert claims on behalf of the receivership's creditors unambiguously affirmed such standing. See *McCandless* v. *Furlaud*, 296 U.S. 140, 159-161, 163, 166-167 (1935). That has long been the law. But a brief reference to *McCandless* in a dissimilar case, *Caplin* v. *Marine Midland Grace Trust Co. of N.Y.*, 406 U.S. 416, 429 (1972), has led to uncertainty about *McCandless*'s holding. See *infra* pp. 13-14. Attempting to interpret and honor the *Caplin* dictum has generated widespread confusion, and even chaos, in the courts of appeals. The consequences of this confusion are grave.

Given the enormous Ponzi schemes of recent years, including Stanford's and the Madoff Ponzi scheme that is the subject of *Picard* v. *JPMorgan Chase & Co.*, No. 13-448 (a pending petition that raises a similar question), it is essential that this Court restore clarity to this important area of the law.

A. Federal equity receivers have long had standing to assert some claims on behalf of creditors

1. The basic premise of a federal equity receivership is that the receiver has standing to assert claims on behalf of the entities placed into receivership. See *Lank* v. *New York Stock Exchange*, 548 F.2d 61, 67 (2d Cir. 1977). In this case, that would include claims that could be brought by the Stanford Entities. But a longstanding exception to the general rule permits a receiver also to assert claims that belong to *all* creditors generally, including fraudulent-transfer claims. *Id.* at 66; see also 75 C.J.S. Receivers § 392 (2013). This exception allows a receiver to assert claims that benefit the estate for all creditors, who would otherwise compete against one another in bringing claims, or who may not have the resources to assert these claims. Thus, while receivers may not be able to selectively bring claims that are personal to a particular creditor or group of creditors, they have historically had the power to bring claims that can be brought by *all* creditors, thereby restoring assets to the estate. This standing is critical for receivers seeking to recover fraudulently transferred assets on behalf of defrauded investors, because fraudulent-transfer claims belong to creditors rather than the debtor-transferor. See Unif. Fraudulent Transfer Act § 4, 7A U.L.A. 58 (2006).[2]

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[2] Almost every state, including Texas (where the Receivership litigation is pending, and whose law applies to the Receivership), have

Even before this Court addressed the question in 1935, federal courts recognized a receiver's standing to assert claims on behalf of creditors generally. In *Drennen* v. *Southern States Fire Ins. Co.*, a receiver sought to recover fraudulently transferred assets, and the court of appeals held that the receiver had standing to bring these claims on behalf of all the creditors. 252 F. 776, 787 (5th Cir. 1918). It also recognized that this was an exception to the general rule:

> The proposition is made that the receiver cannot recover, except where recovery could have been had by the corporation. This may be true as a general proposition, but it is not universally true; and it can very well be insisted that the present case presents a situation where, if further extension of the right of the receiver to recover is required, the extension should be made. * * * [The receiver] is acting also for the stockholders of the corporation, and the creditors * * * *and the receiver is in position to assert and enforce their rights*.

Id. at 787-788 (emphasis added). See also, *e.g.*, *A.B. Leach & Co.* v. *Grant*, 54 F.2d 731, 733 (6th Cir. 1932) (receiver who brought accounting action was not limited to rescission of the contract, as the corporation would have been, because the receiver could bring "a suit on behalf of creditors and stockholders to recover for a fraud").

McCandless reached this Court in 1935. It involved the exception to the general rule, because the receiver of the insolvent corporation there was suing on behalf of all creditors to recover "fraudulently diverted" assets. 296 U.S. at 161. The Second Circuit had applied only the general rule, holding that, because the receiver stood in

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adopted this provision. See Tex. Bus. & Com. Code § 24.005 (West 2009).

the shoes of the corporation alone, he could not assert these claims on behalf of creditors. See *id.* at 156. In an opinion by Justice Benjamin Cardozo, the Court reversed the Second Circuit in no uncertain terms. The receiver's standing, the Court held, was "as the representative of creditors." *Id.* at 159. Analogizing the transfers there to a fraudulent "gift," the Court explained that "the gift could have been annulled *either* by the creditors directly *or* on their behalf by a receiver." *Ibid.* (emphases added). "The duty of reclaiming assets [fraudulently] diverted * * * is one that rests on the receiver." *Id.* at 163. Nor was there any doubt that the case turned on this very principle. Justice Owen Roberts's dissent trained its fire precisely on the Court's endorsement of allowing receivers to sue on behalf of creditors, expressing his "conclusion that the receiver of the corporation is without standing," *id.* at 168 (Roberts, J., dissenting), because "the corporation had no cause of action * * * and the receiver's rights could rise no higher," *id.* at 171; see *id.* at 173-174.[3]

Following *McCandless*, courts recognized that this Court had endorsed the traditional authority of the receiver to sue on behalf of creditors. See, *e.g.*, *Central Hanover Bank & Trust Co.* v. *President & Dirs. of Manhattan Co.*, 105 F.2d 130, 131-132 (2d Cir. 1939) ("[T]here are occasions when [a receiver in equity] may represent creditors when the [receivership entity] would have no standing."). The leading treatise agreed. See 2 R. Clark, Law and Practices of Receivers § 362, at 620-621 (3d ed. 1959).

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[3] Justice Roberts again dissented in *Deitrick* v. *Greaney*, 309 U.S. 190 (1940), arguing "that where the receiver of a national bank sues to recover on a chose in action which was an asset of the bank, his rights rise no higher than those of the bank, even though the obligation was given to deceive creditors or the bank examiner." *Id.* at 201 (Roberts, J., dissenting). The Court again rejected that view.

2. The judgment below is in error because it recognizes only the general rule, and not the exception. Like the dissent in *McCandless*, it permits no standing for receivers to sue on behalf of the creditors at large. See App., *infra*, 4a-5a. But this error ultimately springs from a misreading of *Caplin*, the 1972 case that has generated the disarray among the circuits that is described in Part I.B, *infra*.[4]

Caplin was a bankruptcy case that did not repudiate *McCandless*'s holding, but instead emphasized that the exception that *McCandless* affirmed is not boundless—that is, receivers suing on behalf of creditors cannot select a specific group of creditors and vindicate *their* interests, rather than the estate's. In *Caplin*, a bankruptcy trustee sought to bring claims that were personal to debenture holders, a specific group of creditors, where any recovery would *not* have gone to the estate for the benefit of all creditors. 406 U.S. at 421, 431. The Court therefore held that the trustee, who had the same powers as a "receiver in equity," did not have standing to prosecute the individual debenture holders' claims. *Id.* at 429-430.

That, of course, raises no problem, and was sufficient to resolve the question of whether, by virtue of having the same authority as a receiver, the trustee could bring suit on behalf of the debenture holders. The problem was that the Court, in a single sentence of dictum, characterized *McCandless* in a cryptic, puzzling way. After noting that *McCandless* approved the receiver's suit on behalf of creditors, *Caplin* continued:

> But, the opinion of the Court by Mr. Justice

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[4] The Fifth Circuit's settling on this principle was long in the coming, given that *Caplin* was decided in 1972 and only recently the court of appeals, *in this very case*, had held that receivers could have standing to sue on behalf of creditors. See App., *infra*, at 8a; see also *DSCC I*, 699 F.3d at 853 (same).

> Cardozo clearly emphasizes that the receiver in that case was suing on behalf of the corporation, not third parties; he was simply stating the same claim that the corporation could have made had it brought suit prior to entering receivership.

406 U.S. at 429 (footnote omitted).

What *Caplin* actually meant by that sentence may well be lost to the mists of time, but the one thing that it could *not* have meant is that *McCandless* did not approve a receivership suit that depended on the receiver's standing to represent creditors. First, as is readily discerned by reading the majority and the dissent in *McCandless*, that the receiver was asserting claims on behalf of the creditors was the *entire point of the case*.[5] Second, the *McCandless* dissent was a dissent precisely *because* it rejected allowing receivers to represent third parties; the dissenters would have been as surprised as Justice Cardozo, the parties, and the Second Circuit panel to learn that this aspect of receivership standing was not even in question. Third, *Caplin* itself—in the very next sentence—cited a section of the leading receivership treatise that actually spelled out the very exception to the general rule that *McCandless* had endorsed. See 406 U.S. at 429 (citing 2 R. Clark, Law and Practice of Receivers § 362, at 619 (3d ed. 1959)). Section 362 of Clark's treatise, like *McCandless* and longstanding law, recognizes that receivers generally may stand in the shoes only of the entity, but that "cases are to be found wherein the

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[5] Indeed, contrary to holding that the corporation could bring the claim, *McCandless* expressly reserved that question even as it expressly decided the point relevant here. "There is no occasion to consider whether the corporation itself * * * would be permitted to * * * maintain a suit in equity for appropriate relief. We put that question by. *Enough that the receiver has the requisite capacity.*" 296 U.S. at 160 (emphasis added).

receiver acting for the creditors has been allowed by the court to assert rights superior to the rights of the defendant in the main case which generally is by reason of a fraud having been committed against the creditors of defendant debtor." *Id.* at 620; see also *id.* at 620, 621 (further examples of receivers acting for creditors). It is implausible that *Caplin* would have cited that very section without recognizing that section's discussion of the exceptions—and equally implausible that, if it had intended to disavow the reasoning of Clark's treatise, that it would have cited it without mentioning the disavowal.

Nothing in *Caplin* expresses a desire to overrule *McCandless*, and doing so was unnecessary to deciding the case. Indeed, the dissent did not even mention the receivership question. See 406 U.S. at 435-440 (Douglas, J., dissenting) (arguing that the Bankruptcy Code authorized such suits). Nonetheless, the single sentence reprinted above has led courts of appeals to question the ability of receivers to maintain suits like the one at issue in this case. Over the 42 years since *Caplin*, and especially in recent years, courts attempting to interpret and honor *Caplin*'s dictum have generated the sort of confusion in the law that only this Court can redress. Petitioner turns next to the form of that confusion that currently reigns.

B. The law of receiver standing is in disarray across the circuits

Since *Caplin*, the standing of federal equity receivers to bring claims on behalf of creditors has generated substantial confusion in the circuits. That confusion traces back to *Caplin*'s stray language about *McCandless*, and can only be resolved by this Court. Either *Caplin* merely reiterated, consistent with *McCandless*, that a receiver may not assert claims on behalf of particular creditors for those creditors' benefit, although the same receiver could assert a claim on behalf of the estate's creditors generally to benefit the estate—or, on the other hand, one insolated, inconsistent sentence in *Caplin* actually overruled the holding of *McCandless*.

Circuits have not only shown confusion vis-à-vis each other on this issue, but internally as well. Multiple circuits have opinions in several categories, without one purporting to abrogate the other, thereby demonstrating how correct *Caplin* was to observe that "[t]he issue" of receiver or trustee standing "is a difficult one," 406 U.S. at 422, and one that "has caused even the most able jurists to disagree," *id.* at 421. Cases have respected the traditional principle and understood *Caplin* to merely reject the unbounded standing that the trustee in that case sought. Others have treated *Caplin*'s aside about *McCandless* as effectively overruling *McCandless*, and limited receivers only to bringing suits on behalf of the corporation in all circumstances. Still others have expressed that restrictive approach, but in contexts where the outcomes are consistent with the traditional view because, as in *Caplin*, the receiver would only be representing a subset of creditors for their personal claims.

1. Multiple cases after *Caplin* have continued to recognize the general rule and exception that *McCandless* adopted—that receivers have standing to pursue claims on behalf of the entities they represent, but may also assert claims that belong to all creditors generally and whose recovery would go to the estate (so long as their powers are not restricted by the district court order appointing them). As late as 2012, the Fifth Circuit confidently asserted in another Stanford Receivership case that at least five other circuits supported its then-governing view that receivers could bring claims on behalf of creditors. See *DSCC I*, 699 F.3d at 853 (citing decisions from the Second, Third, Sixth, Seventh, and Ninth Circuits).

Many such cases exist. See, *e.g.*, *Javitch* v. *First Un-*

ion Secs., Inc., 315 F.3d 619, 626 (6th Cir. 2003) (a receiver may stand in the shoes of creditors if allowed to do so by the appointment order and asserting claims on behalf of creditors generally); *Boston Trading Grp., Inc.* v. *Burnazos*, 835 F.2d 1504, 1515-1516 (1st Cir. 1987) (denying receiver the right to assert claims on behalf of creditors only because the receivership order did not cover that authority); *Lank*, 548 F.2d at 67 (receiver's appointment order did not authorize bringing claims on behalf of creditors, but receivers may stand in the shoes of creditors if the appointing order so permits). Some cases expressly recognize the problem posed by *Caplin*'s dictum, but explain that while *Caplin* clearly barred trustees from "bring[ing] an action which *certain* creditors, like debenture holders, have," it did not affect trustees' ability to bring actions belonging to creditors *generally*. *Koch Refining* v. *Farmers Union Cent. Exch., Inc.*, 831 F.2d 1339, 1348 n.11 (7th Cir. 1987) (bankruptcy context).

2. On the other side of the spectrum, some cases have, like the judgment below, see App., *infra*, 4a-5a, converted the general rule into an absolute one, excising the "caveats" that previously attended the general rule, *id.* at 81a, and effectively overruling this Court's decision in *McCandless*. These courts view *Caplin* as standing for the restrictive proposition that receivers *never* have standing to assert *any* claims on behalf of creditors, instead of on behalf of the receivership entities, including fraudulent-transfer claims.

Many of those decisions have followed *Scholes* v. *Lehmann*, 56 F.3d 750 (7th Cir. 1995). *Scholes* assumed that "an equity receiver may sue *only* to *redress injuries* to *the entities in receivership*." *Id.* at 753 (emphases added) (citing *Caplin*, 406 U.S. at 429). Although fraudulent-transfer claims can only be asserted by creditors and not debtor-transferors, *Scholes* held that the entity in receivership *was* a creditor for purposes of the fraudulent-transfer statute, because its assets had been depleted by the fraud. *Id.* at 754-755. It therefore held that the receiver had standing to assert these claims. *Id.* at 755. *Scholes* did not acknowledge that, under *McCandless*, the receiver, *as a receiver*, already had standing to assert fraudulent-transfer claims on behalf of all creditors generally, regardless of whether the entity in receivership also qualified as a creditor under the particular facts of the case. See *infra* at pp. 26-27 (discussing *Scholes*).

Circuits following *Scholes* no longer permit receivers to assert fraudulent-transfer claims, unless the receivership entities themselves qualify as creditors. See *DSCC II*, 712 F.3d at 190-192; *Eberhard* v. *Marcu*, 530 F.3d 122, 132-134 (2d Cir. 2008) (holding that the receiver could not assert fraudulent-transfer claims on behalf of creditors); *Donell* v. *Kowell*, 533 F.3d 762, 777 (9th Cir. 2008) (holding that a receiver must assert fraudulent-transfer actions on behalf of the entities). These courts are in conflict with *McCandless*'s holding expressly approving a receiver's standing to assert such claims on behalf of creditors generally.

The First Circuit shares this view that, under *Caplin*, "the receiver can only make a claim which the corporation could have made." *Fleming* v. *Lind-Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990) (holding that the receiver did not have standing to represent creditors). Further demonstrating the confusion attending this issue, *Fleming* bolstered its conclusion by purporting to cite the majority opinion in *McCandless*, but actually citing the "Argument of Respondents" (which in 1935 was printed in the U.S. Reports) even though the respondents *lost* that argument in *McCandless*.[6]

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[6] Indeed, the First Circuit recognized that *McCandless* governed the case, making its citation of the *losing* side all the more perplexing. See *Fleming*, 922 F.2d at 25 (incorrectly describing *McCandless* as

Several of these cases come from circuits (like the First, Second, and Seventh) in which binding cases had already taken the traditional view. Remarkably, in each circuit, cases expressing both views (the traditional and the restrictive) apparently remain good law, which amplifies the chaos surrounding this question.

3. Finally, ostensibly adopting the most restrictive interpretation of *Caplin*, several cases have stated that receivers may not assert claims on behalf of creditors. But each of these cases is distinguishable from *Scholes* and its progeny because none involves a fraudulent-transfer or other claim belonging to all creditors generally and affecting the receivership estate (*i.e.*, each presents the situation in *Caplin* rather than in *McCandless*). While for that reason none of their holdings necessarily contravene *McCandless*, the expressed rationale in each for denying the receiver standing relied not on finding particular claims outside a receiver's reach, but instead on the principle that receivers can only assert claims on behalf of the corporation. At the least, it is clear that these courts are no longer following, and perhaps no longer aware of, the historical rules governing federal equity receivers' standing to assert the claims of creditors. See, *e.g.*, *Marion* v. *TDI Inc.*, 591 F.3d 137, 147 (3d Cir. 2010) (receiver had standing only to bring claims on

holding that a "'receiver has no greater rights or powers than the corporation itself would have'") (quoting *McCandless*, 296 U.S. at 148). But this language is quoted from the "Argument for Respondents" (and that heading appears at the top of the cited page of the U.S. Reports). While the dissent agreed with respondents, the majority opinion held that the fraudulent-transfer claims at issue *could* be asserted "by the creditors directly or on their behalf by a receiver." 296 U.S. at 159. As *Fleming* shows, courts can square the one loose sentence in *Caplin* with the holding in *McCandless* only by treating Justice Roberts's dissent as the Court's opinion in *McCandless*.

behalf of the corporation, because it is the "general rule that an equity receivership may sue only to redress injuries to the entity in receivership") (citation and internal quotation marks omitted); *Liberte Capital Grp., LLC* v. *Capwill*, 248 F. App'x. 650, 656 (6th Cir. 2007) (unpublished) (receiver could not take over investors' individual fraudulent-inducement claims against broker-dealers employed by debtor, for "when a receiver is appointed over a corporation, the receiver may only assert claims that could have been asserted by the corporation, and the receiver lacks standing to institute action on behalf of investors in the corporation"); *Goodman* v. *FCC*, 182 F.3d 987, 991-992 (D.C. Cir. 1999) (receiver could not assert personal claims of the entity's licensees against the FCC, based on the "rule that a receiver has authority to bring a suit only if the entity could itself properly have brought the same action") (citing *Caplin*).

4. The Fifth Circuit has had cases in each of these categories within the past few years, manifesting the nationwide confusion about *McCandless* and *Caplin* in a particularly vivid way. Indeed, the tortured path of this very case encapsulates it. The first panel correctly applied this Court's long-standing precedent, explaining that, although the "general rule" is that the receiver represents only the receivership entities, "the general rule comes with a few caveats." App., *infra*, 80a-81a. The key caveat is that "[i]t is well settled that, at different points during the pendency of the receivership, a receiver may represent different interests." *Id.* at 81a (citing *Drennen*, 252 F. at 788); see also *id.* at 83a (observing that this view "enjoys wide support"). Thus, there was no problem with the Receiver "acting on behalf of creditors" in bringing claims against the Employees to recover fraudulently transferred funds for the Receivership Estate and, ulti-

mately, for distribution to the creditors. See *id.* at 84a.[7]

This view was subsequently confirmed by *DSCC I*, 699 F.3d at 853. But the *DSCC* panel, on its own motion and without any request for rehearing from the parties, withdrew its opinion and substituted a new one, explaining that "[i]n previous panel opinions, now withdrawn, this court erroneously asserted that a federal equity receiver has standing to assert the [fraudulent-transfer] claims of the investor-creditors of a corporation in receivership." 712 F.3d at 190. Instead, the panel adopted the Seventh Circuit's opinion in *Scholes*, characterizing it as "[t]he leading case explaining the principles that govern a federally appointed receiver's action under" a state fraudulent-transfer statute. *Ibid.* The court now held, unequivocally and without exception, that "a federal equity receiver has standing to assert only the claims of the entities in receivership, and not the claims of the entities' investors-creditors." *Ibid.*[8]

Finally, in the judgment under review by this Court, yet a third Fifth Circuit panel addressed the standing issue in a Stanford Receivership matter. This panel applied *DSCC II* to the issue, concluding that it "foreclosed" the Receiver's claim that he could assert fraudulent-transfer claims on behalf of creditors other than the

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[7] The panel then, on its own motion, concluded that it lacked jurisdiction to reach the arbitrability question, which was bound up in the standing decision. See App., *infra*, 45a-49a.

[8] Because *Scholes* also held that a receivership entity is not barred by the doctrine of *in pari delicto* from asserting fraudulent-transfer claims against third parties who received funds from a Ponzi scheme, the Fifth Circuit in *DSCC II* concluded that its earlier "error in misidentifying the basis for the Receiver's standing to bring this action * * * [was] harmless." 712 F.3d at 192. It therefore affirmed the judgment of the district court in favor of the Receiver, *id.* at 202, and because the defendants did not appeal, the holding of *DSCC II* became final.

Entities. App., *infra*, 4a. The Fifth Circuit denied the Receiver's petition for rehearing *en banc* to consider this important question. *Id.* at 118a. *McCandless* can therefore be understood to have been abrogated within the Fifth Circuit.

C. The standing questions presented to this Court by the Stanford Receiver and the Madoff Trustee are virtually indistinguishable

The Stanford Receiver is not the only party asking this Court to resolve the confusion about *Caplin*. That case arose in bankruptcy, after all, and its effects on trustees' standing have been as contested and unpredictable as in the receivership context. Thus, it is unsurprising that the Trustee of the Madoff Ponzi scheme's estate has also petitioned the Court to grant certiorari to address trustees' standing to raise claims on behalf of creditors. See *Picard* v. *JPMorgan Chase & Co.*, No. 13-448. That petition is currently pending before this Court, which recently called for the views of the Solicitor General. It is fortuitous that the same issue has arisen in both the receivership and bankruptcy contexts at roughly the same time, and that this Court may consider and resolve them in tandem.

As the *Picard* petition explains, the scope of a trustee's standing has generated similar judicial disarray to that described above. Unsurprisingly, *Caplin* is also at the root that disarray. Some courts have understood *Caplin* as consistent with the historical rule, acknowledging that it recognized the "right" of a trustee (or at least one imbued with the powers of a receiver) "to bring a general action on behalf of all creditors," but not to "bring an action which [only] *certain* creditors, like debenture holders, have." *Koch Refining*, 831 F.2d at 1347 n.11; see also *City Sanitation, LLC* v. *Allied Waste Servs. of Mass., LLC (In re Am. Cartage, Inc.)*, 656 F.3d 82, 90 (1st Cir. 2011) (holding that a trustee may assert "general" claims where "liability is to all creditors of the corporation," (internal quotation marks omitted) but "lacks standing to pursue claims that belong personally to the creditors"); *Fisher* v. *Apostolou*, 155 F.3d 876, 880 (7th Cir. 1998) (explaining that a trustee may "act[] on behalf of the estate or the creditors as a whole").

And, as in the receivership context, other courts have read *Caplin* far more restrictively. These courts have ignored the critical distinction between general and personal claims of creditors, and simply held that under *Caplin*, a trustee does not have any "ability to litigate claims * * * on behalf of the debtor corporation's creditors." *Mixon* v. *Anderson (In re Ozark Restaurant Equip. Co., Inc.)*, 816 F.2d 1222, 1226 (8th Cir. 1987); see also *Williams* v. *Cal. 1st Bank*, 859 F.2d 664 (9th Cir 1988). Like the Stanford Receiver, the Madoff Trustee believes that this interpretation of *Caplin* is incorrect as a matter of law and policy, and is challenging a circuit court decision that, the Trustee contends, falls within this category. See Pet. for Cert. in No. 13-448 at 32-35.

Thus, while the powers of a receiver are based in equity and the powers of a trustee are now statutory, the *standing* issues presented to this Court by the Stanford Receiver and the Madoff Trustee are largely indistinguishable. *Caplin* concerned the standing of a reorganization trustee acting under the Bankruptcy Code, but the statute also gave him "the additional rights that a 'receiver in equity would have if appointed by a court of the United States for the property of the debtor.'" *Caplin*, 406 U.S. at 429 (quoting 11 U.S.C. § 587). *Caplin* was this Court's final word regarding *either* a receiver *or* a trustee's standing to sue on behalf of creditors, and cases have applied it in both contexts.[9]

[9] If there is any divergence between a trustee's or a receiver's standing based on *Caplin*, it is because *Caplin* acknowledges that an equi-

The Stanford Receiver and the Madoff Trustee have been charged with unwinding the two largest Ponzi schemes in world history. They must be able to use whatever legal tools are available to protect the interests of tens of thousands of victims. Both have found their litigation efforts repeatedly delayed and impeded—and their litigation costs consequently increased, with recovery from victims correspondingly decreased—by the uncertainty surrounding what claims they have standing to bring, and in what capacity. With so much at stake for so many, resolving these questions has never been more important. The Court should grant review and resolve the question as to both receivers and trustees.

D. Limiting receivers' standing to bring claims on behalf of creditors seriously undermines receivers' abilities to protect creditors, which is why receivers exist

A misunderstanding of *Caplin*—which this Court has not cited once since deciding it—has wreaked havoc in the lower courts' receivership jurisprudence. Eliminating the doctrinal confusion by clarifying that *Caplin* did not, in fact, *sub silentio* overrule *McCandless* would be enough to justify this Court's review, because the judgment below necessarily conflicts with *McCandless*. See this Court's Rule 10(c). But there is also a serious practical need for this Court's review. The disarray in the circuits is wasteful, generating expensive and copious litigation, as this case and *Picard* demonstrate, and diverting resources from where they are desperately needed—recovering assets for those who were defrauded. By contrast, an opinion from this Court clarifying the law would

ty receiver has "additional rights" and therefore broader authority than a similarly situated trustee. 406 U.S. at 429. Thus, *a fortiori*, if the standing inquiry is resolved in favor of bankruptcy trustees, it must be resolved in favor of federal equity receivers.

enable the Stanford Receiver, and every receiver and presumably every bankruptcy trustee, to fulfill those overriding obligations.

1. *McCandless* was correct and should be reaffirmed. This Court has long recognized that a "receiver does not represent [the corporation] alone: he represents all the parties. He represents the law, which takes charge of the property for the benefit of all creditors, according to their respective and mutual rights." *Casey* v. *Cavaroc*, 96 U.S. 467, 488 (1877). Receivers are appointed by the district court, see Fed. R. Civ. P. 66, to protect the creditors by collecting and preserving all of the assets of the estate, until they can be fairly distributed to the creditors. See *Alexander* v. *Hillman*, 296 U.S. 222, 237 (1935); *Eberhard*, 530 F.3d at 131-132.

Allowing receivers to assert claims that belong to creditors generally (rather than only to some creditors) could facilitate receivers' ability to protect the creditors' rights to the same extent as the creditors could. Receivers must undo damage caused, among other things, by fraudulent or collusive transactions. If receivers are limited to claims that the entities and principals (like Stanford himself) could assert, while being subject to all burdens, obligations, and defenses that could be raised against those entities and principals, it is readily apparent that receivers can only ineffectively perform their duties. Furthermore, receivers inherently possess an important advantage: they can assert the claims on behalf of *all* creditors and gather widely dispersed assets for the estate without the chaos of thousands of far-flung creditors racing to various courthouses to file individual, competing, and inconsistent fraudulent-transfer lawsuits (and without the opposite problem of absolutely no action to recover assets that are too small to meaningfully divide in private litigation). *McCandless* aptly held, therefore, that claims belonging to all creditors generally could be asserted "by the creditors directly, *or in their behalf by a receiver*." 296 U.S. at 159 (emphasis added).

The current realities of the Stanford Receivership also illustrate why it is sound to allow the Receiver to bring claims like those involved here. The Stanford Ponzi scheme was a fraud that affected over 18,000 investors around the globe. When the receivership was put into place, the Entities' liabilities exceeded the value of their assets by billions of dollars—much of which was fraudulently transferred by the scheme to persons and entities around the world. App., *infra*, 86a. Unwinding the scheme to locate and eventually recover these widely dispersed assets through litigation requires a massive, expensive, and organized effort. Without the receivership, individual investors or even groups of investors who are ill equipped for that comprehensive task would have to pursue these claims themselves, including identifying and cooperatively prosecuting claims to recover assets wherever they may be found. These challenges would make efficient and effective recovery of the assets impossible.

2. Tellingly, even most courts of appeals that deny receivers standing to bring claims on behalf of creditors at large still recognize the necessity of finding some alternative way to keep receivers in the loop, albeit in an artificial and inefficient way. These courts have therefore resorted to legal fictions that further muddy the landscape and ultimately impede receivers' ability to fulfill their duties. *Scholes*, the Seventh Circuit case followed by the Fifth Circuit here, and also adopted by (at least) the Second, Ninth, and Tenth Circuits, demonstrates the consequences of investing *Caplin*'s stray remark with so much unjustified meaning. See *Scholes*, 56 F.3d 750; see also App., *infra*, 5a (citing *DSCC II*, 712 F.3d at 190-192); *Eberhard*, 530 F.3d at 132; *Donell*, 533 F.3d at 776-777; *Wing* v. *Dockstader*, 482 F. App'x. 361, 363 (10th Cir. 2012) (unpublished).

Scholes concerned a Ponzi scheme perpetrated by one Michael Douglas (not the actor), who used several corporations and limited partnerships. 56 F.3d at 752. To recover assets for the creditors, the receiver filed fraudulent-transfer claims against recipients of the scheme's assets, who contended (like respondents here) that the receiver lacked standing to sue on behalf of creditors. Because fraudulent-transfer claims belong to creditors, they reasoned, no receiver could reach them at all. *Id.* at 753-754 (citing *Caplin*).

The Seventh Circuit recognized the chaos that would ensue under defendants' approach. But it faced a dilemma because of its belief that, under *Caplin*, receivers' standing is limited to the entities themselves. 56 F.3d at 754. It solved this dilemma by turning the entities—the parties that made the fraudulent transfers in the first place—into creditors, at least for purposes of the fraudulent-transfer statute. Douglas, the court explained, was really the transferor; the entities were mere "zombies" whose assets were used in the fraud. *Id.* at 754. Once the scheme collapsed and the entities were "[f]reed from [Douglas'] spell[,] they became entitled to a return of" their assets—in other words, creditors. Because the wrongdoer was Douglas and not the entities, the court also concluded that the defense of *in pari delicto* did not apply, and allowed the receiver to assert his claims. *Ibid.*

The court of appeals candidly acknowledged that this legal fiction was necessary because the receiver needed to be able to get those assets to perform his duties; turning the entities into creditors enabled the court to reach the right result. 56 F.3d at 755. As the court explained, all of the "conceivable alternatives" to these claims being pursued by the receiver were undesirable: "individual suits by the investors, which, even if successful, would multiply litigation," "a class action by the investors—and class actions are clumsy devices," or "an adversary action, in bankruptcy," which was "not famous for expedition." *Ibid.* Unspoken was the most likely alternative: that these claims would never be pursued by the creditors, and the assets would never be recovered.

Scholes and its progeny thus mitigate the problem of ignoring *McCandless*. They provide a creative path for receivers to assert *some* claims—namely, fraudulent-transfer claims when the entity can be characterized as a "zombie"—even when the receiver is denied standing to assert claims on behalf of all creditors generally. But they do so with serious costs. *Which* claims can be so characterized will often be the subject of preliminary litigation that requires money and time—both of which are spent at the expense of the creditors' recovery. The Seventh Circuit itself has said that this question presents an "equitable determination" that must be made anew in each and every case. *Knauer* v. *Jonathon Roberts Fin. Grp.*, 348 F.3d 230, 238 (7th Cir. 2003). And if a receiver has not been appointed over the assets of *both* a Ponzi scheme principal and the scheme's entities, *Scholes* would not seem to apply at all. See, *e.g.*, *Eberhard*, 530 F.3d at 132-134; *Troelstrup* v. *Index Futures Grp., Inc.*, 130 F.3d 1274, 1277 (7th Cir. 1997). Once past those hurdles, even if receivers could avoid the defense of *in pari delicto*, the receiver presumably would still have to litigate against any other defenses that recipients of fraudulent transfers might have against the entities but that they would *not* have against the creditors.

Once again, this receivership case illustrates how much of an impediment that can be. The Fifth Circuit has adopted *Scholes*, and there is no question that the Receiver has standing to bring the fraudulent-transfer claims in court. But respondents have asserted a right to arbitration—something that would not be in issue if the suit were on behalf of the estate's non-entity creditors, who were not party to any arbitration agreement. Cf.

App., *infra*, 83a-84a. Although the Receiver believes that these cases are not arbitrable regardless of which theory of standing he pursues, the judgment below would force him to wage that new battle, instead of going about the urgent business of resolving the claims and distributing the proceeds to the creditors under *McCandless*.[10] This problem is multiplied beyond even the many respondents involved in this particular suit, because many of the receivership cases are at the motion-to-dismiss stage in the district court, with large numbers of defendants challenging the Receiver's standing or raising defensive issues, including arbitration. All of these proceedings would be unnecessary if the judgment below had followed *McCandless* rather than *Scholes*.

3. Without standing to bring claims on behalf of all creditors generally, receivers cannot effectively and efficiently protect those creditors' interests. The *Scholes* system that some courts have followed as an alternative is no panacea. It is an unnecessarily convoluted solution to a problem that did not exist in the first place. And although *Scholes* reached the right result insofar as it allows receivers to bring fraudulent-transfer claims for the benefit of creditors, the unpredictability of its application guarantees large legal bills for everyone and crowded court dockets. Worse yet, it inevitably reduces recoveries for the victims. Given that this Court *has already resolved this question* in Justice Cardozo's *McCandless* opinion, this Court should clarify the law and prevent *Caplin* from being used as a weapon against those who are charged with protecting the interests of the victims.

[10] If the Receiver is required to pursue these claims in arbitration, he may have to separately arbitrate each claim against more than 300 different Employees in different venues, at exorbitant cost to the Estate. Such multiplicity of effort and expense is precisely what a receivership is designed to avoid.

E. This case presents an ideal vehicle

This case presents a particularly clean vehicle for the Court to restore the clarity of *McCandless*'s holding and resolve the confusion in the courts of appeals.

1. Standing was the only issue decided in the judgment below. The ideal time for this Court to resolve a threshold question is at the stage of the litigation in which lengthy, extraneous records about other matters are not required, and other issues do not compete with or affect the question presented. The posture of this case would therefore considerably facilitate the Court's review.

2. There are no factual disputes relevant to the outcome of this purely legal question that could complicate the Court's consideration. There is no dispute, for instance, that fraudulent-transfer claims are "general" to the creditors at large; this Court will therefore not need to resolve threshold questions of whether the claim at issue was general or particular.

3. While circuits often appear confused about this issue, see *supra* Part B, most circuits have weighed in. There appears to be little likelihood that, absent this Court's guidance, the legal climate will materially change, and certainly not in the short run. There is no likelihood that the circuits will resolve this issue on their own.

4. Resolving the question now is urgent. The pending petition in *Picard* provides an opportunity simultaneously to decide the question presented as applied to receiverships and trustees. With respect to this issue, at least, they share many of the same legal and policy concerns. A decision now would also dramatically improve the efficiency of unwinding the two largest Ponzi schemes in history, and be of significant value to the lower courts and many defrauded individuals with few alter-

natives for meaningful recovery.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SCOTT D. POWERS
DAVID T. ARLINGTON
EVAN A. YOUNG
STEPHANIE F. CAGNIART
BAKER BOTTS L.L.P.
98 San Jacinto Blvd.
Suite 1500
Austin, Texas 78701
(512) 322-2500

KEVIN M. SADLER
Counsel of Record
BAKER BOTTS L.L.P.
1001 Page Mill Road
Building One, Suite 200
Palo Alto, California 94304
(650) 739-7518
kevin.sadler@bakerbotts.com

Counsel for Petitioner Ralph S. Janvey

January 2014

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(AUGUST 30, 2013)

NO. 11-10838

RALPH S. JANVEY,
Plaintiff-Appellee,

v.

JAMES R. ALGUIRE; VICTORIA ANCTIL; TIFFANY ANGELLE; SYLVIA AQUINO; JONATHAN BARRACK; ALAN BROOKSHIRE; JAMES C. CHANDLEY; DAVID BRAXTON GAY; GREGORY C. GIBSON; JOHN GREAR; JASON LIKENS; KALE OLSON; TIMOTHY D. ROGERS; NICK SHERROD; SUSAN GLYNN; JOHN WHITFIELD WILKS; STEVE SLEWITZKE; BRAD BRADHAM; NOLAN FARHY; VIRGIL HARRIS; LOUIS SCHAUFELE; ERIC URENA; BIANCA FERNANDEZ; NANCY J. HUGGINS, ET AL.,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 3:09-CV-724

Before BENAVIDES, OWEN, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Ralph S. Janvey (the Receiver), acting in his capacity as receiver for Stanford Group Company and related entities (the Stanford Entities), filed suit against former employees (the Employee Defendants) of the Stanford Entities, claiming that the Employee Defendants received fraudulent transfers in violation of the Texas Uniform Fraudulent Transfer Act (TUFTA) and were unjustly enriched at the expense of the creditors of the receivership estate. The Employee Defendants moved to compel arbitration in the district court. The district court denied the motions, holding that the Receiver brought the claims on behalf of creditors of the Stanford Entities, rather than the Stanford Entities themselves, and was therefore not bound by the arbitration agreements relied upon by the Employee Defendants. We reverse the district court's denial of the motions to compel because a federal equity receiver may not pursue claims on behalf of creditors.

The current action arises out of a suit by the Securities and Exchange Commission (SEC) against R. Allen Stanford, his associates, and the Stanford Entities, which alleged securities law violations in connection with a Ponzi scheme perpetrated by Stanford. The extensive background facts of this proceeding have been recounted by

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

this court in previous decisions,[1] and we repeat only those facts that are relevant to this appeal.

During the course of the SEC suit, the district court appointed the Receiver and authorized him to commence any actions necessary to recover receivership assets. Acting in this capacity, the Receiver filed the present action and named hundreds of defendants, including the Employee Defendants. In response, the Employee Defendants filed motions to compel arbitration, arguing that their agreements with the Stanford Entities compelled the Receiver to arbitrate his claims.

Before it addressed the motions to compel arbitration, the district court granted a preliminary injunction freezing certain assets of the Employee Defendants. On appeal of that order, a panel of this court initially held that the Receiver's claims were not subject to arbitration.[2] However, the panel subsequently withdrew that opinion, substituted a new opinion which concluded that this court lacked jurisdiction to address the motions to compel, and remanded so that the district court could rule on the motions in the first instance.[3] On remand, the district court denied the motions to compel arbitration, holding that the Receiver had standing to bring claims on behalf of creditors and therefore was not bound by the arbitration agreements. This appeal followed.

The primary issue in this appeal is whether the Receiver has standing to bring claims on behalf of Stanford's creditors. "Th[is] court reviews questions of juris-

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[1] *Janvey v. Alguire* (*Alguire II*), 647 F.3d 585, 590-91 (5th Cir. 2011); *Janvey v. Adams*, 588 F.3d 831, 833-34 (5th Cir. 2009).

[2] *Janvey v. Alguire* (*Alguire I*), 628 F.3d 164, 182-85 (5th Cir. 2010), *withdrawn*, *Alguire II*, 647 F.3d 585.

[3] *Alguire II*, 647 F.3d at 603-04.

diction, and specifically standing, de novo."[4] Additionally, "[w]e review de novo a district court's denial of a motion to compel arbitration."[5]

The Receiver argues that he has standing to bring suit on behalf of creditors and, therefore, that he is a stranger to the arbitration agreements between Stanford and the Employee Defendants. However, this argument is foreclosed by this court's recent decision in *Janvey v. Democratic Senatorial Campaign Committee, Inc.* (*DSCC II*),[6] in which we held that "a federal equity receiver has standing to assert only the claims of the entities in receivership."[7]

In that case, the same receiver who is a party to this case sued a number of national political committees, alleging that political contributions made by Stanford to the committees were fraudulent transfers.[8] The panel originally held that the Receiver "represent[ed] the creditors, via the Stanford corporations, in pursuing the TUFTA claims."[9] Acting on its own motion, the panel withdrew that opinion and issued a substitute opinion to "confront and correct errors of law pertaining to standing and imputed knowledge" contained in the original opin-

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[4] *Nat'l Fed'n of the Blind of Tex., Inc. v. Abbott*, 647 F.3d 202, 208 (5th Cir. 2011) (citing *Arguello v. Conoco, Inc.*, 330 F.3d 355, 361 (5th Cir. 2003)).

[5] *Sherer v. Green Tree Servicing LLC*, 548 F.3d 379, 381 (5th Cir. 2008) (citing *JP Morgan Chase & Co. v. Conegie*, 492 F.3d 596, 598 (5th Cir. 2007)).

[6] 712 F.3d 185 (5th Cir. 2013).

[7] *Id.* at 190.

[8] *Id.* at 189.

[9] *Janvey v. Democratic Senatorial Campaign Comm., Inc.* (*DSCC I*), 699 F.3d 848, 853 (5th Cir. 2012), *withdrawn*, *DSCC II*, 712 F.3d 185.

ion.[10] The corrected opinion, relying on the Seventh Circuit's decision in *Scholes v. Lehmann*,[11] concluded that because federal receivers have standing only to assert claims of the entities in receivership, the Receiver did not have standing to bring TUFTA claims on behalf of the creditors, but he did have standing to bring those claims on behalf of the Stanford Entities.[12]

In this case, as he did in the *DSCC* case, the Receiver purports to bring fraudulent-transfer claims on behalf of Stanford's creditors rather than on behalf of the Stanford Entities. Under *DSCC II*, he is not permitted to bring such a suit. In *DSCC II*, we affirmed the district court despite its error in misidentifying the basis for the Receiver's standing because that error was ultimately immaterial to the outcome of the case.[13] This case, however, raises an issue not implicated in *DSCC II*: namely, whether the Receiver is required to arbitrate his claims. In bringing the claims on behalf of Stanford's creditors, the Receiver has sought to avoid arbitration of his claims pursuant to the arbitration clauses in the agreements between the Stanford Entities and the Employee Defendants. The district court below relied on its erroneous conclusion that the Receiver was authorized to sue on behalf of creditors in denying the motions to compel arbitration, reasoning that the creditors were "not party to the arbitration agreements."

On appeal, the parties have focused primarily on whether the Receiver has standing to sue on behalf of creditors and not on whether he is bound by the arbitra-

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[10] *DSCC II*, 712 F.3d at 189-90.

[11] 56 F.3d 750 (7th Cir. 1995).

[12] *DSCC II*,712 F.3d at 192.

[13] *Id*. at 192-93, 202.

tion clauses if he sues, as he must, on behalf of the Stanford Entities. The district court did not address this issue. We therefore remand to allow the district court to consider that question in the first instance.

* * *

For the foregoing reasons, we REVERSE the district court's denial of the motions to compel arbitration and REMAND for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

(AUGUST 26, 2011)

Civil Action No. 3:09-CV-0724-N

RALPH S. JANVEY,
Plaintiff,

v.

JAMES R. ALGUIRE, *et al.*,
Defendants.

ORDER

This Order addresses various former Stanford employees' (the "Employee Defendants")[1] motions to compel arbitration [144, 199, 201, 203, 204, 211, 234, 305, 407, 408, & 488].[2] In the course of an earlier appeal of a preliminary injunction, the Fifth Circuit also determined that the disputes at issue are not arbitrable. While the

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[1] The more-than 300 Employee Defendants are listed in the appendix to the Receiver's second amended complaint against former Stanford employees [157].

[2] Some of these motions also include motions to dismiss. The Court will address the Employee Defendants' motions to dismiss in a separate order.

Fifth Circuit has withdrawn the portion of its opinion dealing with arbitration, this Court nonetheless finds its logic and reasoning convincing. Accordingly, the Court adopts that reasoning and denies the motions.[3]

I. ORIGINS OF THE RECEIVER'S ASSET RECOVERY ACTION

This dispute arises out of the Securities and Exchange Commission's (the "SEC") ongoing securities fraud action against R. Allen Stanford, his associates, and various entities under Stanford's control (the "Stanford Defendants"). As part of that litigation, this Court appointed a receiver (the "Receiver") and authorized him to commence any actions necessary to recover assets of the Receivership Estate. *See* Second Am. Order Appointing Receiver, July 19, 2010 [1130] (the "Receivership Order"), *in SEC v. Stanford Int'l Bank, Ltd.*, Civil Action No. 3:09-CV-0298-N (N.D. Tex. filed Feb. 17, 2009). Pursuant to those powers, the Receiver filed this action to recover approximately $760 million in alleged Stanford International Bank, Ltd. ("SIB") certificate of deposit proceeds paid to certain Stanford investors (the "Investor Defendants") and the Employee Defendants. *See* First Am. Compl. Against Certain Stanford Investors (the "Investor Complaint") [128]; Investor Compl. App. [129]; Second Am. Compl. Against Former Stanford Employees (the "Employee Complaint") [156]; Emp. Compl. App. [157].

The Receiver alleges that the Employee Defendants, through their work, furthered the Stanford Defendants' scheme and in return received compensation in the form

[3] The Court previously denied several motions to compel arbitration in reliance on the Fifth Circuit's now-withdrawn opinion affirming the Court's entry of a preliminary injunction. *See* Order of Apr. 11, 2011 (denying [199, 203, 204, 207, 407 & 408]). The Court reconsiders and again denies those motions here.

of "salaries[,] Loans, SIBL CD commissions, SIBL Quarterly Bonuses, Performance Appreciation Rights Plan ("PARS") Payments, Branch Managing Director Quarterly Compensation, and Severance Payments (collectively, CD Proceeds)." Employee Compl. at 2. The Receiver attributes to the Employee Defendants a minimum of approximately $215 million in CD Proceeds. *See* Employee Compl. at 16. Various Employee Defendants now move to compel arbitration, arguing that agreements between the Employee Defendants and the Stanford Defendants and related entities require the Receiver to arbitrate his claims.

II. THE RECEIVER REPRESENTS DEFRAUDED CREDITORS IN THIS ACTION AND THEREFORE NEED NOT ARBITRATE WITH THE EMPLOYEE DEFENDANTS

Various Employee Defendants contend that the Receiver must arbitrate his claims based on agreements between the Employee Defendants and the Stanford Defendants and related entities. This Court earlier granted preliminary injunctive relief to preserve the status quo pending a decision on the motions to compel arbitration. The Employee Defendants appealed that ruling. On appeal, the Fifth Circuit affirmed. See *Janvey v. Alguire*, 628 F.3d 164 (5th Cir. 2010), *superseded by* 2011 WL 2937949 (5th Cir. 2011) (publication pending). In its initial opinion, apparently at the urging of the parties, the Circuit reached the question of arbitrability and held that the dispute was not arbitrable. On rehearing, the Court vacated that portion of its earlier opinion, not due to any reservation regarding its reasoning, but rather finding that it did not have jurisdiction to determine arbitrability in the first instance. 2011 WL 2937949, at *15-17.

Although the Court is not bound by the Circuit's now-vacated arbitrability ruling as a matter of precedent, the

Court is nonetheless persuaded by the legal reasoning of that decision. Rather than reinvent the wheel or attempt to paraphrase the language of the opinion, the Court with deference and attribution to the panel adopts the language and reasoning of the withdrawn opinion regarding arbitrability as its own:

> [Courts] "perform a two step inquiry to determine whether to compel a party to arbitrate." *Dealer Computer Servs., Inc. v. Old Colony Motors, Inc.*, 588 F.3d 884, 886 (5th Cir. 2009) (citation omitted). In the first step, [courts] "determin[e] whether the parties agreed to arbitrate the dispute." *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002). This step is further subdivided into an inquiry into whether "(1) . . . there is a valid agreement to arbitrate the claims and (2) . . . the dispute in question fall[s] within the scope of that arbitration agreement." *Sherer v. Green Tree Servicing*, 548 F.3d 379, 381 (5th Cir. 2008). If [the court] find[s] affirmatively as to the first step, then [it] must determine whether "any federal statute or policy renders the claims nonarbitrable." *Id.* (quotations and citations omitted). [The Court] finds that this issue can be decided in the first step: The Receiver, acting on behalf of the creditors, is not party to the arbitration obligations between SGC and the Employee Defendants.
>
> *1. The Receiver's Powers*
>
> The parties expend considerable energy debating what [the Court] believe[s] may be distilled to a simple question: in what capacity is the Receiver suing the Employee Defendants? This question goes to the first sub-part of the first step of the arbitrability assessment.

From the Employee Defendants' perspective, the Receiver stands in [Stanford Group Company's ("SGC")] shoes when it seeks to disgorge compensation that SGC paid to the Employee Defendants. The Employee Defendants contend that the Receiver is bound by any pertinent agreements or rules that govern the relationship between SGC and the Employee Defendants. Thus, because SGC and the Employee Defendants are members of FINRA, and the Promissory Notes contained arbitration clauses, the Receiver must arbitrate any disputes with them.

The Receiver conceptualizes his rights and obligations differently. The Receiver contends that he is suing as a creditor or as a representative on behalf of other creditors. Although the Receiver acknowledges that he is marshaling the assets of the Stanford estate, the Receiver claims that here, he is suing for the fraudulent transfer of assets, and he contends that there is substantial precedent standing for the proposition that receivers may assert the rights of creditors to avoid fraudulent transfers. Because Stanford's creditors are not party to the arbitration obligations between SGC and the Employee Defendants, the Receiver concludes that he need not arbitrate his claims here. [The Court] believe[s] that the Receiver's characterization of this case and the pertinent case law is more accurate.

[This Court] appointed the Receiver, "grant[ing] him the power to conserve, hold, manage, and preserve the value of the receivership estate," [*Janvey v. Adams*, 588 F.3d 831, 833 (5th Cir. 2009)] and vesting him "with full power of an equity receiver under the common law as well as such powers as are enumerated [in the Receivership Order]." . . . It is a general rule that "the receiver cannot recover, except where recovery could have been had by the corporation." *Drennen v. S. States Fire Ins. Co.*, 252 F. 776, 789 (5th Cir. 1918). In this sense, a receiver "stands in the shoes of the person for whom he has been appointed and can assert only those claims which that person could have asserted." *Armstrong v. McAlpin*, 699 F.2d 79, 89 (2d Cir. 1983). Were this general rule the only rule, . . . the Employee Defendants would prevail and the Receiver would be bound by the arbitration agreements. As is often the case, however, the general rule comes with a few caveats.

A receiver is also "an instrument of court; he is acting also for the stockholders of the corporation, and the creditors of the corporation." *Drennen*, 252 F. at 788. In this manner, receivers are legal hybrids, imbued with rights and obligations analogous to the various actors required to effectively manage an estate in the absence of the "true" owner. *See, e.g.*, [*United States v. Setser*, 568 F.3d 482, 487-88 (5th Cir. 2009)] (discussing the ability of a receiver to enter and search estate property without a warrant and relinquish property to law enforcement officials). It is well settled that, at different points during the pendency of the receivership, a receiver may represent different interests.[4] The Receiver

[4] *See, e.g.*, *McGinness v. United States*, 90 F.3d 143, 146 (6th Cir. 1996) (finding, under Ohio law, that "[w]hile it is true that the receiver can acquire no greater legal rights or powers with respect to the property than [the taxpayer] possesses . . . , the receiver's powers are not limited to the legal rights of the debtor-taxpayer, [because]

argues here that he should be able to represent the creditors' fraudulent transfer claims, and thereby avoid the matter of arbitrability. [The Court] must address whether the Receiver's claims are, indeed, fraudulent transfer claims and whether this posture avoids the arbitration clauses between SGC and the Employee Defendants.

2. Fraudulent Transfer

The Receiver asserts his claims against the Employee Defendants under a theory of fraudulent transfer, claiming that Stanford gave proceeds of the Ponzi scheme to the Employee Defendants. In Texas, fraudulent transfer claims are governed by [the Texas Uniform Fraudulent Transfer Act ("TUFTA")]. TEX. BUS. & COM. CODE ANN. § 24.008. TUFTA's remedies are expressly directed toward creditors: "In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in Section 24.009 of this code, may obtain" relief. *Id.* § 24.008(a) (emphasis added). The Receiver claims the right to represent "creditors" under that section and to assert his disgorgement claims against the Employee Defendants. To support his position, the Receiver contends that receivers have long held the power to assert creditor claims. [The Court] agree[s].

In analyzing Texas law, [the Fifth Circuit] ha[s] previously rejected a challenge to a receiver's standing to sue on behalf of creditors. *Meyers v. Moody*, 693 F.2d 1196, 1206 (5th Cir. 1982). The

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[u]pon his appointment, the receiver succeeded to the rights of not only the debtor, but also the creditor").

Meyers Court quoted from *Cotten v. Republic National Bank of Dallas*, which held that:

> Certainly a receiver for an insolvent insurance corporation . . . has a right to maintain a suit which is necessary to preserve the corporation's assets and to recover assets of which the corporation has been wrongfully deprived through fraud. In such a suit the receiver may be said to sue as the representative of the corporation and its creditors, stockholders and policyholders . . . .

395 S.W.2d 930, 941 (Tex. Civ. App.—Dall. 1965, writ ref'd n.r.e.). This position enjoys wide support.[5]

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[5] *See Wheeler v. Am. Nat'l Bank of Beaumont*, 338 S.W.2d 486, 495 (Tex. App.—Beaumont 1960, writ granted) ("[T]here are instances where a corporation itself would not be permitted to sue for recovery of a true corporate asset because of its own fraudulent conduct in connection with the loss of the same. However, the receiver would not be so estopped. In such instances he may disaffirm or repudiate the fraudulent acts of the corporate officers and seek recovery of such assets for the benefit of the corporation and creditors. This is the rule in Texas."), *aff'd in part and rev'd on other grounds by* 162 Tex. 502, 347 S.W.2d 918 (1961); *Guardian Consumer Fin. Corp. v. Langdeau*, 329 S.W.2d 926, 934 (Tex. Civ. App.—Austin 1959, no writ) ("[W]hen the receiver acts to protect innocent creditors of insolvent corporations . . . the receiver acts in a dual capacity, as a trustee for both the stockholders and the creditors, and as trustee for the creditors he can maintain and defend actions done in fraud of creditors even though the corporation would not be permitted to do so."); *see also SEC v. Cook*, No. CA 3:00–CV–272–R, 2001 WL 256172, at *2 (N.D. Tex. Mar. 8, 2001) (holding that receiver had standing to pursue fraudulent transfer claim); 64 TEX. JUR. 3D *Receivers* § 179 (2010) (noting power); 66 AM. JUR. 2D *Receivers* § 450 (1973) (same).

> The Employee Defendants provide no contrary support concerning the power of the Receiver to bring a claim under TUFTA, instead contending that the Receiver merely "stands in the shoes" of SGC.[6] [The Court] believe[s] that in this case, the Receiver is acting on behalf of creditors, who are not party to the arbitration agreements and therefore he is not bound by the arbitration agreement.

Alguire, 628 F.3d at 182-85 & nn.10-12 (some alterations and omissions in original). Accordingly, the Court holds that the Receiver has standing to bring creditors' claims and denies the various Employee Defendants' motions to compel arbitration.

CONCLUSION

In this action, the Receiver represents creditors defrauded by the Stanford Defendants' scheme in their recovery efforts. As such, he is not a party to or bound by the Employee Defendants' arbitration agreements. Ac-

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[6] The Employee Defendants rely heavily on *Javitch v. First Union Securities, Inc.*, 315 F.3d 619 (6th Cir. 2003), to support their claim that receivers are also bound by arbitration agreements. *Javitch* is easily distinguishable. The *Javitch* receiver brought suit against a number of brokers and financial institutions that provided services to the insolvent corporation. *Id.* at 622. Akin to the instant case, the receiver claimed to bring the claims for defrauded investor creditors. *Id.* at 625. However, the receiver alleged that the defendants provided negligent services and breached fiduciary duties owed to the insolvent corporation. *Id.* at 622. Because the Javitch receiver sued on behalf of the insolvent corporation, and that corporation had enforceable arbitration agreements with the defendants, the Sixth Circuit held that the receiver was bound to arbitrate. *Id.* at 627. Here, as explained above, the Receiver's fraudulent transfer claims are brought on behalf of defrauded creditors under TUFTA, which looks to the actions of Stanford and not to the services provided by the Employee Defendants. TEX. BUS. & COM. CODE ANN. § 24.005.

cordingly, the Court denies the Employee Defendants' motions to compel arbitration.[7]

Signed August 26, 2011.

/s/

David C. Godbey
United States District Judge

[7] After the Fifth Circuit withdrew the arbitrability section from the original *Alguire* opinion, two groups of Employee Defendants filed supplemental briefs. In them, these Employee Defendants argue in part—and one group for the first time before this Court—that the Receiver must arbitrate his claims even if he represents creditors, citing an arbitration provision in SGC's client agreement (the "Client Agreement") [677 & 680]. This argument suffers from two deficiencies. First, it depends on an erroneous conflating of "creditors" and "investors." Even if the Court assumed that the Client Agreement's arbitration provision applied to every former Stanford investor, not all of the Stanford Defendants' creditors were investors. For example, the Stanford Defendants' scheme also allegedly left numerous trade creditors in the lurch. And, the Employee Defendants point to no evidence that such creditors are bound by arbitration agreements. Second, as a matter of procedure, the Employee Defendants have waived any arguments based on the Client Agreement. The Receiver's standing played a prominent role in the parties' arbitrability briefing. In that briefing, the Receiver consistently argued that he may also stand in the shoes of the Stanford Defendants' creditors. The Employee Defendants nonetheless failed to argue under the Client Agreement in their motions [201-2 & 205]. Although one group raised the issue for the first time in a two-sentence footnote in their reply [353], "'[a]rguments raised for the first time in a reply brief, even by pro se litigants . . . are waived.'" *Cavazos v. JP Morgan Chase Bank, N.A.*, 388 F. App'x 398, 399 (5th Cir. 2010) (quoting *United States v. Jackson*, 426 F.3d 301, 304 n.2 (5th Cir. 2005)) (omission in original). Accordingly, the Court declines to compel arbitration on the basis of the Client Agreement.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(JULY 22, 2011)

NO. 10-10617

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.

Appeals from the United States District Court
for the Northern District of Texas

Before STEWART, PRADO, and ELROD, Circuit Judges.

EDWARD C. PRADO, Circuit Judge:

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

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[1] There are no substantive changes to our previous conclusions and reasoning concerning whether the district court had the power to

The Securities Exchange Commission ("SEC") 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 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]

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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.

[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 Defend-

In 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.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Stanford, 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

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ants," to the defendants who filed the Teral Bennett *et al.* brief as the "Bennett Defendants," and to Jason Green as "Green."

> 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, 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 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. 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 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 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 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 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 the applicable standard, constituted an abuse of discretion." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (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 be re-

[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.

versed 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. 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 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 (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 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 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

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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 231. The parties do not attempt to establish or distinguish similar facts here.

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. *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 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 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 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 (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 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 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 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 (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 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.

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

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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.

arbitration and, *ipso facto*, the meaningfulness of the arbitration process." *Teradyne v. Mostek Corp.*, 797 F.2d 43, 51 (1st Cir. 1986). 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 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 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 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 [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.) (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 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 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

[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.

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 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 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 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). 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 (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 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 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 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 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) (citing *Warfield*, 436 F.3d at 558). In other words, "'the transferees' knowing participation is irrelevant under the statute' for purposes 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] 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 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 injunction because the assets were fraudulently transferred as part of a Ponzi scheme. We find 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.

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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 of civil procedure." *Id.* Clearly, TUFTA contemplates the application of equitable standards, encompassing the usual elements necessary to obtain a preliminary injunction.

Deerfield Med. Ctr. v. City of Deerfield Beach, 661 F.2d 328, 338 (5th Cir. Unit B 1981); *Parker 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 (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 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. 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 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 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. 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 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 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 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 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 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. & COMM. CODE § 24.008(a)(2) (attachment); *id.* § 24.008(a)(3)(A) (injunction). The district court relied upon *Telephone Equipment 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 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 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 spe-

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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)).

cific class of interlocutory orders made appealable by statute, or the issue falls within some jurisprudential exception." *Silver Star Enter., 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 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 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 Enter.*, 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. 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 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 prohibiting the defendant from settling federal claims in other cases with-

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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 Mem. Hosp. v. Mercury Const. Co.*, 460 U.S. 1 (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.

out 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 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 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 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.

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 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.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(DECEMBER 15, 2010)

NO. 10-10617

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.

Appeal from the United States District Court for the Northern District of Texas, Dallas Division

Before STEWART, PRADO, and ELROD, Circuit Judges.

EDWARD C. PRADO, Circuit Judge:

The Securities Exchange Commission ("SEC") 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.[1] 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),[2] a case concerning the frozen accounts of Stanford investors. Although the Fifth Circuit ordered the district court to thaw the accounts of the Stanford 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.[3]

In 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

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[1] 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."

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

[3] 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."

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; and (5) the Receiver's claims are not subject to arbitration.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Stanford, 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, 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 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. *Adams*, 588 F.3d at 833. 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. In *Adams*, the Fifth Circuit vacated the district court's grant of a preliminary injunction. 588 F.3d 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 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 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 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 the Texas Uniform Fraudulent Transfer Act ("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 address the five issues in turn.

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

The Panel has jurisdiction over the appeal of the district court's preliminary injunction under 28 U.S.C. § 1292(a)(1).[4]

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 the applicable standard, constituted an abuse of discretion." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (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 omitted) (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 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. The Receiver argues that case law, the FINRA rules, and common sense allows the district court to issue a preliminary injunction pending its resolu-

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[4] 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.

tion of a motion to compel arbitration. The district court found that it had power to grant preliminary 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 any controversy 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. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (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 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.[5] The Employee Defendants contend that once again we may avoid the fray and still decide the issue in 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. *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

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[5] 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 231. The parties do not attempt to establish or distinguish similar facts here.

authority permits the district court to issue a preliminary injunction to maintain the status 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 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: The district 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 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 (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 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 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, section 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 not yet made 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 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 (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 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.

(Supp. R. #3 at 4273 n.5.)

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.[6] 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). 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

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[6] 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.

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 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 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 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 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 [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) (citing *Tel. Equip. Network, Inc. v. TA/Westchase Place, Ltd.*, 80 S.W.3d 601, 609 (Tex.App.—Houston [1st Dist.] 2002)).

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.[7] The FA Defendants

[7] The Bennett Defendants do not tie this argument to any element of the preliminary injunction standard, instead lodging a general objec-

argue that because they received their compensation from SGC and not SIB, they did not receive compensation from the 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 money from the Stanford Ponzi scheme; and (3) this Court need not 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.'" (Supp. R. #3 at 4277 (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 to defraud under TUFTA. The district court further found that the Receiver presented suf-

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tion 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.

ficient 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 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 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) ("in 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). 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 (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 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 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 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 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 abuse its discretion 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) (citing *Warfield*, 436 F.3d at 558). In other words, "'the transferees' knowing participation is irrelevant under the statute' for purposes 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] 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 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 injunction because the assets were fraudulently transferred as part of a Ponzi scheme. We find 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).[8] 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); *Parker 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 (1934) ("we are not in doubt, the multiplicity of

[8] 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 of civil procedure." TEX. BUS. & COM. CODE § 24.008(a)(3)(A). Clearly, TUFTA contemplates the application of equitable standards, encompassing the usual elements necessary to obtain a preliminary injunction.

actions necessary for redress at law [is] sufficient . . . to uphold the remedy by injunction"). We have previously stated that where a district court has 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. 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." (dicta)). 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 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 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. The 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 (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 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 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 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 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 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. & COMM. CODE § 24.008(a)(2) (attachment); *id.* § 24.008(a)(3)(A) (injunction). The district court relied upon *Telephone Equipment 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.[9] The district court's

[9] Although the *Telephone Equipment* court used the acronym "UFTA," it is apparent that the court cited to and analyzed provi-

reliance was well placed. TUFTA provides that the 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 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, but both parties ask this Court to decide this question. As the parties note, the issue has been fully briefed as the Receiver had an opportunity to file a response to the motion to compel arbitration.

We must first decide whether this issue is before us as a part of the appeal of the preliminary injunction. We have previously held that our "jurisdiction under 28 U.S.C. §1292(a)(1) is not limited to the specific order appealed from." *In re Lease Oil Antitrust Litig.*, 200 F.3d 317, 319-20 (5th Cir. 2000) (citation omitted). To avoid "wast[ing] judicial resources without any offsetting bene-

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sions 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)).

fit in the form of a fully developed record," we have held that "[j]urisdiction extends to certain related issues that have been sufficiently developed so as not to require further development at the trial court level." *Id.* at 320. We decide this issue to conserve judicial resources and expedite the disposition of this complex case. Refraining to do so would mean money wasted in litigation costs that could be used to compensate victims and more time spent before the Employee Defendants' assets are freed.

Given that the district court has not yet decided this matter, we necessarily review the motion to compel arbitration de novo. Therefore, we "perform a two step inquiry to determine whether to compel a party to arbitrate." *Dealer Computer Servs., Inc. v. Old Colony Motors, Inc.*, 588 F.3d 884, 886 (5th Cir. 2009) (citation omitted). In the first step, we "determin[e] whether the parties agreed to arbitrate the dispute." *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002). This step is further sub-divided into an inquiry into whether "(1) . . . there is a valid agreement to arbitrate the claims and (2) . . . the dispute in question fall[s] within the scope of that arbitration agreement." *Sherer v. Green Tree Servicing*, 548 F.3d 279, 381 (5th Cir. 2008). If we find affirmatively as to the first step, then we must determine whether "any federal statute or policy renders the claim s nonarbitrable." *Id.* (quotations and citations omitted). We find that this issue can be decided in the first step: The Receiver, acting on behalf of the creditors, is not party to the arbitration obligations between SGC and the Employee Defendants.

1. The Receiver's Powers

The parties expend considerable energy debating what we believe may be distilled to a simple question: in what capacity is the Receiver suing the Employee Defendants? This question goes to the first sub-part of the first step of the arbitrability assessment.

From the Employee Defendants' perspective, the Receiver stands in SGC's shoes when it seeks to disgorge compensation that SGC paid to the Employee Defendants. The Employee Defendants contend that the Receiver is bound by any pertinent agreements or rules that govern the relationship between SGC and the Employee Defendants. Thus, because SGC and the Employee Defendants are members of FINRA, and the Promissory Notes contained arbitration clauses, the Receiver must arbitrate any disputes with them.

The Receiver conceptualizes his rights and obligations differently. The Receiver contends that he is suing as a creditor or as a representative on behalf of other creditors. Although the Receiver acknowledges that he is marshaling the assets of the Stanford estate, the Receiver claims that here, he is suing for the fraudulent transfer of assets, and he contends that there is substantial precedent standing for the proposition that receivers may assert the rights of creditors to avoid fraudulent transfers. Because Stanford's creditors are not party to the arbitration obligations between SGC and the Em ployee Defendants, the Receiver concludes that he need not arbitrate his claims here. We believe that the Receiver's characterization of this case and the pertinent case law is more accurate.

The district court appointed the Receiver, "grant[ing] him the power to conserve, hold, manage, and preserve the value of the receivership estate," *Adams*, 588 F.3d at 833, and vesting him "with full power of an equity receiver under the common law as well as such powers as are enumerated herein in this order." (Supp. R. #3 at 4270.) It is a general rule that "the receiver cannot recover, except where recovery could have been had by the corporation." *Drennen v. S. States Fire Ins. Co.*, 252 F. 776, 789 (5th Cir. 1918). In this sense, a receiver "stands in the shoes of the person for whom he has been appointed and can assert only those claim s which that person could have asserted." *Armstrong v. McAlpin*, 699 F.2d 79, 89 (2d Cir. 1983). Were this general rule the only rule, we believe the Employee Defendants would prevail and the Receiver would be bound by the arbitration agreements. As is often the case, however, the general rule comes with a few caveats.

A receiver is also "an instrument of court; he is acting also for the stockholders of the corporation, and the creditors of the corporation." *Drennen*, 252 F. at 788. In this manner, receivers are legal hybrids, imbued with rights and obligations analogous to the various actors required to effectively manage an estate in the absence of the "true" owner. *See, e.g.*, *Setser*, 568 F.3d at 487-88 (discussing the ability of a receiver to enter and search estate property without a warrant and relinquish property to law enforcement officials). It is well settled that, at different points during the pendency of the receivership, a receiver may represent different interests.[10] The Receiver argues here that he should be able to represent the creditors' fraudulent transfer claims, and thereby avoid the matter of arbitrability. We must address whether the Receiver's claims are, indeed, fraudulent

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[10] *See, e.g.*, *McGinness v. United States*, 90 F.3d 143, 146 (6th Cir. 1996) (finding, under Ohio law, that "[w]hile it is true that the receiver can acquire no greater legal rights or powers with respect to the property than [the taxpayer] possesses . . . , the receiver's powers are not limited to the legal rights of the debtor-taxpayer, [because] [u]pon his appointment, the receiver succeeded to the rights of not only the debtor, but also the creditor").

transfer claims and whether this posture avoids the arbitration clauses between SGC and the Employee Defendants.

2. Fraudulent Transfer

The Receiver asserts his claim s against the Employee Defendants under a theory of fraudulent transfer, claiming that Stanford gave proceeds of the Ponzi scheme to the Employee Defendants. In Texas, fraudulent transfer claims are governed by TUFTA. TEX. BUS. & COM. CODE ANN. § 24.008. TUFTA's remedies are expressly directed toward creditors: "In an action for relief against a transfer or obligation under this chapter, *a creditor*, subject to the limitations in Section 24.009 of this code, may obtain" relief. *Id.* § 24.008(a) (emphasis added). The Receiver claims the right to represent "creditors" under that section and to assert his disgorgement claim s against the Employee Defendants. To support his position, the Receiver contends that receivers have long held the power to assert creditor claims. We agree.

In analyzing Texas law, we have previously rejected a challenge to a receiver's standing to sue on behalf of creditors. *Meyers v. Moody*, 693 F.2d 1196, 1206 (5th Cir. 1982). The *Meyers* Court quoted from *Cotten v. Republic National Bank of Dallas*, which held that:

> Certainly a receiver for an insolvent insurance corporation . . . has a right to maintain a suit which is necessary to preserve the corporation's assets and to recover assets of which the corporation has been wrongfully deprived through fraud. In such a suit the receiver may be said to sue as the representative of the corporation and its creditors, stockholders and policyholders . . . .

395 S.W.2d 930, 941 (Tex. Civ. App.—Dall. 1965, writ

ref'd n.r.e.). This position enjoys wide support.[11]

The Employee Defendants provide no contrary support concerning the power of the Receiver to bring a claim under TUFTA, instead contending that the Receiver merely "stands in the shoes" of SGC.[12] We believe that

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[11] *See Wheeler v. Am. Nat'l Bank of Beaumont*, 338 S.W.2d 486, 495 (Tex. App.—Beaumont 1960, writ granted) ("[T]here are instances where a corporation itself would not be permitted to sue for recovery of a true corporate asset because of its own fraudulent conduct in connection with the loss of the same. However, the receiver would not be so estopped. In such instances he may disaffirm or repudiate the fraudulent acts of the corporate officers and seek recovery of such assets for the benefit of the corporation and creditors. This is the rule in Texas."), *aff'd in part and rev'd on other grounds by* 347 S.W.2d 918 (Tex. 1961); *Guardian Consumer Fin. Corp. v. Langdeau*, 329 S.W.2d 926, 934 (Tex. Civ. App.—Austin 1959, no writ) ("[W]hen the receiver acts to protect innocent creditors of insolvent corporations . . . the receiver acts in a dual capacity, as a trustee for both the stockholders and the creditors, and as trustee for the creditors he can maintain and defend actions done in fraud of creditors even though the corporation would not be permitted to do so."); *see also SEC v. Cook*, No. CA 3:00-CV-272-R, 2001 WL 256172, at *2 (N.D. Tex. Mar. 8, 2001) (holding that receiver had standing to pursue fraudulent transfer claim); 64 TEX. JUR. 3D *Receivers* § 179 (2010) (noting power); 66 AM. JUR. 2d *Receivers* § 450 (1973) (same).

[12] The Employee Defendants rely heavily on *Javitch v. First Union Securities, Inc.*, 315 F.3d 619 (6th Cir. 2003), to support their claim that receivers are also bound by arbitration agreements. *Javitch* is easily distinguishable. The *Javitch* receiver brought suit against a number of brokers and financial institutions that provided services to the insolvent corporation. *Id.* at 622. Akin to the instant case, the receiver claimed to bring the claims for defrauded investor creditors. *Id.* at 625. However, the receiver alleged that the defendants provided negligent services and breached fiduciary duties *owed to the insolvent corporation*. *Id.* at 622. Because the *Javitch* receiver sued on behalf of the insolvent corporation, and that corporation had enforceable arbitration agreements with the defendants, the Sixth Circuit held that the receiver was bound to arbitrate. *Id.* at 627. Here, as explained above, the Receiver's fraudulent transfer claims are

in this case, the Receiver is acting on behalf of creditors, who are not party to the arbitration agreements and therefore he is not bound by the arbitration agreement. We therefore remand to the district court for action in accordance with this decision.

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 discretion in issuing the preliminary injunction. (3) The preliminary injunction was not an attachment, nor was it overly broad. And (4) The Receiver's claims are not subject to arbitration because he is suing on behalf of estate creditors.

AFFIRMED and REMANDED.

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brought on behalf of defrauded creditors under TUFTA, which looks to the actions of Stanford and not to the services provided by the Employee Defendants. TEX. BUS. & COM. CODE ANN. § 24.005.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

(JUNE 10, 2010)

Civil Action No. 3:09-CV-0724-N

RALPH S. JANVEY,
Plaintiff,

v.

JAMES R. ALGUIRE, *et al.*,
Defendants.

PRELIMINARY INJUNCTION

This Order addresses the Receiver's application for preliminary injunction [392]. Because the Court finds that the Receiver satisfies all the requirements to obtain a preliminary injunction under the Texas Uniform Fraudulent Transfer Act ("TUFTA"), the Court grants his application. The Court enjoins certain former Stanford employees ("Employee Defendants")[1] from removing funds currently frozen in accounts located at Pershing LLC and JP Morgan Clearing Corp., unless funds in the accounts exceed the total of: (1) commissions

[1] *See* Appendix A (list of Employee Defendants).

earned from the sale of SIB CDs; (2) SIB quarterly bonuses; and (3) branch managing-director quarterly compensation.[2]

I. BACKGROUND

A. The Stanford Ponzi Scheme

In February 2009, the Securities Exchange Commission ("SEC") sued various players in what it called a "massive Ponzi scheme" controlled by R. Allen Stanford. Stanford, through his Stanford International Bank ("SIB"), issued some $7.2 billion in sham certificates of deposit ("CDs") to investors.[3] Stanford perpetuated his fraud through a web of more than 100 entities. Defendants in this case are former employees of the Stanford entities. Most worked for Stanford Group Company ("SGC"), a registered broker-dealer; SGC's principal source of revenue was the sale of SIB-issued CDs.

The Stanford scheme operated as a classic Ponzi scheme, paying dividends to early investors with funds brought in from later investors. CD proceeds largely went to speculative and illiquid investments; payments to the first round of investors; large "loans" that Stanford and his associates used funded a lavish lifestyle; and commissions, bonuses, and loans to SGC employees. Indeed, by the time the SEC filed suit, most of the $7.2 billion revenue from CD sales was gone, and the value of the Stanford entities' combined assets was less than $1 billion.

B. Procedural History

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[2] For a totals for each category of funds for each defendant, see the declaration of forensic account Karyl Van Tassel. App. to Receiver's Mot. for Prelim. Inj. at 3-12 [393].

[3] The facts in this section represent the Court's findings based on the evidence before it in this proceeding.

After the SEC brought suit against Stanford, this Court appointed a Receiver to "marshal, conserve, protect, and hold funds and assets" obtained in connection with this scheme. The Court appointed Ralph S. Janvey as the receiver of these assets, and vested him"with full power of an equity receiver under the common law as well as such powers as are enumerated herein in this order." The Court also froze all accounts that originated through SGC, and the Receiver took control of those accounts.

Several months after the Court froze these accounts, the Court advised the Receiver that he must either assert claims against account holders or release their accounts. Thus, the Receiver sued hundreds of investors ("Investor Defendants") and former Stanford employees ("Employee Defendants"), bringing claims against them in the SEC proceeding as "relief defendants." The Court then severed the "relief defendant" complaint from the SEC action, creating this separate lawsuit, *Janvey v. Alguire*. Shortly after this case commenced, the Receiver asked the Court to continue the account freeze as to the Investor Defendants. The Court held a hearing on the issue on July 31, 2009, at which it ruled that the asset freeze could continue only with respect to interest earned from the CDs, but not with respect to return of principal. The Fifth Circuit affirmed the Court's Order in part and reversed it in part, holding that the Receiver must release *all* of the Investor funds because the Investor Defendants were not proper "relief defendants." *Janvey v. Adams*, 588 F.3d 831, 834-35 (5th Cir. 2009).

The Fifth Circuit in *Adams* did not specifically address whether the Employee Defendants were proper relief defendants. *See generally id.* However, in light of the Fifth Circuit's reasoning, the Receiver amended his complaint against the Employee Defendants. *See* Second Am. Compl. at 4-5 [156].[4] His only remaining claims against the Employee Defendants are fraudulent transfer and, in the alternative, unjust-enrichment.

Further, post-*Adams*, the Receiver reached a partial compromise with the Employee Defendants regarding a partial release of their frozen accounts. *See* Order of Jan. 7, 2010 [174]. Several months later, the parties reached another compromise resulting in an another agreed order, which this Court entered. *See* Order of Apr. 6, 2010 [379]. That order provided for the immediate release of all funds in the Employee Defendants' accounts, with the exception of several limited categories of funds. The funds that were to remain frozen were: (1) commissions earned from the sale of SIB CDs; (2) SIB quarterly bonuses; and (3) branch managing-director quarterly compensation. *Id.* at 1.

The April 6 account freeze was set to expire on June 1, 2010. The Receiver asked Court to continue the account freeze in the form of a temporary restraining order, a preliminary injunction, or a writ of attachment. *See* Mot. for Prelim. Inj. at 33 [392]. The Court granted the request for temporary restraining order pending resolution of the preliminary injunction application. *See* Order of May 28, 2010 [448].

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[4] The new complaint states:

> The Receiver now respectfully files this Second Amended Complaint Against Former Stanford Employees and an Appendix in support, amending herein his claims against the Former Stanford Employees to dismiss the relief-defendant claims against them in light of the recent decision of the U.S. Court of Appeals for the Fifth Circuit in *Janvey v. Adams*, Nos. 09-10761 & 09-10765, 2009 WL 3791623 (5th Cir. Nov. 13, 2009).

Id. at 5.

The Receiver asks the Court to enjoin "removal or dissipation of the assets in the Accounts" pending a trial on the merits in this case. *Id.* The Employee Defendants argue that the Court must deny the Receiver's preliminary injunction application because (1) the Court cannot issue a preliminary injunction because their claims are subject to arbitration, (2) the Receiver's requested relief is really an impermissible motion for writ of attachment; (3) the Receiver cannot meet the requirements for a preliminary injunction; and (4) the Receiver's calculation of CD proceeds are flawed. The Court addresses each of these arguments in turn.

II. THE COURT CAN GRANT PRELIMINARY RELIEF BEFORE DECIDING WHETHER TO COMPEL ARBITRATION

Defendants argue that the Court is without power to grant preliminary injunctive relief because the Receiver's claims against them are subject to arbitration. The Fifth Circuit has not weighed in on the question of "'[w]hether the [Federal] Arbitration Act bars the issuance of a preliminary injunction pending arbitration.'" *RGI, Inc. v. Tucker & Assocs., Inc.*, 858 F.2d 227 (5th Cir. 1988) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollum*, 469 U.S. 1127 (1985) (White, J., dissenting from denial of cert.)). The Fifth Circuit *has* held that, at a minimum, a district court may issue a preliminary injunction pending arbitration where such relief was contemplated by the parties' agreement. *RGI*, 858 F.2d at 231.

The situation in this case is different from the cases cited above because Defendants' motions to compel arbitration, many of which very recently became ripe, are still pending. *See Positive Software Solutions Inc. v. New Century Mortg. Corp.*, 259 F. Supp. 2d 561, 563 (N.D. Tex. 2003) (distinguishing between granting injunctive relief while a motion to compel arbitration is pending and granting injunctive relief after a determination that the dispute is subject to arbitration). Due to the time-sensitive nature of the Receiver's requested relief, the Court finds itself in the position of having to decide whether to issue a preliminary injunction before it can resolve the myriad motions to compel arbitration now pending in this case.

The Court holds that it has the power to preserve the status quo pending a decision on the motions to compel arbitration. "[T]he weight of federal appellate authority recognizes some equitable power on the part of the district court to issue preliminary injunctive relief in disputes that are ultimately to be resolved by an arbitration panel." *Merrill Lynch, Pierce, Fenner & Smith v. Salvano*, 999 F.2d 211, 214 (7th Cir. 1993) (citations omitted); *accord Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1380 (6th Cir. 1995) ("[W]e adopt the reasoning of the First, Second, Third, Fourth, Seventh, and arguably the Ninth, Circuits and hold that in a dispute subject to mandatory arbitration under the Federal Arbitration Act, a district court has subject matter jurisdiction under § 3 of the Act to grant preliminary injunctive relief . . . ."). These cases, which address whether a court may issue injunctive relief pending the resolution of an arbitration itself, do not specifically address whether a court may preserve the status quo pending its resolution of a *motion to compel* arbitration. However, the logical inference is that the greater includes the lesser: if a district court has the power to order interim relief pending the conclusion of an arbitration itself, surely it also has the power to do so pending a decision on a motion to compel.[5]

The Court has not decided whether: (1) the Receiver's claims are subject to arbitration, or (2) the parties' arbitration agreement contemplates preliminary injunctive relief. Accordingly, if the Court rules in favor of Defendants on their motions to compel arbitration, Defendants may ask the Court to reconsider its preliminary injunction in light of Fifth Circuit law and the terms of the arbitration agreement.

III. A TUFTA INJUNCTION IS A DISTINCT REMEDY FROM A WRIT OF ATTACHMENT

The Employee Defendants also argue that, regardless of the form of the Receiver's request, the relief he really seeks is a writ of attachment and the Court must analyze it as such. *See* Defs.' Resp. at 7 [413]. The Court rejects this argument because "attachment" and "injunction" are distinct and alternative remedies under TUFTA. Texas courts analyze preliminary TUFTA injunctions under Section 24.008(3), which provides for "an injunction against further disposition the asset transferred or of other property." TEX. BUS. & COM. CODE ANN. § 24.008(3); *see, e.g., Tel. Equip. Network, Inc. v. TA/Westchase Place, Ltd.*, 80 S.W.3d 601, 610 (Tex. App.—Houston [1 Dist.] 2002, no pet.) (distinguishing remedy of a TUFTA injunction from attachment in non-TUFTA cases). TUFTA's remedies provision also pro-

[5] To hold otherwise 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.

vides for an attachment as a provisional remedy. TEX. BUS. & COM. CODE ANN. § 24.008(2). Thus, the statute's plain terms make clear that "attachment" and "injunction" are distinct remedies. Accordingly, because the Court exercises its discretion to grant a preliminary injunction under TUFTA, it need not consider the Receiver's alternative request for a writ of attachment.

IV. THE COURTS GRANTS THE RECEIVERS MOTION FOR PRELIMINARY INJUNCTION UNDER TUFTA

TUFTA provides various remedies for fraudulent transfer claimants, one being an injunction against "further disposition by . . . the transferee . . . of the asset transferred or of other property." TEX. BUS. & COM. CODE ANN. § 24.008(3)(A). A court may grant a TUFTA injunction "subject to applicable principles of equity and in accordance with applicable rules of civil procedure." *Id.* The "applicable principles of equity" that determine when a district court may issue preliminary injunctive relief "are long-established in this circuit." *Libertarian Party of Tex. v. Fainter*, 741 F.2d 728, 729 (5th Cir. 1984). A party seeking preliminary injunctive relief must demonstrate:

> (1) a substantial likelihood that plaintiff will prevail on the merits,
>
> (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted,
>
> (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and
>
> (4) that granting the preliminary injunction will not disserve the public interest.

Id. (citing *Canal Auth. of the State of Fla. v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974)). The party seeking the preliminary injunction must clearly carry the burden of persuasion on all four requirements. *Bluefield Water Assoc., Inc. v. City of Starkville*, 577 F.3d 250, 253 (5th Cir. 2009). The decision whether to grant preliminary injunctive relief lies within the sound discretion of the trial court. *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985).

A. Likelihood of Success on the Merits

"To determine the likelihood of success on the merits," a court must "look to the standards provided by the substantive law." *Roho, Inc. v. Marquis*, 902 F.2d 356, 358 (5th Cir. 1990) (citing *Miss. Power & Light*, 760 F.2d at 622).[6] "Substantial likelihood" does not mean "more than negligible." *Compact Van Equip. Co., Inc. v. Leggett & Platt, Inc.*, 566 F.2d 952, 954 (5th Cir. 1978). Something more than that is required. However, "[a] plaintiff is not required to prove its entitlement to summary judgment in order to establish 'a substantial likelihood of success on the merits' for preliminary injunction purposes." *Byrum v. Landreth*, 566 F.3d 442, 446 (5th Cir. 2009) (citing *ICEE Distribs., Inc. v. J&J Snack Foods Corp.*, 325 F.3d

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[6] In considering the likelihood of success on the merits, the Court looks to the evidence the parties have presented in this preliminary injunction proceeding. Defendants object to the Receiver's evidence as inadmissible on various grounds. *See* Defs.' Resp. at 2-3 [413]; Defs.' Resp. at 5-14 [417]. The Court overrules these objections. A preliminary injunction proceeding is not constrained by the same formal procedures as a trial. *See Federal Sav. & Loan Ins. Corp. v. Dixon*, 835 F.2d 554, 558 (5th Cir. 1987). Indeed, "'inasmuch as the grant of preliminary injunction is discretionary, the trial court should be allowed to give even inadmissible evidence some weight when it is thought advisable to do so in order to serve the primary purpose of preventing irreparable harm before a trial can be held . . . .'" *Id.* (quoting 11C WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2949).

586, 596 n.34 (5th Cir. 2003)); *see also* 11A CHARLES ALAN WRIGHT, ARTHUR MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE §2948.3 (2d ed. 1995) [hereinafter WRIGHT & MILLER] (noting that "[a]ll courts agree" that a "plaintiff must present a prima facie case but need not show that he is certain to win" (citing cases)).

1. The Receiver's Prima Facie Case.—The Receiver creates a prima facie case for liability under TUFTA.[7] Under TUFTA, certain transfers are deemed invalid as to present and future creditors. Specifically, "[a] transfer made . . . by a debtor is fraudulent as to a creditor . . . if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay, or defraud any creditor of the debtor." TEX. BUS. & COM. CODE ANN. § 24.005(a)(1).

Under the Uniform Fraudulent Transfer Act, "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." *Quilling v. Schonsky*, 247 F. App'x 583, 586 (5th Cir. 2007) (citing *Warfield v. Byron*, 436 F.3d 551, 559 (5th Cir. 2006)). Thus, the Receiver may establish fraudulent intent by establishing that the Stanford enterprise operated as a Ponzi scheme. *See Warfield*, 436 F.3d at 558. A so-called "Ponzi scheme" is "'[a] fraudulent investment scheme in

[7] Defendants argue that the Court must deny the Receiver's preliminary injunction application because the Receiver failed to plead his fraudulent transfer claim with requisite particularity under Rule 9(b). *See* Defs.' Resp. at 18 [417]. The Court will address the sufficiency of the Receiver's complaint at a later date, when it rules on Defendants' pending motions to dismiss. The question before the Court today is whether the Receiver has shown a likelihood of success in the context of these preliminary injunction proceedings.

which money contributed by later investors generates artificially high dividends for the original investors.'" *Schonsky*, 247 F. App'x at 586 (citing BLACK'S LAW DICTIONARY 1180 (8th ed. 2004)). The transferee's knowledge is not relevant to determining whether transfers were made with an intent to defraud. *Id.*[8]

The Court finds that the Receiver has properly demonstrated that: (1) the funds he seeks to freeze represent transfers of Stanford CD proceeds, and (2) that the Stanford enterprise operated as a Ponzi scheme (and thus that actual intent to defraud was present). As to the transfers, it is undisputed that the currently frozen funds represent amounts transferred from the Stanford entities to the Employee Defendants in the course of their employment.[9] The frozen funds represent: (1) loans made by SGC to the Employee Defendants; (2) commissions earned from the sale of SIB CDs; and (3) quarterly

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[8] Because no Texas Supreme Court cases address the requisite mental state for a transferee-defendant under TUFTA, the Fifth Circuit in *Schonsky* made its best "Erie guess" as to the proper construction of the statute. *See id.* This accords with the plain language of TUFTA, which posits that transfers are fraudulent "if the *debtor* made the transfer or incurred the obligation with actual intent . . . ." TEX. BUS. & COM. CODE ANN. § 24.005(a)(1) (emphasis added).

[9] Defendants also argue that the Receiver has not shown a likelihood of success on the merits of his claims because he has improperly "lumped" the Employee Defendants in his complaint and in this preliminary injunction proceeding. This is incorrect. The Receiver presents competent evidence that each individual Defendant received transfers of money representing CD sale proceeds from the Stanford Ponzi scheme. *See* App. to Receiver's Mot. for Prelim. Inj. at 8-12. He presents evidence of actual fraudulent intent on the part of the debtor-transferor, Stanford. Defendants do not dispute that Defendants received the transfers in question as proceeds from the Stanford scheme. Nor do they point the Court to authority indicating that some other, more individualized showing is required.

bonuses to financial advisors and managing directors. In other words, the frozen funds directly represent proceeds and profits that the Employee Defendants earned selling Stanford CDs.[10]

Second, the Receiver presents ample evidence that the Stanford scheme, within which the transfers occurred, was a Ponzi scheme. This creates a presumption of actual fraud on the part of the debtor-transferor (here, the Stanford entities). He relies on the plea agreement of James Davis, the chief financial officer of SGC. *See* App. to Notice of Filing [771], *SEC v. Stanford Int'l Bank*, Civil Action No. 09-CV-0298 (N.D. Tex. 2009) [hereinafter "Davis Declaration"]. Davis admitted that the Stanford enterprise took in billions of dollars in CD sales, most of which it diverted into illiquid and overinflated investments. *Id.* at 41-45. Davis himself admitted that the Stanford CD-selling enterprise was a "massive Ponzi scheme," in which investors could not be paid without money collected from later investors. *Id.* at 44-45. The Receiver presents an extensive report from a forensic accountant confirming Davis's admissions. *See* App. to Receiver's Reply [444-2 to 444-4]. He also provides a report from the inspector general of the SEC, which also confirms that the Stanford enterprise operated as a Ponzi scheme. App. to Receiver's Mot. for Prelim. Inj. at 28-184.

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[10] As the Receiver notes, it is not important whether the currently frozen funds, which were commingled in the Employee Defendants' CD accounts with other amounts that have since been released, are the exact funds received in connection with the Stanford scheme. This is because TUFTA allows an injunction against further disposition of "the asset transferred or of other property." TEX. BUS. & COM. CODE ANN. § 24.008(a)(3)(A).

Defendants argue that the Receiver fails to demonstrate that the Stanford enterprise operated as a Ponzi scheme. *See* Defs.' Resp. at 12 [392]. They argue that, to the extent the Stanford enterprise had any legitimate revenue-generating activity, it was not a Ponzi scheme. This is incorrect. It is true that a Ponzi scheme "usually" lacks "any operation or revenue-producing activity other than the continual raising of new funds." BLACK'S LAW DICTIONARY, *supra*, at 1180. However, the term "usually" is an important qualifier in Defendants' definition. Just because the typical Ponzi scheme lacks any legitimate revenue-producing activity does not mean the Stanford scheme was not a Ponzi scheme. Even if Stanford maintained some legitimate investments in order to lure in more investors, the evidence indicates that they comprised a small fraction of his portfolio. *See* Davis Declaration at 43.

The Court finds that the Stanford enterprise operated as a Ponzi scheme, and that the frozen accounts hold proceeds of the fraudulent scheme transferred to Defendants by Stanford with an intent to hinder, delay, and defraud Stanford creditors.

2. Affirmative Defenses.—Because the Receiver showed he is likely to succeed on his prima facie case, Defendants can refute that he is likely to succeed on the merits only by showing that they are likely to succeed on an affirmative defense. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006) ("[T]he burdens at the preliminary injunction stage track the burdens at trial."); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1158 (9th Cir. 2007) ("[O]nce the moving party has carried its burden of showing a likelihood of success on the merits, the burden shifts to the non-moving party to show a likelihood that its affirmative defense will succeed.").

TUFTA includes a statutory affirmative defense, which provides that "[a] transfer or obligation is not voidable under Section 24.005(a)(1) of this code against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee." TEX. BUS. & COM. CODE ANN. § 24.009(a). A defendant invoking this defense has the burden to show *both* objective good faith and reasonable equivalence of consideration. *See, e.g.*, *Hahn v. Love*, 2009 WL 793637, at *6 (Tex. App.—Houston [1 Dist.] 2009, pet. denied).

Defendants fail to show that they are likely to succeed on an objective-good-faith defense. First, they present no evidence to indicate that they acted in objective good faith. As to the second prong of their good-faith defense, Defendants present no evidence that they provided equivalent value for the fraudulent transfers they received. Further, the Fifth Circuit has held that, as a matter of law, services provided in the context of a Ponzi scheme do not constitute "reasonably equivalent value." *See Warfield*, 436 F.3d 558-60. Accordingly, the Court finds that Defendants fail to establish the elements of this affirmative defense, and that it does not preclude the Court's determination that the Receiver is likely to succeed on the merits.

B. Threat of Irreparable Harm

A party seeking a preliminary injunction must show that "the threatened harm would impair the court's ability to grant an effective remedy." 11A WRIGHT & MILLER § 2948.1. The party must also show that there is an actual likelihood that the suggested harm will occur. *See id.*

The Receiver successfully shows that the threatened harm—dissipation of the assets that are the subject of this suit—would impair the Court's ability to grant an effective remedy. Much of the relief the Receiver seeks under TUFTA is equitable in nature and involves the specific assets that are now frozen. *See* TEX. BUS. & COM. CODE ANN. § 24.008(a) (listing various equitable remedies available under TUFTA, including avoidance of the fraudulent transfer, injunction, and appointment of an equitable receiver). If Defendants were to dissipate or transfer these assets out of the reach of the Court, the Court would be unable to grant the equitable remedies the Receiver seeks.

Other Courts have reached a similar conclusion in both fraudulent transfer and analogous cases. In numerous fraudulent transfer cases,[11] courts have held that dissipation of assets would be an irreparable harm to a plaintiff. *See, e.g.*, *S. New Eng. Tel. Co. v. Global Naps, Inc.*, 595 F. Supp. 2d 155, 159 (D. Mass. 2009) ("This Court is persuaded that, absent an injunction, there is a substantial risk that Convergent or Gangi will dissipate, conceal or otherwise secrete assets thus causing irreparable harm to SNET."); *Seib v. Am. Sav. & Loan Ass'n of Brazoria County*, 1991 WL 218642, at *4 (Tex. App.—Dallas 1991, no writ) ("The property has been the subject of a scheme of fraudulent conveyances. If further transfers of such property are not enjoined, appellees will

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[11] As the statute itself makes clear, the Texas Legislature adopted TUFTA with the specific purpose that it be applied uniformly with other states' versions of the Act. TEX. BUS. & COM. CODE ANN. § 24.012 ("This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it."). Thus, the Court finds persuasive UFTA cases from other jurisdictions.

be forced to file lawsuits against subsequent transferees in an attempt to recover the property."). Courts have reached a similar conclusion in analogous contexts as well. *See, e.g.*, *F.T.C. v. Affordable Media*, 179 F.3d 1228, 1236 (9th Cir. 1999) ("[A]bsent the continuation of the asset freeze, the Enjoined Defendants will conceal, dissipate, or otherwise divert their assets, thereby defeating the possibility of the Court granting effective final relief in the form of equitable monetary relief for consumers."); *Newby v. Enron Corp.*, 188 F. Supp. 2d 684, 707 (S.D. Tex. 2002) (holding that plaintiffs could obtain preliminary injunction if, inter alia, they could show that the defendants were "likely to dissipate the assets that may satisfy the equitable remedies" sought by plaintiffs).

Defendants argue that the Court cannot find irreparable harm because the Receiver has an adequate remedy in the form of money damages. It is true that courts generally do not find irreparable harm where money damages would be an adequate remedy. *See* 11A WRIGHT & MILLER § 2948.1 (citing cases). However, this rule does not inhere when "any judgment ultimately obtained . . . would be unenforceable." *Productos Carnic, S.A. v. Central Am. Beef and Seafood Trading Co.*, 621 F.2d 683, 686 (5th Cir. 1980). For example, "when the plaintiff creditor asserts a cognizable claim to specific assets of the defendant or seeks a remedy involving those assets, a court may in the interim invoke equity to preserve the status quo pending judgment where the legal remedy might prove inadequate . . . ." *United States ex rel. Rahman v. Oncology Assocs.*, 198 F.3d 489, 496-97 (4th Cir. 1999) (discussing *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940)). This is precisely the kind of case where preliminary injunctive relief is appropriate despite the fact that the suit is to recover money:

the essence of a TUFTA claim is that the money now held by the transferee-defendant actually belongs to the creditor-plaintiff.

In addition to showing that the threatened harm would be irreparable, a party seeking a preliminary injunction must also show more than mere fear or speculation that the harm will occur. 11A WRIGHT & MILLER § 2948.1 (citing cases). Defendants argue that, in this case, that means that the Receiver must show a likelihood that each individual defendant would dissipate the frozen assets absent a preliminary injunction. They rely on a case from the Southern District of Texas, in which the court came to a similar conclusion. *See Newby*, 188 F. Supp. 2d at 707. There, the court noted that, although dissipation of asset could constitute irreparable harm to any "future equitable award entered by this court," the plaintiffs were required to show that "each defendant is likely to dissipate the assets that may satisfy the equitable remedies." *Id.*

However, the case on which Defendants rely is not a fraudulent transfer case. Various courts, including Texas courts, have found that a history of fraudulent transfer of an asset creates a presumption of its further dissipation. *See, e.g.*, *In re Focus Media*, 387 F.3d 1077, 1087 (9th Cir. 2004) (history of fraudulent transfer "raises the specter of irreparable harm to the bankruptcy estate if these funds are not frozen"); *Affordable Media*, 179 F.3d at 1236-37 (district court's finding of a risk of dissipation of assets, in light of defendants' "history of spiriting their commissions," was "far from clearly erroneous"); *F.T.C. v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1031 (7th Cir. 1988) (district court had discretion to freeze assets of individual defendants in light of history of shifting assets from fraudulent entity to individual defendants); *Seib*, 1991 WL 218642, at *4 ("In cases such as this where there is a prior history of fraudulent conveyances, it is necessary to preserve the status quo of the subject matter of the suit pending a final trial of the case on its merits.").

Like the other courts that have inferred a likelihood of dissipation from a history of fraudulent conveyance, this Court is satisfied that the risk of harm to the Receiver absent the injunction is more than mere speculation. The assets in question have been the subject of prior fraudulent conveyances to the detriment of Stanford investors. Thus, the Court finds it is likely that, absent an injunction, the assets would again be dissipated or transferred out of reach of Stanford creditors and thus that the Receiver has adequately shown a threat of irreparable harm.

C. Balance of Interests and Service of Public Interest

Further, the potential harm to the Receiver absent a preliminary injunction outweighs the potential harm to Defendants. Defendants argue that "the mere pennies that an investor may receive in a theoretical distribution from a successful recovery by the Receiver does not outweigh the [financial advisors'] interest in their own assets." The Court disagrees. The Court must weigh, on one hand, the harm to Defendants of not being able to spend or use the frozen assets pending resolution of the merits of this case, and, on the other hand, the harm to investors as a whole if no injunction issues. For them, the harm is the possible dissipation of one of the few remaining assets that may eventually be available to Stanford's victims. On balance, the Court finds that this potential harm to the investors outweighs the harm of Defendants not being able to access their assets during the pendency of this case.

Finally, the preliminary injunction will not disserve the public interest. In fact, the opposite is true. The Receiver seeks to enjoin removal of frozen funds because he believes they are fraudulently transferred assets that properly belong to innocent Stanford creditors. If the funds are dissipated, they may be transferred out of the reach of the Receiver—and thus the investors—forever. To risk dissipation of one of the few assets potentially available to Stanford's fraud victims before this case can be decided on its merits would substantially disserve the public interest.

V. THE RECEIVER'S CALCULATIONS

Defendants advance various arguments that this injunction should not issue because the *amount* of the Receiver's requested freeze is flawed. First, Defendants argue that their IRA accounts are exempt under Texas law from attachment, execution, and seizure for the satisfaction of debts. *See* Defs.' Resp. at 18–19 [417]. However, not every IRA is automatically exempt from creditors' claims. "A party claiming an exemption under section 42.0021 bears the burden of proving that he or she is entitled to it." *Jones v. Am. Airlines, Inc.*, 131 S.W.3d 261, 270 (Tex. App.—Fort Worth 2004, no pet.) (citations omitted). Specifically, the party claiming an exemption must show that she has a legal right to the funds in the account. *See id.* Defendants fail to carry this burden, especially in light of tremendous evidence and the Court's finding that the funds in the IRA accounts represent fraudulently transferred Ponzi scheme proceeds.

Second, Defendants argue that the freeze should not extend to pre-tax amounts because Defendants already paid taxes on their earnings. In response, the Receiver points the Court to one case in which a federal court declined an offset for taxes paid. *See Donell v. Kowell*, 533

F.3d 762, 779 (9th Cir. 2008). There, the Ninth Circuit held that

> if we permit offsets for taxes, logic suggests we should also permit offsets for bank transfer fees and other fund management fees. . . . 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 receive no recovery.

Id. The Court is compelled enough by this reasoning to decline the request for offset with respect to the preliminary injunction.

Third, Defendants argue that they are entitled to offset of: (1) amounts they lost on their own personal Stanford investments, and (2) amounts of unpaid compensation owed to Defendants. Defendants provide no legal authority indicating that they would be entitled to such an offset. These amounts are essentially unsecured claims Defendants have against the Stanford entities. Like all other Stanford creditors, Defendants may seek these amounts through the Receiver's claims process.

Fourth, Defendants argue that some of the frozen funds predate TUFTA's four-year statute of limitations period and that those amounts must be excluded from the freeze. However, Defendants make no effort to establish which frozen funds are subject to the statute of limitations. Further, as the Receiver correctly notes, even if some of the specific funds now frozen were transferred prior to the limitations period, the total amount of his claims far exceeds the frozen amounts. Because TUFTA allows an injunction on the asset transferred or "other property," the Court overrules Defendants' statute-of-limitations objection.

Fifth, Defendants allege several problems with the Receiver's calculations of employee loans and severance payments. The Court overrules this objection because loan and severance payments are not part of the current account freeze that the Receiver seeks to continue. *See* Order of Apr. 6, 2010 at 1; Receiver's Reply at 7 n.13 [444]; *see also* App. to Receiver's Mot. for Prelim. Inj. at 3-12 (declaration of forensic accountant Karyl Van Tassel, listing loan and severance payments separately from the three categories of funds the Receiver seeks to enjoin).

VI. BOND

Although Rule 65's security requirement is generally thought to be mandatory, a district court has discretion to determine the appropriate amount of bond. 11A WRIGHT & MILLER § 2954 (noting that "[t]he mandatory nature of the security requirement is ameliorated by" the qualification that the security will be "'in such sum as the court deems proper.'"). Thus, the Fifth Circuit, along with other federal courts of appeals, has held that a court may dispense with the security requirement if the grant of an injunction carries no risk of monetary loss to the defendant. *See, e.g*, *Steward v. West*, 449 F.2d 324, 325 (5th Cir. 1971) ("We think, though, that so long as the petitioner continues to pay her rent, it is very unlikely that the defendant will suffer any harm during the pendency of Mrs. Steward's efforts to protect herself and her children from eviction."); *see also* 11A WRIGHT & MILLER § 2954 ("Indeed, it has been held that the court may dispense with security altogether if the grant of an injunction carries no risk of monetary loss to the defendant." (citing cases)). Here, the Receiver has shown that the frozen accounts are safely in the custody of the financial institutions where they are held. Employee Defendants will be entitled to any interest that accrues on their accounts in the event they eventually prevail on the merits at trial. Further, Defendants fail to show that they would suffer any other monetary harm from lack of access to the frozen accounts if the preliminary injunction issues, let alone the possible value of such harm so as to allow the Court to calculate an appropriate security. In light of Defendants' failure to demonstrate a specific monetary harm that will befall them if the injunction issues, the Court finds that no bond is necessary at this time.

CONCLUSION

Because the Court finds that the Receiver satisfies all the requirements to obtain a preliminary injunction under TUFTA, the Court grants his application for preliminary injunction. The Court enjoins the Employee Defendants from removing funds currently frozen in accounts located at Pershing LLC and JP Morgan Clearing Corp., unless funds in the accounts exceed the total of: (1) commissions earned from the sale of SIB CDs; (2) SIB quarterly bonuses; and (3) branch managing-director quarterly compensation. *Id.* at 1.[12]

It is further ordered that this Order is binding upon the parties to this action, their officers, agents, servants, employees and attorneys and upon persons in active concert or participation with them who receiver actual notice of this Order by personal service or otherwise.

[12] For a totals for each category of funds for each defendant, see the declaration of forensic account Karyl Van Tassel. App. to Receiver's Mot. for Prelim. Inj. at 3-12 [393].

Signed June 10, 2010.

/s/
David C. Godbey
United States District Judge

APPENDIX A:
LIST OF STANFORD EMPLOYEE DEFENDANTS

1. Jeffrey E. Adams
2. Paul Adkins
3. Jeannette Aguilar
4. James R. Alguire
5. Peggy Allen
6. Orlando Amaya
7. Victoria Anctil
8. Tiffany Angelle
9. Susana Anguiano
10. James F. Anthony
11. Sylvia Aquino
12. Juan Araujo
13. Monica Ardesi
14. George Arnold
15. John Michael Arthur
16. Patricio Atkinson
17. Mauricio Aviles
18. Donald Bahrenburg
19. Brown Baine
20. Timothy Bambauer
21. Isaac Bar
22. Elias Barbar
23. Stephen R. Barber
24. Jonathan Barrack

25. Robert Barrett
26. Jane E. Bates
27. Timothy W. Baughman
28. Marie Bautista
29. Oswaldo Bencomo
30. Teral Bennett
31. Lori Bensing
32. Andrea Berger
33. Marc H. Bettinger
34. Norman Blake
35. Stephen G. Blumenreich
36. Michael Bober
37. Nigel Bowman
38. Brad Bradham
39. Fabio Bramanti
40. Fernando Braojos
41. Alexandre Braune
42. Charles Brickey
43. Alan Brookshire
44. Nancy Brownlee
45. Richard Bucher
46. George Cairnes
47. Fausto Callava
48. Robert Bryan Cannon
49. Frank Carpin
50. Rafael Carriles
51. Scott Chaisson
52. James C. Chandley
53. Naveen Chaudhary
54. Jane Chernovetzky
55. Susana Cisneros
56. Ron Clayton
57. Neal Clement
58. Christopher Collier
59. Jay Comeaux

60. Michael Conrad
61. Michael Contorno
62. Bernard Cools-Lartigue
63. Don Cooper
64. Jose Cordero
65. Oscar Correa
66. James Cox
67. John Cravens
68. Ken Crimmins
69. Shawn M. Cross
70. James Cross
71. Patrick Cruickshank
72. Greg R Day
73. William S. Decker
74. Michael DeGolier
75. Andres Delgado
76. Pedro Delgado
77. Ray Deragon
78. Arturo R. Diaz
79. Ana Dongilio
80. Matthew Drews
81. Carter W. Driscoll
82. Abraham Dubrovsky
83. Torben Garde Due
84. Sean Duffy
85. Christopher Shannon Elliotte
86. Neil Emery
87. Thomas Espy
88. Jordan Estra
89. Jason Fair
90. Nolan Farhy
91. Evan Farrell
92. Marina Feldman
93. Ignacio Felice
94. Bianca Fernandez

95. Freddy Fiorillo
96. Lori J. Fischer
97. Rosalia Fontanals
98. James Fontenot
99. Juliana Franco
100. John Fry
101. Roger Fuller
102. Attlee Gaal
103. Miguel A. Garces
104. Gustavo A. Garcia
105. David Braxton Gay
106. Gregg Gelber
107. Mark Gensch
108. Gregory C. Gibson
109. Michael D. Gifford
110. Eric Gildhorn
111. Luis Giusti
112. Steven Glasgow
113. John Glennon
114. Susan Glynn
115. Larry Goldsmith
116. Ramiro Gomez-Rincon
117. Joaquin Gonzalez
118. Juan Carlos Gonzalez
119. Russell Warden Good
120. John Grear
121. Jason Green
122. Stephen Greenhaw
123. Mark Groesbeck
124. Billy Ray Gross
125. Vivian Guarch
126. Donna Guerrero
127. John Gutfranski
128. Rodney Hadfield
129. Gary Haindel

130. Jon Hanna
131. Dirk Harris
132. Virgil Harris
133. Kelley L. Hawkins
134. Charles Hazlett
135. Roberto T. Helguera
136. Luis Hermosa
137. Daniel Hernandez
138. Martine Hernandez
139. Patrica Herr
140. Alfredo Herraez
141. Helena M. Herrero
142. Steven Hoffman
143. Robert Hogue
144. John Holliday
145. Nancy J. Huggins
146. Charles Hughes
147. Wiley Hutchins, Jr.
148. David Innes
149. Marcos Iturriza
150. Charles Jantzi
151. Allen Johnson
152. Susan K. Jurica
153. Marty Karvelis
154. Faran Kassam
155. Joseph L. Klingen
156. Robert A. Kramer
157. David Wayne Krumrey
158. Bruce Lang
159. Grady Layfield
160. James LeBaron
161. Jason LeBlanc
162. William Leighton
163. Mayra C. Leon De Carrero
164. Robert Lenoir

165. Humberto Lepage
166. Francois Lessard
167. James C. Li
168. Gary Lieberman
169. Jason Likens
170. Trevor Ling
171. Christopher Long
172. Robert Long, Jr.
173. Humberto Lopez
174. Luis Felipe Lozano
175. David Lundquist
176. Michael MacDonald
177. Anthony Makransky
178. Megan R. Malanga
179. Manuel Malvaez
180. Maria Manerba
181. Michael Mansur
182. Iris Marcovich
183. Janie Martinez
184. Claudia Martinez
185. Aymeric Martinoia
186. Bert Deems May, Jr.
187. Carol McCann
188. Francesca McCann
189. Douglas McDaniel
190. Matthew McDaniel
191. Pam McGowan
192. Gerardo Meave-Flores
193. Lawrence Messina
194. Nolan N. Metzger
195. William J. Metzinger
196. Donald Miller
197. Trenton Miller
198. Hank Mills
199. Brent B. Milner

200. Peter Montalbano
201. Alberto Montero
202. Rolando H. Mora
203. David Morgan
204. Shawn Morgan
205. Jonathan Mote
206. Carroll Mullis
207. Spencer Murchison
208. David Nanes
209. Jon Nee
210. Aaron Nelson
211. Gail Nelson
212. Russell C. Newton, Jr.
213. Norbert Nieuw
214. Lupe Northam
215. Scott Notowich
216. Monica Novitsky
217. Kale Olson
218. John D. Orcutt
219. Walter Orejuela
220. Alfonso Ortega
221. Zack Parrish
222. Tim Parsons
223. William Peerman
224. Beatriz Pena
225. Ernesto Pena
226. Roberto Pena
227. Roberto A. Pena
228. Dulce Perezmora
229. Saraminta Perez
230. Tony Perez
231. James D. Perry
232. Lou Perry
233. Brandon R. Phillips
234. Randall Pickett

235. Eduardo Picon
236. Edward Prieto
237. Christopher Prindle
238. A. Steven Pritsios
239. Arturo Prum
240. Maria Putz
241. Judith Quinones
242. Sumeet Rai
243. Michael Ralby
244. Leonor Ramirez
245. Nelson Ramirez
246. David Rappaport
247. Charles Rawl
248. Syed H. Razvi
249. Kathleen M. Reed
250. Steven Restifo
251. Walter Ricardo
252. Giampiero Riccio
253. Jeffrey Ricks
254. Juan C. Riera
255. Alan Riffle
256. Randolph E. Robertson
257. Steve Robinson
258. Timothy D. Rogers
259. Eddie Rollins
260. Peter R. Ross
261. Rocky Roys
262. Thomas G. Rudkin
263. Julio Ruelas
264. Nicholas P. Salas
265. Tatiana Saldivia
266. John Santi
267. Christopher K. Schaefer
268. Louis Schaufele
269. John Schwab

270. Harvey Schwartz
271. William Scott
272. Haygood Seawell
273. Leonard Seawell
274. Morris Serrero
275. Doug Shaw
276. Nick Sherrod
277. Jon C. Shipman
278. Jordan Sibler 50,000
279. Rochelle Sidney
280. Brent Simmons
281. Edward Simmons
282. Peter Siragna
283. Steve Slewitzke
284. Nancy Soto
285. Paul Stanley
286. Sanford Steinberg
287. Heath Stephens
288. William O. Stone Jr.
289. David M. Stubbs
290. Mark V. Stys
291. Timothy W. Summers
292. Paula S. Sutton
293. William Brent Sutton
294. Ana Tanur
295. Juan Carlos Terrazas
296. Scot Thigpen
297. Christopher Thomas
298. Mark Tidwell
299. Yliana Torrealba
300. Jose Torres
301. Al Trullenque
302. Audrey Truman
303. Roberto Ulloa
304. Eric Urena

305. Miguel Valdez
306. Nicolas Valera
307. Tim Vanderver
308. Jaime Vargas
309. Pete Vargas
310. Ettore Ventrice
311. Mario Vieira
312. Evely Villalon
313. Maria Villanueva
314. Chris Villemarette
315. Frans Vingerhoedt
316. Daniel Vitrian
317. Charles Vollmer
318. James Weller
319. Bill Whitaker
320. Donald Whitley
321. David Whittemore
322. Charles Widener
323. John Whitfield Wilks
324. Thomas Woolsey
325. Michael Word
326. Ryan Wrobleske
327. Ihab Yassine
328. Bernerd E. Young
329. Leon Zaidner

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(OCTOBER 24, 2013)

NO. 11-10838

RALPH S. JANVEY,
Plaintiff-Appellee,

v.

JAMES R. ALGUIRE; VICTORIA ANCTIL; TIFFANY ANGELLE; SYLVIA AQUINO; JONATHAN BARRACK; ALAN BROOKSHIRE; JAMES C. CHANDLEY; DAVID BRAXTON GAY; GREGORY C. GIBSON; JOHN GREAR; JASON LIKENS; KALE OLSON; TIMOTHY D. ROGERS; NICK SHERROD; SUSAN GLYNN; JOHN WHITFIELD WILKS; STEVE SLEWITZKE; BRAD BRADHAM; NOLAN FARHY; VIRGIL HARRIS; LOUIS SCHAUFELE; ERIC URENA; BIANCA FERNANDEZ; NANCY J. HUGGINS, ET AL,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING EN BANC

(Opinion: August 30, 2013, 5 Cir., _____, _____, F.3d _____)

Before BENAVIDES, OWEN, and SOUTHWICK, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

[signed] Priscilla A. Owen
UNITED STATES CIRCUIT JUDGE

P.S. Judge Jones did not participate in the consideration of the rehearing en banc.