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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Tisha Castillo, et al.,

10 Plaintiffs,

11 v.

12 George Harry Johnson, et al.,

13 Defendants.
14

No. CV-17-04688-PHX-DLR

ORDER

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16 Before the Court is Plaintiffs' motion for preliminary injunction against Defendant
17 Johnson Utilities ("JU") to prevent JU from distributing the proceeds of its asset sale, which
18 is fully briefed. (Docs. 229, 232, 234.) The Court will grant Plaintiffs' motion, as
19 explained below.

20 **I. Background**

21 JU is under contract to sell its assets to EPCOR Water Arizona, Inc. ("EPCOR"),
22 the entity appointed by the Arizona Corporation Commission ("ACC") to take over JU's
23 management and operations. (Doc. 229 at 2.) On October 5, 2020, JU and EPCOR applied
24 for asset sale approval, which the ACC granted on December 22, 2020.¹ (Doc. 229-1.)
25 The asset sale price is \$110,300,000. (Doc. 234-1.)

26 Plaintiffs' Second Amended Complaint ("SAC"), *inter alia*, contains claims arising
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¹ Pursuant to stipulation, Defendants agreed not to distribute sale proceeds prior to January 11, 2021, regardless of the issuance date of the Court's order addressing Plaintiffs' motion for preliminary injunction. (Doc. 231.)

1 from allegations that Defendant George Johnson fraudulently caused JU to transfer tens of
2 millions of dollars out of JU to related entities and others referred to as the “Fraudulent
3 Transfer Defendants.” (Doc. 207.) Concerned that JU might engage in similar conduct
4 following the asset sale, thereby thwarting Plaintiffs from collecting on a potential
5 judgment,² on December 11, 2020, Plaintiffs filed an emergency application seeking, *inter*
6 *alia*, a preliminary injunction to prevent JU from transferring or otherwise disposing of the
7 proceeds from the asset sale. (Doc. 229.) Recognizing the potential financial constraints
8 that such an injunction might impose, Plaintiffs suggest allowing JU to retain up to \$5
9 million of the sale proceeds to cover its expenses and to deposit the remaining proceeds in
10 an interest-bearing federally insured account or in publicly-traded securities during the
11 injunction period. Plaintiffs’ motion is now ripe.

12 **II. Discussion**

13 Having carefully considered the parties’ briefs, the Court finds that it has the
14 authority to grant the requested injunction and that Plaintiffs have carried their burden on
15 all four elements of the preliminary injunction test.

16 **A. Authority**

17 The Court may grant an injunction to preserve the status quo and prevent the
18 dissipation of assets when the plaintiff seeks equitable relief in the underlying action.
19 *Johnson v. Couturier*, 572 F.3d 1067, 1084 (9th Cir. 2009) (quoting *De Beers Consol.*
20 *Mines v. U.S.*, 325 U.S. 212, 220 (1945)). The “nexus between the assets sought to be
21 frozen through an interim order and the ultimate relief requested in the lawsuit is essential
22 to the authority of a district court in equity to enter a preliminary injunction freezing
23 assets.” *In re Focus Media Inc.*, 387 F.3d 1077, 1085 (9th Cir. 2004) (quoting *United*
24 *States v. Oncology Assocs., P.C.*, 198 F.3d 489, 496 (4th Cir. 1999)).

25 Here, the Court has the authority to enter a preliminary injunction preserving the
26 proceeds from the asset sale for two reasons. First, Plaintiffs seek equitable relief in the

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28 ² Plaintiffs assert that their maximum claim as of December 31, 2020 was \$66 million (if damages are trebled), and damages (if trebled) continue to accrue at the rate of \$5.7 million per year. (Doc. 234.)

1 underlying action. Namely, they assert fraudulent transfer claims in counts five through
2 seven of their SAC that ultimately request an injunction to unwind JU's alleged prior
3 fraudulent transfers and to prevent JU from transferring its assets in the future. *See Focus*
4 *Media*, 387 F.3d at 1085 (affirming preliminary injunction preventing shareholder from
5 transferring company assets in case in which the plaintiff pled fraudulent conveyance);
6 *Wimbledon Fund, SPC Class TT v. Graybox, LLC*, 648 F. App'x. 701, 702 (9th Cir. 2016)
7 (explaining that the district court had the authority to grant an injunction preventing the
8 dissipation of assets because "this is a fraudulent conveyance case and one in which [the
9 plaintiff seeks] equitable relief"). Second, a nexus ties Plaintiffs' proposed injunction to
10 the relief sought in the underlying action. Plaintiffs' requested injunction is not merely
11 "similar in character" to the equitable relief sought in the underlying action; the requests
12 to prevent future fraudulent transfers in this motion and in the underlying action overlap.
13 Nevertheless, the requested injunction and the relief sought in the underlying action need
14 not be identical. *See Couturier*, 572 F.3d at 1084 (rejecting the defendants' argument that
15 the district court impermissibly granted the plaintiffs' injunction because the relief sought
16 was "different in character than any judgment that might finally issue," noting that the court
17 had authority to grant the injunction because "this is not a case where the preliminary
18 injunction 'deals with a matter lying wholly outside the issues in the suit'"). In sum,
19 because Plaintiffs seek equitable relief in the underlying action and the injunction requested
20 deals with matters directly at issue in the case, the Court has the authority to issue a
21 preliminary injunction under Fed. R. Civ. P. 65.

22 **B. Preliminary Injunction Test**

23 "A plaintiff seeking a preliminary injunction must establish that he is likely to
24 succeed on the merits, that he is likely to suffer irreparable harm in the absence of
25 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in
26 the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Am.*
27 *Trucking Ass'n, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). These
28 elements may be balanced on a sliding scale, whereby a stronger showing of one element

1 may offset a weaker showing of another. *See Alliance for the Wild Rockies v. Cottrell*, 632
2 F. 3d 1127, 1131, 1134-35 (9th Cir. 2011). But the sliding-scale approach does not relieve
3 the movant of the burden to satisfy all four prongs for the issuance of a preliminary
4 injunction. *Id.* at 1135. Instead, “serious questions going to the merits’ and a balance of
5 hardships that tips sharply towards the plaintiff can support issuance of a preliminary
6 injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury
7 and that the injunction is in the public interest.” *Id.* The movant bears the burden of proof
8 on each element of the test. *Envtl. Council of Sacramento v. Slater*, 184 F. Supp. 2d 1016,
9 1027 (E.D. Cal. 2000).

10 **1. Likelihood of Success on the Merits**

11 Here, Plaintiffs have met their burden by, at the very least, demonstrating the
12 existence of “serious questions going to the merits” on their claims where the balance of
13 hardships tips sharply towards Plaintiffs. Plaintiffs’ claims fall into two categories: those
14 concerning bribery of a public servant and those alleging fraudulent transfer. The Court
15 will address each category, in turn.

16 **a. Bribery of a Public Servant**

17 Defendants’ alleged bribery scheme, involving bribery of a public servant, serves
18 as the basis of counts one through four of Plaintiffs’ SAC. In Arizona, a person commits
19 bribery of a public servant if, with corrupt intent, that person “offers, confers or agrees to
20 confer any benefit upon a public servant [] with the intent to influence the public servant’s
21 [] vote, opinion, judgment, exercise of discretion or other action in his official capacity [.]”
22 A.R.S. § 13-2602. Here, *inter alia*, Plaintiffs point to witness testimony from Kelly Norton,
23 which meets each element of the Arizona bribery statute. Specifically, during the related
24 criminal trial, Ms. Norton testified that she helped Johnson repeatedly funnel money to
25 Gary Pierce through his wife, Sherry, with the intent to influence Mr. Pierce’s vote as an
26 ACC Commissioner. (Doc. 2291-1 at 47-77.) Although Defendants seek to undercut this
27 evidence by casting Ms. Norton’s credibility into doubt, it is the factfinders’ role during
28 trial, not the Court’s role at this juncture, to assess Ms. Norton’s credibility. At this stage,

1 Plaintiffs have met their burden in demonstrating the presence of serious questions going
2 to the merits of their bribery claim by proffering evidence suggesting that Defendants
3 offered a benefit to a public servant with the intent to influence his vote.

4 **b. Fraudulent Transfer**

5 Plaintiffs allege fraudulent transfer as the basis for counts five through seven of their
6 SAC. (Doc. 207.) In Arizona, a transfer of assets by a debtor is fraudulent if the transfer
7 is “made with the intent to hinder, delay or defraud a creditor.” A.R.S. § 44-1004(A)(1).
8 When assessing intent, the Court considers—among other factors—whether the transfer
9 was made to an “insider,” A.R.S. § 44-1004(B)(1), and whether “[t]he value of the
10 consideration received [] was reasonably equivalent to the value of the asset transferred or
11 the amount of the obligation incurred.” A.R.S § 44-1004(B)(7).

12 Here, Plaintiffs have pointed to evidence indicating that the Fraudulent Transfer
13 Defendants transferred cash from JU to themselves—insiders. They have also offered
14 evidence that a reasonable juror might conclude shows that the Fraudulent Transfer
15 Defendants did so with the intent to hinder, delay or defraud a creditor. Particularly,
16 evidence indicates that JU created shell affiliates, such as Ultra, exclusively to funnel
17 substantial cash to insiders while avoiding liability. For example, the ACC concluded that
18 Ultra “does not benefit JU in any way, is completely superfluous for the purposes of JU’s
19 operations (because everything is done by Hunt employees), is simply a way to provide
20 revenues to Chris and Barbara Johnson, and is actually detrimental to JU’s financial well-
21 being and the adequacy of its service and operations.” (Doc. 229-1 at 34). Similarly, Gary
22 Drummond, successor to Johnson, testified that Ultra was set up as a shell entity to isolate
23 JU assets from liability. (*Id.* at 22.) Despite the lack of assistance that Ultra provided to
24 JU, Ultra retained up to \$9.5 million annually for the benefit of its owners—Johnson’s
25 children, Chris and Barbara—evidence strongly suggesting that JU did not receive a
26 reasonably equivalent value for its transfers. (*Id.* at 39.) Looking to this evidence, the
27 Court finds that Plaintiffs have demonstrated a likelihood of success on their claims that
28 the Fraudulent Transfer Defendants transferred cash from JU to themselves with the intent

1 to hinder, delay, or defraud a creditor.

2 In a final effort to dispute that Plaintiffs have met their prong-one burden,
3 Defendants point to the fact that the jury hung in their criminal trial to suggest that Plaintiffs
4 cannot demonstrate a likelihood of success on the merits in their civil suit. The fact that
5 the jury could not reach a unanimous verdict convicting Defendants in the criminal trial
6 when applying the stricter beyond-a-reasonable-doubt standard does not suggest that
7 serious questions going to the merits are absent, here. To the contrary, the fact that some
8 jurors did vote to convict, even when applying a more exacting standard, indicates that
9 Plaintiffs may likely prove their claims by a preponderance of the evidence. Similarly,
10 Defendants argue that Plaintiff cannot have not raised serious questions going to the merits
11 because the Ninth Circuit (by granting Defendants' Rule 23(f) petition) and this Court (by
12 granting a stay while the interlocutory appeal remains pending) have indicated that
13 Defendants are likely to prevail on the merits. To the contrary, this Court noted in its stay
14 order that the Ninth Circuit's acceptance of Defendants' petition for appeals "show[s] at a
15 minimum, the presence of serious questions on the merits." (Doc. 227 at 1 (citations
16 omitted)). Each side may simultaneously introduce serious questions going to merits. The
17 Court rejects Defendants' contentions and concludes that Plaintiffs have met their burden
18 on the first prong.

19 **2. Irreparable Harm**

20 A plaintiff suffers irreparable injury when there is "a likelihood of dissipation of the
21 claimed assets, or other inability to recover monetary damages, if relief is not granted."
22 *Couturier*, 572 F.3d at 1085. A defendant's prior attempts to conceal or transfer assets
23 demonstrates a likelihood that, without an injunction to prevent future transfers, the
24 defendant will engage in similar conduct in the future, inhibiting plaintiff from satisfying
25 its potential judgment. *See Arch Ins. Co. v. Sierra Equip. Rental*, No. CIV S-12-0617 KJM
26 KJN, 2012 WL 5897327, at *5 (E.D. Cal. Nov. 13, 2013) (the movant demonstrated a
27 likelihood of irreparable harm by showing there was a substantial danger that the defendant
28 would transfer or conceal the subject asset, thereby preventing the movant's potential

1 recovery, based on evidence that the defendant had concealed and transferred funds in the
2 past); *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 881 (9th Cir.
3 2003) (affirming asset freeze because the “family’s history of fraudulent intra-family
4 transfers” supported a finding of irreparable harm). Here, there is evidence that the
5 Fraudulent Transfer Defendants transferred tens of millions of dollars out of JU to
6 themselves for no legitimate business purpose. Instead, that evidence suggests that
7 Defendants have transferred assets to shield them from JU’s creditors, even to the detriment
8 of JU. (Doc. 229-1 at 34). Nevertheless, Defendants argue that an injunction is not
9 necessary to prevent irreparable harm to Plaintiffs because the people and entities that JU
10 allegedly transferred its assets to in the past are now defendants in the case and within the
11 Court’s reach, should a transfer occur. This argument ignores the possibility that JU, in
12 the absence of an injunction, would simply transfer sale proceeds to non-defendants in
13 order to conceal them. Plaintiffs have met their burden of establishing the likelihood of
14 irreparable injury in the absence of an injunction.

15 **3. Balance of Equities**

16 Turning to the third prong of the preliminary injunction test, the Court balances “the
17 competing claims of injury and must consider the effect on each party of the granting or
18 withholding of the requested relief.” *Winter*, 555 U.S. at 24 (quoting *Amoco Prod. Co. v.*
19 *Village of Gambell, AK*, 480 U.S. 531, 542 (1987)). In the absence of an injunction,
20 Plaintiffs face the prospect of being unable to collect on a potential judgment. In contrast,
21 if an injunction freezes the sale proceeds in their entirety, JU will be unable to pay its
22 ongoing legitimate expenses, including attorney and professional fees, taxes on the sale
23 proceeds, and other future liabilities. Acknowledging the financial constraints that the
24 injunction would pose, Plaintiffs propose that the injunction freeze all but \$5 million of the
25 sale proceeds, giving JU a not insignificant sum with which to pay its expenses while the
26 lawsuit continues. The Court, in setting a bond, has considered the highest amount of
27 recoverable damages that could be realized at the conclusion of this matter and has
28 recognized JU’s need to handle burdensome ongoing expenses. Looking to the value of

1 Plaintiffs’ current maximum claim—\$66 million, the \$5.7 million maximum annual
2 accrual rate, the stage in the litigation, and asset sale’s \$110.3 million value, the Court will
3 exclude \$15.5 million from the injunction’s freeze.³ With this arrangement, JU will have
4 adequate access to funds to manage its ongoing financial obligations⁴ while preserving
5 Plaintiffs’ ability to recover their maximum potential judgment. In the absence of this
6 arrangement, Plaintiffs may never see recovery. Therefore, the balance of hardships of an
7 injunction that prevents JU from transferring the asset sale proceeds (excluding the \$15.5
8 million) tips sharply towards the Plaintiffs.

9 **4. Public Interest**

10 Plaintiffs’ injunction, by protecting Plaintiffs’ ability to recover a potential future
11 judgment, advances “the public’s interest in seeing the satisfaction of judgment debts.”
12 *Life Share Collateral Holdings, LLC v. Dewitty*, No. CV 16-1907 PSG (ASx), 2018 WL
13 3357462, at *1 (C.D. Cal. May 7, 2018); *State Farm Mut. Auto. Ins. Co. v. Am. Rehab and*
14 *Physical Therapy, Inc.*, 376 F. App’x. 182, 184 (3d Cir. 2010). The public’s interest in the
15 seeing the satisfaction of the potential judgment, here, is particularly strong. The plaintiff
16 class is enormous, consisting of 40,000 wastewater customers and 30,000 water customers,
17 and the outcome of the lawsuit and the enforcement of any judgment necessarily carries
18 public consequences. Plaintiffs have consequently met their burden on the fourth prong.

19 **C. Bond**

20 Federal Rule of Civil Procedure 65(c) permits a court to grant preliminary injunctive
21 relief “only if the movant gives security in an amount that the court considers proper to pay
22 the costs and damages sustained by any party found to have been wrongfully enjoined or
23 restrained.” Yet, the district court maintains the discretion to determine “the amount of

24 ³ The Court arrived at the \$15.5 million figure by adding five years of the maximum
25 value of additional accrued damages (acknowledging that this suit is likely to endure for
26 several more years) to the \$66 million current maximum recovery. The Court then
27 subtracted this sum from the \$110.3 million sale value.

28 ⁴ Although the Court presently determines that \$15.5 million is a reasonable sum to
be excluded based on Plaintiffs’ maximum potential recovery, should Defendants find
themselves in a position in which JU requires a larger sum to fulfill its obligations,
Defendants may file a motion demonstrating that they have expended the \$15.5 million on
legitimate obligations, listing their remaining legitimate outstanding obligations, and
explaining why a larger sum should be made available.

1 security required, if any.” *Jorgensen v. Cassidy*, 320 F.3d 906, 919 (9th Cir. 2003)
2 (quoting *Barahona–Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir.1999)). Moreover,
3 “[t]he district court may dispense with the filing of a bond when it concludes there is no
4 realistic likelihood of harm to the defendant from enjoining his or her conduct.” *Id.*
5 Additionally, where public policy favors an injunction and the plaintiffs lack the means to
6 pay a bond, the bond requirement should be nominal. *See Barahona-Gomez*, 167 F.3d at
7 1237 (affirming \$1,000 bond based on “the public interest underlying the litigation and the
8 unremarkable financial means of the class as a whole”). Further, substantial bonds are
9 inappropriate where the defendant has not established financial harm if the injunction is
10 granted. *See, e.g., Yue v. Conseco Life Ins. Co.*, 282 F.R.D. 469, 485 (C.D. Cal. 2012).

11 Here, Defendants assert that they will be harmed by the preliminary injunction
12 because it will render them unable to fulfill legitimate future financial obligations and argue
13 that a bond is necessary to protect them from damages that they will incur should the
14 preliminary injunction later be found erroneous. This argument is unpersuasive because
15 the Court will set aside \$15.5 million for Defendants and will permit Defendants to file a
16 motion requesting a greater allotment in the future, should the \$15.5 million be insufficient
17 to maintain JU’s fulfillment of legitimate obligations. Moreover, Defendants have not
18 proposed a bond amount that they believe would act as an appropriate safeguard against
19 damages incurred from an erroneous preliminary injunction. Considering the public
20 interest underlying the litigation, the unremarkable financial means of the class, and
21 Defendants’ failure to make any showing of cost, the Court will impose a nominal bond of
22 \$1,000. In sum,

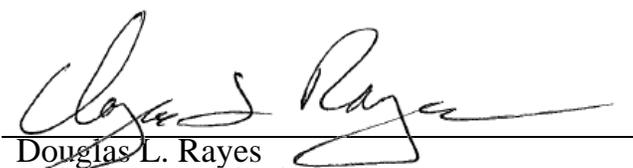
23 **IT IS ORDERED** that Plaintiffs’ motion for preliminary injunction (Doc. 229) is
24 **GRANTED**. Johnson Utilities is hereby **ENJOINED** from transferring or otherwise
25 disposing of the proceeds of the asset sale to EPCOR Water Arizona, Inc, excluding \$15.5
26 million. The parties shall confer and submit a stipulation outlining how the sale proceeds
27 shall be preserved pending resolution of the litigation no later than January 11, 2021 at
28 12:00 p.m. Should the parties fail to reach an agreement, they shall submit a joint memo,

1 limited to five pages, that describes the parties' respective positions by no later than January
2 11, 2021 at 12:00 p.m.

3 **IT IS FURTHER ORDERED** that Plaintiffs shall be required to post a cash bond
4 in the amount of \$1,000 no later than January 11, 2021 at 12:00 p.m.

5 Dated this 8th day of January, 2021.

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Douglas L. Rayes
United States District Judge