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

Case No.: 03:09-CV-00724-N

RALPH JANVEY,

Receiver,

v.

JAMES R. ALGUIRE, et al.,

Relief Defendants.
_____/

FORMER STANFORD EMPLOYEES DANIEL HERNANDEZ'S, ROBERTO PENA'S, AND ROBERTO A. PENA'S MOTION TO COMPEL ARBITRATION AND TO STAY PROCEEDINGS WITH MEMORANDUM OF LAW INCORPORATED

Former Stanford Employees Daniel Hernandez, Roberto Pena and Roberto A. Pena (hereinafter "Defendants"), pursuant to Section 2 the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.,* hereby move for order compelling arbitration and, pursuant to Section 3 of the FAA, 9 U.S.C. § 3, for order staying these proceedings against them, and further state as follows:

INTRODUCTION

On December 18, 2009, the Receiver filed yet another complaint – Receiver's Second Amended Complaint Against Former Stanford Employees, DE #156 – against Defendants. In his latest complaint, the Receiver seeks to assert claims of fraudulent transfer and unjust enrichment claims against Defendant for their receipt of gainful employment compensation received while in their employment for the Stanford Group.

As he acknowledges in his complaint, the Receiver was appointed to present claims on behalf of the "Estate" (the Stanford Group Companies) in order to control and recover assets of the Estate.

Since the receiver seeks to pursue claims which fall clearly under applicable provisions and agreements calling for arbitration of these disputes, Defendants seek appropriate order staying these proceedings and compelling arbitration of claims against them.

ARGUMENT

1. **Stanford is a FINRA member and Defendants are Associated Persons**

The Stanford Group is a member of the Financial Industry Regulatory Authority ("FINRA"). Defendants were most certainly financial advisors for the Stanford Group, a FINRA member. *See e.g.*, Exhibit A, a true and correct copy of Roberto Pena's service agreement with the Stanford Group. Under applicable FINRA rules, arbitration is required for any dispute arising out of the business activities of a Member or an Associated Person and is between or among Members; Members and "Associated Persons"; or "Associated Persons." FINRA Rule 13200(a). An "Associated Person" is defined by FINRA as any person registered under the rules of FINRA who is associated with a Member. FINRA Rules 13100(a) & ®; *see, e.g., Wealth Rescue Strategies v. Thompson*, 2009 WL 3878083 *2 (S.D. Tex. November 17, 2009). The Defendants are "Associated Persons" as they were financial advisors of Stanford Group and they filed the appropriate registrations with FINRA.

Indeed, one such registration, Form U-4 (Uniform Application for Securities Industry Registration or Transfer), filed by the Defendants provides that Defendants are required to arbitrate any dispute, claim, or controversy between themselves and the Group that is required to be arbitrated under FINRA. The Fifth Circuit has recognized that Form U-4 can serve as the written agreement requiring arbitration. *Williams v. Cigna Fin. Advisors, Inc.,* 56 F.3d 656, 659 (5th Cir. 1995); *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 195 S.W. 3d 807, 813 (Tex.App.-Dallas 2006)(Form

U-4 is a contract involving the sale of securities and impacting interstate commerce).

Finally, the written agreement between Defendants and the Stanford Group expressly provides that "any dispute arising in connection with this agreement shall be exclusively and finally settled by arbitration in Houston, Texas." See, e.g., Exhibit A ¶11. The attached service agreement is identical for all three Defendants.

2. **Arbitration is mandated**

Section 2 of the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (the "FAA"), would require the present controversy to be submitted to arbitration:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part hereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1999). Based upon this congressional declaration of a liberal federal policy favoring arbitration agreements, the United States Supreme Court has made clear that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem. Hosp. V. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 941 (1983).

In interpreting the FAA, the Supreme Court has noted that the FAA leaves no room for a court to resolve issues which the parties have agreed will be settled through arbitration. *Shearson / American Express, Inc. v. McMahon*, 482 U.S. 220, 226, 107 S.Ct. 2332, 2337 (1987). Indeed, the FAA "leaves no place 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." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218, 105 S.Ct. 1238,

1241 (1985) (emphasis in original). As such, an order compelling arbitration should be granted unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. *AT&T Tech, Inc. v. Communications Workers*, 475 U.S. 643, 650, 106 S.Ct. 1415, 1419 (1986). Moreover, arbitration clauses are to be generously construed, with all doubts resolved in favor of arbitration. *See, e.g., Wash. Mut. Fin. Group, LLC v. Bailey,* 364 F.3d 260, 263 (5th Cir. 2004); *Ruby-Collins, Inc. v. City of Huntsville*, 748 F.2d 573, 576 (11th Cir. 1984).

Both FINRA Rule 13200, which covers the disputes raised by the Receiver, as well as the Form U-4 filed by the Defendant directs arbitration. In addition, the very agreement between Stanford and the Defendants governing the scope and nature of their compensation – issues directly related to the Receivers current complaint – expressly direct arbitration for "any dispute" related or in connection with the agreement. The FAA, the federal policy supporting it and courts interpreting it all agree that arbitration is mandated. *See, e.g., Wealth Rescue* at *2 ("the court finds that not only does an agreement to arbitrate exist in the U-4s, but the broad nature of the duty to arbitrate – all business activities between associated persons – clearly encompasses the claims at interest here").

The Receiver raises a dispute before this Court seeking recovery of commissions earned by the Defendants in relation to the sale of securities and in the course of their employment for the Stanford Group. By definition alone, these claims fall within the arbitration parameters of Rule 13200, as well as the Form U-4s executed by the Defendants. Clearly both the Member, whose claims are being promoted by the Receiver, and the Defendants as associated persons have manifested their desire to have such claims arbitrated.

3. **This action should be stayed pending arbitration**

"A court can properly stay a suit before it if any issue in the suit is arbitrable, even if some issues are not." *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 361, *cert. denied*, 522 U.S. 912 (1997). Defendants seek such a stay as to these proceedings pending arbitration but only as they affect them. The power to stay is incidental to the power inherent in every court to control disposition of the causes on its docket with the economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American, Co.*, 299 U.S. 248, 254-255 (1936); *Smith Barney v. Burrow*, 2008 WL 4426805 *7 (E.D.Cal. September 26, 2008)(staying action pending FINRA arbitration).

CONCLUSION

Based on the foregoing, Former Stanford Employees Daniel Hernandez, Roberto Pena, and Roberto A. Pena request that this Court grant its Motion to Compel Arbitration and to Stay these Proceedings as to them. Daniel Hernandez, Roberto Pena, and Roberto A. Pena request all other such other and further relief as this Honorable Court deems just and proper.

Dated: January 15, 2010

Respectfully submitted,

By: s/ Alexander Angueira

Alexander Angueira, Esq.
Fla. Bar No. 0716091
Alexander Angueira, P.L.L.C.
7301 S.W. 57th Court, Suite 515
South Miami, FL 33143
Telephone: 305.357.9031
Facsimile: 305.357.9050
alex@angueiralaw.com

***Pro Hac Vice* Application Pending**

Attorney for Former Stanford Employees Hernandez, Pena and Pena

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was served this __th day of January, 2010 in accordance with the Federal Rules of Civil Procedure via notice of filing that is automatically generated by ECF to those counsel or parties who are authorized to receive electronic Notices of Electronic Filing, to include without limitation the below listed counsel.

Kevin M. Sadler
Baker Botts L.L.P.
kevin.sadler@bakerbotts.com
Robert I. Howell
robert.howell@bakerbotts.com
David T. Arlington
david.arlington@bakerbotts.com
1500 San Jacinto Center
98 San Jacinto Blvd.
Austin, Texas 78701-4039

Timothy S. Durst
tim.durst@bakerbotts.com
2001 Ross Avenue
Dallas, Texas 75201

s/ Alexander Angueira
Alexander Angueira, Esq.