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, ROBERTO PENA, AND ROBERTO A. PENA REPLY TO RECEIVER'S RESPONSE TO MOTION TO COMPEL ARBITRATION WITH MEMORANDUM OF LAW INCORPORATED

Former Stanford Employees Daniel Hernandez, Roberto Pena and Roberto A. Pena (hereinafter "Defendants"), through their counsel, hereby file the instant Reply to Receiver's Response to Certain Stanford Employees' Motions to Compel Arbitration [Docket Entry "DE" # 316] , and further state as follows:

INTRODUCTION

In his Response in opposition to Defendants' Motion to Compel Arbitration, the Receiver in efforts to avoid his clear obligations to arbitrate his claims against Defendants engages in a rather twisted analysis. First, the Receiver suggests that he does not represent the receivership entity – the company who entered into the arbitration agreement and the company that employed Defendants – in his efforts to recover against the commissions earned by these former employees while they worked for the receivership entities. *See* Receiver's Response, DE #316 at p.4. Next, the Receiver naively asserts that there is no agreement to arbitrate between the Receiver and the former

employees. *Id.* Or, even more surprisingly, the Receiver asserts that he makes no claim "on behalf of the *debtor* entities . . . but rather in his capacity as a *creditor or representative of creditors*." *Id.* at p.5. Finally, in one last attempt to avoid his contractual obligations to arbitrate, the Receiver invokes the Court's "broad powers" in receivership cases in order to avoid congressional mandate, federal precedent and federal policy compelling arbitration.

As discussed below, the Receiver's arguments are without merit. Putting aside for the moment the clear standing problems in the Receiver's claim that he is now representing the creditors and the Receiver's mis-reading of the law or poor attempt to apply inapplicable cases, what stands clear from the outset is the Receiver is seeking to recover compensation paid to Defendants under an employment agreement that calls for any disputes arising out the employment agreement be subject to arbitration. Whether the compensation was gainfully earned as Defendants' claim or a fraudulent transfer as the Receiver suggests goes to the very heart of the employment relationship and strikes four square against the employment agreement. Despite all his attempts at avoidance, the Receiver was undeniably appointed by the Court to "stand in the shoes" of the Stanford companies. He was not appointed to serve as creditors representative or be a creditor himself. Of this, the Court's order appointing him is clear. In addition, when the Receiver stood in the shoes of the Stanford companies he inherited its contractual obligations as well. The duty to arbitrate is included among them.

THE RECEIVER'S AUTHORITY

On February 17, 2009, the Court entered an Order appointing the Receiver for Defendants Stanford International Bank, Ltd., Stanford Group Company, Stanford Capital Management, LLC, Robert Allen Stanford, James M. Davis, and Laura Pendergest-Holt. *See SEC v. Stanford*

International Bank, Ltd., Civil Action No. 3-09CV0298 (N.D. Tex.) ("Related Case") at DE #10. The Court appointed the Receiver for the Receivership Estate, as defined in the appointment order the assets and records of the Stanford companies and Stanford Defendants. *Id*. The Court specifically limited the powers of the Receiver to the matters related to the Receivership Estate. *Id*. Per the Court's appointment, the Receiver was granted the following authority:

a. take possession of the assets of the Stanford entities;

b. maintain full control of the Receivership Estate;

c. collect monies and assets owned by the Receivership Estate;

d. institute such actions to obtain possession or recover judgment from those persons who received assets traceable to the Receivership Estate; and

e. institute such actions to preserve the value of the Receivership Estate.

Id.

Noticeably absent from the Court's appointment order is any reference to an appointment of the Receiver for the collection of claims of creditors. Indeed to further underscore the divergence in interests of the Receiver and the creditors, the Court in its appointment order expressly enjoined any creditor of the Receivership Estate from commencing any legal action related to the Estate. *Id.*

The Receiver has acknowledged in his complaint, even if he is now unwilling to admit such, that he was appointed to present claims on behalf of the "Estate" (among them the Stanford Group Company) in order to control and recover assets of the Estate. In this Court's recent opinion, the Receiver's acknowledgment was again confirmed. *See* Related Case, DE # 1030, p.3 ("In [Civil Action No. 3:09-CV-724], the Receiver alleges that former employees' earnings from the sale of fraudulent CDs are *receivership assets")*(emphasis supplied).

ARGUMENT

It is a long accepted axiom that a receiver "stands in the shoes" of the entity in receivership. *Javitch v. First Union Securities, Inc.*, 315 F.3d 619, 625 (6th Cir. 2002); *SBA v. Coqui Capital Management, LLC*, 2008 WL 4735234 *2 (S.D. N.Y. Oct. 27, 2008); *cf. O'Melveny and Myers v. FDIC*, 512 U.S. 79, 86 (1994)(FDIC); *cf. United States v. Brezborn*, 21 F.3d 62, 68 (5th Cir. 1994)("the RTC as receiver of an insolvent financial institution stands in the shoes of the bank assuming all debts of the bank"). In so doing, the receiver's authority is defined by the authority enabling the receiver's actions. In this case, the Receiver was appointed under order of the Court.

A receiver's power is "derived from and limited by order of the court appointing him." *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990). As further noted in *Fleming*:

> Since 1935 it has been well settled that the plaintiff in his capacity as receiver has no greater rights or powers than the corporation itself would have. *McCandless v. Furland*, 296 U.S. 140, 148 [. . .] (1935). In *McCandless*, Justice Cardoza clearly emphasized that a receiver in that case was suing on behalf of a corporation, not third parties. . . . In other words, the receiver can only make a claim which the corporation could have made.

Id. (internal quotations omitted).

In this case, the Receiver's powers were bestowed by virtue of court order and that court order, as set forth above, decidedly limited the Receiver's authority to the interests of the receivership estate. The Receiver's efforts to now unilaterally expand his authority, even if only to survive the present request for arbitration, should not be allowed. As described in *Javitch*, the receiver acquires no greater rights than those of the debtor. *Id.* at 625; *see, e.g., Goodman v. FCC*, 182 F.3d 987, 991-92 (D.C. Cir. 1999)(receiver did not have standing to sue on behalf of customers and creditors of entity in receivership); *Eberhard v. Marcu*, 530 F.3d 122, 132 (2nd Cir. 2008)("a

receiver . . . can assert only those claims which the corporation could have asserted"); *Commodities Futures Trading Comm'n v. Chilcott Portfolio Mgt., Inc*., 713 F.2d 1477, 1481 (10th Cir. 1983)(receiver can assert claims only for corporation and not claims for the investors). "Although a receivership is typically created to protect the rights of creditors, the receiver is not the class representative for the creditors and receives no general assignment of rights from the creditors." *Steinberg v. Alpha Fifth Group*, 2008 WL 906270 *4 (S.D. Fla. March 31, 2008)(citations and quotations omitted).

As the above case law directs, a receiver such as Mr. Janvey stands in the shoes of the receivership entities. In this case, his authority is limited to the court order appointing. Should the Receiver attempt to preserve or recover assets of the receivership entity, he does so directly for the benefit of the receivership entity even if ultimately the creditors will benefit as well.

By the same token, the receiver takes on the contractual obligations, such as those found in the employment agreement between Defendants and the receivership entity. '[Receiver] is bound to the arbitration agreement to the same extent that the receivership entities would have been bound absent the appointment of the receiver." *Javitch*, 315 F.3d at 627; *Hays v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 885 F.2d 1149, 1153-54 (3rd Cir. 1989)(bankruptcy trustee "stands in the shoes of the debtor" for purposes of arbitration clause and must arbitrate all claims that are derived from the rights of the debtor"); *Capitol Life Ins. Co. v. Gallagher*, 1995 WL 66602 *2 (10th cir. Feb. 7, 1995)("[receiver] may be compelled to arbitrate because a receiver 'stands in the shoes' of the [receivership entity]").

As discussed in more detail in Defendants' Motion to Compel Arbitration [DE # 199], the employment agreement between Defendants and one of the receivership entities clearly provides that

"any dispute arising in connection with this agreement" shall be exclusively arbitrated. Putting it plainly, the Receiver wants Defendants wages and commissions paid back relative to their employment with one of the receivership entities. To do so, he claims state court claims. Defendants refuse claiming that those sums were paid to them as gainfully earned income. Therefore, in its most elementary sense a "dispute" has arisen related to Defendants' employment agreement. Under the agreement between the parties, the dispute must be arbitrated. The logic seems irrefutable. And so does the case law.

"Liberal federal policy favors arbitration agreements." *Gilmer v. Inter-State/Johnson Lane Corp*., 500 U.S. 20, 25 (1991); *see also Ruby-Collins, Inc., v. City of Huntsville*, 748 F.2d 573, 576 (11th Cir. 1984). Circuit courts have held that clauses like the one here are broad. *See, e.g., Gregory v. Electro-Mechanical Corp*., 83 F.3d 382, 385-86 (11th Cir. 1996)(clause providing that "any dispute ... which may arise hereunder" is broad provision); *Sunkist Soft Drinks, Inc., Sunkist Growers, Inc*., 10 F.3d 753, 758 (11th Cir. 1993) (tort claims are cognizable under arbitration clause providing that "any controversy or claim arising out of or relating to this Agreement or breach thereof . . ."); *McBro Planning & Dev. Co., v. Triangle Elec. Constr. Co., Inc*., 741 F.2d 342, 344 (11th Cir. 1984)(language that "any controversy arising out of or related to this [contract] or breach thereof evidences broad arbitration clause).

The FAA "is at bottom a policy guaranteeing the enforcement of private contractual arrangements." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 625 (1985). 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).

Addressing briefly the Receiver's final claim, or rather plea for relief, the Receiver asks failing all other arguments that this Court to muster its broad and inherent powers and deny Defendants' motion to compel arbitration. In so doing, the Receiver asks this Court to ignore congressional mandate favoring arbitration, federal case law directing arbitration and strong federal policies urging arbitration. Such as request can only be described as imprudent. And the broad power invoked by the Receiver is not without its limits, especially when Defendants are not suggesting interference with the due administration of the receivership estate. As to the Receiver's claim of increase expense, Defendants flatly disagree with that contention. *Specialty Healthcare Management, Inc. v. St. Mary Parish Hosp*., 220 F.3d 650, 655 n.21 (5th Cir. 2000)(". . . arbitration is less expensive than court litigation . . . .").

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. 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: March 17, 2010

Respectfully submitted,

By: s/ Alexander Angueira

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***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 17th day of March, 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.

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