

**IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA**

OKLAHOMA DEPARTMENT OF)
SECURITIES ex rel. IRVING L.)
FAUGHT, ADMINISTRATOR,)

Plaintiff,)

v.)

BARRY POLLARD AND)
ROXANNE POLLARD,)

Defendants and Third Party)
Plaintiffs,)

v.)

AXA ADVISORS, LLC, a Delaware)
Limited Liability Company; and AXA)
EQUITABLE LIFE INSURANCE)
COMPANY, f/k/a EQUITABLE LIFE)
ASSURANCE SOCIETY OF THE)
UNITED STATES,)

Third Party Defendants.)

Case No. CJ-2005-3799
Hon. Vicki Robertson

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

MAR 22 2007

PATRICIA PRESLEY, COURT CLERK
by _____
DEPUTY

**REPLY TO RESPONSE TO AXA EQUITABLE LIFE INSURANCE COMPANY'S
RENEWED MOTION TO COMPEL ARBITRATION**

AXA Equitable Life Insurance Company f/k/a Equitable Life Assurance Society of the United States ("Equitable") files this reply to Third Party Plaintiffs', Barry and Roxanne Pollard (the "Pollards"), Response to Equitable's Renewed Motion to Compel Arbitration. In support, Equitable states as follows:

1. On August 7, 2006, AXA Advisors, LLC ("Advisors") and Equitable filed their Motion to Compel Arbitration and Brief in Support (the "Initial Motion to Compel").

2. A hearing was conducted on the Initial Motion to Compel on February 8, 2007, and the Court granted the Initial Motion to Compel with regard to Advisors. The Court further requested additional briefing in the form of Equitable's Renewed Motion to Compel Arbitration, filed February 16, 2007 (the "Renewed Motion").

3. On March 9, 2007, the Pollards filed their Response to the Renewed Motion, which set out three primary arguments: (1) that the Pollards cannot be bound to arbitrate their claims relating to certain variable life insurance policies (the "Policies") that were initially executed prior to the date of the arbitration agreement; (2) that the insurance contract is the entire contract between Equitable and the Pollards; and (3) that, as a sister company to Advisors, Equitable cannot be bound under the arbitration agreement between the Pollards and Advisors.

4. The Pollards acquired the Policies in 1993 (2 policies), 1994 and 1999. *See* summary of Policies at p. 3 in the Response. The Pollards do not assert any breach of contractual terms of the Policies nor do they claim that they were defrauded into purchasing the Policies in the first place. Rather, the Pollards' claims arise out of the alleged ponzi scheme perpetrated by Marcia Schubert ("Schubert") long after the last policy was purchased and after they established their accounts with Advisors while Schubert was an agent of Advisors and Equitable. The Pollards' claims, as they relate to the Policies, are that they were fraudulently induced by Schubert to "to continue paying premiums" and to "maintain" the Policies by Schubert's representations that she could make money for them by investing in options and day trading. *See* Third Party Petition at ¶ 24 and ¶37.

A. Response to Pollards' Argument in Part I of the Response.

The Pollards first assert that their claims relating to the Policies cannot be arbitrated because the Policies were executed prior to the date of the arbitration agreement. However, as

stated above, the Pollards' claims actually arise out of the Schubert scheme and the Pollards' allegedly continued payment of premiums as a result of monies received through that scheme. The alleged scheme took place long after the acquisition of the Policies and after the account agreement was executed. The Pollards do not claim fraud in the inducement causing them to purchase the Policies. They simply claim that as a result of the securities fraud perpetrated by Schubert, they kept paying premiums and maintained their policies, implying that if they did not think they were making money due to Schubert's misrepresentations about options trading and day trading she was allegedly doing for them, they would have cancelled the Policies much earlier. The fact the Policies were purchased much earlier demonstrates that the claims of the Pollards are not based on the Policies themselves but rather are based on the alleged securities fraud of Schubert in the ponzi scheme. As discussed below, these intertwined claims can be compelled to arbitration.

In addition, the arbitration clause at issue provides "Any controversy arising out of *or relating to your business or this agreement* shall be subject to arbitration." (Emphasis added). Clearly, the Pollards' alleged "insurance" claims relate both to their business and to the account agreement and are therefore subject to arbitration.

B. Response to Pollards' Arguments in Parts II and III of the Response.

In Part II, the Pollards argue that the Policies are the entire contract between Equitable and the Pollards, and since there is no agreement to arbitrate in those Policies, the Pollards cannot be forced to arbitrate their claims. If the Pollards were suing to enforce the terms of the Policies they would be absolutely correct on this point. However, as discussed above, that is not what the Pollards are doing. The question for the Court here is whether the Pollards can be

compelled to arbitrate the claims they have asserted. As discussed below, they can and must be so compelled.

In Part III, without citation to any authority, the Pollards assert that because Equitable is not a signatory to the arbitration agreement, Equitable cannot enforce the arbitration agreement. To the contrary, a wealth of authority holds that a non-signatory may enforce an arbitration agreement under several theories of law such as state-law contract and agency principles as well as principles of estoppel. *See e.g. Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993). Equitable cited numerous of these cases in the Renewed Motion at page 4-5 and will not repeat them all here. However, it is important to note that Oklahoma courts have also allowed nonsignatories to enforce arbitration agreements where, as here, the claims are inherently inseparable from the claims against the signatory to the arbitration agreement. In *Cinocca v. Orcrist, Inc.*, 2002 OK CIV APP 123, 60 P.3d 1072, 1074, the Oklahoma Court of Appeals reversed the trial court ruling that a nonsignatory consultant could not enforce an arbitration agreement. Relying on prior federal cases, the Court of Appeals reversed the trial court finding that where the plaintiff's claims against the party that signed the arbitration agreement and the party that did not sign it were "inherently inseparable," arbitration could be compelled as to all claims. *Id.* at 1075. The Court of Appeals stated,

Where claims against the nonsignatory and the signatory are so "intertwined," application of equitable estoppel is warranted. Otherwise, arbitration proceedings between the signatories "would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted." *Id.*

Similarly, in *Long v. DeGeer*, 1987 OK 104, 753 P.2d 1327, the Oklahoma Supreme Court relied on prior federal cases and held that an arbitration provision of securities account agreement covered dispute between the customer and the agent of brokerage, even though agent did not sign agreement. Accordingly, the argument that the Pollard's make that this Court

cannot compel them to arbitrate their claims against Equitable because Equitable was not a party to the account agreement containing the arbitration provision and the Policies don't require arbitration is unsupported by the law and simply wrong.

Because the Pollards' "insurance" claims are directly related to, if not arising out of, the Schubert securities action to which Advisors is a party, this Court should follow the rule, "arbitration agreements may be upheld against non-parties where the interests of such parties are directly related to, if not congruent with, those of a signatory," and "agreement[s] should be applied to claims against agents or entities related to the signatories." *Pritzker*, 7 F.3d at 1122.

C. Response to Pollard's Arguments in Part IV of the Response.

Finally, the Pollards mistakenly rely on the exemption contained in the Oklahoma Uniform Arbitration Act with respect to contracts that "reference" insurance. However, as indicated above, the Pollards' claims in this action are not insurance claims; the claims do not arise out of the insurance coverage; and the claims do not arise out of the insurance agreements. Instead the Pollards' claims relate the Pollards' "motivation" to continue to pay premiums under these Policies, which the Pollards assert was induced by fraud perpetrated by Schubert, a former agent of Advisors and Equitable. The Western District of Oklahoma has held that, for purposes of the federal securities laws, the Schubert transactions involve the purchase and sale of securities. *Schnorr v. Schubert*, 2005 WL 2019878 at *5-6 (W.D. Okla. 2005). The fact that the Pollards might have been motivated to make continuing payments on these Policies as a result of the monies they received under the Schubert ponzi scheme does not render the Pollards' claims "insurance" claims or claims referencing insurance.

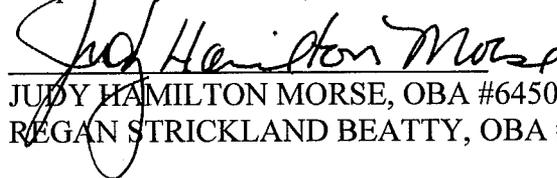
Moreover, the Policies are variable life policies, which, by law, are treated as securities. *See Securities and Exchange Comm'n v. Variable Annuity Life Ins. Co. of America*, 359 U.S. 65,

91 (1959); *Herndon v. Equitable Life Assurance Society of the United States*, 253 F.Supp.2d 1364, 1368 (S.D. Ga. 2002), *aff'd*, 325 F.3d 1252 (11th Cir. 2003); *In re Lutheran Brotherhood Variable Ins. Products Co. Sales Practices Litigation*, 105 F.Supp.2d 1037, 1041 (D. Minn. 2000). The cases cited by the Pollards in support of their assertion that 12 O.S. § 1855 (d) exempts insurance contracts from arbitration do not concern variable insurance policies and have no application here.¹ Accordingly, because the Pollards make no claims as to the actual Policies, but rather, make claims regarding their payment of premiums, by law, the Pollards' claims should be treated as securities claims, which are subject to arbitration.

CONCLUSION

The Pollards' claims relating to their variable life Policies are subject to arbitration because (a) the Policies are variable life insurance policies, which by law are treated as securities; (b) the Pollards' claims relating to the Policies do not arise out of the Policies; and (c) case law clearly authorizes Equitable to enforce the arbitration agreement where the Pollards' claims against Equitable and its sister corporation, Advisors, are directly related. For the reasons stated herein, Equitable requests entry of an order compelling the Pollards' claims against Equitable to arbitration along with the Pollards' claims against Advisors, which have already been compelled to arbitration by this Court, and for all other such relief this Court deems equitable and just.

Respectfully submitted,


JUDY HAMILTON MORSE, OBA #6450
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¹ See *Towe, Hester, & Erwin, Inc. v. Kansas City Fire & Marine Ins. Co.*, 1997 OK CIV APP 58, 947 P.2d 594 (holding that the Federal Arbitration Act applies to an independent agency's claims relating to a rehabilitation program agreement and compelling the claims to arbitration); see also *Cannon v. Lane*, 1993 OK 40, 867 P.2d 125 (holding that a contract between the state and a health maintenance organization was outside the scope of the Uniform Arbitration Act).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of March, 2007, a true and correct copy of the foregoing document was mailed, postage pre-paid to:

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