

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

JAN 12 2007

PATRICIA PRESLEY, COURT CLERK
by _____
Deputy

Oklahoma Department of Securities)
ex rel. Irving L. Faught,)
Administrator;)
)
Plaintiff,)
)
v.)
)
Barry Pollard and Roxanne Pollard,)
)
Defendants.)

Case No. CJ-2005-3799

**PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO COMPEL THE
DEPARTMENT OF SECURITIES TO ARBITRATION**

Plaintiff, Oklahoma Department of Securities, *ex rel.* Irving L. Faught, Administrator, (Department) advises this Court that the motion of Defendants Barry and Roxanne Pollard (Defendants Pollard) proposing to compel the Department to arbitration should fail. In an action brought by the Department outside the administrative process, the district court is the only authority with the power to decide the matters at issue. Further, if the Court ordered the Department to arbitration, the arbitration forum would not decide the claims brought by the Department.

The Department is a state agency charged with enforcing the state securities laws. The Oklahoma Uniform Securities Act of 2004 (Act), Okla. Stat. tit. 71, §§ 1-101 through 1-701 (Supp. 2003), specifically provides that Department proceedings be conducted either through administrative or civil process. *See* Section 1-603 and 1-604 of the Act. No other forum has authority to determine actions brought by the Department. The Department sued the perpetrator

of a securities fraud in district court, obtained an order of disgorgement and is now attempting to recover the fruits of that securities fraud from Defendants Pollard.

The Department is not an NASD member or a customer of an NASD member

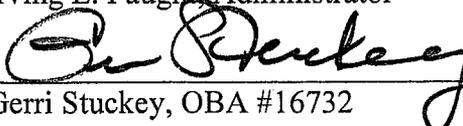
The Department does not stand in the shoes of the perpetrator, but instead, is acting as a public agency enforcing public policy. A governmental agency bringing suit under its statutes, that it has a duty to enforce, need not be itself the victim. *State ex rel. Goettsch v. Diacide Distributors, Inc.*, 561 N.W.2d 369, 375. In a case with similar facts, the court found that the federal securities regulator's standing to obtain the equitable remedies that were at issue stemmed from its duty to advance the public interest, something that is separate and apart from (although it may frequently concur with) the interest of injured investors. *SEC v. Egan*, 856 F. Supp. 401 (N.D. Ill. 1993).

Defendants Pollard entered into a contract with the third-party defendants, AXA Advisors, LLC and AXA Equitable Life Insurance Company (AXA), wherein they agreed to arbitrate any disputes between them before the National Association of Securities Dealers (NASD). The Department is not a party to that contract. Furthermore, the NASD's Code of Arbitration Procedure provides that the only matters eligible for submission to NASD arbitration are those between NASD members or NASD members and their customers. *See* NASD Code of Arbitration Procedure, Section 10101. The Department is neither a member of the NASD nor a customer of AXA or any other NASD member. Even were the Court to direct the Department to arbitration, the NASD would not accept the Department as a party before an arbitration panel.

WHEREFORE, Plaintiff respectfully requests that this Court deny Defendants Pollard's motion to compel Department to arbitration.

Respectfully submitted,

Oklahoma Department of Securities, *ex rel.*
Irving L. Faught, Administrator

By: 

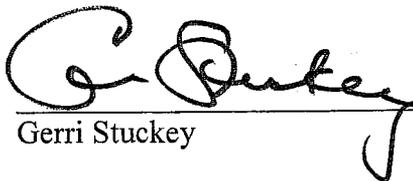
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 12th day of January, 2007, a true and correct copy of the above and foregoing was mailed by U.S. Mail, with postage prepaid thereon, addressed to:

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