

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
 STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
 OKLAHOMA COUNTY, OKLA.

SEP 24 2010

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

PATRICIA PRESLEY, COURT CLERK
 by _____
 DEPUTY

Plaintiff,)

v.)

Case No. CJ-2005-3799

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.)

**DEFENDANTS BARRY POLLARD AND ROXANNE POLLARD'S
 REPLY TO RESPONSE TO MOTION TO ENTER A NEW SCHEDULING ORDER AS
 TO THIRD PARTY DEFENDANT AXA EQUITABLE LIFE INSURANCE COMPANY,
 F/K/A EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES**

Defendants Barry Pollard and Roxanne Pollard (“Pollards”), hereby request this Court to enter a new scheduling order pursuant to Rule 5 of the Rules for District Courts. In response to Third Party Defendant AXA Equitable Life Insurance Company, F/K/A Equitable Life Assurance Society of the United States (“AXA”) *Response to Defendant’s Motion to Enter a New Scheduling Order*, the Pollards submit the following reply:

On May 11, 2005, the Oklahoma Department of Securities ex rel. Irving L. Faught,

Administrator (“Department”) brought suit against the Pollards for claims arising from the actions of Marsha Schubert (“Schubert”), including the operation of an alleged “Ponzi” scheme. At all time pertinent to this case, Schubert was an employee/agent of AXA, doing business on behalf of AXA, thus, AXA is responsible for the damages suffered by the Pollards as a result of the Ponzi scheme. On April 9, 2007, the Pollards filed its *Third Party Petition* against AXA alleging claims of actual fraud, agency, negligent supervision/respondent superior, constructive fraud, negligence, bad faith, breach of contract, unjust.

The Pollards began doing business with AXA through AXA’s agent Schubert in 1993. The Pollards paid monies to Schubert and AXA for payment of premiums for life insurance, for investment pursuant to the terms of the insurance policies and to purchase other products offered by AXA. AXA benefited and profited from the ongoing premium payments and other monies paid by the Pollards to Schubert and AXA for over ten years to the detriment of the Pollards. During the course of its investigation, the Department discovered that Schubert had received over Two Hundred Million Dollars in customer’s money that was improperly and illegally handled. Notwithstanding the large and voluminous transfers of funds in and out and between various accounts, AXA never noticed or questioned the bizarre account activity in the small office run by Schubert. AXA had a duty to ascertain what products Schubert was selling, the manner of sale, the handling of the proceeds, the handling of the premiums and other monies paid, the documentation used in connection with such products, the suitability of such investments for the intended investors, the management and maintenance of insurance products and whether Schubert was sponsoring, promoting or engaging in any other illegal or inappropriate business activity. AXA owed such a duty to supervise Schubert to those persons to whom Schubert was selling life insurance and other AXA products, including the Pollards and

breached such duty by failing to properly monitor the actions of Schubert, its authorized agent and representative. As a direct and proximate result of AXA's wrongful actions and/or omissions, the Pollards have been damaged and are entitled to recover damages from AXA, including any monies which they are ordered to disgorge in the case at hand.

On January 18, 2008, the Pollards and AXA filed an *Agreed Motion to Bifurcate Trial* following this Court's granting of the Department's *Motion for Summary Judgment* against the Pollards as to the unjust enrichment claim and existence of a Ponzi scheme and denying the Pollards' setoff claim. As such, at that time, the only remaining issue as to the Department's claim against the Pollards was the determination of damages. Thus, the parties agreed that bifurcation was appropriate as a number of issues remained regarding the Pollard's third party claims and the scope of those claims would be based on the damages award. On January 18, 2008, an *Agreed Order Bifurcating the Trial* was entered.

Since the entry of the *Agreed Order*, the situation of this case has drastically changed and bifurcation is no longer in the interests of judicial economy and would result in the piecemeal, costly litigation of this case. On April 19, 2010, the Oklahoma Supreme Court reversed the District Court's grant of summary judgment in favor of the Department and ruled that although the Department may bring an action for unjust enrichment against the victims of a Ponzi scheme such as the Pollards, the Department was only entitled to recover unreasonable returns on the Pollards' initial investments, if any. Thus, the Department is precluded from recovering from those victims who received a reasonable rate of return or less than a reasonable rate of return even if they received monies in excess of their initial investment. Further, the Court held that the Pollards are entitled to a setoff any judgments or monies they can prove were non Ponzi scheme monies against any monies ordered to be disgorged. Such is a question of fact to be decided,

thus, it is necessary for AXA to be made a party to these proceedings as the Pollards third party claims overlap with these factual issues.

Okla. Stat. tit. 12, §2018 provides, in pertinent part:

D. SEPARATE TRIALS. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims or issues, always preserving inviolate the right to trial by jury.

It is well-settled in Oklahoma that the “joinder of claims, parties and remedies is strongly encouraged.” *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724 (1966).¹ Bifurcation of issues for trial should not be routinely ordered. *Lis v. Robert Packer Hospital*, 579 F.2d 819, 824 (3rd Cir. 1978), *cert. denied*, 439 U.S. 955, 99 S.Ct. 354, 58 L.Ed.2d 346 (1978). Rather, bifurcation should be confined to special circumstances found to be present in a litigated case. *Faulkenberry v. Kansas City Southern Railway Company*, 661 P.2d 510, 513 (Okla. 1983), *cert. den.*, 464 U.S. 850, 104 S.Ct. 159, 78 L.Ed.2d. 146 (1983)(construing similar state statute; trial court did not abuse its discretion in denying defendant’s motion to bifurcate.) The terms of Okla. Stat. tit. 12, §2018 allow the joinder of a party’s claims or remedies against an opponent in the same action. *See A-Plus Janitorial & Carpet Cleaning v. The Employers’ Workers’ Compensation Association*, 936 P.2d 916 (Okla. 1997). This rule expresses a philosophy of liberality toward entertaining the broadest possible scope of action consistent with fairness to the parties. The purpose of the rule is to avoid multiplicity of litigation. *Id.* Courts generally order separate trials only when clearly necessary. A single trial will generally lessen the delay, expense and inconvenience to the parties and the courts. The movant has the burden

¹ Because Okla. Stat. tit. 12, §2018 of Oklahoma’s Pleading Code regarding joinder is virtually identical to Rule 42 of the Federal Rules of Civil Procedure, Oklahoma Courts may look to federal interpretations of Rule 42 for guidance. *See* Committee Comment to Okla. Stat. tit. 12, §2018.

to show prejudice. *Id.*

The evidence determinative of the Pollards' claims against AXA goes hand in hand with the defenses they have asserted against the Department's claims. The same set of facts and circumstances forming the basis of the Pollard's defenses also provide the basis of Pollards' third party claims. Pollards' third party action arises from the same set of common facts as its defenses and the Department's claims. The issues applicable to the third party petition are germane to the issues to be determined in relation to Pollards' defenses to the Department's claims. When issues are so interwoven that their independent trial would cause confusion and uncertainty, which would amount to a denial of a fair trial, they must be tried together. *Gasoline Products Co. v. Lederle Laboratories*, 676 F.Supp. 233 (D.Utah 1987). The Pollards will be prejudiced if they are barred from presenting these issues in response to the Department's claims. Bifurcation of issues is not the proper avenue to help one's case.

Here, it has already been revealed that the issues all have common facts or contentions. AXA has not demonstrated that bifurcation of common issues will promote the interests of judicial economy and efficiency. The witnesses having relevant testimony will be substantially the same. Likewise, the documentary evidence will be substantially the same. Thus, there will be overlapping testimony and evidence on all the issues arising from the Department's claims against the Pollards', the Pollards' defenses and the Pollards' third-party claims against AXA. It is difficult to see how calling the same witnesses and presenting the same evidence on multiple occasions will result in a savings of time or expense. It is also difficult to see how a lengthier, more expensive trial resulting from fractured proceedings will be more convenient to the Court, the parties or the jury/juries. AXA has failed to show that bifurcation of any issues will actually produce any benefits which its has theorized. Accordingly, its claim for continued bifurcation

should be denied. The relief envisioned by AXA would not serve any benefit but, rather, will simply compound this proceeding.

WHEREFORE, premises considered, Pollards respectfully request the Court enter a new scheduling order as to the Third Party Claims and that such scheduling order be consonant with the scheduling order for the Plaintiff's claims herein.

Respectfully Submitted,



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CERTIFICATE OF MAILING

This will certify that on the 23rd day of September, 2010 a true and correct copy of the foregoing was mailed first class mail, postage prepaid to the following:

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