

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

FEB 16 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 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

**RENEWED MOTION TO COMPEL ARBITRATION WITH
AXA EQUITABLE LIFE INSURANCE COMPANY AND BRIEF IN SUPPORT**

Pursuant to this Court's ruling at the hearing conducted on February 7, 2007, in the above-captioned matter, AXA Equitable Life Insurance Company f/k/a Equitable Life Assurance Society of the United States ("Equitable") files this Renewed Motion to Compel Arbitration pursuant to the Oklahoma Uniform Arbitration Act, 12 O.S. §§1851-1881 and the Federal Arbitration Act, 9 U.S.C. §§1-16 (1994 & Supp. 2001), requesting entry of an order compelling arbitration of third party plaintiffs', Barry Pollard and

Roxanne Pollard (“Third Party Plaintiffs”), claims asserted in this action against Equitable. In support, Equitable shows the Court as follows:

INTRODUCTION & BRIEF STATEMENT OF FACTS

AXA Advisors, LLC (“Advisors”) and AXA Equitable Life Insurance Company are wholly owned subsidiaries of AXA Financial, Inc. Advisors is the broker-dealer and investment advisor for AXA Financial, Inc. Equitable provides life insurance, annuities, and other needs-based products and services, many of which are sold through Advisors. Advisors and Equitable are affiliates and sister entities. Third party plaintiffs, Barry Pollard and Roxanne Pollard (the “Pollards”) made certain investments with Advisors and purchased certain variable insurance policies issued by Equitable. *See Exhibits “A”-“D”—Variable Life Insurance Policies.* Specifically, the Pollards executed applications for variable life insurance products as listed in the table below, which are attached as Exhibits “A” –“D”:

INSURANCE POLICIES			
Date	Policy Number & Description	Policy Owner	Insured
9-22-93	43 238 937 Variable Life Insurance Policy— face value \$1,750,000.00	Frontier Trust Company	Barry Pollard
11-22-93	43 257 265 Variable Life Insurance Policy—	Jane Pollard	Barry Pollard

	face value \$2,000,000.00		
05-19-94	44 230 443 Variable Life Insurance Policy— face value \$500,000.00	P and K Implement, Inc. (Barry Pollard President)	Wendell J. Kirtley
12-22-98	48 253 032 Variable Life Insurance Policy— face value \$570,000.00	Barry Pollard	Barry Pollard

On January 25, 2006, the Pollards filed their Third Party Petition alleging claims simultaneously against Advisors and Equitable based on the conduct of a former agent of both Advisors and Equitable, Marsha Schubert. On August 7, 2006, Equitable and Advisors filed their Motion to Compel Arbitration (the "Initial Motion"). On February 8, 2007, the Court conducted a hearing on the Initial Motion and ruled that (1) the claims of the signatory to the arbitration agreement Barry Pollard and of the non-signatory to the arbitration agreement, Roxanne Pollard, against Advisors shall be submitted to arbitration; (2) the claims of the Department of Securities ("DOS") shall not be submitted to arbitration; and (3) Equitable should file a renewed motion to compel arbitration with regard to Third Party Plaintiffs' claims against Equitable.

ARGUMENTS & AUTHORITIES

A. **Equitable May Enforce the Arbitration Agreement.**

Arbitration agreements may be enforced by non-signatories based on state-law contract and agency principles. *See Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993)(holding that a non-signatory corporation could be compelled to arbitrate under its sister corporation's arbitration agreement where both companies were owned by the same parent company, and the claims asserted against the two); *see also J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320, 321 (4th Cir. 1988); *Hinson v. Jusco Co., Ltd.*, 868 F.Supp. 145, 149 (D. S.C. 1994); *Wasserstein v. Kovatch*, 618 A.2d 886 (N.J. Super. Ct. App. Div. 1993); *Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 923, 938 (3d Cir. 1985), *overruled on other grounds*; *see also, In re Prudential Ins. Co. of America Sales Practice Litigation All Agent Actions*, 133 F.3d 225, 229 (3d Cir. 1998) (citing *Barrowclough*, 752 F.2d 923; *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Cinocca v. Orcrist, Inc.*, 2002 OK CIV APP 123, 60 P.3d 1072, 1074; *Long v. DeGeer*, 1987 OK 104, 753 P.2d 1327. Therefore, the 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.

In *Pritzker*, as in this case, the non-signatory allowed to enforce the arbitration agreement was a "corporate sister" of the defendant and a "subsidiary" of their common parent. 7 F.3d at 1122; *See also McCarthy v. Azure*, 22 F.3d 351, 356 (1st Cir. 1994)

("[T]he law recognizes certain contract and agency principles under which nonsignatories sometimes can be obligated by, or benefit from, agreements signed by others, and these principles can apply to arbitration provisions").

Arbitration agreements may also be enforced against non-signatories under the principles of equitable estoppel where "the signatory raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and another signatory." See *Cinocca*, 60 P.3d at 1074 (citing *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999)). In *Cinocca*, the Oklahoma Court of Civil Appeals noted that where claims against the signatory and non-signatory are "intertwined," "application of equitable estoppel is warranted." *Id.* at 1075. Noting that Oklahoma adheres to a policy similar to the federal policy favoring arbitration, the *Cinocca* Court went on to hold, "Otherwise, arbitration proceedings between the signatories 'would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted.'" *Id.* (citing *Franklin*, 177 F.3d at 947).

Here, Advisors and Equitable are both subsidiaries of the same parent company, AXA Financial, Inc. Further, Advisors and Equitable are "sister" entities entitled to enforce the arbitration at issue. The Pollards asserted their claims against Advisors and Equitable simultaneously in their Third Party Petition, and the claims are interrelated arising out of the alleged conduct of an agent for Advisors and Equitable. Therefore, in keeping with the overarching policy in favor of arbitration, the Court should enforce the arbitration agreement with respect to both Advisors and Equitable.

B. Claims Against Equitable Are Not Exempt From Arbitration Under 12 O.S. §1855(D).

Equitable sold variable insurance products to the Pollards; such variable insurance products have been held to be securities under the governing federal law. *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 Pollards assert, “It is absolutely essential that AXA [Advisors]/Equitable remain parties to the issues that are to be litigated between the [Department of Securities] and the Pollards as *the Pollards seek to be indemnified by AXA [Advisors]/Equitable* for any award granted to the [Department of Securities] against the Pollards.” Defendants’ Response and Objection to Plaintiffs’ Motion to Compel Arbitration and Pollards Motion to Compel the Department of Securities to Arbitration in the Alternative at p. 3. Further the claims asserted by the Pollards in their Third Party Petition regarding the purported “insurance” contracts include the following allegations:

Pollards also forwarded funds to AXA and AXA Equitable for payment of premiums on different life insurance policies. Third Party Petition at ¶ 22.

AXA and AXA Equitable benefited from ongoing premium payments based on the representations by Schubert and Associates that the AXA and AXA Equitable products were earning substantial returns. Third Party Petition at ¶ 23.

In a manner to further induce Pollards to continue to pay premiums directly to AXA and AXA Equitable, Schubert represented that she could make

money for the Pollards by investing in options and day trading which were representations were made while she was an agent of AXA and/or AXA Equitable operating from the office in Crescent, Oklahoma. AXA and AXA Equitable further benefited by the representations made by Schubert of the earnings on their investments that were supposedly with AXA and AXA Equitable by furnishing them with statements indicating substantial amount of investment with AXA and/or AXA Equitable. Third Party Petition at ¶ 24

As a result of the fraudulent misrepresentations by Schubert, Pollards purchased and continued to maintain life insurance policies and investments with the AXA and AXA Equitable and paid substantial premiums of which AXA and AXA Equitable received monetary benefits. Pollards would not have purchased or maintained the policies, had it not been for the fraudulent misrepresentations of Schubert and that were allowed to remain ongoing by AXA and AXA Equitable. Third Party Petition at ¶ 37.

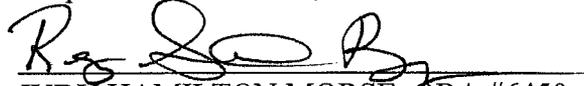
It is clear that the Pollards' claims relating to the variable insurance products stem from and are intertwined with their claim for indemnification from Advisors and Equitable. The Pollards are not asserting claims arising out of the variable insurance contracts or regarding the coverages or benefits provided under the variable insurance contracts, and the fact that the Pollards make allegations with respect to their insurance contracts does not excuse them from arbitrating their claims under 12 O.S. § 1855 where (1) the insurance contracts are variable insurance products treated as securities by law; and (2) the claims asserted relate to the Pollards' investments in those variable insurance products and various other securities—not the insurance coverage or benefits provided under those products.

CONCLUSION

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,



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ATTORNEYS FOR AXA ADVISORS, LLC and
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COMPANY

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 16th day of February, 2007, a true and correct copy of the foregoing document was mailed, postage pre-paid to:

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