

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

JUN - 7 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

**AXA EQUITABLE'S REPLY TO THE POLLARDS' RESPONSE TO MOTION TO
DISMISS BREACH OF CONTRACT CLAIM AND REQUEST FOR
RECONSIDERATION OF RE-NEWED MOTION TO COMPEL ARBITRATION
OF CLAIMS AGAINST AXA EQUITABLE**

AXA Equitable Life Insurance Company ("Equitable") files this Reply to the Response to Equitable's Motion to Dismiss Breach of Contract Claim and Request for Reconsideration of Renewed Motion to Compel Arbitration of Claims Against AXA Equitable filed by Defendants, Barry and Roxanne Pollard (the "Pollards") on May 29, 2007 (the "Response"). In support, Equitable states as follows:

A. The Pollards Have Not Stated Any New “Insurance” Claims Against Equitable.

Despite this Court’s grant of leave to file an amended petition against Equitable, the Pollards have stated no separate insurance related claims against Equitable in their Amended Third Party Petition (the “Amended Petition”). Instead, in their Amended Petition, the Pollards merely reassert claims against Equitable that are essentially identical to those claims asserted against Equitable’s sister company, AXA Advisors, LLC (“Advisors”) and attempt to throw in a breach of contract claim that states only conclusions. The Pollards’ failure to assert any independent insurance related claims against Equitable has led Equitable and this Court in a “round robin” circular argument.

This Court has already compelled the claims against Advisors to arbitration and the Pollards’ claims against Equitable should be similarly compelled to arbitration. The Pollards’ claims against Equitable all relate to or arise out of the conduct of Marsha Schubert (“Schubert”). The Pollards have alleged no claims against Equitable for insurance coverage or policy issues. Although it is not clear from the Pollards’ Amended Petition or Response, it appears that the Pollards are asserting that somehow Equitable’s purported failure to adequately supervise Schubert constitutes a breach of the insurance policies issued by Equitable. The Pollards have cited no authority for this proposition nor have they even directly identified the issue. The Pollards’ claims for damages relate only to their continued payment of premiums and the securities aspect of these variable life insurance policies—all as allegedly induced by or as part of the Schubert scheme. Even after opportunity to amend their Third Party Petition, the Pollards have failed to state any cognizable claim against Equitable that is not directly tied to the conduct of Schubert and the claims against Advisors. Therefore, this Court should dismiss the conclusory breach of contract claim and compel the Pollards’ otherwise identical claims against Equitable to arbitration along with their claims against Advisors.

B. The Breach of Contract Claim Must be Dismissed.

In their Response, the Pollards go through a litany of arguments in part I of the response that insurance policies are contracts; they paid premiums; and Equitable had a duty to “ensure” the policies were monitored and protected. They then argue that Equitable breached its duty by ignoring and failing to monitor the conduct of Schubert. They do not identify a single provision of the insurance policies that they say was breached. Further, the conduct that they complain of in the Response has nothing to do with the insurance policies. Rather they complain of the ponzi scheme that Schubert operated.

In any event, the allegations of the Amended Third Party Petition with respect to the alleged breach of the insurance policy contracts are mere conclusions and that claim must be dismissed for failure to state a claim.

C. The Claims Against Equitable Should Be Compelled to Arbitration.

Under the theory of equitable estoppel, courts have permitted non-signatories to enforce arbitration agreements where the plaintiff signatory’s claims against the non-signatory party and the defending signatory party are based on the same facts and are inherently inseparable. *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999). In *MS Dealer Serv. Corp.*, the Eleventh Circuit applied the rule that “application of equitable estoppel is warranted...when the signatory to the contract containing the arbitration clause raises allegations of ...substantially interdependent and concerted misconduct by both the nonsignatory and one ore more of the signatories to the contract.” *Id.* at 947 (citation omitted). In allowing a non-signatory to enforce an arbitration clause, the *MS Dealer Serv. Corp.* court further noted that the plaintiff’s claims against the defendants (a car dealership and its owner) implicated the defendants inseparably. *Id.* at 948.

The Pollards' claims against Advisors and Equitable are inseparable and rely on the same set of facts. The Pollards assert that the claims against Equitable cannot be compelled to arbitration based on this Court's prior ruling. However, the Amended Third Party Petition, clearly demonstrates that the Pollards do not have any independent claims against Equitable. Rather, it is clear that the Pollards' claims against Equitable are nearly identical to their claims against Advisors. Indeed, at page 3 in their Response to Plaintiff's Motion for Summary Judgment filed in this case on May 15, 2007, the Pollards define AXA Advisors and AXA Equitable Life Insurance as "AXA/Equitable" and then make the following statement: "As was the case in all of the Pollards' dealings with Schubert, there is no distinction between AXA/Equitable and Schubert, they are one and the same." This admission by the Pollards, together with their inability to state independent claims against Equitable, demonstrates why this Court should reconsider the prior ruling and compel the claims against Equitable to arbitration.

All of the Pollards' claims against Equitable and Advisors arise out of Schubert's conduct and ponzi scheme. Where Schubert was a registered agent of both Equitable and Advisors, and the Pollards' own allegations say that Schubert's scheme did not differentiate between those Advisors and Equitable and the Pollards' claims against Advisors and Equitable cannot be separated. The Pollards' claims against Advisors and Equitable are inextricably intertwined. The Pollards' have alleged equal responsibility on the part of Advisors and Equitable for the conduct of Schubert, and the Pollards have alleged equal liability on the part of Advisors and Equitable for the misconduct of Schubert. Therefore, because the Pollards' claims against Equitable are inextricably intertwined with their claims against Advisors (which claims have already been compelled to arbitration) the Pollards should be estopped from proceeding with their claims against Equitable in a separate forum. Equitable and Advisors should not be forced

to defend substantially identical claims arising out of the same set of facts in two forums, and for the reasons stated, Equitable requests entry of an order compelling the Pollards' claims against Equitable to arbitration.

CONCLUSION

Given the opportunity to amend their Third Party Petition, the Pollards have still not stated any independent claims against Equitable. The Pollards' claims all arise out of the ponzi scheme allegedly perpetrated by Schubert which based on their own allegations are not distinct and separable. Because the Pollards' claims against Equitable are virtually identical to their claims against Advisors, the facts, defenses, and discovery will be duplicative and inequitable if the Pollards are allowed to proceed in two forums against these closely related sister corporations under these circumstances. Therefore, Equitable requests entry of an order compelling the Pollards' claims against Equitable to arbitration along with the Pollards' claims against Advisors and for all such other relief this Court deems equitable.

Respectfully submitted,



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ATTORNEYS FOR AXA ADVISORS, LLC and
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of June, 2007, a true and correct copy of the foregoing document was mailed, postage pre-paid to:

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