

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

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

vs. )

**Case No.: CJ-2005-3799  
Judge Vicki Robertson**

BARRY POLLARD AND )  
ROXANNE POLLARD, )  
Defendants and Third Party )  
Plaintiffs )

vs. )

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' RESPONSE AND OBJECTION TO PLAINTIFFS' AXA ADVISORS, LLC and AXA EQUITABLE LIFE INSURANCE COMPANY'S MOTION TO COMPEL ARBITRATION AND BRIEF IN SUPPORT and POLLARDS' MOTION TO COMPEL THE DEPARTEMENT OF SECURITIES TO ARBITRATION IN THE ALTERNATIVE**

**COME NOW** Defendants and Third Party Plaintiffs, Barry Pollard and Roxanne Pollard ("Pollards") and for their Response and Objection to the Third Party Defendants' AXA Advisors, LLC and AXA Equitable Life Insurance Company (collectively referred to as "AXA/Equitable") Motion to Compel Arbitration and Brief in Support. The Third Party Defendants' Motion to Compel Arbitration cannot be granted because:

- (a) Roxanne Pollard is not a party to the arbitration provision relied upon by AXA/Equitable;

- (b) the Department of Securities (“DOS”) is currently not a party to the arbitration proceeding;
- (c) AXA Equitable Life Insurance Company is not a party to the arbitration provisions relied upon by Equitable;
- (d) the insurance contracts are exempt from arbitration;
- (e) there were numerous transactions involving several account types, some of which included insurance and investment accounts, which are so intermingled that it cannot be determined what accounts and transactions are at issue in this lawsuit; and
- (f) the claims at issue are not sufficiently identified to determine whether they may be subject to arbitration.

### **RESPONSE AND OBJECTION**

The Defendants and Third Party Plaintiffs Pollards held investment, retirement and life insurance policies of considerable value with AXA/AXA Equitable. Prior to the events discovered to have given rise to this lawsuit, the Pollards were long time investors of AXA/Equitable. During the events giving rise to this lawsuit, Marsha Schubert (“Schubert”) was the Pollards’ investment advisor as an employee and agent of the Third Party Defendants AXA/Equitable. However, the Pollards have discovered that their investments were significantly devalued as a result of AXA/Equitable’s mismanagement, misappropriations and negligence.

The DOS brought this action against the Pollards seeking recovery for fraudulent transfer and unjust enrichment on the alleged theory that the Pollards received funds that did not belong to them, i.e. a Classic Ponzi Scheme. Yet, the DOS neither identifies on whose behalf it has the right to recover the funds sought, the authority that it has to recover said funds, or who will receive the funds recovered, if any.

For the following reasons, AXA/Equitable's Motion to Compel Arbitration should be denied: (1) AXA/Equitable are necessary and proper parties to this lawsuit; (2) the arbitration clause does not apply to contracts with reference to insurance; (3) the nature and extent of the Plaintiff DOS' claims have not been clearly identified; and (4) the Application sought to be enforced only exists as between AXA and Third Party Plaintiff Barry Pollard, individually. For these reasons, AXA/Equitable's motion is premature given the nature of the lawsuit.

#### **I. AXA/EQUITABLE ARE NECESSARY AND PROPER PARTIES**

The Pollards urge to the Court that at this time AXA/Equitable are necessary and proper parties to this lawsuit for the reason that it was by their negligent acts and the misconduct of their agent Schubert that the Pollards received the funds that the DOS seeks to disgorge from them. Until it is determined by this Court that the DOS may recover the funds sought and the amount of funds that may be recovered, arbitration would not be effective. It is absolutely essential that AXA/Equitable remain parties to the issues that are to be litigated between the DOS and the Pollards as the Pollards seek to be indemnified by AXA/Equitable for any award granted to the DOS against the Pollards. AXA/Equitable must have the opportunity to defend against the liability that may be imputed to them as a result of the actions of their agent/employee Marsha Schubert.

It is not ripe to permit arbitration of the issues as there is the potential for conflicting decisions. 12 O.S. §1861 allows the Court to consolidate proceedings if 1) one party is subject to a separate agreement to arbitrate; 2) the claims arise from the same transaction or related transactions; 3) there exist common issues of law and fact that create the possibility of conflicting decisions; and 4) the prejudice from the failure to consolidate does not outweigh the

risk of undue delay or prejudice to the parties opposing the consolidation. It is clear that the DOS seeks to recover monies from the Pollards based on alleged unjust enrichment. The Pollards not only seek to recover monies from AXA/Equitable for their loss on their investments, but the Pollards also seek to be indemnified by AXA/Equitable for the monies that the DOS seek to disgorge as a result of AXA/Equitable's agent's misconduct.

## II. THE ARBITRATION CLAUSE DOES NOT APPLY TO THIS CASE

If the Court finds that it is not proper to stay arbitration until the issues are litigated, the Pollards argue that the arbitration clause sought to be enforced by AXA/Equitable is overreaching to the issues of this lawsuit. It is inconceivable that the Pollards would have to arbitrate damages they incurred as a result of AXA/Equitable's negligence and the fraudulent activities of its agent Schubert. Thus, the Pollards direct the Court's attention to Title 12 O.S. §1855 (D) which sets forth that the Oklahoma Uniform Arbitration Act ("OUAA") does not apply to contracts that reference insurance.

Pursuant to Towe, Hester & Erwin, Inc. v. Kansas City Fire & Marine Insurance Co., 947 P.2d 594, 1997 OK CIV APP 58, the Court stated that contracts with reference to insurance are not arbitrable. Similarly, Cannon v. Lane, 867 P.2d 1235, 1993 OK 40, involved an HMO and an employee. The HMO did not want to pay for medical procedures rendered to the employee and there resulted a legal dispute that the HMO sought to enforce arbitration. The Court identified the phrase "with reference to" as the state of being related or referred. Cannon at 1237. The Court cited to Boughton v. Farmers Ins. Exch., 354 P.2d 1085 (Okla., 1960), in support of its determination that a contract with reference to insurance falls within the exemption of the

OUAA and thusly rejected the applicants motion to compel arbitration. Cannon at 1238 and 1239.

Although not represented to this Court by AXA/Equitable, the Pollards held several life insurance policies through AXA/Equitable. The Pollards have claims related to these insurance policies arising from AXA/Equitable's handling of these insurance policies. It is believed that these claims may, at least in part, be inextricably intertwined with transactions involving the Pollards' investment accounts with AXA/Equitable. Summarily, all issues involving the insurance policies held by the Pollards are not subject to arbitration.

AXA/Equitable's Motion to Compel Arbitration states that the OUAA and the Federal Arbitration Act ("FAA") apply and that the FAA exempts the OUAA to the extent that it frustrates the FAA. However, not only does AXA/Equitable fail to set forth in what manner Title 12 O.S. §1855 (D) frustrates the FAA, but it also fails to cite to any case law wherein contracts referencing insurance are not exempt from arbitration. The supporting cases cited by AXA/Equitable in its Motion to Compel Arbitration do not address contracts pertaining to life insurance policies.

### **III. THE NATURE AND EXTENT OF THE DOS' CLAIMS HAVE NOT BEEN CLEARLY IDENTIFIED**

There still exists extensive discovery yet to be conducted. The Pollards are not aware of the nature and extent to which the DOS' claims reach as against the Pollards. The Pollards held numerous accounts with AXA/Equitable, and it is the position of the Pollards that the one Application presented to this Court by AXA/Equitable shall not be broadly applied to all accounts in which the Pollards held an interest. As a matter of fact, the DOS has the opportunity

to bring its claims against AXA/Equitable, and it has been mentioned that the DOS might pursue its actions for recovery against AXA/Equitable.

The DOS has neither identified the claims it has against the Pollards, nor has it identified or associated those transactions with which investment accounts that it seeks recovery from the Pollards. There is no reason why AXA/Equitable should not conduct discovery from the DOS to identify the DOS' claims.

It is only after the parties have conducted discovery and all claims have been fully identified and claims have been eliminated, will the valid claims be enumerated and fully litigated. Because the DOS seeks to disgorge the Pollards of money they received from AXA/Equitable's agent Schubert, this case cannot be completely and fully litigated without all of the necessary parties involved herein. Not yet knowing the Court's position regarding the Pollards' alleged liability and the DOS' right to recover any award to which it might be entitled, the Pollards request that this Court stay any arbitration with AXA/Equitable until the parties have had the opportunity to fully litigate the issues and it is determined that the DOS are entitled to disgorge monies from the Pollards. At this point, it has not been determined that there even exist legal issues that are to be litigated.

**IV. THE APPLICATION SOUGHT TO BE ENFORCED  
ONLY EXISTS AS BETWEEN AXA AND THIRD PARTY PLAINTIFF  
BARRY POLLARD, INDIVIDUALLY**

The Application that AXA/Equitable has attached to their Motion to Compel Arbitration limits the extent to which AXA/Equitable seek to enforce arbitration for the following reasons:

First, the Application was only signed by Barry Pollard as an individual. The "Account Registration Type" is identified as "Individual." The Defendants and Third Party Plaintiffs Barry

and Roxanne Pollard held several investment accounts in various capacities with AXA/Equitable. Pollards maintain that the one Application is not so broad as to reach all of the accounts in which they held an investment interest and to all actions past, present and future of whatever nature.

AXA/Equitable cite to Wilkinson v. Dean Witter Reynolds, Inc., 933 P.2d 878, 1997 OK 20 in support of their statement that brokerage accounts are governed by the FAA. Although Wilkinson does make this statement, it does not enforce the arbitration clause. In Wilkinson, there existed an IRA, a joint account, a family account and a trust account held by an individual investor. There arose a dispute between the investor and Dean Witter Reynolds, the investment firm, with regards to the management of the IRA account. Dean Witter argued that the arbitration clauses contained in the applications for the other existing accounts were so broad as to reach to the IRA account. However, the Court rejected this argument and found that there was no arbitration clause pertaining to or extending from other applications to issues regarding the IRA account. The Court reasoned that the parties to each account were different and the nature of the accounts containing arbitration clauses varied significantly from the IRA account. Wilkinson at 879-880.

Second, the Application is only with AXA. The Third Party Defendant Equitable has not produced an Application as between the Pollards and Equitable. Therefore, any claims concerning Equitable should not be compelled to arbitration.

Third, the Application only exists as between AXA and Barry Pollard. The Application provided makes no reference as to Defendant and Third Party Plaintiff Roxanne Pollard. As Roxanne Pollard is not a party to the Application, she is not subject to arbitration until it is established otherwise.

As there has only been presented one Application from AXA identifying one of Barry Pollard's individual accounts, it is inappropriate to grant AXA/Equitable's Motion to Compel Arbitration based on this Application. At this time, it is undetermined as to the number and types of accounts the Pollards actually owned. Furthermore, it has not been discovered as to whether there exist other Applications that supersede the one presented by AXA/Equitable. Therefore, for purpose of judicial economy, it is inappropriate to remove the Pollards' claims against AXA/Equitable to arbitration without first establishing what claims exist and are at issue.

**POLLARDS' MOTION IN THE ALTERNATIVE TO COMPEL  
THE DEPARTMENT OF SECURITIES TO ARBITRATION  
AND STAY ANY PROCEEDINGS BEFORE THIS COURT**

Alternatively, if the Court determines that the arbitration clause contained in AXA's Application, and submitted by Barry Pollard for an Individual account, is enforceable, then the Pollards move this Court to stay the proceedings before this Court and to compel the entire lawsuit to arbitration to include those claims brought by the DOS. As previously stated, the Pollards were long time investors with both AXA and Equitable. Schubert was an employee, agent and representative for AXA/Equitable and acted as an investment advisor in AXA/Equitable's branch office in Crescent, Oklahoma. As such, Schubert became the Pollards' AXA/Equitable investment advisor. During the course of AXA/Equitable and Schubert's handling of the Pollards' accounts, and unbeknownst to the Pollards, AXA/Equitable and Schubert mismanaged and misappropriated funds.

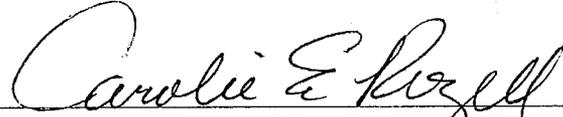
The DOS has brought this lawsuit against the Pollards for those wrongful actions of Schubert and AXA/Equitable, i.e., the DOS' claims arise out of those wrongful transactions of Schubert and AXA/Equitable. As a matter of fact, the DOS has "stepped into the shoes" of

Schubert to disgorge the investors, Pollards, of alleged investor assets received as a result of Schubert and AXA/Equitable's wrongful actions. Yet, the Pollards have not been accused as being wrongdoers or knowing participants to those wrongful acts.

If the Court determines that the parties are subject to arbitration, then the DOS' claims against the Pollards ought to be a part of the arbitration as well because those claims arose directly out of and in furtherance of the Pollards' investments with Schubert and AXA/Equitable. The actions giving rise to this lawsuit and from which the DOS seeks to disgorge monies from the Pollards involve so many accounts and transactions as to closely intertwine the issues giving rise to this lawsuit. It is absolutely and reasonably necessary that all of the parties to this lawsuit be represented in an arbitration of the issues upon which this case is based.

**WHEREFORE**, the Defendants Pollards respectfully request this Court find that the Third Party Defendants' Motion to Compel Arbitration is not proper at this time and thusly deny the same. In the alternative, if the Court finds that the matter should be removed to arbitration the Pollards request that this Court stay all proceedings before this Court and grant the Pollards' Motion to Compel the entire case to arbitration to include the Department of Securities and its claims. The Pollards further request any further and additional relief to which they are entitled.

Respectfully submitted,

A handwritten signature in cursive script that reads "Carolie E. Rozell". The signature is written in black ink and is positioned above a horizontal line.

SHAWN D. FULKERSON, OBA #14484

RICHARD E. PARRISH, OBA #6915

CAROLIE E. ROZELL, OBA #19679

FULKERSON & FULKERSON, P.C.

10444 Greenbriar Place

Oklahoma City, Oklahoma 73159

Telephone: (405) 691-4949

Facsimile: (405) 691-4595

ATTORNEYS FOR DEFENDANTS

AND THIRD PARTY PLAINTIFFS

Barry Pollard and Roxanne Pollard

