

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT  
OKLAHOMA COUNTY, OKLA.

MAY - 9 2007

PATRICIA PRESLEY, COURT CLERK  
by Deputy

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

Plaintiff, )

Case No. CJ-2005-3799  
Hon. Vicki Robertson

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. )

**NOTICE OF HEARING**

PLEASE TAKE NOTICE THAT the hearing on AXA Equitable Life Insurance Company's Motion to Dismiss Breach of Contract Claim and for Reconsideration of Motion to Compel Arbitration will be conducted on June 14, 2007, at 1:30 p.m. before the Honorable Vicki Robertson, Oklahoma County Courthouse, Oklahoma City, Oklahoma 73102.

Respectfully submitted,



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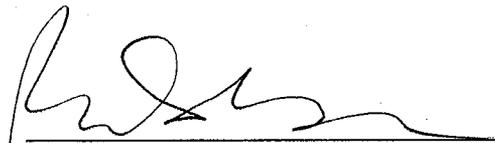
ATTORNEYS FOR AXA ADVISORS, LLC and  
AXA EQUITABLE LIFE INSURANCE  
COMPANY

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 9th day of June, 2007, a true and correct copy of the foregoing document was mailed by first class mail, postage prepaid, to:

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\_\_\_\_\_  
Regan S. Beatty

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**MOTION TO DISMISS BREACH OF CONTRACT CLAIM AND REQUEST FOR  
RECONSIDERATION OF RE-NEWED MOTION TO COMPEL ARBITRATION  
OF CLAIMS AGAINST AXA EQUITABLE**

Pursuant to 12 O.S. § 2012(b)(6), third party defendant AXA Equitable Life Insurance Company (“Equitable”) moves for entry of an order dismissing third party plaintiffs’, Barry and Roxanne Pollard (the “Pollards”) claim for breach of contract, and for reconsideration of the Court’s Order denying Equitable’s Renewed Motion to Compel Arbitration. In support, Equitable states as follows:

## INTRODUCTION

On April 9, 2007, the Pollards filed their Amended Third Party Petition alleging, among other things, a claim for breach of contract against Equitable after the Court granted the Pollards leave to do so in connection with this Court's order denying Equitable's Renewed Motion to Compel Arbitration. As in their prior Petition, the Pollards have not asserted any sustainable claims with regard to a purported breach of Equitable's obligations under those variable life insurance policies purchased by the Pollards between 1993 and 1998 (the "Policies"). As a result, the breach of contract claim should be dismissed. Further, in their Amended Third Party Petition, the Pollards continue to assert claims arising out of the alleged ponzi scheme perpetrated by Marsha Schubert ("Schubert") long after the last policy was purchased and after they established their accounts with AXA Advisors, LLC ("Advisors"), Equitable's sister corporation, while Schubert was an agent of Advisors and Equitable.

This Court has already compelled to arbitration the Pollards' claims arising out of the Schubert scheme against Advisors—which claims are essentially identical to the Pollards' claims against Equitable. The Pollards have alleged no new claims relating directly to coverage, claims to benefits, or other insurance matters. The Pollards' claims are essentially the same as those claims already asserted against Advisors, and the Pollards' claims against Equitable—Advisors' sister corporation—should also be dismissed or compelled to arbitration. The Pollards' claims, as they relate to the Policies, are that they were fraudulently induced by Schubert to "to continue paying premiums" and to "maintain" the Policies by Schubert's representations that she could make money for them by investing in options and day trading as well as claims that Equitable failed to adequately supervise Schubert's conduct. The claims asserted do not give rise to a sustainable breach of contract claim, and moreover, the claims asserted do not arise out of or directly relate to Equitable's conduct with respect to the Policies. Therefore, this Court should

reconsider its prior denial of the Renewed Motion to Compel Arbitration of the Pollards' claims against Equitable.

**A. The Pollards' Breach of Contract Claim is Not a Claim upon Which Relief Can be Granted.**

The Pollards' breach of contract claim should be dismissed under the rule that where it appears that no claim for relief can be stated, such claim should be dismissed without opportunity to amend. *See Workman v. Anderson Music Co.*, 2006 OK CIV APP 123, 149 P.3d 1060, 1064 at n.3. Oklahoma's minimal pleading procedure requires a "short and plain statement of the claim." 12 O.S. §2008(A)(1). This "short and plain statement" must be one "that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."<sup>1</sup> *Conley v. Gibson*, 355 U.S. 41, 46 (1957).

In testing the sufficiency of a claim, "only the well-pleaded facts and reasonable inferences emanating from them are to be considered true and the pleader's conclusions are to be ignored." *Tanner v. Western Publishing Co.*, 1984 OK CIV APP 22, 682 P.2d 239, 241 (Emphasis added). To that end, allegations that merely track statutory language are insufficient to state a claim. *See Mansmann v. Tuman*, 970 F.Supp. 389, 396 (E.D. Penn. 1997)(holding that a claim that merely tracked statutory language was insufficient to provide defendants with notice); *see also, Kerckhoff v. Kerckhoff*, 369 F.Supp. 1165 (E.D. Mo. 1974)(dismissing a petition stating a civil rights complaint merely in terms of the statutory elements). The court need not take plaintiff's conclusory allegations as true. *McBride v. Deer*, 240 F.3d 1287, 1289 (10th Cir. 2001)(citing *Dunn v. White*, 880 F.2d 1188, 1190 (10th Cir. 1989)(*cert. denied* 493 U.S. 1059 (1990))).

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<sup>1</sup> The Oklahoma Rules of Civil Procedure closely track the Federal Rules of Civil Procedure. "Where the text of the Federal Rules has been adopted in the Oklahoma Pleading Code, the construction placed on it by federal and state courts should be presumed to have been adopted as well." *Gay v. Akin*, 1988 OK 150, 766 P.2d 985, 990 at n.18 (citations omitted).

Under Oklahoma law, a breach of contract is “a material failure of performance of a duty arising under or imposed by agreement.” *Milroy v. Allstate Ins. Co.*, 2007 OK CIV APP 6, P.3d \_\_\_, 2006 WL 3896755 (citing *Lewis v. Farmers Ins. Co., Inc.*, 1983 OK 100, ¶ 5, 681 P.2d 67, 69). Here, the Pollards merely allege conclusory statements of law related to a breach of contract and therefore, have failed to state a claim for which relief can be granted. The Pollards’ breach of contract claim in its entirety states,

Pollard’s [sic] and Equitable entered into four variable life insurance policy contracts.

Equitable breached the terms of these contracts.

Pollards have been damaged and are therefore entitled to damages for Equitable’s breach of the contracts.

Petition at ¶¶ 65-67.

The Pollards have not identified any duty arising under or imposed by the variable life insurance policies that was breached by Equitable, and accordingly, the Pollards cannot and have not identified any “breach” of such a nonexistent duty. The facts alleged by the Pollards in “support” of their breach of contract claim all relate to the conduct of Schubert in connection with a related securities fraud action. The Pollards have not cited to any failure of Equitable to perform its duties under the Policies. Instead, the Pollards seek to enforce a breach of contract claim arising out the Pollards’ payment of premiums related to the Policies. Equitable fully performed its obligations under the Policies, and the Pollards have alleged no facts that would provide Equitable notice of any breach of Equitable’s obligations under the Policies. Moreover, even taking the Pollards’ breach of contract claim as true, the Pollards have stated no claim because they have only stated the mere conclusion that Equitable breached the Policies. Therefore, this Court should dismiss the Pollards’ breach of contract claim against Equitable.

**B. The Pollards' Claims Against Equitable Should be Compelled to Arbitration.**

Even after opportunity to amend their Petition, the Pollards have failed to state any claim that arises out of or is directly related to the Policies.<sup>2</sup> Rather, the Pollards have continued to reiterate the same claims against Equitable that they have asserted against Advisors (that Equitable is liable for the allegedly criminal activity Schubert under theories of Actual Fraud, Agency, Negligent Supervision, Respondeat Superior and Constructive Fraud), which claims relate to the Pollards' payments in connection to the Policies. This Court has already determined that all claims against Advisors are required to be determined through arbitration. This Court has also held that Roxanne Pollard, a non-signatory to the arbitration agreement, is bound to arbitrate similar claims alleged against Advisors. Similarly, where the Pollards have made no sustainable claim that is directly related to the Policies, Equitable should be allowed to enforce the arbitration clause, which covers, "Any controversy arising out of or relating to [the Pollards'] business."<sup>3</sup>

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<sup>2</sup> The Policies are variable insurance products, which 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). Therefore, the Policies are not exempt under 12 O.S. § 1855(D).

<sup>3</sup> The arbitration agreement provides,

**I understand that:**

- (i) Arbitration is final and binding on the parties.
- (ii) The parties are waiving their right to seek remedies in court, including the right to a jury trial.
- (iii) Pre-arbitration discovery is generally more limited than and different from court proceedings.
- (iv) The arbitrators' award is not required to include factual findings or legal reasoning and any party's right to appeal or seek modification of rulings by the arbitrators is strictly limited.
- (v) The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry.

As fully briefed in Equitable's Renewed Motion to Compel Arbitration, a non-signatory company may enforce an arbitration agreement executed with its sister company. See *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993); see also, *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.

A recent Oklahoma Supreme Court decision addressed the issue of arbitrability of a claim against a non-signatory related entity in *Oklahoma Oncology & Hematology, P.C. v. US Oncology, Inc.*, 2007 OK 12, P.3d\_\_ (hereinafter "*Oklahoma Oncology*"), which this Court may have considered in denying Equitable's Renewed Motion to Compel Arbitration. *Oklahoma Oncology* is distinguishable on several grounds. In that case, the Oklahoma Supreme Court reversed the District Court's order granting of a motion to compel arbitration because, among other things, (1) the District Court failed to conduct a requested evidentiary hearing on the excessive expense of an arbitration; (2) the fact that the parties had failed to reach an agreement to amend their contract did not constitute an agreement arising out of the contract or transaction;

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**Any controversy arising out of or relating to your business or this agreement shall be subject to arbitration.** This agreement and its enforcement shall be governed by the laws of the State of New York. Arbitration shall be conducted before the New York Stock Exchange, Inc., or any other national securities exchange on which a transaction giving rise to the claim took place (and only such exchange) or before the National Association of Securities Dealers, Inc., as I may elect and in accordance with the rules of the selected organization. Arbitration must be commenced by service upon the other party of a written demand for arbitration or a written notice of intention to arbitrate....

and (3) a second provision in the contract at issue clearly provided an alternate judicial forum for resolution of claims. In addition, the Supreme Court noted that the claims against the non-signatory were not covered by the language of the arbitration clause, which covered claims “arising out of or related to” the contract. Here, the arbitration clause applies to not only claims arising out of or related to the agreement but also to claims arising out of or related to the Pollards’ business—such as the Pollards’ reiterated claims against Equitable seeking to impose liability for Schubert’s conduct. Moreover, no such “alternate” forum is provided for in the agreement. The facts of this case are clearly distinguishable from the facts *Oklahoma Oncology*, and therefore, *Oklahoma Oncology* should not be construed against Equitable with regard to the Pollards’ amended claims.

In this case, the Pollards executed a binding arbitration agreement with Equitable’s sister corporation, Advisors. Even after an opportunity to amend their Petition, the Pollards have failed to state any separate or independent claim against Equitable that is directly related to or arises out of the Policies that Equitable issued long before the dispute arose. The Pollards’ claims against Equitable clearly relate to their business with Advisors where the claims asserted against both AXA entities are nearly identical and seek to impose some liability on both Equitable and Advisors for the conduct of Schubert in connection with a ponzi scheme she ran long after the Policies were purchased. Other than imposition of liability for Schubert’s ponzi scheme, the Pollards have cited no claim against Equitable for damages related to conduct of Equitable. For these reasons, this Court should compel the Pollards’ claims against Equitable to arbitration along with the Pollards’ claims against Advisors.

#### **CONCLUSION**

Conclusory statements of law do not give rise to a sustainable breach of contract claim. Moreover, where the Pollards have not cited to any duty or material breach thereof under the

Policies, this Court cannot uphold the Pollards' breach of contract claim. In addition, the Pollards have not stated any claim against Equitable for conduct of Equitable related to the Policies. Equitable is a sister corporation to Advisors and is entitled to enforce the arbitration agreement where the claims against Equitable are so similar and so closely related to those claims asserted against Advisors. Therefore, Equitable requests entry of an order dismissing the Pollards' breach of contract claim for failure to state a claim upon which relief can be granted under 12 O.S. § 2012(b)(6), reconsideration of this Court's Order denying Equitable's Renewed Motion to Compel Arbitration, and all other such relief this Court deems just and equitable.

Respectfully submitted,



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COMPANY

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The undersigned hereby certifies that on the 9th day of May, 2007, a true and correct copy of the foregoing document was mailed, postage pre-paid to:

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