

BACKGROUND

The Oklahoma Department of Securities, hereinafter "Department," has made claims against Barry Pollard and Roxanne Pollard for an alleged windfall of monies they received that the Department claims they did not give reasonably equivalent value for and that the Department claims do not belong to them. The Department's claim against Roxanne Pollard is limited by the amount of money she received during the period of time of the alleged Ponzi Scheme which totals to no more than \$28,000.00. Nothing makes Barry and Roxanne Pollard, hereafter collectively "Pollards," jointly liable for the debts of the other. The remaining monies claimed by the Department are from Barry Pollard.

Beginning over fourteen years ago, the Pollards were one of Schubert's first AXA/Equitable customers. Defendant Barry Pollard purchased the following life insurance policies from AXA Equitable Life Insurance Company through Marsha Schubert as an agent and representative of Equitable:

Ex. #	YEAR	POLICY TYPE	POLICY NUMBER	DEATH BENEFIT	INITIAL PREMIUM	POLICY OWNER
1	1993	Flexible Premium Variable Life Policy	43 238 937	\$1,750,000.00	\$30,000.00	Frontier Trust Company
2	1993	Modified Premium Variable Whole Life Policy	43 257 265	\$2,000,000.00	\$6,208.00	Roxanne Pollard
3	1994	Flexible Premium Variable Life Policy	44 230 443	\$500,000.00	\$5,000.00	P and K Implement, Inc.
4	1999	Flexible Premium Variable Life Policy	48 253 032	\$570,000.00	\$1,100.00	Barry Pollard

Today, there is only one of the four policies remaining. The other three policies lapsed or were terminated as the Pollards could not substantiate which policies existed upon learning of the alleged Ponzi Scheme. It appeared that the existing policies were of little to no value as a result

of Schubert's conduct as an agent, representative and employee of AXA Equitable Life Insurance Company. (Ex. 5, Pollard Affidavit.)¹

In addition to Barry Pollard's investments into the above four insurance policies, he also invested significant funds with AXA Advisors, LLC through its agent, representative and employee Schubert. These investments were made into brokerage accounts for purposes of investment transactions into stocks and bonds. (Ex. 5, Pollard Affidavit.)

Based on the information available, it is believed that over the entire eleven year period during which Barry Pollard maintained his investments and insurance policies with AXA Equitable Life Insurance Company and AXA Advisors, he invested an estimated \$616,626.00. (Ex. 6, Morley Affidavit.)

For purposes of this Response, the Pollards will refer to AXA Advisors and AXA Equitable Life Insurance Company as "AXA/Equitable" as the Department has not distinguished between either entity. During the entire eleven year period in which the Pollards invested with AXA/Equitable, all investments were made by and through AXA/Equitable's agent, representative and employee Marsha Schubert. 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. (Ex. 5, Pollard Affidavit; Ex. 6, Morley Affidavit.)

The nature of the insurance policies identified above permitted the Pollards to participate in receiving returns on their investments through their policies and to borrow their accumulated returns. On numerous occasions, AXA/Equitable's agent Schubert represented to the Pollards

¹ The Department has deposed Barry Pollard on two separate occasions and has yet to complete his deposition. Counsel for Pollard has not had the opportunity to cross examine Pollard. The information set forth in Barry Pollard's affidavit cited in support hereof reflects Barry Pollard's testimony upon cross examination.

that the values of their policies had sufficient funds to pay for the premiums. (Ex. 5, Pollard Affidavit, Ex. 15, Equitable Policy Statement.) It was further represented to the Pollards that the policies were doing so well that the Pollards should take loans against the policies. (Ex. 5, Pollard Affidavit.) In reliance thereon, the Pollards received loan monies against the cash value of their policies. (Ex. 5, Pollard Affidavit; Ex. 6, Morley Affidavit.)

The Department's Petition does not claim that the Pollards violated the Securities Act. As a matter of fact, the Department has represented on several occasions that it is not accusing the Pollards of any wrongdoing. The Department claims it has the right to pursue the Pollards for their unjust enrichment of monies that allegedly belong to other, unidentified, victims or short investors. There is nothing that ties the monies received by the Pollards as monies belonging to other persons, thusly causing damages to the victim, hereinafter "short investors."

Finally, Barry Pollard filed a petition in the District Court of Logan County, Case No. CJ-2005-71, for damages he suffered based upon the actions of Schubert in her capacity as his investment advisor. On June 10, 2005, the District Court of Logan County granted a judgment to Pollard on his petition. The court then set a hearing to determine damages for July 14, 2005. Schubert's receiver was provided notice of this hearing. (Ex. 14, Affidavit of Mailing.) On July 14, 2005, the District Court of Logan County entered a judgment in favor of Pollard against Schubert in the amount of \$827,000.00. (Ex. 8, Judgment.) The Receiver was provided a copy of this judgment. This judgment was not appealed and is a final order. (Ex. 14, Affidavit of Mailing.)

In addition to judgment owed to Pollard by Schubert, on October 25, 2006, the Pollards were assigned the claim of L & S Pollard Farms, L.L.C. in the amount of \$248,464.05. (Ex. 12,

Assignment; Ex. 13, Proof of Claim.) The Pollards are entitled to setoff both the judgment and the assignment against the amount the Department is requesting be disgorged from the Pollards.

RESPONSE TO THE DEPARTMENT'S STATEMENT OF MATERIAL FACTS

1. Pollards dispute fact number 1. Although the Department has cited to materials relating to Schubert's operation of an alleged Ponzi Scheme, the Pollards are without specific knowledge and information to admit this fact.

2. Pollards dispute fact number 2. Despite allegations of Schubert's operation of a Ponzi Scheme, the Department has failed to show this Court when the Scheme began and specifically that the Pollards were net winners of the Scheme, or are classified as "Relief Defendants." The Department claims that the short investors lost \$9,000,000.00, but it only seeks to recover \$6,000,000.00. (Dpt MSJ ¶2.) Who received the other \$3,000,000.00? The Department has failed to fully and accurately account for the origination of the monies received by the Pollards and the tracing of the same back to the specific short investor. The Department has yet to establish that the monies received by the Pollards were not their own monies. AXA/Equitable's agent Schubert represented to Pollards that all monies they received were loan monies against the cash value of their insurance policies. (Ex. 5, Pollard Affidavit.) Further, not only did the policies reflect that loans were taken against the policies, but the Pollards' financial records reflect the receipt of these monies by Pollard from AXA/Equitable through their agent Schubert to be loans against the policies. (Ex. 6, Morley Affidavit.)

3. The Pollards are without sufficient information to admit fact number 3 and therefore dispute the same. Based on the information available to the Pollards, AXA/Equitable's agent Schubert managed several F&M Bank accounts. The Pollards believe that it is necessary to conduct discovery to more specifically identify which F&M bank accounts are at issue in this

case.

4. The Pollards are without sufficient information to admit fact number 4 and therefore dispute the same and further dispute the affidavit of Dan Clarke. Based on the information available to the Pollards, AXA/Equitable's agent Schubert managed several F&M Bank accounts. The Pollards believe that it is necessary to conduct discovery to more specifically identify which F&M bank accounts are at issue in this case. Furthermore, the monies that are identified to have been used in the Ponzi Scheme include bank loans, personal funds such as commissions and royalty checks, and the activities of other entities. (Dpt MSJ ¶4.) In other words, the "Commingled Funds" originated not only from those funds belonging to the short investors, but from other sources, potentially including the Pollards' monies.

5. The Pollards dispute fact number 5 and further dispute the affidavit of Carol Gruis. The Department has failed to completely and accurately identify the origin, transactions and destination of the monies it seeks to disgorge from the Pollards. For instance, a check dated November 29, 2001, for \$30,000.00 from Pollard Farms, LLC has not been accounted for by the Department. (Dpt MSJ Ex. F.) The Department's accounting² also reflects a transaction for the sale of stock in the amount of \$83,621.81 on August 5, 2001, which is not accounted for by the Pollards' accountant David Morley. (Ex. 9, Dpt Accounting; Ex. 6, Morley Affidavit.) The Pollards' 2001 tax return reflects a loss from the purchase and sale of stocks in the ordinary course of business through AXA/Equitable. (Ex. 6, Morley Affidavit.)

6. The Pollards dispute fact number 6. Pollards only engaged in their stock and insurance investment activities through Schubert in her capacity as an agent of AXA/Equitable. (Ex. 5, Pollard Affidavit.) Based on the information available, the Pollards invested an estimated

² The Department relies upon an accounting prepared for it by BKD, LLP, referred to as "Department's accounting."

\$616,262.00 from 1994 through 2004. (Ex. 6, Morley Affidavit.) The Pollards financial records reflect that \$88,941.00 in checks were personally made to Schubert and/or Schubert and Associates, as an agent of AXA/Equitable. (Ex. 6, Morley Affidavit.) Yet, the Department has only given the Pollards credit for \$59,110.35. (Ex. 9, Dpt Accounting.)

7. The Pollards dispute fact number 7. The Department claims that the funds received were from Commingled Funds, but the Department has not provided any evidence as to what monies the Commingled Funds actually consisted of. The monies received by the Pollards were loan monies from their insurance policies. (Ex. 5, Pollard Affidavit.) The Pollards' financial records reflect that they received only \$192,961.81 directly from Schubert as an agent of AXA/Equitable during 2000-2004, significantly less than what the Department claims. (Ex. 6, Morley Affidavit.) It is also reasonable to believe that the Pollards' loan monies were intermingled with the Commingled Funds. The Department has not shown the origination of the monies received by the Pollards. The Pollards received money from F&M Bank accounts; therefore, it is reasonable to believe that their own loan monies were mixed with the Commingled Funds.

8. The Pollards dispute fact number 8. The Department has failed to fully and accurately identify the Pollards actual receipt of \$386,158.06 consisting of monies that allegedly do not belong to them. The Department seeks to disgorge the Pollards of monies that it has not proven the Pollards actually received. (Ex. 6, Morley Affidavit.) For instance, there are numerous checks written to other entities such a National Life of Vermont. There are checks with no endorsement on the back showing who received the money. There are checks without any payee identified and that are unsigned by the issuer. (Ex. 9, Dpt Accounting.)

9. The Pollards dispute fact number 9 as additional discovery is necessary to fully account for the receipt and disbursement of monies. Barry Pollard has not admitted that the

Department's accounting is correct. His deposition testimony was that he had not personally confirmed each transaction set forth in the Department's accounting, but he assumed that whoever prepared the accounting was thorough. (Ex. 7, Pollard Depo Testimony 25:3-12.) The Department has not shown where it traced the monies invested by the short investors' and received by the Pollards. Additionally, the Department not only fails to consider the entire amount of the Pollards' investments, it fails to account for the Pollards' receipt of loans monies against their own policies in addition to pursuing money that has not been confirmed as received by the Pollards. (Ex. 6, Morley Affidavit.)

10. The Pollards admit they purchased life insurance policies, but the Pollards dispute the remaining allegations in fact number 10. The premiums on the two policies the Department identifies as being paid for with Commingled Funds were neither owned by the Pollards nor were they the beneficiaries. (Ex. 1, Policy #43 238 937; Ex. 3, Policy #44 230 443.)

11. The Pollards dispute fact number 11. AXA/Equitable's agent Schubert represented to the Pollards that the investment returns on their insurance policies were paying for the premiums. (Ex. 7, Transcript Depo Pollard 21: 9-23; Ex. 6, Morley Affidavit; Ex. 5, Pollard Affidavit.)

12. The Pollards are without sufficient information to admit fact number 12 with regard to which insurance policies the Department is referencing and therefore dispute fact number 12. Upon learning of the alleged Ponzi Scheme, the Pollards could not substantiate which policies existed and further learned that the values were significantly lower than represented. (Ex. 5, Pollard Affidavit.) Understandably, they did not want to continue making the premium payments on the policies at that time. (Ex. 5, Pollard Affidavit.)

13. The Pollards dispute fact number 13 as well as the affidavit of Dan Clarke. Schubert as an agent of AXA/Equitable represented that the premiums were paid by the investment returns

from the insurance policies. (Ex. 5, Pollard Affidavit; Ex. 7, Pollard Depo Transcript 21:9-23)

14. The Pollards dispute fact number 14. The Department's accounting shows that the Pollards only invested \$59,110.35 from 2000-2004; however, the Pollards' accounting reflects they invested over \$616,626.00 of which \$88,941.00 was directly paid to Schubert as an agent of AXA/Equitable. (Ex. 6, Morley Affidavit.) Additionally, Pollards sold a bull to Robert Schubert, Marsha Schubert's husband. (Ex. 5, Pollard Affidavit.) The Department includes the monies received for this transaction as a part of the Ponzi Scheme. (Ex. 9, Dpt Accounting.)

ARGUMENTS AND AUTHORITIES

ARGUMENT I – SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only when there is no substantial controversy as to any material fact, and one party is entitled to judgment as a matter of law. The Court must also find that reasonable people could not reach different conclusions on the undisputed facts. All inferences to be drawn from the undisputed facts must be viewed in the light most favorable to the party opposing the motion. *Hutchins v. Silicone Specialties, Inc.*, 1993 OK 70, 881 P.2d 64, 66-67; *Erwin v. Frazier*, 1989 OK 95, 787 p.2d 61.

The monies received by the Pollards are monies that belonged to them from their investment with AXA/Equitable through Schubert for over eleven years. The Department claims these monies were a windfall to the detriment of the "short investors." This case is about restitution for unjust enrichment. But there can be no unjust enrichment when the monies were received by their rightful owner.

This Court cannot grant the Department's Motion for Summary Judgment as there clearly exists a genuine issue of fact over the money invested by the Pollards, the money received by the Pollards, whose money they allegedly received, if in fact not their own, and who received the

Pollards' money. The Department is asking this Court to order the Pollards to disgorge \$386,158.06, yet the Pollards have invested at least \$616,262.00 and the Logan County Court found that Barry Pollard was damaged as a result of his investment relationship with Schubert as an agent of AXA/Equitable and awarded him a judgment for \$827,000.00. (Ex. 6, Morley Affidavit; Ex. 5, Pollard Affidavit; Ex. 8, Judgment.)

ARGUMENT II – THE DEPARTMENT’S INADEQUATE ACCOUNTING

At different points in time, the Department has produced four separate accountings to the Pollards. The accounting attached by the Department as Exhibit G claims that \$386,158.00 is owed. Yet, there are three other accountings, each having different amounts claimed. (Ex. 9, Dpt Accounting (a); Ex. 10, Dpt Accountings (b), (c) & (d).)

If the Court takes the Department’s accounting on its face, the accounting only shows the amount the Department contends was received by the Pollards from the Ponzi Scheme. There exist significant discrepancies in the accountings produced by the Department in comparison to the Pollards’ accounting. (Ex. 6, Morley Affidavit.) There are investment transactions, payments to Schubert as an agent of AXA/Equitable, and there are loan monies received by the Pollards as reflected through their AXA/Equitable statements, that are not accounted for by the Department. (Ex. 6, Morley Affidavit.) Furthermore, during the eleven years in which the Pollards invested in AXA/Equitable through their agent Schubert, it was common for Pollards to personally issue Schubert checks for investment purposes on the Pollards’ behalf. (Ex. 5, Pollard Affidavit; Ex. 6, Morley Affidavit.) The Department has given no credit for these monies.

The Department has attached to its accounting and produced as exhibit G numerous checks that it represents as being not only associated with, but received by, the Pollards. However, upon a careful review of the majority of those checks produced, the backs of the instruments are not

endorsed showing who received the instrument, they are written to other entities other than to the Pollards, they are unsigned, there is no payee identified, or they have been used to purchase cashiers checks. (Ex. 9, Dpt Accounting.) There is a total of \$249,517.81 in checks that the Department claims are somehow associated with the Pollards, but the evidence does not establish their receipt of the monies. (Ex. 9, Dpt Accounting.) Finally, the Department has not considered the Pollards' monies from the insurance policies that flowed through the F&M Bank accounts. It is very likely that Schubert mixed the Pollards' monies into the Commingled Funds at F&M Bank.

This is the evidence that the Department asks this Court to rely upon in disgorging the Pollards of \$386,158.00. (Dpt MSJ.)

**ARGUEMNT III –
THE SECURITIES ACT ONLY PROVIDES FOR DISGORGEMENT
AGAINST ONE WHO VIOLATES THE ACT**

The Department has brought this lawsuit pursuant to the Oklahoma Securities Act Title 71 §1-603. However, this statute provides that the Department is only allowed to recover against those who are “wrongdoers” or “violators” of the Securities Act. 71 O.S. §1-603(A) provides as follows:

If the Administrator believes that **a person has engaged**, is engaging, or is about to engage **in an act, practice, or course of business constituting a violation of this act or a rule adopted or order issued under this act or constituting a dishonest or unethical practice** or that a person has, is, or is about to engage in an act, practice, or course of business that materially aids a violation of this act or a rule adopted or order issued under this act or a dishonest or unethical practice, **the Administrator may, prior to, concurrently with, or subsequent to an administrative proceeding,** maintain an action in the district court of Oklahoma County or the district court of any other county where service can be obtained to enjoin the act, practice, or course of business and **to enforce compliance with this act or a rule adopted or order issued under this act.** (Emphasis added.)

First of all, the Pollards have not been accused of engaging in any act in violation of the Securities Act. As a matter of fact, the Department has stated on several occasions that it is not accusing the Pollards of any wrongdoing or violation of the Act. There is no wrongdoing that permits the Department to enforce the Pollards to comply with the Act.

The Statute further provides that the Department must institute an administrative proceeding **against the person believed to be or who is in violation** of the Securities Act. The Department has not instituted an administrative proceeding against the Pollards. The Statute permits the Department, at its discretion, to institute an action in the District Court against the violator to enforce compliance with the Act. However, the Act does not permit the Department to institute this action in the District Court without having initiated an administrative proceeding against the Pollards.

As previously stated, the Department has openly claimed that the Pollards are not in violation of the Securities Act. Title 71 O.S. §1-603(B) further provides:

In an action under this section and on a proper showing, the court may:

1. Issue a permanent or temporary injunction, restraining order, or declaratory judgment;
2. Order other appropriate or ancillary relief, which may include:
 - a. an asset freeze, accounting, writ of attachment, writ of general or specific execution, and appointment of a receiver or conservator, that may be the Administrator, for the defendant or the defendant's assets;
 - b. ordering the Administrator to take charge and control of a defendant's property, including investment accounts and accounts in a depository institution, rents and profits; to collect debts; and to acquire and dispose of property,
 - c. imposing a civil penalty up to a maximum of Five Thousand Dollars (\$5,000.00) for a single violation or up to Two Hundred Fifty Thousand Dollars (\$250,000.00) for more than one violation; an order of rescission, restitution, **or disgorgement directed to a person that has engaged in an**

- act, practice, or course of business constituting a violation of this act or the predecessor act** or a rule adopted or order issued under this act or the predecessor act, and
- d. ordering the payment of prejudgment and postjudgment interest; or
3. Order such other relief as the court considers appropriate. (Emphasis added.)

In the instant case, the Act only permits the Department to seek disgorgement of the violator of the Securities Act. The Act does not permit the Department to seek remedies for unjust enrichment or to pursue persons who have not violated the Act. It is evident that the Department does not have any authority to recover from the Pollards.

This is truly a case of disgorgement by the Department. Interestingly, “disgorge” means – 1 a: to discharge by the throat and mouth; vomit, b: to discharge violently, confusedly, or as a result of force, c: to give up on request or under pressure, 2: to discharge the contents of. *Merriam Webster’s Collegiate Dictionary Tenth Edition (1993)*. Logically, one would have to consume something for it to be removed from him. One cannot “vomit” what he did not take in. Likewise, the Pollards cannot pay back unlawfully obtained monies they never received.

Foremost, the money received by the Pollards is money that they received via loans from their insurance policies. (Ex. 6, Morley Affidavit; Ex. 5, Pollard Affidavit.) Not only did the policies reflect that loans were taken against them, but the Pollards’ financial records reflect the receipt of these monies to be loans against the policies. (Ex. 6, Morley Affidavit.) Secondly, the Department seeks to disgorge from the Pollards monies they never received. As stated in the preceding Argument II, there is approximately \$249,517.81 that the Department has not established where the monies were received by the Pollards. (Ex. 9, Dpt Accounting.) Additionally, the Department claims that the premiums on two insurance policies were made to

which the Pollards benefited. (Dpt MSJ ¶10.) However, the owners and beneficiaries of these policies are Frontier Trust Company and P and K Implement, Inc. (Ex. 1, Policy #43 238 937; Ex. 3, Policy #44 230 443.) The Department cannot disgorge something from the Pollards that they never received or benefited from. Additionally, it would be an injustice for the Department to disgorge something from the Pollards that they were rightfully entitled to and which belong to them – their own monies. The Securities Act does not permit the Department to seek return of funds for disgorgement against one who is not in violation of the Securities Act.

ARGUMENT IV – UNJUST ENRICHMENT DOES NOT LIE

Unjust enrichment is unavailable as a remedy to the Department under the Oklahoma Securities Act. As set forth above, the Department is only limited to bring this lawsuit against the violator of the Act. Title 71 O.S. §1-603. The Securities' Act equips the Department with the right to only disgorge the violator of the Act. Title 71 O.S. §1-603(B)(2)(c). However, the Department characterizes its lawsuit against the Pollards as one of unjust enrichment – as they claim no violation of the Act by the Pollards. (Dpt MSJ.)

The doctrine of unjust enrichment is an equitable remedy. The basis for recovery under unjust enrichment is that it is contrary to equity and good conscience to retain a benefit where the benefit has come to one person at the expense of another. *N.C. Corff Partnership, Ltd. V. OXY USA, Inc.*, 1996 OK Civ App 92, 929 P.2d 288. The court in *N.C. Corff Partnership, Ltd.* cites to *Teel v. Public Serv. Co. of Okla.*, 767 P.2d 391, 398 (Okla. 1985) quoting “there must be enrichment to another coupled with a resulting injustice.” The Department has shown no injustice to the short investor although it says injustice has occurred.

There must be a basis for unjust enrichment before restitution can be ordered. “Even where a person has received a benefit from another, however, he is liable to pay therefore only if

the circumstances of its receipt or retention are such that, **as between the parties**, it is unjust for him to retain it. *66 Am Jur 2d Restitution and Implied Contracts §4*. No unjust enrichment lies as between the Pollards and the alleged short investor. Once again, for the Department, who was not injured, to be awarded restitution of the Pollards' monies so that they may be distributed to an alleged short investor, only makes the Pollards victims as will be disgorged of their own monies.

In this particular instance, it is contrary to equity and good conscience for the Pollards to have their monies taken from them that rightfully belonged to them. In this instance, the monies received by the Pollards are not monies that were in excess of their investments or that were returns on their investments. The facts of this case differ in this respect from the facts in the cases cited by the Department in its Motion for Summary Judgment. The monies at issue in this case are the monies that the Pollards' borrowed against their insurance policies. It is the Pollards' own borrowed money that the Department is asking this Court to disgorge from the Pollards so that it may be given to an alleged short investor. In essence, the Pollards then become the short investor, because they not only purchased the insurance policy, made premium payments for the policy, they now have no existing insurance policy, and they were not the beneficiaries of two of the relevant insurance policies. This absolutely makes no reasonable sense within the theory of unjust enrichment.

As a matter of fact, Irving Fought, Administrator of the Oklahoma Securities Commission, testified that it would be fair for the Department to offset dollar for dollar all consideration given from the amount sought to be disgorged. (Ex. 11, Fought Depo. P. 95:15-25; 96:1-13.)

The Department may claim that it is the Pollards' responsibility to seek relief for their damages against AXA/Equitable. Although the Pollards' claims against AXA/Equitable include

that for damages associated with any disgorgement ordered from them, arguably, AXA/Equitable would not want to give the Pollards monies they previously received as loans under their insurance policies. The injustice lies herein with disgorging the Pollards' of their money. This case is distinguishable from the other cases in which the Department has obtained judgments for disgorgement in that in those cases, the monies received by the "relief defendants" were arguably monies not legitimately earned from their investments or funds from their insurance policies. Even if the monies that were received by the Pollards could be considered returns on their investments, it appears that at a reasonable rate of return of say 8% on the total invested the Pollards would have received over \$1,000,000.00. (Ex. 6, Morley Affidavit.)

Finally, before the Department can receive any monies from the Pollards under their claim for unjust enrichment, they must establish that the Department has a right to the monies sought. It is not sufficient to show that the Pollards merely are not entitled to the monies. *Consolidated Cut Stone Co. v. Seidenback*, 1941 OK 173, 114 P.2d 480. In bringing this lawsuit, the Department has not established its damages or entitlement to the monies sought. The Department has not established that the monies received by the Pollards were not the Pollards' own monies from the insurance policies they owned. As previously stated, the Department's accounting is incomplete. The court in *Consolidated Cut Stone Co.* quoted *Vanderbilt University et al. v. Williams et al.*, 152 Tenn. 664, 280 S. W. 689, stating "[e]quity may not be invoked to supply a remedy until a right, legal or equitable, exists." The same principle is equally applicable to the case before this Court. The Department has no remedy against the Pollards as no right exists legally or equitably to disgorge the Pollards of their monies. It is only reasonable that before this Court awards a disgorgement of \$386,158.06 under the equitable theory of unjust enrichment, the Department must first prove that the Pollards were unjustly enriched by the

monies they received.

ARGUMENT V – SET OFF

As mentioned previously, the Department has not given credit to the Pollards for set off. The theory of setoff of mutual obligations of parties has been allowed by Oklahoma Courts since statehood. The Supreme Court of Oklahoma in *Caldwell v. Stevens*, 1917 OK 250, 167 P. 610 stated as follows:

“[t]he power to allow a set-off of debts by a court of equity exists independent of the statute, where grounds of equitable interposition are shown, such as fraud, embarrassment in enforcing the demand at law, or special circumstances, such as insolvency or nonresidence, which render it probable that the party will lose his demand and be compelled to pay the demand of the other”.
(Emphasis added)

The special circumstances clearly exist in the instant case by Schubert’s insolvency and by the Department who has taken the legal position that the Pollards should not be classified as short investors allowed to recoup the monies owed to them, but should be compelled to pay monies allegedly owed by them. In this case, the Pollards and the Department have demands against each other. If the Pollards are not allowed to setoff the debts owed to them, they will lose their demand and be compelled to pay the demand of the Department. The very circumstances addressed by the *Caldwell* Court.

In *Southern Sur. Co. v. Maney*, 1941 OK 388, 121 P.2d 295, the Supreme Court of Oklahoma followed its ruling in *Caldwell* and allowed the defendant to setoff a contingent obligation. Southern Surety of New York obtained a judgment against the defendant for unpaid insurance premiums. After the judgment was obtained, Southern Surety went into receivership, the receiver attempted to enforce the judgment and the defendant asserted an equitable setoff arising from his contingent liability under Workmen’s Compensation Act. Due to the insolvency of

Southern Surety, the defendant had been required to pay out funds to his employees who were injured during the time the insurance policy was in force and was still liable on unliquidated claims from other injured employees. The trial court allowed the defendant an equitable setoff and denied the judgment of Southern Surety in its entirety.

In its review of the trial court decision, the Supreme Court of Oklahoma approved the equitable setoff of mutual obligations and states that this power exists independent of statutes. *Southern Sur. Co.* at ¶ 20. The Court held that even though the defendants did not file a claim with the receiver they were still allowed a right to setoff mutual indebtedness, stating as follows:

“ . . . , this court is committed to the view that the rights of the general creditors of an insolvent corporation do not operate to deprive a debtor of his right of equitable set-off against the corporation. The assets pass into the hands of the receiver or trustee subject to all claims and defenses that might have been interposed against the corporation had it continued on under its regular management. *Ward v. Oklahoma State Bank of Atoka*, 51 Okla. 193, 151 P. 852; *Morey et al. v. State ex rel. Mothersead Bank Com'r.*, [129 Okla. 136, 263 P. 1098]. Thus, if the claimed setoff of the judgment debtors is otherwise tenable, they are not limited to a pro rata share of the assets of the dissolved corporation, but may claim the full amount due thereon to the extent the obligation merged in the judgment which they seek to defeat.” (Emphasis added)

Southern Sur. Co. at ¶ 23.

In applying the ruling set out in *Southern Sur. Co.*, the Pollards are entitled to setoff their judgment against Schubert even though they did not file a Proof of Claim. In addition, the Pollards are also entitled to setoff the claim assigned to them by L & S Pollard Farms, Inc., who did file Proof of Claim. (Ex. 13, Proof of Claim.) The Department's claims do not deprive the Pollards of their right of equitable setoff. As the Department seeks to recoup monies on behalf of short investors, it is not entitled to any special protection under the law from any claims or defenses which might have been asserted against Schubert, had a receiver not been appointed.

Southern Sur. Co. at ¶ 23. The Pollards are entitled to setoff their claims against Schubert dollar for dollar and are not limited to a pro rata share distribution from the receivership, to hold otherwise would permanently deprive the Pollards of their valid claims against Schubert. Irving Fought testified that he believed a set off dollar for dollar would be fair. (Ex. 11, Fought Depo. P. 95-96; ll. 15-25, 1-13.)

The Supreme Court of Oklahoma recently reviewed the issue of setoff in the case of *F.D.I.C. v. Moss*, 1991 OK 116, 831 P.2d 613. In that case, Moss borrowed money from the Bank of Newcastle, which later went into default. The F.D.I.C., as receiver for the bank, filed suit to collect the debt. Moss held certificates of deposit in the Dill State Bank, which became insolvent after the Bank of Newcastle. The F.D.I.C. was also receiver for Dill State Bank. Moss asserted that he should be allowed to setoff the debt F.D.I.C. owed him, as a result of his certificates of deposit with the Dill State Bank, from the debt he owed the F.D.I.C., as a result of the defaulted note with the Bank of Newcastle.

The F.D.I.C. argued that the remedy of setoff was not available to Moss because the relationship of the parties was "frozen" when the Bank of Newcastle became insolvent. The Supreme Court of Oklahoma held that even though the obligation of the F.D.I.C. to Moss, through the Dill State Bank, did not arise until after the F.D.I.C. was appointed receiver of the Bank of Newcastle, Moss was entitled to setoff the mutual obligations of the parties. *F.D.I.C. v. Moss* at ¶ 23.

The position of the Pollards in this matter is stronger than that of the defendant in *F.D.I.C. v. Moss*. The setoffs the Pollards are requesting are obligations which existed prior to the appointment of the Receiver and prior to being sued by the Department, even though the claims were not liquidated as to amounts. The obligations of Schubert to the Pollards arose out of the

same transactions as any possible obligation of the Pollards to the Department or Receiver. The Pollards should be allowed to setoff Schubert's obligations to them, being, the judgment rendered in the District Court of Logan County, Case No. CJ-2005-71 and the assigned obligation from L & S Pollard Farms, L.L.C. (Ex. 8, Judgment; Ex. 12, Assignment.) If the Pollards are not allowed to setoff these claims against the Department, they will be denied any recourse for collection of obligations which Schubert owes to them.

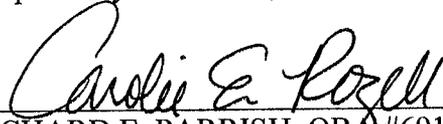
CONCLUSION

The Department cites to information that merely summarizes what it seeks to disgorge from the Pollards. None of the evidence relied upon by the Department actually establishes the Pollards' receipt of monies that did not belong to them resulting from eleven years of investing with AXA/Equitable through Schubert. The Department has simply not proven its case. In relying upon other summary judgments granted by Judge Parrish, the Department asks this Court for the same ruling because another judge granted them summary judgment. The Department cannot show this Court that the facts in the other cases are the same as the facts of this case.

This Court must view the facts of this case independent of any other cases the Department encourages this Court to follow. It is unjust for this Court to award the Department judgment against the Pollards without requiring the Department to provide evidence that traces the specific unearned profits allegedly received by the Pollards. It is further an injustice to disallow the Pollards their day in Court to defend their position and to show this Court that the monies received were in fact loans from their policies.

WHEREFORE, the Defendant Pollards respectfully request that this Court find there exist material facts in dispute, deny the Department of Securities' Motion to for Summary Judgment, and grant any further relief to which the Defendant Pollards to which they may be entitled.

Respectfully Submitted,



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CERTIFICATE OF MAILING

I hereby certify that on this 15th day of May , 2007, a true and correct copy of the above and foregoing Pleading was hand delivered or placed in the U. S. Mail, postage prepaid, and addressed to the following:

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