

This matter is set for hearing on the 10<sup>th</sup> day of January, 2008 at 2:30 p.m. before the Honorable Judge Vicki L. Robertson, Courtroom #315 in the Oklahoma County Courthouse.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT  
OKLAHOMA COUNTY, OKLA.

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

DEC 13 2007

PATRICIA PRESLEY, COURT CLERK  
by \_\_\_\_\_  
Deputy

**DEFENDANTS BARRY AND ROXANNE POLLARD'S MOTION TO  
RECONSIDER AND/OR VACATE ORDER GRANTING PARTIAL SUMMARY  
JUDGMENT DATED NOVEMBER 18, 2007; MOTION FOR NEW AND/OR MOTION  
TO CLARIFY AND BRIEF IN SUPPORT**

COMES NOW the Defendants Barry and Roxanne Pollard ("Pollards") and hereby respectfully request that the Court reconsider and/or vacate its Order dated November 28, 2007 granting partial summary judgment in favor of Plaintiff Oklahoma Department of Securities ex rel. Irving L. Faught, Administrator ("Department") with respect to the existence of the "Ponzi"

scheme and unjust enrichment on the part of the Pollards; grant a New Trial on the Defendants' request for offsets or setoffs; and/or clarify its Order granting partial summary judgment in favor of the Department. The Pollards submit the following brief in support of their motion:

### **BRIEF IN SUPPORT**

On October 26, 2007, the Court granted a Partial Summary Judgment in favor of the Department regarding the existence of a "Ponzi" scheme and unjust enrichment of the Pollards. Further, the Court denied the Pollards' right to any setoff or offset against any funds ordered to be disgorged by the Pollards. However, the Court makes no findings or provides no indication as to the reasoning for its denial of the setoff request and its granting of a partial summary judgment. As depicted more fully below, the Court's decision that no genuine issue of material fact exists regarding the Pollards' right of setoff and offset, their alleged involvement in the "Ponzi" scheme and their alleged unjust enrichment is not sustained by sufficient evidence and is contrary to law and a motion for new trial, or in the alternative, a motion to reconsider should be granted. 12 O.S. §651.

### **STATEMENT OF MATERIAL FACTS**

1. On October 14, 2004, at the request of the Department, Judge Worthington of the Logan County Court appointed Doug Jackson as Receiver over Schubert's assets. *See* Application for Order Appointing Receiver dated October 14, 2004, attached hereto as Exhibit "1"; Order Appointing Receiver dated October 14, 2004, attached hereto as Exhibit "2."

2. On March 4, 2005, Barry Pollard filed a lawsuit against Marsha Schubert doing business as Schubert and Associates in the District Court of Logan County, State of Oklahoma Case No. CJ-2005-71 arising from Pollards' dealings with Marsha Schubert d/b/a Schubert and Associates. *See* Petition attached hereto as Exhibit "3".

3. On May 26, 2005, Schubert was served with Pollard's Motion for Default Judgment and Notice of Hearing on Motion for Default and Notice of Hearing to Determine Plaintiff's Damages by mail. *See* Affidavit of Mailing dated May 26, 2005, attached hereto as Exhibit "4."

4. On June 10, 2005, Judge Worthington of the District Court of Logan County entered judgment in favor of Pollard and against Marsha Schubert d/b/a Schubert & Associates and set a hearing to determine damages. *See* Default Judgment dated June 10, 2005, attached hereto as Exhibit "5"; Order dated July 8, 2005, attached hereto as Exhibit "6."

5. On July 14, 2005, the District Court of Logan County, Judge Worthington entered an Order determining damages to be \$827,000.00. *See* Journal Entry of Judgment dated July 14, 2005, attached hereto as Exhibit "7."

6. The Journal Entry was filed of record with the Logan County Clerk. *See* Affidavit of Judgment/(Money Judgment Only), attached hereto as Exhibit "8."

7. Receiver Doug Jackson was then served with notice of the June 14, 2005 Judgment and of Pollard's hearing on damages against Schubert. *See* Exhibit "6"; Affidavit of Mailing dated July 8, 2005, attached hereto as Exhibit "9."

8. On July 20, 2005, Receiver Doug Jackson was served with Pollard's Journal Entry of Judgment against Schubert by the Logan County Clerk on July 14, 2005. *See* Affidavit of Mailing dated July 18, 2005, attached hereto as Exhibit "10."

9. Neither the Department nor the Receiver challenged the validity of Pollard's Judgment. *See Pollard v. Schubert*, CJ-2005-71 OSCN Report, attached hereto as Exhibit "11."

10. L&S Pollard Farms, L.L.C. filed a Proof of Claim with the Receiver in the amount of \$284,464.05 and are classified by the Department to be a "short" investor on whose

behalf the Department filed the present case. See Proof of Claim, attached hereto as Exhibit "12."

11. On October 25, 2006, L&S Pollard Farms, L.L.C. executed an Assignment of Claim to Barry Pollard for its right, title and interest in and to any and all claims it has in the present case. See Assignment of Claim, attached hereto as Exhibit "13."

12. On May 11, 2005, the Department filed the current lawsuit *DOS v. Pollard*, CJ-2005-3799, in the District Court of Oklahoma County arising from the Pollards' dealings with Marsha Schubert d/b/a Schubert and Associates. See Petition dated May 11, 2005, attached hereto as Exhibit "14."

13. On November 28, 2007, this Court entered an Order granting a Partial Summary Judgment in favor of the Department on the issue of "Ponzi" scheme, unjust enrichment and setoff.

### ARGUMENT

**PROPOSITION I: A SUBSTANTIAL ISSUE OF MATERIAL FACT EXISTS AS TO THE ISSUE OF "PONZI" SCHEME AND UNJUST ENRICHMENT OF THE POLLARDS; THUS, THE PARTIAL SUMMARY JUDGMENT ORDER SHOULD BE RECONSIDERED AND/OR VACATED.**

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 of 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 (emphasis added); *Erwin v. Frazier*, 1989 OK 95, 787 P.2d 61. Viewing the undisputed facts in the light most favorable to the Pollards, it is clear that an issue of material fact exists regarding

the Pollards involvement in the "Ponzi" scheme and their alleged unjust enrichment. As such, the Court's Order for Partial Summary Judgment should be reconsidered and/or vacated. 12 Okla. Stat. §§1031, 1031.1.

Although the Pollards were not parties to the litigation against Schubert wherein a guilty plea was entered as to the "Ponzi" scheme, nor the Logan County case in which the Receiver was appointed, they dispute their involvement in the scheme. The Pollards began investing through Schubert as early as 1994, and as early as 1997, they wrote checks directly to Schubert. Yet, the Department only looks to the last four years (2000-2004) of the eleven year relationship between the Pollards and Schubert to support its assertion that the Pollards were unjustly enriched and should be required to disgorge all monies received. 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 during their eleven year investor relationship with Schubert. *See* Affidavit of David Morely, attached hereto as Exhibit "15." The Department seeks to collect monies from the Pollards that they allegedly unjustly received as part of the "Ponzi" scheme even though the Pollards received an amount less than they should have received based on a reasonable rate of return. If the Pollards' investments would have produced a reasonable rate of return of at least 8%, the Pollards' investments would have exceeded one million dollars which is substantially less than the Pollards ever received from Schubert during their investment relationship. *See* Exhibit "15." The Department cannot disgorge something from the Pollards that they never received or benefited from.

By focusing on this limited time period, the Department has misrepresented the Pollards involvement in the "Ponzi" scheme and alleged unjust enrichment. The Court's granting of a partial summary judgment should be reconsidered and/or vacated 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 Pollards learned in late 2004 or early 2005 that their investments and policies were of little or no value as a result of Schubert's conduct as an agent, representative and employee of AXA/Equitable. *See* Affidavit of Barry Pollard, attached hereto as Exhibit "16." Barry Pollard filed a lawsuit in Logan County against Schubert d/b/a Schubert and Associates on March 4, 2005 for the resulting damages. *See* Exhibit "16." On June 14, 2005, Judge Worthington in the Logan County Court entered Default Judgment in Barry Pollard's favor finding that Barry Pollard was damaged as a result of his relationship and dealings with Schubert. *See* Exhibit "5." Pollard obtained Default Judgment against Schubert d/b/a Schubert and Associates on June 14, 2005 and a Journal Entry of Judgment awarding damages in the amount of \$827,000.00 was entered on July 14, 2005. *See* Exhibits "6" & "7." Thus, it has been decided by the Logan County Court and final judgment rendered that Pollard was damaged, not enriched, by the activities out of which the Department alleges that its claim for disgorgement arises.

The judgment obtained by Barry Pollard from the Logan County Court, the Court in which the Department initiated proceedings against Schubert, is a valid claim against Schubert's estate. 66 Am. Jur. 2d §340 provides that a creditor against a receivership need only present their claim in such a way that it can be recognized by the receiver. "Furthermore, it is generally recognized to be within the discretion of a court appointing a receiver to permit claims against the receiver or corporation or person whose property is in receivership to be litigated in an independent action in another court." *Id.* 66 Am Jur 2d §341 & 342 provides that when one court renders judgment against a receivership defendant, in this case Schubert, the validity and

amount may not be contested or relitigated. "The fact that neither the receivership defendant nor the receiver undertakes to defend the suit in the other court is regarded as immaterial, on the ground that a judgment of the court having jurisdiction of the parties and of the subject matter operates as res judicata, even if obtained by default." 66 Am Jur 2d §342. Because neither the Department nor the Receiver challenged Pollard's Default Judgment against Schubert within the applicable time limitations, it is a final, enforceable judgment against Schubert's estate.

Regardless of the Department's claims, this Court must acknowledge and recognize the \$827,000.000 award entered in favor of Pollard by Judge Worthington. The subject matter out of which Pollard obtained a judgment, Schubert's unlawful investment practices, is based on the same operative facts out of which the Department is claiming the Pollards were unjustly enriched. All of the claims from both the Pollards and the Department center on the investment relationship between the Pollards and Schubert as an agent, representative and employee of AXA/Equitable. The determination that Pollard was damaged in the amount of \$827,000.00 is conclusive and cannot be ignored as it bars any disgorgement action by the Department. It is impossible for this Court to find that the Pollards were unjustly enriched when a judgment for damages has been rendered in their favor arising from the same acts upon which the alleged unjust enrichment is predicated.

The Oklahoma Supreme Court in *Teel v. Public Serv. Co. of Okla.*, 767 P.2d 391, 398 (Okla. 1985) recognized that in order for there to be unjust enrichment "there must be enrichment to another coupled with a resulting injustice." A genuine issue of fact exists as to whether the Pollards were enriched or damaged by the acts of Schubert requiring them to disgorge all funds received from Schubert. Not only have the Pollards received a judgment from the Logan County District Court which found that they had in fact been damaged, not enriched;

but also, they have provided accounting records which directly conflict with those offered to support the Department's position; thus creating a issue of material fact. *See* Exhibits "6", "7" & "15."

Notice of Pollard's Judgment was filed of record with the Logan County Court Clerk as well as the County Clerk. *See* Exhibit "8." Additionally, Notice of the Judgment was sent on July 8, 2005 and July 20, 2005 to the Receiver of Schubert's assets, Doug Jackson, who was appointed, at the request of the Department by Judge Worthington in the Logan County Court. *See* Exhibits "9" & "10" It was the Department who sought the Logan County Court's appointment of the Receiver Doug Jackson over Schubert's assets to stand in the shoes of Schubert. *See* Exhibits "1" & "2." The Department filed this lawsuit even though the Receiver was charged with this responsibility. The Department and the Receiver have worked closely with regards to their actions to recover monies for the Receivership over Schubert's estate. In all other cases similar to the case against the Pollards, the Department and Receiver have been joint Plaintiffs. They did not file the present suit jointly as a conflict of interest existed between the Receiver and the Pollards. Thus, the Department's argument that they were unaware of the Judgment in favor of Pollard in Logan County is a complete misrepresentation of the established relationship between the Department and the Receiver. The Department has known of Pollard's Judgment for over two years. No objection was timely filed and the time limit for such objections has passed. 12 O.S. §1038.

The Department's claim for unjust enrichment simply cannot compete with the Logan County Court's judgment in the Pollards' favor in the amount of \$827,000.00. There can be no claim for unjust enrichment where there is no evidence that the Pollards where enriched by Schubert's "Ponzi" scheme or received money which they were not entitled to receive. It has

been adjudicated by the Logan County Court and final judgment rendered that Pollard was damaged by the activities out of which the Department alleges that its claim for disgorgement arises. Regardless of the Department's claims, this Court must acknowledge and recognize the \$827,000 Judgment entered by Judgment Worthington. In doing so, the Pollards can not be found to be unjustly enriched and damaged by the same transactions with Schubert.

Thus, the grant of summary judgment on the issues of "Ponzi" scheme and unjust enrichment should be reconsidered as it is clear a genuine issue of material facts exists regarding whether the Pollards were damaged or unjustly enriched.

**PROPOSITION II: THE COURT'S DENIAL OF THE POLLARDS' RIGHT TO SETOFF IS AGAINST THE WEIGHT OF THE EVIDENCE AND CONTRARY TO LAW; THUS, THE MOTION FOR NEW TRIAL SHOULD BE GRANTED.**

12 Okla. Stat. §651 provides, in pertinent part:

[a] new trial [shall be] granted, on the application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of the party:

6. That the verdict, report, or decision is not sustained by sufficient evidence, or is contrary to law;

Denying the Pollards right to setoff is contrary to law and the motion for new trial should be granted.

*Studley v. Boylston Nat. Bank*, 30 Am. Bankr. Rep. 165, 229 U.S. 523, 528 provides that setoff represents the right of one party to use his claim against that of another to satisfy, either in part or in whole, what is owed to each other. It would be absurd to make the Pollards pay the Department and/or the Receiver when the Receiver owes the Pollards as creditors of Schubert monies. Clearly, the denial of the Pollards' right to setoff is contrary to law and the weight of the evidence and a new trial should be granted. 12 Okla. Stat. §651

As set forth above, a valid judgment exists in favor of the Pollards against Schubert's

estate in the amount of \$827,000.00. The same court administering the receivership granted the Pollards judgment against Schubert and neither the Department nor the Receiver timely objected to the judgment, thus it is enforceable. Credit must be given where credit is due.

In the cases relied upon by the Department to support its disgorgement action, none of the innocent investors had a judgment against the assets of the wrongdoer or the receivership assets. In *Scholes v. Lehmann*, 56 F.3d 750, the ex-wife of the operator of a "Ponzi" scheme had a valid claim against the assets of the wrongdoer for child support. The court found it was proper to offset the "Ponzi" monies she received against the legitimate debt owed to her by her ex-husband. *Scholes*, 56 F.3d 759. Similarly, the Pollards' judgment is a valid, enforceable claim against Schubert's assets and should be applied as a setoff against any "Ponzi" monies received. There can be no just reason to deny Pollards this offset.

The Pollards are entitled to an additional setoff by way of an assigned claim from L&S Pollard Farms, L.L.C. The Department procured the Logan County Court to appoint a Receiver over Marsha Schubert's estate. The Receiver was given the authority to receive claims filed against Schubert's estate. L&S Pollard Farms, L.L.C, a creditor of Marsha Schubert, had a claim against Schubert's estate in the amount of \$248,464.00. The Department recognizes the validity of L&S Pollard Farm's claim against Schubert's estate and classifies L&S Pollard Farms, L.L.C. as a short investor. *See Exhibit "12."*

Based on the validity of L&S Pollard Farms, L.L.C.'s claim, the Pollards, on behalf of L&S Pollard Farms, L.L.C., entered into an agreement conveying for valuable consideration all right, title and interest in and to any and all claims of L&S Pollard Farms, L.L.C. against Schubert's estate to Barry Pollard. *See Exhibit "13."* Loren Pollard executed an Assignment of Claims evidencing this agreement on behalf of L&S Pollard Farms, L.L.C. to Barry Pollard on

October 25, 2006.

The assignment of these claims to Barry Pollard is valid and should be recognized as an additional setoff against the amount the Department seeks to disgorge from the Pollards. The assignment in effect reduces the amount the Department seeks to recover for the net losers or "short investors." By the assignment, L&S Pollard Farms, L.L.C. has been compensated for its claims against the Schubert estate and no longer has an interest in the monies recovered on its behalf. To ignore this credit would be unjust and enrich the receivership and Schubert's estate.

Finally, Pollards' bank statements as far back as 1997 reflect that the Pollards paid money directly to Schubert. The Department has only looked at the transactions occurring from 2000-2004 claiming the "Ponzi" scheme began in 1999. Credit is only given to the Pollards for checks written directly to Schubert during the last four year period. However, the Pollards had been dealing with Schubert as an agent, representative and employee of AXA/Equitable for over six years prior to the alleged beginning of the Ponzi scheme. To properly offset the monies that Pollards paid directly to Marsha Schubert, the Department must consider all payments made directly to her over the **entire** eleven year investment relationship, not just the four years of the "Ponzi" Scheme. *See* Exhibit "15." Additionally, the Pollards sold a bull to Robert Schubert, Marsha Schubert's husband. *See* Exhibit "16." Thus, the Departments calculations as to the amount which should be disgorged from the Pollards is inaccurate and does not reflect all the monies paid by the Pollards during its investment relationship with Schubert as an agent, representative and employee of AXA/Equitable.

The Pollards are entitled under law to offset any claims for disgorgement as a result of the judgment for damages, the assigned claim and all monies paid directly to Schubert during the investment relationship. This Court's decision to not allow any setoff or offsets is clearly against

the weight of the evidence and contrary to law; thus, a new trial should be granted under 12 Okla. Stat. §651(6).

WHEREFORE, based upon the above and foregoing, the Defendants, Barry and Roxanne Pollard, respectfully requests the following relief from the Court as set forth below:

- A. Pursuant to 12 O.S. §§1031, 1031.1, reconsideration or vacation of the Court's November 28, 2007 Order granting a Partial Summary Judgment for Plaintiff Department recognizing the existence of a "Ponzi" scheme and unjust enrichment of the Defendants;
- B. Pursuant to 12 O.S. §651, *et seq.*, and 12 O.S. §§1031, 1031.1, a new trial or hearing on the Plaintiff's *Motion for Summary Judgment* regarding the issue of setoff, based upon the rulings and findings in the Court's November 28, 2007 Order constituting an abuse of the Court's discretion and the Order not being sustained by sufficient evidence and contrary to law.
- C. Clarification of the Court's November 28, 2007 Order Granting Partial Summary Judgment as to the rulings contained and set forth in its Order, including, but not limited to, the reasons for the denial of the Defendants' request for a setoff and the finding of the existence of a "Ponzi" scheme and unjust enrichment of the Defendants.
- D. All costs, including reasonable attorneys' fee, incurred by the Defendants in pursuit of this Motion.
- E. Any and all other relief the Court deems equitable and just.

Respectfully Submitted,



Russell L. Mulnix (OBA #6494)

Amy G. Piedmont (OBA #21322)

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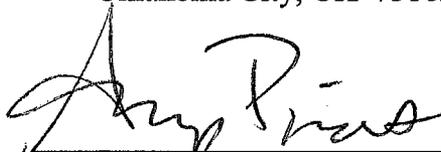
Attorneys for Barry Pollard and Roxanne Pollard

**CERTIFICATE OF SERVICE**

This is to certify that on this 13<sup>th</sup> day of December, 2007, a true and correct copy of the above and foregoing pleading was mailed, with postage fully prepaid thereon to the following;

Amanda Mavis Cornmesser  
Gerri Leann Stuckey  
Melanie Brown Hall  
120 North Robinson Suite 860  
Oklahoma City, OK 73102

July Hamilton Morse  
Regan Strickland Beatty  
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Amy G. Piedmont