

IN THE DISTRICT COURT OF OKLAHOMA  
 STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT  
 OKLAHOMA COUNTY, OKLA.

OCT 31 2007

PATRICIA PRESLEY, COURT CLERK  
 by ~~DEPUTY~~

Oklahoma Department of Securities )  
 ex rel. Irving L. Faught, )  
 Administrator; )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 Barry Pollard and Roxanne Pollard, )  
 )  
 Defendants. )

Case No. CJ-2005-3799

**PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Plaintiff, Oklahoma Department of Securities *ex rel.* Irving L. Faught, Administrator (Department), respectfully submits this response to *Defendant Pollards' Motion for Summary Judgment Against the Oklahoma Department of Securities*, filed on October 11, 2007. The Department hereby adopts and incorporates by reference the arguments and authorities cited in *Plaintiff's Motion for Summary Judgment Against Defendants Barry and Roxanne Pollard and Brief in Support* filed on March 29, 2007 and *Plaintiff's Reply to Defendants' Response to Motion for Summary Judgment* filed on September 20, 2007, and all exhibits attached thereto.

**CASE HISTORY**

Defendants Barry and Roxanne Pollard ("Defendants" or "Defendants Pollard") filed a motion to dismiss in this case in July of 2005 arguing, *inter alia*, the Department's lack of authority to bring its claim against the Defendants and the Department's lack of legal capacity to sue. Like Judge Parrish in Case No. CJ-2005-3796, this Court overruled

Defendants' motion to dismiss finding that the Department is entitled to seek disgorgement from the Defendants for the money received from Marsha Schubert in excess of the value exchanged.

In March of 2007, the Department filed a motion for summary judgment in this matter. Defendants made the identical arguments in their sur-reply filed in connection with the Department's summary judgment motion as Defendants Pollard make in their pending motion for summary judgment: res judicata, collateral estoppel, statute of limitations, setoff, no unjust enrichment, and the Department's lack of authority to seek disgorgement.<sup>1</sup> This Court rejected the Defendants' arguments and, on October 26, 2007, ruled in favor of the Department by granting partial summary judgment. In its ruling, the Court affirmed the operation of a "Ponzi" scheme by Marsha Schubert and that Defendants Pollard were unjustly enriched through that scheme. The Court also denied the request of Defendants for a setoff and/or offset. As a result of the Court's ruling on the Department's motion for summary judgment, the "undisputed" facts set forth in Defendant Pollards' summary judgment motion are not material to the issue now before this Court.

### **BACKGROUND**

In the year 2000 and until mid-October 2004, Marsha Schubert, individually and doing business as Schubert and Associates (Marsha Schubert), accepted money from investors, and represented that their money would be invested in option contracts or used

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<sup>1</sup> Defendants raised the affirmative defenses of res judicata, collateral estoppel and statute of limitations for the first time in their sur-reply. Such defenses are waived unless pled in a responsive pleading. 12 O.S. § 2008(C) and 2008(D). The defenses were not properly raised in the sur-reply or in the pending motion for summary judgment and Defendants Pollard have not requested leave to amend their answer. *Prough v. Edinger, Inc.*, 862 P.2d 71 (Okla. 1993).

for “day trading” purposes. Instead of investing the monies as promised, Marsha Schubert made payments to investors from other investors’ money – a classic “Ponzi” scheme.

On October 14, 2004, the Logan County District Court appointed Douglas L. Jackson as Receiver (“Receiver”) for the assets of Marsha Schubert and Schubert and Associates. On December 10, 2004, the Logan County Court amended the order appointing receiver providing that Mr. Jackson be the Receiver for the investors and creditors of Schubert and Associates and have the authority to institute actions to recover assets and to protect the interests of and promote equity among the investors in the Schubert and Associates program.

On May 11, 2005, the Department and the Receiver filed an action against one hundred fifty-eight (158) defendants for unjust enrichment, fraudulent transfers, and equitable liens. Due to a legal conflict between Barry Pollard and the Receiver, the same action was filed separately against Defendants Pollard by the Department.

Defendants Pollard received the benefit of fictitious profits totaling \$386,158 from Marsha Schubert, for which they did not provide anything of reasonably equivalent value. The money was not generated from any real or legitimate investment. The \$386,158 windfall Defendants Pollard received was literally at the expense of the creditors and claimants of Marsha Schubert, including the 87 “Ponzi” scheme victims.

#### **STANDARD OF REVIEW**

The summary judgment procedure authorized by the Rules of the District Courts of Oklahoma provides a method to dispose of cases where no genuine issue exists for any material fact, or where only a question of law is involved. When a party demonstrates to

the court that no controversy exists as to any material facts, and the moving party is entitled to judgment as a matter of law, the Court has a duty to enter summary judgment in favor of that party. Rule 13, Rules for the District Courts of Oklahoma, OKLA. STAT. ANN. TIT. 12, Ch.2, App. (Rule 13); *Valley Vista Development Corp., Inc. v. City of Broken Arrow*, 1988 OK 140, 766 P.2d 344; *Flanders v. Crane Co.*, 1984 OK 88, 693 P.2d 602. Defendants Pollard are not entitled to summary judgment as a matter of law.

### **ARGUMENTS AND AUTHORITIES**

Defendants' motion for summary judgment is moot as a result of the partial summary judgment recently granted by this Court. However, since Defendants Pollard did not withdraw their summary judgment motion following the Court's ruling, the Department is compelled to respond to the Defendants' arguments and authorities not specifically addressed by the Court in its ruling.

#### **I. Plaintiff is authorized to seek recovery from Defendants for unjust enrichment.**

In their motion for summary judgment, Defendants "appeal" the prior decision of this Court confirming the Department's authority to bring this suit seeking recovery for unjust enrichment. The Defendants continue to argue that the Department does not have the capacity of a party to bring this suit since the Defendants have not violated Oklahoma securities laws.

Oklahoma courts recognize unjust enrichment as an equitable ground of recovery. *Lapkin v. Garland Bloodworth*, 2001 OK CIV APP 29, 23 P.3d 958 (citing *N. C. Corff Partnership, Ltd. v. Oxy USA, Inc.*, 1996 OKLA CIV APP 92, 929 P.2d 288, 295 (cert. denied)). Recovery under the theory of unjust enrichment depends upon a showing the

defendants received money that, in equity and good conscience, they ought not be allowed to retain. See *French Energy, Inc. v. Alexander*, 1991 OK 106, 818 P.2d 1234.

In bringing this action, the Department is acting as a public agency enforcing public policy. For a governmental agency to bring suit under the statutes that it has a duty to enforce, a regulatory agency need not be itself the victim. *State ex rel. Goettsch v. Diacide Distributors, Inc.*, 561 N.W.2d 369, 375 (Iowa 1997) (a case brought by the Iowa Superintendent of Securities under the Iowa Uniform Securities Act). The court ruled that the State must have the benefit of any theory of liability available to individual purchasers suing in their own names absent any contrary legislative intent. *Id.*

In *SEC v. Egan*, 856 F. Supp. 401 (N.D. Ill. 1993), the United States Securities and Exchange Commission (SEC) sought an order of disgorgement from third parties to whom funds were allegedly improperly disbursed. The court stated that the SEC's standing to obtain the equitable remedies that were at issue stemmed from its duty to advance the public interest, something that is separate and apart from (although it may frequently concur with) the interest of injured investors. *Id.* In addition, "a Court can obtain equitable relief from a non-party against whom no wrongdoing is alleged if it is established that the non-party possesses illegally obtained profits but has no legitimate claim to them." *SEC v. Cherif*, 933 F.2d 403, 414 n. 11 (7th Cir. 1991).

Based on the money in and the money out of the "Ponzi" scheme, Defendants Pollard received more than the total of the principal amounts of their investments, and therefore, were unjustly enriched to the detriment of other participants who were not similarly treated. The Department is authorized to seek the disgorgement of the funds

received by Defendants that were in excess of the reasonably equivalent value exchanged.

**II. Plaintiff's claims are not barred by the doctrines of res judicata or collateral estoppel.**

With respect to Defendant Barry Pollard's Logan County case and the present matter, the parties, the subject matter and the claims differ. The parties to the Logan County case were the Barry Pollard, Marsha Schubert, AXA Advisors LLC, and AXA Equitable Life Insurance Company. The Department was not a party to Barry Pollard's suit in Logan County. The subject matter of the Logan County case involves Defendant Barry Pollard's experiences and transactions as a securities and insurance client of Marsha Schubert over an 11-year period and her alleged fraudulent conduct. The subject matter of the instant case relates to Defendants' unjust enrichment resulting from Marsha Schubert's four-year operation of a "Ponzi" scheme – a scheme she orchestrated outside the authorized scope of her business as a registered representative or agent of AXA Advisors LLC, and AXA Equitable Life Insurance Company. Finally, as conceded by Defendants, the causes of action differ. *See* Defendants' sur-reply, without exhibits, attached as Exhibit A hereto, p. 8.

***Res Judicata***

The doctrine of res judicata, or claim preclusion, means that a judgment in a prior action between the same parties or their privies constitutes a bar to a new action on the same cause of action. *Runyan v. City of Henryetta*, 1958 OK 3, 321 P.2d 689, 693. The Oklahoma Supreme Court reiterated the required elements of a res judicata defense in *Dearing v. State ex rel. Com'rs of Land Office*, 1991 OK 6, 808 P.2d 661, 664. Such elements include the "identity of subject matter, of parties, of the capacity of the parties

and an identity of the cause of action.” *Id.* As discussed above, none of these elements are present in this matter.

Additionally, a res judicata defense requires that the prior judgment “must have been a judgment on the merits of the case and not upon purely technical grounds.” *Dearing*, 808 P.2d at 665. “A judgment on the merits is one that disposes of the real or substantial grounds of action or defense as distinguished from matters of practice, procedure or form. *Temoron, Inc. v. Ferraro Energy Corp.*, 1993 OK CIV APP 97, 861 P.2d 319, 323.

When a default judgment is issued based on a technicality, such as failure to answer, appear or otherwise defend, as was the case in Defendant Barry Pollard’s suit against Marsha Schubert in Logan County<sup>2</sup>, the case was not presented to the court on its merits. *Midkiff v. Luckey*, 1966 OK 49, 412 P.2d 175 (citing *Haskell v. Cutler*, 108 P.2d 146 (Okla. 1940)). Defendants’ default judgment against Marsha Schubert was a judgment otherwise than on the merits of the case. The res judicata defense by the Defendants does not apply because the issue of whether Defendant Barry Pollard was damaged or unjustly enriched by Marsha Schubert’s conduct was not actually litigated or decided by the Logan County Court. This fact also detrimentally impacts Defendants’ collateral estoppel argument.

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<sup>2</sup> See Exhibit B hereto, Logan County Default Judgment.

### *Collateral Estoppel*

The doctrine of collateral estoppel, or issue preclusion, means that “[a] right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction cannot be disputed in a subsequent suit between the same parties or their privies, although the subsequent suit is on a different cause of action[.]” *Boy Scouts of America, Inc. v. Thompson*, 1963 OK 80, 380 P.2d 705, 708 (citing *Wilson v. Lee Evans Drilling Co.*, 322 P.2d 630 (Okla. 1957)). Certain elements must be satisfied in order for collateral estoppel to apply: (1) the subject matter of both proceedings must be identical; (2) all relevant issues were actually litigated and decided in the prior proceeding; and (3) the parties in both proceedings must be identical. *Laws v. Fisher*, 1973 OK 69, 513 P.2d 876; *State ex rel. Trimble v. Kindrick*, 1992 OK CIV APP 135, 852 P.2d 758, 760. These elements are absent in the pending matter.

In summary, the differing causes of action, one addressing fraudulent conduct and the other seeking recovery under an unjust enrichment theory, the difference in parties and subject matter, and the fact that the Logan County Court did not actually litigate and decide the substantive issues in the prior proceeding, clearly illustrate the impropriety of applying the doctrines of res judicata or collateral estoppel in this matter. *Bras v. First Bank & Trust Co. of Sand Springs*, 1985 OK 60, 735 P.2d 329, 332 n. 1.

### **III. Plaintiff's claims are not barred by the statute of limitations.**

The appellate court in *Lapkin* confirmed a three year statute of limitations for an unjust enrichment claim. 23 P.3d at 962. Typically, “[a] statute of limitations begins to run from the time the cause of action accrues [that is] when the litigant could maintain for the first time the cause of action to conclusion.” *Roberson v. Painewebber, Inc.*, 2000

OK CIV APP 17, ¶ 5, 998 P.2d 193, 196-197. A limitations period, however, may be tolled under various tolling doctrines. “‘Tolling’ is a term of art which refers to the temporary suspension of the statutory time bar for bringing a suit because of some ‘disability’ on the part of the plaintiff which prevents that person from commencing the action[.]” *Thompson v. Anchor Glass Container Corp.*, 2003 OK 39, ¶ 3, 3 P.3d 836, 838, n. 13.

### ***Discovery Rule***

Among the tolling doctrines recognized by Oklahoma courts is the “discovery rule.” The discovery rule tolls the statute of limitations until such time that the plaintiff “knows of, or in the exercise of reasonable diligence, should have known of or discovered the injury, and resulting cause of action.” *Lovelace v. Keohane*, 1992 OK 24, ¶¶ 3-4; 831 P.2d 624, 629.

Based on the facts and circumstances of this case, the limitations period for the Department’s unjust enrichment claim commenced upon the Department’s discovery of Marsha Schubert’s underlying “Ponzi” scheme -- a discovery which could not have occurred prior to October of 2004. The Department’s investigation of Marsha Schubert commenced in the early days of October, 2004. *See* Exhibit C, Order Initiating Investigation. As part of the investigation, the Administrator of the Department issued subpoenas to various banks to obtain records for accounts known by the Department to be owned and/or controlled by Marsha Schubert. The first such subpoena was served on the Farmers & Merchants Bank of Crescent, Oklahoma, on October 7, 2004. *See* Exhibit D.

With respect to the subpoenaed bank records, the staff of the Department analyzed in excess of 15,000 banking transactions to determine the sources of the monies

remitted to, and the identity of the recipients of funds disbursed by, Marsha Schubert. In one bank account alone, Department representatives analyzed over 10,000 transactions through which approximately Two Hundred Eighty-Seven Million Dollars (\$287,000,000) flowed in and out. It was this bank analysis that allowed the Department to discover the existence of Marsha Schubert's "Ponzi" scheme and to identify the individuals who received funds in excess of the principal amounts of their investments. Accordingly, the statute of limitations in this matter would not have commenced to run prior to October 1, 2004. This action against Defendants Pollard was filed in May 2005, very early in the running of the limitations period.

#### ***Fraudulent Concealment***

Another equitable tolling principle is "fraudulent concealment." Under fraudulent concealment, a statute of limitations period is tolled "only so long as the plaintiff is unable, by reasonable, diligence, to discover the facts necessary for determining the existence of a claim for relief." *First Interstate Bank of Fort Collins, J.A. v. Piper Aircraft Corp.* 744 P.2d 1197, 1200 (Colo. App. 1987). *See Kansas City Life Ins. Co. v. Nipper*, 1935 OK 1127, 51 P.2d 741, 747 (to prevent the running of the limitations period, there must be "some actual artifice to prevent knowledge of the fact; some affirmative act of concealment or some misrepresentation to exclude suspicion and prevent inquiry").

The application of the doctrine of fraudulent concealment to the limitation period for the Department's unjust enrichment claim must be focused on the actions of Marsha Schubert in the underlying fraud. *See Warfield v. Carnie*, 2007 WL 1112591 (N.D. Tex. Apr. 13, 2007). In *Warfield*, a receiver was appointed by the court, at the request of the

United States Securities and Exchange Commission, in connection with a fraudulent “Ponzi” scheme. The receiver sued parties who received false profits, that is, amounts exceeding their principal investments (hereinafter, “relief defendants”). The receiver argued that the statute of limitations was tolled until such time that he was able to determine whether the “net effect” of the transfers between the receivership entities and the relief defendants was detrimental to any participant. The relief defendants argued against the fraudulent concealment theory based on their lack of actual or subjective knowledge of the underlying fraud. However, the *Warfield* court elected not to focus on the actions or knowledge of the relief defendant in applying the fraudulent concealment doctrine. Instead, the court directed its attention to the actions of the defendant wrongdoers in the underlying lawsuit on the fraudulent investment scheme. The *Warfield* court ruled that the limitations period commenced upon the receiver’s discovery, after an extensive investigation, of the fraudulent nature of the underlying transactions and the resulting damages. *Id.*

The facts in this case demonstrate that Marsha Schubert disguised her fraudulent activities in order to lull her investors into a false sense of security, thereby, encouraging future investments that would keep her fraudulent scheme afloat. Marsha Schubert made false representations and created bogus account records reflecting extraordinary investment returns. She also made numerous distributions to the participants in her investment scheme that she purported as being investment profits. As a result of her deceptive practices, there was no way for the Department to discover the facts necessary to determine the existence of Marsha Schubert’s fraud until her “Ponzi” scheme reached its conclusion in October of 2004. *See State v. Argo*, 915 P.2d 1103, 1110-1112 (Wash.

App. Div. 1, 1996). The subsequent analysis of bank records allowed the Department to uncover the “Ponzi” scheme and to identify the individuals who did and did not receive funds in amounts that exceeded their principal investments in the Schubert scheme.

Furthermore, Defendants’ argument that there is a separate limitations period for each payment received by the Defendants is baseless. The case of *Adams v. Moriarty*, 2005 OK CIV APP 105, 127 P.3d 621, relates to the deposit of one investor’s money in the general operating account used in a “Ponzi” scheme – an account in which the funds of numerous other investors were deposited and commingled. The *Adams* court, citing to the analysis in the case of *In re M & L Business Mach. Co., Inc.*, 59 F.3d 1078 (10th Cir. 1995), said: “[I]n a Ponzi scheme, or other scenario where creditors are almost exclusively defrauded parties, there is no distinguishing characteristic [of the fraudulently obtained assets] which promotes the interests of one [defrauded party] over the other.” 127 P.3d at 625. The court in *Adams* incorporated the rationale of the United States Supreme Court in the original “Ponzi” scheme case, *Cunningham v. Brown*, 265 U.S. 1 (1924), by stating: “[o]nce the party fraudulently collecting funds has commingled the funds of various investors in a single account, those assets lose their character as the peculiar assets of their investor.” 127 P.3d at 624.

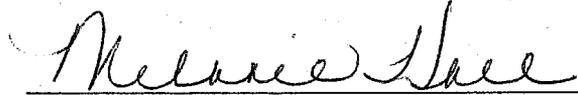
Marsha Schubert’s continuing course of conduct with respect to each participant and the commingling of funds, as well as the very nature of an unjust enrichment claim, require the “Ponzi” scheme to be considered in its entirety. Therefore, the first and last transaction and every transaction in between must be analyzed to determine the “net” loss or “net” benefit to all involved. Such a determination could not be made until the “Ponzi” scheme concluded in October of 2004.

Contrary to the position advocated by Defendants, the limitations period in this case expired no earlier than October 1, 2007. Plaintiff's unjust enrichment claim against Defendants Pollard is not time-barred.

### CONCLUSION

Based on the Court's recent ruling on the Department's motion for partial summary judgment and the arguments and authorities set forth herein, the pending summary judgment motion filed by Defendants Pollard should be denied.

Respectfully submitted,



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Gerri Stuckey, OBA #16732  
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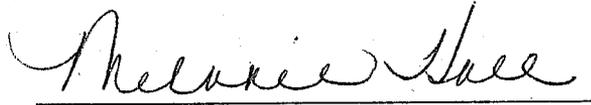
CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of October, 2007, I mailed a true and correct copy of the above and foregoing instrument, postage pre-paid to:

Ronald D. Fulkerson  
Shawn D. Fulkerson  
Carolie E. Rozell  
Fulkerson & Fulkerson,  
P.C.  
10444 Greenbriar Place  
Oklahoma City, OK 73159

Judy Hamilton Morse  
Regan Strickland Beatty  
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20 N. Broadway, Ste. 1800  
Oklahoma City, OK 73102

Russell Mulinex  
Mulinex Ogden Hall  
Andrews & Ludlum  
210 Park Avenue  
Oklahoma City, OK 73102

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IN THE DISTRICT COURT OF OKLAHOMA COUNTY FILED IN THE DISTRICT COURT  
STATE OF OKLAHOMA OKLAHOMA COUNTY, OKLA.

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

OCT - 8 2007

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

vs. )

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

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

vs. )

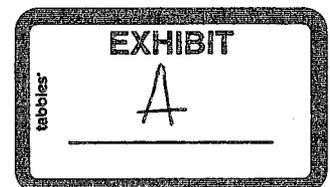
AXA ADVISORS LLC, a Delaware )  
Limited Liability Company; and AXA )  
EQUITABLE LIFE INSURANCE )  
COMPANY, f/k a EQUITABLE LIFE )  
ASSURANCE SOCIETY OF THE )  
UNITED STATES. )  
Third Party Defendants. )

DEFENDANT POLLARDS' SUR-REPLY  
TO THE PLAINTIFF'S REPLY  
TO THE DEFENDANTS' RESPONSE  
TO THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COME NOW the Defendants Barry and Roxanne Pollard by and through their attorneys of record, Richard Parrish and Carolie Rozell of Fulkerson & Fulkerson, P.C., for their Sur-Reply to the Oklahoma Department of Securities' Reply to the Pollards' Response to the Department's Motion for Summary Judgment, and in further support thereof, state:

ARGUMENTS AND AUTHORITIES

The Department's Reply raised new issues asking this Court for the following alternative relief: 1) to determine the existence of the "Ponzi" Scheme, 2) the dates of such scheme, and



3) that the Defendants were unjustly enriched by the scheme. The Pollards will first address the Department's claim for unjust enrichment.

### ARGUMENT I – UNJUST ENRICHMENT

#### A. Unjust Enrichment does not exist until there is a determination of enrichment.

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 term “unjust enrichment” describes a condition resulting from the failure of a party to make restitution in circumstances where it is inequitable.” *Id.*, 929 P.2d 288.

The Department has not cited to any cases where a Ponzi scheme existed and the theory of recovery was that of unjust enrichment. As a matter of fact, *Stenger v. World Harvest Church, Inc.*, 2006 WL 870310, (N.D.Ga.), involved a Ponzi Scheme wherein the court found that recovery under the theory of unjust enrichment was not the proper vehicle. Rather, fraudulent conveyance was the proper avenue for recovery from a person who innocently received monies from the operator of a Ponzi scheme. *Id.* The *Stenger* court citing *Stoker v. Bellemeade, LLC*, 272 Ga.App. 817, 15 S.E. 2d 1 (Ga.Ct.App.2005), stated that it would have difficulty finding that the retention of monies by the innocent investor was unjust.

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.” Beginning in 1994, the Pollards began investing through Marsha Schubert as an agent, representative and employee of AXA Advisors, LLC and AXA Equitable Life Insurance Company, hereinafter “AXA Equitable”. (Ex. 1 Pollard

Affidavit.) All insurance and investment activities the Pollards engaged in during the relevant time periods were in her capacity as an agent or representative of AXA Equitable. (Ex. 1 Pollard Affidavit.) It was later discovered that throughout the eleven year period during which the Pollards established this relationship with Schubert as an agent, representative and employee of AXA Equitable, she mismanaged and misrepresented the value of the Pollards' life insurance policies and investments. Additionally, the Pollards were alleged to have been recipients of Ponzi scheme monies. Barry Pollard filed a lawsuit in Logan County against Schubert d b a Schubert and Associates on March 4, 2005 for the resulting damages. (Ex. 2 Pollards' Petition.) On June 14, 2005, 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. (Ex. 3 Default Judgment.) Notice of the Default Judgment and the scheduled hearing on damages was mailed to the Receiver of Marsha Schubert's assets Douglas Jackson, who was appointed, at the request of the Department, by Judge Worthington in the Logan County Court. (Ex. 9 Department's Petition; Ex. 4 Certificate of Service.) On July 14, 2005, a hearing on damages was held before the Honorable Donald L. Worthington, District Judge for Logan County. The Honorable Worthington entered a Journal Entry of Judgment awarding damages in the amount of \$827,000.00 to Barry Pollard. (Ex. 5 Journal Entry of Judgment.) The Journal Entry of Judgment was mailed to the Receiver immediately after its entry. (Ex. 4 Certificate of Service.)

On November 15, 2004, the Department obtained an Order from Judge Worthington in Logan County appointing Douglas Jackson as the Receiver over Marsha Schubert's assets. (Ex. 6 Order of November 15, 2004.) Even though the Receiver was charged with this responsibility by the Court, the Department on May 11, 2005 filed this lawsuit in Oklahoma County against the

Pollards seeking disgorgement for monies that the Department alleges the Pollards received out of the same transactions for which the Pollards obtained their judgment against Schubert. (Ex. 9 Department's Petition.) On June 17, 2005, after Pollard obtained his judgment against Schubert, the Department served the Summons and Petition on David Trojan, local counsel for the Pollards. Prior to the entry of the Journal Entry of Judgment the Receiver of Schubert's assets had knowledge of Pollard's judgment as reflected by the Affidavit of Mailing of the Journal Entry of Judgment to the Receiver. (Ex. 7 Affidavit of Mailing.) To date, neither the Receiver nor the Department has objected to the Judgment and the time to do so has long expired. 12 O.S. §1038.

The Department's claim for unjust enrichment simply cannot compete with the Logan Court's Judgment for \$827,000.00 in the Pollards' favor. There cannot be an injustice if there is no enrichment. Unless this Court finds there is at least one dollar of enrichment to the Pollards, there cannot be a valid claim for unjust enrichment against the Pollards as it has already been determined by the Logan County Court that Pollard was damaged, not enriched. (Ex. 5 Journal Entry of Judgment.) In none of the cases relied upon by the Department in support of its claim for disgorgement did there exist a long term legitimate investment relationship between the investor and the investment advisor. In all instances, the relationship between the investor and the operator of the Ponzi scheme began at the time that the illegal operations began, i.e. there was no previous investment history or business relationship between the parties until the Ponzi scheme. *In Re: Financial Federated Title & Trust, Inc.*, 309 F.3d 1325 (11<sup>th</sup> Cir.); *In Re: McCarn's Allstate Finance*, 326 B.R. 843, 848 (Bkrcy.M.D Fla.,2005); *In Re: M&L Business Machine Co., Inc.*, 59 F.3d 1073 (10<sup>th</sup> Cir. 1995); *Adams v. Moriarty*, 127 P.3d 621, 2005 OK Civ. App 195; *Cunningham v. Brown*, 265 US 1, 44 S.Ct 424. Furthermore, in these cases a

long term relationship between the innocent recipient of funds and the operator of the Ponzi scheme, comparable to the eleven year relationship established between the Pollards and Schubert as an agent, representative and employee of AXA Equitable, did not exist; rather the scheme lasted merely for a few years. *Id.* Although the circumstances out of which the Department has brought this lawsuit may be similar to those circumstances in the cases relied upon by the Department, the facts of this case against the Pollards is vastly different than those cases supporting the Department's Reply and claim for unjust enrichment.

B. The Department is barred by the doctrine of res judicata from claiming that the Pollard judgment is inapplicable to its claims for disgorgement.

As set out above, 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. (Ex. 5 Journal Entry of Judgment.) Notice of Pollard's Judgment was filed of record with the Logan County Court Clerk as well as the County Clerk. Additionally, Notice of the Judgment was sent to the Receiver of Schubert's assets on July 18, 2005. (Ex. 7 Notice of Mailing.)

In other words, the Department has known of Pollard's Judgment for over two years. As a matter of fact, on September 11, 2007, the Department filed a Motion for Indirect Contempt Citation against Barry Pollard with the Logan County Court as a result of the Judgment's cloud on title to real property in the Schubert Receivership estate. Despite the Pollard's request that the Department seek to resolve the matter in another, more appropriate manner, the Department's Motion for Contempt is being pursued.

The doctrine of Res Judicata is designed to conclude a matter properly before the Court once and for all. *Dearing v. State ex rel. Com'rs of Land Office*, 808 P.2d 661 & 664, 1991 OK 6. By

design. Res Judicata is intended to prevent ongoing litigation of a new action upon the same cause of action against the same parties. *Dearing*, 808 P.2d 664. Additionally, when two actions are pending at the same time in separate counties that involve the same issues between the same parties or their privies, and a final judgment is rendered in one of the actions, it becomes res judicata or a bar to the other pending action regardless of when the lawsuits were filed. *Mico v. Huser*, 91 P.2d 1069, 1938 OK 655.

The Court may consider various elements such as subject matter, parties, capacity of the parties, the cause of action, jurisdiction, and judgment on the merits in determining whether a plea for res judicata is proper. *Dearing*, 808 P.2d 664 & 665. There is no doubt that the subject matter out of which Pollard obtained a judgment against Schubert for damages is the exact same circumstances 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 eleven year investment relationship between the Pollards and Schubert as an agent, representative and employee of AXA Equitable. Further, it was the Department who sought the Logan County Court's appointment of the Receiver Douglas Jackson over Schubert's assets to stand in the shoes of Schubert. (Ex. 8 Fought Depo. P. 73, ll. 17-23.)

The judgment obtained by Barry Pollard from the Logan County Court, the Court in which the Department initiated its proceedings against Schubert, is a valid claim against Schubert's estate. 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 upon a default," 66 Am Jur 2d §342.

As Irving Fought testified at his deposition, the funds that the Department seeks to disgorge from the Pollards will be placed with the Receiver of Schubert's assets. (Ex. 8 Fought Depo. P. 73, ll. 17-23.) The Receiver was appointed to recover assets belonging to Schubert's estate (Ex. 8 Fought Deposition P. 70, ll. 23-25; P. 71, ll. 1-25.) Irving Fought testified that the Department was "trying to recover any assets they can that would go into the Schubert estate for the benefit of the people that were wronged by Marsha's action." (Ex. 8 Fought Deposition P. 73, ll. 7-16.) Once again, however, Pollard already has a recognized judgment against Schubert for the wrong of Schubert actions in her dealings with the Pollards

The court in *Consolidated Cut Stone Co. v. Seidenbach*, 114 P.2d 480, 1941 OK 173, 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." This 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 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 \$827,000.00 Judgment entered by Judge Worthington. In doing so it is impossible to demonstrate that the Pollards have been enriched.

C. The Department's claim is barred by the doctrine of Collateral Estoppel.

Under the doctrine of Collateral Estoppel, a judgment is conclusive as to issues raised in a prior action, to which judgment was rendered, and is to be upheld in subsequent actions involving the same parties, the same issues as those in the prior action, but involving different

claims. *Laws v. Fisher*, 513 P.2d 376, 1973 OK 69. As the Department maintains that it is vested with the authority to have the Receiver appointed over the assets of Schubert's estate as well as having the authority to disgorge assets of people it claims were unjustly enriched, the Department is the "arm" allegedly acting for the benefit of the short investors. It is the party who filed the lawsuit in Logan County requesting the appointment of the Receiver as well as being the party who has sued the Pollards for disgorgement of assets that it will place into the Schubert Receivership estate. Both cases arise out of the same facts and circumstances, that being Pollard's dealings with Marsha Schubert. (Ex. 2 Department's Petition CJ-2005-3799 and Ex. 9 Pollards' Petition CJ-2005-71.)

*Bras v. First Bank & Trust Co. of Sand Springs*, 735 P.2d 329 & 332, 1985 OK 60, states that for collateral estoppel to apply, there must be a determination of party identity and subject matter in each relevant case. The inquiry is whether a particular issue in the present case was actually determined in the prior case. *Bras*, 735 P.2d 332. Although there is an argument that the causes of action differ between those brought by the Department versus those brought by Pollard, there was a determination of issue by the Logan County Court – Pollard was damaged in the amount of \$827,000.00 by the actions of Schubert. This determination is conclusive and cannot be ignored as it bars any disgorgement action by the Department. Further, the Department is estopped from challenging the validity of Pollard's judgment. 12 O.S. §1038

Consistent with the principles of the doctrine of collateral estoppel, although the causes of action differ, the Department is estopped by Pollard's judgment from pursuing its claims for disgorgement based on unjust enrichment. In summary, the parties to both cases are the same. The Department on its own prerogative, as well as through the Receiver, has stepped into the shoes of Schubert to collect assets of the estate. The issues are the same, the Pollards award of

damages has been a determined issue and it is fully enforceable against any claims by the Department. Since the Department seeks to enforce the findings of the Ponzi scheme from a case in which the Pollards were not a party, it is only fair and just that this Court enforce the Pollards' Judgment against the Department.

D. Pollards' right to setoff.

The Department's Reply simply neglects to address the Pollards' claims to setoff. Due to the Department's failure to respond, the Department has conceded the Pollards' claims for setoff. *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. As a general principle, it is absurd to make party B pay party A when party A owes party B. As this Court can logically conclude, the Pollards are entitled to the following setoffs against the amount the Department seeks to disgorge from them.

1. Credit for monies paid directly to Marsha Schubert.

To properly offset the monies that the Pollards paid directly to Marsha Schubert, the Department must consider all payments made directly to her over the entire eleven year investment relationship. The Pollards' financial records reflect \$125,000.00 paid directly to Schubert in 1997 and 1998. (Ex. 10 Checks to Schubert.) The Department has only given Pollard credit for payments to Schubert of \$59,110.35 from 2000-2004. Clearly Pollard is entitled to the correct offset of \$184,110.35 and there can be no dispute concerning this fact.

2. \$827,000.00 Judgment.

Although it has been set forth above, a valid judgment exists in favor of the Pollards against Schubert's estate which is administered by the Department through the Receiver. In fact, the same Court that is administering the receivership granted Pollard judgment against Schubert

Credit must be given where credit is due. The Department wants to pick and choose what monies it seeks to recover from Pollard and simply ignore that Pollards, when given proper offset, will suffer a substantial net loss. Unlike Pollard's Judgment, in all of the cases relied upon by the Department none of the innocent investors had a judgment against the assets receivership assets, those of the wrongdoer. The case of *Scholes v. Lehmann*, 56 F.3d 750, involved the ex-wife of the operator of the Ponzi scheme. The ex-wife had a valid claim against the assets of the wrongdoer for child support. The court found that offset of the Ponzi monies she received against the legitimate debt owed by her ex-husband was proper. *Scholes*, 56 F.3d 759. Similarly, the Pollard's judgment is a valid claim against Schubert's assets and is to be setoff. There can be no just reason to deny Pollard his offset especially when it extinguishes any claim made by the Department for disgorgement.

3. Assignment from L & S Pollard Farms, LLC to Barry Pollard.

The Oklahoma Department of Securities *ex rel.* Irving L. Fought, Administrator vs. Marsha Schubert et al., Case No. CJ-2004-256, was filed in Logan County, Oklahoma in October of 2004. As stated above, the Department procured the Court's appointment of a Receiver over the assets Marsha Schubert's estate. The Receiver is given the authority to receive claims filed against Schubert's estate. One of those claimants is L&S Pollard Farms, LLC which is a creditor of Marsha Schubert in the amount of \$243,464.00. (Ex. 11 Proof of Claim.) The Department recognizes the validity of L&S Pollard Farms' claim against Schubert's estate and thusly considers L&S Pollard Farms to be classified as a "short" investor.

Based on the validity of L&S Pollard Farms' claim, Barry Pollard and Loren Pollard, on behalf of L&S Pollard Farms, entered into an agreement whereby all right, title and interest in and to any and all claims L&S Pollard Farms has against Schubert's estate was conveyed to

Barry Pollard in exchange for valuable consideration. (Ex. 12 Assignment of Claims.) Loren Pollard executed an Assignment of Claims on behalf of L&S Pollard Farms on October 25, 2006 to Barry Pollard.

The assignment of this claim to the Pollard's is valid and should also be recognized as a setoff against the amount that the Department seeks to recover from the Pollards. The Assignment in effect reduces the amount that the Department seeks to recover for the net losers on the "short" side of the equation. By the Assignment, L&S Pollard Farms has been compensated for its claims against the Schubert estate and no longer has an interest in the monies recovered on its behalf. The Department has no choice but to recognize the validity of this Assignment and give credit where credit is rightfully due. To ignore this credit would be unjust and enrich the receivership.

## ARGUMENT II – THE EXISTANCE OF THE PONZI SCHEME AND DURATION OF THE PONZI SCHEME

### A. The Ponzi Scheme as determined by the Logan County Court.

The courts have previously found that a Ponzi scheme is said to have existed if the operator of the Ponzi scheme enters a plea of guilty to such conduct. *Strenger*, 2006 WL 870310, \*14; *In Re: McCann's*, 326 B.R. 851. Furthermore, a party is collaterally estopped from relitigating the existence of a Ponzi scheme. *In Re: Rodriguez*, 209 B.R. 424, (Bkrcty.S.D.Tex., 1997). 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 of the relationship from 2000-2004.

ARGUMENT III – CLAIMS OF THE DEPARTMENT ARE BARRED BY  
STATUTES OF LIMITATIONS

Department has brought this action for the specific recovery of "Investor Assets" received by the Pollards. Department has alleged that the Pollards received "cash and other property and/or control property that are the proceeds of the unlawful activities of Marsha Schubert and/or Schubert and Associates (collectively, Investor Assets)." (Ex. 9 Department's Petition, paragraph 4 at page 2.) The Department has requested the Court require the Pollards to "disgorge any and all Investor Assets received or held by" the Pollards. (Ex. 9 Department's Petition, Prayer for Relief, page 5, paragraph 1.) The Pollards have not been accused of any wrongdoing. The "Investor Assets" the Department seeks to recover is money in the amount of \$386,158.00. See Department's Motion for Summary Judgment, Conclusion at page 8.

There can be no question that money is classified and defined as personal property in Oklahoma. In 1910 the Oklahoma Legislature enacted 60 O.S. Section 9 that states "Every kind of property that is not real is personal." The same year the Oklahoma Legislature in Title 25 entitled Definitions enacted 25 O.S. Section 26 that states in relevant part "The following words also have the signification attached to them in this section, unless otherwise apparent from the context: . . . 3. The words "personal property" include *money*, goods, chattels, things in action and evidences of debt. . . ." (Emphasis added). There is no question that the "Investor Assets" the Department seeks to recover are personal property.

The statute of limitation for the recovery personal property i.e., "Investor Assets," is two years. The relevant paragraph of 12 O.S. Section 95 provides as follows:

A. Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

3. Within two (2) years: An action for trespass upon real property; *an action for taking, detaining, or injuring personal property, including actions for the*

*specific recovery of personal property*; an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud - the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud: ..... (Emphasis added)

Department's Petition specifically prays for a judgment requiring the Pollard's to "disgorge any and all "Investor Assets" they have received or are holding". It cannot be disputed that the "Investor Assets" sought by the Department are personal property. The Department has accused the Pollards of receiving, i.e., "taking", the "Investor Assets", and of continuing to hold, i.e., "detaining", the "Investor Assets." (Ex. 9 Department's Petition filed herein, pages 2, 3 and 4, paragraphs 4, 10, 13, and 14, and Prayer for Relief at page 5, paragraph I.) The Department seeks the specific recovery (disgorgement) of these "Investor Assets." (Ex. 9, Department's Petition filed herein, Prayer for Relief at page 5, paragraph I.)

A statute of limitations begins to run when a cause of action accrues and this occurs at the time that a Department can first maintain an action. See *Big Four Foundry Co. v. Hagens*, 1946 OK 201, 172 P.2d 322. The statute of limitations began to run in this case when the cause of action for the recovery of "Investor Assets" first accrued. The cause of action accrued when the investors could have first maintained an action for the recovery of their money allegedly paid to the Pollards, i.e., when they could have rightfully sued the Pollards for the recovery of their money. Assuming that the Pollards received "Investor Assets" this occurred at the time "Investor Assets" were received by the Pollards. A separate new cause of action would have arisen each time the Pollard's received "Investors Assets." See *Harris v. Heron*, 1944 OK 219, 149 P.2d 94.

An action to recover "Investor Assets" would be required to be brought within two years after each time "Investor Assets" were received by the Pollards. For this reason the Department

can only recover "Investor Assets" purportedly received by the Pollards during the two years prior to the filing of its Petition in this case, i.e., two years prior to May 11, 2005. The two year statute of limitation for the recovery of "Investor Assets" has run for all "Investor Assets" received more than two years before the filing date of the Petition herein. The Department is barred from recovering any "Investor Assets" received by the Pollards prior to May 11, 2003.

For the first time in its Reply to Defendant's Response to Motion for Summary Judgment Department specifically identifies the specific date of the payments it seeks to recover. See Department's Reply to Defendant's Response to Motion for Summary Judgment, Ex. A, Attachment One to Clarke's Affidavit. Previously, other than in generalized conclusory statements, the Department had relied upon papers and compilations purportedly prepared by an accounting firm unsupported by affidavit testimony or proper authentication. In Clarke's affidavit attached to the Department's Motion for Summary Judgment (See Department's Motion for Summary Judgment Ex. D) Clarke identified \$445,268.06 that had been paid from the commingled assets. Clarke in his new affidavit attached to Department's Reply to Response to Motion for Summary Judgment itemizes amounts only totaling \$367,916.81 that has been paid to the Pollards which came from short investors and from the Pollard's themselves. This is a reduction of \$77,351.25. Based upon a review of the attachment to Clarke's new affidavit over 60% of the amounts identified by Clarke as having been received by the Pollards were received by the Pollards prior to May 11, 2003. Based upon the Department's own witnesses and documents the Departments claims are barred by the two year statute of limitations.

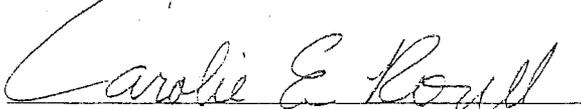
#### ARGUMENT IV - THE DEPARTMENT LACKS THE AUTHORITY TO DISGORGE THE POLLARDS OF THEIR MONIES.

Oklahoma law is extremely limited in addressing disgorgement of monies from innocent

individuals who allegedly received such monies through a Ponzi scheme. The Department has relied upon bankruptcy law as well as case law from other states and non-Tenth Circuit case law. In most cases involving the recovery of monies obtained through Ponzi schemes by innocent individuals, the pursuit of recovery was through the bankruptcy trustee in the bankruptcy proceedings. *In Re: McCann's Allstate Finance*, 326 B.R. 843, 848 (Bankrcty.M.D.Fla.,2005); *In Re: Financial Federated Title & Trust, Inc.*, 309 F.3d 1325 (11<sup>th</sup> Cir.).

The Department attached to their Reply the unpublished Opinion of the Oklahoma Court of Appeals as Exhibit C. Justice Buettner dissented essentially stating that the Department lacked the authority pursuant to the Securities Act to seek disgorgement of innocent investors. The court in *Braniff v. Coffield*, 190 P.2d 815, 1947 OK 369, held that the courts did not have the authority to broaden the powers given to administrative bodies beyond that set forth in the applicable statute. Where a statute specifically establishes the extent of authority to certain classes of people, common law principles may not be invoked to extend the statute to other classes of people to whom the statute does not reach.

Respectfully Submitted.



RICHARD E. PARRISH, OBA #6815  
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CAROLIE E. ROZELL, OBA #19679  
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ATTORNEYS FOR DEFENDANTS  
AND THIRD PARTY PLAINTIFFS  
BARRY AND ROXANNE POLLARD

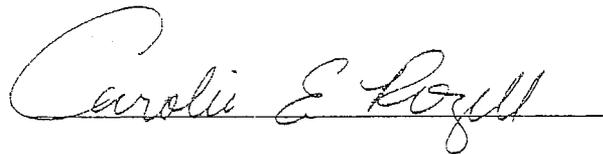
CERTIFICATE OF MAILING

I hereby certify that on this 8<sup>th</sup> day of October, 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:

Amanda Cornmesser  
Gerri Stuckey  
Melanie Hall  
First National Center, Suite 860  
120 N. Robinson  
Oklahoma City, OK 73102  
Tele.: 405-230-7700

Judy Hamilton Morse  
Regan Strickland Beatty,  
of the Firm  
Crowe & Dunlevy,  
Professional Corporation  
North Broadway, Suite 1800  
Oklahoma City, Oklahoma 73102

Attorneys for AXA Advisors, LLC and  
AXA Equitable Life Insurance Company



IN THE DISTRICT COURT OF LOGAN COUNTY  
STATE OF OKLAHOMA

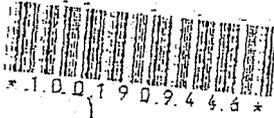
BARRY L. POLLARD,

Plaintiff,

vs.

MARSHA SCHUBERT d/b/a  
SCHUBERT & ASSOCIATES,  
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

Defendants.



Est

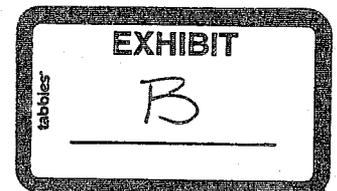
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Case No. CJ-2005-71

DEFAULT JUDGMENT

On the 10<sup>th</sup> day of June, 2005, the captioned matter came before this Court on the Plaintiff's Motion for Default Judgment. The Court, having reviewed the petition, summons, return of service and court file, finds that Defendant, MARSHA SCHUBERT, d/b/a/ SCHUBERT & ASSOCIATES, was served with the summons and petition on March 28, 2005; Defendant has failed to answer, appear or otherwise defend in this action within 20 days as required by law; and accordingly, Defendant, MARSHA SCHUBERT, d/b/a/ SCHUBERT & ASSOCIATES, is in default.

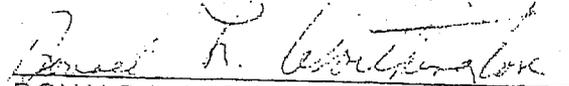
Defendant MARSHA SCHUBERT, d/b/a/ SCHUBERT & ASSOCIATES, is in default and has thus admitted the substantial allegations of the petition. The Court, being fully advised in the premises, and on consideration thereof, finds that the allegations of Plaintiff's Petition are deemed true as therein set forth, that the Defendant is liable for all



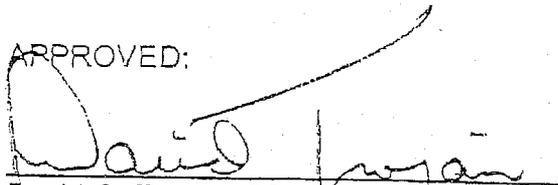
the damages sustained by the Plaintiff and that this court shall hear evidence as to the amount damages due to the Plaintiff in a separate hearing as hereinafter set forth.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff, BARRY L. POLLARD, shall have and recover a judgment of and from Defendant, MARSHA SCHUBERT d/b/a/ SCHUBERT & ASSOCIATES for liability for all damages suffered by the Plaintiff as set out in his petition. This court will determine the amount of all Plaintiff's damages at a hearing set for the 8<sup>th</sup> day of July, 2005 at 3:00 p.m.

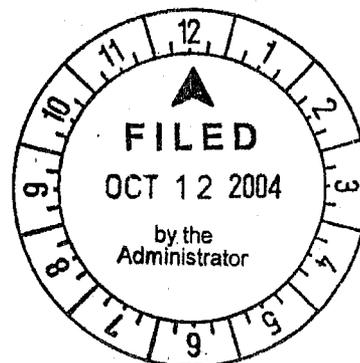
IT IS SO ORDERED.

  
DONALD L. WORTHINGTON  
JUDGE OF THE DISTRICT COURT

APPROVED:

  
David G. Trojan, OBA #9095  
Field, Trojan, Long & Sedbrook, P.C.  
P.O. Box 5676  
Enid, OK 73702-5676  
(580) 233-4625  
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Attorney for Plaintiff

STATE OF OKLAHOMA  
DEPARTMENT OF SECURITIES  
THE FIRST NATIONAL CENTER, SUITE 860  
120 NORTH ROBINSON  
OKLAHOMA CITY, OKLAHOMA 73102



In the Matter of:

Schubert and Associates,  
Richard L. Schubert *dba* Schubert and Associates,  
Richard Schubert, an individual,  
and Marsha Schubert, an individual,

Respondents.

ODS File No. 05-031

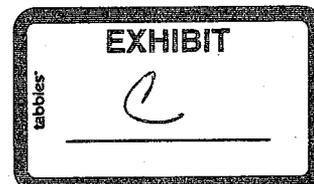
**ORDER INITIATING INVESTIGATION**

It has come to the attention of the Administrator of the Oklahoma Department of Securities (Department) that the referenced Respondents may have violated certain sections of the Oklahoma Securities Act (Act), Okla. Stat. tit. 71, §§ 1-413, 501, 701-703 (2001 and Supp. 2003), the Oklahoma Uniform Securities Act of 2004 (2004 Act), Okla. Stat. tit. 71, §§ 1-101 through 1-701 (Supp. 2003), and/or the Rules of the Oklahoma Securities Commission and the Administrator of the Department of Securities (Rules).

Section 1-602 of the Act provides in part:

A. The Administrator may:

1. Conduct public or private investigations within or outside of this state which the Administrator considers necessary or appropriate to determine whether a person has violated, is violating, or is about to violate this act or a rule adopted or order issued under this act, or to aid in the enforcement of this act or in the adoption of rules and forms under this act;
2. Require or permit a person to testify, file a statement, or produce a record, under oath or otherwise as the Administrator determines, as to all the facts and circumstances concerning a matter to be investigated or about which an action or proceeding is to be instituted; and
3. Publish a record concerning an action, proceeding, or an investigation under, or a violation of, this act or a rule adopted or order issued under this act if the Administrator determines it is necessary or appropriate in the public interest and for the protection of investors.



- B. For the purpose of an investigation or proceeding under this act, the Administrator or its designated officer may administer oaths and affirmations, subpoena witnesses, seek compulsion of attendance, take evidence, require the filing of statements, and require the production of any records that the Administrator considers relevant or material to the investigation or proceeding[.]

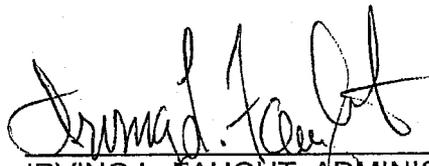
Based upon the information received and in light of the provisions of the Act and the 2004 Act, the Administrator has determined it to be in the public interest to conduct an investigation into the activities of the referenced Respondents.

IT IS THEREFORE ORDERED that an investigation be commenced by the Department into the activities of the referenced Respondents or associated or affiliated entities or individuals, to determine whether such persons have violated or are continuing to violate any provision of the Act, the 2004 Act, or the Rules.

If the Administrator determines that violations of the Act, the 2004 Act, and/or the Rules have occurred, the Administrator may pursue any of the courses of action set forth in the Act or the 2004 Act or as otherwise authorized by law. If, however, the facts indicate that no corrective action by the Administrator is warranted, the investigation will be closed.

Witness my Hand and the Official Seal of the Oklahoma Department of Securities this 12th day of October, 2004.

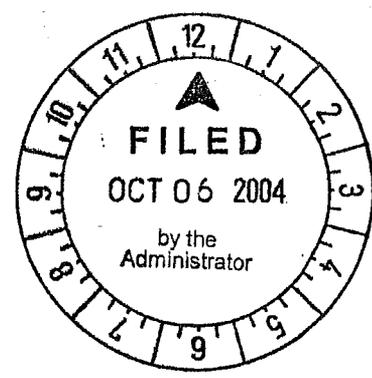
(SEAL)



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IRVING L. FAUGHT, ADMINISTRATOR OF THE  
OKLAHOMA DEPARTMENT OF SECURITIES

STATE OF OKLAHOMA  
DEPARTMENT OF SECURITIES  
FIRST NATIONAL CENTER, SUITE 860  
120 NORTH ROBINSON  
OKLAHOMA CITY, OKLAHOMA 73102



SUBPOENA DUCES TECUM

**TO: Custodian of the Records for  
Farmers and Merchants Bank**

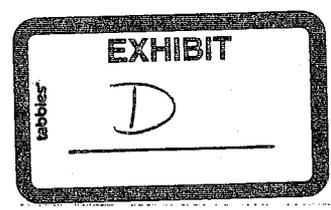
**ODS File No. 05-031**

**IN THE NAME OF THE STATE OF OKLAHOMA**, and pursuant to Section 1.602(A)(2) of the Oklahoma Uniform Securities Act of 2004, Okla. Stat. tit. 71, §§ 1.101 through 1.701 (Supp. 2003), **YOU ARE COMMANDED TO PRODUCE** all documents, records, and materials described in Appendix "A", attached hereto and incorporated by reference, before the Administrator of the Oklahoma Department of Securities, or his designated representative, at 120 North Robinson, First National Center, Suite 860, Oklahoma City, County of Oklahoma, State of Oklahoma, on the **22nd day of October, 2004, at 5:00 p.m.**

Witness my Hand and the Official Seal of the Oklahoma Department of Securities this 6th day of October, 2004.

(SEAL)

  
\_\_\_\_\_  
Irving L. Faught, Administrator  
Oklahoma Department of Securities  
First National Center, Suite 860  
120 North Robinson  
Oklahoma City, Oklahoma 73102  
(405) 280-7700



**STATE OF OKLAHOMA  
DEPARTMENT OF SECURITIES  
FIRST NATIONAL CENTER, SUITE 860  
120 NORTH ROBINSON  
OKLAHOMA CITY, OKLAHOMA 73102**

**Definitions**

1. As used herein, the terms "you" or "your" refer to Schubert and Associates, all entities in which Schubert and Associates has or has had a controlling interest; all predecessors, successors, subsidiaries, and affiliates of Schubert and Associates; and all present and former officers, employees, agents, representatives, and attorneys of Schubert and Associates, or any other person acting or purporting to act on its behalf.

2. As used herein, the term "Department" shall refer to the Oklahoma Department of Securities.

3. As used herein, the term "Investor" shall refer to any person who has subscribed to become a general or limited partner of Schubert and Associates or purchased a security or other investment opportunity issued by Schubert and Associates.

4. As used herein, the term "person" shall refer to any natural person, firm, association, partnership, corporation or other form of business entity, or any legal or governmental entity or political subdivision thereof or association.

5. As used herein, the terms "identification," "identify," or "identity," when used in reference to (a) a natural individual, require you to state his or her full name and residential and business addresses and telephone numbers; (b) a firm, association, partnership, limited liability company, corporation or other form of business entity, require you to state its full name and any names under which it does business, its state of organization, the address of its principal place of business, and the addresses of all of its offices; (c) a business, require you to state the full name or style under which the business is conducted, its business address or addresses, the types of businesses in which it is engaged, the geographic areas in which it conducts those businesses, and the identity of the person or persons who own, operate, control the business; (d) a communication, requires you, if any part of the communication was written, to identify the document(s) which refer to or evidence the communication, and, to the extent that the communication was non-written, to identify the persons participating in the communication and to state the date, manner, place, and substance of the communication.

6. As used herein, the term "document" or "writing" means any medium upon which intelligence or information can be recorded or retrieved, and includes, without limitation; any invoice, bill, order form, receipt, financial statement, account statement, accounting entry, diary, written material, book, file, note, pamphlet, periodical, letter, memorandum (including any memorandum or report of a meeting), calendar, telex, telegram, cable, report, record, contract, agreement, study, handwritten note, working paper, chart, print, laboratory record, drawing,

sketch, graph, index, list, tape, photograph, microfilm, data sheet or data processing card, or any other written, recorded, transcribed, punched, taped, filmed, or graphic matter, however produced or reproduced. "Document" or "writing" shall also mean all computer generated data including, but not limited to, spreadsheets, databases, graphics, charts and presentations, electronic mail messages, electronic facsimiles, scanned material, or all computer generated data stored on removable storage media, including, but not limited to, 3.5" and 5.25" floppy disks, rewritable optical disks, cd-recordable disks, removable hard drives, backup and archive tape cartridges, reels and cassettes, or fixed storage media, including, but not limited to, internal hard drives, external hard drives, and Local Area Network drives.

7. As used herein, the terms "relation," "pertaining to," "relating to," "related to," or "related" mean pertaining in any way to, referring to, reflecting, recording, memorializing, mentioning, constituting, describing, or concerning, directly or indirectly.

8. As used herein, the term "security," means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting-trust certificate; certificate of deposit for a security; contract or option on a contract for the future delivery of any commodity offered or sold to the public and not regulated by the Commodity Futures Trading Commission, provided that such contract or option shall not be subject to the provisions of Section 301 of this title, if sold or purchased on the floor of a bona fide exchange or board of trade and offered and sold to the public by a broker-dealer or agent registered pursuant to this title; investment of money or money's worth including goods furnished and/or services performed in the risk capital of a venture with the expectation of some benefit to the investor where the investor has no direct control over the investment or policy decision of the venture; in general, any interest or instrument commonly known as a "security," or any certificate of interest of participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing; or interest in oil, gas or mineral leases, except that transactions involving leases or interest therein, between parties, each of whom is engaged in the business of exploring for or producing oil and gas or other valuable minerals as an ongoing business, and the execution of oil and gas leases by land, mineral, and royalty owners in favor of a party or parties engaged in the business of exploring for or producing oil and gas or other valuable minerals shall be deemed not to involve a security.

9. The following rules of construction apply to this subpoena:

- (a) the connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the attachment all responses that might otherwise be construed to be outside of its scope; and
- (b) the use of the singular form of any word includes the plural and vice versa.

10. Unless otherwise indicated, this Subpoena applies to all documents in effect, created, recorded, compiled, received, and maintained during the period beginning **January 1, 2001 through the present.**

### Instructions

1. Documents required by the subpoena should be accompanied by a list briefly identifying each document or other material and the item or items of the subpoena to which it relates.

2. Should any document(s), required to be produced by the subpoena, be withheld pursuant to a claim of privilege or for any other reason, you should submit a list stating: (a) the nature of the documents, communications, or information not being produced; (b) the creator(s) and date(s) of creation of the documents, communications, or information; (c) their present, or last known custodian; and (d) the reason(s) the documents are not produced.

3. Should any document(s), required to be produced by the subpoena, have been destroyed, for any reason, provide a detailed statement describing such document(s) and setting forth when, how, and why the document(s) were destroyed. If the destruction occurred as a result of a document retention policy, provide a copy of that document retention policy with the detailed explanation.

4. Place a mark on all documents submitted by you identifying them as having been provided by you.

5. Indicate by separate affidavit whether a diligent search has been made for the subpoenaed documents and whether you have produced all of the documents required by the subpoena.

## Appendix "A"

**You are commanded to produce** for the time period beginning January 1, 2001, to the present, the following documents within your possession, custody or control:

1. Documents identifying each Investor of Schubert and Associates by name, address, and telephone number, and the amount of money each such Investor invested or other consideration or services each such Investor provided.
2. All promotional materials or literature, advertisements, newsletters, reports, solicitation letters, newspaper articles, prospectuses, offering documents, and subscription agreements used by Schubert and Associates to offer securities or other investment opportunities.
3. All reports to and incoming and outgoing correspondence with Investors.
4. All internal memoranda, correspondence or electronic communications relating to the offer and/or sale of securities or other investments issued by Schubert and Associates.
5. All corporate or organizational documents of Schubert and Associates and its subsidiaries including, but not limited to, certificates of incorporation, bylaws, minutes, resolutions, and business plans.
6. Documents identifying all officers, directors, employees, consultants and finders of Schubert and Associates, including their titles, responsibilities, the time periods during which they served, any contracts or agreements relating to their work or services provided, and amounts of commissions or other compensation paid thereto.
7. All monthly financial statements of Schubert and Associates, audited and unaudited.
8. All financial or other operating books and records of Schubert and Associates including, but not limited to, all journals, ledgers, and accounting workpapers.
9. All documents and supporting records for all bank, savings and loan, escrow, and/or brokerage accounts controlled by, held in the name of, or for the benefit of Schubert and Associates, including, but not limited to, all account opening documents, monthly account statements, fronts and backs of canceled checks, deposit slips and supporting deposit items, incoming and outgoing wire transfer documents, electronic transfer records and withdrawal slips.
10. All contracts, agreements, proposals, memorandums of understanding, and correspondence between Schubert and Associates and any other person.
11. Any other documents as may be requested in the future by the Administrator that may be relevant to this inquiry.

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 7<sup>th</sup> day of October, 2004, a true and correct copy of the above and foregoing Subpoena Duces Tecum was mailed by certified mail, return receipt requested, with postage prepaid thereon addressed to:

Schubert and Associates  
c/o Richard L. and Marsha Schubert  
Route 1, Box 35A  
P.O. 314  
Crescent, OK 73028

Brenda London Smith  
Brenda London Smith  
Paralegal

STATE OF OKLAHOMA  
DEPARTMENT OF SECURITIES  
FIRST NATIONAL CENTER, SUITE 860  
120 NORTH ROBINSON  
OKLAHOMA CITY, OKLAHOMA 73102

Re: Schubert and Associates

ODS File No. 05-031

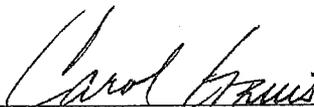
PROOF OF SERVICE OF SUBPOENA DUCES TECUM  
BY PERSONAL DELIVERY

STATE OF OKLAHOMA )  
                                  )     SS.  
COUNTY OF OKLAHOMA )

The undersigned affiant, of lawful age, being first duly sworn upon oath deposes and states:

1. I received this Subpoena Duces Tecum on the 6th day of October, 2004.
2. I served the same by delivering a copy thereof to Farmers and Merchants Bank, at 116 South Grand, Crescent, Oklahoma on this 7th day of October, 2004.

FURTHER AFFIANT SAYETH NOT.

  
\_\_\_\_\_  
Carol Gruis

Subscribed and sworn to before me this 7th day of October, 2004.

  
\_\_\_\_\_  
Notary Public

My Commission Expires: August 26, 2005  
My Commission No.: 01013792  
(NOTARY SEAL)