

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

JAN 29 2008

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

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

Plaintiff, )

v. )

Case No. CJ-2005-3799

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. )

**DEFENDANTS BARRY POLLARD AND ROXANNE POLLARD'S  
REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION  
TO CERTIFY QUESTIONS FOR IMMEDIATE INTERLOCUTORY  
APPEAL AND MOTION TO STAY AND BRIEF IN SUPPORT**

COME NOW Defendants Barry Pollard and Roxanne Pollard ("Pollards"), and respectfully submit the following reply brief in support of their *Motion to Certify Questions for Immediate Interlocutory Appeal and Motion to Stay and Brief in Support* ("Motion for Interlocutory Appeal"). In support of their motion, the Pollards submit the following:

**BRIEF IN SUPPORT**

In its *Response to Defendants' Motion to Certify Questions for Immediate Interlocutory Appeal and Motion to Stay and Brief in Support* ("Response"), the Oklahoma Department of

Securities *ex rel.* Irving L. Faught, Administrator (“Department”) has misconstrued the issues and reasons which support granting the relief sought by the Pollards. As explained in the Pollards’ *Motion for Interlocutory Appeal* and described more fully below, the issue of whether the Department is required to trace the funds received by the Pollards as belonging to other investors before disgorgement may be ordered (“tracing issue”) as well as whether unjust enrichment is the proper theory of recovery and whether the Pollards are entitled to any setoff are issues of first impression. Certification of these issues would result in judicial efficiency because if the Oklahoma Supreme Court determines that the Department is required to trace the funds received by the investor as belonging to other investors before disgorgement may be ordered, it would avoid potential remand and retrial, and would ensure certainty by this Court in applying Oklahoma law regarding Ponzi scheme at the trial in this matter. Further, the determination of these issues affects a substantial part of the merits of this controversy and under 12 Okla. Stat. §952(b)(3), this Court should grant an immediate appeal which may materially advance the ultimate termination of this litigation.

**PROPOSITION I: The “tracing” issue is an issue of first impression for the Oklahoma Supreme Court.**

- a. The Oklahoma Supreme Court has not addressed whether the Department and/or Receiver is required to trace the funds received by an investor under a Ponzi scheme as belonging to another investor before an order to disgorge can be rendered.**

The Oklahoma Supreme Court has never addressed nor resolved the issue of whether the Department should be required to trace funds received by the investor as belonging to another investor before a party can be found to have been unjustly enriched under a Ponzi scheme. Neither the Department nor the Pollards have been able to cite to any published opinion by the Oklahoma Supreme Court addressing the tracing issue. Under 12 Okla. Stat. §952(b)(3), in the

interest of judicial economy, this Court should grant the Pollards' *Motion for Interlocutory Appeal* and certify these issues for resolution by the Oklahoma Supreme Court.

In its *Response*, the Department incorrectly interprets the holding of *Adams v. Moriarty*, 2005 OK CIV APP 105, 127 P.3d 621 and *Cunningham v. Brown et al.*, 265 U.S. 1 (1924). The Department recognized in its *Response* that the Oklahoma Court of Civil Appeals has stated that once the funds are commingled in a single account, "those assets lose their character as the peculiar assets of their investor." *Adams* at 624. Based on this reasoning, the Court held that without any showing that their funds were specifically traceable, the investors were unable to recover 100% of their investments from the receivership estate. *Id.* at 625. Further, in *Cunningham*, the United States Supreme Court held that a person who wishes to establish a constructive trust on money must trace the money from the hands of the defrauded person to the fund over which he seeks to impose a trust. *Cunningham*, 265 U.S. at 11.

However, neither Court addressed the issue asserted in the case-at-hand, whether the Department is required to trace the funds received by the investor as belonging to other investors in order to prove unjust enrichment and require disgorgement of such monies. The Pollards assert that because an investor is required to trace funds it invested to fully recover from the receivership estate, conversely, the Department should be required to trace the funds received by the investor as belonging to other investors in order for disgorgement of such monies to be required. The Department admits in its *Response* that the investment monies from the Pollards were commingled and deposited in Marsha Schubert's bank accounts. If tracing is required by both the investor and the Department in order to establish the right to recovery or disgorgement, under the holding in *Adams*, the Department would be unable to trace the monies received by the Pollards as belonging to other investors because the funds were commingled and the

Department's claim for disgorgement would fail. Clearly, the "tracing" issue is an issue of first impression for the Oklahoma Supreme Court. This Court should certify this issue, as well as the other issues in this case, because a determination by the Oklahoma Supreme Court on these issues may materially advance the ultimate termination of this litigation.

- b. **The "tracing" issue was not resolved by Judge Parrish in *Oklahoma Dept. of Securities v. Toepfer et al.*, CJ-2005-3796; thus, it should be certified to the Oklahoma Supreme Court in order to ensure complete resolution of this dispute.**

The "tracing" issue also was not addressed by Judge Parrish, in *Oklahoma Dept. of Securities v. Toepfer et al.*, CJ-2005-3796, involving the other relief defendants involved in this Ponzi Scheme. See Affidavit of William B. Federman, attached hereto as Exhibit "A." On the date the case was scheduled to begin the jury trial, counsel for both parties and Judge Parrish had specific discussions regarding the "tracing" issue as it applied to the Department's claims. See Exhibit "A." Judge Parrish, recognizing the importance of this issue, asked counsel to recess to further explore settlement and discuss the "tracing" issue. After discussion, the parties settled the case. Thus, Judge Parrish never issued a ruling on the "tracing" issue. See Exhibit "A." As such, the issue of whether the Department is required to trace the funds received by the Pollards as belonging to other investors before an order for disgorgement can be rendered has not been addressed by any Oklahoma court and is ripe for certification to the Oklahoma Supreme Court.

The Pollards assert that in order to adequately resolve this dispute, the Oklahoma Supreme Court must determine whether the Department must trace the funds received by the investor as belonging to other investors before an order for disgorgement may be granted. This issue as well as whether the Department has standing to sue the Pollards for unjust enrichment and whether the Pollards are entitled to a setoff against the amounts ordered to be disgorged are unresolved by the Oklahoma Supreme Court. The Department has offered no Oklahoma case

law which addresses these issues in regards to Ponzi schemes to support its position. If the Court is in error, it will cause the unnecessary expenditure of substantial resources of both parties and the Court, particularly because the circumstances of this case will necessitate a great deal of deposition discovery and expert testimony. To this end, the Pollards' *Motion for Interlocutory Appeal* should be granted to allow the Oklahoma Supreme Court the opportunity to determine the issues before the court in regards to Ponzi schemes.

**PROPOSITION II: Certification of these issues to the Oklahoma Supreme Court could result in the ultimate termination of this litigation.**

This Court's grant of partial summary judgment in favor of the Department essentially determined the merits of this case and defeated all of the Pollards' defenses to disgorgement. The Court ruled that a Ponzi scheme existed; the Pollards had been unjustly enriched due to the Ponzi scheme; the Pollards must disgorge funds received under the Ponzi scheme and that the Pollards were not entitled to any offsets or setoffs.<sup>1</sup> Despite the Department's assertions to the contrary in its *Response*, a reversal of any of these findings on appeal could lead to the ultimate termination of this litigation. For example, if the Oklahoma Supreme Court held that the Pollards were not unjustly enriched, the Department's claim for disgorgement would fail and the litigation would be terminated. Further, certification of these issues would promote judicial economy and would result in judicial efficiency because if the Oklahoma Supreme Court reversed any of the above rulings before the case proceeded to trial on the issues of damages, it would avoid a potential remand and retrial and would save the parties substantial time and expense in regards to this litigation; therefore, certification is appropriate under 12 Okla. Stat. §952(b)(3).

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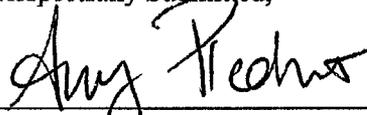
<sup>1</sup> While the Department's assertions regarding the "representations" made in the Pollards' initial Brief are curious, it is undisputed that Judge Worthington in Logan County, Oklahoma is still considering the Pollards' claims against the receivership, holding hearing, thereon and issuing orders thereto as late as January 11, 2008. See Exhibit "B" attached to Department's *Response*.

**CONCLUSION**

In the interest of judicial economy, this Court should certify the issues presented in this litigation as they are issues of first impression which should be addressed by the Oklahoma Supreme Court to ensure just resolution of this dispute. Further, this Court's grant of partial summary judgment in favor of the Department has affected a substantial part of the merits of this controversy and certification of this matter for immediate appeal from that order may advance the ultimate termination of this litigation. Thus, under 12 Okla. Stat. §952(b)(3), this Court should grant the Pollards' *Motion for Interlocutory Appeal*.

WHEREFORE, the Defendants, Barry and Roxanne Pollard, respectfully request this Court that their Motion be granted, and that they be awarded costs, including attorney fees, incurred in this action and such other relief as the Court deems fair and just.

Respectfully Submitted,



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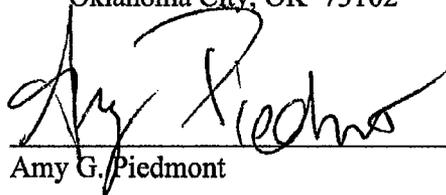
Attorneys for Barry Pollard and Roxanne Pollard

**CERTIFICATE OF SERVICE**

This is to certify that on this 21<sup>st</sup> day of January, 2008, a true and correct copy of the above and foregoing pleading was mailed, with postage fully prepaid thereon to the following;

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