

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
 STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
 OKLAHOMA COUNTY, OKLA.

OCT - 8 2007

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

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 (11th Cir.); *In Re: McCarn's Allstate Finance*, 326 B.R. 843, 848 (Bkrtcy.M.D.Fla.,2005); *In Re: M&L Business Machine Co., Inc.*, 59 F.3d 1078 (10th Cir. 1995); *Adams v. Moriarty*, 127 P.3d 621, 2005 OK Civ. App 105; *Cunningham v. Brown*, 265 US 1, 44 S.Ct. 424. Furthermore, in those 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. *Micco 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 876, 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 \$248,464.00. (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: McCarrn'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, (Bkrtcy.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 I.) 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 conclusionary 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.

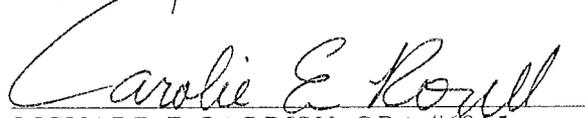
**ARGUMENT IV - THE DEPARTMENT LACKS THE AUTHORITY TO DISGORGE
THE POLLARDS OF THEIR MONIES.**

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: McCarn's Allstate Finance*, 326 B.R. 843, 848 (Bkrcty.M.D.Fla.,2005); *In Re: Financial Federated Title & Trust, Inc.*, 309 F.3d 1325 (11th 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 #8315
SHAWN D. FULKERSON, OBA # 14484
CAROLIE E. ROZELL, OBA #19679
FULKERSON & FULKERSON, P.C.
10444 Greenbriar Place
Oklahoma City, Oklahoma 73159
Telephone: (405) 691-4949
Facsimile: (405) 691-4595

ATTORNEYS FOR DEFENDANTS
AND THIRD PARTY PLAINTIFFS
BARRY AND ROXANNE POLLARD

CERTIFICATE OF MAILING

I hereby certify that on this 8th 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.: 405-280-7700

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
XA Equitable Life Insurance Company

