

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 16 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.

MOTION TO QUASH DEPOSITION SUBPOENA DUCES TECUM

COME NOW Defendants and Third Party Plaintiffs Barry and Roxanne Pollard and
move this Court for a motion to quash the Deposition Subpoena Duces Tecum issued by the
Oklahoma Department of Securities (hereinafter "Department") to a designated representative of
Morley & Associates, P.C.

STATEMENT OF THE FACTS

1. David Morley, CPA and Morley & Associates, P.C. are not parties to this lawsuit.
2. For the past seven years, David Morley, CPA has been the Certified Public Accountant
for Barry and Roxanne Pollard individually, Defendants and Third Party Plaintiffs, as
well as the accountant for their trusts and related businesses.

66.

3. On September 6, 2007, the Department issued a Subpoena to David Morley, CPA for various documents relating to the services provided to the Pollards with regard to this lawsuit. (Exhibit 1, Morley Subpoena 09/06/2007.)
4. In an email dated September 6, 2007, the Department solicited dates from Pollards' counsel on which David Morley would be available to give his deposition. (Exhibit 2, Email dated 09/06/2007.)
5. On September 11, 2007, counsel for Pollards by letter advised the Department of David Morley's availability to give his deposition in the near future. (Exhibit 3, Letter dated 09/11/2007.)
6. On September 13th, the deposition of David Morley, CPA was scheduled by agreement for October 17, 2007 between the Department and counsel for the Pollards. (Exhibit 4, Email dated 09/13/2007.)
7. As the production of David Morley's documents to the September 6th Subpoena was facilitated and accomplished through Pollards' counsel, on September 18th counsel for the Pollards produced by hand delivery to the Department all of the documentation requested in the Department's Subpoena to David Morley. (Exhibit 5, Email dated 09/18/2007.)
8. The Department never communicated to David Morley or counsel for the Pollards that it was seeking additional documentation from David Morley.
9. On October 1, 2007, the Department sent a letter to counsel for Pollards requesting a date and time for the deposition of David Morley. (Exhibit 6, Letter dated 10/01/2007.)
10. On October 4th, Pollards' counsel responded stating the David Morley's deposition had previously been scheduled by agreement for October 17th. (Exhibit 7, Letter dated 10/04/2007; Exhibit 3, Letter dated 09/11/2007.)

11. In response thereto, on October 5th, the Department confirmed the deposition for October 17th and further advised that it would issue a subpoena for documents over which Mr. Morley would be deposed. (Exhibit 8, Letter dated 10/05/2007.) Counsel for Plaintiffs anticipated that the Subpoena would be similar if not the same as the Subpoena issued on September 18th.
12. On October 10, 2007, the Department issued the Deposition Subpoena Duces Tecum which was served on Morley and Associates, P.C. on October 11, 2007. (Exhibit 9, Morley Subpoena 10/10/2007.)
13. Although counsel for the Pollards received a copy of the Deposition Subpoena Duces Tecum on October 12th, they did not receive notice as required by Oklahoma statute of the same.
14. The Deposition Subpoena Duces Tecum demands the appearance of a designated representative for Morley & Associates, P.C. to appear for a deposition on October 17, 2007, at 9:00 a.m. with voluminous records for the Defendants Barry and Roxanne Pollard individually, all trusts, P&K Equipment, Inc., Neurological Surgery Assn., LLC or any other business entities in which the Pollards have any interest. Such other entities include non-parties to this litigation. (Exhibit 9, Morley Subpoena 10/10/2007.)
15. The Deposition Subpoena Duces Tecum was issued only three business days prior to October 17th, the date of Mr. Morley's deposition that was originally facilitated and scheduled by agreement between Pollards' counsel and the Department on September 13, 2007. (Exhibit 4, Email dated 09/13/2007.)

16. Attached as Exhibit A to the Subpoena is a list of items the Department requests the representative of Morley and Associates, P.C. bring with him to his deposition. (Exhibit 9, Morley Subpoena 10/10/2007.)
17. The Exhibit A attached to the Deposition Subpoena Duces Tecum is an exhaustive list demanding that irrelevant and confidential documents and other items be produced from 1994 to 2005, which is eleven years worth of records. (Exhibit 9, Morley Subpoena 10/10/2007.)
18. The Exhibit A requests all materials and documents related to at least seven different persons or businesses to include Barry and Roxanne Pollard, all Pollard trusts, Pollard Farms, LLC, Neurological Surgery Assn., and P&K Equipment, Inc. (Exhibit 9, Morley Subpoena 10/10/2007.)
19. The Department then issued the Deposition Subpoena Duces Tecum for the production of extensive documentation dating back to 1994 and only gave Mr. Morley three business days before his scheduled deposition in which to locate, copy and produce the requested documentation. (Exhibit 9, Morley Subpoena 10/10/2007.) Foremost, this request was made just prior to the October 15th tax deadline, which David Morley, as a Certified Public Accountant who operates his own accounting practice, had obligations to meet on behalf of his clients.
20. The Deposition Subpoena Duces Tecum seeks documents which are overly broad in nature creating an undue burden on David Morley and fall outside of the scope of discovery permitted by Okla. Stat. Title 12 §3226. As such, the Deposition Subpoena Duces Tecum is subject to being quashed under Okla. Stat. Title 12 §2004.1(C)(3)(a)(1), (3), (4) and (5).

21. Finally, the Department has failed to comply with Okla. Stat. Title 12 §3230 with regard to giving notice to adverse parties of the Deposition Subpoena Duces Tecum.

BRIEF IN SUPPORT

THE DEPARTMENT'S DEPOSITION SUBPOENA DUCES TECUM SEEKS DISCOVERY OF DOCUMENTS WHICH ARE NOT DISCOVERABLE AND THE SUBPOENA SHOULD BE QUASHED UNDER OKLA. STAT. TITLE 12 §2004.1.

Okla. Stat. Title 12 §3226 provides that a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. Okla. Stat. Title 12 §2004.1(C)(1) starts off by stating that a party "shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena." Furthermore, the statute provides that the Court shall enforce this duty. Okla. Stat. Title 12 §2004.1 also provides that a motion to quash may be issued where a subpoena ... (1) fails to allow reasonable time for compliance; or (3) requires disclosure of privileged or other protected matter and no exception or waiver applies; or (4) subjects a person to undue burden; or (5) requires production of books, papers, documents or tangible things that fall outside the scope of discovery permitted by Section 3226 of this title.

A. The Department's Deposition Subpoena Duces Tecum fails to allow for reasonable time for compliance and subjects Morley & Associates, P.C. to undue burden.

The Deposition Subpoena Duces Tecum is unreasonable and oppressive in that it requires the representative of Morley & Associates, P.C. to produce numerous documents in less than three business days' notice. Prior to issuing this Deposition Subpoena Duces Tecum, the Department was advised that Mr. Morley's availability was extremely limited until after the October 15th tax deadline. (Exhibit 3, Letter dated 09/11/2007.) The Department is well aware that Mr. Morley owns and operates his private accounting practice in Enid, Oklahoma. It is

absurd and unreasonable to request that Mr. Morley search for and produce eleven years worth of records for a minimum of seven different persons, trusts or related entities, within three business days which also include the October 15th tax deadline to which Mr. Morley is committed.

On September 6, 2007, the Department issued its first Subpoena Duces Tecum to David Morley. (Exhibit 1, Morley Subpoena 09/06/2007.) The production of the relevant documents was arranged through the Pollards' counsel. On September 18th, in compliance with the Subpoena, David Morley, CPA produced all responsive documentation through counsel for Pollards. (Exhibit 5, Email dated 09/18/2007.)

On Monday, October 15th, in a telephone conference call between Pollards' counsel and the Department, it was suggested that the Department proceed with taking Mr. Morley's deposition on October 17th with the documents previously produced on September 18th as well as with any additional information that David Morley could readily and conveniently gather and bring to the October 17th deposition. It was further suggested that in the event the Department believed it was necessary to review additional documentation, then another date could be scheduled to continue Mr. Morley's deposition allowing him additional time to search for and produce additional documents that were not otherwise readily available. When the Department was asked to reconsider the extent of its request of documents from Mr. Morley in relation to the tax deadline, the Department's response was "I don't care, that is not my problem." The Deposition Subpoena Duces Tecum is an improper attempt by the Department to impair Mr. Morley's ability to properly prepare for his deposition.

B. The Department's Deposition Subpoena Duces Tecum requires disclosure of privileged or other protected matter and the production of records that fall outside the scope of discovery.

The Department's Deposition Subpoena Duces Tecum seeks a broad scope of documents

dating back to 1994. The request is voluminous as David Morley has provided services as a Certified Public Accountant to the Pollards both individually as well as to their businesses for the past seven years. As such, David Morley, CPA has a tremendous amount of information that will take time to locate and sort through to fully respond to the Department's extensive request.

The documents and materials requested by the Department pertain in part to Barry Pollard's businesses, such as P&K Equipment, Inc. and Neurological Surgery Assn., LLC. There is one AXA Equitable Life Insurance Policy that was purchased by and owned by P&K Equipment, Inc. The transactions involving the purchase and payment of this life insurance policy, in addition to other non-P&K Equipment, Inc. related transactions, is the focus of this lawsuit, **not** P&K Equipment, Inc., Neurological Surgery Assn., LLC or any other business entities in which the Pollards have any interest. However, the Department requests "all documents, letters, emails, analyses, reports and/or other records of any kind or nature, dated from 1994 through 2005, relating to ... Neurological Surgery Assn., LLC, and P&K Equipment, Inc. (collectively, "the Pollards and/or their Related Entities") including, but not limited to, bank and brokerage statements for all accounts held in the name or for the benefit of or controlled by the Pollards and/or their Related Entities, financial analyses, spreadsheets, ledgers, calculations and notes." The same request follows for all other businesses and trusts owned by or in which the Pollards have any interest. The Department's Subpoena seeks documents that fall outside of the scope of discovery permitted by Okla. Stat. Title 12 §3226 and is subject to being quashed under Okla. Stat. Title 12 §2004.1(C)(3)(a)(1), (3), (4) and (5).

Not only is the Department's request for information from these "Related Entities" irrelevant, but its request extends to persons who are shareholders in these entities but who are not parties to this lawsuit. The Department would certainly not be entitled to any information

concerning other partners, members of limited liability companies and corporate shareholders who are not parties to this lawsuit. It would be essential that Mr. Morley be given the opportunity to redact any information pertaining to these persons and entities who are shareholders of these entities in which the Pollards have some interest.

The Deposition Subpoena Duces Tecum further requests tax returns, all documents, letters, emails, analyses, reports and/or other records prepared by David Morley or Morley and Associates, P.C., all communications between David Morley and any third party, all documents pertaining to any trusts established by the Pollards, including trust agreements, letters, emails, notes, bank and/or brokerage account statements, financial statements or other similar records. These records are requested for each entity and trust in which the Pollards have any association or interest. Yet, previously produced to the Department on behalf of the Pollards in October and December of 2006 as well as in August of 2007 were all of the bank records, including bank statements and cancelled checks, for three accounts held by Barry and Roxanne Pollard individually, five accounts for Pollard Farms, LLC and two accounts for Neurological Investments Assn., LLC.

There is information requested by the Department that may be protected by the Work Product Doctrine. During the course of this lawsuit, there have been documents produced by David Morley at counsel's request. Furthermore, there is correspondence and communications between Pollards' counsel and David Morley that may also be protected by the work product doctrine.

C. The Department's Deposition Subpoena Duces Tecum fails to comply with Okla. Stat. Title 12 §3230(C)(1).

Okla. Stat. Title 12 §3230 (C)(1) requires that notice of a deposition be given to the

adverse party which allows three (3) days in which to prepare for the deposition exclusive of the day of services of the notice. The scheduling of David Morley, CPA's deposition for October 17th was orchestrated by the Department through counsel for the Pollards, Richard Parrish and Carolie Rozell. Likewise, the production of documents responsive to the first Subpoena Duces Tecum issued by the Department to David Morley on September 6, 2007 was arranged through Pollards' counsel. (Exhibit 5, Email dated 09/18/2007.)

No notice of the Deposition Subpoena Duces Tecum was issued by the Department to counsel for the Pollards. It was after the hearing on the Department's Motion for Summary Judgment heard by this Court on October 11th that Pollards' counsel learned through David Morley that the Deposition Subpoena Duces Tecum had been issued. On Tuesday, October 12, 2007, counsel for the Pollards received a copy of the Deposition Subpoena Duces Tecum, one day before the scheduled deposition of David Morley, CPA. The Department has failed to provide notice properly and timely in compliance with Oklahoma Statute.

WHEREFORE, Defendants and Third Party Plaintiffs Barry and Roxanne Pollard respectfully pray this Court quash the Deposition Subpoena Duces Tecum issued by the Department of Securities on October 11, 2007 to Morley and Associates, P.C. Alternatively, said Defendants request that Morley and Associates, P.C. only be required to produce documents relevant to the captioned case and that all information pertaining to partners, members of limited liability companies, or shareholders of corporations, other than the Defendant Pollards, in any business entity be redacted before the documents are produced.

Respectfully submitted,



RICHARD PARRISH, OBA #6915
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 BARRY AND ROXANNE
POLLARD DEFENDANTS AND THIRD PARTY
PLAINTIFFS

CERTIFICATE OF MAILING

I hereby certify that on this 16th day of October, 2007, a true and correct copy of the above and foregoing Pleading was delivered by electronic mail, facsimile and by U.S. Mailing 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
AXA Equitable Life Insurance Company

