

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

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

Plaintiffs,

vs.

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; FARMERS &  
MERCHANTS BANK, an Oklahoma  
Banking Entity; FARMERS &  
MERCHANTS BANCSHARES, INC., an  
Oklahoma Corporation;  
JOHN V. ANDERSON, Individually, and  
as an officer and director of Farmers &  
Merchants Bank, and as a shareholder of  
Farmers & Merchants Bancshares, Inc.; and  
JOHN TOM ANDERSON, Individually, and  
as an Officer and Director of Farmers &  
Merchants Bank and as a shareholder of  
Farmers & Merchants Bancshares, Inc.,

Third Party Defendants.

FILED IN THE DISTRICT COURT  
OKLAHOMA COUNTY, OKLA.

MAY - 1 2007

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

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

**DEFENDANT POLLARDS' RESPONSE TO PLAINTIFF'S MOTION TO STRIKE  
DEFENDANT POLLARDS' AMENDED PETITION ADDING THIRD-PARTY  
DEFENDANTS FARMERS & MERCHANTS BANK, FARMERS & MERCHANTS  
BANCSHARES, INC., JOHN V. ANDERSON AND JOHN TOM ANDERSON**

**COMES 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 Response to the Plaintiff's Motion to Strike the Pollards' Amended Petition Adding Third Party Defendants Farmers & Merchants Bank, Farmers & Merchants Bancshares, Inc., John V. Anderson and John Tom Anderson, and in further support thereof, state:

The Oklahoma Statutes relevant to amending the Petition and third party practice are liberal in permitting the parties to a lawsuit to amend the pleadings and to add parties to ensure that the parties are given the opportunity to completely and fully litigate all relevant claims against all necessary parties. See Title 12 O.S. §§2014, 2015, 2017, 2018, 2019, 2020, and 2021. A consistent thread running through the amendment statutes provides that the parties needed for just compensation for claims that are connected with the subject matter of the litigation is properly addressed in one collective lawsuit.

Title 12 OS §2014 provides that “[a]t any time after commencement of an action a defending party, as a third-party plaintiff, may cause a summons and petition to be served upon a person not a party to the action who is or may be liable to him for all or party of the plaintiff’s claim against him or who is liable to him on a claim arising out of the transaction or occurrence that is the subject matter of a claim that is asserted against him.” Furthermore, 12 OS §2015(A) provides that “A party may amend his pleading once as a matter of course at any time before a responsive pleading is served...Amendments to add omitted counterclaims or to add or drop parties maybe made as a matter of course within the time specified above.” a party may amend his pleading. This case remains in the initial stages of the litigation. That is to say, Equitable has not filed an Answer to the Amended Third Party Petition; the case is not at issue. Now is the

proper time for the Farmers Group to be joined so that all claims against the Pollards and held by the Pollards may be litigated before this Court.

Title 12 OS §2019(A) states that “[a] person who is subject to service of process shall be joined as a party in the action if: 1. In his absence complete relief cannot be accorded among those already parties...” For the following reasons, Farmers Group and Equitable are proper parties to be joined to this lawsuit.

The Department of Securities brought this lawsuit against the Pollards in an attempt to disgorge them of funds they allegedly received through a Ponzi Scheme operated by Marsha Schubert and to which the Department claims the Pollards are not rightfully entitled. Additionally, the Department of Securities has filed a verified petition against the Farmers Group claiming that they aided and abetted in the Ponzi scheme, *Oklahoma Department of Securities ex rel. Irving L. Faught, Administrator vs. Farmers and Merchants Bank et. al*, Oklahoma County Case No. CJ-2006-3311.

Farmers Group is the vehicle through which the alleged victims’ monies flowed to the Pollards. The Pollards’ Equitable insurance policies that originated in the 1990’s and that were active during the duration of time on which the Department of Securities is focusing its lawsuits, are the subject matter and source of the monies that the Department seeks to disgorge from the Pollards. As a direct effect, the Pollards’ claims for damages against Equitable are directly traced to and the result of the wrongful actions of the Farmers Group. Just as the Pollards have sought to recover from Equitable the damages they incurred and may incur as a result of the Department of Securities’ claims against them, the Farmers Group are also necessary and proper parties to this lawsuit for the same reasons. If the Department of Securities obtains an award against the Pollards for the wrongful actions of Equitable, its agent Marsha Schubert, and Farmers Group,

then the Pollards have valid claims for recovery of their damages against the Third Party Defendants.

The Department of Securities has previously stated to the Court that it does not have any claim against the Pollards for violation of the Securities Act. Despite the Pollards being identified by the Department of Securities as unlawful recipients of the victims' funds, the Pollards have themselves been significantly damaged in excess of \$800,000.00 dollars as a result of the Ponzi Scheme. Not only have the Pollards been damaged for their lost investments and their lost insurance coverage, the Department of Securities' is claiming that the Pollards owe an additional \$386,000.00. As such, the Pollards have valid claims for their damages against not only Equitable, but also the Farmers Group. For purposes of sorting through the Department of Securities' claims for unjust enrichment and disgorgement from the Pollards, it is essential that all parties are named in this lawsuit that have liability to the Pollards.

The Department of Securities and Equitable suggest that the Pollards' claims against the Farmers Group should be brought before Judge Parrish in the lawsuit filed by the Department of Securities against the Farmers Group. However, the Department of Securities' only goal is to recover monies for the victims, for the persons the Department of Securities considers to be victims, the so called "net losers", or "short investors." As such, the Department of Securities' claims against the Pollards for monies owed to the victims arise from and involve funds flowing through the Farmers Group who aided and abetted in the Ponzi Scheme.

The Pollards' claims are distinguishable from those of the Department of Securities' in that the Department's interest is to collect for the victims, "net losers." According to the Department of Securities, the Pollards are not "net losers," rather, the Department has identified the Pollards as "net winners." If this were the case, then the Pollards would be forced to litigate

two separate lawsuits in addition to seeking recovery for their damages through arbitration against AXA Advisors, as the Court compelled AXA and the Pollards to arbitrate their claims arising out of the transactions giving rise to this lawsuit. Obviously, the Pollards' claims against the Farmers Group are significantly different from the Department of Securities' claims against the Farmers Group.

The Department of Securities and Equitable further argue that it has been 15 months since the Pollards filed their Answer and Third Party Petition. As recently as March 29, the date of the last hearing, this Court determined that Equitable was a proper party to the lawsuit and leave to amend was granted to Pollards. (See Exhibit 1, OSCN Report) Equitable has not filed an answer. The delay of this case has not been the fault of the Pollards as they are not responsible for Equitable's delay in filing an Answer. Furthermore, the events giving rise to Department of Securities' attempt to disgorge the Pollards of over \$386,000.00, has been ongoing since 2004. It has not just involved the Pollards, it has involved several lawsuits filed in different counties, involving hundreds of people, and affecting thousands of people. As stated above, the Pollards have been financially damaged as a result of their lost investments believed to exceed \$800,000.00. It is only proper that the Pollards have their opportunity to fully litigate and attempt to recover for their damages as a result of the claims against the Third Party Defendants Equitable and Farmers Group.

Finally, no harm or injustice has affected nor will it affect the Department of Securities or Equitable by the addition of the Farmers Group. There should be no surprise to either the Department of Securities or Equitable by the Pollards' inclusion of Third Party Defendants Farmers & Merchants Bank, Farmers & Merchants Bancshares, Inc., John V. Anderson and John Tom Anderson (hereinafter collectively referred to as the "Farmers Group"). It is disingenuous

for the Department of Securities and Equitable to ask this Court to deny the Pollards their opportunity to fully litigate all claims, against them and that they have against others, in one and the same lawsuit in an effort to attain the equitable relief sought. All events that gave rise to this lawsuit and out of which the Pollards' claims exist arose from the same operative facts and transactions as the Department of Securities' claims against the Pollards. The Pollards would be just as inconvenienced, if not more so, to be forced to bring their causes of action against the Farmers Group in a separate lawsuit.

Title 12 O.S. §2020(A)(3) provides that all of the parties do not have to obtain or defend against the other parties and the relief demanded. Judgment may be given to one or more of the parties in accordance with their respective rights and liabilities. Title 12 OS §2021 states that parties may be dropped and added at any stage of the action. Given the facts and circumstances out of which the Department of Securities' claims arose against the Pollards and the same facts and circumstances out of which the Pollards' claims arose against AXA Advisors, Equitable and the Farmers Group, it is proper for this Court to permit the Farmers Group to remain parties to this lawsuit.

**WHEREFORE**, the Defendant Pollards respectfully request that this Court deny the Department of Securities' Motion to Strike the Amended Third Party Petition and Equitable's Supporting Motion, permit the lawsuit to proceed with the Farmers Group as parties to the same, and grant any further relief to which the Defendant Pollards may be entitled.

Respectfully Submitted,



---

RICHARD E. PARRISH, OBA #6915  
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 1st day of May, 2007, a true and correct copy of the above and foregoing Pleading was 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  
0 North Broadway, Suite 1800  
Oklahoma City, Oklahoma 73102

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

