

**IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA**

**FILED IN THE DISTRICT COURT  
OKLAHOMA COUNTY, OKLA.**

JUL 10 2007

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

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

Plaintiff, )

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 STATE, )

Third Party Defendants. )

**DEFENDANTS BARRY AND ROXANNE POLLARDS'  
RESPONSE TO THE PLAINTIFF'S  
MOTION TO STRIKE THE AFFIDAVIT OF DAVID MORLEY**

**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 Response to the Plaintiff Department of Securities' Motion to Strike the Affidavit of David Morley, Certified Public Accountant (CPA) and in further support thereof, state:

**BACKGROUND**

This lawsuit involves over \$800,000.00 with the Department's claims against the Pollards

in excess of \$380,000.00 and the Pollards' claims against the Third Party Defendants AXA Advisors, LLC and AXA Equitable Life Insurance Company hereinafter AXA/Equitable.

For purposes of this Response, the Pollards will refer to AXA Advisors and AXA Equitable Life Insurance Company as "AXA/Equitable" as the Department has not distinguished between either entity. During the entire eleven year period in which the Pollards invested with AXA/Equitable, all investments were made by and through AXA/Equitable's agent, representative and employee Marsha Schubert. As was the case in all of the Pollards' dealings with Schubert, there is no distinction between AXA/Equitable and Schubert, they are one and the same. (Ex. A, Pollard Affidavit; Ex. B, Morley Affidavit.) The claims asserted herein arise from over eleven years of transactions through numerous bank accounts and AXA/Equitable accounts. A true and accurate accounting of the transactions out of which the claims in this lawsuit arose includes each transaction occurring over this eleven year period. But, the Department excludes all transactions occurring prior to 2000. In this instance, the Department cannot do so. For an equitable remedy to be obtained there must be an equitable accounting. The only way to attain equity is to fairly consider both sides of the equation. The Department seeks to disgorge the Pollards of monies they received from a well established and long term relationship with AXA/Equitable.

## **RESPONSE**

On April 13, 2007, an Agreed Order was entered giving the Pollards additional time to respond to the Department's Motion for Summary Judgment on the basis that they would be relying upon the expert testimony of David Morley, CPA, who would not be available to render an expert opinion until after April 15<sup>th</sup>. (Ex. C, Agreed Order.) At the time that the Department filed its Motion for Summary Judgment, the Pollards' Response was due on April 13, 2007. As

set forth in the Agreed Order, the Pollards intended to rely upon an accounting and testimony of expert David Morley, CPA, in support of their Response to the Motion for Summary Judgment. As Mr. Morley, CPA, has an active accounting practice, he would not be available to dedicate any attention to analyze the financial records available and render an opinion by way of affidavit and an accounting for purposes of the Response to the Motion for Summary Judgment until after April 15<sup>th</sup>, "tax season."

Prior to the Department's filing its Motion for Summary Judgment, the Department was advised on several occasions and was well aware that the Pollards' accountant, David Morley, CPA, had knowledge and information concerning the events giving rise to this lawsuit. During both depositions of Barry Pollard, which occurred on two separate occasions prior to the filing of the Motion for Summary Judgment, Pollard identified David Morley, CPA, as his certified public accountant with whom he had many conversations regarding this lawsuit. (Ex. D Pollard Depo., P. 13, ll. 1-12; p. 36, ll. 1-13.) As well, during the time of Barry Pollards' deposition, there were several conversations between counsel for the Department and Pollards concerning an accounting being prepared by David Morley, CPA. It was openly discussed with the Department's counsel that the Pollards fully intended to have an accounting prepared by David Morley, CPA. Barry Pollard's deposition is yet to be completed as it was continued by agreement from a previous scheduled deposition. As such, counsel for Barry Pollard has not been given the opportunity to cross examine Barry Pollard.

In May of 2006, the Pollards produced their initial discovery responses to the Department. At that time, the Pollards had not conducted a complete accounting and still have yet to complete their accounting. However, the Pollards reserved the right to amend and supplement their discovery responses. (Ex. G, Pollards' Discovery Responses) In two letters to

the Department dated June 12, 2006 and November 17, 2006, it was again noted that the Pollards reserved the right to supplement their discovery responses as discovery was ongoing. (Ex. E letter dated June 12, 2006; Ex. F letter dated November 17, 2006)

With regard to Interrogatories 18 and 19, the Pollards objected to the information requested for reasons that go unmentioned by the Department. (Ex. G, Pollards' Discovery Responses) These interrogatories infer that the Pollards received monies belonging to Marsha Schubert and/or Schubert & Associates. Without waiving any objection, the Pollards supplemented their responses by letter dated November 17, 2006, wherein the Pollards referenced those documents produced to the Department containing the information requested. The Department has excluded seven years of the eleven year AXA/Equitable relationship and merely focuses on the last four years. Seven years of the eleven year relationship cannot be excluded because each year is relevant to an equitable accounting.

The Department represents to this Court that "[a]t no time did Pollards ever provide evidentiary material to dispute receipt or disbursement of the funds listed in the accounting provided by Department." However on June 12, 2006, the Pollards provided extensive documents to the Department. On October 17, 2006, the Pollards produced to the Department all tax returns and other relevant financial documentation at the Law Offices of Field, Trojan, Long and Sedbrook in Enid, Oklahoma. At that time, the Department was advised that if they had any questions concerning the financial records produced, the Pollards' accountant David Morley, CPA, would be made available to answer any questions. Again on December 29, 2006, the Pollards produced yet another box of documents containing the Pollards' bank records for six relevant bank accounts. The records produced to the Department on these various occasions are much of the back up documentation to support CPA David Morley's accounting and opinion in

his affidavit.

As mentioned in the Pollards' Response to the Motion for Summary Judgment, the Department has produced four different accountings to the Pollards. Without an accounting first being conducted on behalf of the Pollards, they cannot verify the accuracy of the Department's accounting as the Department's accounting and attachments, purported to be the back up documents, are not authenticated, legible, nor complete.

David Morley, CPA, has served as the Pollards' accountant for several years and is familiar with the transactions out of which the Department has brought this lawsuit. (Ex. D Pollards Depo. P. 59, ll. 8-16.) As a matter of fact, it was common for David Morley, CPA to work directly with Marsha Schubert as an agent of AXA/Equitable on behalf of the Pollards. The statements set forth in CPA David Morley's affidavit are based on his own knowledge of the representations made by Marsha Schubert as AXA/Equitable's agent directly to him. Additionally, he relied upon the representations made to the Pollards by AXA/Equitable's agent and representative Marsha Schubert concerning their AXA/Equitable accounts and insurance policies. CPA David Morley's, affidavit testimony as to the representations that were made by Marsha Schubert as an AXA/Equitable agent and representative is not asserted to establish the truth of such representations. Rather, they are made to present to the Court for the representations that CPA David Morley and the Pollards relied upon in providing his professional services as a Certified Public Accountant to the Pollards. Furthermore, CPA David Morley's, affidavit and attached accounting, are his preliminary expert opinion based on the documents reviewed. For purposes of responding to the Motion for Summary Judgment, nothing prevents Mr. Morley, CPA, as an expert, from rendering an opinion and a summary accounting based on the documents he reviewed to date. It is unnecessary, and impractical, to attach to his

affidavit all documents that he reviewed and relied upon to support his opinion.

As set forth in *Weeks v. Wedgewood Village, Inc*, 554 P.2d 780, 1976 OK 72, one cannot merely contend that an issue of fact exists, they must show that evidence sufficiently exists. Yet, there is no requirement to attach the evidence considered to the affidavit. Mr. Morley, CPA, identifies the Pollards financial documents as what he has reviewed in forming the basis of his opinions. All of the evidence to support CPA David Morley's, affidavit or accounting need not be attached to the Response to the Motion for Summary Judgment, nor is it the appropriate place for attachment. The Evidence Code, 12 O.S. § 3006, allows for the use of a summary as evidence to reflect the contents of voluminous writings. 12 O.S. § 3006 does require the writings summarized to be made available to the other parties. The Pollards have produced to the Department boxes of documents that support and provide the basis for CPA David Morley's findings, conclusions, summaries, and opinions. Such information places facts in dispute which the Department can further investigate through conducting discovery. As a matter of fact, the Department struck the hearing on the Motion for Summary Judgment for purposes of conducting further discovery; however, the only action taken by the Department is a Motion asking this Court to strike the affidavit. Apparently, the Department has now decided the Pollards should not be able to present a defense using CPA David Morley. Not allowing the Pollards to present evidence would be much easier than the Department have to discover, review and evaluate the evidence. To a great extent, the documents that Mr. Morley, CPA, considered in preparing his opinion to date have been produced to the Department. Further, the Evidence code 12 O.S. § 2705, allows an expert to testify by opinion or inference without disclosure of the underlying data or facts upon which he bases his opinions. Certainly, at the trial an expert must disclose such information upon cross-examination. However, for the purposes of responding to the

Department's Motion for Summary Judgment, CPA David Morley's affidavit is sufficient to dispute the Department's multiple inconsistent accountings and to place the Department's "undisputed facts" at issue.

The Department cites to *Elledge v. Staring*, 939 P.2d 1163, 1996 OK CIV APP 161, wherein an affidavit was submitted by one who had no personal knowledge of the statements set forth in his affidavit. The affiant was an investigator of an accident and his affidavit merely regurgitated statements from individuals obtained from his investigations. Clearly there is a difference between the investigator's affidavit and that of David Morley, CPA. David Morley's, CPA, affidavit provides those representations that were made to him based on his own personal knowledge or the knowledge of his client, the Pollards, and they are not offered solely to prove the truth of the matter asserted. It is only hearsay if offered to prove the truth of the matter asserted. See 12 O.S. § 2801 (3). Even if hearsay, the representations of Marsha Schubert would be admissible since she is unavailable due to her incarceration at an out of state federal penitentiary see 12 O.S. § 2804 (A). The Department also cites to *Butler v. Oklahoma City Public School System*, 871 P.2d 444, 1994 OK CIV APP 22, but in this case, the defendant attached nothing to his response to the motion for summary judgment, not even an affidavit.

According to *First Federal Savings and Loan Ass'n of Philadelphia v. Damco Corp.*, 310 A.2d 770n (Del.Super.1973) the test to determine whether an affidavit sets forth matters which would constitute a defense, is whether an affidavit sufficiently sets forth a condition of fact on which the court can determine the legality and sufficiency of the defense. The affidavit of CPA Mr. Morley, along with his accounting in itself establishes that there are material facts in dispute. CPA Mr. Morley's accounting to date conflicts with the accounting relied upon by the Department. Further, CPA David Morley's accounting, for purposes of responding to the

Motion for Summary Judgment, does not rely upon mere allegations and denials. Rather, the affidavit and accounting are based on his analysis of the Pollards' financial records that were reviewed by CPA David Morley which conflicts with all four of the accountings presented by the Department.

As recently as July 3, 2007, this Court found that one of the named Third Party Defendants were properly to remain a party to this lawsuit. The Third Party Defendant Equitable has yet to file an Answer. As such, this case is not at issue and no Scheduling Order has been issued. At the time of responding to the Department's discovery, the Pollards answered the discovery requests to the best of their ability with the information available at that time. The Department has been placed on notice that as discovery is ongoing the Pollards anticipate they will obtain additional information that will necessarily supplement their responses. (Ex. G Discovery Responses; Ex. E Letter June 12, 2006; Ex. F Letter November 17, 2006.) As the discovery deadline has neither passed nor has one even been set, the Department has not been prejudiced in any manner from conducting additional discovery. Additionally, one advantage for naming Third Party Defendant Equitable in this lawsuit was to account for the monies paid to and received from AXA/Equitable including those monies paid to or received from their agent Marsha Schubert. There will be additional and significant discovery to be conducted by which all parties to this lawsuit should benefit to reach an accurate, equitable accounting.

**WHEREFORE**, the Defendants Barry and Roxanne Pollard respectfully request that this Court deny the Department's Motion to Strike the Affidavit of David Morley, CPA finding that said affidavit is sufficient to place facts in dispute, and award any additional relief to the Pollards consistent with principles of equity and justice.

Respectfully Submitted,



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ATTORNEYS FOR DEFENDANTS  
AND THIRD PARTY PLAINTIFFS  
BARRY AND ROXANNE POLLARD

CERTIFICATE OF MAILING

I hereby certify that on this 10<sup>th</sup> day of July 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:

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A handwritten signature in cursive script, reading "Carol E. Royall". The signature is written in black ink and is positioned to the right of the typed text.