

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

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

OCT 11 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.)

DEFENDANT POLLARDS' MOTION FOR SUMMARY JUDGMENT
AGAINST THE OKLAHOMA DEPARTMENT OF SECURITIES

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 Motion for Summary Judgment against the Oklahoma Department of Securities, and in further support thereof, state:

BACKGROUND

The Oklahoma Department of Securities, hereinafter "Department," claims that Barry Pollard and Roxanne Pollard, hereinafter "Pollards," received monies from Marsha Schubert d/b/a Schubert and Associates to their enrichment, and that the monies received by the Pollards were

to the detriment and expense of others deemed "Short Investors." The Department claims that the Pollards did not give reasonably equivalent value for these monies and that such money does not belong to the Pollards. They claim the Pollards were unjustly enriched.

For purposes of this Motion, 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. 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. 1, Pollard Affidavit; Ex. 2, Morley Affidavit.)

Beginning over fourteen years ago, the Pollards were one of Schubert's first AXA/Equitable customers. The Pollards engaged in a number of investment and insurance transactions with Marsha Schubert, all in her capacity as an agent and representative of AXA/Equitable. Based on the information available, it is believed that over the entire eleven year period during which the Pollards maintained their investments and insurance policies with AXA/Equitable, they invested an estimated \$616,626.00. (Ex. 2, Morley Affidavit.)

In 2004, Marsha Schubert plead guilty to the operation of a Ponzi scheme. The Pollards learned in late 2004 or early 2005 that their investments and policies were of little to no value as a result of Schubert's conduct as an agent, representative and employee of AXA/Equitable. (Ex. 1, Pollard Affidavit.)¹ Upon further investigation, Pollards learned that during the course of their relationship with Schubert as an agent, representative and employee of AXA/Equitable she grossly mismanaged and misapplied their monies. Barry Pollard filed a petition in the District

¹ The Department has deposed Barry Pollard on two separate occasions and has yet to complete his deposition. Counsel for Pollard has not had the opportunity to cross examine Pollard. The information set forth in Barry Pollard's affidavit cited in support hereof reflects Barry Pollard's testimony upon cross examination.

Court of Logan County, Case No. CJ-2005-71, for damages he suffered based upon the actions of Schubert in her capacity as his investment advisor. On June 10, 2005, the District Court of Logan County granted a judgment to Pollard on his petition. The court then set a hearing to determine damages for July 14, 2005. Schubert's receiver was provided notice of this hearing. On July 14, 2005, the District Court of Logan County entered a judgment in favor of Pollard against Schubert in the amount of \$827,000.00. The Receiver was provided a copy of this judgment. This judgment was not appealed or contested and is a final order.

In addition to judgment owed to Pollard by Schubert, on October 25, 2006, the Pollards were assigned the claim of L & S Pollard Farms, L.L.C. in the amount of \$248,464.05. The Pollards are entitled to setoff both the Judgment and the Assignment against the amount the Department is requesting be disgorged from the Pollards.

Finally, Pollards' bank statements as far back as 1997 reflect that the Pollards paid money directly to Schubert. The Department has only looked at the transactions occurring from 2000-2004 claiming that the Ponzi scheme began in 1999. Therefore, credit is only given to the Pollards for checks written directly to Schubert during the last four year period.

STATEMENT OF MATERIAL AND UNDISPUTED FACTS

1. On October 14, 2004, at the request of the Department, Judge Worthington of the Logan County Court appointed Doug Jackson as Receiver over Schubert's assets. (Ex. 8, DOS App. For Apt of Receiver; Ex. 9, Logan Order Apt Receiver.)
2. On March 4, 2005, Pollard filed a lawsuit against Marsha Schubert doing business as Schubert and Associates in the District Court of Logan County, State of Oklahoma Case No. CJ-2005-71 arising from Pollards' dealings with Marsha Schubert d/b/a Schubert and Associates. (Ex. 10, Pollard Petition; Ex. 11, Logan Cnty OSCN Rpt CJ-05-71.)

3. On June 10, 2005, Judge Worthington of the District Court of Logan County entered judgment in favor of Pollard and against Marsha Schubert d/b/a Schubert & Associates and set a hearing to determine damages. (Ex. 12, Logan County Default Judgment June 10, 2005; Ex. 11, Logan Cnty OSCN Rpt CJ-05-71.)
4. On July 14, 2005, the District Court of Logan County, Judge Donald Worthington, entered an Order determining damages to be \$827,000.00. (Ex. 4, Logan Journal Entry July 14, 2005; Ex. 11, Logan Cnty OSCN Rpt CJ-05-71.)
5. The Journal Entry was filed of record with the Logan County Clerk. (Ex. 13, Affidavit of Judgment July 19, 2005; Ex. 11, Logan Cnty OSCN Rpt CJ-05-71.)
6. Receiver Doug Jackson was then served with notice of the June 14, 2005 Judgment and of Pollard's hearing on damages against Schubert. (Ex. 14, Logan Order July 8, 2005; Ex. 15, Affidavit of Mailing July 8, 2005; Ex. 11, Logan Cnty OSCN Rpt CJ-05-71.)
7. On July 20, 2005, Receiver Doug Jackson was served with Pollard's Journal Entry of Judgment against Schubert granted by Judge Worthington of the Logan County Court on July 14, 2005. (Ex. 5, Affidavit of Mailing July 20, 2005; Ex. 11, Logan Cnty OSCN Rpt CJ-05-71.)
8. Neither the Department nor the Receiver have challenged the validity of Pollard's Judgment. (Ex. 11, *Pollard v. Schubert* CJ-2005-71 OSCN Report.)
9. On May 11, 2005, the Department filed lawsuit *DOS v. Pollard*, CJ-2005-3799 in the District Court of Oklahoma County arising from Pollards' dealings with Marsha Schubert d/b/a Schubert and Associates. (Ex. 16, Dpt. Petition.)
10. Both the claims made by the Department against Pollard in this case and the claims made by the Pollard against Marsha Schubert d/b/a Schubert and Associates arose from the same operative facts of Pollards' dealings with Marsha Schubert d/b/a Schubert and Associates. (Ex.

10, Pollard Petition; Ex. 16, Dpt Petition.)

11. L&S Pollard Farms, LLC filed a Proof of Claim with the Receiver in the amount of \$248,464.05 and are classified by the Department to be “short” investors and on whose behalf the Department filed *Oklahoma Department of Securities ex rel. Irving L. Fought, Administrator vs. Marsha Schubert et al.*, Case No. CJ-2004-256. (Ex. 7, Proof of Claim.)

12. On October 25, 2006, L&S Pollard Farms, LLC executed an Assignment of Claim to Barry Pollard for its right, title and interest in and to any and all claims it has in the case of *Oklahoma Department of Securities ex rel. Irving L. Fought, Administrator vs. Marsha Schubert et al.*, Case No. CJ-2004-256, Logan County, Oklahoma. (Ex. 6, Assignment of Claim.)

ARGUMENTS AND AUTHORITIES

ARGUMENT I – SUMMARY JUDGMENT STANDARD

Pursuant to Rule 13 of the Rules for the District Courts of Oklahoma, 12 Okla. Stat. Ann., Ch.2, Appll, R. 13, the Court should find in favor of the movant when it is established that there is no substantial controversy as to any material fact.

ARGUMENT II – UNJUST ENRICHMENT DOES NOT EXIST UNTIL THERE IS A DETERMINATION OF ENRICHMENT.

The District Court in Logan County has already determined that the Pollards were not enriched but, in fact, were damaged.

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 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 were customers of Schubert as an agent, representative and employee of AXA/Equitable. (Ex. 1, Pollard Affidavit.) All insurance and investment activities the Pollards engaged in during the relevant time periods were through Schubert 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 arising from his dealings with Marsha Schubert and for the resulting damages. (Ex. 10, 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. 12, Logan County Default Judgment June 10, 2005; Ex. 11, Logan Cnty OSCN Rpt CJ-05-71.) 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. 16, Department’s Petition; Ex. 14, Logan Order July 8, 2005; Ex. 15, Affidavit of Mailing July 8, 2005; Ex. 11, Logan Cnty OSCN Rpt CJ-05-71.) 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. 4,

Logan Journal Entry July 14, 2005; Ex. 11, Logan Cnty OSCN Rpt CJ-05-71.) The Journal Entry of Judgment was mailed to the Receiver immediately after its entry. (Ex. 5, Affidavit of Mailing July 20, 2005; Ex. 11, Logan Cnty OSCN Rpt CJ-05-71.)

On October 14, 2004, the Department obtained an Order from Judge Worthington in Logan County appointing Douglas Jackson as the Receiver over Marsha Schubert's assets. (Ex. 8, DOS App. For Apt of Receiver; Ex. 9, Logan Order Apt Receiver.) 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. 16, Department's Petition.) The Department and their Receiver have worked closely with regards to their actions to recover monies for the Receivership. 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. In all other cases similar to the case against the Pollards, the Department and the Receiver have been joint Plaintiffs. They did jointly file as Plaintiffs because of a conflict of interest between the Receiver and 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. 5, Affidavit of Mailing July 20, 2005; Ex. 11, Logan Cnty OSCN Rpt CJ-05-71.) 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. 4, Journal Entry of Judgment.) What is inequitable is that the Department would even pursue this case in light of prior judgment.

**ARGUMENT III – THE DEPARTMENT’S CLAIMS ARE BARRED BY THE
DOCTRINE OF RES JUDICATA.**

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. 4, Logan Journal Entry July 14, 2005; Ex. 11, Logan Cnty OSCN Rpt CJ-05-71.) Notice of Pollard’s Judgment was filed of record with the Logan County Court Clerk as well as the County Clerk. (Ex. 13, Affidavit of Judgment July 19, 2005; Ex. 11, Logan Cnty OSCN Rpt CJ-05-71.) Additionally, Notice of the Judgment was sent to the Receiver of Schubert’s estate on July 18, 2005. (Ex. 5, Affidavit of Mailing July 20, 2005; Ex. 11, Logan Cnty OSCN Rpt CJ-05-71.)

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 Lien 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 operative facts 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. 17, 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 §340 provides that a creditor against a receivership need only present their claim in such a way that it can be recognized by the receiver. "Furthermore, it is generally recognized to be within the discretion of a court appointing a receiver to permit claims against the receiver or corporation or person whose property is in receivership to be litigated in an independent action in another court." *Id.* 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. 17, Fought Depo. P. 73, ll. 17-23.) The Receiver was appointed to recover assets belonging to Schubert's estate. (Ex. 17, 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. 17, 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 and the Department's claims are barred by res judicata.

**ARGUMENT IV – THE DEPARTMENT’S CLAIMS ARE 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. 16, Department’s Petition CJ-2005-3799 and Ex. 10, 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.

ARGUMENT V – POLLARDS HAVE AN ABSOLUTE RIGHT TO 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.

A. \$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.

B. Assignment from L & S Pollard Farms, LLC to the Pollards.

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. 7, 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. (Ex. 7, Proof of Claim.)

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. 6, Assignment.) 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 VI – CLAIMS OF THE DEPARTMENT ARE BARRED
BY STATUTES OF LIMITATIONS**

The Department has brought this action for the specific recovery of "Investor Assets" received by the Pollards. The 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. 16, 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. 16, 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)

The 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. 16, 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. 16, 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. (Exhibit 18, 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 (Ex. 18, Clarke's Affidavit.) 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 VII - 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 (Bkrtcy.M.D.Fla.,2005); *In Re: Financial Federated Title & Trust, Inc.*, 309 F.3d 1325 (11th Cir.).

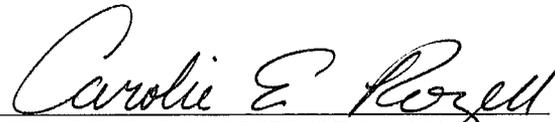
The court in *Braniff v. Coffield*, 190 P.2d 815, 1947 OK 369, a case involving the enforcement of civil liability under Oklahoma security laws, held that the courts did not have the authority to broaden the powers given to administrative bodies beyond that set forth in the applicable statute or the power to enlarge the class of persons from whom relief can be sought. 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.

CONCLUSION

Not only is Pollard's Judgment a valid claim against Schubert, it is a determination that there was no unjust enrichment on behalf of Pollards. As any person is collaterally estopped or prevented by res judicata from challenging the Logan County Court orders reflecting Schubert's operation of a Ponzi scheme and the appointment of a Receiver over Schubert's estate who was empowered to seek disgorgement of innocent investors deemed "relief defendants", so is the Department barred from challenging the applicability of Pollard's Judgment against Schubert's estate. Furthermore, the Department is estopped from claiming that the Judgment is not to be rightfully offset from the amount it seeks to disgorge from the Pollards based on the theory of unjust enrichment. In the event the Court determines that the claims are not absolutely barred by res judicata, collateral estoppel, or setoff, the claims against the Pollards must be offset by the claims they have as the result of the assigned claim and all claims against the Pollards which arose prior to May 11, 2003, are barred by the two year statute of limitations.

WHEREFORE, the Pollards respectfully request Judgment against the Plaintiff, that Plaintiff's claims are barred by collateral estoppel, res judicata and offset. Alternatively, the Pollards request that the Court enter Judgment that the Pollards have a valid offset in the amount of \$248,464.05 by virtue of the Assignment from L & S Pollard Farms LLC, and that claims arising from monies paid to the Pollards prior to May 11, 2003, are barred by the two year statute of limitations. The Defendant Pollards respectfully request that this Court find there is no material fact in dispute, that judgment is properly granted in favor of the Pollards, and award attorney fees and costs in addition to any further relief to which the Defendant Pollards may be entitled.

Respectfully Submitted,



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CERTIFICATE OF MAILING

I hereby certify that on this 11th day of October, 2007, a true and correct copy of the above and foregoing Pleading was hand delivered to the following:

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