

Pollards' request for offsets or setoffs. The Pollards submit the following brief in support of their motion.

BRIEF IN SUPPORT

On October 26, 2007, the Court granted a Partial Summary Judgment in favor of the Department regarding the existence of a "Ponzi" scheme and unjust enrichment of the Pollards. Further, the Court denied the Pollards' right to any setoffs or offsets against any funds ordered to be disgorged by the Pollards. On January 10, 2007, the Court denied the Pollards' *Motion to Reconsider and/or Vacate Order Granting Partial Summary Judgment dated November 18, 2007; Motion for New Trial and/or Motion to Clarify and Brief in Support* ("Motion to Reconsider"). The Court's grant of partial summary judgment and denial of the Pollards' *Motion to Reconsider* affects a substantial part of the merits of this controversy. Therefore, this Court, under 12 Okla. Stat. 952(a)(3), should grant an immediate appeal from that order which may materially advance the ultimate termination of this litigation.

Further, the legal issues presented in the Department's *Motion for Summary Judgment*, the Pollards' Response and the additional replies are issues of first impression for the Oklahoma Supreme Court. If the Court is in error in granting partial summary judgment in favor of the Department, it will cause the unnecessary expenditure of substantial resources of both parties and the Court, particularly because the circumstances of this case will necessitate a great deal of deposition discovery and expert testimony regarding the Pollards' finances. As depicted more fully below, the Pollards believe that the legal issues presented should be reviewed in advance of the final judgment and this Court should certify the issues in the Order granting partial summary judgment pursuant

to 12 Okla. Stat. §952(b)(3). The judicial savings and lessened litigation costs and expenses would be significant if the Court were to grant this Motion.

STATEMENT OF FACTS

On May 11, 2005, the Department filed the current lawsuit *DOS v. Pollard*, CJ-2005-3799, in the District Court of Oklahoma County arising from the Pollards' dealings with Marsha Schubert d/b/a Schubert and Associates. *See* Petition dated May 11, 2005, attached hereto as Exhibit "A." The Department claims that the 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 monies do not belong to the Pollards. They claim the Pollards were unjustly enriched.

Beginning over fourteen years ago, the Pollards were one of Schubert's first investment customers. The Pollards engaged in a number of investment and insurance transactions with Marsha Schubert, many 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 Schubert, they invested more than an estimated \$616,626.00. *See* Affidavit of Morely, attached hereto as Exhibit "B."

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 or no value as a result of Schubert's conduct as an agent, representative and employee of AXA/ Equitable. *See* Affidavit of Barry Pollard, attached hereto as Exhibit

“C.” Upon further investigation, the 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. On March 4, 2005, Barry 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 for damages he suffered based upon the actions of Schubert in her capacity as his investment advisor. See Petition attached hereto as Exhibit “D.” 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. See Default Judgment dated June 10, 2005, attached hereto as Exhibit “E”; Order dated July 8, 2005, attached hereto as Exhibit “F.” Schubert’s receiver, Douglas Jackson, was provided notice of this hearing. See Affidavit of Mailing dated July 8, 2005, attached hereto as Exhibit “G.” On July 14, 2005, the District Court of Logan County, Judge Worthington entered an Order determining damages to be \$827,000.00. See Journal Entry of Judgment dated July 14, 2005, attached hereto as Exhibit “H.” The Journal Entry was filed of record with the Logan County Clerk. See Affidavit of Judgment (Money Judgment Only), attached hereto as Exhibit “I.” On July 20, 2005, the Receiver was served with a copy of this judgment. See Affidavit of Mailing dated July 18, 2005, attached hereto as Exhibit “J.” Neither the Department nor the Receiver challenged the validity of Pollard’s Judgment and it is a final order. See *Pollard v. Schubert*, CJ-2005-71 OSCN Report, attached hereto as Exhibit “K.” **On January 11, 2008**, in *Okla. Dept. of Sec. v. Schubert*, Case No. CJ-2004-256, District Court of Logan County, Judge Worthington denied the Department’s motion to hold the Pollards in contempt for their

judgment against Schubert and her estate. Further, Judge Worthington appointed a Special Receiver to evaluate the validity of the Pollard's claim against the receivership estate in the amount of \$827,000.00. The Pollards will separately seek a continuance and/or stay of the current action until the Special Receiver has reached his decision regarding the validity of the Pollards' claims against Schubert's estate.

In addition to the judgment owed to the Pollards by Schubert or her estate, on October 25, 2006, the Pollards were assigned the claim of L&S Pollard Farms, L.L.C. in the amount of \$284,464.05. *See* Assignment of Claim, attached hereto as Exhibit "L." L&S Pollard Farms, L.L.C. filed a Proof of Claim with the Receiver in the amount of \$284,464.05 and are classified by the Department to be a "short" investor on whose behalf the Department filed the present case. *See* Proof of Claim, attached hereto as Exhibit "M." The Pollards are entitled to setoff both the Judgment and the Assignment against the amount the Department is requesting to be disgorged from them.

Finally, the 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 in an effort to increase the Department's claims against the Pollards.

On March 29, 2007, the Department moved for summary judgment on the issues of the existence of a Ponzi scheme and that the Pollards were unjustly enriched. In response, the Pollards argued that the Department was unable to trace the funds received by the Pollards as belonging to other investors; therefore, there was no proof of unjust enrichment. As such, the Pollards should not be ordered to disgorge funds they rightfully

received. On November 28, 2007, this Court entered an Order granting a Partial Summary Judgment in favor of the Department on the issue of “Ponzi” scheme, unjust enrichment and setoff. *See* Order granting Partial Summary Judgment, attached hereto as Exhibit “N.” On January 10, 2007, this Court denied Pollards’ *Motion to Reconsider and/or Vacate Order Granting Partial Summary Judgment dated November 18, 2007; Motion for New Trial and/or Motion to Clarify and Brief in Support* (“Motion to Reconsider”). The Court has held that the Ponzi scheme existed, that the Pollards were unjustly enriched under the Ponzi scheme and that the Pollards are not entitled to any setoffs, essentially deciding all the merits of this case in favor of the Department. The only remaining issue is the issue of damages suffered or the amount of money the Pollards are required to disgorge. Since there is no Oklahoma authority on point, the question of whether the Department should be required to trace the funds received by the Pollards as belonging to other investors before unjust enrichment can be found is appropriate for certification to the Oklahoma Supreme Court.¹ For these reasons, this Court should grant this *Motion for Interlocutory Appeal* under 12 Okla. Stat. §952(a)(3) and certify these issues for immediate appeal to the Oklahoma Supreme Court.

ARGUMENTS

This Court should grant the Pollards’ *Motion for Interlocutory Appeal* because the Court’s granting of a partial summary judgment in favor of the Department: (1) has decided questions of substance not heretofore determined by the Oklahoma Supreme Court; and (2) the Order affects a substantial part of the merits of this controversy, therefore, an immediate appeal from the Order may materially advance the ultimate

¹ *See Adams v. Moriarty*, 2005 OK CIV APP 105, 127 P.3d 621 wherein the Oklahoma Court of Appeals held that an investor was required to trace his funds in order to fully recover against the receivership estate.

termination of this litigation.

A. This Court should grant the Pollards' *Motion for Interlocutory Appeal* because the District Court's Order granting partial summary judgment in favor of the Department decided questions of substance not heretofore determined by the Oklahoma Supreme Court.

The issues of first impression which should be certified to the Oklahoma Supreme Court are as follows:

- 1) Whether, the Department and/or Receiver is required to trace the funds received by the investor as belonging to other investors in order to prove unjust enrichment and require disgorgement of such monies?
- 2) Whether the Department and/or Receiver may recover monies received by the investors under a Ponzi scheme based on the theory of unjust enrichment?²
- 3) Whether the Pollards are entitled a setoff or offset against any monies ordered to be disgorged?

The Pollards have been unable to find any published opinion by the Oklahoma Supreme Court addressing whether the Department and/or Receiver must trace the funds received by the Pollards from the hands of the other investors under the Ponzi scheme in order to prove that the Pollards were unjustly enriched. Nor has the Oklahoma Supreme Court decided whether unjust enrichment is a proper theory of recovery in a case involving a Ponzi scheme. Both issues are ones of first impression for the Oklahoma Supreme Court. As such, the Pollards' *Motion for Interlocutory Appeal* should be granted to allow the Oklahoma Supreme Court the opportunity to determine these issues in regards to Ponzi schemes.

² The issue of whether unjust enrichment is the proper theory of recovery under a Ponzi scheme is currently before the Oklahoma Supreme Court on a writ of certiorari in *Okla. Dept. of Securities v. Toepfer et. al*, SD 104,004. However, the issues of tracing and setoffs or offsets are not before the Oklahoma Supreme Court nor have they been addressed in any other Oklahoma case. Thus, they are issues of first impression which should be certified for review by the Oklahoma Supreme Court.

The Oklahoma Supreme Court has not resolved the issue of whether the Receiver and/or investor should be required to trace the funds received by the investor as belonging to another investor before a party can be found to have been unjustly enriched under a Ponzi scheme. The determination of this issue is necessary in order to decide whether the monies the Pollards received rightfully belonged to them and/or whether disgorgement of such monies should be ordered. There can be no unjust enrichment when the monies were received by the rightful owner. The Department has offered no support that the monies received by the Pollards could be traced to the investment of other investors to support its contention that the Pollards were unjustly enriched under the Ponzi scheme. Thus, this Court should certify this issue for review by the Oklahoma Supreme Court.

The only Oklahoma case to address the issue of traceability was *Adams v. Moriarty*, 2005 OK CIV APP 105, 127 P.3d 621. In *Adams*, the Oklahoma Court of Civil Appeals addressed the issue of whether an investor was required to trace his funds in order to fully recover against the receivership estate. The Court stated that in the case of Ponzi scheme, remaining assets must be distributed to victims on a pro-rata basis unless a particular creditor's assets are able to be specifically traced. *Id.* The Court, citing *Cunningham v. Brown*, noted that in order for an investor to successfully recover all the funds invested in the Ponzi scheme, it must trace the money. *Cunningham v. Brown*, 265 U.S. 1, 44 S.Ct. 424, 68 L.Ed 873 (1924). In *Adams*, the investors failed to present any evidence showing their deposited funds could be traced distinctly from the other commingled funds in the Ponzi scheme; therefore, summary judgment was granted in

favor of the Receiver.³ Because an investor is required to trace the funds it invested to fully recover from the receivership estate, conversely, the receiver should be required to trace the funds received by the investor as belonging to other investors in order for disgorgement of such monies to be required.

Although *Adams* decided that an investor was required to trace his funds in order to recover, the issue of whether the Receiver and/or Department is also required to trace funds paid to investors as belonging to other investors has never been addressed by the Oklahoma courts. The traceability issue has also not been raised or addressed by the case that was before Judge Parrish, CJ-2005-3796, involving the other relief defendants involved in this Ponzi Scheme. See *Oklahoma Dept. of Securities v. Toepfer et al.*, CJ-2005-3796.⁴

In the case-at-hand, the Department has failed to present any evidence tracing the funds received by the Pollards as belonging to other investors defrauded in the Ponzi scheme. The Pollards dispute that the funds they received did not rightfully belong to them. The Department has failed to fully and accurately account for the origination of the monies received by the Pollards and the tracing of the same back to the specific short investor. There is nothing that ties the monies received by the Pollards as monies belonging to other persons, thus, causing damages to the “short investors.” In fact, the District Court of Logan County held that the Pollards were actually damaged, not enriched by the acts of Schubert and awarded them damages in the amount of

³ In *Adams*, the investor’s funds were invested and transferred 16 days before a receivership was created. The Oklahoma Court of Appeals found this insufficient to show tracing.

⁴ On May 11, 2005, the Department and the Receiver filed an action against one hundred fifty-eight (158) defendants for unjust enrichment. The Pollards were not joined in that suit. On July 2, 2007, Appellant’s Petition for Writ for Certiorari was granted by the Oklahoma Supreme Court and is still pending before the Court. See OSCN Report for Case No. SD- 104004, attached hereto as Exhibit “O.”

\$827,000.00. *See* Exhibit "H."⁵ The Department seeks to disgorge the Pollards of monies that it has not proven the Pollards actually received. Thus, the Pollards argue that the Department's claim for disgorgement of the funds they received should fail unless the Department can trace the funds as belonging to other investors to show the Pollards were in fact unjustly enriched.

In order to resolve this dispute, the Oklahoma Supreme Court must determine whether the Department and/or the Receiver must trace the funds received by the investor as belonging to other investors before an order of disgorgement may be granted. This issue as well as whether the Department has standing to sue the Pollards for unjust enrichment and whether the Pollards are entitled to a setoff against the amounts ordered to be disgorged are unresolved by the Oklahoma Supreme Court. The Department has offered no Oklahoma case law in support of its position, but rather, has relied on other states and non-Tenth circuit cases to justify their cause of action for unjust enrichment. It is unjust for this Court to award the Department judgment against the Pollards without requiring the Department to provide evidence that traces the specific unearned profits allegedly received by the Pollards.

Certification for interlocutory appeal of these issues to the Oklahoma Supreme Court should be granted to allow the Court to address the issues of first impression regarding Ponzi schemes. Certification of these issues would promote judicial economy and would result in judicial efficiency because if the Oklahoma Supreme Court determines that the Department is required to trace the funds received by the investor as belonging to other investors before disgorgement may be ordered, it would avoid a

⁵ Also, Judge Worthington's order of January 11, 2008 allowed Pollard a claim of \$827,000.00 to be evaluated by Special Receiver.

potential remand and retrial, and would ensure certainty by this Court in applying Oklahoma law regarding Ponzi scheme at the trial in this matter. If this Court is in error in granting partial summary judgment in favor of the Department, it will cause the unnecessary expenditure of substantial resources of both parties and the Court, particularly because the circumstances of this case will necessitate a great deal of deposition discovery and expert testimony.⁶ Therefore, under 12 Okla. Stat. 952(a)(3), in the interest of judicial economy, this Court should grant the Pollards' *Motion for Interlocutory Appeal* and certify these issues for resolution by the Oklahoma Supreme Court.

B. This Court should certify the questions of this case for immediate interlocutory appeal because the Court's grant of partial summary judgment affects a substantial part of the merits of the controversy and such an order may materially advance the ultimate termination of the litigation.

An interlocutory order not appealable by right under the statutes, which order affects a substantial part of the merits of the controversy, may be brought for review to the Supreme Court when the trial judge has certified that an immediate appeal from that order may materially advance the ultimate termination of the litigation. 12 Okla. Stat. 952(a)(3); Oklahoma Supreme Court Rule 1.50. The "merits" includes the real and substantial grounds of action or defense, and excludes matters of practice, procedure and evidence. *Pierson v. Canupp*, 754 P.2d 548, 552 n.8 (Okla. 1988).

On October 26, 2007, this Court entered an *Order Granting Partial Summary Judgment* in favor of Plaintiff. See Exhibit "N". The Court ruled that a Ponzi scheme existed; that the Pollards had been unjustly enriched due to the Ponzi Scheme and that the

⁶ The Department currently notified eight depositions beginning on January 23, 2008 and has stated its intent to notice several more depositions before discovery is complete.

Pollards were not entitled to any offsets or setoffs. Essentially, the only issue remaining following the Court's grant of partial summary judgment is damages or the amount of money the Pollards' should be ordered to disgorge. As such, under 12 Okla. Stat. 952(a)(3), the Court should grant the Pollard's *Motion for Interlocutory Appeal* because its grant of partial summary judgment affected a substantial part of the merits of this controversy.

This Court's grant of partial summary judgment in favor of the Department essentially determined the merits of this case and defeated all of the Pollards' defenses to disgorgement. By ruling that the Pollards had been unjustly enriched under the Ponzi scheme, the Court found the Pollards must disgorge all funds received under the Ponzi scheme and are entitled to no setoffs or offsets of those funds.⁷ Further, the Court has found the Pollards must disgorge funds that the Department has not fully proven its origination or traced the same back to any short investor. The Court has imposed liability on the Pollards without requiring the Department to fully prove its case. It is unjust for this Court to award the Department judgment against the Pollards without requiring the Department to provide evidence that traces specific monies allegedly received by the Pollards and not allow the Pollards an opportunity to appeal this decision prior to trial. Allowing an interlocutory appeal of these issues will materially advance the ultimate termination of this litigation, thus, saving the parties and the Court any unnecessary expenditure of time and money.

If the case is allowed to proceed, the parties have indicated that they will need to engage experts and conduct extensive discovery regarding the Pollards finances including

⁷ This now appears to be inconsistent with the ruling of another District Judge in Case No. CJ-2004-256 in Logan County wherein on January 11, 2008, Judge Worthington orally ruled Pollard was entitled to a claim against the receivership estate in the amount of \$827,000.00 to be evaluated by a special receiver.

numerous depositions. At present time, eight depositions have already been scheduled by the Department and the Department has expressed its intent to schedule several more depositions before discovery is completed. The resources of the parties and the trial court that will have been unnecessarily expended in the event that the trial court has erred as a matter of law in partially granting the Department's *Motion for Summary Judgment* will be substantial. The Pollards therefore believe that the legal issues presented should be reviewed in advance of the final judgment and this Court should pursuant to 12 Okla. Stat. §952(b)(3) certify the issues in the Order granting partial summary judgment in favor of the Department for review by the Oklahoma Supreme Court.

CONCLUSION

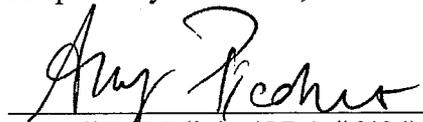
The questions presented in the Department's *Motion for Summary Judgment* and the Pollards' *Response* and all other accompanying motions are unresolved by the Oklahoma Supreme Court. The issues should be certified to the Oklahoma Supreme Court in order to address the issues of first impression regarding Ponzi schemes. If this Court is in error in granting partial summary judgment in favor of the Department, it will cause the unnecessary expenditure of substantial resources of both parties and the Court, particularly because the circumstances of this case will necessitate a great deal of deposition discovery and expert testimony. Further, the Court's grant of partial summary judgment in favor of the Department has affected a substantial part of the merits of this controversy and a certification of this matter for an immediate appeal from that order may materially advance the ultimate termination of this litigation.

The Pollards therefore believe that the legal issues presented should be reviewed in advance of the final judgment and this Court should certify the issues pursuant to 12

Okla. Stat. §952(b)(3) in the Order granting partial summary judgment in favor of Plaintiffs for review by the Oklahoma Supreme Court.

WHEREFORE, based upon the above and foregoing, the Defendants, Barry and Roxanne Pollard, respectfully requests this Court to certify the issues for immediate interlocutory appeal to the Oklahoma Supreme Court pursuant to 12 Okla. Stat. 952(a)(3); to stay all discovery and further proceedings in this matter until the Oklahoma Supreme Court has rendered its opinion; and award attorney's 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 SERVICE

This is to certify that on this 19th day of January, 2008, a true and correct copy of the above and foregoing pleading was mailed, with postage fully prepaid thereon to the following;

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