

IN THE DISTRICT COURT OF THE CHEROKEE NATION

CHEROKEE NATION EDUCATION
CORPORATION, d/b/a CHEROKEE
NATION FOUNDATION,

Plaintiff,

v.

KIMBERLIE GILLILAND,

Defendant.

Case No. CV-16-397

FILED
2016 NOV 30 AM 9:10
CHEROKEE NATION
DISTRICT COURT
KRISTHONCOOYEA
COURT CLERK

**DEFENDANT'S REPLY IN SUPPORT OF MOTION TO
STAY PENDING RESOLUTION OF THE CONCURRENT CRIMINAL ACTION**

Defendant Kimberlie Gilliland ("Gilliland") submits this reply to Plaintiff Cherokee Nation Education Corporation's ("CNEC") brief in opposition to Gilliland's motion to stay this action pending the outcome of the concurrent criminal action.

**I. THIS COURT SHOULD APPLY THE SIX-FACTOR TEST ADOPTED BY
COURTS OUTSIDE THE CHEROKEE NATION**

Gilliland did not find, and CNEC has not cited, any constitutional, statutory or common law authority from the Cherokee Nation addressing a motion to stay a civil action pending the resolution of a concurrent criminal action. Gilliland therefore urged the Court to apply the six-factor test courts outside the Nation have used to determine whether this action should be stayed pending the criminal action the Nation has also filed against Gilliland.

In its response, CNEC cites a portion of § 3 of the Comprehensive Access to Justice Act of 2016 ("CAJA"), specifically the sentence which provides, "No state, or federal law, including any state or federal regulations, shall be binding upon the courts unless specifically incorporated into statute by the Tribal Council or adopted as common law by a decision of the Court." CNEC Opposition Brief at 2. CNEC, however, conveniently ignores the next sentence of § 3 which

provides, “Notwithstanding, in matters which cannot be resolved through application of Cherokee law, the court may apply any federal or state law, including any regulation promulgated by the United States Department of Interior which would be cognizable in a court of general jurisdiction therein.” Inasmuch as there is no constitutional, statutory or common law Cherokee authority on this point, the Court may apply the six-factor common law test Gilliland urges. 12 CNCA § 3.

II. THE SIX-FACTOR TEST OVERWHELMINGLY WEIGHS IN FAVOR OF STAYING THIS ACTION PENDING RESOLUTION OF THE CONCURRENT CRIMINAL ACTION AGAINST GILLILAND

The six factors courts generally consider in determining whether the interests of justice weigh in favor of staying a civil action pending the outcome of a concurrent criminal action are: (1) the extent to which the issues in the civil and criminal cases overlap; (2) the status of the criminal case, including whether the defendant has been indicted; (3) the interests of the plaintiff in proceeding expeditiously versus the prejudice to the plaintiff resulting from the delay; (4) the interests of, and burden on, the defendant; (5) the interest of the Court; and (6) the public’s interest. *E.g., S.E.C. v. Gordon*, 2009 WL 2252119 at *4 (N.D. Okla. Jul. 28, 2009); *AIG Life Ins. Co. v. Phillips*, 2007 WL 2116383 at *2 (D. Colo. Jul. 20, 2007).

CNEC has not disputed that these are the six factors courts have considered. Rather, CNEC disputes their impact here. Contrary to CNEC’s contentions, application of these six factors here requires this action be stayed pending resolution of the concurrent criminal case.

A. The Issues In This Action Substantially Overlap The Issues In The Concurrent Criminal Action

CNEC argues that only eight of the counts in the concurrent criminal action overlap those in this action, “leaving 14 counts that involve transactions or occurrences separate and distinct from the eight criminal counts.” CNEC Opposition Brief at 3. CNEC’s argument completely

ignores the Nation's responses in the concurrent criminal case in which the Nation states that it "expects to introduce testimony and evidence that [Gilliland] had a pattern of using [CNEC] funds and credit cards for her own and her family's personal benefit. This evidence will be used to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." See Nation's Criminal Discovery Responses (relevant portions attached as Exhibit 1).

While CNEC is technically correct that only eight of the counts in the concurrent criminal action overlap the counts in this action, the Nation's discovery responses unquestionably show that it intends to use evidence of other activities alleged in this action to prove Gilliland's guilt on all counts in the concurrent criminal action. The overlapping issues in this and the concurrent criminal action thus involve far more than just the eight specific counts in each which actually contain parallel allegations.¹

B. The Status Of The Case, Including Whether Gilliland Has Been Indicted

CNEC concedes that Gilliland has been indicted. CNEC, nonetheless, argues that Gilliland has purportedly not shown "substantial" prejudice. CNEC is wrong.

The Nation alleges in its complaint in the concurrent criminal action that Gilliland may be imprisoned for up to one year and fined \$5,000.00 **on each of the nine separate counts in the concurrent criminal action**. Refusing to stay this action would require Gilliland to waive her privilege against self-incrimination in the concurrent criminal action and to subject herself to a potential sentence of nine years in prison and \$45,000.00 in fines in order to avoid effectively forfeiting this action and being subject to the \$1.16M civil judgment CNEC stated in its response

¹ CNEC also argues that, "[f]rom a recovery perspective," the overlapping counts equate to only 3.3% of the total recovery sought, \$1,160,000.00. That \$1.16M figure, however, as CNEC concedes, includes a claim for \$928,000.00. Fully 80% of the damages CNEC uses to calculate the "total" recovery it seeks consists of a mythical punitive damage figure based on rank conjecture.

that it is seeking in this action. It is hard to imagine how this Hobson's choice can constitute anything other than substantial prejudice to Gilliland.

C. The Prejudice To Gilliland If This Action Is Allowed To Proceed While The Concurrent Criminal Action Is Pending Outweighs Any Prejudice CNEC Would Suffer If This Action Is Stayed

CNEC argues that witnesses may become unavailable or their memories may fade if this action were stayed. CNEC, however, offers no explanation why, when it had the audit on which it bases its claims in hand in April 2014, it waited over two years until the end of July 2016 to file this action. Had CNEC been truly concerned with witnesses relocating or their memories fading, CNEC would not have waited more than two years to file this action.

CNEC also makes unsubstantiated statements that a delay would purportedly affect its ability to collect a judgment against Gilliland. For example, CNEC claims that Gilliland presently owns two homes, one of which would not be exempt from civil execution. CNEC, however, offers no evidence to support this statement, and the statement is untrue.²

CNEC sat on its claims for over two years after receiving the audit on which it bases those claims. Given CNEC's delay, CNEC cannot be heard to complain that granting the stay necessary to protect Gilliland's constitutional right against self-incrimination in the concurrent criminal proceeding will constitute substantial prejudice to CNEC or will outweigh the prejudice Gilliland will suffer if the stay is denied. *Dienstag v. Bronsen*, 49 F.R.D. 327, 329 (S.D.N.Y. 1970) ("While a [stay] will undoubtedly cause inconvenience and delay the plaintiffs, protection of defendants' constitutional rights against self-incrimination is the more important consideration.").

² See Gilliland Declaration attached as Exhibit 2.

D. The Interests Of, And Burden On, Gilliland

CNEC asserts that defending both this and the concurrent criminal action will not unduly burden Gilliland because, among other things, Gilliland purportedly owns two homes, has a business, and has an ongoing career with Bacone College. CNEC offers no evidentiary support for these statements. As with the assertion that Gilliland owns two homes, these additional assertions are not true. Gilliland does not own any businesses. Bacon College terminated Gilliland's employment shortly after this action and the concurrent criminal action were filed.³

CNEC also argues that statements Gilliland purportedly made to a reporter with the *Muskogee Phoenix* purportedly offer "an unfiltered insight to [Gilliland's] true feelings" toward this Court and the Cherokee judiciary as a whole. Even if true, Gilliland's feelings toward this Court are irrelevant to whether the denial of a stay of this action pending the resolution of the concurrent criminal action will prejudice her and place a severe burden on her.

Finally, CNEC claims that Gilliland's statement promising to file a vigorous counter-suit against the Nation for slandering her somehow proves Gilliland is not lacking in resources. As this Court is no doubt aware, attorneys often handle claims on a contingent basis. The fact that Gilliland might choose at some time to engage an attorney to pursue a claim against the Nation on that basis is hardly evidence of the unlimited resources CNEC claims Gilliland possesses.

E. The Interests Of The Court

In her motion, Gilliland argued staying this action pending a resolution of the concurrent criminal action could benefit the Court by increasing the possibility of a settlement of this action and reducing the scope of discovery in this action because the evidence gathered in the concurrent criminal action could later be used in this action. CNEC does not dispute Gilliland's actions, but rather repeats its mantra that justice should not be delayed by staying this action.

³ See Gilliland Declaration (Exhibit 2).

Again, if speedy justice were truly CNEC's concern, why did it wait over two years after receiving the results of the audit on which it bases its claim to file this action?

F. The Public's Interest

CNEC concedes in its response that Gilliland is facing incarceration and an order to make restitution in the concurrent criminal action, but argues that only this action can provide the additional financial deterrent of punitive damages which CNEC claims are necessary to send a message. If the threat of nine years in prison, full restitution, and \$45,000.00 in fines in the concurrent criminal action is not a deterrent, it is difficult to see how the additional threat of punitive damages in a civil action will do so.

III. THE LESS INTRUSIVE ALTERNATIVES CNEC PROPOSES WOULD NOT BE EFFECTIVE HERE

CNEC proposes alternatives to a stay of this action, including staying any oral depositions of Gilliland and/or discovery concerning the overlapping counts. However, depositions are not the only manner in which Gilliland can incriminate herself. On the day it filed this action, CNEC served requests for admissions on Gilliland requesting her to, among other things, admit that she embezzled funds or converted property belonging to CNEC, and that she did so willfully and wantonly with a culpable state of mind.⁴ Gilliland thus faces self-incrimination even if the Court were to enter an order as CNEC suggests staying only oral depositions from Gilliland.

Similarly, given the Nation's avowed intent to introduce testimony and evidence of activities other than those specifically alleged in the criminal complaint to show Gilliland's motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or lack of accident, a stay of discovery directed only at the overlapping counts would not protect Gilliland

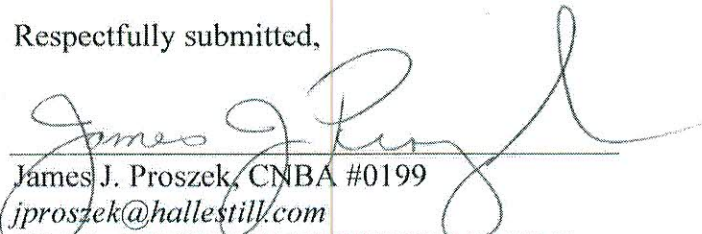
⁴ Gilliland attached a copy of CNEC's requests for admissions as Exhibit 2 to the original motion she filed on August 17, 2016.

from waiving her constitutionally guaranteed right against self-incrimination in the concurrent criminal action.

CONCLUSION

If not stayed, this action will undermine Gilliland's exercise of her constitutionally guaranteed right against self-incrimination in the concurrent criminal action, expand the rights of discovery in the concurrent criminal action beyond the limits in the Nation's Criminal Procedure Code, expose the basis of Gilliland's defense to the prosecution in the concurrent criminal action in advance of trial, and otherwise prejudice Gilliland. CNEC's overarching argument, that staying this action pending a resolution of the concurrent criminal action would, deny CNEC speedy justice is belied by CNEC's own delay in waiting more than two years after the audit on which it bases its claims to file this action. Gilliland therefore respectfully requests that this Court stay this action pending a final resolution of the concurrent criminal action.

Respectfully submitted,



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**ATTORNEYS FOR DEFENDANT
KIMBERLIE GILLILAND**

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this 29 day of November 2016, a true and correct copy of the above and foregoing instrument was sent via e-mail and U.S. Mail, with proper postage thereon fully paid, to:

Ralph F. Keen II
KEEN LAW OFFICE, P.C.
205 W. Division
Stilwell, OK 74960

2940165.1;411365.01951

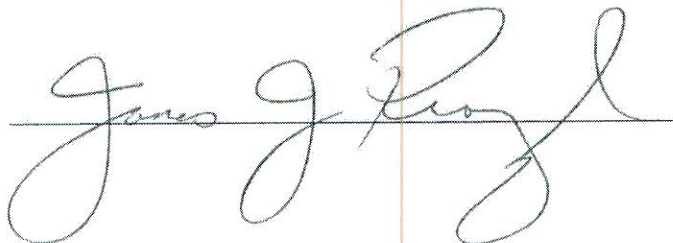
A handwritten signature in cursive script, appearing to read "James G. Keen II", is written over a horizontal line.

Exhibit 1

FILED

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

2016 SEP -2 PM 2:22

CHEROKEE NATION,
Plaintiff,

v.

KIMBERLIE A. GILLILAND,
D.O.B. 08/13/1969,
Defendant.

CRM-2016-54

**NATION'S RESPONSE TO DEFENDANT'S COMBINED
MOTION FOR DISCOVERY AND PRODUCTION OF
EXCULPATORY EVIDENCE AND MATERIALS AND NATION'S
MOTION FOR DISCOVERY AND PRODUCTION**

COMES NOW the Cherokee Nation in the above-styled case, by and through its attorney of record, and in response to the discovery/production motion filed by the Defendant, and for its own motion for discovery/production, hereby respectfully submits the following:

In response to the Defendant's Motion, the Nation would submit the following:

I. WITNESS INFORMATION:

(a) The names and addresses of witnesses which the Cherokee Nation intends to call at trial, together with their relevant, written or recorded statement, if any, or if none, significant summaries of any oral statement.

Heather Sourjohn, former CNF employee, 149 South Bluff, Tahlequah, OK: expected to give testimony re: trips & meals alleged in the Complaint, the Apple equipment that was purchased by Defendant but never taken to the Foundation, her knowledge of use of the Foundation's credit cards, car, and PikePass, as well as the Foundation's policy re: education reimbursement. She may also have knowledge about the printer that was removed from the Foundation. She has general knowledge regarding normal business transactions of the Foundation during her tenure there.

Jennifer Sandoval, CNF, 800 S. Muskogee Ave., Tahlequah, OK: expected to give testimony re: removed printer, the Apple equipment that was purchased by Defendant but never taken to the Foundation, and general knowledge regarding normal business transactions of the Foundation during her tenure there.

17. *BAD ACTS MATERIAL:* All records relating to the arrests and/or convictions of confidential informants or witnesses. Such records shall include, but are not limited to all records, offense reports, arrest reports, insurance reports or any other record describing or reporting the charges or offense.

There are no confidential informants. The Nation will obtain the criminal histories of the Defendant and its witnesses, and will provide that to defense counsel.

18. *NOTICE OF OTHER CRIMES, TESTIFYING WITNESSES, AND EVIDENCE ADMISSIBLE AGAINST THIS DEFENDANT:*

The Nation expects to introduce testimony and evidence that the Defendant had a pattern of behavior using CNF funds and credit cards for her own and her family's personal benefit. This evidence will be used to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

19. *EXPERT RECORDS:* Any and all examination reports prepared by any Cherokee Nation agency including all forensic accounting and/or audits.

Those audits will be provided in the hard copies of discovery being prepared for defense counsel. The only "audit" or report that will not be provided is that investigative report provided to the office of the Cherokee Nation Attorney General in preparation for this action.

20. *SCOPE OF DISCOVERY:* The discovery requests outlined above shall extend to material in the possession or control of the Cherokee Nation, members of the prosecutor's staff and any others who regularly report, or with reference to the particular case, have reported to the prosecutor's office or that the Nation has referred to the Federal Bureau of Investigation or the Bureau of Indian Affairs.

Understood. The responses herein follow this scope.

21. *The Defendant requests the Court to make its order continuing so that if additional information comes to the attention of or to the possession, custody or control of the Cherokee Nation, its employees or agents, the Cherokee Nation must make a prompt and timely disclosure, in writing, to the Defendant and that the order contain language that the prosecution has a duty and responsibility to make a thorough and diligent inquiry of all appropriate Cherokee Nation agencies to insure compliance with the orders entered herein.*

The Nation understands that its obligations as to discovery are a continuing obligation, and will comply.

Exhibit 2

IN THE DISTRICT COURT OF THE CHEROKEE NATION

CHEROKEE NATION EDUCATION
CORPORATION, d/b/a CHEROKEE
NATION FOUNDATION,

Plaintiff,

v.

Case No. CV-16-397

KIMBERLIE GILLILAND,

Defendant.

DECLARATION OF KIMBERLIE GILLILAND

I, Kimberlie Gilliland, declare as follows:

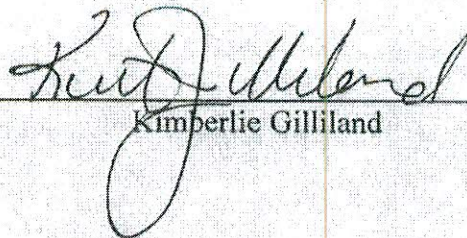
1. The only home I currently own is my residence at 1417 East 46th Street in Tulsa, Oklahoma which my husband, Andrew Sikora, and I purchased in October 2011. I do not now own, and have not since August 11, 2014 owned, two homes.

2. I do not own any business.

3. Bacone College terminated my employment with it in early August 2016 as a result of filing this action and the Cherokee Nation's criminal action against me in July 2014.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE
AND CORRECT.

DATED: 11/29, 2016.



Kimberlie Gilliland