

IN THE DISTRICT COURT OF THE CHEROKEE NATION

FILED

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

vs.

KIMBERLIE GILLILAND,
Defendant.

Case No. CV-2016-397

2016 SEP -6 PM 3:10

CHEROKEE NATION
DISTRICT COURT
KRISTI MONROE
CLERK

**PLAINTIFF'S RESPONSE AND COMBINED BRIEF
IN OPPOSITION TO DEFENDANT'S MOTION TO STAY**

COMES NOW the plaintiff, Cherokee Nation Education Corporation, d/b/a Cherokee Nation Foundation (Foundation) by and through its legal counsel, Ralph F Keen II, who responds in opposition to the Defendant's Motion to Stay as follows:

I. DEFENDANT SEEKS AN EXTRAORDINARY REMEDY

First and foremost, the relief defendant seeks - a complete stay of these civil proceedings pending the outcome of criminal proceedings - is an extraordinary remedy. *"[T]he granting of a stay of civil proceedings due to pending criminal investigation is an extraordinary remedy, not to be granted lightly."*¹ As a matter of constitutional law, a defendant has absolutely no right or entitlement to such extraordinary relief.

There is no general federal constitutional, statutory, or common law rule barring the simultaneous prosecution of separate civil and criminal actions by different federal agencies against the same defendant involving the same transactions. Parallel civil and criminal proceedings instituted by different federal agencies are not uncommon occurrences because of the overlapping nature of federal civil and penal laws. The simultaneous prosecution of civil and criminal actions is generally unobjectionable because the federal government is entitled to vindicate the different interests promoted by different regulatory provisions even though it attempts to vindicate several interests simultaneously in different forums.²

¹ United States v. Simcho, No. 08-10733 (5th. Cir. 2009); Trustee of Plumbers Pen. Fund. v. Transworld Mech., 886 F. Supp. 1134, 1139 (S.D.N.Y. 1995); In re Par Pharmaceutical, 133 F.R.D. 12, 13 (S.D.N.Y. 1990).

² Simcho, at 2.

The 10th Circuit has so recognized and affirmed that the federal constitution does not generally require a stay of civil proceedings pending the outcome of criminal proceedings, absent a clear showing of "*substantial prejudice*" to a party's rights.³

II. DEFENDANT'S BURDEN

Because the defendant seeks extraordinary relief, the defendant carries a heavy burden of proof.⁴ In affirming the trial court's denial of a stay the Tenth Circuit has found: "*When applying for a stay, a party must show 'a clear case of hardship or inequity' if 'even a fair possibility' exists that the stay would damage another party.*"⁵ Similarly, the Northern District of Oklahoma has held that the district court is not generally required to stay a civil proceeding pending the outcome of a parallel criminal proceeding absent "*substantial prejudice*" to a party's rights.⁶ The defendant's arguments fall woefully short of showing a clear case of hardship or inequity, or any substantial prejudice her rights would suffer to justify a complete stay of these proceedings.

While not adopted in the Tenth Circuit, defendant relies heavily on a six-part analysis utilized in other federal jurisdictions. Courts of the Cherokee Nation are in no manner bound by defendant's cited precedent.⁷ Nonetheless, to the extent the Court finds the test helpful, and for the sake of comparative analysis, the Foundation would respond as follows:

1. The Extent To Which The Issues In The Civil And Criminal Cases Overlap

The gravamen of defendant's argument is that the extent of overlap between the criminal and civil counts is the "*most important factor*" for the court to consider and protect her right against self-incrimination.⁸ Defendant asks the Court place her individual rights above Foundation's: "*in order to avoid placing Gilliland in the position of having to choose between*

³ Creative Consumer Concepts, Inc. v. Kreisler, 563 F.3d 1070, 1080 (10th Cir. 2009) *citing* Keating v. Office of Thrift Supervision, 45 F.3d 322, 324 (9th Cir. 1995); SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1375 (D.C.Cir.1980).

⁴ Microfinancial, Inc. v. Premier Holidays Intern., 385 F.3d 72, 77 (1st Cir. 2004) (finding the decision whether or not to stay civil litigation in deference to parallel criminal proceedings is purely discretionary, and the movant carries a heavy burden to prevail in such an endeavor).

⁵ Creative Consumer Concepts at 1080; Ben Ezra, Weinstein, & Co. v. Am. Online Inc., 206 F.3d 980, 987 (10th Cir. 2000); Span-Eng Assocs. v. Weidner, 771 F.2d 464, 468 (10th Cir. 1985); *accord* Austin v. Unarco Indus., Inc., 705 F.2d 1, 5 (1st Cir.1983).

⁶ SEC v. Gordon, 2009 WL 2252119 (N.D. Okla. Jul. 28, 2009) *citing* SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1375 (D.C.Cir.1980).

⁷ The Comprehensive Access to Justice Act of 2016, L.A. 16-16, § 3 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.*"

⁸ See Brief in Support of Defendant's Motion to Stay, p. 4.

risking a loss in the civil action by invoking her constitutional right against self-incrimination or risking conviction in the criminal case by waiving that right and testifying in the civil proceedings."⁹ To the contrary, in deciding whether to testify or invoke their fifth amendment right against self incrimination, the overwhelming authority is that a defendant must make a choice. "A defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his fifth amendment privilege."¹⁰ This premise was first established by the United States Supreme Court in U.S. v. Kordel, finding that criminal convictions based on evidence obtained by the government in a civil proceeding are not constitutionally infirm.¹¹ A plethora of subsequent decisions have made even clearer that it does not violate due process to force a litigant to choose between invoking the fifth amendment in a civil case, thus risking a loss there, or answering the questions in the civil context, thus risking subsequent criminal prosecution.¹²

Admittedly, eight counts in the civil petition involve the same transaction or occurrence as in the criminal information. Yet conversely, in considering the *overall extent of overlap*, the civil complaint contains a total of twenty-two counts, leaving fourteen counts that involve transactions or occurrences separate and distinct from the eight criminal counts. These fourteen counts can be summarized as follows:

Civil Count 1 involves embezzlement and breach of defendant's employment contract vis-à-vis unauthorized pay increases in the amount of \$64,676.35. Count 3 involves embezzlement for monies paid to her and her husband's privately owned business, Cherokee Media, in the amount of \$6,488.00. Civil Counts 4 through 7 involve the improper payment of scholarship funds in the amount of \$22,657.54 to students who did not meet the scholarship criteria.¹³ Count 8 relates to embezzlement of funds for a Colorado family trip for four in the amount of \$1,300.00. Civil Count 13 relates to embezzlement for hotel, meals and travel expense for herself and former Tribal Council member Cara Cowan Watts in the amount of

⁹ *Id.*

¹⁰ Creative Consumer Concepts, Inc. v. Kreisler, 563 F.3d 1070, 1080 (10th Cir. 2009).

¹¹ United States v. Kordel, 397 U.S. 1 (1970).

¹² See, e.g., Baxter v. Palmigiano, 425 U.S. 308, 318–19, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976); United States v. White, 589 F.2d 1283, 1286–87 (5th Cir.1979); Arthurs v. Stern, 560 F.2d 477, 478–79 (1st Cir.1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 768, 54 L.Ed.2d 782 (1978); United States v. Rubinson, 543 F.2d 951, 961 (2d Cir.), *cert. denied*, 429 U.S. 850, 97 S.Ct. 139, 50 L.Ed.2d 124 (1976).

¹³ At least one of these improper scholarships appears to have involved an act of political patronage in favor of former Principal Chief Chadwick Smith.

\$1,200.00. Civil Count 14 relates to embezzlement for purchasing unauthorized airline tickets to Phoenix, Arizona for herself and Cara Cowan Watts in the amount of \$1,000.00. Civil Count 15 relates to conversion of Foundation assets and resources for Cara Cowen Watts Community Workshops in the amount of \$1,600.00. Civil Count 17 relates to conversion of Foundation assets by payment of unauthorized severance package to Lisa Reed Smith in the amount of \$9,597.60. Civil Count 19 relates to the embezzlement for the payment of personal/family insurance coverage in the amount of \$3,288.20. Civil Count 20 involves miscellaneous infractions exhibiting a pattern of practice by the defendant of using Foundation monies for the purchase of elaborate meals, alcoholic beverages for herself and others, and other infractions in the amount of \$3,000.00. Civil Count 21 relates to rescission, cancellation and breach of contract of the defendant's written severance agreement with the Foundation, and seeking monetary recovery in the amount of \$74,500.00. Finally, Civil Count 22 relates to punitive damages in the amount of \$928,000.00 both as punishment and as a future deterrent to others.

From a recovery prospective, the overlapping counts account for \$38,615.00; equating to 3.3 % of the total civil recovery sought - \$1,160,000.00. The defendant should not be permitted to stymie the Foundation's ability to recover on the whole lion's share of its claims, particularly when less intrusive alternatives to a general stay exist.

2. The Status Of The Case, Including Whether Defendant Has Been Indicted

Criminal charges are pending in Cherokee District Court. But again, a district court is not generally required to stay a civil proceeding pending the outcome of a parallel criminal proceeding absent "*substantial prejudice*" to a party's rights.¹⁴ The defendant has made no showing of a substantial prejudice.

3. The Interests Of The Plaintiff In Proceeding Expeditiously Versus The Prejudice To The Plaintiff Resulting From The Delay

Defendant admits that Foundation has a legitimate interest in the expeditious resolution of this action.¹⁵ Foundation asserts that it would be greatly prejudiced if this matter were to be indefinitely stayed. Criminal proceedings at the district court level will undoubtedly require at least a year to go to trial.¹⁶ In addition, should convictions occur, the defendant has the right to

¹⁴ *Supra* note 3.

¹⁵ Defendant's Brief, p 6.

¹⁶ The Cherokee District Court only has two regular criminal dockets, one in the Spring and one in the Fall. Presumptively, the criminal case will not be ready to go to trial by the Spring docket.

appeal, which could take months to years to reach final resolution. Many of the earliest acts of embezzlement date back to unauthorized pay increases in 2009 and proceed forward in time. As the Court can appreciate, witnesses depart, witnesses relocate and memories fade over time. The defendant successfully concealed her wrongful acts while employed only to be discovered after her departure through an independent audit. Justice delayed is justice denied, particularly here where the defendant would reap even more benefit from her skillful deceit and concealment of her bad acts by seeing her civil accountability protracted indefinitely.

In addition, a stay would severely prejudice Foundation's ability to successfully collect a judgment. The defendant presently owns two homes, one of which would presently not be exempt from civil execution. If this matter is stayed for a period of months to years, she will no doubt liquefy or encumber those assets and apply those resources to a vigorous criminal defense. The limiting of Foundation's ability to successfully collect a monetary judgment would cause it substantial prejudice, which more than justifies the Court denying defendant's request for a stay of these proceedings.

4. The Interests Of, And Burden On, The Defendant

Foundation asserts that the defendant will suffer no undue burden by simultaneously defending the criminal charges and the civil claims. Defendant is obviously not without resources. As stated, defendant presently owns two homes and also has a successful business in addition to her ongoing career with Bacone College. The defendant clearly has resources enough to engage a prominent Tulsa law firm in these civil proceedings, as well as experienced local counsel in the criminal proceedings. The defendant attempts to curry sympathy and compassion from the Court in her motion.¹⁷ Yet, her public statements offer an unfiltered insight to her true feelings toward this Honorable Court and the Cherokee judiciary:

I can only assume that because these actions were filed in tribal court that the FBI and federal investigators have rejected these claims for what they are, which is a frivolous attack on a private citizen who has done nothing wrong.¹⁸

¹⁷ See Defendant's Brief, p 7: "[T]he simultaneous defense of both the this action and the Criminal Case will place a severe financial burden upon Gilliland, a lone individual."

¹⁸ Harrison Grimwood, [Woman accused of embezzlement says charges are political retaliation](http://www.muskogee phoenix.com/news/woman-accused-of-embezzlement-says-charges-are-political-retaliation/article_0f92a23c-7914-5fc0-9582-b58147b40c27.html), 2016 Jul 30, Muskogee Phoenix, http://www.muskogee phoenix.com/news/woman-accused-of-embezzlement-says-charges-are-political-retaliation/article_0f92a23c-7914-5fc0-9582-b58147b40c27.html.

In a single public statement defendant successfully managed to insult the entire Cherokee judiciary by suggesting that because these actions were brought in the Cherokee Courts rather than a federal forum, they must be frivolous. The defendant attempts to convince this Court that she has limited resources, yet she went on in the same public statement to promise to file a "*vigorous countersuit*" against the Cherokee Nation for slandering her.

5. The Interests Of The Court

The defendant admits that this Court has a "*strong interest in keeping litigation moving to conclusion without unnecessary delay.*"¹⁹ The interest of the Court would be best served by denying a stay and seeing justice proceed by holding a person entrusted with assets intended to fund Cherokee students accountable for violating that trust and embezzling and converting those assets to her own use and to the use of other insiders.

6. The Public's Interest.

Foundation asserts that the public's interest will be deeply and adversely impacted should this civil matter be indefinitely stayed. A criminal conviction requires proof beyond a reasonable doubt. Civil liability is established by the lesser preponderance of the evidence standard. Criminal law can provide incarceration and restitution of money, but only civil law can provide the additional financial deterrent of punitive damages. The public's interest would be best served by sending a message that embezzlement of Cherokee resources away from those in need cannot and will not be tolerated in the Cherokee Nation.

III. LESS INTRUSIVE ALTERNATIVES

Defendant boldly seeks a complete stay of these proceedings, apparently without considering that lesser intrusive alternatives clearly exist. For example, when the criminal prosecution parallels a civil action, the Fifth Circuit, using a balancing approach, has determined the appropriate remedy is a limited stay of any discovery that might expose the party to a risk of self-incrimination.²⁰ Some courts have stayed only oral depositions of the defendant,²¹ while others have allowed depositions to proceed, but restricted them from public view and ordered the

¹⁹ Defendant's Brief, p 7.

²⁰ Wehling v. Columbia Broadcasting System, 608 F.2d 1084 (5th Cir.1979), *reh'g denied*, 611 F.2d 1026, 1027 (5th Cir.1980).

²¹ Dienstag v. Bronsen, 49 F.R.D. 327 (1970).

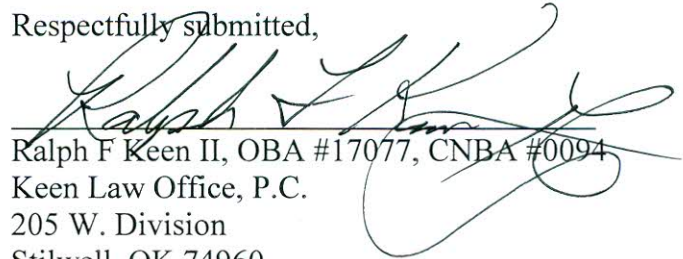
transcripts sealed until the criminal prosecutions were complete.²² When these measures prove inadequate, there is still the option of staying all discovery of the defendant by way of a protective order, as the Supreme Court suggested in Kordel,²³ or staying discovery of only the overlapping counts which pose the highest risk of self-incrimination.

CONCLUSION

The stay the defendant seeks is an extraordinary remedy. One that she has no right or entitlement to under the Cherokee constitution. The defendant has not met her burden of showing a clear case of hardship or inequity, or demonstrating that she will suffer substantial prejudice if a stay is not granted. In deciding whether to testify or invoke their fifth amendment right against self incrimination, the overwhelming authority is that a defendant must make a choice. The Foundation has a legitimate interest in the expeditious resolution of this action and the Court has a strong interest in keeping litigations moving to conclusion without unnecessary delay. The degree of overlap between the civil action as a whole and the criminal proceedings is minimal. Defendant's claims of undue burden and financial hardship are illusory, and the public's interest would be best served by sending a message that embezzlement of Cherokee resources away from those in need cannot and will not be tolerated.

WHEREFORE, premises and precedents considered, Foundation prays the Court deny defendant's motion in its entirety, award it it's fees and costs for defending the same, and for such other relief it deems just and equitable.

Respectfully submitted,



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²² D'Ippolito v. American Oil Co., 272 F.Supp. 310, 312 (S.D.N.Y. 1967).

²³ United States v. Kordel, 397 U.S. 1, 8-9 (1970)(finding where there is a real and appreciable risk of self-incrimination, an appropriate remedy would be a protective order postponing civil discovery until termination of the criminal action).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Plaintiff's Response and Combined Brief in Opposition to Defendant's Motion to Stay* was emailed and/or mailed, postage pre-paid, this 6th day of September, 2016, to the following:

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