

FILED

IN THE DISTRICT COURT OF THE CHEROKEE NATION

2017 FEB 14 PM 1:01

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

Plaintiff,

vs.

KIMBERLIE GILLILAND,

Defendant.

Case No. CV-2016-397

CHEROKEE NATION
DISTRICT COURT
KRISTI MONCOOYEA
COURT CLERK

MOTION TO DEEM PLAINTIFF'S REQUEST FOR ADMISSIONS
ADMITTED AND COMBINED BRIEF IN SUPPORT

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 moves the Court to deem plaintiff's request for admissions admitted, and in support thereof would show the Court as follows:

1. Plaintiff's First Request for Admissions, attached hereto as Exhibit "A," were served on the defendant by private process server on July 27, 2016, as evidenced by the return of service, attached hereto as Exhibit "B."

2. Pursuant to F.R.C.P. 36(A)(3), defendant's responses were due within thirty (30) days after service or on August 26, 2016.

3. The defendant has failed, or refuse to answer said Request for Admissions as required by law and the plaintiff therefore moves this Court to enter an order deeming plaintiff's First Request for Admissions admitted.

Arguments and Authority

Cherokee jurisprudence has yet to adopt a specific discovery code, however, section 5 of the Cherokee Nation Code of Civil Procedure, LA 16-16, provides: "*The Federal rules of Civil Procedure shall be used in Cherokee Nation courts in all suits of a civil nature, whether in law*

or in equity, unless superseded by a Cherokee Nation rule of Civil Procedure.” F.R.C.P. Rule 36(a)(1) provides:

A party may serve on any other party a written request to admit, for the purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:

A) the facts, the application of law de fact, the opinions about either and;

B) the genuineness of any described documents.

Rule 36(a)(3) provides: *“Time to Respond; Effect of Not Responding. A matter is admitted unless, within thirty days after being served, the party defends request as directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney.”* Finally, Rule 36(b) provides that any matter admitted under this rule is: *“conclusively established unless the court on motion permits the admission to be withdrawn or amended.”* [Emphasis added].

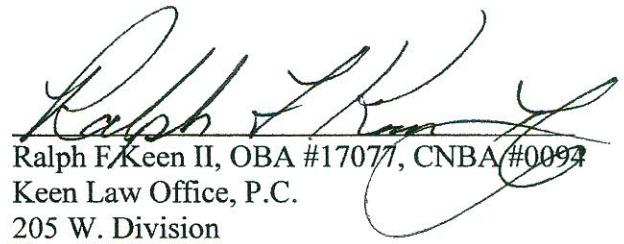
Plaintiff's Request for Admissions were served on the defendant on July 27, 2016. Defendant's original 30-day deadline to answer expired on Friday, August 26, 2016. Rather than seeking an extension of time, the defendant apparently chose to ignore the discovery and instead filed a motion to dismiss and a motion to stay civil proceedings on August 17, 2016. These motions were ultimately heard by this Court and denied by Order dated December 9, 2016. Assuming, arguendo, that defendant's motions operated to somehow toll her obligation to answer discovery, the toll would have lifted with the Court's denial and the thirty-day period would have recommenced. Even under this most liberal calculation, defendant's thirty-day period to respond to plaintiff's Request for Admissions would have expired on December 19, 2016. By letter dated December 13, 2016 undersigned counsel made inquiry to opposing counsel as to when defendant's answers might be expected, attached as Exhibit "C." This inquiry also went

unanswered.

Apparently being aggrieved with the District Court's denials of her motions, the defendant has now sought to commence an untimely appeal of an un-appealable order in the Cherokee Supreme Court. However, the District Court has refused to stay any portion of these proceedings and there is no appellate mechanism that would operate to automatically stay discovery in the District Court during the pendency of defendant's untimely appeal.

WHEREFORE, all premises considered, the plaintiff prays the District Court enter an Order deeming all of plaintiff's First Request for Admissions Admitted, and deny any attempt by the defendant to withdraw or amend the same; and for all other relief the Court finds just and equitable, including a reasonable attorney's fee relating to this motion.

Respectfully submitted,

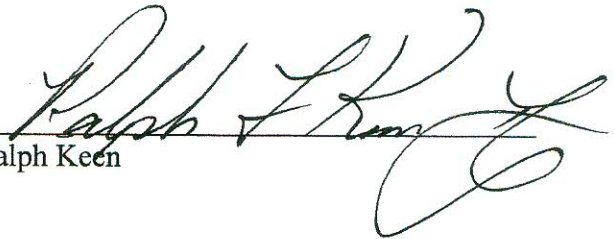


Ralph F. Keen II, OBA #17077, CNBA #00994
Keen Law Office, P.C.
205 W. Division
Stilwell, OK 74960
Telephone (918) 696-3355
Facsimile (918) 696-3576
keenlaw@windstream.net
Attorney for Foundation

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Motion to Deem Plaintiff's Request for Admissions Admitted* was emailed and/or mailed, postage pre-paid, this 14th day of February, 2017, to the following:

James J. Proszek
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
320 South Boston Avenue, Suite 200
Tulsa, OK 74103
Attorney for Defendant



Ralph Keen

IN THE DISTRICT COURT OF THE CHEROKEE NATION

FILED

2016 JUL 27 AM 9:19

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

Case No. CV-14-397

vs.

KIMBERLIE GILLILAND,
Defendant.

REQUESTS FOR ADMISSIONS

TO: Kimberlie A. Gilliland
28177 S Boat House Ln.
Park Hill, OK 74451

Plaintiff, Cherokee Nation Education Corporation d/b/a Cherokee Nation Foundation (hereinafter "Foundation"), pursuant to FRCP Rule 36, requests the defendant respond to the following requests for admissions and serve the same upon plaintiffs through their attorney of record within thirty (30) days of the service of these requests. The plaintiff hereby demands that the defendant respond in writing, under oath, to each of the following Request for Admissions pursuant to Federal statutes. **Failure to respond will be treated as an admission by the defendant.** If you dispute a part, but not all of any Request for Admission, you must admit the part you do not dispute and deny only the part in controversy. If you fail to admit any fact that is later proven at trial, the costs of making such proof, including a reasonable attorney's fee, may be awarded against you.

DEFINITIONS

- A. "You" or "your" shall refer to the named defendant, Kimberlie A. Gilliland.
- B. "Foundation" shall refer to the named plaintiff, Cherokee Nation Education Corporation d/b/a Cherokee Nation Foundation.



C. "Writing" shall refer to any written material, whether typed, handwritten, printed or otherwise, or any photograph, Photostat, microfilm, or any other reproduction thereof, and including, without limitation, each note, memorandum, letter, telegram, circular, release, article, report, analysis, chart, account, book, draft, agreement, contract, order, monthly statement, invoice, pamphlet, correspondence, meeting minutes, interoffice and intra-office communication, ledgers, book of accounts, vouchers, bank check or draft, bank statements, check stubs, deposit slips, charge slips, recorded or written information of whatsoever nature or form and howsoever produces or reproduced.

D. "Identify" of "identification" when used with reference to an individual person, means to state the full name, residential address, present or last known position and business affiliation and telephone number. "Identify" of "identification" when used with reference to a corporation, firm or other entity, means its full name, form of organization and its present or last known address. "Identify" of "identification" when used with reference to a writing, means a description of that writing in a manner sufficient for a subpoena duces tecum or for production, pursuant to Oklahoma statutes. Also give its present location or custodian. If any such writing was, but no longer is, in your possession or control, state what disposition was made of it, the date thereof, the person responsible for making the decision as to such disposition, and the person responsible for carrying out such disposition.

INSTRUCTIONS

Finally, please note that these Request for Admissions are to be regarded as continuing to the extent allowed under Rule 26(e) of the Federal Rules of Civil Procedure as to require additional responses if you acquire additional information between the time the responses are

served and the time of trial. Such additional responses shall be under oath, served seasonably, but not later than thirty (30) days after such further information is received.

REQUEST FOR ADMISSIONS

REQUEST FOR ADMISSION NO. 1: Please admit that on December 22, 2008, Principal Chief Chad Smith endorsed a Council resolution confirming your nomination and appointment to serve on the Foundation Board of Directors for a term of four years.

REQUEST FOR ADMISSION NO. 2: Please admit that you served on the Foundation Board of Directors, including a partial term as President, until your voluntary resignation on October 5, 2009, when you assumed the duties and responsibilities as Executive Director of the Foundation.

REQUEST FOR ADMISSION NO. 3: Please admit that under the Foundation bylaws, the Executive Director has the affirmative duty to cause to be deposited all monies, drafts and checks in the name of, and to the credit of the corporation in such banks and depositories as a majority of the whole Board of Directors shall designate.

REQUEST FOR ADMISSION NO. 4: Please admit that under the Foundation bylaws, the Executive Director has the affirmative duty to render to the President and the Directors, whenever required, an account of all transactions by, and/or the financial conditions of the corporation.

REQUEST FOR ADMISSION NO. 5: Please admit that under the Foundation bylaws, the Executive Director has the affirmative duty to be the administrator of the corporation and be charged with the responsibility of managing the business of the corporation in the role of the chief executive officer and shall perform such other duties as maybe prescribed by the Board of Directors or the President.

REQUEST FOR ADMISSION NO. 6: Please admit that under the Foundation bylaws, the Executive Director is granted authority to sign checks, receipts, deposit funds, enter into contracts, modify or cancel contracts, on behalf of the Board of Directors, not to exceed the amount of \$5,000.00.

REQUEST FOR ADMISSION NO. 7: Please admit that the above-described duties and responsibilities of the Executive Director created an affirmative fiduciary relationship between Foundation and you, relating to all of Foundation's business matters and general operations.

REQUEST FOR ADMISSION NO. 8: Please admit that this fiduciary relationship continuously existed from your assumption of the duties and responsibilities as Executive Director up until your final departure from Foundation's employment in July of 2013.

REQUEST FOR ADMISSION NO. 9: Please admit that you are a citizen of the Cherokee Nation.

REQUEST FOR ADMISSION NO. 10: Please admit that during your tenure as executive director of the Foundation you had exclusive control and discretion over all payroll matters including the approval of timesheets and payroll amounts made through the Paychex Payroll Service.

REQUEST FOR ADMISSION NO. 11: Please admit that you have an ownership interest in Cherokee Media Limited a/k/a Cherokee Media Ltd.

REQUEST FOR ADMISSION NO. 12: Please admit that you are a partner and/or officer of Cherokee Media Limited a/k/a Cherokee Media Ltd.

REQUEST FOR ADMISSION NO. 13: Please admit that Lisa Reed-Smith was your personal housekeeper while also employed by the Foundation.

REQUEST FOR ADMISSION NO. 14: Please admit that you allowed other Foundation employees to sign your name to Foundation checks.

REQUEST FOR ADMISSION NO. 15: Please admit that on or about November 13, 2010, the Foundation received a \$5,000.00 donation with a handwritten notation that it was to be used: "*for operations, unrestricted, your 'slush fund'.*"

REQUEST FOR ADMISSION NO. 16: Please admit that leading up to your final departure date, and following your final departure from Foundation employment, you took no action to discontinue or terminate the automatic payments of the executive director's health insurance for the remainder of the 2013 year.

REQUEST FOR ADMISSION NO. 17: Please admit that on or about June 10th and July 1st of 2013 that you and your husband personally took possession of over \$10,000.00 of computer equipment from the Apple Store in Tulsa, Oklahoma purchased with Foundation funds.

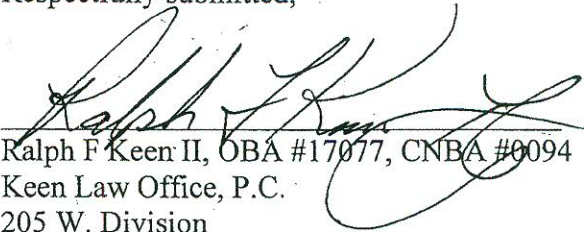
REQUEST FOR ADMISSION NO. 18: Please admit that when your severance agreement with Foundation was finalized on January 28, 2013, you had made no efforts to inform or notify the Board of Directors of any acts of embezzlement or conversion committed by you relating to Foundation assets or property.

REQUEST FOR ADMISSION NO. 19: Please admit that the Metasoft account information included information of a confidential or proprietary nature, and that your continued unauthorized use of the account after your departure of employment constituted a breach of the severance agreement.

REQUEST FOR ADMISSION NO. 20: Please admit that your numerous acts breaching your fiduciary duties through embezzlement and conversion were willful and wanton, committed with a culpable state of mind involving knowledge of, or gross recklessness in respect to, the proper

fiduciary behavior, in complete disregard of the consequences, and other such circumstances and conditions that a reasonable person would know, or have reason to know, that such conduct would, with a high degree of probability, result in harm.

Respectfully submitted,



Ralph F. Keen II, OBA #17077, CNBA #0094

Keen Law Office, P.C.

205 W. Division

Stilwell, OK 74960

Telephone (918) 696-3355

Facsimile (918) 696-3576

keenlaw@windstream.net

Attorney for Plaintiff

PROOF OF SERVICE

Origin / County CHEROKEE

State OK

Federal CHEROKEE NATION Case No. CV-16-397

DOCUMENTS SERVED: I, being duly sworn, certify that I received the foregoing, to wit on

- | | | | |
|--|---|--|---|
| ☒ Summons w/ Petition or Complaint | ☐ Injunction/Victim Protective Order | ☐ Motion to Modify | ☒ Interrogatories |
| ☐ Amended Petition / Complaint | ☐ Garnishment/Lis Pendens | ☐ Motion for Leave/No Vacate/Enter | ☐ Brief-Plaintiff's/Defendants's |
| ☐ Petition / 3rd Party Defendant | ☐ Subpoena Duces Tecum | ☐ Motion/Summary Judgement | ☐ Journal Entry/Answer |
| ☐ Small Claims Affidavit / Money Judgement | ☐ Deposition Subpoena | ☐ Motion/Deficiency Judgement | ☐ Cross/Counser Claim |
| ☐ Small Claims Replevin | ☐ Fees/Subpoena | ☒ Request for Admissions | ☐ Writ/Habeas Corpus |
| ☐ Hearing on Assets | ☐ Notice to Take Deposition | ☒ Request for Production | ☐ Letter/Notice to Quit |
| ☐ Citation for Contempt | ☐ Notice | ☐ Replevin Notice/Order | ☐ Application/Temporary Order |
| ☐ Witness Fee / Amount | ☐ Petition / Guardianship | ☐ Restraining Order | ☐ Order for Hearing |
| ☐ Other | ☐ Forcible Entry & Detainee | | |

METHOD OF SERVICE: Service made pursuant to: Other

Other

☐ Oklahoma/Title 12 O.S. Section 158.1 ☐ Federal Rule 4 Other

(A) That on July 27, 2016 at 6:32 a.m. p.m., I served the above indicated document(s) on the within named KIMBERLIE GILLILAND at 7417 EAST 46TH ST, TULSA OK

(B) Additionally, on _____ at _____ a.m. p.m., I served the document(s) indicated on the within named _____ at 74105

MANNER OF SERVICE: And served the same according to law in the following manner, to wit:

PERSONAL SERVICE

A ☒ by delivering a true copy of said process to the above named and informing such person of their contents.

USUAL PLACE OF RESIDENCE

☐ by leaving a copy of said process for the above named with _____ a resident/family member, who is fifteen years of age or older, at the above listed address which is the usual place of abode or dwelling house of the above named, and informing such person of their contents.

CORPORATION / PARTNERSHIP / UNINCORPORATED ASSOCIATION / GOVERNMENT ENTITIES, ETC.

☐ by delivering a copy of said process to _____ he / she being the service agent authorized to accept service, managing agent in charge, and officer, a partner, owner, or the Attorney of Record for the above named entity/individual, and informing such person of their contents.

POSTED SERVICE

☐ by affixing a copy of said process to the premises at the address indicated, which is in the possession of the above named individual.

NO SERVICE

☐ Said process WAS NOT SERVED on the above named for reason(s) stated: ☐ Evading Service ☐ Not at Home ☐ Bad Address / No Such Address ☐ Service Canceled ☐ Other _____

OTHER INFORMATION

Subscribed and shown to before me this

1st day of August 2016

Megan Elizabeth Lucas
Notary Public / Court Clerk

SEAL

Commission Exp. Jan 2, 2018



Undersigned declares under penalty of perjury that the foregoing is true and correct.

Name of Server

License # PS 2015-1

STATEMENT OF FEES

PROCESS SERVICE FEE: \$ 50.00
URGENT / RUSH FEE: \$ _____
MILEAGE @ _____ (#TRIPS): \$ 30.00
HOURLY (TRAVEL / WAIT): \$ _____
ADDITIONAL SERVICE: \$ _____

BAD ADDRESS / ENDEAVOR: \$ _____
SKIP / LOCATE / RESEARCH: \$ _____
COURIER / COURT FILING: \$ _____
FEES / COST ADVANCED: \$ _____

TOTAL DUE: \$ 100.00

CELL PHONE
918-680-0001

E-mail
rlgprocessservices@yahoo.com

R.L.G. PROCESS SERVICE

P.O. Box 911 • STILWELL, OK 74960 • HOME PHONE 918-696-7442

Bumgarth No. 5208

EXHIBIT

B



KEEN LAW OFFICE, P.C.

Ralph F Keen II

205 West Division
Stilwell, Okla. 74960
keenlaw@windstream.net

Office (918) 696-3355
Fax (918) 696-3576

*Licensed in Oklahoma
and Arkansas*

December 13, 2016

VIA FAX and EMAIL

James J. Proszek
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
320 South Boston Avenue, Suite 200
Tulsa, OK 74103
jproszek@hallestill.com
F (918) 594-0505

RE: *Cherokee Nation Foundation v. Gilliland*, Cherokee Nation Case No. CV-16-397

Dear James,

In light of Judge Fite's rulings of December 9th, please advise when the plaintiff might expect responses to the discovery originally propounded on July 27, 2016.

Best Regards,

KEEN LAW OFFICE, P.C.
Ralph F Keen II
Attorney for Plaintiff

RK/ml

