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 AUG 17 PM 12: 44
CHEROKEE NATION
DISTRICT COURT
KRISTI MONCOOYEA
COURT CLERK

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO STAY

Defendant Kimberlie Gilliland ("Gilliland") submits this brief in support of her motion to stay this action pending resolution of the criminal case the Cherokee Nation filed against her on July 28, 2016, entitled, *Cherokee Nation v. Gilliland*, Case No. CRM-2016-54.

FACTUAL BACKGROUND

On July 27, 2016, Plaintiff Cherokee Nation Education Corporation ("CNEC") filed this action against Gilliland alleging that from January 20, 2010 through July 13, 2013, Gilliland, while serving as CNEC's Executive Director, committed numerous acts of embezzlement, conversion and breaches of the fiduciary duties she purportedly owed to CNEC by purportedly willfully and wantonly converting or embezzling CNEC funds or property for the personal use and benefit of herself, her family and others.[1] On that same date, 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 did so willfully and wantonly with a culpable state of mind.[2]

[1] A copy of the Petition is attached as Exhibit 1.

[2] A copy of CNEC's Requests for Admissions is attached as Exhibit 2.

On July 28, 2016, just one day later, the Cherokee Nation filed a criminal case against Gilliland entitled, *Cherokee Nation v. Gilliland*, Case No. CRM-2016-54 (the "Criminal Case"), in which the Cherokee Nation alleged that Gilliland, while serving as CNEC's Executive Director, willfully and knowingly converted, misappropriated and embezzled CNEC funds for the personal use and benefit of herself and her family.[3] Eight of the nine counts in the Criminal Case are based on the same factual allegations in this action.[4]

Both the Cherokee Constitution and the Indian Civil Rights Act provide Gilliland with a right against self-incrimination. Cherokee Nation Const. Art. III, § 2; 25 U.S.C. § 1301(a)(4). Allowing this action to proceed at the same time as the Criminal Case would place Gilliland in the untenable position of facing self-incrimination in the Criminal Case in order to defend this action or having an adverse inference drawn against her in this action if she invokes her right against self-incrimination. Such a result is contrary to the interests of justice. Gilliland therefore has moved this Court to stay this action pending the final resolution of the Criminal Case.

ARGUMENT AND AUTHORITY

I. THE COURT HAS THE POWER TO STAY THIS ACTION PENDING A FINAL RESOLUTION OF THE CRIMINAL ACTION WHEN THE INTERESTS OF JUSTICE REQUIRE

This Court has the discretion to stay this action pending the completion of the parallel criminal case if the interests of justice so require. *See, e.g., AIG Life Ins. Co. v. Phillips*, 2007 WL 2116383 at *2 (D. Colo. July 20, 2007); *Trustees of Plumbers and Pipefitters Nat'l Pension Fund v. Transworld Mech., Inc.*, 886 F. Supp. 1134, 1138 (S.D.N.Y. 1995). The power to stay proceedings is incidental to this Court's power to control its docket. *See, e.g., SEC v. Gordon*, 2009 WL 2252119 at *3 (N.D. Okla. Jul. 28, 2009); *In re Worldcom, Inc. Securities Litigation*,

[3] *See* Petition (Ex. 1) at ¶ 1; Complaint and Information (copy attached as Exhibit 3) at p. 1.

[4] *Compare* Counts I-IV and VI-IX of the Complaint and Information (Ex. 3) to Counts 9-12, 20 (¶ 150), 2, 16 and 18 of the Petition (Ex. 1).

2002 WL 31729501 at *3-4 (S.D.N.Y. Dec. 5, 2002). Courts are afforded this discretion because the denial of a stay could impair a party's constitutional privilege against self-incrimination, extend criminal discovery beyond the limits in the criminal procedure rules, expose the defense's theory to the prosecution in advance of trial, and/or otherwise prejudice the criminal case. *E.g.*, *Plumbers and Pipefitters*, 886 F. Supp. at 1138; *see Gordon*, 2009 WL 2252119 at *3 ("One reason to stay a civil proceeding where there is a parallel criminal proceeding is 'to prevent either party from taking advantage of broader civil discovery rights.'").

When considering whether to stay a matter involving parallel civil and criminal proceedings, the primary focus is on the criminal defendant's potential waiver or invocation of his constitutional right against self-incrimination. *E.g., Severino v. Klytie's Dev., Inc.*, 2008 WL 1782637 at *2 (D. Colo. Apr. 17, 2008). Determining whether a stay is appropriate requires the balancing of the plaintiff's interests in moving forward with the litigation against the interests of a defendant who faces the choice of being prejudiced in the civil litigation if he asserts his right against self-incrimination or being prejudiced in the criminal litigation if he waives that right. *E.g., AIG*, 20007 WL 2116383 at *2.

In weighing these interests and determining whether a stay is appropriate, courts generally consider six factors: (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., Gordon*, 2009 WL 2252119 at *4; *AIG*, 2007 WL 2116383 at *2.

The most important factor is the degree to which the civil issues overlap with the criminal issues. *E.g., Gordon*, 2009 WL 2252119 at *4; *Plumbers and Pipefitters*, 886 F. Supp at 1139. The strongest case for granting a stay is where a party under a criminal indictment is required to defend a civil proceeding in the same matter. *E.g., Worldcom*, 2002 WL 31729501 at *5; *Volmar Distrib., Inc. v. New York Post Co.*, 152 F.R.D. 36, 39 (S.D.N.Y. 1993); *see Severino*, 2008 WL 1782637 at *3.

The ultimate question is whether this Court should exercise its discretion in order to avoid placing Gilliland in the position of having to choose between 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 proceeding. *See, e.g., Severino*, 2008 WL 1782637 at *2; *Brumfield v. Shelton*, 727 F. Supp. 2d 282, 284 (E.D. La. 1989) ("In a case 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."). Consideration of the six factors listed above weighs overwhelmingly in favor of staying this action pending final resolution of the criminal action.

II. THE INTERESTS OF JUSTICE REQUIRE THAT THIS ACTION BE STAYED PENDING A FINAL RESOLUTION OF THE CRIMINAL ACTION

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

A stay of civil proceedings is most likely to be granted where the civil and criminal actions involve the same subject matter. *E.g., Brock v. Tolkow*, 109 F.R.D. 116, 119 (E.D.N.Y. 1985). A stay is even more appropriate when it is the government who brings both actions. *Id.*

Here, eight of the nine counts in the Criminal Case are based on the same factual allegations as in this action.[5] The issues in this action thus unquestionably overlap the issues in, and involve the same subject matter as, the Criminal Case.

Moreover, CNEC has alleged that it is wholly owned by the Cherokee Nation. Petition (Ex. 1) at ¶ 1. The Cherokee Nation has alleged that CNEC's officers are appointed by the Principal Chief, and approved by the Tribal Council of the Cherokee Nation. Complaint (Ex. 3) at 1. The Cherokee Nation has also alleged that it provides funding to CNEC. *Id.* CNEC has an advisory committee which is comprised of four elected officials of the Cherokee Nation, including the Principal Chief, the Deputy Chief, the chair or co-chair of the Executive and Finance Committee of the Tribal Council, and the chair of the Education Committee of the Tribal Council. CNEC Bylaws (copy attached as Exhibit 4) at art. IV, § 4.4. While CNEC is the nominal plaintiff, the allegations CNEC and the Cherokee Nation have made in the petition in this actions and the complaint in the Criminal Case show that it is effectively the Cherokee Nation, i.e., the government, who is bringing both actions.

Finally, CNEC has already served requests for admissions asking Gilliland to 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. Gilliland must therefore decide whether to respond to the requests for admissions or to assert her constitutionally guaranteed right against self-incrimination. If she chooses the former, she risks providing the Cherokee Nation with leads or evidence which may be used against her in the Criminal Case. If she chooses the latter course, she greatly increases the chance she will be found liable in this action for substantial sums of money. Staying this action pending the final resolution of the Criminal Case will enable

[5] *Compare* Counts I-IV and VI-IX of the Complaint and Information (Ex. 3) to Counts 9-12, 20 (¶ 150), 2, 16 and 18 of the Petition (Ex. 1).

Gilliland to defend this action vigorously without fear that her discovery responses will be used to incriminate her in the Criminal Case. *See, e.g., Brock*, 109 F.R.D. at 120; *see also, AIG*, 2007 WL 2116383 at *3 (A stay may be appropriate when a demand for discovery has been addressed to a defendant who cannot respond "without subjecting himself to a 'real and appreciable' risk of self-incrimination.") (citing *United States v. Kordel*, 397 U.S. 1, 9 (1970)). This first, and most important, factor thus weighs in favor of staying this action.

B. <u>Gilliland Has Been Indicted</u>

Gilliland has been indicted. Indeed, the court gives this second factor more weight when, as here, the defendant is seeking a stay to avoid choosing between her privilege against self-incrimination and her defense of the civil case. *E.g. Gordon*, 2009 WL 2252119 at *4. This second key factor thus also weighs in favor of the stay.

C. <u>The Prejudice To Gilliland If This Action Is Allowed To Proceed While The Criminal Case Is Pending Outweighs CNEC's Interests And Any Prejudice CNEC Would Suffer If This Action Is Stayed</u>

CNEC has a legitimate interest in the expeditious resolution of this action. However, such interests are trumped by Gilliland's interest in avoiding the quandary of choosing between waiving her right against self-incrimination or effectively forfeiting this action. *See, e.g., Plumbers and Pipefitters*, 886 F. Supp. at 1140; *Dienstag v. Bronsen*, 49 F.R.D. 327, 329 (S.D.N.Y. 1970) ("While [a stay] will undoubtedly cause inconvenience and delay to plaintiffs, protection of defendants' constitutional rights against self-incrimination is the more important consideration."). This third factor thus, too, weighs in favor of the stay.

D. <u>Denying The Stay Will Prejudice Gilliland's Interests And Place A Severe Burden On Her</u>

Gilliland has an obvious interest in avoiding the quandary of choosing between waiving her right against self-incrimination or effectively forfeiting the civil case because of the adverse inference that could be drawn against her if she invoked her right against self-incrimination in this action. *See, e.g., AIG*, 2007 WL 2116383 at *3. Denying a stay would therefore undermine the right against self-incrimination both the Cherokee Nation Constitution and the Indian Civil Rights Act bestow upon Gilliland. *See, e.g., Volmar*, 152 F.R.D at 39.

Refusing to grant a stay could also expand the rights of criminal discovery beyond that allowed under the Criminal Procedure Code, expose the basis of Gilliland's defenses to the prosecution in advance of trial, and otherwise prejudice Gilliland in the Criminal Case. *See, e.g., Plumbers and Pipefitters*, 886 F. Supp. at 1138; *Volmar*, 152 F.R.D. at 39. Staying this action in light of the parallel Criminal Case will prevent either party from taking advantage of the broader civil discovery rights. *See, e.g., Gordon*, 2009 WL 2252119 at *3.

Finally, the Cherokee Nation has unlimited resources on which it can draw to pursue both this action and the Criminal Case simultaneously. Conversely, the simultaneous defense of both this action and the Criminal Case will place a severe financial burden upon Gilliland, a lone individual. *See, e.g., Worldcom*, 2002 WL 31729501 at *7-8. This fourth factor, as well, thus weighs in favor of the stay.

E. Staying This Action Would Serve The Interests Of The Court

While this Court has a strong interest in keeping litigation moving to conclusion without unnecessary delay, resolution of the Criminal Case may increase the possibility of the settlement of this action and may reduce the scope of discovery in this action because the evidence gathered during the Criminal Case can later be used in this action. *See, e.g., AIG*, 2007 WL 2116383 at *4; *Worldcom*, 2002 WL 31729501 at *8; *Plumbers and Pipefitters*, 886 F. Supp. at 1140. Granting of the stay would therefore serve the interests of judicial efficiency. *Id.*

F. Staying This Action Will Not Adversely Impact The Public

Finally, all of the actions alleged in the petition occurred more than three years ago. *See* Petition (Ex. 1). Gilliland is no longer the Executive Director of, and has no connection with, CNEC, so the Criminal Case can serve the same deterrent function in the eyes of the public as a civil action. Staying this action will therefore not adversely impact the public.

CONCLUSION

If not stayed, this action will undermine Gilliland's exercise of the right against self-incrimination, expand the rights of criminal discovery beyond the limits in the Criminal Procedure Code, expose the basis of Gilliland's defense to the prosecution in advance of the trial, and otherwise prejudice Gilliland. Staying this action will not seriously injure either CNEC or any public interests and will further the interests of judicial economy. All the factors courts consider when determining whether justice requires a stay of a civil action pending the resolution of a criminal proceeding weigh in favor of a stay here. Gilliland therefore respectfully requests that this Court stay this action pending a final resolution of the Criminal Case.

Respectfully submitted,

James J. Proszek, CNBA #0199
jproszek@hallestill.com
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.
320 South Boston Avenue, Suite 200
Tulsa, OK 74103-3706
Telephone (918) 594-0400
Facsimile (918) 594-0505

ATTORNEYS FOR DEFENDANT KIMBERLIE GILLILAND

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this 17 day of August 2016, a true and correct copy of the above and foregoing instrument was sent by 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

James J. Proszek

2796578.1:411365:01951

Exhibit 1

Exhibit 1

FILED

IN THE DISTRICT COURT OF THE CHEROKEE NATION

2016 JUL 27 AM 9:15

CHEROKEE NATION EDUCATION CORPORATION, d/b/a CHEROKEE NATION FOUNDATION, Plaintiff,	Case No. CV-16-397
vs.	Judge __________
KIMBERLIE GILLILAND, Defendant.	

PETITION FOR BREACH OF FIDUCIARY DUTY, EMBEZZLEMENT AND CONVERSION

COMES NOW the plaintiff, Cherokee Nation Education Corporation, who for its cause of action against the named defendant does allege and state as follows:

GENERAL ALLEGATIONS RELATING TO ALL COUNTS

1. Plaintiff, Cherokee Nation Education Corporation d/b/a Cherokee Nation Foundation (hereinafter "Foundation"), is a non-profit 501(c)(3) corporation, wholly owned by, and incorporated under the laws of the Cherokee Nation. with its principal place of business located in Tahlequah, Oklahoma.

2. The primary mission of the Foundation is to provide higher-education opportunities to qualifying Cherokee students as a means of reaching their full academic potential. Article I, Section 1.5 of the Foundation bylaws provides that the corporation is not organized for pecuniary profit, and no part of the net earnings of the corporation shall inure to the benefit of any private member or individual.

3. Defendant, Kimberlie Gilliland, is a citizen of the Cherokee Nation.

4. Pursuant to Article VIII, Section 6 of the Cherokee Nation Constitution, this

Court has general jurisdiction to hear and resolve disputes arising under the laws and constitution of the Cherokee Nation, both in law and equity, whether criminal or civil in nature.

5. On December 22, 2008, Principal Chief Chad Smith endorsed a Council resolution confirming the nomination and appointment of defendant to serve on the Foundation Board of Directors for a term of four years.

6. Defendant served on the Foundation Board of Directors, including a partial term as President, until her voluntary resignation on October 5, 2009, when she assumed the duties and responsibilities as Executive Director of the Foundation.

7. 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 depositors as a majority of the whole Board of Directors shall designate.

8. 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.

9. 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 may be prescribed by the Board of Directors or the President.

10. 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.

11. The above-described duties and responsibilities of the Executive Director created

an affirmative fiduciary relationship between plaintiff and defendant, relating to all of plaintiff's business matters and general operations.

12. This fiduciary relationship continuously existed from defendant's assumption of the duties and responsibilities as Executive Director up until her final departure from plaintiff's employment in July of 2013.

13. On April 24, 2014, an independent audit of the Foundation was released. The audit report included a schedule of findings and questioned costs. The findings noted the defendant *"exercised substantial control over all phases of the organization and was able to circumvent board authority on a number of issues."* The report indicated that Foundation computers, data files and a printer had been removed from the corporate offices. The report further questioned travel expenses paid for non-employees and checks issued to *"Cherokee Media,"* a business owned and operated by defendant.

COUNT I
BREACH OF FIDUCIARY DUTY - EMBEZZLEMENT
(Unauthorized Pay Increases - $64,676.35)

14. Plaintiff incorporates by reference paragraphs 1 through 13 above as if fully set forth herein.

15. In 2009. Foundation and defendant entered into a contract beginning on August 5, 2009, and ending on December 31, 2009, for defendant to assume the duties and responsibilities of executive director as an independent contractor. Said contract provided that Foundation would pay defendant $3,000.00 per month, not to exceed $36,000.00, and that defendant was not eligible for federal, state, social security, workers' compensation or unemployment benefits, and that defendant was responsible for all federal and state taxes as a result of payments from Foundation.

16. On or about January 11, 2010, Foundation and defendant executed a contract amendment extending the 2009 contract at a rate of $3,000.00 per month until new performance criteria and compensation could be agreed upon.

17. In March of 2010, the Foundation Board approved a new contract with the defendant for 40 hours per week for a term of one calendar year, retroactive to January 11, 2010, in an amount not to exceed $72,000.00, or $6,000.00 per month. The new contract was memorialized on April 2, 2010, in a written agreement stating that defendant was to continue the duties and responsibilities as executive director as an independent contractor and that defendant was responsible for all taxes owed as a result of payments from Foundation.

(January - August 2011 Pay Increase)

18. From January 2011 through August 2011 payroll was processed in-house by defendant, during which time she paid herself approximately $54,000.00, or $6,750.00 per month, as "*Director.*" No Board approval was granted for the pay rate increase or transitioning defendant from a contract employee to a payroll employee. For this time period defendant wrongfully paid herself $6,000.00 in excess of her 2010 approved contact rate.

19. In the Fall of 2011, defendant contracted a private company, Paychex, for Foundation's payroll services. Defendant set up the account with her to have exclusive payroll reporting authority, and final approval of all paychecks. In September 2011, Paychex began withholding federal, state, and social security taxes for defendant and another contract employee, Heather Sourjohn, who had previously been responsible for her own taxes as a contract employee.

(September 2011 Pay Increases)

20. In September 2011, Paychex records establish that defendant's monthly earnings

increased to $7,224.24 per month; said amount being $1,224.24 over her approved monthly contract rate in 2010. As a direct result of defendant's unauthorized pay increase, from September 2011 through December 2011, defendant wrongfully paid herself $4,896.96 in excess of her 2010 approved contact rate.

21. In September 2011, Paychex records further establish that Heather Sourjohn's monthly earnings increased to $4,114.78 per month; said amount being $714.78 over her 2010 monthly rate of $3,400.00 previously approved by Foundation. As a result of defendant's unauthorized pay increase benefitting Heather Sourjohn, Ms. Sourjohn wrongfully received $2,859.12 from September 2011 through December 2011, in excess of her 2010 approved rate.

(2012 Pay Increases)

22. Paychex records and Foundation's 2012 W-2 earnings statement for calendar year 2012 establish that defendant's yearly earnings increased to $89,161.64, which was $17,161.64 over her approved contract rate in 2010. As a direct result of defendant's unauthorized pay increase, she wrongfully received pay of $17,161.64 in 2012 in excess of her 2010 approved contact rate.

23. Paychex records and Foundation's 2012 W-2 earnings statement for calendar year 2012 further establish that Heather Sourjohn's yearly earnings increased to $50,784.69, which was $9,948.69 over her approved 2010 rate of $40,800.00 previously approved by Foundation. As a result of defendant's unauthorized pay increase benefitting Heather Sourjohn, Ms. Sourjohn wrongfully received $9,948.69 in 2012 in excess of her approved 2010 contract rate.

24. On January 28, 2013, Foundation and defendant entered into a Severance Agreement which provided that defendant would receive $74,500.00, less taxes and other withholdings. This amount was intended to reflect one-year's salary for defendant at that time.

The agreement further allowed defendant to remain on Foundation's payroll at her *"base salary"* until her final day of employment on July 12, 2013, at 5:00 p.m. Per the Severance Agreement, defendant received $74,500.00 less social security, Medicare, federal, and state withholdings on January 31, 2013.

(January 2013 Pay Increases)

25. In January 2013, Paychex records establish that defendant received $7,908.18; said amount being $1,908.18 over her approved monthly contract rate in 2010. As a result of defendant's unauthorized pay increase, defendant wrongfully paid herself $1,908.18 in excess of her 2010 approved contact rate.

26. In January 2013, Paychex records further establish that Heather Sourjohn received $4,407.00; said amount being $1,007.00 over her approved 2010 monthly rate. As a result of defendant's unauthorized pay increase benefiting Heather Sourjohn, Ms. Sourjohn wrongfully received $1,007.00 in excess of her approved 2010 rate.

(February 2013 - June 2013 Pay Increases)

27. On January 31, 2013, Paychex records establish defendant wrongfully increased her monthly rate from $7,908.18 to $8,072.26; and increased Ms. Sourjohn's monthly rate from $4,407.00 to $4,612.24.

28. From February 2013 to June 2013 defendant received $40,361.30; said amount being $10,361.30 over her approved 2010 contract rate. As a result of defendant's unauthorized pay increase, she wrongfully paid herself $10,361.30 in excess of her approved 2010 contact rate.

29. From February 2013 to July 12, 2013, Heather Sourjohn received $23,061.20 which was $6,061.20 over her approved 2010 rate. As a result of defendant's unauthorized pay

increase benefitting Heather Sourjohn, Ms. Sourjohn wrongfully received $6.061.20 in excess of her approved 2010 rate.

(July 2013 Overpayment)

30. Defendant's last day per the Severance Agreement was Friday, July 12, 2013, at 5:00 p.m. Due to the pay cycle ending on July 10 defendant should have received two days additional pay on her last paycheck, which under the approved 2010 contract rate, should have been $600.00. However, defendant wrongfully paid herself $8,072.26, a full month's salary at her unauthorized rate for July; said amount being $4,472.26 over her approved 2010 contract rate. As a result of defendant's unauthorized pay increase, she wrongfully paid herself $4,472.26 in excess of her approved 2010 contact rate.

31. Foundation was the rightful owner and possessor of these funds and defendant's wrongful acts caused Foundation to be permanently dispossessed of the funds and converted to the personal use and benefit of her and others without Foundation's consent; said acts constitute embezzlement and/or conversion of funds.

32. Defendant's acts of embezzlement and/or conversion were committed without actual or apparent authority and without approval of the Foundation Board of Directors, and were committed with a culpable state of mind involving knowledge of, or with gross recklessness with respect to, her fiduciary duty owed to the Foundation and constitute a breach and defalcation of that fiduciary duty.

33. As a direct and proximate result of defendant's breach of fiduciary duty through embezzlement and/or conversion, Foundation has suffered monetary damages relating to Count 1 in the amount of $64,676.35.

COUNT 2
BREACH OF FIDUCIARY DUTY - EMBEZZLEMENT
(College Tuition - $21,000.00)

34. Plaintiff incorporates by reference paragraphs 1 through 33 above as if fully set forth herein.

35. During the time frame of January 2011 through April 2013, by defendant's direct actions, in excess of $21,000.00 of Foundation funds were used to pay North Park University, an Evangelical Covenant Church seminary and private university located in Chicago, Illinois, for tuition and expenses related to defendant's enrollment in the school's online master's program. Over the course of time the defendant allegedly earned (or has represented to third parties that she has earned), a Masters Degree in Nonprofit Management, and a graduate certificate on nonprofit fundraising.

36. On or about May 8, 2013, an additional $4,240.00 of Foundation funds were paid to North Park University for tuition and expenses for the 2013 summer semester. This course work could only have been completed after defendant's predetermined last day of employment of July 12, 2013 as contained in her severance agreement executed on January 28, 2013.

37. Foundation was the rightful owner and possessor of these monies and defendant's wrongful acts caused Foundation to be permanently dispossessed of the monies and converted to the her personal use and benefit without Foundation's consent; said acts constitute embezzlement of funds.

38. Defendant's acts of embezzlement were committed without actual or apparent authority and without approval of the Foundation Board of Directors, and with a culpable state of mind involving knowledge of, or with gross recklessness with respect to, her fiduciary duty owed to the Foundation and constitute a breach and defalcation of that fiduciary duty.

39. As a direct and proximate result of defendant's breach of fiduciary duty through embezzlement, Foundation has suffered monetary damages relating to Count 2 in the amount of $21,000.00.

COUNT 3
BREACH OF FIDUCIARY DUTY - EMBEZZLEMENT
(Cherokee Media - $6,488.00)

40. Plaintiff incorporates by reference paragraphs 1 through 39 above as if fully set forth herein.

41. Defendant and her husband, Andrew Sikora, own and operate a private business, Cherokee Media, Ltd., a/k/a Cherokee Media Limited (hereinafter *"Cherokee Media"*). Defendant's résumé asserts that she has served as president of Cherokee Media since 2002.

42. In July of 2009 defendant was advised in writing by the office of the Cherokee Nation Attorney General that the Foundation Executive Director was deemed an officer under the Cherokee Nation Sunshine Ethics Act, and as such, Foundation was prohibited from entering into any contractual relationships with businesses to which she had a pecuniary interest in.

43. During the time frame of February 24, 2012, through August 8, 2012, a total of $5,500.00 of Foundation funds were paid to defendant's husband, Andrew Sikora for *"supplies"* and *"equipment rental/film and supplies/deposit."* The 2012 Foundation *"Program Report"* prepared by the defendant contained information about the Foundation's so-called *"partnership"* with Cherokee Media.

44. On or about June 12, 2013, $988.00 of Foundation funds was paid directly to Cherokee Media. Foundation was the rightful owner and possessor of these monies and defendant's wrongful acts caused Foundation to be permanently dispossessed of the monies and converted to the her personal use and benefit without Foundation's consent; said acts constitute

embezzlement of funds.

45. Defendant's acts of embezzlement were committed without actual or apparent authority and without approval of the Foundation Board of Directors, and with a culpable state of mind involving knowledge of, or with gross recklessness with respect to, her fiduciary duty owed to the Foundation and constitute a breach and defalcation of that fiduciary duty.

46. As a direct and proximate result of defendant's breach of fiduciary duty through embezzlement, Foundation has suffered monetary damages relating to Count 3 in the amount of $6,488.00.

COUNT 4
BREACH OF FIDUCIARY DUTY
CONVERSION OF FOUNDATION SCHOLARSHIP FUNDS
("Student A" - $4,500.00)

47. Plaintiff incorporates by reference paragraphs 1 through 46 above as if fully set forth herein.

48. Defendant unilaterally awarded a total of $4,500.00 in Foundation Gammon Scholarship funds to "Student A," for academic years 2011-2013, with the final $1,500.00 payment being made on January 28, 2013, the same day defendant executed her severance agreement with the Foundation.

49. These funds were awarded in direct violation of Foundation policies and procedures, to wit: 1) "Student A" neither made an application, nor went through the competitive scholarship selection process to be awarded said funds; 2) the funds were paid for attendance at the University of Hawaii at Hilo, a direct violation of the Gammon Scholarship endowment criteria which is restricted to individuals attending college within the continental United States; and, 3) "Student A" was enrolled in a certificate program to acquire a Certificate in Indigenous

Language and Culture Revitalization, a direct violation of the Gammon Scholarship endowment criteria which is restricted to individuals pursuing a course of study that will result in a bachelor's or higher degree.

50. Plaintiff is informed and believes that the scholarship monies wrongfully paid by defendant to "Student A" was in fact an act of unethical political patronage to indirectly benefit former Principal Chief Chadwick Smith. Chief Smith's level of knowledge or complicity in these wrongful acts (if any) is, as of the time of the filing of this petition, unclear.

51. Foundation was the rightful owner and possessor of these monies and defendant's wrongful acts caused Foundation to be permanently dispossessed of the monies to the use and benefit of a third-party without Foundation's consent; said acts constitute a conversion.

52. Defendant's acts of conversion were committed without actual or apparent authority and without approval of the Foundation Board of Directors, and were committed with a culpable state of mind involving knowledge of, or with gross recklessness with respect to, her fiduciary duty owed to the Foundation and constitute a breach and defalcation of that fiduciary duty.

53. As a direct and proximate result of defendant's breach of fiduciary duty through conversion, Foundation has suffered monetary damages relating to Count 4 in the amount of $4,500.00.

COUNT 5
BREACH OF FIDUCIARY DUTY
CONVERSION OF FOUNDATION SCHOLARSHIP FUNDS
("Student B" - $10,000.00)

54. Plaintiff incorporates by reference paragraphs 1 through 53 above as if fully set forth herein.

55. Defendant unilaterally awarded a total of $10,000.00 in Foundation Cherokee Nation Businesses scholarship funds to "Student B" for academic years 2011-2013.

56. These funds were awarded in direct violation of Foundation policies and procedures, to wit: 1) "Student B" neither made an application, nor went through the competitive scholarship selection process to be awarded any scholarship funds for the 2011-2012 academic year, yet was unilaterally awarded $5,000.00 by defendant; and, 2) "Student B" did not satisfy the academic requirements for the Cherokee Nation Business scholarship for the 2012-2013 academic year, yet was unilaterally awarded $5,000.00 by defendant. These funds were paid to "Student B" to the exclusion of four other 2012-2013 applicants who satisfied all scholarship criteria, but went completely unfunded.

57. Foundation was the rightful owner and possessor of these monies and defendant's wrongful acts caused Foundation to be permanently dispossessed of the monies to the use and benefit of a third-party without Foundation's consent; said acts constitute a conversion.

58. Defendant's acts of conversion were committed without actual or apparent authority and without approval of the Foundation Board of Directors, and were committed with a culpable state of mind involving knowledge of, or with gross recklessness with respect to, her fiduciary duty owed to the Foundation and constitute a breach and defalcation of that fiduciary duty.

59. As a direct and proximate result of defendant's breach of fiduciary duty through conversion, Foundation has suffered monetary damages relating to Count 5 in the amount of $10,000.00.

COUNT 6
BREACH OF FIDUCIARY DUTY
CONVERSION OF FOUNDATION SCHOLARSHIP FUNDS
("Student C" - $5,606.73)

60. Plaintiff incorporates by reference paragraphs 1 through 59 above as if fully set forth herein.

61. Defendant unilaterally awarded a total of $5,606.73 in Foundation Gammon Scholarship funds to "Student C," for academic years 2011-2013.

62. These funds were awarded in direct violation of Foundation policies and procedures, to wit: 1) "Student C" did not submit a timely scholarship application, nor did she go through the competitive scholarship selection process to be awarded said funds; and, 2) the funds were further paid in direct violation of the Gammon Scholarship endowment criteria which is restricted to individuals possessing a minimum of one-fourth (1/4) Cherokee blood quantum.

63. Foundation was the rightful owner and possessor of these monies and defendant's wrongful acts caused Foundation to be permanently dispossessed of the monies to the use and benefit of a third-party without Foundation's consent; said acts constitute a conversion.

64. Defendant's acts of conversion were committed without actual or apparent authority and without approval of the Foundation Board of Directors, and were committed with a culpable state of mind involving knowledge of, or with gross recklessness with respect to, her fiduciary duty owed to the Foundation and constitute a breach and defalcation of that fiduciary duty.

65. As a direct and proximate result of defendant's breach of fiduciary duty through conversion, Foundation has suffered monetary damages relating to Count 6 in the amount of $5,606.73.

COUNT 7
BREACH OF FIDUCIARY DUTY
CONVERSION OF FOUNDATION SCHOLARSHIP FUNDS
("Student D" - $2,550.81)

66. Plaintiff incorporates by reference paragraphs 1 through 65 above as if fully set forth herein.

67. On or about January 3, 2011, defendant unilaterally awarded $1,500.00 in Foundation Gammon Scholarship funds to "Student D," and further extended to her a zero-interest student loan in the amount of $2,050.81.

68. These funds were awarded and loaned in direct violation of Foundation policies and procedures in that "Student D" neither made an application, nor went through the competitive scholarship selection process to be awarded or loaned said funds.

69. Foundation was the rightful owner and possessor of these monies and defendant's wrongful acts caused Foundation to be permanently dispossessed of the monies to the use and benefit of a third-party without Foundation's consent; said acts constitute a conversion.

70. Defendant's acts of conversion were committed without actual or apparent authority and without approval of the Foundation Board of Directors, and were committed with a culpable state of mind involving knowledge of, or with gross recklessness with respect to, her fiduciary duty owed to the Foundation and constitute a breach and defalcation of that fiduciary duty.

71. As a direct and proximate result of defendant's breach of fiduciary duty through

conversion, Foundation has suffered monetary damages relating to Count 7 in the amount of $3,550.81.

COUNT 8
BREACH OF FIDUCIARY DUTY - EMBEZZLEMENT
(Colorado Family Trip for Four - $1,300.00)

72. Plaintiff incorporates by reference paragraphs 1 through 71 above as if fully set forth herein.

73. During a period from January 24, 2012, through January 29, 2012, defendant wrongfully expended Foundation funds for her own personal use and benefit, and for the use and benefit of her husband, Andrew Sikora, and for use and benefit of her two minor children, S.S. and S.S., by purchasing meals, hotel lodging, toll road usage, fuel, utilizing a Foundation vehicle and other travel expenses for an apparent all-expense-paid family trip to Golden, Colorado occurring on January 24 - 29, 2012.

74. Foundation was the rightful owner and possessor of these funds and defendant's wrongful acts caused Foundation to be permanently dispossessed of the funds and converted to her personal use and benefit without Foundation's consent; said acts constitute embezzlement of funds.

75. Defendant's acts of embezzlement were committed without actual or apparent authority and without approval of the Foundation Board of Directors, and were committed with a culpable state of mind involving knowledge of, or with gross recklessness with respect to, her fiduciary duty owed to the Foundation and constitute a breach and defalcation of that fiduciary duty.

76. As a direct and proximate result of defendant's breach of fiduciary duty through embezzlement, Foundation has suffered monetary damages relating to Count 8 in the amount of

$1,300.00.

COUNT 9
BREACH OF FIDUCIARY DUTY - EMBEZZLEMENT
(California Family Trip for Four - $3,800.00)

77. Plaintiff incorporates by reference paragraphs 1 through 76 above as if fully set forth herein.

78. During a period from January 24, 2012, through February 14, 2012, defendant wrongfully expended Foundation funds for her own personal use and benefit, and for the use and benefit of her husband, Andrew Sikora, and for use and benefit of her two minor children, S.S. and S.S., by purchasing roundtrip airlines tickets, car rental, hotel lodging, meals, fuel, and other travel expenses for an apparent all-expense-paid family trip to Los Angeles, California occurring on February 9 - 13, 2012.

79. Foundation was the rightful owner and possessor of these funds and defendant's wrongful acts caused Foundation to be permanently dispossessed of the funds and converted to her personal use and benefit without Foundation's consent; said acts constitute embezzlement of funds.

80. Defendant's acts of embezzlement were committed without actual or apparent authority and without approval of the Foundation Board of Directors, and were committed with a culpable state of mind involving knowledge of, or with gross recklessness with respect to, her fiduciary duty owed to the Foundation and constitute a breach and defalcation of that fiduciary duty.

81. As a direct and proximate result of defendant's breach of fiduciary duty through embezzlement, Foundation has suffered monetary damages relating to Count 9 in the amount of $3,800.00.

COUNT 10
BREACH OF FIDUCIARY DUTY - EMBEZZLEMENT
(Texas Trip - American Girl Packages - $300.00)

82. Plaintiff incorporates by reference paragraphs 1 through 81 above as if fully set forth herein.

83. During a period from May 17, 2012, through May 19, 2012, defendant wrongfully expended Foundation funds for her own personal use and benefit, and for the use and benefit of Foundation employee Heather Sourjohn, and their two minor daughters by purchasing two "American Girl" room packages (containing American Girl doll beds, pink balloons, pink bath linens, milk & cookies) during a trip to Texas.

84. Foundation was the rightful owner and possessor of these funds and defendant's wrongful acts caused Foundation to be permanently dispossessed of the funds and converted to her personal use and benefit without Foundation's consent; said acts constitute embezzlement of funds.

85. Defendant's acts of embezzlement were committed without actual or apparent authority and without approval of the Foundation Board of Directors, and were committed with a culpable state of mind involving knowledge of, or with gross recklessness with respect to, her fiduciary duty owed to the Foundation and constitute a breach and defalcation of that fiduciary duty.

86. As a direct and proximate result of defendant's breach of fiduciary duty through embezzlement, Foundation has suffered monetary damages relating to Count 10 in the amount of $300.00.

COUNT 11
BREACH OF FIDUCIARY DUTY - EMBEZZLEMENT
(Queen Mary Paranormal Birthday Experience - $2,500.00)

87. Plaintiff incorporates by reference paragraphs 1 through 86 above as if fully set forth herein;

88. During a period from July 16, 2012, through August 13, 2012, defendant wrongfully expended Foundation funds for her own personal use and benefit, and for the use and benefit of her husband, Andrew Sikora, by purchasing airlines tickets, airport parking (including a $125.00 car wash fee), car rental, hotel lodging (including two nights on the Queen Mary ship, room A185, purportedly known for its *"Paranormalistic"* activity), personal souvenirs, meals (including multiple purchases of alcoholic beverages), fuel and other travel related expenses, for an apparent all-expense-paid trip to Long Beach, California beginning on August 9, and continuing through defendant's birthday of August 13, 2012.

89. Foundation was the rightful owner and possessor of these funds and defendant's wrongful acts caused Foundation to be permanently dispossessed of the funds and converted to her personal use and benefit without Foundation's consent; said acts constitute embezzlement of funds.

90. Defendant's acts of embezzlement were committed without actual or apparent authority and without approval of the Foundation Board of Directors, and were committed with a culpable state of mind involving knowledge of, or with gross recklessness with respect to, her fiduciary duty owed to the Foundation and constitute a breach and defalcation of that fiduciary duty.

91. As a direct and proximate result of defendant's breach of fiduciary duty through embezzlement, Foundation has suffered monetary damages relating to Count 11 in the amount of

$2,500.00.

COUNT 12
BREACH OF FIDUCIARY DUTY - EMBEZZLEMENT
(Portland Trip - $475.00)

92. Plaintiff incorporates by reference paragraphs 1 through 91 above as if fully set forth herein.

93. During a period from July 16, 2012, through August 18, 2012. defendant wrongfully expended Foundation funds for her own personal use and benefit, and for the use and benefit and of her husband, Andrew Sikora, by purchasing unauthorized airlines tickets and personal souvenirs during a trip to Portland, Oregon occurring on August 15 - 18, 2012.

94. Foundation was the rightful owner and possessor of these funds and defendant's wrongful acts caused Foundation to be permanently dispossessed of the funds and converted to her personal use and benefit without Foundation's consent; said acts constitute embezzlement of funds.

95. Defendant's acts of embezzlement were committed without actual or apparent authority and without approval of the Foundation Board of Directors, and were committed with a culpable state of mind involving knowledge of, or with gross recklessness with respect to, her fiduciary duty owed to the Foundation and constitute a breach and defalcation of that fiduciary duty.

96. As a direct and proximate result of defendant's breach of fiduciary duty through embezzlement. Foundation has suffered monetary damages relating to Count 12 in the amount of $475.00.

COUNT 13
BREACH OF FIDUCIARY DUTY - EMBEZZLEMENT
(Cara Cowan Watts Dallas Trip - $1,200.00)

97. Plaintiff incorporates by reference paragraphs 1 through 96 above as if fully set forth herein.

98. During a period from April 26, 2013, through April 28, 2013, defendant wrongfully expended Foundation funds for her own personal use and benefit, and for the use and benefit of a non-Foundation employee, (former) District 5 Cherokee Nation Tribal Councilor Cara Cowan Watts, by purchasing hotel lodging (including $100.00 in pet fee charges) and extravagant meals (including multiple purchases of alcoholic beverages and $72.00 for two bottles of wine), during a purported Foundation business trip to Dallas, Texas occurring on April 26 - 28, 2013.

99. Foundation was the rightful owner and possessor of these funds and defendant's wrongful acts caused Foundation to be permanently dispossessed of the funds and converted to the personal use and benefit of her and others without Foundation's consent; said acts constitute embezzlement of funds.

100. Defendant's acts of embezzlement were committed without actual or apparent authority and without approval of the Foundation Board of Directors, and were committed with a culpable state of mind involving knowledge of, or with gross recklessness with respect to, her fiduciary duty owed to the Foundation and constitute a breach and defalcation of that fiduciary duty.

101. As a direct and proximate result of defendant's breach of fiduciary duty through embezzlement, Foundation has suffered monetary damages relating to Count 13 in the amount of $1,200.00.

COUNT 14
BREACH OF FIDUCIARY DUTY - EMBEZZLEMENT
(Cara Cowan Watts Phoenix Tickets - $1,000.00)

102. Plaintiff incorporates by reference paragraphs 1 through 101 above as if fully set forth herein.

103. During a period from February 28, 2013, through June 3, 2013, defendant wrongfully expended Foundation funds for her own personal use and benefit, and for the use and benefit of a non-Foundation employee, (former) District 5 Cherokee Nation Tribal Councilor Cara Cowan Watts, by purchasing unauthorized airlines tickets to Phoenix, Arizona.

104. Said airline tickets were originally purchased for travel on June 8, 2013, but were changed at defendant's direction on May 31, 2013, for travel to occur on October 25, 2103, three months after defendant's final date of employment under the Severance Agreement, resulting in additional charges being assessed.

105. Foundation was the rightful owner and possessor of these funds and defendant's wrongful acts caused Foundation to be permanently dispossessed of the funds and converted to the personal use and benefit of her and others without Foundation's consent; said acts constitute embezzlement of funds.

106. Defendant's acts of embezzlement were committed without actual or apparent authority and without approval of the Foundation Board of Directors, and were committed with a culpable state of mind involving knowledge of, or with gross recklessness with respect to, her fiduciary duty owed to the Foundation and constitute a breach and defalcation of that fiduciary duty.

107. As a direct and proximate result of defendant's breach of fiduciary duty through embezzlement, Foundation has suffered monetary damages relating to Count 14 in the amount of

$1,000.00.

COUNT 15
BREACH OF FIDUCIARY DUTY
CONVERSION OF FOUNDATION ASSETS AND RESOURCES
(Cara Cowan Watts Community Workshops - $1,600.00)

108. Plaintiff incorporates by reference paragraphs 1 through 107 above as if fully set forth herein.

109. During the time frame of January 2013 through April 2013, defendant unilaterally directed the wrongful use of computers, supplies and employee time and labor to be utilized to copy documents and prepare literature and materials for (former) District 5 Cherokee Nation Tribal Councilor and Principal Chief candidate Cara Cowan Watts' workshops held in Claremore, Oklahoma in January of 2013, and Dallas, Texas in April of 2013. The literature and materials included Cherokee Nation Tribal Registration and Cherokee Voter Registration forms, *"Straight Talk with Cara Cowan Watts"* handouts, and information about the Foundation's purported *"partnership"* with Cherokee Media, defendant's privately owned business.

110. In January 2013, defendant used Foundation funds to rent space in the Will Rogers Memorial Museum in Claremore for $300.00 and to purchase breakfast and lunch in excess of $750.00 for the aforementioned Cara Cowan Watts' Claremore workshop.

111. Article I, Section 1.5 of the Foundation bylaws provides that the corporation is not organized for pecuniary profit, and no part of the net earnings of the corporation shall inure to the benefit of any private member or individual and no part of its activities shall be used for carrying on propaganda or otherwise attempting to influence legislation.

112. No other elected Cherokee official was afforded the opportunity to utilize Foundation funds or resources for politically gratuitous promotional programs as was Cara

Cowan Watts. These acts constitute a direct violation of the Foundation bylaws and subjected the Foundation to negative public scrutiny by creating the appearance of an apolitical educational non-profit politically promoting and favoring a sitting elected official and future candidate for Principal Chief.

113. Foundation was the rightful owner and possessor of these resources and monies and defendant's wrongful acts caused Foundation to be permanently dispossessed of these resources and monies and converted to the personal use and benefit of a third-party without Foundation's consent; said acts constitute conversion of assets.

114. Defendant's acts of conversion were committed without actual or apparent authority and without approval of the Foundation Board of Directors, and were committed with a culpable state of mind involving knowledge of, or with gross recklessness with respect to, her fiduciary duty owed to the Foundation and constitute a breach and defalcation of that fiduciary duty.

115. As a direct and proximate result of defendant's breach of fiduciary duty through conversion, Foundation has suffered monetary damages relating to Count 15 in the amount of $1,600.00.

COUNT 16
BREACH OF FIDUCIARY DUTY
CONVERSION OF FOUNDATION ASSETS
(HP Designjet Printer - $5,000.00)

116. Plaintiff incorporates by reference paragraphs 1 through 115 above as if fully set forth herein.

117. In June of 2013, defendant unilaterally removed a large Hewlett-Packard Designjet Z3200PS 44" Photo Printer and software disks from the Foundation corporate offices

to an unknown location. Said equipment was fully functional and valued in excess of $5,000.00.

118. Foundation was the rightful owner and possessor of this office equipment and defendant's wrongful acts caused Foundation to be permanently dispossessed of the equipment and converted to her personal use and benefit, or the use and benefit of a third party, without Foundation's consent; said acts constitute conversion of assets.

119. Defendant's acts of conversion were committed without actual or apparent authority and without approval of the Foundation Board of Directors, and were committed with a culpable state of mind involving knowledge of, or with gross recklessness with respect to, her fiduciary duty owed to the Foundation and constitute a breach and defalcation of that fiduciary duty.

120. As a direct and proximate result of defendant's breach of fiduciary duty through conversion, Foundation has suffered monetary damages relating to Count 16 in the amount of $5,000.00.

COUNT 17
BREACH OF FIDUCIARY DUTY
CONVERSION OF FOUNDATION ASSETS
(Severance Package Paid to Lisa Reed Smith - $9,597.60)

121. Plaintiff incorporates by reference paragraphs 1 through 120 above as if fully set forth herein.

122. On or about June 27, 2013, defendant unilaterally authorized a severance payment to Foundation employee Lisa Reed Smith (also defendant's personal housekeeper) in the amount of $9,597.60. Said payment was made without any factual findings, authorization or approval by the Board and further exceeded her $5,000.00 spending authority in violation of Foundation bylaws.

123. Foundation was the rightful owner and possessor of these monies and defendant's wrongful acts caused Foundation to be permanently dispossessed of the monies to the use and benefit of a third-party without Foundation's consent; said acts constitute a conversion.

124. Defendant's act of conversion was committed without actual or apparent authority and without approval of the Foundation Board of Directors, and was committed with a culpable state of mind involving knowledge of, or with gross recklessness with respect to, her fiduciary duty owed to the Foundation and constitute a breach and defalcation of that fiduciary duty.

125. As a direct and proximate result of defendant's breach of fiduciary duty through conversion, Foundation has suffered monetary damages relating to Count 17 in the amount of $9,597.60.

COUNT 18
BREACH OF FIDUCIARY DUTY - EMBEZZLEMENT
(Computer Equipment - $5,500.00)

126. Plaintiff incorporates by reference paragraphs 1 through 125 above as if fully set forth herein.

127. On or about June 7, 2013, defendant used Foundation funds to purchase $8,931.10 of computer equipment from the Apple Store in Tulsa, Oklahoma. Said purchase exceeded her $5,000.00 spending authority in violation of Foundation bylaws.

128. On June 10, 2013, defendant used Foundation funds to purchase an additional $2,025.70 of computer equipment from the Apple Store in Tulsa, Oklahoma.

129. On or about July 1, 2013, defendant created a Foundation invoice to herself in the amount of $1,496.00 reflecting a portion of the computer equipment recently purchased. This invoice was allegedly paid by defendant and recorded in Foundation records as a *"donation"* by Kimberlie Gilliland.

130. Based on Foundation records and employee accounts, a substantial portion of the computer equipment purchased with Foundation funds never appeared for use in Foundation's corporate offices, and the whereabouts of the equipment is unknown. Plaintiff is informed and believes the missing computer equipment was converted to defendant's personal use and benefit, or to the use and benefit of her privately owned business - Cherokee Media.

131. Foundation was the rightful owner and possessor of this computer equipment and defendant's wrongful acts caused Foundation to be permanently dispossessed of the equipment and converted to her personal use and benefit without Foundation's consent; said acts constitute embezzlement of assets.

132. Defendant's acts of embezzlement were committed without actual or apparent authority and without approval of the Foundation Board of Directors, and were committed with a culpable state of mind involving knowledge of, or with gross recklessness with respect to, her fiduciary duty owed to the Foundation and constitute a breach and defalcation of that fiduciary duty.

133. As a direct and proximate result of defendant's breach of fiduciary duty through embezzlement, Foundation has suffered monetary damages relating to Count 18 in the amount of $5,500.00.

COUNT 19
BREACH OF FIDUCIARY DUTY - EMBEZZLEMENT
(Personal/Family Insurance Coverage - $3,288.20)

134. Plaintiff incorporates by reference paragraphs 1 through 133 above as if fully set forth herein.

135. During the time period of December 27, 2011 through March 24, 2012 defendant wrongfully paid a total of $3,288.20 of Foundation funds directly to local providers for health