

IN THE DISTRICT COURT IN AND FOR ROGERS COUNTY
STATE OF OKLAHOMA

DEC 04 2019

PHILLIP B. ALBERT,
Plaintiff,

v.

PELCO STRUCTURAL, LLC; PELCO
INVESTMENTS, LLC; PI REALTY, LLC;
PELCO LIMITED, LLC; PELCO
INDUSTRIES, INC.; MATHEW KASEY
SCOTT; and JAMES R. SUTPHEN,
Defendants.

And

PELCO STRUCTURAL, LLC,
Defendant/Third-Party Plaintiff,

v.

DON E. EAGLETON, JR.
Third-Party, Defendant.

CATHI EDWARDS, COURT CLERK
DEPUTY

Case No. CJ-2019-439

PELCO STRUCTURAL'S AMENDED ANSWER, COUNTERCLAIMS, AND THIRD-PARTY PETITION FOR FRAUD, EMBEZZLEMENT AND BREACH OF FIDUCIARY DUTY

ANSWER

Defendant Pelco Structural, LLC ("Structural"), by and through its counsel, hereby submits the following for its answer to Plaintiff, Phil Albert's ("Albert"), Petition.

1. Structural admits Albert is an individual who resides in Tulsa, County and has conducted business in Rogers County. To the extent the allegation in paragraph 1 are inconsistent with the foregoing, they are denied.
2. Structural admits the allegations in paragraph 2.
3. Structural admits the allegations in paragraph 3.

4. Structural admits the allegations in paragraph 4.
5. Structural admits the allegations in paragraph 5.
6. Structural is without sufficient information to admit or deny the allegations in paragraph 6 and therefore denies same.
7. Structural admits Scott is an individual employed by Structural and is without sufficient information to admit or deny the remaining allegations in paragraph 7 and therefore denies same.
8. Structural admits Sutphen is an individual employed by Structural and is without sufficient information to admit or deny the remaining allegations in paragraph 8 and therefore denies same.
9. Structural admits that the real property owned by PI Realty, LLC is in Rogers County and that Structural does business in Rogers County. Structural admits that some of Albert's wrongful actions, fraud, theft, embezzlement, breach of fiduciary duty, breach of the duty of loyalty, breach of contract occurred in Rogers County, among other locations. The remaining allegations in paragraph 9, including any allegation that Structural owes Albert any money, are denied.
10. Structural admits this Court has subject matter jurisdiction and personal jurisdiction over Structural. The remaining allegations in paragraph 10 are denied.
11. Structural adopts and incorporates by reference the foregoing answer and averments.
12. Structural admits that effective January 1, 2005, Par 5 Products, Inc., and Albert, as manager only, executed the Structural operating agreement. To the extent the allegations in paragraph 12 are inconsistent with the foregoing, they are denied.

13. Structural admits that Albert was a manager and President of Structural effective January 1, 2005. Albert later became a profits interest member of Structural. To the extent the allegations in paragraph 13 are inconsistent with the foregoing, they are denied.

14. Structural admits the allegations in paragraph 14.

15. Structural admits the allegations in paragraph 15.

16. Structural admits the 2005 employment agreement specifies in general terms Albert's duties to Structural. Structural specifically and expressly denies the duties and/or rights Albert alleges he has, as set forth in subparagraphs a-e of paragraph 16. The terms of the 2005 employment agreement speak for themselves and differ from those alleged by Albert.

17. Structural admits the sole member of PI Realty, LLC and its managers executed the PI Realty operating agreement, effective January 1, 2005. To the extent the allegations in paragraph 17 are inconsistent with the foregoing, they are denied.

18. Structural admits that Albert has a 25% profits interest in PI Realty, Structural admits that Pelco Investments, LLC owns a 75% membership interest. To the extent the allegations in paragraph 18 are inconsistent with the foregoing, they are denied.

19. Structural admits the allegations in paragraph 19.

20. Structural admits the allegations in paragraph 20.

21. Structural admits the allegations in paragraph 21.

22. Structural admits the allegations in paragraph 22.

23. Structural admits that PI Realty, LLC distributions have been made to Albert and to Pelco Investments, LLC. To the extent the allegations in paragraph 23 are inconsistent with the foregoing, they are denied.

24. Structural denies the allegations in paragraph 24.

25. Structural denies the allegations in paragraph 25.

26. Structural admits that Albert proposed a new employment agreement but denies that the proposed employment agreement was intended to replace the 2005 operating agreement. To the extent the allegations in paragraph 26 are inconsistent with the foregoing, they are denied.

27. Structural denies the allegations in paragraph 27.

28. Structural denies the allegations in paragraph 28.

29. Structural is without sufficient information to admit or deny the allegations in paragraph 29 and therefore denies same.

30. Structural is without sufficient information to admit or deny the allegations in paragraph 30 and therefore denies same.

31. Structural is without sufficient information to admit or deny the allegations in paragraph 31 and therefore denies same.

32. Structural is without sufficient information to admit or deny the allegations in paragraph 32 and therefore denies same.

33. Structural denies the allegations in paragraph 33.

34. Structural is without sufficient information to admit or deny the allegations in paragraph 34 and therefore denies same.

35. Structural is without sufficient information to admit or deny the allegations in paragraph 35 and therefore denies same.

36. Structural is without sufficient information to admit or deny the allegations in paragraph 36 and therefore denies same.

37. Structural is without sufficient information to admit or deny the allegations in paragraph 37 and therefore denies same.

38. Structural admits that it terminated Albert. Structural denies all other allegations in paragraph 38.

39. Structural admits the 2005 employment agreement was entered into between Albert and Structural, and that Structural terminated Albert. To the extent the allegations in paragraph 39 are inconsistent with the foregoing, they are denied.

40. Structural admits the allegations in paragraph 40.

41. Structural admits the allegations in paragraph 41.

42. Structural admits that PI Realty has not paid distributions in 2019 to Albert. To the extent the allegations in paragraph 42 are inconsistent with the foregoing, they are denied.

Count¹ I

43. Structural adopts and incorporates by reference the foregoing answer and averments.

44. Structural admits the allegations in paragraph 44, except to the extent that the Albert implies he kept personal property at Structural's office *because* he was the President.

45. Structural admits Albert asked for the return of his personal property. To the extent the allegations in paragraph 45 are inconsistent with the foregoing, they are denied.

46. Structural denies the allegation in paragraph 46.

47. Structural denies the allegation in in paragraph 47.

48. Structural denies the allegations in paragraph 48, including any implication or allegation that Albert is entitled to relief or judgment based on his allegations in Count I of his Petition.

Count II

49. Structural adopts and incorporates by reference the foregoing answer and averments.

¹ Plaintiff identifies his putative causes of actions as "counts" in his Petition. For consistency, that verbiage is continued herein.

50. Structural admits the 2005 employment agreement contains a non-compete provision. Structural denies that a 2013 employment agreement exists. To the extent the allegations in paragraph 50 are inconsistent with the foregoing they are denied.

51. Structural denies the allegations in paragraph 51.

52. Structural denies the allegation in paragraph 52, including any implication or allegation that Albert is entitled to relief or judgment based on his allegations in Count II of his Petition.

Count III

53. Structural adopts and incorporates by reference the foregoing answer and averments.

54. Structural admits that Albert is a holds a 25% profits interest in PI Realty, LLC therein. Structural denies the remaining allegations in paragraph 54.

55. Structural admits that Albert may request an accounting, at his expense of PI Realty from the time that he became a profits interest holder but not prior thereto. Structural denies that Albert is entitled to, may request or obtain an accounting of Pelco Investments, LLC. To the extent the allegations in paragraph 55 are inconsistent with the foregoing, they are denied, including any implication or allegation that Albert is entitled to relief based on his allegations in Count III of his Petition.

Count IV

56. Structural adopts and incorporates by reference the foregoing answer and averments.

57. Structural denies the allegations in paragraph 57, including any implication or allegation that Albert is entitled to the relief or receivership based on his allegations in Count IV or his Petition.

Count V

58. Structural adopts and incorporates by reference the foregoing answer and averments.

59. Structural denies the allegations in paragraph 59.

60. Structural denies the allegations in paragraph 60.

61. Structural denies the allegations in paragraph 61.

62. Structural denies the allegations in paragraph 62, including any implication or allegation that Albert is entitled to relief or an injunction based on his allegations in Count V of his Petition.

Count VI

63. Structural adopts and incorporates by reference the foregoing answer and averments.

64. Structural denies the allegations in paragraph 64.

65. Structural admits that Albert owes Structural money that Albert stole and embezzled money from Structural, and that Structural has been defrauded and damaged by Albert. To the extent Albert alleges he “may owe” Structural money due to “various business dealings,” that characterization is denied. Albert’s conduct was criminal and fraudulent. At least \$7.4 million is owed by Albert and/or Don E. Eagleton, Jr. (hereafter, “Eagleton”) to Structural and is not the result of “business dealings.”

66. Structural admits there is a justiciable controversy between it and Albert related to the money that Albert stole and embezzled, and related to Albert’s other tortious conduct. Structural denies such conduct is subject to adjudication pursuant to an action seeking declaratory relief, and that Albert is entitled to the relief he requests in Count VI of his Petition.

Count VII

67. Structural adopts and incorporates by reference the foregoing answer and averments.

68. Structural admits the 2005 employment agreement was entered into between Structural and Albert. To the extent the allegations in paragraph 68 are inconsistent with the foregoing, they are denied.

69. Structural admits the allegations in paragraph 69.

70. Structural denies there is a justiciable controversy, as alleged *by Albert*, who has not even alleged a breach of the employment agreement, regardless of which terms are contained therein. As such, Structural denies that a controversy exists under any employment agreement that is subject to declaratory relief, and that Albert is entitled to the relief he requests in Count VII of his Petition.

Count VIII

71. Structural adopts and incorporates by reference the foregoing answer and averments.

72. Structural admits the 2005 operating agreement was entered into between Par 5 Products, Inc. (now Pelco Industries, LLC) and Albert. To the extent the allegations in paragraph 72 are inconsistent with the foregoing, they are denied.

73. Structural admits the allegations in paragraph 73.

74. Structural denies there is a justiciable controversy, as alleged *by Albert*, who has not even alleged a breach of the operating agreement, regardless of which terms are contained therein. As such, Structural denies that a controversy exists under any operating agreement that is subject to declaratory relief, and that Albert is entitled to the relief he requests in Count VIII of his Petition.

Count IX

75. Structural adopts and incorporates by reference the foregoing answer and averments.

76. Structural is without sufficient information to admit or deny what Scott or Sutphen “may claim, or assert.” Structural denies that either Scott or Sutphen have any interest whatsoever in Structural.

77. Neither Scott nor Sutphen have any interest in Structural. Thus the “basis, validity, type and extent” of any interest by either Scott or Sutphen in Structural is *not unknown*, and the allegations in paragraph 77 are denied.

78. Structural denies there is a justiciable controversy, as alleged by Albert or that Albert has any such standing to adjudicate what Scott or Sutphen may claim. As such, Structural denies that a controversy exists that is subject to declaratory relief, and that Albert is entitled to the relief he requests in Count IX of his Petition.

AFFIRMATIVE DEFENSES

1. The Petition, in whole or part, fails to state a claim or cause of action against Structural upon which relief can be granted.

2. Venue is improper in this Court.

3. Applicable statutes of limitations and/or repose bar Albert’s claims in whole or in part.

4. Structural is entitled to an offset against any money owed by Albert, which is denied, for all money stolen and embezzled by Albert from Structural, including legal fees and expenses incurred by Structural related to same.

5. Albert’s causes of action and seeking of declaratory judgment relief are barred in whole and/or part by the Statute of Frauds.

6. Albert’s claims are barred by unclean hands and estoppel.

COUNTERCLAIMS

1. Albert, as a profits interest holder, manager and President of Structural, had access to and de facto control of Structural's financial resources and accounts.
2. Over the course of at least 10 years, Albert has stolen and embezzled Structural funds for his personal use and benefit.
3. Said theft and embezzlement total at least \$7.4 million. Albert perpetrated theft and embezzlement by means of trick and concealment, including fraud upon Structural and its other managers and members.
4. The other members and managers of Structural were unaware of Albert's theft, embezzlement and fraud (due to Albert's concealment) until March of 2019.
5. Upon learning of Albert's theft, embezzlement and fraud, Structural terminated Albert's employment pursuant to the 2005 employment agreement with Albert and operating agreement of Structural.
6. Upon learning of Albert's theft, embezzlement and fraud, Structural removed Albert as a manager and as President, pursuant to the operating agreement of Structural.
7. Albert, in conjunction and conspiracy with Don Eagleton, used a number of schemes, concealment and false statements to steal and embezzle from and to defraud Structural.

Structural Payroll Accounts

8. Albert unilaterally and without authorization, paid himself a salary greater than that authorized by his employment agreement. In particular, from January 1, 2010 through April 19, of 2019, payroll records indicate that Albert received unauthorized salary payments described as "salary" that exceeded his agreed salary by at least \$32,477.82.

9. Next, from January 1, 2010 through April 19, 2019, Structural's payroll records indicate that Albert received unauthorized payments described as "office regular" or "bonus," totaling at least \$707,486.46.

10. Next, from January 1, 2010 through April 19, 2019, Structural's payroll records indicate that Albert received unauthorized payments described as "reimbursements" totaling at least \$2,475,750.00. There are no Structural records, nor any payroll documentation, substantiating any business expenses incurred by Albert to support the fraudulent "reimbursements." Structural policies required receipts and/or other documentation to substantiate work-related expenses.

11. The unauthorized payments described as "reimbursements" were taken in large, even dollar amounts, and paper checks for same were mailed to Albert via Federal Express at Structural's office. For example, a single "reimbursement" in 2015 was for \$200,000. A second single "reimbursement" in 2015 was for \$140,000.

12. Albert, as an employee of Structural, was entitled to paid vacation and personal time. Albert was routinely away from Structural on vacation and personal leave. Nonetheless, from January 1, 2019 through April 19, 2019, Albert paid himself (cashed out) vacation time and personal time totaling \$158,021.57. Said amount and time far exceeds both any reasonable amount of unused vacation and personal time Albert could have accumulated, and exceeds the amounts accrued pursuant to Structural employee policies. Said payments were unauthorized.

13. In total, and known to-date, from January 1, 2010 through April 19, 2019, Albert made unauthorized payments to himself via Structural's payroll account totaling at least \$3,373,735.85 by falsely claiming said payments were salary, bonus, reimbursement or compensation for vacation and paid time off.

14. In addition, Albert authorized bonus payments that were not communicated to, requested or approved by other Structural managers to Structural employees for Albert's own personal benefit and not for the benefit of Structural.

15. Specifically, Albert unilaterally authorized payroll payments to Don Eagleton, over and above Eagleton's regular salary and routine, company-wide bonuses totaling \$260,360.98. Eagleton was employed by Structural as the controller. Eagleton knew of Albert's theft, embezzlement and fraud but did not report same to other Structural managers or members. Instead, Eagleton assisted Albert in his deception, theft, embezzlement and fraud, and/or remained complicit and silent because Albert was authorizing additional payroll payments to Eagleton.

16. In addition, Albert directed that payments be made to four Structural employees who are or were, along with Albert, also members of Pelco Limited, LLC. Said payments benefited only Albert and the Pelco Limited, LLC members in their capacity as such. Said payments, totaling \$346,873.86, were unauthorized and were not bonuses paid as a result of work performed for Structural.

17. In addition, Albert directed that payroll payments be made to at least two employees, Cynthia D. Munroe and Amber M. Brand, totaling at least \$51,533.06, for personal reasons and not in furtherance of any legitimate business interest of or benefit for Structural.

Structural Credit Cards

18. From January 1, 2010 through April 19, 2019, Albert used Structural credit cards to purchase goods and services, and to make charitable contributions, that were personal to Albert and provided no benefit to Structural. All total, Albert used Structural credit cards for personal and unauthorized charitable expenses that total at least \$1,909,017.90.

19. Albert used Structural credit cards to charge \$169,635.69 in personal expenses including, among other things, fine jewelry, custom men's suits, fine dining, flowers and casino

charges, unrelated to Structural operations and solely to benefit Albert and elevate his personal reputation and standing in the community and to those upon whom he bestowed gifts and contributions.

20. Albert's charges to Structural credit cards for personal expenditures were routinely coded by Albert and Eagleton in Structural accounting journals as Work in Progress-Overhead ("WIP-Overhead") expenses and thus did not appear on financial statements. Such a coding is improper and hid the expenses from other Structural members and managers. Moreover, the expenses coded WIP-Overhead were recorded in a password protected document that only Eagleton and Albert had access to, which further concealed the theft, embezzlement and fraud.

21. Albert used Structural credit cards to make donations to various community organizations and non-profits. Some, but not all, are legitimate contributions on behalf of Structural. From January 1, 2010 to April 19, 2019, Structural credit card account statements reflect charitable or community organization contributions of \$473,549.84 and that resulted in no philanthropic benefit for Structural. Moreover, numerous such contributions were claimed by Albert (and his spouse Joan Albert) to be a personal contributions on his/their behalf with the Internal Revenue Service and Oklahoma Tax Commission.

22. Many of these charitable and community contributions Albert paid for with Structural credit cards were coded by Albert and Eagleton as expenses to the "Scrap Income" account in the Structural accounting journals, which concealed these payments from other Structural members and managers.

23. Albert charged \$157,915.06 in personal travel expenses to Structural credit cards. Many of these charges were coded to the Scrap Income account, shielding them from scrutiny by other Structural members and managers.

24. Albert charged to Structural credit cards \$1,107,917.31 in other miscellaneous expenditures and that are unrelated to Structural business. These miscellaneous charges included, but are not limited to, costs for art, flowers, custom clothing, maternity and baby stores, cigars, movies, restaurants, hotels, itunes purchases, and retail home décor, furnishing and gift stores.

25. Many of the credit card charges for miscellaneous expenditures were secretly and improperly coded in Structural accounting journals to either the Scrap Income account or to the WIP-Overhead account.

26. Structural builds steel infrastructure poles and supports. None of the above credit card charges related to Structural's operations or expenses.

Structural Operating Account

27. Albert also paid himself cash, paid personal expenses and made charitable or community donations direct from the Structural operating accounts.

28. Since 2010, Structural's general operating accounts have been maintained by BancFirst and/or RCB Bank.

29. BancFirst records indicate that Albert drew 47 cashier's checks from the BancFirst operating account, none of which have supporting documentation in Structural records as to their purpose. Moreover, 6 of these checks were for even Dollar amounts and made payable to Albert directly. These six checks totaled \$67,000 and were deposited in a Bank of Oklahoma account, the owner of which is unknown to Structural.

30. RCB Bank records indicate that Albert drew 41 cashier's checks from the RCB operating account, none of which have supporting documentation in Structural records as to their purpose. Moreover, 16 of these checks were for even Dollar amounts and made payable to Albert directly. These 16 checks total \$186,000 and were deposited into a Bank of Oklahoma account, the owner of which is unknown to Structural.

31. One cashier's check drawn by Albert on Structural's RCB Bank operating account was made payable to Albert for the amount of \$67,999. This cashier's check was used to pay the personal income taxes owed to the U.S. Internal Revenue Service by Albert and his wife, Joan Albert. This check was coded to Structural's WIP-Overhead account in order to conceal it from the other managers and members of Structural.

32. All total, unauthorized cashier's checks drawn on Structural operating accounts, and at Albert's direction and/or payable to Albert, total \$330,699.000.

33. Albert also effected the payment of an additional \$322,313.96 for personal expenditures from Structural's operating account and for which no legitimate business purpose could be identified. Many of said expenses and payments were coded to Structural's Scrap Income account in order to hide them from the other managers and members of Structural.

34. Albert also made contributions to political campaigns, as well as charitable and community organizations, from the Structural operating accounts at BancFirst and RCB Bank, totaling \$315,268.82 that appear to have been made for Albert's benefit and as part of a philanthropic business initiative that did not benefit Structural. Many of these contributions were coded to Structural's Scrap Metal account in order to conceal them from the other managers and members of Structural.

35. Albert's unauthorized use of Structural funds to pay himself cash, pay personal expenses and make political, charitable and community donations for his own benefit , and from the Structural operating accounts total \$968,281.79.

Loan Advance

36. Upon information and belief, Albert improperly authorized, without consulting other Structural managers and members a \$450,000 draw down on a Structural line of credit (a loan advance), but did not deposit that sum into any Structural operating account for the payment of Structural expenses or obligations.

37. To date, that loan advance is unaccounted for and it is believed that Albert stole and/or embezzled this amount for his personal use.

Summary of Theft, Embezzlement and Fraud

38. In total from January 1, 2010 to present, Albert stole, embezzled, defrauded and/or made unauthorized secretive payments to himself, or to others for his personal benefit, totaling at least \$7,473,090.73, and as follows:

A. Unapproved salary, vacation and personal leave, unsupported bonuses and other non-salary payments, including expense "reimbursements" that are unsupported by documentation, directly to Albert: \$3,373,735.85;

B. Cashier's checks drawn on Structural operating accounts made payable to Albert or for his personal benefit, additional unsupported expenditures and charitable or community contributions made for Albert's personal benefit totaling: \$968,281.79;

C. An unaccounted for loan advance believed to have been embezzled by Albert totaling \$450,000.00;

D. Personal expenses charged by Albert on Structural credit cards for items including jewelry, custom clothing, home furnishings, art, movies, dining, flowers, travel, personal political, charitable and community donations, etc., totaling \$2,022,285.19.

E. Unauthorized payments to other Structural employees purported to be “bonuses” or “salary” but which are, in reality, payments support and encourage concealment of Albert’s conduct, or payments to Albert’s other business partners, none of which were legitimate bonuses or salary for worked performed for Structural’s benefit, totaling \$658,787.90.

39. Upon information and belief, Albert stole, embezzled, defrauded and/or made unauthorized secretive payments to himself, or to others for his personal benefit, prior to January 1, 2010 and Structural is still investigating to determine the full extent of Albert’s conduct and the money unlawfully taken from Structural.

First Cause of Action - Fraud and Constructive Fraud

40. Structural adopts and incorporates by reference its answer, averments and allegations above.

41. Albert, by deceit and dishonesty, hid his theft and embezzlement from Structural by means of creating false financial statements and providing same to Structural’s other managers and members, falsely recording expenses and income in accounting records and preparing and filing false tax returns on behalf of Structural.

42. Albert also made affirmative verbal misrepresentations about Structural’s financial records and condition.

43. Albert, as a member and manager of Structural and by virtue of partially disclosing information, and making false statements, had a duty to affirmatively disclose the full nature of the financial transactions and deceptions committed by him and other Structural employees.

44. Said false statements, misrepresentations and omissions were intended to be relied upon by Structural and its other members and managers.

45. Structural and its members and managers, did in fact rely on said false statements, misrepresentations and omissions.

46. Structural's others members and managers authorized a loan to Structural in order to support the company because Albert misrepresented Structural's financial condition and hid his theft and embezzlement, which he had a duty to disclose. Structural incurred debt based on Albert's fraud, including but not limited to, additional consequential damages and losses.

47. Structural, its members and managers, did not learn of Albert's false statements and misrepresentations until March of 2019.

48. Structural has been damaged by Albert's fraud and constructive fraud.

WHEREFORE, Structural demands judgment in an amount in excess of \$75,000, in its favor and against Albert, together with prejudgment interest, costs and expenses, and all other relief this Court deems just and equitable.

**Second Cause of Action – Civil Action for Computer Crimes Act Violations
by way of Fraud, Embezzlement and Theft**

49. Structural adopts and incorporates by reference its answer, averments and allegations above.

50. Albert, by means of a computer and electronic transactions, did use deception to embezzle and steal from Structural.

51. In addition to the loss of more than \$7.4 million, Structural has incurred expenses for attorneys and financial forensic investigators to discover and account for the losses and the means by which Albert perpetrated his fraud, theft and embezzlement.

52. Pursuant to 21 O.S. §§ 1954 and 1955, Structural may state a claim for recovery of the stolen and embezzled funds, and expenses incurred in the identification and determination of said computer fraud, theft and embezzlement.

WHEREFORE, Structural demands judgment in an amount in excess of \$75,000, in its favor and against Albert, together with prejudgment interest, costs and expenses, including attorneys' fees incurred herein, and all other relief this Court deems just and equitable.

Third Cause of Action – Chose in Action for Theft and Embezzlement

53. Structural adopts and incorporates by reference its answer, averments and allegations above.

54. Structural was the owner and holder of money in its operating accounts.

55. Albert, by deception, fraud, theft and embezzlement, wrongfully took Structural's money, and accessed loan advances on Structural's line of credit for his own benefit.

56. Said conduct was unauthorized and intentional.

57. Structural demands recovery of same pursuant to 60 O.S. § 312.

WHEREFORE, Structural demands judgment in an amount in excess of \$75,000, in its favor and against Albert, together with prejudgment interest, costs and expenses, including attorneys' fees incurred herein, and all other relief this Court deems just and equitable.

Fourth Cause of Action – Breach of Fiduciary Duty

58. Structural adopts and incorporates by references its answer, averments and allegations above.

59. Albert as a member, manager and President of Structural had a fiduciary duty to Structural.

60. Albert's conduct was breach of his fiduciary duty to Structural and Structural has been damaged thereby.

WHEREFORE, Structural demands judgment in an amount in excess of \$75,000, in its favor and against Albert, together with prejudgment interest, costs and expenses, including attorneys' fees incurred herein, and all other relief this Court deems just and equitable.

Fifth Cause of Action – Breach of the Duty of Loyalty

61. Structural adopts and incorporates by references its answer, averments and allegations above.

62. Albert as an employee and President of Structural owed Structural the duty of loyalty.

63. Albert's conduct was breach of his duty of loyalty to Structural and Structural has been damaged thereby.

WHEREFORE, Structural demands judgment in an amount in excess of \$75,000, in its favor and against Albert, together with prejudgment interest, costs and expenses, including attorneys' fees incurred herein, and all other relief this Court deems just and equitable.

Sixth Cause of Action- Breach of 2005 Employment Agreement

64. Structural adopts and incorporates by references its answer, averments and allegations above.

65. Albert breached the terms of his 2005 employment agreement with Structural.

66. Structural has been damaged thereby.

WHEREFORE, Structural demands judgment in an amount in excess of \$75,000, in its favor and against Albert, together with prejudgment interest, costs and expenses, including attorneys' fees incurred herein, and all other relief this Court deems just and equitable.

Punitive Damages and Prayer for Relief

67. Albert's conduct set forth in this Answer and Counterclaims, was intentional and with both reckless disregard and malice to Structural, entitling Structural to punitive damages.

WHEREFORE, Structural demands judgment in an amount in excess of \$75,000, in its favor and against Albert, for all compensatory and consequential damages incurred, together with

prejudgment interest, costs and expenses, including attorneys' fees incurred herein, punitive damages, and any and all other relief this Court deems just and equitable.

THIRD-PARTY PETITION

COMES NOW the Defendant and Third-Party Plaintiff, Pelco Structural, LLC and for its causes of action against Third-Party Defendant, Don Eagleton, alleges and states as follows:

1. Eagleton was employed by Structural as Controller.
2. As Controller, Eagleton, along with Albert as President, was responsible for accurately preparing and maintaining Structural's financial records and statements.
3. As Controller, Eagleton had access to all of Structural's financial records.
4. Structural adopts and incorporates by reference all of the above allegations, averments, in its Answer and Counterclaims as if set forth fully herein this Third-Party Petition.
5. Eagleton was aware of Albert's theft, embezzlement, fraud, constructive fraud, breach of fiduciary duty and breach of duty of loyalty.
6. Eagleton assisted Albert and conspired with Albert, to perpetuate and continue the theft, embezzlement, fraud and constructive fraud as described above and below.
7. Eagleton, in conspiracy with Albert, knowingly coded Albert's personal expenses to WIP-Overhead and Scrap Income accounts/ledgers in Structural financial records.
8. Eagleton knew that this coding effectively hid Albert's theft, embezzlement and fraud from other Structural managers and members.
9. Eagleton knew of and assisted Albert in processing payments from Structural payroll accounts that were not legitimate wages or bonuses to himself, Albert and other Structural employees, including but not limited Structural employees who were also members of Pelco Limited, LLC.

10. Eagleton knew of and assisted Albert in making and concealing charges by Albert for personal expenses and purchases to Structural credit cards.

11. Eagleton knew of and assisted Albert in making and concealing withdrawals by Albert from Structural operating accounts for Albert's personal use and benefit.

12. Eagleton knew of and assisted Albert in using Structural funds to pay Albert and pay Albert's personal expenses.

13. Eagleton knew of and assisted Albert in concealing Albert's use of Structural funds for political, community and charitable contributions that benefited Albert personally and not Structural.

First Cause of Action - Fraud and Constructive Fraud

1. Structural adopts and incorporates by reference its answer, averments and allegations above.

2. Eagleton, by deceit and dishonesty, hid his and Albert's theft and embezzlement from Structural by means of creating false financial statements and providing same to Structural's other managers and members, falsely recording expenses and income in accounting records and preparing and filing false tax returns on behalf of Structural.

3. Eagleton, as Controller of Structural and by virtue of partially disclosing and reporting financial information, and making false statements related thereto, had a duty to affirmatively disclose the full nature of the financial transactions and deceptions committed by him and Albert.

4. Said false statements, misrepresentations and omissions were intended to be relied upon by Structural and its other members and managers.

5. Structural and its members and managers, did in fact rely on said false statements, misrepresentations and omissions.

6. Structural, its members and managers, did not learn of Eagleton's false statements and misrepresentations until March of 2019.

7. Structural has been damaged by Eagleton fraud and constructive fraud.

WHEREFORE, Structural demands judgment in an amount in excess of \$75,000, in its favor and against Eagleton, together with prejudgment interests, costs and expenses, and all other relief this Court deems just and equitable.

**Second Cause of Action – Civil Action for Computer Crimes Act Violations
by way of Fraud, Embezzlement and Theft**

8. Structural adopts and incorporates by reference its answer, averments and allegations above.

9. Eagleton, by means of a computer and electronic transactions, did use deception to embezzle and steal from Structural.

10. In addition to the loss of more than \$7.4 million, Structural has incurred expenses for attorneys and financial forensic investigators to discovery and account for the losses and the means by which Eagleton perpetrated his fraud, theft and embezzlement.

11. Pursuant to 21 O.S. §§ 1954 and 1955, Structural may state a claim for recovery of the stolen and embezzled funds, and expenses incurred in the identification and determination of said computer fraud, theft and embezzlement.

WHEREFORE, Structural demands judgment in an amount in excess of \$75,000, in its favor and against Eagleton, together with prejudgment interest, costs and expenses, including attorneys' fees incurred herein, and all other relief this Court deems just and equitable.

Third Cause of Action – Chose in Action for Theft and Embezzlement

12. Structural adopts and incorporates by reference its answer, averments and allegations above.

13. Structural was the owner and holder of money in its operating accounts.

14. Eagleton, by deception, fraud, theft and embezzlement, wrongfully took Structure's money for his own benefit and not as legitimately earned compensation for work performed on Structural's behalf, and assisted Albert in stealing an embezzling from Structural.

15. Said conduct was unauthorized and intentional.

16. Structural demands recovery of same pursuant to 60 O.S. § 312.

WHEREFORE, Structural demands judgment in an amount in excess of \$75,000, in its favor and against Eagleton, together with prejudgment interest, costs and expenses, including attorneys' fees incurred herein, and all other relief this Court deems just and equitable.

Fourth Cause of Action – Breach of Fiduciary Duty

17. Structural adopts and incorporates by references its answer, averments and allegations above.

18. Eagleton, as Controller, had a fiduciary duty to Structural.

19. Eagleton's conduct was breach of his fiduciary duty to Structural and Structural has been damaged thereby.

WHEREFORE, Structural demands judgment in an amount in excess of \$75,000, in its favor and against Eagleton, together with prejudgment interest, costs and expenses, including attorneys' fees incurred herein, and all other relief this Court deems just and equitable.

Fifth Cause of Action – Breach of the Duty of Loyalty

20. Structural adopts and incorporates by references its answer, averments and allegations above.

21. Eagleton, as an employee and Controller of Structural owed Structural the duty of loyalty.

22. Eagleton's conduct was breach of his duty of loyalty to Structural and Structural has been damaged thereby.


WHEREFORE, Structural demands judgment in an amount in excess of \$75,000, in its favor and against Eagleton, together with prejudgment interest, costs and expenses, including attorneys' fees incurred herein, and all other relief this Court deems just and equitable.

Punitive Damages and Prayer for Relief

23. Eagleton conduct set forth in this Answer and Counterclaims, was intentional and with both reckless disregard and malice to Structural, entitling Structural to punitive damages.

WHEREFORE, Structural demands judgment in an amount in excess of \$75,000, in its favor and against Eagleton, for all compensatory and consequential damages incurred, together with prejudgment interest, costs and expenses, including attorneys' fees incurred herein, punitive damages, and any and all other relief this Court deems just and equitable.

Respectfully Submitted,



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Attorney for Pelco Structural, LLC

ATTORNEY LIEN CLAIMED

CERTIFICATE OF SERVICE

This is to certify that on this ^{3rd} 22nd day of December, 2019, a true and correct copy of the foregoing instrument was mailed to:

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