UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CHEROKEE NATION, **Plaintiff,** **v.** **UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,** **Defendants.**	**Civil Action No. 19-cv-2154-TNM-ZMF**

REPORT AND RECOMMENDATION

Assets belonging to Plaintiff, Cherokee Nation (the "Nation"), have long been held in trust by the United States Government. The Nation has sued for an accounting of its Trust Funds from the Department of the Interior and other federal defendants (collectively, the "Government"). United States District Judge Trevor McFadden denied the Government's first Motion to Dismiss. *See Cherokee Nation v. Dep't of the Interior*, No. 19-cv-2154, 2020 WL 224486, at *1 (D.D.C. Jan. 15, 2020). Shortly thereafter, Judge McFadden referred this matter to a magistrate judge for full case management, including the preparation of a Report and Recommendation on dispositive motions pursuant to Local Civil Rule 72.3. *See* Minute Order, Feb. 18, 2020. The Government has since filed a second Motion to Dismiss pursuant to Rule 12(c). *See* ECF No. 54. The undersigned recommends that the Court DENY the Government's request.

I. Background

The Nation has sued the Government seeking a declaratory judgment and injunctive relief. *See* ECF No. 1 (Compl.), ¶¶ 131–167. "[T]he Nation [is] invok[ing] its right to an accounting of

the Trust Fund as a beneficiary of the Government's trusteeship." *Id.*, ¶ 3. The Nation alleges that the Trust Fund consists of "vast resources" including:

> money; proceeds from the sale of land or profits from the land; money from surface leases for agriculture, surface, oil and gas mining leases, coal leases, sand and gravel leases, businesses, and town lots; income from property owned by the Nation; buildings; the Nation's records; and money resulting from treaties or other agreements.

Id., ¶ 2. "Each of the items in the Trust Fund are subject to specific trust duties set out in treaties, statutes, regulations, executive orders, and agency directives . . . ." *Id.* The Nation has not spared any ink specifying those sources of law. First, it cites 24 treaties with the United States, dating back to 1785. *See id.*, ¶¶ 17–48. Those treaties govern many facets of the Nation's relationship with the Government. For example, some of the earliest treaties concerned the Government's annual payments to the Nation in exchange for the cessation of certain tribal lands. *See id.*, ¶¶ 19–20. Later treaties addressed "mismanagement" of funds promised to the Nation by establishing "an agreement on how the United States would account for the monies from [other treaty obligations] that the United States mishandled." *Id.*, ¶ 40.

Second, the Nation cites 36 Acts of Congress that it alleges are "relevant to and controlling items within the Cherokee Trust Funds." *Id.*, ¶ 49; *see also id.*, ¶¶ 50–58, 60–66, 68–86 (listing statutes). Some of the Acts concern the Government's role in apportioning and managing tribal lands and any natural resources on those lands. *See id.*, ¶ 66 (citing Curtis Act, 30 Stat. 495 (June 28, 1898)); ¶ 85 (citing Act of Oct. 21, 1970, 84 Stat. 1074). Other statutes broadly require the Government to account for the Nation's Trust Funds. *See id.*, ¶ 72 (citing Act of Apr. 4, 1910, 36 Stat. 269); *id.*, ¶ 73 (citing Act of Mar. 3, 1911, 36 Stat. 1058); *id.*, ¶ 74 (citing Act of Aug. 24, 1912, 37 Stat. 518); *id.*, ¶ 101(C)–(I). One such Act from 1893 "agreed to provide . . . a 'complete account of moneys due the Cherokee Nation under any of the treaties ratified'" in certain years between 1817 and 1868. *Id.*, ¶ 61 (quoting Act of Mar. 3, 1893, 27 Stat. 612). An Act passed two

years later "directed the Attorney General to review and make a 'restatement' of the accounting completed under" the 1893 Act. *Id.*, ¶ 63 (quoting Act of Mar. 2, 1895, 28 Stat. 764). Most significantly, the Nation heavily cites the American Indian Trust Fund Management Reform Act of 1994 (the "1994 Act"). *See id.*, ¶¶ 86, 101(J)–(L) (citing 108 Stat. 4239). The 1994 Act requires "as full and complete accounting as possible of the [Nation's] funds to the earliest possible date." *Id.*, ¶ 101(K) (quoting 1994 Act, 108 Stat. 4239).

The Nation filed their Complaint on July 19, 2019. *See id.* Count I broadly requests an accounting, *id.* at 42, citing Presidential Proclamations and Acts of Congress that it contends shape the trust relationship, *id.*, ¶¶ 135–36. Count I also points to "various[] . . . treat[ies], other agreements, [and] . . . congressional or administrative act[s]." *Id.*, ¶ 132. Count II also seeks an accounting, *see id.* at 44, but the foundation for this Count is more precise. It is rooted in the accounting provisions set forth in the 1994 Act—specifically 25 U.S.C. §§ 4011 and 162a. *See id.*, ¶¶ 140–42, 144.

The Court denied the Government's first Motion to Dismiss alleging lack of jurisdiction and failure to state a claim. *See Cherokee Nation*, 2020 WL 224486, at *1. Amid ongoing discovery disputes, the Government has now moved to dismiss under Federal Rule of Civil Procedure 12(c). *See* ECF No. 54 (Def.'s MTD).

II. Legal Standard

Rule 12(c) of the Federal Rules of Civil Procedure allows a party to "move for judgment on the pleadings" "[a]fter the pleadings are closed—but early enough not to delay trial." "This Court evaluates a Rule 12(c) motion for judgment on the pleadings under the same standard as a Rule 12(b)(6) motion to dismiss." *Am. Inst. of Certified Pub. Accts. v. IRS*, 199 F. Supp. 3d 55, 60 (D.D.C. 2016) (citing *Rollins v. Wackenhut Servs., Inc.*, 703 F.3d 122, 130 (D.C. Cir. 2012)),

rev'd on other grounds, 746 Fed. App'x 1 (D.C. Cir. 2018). "Because Rule 12(c) provides judicial resolution at an early stage of a case, the party seeking judgment on the pleadings shoulders a heavy burden of justification." *Dist. No. 1, Pac. Coast Dist., Marine Eng'rs Beneficial Ass'n, AFL-CIO v. Liberty Maritime Corp.*, 933 F.3d 751, 760 (D.C. Cir. 2019). The moving party must demonstrate "that no material fact is in dispute and that it is entitled to judgment as a matter of law." *Id.* (quoting *Peters v. Nat'l R.R. Passenger Corp.*, 966 F.2d 1483, 1485 (D.C. Cir. 1992)).

When evaluating a 12(c) motion, courts must "treat the complaint's factual allegations as true . . . and must grant plaintiff the benefit of all inferences that can be derived from the facts alleged." *Am. Inst. of Certified Pub. Accts.*, 199 F. Supp. 3d at 61 (quoting *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000)) (internal quotation marks omitted). The plaintiff need not make "detailed factual allegations" to withstand scrutiny under Rule 12(b)(6)—or, in this case, Rule 12(c). *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). But the "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

III. Analysis

The Government has reanimated one of its six previously rejected arguments. It alleges that "to the extent [the Nation's] claims rest on an asserted common law trust obligation, those claims fail as a matter of law and must be dismissed." Def.'s MTD at 1. "As the Nation correctly observes, the Government's arguments for dismissal 'have been presented and rejected in multiple other trust accounting cases,' including those in this District." *Cherokee Nation*, 2020 WL 224486, at *2 (citation omitted).

A. Legal Framework

"The existence of a general trust relationship between the Government and Indian tribes is long established." *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 892 (D.C. Cir. 2014) (citing *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831)). In light of that relationship, the Government must follow "a humane and self imposed policy" rooted in "moral obligations of the highest responsibility and trust." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011) (quoting *Seminole Nation*, 316 U.S. at 296–97). "But this general trust relationship alone does not afford an Indian tribe with a cause of action against the Government . . . ." *El Paso Nat. Gas Co.*, 750 F.3d at 892. Rather, it is "the applicable statutes and regulations [that] 'establish [the] fiduciary relationship and define the contours of the United States' fiduciary responsibilities.'" *Jicarilla Apache Nation*, 564 U.S. at 177 (quoting *United States v. Mitchell*, 463 U.S. 206, 224 (1983) ("*Mitchell II*")). Thus, when a tribe claims that the Government owes them a specific duty as trustee, that tribe must "identify a specific, applicable, trust-creating" statute, regulation, or treaty "that the Government violated." *United States v. Navajo Nation*, 556 U.S. 287, 302 (2009) ("*Navajo II*").

Unlike cases involving *private* trustees, there is no "pure common-law cause[] of action for breach of trust." *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 32 (D.D.C. 1999) ("*Cobell V*"); *see also El Paso Nat. Gas Co.*, 750 F.3d at 892 ("[A] cause of action will be inferred from a fiduciary relationship only where a plaintiff can identify specific trust duties in a statute, regulation, or treaty."). "Although many of these same [common law] duties may arise . . . as concomitants to the government's statutorily enumerated trust duties, the common-law nature of those actions cannot be considered actionable in [itself]." *Cobell V*, 91 F. Supp. 2d at 32.; *see also Jicarilla Apache Nation*, 564 U.S. at 173–74 ("The Government, of course, is not a private trustee[, and] . . .

[the Government's trust duties] are defined and governed by statutes rather than the common law.") (citing *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) ("*Navajo I*")).

Yet, common law plays a role in determining the *scope* of the Government's statutorily created trust responsibilities. *See Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) ("*Cobell VI*"). "The general 'contours' of the government's obligations may be defined by statute, but the interstices must be filled in through reference to general trust law." *Id.* Thus, merely referring to "common law" to support claims based on a trust relationship will not sink a tribe's claims so long as there is at least one "specific rights-creating or duty-imposing statutory or regulatory prescription[]." *Jicarilla*, 564 U.S. at 174 (quoting *Navajo I*, 537 U.S. at 506); *see also El Paso Nat. Gas Co.*, 750 F.3d at 899 (dismissing claims only when "*none* of the cited sources of law . . . create a conventional fiduciary relationship" between the tribe and the government) (emphasis added).

B. The Nation's Claims

To create and define various trust responsibilities the Government owes them, the Nation cites throughout its Complaint an abundance of statutes, treaties, and regulations, but never references common law. *See generally* Compl. The Government's challenge to Counts I and II relies on the Nation's description of its case in the Meet and Confer Statement, where it stated it was seeking an accounting "under common law, statutes, and the Administrative Procedure Act." *See* Def.'s MTD at 1 (quoting ECF No. 46 (Meet & Confer Statement) at 2). This ignores that this Court previously rejected "the Government's argument that the Nation has failed to 'set forth any specific relevant statutes' for its claims." *Cherokee Nation*, 2020 WL 224486, at *2 (citation

omitted).[1] If this was not enough, the Nation again identified the statutory bases for its claims. *See* Compl., ¶¶ 50–58, 60–66, 68–86.

Facing certain defeat, the Government doubled down on the specter of a hypothetical: "to the extent Plaintiff does seek to base or 'ground' a claim in common law rather than statute, such a claim should be dismissed." ECF No. 63 (Def.'s Reply) at 2.[2] The Court does not "adjudicate hypothetical disputes in which the specifics of [the basis for a motion to dismiss] . . . are a matter of conjecture." *Getty Images News Servs. Corp. v. Dep't of Def.*, 193 F. Supp. 2d 112, 118 (D.D.C. 2002). Courts dismiss concrete claims that are not supported by the law, not inchoate claims "hypothesized" by a defendant. *Northwest Airlines v. FAA*, 795 F.2d 195, 201 (D.C. Cir. 1986). Look no further than the desired remedy to see the absurdity of this request. The Government would have the Court issue an order dismissing the Nation's claim(s) to the extent any such claim is based or grounded in common law rather than statute—all while not knowing if such claim(s) even exist. Such order would be as clear as mud. While the analysis could (and should) stop here, the Court reviews both counts to further demonstrate their grounding in statutory authority.

---

[1] This is true even though "the phrase 'common law' does not appear in [the Government's prior] motion." *See* ECF No. 63 (Def.'s Reply) at 5. What the Government pled is less important than what the Court previously ruled—that the Nation set forth "specific relevant statutes" for its claims. *Cherokee Nation*, 2020 WL 224486, at *2. This answered the underpinning of the instant motion—tracing the source of the Nation's claims.

[2] The Government should have known to walk away from this argument after this Court's prior rejection; but after the Nation explicitly stated that it was not raising claims based on common law, the Government should have followed the sage advice of Kenny Rogers and known to run away. *See In re Lehman Bros. Sec. & ERISA Litig.*, No. 08-cv-5523, 2012 WL 1563879, at *1 (S.D.N.Y. May 3, 2012) ("As Kenny Rogers taught at least one generation with his hit song, *The Gambler*, in both life and in poker[:] 'You got to know when to hold 'em, know when to fold 'em, [k]now when to walk away[,] and know when to run.'").

1. *Count I*

Count I requests "an accounting for all elements of the Trust Funds that are held or have been held by the United States *qua* trustee for the Nation." Compl., ¶ 137. The Nation later summarized this claim stating: "Count I demands, based on common law *and* applicable trust requirements governing the United States' relationship to Indian Tribes, an accounting of all trust resources that the United States has held or currently holds *qua* trustee for the Cherokee Nation." Meet & Confer Statement at 2 (emphasis added).

Count I incorporates 24 treaties and 36 Acts of Congress concerning the Nation's Trust Fund. *See* Compl., ¶¶ 18–47, 49–87, 131. Additionally, Count I gives several examples of federal law—including one Presidential Proclamation and three Acts of Congress—that allegedly impose fiduciary obligations on the Government. *See id.*, ¶¶ 135–36. Specifically, the Nation references Acts that govern the Nation's interests in saline deposits, *see id.* ¶¶ 53, 135 (citing Act of Aug. 7, 1882, 22 Stat. 349), mineral rights, *see id.*, ¶¶ 102 n.4, 136 (citing Act of June 28, 1898, 30 Stat. 495), timber rights, *see id.*, ¶ 136 (citing Act of June 6, 1900, 31 Stat. 66), and various other monetary and property interests, *see id.*, ¶¶ 70, 136 (citing 1906 Act for the Five Tribes, 34 Stat. 137 (Apr. 26, 1906)). The Nation then points to additional "regulations permitting the leasing of land, oil, gas, town lots, and buildings." *Id.*, ¶ 136. The Nation thus alleges that the Government is bound by fiduciary obligations as it "acted as a trustee *pursuant to specific federal statutes* mandating action benefiting the Nation." *Id.* (emphasis added).

Furthermore, the Nation alleges that some of these authorities create an explicit duty to *account* for the Nation's Trust Funds independent of the duties later expounded by the 1994 Act. *See id.*, ¶ 101. For example, the Nation alleges that "[i]n the Treaty of Washington . . . the United States agreed to account for the monies from the New Echota Treaty that the United States

mishandled." *Id.*, ¶ 101(A) (citing 9 Stat. 871 (Aug. 6, 1846)). And "[t]he Act of Aug. 24, 1912 . . . required [the Government] to account for the Nation's money, among other things, and prohibited the expenditure of 'tribal funds' except in certain limited instances." *Id.*, ¶ 101(G) (citing 37 Stat. 518).

At this stage, the Court is not required to determine the *scope* of the trust responsibilities under these statutes. It suffices that the Nation has cited statutes, treaties, and Presidential Proclamations that it credibly alleges create a trust relationship and that impose duties to account on the Government. Having rooted this claim in enacted federal law, "common law 'could play a role'" in later defining the scope of those duties. *Jicarilla Apache Nation*, 564 U.S. at 177 (quoting *Navajo II*, 556 U.S. at 301).

2. *Count II*

Count II seeks an "Accounting as a Federal Trust Responsibility" as required under the 1994 Act—specifically, 25 U.S.C. § 4011 and § 162a. *See* Compl., ¶¶ 140, 144–52. On this Count, the Court, once again, need look no further than this district's precedents. *See Sisseton Wahpeton Oyate of the Lake Traverse Reservation v. Jewell*, 130 F. Supp. 3d 391, 394 (D.D.C. 2015); *Cobell V*, 91 F. Supp. 2d at 27. Like the plaintiffs in *Sisseton* and *Cobell V*, the Nation in Count II is "seek[ing] to enforce [its] statutory right to an accounting as that phrase is meant under the provisions of 25 U.S.C. § 162a(d)(1)–(7) and 25 U.S.C. § 4011." *Sisseton*, 130 F. Supp. 3d at 394 (quoting *Cobell V*, 91 F. Supp. 2d at 27); *see also* Compl., ¶¶ 141, 144 (stating claims under § 4011 and § 162a).

The Government in *Sisseton* and *Cobell* "argue[d] that they owe[d] no common law fiduciary duty to [the tribes], and [the tribes] ha[d] allegedly failed to identify a rights-creating statute or regulation upon which to base their claims." *Sisseton*, 130 F. Supp. 3d at 394 (internal

quotation marks omitted). Here, the Government again argues that "there is no common law of Indian trusts." Def.'s MTD at 4. But the Government does not allege that the Nation failed to identify a rights-creating statute, as it concedes that the Nation relies in part "on statute[s] and treaties." Def.'s MTD at 2. Rather, it argues that "*to the extent* [the Nation's] claims rest on asserted common law trust obligation, those claims fail as a matter of law and must be dismissed." *Id.* at 1. This hypothetical argument is "incorrect because Plaintiffs rely upon the statutory obligations found in 25 U.S.C. §§ 162a(d), 4011." *Sisseton*, 130 F. Supp. 3d at 394. The Nation is "entitled to seek enforcement of [its] statutory rights provided for in the 1994 Act." *Id.* at 395.

IV. Recommendation

For the foregoing reasons, the undersigned recommends that the Court DENY the Government's Motion to Dismiss.

V. Review by the District Court

The parties are hereby advised that, under the provisions of Local Rule 72.3(b) of the United States District Court for the District of Columbia, any party who objects to the Report and Recommendation must file a written objection thereto with the Clerk of this Court within 14 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the report and/or recommendation to which objection is made and the basis for such objections. The parties are further advised that failure to file timely objections to the findings and recommendations set forth in this report may waive their right of appeal from an order of the District Court that adopts such findings and recommendation. *See Thomas v. Arn*, 474 U.S. 140, 144–45 (1985).

2021.01.04
11:27:32 -05'00'

ZIA M. FARUQUI
UNITED STATES MAGISTRATE JUDGE