IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CHEROKEE NATION, *Plaintiff,* v. THE DEPARTMENT OF THE INTERIOR, *et al.*, *Defendants.*	Case No. 1:19-cv-02154-TNM-ZMF

FEDERAL DEFENDANTS' RESPONSE
IN OPPOSITION TO THE NATION'S RULE 56(d) MOTION

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INTRODUCTION

Plaintiff Cherokee Nation's motion for relief under Federal Rule of Civil Procedure 56(d) should be denied. After engaging in more than a year of discovery and receiving tens of thousands of documents in this case, the Nation elected to move for summary judgment on the sufficiency of the Andersen Report. It did so before discovery was closed, just as the second phase of discovery was about to commence. Now, after reviewing Federal Defendants' cross-motion for summary judgment, the Nation claims that it needs more discovery. But Federal Defendants' cross-motion raised threshold defenses of which the Nation has been aware since the very beginning of this case. And the Nation has not identified any fact that is unavailable and essential for its summary judgment opposition, as Rule 56(d) requires.

The Nation's arguments fail for two independent reasons. *First*, the Nation's motion does not comply with Rule 56(d), which requires the Nation to "show[] by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." This requirement is important because Rule 56(d) stands in for a party's obligation to otherwise file declarations or other evidence creating material disputes of fact. Rather than make the necessary Rule 56(d) showing by sworn declaration as required, the Nation sets out its supposed grounds for relief solely in its brief. Its Rule 56(d) motion should be denied on this ground alone.

Second, the Nation has not satisfied the three criteria that the D.C. Circuit requires under Rule 56(d) for any of the categories on which the Nation seeks discovery. The Nation does not identify specific facts that are essential to its opposition. Instead, the Nation identifies topics for which it would like to seek additional discovery. But that is not the relevant inquiry—Rule 56 explicitly allows for summary judgment motions "at any time" in advance of discovery closing. Rule 56(d) is only triggered where a party demonstrates via affidavit that it cannot present facts essential to opposing a summary judgment motion. Here, as explained further below, none of the

Nation's desired discovery is necessary for it to respond to Federal Defendants' cross-motion. Indeed, the Nation has already filed its opposition and disputed the facts on which it seeks more discovery in this motion, illustrating that the Nation does not actually view the supposedly-lacking facts as essential. Further, many of the supposedly-lacking facts have been available to the Nation. For example, our cross-motion is based on historical research from publicly available sources and entails arguments about which the Nation has long been on notice, regarding topics for which the parties have already engaged in targeted discovery. Nothing about the case's discovery procedures has prevented the Nation from developing facts that it may see as key to the case. And, in advance of our cross-motion, we provided the documents we had collected (but not yet produced) from the relevant archival document repositories.

Because it cannot satisfy the requirements of Rule 56(d), the Nation's motion should be denied and the Court should rule on the pending cross-motions for summary judgment.

BACKGROUND

The Nation's motion ignores the substantial discovery that has occurred in this case to date, as well as Federal Defendants' engagement on the Nation's efforts to meet and confer in advance of this motion.

A. Discovery conducted to-date in this case

The Parties have been engaged in discovery in this case since its inception. Even before the case was filed in this District (when the case was still in the Western District of Oklahoma, before the Nation's voluntary dismissal), Federal Defendants produced in March 2019 historical documents collected from the Cherokee Heritage Center.[1] Mar. 4, 2019 Transmittal Letter,

[1] The Nation filed a nearly identical complaint in the Western District of Oklahoma in 2016. Case No. 5:16-cv-1354. In May 2019, that court ordered that the parties "simultaneously brief the issue of whether Defendants' Motion to Dismiss (Dkt. 51) for lack of jurisdiction . . . must be

attached as Exhibit 1. Federal Defendants provided initial disclosures in April 2020, provided written responses to 16 requests for production in June 2020, produced documents concerning prior lawsuits filed by the Nation against the United States from the National Archives in July 2020, and responded to ten interrogatories in August 2020. *See* Joint Status Reports, ECF Nos. 61, 75 n.2; Fed. Defs.' Resps. and Objs. to Pl.'s First Set of Reqs. for Produc. (June 5, 2020).

Federal Defendants also served the administrative record in this case, which contains over 100,000 pages relating to the Andersen Report and underlying Trust Reconciliation Project, in April 2020. Notice of Filing of Index to Certified Admin. R., ECF No. 51. Following denial of Federal Defendants' motion for protective order seeking to limit the case to the administrative record, substantial additional document collection and production began. Since that order, discovery has proceeded in a reasonable and cooperative manner in two phases. Under the Magistrate Judge's order to meet and confer, the Parties proposed a plan for a phase 1 of discovery that would include production of documents relating to land sales during the allotment era and documents relating to the government's appointment of principal chiefs—both of which are topics at issue in briefing on Federal Defendants' cross-motion.[2] Apr. 30, 2021 Joint Status Report at 6-7, ECF No. 75. In their joint status report setting out the phase 1 plan, the Parties identified Court of Claims cases and "past accountings" as additional potential topics of discovery *Id.* at 7-8. As part of phase 1, the Parties (despite pandemic-related closures) sought

converted to a Fed. R. Civ. P. 56 motion for summary judgment." Order, Case No. 5:16-cv-1354, ECF No. 87. The Nation filed a notice of voluntary dismissal without prejudice later that same day. Case No. 5:16-cv-1354, ECF No. 88. Thus, the Nation was aware of the jurisprudential issues presented by its case—and took efforts to avoid having them resolved on summary judgment—even before it filed suit in this Court.

[2] We engaged in this process despite simultaneously filing objections to the District Court concerning the Magistrate Judge's order. *See* April 30, 2021 Joint Status Report at 1-2 n.1, ECF No. 75.

access to the National Archives Headquarters to collect and image additional documents concerning Court of Claims and Indian Claims Commission litigation, along with the "settled account package[s]" produced by the General Accounting Office (now the Government Accountability Office) during the allotment era. Jan. 31, 2022 Joint Status Report, at 2-3, ECF No. 87; Ecker Decl., ¶¶ 2-6, Ex. 39 to Cross-Motion, ECF No. 96-44. Phase 2 began in April 2022. Apr. 11, 2022 Joint Status Report, ECF No. 92. Federal Defendants agreed to "produce all non-privileged documents collected by Federal Defendants' historical contractor" as part of phase 2. *Id.* at 3.

Collectively, beyond the administrative record, Federal Defendants have produced 43,207 documents totaling over 190,000 pages. These productions include every primary source document relied on in Federal Defendants' cross-motion. *See* Kehoe Decl., ¶¶ 7-9, Ex. 75 to Fed. Defs.' Summary J. Reply. But these productions also included Federal Defendants' historian's entire collection of documents. *Id.* [__]. Those collections were aimed at compiling as complete a historical record as possible, without regard to whether the documents might be deemed favorable or unfavorable to the government's position. *Id.* [__]. Federal Defendants' historian collected documents on three historical subjects: (1) the government's historical management of the Nation's natural resources and trust funds; (2) tribal governance, particularly in the period between 1906 and 1971; and (3) previous claims brought in federal courts by the Nation and related groups against the United States. *See* Apr. 11, 2022 Joint Status Report at 3-4; Kehoe Decl., ¶ 5.

B. The Parties' Efforts to Confer and the Nation's 56(d) motion

The Nation first approached Federal Defendants about discovery "in relation to the issues raised in Federal Defendants' summary judgment motion" in June 2022. June 29, 2022 Letter, attached as Exhibit 2. That letter sought seven categories of discovery, but did not specify

whether the Nation sought that discovery under Rule 56(d) or merely as part of the ongoing discovery process in this case. *Id.* Following an initial video conference in mid-July, we requested, consistent with Rule 56(d), that the Nation identify those of Federal Defendants' material undisputed facts to which the Nation believed it could not respond, what essential facts the Nation would need to be able to respond, and the discovery the Nation believed it would need to do so. Email Chain, at 3, attached as Exhibit 3. The Nation responded that it was "still evaluating whether to move for relief under Rule 56(d)" and "the Nation's entitlement to discovery . . . is not limited to whether or not [it] seek[s] relief under Rule 56(d)." *Id.* at 2-3. In that same email, the Nation committed to "respond[ing] to [our] request as part of a conferral process on [its] Rule 56(d) motion." *Id.* at 3.

After a second video conference, we provided our position on the Nation's general request for discovery based on our understanding that, at least at that time, the Nation was not pursuing relief under Rule 56(d). Exh. 9 to Frandina Decl. at 3, ECF No. 98-1. In that letter, we noted our understanding that the Nation would confer further should it decide to move under Rule 56(d) and that, "[w]ithout more information . . . relating to the requirements of Rule 56(d), we are unable to agree that the discovery you request should occur *now* as opposed to at the conclusion of Phase 2" of discovery. *Id.* Given our understanding that the Nation had not yet invoked Rule 56(d), and in light of the ongoing summary judgment briefing and the process through which discovery has occurred to date, we declined to agree to additional discovery before the next joint status report deadline of October 17 (when the parties are to propose next steps). *Id.* at 3-4.

On August 9, three weeks before the Nation's deadline to respond to our cross-motion and reply in support of its motion for partial summary judgment, the Nation sent a letter. Aug. 9,

2022 Letter, attached as Exhibit 4. That letter invoked Rule 56(d), but also stated that the Nation "continue[d] to evaluate moving for relief under Rule 56(d), the discovery dispute resolution process outlined in the Joint States Report, ECF No. 75 at 9, and/or a motion for relief from the current 'discovery by agreement' status quo in this case." *Id.* at 1 n.1. The letter did not state what relief under Rule 56(d)—deferral or denial of the summary judgment motion, more time to take discovery, or "any other appropriate order," Fed. R. Civ. P. 56(d)—the Nation sought. *Id.*

We responded by letter on August 17. Aug. 17 Letter, attached as Exhibit 5. We noted in that letter that, at that time, it was "still unclear to us what relief [the Nation] intend[ed] to seek" because the Nation's letters to date did not say. *Id.* at 2. We informed the Nation that its "August 9 letter does not satisfy [its] duty to confer" under Local Rule 7(m). *Id.* 2-3. To advance discussions, however, we "assume[d] for purposes of [our] response that [the Nation] intend[ed] to seek the standard remedy of deferral under Rule 56(d)." *Id.* Under that assumption, we addressed each of the three essential elements required to show entitlement to relief under Rule 56(d) in the D.C. Circuit with respect to the five categories that the Nation's August 9 letter appeared to press. *Id.* at 3-9.

Perhaps because they illustrate that the Nation did not begin conferring on Rule 56(d) until August 9, the Nation did not attach to its motion its August 9 letter, our August 17 response, or the iterative emails in between. We therefore attach them as exhibits to this response. *See* Email Chain, Ex. 3; *see* Ex. 9 to Frandina Decl., at 2-3 (discussing Nation's deferral of Federal Defendants' request to "specify what facts in [Federal Defendants'] summary judgment motion and supporting materials you are unable to respond to"); Aug. 9, 2022 Letter, Ex. 4; Aug. 17 Letter, Ex. 5. For the Court's convenience, below is a brief summary of the Parties' negotiations concerning each of the three issues the Nation raises in its motion:

Prior testimony. The Nation raised its request for prior testimony in its June 29 letter. We responded that we "[were] not initially opposed to this request," but needed to ensure that confidential information of other tribes' financial accounts, among other confidential material, is protected from disclosure. Ex. 9 Frandina Decl, at 8-9. We thus indicated in July 2022 our openness to exploring production of prior testimony. *Id.* In response, the Nation said only that, in its view, the prior testimony "is necessary to provide the Court with a full factual record" on issues such as the government's trust obligations, applicability of the Indian Claims Commission Act, and the 1924 Acts related to the Five Civilized Tribes. Aug. 9 Letter at 4. The Nation did not respond to our offer to work cooperatively to address confidentiality issues surrounding prior testimony.

We reiterated our offer in our August 17 letter: "As we have previously stated, we are not opposed to coming up with a workable method of sharing prior deposition or trial testimony on relevant subjects despite the confidentiality issues we have identified" but that, because of confidentiality orders in prior cases, "we cannot just turn over all prior testimony in a blanket fashion." Aug. 17 Letter at 6. In that letter, we also, "[a]s a show of good faith, . . . identified the United States' litigation with the Chickasaw and Choctaw Nations . . . as a potential source of deposition transcripts" and informed the Nation that if it "wish[ed] to see testimony not available publicly, we need to confer further to protect confidential information." Aug. 17 Letter at 6 n.6. The Nation did not respond. Notably, the Nation did not identify Mr. Swimmer as an allegedly key potential source of prior testimony, as it now appears to argue. *See* Aug. 9 Letter; Pl.'s Mot. 6-8.

Repudiation. The Nation raised the issue of repudiation in its June 29 and August 9 letters. *See* June 29 Letter; Aug. 9 Letter. As it does here, the Nation pointed to our response to

Interrogatory No. 5, which asked whether "Federal Defendants contend [they] have repudiated any trusteeship owed to the Cherokee Nation," citing Federal Defendants' motion to dismiss. Fed. Defs.' Resp. to Pl.'s Interrog. No. 5, Ex. 7 to Frandina Decl., ECF No. 98-1. The Nation asserts that, by analyzing repudiation at summary judgment, Federal Defendants "changed position on this issue." *Id.*; Aug. 9 Letter at 4. Even though the Nation was aware of the potential relevance of the doctrine of repudiation—which the Nation itself invoked at the 12(b) stage in response to Federal Defendants' statute of limitations argument—the Nation asserted that it "has been prevented from conducting discovery on the topic because the Federal Defendants did not raise repudiation until their summary judgment submission." Aug. 9 Letter at 4. In response, we explained that there was nothing improper about our assertion of repudiation at the summary judgment stage. Ex. 9 to Frandina Decl., at 7. And, although we contended that we satisfied any duty to supplement by providing notice of our position on repudiation in writing in our summary judgment brief, we nevertheless offered to supplement our interrogatory response. *Id.* at 8. The Nation did not respond to our offer. *See* Aug. 9 Letter at 4; Aug. 17 Letter at 5.[3]

Prior accountings. The Nation presented this category as two separate categories in our discussions: (1) the Slade-Bender Report; and (2) the 1924 Act and related lawsuits. June 29 Letter at 1-2. The Nation took the position that both prior accountings—of which the Nation was indisputably already aware—should have been disclosed in response to Interrogatory Nos. 1 and 2. *Id.* Interrogatory No. 1 asked "what you contend is required to be included in an 'accountings provided to Plaintiff required by law,'" quoting Federal Defendants' certification of their administrative record. Ex. 7 to Frandina Decl., ECF No. 98-1. Interrogatory No. 2 asked that

[3] As we explained in our July 28 Letter, the Nation misconstrues our argument on repudiation. "The facts we raised in [the repudiation] context . . . were the same facts we raised in the context of our broader statute of limitations arguments." July 28 Letter at 7.

Federal Defendants identify what accountings were referenced in the administrative record certification. *Id.* Federal Defendants answered that their administrative record certification referred only to the Andersen Report and the underlying Trust Reconciliation Project ("TRP"). *Id.* The Nation also took the position that discovery was needed to "establish the scope of" the Slade-Bender Accounting and the 1924 Act-related accounting efforts. Aug. 9 Letter, at 3-4. We responded that we did not see a bona fide dispute as to the scope of these accountings since both parties were in possession of the accountings themselves as well as available underlying documents. Aug. 17 Letter at 4-5.

The Nation never responded to our August 17 letter or our request that it confer further pursuant to Local Rule 7(m).[4] Instead, the Nation filed its motion for relief under Rule 56(d) concurrently with its opposition to our cross-motion for summary judgment, and represented it had conferred with Federal Defendants who had informed the Nation that they opposed the motion. Pl.'s Mot. 5. That motion asks "that the Court grant this Motion and deny the United States' Cross Motion [for Summary Judgment], or in the alternative delay ruling on the Cross Motion until the Cherokee Nation has had time to conduct discovery." *Id.* at 13.

LEGAL STANDARD

Federal Rule of Civil Procedure 56(d) provides:

> WHEN FACTS ARE UNAVAILABLE TO THE NONMOVANT. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) defer considering the motion or deny it;
>
> (2) allow time to obtain affidavits or declarations or to take discovery; or

[4] This "abrupt and premature end to the discussion" raises questions about the Nation's compliance with Rule 7(m). *Eng. v. Washington Metro. Area Transit Auth.*, 293 F. Supp. 3d 13, 16-17 (D.D.C. 2017).

(3) issue any other appropriate order.

The D.C. Circuit requires a party seeking relief under Rule 56(d) to "(1) outline the particular facts the party defending against summary judgment intends to discover and describe why those facts are necessary to the litigation; (2) explain why the party could not produce those facts in opposition to the pending summary-judgment motion; and (3) show that the information is in fact discoverable." *Jeffries v. Barr*, 965 F.3d 843, 855 (D.C. Cir. 2020) (quoting *Convertino v. U.S. Dep't of Justice*, 684 F.3d 93, 99-100 (D.C. Cir. 2012) (quotation marks and alterations omitted). These elements are referred to as the *Convertino* criteria.

The first element requires a showing of "what facts [plaintiff] intend[s] to discover that would create a triable issue." *Byrd v. U.S. E.P.A.*, 174 F.3d 239, 248 n.8 (D.C. Cir. 1999). The second requires the summary judgment non-movant to demonstrate not only why they were unable to produce the information—for example, because it is in the exclusive control of the opposing party—but also requires a showing of diligence in seeking the proposed discovery. *Berkeley v. Home Ins. Co.*, 68 F.3d 1409, 1414 (D.C. Cir. 1995); *Convertino*, 684 F.3d at 100 (citing *Berkeley* for second requirement). The third element requires more than discoverability in the sense of relevant, non-privileged materials. It requires a showing that "the discovery sought will produce the evidence required." *Messina v. Krakower*, 439 F.3d 755, 762 (D.C. Cir. 2006); s*ee also Convertino*, 684 F.3d at 100 (citing *Messina* as the source of the D.C. Circuit's discoverability requirement). The D.C. Circuit has held that there is no basis for a "thumb on the scale in favor of [the party opposing summary judgment]," but instead, courts must apply all three requirements in every case. *U.S. ex rel. Folliard v. Gov't Acquisitions, Inc.*, 764 F.3d 19, 26–27 (D.C. Cir. 2014).

Each of these elements must be supported by sworn statements in an affidavit or declaration rather than by unsworn argument. *Estate of Parsons v. Palestinian Auth.*, 715 F.

Supp. 2d 27, 35 (D.D.C. 2010), *aff'd*, 651 F.3d 118 (D.C. Cir. 2011); Fed. R. Civ. P. 56(d). "The affidavit cannot be a generalized, speculative request to conduct discovery but must demonstrate that further specified discovery will defeat a summary judgment motion." *Parsons*, 715 F. Supp. 2d at 35 (quotation and citation omitted).

ARGUMENT

I. The Nation does not provide a declaration that satisfies Rule 56(d).

The Nation's motion is easily denied because the Nation has not complied with Rule 56(d). The Rule requires that a "nonmovant show[] by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition" to summary judgment. Fed. R. Civ. P. 56(d). "The affidavit or declaration itself must 'identify . . . the specific facts that further discovery would reveal, and explain why those facts would preclude summary judgment.'" *Harrison v. Office of the Architect of the Capitol*, 281 F.R.D. 49, 52 (D.D.C. 2012) (quoting *Tatum v. City & Cty. of S.F.*, 441 F.3d 1090, 1100 (9th Cir. 2006)). Courts in this district routinely deny Rule 56(d) motions, like the Nation's, that fail to include a declaration that meets these requirements. *See, e.g.*, *Harrison*, 281 F.R.D. at 52 (noting Rule 56(d) motion "fails on . . . separate, independent basis" of submitting a declaration that "merely faults the [federal defendant] for failing to provide [plaintiff] with updates" but "does not identify the specific facts that further discovery would reveal or explain why those facts would preclude summary judgment"); *Hicks v. Gotbaum*, 828 F.Supp.2d 152, 159 (D.D.C. 2011) (denying further discovery when party opposing summary judgment did not file an affidavit or declaration); *see also Messina*, 439 F.3d at 762 (affirming denial of Rule 56(d) motion where "the affidavit presented no reason to believe" that the fact the non-movant hoped to demonstrate actually existed).

The Nation's brief acknowledges Rule 56(d)'s affidavit requirement. Pl's Mot. 5 ("A Rule 56(d) motion must be supported by a declaration addressing what are known as the *Convertino* criteria."). But the Nation did not submit such a declaration here. The Nation submits the declaration of its counsel, Michael Frandina, but that declaration largely introduces documents. ECF No. 98-1 ¶¶ 2-9. Beyond that, the declaration states that Federal Defendants' cross-motion "relies on 74 exhibits that were not in the administrative record" and that Mr. Frandina performed searches for the 1924 Act and the Slade-Bender Accounting in the administrative record. *Id.* ¶¶ 10-12. But it does not even attempt to provide information about the "specific facts that further discovery would reveal" or "why those facts would preclude summary judgment." *Harrison*, 281 F.R.D. at 52. The Nation's 56(d) motion should be denied on this basis alone.

II. The Nation has not shown it meets any of the essential elements for relief under Rule 56(d).

Even assuming the Nation had submitted an explanatory declaration under Rule 56(d), the three requests for additional discovery the Nation presents also fail on their own terms. Each one fails to identify facts—as opposed to generalized issues or, in some cases, means of discovery—that the Nation would intend to use in an attempt to create an issue of fact. That does not satisfy Rule 56(d), which instead requires that the summary judgment non-movant "outline the particular facts [it] intends to discover and describe why those facts are necessary to the litigation." *Convertino*, 684 F.3d at 99. This element requires that the Nation "show what facts [it] intend[s] to discover that would create a triable issue." *Byrd*, 174 F.3d at 248 n.8. The Nation's attempted (unsworn) showing falls far short.

Likewise, the Nation fails in its attempted showing on the remaining two requirements of Rule 56(d). The Nation falls back on the Court-directed "discovery by agreement" process as a

reason to defer ruling on the summary judgment cross-motion. But the Nation was free under that procedure to prioritize the discovery issues it deemed most important, and the Nation has not established that it diligently sought discovery on the three issues it highlights in its motion, much less that Federal Defendants refused to provide it. And nothing in the discovery by agreement procedure would have prevented the Nation from seeking relief from the Court if it had desired discovery that Federal Defendants had refused. Nor did the discovery by agreement procedure prevent the Nation from conducting research in public sources that were equally available to both Parties. The Nation's failure to diligently pursue discovery or to conduct its own research—rather than relying on Federal Defendants' contracted research historian—is dispositive on this point.

Finally, the Nation asserts—often in only one sentence—that the information it requests is "discoverable." *See* Pl.'s Mot. 8, 10, 13. But the third *Convertino* criteria requires far more. The Nation must show that "the discovery sought will produce the evidence required." *Messina*, 439 F.3d at 762; s*ee also Convertino*, 684 F.3d at 100 (citing *Messina* as the source of the D.C. Circuit's discoverability requirement). The Nation has not done so, and thus fails on this front as well.

Each of the Nation's three requests for discovery is taken in turn below.

A. The Nation's assertion that it needs prior testimony does not satisfy any Rule 56(d) element.

The Nation states in its brief (but not in its declaration) that it "has requested, but the United States has not agreed to produce, prior testimony by the United States on issues raised in the United States' Cross Motion." Pl.'s Mot. 6. This blanket statement is incorrect, and in any event does not justify relief under Rule 56(d).

For the first Rule 56(d) requirement ("outline the particular facts the party defending against summary judgment intends to discover and describe why those facts are necessary to the litigation," *Jeffries*, 965 F.3d at 855), the Nation argues that "the facts that the Cherokee Nation needs is to determine prior binding testimony that the United States has made regarding the Trust Reconciliation Project and the Arthur Andersen Report." Pl.'s Mot. 7. But Rule 56(d) requires the Nation to identify specific facts, not broad categories of potential discovery. A desire to explore prior testimony is not itself a fact, much less one "that would create a triable issue." *Byrd*, 174 F.3d at 248 n.8.[5]

Although the Nation is vague about what specific facts it hopes to find by reviewing prior testimony, it speculates—but notably does not declare under oath, as 56(d) requires—that it believes it "likely that additional testimony exists that contains admissions that the Arthur Andersen Report was not an accounting and did not satisfy the United States' trust obligations." Pl.'s Mot. 7-8. If the Nation truly believes that there are essential (yet undiscovered) facts necessary to address the question of the Andersen Report's legal adequacy, then it is unclear why the Nation elected to now move for partial summary judgment regarding the legal adequacy of the Andersen Report. The Nation's own rationale defeats its request. If, as the Nation's summary judgment motion surmises, there are no undisputed facts regarding the adequacy of the Andersen Report, then there likewise would not be any essential (but lacking) facts necessary to respond to

[5] Although the Court's analysis should be limited to the arguments the Nation raises in its briefing, the Nation's letters also fail to outline facts it intends to discover. The letters state only that "prior binding testimony is necessary to provide the Court with a full factual record on" the government's trust obligations, applicability of the ICCA, "and the 1924 acts related to the Five Civilized Tribes." Aug. 9 Letter. That statement does not explain what facts the Nation anticipates discovering, nor explain why prior testimony—as opposed to statutes—would serve as a basis for establishing the United States' trust obligations. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011) ("The government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute.").

Federal Defendants' argument that the Andersen Report did reasonably implement the governing duty.

Further, the Nation's characterization of "the United States' litigation position" as "so different from the factual record that has been identified by the Nation so far" is both factually incorrect and irrelevant to the Nation's request for Rule 56(d) relief. *Id*. The Nation appears to rely on a 2007 declaration from Ross Swimmer for its proposition. But, as we explain in our summary judgment reply, there is nothing inconsistent about the ongoing programmatic work relating to other tribes' accounts that Mr. Swimmer discusses in his 2007 declaration, and Interior's position that the Andersen Report satisfied the 1994 Act. Fed. Defs.' Reply in Support of Cross-Mot. for Sum. J. at II.A-B. Without more, the Nation's claim is "only a conclusory assertion without supporting facts to justify the proposition that the discovery sought will produce the evidence required." *Convertino*, 684 F.3d at 100.

The Nation's other unsworn assertions on the first *Convertino* element are similarly insufficient. The Nation says that "[t]he prior testimony could help resolve issues in this case that overlap with the numerous other tribal trust cases." Pl.'s Mot. 8. But helpfulness is not the standard, let alone helpfulness sorting out factual issues in other cases. Rather, the Nation must show—not just allege or assert without factual support—that it is likely to uncover facts that will allow it to raise a triable issue of fact that it is otherwise unable to dispute. *See Messina*, 439 F.3d at 762-63) (affirming denial of Rule 56(d) relief where non-movant sought to "ascertain the scope and extent of the dissemination of . . . defamatory materials," but "presented no reason to believe [the materials were] disseminated"). Next, the Nation argues that prior testimony "could also result in the United States being judicially estopped from taking inconsistent positions, as it is attempting to do with the . . . Andersen Report now." Pl.'s Mot. 8. As already discussed, our

position is not inconsistent. In any event, the Nation's newfound interest in developing a judicial estoppel defense is unconnected from any *facts* the Nation needs. A potentially available legal argument is not a fact. And the Nation's suggestion that a deposition can judicially estop the United States is meritless. Judicial estoppel cannot apply absent judicial adoption of an inconsistent argument; the doctrine is not implicated by potentially inconsistent testimony. *See Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 798 (D.C. Cir. 2010).

For the second *Convertino* criteria ("explain why the party could not produce those facts in opposition to the pending summary-judgment motion," *Jeffries*, 965 F.3d at 855), the Nation asserts that "its discovery efforts have been stymied by the United States, which would not agree to produce such records as part of the agreed discovery exchanged in this case to date." Pl.'s Mot. 8. That is inaccurate. The United States did not refuse to provide prior testimony. As already discussed, we offered on several occasions to discuss an orderly process of identifying and producing prior testimony. *See* Ex. 9 to Frandina Letter; Aug. 17 Letter at 6. The issue was simply that, as detailed above, the Nation did not explain in the meet and confer process (nor in its present motion) why it needs these facts to respond to Federal Defendant's cross-motion. That Mr. Swimmer has offered a declaration in this case in support of the Nation's summary judgment response, Pl.'s Summ. J. Opp'n 5-6, ECF No. 99, only disproves the Nation's point and the entire premise of the Nation's motion. The Nation has apparently all along had access to a witness to attempt to dispute the facts that the Nation sees (incorrectly) as essential to portions of Federal Defendants' summary judgment motion. Rule 56(d) only "protects a party opposing a summary judgment motion who . . . cannot by affidavit—or presumably by any other means authorized under Rule 56(c)—present facts essential to justify the adverse party's opposition." Wright & Miller, 10B Fed. Prac. & Proc. Civ. § 2740 (4th ed.).

For the third *Convertino* criteria (requiring a showing "that the information is in fact discoverable," *Jeffries*, 965 F.3d at 855), the Nation asserts that this prior testimony is "discoverable from the United States" because it has "possession, custody, or control." Pl.'s Mot. 8. Discoverability in the sense of relevant, non-privileged information, is not the standard. Rather, Rule 56(d)'s third element requires a showing that "the discovery sought will produce the evidence required." *Messina*, 439 F.3d at 762; s*ee also Convertino*, 684 F.3d at 100 (citing *Messina* as the source of the D.C. Circuit's discoverability requirement). This showing requires more than "a 'conclusory assertion without any supporting facts.'" *Messina*, 439 F.3d at 762. But that is all the Nation has provided.

B. The Nation has not shown any of the three *Convertino* criteria with respect to the issue of repudiation.

Federal Defendants' summary judgment argument on repudiation is unremarkable. Federal Defendants' point is that, in providing the Andersen Report under the 1994 Act, Interior "repudiated"—case law's term, not ours—any supposed duty to conduct the additional time- and cost-unlimited accounting the Nation now seeks. *See* Fed. Defs.' Opening Br. 53-54. With respect to this issue, the Nation does not even argue that it "cannot present facts essential to justify its opposition" as Rule 56(d) requires. Instead, the Nation says that it "may need to discover" facts about repudiation, depending on how the Court rules on summary judgment. Pl.'s Mot. 9-10. Specifically, the Nation says it would need discovery "to the extent the Court determines that there is a genuine dispute of the material facts concerning repudiation." *Id.* at 10. But in that circumstance, there would be no need for the Nation to seek relief under 56(d) for its summary judgment opposition, because the Court would have already found a factual dispute based on the existing summary judgment record. As explained in our summary judgment briefing, there are no material disputed facts at issue. But, should the Court disagree, then Rule

56(d) would be irrelevant, and nothing would prevent either party from seeking additional discovery on repudiation subject to whatever scheduling and discovery orders are put in place.

In addition, the Nation has not identified facts it needs to discover regarding repudiation that are necessary to the litigation, and thus has not met its burden to establish the first *Convertino* criteria. *Convertino*, 684 F.3d at 99-100. The Nation contends that it needs discovery on "when the United States knew that it had repudiat[ed] the trust." Pl.'s Mot. 9. That assertion misconstrues the doctrine of repudiation.[6] A trustee may repudiate a trust responsibility in one of two ways: either "by express words or by taking actions inconsistent with his responsibilities as trustee." *Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004). And a beneficiary's claim accrues "as soon as he learns that the trustee has failed to fulfill his responsibilities." *Id.*

Here, Federal Defendants' cross-motion argued that the Nation's challenge to the adequacy of the Andersen Report had accrued (and is time-barred) because Federal Defendants made statements and took actions inconsistent with any intent to provide anything further under Section 4044 of the 1994 Act. FD Opp. Br. 51, ECF No. 96-1. The United States need not establish that it expressly used the word "repudiation" to describe its actions to the Nation. *Shoshone*, 364 F.3d at 1348. And it is not necessary to the Court's statute of limitations analysis to determine whether Federal Defendants "knew" that those actions could be considered "repudiation" under the case law's use of that term. Federal Defendants either took the inconsistent action (or inaction) or they did not. Instead, the relevant knowledge inquiry for statute of limitations purposes is when the *Nation* became aware (or should have been aware) of

[6] As we explain in our concurrently filed summary judgment reply, repudiation means nothing more than claim accrual in cases like this, and it is not relevant whether the word "repudiation" was ever used. *See* Fed. Defs.' Reply at II.B.

the words or actions. *Id*. That occurred two decades ago when the Andersen Report was provided, and that is why 54 tribal nations sued before the expiration of the limitations period. *See* Swimmer Decl., ¶ 9, Ex. 3 to Frandina Decl.; Mem. In Supp. of Mot. for Remand, at 11-12, Ex. 4 to Frandina Decl. (noting limitations period extension to 2006).

The Nation also fails to meet the second *Convertino* criteria because all of the facts on which Federal Defendants rely to establish repudiation have been known to the Nation from the beginning of this case when we raised the limitations issue. Fed. Defs.' Mot. to Dismiss 21-24, ECF No. 34-1. Those facts are simple and undisputed. The Nation received the Andersen Report in 1996. Pl.'s SUF ## 91-92, ECF No. 88-2; Fed. Defs.' Resp., ECF No. 96-3. In its transmittal to Congress, Interior explicitly referenced Section 4044 of the 1994 Act. Pl.'s SUF Resp. #108, ECF No. 99-1 (admitting same). Congress extended the date the Andersen Report was "deemed received" to December 31, 2000, to allow tribes additional time to file suit. Settlement of Tribal Claims—Amendment, Pub. L. No. 109-158, 119 Stat. 2954 (2005). The Nation did not sue within six years of that date. Compl., ECF No. 1.

The Nation's reliance on the "discovery by agreement procedure" does not explain why the Nation has been unable to produce the facts it supposedly needs to oppose this (undisputed) set of actions that put the Nation on notice of its claim challenging the Andersen Report two decades ago. That is particularly true given that the statute of limitations inquiry focuses on what *the Nation* knew or should have known. The Nation plainly was aware of the potential relevance of repudiation to this case. Indeed, it was the Nation that cabined the statute of limitations issue as one of "repudiation" by raising it at the motion to dismiss stage, and the Court explicitly reserved it at that time. Mem. Opin. And Order, 2020 WL 224486, at *3, ECF No. 42. And the Nation must have believed the doctrine might be relevant, because it served an interrogatory on

the topic. Nothing in Federal Defendants' interrogatory response prevented the Nation from seeking further discovery on a topic it knew was at issue, particularly if it believed, as it now asserts, that the response we served over two years ago was insufficient. After all, the remedy for an allegedly insufficient discovery response is to confer on the deficiency and, if unsuccessful, to file a motion to compel. *See* 8B Fed. Prac. & Proc. Civ. § 2285 (3d ed.) (discussing requirements to confer "in an effort to obtain the desired material without court action" and the requirements for a motion to compel). The Nation never did any of that, instead only challenging our ability to discuss the repudiation issue based on a two-year old interrogatory response. The Nation has not carried its burden to establish the second *Convertino* criteria. *Jeffries*, 965 F.3d at 855.

For similar reasons, the Nation has not met its burden to establish *Convertino*'s third requirement, that further discovery "will produce the evidence [the Nation believes is] required." *Messina*, 439 F.3d at 762. For purposes of Rule 56(d), the standard is not whether the Nation can conceive of discovery requests that might otherwise meet the standards of potential relevance under Rule 26, but whether the Nation's desired discovery will produce evidence necessary to its summary judgment opposition. *Id.* The Nation's argument under this element is all of one sentence: "the information requested is discoverable, and only from the United States, since only the United States knows when it repudiated the trust." Pl.'s Mot. 10. The idea that "only the United States knows when it repudiated" is simply not correct. *Id.* There is no dispute about the facts that we contend trigger the statute of limitations (*see* Pl.'s SUF Resp. #108), only a legal dispute about whether those actions were enough, as a matter of law, to constitute "repudiation," as some courts have used that term. Discovery about whether Interior officials thought what they were doing nearly thirty years ago constituted "repudiation" as a matter of law is simply not material; thus, the Nation cannot show that the discovery it requests will lead to anything of

substance for summary judgment. *See Little v. Comercial. Audio Assocs., Inc.*, 81 F. Supp. 3d 58, 64 (D.D.C. 2015) (denying Rule 56(d) motion where plaintiffs' "affidavit does not offer any facts to support the proposition that discovery will actually produce evidence manifesting fraudulent concealment").

The Court should thus deny relief under Rule 56(d) on the strictly legal question of repudiation.

C. The Nation has not established that it needs additional discovery to oppose our summary judgment arguments concerning pre-1946 accounting work.

Finally, the Nation argues that it needs more discovery on the Slade-Bender Accounting and the accounting work undertaken in connection with the 1924 Act and the Nation's related accounting and mismanagement litigation. Pl.'s Mot. 10-13. The Nation contends—but again, does not declare under oath, as required—that it needs more information about "the scope of the alleged prior accountings, including the scope of authority of any agents allegedly acting on behalf of the Cherokee Nation." Pl.'s Mot. 11-12. It is unclear how such facts "would create a triable issue" relevant to the subject of the summary judgment briefing. *Byrd*, 174 F.3d at 248 n.8. With respect to the Slade-Bender, the Nation does not dispute that its National Council "passed an act to 'accept' the Slade & Bender Report." Pl.'s SUF Resp. #9. And, in an objection to a statement of undisputed fact concerning the Slade-Bender Accounting, the Nation says that it "does not seek a restatement of the transactions covered by the Slade & Bender Report." Pl.'s SUF Resp. #2. If the Nation is not bringing a claim under the 1893 Act—the Act under which the Slade-Bender Accounting was developed—nor disputing that the Nation accepted its results, then the contents of the Slade and Bender accounting do not present an issue at all, let alone a triable one. Even if this were a live issue, both parties have the Slade-Bender Accounting itself, so there can be no question as to its scope; indeed, the Nation has not even attempted to

articulate an issue or concern with the accounting's scope. This forecloses the Nation's Rule 56(d) motion on this topic. *See U.S. ex rel. Folliard v. Gov't Acquisitions, Inc.*, 880 F. Supp. 2d 36, 46 (D.D.C. 2012), *aff'd* 764 F.3d 19, (Rule 56(d) not met where plaintiff sought discovery about publicly available statutes and a contract that had been provided in discovery). The Nation has outlined no particular facts that it intends to discover with respect to the Slade-Bender Accounting or "describe[d] why those facts are necessary to the litigation," as required. *Convertino*, 684 F.3d at 99.

The Nation's attempt to satisfy *Convertino*'s first element with respect to the 1924 Act is even more attenuated because that Act required something different: That the United States open its books to the Nation in anticipation of litigation. Fed. Defs.' Opening Br., ECF No. 96-1, at 36-46. For purposes of summary judgment, the significance of the accounting and related litigation under the 1924 Act is: (i) to show that the Nation does in fact know what happened to its accounts during that time period (notwithstanding its claim to the contrary its opening brief); and (ii) to establish that the Nation is precluded from relitigating accounting claims that it has—or could have—previously resolved. The Nation does not suggest, much less establish, that any additional facts are necessary for these determinations.

The Nation also argues that it needs facts about the "scope of agency" of the Nation's representatives that participated in these accounting efforts and follow-on litigation.[7] Pl.'s Mot. 12. But the Nation does not say what facts it hopes to discover, just that it would like to explore the issue. That is insufficient under Rule 56(d). *Messina*, 439 F.3d at 762–63. Nor could any such discovery lead to a dispute of *material* fact, since there is not so much as an allegation that

[7] The Nation did not raise its "scope of agency" point with us prior to filing its brief, and has thus failed to confer on this issue in particular.

the selection of its attorneys failed to comply with the statutory scheme that Congress established in the 1924 Act. *See* Fed. Defs.' Reply at III.C. That is the dispositive legal question, because "Congress has plenary authority to legislate for Indian tribes in all matters, including their form of government." *United States v. Wheeler*, 435 U.S. 313, 319 (1978); *cf. Jicarilla*, 564 U.S. at 175 (citing *Wheeler*).

In this way, the Nation's request is similar to one the D.C. Circuit has rejected. In *Messina v. Krakower*, the D.C. Circuit affirmed the district court's denial of relief under Rule 56(d) (then Rule 56(f)) in a defamation case. 439 F.3d at 763. The summary judgment non-movant there averred in an affidavit that it needed depositions "to ascertain the scope and extent of the dissemination of the defamatory materials." *Id.* at 762. The problem, however, was that "the affidavit presented no reason to believe that the [allegedly defamatory] letter was disseminated" beyond one additional individual. *Id.* In essence, then, the affiant had provided insufficient evidence to demonstrate that "that discovery would have produced the evidence she anticipated." *Id.* at 763 n.6. The Nation's request that this Court allow it discovery to explore the scope of these accountings and the scope of its own agency is similarly unsupported; there is no evidence beyond the Nation's conclusory and unsworn assertions that it may produce the evidence the Nation seeks.

The Nation's remaining arguments can be taken together with respect to both the Slade-Bender Accounting and the 1924 Act accountings. The Nation points only to the "discovery by agreement procedure" as the reason it supposedly has not developed additional facts concerning these accountings. Pl.'s Mot. 12-13. But the second *Convertino* criteria requires a showing that the Nation "could not produce . . . facts in opposition to the pending summary-judgment motion." *Jeffries*, 965 F.3d at 855. All the materials we produced to the Nation and included in

the summary judgment record come from publicly-available sources: Hein Online, Cherokee National Papers located at the Oklahoma Historical Society, the National Archives, and other online databases. *See* Kehoe Decl., ¶¶ 7-9, Ex. 75 to Fed. Defs.' Summary J. Reply; Aug. 17 Letter at 7. And we identified "earlier accountings" as early as April 2021. Apr. 30, 2021 Joint Status Report at 7-8. The Nation has always been free to conduct its own research in these sources and we even offered to discuss reasonable extension requests if the Nation wanted more time to review documents or conduct its own research. Aug. 17 Letter at 3. Instead, the Nation has chosen to rely on our research, and the Nation has made only conclusory assertions that Federal Defendants' historian's collection was incomplete. *See* Pl.'s Mot. 12-13; *but see* Kehoe Decl. ¶ 6 (testifying that "[m]y team and I sought to collect as complete a historical record as possible, without regard as to whether documents might be perceived as favorable or unfavorable to the position of the United States in this case"). Though National Archives locations were closed for some time during the pandemic, they have been reopened (by appointment) since March of this year. Kehoe Decl. ¶ 11. The second *Convertino* criteria is not met where a party "had an opportunity to request additional discovery . . . but failed to do so." *Davis v. Yellen*, No. 08-CV-447 (KBJ), 2021 WL 2566763, at *3 n.6 (D.D.C. June 22, 2021); *see also Berkeley*, 68 F.3d at 1414.

On the third *Convertino* criteria, the Nation says that "the information requested is discoverable from the United States because it is the party that owes the Nation an accounting, would be in possession, custody, or control of such records, and has knowledge about what accounting(s) have allegedly been provided, if any." Pl.'s Mot. 13. These three conclusory justifications each fail to demonstrate that "the discovery sought will produce the evidence required." *Messina*, 439 F.3d at 762. They all go to discoverability, not the heightened showing

required under Rule 56(d). Indeed, the public sources that Federal Defendants' historian has searched are decidedly *not* in Federal Defendants' possession, custody, or control. In the FOIA context, where "possession or control is a prerequisite," the D.C. Circuit has concluded that records transferred to the National Archives need not be disclosed. *DiBacco v. U.S. Army*, 795 F.3d 178, 192 (D.C. Cir. 2015); *see also Chambers v. U.S. Dep't of Interior*, 568 F.3d 998, 1004 (D.C. Cir. 2009) (compiling cases).[8]

In sum, the Nation has not shown any of the *Convertino* criteria with respect to earlier accountings.

III. If the Court grants the Nation relief under Rule 56(d), it should defer ruling on both parties' summary judgment motions.

The Nation has not shown that it lacks access to evidence that would allow it to respond to any of Federal Defendants' material and undisputed facts, and the Nation has not met any of the other criteria required by Rule 56(d) or *Convertino*. *See supra* I-II. But, if the Court grants the Nation relief under Rule 56(d), it should defer ruling on both of the pending summary judgment motions until any targeted discovery aimed at a particular fact has occurred. The Court should not, as the Nation appears to suggest, rule on the Nation's motion while simultaneously deferring Federal Defendants' cross-motion. *See* Pl.'s Mot. 13. That request invites a disorderly process whereby the Court may reach the merits of the Andersen Report without ever ruling on Federal Defendants' asserted defenses, including limitations and res judicata. As a matter of logic and judicial resources, it would make little sense to proceed with the Nation's motion and not Federal Defendants' motion, since Federal Defendants' success on these threshold issues

[8] The Nation asserts the same alleged discovery violations that it says in its summary judgment opposition brief preclude our arguments on repudiation and prior accountings. *See* Pl.'s Mot. 21, 24. As explained in our summary judgment reply, the Nation's contentions are meritless. Fed. Defs.' Reply Section IV.

would obviate the need to reach the merits at all. And federal courts "do not approve in general the piecemeal consideration of successive motions for summary judgment." *Allstate Fin. Corp. v. Zimmerman*, 296 F.2d 797, 799 (5th Cir. 1961). That is especially so where, as here, it would be "more economical to address the remaining issues in this litigation all at once." *Siemens Westinghouse Power Corp. v. Dick Corp.*, 219 F.R.D. 552, 554 (S.D.N.Y. 2004) (citing *Allstate* favorably in declining to review successive summary judgment motion).[9]

CONCLUSION

The Nation's Rule 56(d) motion should be denied because the Nation has failed to identify any fact that is both unavailable and necessary to justify its summary judgment opposition. The Nation's motion does not comply with the federal rule. As to the merits of the motion, the Nation has not met the *Convertino* criteria with respect to any of the three categories on which it seeks additional discovery. The Nation's motion should be denied in its entirety and the Court should proceed to ruling on the cross-motions for summary judgment.

[9] The Nation appears to imply that we should not have cross-moved on the entire case in response to its motion for partial summary judgment, but we could not risk the possibility that our defense might be deemed waived as a result. *See United Mine Workers of Am. 1974 Pension v. Pittston Co.*, 984 F.2d 469, 478 (D.C. Cir. 1993).

Respectfully submitted,

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