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**

REPLY IN SUPPORT OF CHEROKEE NATION'S RULE 56(d) MOTION

I. Introduction

The Cherokee Nation's Rule 56(d) Motion [ECF No. 98] establishes that the Nation is entitled to relief under Rule 56(d), including showing the three *Convertino* criteria for each of the discovery issues raised in the Motion. The United States' arguments in its Response in Opposition [ECF No. 104] do not show otherwise. Accordingly, the Court should grant the Motion, and either deny the United States' Cross-Motion [ECF No. 97], or delay ruling on it until the Nation has had time to conduct the pertinent discovery.

Moreover, the Court should not accept the United States' invitation to delay ruling on the Nation's Motion for Partial Summary Judgment [ECF No. 88], which raises the discrete issue of whether the Arthur Andersen Report constitutes the accounting required by law that the Nation seeks. *See* ECF No. 104 at 29-30. None of the discovery issues raised in the Nation's Motion implicate that issue, and the United States has not identified any discovery that is needed before that issue can be resolved. Indeed, for most of this litigation, the United States repeatedly urged that the Court must resolve that issue before any discovery could even take place. *See, e.g.*, ECF No. 46 at 151 ("a determination on whether Interior provided the legally required accounting to

Plaintiff should be decided on judicial review of the accounting actually provided (and the administrative record upon which Interior's accounting decisions were based)."); ECF No. 55 (motion for a protective order to prohibit discovery outside the administrative record). The Court should ignore the about-face by the United States, and rule forthwith on the Nation's Motion for Partial Summary Judgment.

II. Argument & Authorities

A. The Motion was Properly Supported by a Declaration

The United States first argues that the Motion was not properly supported by a declaration. ECF No. 104 at 15-16. This is not correct. A declaration was submitted that supports most of the factual underpinnings of the Motion, and the rest of the facts are subject to judicial notice[1]. For example, the United States claims that the Nation failed to support by declaration that it requested discovery of prior testimony by the United States that had not been produced. ECF No. 104 at 13. In actuality, the declaration submitted by the Nation included two documents which establish this fact. *See* ECF No. 98-1 at 35 (letter to United States outlining discovery sought on "prior testimony on topics relevant to this case"); 170-71 (letter from the United States acknowledging request for production of prior testimony and that admitting that no such testimony has been produced).

Moreover, the declaration submitted with the Motion differs from those rejected by other courts in the cases cited by the United States, and not just because none of those cases involve the "discovery by agreement" procedure governing this case. For example, in *Hicks v. Gotbaum*, 828 F. Supp. 2d 152 (D.D.C. 2011), the plaintiff had not even "submitted a Rule 56(d) motion or

[1] The Motion included an in-depth discussion of the procedural history of the case. ECF No. 98 at 1-5. No declaration was needed to support the facts stated in that procedural history because it referred to pleadings that are subject to judicial notice. *E.g.*, *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 266 U.S. App. D.C. 1, 832 F.2d 601, 607 (1987) ("Courts may take judicial notice of official court records") (citations omitted).

affidavit, nor ha[d] she specified facts that she seeks to discover or demonstrated why discovery might create triable issues of fact." *Id.* at 159. In *Estate of Parsons v. Palestinian Auth.*, 715 F. Supp. 2d 27 (D.D.C. 2010), the "barebones" affidavit was rejected because it merely "[sought] to incorporate by reference what amounts to unsupported argument." *Id.* at 35; *see also Messina v. Krakower*, 370 U.S. App. D.C. 128, 135, 439 F.3d 755, 762 (2006) (noting that the fact sought to be discovered was whether the allegedly defamatory letter was disseminated but "the affidavit presented no reason to believe that Krakower's letter was disseminated to any third person other than Kalfon, and at oral argument Messina conceded that she still had no reason to believe there was any such dissemination."); *cf. Harrison v. Office of the Architect of the Capitol*, 281 F.R.D. 49, 51 (D.D.C. 2012) (denying Rule 56(d) motion for five separate reasons, including that "it is not even clear from Harrison's vague and disjointed submission whether she even wants any additional discovery."). Here, in contrast, the declaration properly supports the Motion as shown below.

B. The Motion established that the *Convertino* criteria were met for discovery on prior binding testimony by United States

For the first *Convertino* criteria, the prior binding testimony of the United States is needed to show that the Arthur Andersen Report was never intended to be an accounting. The United States attempts to mischaracterize the Nation's argument about the additional facts the Nation intends to discover on the Arthur Andersen Report, and why those facts are necessary. Specifically, the United States claims the Nation argues "that there are essential (yet undiscovered) facts necessary to address the question of the Andersen Report's legal adequacy." ECF No. 104 at 18. That is not accurate. As the Nation has stated in seeking partial summary judgment, there is no doubt that the Arthur Andersen Report is not the accounting required by law. *See* ECF Nos. 88, 100. The Nation has not argued that further discovery is needed on that issue, and fully believes

the Court has everything it needs to rule on it now. The United States' Cross-Motion for Summary Judgment [ECF No. 97] raises a different argument about the Arthur Andersen Report, namely, that its delivery constituted repudiation because the Nation knew or should have known the United States intended for the Arthur Andersen Report to be an accounting. *See, e.g.*, ECF No. 103 at 16. That is the issue on which the Nation seeks further discovery. The Nation has already pointed the Court to multiple instances where the United States has taken the opposite position and admitted that the Arthur Andersen Report was not intended to be an accounting, including sworn statements by Ross Swimmer and Jim Parris, both prior employees of Interior. *See, e.g.*, ECF No. 88-1 at 23-30, ECF No. 100 at 12-15 (citing, *inter alia*, Plaintiff's Exhibits 30 and 33). However, additional sworn testimony—some of which may bind the United States under Rule 30(b)(6)—is probative and will help the Court resolve that issue.

For the second and third *Convertino* criteria, the United States does not dispute that the Nation has requested production of prior testimony on issues raised in the United States' Cross-Motion [ECF No. 97], that it has such information, or that it has not produced it. *See* ECF No. 98-1 at 170-7. Instead, the United States attempts to deflect by claiming that it offered to produce such testimony. However, not only did that offer come long after the United States filed its Cross-Motion, the United States has still yet to produce anything.[2] Moreover, while it is true the Nation does not know the full extent of what discovery on this issue will show, it has provided the Court with a specific example of prior testimony by way of the Ross Swimmer declaration. As such, the

[2] The United States indicates that its failure to produce the prior testimony is the Nation's fault because the Nation failed to confer further on how to protect the confidentiality of the prior testimony. ECF No. 104 at 11. However, the reason no further conferral occurred on that issue is because it was clear to the Nation's counsel that Court intervention was needed to resolve the issue, as the parties have a protective order in this case which already addressed the confidentiality issue raised by the United States, *see* ECF No. 50, which the United States has used liberally.

Court should grant the Motion and order the United States to produce all responsive prior binding testimony of the United States and put an end to the United States' gamesmanship on this issue.

C. The Motion established that the *Convertino* criteria were met for discovery on repudiation

For the first *Convertino* criteria, a close look at the relevant law and facts are required to understand why Rule 56(d) may apply to the issue of repudiation. The only relevant fact relied on by the United States in support of its position that it repudiated its trust accounting duties—thus triggering accrual of the Nation's claim and running of the statute of limitations—is that the Nation received the Arthur Andersen Report. *See, e.g.*, ECF No. 103 at 16 ("Rather, limitations begin to run when the Nation is aware that the United States has taken actions allegedly inconsistent with a duty. That occurred two decades ago when the Andersen Report was provided."). The fact of delivery of the Arthur Andersen Report is undisputed now, and was assumed by the Court when it denied the motion to dismiss and concluded "there is no suggestion that the Government has repudiated the trust."[3] ECF No. 42 at 6.

As to the relevant law, this Court has already held that the statute of limitations on the Nation's accounting claims began to run only when the United States repudiated the trust and the Nation knew of that repudiation. ECF No. 42 at 6; *see also Shoshone II*, 364 F.3d at 1348 ("A cause of action for breach of trust traditionally accrues when the trustee 'repudiates' the trust *and the beneficiary has knowledge of that repudiation*.") (emphasis added). While the United States also cites to *Shoshone II* for the repudiation standard, the United States subtly attempts to change the relevant inquiry from the beneficiary's knowledge of repudiation to the beneficiary's

[3] While the Nation agreed that there was no suggestion that the Government repudiated the trust, it still sought closure of the issue by issuance of an interrogatory on repudiation, ECF No. 98-1 at 142, which further confirmed that the United States was not claiming repudiation as of August 27, 2020, *id.* at 154. Despite all of that, the United States for the first time claims in its Cross-Motion that it repudiated the trust more than 20 years ago.

knowledge of the facts the trustee claims constitute repudiation, and then asks this Court to find that there was repudiation solely because the Nation knew about delivery of the Arthur Andersen Report. ECF No. 104 at 22-23. That is not the proper inquiry. Instead, the law is clear that the statute of limitations only begins to run when the beneficiary knows of the repudiation or "a final accounting has occurred that establishes the deficit of the trust." *Shoshone II*, 364 F.3d at 1348 (citing 76 Am. Jur. 2d Trusts § 440 (2000); *McDonald v. First Nat'l Bank of Boston*, 968 F. Supp. 9, 14 (D. Mass. 1997)).

The need for discovery is further evidenced by the United States' muddled and shifting argument on whether and to what extent such repudiation occurred. The United States has now admitted that it has not repudiated the trust. *See* ECF No. 103 at 16 n.3 ("Our use of the term 'repudiation' is not meant to imply that there is no longer a trust relationship between Interior and the Nation, only that the Nation was on notice by Interior's words or actions of any alleged breach."); *see also id.* at 15 ("'repudiation' in this context means nothing more than claim accrual"). The United States also argues that it has not breached its fiduciary responsibilities to the Nation, which precludes a finding of repudiation. *See* ECF Nos. 97 and 103 (arguing that the United States has satisfied its trust duties to the Nation). Repudiation involves a breach of the trustee's fiduciary duties owed to the trust beneficiary, not merely claim accrual. *See, e.g., Pelt v. Utah*, 611 F. Supp. 2d 1267, 1285 (D. Utah 2009) ("Repudiation of a trust occurs when the trustee expressly terminates the fiduciary relationship or takes actions inconsistent with the terms of the trust (for example, by claiming or taking the corpus of the trust as its own and denying any obligation to the beneficiary).") (citations omitted). Here, the United States tries to have it both ways, raising important questions of material facts precluding decision on the United States' Cross-Motion.

Further, based on the United States' own arguments, the Nation could not have known of the repudiation until well into this litigation. Indeed, the United States sworn discovery responses and statements in this case foreclose this argument. More specifically, when the United States provided its discovery response on repudiation on August 27, 2020, ECF No. 98-1 at 154, it clearly knew the date that the Arthur Andersen Report was delivered to the Nation back in 1996. Despite this, the United States did not claim it knew that repudiation occurred, and it later admitted that "[a]t the time we answered [Interrogatory No. 5], we had not yet developed our position on whether the various accountings provided, including the Andersen Report, constituted repudiation . . . ." ECF No. 98-1 at 170. If the United States did not know that repudiation occurred until after August 27, 2020, it is not possible that the Nation should have known of repudiation before then.

Rule 56(d) mandates further discovery only if the Court is unable to agree with the Nation that there are sufficient facts to conclude that the Nation could not have known of the United States' purported repudiation of the trust until this litigation. On that issue, discovery into the who/what/when/where/why/how of the United States' conclusion it repudiated the trust is probative, because a beneficiary cannot be held to better knowledge of repudiation than its trustee.

For the second and third *Convertino* criteria, the Motion establishes that the Nation was unable to get additional discovery on repudiation due to the United States' discovery response, and that the United States' knowledge about repudiation is only discoverable from the United States. As such, should the Court not be able to deny the United States' Cross-Motion based on the facts before it, the Court should grant the Motion so that the Nation can undertake discovery on the issue.

D. The Motion established that the *Convertino* criteria were met for discovery on the prior alleged accountings

For the first *Convertino* criteria, facts on the prior alleged accountings are needed for at least two reasons.

First, the United States claims that the existence of the alleged prior accountings provides support for its *post-hoc* claim that it was reasonable for the Arthur Andersen Report to exclude pre-1972 time periods. While the Nation has disputed this claim, *see* ECF No. 100-1 at SUF#135, further discovery on this issue may be warranted.

Second, more discovery into the scope of agency issue during the prior alleged accountings is needed. This issue relates to the illegal suppression of the Nation's government by the United States from the early 1900s to the 1970s, which encompasses time periods relevant to the alleged prior accountings. For example, the United States argues that the Nation does not dispute that the United States complied with the process it used to appoint attorneys for the Nation, and that the process was proper "because 'the organization and management of the trust is a sovereign function subject to the plenary authority of Congress.'" ECF No. 103 at 25 (quoting *Jicarilla*, 564 U.S. at 175). The Nation not only disagrees with that legal conclusion, but also strongly disputes that factual allegation and seeks additional discovery on this precise issue. More specifically, during the illegal takeover of the Nation's government, Interior was acting unlawfully and was not following Congressional directives. *See* ECF No. 100-1 at SUF 70 ("At this time, the United States had illegally suppressed the Nation's Constitutional government, and the Nation lacked even a Principal Chief for long stretches, and so there would not have been any client representative for the hired attorneys to report to or take direction from other than the United States and its agents") (citations omitted), *see also* ECF No. 100 at 36-40; *Harjo v. Kleppe*, 420 F. Supp. 1110, 1130 (1976) ("The available evidence clearly reveals a pattern of action on the part of the Department

and its Bureau Of Indian Affairs designed to prevent any tribal resistance to the Department's methods of administering those Indian affairs delegated to it by Congress. This attitude, which can only be characterized as bureaucratic imperialism, manifested itself in deliberate attempts to frustrate, debilitate, and generally prevent from functioning the tribal governments expressly preserved by § 28 of the Act."). It was during the period of bureaucratic imperialism that the United States selected attorneys for the Nation in several instances, including for the alleged accounting that occurred under the 1924 act. As such, the scope of agency of the attorneys is relevant, and the Nation should be entitled to conduct discovery on it.

For the second *Convertino* criteria, the Nation showed it could not produce these facts because of the discovery by agreement procedure, and for third *Convertino* criteria, it is the United States that has information on the alleged prior accountings, because they occurred during the period of bureaucratic imperialism by Interior and the BIA over the Nation. As such, the Court should grant the Motion so that the Nation can undertake discovery on the issue of the alleged prior accountings.

III. Conclusion

For the reasons set forth above and in the Motion, the Cherokee Nation would respectfully request that the Court grant the Motion and deny the United States' Cross-Motion, or in the alternative delay ruling on the Cross-Motion until the Cherokee Nation has had time to conduct discovery.

Respectfully submitted this 17th day of October, 2022,

Sara Elizabeth Hill
Attorney General
THE CHEROKEE NATION
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 1533
Tahlequah, OK 74465
Tel: 918-456-0671

Fax: 918-458-5580
Email: sara-hill@cherokee.org

Chad Harsha
Secretary of Natural Resources
THE CHEROKEE NATION
P.O. Box 948
Tahlequah, OK 74465-0948
Tel: 918-207-3836
Fax: 918-458-6142
Email: chad-harsha@cherokee.org

Anne E. Lynch, DC Bar No. 976226
Michael D. Goodstein, DC Bar No. 469156
VAN NESS FELDMAN LLP
1050 Thomas Jefferson Street NW
Seventh Floor
Washington, DC 20007
Tel: 202-298-1800
Email: alynch@vnf.com
mgoodstein@vnf.com

/s/ Michael M. Frandina
David F. Askman
Michael M. Frandina
ASKMAN LAW FIRM LLC
1543 Champa Street, Suite 400
Denver, CO 80202
Tel: 720-407-4331
Email: dave@askmanlaw.com
michael@askmanlaw.com

Jason B. Aamodt
Krystina E. Phillips
Dallas L.D. Strimple
INDIAN & ENVIRONMENTAL LAW GROUP
204 Reunion Center
Nine East Fourth Street
Tulsa, OK 74103
Tel: 918-347-6169
Email: jason@iaelaw.com
deannaa@iaelaw.com
krystina@iaelaw.com
dallas@iaelaw.com

Counsel for Plaintiff Cherokee Nation