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**

THE CHEROKEE NATION'S RULE 56(d) MOTION AND STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT

I. Introduction and Procedural History

The need for this Motion is due in part to the unique procedural history of this case. Plaintiff, the Cherokee Nation, seeks a meaningful accounting of its assets held in trust by the United States and its agencies under common law, statutes, and the Administrative Procedure Act ("APA"), along with injunctive relief necessary to ensure that the accounting is accurate and complete and to ensure that the Nation's Trust Fund is properly held and managed going forward. The Cherokee Nation has asserted three claims, including two non-APA claims. *See, e.g.*, Memorandum Opinion and Order, ECF No. 85.

At the outset of this case, the United States strenuously opposed any discovery based on its argument that the only issue the Court needed to decide was about the Arthur Andersen Report, which stemmed from the trust reconciliation project and was part of the administrative record. *See, e.g.*, ECF No. 46 at 15[1] ("a determination on whether Interior provided the legally required

[1] All page citations refer to the pagination generated by the Court's CM/ECF system, or for documents that have not been filed, to the pagination generated by a PDF reader.

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).

In response to the United States' "no-discovery" position, the Court issued an incomplete scheduling order that, *inter alia*, allowed for limited discovery followed by briefing on a protective order, prevented depositions "until further order of the court," did not increase discovery limits, and set a status conference for June 19, 2020. ECF No. 49. At the June 19, 2020 status conference, the Court ordered some discovery to occur immediately, and directed the parties to "meet and confer in an effort to agree upon what discovery will commence immediately and jointly file a status report with respect to the resolution of that issue by Wednesday, June 24th." *See, e.g.*, June 19, 2020 Transcript, at 26 (attached to Declaration of Michael Frandina dated August 31, 2022 ("Frandina Declaration") as Exhibit 1).

The parties were able to agree on some discovery, including 10 interrogatories each and production by the United States of certain documents collected from the National Archives Records Administration ("NARA"). ECF No. 64 at 1-2. The parties did not agree on other items, including depositions and further production of documents. ECF No. 64 at 2-3. The Court adopted the discovery plan for those areas where the parties agreed, but did not rule on areas of disagreement. *See* Minute Order dated June 26, 2020. Thereafter, the Court denied the United States' Motion for Protective Order. ECF No. 85 (adopting in part ECF Nos. 72, 73). However, the Court directed the parties to again meet and confer about ways to target discovery and tailor it to the needs of the case. The parties have periodically met and conferred, identifying areas where they agree discovery should proceed, and so a "discovery by agreement" procedure was adopted. ECF No. 73 at 19, ECF No. 85 at 6.

For the duration of this case, the parties have worked under the "discovery by agreement" procedure, including agreeing upon two initial phases of discovery. ECF No. 75, ECF No. 92. The parties have worked cooperatively, and have made progress in developing the discovery needed in this case, particularly given that the American Indian Records Repository (the "AIRR") where the majority of the documents responsive to the Nation's first set of document requests are stored, *see* ECF No. 55-1 at 22-23, has been inaccessible due to the Covid-19 health emergency for much of the discovery period of this case. There are several categories of discovery that the Cherokee Nation has sought, but that were not agreed to by the United States, and so have not occurred. *See, e.g.*, March 4, 2022 Letter from M. Frandina to J. Ecker, at 4 (attached to Frandina Declaration as Exhibit 2). For example, the Nation sought "payments of money, in-kind, or services promised under numerous treaties spanning from 1785 to 1866," but the United States would only agree to produce "available documents" from certain Courts of Claims cases. ECF No. 75 at 8.

Although discovery on those issues is ongoing, the Nation filed its Motion for Partial Summary Judgment [ECF No. 88] ("Motion") to resolve with finality the United States' oft-repeated (but wholly unsupported) refrain that the Arthur Andersen Report satisfied whatever accounting was required by law to be provided to the Nation. That issue is ripe for consideration by the Court since the United States has presented its administrative record for review and evaluation.[2]

[2] Prior to its Cross Motion for Summary Judgment, ECF No. 96, the United States had represented numerous times that the "issue of whether the 'accounting' Interior has provided and is providing is legally sufficient" is the "cornerstone legal question" in the case. ECF No. 46 at 13. The United States told the Nation and the Court that "that issue can and should be resolved first through judicial review of the accountings that have been provided," based on "the administrative record upon which Interior's accounting decisions were based." *Id.* at 13-14.

After the Nation filed its Motion, the Parties met and conferred (as previously scheduled) to discuss the next set of discovery topics that could be begun concurrently with the motion briefing schedule. The Nation proposed several very specific topics for discovery. *See* March 4, 2022 Letter from M. Frandina to J. Ecker (attached to Frandina Declaration as Exhibit 2). The United States agreed to a very limited Phase 2 production consisting of documents that its "historical contractor" had collected from various repositories, including some that are not accessible to the public. The United States contended that responding fully to the topics identified by the Nation "would require additional searching and collection" at National Archives collections and other locations. ECF No. 92 at 3. The United States produced those documents on April 27, 2022. Based on the United States' representations reflected in the Joint Status Report [ECF No. 92], that production represents a subset of the available documents on the Phase 2 topics, but the United States has declined to engage in additional discovery by agreement at this time "given that Plaintiff has now moved, and Federal Defendants intend to cross-move, on issues that Federal Defendants believe are likely to be dispositive as to the merits of the case." ECF No. 92 at 3 n.2.

On June 13, 2022, the United States filed a Cross Motion for Summary Judgment, in which it did a complete about-face on its prior insistence that all the Court needed was the administrative record. *See, e.g.*, ECF No. 97 at 35 ("The Court cannot reach the merits of the Andersen Report, as the Nation's motion requests, without also considering our threshold procedural defenses and the historical context in which the Andersen Report must be placed."). The United States has also relied on 74 exhibits that were not in the administrative record, including 20 that were produced with the partial Phase 2 production on April 27, 2022 (after the Cherokee Nation had filed its

Motion for Partial Summary Judgment).[3] Frandina Declaration ¶10. In other words, the United States' newfound position appears to be that the Court cannot decide whether the Trust Reconciliation Project produced an accounting to the Nation without considering documents and facts outside of the administrative record, including facts covered by the Nation's requested Phase 2 discovery topics, on which the only records that have been produced are those cherry-picked by the United States' historical contractor.

The Cherokee Nation is concurrently filing a response to the United States' Cross Motion. However, for certain issues discussed herein, to the extent the Court does not deny summary judgment, additional discovery is needed. The Cherokee Nation conferred on this motion with United States, who stated the motion is opposed. *See* LCvR 7(m).

II. Standard of Review

"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 (3) issue any other appropriate order." Fed. R. Civ. P. 56(d). A Rule 56(d) motion must be supported by a declaration addressing what are known as the *Convertino* criteria, which are to: (1) 'outline the particular facts [the nonmovant] intends to discover and describe why those facts are necessary to the litigation;' (2) 'explain why [the nonmovant] could not produce [the facts] in opposition to the motion [for summary judgment];' and (3) 'show the information is in fact discoverable.'" *Haynes v. D.C. Water & Sewer Auth.*, 924 F.3d 519, 530 (2019) (quoting *Convertino v. U.S. Department of Justice*, 684 F.3d 93, 99-100 (D.C. Cir. 2012)).

[3] These exhibits are U.S. Exhibits 1, 5, 6, 7, 9, 35, 41, 43, 44, 46, 53, 56, 58, 61, 63, 64, 66, 69, 70, and 71. These exhibits form the basis for U.S. Statements of Undisputed Fact ## 1, 5, 6, 7, 11, 12, 36, 46, 47, 48, 49, 50, 51, 55, 56, 57, 58, 71, 73, 74, 76, 77, 79, 80, 81, 83, 85, 86, 87, 89, 90, 95, 96, 100, 102, 103, 104, and 105.

III. Argument & Authorities

A. Prior binding testimony by United States

Cherokee Nation 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. Such issues where prior testimony may exist include the Slade and Bender Report, prior accounting, reconciliation, or auditing efforts (such as those identified by the United States in its Cross Motion undertaken pursuant to the 1924 Act), the ICCA and cases filed pursuant to that Act, the Trust Reconciliation Project and work done by Arthur Andersen, ongoing efforts to provide accountings to tribes after production of the Arthur Andersen Report, and the United States' trust obligations to tribes. Testimony on these issues likely exists from some of the other numerous tribal trust cases brought against the United States within the past few decades.

Because the United States has not agreed to produce those records, the Nation has conducted some searches from other sources. The Nation recently identified a Declaration of Ross Swimmer, who was, at the time, the U.S. Special Trustee for American Indians in the U.S. Department of Interior, along with related briefing by the United States. *See* Declaration of Ross Swimmer dated August 10, 2007 (attached to Frandina Declaration as Exhibit 3); United States' Memorandum in Support of the Motion to Remand dated August 11, 2007 (attached to Frandina Declaration as Exhibit 4); United States' Reply Memorandum in Support of the Motion to Remand dated November 21, 2007 (attached to Frandina Declaration as Exhibit 5). Mr. Swimmer declared, *inter alia*, that after submission of the Arthur Andersen Report, Interior had continued reconciliation work that it had been unable to complete, *id.* ¶ 9; that Interior was preparing a proposed accounting plan that applied to all tribes, *id.* ¶¶ 2, 17, 22; and that he was "committed to ensuring that Interior provides tribes with historical accountings in accordance with its understandings and interpretations of applicable law," *id.* ¶ 20.

Mr. Swimmer's Declaration was used by the United States in a combined tribal trust case involving 37 cases and 54 tribes who brought claims that they had not received a full and complete accounting (including allegations that the Arthur Andersen Report received by each tribe was not a full and complete accounting). In seeking a remand to prepare a proposed accounting plan that would apply to all tribes (including those not litigating), the United States stated as follows to this Court:

> In other words, Interior made clear to Congress in 1997 that further accounting efforts were possible and also expressed that it would pursue such accounting where appropriate in order to address the individual circumstances of each tribe.

United States' Memorandum in Support of the Motion to Remand dated August 11, 2007 (attached to Frandina Declaration as Exhibit 4), at 19; *see also id.* at 24-25.

> The issues Plaintiffs demand to litigate now should be addressed, if ever, following issuance of any final agency action under the tribal trust accounting plan, with a supporting administrative record, upon which Plaintiffs can base any subsequent challenge and the Court can rely to determine the merits of Plaintiffs' challenge.

United States' Reply Memorandum in Support of the Motion to Remand dated November 21, 2007 (attached to Frandina Declaration as Exhibit 5), at 25. This is completely at odds with the position taken by the United States in its Cross Motion—that the Arthur Andersen Report was final agency action, is the accounting required by law, and that the Nation should have known that no further accounting work would be done by the United States after production of the Arthur Andersen Report.

For the first *Convertino* criteria, the facts that the Cherokee Nation needs is to determine prior binding testimony that the United State has made regarding the Trust Reconciliation Project and the Arthur Andersen Report. Because the United States' litigation position is so different from the factual record that has been identified by the Nation so far, it is 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. The Cherokee Nation lacks knowledge about how many such matters there are. Nonetheless, at least some such testimony exists, such as the Ross Swimmer Declaration mentioned above. The prior testimony could help resolve issues in this case that overlap with the numerous other tribal trust cases. The prior testimony—and associated briefing—could also result in the United States being judicially estopped from taking inconsistent positions, as it is attempting to do with the Arthur Andersen Report now.

For the second *Convertino* criteria, the Cherokee Nation could not produce these facts because 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. This is an issue that the Cherokee Nation has raised on multiple occasions, but has not been able to obtain agreement from the United States. *See, e.g.*, March 4, 2022 Letter from M. Frandina to J. Ecker, at 4 (attached to Frandina Declaration as Exhibit 2). Although the Nation identified Mr. Swimmer's declaration, many of the requested records likely are not publicly available but are within the custody and control of the United States.

For the third *Convertino* criteria, the information requested is discoverable from the United States. The United States has possession, custody, or control of the records, and has the requisite knowledge to produce information of its own officials' testimony on issues that go the heart of its defenses raised in this case.

B. Repudiation

For the reasons set forth in its concurrently filed response brief, the Cherokee Nation believes that the Court can (and should) decide the issue of repudiation in favor of the Cherokee Nation. However, if the Court is not inclined to agree, then the Cherokee Nation respectfully requests that the Court defer a decision on that issue until the Nation can take discovery on the alleged repudiation. The United States has been aware—for numerous years—that the Nation does

not believe that the United States had ever repudiated its responsibilities over the Nation's trust. *See* ECF No. 2-1 at 39 ("The United States has not repudiated the trust."). The Court previously recognized that "there is no suggestion that the Government has repudiated the trust." ECF No. 42 at 6. The Nation sought to confirm that the United States does not claim repudiation, propounding Interrogatory No. 5 on July 10, 2020 as follows:

> State definitively whether You contend You have repudiated any trusteeship owed to the Cherokee Nation. If you contend you have repudiated any trusteeship owed to the Cherokee Nation, identify the trust responsibility repudiated, the express words or actions taken by You that You contend repudiate the trust responsibility, when such repudiation occurred, why it occurred, who was responsible for deciding to repudiate, and identify each and every document relating to each such repudiation.

Plaintiff's Interrogatories dated July 10, 2020, at 3 (attached to Frandina Declaration as Exhibit 6).

In response, the United States did not claim that any repudiation had occurred, ever. United States' Responses and Objections to Plaintiff's Interrogatories dated August 27, 2020, at 9-10 (attached to Frandina Declaration as Exhibit 7). Nor did United States ever supplement its response. Nor did United States ever provide initial disclosures that mentioned repudiation, either for individuals with knowledge or categories of supporting documents. United States' Rule 26 Initial Disclosures dated April 13, 2020 (attached to Frandina Declaration as Exhibit 8). Despite this, in its Cross Motion the United States argues—for the first time—that it has repudiated the trust. *See* ECF No. 97 at 61-64.

For the first *Convertino* criteria, the facts about repudiation the Cherokee Nation may need to discover include when the United States knew that it had repudiation the trust. This is a critical fact because the statute of limitations does not begin to run until the Nation knew of the repudiation, *see Shoshone Indian Tribe v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004) ("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), and the Nation could not

possibly have known about the alleged repudiation before the United States. The Nation believes that the Court has enough facts to conclude that the United States did not repudiate the trust until after this litigation began, based on the United States' response to Interrogatory No. 5 and its statement during conferral with the Nation that "At 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, and we were under no obligation to marshal our case at that time." Letter dated July 28, 2022 from J. Ecker to M. Frandina *et al.*, at 8 (attached to Frandina Declaration as Exhibit 9). This makes clear that repudiation was a theory created for litigation purposes only. However, to the extent the Court determines that there is a genuine dispute of the material facts concerning repudiation, the Cherokee Nation will need discovery to establish those facts.

For the second *Convertino* criteria, the Cherokee Nation could not produce these facts because this case has been governed by a discovery by agreement procedure, and the United States did not agree to discovery on repudiation. In addition, the United States answer to Interrogatory No. 5 misled the Nation into believing that repudiation was not an issue in this case.

For the third *Convertino* criteria, the information requested is discoverable, and only from the United States, since only the United States knows when it repudiated the trust.

C. Prior alleged accountings

The Cherokee Nation needs discovery on the alleged prior accountings referenced in the United States' Cross Motion for Summary Judgment—the Slade and Bender Report, ECF No. 97 at 42-46, and the activities related to claims made under the 1924 Act, ECF No. 97 at 51-56. As with repudiation, the United States' position that the Slade and Bender Report or activity done in connection with the 1924 Act constitutes an accounting required by law was never mentioned in the United States' initial disclosures or discovery responses. *See* United States' Rule 26 Initial

Disclosures dated April 13, 2020 (attached to Frandina Declaration as Exhibit 8). Rather, the United States has asserted repeatedly that all accountings required by law are contained in the administrative record the United States filed in this case. For example, Lawrence Dunmore declared that "included within the administrative record are all documents the Department of the Interior directly and indirectly relied upon in providing all accountings to Plaintiff required by law during the applicable time frame." *See, e.g.*, ECF No. 53-2 at 2. The Nation propounded Interrogatories Nos. 1 and 2 on this statement, specifically asking the United States to "[i]dentify any accountings provided to Plaintiff required by law." Plaintiff's Interrogatories dated July 10, 2020, at 2 (attached to Frandina Declaration as Exhibit 6). In response, the United States only pointed to the administrative record and the Arthur Andersen Report. United States' Discovery Responses dated Aug. 27, 2020, at pp. 2-8 (attached to Frandina Declaration as Exhibit 7). The United States did not disclose either the Slade and Bender Report or the 1924 Act in its response, and it never supplemented or corrected its response. The Nation similarly propounded Request for Production No. 8 on this issue, asking the United States to produce "[a]ll documents relating to any accounting of the Trust Fund provided to the Cherokee Nation," to which the United States only pointed to the administrative record and the Arthur Andersen Report. United States' Responses and Objections to Plaintiff's First Set of Requests for Production of Documents dated June 5, 2020, at 2-3 (attached to Frandina Declaration as Exhibit 10). No mention of the Slade and Bender Report or the 1924 Act appears anywhere in the administrative record. Frandina Declaration ¶¶11-12. Despite this, the United States now relies on the Slade and Bender Report and the work done in connection with the 1924 Act in its cross motion.

For the first *Convertino* criteria, the facts about the alleged prior accountings that the Cherokee Nation needs is the scope of the alleged prior accountings, including the scope of

authority of any agents allegedly acting on behalf of the Cherokee Nation. The scope of such accountings go to, *inter alia*, the United States' *res judicata* arguments including the alleged "nucleus of facts" surrounding those alleged accountings. *See, e.g.*, U.S. SUF## 73, 74, 76, 77, 83 (describing the scope of the work done by the accountants hired to represent the Nation in claims filed pursuant to the 1924 Act); U.S. SUF## 78, 79, 80, 81, 82, 84, 85, 86, 91 (describing the claims filed by the attorneys that were hired to bring claims under the 1924 Act on behalf of the Nation); & U.S. SUF## 87, 88, 89, 90 (describing the scope of work done by GAO accountants for the United States' defense of those claims). *See also* U.S. SUF## 106 (describing claims brought on behalf of the Nation to the ICC)

In terms of the scope of agency, the Nation's concurrently filed reply discusses at length the illegal suppression of the Cherokee Nation's government by the United States, including during time periods relevant to the alleged accountings. That scope of agency is relevant to the United States' *res judicata* arguments and the alleged "same parties" issue. *See, e.g.*, U.S. SUF##69, 70, 71, 72 (describing the procedure imposed by the United States to retain attorneys and accountants hired to bring claims under the 1924 Act on behalf of the Nation) & U.S. SUF## 93, 94 (describing or quoting statements made those attorneys). *See also* U.S. SUF## 100, 101, 102, 103, 104, 105 (describing the process used to retain attorneys hired to bring claims to the ICC on behalf of the Nation).

For the second *Convertino* criteria, the Cherokee Nation could not produce these facts because this case has been governed by a discovery by agreement procedure, and the United States did not agree to discovery on these alleged prior accountings, including by deposition. In addition, many of the facts that the United States put forward in support of its Cross Motion on this issue were from the partial Phase 2 production, which the United States admits is incomplete and

contains only the records selected for scanning by its historical consultant. *See* U.S. SUF## 71, 73, 74, 76, 77, 79, 80, 81, 83, 85, 86, 87, 89, 90, 95, 96, 100, 102, 103, 104, 105.

For the third *Convertino* criteria, 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.

IV. Conclusion

For the reasons set forth above, the Cherokee Nation would respectfully request that the Court grant this 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 1st day of September, 2022,

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