UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
Baltimore Division

SHARYL THOMPSON ATTKISSON, Plaintiff(s), v. SHAUN WESLEY BRIDGES *et al.* DEFENDANTS	Civil Action No. 1:20-cv-68-RDB **RELATED TO** Civil Action No. 1:23-1106

PLAINTIFFS' MEMORANDUM IN SUPPORT OF OPPOSITION TO DEFENDANT SHAUN BRIDGES' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Sharyl Thompson Attkisson and Sarah Judith Starr Attkisson, by and through their attorneys, submit this Memorandum in Support of Opposition to Defendant Shaun Bridges' Motion for Summary Judgment.

A. SUMMARY OF RESPONSE

The Defendant's Rule 56 motion should be denied, or in the alternative, deferred. Under Rule 56(d) of the Federal Rules of Civil Procedure, a court may deny or defer consideration of a motion for summary judgment where the non-movant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition. Fed. R. Civ. P. 56(d). Plaintiffs have presented specific facts through both an affidavit and the background record from

the pending Administrative proceeding[1], which is incorporated herein by reference, that preclude summary judgment and warrant deferring consideration of the MSJ under Rule 56(d).[2] A favorable ruling on the Petition is necessary for the Plaintiffs to obtain evidence necessary to fairly and fully respond to the motion. Accordingly, the Defendants' Motion should be denied, or alternatively, delayed until after this issues that form the subject of the Administrative proceeding are decided and that proceeding has run its course.

B. BACKGROUND

Although the facts are well-known to the parties and the Court, a brief summary follows. Upon discovery of the alleged hacking of their computers and phones, the Plaintiffs first filed suit in December of 2014 in the Superior Court of the District of Columbia against former U.S. Attorney General Eric Holder, former Postmaster General Patrick Donahoe, and "John Doe" agents, alleging violations of the First and Fourth Amendments to the U.S. Constitution based on the alleged electronic intrusions on their devices. *See Attkisson v. Holder*, 113 F. Supp. 3d 156 (D.D.C. 2017).

Defendants Holder and Donahoe removed the case to the U.S. District Court for the District of Columbia. *Id.* at 159. A year and one half later -- in July 2016 – the court in the District of Columbia consolidated the Plaintiffs' initial lawsuit with a complaint filed by Sharyl Attkisson in September 2015 under the Federal Tort Claims Act ("FTCA") against the United States. *See Attkisson v. Holder*, 241 F. Supp. 3d 207, 211 (D.D.C. 2017). Almost one-year later – on March 19, 2017, the court ruled on pending motions and the case was transferred to the U.S. District Court

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1 Petition for Judicial Review; Case 1:23-cv-01106-JRR, Doc. 1, Filed 4/25/23, Page 1 of 16 with Exhibits. Case assigned to Judge Julie Rebecca Rubin on 27 April 2023. Plaintiffs incorporate by reference the Petition and all Exhibits in lieu of refiling the same.

2 Exhibit 1, Attkisson Aff.

for the Eastern District of Virginia on based on the fact that the alleged surveillance was of their Virginia home. *Attkisson*, 241 F Supp. 3d at 212-15.

On September 15, 2017, the Plaintiffs filed a Consolidated Complaint in the Eastern District of Virginia to clarify their claims against the various defendants. In the Consolidated Complaint the Plaintiffs alleged violations of their First and Fourth Amendment rights under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), as well as violations of the Electronic Communications Privacy Act ("ECPA"), the Stored Communications Act, the Computer Fraud and Abuse Act, the Foreign Intelligence Surveillance Act, the Virginia Computer Crimes Act, and common law trespass to land and chattel. *See Attkisson v. Holder*, No. 1:17-cv-364 (LMB/JFA), 2017 WL 5013230 (E.D. Va. Nov. 1, 2017), *aff'd*, 919 F.3d 789 (4th Cir. 2019), *withdrawn from bound volume*, *amended and superseded on reh'g*, 925 F.3d 606 (4th Cir. 2019), *as amended* (June 10, 2019), and *aff'd*, 925 F.3d 606 (4th Cir. 2019), *as amended* (June 10, 2019). The Consolidated Complaint named Holder, Donahoe, and the unnamed John Doe agents. *Id.*

On November 1, 2017, Judge Brinkema of the U.S. District Court for the Eastern District of Virginia dismissed named Defendants Holder and Donahoe from the suit. *Id.* The Plaintiffs had specifically alleged that Holder was personally involved in discussions that centered on Sharyl's "Fast and Furious" reporting, and that he directed one of his aides to "get a 'handle'" on her reporting. *Id.* at *4. The Plaintiffs also alleged that Donahoe was ultimately responsible for the use of the USPS network to infiltrate the Attkissons' devices and the unconstitutional monitoring of mail as part of a mass surveillance program. *Id.*

With the dismissal of Holder and Donahoe, as well as the dismissal of two counts alleged under Virginia law, the suit moved forward against the John Doe agents on the federal statutory

and *Bivens* claims. On May 15, 2018, Judge Brinkema dismissed all remaining claims. The United States Court of Appeals for the Fourth Circuit affirmed both of Judge Brinkema's decisions in *Attkisson v. Holder*, 925 F.3d 606 (4th Cir. 2019).

The present action was initiated on January 10, 2020, against named and unnamed government officials, alleging a violation of the Fourth Amendment to the Constitution under *Bivens* (Count 1) and a violation of the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. §§ 2511 and 2520 (Count 2). (Complaint, ECF No. 1; Amended Complaint, ECF No. 15.) In this action, the Attkissons now claim they have acquired details regarding the involvement of "key individuals" from "a person involved in the wrongdoing who has come forward to provide information." (ECF No. 15 ¶ 3.) According to the source, Defendant Rosenstein, acting as the U.S. Attorney for the District of Maryland, ordered Co-Defendants, Henry, Bridges, Clarke, and White, to conduct home computer surveillance on the Attkisson family in March 2011. (*Id.* ¶ 28.) The Plaintiffs alleged that the Defendants were all government employees "connected to" the special, multi-agency, federal government "Silk Road Task Force" based in Baltimore, Maryland. (*Id.*)

This Court should deny or, at a minimum, defer ruling on Defendants Bridges' Motion for Summary Judgment ("MSJ")[3] because it is procedurally premature in light of the Plaintiffs' related Petition for Judicial Review that is still pending before this Court (the "Petition")[4].

On April 23, 2023, the Plaintiffs filed their Petition under the Administrative Procedure Act ("APA") seeking to compel long-sought after essential discovery from the United States, including the U.S. Department of Justice ("DOJ") and the United States Postal Service ("USPS") (collectively, "Petition Respondents").[5] The Petition chronicles the government's almost decade-

[3] Def.'s Mot. Summ. J., ECF No. 109.
[4] Pet'rs Compl., Attkisson v. United States of America, No. 1:23-cv-01106-JRR (D. Md. Apr. 25, 2023).
[5] Pet'rs Compl., Attkisson v. United States of America, No. 1:23-cv-01106-JRR at 15-16 (D. Md. Apr. 25, 2023).

long commitment to stonewalling discovery requests, and articulates – in detail -- how and why the requested discovery is designed to reveal facts surrounding the allegations of illegal infiltration of Plaintiffs' electronic work and home devices.[6]

Under Rule 56(d) of the Federal Rules of Civil Procedure, a court may deny or defer consideration of a motion for summary judgment if the nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition. Fed. R. Civ. P. 56(d). Plaintiffs have presented specific facts through an affidavit that preclude summary judgment and warrant deferring consideration of the MSJ under Rule 56(d).[7] A favorable ruling on the Petition is necessary for the Plaintiffs to obtain evidence necessary to overcome the MSJ. Accordingly, the Defendants' Motion should be denied, or alternatively, delayed until after this Court compels more discovery pursuant to the relief sought in the Petition.

C. <u>ARGUMENT</u>

In moving to defer consideration of a motion for summary judgment, the Plaintiffs need only submit an affidavit stating "that it could not properly oppose a motion for summary judgment without a chance to conduct discovery." Fed. R. Civ. P. 56(d); *see also Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244 (4th Cir. 2002) (quoting *Evans v. Technologies Applications Service Co.*, 80 F.3d 954, 961 (4th Cir. 1996)). Further, Rule 56(d) requires that "summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir. 1995) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5 (1986)); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (noting that summary judgment is appropriate only "after adequate time for discovery"). Here, the Plaintiffs have demonstrated, both through its

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[6] *Id.*; *see also* Compl., ECF No.1.
[7] Exhibit 1, Attkisson Aff..

Petition and by affidavit, that the additional discovery would illuminate critical facts essential to its claims and that there has not been an adequate opportunity for discovery thus far.

1. PLAINTIFFS HAVE SATISFIED THE REQUIREMENTS OF FED. R. CIV.P. 56(D)

Non-movants must generally file an affidavit or declaration to succeed on a 56(d) opposition motion. *Nader v. Blair*, 549 F.3d 953, 961 (4th Cir. 2008). The Affidavit of Plaintiff Sharyl Thompson Attkisson demonstrate that requested discovery would preclude ruling on the MSJ in favor of the Defendants (at least)[8] for the following reasons:

Specific Discovery Requested by Plaintiffs	**Preclusion of Summary Judgment**
Deposition of USPS 30(b)(6) witness	The requested testimony sought relates directly to the USPS' admission that the IP addresses found on Plaintiffs computer devices as responsible for the illegal infiltration were owned, maintained and controlled by USPS and exclusively available only to government actors. Judge Brinkeman permitted on deposition in the Virginia proceeding and the USPS witness who testified confirmed ownership of the IP addresses and identified other sources of information within the USPS for which discovery was sought. The USPS witness was tragically killed in a pedestrian traffic accident and his follow-up deposition never completed, and the Defendant never had an opportunity to cross-examine the witness because the defendants was not a party at the time. The facts and issues surrounding the USPS's exclusive control over IP addresses found by forensic examination to have intruded upon the Plaintiffs electronic equipment (laptops, computers and cell phones); who had access; who authorized use; when; why; how it was used; and all documentary evidence; log books; and other evidence to help identify the users of the IP address to infiltrate Plaintiffs' computers is directly relevant. The requested testimony would also uncover who knew; who approved of the activities; identify the users/infiltrating parties; and whether and to what extent USPS employees or technical systems played a part intruding upon the Plaintiffs electronic equipment. *See* Attkisson Aff. ¶¶ 62, 69.

[8] *See*, Attkisson Aff. ¶¶ 64-81. Plaintiffs note that this table is intended as a limited summary of the Affidavit for the Court's convenience. The entire Petition and corresponding exhibits contain more information demonstrating the relevancy of the sought after discovery. *See e.g.,* Pet'rs Compl. Ex. 5, Attkisson v. United States of America, No. 1:23-cv-01106-JRR at 15-16 (D. Md. Apr. 25, 2023).

	The requested testimony would likewise corroborate the sworn testimony of now deceased USPS representative Cliff Biram, who confirmed that the government USPS IP addresses found on my computer were in fact owned and maintained exclusively by the USPS, and that those IP addresses had never been used publicly, and were only accessible to federal employees and contractors with special permission. *See* Attkisson Aff. ¶ 69.
Deposition of a DOJ 30(b)(6) witness	The requested testimony would illuminate facts and issues surrounding the DOJ's Operation "Fast and Furious" and the DOJ's policy and practice of monitoring journalists, specifically the Plaintiff Ms. Attkisson, as alleged in the complaint. *See* Attkisson Aff. ¶ ¶ 31-35. The requested testimony would likewise provide factual information about who was involved; when; how; where; persons with knowledge of the activities; and illuminate facts and issues around any investigations, communications, or correspondence within the DOJ and Congress related to Ms. Attkisson. *See* Attkisson Aff. ¶ ¶ 68.
Deposition of Michael Graham (USPS)	The requested testimony would illuminate facts and issues around his involvement in investigations relating to or knowledge of the use of USPS IP addresses to remotely infiltrate Ms. Attkisson's devices. *See* Attkisson Aff. ¶ ¶ 56.
Deposition of John Duckworth (USPS)	According to publicly available information, Mr. Duckworth served in the USPS OIG department for over 11 years. Between 2012 and 2022, Mr. Duckworth was a Special Agent in the Computer Crimes Unit. His focus was on computer forensics, intrusion response, electronic crime investigation, incident response, breach investigations. The Attkissons learned of Mr. Duckworth's involvement when one of his colleagues contacted Sharyl Attkisson and told her that Mr. Duckworth was assigned to the case and would be meeting with Sen. Tom Coburn. Ms. Attkisson's seeks detailed testimony from Mr. Duckworth regarding his knowledge of and communications about Ms. Attkisson's computer intrusion case; who was involved; when they were involved; who had access to physical evidence; when; for what purpose; what was done with the evidence; what was looked at; removed; added; evaluated; the investigation, including witness statements; the USPS IP addresses found of the computer and how those government-controlled IP addresses made their way onto Mr. Attkisson's computer; and the results of any internal investigations into who was responsible for the alleged intrusions. The requested testimony would illuminate facts and issues around his involvement in investigations relating to or knowledge of the use of USPS IP addresses to remotely infiltrate Ms. Attkisson's devices. *See* Attkisson Aff. ¶ ¶ 56.

Deposition of Keith Bonanno (DOJ)	Plaintiffs seek detailed testimony from Mr. Bonanno regarding the process of his investigation into the intrusions of one of Sharyl Attkisson's personal computers, including his possession of physical evidence, chain of custody, who had access to or accessed the physical evidence, what was done, how it was done, what was deleted, if anything, and what steps were taken to ensure preservation of evidence. Among other details, we would find important the details of his communications with others inside and/or outside the agency, who was given access to evidence, who was involved in manipulating or searching the evidence, how it was done, what tools were used with the software, the methodology used and undertaken, the conclusions drawn, the bases for those conclusions, and his communications regarding the work undertaken, and the drafts and reports released to or withheld from Ms. Attkisson and others. The requested testimony would illuminate facts and issues around his or the DOJ's knowledge of and involvement in investigations relating to Ms. Attkisson, including the DOJ OIG Abbreviated Report of Investigation. *See* Attkisson Aff. ¶ ¶ 67-69.
Deposition of William Blier (DOJ)	Plaintiffs seek detailed testimony from Blier regarding his personal participation and input into his agency's investigation into the intrusions into one of Sharyl Attkisson's personal computers. We would like Mr. Blier to provide a timeline and detail of his involvement in the investigation, how chain of custody was handled with the evidence he acquired, the facts learned, the draft(s) and report(s) generated, the people inside and outside the agency he communicated with, the factual information he obtained, and the decisions regarding their release or withholding to Ms. Attkisson and others. The requested testimony would provide facts and issues around his or the DOJ's knowledge of and involvement in investigations relating to Ms. Attkisson, including the DOJ OIG Abbreviated Report of Investigation. *See* Attkisson Aff. ¶ ¶ 55, 67-69.
Deposition of Dean Boyd (DOJ)	The requested testimony from Mr. Boyd regards matters surrounding a public statement he reportedly issued about Ms. Attkisson's computer intrusions. Mr. Boyd was quoted by multiple media outlets on or about May 22, 2013 as saying that "To our knowledge, the Justice Department has never 'compromised 'Ms. Atkisson's [sic] computers, or otherwise sought any information from or concerning any telephone, computer or other media device she may own or use."[9] The facts surrounding that statement, including who authorized it; the factual basis for the statement; the source of the factual information publicly disclosed; efforts made to verify the truth or accuracy of the statement; efforts made to investigate

[9] https://www.politico.com/blogs/media/2013/05/doj-we-havent-compromised-sharyl-attkissons-computers-164537

	the basis for the statement; and the identity of persons with knowledge of these facts.; and who Mr. Boyd communicated with inside and/or outside of the agency about the public disclosure; along with a timeline of his involvement and the disclosure are all critical issues relevant to the issues in the litigation.
Deposition of Michael Horowitz (DOJ)	The requested testimony from Mr. Horowitz concerns his participation and input into the agency's investigation into the intrusions into one of Sharyl Attkisson's personal computers. The facts sought include the source of his information; who briefed him on the case and what information was shared and provided; the factual details of his communications with others inside and/or outside the agency; who had access to the evidence; who was involved in manipulating or searching the evidence, including evidence collected from Cyberpoint; how the forensic investigation carried out; the software sources identified; the tools used with the software investigation; the methodology used and undertaken; the facts that led to the conclusions drawn; the bases for those conclusions; the factual interviews and identification of persons with information that were allegedly completed about the alleged individuals involved in the surveillance; his communications regarding the work undertaken, and the drafts and reports released to or withheld from Ms. Attkisson and Congress; and the efforts undertaken to confirm the involvement and background of the defendants alleged to have been involved, including facts to verify work, employment, and job tasks relating to the Attkissons.
Deposition of Shawn Henry (DOJ)	Mr. Henry, along with Mr. Rosenstein, were originally defendants in the litigation. Mr. Henry is a resident and citizen of Virginia and previously served as the head of the Washington, D.C. field office of the Federal Bureau of Investigation ("FBI") in addition to serving as the Executive Assistant Director of the Criminal, Cyber, Response, and Services branch under FBI Director Robert Mueller. (ECF Doc. 31) According to statements of one of the co-defendants in the litigation, Mr. Henry was ordered to conduct illegal home surveillance of the Attkisson family in March, 2011. (ECF Doc. 31) The *Bivens* claim against Mr. Henry was dismissed based on a similar ruling from the Fourth Circuit that this represented a "new" *Bivens* context under the Fourth Amendment and could not be asserted against a "high-level" government official like Mr. Henry. (ECF Doc. 31). We seek detailed testimony from Mr. Henry regarding his alleged participation in and/or knowledge of the illegal computer surveillance of

	Ms. Attkisson while he was employed by the government, a claim which forms the basis of the litigation. We would like to know the veracity of the co-defendant's admissions; whether and who he communicated with inside and outside of the agency regarding Ms. Attkisson, if anyone; a timeline of events; who was involved with him; what tools were used as part of the surveillance; how it was organized; from where; the content and context of the communications, as well as a timeline of events. The requested testimony seeks relevant facts and issues about the identity of suspected participants; employment issues; job assignments; techniques, methods, and software used in government surveilling; and any personal or second-hand knowledge of the surveillance and investigation of Plaintiffs. See Attkisson Aff. ¶ 72.

Unlike cases where a party's motion under Rule 56(d) was denied for procedural deficiencies, Plaintiffs have properly submitted an affidavit "[specifying] legitimate needs" for additional discovery, including background facts known publicly and confirming the need and necessity for the discovery. *Nguyen*., 44 F.3d 234, 242 (4th Cir. 1995). Given the obstructions to previous discovery requests and unwillingness to provide any information whatsoever, including the government's rather odd and unusual denials of knowledge of facts known to exist publicly, there is likely even more discoverable information surrounding the Defendants' illegal intrusions that cannot be known to Plaintiffs unless more discovery is conducted.

2. PLAINTIFFS HAVE NOT HAD A FAIR OR ADEQUATE OPPORTUNITY TO CONDUCT DISCOVERY OF KEY GOVERNMENT PERSONNEL KNOWN TO HAVE FIRST-HAND KNOWLEDGE OF THE EVENTS OR INVESTIGATION

Summary Judgment should also be denied under Rule 56(d) because there has not been fair or adequate opportunity for discovery. *See Harrods*, 302 F.3d 214, 244 (4th Cir.2002).

Specifically, the discovery that has previously been denied by the government as requested by the Plaintiffs in its pending Petition.[10]

A Rule 56(d) motion must be granted "where the nonmoving party has not had the opportunity to discover information that is essential to [its] opposition." *Harrods*, 302 F.3d 214, 244 (4th Cir. 2002) (quoting *Anderson.,* 477 U.S. 242, 250 n. 5 (1986)). Summary judgment is generally appropriate only after "adequate time for discovery." *Evans*, 80 F.3d 954, 961 (4th Cir. 1996) (citing *Celotex Corp.,* 477 U.S. 317, 322 (1986)).

The Plaintiffs' Petition is a classic example of not having an "adequate opportunity to discover information." *Anderson*, 477 U.S. 242, 250 n. 5 (1986)[11]. Since as early as 2014, the government has been stonewalling the Plaintiffs' valid inquiries for information, Freedom of Information Act requests, and discovery requests both before this Court and others.[12] The Petition and the Affidavit chronicle the nearly decade-long pattern of government obfuscation, delays, refusals, and falsities that have frustrated her search for information and justice after being illegally surveilled by the Defendants.[13] The Department of Justice's remarkable commitment to hiding information likely to corroborate Plaintiffs' claims has notably garnered attention from several U.S. Senators since as early as 2013, including Senator Ron Johnson, who publicly wrote to the Department of Justice's Office of the Inspector General in 2022 expressing his "concern[] about these unresolved questions regarding the alleged surveillance of Ms. Attkisson" and commenting on the government's "successful[] resist[ance] in providing any meaningful answers or insights

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[10] Pet'rs Compl. Ex. 5, Attkisson v. United States of America, No. 1:23-cv-01106-JRR at 2, 15-16 (D. Md. Apr. 25, 2023).

[11] *See Attkisson v. Holder*, 925 F.3d 606, 638 (4th Cir. 2019) (Wynn, J., dissenting) ("Given the government's longstanding opposition to affording Attkisson *any* discovery—including its initial Kafkaesque position that Attkisson was not entitled to obtain discovery …") (emphasis in original).

[12] Attkisson Aff. ¶¶ 48-63.

[13] *Id.*

into the matter."[14] The Court's favorable ruling on the pending Petition would be the Plaintiffs' *first real opportunity* to obtain meaningful discovery essential to prove its claims. Accordingly, summary judgment should be denied.

3. <u>OTHER FACTORS WAY IN FAVOR OF DENYING SUMMARY JUDGMENT</u>

By default, and as this Court has noted, Rule 56(d) motions are "broadly favored and should be liberally granted." *McCray*, 741 F.3d 480, 483-84 (4th Cir. 2014) (citing *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.,* 721 F.3d 264, 281 (4th Cir. 2013)). However, Rule 56(d) motions are afforded an even *stronger preference* where the requested discovery lies outside of the requesting party's control. *See Ingle ex Rel. Estate of Ingle v. Yelton*, 439 F.3d 191, 196 (4th Cir. 2006) ("courts should hesitate before denying Rule 56(f) motions when the party opposing summary judgment is attempting to obtain necessary discovery of information possessed only by her opponent.").

Summary judgment is especially premature at this stage because the very documents, testimony, and information requested in the Petition are uniquely within the Petition Respondents' exclusive control. *See also Harrods*, 302 F.3d 214, 246 (4th Cir. 2002) ("[s]ufficient time for discovery is considered especially important when the relevant facts are exclusively in the control of the opposing party.") (quoting 10B Charles A. Wright, Arthur R. Miller, Mary Kay Kane, Federal Practice Procedure § 2741, at 419 (3d ed. 1998). Here, the facts necessary to prove the Plaintiffs allegations are completely outside of their control. Even more, the government Respondents have a unique level of exclusivity over their documents, electronic systems, and personnel and command rigorous legal procedures that make the discovery process more difficult.

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[14] Attkisson Aff. (Ex. 1) and Exhibit 2, Letter from Senator Ron Johnson to William P. Barr, Attorney General, Dept. of Justice (Jan. 8, 2020).

The Petition Respondents have made every effort to keep such information exclusive. It is perhaps no great surprise that the Respondents are so unwilling to disclose any information whatsoever, considering that the information sought likely would reveal the source and attribution of its (and the Defendants') illegal intrusions of the Plaintiffs' privacy. *See Harrods*, 302 F.3d 214, 246-47 (4th Cir. 2002) ("summary judgment prior to discovery can be particularly inappropriate when a case involves complex factual questions about intent and motive").

Lastly, it is likely that the Court's pending ruling on Plaintiffs Petition will render the MSJ moot and therefore judicial economy will be better served by first resolving the Petition's requested review of the agency decision to not participate in the discovery process.

4. PLAINTIFFS HAVE BEEN DILIGENT IN THEIR PURSUIT FOR DISCOVERY

Defendant argues that Rule 56(d) does not apply because the Plaintiffs have had "ample time and opportunity" to develop discovery.[15] The Defendant's argument, with all due respect, flagrantly ignores the record and reality, and directly defies the words from the Fourth Circuit noting Plaintiffs' "diligence" and untiring efforts to conduct necessary discovery. As the Fourth Circuit noted back in 2019[16]:

> In this case, the government—not unlike Dean Smith's Tar Heels—put up the "fours" when Plaintiff-Appellant Sharyl Attkisson, a journalist formerly employed by CBS News, filed suit against unnamed employees and agents of the federal government (the "Doe Defendants"). Attkisson alleged that the Doe Defendants conspired to violate her constitutional and statutory rights by accessing and commandeering her home and work internet-connected devices for surveillance purposes. But Attkisson never got a meaningful opportunity to pursue her claims because <u>the government did everything in its power to run out the clock on Attkisson's action—it filed motions challenging venue and jurisdiction, motions</u>

[15] Def.'s Mot. Summ. J. 22-25, ECF No. 109.

[16] WYNN, Circuit Judge, concurring in part and dissenting in part: *Attkisson v. Holder*, 925 F.3d 606, 628 (4th Cir. 2019).

challenging the sufficiency of service, motions for extension of time, motions to dismiss, and motions for protective orders.

And just as the Tar Heels had great success running the Four Corners, the government's strategy worked. Although Attkisson **diligently** sought to identify the Doe Defendants for nearly four years—including by repeatedly serving discovery on the government and third-parties directed at identifying the Doe Defendants—the district court dismissed her case with prejudice against the Doe Defendants for failing to comply with a court order to identify the names of the Doe Defendants by a date certain. The district court did so even though the government's delaying tactics deprived Attkisson of any meaningful opportunity to engage in the discovery necessary to identify the Doe Defendants.

… But this Court long has held that plaintiffs—like Attkisson—who state a plausible claim that unnamed defendants violated their constitutional or statutory rights are entitled to a meaningful opportunity to engage in discovery aimed at identifying the "true identity of an unnamed party." *Schiff v. Kennedy* , 691 F.2d 196, 197–98 (4th Cir. 1982). And this Court has held that dismissal of an action for failure to comply with a court order is a "drastic" sanction, *Hillig v. C.I.R.* , 916 F.2d 171, 174 (4th Cir. 1990), that courts should impose only in "extreme circumstances," *Reizakis v. Loy* , 490 F.2d 1132, 1135 (4th Cir. 1974).

Because the government deprived Attkisson of a meaningful opportunity to identify the Doe Defendants and the district court never determined that the requisite "extreme circumstances" were present to warrant dismissal for failure to comply with a court order, I disagree with the majority opinion's determination that the district court permissibly exercised its discretion in dismissing Attkisson's claims against the Doe Defendants. Not only should we disapprove of the tactics the government used to run out the clock on Attkisson's claims, but we should also reject the troubling "game plan" it provided for the government and private parties to prevent disclosure of—and, therefore, responsibility for—their potentially unconstitutional or illegal electronic surveillance activities. Accordingly, I respectfully dissent as to the dismissal of Attkisson's claims against the Doe Defendants. *Attkisson v. Holder*, 925 F.3d 606, 628-30 (4th Cir. 2019). (emphasis added)

The Defendant's argument for lack of diligence defies the words from the Fourth Circuit years earlier; defies the factual record; and flagrantly attacks a victim seeking simple justice who has repeatedly been stonewalled by her own government.

While Plaintiffs certainly agree that its diligent pursuit of discovery has exhausted "ample time" and resources, it cannot agree that its inability to obtain discovery was due to its own delay or lack of effort. Indeed, the Petition and Affidavit demonstrate that Plaintiffs have endured several *Touhy* proceedings, litigated motions to compel, and countless requests for information all to the same end – government delay, obfuscation, and indifference.[17] Rule 56(d) protection is only prohibited where a party has an "opportunity to discover evidence but [chooses] not to." *McCray*, 741 F.3d 480 (4th Cir. 2014) (citing *Harrods*, 302 F.3d at 246 (4th Cir. 2004)). Plaintiffs have exercised all possible diligence in pursuing discovery, including by filing its Petition seeking this Court's review of the Respondents' "arbitrary capricious, [and] otherwise unlawful" failure to participate in the discovery process." 5 U.S.C.A. § 706(2)(A)-(B).

CONCLUSION

The Defendants' MSJ is premature and should be denied under Rule 56(d), which exists to help prevent "railroading the non-moving party through a premature motion for summary judgment before the non-moving party has had the opportunity to make full discovery." *Dickens v. Whole Foods Market Group, Inc.*, 2007 WL 1034937 (D.D.C. Apr. 3, 2007). In the present case, the Defendants are attempting to railroad the Plaintiffs (and this Court's review authority under the APA) through their premature MSJ.

WHEREFORE Plaintiffs pray this Court deny Defendant Shaun Bridges' Motion for Summary Judgment.

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[17] *See e.g.*, Attkisson Aff. ¶¶ 14-47, ¶¶ 48-63.

Respectfully submitted this, 13th day of June, 2023.

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COUNSEL FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will transmit a true and correct copy of the same to all parties in this matter.

/s/ C. Tab Turner
Tab Turner