UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS, et al.,	5:82-CV-0783 (Lead) 5:82-CV-1114 (Member) 5:89-CV-0829 (Member)
Plaintiffs,	
v.	**PLAINTIFFS THE MOHAWKS OF AKWESASNE BY AND THROUGH THE MOHAWK COUNCIL OF AKWESASNE'S AND PEOPLE OF THE LONGHOUSE BY THE MOHAWK NATION COUNCIL OF CHIEFS' REPLY IN SUPPORT OF MOTIONS FOR PARTIAL SUMMARY JUDGMENT**
THE STATE OF NEW YORK, et al.,	
Defendants.	

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INTRODUCTION

On January 19, 2021, the parties told the Court they "agreed that there are issues that can be resolved as a matter of law and need not be the subject of discovery" and "in an effort to narrow discovery to issues that truly require factual development, the parties requested the opportunity to file dispositive motions on specific legal issues that will go to liability or defenses posed by the parties." ECF No. 757 at 2. The Mohawks of Akwesasne by and through the Mohawk Council of Akwesasne ("MCA") and the People of the Longhouse at Akwesasne by the Mohawk Nation Council of Chiefs ("Nation") acted on this agreement by seeking partial summary judgment on necessary and dispositive elements of their claims, in order to resolve them and narrow the issues for discovery and future resolution. *See* ECF Nos. 769-2 ("MCA Memo."); 770-1 ("Nation Memo."). In their Response ("Resp."), ECF No. 788, rather than opposing MCA's and the Nation's arguments, Defendant State of New York and Municipal Defendants ("Defendants") argue that Defendants' affirmative defense of laches precludes the Court from granting summary judgment on any issue without further discovery. This unjustified reversal does not provide a basis to deny, or to postpone deciding, any of the Plaintiffs' motions.

ARGUMENT

Rather than contesting Plaintiffs' legal arguments, Defendants try to erect procedural barriers to decision. Those barriers crumble upon examination. Granting MCA's and the Nation's motions is not premature because the existence of multiple issues does not preclude summary judgment on one or some of those issues. The Court has already rejected Defendants' effort to postpone deciding the motions, *see* ECF Nos. 774 to 775, and should do so again here. Defendants' effort to invoke Rule 56(d) fails for an insufficient affidavit and the lack of need for discovery. Therefore, because Defendants have conceded the legal arguments in Plaintiffs' motions, MCA and the Nation respectfully request the Court grant their Motions, as well as the other Plaintiffs'.

I. MCA and the Nation Properly Seek Summary Judgment on the Merits.

Obviously, a claimant must succeed on the merits to receive relief. The resolution of necessary elements of the merits of a claim is therefore dispositive and relevant. Such resolution will narrow the issues for discovery and for the court to decide in later stages of the case. That is the purpose of the Court's scheduling order under which the Plaintiffs submitted these motions. *See* ECF No. 757 at 2. This alone justifies MCA's and the Nation's motions on the elements of a Non-intercourse Act ("NIA") *prima facie* claim and Defendants' counterclaims.

Defendants argue that partial summary judgment on those issues is improper because in its 2013 Order, this Court established that the outcome of this case turns only on the resolution of the question of laches presented by *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005). Resp. at 12-13. This is wrong for two reasons. First, Defendants misread the 2013 Order, which held that Defendants' motions raising laches should be granted as to some claims but not the Hogansburg Triangle claims, leaving them for future adjudication. *Canadian St. Regis Band of Mohawk Indians v. New York* ("*St. Regis XVII*"), Nos. 5:82-cv-0783, 5:82-cv-1114, 5:89-cv-0829 (LEK/TWD), 2013 WL 3992830, at *15-20 (N.D.N.Y. July 23, 2013). Second, Defendants misunderstand the relationship between the merits of a land claim and the defense of laches. *Sherrill* expressly acknowledged the distinction between "[t]he substantive questions whether the plaintiff has any right or the defendant has any duty, and if so what it is" and "the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is." 544 U.S. at 213; *accord Oneida Indian Nation of N.Y. v. County of Oneida*, 199 F.R.D. 61, 90 (N.D.N.Y. 2000) ("there is a sharp distinction between the *existence* of a federal common law right to Indian homelands and how to *vindicate* that right"). In other words, the merits of a claim and defenses to the claim—like laches—are distinct questions. *Both* must be resolved for a claimant to obtain relief. Here, the only issues the parties have asked the Court to decide are merits

questions. The Court does not need to wait for the Defendants to collect factual material related to the remedy to resolve Plaintiffs' motions on those questions.

Rule 56 plainly allows the Court to act on these motions now. A motion for summary judgment properly seeks judgment on a "claim or defense—or . . . part of [a] claim or defense . . . ." Fed. R. Civ. P. 56(a); *see id.*, adv'y comm. note to 2010 amend. ("[S]ummary judgment may be requested not only as to an entire case but also as to a claim, defense, or part of a claim or defense."). For that reason, the Court can properly grant summary judgment on elements of a claim while leaving remedy questions unresolved. *See Gowanus Indus. Park, Inc. v. Arthur H. Sulzer Assocs.*, 436 F. App'x 4, 5 (2d Cir. 2011) (discussing district court's grant of partial summary judgment on liability but not damages). Additionally, the court may also grant summary judgment on one claim or defense, and not others. *See Hotel 71 Mezz Lender LLC v. Nat'l Ret. Fund*, 778 F.3d 593, 606 (7th Cir. 2015) ("There is no doubt that a court may grant, and a party may seek, summary judgment as to one party or one claim, leaving other claims and other parties to be addressed a later point in the litigation."). That is the proper function of a motion for partial summary judgment. *See* Fed. R. Civ. P. 56(a), adv'y comm. note to 2010 amend. ("The subdivision caption adopts the common phrase 'partial summary judgment' to describe disposition of less than the whole action."). This defeats Defendants' position that the existence of an affirmative defense precludes the Court from granting Plaintiffs' motions.

Defendants produce no contrary authority. They cite a portion of the Court's 2013 Order, Resp. 12-13, laying out the standard applicable to the Defendants' Rule 12(c) motions, which only raised laches. *St. Regis XVII*, 2013 WL 3992830, at *2.[1] That recitation of the applicable standard for those motions does not show that the Court can now only grant summary judgment on laches.

[1] Despite Defendants' contrary assertion, Resp. at 13, *St. Regis XVII* did not concern Rule 12(e).

Defendants also wrongly assert that other land claims cases support their urged approach. In *Sherrill*, the Supreme Court applied laches *sua sponte* and did not disapprove of resolving the merits of land claims in this context, *see* 544 U.S. at 214 n.8, while also noting the distinction between merits and remedies, *see supra* at 2. In *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 273-74 (2d Cir. 2005), the Second Circuit applied *Sherrill* on appeal, since the district court had issued its decision before the Supreme Court's opinion, *see id.*, and did not suggest that the existence of an affirmative defense precluded summary judgment on the merits. Defendants also cite *Onondaga Nation v. New York*, 500 F. App'x 87 (2d Cir. 2012), *aff'g* No. 5:05-cv-0314 (LEK/RFT), 2010 WL 3806492 (N.D.N.Y. Sept. 22, 2010). But *Onondaga* was decided on a Rule 12(b)(6) motion, brought only on the issue of whether laches totally barred relief on the Onondaga Nation's claims. 500 F. App'x at 88-89; 2010 WL 3806492, at *1, 4; *see Canadian St. Regis Band of Mohawk Indians v. New York* ("*St. Regis XVI*"), Nos. 5:82-cv-0783, 5:82-cv-1114, 5:89-cv-0829, 2012 WL 8503274, at *15 (N.D.N.Y. Sept. 28, 2012), *accepted in part & rejected in part*, *St. Regis XVII*. This case has proceeded past that stage. *Onondaga* does not control whether the Court may award summary judgment on claims not barred by laches under *St. Regis XVII*.[2]

II. Defendants Have Not Shown that Discovery Is Necessary to Resolve MCA's and the Nation's Motions.

Defendants then argue, relying on Rule 56(d), that the Plaintiffs' motions, including MCA's and the Nation's, are "premature" because there has not been discovery. Defendants' reliance on Rule 56(d) fails because they have not submitted a proper affidavit and discovery is not necessary. Resp. 14-17. A Rule 56(d) affidavit must explain:

> (1) what facts are sought to resist the motion and how they are to be obtained,
> (2) how those facts are reasonably expected to create a genuine issue of material

[2] MCA and the Nation join the additional reasons why summary judgment is not premature described in the St. Regis Mohawk Tribe's ("SRMT") and United States' reply briefs.

> fact, (3) what effort the affiant has made to obtain them, and (4) why the affiant has been unsuccessful in those efforts.

Car-Freshner Corp. v. Getty Images, Inc., 822 F. Supp. 2d 167, 173 (N.D.N.Y. 2011) (quoting *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 303 (2d Cir. 2003)). A successful affidavit describes what evidence would help show a dispute of material facts, explains how each piece of evidence called for would do so, and sufficiently explains why the non-movant has not yet obtained the evidence. *See, e.g.*, *Carollo v. United Capital Corp.*, No. 6:16-cv-13, 2021 WL 1115294, at *4 (N.D.N.Y. Mar. 24, 2021). A sufficient affidavit is required even when parties have not conducted discovery. *Riley v. Town of Bethlehem*, 44 F. Supp. 2d 451, 459 (N.D.N.Y. 1999).

Defendants make no effort at all to comply with these requirements. They do not describe what facts they would seek to resist any of plaintiffs' motions on the existence of elements of the NIA *prima facie* case or how the facts would be "reasonably expected" to create any disputes. Nor do they describe their efforts to obtain facts and why they failed. Defendants instead only argue that discovery is necessary to develop the factual record because the elements of the NIA *prima facie* case are "fact intensive," Resp. at 15, and they should obtain relief under Rule 56(d) because they have not had the opportunity to undertake formal discovery on "the various complex claims which Plaintiffs now seek to resolve via summary judgment," *id.* at 16. That does not comply with, or excuse, the requirements for a sufficient Rule 56(d) affidavit. *See Riley*, 44 F. Supp. 2d at 459. And in any event, Defendants make no serious assertions that resolving MCA's and the Nation's motions depends on facts that they can only get through discovery.

Discovery is not necessary at all to resolve MCA's motion as to the first factor of the NIA *prima facie* case, as Defendants have admitted the fact that MCA is "an Indian tribe recognized

under the laws of Canada." *Compare* ECF No. 792 at 2, ¶ 1, *with* ECF No. 769-1 at 1, ¶ 1.[3] Although they deny that this is a material fact to "the issues currently before the Court," *see* ECF No. 792 at 2, ¶ 1, their view is that the only issue "currently before the Court" is laches, *see* ECF No. 788 at 5, so they do not deny that the issue is material to the first *prima facie* NIA element. Defendants make absolutely no effort to address the need for discovery on this issue in their supporting affidavit. *See* ECF No. 789 at 8-10, ¶¶ 27-34. Finally, as MCA demonstrated in its motion—and which Defendants do not contest in their response—Defendants conceded earlier in the litigation that MCA is an Indian tribe, and the facts supporting that conclusion are publicly available and incontrovertible. *See* MCA Memo. at 10 & n.4.

The other issues on which MCA and the Nation seek summary judgment depend on official actions or lack thereof by the federal government after the Treaty with the Seven Nations of Canada, May 31, 1796, 7 Stat. 55. *See* MCA Memo. at 21 & n.9; Nation Memo. at 5 n.2, 6-9. These are the acts of a democratic government, which are shown by legal enactments or documents in the public record. Defendants' failure to obtain them does not justify further discovery under Rule 56(d).[4] "[M]atters of law . . . are inappropriate subjects for discovery requests" and so cannot support a Rule 56(d) request. *Players, Inc. v. City of New York*, 371 F. Supp. 2d 522, 530

[3] Defendants object to MCA's statement of facts, saying that "reference to previously docketed pleadings, affidavits and exhibits without providing copies thereof . . . is improper." ECF No. 792 at 2. MCA cited to the documents relied upon, as required by the rules. *See* Fed. R. Civ. P. 56(c)(1)(A); Local Rule 56.1(a); *Albertin v. Nathan Littauer Hosp. & Nursing Home*, No. 1:18-cv-1422, 2021 WL 1742280, at *7 n.8 (N.D.N.Y. May 4, 2021). MCA can provide copies of these documents at the Court's request.

[4] There is no support for Defendants' assertion that the application of legal texts is a question of fact because the treaties and purported treaties at issue are "decades" or "centuries" old. Resp. at 16. The interpretation of treaties, no matter how old, is a "question of law for a court to decide." *Cayuga Indian Nation of N.Y. v. Cuomo*, 758 F. Supp. 107, 111 (N.D.N.Y. 1991) (interpreting one-hundred-ninety-seven-year-old Treaty of Canandaigua, Nov. 11, 1794, 7 Stat. 44); *accord Georges v. UN*, 834 F.3d 88, 92-93 (2d Cir. 2016) (interpreting forty-six-year-old Convention on Privileges and Immunities of the United Nations, Apr. 29, 1970, 21 U.S.T. 1418).

(S.D.N.Y. 2005). To the extent that Defendants may seek other documents related to the federal government's actions, they have ample opportunity to find them in the public record, and discovery is not required. *See Sage Realty Corp. v. Ins. Co. of N. Am.*, 34 F.3d 124, 127-28 (2d Cir. 1994) (rejecting request for further discovery on facts that were publicly available to non-movant); *Players, Inc.*, 371 F. Supp. 2d at 530; *Payton v. CUNY*, 453 F. Supp. 2d 775, 787 (S.D.N.Y. 2006) (rejecting request in part because non-movant sought publicly available document). In contrast, Defendants' cases that denied summary judgment before formal discovery, Resp. at 15-16, involved factual disputes where a party had information that the other party could not obtain without discovery. *Ass'n of Car Wash Owners v. City of New York*, 911 F.3d 74, 83-84 (2d Cir. 2018) (costs of bonds and plaintiffs' financial situation)[5]; *Hellstrom v. U.S. Dep't of Veterans Affairs*, 201 F.3d 94, 97-98 (2d Cir. 2000) (employer's true motivation in demoting employee); *Sutera v. Schering Corp.*, 73 F.3d 13, 18 (2d Cir. 1995) (employer's true motivation in firing employee); *Crystaline H_2O, Inc. v. Orminski*, 105 F. Supp. 2d 3, 8-9 (N.D.N.Y. 2000) (whether contracting parties had meeting of the minds).[6]

Defendants assert they have "not had the same opportunity" as Plaintiffs to find documents, ECF No. 789 at 10 ¶ 33, and they need discovery to do so, Resp. at 6, 12. Not so. This litigation has been pending for years, and Defendants received multiple extensions before filing their

[5] In fact, in *Association of Car Wash Owners*, the defendants submitted affidavits and exhibits detailing the information held by the plaintiffs that they needed, how it was related to the issues of material fact, and why they could not otherwise obtain it. *See, e.g.*, Ex. 1, Decls. of Jeffrey F. Dantowitz & Patrick A. Bradford, *Ass'n of Car Wash Owners v. City of New York*, No. 15-CV-8157 (AKH)(DCF) (S.D.N.Y. filed Mar. 14, 2017).

[6] In *Trebor Sportswear Co. v. Ltd. Stores, Inc.*, 865 F.2d 506 (2d Cir. 1989), the court affirmed the denial of Rule 56(d) relief where the appellants had "ample time to conduct discovery" and "proffered no persuasive basis for the district court to conclude that further discovery would yield" relevant evidence. *Id.* at 511-12 (citing former Rule 56(f)). Just as in *Trebor*, Defendants have had ample time to obtain facts and have given no persuasive basis for further discovery.

response. Indeed, throughout this litigation the parties have uncovered and presented reams of information to the Court without formal discovery. *See* ECF Nos. 63 to 63-20; 65; 67 at 24-31; 97 at 16-44; 136 at 23-32; 182 to 182-14; 191-1; 260; 474 to 474-40; 475 to 482-9; 768-4 to 768-11; 771-2 to 771-15; 772-1 to 772-10.

In their Affirmation, Defendants also cite the Court's 2003 decision denying in part the Mohawk Plaintiffs' Rule 12(f) motion to strike certain affirmative defenses because the factual record had not been developed at that time. ECF No. 789 at 8-9, ¶¶ 29-30 (quoting *Canadian St. Regis Band of Mohawk Indians ex rel. Francis v. New York* ("*St. Regis VI*"), 278 F. Supp. 2d 313, 345-46, 347-48 (N.D.N.Y. 2003)). The Court in the quoted passages of *St Regis VI* was deciding a motion made on the pleadings, *see* ECF Nos. 240 at 2; 241 at 6-7,[7] and that does not govern how the parties can develop facts at this stage, *see St. Regis VI*, 278 F. Supp. 2d at 324-25.

Defendants' request for 56(d) relief is also foreclosed by their own agreement in January that there are dispositive issues in the case that do not require discovery, that the parties were determining what those issues were, and that motions on those legal issues should be filed this May with an agreed-upon briefing schedule to follow. *See* ECF No. 757 at 2. Defendants knew motions on dispositive issues were coming before discovery and had agreed to a schedule that would give them time to prepare for them. "A party who fails 'to use the time available [for discovery] and takes no steps to seek more time until after a summary judgment motion has been filed need not be allowed more time for discovery absent a strong showing of need.'" *Jaiyeola v. Carrier Corp.*, 562 F. Supp. 2d 384, 391 (N.D.N.Y. 2008) (alteration in original) (quoting *Burlington Coat Factory Warehouse Corp. v. Esprit De Corp.*, 769 F.2d 919, 928 (2d Cir. 1985)).

[7] Defendants mistakenly say that the quoted language in ¶ 30 of their Affirmation related to motions to dismiss, *see* ECF No. 789 at 9, but that passage concerned only the motion to strike.

The Court has already rejected Defendants' back-pedaling from their earlier agreement to set a dispositive briefing schedule, ECF Nos. 774 to 775, and they have not made a "strong showing."

Defendants point to another issue—the standing of MCA and the Nation—and argue that the Court cannot grant summary judgment on liability until it is resolved. Resp. at 14-15. But Defendants do not provide a sufficient Rule 56(d) affidavit on the relevant facts relating to standing that they need to gather through discovery and why they cannot get them another way. *See supra* at 4-6. That is not all. Since the Court can order summary judgment on some issues without deciding all of them, any material that Defendants could discover on standing is not germane to their defense against MCA's and the Nation's motions. *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1138 (2nd Cir. 1994) ("[l]itigants seeking relief under [Rule 56(d)] must show that the material sought is germane to the defense" (citation omitted)). Moreover, MCA's and the Nation's standing only needs to be resolved in this case if neither the United States nor SRMT have standing, *see, e.g.*, *Duke Power Co. v. Carolina Envt'l Study Grp., Inc.*, 438 U.S. 59, 72 n.16 (1978); *Doe v. Bolton*, 410 U.S. 179, 189 (1973); *Ragbir v. Homan*, 923 F.3d 53, 57 n.2 (2d Cir. 2019), *vacated on other grounds sub nom. Pham v. Ragbir*, 141 S. Ct. 227 (2020), and Defendants are not now contesting those Plaintiffs' standing, *see St. Regis VI*, 278 F. Supp. 2d at 325-29 (striking State's prior affirmative defense, asserting SRMT lacks standing).

III. The Court Should Grant MCA's and the Nation's Motions.

When a party opposing summary judgment on Rule 56(d) grounds fails to show that further discovery is necessary, then the court should grant summary judgment when the memorandum on file shows it is warranted. *See Sage Realty*, 34 F.3d at 126-28 (affirming district court's denial of relief under former Rule 56(f) and grant of summary judgment); *Jeanty v. City of Utica*, No. 6:16-cv-00966 (BKS/TWD), 2021 WL 149051, at *38-39 (N.D.N.Y. Jan. 14, 2021). MCA and the Nation respectfully ask the Court to do so here based on the arguments in their memorandums and

SRMT's arguments incorporated into MCA's and the Nation's memorandums, MCA Memo. at n.9; Nation Memo. at 5 n.2, which are correct, and which Defendants have conceded.

Defendants conceded these arguments by failing to contest any of them. Instead, Defendants merely asserted that "the only issue remaining in this action is whether Plaintiffs' claim to the Hogansburg Triangle is . . . barred under *Sherrill* and *Cayuga*," Resp. at 5, and further that "the outcome of plaintiffs' assertion of rights to ancestral lands does not turn on its interpretation of the Non-Intercourse Act, but the viability of defendants' arguments under *Sherrill*," *id.* at 12. By failing to respond, Defendants have consented to Plaintiffs' arguments. *See Martineau v. Newell*, No. 9:17-cv-0983 (LEK/ML), 2019 WL 7606069, at *6 (N.D.N.Y. Oct. 15, 2019), *adopted as modified on other grounds* 2019 WL 5883686 (N.D.N.Y. Nov. 12, 2019); *Maioriello v. N.Y. State Office for People with Dev'l Disabilities*, 272 F. Supp. 3d 307, 333 (N.D.N.Y. 2017); *Frink Am., Inc. v. Champion Rd. Mach. Ltd.*, 48 F. Supp. 2d 198, 208-09 (N.D.N.Y. 1999) (collecting cases). Therefore, MCA and the Nation succeed if they show their arguments "possess[] facial merit, which has appropriately been characterized as a 'modest' burden." *Martineau*, 2019 WL 7606069, at *6; *Estate of D.B. ex rel. Briggs v. Thousand Islands Cent. Sch. Dist.*, 327 F. Supp. 3d 477, 526 (N.D.N.Y. 2018) (citations omitted); *see Estate of D.B.*, 327 F. Supp. 3d at 488 n.5, 503 n.62, 508 n.81 (noting that non-movant demanded additional discovery but did not comply with Rule 56(d)). They have met that burden here—as have the United States and SRMT.

CONCLUSION

For these reasons, the Court should grant MCA's and the Nation's motions.

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Respectfully submitted,

Dated: September 22, 2021

/s/ Frank S. Holleman

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2021, I electronically filed the above and foregoing document and attachments with the Clerk of Court via the ECF System for filing.

/s/ Frank S. Holleman
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