UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The Oneida Indian Nation of New York State, et al.,

Plaintiffs,

v. Civil Action No. 70-CV-35 (NPM)

The County of Oneida, New York, et al.,

Defendants.

The Oneida Indian Nation of New York State, et al.

Plaintiffs,

v. Civil Action No. 74-CV-187 (LEK)

The County of Oneida, New York, et al.,

Defendants.

BOND, SCHOENECK & KING'S OBJECTIONS PURSUANT TO 28 U.S.C. §636(B)(1) TO THE REPORT-RECOMMENDATION AND ORDER ON THE MOTION TO HAVE THIS COURT RECOGNIZE BOND, SCHOENECK & KING'S ENTITLEMENT TO A FEE PURSUANT TO ITS RETAINER AGREEMENT WITH THE ONEIDA INDIAN NATION

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OBJECTIONS TO THE REPORT, RECOMMENDATION AND ORDER OF THE HONORABLE RANDOLPH E. TREECE DATED FEBRUARY 18, 2011

Bond, Schoeneck & King, PLLC ("BS&K") objects only to that portion of Judge Treece's Report, Recommendation and Order contained at section IV, pages 54-56, in which Judge Treece, by misunderstanding the relief sought by BS&K in its motion, and by misinterpreting the retainer agreement between BS&K and the Oneida Indian Nation of New York (the "New York Oneidas"), prematurely and improperly calculated the amount of the legal fees to which BS&K is entitled.

The basis for BS&K's objections are set forth in detail below and are also articulated in the papers submitted by BS&K in its Motion to Have this Court Recognize its Right to a Fee Pursuant to Retainer Agreement and Charging Lien, previously filed with District Court in two separate but related actions designated as 5:70-CV-35(LEK) and 5:74-CV-187(LEK/DRH).

INTRODUCTION

In 1965, the Oneida Indian Nation of New York (the "New York Oneidas") came to Bond, Schoeneck & King ("BS&K") on a quixotic effort to obtain legal redress and monetary compensation for Oneida land taken by the State of New York through a series of illegal treaties. When Jacob Thompson, President of the New York Oneidas, came to BS&K, no State or Federal Court would hear a Native American land claim. BS&K took on this cause with no apparent solution, at a time when the Oneida tribes were virtually penniless. There was little besides a thirty-two acre reservation in Oneida. Today, the Oneida Nation of New York is the largest employer in Oneida and Madison Counties, and the Oneida Nation of New York enjoys prosperity and riches undreamed of in 1966. All this takes place on lands that the Oneida Nation now controls, and the foundation of its control rests on the results of the case that BS&K began in 1970, and tried to a successful conclusion in 1977.

In 1999, as the third decade of the Oneida's land claim litigation was drawing to a close, BS&K filed a limited motion asking the Court to recognize its right to a fee. BS&K had represented the Oneidas from 1966 through 1978. The motion was referred to Magistrate Judge Treece for a recommendation. On February 18th of this year, Judge Treece issued his Report - Recommendation and Order. Judge Treece found that BS&K is entitled to a fee of 9% of the Oneida's recovery. However Judge Treece, in what amounted to an advisory opinion, then determined the actual amount of fees BS&K should recover, despite this issue not being presented to him on the motion. Judge Treece determined that the recovery was limited to the damages awarded in the two land claim lawsuits brought by the Oneidas. BS&K objects to that narrow definition of the term "recovery," the resolution of the fee award before full presentation, and to the fee awarded.

Limiting "recovery" to damages is not required by the terms of the fee agreement between BS&K and the New York and Wisconsin Oneidas.[1] Indeed, to view recovery as limited to damages is to ignore the entire context of the fee agreement, the strategy that BS&K followed with the full approval of the Oneidas, and the unique nature and results of this litigation. BS&K achieved far more than the Oneida's rights to two years of rent from Oneida and Madison County. BS&K established that reservation land remained the Oneidas, allowing the Oneidas to establish the lands it purchased within the reservation claim as Oneida land, with all the attributes of Oneida land. That recovery far exceeds the value of the damages – the rent plus interest — awarded in the Test Case.

Opportunity knocked for the Oneidas only after Bond, Schoeneck & King opened the door. The Oneidas answered the knock and have made much of that opportunity. BS&K does not seek compensation for what the Oneidas have built. BS&K, however, should be compensated for opening the door so opportunity could knock.

The Court should reject the narrow reading of "recovery" ascribed in the Magistrate's Report-Recommendation. The Court should hold that the "recovery" is the benefit that flowed from the Court's recognition of the Oneida's reservation rights. BS&K's equitable fee should be determined through an evidentiary hearing.

STATEMENT OF FACTS

In the spring of 1965, Jacob Thompson, then president of the New York Oneidas, first met with BS&K. *See* Affidavit of Jacob Thompson ("Thompson Aff."), dated November 22, 2002; *see also* Declaration of George C. Shattuck ("Shattuck Decl."), dated May 18, 1999, ¶

6. President Thompson was in pursuit of legal counsel to help the New York Oneidas find a way to secure compensation for Oneida land which had been illegally taken by New York State. Thompson Aff. ¶ 12; Shattuck Decl. ¶ 6. When BS&K and Jacob Thompson first met, the Oneida lands in New York, which once covered hundreds of thousands of acres, had been reduced to a mere thirty-two.

Despite BS&K's "recogni[tion] that the prospects of success were remote," over the course of more than a year BS&K agreed to represent the Oneidas if an appropriate contingent fee agreement were reached. Shattuck Decl. ¶ 9. Other than a contingent fee agreement, the New York Oneidas had no other means to pay for legal services. Thompson Aff. ¶ 11. On June 24, 1966, BS&K entered into a Retainer Agreement (the "Agreement") with the Oneidas. Shattuck Decl. ¶ 12. The Retainer Agreement was submitted to, and approved by, the Secretary of the Interior, and amended by agreement in June 1967. *Id.* The sole purpose of the Agreement was for BS&K "to advise and represent the Nation in connection with . . . the claims of the Nation against the State of New York in respect of their former lands in New York State." Shattuck Decl. Ex. 1.

BS&K and the Oneidas agreed that BS&K would not sue to demand the ejectment of those now inhabiting the tribal lands. Instead, BS&K pursued a strategy in which it first sought political relief. BS&K petitioned then President Johnson; BS&K petitioned the New York State Constitutional Convention; BS&K pursued other political remedies. Only after those non-judicial avenues failed did BS&K institute a judicial proceeding. Shattuck Decl. ¶¶ 30-46.

BS&K's strategy was cautious. It was designed to establish the rightness of the Oneida's cause without generating undue alarm or opposition. Thus, when BS&K began the first litigation on behalf of the Oneidas, BS&K did not file suit for all the hundreds of thousands of

[1] Through the pending fee application, BS&K does not seek a fee from the Oneida of the Thames.

acres that had been Oneida territory. Shattuck Decl.¶ 9-52-53. Instead, BS&K filed what is now known as the Test Case. Shattuck Decl. ¶ 53. In the Test Case, BS&K filed suit against Madison and Oneida Counties, alleging that those counties owed rent for a two year period for lands that were now in the possession of the counties, but were in fact owned by the Oneidas.

At the time BS&K commenced this action, both the United States Supreme Court (*Taylor v. Anderson*, 234 U.S. 74 (1914)) and the Court of Appeals for the Second Circuit (*Deere v. St. Lawrence River Power Co.*, 32 F.2d 550 (2d Cir. 1929)) had ruled that claims similar to those made in the Test Case did not arise under federal law. Federal courts uniformly held that such claims did not present a federal question under the "well-pleaded complaint" rule. State courts also refused to hear Native American land claims, as illustrated in such cases as *Johnson v. Long Island Railroad Co.*, 162 N.Y. 462 (1900), *Pharaoh v. Benson*, 164 A.D. 51, *aff'd* 222 N.Y. 665 (1918); *St. Regis Tribe of Mohawk Indians v. State*, 5 N.Y.2d 24 (1958).

Based on that law, both the District Court and the Second Circuit dismissed the Oneida's complaint. The Supreme Court, however, in a landmark opinion which would change the fortune of the Oneidas and of Native Americans throughout the country, held:

> we are of the view that the complaint asserted a current right to possession conferred by federal law, wholly independent of state law . . . . Given the nature and source of the possessory rights of Indian tribes to their aboriginal lands, particularly when confirmed by treaty, it is plain that the complaint asserted a controversy arising under the Constitution, laws or treaties of United States within the meaning of both §1331 and §1362.

Oneida Indian Nation of New York v. Oneida County, 414 U.S. 661, 666-67 (1974).

Following BS&K's success before the Supreme Court, BS&K researched, drafted and filed a new complaint on April 18, 1974. That complaint commenced a second action, known as the "Reservation Case." The action sought rent and other compensation for Oneida and Madison Counties' use and possession of land within the "Reservation," approximately 300,000 acres, that had been reserved by the Oneidas in the 1788 Treaty of Fort Schuyler with the State of New York.

After the commencement of the Reservation Case, this Court held a trial on liability in the Test Case before Judge Port in November 1975.[2] BS&K partners John Freyer and George Shattuck tried the case on behalf of the Oneidas. In a decision dated July 12, 1977, Judge Port found that the Oneidas' evidence established that New York's "purchase" of Oneida land was in violation of the Non-Intercourse Act. *Oneida Indian Nation of N.Y. v. Cty. of Oneida*, 434 F. Supp. 527, 548 (N.D.N.Y. 1977). Furthermore, Judge Port rejected all of the affirmative defenses raised by the defendant counties.

Approximately one year after the liability ruling in the Test Case, BS&K withdrew as counsel of record for the Oneidas by filing formal substitutions of counsel in the Test Case on July 31, 1978 and the Reservation Case on August 23, 1978. *See* Shattuck Decl., Exs. 35 & 36. The withdrawal was with the clients' consent because the Oneidas at that time wished to pursue claims against private landowners, a different goal than the Oneidas had in 1965. The Test and Reservation cases continued. The Oneidas instigated other cases as well.[3]

Procedural History of The Pending Fee Motion

On May 20, 1999, BS&K moved this Court to recognize its right to a fee pursuant to the terms of the Retainer Agreement. BS&K did not brief what the fee should be, other than to argue that it should be substantial. BS&K specifically requested that "the Court award

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[2] It was not until 1975, during the trial of the Test Case, that the Canadian Oneidas finally joined the land claim litigation as a plaintiff. Shattuck Decl. ¶¶ 51, 98.

[3] *See, e.g., Oneida Indian Nation of N.Y. v. New York*, 520 F. Supp. 1278 (N.D.N.Y 1981). In that case, the Oneidas sought to invalidate its treaties with New York, to restore the Oneida's possession to that land, and to obtain damages for their entire period of dispossession. This action was dismissed. *Id.*, at 1328-29. Although the Second Circuit reversed and remanded for further proceedings, 691 F.2d 1070 (2d Cir. 1982), on remand, this Court again dismissed the Oneida's claims. 649 F. Supp. 420, 444 (N.D.N.Y. 1986).

[BS&K] and the opportunity to submit such additional affidavits and law at the conclusion of the two actions. Memorandum of Law In Support of Bond, Schoeneck & King, LLP's Motion to Have the Court Recognize Its Right To A Fee Pursuant to Its Retainer Agreement and Charging Lien. May 12, 1999 at 25. On or about August 15, 2002, over three years after BS&K made the underlying motion, the New York and Wisconsin Oneidas served their opposition papers on BS&K. BS&K filed its Reply on December 11, 2002. On Friday, February 18, 2011, Magistrate Treece issued a Report-Recommendation and Order. In his Report-Recommendation, Magistrate Treece held that BS&K was entitled to a fee, established the fee at 9% of the recovery, and held that the recovery was the damage awards in the Test and Reservation Cases, respectively. Judge Treece ordered that the any objections to the Report-Recommendation be filed by March 4, 2011.

ARGUMENT

I.

THE REPORT-RECOMMENDATION, BY REACHING THE ACTUAL AMOUNT OF ATTORNEY'S FEES TO WHICH BS&K IS ENTITLED, IS AN IMPROPER AND PREMATURE ADVISORY OPINION THAT SHOULD ONLY HAVE BEEN ADDRESSED AFTER THE ISSUE AND EVIDENCE SUBMITTED

As plainly set forth in BS&K's moving papers, BS&K only sought from the Court recognition that BS&K was entitled to a legal fee based upon its retainer agreement with the Oneidas. *See* BS&K's Notice of Motion. BS&K did not move the Court to fix or determine the amount of any fee to which BS&K was entitled. BS&K specifically applied for permission, after the entitlement issue was resolved, to submit additional evidence to assist the Court in actually calculating the fee owed. BS&K's Notice of Motion requested:

> an Order recognizing the firm's right to a fee under its retainer agreement, and the application of the firm's charging lien under New York Judiciary Law § 475, and directing that, at the conclusion of the two captioned actions, by settlement or judgment, the Court will afford Bond, Schoeneck & King and the parties an opportunity to submit such additional affidavits and law as they deem appropriate in light of the consideration awarded to or received by the Oneidas, and that the Court will calculate the amount of the firm's fee and lien as a specific percentage of the value of the consideration recovered by, awarded to or otherwise received by the Oneidas, including all benefits and compensation conferred by or on behalf of the State and its political subdivisions, instrumentalities and agencies in the two actions.

Although BS&K did note that BS&K's legal representation of the Oneidas resulted in significant economic gain for the Oneidas, no sum certain was requested. The Oneidas took the position that for many reasons no fee was appropriate, or if it was, that it should be limited to an hourly rate. The Oneidas also submitted no evidence that would allow Judge Treece to calculate any award, even under their limited alternative theory.

Significantly, Judge Treece, rather than deferring a determination on the amount of the fee until after additional submissions or an evidentiary hearing, rendered an advisory opinion as to the actual amount of the fee to which BS&K was entitled. This was outside the scope of what was requested and briefed by the parties, was in error. As the Second Circuit held in *Amalgamated Clothing and Textile Workers Union v. J. P. Stevens*, "A live controversy, within the Article III jurisdiction of the federal courts, requires a plaintiff seeking relief and a defendant opposing that relief.... Since such a ruling would not advance toward completion the resolution of any live controversy between the parties as to the plaintiff's entitlement to relief, the ruling would be an advisory opinion beyond the competence of an Article III court." 638 F.2d 7, 8 (2d Cir. 1980).

Here, Judge Treece, after deciding the issue of entitlement squarely presented to him, prematurely, and without the benefit of evidentiary submissions, improperly addressed and decided the amount of fees to be awarded. At the very least, Judge Treece, consistent with BS&K's Notice of Motion, should have given BS&K an opportunity to submit evidence substantiating the fee amount to which BS&K believes it is entitled.

II.

THIS COURT MUST UNDERTAKE A *DE NOVO* REVIEW OF THE REPORT-RECOMMENDATION

On the submission of objections to the Report-Recommendations of a Magistrate, the District Court is required to undertake a *de novo* review of the portions to which objections are made. *Rivera v. Barnhart*, 423 F. Supp. 2d 271, 273 (S.D.N.Y. 2006); *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 419 F. Supp. 2d 206, 209-10 (N.D.N.Y. 2005). The portions not objected to may be reviewed for clear error. *Demartino v. Kruger*, No. 09-CV-119 (NGG) (LB),09-CV-305 (NGG) (LB),09-CV-2578 (NGG) (LB), 2010 U.S. Dist. LEXIS 94642, at *5 (E.D.N.Y. Sep. 7, 2010) (*citing Brown v. Ebert*, No. 05 Civ. 5579 (DLC), 2006 U.S. Dist. LEXIS 94265, at *2 (S.D.N.Y. Dec. 29, 2006). The Magistrate's Report-Recommendation is not entitled to deference. *Pall Corp. v. Entegris, Inc.*, 249 F.R.D. 48, 52 (E.D.N.Y. 2008) (*citing Nomura Sec. Int'l, Inc. v. E*Trade Sec., Inc.*, 280 F. Supp. 184, 198 (S.D.N.Y. 2003). Based upon the *de novo* review, this Court should conclude that the recovery under the governing fee agreement was intended to cover more than damages.

III.

THE ONEIDAS HAVE ACHIEVED A SUBSTANTIAL RECOVERY

The parties agree that any right BS&K has to an attorneys' fee must arise from the Retainer Agreement, entered into in 1966, and as later modified.

Paragraph 10 of the Retainer Agreement provides:

> This contract may be terminated on 60 days written notice by . . . the attorneys. If the contract shall be so terminated, except for the wrongdoing or dereliction of the attorneys, the attorneys shall be credited with such share in the attorney fee as the court or tribunal finally determining the Oneidas' claim may determine to be equitable; provided, that such fee shall be wholly contingent upon a recovery for the Oneidas and; provided further, that if there be a recovery without submission to a court or tribunal then said fee to be in such amount as the Secretary of Interior or his authorized representative may find to be equitable.

Shattuck Decl. Ex. 1.

Notably, the Retainer Agreement does not use the word "damages." Instead, the Agreement conditions receipt of a fee upon a "recovery," and charges the Court finally determining the Oneida's claim with setting an "equitable" fee.[4]

Applying this clause, the Court must determine whether there was a "recovery," what the "recovery" is, and the amount of the equitable fee. In the Report and Recommendation, Magistrate Treece determined that the recovery was the awards that have been made in the Test Case and Reservation Cases. That is too narrow a view of the "recovery," and does not at all comport with the parties' intentions at the time the Retainer Agreement was executed and approved by the Bureau of Indian Affairs.

The record shows that neither BS&K nor the Oneidas envisioned recovery as the mere award of damages and interest. In fact, the record clearly shows that the parties considered and pursued many avenues of potential relief from petitions to the President of the United States to testimony at the State Constitutional Convention of 1967 to litigation. Even the litigation was viewed as a multi-step process. "Our plan since 1965 was to get the Oneida's land back piece by piece from the State and its political subdivisions. . . . This would allow each recovery to finance

[4] This matter has now been finally determined. *Oneida Indian Nation of N.Y. v. Cty. of Oneida*, 617 F.3d 114 (2d Cir. 2010), although, on information and belief, the time for filing of a petition for certiorari has not yet passed.

the initiative against the government." Shattuck Decl., ¶ 127. "We believed, along with the Oneidas, that once we established our point eventually things would fall into place." *Id.*, ¶ 130.

That is largely what occurred. After the President, the Secretary of the Interior, Senator Edward Kennedy, the State Attorney General, and the State Constitutional Convention all had rebuffed the Oneidas entreaties for redress, BS&K filed suit – the Test Case – in 1970.[5] In 1974, the United States Supreme Court ruled in the Oneidas favor, opening the courthouse door. 414 U.S. 661 (1974) (*Oneida I*). The world had changed. In 1975, the Test Case was tried in this Court. In 1977, this Court ruled in the Oneida's favor holding the counties liable for wrongful possession of Oneida land. 434 F. Supp. 527, 548 (N.D.N.Y. 1977). Damages were later assessed at $16,694, plus interest, for two years' rent on approximately 870 acres that were possessed by Oneida and Madison Counties, respectively. Magistrate's Report-Recommendation, p. 6; *see also Oneida Indian Nation of N.Y. v. Cty. of Oneida*, 719 F.2d 525, 530 (2d Cir. 1983).[6]

The amount of the rent award is incidental to the real import of the case. In ruling that the Oneidas were owed rent, this Court held that the Oneidas retained title to 100,000 acres. 434 F. Supp. at 548. The Second Circuit affirmed. "The Counties' occupation, regardless of their good or bad faith, of Indian land obtained in a transaction that violates the 1793 Act renders them liable." 719 F.2d at 541. The Supreme Court affirmed. "Having determined that the Oneidas have a cause of action under federal common law, we address the question whether

[5] Certainly, intending to follow this cautious strategy, BS&K would not have entered into a Retainer Agreement that limited "recovery" to damages. "It was explained that the only way the case could be justified if the potential fee to be earned was large." Shattuck Decl., ¶ 9.
[6] That amount was later increased to $34,964, plus interest. *Oneida Indian Nation of N.Y. v. Cty. of Oneida*, 217 F. Supp. 2d 292, 310 (N.D.N.Y. 2002).

there are defenses available to the counties. We conclude that none has merit." *Cty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 240 (1985) (*Oneida II*).

Armed with this Court's holding, over the forty-one years of this unique litigation, the Oneidas, piece by piece, have reestablished sovereignty over a significant, albeit incomplete, portion of the reservation retained by them in the 1788 Treaty of Fort Schuyler with the State of New York, as recognized by the Treaty of Canandaigua. 7 Stat. 44 (Nov. 11, 1794). With that sovereignty, the Oneidas have developed wealth and influence far beyond the dreams of 1966. Even without a damages award in the Reservation Case, the Oneidas have achieved a significant recovery.

At least two events exemplify the importance of this Court's holding in 1977. In 1970, at the time of the filing of the Test Case, the Oneidas possessed a mere 32 acres of the Reservation Land. In 1993, the Oneida Indian Nation of New York purchased parcels of land in the Towns of Vernon and Verona, land recognized as within the Reservation. Copies of the Deeds are attached at Appendix "1." On that land, the New York Oneidas began construction of a casino. *See* N.Y. TIMES (Apr. 17, 1993)[7] In order to operate that casino, pursuant to the Indian Gaming Regulatory Act ("IGRA"), the New York Oneidas had to execute a Compact with the State of New York, a copy of which is attached at Appendix "2." *See* 25 USC § 2701, *et seq.*[8]

[7] http://query.nytimes.com/gst/fullpage.html?res=9F0CE0D91030F934A25757C0A965958260&pagewanted=all (last visited Mar. 4, 2011), a copy of which is attached at Appendix "3."

[8] In 1976, the United States Supreme Court unanimously ruled that a federal law that conferred certain jurisdictional control to States over Indian reservations did not confer "general state civil regulatory control over Indian reservations." *Bryan v. Itasca County*, 426 U.S. 373, 384 (1976). The holding in *Bryan* spawned Indian gaming operations in California, Florida, Wisconsin and Connecticut, all of which resulted in litigation challenging the legality of such gaming. *See e.g., Seminole Tribe of Fla. v. Butterworth*, 658 F.2d 310 (5th Cir. 1981); *Oneida Tribe of Indians of Wisc v. Wisconsin*, 518 F. Supp. 712 (W.D. Wis. 1981); *Mashantucket Pequot Tribe v. McGuigan*, 626 F. Supp. 245 (D. Conn. 1986). In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209-10 (1987), the Supreme Court read the holding in *Bryan* to apply to gaming activities specifically. The IGRA was enacted in 1988 to establish regulatory control of Indian gaming activities.

The State of New York, acting through then Governor Mario Cuomo, and the Oneida Indian Nation of New York did so on April 21, 1993.

That Compact specifically authorizes the operation of a casino on "Nation lands." "The Nation shall establish one or more gaming facilities on the Nation lands . . . ." Compact, § 2(b). "'Nation lands' means the reservation lands of the Nation or lands within the State over which the nation exercises governmental power and that are . . . held in trust by the United States for the benefit of the Nation . . . ." *Id.*, § (1)(o).[9] The Secretary of the Interior approved the Compact on June 4, 1993. The resolution of the Test Case was a condition precedent for the establishment of the casino. But for the Test Case, there was no legal finding that the acreage on which the casino sits is Indian land.

The New York Oneidas continued to purchase parcels of land within the reservation. In accordance with the acknowledgement in the Compact, the Oneidas viewed that land as Reservation land, exempt from taxation. Litigation ensued and this Court, 145 F. Supp. 2d 226 (N.D.N.Y. 2001), and the Second Circuit, 337 F.3d 139 (2d Cir. 2003) agreed with the Oneidas. In 2005, the Supreme Court reversed, holding that the Tribe's open-market purchase of Reservation land did not permit the New York Oneidas to assert sovereign dominion over the parcels. *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 199 (2005). For almost three decades since Judge Port's decision in 1977, the assumption had been otherwise. The Oneidas benefited from that assumption.

In any event, the New York Oneidas had an easy solution available.

The tribe applied and the Secretary of the Interior accepted into Trust of 13,004 acres of land purchased by the Oneida Indian Nation of New York in 2008. U.S. DEP'T OF THE

[9] This is in accord with the language of the IGRA. "[s]uch lands are located within the boundaries of the Reservation...." 25 U.S.C. § 2719(a)(1).

INTERIOR, BUREAU OF INDIAN AFFAIRS, RECORD OF DECISION, p. 8 (May 2008) (a copy of which is attached at Appendix "4"). Once again, it was the Test Case that established those 13,004 acres as Indian land. 434 F. Supp. at 548.[10] As Indian land held in Trust, significant benefits accrue. The sovereignty of the Oneidas is recognized over the land. 25 U.S.C. § 465. The land is exempt from local and State taxation. *Id.* The Tribe has great latitude in making decisions about the use of the land.[11]

The New York Oneidas have made great success out of their recovery. According to the Tribe's website, they have established Oneida Enterprises. In 2009, Oneida Enterprises:

- paid $120 million in wages to 4,500 employees
- contributed $4.5 million to employees' 401(k) accounts
- spent $318 million with outside vendors
- spent $16 million on capital improvements

Annual Report, 2009.[12] Tribal lands now include gasoline stations/convenience stores, and tobacco stores. The lands include championship golf courses, one of which hosts a Professional Golfers Association Tour event, the casino, an entertainment venue, a spa, and two hotels. *See*

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[10] These non-contiguous parcels as Indian land must meet fewer criteria for acceptance as Trust land. *See* 25 C.F.R. § 151.10.

[11] The State of New York and municipalities have challenged the acceptance of the land into Trust. A press release announcing suit by the State of New York and others, by then Attorney General Andrew Cuomo, objecting to the Secretary of the Interior's decision authorizing the transfer of the 13,000+ acres into Trust, stated:

"The effect of this unprecedented decision is the Permanent Removal of Oneida Indian Nation-owned land from the tax and regulatory jurisdiction of the State of New York, the Counties of Madison and Oneida and numerous cities, towns and villages in which the land is located." (Copy of the Press Release is attached. (Appendix "5")).

According to published reports, the New York Oneidas and Oneida County were negotiating an Agreement in which the Oneidas would pay Oneida County $55 million if, *inter alia*, the County dropped its lawsuit with respect to the 8,800 of the 13,004 acres that lie in Oneida County. *See* http://blog.syracuse.com/news/print.html?entry=/2009/05/oneida_county_oneida_indian_na.html (last visited Mar. 4, 2011), a copy of which is at Appendix "6."

[12] *Available at* http://www.oneidaindiannation.com/enterprises/Annual-Report.html. A copy is attached at Appendix "7."

http://www.turningstone.com. All of this sits on Indian land, legally recognized as such for the first time since 1795 by this Court's 1977 decision in the Test Case.

Although it is true that under the current status of the Reservation Case there has been no award of damages, and since *City of Sherrill v. Oneida Indian Nation of N.Y.,* 544 U.S. 197, the Oneidas have not been able to assert sovereignty simply through the purchase of Reservation lands, that does not take away from the substantial benefits the Oneidas have enjoyed as a result of the Test case, and all the earlier favorable decisions in the Reservation Case.[13] The benefits can be seen with the naked eye as one drives past on the New York State Thruway. The New York Oneidas herald the benefits on their web site and the web site for their Turning Stone Casino. *See* http://www.oneidaindiannation.com; http://www.turningstone.com.

We do not mean to suggest that every benefit the Oneidas have accrued since the Test Case is a part of the recovery. The Oneida's accomplishments are a testament to their vision, intelligence, ambition, enterprise, and tenacity. What we do state, however, plainly and directly, is that damages alone cannot be viewed as the "recovery" in this unique matter. If the Oneidas do not recover another nickel in damages, they recovered in the Test Case, and through the long pendency of the Reservation case, the ability to reestablish Indian land. That is a substantial benefit, and the New York Oneidas have clearly taken advantage of that benefit. "[P]arties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. . . ." *North Carolina Dept. of Transp. v. Crest St. Council*, 479 U.S. 6, 12-13 (1986 (citation omitted). "[P]revailing parties" may receive attorney's fees if they "succeed on any significant issue in litigation which achieve some of the benefit the parties sought in bringing the suit." *Texas State Teachers Ass'n v. Garland Indep.*

Sch. Dist., 489 U.S. 782, 789 (1989) (quotations omitted). Consequently, relief need not be "judicially decreed" in order to justify a fee award. *Koster v. Perales*, 903 F.2d 131, 134 (2d Cir. 1990). In fact, a resolution of a lawsuit by settlement is sufficient to award attorney's fees if the settlement grants some or all of the desired relief. *See Ermler v. Town of Brookhaven*, 780 F. Supp. 120, 123 (E.D.N.Y. 1992).

In *Western Shoshone Identifiable Group v. United States*, 652 F.2d 41, 47-48 (Ct. Cl. 1981), the Court of Claims articulated 13 factors to be considered in determining the reasonableness of an award of attorney's fees in Native American land claim cases:

> (1) the nature of the undertaking and the character of the services required; (2) the responsibility assumed; (3) the professional repute, standing, ability, and experience of counsel; (4) the services rendered, including the time and labor required; (5) the magnitude and importance of the cases; (6) the novelty and difficulty of the questions involved; (7) the opposition encountered; (8) the results accomplished and the benefits flowing to the clients; (9) the professional competence displayed, including skill, industry and diligence; (10) the fidelity of counsel to the interests of their clients; (11) the contingent nature of the employment and the hazards and risks involved; (12) the loss of income opportunities for other employment due to employment of counsel in the litigation for which compensation is to be awarded; and (13) customary charges and going rates of attorneys for similar services.

These factors are similar to the factors a court uses to assess the compensation owed to an attorney who properly withdraws from representation, as BS&K did in the Test and Reservation Cases. *See Tops Markets, Inc. v. Quality Markets, Inc.*, No. 93-CV-0302E(F), 2001 U.S. Dist. LEXIS 4238, at *9 (W.D.N.Y. Apr. 3, 2001); *General Star Indemnity Co. v. Custom Editions Upholstery Corp.*, 940 F. Supp. 645, 652 (S.D.N.Y. 1996); *Wong v. Michael Kennedy, P.C.*, 853 F. Supp. 73, 81 (E.D.N.Y. 1994); *DeGraff, Foy, Conway & Holt-Harris v. McKesson & Robbins,*

[13] Even for lands outside the Trust, those benefits would appear to include protection from the ability of a state or local government to enforce property tax collections. *Oneida Indian Nation of N.Y. v. Madison Cty.*, 605 F.3d 149 (2d Cir. 2010).

Inc., 31 N.Y.2d 862 (1972); *Ogletree, Deakins, Nash, Smoak & Stewart, P.C. v. Albany Steel, Inc.*, 243 A.D.2d 877, 879 (3rd Dep't 1997).

Particular attention must be drawn to the eighth factor stated by the Court in *Western Shoshone*, "the results accomplished and the benefits flowing to the client." 652 F.2d at 47. Recovery is not limited to damages. Recovery is the "results accomplished," the "benefits flowing." Indeed, the "substantial benefit standard" of *Western Shoshone* has been cited positively and adopted in subsequent Indian land claim cases regarding attorneys' fees. *See e.g. Pueblo of Santo Domingo v. United States*, 54 Fed. Cl. 240, 245 (2002). BS&K did something more than win landmark legal points. The points BS&K won resulted in tangible results, in real benefits.

The Retainer Agreement itself recognized that the recovery might not be in the form of damages. Paragraph 10 of the Retainer Agreement envisioned the possibility of recovery in a court, or "recovery without submission to a court or tribunal," Agreement, ¶ 10, Clearly, a recovery without submission to a court or tribunal would not be in the form of damages, but could have taken many other forms. "'Recovery' is not synonymous with 'gain,' and Defendant errs by conflating the two. . . . Black's Law Dictionary 1389 (9th ed. 2009 (defining 'recovery' as '[t]he regaining or restoration of something lost or taken away [,] . . . [t]he obtainment of a right to something (esp. damages) by a judgment or decree . . . ." *Walker v. Dovetails, Inc.*, No. 310CV526-HEH, 2011 U.S. Dist. LEXIS 18537, at *9 (E.D. Va. Feb. 24, 2011) (editing in original). The Second Circuit has held that the lack of monetary recovery does not preclude an award for attorneys' fees, *see Universal Acupuncture Pain Servs., P.C. v. Quadrino & Schwartz, P.C.*, 370 F.3d 259, 264 (2d Cir. N.Y. 2004).

In determining BS&K's *quantum meruit* award, Judge Treece should therefore have considered the Oneida's recovery beyond damages. We must also note that almost nine years had passed since this Motion had been briefed. The circumstances of the case had changed in that time. Although there was some limited briefing in the original motion papers on how a fee award should be determined, the Motion was for a declaration that the firm was entitled to a fee. BS&K's motion was limited to having this Court "recognize[e] the firm's <u>right</u> to a fee under its retainer agreement . . . ." Notice of Motion, dated May 20, 1999 (emphasis added). Judge Treece could have and should have asked for further briefing before determining the amount of the fee.

There was a value to this Court's holding that the reservation land is Indian land. The value of that holding can be quantified. That value can be determined through an evidentiary hearing. That it may be difficult to determine value does not in any way preclude finding that value, and calculating BS&K's fee based upon that value.

In *Steiner v. Williams*, 99 Civ. 10186 (JSM), No. 99 Civ. 1479 (JSM), 2001 U.S. Dist. LEXIS 7097 (S.D.N.Y. May 31, 2001), the court found that although a settlement may not involve the payment of money by the defendants, counsel may nonetheless recover a fee if the settlement conferred a substantial non-monetary benefit on the plaintiffs. *Id.*, at *12 (*citing Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc.*, 54 F.3d 69 (2d Cir. 1995); *see also Sheppard v. Consol. Edison Co. of New York, Inc.*, No. 94-CV-0403 (JG), 2002 U.S. Dist. LEXIS 16314, at *15, *16 (E.D.N.Y. Aug. 1, 2002) (in valuing total settlement for percentage-based attorneys' fee award, court included an estimated $5 million in non-monetary, injunctive relief). In *Yeagley v. Wells Fargo Co.*, No. C 05-03403 CRB, 2008 U.S. Dist. LEXIS 5040 (N.D. Cal. Jan. 18, 2008), the court valued a non-monetary settlement in a class action while adopting a fee award of 25% of the settlement. "Indeed, the monetary value of the settlement is not anywhere described in the settlement agreement." *Id.*, at 22. In order to value the settlement, the Court engaged in an inquiry on the value of the settlement to class members. "As is explained above, . . a consumer could obtain free credit reports from all three credit reporting agencies; thus, the value of the tri-merged credit report is the time participating class member saved by not having to request free credit reports from three different agencies." *Id.*, at 13-14. In *McCoy v. Health Net, Inc.*, 267 F. Supp. 2d 448 (D.N.J. 2008), the Court was called upon to value the recovery of a class settlement and make an award of attorneys' fees. The settlement included a cash fund and significant injunctive relief requiring the defendant health insurer to change its business practices. The Court determined to award class counsel a percentage fee, and valued the injunctive portion of the settlement at $28 million dollars. 267 F. Supp. 2d at 478. This resulted in an attorneys' fee award of $69,720,000 based upon the common fund and the injunction valued at $249 million. *Id.* In *Dewey v. Volkswagen of America*, 728 F. Supp. 2d 546 (D.N.J. 2010), a class action settlement required that all class members receive educational materials regarding preventive maintenance, that some class members receive repairs, and that other class members receive reimbursement for repairs. The Court held that the non-cash component did not prevent the Court from valuing the settlement, and the Court conducted an evidentiary hearing of the value of both the cash and non-cash components of the settlement.

As these cases show, recoveries need not be limited to cash awards. These settlements had value, and the courts did not shy away from determining those values. Here, the Test Case had value, and the Reservation Case had value, far beyond the damage awards. There is a direct line from the Test Case to the establishment of Oneida Enterprises. There is a direct line from the Test Case to acceptance by the United States of 13,004 acres into Trust. As George Shattuck and Jacob Thompson believed in 1967, once "we established our point, things would fall into place." Shattuck Decl ¶ 130. Without reading a line in any decision, anyone can plainly see driving into the Turning Stone complex that things have fallen into place. The prosperity of the Oneida Indian Nation of New York is built upon the foundational victory in the Test Case. There was a recovery. BS&K's fee should be based upon that recovery.

CONCLUSION

BS&K's motion for a fee should be granted, based upon the value of the recovery that has been achieved.

Dated: March 4, 2011

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