11-3272-CV

United States Court of Appeals For the Second Circuit

Oneida Indian Nation of New York State, AKA Oneida Indian Nation of New York, AKA Oneida Indians of New York, Oneida Indian Nation of Wisconsin, AKA Oneida Tribe of Indians of Wisconsin,

Plaintiffs - Appellees,

Oneida of the Thames Council,

Plaintiff,

Thames Band of Canada (Oneida),

Plaintiff- Counter Defendant,

United States of America, New York Brothertown Indian Nation, by Maurice "Storm" Champlain, Vice Chief,

Intervenor Plaintiffs,

v.

Bond Schoeneck & King, PLLC,

Appellant,

County of Oneida, New York, County of Madison, New York,

Defendants –Third Party Plaintiffs,

State of New York,

Defendants - Counter Claimants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK (CONSOLIDATED WITH 11-3275-CV)

BRIEF FOR APPELLANT BOND SCHOENECK & KING, PLLC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant, Bond, Schoeneck & King, PLLC, states there is no parent corporation and no publicly held corporation owning 10 percent or more of Appellant.

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PRELIMINARY STATEMENT

Despite the groundbreaking legal work that Bond, Schoeneck & King, PLLC ("Appellant" or "BS&K") performed over the course of thirteen years for the Oneida Indian Nations of New York and Wisconsin ("Appellees" or the "Oneidas"), including achieving a landmark victory before the Supreme Court and prevailing at a trial, the District Court awarded BS&K just over $5,100 in attorney fees. BS&K thus appeals from the decision and order of the United States District Court for the Northern District of New York (the "District Court"), Hon. Lawrence E. Kahn), dated July 12, 2011, *Oneida Indian Nation v. County of Oneida*, Nos. 5:70-CV-0035(LEK), 5:74-CV-187(LEK/DRH), 2011 U.S. Dist. LEXIS 74702 (N.D.N.Y. July 12, 2011) (the "Decision") (SA58),[1] which approved and adopted a Report and Recommendation filed on February 18, 2011 by Magistrate Judge Randolph F. Treece, *Oneida Indian Nation of N.Y. State v. County of Oneida*, Nos. 5:70-CV-0035(LEK), 5:74-CV-187(LEK/DRH), 2011 U.S. Dist. LEXIS 74698 (N.D.N.Y. Feb. 18, 2011) (the "R&R") (SA1).

JURISDICTIONAL STATEMENT

The District Court's subject-matter jurisdiction was predicated on: (i) supplemental jurisdiction under 28 U.S.C. § 1367 (*see, e.g.*, *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 140 F.3d 442, 445 (2d Cir. 1998)), (ii) the

[1] Citations to "SA__" refer to the Special Appendix.

federal courts' ancillary jurisdiction over attorneys' fee claims (*see, e.g., Cluett, Peabody & Co. v. CPC Acquisition Co.*, 863 F.2d 251, 256 (2d Cir. 1988)), and (iii) the express terms of the retainer agreement at issue in this matter, as shown in the Statement of Facts, below. This Court's jurisdiction is based on 28 U.S.C. § 1291, as the Decision below constitutes a final decision and order of the District Court. The appeal is timely as notice of appeal was filed on August 10, 2011, *i.e.*, within thirty days of the Decision. The appeal is from a final order or judgment that disposes of all parties' claims, *i.e.*, the Decision.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

(1) The District Court committed reversible error by adopting the R&R's determination of BS&K's fee as a simple percentage of the Appellees' damages award in a strategic 'test' litigation. The court should have determined the fee by analyzing, after a hearing, factors of quantum meruit. These factors are not limited to a percentage of damages, nor are they solely a product of the Firm's hourly rates. Rather, they include: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the attorney's customary hourly rate; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved in the case and the results obtained; (9) the

experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. As shown below, all of these factors warranted a much higher fee award to BS&K.

(2) BS&K filed its motion for a declaration of a right to its fee in 1999. The R&R and the Decision were issued twelve years later without a hearing or even oral argument. Prior to determining the fee, the court below should have held a hearing to permit BS&K the opportunity to submit proof and develop the evidentiary record regarding the foregoing quantum meruit factors, as well as the changes in the parties' circumstances since 1999.

(3) The court below failed to include mandatory prejudgment interest in determining BS&K's fee award.

(4) Even if the lower court was correct to determine BS&K's equitable fee as a simple percentage of Appellees' "recovery" in the underlying test action, the recovery should have been much more broadly construed than the relatively small amount of damages obtained in litigation, as the decisions that BS&K obtained for Appellees – including a landmark decision by the United States Supreme Court – carried far more value to Appellees than the actual damages awarded. Because of BS&K's work, the Appellees gained entry to the federal courts and overcame a longstanding jurisdictional barrier, and the courts

established, as a matter of law, Appellees' original Indian title to 100,000 acres of lands. These victories were the foundation on which the Oneidas have built vast and previously-unimagined development and wealth.

STATEMENT OF THE CASE

As discussed below, these actions span almost forty years of litigation between Appellees and the New York Counties of Oneida and Madison. This appeal is limited to BS&K's claim, as Appellees' former counsel of record in those cases, for an equitable attorney fee award. On May 20, 1999, BS&K filed a motion in both of the underlying cases seeking only that the District Court recognize its right to such a fee, not a determination of the amount of the fee itself. The application was referred to Magistrate Judge Treece on November 18, 2002, who issued the R&R on February 18, 2011 – almost twelve years after the motion was filed. BS&K thereafter filed objections to the R&R. On July 12, 2011, the District Court issued its Decision adopting the R&R in full. Neither Magistrate Judge Treece nor the District Court heard oral argument.

STATEMENT OF FACTS

A. INTRODUCTION

In 1974, the Oneidas, through BS&K's representation, achieved a landmark victory before the United States Supreme Court removing a longstanding barrier to federal court jurisdiction over indigenous land claims. *Oneida Indian Nation of*

N.Y. v. County of Oneida, 414 U.S. 661, 94 S. Ct. 772 (1974) ("*Oneida I*"). That Supreme Court decision was a watershed event in American Indian law, reversing a century of jurisprudence based on the federal "well-pleaded complaint" rule that had effectively left indigenous American tribes without a judicial forum – federal or state – for their claims. As for the Oneidas, the decision opened the door to previously unimaginable economic opportunities and provided them with tremendous leverage in subsequent negotiations with New York State.

Prior to *Oneida I*, the Oneidas had struggled for many years to obtain both a forum for their claims and counsel willing to bring them. In 1965, the Oneidas approached BS&K, and the Firm developed a multifaceted strategy that involved petitioning government authorities, seeking the assistance of the United States, positioning the Oneidas in a favorable light, and, finally, commencing litigation in federal court based on New York State's acquisition of 300,000 acres of land from the Oneidas between 1795 and the mid-1840s in violation of federal law and treaties. BS&K filed a first action, known as the "Test Case" (N.D.N.Y. Civ. Action No. 70-CV-35), in 1970, as the precursor to a second action, known as the "Reservation Case" (N.D.N.Y. Civ. Action No. 74-CV-187), filed in 1974.[2]

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[2] This Court recently described the procedural history of both Cases. *See Oneida Indian Nation of New York v. County of Oneida*, 617 F.3d 114, 116-17 & 118-22 (2d Cir. 2010); *Oneida Indian Nation v. Madison County*, Nos. 05-6408-cv (L); 06-5168-cv (CON); 06-5515-cv (CON), 2011 U.S. App. LEXIS 21210, *13-14 (2d Cir. Oct. 20, 2011).

Subsequent to the groundbreaking victory of *Oneida I*, BS&K won again at trial in 1977, establishing the Oneidas' original Indian title to 100,000 acres of land and the Counties' liability for rent on 827 acres. *Oneida Indian Nation of N.Y. State v. County of Oneida*, 434 F. Supp. 527 (N.D.N.Y. 1977). That trial set the stage for a subsequent damages award which was affirmed by the Supreme Court. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) ("*Oneida II*").

In 1978, however, BS&K withdrew from representation in both Cases out of the concern for a potential, if not actual, conflict of interest (as described in greater detail below). Pursuant to the contingency fee agreement between the Oneidas and BS&K, upon termination of its representation, BS&K was entitled to an equitable determination of its attorney fee. This appeal seeks an order directing the lower court, which determined that fee without considering principles of quantum meruit, to re-assess the Firm's equitable fee by holding an evidentiary hearing.

B. BACKGROUND

The history of the Oneidas' claims has been well-recited in prior decisions, including the 1977 decision in the Test Case by Senior District Court Judge Port, *Oneida Indian Nation v. County of Oneida*, 434 F. Supp. 527, 533 (N.D.N.Y. 1977), and this Court's recent decision in the Reservation Case, *Oneida Indian Nation of New York v. County of Oneida*, 617 F.3d 114, 118-20 (2d Cir. 2010).

Briefly, in gratitude for their military assistance during the Revolutionary War, the Oneidas were "secured" in their possession of the approximately 6 million acres of land on which they were then-settled by the 1784 Treaty of Fort Stanwix. *See* 434 F. Supp. at 533. In 1788, however, the State of New York "acquired" the bulk of that land pursuant to the Treaty of Fort Schuyler, leaving the Oneidas with about 300,000 acres (the "Reservation"). *Id.*; *see also* 617 F.3d at 118.

Thereafter, in 1790, Congress passed the first version of the Non-Intercourse Act. The present form of the Act largely reflects an amendment in 1793 providing that any transfer of Indian land unauthorized by the United States has "no validity in law or equity." 25 U.S.C. § 177. Thus, not even a court conferred with federal jurisdiction by Article III of the Constitution is empowered to validate a transfer of land in violation of the Non-Intercourse Act.[3]

In 1794, the Oneidas (and the other tribes of the Iroquois nations) entered into the Treaty of Canandaigua with the United States, under which the Oneidas' reservation "as established by the Treaty of Fort Schuyler" was acknowledged and

[3] For instance, the Eleventh Amendment, introduced by Congress in 1793, prohibited courts of "law and equity" from taking jurisdiction of suits by citizens of one State against another State, addressing the result reached in *Chisholm v. Georgia*, 2 U.S. 419 (1793) . The same Congress amended the Non-Intercourse Act to delimit the powers of courts in "law and equity." Thus, federal courts are not empowered to extinguish original Indian title; only Congress can do so.

guaranteed. *See* 617 F.3d at 118-19, *quoting City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 204-05 (2005).

Nevertheless, in 1795, New York State acquired approximately 100,000 acres of the Oneidas' Reservation land without the federal authorization required by the Non-Intercourse Act. *See Oneida*, 434 F. Supp. at 534-35. From 1795 to the mid-1840s, the State acquired almost all of the tribe's remaining Reservation land, and most of these acquisitions likewise violated the Non-Intercourse Act. *Id.* at 535. By 1846, the Oneidas' landholdings in New York were diminished to just a few hundred acres. *Id.* Only 32 acres remained by 1920. *Oneida Indian Nation v. Madison County*, Nos. 05-6408-cv (L); 06-5168-cv (CON); 06-5515-cv (CON), 2011 U.S. App. LEXIS 21210, *12 (2d Cir. Oct. 20, 2011).

Prior to Judge Port's 1977 decision in the Test Case, New York State had long taken the view that it was not subject to the Non-Intercourse Act. *See, e.g., St. Regis Tribe of Mohawk Indians v. State of New York*, 5 N.Y.2d 24, 39-40 (N.Y. 1958); *United States v. Franklin County*, 50 F. Supp. 152, 156 (N.D.N.Y. 1943); JA165, ¶ 35.[4] In fact, even the federal government believed, at that time, that the Act was inapplicable to New York State. JA167, ¶ 43; JA233. Thus, the Oneidas' efforts (both before and after retaining BS&K) to obtain redress from New York,

[4] Citations to "JA__" are to the Joint Appendix.

without resorting to litigation, for the State's acquisition of their land in violation of the Act had fallen on deaf ears. *See*, *generally*, JA163-65, ¶¶ 30-38.

As for litigation efforts, prior to *Oneida I*, federal courts had uniformly ruled that American Indian land claims did not arise under federal law – even though the claims were premised on federal treaties – because the claims were considered to be actions of ejectment governed by state law. *See*, *e.g.*, *Taylor v. Anderson*, 234 U.S. 74, 75-76, 34 S. Ct. 724, 724-25 (1914); *Deere v. St. Lawrence River Power Co.*, 32 F.2d 550, 552 (2d Cir. 1929). Federal courts thus consistently refused to hear such claims for failing to present a federal question under the so-called "well-pleaded complaint" rule. First established by the Supreme Court in *Gold-Washing & Water Co. v. Keyes*, 96 U.S. 199, 24 L. Ed. 656 (1878) after federal question jurisdiction had been established by Act of Congress in 1875, the well-pleaded complaint rule provided that "federal question jurisdiction is present only if the reliance on a federal right appears on the face of the well pleaded complaint." *Oneida Indian Nation of New York v. County of Oneida*, 464 F.2d 916, 920 (2d Cir. 1972) (reciting history of the well-pleaded complaint rule).

New York State courts, meanwhile, had refused to hear tribal land claims in the absence of state enabling legislation (*see Johnson v. Long Island Railroad Company*, 162 N.Y. 462, 468 (N.Y. 1900); *Pharaoh v. Benson*, 164 A.D. 51, 52 (2d Dep't 1914), *aff'd*, 222 N.Y. 665 (N.Y. 1918); *St. Regis Tribe*, 5 N.Y.2d at 36-

40)) and also in reliance on federal law barring New York courts from taking jurisdiction over "civil actions involving Indian laws or claims . . . which relate to transactions or events transpiring prior to September 13, 1953." 25 U.S.C. § 233.

In short, prior to retaining BS&K, the Oneidas had long been deprived of any judicial forum willing to hear their claims, and both the United States and New York State interpreted the Non-Intercourse Act as inapplicable to New York.

C. THE RETAINER AGREEMENT

The Oneidas approached BS&K for representation in the spring of 1965. JA156, ¶ 6. After carefully investigating the Oneidas' land claims and recognizing the substantial risk of failure, BS&K agreed to represent the Oneidas. *Id.*, ¶ 9. From the outset, BS&K made clear to the Oneidas that the Firm could never sue private landowners without a conflict of interest, and at that time the Oneidas did not express any desire to do so. JA156-57, ¶¶ 6, 11; *see also* JA724, ¶ 16.

On June 24, 1966, BS&K and the Oneidas entered into a retainer agreement (the "Retainer Agreement"). JA157, ¶ 12. The Retainer Agreement was approved by the Secretary of the Interior on March 28, 1967, on the condition that the parties revise certain provisions, including Paragraph 10. JA157-59, ¶¶ 12, 22; JA230. The parties amended the Retainer Agreement pursuant to the Secretary of the Interior's requirements in June 1967. JA213.

The Retainer Agreement provided for BS&K to earn a contingency fee of 20% of up to $1 million in any recovery from New York State or its political subdivisions or instrumentalities "as a result of [BS&K's] services," and 10% of any additional amount recovered in excess of $1 million. JA207, ¶ 5.

If BS&K's representation were terminated, however, under Paragraph 10 – the exact language of which was supplied by the Secretary of Interior – BS&K would be entitled to "such share in the attorney fee as the court or tribunal finally determining the Oneidas' claim may determine to be equitable." *See* JA213, ¶ 10. There were only two conditions to BS&K's right to this equitable fee: (1) that BS&K's representation was not terminated due to wrongdoing or dereliction; and (2) that the Oneidas obtained a recovery. *Id.* Nothing in Paragraph 10 limited BS&K's fee to a percentage of any such recovery.

In addition, under Paragraph 10, the parties expressly agreed that BS&K's equitable fee should be determined by the "court … finally determining the Oneidas' claim" (*id.*, ¶ 10) – in other words, the Oneidas explicitly agreed that the District Court (where the Test and Reservation Cases were subsequently brought) would have jurisdiction to decide this fee dispute.

D. BS&K'S WORK FOR THE ONEIDAS

1. Reversing Decades of Federal Jurisprudence, The Supreme Court Holds That the Well-Pleaded Complaint Rule Does not Bar the Oneidas from Federal Court

After exhaustively researching the law, BS&K determined that the only legal theory available to the Oneidas with any real chance of success (which was, itself, remote) was to challenge the State's acquisition of Oneida lands in violation of the Non-Intercourse Act. JA160, ¶ 26. At that time, BS&K had very little law to draw from in developing the theory and strategy. The only treatise on American Indian federal law that was recognized in 1970, Felix S. Cohen's Federal Indian Law, did not address the question of federal court jurisdiction over Indian land claims. JA161, ¶ 27.[5] BS&K also pursued a strategy of petitioning state and federal governmental authorities (including the White House) for relief before turning to litigation and, from 1967 to 1970, the Firm exhausted all such efforts. JA163-68, ¶¶ 30-45.

As to litigation, BS&K painstakingly developed a targeted strategy designed to overcome the seemingly insurmountable obstacle of the well-pleaded complaint rule, while simultaneously avoiding intense political opposition. The first step was to test a limited claim for two years' rent on just 827 acres occupied by Madison

[5] After BS&K's victory before the Supreme Court in the Test Case, subsequent editions of Cohen's treatise expressly included and analyzed *Oneida I*. JA161-62, ¶¶ 27-28.

and Oneida Counties within an area of 100,000 acres that New York had "purchased" in 1795. JA95-112; JA113, ¶ 22; JA168-70, ¶¶ 46-54; JA196-97, ¶¶ 127-29; *see also Oneida Indian Nation v. County of Oneida*, 719 F.2d 525, 529 (2d Cir. 1983). Thus, in 1970, BS&K began the litigation process by filing the Test Case, alleging that the Oneidas' right to the subject land was guaranteed by federal treaty, that the State's acquisition of the land had been in violation of the Non-Intercourse Act, and that the Counties were therefore in wrongful possession and owed the Oneidas damages for the land's fair rental value for the years 1968 and 1969. *See* JA113, ¶ 22.

As anticipated, the District Court dismissed the Test Case soon after the complaint was filed, holding "that a Federal Question was lacking because the well-pleaded complaint rule bars suits to recover land." JA171, ¶ 56; 70-CV-35, Dkt. 4. On appeal, this Court affirmed, holding that the Oneidas' claim "shatters on the rock of the 'well-pleaded complaint' rule." *Oneida Indian Nation of New York v. County of Oneida*, 464 F.2d 916, 918 (2d Cir. 1972).

BS&K's strategy then reached its pivotal moment. There was no ground for an automatic appeal to the Supreme Court, so the Firm petitioned the Court for certioriari. JA172, ¶¶ 59-60. The Counties and the United States filed opposition. *Id.*, ¶¶ 60-61; JA235. Against all odds, the Supreme Court granted certioriari on the sole issue of federal question jurisdiction. JA173, ¶ 63.

BS&K's attorneys then set themselves to the daunting task of briefing and arguing a landmark case before the high court of the land, seeking to overturn the Supreme Court's own precedent applying the well-pleaded complaint rule to American Indian land claims. JA173, ¶ 64. After the case was fully briefed, the Supreme Court heard oral argument on two days, November 6 and 7, 1973. JA177, ¶ 70. BS&K partner George Shattuck recalls being peppered with questions, particularly from Justices Brennan and Marshall, who expressed concern that the Oneidas' ultimate goal was ejectment; Mr. Shattuck focused his argument on convincing the Court simply of the Oneidas' right to have their case be heard in federal court. JA177-78, ¶¶ 72-73; JA181, ¶ 81.

The strategy worked. Two months after oral argument, to the great surprise of Native American law experts,[11] the Supreme Court issued its opinion, unanimously rejecting the lower courts' application of the well-pleaded complaint rule to bar the Oneidas from federal court. *Oneida I*, 414 U.S. at 666-67. The Court also rejected the view long-held by both the federal government and New York State that the Non-Intercourse Act did not apply to the State's unauthorized

[11] Upon hearing of the Supreme Court's decision, L. Graeme Bell, III of the Native American Rights Fund wrote George Shattuck, expressing: "My heartiest congratulations on your splendid victory in the Supreme Court case. I remain absolutely stunned by the scope of the victory, as well as the theories propounded by Justice White, and I am embarrassed that I was not more supportive of your thoughts on the well-pleaded complaint rule, as it applies to your case." JA183, ¶ 84.

acquisitions of land from the Oneidas. The Court held instead that "[t]he rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13." *Id.* at 670.

2. BS&K Expands the Theory of Recovery to More Oneida Lands

Immediately after the Firm's victory before the Supreme Court in *Oneida I*, BS&K implemented the next step of its multi-pronged litigation strategy, preparing and filing the Reservation Case on the same underlying theory of recovery – *i.e.*, that all of the Oneidas' lands (300,000 acres) which New York State had acquired from 1795 to the mid-1840's violated the Non-Intercourse Act. *See* JA114-41; JA191, ¶ 110.

3. BS&K Establishes the Oneidas' Original Indian Title to 100,000 Acres, and the Counties' Liability for Violation of the Non-Intercourse Act, at Trial in the Test Case

On remand from the Supreme Court in *Oneida I*, Judge Port ordered that trial of the issues in the Test Case be trifurcated: the first phase would determine the defendant counties' liability to the Oneidas; the second would determine the damages; and the third would determine the liability of the State of New York to the defendant counties. *Oneida*, 434 F. Supp. at 532. The liability trial took place in November 1975. BS&K submitted extensive documentary evidence and expert testimony – at the Firm's own expense – establishing, *inter alia*, that New York

State's acquisition of the Oneidas' land in 1795 violated the Non-Intercourse Act. JA184-89, ¶¶ 86-102. BS&K also squarely addressed the defense of laches at the trial, offering proof to show that the Oneidas had tried many times to obtain redress but were unable to procure an adequate response from the federal or state government (JA188, ¶ 101).

Judge Port found that New York's "purchase" of the Oneidas' land was indeed in violation of the Non-Intercourse Act. *See Oneida*, 434 F. Supp. at 548. Specifically, Judge Port ruled that: (1) the Oneidas were a tribe within the meaning of the Act; (2) the 100,000 acres purchased by New York in 1795 were covered by the Act; (3) a fiduciary relationship existed between the United States and the Oneidas; and (4) the United States never consented to the 1795 acquisition, as required by the Act. *Id.* at 537-41. Judge Port further held that the Oneidas had never abandoned their claim to the land "but have continued to protest its diminishment up until today." *Id.* at 541.

Crucially, Judge Port's decision established the supremacy of the Oneidas' original Indian title to the 100,000 acres – which had been guaranteed to them by the Treaty of Canandaigua, long ago – as a matter of law:

> The Nonintercourse Act states that no purchase of Indian land, unless made by treaty or convention pursuant to the Constitution, shall be of *any validity* in law or equity. …
>
> The plaintiffs have established a claim for violation of the Nonintercourse Act. Unless the act is to be rendered

> nugatory, it must be concluded that the plaintiffs' right of occupancy and possession to the land in question was not alienated. By the deed of 1795, the State acquired no rights against the plaintiffs…

Oneida, 434 F. Supp. at 541, 548 (emphasis in original), *citing* 25 U.S.C. § 177. Judge Port's findings of liability were later affirmed by both the Second Circuit, *see* 719 F.2d at 530-542, and by a divided Supreme Court in 1985. *See Oneida II*, 470 U.S. 226.

4. Litigation After BS&K's Withdrawal

Approximately one year after Judge Port's 1977 decision, BS&K withdrew as counsel of record for the Oneidas. The magnitude of the Firm's success for the Oneidas had the unintended effect of creating a potential conflict of interest, as *Oneida I* inspired other tribal groups to explore claims for ejectment, and the Wisconsin Oneidas were indeed considering a lawsuit for ejectment. JA727, ¶ 26. Thus, had BS&K remained the Oneidas' counsel of record, the Firm would have faced a conflict of interest if the Oneidas decided to seek ejectment. JA196-99, ¶¶ 126-35.[6]

Trial on the damages phase in the Test Case occurred in 1981 and ultimately resulted in the Counties' depositing, by stipulation and order dated March 9, 2004,

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[6] Indeed, the Oneidas ultimately chose to take that path in the Reservation Case, as discussed below. *See Oneida Indian Nation of New York v. County of Oneida*, 199 F.R.D. 61 (N.D.N.Y. 2000) (denying Oneidas' request to amend complaint in Reservation Case to assert ejectment claims).

the sum of $57,494.87 with the Clerk of the Court. *See* 70-cv-0035, Dkt. No. 121. At the time of BS&K's withdrawal, dispositive motions had not yet been made in the Reservation Case, which laid dormant for many years as the Oneidas and New York State made numerous attempts to settle. Eventually, the United States intervened in the Reservation Case in June 1998, fulfilling an original goal of BS&K. JA166. The Oneidas and the United States sought to amend their pleadings to join 20,000 private landowners as defendants and, for the first time, to seek the remedy of ejectment. *See Oneida Indian Nation of New York State v. County of Oneida*, 199 F.R.D. 61, 67-69 (N.D.N.Y. 2000). This was the very strategy that BS&K recommended that the Oneidas avoid from the outset because of the likely political firestorm it would ignite. On September 25, 2000, the District Court (Hon. Neal P. McCurn) denied the Oneidas' attempt to assert such claims against private landowners. *Id.*, 199 F.R.D. at 79-84 (finding that, *inter alia*, amendment was in bad faith).

In 2007, the District Court (Hon. Lawrence E. Kahn) dismissed the Oneidas' possessory claims under the doctrine of laches as applied by this Court in *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), which followed the Supreme Court's decision in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005). *See Oneida Indian Nation v. New York*, 500 F. Supp. 2d 128, 134 (N.D.N.Y. 2007). On appeal, this Court affirmed Judge Kahn's decision and also dismissed

the Oneidas' remaining, non-possessory claims under the laches doctrine. *See Oneida*, 617 F.3d at 135 (finding "each of the purportedly nonpossessory claims pressed by plaintiffs on appeal falls within the equitable bar recognized in *Cayuga*"). The Court expressly held that its decision did not overrule the Oneidas' prior victories in the Test Case. *Id.* at 140 ("... the Oneidas contend that the [decision] would effectively overrule *Oneida II*. We disagree."). On October 17, 2011, the Supreme Court denied the Oneidas' petition for a writ of certioriari. *See Oneida Indian Nation v. Oneida County, N.Y.*, --- U.S. ---, 2011 U.S. LEXIS 7494 (U.S. Oct. 17, 2011) (No. 10-1420).

E. BS&K's MOTION FOR AN EQUITABLE FEE

In 1999, BS&K filed its motion for an Order recognizing the Firm's right to an equitable fee. JA250-51. BS&K further requested an opportunity to submit additional evidence as to the amount of the fee, but only after the Oneidas' claims against the Counties were finally settled. *Id.* Finally, because at that time it appeared that a significant settlement was "imminent"[7], BS&K posited that an equitable fee could be determined as a specific percentage of the Oneidas' ultimate

[7] *See, e.g.*, BS&K Mem. at 1. *See also* NY Oneidas Opp'n to Objections (5:70-CV-0035, Dkt. No. 127/128; 5:74-CV-187, Dkt. No. 629/630) at p. 1 ("BS&K's fee motion ... was filed in 1999 at a time when, as shown on the docket sheet in No. 74-CV-187, it looked as if the case might be settled by a mediator."). In 2002, when the Oneidas filed their opposition to BS&K's motion and BS&K filed its reply brief, the Oneidas and New York State were still engaged in mediation to try to settle the Oneidas' claims. *See* BS&K Reply Mem. at 3.

settlement with the State. *Id.* Twelve years passed, however, and during that time the Oneidas' negotiations with New York State failed to result in the anticipated resolution.

On February 18, 2011, Magistrate Judge Treece unexpectedly issued the R&R, without receiving argument or affording the parties a chance to submit additional briefing that would have alerted the court to the change in underlying circumstances since 1999. In the first 53 pages of the R&R, Magistrate Judge Treece analyzed the parties' arguments and concluded that BS&K's withdrawal in 1978 constituted a termination of representation and that the Oneidas ultimately obtained a recovery. This should have ended the inquiry, as BS&K had only applied for a determination of its *right* to a fee, not the amount. In the last two pages of the R&R, however, Magistrate Judge Treece proceeded to determine the fee *sua sponte*. He did not hold an evidentiary hearing or even receive oral argument before setting the fee as 9% of the Oneidas' damages for two years' rent in the Test Case. This amounted to an award of just $5,174.54 for thirteen years of work, the unprecedented success and the tangible results that BS&K achieved for the Oneidas. *See* SA54-56.

Magistrate Judge Treece apparently believed that BS&K had, in fact, moved the court to determine the fee: "By its Motion, BSK asks the Court to order that any fees due it be calculated 'as a specific percentage of the value of the

consideration recovered by, awarded to or otherwise received by the Oneidas…'" SA54, *quoting* BS&K Mem.[8] at 25. But the quotation was taken out of context; in BS&K's application, the Firm asked only for an Order recognizing its right to a fee "and directing that, at the conclusion of the [Test and Reservation Cases] … the Court will afford [BS&K] and the parties an opportunity to submit such additional affidavits and law as they deem appropriate…" BS&K Mem. at 25. Indeed, BS&K stated in its reply memorandum that "[t]he amount can be set later." *See* BS&K Reply Mem.[9] at 3.

BS&K argued, from the outset, that an equitable fee should take into account the quantum meruit factors that would establish the full value to the Oneidas of BS&K's work, warranting a significant premium. *See* BS&K Mem. at 18-22; BS&K Mem. at 15, n. 21; BS&K Reply Mem. at 34-35. In 1999, when it appeared that the Oneidas were likely to reach a substantial settlement with New York State, BS&K contended that a fee based on a specific percentage of that ultimate resolution would have closely approximated the quantum meruit-based premium owed to BS&K for its groundbreaking work for the Oneidas. By 2011, however, those underlying circumstances had changed, and the concept of setting the fee as

[8] 5:70-CV-0035, Dkt. No. 55; 5:74-CV-187, Dkt. No. 131.

[9] 5:70-CV-0035, Dkt. No. 112; *see also* 5:74-CV-187, Dkt. No. 472-78.

solely a percentage of damages was inapplicable, as an evidentiary hearing would have shown.

Moreover, as stated at Section C, above, Paragraph 10 of the Retainer Agreement provides that upon termination of BS&K's representation, the Firm would be entitled to an equitable fee. Magistrate Judge Treece did not overlook Paragraph 10, but his analysis of that provision was focused on whether BS&K's termination was due to "wrongdoing." *See* SA36-38. In passing, he also stated: "Paragraph 10 of the Retainer Agreement specifies the terms under which attorney's fees shall be determined after a premature termination of the contract has occurred and therefore, the Court need not consider whether BSK is owed attorney fees pursuant to New York Judiciary Law § 475 [which provides for a charging lien] nor whether 'just cause' existed for BSK's withdrawal." *See* SA37. Magistrate Judge Treece then cited two cases for the general proposition (supplied in his parenthetical descriptions of the cases) that where the parties have an express contract governing compensation, quantum meruit does not apply. *Id.*, *citing McNammee, Lochner, Titus & Williams, P.C. v. Higher Educ. Assistance Fund*, 50 F.3d 120 (2d Cir. 1995); *Jontow v. Jontow*, 34 A.D.2d 744 (1st Dep't 1970).[10]

BS&K filed its objections to the R&R on March 4, 2011, arguing, *inter alia*, that its fee should not have been determined without affording BS&K the

[10] As discussed at page 31, below, neither of these cases support that proposition.

opportunity to submit additional evidence. *See* Objections Br.[11] at 7-9. BS&K further contended that the fee should have been determined on a quantum meruit basis, taking into consideration the full scope of the Oneidas' 'recovery' beyond the two years' rent awarded as damages in the Test Case, as well as the change in underlying circumstances during the interval since BS&K's motion was filed in 1999. *Id.* at 18. BS&K pointed out that the underlying foundation of the Oneidas' considerable economic success and development, including a casino in Verona, New York, was the result BS&K achieved before the Supreme Court in *Oneida I* and before Judge Port at the trial on liability. *Id.* at 12-15. The Firm made clear, however, that it did not seek any share of those businesses: "We do not mean to suggest that every benefit the Oneidas have accrued since the Test Case is a part of the recovery." *Id.* at 15.

The District Court adopted the R&R in full without addressing Paragraph 10 of the Retainer Agreement and rejected BS&K's objection that an evidentiary hearing was required to determine the fee. The District Court held instead that BS&K had allegedly failed to ask the court to receive further evidence or proffer any new evidence in support of a greater fee. *See* SA65, *citing* 28 U.S.C. 636(b). Additionally, the District Court misconstrued BS&K's position to be "that its contingent fee in the Oneida land claim recovery includes Oneida Nation of York

[11] 5:70-CV-0035, Dkt. No. 126; 5:74-CV-135, Dkt. No. 625 & 628.

[sic] businesses, including a casino … [and] income generated by the Oneida Casino." SA61. BS&K has never taken that position.

SUMMARY OF ARGUMENT

In Point I, below, BS&K shows that the lower court was incorrect to determine (*sua sponte*) the equitable fee award as a percentage of the Oneidas' damages rather than applying longstanding principles of quantum meruit. In Point II, BS&K shows that the court further erred by depriving BS&K of the opportunity to submit proof at an evidentiary hearing. In Point III, the court below was required to apply prejudgment interest to any fee award. Finally, in Point IV, BS&K shows that even if the lower court was correct to determine the fee (again, *sua sponte*) as a simple percentage of the Oneidas' "recovery," that term should have been construed much more broadly to take into account the true value of BS&K's efforts and successes for the Oneidas, and the many doors which were opened to the Oneidas by the landmark decisions BS&K obtained for them, including the Supreme Court's decision in *Oneida I* and Judge Port's decision establishing their original Indian title to 100,000 acres of land.

ARGUMENT

STANDARD OF REVIEW

As shown below, the court below made errors of law by, *inter alia*, determining the amount of BS&K's fee without applying a quantum meruit

analysis and without holding an evidentiary hearing. Therefore, this Court should review the District Court's mistaken conclusions of law de novo. *See, e.g., Pres. Coalition v. Fed. Transit Admin.*, 356 F.3d 444, 450 (2d Cir. 2004) ("where an appellant's contention on appeal regarding an award of attorneys' fees is that the district court made an error of law in granting or denying such an award, the district court's rulings of law are reviewed de novo"); *Baker v. Health Mgmt. Sys.*, 264 F.3d 144, 149 (2d Cir. 2001) (same). Even if this Court's review is limited to abuse of discretion, however, the Decision should be reversed and remanded for the reasons given below.

New York law governs this dispute. *E.g., Tops Mkts., Inc. v. Quality Mkts., Inc.*, No. 93-CV-0302E(F), 2001 U.S. Dist. LEXIS 4238, *6 (W.D.N.Y. Apr. 3, 2001) ("Disputes over attorney fees are governed by the law of the forum state.")).

I. THE LOWER COURT SHOULD HAVE DETERMINED THE FEE BASED ON QUANTUM MERUIT.

A. Equitable Fee Awards Require a Quantum Meruit Analysis.

The Second Circuit has held that a withdrawing or discharged attorney is entitled to a fee based on quantum meruit principles as long as the attorney was not discharged with cause. *See D'Jamoos v. Michael Griffith*, 340 Fed. Appx. 737, 741 (2d Cir. 2009) (summary order); *Universal Acupuncture Pain Servs., P.C. v. Quadrino & Schwartz, P.C.*, 370 F.3d 259, 263 (2d Cir. 2004); *Stair*, 722 F. Supp. 2d at 267-68 (attorney's charging lien to be determined on quantum meruit basis

upon termination of representation). New York law thus provides that "[e]ven where … the withdrawing attorney and his client have a contingent contract, the amount of the compensation must be fixed on a quantum meruit basis." *Blunt v. Northern Oneida County Landfill*, 145 A.D.2d 913, 914 (4th Dep't 1988); *see also Smith v. Boscov's Dept. Store*, 192 A.D.2d 949, 950 (3d Dep't 1993) ("Recovery on a quantum meruit basis is called for even where the attorney discharged without fault was employed under a contingent fee contract."); *In the Matter of Shaad*, 59 A.D.2d 1061, 1061 (4th Dep't 1977). The quantum meruit fee is meant to compensate "for the reasonable value of services rendered *before* discharge." *Univ. Acupuncture Pain Servs.*, 370 F.3d at 264 (emphasis in original).

Thus, the law of this Circuit provides that an attorney fee based on quantum meruit should be determined based on "(1) the contingent nature of the representation, (2) the results achieved by the attorney before discharge, and (3) the client's actual chance of success at the time the attorney was discharged." *Id.* at 265 (citations omitted). Other factors to be considered include "the difficulty of the matter, the nature and extent of the services rendered, the time reasonably expended on those services, the quality of performance by counsel, the qualifications of counsel, the amount at issue, and the results obtained (to the extent known)." *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 148 (2d Cir. 1998); *Stair v. Calhoun*, 722 F. Supp. 2d 258, 268 (E.D.N.Y. 2010).

The district court should also consider 'case-specific variables' such as:

> (1) [T]he time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the attorney's customary hourly rate; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved in the case and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 522 F.3d 182, 187 n. 3 (2d Cir. 2007); *see also id.* at 190 ("In determining what rate a paying client would be willing to pay, the district court should consider, among others, the Johnson factors."), *citing Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)[12]; *Konits v. Karahalis*, 409 Fed. Appx. 418, 422 (2d Cir. 2011) (summary order) (directing that "Johnson" case-specific considerations be factored into the presumptively reasonable fee analysis); *see also*

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[12] It has been suggested that this Court's instruction that district courts should apply these so-called *Johnson* factors may no longer be viable in light of a recent Supreme Court decision affirming the "lodestar" approach to determining attorney fees under federal fee-shifting statutes, such as Section 1983 claims. *See, e.g., Gordon v. Site 16/17 Dev., LLC*, No. 11 Civ. 0427 (RMB) (AJP), 2011 U.S. Dist. LEXIS 82367, *17 n. 11 (S.D.N.Y. July 28, 2011), *citing Perdue v. Kenny A.*, 130 S. Ct. 1662, 1672-73, 176 L. Ed. 2d 494 (2010). Thus far, however, courts in this Circuit have continued to apply the *Johnson* factors. *See, e.g., Konits*, 409 Fed. Appx. at 422; *Kittay v. Korff (In re Palermo)*, No. 08 CV 7421 (RPP), 2011 U.S. Dist. LEXIS 99537, *67-68 (S.D.N.Y. Sept. 2, 2011).

Rich Prods. Corp. v. Impress Indus., Inc., No. 05-CV-187S, 2008 U.S. Dist. LEXIS 4742 (W.D.N.Y., Jan. 23, 2008) (it is within district court's discretion to determine reasonableness of rates based on "similar services by lawyers of reasonably comparable skill, experience, and reputation [and] the Court's 'knowledge of prevailing community rates and the relative experience of counsel.'"), *citing Luciano v. Olsten Corp.*, 109 F.3d 111, 115 (2d Cir. 1997) (citation and internal quotations omitted), *and citing Sheehy v. Wehlage*, No. 02-CV-592, 2007 U.S. Dist. LEXIS 11722, at *18 (W.D.N.Y., Feb. 20, 2007). *See also Western Shoshone Identifiable Group v. United States*, 652 F.2d 41, 47-48 (Ct. Cl. 1981) (applying largely same factors to determine fee award in American Indian land claim cases).

This Court has further explained that the proper measure of success "is not limited to inquiring whether a plaintiff prevailed on individual claims":

> Both the quantity and quality of relief obtained, as compared to what the plaintiff sought to achieve as evidenced in her complaint, are key factors in determining the degree of success achieved. Indeed, this comparison promotes the court's central responsibility to make the assessment of what is a reasonable fee under the circumstances of the case.

Barfield v. N.Y. City Health & Hosps. Corp., 537 F.3d 132, 152 (2d Cir. 2008) (quotations omitted).

Finally, the district court should analyze all of these factors in order to determine the "presumptively reasonable fee" in a given case. *Arbor Hill*, *supra*, 522 F.3d at 183. In making this determination, the district court should consider "contemporaneous time records, affidavits, and other materials." *Antonmarchi v. Consol. Edison Co.*, No. 03 Civ. 7735 (LTS)(KNF), 2010 U.S. Dist. LEXIS 88024, *9 (S.D.N.Y, Aug. 25, 2010), *citing McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund*, 450 F.3d 91, 96 (2d Cir. 2006). The district court is also to "examine[]the particular hours expended by counsel with a view to the value of the work product of the specific expenditures to the client's case." *Antonmarchi*, 2010 U.S. Dist. LEXIS 88024 at *10, *quoting Luciano*, 109 F.3d at 116.

Although the presumptively reasonable fee is often based on the prevailing hourly rates charged in the local legal community[13] – *see Antonmarchi*, 2010 U.S. Dist. LEXIS 88024 at *7 – this Court has instructed district courts to "adjust the base hourly rate to account for … case-specific variables." *Arbor Hill*, 522 F.3d at 183-84. *See also Robinson v. City of New York*, No. 05 Civ. 9545 (GEL), 2009 U.S. Dist. LEXIS 89981, *7 (S.D.N.Y. Sept. 29, 2009) ("Following the determination of the presumptively reasonable fee, the court must then consider whether an upward or downward adjustment of the fee is warranted based on

[13] "The community is defined as the district in which the court sits." *La Barbera v. Les Sub-Surface Plumbing, Inc.*, No. 06 CV 3343 (NG) (KAM), 2008 U.S. Dist. LEXIS 27047, *24 (E.D.N.Y. Apr. 1, 2008).

factors such as the extent of plaintiff's success in the litigation."); *Adorno v. Port Auth. of N.Y. & N.J.*, 685 F. Supp. 2d 507, 511 (S.D.N.Y. 2010) ("the process is really a four-step one, as the court must: (1) determine the reasonable hourly rate; (2) determine the number of hours reasonably expended; (3) multiply the two to calculate the presumptively reasonable fee; and (4) make any appropriate adjustments to arrive at the final fee award."); *Vereen v. Siegler*, No. 3:07CV1898 (HBF), 2011 U.S. Dist. LEXIS 64162, *10 (D. Conn. June 16, 2011) ("Having determined the presumptively reasonable fee, the final step in the fee determination is to inquire whether an upward or downward adjustment is required."). Moreover, courts in this Circuit recognize that "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee," and thus "in some cases of exceptional success an enhanced award may be justified." *Orthopedic Assocs. of 65 Pa. Ave. v. Sedor*, No. 3:00-cv-238 (GLS), 2011 U.S. Dist. LEXIS 103546, *11 (N.D.N.Y. Sept. 12, 2011), *quoting Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983).

B. The Lower Court Neglected to Apply Quantum Meruit.

Instead of applying the foregoing analysis, Magistrate Judge Treece determined BS&K's equitable fee as a simple percentage of the Oneidas' damages for two years' rent in the Test Case. As stated above, in his review of Paragraph 10 of the Retainer Agreement, Magistrate Judge Treece relied on two cases,

McNammee v. Higher Educ. Assistance Fund, 50 F.3d 120, and *Jontow v. Jontow*, 34 A.D.2d 744, to reach the conclusion that a quantum meruit analysis was unnecessary merely because the parties had a written Retainer Agreement. SA37.

Neither case actually supports that proposition. In *McNammee*, the law firm was hired to collect on defaulted student loans, and its retainer agreement provided for a 25% contingency fee on each file that would "constitute the full and sole compensation for all services." *See McNammee*, 50 F.3d at 124. The Court thus found that, upon termination, the firm was solely entitled to a 25% fee on each file – no more or less than exactly what the contract provided. *Id.* Similarly, in *Jontow*, the retainer agreement provided that the attorney fee would be shared in equal part by the plaintiff firm and the client's trial counsel. The trial court nonetheless apportioned the fee between the plaintiff and trial counsel on a quantum meruit basis, and the Appellate Division reversed "[i]n view of the fact that there was a written agreement between the appellant and the respondent to divide their fee equally." *Jontow*, 34 A.D.2d at 744.

Here, by contrast, the provision in the Retainer Agreement for determining BS&K's fee upon termination of the representation simply calls for an equitable fee, not a specific dollar amount, split or percentage. Thus, neither of the cases cited by Magistrate Judge Treece supports his apparent conclusion that quantum meruit was precluded because the parties hereto had an express Retainer

Agreement; to the contrary, the rule is that "absent an express agreement between the attorney and client ***to the contrary***, a discharged attorney may recover the fair and reasonable value of the services rendered, determined at the time of the discharge and computed on the basis of quantum meruit." *Stair*, 722 F. Supp. 2d at 268; *Melnick v. Press*, No. 06-CV-6686 (JFB) (ARL), 2009 U.S. Dist. LEXIS 77609, *13 (E.D.N.Y. Aug. 28, 2009) (same).

Moreover, Magistrate Judge Treece dismissed the concept of a charging lien too hastily, as this Court has previously held that "[a] charging lien, although originating at common law, ***is equitable in nature***, and the overriding criterion for determining the amount of a charging lien is that it be fair." *Sutton v. N.Y. City Transit Auth.*, 462 F.3d 157, 161 (2d Cir. 2006) (emphasis added and internal quotations omitted). Federal courts in New York thus determine the amount of a terminated attorney's charging lien on a quantum meruit basis. *See Stair*, 722 F. Supp. 2d at 267-68 (holding that "attorneys who terminate their representation are still entitled to enforce their charging liens," and "the amount at which the charging lien should be fixed [is] computed on the basis of quantum meruit"). Here, because the Retainer Agreement between BS&K and the Oneidas expressly called for an equitable fee, the foregoing authority makes clear that the fee should have been determined on a quantum meruit basis.

In its review of the R&R, the District Court completely overlooked and did not even address Paragraph 10 of the Retainer Agreement, and thus failed to consider whether the determination of the fee as a percentage of the Oneidas' damages was consistent with the principles of equity embodied in the quantum meruit analysis. Indeed, even the Oneidas argued below that, if BS&K was entitled to any fee, it should be determined on a quantum meruit basis:

- "A fair fee … would be based on the lodestar approach…" *See* Joint Opp'n, dated Aug. 15, 2002,[14] at p. 2.
- "… an hours-based fee is appropriate here, if any at all, because the general rules are that quantum meruit fees are awarded to attorneys after termination of a contingent fee agreement…" *Id.* at 22.
- "A quantum meruit award is determined by the 'lodestar approach,' multiplying allowed hours by a reasonable hourly rate, and then adjusting up or down." *Id.* at 23.

C. The Quantum Meruit Factors Warrant a Greater Fee Award.

The lower court failed to properly account for these quantum meruit principles, which, had they been considered below, would have demonstrated the tremendous value and significance of BS&K's work for the Oneidas. BS&K overcame the jurisdictional barriers. BS&K proved the Oneidas' original Indian title to 100,000 acres of land. BS&K established the Counties' liability for rent. The full value of these results simply was not taken into account by the court below in the *sua sponte* determination of BS&K's fee.

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[14] 5:70-CV-0034, Dkt. No. 109; *see also* 5:74-CV-187, Dkt. No. 472-78.

Moreover, at the time they approached BS&K, the Oneidas lacked not only a forum but an attorney willing to take their case. They had approached other counsel without success, and unsurprisingly so; ten decades of legal precedent barred their claim and the Oneidas lacked the financial resources to retain counsel on any basis other than a contingency. This surely made it all but impossible for the Oneidas to find counsel, as Magistrate Judge Treece expressly noted. *See, e.g.*, SA40 ("According to Jacob Thompson, prior to contacting BSK, he contacted several law firms in the greater Syracuse, New York area regarding representation … most stated they were too small to take on a case of this magnitude, particularly since the Oneida Nation had no ability to pay hourly rates for the enormous work which would be involved."). *See also* JA722, ¶ 11. BS&K took the case, however, accepting a considerable risk that the Firm might never recover a fee for its services.

After overcoming the odds, BS&K left the Oneidas very well-positioned at the time of the Firm's withdrawal. The doors to the federal courthouse had been opened and the Oneidas' original Indian title to lands illegally acquired by New York State in 1795 had been established. Because of BS&K, the Oneidas now had tremendous leverage to negotiate with the State, including (but not limited to) for the State's unauthorized taking of their land as alleged in the Reservation Case. Moreover, once their original Indian title to 100,000 acres of the land had been

established, the Oneidas were able to pursue previously-unimaginable commercial opportunities and development, including building a casino (as discussed below, at pp. 50-51). BS&K had created the foundation for the Oneidas' ensuing success.

Additionally, if an evidentiary hearing had been held below, BS&K would have submitted proof of at least 2,885 hours of time spent representing the Oneidas from 1965 to 1978. At the then-applicable rates at BS&K and in the market ($45 to $85 per hour), the Firm's fees for those hours were at least $202,000, with disbursements exceeding $14,500 for expert witnesses, subpoena fees, deposition transcripts, and similar expenses. This proof would have established a baseline presumptively reasonable fee for the District Court to adjust upward in recognition of the other case-specific, quantum meruit variables. *Arbor Hill*, 522 F.3d at 183-84.

In short, the issues could not have been more novel, nor the challenges more unprecedented, when BS&K took the case. The Firm's victory in *Oneida I* could not have easily been predicted. At the time of BS&K's withdrawal, the Oneidas' chances of continued success were very good. The Firm devoted significant time and resources to the Oneidas' case. None of these factors were adequately reviewed by Magistrate Judge Treece or the District Court, and their failure to determine BS&K's fee on a quantum meruit basis was reversible error. *See*

Universal Acupuncture Pain Servs., 370 F.3d at 265 (reversing and remanding for determination of fee under quantum meruit).

D. That a Fee Based on Quantum Meruit Would Exceed the Oneidas' Damages in the Test Case Is no Bar to Awarding a Truly Equitable Fee.

To be sure, an equitable fee determined on a quantum meruit basis would far exceed the Oneidas' damages award of $57,494.87 in the Test Case. But this Court has expressly held that "a discharged attorney's recovery in quantum meruit for a fee is not limited by the former client's ultimate recovery…" *Univ. Acupuncture*, 370 F.3d at 264. Moreover, federal courts applying New York law recognize that an award of attorney fees may lie well in excess of the litigant's damages award where, as here, "the benefits of the litigation reached far beyond the amount sought in the [action], such as in 'cases where there are transcending principles involved …'" *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1264 (2d Cir. 1987), *quoting Colon v. Automatic Retailers Assoc. Service, Inc.*, 74 Misc. 2d 478, 487 (Civ. Ct., N.Y. Cty., 1972) (*rev'd on other grounds by* 74 Misc. 2d 665 (Sup. Ct., N.Y. Cty., 1973)); *see also Simmons v. Government Employees Ins. Co.*, 59 A.D.2d 468, 472 (2d Dep't 1977) ("Although it is the exception rather than the rule to make an award of attorney's fees which exceeds the amount of the underlying claim, there are instances where the very nature of the underlying claim itself makes such an award not only reasonable but proper."),

overruled on other grounds by Shand v. Aetna Ins. Co., 74 A.D.2d 442, 448 (2d Dep't 1980).

For this purpose, transcending principles are those "factors that would 'make it economically feasible and reasonable that a fee be paid in excess of the amount involved in the litigation.'" *Antidote Int'l Films, Inc. v. Bloomsbury Publ'g, PLC*, 496 F. Supp. 2d 362, 364 (S.D.N.Y. 2007), *quoting Colon*, 74 Misc.2d at 487. Transcending principles calling for a "fee … greater than the amount of money involved in the litigation" are also present where, as here:

> [S]ubtle and complex questions of law and fact were skillfully analyzed, researched and briefed by [the] lawyers. Every facet of the case was carefully, ably and fully prepared. The case was tried by [the attorney] in a highly intelligent and professional manner and he achieved an optimum result for his client.

Colon, 74 Misc.2d at 486.[15] Courts have further held that "the sheer length of the litigation" may be "a sufficiently unusual circumstance to warrant a departure from the proportionality rule" (*i.e.*, that attorney fees not exceed the amount in controversy). *Amerisource Corp. v. Rx USA Int'l, Inc.*, No. 02-CV-2514 (JMA), 2010 U.S. Dist. LEXIS 52424, *41 (E.D.N.Y. May 26, 2010).

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[15] Judge Scheindlin of the Southern District of New York has described the *Colon* decision as "the seminal New York case" on this issue. *See Krumme v. Westpoint Stevens Inc.*, 79 F. Supp. 2d 297, 304 (S.D.N.Y. 1999), *rev'd on other grounds by* 238 F.3d 133 (2d Cir. 2000).

Moreover, as this Court has explained, there is no categorical bar under New York law to awarding attorney fees in excess of the recovery. *See Diamond D Enterprises USA, Inc. v. Steinsvaag*, 979 F.2d 14, 19 (2d Cir. 1992) (holding that fee award of $41,000 was reasonable where jury verdict for damages was only $17,000; rejecting defendants' argument that Second Circuit law "damns, as unreasonable, an award of fees in excess of the amount actually recovered in a lawsuit."); *Kassim v. City of Schenectady*, 415 F.3d 246, 252 (2d Cir. 2005) (opining that fee award of $65,400 on judgment of only $2,500 would not be unreasonable, because "we have repeatedly rejected the notion that a fee may be reduced merely because the fee would be disproportionate to the financial interest at stake in the litigation"); *see also Amerisource Corp.*, 2010 U.S. Dist. LEXIS 52424 at *40 (awarding attorneys' fees and costs of $1.8 million where judgments were $175,000 and $99,000, because litigation lasted for nine years and amount truly in controversy was over $55 million; "the Court has the discretion to permit a fee award that exceeds the basic damages value of the case if it is reasonable to do so under the circumstances"); *Kahlil v. Original Old Homestead Rest., Inc.*, 657 F. Supp. 2d 470, 478 (S.D.N.Y. 2009) (awarding $93,172.25 in fees where judgment was $36,000, explaining that "the simple disproportion between a plaintiff's recovery and the fee applied for is not a proper basis for a reduction in an otherwise reasonable fee"); *Krumme v. Westpoint Stevens Inc.*, 79 F. Supp. 2d 297,

303-04 (S.D.N.Y. 1999) ("there is no bright-line rule … there are circumstances where reasonable attorneys' fees can exceed the amount in controversy"), *rev'd on other grounds by* 238 F.3d 133 (2d Cir. 2000). *See also Millea v. Metro-North R.R.*, No. 10-409-cv (L), 2011 U.S. App. LEXIS 16354, *28 (2d Cir. Aug. 8, 2011) ("The district court conflated a small damages award with a de minimis victory.").

Here, the transcending principles that warrant an equitable fee greater than the damages for two years' rent in the Test Case are the same quantum meruit factors discussed above: the value to the Oneidas of BS&K's victory before the Supreme Court, reversing many years of jurisprudence barring American Indians from federal court under the well-pleaded complaint rule, and the value to the Oneidas of Judge Port's decision establishing their original Indian title to 100,000 acres of land and the Counties' liability for rent on 827 acres. Judge Port's decision established the supremacy of the Oneidas' original Indian title by applying the Non-Intercourse Act, pursuant to which the Oneidas' title could only be extinguished by an affirmative and specific Act of Congress. The Test Case was thus, by definition, successfully designed to determine and establish the Oneidas' rights in the first instance and open the door for them to bring additional claims. The commercial impact of the finding of the Oneidas' original Indian title to their lands in the Test Case was far-reaching, eventually enabling the Oneidas to build a casino on that land. To limit BS&K's fee by the end result of litigation in

the Test Case would ignore the true value to the Oneidas of BS&K's work, which created the foundation for the Oneidas' later success. New York law wholly supports an attorney fee award exceeding the amount in controversy in this type of 'determinative' action. *See Colon*, 74 Misc.2d at 487 (supplying examples of "determinative" actions with transcending principles warranting a larger attorney fee award, such as "[a]n action to recover a small disability payment under a disability insurance policy").

For instance, in *Antidote Int'l Films v. Bloomsbury Publishing*, the District Court (Hon. Rakoff) found that transcending principles justified a fee award of $279,175 even though the jury verdict awarded damages of $116,500, because the plaintiff's attorney had proven a breach of contract that not only afforded the plaintiff compensatory damages for that particular breach, but that also opened the door to the plaintiff to exercise additional contractual rights. *See Antidote Int'l Films*, 496 F. Supp. 2d at 365-66 ("[T]he instant action is determinative of [the contract] in certain respects."). Likewise, in *Krumme*, Judge Scheindlin of the Southern District of New York declined to adopt a Magistrate Judge's report and recommendation capping attorneys' fees at one-third of the amount in controversy because there were transcending principles – due to the fact that the attorneys had commenced several cases in federal and state court, including a "test case," and "[e]very issue that was fully litigated and resolved in the federal cases had, and

will continue to have, a direct and immediate effect" on the parties – requiring a greater fee. *See* 79 F. Supp. 2d at 307-09.[16]

Indeed, attorney fee awards may exceed the amount in controversy in any one action where (as here) the attorneys have commenced multiple suits to determine or establish their clients' rights. For instance, in *National Union Fire Ins. v. Hartel*, the District Court (Hon. Stanton) awarded the plaintiff its attorneys fees in the amount of $37,385.47 even though the amount in controversy in that action was $21,826.80, because plaintiff's counsel had subsequently brought a separate action against the same defendant for a declaratory judgment that, by bringing the first action, the plaintiff had not violated the Fair Debt Collection Practices Act ("FDCPA"):

> The amount involved in this litigation is $ 21,826.80 (principal amount sued for plus interest). The attorneys' fees, costs and disbursements relating to this suit are approximately $ 12,978.23. The attorneys' fees, costs and disbursements relating to the FDCPA suit are approximately $ 24,407.24. The benefits to plaintiff from the FDCPA suit reached far beyond the $ 21,826.80 recoverable from Mr. Hartel. National Union has close to 200 cases against investors pending in this court, as well as other lawsuits against investors in other courts. The favorable precedent established will benefit National Union if the issue is raised by other defendants, and it will reduce or eliminate National Union's potential

[16] Judge Scheindlin's decision was reversed on appeal for other reasons, including because the plaintiff simply was not entitled to attorneys' fees in the first place. *See* 238 F.3d at 138.

> liability (as threatened by counsel for Mr. Hartel) for violating the FDCPA.

National Union Fire Ins. Co. v. Hartel, 782 F. Supp. 22, 24 (S.D.N.Y. 1992).

BS&K's work was determinative. The Oneidas' original Indian title to their land had not previously been established. Until BS&K shattered the jurisdictional barrier in *Oneida I*, the heavy weight of federal precedent had long barred the Oneidas from the courts. No other attorneys were willing to take the case. The decisions that BS&K achieved in *Oneida I* and Judge Port's 1977 decision had, and continue to have, a lasting and direct benefit to the Oneidas. Transcending principles call for BS&K to be granted an equitable fee award greater than the Oneidas' award of $57,000 for rent for the years 1968-69 in the Test Case.

II. THE LOWER COURT ERRED BY DETERMINING THE FEE WITHOUT HOLDING AN EVIDENTIARY HEARING.

A. BS&K Requested – but was Deprived –an Evidentiary Hearing, Which was Required for the Lower Court to Establish an Equitable Fee.

Courts in this Circuit observe the well-established requirement of New York law that "[a] hearing is required … for a determination of [an attorney] fee on a quantum meruit basis." *Tops Mkts.*, 2001 U.S. Dist. LEXIS 4238 at *9, *quoting Teichner v. W & J Holsteins*, 64 N.Y.2d 977, 979 (N.Y. 1985); *Antonmarchi v. Consol. Edison Co.*, 678 F. Supp. 2d 235, 241 (S.D.N.Y. 2010) (same), *quoting Matter of Mason v. City of New York*, 67 A.D.3d 475, 475 (1st Dep't 2009). *Accord Blunt*, 145 A.D.2d at 914 (requiring "a hearing for the purpose of

determining the reasonable value of the services performed"); *Kahn v. Kahn*, 186 A.D.2d 719, 720 (2d Dep't 1992) ("Where an attorney's withdrawal from a case is justifiable, the attorney is entitled to recover for services rendered on the basis of quantum meruit [and] a hearing is required to determine the amount of compensation."); *Corsi v. Ott*, 357 N.Y.S.2d 746, 747 (4th Dep't 1974) (finding that "a quantum meruit award for legal services rendered cannot be made without a hearing to determine the nature and extent of the attorney's services, the amount of time involved, the value of the services rendered, the amount of services still to be performed, the likelihood of plaintiff's recovery and, if so, the amount thereof").

Hence the lower court committed reversible error by determining the Firm's fee without holding an evidentiary hearing. The prejudice of this failure to BS&K was compounded by the fact that the fee was unexpectedly determined without an evidentiary hearing more than ***twelve*** years after BS&K had filed the underlying motion, which sought only a determination of the right to an equitable fee, not a sum certain, and which expressly asked for the opportunity to submit additional evidence once the right to a fee was established. The court did not take into account Paragraph 10 of the Retainer Agreement or the changes in underlying circumstances in the years since 1999 that rendered a fee based on a percentage inappropriate. The court determined the fee without even hearing oral argument.

The District Court further erred by citing 28 U.S.C. § 636(b)(1) to penalize BS&K for not proffering additional evidence in support of a determination of its equitable fee. *See* SA65. But that statute does not obligate the party objecting to an R&R to make a proffer of evidence. Indeed, it does not even permit the objecting party to supplement the record on its own volition. Rather, the statute simply provides: "The [district court] judge ***may*** also receive further evidence or recommit the matters to the magistrate judge with instructions." 28 U.S.C. § 636(b)(1) (emphasis added). Whether to accept supplemental evidence is thus a matter of discretion for the district court, *see Hynes v. Squillace*, 143 F.3d 653, 656 (2d Cir. 1998), and not (as Judge Kahn seemed to suggest) an automatic right afforded to the objecting party. Indeed, district courts typically decline to accept a proffer of new evidence on objection to a magistrate judge's report and recommendation. *See, e.g., U.S. Fid. & Guar. Co. v. J. United Elec. Contracting Corp.*, 62 F. Supp. 2d 915, 917 (E.D.N.Y. 1999); *In re Adler, Coleman Clearing Corp.*, 497 F. Supp. 2d 520, 522 (S.D.N.Y. 2007).

Moreover, BS&K ***did*** request an opportunity to submit further evidence, as the Firm repeatedly objected that Magistrate Judge Treece had deprived BS&K of such an opportunity:

- "BS&K's equitable fee should be determined through an evidentiary hearing." Objections Br. at 3.

- "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." *Id.* at 7.

- "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." *Id.* at 8.

- "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." *Id.* at 9.

Thus, the District Court should not have approved the fee award on the erroneous basis that BS&K missed its chance to submit additional evidence. At the very least, the District Court could have addressed BS&K's objections by directing the parties to submit such evidence under 28 U.S.C. § 636(b)(1), rather than simply penalizing BS&K for failing to do so.

In short, the lower court's failure to hold an evidentiary hearing was reversible error, and on remand the District Court should hold that hearing in order to permit BS&K a full opportunity to present evidence regarding the appropriate amount of an equitable fee. *See, e.g., Farbotko v. Clinton County*, 433 F.3d 204, 210 (2d Cir. 2005) (vacating statutory fee award and remanding "for findings of fact" as to reasonableness of fee, instructing district court to hold evidentiary

hearing if "necessary … to resolve factual disputes"); *Crescent Publ'g Group, Inc. v. Playboy Enters.*, 246 F.3d 142, 149 (2d Cir. 2001) (remanding because parties "should have been afforded the opportunity to develop the evidentiary record before any determinations as to the propriety and amount of [statutory] fee award," and holding that district court could forego holding an evidentiary hearing if parties' supplemental written record was sufficient for court to make "a reasoned determination" without one).

B. An Evidentiary Hearing Would Have Led to an Equitable Fee Award Based on Established Quantum Meruit Factors.

If BS&K had been afforded a hearing, the evidence would have established BS&K's right to an award that was much more fair than $5,100. For instance, as discussed above, BS&K would have presented proof of its hours – in the form of contemporaneous time records – from 1965 through June 30, 1978, showing that the Firm's total hours spent on the representation during those years came to at least 2,885 hours. BS&K would also have submitted proof to establish that, at the generally applicable hourly rates for partners and associates during those years ($45 to $85) and prevailing market rates, BS&K's fees thus totaled at least $202,000.00, with disbursements of more than $14,500.00.

An evidentiary hearing would also have permitted BS&K the opportunity to develop proof of the value to the Oneidas of both the Supreme Court's watershed decision in *Oneida I* and the 1977 decision subsequently issued by Judge Port

establishing the Oneidas' original Indian title. The lower court should have held a hearing to receive proof of these factors – as New York law requires – in which case the fee award would undoubtedly have been far more equitable than a mere $5,100 for: exhausting all non-litigation avenues for potential relief; developing a multifaceted litigation strategy; implementing step one by commencing the Test Case; resisting the Counties' dispositive motions; appealing and arguing against dismissal of the Test Case to the Second Circuit; petitioning the Supreme Court for certiorari; briefing, arguing, and prevailing before the Supreme Court, reversing a century of federal jurisprudence; identifying and preparing the fact and expert witnesses for a full trial before Judge Port on liability; trying the case and winning; implementing step two of the litigation strategy by commencing the Reservation Case; and establishing the Oneidas' original Indian title to 100,000 acres of land, paving the way for the Oneidas to realize significant commercial development and success.

III. PREJUDGMENT INTEREST SHOULD HAVE BEEN AWARDED.

The lower court further erred by failing to include prejudgment interest in the fee award. This Court has made clear that prejudgment interest at New York's statutory rate should be included in an award of attorney fees, and that the interest accrues from the date of termination of the attorney's representation. *See D'Jamoos*, 340 Fed. Appx. at 742. *See also Simon, M.D. v. Unum Group*, No. 07

Civ. 11426 (SAS), 2010 U.S. Dist. LEXIS 70564, *7 (S.D.N.Y., Jul. 14, 2010) (same); *Stillman v. Inservice America Inc.*, 738 F. Supp. 2d 480, 482-83 (S.D.N.Y. 2010) (under New York law, awarding prejudgment interest is mandatory on a quantum meruit claim).

To illustrate, had the lower court calculated BS&K's equitable fee as $202,000 simply based on BS&K's hours and rates – in other words, not even adjusting upward for the other quantum meruit factors, all of which would warrant a premium – with prejudgment interest assessed at New York's statutory rate,[17] the interest alone would amount to $584,000. Including the more than $14,500 disbursements, the total award for fees, costs and interest would exceed $845,000.

IV. EVEN IF THE FEE WAS PROPERLY DETERMINED AS A PERCENTAGE OF THE ONEIDAS' RECOVERY, THE 'RECOVERY' SHOULD HAVE BEEN CONSTRUED MORE BROADLY THAN THE ONEIDAS' DAMAGES FOR RENT.

Even if the court below was correct to determine BS&K's equitable fee as a percentage of the Oneidas' recovery, it was error nonetheless to limit the "recovery" to their damages for two years' rent. The term "recovery" is not expressly defined in the Retainer Agreement, but the Agreement implicitly recognized that a recovery might not take the form of damages: Paragraph 10 provides for the possibility of a "recovery without submission to a court or

[17] CPLR 5004 provides for simple interest accruing on an annual basis. The rate was 6% until June 25, 1981, and has been 9% since 1981.

tribunal." Clearly, a recovery without submission to a court or tribunal would not necessarily be in the form of damages, but could have taken many other forms.

Moreover, the record shows that at the time they entered into the Retainer Agreement, neither BS&K nor the Oneidas envisioned a recovery as limited to an award of damages. Rather, the parties agreed that BS&K would first pursue many avenues of non-judicial relief, ranging from petitions to President Johnson to testimony at the State Constitutional Convention of 1967. Success at any of those stages would have been considered a recovery: "[O]ur 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 the initiative against the government." JA196, ¶ 127 (emphasis added).

Further, the damages that the Oneidas were awarded for two years' rent hardly captures the full scope of their recovery. It was only after BS&K's victory before the Supreme Court in *Oneida I* and Judge Port's subsequent decision on liability that the Oneidas' fortunes began to change. The amount of the ultimate damages award is thus incidental to the real import of the decisions BS&K obtained in the case. Judge Port held that the Oneidas retained their original Indian title to 100,000 acres of land which could not be transferred without Congressional approval, *see* 434 F. Supp. at 548, and this Court 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 likewise affirmed. *Oneida II*, 470 U.S. at 240.

Their original Indian title having thus been conclusively established as a direct result of BS&K's work, the Oneidas began, piece by piece, to reestablish their 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 anyone's dreams in 1966. Even without damages – in other words, even if the Oneidas' case had never proceeded further than Judge Port's decision on liability – the Oneidas achieved a significant recovery.

The Oneidas' more recent accomplishments exemplify the importance of Judge Port's decision establishing the Oneidas' original Indian title. Again, BS&K does not seek any part of the Oneidas' revenues or income, including from the casino, but argues simply that BS&K's results made those ventures possible, and thus the value of BS&K's services cannot be fully measured without recognizing that the Oneidas' success today flows directly from BS&K's achievements.[18]

[18] By analogy, when a zoning change is achieved, the value of the land increases because of the greater opportunity for development. The new value does not include whatever structure is ultimately built on the land, but the value has gone up *because* the structure can be put on the land.

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 New York Oneidas purchased parcels of land in the Towns of Vernon and Verona, land recognized as within the Reservation. JA729-44. On that land, the New York Oneidas began construction of a casino. *See, e.g.*, JA790-92. In order to operate that casino, pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 USC § 2701, *et seq*., the New York Oneidas executed a Compact with the State of New York (the "Compact"). JA745-89.

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 . . . ." JA754, § 2(b). The term "Nation lands" is defined as "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 . . . ." JA752, § (1)(o).[19] The Secretary of the Interior approved the Compact on June 4, 1993. The resolution of the Test Case was thus a condition precedent to the establishment of the casino. But for Judge Port's 1977 decision in the Test Case, there would not have been any legal finding that the acreage on which the casino sits is Indian land.

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

The New York Oneidas[20] continued to purchase parcels of land within the Reservation. As acknowledged in the Compact, the Oneidas viewed that land as Reservation land, exempt from taxation. As well-documented by this Court's recent decision in *Oneida Indian Nation v. Madison County*, Nos. 05-6408-cv (L); 06-5168-cv (CON); 06-5515-cv (CON), 2011 U.S. App. LEXIS 21210, *15-36 (2d Cir. Oct. 20, 2011), much litigation on that issue ensued and the Oneidas were ultimately unsuccessful, but for many years prior to the Supreme Court's decision in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), the Oneidas had in fact prevailed in that position. Thus, here, again, the Oneidas enjoyed a direct and tangible economic benefit as a result of BS&K's success before Judge Port.

Third, the tribe applied and the Secretary of the Interior accepted into Trust 13,004 acres of land purchased by the New York Oneidas in 2008. JA800. Once again, it was the Test Case that established those 13,004 acres[21] as original Indian land. 434 F. Supp. at 548. As Indian land held in Trust, significant benefits accrue, including the fact that the sovereignty of the Oneidas is recognized over the land, and that it is exempt from local and State taxation. 25 U.S.C. § 465.

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[20] Ostensibly, the Wisconsin Oneidas could have used Judge Port's decision establishing liability and original Indian title in similarly beneficial ways.

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

Finally, the economic value of the results that BS&K obtained cannot be measured solely from the dollar amount of the damages awarded in the Test Case for rent on 872 acres for the years 1968 and 1969, because the Oneidas could have used Judge Port's 1977 decision establishing liability to pursue a claim against the Counties for rent on that same land for the years subsequent to 1969.

In sum, the New York Oneidas have reaped innumerable rewards from their recovery. To be sure, BS&K does not assert that every benefit that has accrued to the Oneidas since the Test Case is a part of the 'recovery,' nor does BS&K seek any award based on a percentage of the Oneidas' revenues from their land, business operations, or the casino. The Oneidas' accomplishments are a testament to their own vision, intelligence, ambition, enterprise, and tenacity. The point here is simply that the damages for two years' rent in the Test Case cannot, alone, be viewed as the "recovery" for purposes of determining an equitable fee award. The Oneidas' recovery due to BS&K's efforts took the form of many economic successes, all flowing from BS&K's dismantling of the longstanding jurisdictional barriers to federal court and BS&K's establishment of the Oneidas' supremacy of their original Indian title to their lands. Precedent and basic fairness require that this "recovery" be measured both in "quantity and quality," *Barfield*, 537 F.3d at 152, comprised of "the results accomplished and the benefits flowing to the client." *Western Shoshone*, 652 F.2d at 47. It is respectfully submitted that the lower court

did not adequately take the full measure of the Oneidas' recovery flowing from BS&K's efforts and success, and the Decision must therefore be reversed.

CONCLUSION

The lower court should have determined BS&K's fee award on a quantum meruit basis. The decision should be reversed and remanded to determine the Firm's presumptively reasonable fee based not only on its hours and rates, but adjusted upward to account for the unparalleled – and, in 1965 when the Oneidas approached the Firm, the unimaginable – success BS&K achieved for the Oneidas. Any fee award should also include prejudgment interest.

Dated: November 17, 2011

Respectfully,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,298 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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(s) s/ Clifford G. Tsan
Attorney for Appellant Bond, Schoeneck & King, PLLC
Dated: November 17, 2011

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ONEIDA INDIAN NATION, *et al.*,

Plaintiffs.

-against- 5:70-CV-0035(LEK)

COUNTY OF ONEIDA, *et al.*,
Defendants.

ONEIDA INDIAN NATION, *et al.*,

Plaintiffs.

5:74-CV-187 (LEK/DRH)

-against-

STATE OF NEW YORK, *et al.*,
Defendants.

DECISION and ORDER

I. Introduction

This matter comes before the Court following a Report-Recommendation ("R&R") filed on February 18, 2001 by the Honorable Randolph F. Treece, United States Magistrate Judge, pursuant to 28 U.S.C. § 636(b) and Local Rule 72.3 of the Northern District of New York. Dkt. No. 624/122.[1] Judge Treece's R&R addresses Bond, Schoeneck & King's ("BSK") Motion to have the Court recognize its right to a fee pursuant to the Retainer Agreement and charging lien in connection with its previous representation of the Oneida Nation. Dkt. No. 130/55. After fourteen

[1] This Motion was filed concurrently in two separate, but related, actions designated as Civil Case Numbers 5:74-CV-187 (LEK/DRH) and 5:70-CV-35 (LEK). In his R&R, Judge Treece refers to the former as the "Reservation Case," and the latter as the "Test Case." This decision will cite case numbers in both dockets by using the Docket Number in the Reservation Case, followed by the Docket Number in the Test Case, except where the cited docket entry is only available in one of the case dockets.

days from the service thereof, the Clerk has sent the entire file to the undersigned, including the Objection to Report and Recommendations by BSK, which was filed on March 4, 2011, and the Objection of Bertram E. Hirsch ("Mr. Hirsch"), which was filed on March 25, 2011. Objection to Report and Recommendations by Bond, Schoeneck, & King ("BSK's Objection") (Dkt. No. 625/136); Objection to Report and Recommendations by Attorney Bertram E. Hirsch ("Hirsch's Objection") (Dkt. No. 631/129). Responses were filed on March 23, 2011. Dkt. Nos. 629/127 and 630/128. Additionally, the Oneida Indian Nation of New York has filed a Motion to strike BSK's Objection because it was not filed under seal. Dkt. No. 632/130.

II. Discussion

A. Motion to Strike

Plaintiff Oneida Indian Nation of New York ("NY Oneida") has moved pursuant to Fed. R. Civ. P. 12(f) and 37(c), Local Rule 1.1(d), and the Court's inherent authority, to strike BSK's Objections. NY Oneida argues that BSK's Objection should be stricken because BSK filed this document in violation of the sealing order entered in these cases, and then failed to ask the Court to correct the error. Dkt. No. 645/130.

While the Court cautions BSK to be more diligent in its procedures for honoring its obligations to file under seal in future cases, it does not find that striking BSK's Objection to the R&R is appropriate in this case. Whether to grant a Rule 12(f) motion "is within the district court's discretion"; however, such motions "are disfavored and not routinely granted." Holmes v. Fischer, No. 09-CV-00829S(F), 2011 U.S. Dist. LEXIS 831, at *14 (W.D.N.Y. Jan. 4, 2011). Imposing sanctions based on the Court's inherent power is also generally disfavored:

> In order to impose sanctions pursuant to its inherent power, a finding of bad faith is necessary. Awards should be imposed based on clear evidence that the challenged actions are entirely without color, and are taking for reasons of harassment or delay or for other improper purposes and such sanctions require 'a high degree of specificity in factual findings."

Rivera v. Sharp, 2010 U.S. Dist. LEXIS 62556, at *4 (D.V.I. June 21, 2010) (quoting Wolters Kluwer Fin. Srvcs., Inc. v. Scivantage, 525 F. Supp. 2d 448, 539 (S.D.N.Y. 2007). BSK's failure to file under seal was accidental, it attempted to contact the Clerk's office and opposing counsel regarding its mistake, the R&R had already been filed publicly and outlined the parties' dispute over attorney's fees, and BSK's Objection contained little or no confidential or embarrassing information. See generally BSK's Memorandum in opposition to NY Oneida's motion to strike (Dkt. No. 633/131); R&R; and BSK's Objection. The Court does not find that BSK's failure to file its Objection under seal rises to the level of bad faith or involves otherwise compelling circumstances, and therefore it exercises it denies the Motion to strike BSK's Objection.

B. Report-Recommendation

1. BSK's Objection to the Report-Recommendation

This Court is to "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b). "A [district] judge . . . may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." Id. Where, however, an objecting "'party makes only conclusory or general objections, or simply reiterates his original arguments, the Court reviews the Report and Recommendation only for clear error.'" Farid v. Bouey, 554 F. Supp. 2d 301, 307 (N.D.N.Y. 2008) (quoting McAllan v. Von Essen, 517 F. Supp. 2d 672, 679 (S.D.N.Y. 2007) (citations and quotations omitted); see also Brown v. Peters, No. 95-CV-1641, 1997 WL 599355, at

*2-3 (N.D.N.Y. Sept. 22, 1997). "A [district] judge . . . may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

BSK specifically objects to section IV of Magistrate Judge Treece's R&R which awarded BSK attorneys' fees in these Oneida land claim cases. Judge Treece awarded BSK $5,174.54 of the $57,494.54 that Plaintiffs recovered from Defendants. R&R at 56. BSK objects to Magistrate Judge Treece's award on the ground that it is entitled to a larger fee "based upon the value of the recovery that has been achieved." BSK's Objection at 20. Rather than arguing that it is entitled to more of the money awarded in the judgment in No. 70-CV-35, BSK contends that its contingent fee in the Oneida land claim recovery includes Oneida Nation of York businesses, including a casino established under a gaming compact approved by the Secretary of the Interior in 1993, as well as to any value created by a trust land decision made by the Department of Interior in 2008. Id. at 14-15. BSK argues that everything the Oneida Nation has gained as a result of the legal principle underlying the $57,494.54 damage award, namely that a 1795 purchase of some Oneida lands by New York was invalid because it violated federal law, should be included it the "amount recovered" under the Retainer Agreement. Id. at 3, 15, 20.

The Court has considered BSK's Objection, has undertaken a *de novo* review of the record, and has determined that the R&R should be approved. With respect to BSK's argument that the term "recovery" should include relief not contained in the final judgment, such as income generated by the Oneida Casino, the Court notes that BSK fails to cite any case in which a contingent fee interest was extended beyond the award contained in a final judgment resolving the litigation or beyond the terms of a settlement. See Universal Acupuncture Pain Servs., P.C. v. Quadrino & Schwartz, P.C., 370 F.3d 259, 264 (2d Cir. 2004) (holding that attorney's fees in quantum meruit

could be appropriate where the client settled without a monetary award, if the attorney was fired by the client without cause and prior to the completion of litigation); Pueblo of Santo Domingo v. United States, 54 Fed. Cl. 240, 245 (2002) (holding that counsel for an Indian tribe were entitled to the maximum allowable percentage of the tribe's recovery in a settlement it reached with the United States); Walker v. Dovetails, Inc., No. 201CV0526, 2011 U.S. Dist. LEXIS 18357, at *9 (E.D. Va. Feb. 24, 2011) (including a pre-judgment payment from defendant to plaintiff in calculating an attorney's fee because that payment was credited toward the Court's judgment); Dewey v. Volkswagon of America, 728 F. Supp. 2d 546 (D.N.J. 2010) (valuing a class-action settlement that included non-cash benefits such as free repairs); McCoy v. Health Net, Inc., 267 F. Supp. 2d 448 (D.N.J. 2008) (valuing non-cash benefits in another class-action settlement, such as the ability of consumers to obtain free credit reports); Western Shoshone Identifiable Grp. v. United States, 652 F.2d 41, 47-48 (Ct. Cl. 1981) (affirming an attorney's fee that constituted 10% of the award obtained in litigation based upon the application of a multi-factor test). Judge Treece specifically addressed this argument by stating that "the Retainer Agreement neither explicitly or implicitly embraces that interpretation" and that "[t]he Court cannot imagine what all of this would portend in terms of a fee." R&R at 56.

In determining the applicable law, Judge Treece correctly stated that the Second Circuit has rejected the proposition "that [the] statutory requirements governing federal approval of certain contracts between Indians and non-Indians give rise to a federal common law governing such contracts." Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians, 94 F.3d 747, 753 (2d Cir. 1996) (citing Gila River Indian Cmty. v. Hanningson, Durham & Richardson, 626 F.2d 708, 714-15 (9th Cir. 1980)). Magistrate Judge Treece also correctly concluded that, in the absence of a

federal common law governing contracts between Indians and non-Indians, state contract law must be applied to the extent that federal Indian law does not override it. Niagara Mohawk Power Corp., at 747.

However, rather than relying on contract law principles in its Objection, BSK cites cases on common fund fee awards in class action lawsuits, fee awards in tribal claims against the federal government, and other statutory fee awards. BSK's Objection at 15-19. These cases are not applicable when a contingency fee agreement governs attorneys' fees. Niagara Mohawk Power Corp. at 747. Under New York law, when a term in a fee agreement between an attorney and a client is ambiguous, the New York Court of Appeals has held that "[w]hile, in the law generally, equivocal contracts will be construed against the drafters, courts as a matter of public policy give particular scrutiny to fee arrangements between attorneys and clients, casting the burden on attorneys who have drafted the retainer agreements to show that the contracts are fair, reasonable, and fully known and understood by their clients." Shaw v. Mfrs. Hanover Trust Co., 68 N.Y.2d 172, 176 (1986).

The Retainer Agreement itself does not expressly state that BSK is entitled to recover casinos, trust land, or anything that the Oneida tribes came by outside of a land claim settlement or judgment. Dkt. No. 630/128, Ex. A. Instead, the Retainer Agreement states, "The compensation of the Attorneys for the services to be rendered under the terms of this contract is to be wholly contingent upon a recovery for the Nation from the State of New York, or any political sub-division or department to it." Id. at 2. The Retainer Agreement goes on to specify the percentages that BSK is entitled to for "amounts recovered by the Nation from the State of New York or any political subdivision, or instrumentality, or agency thereof on account of such claim as a result of or through

the instrumentality of attorney's services, advice or assistance." Id. Nowhere in the fee agreement is the term "amounts recovered" defined or is its meaning delineated. Finally, in the context of a contingency arrangement between a client and an attorney, the plain meaning of "amounts recovered" might not include revenue generated by the client outside of recovery obtained through a settlement or final judgment.

It follows, therefore, that BSK can only recover if it proves that it advised its client before making the fee agreement that the term "amounts recovered" might give BSK an interest in these items. To the contrary, there are indications in the record that BSK advised its client that its fees would be limited to money damages: in its reply memorandum, BSK stated that the Oneida Nation sought counsel to secure "monetary compensation" and that the firm pursued "narrow relief" in the form of the land's "rental value." Dkt. No. 472 (Test Case document). Furthermore, BSK's expert attached documents in which BSK advised the Oneida Nation that the aim of the litigation was to get "money damages" and that BSK "would receive no compensation for our services unless we succeeded in collecting something." Dkt. No. 143 (Reservation Case document).

Based upon the foregoing, the Court finds that BSK has not proven that it advised its client that "recovery" or "amounts recovered" would include revenue generated by political and business agreements, such as the licensing and establishment of a casino, that were completely apart from the damages or settlement obtained in the lawsuits. And because BSK has not carried its burden of showing that its client fully knew and understood that the term "amounts recovered" included revenue generated separately from a judgment or settlement, the term "amounts recovered" must be construed against the attorney who drafted it. Thus, Magistrate Judge Treece was correct to construe "amounts recovered" to include only the recovery obtained in the Test Case against the

State of New York.

BSK also argues that Magistrate Judge Treece's calculation of a fee award was premature and that BSK was entitled to an evidentiary hearing on the amount of the fee. BSK's Objection at 1, 3, 8. However, the Court notes that BSK has failed to ask the Court to receive further evidence, and furthermore, the Court finds that BSK has failed to proffer any proof that it could have offered in support of a greater fee. See 28 U.S.C. 636(b)(1) (in BSK's Objections, it could have asked the Court to "receive further evidence"). Instead, BSK has not offered, or referenced in its submissions, any new evidence in support of a greater fee. The Court has considered BSK's Objection and has undertaken a *de novo* review of the record, and it has determined that the R&R should be approved.

B. Mr. Hirsch's Objections to the Report-Recommendation

Mr. Hirsch does not object to the legal conclusions contained in Magistrate Judge Treece's R&R, but rather, attempts to correct two factual errors he asserts are contained in the R&R. Hirsch Objection. First, the R&R contains a reference to Mr. Hirsch being the plaintiff's attorney in Homer v. Halbritter, 1994 U.S. Dist. LEXIS 16513 (N.D.N.Y. November 15, 1994). R&R at 44. Shortly thereafter, the R&R makes reference to a 1993 letter written by George Shattuck, in which it is claimed that Mr. Hirsch was then representing the Oneida Indian Nation of New York. Id. It would appear that Mr. Hirsch objected to the R&R in order to correct this error. Upon reviewing the counsel listed in Homer, the Court notes that Mr. Hirsch does not appear to have been an attorney in that case. Id. The Court may not amend or correct the R&R in this respect, because it is limited to the record before it, and the record contains a document that lists Mr. Hirsch as an attorney in Homer. Smith Decl., Ex. 45. However, insofar as the R&R stated that Mr. Hirsch was attorney in that case, the Court notes that the R&R may have been in error.

III. Conclusion

Accordingly, it is hereby:

ORDERED, that the R&R (Dkt. No. 624/122) is **APPROVED** and **ADOPTED** in its **ENTIRETY**; and it is further

ORDERED, that BSK's Motion to have the Court recognize its right to a fee (Dkt. No. 130/54) is **GRANTED** to the extent outlined in Magistrate Judge Treece's R&R (Dkt. No. 624/122); and it is further

ORDERED, that the Clerk serve a copy of this Order on all parties.

IT IS SO ORDERED.

DATED: July 12, 2011
Albany, New York

Lawrence E. Kahn
U.S. District Judge