11-3272-CV

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Oneida Indian Nation of New York, and Oneida Tribe of Indians of Wisconsin,

Appellees,

Oneida of the Thames Council (Thames Band of Canada (Oneida)), *Plaintiff*, United States of America, New York Brothertown Indian Nation, *Plaintiff-Intervenors*,

v.

Bond Schoeneck & King, PLLC,

Appellant,

County of Oneida, New York, County of Madison, New York, and State of New York, *Defendants.*

On Appeal from the United States District Court for the Northern District of New York (Consolidated with 11-3275-CV)

BRIEF FOR APPELLEES ONEIDA INDIAN NATION OF NEW YORK AND ONEIDA TRIBE OF INDIANS OF WISCONSIN

Arlinda F. Locklear
4113 Jenifer Street, NW
Washington, DC 20015
(202) 237-0933
alocklearesq@verizon.net

Counsel for Oneida Tribe of Indians of Wisconsin

Michael R. Smith
David A. Reiser
Zuckerman Spaeder LLP
1800 M Street, NW
Washington, DC 20036
(202) 778-1832
msmith@zuckerman.com

Counsel for Oneida Nation of New York

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

STATEMENT

This case involves an appeal by a law firm that represented the Oneidas in land claim litigation under a contingent fee agreement from 1966 until 1978, when the firm formally withdrew. The firm's interim success in establishing federal subject matter jurisdiction over the Oneida land claim did not itself win a recovery for the Oneidas. *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 675 (1974) ("The claim may fail at a later stage for a variety of reasons."). Notwithstanding this Court's recent dismissal of the Oneidas' land claim without any recovery (*Oneida Indian Nation v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010)), and the Oneidas' earlier recovery of $57,494 in damages and interest in a test case, the firm appeals the district court's fee award of $5,174.54 and argues that it should receive a fee many times the Oneidas' recovery in the cases it filed on the Oneidas' behalf.

A. The BSK Retainer Agreement.

In 1966, the Oneida Indian Nation of New York and the Oneida Tribe of Indians of Wisconsin (the Oneidas) retained the firm of Bond Schoeneck & King (BSK) to obtain compensation from the State of New York or its agencies and municipal subdivisions for Oneida land the State had acquired in transactions that were not approved by the federal government (and were therefore in violation of 25 U.S.C. § 177 and its precursors). (JA 206-212.) The Department of the Interior

modified and approved the Retainer Agreement pursuant to 25 U.S.C. § 81. (JA 213-16 (modifications); 230-32 (approval).)

The Retainer Agreement made BSK's fee contingent on its success in obtaining a recovery from New York State, its agencies, or its municipal subdivisions. Paragraph 4 provided: "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 of it." (JA 207 (emphasis added).) The Retainer Agreement did not define "recovery," but used dollars to measure the related term "amount recovered," indicating that "recovery" referred to monetary compensation paid by the State or its subdivisions. (¶¶ 5, 6, *id.* at 207-08.) Specifically, the agreement authorized a fee of 20% of the "amount recovered" up to $1 million, and 10% of the "amount recovered" above that sum. (¶ 5, *id.*) Likewise, expenses were to be "reimbursed from the amount of any judgment" or settlement. (¶ 7, *id.* at 208.)

The agreement comprehensively addressed the determination of fees in the event that BSK's representation ended. If the United States Department of Justice intervened and took over responsibility for the case, "the fee of the Attorneys shall be fixed by the Secretary of the Interior on a quantum meruit basis if said

Department of Justice is successful in obtaining a recovery." (¶ 5, *id.* at 208.) If, instead, the firm, the Oneidas, or the Department of the Interior terminated the representation on 60 days written notice:

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

(*Id.* at 213-14 (emphasis added).) Thus, under the Retainer Agreement, BSK's fee on termination was limited to a share or portion of the contractual fee (calculated in ¶ 5 as a percentage of the Oneidas' recovery) the firm would have been due had it completed the engagement. The Agreement did not allow BSK to collect a fee upon termination greater than the fee it would have earned had it completed the engagement.

The Retainer Agreement was limited to ten years. (*Id.* at 218.) BSK later obtained a five-year extension of the Retainer Agreement to March 28, 1982. (*Id.* at 385, 386-402.)

B. The Land Claim Litigation

BSK filed two lawsuits in the Northern District of New York on behalf of the Oneidas: first, the 1970 "Test Case" seeking two years of trespass damages from Madison and Oneida Counties for a small amount of County land that previously had been acquired by the State of New York from the Oneidas in a single unapproved transaction in 1795 (Docket No. 70-CV-35; JA 95-100; JA 113 (amended complaint)); and second, the later "Reservation Case" seeking trespass damages from 1951 forward for all land held by the Counties that had been acquired by the State of New York in a long series of unapproved transactions (Docket No. 74-CV-187; JA 114-120 (BSK's complaint)). BSK represented the Oneidas in the Test Case before the Supreme Court, which held that there was federal question jurisdiction with respect to the Oneidas' damages claim, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), returning the case to the district court for trial. BSK represented the Oneidas at trial on liability. *See* 434 F. Supp. 527 (N.D.N.Y. 1977).[1]

[1] Although BSK's characterization of its work has no direct bearing on any issue in the case, the Court should not rely uncritically on it. There was nothing novel about the legal principle that a tribe retained rights to land alienated in violation of federal restrictions against alienation, *Heckman v. United States*, 224 U.S. 413 (1912); *United States v. Boylan*, 265 F. 165 (2d Cir. 1920) (restoring Oneidas' possession of land alienated by a private mortgage), or about the fact that the State had not obtained federal approval of its Oneida land transactions and had cheated the Oneidas. That evidence was presented to the Indian Claims Commission in

After completing the Test Case liability phase trial, BSK decided to withdraw, citing a conflict between the Oneidas' interest and the interests of partners and clients of the firm who owned land within the area that the BSK-drafted complaints alleged had been transferred in violation of federal law. (JA 196-99 (BSK's explanation of the withdrawal); JA 314-26 (ethics expert's conclusion that the conflict existed from the inception of the representation).) Other lawyers then represented the Oneidas in subsequent district court proceedings in the Test Case to determine damages and the State's third-party liability to the Counties, in appeals defending the Test Case judgment in this Court (which remanded for recalculation of damages), and in the Supreme Court (which affirmed). *See* 719 F.2d 525 (2d Cir. 1983); 470 U.S. 226 (1985). After further proceedings to modify the damages calculation in accordance with this Court's remand instructions in the Test Case, the district court entered a final judgment in 2003. The Oneidas recovered $57,494 in damages and interest. (DE 119

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support of the Oneidas' 1951 claim against the United States for breaching its duty to protect the Oneidas. *Oneida Indian Nation v. United States*, 43 Indian Cl. Comm'n 373, 380-82 (1978) (describing circumstances surrounding 1795 state transaction). BSK also knew that this Court had already rejected the State's position that federal restrictions did not apply to New York. *Compare* BSK Br. 8 *with* JA 366 and G. Shattuck, The Oneida Land Claims 7, 33 (1991). As to the Supreme Court's review of the jurisdictional ruling, BSK overlooks the Solicitor General's supplemental memorandum notifying the Court of a Circuit split that developed after BSK filed its petition. U.S. Supp. Mem, No. 72-851, 1973 WL 172600. BSK's brief also does not acknowledge that the Native American Rights Fund (NARF) assisted BSK at the liability trial (JA 451), and paid for one of the Oneidas' two expert witnesses. (JA 452-53.)

(amended judgment); JA 17 (docket entries for satisfaction of judgment and acknowledgment of receipt of funds paid into the court registry).)

In 1998, the United States intervened as a plaintiff in the Reservation Case, (JA 142-153 (complaint in intervention)), and the Oneidas and the United States filed amended complaints expanding the scope of the case to seek damages from the State of New York, including with respect to privately-owned land. (JA 276-305 (Oneidas' amended complaint).) The district court resolved various claims and defenses, directed further mediation efforts, and presided over the production of documents and depositions of expert witnesses. (*E.g.*, DE 363, 381, 396, 495, 516; JA 66-81.) In 2006, the State and Counties moved to dismiss the Reservation Case on the basis of equitable considerations applied in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) (Oneida Indian Nation does not have sovereignty over reacquired land within the Oneida reservation).[2] (DE 582; JA 87.) The district court partially granted and partially denied the motion, and certified interlocutory appeals pursuant to 28 U.S.C. § 1292(b). *Oneida Indian Nation v. New York*, 500 F. Supp. 2d 128 (N.D.N.Y. 2007). This Court agreed to hear the cross-appeals.

[2] *See also Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005) (applying equitable defense of laches to dismiss tribal land claim).

On August 9, 2010 this Court issued its opinion in *Oneida Indian Nation v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010). The Court held that all of the Oneidas' claims in the Reservation Case had to be dismissed as "subject to and barred by the defense recognized in *Sherrill* and *Cayuga*." *Id.* at 140. The Court remanded "for the entry of judgment and the resolution of any pending motions." *Id.* at 141. Following the denial of petitions for rehearing, the district court entered a judgment of dismissal on January 10, 2011. (DE 623; JA 92.) Accordingly, the Oneidas recovered nothing from the State of New York or its municipal subdivisions in the Reservation Case.

C. BSK's Withdrawal as Counsel for the Oneidas.

An internal firm memorandum to BSK's Executive Committee dated March 30, 1977, evaluating withdrawal, began by noting that, because BSK could collect a fee even if someone else represented the Oneidas, "*we* really don't have much to lose, whether we continue or not." (JA 705 (emphasis in original).) The memorandum went on to observe that, "[d]epending on how you define 'conflict', we may well have had one in 1966 when we took the case, in 1975 when we tried it, and now—in fact our very success in the Supreme Court that created the real conflict over land titles." (*Id.*) The conflict existed because clients and members of BSK—including the lead BSK attorney and a named partner—owned land that had belonged to the Oneidas and had been alienated from the tribe without federal

approval, just like the County-owned land for which BSK had sought trespass damages in the Test Case and the Reservation Case. (JA 404-06; 440.) Although BSK had limited the damages demands in the Test Case and the Reservation Case to County-owned land, those damages claims rested on a principle that the Oneidas retained a right to possession arising under federal law equally applicable to any landowner, including the members and clients of the firm. *See Oneida Indian Nation v. County of Oneida*, 434 F. Supp. 527, 530 (N.D.N.Y. 1977) (quoting the court's statement in its 1971 opinion dismissing the complaint: "it [is] obvious that there are, of necessity, numerous other parties occupying the balance of the 100,000 acre parcel under title derived from New York State, against whom . . . claims could be made.").

A follow-up memorandum to BSK's Executive Committee reported (erroneously) that the United States had agreed to file suit on behalf of the Oneidas. (JA 489.)[3] The memorandum suggested that the firm in the future could be "entitled to a percentage fee based on 125/300 of any settlement from the State in regard to such land [referring to the portion of the entire 300,000 acre reservation that was involved in the single land transaction at issue in the Test

[3] The Department of the Interior had agreed to recommend intervention (JA 505), but the Justice Department did not follow that recommendation for another 20 years. The Oneidas could not pursue claims against the State without federal government intervention.

Case] plus a quantum meruit fee on the balance. (Please remember that our retainer is wholly contingent upon an eventual recovery.)" The memorandum concluded with the view that "this is a good time to 'bow out'" among other reasons, because "I think we have reached the point of diminishing returns in terms of time spent." (JA 489.)

On April 25, 1977, BSK sent the Oneidas a letter withdrawing as counsel. BSK explained that "we are unable to represent or advise you with respect to potential actions against the private landowners." (JA 492.)[4] However, BSK did "not intend this letter to be a 'termination' of your retainer contract." (JA 494.) BSK noted that "[i]t would be premature at this time to discuss the calculation of our counsel fees under our retainer since this must await the ultimate recovery." (*Id.*) Consistent with BSK's position that it was not terminating the Retainer Agreement, BSK continued to file annual reports required by the Agreement with the Department of the Interior on the services it said it provided to the Oneidas. (JA 511-18.) In a post-withdrawal letter advising the Oneidas that it would not represent them in the damages trial in the Test Case, BSK characterized its role as "inactive status." (JA 508.)

[4] As discussed below, ethics expert Charles Wolfram explained in a declaration that BSK had the same disabling conflict from the beginning. *See* pp. 12-13, *infra*.

BSK told the Oneidas in 1977 that it could not ethically advise them about suing private landowners when it wanted to withdraw, having apparently reached the point of diminishing financial returns. Yet the firm "gave such advice at the outset of the representation." (*Id.* at 323 (expert declaration); *see id.* at 586 (BSK letter noting that the conflict "has been there in one form or another from the very beginning"); *id.* at 506 (BSK letter advising opposing counsel that if he moves to reopen liability in the Test Case—the very matter in which BSK had previously represented the Oneidas at trial—"I think we would have a direct conflict at that point").)

D. BSK's Post-Withdrawal Violation of Its Duty of Loyalty to the Oneida Indian Nation of New York.

In 1993, BSK agreed to represent the Oneida of the Thames (a Canadian tribe) in and promoted litigation and settlement discussions adverse to the Oneida Indian Nation of New York. (JA 663-64 (letter from the Oneida Nation objecting to the representation); *id.* at 609-11 (letter recommending that the Canadian tribe join in litigation to enjoin the Oneida Nation casino); *id.* at 597-606 (complaint and TRO application to enjoin the Oneida Nation casino).) The Magistrate Judge found that BSK thereby breached its duty of loyalty to the Oneida Indian Nation of New York, (SPA 49, 51 (finding BSK's representation of the Canadian Oneidas "was improper under Canon 5 and DR 5-108 of the Model Code")), and BSK did

not object to that finding. The Magistrate Judge reduced but did not entirely forfeit BSK's fee, reasoning that BSK's subsequent ethical breach did not affect the value of the services BSK had performed prior to its withdrawal. (*Id.* at 53.)

E. The Fee Proceedings and Ruling Below

1. BSK's Fee Application

On May 20, 1999, BSK filed a motion for an order "recognizing the firm's right to a fee under its retainer agreement." (JA 250-51.) At that time, the Oneidas and the United States were involved in a court-ordered mediation of the Reservation Case. (*See* DE 86, 89, 137, 140; JA 36, 41.) But neither the Reservation Case nor the Test Case had produced a recovery for the Oneidas. Accordingly, BSK sought "at the conclusion of the two captioned actions" (*i.e.*, the Test Case and the Reservation Case), "an opportunity to submit such additional affidavits and law as [BSK] deem[s] appropriate in light of the consideration awarded to or received by the Oneidas." (JA 251.) BSK did not request an evidentiary hearing in its motion.

BSK asked the district court to "calculate the amount of the firm's fee and lien as a *specific percentage of the value of the consideration* recovered by, awarded to, or otherwise received by the Oneidas, including all benefits and compensation conferred by or on behalf of the State and its political subdivisions, instrumentalities and agencies *in the two actions*." (*Id.* (emphases added).) BSK

later supplemented its fee application with an affidavit from an ethics professor supporting an award of "between 60 and 80 percent of what their contingency fee—20% of the first $1,000,000 of recovery plus 10% of any recovery in excess of $1,000,000—would have yielded." (JA 275.)

2. Proceedings on BSK's Application

The parties engaged in discovery and fully briefed the fee issues in 2002. The fee-related pleadings were filed under seal because they included attorney-client confidences related to a still-pending case.[5] (DE 472-78; JA 77-78.) Meanwhile, litigation of the merits of the Reservation Case proceeded in the district court and later in this Court. When the Counties objected to the district judge reviewing sealed documents regarding the fee application that might have relevance to the merits of the Reservation Case (DE 434, 448, 450; JA 74-75), the district judge referred BSK's fee application to the Magistrate Judge. (DE 463; JA 76.)

After BSK filed its fee application, the Oneidas submitted a declaration to the district court by ethics expert Professor Charles Wolfram. Professor Wolfram explained that BSK *did* have a disabling conflict of interest from the beginning of

[5] BSK subsequently filed its Objections to the Magistrate Judge's Report and Recommendation on the public record in violation of the sealing order, making it futile to continue to insist on sealing the record. (*See* SPA 59-60.) Accordingly, the Oneidas did not object to BSK's request to unseal the documents for purposes of preparing the Joint Appendix for this Court.

the representation. (JA 314-326.) BSK obtained the Oneidas' consent to a limitation of the scope of the representation, but it did so without making appropriate disclosures—of the nature of the conflict and the options that the client would forego—to the Oneidas, and to the Department of the Interior, which was required to approve the Retainer Agreement. (JA 410-12 (deposition testimony by BSK's lead attorney concerning BSK's advice to the Oneidas); *id* at 320-21 (expert declaration).) While an unconflicted lawyer might have had reasons to limit the Test Case and the original Reservation Case complaints as BSK did, BSK failed to properly discuss the options with the Oneidas. (*Id.* at 322.) BSK relied on an affidavit from Professor Lester Brickman, who maintained that the conflict arose only as a result of the Supreme Court's 1974 jurisdictional ruling in favor of the Oneidas in the Test Case. (JA 271-72 (affidavit of Professor Lester Brickman, ¶¶ 21-22).)

BSK did not file anything further in support of its fee application at the conclusion of the Test Case in 2003, when the final judgment was entered and satisfied. (JA 17 (docket entries for entry and satisfaction of $57,494 judgment).) Nor did BSK file anything further after the entry of a judgment of dismissal in 2011 in the Reservation Case. (*Id.* at 92.)

3. The Magistrate Judge's Report and Recommendation

Consistent with this Court's directive to resolve pending motions in its decision dismissing the land claim, 617 F.3d at 141, the district court ruled on BSK's pending fee application after entering the judgment of dismissal in the Reservation Case. At that time, both matters in which BSK had represented the Oneidas had been concluded.

On February 18, 2011, Magistrate Judge Treece issued a Report and Recommendation awarding BSK 9% of the Oneidas' $57,494 recovery in the 1970 Test Case, discounting its share of the maximum contractual fee (20% of the first $1 million) because other firms did much of the work after BSK withdrew and because of BSK's post-withdrawal breach of its duty of loyalty to the Oneida Indian Nation of New York in violation DR 5-108 of the Model Code of Professional Responsibility. (SPA 53, 55.) Magistrate Judge Treece did not award BSK any fees with respect to the 1974 Reservation Case because the case had been dismissed without any recovery, and because in that case "BSK's participation as counsel was limited to researching, drafting and filing the Complaint." (*Id.* at 55.) The Report and Recommendation also rejected BSK's argument that it was entitled under its retainer agreement to a fee based on something other than "a monetary recovery by the Oneidas." (*Id.* at 56 n.30 (describing argument as "specious").)

Addressing whether BSK had forfeited its fee because it had a disabling conflict of interest when it represented the Oneidas with respect to land claims that were adverse to the interests of other BSK clients and partners of the firm, the Magistrate Judge rejected BSK's contention that the conflict arose only from its victory in the Test Case. (SPA 26.) "The victory certainly increased the possibility of recovery and opened the doors for other Native American tribes to sue in federal court on the same or similar grounds, but it did not *create* any potential conflicts. The fact that the Nation sued only the State of New York and its subdivisions and sought only monetary damages does not change the basis upon which the suit was brought: the Nation's rightful ownership of the land." (*Id.* at 26-27 (emphasis in original).) The Magistrate Judge thus recognized that—regardless of the particular relief sought in BSK's complaints—the interests of the Oneidas and the private landowners were antagonistic. (*See id.* at 31 (quoting EC-5-3 of the 1970 Model Code of Professional Responsibility) (requiring "full disclosure" if the likelihood of future interference with the lawyer's professional judgment is reasonably foreseeable).) The Magistrate Judge nevertheless concluded that BSK had not violated its professional obligations, and had not forfeited its claim to a fee, because the Oneidas' consent to BSK's insistence on limiting the scope of the representation meant that BSK's judgment was not likely

to be affected by its conflicting interests and that BSK was not required to advocate for relief directly against its other clients. (*Id.* at 33.)

4. BSK's Objection

BSK objected "only to that portion of Judge Treece's Report and Recommendation and Order contained at section IV, pages 54-56." (DE 625; JA 93.) BSK argued to the district court "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 land by New York was invalid because it violated federal law, should be included in the 'amount recovered' under the Retainer Agreement." (SPA 61.) BSK contended "that its contingent fee in the Oneida land claim recovery includes Oneida Nation of [New] York businesses, including a casino established under a gaming compact approved by the Secretary of the Interior, as well as to any value created by a trust land decision made by the Department of the Interior in 2008." (*Id.*)

BSK did not object to the Magistrate Judge's ruling that the "Retainer Agreement specifies the terms under which attorney's fees shall be determined after a premature termination of the contract has occurred," and that the court therefore did not have to consider whether BSK was entitled to a quantum meruit recovery based on a state law charging lien. (SPA 37.) BSK also did not challenge the Magistrate Judge's finding that the firm acted improperly and in

violation of its ethical duty of loyalty after it withdrew, or that a fee reduction was appropriate in light of the firm's improper conduct. Nor did BSK dispute the finding that the firm did nothing in the Reservation Case other than prepare a complaint.

5. The District Court's Ruling on BSK's Objection

On July 12, 2011, the district court (Kahn. J.), applying New York law requiring attorneys' fee agreements to be "fully known and understood by their clients," concluded that BSK had not shown that the terms "recovery" or "amounts recovered" in the Retainer Agreement included anything other than the money paid to the Oneidas as damages in the Test Case. (SPA 63-4 (citation omitted) ("BSK has not proven that it advised its client that 'recovery' or 'amounts recovered' would include revenues 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.").) The district court therefore declined to award any fee based on "relief not contained in the final judgment, such as income generated by the Oneida Casino." (*Id.* at 61.) The district court approved and adopted the Report and Recommendation, and granted BSK's fee application to the extent authorized there. (*Id*. at 66.) BSK filed notices of appeal on August 10, 2011. (JA 914.)

SUMMARY OF THE ARGUMENT

This appeal is controlled by two basic principles: (1) when a lawyer agrees to represent a client for a contingent fee, the lawyer does not get a fee if the client loses; and (2) a lawyer may not *increase* a fee over the maximum fee in the retainer agreement by quitting the case. Both principles are reflected in the plain language of BSK's Retainer Agreement with the Oneidas. Under ¶ 10 of that agreement, if BSK terminates the representation, its fee remains "wholly contingent upon a recovery for the Oneidas," and BSK is entitled to "such share in the attorney fee as the court or tribunal finally determining the Oneidas' claim may determine to be equitable." (JA 217-18.) A *share* in the attorney's fees is necessarily less than the whole amount BSK would have earned had it seen the case through to a conclusion, and must be calculated like the original fee—based on a percentage of the "amount recovered" by the Oneidas. Put differently, the percentage fee fixed by the Retainer Agreement (¶¶ 5, 6) is a cap on the "share" that can be awarded upon termination of the agreement before the litigation is over. *See* Restatement (Third) of the Law Governing Lawyers § 40 (2000) (withdrawing lawyer can recover the *lesser* of a ratable share of the contract fee or the value of his services).

The lawyer cannot, by withdrawing, recover more than the fee contract provides. "Were that not so, lawyers would be encouraged to withdraw before

being discharged" to increase their fees. *Id.*, cmt. *d*. The Oneidas recovered a judgment of $57,494 in the Test Case and recovered nothing in the Reservation Case. BSK's 20% maximum fee under the Retainer Agreement was therefore less than $12,000. BSK's disappointment with the size of its fee is certainly less than the Oneidas' own disappointment with the outcome of the land claim litigation, and no different from that of any other law firm that cannot collect a contingent fee because its client does not recover. It is not a basis for suing the Oneidas to obtain a greater fee than the Retainer Agreement authorizes.

BSK has now fundamentally changed its theory about why it can seek a fee much greater than the amount the Oneidas recovered in the Test Case. In the district court, BSK argued that the "recovery" under its contract includes such things as profits from Oneida Nation business, the Nation's gaming compact, and an application to transfer land into federal trust status, an argument BSK now relegates to a fallback position in Part IV of its brief. On appeal, BSK principally relies on New York law permitting a discharged lawyer to recover an extra-contractual quantum meruit fee award. But BSK's fee application was based on the contract, not quantum meruit. BSK tries to blur the line between the share of the percentage fee the firm agreed to upon termination and an extra-contractual quantum meruit award (BSK Br. 32) because equity plays a role in both. But an

equitable share of a contractual fee is not the same thing as a quantum meruit fee outside the contract under New York law.

BSK's new quantum meruit argument (Part I) fails for at least five reasons. *First*, BSK did not make that argument below, and did not object to the Magistrate Judge's Report and Recommendation on that ground, and so it has forfeited appellate review. *Second*, New York law governing attorneys' fee agreements and other contracts precludes extra-contractual quantum meruit recovery when the contract itself addresses the particular subject—fees after termination—as it does here by providing an equitable share of the percentage contingency fee. *Third*, the court below did not—and could not—find that BSK had "just cause" to withdraw under New York law, and so BSK could not seek quantum meruit fees even if that body of law rather than the contract governed. *Fourth*, the implicit waiver of tribal sovereign immunity to contractual fees to be paid from the Oneidas' monetary recovery did not extend to payment of extra-contractual fees out of the tribes' pockets, as BSK's quantum meruit theory would require. *Fifth*, any quantum meruit fee claim would have accrued in 1977 when BSK notified the Oneidas the firm was going to withdraw and so is now time-barred.

BSK's arguments that it was entitled under New York law to an evidentiary hearing and prejudgment interest (Parts II and III) fail because both arguments

depend on BSK's quantum meruit theory. Also, BSK did not seek an evidentiary hearing in its fee application below or proffer any evidence warranting a hearing in its objections to the Magistrate Judge's Report and Recommendation. Besides, the New York law on which BSK relies does not require *evidentiary* hearings with regard to fee applications.

BSK's final fallback argument (Part IV) is that the district court should have construed the Retainer Agreement to allow BSK to collect a fee based on something other than a percentage of the money paid to the Oneidas to satisfy the Test Case judgment, such as some value attributed to Oneida Nation gaming compacts, businesses and trust land. That argument defies the settled rule (followed by the district court) that attorneys must show that terms in fee agreements are fully understood by the clients—something BSK does not even attempt. The district court's interpretation of the reasonable and apparent meaning of the Retainer Agreement was correct, and the fee it awarded was well within its discretion.

The decision below can also be affirmed on the alternative ground that BSK forfeited its fee entirely because of ethical lapses, including the district court's finding—uncontested on appeal—that BSK breached its duty of loyalty to the

Oneida Indian Nation of New York after it withdrew, and BSK's conflict of interest.

ARGUMENT

I. BSK IS NOT ENTITLED TO A QUANTUM MERUIT FEE.

BSK's Retainer Agreement provides that, if BSK terminates its representation of the Oneidas, the firm can obtain a fee based on an "equitable" "share" of the negotiated contingency fee, which in turn is based upon a percentage of the recovery, not upon a lodestar calculation of hours and rates. (¶¶ 5, 10; JA 207, 213-14.) There is no basis for BSK's attempt to import into this case New York law permitting a *discharged* lawyer to recover a quantum meruit fee *outside and without regard to the retainer agreement*.

A. BSK Did Not Object to, and Therefore May Not Appeal, the Magistrate Judge's Ruling That the Contract Governs Its Fee Application.

The Magistrate Judge decided that BSK's fee would be set under its contract and not under provisions of New York law: "Paragraph 10 of the Retainer Agreement specifies the terms under which attorney's fees shall be determined after a premature termination of the contract and therefore, the Court need not consider whether BSK is owed attorney fees pursuant to New York Judiciary Law § 475 nor whether 'just cause' existed for BSK's withdrawal." (SPA 37 (citing *McNammee, Lochner, Titus & Williams, P.C. v. Higher Educ. Assistance Fund*, 50

F.3d 120, 124-25 (2d Cir. 1995) (applying New York law)); *see also* Richard A. Lord, 23 Williston on Contracts § 62.7 (4th ed. & 2011 supp.) (citing *McNammee*).

BSK did not challenge this portion of the Report and Recommendation in its Objections, nor did it otherwise seek a fee determined under New York charging lien law applying quantum meruit standards, rather than under the Retainer Agreement's provision for an equitable share of the percentage contingency fee. To the contrary, BSK explicitly limited its Objections (DE 625) to Part IV of the Report and Recommendation, which had nothing to do with whether BSK had a right to an extra-contractual quantum meruit fee under New York law. Indeed, BSK argued that "[t]he parties agree that any right BS&K has to an attorneys' fee must arise from the Retainer Agreement," and quoted ¶ 10 of that agreement. (DE 265 at 9.) BSK was correct. As discussed in § I.B, *infra*, it is clear under New York law that, when a retainer agreement explicitly addresses a fee award in the event of attorney discharge or withdrawal, that contractual provision supersedes a right to extra-contractual quantum meruit recovery.[6]

[6] The parties' intent that the contract determines the manner in which attorneys' fees were to be awarded in all circumstances is also reflected in ¶ 5 of the Retainer Agreement, which provides for a quantum meruit fee if the United States Department of Justice "assumes the responsibility of handling the claim." (JA 208.) The same provision also underscores that—in all circumstances—fees are to be paid from the Oneidas' recovery, not out of the pocket under New York charging lien law. The Agreement specifies that the quantum meruit fee is to be

"[A] party waives appellate review of a decision in a magistrate judge's Report and Recommendation if the party fails to file timely objections designating the particular issue." *Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, PC*, 596 F.3d 84, 92 (2d Cir. 2010). Here, as in *Wagner & Wagner*, BSK not only failed to identify and object to the specific ruling that its right to a fee was governed by the Retainer Agreement, but also "in effect told the district court not to consider the relief now sought." *Id.*

The omission of a quantum meruit theory from BSK's Objections to the Report and Recommendation was not inadvertent. BSK has dramatically changed its theory on appeal. In its original Notice of Motion seeking fees, BSK asked the district court to "calculate the amount of firm's fee and lien as a specific percentage of the value of the consideration recovered by, awarded to or otherwise received by the Oneidas." (JA 251.) BSK's supporting memorandum clarified that its charging lien theory was not an independent basis for calculating a fee. Rather, BSK was seeking "a charging lien under New York Judiciary Law § 475 in the same amount" as BSK's "equitable share of the Oneidas' total recovery" under the Retainer Agreement. (BSK Mem., DE 55, at 10.) The affidavits supporting BSK's application likewise claimed a fee on the same theory. (JA 275 (expert

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determined, in that event, by the Secretary of the Interior, not by a court, and only if "said Department of Justice is successful in obtaining a recovery."

affidavit) (60-80% of what the contingency fee "would have yielded"); JA 202 (affidavit of BSK's lead attorney seeking "a specific percentage of the Oneidas' ultimate recovery").) Moreover, BSK did not seek an extra-contractual quantum meruit fee when it withdrew, insisting that it was not thereby terminating the Retainer Agreement. *See* pp. 9-10, *supra* (discussing BSK's communications after withdrawal); p. 9, *supra* (discussing accrual of quantum meruit claim upon discharge).[7] Until it reached this Court, BSK has consistently sought a fee based on a percentage of the Oneidas' recovery under the terms of the Retainer Agreement, not an extra-contractual fee that could exceed the maximum under the Retainer Agreement.[8]

[7] If BSK had ever had a quantum meruit fee claim—which it did not—its position that it was withdrawing but not terminating the Retainer Agreement would have been an election to accept a portion of a contingent fee paid to successor counsel rather than a quantum meruit fee paid by the former client. *Wojick v. Miller Bakeries Corp.*, 2 N.Y.2d 631, 639-40 (1957) (discharged lawyer may elect to be paid a portion of future contingent fee awarded to successor counsel rather than quantum meruit); *Lai Ling Cheng v. Modansky Leasing Co.*, 73 N.Y.2d 454, 458 (1989) (same); *Cohen v. Grainger, Tesorio & Bell*, 81 N.Y.2d 655, 658 (1993) (same).

[8] BSK did refer in one place to a "quantum meruit award" (DE 625, Objections, at 18), but in the context of an argument for a broad definition of "recovery" under the Retainer Agreement, not as a distinct extra-contractual claim. BSK did not argue that its fee could be based on a lodestar calculation or anything other than a percentage of the Oneidas' recovery.

B. BSK Is Not Entitled to a Quantum Meruit Fee Under New York Law.

1. The Contract Addresses Fees Upon Termination.

BSK argues (Br. 26-30) that its fee should be calculated by using a lodestar method or what it calls "case specific variables" developed in cases involving fee-shifting statutes, rather than by determining BSK's equitable share of the percentage fee specified in the Retainer Agreement with the Oneidas. That approach, BSK maintains, would permit the district court to award an amount far exceeding the Oneidas' $57,494 in damages. (BSK Br. 36-42.) Even if BSK had sought a quantum meruit fee based on such a calculation below—which it did not—and even if BSK had objected to the Magistrate Judge's denial of such a fee—which it did not—BSK's argument fails because the terms of the contract, not extra-contractual state law, governs BSK's fee upon termination.[9]

The rule in New York is that a fee agreement provision addressing the consequences of termination controls and preempts the extra-contractual quantum meruit remedy. *Kasowitz, Benson, Torres & Friedman v. Duane Reade*, 2011 WL 4907767, * 11 (N.Y. Cty. Sup. Ct. Mar. 17, 2011) (dismissing attorney's quantum meruit complaint because governed by express contract); *McNamee, Lochner,*

[9] That is not to say that the lodestar would be irrelevant. As the Oneidas argued below prior to the dismissal of the Reservation Case, even if there were a large recovery, the court could fairly limit BSK's share of the fee to the lodestar amount under all of the circumstances, including BSK's conflict and infidelity.

Titus & Williams v. Higher Education Assistance Found., 50 F.3d 120, 124 (2d Cir. 1995) (reversing holding that attorney is entitled to a quantum meruit fee; recovery must be limited to the contingency fee in the contract). As then-District Judge Lynch summarized the law:

> Ordinarily, recovery in quantum meruit is allowed where there is no valid and enforceable contract governing a "particular subject matter." *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388 (N.Y. 1987).
>
> Under New York law, a quantum meruit claim is only available when the matter at issue is not covered by an otherwise enforceable contract. *Beth Isr. Med. Ctr. v. Horizon Blue Cross & Blue Shield of N.J.*, 448 F.3d 573, 586-87 (2d Cir. 2006). If the contingent fee arrangement is found to have specifically covered the situation at hand, either by entitling or not entitling Fredericks to a contingent fee, a quantum meruit claim cannot survive. *See Goldman v. Metro. Life Ins. Co.*, 5 N.Y.3d 561, 587 (N.Y. 2005). Although the parties disagree as to whether the retainer agreement entitled Fredericks to any recovery for his services at the trial level, it is undisputed that the retainer agreement governed whatever recovery he received at that stage. As discussed above, the retainer agreement must be read to deny Fredericks any contingent fee recovery for work performed at the trial level. Accordingly, the "particular subject matter," *Clark-Fitzpatrick*, 70 N.Y.2d at 388, of Fredericks's entitlement to recovery for his services at the trial level is covered by a valid contract, and no quantum meruit recovery for those services may be had.

Fredericks v. Chemipal, Inc., 2007 WL 1310160, * 6 (S.D.N.Y. 2007). The same rule applies to contracts generally, not just to attorneys' fee agreements. *Parker Realty Group, Inc. v. Petigny*, 14 N.Y.3d 864, 865-66 (2010) ("Recovery under the theory of quantum meruit is not appropriate where, as here, an express contract

governed the subject matter involved."); *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 (2009) (no quasi-contract recovery for unjust enrichment where contract governs the particular subject matter); *Goldman v. Metropolitan Life Ins. Co.*, 5 N.Y.3d 561, 572 (2005) (no claim for unjust enrichment "because the matter is controlled by contract"); *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388-89 (1987) (no quasi-contract claim when there is an express agreement).

This Court follows the foregoing rule concerning quantum meruit in contract cases applying New York law. *Beth Israel Med. Ctr. v. Horizon Blue Cross & Blue Shield of N.J., Inc.*, 448 F.3d 573, 587 (2d Cir. 2006) (no unjust enrichment claim because there is an implied-in-fact contract); *Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp.*, 418 F.3d 168, 175 (2d Cir. 2005) (quantum meruit recovery barred "if the parties have a valid, enforceable contract that governs the same subject matter as the quantum meruit claim"); *Reilly v. Natwest Markets Group, Inc.*, 181 F.3d 253, 262-63 (2d Cir. 1999). Courts outside New York generally follow the same rule. Richard A. Lord, 23 Williston on Contracts, § 62.7 (4th ed. & 2011 supp.) (unless fee agreement is excessive or fraudulent, "[a]n express contract will control the amount of compensation due the attorney from the client * * * and the right to recover is therefore governed by the contract, rather than principles of quantum meruit").

2. BSK Withdrew from the Representation after Choosing the Other Side of a Conflict of Interest, Not for "Just Cause".

According to the Restatement (Third) of the Law Governing Lawyers § 40 (2000), "If a client-lawyer relationship ends before the lawyer has completed the services due for a matter and the lawyer's fee has not been forfeited under § 37," a withdrawing lawyer "may recover the *lesser* of the fair value of the lawyer's services as determined under § 39 and *the ratable proportion of the compensation provided by any otherwise enforceable contract between lawyer and client for the services performed*." (Emphases added). (*See* JA 332 (declaration of ethics expert discussing the Restatement).) Likewise, BSK's contract permitted it to obtain a *share* of the fee it could have earned if it completed the engagement.[10] A lawyer cannot increase a fee by withdrawing for his or her own benefit or for the sake of another client. Even assuming that BSK did not forfeit its fee because of its conflict of interest at the outset of the representation, (*id.* at 321-23), BSK cannot claim a larger fee from the Oneidas than it could have received for completed work

[10] As this Court noted in another context, "'share' is commonly defined as 'a portion belonging * * * to an individual'" *i.e.* something that has "been divided and that [is] less than a whole." *Cohen v. J.P. Morgan Chase & Co.*, 498 F.3d 111, 117 (2d Cir. 2007) (quoting Webster's Third Int'l Dictionary, 2087 (2002)). Similarly, at the time of the Retainer Agreement, Black's Law Dictionary, 1542 (4th ed. 1968), defined "share" as "[a] part or definite portion of a thing owned by a number of persons in common and contemplates something owned in common by two or more persons and has reference to that part of the undivided interest which belongs to some one of them."

because it chose to withdraw, placing the conflicting interests of its clients who owned land subject to Oneida claims above the Oneidas' interests.

BSK is wrong about whether this Court has construed New York law to authorize a quantum meruit fee whenever a lawyer withdraws from a contingent fee representation. (*See* BSK Br. 25.) The cases BSK cites from this Court involve attorneys who were discharged by their clients, as do the New York cases it cites with one possible exception.[11] The actual New York rule applied by this Court and the New York Court of Appeals is limited to lawyer withdrawal for "just cause" which ordinarily refers to client conduct tantamount to constructive discharge.[12] *See Itar-Kass Russian News Agency v. Russian Kurier, Inc.*, 140 F.3d 442, 451 (2d Cir. 1998) (quoting *Klein v. Eubank*, 87 N.Y.2d 459, 462 (1996)); *People v. Keeffe*, 50 N.Y.2d 149, 156 (1980) ("An attorney's charging lien may be lost if he voluntarily withdraws or is discharged for misconduct, among other ways."); *Ramirez v. Willow Run Country Club, Inc.*, 873 N.Y.S.2d 632, 633 (1st

[11] It is not clear from the short opinion in *Blunt v. Northern Oneida County Landfill*, 145 A.D.2d 913, 914 (4th Dept. 1988), whether the lawyer moved to withdraw as counsel of record because he quit or because he was discharged. The two cases on which the appellate court relied both involved discharged lawyers. The briefs on appeal reflect that the attorney withdrew after a breakdown of the attorney-client relationship amounting to a constructive discharge, including the client's effort to retain new counsel prior to the attorney's withdrawal.

[12] The magistrate judge collected examples of "just cause" for withdrawal in *Louima v. City of New York*, 2004 WL 2359943, *61-62 (E.D.N.Y. 2004).

Dept. 2009) (remanding for determination whether withdrawal was for "just cause"). The New York rule prevents a client from abusing the absolute right to discharge a lawyer by retaining the benefits of a lawyer's services without payment. *Matter of Dunn*, 205 N.Y. 398, 401-02 (1912); *Itar-Kass*, 140 F.3d at 448-49 (discussing history of New York charging lien). The same principle applies when the client destroys the attorney-client relationship, forcing the lawyer to withdraw. However, even if it could be said that BSK withdrew for just cause, the New York rule that a lawyer who quits for "just cause" may have a charging lien does not change the way the fee is calculated when fees upon termination are governed by the retainer agreement, as they are here. (*See* § I.B.1, *supra*.) *Itar-Kass*, 140 F.3d at 453 (awarding contractual fee).

BSK cannot demand a quantum meruit recovery on the theory that a conflict gave the firm "just cause" to withdraw. The firm's conflict was foreseeable and inherent in any representation of the Oneidas that called into question the validity of State land transactions that included land owned by clients and partners of the firm, even if they were not parties. A firm cannot avoid a conflict as unforeseeable by assuming that its efforts on behalf of one set of clients will fail, nullifying the threat to the other clients. Assertion of an adverse claim, not its success, produces the conflict. BSK's belated acknowledgement that it had a conflict in advising the Oneidas about whether and how to proceed on claims against private landowners is

therefore not "just cause." To the contrary, this Court has held that a lawyer's conflicted representation may constitute "just cause" for the lawyer's *discharge by the client without a fee* under New York law. *Garcia v. Teitler*, 443 F.3d 202, 212 (2d Cir. 2006); *cf.* Restatement (Third) of the Law Governing Lawyers § 40, cmt. *e* (2000) ("[A] lawyer who knowingly and recklessly undertakes to represent a client in a suit against another client of the lawyer's firm without the consent of both clients * * * is subject to forfeiture of compensation even though the lawyer's withdrawal is compelled under § 32(2)(a).").

In any event, the Magistrate Judge declined to decide whether BSK had shown just cause to withdraw because the Retainer Agreement applied a different standard. (SPA 37.) BSK did not object to that ruling, and cannot now challenge it on appeal. (*See* § I.A, *supra*.)

C. BSK's Quantum Meruit Claim Is Barred.

1. The Oneidas Did Not Waive Tribal Sovereign Immunity to an Extra-Contractual Quantum Meruit Fee.

BSK is seeking a sum of money from two federally recognized Indian tribes that must come from their general treasuries rather than from a pot of money under the jurisdiction of a court (here, the $57,494 paid into the court's registry to satisfy the Test Case judgment). The Report and Recommendation noted that an Indian tribe is immune to suit unless the tribe has waived its immunity or Congress has

abrogated it. (SPA 21-22 (citing cases).) There is no claim that Congress abrogated the Oneidas' immunity.

Although the Report and Recommendation held that the Oneidas had waived sovereign immunity to the court's award of an equitable share of the percentage contingency fee under the Retainer Agreement (SPA 22-23), there is no such waiver of sovereign immunity with regard to an extra-contractual fee award independent of or greater than the Oneidas' actual recovery. As the Magistrate Judge ruled, the Oneidas "sovereign immunity is abrogated to the extent delineated in Paragraph 10 [of the Retainer Agreement]." (SPA 23.) Paragraph 10 of the Retainer Agreement provides, "If the contract shall be so terminated, except for wrongdoing or dereliction of the attorneys, the attorneys shall be credited with such share in the attorney fee as the court or tribunal finally determining the Oneidas' claim may determine to be equitable; provided, that such fee shall be wholly contingent upon a recovery for the Oneidas." (JA 213-14.) The parties' intent that the contract, rather than background New York law, determine the manner in which attorneys' fees were to be determined is also reflected in ¶ 5 of the Retainer Agreement, which—consistent with New York practice upon substitution of counsel—provides for a quantum meruit fee if the United States Department of Justice "assumes the responsibility of handling the claim." (JA 208.) But the Agreement specifies even in that circumstance that the quantum

meruit fee is to be determined by the Secretary of the Interior, not by a court, and only if "said Department of Justice is successful in obtaining a recovery." Thus, the contract explicitly foreclosed the possibility that the Oneidas could be liable to pay fees out-of-pocket on a quantum meruit theory under New York law rather than paying them as a percentage of the recovery. A waiver of immunity to a quantum meruit claim cannot be read into the contract.

Tribes can place limitations on the scope of a waiver of sovereign immunity. For example, a tribe can limit the waiver to a particular forum. *See, e.g., Big Horn Elec. Coop. v. Adams*, 219 F.3d 944, 955 (9th Cir. 2000) (waiver of immunity to suit in tribal court does not waive immunity in federal court); *Adams v. Moapa Band of Paiute Indians*, 991 F. Supp. 1218, 1222-23 (D. Nev. 1997) (waiver of immunity to suit in tribal or state court does not waive immunity to suit in federal court); *Calvello v. Yankton Sioux Tribe*, 899 F. Supp. 431, 437 (D.S.D. 1995) (tribe's waiver of sovereign immunity limited to state court). Tribes can also limit sovereign immunity waivers to satisfy obligations from particular funds. *See, e.g.*, *Missouri River Servs. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 853 (8th Cir. 2001) (tribe had waived immunity to a judgment satisfied from the property involved in a joint operating agreement or the net profits of the operation, but had not waived the immunity of other properties and funds); *Namekegan Dev. Corp. v. Bois Forte Res. Housing Auth.*, 517 F.2d 508, 510 (8th Cir. 1975) (tribe had

waived immunity to execution, but only as to specified funds). Paragraph 10 of the Retainer Agreement made the Oneidas liable for a fee paid out of money the tribes recovered from the State and its municipal subdivisions—which consists here of the $57,494 the Counties paid in the Test Case. It did not waive tribal sovereign immunity as to bank accounts or other tribal assets, or for a fee award that exceeds the percentage contingency fee stated in the Retainer Agreement.

An implied waiver of sovereign immunity to enforce a contract is not a waiver of sovereign immunity to extra-contractual theories such as quantum meruit claims. Courts apply that immunity rule to tribes, *Oneida Indian Nation v. Hunt Construction Group*, 888 N.Y.S.2d 828, 829-30 (4th Dept. 2009); to state and local governments, *City of Houston v. Swinerton Builders, Inc.*, 233 S.W.3d 4, 13 (Tex. App. 2007) (governmental immunity); *William E.S. Flory Small Bus. Dev. Ctr. v. Commonwealth*, 541 S.E.2d 915, 918 (Va. 2001); *Paul A. Whitfield, P.A. v. Gilchrist*, 497 S.E.2d 412, 415 (N.C. 1998); and to the United States, *Merritt v. United States*, 267 U.S. 338, 341 (1925). The Oneidas did not waive tribal sovereign immunity to a claim for fees based on a state-law quantum meruit theory far in excess of the fee payable under the Retainer Agreement.

2. A Quantum Meruit Fee Would Have Accrued by 1978, and So BSK's Claim Is Barred by the Six-Year Statute Of Limitations.

A quantum meruit fee under New York law is a non-contractual remedy independent of the retainer agreement, the contingent fee, or the client's actual recovery. It can be, and is, determined at the time of termination by courts applying New York law even if they do not know how the underlying litigation will turn out. *Matter of Tillman*, 259 N.Y. 133, 136 (1932) (quantum meruit value of attorney's services is based on the services performed and does not depend upon the outcome of the litigation); *Matter of Montgomery*, 272 N.Y. 323, 326 (1936) (quantum meruit fee independent of the contract price); *Universal Acupuncture Pain Servs. v. Quadrino & Schwartz*, 370 F.3d 259, 263-64 (2d Cir. 2004). A claim for quantum meruit compensation therefore accrues when the lawyer stops performing the legal services required under the contingent fee agreement. *Tillman*, 259 N.Y. at 136; *Universal Acupuncture Pain Svcs.*, 370 F.3d at 263 ("Under New York law, a lawyer's right to recover in quantum meruit accrues immediately upon discharge."). BSK's quantum meruit claim—if, contrary to the express terms of the Retainer Agreement, the firm had any such claim—accrued in April 1977 when BSK advised the Oneidas it was withdrawing as their counsel (JA 500-504), or, at the latest, when BSK formally moved to withdraw in the Test Case and the Reservation Case in July and August 1978. (JA 199.) The statute of

limitations on such clams is six years. N.Y. CPLR § 213(2). Thus, the limitations period on an extra-contractual quantum meruit fee claim expired long before BSK filed its fee application in 1999.

II. BSK WAS NOT ENTITLED TO AN EVIDENTIARY HEARING ON ITS FEE CLAIM.

BSK claims the district court erred in ruling on the firm's fee application without holding an evidentiary hearing. BSK cites cases (BSK Br. 42-43) requiring a hearing when an extra-contractual quantum meruit fee is awarded under New York law, but those cases do not require evidentiary hearings. And the rule for quantum meruit fees does not apply here to a *contractual* fee award, which must be calculated as an equitable share of the contractual attorneys fee based on a percentage of the recovery. (*See* § I.B., *supra*.)

BSK did not seek an evidentiary hearing in its fee application. It asked for the opportunity to submit "affidavits and law" after the Test Case and Reservation Case were over (JA 251), not for a trial-type hearing. BSK did not submit any affidavits when the Test Case ended in 2003 or at the conclusion of the Reservation Case in 2010. Even if BSK expected that the court would invite submissions before ruling on fees after the Reservation Case was dismissed, BSK sought and received *de novo* consideration by the district judge. BSK then had the right to offer "further evidence"—including affidavits—for the district court to

consider, (*see* SPA 65 (citing 28 U.S.C. § 636(b)(1))), but it did not offer anything.[13] (*Id.*) In particular, BSK did not ask the district court to consider the hours, hourly rates, or disbursements that it now represents (BSK Br. 46), because, until it reached this Court, *BSK never claimed it was entitled to a quantum meruit fee calculated using a lodestar approach*. Those facts are not in the record because BSK chose not to put them there. BSK's arguments on appeal about non-record information should be stricken and disregarded. *See* Fed. R. App. P. 28(a)(7) (requiring citations to the record).

Even when there is a constitutional right to a jury trial, courts grant summary judgment when there are no factual disputes to resolve. *Benjamin v. Traffic Exec. Ass'n*, 869 F.2d 107, 115 n.11 (2d Cir. 1989). BSK *argued* in a conclusory fashion that it wanted a hearing (*see* BSK Br. 44-45), but—as the district court noted—it did not even identify any evidence that should be considered or any factual dispute that needed resolution at a hearing. (SPA 65). BSK now says it "would also have submitted proof" about its hours and rates (BSK Br. 46), but it is simply too late

[13] The fact that a district court has discretion to decline to consider new evidence, *see* BSK Br. 44; *Hynes v. Squillace*, 143 F.3d 653 (2d Cir. 1998) (upholding consideration of new evidence), does not excuse BSK's failure to make a proffer of evidence to the district court. A court cannot exercise discretion without knowing what evidence it is being asked to consider. Proffers of evidence were made in the two cases BSK cites. *In re Adler, Coleman Clearing Corp.*, 497 F. Supp. 2d 520, 522 (S.D.N.Y. 2007) (rejecting proffered affidavit); *U.S. Fid. & Guar. Co. v. J. United Elec. Contracting Corp.*, 62 F. Supp. 2d 915 (E.D.N.Y. 1999) (rejecting proffered affidavit and documents).

for that, especially when BSK was seeking a fee based on a percentage of the Oneidas' recovery below, not one based on its hours and rates. On this record, there was no reason for the district court to hold a hearing, much less an evidentiary hearing.

III. BSK WAS NOT ENITLED TO PREJUDGMENT INTEREST.

BSK claims the district court should have awarded prejudgment interest, again relying on state law involving extra-contractual quantum meruit fees.[14] As explained in Part I, BSK is not entitled to a quantum meruit fee determined at the time of termination, so it is not entitled to interest calculated from that time either. BSK also did not request prejudgment interest in its fee application. Nor did it object to the Magistrate Judge's ruling on the ground that it did not include prejudgment interest. (JA 250-51.) Thus, BSK's claim is waived. (*See* § I.A, *supra*.)

Even if BSK could pursue a state law prejudgment interest claim for the first time on appeal, the claim lacks any merit. New York CPLR § 5001 authorizes prejudgment interest when a court awards damages for breach of contract. The role of the district court in determining BSK's equitable share of the *contractual*

[14] BSK makes no argument that it would be entitled to prejudgment interest under federal law. *See Wickham Contracting Co., Inc. v. Local Union No. 3*, 955 F.2d 831 (2d Cir. 1992) (discussing equitable framework for award of prejudgment interest).

fee is to carry out the contract, not to award damages for breach of contract. New York courts treat quantum meruit fee awards to discharged lawyers as equivalent to breach of contract damages for purposes of § 5001 even though an unjustified discharge is not, technically, a breach of the retainer agreement because ethics rules give a client an unfettered right to discharge the lawyer. But the Oneidas did not fire BSK or breach the contract. BSK withdrew as counsel, declining to provide the legal services it had agreed to render.

IV. BSK IS NOT ENTITLED UNDER THE RETAINER AGREEMENT TO A FEE EXCEEDING THE ONEIDAS' MONETARY RECOVERY.

This Court reviews attorney fee awards for abuse of discretion. *Millea v. Metro-North R.R. Co.*, 658 F.3d 154, 166 (2d Cir. 2011). There was no legal error or other abuse of discretion in setting BSK's fee in this case.

BSK argues that the fee award was too small because the district court should have treated such things as the Oneida Nation's casino and its application for trust land as part of the Oneidas' "recovery" in the Test Case. (BSK Br. 48-54.) Even on appeal, BSK is so vague about how BSK's activities produced these results or how they should be valued that it is impossible that the Oneidas (or the Department of the Interior which was required to approve the agreement) could have understood when the Retainer Agreement was made that such things could be used to calculate BSK's fee.

Nothing in the text of the Retainer Agreement supports BSK's interpretation. The related term "amounts recovered" in paragraphs 5 and 6 of the Agreement is measured in dollars, confirming that "recovery" is monetary.[15] (JA 207-08.) BSK quotes from a declaration by the lead BSK attorney that suggests that the ultimate goal of the representation was to restore land, financed by "each recovery." (Bsk. Br. 49.) But even that self-serving reference does not support BSK's position. (*See* SPA 64 (noting that BSK's expert attached documents indicating that the goal of the litigation was to win "money damages").) BSK sued only for monetary relief from Madison and Oneida Counties, and BSK withdrew because it felt it could not even advise the Oneidas about seeking other relief because of the interests of private landowners such as lawyers and clients of the firm. It is hard to see how BSK could now take credit for purposes of calculating a fee for work establishing rights with regard to privately-owned land that BSK concluded it ethically could not perform.

BSK's theory seems to be a kind of intellectual property claim that attaches to any consequence, however indirect and remote, of the legal principles that BSK litigated in the Test Case, even though BSK had no involvement in producing any of those consequences (and, in the case of the Oneida Nation casino, sought to

[15] The possibility that Oneidas might recover without submission to a court or tribunal, *see* BSK Br. 48-49, does not imply that a recovery for purposes of setting a fee would involve something other than money.

close it). The district court rejected BSK's expansive reading of "recovery" under settled New York law governing the interpretation of fee agreements. Besides, the connection between the work that BSK did and the Oneida Nation's businesses, gaming compact, and trust land is simply too remote to qualify as a "recovery" on the Oneidas' land claims (or recovery "from" the State of New York) even if, as BSK contends, a recovery could be something other than monetary damages or something awarded in a judgment resolving the litigation.

A. The District Court Properly Construed the Retainer Agreement to Provide for Fees Paid from a Monetary Recovery.

The Magistrate Judge found BSK's argument that the Oneidas' recovery could include Oneida business ventures "specious" and could not "imagine" what BSK's vague standard "would portend in terms of a fee." (SPA 56.) The district court conducted a *de novo* review and likewise rejected the contention "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." (*Id.* at 63.) In the absence of a definition in the Retainer Agreement or some familiar usage of "recovery" to include such things, the district court ruled 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 an interest in these items." (*Id.* at 64.) The district court found no such proof in the record. (*Id.*)

The district court correctly placed the burden on BSK to demonstrate that the Oneidas understood at the time they signed the Retainer Agreement that "recovery" included more than the monetary damages sought in the complaints that BSK filed because New York law requires attorney fee contracts to be "fully known and understood" by the clients. (SPA 63.) The New York cases preclude attorney enforcement of contractual provisions without clear proof that the provision was understood by the client, including provisions that seem much more likely to be understood than BSK's novel interpretation of "recovery." *Jacobsen v. Sassower*, 66 N.Y.2d 991 (1985) (attorney cannot enforce "non-refundable retainer" provision of contract); *Shaw v. Mnfrs. Hanover Trust Co.*, 68 N.Y.2d 172, 177-78 (1986) (attorney cannot collect a contingent fee "determined by the sum recovered" when the client recovered nothing at trial and won damages on appeal only after the attorney's discharge); *Bizar & Martin v. U.S. Ice Cream Corp.*, 644 N.Y.S.2d 753 (2d Dep't 1996) (attorney cannot collect a fee based on "non-cash benefits" as part of the "gross recovery" under the fee contract); *In re Seigel*, 754 N.Y.S.2d 300, 301 (2d Dep't 2002) (attorney cannot collect a fee based on the increase in the value of client's property despite an agreement authorizing a fee based on "any recovery received by the Client, whether it is in the form of cash or the value of any property which may be received").[16]

[16] *Seigel* illustrates why—absent clear evidence that the client fully knew and

On appeal, BSK does not dispute the legal standard the district court applied. Nor could it. *See Revson v. Cinque & Cinque P.C.*, 221 F.3d 59, 67-68 (2d Cir. 2000); *Fredericks v. Chemipal, Ltd.*, 2007 WL 1310160, * 5 (S.D.N.Y. 2007) (Lynch, J.) (summarizing New York law). Federal courts outside of New York as well as the New York courts cited above have rejected broad constructions of fee agreements like BSK's, limiting them to natural readings a client would have understood. For example, the Fifth Circuit in *Wampold v. E. Eric Guirard & Assoc.*, 442 F.3d 269, 269-70 (5th Cir. 2006), held that the "gross proceeds of recovery" did not include a stream of future disability payments as well as the lump sum payment made by the disability insurer for the amount owed to the client at the time of the judgment—although undoubtedly the future payments were due to the legal principle the attorney established. *Id.* at 271-72. *See also Henslee, Monek & Henslee v. D.M. Cent. Transp. Co.*, 870 F. Supp. 764 (E.D. Mich. 1994) (contingency interest in "gross amount . . . realized on this claim" did not include value of job reinstatement).

BSK does not bother to identify any error in the district court's ruling that the "recovery" under the Retainer Agreement is limited to the Test Case judgment; it simply ignores the ruling. BSK's brief identifies nothing in the record showing

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understood—a lawyer could not charge a client a contingent fee in BSK's analogy to an increase in the value of land because of a zoning change. (*See* BSK Br. 50 n.18.)

that the Oneidas fully knew and understood the unusual meaning of a contingent fee recovery the firm now advocates, especially when the only relief BSK sought in the complaints that it filed was money damages. BSK identifies no limiting principle or parameter by which anyone could determine what "recovery" means if it means something other than the money paid in satisfaction of the judgment in the Test Case, or how a court would assign a value to such things as the Oneida Nation gaming compact, deeds, earnings of Oneida Nation businesses, and a trust application. (*See* JA 729-907.) As the Magistrate Judge wrote, it is hard to "imagine what all of this would portend in terms of a fee." (SPA 56.)

B. The Oneidas Did Not Waive Tribal Sovereign Immunity to an Out-of-Pocket Fee Paid from Tribal Funds, Rather Than One Paid From a Recovery From the State or Its Municipal Subdivisions.

The Oneidas' implicit waiver of tribal sovereign immunity under ¶ 10 of the Retainer Agreement was limited to a fee payable from a recovery by the Oneidas from the State or its subdivisions and thus under the jurisdiction of the court or tribunal through a judgment or a settlement—not collection of a fee from the tribe's own bank accounts or other assets. (*See* § I.C.1, *supra*.)

In short, the Oneidas agreed to pay a fee only out of a *res* obtained from the State or its subdivisions. The only such *res* before the court finally determining the Oneidas' claim—the United States District Court for the Northern District of New

York—is the money ($57,494) deposited with that court by the Counties to satisfy the Test Case Judgment. The State and its subdivisions have not tendered any other recovery from which a fee could be deducted.

C. Oneida Nation Businesses and Trust Land Are Not "Recoveries" in the Test Case or the Reservation Case.

BSK now disclaims "any part of the Oneidas' revenue or income, including from the casino." (BSK Br. 50.) The firm's theory, however, is that its "results made those ventures possible, and thus the value of [BSK's] services cannot be fully measured without recognizing that the Oneidas' success today flows directly from [BSK's] achievement." (*Id.*) The short answer is that BSK's fee under the Retainer Agreement is based on a percentage of the Oneidas' recovery from the State or its subdivisions, not nebulous theories about the value of an abstract legal principle to the Oneidas. (JA 207.) Even if a recovery under the Retainer Agreement could take a form other than a monetary payment, a "recovery" is limited to consideration paid by the State or its subdivisions to satisfy Oneida land claims.

BSK does not—and cannot—identify anything other than the Test Case judgment received from the State or its subdivisions to satisfy Oneida land claims. The Oneida Nation's 1993 gaming compact with New York followed from the duties imposed on the State by the Indian Gaming Regulatory Act, particularly 25

U.S.C. § 2710. The gaming compact (JA 745-789) did not settle or otherwise resolve Oneida land claims. And it would be quite remarkable for BSK to seek credit for the casino in any event, having advised the Canadian Oneidas in connection with litigation to close the casino. (SPA 49.) The Oneida Nation's trust application to the U.S. Department of the Interior is actively opposed by the State of New York and Madison and Oneida Counties, which have sued to overturn the decision to take certain land into trust. *New York v. Salazar*, No. 08-CV-644 (N.D.N.Y.).[17] There is simply no stretch of the imagination or twist of the English language that would classify a federal government decision to take land into trust status over State opposition as a recovery *from* the State or its subdivisions.

BSK seems to recognize that it cannot plausibly characterize Oneida Nation ventures or trust land as a "recovery" in the Test Case or Reservation Case received from the State of New York or its subdivisions. Thus, BSK cryptically refers to the Oneidas' "innumerable rewards *from their recovery*," (BSK Br. 53 (emphasis added)), suggesting that "recovery" refers to an abstract legal principle somehow indirectly connected to certain material "rewards." BSK points to no

[17] BSK is mistaken (Br. at 52), in claiming that the Secretary of the Interior has accepted land into trust. The Secretary's May 20, 2008 decision to do so has been stayed to permit APA review. *See* 25 C.F.R. § 151.12(b) (staying action for 30 days to permit filing of challenges). The federal government has agreed to a stay through an appeal to this Court. *New York v. Salazar*, *supra*, DE 35 (filed Sept. 3, 2008).

contingent fee case that requires a client to pay an out of pocket fee for establishing a legal principle, and the Oneidas are aware of no such case. (*See* SPA 63 (district court noted that BSK relied on inapposite "cases on common fund awards in class action lawsuits, fee awards in tribal claims against the government and other statutory fee awards").) Even without invoking New York's strict rule for interpreting lawyers' fee agreements, (§ IV.A, *supra*), there is no basis for BSK's suggested treatment of a fee agreement designed to allow a client to pay fees out of its winnings in this unusual way.

BSK is, in any event, overambitious in claiming credit. BSK's Supreme Court victory in the Test Case established federal court jurisdiction only. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974). BSK did thereafter try liability in the Test Case with the assistance of NARF, but then withdrew. Other lawyers completed the district court litigation in the Test Case, won the appeal to this Court, and won a 5-4 victory in the Supreme Court, *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985). That Supreme Court decision, far more than the district court's opinion, established the legal principles on which the Oneidas later relied. This Court's 2003 decision in *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003), not the Test Case, confirmed that the Oneida reservation had not been disestablished. And the State and Counties continued to dispute liability in the Reservation Case for many years, resulting in extended

motions practice, document discovery, and expert witness depositions conducted by other lawyers. (JA 28-92.) Even if establishing an abstract principle could qualify as a recovery, BSK's trial-level litigation is simply too remote from the "rewards" for which the firm seeks to assess a fee.[18]

D. By Its Conflicts of Interest, BSK Forfeited Its Fee.

A law firm that violates ethical responsibilities to a client may forfeit its fee. Restatement (Third) of Law Governing Lawyers § 37 (2000); *Silbiger v. Prudence Bonds Corp.*, 180 F.2d 917 (2d Cir. 1950). BSK does not dispute that it breached its duty of loyalty to the Oneida Nation by representing the Canadian Oneidas in matters adverse to the Nation, even recommending litigation to close the Nation's casino. That alone would justify forfeiture of BSK's entire fee, not just reduction of the fee by 10% (from 10% of the recovery to 9%), as ordered by the court below. (SPA 53.)

The court below declined to order forfeiture of BSK's fee on the additional ground that BSK had a conflict of interest from the beginning of the firm's representation of the Oneidas, not an "unintended" consequence of BSK's success,

[18] BSK also suggests that it should be credited with a fee based on the value of damages it says the Oneidas can recover with respect to County land in addition to the two-year period recovered in the Test Case. (BSK Br. 53). BSK does not explain how this can be so in light of this Court's decision mandating dismissal of all damages claims in the Reservation Case (which included land transferred in the 1795 transaction at issue involved in the Test Case). That dismissal included the damages claim BSK envisions.

as BSK maintains. (BSK Br. 17.) This Court can affirm the decision below on the alternative ground that BSK forfeited its entire fee, and therefore is not entitled to any relief because it received more from the district court than it was entitled to receive. *See* Restatement (Third) of the Law Governing Lawyers § 37 cmt. e ("Ordinarily forfeiture extends to all fees for the matter for which the lawyer was retained. . . .").

The reality is that BSK's position was self-contradictory from the start. BSK claims credit for challenging the titles of private landowners, (*see e.g.*, BSK Br. 16 (describing Judge Port's Test Case decision as establishing the supremacy of the Oneidas "original Indian title" to the entire 100,000 acres conveyed in the 1795 transaction, including more than 99,000 acres of privately-owned land)), but BSK could not ethically do that because of conflicting duties to other firm clients and the personal interests of firm lawyers. Nor could BSK advise the Oneidas about whether they should do so for the same reasons. (JA 324) (expert opinion that BSK's conflict existed from the outset). That conflict did not depend on whether the Oneidas sued for ejectment, or whether they sued only for money damages. It makes no difference whether BSK subjectively perceived the conflict before 1977; the standard is objective. *See So v. Suchanek*, Nos. 10-7071, 10-7087 & 10-7113, 2012 WL 164055 *5 (D.C. Cir. Jan. 20, 2012) (applying D.C. Rules of Professional Conduct); Restatement (Third) of the Law Governing Lawyers § 37

cmt. d ("A violation is clear if a reasonable lawyer, knowing the relevant facts and law reasonably accessible to the lawyer, would have known that the conduct was wrongful."). If BSK could not advise the Oneidas about which remedies to pursue after winning the Test Case, it could not advise them about such choices before filing suit either. Contrary to the Magistrate Judge's legal analysis, BSK did not avoid the conflict of interest just by limiting the representation, because consent to the limitation depended on conflicted advice. BSK represented the Oneidas despite the conflict, for which it should have forfeited its fee. BSK cannot have it both ways for purposes of its fee application. If BSK's engagement for the Oneidas included asserting the "supremacy" of the Oneidas' Indian title throughout the Oneidas' lands, BSK had a conflict and forfeited its fee. If not, at the very least BSK cannot claim that it is entitled to include remote consequences of that legal principle as a "recovery" for purposes of calculating its fee.

E. Under All the Circumstances, the Fee Awarded to BSK Was More Than an Equitable Share.

BSK's fee application disregards the fundamental point of a contingent fee agreement: the lawyer is paid only if the client wins. BSK's clients did not win. This Court held that an equitable defense barred the Oneida land claim—the Oneidas were entitled to no recovery. 617 F.3d at 140. BSK cannot seek a greater

fee for doing part of the work on the Oneidas' land claim than it would have been paid if it had seen the cases through to a conclusion.

BSK does not contest the district court's determination under the Retainer Agreement that the firm's equitable share of the 20% contingency fee was 9% of the Oneidas' recovery. There is nothing unfair about giving BSK 9% of the recovery in the case the Oneidas won based on a contract that gave BSK a maximum fee of 20% if the firm saw the litigation through to its conclusion and did not withdraw. BSK left much work still to be done in the Test Case, justifying the district court's reduction of the fee to 10% of the recovery. Considering BSK's improper conduct after it withdrew, and the conflict between the interests of the Oneidas and BSK's other clients and its own lawyers, BSK was fortunate to have its fee reduced to 9% rather than forfeited entirely.

CONCLUSION

The order of the district court should be affirmed.

Respectfully submitted,

/s/ Arlinda F. Locklear
Arlinda F. Locklear
4113 Jenifer Street, NW
Washington, DC 20015
(202) 237-0933

alocklearesq@verizon.net

Counsel for the Oneida Tribe of Indians of Wisconsin

/s/ Michael R. Smith
Michael R. Smith
David A. Reiser
Zuckerman Spaeder LLP
1800 M Street, NW, Suite 1000
Washington, DC 20036
(202) 778-1832
msmith@zuckerman.com

Counsel for the Oneida Indian Nation

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1. This brief complies with the type-volume limitation of Fed. R. Rep. P. 32(a)(7)(B) because this brief contains 13,099 , excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 2010 in size 14 Times New Roman font.

/s/ Michael R. Smith
Attorney for Oneida Nation of New York