

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ESSEX

Matter of LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

Index No. 315-08

ADIRONDACK PARK AGENCY,

Respondent.

ADIRONDACK PARK AGENCY,

Plaintiff,

-against-

Index No. 332-08

LEWIS FAMILY FARM, INC.,

SALIM B. LEWIS and BARBARA LEWIS,

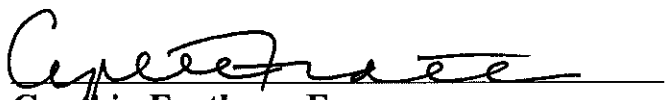
Defendants.

NOTICE OF MOTION

PLEASE TAKE NOTICE that, upon the annexed affirmation of Cynthia Feathers, Esq., dated August 27, 2009, and upon all prior proceedings in this matter, the undersigned will move this Court (Hon. Richard B. Meyer, Acting Supreme Court Justice) at an Individual Assignment Term to be held at the Essex County Courthouse in Elizabethtown, NY on September 9, at 9:30 a.m. of that day or as soon thereafter as counsel can be heard, for an order granting New York Farm Bureau, Inc. permission to submit an amicus curiae memorandum of law in support of the motion pursuant to CPLR article 86 of the Lewis Family Farm, Inc.

Date: August 27, 2009
Saratoga Springs, NY

Respectfully submitted,


Cynthia Feathers, Esq.

Of counsel to New York Farm Bureau, Inc.
48 Union Avenue, Suite 2
Saratoga Springs, NY 12866
(518) 691-0088

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Defendants.

**AFFIRMATION IN SUPPORT OF
MOTION TO FILE AMICUS CURIAE
MEMORANDUM OF LAW**

CYNTHIA FEATHERS, an attorney duly admitted to practice in the Courts of this State, does hereby affirm under penalty of perjury that:

1. I am of counsel to New York Farm Bureau (“Farm Bureau”), a not-for-profit farm organization, and I make this affirmation in support of its motion seeking permission to file an amicus curiae memorandum of law in support of the Lewis Family Farm motion, returnable September 4, which seeks attorneys’ fees and other expenses pursuant to CPLR article 86, based on a July 16, 2009 Third

Department decision affirming this Court's ruling annulling, as irrational, an Adirondack Park Agency (APA) determination.

2. Farm Bureau has expertise that enables it to offer insights on the salient issues.

3. With a statewide membership of nearly 29,000 farmers in 52 counties, Farm Bureau is dedicated to promoting and representing the economic and other interests of New York farmers and encouraging the development and preservation of agriculture within the State. The organization seeks to ensure adherence with state polices and laws regarding agriculture.

4. Because of its expertise, in the underlying proceedings, this Court and the Third Department granted Farm Bureau permission to file an amicus curiae brief. In such submissions, the organization contended that, under relevant laws, farm houses are agricultural use structures that cannot be regulated by the APA. That same expertise qualifies Farm Bureau to offer assistance on the issue of whether the State was not substantially justified in the position it took in the instant proceedings.

5. In its memorandum of law, Farm Bureau would seek to provide special assistance to this Court by concentrating on State and Federal cases in which an irrational interpretation of laws demonstrated the lack of a substantially justified position. *See e.g. Matter of Simpkins v. Riley*, 193 AD2d 1009 (3rd Dept 1993)

(State's position not substantially justified where agency failed to follow its own unambiguous regulations); *cf. Matter of Rivers v. Corron*, 222 AD2d 863 (3rd Dept 1995) (respondent's position substantially justified where it applied seemingly unambiguous language of unchallenged regulation promulgated by unrelated State agency).

6. It is desirable for this Court to have as much relevant information and analysis as possible to reach a just result that will withstand an inevitable appeal.

7. The matter in dispute is of significant importance to Farm Bureau constituents. It is vital that the APA and other state agencies be held accountable for unjustified actions impacting farmers. Otherwise, there will not be a sufficient deterrent to governmental abuses that harm farmers and farming in this State. Nor will there be sufficient incentive for attorneys to provide legal assistance in actions seeking redress from wrongful actions of the state; farmers lacking the resources of the instant farmers would not be able to vindicate their rights.

8. Farms in New York State are under significant financial pressures to remain viable. Availability of financial resources to defend their clear legal rights should not be the factor that determines whether they are able to survive. Weather, commodity prices, and input costs are volatile enough.

9. The Legislature enacted the Equal Access to Justice Act (EAJA) to help prevailing parties secure legal assistance to contest wrongful actions of state

actions. *See Matter of Wittlinger v. Wing*, 99 NY2d 425 (2003). By allowing victorious petitioners and plaintiffs to recover attorneys' fees, the statute seeks to help those whose rights have been violated, but who otherwise might not have been able to induce lawyers to "fight City Hall." *See id.*

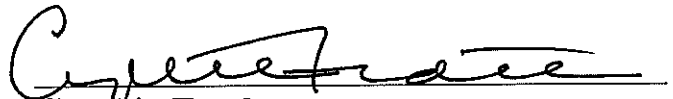
10. Thus, as defined in the EAJA, "party" includes not only an owner of an entity who had less than 100 employees when the civil action was filed, as the Lewis Family Farm, but also an individual whose net worth, excluding his principal residence, did not exceed \$50,000 at the time of the civil action. *See* CPLR 8602 (d) (i), (ii). Many farmers served by the Farm Bureau would qualify as a party under either definition.

11. The purpose of the EAJA is to assist such economically disadvantaged litigants in obtaining legal assistance in the prosecution of actions seeking to obtain redress from wrongful actions of the State. *See Matter of Scott v. Coleman*, 20 AD3d 631 (3rd Dept 2005), *app dsmd* 5 NY3d 880 (2005), citing *Wittlinger v. Wing, supra*.

12. Therefore, to help fulfill the central purpose of the EAJA in this and future cases affecting farmers, Farm Bureau respectfully seeks permission to submit an amicus curiae memo of law supporting the Lewis Family Farm application, and it further requests a deadline of September 30 or thereafter for submission of such memo.

WHEREFORE, on behalf of Farm Bureau, the undersigned respectfully requests that this Court grant this motion for leave to file an amicus curiae memo and grant such other and further relief as it deems just and proper.

Dated: August 27, 2009
Saratoga Springs, NY

A handwritten signature in black ink, appearing to read 'Cynthia Feathers', written over a horizontal line.

Cynthia Feathers

Of counsel to New York Farm Bureau, Inc.
48 Union Avenue, Suite 2
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