

STATE OF NEW YORK  
SUPREME COURT     COUNTY OF ESSEX

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LEWIS FAMILY FARM, INC.,

*Petitioner,*

-against-

ADIRONDACK PARK AGENCY,

*Respondent.*

**AFFIRMATION**

Index No. 315-08

Hon. Richard B. Meyer

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ADIRONDACK PARK AGENCY,

*Plaintiff,*

-against-

LEWIS FAMILY FARM, INC., SALIM B. LEWIS  
and BARBARA LEWIS,

*Defendants.*

**COUNTERCLAIM**

Index No.: 332-08

Hon. Richard B. Meyer

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**AFFIRMATION IN SUPPORT OF LEWIS FAMILY FARM'S MOTION  
TO RECOVER FEES AND EXPENSES PURSUANT TO CPLR ARTICLE 86**

**JACOB F. LAMME**, an attorney at law duly admitted to practice in the courts of the State of New York, swears and affirms under penalty of perjury as follows:

1. I am duly licensed and admitted to practice law in the State of New York, and I am an associate at the law firm of McNamee, Lochner, Titus & Williams, P.C., attorneys for Petitioner Lewis Family Farm, Inc. ("Lewis Family Farm"). As such, I am fully familiar with the pleadings and proceedings had in this action, and with the matters set forth herein.

2. I make this affirmation in support of the Lewis Family Farm's motion pursuant to the New York State Equal Access to Justice Act ("EAJA"), Article 86 of the CPLR, for an award of reasonable counsel fees and expenses. More specifically, I submit this affirmation to

demonstrate that the amount of legal fees and expenses at issue is, in fact, far less than the \$87,829.95 disputed by Respondent Adirondack Park Agency ("Agency").

3. On February 3, 2010, this Court issued a Decision and Order holding that the Lewis Family Farm is entitled to an award of fees and expenses under Article 86 of the CPLR because the position of the Agency throughout this litigation was not "substantially justified". See Lewis Family Farm, Inc. v. Adirondack Park Agency, 2010 NY Slip Op 50180U (Essex County Sup. Ct., Feb. 3, 2010).

4. On August 12, 2009, the Lewis Family Farm submitted an itemized bill totaling \$208,770.06 from McNamee, Lochner, Titus & Williams, P.C. for professional legal services rendered from March 26, 2008 through August 10, 2009.

5. This itemized bill contained various time entries, each of which demonstrates (i) the date of services rendered, (ii) the attorney providing the services, (iii) the number of hours worked, (iv) the billable rate, (v) the fees billed, and (vi) a detailed description of the services rendered.

6. The attorneys who worked on this case provided details of the services rendered in one time entry per day, rather than making a time entry for each specific task performed in a day. This is a standard and customary practice at McNamee, Lochner, Titus & Williams, P.C., unless the law (i.e., bankruptcy fee applications) or the client requests otherwise. The Lewis Family Farm did not request that McNamee, Lochner, Titus & Williams, P.C. issue its bills in a manner different from its standard and customary practice.

7. In opposition to the Lewis Family Farm's motion for fees and expenses, the Agency submitted a color-coded spreadsheet challenging \$87,829.95 of those legal fees and expenses. (See Affirmation of Loretta Simon, dated August 28, 2009, Ex. G). The Agency has

arranged its challenges into six (6) separate categories: *Illegal Ex Parte Stay*, *Non-Legal Expenses for Publicity and Meeting with Allies*, *Paraprofessional Tasks*, *Lewis Family Farm I (Index No. 498-07)*, *Lewis Family Farm III (Index No. 332-08)*, *Unspecified Challenges* and *Expenses*. (See Simon Aff., Ex. G).<sup>1</sup>

8. The \$87,829.95 in fees and expenses that has been challenged by the Agency can basically be broken down as follows:<sup>2</sup>

- A. *Illegal Ex Parte Stay* = \$9,300.00
- B. *Non-Legal Expenses for Publicity and Meeting with Allies* = \$23,962.50
- C. *Paraprofessional Tasks* = \$11,343.75
- D. *Lewis Family Farm I (Index No. 498-07)* = \$11,917.50
- E. *Lewis Family Farm III (Index No. 332-08)* = \$24,097.50
- F. *Unspecified Challenges* = \$5,856.25
- G. *Expenses* = \$1,352.45

**TOTAL = \$87,829.95**

9. Pursuant to this Court's Decision and Order of February 3, 2010, the Lewis Family Farm cannot recover for fees and expenses incurred in *Lewis Family Farm I (Index No. 498-07)*. See *Lewis Family Farm, Inc. v. Adirondack Park Agency*, 2010 NY Slip Op 50180U, \*8-9 (Essex County Sup. Ct., Feb. 3, 2010). Thus, the \$11,917.50 in legal fees associated with those time entries is not recoverable and no longer in dispute. As such, the amount at issue has been diminished to **\$75,912.45**.

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<sup>1</sup> "Unspecified Challenges" contains four (4) times entries that do not fall into any of the Agency's categories because the Agency failed to articulate any specific challenge.

<sup>2</sup> Where a challenged time entry falls into multiple categories, it has been placed in the most prominent category based on the description of services rendered.

10. This Court also held that the Lewis Family Farm cannot recover for fees and expenses incurred in *Lewis Family Farm III* (Index No. 332-08). See Lewis Family Farm, Inc. v. Adirondack Park Agency, 2010 NY Slip Op 50180U, \*8-9 (Essex County Sup. Ct., Feb. 3, 2010). The Lewis Family Farm incurred \$24,097.50 in legal fees in defending itself and its officers against the Agency's unjustified enforcement action, which was filed on the heels of the Article 78 petition, as the Agency sought another judge. Thus, the amount in dispute has been diminished to **\$51,814.95**.

11. However, the Court should consider the fees and expenses incurred by the Lewis Family Farm in defending against the State's unjustified counterclaim when making the award pursuant to EAJA. This improper enforcement action was just as "contrary to state statutes" (Lewis Family Farm, Inc., 2010 NY Slip Op 50180U, \*5) as the Attorney General's "defense in the underlying action." (Id.). In the unique circumstances of this case, in which this Court ordered the Agency's enforcement action to be treated as a counterclaim, the fees incurred in defense of that action were an integral part of the "civil action brought against the state" by the Lewis Family Farm. See CPLR § 8601(a). The issues were exactly the same. The Agency filed the enforcement action in retaliation to the Lewis Family Farm's Article 78 proceeding. Indeed, the Agency's action was not ripe because, by the very terms of the Agency's now-annulled administrative determination, the Lewis Family Farm's time to comply had not yet expired when the action was filed. The Agency merely could have stated its position in an objection to the Petition, which it did, instead of protracting this litigation with a frivolous and meritless enforcement action. Thus, no policy interest under the EAJA is served by allowing the State to heap substantial additional attorneys fees upon a party who ultimately prevails through a meritless, burdensome and, in this case, personally threatening counterclaim.

12. For these reasons, we ask this Court to reconsider the scope of the award to include the \$24,097.50 in legal fees incurred, or in the alternative, take them into consideration in granting the award while serving the true values of the EAJA.

13. As to the remaining categories, the Agency's objections are without merit. The Agency's challenges to specific time entries are wholly and categorically unfair because they attack an entire time entry based upon a task that only makes up a fraction of the entry.<sup>3</sup> This is improper. In any event, the United States Supreme Court has recognized the nature of professionalism in accounting for an attorney's time and the nature of the records that must be presented in support of a fee application by holding that billing records in support of a fee application need not record "how each minute of time was expended", but must only allow for meaningful Court review, which the Lewis Family Farm has done here. See Hensley v. Eckerhart, 461 U.S. 424, 437 n.12 (1983)<sup>4</sup>; accord Luca v. County of Nassau, 2010 U.S. Dist. LEXIS 5867 (E.D.N.Y. Jan. 25, 2010). Therefore, the actual fees and expenses in dispute is significantly less than \$51,814.95, and each category will be addressed below.

**The Agency's Unspecified Challenge to Fees Incurred Through Court Appearances By Counsel is Incongruous**

14. The Agency has challenged four (4) time entries for which it has failed to articulate any reason as to why the time entries are in dispute. Three (3) of these time entries pertain to participation in oral argument at various times on the Article 78 petition, while the fourth pertains to initial research for the instant EAJA motion.

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<sup>3</sup> For example, the bill indicates that, on June 3, 2008, I spent 7.5 hours (\$1,125.00) drafting and finalizing a memorandum of law in support of the Lewis Family Farm's Article 78 Petition, which I then served on the Attorney General. The Agency challenges this entire \$1,125.00 fee, even though the disputed task (i.e., service of papers) only accounted for fifteen (15) minutes, at most. (See ¶ 30, *infra*).

<sup>4</sup> The Supreme Court also stated that "[a] request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). Unfortunately, this has not occurred here.

15. These unarticulated challenges are in direct contravention to this Court's Decision and Order, which specifically awarded fees for the Article 78 proceeding and the instant fee application. To the extent that the Agency challenges the time entries for travel time, the attack is unsupported and without merit, especially since the Agency's own counsel traveled to Elizabethtown, New York from Albany and, presumably, was paid during this time.

16. Accordingly, the Agency cannot seriously mount a challenge to the \$5,856.25 in legal fees incurred by the Lewis Family Farm in these time entries. As such, the amount of fees and expenses in dispute has been diminished to **\$45,958.70**.

**The Agency's Effort to Exclude All Fees Related to the Order to Show Cause That Was Necessary to Obtain a Stay Must Fail**

17. The law of this case establishes that the Agency's administrative determination "went beyond the clear and unambiguous statutory language in an effort to assert jurisdiction, impose a \$50,000 civil penalty, and, incredibly, required LFF to waive 'the right to challenge Agency jurisdiction and the review clocks otherwise applicable'." Lewis Family Farm, Inc. v. Adirondack Park Agency, 2010 NY Slip Op 50180U, \*6 (Essex County Sup. Ct., Feb. 3, 2010).<sup>5</sup> The administrative determination also demanded that the Lewis Family Farm submit to this unchallengeable administrative constraint within thirty (30) days.

18. When the Agency first issued its administrative determination, the Lewis Family Farm sought to hold down the cost of this litigation by requesting that the Agency agree to voluntarily stay enforcement of it pending judicial review. The Agency declined. Thus, the Lewis Family Farm was forced to incur \$9,300.00 in additional legal fees to obtain a stay because of the Agency's steadfast refusal to stay enforcement of its illegal administrative

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<sup>5</sup> Perhaps it is even more incredible that, in open court, the Agency described this element of the illegal administrative determination as a "cut and paste" from a standard Agency settlement agreement. See Oral Argument Transcript from October 30, 2009, pp. 31-32, attached hereto as Exhibit "A". This appears to establish a fundamental institutional pattern of jurisdictional overreaching that, perhaps, demands further inquiry.

determination, which served only to protract this litigation. Obviously, a stay of the illegal, draconian determination was justified as this Court and the Appellate Division determined in April-May of 2008.

19. The Agency challenges \$9,300.00 in legal fees incurred by the Lewis Family Farm for the commencement of the Article 78 proceeding and the stay received at the outset of litigation. This is in direct contravention to this Court's Decision and Order, which specifically awarded fees for the Article 78 proceeding.

20. While the initial Order to Show Cause did mistakenly contain a single sentence referencing an *ex parte* stay, the amount of legal work performed was not affected in any way because the Lewis Family Farm was still forced into commencing the proceeding and seeking a stay of the Agency's illegal administrative enforcement, on proper notice, via Order to Show Cause.

21. In any event, on April 9, 2008, the Court issued an Amended Order to Show Cause correcting the alleged mistake. Thus, the *ex parte* stay had no effect; it was not "illegal" as the Agency now postures because nothing was actually "stayed" by the original Order to Show Cause. In any event, the parties still were required to litigate the stay, which was ultimately granted by this Court and affirmed and modified by the Appellate Division. The Lewis Family Farm incurred \$9,300.00 in legal fees for this portion of the litigation.

22. Accordingly, the Agency cannot seriously mount a challenge to the \$9,300.00 in fees incurred for the stay that was properly litigated and obtained in the Article 78 proceeding. As such, the amount of fees and expenses in dispute has been diminished to **\$36,658.70**.

**Paraprofessional Tasks**

23. The Agency challenges \$11,343.75 in legal fees because it claims that several tasks could have been performed more cheaply by having a para-professional perform the tasks rather than an attorney. Each of the Agency's challenges is without merit.

24. First of all, there is no requirement that counsel must always perform every task in the most cost effective manner, or mandating the use of law firm resources based upon the lowest rates available. If that were the case, then an experienced attorney would never be allowed to do anything, leaving all tasks to be performed by para-professionals and law clerks. Obviously, this is not the rule. Nothing in the jurisprudence of the EAJA or the Code of Professional Responsibility suggests this line of reasoning.

25. The Agency is objecting to (i) counsel's time spent preparing responses to the Agency's improper objections and inquiries into the farm worker housing's septic systems; (ii) counsel's teleconferences with this Court and the County Clerk's office; and (iii) the time spent by associate counsel hand-delivering papers to the Agency's counsel. All of these fees were reasonably and directly related to the Article 78 litigation.

26. Incredibly, the Agency challenges three (3) time entries (\$1,425.00) pertaining to counsel's time spent preparing responses to the Agency's improper objections and inquiries into the farm worker housing's septic systems. The Agency's illegal administrative enforcement order, which this Court annulled and condemned as unjustified, required the Lewis Family Farm to submit to the Agency as-built plans of the farm worker housing's septic systems and an engineer's certification that the septic systems complied with various State guidelines. In May 2008, when the Lewis Family Farm obtained a stay from this Court, as affirmed and modified by the Appellate Division, the Lewis Family Farm was required to provide this information to the



Agency. As such, counsel to the Lewis Family Farm worked with Douglas R. Ferris, P.E. to provide his expert certification. Certainly, the Agency cannot seriously argue that a para-professional should be working with the engineer to comply with the Court's order. Indeed, had a para-professional performed these tasks, such activity would have risen to the level of practicing law without a license.

27. The Agency also challenges three (3) time entries (\$300.00) detailing my teleconferences with the Lewis Family Farm and my attention to managing the file. An attorney is certainly permitted to confer with his client and review his files in order to strategize. Again, the Agency's challenge is baseless.

28. The Agency challenges a single 8.25 hour (\$1,237.50) time entry on April 22, 2008 merely because it contains a notation that a telephone call was placed to the Essex County Clerk. This is highly improper. At most, this call represents a minute or two of actual time. Moreover, as a matter of policy at McNamee, Lochner, Titus & Williams, P.C., only attorneys fully familiar with a case are permitted to contact a court or clerk to discuss matters. Thus, the Agency's over-inclusive challenge to this entry is without merit.

29. Finally, the Agency challenges eleven (11) time entries (\$8,743.75) because they contain instances in which I personally served the Attorney General with papers in this litigation. Again, the time entries in the billing records are block entries with details of all work performed in a given day. So the Agency's dispute over \$8,743.75 in fees incurred is highly inflated.

30. In any event, at most, it took me 15 minutes to hand deliver papers upon the Agency's counsel because my office is located only approximately 750 yards from the office of the Agency's counsel. Thus, the Agency's challenge to these 11 time entries boils down to 2.75

hours of work (for a total of \$425.00).<sup>6</sup> But, my performance of these tasks was actually more efficient and cost effective than hiring a process server, who can charge \$40.00 or more per service. Importantly, during the times in which I was serving the Attorney General, I was often multitasking and conferencing with my co-counsel or client via telephone. On at least one occasion, I served Assistant Attorney General Loretta Simon so that I could speak with her about this litigation, which I did.

31. Consequently, the amount legitimately in dispute over activities that the Agency believes should have been performed by a para-professional has been boiled down to \$425.00. But because these fees were legitimately incurred in an appropriate and efficient manner, the Agency's dispute is without merit. As such, the amount of fees and expenses in dispute has been diminished to **\$25,314.95**.

**The Agency's Effort to Exclude All Fees Related to Coordination With Amicus Counsel and Responding to Press Inquiries Must Fail**

32. The Agency challenges \$23,962.50 in legal fees essentially because it claims that counsel for the Lewis Family Farm should not have conferred with amicus counsel, responded to press inquiries, or responded to the client's inquiries regarding presenting the Lewis Family Farm's case to the press and public via use of a website.

33. The Lewis Family Farm has already responded to the Agency's dispute concerning fees incurred for responding to press inquiries and the Lewis Family Farm's inquiries concerning the website it created to inform the press and public about this case. (See Affirmation of John J. Privitera, Esq., dated September 23, 2009, ¶¶ 7-15). Those facts will not be restated here.

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<sup>6</sup> Nine (9) entries are at \$150.00 per hour, and two (2) are at \$175.00 per hour.

34. As counsel for the Lewis Family Farm, we were obliged to coordinate and consult with counsel for New York Farm Bureau, Inc. ("Farm Bureau"), a party that this Court permitted to appear in this case as *amicus curiae*. Indeed, the entire purpose of having an amicus is to provide the Court with policy arguments that would generally not be made by a party in the litigation. (See Affirmation of Cynthia Feathers, dated March 1, 2010, ¶ 4). It was extremely important for us to confer with the Farm Bureau's counsel in order to ensure that our arguments to the Court were efficient and harmonious. Had we not conferred with counsel for the Farm Bureau, John Privitera and I would have breached our ethical duties to zealously advocate for the Lewis Family Farm.

35. The Agency has no basis upon which to challenge fees incurred by the Lewis Family Farm in conferring with Farm Bureau on matters directly related to this litigation. The Agency's ill-formed and illegal administrative determination, had it gone unchallenged, would have had a devastating effect on the members of the Farm Bureau and New York's constitutionally-based Right-to-Farm Law. Thus, the Lewis Family Farm properly sought the Farm Bureau's support in this case, and counsel had a duty to confer with the Farm Bureau throughout this case. The accompanying Affirmation of Cynthia Feathers, Esq., dated March 1, 2010, corroborates this professional view. The use of amicus in this case was authorized by this Court. Thus, for this particular category, the Agency has no basis upon which to challenge the manner in which the Lewis Family Farm attacks the Agency's illegal actions.

36. Each of the Agency's challenges is without merit, thereby diminishing the amount at issue to **\$1,352.45**.

**Expenses are Recoverable Under the EAJA**

37. The Agency challenges \$1,352.45 in expenses incurred by the Lewis Family Farm in this nearly two-year old litigation. The expenses in dispute include travel and copy charges, as well as several other expenses that were directly related to this litigation.

38. The amount of expenses sought in this matter is *below* the amount of expenses actually expended because, although we have the mechanism to do so, the McNamee law firm did not charge the Lewis Family Farm for most of the abundance of online legal research performed on LexisNexis. Also, John Privitera did not charge for most of his travel expenses. Had we charged for these expenses, the Agency would have been obligated to pay thousands of dollars more in expenses.

39. In any event, the Agency has failed to articulate any reasons why it disputes any of the expenses. This Court has already concluded that the Lewis Family Farm is entitled to recover expenses pursuant to the EAJA. See Lewis Family Farm, Inc. v. Adirondack Park Agency, 2010 NY Slip Op 50180U, \*8 (Essex County Sup. Ct., Feb. 3, 2010).

40. Thus, the \$1,352.45 in expenses is not at issue, thereby diminishing the amount in dispute to ***\$0.00***.

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**Conclusion**

41. Based on the foregoing, and for the reasons set forth in the other submissions on this motion, the Lewis Family Farm respectfully asks this Court to enter an order granting an award of counsel fees and expenses to the Lewis Family Farm in an amount equal to or greater than \$226,087.53, together with such other and further relief as the Court deems just and proper.

I hereby swear and affirm the above under penalty of perjury this 4<sup>th</sup> day of March, 2010.

McNAMEE, LOCHNER, TITUS & WILLIAMS, P.C.

A handwritten signature in black ink, appearing to read 'Jacob F. Lamme', is written over a horizontal line.

Jacob F. Lamme, Esq.

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