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., et al.,
Defendants.

MEMORANDUM OF LAW OF AMICUS CURIAE NEW YORK FARM BUREAU SUPPORTING ATTORNEYS' FEES TO LEWIS FAMILY FARM

I. Introduction

Few farmers whose efforts to build farm worker housing were thwarted by the Adirondack Park Agency would have been able to fight back and prevail. The Agency's position is essentially that the Lewis Family Farm should be penalized for having the unique combination of tenacity, courage, and counsel to successfully confront the government's unreasonable actions.

But the Lewis Family Farm investment in creating and sustaining a viable farm in the North County is a virtue to be cultivated. The victory the Lewis Family Farm has scored is not just for one farm, but for all farms in the Adirondack Park burdened by bureaucratic positions that choke their efforts to survive and grow.

It is no answer for the Adirondack Park Agency to contend that the Lewis Family Farm could perhaps have obtained a permit for the farm worker housing. Empowering the Agency to regulate such agricultural use structures could have invited many arbitrary intrusions on farming and have had disastrous consequences for farming within the Adirondack Park.

The CPLR Article 78 proceeding commenced by the Lewis Family Farm is precisely the kind of action the State Equal Access to Justice Act is designed to encourage. The Lewis Family Farm fits within the definition of party under the statute; and arguments that having resources to stay the litigation course constitutes special circumstances lack merit, as do contentions regarding the purported substantial justification for the state's stance based on the issue of first impression and the dictum of an initial Supreme Court decision.

New York Farm Bureau, Inc. ("Farm Bureau"), a non-governmental voluntary general farm organization, seeks to promote, protect, and represent the interests of New York farmers and to encourage agriculture within the state. With a statewide membership of approximately 29,000 families in 52 counties, Farm

Bureau strives to strengthen legislation recognizing the unique nature of the agricultural industry and to ensure adherence to state policies regarding agriculture. That mission encompasses ensuring that farmers are protected from unreasonable government action, as well as the financial burden of defending themselves against legal actions that are not substantially justified under state law.

II. No Special Circumstances Permit Denial of Attorneys' Fees

Based on an erroneous claim of special circumstances, the Adirondack Park Agency opposes the payment of attorneys' fees and reasonable expenses to the Lewis Family Farm, which won in this Court and in the Third Department, as set forth in the motion for fees.

As long as an individual or entity qualifies as a party under the statutory definition, any further consideration as to the amount of financial resources available to the party is improper and irrelevant and cannot constitute special circumstances warranting a denial of fees, as set forth below.

Under the federal Equal Access to Justice Act ("EAJA"), a court shall award fees and expenses to a prevailing party in any civil action against the United States, unless the government's position was substantially justified or special circumstances make the award unjust. *See* 28 USC § 2412 (d) (1) (A).

The purpose of the federal fee-shifting EAJA is to lessen the deterrent effect that the burden of attorneys' fees might have on the willingness and ability of

parties to litigate meritorious civil claims challenging government action. *See United States v.* Paisley, 957 F2d 1161, 1164 (4th Cir 1992), *cert den* 506 US 822 (1992); Bennett, Winning Attorneys' Fees from the U.S. Government, at § 1.02.

The federal EAJA ensures that parties of limited means can litigate against the government on equal footing. *See* Vol. 3, Derfner, Court-Awarded Attorneys' Fees (Bender), ¶ 39.01 [3] [b]. Limited means is given an expansive definition. Thus, individuals with a net worth not exceeding $2 million and enumerated organizations with a net worth not exceeding $7 million and no more than 500 employees can collect counsel fees. *See id.*

In addition, regardless of net worth, agricultural cooperative associations qualify as parties. *See* 28 USC § 2412 (d) (1) (A). Such entities are defined as associations in which farmers collaborate in preparing, marketing, and distributing farm products; furnishing farm supplies; and providing farm business services. *See* 12 USC § 1141 (j) (a).

If a corporate entity litigated against the government, the only relevant consideration as to eligibility is the net worth and number of employees – unless the entity is a "front" used to evade net worth caps. *See id.* at ¶ 39.01 [3] [c]. Since the resources of a prevailing party are a threshold eligibility criterion, such factor can never be a special circumstance warranting a denial of fees. *See id.*

These principles apply with equal force under the New York State EAJA (CPLR Article 86).

A court shall award reasonable attorneys' fees to a prevailing party in a suit against the state, unless the position of the state was substantially justified or special circumstances make the award unjust. *See* CPLR 8601 (a). The state EAJA was modeled on the federal EAJA and the significant body of case law that has evolved there under. *See* CPLR 8600.

Like the federal EAJA, the state statute recognizes that some individuals and businesses may not have the resources to sustain a long legal battle against a government agency acting without justification. *See* Governor's Approval Memorandum, L 1989, ch 770, 1989 Legislative Annual, at 335-337.

The state EAJA is more restrictive than its federal counterpart as to eligible parties. Thus, an individual must have a net worth of less than $50,000 to be eligible as a party. *See* CPLR 8602 (d). However, the state statute is more liberal as to when businesses and organizations qualify than it is as to when individuals are eligible. *See* Vol. 14, Weinstein Korn Miller, NY Civil Practice, ¶ 8602.05.

Thus, any independently owned businesses with fewer than 100 employees will qualify as a party. *See* CPLR 8602 (d). There is no question that the Lewis Family Farm qualifies as a party. Clearly, the Adirondack Park Agency's

resistance to attorneys' fees based on speculation as to resources Barbara or Sandy Lewis may possess is improper and irrelevant.

Not only does the Lewis Family Farm qualify as a party, but virtually every farm in New York could be a party under CPLR Article 86. Indeed, 96% of New York State farmers have less than 10 farm worker employees. *See* 2007 Census of Agriculture, New York State and County Data, Issued February 2009 by the United States Department of Agriculture, at p 302. The average farm income in the state is $26,903. *See id.*, at p 110-112. It is interesting that the federal EAJA singles out associations designed to protect farms and farmers by making such groups eligible as parties, regardless of their net worth. While the state EAJA contains no parallel provisions, the 100-employee limit provides ample protection to New York farms.

The EAJA was not designed to help only impoverished individuals or tiny, precarious businesses. Instead, the law recognizes that state bureaucracies sometimes take unreasonable actions and that lowering economic barriers will improve the chances, in a quest for justice, of individuals of modest means and a wide variety of relatively small businesses and other organizations facing such actions. *See* Fried, Arthur, J., "Attorneys' Fees against the State: The Equal Access to Justice Act, NYLJ, Vol. 203, No. 62 (April 2, 1990).

The bill fosters accountability in government and provides a deterrent to unreasonable government action and "knee-jerk defenses" of such actions in court. *See id.* Such accountability is vital to New York farmers. Farming is a highly regulated business, and farmers work with state agencies on a routine basis to operate their farms. Given the inherent risks of farming (weather, commodity pricing, and input costs, to name only a few factors), farmers need to know that their government will be held accountable for forcing them to defend against unwarranted and unreasonable state action.

Awarding fees in this case will foster accountability in the Adirondack Park Agency and deter similar unreasonable actions against farmers who seek only to farm in peace and survive the challenging circumstances in the Adirondack Park.

III. No Substantial Justification Based on Dictum, Issue of First Impression

A. Judge Ryan's Dictum

The Adirondack Park Agency has also failed in its efforts to prove that its stance against the Lewis Family Farm was substantially justified. For its arguments, the Agency relies on two basic premises: (1) that Judge Ryan's decision, as described in movant's papers, demonstrates the reasonableness of the agency's position; and (2) that, because this case involved an issue of first impression, the Agency is insulated from liability under the fee-shifting statute. Neither position has merit.

"Substantially justified" has been interpreted as meaning "justified to a degree that could satisfy a reasonable person" or as having a "reasonable basis in both law and fact." *See Pierce v. Underwood*, 487 US 552, 565 (1988); *New York State Clinical Laboratory Assn., Inc. v. Kaladjian*, 85 NY2d 346 (1995).

Under the federal EAJA, the fact that another court agreed with the government does not establish that the government's position was substantially justified. *See Pierce v. Underwood, supra*. The case law that has evolved under the federal EAJA on this issue must guide interpretation of the state statute. *See* CPLR 8600.

The government is not shielded from fees under EAJA just because a trial court upheld the government's position at some point in the subject proceedings. *See United States v. Real Property Known as 22249 Dolorosa St.*, 190 F3d 977, 982 (9th Cir 1999). A District Judge's agreement with the government in the initial case is not conclusive as to whether or not the government was reasonable in its position. *See id.*

In considering an application for fees under EAJA, the trial court must not overemphasize the significance of the fact that an ALJ's decision was adopted by a Magistrate Judge and affirmed by the District Court. *See Howard v. Barnhart*, 376 F3d 551, 554 (6th Cir 2004) (where ALJ selectively considered evidence in denying Social Security benefits, agency's decision to defend such denial was without

substantial justification); *see also Role Models America, Inc. v. Brownlee*, 353 F3d 962 (DC Cir 2004) (government largely focused on fact that it prevailed in District Court, but failed to demonstrate reasonableness of agency's actions in contravention of regulations).

Thus, a favorable decision does not automatically or inherently prove substantial justification. In this case, the arguments by the Adirondack Park Agency are particularly weak. Judge Ryan's subject decision dismissing the premature CPLR Article 78 proceeding merely contained dictum regarding the nature of farm worker housing.

The discussion about statutory interpretation was unnecessary to reaching the decision and thus was not binding. *See Matter of Atlantic Mutual Ins. Co. v. Lauria*, 291 AD2d 492 (2nd Dept 2002); *233233 Company v. City of NY*, 171 AD2d 492 (1st Dept 1991). Preliminary steps in an agency's decision-making process, such as those at issue in Judge Ryan's decision, are not ripe for judicial review. *See e.g. Matter of Sour Mt. Realty, Inc. v. New York State Dept. of Environmental Conservation*, 260 AD2d 920 (3rd Dept 1999), *lv den* 93 NY2d 815 (1999). Where premature CPLR Article 78 petitions challenge nonfinal determinations, no enforceable finding on dispositive issues can be made; first there must be a full record and a final determination. *See id.*

Finally, as detailed in the briefs of the Lewis Family Farm and amicus curiae submitted to this Court in the underlying proceedings, Judge Ryan's decision, in dealing with the nature of farm worker housing, was superficial and poorly reasoned. It is specious to use such decision to prove that the Agency's position against the Lewis Family Farm has been substantially justified.

B. First Impression Argument

The Adirondack Park Agency's reliance on the issue of first impression presented here also fails. EAJA fees should not be denied based on a government's argument that an appeal presented issues of first impression and its position was thus substantially justified. *See Devine v. Sutermeister*, 733 F2d 892, 895 (Fed Cir 1984). The mere characterization of some government arguments as novel cannot detract from the fact that its positions were insupportable, given legal authority to the contrary. *See id.*

While in some contexts, the novelty or importance of issues presented may validate an otherwise marginal appeal by the government, the novelty of a position cannot compensate for the paucity of support in favor of the position. *See id.* A prevailing party's entitlement to fees under EAJA should not depend on the creativity of the government in fashioning novel, but meritless, arguments. *See id.*

Nor can the "special circumstances" provision be invoked to shield novel, but meritless, positions under the fee-shifting statute. That "safety valve"

provision helps to ensure that the government is not deterred from advancing in good faith novel, but credible, extensions and interpretations of the law. *See id.* But that protection is unavailable where the law does not support the government's position.

Such is the case here. The central question in the instant dispute is whether the Lewis Family Farm on-farm worker housing were agricultural use structures, defined as "any barn, stable, shed, silo, garage, fruit and vegetable stand or other building or structure directly and customarily associated with agricultural use." *See* Exec Law § 802 (8). "Structures" include single family dwellings. *See* subdivision (62).

The Agriculture Law and Real Property Tax Law make clear what is meant by buildings associated with agricultural use or farm operations. The Agriculture Law provides that all buildings on the farm are considered part of a "farm operation" if they contribute to the production of crops, livestock, and livestock products as a commercial enterprise. *See* AML § 301 (11).

The Real Property Tax Law § 483 provides an exemption from real property taxation for structures and buildings essential to the operation of agricultural lands; and such term encompasses structures and buildings used to provide housing for employees and their families who operate lands used for agricultural purposes. *See* subdivisions (1) and (2).

The protected role of farm worker housing and the rejection of government regulation of such housing was set forth in *Town of Lysander v. Hafner*, 96 NY2d 558, 565 (2001). When a municipality refused to grant a permit to install several homes to house migrant farm workers on a farm in an Agricultural District, the Commissioner of Agriculture appeared amicus curiae on the farm owner's behalf and concluded that the homes used for farm worker residences were protected on-farm buildings. *See id.*

The Commissioner explained that farmers rely upon on-farm homes as shelter for their farm laborers to accommodate the long work day, seasonal housing needs, and a shortage of rental housing local areas. *See id.*, at 564. The Court of Appeals adopted the Commissioner's interpretation. In the instant case, the Commissioner issued an advisory opinion finding that the farm worker housing was a part of the Lewis Family Farm farm operations, as discussed more fully by the Lewis Family Farm in its motion papers.

In finding that farm worker houses were not agricultural use structures, the Adirondack Park Agency ignored the Agricultural Law, the Real Property Tax Law, the lessons of *Lysander*, and the finding of the Commissioner of Agriculture. The Agency did not, and could not, provide any principled and rational basis to find that the realities of farming are different in Agricultural Districts inside the Adirondack Park, in which the subject housing was built, than outside the Park,

where the *Lysander* housing was located. Indeed, the State Constitution protections of farming apply with equal force throughout the state. *See* NY Const. Art XIV, § 4. Nor did the Agency explain credibly why the analysis of *Lysander* in referring to mobile homes should not apply to modular homes, such as those built by the Lewis Family Farm for their laborers.

Moreover, upon appeal, the Adirondack Park Agency drastically changed its statutory interpretation argument by abandoning two bases for its administrative determination, which stated that the farm worker housing was "accessory in nature" and constituted subdivisions. Such rejection of the core of its administrative ratio decidendi is a convincing demonstration of the lack of worth in the agency's position against the Lewis Family Farm. While the Adirondack Park Agency could perhaps be credited with a novel, creative position, its stance was patently unreasonable, and thus the Agency should not be shielded from statutorily mandated counsel fees.

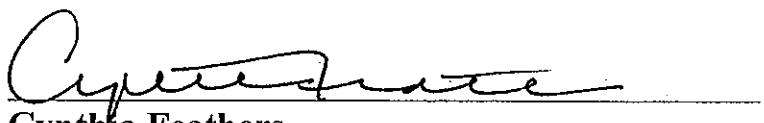
Finally, even if the importance of a legal issue might sometimes justify a government decision to take a long shot in advancing a novel position in a test case, the government must reimburse the private parties for counsel fees when it loses such cases. After all, through no fault of their own, the private parties faced with such positions are forced to expend large amounts of time and effort

defending their legal rights. Thus, the public at large, not that individual litigant, must bear the costs for such experiments by the government.

For all of the foregoing reasons, the amicus curiae supports the application of the Lewis Family Farm for an award of attorneys' fees and reasonable expenses pursuant to CPLR Article 86.

Dated: October 5, 2009
Saratoga Springs, NY

Respectfully submitted,



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