

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

LEWIS FAMILY FARM, INC.,

Petitioner-Respondent-Cross-Appellant,

-against-

NEW YORK STATE ADIRONDACK PARK AGENCY,

Respondent-Appellant-Cross-Respondent.

NOTICE OF
CROSS-MOTION

Case No. 510986

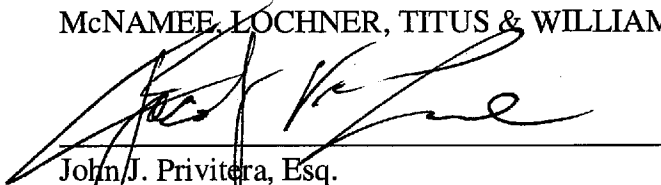
PLEASE TAKE NOTICE that upon the Affirmation of Jacob F. Lamme, Esq., sworn to March 1, 2011, and upon all of the papers and proceedings had herein, Petitioner-Respondent-Cross-Appellant Lewis Family Farm, Inc., will cross-move at a motion term of this Court to be held at the Justice Building, South Mall, Albany, New York, on March 7, 2011 for an order (1) granting an extension of the time in which Lewis Family Farm, Inc. has to perfect its cross-appeal pursuant to 22 NYCRR § 800.12; (2) designating the Adirondack Park Agency as the "appellant" pursuant to 22 NYCRR § 800.9(e); and (3) granting such other and further relief as the Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that pursuant to 22 NYCRR § 800.2, papers in opposition to this cross-motion, if any, must be filed by 11:00 a.m. on Friday, March 4, 2011, and this cross-motion will be submitted on the papers and personal appearances by the parties or their counsel in opposition to the cross-motion is neither required nor permitted.

Dated: March 1, 2011

Albany, New York

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



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AFFIRMATION

Case No. 510986

JACOB F. LAMME, ESQ., 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 a member of the bar of this Court. I am an associate with the law firm of McNamee, Lochner, Titus & Williams, P.C., attorneys for Petitioner-Respondent-Cross-Appellant Lewis Family Farm, Inc. ("Lewis Family Farm") in this action. As such, I am fully familiar with the pleadings and proceedings in this action and with the matters set forth herein.

2. I submit this affirmation in partial opposition to the motion submitted by Respondent-Appellant-Cross-Respondent New York State Adirondack Park Agency ("APA"), and in support of the Lewis Family Farm's cross-motion for an order (1) granting an extension of the time in which Lewis Family Farm has to perfect its cross-appeal pursuant to 22 NYCRR § 800.12; (2) designating the APA as the "appellant" pursuant to 22 NYCRR § 800.9(e); and (3) granting such other and further relief as the Court may deem just and proper.

3. The APA has moved to consolidate four outstanding appeals. (See Exs. B, C, G and H to the Affirmation of Julie M. Sheridan, dated February 17, 2011). The Lewis Family Farm agrees that these appeals should be consolidated. However, the Lewis Family Farm

opposes the relief sought to the extent that the APA does not seek a briefing schedule similar to the one issued by this Court on December 21, 2010. (See Ex. E to Sheridan Aff.). Given the age of this case, the APA should not be allowed to perfect its consolidated appeal at its leisure.

Extension of Time

4. This Court is permitted to extend the time to perfect an appeal upon a showing of a reasonable excuse for the delay and merit to the appeal. See 22 NYCRR § 800.12. The Lewis Family Farm seeks an extension of the time it has to perfect its cross-appeal of the lower court's February 3, 2010 decision and order. This Court previously extended that time to 45 days from the filing and service of the APA's brief on its appeal. (See Sheridan Aff., Ex. E). This extension is necessary because the APA chose to file the instant motion instead of its brief.

5. An extension for the Lewis Family Farm is justifiable and reasonable because it would further the interests of justice and judicial economy. The Lewis Family Farm's cross-appeal has merit because the New York State Equal Access to Justice Act ("EAJA") allows a prevailing party to recovery its counsel fees and expenses in certain actions against the State of New York. See CPLR § 8600; Greer v. Wing, 95 N.Y.2d 676, 679 (2001).

6. Here, the Lewis Family Farm commenced an Article 78 proceeding against the APA, which retaliated by commencing its own action against the Lewis Family Farm and, incredibly, its officers in their personal capacity. The lower court immediately consolidated the actions and deemed the APA's action as a counterclaim within the Article 78 proceeding. Thus, the lower court improperly declined to award the Lewis Family Farm fees incurred in defending the counterclaim, since it was a "prevailing party" in the action against the State.

7. As such, the Lewis Family Farm has demonstrated a reasonable excuse for delay and merit to its cross-appeal such that the requested extension sought is warranted.

APA Should Be Deemed the "Appellant"

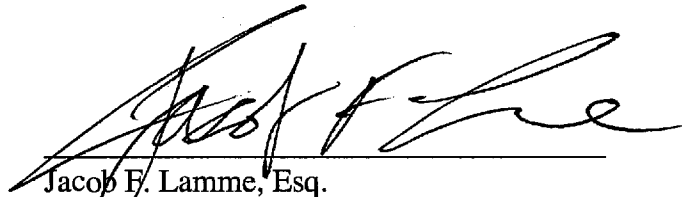
8. The APA is the main aggrieved party. The Lewis Family Farm's appeals are ancillary to the main issue in the APA's appeal (i.e., whether the lower court properly awarded attorney's fees to the Lewis Family Farm pursuant to the EAJA). Accordingly, this Court should follow its Decision and Order of December 21, 2010 and again deem the APA the "appellant" for the purposes of the consolidated appeals. See 22 NYCRR § 800.9(e).

9. Further, this Court should issue a briefing schedule directing (i) the APA to file its initial brief in support of its appeals; (ii) the Lewis Family Farm to file a single brief in opposition to the APA's appeals and in support of its appeals; (iii) the APA to file a single brief in reply on its appeals and in opposition to the Lewis Family Farm's appeals; and (iv) the Lewis Family Farm to file a reply brief on its appeals.

10. The APA should be required to file its initial brief within thirty (30) days of the Court's decision and order on the instant motion and cross-motion.

11. Based on the foregoing, the Lewis Family Farm respectfully requests an order from this Court granting the relief sought herein, together with other relief as to this Court seems just and proper.

I, Jacob F. Lamme, hereby swear and affirm the above under penalty of perjury on this 1st day of March, 2011.



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