

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ESSEX

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LEWIS FAMILY FARM, INC.,

Petitioner,

ACTION NO. 1

-against-

ADIRONDACK PARK AGENCY,

Index No. 315-08

Respondent.

Hon. Richard B. Meyer

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ADIRONDACK PARK AGENCY,

Plaintiff,

ACTION NO. 2  
COUNTERCLAIM

-against-

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

Index No.: 332-08

Hon. Richard B. Meyer

Defendants.

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

**JOHN J. PRIVITERA**, 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 an attorney at law licensed to practice in the State of New York and a Member of the bar of this Court. I am counsel to Petitioner/Applicant, Lewis Family Farm, Inc. ("Lewis Family Farm"), and I make this affirmation in further support of the Lewis Family Farm's application for an award of reasonable attorney's fees and expenses, and in Reply to Respondents' opposition to the fee application.

**THE McNAMEE BILLS TO THE LEWIS FAMILY FARM  
ARE REASONABLE AS A MATTER OF FACT**

2. I have been practicing law for over thirty (30) years. My current hourly rate is \$300 per hour. The Lewis Family Farm agreed to pay me my hourly rates and has agreed to pay me for all of my time that is set forth in the application, and the related expenses. This is established by the Affidavit of Salim B. Lewis, an officer of the Lewis Family Farm. The Adirondack Park Agency ("the State") does not raise any issue of fact to cast any doubt upon this professional relationship.

3. According to federal case law, which may be used as a guide by this Court in considering the "reasonableness" of an award of fees, though not the rate, the Court should ascertain whether "a paying client would be willing to pay" the fee. Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 552 F.3d 182, 190 (2d Cir. 2008). This case and the standard cited therein, is referred to in Alexander v. Cahill, which was cited by the Respondent in opposing the motion. Alexander v. Cahill, 2009 U.S. Dist. LEXIS 29165 (March 30, 2009).

4. As applied here, the Lewis Family Farm meets the Arbor Hill test. The State has provided absolutely no factual basis upon which to establish that the Lewis Family Farm is not willing to pay the fee. Indeed, not only has the Lewis Family Farm provided affidavits establishing beyond any doubt that it is willing to pay these fees, the Affidavit of Mr. Lewis establishes that the Lewis Family Farm is obliged to pay the fee.

5. In addition, with respect to some of my work related to this matter that is not the subject of this motion, the Lewis Family Farm has already paid my fee of \$300 per hour, including much of my work during the administrative proceedings that make up the record in this Article 78 special proceeding. This fact cannot be contested.

6. As to whether my \$300 per hour hourly rate is "reasonable" for a litigator with over thirty (30) years of experience, please see the accompanying affidavit of Jorge Valero which establishes that my hourly rate is actually below market in upstate New York. Therefore, it is *per se* a "reasonable hourly rate."

#### **DEALING WITH THE PRESS IS A LAWYER'S RESPONSIBILITY**

7. The State seeks to cast doubt upon the number of hours that I and my associate, Jacob Lamme, spent in defending against the State's unjustified legal position. For example, it is suggested that the Court must determine that any time spent by an attorney in responding to press inquiries is necessarily an unreasonable use of the lawyer's time for which a client must always refuse to pay. This is not the case in my experience in dealing with cases that develop a keen public and press interest such as this one.

8. Indeed, it was not my experience when I worked as an Assistant Attorney General for the New York State Department of Law from 1986 to 1991. During this period of time I was often called upon by my superiors to assist spokespersons for the Department, editing and publishing press statements and responding to press inquiries. I specifically recall composing press statements with Nathan Riley and Nancy Connery, both employed by the Attorney General, during these years. Once my superiors trusted me on the matter, I often responded directly to press inquiries and my quotes were reported in the press during these years on several occasions.

9. Therefore, the Respondent's papers, impugning the reasonableness of attorney time in responding to press inquiries, lacks any support in history and is lacking in all credibility because of the pattern and practice that I am aware of within the Department of Law.

10. In addition, there is no professional inclination on the part of attorneys to prohibit all contact with the press, as either unprofessional or unreasonable. The Rules of Professional Conduct set forth in 22 NYCRR Part 1200 provide an entire section on trial publicity in Rule 3.6. (22 NYCRR 1200.38). These disciplinary rules guide a lawyer's conduct in dealing with the press; certainly it cannot be said that dealing with the press in compliance with these rules is *per se* an unreasonable use of our attorney's time.

11. A client is entitled to rely upon his or her counsel to make sure that the press accurately conveys a complete and correct description. If this Court is inclined to consider the possibility that all responses by counsel to press inquiries are *per se* unreasonable, we would ask the Court to hold a hearing and determine if any of the State's attorneys, including attorneys within the Adirondack Park Agency and the Attorney General's Office, had any contact whatsoever with their respective spokesperson when the press inquired, and if so, how much time was devoted to the issue.

12. The State contends that the small amount of time my firm spent advising the Lewis Family Farm on matters pertaining to its website was unreasonable. However, the Lewis Family Farm decided to create a website, <http://www.sblewis.com>, in order to *hold down* the amount of attorney time spent on responding to press inquiries and telephone calls.

13. When *The New York Times* decided to air the differences between the Adirondack Park Agency's unfounded legal position and the Department of Agriculture and Markets in an April 14, 2008 story cited by the State, (see State's Memorandum in Opposition, pg. 17 n.2), I became overwhelmed with press inquiries from, among other sources, *The New York Times*, the Associated Press International Wire Service (3 reporters); the *Plattsburgh Press Republican*, the *Adirondack Daily Enterprise*, various television and radio reporters, the *Pennysaver* and the

*Glens Falls Post Star*. It was reasonable for my firm to spend a brief period of time assisting the Lewis Family Farm in uploading various legal documents to the website, so that I did not have to read, explain, telefax, and otherwise respond to press inquiries in a time consuming manner.

14. After the website was up and running, I was able to dispatch with journalists in a few minutes, quite effectively. This is a reasonable course of action and it actually was successful because it held down the attorneys fees in this case rather than increased them. At least ten (10) stories about this case have been written by the press. See [http://sblewis.com/SBLewis/Press\\_Archives/Press\\_Archives.html](http://sblewis.com/SBLewis/Press_Archives/Press_Archives.html).

15. The Lewis Family Farm does not have a press office like the Adirondack Park Agency and the Attorney General's Office. See <http://apa.state.ny.us/press/press.cfm> (APA press contact, Keith P. McKeever, public relations); see also [http://oag.state.ny.us/media\\_center/media\\_center.html](http://oag.state.ny.us/media_center/media_center.html) (Office of the Attorney General Andrew M. Cuomo, Media Center, Richard Bamberger, Director of Communications).

#### **COMMUNICATING WITH A CLIENT IS A LAWYER'S RESPONSIBILITY**

16. As a Member of the Bar and Officer of the Court, counsel is compelled to respect, obey and honor Rule 1.4 of the Professional Rules of Conduct.

17. Thus, my associate and I spent time during the two (2) years of litigation ensuring that we kept the Lewis Family Farm properly informed, engaged in consultation, and aware of all aspects of this matter so that the Lewis Family Farm could make informed decisions.

18. Sandy Lewis and Barbara Lewis, officers of the Lewis Family Farm who consulted with Jacob Lamme and me regarding this dispute, are intelligent, informed, challenging, concerned, thoughtful and caring people. Throughout the course of our

representation of the Lewis Family Farm, I have endeavored to respect and honor their challenges, and I take great pride in keeping my clients fully informed.

**THE McNAMEE LAW FIRM WAS EFFICIENT  
AND REASONABLE IN ITS TIME ON THIS CASE**

19. The State strongly suggests that Jacob Lamme, my associate, and I spent an unreasonable amount of time in defending this unjustifiable prosecution.

20. Initially, this Court ought to review all of the procedural steps, motions, cross-filed civil cases and other tasks we were compelled to perform in defense of the Lewis Family Farm, as set forth in the Farm's opening Memorandum in Support of this Motion, at pp. 2-5.

21. For example, after this Court annulled the Agency's illegal Administrative Determination, the State decided to increase, substantially, the Lewis Family Farm attorney's fees and expenses by falsely alleging that the Lewis Family Farm's modular farm worker housing cluster posed a threat to the environmental quality of the Boquet River and that its common septic system violated New York's health laws. Copies of the briefs and affidavits submitted to the Appellate Division on this issue are attached hereto as **Exhibit "A"**.

22. Of course, the Agency has absolutely no regulatory authority over the water quality in New York State because its jurisdiction is no more than that of a "local planning board and a local zoning entity." See Hunt Brothers v. Glennon, 81 N.Y.2d 906, 909 (1993). In addition, the Agency has absolutely no regulatory authority over the health laws either. Thus, not only did the Agency illegally endeavor to extend its jurisdiction over environmental permitting matters and health laws, but it also forced the Lewis Family Farm to retain the services of the professional engineers that designed and installed the septic system for the farm houses, in order to disprove these overreaching, false allegations.

23. Additionally, the State decided to substantially increase the Lewis Family Farm attorney's fees and expenses at the Appellate Division by briefing factual matters that had no bearing on the pure issue of law that this case centered around. Indeed, it was not until oral argument before the Appellate Division that the State finally conceded that this matter involved a question of law – not the actions of the Lewis Family Farm or its officers. Copies of the briefs submitted to the Appellate Division on appeal are attached hereto as **Exhibit "B"**.

24. If the Court is inclined to consider this criticism of my firm's efficiency, we ask for a full hearing on the amount of time spent by all lawyers and paralegals used by the State on this case. I am informed by the names on pleadings and affidavits in this case that the following licensed attorneys incurred time in support of the State's position before the Courts:

Julie M. Sheridan, Esq.

Denise A. Hartman, Esq.

Katherine Kennedy, Esq.

Lisa M. Burianek, Esq.

Loretta M. Simon, Esq.

John Banta, Esq.

Paul VanCott, Esq.

Barbara Rottier, Esq.

Sarah Reynolds, Esq.

25. Further, I am informed and believe that there are many other lawyers and unnamed paralegals not listed above that were involved in discussions, approvals, brief reading, research and other aspects of the State's unjustified prosecution.

26. I respectfully submit that the Court is likely to find that Mr. Lamme and I spent fewer hours on the defense of this matter than the State's massive legal team spent trying to persuade this Court and the Appellate Division of its unjustified reading of the law. Should there be any doubt as to this, we ask the Court to convene a factual hearing to obtain sworn testimony from each attorney and paralegal that worked for the State on this matter in order to ascertain the number of hours spent by them.

27. Mr. Wray states in his Affidavit that he formulated an opinion regarding the Agency's legal position in prosecuting the Lewis Family Farm when Judge Ryan's opinion was published in August 2007. It is unlikely that Mr. Wray first considered the Agency's now-annulled legal position after Judge Ryan's opinion was published because pending enforcement issues are generally discussed and reviewed by Mr. Wray before the Board considers the final recommendations to Staff. See generally, Agenda for the Adirondack Park Agency meetings September 9-11, 2009, pp. 5-6, attached as **Exhibit "C"**.

28. In considering whether the State's prosecution of the Lewis Family Farm based upon a wholly untenable legal position was "substantially justified", this Court may fairly consider, within its sound discretion, the responses of reasonable, informed people. Indeed, the parties here agree that the United States Supreme Court has interpreted the phrase "substantially justified" to mean "justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 565 (1988).

29. Mr. William Doolittle, a well-informed and highly regarded newspaper editor, observed that the State's prosecution of the Lewis Family Farm was based upon nothing less than "mendacious arguments." See "Knocking Down The APA," July 31, 2009 *Glens Falls Post Star*, attached as **Exhibit "D"**. A "mendacious" argument is not only flawed, it is false.



30. It can scarcely be maintained that when a reasonable person such as Mr. Doolittle observes that an argument is mendacious, that it is, at the same time, substantially justified. It also bears noting that Mr. Doolittle has concluded: "The agency staffers can read. They knew they were twisting the law beyond any legitimate shape, but they pushed ahead anyway, in bad faith." "The APA Should be Accountable" September 10, 2009, W. Doolittle, *Glens Falls Post Star*, attached as **Exhibit "E"**. Applying the Supreme Court's Pierce standard, these observations of a "reasonable person" can be considered.

31. Neither I nor my associate has spoken with Mr. Doolittle.

32. For these reasons, this Court should find that the time spent by my firm on this case was reasonable.

**MCNAMEE'S HOURLY RATES ARE MORE THAN REASONABLE**

33. I am generally familiar with hourly rates for lawyers in New York. Many lawyers in New York City charge as much as \$2,500 per hour. For example, I am informed and believe that Debevoise & Plimpton, LLP, Mr. Cecil Wray's firm, charges over \$1,000 per hour for senior attorneys like myself.

34. Further, I am environmental counsel to the St. Regis Mohawk Tribe. I currently have an appearance in the General Motors Corporation bankruptcy case to protect the Tribe's sovereign interest. The State of New York, through the Attorney General's Office, has a similar appearance in the case to protect New York. I just received a notice of filing in that case which indicates that the New York City firms used by General Motors charged nearly twenty million dollars (\$20,000,000.00) for the first month of work in the petition for bankruptcy this summer. This filing is attached hereto as **Exhibit "F"**. I provide this document only because bankruptcy

judges routinely approve the payment of fees upon engaging in the same inquiry as this Court must, whether or not the fees are "reasonable."

35. No one is arguing before the Bankruptcy Judge that General Motors, as a Detroit Company, should have limited themselves to Detroit lawyers and Detroit rates. No one is nitpicking at every quarter-hour either. Some perspective is required here. The Lewis Family Farm could reasonably have retained New York City counsel for this matter, in which case the fees would have been at least three or four times higher than they are now.

**THE STATE COULD HAVE AVOIDED THIS DISPUTE  
BY REDRAWING THE EDGE OF WHALLONSBURG**

36. The Agency could have avoided this entire dispute and saved the Lewis Farm counsel fees in the administrative case and the litigation if it had just redrawn the edge of the Hamlet of Whallonsburg the way it was supposed to be in the first place. Specifically, Executive Law § 805(2) provides broad discretion on the part of the Agency to change the land use and development plan map that was originally designed in 1973.

37. Section 805(2)(c)(4) goes so far as to grant the Agency the authority to amend boundaries of land use areas to clarify them by a simple majority of vote without a public hearing. Through this process, the edges of the originally demarked boundaries of the hamlets within the Park, wherein the Agency essentially has no jurisdiction unless the proposed project is over 40 feet tall, have amended the edges of Lake Placid, Lake George, and Saranac Lake. Countless other hamlets have been amended repeatedly. As the Adirondack Park Agency's Citizen Guide states, "Hamlet boundaries usually go well beyond established settlements to provide room for future expansion."

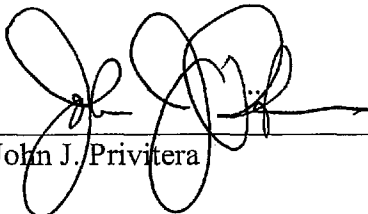
38. If this Court has any doubt about the ever-changing edges of the hamlets in the Park, a hearing should be held. In or around March 2008, a petition was presented to the Agency

requesting a boundary adjustment to Whallonsburg to correct the map's failure to include the Walker Farm. The boundary petition includes the signatures of many prominent North Country individuals, including Assemblywoman Theresa Sayward. A copy of the petition is attached as **Exhibit "G"**.

39. The Agency had an opportunity to simply correct the error of excluding Walker's Corner from the Hamlet of Whallonsburg and redrawing the map around the pre-existing development of the Walker Farm where the three farm worker houses at issue in this case are located. If the Agency had following the promise in its Citizen Guide and acted consistent with its authority under Executive Law § 805, Whallonsburg would have been amended to include the farm worker houses, which would have placed them beyond the Agency's jurisdiction and no permit would have been required.

40. If the three farmworker houses at issue in this case are truly "permissible" as Mr. Cecil Wray, Esq. swears, then the Agency should have granted the boundary petition. Instead, the boundary petition was fully ignored and never acted upon by Staff or the Board. This Court may reasonably inquire as to the reasons for this Agency decision as well.

I, John J. Privitera, hereby swear and affirm the above under penalty of perjury this 23<sup>rd</sup> day of September, 2009.

  
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John J. Privitera

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