STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

ACTION NO. 1

ADIRONDACK PARK AGENCY,

Respondent.

Index No. 315-08
RJI No.: 15-1-2008-0109
Hon. Richard B. Meyer

ADIRONDACK PARK AGENCY,

Plaintiff,

-against-

ACTION NO. 2 / COUNTERCLAIM

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

Defendants.

Index No.: 332-08
RJI No.: 15-1-2008-0117
Hon. Richard B. Meyer

LEWIS FAMILY FARM'S MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT'S MOTION TO STRIKE

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PRELIMINARY STATEMENT

Petitioner Lewis Family Farm, Inc. ("Lewis Family Farm") submits this memorandum of law and accompanying affidavit of Sandy Lewis in order to respond to the misapprehensions of law and fact set forth in the "cross-motion to strike" / "sur-reply" of Respondent Adirondack Park Agency (the "State"). The Lewis Family Farm submits that the "cross-motion to strike" the Lewis Family Farm's properly submitted reply papers should be denied in its entirety.

The State's "cross-motion to strike" / unauthorized "sur reply" is a deliberate distraction from the fundamental merits of the Lewis Family Farm's underlying motion for counsel fees pursuant to Article 86 of the CPLR, which states that "a court ***shall*** award to a prevailing party" fees and expenses, unless the Court finds that the position of the State was substantially justified. CPLR § 8601(a) (emphasis supplied). The Legislature's mandatory direction is clear.

Here, the Lewis Family Farm is indisputably the prevailing party, and the State failed to carry its heavy burden of establishing that its position was substantially justified. As previously briefed, no court has ever held that an annulled administrative decision, contrary to clear statutory language and unambiguous terms of law, is substantially justified. See Perez v. NYS Dep't of Labor, 259 A.D.2d 161, 163 (3d Dep't 1999) (an annulled agency determination for lack of subject matter jurisdiction cannot be substantially justified); Simpkins v. Reilly, 193 A.D.2d 1009, 1010-11 (3d Dep't 1993); Mendenhall v. Nat'l Transp. Safety Bd., 92 F.3d 871, 874 (9th Cir. 1996); Serio v. NYS Dep't of Corr. Svcs., 215 A.D.2d 835 (3d Dep't 1995) (holding that the State's position cannot possibly be substantially justified where there is an outright dismissal of all charges against a petitioner). Thus, if there is ever a quintessential case under the Equal Access to Justice Act ("EAJA"), it is this one. See generally Lewis Family Farm, Inc. v. Adirondack Park Agency, 64 A.D.3d 1009, 1015, 882 N.Y.S.2d 782 (3d Dep't 2009) (holding

that the State's distorted reading of the Park Act and Rivers Act was contrary to the "clear statutory language" and "clear and unambiguous statutory terms" set forth in the law).

In the face of this established body of law, the State should have attempted to resolve the Lewis Family Farm's motion without litigation, saving the State and this Court time and money. Rather, the State now attacks Sandy Lewis, a Lewis Family Farm officer, for the exercise of his First Amendment rights on a website he created, http://www.sblewis.com. The State also argues, under a gross misapprehension of law, that any reduction in the fee award will impact the undersigned counsel's firm. This is not the law.

ARGUMENT

POINT I

THE STATE'S IMPROPER SUR-REPLY IS IMMATERIAL, EXCEPT THAT IT ESTABLISHES THAT PETITIONER'S COUNSEL'S RATES ARE BELOW MARKET

In an effort designed to usurp the last word on the Lewis Family Farm's motion for counsel fees pursuant to Article 86 of the CPLR, the State submitted "sur-reply" papers, disguised as a "cross-motion to strike",[1] more than three weeks after the Lewis Family Farm submitted its reply papers. Generally, such unauthorized sur-reply papers are not considered by the Court. See CPLR 2214; Boockvor v. Fischer, 56 A.D.3d 405 (2d Dep't 2008); Flores v. Stankiewicz, 35 A.D.3d 804, 805 (2d Dep't 2006); Mu Ying Zhu v. Zhi Rong Lin, 1 A.D.3d 416, 417 (2d Dep't 2003).

Nevertheless, the Lewis Family Farm embraces the fact that the State went beyond the administrative record to prove that the average hourly billing rate for equity partners reached $332 last year. (See Affirmation of Loretta Simon in Support of Cross-Motion to Strike, Ex. B)

[1] By fashioning its "sur-reply" papers as a "cross-motion" with notice pursuant to CPLR § 2214(b), the State has positioned itself with the opportunity to submit reply papers on October 28, 2009, the day before oral argument.

(hereafter "Simon Sur Reply Aff."). Thus, the State admits that the standard hourly rate of John Privitera, Esq., counsel to Lewis Family Farm, is more than 10% *less* than the average hourly billing rate for equity partners.

The remainder of the State's "cross-motion to strike" / "sur-reply" papers do not raise any issues material to the Court's consideration of the Lewis Family Farm's pending motion for counsel fees pursuant to Article 86 of the CPLR.

POINT II

THE STATE MISAPPREHENDS THIS COURT'S SCOPE OF REVIEW

The State seeks to distort the EAJA, just as it sought to distort the Park Act and the Rivers Act. The EAJA provides, in pertinent part, as follows:

> Whether the position of the State was substantially justified shall be determined solely on the basis of the record before the Agency or official whose act, acts or failure to act gave rise to the civil action. Fees shall be determined pursuant to prevailing market rates for the kind and qualify of services furnished . . .

CPLR § 8601(a).

The State suggests that an application for attorney's fees may never go beyond the administrative record. (See Simon Sur Reply Aff., ¶¶ 6-7). This is not what the statute provides, by its very terms. To be sure, the determination as to whether the position of the State was substantially justified must be determined solely "on the basis of the record". Id. However, a motion for attorney's fees must necessarily establish what those fees were (beyond the administrative record); what the petitioner agreed to pay counsel (beyond the administrative record); the prevailing market rates for reasonable attorney fees (beyond the administrative record); and, the kind and quality of services furnished by counsel (beyond the administrative record). Id.

Further, not only does the State misapprehend the fundamental terminology of the EAJA by asking this Court to impose a double standard that prohibits the Lewis Family Farm from going beyond the administrative record in establishing the necessary elements of its attorney's fee award, but the State apparently believes that it can go beyond the administrative record whenever it chooses. The State went well beyond the administrative record when it opposed the Lewis Family Farm's motion by providing this Court with a five year old, limited survey in an unavailing effort to suggest that Mr. Privitera's standard and customary hourly rate of $300 per hour was above market. (See Affirmation of Loretta Simon, dated August 28, 2009, ¶¶ 17-18 and Ex. H thereto). The Lewis Family Farm was entitled to rebut on reply, as it did.

Now, to illustrate the double standard that the State asks this Court to apply, the State's "cross motion to strike" / "sur-reply" goes further beyond the administrative record and offers material including:

- Affirmation of Loretta Simon in Support of Cross Motion to Strike / Sur Reply, (Simon Sur Reply Aff., Ex. B), (stating that the average hourly billing rate for equity partners—such as Mr. Privitera—reached $332 last year, more than 10% above the rate of the Lewis Family Farm's lead counsel);

- A newspaper article from the *Press Republican* dated August 21, 2009, after the Third Department's unanimous affirmance of this Court (Simon Sur Reply Aff., Ex. D);

- A portion of Mr. Sandy Lewis' website, http://www.sblewis.com, expressing his First Amendment rights and documenting his pride in Barbara Lewis, an officer of Lewis Family Farm, Klaas Martens, an important expert witness, the Farmland Protection Bureau of New York State Department of Agriculture & Markets and many others at the same that he expressed his view that the conduct of the Adirondack Park Agency was shameful (Simon Sur Reply Aff., Ex. E);

- An additional reference to a portion of Mr. Lewis's website that includes an unofficial text of the oral argument in the Third Department that was provided to him by a member of the international press (Simon Sur Reply Aff., Ex. F); and

- A self-serving letter from the Office of the State Comptroller to the Governor seeking to establish that the fee award requested here by the Lewis Family Farm is larger than the largest fee award against the State last year (Simon Sur Reply Aff, Ex. G).[2]

The State's broad reach beyond the administrative record with respect to "prevailing market rates for the kind and quality of the services furnished" by the Lewis Family Farm's counsel is helpful and appropriate, particularly where it shows that the average prevailing market rate for an equity partner is 10% *higher* than the hourly rate of the Lewis Family Farm's counsel. However, the State is simply wrong, as a matter of law, to suggest that somehow a motion for counsel fees pursuant to Article 86 of the CPLR can be decided exclusively upon the administrative record. This Court must go beyond the administrative record with respect to the fees themselves, as the statute requires.

POINT III

NO NEW MATTERS WERE RAISED IN REPLY ON THE PENDING MOTION FOR COUNSEL FEES

The State is correct in stating that a party may not raise new issues of law in reply papers (Simon Sur Reply Aff. ¶ 5), but this recitation of the law is immaterial because the Lewis Family Farm did not raise any new issues of law in its reply papers. Rather, it appropriately rebutted the State's frail factual defense, in which it suggested that the hourly rate of the Lewis Family Farm's counsel was above "prevailing market rates for the kind and quality of the services furnished," CPLR § 8601(a), and sought a reduced award.

Here, the State cites federal civil rights law, the substance of which does not apply because an award under 42 U.S.C. § 1988 is discretionary; whereas an award under Article 86 of the CPLR is mandatory. Nevertheless, in discussing "reasonable fees" under § 1988, as

[2] Conspicuously, the State does not argue that the Lewis Family Farm's requested fee award would be greater than the largest EAJA fee award it has ever paid – it merely compares the requested fee award to those awards paid by the State last year.

calculated according to the prevailing market rates in the relevant community, the Supreme Court of the United States observed as follows:

> We recognize, of course, that determining an appropriate "market rate" for the services of a lawyer is inherently difficult. Market prices of commodities and most services are determined by supply and demand. In this traditional sense there is no such thing as a prevailing market rate for the service of lawyers in a particular community. The type of services rendered by lawyers, as well as their experience, skill and reputation, varies extensively – even within a law firm. Accordingly, the hourly rates of lawyers in private practice also vary widely. The fees charged often are based on the product of hours devoted to the representation multiplied by the lawyer's customary rate. But the fee usually is discussed with the client, may be negotiated, and it is the client who pays whether he wins or loses.

Blum v. Stenson, 465 U.S. 886, 895-96 n.11 (1984).

Here, the record shows that the Lewis Family Farm's counsel charged their standard, customary, prevailing hourly rates—which the Lewis Family Farm agreed to pay. (Lewis Aff. ¶¶ 7-8). Without establishing an alternate "prevailing market rate,"[3] CPLR § 8601(a), the State opposed seeking to show that the award to the Lewis Family Farm should be reduced.[4] For the reasons already briefed, the State's efforts in this regard must fail.

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[3] The State misreads and misunderstands the importance of the Affidavits of Ronald Briggs and Howard Aubin. Both Affidavits establish that the market of available lawyers inside the Adirondack Park who are prepared to engage in contentious litigation with the Adirondack Park Agency is thin to non-existent. Mr. Briggs attests that, in addition, it is not uncommon for experienced lawyers in the North Country to charge upward of $300 per hour, the customary rate for the Lewis Family Farm's lead counsel, which was charged here. Moreover, Mr. Briggs' statement that he represented the Lewis Family Farm many years ago in a real estate transaction does not make him an "interested" party. (See Lewis Opposition Aff., ¶ 5).

[4] The State expresses a gross misunderstanding of the law by arguing that the fee award would benefit counsel. The law provides that "a court shall award to a prevailing party" fees and expenses. CPLR § 8601(a). Thus, any award ordered as a result of this motion will be made to the Lewis Family Farm not to McNamee, Lochner, Titus & Williams, P.C., Petitioner's counsel. The Lewis Family Farm is obliged to pay the fees and expenses regardless of this Court's ruling. (Lewis Aff., ¶ 8). Misunderstanding the law, the State suggests that Mr. Jorge Valero, who supplied a Reply Affidavit relating to prevailing market rates "is employed by the McNamee firm and could benefit from any fee award." (Simon Sur Reply Aff. ¶ 10, pg. 6). McNamee does not benefit from any fee award. Indeed it is even unfair to suggest that the Lewis Family Farm "benefits" from a fee award, given the harm that the State's illegal determination has wrecked upon the Lewis Family Farm. (Lewis Aff., ¶¶ 12-13). In any event, Mr. Valero is not a lawyer. The rules of professional conduct provide no mechanism for dividing a fee with a non-lawyer. See generally 22 NYCRR § 1200.5 (Rule 1.5).

POINT IV

PETITIONER DOES NOT SEEK ATTORNEY'S FEES "FOR PUBLICITY" OR FOR "MAINTAINING ITS ADVOCACY WEBSITE"

The State claims that the Lewis Family Farm seeks an award of attorney's fees "for publicity expenses or to establish and manage an advocacy website." (See Simon Sur Reply Aff., ¶ 14) This is simply false. The motion before this Court does not seek any "expenses" in this regard. The Lewis Family Farm's counsel has nothing whatsoever to do with Sandy Lewis's website, http://www.sblewis.com. The site was established, designed, built and is maintained by others. (See Lewis Opposition Aff., ¶ 2). The State's baseless claim that it is being "asked to pay for private websites" or that the taxpayers are being asked "to reimburse a private citizen for private opinions, particularly when those opinions are derogatory," is simply not based in the facts of this case. Id. Whether or not Mr. Lewis has "posted inflammatory language criticizing government" is immaterial to this case, notwithstanding the State's effort to characterize the protected First Amendment expressions of Sandy Lewis in the wake of an illegal attack upon the Lewis Family Farm.

Sandy Lewis has an absolute, constitutionally protected right to express his view concerning government in this case. These views are not fostered or embraced by the Lewis Family Farm's counsel, nor are they material to this case.[5]

[5] As the Rules of Professional Conduct provide, "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." 22 NYCRR § 1200.2 [Rule 1.2(b)].

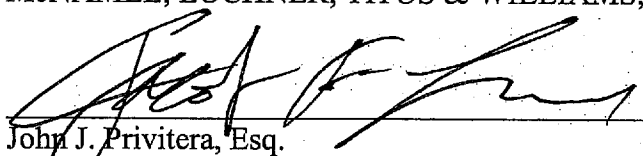
CONCLUSION

The States cites no law in support of its "cross-motion to strike" the Lewis Family Farm's reply papers on the pending motion for attorney's fees other than the law which bars the raising of new matters of law on reply, which does not apply here. Surely, the CPLR does not allow a sur-reply, which the State seeks in the alternative.

For all of the foregoing reasons, the State's "cross-motion to strike" should be denied and the Lewis Family Farm's motion for attorney's fees pursuant to Article 86 of the CPLR should be granted.

Dated: October 22, 2009
Albany, New York

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



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