STATE OF NEW YORK SUPREME COURT
ESSEX COUNTY

LEWIS FAMILY FARM, INC.,

Petitioner,

v.

NEW YORK STATE ADIRONDACK PARK AGENCY,

Respondent.

Hon. Richard B. Meyer
INDEX No. 315-08

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

Defendants.

INDEX No. 332-08

MEMORANDUM OF LAW IN FURTHER OPPOSITION TO THE AMOUNT OF PETITIONER'S APPLICATION FOR COUNSEL FEES

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Preliminary Statement

Under CPLR Article 86, the burden is squarely placed on the party seeking reimbursement of attorneys fees to establish both eligibility and entitlement for the claimed fees. Relevant case law confirms that a fee application must be itemized to allow court scrutiny, seek reasonable hourly rates consistent with those of the local legal community, seek costs only for substantive legal work in the underlying litigation and request compensation for a reasonable number of hours. Petitioner's fee application fails on all counts.

Petitioner's application for attorney's fees pursuant to CPLR Article 86 is fundamentally flawed because of its failure to provide the most basic document: a retainer agreement with counsel. Indeed, this Court specifically asked during a February 22, 2010 telephone conference, that petitioner provide the retainer agreement. Petitioner suggested that such a document existed by arguing that the attorney-client privilege precluded its production. We now find that the document apparently never existed. See Third Affirmation of John Privitera sworn to March 4, 2010 ("3/4/10 Privitera Aff."), ¶ 13. Instead, petitioner produces no fewer than eight affirmations, but none address the critical question at issue: How much in fees was petitioner's counsel actually to be paid in bringing this case and at what hourly rate?

Given petitioner's failure to provide a retainer agreement or evidence of payment to substantiate its entitlement to the reimbursement of its fees, the Adirondack Park Agency ("APA") respectfully submits that the Court should draw a strong negative inference against the application. Specifically, the hourly rates sought in application should be significantly reduced to conform to "reasonable" fees at the "prevailing market rate," which the APA submits is a maximum of $235 per hour for an experienced attorney and not more than $120 per hour for an attorney with 1- 4 years experience. As detailed below, the Court should also deny

reimbursement for fees and costs in the application which are ineligible for reimbursement under New York's Equal Access to Justice Act ("EAJA"), CPLR § 8601 et seq., and are otherwise excessive, unnecessary, or inappropriate.

Facts

This Article 78 proceeding challenged a determination of the APA dated March 25, 2008, which found Lewis Family Farm, Inc. ("Lewis Farm") in violation of the Adirondack Park Agency Act ("APA Act" Executive Law § 801 et seq.) and the Wild, Scenic and Recreational Rivers Act ("Rivers Act"), ECL § 15-2701, et seq., for its construction of three single-family dwellings in the Adirondack Park along a protected river corridor without an APA permit. See August 24, 2009 Affidavit of Cecil Wray ("Wray Aff.") Exhibit A, March 25, 2008 (APA Determination). The Court's November 19, 2008 Decision and Order, as affirmed by the Appellate Division on July 16, 2009, found that the APA's determination was affected by "error of law" and that the three single-family dwellings were exempt from permitting requirements as "agricultural use structures." In its subsequent Decision and Order of February 3, 2010, this Court determined that an award of attorney fees was appropriate under CPLR Article 86 and allowed the petitioner an opportunity to submit additional evidence in support of its application, including evidence of prevailing market rates in the Fourth Judicial District where this proceeding is venued.

Relevant Statute

The New York Equal Access to Justice Act ("EAJA"), CPLR Article 86, permits an award of fees and expenses to prevailing parties in civil actions brought against the State and limits fees to the "prevailing market rates." See CPLR § 8601(a). Section 8602(b) defines fees and other expenses:

> "Fees and other expenses" means the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, consultation with experts, and like expenses, and reasonable attorney fees, including fees for work performed by law students or paralegals under the supervision of an attorney incurred in connection with an administrative proceeding and judicial action.

CPLR § 8602(b).

ARGUMENT

POINT I

PETITIONER'S FAILURE TO PRODUCE WRITTEN EVIDENCE OF ITS FEE ARRANGEMENTS OR PAYMENT OF LEGAL FEES IN THIS LITIGATION WARRANTS AN ADVERSE INFERENCE AGAINST ITS APPLICATION

In a conference call with this Court on February 22, 2010, regarding petitioner's attorney fee application, this Court asked counsel John Privitera to provide the retainer agreement with his client. Counsel declined, raising the attorney-client privilege. The Court suggested that material could be redacted from the agreement to address the privilege concerns, and inquired further about a retainer letter or similar correspondence. See 2010 Simon Aff., ¶¶ 5-8. Now, counsel states that there is no retainer agreement, and that his fee arrangement with petitioner is "oral." See 3/4/10 Privitera Affirmation ("Privitera Aff."), ¶ 13. In his affidavit, Mr. Salim Lewis - a principal of petitioner - also asserts the attorney-client privilege, and states that he "resists retainer agreements." See Affidavit of Salim B. Lewis dated March 3, 2010 ("3/3/10 S. Lewis Aff.") ¶¶ 4, 14. Petitioner's failure to produce evidence of its actual fee arrangement with counsel warrants a strong adverse inference against its Article 86 application.

As determined by the Appellate Division Third Department, federal court decisions involving attorney fee awards and retainer agreements are relevant because the New York Legislature intended that counsel fees be calculated in accordance with federal case law. See

Matter of Thomas v. Coughlin, 194 A.D.2d 281, 284 (3d Dep't 1993). However, because the Federal EAJA hourly rate is capped at $125.00 per hour, it is also appropriate for the Court to consider other fee-related federal caselaw. See, e.g. 42 U.S.C. § 1988; 24 U.S.C. § 2412(b)(1)(A); 5 U.S.C. § 504(b)(1)(A).

It is axiomatic that the fee arrangement of a prevailing party in an attorney fees application is a relevant factor for the Court to consider in determining the reasonableness of a fee application. See Crescent Publ. Group, Inc. v. Playboy Enters., Inc. 246 F.3d 142 (2d Cir. 2001) (award of attorney fees under copyright act vacated and remanded for further proceedings). In Crescent, the court stated that proof of the fee arrangements was an important consideration in ensuring an equitable result regarding fees.

> [W]e conclude that, for prevailing parties with private counsel, the actual billing arrangement is a significant, though not necessarily controlling, factor in determining what fee is "reasonable." In weighing this factor, we remind the District Court that in no event should the fees awarded amount to a windfall for the prevailing party.

Id. at 151 (emphasis added).

In light of the absence of any written evidence of a fee arrangement at the rates requested, the Court can and should draw a negative inference against petitioner's fee request, including with respect to the hourly rates sought by petitioner. The State taxpayers should not be made to foot the bill for petitioner's claimed fees for which there is no written contractual obligation to pay. Hours not appropriately charged to one's client are not appropriately charged to one's adversary. See Rahmey v. Blum, 95 A.D.2d 294, 300 (2d Dep't 1983) (award of counsel fees pursuant to 42 U.S.C. § 1988 granted, but remitted to determine reasonable amount); see also Hensley v. Eckerhart, 461 U.S. 424, 434 (1983) (award of attorney fees in §1988 case vacated and remanded for determination of which fees were reasonable). The Second Circuit has noted

that under EAJA an award goes to the prevailing party: while "[a] retainer or similar agreement may provide for payment of counsel. . . , counsel has no standing to apply to the public fisc for payment." See Oguachuba v. INS, 706 F.2d 93, 97-98 (2d Cir. 1983); see also Ross v. Congregation B'Nai Abraham, 12 Misc. 3d 559, 570 (Civ. Ct. N.Y. Co., 2006) ("Without the blueprint of a fee agreement, moreover, the court's determination of reasonableness is more onerous and less accurate.")

In addition to petitioner's failure to substantiate its fee application with a retainer agreement or similar evidence of fees charged petitioner, counsel confirms that petitioner has not paid any of the fees of this litigation, Lewis Farm 2 and 3, and has paid only for representation in the administrative proceedings before the Agency. See 3/4/10 Privitera Aff. ¶ 14. CPLR Article 86 is not a mechanism for a prevailing party to obtain reimbursement from the State for fees it neither owes nor has paid. Petitioner, having failed to produce any written agreement, and having failed to pay its attorney for this litigation, should not now be allowed to go directly to the public fisc to pay what he has not. With no agreement and no payment by petitioner of the litigation costs, the Court has no factual foundation upon which to base an award and must by default, draw a negative inference as to the rate of $300 per hour and the $226,087 sought from the State.

Mr. Lewis' affidavit fails to state the amount petitioner agreed to pay its counsel, or the form of the agreement, whether it be in the form of a retainer agreement, a flat fee, a contingency or simply correspondence regarding the attorney-client relationship. Rather, Mr. Lewis asserts that petitioner's relationship with counsel is "not anyone's business - and that includes New York State government . . . ." See 3/3/10 S. Lewis Aff., ¶ 4. Mr. Lewis is wrong on several fronts. By seeking fee reimbursement under CLPR Article 86, petitioner has placed his

relationship with counsel - with respect to fees - directly in issue. New York Courts have uniformly held that the attorney client privilege does not extend to counsel fee arrangements. See In re. Nassau Co., 4 N.Y.3d 665 (2005) (financial and payment records, and copies of retainer of petitioner's law firm not protected under attorney client privilege); see also Priest v. Hennessy, 51 N.Y.2d 62 at 69, 70 (1980)(fee arrangements between attorney and client do not ordinarily constitute a confidential communication); Charney v. Cromwell LLP, 15 Misc 3d 1128(A) (Sup.Ct. N.Y. Co., 2007) (fee arrangements not protected because they are not relevant to legal advice given).

Petitioner's sole statement on attorney fees in a six page affidavit is "We have paid McNamee for service." See 3/3/10 S. Lewis Aff ¶ 15. The implication of the statement is that petitioner has paid counsel fees for this litigation. That is not the case. Mr. Privitera's affirmation makes clear that neither Mr. Lewis, nor his corporate alter ego, have paid counsel for services in Lewis Farm 2 and 3, and has paid only for representation in the underlying APA administrative proceeding, which fees are ineligible under CPLR Article 86. See 3/4/10 Privitera Aff., ¶ 14.

The State submits that the amount that petitioner actually paid in counsel fees is plainly relevant to the instant fee application. Failure to disclose any written agreement or to confirm the amount paid to counsel hinders the Court's ability to determine a reasonable award. Absent any evidence that the amount billed to the State is the actually the amount petitioner agreed to pay or did actually pay, there is no way to ensure an award is not a "windfall" to the petitioner at taxpayer expense.

POINT II

THE HOURLY RATES IN THE APPLICATION FOR ATTORNEY FEES SHOULD BE REDUCED TO REASONABLE PREVAILING HOURLY RATES IN THE COMMUNITY OR JUDICIAL DISTRICT

Petitioner's application seeks an award of $226,087 for approximately 1,058 hours, at an hourly rate of $300.00 for an experienced attorney and between $150 and $175 for an associate with 1- 4 years experience. As explained below, any reimbursement should be reduced to maximums of $235 and $120 per hour respectively.

New York courts have determined that the reasonable hourly rate for attorney fees should be based on "the customary fee charged for similar services by lawyers in the community with like experience . . . ." Rahmey v. Blum, 95 A.D.2d 294, 302 (2d Dep't 1983). Federal courts in the 2d Circuit of New York have held in awarding attorney fees, that the "relevant community" for determining the prevailing rate is the community where the court sits. See Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 2005 WL670307 (N.D.N.Y.) (Mar. 22, 2005), amended and superceded, 493 F.3d 110, 118 (2d Cir. 2007) (awarding $210 per hour, an amount that a reasonable client in the Northern District of New York area would pay). The relevant community is deemed to be within the judicial district. Id. at 118 (citing Polk v. New York State Dep't of Corr. Servs., 722 F.2d 23, 25 (2d Cir. 1983); see also Luciano v. Olsten Corp., 109 F.3d 111 (2d Cir. 1997); In re Agent Orange Prod. Litig., 818 F.2d 226, 232 (2d Cir. 1987) (the relevant community is the district where the case is brought). While a court may consider out-of-district rates, the rule of reason applies. Arbor Hill Concerned Citizens, 493 F.3d at 119 ("We presume . . . that a reasonable, paying client would in most cases hire counsel from within his district, or at least counsel whose rates are consistent with those charged locally").

A. The Hourly Rate For Reimbursement Should Be Reduced To The Prevailing Rate In The Fourth Judicial District To An Amount At Or Below $235 Per Hour

Petitioner bears the burden for production of evidence of the prevailing rate. See Farbotko v. Clinton County, 433 F.3d 204, 209 (2d Cir., 2005) (award for attorney fees for due process violations remanded for determination of reasonable hourly rate); see also Blum v. Stenson, 465 U.S. 886 at 896 n.11 (1984)(fee applicant has burden of showing by satisfactory evidence, in addition to attorney's own affidavits that requested rates are prevailing market rates). Petitioner has not met that burden in its application.

As the Court has recognized, this Essex County proceeding should be compensated at prevailing rates for the Essex County community or at the prevailing rate within the Fourth Judicial District. Petitioner cites no case law in the Fourth Judicial District supporting the high hourly rates it seeks. A recent case in the United States District Court for the Northern District of New York, which arose in Clinton County, New York, found that a reasonable hourly rate for an experienced attorney in a complex federal civil rights matter was $235 per hour. See Luessenhop v. Clinton County, 558 F. Supp.2d 247 (N.D.N.Y., 2008)("Luessenhop I"), affirmed, 324 Fed. Appx. 125, 126 (2d Cir. 2009) ("Luessenhop II"). Under Article 86 and relevant precedent, the attorney fees requested by petitioner exceed that standard. Additionally, in 2008 and 2009, the U.S. District Court for the Northern District of New York determined reasonable hourly rates in the Albany area to be $210 per hour for an experienced attorney, $150 per hour for an attorney with four or more years experience, $120 per hour for an attorney with less than four years experience, and $80 per hour for paralegals. See Alexander v. Cahill, 2009 WL 890608 (NDNY); see also Paramount Pictures Corp. v. Hopkins, 2008 WL 314541, (N.D.N.Y.). While these cases are not within the Fourth Judicial District, they demonstrate that petitioner's

request for $300 per hour and between $150 and $175 for an attorney with less than 4 years experience, even in the Albany area is not reasonable. Even using Luessenhop I, a complex civil rights case, as a template, reasonable counsel rates should not exceed $235 per hour; the hourly rate for associates with 1 - 4 years experience should be reduced to a maximum of $120 per hour (Jacob Lamme, Mathew Barry and Francine Vero).

1) Petitioner's Affidavits Regarding Rates for the Albany Area are Unavailing

In its February 3, 2010 Order, the Court specifically listed the counties in the Fourth Judicial District for which fees will be considered. See 2/3/10 Order at 9. In its first submission to the Court in its attorney fee application, petitioner failed to produce an affidavit of a disinterested local practitioner attesting to the hourly prevailing rate in the District, even though he affirms that he has used the services of North Country lawyers. See 3/3/10 S. Lewis Aff., ¶ 12. In its third and most recent submission, petitioner offers eight new affidavits as evidence of prevailing rates. Notably, two of the affidavits are from attorneys whose offices are located in Albany County, which is not within the Fourth Judicial District. See Affirmations of Mr. Michael Cunningham ("Cunningham Aff.") and Mr. Jerry Hoffman ("Hoffman Aff.")(attesting to rates of up to $300 per hour and between $250 and $350, respectively). Not surprisingly, the rates for these Albany County attorneys are above the prevailing rate of $235 per hour for an experienced attorney in Northern New York. The Court should reject or disregard both affidavits.

In Luessenhop II, the court specifically rejected the use of Albany area rates for a case in the North Country, noting that: "representation of plaintiff in the North Country would not command the rate of Albany attorneys documented in the record." See Luessenhop II, 324 Fed. Appx., at 126. To determine the prevailing rate in the North Country, the Court in Luessenhop I

conducted its own survey for reimbursement of an experienced attorney in the North Country in a complex federal civil rights case:

> The Court's survey reflects the following: 1 attorney at $175, 1 attorney with a variable rate depending on the client from $190 to $250, 4 attorneys at $200, 1 attorney at $210, 2 attorneys with variable rates depending on the client from $225 to $250, 1 attorney at $275, 1 attorney at $285, and 2 attorneys at $300. Our survey's approximate average is $249 whereas Luessenhop's survey of attorney fees has an approximate average of $262.

Luessenhop I, 558 F. Supp.2d at 265, FN19.[1] Petitioner in Luessenhop I was represented by an experienced attorney, who sought an hourly rate of $260, however the Court found that the reasonable hourly rate for the geographic district was $235. See Luessonhop I, 558 F. Supp.2d at 267. Additionally, rates appear to be variable, as indicated in Mr. Hoffman's affirmation where he attests "my hourly rate averages between $250 and $350 per hour." See Hoffman Aff., ¶ 5. Indeed, Luessenhop I rejected a survey of rates for attorneys in the Albany area.

> Even though some of the attorneys expressed surprise that an experienced lawyer would handle a complex federal case for under $300 per hour . . . what is lacking from Mishler's Affirmation, and probably because it was neither asked nor deeply probed, is whether these attorneys are billing all of their clients at these rates, or only their best paying, corporate-like clients. Also absent from this Affirmation is the realistic notion of whether these attorneys are actually collecting these rates from their lower level paying clients and the prospect of discounts.

See Luessenhop I, 558 F.Supp.2d at 261. For the reasons stated herein, the rates of both Mr. Cunningham and Mr. Hoffman are not evidence of the prevailing rate in the Fourth Judicial District.

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[1] The Circuit Court noted that it did not condone the District Court conducting its own survey, but affirmed its decision. Luessenhop II, 324 Appx. 125.

2) Counsels' Rates in the United States District Court for the Southern District of New York in 2007 Were $250 per Hour and $140 per Hour

In 2007, John Privitera and Jacob Lamme sought rates of $250 per hour, and $140 per hour respectively, in a complex bankruptcy matter in the Southern District of New York, where hourly rates are considerably higher than in Northern New York.[2] See 2010 Simon Aff., Exhibit A, (In Re: Westwood Chemical Corp., Case No. (CGM) 05-35298, Application for Approval ¶ 80); see also Luessenhop I, 558 F. Supp.2d at 265 ("it appears that all the Southern and Eastern District of New York rates are twice those of this District"). In their counsel's fee application in the Southern District Bankruptcy Court in Westwood, Mr. Lamme, on behalf of Mr. Privitera, certified "To the best of my knowledge, the fees and disbursements sought by the Final Fee Application are billed at rates and in accordance with practices customarily employed by the Applicant, and generally accepted by Applicant's clients." See 2010 Simon Aff., Exhibit A, (Lamme Aff. dated June 25, 2007 ¶¶ 3 and 6). Less than ten months later, in April 2008, counsel filed this Article 78 proceeding in State court, for which it now seeks reimbursement in the North Country at a rate of $300 per hour for Mr. Privitera, and between $150 and $175 per hour for Mr. Lamme. The Court should decline to award the excessive rates in light of Mr. Privitera and Mr. Lamme's recent billing in the Southern District, where rates are typically much higher. Accordingly, the State respectfully requests that the Court reduce the rate of reimbursement for

[2] See Arbor Hill Concerned Citizens v. County of Albany, 493 F.3d 110 at 112: "Indeed, we believe that a reasonable, paying resident of Albany would have made a greater effort to retain an attorney practicing in the Northern District of New York, whether in Syracuse, Binghamton, Utica, or Kingston, than did plaintiffs. The rates charged by attorneys practicing in the Southern District of New York would simply have been too high for a thrifty, hypothetical client-at least in comparison to the rates charged by local attorneys, with which he would have been familiar."

both Mr. Privitera and Mr. Lamme to the reasonable prevailing market rate in the Fourth Judicial District, consistent with Luessenhop.

3) Only Rates of Disinterested Practitioners within the District Should be Considered

Petitioner submits three affidavits of attorneys in the Fourth Judicial District, however, only one qualifies as a disinterested affiant in this matter. See Freedman v. Town of Fairfield, 312 Fed. Appx. 422, 2009 WL 485158 (2d Cir. 2009) ("fee applicants should include . . . an expert affidavit by a *disinterested* local practitioner stating the prevailing market rates in the area" (emphasis added)). The affidavit of Ronald J. Briggs fails as evidence of prevailing market rates in the District because Mr. Briggs, by his own admission, is not a disinterested attorney, having worked as counsel to Mr. Lewis. See Affirmation of Ronald Briggs (undated). Nor can the statement of attorney Cynthia Feathers be considered one of a "disinterested" attorney. As the Court is aware, Ms. Feathers was a strong advocate for petitioner in her role as counsel for amicus curiae New York Farm Bureau. Accordingly, the only affirmation from an apparently disinterested attorney with offices in the Fourth Judicial District is that of Benjamin Pratt. See Affidavit of Benjamin R. Pratt ("Pratt Aff.") dated February 25, 2009. Mr. Pratt, an experienced attorney in Glens Falls, whose practice is primarily in the area of health law, attests to an hourly rate for partners in his firm of $275 per hour. See Pratt Aff., ¶¶ 2,3,5.

4) Petitioner is Entitled to One Half the Hourly Rate For Travel

As acknowledged in counsel's Westwood bill submitted in the Southern District, rates for attorney travel are routinely billed at one half the hourly rate. See 2010 Simon Aff., Exhibit A (Westwood fee app.); see also Teamsters Con. Pension & Ret. Fund v. United Parcel Service, 2004 WL 437474 (NDNY). The billing of travel time at one half (1/2) of the hourly rate is proper. See Luciano v. Olsten Corp., 925 F.Supp. 956, 965 (EDNY 1996) ("travel time is

compensable at 50% of the hourly rate awarded")(citing Cruz v. Local Union No. 3 of Intern. Broth. of Elec. Workers, 34 F.3d 1148, 1151 (2d Cir.1994). This Court should reduce any fee award relating to travel to half of the hourly rate determined as "reasonable" by the Court.

5) Reimbursement For Non-Attorney Work Should Be Reduced To Non-Attorney Rate

The Court has discretion to reduce the number of hours billed when appropriate. See Arbor Hill, 493 F.3d at 117. Work that does not require an attorney's attention is not compensable at an attorney's rate and is therefore ineligible for compensation. See Fine v. Sullivan, 1993 WL 330501, 1993 US Dist Ct. LEXIS 11706 (SDNY 1993). Fine provides a template for analyzing the reasonableness of an application for attorney fees under Article 86, particularly with respect to clerical and para-professional activities outside the scope of substantive legal work. It is appropriate to distinguish between legal work and clerical work that can be accomplished by non-lawyers. See Rahmey, 95 A.D.2d at 301 (finding such non-legal work may command a lesser rate, its value is not enhanced because a lawyer does it). Under these cases, petitioner should not be compensated at the attorney rate for preparation of affidavits of service, or for other essentially "boilerplate" documents, calls to the Court's Clerk's Office, service and filing of papers and photocopying of documents. See 8/28/09 Simon Aff., ¶ 15, Exhibit G.

POINT III

FEES RELATED TO LEWIS FARM 1 AND 3, THE EX- PARTE STAY IN LEWIS FARM 2, INTERVIEWS WITH PRESS, WORK WITH SUPPORTERS, PETITIONER'S WEBSITE AND UNIDENTIFIED INDIVIDUALS ARE INELIGIBLE FOR REIMBURSEMENT UNDER ARTICLE 86

A. Petitioner Failed To Remove All Fees For Lewis Farm 1 and 3 As Directed in the Court's February 3, 2010 Order

This Court's February 3, 2010 Decision and Order denied reimbursement for fees related to the Lewis Farm 1 action (Index No. 498-07) and for fees related to the APA's enforcement action, Lewis Farm 3 (Index No. 332-08). See 2/3/10 Order p.8-9, referencing CPLR § 8601(a) and (f). Nonetheless, fees relating to both matters remain in petitioner's revised billing. See 2010 Simon Aff., ¶ 22. The fees for Lewis Farm 1 and 3 should be deleted. To the extent petitioner's failure to remove these charges constitutes an effort to reargue this Court's 2/3/10 Order, upon which petitioner has filed a Cross-Notice of Appeal, reargument is improper absent a notice of motion and supporting papers for reargument. See Affidavit of Jacob Lamme dated March 4, 2010 ("Lamme Aff."), ¶¶ 11-12; see also CPLR § 2221.

B. Fees For Petitioner's Ex-Parte Stay Should Be Deleted

As previously argued to this Court, petitioner should be denied compensation for expenses relating to the plainly illegal ex-parte stay it obtained against the APA at the commencement of this Lewis Farm 2 litigation. See 8/28/09 Simon Aff, Exhibit G. State law plainly prohibits ex- parte restraining orders against the State and other government entities ("No temporary restraining order may be granted . . . against a public officer, board or municipal corporation of the state to restrain the performance of statutory duties"). See McArdle v. Comm. of Investigation, 41 A.D.2d 401 (3d Dep't 1973) ("As we have held several times, stays which

restrain State officials from the performance of their official duties may not be granted ex parte"); see also CPLR § 6313(a). Furthermore, the Uniform Rules for Trial Courts, 22 NYCRR § 202.7(f), require notification of the time, date and place, to the party against whom the temporary restraining order is sought.

The Court vacated the ex-parte stay with an amended order on April 9, 2008, after objection from the Office of the Attorney General. See Record Volume II. Counsel's billing statement includes extensive fees for the ex-parte stay including, but not limited to, $1,687.50 for travel to get the ex-parte stay signed and served, and $900 to speak with the Office of the Attorney General by phone, and prepare and revise a corrected order for the Court. See 3/4/10 Privitera Aff., Exhibit D (entries for 4/08/08 and 4/9/09). Accordingly, petitioner's fee request relating to the ex-parte stay in derogation of CPLR § 6313[a] should be stricken. See 8/28/09 Simon Aff. ¶ 11, Exhibit G. Furthermore, counsel concedes that the ex parte order was a mistake. See 3/4/10 Lamme Aff., ¶ 20.

C. Fees for Press Interviews, Publicity, Meetings with Supporters, and a Website Are Outside the Scope of Article 86

Petitioner should be denied fees for all publicity activities, including press work such as "series of press interviews," website work, and work with supporters. See 8/28/09 Simon Aff., ¶¶ 13-14, Exhibit G; see also 2010 Simon Aff., ¶ 22(d). Article 86 and federal law provide reimbursement of fees for substantive legal work expended on litigation, not public relations work or advertising. See Society for Good Will to Retarded Children v. Cuomo, 574 F.Supp. 994 (E.D.N.Y. 1983), remanded on other grounds, 737 F.2d 1253 (2d Cir. 1984):

> Plaintiffs claim 9 2/6 hours for communications with newspapers and television stations and for press conferences. There is no precedent for awarding fees for such work. These are not hours "expended on the litigation." Although press coverage may have helped plaintiffs' case, this was not legal work recoverable under

> section 1988. Accordingly, compensation for the 9 2/6 hours spent in communication with the press is denied.

Id. at 998-999. Similarly, in In re Agent Orange Product Liability Litigation, 611 F. Supp. 1296 (E.D.N.Y. 1985), referring to counsel's time spent with the media, the Court concluded that "[a]lthough such time surely was a necessary precondition to building a base for successful prosecution of this class action, it is not substantive legal work deserving of an award of attorney's fees." Id. at 1376; see also Role Models America, Inc. v. Brownlee, 353 F.3d 962 (D.C. Cir. 2004) (fees denied in federal EAJA case for reporter teleconference, finding "the government cannot be charged for time spent in discussions with the press").

Similarly, petitioner's entries seeking fees for lobbying efforts, letters, meetings or telephone calls to supporters, organizations or individuals, are also ineligible. See Rocky Mountain Christian Church v. Bd. of Co. Comm., of Boulder Co., 2010 WL 148289 (2010) (granting motion for attorney fees in 42 U.S.C.§ 1988 action but denying fees for communications with press and supporters). In Rocky Mountain, as here, the prevailing party sought reimbursement for non-legal work entries such as "preparing for and participating in interviews with the press, responding to press inquiries, contacting supporters ..." Id. at *4. The Court denied the expenses.

> Communications with the press, communications with members of Congress, and communications with supporters are not services that were reasonably necessary in this litigation. Therefore I conclude that charges for attorney time spent providing such services may not be included in an award of reasonable attorney fees.

Id. at *4.

Here, petitioner seeks reimbursement for numerous press interviews, other communications with the press, as well as meetings with supporters, the Local Government

Review Board, which passed a resolution in support of the petitioner, and the New York Farm Bureau, which organization filed two amicus briefs on petitioner's behalf. See 8/28/09 Simon Aff., ¶ 13, Exhibit G; 2010 Simon Aff., ¶ 22(d). None of this time qualifies for Article 86 reimbursement. The time spent soliciting amicus briefs is not recoverable in an attorney fee application. See Brady v. Wal-Mart Stores, Inc., 455 F.Supp.2d 157, 213 (E.D.N.Y. 2006). The Brady court found that the government was not required to pay fees for time spent soliciting amicus support: "[D]efendants correctly object to being asked to pay for 7.5 hours that Brady's attorneys spent meeting with their client after trial and soliciting potential amicus briefs. Taking a victory lap is perfectly understandable, as is the search for allies, but the law does not require a losing party to subsidize either." Id.

Accordingly, fees for the many meetings, phone calls or other communications with the New York Farm Bureau and other supporters should be denied. See 2010 Simon Aff., Exhibit B. Consistent with this line of cases, reimbursement for time spent on a website promoting petitioner's personal views should also be rejected because it constitutes non-legal work intended for publicity purposes, which counsel concedes. See Lamme Aff., ¶ 33 (petitioner acknowledges that it created the website "to inform the press and public about the case"). Therefore, all such expenses should be excised from petitioner's application. See 2010 Simon Aff., Exhibit B.

D. Claims That Are Grouped Within Ineligible Fees Should Be Rejected

A fee request should allow the court to identify the specific claim and the number of hours that pertain to it. See Rahmey, 95 A.D.2d at 300. Here, petitioner's claims, even in its second supplemental application, are grouped in such a way as to make it impossible for the Court or the State to determine the amount of time spent on particular activities. See 3/4/10

Privitera Aff., Exhibit D, (e.g. second entry for 11/20/08, where "series of press interviews" is combined with "research regarding stay/right to escrow"and other activities).

E. Entries for Unidentified Individuals Should be Deleted

Petitioner's fee application includes several entries for individuals who are not otherwise identified in counsel's affirmations, including several entries for "CM" and an entry dated 2/23/10 "conference with Chris Massaroni;" an entry dated 6/19/08 "James Girvin; Travel;" and an entry dated 8/12/08 "Doug Eakeley, Esq." See 3/4/10 Privitera Aff., Exhibit D. The Court should deny reimbursement for these undocumented claims. See e.g.: Paramount Pictures Corp. v. Hopkins, 2008 WL 314541, (N.D.N.Y.)("Since it is Plaintiff's responsibility to establish the qualifications and experience of its attorneys, the Court will not award attorney's fees for the work of the individuals it could not identify"). Mr. Gavin, Mr. Massaroni, and Mr. Eakeley appear to be attorneys, but have not documented the nature of their work on this case and their qualifications. Accordingly, those entries should be stricken.

POINT IV

THE NUMBER OF HOURS IN PETITIONER'S APPLICATION IS EXCESSIVE AND MUST BE SIGNIFICANTLY REDUCED

After removing ineligible charges, the Court should limit reimbursement of fees to a reasonable number of hours, and reduce excessive and unreasonable time entries. See Rahmey, 95 A.D.2d at 301 (if time spent on claim is unnecessarily high, judge may refuse compensation). It is not always the case that the amount of time expended is "reasonably expended." See Copeland, et. al. v. Marshall, et. al., 641 F.2d 880, 891 (D.C. Cir., 1980) (District Court's reduction in fee award upheld because of expenditure of unnecessary time, duplication, waste of effort). To remedy excessive hours, the Court can make across-the-board reductions in an

award. See In re "Agent Orange", 818 F2d. 226, 237-238 (2d Cir. 1987); see also Luciano,109 F.3d 111 (2d Cir. 1997) (reduction in hours by 30% for contentious conduct).

A. Petitioner's Claimed Hours for an Article 78 Proceeding are Excessive

Here, petitioner's fees are excessive for an Article 78 summary proceeding, where there is no discovery, trial, or witness examination because the proceedings are designed for prompt and efficient resolution of largely legal issues. See Matter of Council of City of N.Y. v. Bloomberg, 6 N.Y.3d 380, 389 (2006). In stark contrast to petitioner's application, in fiscal year 2008, the total of all Article 86 awards combined in New York State (four Article 78 proceedings) was $197,330.35. See 10/9/09 Simon Aff, Exhibit G. In one "upstate" case, Matter of Bolak v. DOH , Cayuga County DSS, (Cayuga Co., 2008), the total fee award was $12,529. In another (Matter of Melendez v. Wing) heard by the New York State Court of Appeals, originating in New York County, the total award was $162,301.35. See 10/9/09 Simon Aff., Exhibit G. Plainly, the $226,087 sought by petitioner's Article 86 fee application is excessive.

B. Petitioner's Fee Claims for Internal Meetings and Conferences are Excessive

Petitioner seeks reimbursement for more than 75 internal meetings or conferences, most between an associate and Mr. Privitera. See 3/4/10 Privitera Aff., Exhibit C (eg; entries: 3/27/08 "Meeting with John J. Privitera regarding article 78 petition" and 4/9/08 "Meeting with John J. Privitera"). Where attorneys bill substantial amounts of time to cursorily described internal conferences with each other, recovery of the full amount billed is inappropriate. See Tlacoapa v. Carregal, 386 F.Supp.2d 362, 373 (S.D.N.Y. 2005)(in Fair Labor Standards Act case, court found hourly rates excessive and reduced attorney fee award by 25%). Here, there are numerous entries in petitioner's billing statement involving outlining, researching and drafting the petition, even though counsel here already had the benefit of a complaint and supporting papers filed in

the Lewis Farm 1 action when petitioner was represented by two well known law firms; Nixon Peabody and Brennan & White. Notably, each of the claims in Lewis Farm 1 was repeated in Lewis Farm 2. See Record Volume I (Lewis Farm 1, complaint).

C. The Fees Claim for Client Communications are Excessive

Petitioner seeks reimbursement for over 100 client communications with its attorney. See 8/28/09 Simon Aff., ¶ 14; see also 2010 Simon Aff., ¶ 26. While petitioner and its attorney may have been in frequent contact, these are not legal expenses necessary to the litigation, and should not be reimbursed by the taxpayers. See e.g., Patterson v. Julian, 250 F Supp.2d 36, 44 (N.D.N.Y. 2003) (finding award of fees in Sec. 1988 violation, but reducing hours in application; "While it is no doubt true, and laudable, that an attorney should summarize the events relevant to the case with the client, 2.7 hours are not needed."). Moreover, as discussed previously, it is impossible to determine the many hours counsel spent on client communications because they are grouped together in the billing statement with other claims and are not separately described or accounted for. As discussed above, any grouped claims that include ineligible claims should be denied.

D. The Claimed Hours for Preparation of the Fee Application are Excessive

Where a fee application is appropriate, counsel is entitled to compensation for preparing the application, however, where fee claims are exorbitant or the hours unnecessarily high, a court may refuse compensation or reduce the award. See Baird v. Boies, Scheiller & Flexner LLP, 219 F.Supp.2d 510, 518 (S.D.N.Y. 2002) (application for fees in gender discrimination case reduced overall by 60%). The Baird Court found that 215 hours spent on the fee application was "unreasonably excessive," citing Colbert Furumoto Realty, Inc., 144 F.Supp.2d 251 at 261-62 (S.D.N.Y. 2001) (courts within the Second Circuit have awarded fee applications in the range

of eight to twenty-four percent of the total time claimed). Baird, 219 F.Supp.2d at 525. A request for attorney fees should not be a second major litigation. See Hensley, 461 U.S. at 437. A Court in a fee application, may reduce hours to exclude excessive, duplicative, redundant and unnecessary hours in the fee application (Id. at 434) and make across-the–board percentage cuts in the number of hours claimed. See Heng Chan v. Sung Yue Tung Corp., 2007 WL 1373118 S.D.N.Y. (Court reduced claimed fees in case involving violations of federal and state labor law). Petitioner's fee request for preparation of its Article 86 application should be reduced to no more than five percent of the hours spent on the litigation (excluding the preparation of the fee application). See 2010 Simon Aff., ¶ 27.

Petitioner requests more than 280 hours for preparation of its attorney fee application, which includes numerous unnecessary and duplicative documents: an affidavit from a non-attorney attesting to attorney rates (see Aubin Aff.), two affirmations from attorneys who are not disinterested (see Briggs Aff. and Feathers Aff.) and two affirmations from attorneys outside the judicial district (see Cunningham Aff. and Hoffman Aff). Moreover, on its face petitioner's application regarding law firm fees is duplicative, as demonstrated by the submission of three affirmations from Mr. Privitera, two affirmations from Mr. Lamme and two affidavits from Mr. Valero. The third affirmation of Mr. Privitera, which is thirteen pages long, is notably short on useful information for the fee application, and includes numerous self-serving statements such as "Private practice is not a 9-5 job, nor was my devotion to this case," "Jacob Lamme, my associate, and I have been exceedingly efficient and cost effective," "I recall elements of my argument ... while mowing the lawn, jogging, chopping wood and climbing a mountain," "I declined to bill the Lewis Family Farm for a moment of inspiration that occurred while taking a shower." See 3/4/10 Privitera Aff. at ¶¶ 6, 15. While Mr. Privitera may have "declined" to

charge his client for such moments of inspiration, petitioner and counsel may not now charge the State of New York for preparation of this and other marginally useful affirmations. See 3/4/10 Privitera Aff., Exhibit D, (e.g. entries 2/20/10, 2/22/10, 2/23/10 of JJP [$900, $1,125 and $750 respectively]). Equally excessive and duplicative (and likely to appear on the next revised bill) are the exhibits to Mr. Privitera's affidavit, over 500 pages of documents, including the entire "Right to Farm" report, which is already part of the litigation Record, and a copy of a Bar Association report, from which the State included excerpts in a prior affirmation. See 3/4/10 Privitera Aff., Exhibits B and E; see also 8/28/09 Simon Aff., Exhibit H. Accordingly, petitioner's fee application should be significantly reduced by elimination of all the aforementioned unnecessary and duplicative sworn statements and exhibits.

The Court should further exercise its discretion to reduce the claimed hours in the fee application to a reasonable amount. Reduction of the number of hours in the prevailing party's fee application is appropriate where the claimed hours are excessive. See Luessenhop I, 558 F. Supp.2d at 271 (reducing the number of hours for the fee application from 62 hours to 30). In the Brady ADA case, the Eastern District found 257 hours spent on fee litigation to be excessive.

> I would be remiss if I did not trim some of the fat from Brady's fee application in light of the clear excessiveness of the billing for its preparation. I will reduce by half the lodestar hours for this task. See Murray, 354 F.Supp.2d at 241 (citations omitted) (noting that even in a complex case a fee application should only take about 30 hours); Levy, 2005 WL 1719972, at *8 (justifying an across-the-board 35 percent reduction in part on the 101.3 hours billed for the fee application).

Brady, 455 F.Supp.2d at 212; see also Kauffman v. Maxim Healthcare Services Inc., 2008 WL 4223616 at *12 (E.D.N.Y.) (finding forty billable hours would have been more than sufficient to have prepared an equally effective, albeit less verbose, fee application). In the absence of unusual circumstances, hours allowed for preparing and litigating attorney fees should not

exceed three percent of hours in the underlying case where the issue was submitted on papers without trial; fees for preparation of the application should not exceed five percent of hours when a trial is necessary. See Coulter v. State of Tennessee, 805 F2d 146, 151 (6th Cir., 1986)(fees sought in civil rights action affirmed in part, reversed in part and remanded); see also DiFilippo v. Morizio, 759 F.2d 231, 236 (2nd Cir. 1985)(Civil rights case remanded to District of Connecticut for recalculation of fee award finding, among other things, 42 hours spent on the fee motion itself, an "utterly excessive claim"); Trichilo v. Secretary of Health and Human Services, 823 F.2d 702, 707 (2nd Cir. 1987), reaffirmed and extended, 832 F.2d 743 (2d Cir. 1987) (determination that 13.1 hours spent by counsel in preparing fee application reasonable). Following this line of cases, any reimbursement for preparation of the Article 86 application should not exceed 5% of fees and expenses in the underlying Article 78 proceeding.

E. Reduction for Unsuccessful Claims

Finally, the fee application should be further reduced because the amended petition consisted of sixteen (16) claims against the APA, and the Agency was successful in two of them, with the Court granting the APA's motion to dismiss two claims (§ 305-a of Agriculture and Markets Law [claim 3] and § 308 Agriculture and Markets Law [claim four]). See Decision and Order, dated July 2, 2008. As this Court is aware, petitioner vigorously litigated the claims pursuant to Agriculture and Markets Law §§ 305-a and § 308. The Court did not address five other claims (three due process claims, one claim involving the Local Government Review Board, and one claim relating to substantial evidence). Compensation should not be paid for time spent litigating claims upon which the party seeking the fee did not ultimately prevail. See Copeland, 641 F.2d at 891; Alexander v. Cahill, 2009 WL 890608 (N.D.N.Y.)(because plaintiffs were only partially successful, the court reduced the fee award by thirty (30) percent). Reduction

in the hours sought in a fee award is within the Court's sound discretion. See Separ v. Nassau County Dep't if Soc. Servs., 327 F.Supp.2d 187, 190-91 (E.D.N.Y. 2004) (award for an employment discrimination claim should be reduced by 60% to account for limited success). Because petitioners were not wholly successful, the Court should exercise that discretion to reduce the award by at least 1/8 (for petitioner's loss on 2 claims out of 16).

CONCLUSION

For all the foregoing reasons this fee application for attorney fees pursuant to the Equal Access to Justice Act should be significantly reduced to reasonable prevailing rates in the Fourth Judicial District and all unnecessary, duplicative, inappropriate or otherwise ineligible claims for reimbursement should be denied. Petitioner's failure to produce evidence of its actual fee arrangement with counsel warrants a strong adverse inference against its Article 86 application, particularly at taxpayer expense.

The Court should reduce the hourly rate for attorney work to the reasonable prevailing rate of not more than $235 per hour for an experienced attorney and a maximum of $120 for an associate with 1-4 years experience, and reduce all travel to half the hourly rate. Fees should be denied for all inappropriate charges stated herein and in the previous submissions of the State on this motion, including charges for publicity, work with supporters, a website, prior litigation, fees related to the APA's enforcement action, unidentified individuals, and for an ex-parte stay against the State in derogation of CPLR § 6313[a]). See 8/28/09 Simon Aff., Exhibit G; see also 2010 Simon Aff., Exhibit B. Finally, the remaining fees should be reduced by 1/8th, to account for two unsuccessful claims, and the award for preparation of this fee application should be reduced to five percent of the legitimate charges for the underlying litigation.

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Respectfully submitted,

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