STATE OF NEW YORK
COUNTY OF ESSEX
COUNTY, FAMILY & SURROGATE'S COURTS

RICHARD B. MEYER
JUDGE

AMY N. QUINN
COURT ATTORNEY
JILL H. DRUMMOND
SECRETARY

November 17, 2010

McNamee, Lochner, Titus & Williams, P.C.
Attn: John J. Privitera, Esq.
677 Broadway
Albany, New York 12207

New York State Attorney General
Attn: Loretta Simon, Esq.
Assistant Attorney General
The Capitol
Albany, New York 12224-0341

Re: ***Lewis Family Farm, Inc. v. Adirondack Park Agency***
Index Nos.: 315-08 and 332-08

Counselors:

I enclose to each of you a date stamped copy of the decision and order that was entered in the Essex County Clerk's Office this date.

Very truly yours,

Richard B. Meyer

RBM:jhd
Enclosure
cc: Cynthia Feathers, Esq.
Terry Stoddard, Chief Clerk

ESSEX COUNTY COURTHOUSE
7559 COURT STREET, P.O. BOX 217 • ELIZABETHTOWN, NEW YORK 12932
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Supreme Court of the State of New York
For the County of Essex

Submitted April 28, 2010 Decided November 17, 2010

Index No.: 315-08 – IAS No.: 15-1-2008-0109
Index No.: 332-08 – IAS No.: 15-1-2008-0109

LEWIS FAMILY FARM, INC.
Petitioner,

v.

ADIRONDACK PARK AGENCY,
Respondent.

Supplemental Decision and Order
on Application for Counsel Fees

McNamee, Lochner, Titus & Williams, P.C. (*John J. Privitera, Esq.,* and *Jacob F. Lamme, Esq.* of counsel), Albany, New York, for Lewis Family Farm, Inc.

Andrew M. Cuomo, Esq., New York State Attorney General (*Loretta Simon, Esq., Assistant Attorney General*), Albany, New York, for the Adirondack Park Agency.

Cynthia Feathers, Esq., for the New York Farm Bureau, Inc., as *amicus curiae*, supporting Lewis Family Farm, Inc.

Lewis Family Farm, Inc. (LFF) successfully challenged the March 25, 2008 administrative determination of the Adirondack Park Agency (APA) (*see* *Lewis Family Farm, Inc. v. New York State Adirondack Park Agency*, 64 AD3d 1009, 882 NYS2d 762, *affirming* 20 Misc3d 1114, 867 NYS2d 375 [Table], 2008 WL 2653236), resulting in annulment of that determination and dismissal of the APA's enforcement action. LFF now seeks fees and expenses under the New York State Equal Access to Justice Act (EAJA)(*CPLR Article 86*) [1].

By decision and order dated February 3, 2010 (2010 NY Slip Op 50180[U], 26 Misc3d 1219 [A]), this Court found that LFF was a prevailing party under the EAJA, the APA's position was not substantially justified, and there did not exist special circumstances which would "make an award unjust" (*CPLR §8601[a]*). However, decision on the remaining issues was reserved pending an evidentiary hearing relative to a reasonable hourly rate for the services rendered by LFF's counsel and the number of hours reasonably expended by such counsel in the prosecution of LFF's civil

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1 Notice of motion dated August 13, 2009; Affirmation of Privitera dated August 12, 2009 with exhibits A and B; Affidavit of S.B. Lewis sworn to August 13, 2009; Memorandum of Law dated August 13, 2009.

APA answering papers: Affirmation of Simon dated August 28, 2009 with exhibits A through H; Affidavit of Cecil Wray sworn to August 24, 2009 with exhibits A through B; Memorandum of Law dated August 28, 2009.

LFF reply papers: Privitera affirmation dated September 23, 2009 with exhibits A through G; Affirmation of Ronald Briggs dated September 23, 2009; Affidavit of Jorge Valero dated September 17, 2009; Affidavit of Howard Aubin dated September 21, 2009; Memorandum of Law dated September 22, 2009.

Amicus curaie brief of New York Farm Bureau dated 10/05/09. APA memorandum of law in opposition to Farm Bureau's *amicus* brief with copy of record on appeal volume III.

Cross Motion by APA to strike: Notice of cross motion dated October 9, 2009; Affirmation of Loretta Simon dated October 9, 2009 with exhibits A through G.

LFF's Opposition to Cross Motion: Affidavit of S.B. Lewis sworn to October 21, 2009; LFF memorandum of law in opposition to cross motion to strike dated October 22, 2009.

action against the APA. LFF's counsel was directed to furnish true and complete copies of all billing records covering services rendered and expenses incurred in LFF's action against the APA, including the appeal therefrom and the present application. Thereafter, the parties waived their respective rights to such a hearing and instead agreed to have the Court render a decision based upon the submission of papers [2].

LFF's counsel submitted twelve pages of billing records[3] – spanning a period of almost two years – containing more than 440 separate work entries by date and timekeeper, and totaling $222,291.00 for 1,059.35 hours of legal services[4] plus an additional $3,796.53 in expenses. Each

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2 In addition to the papers identified in footnote 1, the parties also submitted the following for consideration by the Court: Third affirmation of John J. Privitera, Esq. dated March 4, 2010 with exhibits A through E; Second affidavit of Salim "Sandy" B. Lewis, sworn to March 3, 2010; Affirmation of Jerry Hoffman, Esq. dated February 23, 2010; Affirmation of Benjamin R. Pratt, Esq. dated February 25, 2010; Affirmation of Michael J. Cunningham, Esq. dated February 26, 2010; Affidavit of Jorge Valero sworn to March 1, 2010; Affirmation of Jacob F. Lamme, Esq. dated March 4, 2010 with exhibit A; Affirmation of Cynthia Feathers, Esq. dated March 1, 2010; Affirmation of Loretta Simon, Esq. dated March 19, 2010 with exhibits A through I.

3 Three pages itemized expenses for telephone calls, online legal research charges, copy charges, travel expenses, postage, etc., totaling $3,796.53

4 The Court's own calculation of hours and total legal fees, shown below, produced a different result – 1,059.85 hours, a difference of 1.5 hours, and $222,663.75 in total fees ($372.75 more than billed). Under either calculation, the total hours billed represent two lawyers each working a forty-hour week for over thirteen weeks. These minor mathematical discrepancies are of no import since this Court is making its own assessment of the reasonable number of hours, and the reasonable hourly rates, for which LFF is to be compensated (*see F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F2d 1250, 1265).

Attny	Hours	Rate	Total
JFL	336.00	150	$ 50,400.00
JFL	304.10	175*	53,217.50
JJP	382.00	300	114,600.00
FJS	3.90	250	975.00
FRV	3.70	125	462.50
CLRK	24.50	75	1,837.50
MPB	0.90	175	157.50
CM	1.50	275	412.50
JHS	3.25	185	601.25
Total:	1,059.85		$222,663.75

*(as of 02/27/09)

entry states the total number of hours or portions thereof expended by the timekeeper, the hourly rate at which such time is billed, the total amount of fee charged, and a brief, often vague, summary description of the services then rendered. Many of the work entries (63%) contain multiple separate tasks without any allocation of the total time expended that date for each activity[5], while others pertain to services performed by non-attorney staff and to consultations with other attorneys in the firm representing LFF. The APA opposes the application contesting not only numerous billing entries, based upon its counsel's detailed analyses of the billing records and legal precedents, but also the reasonableness of the hourly rates charged and sought by LFF's counsel.

"The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate" (*Blum v. Stenson*, 465 US 886, 888, 104 SCt 1541, 1544, 79 LEd2d 891; *see also Blanchard v. Bergeron*, 489 US 87, 94, 109 SCt 939, 945, 103 LEd2d 67). Although "[t]he presence of a pre-existing fee agreement may aid in determining reasonableness" (*Blanchard v. Bergeron*, *supra* at 93, 109 SCt at 944, 103 LEd2d 67), such an agreement is not decisive (*id.*; *see also Giarrusso v. City of Albany*, 174 AD2d 840, 571 NYS2d 141). The court "should exclude from this initial fee calculation . . . hours that are excessive, redundant, or otherwise unnecessary . . ." (*Hensley v. Eckerhart*, 461 US 424, 434, 103 SCt 1933, 1939-1940, 76 LEd2d 40) since "'[h]ours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority.' *Copeland v. Marshall*, 205 USAppDC 390, 401, 641 F2d 880, 891 (1980) (en banc) (emphasis in original)" (*id.*). "[T]he fee applicant bears the burden of . . . documenting the appropriate hours expended and hourly rates . . . and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims

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5 Of the 444 separate work entries, 149 contained two separate activities and another 131 entries incorporated 3 or more tasks, all with no allocation or itemization of time expended per activity or task. As an example, the entry for 11/21/08 states "attention to correspondence with the Court, final judgment by the Court, release of $50,000 from escrow and extended conferences with Sandy Lewis regarding same." It is impossible to determine how much of the total time of 5 hours expended by counsel was spent on each task or activity.

(*Hensley v. Eckerhart*, *supra* at 437, 103 SCt at 1941, 76 LEd2d 40) and provide "an explanation of how the hours were spent" (*Rahmey v. Blum*, 95 AD2d 294, 300, 466 NYS2d 350, 356).

The billing records here do "not permit intelligent review of the necessity or reasonableness of the time expenditures recorded therein (*see, Valmonte v. Bane*, 895 FSupp 593, 602)" (*Rourke v. New York State Dept. of Correctional Services*, 245 AD2d 870, 870, 666 NYS2d 765, 767), a problem which this Court had intended to be addressed at the evidentiary hearing. LFF's subsequent submissions do not contain any further particularization or explanation of its counsels' services and billing. Since "more flexibility . . . [is] permitted where . . . recovery of fees is sought under CPLR article 86 (see, *Matter of Thomas v. Coughlin*, 194 AD2d 281, 284, 606 NYS2d 378; *see also*, *Riordan v. Nationwide Mut. Fire Ins. Co.*, 977 F2d 47, 53)" (*id.*, at 872, 666 NYS2d at 768), rather than deny LFF's fee requests for all such entries, this Court expended many hours in a page-by-page examination of the voluminous records maintained by the clerk in this matter, including the papers on this application, and compared them with LFF's billing records in order to arrive at a fair result. Where the time expended per task could not be reasonably discerned from the billing records and/or the clerk's records, no award has been made. Of course, the Court is not bound by the statements by LFF's counsel of time expended (*Steiger v. Dweck*, 305 AD2d 475, 476, 762 NYS2d 84, 85) and instead must make its "own assessments of the reasonableness of the amount of time spent on the case" (*F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F2d 1250, 1265). Moreover, in "cases with voluminous fee applications . . . it is unrealistic to expect a trial judge to evaluate and rule on every entry in an application" (*New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F2d 1136, 1146).

"Long tradition and just about a universal one in American practice is for the fixation of lawyers' fees to be determined on the following factors: time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved [citations omitted]" (*In re*

Freeman's Estate, 34 NY2d 1, 10, 355 NYS2d 336, 341, 311 NE2d 480, 484; *see also Matter of Estate of Coughlin*, 221 AD2d 676, 633 NYS2d 610). The underlying litigation, though presenting novel questions of law which received unusual media attention, involved a relatively straightforward matter of statutory construction, and was not overly complex or unique. No special legal expertise was required, and there was no discovery or evidentiary hearings. Also, the essential facts were not in dispute. Review of the clerk's records reveals that the parties repeatedly asserted the same legal arguments throughout the litigation, with little deviation or new material added during the various stages.

The course of the litigation was, however, protracted as the result of certain claims – ultimately dismissed by this Court – made by each side, and by the procedural strategy employed by the APA. In this regard, only a few matters need be noted. The APA objects to any award of legal fees for LFF's initial application for a preliminary injunction precluding the APA from enforcing its administrative determination pending resolution of the litigation because this Court executed an order to show cause presented by LFF's counsel which contained a temporary restraining order (TRO) in violation of CPLR §6313[a]. As a result, the APA claims, the course of the litigation was extended. Because this Court immediately rectified this error by issuing an amended order to show cause without any TRO, and since the application for a preliminary injunction would have been made and considered by this Court to the same extent had no TRO ever been issued, the APA's assertion must be and is rejected.

The overriding factor causing the litigation to be protracted was not the claims of LFF that were ultimately dismissed or not reached by this Court. Instead it was the APA's defensive strategy. First, the APA took the procedural step of filing a motion to dismiss rather than an answer and return. The APA could have asserted in its answer the same claims made in its motion to dismiss, thereby allowing the parties and the Court to address all relevant issues at one time rather than piecemeal. While it is legally proper to initially respond to an article 78 petition by a motion to dismiss, and thereafter serve an answer and return if the motion is denied, this procedure necessarily prolongs the litigation unless the motion is granted. Moreover, it has a chilling effect on parties aggrieved by governmental action because litigation against the state is made more

protracted and costly, perhaps unaffordable. Second, the APA asserted as a complete defense that the August 2007 dismissal of LFF's prior declaratory judgment action as premature and not ripe for judicial intervention was determinative of the issues before this Court. This defense was totally opposite to the argument openly and vigorously asserted by the APA in that prior proceeding, namely that LFF could later challenge any unfavorable jurisdictional determination made by the APA if that prior proceeding was dismissed. This aspect of the APA's strategy, from its inception, violated the doctrine of judicial estoppel, also known as estoppel against inconsistent positions (*see, Martin v. C.A. Productions Co.*, 8 NY2d 226, 231, 203 NYS2d 845, 849, 168 NE2d 666, 668; *Maas v. Cornell University*, 253 AD2d 1, 683 NYS2d 634, *affirmed* 94 NY2d 87, 699 NYS2d 716, 721 NE2d 966; *Ford Motor Credit Co. v. Colonial Funding Corp.*, 215 AD2d 435, 626 NYS2d 527 *Neumann v. Metropolitan Medical Group*, 153 AD2d 888, 545 NYS2d 592). "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him" (*Davis v. Wakelee* 156 US 680, 690, 15 SCt 555, 559 [US 1895];. "Invocation of the doctrine of estoppel is required in such circumstances lest a mockery be made of the search for truth" (*Karasik v. Bird*, 104 AD2d 758, 759, 480 NYS2d 491, 493), to insure "'the orderly administration of justice and regard for the dignity of judicial proceedings'" *(State of Arizona v. Shamrock Foods Co.*, 9th Cir, 729 F2d 1208, 1215, quoting from 1B Moore's Fed Prac, par 405[8], p. 767)" (*Environmental Concern, Inc. v. Larchwood Const. Corp.*, 101 AD2d 591, 593, 476 NYS2d 175, 177), and because "[w]e cannot tolerate this 'playing "fast and loose with the courts"' (*Scarano v. Central R. Co. of N.J.*, 3rd Cir, 203 F2d 510, 513; *see, also, Konstantinidis v. Chen*, 626 F2d 933, DC Cir)" (*id*, at 594, 476 NYS2d at 177). "[H]aving charted their own course, the [APA] cannot now be heard to complain of the result *(cf., Orens v. Secofsky*, 60 AD2d 866, 867, 401 NYS2d 259)" (*Neumann v. Metropolitan Medical Group* 153 AD2d 888, 888, 545 NYS2d 592, 593).

However, the APA's counsel correctly challenges many of the billing entries by LFF's counsel. Billing entries which do not allocate the time claimed among several tasks are rejected except to the extent that this

Court has been able to allocate a reasonable time to the preparation of pleadings, motion papers, briefs or memoranda of law, and other court documents based upon review of the clerk's records. Compensation is denied for "strategy" discussions and conferences with LFF's corporate principals, there being no justification provided. No fees are awarded for time expended in dealing with the media, or for publicizing matters related to the case including on LFF's website (*Role Models America, Inc. v. Brownlee*, 353 F3d 962, 973), or for time expended in connection with the appeal from the August 2007 proceeding, including for the motion to consolidate that appeal with the appeal in this proceeding, or the appeal from the dismissal of the APA's enforcement action. Charges for time spent dealing with the New York State Farm Bureau relative to its *amicus* status and submissions are denied (*see Brady v. Wal-Mart Stores, Inc.*, 455 FSupp2d 157, 213). Fifty percent (50%) of the time charged for travel shall be compensated (*see Luciano v. Olsten Corp.*, 925 FSupp 956, 965).

The present litigation consisted of five stages: commencement of the proceeding and the application for a preliminary injunction, including the motion to reargue; the APA's motion to dismiss, including its motion for permission to appeal this Court's July 2, 2008 decision and order; the APA's answer and return and the defendant's motion for judgment; the appeal from the November 19, 2008 decision and order herein, including the APA's motion for a stay; and the instant application for counsel fees and expenses. The reasonable hours attributable to the legal services rendered to LFF for each stage, including travel time at fifty percent, is as follows:

Stage	Privitera	Lamme
Commence Action/Prelim. Inj.	29.50	63.75
Travel (50%)	2.50	7.75
APA motion to dismiss	25.25	41.75
Travel (50%)	2.50	2.50
APA answer/return - LFF motion .	27.50	43.75
Appeal	31.75	46.25
Art. 86 application	19.75	32.50
Travel (50%)	2.50	2.50
Total	141.25	240.75

As to the issue of reasonable hourly rate, "[i]t is well settled that the hourly rate at which counsel is to be compensated is a matter committed to Supreme Court's sound discretion (*see generally, Matter of Rourke v. New York State Dept. of Correctional Servs.,* 245 AD2d 870, 871, 666 NYS2d 765)" (*Perez v. New York State Dept. of Labor*, 259 AD2d 161, 164, 697 NYS2d 718, 721). In arriving at a reasonable hourly rate, the Court must consider what a reasonable hourly rate is in "'the district in which the court sits.' *Polk v. New York State Department of Correctional Services,* 722 F2d 23, 25" (*Luciano v. Olsten Corporation*, 109 F3d 111, 115), and in so doing may rely on its "own knowledge of the local hourly rates (*see, Miele v. New York State Teamsters Conf. Pen. & Ret. Fund,* 2nd Cir., 831 F2d 407, 409)" (*Behavior Research Institute, Inc. v. Ambach*, 144 AD2d 872, 874, 535 NYS2d 465, 467). Out-of-district rates may also be considered (*see Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany and Albany County Bd. of Elections*, 522 F3d 182, 191 [2nd Cir, 2008]).

While LFF has submitted affidavits from four attorneys reflecting that the requested hourly rates of $300.00 for a litigation partner and $175.00 for an associate attorney are charged in the Fourth Judicial District, this Court is well aware of experienced litigation attorneys charging substantially less in the district. For instance, a number of experienced trial attorneys accept the assigned counsel rate of $75.00 per hour in criminal cases, some of which are significantly more complex than the underlying proceeding here. A reasonable hourly rate under the prevailing market conditions here is $225.00 for Privitera,, and $150.00 for Lamme. This results in a reasonable fee of $31,781.25 for Privitera (141.25 hours times $225.00) and $36,112.50 for Lamme (240.75 hours times $150.00). The Court also awards expenses in the amount of $3,796.53, for a total award of attorneys fees and expenses of $71,690.28.

The Clerk is directed to enter judgment in favor of Lewis Family Farm, Inc. and against the Adirondack Park Agency in the total sum of $71,690.28.

IT IS SO ORDERED.

ENTER

Richard B. Meyer
J.S.C. (Acting)