

STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

ADIRONDACK PARK AGENCY,

Respondent.

AFFIRMATION

Index No. 315-08

Hon. Richard B. Meyer

ADIRONDACK PARK AGENCY,

Plaintiff,

-against-

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

Defendants.

COUNTERCLAIM

Index No.: 332-08

Hon. Richard B. Meyer

**THIRD AFFIRMATION OF JOHN J. PRIVITERA, COUNSEL FOR PETITIONER, IN
RELATION TO ATTORNEY'S FEE AWARD**

JOHN J. PRIVITERA, under penalty of perjury, hereby affirms as follows:

1. I am an attorney at law, licensed to practice law in the State of New York, and a Member of the Bar of this Court.

2. I make this Second Affirmation in support of the Lewis Family Farm's application for an attorney's fee award.

The McNamee Law Firm is Entitled to a Judicial Determination as to the "Kind and Quality of the Services" Rendered by the Firm to the Lewis Family Farm.

3. The Agency attacks my law firm's fees for professional services, alleging that they are unreasonable and excessive. Given the very public nature of these proceedings and the effort to which the Agency has gone in challenging my professionalism, I respectfully suggest

that my firm is entitled to a judicial determination as to the quality of my work. This is not only compelled by the factual circumstances of this case, but fully required by CPLR § 8601(a), which states that the Court's determination as to a fee award, although fully within its discretion, "shall be determined" upon "the kind and quality of services furnished" in addition to prevailing market rates.

4. I have been a litigator for over 32 years. I am a member of the Bar of New York and the District of Columbia, with admission to practice before the United States Supreme Court and the United States Courts of Appeals for the District of Columbia, Second Circuit, Fourth Circuit, Fifth Circuit, Eighth Circuit, Ninth Circuit and Eleventh Circuit. I have appeared *pro hac vice* in many other courts. I am a regular speaker at continuing legal education programs for the New York State Bar Association ("NYSBA"), including, most recently, a continuing legal education lecture at the Annual Meeting of NYSBA's Real Property Law Section in the summer of 2009. I served as the Chair of the Real Property Law Section of the State Bar Association and I have served on NYSBA's House of Delegates for four years, including a recently renewed term as an elected delegate from the Third Judicial District. In addition, I have published numerous articles. I also have the highest rating from the two national rating services, Martindale Hubbell, in which my rating is "AV"¹ and Superlawyers, a new rating system which objectively selects the top five percent of the lawyers. My resume is attached as **Exhibit "A"**.

5. I am a senior partner in my firm, and I have an ethical obligation to maintain my professional reputation for the "kind and quality of services" which I provide and take pride in.

¹ After a lawyer's general ethical standards and legal abilities are confirmed, his/her ratings are aggregated by Martindale Hubbell to produce a numeric rating. An "AV" rating is considered "preeminent" and a "testament to the fact that a lawyer's peers rank him or her at the highest level of professional excellence." (See <http://www.martindale.com>).

Therefore, I respectfully suggest that I am entitled to a professional finding regarding the kind of lawyer that I am and the quality of services that I provided in this case.

6. I respectfully maintain that the number of hours for which I have billed the Lewis Family Farm in this case significantly underestimates both the quality of services that I have provided to my client and the amount of time that I have devoted to the success in this case. With all due respect to the valuable work provided by plumbers, carpenters, mechanics, roofers, welders and others, I do not limit my professional work on behalf of a client to those moments when I have a pen in hand or keyboard at my finger tips. Private practice is not a 9 to 5 job, nor was my devotion to this case chained to my office. Rather, my mind is often on the dispute at hand, and the best interests of the client, when I am not at my desk. I recall elements of my arguments in this case having occurred to me while mowing the lawn, jogging, chopping wood and climbing a mountain. It is not out of embarrassment that I declined to bill the Lewis Family Farm for a moment of inspiration that occurred while taking a shower, but rather, my devotion to the cause and task at hand has been more important than reflecting every moment of thought in a bill. I did not charge the Lewis Family Farm for any of this time, notwithstanding the fact that these thoughts significantly enhanced the quality of my professionalism on behalf of the Farm. I have also received calls from Salim B. "Sandy" Lewis at home and on my cell phone during late evenings, early mornings and weekends, always staying devoted to my client. Much of this time remained unbilled as well. Indeed, devotion to the client's interest at many waking moments is the essence of professionalism, which separates the profession of the practice of law from the trades and other businesses.

7. For centuries, lawyers charged clients based on flat fees, piece work, relationships and perceived values. I specifically recall an incident when I first began to practice law in a

well-heeled litigation firm in Washington, D.C. in which a senior partner charged a client \$50,000.00 for no more than a few hours work and the client was overjoyed because of the result. I also specifically recall a client relationship in Corinth, New York (Saratoga County-Fourth Judicial District), several years ago, in which I charged about \$5,000.00, achieved a successful result and the client insisted that my bill was too low. For all of these reasons, the historic professionalism of practicing law, which is not based on hourly rates, is rapidly returning to value-based billing, a return that is supported by many clients, professionals and academics.²

The McNamee Law Firm is Part of the Community of Lawyers in the Fourth Judicial District

8. Although my law firm maintains its primary office and headquarters in Albany, we have an active office in Saratoga County, out of which I have worked on numerous occasions. A few of my partners spend a great deal of time there.

9. Moreover, most of my work is done on behalf of clients in the Fourth Judicial District. Indeed, a full 62% of my receipts in 2009 were from clients based in the Fourth Judicial Department and I expect this percentage to rise in 2010. This percentage does not include the Lewis Family Farm. These include a ranch in Essex County; a developer in Saratoga County; a businessman in Hamilton County; a recognized Indian Tribe in St. Lawrence/Franklin County; another businessman in Essex County; a large factory in Warren County; a large factory in Saratoga County; a food manufacturer in Schenectady County; a world wide chemical company

² See Scott Turow, *The Billable Hour Must Die: It Rewards Inefficiency. It Makes Clients Suspicious. And It May Be Unethical*, 93 A.B.A. J. 32 (2007) ("The widespread practice of billing by the hour exists almost in defiance of the principles that are supposed to guide our profession"); Mark E. Lacis, *Life Without An Hourly Rate*, 36 Colo. Lawyer 67 (2007) ("Law firms need to embrace change"); Arthur G. Greene, *Thinking Outside the Box: Leave the Billable-Hours Factories Behind*, 13 Bus. L. Today 17 (2004) ("There is no one fee method that fits all situations. Lawyers need to understand the broad range of fee agreements possible in order to effectively explore the options and select one that best fits a particular situation"); Ronald D. Rotunda, *Moving from Billable Hours to Fixed Fees: Task-Based Fees and Legal Ethics*, 47 U. Kan. L. Rev. 819 (1999) ("It is increasingly common for clients or lawyers to propose task-based, or fixed fee billing). See generally accompanying Affirmation of Jerry Hoffman, Esq., dated February 23, 2010, ¶ 5.

based on Schenectady County; and another homeowner in Essex County. Over the years, I have appeared in the Courts of each of these Counties and I have appeared in the United States District Court for the Northern District of New York and the United States District Court for the Southern District of New York on behalf of these clients. Although there are some decades-long relationships among these clients in which, out of respect for the relationship, my hourly rate is slightly less than \$300 per hour, the overwhelming majority of my work in the Fourth Judicial Department and on behalf of clients here is at the rate of \$300 per hour.

10. I also do most of my pro bono work in the Fourth Judicial District, having worked 76.75 pro bono hours in the Fourth Judicial District in 2009. This pro bono work in this District had a fair market value of \$23,000.00.

11. For all of these reasons, I respectfully pray that this Court make a judicial determination that the McNamee Law Firm in general, and Jacob F. Lamme and I in particular, are members of the "prevailing community" of the Fourth Judicial District.

My Long-Standing Relationship with the Lewis Family Farm

12. In 1999, I represented the Lewis Family Farm in defense of an enforcement action relating to wetlands against the Farm that had been commenced by the Attorney General's Office. At the Farm's request, no formal retainer agreement was signed. The Farm simply agreed to pay for my professional services. Based upon this trust and understanding, I opened a file for this wetland matter at my then standard hourly rate of \$250.00 an hour. I realize now that, had I been more diligent in maintaining the true value of my hourly rate, as adjusted for inflation from my 1999 hourly rate of \$250.00, my hourly rate would now be about \$330.00 an hour. New York State's objection to my hourly rate has now forced me to revisit the value of my services as reflected in a fair statement of my hourly rate.

13. The 1999 Lewis Family Farm wetland case was resolved without any admission of liability by the Farm and without payment of any fine by the Farm. The Farm paid me for my professional services for this work. Because of this historic professional relationship, I was not concerned when the Lewis Family Farm declined to enter into a written retainer agreement with me. (See N.Y. Rules of Professional Conduct, § 1215.2). When the Farm contacted me in 2007 and asked me to take over the defense of the Farm as against the Agency's illegal actions, I simply agreed to charge my standard hourly rate again and, once again, trusted that the Farm would pay my fees as it had in the past.

14. Indeed, the Lewis Family Farm has paid a significant portion of my professional fees and expenses in this case based upon the oral agreement between the Farm and my Firm. My Firm's records reveal that the Farm paid my firm \$86,693.20 in this case, based upon billings at my standard hourly rate of \$300.00 per hour and my associate, Jacob Lamme's then standard hourly rate of \$150.00 per hour, establishing as a matter of fact and law that our fees are reasonable. This payment to date essentially covers the administrative defense of the Agency's illegal enforcement action, which the Court of Appeals has held is not recoverable here under the Equal Access to Justice Act. See Greer v. Wing, 95 N.Y.2d 676, 680 n.2 (2001).

15. Once again, we respectfully maintain that Jacob Lamme, my associate, and I have been exceedingly efficient and cost effective in defending the Farm and have resisted, at every turn, the "big firm" impulse to overstaff and congregate over every plausible issue in a manner that greatly increases a firm's invoices.

16. Perhaps the largest law firm in New York State is the Attorney General's Office. The Agency is also replete with lawyers. The status conference held with this Court on February 22, 2010 was, once again, staffed by three Assistant Attorney's General, including the

appearance of a new lawyer, Susan L. Taylor, Esq., as well as a paralegal. We respectfully maintain that the best measure of the reasonableness of my time and that of my associate, Jacob Lamme, in prosecuting this case is the amount of time spent by the **ten New York State lawyers** who worked against us in a manner that the Court has now held was contrary to New York Law. See Lewis Family Farm, Inc. v. Adirondack Park Agency, 2010 NY Slip Op 50180U (Essex County Sup. Ct., Feb. 3, 2010). (See Second Affirmation of John J. Privitera, Esq., dated September 23, 2009, ¶ 24-25). The State assiduously declines to come forward with these facts, from which this Court is justified in drawing an inference that they spent more time than we did. Respectfully, New York State's decision to field a 10-lawyer team is nothing short of an admission that it would have been reasonable for my firm to staff the case with ten attorneys.

The Award Sought is Below the "Prevailing Market Rate" in the Fourth Judicial District

17. This Court has determined that it will calculate the Lewis Family Farm's award of counsel fees and expenses based on "a reasonable hourly rate in the 'prevailing community', meaning 'the district in which the court sits'", which is the Fourth Judicial District, with the discretion to consider out-of-district rates. See Lewis Family Farm, Inc. v. Adirondack Park Agency, 2010 NY Slip Op 50180U, *9 (Essex County Sup. Ct., Feb. 3, 2010) (citations omitted).

18. The Court's discretion in this regard is vital because "[t]he legal communities of today are increasingly interconnected. To define markets simply by geography is too simplistic." See Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 552 F.3d 182, 192 (2d Cir. 2008). The Lewis Family Farm has previously established that the average billing rate range for a partner in Albany working in the "Capital Region" is \$308 to \$626 per hour, with the upper end of the scale being \$850 per hour. (See Affidavit of Jorge Valero, sworn to September

17, 2009, ¶ 7 and Ex. C). Thus, this Court has the discretion to use these hourly rates in computing the Lewis Family Farm's fee award in this case.

19. However, the Lewis Family Farm has submitted this fee application seeking to recover attorneys fees based on my standard rate of \$300 per hour, and \$150-\$175 per hour for my associate, Jacob F. Lamme. These rates are at or below the "prevailing market rate" in the Fourth Judicial District, for the kind and quality of services provided, as established by the following Affirmations from attorneys that are either based in or who regularly practice in that "prevailing community":

- Michael J. Cunningham, Esq.: A commercial litigator who regularly practices in the Fourth Judicial District and charges \$340 per hour, and whose associates' hourly rates have exceeded \$175 for the past six years. (Affirmation of Michael J. Cunningham, dated February 26, 2010).
- Jerry Hoffman, Esq.: An attorney who represents health care providers in the Fourth Judicial District at hourly rates up to \$350 per hour, with the support of associates at rates of \$200 to \$300 per hour. (Affirmation of Jerry Hoffman, Esq., dated February 23, 2010).
- Cynthia Feathers, Esq.: An attorney in the Fourth Judicial District who, at times, charges \$300 per hour for her services and considers this rate to be within the prevailing market rate for legal services performed in the Fourth Judicial District. (Affirmation of Cynthia Feathers, Esq., dated March 1, 2010).
- Benjamin R. Pratt, Jr., Esq.: An attorney based in the Fourth Judicial District, whose law firm's hourly rates are \$275 for partners and \$200 for

associates, who finds it reasonable for a law firm to charge hourly rates of \$300 for partners and \$150-\$175 for associates for significant litigation in the Fourth Judicial District.

(Affirmation of Benjamin R. Pratt, Jr., Esq., dated February 25, 2010).

- Ronald J. Briggs, Esq.: An attorney based in the Fourth Judicial District, who attests that there are a number of attorneys in the Fourth Judicial District who charge \$300 per hour or more for their legal services.

(Affirmation of Ronald J. Briggs, Esq., submitted September 23, 2009).

20. As this Court has already determined, it may rely on case law decided under the federal EAJA (28 U.S.C. § 2412) to determine the standard for establishing the location of the "prevailing community". See Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 552 F.3d 182, 192 (2d Cir. 2008); Luciano v. Olsten Corp., 109 F.3d 111 (2d Cir. 1997); Polk v. NYS Dep't of Corr. Svcs., 722 F.2d 23 (2d Cir. 1983).

21. However, this Court cannot rely on the determination of hourly rates or the mathematical equations used to calculate fee awards set forth in any case decided under 28 U.S.C. § 2412 because—unlike the New York State EAJA—the federal EAJA provides a statutory prohibition of awarding fees in excess of \$125 per hour "unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. § 2412(d)(2). Thus, when federal courts make fee awards under the federal EAJA, they are constrained by the statutory benchmark of \$125 per hour and cannot award true prevailing market rates. Moreover, each rate determination is case specific, so rates differ from case to case since it is not a true prevailing market rate being established. See e.g., Parsons v. Commissioner of Social Security,

2008 U.S. Dist. LEXIS 99739 (N.D.N.Y. Dec. 10, 2008) (establishing an hourly rate of \$195 per hour under the federal EAJA); Alexander v. Cahill, 2009 U.S. Dist. LEXIS 29165 (N.D.N.Y. March 30, 2009) (establishing an hourly rate of \$210 per hour for the partner and \$120 per hour for the associate under the federal EAJA).

22. This Court does not face such a constraint, and it would be error to rely on any particular rate established under the federal EAJA. The New York Legislature made a deliberate decision not to index the definition of a "reasonable rate" under the New York State EAJA. Rather, a determination of the reasonableness of a true prevailing market rate is subject to the sound discretion of this Court, which will not be disturbed upon review absent abuse by the Court. See Matter of Simpkins v. Riley, 193 A.D.2d 1009, 1010-11 (3d Dep't 1993); Matter of Perez v. NYS Dep't of Labor, 259 A.D.2d 161, 163 (3d Dep't 1999); Matter of Barnett v. NYS Dep't of Soc. Svcs., 212 A.D.2d 696, 697 (2d Dep't 1995).

The State's Attempt to Discredit the True "Prevailing Market Rate" Must Fail

23. Notwithstanding the affirmations from attorneys located and practicing in the Fourth Judicial District, which conclusively establish that my rate of \$300 per hour and my associate's rate of \$150-\$175 per hour are *per se* reasonable and within the prevailing market rates in the Fourth Judicial District, the State has attempted to cast doubt upon the true market rate for legal services in Albany and the Fourth Judicial District by relying on a single outdated (2004) survey, which the State claims establishes that the Lewis Family Farm is only entitled to collect its fee award based on a median rate of \$150. (See Affirmation of Loretta Simon, dated August 28, 2009, ¶¶ 17-18 and Ex. H).

24. The State declined to provide the Lewis Family Farm or the Court with a full copy of the 2004 survey upon which it relies and only produced a select handful of pages.

Therefore, I tracked down a copy of this out-dated and no longer published survey, which is entitled *The 2004 Desktop Reference on the Economics of Law Practice in New York State* (NYSBA 2004) (hereafter "2004 Survey"), and have attached a complete copy as **Exhibit "B"**.

25. Interestingly, the 2004 Survey actually supports the Lewis Family Farm – not the Agency. First of all, the hourly rates set forth in the 2004 Survey are only indicative of hourly rates as they were in 2003. (See Ex. B, pp. 283-90). Thus, if any credence is given to this information, then the numbers must be adjusted to reflect inflation, which compounds at approximately 3% per annum. According to the 2004 Survey, my 2003 rate should be \$275 per hour because I am in the 95th percentile, based on my qualifications, reputation and experience, and my associate's rate should be \$150 per hour. (See Ex. B, pp. 263-64). The rates that my law firm charged the Lewis Family Farm were below these rates because, when adjusted for inflation to 2008, my rate would be \$322 per hour, according to the 2004 Survey upon which the State relies.

26. In any event, the 2004 Survey's utility to the instant motion is limited because (i) the "Other" category is so vast that it includes approximately fifty (50) Counties (see Ex. B, pg. 2), and (ii) only 4.2% of the attorneys responding to the survey were located in the Fourth Judicial District (see Ex. B, pg. 7). Thus, unlike the affirmations of attorneys practicing in the Fourth Judicial District, the 2004 Survey is not representative of the true prevailing market rate.

27. No doubt the State will attempt to attack the "prevailing market rate" in the Fourth Judicial District, as established by the esteemed attorneys who have provided proof on this issue. The State even may find an attorney or two to submit an affidavit saying that their rates are lower than \$300 per hour. But, it is not about whether the State can find someone who charges less than \$300 for his or her legal services. Rather, this is about establishing the true "prevailing

market rate" for the "kind and quality of services" that the Lewis Family Farm received in this litigation. On this record, the Court must find that the fees and expenses at issue were well within the prevailing market rate in the Fourth Judicial District.

The Appropriate Fee Award for the Lewis Family Farm

28. On February 12, 2009, pursuant to this Court's Decision and Order of February 3, 2010, I served "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" upon the Agency's counsel. See Lewis Family Farm, Inc. v. Adirondack Park Agency, 2010 NY Slip Op 50180U, *9 (Essex County Sup. Ct., Feb. 3, 2010). A copy of this billing record is attached hereto as **Exhibit "C"**.

29. An updated version of those billing records, which includes fees and expenses incurred by the Lewis Family Farm through March 4, 2010, is attached hereto as **Exhibit "D"**.

30. We did everything we could to hold down the Lewis Family Farm's counsel fees and expenses in this case. Before the Agency Board members made the illegal administrative enforcement determination, we presented them with all of the law and agricultural policy reasons why they should not follow the grossly mistaken view of the Adirondack Park Agency Act provided by Agency staff counsel. We presented these matters in a rational, cogent manner, as set forth in **Exhibit "E"**. All of the counsel fees and expenses now at issue and before this Court are a direct result of the Agency and the Attorney General ignoring the Lewis Family Farm, the New York State Constitution and the Commissioner of Agriculture and Markets at a time when this litigation could have been avoided.

31. Based on the foregoing, and for the reasons set forth in the other submissions on this motion, the Lewis Family Farm respectfully asks this Court to enter an order granting an award of counsel fees and expenses to the Lewis Family Farm in an amount equal to or greater than \$226,087.53, together with such other and further relief as the Court deems just and proper.

I hereby swear and affirm the above under penalty of perjury this 4th day of March, 2010.

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

A handwritten signature in black ink, appearing to read 'John J. Privitera', is written over a horizontal line.

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