STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT NO. 13
	) SS:	
COUNTY OF MARION	)	CAUSE NO. 49D13-2106-PL-018812

SALINI IMPREGLIO/S.A. HEALY JOINT VENTURE and THE LANE CONSTRUCTION CORPORATION,	)
Petitioners,	)
v.	)
INDIANA DEPARTMENT OF LABOR and the INDIANA OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION,	)
Respondents.	)

PETITIONERS' REPLY IN SUPPORT OF
PETITION FOR ATTORNEYS' FEES AND COSTS

It takes time and money to unearth and prove unlawful conduct by the administrative state—especially when the administrative agencies disobey Court orders to produce documents, make material misrepresentations about the existence of documents and adequacy of their production, and spoliate evidence. The misconduct revealed and proven here was material, spanned three years, "caused significant delays and needlessly forced Petitioners and the Court to expend significant resources." (Order, ¶¶ 25-26.) It was "unreasonable," and "Respondents and their counsel" acted "with disregard for Petitioners, the Court, and the orderly process of justice." (*Id.* at ¶ 25.)

These actions should have consequences. Yet Respondents ask the Court to let them off scot-free. Indeed, they say they should not have to pay a single cent of Petitioners' fees or costs. (Resp., p. 1.) Their reason? "The Court has already sanctioned Respondents by vacating the Safety Orders." (*Id.*)

What Respondents ignore, however, is that the Court vacated all the Safety Orders because their service was deficient, and any attempt to cure the insufficient service would be time barred. (Order, ¶¶ 16-17, 28.) In addition to deficient service, the willful Safety Order was vacated because it violated Lane's due process rights. (*Id.* at ¶¶ 21-22.) Thus, the Court has yet to issue an independent sanction for the Respondents' misconduct.

In the alternative, Respondents ask the Court to limit the award of fees and costs to $61,100, the total penalties at issue. (Resp., p. 1.) In doing so, they ignore the Declaration of David Bondanza, which proves the costs to Petitioners' business imposed by the willful Safety Order far exceeded the financial penalty associated with it. They also ignore that they refused to engage in any settlement negotiations. Adopting Respondents' view would not only punish Petitioners for bringing Respondents' discovery misconduct and due process violations to light, but it would incentivize Respondents to make future litigation involving penalties more financially burdensome than paying off the penalties, regardless of their merits or Respondents' disregard for complying with due process or their discovery obligations to produce and preserve evidence.

These undisputed facts, along with Petitioners' payment of Bose's fees and the misconduct that "needlessly forced" Petitioners "to expend significant resources," show the time spent by Petitioners on this matter was reasonable. Notably, despite meticulously reviewing the time entries by Petitioners' counsel, Respondents identify only about 62 hours of specific time entries that they claim were excessive, administrative, and vague. (Resp., pp. 10-15.) That total is slightly less than eight percent (8%) of the 777.2 hours billed through June 30, 2024. (Pet. Fees, Ex. 2.) In other words, Respondents challenge fewer than one-twelfth of Petitioners' time entries out of a three-year litigation odyssey that was of Respondents' making with no acknowledgment or contrition of their own misconduct; yet they deign to criticize this marginal assortment of time entries and staffing decisions that Petitioners and their experienced general counsel determined were reasonable and appropriate when paying such invoices.

As to rates, the Bondanza Declaration and Affidavit of Bradley R. Sugarman establish that Bose McKinney & Evans' rates are reasonable. The numerous trial court orders awarding all Bose's fees and holding that they are reasonable further show its rates are reasonable. In response to this evidence and precedent, Respondents offer argument of counsel only. They argue sanctioned administrative agencies, not the free market, should set the rate of legal fees. Fortunately, the law is that the free market sets the reasonable rate—not the administrative agencies gone awry.

Ultimately, the outcome of this matter strikes at the heart of the judiciary. Without the power to sanction the administrative state, there would be no independent judiciary. *Noble Cnty. v. Rogers*, 745 N.E.2d 194, 198-199 (Ind. 2001). There would be no way to ensure judicial proceedings function properly either. *Id.* Awarding fees as a sanction against administrative agencies that have consistently disregarded this Court's authority and the orderly process of justice upholds these fundamental principles.

Argument

1. *The Court has yet to issue an independent sanction for the misconduct, and an award of fees and costs is warranted under the facts and caselaw.*

The Court concluded that awarding Petitioners' their fees and costs as a sanction for the misconduct "may be warranted." (Order, ¶ 27.) And as explained in the Fee Petition, the nature, amount, and duration of the misconduct make such an award more than appropriate. (Pet. Fees, pp. 4-9.) One of the most troubling aspects of the misconduct is that it occurred despite of, and so soon after, the *Littler* decision. Respondents and their counsel say they "take[] seriously the lessons of *Littler v. Martinez*, 2020 WL 42776 (S.D. Ind. Jan. 3, 2020)." (Resp., p. 1 n.1.) But if that were true, the misconduct would not have occurred. Actions speak louder than words, and actions should have consequences. In accordance with *Littler*, awarding Petitioners all their fees and costs is warranted. *Littler*, 2020 WL 42776, at *38 ("None of these practices can continue, and increasingly severe sanctions will be warranted if they do.")

Nevertheless, Respondents ask the Court to outright deny the petition for fees, costs, and expenses. (Resp., pp. 1, 4-6.) Their extreme request is based on a misunderstanding of the Order. First, Respondents mistakenly believe vacating the Safety Orders was an independent sanction. (*Id.*) Although the Court said that "vacating the Safety Orders is an appropriate sanction for the misconduct," this was not the only reason the Court vacated the Safety Orders. The deficient service of the Safety Orders combined with any attempt to cure the insufficient service being time barred was an independent basis for vacating the Safety Orders. (Order, ¶¶ 16-17, 28.) Further, the willful Safety Order was also vacated because it violated Lane's due process rights. (*Id.* at ¶ 21.) Thus, the Court has yet to issue an independent (and adequate) sanction for the unacceptable misconduct that occurred in this case.

Second, Respondents wrongly suggest the Court issued sanctions under Trial Rule 37 and present arguments under that Rule. (Resp., pp. 4-7) (citing T.R. 37(B).) The Court issued sanctions under its inherent authority. (Order, p. 9) ("Sanctions under the Court's inherent authority are warranted.") Although cases involving violations of discovery orders, unreasonable discovery behavior, and awards of attorneys' fees may present persuasive value, like *Int'l Bus. Machines Corp. v. ACS Hum. Servs., LLC*, 999 N.E.2d 880, 894 (Ind. Ct. App. 2013), Petitioners are requesting fees and costs under the Court's inherent authority. Here, there is no dispute that Respondents and their counsel repeatedly defied not just the rules of discovery, but also the orders of this Court, such

that Petitioners have subjected themselves to sanctions under the Court's inherent authority.

2. Capping sanctions at the amount of penalties at issue would create perverse incentives and not adequately account for the misconduct here.

In the alternative, Respondents ask the Court to cap the sanctions at the amount of penalties at issue, $61,100. There are several reasons why the Court should reject Respondents' argument. First, for the reasons stated in the Fee Petition, the Court should order Respondents to pay all Petitioners' fees and costs. (Pet. Fees, pp. 4-9.)

Second, adopting a mechanical rule that a fee award cannot exceed the civil penalties at issue would be reversible error. Respondents cite no case to support this request. (Resp., p. 9.) And this is not the law. For example, in *R.L. Turner Corp. v. Wressell*, 44 N.E.3d 26, 35, 39-41 (Ind. Ct. App. 2015), the court affirmed an award of attorneys' fees that was approximately nine times the damages that were awarded. In doing so, the court rejected defendant's argument that such an award was "patently unreasonable."

The Seventh Circuit has similarly held that a "court should not deny a party its requested fees solely because they would exceed the damages or automatically reduce the fees to make them equivalent to the damages received." *Cooper v. Retrieval-Masters Creditors Bureau, Inc.*, 42 F.4th 675, 687 (7th Cir. 2022). Such a rule is inappropriate in our system of justice because in some cases, "rights that cannot be valued solely in monetary terms" are vindicated. *Id.* Moreover, in certain situations, the harms checked and principles established are more important than the monetary damages at issue. *Id.*

This case is one of those cases. The undisputed Bondanza Declaration proves the harms to Petitioners if the willful Safety Order had been upheld were much greater than the monetary penalty associated with it. (Pet. Fees, pp. 2, 12-13.) In addition, unearthing misconduct by the administrative state and holding it accountable serve a vital public interest. *See Littler*, 2020 WL 42776, at *37-38 ("It is paramount that the Court deter such misconduct.")

Third, adopting Respondents' mechanical rule would create perverse incentives. The administrative state would know that no matter how serious or frequent its misconduct is in the future, its risk of sanctions is capped at the amount of penalties at issue. Often, the civil penalties associated with safety orders are less than $10,000.[1] Respondents' proposed rule would hamper courts' ability "[t]o protect the proper functioning of judicial proceedings." *Rogers*, 745 N.E.2d at 198. Additionally, it would unfairly burden litigants to choose between exonerating themselves and/or exposing agency misconduct versus the potentially prohibitive cost of litigating against a government agency unconstrained by finances or the risk of monetary repercussions for driving the cost of challenging the agency as high as possible through delay and other malfeasance. Respondents' proposed rule would, therefore, incentivize and reward

[1] Here, the penalties for the alleged serious violations were $5,000, $3,500, and $2,500. (Pet. Judicial Review, Ex. A.) The penalty for the alleged willful violation was $50,000. (*Id.*) The penalty for the alleged nonserious violation was $100. (*Id.*) The IOSHA inspector who issued the willful safety order testified this was the only one she issued in her 15-year career (and she disagreed with it). (Pet'rs. Br., pp. 20, 44-49.)

agency misconduct and substantially impair the Court's ability to deter future misconduct. Thus, an award of fees, costs, and expenses should not be capped at $61,100 in this case or otherwise tied to the amount of the penalty in any way. Respondents' longstanding, indefensible misconduct cost Petitioners far more than the amount of the penalty, and they should be brought to bear for that misconduct by making Petitioners financially whole.

3. *Bose's fees are presumptively reasonable, and Respondents fail to rebut that presumption or the evidence and precedent showing that the fees are reasonable.*

The facts in the record, including Petitioners' payment of Bose's fees, Respondents' refusal to engage in settlement negotiations, the Bondanza Declaration, the Sugarman Affidavit, and the facts found in the Order establish Bose's fees are reasonable. Respondents do not dispute these underlying facts. Likewise, Respondents do not (i) address the mountains of precedent holding that Bose's fees are reasonable and awarding all of Bose's fees or (ii) submit expert testimony contradicting the evidence of reasonableness set forth in the Bondanza Declaration and Sugarman Affidavit.

Instead, they argue that despite Petitioners paying Bose's fees, the presumption of reasonableness does not apply because this is not an indemnification case. (Resp., pp. 7-8.) They say that unlike in indemnification cases where an indemnified party expects its attorneys' fees to be paid by the opposing party, "the parties here had no expectation at the outset of litigation that the other party would be required to bear the cost of the

judicial review." (Resp., p. 8.) But this fact provides even more support for concluding that Bose's fees are reasonable. Despite not expecting to be repaid at the outset of the litigation, Petitioners agreed to and paid Bose's fees. Thus, Bose's fees are reasonable. *Medcom Holding Co. v. Baxter Travenol Lab'ys, Inc.*, 200 F.3d 518, 521 (7th Cir. 1999) ("One indicator of reasonableness is that MHC paid all of these bills at a time when its ultimate recovery was uncertain."); *Fleet & Farm of Green Bay, Inc. v. United Fire & Cas. Co.*, No. 13-C-1013, 2015 WL 5839056, at *2 (E.D. Wis. Oct. 7, 2015) ("the question of coverage was hardly so clear that the Plaintiff had any incentive to run up the bill or to proceed on the assumption that United Fire would later be on the hook for those fees . . . Allowing a secondary 'reasonableness' inquiry (often years later) would add expense and squander judicial resources.")

Indeed, Petitioners could not have expected that they would need to pay their attorneys to overcome Respondents' stonewalling during discovery, to uncover Respondents' repeated misrepresentations to Petitioners and this Court, and to expose Respondents' spoliation of evidence and disregard for the Court's orders. Thus, Petitioners had every motivation to negotiate rates reasonable for the work and market and to scrutinize the bills to ensure that the legal services provided were reasonable and appropriate for them. Bondanza's Declaration shows Petitioners did so here, thereby establishing their reasonableness and necessity.

More fundamentally, Respondents miss the point of the presumption of reasonableness cases. The holding in those cases, and similar cases, is not that fees are reasonable because the party seeking fees was indemnified. The holding is that the free market sets the value of legal services. If someone is willing to pay, and does pay, an attorney's bills, then that is the "best evidence" the bills are reasonable. (Pet. Fees, pp. 9-10.) Courts apply this rule to cases involving contractual fee shifting, statutory fee shifting, and fee shifting under the Rules of Procedure.[2] Therefore, Bose's fees are presumptively reasonable and should be awarded because Respondents do not offer any evidence to rebut this presumption.

Respondents' only attempt to rebut this presumption comes through its attorneys. They say "this litigation was not complex" and "did not require such expertise" as the Bose lawyers have. (Resp., pp. 9-12.) The irony of Respondents' argument is that perhaps they could have avoided the Order (through settlement or by avoiding misconduct) if they had appreciated the complexity and seriousness of this matter, the facts in the record, their obligations to Petitioners and the Court in preserving and producing evidence, and the applicable procedural and substantive law. At bottom, the factual

[2] *RK Co. v. See*, 622 F.3d 846, 848, 854 (7th Cir. 2010) (finding that district court did not abuse its discretion in awarding RK the full amount of attorneys' fees requested when "the invoices were being paid by an RK employee" in a case involving federal and state securities laws, state deceptive practices law, and common law fraud); *Blaga v. Old Dominion Freight Line, Inc.*, No. 12 C 8049, 2015 WL 3957737, at *2-3 (N.D. Ill. June 29, 2015) (noting that "Seventh Circuit courts often look at what the attorney's paying clients have agreed to pay him or her" and awarding fees and costs under Rule 37).

complexity of this case is demonstrated by the length of the agency record (over 7,000 pages), and the legal complexity is shown by the type and number of legal claims and length of judicial review briefs. (Pet. Fees, pp. 11, 15.)

Respondents also nitpick a small amount of Bose's time entries. They say Bose overbilled and overstaffed this case. (Resp., pp. 9-15.) Again, the irony is that perhaps if Respondents appreciated the time and effort required to properly litigate this case, they would not be in this position (because they would have settled or not committed the misconduct). In addition, Respondents' criticisms are misleading and unpersuasive.

For instance, to support their argument, Respondents state that Petitioners staffed this case with seven partners. (*Id.* at 9-10.) Such a misleading and inaccurate statement deserves more attention. Four attorneys have appeared for Petitioners (three partners and one associate). Petitioners' Exhibit 2 submitted with the Fee Petition proves that an associate, Jackson Schroeder, billed more than half the total hours Bose billed Petitioners (through June 30, 2024, Mr. Schroeder billed 438.7 of the 772.8 total hours billed) and close to half the total fees. (Pet. Fees, Ex. 2.) Although other partners have billed on this matter, that time is de minimis and does not constitute seven partners being staffed on the case (*i.e.*, Alan Becker billed a total of $117, Samuel Laurin $212, Sandra Perry $267, and Justin Swanson $703).[3] (*Id.*)

[3] Such billing actually shows that Bose staffed the matter efficiently by ensuring that the work was channeled to those best equipped to do it, given the nature of the litigation.

What's more, this criticism and others leveled by Respondents are inconsistent with their own behavior. Respondents have had eight different attorneys who have appeared in this matter, and at the time of the judicial review hearing, had four attorneys with appearances on file. Moreover, although they complain about three Bose attorneys attending certain hearings, Resp., p. 12, Respondents had three attorneys attend the final hearing.

Finally, several of Respondents' criticisms are inaccurate or fail to appreciate the complexity and importance of the work. For example, Respondents say, "Petitioners billed an hour for drafting a Motion to hold a hearing remotely on December 6, 2021. (Petition Ex. B-1 at 29)." But this is false, and false statements like these are one of the reasons the Court sanctioned Respondents. What Petitioners actually billed for on December 6, 2021 included analyzing multiple pieces of correspondence from Respondents' counsel, assessing Respondents' request to hold the hearing remotely, drafting responsive correspondence, drafting the joint motion, and drafting the proposed order. (Pet. Fees, Ex. B-1, p. 29.)

Respondents also complain about Petitioners billing approximately 18 hours for work related to their Motion to Supplement and Compel Agency Record, 22 hours for work related to their Motion for Finding Respondents in Contempt of Court and for Appropriate Sanctions, and "nearly eight hours" for work related to their Motion for Hearing on and Reply in Support of Renewed Motion for Finding Respondents in

Contempt of Court and Appropriate Sanctions. (Resp., p. 14.) Notably, the only reason Petitioners had to spend any time working on these motions is because Respondents failed to give Petitioners the complete agency record and continued to refuse to do so despite the Court's December 2021 order. Plus, these motions were critical to Petitioners' case, and the agency record that Petitioners eventually received revealed evidence establishing the Safety Orders should be vacated. (Order, ¶ 26.) In addition, these motions and the ensuing discovery led to Petitioners proving that Respondents destroyed evidence and withheld evidence from this Court in disregard of the Court's order. (*Id.* at ¶¶ 8-15, 24-27.)

Ultimately, the Court need not split hairs over whether a time entry for 1.3 hours should have been a 1.2 or 0.9, Petitioners' staffing decisions, or the like. (Pet. Fees, Ex. C) ("The Court also rejects ITM's request to dissect the line-by-line details of the City's time entries or reweigh the staffing decisions of the City and its attorneys after the fact."); *Medcom*, 200 F.3d at 521 ("Instead of doing a detailed, hour-by-hour review after the fashion of a fee-shifting statute, therefore, the district judge should have undertaken an overview of MHC's aggregate costs to ensure that they were reasonable in relation to the stakes of the case and Baxter's litigation strategy."); *In re USA Gymnastics*, No. 18-9108-RLM-11, 2020 WL 5833189, at *14 (Bankr. S.D. Ind. Sept. 29, 2020) ("Given *Thomson's* directive, the Court will not rummage through the invoices, line by line, and question whether each specific charge is vague, duplicative, excessive, block billed, or fails some

other criteria[.]") Bose's fees are presumptively reasonable because Petitioners paid them, and the undisputed evidence and precedent in the record confirm their reasonableness. The Court should grant the Petition for Fees and Cost.

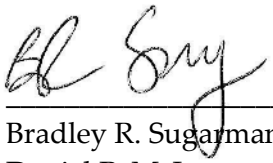
4. Updated request for fees and costs.

With their Fee Petition, Petitioners submitted evidence that the total fees and costs incurred through June 30, 2024 was $334,216.17. (Pet. Fees, Ex. B.) With this Reply, Petitioners are submitting a Supplemental Affidavit of Bradley R. Sugarman that establishes from July 1, 2024 through July 31, 2024, Petitioners incurred an additional $15,443.50 in attorney's fees and $55.78 in costs. (Ex. H.) This brings the total amount of fees and costs to $349,715.45. (*Id.*) Of the $349,715.45, Petitioners have paid $334,216.17, and the deadline for Petitioners to pay the invoice dated August 27, 2024 (for time incurred in July 2024) is not yet due. (*Id.*) Petitioners have yet to be invoiced for time incurred in August and September 2024 and reserve the right to submit and request post-July 31, 2024 fees and costs through any hearing on the Fee Petition. (*Id.*)

Conclusion

For the reasons stated in this Reply and Petitioners' Fee Petition, the Court should grant the Petition for Fees and Cost and award Petitioners all their attorneys' fees, costs, and expenses.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following via electronic transmission this 9th day of September 2024:

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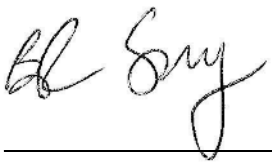

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