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Clerk
Marion County, Indiana

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.)

RESPONDENTS' RESPONSE TO PETITIONERS' PETITION FOR ATTORNEY'S FEES AND COSTS

The Court should deny Petitioners' Petition for Attorney's Fees and Costs or, alternatively, reduce Petitioners' award to not more than the civil penalty at issue—$61,100. The Court has already sanctioned Respondents by vacating the Safety Orders.[1] Moreover, Petitioners' request of over $300,000 in this case is unreasonable under the circumstances. Consequently, Petitioners are not entitled to additional sanctions in the form of attorney's fees and costs, and even if they were so entitled, they could recover only reasonable fees and costs.

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[1] The Office of the Attorney General recognizes its obligations to the Court and to other litigants and counsel. It takes seriously the lessons of *Littler v. Martinez*, 2020 WL 42776 (S.D. Ind. Jan. 3, 2020) and the concerns identified in the Court's final order.

BACKGROUND

On June 10, 2024, this Court granted Petitioners' Verified Petition for Judicial Review and vacated Indiana Department of Labor's March 25, 2021, Safety Orders. Final Order at 11. What preceded the Final Order was a protracted dispute between Petitioners and Respondents over the scope of the agency record and later the supplementation of the agency record owed. Final Order ¶¶ 7–15. The Court's Final Order made numerous findings of fact regarding Respondents conduct over the course of the judicial review. Namely, the Court found that Respondents failed to produce documents on several occasions as required by the Court's December 17, 2021 Order Granting Petitioners' Motion to Supplement and Compel the Agency Record; that Respondents made several false statements concerning the production of documents included in the supplemented agency record; and that Respondents spoiled evidence by removing information from the Safety Order files. Final Order ¶¶ 9–14.

The Court concluded that "entering a ruling in favor of Petitioners and against Respondents and vacating the Safety Orders is an appropriate sanction for the misconduct." Final Order ¶ 27. The Court also stated that Petitioner may submit a Petition for fees and costs within 30 days of the Final Order. *Id.* Petitioners filed their Petition for Attorney's Fees and Costs on June 10, 2024, requesting a total of $334,216.17 in fees and costs, to be apportioned jointly and severely amongst Respondents and the Office of the Indiana Attorney General.

LEGAL STANDARD

The general rule in Indiana and across the country "is that each party pays its own attorney's fees." *River Ridge Development Authority*, *v. Outfront Media, LLC*, 146 N.E.3d 906, 912 (Ind. 2020). The Court nevertheless maintains "inherent authority" to sanction a party by awarding attorney's fees. *Id.* at 916. The Court may only invoke this authority after finding that a party "litigated in bad faith and that its conduct was calculatedly oppressive, obdurate, or obstreperous," and where no other exception to the general rule applies. *Id.* Bad faith is "not simply bad judgment or negligence. Rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity." *K.R. Calvert Co., LLC v. Sandys*, 141 N.E.3d 811, 826 (Ind. Ct. App. 2020). To reach a bad faith determination, "there must be some evidence that the party affirmatively operated with 'furtive design or ill will.'" *River Ridge Development Authority*, 146 N.E.3d at 919.

"The party seeking fees carries a 'hefty' burden to demonstrate that an exception to the American Rule is warranted." *Minser v. DeKalb County Plan Commission*, 170 N.E.3d 1093, 1102 (Ind. Ct. App. 2021); *see River Ridge Development Authority*, 146 N.E.3d at 916; *In re Paternity of W.M.T.*, 180 N.E.3d 290, 304 (Ind. Ct. App. 2021) ("Mother had the burden of proving such fees were warranted.").

ARGUMENT

Because the Court already issued an "appropriate sanction" by vacating the Safety Orders, and due to the excessiveness of Petitioners' request for fees and costs, Petitioners' request should be denied or reduced to not more than $61,100.

I. Petitioners are not entitled to an additional sanction

Much of the conduct that the Court found unacceptable, and that Petitioners now seek fees and costs as a sanction for, stems from Respondents' failures to comply with the Court's December 17, 2021 Order compelling supplementation and production of the entire agency record. *See* Final Order at 8–12. Indeed, Petitioners previously moved to sanction Respondents for failing to comply with the Court's December 17, 2021 Order on two occasions. Docket (January 31, 2022, *Petitioners' Motion for Finding Respondents in Contempt of Court and for Appropriate Sanctions* and July 8, 2022, *Petitioners' Motion for Finding Respondents in Contempt of Court and for Appropriate Sanctions*). And in both prior motions, Petitioners asked the Court to enter a default judgment and vacate the Safety Orders, and award fees and costs related to their motion to compel and contempt of court. *Id.*

But like their prior motion regarding supplementation of the record, *see id.*, Petitioners are again likening Respondents' failure to submit documents in compliance with the Court's December 17, 2021 Order to supplement the record with a discovery violation under Trial Rule 37. *See* Pet. at 3–4, 8 (citing caselaw affirming sanctions for failing to comply with a discovery order under Trial Rule

37). But as Respondents argued in their February 15, 2022 *Response in Opposition to Petitioners' Motion for Contempt and Sanctions*, AOPA does not provide for the imposition of fees and costs following an order to supplement the record or failure to do the same, and as such, any precedent involving sanctions for failure to cooperate in discovery are not applicable. *See* Ind. Code ch. 4-21.5-5.

Nevertheless, to the extent the Court believes discovery sanctions under Trial Rule 37 are applicable or illustrative here, the Final Order's ruling for Petitioner and vacation of the Safety Orders serves as an adequate sanction for Respondents' conduct. Having discussed the same conduct of which Petitioners now request attorney fees, the Court concluded that its entry of a ruling in favor of the Petitioners and vacation of the Safety Orders "is an appropriate sanction for the misconduct." Final Order ¶ 27. Therefore, the Court entered judgment, against IDOL, and accepted Petitioner's version of facts (subsection (a)). Entering a judgment in favor of the Petitioners on the basis of misconduct occurring during litigation, including supplementation of the record, is akin to the sanction of default judgment originally sought by Petitioners.

Indiana courts treat a default judgment as the most severe in a series of "progressive sanctions" for a failure to comply. *Carmichael v. Separators, Inc.*, 148 N.E.3d at 1048, 1062 (Ind. Ct. App. 2020). Indeed, "[a] trial court may impose various sanctions for discovery violations, including an award of costs and attorney fees, exclusion of evidence, dismissing the action, or rendering a judgment by default. A trial court is not required to impose lesser sanctions before applying the

ultimate sanction of dismissal or default judgment." *Peters v. Perry*, 877 N.E.2d 498, 499 (Ind. Ct. App. 2007) (emphasis added) (citation omitted); *see Nagel v. Northern Indiana Public Service Co.*, 26 N.E.3d 30, 39 (Ind. Ct. App. 2015) ("Indiana Trial Rule 37(B)(2)(c) permits a trial court to impose sanctions, *up to and including* default judgment, if a party fails to comply with an order compelling discovery." (emphasis added)).

Because the Court has already issued an order with an extreme sanction—which the Court declared an "appropriate sanction"—finding in favor of the Petitioners and vacating the Safety Orders, the Court should not entertain the request for attorney fees. That would be consistent with the American Rule: that each side pay their own attorney's fees. To the extent that Trial Rule 37(B) is applicable here, and to the extent fees and costs are further warranted, said fees and costs must be confined to "reasonable expenses . . . caused by the failure" to comply with the Courts December 17, 2021, Order. Ind. Tr. R. 37(B). *See infra*, § II (reasonableness).

II. Petitioners seek an unreasonable amount of fees and costs

The Indiana Court of Appeals has repeatedly affirmed that "[w]hat constitutes reasonable attorney's fees is a matter largely within the trial court's discretion." *Venture Enterprises, Inc. v. Ardsley Distributors, Inc.*, 669 N.E.2d 1029, 1033 (Ind. Ct. App. 1996); *J.S. v. W.K.*, 62 N.E.3d 1, 10 (Ind. Ct. App. 2016). "The trial judge is considered to be an expert on the question and may judicially know what constitutes a reasonable attorney's fee." *Longest ex rel. Longest v. Sledge*, 992

N.E.2d 221, 231 (Ind. Ct. App. 2013). And in determining what exactly what constitutes a reasonable fee, the Court is to consider "all relevant circumstances" such as hourly rate, the result achieved, and the difficulty of the issues." *Shoaff v. First Merchant's Bank*, 201 N.E.3d 646, 660 (Ind. Ct. App. 2022). Moreover, it is the party requesting the assessment of attorney's fees that bears the burden of proof. *Buschman v. ADS Corp.*, 782 N.E.2d 423, 431 (Ind. Ct. App. 2003); *IBM Corp v. ACS Human Services, LLC*, 999 N.E.2d 880, 889–90 ("[I]t is incumbent upon an individual seeking the payment of fees and costs to prove their entitlement to such an award.").

A. There is no presumption of reasonableness in this case simply because a client already paid fees and costs

Petitioners turn the burden of proof on its head, arguing instead that their payment of attorney's fees is proof-positive that said fees are reasonable. But their citations to caselaw on this point are unavailing. In three of the cases cited—*Thompson Inc. v. Insurance Co. of North America*, *Mehta v. Shah*, and *Balcor Real Estate Holdings, Inc. v. Walentas-Phoenix Corp.*—the petitions for fees and costs were premised on underlying indemnification agreements between the litigating parties. The "presumption of reasonableness" in these cases was justified, in part, by a desire to prevent a breaching party from "nit-pick[ing] costs" when one party previously agreed to defend the other or make the other party whole by reimbursing incurred legal expenses. *Thompson Inc.*, 11 N.E.3d at 1024; *Balcor Real Estate Holdings, Inc.*, 73 F.3d at 153–54 ("By protesting the quantification of fees, Walentas is trying to weasel out of the contract yet again."); *Mehta*, 113 F. App'x at

169–70 ("The indemnity requires Shah to make Superior whole.") (brackets omitted). In all three instances, the respective court's decision to award attorney's fees was based on the parties' prior contractual agreement to provide counsel for or cover the cost of litigation. *Balcor Real Estate Holdings*, 73 F.3d at 152 ("[T]he district court's actual basis was the parties contract."); *Thompson Inc.,* 11 N.E.3d at 1024 (discussing presumption of reasonableness as it pertains to insurers breaching their duty to defend).

The presumptive reasonableness provided in the above indemnification cases does not neatly apply to the present situation. Unlike the parties in those cases, 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. Quite the opposite—Petitioners are seeking fees and costs as a sanction for conduct occurring *during* the course of the judicial review. Petitioners' request for fees and costs does not resemble the expectation of reimbursement present in the cases to which they cite. That Petitioners already paid their attorney's fees is not proof-positive that said fees are reasonable.

B. Petitioners' requested fees are unreasonable.

Instead, the Court must evaluate the requested fees independently to determine whether they are reasonable. Here, the $334,216.17 in fees that Petitioners have requested—which is over five times the amount of the $61,100 Safety Award at issue in this action—is unreasonable and excessive. First, it is disproportionate to the amount at stake in this case, as well as the case's

complexity. While Petitioners claim that this action required specialized expertise, most of their work involved responding to litigation and administrative law disputes that did not require specialized expertise. In addition, Petitioners' requested fees are unreasonable because their counsel's invoices demonstrate that counsel frequently over-staffed this case, duplicated efforts, and charged exorbitant rates. For those reasons, the Court should substantially reduce Petitioners' requested fees.

1. The fees are disproportionate to the penalty challenged.

Petitioners' total request of $334,216.17 is unreasonable because it is wholly disproportionate to the amount that was at stake in this action—the $61,100 civil penalty for the Safety Orders. Petitioners claim that they risked reputational damage in addition to the $61,100 civil penalty, but that argument is not a sufficient justification for accruing attorney's fees over five times higher than the penalty for which they were charged. Moreover, Petitioners' request constitutes the entire sum of fees and costs accrued throughout the litigation, not just the fees and costs Petitioners incurred in responding to Respondents' misconduct during the supplementation of the record. *See* Final Order ¶¶ 8–15. It would be highly unreasonable for Respondents to have to pay this amount when they could not have had any reasonable expectation that Petitioners would have accrued such exorbitant and disproportionate fees.

2. The nature of this litigation was not complex.

In addition, the Court should not award Petitioners' requested attorney's fees because this litigation was routine and did not require the expertise of the seven

partners who staffed this case. Petitioners claim that "the issues presented were difficult, novel, and required high levels of skill to perform the legal work properly." (Petition at 11). Specifically, they assert that the novelty of the matter was demonstrated by Ellen Osborne's (the IOSHA inspector at issue) testimony that she had issued one willful violation in her 15-year career at IOSHA—namely, the willful Safety Order issued to Lane. (*Id.*).

This assertion misconstrues the nature of the legal work on this case as the significant bulk of the case involved routine litigation matters such as disputing the scope of the agency record and appearing in court for hearings. The vast amount of work that Petitioners' counsel completed had nothing to do with the technical nature of the Safety Orders alleged. And, even if the parties had litigated the validity of the Safety Orders, Petitioners' attorneys acknowledge themselves that Petitioners' in-house counsel could have handled those technical disputes in-house without having to retain outside counsel. (Petition at 14). In other words, Petitioners' attorneys were not even hired for their expertise regarding the Safety Award. They were hired to litigate and for their experience in administrative law—two areas that are not novel.

3. Petitioners' invoices are vague.

Petitioners have also failed to meet their burden to justify their fees because several of their entries are too vague to support a determination that the charges were appropriate. The Supreme Court has held that "[w]here the documentation of hours is inadequate," an attorney's fee award may be reduced accordingly. *Hensley*

v. Eckerhart, 461 U.S. 424, 433 (1983). Although counsel is not expected to record in great detail how each minute of the day is spent, the general subject matter should be identified. *Id.* at 437, n. 12. The billing records must also be sufficiently clear to enable the court to identify what hours, if any, are excludable because they are excessive, redundant, or otherwise unnecessary. *Tomazzoli v. Sheedy*, 804 F.2d 93, 97, n.5 (7th Cir. 1986).

Petitioners' counsel's invoices are rife with inadequate descriptions. As an example, on June 4, 2021, Bradley Sugarman billed for "attend[ing] to service issues" for 0.3 of an hour but did not identify the nature of those service issues. (Petition Ex. B-1 at 5). That same day, Seth Thomas billed for "Attention to assignment to D02 and direct A. Cordray to accomplish filing in D13." *Id.* This entry took 0.7 hours, which seems excessive for instructing A. Cordray to file in a certain court, but the entry is so vague and ambiguous that it is not possible to determine the nature of the work. *See id.* Similarly, on October 1, 2021, Bradley Sugarman billed for "attend[ing] to case management" (Petition Ex. B-1 at 22). These examples are not exhaustive but demonstrate the vagueness of Petitioners' invoices.

4. Petitioners overstaffed this case and duplicated their efforts.

Petitioners' fees are also unreasonable because they significantly overstaffed this case and duplicated efforts. The Supreme Court has held that overstaffing is one reason to exclude hours when awarding attorney's fees. *Hensley*, 461 U.S. at 434. Here, no less than *seven* different partners billed time in this action, as well as two associates and three paralegals. (Petition Ex. B-1; B-2). At least two of those

partners, Daniel McInerny and Bradley Sugarman, were regularly involved and billed at rates of up to $585 and $625 per hour, respectively. (Petition Ex. B-2). Petitioners have not provided any justification for the fact that over four times as many partners billed on this case than associates—at a fee rate almost twice as high as the associates. (For comparison, Jackson Schroeder, an Associate, charged a rate of $285 per hour in 2021 up to $370 per hour in 2024) (Petition Ex. B-2). The nature of the case did not require such expertise.

Inevitably, having so many attorneys involved in a case leads to excessive duplication of efforts. This is apparent from the very first invoice, as multiple partners spent many combined hours just getting up to speed on the case. There are also many entries throughout Petitioners' invoices where co-counsel billed for merely updating each other on research or developments in the case. (*See, e.g.,* Petition Ex. B-1 at 1 ("discuss research with D. McInerny" on 5/19/21); Petition Ex. B-1 at 1 ("communication with B. Sugarman regarding research results" on May 25, 21); Petition Ex. B-1 ("Emails with B. Sugarman and D. McInerny regarding update on status" on 06/01/21")). And Petitioners duplicated their efforts by having multiple attorneys attend hearings. For instance, three attorneys (Bradley Sugarman, Jackson Schroeder, and Daniel McInerny) appeared for and billed for the Court's March 15, 2022, hearing on Petitioners' contempt motion. (Petition Ex. B-1 at 43).

That the plaintiff could afford to pay multiple lawyers and chose not to question such overstaffing is not enough to justify the duplication that resulted.

When the party will be paid by its opponent, the court is required to gauge the reasonableness of the award under the circumstances. And here, the duplication of efforts and extensive involvement of multiple partners was not warranted or reasonable.

5. Petitioners overbilled for routine matters.

In addition to the excessive number of attorneys who billed for work on this case, it is clear that Petitioners' counsel inflated their work and overbilled—sometimes for routine matters that clearly did not warrant the fees charged. As examples, on June 7, 2021, it took two partners 1.3 hours to draft a one-and-a-half page letter requesting the agency record, which should have been second nature to two such experienced partners. (Petition Ex. B-1 at 5). On June 24 and 25, 2021, Seth Thomas, a Partner, spent an hour revising a Certificate of Service and also notably filed the Certificate himself rather than delegating that task to an employee who could file documents at a lesser fee. (Petition Ex. B-1 at 6). Also on June 24, 2021, it took Daniel McInerny 2.4 hours to e-mail Respondents' counsel to request an extension of time to file the agency record, to draft a Motion for Extension of Time that consisted of two pages of substance, including a brief legal standard and a timeline of events, and to forward that Motion for review. (Petition Ex. B-1 at 5-6). Then, on September 9, 2021, two attorneys billed for 2.5 hours collectively to draft a joint motion to establish a briefing schedule and for extension of time to file the agency record. (Petition Ex. B-1 at 17). The amount of time spent on these matters would have been excessive for a new attorney, let alone experienced partners who

would have drafted such Motions countless times before and likely even have templates.

These examples are not exhaustive but instead demonstrate that there were numerous examples of overbilling in just a three-month span of time at the beginning of the lawsuit. Such overbilling continued over the next few years. Among other notable examples, Petitioners billed an hour for drafting a Motion to hold a hearing remotely on December 6, 2021. (Petition Ex. B-1 at 29). They also billed approximately 18 hours for a Motion to Supplement and Compel Agency Record on October 1, 2021, that totaled 10 billable pages. (Petition Ex. B-1 at 17–22; October 1, 2021, Motion to Supplement and Compel Agency Record). And Petitioners billed approximately 22 hours for their February 1, 2022, Motion for Finding Respondents in Contempt of Court and for Appropriate Sanctions, which was a 12-billable-page Motion, and Proposed Order. (Petition Ex. B-1 at 33, 34; February 1, 2022, Motion for Finding Respondents in Contempt of Court and for Appropriate Sanctions). Likewise, Petitioners' August 16, 2022 Motion for Hearing on and Reply in Support of Renewed Motion for Finding Respondents in Contempt of Court and Appropriate Sanctions is twelve numbered paragraphs long spread over less than four pages. (August 16, 2022, Motion for Hearing on and Reply in Support of Renewed Motion for Finding Respondent in Contempt of Court and Appropriate Sanctions). It is not clear how it took Petitioners nearly eight hours to draft twelve paragraphs. (Petition Ex. B-1 at 55).

In addition to these pervasive examples of overbilling, Petitioner's use of block billing hinders its ability to demonstrate which entries are appropriate. While block billing (combining multiple activities into one fee block) is permitted in Indiana, that does not change the fact that the practice makes it difficult to determine how much time counsel spent on each activity and, as a result, whether that time was appropriate, compensable, and reasonable.

6. Time spent on administrative tasks should not be compensated.

Finally, the Court should not award Petitioners attorney's fees for purely administrative tasks. As persuasive authority, the Third Circuit has held that the Court should disallow hours expended by counsel "on tasks that are easily delegable to non-professional assistance." *Cf. Halderman v. Pennhurst State Sch. & Hosp.*, 49 F.3d 939, 942 (3d Cir. 1995) (reasoning that legal service rates are not applicable when an attorney provides services that could have been easily delegated to a non-attorney). This concept is relevant here because, as stated above, Partners on the case regularly handled tasks such as filing cases that could have easily been delegated to professionals charging a lesser fee. In addition, Petitioners' counsel have included purely administrative tasks in their invoices. Among other examples, counsel billed Petitioners a minimum of $2,753.50 for 4.8 hours spent updating their budget. This amount is a minimum because it does not include three instances of up to 6 hours where references to updating the budget were included in block billing entries and it was impossible to determine how much was allocated to

budgeting. Such administrative tasks should not be included in attorney's fees and should not be charged to Respondents.

CONCLUSION

Because the Court has already sanctioned Respondents by vacating the Safety Orders and because Petitioners' requested fees are not reasonable, the Court should deny Petitioners' petition for fees and costs, or alternatively, reduce the award to a reasonable amount not more than $61,100.

Theodore E. Rokita
Attorney General of Indiana
Attorney No. 18857-49

By: *<u>/s/ Bradley S. Davis</u>*
Bradley S. Davis
Deputy Attorney General
Atty. No. 38172-53

OFFICE OF ATTORNEY GENERAL TODD ROKITA
Indiana Government Center South 5th Floor
302 West Washington Street
Indianapolis, IN 46204
Telephone: 317-233-5601

CERTIFICATE OF SERVICE

I certify that on August 23, 2024, the foregoing was served upon the following person(s) via IEFS, if Registered Users, or by depositing the foregoing in the U.S. mail, first class postage prepaid, if exempt or non-registered user:

Bradley R. Sugarman
Daniel P. Mcinerny
Thomas F. O'Gara
Jackson L. Schroeder
Bose McKinney & Evans, LLP
111 Monument Circle, Suite 2700
Indianapolis, IN 46204
bsugarman@boselaw.com
dmcinerny@boselaw.com
togara@boselaw.com
jschroeder@boselaw.com

By: */s/ Bradley S. Davis*
Bradley S. Davis
Deputy Attorney General
Atty. No. 38172-53

OFFICE OF ATTORNEY GENERAL TODD ROKITA
Indiana Government Center South, 5th Floor
302 West Washington Street
Indianapolis, IN 46204-2770
Telephone: 317-233-5601
Facsimile: (317) 232-7979
E-mail: Bradley.Davis@atg.in.gov