STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **74 WYTHE RESTAURANT COMPANY LLC** for an Award of Costs Pursuant to Article 41 of the Tax Law for the Periods December 1, 2013 through February 29, 2016 and March 1, 2017 through August 31, 2019.	:	DETERMINATION DTA NOS. 830441 AND 850382

Petitioner, 74 Wythe Restaurant Company LLC, appearing by Hodgson Russ, LLP (Joseph N. Endres, Esq., of counsel), filed an application on September 6, 2024, for an award of costs pursuant to article 41 of the Tax Law for the periods December 1, 2013 through February 29, 2016 and March 1, 2017 through August 31, 2019.

The Division of Taxation, appearing by Amanda Hiller, Esq. (Brian Evans, Esq., of counsel), filed a response to the application for costs on January 17, 2025. By permission, petitioner was given until March 21, 2025 to file a reply, which date began the 90-day period for the issuance of this determination.

Based upon petitioner's application for costs, the Division of Taxation's response to the application, petitioner's reply thereto, and all pleadings and proceedings had herein, Kevin R. Law, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioner is entitled to an award of costs pursuant to Tax Law § 3030.

II. If so, whether the maximum rate should be increased to factor in cost-of-living adjustments or some other special circumstances.

FINDINGS OF FACT

1. In April 2016, the Division of Taxation (Division) commenced an audit of 74 Wythe Restaurant Company LLC's (petitioner's) sales and use tax returns for the period September 1, 2013 through February 29, 2016.

2. Petitioner's primary business was the operation of a music venue called Output, located at 74 Wythe Avenue, Brooklyn, New York, that featured electronic dance music (EDM) events.

3. With respect to petitioner's audited sales, the Division determined that additional tax was due on petitioner's admission charges and, further, determined that petitioner charged its customers the proper amount of tax with respect to all sales other than admission charges.

4. The Division asserted that petitioner's admission charges were taxable because the concerts performed at the night club did not fall under the category of live dramatic or musical arts performances.

5. The Division issued a notice of determination (assessment ID L-050377131), dated August 12, 2019, to petitioner asserting sales tax due for the period December 1, 2013 through February 29, 2016, plus interest and penalties (First Audit Period Notice).

6. Petitioner's prior representatives, Barry Leibowicz, Esq., and Scott Ahroni, Esq., protested the First Audit Period Notice by filing a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) on August 20, 2019.

7. In October 2019, the Division commenced another audit of petitioner's sales and use tax returns for the period March 1, 2016 through August 31, 2019. Following a cursory review of petitioner's sales, the Division determined that petitioner's reported non-taxable sales from admission charges were subject to sales tax.

8. The Division issued a notice of determination (assessment ID L-051975049), dated September 8, 2020, to petitioner asserting sales tax due for the period March 1, 2017 through August 31, 2019 (Second Audit Period Notice).

9. On January 21, 2021, petitioner executed a power of attorney engaging Hodgson Russ, LLP (Hodgson) to represent the company in protest of the First Audit Period Notice and the Second Audit Period Notice.

10. Petitioner initially protested the Second Audit Period Notice by filing a request for conciliation conference with BCMS on March 19, 2021. BCMS issued a conciliation order dismissing request (CMS No. 000328440), dated April 9, 2021, determining that such request was untimely filed.

11. On May 7, 2021, petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order relating to the Second Audit Period Notice.

12. Following a conciliation conference, BCMS issued a conciliation order (CMS No. 000313802) to petitioner, dated December 30, 2022, sustaining the First Audit Period Notice.

13. On January 12, 2023, petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order relating to the First Audit Period Notice.

14. Petitioner's petitions relating to both the First Audit Period Notice and the Second Audit Period Notice were consolidated into one proceeding.

15. At the hearing in this matter, the Division presented the testimony of its auditor, Michelle Roman. During her time with the Division, Ms. Roman had completed between 180 and 200 audits, although this was her first audit of a taxpayer selling tickets to performances. While conducting the audits of petitioner, Ms. Roman maintained a record of documents

exchanged with petitioner and a log related to the audit, as is the typical practice of the Division, which was offered into evidence.

16. Ms. Roman reported that she discussed with her audit team whether admission charges to Output, the venue operated by petitioner, were taxable under Tax Law § 1105 (f) (1). Ms. Roman testified that she, under advisement and in consultation with the Division's audit team leaders and section heads, concluded that petitioner's admission charges were subject to sales tax because disc jockeys (DJs) do not perform live music; rather, they are merely using other people's records. Ultimately, Ms. Roman determined that petitioner's admission charges were subject to sales tax because the performances did not fall under the live performance exemption. When pressed as to what would qualify for the exemption from sales tax, Ms. Roman offered that musical plays would qualify. When questioned further, Ms. Roman was unable to provide a meaningful definition of a live musical arts performance, instead, deferring to the Division's field audit management's conclusion that DJ performances simply cannot constitute live musical arts performances and that qualifying live musical arts performances were limited to theatrical productions.

17. Ms. Roman testified that she was not sure if she concluded that petitioner's admission charges were subject to sales tax as charges of a roof garden, cabaret or similar place pursuant to Tax Law § 1105 (f) (3). Ms. Roman admitted that she never considered whether Output qualified as a roof garden, cabaret or similar place for sales tax purposes, but rather based her conclusion regarding the taxability of its admission charges on her determination that the performances were not live musical performances, and that petitioner sold food and drink at Output. Furthermore, Ms. Roman testified that, while conducting the audit, she did not review Tax Law § 1123, which provides for a sales tax exemption for admission charges to live musical

or dramatic arts performances at a roof garden, cabaret or similar place. Neither Ms. Roman nor anyone else from the Division attended any performances at Output or reviewed video of any such performances before determining that Output's admission charges were subject to sales tax.

18. Ms. Roman testified that she did not believe that she concluded that petitioner's admission charges were subject to sales tax under Tax Law § 1105 (d) and that she was unfamiliar with that particular section of the Tax Law.

19. Output stopped charging sales tax on its admission charges prior to the First Audit Period based on the advice of petitioner's tax professional. During the audit of the First Audit Period, Ms. Roman asked petitioner's representative to provide a written explanation as to why it stopped collecting sales tax on its admission charges. In response, petitioner's representative sent Ms. Roman an email stating that petitioner does not charge tax on the entry fee because Output sold tickets to a live musical performance. Ms. Roman relayed this response to the Division's Field Audit Management (FAM). Ms. Roman communicated with Cynthia Foster, a sales tax liaison from FAM, regarding the issue of the taxability of petitioner's admission charges. Ms. Foster told Ms. Roman that the live musical performance exemption is for Broadway shows and not for concerts. Ms. Roman understood Ms. Foster's response to mean that the sales tax exemption for live musical arts performances was reserved for Broadway shows or "a similar show, not just on Broadway, but in a theater setting." However, Ms. Roman could not recall having reviewed Ms. Foster's conclusion or analysis against any other authority construing admission charges.

20. During their conversation, Ms. Foster further advised Ms. Roman that sales tax should be charged on sales of concert tickets. According to the auditor's Tax Field Audit Record

detailing her conversation with Ms. Foster, "[w]hen asked if someone purchased a ticket to go see a concert would they be charged tax and she said yes."

21. After her conversation with Ms. Foster, Ms. Roman sent a copy of Tax Bulletin, TB-ST-535, *Live Dramatic and Musical Arts Performances,* to petitioner's representative along with copies of her final workpapers for the sales area for the First Audit Period. In her letter to petitioner's representative, Ms. Roman stated, "[u]nfortunately it is the departments [sic] position that the concerts performed at the night club do not fall under the category of 'live dramatic or musical arts' performances. I have enclosed TB-ST-535 for your reference which explains in more detail what are the requirements for a 'live dramatic or musical arts' performance."

22. At the hearing, Ms. Roman recognized that TB-ST-535 pertains to the sales tax exemption for property and services purchased and used in dramatic and musical arts performances, and that such exemption is not at issue in this matter. She confirmed that TB-ST-535 directs the reader to form ST-121.9, which lists the conditions for the exemption. Near the end of the document, TB-ST-535 directs the reader to Tax Law § 1115 (x). Ms. Roman recognized that TB-ST-535 and Tax Law § 1115 (x) lay out the conditions for the exemption, but neither the publication nor the statute lay out requirements for the taxability of admission charges under Tax Law § 1105 (f) (1). Nothing in the Division's training manuals or audit guidelines instruct auditors to review Tax Law § 1115 (x) when construing Tax Law § 1105 (f). During her cross-examination, Ms. Roman was unable to provide the reason the Division concluded that the DJ performances at Output were not live musical performances:

> "Q: So you concluded that they were not live dramatic or musical arts performances for purposes of the exclusion in Tax Law 1105 (f) (1).
>
> A: Yes.
>
> Q: And on what basis did you make that conclusion?

A: Again, in discussing with team leaders and section heads, since the power of attorney told us that their performers were DJs, we determined that DJs do not fall under live musical performances.

Q: And why not?

A: We just didn't feel that it was a live musical performance.

Q: But why not?

A: I wasn't able to -- I wasn't able to find any reason as to why; but it was just the Department's position that it's not."

23. The Administrative Law Judge ultimately concluded that:

"the Division was unable to point to a statutory or regulatory provision limiting the exemption for admission charges to live musical arts performances to Broadway-type theatrical productions, despite its reliance on that construction. Considering the Division never actually visited Output to observe the performances it claims did not qualify as live musical performances, it is difficult to see how it reached its determination that such performances were not live musical arts performances . . . But at the end of the day, we are left with little more than a baseless arbitrary distinction between the kinds of live musical arts performances that happened at Output and those happening in theaters on Broadway.

* * *

Petitioner has met its burden of demonstrating that its interpretation of the term 'live musical arts performances' as including the DJ performances at Output as live musical arts performances that are not Broadway-like theatrical productions was the only reasonable construction of the statutory language" (Determination, conclusion of law F).

24. On June 6, 2024, the Administrative Law Judge issued his determination cancelling the subject notices issued to petitioner as well as the notices issued to petitioner's responsible officers, Shawn H. Schwartz, Nicholas Matar and Robert T. Pittman.

25. Because no exception to the Tax Appeals Tribunal had been filed by either party, the determination became final on July 8, 2024 (***see*** Tax Law § 2006 [7]; General Construction Law § 25-a).

26. On September 6, 2024, petitioner filed an application for costs (application). Included with the application was the affirmation of petitioner's representative, Joseph Endres, Esq., dated March 12, 2025,[1] with a series of attachments including: (i) a document, dated August 30, 2024,[2] purporting to be an affirmation signed by Barry Leibowicz, Esq., with invoices; (ii) affidavit of Shawn Schwartz, sworn to on September 5, 2024, with attachments; (iii) petitioner's BCMS submission; (iv) schedule of the invoices from Hodgson; (v) schedule of the highlighted charges in the Leibowicz invoices; (vi) schedule of the invoices from Mark J. Butler, PhD; (vii) 2023 Real Rate Report prepared by Wolters Kluwers; (viii) 2022 edition of The Annual Survey of Law Firm Economics published by the National Law Journal; and (ix) Thomas Reuters Financial Insights for 2023. These reports set forth various mean hourly rates for attorneys in various segments of law practices. Petitioner points to these various statistical rate reports to allege that the $75.00 maximum hourly rate set forth in Tax Law § 3030 does not accurately reflect hourly rates charged by attorneys.

27. To defend against the Division's First Audit Period Notice and Second Audit Period Notice, petitioner incurred three categories of costs: (i) legal fees, (ii) expert witness fees and (iii) disbursements related to both.

28. Petitioner initially hired the attorneys of Leibowicz & Ahroni PLLC, now known as Law Offices of Barry Leibowicz PLLC (the Leibowicz Firm) to both defend petitioner in the ongoing audits as well as to protest the eventual assessments that resulted.

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[1] Originally submitted with the application was a document signed by Mr. Endres purporting to be an affirmation that did not conform to affirmation language required by CPLR 2106 as amended by L 2023, ch 559, § 1. The Division's response to petitioner's application for costs included a document signed by its representative, Mr. Evans, purporting to be an affirmation that also did not conform to the affirmation language required by CPLR 2106. By letter, dated February 26, 2025, the parties were given the opportunity to cure the defective affirmations.

[2] This document also did not have the requisite affirmation language required by CPLR 2016.

29. Of the work performed by the Leibowicz Firm, $47,162.10 (comprised of $47,051.50 in legal fees, representing 71.4 hours of work, and $110.60 in disbursements) related to its defense of the First Audit Period Notice and the Second Audit Period Notice.

30. Of the work performed by Hodgson, $421,322.98 (comprised of $419,213.65 in legal fees representing 691.46 hours of work and $2,109.33 in disbursements) related to its defense of the First Audit Period Notice and the Second Audit Period Notice.

31. Dr. Butler, a professor of popular music studies at Humboldt University in Berlin, performed work on behalf of petitioner to analyze the musical performances of the DJs who performed at Output and provided a written report detailing his conclusions. Dr. Butler also testified at the hearing in this matter and was certified as an expert witness. Dr. Butler invoiced petitioner a total of $15,083.87 for his services (comprised of expert witness fees totaling $12,937.50 and disbursements totaling $2,146.37).

32. The computation of the Hodgson and Leibowicz Firm attorney fees to defend the First Audit Period Notice and the Second Audit Period Notice do not include amounts related to the defense of the Division's audits prior to the issuance of the First Audit Period Notice or the Second Audit Period Notice and do not include amounts related to the defense of the notices of determination issued to petitioner's responsible persons.

33. The costs incurred by petitioner to defend against the Division's First Audit Period Notice and its Second Audit Period Notice, and for which petitioner seeks reimbursement, total $483,568.95.

34. Petitioner's net worth was below $7 million at all times during the audits and protests in this matter, including on August 19, 2019 and March 19, 2021, the dates on which petitioner's representatives filed protests with BCMS for the First Audit Period Notice and Second

Audit Period Notice, respectively.

35. At all times during the audits and protests in this matter, including on August 19, 2019, and March 19, 2021, the dates on which petitioner's representatives filed protests with BCMS for the First Audit Period Notice and Second Audit Period Notice, respectively, petitioner employed fewer than 500 employees.

36. Petitioner closed Output on January 1, 2019. Petitioner continued filing New York State sales and use tax returns following Output's closure to report sales from the liquidation of the company's assets. Petitioner filed final 2019 Federal and New York State partnership returns, including balance sheets listing Wythe's beginning and ending 2019 assets indicating that petitioner had $0 assets at the end of 2019.

37. In opposition to petitioner's application for costs, the Division submitted an affirmation of Brian Evans, Esq. The Division also argues it was substantially justified under Tax Law § 3030 (c) (5) (B) (i) and takes issue with whether said legal fees and disbursements were actually paid and, if so, by whom, who the client was, and whether the amount of said attorney fees was reasonable. The Division presented no evidence of an amount of fees that would be deemed reasonable under similar circumstances. The Division also argues that there is a lack of detail in the invoices.

38. Petitioner requested and was given permission to file a reply to the Division's affirmation in opposition to petitioner's application for costs. Submitted as part of its reply were a second affirmation of Joseph Endres, Esq., dated March 21, 2025, with exhibits, including an engagement letter from Hodgson to petitioner signed by Shawn Schwartz on behalf of petitioner, a statement of account for petitioner, detailing payments totaling $451,858.04 made on petitioner's client account with Hodgson, and reports from M&T Bank that detailed wire

transfers received by Hodgson for legal fees incurred by petitioner. Also included was a second affidavit of Shawn Swartz detailing how the legal fees incurred by petitioner were paid.

39. In his second affirmation, Mr. Endres avers that, on or about January 22, 2021, Hodgson issued an engagement letter to petitioner detailing the terms and conditions of its representation of petitioner as its attorneys.

40. The engagement letter was signed by Shawn Schwartz on behalf of petitioner on January 21, 2021. The date discrepancy is deemed to be the result of a typographical error. The January 22, 2021 engagement letter was the only letter engaging Hodgson to represent petitioner for both the First Audit Period and the Second Audit Period.

41. Hodgson did not execute any engagement letters with respect to the responsible persons of petitioner.

42. Hodgson represented the responsible persons in their protests before BCMS and the Division of Tax Appeals as a consequence of its engagement with petitioner and in their capacities as responsible persons of petitioner.

43. Hodgson did not execute any engagement letters with respect to any other entities involved with the operation, management or ownership of petitioner.

44. All legal fees relating to Hodgson's representation of petitioner have been paid in full.

45. Hodgson's legal fees were paid via wire transfer initiated by the following three entities: petitioner, PMS Bubble LLC (Bubble) and Superior Ingredients LLC (Superior).

46. Petitioner and Bubble each paid Hodgson $30,000.00 for legal services incurred by petitioner.

47. Superior paid Hodgson approximately $391,858.04 for legal services incurred by petitioner.

48. Bubble is a partnership that owned 65% of petitioner during its operation of Output. Bubble was the entity that represented the "operating group" charged with running Output.

49. The partners in Bubble consisted of Shawn Schwartz, Nicholas Matar and Robert T. Pittman, the individuals who were personally assessed as responsible persons of petitioner.

50. The remaining 35% ownership interest in petitioner was held by 74 Wythe Partners LLC (Partners). Partners represented the real estate group that invested in the operation of Output.

51. Following the conclusion of petitioner's operation of Output, Bubble and Partners contributed their respective membership interests in petitioner to Superior, in exchange for membership interests in Superior.

52. Superior, and to a lesser extent Bubble, agreed to fund the litigation costs incurred by petitioner during its protest of its sales tax assessments.

53. Petitioner agreed to remit to Superior any recovery of fees awarded to petitioner as a result of a successful application for costs.

54. In conjunction with its application for costs and fees, and in its reply, petitioner submitted two sets of proposed findings of fact. All of petitioner's proposed findings of fact contained in the first submission, except for proposed finding of fact 27, which is deemed irrelevant to this proceeding, have been accepted and are set forth herein. All of petitioner's proposed findings of fact contained in the second submission, except for proposed findings of fact 20 and 21, which are in the nature of legal argument, have been accepted and are set forth herein.

CONCLUSIONS OF LAW

A. Tax Law § 3030 (a) provides, generally, as follows:

> "In any administrative or court proceeding which is brought by or against the commissioner in connection with the determination, collection, or refund of any tax, the prevailing party may be awarded a judgment or a settlement for:
>
> (1) reasonable administrative costs incurred in connection with such administrative proceeding within the department, and
>
> (2) reasonable litigation costs incurred in connection with such court proceeding."

B. To be a prevailing party, the applicant must: (1) substantially prevail with respect to the amount in controversy or the most significant issue or set of issues presented; (2) file the application within 30 days of the final disposition; and (3) meet the net worth requirements (***see*** Tax Law § 3030 [c] [5] [A]). Because the Administrative Law Judge granted the petitions in their entirety and cancelled the subject notices in his June 6, 2024 determination, petitioner has substantially prevailed with respect to the amount in controversy and the set of issues presented (***see*** Tax Law § 3030 [c] [5] [A] [i]). In addition, because no exception was filed to the determination of the Administrative Law Judge, this matter became final on July 8, 2024. Thus, petitioner had until August 7, 2024 to file the instant application. By letter dated July 30, 2024, petitioner requested, and was granted permission until September 6, 2024, to file the application for costs. The instant application was filed by the extended due date and is, therefore, timely.

C. To qualify for an award of litigation costs, a partnership that is a prevailing party cannot have a net worth that exceeded $7 million at the time the action was filed nor have more than 500 employees at the time the action was filed (***see*** Tax Law § 3030 [c] [5] [A] [ii] [II]). As part of its application, petitioner submitted an affidavit from Mr. Schwartz along with exhibits that established petitioner's net worth was less than $7 million and that it had fewer than

500 employees on the respective dates that petitioner filed its requests for conciliation conference protesting the subject notices of determination with BCMS.

D. A taxpayer will not be treated as the prevailing party if the Division establishes that its position was substantially justified (***see*** Tax Law § 3030 [c] [5] [B]). A position is substantially justified if it has a reasonable basis in both fact and law and is justified to a degree that could satisfy a reasonable person (***see Pierce v Underwood***, 487 US 552, 565 [1988]). In this case, the burden is on the Division to establish that its position was reasonable in both fact and law and was justified on the dates the respective notices were issued to petitioner (***see*** Tax Law § 3030 [c] [5] [B]). The Division has failed to meet this burden.

The Division claims that the notices, at the time each was issued, were reasonable both in fact and in law because the Division was not aware of the nature of EDM played by DJs at Output as distinguished from the music played by a traditional DJ. Contrary to the Division's assertions during the audit, petitioner provided both written material and verbal discussions that described the nature of the performances at issue. The auditor's log referred to the shows as concerts and the auditor was keenly aware of petitioner's position that these shows were live musical performances. As further noted by petitioner, regardless of whether the Division was fully aware that the EDM performances that occurred at petitioner's venue were musical performances, the Division's legal position underpinning its notices was based on the belief from FAM that the live musical arts performance exemption is only applicable to Broadway-type theatrical performances and not applicable to live musical performances such as concerts. As found by the Administrative Law Judge, this is in direct conflict with applicable law. Simply stated, the Division failed to establish that either its factual or legal basis for its position, at the time the notices were issued, was reasonable.

E. The Division takes issue with whether petitioner, rather than one, or all of its responsible persons, was the true payor of the legal fees and costs incurred in contesting the notices of determination. It speculates that because petitioner ceased operations, it is probable that it was one of the responsible persons who was the real client and speculates that the net worth requirements would act to preclude that particular petitioner from being eligible for reimbursement for costs and fees. This argument is rejected.

Contrary to the Division's assertions, there is nothing in Tax Law § 3030 that requires anything more than "an itemized statement from an attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed (except to the extent differing procedures are established by rule of court)." This requirement was met in this matter vis-à-vis the attorney billing statements and the billing statements from petitioner's expert witness. Nonetheless, petitioner, in its reply, submitted its engagement letter from Hodgson, a statement of account for petitioner, detailing payments totaling $451,858.04 made on petitioner's client account with Hodgson, and reports from M&T Bank that detailed wire transfers received by Hodgson for payment of the legal fees incurred by petitioner. Here, petitioner, and/or its successor entities, have established that the costs were incurred and were paid by petitioner and/or its successor entities.

F. Next, the Division asserts that petitioner's application for costs should be denied because of the volume of costs, the specificity of the invoices and, further, alleged that the time spent by petitioner's tax professionals on defending petitioner's position was excessive. The Division points to no evidence establishing what a reasonable cost or amount of time should be in this type of case and a careful review of the Hodgson and Leibowicz Firm invoices, as well as Dr. Butler's invoices, do not appear to be out of the ordinary from what one should expect to pay

when hiring competent tax professionals and an expert witness. Stated another way, other than its unsupported protestations, the Division has not shown that the fees listed on the invoices were unreasonable. Therefore, petitioner has established an entitlement to reasonable litigation costs and fees.

In this regard, section 3030 (c) (1) of the Tax Law defines reasonable litigation costs as:

> "(A) reasonable court costs, and
>
> (B) based upon prevailing market rates for the kind or quality of services furnished:
>
> (i) the reasonable expenses of expert witnesses in connection with a court proceeding,
>
> (ii) the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and
>
> (iii) reasonable fees paid or incurred for the services of attorneys in connection with the court proceeding, except that such fees shall not be in excess of seventy-five dollars 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 such proceeding, justifies a higher rate."

G. In this case, as noted by petitioner, the maximum hourly rate of $75.00 has been the rate since the statute's enactment in 1997 (***see*** L 1997, ch 577, § 31). The cost of living has approximately doubled since the statute's enactment in 1997 (***see*** Consumer Price Index Inflation Calculator available at https://www.bls.gov/data/inflation_calculator.htm), therefore, an hourly rate of $150.00 is justified in this matter. The data that petitioner presented from the 2023 Real Rate Report prepared by Wolters Kluwers, the 2022 edition of The Annual Survey of Law Firm Economics published by the National Law Journal and the Thomas Reuters Financial Insights for 2023, which set forth tax attorney and litigation attorney billing rates, while establishing that the maximum reimbursement rate is low, does not set forth a compelling reason to increase the

$75.00 maximum rate, as adjusted for the cost-of-living increases, any further. To the extent that the maximum hourly rate is low, it is for the Legislature to remedy that inadequacy.

H. Based upon the foregoing, the Division is directed to pay petitioner's attorney fees representing the combined attorney hours from the Leibowicz Firm (71.4 hours) and Hodgson (691.46 hours) at the rate of $150.00 hourly, or $114,429.00; disbursements of $110.60 (Leibowicz Firm) and $2,109.33 (Hodgson); and Dr. Butler's expert witness fees of $12,937.50, plus disbursements of $2,146.37.

I. 74 Wythe Restaurant Company LLC's application for an award of costs is granted to the extent set forth in conclusion of law H, but is otherwise denied.

DATED: Albany, New York
June 18, 2025

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE