940 F.Supp.2d 208
United States District Court,
D. New Jersey.

UNITED STATES of America and The State of New Jersey, ex rel. Nicholas M. DePace, Plaintiff,
v.
The COOPER HEALTH SYSTEM, et al., Defendants.

Civil Action No. 08–5626 (JEI/AMD).
|
April 22, 2013.

Synopsis
Background: Relator brought action was pursuant to the qui tam provisions of the Federal False Claims Act (FCA) and the New Jersey False Claims Act, alleging that hospital paid kickbacks to physicians in return for referrals, which caused false claims to be made against the federal and New Jersey governments when hospital subsequently billed Medicare and Medicaid programs for services resulting from the tainted kickbacks. After United States and New Jersey intervened for the purposes of settlement, and settlement was reached, relator moved to reopen the case to resolve issue of his obligations under contingency fee agreement with his attorneys, and for the court's determination of reasonableness of attorney fee.

Holdings: In resolving an issue of first impression, the District Court, Irenas, Senior District Judge, held that:

[1] settlement agreement did not supersede relator's contingency fee agreement;

[2] fee shifting provisions of FCA did not prohibit an attorney from receiving both statutory attorney fees and a contingency fee; and

[3] total contingent and statutory fees received by relator's legal representatives was reasonable.

Application to Reopen granted; requested relief denied.

Attorneys and Law Firms

***209** Carl D. Poplar, Cherry Hill, NJ, Jacobs & Barbone, Esqs., by: Louis M. Barbone, Atlantic City, NJ, for Nicholas M. DePace.

Pietragallo, Gordon, Alfano, Bosick & Raspanti LLP, prose, by: Jesse Abrams–Morley, Gaetan J. Alfano, Philadelphia, PA.

OPINION

IRENAS, Senior District Judge:

Pending before the Court is Relator Nicholas DePace's "Application for Emergent Relief to Reopen Pursuant to L. Civ. R. 41.1(b) and for the Court's Determination of Reasonableness of Attorney's Fee Pursuant to L. Civ. R. 103.1(a)" (the "Application"). For the reasons discussed below, Relator's Application to Reopen will be granted; however, the relief requested by the Relator will be denied.

I.

On November 12, 2008, Relator Nicholas DePace, M.D., initiated this *qui tam* action against the Cooper Health System, Cooper University Hospital (collectively "Cooper"), and Cardiovascular Associates of the Delaware Valley, P.A. (Pietragallo Br. in Opp. Ex. H., at 1.) [1] Dr. DePace's action was pursuant to the *qui tam* provisions of the Federal False Claims Act, 31 U.S.C. § 3730(b), and the New Jersey False Claims Act, N.J. Stat. Ann. § 2A:32C–1, *et seq.* (Pietragallo Br. in Opp. Ex. H., at 1.) These *qui tam* provisions allow private citizens to file actions on behalf of the Government in cases where people or companies have allegedly made false or fraudulent claims against the Government. *See* 31 U.S.C. § 3730(b) ("A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government."); N.J. Stat. Ann. § 2A:32C–5(b) ("A person may bring a civil action for a violation of this act for the person and for the State. Civil actions instituted under this act shall be brought in the name of the State of New Jersey.").

Dr. DePace's Complaint alleged that the Defendants "paid millions of dollars in illegal kickbacks to physicians to induce them to refer patients to Cooper for expensive in-patient and out-patient cardiac services." (DePace Aff. Ex. 1, March 11, 2013.) Allegedly, these kickbacks caused false claims to be made against the Federal and New Jersey Governments because Cooper subsequently billed Medicare and Medicaid programs for services resulting from the tainted referrals. (Pietragallo Br. in Opp. Ex. H, at 2.)

Dr. DePace retained the law firm of Pietragallo, Gordon, Alfano, Bosick, & Raspanti, LLP (the "Pietragallo Firm") to represent him in the *qui tam* litigation. ***210** (Pietragallo Br. in Opp., at 4.) This representation was secured through a contingency fee agreement (the "Contingency Fee Agreement") entered into by the Pietragallo Firm and Dr. DePace. (*Id.*) Under the Contingency Fee Agreement, Dr. DePace was not obligated to pay the Pietragallo Firm unless there was a recovery in his *qui tam* action. (*Id.* Ex. G, at 3.) However, in the case of a recovery prior to the commencement of trial, the Contingency Fee Agreement required Dr. DePace to pay the Pietragallo Firm forty percent of the gross recovery. (*Id.*) The Contingency Fee Agreement also contemplated what would happen if Dr. DePace were to receive statutory attorneys' fees from the Defendants in this case, stating:

> [i]f there is a judgment, settlement or arbitration award, the Federal and state False Claims Act statutes provide that attorney's fees and costs may be paid by the defendants ("Statutory Attorneys' Fees and Costs"). **This is in addition to any Attorney's Contingency Fees we may receive pursuant to Paragraph 6B of this Agreement.**

(*Id.* (emphasis in original)) The Contingency Fee Agreement also includes an Alternate Dispute Resolution clause which states that "any disputes between us will be resolved by alternate dispute resolution," and that "Pennsylvania law shall apply to any dispute arising under the terms of this agreement." (*Id.* Ex. G., at 6.) Dr. DePace's personal counsel, Joseph Milestone, assisted Dr. DePace during the negotiation of the Contingency Fee Agreement. (DePace Aff. ¶ 13, March 11, 2013; Pietragallo Br. in Opp., at 4–6.) Under the Contingency Fee Agreement, Milestone would receive twenty-five percent of the Pietragallo Firm's contingent fee for providing services as local counsel. (Pietragallo Br. in Opp. Ex. G, at 2.)

On January 22, 2013, the United States and the State of New Jersey elected to intervene in Dr. DePace's *qui tam* litigation for the purposes of settlement. (Notice of Election to Intervene in Part and to Decline to Intervene in Part.) On that same date, a Joint Stipulation of Dismissal of Relator's Complaint was filed with the Court stating that the United States, the State of New Jersey, Dr. DePace, and Cooper had entered into a settlement agreement (the "Settlement Agreement"). (Joint Stipulation of Dismissal of Relator's Compl.) Under the Settlement Agreement, Cooper agreed to pay the United States $10,269,000.00 plus interest, and the State of New Jersey $2,331,000.00 plus interest. (Pietragallo Br. in Opp. Ex. H, at 3.) Out of the money received from Cooper, the United States agreed to pay Dr. DePace $1,951,110.00 and New Jersey agreed to pay Dr. DePace $442,890.00. (*Id.*) Lastly, Cooper agreed to pay Dr. DePace's counsel $430,000 for expenses, attorneys' fees, and costs. (*Id.*) Specifically, the Settlement Agreement stated that "Cooper agrees to pay Relator's Counsel, and Relator's Counsel agree to accept as full payment $430,000 for expenses, and attorney's fees and costs in accordance with subsection 3730(d)(1)." (*Id.*) In an invoice detailing all the hours spent by the Pietragallo Firm on this case sent by the Pietragallo Firm to counsel for Cooper shortly prior to settlement, the Pietragallo Firm represented its total fees and costs to be $458,420.55. (Pl.'s Supplemental Br. Ex. 2.)

The Pietragallo Firm instructed the United States and the State of New Jersey to deposit Dr. DePace's share of the settlement into the Pietragallo Firm's IOLTA account. (Pietragallo Br. in Opp., at 11.) On January 31, 2013, the Pietragallo Firm sent to Dr. DePace and his current counsel Carl Poplar a distribution memo (the "Distribution Memo") detailing how funds ***211** would be distributed from the IOLTA account. (*Id.* Ex K.) The Distribution Memo allocated thirty percent of Dr. DePace's share to the Pietragallo firm and ten percent to Milestone, accounting for the entire forty percent contingency fee. (*Id.*) However, Milestone notified the Pietragallo Firm that he would not be seeking any fees for his work in this case. (Pietragallo Letter, April 4, 2013.) Consequently, the Pietragallo Firm wired Milestone's

share to Dr. DePace on April 3, 2013, effectively reducing the contingency fee to thirty percent, and allowing Dr. DePace to receive $1,682,142.45, or seventy percent of his share, under the terms of the Distribution Memo. [2] (*Id.*)

The day after the Pietragallo Firm sent Dr. DePace and Poplar the Distribution Memo, Poplar sent an e-mail to the Pietragallo Firm stating that he had "reservations" about the Contingency Fee Agreement. (Pietragallo Br. in Opp. Ex. T.) At a meeting held on February 6, 2013, Poplar stated his position that the Contingency Fee Agreement may be unenforceable. (Pietragallo Br. in Opp., at 13). Consequently, the Pietragallo Firm sought to initiate the alternate dispute resolution procedures outlined in the Contingency Fee Agreement. (*Id.,* at 14.) However, Dr. DePace, through Counsel, declined the invitation to alternate dispute resolution on the belief that the alternate dispute resolution procedures in the Contingency Fee Agreement were unenforceable. (*Id.* Ex. M.)

In response to Dr. DePace's refusal to pursue alternate dispute resolution, on February 19, 2013, the Pietragallo Firm filed a Petition to Compel Arbitration before the Court of Common Pleas of Philadelphia, (*Id.* Ex. N,) and on February 22, 2013, the Pietragallo Firm filed a Motion to Preserve the Status Quo of Disputed Funds before the same court (*Id.* Ex P.)

Five days later, Dr. DePace filed the Application in this Court. In the Application, Dr. DePace asks this Court to enjoin the state court proceedings initiated by the Pietragallo Firm, to hold that the Settlement Agreement superseded the Contingency Fee Agreement, or in the alternative to hold that the Contingency Fee Agreement is either unreasonable, or disallowed by the Federal False Claims Act. Dr. DePace has filed four briefs in support of his application, and the Pietragallo Firm has filed three briefs in opposition. Oral argument was held on April 19, 2013. At this time, the Court does not need to determine whether to enjoin the state court proceedings because the Pietragallo Firm has agreed not to proceed with the state court proceedings until resolution of Dr. DePace's Application before this Court. Still at issue, however, is the validity and reasonableness of the Contingency Fee Agreement.

II.

To the extent that Dr. DePace's Application specifically asserts that the Settlement Agreement supersedes the Contingency Fee Agreement, this Court has jurisdiction to reopen the case. The Court's Order of January 24, 2013, which dismissed the case, stated explicitly that this Court "shall retain jurisdiction ***212** over any disputes that may arise regarding compliance with the Settlement Agreement." (Order, January 24, 2013.) Whether the terms of the Settlement Agreement obviate Dr. DePace's obligation to comply with the Contingency Fee Agreement is clearly a dispute "regarding compliance with the Settlement Agreement."

[1] Further, this Court has jurisdiction to reopen the case because the Court has ancillary jurisdiction over disputes regarding fees and costs. *See Novinger v. E.I. DuPont de Nemours & Co., Inc.,* 809 F.2d 212 (3d Cir.1987); *see also Kant v. Seton Hall University,* 422 Fed.Appx. 186, 188 n. 3 (3d Cir.2011) (citing *Kalyawongsa v. Moffett,* 105 F.3d 283 (6th Cir.1997), for the proposition that " 'although attorneys' fee arrangements are contracts under state law, the federal court's interest in fully and fairly resolving the controversies before it requires courts to exercise supplemental jurisdiction over fee disputes that are related to the main action." ') In *Novinger,* the Third Circuit recognized that "the federal forum has a vital interest in [attorneys' fee arrangements] because they bear directly upon the ability of the court to dispose of cases before it in a fair and reasonable manner." 809 F.2d at 217. Therefore, the Third Circuit held that the district court properly concluded that "although there was no diversity of citizenship between the Novingers and their former counsel there was ancillary jurisdiction over the dispute over fees and expenses." *Id.*

Similar to *Novinger,* the instant case involves a fee dispute between a client and his former counsel concerning the fees owed to counsel for representation in a federal action. Therefore, as in *Novinger,* although there is no diversity of citizenship between the Pietragallo Firm and Dr. DePace, there is ancillary jurisdiction over the dispute over fees and expenses. *See id.*

In arguing that the Court does not have jurisdiction over this fee dispute, the Pietragallo Firm relies on this district's unreported decision in *Knoepfler v. Guardian Life Ins. Co.*

of America, 2010 WL 3001380 (D.N.J.2010), which has never been cited by any court, for the proposition that ancillary jurisdiction only attaches to fee disputes that arise while the main action is still pending. (Pietragallo Br. in Opp., at 24.) The Pietragallo Firm's reliance on *Knoepfler* is misplaced. Unlike in the instant case, in *Knoepfler,* the attorney who initiated litigation over the fee dispute "did not appear on its own behalf in any context before the [main action] was conclusively resolved." 2010 WL 3001380, at *3. This represents a factual scenario that the Third Circuit explicitly declined to address in *Novinger. See* 809 F.2d at 218 n. 4 ("We leave for another day the question whether ancillary jurisdiction extends to the resolution of a post settlement fee dispute between two attorneys, only one of whom was attorney of record."). In the instant case, the Pietragallo Firm was counsel of record throughout the five year duration of the *qui tam* action.

Further, to the extent that *Knoepfler* suggests that a federal court does not have ancillary jurisdiction over a fee dispute that arises after the main action has terminated, this Court disagrees. In *Novinger,* in dealing with a fee dispute that arose after a substitution of attorneys, the Third Circuit stated that:

> in the context of contingent fee litigation the nature of such disputes is such that they cannot be resolved at the time the court acts to permit substitution of counsel. At that point in the lawsuit, the reasonable value of the attorney's services cannot be determined because it ***213** must be measured, at least in part, against the results obtained.

809 F.2d at 218. Therefore, the Third Circuit concluded that "the rule of necessity ... must be broad enough to permit the resolution of those disputes after the underlying case has been resolved by judgment or settlement." *Id.* Although the instant case does not involve the substitution of attorneys, similar to *Novinger,* at issue is a contingent fee dispute which could not be resolved until after the conclusion of the litigation because "the reasonable value of the attorney's services ... must be measured, at least in part, against the results obtained." *Id.* Thus, the fact that Dr. DePace's *qui tam* litigation has settled is of no moment.

This understanding of a federal court's ancillary jurisdiction over fee disputes is consistent with precedent from the Supreme Court and other circuits. *See Cooter & Gell v. Hartmarx,* 496 U.S. 384, 395, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) (stating that "[i]t is well established that a federal court may consider collateral issues after an action is no longer pending"); *In re Austrian and German Bank Holocaust Litigation,* 317 F.3d 91 (2d Cir.2003) (stating that "[w]henever a district court has federal jurisdiction over a case, it retains ancillary jurisdiction after dismissal to adjudicate collateral matters such as attorney's fees"); *Zucker v. Occidental Petroleum Co.,* 192 F.3d 1323, 1329 (9th Cir.1999) ("No Article III case or controversy is needed with regard to attorneys' fees as such, because they are but an ancillary matter over which the district court retains equitable jurisdiction even when the underlying case is moot. Its jurisdiction outlasts the 'case or controversy.' "). Therefore, the Pietragallo Firm's reliance on *Knoepfler* does not persuade this Court that it lacks ancillary jurisdiction over the instant fee dispute.

III.

[2] Dr. DePace's primary argument before the Court is that the Pietragallo firm is not entitled to the fees it is owed under the Contingency Fee Agreement because the Settlement Agreement supersedes the Contingency Fee Agreement. (Pl.'s Supplemental Br., at 7.) Specifically, Dr. DePace argues that "Nicholas DePace, and the respondent law firm clearly modified the 2008 [Contingency Fee Agreement] by articulating and agreeing to new terms on the same topic of counsel fees within the Settlement Agreement." (*Id.*) Therefore, Dr. DePace argues, because the Settlement Agreement identifies the $430,000 to be paid by the defendants as "full payment," the Pietragallo Firm has forfeited its right to the fees it would receive under the Contingency Fee Agreement.

The Court finds this argument unpersuasive because it mischaracterizes the Settlement Agreement and the Contingency Fee Agreement as covering the "same topic." In *Venegas v. Mitchell,* the Supreme Court analyzed the fee shifting provisions of 42 U.S.C. § 1988 (" § 1988"), which states that a court may require a defendant to pay to a prevailing plaintiff "a reasonable attorney's fee as part of the costs." 495 U.S. 82, 110 S.Ct. 1679, 109 L.Ed.2d 74 (1990). The Supreme Court's reasoning in *Venegas*

makes clear that statutory fees and contingent fees are not the "same topic." Specifically, the Court stated that the statute:

> controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer. What a plaintiff may be bound to pay and what an attorney is free to collect under a fee agreement are not necessarily measured by the "reasonable attorney's fee" that a ***214** defendant must pay pursuant to a court order.

Id. at 90, 110 S.Ct. 1679.

Under the reasoning in *Venegas,* contrary to Dr. DePace's assertions, the Settlement Agreement and the Contingency Fee Agreement do not cover the "same topic." The Contingency Fee Agreement governs what Dr. DePace, as the prevailing plaintiff, must pay the Pietragallo Firm, while the Settlement Agreement governs what Cooper, as the losing defendants, must pay under the fee shifting provisions of the Federal False Claims Act. *See id.* In this context, the phrase "full payment" in the Settlement Agreement can only be interpreted as defining Cooper's obligations, and not Dr. DePace's. Thus, the Court finds that the Pietragallo Firm's acceptance of $430,000 as "full payment ... for expenses, and attorney's fees and costs in accordance with subsection 3730(d)(1)" in the Settlement Agreement does not modify any of the terms in the Contingency Fee Agreement, including those which require Dr. DePace to pay his lawyers a contingency fee in addition to statutory fees the firm received from Cooper.

IV.

In addition to arguing that the Settlement Agreement supersedes the Contingency Fee Agreement, Dr. DePace argues that the fee shifting provisions of the Federal False Claims Act do not permit an attorney to recover both a contingent fee and statutory attorneys' fees. (Pl.'s Br. in Further Supp., at 24; Pl.'s Supplemental Br., at 3–4.) [3] The Federal False Claims Act has two fee shifting provisions. 31 U.S.C. § 3730(d)(1) ("§ 3730(d)(1)") applies in cases like the instant case, where the Government opts to intervene in the *qui tam* action. Section 3730(d)(1) provides that any successful litigant "shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant." 31 U.S.C. § 3730(d)(2) ("§ 3730(d)(2)") applies in cases where the Government opts not to intervene; however, the language in § 3730(d)(1) and § 3730(d)(2) is identical. Dr. DePace argues that because the Federal False Claims Act states that "all" attorneys' fees are to be awarded against the defendant, the statute does not allow for attorneys to receive additional fees from clients through contingency agreements. (Pl.'s Br. in Further Supp., at 24; Pl.'s Supplemental Br., at 3–4.)

[3] Whether the Federal False Claims Act allows an attorney to receive both statutory fees and a contingency fee is an issue of first impression in this Circuit. Nonetheless, after considering the submissions of the parties, decisions in other circuits, and legislative intent, the Court is convinced that the statute does allow for an attorney to recover both fees.

The Supreme Court's reasoning in *Venegas,* cited in Part III, is again relevant. In *Venegas,* as a result of finding that statutory fees are a separate issue from contingent fees, the Supreme Court held that a contingency fee agreement which required a client to pay his attorney more than the ***215** court awarded statutory fees was enforceable. 495 U.S. at 90, 110 S.Ct. 1679. Although the specific contract at issue in *Venegas* provided that the amount of the contingency fee was to be offset by the amount of the statutory fee, the Supreme Court's rationale is not limited to this factual scenario. For example, the Supreme Court explicitly stated that "[s]ection 1988 itself does not interfere with the enforceability of a contingent fee contract," drawing no distinction between contingency fee contracts that allow for offsets and those that do not. *See id.* The Supreme Court echoed this holding twelve years after *Venegas* in *Gisbrecht v. Barnhart,* stating that in cases involving statutory fees, "nothing prevents the attorney for the prevailing party from gaining additional fees, pursuant to contract, from his own client." 535 U.S. 789, 807, 122 S.Ct. 1817, 152 L.Ed.2d 996 (2002). The Supreme Court also laid out a policy rationale for its holding in *Venegas,* stating that "depriving plaintiffs of the option of promising to pay more than the statutory fee if that is necessary to secure counsel of their choice would not further § 1988's general purpose of enabling such

plaintiffs in civil rights cases to secure competent counsel." *Venegas,* 495 U.S. at 89–90, 110 S.Ct. 1679. Nothing about this policy rationale is unique to contingency fee contracts that allow for an offset.

Although *Venegas* happened to arise under the fee shifting provision of § 1988, this Court sees no reason why the Supreme Court's holding should not apply with equal force to the fee shifting provisions of the Federal False Claims Act. There is no language in *Venegas* to suggest that the Supreme Court's reasoning was unique to § 1988. In fact, in the Supreme Court's later opinion in *Gisbrecht,* a case arising under the Social Security Act, the Supreme Court cited *Venegas* for the general proposition that "the lodestar method was designed to govern the imposition of fees on the losing party. In such cases, nothing prevents the attorney for the prevailing party from gaining additional fees, pursuant to contract, from his own client." *Gisbrecht,* 535 U.S. at 806, 122 S.Ct. 1817 (internal citations omitted).

Further, the policy rationale explained in *Venegas* is equally relevant in the context of the Federal False Claims Act. As with § 1988, the fee shifting provisions of the Federal False Claims Act are concerned with enabling plaintiffs to secure competent counsel. Specifically, the legislative history of the Senate version of the Federal False Claims Act states that the "[u]navailability of attorneys fees inhibits and precludes many individuals, as well as their attorneys, from bringing civil fraud suits." S.Rep. No. 99–345, at 29 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5294. Thus, as with the fee shifting provision of § 1988, "depriving plaintiffs of the option to pay more than the statutory fee if that is necessary to secure counsel of their choice would not further" the Federal False Claims Act's purpose of enabling such plaintiffs to secure competent counsel. *See Venegas,* 495 U.S. at 89–90, 110 S.Ct. 1679.

This Court is not alone in holding that *Venegas* applies to the Federal False Claims Act as well as § 1988. In *United States ex rel. Maxwell v. Kerr–McGee Oil & Gas Corp.,* the United States District Court for the District of Colorado, applying *Venegas,* held that "the existence of a contingent fee agreement between [the plaintiff] and his counsel does not justify reducing the lodestar amount of attorneys' fees owed by the Defendant under 31 U.S.C. § 3730(d)(2)." 793 F.Supp.2d 1260, 1264 (D.Colo.2011). In reaching this conclusion, the *Maxwell* court stated that fee shifting under § 3730(d)(2) "is designed to ***216** shift all of the costs (including attorney fees) to the loser in an action. The fact that the winner's attorneys receive compensation from another source is irrelevant to the fee award." *Id.* Further, the Court in *Maxwell* recognized the fact that the plaintiff's attorneys were not required to use the statutory fee to offset the contingency fee, stating that "whether [plaintiff's] attorneys will enforce their right to collect both the contingent fee as well as a statutory award, reduce it, or waive it altogether is beyond the purview of the issues before the Court." *Id.* at 1265.

In addition to *Maxwell*, many other courts, without making reference to *Venegas,* have acknowledged the existence of fee arrangements in *qui tam* litigation which allow lawyers to receive both a statutory fee and a contingency fee without offset. *See e.g. United States ex rel. Lefan v. General Electric Co.,* 394 Fed.Appx. 265, 272 (6th Cir.2010) (stating that an attorney's contingency fee award was "in addition to" statutory attorney fees and cost reimbursements); *United States ex rel. Alderson v. Quorum Health Group, Inc.,* 171 F.Supp.2d 1323, 1335 n. 35 (M.D.Fla.2001) (rejecting the argument that an award of statutory fees would represent a windfall to a relator's attorney who also recovered a contingent fee because "to obtain the necessary professional advice and assistance, [relator] remains free to distribute his recovery as he sees fit"); *United States ex rel. Poulton v. Anesthesia Associates of Burlington, Inc.,* 87 F.Supp.2d 351, 359 (D.Vt.2000) (granting an upward adjustment of lodestar under § 3730(d)(1) even though attorneys had "already recovered handsomely through their contingency fee arrangement"); *United States ex rel. John Doe I v. Pennsylvania Blue Shield,* 54 F.Supp.2d 410, 413 (E.D.Pa.1999) (awarding statutory fees under § 3730(d)(1) even though relators had already paid a forty percent contingency). In contrast, the Court is aware of no cases which suggest that the Federal False Claims Act precludes an attorney from receiving both statutory and contingency fees.

Despite the case law above, Dr. DePace urges this Court to reject the reasoning in *Maxwell* because *Maxwell* was interpreting § 3730(d)(2), and not § 3730(d)(1). According to Dr. DePace, this distinction is relevant because in non-intervention cases where § 3730(d)(2) is applicable, "the risk is great, the work is more, and the relator is entitled to a greater award than in an intervention case." (Pl.'s Br. in Further Supp., at 20.) In contrast, "once the government intervenes, it is only the exceptional and rare case that

there is any risk for the relator or relator's counsel." (*Id.*) Further, "[t]he effect of government intervention on the Relator and his counsel is to relieve both of the rigors, expense and more substantial risk of failure." (Pl.'s Supplemental Br., at 4.) As a result of these differences between intervention and non-intervention cases, Dr. DePace maintains that *Maxwell* is not relevant to the instant case.

The Court disagrees. Initially, the Court notes that Dr. DePace provides no case law or statistics to support his broad generalizations about the amount of risk and work involved in intervention and non-intervention cases. Additionally, the Court's experience in the instant litigation convinces the Court that Dr. DePace's generalizations are inaccurate. The instant litigation has spanned five years. The Government did not formally intervene until shortly before settlement. Thus, for nearly the entire duration of this litigation, the Pietragallo Firm represented Dr. DePace under circumstances no different from a non-intervention case. Had the Government opted not to intervene, the Pietragallo Firm faced enormous ***217** risk. If the firm decided to withdraw from the representation at that point, and there was no recovery, it would have received no fees despite spending five years representing Dr. DePace. (Pietragallo Br. in Opp. Ex. G, at 6–7.)

Further, assuming *arguendo* that Dr. DePace is correct about the differences between intervention and non-intervention cases, the Court still finds that an attorney can receive both a contingency fee and a statutory fee under § 3730(d)(1). The language in § 3730(d)(1) and § 3730(d)(2) is identical, and there is no legislative history to suggest that Congress intended this identical language to be interpreted differently. Thus, practical differences in the nature of intervention and non-intervention cases are not an excuse for the Court to ignore the plain language of the statute. In addition, holding that § 3730(d)(1) prohibits an attorney from receiving both a statutory fee and a contingency fee directly contradicts the Supreme Court's reasoning and language in *Venegas* and *Gisbrecht.*

In sum, this Court finds that the fee shifting provisions of the Federal False Claims Act do not prohibit an attorney from receiving both statutory attorneys' fees and a contingency fee. Therefore, the Federal False Claims Act does not invalidate the Contingency Fee Agreement between Dr. DePace and the Pietragallo Firm.

V.

A.

Although the Court has found that neither the Settlement Agreement nor the Federal False Claims Act precluded the Pietragallo Firm from receiving both a contingency fee and a statutory fee, the Contingency Fee Agreement is only enforceable if the total fee received by the Pietragallo Firm is reasonable. New Jersey Rule of Professional Conduct 1.5(a) ("Rule 1.5(a)") states that "a lawyer's fee shall be reasonable."[4] The New Jersey Rules of Professional Conduct bind this court by virtue of Local Civil Rule 103.1(a), which states that "[t]he Rules of Professional Conduct of the American Bar Association as revised by the New Jersey Supreme Court shall govern the conduct of the members of the bar admitted to practice in this Court."

[4] The Court finds that the total fee received by the Pietragallo Firm is reasonable under Rule 1.5(a). Although the Court agrees with Dr. DePace that the rote addition of a contingency fee to a statutory fee is not an automatic formula for determining reasonableness, in this case the addition does produce a reasonable fee. This case is not one where the additional contingency fee sought by the law firm is so large that the firm's total ***218** fees dwarf the plaintiff's recovery, or even exceed the Plaintiff's recovery. On the contrary, pursuant to the Distribution Memo of January 31, 2013, the Pietragallo Firm seeks a thirty percent contingency fee in addition to statutory fees of $430,000.00. In total, the Pietragallo Firm would thus receive forty-one percent of Dr. DePace's and the Pietragallo Firm's combined recovery.[5]

These fees are perfectly in line with the fees received by lawyers in *qui tam* cases across the country. (Pietragallo Br. in Opp. Ex. II.) Further, the Pietragallo Firm has provided numerous affidavits from prominent *qui tam* lawyers who assert that fee agreements like the one at issue in this case are typical in *qui tam* litigation under the Federal False Claims Act. (*E.g.* Pietragallo Br. in Opp. Ex. A (stating that it is "standard practice" for *qui tam* attorneys to receive both their reasonable hourly fees and costs paid by the defendant, and a contingency fee paid by the client); *id.* Ex. B ("[I]t is standard practice

of attorneys representing *qui tam* relators to enter into retainer agreements ... under which counsel are paid both a 'contingent fee' ... as well as attorneys' fees recovered from the defendant(s).")). The Government has also filed a letter in this case stating its position that § 3730(d)(1) does "not preclude a relator from entering into an agreement with counsel providing for an additional contingent fee based upon any relator share recovered." (Letter from Counsel for the United States.)

The legitimate risk of non-payment in *qui tam* cases also convinces the Court that the forty-one percent fee sought by the Pietragallo Firm is reasonable. Unlike more conventional legal representation, the success of a *qui tam* suit depends in large part on the actions of a third party —the Government. Further, litigating cases under the *qui tam* provisions of the Federal False Claims Act can often take many years, (*E.g.* Pietragallo Br. in Opp. Ex. A ¶ 15; *id.* Ex. B ¶ 10,) and the Government's decision to intervene can occur at any time. In the instant case, it took the Government five years to intervene. During these five years, the Pietragallo Firm was receiving no payment for its representation of Dr. DePace. At the end of the five years, had the Government opted not to intervene, the Pietragallo Firm faced a substantial risk of receiving no payment despite its prolonged representation of Dr. DePace.

B.

Even though the Court finds the amount of the fee owed to the Pietragallo Firm to be reasonable, the Contingency Fee Agreement may nonetheless be unenforceable if New Jersey ethical rules make the "double recovery" of statutory fees and a contingency fee per se unreasonable. Over the course of his four briefs, Dr. DePace cites to a veritable laundry list of ***219** New Jersey ethical rules and New Jersey Supreme Court decisions in support of this argument. (Pl.'s App. for Emergent Relief, at 7–13; Pl.'s Supplemental Br., at 9–10; Pl.'s Br. in Further Supp. of Mot., at 1–11.) Nonetheless, the Court finds that there is no law in New Jersey which prohibits the Pietragallo Firm from being paid as they were in this case.

First, Dr. DePace argues that the Pietragallo Firm's fee in this case is not reasonable because under the Settlement Agreement the Pietragallo Firm was paid "for nearly every penny of its time." (Pl.'s App. for Emergent Relief, at 10.) Therefore, "an additional bonus fee without proper consideration of fee enhancement criteria is per se unreasonable" under Rule 1.5(a). (*Id.*)

The Court disagrees. In *Szczepanski v. Newcomb Medical Center, Inc.,* the New Jersey Supreme Court cited *Venegas* with approval for the proposition that "statutory-fee awards and fees payable under contingent-fee agreements are distinct and independent concepts." 141 N.J. 346, 661 A.2d 1232, 1239 (1995). Given that the New Jersey Supreme Court has recognized the central holding of *Venegas,* it would not make sense if any fee payable by a prevailing party to his lawyer after the lawyer had already received statutory fees from the losing party were unreasonable under Rule 1.5(a). Such an interpretation of Rule 1.5(a) would eviscerate the notion that "the lodestar method was designed to govern the imposition of fees on the losing party. In such cases, nothing prevents the attorney for the prevailing party from gaining additional fees, pursuant to contract, from his own client." *Gisbrecht,* 535 U.S. at 807, 122 S.Ct. 1817. Therefore, the Court declines to adopt such a reading of Rule 1.5(a).

Dr. DePace next argues that double recovery is unethical in this case because the Pietragallo Firm attempted to conceal the existence of the Contingency Fee Agreement from the Court. Dr. DePace's presentation of this argument is far from concise. The argument is presented over four separate briefs, and cites to different case law and ethical rules each time it is presented. As best the Court can tell, the argument is essentially two pronged. First, the failure to disclose is in direct violation of New Jersey Rule of Professional Conduct 3.3(a)(5) ("Rule 3.3(a)(5)"), which states that "a lawyer shall not knowingly fail to disclose to the tribunal a material fact knowing that omission is reasonably certain to mislead the tribunal." (Pl.'s Letter Br., at 4.) Second, the failure to disclose the agreement conflicts with the New Jersey Supreme Court's decision in *Rendine v. Pantzer,* 141 N.J. 292, 661 A.2d 1202 (1995), which sets guidelines for when a court can enhance the fee amount a lawyer receives under fee shifting statutes. (Pl.'s Br. in Further Supp., at 6.)

The Court is puzzled by this line of argument. It is immaterial that no representation was made to the Court in this case because the Court played no role in setting the fee that Cooper was obligated to pay under § 3730(d)(1). The statutory fees were agreed to privately by the parties

during settlement negotiations. Therefore, under Rule 3.3(a)(5) it cannot be said that the failure to disclose the Settlement Agreement was "reasonably certain to mislead the Court" because there was simply no opportunity for the Court to be misled.

Dr. DePace's reliance on *Rendine* is similarly misplaced. In *Rendine,* the New Jersey Supreme Court addressed the issue of whether a court awarding attorneys' fees under a state fee shifting statute was permitted to enhance the fee award based on the "essentially contingent nature of the counsel-fee arrangement." ***220** 661 A.2d at 1218. The New Jersey Supreme Court ultimately held that "the trial court, after having carefully established the amount of the lodestar fee, should consider whether to increase that fee to reflect the risk of non-payment in all cases in which the attorney's compensation entirely or substantially is contingent on a successful outcome." *Id.* at 1228.

As with Rule 3.3(a)(5), *Rendine* has no applicability in this case. Whether the Pietragallo Firm was entitled to a fee enhancement was not an issue in this case because the Court was never asked to determine a fee award under § 3730(d)(1). Further, *Rendine* is entirely silent as to whether an attorney can receive both a statutory fee and a contingency fee. The fact that the New Jersey Supreme Court held that a trial court may consider the contingent nature of a fee agreement in determining a reasonable fee under fee shifting statutes does not at all imply that an attorney cannot also receive payment under a contingency fee agreement with his client. As already stated, an award of statutory fees and a private contingency fee agreement are "distinct and independent concepts." *Szczepanski,* 661 A.2d at 1239.

Dr. DePace's reliance on *Rendine* is misplaced for another reason, namely that *Rendine* established criteria to be used by a trial court in determining a reasonable fee under state fee shifting statutes. At issue in the instant case is a federal fee shifting statute, and the factors to be considered in determining a reasonable fee under a federal statute are not necessarily the same as those under a state statute. For example, in *City of Burlington v. Dague,* the Supreme Court of the United States held that the Federal Resource Conservation and Recovery Act and the Clean Water Act did not permit enhancement of the lodestar fee on the basis of contingency. 505 U.S. 557, 567, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992); *see also Rendine,* 661 A.2d at 1223. This holding has been applied to other federal fee shifting statutes. *See Rendine,* 661 A.2d at 1223. Therefore, even if this were a case where the Court was called upon to determine a reasonable attorneys' fee, the Court would not be obligated to apply a contingency enhancement on the basis of *Rendine.* [6]

Another ethical argument advanced by Dr. DePace is that the addition of a contingency fee to a statutory fee is unreasonable because in cases where the contingency fee is larger than the statutory fee, New Jersey law requires the attorney to use the statutory fee to offset the contingency fee. (Pl.'s Br. in Further Supp., at 9.) In other words, Dr. DePace argues that a reasonable fee is an analysis of the "difference" between the statutory fee and the contingent fee. In support of his argument, Dr. DePace relies on the decisions of *Singer v. State,* 95 N.J. 487, 472 A.2d 138 (1984), and *Yakal–Kremski ex rel. Yakal–Kremski v. Denville Twp. Bd. of Ed.,* 329 N.J.Super. 567, 748 A.2d 642 (2000).

Despite Dr. DePace's assertions, these cases do not stand for the proposition that any New Jersey law or ethical rule prohibits an attorney from receiving both a contingency fee and a statutory fee. *Singer* arises under the fee shifting provision of § 1988. 472 A.2d at 139. The issue confronting ***221** the New Jersey Supreme Court was what method should be used to determine a reasonable fee under that fee shifting statute. *Id.* at 142–45. In detailing the correct method, the New Jersey Supreme Court noted that "an award made on the basis of [this method] does not disserve attorneys who customarily charge higher rates to their private clients" because "[i]n appropriate cases, they may charge clients in successful civil rights litigation the difference between a reasonable fee awarded under the Awards Act and their normal rates." *Id.* at 145. *Singer,* however, does not say that this is the only way for an attorney to receive greater compensation than a statutory fee award, and is entirely silent as to whether attorneys can receive both a statutory fee and a contingency fee.

Dr. DePace's reliance on *Yakal–Kremski* is similarly misplaced. In *Yakal–Kremski,* the New Jersey Superior Court, Appellate Division, sought to determine criteria for awarding counsel fees under the New Jersey Tort Claims Act. The Appellate Division held that "the existence of a contingency fee retainer should not prevent the exercise of statutory discretion by the judge in assessing a reasonable award of fees." 748 A.2d at 646. In reaching this conclusion, the court cited to *Furey v. Cnty. of Ocean,*

287 N.J.Super. 42, 670 A.2d 120 (1996), stating "in *Furey,* we noted that allowing fees in that particular case would permit the decedent's widow and daughter to more fully recover their economic loss caused by death, as the award would relieve them of all or part of the *contingent fee* they are subject to on the recovery of their loss." *Id.* (emphasis in original) (internal citations and quotations omitted). Much like in *Singer,* the *Yakal–Kremski* court nowhere states that attorneys are prohibited from receiving both statutory and contingency fees, or even addresses the issue.

Moreover, even if *Singer* and *Yakal–Kremski* did stand for the proposition that an attorney practicing in New Jersey could not receive both statutory and contingency fees, those decisions would not be controlling in the instant case. First, *Singer* was decided six years prior to *Venegas,* and both cases interpret the same statute. *Singer* does not purport to interpret any New Jersey specific law or ethical rule. Therefore, to the extent that *Singer* disagrees with *Venegas,* this Court is bound by *Venegas.*

In contrast, *Yakal–Kremski* does interpret a New Jersey specific statute, namely the New Jersey Tort Claims Act. However, the policy behind the fee shifting provision of the Tort Claims Act is fundamentally different from the policy behind the fee shifting provisions of the Federal False Claims Act. The purpose and policy underlying the fee shifting provision of the Tort Claims Act is to "reimburse an injured claimant to the full extent of his present and projected economic loss." N.J. Stat. Ann. § 59:9–5 cmt. Allowing an attorney to receive both a statutory fee and a contingency fee would arguably undermine this policy because the prevailing party would be obligated to pay the attorney out of his recovery. In contrast, as stated in Section IV above, the policy behind the fee shifting provisions of the Federal False Claims Act was to ensure that litigants had access to competent counsel. This policy would not be undermined by allowing a party to choose to pay a contingency fee in addition to a statutory fee in order to secure his preferred counsel. [7]

***222** Overall, because the Court finds that the total amount of the fee is reasonable and that no New Jersey law or ethical rule prohibits a fee structure wherein an attorney receives both a contingency fee and a statutory fee, [8] there is no basis for finding that the Contingency Fee Agreement in this case is unenforceable. [9]

VI.

For the foregoing reasons, Dr. DePace's Application to Reopen is granted. However, the relief requested in his Application and subsequent briefs is denied. The Contingency Fee Agreement entered into with the Pietragallo Firm is fully enforceable. An appropriate order will accompany this Opinion.

ORDER DENYING RELIEF SOUGHT IN DR. DEPACE'S APPLICATION FOR EMERGENT RELIEF (Dkt. No. 27)

This matter having appeared before the Court upon Relator Dr. Nicholas DePace's "Application for Emergent Relief to Reopen Pursuant to L. Civ. R. 41.1(b) and for the Court's Determination of Reasonableness of Attorney's Fee Pursuant to L. Civ. R. 103.1(a)" (Dkt. No. 27) (the "Application"); the Court, having considered the submissions of the parties and statements made during oral argument; for the reasons set forth in an Opinion issued on even date herewith; and for good cause appearing;

IT IS on this 22nd day of April, 2013,
ORDERED THAT:

(1) The Clerk of Court is hereby directed to **REOPEN THIS FILE.**

(2) The relief requested in Dr. DePace's Application (Dkt. No. 27) is hereby **DENIED.**

(3) The Clerk of Court is hereby directed to **CLOSE THIS FILE.**

All Citations

940 F.Supp.2d 208, Med & Med GD (CCH) P 304,427

Footnotes

1 Citations in this form are to "Respondent's Brief in Opposition to Plaintiff's Application for Emergent Relief Pursuant to L. Civ. R. 65.1, Motion to Reopen Pursuant to L. Civ. R. 41.1(b) and Motion to Invoke the Court's Review of Counsel Fees Pursuant to L. Civ. R. 103.1(a)."

2 Under the terms of the Contingency Fee Agreement, the Pietragallo Firm had no obligation to return Milestone's uncollected fee. Mr. Milestone's contingency fee was to be paid out of the Pietragallo Firm's contingency fee. (Pietragallo Br. in Opp. Ex. G.) Thus, in the scenario where Milestone decided not to collect his fee, the Pietragallo Firm was entitled to the full forty percent contingency fee. As stated in the body of the Opinion, returning Milestone's fee to Dr. DePace had the effect of reducing the amount of the contingency fee from forty percent to thirty percent.

3 In his supplemental brief, Dr. DePace briefly attempts to argue that the New Jersey False Claims Act also prohibits an attorney from receiving both statutory and contingency fees. (Pl.'s Supplemental Br., at 2–4.) This argument is irrelevant. Under the terms of the Settlement Agreement, the Pietragallo Firm only received statutory fees under the fee shifting provisions of the Federal False Claims Act. Therefore, the Court does not respond to this argument in this Opinion.

4 Rule 1.5(a) also lists eight factors to be considered in determining the reasonableness of a fee. These factors are:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
3. The fee customarily charged in the locality for similar legal services;
4. The amount involved and the results obtained;
5. The time limitations imposed by the client or by the circumstances;
6. The nature and length of the professional relationship with the client;
7. The experience, reputation, and ability of the lawyers performing the services;
8. Whether the fee is fixed or contingent.

The Court finds that all of these factors militate in favor of the fee requested by the Pietragallo Firm.

5 This percentage is reached by dividing the total attorneys' fees sought, $1,150,918.25, by the sum of the relator's share and the statutory fee award. The precise fraction is $1,150,918.25/($2,403,060.63+ $430,000.00).

Further militating in favor of finding this percentage reasonable is that the Pietragallo Firm receives no credit in its contingency fee for the over $12 million recovery of the State and Federal Governments. The contingency fee is calculated solely based on the amount of Dr. DePace's share. Although the Court is aware that the Pietragallo Firm does not represent the Government, it is common in *qui tam* cases for the Government to work closely with the Relator's attorneys. Additionally, a representative of the Federal Government represented to the Court in oral argument held on April 19, 2013, that the Pietragallo Firm did work closely with the Government in this case.

6 The Court does not hold that contingency enhancements are prohibited under the Federal False Claims Act. This issue is not before the Court because the Settlement Agreement does not include any enhancements. The Pietragallo Firm represented to Cooper that a reasonable lodestar fee would be $458,000.00, and ultimately accepted $430,000.000 as the lodestar. The Court relies on *Dague* only for the purpose of showing that *Rendine* is not binding precedent for statutory fees awarded under federal statutes.

7 Additionally, the Court notes that *qui tam* litigation is unique in that unlike the New Jersey Tort Claims Act and most other state and federal statutes that allow for fee shifting, the purpose of the award to a relator is not primarily for the purpose of making an injured party whole. Instead, the relator's share is "generally viewed as a finder's fee." *United States ex rel. Alderson v. Quorum Health Group, Inc.,* 171 F.Supp.2d 1323, 1332 (M.D.Fl.2001.)

8 The Court is aware that Dr. DePace, in passing, lists other ethical grounds on which he believes the Contingency Fee Agreement is unenforceable, such as New Jersey Court Rule 1:21–7(b), and New Jersey Rule of Professional Conduct 2.1. In addition, Dr. DePace briefly argues in his fourth brief that cross-checking the lodestar award with the contingency fee shows the contingency fee to be unreasonable, and that the amount of the statutory award was itself unreasonable. Although the Court does not address these arguments in the body of this Opinion, it has considered these arguments and finds them all to be without merit.

9 The Court is aware that the Pietragallo Firm argues that Pennsylvania law should be applied to determine the reasonableness of the fee in this case. However, because the Court finds that even under New Jersey law the fee is reasonable, it does not conduct a choice of law analysis.

87 F.Supp.2d 351
United States District Court,
D. Vermont.

UNITED STATES of America ex rel.
Thomas J. POULTON, M.D., Plaintiffs,
v.
ANESTHESIA ASSOCIATES OF BURLINGTON, INC., Associates in Practice Management, Robert Dunn, Fletcher Allen Health Care, Fletcher Allen Provider Corp., University of Vermont, University Health Center, Inc., University of Vermont College of Medicine, Surgical Associates Foundation, Defendants.

No. Civ. 2:99–CV–269.
|
March 3, 2000.

Relator in successful qui tam action involving entities in health care industry moved for award of attorney fees under False Claims Act (FCA). The District Court, Sessions, J., held that: (1) defendant was liable for 90% of relator's attorney fees; (2) hourly rate of $225 per hour for attorneys and $160 for associates was suitable in complex health care fraud and qui tam action; and (3) upward adjustment to lodestar calculation was warranted.

Motion granted in part.

West Headnotes (17)

[1] United States
Costs and fees

Lodestar approach for calculating attorney fees, which involves multiplying number of hours reasonably expended on litigation times a reasonable hourly rate, is typically used in qui tam actions under the False Claims Act (FCA). 31 U.S.C.A. § 3730(d)(1).

2 Cases that cite this headnote

[2] United States
Costs and fees

Under lodestar approach for calculating attorney fees in qui tam action, initial burden of proof that fee is reasonable falls on relator, who must submit evidence regarding number of hours expended and hourly rate claimed, and then party opposing fee award has burden of challenging reasonableness of fee requested. 31 U.S.C.A. § 3730(d)(1).

2 Cases that cite this headnote

[3] Federal Civil Procedure
Result;prevailing parties;"American rule"

Federal Courts
Costs and attorney fees

Allocation of attorney fee liability among parties is matter committed to district court's discretion and will not be disturbed unless determination evidences abuse of discretion.

Cases that cite this headnote

[4] United States
Costs and fees

Health care entity would be held liable for 90% of successful relator's attorney fees in False Claims Act (FCA) action, where entity paid 90% of total settlement to government and other two defendants in action were without assets or held assets which were effectively judgment proof. 31 U.S.C.A. § 3730(d)(1).

Cases that cite this headnote

[5] United States
Costs and fees

Successful relator's attorney fees in False Claims Act (FCA) action against health care entities would not be reduced based on impact of relator's counsel on case, where relator's attorneys were actively involved with claims from beginning of suit and government offered 24% share of settlement to relator, thereby acknowledging importance of relator's role and role of his attorneys. 31 U.S.C.A. § 3730(d)(1).

Cases that cite this headnote

[6] **Federal Civil Procedure**
Amount and elements

Reasonableness of rate charged by attorney, for purposes of awarding attorney fees, is determined by its congruity with those prevailing in community for similar services by lawyers of reasonably comparable skill, experience, and reputation.

Cases that cite this headnote

[7] **Federal Civil Procedure**
Amount and elements

Court exercising its discretion with respect to reasonableness of rate charged by attorney, when calculating attorney fees, must consider prevailing marketplace rates for type of work and experience of attorneys.

1 Cases that cite this headnote

[8] **Federal Civil Procedure**
Amount and elements

Prevailing community that federal district court should use in setting lodestar rate for attorney fees is district in which the court sits.

Cases that cite this headnote

[9] **United States**
Costs and fees

Hourly rate of $225 per hour for attorneys and $160 for associates was suitable for purposes of calculating successful relator's attorney fees in complex health care fraud and qui tam action against health care entities. 31 U.S.C.A. § 3730(d)(1).

Cases that cite this headnote

[10] **United States**
Costs and fees

Successful relator's attorneys fees under False Claims Act (FCA) would not be reduced for vague and clustered billing, where challenged entries were understandable when viewed in context of preceding billing entries.

Cases that cite this headnote

[11] **United States**
Costs and fees

Although reduction of lodestar calculation of attorney fees in False Claims Act (FCA) action is appropriate for hours spent on unsuccessful claims when case has gone to trial and many claims are found to be not meritorious, such reduction is not appropriate when case resulted in global settlement of claims. 31 U.S.C.A. § 3730(d)(1).

Cases that cite this headnote

[12] **Federal Civil Procedure**
Amount and elements

When travel time is used productively by attorney, such as in preparation for meetings in destination city, no reduction in attorney's hourly rates is warranted, for purposes of calculating attorney fees.

Cases that cite this headnote

[13] **Federal Civil Procedure**
Amount and elements

For purposes of calculating attorney fees awarded to successful litigant, attorney's hourly rate should be reduced by 50% for non-productive travel time.

1 Cases that cite this headnote

[14] **United States**
Costs and fees

Health care entity which opposed attorney fee award to successful relator in False Claims Act (FCA) action failed to satisfy burden of clarifying its objections to hours claimed by attorneys, where entity did not designate specific portions of work performed by relator's counsel that it considered duplicative. 31 U.S.C.A. § 3730(d)(1).

Cases that cite this headnote

[15] United States
Costs and fees

Time counsel spent on negotiating successful relator's share of settlement in False Claims Act (FCA) action was not appropriately billed to defendants in qui tam case. 31 U.S.C.A. § 3730(d)(1).

2 Cases that cite this headnote

[16] Federal Civil Procedure
Attorney fees

There is strong presumption that lodestar determines the reasonable attorney fee, and burden rests on fee applicant seeking upward adjustment to show that such adjustment is necessary to determination of reasonable fee.

Cases that cite this headnote

[17] United States
Costs and fees

Several of claims raised by relator in False Claims Act action were real risk-of-not-prevailing issues, thereby warranting upward adjustment to lodestar calculation of attorney fees; relator's attorneys believed there was substantial risk involved in taking case and relator had some difficulty in obtaining counsel. 31 U.S.C.A. § 3730(d)(1).

1 Cases that cite this headnote

Attorneys and Law Firms

***353** Marc S. Raspanti, David M. Laigaie, Miller, Alfano & Raspanti, P.C., Philadelphia, PA, Howard Bruce Klein, Law Offices of Howard Bruce Klein, Philadelphia, PA, Richard Thomas Cassidy, Hoff, Curtis, Pacht, Cassidy & Frame, P.C., Burlington, VT, for Thomas J. Poulton, M.D., United States of America ex rel., plaintiff.

Joseph Robert Perella, AUSA, Office of the United States Attorney, Burlington, VT, for United States of America, intervenor-plaintiff.

Marc B. Heath, Downs, Rachlin & Martin, PLLC, Burlington, VT, for Fletcher Allen Health Care, defendant.

Karen McAndrew, Dinse, Knapp & McAndrew, P.C., Burlington, VT, for Associates in Practice Management, Robert Dunn, defendants.

OPINION AND ORDER

SESSIONS, District Judge.

In this qui tam case, Dr. Thomas J. Poulton, M.D. ("Dr. Poulton," "relator," "Plaintiff"), relator in the above captioned matter, moves for attorneys' fees and costs (paper 64), pursuant to 31 U.S.C. § 3730(d)(1). Defendant Fletcher Allen Health Care ("FAHC") opposes the motion on several grounds (paper 66), which are enumerated and addressed below. For the following reasons, the Court GRANTS in part Plaintiff's motion for attorneys' fees and costs (paper 64).

Factual Background

In 1995, Dr. Poulton was offered the Chairmanship of the Department of Anesthesiology for the University of Vermont ("UVM") College of Medicine, the Presidency of Anesthesia Associates of Burlington ("AAB"), and the Health Care Physician Leadership for Anesthesiology at FAHC. He accepted the positions, and his family moved from Kansas to Burlington.

Shortly after his arrival in Burlington, Dr. Poulton noticed billing irregularities at AAB. Although he brought these matters to the attention of senior management of FAHC, UVM, and the AAB executive committee, they failed to address his concerns. Ultimately, he brought the matter to the attention of the federal government and filed this suit, claiming that the defendants violated the False Claims Act, 31 U.S.C. §§ 3729–3733, and that they retaliated against him in violation of 31 U.S.C. § 3730(h).

Two and one half years after Dr. Poulton filed his suit, defendants agreed to settle. During those years, Dr. Poulton and his counsel worked closely with U.S. ***354** Attorney Charles Tetzlaff ("Mr. Tetzlaff"), assisting in the government's federal health care fraud investigation. As a result of Dr. Poulton's suit, the government has recovered to date $3.2 million dollars, and will shortly recover an additional $150,000. FAHC paid nearly 90% of the total settlement to the government, while AAB paid under 6%, and Mr. Dunn, the third defendant, was held responsible for 4.5% of the total settlement.

The government has approved a twenty-four percent relator's share to Dr. Poulton, which is intended to award the relator and counsel based on "the extent to which the person substantially contributed to the prosecution of the action." 31 U.S.C. § 3730(d)(1). The maximum share available in cases where the government has intervened is twenty-five percent.

Of the three entities involved with the settlement, FAHC, AAB, and Mr. Dunn, Plaintiff argues that two are financially insolvent for purposes of this matter. AAB is a defunct corporation wholly lacking in corporate assets, and Mr. Dunn's assets are held in pension funds or in his wife's name. When settling Dr. Poulton's retaliation claim against AAB, AAB received a full release from liability, including attorney's fees under 31 U.S.C. § 3730(d)(1).

Dr. Poulton was represented in this matter by two separate law firms in Philadelphia, Miller, Alfano & Raspanti, P.C. ("MAR") and the Law Offices of Howard Bruce Klein. Dr. Poulton's brief claims that despite an extensive search of attorneys in the Burlington area, he was unable to find appropriate representation. Particularly, he could not find an attorney who had handled both health care fraud and qui tam cases. He further claims that those few attorneys whose experience was commensurate with the level required for this litigation had to decline due to prior representation of one or more of the defendants.

At the time of the filing of the Motion for Attorneys' Fees and Costs, fees and costs totaled $342,965.72, which are as follows:

	Fees	Costs	Total
Miller, Alfano & Raspanti, P.C.	$240,902.50	$17,917.02	$258,819.52
Howard Bruce Klein	$ 80,537.50	$ 3,608.70	$ 84,146.20
		Total	$342,965.72

Discussion

[1] In accord with the Federal False Claims Act, a successful relator "shall also receive an amount for reasonable expenses which the Court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees and costs shall be awarded against the defendant." 31 U.S.C. § 3730(d)(1). The lodestar approach, which involves "multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate," *G.M., ex rel. R.F. v. New Britain Bd. Of Educ.,* 173 F.3d 77, 84 (2d Cir.1999) (quoting *Blanchard v. Bergeron,* 489 U.S. 87, 94, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989)), is typically used in qui tam actions.

[2] The initial burden of proof that the fee is reasonable falls on the relator, who must submit evidence regarding the number of hours expended and the hourly rate claimed. *See Hensley v. Eckerhart,* 461 U.S. 424 at 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). "The party opposing the fee award then has the burden of challenging the reasonableness of the fee requested [...]" *United States ex rel. Doe v. Pennsylvania Blue Shield,* 54 F.Supp.2d 410 at 413–14 (M.D.Pa.1999).

The relator argues that counsel expended a reasonable number of hours, billed within the prevailing market rate, and that the lodestar figure should be upwardly adjusted to recognize the risk inherent in this litigation. The Defendant opposes each of these characterizations, and seeks reductions in the fee amount on a variety of grounds, including vague billing records, excessive travel time,

duplicative charges, time spent on negotiating relator's percentage and non-meritorious claims, and billing for Lexis and publication charges. The Defendant further argues that the fees and costs should be divided equally between the three defendants, and that the ***355** billing rate of $250 for attorneys and $195 for associates exceeds Vermont billing standards. The relator has agreed that some of these reductions are warranted in his Reply Brief.

1. *Percentage of Fees and Costs to be Paid by Defendants*

[3] "The allocation of fee liability is a matter committed to the district court's discretion and will not be disturbed unless the determination evidences an abuse of discretion." *Koster v. Perales,* 903 F.2d 131, 139 (2nd Cir.1990). Courts have, in their discretion, apportioned costs and fees across parties based on a variety of factors, such as the percentage of settlement paid by each party or the ability of parties to pay. *See, i.e., Soler v. G & U, Inc.,* 801 F.Supp. 1056, 1067 (S.D.N.Y.1992), *Grendel's Den, Inc. v. Larkin,* 749 F.2d 945, 960 (1st Cir.1984). In cases involving a single, indivisible harm, courts have assigned all costs and fees to one party. *Koster,* 903 F.2d at 140. The Second Circuit advises in apportioning fees the Court should "make every effort to achieve the most fair and sensible solution that is possible." *Id.* at 139.

Dr. Poulton requests that the entirety of fee and cost reimbursement be awarded against FAHC, while FAHC argues that the proper apportioning of liability requires division in thirds between FAHC, AAB, and Mr. Dunn. In support of this methodology, FAHC's brief distances itself from the majority of Surgical Intensive Care Unit billing, which was at the heart of the health care fraud investigation and settlement.

[4] However, FAHC paid nearly 90% of the total settlement to the government, while AAB paid under 6%, and Mr. Dunn, 4.5%. In holding each party responsible on the basis of these percentages, 90% of the fees and costs for Dr. Poulton's representation should be provided by FAHC. Although the relative ability of each defendant to pay is not the determining factor in this case, consideration of ability to pay further establishes FAHC as the best candidate for absorbing the majority of the fees and costs; AAB is currently a defunct corporation with no corporate assets, and Mr. Dunn assets are effectively judgment proof. Furthermore, AAB has been subsumed by FAHC, the physicians of AAB are now employees of FAHC, and in the past Mr. Dunn has served as a consultant to FAHC. Finally, the Court takes into consideration the Government's representation in a letter from Mr. Perella dated February 23, 2000 that it "has maintained throughout this litigation that FAHC is liable for the improper billings at issue regardless of what entity or individual is most culpable." For all the foregoing reasons, FAHC is held liable for 90% of the fees and costs attributed to Dr. Poulton's representation.

2. *Value of Relator's Counsel in Qui Tam Action*

[5] FAHC argues that Dr. Poulton's brief amplifies the value of his counsels' role in the prosecution of this case. Particularly, they argue that government attorneys pursued the PATH or Nutrition claims upon which a large part of the settlement was based with no assistance from private counsel. However, there is strong evidence that the government found Dr. Poulton's attorneys to be very valuable throughout the investigation. Dr. Poulton's brief asserts that United States Attorney Charles Tetzlaff regularly lauded the assistance provided by Plaintiff's lawyers. Furthermore, the evidence shows that Dr. Poulton's attorneys were actively involved with work on the PATH claims from the beginning of this suit. Much of the proffers made by the relator with the assistance of counsel dealt directly with the PATH claims. And while Dr. Poulton did not specifically provide evidence regarding the nutrition claims, the government came to know of the nutrition billing irregularities through Dr. Poulton's allegations concerning Surgical Intensive Care Unit billing errors.

***356** More important, the government offered Dr. Poulton a twenty-four percent relator's share of the settlement. Given that the maximum available under law is twenty-five percent, the award evinces the government's acknowledgment of the important role Dr. Poulton and his counsel played in the investigation of this case.

Finally, this case resulted in a global settlement. As discussed later in this opinion, Defendant's assertion that some of the claims were "unsuccessful" has no bearing on the valuation of Dr. Poulton's attorneys' contributions to the outcome of this case. Settlement does not determine the relative merits of dismissed versus retained claims; neither the dismissal of certain claims through the settlement agreement nor FAHC's denial of liability on all claims reflect negatively on relator's counsel. Thus, the fee will not be reduced for alleged

overstatement of the impact of relator's counsel on this case.

3. *Reasonable Hourly Rates and the Prevailing Market*

[6] **[7]** **[8]** The reasonableness of the rate charged is determined by its congruity with "those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stenson,* 465 U.S. 886, 896 n. 11, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). In exercising its discretion, this Court must consider "the prevailing marketplace rates for the type of work and the experience of the attorneys." *Cabrera v. Jakabovitz,* 24 F.3d 372, 392 (2d Cir.1994). "The 'prevailing community' this Court should use in setting the lodestar, is the district in which the court sits." *Cruz v. Local Union No. 3 of Intern. Broth. of Elec. Workers,* 34 F.3d 1148 (2d Cir.1994).

Dr. Poulton claims that after a diligent search, he was unable to locate Vermont counsel whose skill level, experience, and lack of conflict presented adequate representation for this case. He then selected representation from two law firms in Philadelphia which had experience with both qui tam and health care fraud cases. By seeking counsel from a major city outside of Vermont, the hourly rate billed for representation in this matter exceeded Vermont's prevailing market rate for such cases of $200 per hour for attorneys and $90–$120 per hour for associates.

The Court does not believe that there are no attorneys in the State of Vermont capable of handling a health care fraud qui tam case. As noted in Defendant's Opposition, David Shaw, Esq., an attorney licenced to practice in the state of Vermont, filed a Qui Tam complaint in 1995 through which a $3.5 million settlement was reached. Several other attorneys in the state of Vermont offered affidavits which attest to their ability to handle complex litigation, all at or below the rate of $200 per hour.

More important, it does not appear that Dr. Poulton performed a diligent search for attorneys beyond the Burlington area. Had he done so, he would have likely come across attorneys capable of representation without conflict on the grounds of past representation of the defendants in this action. The assertion that Dr. Poulton must establish that every single attorney in Vermont was incapable of representing him before hiring his Philadelphia counsel is a gross overstatement. However, it does appear that Dr. Poulton's failure to search beyond the Burlington area naturally produced a lack of qualified attorneys who were not in conflict. Therefore, the Court rejects the claim that locating and retaining qualified lead attorneys in the state of Vermont in this matter would have placed an undue burden on Dr. Poulton.

[9] Although the Court believes that many members of the Vermont bar would have been capable of handling this case and could have been located through a search that stretched beyond the Burlington area, it is also clear that retention of out-of-state counsel was feasibly necessary for the purpose of consultation on the more complex health care fraud and qui tam aspects of this case. Thus, the hourly rate of $225 per hour for attorneys and $160 for associates is suitable to both Vermont ***357** standards and the complexity of this case, and is found to be appropriate in this case. Based upon the Court's review of the experience of Klein and Raspanti, each shall be compensated at a rate of $225 per hour. Associate's work shall receive $160 per hour.

4. *Reasonableness of Hours Expended*

a. *Vague Entries*

FAHC has requested this Court to reduce the loadstar for "vague and clustered" entries which it claims appears throughout the billing records. Although FAHC has brought a few of these allegedly vague entries to the Court's attention, a list of specific entries and the corresponding amount of reduction requested has not been offered. Plaintiff's counsel notes that the specific entries challenged by FAHC amount to a mere 1.75% of the requested fees.

[10] Furthermore, those entries listed as vague and non-descriptive by FAHC are taken out of context. When reviewed in the context of the preceding billing entries, the entries appear quite clear. FAHC has not met its burden of proving that these entries are so lacking in descriptive accuracy that they will be overcharged. Thus, no fee reduction is applicable for vague and clustered billing.

b. *Unsuccessful Claims*

[11] While reduction of the loadstar is appropriate for hours spent on unsuccessful claims when the case has gone to trial and many claims are found to be not meritorious,

such a reduction is not appropriate here. Settlement does not determine which claims are meritorious, and effective work by Plaintiff's attorneys on all claims serves as fuel for productive settlement discussions. FAHC chose to settle Dr. Poulton's fraud claims in exchange for the payment of $3 million to the government, and settled his retaliation claim in exchange for the payment of $400,000. Having made these choices, FAHC cannot now escape fee liability by arguing that certain claims were unsuccessful. Thus, no reduction for unsuccessful claims is warranted.

5. *Other Fees and Expenses*

a. *Reduced Hourly Rate for Travel Time*

[12] **[13]** In cases where the travel time was used productively, such as in preparation for meetings in the destination city, no reduction in hourly rates is warranted. Thus, the hourly rate applies. However, non-productive travel time, as admitted by the relator in Mr. Laigaie's trip from Stowe to Burlington, should be reduced by 50%. Thus, the offered reduction of $292.50 is appropriate.

b. *Fees Related To Retaliation Claim*

FAHC argues that those fees related to the retaliation claims were inappropriately charged. Relator's counsel asserts that the billing entries that addressed the retaliation charge were previously removed, but the remaining entries which addressed retaliation primarily included work on the fraud claims and therefore were retained. Four additional entries are considered as relating to the retaliation claim, and are withdrawn by Dr. Poulton, in the amount of $264.00. While maintaining that the rest of the entries relate solely to the fraud claims, Dr. Poulton nonetheless agrees to withdraw an additional thirty percent of the disputed entries by value, which amounts to $2,291.70. This amount is appropriate, as most entries which address retaliation do appear to include some, but not highly significant relationship to the fraud claims. Thus, the total reduction in this area is $2555.70.

c. *Duplication of Effort*

FAHC requests that the fee be reduced for Plaintiff's use of two experienced qui tam law firms. Particularly, FAHC feels that it was unnecessary for both law firms to (1) attend all meetings in Burlington, (2) review, revise, and edit the pleadings, (3) repeatedly meet with Dr. Poulton and review ***358** the same documents provided by him, and (4) be actively involved with all settlement negotiations. FAHC characterizes this as inefficient work which should bar duplicative recovery. However, the portion of work considered duplicative by FAHC is indeterminate. Specific portions of the work they would have the Court strike are not specified.

[14] In his affidavit, Howard Bruce Klein stated that he sought co-counsel from Miller, Alfano and Raspanti because they are nationally recognized qui tam experts, and had the attorney depth and support staff that he felt the case required. He further claims that due the risk factor and the relative small size of his firm, he felt Mr. Raspanti's assistance was needed in this case. Certainly, in cases of complex litigation such as this one, attorneys rarely work alone. It is not per se unreasonable for two plaintiff's attorneys to review the same piece of correspondence or attend settlement agreements in a multi-million dollar health care fraud qui tam case. To determine whether specific hours were unnecessarily expended by counsel in both firms, the Court would be required to analyze each billing entry for duplicative review by the law firms, and evaluate whether the issue reviewed by both attorneys was sufficiently complex or important for both attorneys to have been involved. Clearly, this burden should fall on FAHC and not the judiciary. Therefore, as FAHC's burden to clarify its objections has not been met, the unspecified opposition to duplicative billing is insufficient grounds for reduction in the fee.

d. *Excessive Costs*

FAHC claims that several costs billed are not recoverable in fee-shifting cases, namely Lexis billing, the Anesthesia Answer Book Subscription, and photocopying, postage, and other such office costs. Dr. Poulton agrees to the reduction for the Lexis charges, amounting to $390.55, and that fee is stricken. In addition, this court strikes $993.00 paid for the Anesthesia Answer Book Subscription as overhead inappropriate for billing in a fee-shifting case. The total reduction for excessive costs is $1383.55.

e. *Fees Associated with Negotiation of Relator's Share*

[15] The time counsel spent on negotiation of the Relator's share is not appropriately billed to the defendants in this case. Two of the three entries addressing the relator's share are stipulated for a reduction by Dr.

Poulton, amounting to $275.00. The third entry, however, does not address relator's share, and therefore is not subject to the reduction. Thus, the total award is reduced by $275.00 to account for time billed in achieving a relator's share.

f. *Duplicative Billing*

FAHC has brought a singular recorded instance of duplicative billing to the Court's attention. Dr. Poulton acknowledges the error and agrees to the reduction of $390.00.

5. *Increasing the Loadstar for Inherent Risk*

[16] There is a strong presumption that the loadstar determines the reasonable fee. *City of Burlington v. Dague,* 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992). The burden rests on the fee applicant seeking an upward adjustment to show that "such an adjustment is necessary to the determination of a reasonable fee." *Blum v. Stenson,* 465 U.S. 886, 898, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). In *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 483 U.S. 711, 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987), the plurality reasoned that "it [is] desirable and an appropriate application of the statute to hold that if the trial court specifically finds that there was a real risk-of-not-prevailing issue in the case, an upward adjustment of the lodestar maybe made, but, as a general rule, in an amount no more than one-third of the lodestar." *Id.* at 730, 107 S.Ct. 3078.

***359** **[17]** Plaintiffs' attorneys have offered in affidavit that they believed there was substantial risk involved in taking this case. Furthermore, Plaintiff did make some attempt to secure other counsel without success. The Court is aware that Plaintiff's attorneys have already recovered handsomely through their contingency fee arrangement. However, as the Court also finds that several of the claims raised in this case under the False Claims Act were "real risk-of-not-prevailing issues," an upward adjustment of the loadstar is warranted. Thus, a ten percent upward adjustment is applied to the loadstar.

6. *Summary of Reductions and Enhancements*

The Court finds that FAHC is liable for ninety percent (90%) of the fees and costs. The appropriate billable rate is $225 per hour for attorneys and $160 for associates. The following reductions are appropriate: $292.50 for unproductive travel time; $2555.70 for fees related to the retaliation claim; $1383.55 for excessive costs; $275.00 for time spent on the relator's share; and, $390.00 for duplicative billing. The total of itemized reductions is $4896.75. Of this amount, $3513.30 (the total excluding excessive costs) must be readjusted prior to reduction to account for the change in billing rate from $250 to $225 per hour and $195 to $160 per hour for associates. Thus, ninety percent of the total fees requested by Dr. Poulton, billed at $225 per hour and $165 per hour for associates, excluding the hours omitted from recovery by this opinion, increased by a multiplier of ten percent, is to be paid to relator's counsel by FAHC. Ninety percent of all costs are also to be paid by FAHC. Further costs and fees accrued since the time of filing of the Motion for Attorneys' Fees and Costs and in the course of defending the motion shall be paid to relator's counsel by FAHC according to the same methodology.

Order

Wherefore, the Court GRANTS in part Relator's Motion for Attorneys' Fees and Costs (paper 64). Relator shall prepare a proposed order with current fees and costs within thirty days.

All Citations

87 F.Supp.2d 351

End of Document

DRAFT RELATORS' CONFIDENTIALITY AND SHARING AGREEMENT

This Agreement represents the agreement and understanding between and among Relators 1 – 4 (collectively, the "Relators") as to the terms of confidentiality that shall govern their relationship, as well as their agreement to together share statutory relator share award(s), if any, from Defendants and related entities included on Exhibit A hereto ("Defendants"), resulting from the *qui tam* actions separately filed by Relators, further described herein.

1. On _____ [date], Relator 1, represented by Attorney 1, filed a lawsuit against Defendants in the United States District Court for the ___ District of _____ under the *qui tam* provisions of the False Claims Act, 31 U.S.C. §3729, *et seq*. ("FCA"), styled *United States ex rel*. *Relator 1 v*. *Defendants*, No. _____) ("Relator 1 Action"), alleging that Defendants submitted false claims for reimbursement to the federal government [and the following States: _____]. [Relator 1 also alleged that a Defendant-Related Entity wrongfully terminated her employment in violation of 31 U.S.C. 3730(h) ("Relator 1 Wrongful Termination Claim")].

2. On _____ [date], the United States filed a Notice of Election to Decline Intervention in the Relator 1 Action. Also on ____ [date], the court in the Relator 1 Action ordered, among other things, that the complaint be unsealed and served by Relator 1 upon the Defendants in the Relator 1 Action. [OR As of the date of this Agreement, the Relator 1 Action remains under seal.]

3. On _____ [date], Relator 2, represented by Attorney 2, filed a lawsuit against Defendants in the United States District Court for the ____ District of ____ under the *qui tam* provisions of the FCA and the false claims act for the State of _____, styled *United States of America and State of ____, ex rel*. *Relator 2 v*. *Defendants*, No. ____ ("Relator 2 Action"), alleging that Defendants submitted false claims for reimbursement to the federal government [and the following States: ____.]

4. As of the date of this Agreement, the Relator 2 Action remains under seal.

5. On _____ [date], Relator 3, represented by Attorney 3, filed a lawsuit against Defendants and other defendants, in the United States District Court for the _____ District of ____ under the *qui tam* provisions of the FCA and the false claims acts for the States of _____, styled *United States ex rel*. *Relator 3 v*. *Defendants*, No. _____ ("Relator 3 Action"), alleging, among other things, that Defendants submitted false claims for reimbursement to the federal government, [and the following States: _____.]

6. As of the date of this Agreement, the Relator 3 Action remains under seal.

7. On _____ [date], Relator 4, represented by Attorney 4, filed a lawsuit against Defendants in the United States District Court for the _____ District of _____ under the *qui tam* provisions of the FCA, styled *United States of America ex rel*. *Relator 4 v*. *Defendants*, No. _____ ("Relator 4 Action"), alleging that Defendants submitted false claims for reimbursement to the federal government [and the following States: _____.] .

8. As of the date of this Agreement, the Relator 4 Action remains under seal.

9. The Relator 1 Action, the Relator 2 Action, the Relator 3 Action and the Relator 4 Action are collectively referred to hereinafter as the "FCA Actions."

10. The Relators, together with their attorneys and legal staff (collectively, the "Parties"), along with government lawyers working on the FCA Actions (from both the federal government and the States) are jointly prosecuting the FCA Actions and share a "common interest" as that term is used in: *In re: Grand Jury Subpoenas 89-3 and 89-4*, 902 F. 2d 244, 249 (4th Cir. 1990). In furtherance of their joint prosecution and common interest, the Parties may find it beneficial to disclose to each other documents, communications and information that are protected under the attorney-client privilege, work product doctrine, investigative privilege, and/or other privileges. Accordingly, the Parties agree that sharing of such documents, communications and information between and among the Parties will not constitute a waiver of any such privilege or work product, and the Parties further agree that such shared documents, communications and information will be maintained as confidential. This Agreement is included among the documents shared, and the Parties agree that it is considered confidential and will be maintained as such. The Parties' common interest predates this Agreement and this Agreement shall apply to any documents, communications and information that the Parties have shared before or will share after the date of this Agreement. The Parties agree that none of the Parties shall disclose the confidential documents, communications and/or information to anyone without agreement by all Parties or order of a court of competent jurisdiction.

11. Relators have determined that it is in their best interest individually and collectively to work together to bring the FCA Actions to a successful resolution and have agreed among themselves to share in any recovery which is realized in any and all of the FCA Actions; that each Relator is an original source of information required to prosecute the FCA Actions; that the amount that any of the Relators might recover individually, if any, is uncertain and undeterminable at this time; and that each Relator will make a material contribution to the prosecution of the FCA Actions. The Relators recognize that various factual scenarios could develop which could produce different awards from different courts in terms of the amount each Relator might share in any recovery, or could produce no awards to one or more of them. The Relators also recognize that the determination of whether each of them is an original source of information required to prosecute the FCA Actions, or whether there are other bars to recovery, can be fact specific and can be raised by a defendant or even a co-plaintiff in the case. It is possible that one or more courts could rule that one or more Relators are entitled to a recovery, but other Relators are not entitled to a recovery. In order to avoid uncertainty and to work together to improve the likelihood of success of the FCA Actions, regardless of any later developments, determinations or decisions, the Relators have agreed in advance to the sharing of any recoveries to any or all of them as set out herein.

12. In connection with the sharing discussed in this Agreement, the Relators agree and understand that the lawyers for Relators are working together and will work together in the future to advance the common interests of Relators by such actions as drafting subpoenas and

CIDs; reviewing and analyzing documents produced to the government; preparing memoranda, briefs, interview and deposition outlines; working together on joint strategy and communications; and other joint efforts to develop and advance the FCA Actions and the claims included therein. While each Relator has a separate attorney-client relationship with his or her own counsel, as specified in his or her individual engagement agreement with his or her respective counsel, and no Relator has separately consulted with or directly communicated with another Relator's counsel, Relators understand and agree that all of the lawyers and law firms identified in this Agreement as representing the Relators have served and are serving as limited co-counsel for all of them, to the extent of the work they have performed and are continuing to perform to advance the common interests of the Relators. This co-counsel relationship does not change the terms of the engagement agreements that each of the Relators has with his or her individually retained counsel, except to expand the attorneys who are entitled to make a claim upon any non-prevailing defendants for attorneys' fees, expenses, and costs for each of the Relators. That is, to the extent that these limited co-counsel arrangements result in attorneys' fees, expenses, and costs expended on the Relators' behalf, the right to request those fees, expenses, and costs may not be waived by any of the Relators absent an agreement in writing by all Relators and counsel to such waiver. Relators understand and agree that the work of all of the counsel signing this Agreement performed to advance the FCA Actions has added and will continue to value to each of the Relators' cases, and to that extent, each of the counsel signing this Agreement and their firms are serving as Co-counsel for the limited purposes described herein for each of the Relators, and may seek the recovery of their attorneys' fees, costs, and expenses pursuant to §3730(d)(1) of the FCA in any or all of the FCA Actions.

13. Relators agree to share, in the manner set forth in paragraph 14 below, and subject to paragraphs 15 – 20, below, all monies that are awarded as relator share awards in any or all of the FCA Actions from Defendants, whether any such relator share award arises from the Relator 1 Action, the Relator 2 Action, the Relator 3 Action, or the Relator 4 Action, whether any of the FCA Actions are dismissed, consolidated or otherwise disposed of, and no matter what allegations form the basis for the governments' recovery(ies) and ultimate award(s). In other words, Relators agree to pool and share all relator share awards derived from federal and/or state recoveries or settlement or otherwise from Defendants, whether received on one or more than one occasion(s) (the "Award Pool").

14. Net of any reasonable costs and expenses that are to be paid from the Award Pool, as provided in paragraph 18, below, Relators agree that such Award Pool, if any, shall be allocated and distributed as follows:

a. ____ percent (__%) of the Award Pool shall be allocated and distributed to Relator 1;

b. ____ percent (__%) of the Award Pool shall be allocated and distributed to Relator 2;

c. ____ percent (__%) of the Award Pool shall be allocated and distributed to Relator 3; and.

d. ___ percent (__%) of the Award Pool shall be allocated and distributed to Relator 4.

If there is no Award Pool, Relators' Attorneys shall not be reimbursed for any Costs advanced. If there is an Award Pool, but it does not exceed the unreimbursed reasonable Costs reasonably related to pursuing the claims against Defendants described in paragraph 18, below, Relators' Attorneys shall share such unreimbursed Costs recovered in proportion to those Costs advanced by each, to the extent of the Award Pool. Relators further agree that nothing in this Agreement changes or otherwise effects the agreements they have with their attorneys with respect to payment of attorneys' fees or reimbursement of costs and expenses, to the extent such costs and expenses are not reimbursed.

15. Relators agree that any monies recovered from Defendants specifically as a result of the Relator 1 Wrongful Termination Claim shall be allocated and distributed solely to Relator 1 and will not be included in the Award Pool.

16. [Relators agree (1) that ___ percent (__%) of any monies recovered from _____ [another defendant] will be included in the Award Pool; but (2) that any other monies recovered from any party other than Defendants listed on Exhibit A hereto will not be included in the Award Pool, specifically including, without limitation, (a) recoveries from _____ named as defendants in the Relator __ Action, which recoveries, if any, shall be allocated and distributed solely to Relator __ and will not be included in the Award Pool, and (b) recoveries from _____, who Relator __ may add as defendants in the Relator __ Action, which recoveries, if any, shall be allocated and distributed solely to Relator __ and will not be included in the Award Pool.]

17. Each Relator shall be permitted to seek individual reimbursement from Defendants of the statutory or lodestar-based attorneys' fees to be paid by Defendants as provided by the FCA and false claims acts of various states, of their own attorneys and that such reimbursement from Defendants will not be included in the Award Pool, but will be allocated to such Relator and his or her Counsel and to the other Counsel who served as limited Co-counsel for the Relator. Each Relator agrees that his or her Counsel will provide testimony, if needed, to support the recovery of statutory or lodestar-based attorneys' fees to be paid by Defendants to each of the other Relators, consistent with the agreement and understandings herein.

18. With respect to the costs and expenses incurred in the FCA Actions, the Relators agree that their attorneys have in the past and will continue in the future to advance from time to time, costs and expenses related to pursuing the FCA Actions and the claims therein against Defendants, incurred by their attorneys to litigate, negotiate and/or settle the FCA Actions. These costs and expenses include, but are not limited to, the costs of travel, lodging, meals, long distance phone calls, facsimiles, filing fees and other court costs, photocopying, postage, express

mail, couriers, scanning, printing, deposition transcripts, discovery, expenses associated with pre-trial proceedings, mediator's fees, fees and expenses of experts and consultants, expenses associated with trial and appellate proceedings and any other actual out-of-pocket expenses (the "*Costs*"). Each Relator has the right to seek reimbursement of such Costs from Defendants under the FCA and false claims acts of various states, and agrees to seek such reimbursement of Costs. To the extent that all such Costs are not reimbursed by Defendants, Relators agree that (a) all reasonable Costs, reasonably related to pursuing the claims against Defendants, advanced in the FCA Actions have and/or will benefit each of the Relators in the proportions agreed to in paragraph 14, above; and (b) shall be reimbursed out of the ultimate Award Pool, prior to the division of the Award Pool among the Relators as provided in paragraph 14, above. This paragraph contemplates that the FCA Actions will be settled globally and/or simultaneously; if that is not the case, the Parties will reconsider this methodology and will attempt to reach agreement on a fair method for dealing with these Costs.

19. If there are large Costs to be incurred in the future that are reasonably related to pursuing the claims against Defendants on behalf of the Relators, Attorneys for Relators agree that, with preauthorization for such large Costs, which shall not be withheld unreasonably, they will share (until and unless reimbursed by Defendants) such large Costs in the proportions agreed by their Relator-clients in paragraph 14, above, and agree to cooperate to reimburse each other for any Cost advance disparities for such large Costs that develop among them in the future during the FCA Actions, and shall reconcile and reimburse their respective shares, based upon their Relator-clients' respective shares of the recovery set forth in paragraph 14, above, at least once a year. There will be no reimbursement among Attorneys for Relators for Cost advance disparities for Costs that were incurred prior to the date of this Agreement, or for ordinary Costs that each incurs during the pendency of the FCA Actions, but only for those preauthorized large Costs described herein.

20. The Parties also agree that they will work together and consult with each other with respect to litigation strategy for advancing the FCA Actions. If the Parties cannot agree on litigation strategy, which Costs are "reasonable" or "reasonably related to pursuing the claims against Defendants", or which large costs should be preapproved and Cost advance disparities reimbursed, as discussed in paragraphs 18 and 19 herein, the Parties agree to submit their disagreement to a mediator selected by them collectively for the purpose of mediating such dispute, and that such mediator will be compensated by the Parties in the proportions provided in paragraph 14, above.

21. Relators recognize that the FCA Actions [OR Relator __ Action, Relator __ Action, and Relator __ Action] remain under seal pursuant to the FCA and applicable court orders. Accordingly, Relators agree that the existence of the FCA Actions [OR Relator __ Action, Relator __ Action, and Relator __ Action] shall be kept strictly confidential and that the identities of Relators shall not be disclosed for as long as these FCA Actions remain under seal, subject to further order of their respective courts. Relators recognize that violating the seal orders in the FCA Actions may result in the imposition of court-ordered sanctions, including, but not limited to, the dismissal of one or

more of the FCA Actions. Relators further recognize that breaching this paragraph may subject the breaching Relator to an action for damages stemming from such a breach.

22. This Agreement is binding on Relators, Relator's Counsel, and each of their heirs, successors, and assigns.

23. This Agreement may be executed in several counterparts, each of which shall be deemed to be an original but all of which together shall constitute a single instrument. Facsimile and scanned and emailed signatures shall be deemed as binding as original signatures.

24. In the event that any provision contained in this Agreement is deemed to be illegal, invalid, or unenforceable under present or future laws, in whole or in part, Relators each acknowledge and agree that each and every other provision of this Agreement shall remain valid and enforceable.

25. This Agreement embodies the entire agreement and understanding among the Relators relating to their relationship to one another in connection with their claims against Defendants and supersedes all previous agreements or understandings with the other Relators, whether written or oral, relating to their claims against Defendants.

26. Relators warrant, represent and acknowledge that prior to executing this Agreement, they each have had the opportunity to seek, and to the extent each has desired, they have obtained any and all legal, accounting and other advice and counsel deemed necessary and appropriate by them regarding the subject matter of this Agreement. In this connection, Relator 1 acknowledges that she has obtained legal advice and counsel from Attorney 1; Relator 2 acknowledges that she has obtained legal advice and counsel from Attorney 2; Relator 3 acknowledges that he has obtained legal advice and counsel from Attorney 3; and Relator 4 acknowledges that she has obtained legal advice and counsel from Attorney 4. Relators hereby acknowledge and warrant that they have entered into this Agreement of their own free will and based on their independent judgment, after a thorough investigation of all the relevant facts, and without any reliance on any representations or inducements of any other Relator or any advisor, attorney or representative of any other Relator, except those representations as specifically set forth herein. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in interpreting this Agreement. The language in this Agreement shall be interpreted as to its fair meaning and not strictly for or against any party.

27. Relators hereby acknowledge and warrant that they are not represented by Attorneys 1 – 4 with respect to personal income taxation or estate planning issues. Relators further acknowledge, represent and warrant that they are not relying on any representation or inducement of any other Relator, or attorney for any other Relator, in connection with income taxation or estate planning issues. Relators are advised to contact and consult with a tax specialist attorney and/or a C.P.A. of Relators' own choosing regarding personal income taxation or estate planning issues.

In Witness Whereof, the Parties have executed this Agreement as of the dates set forth below.

_____	_____
Relator 1	Date
_____	_____
Relator 2	Date
_____	_____
Relator 3	Date
_____	_____
Relator 4	Date
_____	_____
Attorney 1, Attorney for Relator 1	Date
_____	_____
Attorney 2, Attorney for Relator 2	Date
_____	_____
Attorney 3, Attorney for Relator 3	Date
_____	_____
Attorney 4, Attorney for Relator 4	Date

397 Fed.Appx. 144
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 6th Cir. Rule 32.1.
United States Court of Appeals, Sixth Circuit.

UNITED STATES of America, ex rel., Bringing This Action on Behalf of The United States of America; Dennis LEFAN, Bringing This Action on Behalf of The United States of America; Jason Gibson, Bringing This Action on Behalf of The United States of America; Harold Dilback; J. Keith Lax; L. Elsworth Cranor; Jeff Ashby; Connie Sue Orten, Plaintiffs and Relators–Appellees Cross–Appellants,
Helmer, Martins, Rice & Popham Co., L.P.A., Appellant,
v.
GENERAL ELECTRIC COMPANY; Precision Castparts Corporation; Alcoa, Inc., Defendants–Appellants Cross–Appellees.

Nos. 08–5216, 08–5296, 08–5390, 08–5510.
|
Sept. 3, 2010.

Synopsis
Background: Following the settlement of a False Claims Act (FCA) suit, the United States District Court for the Western District of Kentucky district court, 2008 WL 152091 and 2008 WL 859432, awarded attorney fees to relators, and contractor and attorneys cross-appealed.

Holdings: The Court of Appeals, Helene N. White, Circuit Judge, held that:

[1] 60–day limit for appeal in cases in which government is a party applied to relator's attorneys' appeal from fee award, notwithstanding that United States did not actively participate in the appeal;

[2] relator's attorneys were not entitled to fees for the time it spent litigating the first-to-file issue with a third-party relator; and

[3] a final order issued in FCA case that entitles a relator to a share of the government's recovery also entitles the relator to attorney fees at such point for purposes of calculating interest owed on attorney fee award.

Affirmed in part and reversed in part.

***145** On Appeal from the United States District Court for the Western District of Kentucky.

Before: RYAN, COOK and WHITE, Circuit Judges.

OPINION

HELENE N. WHITE, Circuit Judge.

****1** Defendants General Electric Co., Precision Castparts Corp., and Alcoa, Inc. (collectively "GE"), appeal from the decision of the district court awarding attorneys' fees following the settlement of a False Claims Act (FCA) suit. The law firm of Helmer, Martins, Rice & Popham (HMRP) cross-appeals. [1] We affirm in part and reverse in part.

I

GE had multiple contracts to manufacture jet engines for use in military aircraft. In 2000, a *qui tam* action was filed under seal by two relators [2] pursuant to the False Claims Act (FCA), 31 U.S.C. § 3729 *et seq.* The action alleged that flight-critical engine blades and vanes were improperly manufactured, tested, and inspected at GE's Madisonville, Kentucky, plant, and that GE falsely certified to the Government that the parts met contract specifications. Relators initially hired the Louisville-based firm of Priddy, Cutler, Miller and Meade (PCMM) to represent them. Alton Priddy (Priddy), a labor attorney, was lead counsel.

The Department of Justice obtained a partial unsealing of the case in 2001, at which point GE received a copy of the action. GE retained counsel and began preparing its defense. In 2002, Priddy determined that Relators' interests would be best served by associating co-counsel with FCA expertise. After a brief search, he contacted Frederick Morgan, Jr. (Morgan), a partner at Cincinnati-based Helmer, Martins & Morgan (HMM), and the two firms undertook joint representation of Relators. In 2005, Morgan and Mary Jones (Jones), a paralegal working on the matter, moved to another Ohio firm, Volkema Thomas (VT). Subsequently, HMM became HMRP. Morgan and Priddy remained primary counsel for Relators, with Morgan performing the majority of work in the case. In 2006, the Government formally intervened as co-plaintiff and a settlement was reached.

Under the settlement, GE admitted no wrongdoing but agreed to pay $11.5 million dollars, of which Relators received nearly $2.4 million. On July 20, 2006, the district court dismissed with prejudice "all ... claims concerning the Covered Conduct ... asserted in prior complaints herein on behalf of the United States under the *qui tam* provisions of the False Claims Act." Only the three individual retaliation claims as well as claims for attorneys' fees remained active before the court. [3]

***146** The parties engaged in negotiations over the fees but were unable to reach an agreement. Ultimately, HMRP and PCMM/VT filed separate motions for attorney fees. After limited discovery, GE filed motions in opposition, contesting various methods used by the firms to calculate the appropriate fees. In particular, GE and the firms disagreed on whether prevailing Kentucky rates should apply to the attorneys of the Ohio-based firms, and whether the firms adequately documented their claimed hours and expenses.

The district court entered its order on the motions on January 15, 2008, 2008 WL 152091. The court ruled that the 2007 hourly billing rates charged by the Kentucky firm PCMM—$250 per hour for partners and $200 per hour for associates—would be used to calculate reasonable fees for work performed on the case. The order made four exceptions: 1) Morgan's billing rate was set at $400 per hour, "based on his expertise and national practice" in FCA cases; 2) Priddy's rate was set at $325 per hour; 3) HMRP partner James Helmer's rate was set at $325 per hour; and 4) Jones' rate was set at $200 per hour.

****2** The court accepted nearly all of the hours claimed by the firms, reducing fees by only 0.2 hours billed for the reservation of a conference room. The court denied the firms' requests for fee enhancements for "exceptional success," but allowed fees for fee-related litigation and almost all of the firms' costs and expenses.

In total, the court awarded Relators nearly $2.2 million in fees and expenses for the work of the three law firms. GE filed a notice of appeal on February 14, 2008. Relators filed a notice of cross-appeal on March 3, and an amended notice on March 14. [4]

GE also moved to stay the enforcement of the fee award while it appealed the order to this court, and for approval of a supersedeas bond in the amount of $2.4 million. Relators opposed the bond, claiming that it was insufficient to cover interest on the award, which they claimed should be calculated from the time of the settlement in July 2006. Relators asked for a bond of nearly $2.75 million. In addition, Relators filed a motion for clarification seeking an order from the district court that interest on attorneys' fees would be calculated from the July 2006 partial dismissal rather than the actual order granting attorneys' fees. On March 28, the district court granted GE's motion and approved a bond in the amount of $2.4 million. The court denied Relators' motion for clarification for lack of jurisdiction. On April 15, 2008, Relators amended their appeal to include the district court's approval of the supersedeas bond.

II

HMRP asserts three cross-claims on appeal: 1) that the district court erred in awarding rates to many of its attorneys based on prevailing Kentucky rates, rather than prevailing rates for *qui tam* specialists; 2) that the district court improperly failed to award it attorneys' fees for all work performed; and 3) that the district court incorrectly calculated interest on the award when it set the amount of the supersedeas bond.

GE contests the timeliness of HMRP's two claims relating to the district court's calculation of attorneys' fees. The district court entered its order awarding attorneys' ***147** fees on January 15, 2008. GE filed its appeal on February 14, 2008. Relators filed a notice of cross appeal on March

3, 2008, and an amended notice containing HMRP's cross-claims on March 14, 2008.

Federal Rule of Appellate Procedure 4(a)(1)(A) requires a party to file a notice of appeal in a civil action "within 30 days after the judgment or order appealed from is entered." However, "[w]hen the United States ... is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered." Fed. R.App. P. 4(a)(1)(B). HMRP's cross-appeal of the district court's January 15 order, therefore, is only timely if the longer, 60–day period applies. In the instant case, the United States was unquestionably a party to the underlying FCA claim. *See United States ex rel. Eisenstein v. City of New York,* 556 U.S. 928, 129 S.Ct. 2230, 2234, 173 L.Ed.2d 1255 (2009) ("The United States, therefore, is a "party" to a privately filed FCA action ... if it intervenes in accordance with the procedures established by federal law.").

3 **[1] While the United States was not involved in the attorneys' fee litigation, the litigation was spawned by Relators' prevailing in the underlying FCA claim. The award of attorneys' fees is mandated by the same section of the FCA as Relators' entitlement to a share of the proceeds. *See* 31 U.S.C. § 3730(d)(1). Thus the statute treats the award of attorneys fees as another phase of the same litigation. As the United States was a party to the underlying litigation, the 60–day limit prescribed in Rule 4(a)(1)(B) applies to all subsequent proceedings, not simply to those in which the United States actively participates. [5]

III

The parties contest various aspects of the district court's determination of the attorneys' fee award. We review a district court's award of attorneys' fees for abuse of discretion. *Gonter v. Hunt Valve Co.,* 510 F.3d 610, 616 (6th Cir.2007). "The district court abuses its discretion if it applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Cherry Hill Vineyards, LLC v. Lilly,* 553 F.3d 423, 435 (6th Cir.2008) (internal quotation marks omitted). In reviewing the award of attorneys' fees, "the primary concern is that the fee awarded be reasonable." *Gonter,* 510 F.3d at 616 (internal quotation marks omitted). A reasonable fee is "one that is adequately compensatory to attract competent counsel yet which avoids producing a windfall for lawyers." *Geier v. Sundquist,* 372 F.3d 784, 791 (6th Cir.2004) (quoting *Reed v. Rhodes,* 179 F.3d 453, 471 (6th Cir.1999)).

A

Both parties claim that the district court abused its discretion when it calculated the hourly rates awarded to Relators' Ohio-based counsel. GE asserts that the district court erred in awarding rates exceeding prevailing Kentucky rates to HMRP attorney Morgan and paralegal Jones. HMRP contends that all of its attorneys should have received their normal billing rates, not the lower rates found by the court. We have held that in determining *148 the appropriate fees for an "out-of-town specialist," a district court "must determine (1) whether hiring the out-of-town specialist was reasonable in the first instance, and (2) whether the rates sought by the out-of-town specialist are reasonable for an attorney of his or her degree of skill, experience, and reputation." *Hadix v. Johnson,* 65 F.3d 532, 535 (6th Cir.1995).

The district court's order does not specifically mention *Hadix,* but does comport with its dictates. The district court stated that Relators were required to "establish the necessity of retaining outside, non-local counsel" and discussed in detail the parties' arguments concerning the need to hire non-local *qui tam* specialists. [6] The court also referred to Relators' argument concerning the "reputation and credentials of the attorneys and law firms involved in this matter." In the section of the order announcing the court's rate determination, the court again referred to the parties' positions. It awarded Morgan a higher rate due to his "expertise and national practice in [FCA] cases," but set the general rate for HMRP attorneys at the rates charged by PCMM because the attorneys "chose to practice within this Court's jurisdiction" of western Kentucky. The court did not explain its decision to award Jones a rate of $200 per hour, but referred generally to the parties submissions on rates, which included documentation that Jones had worked on FCA and complex litigation matters for nearly a decade and was HMRP's "most experienced paralegal." It is clear that the court found Jones' experience and expertise merited the higher rate. Viewing the order as a whole, we conclude that the district court considered the parties' detailed submissions and crafted what it felt was a reasonably

compensatory rate, giving due consideration to, although not specifically identifying, the factors identified in *Hadix*. Given the broad deference we accord to such decisions, we cannot say that the district court abused its discretion in making this determination.

B

****4** GE also challenges the district court's decision to award fees for the remaining attorneys based on the 2007 hourly rates charged by PCMM. We have held that "the district court has the discretion to choose either current or historical rates so long as it explains how the decision comports with the ultimate goals of awarding reasonable fees." *Gonter,* 510 F.3d at 617. In the instant case, the district court noted the parties' arguments and determined that the 2007 rates were necessary to "compensate the law firms for their delay in receiving payment." It then stated that this would "produce hourly rates that are '*adequately compensatory to attract competent counsel yet which avoid producing a windfall for attorneys.*' " (emphasis in original). The court thus considered the parties' positions, stated its reason for choosing an appropriate rate, and quoted the standard for a reasonable fee award that we have long applied. We conclude that this reasoning sufficiently indicates how the district court's discretion was exercised, and affirm its finding.

C

GE's final claim is that the district court abused its discretion by failing to exclude from its calculation of attorneys' fees "vague time entries."[7] The "key requirement ***149** for an award of attorney fees is that '[t]he documentation offered in support of the hours charged must be of sufficient detail and probative value to enable the court to determine with a high degree of certainty that such hours were actually and reasonably expended in the prosecution of the litigation.' " *Imwalle v. Reliance Med. Prods., Inc.,* 515 F.3d 531, 553 (6th Cir.2008) (quoting *United Slate, Local 307 v. G & M Roofing & Sheet Metal Co.,* 732 F.2d 495, 502 n. 2 (6th Cir.1984)). However, entries may be sufficient "even if the description for each entry [is] not explicitly detailed." *McCombs v. Meijer, Inc.,* 395 F.3d 346, 360 (6th Cir.2005). The Supreme Court has held that "counsel ... is not required to record in great detail how each minute of [ ] time was expended ... [but] should identify the general subject matter of [ ] time expenditures." *Hensley v. Eckerhart,* 461 U.S. 424, 437 n. 12, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).

[2] GE contends that "hundreds" of entries submitted by Relators' counsel should have been disregarded as too vague. GE points to time entries marked, for example, "Email," "Telephone Conference w/REL," and "Travel to Owensboro" as examples of such entries. However, the district court could determine from the billing statements submitted and the context of the trial timeline that these entries adequately described the work performed. *See Imwalle,* 515 F.3d at 554. Relators' counsel submitted extensive lists of activities, accounting for time spent to the fraction of the hour. Many of the descriptions, while brief, referred to frequent events. For example, "travel to Owensboro," the Kentucky city in which Relators were located, is sufficiently detailed within the context of the litigation for the court to determine that such time was expended on matters related to the case. It was not an abuse of discretion for the court to accept such hours in the calculation of HMRP's fees.

D

****5** HMRP challenges the decision of the district court not to award it fees for work performed on a related first-to-file challenge. The FCA provides that "[w]hen a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). This has been applied to create a "first-to-file" bar, preventing successive FCA suits based on the same underlying facts. *See, e.g., United States ex rel. Poteet v. Medtronic Inc.,* 552 F.3d 503, 515–17 (6th Cir.2009) (analyzing first-to-file issues and collecting cases).

[3] In the instant case, Relators, at the request of the district court,[8] litigated, and ultimately prevailed in, a first-to-file dispute with a third-party relator. GE argued that the first-to-file issue "had nothing to do with advancing the matter relating to GE" and should not factor into the fee award. The district court accepted GE's argument and subtracted $10,967.75 from HMRP's total fee award, because it found that HMRP "does not appear to dispute [GE's] contention." HMRP did, in fact,

dispute GE's contention in both its Reply Memorandum and Second Reply Memorandum before the district court. *See* R. 88 at 12 (under the heading "Our First–to–File Litigation Was Related To General Electric"); R. 135 at 12 n. 27.

***150** Nevertheless, our precedent precludes HMRP's recovery of litigation expenses related to the first-to-file issue because the action "did not directly involve the *qui tam* defendants." *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.,* 41 F.3d 1032, 1046 (6th Cir.1994). In *Taxpayers,* this court determined that the relators were not entitled to attorneys' fees for litigation against the Government regarding their share of a *qui tam* recovery. [9] The court held that the defendant in that case, also General Electric Co., was not responsible for the fees because

> [a]lthough GE eagerly assisted in the government's efforts to reduce the relators' bounty, GE's role was comparatively peripheral. It had no legal standing or right to participate in the proceedings. Nothing in the record suggests that the government initiated its contest against the relators because of GE, and nothing suggests that GE prolonged the litigation process or could have hastened its conclusion.

Id. This reasoning applies to the instant case. GE had no participation in, or apparently knowledge of, the first-to-file dispute. It neither initiated the contest nor had any control over its resolution. As GE had no role or interest in the first-to-file proceedings, we affirm the district court's denial of HMRP's request for attorneys' fees for the time it spent litigating the first-to-file issue.

E

HMRP further claims that the district court abused its discretion by failing to appropriately compensate the firm for fees incurred litigating the attorneys' fee issue. " 'Time spent in preparing, presenting, and trying attorney fee applications is compensable' as part of the reasonable fee," but recovery is "limited." *Gonter,* 510 F.3d at 620 (quoting *Coulter v. Tennessee,* 805 F.2d 146, 151 (6th Cir.1986)) (emphasis omitted). We have held that when a case is settled without a trial, "in the absence of unusual circumstances, the hours allowed for preparing and litigating the attorney fee case should not exceed 3% of the hours in the main case." *Coulter,* 805 F.2d at 151 (noting that a five-percent limit applies if the case goes to trial).

****6** In the instant case, the district court stated its intention to "award the Relators attorneys' fees for fee-related litigation based upon the reasonable rates set forth ... above." The order did not specify an amount representing three percent of fees incurred in the main case. Rather, the court stated "[t]he Court accepts that the Relators' attorney's fees for the fee-related litigation do not exceed the 3% hourly limit since the Defendants do not argue to the contrary."

Ultimately, the court awarded HMRP $1,000,091.50 in fees, based on the hours HMRP submitted in its initial fee application on February 9, 2007, which apparently included some hours spent in litigating the fee issue. The court did not include 176.4 additional hours claimed to have been spent on fee-related litigation, submitted to the court by HMRP on March 13, 2007, nor were the later-submitted hours mentioned in the court's order. HMRP correctly asserts that those hours also should have been considered by the district court.

We therefore remand for the district court to make a calculation of the hours spent by HMRP on the underlying FCA claim alone. The district court should then exercise its discretion to determine a ***151** reasonable fee-related litigation award based upon all of the hours submitted by HMRP, subject to the three-percent cap. [10]

IV

Finally, HMRP claims that the district court improperly calculated the interest owed on the attorneys' fee award in setting a supersedeas bond amount. The decision to grant or deny a supersedeas bond is reviewed for abuse of discretion. *Arban v. W. Pub. Corp.,* 345 F.3d 390, 409 (6th Cir.2003) (applying abuse of discretion standard where the district court granted a stay without requiring a supersedeas bond).

The underlying *qui tam* action was settled on July 21, 2006. The parties continued to litigate the whistleblower actions. Relators filed requests for attorneys' fees for HMRP on March 15, 2007. The district court issued its order granting in part and denying in part the fee motions

on January 15, 2008. The order awarded Relators nearly $2.2 million in fees and expenses for the work of the three law firms. GE moved to stay the enforcement of the fee award while it appealed the order to this court, and for approval of a supersedeas bond in the amount of $2.4 million. Relators opposed the bond, claiming that it was insufficient to cover interest on the award, which they claimed should be calculated from the time of the settlement, in July 2006. Relators sought a bond of nearly $2.75 million. In addition, Relators filed a motion for clarification seeking an order from the district court that interest on attorneys' fees would be calculated from the July 2006 partial dismissal rather than the actual order granting attorneys' fees.

On March 28, 2008, 2008 WL 859432, the district court granted GE's motion and approved a bond in the amount of $2.4 million, stating that Relators became "entitled" to attorneys' fees on January 15, 2008, when the court entered its order quantifying the fees, and calculated interest on the award accordingly. The court stated that the January 15 order "constitutes the one and only 'judgment' from which post-judgment interest can accrue. Accordingly, the Court accepts the Defendants' calculation of post-judgment interest for the purposes of the supersedeas bond and finds that the amount of the bond is sufficient." Federal Rule of Civil Procedure 62(d) allows a party to stay the execution of a judgment pending appeal by providing a supersedeas bond. The stay is effective upon approval of the bond by the court. Fed.R.Civ.P. 62(d). Commentators have noted that "[a]lthough the amount of the bond usually will be set in an amount that will permit satisfaction of the judgment in full, together with costs, interest, and damages for delay, the courts have inherent power ... to provide for a bond in a lesser amount or to permit security other than the bond." 11 CHARLES WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2905, at 522 (4th ed.2008).

****7** In the instant case, the district court's approval of the supersedeas bond purported to include enough interest to satisfy the judgment in full. To determine the date from which interest should be awarded, the court cited this court's holding in *Associated General Contractors of Ohio, Inc. v. Drabik* that post-judgment interest begins "to run on an [*sic*] fee award from the time of entry of the judgment which unconditionally ***152** entitles the prevailing party to reasonable attorney fees." 250 F.3d 482, 495 (6th Cir.2001) (citation omitted). The court determined that the July 21, 2006 partial dismissal was not a "judgment on the merits" entitling Relators to attorneys' fees, and that such an entitlement did not occur until the January 2008 order quantifying those fees.

[4] The parties dispute the point at which Relators became "unconditionally entitled" to reasonable attorneys' fees. This court has not addressed whether a relator is unconditionally entitled to attorneys' fees upon the court's consent to a partial settlement agreement, or whether the court must issue a final judgment indicating the entitlement to attorneys' fees. In light of the FCA's mandatory fee-shifting provision, we hold that a final order issued in an FCA case that entitles a relator to a share of the Government's recovery also entitles the relator to attorneys' fees.

The Supreme Court has held that, for the purposes of finality and appeal, an award of attorneys' fees is collateral to the judgment on the merits in the underlying case. *Budinich,* 486 U.S. at 200, 108 S.Ct. 1717. Thus, a judgment on the merits of Relators' underlying claim was issued on July 21, 2006. At that point, Relators became conclusively entitled to "at least 15 percent but not more than 25 percent of the ... settlement of the claim." 31 U.S.C. § 3730(d)(1). The FCA states that a successful relator "*shall* " receive reasonable attorneys' fees. *Id.* (emphasis added). While the district court retained discretion to determine what amount of attorneys' fees would be reasonable, Relators had an entitlement to a reasonable amount. The district court's finding that Relators did not become entitled to an award until that award was quantified was in error. While the amount of the eventual award was not certain when the FCA claims were settled, the existence of the award was. Therefore the district court misapplied the legal standard we set out in *Associated Gen. Contractors,* 250 F.3d at 495, constituting an abuse of discretion. *See Cherry Hill Vineyards, LLC,* 553 F.3d at 435.

V

We **AFFIRM** the district court's January 15, 2008 order awarding attorneys' fees, except for its calculation of the appropriate fee-related litigation award. On that issue, we **REMAND** for further proceedings consistent with this opinion. Further, we **VACATE** the March 28, 2008 order

of the district court approving a supersedeas bond in the amount of $2.4 million and **REMAND** with instructions to calculate interest owed in all further proceedings from July 21, 2006.

All Citations

397 Fed.Appx. 144, 2010 WL 3476673

Footnotes

1 Two other firms shared in the representation in the instant case. Those firms entered into a settlement agreement with GE following oral argument and have been dismissed from the appeal.

2 Several other individuals were later added to the action; we refer to the group collectively as "Relators."

3 Three Relators claimed that GE had retaliated against them for their whistleblowing activities. Those cases have also been settled.

4 Subsequent to hearing oral argument, this panel requested that the parties return to mediation. PCMM and VT resolved their differences with GE, and those two firms have been dismissed from the appeal and cross-appeals.

5 While it is true that, for the purpose of finality, an award of attorneys' fees is considered collateral to the underlying claim, *see e.g., Budinich v. Becton Dickinson & Co.,* 486 U.S. 196, 200, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988), this does not render the proceedings independent of the underlying claim. *Cf. Sprague v. Ticonic Nat. Bank,* 307 U.S. 161, 170, 59 S.Ct. 777, 83 L.Ed. 1184 (1939) ("[W]e view the petition for [attorney's fees] as an independent proceeding supplemental to the original proceeding ...").

6 The district court noted that Relators had presented evidence regarding "the lack of experienced False Claims Act litigators within the Court's jurisdiction."

7 The district court accepted nearly all of the claimed hours. It did deduct .20 hours of Priddy's time spent reserving a conference room.

8 The district court's order is not included in the record before this court. However, the parties do not dispute that the court requested the Relators settle the first-to-file issue before proceeding with the instant case.

9 We note that HMRP cites no legal authority before this court to support its contention that the first-to-file hours are compensable.

10 HMRP argues that on remand, the district court "should not be constrained by the 3% ... guideline[ ] ... because there are 'unusual circumstances.' " However, HMRP did not make this argument before the district court and our review of the record finds no circumstances warranting deviation from the default rule.

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Only the Westlaw citation is currently available.

United States District Court,
S.D. Ohio,
Western Division.

UNITED STATES of America, ex rel. David M. ELLISON, Relator,
v.
VISITING PHYSICIANS ASSOCIATION, P.C., et al., Defendant.

No. 1:04–cv–220.
|
July 19, 2010.

Attorneys and Law Firms

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M. Scott McIntyre, Baker & Hostetler LLP, Cincinnati, OH, Max R Hoffman, Jr., Butzel Long, Lansing, MI, for Defendant.

ORDER GRANTING IN PART MOTION FOR ATTORNEYS' FEES

SUSAN J. DLOTT, Chief Judge.

***1** This matter is before the Court on the Motion for Award of Attorneys' Fees and Expenses Pursuant to 31 U.S.C. § 3730(d) ("Motion for Attorneys' Fees") (doc. 50) filed by Helmer, Martins, Rice & Popham, Co., LPA ("HMRP"). HMRP represented Relator David M. Ellison in this *qui tam* case from its inception in February 2004 through March 2005 only. The case was settled pursuant to a Joint Stipulation of Dismissal (doc. 48) entered in November 2009. Defendant agreed in the Joint Stipulation of Dismissal that Ellison was a prevailing party for purposes of Count 1 of the Complaint alleging a violation of the False Claims Act, 31 U.S.C. § 3729(a) (1) and (a)(2). HMRP now moves for an award of attorneys' fees and expenses. Defendant challenges both HMRP's entitlement to attorneys' fees and the amount sought. For the reasons that follow, the Court will **GRANT IN PART** HMRP's Motion for Attorneys' Fees and **AWARD** attorneys' fees and expenses in the amount of **$41,984.25.**

I. HMRP'S STANDING TO MOVE FOR AN ATTORNEYS' FEE AWARD

The False Claims Act contains a fee-shifting provision which provides for the payment of attorneys' fees to a prevailing *qui tam* plaintiff. 31 U.S.C. § 3730(d). Defendant initially objects to the award of attorneys' fees to HMRP on the grounds that the right to collect attorney fees belongs to the *qui tam* plaintiff, not to his attorneys. *See Gonter v. Hunt Valve Co., Inc.,* 510 F.3d 610, 614 (6th Cir.2007). Ellison initially did not seek fees on HMRP's behalf. However, on March 9, 2010, Ellison filed a Consent to Fee Petition (doc. 62) consenting to a petition for reasonable attorneys' fees by HMRP. The Court finds that HMRP has standing to seek attorneys' fees.

II. AMOUNT OF THE ATTORNEYS' FEE AWARD

In calculating a statutory award of attorneys' fees, "[t]he most useful starting point ... is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983); *see also Penn. v. Del. Valley Citizens' Council for Clean Air,* 478 U.S. 546, 564–65, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986). The result of this calculation—called the lodestar calculation—"produces an award that *roughly* approximates the fee that the prevailing party would have received if he or she had been representing a paying client who was billed by the hour in a comparable case." *Perdue v. Kenny A.,* —— U.S. ——, ——, 130 S.Ct. 1662, 1672, 176 L.Ed.2d 494 (2010) (emphasis in the original). The lodestar calculation strongly is presumed to yield a reasonable fee. *City of Burlington v. Dague,* 505 U.S. 557, 562, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992). A reasonable fee is one which is adequate to attract competent counsel, but does not produce a windfall to attorneys. *See Gonter,* 510 F.3d at 616–17 (citation omitted).

HMRP seeks an award of attorneys' fees and expenses in the amount of $40,820.01 for services performed in

2004 and 2005 on behalf of Ellison. HMRP seeks expenses in the amount of $976.06 and fees in the amount of $39,843.95 as follows:

ATTORNEY/STAFF	HOURLY RATE	HOURS	TOTAL
James B. Helmer, Jr.	$498.00	3.15	$ 1,568.70
Julie W. Popham	$425.00	.15	$ 63.75
Frederick M. Morgan, Jr.	$500.00	58.90	$ 29,450.00
Jennifer M. Verkamp	$450.00	16.85	$ 7,582.50
A. Manley (Paralegal)	$131.00	9.00	$ 1,179.00
			$ 39,843.95

***2** (Doc. 50–2 at 4.) In addition, HMRP seeks $6,486.44 in fees and expenses for services rendered in conjunction with the pending Motion for Attorneys' Fees. (Doc. 58–2 at 3.)

1. Objection to Hourly Rates Sought

Defendant objects to the amount of fees which HMRP seeks on several grounds. First, Defendant objects to the reasonableness of the fees calculation on the grounds that HMRP used the attorneys' and paralegal's current (2010) billing rates, instead of a reasonable rate charged for services performed in 2004 and 2005. Defendant argues that calculating fees using current billing rates would result in a windfall to HMRP. Defendant contends that the Court should apply the historical billing rates approved for the same firm by the Western District of Kentucky in a *qui tam* case which was filed in 2000 and settled in 2006:

ATTORNEY/STAFF	HOURLY RATE	HOURS	TOTAL
James B. Helmer, Jr.	$325.00	3.15	$ 1,023.75
Julie W. Popham	$250.00	.15	$ 37.50
Frederick M. Morgan, Jr.	$400.00	58.90	$ 23,560.00
Jennifer M. Verkamp	$250.00	16.85	$ 4,212.50
A. Manley (Paralegal)	$35.00	9.00	$ 315.00
			$ 29,148.75

See U.S. ex rel. LeFan v. Gen. Elec. Co., No. 4:00–cv–222, 2008 WL 152091, at *6 (W.D.Ky. Jan.15, 2008). [1]

The Supreme Court has recognized that an attorney can be compensated for the delay in receiving fees in a federal fee-shifting statute case by "basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value." *Perdue,* 130 S.Ct. at 1675. "The district court has the discretion to choose either current or historical rates so long as it explains how the decision comports with the ultimate goals of awarding reasonable fees." *Gonter,* 510 F.3d at 617. Courts in this Circuit have approved the use of current billing rates when there has been a delay in payment. *See, e.g., Dowling v. Litton Loan Serv. LP,* 320 F. App'x 442, 447 (6th Cir.2009); *Barnes v. City of Cincinnati,* 401 F.3d 729, 745–46 (6th Cir.2005) (affirming this Court's decision to award fees at current rates); *Bank One, N.A. v. Echo Acceptance Corp.,* 595 F.Supp.2d 798, 801–02 (S.D.Ohio 2009). "Clearly, compensation received several years after the services were rendered ... is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed, as would normally be the case with private billings." *Missouri v. Jenkins,* 491 U.S. 274, 283, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989). Following these precedents, the Court will award HMRP fees at the current billing rates set forth in the first table above. HMRP was not dilatory in protecting its rights or seeking the attorneys' fees. Awarding HMRP current rate fees for services will not result in an excessive fee.

2. Objections to Reasonableness of Hours

The Court next examines Defendant's objections to the reasonableness of awarding fees to HMRP for certain services performed. Defendant first objects that HMRP should not be awarded fees for approximately sixteen hours Mr. Morgan and Ms. Verkamp spent researching items such as "defendants' practices" and "other cases against [Defendant]" and "physician credentials." (Doc. 50–2.) This Court, however, accepts HMRP's representation that the preliminary research involved was necessary and could not have been performed easily by a paralegal. *See LeFan,* 2008 WL 152091, at *4 ("[T]he Court accepts the Relators' argument that these tasks had to be performed by an attorney or paralegal familiar with facts and law of the case.").

***3** Next, Defendant objects to the time spent by HMRP attorneys preparing and filing the Complaint and Disclosure Statement. This objection is not well-founded. Defendant concedes that the preparation of these filings was relevant work. The False Claims Act requires the preparation of a "written disclosure of substantially all material evidence and information the [*qui tam* plaintiff] possesses" which is separate from the complaint. 31 U.S .C. § 3730(b)(2). Also, the Local Rules require that a False Claims Act complaint be filed *in camera* and in the presence of a representative from the United States Attorney's office. *See* S.D. Ohio Loc. R. 3.2 (2004). It was reasonable for an HMRP attorney personally to file the Complaint in compliance with these Local Rules instead of delegating the task to a staff member. The Court will not reduce the fees requested for these services.

Finally, Defendant objects to the time spent by HMRP on matters it contends are not related to preparation of the case. Specifically, Defendant objects to 5.45 hours spent by Mr. Morgan and Ms. Verkamp, in part, preparing the fee agreement. Only 0.4 hours of the total 5.45 is solely attributed to preparation of the fee agreement. HMRP used block entries to account for the remaining 5.05 hours, only one aspect of which was the preparation of the fee agreement. Because the preparation of a fee agreement was a necessary protection to both Ellison and HMRP, and could be considered a prerequisite to HMRP's filing suit on behalf of Ellison, the Court will award fees for the time spent on this task.

3. Summary of Fees Incurred Prior to Filing of Motion for Attorneys' Fees

In sum, the Court will not strike or reduce any of the fee statement entries as excessive or unreasonable. The Court will award HMRP fees for services performed in 2004 and 2005 as follows:

ATTORNEY/STAFF	HOURLY RATE	HOURS	TOTAL
James B. Helmer, Jr.	$498.00	3.15	$ 1568.70

Julie W. Popham	$425.00	.15	$ 63.75
Frederick M. Morgan, Jr.	$500.00	58.90	$ 29,450.00
Jennifer M. Verkamp	$450.00	16.85	$ 7,582.50
A. Manley (Paralegal)	$131.00	9.00	$ 1,179.00
			$ 39,843.95

4. Objection to Fees Related to Filing the Motion for Attorneys' Fees

Defendant objects that $6,339.40 is an excessive amount for fees related to the preparation of the Motion for Attorneys' Fees. Defendant points out that courts in the Sixth Circuit typically apply a 3% rule in determining the fees to be awarded for the preparation of a fees motion. "In the absence of unusual circumstances, the [Sixth Circuit has] limited the compensable hours for preparing and 'successfully' litigating a fee petition to three percent of the hours in the main case." *Gonter,* 510 F.3d at 620. The Court finds that this fee dispute is not so unusual as to warrant a departure from the 3% standard.

HMRP seeks compensation for 88.05 hours of services prior to the pending motion. Three percent of 88.05 hours is 2.64 hours. The average billing rate for the three attorneys who worked on the Motion for Attorneys' Fees is $441.00. Accordingly, the Court will award $1,164.24 (2.64 hours x $441.00) for fees and expenses expended in litigating the pending motion.

IV. CONCLUSION

***4** For the foregoing reasons, Helmer, Martins, Rice & Popham's Motion for Award of Attorneys' Fees and Expenses (doc. 50) is **GRANTED IN PART.** The Court **AWARDS** HMRP attorneys' fees and expenses in the total amount of **$41,984.25** as follows: $39,843.95 for fees incurred prior to the pending motion, $976.06 in expenses, and $1,164.24 for fees incurred to litigate the pending motion.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 2854137

Footnotes

1 The judgment in *LeFan* was stayed pending appeal. *See U.S. ex rel. LeFan v. Gen. Elec. Co.,* No. 4:00–cv–222 (W.D.Ky. Mar. 28, 2008).

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United States District Court, S.D. Illinois

U.S.A. ex rel. Joe Liotine, Plaintiffs,
v.
CDW–Government, Inc., Defendant.

No. 3:05–cv–00033–DRH–PMF
|
Filed September 25, 2013

Attorneys and Law Firms

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MEMORANDUM AND ORDER

HERNDON, Chief Judge:

***1** Pending before the Court is the Report and Recommendation ("the Report") issued by Magistrate Judge Phillip M. Frazier (Doc. 331). The Report recommends that the Court grant plaintiff and Relator Joe Liotine's ("Liotine") motions for attorney fees (Docs.299, 301). Defendant CDW Government Inc. ("CDW–G") filed objections to the Report (Doc. 332). Liotine filed a response to the objections to the Report (Doc. 333) and CDW–G filed a reply to Liotine's response (Doc. 335). Based on the following, the Court **ADOPTS** the Report and **GRANTS** Liontine's request for additional fees.

On March 5, 2013, the United States and CDW–G settled its False Claims Act ("FCA") dispute for $7 million dollars. At issue was conduct in connection with General Services Administration (GSA) Contract Number GS–35F–0195J. The plaintiff's attorneys were directed to file a petition for attorney fees and did so on March 12, 2013 (Docs.299, 301). During the course of this litigation, Liotine acquired the counsel of Aschemann Keller, L.L.C. ("Aschemann firm"), a firm located in the southern part of Illinois, and Helmer, Martins, Rice and Pophamco, L.P.A. ("Helmer firm"), a firm located in Cincinnati, Ohio. Both firms practice a specialty in False Claims Act litigation.

The Helmer firm requested attorney fees totaling $1,954,475.00 for 4,433.45 hours worked with rates per hour varying from $600.00 for a senior partner to $155.00 for a paralegal. The Aschemann firm requested attorney fees totaling $1,628,295.00 for 3,033.3 hours worked with rates per hour varying from $550 for a senior partner to $350 for the associate who worked on the case. [1] Since that time, the parties have engaged in a discordant two-month back and forth regarding the fees and related discovery (*See* Docs. 299 to 335).

On May 17, 2013, Judge Frazier issued the Report recommending an award of attorney's fees in the following amounts:

1. The law firm of Helmer, Martins, Rice and Pophamco, L.P.A. should be awarded a lodestar amount of $1,974,035 and costs and expenses of $38,879.17.

2. The law firm of Aschemann Keller, L.L.C. should be awarded a lodestar amount of $1,527,519 and costs and expenses of $72,675.52.

In so deciding, the Judge adopted Liontine's request regarding their reasonable rates, finding the Helmer firm had provided sufficient evidence to support a finding of an actual rate and the Aschemann firm had established an appropriate reasonable rate. Judge Fraizer then reduced the requested number of hours based on specific objections made by CDW–G regarding clerical work and travel time while increasing the number of hours based on additional reporting from the Helmer firm for time spent on this case from March 12 to March 28, 2013. Thereafter, CDW–G filed objections to the Report (Doc. 332). Broadly, CDW–G argues that Liotine's counsel did not meet their burden of demonstrating that their hours and rates sought were reasonable (Doc. 332 at 1). CDW–G does not object the Report's recommendation as it relates to costs and expenses (Doc. 332 at 1, n.1).

***2** Since timely objections have been filed, this Court must undertake *de novo* review of the Report. 28 U.S.C. § 636(b)(1)(B); Fed.R.Civ.P. 72(b); Southern District of Illinois Local Rule 73.1(b); *Govas v. Chalmers,* 965 F.2d 298, 301 (7th Cir.1992). The Court may "accept, reject or modify the recommended decision." *Willis v. Caterpillar Inc.,* 199 F.3d 902, 904 (7th Cir.1999). In making this determination, the Court must look at all the evidence contained in the record and give fresh consideration to those issues to which specific objection has been made. *Id.* Seventh Circuit cases, however, indicate that arguments not made before a magistrate judge are normally waived. [2] *See, e.g., Divane v. Krull Electric Co.,* 194 F.3d 845, 849 (7th Cir.1999).

A prevailing FCA party is entitled to recover "reasonable expenses ... plus reasonable attorneys' fees and costs." 31 U.S.C. § 3730(d)(1). The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983). The burden rests on the prevailing party to establish that it documented the appropriate hours expended and its hourly rates. *Id.* However, the district court has broad discretion in determining the amount of a fee award and may adjust the fee award as it deems necessary. *Id.* at 437; *Blum v. Stenson,* 465 U.S. 886, 888 (1984). A reasonable attorney's fee "is one that is adequate to attract competent counsel, but that does not produce windfalls to attorneys." *Blum,* 465 U.S. at 897. With these principles in mind, the Court turns to the specific objections to the Report.

I. *REASONABLE RATES*

A. Helmer Firm

The Helmer firm requested rates ranging from $600.00 per hour for a lead partner to $155.00 for a paralegal. In support of its request, the Helmer firm submitted two declarations (the "Helmer Declarations") that the rates submitted were the firm's actual rates (Docs.300–1, 313–1). CDW–G objects to the Report's acceptance of the Helmer Declarations as sufficient evidence to establish Helmer's actual rates and requests the Court use the prevailing market rate in the Saint Louis area (Doc. 332 at 3–9).

Reasonable fees are to be calculated according to prevailing market rates in the community. *Blum,* 465 U.S. at 895. An attorney's actual billing rate for comparable work is presumptively appropriate to use as the market rate in determining an award of attorney's fees. *People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205,* 90 F.3d 1307, 1310 (7th Cir.1996). "Once an attorney provides evidence of his billing rate, the burden is upon the defendant to present evidence establishing 'a good reason why a lower rate is essential.' " *Id.* at 1313 (quoting *Gusman v. Unisys Corp.,* 986 F.2d 1146, 1151 (7th Cir.1993)).

As the Report discussed, while it is true that in some cases an attorney's self-serving affidavit will not be sufficient evidence of actual rates, that is not the case here. *See Spegon v. Catholic Bishop of Chicago,* 175 F.3d 544, 556 (7th Cir.1999). The Helmer Declarations are not self-serving, but instead sufficient evidence of the firm's actual rate. Unlike *Spegon* where the firm had no fee-paying clients, here Helmer attests to actual rates charged actual clients. *Id.* Additionally, the Court notes that it is common practice, as the defense should know, to accept thorough declarations of this kind as evidence of an attorney's rates. Therefore, there is no need for the Helmer firm to submit third party affidavits, invoices, or any other record. The inquiry ends there.

B. Aschemann Firm

***3** The Aschemann firm requested rates ranging from $550 per hour for a senior partner to $350 for an associate. While the Report found that the Aschemann Firm had not submitted sufficient evidence of its actual rates, Judge Frazier concluded that the rates were reasonable using the Helmer firm's rates as the prevailing market rate. In so finding, the Judge determined that the firms were of similar skill and in the same general geographic region. CDW–G's counsel balks at the rate as per se unreasonable and asserts that the Court should adopt a reasonableness rate from Southern Illinois. Specifically, CDW–G argues that the rates as approved by the Report are a result of some sort of national qui tam bar and are also inappropriately compared to those of CDW–G's counsel (Doc. 332 at 5 & 6).

As noted above, absent the provision of sufficient evidence establishing the firm's actual rate, the Court must look to "the rate charged by lawyers in the community of 'reasonably comparable skill, experience, and reputation.' " *See People Who Care,* 90 F.3d at 1310. "Once an attorney provides evidence of his billing rate, the burden is upon the defendant to present evidence establishing 'a good reason why a lower rate is essential.' " *Id.* at 1313. "A defendant's failure to do so is essentially a concession that the attorney's billing rate is reasonable and should be awarded." *Id.*

The Court finds no flaw in the Report's analysis. Judge Fraizer concluded the relevant community to include both the Helmer and Aschemann firms. Such a comparison is not farfetched considering the Report's detailed examination of the like skills and reasonable geographic proximity of the two firms. While CDW–G argues that this establishes some sort of national qui tam rate, counsel fails to acknowledge the proximity of "Southern Illinois" (which counsel appears to treat as its own island) to Saint Louis and Cincinnati as well as the specialized skills required to adequately litigate FCA cases. The Aschemann firm's rate is further supported by a third party affidavit from Southern Illinois practitioner and FCA specialist, Mr. Ronald E. Osman (Doc. 312–4). The Court finds that the Aschemann firm has submitted sufficient evidence for the Court to conclude that the rates requested are reasonable and to shift the burden to CDW–G.

CDW–G has not overcome this burden. The Court finds CDW–G's evidence of the Kurowski firm's rates unpersuasive. The firm is not similarly-situated—it does not have the level of specialization in FCA litigation—and it also, as the Report details, had relatively minor involvement in this case (Doc. 331 at 12).

Finally, overshadowing this discussion of rates is the obvious comparison to CDW–G's attorneys' rates. CDW–G objects to the use of its rates as "the primary evidence of the reasonableness of Liotine's counsels rates" (Doc. 332 at 6). As discussed, CDW–G's rates were not the *primary* evidence used to support the reasonableness of Aschemann's requested rates. To deny that they have a bearing, as the Report notes, is preposterous. The Court agrees with the Report's note, "[t]here is a striking amount of undeniable incredulity in CDW–G's suggestion that a reasonable rate for the Aschemann firm should be set at $230 for partners and $170 for associates when [defense counsel's] associates bill at a rate that is 148% higher than CDW–G's suggested rate for Aschemann's firm's lead attorneys" (Doc. 331 at 11–12).

II. *REASONABLE HOURS*

Liotine's counsel requested 7,376.75 total hours to use as reasonable hours in the lodestar calculation. The Report recommended granting Liotine's request with some minor adjustments addressed below in the "Hour Adjustments" section. CDW–G again generally objects to the burden shifting method used by Judge Frazier, arguing that Liotine's counsel failed to establish that their hours were reasonable and that it was not CDW–G's responsibility to identify specific examples of unreasonable hours. Instead, CDW–G proposes a 40% reduction for all partner-level attorneys and suggests that Magistrate Judge Frazier "was, of course, free to engage in a more time consuming line-item review if the Judge wished to do so" (Doc. 332 at 11).

***4** *Hensley* directs the Court to exclude hours that were not reasonably expended—hours that are excessive, redundant or otherwise unnecessary. 462 U.S. at 434. "Hours that are not properly billed to one's client also are not properly billed to one's adversary...." *Id.* (emphasis in original). Specifically, a movant is required to "exercise 'billing judgment' with respect to hours worked and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." *Id.* at 437.

Liotine's counsel affirmed in their declarations that they have attempted to exercise billing judgment (Doc. 300–1 at 12 ¶ 41; Doc. 302–1 at 2 ¶ 8). They also submitted billing statements tracking their hours down to a tenth of an hour (Docs.300–2, 302–2). The Court finds that the billing statements are sufficiently detailed and that, therefore, Liotine's counsel has exercised billing judgment.

The Court conversely rejects CDW–G's proposal to reduce the total hours requested by partner-level attorneys by 40%. CDW–G argues four issues in support of its requested percentage reduction, that 1) Liotine's billing statements are overly broad and vague, 2) time expended on first-to-file and relator fee-sharing issues

should have been excluded, 3) entries demonstrate excessive hours and duplication of efforts, and 4) clerical work and travel should not be compensated at requested rates. Judge Frazier rejected CDW–G's proposal because CDW–G failed to provide specific entries it found objectionable. While CDW–G provides additional exhibits now supporting the reduction, as noted above, these exhibits were not presented before the Magistrate Judge and will not be considered by the Court. Therefore, the Court will deny these general objections. "The district court must provide a clear and concise explanation for its award, and may not 'eyeball' and decrease the fee by an arbitrary percentage...." *Schlacher v. Law Offices of Phillip J. Rotche & Associates, P.C.,* 574 F.3d 852, 857 (7th Cir.2009).

III. *HOUR ADJUSTMENTS*

The Court adopts the Report's analysis regarding its adjustments to Liotine's requested hours (Doc. 331 at 21). CDW–G has not objected to these downward adjustments. First, the Court will deduct 50.54 hours from Dale Aschemann and 6.25 hours from Tim Keller. Then the Court will add the additional hours requested by the Helmer firm from March 12 to March 28. Therefore 25.70 additional hours will be awarded to Robert M. Rice, 9.35 additional hours will be awarded to James B. Helmer, Jr., and 0.5 hours will be awarded to both Paul B. Martins and Jennifer Lambert.

Additionally, the Court has considered Liotine's request for additional fees as a result of the continued litigation on the attorney fees issue. As evidence, Liotine submits a Second Supplemental Helmer Declaration (Doc. 333–2) and a Supplemental Aschemann Declaration (Doc. 333–1). Attached to each declaration is an associated, detailed time report. The Aschemann firm requests 68.75 hours from March 13 to March 12 for a total of $36,093.75 in additional fees. The Helmer firm requests 59.30 hours from March 29 to June 12 for a total of $31, 657.25. The Helmer firm also requests $795.00 in additional costs and expenses. Counsel additionally requests that CDW–G pay interest on the whole award from March 5, 2013, the date of the parties' settlement.

Again, the Court cannot help but note the huge disparity in hours spent on this case between the parties. According to CDW–G's self-reported hours billed, CDW–G spent 2,486 hours or 62 full weeks more than Liotine's counsel on this case. [3]

***5** "A request for attorney's fees should not result in a second major litigation" as it has in this case. *Hensley,* 461 U.S. at 437. Upon review, the Court finds that the additional attorney fees and costs are reasonable given the extremely contentious nature of the attorney fees issue itself. However, Liotine's request for interest on the whole award of attorney's fees from the date of settlement, March 5, 2013, is denied. Under 28 U.S.C. § 1961, "[i]nterest shall be allowed on any money judgment in a civil case recovered in district court." The phrase "any judgment" is construed as including a judgment awarding attorneys' fees. *See Fleming v. County of Kane,* 898 F.2d 553, 564 (7th Cir.1990). In *Fleming,* the Seventh Circuit held that post-judgment interest on attorney's fees is allowed only from the date that judgment is entered regarding the specific amount awarded. *Id.* at 565. The attorney's fees judgment has not yet been entered.

IV. *LODESTAR ADJUSTMENT*

In its motion for attorney's fees, the Aschemann firm requested a 15% upward adjustment based on the *Hensley* factors. [4] Conversely, CDW–G requested a 15% downward adjustment. The Report declined to adjust the lodestar amount finding that a positive adjustment was unwarranted given the significant fee amount awarded and that a negative adjustment was equally unnecessary because of the plaintiff's success and appropriately proportional award. CDW–G in its objections again requests a 15% decrease in the entire lodestar amount.

The district court has the authority to adjust the product of a lodestar approach. *Hensley,* 461 U.S. at 434. While an adjustment may be made according to the *Hensley* factors, most of these factors are subsumed within the initial lodestar calculation. *See Blum,* 465 U.S. at 888–89.

While CDW–G urges the Court to find that the plaintiffs' were ultimately unsuccessful as they received only $7 million of their requested $228 million award. This figure is disputed—Liotine maintains that they requested $28 million. [5] CDW–G also argues that Liotine was ultimately unsuccessful because they "lost" on 8 of their 11 claims at summary judgment. The Supreme Court directs us to look

first at whether the plaintiff failed to prevail on claims that were unrelated to the claims on which he succeeded, and second at whether the plaintiff achieved a level of success that makes the hours expended a satisfactory basis for making a fee award. *Hensley,* 461 U.S. at 434 (quotations omitted). Here, 8 of plaintiff's 11 claims were dismissed on summary judgment but Liotine was nonetheless successful in achieving a 7 million dollar settlement. As the parties have noted, a FCA case has implications beyond the settlement or ultimate monetary award. The very nature of these claims is to help the Government police fraudulent conduct. That victory cannot be overlooked. For the above reasons the award will not be adjusted in either direction.

V. *CONCLUSION*

Accordingly, the Court **ADOPTS** the Report (Doc. 331) and **GRANTS** Liontine's request (Docs.299, 301) for additional fees:

***6** 1) The law firm of Helmer, Martins, Rice and Pophamco, L.P.A. should be awarded a lodestar amount of $2,005,692.25 and costs and expenses of $39,674.74.

2) The law firm of Aschemann Keller, L.L.C. should be awarded a lodestar amount of $1,563,612.75 and costs and expenses of $72,675.52.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 5366960

Footnotes

1 Judge Frazier provides a detailed account of the firms' requests which the court adopts as its own (*See* Doc. 331 at 3 & 7).

2 CDW–G provides the Court with detailed exhibits # 1–13 in its objection to the Report. As these exhibits were not previously provided to the Magistrate Judge to allow him to address the specificity of counsel's objections, they will not be reviewed.

3 CDW–G reported spending 9, 862 hours on this case (Doc. 332 at 16, n.20).

4 "The twelve factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." *Hensley,* 461 U.S. at 430, n.3 (citation omitted).

5 As noted in the Report, this figure is disputed (Doc. 331 at 23). It nonetheless remains in dispute (*See* Doc. 332 at 18; Doc. 333 at 16).

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United States District Court,
S.D. Illinois.

U.S.A. ex rel. Joe Liotine, Plaintiffs,
v.
CDW–Government, Inc., Defendant.

Case No.: 3:05-cv-00033-DRH-PMF
|
Signed May 17, 2013

REPORT AND RECOMMENDATION

FRAZIER, Magistrate Judge

***1** Before the Court are Relator Joe Liotine's motions for attorney fees (Docs.299, 301) and Defendant CDW–Government, Incorporated's ("CDW–G") response (Doc. 307) thereto. For the following reasons, it is recommended that Liotine's (Docs.299, 301) motions for attorney fees be granted in the amounts set forth below.

A. Motions for Attorney Fees

Relator Joe Liotine has filed two motions for attorney fees (Docs.299, 301) seeking recovery of reasonable attorney fees pursuant to 31 U.S.C. § 3730(d) and §3730(h). This False Claims Act case has settled for 7 million dollars. The parties agree that Liotine's counsel is entitled to reasonable attorney fees. They disagree, however, as to the reasonableness of the fees requested by Liotine.

Determining the so-called reasonableness of an attorney fee could appear to be a vague and ambiguous task. In *Hensley v. Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), the U.S. Supreme Court developed an objective approach, commonly referred to as "lodestar," to aid in the calculation of reasonable attorney fees. Lodestar calculates the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate, and aims to provide "an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley,* 461 U.S. at 433. "[T]he lodestar method produces an award that roughly approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case." *Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542, 130 S.Ct. 1662, 1672, 176 L.Ed.2d 494 (2010) (emphasis added). It "cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results." *Id.* The parties agree that the lodestar method is appropriate in this case.

1. Reasonable Rates

In 2004, Relator Joe Liotine initially sought counsel in the Chicago area, where he resided. He was ultimately referred to the firm of Aschemann Keller, L.L.C. ("Aschemann firm") in Marion, Illinois, which is located in the southern part of Illinois. Dale J. Aschemann filed the complaint in this case on January 19, 2005. In 2008, the United States filed a notice pursuant to the False Claims Act that it was not intervening in this case. *See* Doc. 38. Sometime thereafter, CDW–G hired a Washington, D.C.-based law firm Dickstein Shapiro, L.L.P. ("Dickstein Shapiro"), which boasts a specialty in False Claims Act litigation and significant litigation resources. In an effort to obtain more litigation resources, the Cincinnati, Ohio law firm of Helmer, Martins, Rice and Pophamco, L.P.A. ("Helmer firm"), which also has a specialty in False Claims Act litigation, joined forces with Aschemann firm shortly thereafter to prosecute this case on behalf of Liotine. The Aschemann and Helmer firms have jointly-prosecuted this case to present day and have filed separate petitions for attorney fees. *See* Docs. 299, 301.

a. Helmer Firm (Docs.299–300, 313).

***2** The Helmer firm has requested attorney fees as follows:

Name	Hours	Rate/Hour	Total
James B. Helmer, Jr. (Lead Partner)	247.60	$600.00	$148,560.00
Paul B. Martins (Senior Partner)	78.10	$525.00	$41,002.50
Robert M. Rice (Senior Partner)	2,922.45	$525.00	$1,534,286.25

James A. Tate (Associate)	1.20	$295.00	$354.00
Jennifer Lambert (Senior Associate)	164.05	$390.00	$63,979.50
Erin M. Campbell (Associate)	17.80	$380.00	$6,764.00
Jennifer P. Pomerantz (Paralegal)	900.25	$175.00	$157,543.75
William J. Diggs II (Paralegal)	5.75	$155.00	$891.25
Dayna Boatright (Paralegal)	6.25	$175.00	$1,093.75
	4,343.45		**$1.954,475.00**

See Doc. 300–1 at 14 ¶ 50; 300–2 at 104. In support of its request, the Helmer firm has submitted the declaration of James B. Helmer, Jr. that details the credentials of the individuals employed by the Helmer firm and the work those employees have performed in this case. See Doc. 300–1. With respect to rates, Helmer testifies that the above rates "are what we charge in False Claims Act cases." Doc. 300–1 at 11 ¶ 35. Furthermore, the requested hourly rates "have been accepted by opposing counsel, the Department of Justice and by federal judges" in False Claims Act cases. Id. ¶¶ 34–35. Helmer attests that his firm also does "other complex litigation (besides False Claims Act matters) for corporations," and the requested rates are "consistent with our rates that we currently charge and are paid by our hourly-fee paying clients in non-False Claims Act cases." Id. ¶ 35. Helmer has also filed a supplemental declaration with Liotine's (Doc. 313) reply stating that the rates sought here are "the exact same hourly rates that we currently charge and are paid by hourly-paying clients." See Doc. 313–1 at 2.

In setting reasonable rates, the lodestar method "looks to 'the prevailing market rates in the relevant community.' " *Perdue,* 130 S.Ct. at 1672 (quoting *Blum v. Stenson,* 465 U.S. 886, 895, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)). "The attorney's actual billing rate for comparable work is 'presumptively appropriate' to use as the market rate." *People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205,* 90 F.3d 1307, 1310 (7th Cir.1996) (citing *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1150 (7th Cir.1993)). "Once an attorney provides evidence of his billing rate, the burden is upon the defendant to present evidence establishing 'a good reason why a lower rate is *essential*.' " *Id.* at 1313. (quoting *Gusman,* 986 F.2d at 1151) (emphasis added). "A defendant's failure to do so is essentially a concession that the attorney's billing rate is reasonable and should be awarded." *Id.*

CDW–G argues that the Helmer firm did not submit adequate evidence to support their request for attorney fees and cite to cases where a failure to support rates with third-party affidavits resulted in a reduction of a fee award. *See* Doc. 307 at 6 (citing *Blum,* 465 U.S. at 895 n.11 and *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 640 (7th Cir.2011)). It is true that in some cases an "attorney's self-serving affidavit alone cannot satisfy the plaintiff's burden of establishing the market rate for that attorney's services." *Spegon v. Catholic Bishop of Chicago,* 175 F.3d 544, 556 (7th Cir.1999) (citing *Blum,* 465 U.S. at 895 n. 11). In *Spegon,* the Seventh Circuit considered the situation where an attorney, *who had no fee paying clients,* was unable to shift the burden of proof to the defendant to come forward with evidence that the plaintiff's requested rate was reasonable. *See id.* Because the plaintiff's attorney in *Spegon* did not have fee paying clients or any other evidence, such as third-party affidavits, to establish that the requested rates were the market rates for someone of the plaintiff attorney's experience, the Seventh Circuit determined that the burden never shifted to the defendant to come forward with evidence that lower rates were essential. *See id.* Unlike the plaintiff's attorney in *Spegon,* the Helmer firm has an actual billing rate and hourly fee-paying clients for comparable work. *See id.* (... since [plaintiff's attorney] has no fee-paying clients, he has no "actual" billing rate that can be presumed to be his market rate-despite his assertions to the contrary. *See People Who Care,* 90 F.3d at 1310).

***3** The Helmer firm's declarations are sufficient to establish its actual billing rate in this case. The evidentiary dispute here essentially comes down the literal

interpretation (or the lacking applicability thereof) of footnote 11 of U.S. Supreme Court's decision in *Blum,* which recognized the inherent difficulty of establishing the market rate for an attorney's services. *See Blum,* 465 U.S. at 895 n. 11. In its entirety, footnote 11 reads as follows:

> We recognize, of course, that determining an appropriate "market rate" for the services of a lawyer is inherently difficult. Market prices of commodities and most services are determined by supply and demand. In this traditional sense there is no such thing as a prevailing market rate for the service of lawyers in a particular community. The type of services rendered by lawyers, as well as their experience, skill and reputation, varies extensively–even within a law firm. Accordingly, the hourly rates of lawyers in private practice also vary widely. The fees charged often are based on the product of hours devoted to the representation multiplied by the lawyer's customary rate. But the fee usually is discussed with the client, may be negotiated, and it is the client who pays whether he wins or loses. The § 1988 fee determination is made by the court in an entirely different setting: there is no negotiation or even discussion with the prevailing client, as the fee–found to be reasonable by the court–is paid by the losing party. Nevertheless, as shown in the text above, the critical inquiry in determining reasonableness is now generally recognized as the appropriate hourly rate. And the rates charged in private representations may afford relevant comparisons.
>
> In seeking some basis for a standard, courts properly have required prevailing attorneys to justify the reasonableness of the requested rate or rates. To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence–*in addition to the attorney's own affidavits* – that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. A rate determined in this way is normally deemed to be reasonable, and is referred to–for convenience–as the prevailing market rate.

Id. (emphasis added). It must be recognized that Blum involved a case where the plaintiffs were represented by a non-profit legal aid firm. *Id.* at 890. The U.S. Supreme Court granted certiorari to "consider whether it was proper for the District Court to use prevailing market rates in awarding attorney's fees to nonprofit legal services organizations and whether the District Court abused its discretion in increasing the fee award above that based on market rates." *Id.* at 892. Thus, the actual rates billed by the non-profit legal aid firm were not an issue in *Blum* and there was no discussion as to what standard applies to a fee petitioner who comes forward with a declaration stating exactly what rate it is paid by hourly fee-paying clients. The undersigned agrees with the Helmer firm's argument that the Seventh Circuit has developed an approach for establishing the appropriate market rates, and evidence of the prevailing market rate in the community (necessarily evidence beyond the fee petitioner's affidavit) is required only in the absence of evidence of the fee petitioner's actual billing rate.[1] *See* Doc. 313 at 2–3 (citing *Mathur v. Bd. of Trustees of S. Illinois Univ.*, 317 F.3d 738, 743 (7th Cir.2003)) (Only if an attorney is unable to provide evidence of her actual billing rates should a district court look to other evidence, including "rates similar experienced attorneys in the community charge paying clients for similar work." *People Who Care,* 90 F.3d at 1310). *See also Spegon,* 175 F.3d at 555.

***4** The Helmer firm has met its burden in establishing that the requested rates are appropriate for the lodestar calculation, and the burden has shifted to CDW–G to come forward with a reason why a lower rate is essential. Much of the (Doc. 307) response is devoted to arguing what legal market should be used to establish the prevailing market rate in the relevant community for the Helmer firm. However, this analysis is not necessary in light of the fact that the Helmer firm has established its actual billing rate. *See People Who Care,* 90 F.3d at 1310 (citing *Blum,* 465 U.S. at 892, 895 n. 11); *Mathur,* 317 F.3d at 743. CDW–G has not submitted any persuasive reason why the presumption as to the reasonableness of the Helmer firm's requested rates should be overcome. Therefore, the Court should use the Helmer firm's requested rates in its lodestar calculation.

b. Ascheman Firm (Docs.301–02, 312).

The Aschemann firm has requested rates as follows:

Name	Hours	Rate/Hour	Total

Dale Aschemann (Senior Partner)	2,630.1	$550	$1,446,555.00
Tim Keller (Senior Partner)	203.1	$550	$ 111,705.00
Tyler Robinson (Associate)	200.1	$350	$ 70,035.00
	3,033.3		$1,628,295

Doc. 302–1 at 3 ¶ 11. In support, the Aschemann firm offers the declaration of Dale J. Aschemann, who attests to the credentials and work performed by the three attorneys in the Aschemann firm seeking fees in this case. *See* Doc. 302–1.

The Aschemann firm has not provided sufficient evidence regarding the actual billing rate charged to and paid by hourly fee-paying clients. The Aschemann firm attests that they will be seeking the requested rates in this case and similar cases around the country. *See* Doc. 302–1 at 8–9 ¶ 33, 35. It states that it has received "similar hourly rates" in other *qui tam* litigation around the country, but it is not able to divulge the specifics due to fees being awarded as part of settlement agreements. *See* Doc. 302 at 7 n. 24. The Aschemann firm has presented evidence of a fee that it actually received in this district of approximately $650/hour for legal work that was performed in connection with complex federal litigation in which the attorneys of record received lodestar rates ranging from $350–$750 per hour. *See id.* ¶ 35 (citing *Burns v. IDFA Services, et al.*, No 09–390 (S.D.Ill.2009)). It appears that this fee was received just one time, the Aschemann firm attorneys were not the attorneys of record, and the work was not billed at the requested rates in this litigation. Unlike the Helmer firm, the Court cannot conclude from the evidence presented that the Aschemann firm's requested rate is its actual billing rate. While the forgoing evidence is persuasive as to the reasonableness of a rate for the Aschemann firm, it is insufficient to establish that the requested rates are the firm's actual billing rates charged to and paid by hourly fee-paying clients for False Claims Act litigation or comparable work.

As noted above, the Court should now look to the next best evidence of the reasonable rate for the Aschemann firm-"the rate charged by lawyers in the community of 'reasonably comparable skill, experience, and reputation.' " *See People Who Care,* 90 F.3d at 1310 (quoting *Blum,* 465 U.S. at 892, 895 n. 11). The Court need not look much further than this case to find the next best evidence of the appropriate rates for the Aschemann firm. From an examination of the declarations, it would appear that Dale Aschemann and Tim Keller (senior partners) have similar skill, experience, and reputations to that of the senior partners of the Helmer firm. The firms appear to have similar skillsets and similar quality of work when the filings of both firms are examined in this case. The senior partners at the Helmer firm have established that they actually charge and are paid an hourly rate of $525/hour by hourly fee-paying clients. The evidence described in previous paragraph is at least probative of the reasonable rate for the Aschemann firm, and $525/hour falls within the range it attests to requesting and receiving in various circumstances. Further, the requested rate of $350/hour for associates in the Aschemann firm falls below the average rate that the Helmer firm charges for its associates.

***5** To help establish a reasonable rate, the Aschemann firm has submitted the affidavit of attorney Ronald E. Osman, who is also a False Claims Act practitioner with substantial experience headquartered in southern Illinois. *See* Doc. 312–4. He testifies that the normal and customary plaintiff billing rate for False Claims Act litigation is $400–$600 per hour. *Id.* at 3 ¶ 10. Osman further attests to his familiarity with the Aschemann firm, and states that, aside from his own and the Aschemann firm, no other firms in southern Illinois dedicate time and resources to False Claims Act relator representation. *See id.* ¶ 12. Osman concludes that he has personally observed the work of the Aschemann firm for a substantial period of time, and he believes that the Aschemann firm is entitled to rates of $575 per hour for partners and $350 per hour for associates. This evidence should be given a fair amount of weight.

The Achemann and Helmer firms are in the same relevant False Claims Act community in terms of identifying the prevailing market rate in this case. CDW–G argues that the relevant community in this case for the Aschemann firm is limited to just southern Illinois. *See* Doc. 307 at 7–8 (citing *Uphoff v. Elegant Bath, Ltd.*, 176 F.3d 399, 407 (7th Cir.1999)). This argument is not persuasive. The

fact that the case was filed in the Southern District of Illinois is of little significance in this instance because it is alleged that CDW–G was defrauding agencies of the federal government. Relator representation in False Claims Act litigation is a very specialized area of practice. The Aschemann firm has submitted evidence that this case originated from a referral from the Chicago area. These types of referrals from a large-market area to an attorney in a smaller locale almost never occur unless the attorney in the smaller locale is highly regarded and has a highly specialized practice. Liotine's counsel has submitted evidence of False Claims Act cases that they are involved with across the country to add further support to the idea the False Claims Act relator representation is, essentially, a nationwide practice. The idea that False Claims Act litigation may be a nationwide practice is further supported by the fact that CDW–G sought and obtained representation from Dickstein Shapiro, which is located in Washington, D.C.

While the Court does not necessarily need to conclude that the relevant community in this case consists of a national market (although it surely could), the Court should not have any trouble concluding that the Aschemann firm and the Helmer firm are in the same relevant community for purposes of this litigation. Both firms claim a specialty in False Claims Act relator representation and have attorneys with similar skills, experience, and reputations. Both firms believed that representation of Liotine in this matter was an appropriate use of their respective firm's resources. And finally, for what it's worth, both firms are located in the same general geographic region of the United States. [2]

Finally, the parties disagree as to whether the Court should consider the rates that Dickstein Shapiro charges CDW–G for this case. As of February 28, 2013, those rates are: J Jackson (Partner) $750/hour, D Nadler (Partner) $740/hour, D Yang (Associate) $570, and D Gunn (Associate) $570/hour. Dickstein Shapiro argues that this comparison is apples to oranges because their rates are privately negotiated and it is "self-evident that the rates charged by large national defense firms that operate in some of the most expensive legal markets in the country such as New York, Los Angeles and Washington D.C., have no meaningful connection to the rates charged by a two-partner firm in smaller markets such as Marion, Illinois in the case of Aschemann Firm or a four-partner firm in Cincinnati, Ohio as in the case of the Helmer Firm." [3] Doc. 311 at 4. *See also* Doc. 307 at 7.

***6** The rates charged by CDW–G ultimately do have probative value as to the reasonableness of the rates charged by the Aschemann firm. For some of the reasons that CDW–G has presented, Liotine's attorneys' hourly billing rates should not be set exactly to the rates that Dickstein Shapiro charges CDW–G. However, it would not be too far off to suggest that a reasonable rate for Liotine's attorneys could approach the rates that Dickstein Shapiro's lead counsel bills its client. CDW–G cannot escape the fact that Liotine's attorneys and CDW–G's attorneys have been practicing in the same case, in the same district court, and within the same highly specialized practice area. It is the undersigned's observation of the proceedings that CDW–G's attorneys, while certainly talented and highly qualified, have not produced work that is superior in any way to that produced by Liotine's attorneys. Once it is established that Dickstein Shapiro's work product has no qualitative edge over that of Liotine's attorneys, then the hourly rate negotiated in an arms-length transaction between Dickstein Shapiro and CDW–G takes on real significance. CDW–G is undoubtedly managed by a very savvy and sophisticated group whose considered judgment as to what constitutes a reasonable hourly fee should be given great deference. And recall, this is not a rate that Dickstein Shapiro is charging for work in another region or another type of case. It is identical work in the identical case to Liotine's attorneys. The issues and obstacles were the same for both sides. The same law applies across the board. If anything, the case is more difficult for Liotine because he is the plaintiff.

There is a striking amount of undeniable incredulity in CDW–G's suggestion that a reasonable rate for the Aschemann firm should be set at "$230 for partners and $170 for associates" (*see* Doc. 307 at 3, 5, 13) when Dickstein Shapiro's associates bill at a rate that is 148% higher than CDW–G's suggested rate for the Aschemann's firm's lead attorneys. Liotine's lead attorneys planned, executed, and carried out the prosecution of this case to a substantial result. Dickstein Shapiro's associate involvement appears to be limited primarily to the tasks of research and writing. The Court would have to be willfully blind to conclude that Dickstein Shapiro's rates in the same case for identical tasks have no bearing whatsoever on the reasonableness of the requested rates of Liotine's attorneys when associates, who typically have no case

management responsibilities, bill at rate well beyond the rates suggested for the relator's lead attorneys.

For the forgoing reasons, a presumption has been established that lodestar rates of $525/hour for Dale Aschemann and Tim Keller (senior partners) and $350/hour for Tyler Robinson (associate) are reasonable in this case. The burden now shifts to CDW–G to come forward with an adequate reason why a lower rate is essential.

CDW–G submits evidence of what Kurowski Shultz, L.L.C. ("Kurowski firm"), a firm located in southern Illinois that serves as local counsel for CDW–G. *See* Doc. 307–1. The Kurowski firm charges CDW–G $230 an hour for partners and $170 an hour for associates. *See id.* CDW–G urges the Court to impose these rates upon the Aschemann firm. The Aschemann firm correctly points out that the evidence does not demonstrate that the Kurowski firm is similarly-situated in terms of specialization in False Claims Act litigation. The docket reflects that the Kurowski firm had relatively minor involvement in this case. The last docket entry reflecting work performed by the Kurowski firm was in February 2009. *See* Doc. 62. This firm has not participated since Dickstein Shapiro entered their appearances in the early stage of this case on February 6, 2009. *See* Docs. 66 *et al.* While CDW–G's evidence has some minute probative value, it is not enough to overcome the presumption

2. Reasonable Hours

Liotine's counsel has requested 7,376.75 total hours to use as reasonable hours in the lodestar calculation. CDW–G notes that Liotine bears the burden of demonstrating that their hours expended are reasonable, and it is not CDW–G's burden to demonstrate that they are excessive or unreasonable. *See* Doc. 307 at 14 n.10. Lodestar factors in "billing judgment" in that an attorney seeking fees must exclude hours that would be excessive, redundant, or otherwise unnecessary. *Hensley,* 461 U.S. at 434 (Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority.). Both the Helmer firm and the Aschemann have affirmed in their declarations that they have attempted to adhere to this principle. *See* Doc. 300–1 at 12 ¶ 41; Doc. 302–1 at 2 ¶ 8. They have submitted their detailed, billing statements in support of their request. *See* Docs. 300–2, 302–2. The undersigned has reviewed the billing statements and finds that both statements sufficiently detailed down to a tenth of an hour and agrees that both the Helmer and Aschemann firms have exercised substantial billing judgment. There being no apparent concerns with the hours submitted for the lodestar calculation, the Court finds that Liotine has met his burden regarding reasonableness and the burden will now shift to CDW–G to provide objections.

***7** CDW–G begins by stating as follows:

> CDW–G does not ask the Court to engage in a line-item review of the hours spent by Liotine's counsel.

Doc. 307 at 14. Instead, it argues that the Court should reduce the total hours requested for all partner-level attorneys by 40%. *Id.* In support of this request, CDW–G argues that 1) Liotine's billing statements are overly broad and vague, 2) time expended on first-to-file and relator fee-sharing issues should've been excluded, 3) entries excessive duplicative efforts, and 4) clerical work and travel should not be compensated at requested rates.

A 40% cut of all the hours submitted has not been sufficiently justified by CDW–G because it has not provided clear and concise reason or sufficiently specific objections to support such a "meat-axe" approach. "The district court must provide a clear and concise explanation for its award, and may not 'eyeball' and decrease the fee by an arbitrary percentage because of a visceral reaction that the request is excessive." *Schlacher v. Law Offices of Phillip J. Rotche & Associates, P.C.*, 574 F.3d 852, 857 (7th Cir.2009) (citing *Small v. Richard Wolf Med. Instruments Corp.*, 264 F.3d 702, 708 (7th Cir.2001)); *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 570 (7th Cir.1992). The Seventh Circuit has specifically cautioned against taking the meat-axe approach that CDW–G advocates here, explaining as follows:

> A district court facilitates appellate review by making specific findings en route to a fee calculation, and therefore we have reversed when we could not discern whether the district court arrived at its fee award by using the proper factors. *See [Eddleman v. Switchcraft, Inc.,* 927 F.2d 316, 317–20 (7th Cir.1991)]. But we need not automatically reverse a fee award in the absence of explicit findings about rates and hours. *See Small,* 264 F.3d at 709 (approving fee award lacking "detailed explanation" where district court simply accepted defendant's objections to billed time); *Henry v. Webermeier,* 738 F.2d 188, 193 (7th Cir.1984)

(explaining that there is no "Procrustean bed to which every fee proceeding must be fitted despite its actual dimensions"). When substantial fees are at stake, the district court must calculate the award with greater precision. *See Vukadinovich v. McCarthy,* 59 F.3d 58, 60 (7th Cir.1995) (explaining that "proportioning of formality to stakes is a general principle of the law" that applies to attorney's fee awards); *In re Cont'l Ill. Sec. Litig.*, 962 F.2d at 570 (remanding because district court made substantial cuts to $9 million fee request without sufficient explanation, but approving another court's "meat-axe approach" to fee petition in case where only $6,000 in fees were at stake); *Lenard v. Argento,* 808 F.2d 1242, 1247 (7th Cir.1987) (explaining that less elaborate findings are required when a fee request is for "only a few hundred or a few thousand dollars").

Id. at 857–58. CDW–G has cited a Seventh Circuit case from 1986 involving an attorney fee award of $6,000 in case that settled for $5,000 as support its argument for the meat-axe approach. *See* Doc. 307 at 14 (citing *Tomazzoli v. Sheedy,* 804 F.2d 93, 98 (7th Cir.1986)). In contrast, it cannot be disputed that substantial fees are at stake in this case. In light of that fact, the approach advocated by CDW–G is not warranted. In order to broadly cut hours by 40%, CDW–G would have had to have explained exactly how it arrived at that specific figure. There is no explanation. Rather, the proposed cut appears to be base on the type of "visceral reaction" that the Seventh Circuit has specifically cautioned against. *See Schlacher,* 574 F.3d at 857. For these reasons, the undersigned will only attempt to rule on specific objections that CDW–G has made to Liotine's billing statements. All non-specific objections in the (Doc. 307) response are denied.

a. Objection: Overly Broad and Vague Entries, Redactions for Privilege, and Block Billing Render Certain Claims Unsupportable

***8** As noted above, the Court has reviewed the billing statements and disagrees that the entries are overly broad or vague. Although a lot of the entries are in fact not block-billed at all, CDW–G objects without citing sufficient examples of inappropriate block-billed entries. The Seventh Circuit does not prohibit the practice of block-billing, *Farfaras v. Citizens Bank & Trust of Chicago,* 433 F.3d 558, 569 (7th Cir.2006), and without specific examples of what CDW–G objects to, the Court will not make specific findings.

b. Objection: Time Expended on First–to–File and Relator Fee–Sharing Issues Should Be Excluded

CDW–G argues that time should be excluded for time expended on first-to-file issues. It states that "[i]n Liotine's counsel spent nearly 70 hours on collateral pursuits that had no bearing on the merits of the case." *See* Doc. 307 at 16. CDW–G cites cases for support of its argument that collateral issues are not compensable. But even if the Court was persuaded by this argument, CDW–G has failed to identify the specific entries it believes were spent on these issues. It does not explain at all how it arrived at 70 hours. Such a vague objection deprives the fee petitioner of the opportunity to rebut the assertion, and it deprives the Court of the opportunity to provide the fee petitioner with the required clear and concise reason for a reduction. *See Schlacher,* 574 F.3d at 857. CDW–G could have easily attached an exhibit to its response that provided a basis for its requested reduction. Without such a basis, the proposed reduction lacks specificity and must be denied.

c. Objection: Excessive Hours Compensation for Repeatedly Bringing New Department of Justice ("DOJ") Attorneys Up to Speed on the Case, Due to Staff Turnover at DOJ Should be Excluded

Again, CDW–G fails to provide sufficiently specific objection. It just vaguely states that the requested hours were excessive. Even if CDW–G had provided a specific objection, it would have likely been overruled. Like it or not, False Claims Act litigation by its terms necessarily involves the DOJ. Turnover in staff at the DOJ is not exactly a new phenomenon. To the extent that the objections are based on face-to-face meetings versus some other, less costly means, CDW–G has failed to sufficiently identify the entries it specifically objects to. [4]

d. Objection: Unreasonable Inefficiencies and Redundancies Created by Having Multiple Attorneys Working on the Same Tasks Should Be Excluded

CDW–G cites *Schlacher* for the principle that district courts should scrutinize fee petitions for duplicative billing when multiple lawyers seek fees. *See* Doc. 307 at 17 (citing *Schlacher,* 574 F.3d at 858–859). The Court completely agrees. However, CDW–G has again failed to accomplish its side of this task. The full portion of *Schlacher* that CDW–G relies on provides as follows:

> Second, the district court referred to factors permissible in reducing the billed time: it observed that this was an uncomplicated, low-stakes case that settled within three months of filing and without discovery. The court concluded that it was unreasonable to require the defendant to pay for the time that four attorneys had collectively put into the case because their work necessarily overlapped and one competent attorney would have sufficed. This conclusion was not an abuse of discretion. Though efficiency can sometimes be increased through collaboration, *see Tchemkou v. Mukasey,* 517 F.3d 506, 511–12 (7th Cir.2008), overstaffing cases inefficiently is common, and district courts are therefore encouraged to scrutinize fee petitions for duplicative billing when multiple lawyers seek fees. *See Trimper v. City of Norfolk,* 58 F.3d 68, 76–77 (4th Cir.1995); *Lipsett v. Blanco,* 975 F.2d 934, 938 (1st Cir.1992) ("A trial court should ordinarily greet a claim that several lawyers were required to perform a single set of tasks with healthy skepticism."); *Jardien v. Winston Network, Inc.,* 888 F.2d 1151, 1160 (7th Cir.1989). Here, the district court appears to have done that. *The defendant submitted detailed objections to the hours billed, identifying precisely which entries were excessive or redundant.* The district judge expressly sustained those objections, thereby implicitly finding that it was reasonable to compensate the four attorneys collectively for only about twenty-three of the nearly forty hours of claimed work. When added to the undisputed paralegal fees and costs, the total came to $6,322.70, which the district court apparently rounded up to $6,500. *Although greater detailed findings in calculating the fee award might have been required in a higher-stakes case,* the district court arrived at a fee that was reasonable in relation to the difficulty and stakes of this case, *see Bankston v. Illinois,* 60 F.3d 1249, 1256 (7th Cir.1995), and provided an explanation that was "limited but sufficient" to enable us to determine that it did not abuse its discretion, *see Small,* 264 F.3d at 709; *Uphoff,* 176 F.3d at 409.

***9** *Schlacher*, 574 F.3d at 858–59 (emphasis added). Unlike the respondent in *Schlacher*, CDW–G has not attempted to precisely identify which entries of Liotine's billing statements are objectionable. Without the detailed objections, the Court cannot make the detailed findings it is required to make in this higher-stakes case. See *id.*

It is recognized that pages 18–19 of CDW–G's response contain several examples to illustrate the ultimate point that CDW–G is trying to make with regard to the meat-axe reduction that it has requested. However, the Court cannot make specific findings as to the examples given because, for example, it cannot determine how CDW–G arrived at 1,067 hours for document review, 174 hours to prepare the initial set of discovery requests, 308 hours preparing two-cross motions for partial summary judgment, 922 related hours for depositions, 70 hours spent preparing a GSA timeline, etc. If some of those totals are actually correct and CDW–G can specifically document how it arrived at those figures, a persuasive argument for specific reductions likely could have been made.

The Court does not understand why CDW–G obviously spent time carefully reviewing the billing statements to compile these totals, yet it failed to provide detailed objections that precisely identified the portions of the billing statements to which it objects. This could be done without taking much space in its response by using exhibits to show how it arrived at its total. Perhaps CDW–G chose the less-detailed approach in hopes that the Court would be so perplexed that it would ultimately adopt its meat-axe reduction approach. CDW–G states that it does not ask the Court to engage in a line-item review of the hours spent by Liotine's counsel. But in order to grant objections based on the examples in this section, it would basically have to re-do the work that CDW–G purports to have done in tallying the entries line by line without any sort of roadmap. This would necessarily require a line-item review.

e. 526 Hours Billed by Senior Partners Keller, Helmer, and Martins Should Be Excluded

CDW–G argues that all of the time requested by senior partners other than Aschemann and Rice should be excluded because Aschemann and Rice are fully capable

False Claims Act practitioners, and the time billed by other senior partners was therefore unreasonable. However, when you factor in the length of this case, the amount of time billed by senior partners other than Aschemann and Rice over the life of this case is not substantial. *See* Docs. 312 at 5; 313–1 at 23. CDW–G has not specifically identified how the work performed by Keller, Helmer, and Martins is unreasonable or duplicative. The mere fact that other senior partners billed hours in this case cannot lead the Court to a conclusion that any time they billed was *per se* unreasonable. *See Kurowski v. Krajewski*, 848 F.2d 767, 776 (7th Cir.1988) (The use of two (or more) lawyers, which solvent clients commonly pay for because they believe extra help beneficial, may well reduce the total expenditures by taking advantage of the division of labor.). Additionally, it is noted that Dickstein senior partners Jackson and Nadler both participated in most proceedings. Considering the considerable cost to the client, it can only be presumed that those attorneys believed multiple attorney participation was necessary in this case.

f. Specific Objections

***10** CDW–G made the following specific objections to the billing statements:

1) Attempting Secure Conference Rooms and Meeting Arrangements (4/30/04 (0.5 hours), 11/24/08 (0.5 hours));

The Court recognizes that the Aschemann exercised billing judgment and did not submit any non-attorney hours for reimbursement. *See* Doc. 302–1 at 2 ¶ 8. While this is commendable, the Court still cannot justify billing purely clerical tasks at a senior partner rates. *See Missouri v. Jenkins,* 491 U.S. 274, 288 n.10 (1989). That Court does not have a secretarial rate to reduce the entry to (and we cannot make one up) so it will sustain the objection with a complete reduction to zero and assume these costs are subsumed in the hourly rates of counsel. Based on this objection, one hour will be reduced from the time that Dale Aschemann billed in this case.

2) Arranging Flight Schedules and Travel Itineraries (9/15/04 (0.4 hours), 8/29/08 (0.25 hours), 12/3/08 (0.4 hours), 6/17/11 (4.45 hours));

These are also clerical tasks billed at the partner level. The entry from 6/17/2011 is one example of an inappropriate block-billed entry. Unlike most of the rest of Aschemann's block entries, this entry does not specify how much time was spent on each task in the block. Because the Court cannot determine how much time was spent on each task listed in the block, a percentage reduction is appropriate. There is one clerical task in the block and there are 5 total tasks in the block. Therefore, the Court will reduce this entry by 20%. On this objection, 1.94 hours will be reduced from the time that Dale Aschemann billed in this case (0.4+0.25+0.4+0.89).

3) Scanning, Photocopying, and Organizing Documents, Copying CD–ROMs, and Dealing with Technology Issues Like Computer Malfunctions (9/17/07 (3 hours), 7/2/08 (1.25 hours), 8/19/08 (5 hours), 9/30/09 (8 hours), 2/17/10 (1 hour), 6/28/10 (2 hours)).

These are also clerical tasks billed at the partner level. With respect to the block-billed entry dated 9/17/2007, the Court cannot discern how much time was spent on each task. Because one task was clerical and the other was not, the Court will deduct 1.5 hours from Aschemann's total for that 3 hour entry. On this objection, 16.75 hours will be reduced from the time that Dale Aschemann billed in this case (1.5+1.25+5+8+1).

4) On 4/5/04, Aschemann and Keller Drove to Fairview Heights to Meet with AUSA's Office and Back. (6.25 total hours each);

Although the Court is sympathetic to the opportunity cost of driving and waiting, it agrees with CDW–G that, travel and waiting time should not be billed at a senior partner rate in light the rates being recommended for the lodestar calculation. Based on this objection, Aschemann and Keller shall receive hour reductions of 6.25 each.

5) On 4/8/04, Mr. Aschemann Drove 6.1 Hours to Elgin to Meet with Client.

Based on this objection, Aschemann shall receive an hour reduction of 6.1 hours.

6) On 1/19/05, Mr. Aschemann has the Vague Entry "To Fairview Heights (100 miles), for Which he Charged 6.5 Hours;

Based on this objection, Aschemann shall receive an hour reduction of 6.5 hours.

7) On 3/30/05, Mr. Aschemann Drove 6 Hours to Meet with Client;

***11** Based on this objection, Aschemann shall receive an hour reduction of 6 hours.

8) On 8/18/05, Mr. Aschemann Drove 6 hours to Chicago to Meet with Client and GSA Officials;

Based on this objection, Aschemann shall receive an hour reduction of 6 hours.

3. Hour Adjustments

Based on CDW–G's above objections, the Court will deduct 50.54 hours (1+1.94+16.75+6.25+6.1+6.5+6+6) from Dale Aschemann and 6.25 hours from Tim Keller. Additionally, after review of time records from March 12 to March 28, 2013 from the Helmer firm for this case, it will be recommended that 25.70 additional hours be awarded to Robert M. Rice, 9.35 additional hours be awarded to James B. Helmer, Jr., and 0.5 hours be awarded to both Paul B. Martins and Jennifer Lambert. *See* Doc. 313–1; 313–2. The Helmer firm appears to have again exercised substantial billing judgment with this time submission. *See id.* CDW–G will be afforded the opportunity to object to this new evidence if it chooses to file an objection to this portion of the Report and Recommendation.

4. Preliminary Lodestar Calculation

Helmer Firm

Name	Hours	Rate/Hour	Total
James B. Helmer, Jr. (Lead Partner)	256.95	$600.00	$154,170
Paul B. Martins (Senior Partner)	78.60	$525.00	$41,265
Robert M. Rice (Senior Partner)	2,948.15	$525.00	$1,547,778.75
James A. Tate (Associate)	1.20	$295.00	$354.00
Jennifer Lambert (Senior Associate)	164.55	$390.00	$64,174.5
Erin M. Campbell (Associate)	17.80	$380.00	$6,764.00
Jennifer P. Pomerantz (Paralegal)	900.25	$175.00	$157,543.75
William J. Diggs II (Paralegal)	5.75	$155.00	$891.25
Dayna Boatright (Paralegal)	6.25	$175.00	$1,093.75
	4,379.5		**$1,974,035**

Aschemann Firm

Name	Hours	Rate/Hour	Total
Dale Aschemann (Senior Partner)	2,579.56	$525	$1,354,269
Tim Keller (Senior Partner)	196.6	$525	$103,215
Tyler Robinson (Associate)	200.1	$350	$70,035
	2,976.26		**$1,527,519**

5. Adjustments to Preliminary Lodestar Calculation

The Aschemann firm has requested a 15% upward adjustment based on the *Hensely* factors. 'The twelve factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." *Hensley,* 461 U.S. at 430 n.3 (citation omitted). Liotine spends a few pages of his fee petition describing in detail his efforts in this litigation. *See* Doc. 302 at 8–10. The Court agrees that Liotine fought a difficult battle against a well-funded and highly-skilled opponent, and achieved a substantial result. However, the Court does not agree that is one of the "rare and exceptional circumstances" where an upward adjustment of the lodestar amount is necessary. *Perdue,* 130 S.Ct. at 1673 (internal quotations and citations omitted). It is being recommended that the Aschemann firm be awarded a substantial fee award. Thus, this would appear to be a situation where all of the relevant *Hensley* factors are "subsumed in the lodestar calculation." *Id.*

***12** Conversely, CDW–G argues that a 15% downward adjustment to the lodestar amount is appropriate in this case due to Liotine's limited success. In determining the degree of success obtained, the Court looks to "the difference between the judgment recovered and the recovery sought, the significance of the legal issues on which the plaintiff prevailed and, finally, the public purpose served by the litigation." *Connolly v. Nat'l Sch. Bus Serv., Inc.*, 177 F.3d 593, 597 (7th Cir.1999) (citing cases). "The standard is whether the fees are reasonable in relation to the difficulty, stakes, and outcome of the case." *Id.* (citing cases). CDW–G argues that Liotine's complaint sought $228 million and only recovered $7 million. However, this figure appears to be disputed. *See* Doc. 244 at 27 ($28 million). Regardless, CDW–G acknowledges that the Seventh Circuit has rejected this type of mechanical adjustment argument. *See id.* (... this Court has repeatedly rejected the contention that a district court should look to the percentage of the plaintiff's initial demand actually recovered through settlement or judgment and then mechanically reduce the attorney's fee award by a proportionate amount.). Next, it is argued that Liotine "lost" on 8 of the 11 claims at the summary judgment stage. However, the failure to prevail on summary judgment is not the same as "losing" on a claim. This case settled prior to trial so the Court cannot conclude that Liotine or the government lost in any respect. Factoring in the significance of the legal issues on which Liotine prevailed and the fact that the case also served a public purpose, the Court cannot agree that this case is one where a percentage downward adjustment based on limited success is appropriate.

Finally, CDW–G points to the requested lodestar amount to argue that "the amount of attorney fees sought (about $3.7 million) is 53% of the entire recovery in this case." Doc. 307 at 24. This is a common tag-line used in many of CDW–G's documents filed in this court. Presumably, this is intended to convince the Court that the Liotine's attorneys are asking for an unreasonable award. However, many of the cases cited in support of CDW–G's own positions are cases where the attorney fee award was actually many times larger than the relief rewarded. That's because such proportionality arguments have been explicitly rejected by the Seventh Circuit. *See Connolly,* 177 F.3d at 597 (Nor has this Court ever held that an attorney's fee award is unreasonable simply because it exceeds by some multiple the amount recovered by the plaintiff, notwithstanding the concerns in *Riverside v. Rivera,* 477 U.S. 561, 584–586, 106 S.Ct. 2686, 91 L.Ed.2d

466 (Powell, J., concurring) and *Cole v. Wodziak,* 169 F.3d 486, 488 (7th Cir.1999). *See, e.g., Estate of Borst v. O'Brien,* 979 F.2d 511, 517 (7th Cir.1992) (attorneys' fee award 47 times plaintiff's recovery not unreasonable)).

Although the lodestar amount being recommended in this case is sizable, it is not unreasonable especially when the public purpose of the False Claims Act and its fee-shifting provisions are considered. "The original False Claims Act was enacted in 1863 in order to strike back against the fraud of unscrupulous Civil War defense contractors." *Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1041 (8th Cir.2002) (citing S.Rep. No. 99–345, at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273). "The Act contained a *qui tam* provision allowing private persons to sue as relators representing the government's interests, and it rewarded relators who prevailed in their suits with a bounty of half the damages and forfeitures they recovered for the government." *Id.* "The 1986 amendments were an avowed attempt to reinvigorate the False Claims Act after a 1943 amendment and judicial decisions interpreting the 1943 amendment had emasculated the 1863 law." *Id.* at 1040–41. In its brief, the Helmer firm recalls the legislative intent of the 1986 amendments, as stated by its sponsors, as follows:

> The law we vote on today is intended to encourage a working partnership between both the Government and the *qui tam* plaintiff. The public will be well served by having more legal resources brought to bear against those who defraud the Government.... Even the United States Government is not without financial limitations. It is not uncommon for Government attorneys to be overworked and underpaid given the demanding tasks and frequently overwhelming caseloads they maintain. I do not say this to impugn the ability or character of Government attorneys, but only to reflect the harsh reality of today's funding limitations of Government activities in all areas which include the budgets of the Government's prosecuting agencies. If the Government can pass a law that will increase the resources available to confront fraud against the Government without paying for it with taxpayer money, we are all better off. This is precisely what this law is intended to do: deputize ready and able people who have knowledge of fraud against the Government to play an active and constructive role through their counsel to bring to justice those contractors who overcharge the Government.

***13** Doc. 300 at 3 (citing 132 Cong. Rec. 29315, 29321–22 (October 7, 1986) (Remarks of Cong. Berman); S.Rep. No. 345 at 5266–67). The sizable lodestar amount recommended here is consistent with the Congressional intent of the 1986 amendments to the False Claims Act. Liotine, in partnership with the federal government, has achieved a substantial result that resulted in recovery for the United States. This type of recovery is rare. *See id.* at 2 (citing statistics demonstrating that recovery for the United States occurs in 9% or less of all non-intervened cases). Congress mandated fee-shifting in False Claims Act cases. 31 U.S.C. §§ 3730(d), 3730(h). The size of the lodestar amount recommended here should serve to 1) encourage other highly-skilled professionals to engage in False Claims Act litigation and 2) have a deterrent effect on persons or corporations intending to engage in fraud against the federal government.

6. Costs and Expenses

CDW–G does not object to the requests for recovery of costs and expenses submitted by Liotine in his (Docs.299, 301) fee petitions. *See* Doc. 307 at 2 n.2. Those costs and expenses amount to $38,688.77 for the Helmer firm and $72,675.52 for the Aschemann firm.

7. Additional Costs and Expenses

After review of the additional costs and expenses from March 12 to March 28, 2013 submitted by the Helmer firm for this case, it will be recommended that an additional $190.40 be awarded. CDW–G will be afforded the opportunity to object to this new evidence if it chooses to file an objection to this portion of the Report and Recommendation.

B. Conclusion and Recommendation

For the forgoing reasons, it is recommended that Liotine's (Docs.299, 301) motions for attorney fees be granted as follows:

1) The law firm of Helmer, Martins, Rice and Pophamco, L.P.A. should be awarded a lodestar amount of $1,974,035 and costs and expenses of $38,879.17.

2) The law firm of Aschemann Keller, L.L.C. should be awarded a lodestar amount of $1,527,519 and costs and expenses of $72,675.52.

SO ORDERED.

All Citations

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Footnotes

1 An affidavit or declaration from an attorney that testifies as to exactly what hourly rate clients actually pay should be distinguished from affidavit from an attorney who has no fee-paying clients and merely asserts that a requested rate is appropriate. The latter is the definition of "self-serving."

2 As demonstrated by Major League Baseball's placement of the St. Louis Cardinals and the Cincinnati Reds in the Central division of the National League.

3 The $750/hour rates charged by lead counsel for CDW–G is doubtlessly influenced by many things beyond the relative skills of the attorneys themselves. For example, the hourly rates charged by CDW–G attorneys Yang and Gunn, both ***associates,*** who to the undersigned's recollection had no participation in this case beyond research and motion preparation, each exceed the rates sought by Liotine's primary counsel and objected to as unreasonable by CDW–G. The care and feeding of such obviously talented associates and others like them must cost a bundle. The additional support and administrative staff plus rent, furniture, potted plants, etc. in the Washington, D.C. area plus other similar locales is likely a considerable amount and almost certainly is not a fixed cost experienced by the Helmer and Aschemann firms in their more austere milieus. Perhaps the apples-to-apples comparison CDW–G seems to seek would necessarily involve a protracted evidentiary hearing designed to separate the sizzle from the steak where attorney fees are concerned. The hearing would necessarily involve testimony from office managers and managing partners, along with accountants and others. In other words, a first class dog and pony show.

4 Once again, perhaps a detailed evidentiary hearing at which CDW–G's own attorneys explain their own hours spent negotiating draft after draft of its own release from the government with DOJ attorney Kelly Hauser would be enlightening.