

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION**

THE UNITED STATES OF AMERICA, ex rel.)	
BRADLEY STEPHENS,)	
)	
Plaintiffs,)	
)	
v.)	Cause No.: 2:12-CV-306
)	
DR. ARSHAD MALIK, AFZAL J. MALIK, and)	
PRIME HEALTH CARE SERVICES, INC.,)	
)	
Defendants.)	

OPINION AND ORDER

This matter is before the Court on the Petition for Attorney Fees and Expenses and memorandum in support filed by Relator/Plaintiff Bradley Stephens (docket entries 107 and 108). Defendants Afzal Malik and Prime Health Care Services, Inc., filed a response to the petition (DE 113) and Stephens filed a reply (DE 114).¹ Shortly after Stephens filed his petition, Defendants moved to strike it as untimely. Defendants’ Motion to Strike (DE 109). The Court (Magistrate Judge Paul R. Cherry) denied the motion (DE 112). Stephens then filed a Supplemental Petition for an Award of Attorney’s Fees and Costs (DE 115) and a supplemental supporting memorandum (DE 116). The Defendants did not file a supplemental response and so this matter is ripe for resolution.

For the reasons discussed below, the Court GRANTS the Petition for Attorney Fees and Expenses (DE 107), GRANTS the Supplemental Petition for an Award of Attorney’s Fees and

¹ All the substantive claims in this case have been settled, as discussed below. This fee litigation involves only Stephens and Defendants Afzal Malik and Prime Health Care Services. Defendant Dr. Arshad Malik already paid his portion of Plaintiff’s fees and so is not a party to the present dispute.

Costs (DE 115), and awards the total sum \$81,790.50. The Clerk of the Court is instructed to enter judgment in favor of Relator/Plaintiff Bradley Stephens, and against Defendants Afzal Malik and Prime Health Care Services, Inc., jointly and severally,² in the amount of \$81,790.50, plus interest, at the prevailing legal rate, from April 29, 2016, until judgment is paid in full.

DISCUSSION

Stephens filed this *qui tam* action on August 1, 2012, under the False Claims Act, 31 U.S.C. § 3729 *et seq.* Complaint (DE 1), p. 1. Stephens alleged that Defendant Arshad Malik, an Indiana physician, “violated the [FCA] by referring Medicare patients to Defendant Prime Health Care Services, Inc. (a company solely owned by his brother, Defendant Afzal J. Malik) which, in turn, billed Medicare for home health services in violation of the Stark Law, 42 U.S.C. § 1395nn(a)(1)-(2).” Petition for Attorney Fees, p. 1. The United States filed a Notice of Election to Intervene in Part and Decline in Part on March 24, 2014 (DE 17) and joined this action as a plaintiff. After nearly four years of litigation, the parties filed a joint Notice of Settlement on April 20, 2016 (DE 104). The court entered an Agreed Order of Dismissal on April 29, 2016, dismissing this case without prejudice and retaining jurisdiction (at the request of all parties) for purposes of enforcing the settlement agreement. Order of Dismissal (DE 15), p. 1. The enforcement of the settlement, at least as to plaintiff’s counsel’s fee award, is what brings this matter before the Court.

In his petition, Stephens states that because “settlement was reached resolving all False Claims Act claims between the Relator, the United States of America, and the Defendants[,] . . .

² Damages in False Claims Act cases are assessed jointly and severally against culpable defendants. *United States v. Hughes*, 585 F.2d 284, 286 (7th Cir. 1978). *See also, Jones v. Southpeak Interactive Corp. of Delaware*, 777 F.3d 658, 677 (4th Cir. 2015).

the Relator is now a prevailing party and, as such, is entitled to recover reasonable attorney fees and expenses attributable to the False Claims Act claims” asserted in this case. Petition for Attorney Fees, p. 1.³ Stephens claims that “[w]hile an agreement was recently reached with Defendant Dr. Arshad Malik, all attempts to do so with Defendant Afzal J. Malik and Defendant Prime Health Care Services, Inc., via their common counsel, have been unsuccessful.” *Id.*, pp. 1-2. Stephens requests that “his counsel be paid attorney fees of \$73,078.50 (\$93,078.50 minus the \$20,000.00 paid by Defendant Dr. Arshad Malik) and expenses of \$2,497.00, plus interest from the April 29, 2016[,] settlement and dismissal of the *qui tam* allegations in this case.” *Id.*, p. 2.⁴

In their response brief, Afzal Malik and Prime Health Care challenge Stephens’ fee petition first by renewing their argument that it “is time barred and it does not comply with trial

³ The False Claims Act provides that a prevailing plaintiff/relator in a *qui tam* action is entitled to an award of “reasonable attorneys’ fees and costs[]” (regardless of whether the United States intervenes in the case). 31 U.S.C. § 3730(c)(d)(1) and (2). The Act also provides that the prevailing plaintiff/relator “receive an amount for reasonable expenses necessarily incurred, . . .” in prosecuting the action and that “[a]ll such expenses, fees, and costs shall be awarded against the defendant.” 31 U.S.C. § 3730(d)(1).

⁴ In his petition, Stephens also asks that his counsel “be paid the reasonable fees for time expended in drafting and litigating this Petition for Attorney Fees and Expenses.” Petition, p. 2. He goes on to state that “[t]hrough some of those hours and expenses have already been incurred and are thus part of this fee application, the total additional amounts cannot be ascertained until the litigation of this fee petition is completed. The Relator will itemize this time in his Reply memorandum, should it become necessary, or in a supplemental petition.” *Id.*, p. 2, n. 1. Stephens’ footnote was apparently prophetic, given that the parties ended up litigating the Defendant’s Motion to Strike (referenced above). This was the reason Stephens filed his supplemental petition (DE 115), i.e., to recover additional fees incurred in responding to (and ultimately defeating) the Defendants’ motion and litigating this fee issue. *See* Memorandum in Support of Supplemental Petition (DE 116), p. 2. In his supplemental petition, Stephens asks the Court for “an additional award of . . . [\$6,215.00] for time spent litigating his Fee Petition and for the preparation of” the filing of the supplemental petition and memorandum in support. *Id.* So, Stephens is asking for “total requested fees and costs for all work performed on the case” in the amount of \$81,790.50, plus interest from the date of the settlement. *Id.*

rules and should be denied.” Defendants’ Response, p. 1. The Defendants don’t expressly state that they are asking this Court to reconsider the Order entered by Magistrate Judge Cherry, in which he denied their motion to strike (which was based on this same argument), but clearly that’s what they are requesting. The Court has considered the Defendants’ arguments presented in their brief but declines the invitation to reconsider or reverse the Court’s July 5, 2016, Opinion and Order.

Aside from their argument that his petition was untimely, the Defendants concede that Stephens is entitled to recover fees and costs. They do, however, raise challenges as to the amount. This argument is twofold. First, the Defendants contend that the “fee request should be decreased by \$5,625.50 because the time requested to be reimbursed is unreasonable and would compensate the relator for attorney time not actually spent on this case.” Defendants’ Response, p. 2. Second, the Defendants argue that Stephens “requests to be reimbursed at an attorney rate that is not reasonable because it is not his attorney’s actual rate [and] a credit of \$7,937.50 should be given the Defendants [sic].” *Id.*, p. 3.

I. Original fee petition.

In his memorandum in support of his first petition for fees and costs, Stephens notes that “courts typically calculate attorney’s fees in *qui tam* cases using the same standard as applied in 42 U.S.C. § 1988 civil rights actions and other matters involving federal statutes. This is commonly referred to as the ‘lodestar method.’” Plaintiff’s Memorandum, p. 2 (citations omitted). Stephens contends that his request for fees is based on a reasonable hourly rate and a reasonable number of hours of work, thereby providing a “reasonable lodestar” for Plaintiff’s request. *Id.*, pp. 2-4. Stephens’ counsel submitted a declaration in support of the fee petition that

summarizes his qualifications and expertise in cases like this, his work on this case, and his calculation of fees. Declaration of Travis W. Cohron (DE 108-1). Mr. Cohron also submitted a spreadsheet itemizing the fees and expenses incurred in this case. Plaintiff's Exh. (DE 108-2).

The Defendants' first argument for a decrease in the amount requested by Stephens is based on its brow raising contention that Stephens' fee petition contains "altered entries" and they attach what they claim is "a summary of those altered entries[.]" Defendants' Response, p. 2 (citing Defendants' Exhibits 113-1 and 113-2). As the Defendants explain it, "[t]hrough informal discovery, [Stephens] provided to these Defendants a listing of time spent working on th[is] case[.] [Stephens] now reports attorney time that has been increased from the actual time recorded at the time the work was completed[.]" *Id.* In other words, the Defendants are claiming that Stephens' counsel is fudging the numbers and consequently his fee award should be reduced "by \$4,922.50" for "work performed before 2016 (3.5 years)[.]" *Id.* (The 3.5 years refers to the period from the inception of this case through December 2015.) As to fees incurred for the period from January through May 2016, the Defendants state that since Stephens "did not supplement [his] informal discovery with entries for time after [December 2015] . . . defendants cannot make a reasoned decision as to the reasonableness of the attorney time requested to be reimbursed." *Id.*, p. 3. Still, argue the Defendants, "[i]t is reasonable to assume that [Stephens] has reviewed all of his counsel's time entries and made adjustments. . . . These Defendants believe that the court can reasonably make a downward adjustment of 14% of the 3.5 Year Adjustment, or \$703.00." *Id.* Thus, the Defendants seek a reduction in the attorney fee in the amount of \$5,625.50 (\$4,922.50 for pre-2016 fees and \$703.00 for the period from January through May of 2016).

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