UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:10-23382-CV-MORENO/LOUIS

OLIVIA GRAVES,

Plaintiff/Relator,

vs.

PLAZA MEDICAL CENTERS, CORP.,
HUMANA, INC., and **MICHAEL CAVANUGH**,

Defendants.
______________________________________/

REPORT AND RECOMMENDATION

THIS CAUSE comes before the Court on Relator's Verified Motion for Award of Attorneys' Fees and Expenses (ECF No. 916). Plaintiff Olivia Graves (the "Relator") seeks an award of attorneys' fees and costs pursuant to the fee-shifting provision of the False Claims Act ("FCA"). Defendants do not contest Relator's entitlement to fees or costs, but challenge the amount sought.

This matter was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(A) and the Magistrate Judge Rules of the Southern District of Florida (ECF No. 938). Upon consideration of the verified motion, Defendants' opposition thereto, testimony and argument received at a hearing conducted on March 16, 2018, and upon review of the record as a whole, the undersigned recommends that Relator's Motion for Award of Attorneys' Fees and Expenses be **GRANTED in part** and **DENIED in part** as explained below.

I. BACKGROUND

A. Case History

The FCA allows a private party to bring a *qui tam* civil action "in the name of the [Federal] Government" against any person who knowingly presents to the Government a false or fraudulent claim for payment. 31 U.S.C. § 3730(b)(1); 31 U.S.C. § 3729(a). A relator is entitled to receive a share of the proceeds from settlement and to recover reasonable attorneys' fees and costs. 31 U.S.C. § 3730(d)(2).

Relator initiated this lawsuit on September 17, 2010, by filing a sealed *qui tam* lawsuit against Defendants Plaza Medical Centers, Corp., Humana, Inc., and Dr. Michael Cavanaugh ("Defendants"),[1] alleging that they purposefully misdiagnosed Medicare Part C patients with more severe conditions than they actually had in order to misappropriate and divert government funds from Medicare. Relator also alleged that Defendant Humana violated the FCA by promulgating a defective compliance program that failed to identify provider fraud and return overpayments from miscoded entries. Relator's claims alleging Medicare Part C fraud were novel; at the time the complaint was unsealed, there had been only one other case raising allegations based on a similar theory of fraud.

After the Government noticed its intent not to intervene in April of 2014, the Court unsealed the complaint, and Relator filed a First Amended Complaint (ECF No. 50). Defendants responded to the First Amended Complaint with four separate motions to dismiss (ECF Nos. 72-75), which were all granted (ECF No. 97). Relator filed her Second Amended Complaint on October 23, 2014 (ECF No. 102), which was met again with Defendants' motions to dismiss and to strike (ECF Nos. 110-11, 113-14). Relator filed a Third Amended Complaint on September 22, 2015 (ECF No. 277).

[1] The original complaint also included Mr. Spencer Angel as a Defendant; however, the Court dismissed the claims against Mr. Angel with prejudice on October 08, 2014 (ECF No. 97).

On January 29, 2016, Relator filed a Fourth Amended Complaint (ECF No. 382), expanding her claims and alleging for the first time that Defendants had engaged in fraudulent activity across nine additional non-party medical centers.

On December 6, 2016, the Court dismissed all of Relator's new allegations relating to the additional medical centers in her Fourth Amended Complaint (ECF No. 690). Relator subsequently filed a Fifth Amended Complaint (ECF No. 789), which was dismissed as well, and the Court ordered Relator's Third Amended Complaint to be treated as the operative complaint (ECF No. 829).

Discovery disputes in this case were as numerous as they were contentious. For example, Defendants moved for sanctions shortly after appearing, seeking their fees for moving to compel better initial disclosures (ECF No. 129). The case was also aggressively litigated on the merits. Defendants filed three separate motions for summary judgment (ECF Nos. 622, 624, 630) on several grounds, including that Relator could not demonstrate that Defendants had knowingly and directly submitted false diagnoses to the government. Magistrate Judge O'Sullivan recommended that Defendants' motions for summary judgment be denied (ECF Nos. 811, 812) and U.S. District Court Judge Moreno adopted this recommendation on March 20, 2017 (ECF Nos. 825, 826). Relator's case was the first to survive a summary judgment challenge on the grounds that a Medicare Part C contractor, like Humana, does not satisfy its regulatory obligations to monitor fraud simply by having a compliance program, if the program is defective.

On October 26, 2017, Relator and Defendants executed a settlement agreement in which Defendants agreed to pay a total of three million dollars ($3,000,000) to the United States in exchange for a release with prejudice of all claims. The settlement agreement, which was

approved by the Department of Justice, left open the amount of Relator's claim for reasonable expenses, attorneys' fees and costs, pursuant to 31 U.S.C. § 3730(d).

B. Relator's Motion for Fees

Relator seeks fees incurred by counsel from four different law firms. For the first four years of this litigation, Relator was represented by Freidin Brown, a Miami law firm.[2] Relator expanded her legal team to include attorneys Douglas F. Eaton and William G. Wolk, the named partners of the Miami-based firm, Eaton & Wolk, PL, after the initial complaint was unsealed and the First Amended Complaint was filed. Attorneys from the national law firms of Quinn Emanuel Urquhart & Sullivan, LLP ("Quinn Emanuel"), and Guttman Buschner & Brooks ("GBB") appeared on behalf of Relator within a few months of her filing of the Fourth Amended Complaint in January 2016.

Relator's motion requests a total of $5,625,011 in attorneys' fees[3] and a total of $820,880.37 in costs, which includes the seven years of litigation before reaching a settlement, plus fees and costs incurred in litigating this motion for fees (ECF No. 935).[4] Defendants challenge the reasonableness of the Relator's demand relative to the outcome in this case. Defendants further contest the hourly rates demanded, and object to specific time entries. With respect to costs, Defendants object to a number of Relator's requested costs as inadequately documented, or otherwise not compensable. Defendants contend that the reasonable fee award is in the range of $2,017,753, and costs of $271,354.18 should be awarded, plus Relator's fees and costs necessarily incurred in litigating its fee petition (ECF Nos. 928, 936, 945).

[2] Relator was originally represented by attorney Manuel L. Dobrinsky of what was then the Freidin Dobrinsky law firm. However, in 2015, Mr. Dobrinsky left the firm, leaving the case at the newly formed firm, Freidin Brown. The Court refers to this firm as Freidin Brown throughout.

[3] Relator's counsel subsequently withdrew a few entries that were specifically objected to by Defendants (ECF No. 935).

[4] The parties were ordered to mediate in effort to reach agreement on the amount of fees and costs to be awarded, over Defendants' objection, but the mediation ended in an impasse.

Relator initially submitted four separate, blended timesheets, which totaled roughly 215 pages, many of which did not separate the time entries by billing attorney (ECF Nos. 916-4, 916-11, 916-22, 916-26). In an effort to undertake a fair analysis of the hours billed by each of Relator's counsel, the Court was therefore required to parse through these entries and evaluate the billings by each attorney on its own. In response, Defendants submitted a thorough 244-page line-by-line analysis of Relator's fee entries, which the Court evaluated in painstaking detail (ECF No. 928-1). In support of her Notice of Supplemental Attorneys' Fees and Costs, Relator's submitted an additional 37 pages of entries, which the Court carefully reviewed (ECF No. 935). Some of Relator's submissions, moreover, did not separate billing entries that related to Relator's "fees on fees" requests from those arising from pre-settlement efforts (ECF No. 935-10, 935-11).

After a hearing on Relator's fee petition, and in response to Relator's contention that she did not have room in her filed Reply to respond to each of Defendants' objections and Defendants' representation that it would withdraw certain objections, the Court allowed limited supplemental submissions from both parties. These submissions modified both Relator's time entries (by removing certain previously claimed hours) and Defendants' objections (by omitting certain objections), which the Court accounted for by manually adjusting previous submissions. In sum, the Court expended a significant amount of time and resources parsing through roughly 252 pages of timesheets and 244 pages of objections in order to evaluate both parties' claims.

II. LEGAL STANDARD

The Eleventh Circuit has adopted the lodestar method to determine the reasonableness of an award of attorneys' fees. *Norman v. Housing Authority of City of Montgomery*, 836 F.2d 1292, 1299 (11th Cir. 1988). Although the Eleventh Circuit set forth the lodestar approach in

Norman, it has reiterated that at least some of the factors articulated in the older *Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 714 (5th Cir. 1974), *abrogated on other grounds by Blanchard v. Bergeron*, 489 U.S. 87, 109 S. Ct. 939, 103 L. Ed. 2d 67 (1989), still have some utility in establishing the appropriate hourly rate. *Norman*, 836 F.2d at 1299.[5]

To determine a lodestar amount, a court must ascertain a reasonable hourly rate and multiply it by the number of hours an attorney reasonably expended on the litigation. *Norman*, 836 F.2d at 1299. Where the time or fees claimed seem excessive, or there is a lack of support for the fees claimed, "the court may make the award on its own experience." *Id.* at 1303. The burden of establishing that the fee request is reasonable rests with the fee applicant, who must "submit evidence regarding the number of hours expended and the hourly rate claimed." *U.S. ex rel. Educ. Career Dev., Inc. v. Cent. Fla. Reg'l Workforce Dev. Bd., Inc.*, No. 6:04CV93ORL19DABC, 2007 WL 1601747, at *3 (M.D. Fla. June 1, 2007) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)); *see also* S.D. Fla. Local Rule 7.3(a). Evidence in support of the fee applicant's request requires "sufficient particularity so that the district court can assess the time claimed for each activity." *Norman*, 836 F.2d at 1303.

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[5] In this case, Relator addressed the *Johnson* factors in her motion. As such, the Court has given these factors and the parties' arguments relating thereto due consideration. The twelve *Johnson* factors that may be considered when setting a fee include the following:
(1) the time and labor required;
(2) the novelty and difficulty of the issues;
(3) the skill required to perform the legal services properly;
(4) the preclusion of other employment;
(5) the customary fee;
(6) whether the fee is fixed or contingent;
(7) the time limitations imposed by the client or 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 professional relationship with the client; and
(12) the awards in similar cases.
Johnson, 488 F.2d at 717-19.

III. RELATOR'S CLAIMED FEES

The Court begins with an analysis of the hourly rate sought by Relator's attorneys. The Court then considers whether the submissions demonstrate that the number of hours claimed are reasonable. Finally the Court considers whether the results in the case warrant adjustment of the lodestar calculated.

A. Reasonable Hourly Rates

A reasonable hourly rate is defined as the "prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." *Norman,* 836 F.2d at 1299. Under a fee-shifting statute, a prevailing plaintiff is only entitled to have the losing party pay for an attorney with reasonable expertise at the market rate, not for the most experienced attorney. *See Am. Civil Liberties Union of Georgia v. Barnes*, 168 F.3d 423, 437 (11th Cir. 1999). While the particular expertise, experience, and prestige of Relator's attorneys may be taken into account, the fees are constrained to the range of the prevailing market rates. The relevant legal community for purposes of determining the reasonable hourly rate for an attorney's service is "the place where the case is filed." *Cullens v. Georgia Dep't of Transp.*, 29 F.3d 1489, 1494 (11th Cir. 1994). The fee applicant bears the burden of demonstrating that the rates charged are reasonable in the relevant legal community. *Norman*, 836 F.2d at 1299. The Court is deemed an expert on the issue of attorneys' fees and rates and "may consider its own knowledge and experience concerning reasonable and proper fees." *Norman*, 836 F.2d at 1303 (quoting *Campbell v. Green*, 112 F.2d 143, 144 (5th Cir. 1940)).

The charts below summarize the pertinent information, regarding the attorneys for which Relator seeks to recover fees.[6]

FREIDIN BROWN			
NAME & POSITION	**YEARS OF EXPERIENCE**	**BILLED HOURS**	**HOURLY RATE SOUGHT**
Philip Freidin, *Partner*	48	422.5	$900
Manuel Dobrinsky, *Partner*	29	354.6	$650
Jonathan Freidin, *Associate*	5	1026.4	$350
David Werner, *Associate*	3	1996.9	$300
Virginia Diaz, *Paralegal*	N/A	79	$125

EATON & WOLK			
NAME & POSITION	**YEARS OF EXPERIENCE**	**BILLED HOURS**	**HOURLY RATE SOUGHT**
William Wolk, *Partner*	21	220.75	$625
Douglas Eaton, *Partner*	20	806.2	$625

QUINN EMANUEL			
NAME & POSITION	**YEARS OF EXPERIENCE**	**BILLED HOURS**	**HOURLY RATE SOUGHT**
Sam Sheldon, *Partner*	21	508.5	$1,090-$1,110
Valerie Roddy, *Partner*	14	535.4	$895-$945
Jon Cederberg, *Partner*	40	425.1	$700
David Farber, *Associate*	2	779.6	$550-$610
David Kramer, *Associate*	3	975.6	$600-$725
Lauren Hudson, *Associate*	2	172.5	$550-$610

GUTTMAN BUSCHNER & BROOKS			
NAME & POSITION	**YEARS OF EXPERIENCE**	**BILLED HOURS**	**HOURLY RATE SOUGHT**
Reuben Guttman, *Partner*	29	238.0	$950
Justin Brooks, *Partner*	9	473.8	$800
Traci Buschner, *Partner*	27	61.7	$850
Caroline Poplin, *Of Counsel*	42	68.3	$900
Paul Zwier, *Of Counsel*	38	36.6	$850

i. Rates for the Miami-Based Law Firms: Freidin Brown and Eaton & Wolk

[6] These hours reflect the revisions provided by Relator per ECF Nos. 935 and 946.

Relator's Miami-based firm Freidin Brown requests $650 to $900/hour for its partners and $300 to $350/hour for its associates. Relator relies on the opinion of her retained expert, Mr. Harley Tropin, that these rates are reasonable for this case because Mr. Freidin and his colleagues are highly skilled litigators of superb reputation in this community. Indeed, Mr. Freidin has extensive experience in medical malpractice cases, including more than 200 jury trials, 100 bench trials, and 25 verdicts in excess of seven figures. With respect to Mr. Eaton and Mr. Wolk, they each have approximately 20 years of experience. Relator's expert, Mr. Harley Tropin, advances that both Mr. Eaton and Mr. Wolk should be compensated at a rate of $625/hour.

Defendants characterize the rates sby Freidin Brown and Eaton & Wolk as unrealistically high rates and not in line with the prevailing average rates for attorneys in the Miami legal market. This Court is unaware of any case in the Southern District of Florida awarding $900/hour to an attorney seeking fees pursuant to a fee-shifting statuary provision. Mr. Freidin, who predominantly collects fees on a contingency basis, acknowledged that he does not himself have a record of billing a client at the rate of $900/hour. Indeed, attorneys of comparable seniority as Mr. Freidin have generally been awarded $400-$500/hour in this district. *See United States v. Everglades Coll., Inc.*, 855 F.3d 1279, 1282 (11th Cir. 2017) (affirming district court award, which rejected a $700/hour request by an attorney with 40 years of experience in a *qui tam* FCA case and awarded $500/hour instead); *Hermosilla v. Coca-Cola Co.*, No. 10-21418-CIV, 2011 WL 9364952, at *1 (S.D. Fla. July 15, 2011), *subsequently aff'd,* 492 F. App'x 73 (11th Cir. 2012) (reducing fee award for premium South Florida and New York law firms to $425/hour per partner and $225/hour per associate).

Defendants presented the expert opinion of Thomas Scott who, in addition to having extensive experience in this District serving as the United States Attorney, United States District Court and Circuit Judge for the Eleventh Judicial Circuit, has been appointed to serve as a special master on multiple complex matters. His affidavit (the "Scott Affidavit") (ECF No. 928-2) attached to Defendants' opposition to the verified motion identifies a range of reasonable fees based on awards that have been made in this District, delineated by timekeeper's position: for associates, $200 to $300/hour; partners, $300 to $450/hour; and "select partners," of $450 up to $625/hour. These ranges are generally consistent with the Court's experience. Within those parameters, the Court recommends the following as hourly rates to be used for Relator's counsel.

Beginning with Mr. Freidin, he is unquestionably among the upper echelons of lawyers in our district. Mr. Scott, who testified at the hearing, acknowledged that Mr. Freidin is at least as qualified as another highly-esteemed member of the local bar who was awarded $625/hour on a fee-shifting award. (ECF No. 944 at 206). Accordingly, the Court recommends that Mr. Freidin be compensated consistent with one of the highest fee-shifting awards in this district, at $625/hour.

Defendants' expert, Mr. Scott agrees that Mr. Eaton and Mr. Wolk are "select partners," but opines that the appropriate rate for them in light of their experience is $540/hour. The Court adopts Mr. Scott's recommendation, finding that $540/hour is a reasonable rate for attorneys of Mr. Eaton's and Mr. Wolk's experience. Though this rate is higher than other courts in this district have generally applied to counsel of comparable experience,[7] the Court recommends it here with agreement of Defendants' expert.

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[7] *See, e.g.*, *Estrada v. Alexim Trading Corp.,* No. 10-23696-cv, 2012 WL 4449470, at *8 (S.D. Fla. Sept. 26, 2012) (rejecting a request for $450/hour for a lead FLSA attorney with 23 years of experience and reducing the request to $325/hour, finding $325 to be at the "upper end of reasonableness" for an experienced lead counsel in a FLSA case); *Reppert v. Mint Leaf, Inc.*, No. 11-21551-cv-Altonaga (S.D. Fla. Jan. 31, 2013) (reducing a $425/hour request to

The Court finds that the reasonable rate for an associate with three to five years of experience is $250/hour and will apply that rate for Mr. Jonathan Freidin and Mr. David Warner. Defendants do not challenge the rate at which Ms. Virginia Diaz, a paralegal, billed her time, and the Court finds that the unopposed rate of $125/hour is reasonable.

ii. Rates for the Non-Local Law Firms: Quinn Emanuel and GBB

In addition to the two Miami-based law firms, Relator retained two national firms, Quinn Emanuel, which is based in California, and GBB, which is based in Washington D.C. The rates sought by the national firms are well above local market rates and those sought by Relator's Miami-based counsel. The fees sought cannot be justified in this case.

A fee applicant desiring to recover non-local rates for out of town attorneys "must show a lack of attorneys practicing in that place who are willing and able to handle his claims." *Am. Civil Liberties Union of Georgia v. Barnes*, 168 F.3d 423, 437 (11th Cir. 1999). A party who prevails "is not entitled to have the losing party pay for an attorney with the most expertise on a given legal issue, regardless of price, but only for one with reasonable expertise at the market rate." *Id*. The award of non-local attorneys' fees rates predominates in cases where litigants can demonstrate that an absence of attorneys in their discrete, local market required them to resort to attorneys in neighboring towns. *See Brooks v. Georgia State Bd. of Elections*, 997 F.2d 857, 869 (11th Cir. 1993) (finding that it was not clearly erroneous for district court to award Atlanta rates where there were no Brunswick attorneys available); *North Pointe Ins. Co. v. City Wide Plumbing, Inc.,* Case No. 2:13-cv-30-FTM-29DNF, 2014 WL 3540645 (M.D. Fla. July 17 2014) (awarding "slightly higher" Tampa rates for party unable to find a Fort Myers attorney willing to

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$375/hour for an attorney with 27 years of experience and a $350/hour request to $325/hour for an attorney with 10 years of experience in an FLSA case). Mr. Dobrinsky similarly had nearly 25 years of complex and trial experience when he represented Relator, and the Court recommends an hourly rate that recognizes his experience and status as a "select" partner on par with Mr. Eaton and Mr. Wolk ($540/hour). Mr. Wolk himself provided evidence that the average hourly rate for an attorney with 20 years of experience in Miami is $456 (ECF No. 916-23 at 223).

try a federal insurance coverage case in the Fort Myers area); *White Holding Co., LLC v. Martin Marietta Materials, Inc.*, No. 5:05-CV-328-OC-10GRJ, 2011 WL 13176667, at *1 (M.D. Fla. Apr. 4, 2011) (holding that a party could be compensated for reasonable rates charged within the greater North Central Florida legal market, rather than for rates charged by the rural Ocala legal market).

Relator argues that her retention of the national firms, Quinn Emanuel and GBB, was necessitated by the complex nature of the FCA claims raised in her case, by the taxing costs associated with prosecuting this lawsuit, by Humana's prominent defense team at O'Melveney & Myers, and by the absence of local attorneys willing to join her case. Relator notes that before retaining Quinn Emanuel and GBB her lawyers met with two separate Miami-based attorneys—one from the reputable local firm, Stumphauzer & Sloman, and another from an undisclosed national firm—but that neither was willing to join the case. Relator argues that this case was particularly undesirable to local firms because of the government's decision to not intervene.

Notwithstanding the same, the Court finds Relator has not met her burden to prove that there were no attorneys in South Florida capable of efficiently handling Relator's case. This is particularly true given that two Miami firms handled the first six years of this litigation without the help of national counsel. In fact, before appearances by Quinn Emmanuel or GBB, Relator's counsel drafted and filed five separate complaints, collected and reviewed 500,000 pages of medical records, responded to dispositive motions, prepared damage disclosures, took depositions, overcame discovery obstacles, and coordinated efforts with the United States Attorney's Office. Moreover, as supported by Mr. Eaton's and Mr. Wolk's affidavits, they both have "significant" experience in False Claims Act Litigation (ECF No. 916-19 and 916-20). This demonstrates that not only were there attorneys in South Florida capable of handling Relator's

case, but also that Relator herself had the benefit of a legal team that possessed the capability of handling her FCA claims with reasonable expertise at local rates.

Relator's argument that the government's decision not to intervene made it more difficult to find counsel willing to join the suit is undermined by the fact that the Miami-based firm of Eaton & Wolk did join the team after the government's decision. Moreover, Relator's counsel candidly acknowledged at the hearing that the Miami-based firms that declined to join based their decision on financial considerations particular to this case. Ultimately, the decision to join forces with Quinn Emmanual was predicated on the fact that Sam Sheldon's team had brought the only other *qui tam* case that raised allegations of Medicare Part C fraud, which was then pending in the District of Puerto Rico, and the appreciation that Relator's case could have a significant impact, good or bad, on that case. While these are reasonable justifications for Relator to have retained the national firms she selected in this case, it does not demonstrate an absence of attorneys in the Miami market who could have represented her, as is her burden in seeking reimbursement for their fees at non-local rates.

Relator's non-local attorneys will be compensated at the rates established for her Miami-based lawyers. The Court recognizes two of those attorneys as "upper-echelon" lawyers: Sam Sheldon and Reuban Guttman. Mr. Sheldon, the former Deputy Chief of the Criminal Fraud Division and head of the Health Care Fraud Unit of the United States Department of Justice, is widely recognized to be among the most sophisticated health care attorneys in the United States. Similarly, Mr. Guttman has significant experience and success in pursuing FCA suits, experience Defendants' expert testified he did not take into account in reaching his opinion that the reasonable rate for Mr. Guttman would be $540/hour. The Court therefore recommends that Mr. Sheldon and Mr. Guttman be compensated at $625/hour.

Ms. Poplin, Ms. Roddy, Ms. Buschner, Mr. Zwier, and Mr. Cederberg will be compensated at $540/hour. The Court recommends these select-partner rates for these five partners, who have between 27 and 42 years of experience in litigation; Ms. Poplin is also a practicing physician. Mr. Brooks (a partner with 9 years of experience), the Court recommends, should be compensated at $420/hour. As with the associates from the local firms, the Court adopts Mr. Scott's opinion that associates David Farber, David Kramer, and Lauren Hudson, who have between 2-3 years of experience, should each be compensated at $250/hour.

These rates are consistent with fees awarded to experienced non-local attorneys practicing in the Southern District of Florida. *See Hermosilla v. Coca-Cola Co.*, No. 10-21418-CIV, 2011 WL 9364952, at *1 (S.D. Fla. July 15, 2011), *subsequently aff'd,* 492 F. App'x 73 (11th Cir. 2012) (reducing fee award for premium South Florida and New York law firms to $425/hour per partner and $225/hour per associate); *Red Bull GMBH v. Spaceful Corp.,* No. 06-20948-cv (S.D. Fla. June 20, 2007) (awarding reduced blended hourly rates for premium Washington D.C. and South Florida law firm of $400/hour for partners and $250/hour for associates); *Procaps S.A. v. Patheon Inc.*, No. 12-24356-CIV, 2015 WL 2090401, at *1 (S.D. Fla. May 5, 2015), *affirmed on appeal*, (reducing hourly rates for Washington D.C.—based attorney from $995/hour to $565/hour for a partner with more than 30 years of experience).

B. Numbers of Hours Reasonably Expended

The next step in the computation of the lodestar is a determination of reasonable hours expended on the litigation. A fee applicant must set out the general subject matter of the time expended by the attorney "with sufficient particularity so that the court can assess the time claimed for each activity." *Norman*, 836 F.2d at 1303. Excessive, redundant, or otherwise unnecessary hours should be excluded from the amount claimed. *Id.* at 1301. A fee applicant

must exercise billing judgment by excluding "excessive, redundant or otherwise unnecessary [hours]." *Hensley*, 461 U.S. at 434. Where a fee applicant does not exercise billing judgment, "courts are obligated to do it for them." *ACLU of Ga.*, 168 F.3d at 428. When a request for attorneys' fees is unreasonably high, the court "may conduct an hour-by-hour analysis or it may reduce the requested hours with an across-the-board cut," but it cannot do both. *See Bivins v. Wrap It Up, Inc.*, 548 F.3d 1348, 1351 (11th Cir. 2008).

Relator argues that the number of hours billed by her attorneys in this matter are reasonable in light of the complexity of the case, and in light of Defendants' aggressive litigation tactics. In addition, Relator notes that she has already voluntarily reduced excess fees and costs incurred while litigating this case. Defendants counter that Relator cannot be compensated for hours related to: (i) unsuccessful claims; (ii) redundant or duplicative work; (iii) administrative and clerical duties; and (iv) vague and block billed entries. Defendants raised line-by-line objections to counsels' time records, challenging approximately 20% of the total time submitted on the basis of specific objections.[8] At the hearing, defense counsel acknowledged that with respect to approximately 340 of those hours, the applicable objection was misplaced and the objection later withdrawn.

Having reviewed the record, considered the experts' affidavits, and considered the testimony of Mr. Scott, and for the reasons more fully explained below, the Court finds that Relator's Counsel has generally met its burden to provide adequate description with sufficient particularity and to exercise billing judgment in eliminating non-compensable entries. Some reduction is necessitated however to correct for inclusion of time Relator billed for unsuccessful claims, and to account for duplicative time entries. Because the time entries warranting reduction

[8] Defendants propose an additional 25% reduction in the hours to which they raised no specific objections.

compromise a small minority of all the time submitting, the Court recommends a reduction of 10% of the hours billed by each billing professional.

i. Hours Billed for Unsuccessful Claims

This Court "has the authority to reduce the amount of attorneys' fees awarded in relation to the success of the Relator" on her claims. *United States ex. Rel. Nichols v. Omni Healthcare, Inc.*, Case No. 4:02-cv-66(HL), 2009 WL 365615 (M.D. Ga. Feb. 10, 2009). Where a party does not prevail on a claim that is different from her successful claims, "the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee." *Hensley*, 461 U.S. at 440. Nonetheless, where a lawsuit consists of related claims, a party who has won substantial relief should not incur a reduction in attorneys' fees solely because the Court did not adopt each contention raised. *Id.*

In this case, Relator's attorneys spent a significant amount of time unsuccessfully seeking to expand her case beyond a single medical center. This included the drafting and filing of two complaints, researching nuanced and relevant areas of the law, and drafting and enforcing significant amounts of new discovery requests. Ultimately, this Court rejected all of the claims that extended to unrelated medical centers, limiting the scope of this case to a single center.

Defendants contend that Relator should not be able to recover for any time spent preparing or litigating those unsuccessful claims. Indeed, Relator states in her verified motion that she has "voluntarily eliminated time spent related to the Fourth Amended Complaint and allegations against the other clinics and does not seek to recover for this work." ECF No. 916, n.21.[9] However, the timesheets submitted reflect time spent on the Fourth Amended Complaint. For example, in the months leading up to Relator's filing of her Fourth Amended Complaint, and

[9] It appears that between the original demand to Defendants and filing of the verified motion, Relator's counsel reduced its fee demand by almost a third, as Defendants' opposition to Relator's request for appointment of a mediator represents that Relator's fee demand had been $8.6 million (ECF No. 909 at 2).

on the day of the filing, her attorneys submitted entries for "revising Humana's section of 4th amended complaint," "review[ing] Eaton draft of complaint," emailing "re: service of Fourth Amended Complaint," and "prepar[ing] 4th Amended Complaint for filing." Time incurred in pursuit of the unsuccessful and unrelated claims advanced in the Fourth and Fifth Amended Complaints should have been excluded from the submission, which the Court takes into account in recommending an across the board reduction in total hours.

ii. Redundant & Duplicative Hours

The more significant billing issue warranting some reduction in total hours relates to the apparently redundant hours billed by multiple attorneys. "Redundant hours must be excluded from the reasonable hours claimed by the fee applicant." *ACLU of Ga.,* 168 F.3d at 432. Such "hours generally occur where more than one attorney represents a client." *Norman*, 836 F.2d at 1301-1302. While there is nothing unreasonable about a client having multiple attorneys, a fee applicant may only recover for the hours of multiple attorneys if the attorneys "are not unreasonably doing the same work, and are being compensated for the distinct contribution of each lawyer." *Norman* 836 F.2d at 1302; *ACLU of Ga.,* 168 F.3d at 432. A fee applicant has the burden to show "that the time spent by those attorneys reflects the distinct contribution of each lawyer to the case and is the customary practice of multiple-lawyer litigation." *Id.*

A review of Relator's attorneys' billing records does not show the division of labor among the attorneys for similar work. Instead, the records demonstrate some duplication of labor without indicators of distinct contribution. For example, between July 10 and July 25, 2016, four different GBB attorneys billed time to prepare for the Cavanaugh deposition, but no attorney specified the nature of the preparation, the materials reviewed, or their individual contributions to the preparation. Similarly, on December 27, 2016, three different attorneys billed time for

reviewing and revising motions *in limine*. While it was proffered that each attorney worked on distinct motions or distinct issues, the billing descriptions submitted do not permit the Court to evaluate the distinct contributions made by each. Similarly, on March 10, 2016, four different attorneys billed over an hour each to discuss discovery strategy.

In these and other examples reviewed by the Court, Relator's billing records do not indicate the distinct contributions made by individual billing attorneys. Nor do the attorneys' affidavits clarify the billing records by describing their particular contributions made to the matters at hand. Even taking into account Relator's attempt to clarify certain entries in her supplemental notice of filing (ECF No. 946), the Court finds that Relator's duplicative time entries do not sufficiently identify the distinct contributions made by each attorney billing for the substantially the same task.

iii. Other Objections

The Court has considered the other categories of deficiencies that Defendants averred warrant a significant across the board reduction (of up to 37%). Having reviewed the entries, Defendants' objections and amendments, and the record as a whole, the Court does not recommend reducing the hours based on these alleged deficiencies.

Defendants challenged particular entries as non-compensable time spent on administrative or clerical work. It is well established that an applicant for attorneys' fees "is not entitled to compensation at an attorney's rate simply because an attorney undertook tasks which were mundane, clerical or which did not require the full exercise of an attorney's education and judgment." *Norman*, 836 F.2d at 1306; *Tiramisu In'l LLC v. Clever Imports LLC*, 741 F. Supp. 2d 1279, 1297 (S.D. Fla. 2010). Defendants argue that a reduction in attorneys' fees is necessitated by improper billing related to clerical duties performed by Relator's attorneys. The Court has undertaken a careful review of the record and disagrees with Defendants'

characterization. Indeed, many of the entries highlighted by Defendants, such reviewing the production of documents and updating Relator's privilege log, required the attention of an attorney, and in fact rarely could be competently performed by a non-attorney.

Defendants contest certain entries as block billing, which defeat the Court's ability to ascertain the time spent on particular tasks and whether the time was necessary. Attorneys should "maintain billing records in a manner that will enable a reviewing court to identify distinct claims." *Hensley*, 461 U.S. at 437. When an attorney includes multiple tasks in a single entry, often referred to as "block billing," it can be difficult for the Court to determine the amount of time expended on a single issue. A court has "broad discretion in determining the extent to which a reduction in fees is warranted by block billing." *Bujanowski v. Kocontes*, No. 808-CV-0390-T-33EAJ, 2009 WL 1564263, at *2 (M.D. Fla. Feb. 2, 2009), *report and recommendation adopted in part*, No. 808CV390T33EAJ, 2009 WL 1564244 (M.D. Fla. May 1, 2009), *aff'd,* 359 F. App'x 112 (11th Cir. 2009).

Defendants propose a 25% reduction of Relator's hours to correct entries that are vague or block billed. Having reviewed the entries and objections, the Court disagrees that such a reduction is warranted as the vast majority of the entries to which Defendants objected on this basis encompass small increments of time and describe discrete tasks performed. Indeed, many of the entries which Defendants labeled as block-billed—such as "review[ing], implement[ing] changes to complaint from client"— are better understood as related, contemporaneous activities constituting a single task, rather than separate, individual activities. Finally, where there are instances of vague entries, those entries are not so confusing that it makes distilling how the time was spent impossible. *See Williams v. R.W. Cannon, Inc.,* 657 F. Supp. 2d 1302, 1312 (S.D. 2009) (awarding fees and refusing to reduce petition for block billing where entries clarified,

rather than obscured, record). As such, the Court finds that no reduction is warranted to correct for block billing.

Defendants finally advance a reduction to account for Relator's over-reliance on attorney time where a paralegal could have been used at reduced rates. However, Relator's elections were in the Court's experience reasonable. Relator herself conducted a review of approximately 600 medical files, and employed non-billing legal assistants, in lieu of paralegals who bill by the hour. Relator's team also drew heavily on the time of those associates with the lowest hourly billable rate: Mr. Werner and Mr. Jonathan Freidin, associates of Freidin Brown, account for nearly a third of all the time billed on the case between them, and Mr. Werner by himself invested over four times as many hours as any of the partners who billed on the case.

C. Adjustment of Lodestar Due to Results Obtained

There is a "'a strong presumption' that the lodestar is the reasonable sum the attorneys deserve." *Bivens v. Wrap it Up, Inc.,* 548 F.3d 1348, 1350 (11th Cir. 2008) (quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565-66 (1986)). Nevertheless, after determining the lodestar, the Court must consider other factors, including the results obtained and their relationship to the fees requested. *See Hensley*, 461 U.S. at 434. This is particularly true in FCA cases where the fees sought can be exponentially larger than the recovery obtained. *Everglades College, Inc.*, 855 F.3d at 1293 (affirming a greater than 95% lodestar reduction based on relator's limited success). The assessment of the relief obtained requires a holistic evaluation of the issues presented and the relative importance of various issues. *Id.* The extent of a party's success is a crucial factor in determining the amount of fees to be awarded. *Hensley*, 461 U.S. at 440. Where a prevailing party receives only partial or limited success, a reduction in fees may be appropriate. *Everglades*, 855 F.3d at 1292.

Defendants contend that a large across the board reduction is necessary because Relator settled for $3,000,000, which Defendants characterize as a fraction of the alleged "tens of millions" of dollars initially sought by Relator. For this proposition, Defendants rely on two of Relator's Motion to Continue Trial Date And/Or Deadlines And For Modification of Scheduling Order (ECF No. 265, 343), both of which allege that Defendants fraudulently received Medicare reimbursements potentially amounting to "tens of millions of dollars."

Relator counters that her First, Second, and Third Amended Complaints all allege that the United States suffered damages "in excess of hundreds of thousands of dollars," rather than multimillions of dollars. In addition, Relator insists that because she adopted the $3,273,812 damage calculation put forth by Humana's own expert, the settlement amount actually constitutes 92% of the damages she sought. Relator also points to the precedential nature of her case, which made new law and was the first Medicare Part C case to advance beyond summary judgment.

In balancing these competing concerns, and considering the relationship between the amount of fees requested and the results obtained, the Court does not recommend reduction to the lodestar. The scope of this litigation was largely defined by the potential damages in this case. Relator's operative complaint requests an "excess of hundreds of thousands of dollars," and in fact Relator received much more than that. Indeed, because Relator had adopted Defendants' damages calculation, she was compensated almost to the full extent of damages stipulated by both parties' experts. The fact that Relator received $3,000,000 out of an agreed $3,273,812 in potential damages is at least one indicator of Relator's success.

Beyond the numbers, the Court also notes that Relator is a party who obtained relief of significant import in the FCA realm. Relator's case is one of the first Medicare Part C cases to

advance beyond summary judgment, and as such is likely to have lasting impact on the future of actions based upon fraud alleging Medicare Part C. Indeed, this case, and the order adopting the Report and Recommendation denying summary judgment, has already been cited in a False Claims Act Treatise. *See* Sylvia M. Claire, The False Claims Act: Fraud Against the Government, §§ 4:3, 4:52, 4:71 (West, 3rd ed. 2017). The Court recognizes the value this novel claim has brought to the United States beyond the monetary recovery, and the path paved for other claims to be redressed as a result of Relator's efforts here. The Court thus rejects Defendants' contention that the fee award should be reduced based on Relator's limited degree of success.

The Court is also mindful of the impact this litigation had on the firms.[10] Mr. Freidin took this case on a contingency basis and assumed a tremendous amount of risk in litigating this lawsuit. Relator has not requested application of a multiplier to account for this risk. This is particularly noteworthy given that Mr. Freidin's entire practice was nearly grinded to a halt when, after returning home from an out of state trial, his partner Mr. Dobrisnky separated from the firm, and the case was left solely to Mr. Freidin and his two young associates.

After taking into consideration all of the materials submitted by the Parties in relation to this motion, the docket as a whole including transcripts of discovery disputes heard, argument and expert testimony, the Court is satisfied that the total fee award calculated is reasonable in this case.

D. Fees on Fees

Relator seeks an additional $121,487 in attorneys' fees associated with 230.7 hours spent litigating her fee petition. Defendants do not dispute that Relator is entitled to an award of

[10] Defendants' expert testified that he did not take the impact the case had on Freidin's firm into account in his analysis and application of the *Johnson* factors. ECF No. 944 at 234.

attorneys' fees for the time spent litigating her fee petition, but rather advance that Relator's request is excessive. This Court disagrees. This was a complicated petition, involving four different firms, at least seventeen lawyers, and hundreds of pages of fee entries. Indeed, Defendants' expert, Mr. Thomas Scott, candidly acknowledged that this was the most difficult attorneys' fees petition he had ever opined on. Notwithstanding the same, the Court finds that Relator's $121,487 fee request was calculated using unreasonably high rates.[11] Accordingly, the Court will reduce Relator's request by 40% to account for counsel's excessive rates, and award Relator $72,892.2 in additional fees.[12]

IV. <u>COSTS AND EXPENSES</u>

The FCA provides that a relator "shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs." 31 U.S.C. § 3730(d)(2). Relator seeks a total reimbursement of $820,880.37 for her costs and expenses. At the hearing on March 16, 2018, Defendants acknowledged that Relator in fact incurred these costs, but argued that certain expenses were either not necessarily incurred, or were otherwise not compensable. Specifically, Defendants advanced that Relator should not be able to recover costs for services that lack invoices, and for other expenses relating to meals, expert fees, legal research, and travel not necessarily incurred. In addition, Defendants argued that Relator waived her right to costs paid for the scanning and copying of documents by Xact Data Discovery, a third-party which aided both parties in document production and for which Relator and Defendants agreed to share the costs during the pendency of the litigation.

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[11] In fact, Quinn Emanuel's paralegal billed at the rate of $310/hour (ECF 935-5 at 3).

[12] The Court is unable to recalculate Relator's fee petition with the awarded rates because not all of Relator's law firms submitted time entries separated by individual attorneys. *See e.g.*, ECF No. 935-2. Accordingly, the Court deducts 40% to account for the unreasonably high rates used to calculate Relator's fees and costs associated with litigating her fee petition.

Having reviewed Relator's supporting materials, and Defendants' objections to the same, the Court finds that Relator's requested costs were necessarily incurred. This was a seven-year litigation, involving extensive discovery that included reviewing roughly 500,000 pages of medical records, filing or responding to approximately 52 separate motions (one of which included the filing of nearly 200 exhibits), taking and defending 10 expert depositions throughout the country, and attending a number of hearings. Predictably, Relator incurred significant costs and expenses associated with litigating this lawsuit.

As such, the Court finds that Relator is permitted to recover for her costs related to meals, expert fees, and legal research, which were necessarily incurred. 31 U.S.C. § 3730(d)(1). The lack of certain invoices is not fatal to Relator's claim for costs. *See United States ex rel. Beaujon v. Plaza Health Network,* 12-20951-CV-Moreno (Nov. 25, 2015).

Moreover, the Court agrees with Relator that the agreement to share costs paid to Xact Data Discovery during the pendency of the litigation does not preclude Relator from recovering her costs at the conclusion of the case. Defendants, who seek to enforce the agreement, acknowledge that the parties did not have a written agreement, and indeed provide no evidence to support the contention that Relator agreed to waive her entitlement to collect these costs, if she prevailed.

The Court will not, however, award Relator her non-local attorneys' travel expenses for travel to Miami. As discussed above, there is no reason why Relator's competent local counsel was ill-suited to handle Relator's local disputes. As such, the Court will deduct $20,000[13] in costs on this basis for a total award of $800,880.37 in costs and expenses.

[13]Defendants aver that the Court should exclude roughly $30,000 on this basis; however, Defendants identified several records that include attorneys' travel costs to places outside of Miami. The Court will not refuse reimbursement for costs that would have been incurred even by local counsel.

V. CONCLUSION

In light of the foregoing analysis, the Court recommends that Relator be awarded attorneys' fees and costs, as follows:

NAME & POSITION	HOURS BILLED	HOURS AFTER 10% REDUCTION	HOURLY RATE	LODESTAR
Philip Freidin, *Partner*	422.5	380.25	$625	$237,656.25
Manuel Dobrinsky, *Partner*	354.6	319.14	$540	$172,335.60
William Wolk, *Partner*	220.75	198.675	$540	$107,284.50
Douglas Eaton, *Partner*	806.2	725.58	$540	$391,813.20
Jonathan Freidin, *Associate*	1026.4	923.76	$250	$230,940.00
David Werner, *Associate*	1996.9	1797.21	$250	$449,302.50
Virginia Diaz, *Paralegal*	79	71.1	$125	$8,887.50
Sam Sheldon, *Partner*	508.5	457.65	$625	$286,031.25
Valerie Roddy, *Partner*	535.4	481.86	$540	$260,204.40
Reuben Guttman, *Partner*	238.0	214.2	$625	$133,875.00
Caroline Poplin, *Of Counsel*	68.3	61.47	$540	$33,193.80
Traci Buschner, *Partner*	61.7	55.53	$540	$29,986.20
Paul Zwier, *Of Counsel*	36.6	32.94	$540	$17,787.60
Justin Brooks, *Partner*	473.8	426.42	$420	$179,096.40
Jon Cederberg, *Partner*	425.1	382.59	$540	$206,598.60
David Kramer, *Associate*	975.6	878.04	$250	$219,510.00
David Farber, *Associate*	779.6	701.64	$250	$175,410.00
Lauren Hudson, *Associate*	172.5	155.25	$250	$38,812.50
		8,263.305		**$3,178,725.30**

Total lodestar:	$3,178,725.30
Additional fees:	$72,892.20
Total fees:	$3,251,617.5
Total costs:	$800,880.37
Total fee petition recovery:	**$4,052,497.87**

VI. RECOMMENDATION

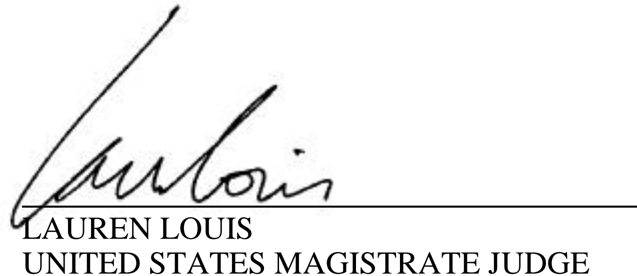
For the foregoing reasons, it is hereby **RECOMMENDED** as follows:

(1) Relator's Verified Motion for Award of Attorneys' Fees and Expenses (ECF No. 916) should be **GRANTED in part** and **DENIED in part.** Relator should recover from Defendants $3,251,617.5 in attorneys' fees and $800,880.37 in costs, for a total fee award of $4,052,497.87.

(2) The Court should enter a fee and cost judgment, pursuant to Fed. R. Civ. P. 58, for that amount.

Pursuant to Local Magistrate Rule 4(b), the parties have fourteen (14) days from the date of this Report and Recommendation to serve and file written objections, if any, with the Honorable Federico A. Moreno, United States District Judge. Failure to timely file objections shall bar the parties from a *de novo* determination by the District Judge of an issue covered in the report and bar the parties from attacking on appeal the factual findings contained herein. *LoConte v. Dugger*, 847 F.2d 745 (11th Cir. 1988); *R.T.C. v. Hallmark Builders*, *Inc*., 996 F.2d 1144, 1149 (11th Cir. 1993).

DONE and **ORDERED** in chambers at Miami, Florida this 23rd day of May, 2018.



LAUREN LOUIS
UNITED STATES MAGISTRATE JUDGE

cc: The Honorable Federico A. Moreno
Counsel of record