

United States District Court, E.D. Virginia,
Alexandria Division.
UNITED STATES of America ex rel. DRC, INC., et al., Plaintiffs,
v.
CUSTER BATTLES, LLC, et al., Defendants.
No. 1:04cv199.

Oct. 14, 2009.

Bernard Joseph Dimuro, Dimuro Ginsberg & Mook PC, Alexandria, VA, Mark Robert Mann, Grayson & Kubli PC, McLean, VA, Mary Elizabeth Harkins, Framme Law Firm PC, Richmond, VA, for Plaintiffs.

Edward Scott Rosenthal, Lana Marie Manitta, Rich Rosenthal Manitta Dzubin & Kroeger LLP, Alexandria, VA, for Defendants.

Scott Custer, pro se.

Michael Battles, pro se.

ORDER

T.S. ELLIS, III, District Judge.

This False Claims Act ("FCA" or "the Act") matter is before the Court for resolution of two post-verdict issues following denial of defendants' motion for judgment as a matter of law pursuant to Rule 50, Fed.R.Civ.P. *See United States of America ex rel. DRC, Inc., et al. v. Custer Battles, LLC, et al.*, 1:04cv199 (E.D.Va. Sept. 4, 2009) (Order). Specifically at issue are (i) the total amount of damages and penalties to be imposed against defendants pursuant to 31 U.S.C. § 3729(a), and (ii) the appropriate relators' share to be awarded pursuant to 31 U.S.C. § 3730(d)(2). [FN1]

FN1. Also pending is the relators' motion for costs and attorneys' fees, which motion will be addressed and decided by separate Order.

The FCA provides that a person who is found to have violated the Act "is liable to the United States Government for ... 3 times the amount of damages which the Government sustains because of the act of that person." 31 U.S.C. § 3729(a). Here, the jury's \$3,000,000 damages verdict, trebled, requires a \$9,000,000 damages award to be entered against the defendants as to Counts I and II--the FCA false claims and false statements counts. And, since the jury found all seven defendants liable for the entire \$3,000,000 in damages on these counts, all defendants are likewise jointly and severally liable for the entire trebled damages amount.

In addition to trebled damages, the FCA also requires the imposition of "a civil penalty of not less than \$5,000 and not more than \$10,000" for all violations of 31 U.S.C. § 3729(a). Yet, for violations occurring after September 29, 1999, as involved here, the applicable penalty range is \$5,500 to \$11,000. [FN2] District courts have no discretion to award less than the minimum civil monetary penalty for each violation. *See United States v. Brown*, 274 F.2d 107, 110 (4th Cir.1960) (citation omitted). Yet, the determination of the specific civil penalty within the applicable statutory range rests within the sound discretion of the district court. *See Cook County, Illinois v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003). And, in assessing the appropriate civil penalty to be imposed, "the focus in each case [should] be upon the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures." *United States v. Bornstein*, 423 U.S. 303, 313 (1976). In this regard, it has been recognized that

FN2. Pursuant to the Federal Civil Monetary Penalties Inflation Adjustment Act of 1990, the minimum civil penalty for each violation of 31 U.S.C. § 3729(a) of the FCA was increased from \$5,000 to \$5,500, and the maximum penalty was increased from \$10,000 to \$11,000, effective September 29, 1999. *See* 64

Fed.Reg. 47104 (Aug. 30, 1999).

[t]hough there is no defined set of criteria by which to assess the proper amount of civil penalties against the defendant, ... an approach considering the totality of the circumstances, including such factors as the seriousness of the misconduct, the scienter of the defendants, and the amount of damages suffered by the United States as a result of the misconduct is the most appropriate.

United States ex rel. Miller v. Bill Harbert Int'l Construction, Inc., 501 F.Supp.2d 51, 56 (D.D.C.2007).

In this case, the jury found five separate violations of § 3729(a)(1) and 31 separate violations of § 3729(a)(2), resulting in a total of 36 violations subject to a mandatory statutory penalty. And here, the totality of the circumstances points persuasively to the imposition of a \$5,500 statutory-penalty per violation, for a total civil penalty of \$198,000. Yet, because the jury did not find all seven defendants responsible for all of the 36 separate false claims and false statements, each defendant is not liable for the entire \$198,000 penalty. Instead, of this total penalty, the seven defendants are appropriately liable for the following specific amounts: (i) Custer Battles LLC--\$192,500 for 35 violations; (ii) Secure Global Distribution--\$99,000 for 18 violations, (iii) Mideast Leasing--\$77,000 for 14 violations, (iv) Custer Battles Levant--\$16,500 for three violations, (v) Scott Custer--\$192,500 for 35 violations, (vi) Michael Battles--\$192,500 for 35 violations, and (vii) Joseph Morris--\$187,000 for 34 violations.

Finally, the FCA provides that a prevailing *qui tam* relator is entitled to a share of the "proceeds of the action or settlement" of the claim. 31 U.S.C. § 3730(d)(2). Where, as here, the government elects not to intervene in the action, the FCA specifically provides that

the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds.

31 U.S.C. § 3730(d)(2). In considering whether and how much to award a relator in excess of the 25 percent minimum mandated by the FCA, district courts should consider, *inter alia*, (i) the significance of the information provided to the government, (ii) the contribution of the person bringing the action to the result obtained, and (iii) whether the information that formed the basis for the suit was known to the government. *See* S.Rep. No. 99-345, at 28 (1986); *see also United States ex rel. Marchese v. Cell Therapeutics, Inc.*, 2007 WL 4410255, at *8 (W.D.Wash. Dec. 14, 2007) (identifying the relevant factors as "(1) the significance of the evidence provided to the government; (2) the relator's contribution to the final outcome; and (3) whether the government was previously aware of the information provided"). These and other factors, applied to the facts of this case, point persuasively to the conclusion that the relators' statutory share should be 30% of the total amount of damages and penalties awarded in this case (\$9,198,000), or \$2,759,400.

Accordingly, for the foregoing reasons, and for good cause,

It is hereby **ORDERED** that judgment is entered in accordance with the jury verdict in favor of the relators and against all defendants, jointly and severally, in the total amount of \$9,000,000.

It is further **ORDERED** that a total penalty of \$198,000 is imposed in favor of the relators and against defendants pursuant to 31 U.S.C. § 3729(a), with each defendant liable for the following specific amounts: (i) Custer Battles LLC--\$192,500; (ii) Secure Global Distribution--\$99,000, (iii) Mideast Leasing--\$77,000, (iv) Custer Battles Levant--\$16,500, (v) Scott Custer-- \$192,500, (vi) Michael Battles--\$192,500, and (vii) Joseph Morris--\$187,000.

It is further **ORDERED** that the relators, collectively, are awarded \$2,759,400 out of the proceeds of the action pursuant to 31 U.S.C. § 3730(d)(2), representing 30% of the total amount of damages and penalties awarded in this case. [FN3]

FN3. Although the government contends in its respective brief that the district court is required to determine how the total relators' share is to be apportioned amongst the three relators, it has cited no statutory or other authority supporting this proposition nor has an independent search revealed any applicable case law on this precise point. Here, the record reflects that the relators have entered into a private agreement as to how any award pursuant to 31 U.S.C. § 3730(d)(2) will be apportioned between them in this case. *See* Doc.

595 at 1-2. In the circumstances, it appears the relators' private agreement, once it is disclosed to the government, will fully satisfy the government's tax and payment concerns in this instance.

It is further **ORDERED** that a final judgment consistent with the rulings set forth in this Order will promptly issue following resolution of the relators' pending motion for costs and attorneys' fees.

The Clerk is directed to send a copy of this Order (i) to all counsel of record, (ii) to defendant Michael Battles at 11915 Goldenaster Place, Bradenton, Florida 34202, and (iii) to defendant Scott Custer at 7527 Rigby Court, Bradenton, Florida 34202.