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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,)	
)	3:05-CR-0114-RCJ-RAM
Plaintiff,)	
)	
vs.)	ORDER
)	
MARK CAPENER,)	
)	
Defendant.)	
_____)	

This matter comes before the Court on Defendant’s Motion for Attorneys’ Fees and Expenses. (#228.) The Court has considered the Motion, the pleadings on file, and oral argument on behalf of all parties and issues the following Order.

BACKGROUND

Defendant Dr. Mark Capener (“Capener” or “Defendant”), a doctor specializing in ear, nose, and throat procedures, seeks attorneys’ fees under the Hyde Amendment. On May 5, 2005, the Government charged Capener with thirty-eight counts of health care fraud under 18 U.S.C. § 1347, and five counts of mail fraud under 18 U.S.C. § 1341. On July 27, 2005, the Government obtained a superseding indictment charging Capener with thirty-eight counts of health care fraud, thirteen counts of mail fraud, and one count for making a false statement to a Federal Bureau of Investigation officer under 18 U.S.C. § 1001. The Government alleged that Capener knowingly and willfully devised a scheme whereby he defrauded numerous health care benefit programs in connection with the delivery of or payment for

1 health care benefits. More specifically, the Government alleged that Capener would “up-
2 code” or charge for a service reimbursable at a higher rate than appropriate for the service
3 actually provided. According to the Government, Capener would send bills with codes
4 representing surgeries and procedures not actually performed or not needed to the health care
5 benefit programs through the U.S. mail system. Thus, the Government accused Capener of
6 knowingly billing for unnecessary procedures and/or procedures never actually performed
7 with the intent to defraud the health care benefit programs to increase his income.

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9 The Government relied heavily on one of its principal expert witnesses, Dr. Dale
10 Rice. Dr. Rice is a medical doctor specializing in otolaryngology, commonly referred to as
11 an ear, nose, and throat (“ENT”) doctor. Dr. Rice offered testimony to prove two main
12 points: (1) Capener did not perform surgeries for which he billed; and (2) Capener performed
13 unnecessary surgeries on his patients. Dr. Rice based his testimony, and the Government
14 established their case, on four main theories or “pillars.” First, Dr. Rice testified that no bone
15 fragments were reported in the pathology reports. Dr. Rice indicated the lack of bone
16 fragments was extremely important because it established that Capener did not perform many
17 of the procedures for which he billed. According to Dr. Rice, if Capener had in fact
18 performed the nasal surgeries listed in his billings, the pathology report would have
19 contained bone fragments. Second, Dr. Rice testified that Capener could not have performed
20 the surgeries for which he billed within the time limits he asserted in his billings. Third, Dr.
21 Rice indicated that the CT scans on certain patents indicated that no surgical procedures had
22 been performed. Finally, Dr. Rice testified that the CT scans further confirmed Capener
23 billed for procedures beyond those he actually performed.
24

1 On October 2, 2006, trial commenced in Reno, Nevada. Before trial began the Court
2 dismissed several counts in the Superseding Indictment. During the course of trial it became
3 evident the Government could not sustain indictments based on some of their “pillars”
4 described above. The Court therefore further dismissed additional counts prior to submitting
5 the case to the jury. In total, the Court dismissed twenty-seven counts before submitting the
6 case to the jury for deliberation. On November 2, 2006, the jury returned a verdict of not
7 guilty on all remaining counts.

8 Capener now moves the Court for attorneys’ fees and costs. Capener claims the
9 Government based its case on deliberately false testimony. Capener further asserts the
10 Government willfully concealed the deficiencies in its case by suppressing evidence and
11 knowingly providing false testimony to the jury. More specifically, Capener contends the
12 Government presented a frivolous case, acted vexatiously, and prosecuted its case in bad
13 faith.

14 **DISCUSSION**

15 **I. The Hyde Amendment**

16 As noted above, Defendant seeks fees and costs under the Hyde Amendment.
17 Congress enacted the Hyde Amendment as a method through which to sanction the
18 Government for “prosecutorial misconduct.” *United States v. Braunstein*, 281 F.3d 982, 995
19 (9th Cir. 2002) (citation omitted). The Hyde Amendment provides in relevant part:
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21 The court, in any criminal case . . . may award to a prevailing party, other than
22 the United States, a reasonable attorney’s fee and other litigation expenses,
23 where the court finds that the position of the United States was vexatious,
24 frivolous, or in bad faith, unless pursuant to the procedures and limitations

1 (but not the burden of proof) provided for an award under section 2412 of title
2 28, United States Code.

3 18 U.S.C. § 3006A. Modeled after the Equal Access to Justice Act (“EAJA”), the Hyde
4 Amendment requires a more demanding burden of proof than the EAJA. *United States v.*
5 *Lindberg*, 220 F.3d 1120, 1124 (9th Cir. 2000). Under the EAJA, a defendant will prevail
6 unless the Government can prove its position was substantially justified. *Id.* “However,
7 recovering attorney fees and costs under the Hyde Amendment requires a stronger showing.”
8 *United States v. Manchester Farming P’Ship*, 315 F.3d 1176, 1182 (9th Cir. 2003) (citations
9 omitted). Under the Hyde Amendment, Capener bears the burden “to prove the
10 Government’s position was vexatious, frivolous, or in bad faith.” *Id.* (citing *Lindberg*, 220
11 F.3d at 1125). “The elements are disjunctive; thus, the defendant need only prove one of the
12 three elements to recover.” *Id.* (citation omitted). Congress did not define the terms
13 “vexatious,” “frivolous,” or “bad faith” in the Hyde Amendment, but the Ninth Circuit has
14 defined all three terms. The Ninth Circuit has warned: “[T]he Hyde Amendment should not
15 be an exercise in 20/20 hindsight based solely on reasonableness,’ but rather should account
16 for the fluidity of the trial process.” *Id.* (quoting *United States v. Sheburne*, 249 F.3d 1121,
17 1127 (9th Cir. 2001)).

18
19 **A. Pursuit of a Frivolous Case**

20 A “frivolous” case is one that is “groundless . . . with little prospect of success; often
21 brought to embarrass or annoy the defendant.” *United States v. Braunstein*, 281 F.3d 982,
22 995 (9th Cir. 2002). A case is frivolous when “the government’s position was foreclosed by
23 binding precedent or so obviously wrong as to be frivolous.” *Id.* (quoting *Gilbert*, 198 F.3d
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1 at 1304) (internal quotation marks omitted). While a finding of bad faith requires actual “ill
2 will” or “dishonest purpose,” *see Manchester*, 315 F.3d at 1185, a showing of frivolousness
3 may be made based on a finding that the prosecution had “reason to believe” its case had no
4 support. *See Braunstein*, 281 F.3d at 996. In this case, the Government had reason to believe
5 that its fraud theory based on the absence of bone in the pathology slides lacked merit.

6 Prior to trial, the Government interviewed Dr. Mardini, the pathologist who produced
7 the reports. At trial, Dr. Mardini testified that contrary to the Government’s assertion, bone
8 fragments existed in all the pathology slides, and that he would have so told anyone who
9 asked him before trial. The evidence confirmed that Capener’s pathology slides contained
10 bone fragments. This showing completely destroyed one of the Government’s main
11 arguments in support of its case. As noted above, the Government interviewed Dr. Mardini
12 and discussed the case with him before trial. The Government contends it did not ask Dr.
13 Mardini about the pathology reports. While Dr. Mardini provided a sworn affidavit wherein
14 he stated that he did “not recall whether [he] was ever specifically asked about the presence
15 of bone in the slides” (#243-2 at 2), he did confirm that his investigation conclusively
16 demonstrated bone fragments in the pathology reports for Capener’s surgeries. Either the
17 Government consciously decided to proffer a theory it knew was false, or it failed to conduct
18 any investigation or inquiry to confirm whether Dr. Rice’s contentions regarding lack of bone
19 fragments was in fact accurate. In addition, the Government failed to produce to Capener
20 expert disclosures from Dr. Rice, which discussed the lack of bone as a basis for his opinions.
21 Taken together, these facts indicate the Government had reason to believe their lack-of-bone
22 theory was without support. The Government had the ability to overcome Dr. Rice’s failure
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1 to investigate the basis for his opinion regarding the lack of bone in the pathology slides. In
2 this regard, this case is on point with *Braunstein*. Accordingly, the Court finds that the
3 Government pursued frivolous claims as to the fraud-related counts based on the
4 Government's first pillar – the lack of bone in the pathology reports from surgery.

5 **B. Bad Faith**

6 Bad faith is “not simply bad judgment or negligence, but rather it implies the
7 conscious doing of a wrong because of dishonest purpose or moral obliquity; . . . it
8 contemplates a state of mind affirmatively operating with furtive design or ill will.”

9 *Manchester*, F.3d at 1185 (citation omitted). Defendant argues the Government acted in bad
10 faith because Dr. Rice perjured himself with regards to the pathology slides, and “it seems
11 unlikely that the government was unaware that the testimony was false.” (#228-1.)

12 However, while Defendant has presented evidence that the Government had reason to believe
13 that one of Dr. Rice's “pillars” lacked sufficient support for conviction based on fraud,
14 Defendant has not presented any direct evidence that the Government actually participated
15 with or encouraged Dr. Rice in his alleged perjury (or more appropriately, error or false
16 assumption; there is certainly no basis to allege perjury on the doctor's part). Further, while
17 Defendant has demonstrated that Dr. Rice may have very well acted negligently in his failure
18 to explore the basis for his opinions, he has not presented sufficient evidence that Dr. Rice
19 intentionally lied on the stand. Certainly Dr. Rice's testimony regarding the lack of bone was
20 incorrect; however, the record does not establish that the Government and Dr. Rice conspired
21 to knowingly present false testimony. Defendant has not presented sufficient evidence that
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1 the Government consciously acted with ill will. Accordingly, the Court finds the
2 Government did not act in bad faith.

3 **C. Vexatious Conduct**

4 Defendant may also recover fees and costs if he can prove the Government's actions
5 were vexatious. "Vexatious" has both a subjective and objective element: "[S]ubjectively,
6 the Government must have acted maliciously or with an intent to harass; objectively, the suit
7 must be deficient or without merit." *United States v. Manchester Farming P'Ship*, 315 F.3d
8 1176, 1182 (9th Cir. 2003) (citing *United States v. Sheburne*, 249 F.3d 1121, 1126-27 (9th
9 Cir. 2001)). To prove vexatiousness, Defendant must show the Government acted with "ill
10 intent." *Sheburne*, 249 F.3d at 1127 n.5.

11
12 Defendant argues the Government's efforts to prevent defense counsel from obtaining
13 medical records was vexatious. However, the record indicates that the Government took
14 such action because it believed Defendant was seeking to obtain the records in violation of
15 HIPPA. Thus, this conduct does not demonstrate the Government acted vexatiously.

16 Defendant also appears to argue that the Government acted vexatiously by intentionally
17 harassing Defendant by pursuing investigations instigated by vengeful tipsters or informants.
18 However acting on tips or information from those who allegedly hold grudges is not
19 vexatious. *Manchester Farming P'Ship*, 315 F.3d at 1182-83 ("Tipsters, by their nature,
20 often hold grudges against the reported parties. It does not follow that the Government
21 harassed, acted maliciously, or with an "ill intent" simply because it followed up on such a
22 tip."). Further, while this Court dismissed several counts for lack of evidence, the Court did
23 allow some counts to proceed to the jury. Thus, some counts were not "deficient or without
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1 merit.” *See id.* at 1182. Defendant has not demonstrated that the Government acted
2 vexatiously in this case.

3 **D. Amount of Fees and Costs**

4 Because the Court finds Defendant has satisfied the frivolous standard in regards to
5 those claims based on lack of bone under the Hyde Amendment, Defendant may recover fees
6 and costs. Under 28 U.S.C. § 2412(d)(2)(A), Congress has defined “fees and other expenses”
7 to include “the reasonable expenses of expert witnesses, the reasonable cost of any study,
8 analysis, engineering report, test, or project which is found by the court to be necessary for
9 the preparation of the party’s case, and reasonable attorney fees” However, § 2412
10 further states in part:
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12 The amount of fees awarded under this subsection shall be based upon
13 prevailing market rates for the kind and quality of the services
14 furnished, except that (i) no expert witness shall be compensated at a
15 rate in excess of the highest rate of compensation for expert witnesses
16 paid by the United States; and (ii) attorney fees shall not be awarded in
17 excess of \$ 125 per hour unless the court determines that an increase in
18 the cost of living or a special factor, such as the limited availability of
19 qualified attorneys for the proceedings involved, justifies a higher fee.

20 § 2412(d)(2)(A). As noted above, the Court finds that the Government had reason to believe
21 the counts against Capener based on its first pillar—no presence of bone in the pathology
22 slides—lacked merit. The Court therefore awards attorneys’ fees and costs incurred by
23 Defendant in refuting this first pillar. Defendant has submitted expense reports detailing
24 these costs. (*See* #228, Ex. 1-4.) Therefore, the Court awards \$175,006.50 in costs for expert
25 witnesses and other related charges permissible under § 2412(d)(2)(A).¹ The Court further

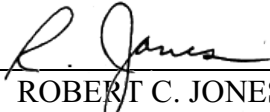
¹This figure represents expenses and costs identified by Defendant as relating to costs incurred in refuting the Government’s argument of lack of bone on the pathology reports and slides.

1 awards attorneys' fees. However, Defendant has not demonstrated that the Court should
2 depart from the \$125 per hour cap. Accordingly, the Court awards \$104,009 in attorneys'
3 fees.²

4 **CONCLUSION**

5 Pursuant to the above analysis, IT IS HEREBY ORDERED that Defendant's Motion
6 for Attorneys' fees and Expenses (#228) is *granted in part and denied in part*. The Court
7 awards \$175,006.50 in costs and \$104,009 in attorneys' fees.

8 DATED: June 18, 2007

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10 _____
11 ROBERT C. JONES
12 UNITED STATES DISTRICT JUDGE

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23 (#228, Ex. 1-4.)

24 ²This figure represents Defendant's attorneys' fees incurred in refuting the Government's lack-of-
25 bone argument. (*Id.*) As noted above, the Court applies the \$125 cap.