UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, THE STATE OF NEW YORK, ex rel. ASSOCIATES AGAINST OUTLIER FRAUD,	
Plaintiffs,	
-v-	09 Civ. 1800(JSR)
HURON CONSULTING GROUP, INC., and EMPIRE HEALTH CHOICE ASSURANCE, INC. d/b/a EMPIRE MEDICARE SERVICES,	MEMORANDUM ORDER
Defendants.	

JED S. RAKOFF, U.S.D.J.

On March 8, 2013, this Court entered summary judgment against plaintiff-relator Associates Against Outlier Fraud ("Relator") and in favor of defendants Huron Consulting Group, Inc., Huron Consulting Group, LLC, and Huron Consulting Services, LLC (collectively, "Huron"), and co-defendants Empire Health Choice Assurance, Inc., and Empire Medicare Services (collectively, "Empire"). After the judgment was affirmed on appeal and defendants submitted bills of costs, the Clerk of Court awarded costs to Huron of $7,886.95 and costs to Empire of $5,839.80. Now pending before the Court is Relator's appeal of that award.

Relator first asks the Court to reverse the award of costs in its entirety. Under Federal Rule of Civil Procedure 54(d)(1), "costs . . . should be allowed to the

prevailing party" "[u]nless a federal statute . . . provides otherwise." In Relator's view, the False Claims Act (the "FCA"), pursuant to which Relator initiated this litigation, "provides otherwise." Specifically, the FCA requires that courts, before awarding "reasonable attorneys' fees and expenses," must find that the lawsuit was "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment," 31 U.S.C. § 3730(d)(4), and Relator reads this limitation to prohibit an award of "costs" pursuant Rule 54(d)(1).[1] Relator acknowledges that the restriction in § 3730(d)(4) applies to "expenses," while Rule 54(d)(1) allows for an award of "costs," but Relator contends that this difference of terminology is of no moment because in Relator's view the two terms are synonymous. To support this interpretation, Relator cites numerous cases that, in dicta, use the two terms interchangeably. See, e.g., U.S. ex rel. Kelly v. Boeing Co., 9 F.3d 743, 752 (9th Cir. 1993).

But the statutory language of the FCA forecloses Relator's argument. "[U]nder the [language of the] FCA, fees, expenses, and costs are three distinct categories." U.S. ex rel. Lindenthal v. Gen. Dynamics Corp., 61 F.3d

[1] Defendants do not assert that Relator's suit was frivolous, vexatious, or primarily intended to harass.

1402, 1413 (9th Cir. 1995). For example, if the United States declines to intervene in a qui tam action and the relator prevails, the statute provides that the relator "shall . . . 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). Likewise, when the Government intervenes, but the defendant prevails, § 3730(g), by incorporation of 28 U.S.C. § 2412(d), allows the defendant to recover "fees and other expenses, in addition to any costs awarded pursuant to" Rule 54(d).[2] In the face of this language, to read the limitation on "expenses" in § 3730(d)(4) to apply to "costs" as well would be contrary to the rule that courts are to "give effect, if possible, to every clause and word of a statute, and to render none superfluous." Tablie v. Gonzales, 471 F.3d 60, 64 (2d Cir. 2006) (internal quotation marks omitted).

[2] Technically, 28 U.S.C. § 2412(d) distinguishes between "fees and expenses" and "costs awarded pursuant to subsection (a)," which permits recovery of costs "as enumerated in [28 U.S.C. §] 1920." § 1920, in turn, "defines the term 'costs' as used in Rule 54(d)." Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437, 441 (1987).

The distinction in the FCA between "costs" and "expenses" also reflects that the two terms have different meanings in this context. "Although 'costs' has an everyday meaning synonymous with 'expenses,' the concept of taxable costs under Rule 54(d) is more limited." Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997, 2006 (2012) (internal quotation marks omitted). The same is true under the FCA. For instance, 28 U.S.C. § 2412(d) -- which, as just noted, the FCA incorporates through § 3730(g) -- defines "fees and other expenses" as separate from Rule 54(d)(1) costs and as "includ[ing] the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees." Cf. Taniguchi, 132 S. Ct. at 2006 (explaining that "[t]axable costs are limited to relatively minor, incidental expenses" and distinguishing "nontaxable expenses borne by litigants for attorneys, experts, consultants, and investigators").[3] Furthermore, the

[3] This brief discussion also puts to rest Relator's contention that it is not possible to "propose an expense/cost item not covered by [Rule 54(d) costs] but which can be charged to a relator [as expenses] if not blocked by § 3730(d)(4)'s exemption." Relator's Appeal Memorandum at 11. Thus, while Relator is correct in observing that none of the three courts of appeals that have reached the same conclusion at which this Court now

line drawn in the FCA tracks the structure of Rule 54, which allows the Clerk of Court to tax "costs," see Fed. R. Civ. P. 54(d)(1), but requires a "claim for attorney's fees and related nontaxable expenses" to be made by motion to the court. See Fed. R. Civ. P. 54(d)(2).

In sum, the "dicta loosely suggesting that costs and expenses are interchangeable terms" on which Relator relies cannot overcome the FCA's conscious distinction between "costs" and "expenses" and its alignment with Rule 54(d). See Costner, 317 F.3d at 891. Accordingly, the Court finds that § 3730(d)(4)'s limitation on the recovery of "attorneys' fees and expenses" does not bar an award of "costs" under Rule 54(d)(1).

The Court also rejects Relator's alternative argument that, even if costs are generally taxable in an FCA action, the Clerk erred in awarding both defendants the costs incurred in obtaining certain deposition transcripts. According to Relator, "[i]t is black letter law that a losing litigant is only required to reimburse the

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arrives has made explicit the difference between "costs" and "expenses," see United States ex rel. Ritchie v. Lockheed Martin Corp., 558 F.3d 1161, 1172 (10th Cir. 2009); U.S. ex rel. Costner v. United States, 317 F.3d 889, 891 (8th Cir. 2003); Lindenthal, 61 F.3d at 1414, Relator errs in claiming that this omission has any significance.

prevailing parties jointly for costs for an original and one copy of a deposition." Relator's Appeal Memorandum at 12. But Relator cites nothing for this proposition,[4] and neither Rule 54(d)(1) nor Local Civil Rule 54.1 supports it. While a court, in its discretion, may find it inappropriate to award costs for deposition transcripts to each of multiple defendants when those defendants are "related companies . . . present[ing] a common defense," Brager & Co. v. Leumi Sec. Corp., 530 F. Supp. 1361, 1366 (S.D.N.Y.) aff'd, 697 F.2d 288 (2d Cir. 1982), here, Huron and Empire are distinct entities, each retained different counsel, and Relator "pursue[d] two theories of liability, tailored to each defendant." United States v. Huron Consulting Grp., Inc., 929 F. Supp. 2d 245, 252 (S.D.N.Y.

[4] The only case that Relator does discuss, Astrazeneca AB v. Lek Pharmaceutical and Chemical Co., D.D. (In re Omeprazole Patent Litigation), 00-cv-4541, 2012 WL 5427791 (S.D.N.Y. Nov. 7, 2012), undermines its position. There, the court awarded certain defendants (who made a joint application) the costs of an "original transcript and one copy of all depositions introduced and received into evidence" at trial and refused to consider whether specific depositions were actually only related to other defendants "because the claims and defenses of each defendant in the litigation were inextricably intertwined." Id. at *1, 3. Then, in a separate decision, the court allowed other defendants to recover costs for the same deposition transcripts. See Astrazeneca AB v. Mylan Laboratories Inc. (In re Omeprazole Patent Litig.), 00-cv-6749 BSJ, 2012 WL 5427849, at *4 (S.D.N.Y. Nov. 7, 2012).

2013). Thus, there is no basis for Relator's position that Empire and Huron must share the costs of depositions.

For the foregoing reasons, the Court affirms the award of costs entered by the Clerk of Court.

SO ORDERED.

Dated: New York, NY
February 2, 2015

JED S. RAKOFF, U.S.D.J.