UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, - against - WAEL BAKRY, ABRAHAM DEMOZ, and MAYURA KANEKAR, Defendants.	CASE NO.: 1:17-cr-00353-ERK ECF Case ORAL ARGUMENT REQUESTED

DEFENDANT MAYURA KANEKAR'S MEMORANDUM OF LAW
IN SUPPORT OF HER MOTION FOR ATTORNEYS' FEES AND EXPENSES

Defendant Mayura Kanekar, by and through her undersigned counsel, respectfully submits this Memorandum of Law in support of her motion for reimbursement of attorneys' fees and expenses pursuant to the "Hyde Amendment," reprinted in the Historical and Statutory Notes to Title 18, United States Code, Section 3006A.

I. INTRODUCTION

In the early morning hours of July 10, 2017, despite her prior full and voluntary cooperation with government investigators, armed federal agents entered into the home of Mayura Kanekar, a respected occupational therapist with no criminal history. In the presence of Ms. Kanekar's husband and her elderly father, and with her young daughter sleeping in the next room, those agents arrested her, and the Department of Justice's Medicare Fraud Strike Force ("DOJ") proceeded to charge her with an extraordinary litany of crimes they either knew, or had reason to know, lacked any legitimate basis. For the next five years, Ms. Kanekar's life was turned upside down, her career was left in shambles, and every penny of her savings was expended defending against these baseless charges. After a lengthy trial before this Court, the

jury finally gave Ms. Kanekar her moment of vindication by acquitting her on all charges. *See* ECF Nos. 374, 378. And while it is true that "[a]n acquittal, without more, will not lead to a successful Hyde Amendment claim," the law was specifically created to compensate prevailing defendants who—like Ms. Kanekar—have been victims of a wrongful prosecution. *United States v. Schneider*, 395 F.3d 78, 88 (2d Cir. 2005), *as amended* (Feb. 9, 2005). Where, as here, the government's prosecution was vexatious, frivolous, or in bad faith, compensation under the Hyde Amendment is warranted.

When advocating for the passage of the Hyde Amendment into law, Representative Henry Hyde stated, "I really wish you had some imagination and could imagine yourself getting arrested, getting indicted, and [then] the Government has a case it cannot substantially justify." 143 Cong. Rec. H7786-04, H7793 (1997). Ms. Kanekar does not have to imagine this; she lives with it every day. For the reasons discussed herein, we respectfully request the Court grant Ms. Kanekar's motion for attorneys' fees and expenses as called for under the Hyde Amendment.

II. LEGAL FRAMEWORK AND ELIGIBILITY

The Hyde Amendment grants the Court discretion to award a prevailing criminal defendant "a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust." Pub. L. 105-119, Title VI, § 617, Nov. 26, 1997, 111 Stat. 2519, reproduced as a statutory note to 18 U.S.C. § 3006A, historical and statutory notes. The Second Circuit has indicated that "[f]or the government's position to be 'vexatious, frivolous, or in bad faith,' the prosecution must have been brought (a) to hector or intimidate the defendant on shaky factual or legal grounds (vexatious); (b) without even a reasonably arguable factual and legal basis (frivolous); or (c) with an element of intentional

deceit or dishonesty (in bad faith)." *United States v. Bove*, 888 F.3d 606, 609 (2d Cir. 2018) (citations omitted).

The Hyde Amendment incorporates the procedures provided for awards of attorneys' fees to "prevailing parties" under the Equal Access to Justice Act, 28 U.S.C. § 2412 ("EAJA"). Specifically, the EAJA requires:

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified.

28 U.S.C. § 2412(d)(1)(B).

Ms. Kanekar is a "party" under the EAJA as her net worth was less than $2 million when she was indicted and through today, *see* 28 U.S.C. § 2412(d)(2)(B), and she is undoubtedly a "prevailing party" as she was fully acquitted by the jury on all counts. This application was brought within 30 days of the final judgment acquitting Ms. Kanekar, which was docketed on July 13, 2022 (ECF No. 378). Ms. Kanekar respectfully requests an award of $845,750.70 for attorneys' fees and other litigation expenses as itemized in the accompanying Declaration of Morris J. Fodeman ("Fodeman Decl.") and exhibits attached thereto.

III. ARGUMENT

As the Court is aware from presiding over the trial in this case, the DOJ charged Ms. Kanekar with conspiracy to commit health care fraud, conspiracy to pay health care kickbacks, money laundering conspiracy, conspiracy to defraud by obstructing the lawful functions of the Internal Revenue Service ("IRS"), subscribing to a false and fraudulent tax return, and false claims. *See* Superseding Ind., ECF No. 95. The government's case against Ms. Kanekar was

divided into two purported schemes: first, the "kickback" scheme, in which the government alleged Ms. Kanekar paid the individuals managing the medical offices where her occupational therapy practice was located to supply patients through cash kickbacks, and second, the "false claims" scheme, which alleged that Ms. Kanekar fraudulently billed Medicare by submitting claims using her personal NPI number as the "rendering provider" while she was out of the country. As the evidence demonstrated, neither of these alleged theories of prosecution could have in good faith proceeded to trial against Ms. Kanekar. Indeed, as shown below, the government's vexatious, frivolous, and bad faith prosecution of Ms. Kanekar was evident at each stage of the case, from investigation to indictment and through trial.

A. The Government's Baseless and Shifting Theory Relating to the "Kickback" Scheme

1. The Government's Inadequate Investigation

From the start, the government's case against Ms. Kanekar in relation to the "kickback" scheme—the theory of wrongdoing underlying five of the seven charges against Ms. Kanekar—was defective. The government's theory, as explained to the Court shortly before trial, was as follows:

> The defendants are charged with participating in a large pay to play scheme in which these licensed healthcare providers worked at clinics throughout Brooklyn and Queens where the locations were being managed by a number of co-conspirators often referred to as manager co-conspirators in which the general arrangements among these defendants and other healthcare providers is that they would see patients, primarily Medicare beneficiaries, at these clinics. And once they received funds from the Medicare system on those claims, after certain expenses, they would then pay back approximately 90 percent of those reimbursements to the so-called managers. . . . [T]he way that the referrals worked here by these managers is that the managers typically paid ambulette drivers, non-emergency vehicles, where these ambulette drivers also controlled patient population through cash kickbacks. Cash went from managers to ambulette drivers and then from ambulette drivers into the hands of the patients' beneficiaries themselves. Some of the managers also actually paid patients directly to go

> to these clinics that the defendants were either working at or supposedly supervising.

Apr. 18, 2022 Status Conf. Tr. 6-8.

The problem with this theory, as demonstrated at trial, was that there was no evidence whatsoever that Ms. Kanekar had any *knowledge* of patient kickbacks. To the contrary, as the government's own witnesses testified, the practice of paying patient kickbacks was purposefully *hidden* from Ms. Kanekar and the other medical providers. *See, e.g.*, Trial Tr. 223-24 (Vadim Alekseyev—a manager—testifying that he paid patients away from the clinic because he "didn't want other people to hear," specifically because he "didn't want the [medical] providers to know [he was] paying the patients"); 518-21, 525 (Oleg Dron—a medical provider—testifying that each time he asked managers if patients were being paid, they told him "no"); 626-32 (Oleg Rubenov—an ambulette driver—testifying that payments to patients were hidden from providers, other ambulette drivers, and those who "didn't need to know"); 793-96, 864-65, 910-911 (Mark Tsyvin—a manager—testifying that he "didn't want any doctors or anyone included to see any illegal contact or any illegal activity in the clinic" because it was "important to [him] that everybody in the clinic from the cleaning people to the doctors believed that [the] clinic was operating legally" and specifically that "it was a secret from Ms. Kanekar what [he] was doing with her checks"); 1061, 1092-93 (Alexander Khavash—a medical provider—testifying that he asked Tsyvin and Aleksandr Pikus whether patients were being paid, and they told him "no," and lied to him about why his checks were being cashed); 1752-53 (Max Vernik—a manager—testifiying that he did not want patients being paid in the clinic because he "didn't want anybody

seeing" and agreeing that "the point was to keep the information from other people unless they needed to know").[1]

Had the government conducted a good-faith investigation of Ms. Kanekar, this fact would have been apparent even before indicting her back in 2017. But as the evidence adduced at trial showed, the government did not conduct that investigation. The government did not utilize any wiretaps or undercover agents to determine Ms. Kanekar's culpability (despite using undercover agents in similar cases, *see, e.g.*, *United States v. Lu*, No. 11-cr-00743-ERK (E.D.N.Y.)). The government did not collect or review Ms. Kanekar's emails by which she communicated with her supposed co-conspirators, despite getting her consent to image her cell phone and obtaining a search warrant to collect the emails of other alleged co-conspirators (co-defendant Abraham Demoz, as well as managers Pikus and Tsyvin). Further, the government's review of whatever emails it did collect was perfunctory and inexplicably narrow. Even post-indictment, in 2018, the government's review of the collected emails was limited to a search of the "to," "from," "cc," and "bcc" fields for a list of names and email addresses. *See* Fodeman Decl. Ex. 2 (Mar. 2, 2018 Ltr.). In other words, the government only searched (1) a limited number of email custodians for (2) emails to/from certain individuals—not a more fulsome search for communications with other individuals or that could have captured other relevant information (such as, for example, a keyword search). That process almost certainly missed emails relevant to the subject matter of the instant case and subject to disclosure pursuant to Section 3500, *Giglio*, or *Brady*. For example, the government's list of search terms did not include, among others, Vadim Alekseyev

[1] This distinguishes the instant case from others denying relief under the Hyde Amendment, such as, for example, *United States v. Schneider*, 395 F.3d 78, 87 (2d Cir. 2005), *as amended* (Feb. 9, 2005), where "[t]he government's witnesses . . . directly implicated Schneider in the crime."

or Oleg Rubenov, two cooperating witnesses who testified at trial. Moreover, the government's process did not search the *body* of the emails, meaning that it would not have identified any emails from the custodians to an individual not on the government's list, even if that email was directly relevant to the instant case. When the defense raised this issue with the government, the government shirked its *Brady* and *Giglio* obligations by claiming that the defense should have insisted on a broader search in the Rule 16 process, and refusing to "seize" further emails. *See* ECF No. 309-10 (May 10, 2022 Ltr.).[2]

What the government did do was interview its cooperating witnesses—all without developing any evidence that Ms. Kanekar knew that patients were being paid cash kickbacks.[3] As we indicated to the Court when filing Ms. Kanekar's initial motions *in limine* in 2020:

> The government has not provided any evidence that Ms. Kanekar (1) paid kickbacks to any patient or ambulette driver; (2) witnessed or otherwise learned of anyone paying kickbacks to any patient or ambulette driver; or (3) understood that money she paid to those she trusted to run her business could be used to pay kickbacks. There is not a single email or text message produced by the government indicating Ms. Kanekar had any involvement in a kickback scheme.

ECF No. 250 at 11-12 (Reply Mem. of Law in Support of Motions *In Limine*). Despite having five years between indictment and trial, the government failed to adduce any such evidence. Nevertheless, the government proceeded to trial on these charges, which were "so obviously wrong as to be frivolous." *United States v. Braunstein*, 281 F.3d 982, 996 (9th Cir. 2002). In *Braunstein*, for example, the Ninth Circuit reversed a denial of a Hyde Amendment claim where

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[2] An unredacted copy of this letter was sent by email to Chambers along with the filing of the May 16, 2022 letter sent on behalf of Ms. Kanekar addressing ongoing issues with the government's disclosures (ECF No. 309).

[3] Furthermore, despite the fact the alleged payment of bribes to patients was at the heart of the government's case, it appears that the government chose not to interview, let alone call as a witness, a *single* patient.

the prosecutors' charges were "dependent on oral misrepresentations by Braunstein," but none of the grand jury witnesses, or any of the government's other evidence, supported that any such misrepresentations were made. *See id.* Here, similarly, the government proceeded to indict and try Ms. Kanekar on a theory that was wholly unsupported by any of its own witnesses or any significant evidence.

2. The Eve-of-Trial Disclosures

The government's vexatious, frivolous, and bad faith prosecution of Ms. Kanekar became even more apparent through its eve-of-trial disclosures. As we previously brought to the Court's attention, interview notes produced by the government as "3500 material" in late April disclosed, *for the first time*, *Brady* material indicating that managers, including Mark Tsyvin, actively lied to providers about patients being paid. *See* ECF No. 309.[4] As noted in our May 16, 2022 letter to the Court, it defies belief that the sparse and cryptic notes produced by the government constituted the entirety of the conversations between the witnesses and the government on these matters. *See id.* Further, it is inconceivable that the government did not ask its witnesses about this key area—one at the direct heart of the case—at any prior point in the years it was building its case. Indeed, *nearly every government cooperator* testified that this practice of hiding payments from providers had occurred (see cites above). The fact that the government disclosed this in April 2022 demonstrates that the government either: (1) knew of this *Brady* material for some unspecified period of time but did not disclose it until trial was about to start; (2) purposely avoided asking its cooperators key questions at the heart of the case to avoid learning *Brady* material; or (3) somehow missed the existence of these facts which speak directly to the defendants' *mens rea,* the key issue in the case. Any one of the three possibilities demonstrates

[4] An unredacted version of this letter was filed under seal at ECF No. 313.

the unjust nature of the government's prosecution and supports an award under the Hyde Amendment. *See United States v. Ranger Elec. Commc'ns, Inc.*, 22 F. Supp. 2d 667, 676 (W.D. Mich. 1998) (finding that *Brady* violations constitute "bad faith" within the meaning of the Hyde Amendment), *rev'd on other grounds,* 210 F.3d 627 (6th Cir. 2000).

A similar phenomenon occurred in relation to the testimony of cooperator Roman Azimov. The government met with Azimov approximately 20 times between 2016 and 2019. Not a single piece of 3500 material produced by the government covering those time periods mentions Ms. Kanekar having any knowledge about patient kickbacks. Yet, on April 29, 2022—just a few days prior to jury selection in this case—Azimov conveniently shared with the government, purportedly for the first time, that Ms. Kanekar was allegedly told by her employees that patients spoke about being paid in the medical office. *See* Trial Tr. 1622-23. On May 27, 2022, the Friday before Azimov was scheduled to testify, he shared even more details he had, for some reason, never shared before: that he had a conversation with Ms. Kanekar nearly a decade prior, alone in his car, in which she said "[s]he didn't want the patients to discuss in the clinics about receiving any kickbacks in her department," at which point, Azimov "escalated" the situation to the other managers, including Pikus and Tsyvin. *Id.* 1415-16.

There is nothing in the 3500 material to indicate that the government pushed back on Azimov or questioned why he was only remembering this highly salient conversation years later, on the eve of trial. It is understandable why not; prior to May 31, the day Azimov was scheduled to testify, eight government witnesses had testified (Martha Lorenzo, Alekseyev, Dr. Greg McKinney, Dron, Rubenov, Tsyvin, Khavash, and Nuruddin Pethani), and the prosecution's case was faltering. Lorenzo, a check cashing compliance expert, testified that she did not identify anything suspicious about the checks cashed by the managers. *See, e.g.*, Trial Tr. 146. As noted

above, Alekseyev, Rubenov, and Tsyvin testified that they purposely concealed from the providers that patients were being paid. Dr. McKinney, the government's Medicare expert, admitted that he had given an inaccurate definition of "rendering" provider on direct examination, that he had no knowledge of the bills submitted in this case, and that billing errors could occur. *See* Trial Tr. 374-75, 378-79, 385-86. Dron testified that he believed his services were being billed correctly, that none of the managers admitted to him that patients were being paid, and that his only indication of patient payments were conversations in Russian (a language which none of the defendants speak). *See id.* 510, 523-25, 541. Perhaps most tragically of all, Ms. Kanekar's former co-defendant, Khavash, testified that, despite his guilty plea, he was telling the truth when he testified under oath in 2016 that he did not think that he had committed any crimes and had no reason to think crimes were even being committed at the clinics.[5] *See id.* at 1086-88; *see also id.* at 1190 (the Court admonishing the government: "I thought that your last cooperating witness was a very weak witness. He may have been sincere in the sense that he was, you know, he was trying to – you know, you made him plead to something that he didn't believe. And that was a problem. The cross on his plea – he basically didn't believe he had done any of that, if I recollect this testimony correctly.").

It was in this context that the government presented Azimov's dubious testimony to the jury. It did so despite the fact that Azimov had never once mentioned this highly relevant and seemingly inculpatory evidence at any of the prior numerous interviews, totaling more than 100 hours, until he "remembered" it just before he was set to testify. *See* Trial Tr. 1551-52, 1568-72. It did so regardless of his admitted lack of trustworthiness, including his continued commission

[5] When later questioned about the circumstances leading to his guilty plea and cooperation, Khavash disclosed that his wife had been diagnosed with a serious illness and that the prospect of spending years in prison away from his children was "unthinkable." Trial Tr. 1118.

of fraud while cooperating with the government. *See id.* at 1554-55. And it did so despite the fact that not a *single* other cooperating witness—including, for example, Tsyvin, to whom Azimov specifically claimed he "escalated" this issue—corroborated his story. *See id.* at 1614-21; *see generally id.* at 659-865 (Tsyvin testimony).[6]

3. The Shifting Theory on the Kickback Scheme

Given the lack of evidence supporting its original kickback theory, it is perhaps no surprise that, by the time trial occurred, the government shifted its theory to argue that there were actually "two types of kickbacks" at issue in the case—that Ms. Kanekar and her co-defendants could be found guilty not only by knowing that patients were being paid cash kickbacks, but also simply by virtue of being in business with the managers, whom the government claimed were "steering" patients to the clinics:

> THE COURT: So let me understand your theory of the case. The problem that paying off patients provides them with an incentive to go for treatments that they may or may not need?
>
> MR. ESTES: Yes, Your Honor. That's part of it, but to be clear it's not just the paying off of the patients, but paying for the patient referrals. Those are the two types of kickbacks that are issue in the case.
>
> THE COURT: I mean could you say that again? I –

[6] Had Ms. Kanekar been convicted, the government's knowing presentation of Azimov's false testimony may itself have been grounds for a reversal. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959) (citations omitted) ("[I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears."); *United States v. Agurs*, 427 U.S. 97, 103 (1976) ("[A] conviction obtained by the knowing use of the perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."); *Drake v. Portuondo*, 553 F.3d 230, 241 (2d Cir. 2009) (citation omitted) (noting that the Second Circuit has "interpreted Supreme Court precedent as holding that 'if it is established that the government knowingly permitted the introduction of false testimony reversal is virtually automatic'").

> MR. ESTES: Yes. So not just the paying the patients, but the paying for patient referrals for –
>
> THE COURT: What does that mean?
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> MR. ESTES: So sending a patient to the clinic. The steering and controlling of patients as well violates the anti-kickback statute, promises in the Medicare program – those as well. That's the basis of the –
>
> THE COURT: Is it the steering or just paying them, because you're encouraging the people to get treatment that they may or may not need?
>
> MR. ESTES: It's both, Your Honor. By paying both for the referrals – and I think the additional witnesses will be explaining – making sure that, you know, patients come. They see someone. . . . That someone is, you know, attending some kind of services at the clinic that just drives up services that otherwise might not be provided. That it's basically for a lot of patients an additional job or source of income for them.

Trial Tr. 270-71.

Notwithstanding the fact that the defense had relied on the government's primary theory of patient kickbacks for five years,[7] the government's second theory had a serious flaw: not a single one of its own witnesses believed that the payments made by the providers to the managers was illegal, a necessary element for an offense with a willfulness *mens rea*.

Dron testified that he "didn't expect or intend to commit a crime" when he entered into financial arrangements with the managers. Trial Tr. 523-26. Khavash testified that he thought the arrangement by which he received 10% of the payments from insurers and gave the remaining 90% (after paying professional salaries) for the managers to handle all administrative

[7] *See* Trial Tr. 273 (Mr. Fodeman: "I've been on this case since the beginning. I sat here and listened to the opening statement. I always understood from the bill of particulars, from all the correspondence, this is a case about patients getting paid kickbacks. That's what I understood the crime was. That's what we're ready to defend. That's it. Now I'm hearing Mr. Estes say – I think – I'm not even sure what he's saying, but I think what he's saying is just paying the managers to promote the business is in and of itself a crime? Is that what he's saying? Because that's not what's been articulated in the past.").

aspects of the practice was a "good deal" and that he did not think he was engaging in any criminality when entering into it. *Id.* at 1056-57. Significantly, Tsyvin, one of the managers on the other end of the financial arrangement with Ms. Kanekar, testified that he did not think the "90/10 deal" was illegal in and of itself, and that the only illegal aspect was "what [he was] doing with the money [he] got"—paying cash to ambulette drivers for patient kickbacks—about which he did not tell Ms. Kanekar or any other provider. *Id.* at 976, 910-11.

4. The Faulty Tax Counts

The government's vexatious, frivolous, and bad faith behavior spilled over into the tax counts, which were necessarily dependent on the kickback allegations.[8] The government called one fact witness in relation to Ms. Kanekar's allegedly false and fraudulent tax returns: her accountant, Kuldip Madan. Yet Madan testified that: (1) he believed all of Ms. Kanekar's returns were accurate; (2) there was nothing suspicious about the management fees Ms. Kanekar paid; (3) he believed that the deductions Ms. Kanekar took for the management fees were proper, and did not advise Ms. Kanekar otherwise; (4) Ms. Kanekar issued 1099s for all management fees paid, alerting the IRS to those payments; (5) Ms. Kanekar paid taxes on every penny she made; (6) Ms. Kanekar had always been honest and forthright with him; and most significantly, (7) *the government had never asked him any of those questions.* Trial Tr. 1293-94. This again demonstrates that the government either knew it had no reasonable basis to pursue these charges and did so anyway, or purposely avoided learning the truth about its allegations.

[8] As the Court may recall, the tax counts were premised on the theory that the defendants improperly deducted the alleged kickback payments as legitimate expenses on their taxes. *See* Superseding Ind., ECF No. 95 ¶ 41.

B. The Government's Baseless False Claims Charges

The government's other theory of criminality related to its false claims charges; specifically, the government alleged that Ms. Kanekar defrauded Medicare when her personal NPI was listed as the "rendering provider" on Box 24(j) of the CMS 1500 Claim Form for services that were "not supervised by licensed professionals as required[.]" Superseding Ind., ECF No. 95 ¶ 28. The actual false claims counts in the Superseding Indictment included only two $70 claims made to Medicare submitted for treatments provided to patients on September 30, 2014, while Ms. Kanekar was traveling out of the country. *See id.* at 20.

First, as with its alleged kickback scheme, the government's position with regards to the false claims charges was vexatious, frivolous, and brought in bad faith because there was no colorable basis to bring these charges before the jury. Even before indicting Ms. Kanekar, the government was privy to the evidence fully debunking the legal and factual basis for the false claims charges. Specifically, documents in the government's possession demonstrated:

(1) Ms. Kanekar relied on a billing service, Brunswick Billing a.k.a. NPV Billing, to submit claims to Medicare (*see, e.g.*, GX 404 (Medicare claims data); GX 1401 (EDI Third-Party Provider Authorization Form));

(2) Ms. Kanekar and her therapists provided the billing service with the correct information for all services rendered (*see, e.g.*, DX 600 (superbills); DX 722-B (WebMD records)); and

(3) the billing company, not Ms. Kanekar, submitted those claims improperly (*see* GX 404; GX 1401).

The government either knew, or chose to willfully ignore, this evidence. Saliently, one of the government cooperators was Mishelle Neginsky-Singer, Pikus's partner who oversaw Brunswick/NPV Billing. Not only did the government did not call Neginsky-Singer to testify, as

far as we can tell from the produced 3500 material, the prosecutors and agents never even asked about how she or others at the billing company chose which NPI to use as the "rendering provider," whether anyone at the billing company understood the relevant Medicare supervision rules, or whether Ms. Kanekar was involved in the billing process at all.[9] The government's insistence on proceeding to trial on the false claims charges despite the mountain of evidence in its possession demonstrating its faulty position, and its refusal to pursue investigative avenues that would have undermined their charges, demonstrates that its prosecution was at the very least frivolous, if not vexatious or brought in bad faith. *See, e.g.*, *Braunstein*, 281 F.3d at 996-97 (granting Hyde Amendment claim where government had information demonstrating its position was incorrect prior to indicting defendant); *United States v. Holland*, 34 F. Supp. 2d 346, 365 (E.D. Va. 1999) (finding prosecution vexatious where prosecutors pursued criminal charges based on evidence it knew would not even support civil penalties), *opinion vacated in part on reconsideration,* 48 F. Supp. 2d 571 (E.D. Va. 1999), *aff'd,* 214 F.3d 523 (4th Cir. 2000).

Second, as outlined in our May 25, 2022, letter to the Court, ECF No. 335, from 2018 through the start of trial, the government represented to the parties and the Court that it "[did] not intend to demonstrate during its case-in-chief that other specific claims submitted to Medicare for services purportedly rendered by defendant Kanekar were for services that were not medically necessary, not performed or not adequately supervised." ECF No. 106 at 1; *see also* ECF No. 124 at 13. This explicit representation was relied upon by the Honorable Sterling Johnson, Jr., in denying co-defendant Wael Bakry's motion for particulars on the same issue.

[9] The government did not even have Neginsky-Singer plead guilty to submitting "false" claims on Ms. Kanekar's behalf; instead, it arranged for Neginsky-Singer to plead guilty to a single count of health care fraud related to her submission of claims to Medicare for non-reimbursable vitamin fusion procedures (treatments wholly unrelated to Ms. Kanekar's practice).

See ECF No. 203 at 5-6. The government reiterated its intention to limit its case in this fashion at the pretrial conference before Your Honor. *See* Apr. 18, 2022 Status Conf. Tr. 11-13 ("[O]f the remaining defendants, the government expects that it will be that services were provided to these patients not necessarily as claimed, not necessarily by the providers who are claiming they actually do the rendering. And as I said, if one provider is out of the country and is claiming that they're using the unique provider identification number, that they're the one that's the rendering provider. They're not necessarily doing it, but then perhaps someone else in the office is doing something but it's being claimed as if that provider is the one doing it.").

As such, reasonably relying on the government's representations, the defense did not prepare to rebut allegations that any of the services rendered were medically unnecessary. Yet, despite these explicit representations, the government introduced such evidence at trial—first, when it elicited testimony from Tsyvin that he and Ms. Kanekar had discussed billing four modalities instead of three, (*see* Trial Tr. 695-99), and second, when it elicited testimony from Khavash about using "higher complexity" codes at the request of the managers to increase billing, (*see* Trial Tr. 1021-22).

The Court explicitly noted that the government introduced this evidence in contravention of its previous representations:

> THE COURT: I'm reading from – this is from Judge Johnson's opinion, but it's basically in your letter. Otherwise, at this time the Government does not intend to demonstrate during its case in chief that other specific claims submitted to Medicare or Medicaid services for services purportedly rendered by Defendants Bakry and Kanekar were for services that were not medically necessary, not performed, and were adequately supervised. And what you're saying, if I understand you right now, is that well, we're not going to – we might not – specific claims like (indiscernible) but in general this went on?
>
> MR. ESTES: Yes.
>
> THE COURT: Well, that's not what you said.

Id. at 1697. As a result, the Court provided a curative instruction to the jury, but of course, the prosecution had already elicited facts the defense could not sufficiently rebut. This bad faith attempt to sway the jury in a manner for which the government knew the defense could not prepare further supports an award under the Hyde Amendment.

* * *

In sum, the government's overarching strategy was to throw as many charges and theories at the jury as possible, hoping for a possible conviction to compensate for the inadequate investigation and lack of evidence against Ms. Kanekar. Your Honor specifically noted displeasure with this strategy. *See* Trial Tr. 2315:3-10 ("I don't understand why the Government has charged every conceivable statute that – you know, in a case like this, the goal should be to make it simple for the Jury, not complicated with all this. But every statute that they could possibly find that adds nothing to – in my view – to the essence of what they're charging was done wrong here."); 3122:2-8 ("I hope just sitting there and listening to this you realize how complicated you've made this case with all those stupid Counts that you've chosen to put into this indictment. What you're doing is like throwing darts in the hope that one dart will hit the bullseye. And it doesn't help your case to complicate it in this way. I feel dizzy myself[.]").[10] In *United States v. Claro*, for instance, the Southern District of Texas dismissed charges against a defendant where, despite "muddled" evidence of the alleged offenses and dubious theories of illegality, the government indicted the defendant on conspiracy, mail fraud, and money

[10] The Court noted the apparent lack of supervision from the DOJ over the prosecution as it proceeded through trial. Indeed, the Court even ordered the prosecution to explain the DOJ's authority in bringing the case in the Eastern District of New York (*see* ECF No. 342); surprisingly, the prosecution never responded to the Court's direct order.

laundering, which accompanied a press release.[11] 2007 WL 2220980 (S.D. Tex. July 31, 2007), *aff'd in part and vacated in part,* 479 F.3d 452 (5th Cir. 2009). Despite outcries from the defendant, the government failed to provide a clear explanation of its theory of wrongdoing, provide certain *Brady* evidence, or provide a good-faith list of relevant evidence. After dismissal, the court awarded attorneys' fees under the Hyde Amendment, finding "[t]he case against [the defendant] lacked even a semblance of responsible work by the government. His attorneys had to work with a jumbled array of facts and theories, a mountain of documentary evidence, and unresponsive government lawyers." *Id.* The court further noted that "[t]he discretion the government has to prosecute those it thinks guilty of crimes must be grounded in a sound facts and articulated law. The Hyde Amendment was passed to give some recompense to those prosecuted without this most basic discretionary safeguard from prosecutorial oppression." *Id.* The same applies here—the government's pursuit of dubious and shifting legal theories,

[11] Perhaps telling of the government's motives in bringing this baseless and flawed case is that it issued not one but *two* press releases trumpeting its prosecution of Ms. Kanekar: one when Ms. Kanekar was arrested and another, nearly identical press release when the superseding Indictment was returned (despite the fact that the charged crimes were nearly identical). *Compare* Press Release, Department of Justice, *Three Doctors, A Chiropractor, Three Therapists And Medical Company Owners Arrested In Brooklyn As Part Of National Health Care Fraud Takedown* (July 13, 2017), https://www.justice.gov/usao-edny/pr/three-doctors-chiropractor-three-therapists-and-medical-company-owners-arrested ("Ten individuals, including three doctors, a chiropractor, three licensed physical and occupational therapists and two medical company owners, have been charged for their alleged participation in multiple schemes that fraudulently billed the Medicare and Medicaid programs more than $125 million") *with* Press Release, Department of Justice, *Five Doctors and Eight Healthcare Professionals Charged as Part of National Healthcare Fraud Takedown* (June 28, 2018), https://www.justice. gov/usao-edny/pr/five-doctors-and-eight-healthcare-professionals-charged-part-national-healthcare-fraud ("Thirteen individuals, including five doctors, a chiropractor, three licensed physical and occupational therapists and two pharmacy owners have been charged for their participation in fraudulent schemes in connection with which Medicare and Medicaid programs were billed more than $163 million.").

charges it knew was unsupported by any evidence, and strategies to present improper evidence to the jury support an award under the Hyde Amendment.

CONCLUSION

For the foregoing reasons, we respectfully request the Court award Ms. Kanekar with $845,750.70 for attorneys' fees and expenses incurred in defending herself against the government's vexatious, frivolous, and bad faith prosecution.

Dated: August 12, 2022

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