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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

JOSEPH EARL PERRY,  
  
Plaintiff,  
  
vs.  
  
PACIFIC MARITIME INDUSTRIES  
CORP., et al.  
  
Defendants.

CASE NO. 13cv2599-LAB (JMA)  
  
**ORDER DENYING MOTION FOR  
ATTORNEY’S FEES AND COSTS [Dkt.  
68]**

Defendants have filed a Motion for Attorney’s Fees and Costs in this qui tam action. For the reasons below, the motion is **DENIED**.

**Background**

Plaintiff Joseph Earl Perry brought this action in 2013 on behalf of the United States under the False Claims Act, 31 U.S.C. § 3729 et. seq. The gist of Perry’s claim was that two government contractors, Pacific Maritime Industries Corporation and Harcon Precision Metals, Inc., and their president, John Atkinson (collectively, “Pacific”), had tried to cheat the Navy on six separate contracts. In 2017, after several of Perry’s claims had already been dismissed, the Court granted summary judgment in favor of Pacific on his remaining claims. As the prevailing party, Pacific then filed this Motion for Attorneys’ Fees and Costs, which the Court deferred until Perry’s appeal of this Court’s decision was final. The Ninth Circuit affirmed the summary judgment ruling and granted Pacific’s motion to transfer consideration of attorneys’ fees on the appeal to this Court. This Court then ordered a two-phase fee application procedure, with additional briefing to determine the

1 appropriate amount of fees required only if entitlement was established in the first phase.  
2 Dkt. 60. Here, the Court considers only whether Pacific is entitled to fees.

### 3 **Legal Standard**

4 In actions brought under the False Claims Act, a court may award attorneys' fees  
5 against the plaintiff if "the action was clearly frivolous, clearly vexatious, or brought  
6 primarily for purposes of harassment." 31 U.S.C. § 3730(d)(4). An action is "clearly  
7 frivolous" when the result is obvious or the arguments made are "wholly without merit."  
8 *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1006 (9th Cir. 2002). Additionally, an action  
9 is "clearly vexatious" or "brought primarily for purposes of harassment" when the plaintiff  
10 pursues the litigation with an improper purpose, such as to annoy or embarrass the  
11 defendant. *Id.*

12 Wary that saddling whistleblowers with attorneys' fees will chill them from coming  
13 forward with evidence of corporate wrongdoing, the Ninth Circuit has expressed  
14 reluctance to grant such fees in the absence of "rare and special circumstances." *Id.* at  
15 1007.

### 16 **Analysis**

17 Pacific does not contend Perry's claims are vexatious or brought for the primary  
18 purpose of harassment, instead arguing only that Perry's claims are clearly frivolous. But  
19 they are not.

20 The main basis for Pacific's argument that Perry's claims were clearly frivolous is  
21 that Perry failed to present adequate documentation or witnesses to support his claims,  
22 and only appealed two of the six claims that were dismissed. While Perry could have  
23 certainly done more to help himself, it's another thing to say his case was meritless simply  
24 because the evidence supporting his claims never fully materialized or because the  
25 eventual result was not in his favor. The Supreme Court has cautioned courts to resist  
26 the temptation to engage in post hoc reasoning that, because a plaintiff did not ultimately  
27 prevail, his action must have been unreasonable or without foundation. See  
28 *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412,

1 421-22 (1978). Since a prospective plaintiff can seldom be sure of ultimate success from  
2 the outset of the case, “this kind of hindsight logic could discourage all but the most airtight  
3 claims.” *Id.*

4 Mindful of the Supreme Court’s admonition, the Court finds that Perry’s claims—  
5 as weak as they may have ultimately been—were not frivolous. Two of Perry’s claims  
6 failed not because his reading of the contract specifications was incorrect—indeed, in its  
7 summary judgment order the Court conceded that his reading may have been the better  
8 of the two—but because he failed to prove that Pacific knowingly misinterpreted the  
9 specifications. See Dkt. 54 at 4, 6. His inability to prove scienter did not undermine the  
10 suit as a whole and was not a “clearly frivolous” waste of time that rose to the level of a  
11 rare and special circumstance justifying an award of attorneys’ fees. While Perry’s claim  
12 was ultimately unsuccessful, it was not wholly lacking in legal merit, and doesn’t justify  
13 the additional penalty of attorneys’ fees. See *Boyd v Accuray, Inc.*, 2012 WL 4936591,  
14 at \*4 (N.D. Cal. 2012) (“[A]lthough Plaintiff’s claims were insufficient to withstand summary  
15 judgment, they were not clearly frivolous or vexatious.”); see also *United States ex rel.*  
16 *Berg v. Honeywell Int’l, Inc.*, 2017 WL 1843688, at \*2 (D. Alaska 2017) (“The fact that this  
17 Court granted summary judgment in favor of Honeywell does not mean the result was  
18 ‘obvious’ or that Relators’ arguments were ‘wholly without merit.’”).

19 Pacific cites only two cases—both easily distinguishable—as authority for its point.  
20 At the same time, Pacific glosses over the fact that nearly all Section 3730(d)(4) claims  
21 are resolved in favor of not imposing fees. The cases relied on by Pacific do not meet  
22 the high bar for “rare and special circumstances.”

23 The first case, *U.S. ex rel. J. Cooper & Associates, Inc. v. Bernard Hodes Group,*  
24 *Inc.*, 422 F. Supp. 2d 225 (D.D.C. 2006), is a district court case that wasn’t decided under  
25 the same “rare and special circumstances” doctrine that governs in the Ninth Circuit. But  
26 even applying that heightened standard, *J. Cooper* is easily distinguishable. The court in  
27 *J. Cooper* dismissed the case on jurisdictional grounds almost immediately, finding that  
28 the plaintiff was not the direct source of the whistleblower information, a prerequisite for

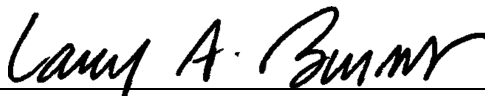
1 bringing a qui tam action. Id. at 235-37. A reasonable plaintiff would have been aware  
2 of this jurisdictional requirement, making J. Cooper's decision to file suit anyway  
3 sanctionable under Section 3730(d)(4).

4 In United States v. Safran Group, S.A., 2018 WL 558937 (N.D. Cal. 2018), the  
5 other case relied on by Pacific, the court granted attorneys' fees only for specific claims  
6 that were deemed to be clearly frivolous, rather than for the action as a whole. Allowing  
7 attorneys' fees to be apportioned by claim is antithetical to the "rare and special  
8 circumstances" doctrine, greatly increases the chances that whistleblowers will be taxed  
9 with fees, and thus decreases the chances of them pursuing claims in the first instance.  
10 It will also strain judicial resources by opening up nearly every failed claim under the False  
11 Claims Act to the possibility of a motion for attorneys' fees, even where many (but not all)  
12 of the allegations were strong. For these reasons, the Court rejects the tack followed in  
13 Safran Group.

14 In sum, while Perry's evidence fell short at summary judgment, it had a reasonable  
15 chance of success. Deeming his claims clearly frivolous is unwarranted and would likely  
16 discourage future whistleblowers from coming forward. Pacific's motion is **DENIED**.

17 **IT IS SO ORDERED.**

18 Dated: June 13, 2019

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21 **HONORABLE LARRY ALAN BURNS**  
22 Chief United States District Judge  
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