# EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA

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| UNITED STATES OF AMERICA | ) | |
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| | ) | |
| v. | ) | CASE NO. 5:07-CR-98-IPJ-PWG |
| | ) | |
| ALEXANDER NOOREDIN LATIFI and AXION CORPORATION. | ) | |

**DEFENDANT'S FIRST AMENDED MOTION FOR ATTORNEY FEES AND COSTS**

Defendant Alex Nooredin Latifi (hereinafter referred to as "Defendant") hereby submits his First Amended Motion for Attorneys Fees and Costs, and moves this Court pursuant to 18 U.S.C. § 3006A[1] (the "Hyde Amendment") to grant Defendant an award of attorney fees and costs following the Court's judgment of acquittal of all charges in the above-styled cause. In support of its motion, Defendant provides as follows:

1. The Government is liable to Defendant under the Hyde Amendment for his attorneys' fees and costs in this extraordinary case, which consisted of a more than three-year, bumbling investigation by inexperienced, gullible Government CID agents, culminating in a vexatious, frivolous, and bad faith prosecution that any reasonable prosecutor would have abandoned due to the

[1] Public Law No. 105-119, 111 Stat. 2440, 2519 (1997).

undisputed evidence and applicable law. Despite knowledge that the facts were woefully insufficient to prove guilt beyond a reasonable doubt, the Government prosecuted with bullheaded determination, haphazardly throwing anything and everything at the wall with the contemptible hope that something would stick. Ultimately, the case was dismissed in its entirety by this Court upon a motion for judgment of acquittal, but the damage to the Defendant's business, his reputation, and his emotional health are irreparable. While he can never be made whole, the Hyde Amendment dictates that he should at least recoup the reasonable attorneys' fees and costs that he incurred in defending this unjust and abusive prosecution.

## I. Background Facts

### (a) The Government's Baseless Accusations

2. In Counts 1 and 6 of the Superseding Indictment, the Government improperly alleged that Defendant willfully violated the Arms Export Control Act ("AECA"), 22 U.S.C. § 2778(c), in connection with Axion Corporation's bid to supply a helicopter part to the United States Army when the Government was aware that the facts would not support a conviction beyond a reasonable doubt. Specifically, the Government claimed Defendant emailed a drawing of a helicopter part to a proposed subcontractor in the People's Republic of China ("China") and to another proposed subcontractor in the United States, who thereafter forwarded the drawing to China. The Government levied such allegations despite its

knowledge that the drawings in question were misleadingly labeled in direct violation of a Department of Defense directive due to the Government's own recklessness or negligence. Furthermore, Government prosecutors and agents recklessly withheld or obfuscated this material, exonerating fact from two grand juries in their determination to secure an indictment at all costs.

3. In Count 2, the Government improperly alleged that Defendant violated 18 U.S.C. § 38, Fraud Involving Aircraft Parts, regarding the purchase of tungsten blanks in the manufacture of the helicopter part. The Government claimed the tungsten blank used in the first article submitted in connection with the helicopter part was not purchased from Tungsten Products as reported by Defendant in the First Article Test Report. At no time prior to the indictment of the Defendant for this offense did the Government interview the sales representative from Tungsten Products who provided Defendant with the tungsten blank used in the first article. Furthermore, the Government ignored other evidence which ultimately mandated an acquittal at trial, including the check tendered by Axion Corporation and cashed by Tungsten Products for the purchase of the tungsten blanks. Again, the Government willfully or recklessly withheld this information from the two grand juries impaneled to determine probable cause.

4. In Count 3, the Government improperly alleged that Defendant violated 18 U.S.C. § 1001 by filing false reports to the Government in connection

with Defendant's submission of the First Article Test Report for a separate contract to supply certain shock absorbers. Specifically, the Government alleged that Defendant signed and submitted to the Government three test reports that he knew to be false. These allegations were the result of misinformation provided by the Government's primary confidential informant, an employee of Defendant and Axion Corporation who embezzled funds from Defendant and was convicted in state court of possession of forged instruments – namely Axion Corporation checks that she wrote to herself by forging Defendant's signature. After learning that its informant had perfected the forgery of Defendant's signature, Government agents and prosecutors buried their heads in the sand and neglected to implore even the most elementary techniques of verifying the *bona fides* of the signatures on the test reports in question.

**(B) The Undisputed Evidence That Mandated Acquittal**

5. The drawings that formed the basis of Counts 1 and 6 of the Government's allegations were of a helicopter part called the "bifilar weight assembly," which essentially acts as a buffer on the rotary head of the UH-60 helicopter manufactured by Sikorsky Aircraft Corporation ("Sikorsky"). Sikorsky supplies the UH-60 Helicopter to many different countries for military use. The People's Republic of China has used the UH-60 Helicopter for many years.

6. The drawings in question were sent to Defendant by the United States Army as part of a solicitation of bids for procurement of the bifilar weight assembly for the Sikorsky UH-60 helicopter that the United States Army Aviation and Missile Command, Redstone Arsenal, Alabama ("Redstone Arsenal") distributed to various government contractors, including Defendant.[2] The bid solicitation was accompanied by a Compact Disk (the "CD") containing Sikorsky drawings of the bifilar weight assembly.[3]

7. Labeling was on the face of the CD, including a statement "For Official Government Business Only" and "Distribution Statement: C." Unlike other restricted procurements, however, there was no specific mention of the AECA or any export restriction or any other restriction on the CD label. When opened on a computer, the files stored on the CD consisted of different pages of Sikorsky drawings of the bifilar weight assembly.

8. No warning, label, or other notice appeared on any of the Sikorsky drawings on the CD disseminated to Defendant and others by the Army as part of the solicitation; nothing on the drawings indicated in any way that the drawing was intended to be or was subject to the AECA or any other restriction. None of the

[2] A true and correct copy of the solicitation is attached hereto as **Exhibit A**.

[3] A true and correct copy of the face of the CD that was sent to Axion Corporation as part of the government's initial solicitation is attached hereto as **Exhibit B**.

drawings on the CD contained any warnings or reference to the AECA or any other law or restriction. Some of the drawings contained on the CD carried the label: "THIS DRAWING CONTAINS NO CRITICAL CHARACTERISTICS. . . ." The printed drawings also contained language stating that they were "unrestricted."

9. More importantly, these drawings did not comply with the Government's Department of Defense Directive Number 5230.24 (the "DoD Directive"), which provides in pertinent part:

> Export Control Warning. All technical documents that are determined to contain export-controlled technical data shall be marked "WARNING – This document contains technical data whose export is restricted by the Arms Export Control Act (Title 22, U.S.C., App. 2401 et. seq.) or the Export Administration Act of 1979, as amended, Title 50, U.S.C., App. 2401 et. seq. Violations of these export laws are subject to severe criminal penalties. Disseminate in accordance with provisions of DoD [Department of Defense] Directive 5230.25."

*DoD Directive* at E3.1.1.8 (emphasis in original).[4]

10. Section 6.3.4 of the DoD Directive explicitly states that "all documents that are found to contain export-controlled technical data *shall* be marked with the export control statement contained in subsection E3.1.1.8." *See id.* (emphasis added). The DoD Directive further mandates that "[t]he distribution statement *shall* be displayed *conspicuously on technical documents so as to be*

[4] A true and correct copy of Department of Defense Directive 5230.24 is attached hereto as **Exhibit C**.

*recognized readily by recipients.*" DoD Directive at 6.8. (Emphasis added). It is undisputed that the drawings supplied in Redstone Arsenal's solicitation for the bifiler weight assembly upon which the Government based its vexatious allegations did not contain the above Export Control Warning mandated by the DoD Directive. Therefore, if a drawing was wrongfully disseminated, then it was the Government's fault— not the Defendant's.

11. In addition to the Government's knowledge that the drawings did not comply with its own DoD Directive, the Government established during grand jury testimony from an experienced NASA contractor that the drawings were not properly marked with the warning of any restrictions that are typically relied upon by Government contractors. *See* Exhibit 5 to Government's Response to Defendants' Motion to Dismiss (Doc 39).

12. Notably, the testimony of the Government's own witness clearly established that the drawing was not properly labeled and that government contractors commonly expect drawings that are subject to the requirements of the AECA to be marked with a warning of the restriction. This testimony demonstrated that both Defendant and the Government's witness had reviewed the drawing and determined that it did not carry the typical label or warning that would designate it as an item subject to export control.

13. Despite the Government's knowledge that the drawing was not marked as restricted and did not carry the warning mandated by the DoD Directive, the Government recklessly disregarded these facts which would have required any reasonable prosecutor to exercise discretion and defer prosecution. In essence, the Government recklessly proceeded on the warped theory that Defendant should be held criminally liable for the DoD's own admitted negligence or recklessness in improperly labeling the drawing.

14. Moreover, evidence admitted at Defendant's trial established that Government agents negligently failed to perform a thorough investigation prior to the Government seeking search warrants and an indictment. Particularly, the Government was aware when it filed charges against Defendant that much of its case was based upon uncorroborated testimony of a convicted felon who embezzled money from Defendant during the same time period that she was acting as an informant for the Government.

15. The Government was also aware that upon discovery of these nefarious acts, its primary confidential informant was terminated from Axion Corporation, convicted in state court of possession of a forged instrument, and thereafter sentenced to three years incarceration, placed on probation for four years, and ordered to pay $12,730 in restitution to Defendant. In its affidavit to United States Magistrate Judge T. Michael Putnam, however, the Government

deliberately or recklessly obfuscated this material fact by misstating that "Latifi filed fraud charges" against the informant after she provided information to the Government. In fact, as the agent then and there knew, Defendant had not filed fraud charges – to the contrary, the confidential informant had been arrested by the Madison County Sheriff's department for forging Defendant's signature on 17 Axion Corporation checks.

16. Upon discovering that he had been relying on a biased witness and admitted forger of Defendant's signature, any reasonably prudent agent would have at least secured handwriting exemplars from Defendant to test the authenticity of documents and signatures which ultimately became the subject documents in Count 3 of the Government's indictment. The Government not only failed to follow elementary investigative procedure in seeking handwriting exemplars in its more than three-year investigation, but it also failed to even test the *bona fides* of the signature on the subject documents until more than half-way through Defendant's trial, despite its knowledge that a known forger prepared and submitted the questioned documents to the Government.

17. His representations to Magistrate Putnam to the contrary, the agent (who is no longer employed by the Army CID) knew that such arrest did not occur after the Government's confidential informant had provided information regarding Defendant; rather, the agent continued to receive and rely upon misinformation

from the informant after her arrest, and the Government immunized her. The agent was further aware that the informant's termination and arrest occurred prior to the execution of the first search warrant and prior to Defendant's discovery that he was the target of a Government investigation.

18. In grand jury testimony proffered by the Government, this same agent materially misled the grand jury regarding the confidential informant's arrest by asserting that the informant claimed she had permission to write checks to herself—despite the agent's knowledge that the informant had pleaded guilty. He further downplayed the informant's sentence of incarceration and restitution by advising the jury that she simply "got probation."

19. Additionally, despite the fact that the Government's investigation had been pending for almost three years at the time charges were filed against Defendant, the Government deliberately neglected to investigate—or even interview—known, elementary witnesses, including the sales person at the "Alabama company" who sold and delivered the tungsten materials to Axion Corporation, the Army's Quality Assurance Representative who worked with Axion Corporation to assure compliance on the contracts in question, and the Alabama subcontractor who machined the bifilar weight assembly regarding his manufacturing of the bifilar weight assembly in Huntsville, Alabama. All of these witnesses had essential knowledge of the facts related to Counts 2 and 3 of the

superseding indictment and were known by the Government's agents and prosecutors. Inexplicably, the Government refused to interview these key witnesses during the almost three years of investigation that occurred prior to indictment. Further, the Government also deliberately withheld knowledge of these witnesses and its calculated decision not to interview them from Magistrate Putnam and the two grand juries impaneled to determine probable cause.

20. The Government also failed to examine or unjustifiably disregarded other essential evidence that would have caused any reasonable prosecutor to determine that the facts would not support a conviction beyond a reasonable doubt. First, the Government ignored or discounted Axion Corporation's Purchase Order to Tungsten Products which evidenced their purchase of the tungsten blank used to build the first article biflar weight assembly. Second, the Government refused to acknowledge the check Defendant provided to Tungsten Products for the purchase of the tungsten blank used in the First Article Test which was subsequently negotiated by Tungsten Products. Despite the Government's knowledge that the check had been negotiated and that the Defendant's agreement with Tungsten Products was for delivery upon payment, the Government inexplicably and doggedly maintained that the blank used to manufacture the First Article had not been procured from Tungsten Products.

**(c) Hyde Amendment Prerequisites**

21. Upon information and belief, on the date of the filing of this action Defendant Alex Nooredin Latifi had a net worth of less than $2,000,000.00 ($2 million) as required under the Hyde Amendment.

22. Defendant has outstanding attorneys' fees and costs that were not recouped in the Court's award of fees under the Civil Asset Forfeiture Reform Act in *United States v. Certain Real Property, et al.*, 2:06-CV-01102-VEH (N.D. Ala. 2007). Defendant requests the opportunity to present evidence to the Court regarding such outstanding costs and fees.

## II. Defendant is Entitled to an Award of Attorney Fees and Costs Under the Hyde Amendment.

The Hyde Amendment was proposed on September 24, 1997, by Congressman Henry Hyde to deal with the exact situation presented in the case *sub judice* – "to provide reimbursement for legal fees and expenses incurred by individual persons who the government prosecuted without substantial justification." *United States v. Morris*, 248 F. Supp. 2d 1200, 1204 (M.D. Ga. 2003). Congressman Hyde noted, "[i]f the Government, your last resort, is your oppressor . . . you really have no place to turn." *Id.* (citing 143 Cong. Rec. H7786-04, H7791 (Sept. 24, 1997)). Moreover, the remedy was created for someone who was "unjustly, maliciously, improperly, abusively tried by the Government, by the

faceless bureaucrats who hire a law firm or get a U.S. Attorney looking for a notch on his gun." 143 Cong. Rec. at H7792. As demonstrated by the Government's abusive and improper three year investigation of Defendant Alex Nooredin Latifi and his company, the Government's unjust and outrageous decision to indict Defendant despite the Government's full knowledge that the drawings which formed the basis of the charges were not properly marked as restricted by the AECA as mandated by the DoD directive, the Government's reliance on a convicted felon as the primary informant throughout the case, who was arrested for embezzling thousands of dollars from Defendant and admitted to sabotaging Defendant's record-keeping and Purchase Order system, and the bungling agent's indifference to obvious investigative techniques—never has an award under the Hyde Amendment been more appropriate than in this case.

Attorney's fees and expenses may be awarded to "a prevailing party, other than the United States, . . . 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." *United States v. Gilbert*, 198 F.3d 1293, 1298 (11th Cir. 1999). The terms "vexatious, frivolous, or in bad faith" are not defined by the statute, and have been "given their ordinary meaning." *Id.* (citing *Chapman v. United States*, 500 U.S. 453, 462 (1991)).

The term "vexatious" has been defined as "without reasonable or probable cause or excuse." *Gilbert*, 198 F.3d at 1299 (citing BLACK'S LAW DICTIONARY 1559 (7th ed. 1999)). In other contexts, "vexatious" conduct has been described as "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). A "frivolous action" is one that is "[g]roundless ... with little prospect of success; often brought to embarrass or annoy the defendant." *Gilbert*, 198 F.3d at 1299. Finally, "bad faith is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; ... it contemplates a state of mind affirmatively operating with furtive design or ill will." *Id.* (internal quotations omitted).

The Government's decision to charge Defendant with violating the AECA based upon the Government's own negligent or reckless failure to properly label the drawings in direct violation of its own DoD Directive, when the drawings were even marked "uncontrolled," was clearly vexatious, groundless, and without foundation. *See United States v. Holland*, 34 F. Supp. 2d 346, 364 (E.D. Va.1999) (stating that the proper inquiry is "whether a reasonable prosecutor should have concluded that the applicable law and the available evidence were insufficient to prove . . . guilt beyond a reasonable doubt, and [ ] if so, was the continuation of the prosecution vexatious"). As established in *United States v. Adames*, 878 F.2d

1374, 1377 (11th Cir. 1989), "[s]ection 2778(c) . . . imposes criminal sanctions only on those persons who '*willfully*' violate the AECA and the regulations promulgated thereunder." (Emphasis Added).

The Government must prove defendants had the specific intent to violate the statute to sustain a conviction under the AECA. *United States v. Johnson*, 139 F.3d 1359 (11th Cir. 1998). However, the Government was aware that the drawings were not properly marked and was presumably aware of its own DoD directive which requires a conspicuous warning. If the investigators and prosecutors were not initially aware of these unquestionably exonerating facts, they were made aware prior to indicting Defendant in grand jury testimony from the Government's own witness that the drawings were not properly marked. At all times during the investigation of the Defendant, the grand jury proceedings, and trial, the Government's position was foreclosed by binding precedent from the Eleventh Circuit that precludes a conviction under the AECA for Defendant's innocent error in sending improperly marked drawings outside of the United States. *See Adames*, 878 F.2d at 1377 ("[t]his requirement of willfulness connotes a voluntary, intention violation of a known legal duty."); *see also United States v. Davis*, 583 F.2d 190, 193 (5th Cir. 1978) ("Because the items covered by the statute are spelled out in administrative regulations and include items not known

generally to be controlled by the government, [we infer] that Congress did not intend to impose criminal penalties on innocent or negligent errors.").

Additionally, as established at trial, the Government's charge in Count 2 of Fraud Involving Aircraft Parts had absolutely no factual support. The Government recklessly failed to investigate the sales person who provided the tungsten blank to Defendant prior to indictment and willfully refused to examine both the Purchase Order evidencing the sale of the blank and the check issued to and negotiated by Tungsten Products for the blank prior to indictment. The Government's failure to consider this evidence during the three year investigation of Defendant is nothing less than unreasonable. Thus, Defendant's prosecution was without foundation and the reasonable prosecutor would have elected not to pursue a conviction due to the insufficiency of the evidence against Defendant. No reasonable prosecutor would take the capricious position that the Government took in this case—essentially, posing that the Government bears no responsibility for its own reckless failures, but rather, that such Government failures should be leveraged to secure a criminal conviction against Defendant. The Government's position was nothing short of vexatious. *See Holland*, 34 F. Supp. 2d at 364.

Moreover, the evidence admitted at trial "supports the conclusion that the government's position was so obviously wrong as to be frivolous." *United States v. Braunstein*, 281 F.3d 982, 996 (9th Cir. 2002). First, the drawing Defendant was

alleged to have distributed in violation of the AECA was *never* labeled as restricted by the AECA. Likewise, similar drawings are available on the internet for world wide consumption at http://www.tpub.com/content/hseries/TM-1-1520-265-23/css/TM-1-1520-265-23_112.htm. More importantly, the Government's own witnesses admitted the drawing was not marked according to DoD Directive 5230.24, as the witness – and all government contractors – would expect of a document that was restricted by the AECA. Each of the Government's witnesses, including experts from the State Department and the Department of Defense, testified at trial that the drawing *was not marked* with the proper restrictions. Defendant could not have been convicted of *willfully* violating a statute by distributing a document that was not, in fact, actually marked restricted absent any other knowledge that the drawings were restricted.

The Government's unquestioning reliance on a known forger to support its charge in Count 3, Filing False Reports, further supports the frivolous nature of this prosecution. Failing to obtain handwriting exemplars from the Defendant or the informant, who had been convicted of forging Defendant's signature and sentenced to three years incarceration, is obviously wrong in light of Defendant's signature on the report as the sole basis of this charge. Verifying that the signatures on the reports were, in fact, those of the Defendant – and not the informant – would have been the only reasonable action prior to indictment. From

the beginning, the Government was aware it had little, if any, chance of success on this charge. Accordingly, the Government's case against Defendant was frivolous. *See Braunstein*, 281 F.3d at 995-97.

Finally, the Government's prosecution of Defendant was in bad faith. The Government agents investigating Defendant intentionally or recklessly failed to perform a thorough investigation of the case despite the almost three years of investigation and two grand juries that occurred prior to Defendant's indictment. These agents failed to interview key witnesses, neglected to keep proper written notation of interviews, failed to obtain handwriting from the accused, and filed misleading sworn statements to Magistrate Putnam to obtain a search warrant. Further, the Government continued to rely on the primary confidential informant following her arrest for embezzling funds from Defendant. The material omissions and knowing falsehoods presented to both Magistrate Putnam and two grand juries impaneled to determine probable cause demonstrates the Government acted consciously with a dishonest purpose and operated with furtive design. *Gilbert*, 198 F.3d at 1299. The Government's position in prosecuting Defendant was obviously in bad faith and must be soundly condemned by our system of equal justice.

The Government not only prosecuted Defendant without any reasonable basis, but also smeared Defendant in the press by disingenuously causing a

national press release to issue announcing allegations that it knew or that any reasonable prosecutor would know could not be supported by the facts and applicable law. *See DOJ Press Release,* "Alabama Defense Contractor And Its Owner Indicted For Illegal Exports of Military Technology" (March 29, 2007) at http://birmingham.fbi.gov/dojpressrel/pressrel07/bh032907.htm (last viewed December 12, 2007). Such a baseless attempt to discredit Defendant in the national press is a further indication of the misguided, Nifong-esque prosecutorial zeal employed in this case and is totally outside the bounds of propriety. Further, the Government continued to issue new press statements about the Axion indictment up to the trial despite its representations to the Court and to Defendant that it would make no further press releases until after the conclusion of the trial. *See e.g.* http://hongkong.usconsulate.gov/uscn_others_2007101103.html (press statement issued on October 11, 2007 summarizing Axion Corporation indictment). To add insult to injury, the Government persists in defaming Defendant by continuing to post the press release on its various websites, despite this Court's Order of Acquittal. *See also* http://www.usdoj.gov/usao/aln/Docs/March%202007/MAR2907__DefenseContractor.htm ; http://www.usdoj.gov/opa/pr/2007/October/07_nsd_807.html ; http://www.bis.doc.gov/news/2007 /doj10_11_07factsheet.html; http://hongkong.usconsulate.gov/uscn_others_2007101103.html.

## III. Conclusion

Accordingly, Defendant is entitled to an award of attorney fees and costs of litigation due to the Government's vexatious, frivolous, and bad faith prosecution of Defendant. *Gilbert*, 198 F.3d at 1296. *See also U.S. v. Adkinson*, 247 F.3d 1289 (11th Cir. 2001).

WHEREFORE, Defendant Alex Nooredin Latifi respectfully moves this Court to grant its motion for attorney fees and costs under 18 U.S.C. § 3006A.

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 12, 2008, the foregoing has been served upon the following counsel of record via CM/ECF system which will send notification of such filing to the following:

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