

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

UNITED STATES OF AMERICA )  
)  
Plaintiff, )  
vs. ) 5:07-CR-00098-IPJ-PWG  
)  
ALEXANDER NOOREDIN LATIFI )  
and AXION CORPORATION, )  
)  
Defendants. )

**MOTION FOR AN ORDER TO SHOW CAUSE WHY DAVID H. ESTES,  
ANGELA REDMOND DEBRO, ALICE H. MARTIN,  
DAVID BALWINSKI, MARCUS MILLS, AND JAMES  
OGELSBY SHOULD NOT BE HELD IN CONTEMPT OF COURT**

Pursuant to Fed. R. Crim. P. 42, Defendants Axion Corporation and Alexander (sic) Nooredin Latifi move the Court to order Assistant United States Attorneys David H. Estes (Estes) and Angela Redmond Debro (Debro), former United States Attorney Alice H. Martin (Martin), Special Agents David Balwinski (Balwinski) and Marcus Mills (Mills) of the Army Criminal Investigation Command, and trial witness James Ogelsby (Ogelsby) to show cause why they should not be held in contempt of court. Defendants have recently uncovered dramatic evidence demonstrating that the above named prosecutors and investigators concealed material exculpatory evidence from Defendants in violation of their obligations under Fed. R. Crim. P. 16(a) and *Brady v. Maryland* and deliberately presented false, incomplete, and misleading evidence to this Court

in violation of 18 U.S.C. § 1622. Similarly, Defendants have recently received information that Ogelsby presented perjured testimony to the Court in violation of 18 U.S.C. § 1623. Upon discovery of this information Defendants through undersigned counsel immediately contacted the office of the United States Attorney for the Northern District of Alabama and requested immediate attention to these issues. To date, however, the matter remains unresolved. In support of their motion, Defendants state as follows:

**a. Background**

1. On March 28, 2007 the United States filed an Indictment (Doc. 1, Superseding Indictment filed May 2, 2007, Doc. 9) against Defendants in this case. The Government was represented by Martin, Estes, and Debro.

2. Included in the Indictment was an 18 U.S.C. § 1001 count against Defendants based upon an allegedly false first article test report (FATR) for the bifilar weight assembly. The crux of the charge was the allegation that Axion, in submitting its FATR, certified that its tungsten blank was supplied by Tungsten Products, a subsidiary of Allegheny Technologies, Inc. in Madison, Alabama, when in fact it was not. The central proof for that allegation was the testimony of Tungsten Products plant manager Oglesby, who in early 2004 told investigators Balwinski and Mills that Axion had not received blanks from Tungsten Products until January 9, 2004 – too late to be used in Axion’s FATR – and that if Latifi said

otherwise he was “lying.” *See* Memorandum of Interview attached to this motion as **Exhibit A** (this document was dictated and transcribed by undersigned counsel and their office staff from the Government’s investigatory notebook).

3. Beginning October 22, 2007, the Court held a seven day trial in this case. On October 31, 2007, the Court entered a judgment of acquittal and dismissed all charges. (Doc. 61). On December 12, 2007, Defendants filed a motion seeking to recover fees and costs under the Hyde Amendment on grounds that the prosecution of Defendants was vexatious, frivolous, and conducted in bad faith. (Doc. 63). As partial grounds for its motion, as well as for the complaint lodged by the undersigned with the Department of Justice Office of Professional Responsibility, Defendants cited the perjurious testimony given by Oglesby and suborned by the prosecution. Defendants based their contentions in part upon the account of Joseph Ferrante (Ferrante) a former Tungsten Products account sales manager who dealt extensively with Axion. Ferrante was subpoenaed by the Government to appear at trial but was never called. His account directly contradicts that of Oglesby. Subsequently, Ferrante has informed Defendants and undersigned counsel in a sworn affidavit that he was pressured by Estes and Balwinski to change his testimony, but he refused.

**b. Newly Discovered Evidence of Fraud on the Court**

4. Defendants and their counsel now have explicit, unequivocal evidence that Estes, Debro, Mills, and Balwinski, under the supervision and with the complicity of Martin, conspired with Oglesby to conceal material, exculpatory evidence and to perpetrate a fraud on this Court.

5. On August 27, 2009, Axion received certain documents through civil discovery in a related lawsuit against Allegheny Technologies Incorporated (ATI), corporate parent of the business unit known as Tungsten Products. Axion had in that case specifically and repeatedly requested all communications between ATI and any agents of the Department of Defense or Department of Justice. When those communications were finally produced, they revealed the extent of the misconduct suspected by Defendants:

6. On October 2, 2007, less than three weeks before trial, Balwinski sent an email to ATI's legal department, copying Estes and Debro. Attached hereto as **Exhibit B**, the email states as follows:

Yesterday afternoon, Ane Debro, David Estes, and I met with Joe Ferrante, former sales representative for Allegheny Technologies, Inc. (ATI), to discuss his potential testimony at the pending trial of Axion Corporation and Alex Latifi.

Ferrante raised several issues that need to be clarified prior to trial . . .

Ferrante stated it was possible that Latifi could have been given one bifilar from floor stock and the remaining two on 9 Jan 04 . . . Additionally, Ferrante said that Steve Muller and/or JB Oglesby

would have to approve the release of the floor stock piece before it was given to Latifi.

Finally, Ferrante stated the ATI documents currently in our possession are from the sales office, and that the “work orders” for the bifilar blanks would be the most accurate means of determining when the bifilars were produced and delivered to Axion.

7. On October 5, 2007 – 17 days before trial – ATI attorney Lauren McAndrews (McAndrews) replied to Balwinski’s email, copying Debro: “I had the opportunity to speak with JB Oglesby about this. He is looking for the work order. I can further explain his reactions to Mr. Ferranti’s (sic) statement. I will call you to discuss.”

8. A phone interview of Oglesby was set up by Debro and McAndrews for Tuesday, October 9, 2007 – 13 days before trial – and evidently took place. *See* Emails attached hereto as **Exhibit C**. In discovery in this case, Defendants requested that all investigatory notes and memoranda be produced. Defendants’ attorneys have reviewed their files and found no record that this interview was ever provided to Defendants by the Government.

9. On October 12, 2007 – 10 days before trial – McAndrews sent an email to Debro and Balwinski attaching the work orders (the Work Orders) evidently discussed in the October 9, 2007 interview. The October 12, 2007 email and attached Work Orders are attached hereto as **Exhibit D**. Again, Defendants’ attorneys have reviewed their files and found no record that this email or the highly

relevant and clearly exculpatory work orders were ever produced to Defendants by the Government.

10. On October 16, 2007 – 6 days before trial – Debro sent an email to McAndrews, copying Balwinski and asking for another meeting with Oglesby. Evidently, they spoke. *See* emails attached hereto as **Exhibit E**. Again, no record of this interview was ever provided to the Defendants. Plainly, however, they must have discussed the recently transmitted Work Orders and Oglesby’s forthcoming testimony.

11. As Defendants have discovered, the Work Orders directly contradict Oglesby’s testimony regarding ATI’s January 9, 2004 delivery of the blanks to Axion. Comprising a step-by-step record of the manufacture of the bifilar blanks by ATI, the Work Orders bear the endorsement “Per J. Ogelsby,” along with handwritten notes requiring delivery of the blanks by December 22, 2003. Finally, the Work Orders bear two stamps showing that two blanks were, in fact, shipped to Axion on December 22, 2003.

12. With the aid and participation of Oglesby, the prosecution obfuscated this plainly exculpatory evidence. No disclosure was ever made to Defendants of this documentary or other evidence tending to disprove the Government’s case. The above-cited emails demonstrate that the Government was well aware of the import of these documents and was desperate to have them explained prior to trial.

Yet, upon receiving whatever explanation was forthcoming, the Government elected to bury this evidence. Instead, the Government called Oglesby not once, but twice, to offer misleading half-truths as well as outright lies. Knowing full well of documents indicating delivery on December 22, 2003, and of their importance, Oglesby testified unequivocally that the blanks could only have been delivered on January 9, 2004 and that a bill of lading of that date was the best evidence of their delivery. When he was asked if there were any documents indicating an earlier delivery, he denied the existence of the Work Orders:

Estes: You stated that you may not personally know of every bifilar blank that leaves Tungsten Products; is that correct?

Oglesby: Correct.

Estes: But there would be documentation for every bifilar blank that leaves Tungsten Products?

Oglesby: Correct.

Estes: And was there any documentation, other than those three blanks right there, for Axion before you went into production?

Oglesby: No.

Estes: Thank You.

See Trial Transcript, Day 1, p. 220, (emphasis added) a copy of which is attached hereto as **Exhibit F**.

13. The withholding of the Work Orders by Estes, Debro, and Martin constitutes a manifest violation of their Fed. R. Crim. P. 16 and *Brady* obligations as well as their ethical obligations as attorneys and officers of this Court. That violation was exponentially compounded by the presentation of incomplete, misleading evidence to the Court. The email correspondence leaves no doubt that Debro and Balwinski participated in the pre-trial conception of this scheme, then watched as Estes adduced the perjurious testimony of Oglesby who stated unequivocally that no other documents or proof existed other than those that had been presented to the Court when, in fact, he knew that the Work Orders not only existed but tended to prove a December 22, 2003 delivery and corroborate the prior interviews of Joseph Ferrante. All of these individuals sought to present false evidence to the Court with the hope of convicting Defendants of a crime they knew Defendants had not committed. Had their plan succeeded, Mr. Latifi might have spent the remainder of his life in prison. Defendants and their undersigned counsel can conceive of no possible legal, ethical, or moral explanation for the conduct herein described.

WHEREFORE, Defendants move the Court to issue an order directing Estes, Debro, Martin, Balwinski, and Oglesby to show cause why they should not be held in contempt of court, and to provide such other, further, or different relief as the Court finds justice to require, including but not limited to substantial

monetary penalties imposed for the expenses, anguish, and attorneys' fees incurred by Defendants as a consequence of the outrageous, contemptuous act of the aforementioned individuals.

Date: September 14, 2009.

/s/ Henry I Frohsin  
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**CERTIFICATE OF SERVICE**

I hereby certify that on September 14, 2009, the foregoing has been filed using the CM/ECF system, which will notify counsel of record as follows:

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