

1 Jurisdiction and Venue

2 2. This Court has subject matter jurisdiction over this action and personal jurisdiction
3 over the parties pursuant to 5 U.S.C. § 552(a)(2)(A), 5 U.S.C. § 552(a)(2)(C), 5 U.S.C. §
4 552(a)(3)(A), 5 U.S.C. § 552(a)(3)(C) , 5 U.S.C. § 552(a)(6)(A)(ii), and 5 U.S.C. §
5 552(a)(6)(F).

6
7 3. Venue is proper in this district pursuant to Section 552(a)(4)(B), as this is the
8 district in which plaintiff resides.

9
10 Parties

11 4. Plaintiff Jed Margolin (“Margolin”) is an engineer and independent inventor who
12 resides at 1981 Empire Rd., VC Highlands, Nevada.

13
14 5. Defendant National Aeronautics and Space Administration (“NASA”) is an
15 independent administrative agency within the Executive Branch of the United States
16 within the meaning of 5 U.S.C. § 551(1) and 5 U.S.C. § 552(f)(1). Defendant Charles F.
17 Bolden is the Administrator of the National Aeronautics and Space Administration.

18
19 Statement of Facts - Background

20 6. Margolin is the named inventor on U.S. Patent 5,904,724 **Method and apparatus**
21 **for remotely piloting an aircraft** issued May 18, 1999 (the ‘724 patent). The front page

1 of the patent is in Exhibit 1 at Appendix A15. The patent teaches the use of what is now
2 called *synthetic vision* for controlling an unmanned aerial vehicle (UAV).

3
4 7. Margolin contacted NASA in May 2003 after he became aware that NASA had
5 used synthetic vision in the X-38 project. Because the use of synthetic vision for
6 controlling a UAV can be used to the detriment of this country by unfriendly entities he
7 wanted a friendly conversation because he thought NASA should buy the patent in order
8 to control the technology.

9
10 8. In June 2003 Margolin was turned over to Mr. Alan Kennedy in the Office of the
11 General Counsel. This is what Margolin recorded in his Contact Log:

12 *Summary: He basically said that what most independent inventors have is junk and*
13 *that since I am an independent inventor what I have is probably junk. If NASA*
14 *evaluates it as a license proffer it will give it a pro forma rejection and I will file a*
15 *claim anyway, so the same people who rejected it as a proffer will reject it as a*
16 *claim, but in the process will have had to do more work, so to save them some work*
17 *they will ignore the proffer and handle it as a claim.*
18

19 9. As a result, Margolin filed a claim, completely answering all the questions on
20 NASA's claim form. See Exhibit 1 at Appendix A5. Then Mr. Kennedy informed him
21 that NASA would conduct an investigation (expected to last 3-6 months) and that the
22 purpose of the investigation would be to find prior art to invalidate the patent.

23
24 10. After six months Margolin did not hear from NASA so he called Mr. Kennedy,
25 who said:

- 1 a. The investigation had not been done.
- 2 b. NASA had a Research Exemption for using the patent. Margolin advised him this
3 was not true. *See Madey v. Duke* 307 F.3d 1351 (Fed. Cir. 2002).
- 4 c. "The X-38 never flew." Margolin informed him of the video on NASA's web site
5 showing the X-38 flying.
- 6 d. The Statute of Limitations gives NASA 6 years to respond to his claim.
- 7 e. It would cost Margolin more to sue NASA in Federal Claims Court than he could
8 hope to recover from NASA.

9
10 11. After that, Mr. Kennedy refused to talk to Margolin or respond to his letters. Then,
11 various things came up and Margolin was unable to pursue his claim against NASA.

12
13 12. Subsequently, Margolin assigned the patent to Optima Technology Group, a
14 Delaware Corporation. The claim against NASA went along with the patent.

15

16 Statement of Facts - Current Case

17 13. Although Margolin no longer owned the claim against NASA he still wanted to
18 know the results of NASA's investigation so, on July 1, 2008 he filed a FOIA request.
19 See Exhibit 2 at Appendix A20. It was assigned FOIA HQ 08-270. For some reason it
20 was turned over to Mr. Jan McNutt in the Office of the General Counsel. Mr. McNutt's
21 response is Exhibit 3 at Appendix A22. In his response Mr. McNutt admitted that no

1 investigation had been done and asked Margolin to give NASA a 90-day extension to his
2 FOIA request.

3
4 14. Margolin agreed to the extension. See Exhibit 4 at Appendix A24. However,
5 despite being told several times that the requested documents were being sent out, NASA
6 did not send any documents to Margolin until May 18, 2009. It is likely that the reason
7 NASA finally responded to Margolin's FOIA Request is the fax he sent to Acting
8 Administrator Christopher Scolese where he asked Mr. Scolese to confirm that he had
9 exhausted all the administrative remedies that NASA had to offer. See Exhibit 5 at
10 Appendix A26. Margolin had previously sent the letter to Mr. Scolese by Certified Mail,
11 but USPS did not deliver it and had no explanation how or where it was lost.

12
13 15. NASA's response to Margolin's FOIA Request is in Exhibit 6 at Appendix A30.
14 The documents themselves have been omitted from this Complaint due to their length.
15 The NASA Response states:

16 It has been determined that portions of the records found responsive to your request
17 contain information which is exempt from disclosure under the deliberative process
18 privilege of Exemption 5. This privilege covers advisory opinions, recommendations,
19 and deliberations, which are part of the government decision-making process, 5.
20 U.S.C. § 552(b)(5).
21

22 16. Although 5 U.S.C. § 552(a)(6)(F) requires agencies to give an estimate of the
23 volume of the documents being withheld, NASA failed to do so.

24

1 17. One of the documents that NASA withheld from Margolin is a letter dated March
2 19, 2009 that was sent by Gary G. Borda (“Borda”) NASA Agency Counsel for
3 Intellectual Property to Optima Technology Group (“OTG”). See Exhibit 7 at Appendix
4 A33. This document was given to Margolin by OTG. In this letter Borda denies Claim I-
5 222 regarding NASA’s infringement of U.S. Patent 5,904,724 (‘724) in the X-38 project.
6 Margolin’s FOIA 08-270 request to NASA was to produce documents relating to Claim
7 I-222 and NASA withheld the most material document so far. The Borda letter asserts:

8 “... numerous pieces of evidence were uncovered which would constitute
9 anticipatory prior knowledge and prior art that was never considered by the U.S.
10 Patent and Trademark Office during the prosecution of the application which
11 matured into Patent No. 5,904,724.”
12

13 And threatens, “... NASA reserves the right to introduce such evidence of invalidity in an
14 appropriate venue, should the same become necessary.”

15
16 The only appropriate venues for NASA to challenge the validity of a U.S. Patent are the
17 U.S. Court of Federal Claims, the U.S. Court of Appeals for the Federal Circuit, and the
18 USPTO. The Courts and the USPTO will not accept NASA’s word that a patent is invalid
19 due to prior art. NASA would be required to produce the evidence. Because NASA’s
20 threatened use of the Borda Patent Report requires that it be made public, it is not subject
21 to the Deliberative Process, Attorney Work Product, or Attorney-Client exemptions of 5
22 U.S.C. § 552(b)(5). Therefore, the exemption NASA claims under 5 U.S.C. § 552(b)(5)
23 does not apply.

1 There is another reason NASA needs to produce the Borda patent report. Although
2 Margolin no longer owns the '724 patent he is still the named inventor. By asserting it
3 has evidence to invalidate the patent, and then withholding that evidence, NASA has
4 defamed Margolin's reputation as an inventor. It smacks of 1950s McCarthyism (making
5 damaging accusations without providing proper evidence).

6
7 18. Margolin filed a FOIA Appeal on June 10, 2009. The Margolin Appeal is Exhibit
8 8 at Appendix A39. The Appendices in the appeal have been omitted due to their length.
9 Margolin's FOIA Appeal was received at NASA Headquarters on June 12, 2009. See
10 Exhibit 9 at Appendix A60.

11
12 19. On Monday, July 21, 2009, Margolin called the NASA Office of the General
13 Counsel to inform NASA that they had failed to respond by the 20 day statutory deadline
14 required by 5 U.S.C. § 552(a)(6)(A)(ii), and to ask what NASA's intentions were.
15 Margolin spoke to Mr. Randolph Harris who said he would look into the matter and call
16 him back later that day. Mr. Harris did not call Margolin back that day, so the next day
17 Margolin called Mr. Harris. Mr. Harris said that NASA would be sending Margolin a
18 bunch of documents but he did not know what the documents were or when they would
19 be sent. He guessed seven days. Margolin also asked whether NASA would waive legal
20 service and accept a Complaint by USPS Express Mail. Mr. Harris said, "No." Only
21 Certified mail. After Margolin told him about the problem when he had sent NASA the

1 letter of April 6, 2009 to Acting Administrator Scolese (USPS never delivered it) Mr.
2 Harris still said, “No.” Margolin emailed Mr. Harris a letter asking him to confirm what
3 he had said in the telephone conversation. See Exhibit 10 at Appendix A62.

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5 20. Margolin did not receive a reply from Mr. Harris. Instead he received an email
6 from Mr. Jan McNutt, who asked for a 20-day extension for NASA to respond to
7 Margolin’s FOIA Appeal. See Exhibit 11 at Appendix A64. Whereas Mr. Harris had
8 promised NASA would be sending more documents, Mr. McNutt did not. Since NASA
9 had been acting in bad faith toward Margolin for over six years and Mr. McNutt had
10 already taken improper advantage of the number of courtesies Margolin had extended to
11 him regarding Mr. McNutt’s actions in the FOIA request, Margolin said, “No” to Mr.
12 McNutt’s request for an extension. See Exhibit 12 at Appendix A66. NASA had failed to
13 respond to his FOIA Appeal (or ask for an extension) within the 20 day statutory period
14 required by FOIA, and there was no reason to believe NASA had changed course and
15 was suddenly going to start acting in good faith.

16 21. It is possible that Mr. Borda was being mendacious in his letter of March 19, 2009
17 when he said that NASA had prior art to invalidate the ‘724 patent. See Exhibit 7 at
18 Appendix A33. Otherwise he would have produced the patent report, or at least listed the
19 evidence, to prove his point. It is possible that Mr. McNutt’s request for an extension was
20 to give NASA time to look for some. Therefore, time is of the essence in compelling
21 NASA to respond now.

1 22. Mr. Mike Abernathy of Rapid Imaging Software co-authored an article in
2 AUVSI's *Unmanned Systems Magazine* which presented a spurious history of synthetic
3 vision (**Synthetic Vision Technology for Unmanned Systems: Looking Back and**
4 **Looking Forward** by Jeff Fox, Michael Abernathy, Mark Draper and Gloria Calhoun).
5 See Exhibit 13 at Appendix A69. Margolin responded with the article **Synthetic Vision –**
6 **The Real Story**. See Exhibit 14 at Appendix A72. Although the editor of AUVSI
7 Magazine had promised Margolin the opportunity to respond in the magazine, he later
8 refused to even mention the controversy about the Abernathy article. See Exhibit 15 at
9 Appendix A130. As result, Margolin posted his response on his personal web site at
10 www.jmargolin.com .

11
12 Mr. Abernathy's company provided the synthetic vision software for the X-38 project
13 (Exhibit 1 at Appendix A6) which is why NASA should disclose their contacts with Mr.
14 Abernathy and his company regarding the I-222 claim, the '724 patent, and NASA's
15 allegation that it has prior art to invalidate the '724 patent.

16
17 23. After Margolin commenced this Court action NASA sent Margolin its Denial of
18 Margolin's FOIA Appeal. (See Exhibit 16 at Appendix A134) On August 10, 2009
19 Margolin received NASA's Denial of his Appeal. The letter was from Thomas S.
20 Luedtke, Associate Administrator for Institutions and Management. It was dated August
21 5 (four days after Margolin's Complaint appeared on Pacer and two days after Margolin

1 served the U.S. Attorney) and postmarked August 6, which was the same day the Post
2 Office delivered Margolin's Summons and Complaint to NASA. NASA denied
3 Margolin's Appeal and produced no additional documents, only more reasons to withhold
4 them.

5 **Cause of Action**
6 (Breach of Duty to Disclose Responsive Documents)
7

8 24. Plaintiff incorporates and re-alleges all preceding paragraphs as if fully set out
9 herein.

10
11 25. Defendants have violated their duty of disclosure under 5 U.S.C. § 552(a)(2) *et seq.*
12 by failing to disclose all documents related to the Administrative Claim of Jed Margolin
13 for Infringement of U.S. Patent Nos. 5,566,073 and 5,904,724; NASA Case No. I-222.

14
15 26. Plaintiff has constructively exhausted all his administrative remedies as set forth in
16 5 U.S.C. § 552(a)(6)(C)(i).

17

Requested Relief

WHEREFORE, plaintiff respectfully requests that this Court:

- A. Order defendant to disclose requested records in their entireties and provide copies to plaintiff, said records to include the patent report alleged to exist, but not provided, in the Borda letter, and contacts between NASA and Mike Abernathy (and/or Rapid Imaging Software and/or its employees and/or agents);
- B. Issue an Order finding that defendant's actions were in bad faith, arbitrary, capricious, and contrary to law;
- C. Provide for expeditious proceedings in this action;
- D. Award plaintiff his costs incurred during the administrative proceedings and in this action; and
- E. Grant such other relief as the Court may deem just and proper.

Respectfully submitted,

/Jed Margolin/

Jed Margolin, plaintiff pro se
1981 Empire Rd.
VC Highlands, NV 89521-7430
775-847-7845
jm@jmargolin.com

Dated: September 24, 2009

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the foregoing FIRST AMENDED COMPLAINT has been made by electronic notification through the Court's electronic filing system on September 24, 2009.

/Jed Margolin/

Jed Margolin