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10 UNITED STATES DISTRICT COURT
11 DISTRICT OF NEVADA
12

JED MARGOLIN,)	
)	Case No. 3:09-cv-00421-LRH-(VPC)
Plaintiff,)	
)	
vs.)	MOTION FOR SUMMARY JUDGMENT
)	
NATIONAL AERONAUTICS AND)	AND
SPACE ADMINISTRATION,)	
)	MEMORANDUM OF POINTS AND
Defendant.)	AUTHORITIES IN SUPPORT THEREOF
)	

13
14

15 Comes now Plaintiff, Jed Margolin (“Margolin”), appearing pro se, and files his Motion
16 for Summary Judgment. This motion is made pursuant to Rule 56, Fed. R. Civ. P., and is made
17 on the grounds that there is no genuine issue as to any material fact and that Plaintiff is entitled
18 to summary judgment as a matter of law with respect to the violation by the Defendant, National
19 Aeronautics and Space Administration (“NASA”), of the duty imposed on it by 5 U.S.C. § 552,
20 *et seq.* to disclose and release requested agency records improperly withheld from Plaintiff.

21 This motion is based upon the pleadings, papers, exhibits, and the following
22 memorandum of points and authorities filed in this action.
23

1 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S
2 MOTION FOR SUMMARY JUDGMENT

3
4 Standard of Review

5 Summary judgment is the procedural vehicle by which nearly all FOIA cases are
6 resolved,¹ because "in FOIA cases there is rarely any factual dispute . . . only a legal dispute
7 over how the law is to be applied to the documents at issue."²

8 Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil
9 Procedure, which provides, in part, that the "judgment sought should be rendered if the
10 pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no
11 genuine issue as to any material fact."³

¹ See, e.g., *Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1243 (11th Cir. 2008) ("Generally, FOIA cases should be handled on motions for summary judgment, once the documents at issue are properly identified." (quoting *Miscavige v. IRS*, 2 F.3d 366, 369 (11th Cir. 1993))); *Wickwire Gavin, P.C. v. USPS*, 356 F.3d 588, 591 (4th Cir. 2004) (declaring that FOIA cases are generally resolved on summary judgment); *Cooper Cameron Corp. v. Dep't of Labor*, 280 F.3d 539, 543 (5th Cir. 2002) ("Summary judgment resolves most FOIA cases."); *Moore v. Bush*, 601 F. Supp. 2d 6, 12 (D.D.C. 2009) ("FOIA cases are typically and appropriately decided on motions for summary judgment."); *Harrison v. EOUSA*, 377 F. Supp. 2d 141, 145 (D.D.C. 2005) (same); *Raytheon Aircraft Co. v. U.S. Army Corps of Eng'rs*, 183 F. Supp. 2d 1280, 1283 (D. Kan. 2001) ("FOIA cases . . . are especially amenable to summary judgment because the law, rather than the facts, is the only matter in dispute."); *Sanderson v. IRS*, No. 98-2369, 1999 WL 35290, at *2 (E.D. La. Jan. 25, 1999) (observing that summary judgment is the usual means for disposing of FOIA cases).

² *Gray v. Sw. Airlines, Inc.*, 33 Fed. Appx. 865, 869 n.1 (9th Cir. 2002) (citing *Schiffer v. FBI*, 78 F.3d 1405, 1409 (9th Cir. 1996)) (non-FOIA case).

³ Fed. R. Civ. P. 56(c); see, e.g., *McClain v. DOJ*, 17 Fed. Appx. 471, 474 (7th Cir. 2001) ("[T]he purpose of summary judgment is to isolate and dispose of factually unsupported claims[.]").

1 In a Freedom of Information Act (“FOIA”), the requester of agency records is entitled to
2 summary judgment if he establishes that a proper request has been made for a document that
3 does not fall within a permitted statutory exemption from disclosure. *Willamette Industries, Inc.*
4 *v. U.S.*, 689 F.2d 865, 867 (9th Cir. 1982); *Kamman v. I.R.S.*, 56 F.3d 46, 48 (9th 1995).

5 The Freedom of Information Act [5 USC § 552 (a)(4)(B)] gives the Court:

6 ... jurisdiction to enjoin the agency from withholding agency records and to order the
7 production of any agency records improperly withheld from the complainant. In such a case
8 the court shall determine the matter de novo, and may examine the contents of such agency
9 records in camera to determine whether such records or any part thereof shall be withheld
10 under any of the exemptions set forth in subsection (b) of this section, and the burden is on
11 the agency to sustain its action.

12
13 {Emphasis added}

14 The Court determines the matter *de novo* and the burden is on NASA to defend their withholding
15 of documents.

16
17 Summary of Material Facts on which NASA and Margolin Agree

18
19 1. Margolin is the named inventor on U.S. Patent 5,566,073 (‘073) **Pilot aid using a**
20 **synthetic environment** (Second Amended Complaint, Appendix Volume 1 at A20) and U.S.
21 Patent 5,904,724 (‘724) **Method and apparatus for remotely piloting an aircraft**. (Second
22 Amended Complaint, Appendix Volume 1 at A15).

23 2. Margolin submitted an administrative claim for patent infringement to the NASA
24 Headquarters Office of the General Counsel in a letter dated June 17, 2003 for infringement of
25 ‘724 on NASA’s X-38 project. (Second Amended Complaint, Appendix Volume 1 at A5)

1 3. Margolin sent NASA's Mr. Alan Kennedy a letter in January 2004. (Second
2 Amended Complaint, Appendix Volume 1 at A33)

3 4. Margolin received no response to his letter. (NASA's Answer to Second Amended
4 Complaint at 3, line 22-23)

5 5. Margolin filed a FOIA Request with NASA in June 2008. (Second Amended
6 Complaint, Appendix Volume 1 at A35.) The FOIA Request asks for "...all documents related to
7 the Administrative Claim of Jed Margolin for Infringement of U.S. Patent Nos. 5,566,073 and
8 5,904,724; NASA Case No. I-222."

9 6. Margolin's FOIA Request was assigned to Mr. Jan McNutt in NASA's Office of the
10 General Counsel. (NASA's Answer to Second Amended Complaint at 4, lines 17-19)

11 7. Mr. McNutt asked Margolin for a 90-day extension. (Second Amended Complaint,
12 Appendix Volume 1 at A37)

13 8. Margolin agreed to give NASA the 90-day extension. (Second Amended Complaint,
14 Appendix Volume 1 at A39)

15 9. NASA did not respond to Margolin's FOIA Request until May 2009. (Second
16 Amended Complaint, Appendix Volume 1 at A45)

17 10. NASA withheld documents citing FOIA Exemption 552(b)(5). (NASA's Answer to
18 Second Amended Complaint at 5, lines 4-5)

19 11. NASA's response failed to provide an estimate of the volume of withheld
20 documents. (NASA's Answer to Second Amended Complaint at 6, lines 4-6)

1 12. Margolin filed a FOIA Appeal on June 10, 2009. (Second Amended Complaint,
2 Appendix Volume 1 at A54) which was delivered to NASA on June 12, 2009. (Second Amended
3 Complaint, Volume 1 at A75)

4 13. Margolin filed a FOIA lawsuit against NASA on July 31, 2009 in U.S. District
5 Court for the District of Nevada, case No. 3:09-cv-00421-LRH-VPC.

6 14. NASA denied Margolin's FOIA appeal in a letter dated August 5, 2009. (NASA's
7 Answer to Second Amended Complaint at 7, lines 2-3)

8 15. NASA sent Margolin a supplemental response of approximately 4,000 pages of
9 documents in November 2009. (NASA's Answer to Second Amended Complaint at 7, lines 8-10
10 and lines 16-17)

11 16. NASA did not provide an index for the documents. (NASA's Answer to Second
12 Amended Complaint at 7, lines 18-19)

13 17. NASA withheld documents citing FOIA Exemptions (b)(3), (b)(4), (b)(5), and
14 (b)(6) (NASA's Answer to Second Amended Complaint at 7, lines 21-23)

15 18. NASA redacted certain communications between NASA and Mr. Michael
16 Abernathy (the contractor who worked on the X-38 project) contained in the supplemental
17 response to Margolin's 2008 FOIA request. (NASA's Answer to Second Amended Complaint at
18 8, lines 15-17)

19 19. NASA employees conducted a telephone conference in 2006 that included Mr.
20 Abernathy. (Second Amended Complaint, Appendix Volume 2 at A119 and NASA's Answer to
21 Second Amended Complaint at 8, lines 17-18)

22

1 Introduction

2 Margolin is the named inventor on U.S. Patent 5,566,073 ('073) **Pilot aid using a**
3 **synthetic environment** and U.S. Patent 5,904,724 ('724) **Method and apparatus for remotely**
4 **piloting an aircraft**. The '073 patent teaches the use of what is now called *synthetic vision* in
5 manned aircraft. The '724 patent teaches the use of synthetic vision for controlling unmanned
6 aerial vehicles (UAVs).

7 Margolin contacted NASA in May 2003 after he became aware that they had used
8 synthetic vision in the X-38 project. He submitted an administrative claim for patent
9 infringement to the NASA Headquarters Office of General Counsel in a letter dated June 17,
10 2003. Margolin was told that NASA would conduct an investigation that was expected to take 3-
11 6 months.

12 Margolin did not receive a determination on his administrative claim for patent
13 infringement by December 2003 and in January 2004 sent a letter to NASA attorney Alan J.
14 Kennedy. Margolin received no response to his letter.

15 In June 2008 Margolin filed a FOIA request to obtain the results of NASA's promised
16 investigation.

17 Margolin's FOIA request was turned over to Mr. Jan McNutt ("McNutt") in the Office of
18 the General Counsel. In McNutt's response, dated August 5, 2008, he asked Margolin to give
19 NASA a 90-day extension to his FOIA request. On August 8, 2008 Margolin agreed to the
20 extension.

21 NASA failed to send any documents to Margolin until May 2009, approximately six
22 months after NASA's extension ran out.

1 In their very tardy response to Margolin's FOIA Request, NASA withheld documents,
2 citing 5 U.S.C. § 552(b)(5).

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

5 Margolin filed a FOIA Appeal on June 10, 2009.

6 NASA failed to respond to Margolin's FOIA Appeal (or ask for an extension) within the
7 20 day statutory period required by FOIA. NASA's request for an extension was made after the
8 statutory 20-day period so Margolin denied it. Even so, Margolin waited until July 31, 2009 to
9 file the present action.

10 It was not until after Margolin filed the present action that NASA sent Margolin their
11 decision on his FOIA Appeal. NASA denied Margolin's FOIA Appeal and produced no
12 additional documents. NASA admitted to withholding 100 pages of documents.

13 On November 16, 2009 Margolin received two boxes of documents from Stephen L.
14 McConnell ("McConnell"), NASA Freedom of Information Act Officer.

15 According to NASA there are about 4,000 pages of documents, which is a great deal
16 more than the 100 pages they admitted to withholding in their Denial of FOIA Appeal. They are
17 not in any particular order. There is no index. There are many duplicates. Although the pages are
18 numbered the numbers are frequently illegible. There are gaps in the numbers indicating that
19 sections were entirely withheld. The pages run from 00017 to 05605 indicating that around 1600
20 pages were entirely withheld. Many of the emails are redacted under §552 (b)(5). Sometimes the
21 entire body of the email is redacted. McConnell characterizes §552 (b)(5) as:

22 (b)(5) – which protects inter-agency documents generated which "are predecisional and/or
23 deliberative in nature" and information protected as attorney work product; and

1 The Issues

2 The material issues are:

3 Issue 1. Whether, in view of the email from NASA attorney Edward K. Fein (“Fein”) to Frank
4 Delgado (“Delgado”) and Alan Kennedy (“Kennedy”) et al. on Monday, July 12, 2004, all
5 subsequent documents are post-decisional and therefore not exempt from production under §552
6 (b)(5). In this email Fein wrote:

7 Frank ... Thank you so much for your detailed analysis and research on this matter. I know
8 that you invested considerable time into assisting in the defense of this infringement claim.
9 Your effort, together with valuable input from Mike Abernathy, will be the basis for
10 NASA's denying the administrative claim.
11

12
13 Issue 2. Whether any documents from or to Mike Abernathy (“Abernathy”) or from or to Rapid
14 Imaging Software are exempt from production under §552 (b)(5). Abernathy (at Rapid Imaging
15 Software) was the Contractor who provided the synthetic vision software for the X-38 project. In
16 a unanimous Supreme Court decision in *Department of the Interior v. Klamath Water Users*
17 *Protective Ass'n.* 532 U.S. 1 (2001), the Court ruled that the threshold of Exemption 5 did not
18 encompass communications between the Department of the Interior and several Indian tribes
19 which, in making their views known to the Department on certain matters of administrative
20 decisionmaking, not only had "their own, albeit entirely legitimate, interests in mind," (*Klamath*,
21 532 U.S. at 12) but also were "seeking a Government benefit at the expense of other applicants."
22 (*Id.* at 12 n.4) As the NASA documents show, Abernathy had his own interests in mind
23 regarding NASA's infringement of U.S. Patent 5,904,724 because his company has been accused
24 of infringing the same patent.
25

1 Issue 3. Whether NASA has failed to meet their burden under 5 U. S. C. § 552(a)(4)(B) of
2 justifying their withholding of documents and their redactions. In NASA's Answer to Second
3 Amended Complaint they admitted they sent Margolin approximately 4,000 pages of documents,
4 they admitted they did not provide an index of the documents, and asserted they had no duty to
5 do so.

6
7 Issue 1

8 Whether all documents subsequent to July 12, 2004 are post-decisional
9 and not exempt from production under §552 (b)(5).
10

11 The 4,000 or so pages of documents that NASA provided included this email from
12 Edward K. Fein (NASA attorney at JSC) to Frank Delgado (NASA employee at JSC) and Alan
13 Kennedy (NASA attorney in the Office of the General Counsel) and was copied to several others
14 at NASA. (Second Amended Complaint, Appendix Volume 2 at A19):

15 [Page 04607] [AV2-A19]

16 -----Original Message-----

17 From: FEIN, EDWARD K. (JSC-HA) (NASA)

18 Sent: Monday, July 12, 2004 11:00 AM

19 To: DELGADO, FRANCISCO J. (FRANK) (JSC-ER2) (NASA); 'Kennedy, Alan; [redacted
20 (b)(6)]

21 Cc: FARMER, CLIFF L. (JSC-ER) (NASA); MURATORE, JOHN F. (JSC-MS) (NASA)

22 Subject: RE: Patents 5566073 and 5904724
23

24 Frank ... Thank you so much for your detailed analysis and research on this matter. I know
25 that you invested considerable time into assisting in the defense of this infringement claim.
26 Your effort, together with valuable input from Mike Abernathy, will be the basis for
27 NASA's denying the administrative claim. There is always a chance that Margolin will file a
28 law suit, but with all of the information you guys have turned up, I think the chance of that is
29 small.

30
31 Thanks again!

32 -Ed
33

1 NASA's failure to inform Margolin of their decision at this point is irrelevant. What is
2 relevant is what NASA did after making this decision.

3 a. In September 2004 NASA approved a plan to file a Request for Re-Examination with the
4 Patent Office. (Second Amended Complaint, Appendix Volume 2 at A55)

5 [Page 2645] [AV2-A55]
6 Re: US Patents 5566073 and 5904724
7 From: Barry V. Gibbens, LaRC [redacted (b)(6)]
8 To: Mike Abernathy [redacted (b)(6)] Kennedy, Alan [redacted (b)(6)]
9 CC: Linda B. Blackburn [redacted (b)(6)]
10 Dan Baiz [redacted (b)(6)]
11 'Trey Arthur' [redacted (b)(6)]
12 DELGADO FRANCISCO J. (FRANK) [redacted (b)(6)]
13 FEIN, EDWARD K. JSC-H (NASA) [redacted (b)(6)]
14 Eric Boe [redacted (b)(6)]
15 Date: Sep 01 2004 - 11:29am
16 Hi Alan (and others),
17

18 Just to clarify the message below, I spoke with Mike Abernathy this morning, and I've
19 spoken with Dan Baize on a number of occasions concerning this topic. I've also spoken
20 with you (Alan) briefly, and with Linda Blackburn, Patent Counsel here at Langley (not
21 Linda "Blackwell" :-). It seems clear that the technical folks have determined that the
22 Margolin patent on Synthetic Vision creates a substantial problem for many of our partners
23 in the aviation safety industry for a variety of reasons. It also seems clear that there is
24 substantial prior art in existence to make an argument for re-examination of the Margolin
25 patent. Linda has stated that we at Langley are willing to support an analysis of this situation
26 at the Center level. She has, however, also told me that we first need to perform a formal
27 infringement analysis to confirm (from a legal perspective) that we are in fact practicing the
28 patent as described by its claims. If that analysis shows probable infringement, then we can
29 proceed with a re-examination request, which Dan Baize has indicated he would be willing
30 to fund. It is my understanding that you (again Alan) gave your blessing this morning for us
31 to proceed at the Center level on these activities. If that is the case, I'll go ahead and begin
32 moving on the formal infringement analysis, keeping you apprised of progress as it
33 develops. Please let me know if you are in agreement with the situation as I have described
34 it. If so, I'll begin work here shortly.

35
36 Thanks,

37
38 Barry

1 NASA's subsequent decision not to carry out their plan is irrelevant and their reasons are
2 unknown. Margolin suggested [Second Amended Complaint at 39, lines 9-15]:

3 It's possible that NASA concluded they did not infringe. However, they had already decided
4 they did not infringe when they decided to deny Margolin's claim in July. Besides, NASA's
5 reason for wanting to invalidate the Patents was to benefit their partners.
6

7 There is another possibility to consider, which is that an analysis of Abernathy's purported
8 prior art did not stand up to careful scrutiny. Thus, the patents would survive a Re-
9 Examination and come out of it even stronger.
10

11 NASA denied Margolin's suggested reasons but offered no explanation of their own. From
12 NASA's Answer to Second Amended Complaint at 10, lines 4-9:

13 28. Defendant admits that it did not file a Request for Reexamination on U.S. Patent
14 Nos. 5,566,073 and 5,904,724. Defendant denies the allegations contained in page 39, lines
15 9-21 of this paragraph. The allegations contained at page 39, line 23, through page 40, line
16 15, constitute conclusions of law to which no response is required. Defendant lacks
17 knowledge and information sufficient to form a belief as to the allegations contained in the
18 last sentence of this paragraph and, on that basis, denies those allegations.
19

20 Whatever reason NASA had for deciding not to file a Request For Re-Examination, they spent
21 time and energy (and NASA money) making that decision. Surely they would not have done so
22 if there had been any question about denying Margolin's claim for compensation.
23

24 b. An email from Frank Delgado (NASA employee) to Fein and Kennedy (NASA attorneys),
25 and to Abernathy is probative because it shows NASA's hostility toward the patent which was
26 the subject of Margolin's claim. (Second Amended Complaint, Appendix Volume 2 at A61):

27 [Page 00067] [AV2-A61]
28 From: Delgado, Francisco J. (JSC-ER2) [redacted (b)(6)]
29 Sent: Monday, September 25, 2006 9:42 PM
30 To: Mike Abernathy; Fein, Edward K. (JSC-AL); Kennedy, Alan J. (HQ-MC000); [redacted
31 (b)(6)]
32 Cc: Delgado, Francisco J. (JSC-ER2); Fredrickson, Steven E. (JSC-ER)

1 Subject: FW: Read: Let us chat on about SCOUT, SC3D, the X-38 program and RIS; noted
2 below are our patents that cover said technology that RIS and your groups are using.
3

4 See email from "Mr. Adams" below.
5

6 This is getting more ridiculous by the minute. I have resisted replying in any form as
7 suggested by JSC council. However, this matter has been left open for quite some time and
8 something needs to be done NOW. It has come to my attention that Mr. Adams and
9 company have issued a letter that prohibits RIS from selling any of their software until this
10 issue is resolved. We have had a very "intellectually" fruitful relationship with RIS for
11 almost a decade and would like to continue this relationship for many years to come. Some
12 of the technology concepts in question were co-developed by RIS and I during many
13 "brainstorming sessions" on how to provide optimal situation awareness to various users.
14

15 The folks pressing forward with this claim do not have solid ground to stand on (IMHO).
16 Based on the previous research performed, I do not see how their patent claims are valid and
17 I would like to request that NASA's council take this matter seriously and get the patents
18 invalidated (as it should have been done when this first showed up a couple of years ago).

19 This is not only the right legal thing to do, but also the right moral thing to do. If we allow
20 an individual to continue to harass small companies and stand-by with little/no action, then
21 we are no better than the company doing the harassing. As a government organization, we
22 need to keep the public faith and trust and again, "do the right thing." I realize that patience
23 is important in legal matter, but believe that the time for sitting idle and hoping that this
24 matter goes away is way past due and that something needs to be done ASAP. Putting
25 companies that NASA relies on to help move technology forward out of business with a
26 barrage of unwarranted litigation does not seem like it is in NASA's (or our taxpayers) best
27 interest.
28

29 Please let me know what I need to do on my end to help move this along.
30

31 BTW: If we do not deal with issue immediately it will only get worse for NASA. I know of
32 several Projects within JSC, JPL, and Langley that use independently developed technology
33 (i.e. technology that does not use what RIS and I came up with) that I am sure Mr. Adams
34 and company would claim infringes on their "Patents." We seem to be on his radar at the
35 moment because we do what government organizations are encouraged to do ("Publish their
36 work").
37

38 Thank You,
39

40 Frank Delgado
41

42 {Emphasis added}

1 This email does not sound like NASA is considering granting Margolin's claim for
2 compensation. If NASA were considering granting Margolin's claim for compensation they
3 would not be expressing their desire to destroy the patent in order to "do the right thing." If Fein
4 or Kennedy replied to Delgado's email it was not provided to Margolin.

5
6 c. Sometimes NASA loses things, important things. In 2008 NASA was unable to account for
7 capital assets with an acquisition cost of about \$32 Billion (with a net value of about \$18.6
8 Billion). This was revealed in a memo dated September 25, 2008 from NASA's Assistant
9 Inspector General for Auditing to various NASA officers with the subject "Final Memorandum
10 on NASA's Development of the Integrated Asset Management – Property, Plant, and Equipment
11 Module to Provide Identified Benefits (Report No. IG-08-032; Assignment No. A-08-001-00)."
12 See Exhibit 1, Appendix Volume 1 at A5, third full paragraph.

13 NASA also lost their policy on reviewing patent claims. One of the documents NASA
14 provided in the 4,000 pages or so is an email from Gary G. Borda dated January 23, 2009 asking
15 people to look for NASA's procedures for administratively reviewing a claim of patent
16 infringement. See Exhibit 2, Appendix Volume 1 at A19. These procedures were referenced in
17 GAO report B-285211 where GAO reviewed NASA's administrative action in denying another
18 inventor's claim. (*Ibid.*) Margolin filed a second Freedom of Information Act Request with
19 NASA in December 2009. One of the documents he asked for was NASA's procedures for
20 administratively reviewing a claim of patent infringement, specifically the procedures referenced
21 in the above GAO report. Margolin was not satisfied with NASA's response and filed a FOIA
22 Appeal. In NASA's denial of Margolin's FOIA Appeal they admitted they had been unable to

1 find NASA's procedures for administratively reviewing a claim of patent infringement. See
2 Exhibit 3, Appendix Volume 1 at A40 (next to last paragraph).

3
4 Perhaps NASA also lost their memory of (i.e. forgot) denying Margolin's claim in July 2004.

5

6 Issue 2
7 Whether any documents from or to Mike Abernathy ("Abernathy") or from
8 or to Rapid Imaging Software are exempt from production under §552
9 (b)(5) in view of *Klamath*
10

11 Abernathy (at Rapid Imaging Software) was the Contractor who provided the synthetic
12 vision software for the X-38 project. In a unanimous Supreme Court decision in *Department of*
13 *the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001), the Court ruled that the
14 threshold of Exemption 5 did not encompass communications between the Department of the
15 Interior and several Indian tribes which, in making their views known to the Department on
16 certain matters of administrative decisionmaking, not only had "their own, albeit entirely
17 legitimate, interests in mind," (*Klamath*, 532 U.S. at 12) but also were "seeking a Government
18 benefit at the expense of other applicants." (Id. at 12 n.4)

19 As the NASA documents show, Abernathy had his own interests in mind regarding
20 NASA's infringement of U.S. Patent 5,904,724 ('724) because his company has been accused of
21 infringing the same patent. When Abernathy was approached for a friendly conversation about
22 licensing the '724 patent he asked NASA for legal advice in dealing with the situation. See
23 Second Amended Complaint at 40-67. Unfortunately, NASA's legal advice has been either
24 redacted or withheld. However, since the object of the infringement is the same software used in

1 the X-38 project (“Landform”) it is unlikely that NASA advised Abernathy to license the ‘724
2 patent and, indeed, Abernathy refused to license the patent. He also spoke of filing a Request For
3 Re-Examination with the Patent Office and, like NASA, failed to do so.

4 If NASA is to be believed, that Abernathy was only a Government Contractor (and not
5 acting as NASA’s Agent), then *Klamath* applies and none of the documents between NASA and
6 Abernathy (or Rapid Imaging Software or any of NASA’s other Contractors or Partners) is
7 eligible for the §552 (b)(5) exemption.

8
9 Issue 3

10 NASA has failed to meet their burden of justifying their withholding
11 of documents and their redactions
12

13 NASA has failed to meet their burden under 5 U. S. C. § 552(a)(4)(B) of justifying their
14 withholding of documents and their redactions.

15 In NASA’s Answer to Second Amended Complaint they admitted they sent Margolin
16 approximately 4,000 pages of documents, they admitted they did not provide an index of the
17 documents, and asserted they had no duty to do so. See NASA’s Answer to Second Amended
18 Complaint at 7, lines 18-19.

19 In *Vaughn v. Rosen* 484 F2d 820, 157 U.S.App.D.C. 340 the Court explained:

20 The Freedom of Information Act was conceived in an effort to permit access by the citizenry
21 to most forms of government records. In essence, the Act provides that all documents are
22 available to the public unless specifically exempted by the Act itself.¹⁰ This court has
23 repeatedly stated that these exemptions from disclosure must be construed narrowly, in such
24 a way as to provide the maximum access consonant with the overall purpose of the Act.¹¹
25 By like token and specific provision of the Act, when the Government declines to disclose a
26 document the burden is upon the agency to prove de novo in trial court that the information
27 sought fits under one of the exemptions to the FOIA.¹² Thus the statute and the judicial
28 interpretations recognize and place great emphasis upon the importance of disclosure.
29

1 In light of this overwhelming emphasis upon disclosure, it is anomalous but obviously
2 inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue
3 with desirable legal precision for the revelation of the concealed information. Obviously the
4 party seeking disclosure cannot know the precise contents of the documents sought; secret
5 information is, by definition, unknown to the party seeking disclosure. In many, if not most,
6 disputes under the FOIA, resolution centers around the factual nature, the statutory category,
7 of the information sought.

8 and

9 This lack of knowledge by the party seeing disclosure seriously distorts the traditional
10 adversary nature of our legal system's form of dispute resolution. Ordinarily, the facts
11 relevant to a dispute are more or less equally available to adverse parties. In a case arising
12 under the FOIA this is not true, as we have noted, and hence the typical process of dispute
13 resolution is impossible. In an effort to compensate, the trial court, as the trier of fact, may
14 and often does examine the document in camera to determine whether the Government has
15 properly characterized the information as exempt. Such an examination, however, may be
16 very burdensome, and is necessarily conducted without benefit of criticism and illumination
17 by a party with the actual interest in forcing disclosure. In theory, it is possible that a trial
18 court could examine a document in sufficient depth to test the accuracy of a government
19 characterization, particularly where the information is not extensive. But where the
20 documents in issue constitute hundreds or even thousands of pages, it is unreasonable to
21 expect a trial judge to do as thorough a job of illumination and characterization as would a
22 party interested in the case

23 And thus was born the Vaughn Index, which NASA asserts it has no duty to provide.

24 In *Coastal States Gas Corp. v. Department of Energy*, 617 F. 2d 854 - Court of Appeals, Dist. of
25 Columbia 1980, the Court ruled that conclusory assertions of privilege will not suffice to carry
26 the Government's burden of proof in defending FOIA cases.

27 III. The Vaughn Index: In lieu of in camera inspection, DOE submitted an index of the
28 withheld documents, along with affidavits from regional counsel in support of its decision
29 not to release the memoranda. The parties have referred to these materials as the
30 Government's "Vaughn Index," but we wish to make clear that this index is not what we had
31 in mind in our decision in *Vaughn v. Rosen*, 157 U.S.App.D.C. 340, 484 F.2d 820 (1973),
32 cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974) (*Vaughn I*), in which we
33 set out suggested procedures to allow the courts to determine the validity of the
34 Government's claims without physically examining each document. We repeat, once again,
35 that conclusory assertions of privilege will not suffice to carry the Government's burden of
36 proof in defending FOIA cases.

1 All NASA has done is make a broad conclusory statement that the documents it provided are
2 exempt under §552 (b)(5) and other sections.

3 From NASA's Answer to Second Amended Complaint at 7, lines 21-23:

4 Defendant admits that certain documents were withheld from the supplemental response to
5 Plaintiff's 2008 FOIA request under FOIA Exemptions (b)3, (b)(4), (b)(5) and (b)(6).

6

7

8 Margolin's Duties Under Local Rule LR 56-1

9 Local Rule 56-1 MOTIONS FOR SUMMARY JUDGMENT requires:

10 Motions for summary judgment and responses thereto shall include a concise statement
11 setting forth each fact material to the disposition of the motion which the party claims is or
12 is not genuinely in issue, citing the particular portions of any pleading, affidavit, deposition,
13 interrogatory, answer, admission, or other evidence upon which the party relies.

14

15 Margolin believes this means he must do this for each paragraph in NASA's Answer.

16 First, Margolin wants to address the formulaic language used in much of NASA's

17 Answer which takes the form:

18 Defendant lacks sufficient knowledge and information to form a belief as to the truth of the
19 allegations contained in xxx and, on that basis, denies those allegations.

20

21 When NASA denies an allegation, it is irrelevant that it is because they claim to lack
22 sufficient knowledge and belief as to the truth of the allegation. A denial is a denial, especially
23 when NASA says in Paragraph 41, "Defendant further denies all allegations of the complaint not
24 previously expressly admitted." (NASA's Answer to Second Amended Complaint, Paragraph 41
25 at 13, line 17.)

1 In some cases NASA's denial is an embarrassment to the Agency, such as in Paragraph 6
2 (NASA's Answer to the Second Amended Complaint at 2, lines 15-17) when NASA denies that
3 Margolin's '073 and '734 patents teach what is now called *synthetic vision*. The FAA has a
4 definition for synthetic vision. NASA knows what synthetic vision is. NASA and their
5 sycophants claim NASA invented it. NASA made the following statement in an email by Barry
6 Gibbens on September 1, 2004 (Second Amended Complaint, Appendix Volume 2 at A55):

7 "It seems clear that the technical folks have determined that the Margolin patent on
8 Synthetic Vision creates a substantial problem for many of our partners in the aviation safety
9 industry for a variety of reasons.
10

11 NASA's denials, indeed this entire case, show the truth in a remark made by Admiral
12 Hyman Rickover in a speech he gave at Columbia University in 1982, in which he succinctly
13 outlined his management philosophy. The Admiral said, "Unless one person who is truly
14 responsible can be identified when something goes wrong, then no one has really been
15 responsible." (<http://govleaders.org/rickover.htm>)

16 It is why Margolin filed the Complaint against NASA Administrator Bolden. Margolin
17 thought that someone should be responsible, even if most of the events in the case occurred on
18 someone else's watch. The Agency disagreed, and rather than have the case go down the drain
19 on this issue, Margolin amended his complaint to make NASA the Defendant and to remove
20 General Bolden as a Defendant. Now, as a result, no one at NASA is responsible for anything,
21 which is why no one at NASA knows anything.

22 Sometimes, NASA's denial is truly offensive, such as when NASA denies that Margolin
23 is an engineer and independent inventor. See Paragraph 4 (NASA's Answer to the Second

1 Amended Complaint at 2, lines 10-11). Perhaps NASA was trying to bait Margolin into filing a
 2 Motion to Strike NASA’s offensive and scandalous remark.

3 In order to comply with LR-56-1 Margolin will attempt to pair NASA’s Answer with
 4 Margolin’s Second Amended Complaint and give a concise statement about it.

5

<u>NASA</u>	<u>Margolin</u>
1. This paragraph contains Plaintiff’s characterization of this lawsuit — not allegations of fact — and thus no response is required. To the extent a response is required, Defendant admits that this matter purports to be an action for injunctive and other relief brought pursuant to the Freedom of Information Act ("FOIA"). Defendant denies the remaining allegations of this paragraph.	1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552 (2007) (“FOIA”), for injunctive and other appropriate relief seeking the disclosure and release of agency records improperly withheld from plaintiff by defendants Charles F. Bolden, in his official capacity as Administrator of the National Aeronautics and Space Administration, and the National Aeronautics and Space Administration.

6
 7 NASA and Margolin agree this action is brought under the Freedom of Information Act.

8

<u>NASA</u>	<u>Margolin</u>
2. This paragraph contains Plaintiff’s conclusions of law regarding the scope and extent of the Court’s jurisdiction, to which no response is required. To the extent a response is required, Defendant admits that this Court has jurisdiction over this action.	2. This Court has subject matter jurisdiction over this action and personal jurisdiction 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. § 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. § 552(a)(6)(F).

9
 10 NASA and Margolin agree that this Court has jurisdiction over this action.

1

<p><u>NASA</u></p> <p>3. This paragraph contains Plaintiff's conclusions of law regarding the appropriate venue for this action, to which no response is required. To the extent a response is required, Defendant admits that venue is proper in this Court.</p>	<p><u>Margolin</u></p> <p>3. Venue is proper in this district pursuant to Section 552(a)(4)(B), as this is the district in which plaintiff resides.</p>
---	---

2

3 NASA and Margolin agree that venue is proper in this Court.

4

<p><u>NASA</u></p> <p>4. Defendant admits that Plaintiff lives at 1981 Empire Rd., VC Highlands, Nevada . Defendant lacks sufficient knowledge and information to form a belief as to the truth of the remaining allegations contained in this paragraph and, on that basis, denies those allegations.</p>	<p><u>Margolin</u></p> <p>4. Plaintiff Jed Margolin (“Margolin”) is an engineer and independent inventor who resides at 1981 Empire Rd., VC Highlands, Nevada.</p>
--	--

5

6 NASA agrees that Margolin resides at 1981 Empire Rd., VC Highlands, Nevada.

7 NASA denies that Margolin is an engineer and independent inventor.

8 Margolin responds:

9 1. Margolin has a Bachelor of Science in Engineering (Electrical Engineering) degree
 10 from The University of Michigan (1972). See Exhibit 4, Appendix Volume 1 at A46. He is an
 11 engineer.

12 2. Margolin is the named inventor or co-inventor on sixteen U.S. Patents. See, for
 13 example the front page of U.S. Patent 5,566,073 (Second Amended Complaint, Appendix

1 Volume 1 at A20) and 5,904,724 (Second Amended Complaint, Appendix Volume 1 at A15).

2 According to 35 U.S.C. 101 **Inventions patentable:**

3 Whoever invents or discovers any new and useful process, machine, manufacture, or
4 composition of matter, or any new and useful improvement thereof, may obtain a patent
5 therefor, subject to the conditions and requirements of this title.
6

7 While it is not explicitly stated, patents may only be obtained by the inventor. You cannot get a
8 patent on something you did not invent. Therefore, if you have a patent, you are an inventor.

9 Margolin is an inventor.

10 3. The remaining issue is whether Margolin is an independent inventor. In NASA's
11 denial of Margolin's FOIA Appeal for Margolin's Second FOIA Request, NASA stated (Exhibit
12 3, Appendix Volume 1 at A40):

13 There are no responsive records to items 3, 4, 5 and 8 because the search revealed no
14 Agency records which refer to Agency use of the category "Independent Inventors."
15

16 It is dishonest of NASA to assert that they do not know what an independent inventor is while
17 denying that Margolin is one. This is probative because it is representative of the disrespect
18 NASA has shown Margolin for the past 7+ years.

19

<u>NASA</u>	<u>Margolin</u>
5. Defendant admits the allegations contained in this paragraph.	5. Defendant National Aeronautics and Space Administration ("NASA") is an independent administrative agency within the Executive Branch of the United States within the meaning of 5 U.S.C. § 551(1) and 5 U.S.C. § 552(f)(1). Defendant Charles F. Bolden is the Administrator of the National Aeronautics and Space Administration.

1 NASA and Margolin agree on this one.

2

<u>NASA</u>	<u>Margolin</u>
6. Defendant admits the allegations contained in the first sentence of this paragraph.	6. Margolin is the named inventor on U.S. Patent 5,566,073 ('073) Pilot aid using a synthetic environment and U.S. Patent 5,904,724 ('724) Method and apparatus for remotely piloting an aircraft.
Defendant lacks sufficient knowledge and information to form a belief as to the truth of the allegations contained in the second and third sentences of this paragraph and, on that basis, denies those allegations.	The '073 patent teaches the use of what is now called <i>synthetic vision</i> in manned aircraft. The '724 patent teaches the use of synthetic vision for controlling unmanned aerial vehicles (UAVs).
The allegations contained in the fourth and fifth sentences of this paragraph purport to characterize documents attached to Plaintiff's second amended complaint. Those documents speak for themselves and contain the best evidence of their contents and thus no response is required.	The front page of the '073 patent is Exhibit 2 at Appendix Volume 1 A20. The front page of the '724 patent is Exhibit 1 at Appendix Volume 1 A15.

3

4 NASA admits that Margolin is the named inventor on '073 and '724.

5 NASA denies that the '073 patent teaches the use of what is now called *synthetic vision*
 6 in manned aircraft and that the '724 patent teaches the use of synthetic vision for controlling
 7 unmanned aerial vehicles (UAVs).

8 The FAA's current definition of synthetic vision is contained in the Code of Federal
 9 Regulations Title 14.

10 Title 14: Aeronautics and Space

11 PART 1—DEFINITIONS AND ABBREVIATIONS

1 Synthetic vision means a computer-generated image of the external scene topography from
 2 the perspective of the flight deck that is derived from aircraft attitude, high-precision
 3 navigation solution, and database of terrain, obstacles and relevant cultural features.
 4

5 Synthetic vision system means an electronic means to display a synthetic vision image of the
 6 external scene topography to the flight crew.
 7

8 These elements are taught by ‘073 and ‘724. NASA’s denial that ‘073 and ‘724 teach synthetic
 9 vision is probative because it makes NASA look dishonest and/or inept.
 10

<p><u>NASA</u></p> <p>7. Defendant admits that Plaintiff contacted NASA Langley Research Center in May 2003.</p>	<p><u>Margolin</u></p> <p>7. Margolin contacted NASA in May 2003 after he became aware that they had used synthetic vision in the X-38 project.</p>
<p>Defendant lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations contained in this paragraph and, on that basis, denies those allegations.</p>	<p>Because the use of synthetic vision for controlling a UAV can be used to the detriment of this country by unfriendly entities he wanted a friendly conversation because he thought NASA should buy the ‘724 patent in order to control the technology.</p>

11
 12 NASA admits that Margolin contacted NASA in May 2003 but denies that the use of synthetic
 13 vision for controlling a UAV can be used to the detriment of this country by unfriendly entities.
 14 NASA also denies Margolin wanted a friendly conversation because he thought NASA should
 15 buy the ‘724 patent in order to control the technology.
 16

<p><u>NASA</u></p> <p>8. Defendant admits that patent counsel at NASA Langley Research Center ordered the United States Patent and Trademark Office prosecution histories for U.S. Patent Nos. 5,566,073 and 5,904,724.</p>	<p><u>Margolin</u></p> <p>8. NASA immediately ordered copies of the file wrappers for U.S. Patent 5,566,073 and U.S. Patent 5,904,724.</p>
---	--

Defendant admits that the prosecution histories were ordered May 16, 2003.	See Exhibit 3 at Appendix Volume 1 A22.
Defendant lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations contained in this paragraph and, on that basis, denies those allegations.	Only a small portion of the file wrappers has been included in the present Appendix.

1

2 NASA admits that they ordered the file wrappers for ‘073 and ‘724 but denies that only a

3 small portion of the file wrappers was included in Margolin’s Second Amended Complaint

4 Appendix Volume 1 at A22.

5 Margolin responds by noting that he included only 5 pages of the ‘073 file wrapper in

6 order to avoid wasting time, paper, and bandwidth. (See Second Amended Complaint Appendix

7 Volume 1 at A22.) Since NASA has challenged Margolin on this he has included herein as

8 Exhibit 10, Volume 1 at A65 sixty of the approximately 240 pages of the file wrapper for ‘073

9 produced by NASA. Note that some of the pages produced by NASA are upside down. (NASA’s

10 numbers are right-side up.)

11

<u>NASA</u>	<u>Margolin</u>
9. Defendant admits that Plaintiff was referred to the NASA Headquarters Office of General Counsel in June 2003 and spoke to Alan Kennedy.	9. In June 2003 Margolin was turned over to Mr. Alan Kennedy (“Kennedy”) in the Office of the General Counsel.
Defendant admits that Mr. Kennedy is no longer employed with NASA.	
Defendant lacks knowledge and information sufficient to form a belief as	This is what Margolin recorded in his Contact Log:

<p>to the truth of the remaining allegations contained in this paragraph and, on that basis, denies those allegations.</p>	<p>Summary: He basically said that what most independent inventors have is junk and that since I am an independent inventor what I have is probably junk. If NASA evaluates it as a license proffer it will give it a pro forma rejection and I will file a claim anyway, so the same people who rejected it as a proffer will reject it as a claim, but in the process will have had to do more work, so to save them some work they will ignore the proffer and handle it as a claim.</p>
--	---

1
 2 NASA admits Margolin was referred to the NASA Headquarters Office of General
 3 Counsel in June 2003 and spoke to Alan Kennedy.

4 NASA denies the substance of Margolin’s conversation with Kennedy as Margolin noted
 5 in a contemporaneous account. Perhaps Margolin should have recorded his conversations with
 6 NASA’s attorneys.

7

<u>NASA</u>	<u>Margolin</u>
<p>10. Defendant admits that Plaintiff submitted information supporting an administrative claim for patent infringement to the NASA Headquarters Office of General Counsel in a letter dated June 17, 2003. The remaining allegations contained in the first sentence of this paragraph purport to characterize the contents of that letter. That letter speaks for itself and contains the best evidence of its contents and thus no response is required.</p>	<p>10. As a result, in June 2003 Margolin filed a claim, completely answering all the questions on NASA’s claim form. See Exhibit 1 at Appendix Volume 1 A5.</p>
<p>Defendant lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations contained in this paragraph and, on that basis, denies those allegations.</p>	<p>Then Kennedy informed him that NASA would conduct an investigation (expected to last 3-6 months) and that the purpose of the investigation would be to find prior art to invalidate the patent.</p>

8

1 NASA admits Margolin filed a claim.
 2 NASA again denies the substance of a conversation Margolin had with Kennedy and
 3 noted in a contemporaneous account.
 4

<u>NASA</u>	<u>Margolin</u>
<p>11. Defendant admits that Plaintiff did not receive a determination on his administrative claim for patent infringement by December 2003.</p>	<p>11. After six months Margolin did not hear from NASA so he called Kennedy, who said:</p>
<p>Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations regarding Mr. Kennedy's purported comments to Plaintiff as set forth in sections a. through e. of this paragraph and, on that basis, denies those allegations.</p>	<p>a. The investigation had not been done.</p> <p>b. NASA had a Research Exemption for using the patent. Margolin advised him this was not true. <i>See Madey v. Duke</i> 307 F.3d 1351 (Fed. Cir. 2002).</p> <p>c. "The X-38 never flew." Margolin informed him of the video on NASA's web site showing the X-38 flying.</p> <p>d. The Statute of Limitations gives NASA 6 years to respond to Margolin's claim.</p> <p>e. It would cost Margolin more to sue NASA in Federal Claims Court than he could hope to recover from NASA.</p>
<p>Defendant admits that Plaintiff sent a letter dated January 8, 2004 addressed to Mr. Kennedy. The allegations contained in this paragraph purport to characterize the contents of that letter. That letter speaks for itself and contains the best evidence of its contents and thus no response is required. Defendant admits that no response to Plaintiff's January, 8, 2004 letter was sent and thus Plaintiff received no response thereto.</p>	<p>Margolin sent Kennedy a letter dated January 8, 2004, asking him to confirm some of the things he had said. See Exhibit 4 at Appendix Volume 1 A33. Margolin received no response to his letter.</p>

1 NASA admits Margolin did not receive a determination of his administrative claim for
2 patent infringement by December 2003.

3 NASA admits Margolin sent Kennedy a letter in January 2004 and received no reply.

4 NASA again denies the substance of a conversation Margolin had with Kennedy and
5 noted in a contemporaneous account.

6

<u>NASA</u>	<u>Margolin</u>
12. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, on that basis, denies those allegations.	12. After that, Kennedy refused to talk to Margolin or respond to his letter. Then, various things came up and Margolin was unable to pursue his claim against NASA.
Defendant admits that it has no record that Plaintiff contacted Defendant regarding the status of his administrative claim for patent infringement after January 8, 2004.	
Defendant admits that it has no record of any contact by Plaintiff between January 8, 2004 and June 28, 2008 — the date Plaintiff filed his FOIA request.	

7

8 NASA admits Margolin did not contact NASA again until June 2008.

9 NASA denies Kennedy refused to talk to Margolin or respond to his letter. However, in

10 Paragraph 11 (*supra*) NASA has admitted that Kennedy did not respond to Margolin's letter.

1

<u>NASA</u>	<u>Margolin</u>
<p>13. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, on that basis, denies those allegations.</p> <p>Defendant admits that due to deficiencies in the United States Patent Office records relating to the alleged assignment of U.S. Patent Nos. 5,566,073 and 5,904,724, Defendant has been unable to definitively determine the current ownership of these patents.</p> <p>Defendant admits that it received notification from Optima Technology Group (“OTG”) dated July 14, 2008 alleging that the patents had been assigned to OTG. Defendant further admits that OTG claimed that the patents were assigned in July 2004 — four years before the date notice was received by NASA.</p>	<p>13. Margolin later assigned the patents to Optima Technology Group and the claim against NASA went with them.</p>

2

3 NASA denies Margolin assigned the patents to Optima Technology Group and casts
 4 doubt on the ownership of the patents (‘073 and ‘724).

5 The patents were litigated in U.S. District Court For the District of Arizona in case No.
 6 CV-00588-RC. Before the case began an individual named Reza Zandian fraudulently filed
 7 documents with the Patent Office assigning the patents to his company (Optima Technology
 8 Corporation) whose name was similar to the proper owner (Optima Technology Group). In an
 9 order dated August 18, 2008 the Arizona Court ruled:

- 10 1. Optima Technology Corporation has no interest in U.S. Patents Nos. 5,566,073 and
 11 5,904,724 (“the Patents”) or the Durable Power of Attorney from Jed Margolin dated July
 12 20, 2004 (“the Power of Attorney”);
 13
 14 2. The Assignment Optima Technology Corporation filed with the USPTO is forged,
 15 invalid, void, of no force and effect, and is hereby struck from the records of the USPTO;

1
2 3. The USPTO is to correct its records with respect to any claim by Optima Technology
3 Corporation to the Patents and/or the Power of Attorney; and

4
5 4. OTC is hereby enjoined from asserting further rights or interests in the Patents and/or
6 Power of Attorney; and

7
8 5. There is no just reason to delay entry of final judgment as to Optima Technology
9 Corporation under Federal Rule of Civil Procedure 54(b).
10

11 NASA knew about this situation. The Arizona Court's Order is among the 4,000 or so
12 pages of documents NASA gave Margolin in November 2009. See Exhibit 5, Appendix Volume
13 1 at A48. The Patent Office obeyed the Court's Order but, apparently, the Order is not good
14 enough for NASA. NASA's actions in questioning the current ownership of the patents are
15 beneath contempt. NASA's attempt to poison the well by having their agent Abernathy publish a
16 spurious history of synthetic vision largely failed, so now they are questioning the current
17 ownership of the patents. This issue is irrelevant to the present case except to promote NASA's
18 agenda for adding more poison to the well. In the interest of fairness, the Court is requested to
19 order NASA produce all documents and records of communications where they questioned the
20 proper ownership of the Patents.

21 This is not the first time NASA has acted like it is above the Law. When NASA failed to
22 respond in a timely manner to Margolin's Second FOIA Request he contacted them to ask what
23 their intentions were. The response he received was as follows (See Exhibit 6, Appendix Volume
24 1 at A51):

25 This action is currently is currently being reviewed for legal concurrence; this action should
26 be completed within the next couple days. We apology for the delay in this process; but we
27 must adhere to our agency's processing procedures.
28

1 There is no mention of NASA’s statutory obligations under the Freedom of Information Act,
 2 only “our agency’s processing requirements.”
 3
 4

<p><u>NASA</u></p> <p>14. Defendant admits that Plaintiff submitted a request for records under FOIA on June 28, 2008.</p> <p>Defendant lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations contained in the first sentence of this paragraph and, on that basis, denies those allegations.</p>	<p><u>Margolin</u></p> <p>14. Although Margolin no longer owned the claim against NASA he still wanted to know the results of NASA’s investigation so, on June 28, 2008 he filed a FOIA request. See Exhibit 5 at Appendix Volume 1 A35.</p>
<p>Defendant admits that the FOIA matter was assigned FOIA HQ 08-270.</p>	<p>It was assigned FOIA HQ 08-270.</p>
<p>Defendant admits that Jan McNutt, who worked in the NASA Headquarters Office of General Counsel, was assigned to conduct a search for records responsive to Plaintiff’s FOIA request.</p> <p>Defendant admits that Mr. McNutt sent Plaintiff a letter dated August 5, 2008. The allegations in this paragraph purport to characterize the contents of that letter. That letter speaks for itself and contains the best evidence of its contents and thus no response is required.</p>	<p>For some reason it was turned over to Mr. Jan McNutt (“McNutt”) in the Office of the General Counsel. McNutt’s response, dated August 5, 2008, is Exhibit 6 at Appendix Volume 1 A37. In his response he said,</p> <p>We regret the delay in processing your claim and assure you that we are now undertaking measures to provide a resolution of your claim as soon as possible. Unfortunately, Mr. Alan Kennedy retired from NASA earlier this year and the action on your claim was not conveyed to management in a timely manner. In addition the local attorney responsible for review of your claim also departed from NASA. We are now cognizant of the importance of proceeding with a review of the claim and will contact you when we have reached a decision.</p>
<p>Defendant lacks sufficient knowledge and</p>	<p>In a telephone conversation with McNutt he said</p>

<p>information to form a belief as to the truth of the allegations contained at lines 15-18 of this paragraph and, on that basis, denies those allegations.</p>	<p>that Margolin’s claim “had fallen between the cracks.” This led Margolin to believe that no investigation had been done, or that it had not been completed (“We are now cognizant of the importance of proceeding with a review of the claim and will contact you when we have reached a decision.”).</p>
<p>Defendant admits that Mr. McNutt is no longer employed with NASA.</p>	<p>???</p>
<p>Defendant admits the allegation contained in the last sentence of this paragraph.</p>	<p>In McNutt’s letter he asked Margolin to give NASA a 90-day extension to his FOIA request.</p>

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NASA and Margolin agree that Margolin filed a FOIA Request on June 28, 2008.

NASA denies that Margolin had a reason for filing the FOIA Request.

NASA and Margolin agree that the FOIA matter was assigned FOIA HQ 08-270.

NASA and Margolin agree that the FOIA case was turned over to Jan McNutt, who worked in the NASA Headquarters Office of General Counsel and that Mr. McNutt sent Margolin a letter dated August 5, 2008.

NASA denies the substance of Margolin’s telephone conversation with Mr. McNutt.

NASA surprises Margolin with the news that Mr. McNutt has left NASA. A telephone call to NASA’s Office of the Inspector General confirmed Margolin’s suspicion that, as a result of Mr. McNutt’s departure from NASA, he can no longer be compelled to cooperate with an investigation by NASA’s Inspector General.

NASA and Margolin agree that Mr. McNutt asked Margolin to give NASA a 90-day extension to his FOIA request.

1

<p><u>NASA</u></p> <p>15. Defendant admits the allegations contained in the first sentence of this paragraph.</p>	<p><u>Margolin</u></p> <p>15. On August 8, 2008 Margolin agreed to the extension. See Exhibit 7 at Appendix Volume 1 A39.</p>
<p>Defendant lacks sufficient knowledge and information to form a belief as to the truth of the remaining allegations contained this paragraph and, on that basis, denies those allegations.</p>	<p>However, despite being told several times that the requested documents were being sent out, NASA did not send any documents to Margolin until May 2009.</p> <p>It is likely that the reason NASA finally responded to Margolin’s FOIA Request is the fax he sent to Acting Administrator Christopher Scolese where he asked Mr. Scolese to confirm that he had exhausted all the administrative remedies that NASA had to offer. See Exhibit 8 at Appendix Volume 1 A41. Margolin had previously sent the letter to Mr. Scolese by Certified Mail, but USPS did not deliver it and had no explanation how or where it was lost.</p>

2

3 NASA and Margolin agree that Margolin gave NASA a 90-day extension to his FOIA
 4 request.

5 NASA denies that Margolin was told several times that the requested documents were
 6 being sent out and that NASA finally sent Margolin documents in May 2009.

7 NASA denies that Margolin sent Acting Administrator Christopher Scolese the letter
 8 reproduced as Second Amended Complaint, Exhibit 8, Appendix Volume 1 at A41.

9

10 Paragraph 16 is long and will be separated into parts.

<p><u>NASA</u></p> <p>16. Defendant admits that it withheld documents, citing FOIA Exemption (b)(5), in its initial response to Plaintiff’s request for records under the FOIA.</p>	<p><u>Margolin</u></p> <p>16. In its very tardy response to Margolin’s FOIA Request, NASA withheld documents, citing 5 U.S.C. §552(b)(5). See Exhibit 9 at Appendix Volume 1 A45.</p>
---	---

1

2 NASA and Margolin agree that NASA withheld documents, citing FOIA Exemption (b)(5).

3

4 (Paragraph 16, continued)

<p>Defendant admits that its first response to Defendant’s request for records under the FOIA did not include the referenced March 19, 2009 letter from Gary Borda of the NASA Headquarters Office of General Counsel.</p>	<p>a. One of the documents that NASA withheld from him is a letter dated March 19, 2009 that was sent by Gary G. Borda (“Borda”) NASA Agency Counsel for Intellectual Property to Optima Technology Group (“OTG”). (This document was given to Margolin by OTG.) In this letter Borda denies Claim I-222 regarding NASA’s infringement of U.S. Patent 5,904,724 (‘724) in the X-38 project. See Exhibit 10 at Appendix Volume 1 A48. Margolin’s FOIA 08-270 request to NASA was to produce documents relating to Claim I-222 and NASA withheld the most material document at that point.</p>
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5

6 NASA and Margolin agree that NASA’s response did not include the Borda letter.

7

8 (Paragraph 16, continued)

<p>Defendant admits that the March 19, 2009 letter from Mr. Borda is the final agency action on the administrative claim for patent infringement of U.S. Patent No. 5,904,724 originally filed by Plaintiff.</p>	<p>The Borda Letter denied the claim based on a detailed claims analysis of ‘724 as applied to the X-38 project.</p>
--	--

9

1 NASA asserts that the Borda letter was NASA’s final agency action on the administrative
 2 claim for patent infringement filed by Margolin. Margolin asserts that NASA’s decision was
 3 made in July 2004.

4

5 (Paragraph 16, continued)

Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained in the sentence at page 6, line 10 of this paragraph regarding Plaintiff’s allegation that he received the letter from OTG and, on that basis, denies the allegation.	[again: page 6, line 10] (This document was given to Margolin by OTG.)
--	---

6

7 NASA denies that Margolin received his copy of the Borda letter from OTG (Optima
 8 Technology Group). Since NASA didn’t give it to Margolin where do they think he got it?

9

10 (Paragraph 16, continued)

The allegations contained in the sentence at page 6, lines 10-12, and in the sentences at page 6, line 16, through page 7, line 2, purport to characterize the contents of the March 19, 2009 letter. That letter speaks for itself and contains the best evidence of its contents and thus no response is required.	[again: page 6, lines 10-12] In this letter Borda denies Claim I-222 regarding NASA’s infringement of U.S. Patent 5,904,724 (‘724) in the X-38 project. See Exhibit 10 at Appendix Volume 1 A48. The Borda Letter denied the claim based on a detailed claims analysis of ‘724 as applied to the X-38 project. It also made the assertion: “... numerous pieces of evidence were uncovered which would constitute anticipatory prior knowledge and prior art that was never considered by the U.S. Patent and Trademark Office during the prosecution of the application
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	<p>which matured into Patent No. 5,904,724.”</p> <p>and threatens,</p> <p>“... NASA reserves the right to introduce such evidence of invalidity in an appropriate venue, should the same become necessary.”</p> <p>However, the Borda Letter did not provide a detailed claims analysis of ‘724 against the purported prior art. It did not even list the purported prior art.</p>
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NASA admits Margolin made allegations regarding the contents of the Borda letter and failed to deny them.

(Paragraph 16, continued)

<p>Defendant denies the allegations contained at page 6, lines 12-14 of this paragraph.</p> <p>Defendant admits that the NASA Headquarters Office of General Counsel belatedly conducted the initial search of its files on Plaintiff’s administrative claim in January 2009 and provided responsive documents to the NASA HQ FOIA office on January 22, 2009.</p> <p>Defendant admits that Plaintiff was advised on January 23, 2009 during a telephone call with Kellie Robinson, of the NASA Headquarters FOIA Office, that the FOIA Office had received the responsive documents resulting from the initial search for processing on January 22, 2009.</p> <p>Defendant admits that Mr. Borda’s March 19, 2009 letter was created after the initial search was conducted and was therefore not within the scope of Plaintiff’s FOIA request.</p>	<p>[again: page 6, lines 12-14] Margolin’s FOIA 08-270 request to NASA was to produce documents relating to Claim I-222 and NASA withheld the most material document at that point.</p>
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7

1 NASA denies that the Borda letter was the most material document at that point. When
2 Margolin filed his Complaint in July 2009 he believed the Borda letter was the most material
3 document so far. He did not receive the Fein email of July 2004 until November 2009. It was the
4 Fein email that stated NASA's intention to deny Margolin administrative claim of patent
5 infringement. (Second Amended Complaint, Appendix Volume 2 at A19) If NASA denies that
6 the Borda letter was the most material document in the case, perhaps they will agree that the Fein
7 email is.

8 NASA admits they did not conduct their initial search for documents until January 2009,
9 approximately six months after Margolin filed his FOIA Request. What did NASA do during this
10 six months? They ordered the Court documents in the UASC v. Optima Technology Group case
11 (See Second Amended Complaint Paragraph 30 at 67, line 25) and contacted Abernathy for help
12 in destroying the patents. (See Second Amended Complaint Paragraph 32 at 74, line 9.)

13 NASA admits their investigation was completed in January 2009. However, NASA did
14 not send Margolin the results of their investigation until approximately four months later, in May
15 2009. NASA admits that the Borda letter was created during this time. It is reasonable to believe
16 that the timing was intentional in order to withhold the letter from Margolin. NASA is playing
17 the Shell Game here.

1 (Paragraph 16, continued)

<p>Defendant denies the allegations contained at page 7, lines 4-5 of this paragraph and denies that any document that could constitute a “Borda Patent Report” was ever prepared, much less withheld.</p>	<p>It also made the assertion:</p> <p>“... numerous pieces of evidence were uncovered which would constitute anticipatory prior knowledge and prior art that was never considered by the U.S. Patent and Trademark Office during the prosecution of the application which matured into Patent No. 5,904,724.”</p> <p>and threatens, “... NASA reserves the right to introduce such evidence of invalidity in an appropriate venue, should the same become necessary.”</p> <p>However, the Borda Letter did not provide a detailed claims analysis of ‘724 against the purported prior art. It did not even list the purported prior art.</p> <p><i>[page 7, lines 4-5]:</i> NASA later claimed an exemption for the Borda Patent Report under Deliberative Process, Attorney Work Product, or Attorney-Client exemptions of 5 U.S.C. § 552(b)(5).</p>
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2

3 NASA denies that any document that could be considered a “Borda Patent Report” was ever
 4 prepared. As Margolin will explain shortly such a patent report is necessary in order to invalidate
 5 a patent due to prior art. Is NASA admitting that Borda lied when he stated, “

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

9

10 and threatens, “... NASA reserves the right to introduce such evidence of invalidity in an

11 appropriate venue, should the same become necessary.” ?

12

1 (Paragraph 16, continued)

<p>The allegations contained at page 7, line 7, through page 8, line 7, constitute legal conclusions to which no response is required.</p>	<p>However, documents that are subject to Discovery in a court action are not exempt. A good explanation can be found in <i>Martin v. Office of Special Counsel Merit Systems Protection Board</i>, 819 F.2d 1181, 260 U.S.App.D.C. 382. (U.S. App. D.C., 1987) From ¶11:</p> <p>FOIA Exemption (b)(5) protects from disclosure those "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. Sec. 552(b)(5) (1982). <u>Though the Supreme Court has noted that this language "clearly contemplates that the public is entitled to all such memoranda or letters that a private party could discover in litigation with the agency,"</u> Mink, 410 U.S. at 86, 93 S.Ct. at 835, the exact relationship between ordinary civil discovery and Exemption (b)(5), particularly the application of discovery privileges under the exemption, has bedeviled the courts since the Act's inception. Id. The Supreme Court, seeing the need for a broadly sweeping rule on the matter, has insisted that the needs of a particular plaintiff are not relevant to the exemption's applicability, and has held repeatedly that <u>only documents "normally" or "routinely" disclosable in civil discovery fall outside the protection of the exemption.</u> See <i>NLRB v. Sears, Roebuck & Co.</i>, 421 U.S. 132, 149 & n. 16, 95 S.Ct. 1504, 1515 & n. 16, 44 L.Ed.2d 29 (1975); <i>FTC v. Grolier Inc.</i>, 462 U.S. 19, 26, 103 S.Ct. 2209, 2213, 76 L.Ed.2d 387 (1983); <i>United States v. Weber Aircraft Corp.</i>, 465 U.S. 792, 799, 104 S.Ct. 1488, 1492, 79 L.Ed.2d 814 (1984).</p> <p>(Emphasis added)</p> <p>Therefore, if a document is "normally" or "routinely" available through Discovery, it is not exempt from production under 5 U.S.C. Sec. 552(b)(5).</p> <p>Even so, NASA's threatened use of the Borda Patent Report would not even require Discovery.</p> <p>The only appropriate venues for NASA to challenge the validity of a U.S. Patent are the U.S. Court of Federal Claims, the U.S. Court of Appeals for the Federal Circuit, and the USPTO. The Courts and the USPTO will not accept NASA's word that a patent is invalid due to prior art. NASA would be required to produce the evidence.</p>
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	Because NASA's threatened use of the Borda Patent Report requires that it be made public, it is not subject to the Deliberative Process, Attorney Work Product, or Attorney-Client exemptions of 5 U.S.C. § 552(b)(5). Therefore, the exemption NASA claims under 5 U.S.C. § 552(b)(5) does not apply.
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2 NASA admits that Margolin's allegations raise questions that are a matter of law but
3 offers no discussion of their own.

4 In particular, there is the proposed use of the "... numerous pieces of evidence [that] were
5 uncovered which would constitute anticipatory prior knowledge and prior art that was never
6 considered by the U.S. Patent and Trademark Office during the prosecution of the application
7 which matured into Patent No. 5,904,724." and Borda's threat, "... NASA reserves the right to
8 introduce such evidence of invalidity in an appropriate venue, should the same become
9 necessary."

10 The USPTO Manual of Patent Examining Procedure (MPEP) Section explains the
11 requirements for a Request For Ex-Parte Re-Examination in Section 2205 **Content of Prior Art**
12 **Citation** (Exhibit 9, Appendix Volume 1 at A60)
13 (URL is http://www.uspto.gov/web/offices/pac/mpep/documents/2200_2205.htm#sect2205)

14 **2205 Content of Prior Art Citation [R-7]**
15

16 The prior art which may be submitted under 35 U.S.C. 301 is limited to "written prior art
17 consisting of patents or printed publications."
18

19 *>Pursuant to 35 U.S.C. 301, an< explanation is required of how the person submitting the
20 prior art considers it to be pertinent and applicable to the patent, as well as an explanation of
21 why it is believed that the prior art has a bearing on the patentability of any claim of the
22 patent. The prior art citation must, at a minimum, contain some broad statement of the
23 pertinency and applicability of the art submitted to the patentability of the claims of the
24 patent for which the prior art citation is made. *>The explanation of why it is believed that
25 the prior art has a bearing on the patentability of any claim of the patent< would be met, for

1 example, by a statement that the art submitted in the prior art citation under 37 CFR 1.501
 2 was made of record in a foreign or domestic application having the same or related invention
 3 to that of the patent. >The explanation of how the person submitting the prior art considers it
 4 to be pertinent and applicable to the patent would set forth, for at least one of the patent
 5 claims, how each item cited shows or teaches at least one limitation of the claim.< Citations
 6 of prior art by patent owners may also include an explanation of how the claims of the patent
 7 differ from the prior art cited.
 8

9 {Emphasis added}

10 That is what is required to challenge the validity of a patent due to prior art, a report showing
 11 “for at least one of the patent claims, how each item cited shows or teaches at least one limitation
 12 of the claim.” NASA asserts that no such report ever existed.

13
 14 (Paragraph 16, continued)

Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained at page 8, lines 9-10 of this paragraph and, on that basis, denies those allegations.	b. Margolin already had most of the documents NASA sent him because they were documents he had sent to NASA.
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16
 17 NASA denies that Margolin already had most of the documents NASA sent him because they
 18 were documents he had sent NASA. If NASA had read the documents they sent him they would
 19 have had to agree with him.

20
 21 (Paragraph 16, continued)

Defendant admits that it did not provide an estimate of volume of withheld documents in its initial response to Plaintiff's FOIA request, as alleged at page 8, lines 12-13 of this paragraph.	c. Although 5 U.S.C. § 552(a)(6)(F) requires agencies to give an estimate of the volume of the documents being withheld, NASA failed to do so.
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22

1 NASA admits it failed its duty under 5 U.S.C. § 552(a)(6)(F) to provide an estimate of the
 2 volume of withheld documents.

3

<p><u>NASA</u></p> <p>17. Defendant admits the allegations contained in this paragraph.</p>	<p><u>Margolin</u></p> <p>17. Margolin filed a FOIA Appeal on June 10, 2009. See Exhibit 11 at Appendix Volume 1 A54. The Appendices in the appeal have been omitted due to their length. Margolin’s FOIA Appeal was received at NASA Headquarters on June 12, 2009. See Exhibit 12 at Appendix Volume 1 A75.</p>
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4

5 NASA and Margolin agree on this one.

6

<p><u>NASA</u></p> <p>18. Defendant admits that Plaintiff spoke to Randolph Harris of the NASA Headquarters Office of General Counsel on July 21, 2009 and on July 22, 2009.</p>	<p><u>Margolin</u></p> <p>18. On Monday, July 21, 2009, Margolin called the NASA Office of the General Counsel to inform NASA that they had failed to respond by the 20 day statutory deadline required by 5 U.S.C. § 552(a)(6)(A)(ii), and to ask what NASA’s intentions were.</p>
<p>Defendant admits that Mr. Harris lacked personal knowledge regarding the manner and timing of NASA’s response to Plaintiff’s FOIA appeal.</p>	<p>He spoke to Mr. Randolph Harris who said he would look into the matter and call him back later that day. Mr. Harris did not call him back that day, so the next day he called Mr. Harris. Mr. Harris said that NASA would be sending Margolin a bunch of documents but he did not know what the documents were or when they would be sent. He guessed seven days.</p>
<p>Defendant admits that Mr. Harris declined to accept service on behalf of Defendant by USPS Express Mail.</p>	<p>Margolin also asked whether NASA would waive legal service and accept a Complaint by USPS Express Mail. Mr. Harris said, “No.” Only Certified mail. After Margolin told him</p>

	<p>about the problem when he had sent NASA the letter of April 6, 2009 to Acting Administrator Scolese (USPS never delivered it) Mr. Harris still said, “No.”</p>
<p>Defendant admits that Plaintiff e-mailed Mr. Harris a letter on July 21, 2009. The allegations contained in this paragraph purport to characterize the contents of that letter. That letter speaks for itself and contains the best evidence of its contents and thus no response is required.</p> <p>Defendant lacks sufficient knowledge and information to form a belief as to the truth of the remaining allegations contained in this paragraph and, on that basis, denies those allegations.</p>	<p>Margolin emailed Mr. Harris a letter asking him to confirm what he had said in the telephone conversation. See Exhibit 13 at Appendix Volume 1 A77.</p> <p>NASA had failed to respond to Margolin’s FOIA Appeal (or ask for an extension) within the 20 day statutory period required by FOIA, and there was no reason to believe NASA had changed course and was suddenly going to start acting in good faith.</p>

1
2 NASA and Margolin agree on everything in this paragraph except that NASA denies failing to
3 respond to Margolin’s FOIA appeal within the 20 day statutory period required by FOIA.
4 Margolin filed his FOIA Appeal on June 10, 2009. (Second Amended Complaint, Appendix
5 Volume 1 at A54) It was received at NASA on June 12, 2009. (Second Amended Complaint,
6 Appendix Volume 1 at A75) NASA’s denial of Margolin’s appeal was mailed August 6, 2009.
7 (Second Amended Complaint, Appendix Volume 1 at A90). By Margolin’s count that comes to
8 38 business days after NASA received his FOIA Appeal.

9
10

<p><u>NASA</u></p> <p>20. Defendant admits the allegations contained in this paragraph.</p>	<p><u>Margolin</u></p> <p>20. Margolin filed a FOIA lawsuit against NASA on July 31, 2009 in U.S. District Court for the District of Nevada, case No. 3:09-cv-00421-LRH-VPC.</p>
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1 NASA and Margolin agree that Margolin filed suit against NASA.

2

<u>NASA</u>	<u>Margolin</u>
<p>21. Defendant admits that it denied Plaintiff's FOIA appeal in a letter dated August 5, 2009. The allegations contained in this paragraph purport to characterize the contents of the August 5, 2009 letter. That letter speaks for itself and contains the best evidence of its contents and thus no response is required.</p>	<p>21. After Margolin filed the Court action NASA sent him their Denial of his FOIA Appeal. See Exhibit 16 at Appendix Volume 1 A84 .</p>
<p>Defendant lacks knowledge and information sufficient to form a belief as to the remaining allegations contained in this paragraph and, on that basis, denies those allegations.</p>	<p>On August 10, 2009 Margolin received NASA's Denial of his Appeal. The letter was from Thomas S. Luedtke, Associate Administrator for Institutions and Management. It was dated August 5 (four days after Margolin's Complaint appeared on Pacer and two days after he served the U.S. Attorney) and postmarked August 6, which was the same day the Post Office delivered the Summons and Complaint to NASA.</p> <p>NASA denied Margolin's FOIA Appeal and produced no additional documents, only more reasons to withhold them. NASA admitted to withholding 100 pages of documents.</p>

3

4 NASA admits that they denied Plaintiff's FOIA appeal in a letter dated August 5, 2009.

5 NASA denies the letter was sent by Thomas S. Luedtke and that they produced no
 6 additional documents. See Second Amended Complaint, Appendix Volume 1 at A84 for
 7 Luedtke's letter.

8

9 Paragraph 22 is long and will be separated into parts.

10

1

<u>NASA</u>	<u>Margolin</u>
<p>22. Defendant admits that it sent documents comprising a supplemental response to Plaintiff's June 2008 FOIA request in two boxes in November 2009 with a cover letter from Stephen L. McConnell, NASA FOIA Officer.</p> <p>Defendant admits that, upon further review of Defendant's FOIA request as a result of the instant litigation, Defendant determined that it would not be unreasonable to expand its search to include documents and electronic records at NASA Field Centers even though Plaintiff submitted his June 2008 FOIA request only to NASA Headquarters.</p> <p>Defendant admits that Plaintiff did not submit a FOIA request to any NASA Field Office seeking documents relating to the review of his administrative claim for infringement.</p>	<p>22. On November 16, 2009 Margolin received two boxes of documents from Stephen L. McConnell (“McConnell”), NASA Freedom of Information Act Officer. See Exhibit 17 at Appendix Volume 2 A4. The cover letter is Exhibit 18 at Appendix Volume 2 A6.</p>

2

3

NASA admits that Margolin was referred to the NASA Headquarters Office of General Counsel in June 2003 (Paragraph 9 *supra*).

4

5

NASA admits that Margolin submitted his administrative claim for patent infringement to the Headquarters Office of the General Counsel (Paragraph 10 *supra*).

6

7

Therefore, it was reasonable for Margolin to submit his FOIA request to the Headquarters Office of the General Counsel.

8

9

NASA’s inference that Margolin made a mistake by not submitting his FOIA request to other NASA locations is misleading and is more of the Shell Game that NASA is playing.

10

11

Margolin requests the Court instruct NASA to stop being so annoying.

12

1 (Paragraph 22 continues)

<p>Defendant admits that the cover letter stated that the supplemental response included approximately 4,000 pages of documents.</p> <p>Defendant admits that 4,000 is a number greater than 100.</p>	<p>According to NASA there are about 4,000 pages of documents, which is a great deal more than the 100 pages they admitted to withholding in their Denial of FOIA Appeal.</p>
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2

3 NASA admits they gave Margolin approximately 4,000 pages of additional documents
 4 and that “4,000 is a number greater than 100.” Whether 4,000 is a great deal more than 100, or is
 5 simply greater than 100 may be a matter of opinion that depends on who has to read the
 6 documents. It is not insubstantial.

7

8 (Paragraph 22 continues)

<p>Defendant admits that it did not provide an index of the documents included in the supplemental response to Plaintiff’s 2008 FOIA request and that it had no duty to do so.</p> <p>Defendant admits that there are duplicates of documents included in the supplemental response to Plaintiff’s 2008 FOIA request.</p>	<p>They are not in any particular order. There is no index. There are many duplicates. Although the pages are numbered the numbers are frequently illegible. There are gaps in the numbers indicating that sections were entirely withheld, usually in the most interesting parts. Is NASA really this disorganized?</p>
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9

10 Since NASA admits it did not provide an index to the 4,000 or so pages of documents it provided
 11 and asserts it has no duty to do so, Margolin is forced to request that the Court order NASA to
 12 provide the documents to the Court for *in camera* inspection.

1 (Paragraph 22 continues)

<p>Defendant admits that certain documents were withheld from the supplemental response to Plaintiff's 2008 FOIA request under FOIA Exemptions (b)3, (b)(4), (b)(5) and (b)(6).</p>	<p>The pages run from 00017 to 05605 indicating that around 1600 pages were entirely withheld. Many of the emails are redacted. Sometimes the entire body of the email is redacted under §552 (b)(5) which McConnell characterizes as:</p> <p>(b)(5) – which protects inter-agency documents generated which "are predecisional and/or deliberative in nature" and information protected as attorney work product; and</p>
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2

3 NASA admits it withheld documents from its supplemental response. Margolin requests NASA
 4 be ordered to include them in his request for *in camera* inspection made above.

5

6 (Paragraph 22 continues)

<p>Defendant lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations contained in this paragraph and, on that basis, denies those allegations.</p>	<p>That is what this entire case is about. However, by providing the documents (such as they are) it may mean NASA does not have to provide a Vaughn Index or provide them to the Court for in-camera inspection or have the Court appoint a Special Master to review them. This places the entire burden on Margolin. The documents are too voluminous to file in their entirety in this Court action. The most relevant parts are reproduced in Appendix Volume 2 and Appendix Volume 3.</p>
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7

8 NASA's denial has made it necessary for Margolin to make many of the redacted emails that are
 9 part of the 4,000 or so pages it sent Margolin in November 2009 available as an appendix to this
 10 filing. To avoid wasting the Court's time Margolin has included only approximately 574 pages.
 11 See Exhibit 11, Appendix Volume 2 through Appendix Volume 7. Most are emails. One of
 12 Margolin's favorite NASA emails is in Appendix Volume 6 at A18. It's totally redacted.

1 Paragraph 23 is long and will be separated into parts.

<u>NASA</u>	<u>Margolin</u>
<p>23. Defendant denies the allegations contained at page 11, lines 11-14 of this paragraph.</p>	<p>23. The approximately 4,000 pages of documents Margolin received from NASA on November 16, 2009 tell a very different, and very disturbing, story of the period of time from when he contacted NASA in May 2003 about their infringement of ‘724 to when they finally responded to his FOIA request in May 2009.</p>

2

3 NASA denies the 4,000 or so pages tell a very different story of the period of time from when
 4 Margolin contacted NASA in May 2003 about their infringement of ‘724 to when they finally
 5 responded to his FOIA request in May 2009.

6

7 (Paragraph 23 continues)

<p>Defendant admits that it has not provided any patent infringement analysis prepared by Mr. Frank Delgado to Plaintiff.</p> <p>Defendant admits that such pre-decisional information prepared at the request of Agency counsel was appropriately withheld under FOIA Exemption (b)(5).</p> <p>Defendant denies the allegations contained at page 11, lines 16-26, through page 12, lines 1-13, of this paragraph.</p>	<p>They show:</p> <p>a. The synthetic vision software for the X-38 project had been done by Mike Abernathy (“Abernathy”) of Rapid Imaging Software, working with NASA’s Frank Delgado (“Delgado”) (JSC-NASA).</p> <p>Delgado was brought onboard NASA’s claim investigation in early 2004. Abernathy was brought onboard a few months later and has been heavily involved ever since.</p> <p>Delgado said the X-38 project did not infringe the ‘724 patent but his analysis has not been provided.</p> <p>Abernathy provided a few references that he said were prior art that would invalidate ‘073 and ‘724. However, a true analysis report requires showing how the patent claim elements are present in the purported prior art. Abernathy failed to do that. A</p>
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	<p>list of references without such a detailed analysis is worthless.</p> <p>Both Delgado and Abernathy are incensed that the '073 and '724 patents were even issued and argue that NASA should file a Request For Re-Examination with the Patent Office. Both Delgado and Abernathy display a profound ignorance of patents and the patent system. There is no evidence that NASA's attorneys (some of whom are patent attorneys) made any attempt to educate them.</p> <p>NASA appears to have accepted the Delgado and Abernathy reports uncritically, and in July, 2004, decided to deny Margolin's claim.</p>
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1
2 NASA admits it has not provided the patent analysis performed by Frank Delgado. But, perhaps
3 the patent analysis was done by someone else. In an email from Barry Gibbens on September 1,
4 2004 (Second Amended Complaint, Appendix Volume 2 at A55) he states "It also seems clear
5 that there is substantial prior art in existence to make an argument for re-examination of the
6 Margolin patent." This would qualify as the "Borda Patent Report," which calls into question
7 NASA's truthfulness in Paragraph 16 (*supra*) where NASA:

8 ... denies that any document that could constitute a "Borda Patent Report" was ever
9 prepared, much less withheld.

10

11 NASA denies everything else.

1 (Paragraph 23 continues)

<p>Defendant denies the allegations in the first sentence of subsection b. of this paragraph and admits that a final agency determination was made on the administrative claim for infringement originally filed by Plaintiff on March 19, 2009 — the date that Mr. Borda, as the deciding official, issued his letter.</p> <p>The allegations contained in the second sentence of subsection b. of this paragraph constitute conclusions of law to which no response is required. To the extent a response is deemed required, the allegations contained in the second sentence of subsection b. of this paragraph are denied.</p>	<p>b. NASA decided in July 2004 to deny Margolin’s Claim, relying heavily on information supplied by Abernathy. All of the documents dated after that are post-decisional. Therefore, they are not exempt under 5 U.S.C.§552(b)(5)</p>
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2

3 NASA and Margolin completely disagree on this. Margolin asserts that it was in the Fein email
 4 of July 2004 that NASA decided to deny Margolin’s claim.

5

6 (Paragraph 23 continues)

<p>Defendant denies the allegations contained in subsection c. of this paragraph.</p>	<p>c. In September 2004 NASA approved a plan to file a Request for Re-Examination with the Patent Office because:</p> <p style="padding-left: 40px;">It seems clear that the technical folks have determined that the Margolin patent on Synthetic Vision creates a substantial problem for many of our partners in the aviation safety industry for a variety of reasons.</p> <p>For reasons that are not given, the Request for Re-Examination was not filed.</p>
---	---

7

8 NASA denies it planned to file a Request For Re-Examination with the Patent Office. This is
 9 contradicted by the email dated September 1, 2004 from Barry Gibbens to (among others) Alan

1 Kennedy and Edward Fein. See Margolin’s Second Amended Complaint Appendix Volume 2 at
 2 A55.

3

4 (Paragraph 23 continues)

<p>Defendant admits that it appropriately engaged in communications with Michael Abernathy, as Defendant's contractor, regarding the allegations of infringement initiated by Plaintiff.</p> <p>Defendant admits that certain communications between Defendant and Mr. Abernathy contained in the supplemental response to Plaintiff's 2008 FOIA request were redacted.</p> <p>Defendant admits that its employees conducted a telephone conference that included Mr. Abernathy.</p> <p>Defendant denies the remaining allegations contained in subsection d. of this paragraph.</p>	<p>d. In September 2006 the issue heated up again when Robert Adams of Optima Technology asked Abernathy to license the Patents. There was considerable communications between Abernathy and NASA on the subject even though much of it has been redacted. There was also a conference call between Abernathy and various NASA staff members. Although Abernathy showed a profound ignorance of patents and patent law, NASA continued to accept his work uncritically.</p>
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5

6 Margolin denies that NASA’s communications with Abernathy was appropriate. NASA gave
 7 Abernathy legal advice concerning his company’s patent infringement. Such communications
 8 suggest Abernathy was acting as NASA’s agent.

9

10 (Paragraph 23 continues)

<p>The allegations contained in subsection e. of this paragraph constitute conclusions of law to which no response is required. To the extent a response is deemed required, Defendant denies that Mr. Abernathy is Defendant's agent.</p>	<p>e. The relationship between NASA and Mike Abernathy has been so close that it is reasonable to believe Mike Abernathy has been acting as NASA’s Agent.</p>
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11

1 NASA denies Abernathy was acting as their agent.

2

<p><u>NASA</u></p> <p>24. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegation that certain individuals are “major players,” and, on that basis, denies that allegation.</p>	<p><u>Margolin</u></p> <p>24. The following are the major players. For a fairly complete list of the players see Exhibit 19 at Appendix Volume 2 A9.</p> <ul style="list-style-type: none"> • Alan Kennedy (Attorney, Office of the General Counsel, NASA HQ, now retired) • Barry V. Gibbens (Attorney, Langely Research Center , now deceased) • Edward K. Fein (Intellectual Property Counsel, NASA Johnson Space Center). • John Muratore (Program Manager, X-38/Crew Return Vehicle). • Franciso (Frank) J. Delgado of the Engineering Directorate (Johnson Space Center) headed up the software project for the X-38 program. • Mike Abernathy (Rapid Imaging Software) is the contractor who supplied the synthetic vision software for the X-38 project. • Gary G. Borda (Office of the Associate General Counsel, Agency Lead Attorney, NASA HQ) • Robert F. Rotella (Attorney, Office of the General Counsel, Commercial and Intellectual Property Law Practice Group) • Dan Baize (Project Manager, Synthetic Vision, NASA Langley Research Center) • Mark W. Homer (Patent Counsel, NASA Management Office -JPL) • John H. Del Frate is director of the Advanced Planning and Partnerships Office at NASA's Dryden Flight
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	<p>Research Center.</p> <ul style="list-style-type: none"> • Kurt G. Hammerle is a patent attorney at Johnson Space Center. • Mr. Jan McNutt (Attorney, Office of the Associate General Counsel, Commercial and Intellectual Property Law Practice Group, NASA Agency Counsel for Intellectual Property, NASA HQ)
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1

2 NASA denies that the individuals (whose names come up frequently in NASA’s emails

3 regarding the present subject) are “major players.”

4

5 Paragraph 25 is long and will be separated into parts.

<p><u>NASA</u></p> <p>25. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained at page 14, lines 12-18 of this paragraph and, on that basis, denies those allegations.</p>	<p>Margolin</p> <p>25. The earliest email in the NASA documents starts February 13, 2004 at 10:52 AM and is part of a long complicated email thread. See Exhibit 20 at Appendix Volume 2 A13. In order to show them in a less confusing manner they have been converted to text and will be reproduced here in what appears to be the correct chronological order and without unnecessary duplication. The page numbers refer to the NASA page numbers followed by the Appendix Volume 2 page number. (When emails are part of a chain of quoted messages and they come from different time zones it can be difficult to precisely determine the proper chronological order.)</p>
--	---

6

7 NASA denies Margolin’s attempt to present the emails in an understandable fashion but fails to

8 present their own version.

1 (Paragraph 25 continues)

<p>Defendant admits that it has appropriately redacted or withheld certain documents included in the supplemental response to Plaintiff's 2008 FOIA request under Exemptions (b)3, (b)(4), (b)(5) and (b)(6) of the FOIA.</p>	<p>This first email is from Edward K. Fein (Intellectual Property Counsel, NASA Johnson Space Center) to John Muratore (Program Manager, X-38/Crew Return Vehicle). Unfortunately, NASA has completely redacted the message under 5 USC, §552(b)(5) . They have completely redacted many messages under (b)(5).</p>
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2

3 Margolin denies NASA's assertion that the redactions are appropriate or that documents were

4 appropriately withheld.

5

6 (Paragraph 25 continues)

<p>The allegations contained at page 15, line 3, through page 18, line 39, purport to characterize certain documents contained in Defendant's supplemental response to Plaintiff's 2008 FOIA. Those documents speak for themselves and contain the best evidence of their contents and thus no response is required.</p> <p>Defendant denies the remaining allegations contained at page 15, line 3, through page 18, line 39.</p>	<p>[NASA emails with expository commentary by Margolin]</p>
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7

8 NASA denies that Margolin has presented NASA emails with his own expository commentary.

9

1 (Paragraph 25 continues)

<p>Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained at page 19, line 1, through page 20, line 2, and, on that basis, denies those allegations.</p>	<p>If Abernathy had done even a small amount of due diligence he would have discovered that there are a number of U.S. Patents for making peanut butter and jelly sandwiches. U.S. Patent 3,552,980 issued June 5, 1971 to Cooper, et al. is a good example. See Exhibit 21 at Appendix Volume 2 A22. From Column 1 line 45 - Column 2 line 23:</p> <p>[Discussion of U.S. Patent 3,552,980. See Second Amended Complaint.]</p> <p>This patent is probative because it shows Abernathy's ignorance of basic patent law concepts and his inability to do even a minimum amount of diligence.</p>
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2

3 NASA denies Margolin's evidence of Abernathy's ignorance of patents.

4

5 (Paragraph 25 continues)

<p>Defendant denies the allegations contained at page 20, lines 4-6</p>	<p>Yet, as later documents show, NASA relied on his work uncritically in making their decision to deny Margolin's claim. NASA's refusal to comply with the Freedom of Information Act is due, at least in part, to their desire to avoid embarrassment to the Agency.</p>
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6

7 NASA denies they relied uncritically on Abernathy's work and that their refusal to comply with
 8 the Freedom of Information is due at least in part, to their desire to avoid embarrassment to the
 9 Agency.

10

1 (Paragraph 25 continues)

Defendant lacks sufficient knowledge and information to form a belief as to the truth of the allegations contained at page 20, lines 8-26, and, on that basis, denies those allegations.	[More discussion of U.S. Patent 3,552,980. See Second Amended Complaint.]
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2

3 NASA denies Margolin's analysis of U.S. Patent 3,552,980 (the PBJ Patent).

4

5 (Paragraph 25 continues)

The allegations contained at page 21, line 1, through page 24, line 8, purport to characterize certain documents contained in Defendant's supplemental response to Plaintiff's 2008 FOIA request. Those documents speak for themselves and contain the best evidence of their contents and thus no response is required.	[NASA emails]
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6

7 NASA chooses to let their emails speak for themselves.

8

9 (Paragraph 25 continues)

Defendant denies that it made a determination with regard to Plaintiff's claim in July 2004. The remaining allegations contained at page 24, lines 11-22, constitute legal conclusions to which no response is required.	<p>NASA decided to deny the claim in July, 2004. All of the documents that came afterwards are post-decisional documents that are, therefore, not exempt from disclosure. Traditionally, the courts have established two fundamental requirements, both of which must be met, for the deliberative process privilege to be invoked. <i>See Mapother v. Dep't of Justice</i>, 3 F.3d 1533, 1537 (D.C. Cir. 1993) ("The deliberative process privilege protects materials that are both predecisional and deliberative." (citing <i>Petroleum Info. Corp. v. United States Dep't of the Interior</i>, 976 F.2d 1429, 1434 (D.C. Cir. 1992))). First, the communication must be predecisional, i.e., "antecedent to the adoption of an agency policy." (<i>Jordan</i>, 591 F.2d at 774) Second, the communication must be deliberative, i.e., "a direct part of</p>
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	the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." <i>Vaughn v. Rosen</i> , 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). The burden is upon the agency to show that the information in question satisfies both requirements. <i>See Coastal States</i> , 617 F.2d at 866.
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1
2 NASA denies that it decided to deny Margolin's claim in July, 2004 but offers no argument as to
3 why the email should be interpreted as meaning something other than what its plain language
4 states.

5
6 (Paragraph 25 continues)

Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained at page 24, line 24, through page 25, line 3, and, on that basis, denies those allegations.	The statement, "There is always a chance that Margolin will file a law suit, but with all of the information you guys have turned up, I think the chance of that is small", makes no sense because NASA never informed Margolin of "all of the information you guys turned up." Margolin has learned of this only now, in 2009, as a result of the present lawsuit. In order for a deterrent to work, your opponent has to know of its existence. This is one of the messages of the classic 1964 Stanley Kubrick film Dr. Strangelove, or How I learned to stop worrying and love the Bomb.
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7
8 NASA has not seen the classic 1964 Stanley Kubrick film **Dr. Strangelove, or How I learned**
9 **to stop worrying and love the Bomb.**

1

<p><u>NASA</u></p> <p>26. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, on that basis, denies those allegations.</p>	<p><u>Margolin</u></p> <p>26. Abernathy’s Detailed Analysis of Prior Art appears to be contained in the email from Mike Abernathy to Edward Fein dated June 28, 2004. See Exhibit 22 at Appendix Volume 2 A32. A true prior art analysis requires an actual discussion of purported prior art pointing out where the elements in the patent claim being discussed are present in the purported prior art. Abernathy has failed to do this, especially with the article that is in Dutch. See Exhibit 22 at Appendix 2 A42.</p>
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2

3 NASA denies at least that a true prior art analysis requires an actual discussion of purported prior
 4 art pointing out where the elements in the patent claim being discussed are present in the
 5 purported prior art.

6

<p><u>NASA</u></p> <p>27. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained at page 25, lines 12-20, of this paragraph and, on that basis, denies those allegations.</p> <p>The allegations contained at page 25, line 21, through page 39, line 4, purport to characterize certain documents contained in Defendant's supplemental response to Plaintiff's 2008 FOIA request. Those documents speak for themselves and contain the best evidence of their contents and thus no response is required.</p>	<p><u>Margolin</u></p> <p>27. Although NASA had already made the decision to deny the claim, the story is just getting started.</p> <p>Exhibit 23 at Appendix Volume 2 A45 contains a complicated email thread that took place on September 1, 2004. They were in the same section in the NASA files as an email where Jan McNutt introduced himself to Edward Fein after Mr. McNutt started working at NASA and the case was dumped into his lap. The September 2004 documents may have been provided to McNutt as a result of his email to Mr. Fein. The following is an attempt to present the thread in order and</p>
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	without unnecessary duplicates.
Defendant denies the remaining allegations contained at page 25, line 21, through page 39, line 4, of this paragraph.	[NASA emails with commentary by Margolin. See 2 nd Amended Complaint.]

1

2 NASA denies Margolin’s observation about NASA’s emails and chooses to let their emails

3 speak for themselves.

4

5 Paragraph 28 is long and will be separated into parts.

<u>NASA</u>	<u>Margolin</u>
28. Defendant admits that it did not file a Request for Reexamination on U.S. Patent Nos. 5,566,073 and 5,904,724.	28. Despite NASA’s Plan to file a Request for Re-Examination with the Patent Office, they didn’t do it.

6

7 NASA admits it did not file a Request for Reexamination for the patents. Previously, in

8 Paragraph 23 (*supra*) they denied they were even considering filing one.

9

10 (Paragraph 28 continues)

Defendant denies the allegations contained in page 39, lines 9-21 of this paragraph.	<p>It’s possible that NASA concluded they did not infringe. However, they had already decided they did not infringe when they decided to deny Margolin’s claim in July. Besides, NASA’s reason for wanting to invalidate the Patents was to benefit their partners.</p> <p>There is another possibility to consider, which is that an analysis of Abernathy’s purported prior art did not stand up to careful scrutiny. Thus, the patents would survive a Re-Examination and come out of it even stronger.</p>
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	<p>Since NASA's reason for wanting to invalidate the Margolin patents was to benefit their partners, this places any and all communications between NASA (or any NASA employee or anyone outside NASA acting at NASA's direction) and NASA's partners (or anyone acting for NASA's partners) that relate to the Margolin patents, the Infringement Claim, and Margolin's FOIA request subject to Margolin's FOIA request.</p>
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2 NASA denies the conclusion Margolin reached after reading NASA's email.

3

4 (Paragraph 28 continues)

<p>The allegations contained at page 39, line 23, through page 40, line 15, constitute conclusions of law to which no response is required. Defendant lacks knowledge and information sufficient to form a belief as to the allegations contained in the last sentence of this paragraph and, on that basis, denies those allegations.</p>	<p>Not only are the documents post-decisional the threshold issue under Exemption 5 is whether a record is of the type intended to be covered by the phrase "inter-agency or intra-agency memorandums" -- a phrase which appears to encompass only documents generated by an agency and not documents circulated beyond the executive branch. <i>See United States Dep't of Justice v. Julian</i>, 486 U.S. 1, 19 n.1 (1988).</p> <p>However, the Supreme Court shed light on this issue when it ruled on the contours of Exemption 5's "inter-agency or intra-agency" threshold requirement for the first time in <i>Department of the Interior v. Klamath Water Users Protective Ass'n</i>. 532 U.S. 1 (2001). In a unanimous decision, the Court ruled that the threshold of Exemption 5 did not encompass communications between the Department of the Interior and several Indian tribes which, in making their views known to the Department on certain matters of administrative decisionmaking, not only had "their own, albeit entirely legitimate, interests in mind," (<i>Klamath</i>, 532 U.S. at 12) but also were "seeking a Government benefit at the expense of other applicants." (<i>Id.</i> at 12 n.4)</p> <p>Thus, records submitted to the agency by the Tribes,</p>
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	<p>as "outside consultants," did not qualify for attorney work-product and deliberative process privilege protection in the case. (Id. at 16)</p> <p>NASA partners, especially Abernathy, have an interest in having U.S. Patents 5,566,073 and 5,904,724 declared invalid.</p>
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Among other things, NASA denies Abernathy has an interest in having U.S. Patents 5,566,073 and 5,904,724 declared invalid. This is contradicted by the email exchanges between Abernathy and Optima Technology Group, and Abernathy and NASA in September 2006.

<p><u>NASA</u></p> <p>29. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained at page 40, line 20, through page 43, line 12, of this paragraph and, on that basis, denies those allegations.</p>	<p><u>Margolin</u></p> <p>29. There was no apparent activity in the case until two years later, in September 2006 when Robert Adams of Optima Technology Group contacted Mike Abernathy about licensing the Margolin Patents. See Exhibit 24 at Appendix Volume 2 A59.</p> <p>In the numerous exchanges between Adams and Abernathy several things are apparent.</p> <p>a. Abernathy showed a deeply flawed understanding of patents.</p> <p>One of Abernathy’s themes is that an autopilot is absolutely essential in flying a UAV, that the ‘724 patent does not have an autopilot, and therefore, the ‘724 patent is “defective.” Abernathy’s understanding of what constitutes a “defective” patent is defective. See 35 U.S.C. 251.</p> <ul style="list-style-type: none"> • • • <p>[For the remainder of paragraph 29 see 2nd Amended</p>
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	Complaint]
<p>The allegations contained at page 43, line 14, through page 67, line 17, purport to characterize certain documents contained in Defendant's supplemental response to Plaintiff's 2008 FOIA request. Those documents speak for themselves and contain the best evidence of their contents and thus no response is required.</p> <p>Defendant denies the remaining allegations contained in this paragraph.</p>	[See 2 nd Amended Complaint]

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2 NASA denies Margolin's characterization of the NASA emails but offers no explanation of their

3 own.

4

<u>NASA</u>	<u>Margolin</u>
<p>30. Defendant admits the allegations contained at page 67, lines 21-29, except that Plaintiff filed his FOIA request on June 28, 2008 and Mr. McNutt requested a 90-day extension on August 5, 2008.</p>	<p>30. Margolin filed his FOIA Request on July 1, 2008. It was turned over to McNutt of the Office of the General Counsel. McNutt asked Margolin for a 90-day extension on July 24, 2008. Margolin agreed on August 8, 2008.</p>
<p>The allegations contained at page 67, line 31, through page 70, line 8, purport to characterize certain documents contained in Defendant's supplemental response to Plaintiff's 2008 FOIA request. Those documents speak for themselves and contain the best evidence of their contents and thus no response is required.</p>	<p>Shortly thereafter McNutt asked Laura Burns (Law Librarian for the Office of the General Counsel) for Court documents in the then-ongoing litigation between Universal Avionics Systems Corporation ("UASC") and Optima Technology Group (OTG) and Jed Margolin in U.S. District Court for the District of Arizona (Universal Avionics Systems Corporation vs. Optima Technology Group, et. No. CV 07-588-TUC-RCC). See Exhibit 25 at Appendix Volume 2 A99.</p> <p>[NASA email]</p>

<p>Defendant denies the remaining allegations contained at page 67, line 31, through page 70, line 8.</p>	<p>Why did McNutt do this? The litigation between UASC and OTG had nothing to do with Margolin’s Claim or Margolin’s FOIA Request.</p> <p>Since NASA wanted the Margolin patents invalidated it is reasonable to ask the following questions:</p> <p>a. Did McNutt (or any NASA employee or anyone outside NASA at NASA’s direction) have communications with UASC regarding the Margolin Patents, Margolin’s Claim, or Margolin’s FOIA Request?</p> <p>b. Did McNutt (or any NASA employee or anyone outside NASA at NASA’s direction) aid UASC in its litigation with OTG?</p> <p>McNutt’s actions place any and all communications between NASA (or any NASA employee or anyone outside NASA acting at NASA’s direction) and Universal Avionics Systems Corporation (or anyone acting for Universal Avionics Systems Corporation) that relate to the Margolin patents, the Infringement Claim, and Margolin’s FOIA request subject to Margolin’s FOIA request.</p> <p>It should be noted that the UASC litigation was settled long before it even got to the part that was supposed to be about the patents.</p>
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- 1
- 2 NASA admits Margolin filed a FOIA Request.
- 3 NASA chooses to let their emails speak for themselves.
- 4 NASA denies Margolin’s commentary on NASA’s emails but offers no explanation of their own.
- 5

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<p><u>NASA</u></p> <p>31. The allegations contained at page 70, lines 10-25, purport to characterize certain documents contained in Defendant's supplemental response to Plaintiff's 2008 FOIA request. Those documents speak for themselves and contain the best evidence of their contents and thus no response is required.</p> <p>Defendant denies the remaining allegations contained at page 70, lines 10-25.</p>	<p><u>Margolin</u></p> <p>31. In or around October 2008 NASA Dryden (DFRC-NASA) was apparently asked if any of their projects might infringe on the Patents. The answers are informative. See Exhibit 26 at Appendix Volume 2 A103.</p> <p>In the following email (written by Mark Homer, quoting John Del Frate - October 21, 2008), although he concludes that Dryden's work does not infringe he pays the patent ('724) a high compliment.</p> <p>Since May of 1999, we have tested a number of UAVs. This patent would be addressed to our most sophisticated UAVs which would include: X-36, X-45 (UCAV), Pathfinder Plus, Helios/Centurion, Altus, Altair, Ikhana, Hyper-X (X-43) and X-48B (currently flying). As I mentioned in a previous e-mail, our level of complexity in the ground control stations never reached the level described in the patent. It could go there, but it is very costly and our niche is in testing the aircraft and doing research to enable capabilities. The environment described in the patent is more for the operational level UAVs.</p> <p>And he also reveals which projects probably infringe.</p>
<p>Defendant denies the allegations contained at page 70, line 26, through page 71, line 8, of this paragraph.</p>	<ul style="list-style-type: none"> • X-36, X-45 and X-48B were done by Boeing. • Pathfinder Plus and Helios/Centurion were sponsored by the Office of Aerospace Technology at NASA Headquarters. They were managed by the NASA Dryden Flight Research Center in partnership with AeroVironment, Inc., Monrovia, Calif. • Altus and Altair are General Atomics. • Lkhana is a modified version of the Predator B manufactured by General Atomics.

	<ul style="list-style-type: none"> • Hyper-X (X-43) was a project managed by NASA-Langley and included partners Boeing, Micro Craft, Pratt & Whitney, RJK Technologies, and Boeing, who was responsible for the vehicle design, thermal protection system, flight control system and the navigation.
<p>The allegations contained at page 71, line 9, through page 74, line 6, purport to characterize certain documents contained in Defendant's supplemental response to Plaintiff's 2008 FOIA request. Those documents speak for themselves and contain the best evidence of their contents and thus no response is required.</p> <p>Defendant denies the remaining allegations contained at page 71, line 9, through page 74, line 6.</p>	<p>[NASA emails with some expository commentary by Margolin]</p>

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2 NASA chooses to let their emails speak for themselves.

3 NASA denies Margolin's commentary on NASA's emails but offers no explanation of its own.

4

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<u>NASA</u>	<u>Margolin</u>
<p>32. The allegations contained at page 74, line 9, through page 76, line 3, purport to characterize certain documents in Defendant's supplemental response to Plaintiff's 2008 FOIA request. Those documents speak for themselves and contain the best evidence of their contents and thus no response is required.</p> <p>Defendant denies the remaining</p>	<p>32. In early October 2008 McNutt contacted Abernathy and asked for help in the infringement action. This is another tangled email thread. Again, in order to show them in a less confusing manner they have been converted to text and will be reproduced here in what appears to be the correct chronological order and without unnecessary duplication. The page numbers refer to the NASA page numbers followed by the Appendix Volume 2 page number. (When emails are part of a chain of quoted messages and they come from different time zones it can be difficult to precisely determine the proper chronological order.) See Exhibit 27 at Appendix Volume</p>

<p>allegations contained at page 74, line 9, through page 76, line 3, in this paragraph.</p>	<p>2 A106.</p> <p>[NASA emails with some expository commentary by Margolin]</p> <p>About the Serrafian reference: Simulator Evaluation of a Remotely Piloted Vehicle Lateral Landing Task Using a Visual Display. Serrafian published two reports about HiMat.</p> <p>NASA Technical Memorandum 84916 (May 1984): NASA Technical Memorandum 85903 (August 1984):</p> <p>Although the material in both reports is mostly the same they are not identical. Abernathy's failure to distinguish the two reports (or note that there are two reports) is poor scholarship.</p> <p>Abernathy also failed to mention that neither report shows the use of synthetic vision.</p>
<p>Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained at page 76, lines 6-18 and, on that basis, denies the allegations.</p> <p>The allegations contained at page 76, lines 20-30, purport to characterize a technical report. That document speaks for itself and contains the best evidence of its contents and thus no response is required.</p> <p>Defendant denies the remaining allegations contained at page 76, lines 20-30 of this paragraph.</p>	<p>The Serrafian report that Abernathy should have read is NASA Technical Memorandum 88264 Effect of Time Delay on Flying Qualities: An Update by Rogers E. Smith and Shahan K. Sarrafian. See Exhibit 29 at Appendix Volume 3 A4.</p> <p>From the Introduction:</p> <p>The advent of modern, full-authority electronic flight control systems produced many exciting advances in aircraft handling and performance capabilities. Unfortunately, this improved capability has not evolved without cost. Chief among the problems related to this modern technology is the introduction of additional time delay in the response of the aircraft to pilot input. These time delays can produce a significant degradation in the flying qualities of the aircraft during demanding tasks.</p> <p>This Serrafian report is about the need to compensate for time delays in the control systems used in modern manned aircraft. There are additional time delays with unmanned aircraft which must be considered, and they are considered in the '724 patent.</p>

<p>Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained at page 77, lines 1-19 of this paragraph and, on that basis, denies those allegations.</p>	<p>Abernathy cited Wikipedia as a source. Anyone can edit Wikipedia. Wikipedia states (http://en.wikipedia.org/wiki/Wikipedia:About)</p> <p>Wikipedia is written collaboratively by an international group of volunteers. Anyone with internet access can write and make changes to Wikipedia articles. There are no requirements to provide one's real name when contributing; rather, each writer's privacy is protected unless they choose to reveal their identity themselves.</p> <p>The Wikipedia article on Highly Maneuverable Aircraft Technology was started March 24, 2006 by a contributor named Arado, and simply said:</p> <p>The Highly Maneuverable Aircraft Technology (HiMAT) was a NASA-program to develop technologies for future fighter aircraft. Among the technologies explored were close-coupled canards, fully digital flight control (including propulsion), composite materials (graphite and fiberglass), winglets etc.</p> <p>The article did not mention synthetic vision until February 5, 2008. That contributor, using the name SoarIT, has chosen to remain anonymous.</p> <p>In short, Wikipedia cannot be relied upon for reliable information on subjects where people have an agenda to promote.</p>
<p>The allegations contained at page 77, line 20, through page 84, line 25, purport to characterize certain documents contained in Defendant's supplemental response to Plaintiff's 2008 FOIA request. Those documents speak for themselves and contain the best evidence of their contents and thus no response is required.</p>	<p>[NASA emails, See 2nd Amended Complaint]</p>
<p>Defendant denies the remaining allegations contained at page 77,</p>	<p>[NASA emails, See 2nd Amended Complaint]</p>

<p>line 20, through page 84, line 25, of this paragraph.</p>	<p>The preceding emails show there was a conference call with at least Jan McNutt, Bob Rotella, Ed Fein, Mike Abernathy, and Abernathy’s attorneys.</p> <p>The close cooperation between these parties constitute agency, misconduct, or conspiracy.</p> <p>McNutt says, “Hopefully, we will find a solution that everyone can share in.”</p> <p>Everyone except Margolin and Optima Technology Group, that is. And who did McNutt mean by “everyone” ?</p> <p>It is not known if McNutt kept his promise to Abernathy, “I will let you know the development of this in as much as I can.” The NASA documents are silent on the matter.</p>
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2 NASA chooses to let their emails speak for themselves.

3 NASA denies the facts of how Wikipedia works when they could have gone to the
4 Wikipedia Web site and verified these facts for themselves.

5 NASA denies Margolin’s commentary on NASA’s emails but offers no explanation of
6 their own.

7

<p><u>NASA</u></p> <p>33. Defendant admits that Jeffrey L. Fox, a NASA civil servant employee at Johnson Space Center, contributed to an article entitled Synthetic Vision Technology for Unmanned Systems: Looking Back and Looking Forward.</p> <p>Defendant denies that NASA has withheld documents that are not exempt from production.</p>	<p><u>Margolin</u></p> <p>33. The article that Abernathy sent to NASA to preview (See Exhibit 30 at Appendix Volume 3 A18) was published in the December 2008 issue AUVSI’s <i>Unmanned Systems Magazine</i> as Synthetic Vision Technology for Unmanned Systems: Looking Back and Looking Forward. The authors are Jeff Fox, Michael Abernathy, Mark Draper and Gloria Calhoun. See Exhibit 31 at Appendix Volume 3 A26.</p>
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<p>Defendant lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 33 and, on that basis, denies those allegations.</p>	<p>Abernathy is with Rapid Imaging Software, Mark Draper and Gloria Calhoun are with AFRL, and Jeff Fox is listed as Flight Operations Engineer at NASA Johnson Space Center. (See Exhibit 31 at Appendix Volume 3 A27) Jeff Fox was not listed as a co-author on the preview copy Abernathy gave to NASA. A comparison of the two versions shows that it was tightened up and made more readable, presumably by AUVSI Editor Brett Davis. There are no major additions. The addition of Mr. Fox's name and affiliation with NASA indicates that NASA gave its approval to the article. It also gave the article more credibility. The article presents a spurious history of synthetic vision.</p> <p>Margolin responded with the article Synthetic Vision – The Real Story. See Exhibit 32 at Appendix Volume 3 A29. Although the editor of AUVSI Magazine had promised Margolin the opportunity to respond in the magazine, he later refused to even mention the controversy about the Abernathy article. See Exhibit 33 at Appendix Volume 3 A87. As result, Margolin posted his response on his personal web site at www.jmargolin.com .</p> <p>NASA decided to deny Margolin's claim in July, 2004. (See Exhibit 20 at Appendix Volume 2 A19]. Everything after that is post-decisional and therefore not exempt from production.</p> <p>Although NASA has now provided approximately 4,000 pages of documents many are redacted and it is likely that many have been entirely withheld.</p> <p>NASA must disclose all these documents in their entirety, preferably in their original electronic format.</p>
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1 NASA asserts that NASA’s Jeff Fox contributed to the article published in the December 2008
 2 issue of AUVSI’s *Unmanned Systems Magazine* as **Synthetic Vision Technology for**
 3 **Unmanned Systems: Looking Back and Looking Forward**. (See Second Amended Complaint
 4 Appendix Volume 3 at A26) However, an email from Brett Davis, editor of AUVSI *Unmanned*
 5 *Systems Magazine* raises doubts about that. (See Exhibit 7, Appendix Volume 1 at A54):

6 As far as I can tell from my email trail, he was indeed not listed on the first version of the
 7 story that came to me. I edited it to our style and sent it back to Michael Abernathy for
 8 review. They then revised my edit and sent it back to me and at that point asked to have him
 9 added as an author.

10
 11 I didn’t do a side-by-side analysis of what might have been changed or added by him in
 12 particular, though, and wouldn’t necessarily been able to tell anyway. I also didn’t deal with
 13 him directly, only with Michael Abernathy, but that’s not an usual arrangement for multi-
 14 author stories provided by outside companies.

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 16

<u>NASA</u>	<u>Margolin</u>
<p>34. Defendant admits that Plaintiff sent an electronic copy of a document named "auvsi_answer.pdf" to Mr. McNutt. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 34 and, on that basis, denies those allegations.</p>	<p>34. Margolin sent a copy of his response to McNutt. See Exhibit 34 at Appendix Volume 3 A91. There is no evidence in the NASA documents that anyone at NASA discussed the Margolin Response. It is hard to believe that no one at NASA discussed it.</p> <p>The NASA documents from Abernathy end with one where he expresses pleasure at the apparent misfortune of others. (See Exhibit 28 at Appendix Volume 2 A125)</p>

17

18 NASA and Margolin agree that Margolin sent a copy of his response to the Abernathy
 19 article to McNutt.

20 NASA denies that Abernathy’s letter expresses pleasure at the apparent misfortune of
 21 others.

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<u>NASA</u>	<u>Margolin</u>
<p>35. The allegations contained in this paragraph consist of Plaintiff's characterization of certain documents that are attached to the second amended complaint. Those documents speak for themselves and contain the best evidence of their contents and thus no response is required.</p> <p>Defendant denies that it is engaging in a war against Plaintiff and admits that doing so would be especially difficult during the four and a half year period between January 2004 and July 2008 when neither Plaintiff nor OTC communicated at all with Defendant regarding the patent claim.</p> <p>Defendant lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 35 and, on that basis, denies those allegations.</p>	<p>35. Finally we find out what this has all been about in these emails from Robert F. Rotella, Senior Patent Attorney, Office of the General Counsel, NASA Headquarters. [See Exhibit 34 at Appendix Volume 3 A94]</p> <p>The first one appears to have been sent when he was offsite and sent the email to himself. The second one was to his staff. Emphasis has been added.</p> <hr/> <p>[Page 02363] [AV3-A94] [redacted] From: Bob Rotella [r.rotella@att.net] Sent: Thursday, March 19, 2009 10:17 AM To: Rotella, Robert F. (HQ-MC000) Subject: <u>war</u></p> <p><i>NASA Administrative Claims - Jed Margolin and its successor in interest, Optima, have pursued an administrative claim for patent infringement. Upon completion of investigation by JSC and DFC, reviewed all materials and prepared initial draft of final agency determination letter denying claim based on lack of infringement. (Rotella, McNutt, Borda)(3/9/09)</i></p> <hr/> <p>[Page 02364] [AV3-A95] [redacted] From: Rotella, Robert F. (HQ-MC000) Sent: Thursday, March 19, 2009 10:24 AM To: Borda, Gary G. (HQ-MC000); Graham, Courtney B. (HQ-M0000) Cc: Bayer, Kathy (HQ-MC000) Subject: <u>WAR item</u></p> <p><i>NASA Administrative Claims - Jed Margolin and its successor in interest, Optima, have pursued an administrative claim for patent infringement. Upon completion of investigation by JSC and DFC, reviewed all materials and prepared initial draft of</i></p>

final agency determination letter denying claim based on lack of infringement. (Rotella, McNutt, Borda)

*Robert F. Rotella
Senior Patent Attorney
Office of the General Counsel
NASA Headquarters
[redacted (b)(6)]*

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NASA has been at **war** against Margolin and Optima Technology Group.

In modern warfare there are no rules. NASA's actions during the past 6+ years confirm that they considered the patent claim a war, a war they were resolved to win even at the cost of fairness and honesty.

The very next document is also interesting.

*[Page 02367] [AV3-A96]
[redacted]*

*From: Rotella, Robert F. (HQ-MC000)
Sent: Tuesday, May 05, 2009 2:14 PM
To: Graham, Courtney B. (HQ-MC000)
Subject: CIPLG Practice Group*

1) Node 3 module of ISS online naming contest: Drafted set of rules and entry conditions for participants; the most significant was that the agency was not bound to accept the results of the online voting which avoided having to name Node 3 after Stephen Colbert, who encouraged viewers to nominate him.

2) Administrative Claims for Patent Infringement:

a) Delta Engineers' allegation of infringement of its U.S. patent covering a "High Performance Cold Plate." Claim was denied in a final agency decision following extensive review;

b) Margolin/Optima allegation of patent infringement by X-38 Project, based on patent covering "Synthetic Vision." Claim was denied in a final agency decision following extensive review and coordination with Center patent staffs.

3) NASA trademarks: agency will pursue formal trademark registration in US and European Community for NASA brands, including: meatball, NASA seal, NASA acronym, "National Aeronautics and Space Administration.

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[redacted (b)(6)]*

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NASA denied the '724 claim (again) as well as the claim by Delta Engineers.

It then decided to pursue formal trademark registration for various NASA brands.

Why should anyone respect NASA's Intellectual Property when NASA refuses to respect the Intellectual Property of others?

1 NASA chooses to let their emails speak for themselves.

2 NASA denies Margolin's commentary on NASA's emails but offers no explanation of their own.

3 NASA denies they have been at war against Margolin but refuses to explain the use of the term

4 "war" in their emails.

5 NASA's statement denying they have been engaged in a war against Margolin is a non sequitur:

6

7 "… Defendant denies that it is engaging in a war against Plaintiff and admits that doing so

8 would be especially difficult during the four and a half year period between January 2004

9 and July 2008 when neither Plaintiff nor OTC communicated at all with Defendant

10 regarding the patent claim. "

11

12 {Emphasis added.}

13 NASA's response suggests that they could not engage in a war against an entity unless that entity

14 was in communications with them.

15

16 The evidence shows that NASA has been engaged in a stealth war against the Margolin patents

17 both directly and through its Agent Abernathy for years. This is the story told by NASA's

18 redacted documents. The unredacted documents are probably much worse, which is why they

19 were redacted. Even now, NASA is questioning the proper ownership of the patents in order to

20 damage them. NASA's behavior is repugnant.

21

22 Note that NASA may have confused OTC (Optima Technology Corporation) with OTG (Optima

23 Technology Group) which is the proper owner of the patents. See Paragraph 13 (*supra*) for an

24 explanation of the difference between the two companies.

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<p><u>NASA</u></p> <p>36. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 36 and, on that basis, denies those allegations.</p>	<p><u>Margolin</u></p> <p>36. Over a period of only a few days in early November 2009 Margolin’s personal web site (www.jmargolin.com) was visited by Abernathy’s attorneys (Sutin Thayer), Universal Avionics Systems Corporation (both Arizona and Washington State), and the law firm of Greenberg Traurig.</p> <p>{Excerpts from the server logs for www.jmargolin.com } See Margolin’s Second Amended Complaint</p>
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3 NASA denies the plain evidence.

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<p><u>NASA</u></p> <p>???</p>	<p><u>Margolin</u></p> <p>37. The reason for these visits was revealed on December 3, 2009 when Margolin received an email from Scott J. Bornstein (“Bornstein”) of the law firm of Greenberg Traurig. See Exhibit 38 at Appendix Volume 3 A134.</p> <p>Margolin points out that:</p> <ul style="list-style-type: none"> • He has never threatened to sue Abernathy for infringement of the Patents. • He does not own the Patents and, therefore, does not have standing to sue Abernathy for infringement. Thus, Abernathy does not need to fear that Margolin will sue him for infringement. • Optima Technology Group/Robert Adams is not Margolin’s agent and does not represent him. • Margolin is not Optima Technology Group/Robert Adams’ agent and does not represent them. <p>Bornstein represented Universal Avionics Systems Corporation in its lawsuit against Optima Technology Group and Margolin. He now also represents Abernathy.</p>
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37. Defendant denies that it has acted illegally or inappropriately, as Plaintiff suggests at pages 94-95.

The allegations at page 95, lines 1-11 purport to characterize the contents of a letter from Mr. McNutt to Plaintiff. That letter speaks for itself and contains the best evidence of its contents and thus no response is required.

Defendant lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 37 and, on that basis, denies those allegations.

Abernathy has been constructively working as NASA's agent since 2004 in NASA's attempt to invalidate the Patents because, according to NASA:

It seems clear that the technical folks have determined that the Margolin patent on Synthetic Vision creates a substantial problem for many of our partners in the aviation safety industry for a variety of reasons.

See Exhibit 23 at Appendix Volume 2 A55.

Although NASA denied Margolin's claim in July 2004 (See Exhibit 20 at Appendix Volume 2 A19) they have continued in their attempts to invalidate and discredit the Margolin Patents through, at least, Abernathy.

They have waged a war (NASA's own word) against Margolin, one conducted by stealth and deception, all the while telling themselves it was for the Public Good. It was not for the Public Good. It was for their own benefit and the benefit of their Partners.

And now Bornstein (representing NASA's agent Abernathy) has threatened Margolin with unspecified legal action which, if taken, would subject Margolin to a frivolous and malicious lawsuit.

NASA has crossed a line.

This line separates civilized behavior from uncivilized behavior.

This line separates decency from indecency.

This line separates bureaucratic self-interest from criminal misconduct.

According to McNutt's August 5, 2008 letter to Margolin (See Exhibit 6 at Appendix Volume 1 A37):

We regret the delay in processing your claim and assure you that we are now undertaking measures to provide a resolution of your claim as soon as possible. Unfortunately, Mr. Alan Kennedy retired from NASA earlier this year and **the action on your claim was not conveyed to management in a timely manner**. In addition the local attorney responsible for review of your claim also departed from

NASA. We are now cognizant of the importance of proceeding with a review of the claim and will contact you when we have reached a decision.

{Emphasis added}

It is hardly credible that the group dealing with the Margolin Claim, and then the Margolin FOIA request, could have kept their actions secret from NASA management considering the enormous amount of time spent by various NASA personnel on it over the years.

Still, since the core group was relatively small, they might have been able to operate under the radar.

This Rogue Group has committed criminal misconduct under cover of authority.

Normally, the department charged with investigating criminal misconduct is the Department of Justice. However, DOJ is representing NASA in the present case, which presents an insurmountable conflict of interest.

The only way a proper investigation can be conducted is for the United States Attorney General to appoint Special Counsel as provided by 28 C.F.R. § 600 .

- 1
- 2 NASA fails to address the matter of the Bornstein Letter.
- 3 NASA denies it has acted illegally, which is why the only way a proper investigation can be
- 4 conducted is for the United States Attorney General to appoint Special Counsel as provided by
- 5 28 C.F.R. § 600.
- 6

<u>NASA</u>	<u>Margolin</u>
38. The Court is respectfully referred to Section 1207.103 of Title 14 of the Code of Federal Regulations for a full and accurate description of its contents.	38. It is ironic that the documented unethical and criminal acts were committed by, at the behest of, or with the knowledge of NASA's Office of the General Counsel. Under the Code of Federal

<p>Defendant denies that unethical and/or criminal acts were committed by, at the behest of, or with knowledge of NASA’s Office of the General Counsel.</p> <p>Defendant lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 38 and, on that basis, denies those allegations.</p>	<p>Regulations Title 14 Aeronautics and Space, Part 1207—Standards of Conduct:</p> <p>§ 1207.103 Designations of responsible officials.</p> <p>(a) <i>Designated Agency Ethics Official.</i> The General Counsel of NASA is the Designated Agency Ethics Official and is delegated the authority to coordinate and manage NASA's ethics program as set forth in 5 CFR 2638.203.</p>
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2 NASA denies everything.

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4 **Cause of Action - (Breach of Duty to Disclose Responsive Documents)**

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<p><u>NASA</u></p> <p>39. Defendant repeats and re-alleges the responses made in paragraphs 1-38.</p>	<p><u>Margolin</u></p> <p>39. Plaintiff incorporates and re-alleges all preceding paragraphs as if fully set out herein.</p>
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7 Required boilerplate.

8

<p><u>NASA</u></p> <p>40. The allegations contained in this paragraph constitute conclusions of law to which no response is required. To the extent a response is deemed required, Defendant denies the allegations.</p>	<p><u>Margolin</u></p> <p>40. Defendants have violated their duty of disclosure under 5 U.S.C. § 552(a)(2) et seq. by failing to disclose all documents related to the Administrative Claim of Jed Margolin for Infringement of U.S. Patent Nos. 5,566,073 and 5,904,724; NASA Case No. I-222.</p>
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<p><u>NASA</u></p> <p>41. Defendant admits that Plaintiff has exhausted his administrative remedies under the FOIA.</p> <p>The remaining paragraphs of the complaint contain Plaintiff's requested relief, to which no response is required.</p> <p>To the extent a response is deemed necessary, Defendant denies the allegations. Defendant further denies all allegations of the complaint not previously expressly admitted.</p>	<p><u>Margolin</u></p> <p>41. Plaintiff has constructively exhausted all his administrative remedies as set forth in 5 U.S.C. § 552(a)(6)(C)(i).</p> <p>Requested Relief</p> <p>WHEREFORE, plaintiff respectfully requests that this Court:</p> <p>A. Order defendant to disclose requested records in their entirety and provide copies to plaintiff, said records to include: the patent report alleged to exist, but not provided, in the Borda letter; contacts between NASA and Mike Abernathy (and/or Rapid Imaging Software and/or its employees and/or agents); contacts between NASA (and/or those acting at NASA's direction) and Universal Avionics Systems Corporation; and contacts between NASA (and/or those acting at NASA's direction) and its partners including, but not limited to, Boeing, General Atomics, and AeroVironment.</p> <p>B. Issue an Order finding that defendant's actions were in bad faith, arbitrary, capricious, and contrary to law;</p> <p>C. Provide for expeditious proceedings in this action;</p> <p>D. Award plaintiff his costs incurred during the administrative proceedings and in this action;</p> <p>E. Recommend to the United States Attorney General that he appoint Special Counsel to investigate criminal misconduct committed by NASA employees under color of authority; and</p> <p>F. Grant such other relief as the Court may deem just and proper.</p>
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1 **NASA's Affirmative Defenses**

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3 AS A FIRST AFFIRMATIVE DEFENSE, defendant avers that the FOIA request that is the
4 subject of this lawsuit implicates information that is protected from disclosure by one or
5 more statutory exemptions, including, but not limited to, Exemptions (b)(3), (b)(4), (b)(5)
6 and (b)(6) of the FOIA. Disclosure of such information is not required or permitted.
7

8 **Margolin's Response**

9 NASA has misstated public policy. For example, Exemption b(5) under the Freedom of
10 Information Act does not require an Agency to withhold documents. It allows Agencies to
11 withhold documents.

12 Indeed, the Attorney General issued a memo to all federal agencies in March 2009 where
13 he stated (Exhibit 8, Appendix Volume 1 at A56):

14 As President Obama instructed in his January 21 FOIA Memorandum "The Freedom of
15 Information Act should be administered with a clear presumption: In the face of doubt,
16 openness prevails." This presumption has two important implications.

17
18 First, an agency should not withhold information simply because it may do so legally. I
19 strongly encourage agencies to make discretionary disclosures of information. An agency
20 should not withhold records merely because it can demonstrate, as a technical matter, that
21 the records fall within the scope of a FOIA exemption.
22

23 {Emphasis added}

24 In the present case, NASA has not even met their burden for withholding the documents.
25

1 **NASA's Prayer For Judgment**
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- 3 1. That judgement be entered in favor of Defendant and against Plaintiff;
4 2. That Plaintiff take nothing by way of his complaint;
5 3. For costs of suit; and
6 4. For such other relief as may be proper.
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9 **Margolin's Response**

10 Margolin responds to NASA's Prayer For Judgment, items 2 and 3.

11 In the United States, parties are ordinarily required to bear their own attorney's fees; the
12 prevailing party is not entitled to collect from the loser. Under this American Rule, the court
13 follows a general practice of not awarding fees to a prevailing party absent explicit statutory
14 authority. *See Alyeska Pipeline Service Co. v Wilderness Society et al.* 421 U.S. 240 (1975) for a
15 history of the American Rule.

16 There is no statutory authority in 5 U.S.C. § 552 *et seq.* for assessing costs against a
17 losing Plaintiff. There is only statutory authority for assessing costs against a losing Defendant.

18 5 U.S.C. § 552 (a)(4)(E)(i):

19 The court may assess against the United States reasonable attorney fees and other litigation
20 costs reasonably incurred in any case under this section in which the complainant has
21 substantially prevailed.
22

23 If Courts were to assess costs against losing Plaintiffs in a Freedom of Information Act
24 suit the effects would be chilling. It would turn the Freedom of Information Act into a sham.

25 Besides, Margolin has already substantially prevailed. As a result of the present action
26 NASA voluntarily produced 4,000 or so pages of documents which is substantially more than the
27 100 pages of documents they eventually (and not willingly) admitted to withholding.

Table of Authorities

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24	McClain v. DOJ, 17 Fed. Appx. 471, 474 (7th Cir. 2001)	2
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26	Miccosukee Tribe of Indians of Fla. v. United States, 516 F.3d 1235, 1243	
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31	Moore v. Bush, 601 F. Supp. 2d 6, 12 (D.D.C. 2009)	2
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36	Sanderson v. IRS, No. 98-2369, 1999 WL 35290, at *2	
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39	Vaughn v. Rosen 484 F2d 820, 157 U.S.App.D.C. 340	15
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41	Wickwire Gavin, P.C. v. USPS, 356 F.3d 588, 591 (4th Cir. 2004)	2
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43	Willamette Industries, Inc. v. U.S., 689 F.2d 865, 867 (9th Cir. 1982)	3
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CERTIFICATE OF SERVICE

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2
3 The undersigned hereby certifies that service of the foregoing MOTION FOR SUMMARY
4 JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
5 THEREOF has been made by electronic notification through the Court's electronic filing system
6 on June 9, 2010.

7
8 /Jed Margolin/

9
10 Jed Margolin

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