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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.)	OPPOSITION TO NASA’s CROSS-
)	MOTION FOR SUMMARY JUDGMENT
NATIONAL AERONAUTICS AND)	
SPACE ADMINISTRATION,)	
)	
Defendant.)	
_____)	

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14

15 Comes now Plaintiff, Jed Margolin (“Margolin”), appearing pro se, and files his
16 Opposition to NASA’s Cross-Motion for Summary Judgment.

17 This is a Freedom of Information Act (“FOIA”) action in which Margolin appeals
18 NASA’s decision to withhold information. NASA cites various exemptions, some of which are
19 used to obfuscate the real issues, and asserts the new defense of “Common Interest Privilege.”

20 This opposition is made pursuant to Federal Rules of Civil Procedure Rule 56.

21 Margolin asks the Court’s indulgence if this opposition is longer than is typical for such a
22 filing. The length of this opposition is necessitated by NASA’s introduction of the new defense
23 of “Common Interest Privilege” in their OPPOSITION TO MOTION FOR SUMMARY

1 JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT and by NASA’s use of a
2 Declaration to make legal arguments and legal conclusions and to interpret the law.

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5 OPPOSITION TO NASA’s CROSS-MOTION FOR SUMMARY JUDGMENT

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1 OPPOSITION TO NASA's CROSS-MOTION FOR SUMMARY JUDGMENT

2
3 **I. Introduction**

4 NASA has combined their OPPOSITION to Margolin's MOTION FOR SUMMARY
5 JUDGMENT with their CROSS-MOTION FOR SUMMARY JUDGMENT.^{1/}

6 Margolin has separately filed his REPLY^{2/} to the part of NASA's Opposition & CMSJ
7 that appears to be their Opposition to Margolin's Motion For Summary Judgment^{3/}. This
8 Opposition to NASA's Cross-Motion For Summary Judgment is directed to the part of NASA's
9 Opposition & CMSJ that appears to be their Cross-Motion For Summary Judgment.

10 However, since NASA failed to distinguish which parts of their filing pertain to their
11 OPPOSITION and which parts pertain to their CROSS-MOTION FOR SUMMARY
12 JUDGMENT there may be some duplication in Margolin's Reply to NASA's Opposition and
13 this Opposition to NASA's Cross-Motion For Summary Judgment.

14
15 **II. Background**

16
17 **1.** Margolin is the named inventor on U.S. Patent 5,566,073 ('073) **Pilot aid using a**
18 **synthetic environment** which teaches the use of what is now called *synthetic vision* for manned

¹ NASA's "OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT" will be abbreviated here as "NASA Opposition & CMSJ" and is Document 42 - Document 45. It is duplicated in Document 46, because NASA combined their OPPOSITION with their CROSS-MOTION FOR SUMMARY JUDGMENT.

² Margolin's REPLY TO NASA's OPPOSITION TO MARGOLIN's MOTION FOR SUMMARY JUDGMENT will be abbreviated here as "Margolin Reply".

³ Margolin's MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF will be abbreviated as "Margolin MSJ" and is Document 32 - Document 38.

1 aircraft and U.S. Patent 5,904,724 ('724) **Method and apparatus for remotely piloting an**
2 **aircraft** which teaches the use of what is now called *synthetic vision* for unmanned aircraft.

3 2. Margolin contacted NASA in May 2003 after he became aware that NASA had used
4 synthetic vision in the X-38 project.

5 3. In June 2003 Margolin was turned over to Mr. Alan Kennedy ("Kennedy") in the
6 Office of the General Counsel. Margolin offered to sell NASA the patents and was told he could
7 either offer to sell NASA the patents or file a claim for compensation but not both.

8 4. As a result, Margolin filed a claim for compensation with NASA in June 2003 for
9 infringing the '724 patent. Then Kennedy informed him that NASA would conduct an
10 investigation (expected to last 3-6 months) and that the purpose of the investigation would be to
11 find prior art to invalidate the patent.

12 5. After six months Margolin did not hear from NASA so he called Kennedy who said
13 the investigation had not been done. After that, Kennedy refused to talk to Margolin or respond
14 to his letter. Then, various things came up and Margolin was unable to pursue his claim against
15 NASA. NASA made no attempt to contact Margolin.

16 6. Margolin later assigned the patents to Optima Technology Group and the claim
17 against NASA went with them.

18 7. Although Margolin no longer owned the claim against NASA he still wanted to
19 know the results of NASA's investigation so, in June 2008 he filed a FOIA request. It was
20 assigned FOIA case number HQ 08-270 and was turned over to Mr. Jan McNutt ("McNutt") in
21 the Office of the General Counsel.

1 **8.** McNutt asked Margolin for a 90-day extension, and, on August 8, 2008, Margolin
2 agreed to the extension. However, despite being told several times that the requested documents
3 were being sent out, NASA did not send any documents to Margolin until May 2009.

4 **9.** In its very tardy response to Margolin's FOIA Request, NASA produced 62 pages of
5 documents and stated they had withheld documents, citing 5 U.S.C.§552(b)(5). NASA failed its
6 duty under 5 U.S.C. § 552(a)(6)(F) which requires agencies to give an estimate of the volume of
7 documents being withheld.

8 **10.** Margolin filed a FOIA Appeal on June 10, 2009.

9 **11.** NASA failed to respond to Margolin's FOIA Appeal within the required period so,
10 on July 31, 2009 Margolin filed the present FOIA lawsuit against NASA in U.S. District Court
11 for the District of Nevada, case No. 3:09-cv-00421-LRH-VPC.

12 **12.** It was not until after Margolin filed the Court action that NASA sent him their
13 Denial of his FOIA Appeal. On August 10, 2009 Margolin received NASA's Denial of his
14 Appeal. The letter was from Thomas S. Luedtke, Associate Administrator for Institutions and
15 Management. It was dated August 5 (four days after Margolin's Complaint appeared on Pacer
16 and two days after he served the U.S. Attorney) and postmarked August 6, which was the same
17 day the Post Office delivered the Summons and Complaint to NASA. NASA denied Margolin's
18 FOIA Appeal and produced no additional documents. NASA admitted to withholding 100 pages
19 of documents.

20 **13.** On November 16, 2009 Margolin received two boxes of documents from NASA.
21 According to NASA there are about 4,000 pages of documents, which is a great deal more than
22 the 100 pages they admitted to withholding in their Denial of FOIA Appeal. They are not in any

1 particular order. There is no index. There are many duplicates. Although the pages are numbered
2 the numbers are frequently illegible. There are gaps in the numbers indicating that sections were
3 entirely withheld, usually in the most interesting parts. The pages run from 00017 to 05605
4 indicating that around 1600 pages were entirely withheld. Many of the emails are redacted.
5 Sometimes the entire body of the email is redacted under §552 (b)(5). NASA's cover letter adds,
6 for the first time, (b)(3), (b)(4), and (b)(6) as reasons for redacting and/or withholding
7 documents.

8 **14.** The approximately 4,000 pages of documents Margolin received from NASA in
9 November 2009 tell a very different, and very disturbing, story of the period of time from when
10 he contacted NASA in May 2003 about their infringement of '724 to when they finally
11 responded to his FOIA request in May 2009. They show:

12 **a.** The synthetic vision software for the X-38 project had been done by Mike Abernathy
13 ("Abernathy") of Rapid Imaging Software, working with NASA's Frank Delgado ("Delgado")
14 (JSC-NASA). Delgado was brought onboard NASA's claim investigation in early 2004.

15 Abernathy was brought onboard a few months later and has been heavily involved ever since.

16 **b.** Delgado said the X-38 project did not infringe the '724 patent but his analysis has not been
17 provided. Abernathy provided a few references that he said were prior art that would invalidate
18 '073 and '724. However, a true analysis report requires showing how the patent claim elements
19 are present in the purported prior art. Abernathy failed to do that. A list of references without
20 such a detailed analysis is worthless.

21 **c.** Both Delgado and Abernathy are incensed that the '073 and '724 patents were even issued
22 and argue that NASA should file a Request For Re-Examination with the Patent Office. Both

1 Delgado and Abernathy display a profound ignorance of patents and the patent system.
2 NASA appears to have accepted the Delgado and Abernathy reports uncritically, and in July,
3 2004, decided to deny Margolin's claim.

4 **15.** In Margolin's Second Amended Complaint he surmises "The relationship between
5 NASA and Mike Abernathy has been so close that it is reasonable to believe Mike Abernathy has
6 been acting as NASA's Agent." (Second Amended Complaint page 13, lines 8-9) NASA
7 characterizes it as "Common Interest Privilege." (NASA Opposition & CMSJ page 14, line 13)

8

9

III. Standard of Review

10

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

12

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

19

20 {Emphasis added}

21

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

24 NASA has added their own twist. From NASA Opposition & CMSJ page 9, line 25 - page 10,

25 line 1:

26 The agency has the burden to justify any non-disclosure. *Dep't of Justice v. Tax Analysts*,
27 492 U. S. 136, 143 (1989). But the FOIA requester also has a burden — he is required to
28 show that a disclosure is in the public interest. *Nat'l Archives & Records Admin. v. Favish*,
29 541 U.S. 147, 172 (2004).

30

31 {Emphasis added}

32

1 *Favish* was about Exemption 7(C). From the Supreme Court's decision, first paragraph:

2 Skeptical about five Government investigations' conclusions that Vincent Foster, Jr., deputy
 3 counsel to President Clinton, committed suicide, respondent Favish filed a Freedom of
 4 Information Act (FOIA) request for, among other things, 10 death-scene photographs of
 5 Foster's body. The Office of Independent Counsel (OIC) refused the request, invoking FOIA
 6 Exemption 7(C), which excuses from disclosure "records or information compiled for law
 7 enforcement purposes" if their production "could reasonably be expected to constitute an
 8 unwarranted invasion of personal privacy," 5 U. S. C. §552(b)(7)(C). Favish sued to compel
 9 production. In upholding OIC's exemption claim, the District Court balanced the Foster
 10 family's privacy interest against any public interest in disclosure, holding that the former
 11 could be infringed by disclosure and that Favish had not shown how disclosure would
 12 advance his investigation, especially in light of the exhaustive investigation that had already
 13 occurred. The Ninth Circuit reversed, finding that Favish need not show knowledge of
 14 agency misfeasance to support his request, and remanded the case for the interests to be
 15 balanced consistent with its opinion. On remand, the District Court ordered the release of
 16 five of the photographs. The Ninth Circuit affirmed as to the release of four.
 17

18 The Supreme Court held (*Favish*, second paragraph):

19 2. The Foster family's privacy interest outweighs the public interest in disclosure. As a
 20 general rule, citizens seeking documents subject to FOIA disclosure are not required to
 21 explain why they seek the information. However, when Exemption 7(C)'s privacy concerns
 22 are present, the requester must show that public interest sought to be advanced is a
 23 significant one, an interest more specific than having the information for its own sake, and
 24 that the information is likely to advance that interest.
 25

26 NASA has attempted to subvert the Freedom of Information Act by applying a narrow ruling
 27 involving Exemption 7(C)⁴, which NASA has not asserted, to all the Exemptions. NASA is

⁴ (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for

1 required to justify its non-disclosures; Margolin is not required to show that a disclosure is in the
2 public interest (even though it is).

3
4 As NASA notes in their Opposition & CMF (page 10,lines 2 - 10):

5 The government may offer affidavits to prove that documents are exempt from release.
6 *Church of Scientology v. United States Dep't of Army*, 611 F.2d 738, 742 (9th Cir. 1980).
7 Courts are required to give those affidavits a presumption of good faith and substantial
8 weight. *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996). "If the affidavits contain reasonably
9 detailed descriptions of the documents and allege facts sufficient to establish an exemption,
10 'the district court need look no further.'" *Lane v. Dep't of Interior*, 523 F.2d 1128, 1135-36
11 (9th Cir. 2008). If, however, the court finds that the agency affidavits are "too generalized,"
12 the court may examine the disputed documents *in camera* to make a "first-hand determination
13 of their exempt status." *Id.* at 1136.

14
15 However, Affidavits (and Declarations) may not be used to make legal arguments and legal
16 conclusions or to interpret the law. *See Doolittle v. U.S. Dep't of Justice*, 142 F. Supp. 2d 281,
17 285 n.5 (N.D.N.Y. 2001) ("The practice of submitting legal arguments through the declaration ...
18 is improper, and such arguments will not be considered."); *Peters v. IRS*, No. 00-2143, slip op. at
19 5 (D.N.J. Feb. 23, 2001) ("Argument of the facts and the law shall not be contained in the
20 affidavits."); *Alamo Aircraft Supply, Inc. v. Weinberger*, No. 85-1291, 1986 U.S. Dist. LEXIS
21 29010, at *3 (D.D.C. Feb. 21, 1986) (reproving agency declaration for "several gratuitous
22 recitations of the affiant's own interpretation of the law").

law enforcement investigations or prosecutions, or would disclose guidelines for law
enforcement investigations or prosecutions if such disclosure could reasonably be expected to
risk circumvention of the law, or (F) could reasonably be expected to endanger the life or
physical safety of any individual;

IV. Argument

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1. NASA’s Counsel makes extensive use of the Declaration of Courtney B. Graham (“Graham”)⁵ in NASA’s statements and arguments. As such, NASA’s statements and arguments inherit many of the defects in Graham’s Declaration. For example:

A. Graham admits she did not start at NASA until October 6, 2006. (Graham ¶ 2) Therefore, she has no personal knowledge of events at NASA that occurred before that date. All she knows of the events that occurred before that date are either from what people told her (hearsay) or what she has read in the documents. Not all events in a bureaucracy are well documented. Sometimes, they are not documented at all, or the documents are lost. And, documents are subject to interpretation.

B. Graham admits she did not begin supervising CIPL until November 2008. (Graham ¶ 2) Since Margolin has not seen her name in the documents NASA sent him, the same argument can be made for events that occurred before November 2008.

Thus, Graham’s declaration of events that occurred before November 2008 does not merit Substantial Weight.

2. NASA’s Counsel frequently makes a legal argument and then cites Graham making the same legal argument. For example (Emphasis added):

⁵ The Declaration of Courtney B. Graham will be referred to as the “Graham Declaration” or “Graham’s Declaration” or simply “Graham”.

<p><u>NASA (page 7, lines 24 - page 8, line 8)</u></p> <p>NASA also withheld certain records received from the NASA field centers under Exemption 5. (Graham Dec. ¶ 36). Those documents included e-mails among NASA attorneys and technical personnel discussing case number I-222. <u>As such, they constitute pre-decisional communications within Exemption 5's deliberative process privilege.</u> (Graham Dec. ¶ 36).</p> <p>Moreover, many of those documents were either prepared by NASA attorneys or developed by NASA employees at the direction of NASA attorneys in order to evaluate the claims of patent infringement asserted against NASA in case number I-222. (Graham Dec. ¶ 36). <u>As such, those records were created in anticipation of litigation and they constitute attorney work product or attorney-client privileged communications exempt from disclosure under Exemption 5.</u> (Graham Dec. ¶ 36). Lastly, NASA created claim charts to assist attorneys in evaluating Plaintiff's patent infringement claim. <u>Those claim charts constitute attorney work product that is protected under Exemption 5.</u> (Graham Dec. ¶ 36).</p>	<p><u>Graham</u></p> <p>36. Certain agency records received from the NASA Field Centers were withheld in their entirety under FOIA Exemption 5. These documents include e-mails among NASA attorneys and technical personnel discussing Case Number I-222 and, <u>as such, constitute pre-decisional communications within the deliberative process privilege of Exemption 5.</u> Further, many of these documents were either prepared by agency attorneys or developed by NASA employees at the direction of agency attorneys in order to evaluate the claims of patent infringement asserted against the agency in Case Number I-222. <u>As such, these records were created in anticipation of litigation and constitute attorney work-product or privileged attorney-client communications exempt from disclosure under Exemption 5.</u> NASA also created claim charts to assist attorneys in evaluating Plaintiff's patent infringement claim. <u>These claim charts thus constitute attorney work product.</u></p>
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1

2 NASA wants this Court to give substantial weight to Graham's legal conclusions. However,

3 Affidavits (and Declarations) may not be used to make legal arguments and legal conclusions or

4 to interpret the law. *See Doolittle, Peters, Alamo, supra.*

5

1 The following is where Graham interprets the law:

<u>NASA (page 2, lines 9 -13)</u>	<u>Graham</u>
<p>An administrative claim for patent infringement is a claim for money damages for patent infringement against the federal government. (Graham Dec. ¶ 8). A claimant may challenge an agency's final determination on a patent infringement claim by seeking review in the Court of Federal Claims. 28 U.S.C. § 1498(a). (Graham Dec. ¶ 8). A successful claimant may recover "reasonable and entire compensation" for a patent infringement. <i>Ibid.</i> (Graham Dec. ¶ 8).</p>	<p>8. By way of background, an administrative claim for patent infringement is a claim for monetary damages for patent infringement against the Federal government. If the administrative claim is denied, the claimant may bring an action in the Court of federal Claims under 28 U.S.C. § 1498(a) seeking "reasonable and entire compensation" for the alleged infringement of his patents.</p>

2

3 Even though Graham's statements sound like they are probably true, they are an interpretation of
 4 the law and are not permitted in a Declaration or Affidavit. Again, *See Doolittle, Peters, Alamo,*
 5 *supra.*

6

7 NASA wants the Court to give Substantial Weight to the Graham Declaration which contains
 8 legal arguments and legal conclusions and interprets the law. Not only are these practices
 9 prohibited (*See Doolittle, Peters, Alamo, supra*) they violate the Freedom of Information Act {5
 10 USC § 552 (a)(4)(B)} which charges the Court to determine the matter *de novo*.

11

12 It would be proper for the Court to give substantial weight to Graham's statements of her
 13 personal knowledge, as long as her personal knowledge does not include legal arguments and
 14 legal conclusions and interpretations of the law. Unfortunately, Graham does not separate them
 15 and it would be a burden on this Court to do that for her.

16

1 **3.** In NASA’s Opposition & CMSJ, in the section **Argument A. Standard of Review** (page 9,
2 lines 25 - page 10, line 1) NASA misleads the Court by asserting “But the FOIA requester also
3 has a burden -he is required to show that a disclosure is in the public interest. *Nat’l Archives &*
4 *Records Admin v. Favish*, 541 U.S. 147, 172 (2004)” As Margolin has shown here in his own
5 **Standard of Review** (*supra*) *Favish* was a narrow ruling regarding only Exemption 7(C), which
6 NASA has not asserted in the present case.

7

8 **4.** In NASA’s Opposition & CMSJ, in the section **Argument B. Summary judgment**
9 **standard** (page 10, lines 15 - 26) NASA correctly states:

10 A party is entitled to summary judgment if the evidence shows that there is no genuine issue
11 of material fact and the moving party is entitled to judgment as a matter of law.

12

13 NASA also correctly observes: “The burden of proving the absence of a genuine issue of material
14 fact falls on the moving party.”

15

16 NASA has already failed its burden by, at least, refusing to properly address the genuine and
17 material issue of the Fein email of July 12, 2004 (See Second Amended Complaint, page 23, line
18 21 - page 24, line 22; also Margolin MSJ, page 9, line 7 - page 11, line 22; also Margolin Reply,
19 page 6, line 11 - page 10, line 8) NASA’s response has been only a conclusory “Plaintiff is
20 mistaken” (NASA Opposition & MSJ, page 16, Footnote 3)

21

22 **5.** NASA asserts (NASA Opposition & CMSJ page 11, line 1):

23 **C. Exemption 3 applies — 41 U.S.C. § 253b(m)(1) and 10 U.S.C. § 2305(g) prohibit the**
24 **release of Rapid Imaging's contract proposal**

25 .

26 .

1 .
 2 NASA possesses two copies of a contract proposal made by Rapid Imaging to NASA under
 3 NASA's Small Business Innovation Research program. (Courtney Dec. ¶ 35). Two federal
 4 statutes bar the release of those documents. The first statute, 41 U.S.C. § 253b(m)(1),
 5 provides that a "proposal in the possession or control of an executive agency may not be
 6 made available to any person under [the FOIA]." The second statute, 10 U.S.C. § 2305(g),
 7 prohibits the disclosure of contractor proposals unless the proposal was incorporated by
 8 reference into the resulting contract. A review of the contract documents between NASA and
 9 Rapid Imaging shows that the proposal was not incorporated into the Rapid Imaging contract.
 10 (Graham Dec. ¶ 35). The proposal is thus specifically exempt from disclosure. (Graham Dec.
 11 ¶ 35). Because two federal statutes bar the release of the proposal, Exemption 3 applies to
 12 protect copies of that document. Accordingly, NASA is entitled to summary judgment on
 13 that issue.

14
 15 Margolin responds: Margolin did not specifically ask for RIS' contract proposals. He couldn't,
 16 because he didn't know they existed until now. NASA has set up a straw man in order to knock
 17 him down so they can say they got a Summary Judgment on at least something. Nonetheless,
 18 since NASA has shown they have problems getting details right, and since they have not
 19 produced the Rapid Imaging contract (the one that failed to incorporate by reference the RIS
 20 contract proposals) Margolin requests the Court examine the RIS contract proposal *in camera* to
 21 see if it really says what NASA asserts it says.

22
 23 **6.** In the following section Optima Technology Corporation is emphasized for reasons given in
 24 Margolin Reply page 18, line 15 - page 21, line 12.

25
 26 NASA asserts (NASA Opposition & CMSJ starting at page 11, line 17):

27 **D. Exemption 4 applies — The records contain commercial or financial information**
 28 **from Optima Technology Corporation and Rapid Imaging and the information is**
 29 **confidential or privileged.**

30 .
 31 .
 32 .

33 **1. The information is commercial.**

1 .
2 .
3 .
4 The documents relate to commerce and to the business or trade of Optima Technology
5 Corporation and Rapid Imaging. (Graham Dec. ¶¶ 16-77, 36-38).
6

7 **2. The information was obtained from a person.**

8 .
9 .
10 .
11 Here, Optima Technology Corporation and Rapid Imaging qualify as "persons" under those
12 authorities.
13

14 **3. The information is confidential or privileged.**

15 **a. The information is confidential.**

16 Here, if NASA were to disclose the withheld information, Optima Technology Corporation
17 and Rapid Imaging would likely refrain from turning over any information to the agency in
18 the future for fear that the agency would again release the information. (Graham Dec. ¶ 40).
19 Under the circumstances, the government's ability to obtain necessary information would be
20 impaired. (Graham Dec. ¶ 40).
21

22 **b. The information is privileged**

23 **1. Attorney-client privilege**

24 .
25 .
26 .
27 As noted, certain withheld documents contain direct communications made in confidence
28 from Rapid Imaging to its legal counsel for the purpose of obtaining legal advice and legal
29 services. (Graham Dec. ¶¶ 37-38). The withheld documents also consist of draft documents
30 that embody information communicated in confidence by Rapid Imaging to its counsel.
31 (Graham Dec. ¶ 37). Those documents are protected as attorney-client privileged
32 communications under Exemption 4. *See Admiral Ins. Co. v. United States District Court*,
33 881 F.2d 1486, 1492 (9th Cir. 1989) (describing elements of attorney-client privilege); *Miller*,
34 *Anderson*, 499 F.Supp. at 771 (holding that legal memorandum prepared for utility company
35 by its attorney qualified as legal advice protectible under Exemption 4 as subject to attorney-
36 client privilege).
37

38 **2. Work product privilege**

39
40 The withheld records also include documents prepared in anticipation of litigation. (Graham
41 Dec. ¶¶ 17, 36-38). The work product doctrine recognizes that it is essential that a lawyer
42 work with a certain degree of privacy — free from unnecessary intrusion by opposing parties

1 and their counsel. Proper preparation of a client's case demands that he assemble
 2 information, sift what he considers to be the relevant facts, prepare his legal theories and plan
 3 his strategy without undue and needless interference. *See Hickman v. Taylor*, 329 U.S. 495,
 4 511 (1947) (protecting witness statements taken by counsel "with an eye toward litigation"
 5 after a claim had arisen but before litigation had begun); *Upjohn Co v. United States*, 449 U.S.
 6 383 (1981) (holding that work-product doctrine applied to information gathered by in-house
 7 counsel long before any legal proceedings were threatened). The work-product doctrine
 8 applies to materials prepared by a non-lawyer representative as well as to materials prepared
 9 by a party itself *Admiral*, 881 F.2d at 1494; *see also* Fed. R. Civ. Pr. 26(b)(3). Documents
 10 prepared by Rapid Imaging's counsel in anticipation of litigation are thus protected by
 11 Exemption 4. *See Indian Law Res. Ctr. v. Dept of Interior*, 477 F.Supp. 144, 148 (D. D. C.
 12 1979) ("The vouchers reveal strategies developed by Hopi counsel in anticipation of
 13 preventing or preparing for legal action to safeguard tribal interests. Such communications
 14 are entitled to protection as attorney work product.").

16 3. Common Interest privilege

17
 18 While it is generally true that privileged information loses its privilege when disclosed to a
 19 third party, the privilege is maintained when that third party shares a common interest in a
 20 legal matter. *See Waller v. Financial Corp. America*, 828 F.2d 579, 583 (9th Cir. 1987)
 21 ("Under the joint defense privilege, 'communications by a client to his own lawyer remain
 22 privileged when the lawyer subsequently shares them with co-defendants for purposes of a
 23 common defense."); *Center for Biological Diversity v. Office of Mgmt. and Budget*, 2009
 24 WL 1246690 (N.D.Cal.) ("Courts have extended the attorney-client privilege to multiple
 25 parties who share a common interest in a legal matter."). Documents shared under these
 26 circumstances are exempt from disclosure under Exemption 4. *Miller, Anderson* at 771.

27
 28 Rapid Imaging provided the withheld documents to NASA in connection with their common
 29 interest of defending against patent infringement claims. (Graham Dec. ¶¶ 16-17). All
 30 attorney-client communications and work-product information shared by Rapid Imaging
 31 relating to these claims is thus protected by the common interest privilege. As a result, the
 32 documents are exempt from disclosure under Exemption 4.

33
 34 Margolin responds:

35 **7. NASA: D. Exemption 4 applies — The records contain commercial or financial**
 36 **information from Optima Technology Corporation and Rapid Imaging and the information**
 37 **is confidential or privileged.** (NASA Opposition & CMSJ page 11, line 17)

1 NASA asserts that the records contain commercial or financial information from Optima
2 Technology Corporation and Rapid Imaging. If NASA truly has had communications with
3 Optima Technology Corporation they have committed criminal fraud in view of the ruling of the
4 U.S. District Court For the District of Arizona. (See Margolin Reply, page 18, line 15 - page 21,
5 line 12) If they mean Optima Technology Group, then that's different. NASA has already
6 produced unredacted documents containing commercial or financial information (including bank
7 account numbers) to Margolin as a result of his FOIA request. (Margolin Reply, page 17, line 12
8 - page 18, line 13) Presumably, NASA has provided or will provide these same documents to
9 other FOIA requestors. NASA's withholding of documents is selective, inconsistent, and
10 spiteful. They divulged sensitive commercial information from Optima Technology Group but
11 not Rapid Imaging. That is called bad faith. And NASA wants to use their bad faith to score a
12 point on the Summary Judgment tally board.

13

14 **8. NASA: D-1. The information is commercial.** (NASA Opposition & CMSJ page 12, lines
15 1 -11)

16

17 NASA asserts that the information is commercial and again asserts it involves Optima
18 Technology Corporation and Rapid Imaging. This calls for an *in camera* inspection of the
19 documents.

20

21 **9. NASA: D-2. The information was obtained from a person.** (Nasa Opposition & CMSJ
22 page 12, lines 13 -22)

23

1 NASA asserts that Optima Technology Corporation and Rapid Imaging are legally “persons.”
2 They forgot to cite *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010), not to
3 mention *Santa Clara County v. Southern Pac. R. Co.*, 118 U.S. 394 (1886).

4
5 **10. NASA: 3. The information is confidential or privileged; a. The information is**
6 **confidential.** (NASA Opposition & CMSJ, page 12, line 24)

7
8 NASA asserts the information is confidential and if divulged “Optima Technology Corporation
9 and Rapid Imaging would likely refrain from turning over any information to the agency in the
10 future for fear that the agency would again release the information.” {Again with the Optima
11 Technology Corporation.}

- 12 1. NASA is engaging in speculation.
13 2. Rapid Imaging not only turned the information over to NASA willingly, they asked to
14 help NASA. From an email sent by Abernathy to Edward Fein June 28, 2004 (Second
15 Amended Complaint, Appendix Volume 2 at A15):

16 From: Mike Abernathy [mailto:[redacted (b)(6)]]
17 Sent: Monday, June 28, 2004 9:10 AM
18 To: FEIN, EDWARD K. (JSC-HA) (NASA)
19 Subject: RE: Administrative Claim of Jed Margolin for Infringement of U.S. Patent
20 5,904,724 by the X-38 Project

21 .
22 .
23 .
24 The patent claims a pilot aid using a synthetic environment – if the method were used
25 for another purpose than aiding the pilot like for example aiding a camera operator
26 instead would that be infringement?

27
28 What bothers me about this patent is that it appears to be not a patent on peanut butter,
29 nor on jelly, but rather a patent on the method of making a sandwich by combining the
30 two. This to me appears to be a non-novel use of existing technologies to create a

1 "method". Everyone familiar with the field of synthetic vision is boggled that such a
2 patent has been issued because it is obvious use of existing technologies.

3
4 Let me know how I can help. Best regards,

5
6 Mike Abernathy [redacted (b)(6)]
7 Rapid Imaging Software, Inc
8 [redacted (b)(6)]
9

10 {Emphasis added}

11
12 **11. NASA: D-3. The information is confidential or privileged; b. The information is**
13 **privileged; 1. Attorney-client privilege and 2. Work product privilege.** (NASA Opposition &
14 CMSJ page 13, line 21 - page 14, line 12)

15
16 NASA asserts that the information is privileged because of: 1. Attorney-client privilege between
17 RIS and their attorney; and 2. Work product privilege by RIS' attorney.

18
19 Margolin has not subpoenaed RIS or their attorneys. NASA is trying to sell this Court a stinky
20 old red herring.

21
22 **12. NASA: D-3. The information is confidential or privileged; b. The information is**
23 **privileged; 3. Common interest privilege** (NASA Opposition & CMSJ, page 14, lines 13 - 27)

24
25 All of NASA's previous tired, old, generalized, time-and-space-wasting arguments have led to
26 this newly introduced defense of **Common Interest Privilege.**

1 NASA introduces Common Interest Privilege by admitting “While it is generally true that
2 privileged information loses its privilege when disclosed to a third party,” and then adds “the
3 privilege is maintained when that third party shares a common interest in a legal matter.”

4 Then they cite a number of cases. (This is going to be long. Sorry.)

5 A. *Waller v. Financial Corp. America*, 828 F.2d 579, 583 (9th Cir. 1987) (“Under the joint
6 defense privilege, ‘communications by a client to his own lawyer remain privileged when the
7 lawyer subsequently shares them with co-defendants for purposes of a common defense.’ ”);
8

9 *Waller* ¶ 1:

10 1 This appeal arises out of two consolidated Rule 10b-5 class action lawsuits brought by
11 shareholders against Financial Corporation of America (FCA), several of its officers and
12 directors, and its accountant, Arthur Anderson & Co. (Anderson). Plaintiffs reached a
13 settlement agreement with FCA alone, in parallel actions filed for the purpose of expediting
14 the settlement. Anderson sought to object to the settlement by filing a motion “to establish
15 limited standing to object to the proposed settlement.” The district court denied Anderson's
16 motion and approved the settlement. We view Anderson's motion as a motion to both
17 intervene as a matter of right and object to the settlement. We hold that while Anderson
18 should have been granted intervenor status, it did not have standing to object to the
19 settlement between plaintiffs and FCA.

20 Waller sued FCA (and its CEO and other officers). Arthur Anderson (FCA’s accountants) were
21 added as co-defendants. Other plaintiffs filed a series of lawsuits that were consolidated into a
22 single action. FCA agreed to settle with plaintiffs. Anderson did not, and objected to FCA’s
23 proposed settlement. Part of FCA’s proposed settlement was to assist plaintiffs in going after
24 Anderson.

25 *Waller* ¶ 4:
26

27 4 The settlement was signed by FCA and the classes on April 11, 1986. Under its
28 provisions, FCA agreed to pay at least \$32 million to the classes in cash or stock. FCA also
29 pledged to “co operate” in the prosecution of actions against Anderson and the individual
30 defendants. In addition, FCA and plaintiffs agreed to share in the proceeds of the ongoing,
31 unsettled actions according to a specified formula, with FCA's share to be approximately
32 one-third. FCA also agreed to assert claims against Anderson and certain FCA officers and

1 directors, and both FCA and plaintiffs pledged not to settle their respective suits without the
2 prior approval of the other.

3
4 FCA and Anderson had entered into a joint defense agreement to protect privileged and
5 confidential information exchanged in the course of the case preparation. *Waller* ¶ 5:

6 5 At a hearing on April 14, 1986 the district judge gave preliminary approval to the
7 settlement. The court instructed Anderson to file a motion to establish standing if it wished
8 to present objections to the settlement.⁵ In compliance with the court's directive Anderson
9 filed a motion on May 9, 1986 to "Establish Arthur Anderson & Co.'s Limited Standing to
10 Object to Proposed Settlement." The motion alleged that the proposed settlement would
11 adversely affect Anderson's formal legal rights by requiring FCA to "cooperate" with
12 plaintiffs in the ongoing litigation and share in the proceeds obtained therefrom. Anderson
13 contended that this arrangement would require FCA to breach a joint defense agreement
14 entered into in June 1985 by FCA, Anderson and the other defendants in the original Waller
15 and Husni actions. The purpose of the agreement was to protect privileged and confidential
16 information exchanged in the course of the case preparation. The agreement provided that
17 (1) privileged communications would remain privileged when communicated to other clients
18 or counsel, (2) defendants who are dismissed or settle would continue to protect the
19 confidentiality of "joint defense information", (3) specific enforcement or injunction are the
20 appropriate remedies to compel performance, and (4) federal law governing the attorney-
21 client work product privilege would govern. There was a further agreement to toll the statute
22 of limitations with respect to any claims the defendants had against one another arising out
23 of these proceedings. Anderson's motion was denied by the district court on June 5, 1986.
24 Anderson timely appealed.

25
26 {Emphasis added}

27
28 The Court recognized the joint defense agreement between FCA and Anderson but declined to
29 rule on the part of Anderson's motion in which Anderson used its fear that FCA would breach
30 the joint defense agreement as a reason for asking that Anderson be allowed to intervene in the
31 settlement between FCA and plaintiffs. *Waller* ¶18:

32 18 Anderson urges us to find that a claim of formal legal prejudice is made out where a
33 settlement compromises a nonsettling defendant's rights to preserve the confidentiality of
34 communications protected by the common law joint defense privilege⁷ and by the parties'
35 own joint defense agreement. We, however, for the reasons below, do not believe that the
36 settlement between the classes and FCA contravenes the joint defense privilege or the joint
37 defense agreement. We therefore have no occasion to decide the issue put before us by
38 Anderson.

1 How *Waller* applies to the present case: It doesn't.

2 **a.** NASA and RIS have never been co-defendants in a lawsuit over their infringement of the
3 Patents. (Margolin and NASA have never been in litigation over NASA's infringement of the
4 patents; Margolin and RIS have never been in litigation over RIS's infringement of the Patents;
5 Optima Technology Group and NASA have never been in litigation over NASA's infringement
6 of the Patents; Optima Technology Group and RIS have never been in litigation over RIS'
7 infringement of the Patents.)

8 **b.** FCA and Anderson had a formal Joint Defense Agreement. The specificity of their
9 Agreement indicates that it was a formal written agreement. NASA has failed to produce any
10 evidence that NASA and RIS had a formal written Joint Defense Agreement.

11
12 In order for *Waller* to be relevant, NASA and RIS would have to be co-defendants in a lawsuit,
13 have a formal Joint Defense Agreement, and have NASA and RIS turn on each other.

14

15 **B.** *Center for Biological Diversity v. Office of Mgmt. and Budget*, 2009 WL 1246690 (N.D.Cal.)
16 ("Courts have extended the attorney-client privilege to multiple parties who share a common
17 interest in a legal matter.").

18

19 Margolin does not have ready access to Westlaw's proprietary documents. However, the

20 **Department of Justice Guide to the Freedom of Information Act** (2009 Edition) available at

21 http://www.justice.gov/oip/foia_guide09.htm adds the information on page 412, footnote 287

22 that *Center* was case No. 07-04997 (N.D. Cal. May 5, 2009):

23 287 *Judicial Watch*, 365 F.3d at 1114 (quoting *In re Sealed Case*, 121 F.3d at 752); see *Ctr.*
24 *for Biological Diversity v. OMB*, No. 07-04997, 2009 WL 1246690, at *8 (N.D. Cal. May 5,
25 2009) (protecting "any document which is a draft of a presentation or memorandum for the
26 President or his senior advisors[,] but not intra-agency communications pertaining to such

1 documents); Elec. Privacy Info. Ctr., 584 F. Supp. 2d at 80-81 (citing In re Sealed Case and
2 protecting documents that were either received by President or his immediate advisors).

3
4 See Exhibit 5 Appendix at A19, footnote 287.

5
6 Margolin used Pacer to download the N.D. Cal. opinion which is No. 07-04997 Document 95
7 (**MEMORANDUM & ORDER Re: Cross-Motions for Summary Judgment**). He later found
8 the same document using Google Scholar which labels it as 625 F.Supp.2d 885 (2009).

9
10 Frankly, Margolin is unable to find any mention in *Center* regarding NASA's characterization
11 that "Courts have extended the attorney-client privilege to multiple parties who share a common
12 interest in a legal matter." It is not in 07-04997 Document 95 (**MEMORANDUM & ORDER**
13 **Re: Cross-Motions for Summary Judgment**) or in Document 59⁶/

14
15 The Center for Biological Diversity ("CBD") sued the Office of Management and Budget in a
16 Freedom of Information Act action to obtain (From Document 59 Page 2 lines 21 - 25):

17 All documents relating to the development of the Final Rule setting average fuel economy
18 standards for light trucks for model years 2008-2011 (71 Fed. Reg. 17566-17679,
19 "rulemaking") that are not already posted on the internet in Docket Nos. 2005-22223 and
20 2006-24309. This request includes communications among staff and with others that were
21 created during the development of the Final Rule and the Proposed Rule (70 Fed.Reg. 51414-
22 51466). This request includes but is not limited to e-mail exchanges or other correspondence
23 among agency staff and between agency staff and others, draft documents, internal reviews
24 and critiques, inter-agency reviews, agency meeting notes, etc.
25

⁶ Document 59 is referred to in Document 95 in BACKGROUND - "The facts of the case have been extensively set forth in the court's prior order concerning the production of documents by OMB relating to the ARMS database system of the Executive Office of the President. See Memorandum & Order Re: Cross Motions for Summary Judgment (Docket Entry 59) at 1-4 ("First SJ Order")."

1 OMB produced some documents and withheld others, claiming (among other reasons) Exemption
2 5 Deliberative Process. OMB also claimed the Presidential Communications Privilege.

3 **B. The Presidential Communications Privilege**

4
5 Exemption 5 has been construed to incorporate the presidential communications privilege.
6 See *Sears Roebuck*, 421 U.S. at 149 n. 16 & 150; *Judicial Watch*, 365 F.3d at 1113. The
7 President of the United States "can invoke the privilege when asked to produce documents or
8 other materials that reflect presidential decision-making and deliberations and that the
9 President believes should remain confidential." *In re Sealed Case*, 121 F.3d at 744. Unlike the
10 deliberative process privilege, "the presidential communications privilege applies to
11 documents in their entirety, and covers final and post-decisional materials as well as pre-
12 deliberative ones." *Id.* at 745.
13

14 OMB submitted a Vaughn Index, which the Court found inadequate, saying (CBD Document 59,
15 page 10, lines 1 - 21):

16 Defendant's Vaughn index bears a resemblance to the approach rejected by the Ninth Circuit
17 in *Wiener*. There, the FBI's indices assigned to documents various numerical codes that
18 corresponded with (1) an exemption (e.g., "(b)(1)" referenced FOIA Exemption 1), and (2) a
19 general category of information within which the withheld information allegedly fell (e.g.,
20 "c3" referred to "detailed information pertaining to/or provided by an intelligence source").
21 943 F.2d at 978. Accompanying declarations then used "boilerplate explanations" to state
22 why each type of document (such as a "(b)(1)c3" document) should be withheld. *Id.* at 978-
23 79. Any documents that were of the same type would be given the same explanation for
24 withholding. *Id.* at 978. The Ninth Circuit ruled that the FBI had made "no effort . . . to tailor
25 the explanation to the specific document withheld" and that the indices therefore lacked the
26 level of specificity required by an agency's declarations. *Id.* at 978-79.
27

28 The Vaughn index in this action likewise relies upon boilerplate explanations to claim
29 exemption and does not provide a single particularized claim of exemption to any document.
30 Instead of assigning numbers to its various boilerplate statements (such as those describing
31 documents as "deliberative" and describing the harm that would result from nondisclosure) as
32 in *Wiener*, however, defendant OMB provides the full boilerplate texts; creating lengthy but
33 practically meaningless document descriptions. Defendant's index, then, while
34 distinguishable in form, is functionally similar to the one rejected in *Wiener*. This distinction
35 is without a difference in law or fact. Accordingly, the court finds that defendant's overly
36 simplistic and conclusory summaries, coupled with boilerplate explanations for exemption,
37 do not provide sufficient facts for the court to conduct a *de novo* review of defendant's
38 withholding under the deliberative process privilege.
39

1 The Court ordered an *in camera* review by a Special Master, which was done. (CBD Document
2 102). The results of the case were that OMB settled. They released additional documents (CBD
3 Document 109, Exhibit 6 Appendix at A21) and paid CBD attorneys fees and costs in the amount
4 of \$175,000 (CBD Document 124, Exhibit 6 at A21).

5
6 While *Center for Biological Diversity v. Office of Mgmt. and Budget*, No. 07-04997 (N.D.Cal.)
7 does not support NASA's assertion that "Courts have extended the attorney-client privilege to
8 multiple parties who share a common interest in a legal matter" *Center* is relevant to the present
9 case.

10
11 If NASA's **Exhibit I - Margolin FOIA Withheld Index** is intended to be a Vaughn Index, it is a
12 very poor one. The comments the Court made in *Center* (CBD Document 59, page 10, lines 1 -
13 21) apply directly to NASA's Exhibit I:

14 The Vaughn index in this action likewise relies upon boilerplate explanations to claim
15 exemption and does not provide a single particularized claim of exemption to any document.
16 Instead of assigning numbers to its various boilerplate statements (such as those describing
17 documents as "deliberative" and describing the harm that would result from nondisclosure) as
18 in *Wiener*, however, defendant OMB provides the full boilerplate texts; creating lengthy but
19 practically meaningless document descriptions. Defendant's index, then, while
20 distinguishable in form, is functionally similar to the one rejected in *Wiener*. This distinction
21 is without a difference in law or fact. Accordingly, the court finds that defendant's overly
22 simplistic and conclusory summaries, coupled with boilerplate explanations for exemption,
23 do not provide sufficient facts for the court to conduct a *de novo* review of defendant's
24 withholding under the deliberative process privilege.

25
26 If NASA does not intend **Exhibit I - Margolin FOIA Withheld Index** to be a Vaughn Index,
27 then it should produce one. The Court should not even consider NASA's Cross-Motion For
28 Summary Judgment without one.

29

1 *Center* contains even more relevant information. In the Section **II. Exemption 4: Confidential**
2 **Business Communications Privilege** the Court explains:

3 Exemption 4 of the FOIA permits withholding documents which are "trade secrets and
4 commercial or financial information obtained from a person and privileged or confidential."
5 5 U.S.C. § 552(b)(4). Commercial or financial information is deemed "confidential" if
6 disclosure is likely to either: "(1) [i]mpair the Government's ability to obtain necessary
7 information in the future; or (2)[c]ause substantial harm to the competitive position of the
8 person from whom the information was obtained." [Frazee v. U.S. Forest Serv., 97 F.3d 367,](#)
9 [371 \(9th Cir.1996\)](#). In order to show that a document falls under Exemption 4, the party
10 seeking to withhold the document "must present specific `evidence revealing (1) actual
11 competition and (2) a likelihood of substantial competitive injury'" although evidence of
12 actual competitive harm is not necessary. *Id.*, citing [GC Micro Corp. v. Def. Logistics](#)
13 [Agency, 33 F.3d 1109, 1113 \(9th Cir.1994\)](#).
14

15 NASA's **Exhibit I - Margolin FOIA Withheld Index** is insufficient as a Vaughn Index because
16 of its lack of specificity (and use of boilerplate) and because NASA has not presented specific
17 evidence (for each document) of (1) actual competition and (2) a likelihood of substantial
18 competitive injury if the document were produced.

19
20 **C.** After NASA's inappropriate reference to *Center* they add "Documents shared under these
21 circumstances are exempt from disclosure under Exemption 4. *Miller, Anderson* at 771."

22 (Emphasis added)

23
24 The *Miller, Anderson* citation is to *Miller, Anderson, Nash, Yerke & Wiener v. Dept of Energy,*
25 499 F.Supp. 767, 770 (D. Or. 1980).

26
27 Margolin notes that NASA's phrase Documents shared under these circumstances lacks an
28 antecedent because the preceding *Center* citation was not relevant to the subject. However, an
29 analysis of *Miller* will be provided.

1
2 Portland General Electric (PGE) is a private company. Bechtel, also a private company, built the
3 Trojan Nuclear Plant for PGE. FOIA Defendant Bonneville Power Administration (“BPA”) is a
4 power marketing agency of the United States Department of Energy and is entitled to 30% of the
5 power generated by the Trojan Nuclear Plant. There were problems with the Trojan Nuclear
6 Plant and the Nuclear Regulatory Commission shut it down for a period of months. PGE had to
7 buy replacement power from somewhere else and pay to have the Trojan Nuclear Plant fixed.
8 PGE sued Bechtel, saying Bechtel had failed to properly build the Plant. The document at issue
9 was written by PGE’s attorneys and sent to Bechtel. BPA asked PGE for copies of all the
10 documents relating to the litigation between PGE and Bechtel Corporation, and PGE did so. The
11 document in question was one of them. BPA wanted the documents to help it decide whether to
12 intervene in the lawsuit brought by PGE against Bechtel. Presumably, BPA was considering
13 joining the lawsuit (intervening) on PGE’s side but the Court does not explicitly say that.

14 The Court decided (about the particular document) in the section **Privileged or Confidential:**

15
16 The issue as to whether the memorandum, which I have characterized as commercial
17 information, is privileged or confidential as those terms are used in the Act, remains to be
18 resolved.

19
20 After considering relevant case law, I conclude that the memorandum at issue falls within
21 the established definition of "privileged" and within the established definition of
22 "confidential".

23
24 771*771 I find that the document is privileged by virtue of the attorney-client privilege. It is
25 uncontested that the document is a legal memorandum prepared by PGE's attorney and
26 communicated to an agent of PGE; therefore, at least initially, the document was clearly
27 privileged information. Furthermore, I find that the privilege was not waived when the
28 memorandum was turned over to BPA. Although generally if privileged information is
29 disclosed to a third party, it loses its privilege, courts have recognized that public policy
30 demand an exception to this rule when the third party to whom the disclosure is made is a
31 co-litigant with substantially identical interests. See, [Hunydee v. United States, 355 F.2d 183](#)
32 (9th Cir. 1965); [Continental Oil Company v. United States, 330 F.2d 347 \(9th Cir. 1964\);](#)

1 [SCM Corp. v. Xerox Corp.](#), 70 F.R.D. 508 (D.Conn.1976); *see also*, [Duplan Corp. v.](#)
2 [Deering Miliken Inc.](#), 397 F.Supp. 1146 (D.S. C.1975). Although at the time that PGE
3 turned over the memorandum BPA was not a party to the litigation, BPA was in the process
4 of deciding whether or not to enter the litigation. The policy reasons which demand that the
5 privilege not be waived when disclosure is made to a co-litigant are not weakened by the
6 fact that the party with similar interests to whom the disclosure is made is in the process of
7 deciding to intervene, as opposed to having already intervened.

8 Furthermore, the mere failure to explicitly restrict the re-disclosure of information does not
9 constitute the waiver of an otherwise valid privilege.

10 Therefore, I conclude that the document remained privileged information after it was turned
11 over to BPA.

12 {Emphasis added}

13
14 In order for *Miller* to be on-point in the present case the following scenario would have to occur:

- 15 **1.** RIS sues Optima Technology Group for something;
- 16 **2.** NASA asks RIS for all documents in the case and RIS complies;
- 17 **3.** NASA considers entering the case on RIS' side;
- 18 **4.** NASA has a direct financial interest in RIS;
- 19 **5.** Margolin files a FOIA request for the documents.

20 That scenario has not happened.

- 21 **1.** RIS is not suing Optima Technology Group. And Optima Technology Group is not suing
22 RIS for patent infringement. (As noted *supra* RIS' contract with NASA puts all the
23 responsibility for patent infringement on NASA.)
- 24 **2.** NASA did not ask RIS for documents. RIS asked NASA to be allowed to help them.
- 25 **3.** There is no case for NASA to consider entering.
- 26 **4.** Presumably, NASA does not have a direct financial interest in RIS.
- 27 **5.** OK, Margolin has filed a FOIA request.

1 The above scenario fails the *Miller* test.

2 But it raises a question that begs to be asked. Does NASA or any of NASA's employees have a
3 financial interest in RIS? It would have been inappropriate to ask this question earlier, but now
4 NASA has opened the door by citing *Miller*. Margolin requests the Court order NASA to provide
5 an affidavit stating whether NASA, or any of its current or former employees, have a financial
6 interest in RIS.

7
8 There is another problem using *Miller*. In *The Washington Post Company v U.S. Department of*
9 *Health and Human Services*, 603 F.Supp. 235 (D.D.C. 1985) the Court makes the observation in
10 footnote 8 that *Miller* is considered an alternative holding:

11 [\[8\]](#) Most Exemption 4 litigation has focused on the meaning of the word "confidential," and
12 the word "privilege" has not generally been read to add much to the scope of Exemption 4.
13 See Freedom of Information Case List (September 1984 Edition) at 266, J. O'Reilly, Federal
14 Information Disclosure § 14.09. This Court has been unable to find any cases where
15 documents which were held to be privileged, but not confidential, were exempted from
16 disclosure under Exemption 4. However, at least two District Courts have made alternative
17 holdings that information which was confidential was also privileged under the attorney
18 work-product doctrine and the attorney-client privilege and thus protected from disclosure
19 under Exemption 4. [Indian Law Resource Center v. Department of the Interior](#), 477 F.Supp.
20 [144, 148-49 \(D.D.C.1979\)](#), and [Miller, Anderson, Nash, Yerke & Wiener v. United States](#)
21 [Department of Energy](#) 499 F.Supp. 767, 771-72 (D.Or.1980), respectively.
22

23 And then there is *Klamath*. {*Department of the Interior v. Klamath Water Users Protective*
24 *Ass'n*. 532 U.S. 1 (2001)}

25 **a.** *Klamath* is exactly on-point (Margolin Reply, page 10, line 10, while *Miller* is not (*supra*)).

26 **b.** *Miller* was decided by United States District Court for the District of Oregon in 1980.

27 **c.** *Klamath* was decided by the U.S. Supreme Court in 2001.

28 Margolin asks this Court give priority to the U.S. Supreme Court.

1 NASA's claim to Common Interest Privilege under Exemption 4 does not hold up to careful
2 scrutiny of the above cases cited by NASA.

3
4 **13.** NASA claims Common Interest Privilege once again, only now it is under Exemption 5
5 (NASA Opposition & CMSJ, page 15, line 1): **E. Exemption 5 applies — The information is**
6 **protected by the deliberative process, work-product and attorney-client privileges.**

7
8 NASA's first paragraph, citing *Sears* and *Lahr* is standard boilerplate and is not directed to any
9 specific documents in the present case.

10
11 NASA's second paragraph contains boilerplate references to *NLRB (Sears)* and *Grolier*, also not
12 directed to any specific documents in the present case. NASA also cites *Hanson v. Agency for*
13 *Int'l Dev.*, 372 F.3d 286 (4th Cir. 2004)

14
15 **A.** *Hanson v. Agency for Int'l Dev.*, 372 F.3d 286 (4th Cir. 2004)

16 From the Court's decision:

17 I.
18 2 Appellee USAID is a federal agency that finances and oversees development projects
19 in foreign countries under the government's foreign assistance program. *See* 22 U.S.C. §
20 2151 et seq. USAID's responsibilities include carrying out development activities in Egypt.
21 *See* 22 U.S.C. § 2346. One of USAID's projects was the construction of a system of water
22 and sewage treatment facilities for the Aswan cities in Upper Egypt. While USAID financed
23 the project, the National Organization for Potable Water and Sanitary Drainage
24 ("NOPWASD") served as the Egyptian government's agency implementing the project.

25
26 3 In 1995 USAID retained the engineering firm Camp Dresser & McKee International,
27 Inc. ("CDM") to design the waste and sewage treatment facilities and to provide
28 construction, administration and management services for the project. In 1998 following a
29 competitive bidding process, NOPWASD awarded the construction contract to build CDM's
30 design to a joint venture between Contrack International, Inc. and Morrison Knudsen
31 International, Inc. (the "JV"). The JV's contract conformed with USAID's Host Country

1 Contracting Mechanism. Under this framework, construction firms directly contract with the
2 implementing agency of the host government, while USAID retains certain approval rights,
3 including the right to approve material changes to the contract, such as the level of
4 compensation.
5

6 4 In September 2000, the JV asked NOPWASD for an additional \$38 million to
7 compensate for time delays. In April 2001, CDM in its capacity as project engineer
8 evaluated the JV's request and found that the compensation should be substantially lower.
9 CDM and the JV met several times, yet failed to resolve the dispute. In May 2001 at
10 USAID's urging, CDM hired Richard J. Roy of Roy & Associates as a neutral third party to
11 evaluate the negotiation process, the parties' positions, and the impediments to settlement.
12 Roy's contract provided that he was to provide a final report ("Roy Report") of his findings
13 to NOPWASD and USAID. Roy's contract neither permitted nor provided for disclosure to
14 any other party. The construction dispute still has not been resolved, and the JV has
15 threatened to sue USAID and CDM to secure the compensation to which it claims
16 entitlement.
17

18 5 Appellant Mark Hanson is a partner in the law firm representing one of the JV
19 members. In February, 2002, Hanson filed a FOIA request with USAID requesting the
20 disclosure of a number of documents related to the dispute, including the Roy Report.
21 USAID produced most of these documents, but refused to produce the Roy Report on the
22 grounds that it fell under the deliberative process and attorney work-product privileges of 5
23 U.S.C. § 552(b)(5).
24

25 6 Hanson filed suit in district court claiming that USAID had unlawfully withheld the
26 Roy Report. The district court granted USAID's motion for summary judgment and ruled
27 that the withheld document was exempt from disclosure under 5 U.S.C. § 552(b)(5), because
28 it constituted attorney work product prepared in anticipation of litigation. Although Roy
29 voluntarily released a draft of his report to the JV during the course of the FOIA litigation,
30 the district court held that USAID had not authorized Roy to do this and thus had not waived
31 its right to claim the FOIA exemption. Hanson appealed the district court's decision to this
32 court.
33

34 Margolin will attempt to simplify.

- 35 a) The United States Agency for International Development ("USAID") provided the money
36 for the construction of a system of water and sewage treatment facilities for the Aswan
37 cities in Upper Egypt.

- 1 b) In 1995 USAID hired the engineering firm Camp Dresser & McKee International, Inc.
2 ("CDM") to design the waste and sewage treatment facilities and to provide construction,
3 administration and management services for the project.
- 4 c) In 1998 Egypt's National Organization for Potable Water and Sanitary Drainage
5 ("NOPWASD") contracted the Joint Venture ("JV") of Contrack International, Inc. and
6 Morrison Knudsen International, Inc. to build CDM's design.
- 7 d) USAID retained the right to approve material changes to the contract, such as the level of
8 compensation.
- 9 e) In 2000 JV asked NOPWASD for an additional \$38 million to compensate for time
10 delays { which required USAID's approval }.
- 11 f) In 2001 CDM in its capacity as project engineer evaluated JV's request and found that the
12 compensation should be substantially lower. {CDM was hired by USAID. }
- 13 g) CDM and the JV met several times but failed to resolve the dispute.
- 14 h) In 2001, at USAID's urging, CDM hired Richard J. Roy of Roy & Associates as a neutral
15 third party to evaluate the negotiation process, the parties' positions, and the impediments
16 to settlement. Roy's contract provided that he was to provide a final report ("Roy
17 Report") of his findings to NOPWASD and USAID.
- 18 i) Roy's contract neither permitted nor provided for disclosure to any other party.
- 19 j) The construction dispute still has not been resolved, and the JV has threatened to sue
20 USAID and CDM to secure the compensation to which it claims entitlement.

- 1 k) Appellant Mark Hanson (“Hanson”) is a partner in the law firm representing one of the
2 JV members. In February, 2002, Hanson filed a FOIA request with USAID requesting the
3 disclosure of a number of documents related to the dispute, including the Roy Report.
- 4 l) USAID produced most of these documents, but refused to produce the Roy Report on the
5 grounds that it fell under the deliberative process and attorney work-product privileges of
6 5 U.S.C. § 552(b)(5).
- 7 m) Hanson filed suit in district court claiming that USAID had unlawfully withheld the Roy
8 Report.
- 9 n) The district court granted USAID's motion for summary judgment and ruled that the
10 withheld document was exempt from disclosure under 5 U.S.C. § 552(b)(5), because it
11 constituted attorney work product prepared in anticipation of litigation. Although Roy
12 voluntarily released a draft of his report to the JV during the course of the FOIA
13 litigation, the district court held that USAID had not authorized Roy to do this and thus
14 had not waived its right to claim the FOIA exemption. {It turns out that what Roy
15 thought was only a draft report ended up being the final report.}
- 16 o) Hanson appealed the district court's decision to this court. {United States Court of
17 Appeals , Fourth Circuit}
- 18 p) Hanson asserted that, although Roy was both an attorney and an engineer, he was acting
19 solely as an engineer when he wrote the report. The Court disagreed.

20 The Appeals Court ruled in ¶22 and ¶23:

21 22 A client can waive an attorney-client privilege expressly or through his own conduct.
22 *In re Grand Jury Proceedings*, [727 F.2d 1352](#), 1355-56 (4th Cir.1984). Implied waiver
23 occurs when a party claiming the privilege has *voluntarily* disclosed confidential
24 information on a given subject matter to a party not covered by the privilege. *Sweeney*, 29

1 F.3d at 125. However, an attorney may not unilaterally waive the privilege that his client
2 enjoys. "[T]he ability to protect work product normally extends to both clients and attorneys,
3 and the attorney or the client, expressly or by conduct, can waive or forfeit it, *but only as to*
4 *himself.*" *In re Doe*, 662 F.2d at 1079 (emphasis added) (internal citation omitted).

5 23 Roy's unilateral disclosure of the Roy Report thus tells us nothing about whether
6 USAID has waived its right to withhold the Roy Report. Roy as an attorney could not waive
7 USAID's right without USAID's consent. Here the district court properly held that the fact
8 USAID had not authorized Roy to disclose the report meant that USAID had not waived
9 Exemption 5 of FOIA. In fact, Roy's contract with CDM expressly stated that Roy was to
10 send the report only to NOPWASD and USAID. Hanson fails to point to any conduct by
11 USAID, NOPWASD, or CDM that suggested that they intended to waive their attorney
12 work product exemption.

13 Here is how Hanson relates to the present case.

14 **a.** NASA has not asserted that Mike Abernathy ("Abernathy") is an attorney. Many (perhaps all)
15 of the early Abernathy documents were written by Abernathy and provided voluntarily, if not
16 eagerly, to NASA by Abernathy.

17 **b.** NASA has not asserted that they contracted with Abernathy for his legal work.

18 **c.** NASA has not asserted that they paid Abernathy's attorneys and, therefore, have an attorney-
19 client relationship with them.

20 **d.** Abernathy voluntarily disclosed to NASA information that would otherwise have been entitled
21 to attorney-client privilege between Abernathy and his attorneys. As the client, Abernathy has
22 every right to do this. It is the attorney who may not unilaterally waive the privilege that his client
23 enjoys. Abernathy waived attorney-client privilege for the documents he gave to NASA.

24 **e.** Abernathy has never provided Margolin with a draft of anything.

25 **f.** Hanson was about a particular document that was very particularly described to meet the
26 requirements of *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). Under *Vaughn*, government
27 agencies seeking to withhold documents requested under the FOIA have been required to supply

1 the opposing party and the court with a “Vaughn index,” identifying each document withheld,
2 the statutory exemption claims, and a particularized explanation of how disclosure of the
3 particular document would damage the interest protected by the claimed exemption.
4 NASA has failed to particularly describe the withheld documents. It has provided only boilerplate
5 wrapped in a blanket of generalizations.

6
7 **B.** We finally get to the crown jewel of NASA’s Common Interest Privilege: *Hunton &*
8 *Williams, LLP v. Dep’t of Justice*, 2008 WL 906783 (E.D. Va. 2008). NASA has cited the case
9 originally heard in the Eastern District of Virginia (3:06-cv-00477-JRS; opinion released
10 3/31/2008). Hunton appealed to the U.S. Court of Appeals for the Fourth Circuit: *Hunton &*
11 *Williams v. U.S. Dep’t of Justice*, 590 F.3d 272, 277 (4th Cir. 2010). It is the *Hunton* appeal that
12 will be discussed here.

13
14 *Hunton* is a FOIA case, the subject of which was a patent lawsuit between NTP, Inc. (“NTP”)
15 and Research in Motion (“RIM”) the maker of the popular BlackBerry. DOJ intervened in the
16 case and Hunton wanted documents from DOJ relating to DOJ’s intervention. DOJ refused to
17 provide them, citing Common Interest Privilege. Some background is in order.

18
19 NTP sued RIM for patent infringement in the Eastern District of Virginia (“E.D.Va”), Case
20 3:01-cv-00767-JRS. E.D.Va Document 423 MEMORANDUM OPINION provides a good
21 background. (In E.D.Va Document 423 RIM moved to stay the proceedings and the
22 injunction until the Patent Office re-examined the NTP patents. RIM’s motion was denied
23 despite DOJ’s intervention. E.D.Va-Documents 423 is reproduced in Exhibit 7 Appendix at
24 A26. From E.D.Va-Documents 423:

1 I.

2 A. Brief Procedural History

3
4 Plaintiff NTP, Inc. (“NTP”) filed suit against RIM in this Court on November 13, 2001,
5 alleging that several dozen system and method claims from its patents-in-suit had been
6 infringed by RIM’s BlackBerry wireless email devices and services. Drawn out discovery
7 disputes, claim construction issues, multiple motions for summary judgment, countless pre-
8 trial motions, and many evidentiary objections set the tone for a complex, contentious path
9 toward a resolution of this case. Numerous time extensions were granted to the parties in the
10 months leading up to trial.

11
12 Nearly one year after the Complaint was filed, a thirteen-day jury trial commenced on
13 November 4, 2002. On November 21, 2002, the jury returned a verdict finding direct,
14 induced, and contributory infringement by RIM on all of NTP’s asserted claims. Shortly
15 thereafter, RIM moved for a judgment as a matter of law or, in the alternative, a new trial.
16 After denying both requests, this Court entered its final judgment in NTP’s favor on August
17 5, 2003. Apart from monetary damages, the Court entered a permanent injunction against
18 RIM, which was stayed pending RIM’s appeal to the United States Court of Appeals for the
19 Federal Circuit.[FN1]

20
21 On August 2, 2005, the Federal Circuit issued its ruling which affirmed-in-part, reversed-
22 inpart, and vacated-in-part this Court’s judgment. See NTP, Inc. v. Research in Motion, Ltd.,
23 418 F.3d1282, 1326 (Fed. Cir. 2005). In analyzing the case on remand, this Court must now
24 consider what effect, if any, the Court’s misconstruction of the “originating processor” term
25 might have had on the jury’s assessment of damages and on the scope of the injunction.

26
27
28 At this point, over the course of the litigation RIM has moved on four separate occasions to stay
29 the proceedings based at least in part on the ongoing reexamination of the patents-in-suit by the
30 United States Patent and Trademark Office (the “PTO”). RIM’s first three attempts were
31 unsuccessful.

32
33 In January 2003, the PTO announced that it would begin to reexamine several of the patents-in-
34 suit.) After denying RIM’s third Motion to Stay, the Federal Circuit issued a mandate to the
35 Court (E.D.Va) to begin final remand proceedings.

36

1 In RIM’s fourth attempt to stay the proceedings, RIM asked the Court (E.D.Va) “to stay
2 proceedings in this litigation until the . . . [PTO] issues its final actions on its reexaminations of
3 the patents-in-suit.” RIM said it believed PTO would begin to issue final actions on its
4 reexaminations of the patents-in-suit in the next few months and contended that it is highly likely
5 that the result of the PTO’s reexamination proceedings will be to invalidate the patents-in-suit.
6 NTP said, no, it will take a lot longer than that. The Court agreed with NTP:

7 Reality and past experience dictate that several years might very well pass from the time
8 when a final office action is issued by the PTO to when the claims are finally and officially
9 “confirmed” after appeals. See, e.g., In re Am. Acad. of Sci. Tech Ctr., 367 F.3d 1359 (Fed.
10 Cir. 2004) (affirming the claim construction of the Board of Patent Appeals and
11 Interferences in a case where, after numerous rehearing requests and appeals, the PTO’s
12 findings were not confirmed until ten years after a reexamination was first requested).

13
14 The Court also makes an astute observation about patents:

15
16 III.

17
18 The Court recognizes the rights of a patent holder whose patents have been infringed.
19 Indeed, the essence of patent protection is that a party legally deemed to have infringed one
20 or more patents shall be liable to the patent holder for damages. Valid patents would be
21 rendered meaningless if an infringing party were allowed to circumvent the patents’
22 enforcement by incessantly delaying and prolonging court proceedings which have already
23 resulted in a finding of infringement.

24
25 The Court denied RIM’s Motion for Stay of Proceedings Pending Reexamination of NTP, Inc.’s
26 Patents-in-Suit. It was November 30, 2005.

27
28 Subsequently:

29 **a.** RIM settled with NTP for \$612.5 million. (See eWeek article Exhibit 8 Appendix at A34).

30 **b.** In the USPTO re-examination of the NTP patents, the USPTO disallowed some of the claims
31 in the NTP patents and upheld others. NTP appealed to the USPTO Board of Patent Appeals and

1 Interferences (BPAI) and lost. NTP is currently appealing BPAI's decision at the U.S. Court of
2 Appeals for the Federal Circuit.

3
4 Now, back to *Hunton*. {*Hunton & Williams v. U.S. Dep't of Justice*, 590 F.3d 272, 277 (4th Cir.
5 2010)} The Court's **Opinion** states the issue:

6 This appeal centers on communications between the U.S. Department of Justice ("DOJ") and
7 a telecommunications company, in which the company allegedly lobbied DOJ to take its
8 side in litigation with a client of law firm Hunton and Williams, LLC ("Hunton"). The
9 district court upheld DOJ's decision to deny Hunton's request under the Freedom of
10 Information Act, 5 U.S.C. § 552 (2006), ("FOIA") for records of those communications.
11 Hunton contends that it is entitled to the records, regardless of whether they satisfied the
12 requirements of the so-called common interest doctrine, which enables parties with a shared
13 legal interest to pursue a joint legal strategy. DOJ argues not only that common interest
14 communications are exempt from FOIA, but that we should defer to the agency's invocation
15 of the common interest doctrine without demanding any serious inquiry into the validity of
16 its common interest claims.

17
18 Both sides have a point, though only a partial one. DOJ argues persuasively that FOIA does
19 not strip the government of its civil discovery privileges or its valuable right to partner with
20 other parties in litigation or in anticipation of the same. At the same time, however, Hunton
21 correctly contends that common interest assertions by government agencies must be
22 carefully scrutinized. For the doctrine to apply, an agency must show that it had agreed to
23 help another party prevail on its legal claims at the time of the communications at issue
24 because doing so was in the public interest. It is not enough that the agency was simply
25 considering whether to become involved.

26
27 It bears repeating.

28 "Hunton contends that it is entitled to the records, regardless of whether they satisfied the
29 requirements of the so-called common interest doctrine, which enables parties with a shared legal
30 interest to pursue a joint legal strategy."

31
32 "DOJ argues not only that common interest communications are exempt from FOIA, but that we
33 should defer to the agency's invocation of the common interest doctrine without demanding any
34 serious inquiry into the validity of its common interest claims."

1 “Both sides have a point, though only a partial one. DOJ argues persuasively that FOIA does not
2 strip the government of its civil discovery privileges or its valuable right to partner with other
3 parties in litigation or in anticipation of the same.”

4
5 “At the same time, however, Hunton correctly contends that common interest assertions by
6 government agencies must be carefully scrutinized. For the doctrine to apply, an agency must
7 show that it had agreed to help another party prevail on its legal claims at the time of the
8 communications at issue because doing so was in the public interest. It is not enough that the
9 agency was simply considering whether to become involved.”

10
11 The Government’s common interest with RIM was that so many government officials and
12 workers used Blackberrys that if the system were shut down the Government would be brought
13 to its knees.

14
15 RIM attorney Herbert Fenster met with DOJ attorneys, including John Fargo on March 10, 2005,
16 and offered to furnish DOJ with information and drafts of affidavits RTM was then in the
17 process of obtaining as part of its efforts to overturn the injunction. DOJ contends that,
18 immediately after the meeting, Fenster and Fargo orally agreed to exchange documents on a
19 confidential "common interest" basis but the first time the phrase "common interest" appeared in
20 any written communication between RTM and DOJ was October 6, 2005, when Fargo added the
21 disclaimer "protected by joint and common interest privilege" to an email reply he sent to
22 Fenster.

23
24 The Appellate Court ruled that:

1 For the foregoing reasons, we affirm the district court's conclusion that privileged
2 communications between DOJ and RIM subsequent to their November 2005 common
3 interest agreement are protected from disclosure by FOIA Exemption 5. We vacate its
4 conclusion that a common interest relationship existed between RFM and DOJ from March
5 2005 to November 2005. On remand, the district court should determine the point in time
6 when DOJ decided that the public's interest converged with RIM's interest in opposing broad
7 injunctive relief, that it wanted RIM to prevail in its litigation, and that it would assist RIM
8 in doing so. The judgment is hereby

9
10 *AFFIRMED IN PART, VACATED AND REMANDED IN PART.*

11
12 Thus, the appellate court affirmed the district court's conclusion that privileged communications
13 between DOJ and RIM after their November 2005 common interest agreement were protected
14 from disclosure. The appellate court vacated the conclusion that a common interest relationship
15 existed between RIM and DOJ from March 2005 to November 2005, and remanded in part.

16
17 There was a dissenting opinion by Circuit Judge Michael. Here is the first paragraph:

18 MICHAEL, Circuit Judge, dissenting:

19 I respectfully dissent. The documents exchanged between Research in Motion, Ltd. (RIM)
20 and the Department of Justice (DOJ) about the BlackBerry patent infringement case
21 (BlackBerry litigation) brought by NTP, Inc. against RFM were improperly withheld by
22 DOJ under exemption 5 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(5).
23 This conclusion is mandated by [*Department of the Interior v. Klamath Water Users*](#)
24 [*Protective Ass'n*, 532 U.S. 1, 121 S.Ct. 1060, 149 L.Ed.2d 87 \(2001\)](#). *Klamath* makes clear
25 that RIM's communications with DOJ were undertaken in RIM's own interest as a self-
26 advocate at the expense of its opponent, NTP. As a result, the communications did not meet
27 exemption 5's first condition as "intra-agency" communications and thus could not be
28 withheld under exemption 5, even if RIM and DOJ shared a common interest in the
29 BlackBerry litigation.

30 In the Court's description of the March 10, 2005 meeting between Fenster (RIM's) and Fargo
31 (DOJ) the statement is made:

32 The United States government is the largest single user of BlackBerry devices, and as a
33 matter of law, it cannot be subject to injunctive relief against the use of patented technology.
34 28 U.S.C. § 1498(a) (2006); [*Trojan, Inc. v. Shat-R-Shield, Inc.*, 885 F.2d 854, 856-57](#)
35 [*\(Fed.Cir.1989\)*](#).

1 If the Government bought the BlackBerrys under contract for its officials and workers, which is
2 necessary in order for 28 U.S.C. § 1498(a) (2006) to apply, why didn't the contract contain the
3 same provision that NASA says its contract with RIS contained, that the Government was
4 responsible for all claims of patent infringement? Then NTP's case would be against the
5 Government and not RIS. Did the Government buy the BlackBerrys under contract or did most
6 of the government workers buy their BlackBerrys for their own personal use and then start using
7 it for their Government work?

8
9 If that was the case then 28 U.S.C. § 1498(a) did not apply. But the Government did have the
10 remedy of using eminent domain to seize the patents and fairly compensate NTP for their
11 property instead of ganging up with RIS against NTP, then a small patent licensing company, to
12 destroy the patents.

13
14 The following paragraph in *Hunton* is even more troubling.

15
16 At some point prior to DOJ's intervention, NTP became concerned about communications
17 between RIM and the PTO in connection with the patent reexamination proceedings, and in
18 January 2006, counsel for NTP filed a FOIA request with the PTO and its parent agency, the
19 Department of Commerce, to obtain any such communications. *See Rein v. U.S. Patent &*
20 *Trademark Office, 553 F.3d 353, 362 (4th Cir.2009)*. In the wake of that request, Hunton
21 learned of the common interest agreement between DOJ and RIM. Shortly after the
22 BlackBerry litigation settled, Hunton filed a second FOIA request, this time with DOJ,
23 seeking records of communications between RIM and DOJ, as well as related
24 communications between DOJ and other agencies such as the PTO. DOJ withheld roughly
25 half of the documents Hunton requested, and Hunton challenged the withholding of those
26 documents that DOJ claimed were protected from disclosure by Exemption 5 of FOIA. 5
27 U.S.C. § 552(b)(5). Following an *in camera* inspection of a substantial portion of the
28 documents DOJ withheld, the district court in Hunton's DOJ FOIA suit granted DOJ's
29 motion for summary judgment for all but three of the documents at issue.

30
31 {Emphasis added}

32 Why was DOJ talking to the Patent Office?

1 The Patent Office is required, by Law, to examine patent applications (and re-examine patents)
2 on their merits. If DOJ had wanted to know the status of the re-examination of NTP's patents
3 they could have looked them up on Public Pair, just like everyone else. One of NTP's patents
4 currently being re-examined is U.S. Patent 5,436,960 **Electronic mail system with RF**
5 **communications to mobile processors and method of operation thereof**, issued July 25, 1995
6 to Campana, Jr., et al. (Appl. No.: 07/702,939). See Exhibit 9 Appendix at A38 for a screen
7 capture of the most recent entries of the filewrapper showing the current status of the re-
8 examination. All of the documents, except for a few labeled NPL (Non-Patent Literature), can be
9 downloaded. For free.

10 Why was DOJ talking to the Patent Office?

11
12 A summary of the events:

- 13 a) RIM was found to have infringed on NTP's patents.
- 14 b) NTP offered to license their patents to RIM.
- 15 c) RIM turned down NTP's offer.
- 16 d) NTP obtained an injunction prohibiting RIM from making, using, or selling products that
17 infringed on NTP's patents. This would mean shutting down BlackBerry, which is used
18 by many Government officials and workers.
- 19 e) RIM lobbied several Government agencies and found a willing listener in DOJ by
20 persuading DOJ that shutting down BlackBerry would bring the Government to its knees.
21 RIM and DOJ started talking on March 10, 2005. RIM and DOJ signed a common
22 interest agreement in November 2005, shortly before DOJ intervened in the case.

1 f) The district court ruled that a common interest relationship existed between RIM and
2 DOJ starting in March 2005 and that their communications from that point on was
3 protected from disclosure by Exemption 5.

4 g) On Appeal, the Appellate Court ruled that, since the common interest agreement was not
5 signed until November, 2005, Exemption 5 only applied to communications after that
6 date and that communications before that date was not exempt.

7 h) In a dissenting opinion by Judge Michael, citing *Klamath*, the Judge said that none of the
8 communications should be exempt.

9 How this applies to Margolin's case.

10 a) NASA has not produced any evidence of a formal written common interest agreement
11 between NASA and RIS. Indeed, NASA did not mention "common interest defense" in
12 its Answer to Second Amended Complaint. NASA asserted the argument only at this late
13 stage in the proceedings.

14 b) NASA's stated common interest with RIS ("...NASA and Rapid Imaging shared a
15 common interest in defending against Plaintiff's patent infringement claims.") (Graham
16 Declaration ¶ 16) does not bear up under scrutiny. NASA admits that its contract with
17 RIS makes NASA responsible for all claims of patent infringement. (Graham Declaration
18 ¶ 16)

19 c) There is no litigation for NASA to intervene in. Optima Technology Group, the owner of
20 the Patents (and the claim against NASA), cannot sue RIS because RIS' contract with
21 NASA makes NASA responsible for patent infringement. RIS would also be shielded by

1 28 U.S.C. § 1498. If RIS were to sue Optima Technology Group in a Declaratory
2 Judgment action, 28 U.S.C. § 1498 would make it a frivolous and malicious suit.

3 d) If NASA were to be sued by Optima Technology Group for infringement, and Optima
4 Technology Group were to prevail, NASA would not face an injunction (28 U.S.C. §
5 1498). Its various synthetic vision projects would not be shut down.

6 e) If NASA were to be sued by Optima Technology Group for infringement, it would have
7 to be in U.S. Court of Federal Claims. Margolin suspects that RIS would lack standing to
8 join in the suit. (Margolin is not an attorney and is only guessing here.)

9 As a result, the value of *Hunton* is that NASA has no claim of common interest with RIS
10 without a formal written common interest agreement with RIS. Even then, Judge Michael's
11 dissenting opinion argues that *Klamath* should prevail.

12
13 Through the current proceedings NASA has frequently used the justification for withholding
14 documents as "in anticipation of litigation." Until NASA cited *Hunton*, Margolin assumed
15 NASA was anticipating a claim against NASA for patent infringement. But, by citing
16 *Hunton*, NASA raises the specter that NASA has been anticipating some other kind of
17 litigation. Margolin requests the Court order NASA to provide an affidavit stating the precise
18 nature of the litigation they have been anticipating.

19
20 C. *Donham v. U.S. Forest Service*, 2008 WL 2157167 at 5 (S.D. Ill.)

21 From the Opinion:

1 **A. Introduction and Factual/Procedural Background**

2
3 On February 12, 2007, Plaintiffs filed a complaint against the United States Forest Service
4 (USFS) alleging violations of the Freedom of Information Act (FOIA). Plaintiffs alleged that
5 their FOIA request was improperly denied by the USFS with respect to three documents,
6 labeled Documents 1, 2, and 3 in the USFS's *Vaughn* Index ¹ (Doc. 17-2, Exh. E). Document
7 1 is a copy of ISO 14001, Document 2 is a draft USFS document entitled "NEPA, EMS, and
8 the New Forest Planning Rule," and Document 3 is a draft USFS document entitled
9 "Greening of the FS (EO13148): 'Big Picture' Integrated Approach to NFMA/NEPA/EMS."

10
11 On September 14, 2007, the parties filed cross motions for summary judgment (Docs. 25 &
12 26). On May 9, 2008, the Court denied Plaintiffs' motion and granted in part and denied in
13 part the USFS's motion, finding that Documents 2 and 3 are exempt from disclosure (Doc.
14 33). That left Document 1 ("ISO 14001"), which the parties agree is a copyrighted document
15 to which the USFS obtained access pursuant to a licensing agreement with the American
16 National Standards Institute (ANSI). ² The Court declined to rule with respect to the ISO
17 14001, and instead directed Plaintiffs to join ANSI to the action as a required party. ANSI
18 appeared in the action and informed the Court that it had voluntarily provided Plaintiffs with
19 a copy of ISO 14001.

20 The parties have now filed cross motions for summary judgment (Docs. 53 &54).
21 Plaintiffs and the USFS each submitted responses (Docs. 55 & 59), and ANSI filed a
22 memorandum in support of the USFS's motion for summary judgment (Doc. 64). The USFS
23 argues that Plaintiffs' acquisition of the ISO 14001 from ANSI makes their claim as to that
24 document moot. Alternatively, the USFS claims that the ISO 14001 is not an agency record,
25 and even if it is, it is exempt from disclosure. Plaintiffs, on the other hand, argue that their
26 claim is not moot, and that the FOIA requires the USFS to produce the ISO 14001 in
27 response to its FOIA request.

28 Having fully reviewed the parties' filings, the Court finds that Plaintiffs' claim for the
29 production of the ISO 14001 is **MOOT**. Consequently, the pending motions for summary
30 judgment must be **DENIED AS MOOT** and this case must be **DISMISSED**.
31

32 Donham sued the U.S. Forest Service under the Freedom of Information Act for withholding
33 three documents in the *Vaughn* Index. The Court ruled that two of the documents were, indeed,
34 exempt from disclosure. The remaining document was ANSI Standard ISO 14001, which is a
35 copyrighted document. ANSI was dragged into the case and simply gave Donham a copy of ISO
36 14001. The issue in the case was whether that made the case moot. It did. Case over.
37

1 In the present case:

2 **a.** NASA has not asserted that Margolin is seeking copyrighted material.

3 **b.** NASA has not produced a Vaughn Index in order to properly argue about the documents.

4 **c.** There is nothing about the case that could be considered moot.

5

6 **d.** *Gerstein v. CIA*, No. 06-4643, 2008 WL 4415080 at 16 (N.D. Cal) (protecting draft letters).

7 This is a case in the Northern District of California that appears to be in the final stages of being

8 concluded. The last document in the Docket Report is Document 146:

9 ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S
10 SECOND RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT;
11 DENYING PLAINTIFF'S RENEWED MOTION FOR PARTIAL SUMMARY
12 JUDGMENT; VACATING HEARING. Signed by Judge Maxine M. Chesney on
13 September 17, 2010. (mmclc2, COURT STAFF) (Filed on 9/17/2010) (Entered:
14 09/17/2010)

15

16 The Order refers to a previous order issued on February 23, 2010 (Gerstein Document 128):

17

18 ORDER GRANTING IN PART AND DENYING WITHOUT PREJUDICE IN PART
19 DEFENDANTS' RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT;
20 DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT;
21 DENYING PLAINTIFF'S MOTION TO MODIFY STIPULATION AND ORDER
22 DISMISSING CERTAIN PENDING CLAIMS

23

24 And that refers to an Order issued September 26, 2008 (Gerstein Document 99):

25

26 ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION
27 FOR PARTIAL SUMMARY JUDGMENT; DENYING PLAINTIFF'S MOTION FOR
28 PARTIAL SUMMARY JUDGMENT; DENYING PLAINTIFF'S MOTION FOR MORE
29 DEFINITE STATEMENT; DENYING WITHOUT PREJUDICE PLAINTIFF'S MOTION
30 FOR IN CAMERA REVIEW AND LIMITED DISCOVERY

31

32 From that document is the background of the case:

1 BACKGROUND

2
3 Gerstein alleges he is a professional journalist employed full-time as a reporter covering
4 legal and political issues for the New York Sun, a daily newspaper published in New York
5 City. (See Compl. ¶ 2.)
6

7 Gerstein alleges that “[f]rom mid-2005 to the present, President Bush, executive branch
8 officials, members of Congress, and the press have participated in an escalating public
9 debate about unauthorized disclosures, often called ‘leaks,’ of classified information.” (See
10 Compl. ¶ 13.) According to Gerstein, such debate “has been spurred and fueled by a series
11 of highly-publicized news reports, including stories about alleged secret CIA prisons
12 overseas, about the warrantless surveillance by the NSA of certain telephone calls placed or
13 received by Americans, about an alleged decision by President Bush and Vice President
14 Cheney to declassify an intelligence estimate on Iraq without notifying personnel normally
15 notified in such declassification, and about the alleged tracking by government agencies of
16 billions of long-distance telephone calls made within the United States.” (See *id.*)
17

18 On March 16 and 17, 2006, Gerstein sent separate, but similar, requests under the Freedom
19 of Information Act (“FOIA”) to the CIA, DOD, DOJ,[FN1] DOS, FBI, NRO, and NSA,
20 pursuant to which Gerstein sought certain records relating to unauthorized disclosures of
21 classified information. (See Declaration of Joshua A. Gerstein (“Gerstein Decl.”) Exs. A, E,
22 G-J, M-N, and P-R.) As an example, Gerstein’s request to the CIA seeks the following
23 records:
24

- 25 1. All so-called criminal referrals submitted by CIA to the Department of Justice (“DOJ”)
26 since January 1, 2001 regarding unauthorized disclosure of classified information to the
27 press or public.
28
29 2. All responses from DOJ to CIA indicating the outcome of the investigations, inquiries, or
30 legal analyses related to the incidents referenced in No. 1 above.
31

32 [FN1] Gerstein’s request for records from the DOJ was handled by three separate
33 offices within the DOJ: the Office of Information and Privacy (“OIP”), the Office of
34 Professional Responsibility (“OPR”), and the Criminal Division (“CRM”), each of
35 which provided separate responses to Gerstein’s request.
36

37 3. All records reflecting the outcome of disciplinary proceedings instituted in connection
38 with the incidents referenced in No. 1 above.
39

40 4. All records reflecting the outcome of damage assessments conducted in connection with
41 the incidents referenced in No. 1 above.
42

43 5. All logs, lists, tallies, tabulations, summary reports, compilations, and the like pertaining
44 to the referrals described in No. 1 above, whether or not composed solely of those referrals.

1
2 6. All records pertaining to published reports in or about August 1998 that the United States
3 was aware of or tracking a satellite telephone used by Osama Bin Laden, the source or
4 sources of that alleged leak, all referrals by DOJ in connection with that alleged leak, all
5 replies from DOJ thereto, and any damage assessment conducted in connection with that
6 alleged leak.

7
8 (See *id.* Ex. A at 1-2.)
9

10
11 Margolin responds: NASA has not asserted that Margolin is seeking classified information. (At
12 least, not yet.)
13

14 E. *Buckner v. IRS*, 25 F. Supp. 2d 893, 900 (N.D. Ind. 1998)

15 From:

16 **II. Discussion**

17
18 **A. Summary Judgment under FOIA**

19
20 In a FOIA case, summary judgment is available when the defendant agency establishes that
21 it has completely fulfilled its duties under FOIA by showing "that each document that falls
22 within the class requested either has been produced, is unidentifiable, or is wholly exempt
23 from the Act's inspection requirements." *Pollack v. United States Bureau of Prisons*, 879
24 F.2d 406, 409 (8th Cir.1989); (quoting, *Miller v. United States Department of State*, 779
25 F.2d 1378, 1383 (8th Cir.1985)); *National Cable Television Ass'n, Inc. v. Federal*
26 *Communications Comm'n*, 479 F.2d 183, 186 (D.C.Cir.1973). The underlying facts, and the
27 inferences to be drawn from them are to be construed in the light most favorable to the
28 FOIA requester. *Pollack*, 879 F.2d at 409.
29

30 **1. An adequate factual basis**

31
32 In FOIA cases, a threshold predicate to deciding a motion for summary judgment is whether
33 the defendant agency has given the court an adequate factual basis to decide whether or not
34 the withheld documents fit into the prescribed exemptions. See *Becker v. IRS*, 34 F.3d 398,
35 402 (7th Cir.1994); (citing *Wright v. Occupational Safety and Health Admin.*, 822 F.2d 642,
36 645 (7th Cir.1987)); *Antonelli v. Drug Enforcement Admin.*, 739 F.2d 302, 303 (7th Cir.
37 1984). There are three ways by which a defendant agency can provide the court with an
38 adequate factual basis: 1) sufficiently detailed 897*897 affidavits; 2) a Vaughn index; or 3)
39 submit the documents in question for an *in camera* inspection. A court may rely on any

1 combination of the methods available to determine whether or not a document has been
2 properly withheld under a FOIA exemption. The detailed affidavit is the least burdensome
3 of the methods available. The Vaughn index and *in camera* inspection are used at the court's
4 discretion when more information is necessary to establish an adequate factual basis for
5 making a decision.
6

7 A sufficiently detailed affidavit can provide the court an adequate factual basis for ruling on
8 a FOIA case. The affidavit must convey the character of the documents in question with
9 enough detail to demonstrate whether or not the claimed FOIA exemption is applicable. "A
10 district court may grant summary judgment to the government in a FOIA case only if the
11 agency affidavits describe the documents withheld and the justifications for nondisclosure in
12 enough detail and with sufficient specificity to demonstrate that material withheld is
13 logically within the domain of the exemption claimed." *Patterson v. IRS*, 56 F.3d 832, 836
14 (7th Cir.1995) (quoting *PHE, Inc. v. Department of Justice*, 983 F.2d 248, 250
15 (D.C.Cir.1993)) (quoting *King v. U.S. Department of Justice*, 830 F.2d 210, 217
16 (D.C.Cir.1987)); see also *Miscavige v. IRS*, 2 F.3d 366, 368 (11th Cir.1993) (holding that a
17 sufficiently detailed affidavit can establish an adequate factual basis for the purposes of
18 determining a FOIA disclosure dispute). Affidavits must assert more than mere bald
19 conclusions to provide the court with an adequate factual basis for review. *Patterson v. IRS*,
20 56 F.3d 832, 836 (7th Cir. 1995). In some FOIA cases the agency is required to submit what
21 is called a "Vaughn index" named for the case *Vaughn v. Rosen*, 484 F.2d 820
22 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974). A
23 Vaughn index is a comprehensive listing of each withheld document cross-referenced with
24 the FOIA exemption that the Government asserts as applicable. *Solar Sources Inc. v. United*
25 *States*, 142 F.3d 1033, 1037 (7th Cir.1998); see *Wright v. OSHA*, 822 F.2d 642, 645 (7th
26 *Cir.1987)*; *Vaughn*, 484 F.2d 820 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564,
27 39 L.Ed.2d 873 (1974). The government is not obligated to create a Vaughn index
28 (frequently a time-consuming and tedious process) in every FOIA case. *Wright*, 822 F.2d at
29 645-46. "The agency need only provide sufficient information to allow a court to review the
30 agency's claimed exemption." *Id.* at 646.
31

32 Margolin responds:

33 **a.** NASA has not established that it has completely fulfilled its duties under FOIA by showing
34 "that each document that falls within the class requested either has been produced, is
35 unidentifiable, or is wholly exempt from the Act's inspection requirements."

36 **b.** NASA has not produced a Vaughn Index.

1 **c.** The Graham Declaration (affidavit) is insufficient for reasons previously discussed and for
2 more reasons to be given presently.

3 **d.** NASA has not submitted the documents for *in camera* inspection.

4
5 **f.** *Judicial Watch, Inc. v. Dep't of Commerce*, 337 F. Supp. 2d 146, 174 (D.D.C. 2004) (applying
6 privilege to documents written by agency attorneys to superiors describing advice given to clients
7 within agency).

8
9 Judicial Watch's relevance to the present case is actually in the section **Discussion** where the
10 Court discusses a previous action brought by Judicial Watch. See *Judicial Watch*, 34 *F.Supp.2d*
11 *at 46*).

12 I. *Adequacy of the Second Search*

13
14 When responding to a FOIA document request, an agency is obliged to conduct a good faith
15 search that is reasonably calculated to uncover all documents responsive to that request. See
16 *Valencia-Lucena v. Coast Guard*, 180 F.3d 321, 325-26 (D.C.Cir.1999); *Campbell v. Dep't*
17 *of Justice*, 164 F.3d 20, 27 (D.C.Cir.1998); *Oglesby v. Dep't of the Army*, 920 F.2d 57, 68
18 (D.C.Cir.1990). The adequacy of a FOIA search, and the corresponding search burden, are
19 case-dependent. See *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C.Cir.1990). Normally, an
20 agency need only conduct a "reasonable" search, but in this case the DOC's burden was
21 heightened as a result of its prior misconduct. See *Judicial Watch*, 34 *F.Supp.2d at 46*. In its
22 1998 Memorandum Opinion, this Court found that

23
24 [T]he DOC's search was inadequate, unreasonable and unlawful under the FOIA. The DOC
25 failed to search entire offices that were likely, if not certain, to hold responsive documents.
26 Documents were destroyed, discarded and given away, sometimes without being searched to
27 determine if they were responsive, other times with full knowledge that they were
28 responsive.

29
30 *Judicial Watch*, 34 *F.Supp.2d at 46*. The Court ordered the DOC to conduct a second search
31 "more restrictive and rigorous... than those ordinarily ordered as relief in a FOIA case"
32 because the "egregious facts of this case make such requirements entirely necessary to
33 ensure agency compliance with the law and this Court's orders." *Id.* The Court also found
34 that Judicial Watch could conduct discovery "related to the destruction or removal of
35 documents after its first FOIA 159*159 request was filed, [which] may include, out of
36 necessity, some inquiry into the creation and handling of documents." *Id.*

1 NASA's bad faith over the years have been discussed in Second Amended Complaint and
2 Margolin MSJ, among others. NASA's bad faith strongly suggests misconduct both in the
3 original actions and the attempts to hide it. It is still going on.

4 On July 20, 2010 Margolin filed a third FOIA request (by email) with NASA. See
5 Exhibit 10 Appendix at A40.

6 On July 24, 2010 he received an email from NASA asserting, "Your request does not
7 clearly define a request for specific NASA agency records," which was nonsense. See Exhibit 11
8 Appendix at A42.

9 Margolin responded on July 29, 2010. See Exhibit 12 Appendix at A45.

10 Margolin received a letter (by USPS) from NASA dated August 16, 2010 in which
11 NASA gave itself a 10 day extension and promised to send him a final reply by August 31, 2010.
12 See Exhibit 13 Appendix at A49.

13 On September 9, 2010, not having received a reply, he sent NASA a polite email asking
14 NASA's intentions. See Exhibit 14 Appendix at A51. He sent it using Windows Mail using the
15 feature requesting a Read Receipt.

16 On September 13, 2010, not having received a reply or even a Read Receipt for his
17 September 9 email, he sent a more strongly worded email, he sent it to a wider distribution, and
18 used the Windows Mail feature requesting a Read Receipt. See Exhibit 15 Appendix at A53.
19 This time several NASA people read the email. (Exhibit 15 Appendix at A54). However, as of
20 the date of this present filing he has not received a reply from NASA to his FOIA request, the
21 reply promised by August 31.

1 On September 13, 2010 Margolin used the Web site of the National Archives and
2 Records Administration (“NARA”) to ask them a question. NARA interpreted it as a FOIA
3 request and responded by USPS Mail in a letter dated September 24, 2010. See Exhibit 16
4 Appendix at A60. The NARA letter says:

5 This is in response to your Freedom of Information Act (FOIA) request of September 13,
6 2010, for any records sent to the National Archives by the National Aeronautics and Space
7 Administration (NASA) Office of General Counsel in the previous three months. Your
8 request was received in this office on September 21, 2010, and assigned tracking number
9 NGC10-243.

10
11 A review of our records indicates that NARA received only one SF-258, Agreement to
12 Transfer Records to the National Archives, from NASA:

- 13 • Periodic Information Series –GSFC (Miscellaneous), 2008-2010. 1 Cubic Foot
14

15 Granted, the information is not specific enough to constitute a smoking gun, but it does confirm
16 Margolin’s fears that the reason NASA stalled him and is now ignoring him on his third FOIA
17 request was to give themselves time to send responsive records to NARA so NASA could say
18 they do not have responsive records. Some of the records they sent to NARA may be relevant to
19 the present case. If the Court wishes to expand the present case to include Margolin’s third
20 FOIA request, Margolin will not object. It will save Margolin the time and expense of filing a
21 second FOIA action in this Court, and will save the Court time and resources as well.

22
23 **14. NASA: F. Exemption 6 applies — The information is contained in personnel, medical**
24 **or "similar" files the disclosure of which would constitute a clearly unwarranted invasion of**
25 **privacy.**

26
27 This has been addressed in Margolin Reply, page 16, line 8 - page 18, line 13.

1 **V. Analysis of The Graham Declaration**

2 Margolin finds it necessary to respond in detail to the Graham Declaration to show that it
3 should not be given Substantial Weight. Some parts have been emphasized.

4
5 **Graham**

6
7 I, COURTNEY B. GRAHAM, hereby declare under penalty of perjury as follows:

8
9 1. I am the Associate General Counsel for Commercial and Intellectual Property Law in the
10 Office of General Counsel of the National Aeronautics and Space Administration ("NASA"), and
11 respectfully submit this declaration in support of Defendant's opposition to Plaintiff's motion for
12 summary judgment based upon my knowledge of the facts set forth herein, as well as my review
13 of the pertinent documents referred to herein and annexed hereto.

14
15 **Margolin**

16 Graham states that her Declaration is in support of NASA's opposition to Margolin's motion for
17 summary judgment yet is referred to extensively in the part of NASA's Opposition and Cross-
18 Motion devoted to an Opposition. Graham's Declaration is used mostly to support NASA's
19 Cross-Motion.

20 **Graham**

21 2. **I have been employed by NASA since October 6, 2006.** I joined NASA as a Senior
22 Attorney and **began supervising the Commercial and Intellectual Property Law ("CIPL")**
23 **practice group in the Office of General Counsel in November 2008.** I became Acting
24 Associate General Counsel of the practice group in June 2009, and was permanently hired in that
25 position on May 9, 2010.

26 **Margolin**

27 Graham did not start at NASA until October 6, 2006. Therefore, she has no personal
28 knowledge of events at NASA that occurred before that date. All she knows of the events that

1 occurred before that date are either from what people told her (hearsay) or what she has read in
2 the documents. Not all events in a bureaucracy are well documented. Sometimes, they are not
3 documented at all, or the documents are lost. And, documents are subject to interpretation.

4 The Fein Email is dated July 12, 2004, before Graham was at NASA. NASA decided to
5 file a Request for Re-Examination of the Patents at the Patent Office in September 2004.
6 Graham did not begin supervising CIPL until November 2008. Since Margolin has not seen her
7 name in the documents NASA sent him, the same argument can be made for events that occurred
8 before November 2008. Thus, Graham's declaration of events that occurred before November
9 2008 do not merit Substantial Weight.

10 Abernathy told NASA on October 3, 2008 that he had prepared a Request For Re-
11 Examination of the Patents. Graham has no personal knowledge of these events because she did
12 not begin supervising CIPL until November 2008. Thus, her declaration of events that occurred
13 before October 6, 2006 does not merit Substantial Weight.

14 **Graham**

15 3. My duties and responsibilities as the Associate General Counsel of the CIPL practice
16 group include developing and implementing agency policies and processes for NASA's
17 intellectual property portfolio and providing direct legal support in the areas of intellectual
18 property protection, licensing and enforcement to NASA Headquarters Mission
19 Directorates and mission support offices. Under my leadership, the CIPL practice group, under
20 the authority of the Agency Counsel for Intellectual Property, is responsible for reviewing and
21 providing the final agency determination on all administrative claims of patent infringement
22 brought against NASA.

23
24 **Margolin**
25

26 Graham's leadership of CIPL did not begin until November 2008 at the earliest, when she
27 began supervising CIPL. She has no personal knowledge of how Patent Claim I-222 was handled

1 before that. Graham might be assuming that NASA followed its standard administrative
 2 procedures for reviewing a claim of patent infringement for I-222 but there was none. NASA
 3 might have had a written procedure for administratively reviewing a claim for patent infringement
 4 at one time, but they lost it. Margolin made a second FOIA request to NASA in December 2009
 5 asking for, among other documents, NASA's procedures for administratively reviewing a claim for
 6 patent infringement." Margolin didn't get it and appealed. In NASA's April 13, 2010 response to
 7 his FOIA Appeal they said, from Margolin MSJ Exhibit 3, Appendix Volume 1 (Document 32-1)
 8 at A40 (next to last paragraph):

9 Although in item 9 you failed to identify a particular GAO report, NASA Headquarters Office
 10 of General Counsel identified GAO Administrative Review B-285211, NASA's
 11 Administrative Review of a Patent Infringement Claim, dated August 8, 2000, which states
 12 that the GAO reviewed NASA's procedures for administratively reviewing a claim of patent
 13 infringement as attached to a September 29, 1987 letter, As confirmed by the document
 14 quoted at page 13 of your appeal, the NASA Headquarters Office of General Counsel did not
 15 have a copy of the attachment as of January, 2009. The search revealed that no copy of the
 16 attachment has been located since that time.

17
 18 {Emphasis added}

19
 20 **Graham**

21 4. On June 28, 2008, Plaintiff filed FOIA request No. 08-270 seeking "all documents related to
 22 the Administrative Claim of Jed Margolin for Infringement of U.S. Patent Nos. 5,566,073 and
 23 5,904,724; NASA Case No. I-222," See Plaintiff's FOIA Request, FOIA No. 08-270, dated June
 24 28, 2008 (annexed hereto as Exhibit A).

25 5. The FOIA Office at NASA Headquarters routes requests to the appropriate program office
 26 based on the subject matter of the particular FOIA request.

27 6. Upon receipt of Plaintiff's June 28, 2008 FOIA request, the FOIA Public Liaison Specialist
 28 at NASA Headquarters determined that responsive records regarding the referenced administrative
 29 claim for patent infringement, Case Number I-222, would have originated and been maintained by
 30 the CIPL practice group in the NASA Headquarters Office of General Counsel. Accordingly,
 31 Plaintiff's FOIA request No. 08-270 was forwarded to the CIPL practice group to conduct a
 32 records search. The FOIA Office at NASA Headquarters did not forward Plaintiff's FOIA request

1 No. 08-270 to any NASA Field Center FOIA Office for action.

2

3 **Margolin**

4 No comment.

5

6 **Graham**

7 7. NASA Case Number I-222 is an administrative claim for patent infringement against
8 NASA that was submitted to the CIPL practice group by Plaintiff on June 7, 2003. See
9 Administrative Claim for Patent Infringement, dated June 7, 2003 (annexed hereto as Exhibit B).
10 Plaintiff owned the patents at the time Case Number I-222 was initiated, but the patents were
11 subsequently acquired by **Optima Technology Corporation**. Gary Borda, Agency Counsel for
12 Intellectual Property, issued a final determination denying Plaintiff's claim on behalf of NASA on
13 March 19, 2009. See NASA Final Determination, Case I-222, dated March 19, 2009
14 (annexed hereto as Exhibit C).

15

16 **Margolin**

17 Margolin objects to Graham's statement that "the patents were subsequently acquired by
18 **Optima Technology Corporation.**" This is discussed in Margolin's Reply to NASA's
19 Opposition to Margolin's MSJ (page 18 line 15 - page 21, line 12).

20 Margolin also objects to Graham's statement that NASA finally denied the I-222 claim
21 on March 9, 2009. This is a legal conclusion that does not belong in a Declaration. See *Doolittle,*
22 *Peters, Alamo, supra.*

23 **Graham**

24 8. By way of background, an administrative claim for patent infringement is a claim for
25 monetary damages for patent infringement against the Federal government. If the administrative
26 claim is denied, the claimant may bring an action in the Court of federal Claims under 28 U.S.C. §
27 1498(a) seeking "reasonable and entire compensation" for the alleged infringement of his
28 patents.

29

1 **Margolin**

2 This is Graham's own interpretation of the law and has no place in a declaration, even
3 though it is probably correct. See *Alamo, supra* (reproving agency declaration for "several
4 gratuitous recitations of the affiant's own interpretation of the law").

5 **Graham**

6 9. **When the CIPL practice group receives an administrative claim for patent**
7 **infringement, it is customary for the CIPL practice group reviewing attorneys to transmit a**
8 **copy of the claim to patent attorneys located at any NASA Field Centers likely to have**
9 **relevant technology or activities.** The Field Center patent attorneys review the claim and are
10 responsible for conducting the local investigation of the allegations of infringement. This
11 investigation requires the patent attorneys to conduct interviews with scientists and engineers who
12 may have knowledge of relevant technology. The patent attorneys also review the asserted patents
13 and analyze the activities and technologies at the NASA Field Centers to determine whether the
14 asserted patents cover those activities. The Field Center patent attorneys then summarize the
15 results of the investigation and review and provide their legal opinion on the efficacy of the claim
16 to the CIPL practice group attorneys responsible for reviewing the claim. The CIPL practice
17 group maintains a file for each claim received.
18

19 **Margolin**

20 Graham's description of the procedure that NASA follows after receiving a claim for
21 patent infringement makes CIPL sound like a well-oiled machine. Unfortunately, it is a machine
22 without an instruction manual. As noted above, as of January 2009 NASA could not find a copy of
23 the document detailing their procedures for administratively reviewing a claim of patent
24 infringement.

25 **Graham**

26 10. Once all of the Field Center patent attorneys have completed their assessments of the claim
27 and provided their opinion to the CIPL practice group attorneys responsible for reviewing the
28 claim, those attorneys prepare a consolidated analysis in consultation with the Field Center patent

1 attorneys and develop the legal opinion supporting a final determination on the claim.

2

3 **Margolin**

4 Again, Graham has no personal knowledge of how Claim I-222 was handled before November
5 2008.

6 **Graham**

7 11. The NASA personnel supporting the investigation and review of Case I-222 at NASA
8 Headquarters were **Gary Borda, Jan McNutt, Robert Rotella, Alan Kennedy and Kathy**
9 **Bayer**. Mr. Borda is Agency Counsel for Intellectual Property and is currently employed by
10 NASA. **Mr. McNutt is an attorney who retired from federal service in January 2010.** Mr.
11 Rotella is a patent attorney currently employed by NASA. Mr. Kennedy is a patent attorney who
12 retired from federal service in February 2008. Ms. Bayer is a legal technician who is employed at
13 the NASA Headquarters Office of General Counsel.

14

15 **Margolin**

16 As described previously, for much of the time Graham either wasn't at NASA or was not
17 in the loop.

18 Graham also makes the misstatement that "Mr. McNutt is an attorney who retired from
19 federal service in January 2010." No, he didn't. He went to work for US Army Research,
20 Development and Engineering Command as an International Acquisition Attorney. See Exhibit 3
21 Appendix at A12. (From <http://www.linkedin.com/pub/jan-mcnutt/2/2b9/252>). The U.S. Army is
22 a department of the Federal Government. Thus, he did not retire from federal service. He simply
23 left NASA. While Graham's misstatement may be inconsequential it is probative because it
24 shows Graham's lack of attention to details. It is unfortunate that Mr. McNutt left NASA. He
25 was a late, but key player in the game.

1 **Graham**

2 12. In Case Number I-222, personnel supporting NASA Langley Research Center, Johnson Space
3 Center, and Dryden Flight Research Center were asked to investigate Plaintiff's claims of
4 infringement against NASA.
5

6 **Margolin**

7 Graham lacks personal knowledge. She is only relating information from the documents.
8

9 **Graham**

10 13. The NASA personnel supporting the investigation at NASA Langley Research Center tasked
11 with investigating Plaintiff's claims for infringement were Helen Galus and Barry Gibbens. Ms.
12 Galus is a patent attorney currently employed by NASA. Mr. Gibbens was a patent attorney and
13 is deceased.

14 14. The NASA personnel supporting the investigation at Johnson Space Center tasked with
15 investigating Plaintiff's claim for infringement were Edward Fein, Kurt Hammerle, Theodore Ro
16 and Francisco Delgado. Mr. Fein, Mr. Hammerle and Mr. Ro are patent attorneys currently
17 employed by NASA. Mr. Delgado is an aerospace engineer currently employed by NASA.
18

19 15. The NASA personnel supporting the investigation at Dryden Flight Research Center were
20 Mark Homer and John Del Frate. Mr. Homer is a patent attorney currently employed by NASA.
21 Mr. Del Frate is a supervisory general engineer currently employed by NASA.
22

23 **Margolin**

24 Graham has no personal knowledge of how Claim I-222 was handled before November 2008.
25

26 **Graham**

27 **16. NASA Headquarters and Johnson Space Center personnel investigating Case**
28 **Number I-222 also communicated with persons associated with Rapid Imaging Software,**
29 **Inc. ("RIS"). RIS is a NASA contractor that creates flight visualization tools such as**
30 **software that permits users to fly through virtual terrain — a technical area related to Case**
31 **Number I-222. RIS had separately received allegations of infringement relating to the same**
32 **patents asserted against NASA in Case Number I-222. Because RIS' contract included the**

1 **clause at Federal Acquisition Regulation 52.227-1, Authorization and Consent, NASA is**
2 **responsible for any infringing activities conducted by RIS in the performance of its**
3 **contracts. Under the circumstances, NASA and RIS had a common interest in defending**
4 **against Plaintiff's patent infringement claims.**
5

6 **Margolin**

7 Margolin objects to Graham's statement that "NASA and RIS had a common interest in
8 defending against Plaintiff's patent infringement claims." This is a legal conclusion that does not
9 belong in a Declaration. *See Doolittle, Peters, Alamo, supra.*

10
11 As detailed in Margolin's Reply to NASA's Opposition & CMSJ (Page 11, line 3 - page 13, line
12 1):

13 **1.** NASA admits that RIS was a NASA contractor.

14 **2.** NASA admits that RIS had no fear of being sued for infringement for its actions in the X-38
15 project.

16 **3.** RIS' interest in defending itself against charges of patent infringement had nothing to do with
17 their work for NASA. It didn't have anything to do with work RIS might have done for other
18 Federal agencies since that work would also have been covered by 28 U.S.C. §1498.

19 NASA's "Common Interest" relationship with RIS began years before RIS had any fear of being
20 sued for patent infringement. RIS was brought onboard by at least June 24, 2004. See Second
21 Amended Complaint Appendix Volume 2 (Document 16-3) at A15-A16.

22
23 When Optima Technology Group contacted RIS in 2006 Abernathy complained to NASA in an
24 email dated September 26, 2006:

25 In 1999 the patent office issues a patent to a former Atari employee named Margolin for a
26 Synthetic Environment for Remotely Piloted Vehicle. He had evidently applied for it in

1 1996. Shortly thereafter he begins to complain to NASA that they and RIS infringed upon
2 his patent presumably by flying a system 2 years before he received his patent. Is this a
3 joke?
4

5 In 7 years he never so much as asked RIS about using his technology. Margolin as best I can
6 tell never built this system and never test flew it. Can't say as I blame him because his
7 system looks to me like a crater looking for an address. It cannot be safely operated in the
8 form patented (no autopilot). No one is even stupid enough to build it this way, not even
9 him.
10

11 See Second Amended Complaint Appendix Volume 2 (Document 16-3) at A63.

12 Aside from being incredibly insulting coming from a guy whose knowledge of patents would fit
13 comfortably inside a quantum dot (Second Amended Complaint page 17, line 33 - page 20, line
14 26), since Abernathy had not heard from Margolin in the previous 7 years he could hardly have
15 been afraid of being sued for patent infringement in 2004 when his alleged "Common Interest"
16 with NASA began.

17 What exactly, was NASA's "Common Interest" with NASA in 2004?

18 Graham's claim of "Common Interest Privilege" is not only an impermissible legal argument, it
19 does not hold up under scrutiny.

20 **Graham**

21 **17. In reviewing RIS' work, NASA communicated with Michael Abernathy, Benjamin**
22 **Allison, and Richard Krukar regarding the substance of the claims at issue in Case**
23 **Number I-222. Mr. Abernathy is the principal of RIS. Mr. Allison and Mr. Krukar are**
24 **RIS' outside attorneys. As a result of these discussions, RIS provided NASA with copies of**
25 **attorney work-product documents prepared by Mr. Krukar in anticipation of litigation in**
26 **response to the patent claims asserted against RIS. RIS also provided NASA with privileged**
27 **attorney-client communications between RIS and its attorneys. These documents were**
28 **provided by RIS to assist NASA's attorneys in determining the agency's potential liability**
29 **as a result of the claims of infringement against RIS, as a NASA contractor.**
30

31

1 **Margolin**

2 This is more impermissible legal argument masquerading as “fact.” *See Doolittle, Peters, Alamo,*
3 *supra.*

4 **Graham**

5 18. In reviewing Case Number I-222, the responsible CIPL practice group attorneys
6 communicated extensively with the patent counsel and technical personnel investigating the claim
7 in order to develop the evidence required to develop the March 19, 2009 Final Determination on
8 Case Number I-222.

9 19. When the CIPL practice group received Plaintiff’s FOIA request No. 08-270, the group
10 conducted a search of its records. A copy of the CIPL practice group file for Case Number I-222
11 was forwarded to the FOIA office on January 21, 2009. The RIS documents, discussed in
12 Paragraph 17 above, had not been placed in the file and were not provided to the Headquarters
13 FOIA office so they were not considered as part of the initial determination on Plaintiff’s FOIA
14 request No. 08-270. On May 14, 2009, the NASA Headquarters FOIA Office issued an initial
15 determination in response to Plaintiff’s FOIA request No. 08-270 releasing responsive documents
16 to Plaintiff. *See NASA’s Initial Determination on Plaintiff’s FOIA Request, FOIA No. 08-270,*
17 *dated May 14, 2009 (annexed hereto as Exhibit D).*

18 20. The May 14, 2009 initial determination included 63 pages of responsive documents. These
19 documents were also included in the supplemental response to Plaintiff’s FOIA request, discussed
20 at Paragraph 40, identified as Document Nos. 05605 through 05667. An additional 227 pages of
21 responsive documents were identified in the initial determination as exempt from disclosure under
22 Section (b)(5) of the FOIA under the deliberative process privilege. These documents are
23 identified in the supplemental response as Document Nos. 04639 through 04866. As discussed
24 more fully in Paragraph 30, these documents were reviewed again for release in November, 2009
25 and all but 22 pages were eventually released.
26

27 **Margolin**

28 Not to be picky, but in Graham ¶ 20, NASA’s May 14, 2009 initial determination
29 produced 62 pages of documents. See Exhibit 2 Appendix at A8. This uses the *Properties* feature
30 of Adobe Reader to show information about the PDF file provided by NASA containing the

1 initial production of documents in the file NASA emailed to Margolin. See Exhibit 1 Appendix
2 at A5.

3 Also, NASA's Counsel characterizes NASA's initial product as "63 documents." NASA
4 Opposition & CMSJ page 5, lines 2-3. Again, probably not material, but it is probative because it
5 shows NASA's poor attention to details.

6 And Graham's statement that NASA's supplemental production included the original
7 production of documents in Document Nos. 05605 through 05667 is not true. The documents
8 Margolin received ended with Document No. 05605. See Exhibit 4 Appendix at A15.

9 **Graham**

10 21. Plaintiff filed a timely appeal of the May 14, 2009 initial determination on June 10, 2009. In
11 appealing the May 14, 2009 initial determination, Plaintiff specifically appealed: (1) NASA's
12 failure to provide a copy of the March 19, 2009 Final Determination on Case Number I-222 in
13 response to Plaintiff's FOIA request No. 08-270; (2) NASA's failure to provide a copy of a
14 "patent report" containing evidence related to the validity of the patent at issue in Case Number I-
15 222; and (3) NASA's failure to provide records between NASA and RIS "which provided the
16 synthetic vision system for the X-38 project." Plaintiff also requested an estimate of the volume
17 of responsive documents withheld under Exemption 5 in the May 14, 2008 initial
18 determination. *See* Margolin FOIA Appeal on FOIA Request, FOIA No. 08-270, dated June 10,
19 2009 (annexed hereto as Exhibit E).
20

21 **Margolin**

22 No. Margolin did not appeal NASA's failure to provide the Borda Letter. He chastised
23 NASA for not providing it. NASA likes to say that Margolin's FOIA Appeal requested the Borda
24 Letter which he already had. This comes under the category that if you tell a lie often enough,
25 people will believe it. Don't believe this one.

26 Also, NASA admits it failed to provide an estimate of the number of pages it withheld
27 from its initial production.

1 NASA failed to admit that they responded to Margolin FOIA Appeal only after he filed
2 the present lawsuit.

3 **Graham**

4 22. The FOIA Office at NASA Headquarters routes appeals under FOIA to the Headquarters
5 Office of General Counsel. The Headquarters Office of General Counsel, as the office responsible
6 for interpreting the FOIA statute (see 14 CFR § 1206.501), reviews the record supporting the
7 initial determination and provides an opinion to support the final agency determination on the
8 request. The final agency determination is issued by the NASA Administrator or his
9 designee. *See* 14 CFR § 1206.607.

10
11 23. The final agency determination on Plaintiff's FOIA request No. 08-270 was issued by
12 Thomas S. Luedtke, NASA's Associate Administrator for Institutions and Management on August
13 5, 2009. *See* NASA Final Determination on Plaintiff's FOIA Request, FOIA No. 08-270, dated
14 August 5, 2009 (annexed hereto at Exhibit F).

15
16 24. The final agency determination on FOIA No. 08-270 estimated that 100 pages were
17 withheld under Exemption 5. (As discussed above, at Paragraph 20, 227 pages of documents were
18 actually withheld in the initial determination.)

19

20 **Margolin**

21 Graham ¶ 24 admits that Margolin was finally told that 100 pages were withheld from NASA's
22 initial production but that 227 were actually withheld. Contrast this with the approximately 4,000
23 pages that were produced in November 2009.

24 **Graham**

25 25. The final agency determination on FOIA No. 08-270 affirmed the initial
26 determination on the issues identified by Plaintiff on appeal. First, the March 19, 2009 Final
27 Determination on Case Number I-222 was already in Plaintiff's possession as evidenced by his
28 quoting it in his appeal. Second, the documents reviewed in FOIA No. 08-270 relevant to
29 NASA's evaluation of Case Number I-222 were either prepared by agency attorneys or
30 developed by NASA employees at the direction of agency's attorneys in order to evaluate the
31 claims of patent infringement asserted against the agency. As such, these records were created in
32 anticipation of litigation and constitute attorney work-product or privileged attorney-client
33 communications exempt from disclosure under Exemption 5. Finally, a general request for

1 records exchanged between NASA and its contractor, RIS, relating to the X-38 project was
2 determined to exceed the scope of the original June 28, 2008 FOIA request.
3

4 **Margolin**

5 Once again, the Lie, that in Margolin's FOIA Appeal he asked for the Borda Letter even though
6 he already had it. And, once again, Graham is making legal arguments.

7 **Graham**

8 26. On August 11, 2009, I received a notice that Plaintiff had filed a lawsuit against NASA.
9 See NASA Headquarters Action Tracking System, No. A/2009-00202, dated August 11, 2009
10 (annexed hereto as Exhibit G).
11

12 27. On August 12, 2009, I issued a notice to preserve evidence relevant to the lawsuit to
13 NASA Langley Research Center, Johnson Space Center and Dryden Flight Research Center. I
14 also asked the patent attorneys at each Center responsible for reviewing Case Number I-222 to
15 provide me with copies of all documents in their possession so I could review them in connection
16 with the litigation. See E-Mail, ACTION REQUIRED: Margolin FOIA Suit, dated August 12,
17 2009 (annexed hereto at Exhibit H).
18

19 28. I received over 5600 pages of documents from the NASA Field Centers in response to my
20 request. Many documents were duplicates because the NASA personnel investigating the claims
21 consulted closely with one another by e-mail and telephone while reviewing Case Number I-222,
22 so e-mails and documents were received by multiple people simultaneously.
23

24 29. After reviewing these documents, I made the determination that, given the number of
25 responsive documents received from the NASA Field Centers, it would be appropriate for NASA
26 to supplement the documents provided with the May 12, 2009 initial determination with
27 responsive records from the NASA Field Centers that supported the review of Case Number
28 I-222 even though Plaintiff sent his FOIA request only to NASA Headquarters.
29

30 30. I also learned at that time that the RIS documents had not been included in the file provided
31 to the FOIA office in response to Plaintiff's FOIA request No. 08-27. Therefore, I initiated a
32 review of the RIS documents to determine whether any of those documents were releasable.
33

34 31. I also initiated a second review of document numbers 04639 through 04866 —the 227
35 pages of documents that were withheld in connection with the May 12, 2009 initial determination
36 — to determine whether any of those documents contained segregable material that could be
37 released. Of these, 205 pages were released in whole or in part as a result of the second review.
38 Only 22 pages withheld under the original request were withheld after the second review. These

1 22 pages are identified at lines 364 through 379 of the index. *See* Margolin FOIA Withheld
2 Index Final (annexed hereto as Exhibit I). Each of these 22 pages was withheld under Exemption
3 5 of the FOIA as each of these records contains privileged communications among the NASA
4 attorneys investigating Case I-222.

5
6 **Margolin**

7 Graham has finally gotten to events that she has personal knowledge of. Then she spoils it by
8 making legal arguments (“... as each of these records contains privileged communications among
9 the NASA attorneys investigating Case I-222.”). Again, *See Doolittle, Peters, Alamo, supra*.

10 **Graham**

11 32. Many of the newly identified documents were released. If releasable information and
12 information exempt from disclosure under the FOIA appeared in the same document and could
13 be segregated, the document was redacted and released. These redacted documents were marked
14 with the asserted FOIA exemption when redacted.

15 **33. Redacted information included personal information such as telephone numbers, street**
16 **addresses, personal e-mail addresses and bank account information which was withheld**
17 **under FOIA Exemption 6. Redacted information included segregable portions of pre-**
18 **decisional communications exchanged among the NASA attorneys and between NASA**
19 **attorneys and technical personnel regarding the review of Case Number I-222. These**
20 **redactions were withheld under FOIA Exemption 5 under the deliberative process**
21 **privilege and as attorney-client privileged communications and attorney work product.**
22

23 **Margolin**

24 Graham’s hypocrisy in standing on Exemption 6 has been discussed in Margolin’s Reply
25 to NASA’s Opposition to Margolin’s MSJ on page 16, line 8 - page 18, line 13. NASA openly
26 posts the names, email addresses, and telephone numbers of many of their employees on their
27 Web sites. They provided sensitive and unredacted financial information (but only from Optima
28 Technology Group) to Margolin in their tardy response to his FOIA request.

1 And once again, Graham makes legal arguments (“Redacted information included
2 segregable portions of pre-decisional communications exchanged among the NASA attorneys
3 and between NASA attorneys and technical personnel regarding the review of Case Number I-
4 222.”)

5 **Graham**

6 34. Other redacted information included **Optima Technology Corporation's** offers of
7 settlement, with specific information regarding license fees and other financial details relating to
8 the patents asserted in Case Number I-222. This information was withheld as confidential
9 commercial or financial information received from a person under FOIA Exemption 4.
10

11 **Margolin**

12 Graham continues to assert that Optima Technology Corporation is the rightful owner of the
13 Patents. See Margolin Reply to NASA’s Opposition to Margolin’s MSJ, page 18, line 15 - page
14 21, line 12.

15 **Graham**

16 35. Certain agency records received from the NASA Field Centers were withheld in their
17 entireties under FOIA Exemption 3. Two copies of RIS' contract proposal to NASA under the
18 NASA Small Business Innovation Research program were revealed by the search. These
19 documents were withheld under Exemption 3 as prohibited from disclosure under another federal
20 statute. Section 2305(g) of Title 10 (applicable to NASA under Section 2303 of Title 10) prohibits
21 disclosure of contractor proposals under the FOIA unless the proposal was incorporated by
22 reference into the resulting contract. A review of the contract documents between NASA and RIS
23 showed that the proposal was not incorporated into the RIS contract and was therefore specifically
24 exempted from disclosure by statute. These documents are identified at lines 220 and 381 of the
25 Margolin FOIA Withheld Index Final (annexed hereto as Exhibit I).

26 36. Certain agency records received from the NASA Field Centers were withheld in their
27 entireties under FOIA Exemption 5. These documents include e-mails among NASA attorneys
28 and technical personnel discussing Case Number I-222 and, as such, constitute pre-decisional
29 communications within the deliberative process privilege of Exemption 5. Further, many of these
30 documents were either prepared by agency attorneys or developed by NASA employees at the

1 direction of agency attorneys in order to evaluate the claims of patent infringement asserted against
2 the agency in Case Number I-222. As such, these records were created in anticipation of litigation
3 and constitute attorney work-product or privileged attorney-client communications exempt from
4 disclosure under Exemption 5. NASA also created claim charts to assist attorneys in evaluating
5 Plaintiff's patent infringement claim. These claim charts thus constitute attorney work product.
6

7 **Margolin**

8 Graham makes more Legal conclusions (“As such, these records were created in anticipation of
9 litigation and constitute attorney work-product or privileged attorney-client communications
10 exempt from disclosure under Exemption 5. NASA also created claim charts to assist attorneys in
11 evaluating Plaintiff's patent infringement claim. These claim charts thus constitute attorney work
12 product.”)

13 **Graham**

14 37. Certain agency records were withheld in their entireties under FOIA Exemption 4 as
15 confidential commercial or financial information received from **Optima Technology**
16 **Corporation**. These records include offers of settlement, with specific financial terms, received
17 from **Optima Technology Corporation — the owner of the patents asserted in Case I-222**.
18 Examples of these documents are identified at lines 7 through 12 of the Margolin FOIA Withheld
19 Index Final (annexed hereto as Exhibit I).
20

21 **Margolin**

22 Graham continues to defame **Optima Technology Group's** ownership of the Patents.
23 The confidential commercial or financial information she says she is protecting was produced by
24 NASA in their FOIA response of May 2009. See Margolin Reply to NASA's Opposition
25 Appendix at A46. In it, Optima Technology Group refers to their offer to settle NASA's
26 infringement for \$75,000.

1 **Graham**

2 38. Additional records withheld under Exemption 4 included specific attorney work-product and
3 privileged communications between RIS and its attorneys, Mr. Allison and Mr. Krukar. These
4 documents were disclosed to NASA by RIS to support NASA's review of the agency's potential
5 liability for infringement by RIS as a NASA contractor under Case Number I-222. These records
6 also consist of draft documents that embody information communicated in confidence by RIS to
7 its attorneys.

8 39. NASA provided RIS with notice under 14 C.F.R. § 1206.610 (a) and (f) advising RIS that a
9 FOIA request for RIS information had been received by the agency and that litigation had been
10 commenced seeking disclosure of the RIS documents. In response to this notice, RIS provided a
11 basis for its objection to NASA's proposed disclosure of these records. NASA made a
12 determination to withhold the RIS records as privileged attorney-client communications and
13 attorney work product under Exemption 4. *See* Letter from Courtney Graham to Benjamin
14 Allison, dated January 11, 2010 (annexed hereto as Exhibit J), **NASA's notice to RIS and RIS**
15 **objections are not attached to this Declaration as they include information sufficient to**
16 **identify the withheld documents.** Examples of these documents are identified at lines 221
17 through 247 of the Margolin FOIA Withheld Index Final (annexed hereto as Exhibit I).
18

19 **Margolin**

20 If "NASA's notice to RIS and RIS objections are not attached to this Declaration as they include
21 information sufficient to identify the withheld documents" they must be Above Top Secret.

22 **Graham**

23 40. As a result of my determination to release documents from the NASA Field Centers and
24 the additional review of the earlier withheld documents, approximately 4000 pages of additional
25 records were fully or partially released to Plaintiff by the NASA Headquarters FOIA office on
26 November 5, 2009. *See* NASA Supplemental FOIA Response, dated November 5, 2009 (annexed
27 hereto as Exhibit K). If NASA were to disclose any of the withheld information referenced in this
28 declaration or the index, **Optima Technology Corporation** and Rapid Imaging would likely
29 refrain from turning over information to the agency in the future for fear that the agency would
30 again release the information. Under the circumstances, the government's ability to obtain
31 necessary information would be impaired.
32

33 **Margolin**

34 **Optima Technology Corporation** again.

1 **Graham**

2 **41. In responding to Plaintiff's June 28, 2008 FOIA request, NASA did not act in bad faith**
3 **towards the Plaintiff, The NASA Headquarters FOIA Office maintained a significant**
4 **backlog of requests in 2008 and 2009. The NASA Headquarters FOIA Office reported a**
5 **backlog of 210 FOIA requests at the end of Fiscal Year 2008 and a backlog of 195 FOIA**
6 **requests at the end of Fiscal Year 2009. See NASA FOIA Report for Fiscal Year 2009 at**
7 **page 17 (annexed hereto as Exhibit L). NASA also took steps to ensure that responsive**
8 **documents at NASA Field Centers were provided to Plaintiff once they were identified even**
9 **though Plaintiff sent his FOIA request only to NASA Headquarters.**

10

11 **Margolin**

12 NASA's bad faith has been addressed in Margolin's Reply to NASA's Opposition to Margolin's
13 MSJ (Margolin Reply, page 15, line 1 onwards). NASA's bad faith has also been extensively
14 documented in Margolin's Second Amended Complaint.

15

1 **VI. Summary**

2
3 **1.** NASA has not established that it has completely fulfilled its duties under FOIA by showing
4 that each document that falls within the class requested either has been produced, is
5 unidentifiable, or is wholly exempt from the Act's inspection requirements.

6
7 **2.** NASA has not produced a Vaughn Index and has failed to particularly describe the withheld
8 documents.

9
10 **3.** The Graham Declaration (affidavit) is insufficient because Graham declares facts of which
11 she has no personal knowledge and uses her Declaration to make legal arguments and legal
12 conclusions and to interpret the law.

13
14 **4.** NASA has not submitted the documents for *in camera* inspection.

15
16 **5.** NASA has failed to properly address the genuine and material issue of the Fein email of July
17 12, 2004. NASA's response is only a conclusory "Plaintiff is mistaken."

18
19 **6.** NASA has failed to properly address Margolin's argument that Klamath should apply.
20 NASA's response is only the conclusory statement that Margolin's reliance on Klamath "is
21 misplaced" and does not argue why Margolin's reliance on Klamath "is misplaced."

22
23 **7.** NASA has shown Margolin bad faith for years, continues to show bad faith, and has likely
24 engaged in misconduct.

25

VII. Conclusion

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For the foregoing reasons, Margolin respectfully requests:

1. That the Court not give the Graham Declaration the Substantial Weight normally given to agency officials;

2. That the Court order NASA to provide an affidavit stating whether NASA, and/or any of its current or former employees, have a financial interest in Rapid Imaging Software;

3. That the Court order NASA to provide an affidavit stating the precise nature of the litigation they have been anticipating; and

4. That the Court deny NASA's Cross-Motion for Summary Judgment.

Respectfully submitted,

/Jed Margolin/

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Dated: October 4, 2010

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the foregoing OPPOSITION TO NASA’s CROSS-MOTION FOR SUMMARY JUDGMENT has been made by electronic notification through the Court's electronic filing system on October 4, 2010.

/Jed Margolin/

Jed Margolin

VIII. TABLE OF AUTHORITIES

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