Jed Margolin, Pro Se
1981 Empire Rd.
VC Highlands, NV 89521-7430
Telephone: 775-847-7845
Email: jm@jmargolin.com

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JED MARGOLIN, Plaintiff, vs. NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, Defendant.	Case No. 3:09-cv-00421-LRH-(VPC) REPLY TO NASA's OPPOSITION TO MARGOLIN's MOTION FOR SUMMARY JUDGMENT

Comes now Plaintiff, Jed Margolin ("Margolin"), appearing pro se, and files his Reply to NASA's Opposition to Margolin's Motion for Summary Judgment.

This reply is based upon the pleadings, papers, exhibits, and memoranda of points and authorities filed in this action and is made pursuant to Federal Rules of Civil Procedure Rule 56(e)(2) and Rule 56(g).

REPLY TO NASA's OPPOSITION TO MARGOLIN's MOTION FOR SUMMARY JUDGMENT

Introduction

NASA has combined their OPPOSITION to Margolin's MOTION FOR SUMMARY JUDGMENT with their CROSS-MOTION FOR SUMMARY JUDGMENT.[1]/

However, NASA has failed to distinguish which parts of their filing pertain to their OPPOSITION and which parts pertain to their CROSS-MOTION FOR SUMMARY JUDGMENT. That may be because NASA has relegated their Opposition to three footnotes and several paragraphs scattered through the filing. Indeed, NASA ends with the Conclusion asking only, "For the reasons argued above, this Court should enter an order granting summary judgment in favor of NASA."

A. The footnotes from NASA Opposition & CMSJ page 16, lines 24 -28:

> [3] Plaintiff argues that documents created after 2004 are post-decisional. Plaintiff is mistaken. The patent infringement claim was denied on March 19, 2009. (Graham Dec. ¶ 7). Thus, that is the determinative date for post-decisional documents.
>
> [4] Plaintiff's reliance on *Dep't of Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001) is misplaced. That case does not address the grounds for non-disclosure discussed above.

[1] 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.

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.

Footnote 3 makes the conclusory statement, "Plaintiff is mistaken" but does not say why Plaintiff is mistaken. Footnote 4 says Plaintiff's reliance on Klamath "is misplaced" but does not explain why Plaintiff's reliance on Klamath is misplaced. Instead, in the passage referred to as "the grounds for non-disclosure discussed above" (NASA Opposition & CMSJ page 16, lines 7 - 13) NASA introduces a defense of "Common Interest Privilege." Margolin will discuss NASA's "Common Interest Privilege" in his OPPOSITION TO NASA's MOTION FOR SUMMARY JUDGMENT which will be filed separately so there will be no doubt what belongs where.

B. An additional footnote, at the very end, states (NASA Opposition & CMSJ page 18, lines 27-28):

> [5] Plaintiff also appears to argue for an award of attorney fees and costs. Any such request is premature. Accordingly, Defendant will respond to such a request at the conclusion of this case if and when Plaintiff files a motion seeking fees and costs.

Margolin was following NASA's lead. In NASA's ANSWER TO SECOND AMENDED COMPLAINT (Document 30) page 14, line 4, NASA asked the Court "3. For costs of suit;" And Margolin did not ask for attorney fees. He asked only for costs. NASA has been careless with the details.

C. A short paragraph that pertains to NASA's Opposition is NASA Opposition & CMSJ page 9, lines 6 -13:

> **H. NASA's good faith**
>
> In responding to Plaintiff's FOIA request, NASA did not act in bad faith. (Graham Dec. ¶ 41). The NASA Headquarters FOIA Office maintained a significant backlog of requests in 2008 and 2009. (Graham Dec. ¶ 41). The NASA Headquarters FOIA Office reported a backlog of 210 FOIA requests at the end of 2008 and a backlog of 195 FOIA requests at the end of 2009. (Graham Dec. ¶ 41); *see also* NASA FOIA Report for Fiscal Year 2009 at page 17 (Graham Dec. ¶ 41; Ex. L).

This is a lame excuse not permitted by 5 U.S.C. § 552 (a)(6)(C)(ii). NASA did not act in good faith in responding to Margolin's FOIA request and NASA is not acting in good faith now.

D NASA wants to make this case about "Exemption 6 (personnel, medical or "other" files the disclosure of which would constitute a clearly unwarranted invasion of privacy)" (NASA Opposition & CMSJ page 1, lines 25-26; page 6, lines 24-25; and page 16, line 14 - page 17 line 17). In particular, NASA wants the case to be about "private information such as names, addresses and social security numbers contained within the documents. (NASA Opposition & CMSJ page 17, lines 14-15; and Graham Dec. ¶ 33). Until now, Margolin was unaware that any of the documents contained social security numbers and he has never asked NASA for any. NASA's statement that names and addresses are private information is disingenuous. NASA openly posts the names and addresses of many NASA employees on their Web sites.

E. NASA continues to assert that Optima Technology Corporation is the rightful owner of the Patents despite the order of the U.S. District Court for the District of Arizona which says it is not. This is part of NASA's illegal and extralegal effort to destroy the value of the patents for the benefit of its partners, such as Rapid Imaging Software.

Standard of Review

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

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

{Emphasis added}

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

NASA has added their own twist. From NASA Opposition & CMSJ page 9, line 25 - page 10, line 1:

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

{Emphasis added}

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

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

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

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

NASA has attempted to subvert the Freedom of Information Act by applying a narrow ruling involving Exemption 7(C)[2]/, which NASA has not asserted, to all the Exemptions.

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

Argument

A. NASA has dismissed the two most important issues in this case in two footnotes.

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

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

[2] **(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 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;

NASA dismisses it by saying (NASA Opposition & CMSJ page 16, lines 24 -26):

> [3] Plaintiff argues that documents created after 2004 are post-decisional. Plaintiff is mistaken. The patent infringement claim was denied on March 19, 2009. (Graham Dec. ¶ 7). Thus, that is the determinative date for post-decisional documents.

NASA produces no argument, just "Plaintiff is mistaken."

What did NASA do after the Fein email? They got ready for litigation.

NASA and RIS formed an alleged Common Interest association because they were both afraid of being sued for patent infringement. (This will be addressed more fully in **Margolin's Opposition to NASA's Motion For Summary Judgment**.)

They proposed to file a Request for Ex-Parte Re-Examination with the Patent Office. Until NASA filed **Exhibit I - Margolin FOIA Withheld Index (Document 46-3)** Margolin thought it was all talk. It turns out they prepared a Request for Ex-Parte Re-Examination. From NASA **Exhibit I - Margolin FOIA Withheld Index**, Page 34, items 232, 233, 236 (The Bates Numbers and other columns have been omitted here for legibility):

	C	D	E	G	I	J
	Date	**Sender**	**Recipient**	**Subject**	**FOIA Exemption Claimed**	**Notes**
232	10/8/08	Abernathy	McNutt, Fein	Patent Reexamination - E	b(4)	Email from RIS forwarding communication containing privileged attorney work product created by RIS counsel.
233	NA	Rapid Imaging Software, Inc.	NASA Office of General Counsel		b(4)	Portions of unfiled draft Request for Ex Parte Rexamination of issued patent reflecting privileged opinion of RIS counsel and confidential attorney work product.
236	10/8/08	Abernathy	McNutt, Fein	[REDACTED]	b(4)	Email from RIS forwarding communication containing privileged attorney work product created by RIS counsel.

237	NA	Rapid Imaging Software, Inc.	NASA Office of General Counsel		b(4)	Portions of unfiled draft Request for Ex Parte Rexamination of issued patent reflecting privileged opinion of RIS counsel and confidential attorney work product.

Margolin has not found anything in any of the documents provided to him by NASA that show they ever considered granting his claim for compensation. Indeed, they mounted a stealth campaign against the Patents while outwardly ignoring the claim, and later, Margolin's FOIA request. NASA denied Margolin's claim in July 2004 and all of the documents after July 2004 are post-decisional.

There is the question: So what, if the documents were produced in contemplation of litigation? Margolin replies: NASA cannot exempt those documents which would be discoverable during litigation. One such document is what Margolin calls the Borda Patent Report. The Borda Letter of March 2009 makes the assertion that (From Margolin MSJ page 37, line 1 onwards):

> "... numerous pieces of evidence were uncovered which would constitute anticipatory prior knowledge and prior art that was never considered by the U.S. Patent and Trademark Office during the prosecution of the application which matured into Patent No. 5,904,724." and threatens, "... NASA reserves the right to introduce such evidence of invalidity in an appropriate venue, should the same become necessary."

Margolin argued:

> NASA's threatened use of the Borda Patent Report would not even require Discovery. The only appropriate venues for NASA to challenge the validity of a U.S. Patent are the U.S. Court of Federal Claims, the U.S. Court of Appeals for the Federal Circuit, and the USPTO. The Courts and the USPTO will not accept NASA's word that a patent is invalid due to prior art. NASA would be required to produce the evidence.
>
> However, the Borda Letter did not provide a detailed claims analysis of '724 against the purported prior art. It did not even list the purported prior art. [page 7, lines 4-5].

> NASA claimed an exemption for the Borda Patent Report under Deliberative Process, Attorney Work Product, or Attorney-Client exemptions of 5 U.S.C. § 552(b)(5).

NASA denied that anything that could constitute "a Borda Patent Report" was ever prepared.

From NASA's Answer to Second Amended Complaint page 5, lines 24 - 26:

> Defendant denies the allegations contained at page 7, lines 4-5 of this paragraph and denies that any document that could constitute a "Borda Patent Report" was ever prepared, much less withheld.

Now they are saying that the Borda Patent report is exempt from production because it is confidential attorney work product. The following is from **Exhibit I - Margolin FOIA Withheld Index**, Page 36, item 247 (The Bates Numbers and other columns have been omitted here for legibility):

	C	D	E	I	J
	Date	**Sender**	**Recipient**	**FOIA Exemption Claimed**	**Notes**
247	NA	Rapid Imaging Software, Inc.	NASA Office of General Counsel	b(4)	Unfiled draft Request for Ex Parte Rexamination of issued patent reflecting privileged opinion of RIS counsel and confidential attorney work product.

It is unlikely that NASA's "draft Request for Ex Parte Re[-e]xamination" would have made it to "draft" form without containing a reason for the Patent Office to re-examine the patent. It is the central part of a Request For Re-Examination. (See Margolin Second Amended Complaint, page 6, line 8 - page 8, line 7). It is the "Borda Patent Report." And a Request For Re-Examination is not "litigation." Litigation is a judicial proceeding or contest. An Ex-Parte Re-Examination by the Patent Office is not a judicial proceeding or contest. The Patent Office is under the Commerce Department, which is in the Executive branch of the Federal Government. It is not part of the Judicial Branch. And, in an Ex-Parte Re-Examination, once the Patent Office agrees

to re-examine a patent, the Requestor has no further part in the Re-Examination. Therefore, documents prepared for the purpose of filing a Request For Ex-Parte Re-Examination are not entitled to exemption under the grounds they were produced in anticipation of litigation because an Ex-Parte Re-Examination by the Patent Office is not a judicial process and, therefore, not litigation.

Margolin has been making the "Borda Patent Report" an issue since his FOIA Appeal to NASA. See Second Amended Complaint - Exhibit 11 - Appendix Volume 1 at A54 (Document 16-2). NASA has never responded to the issue.

Issue 2 - *Klamath*

NASA's Footnote 4 states that Margolin's reliance on *Dep't of Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001) "is misplaced," and says, "That case does not address the grounds for non-disclosure discussed above."

It is not exactly clear what NASA is referring to as "the grounds for non-disclosure discussed above."

The entire section that refers to Footnote 4 is in NASA Opposition and CMSJ pages 15-16 (Section **E. Exemption 5 applies — The information is protected by the deliberative process, work-product and attorney-client privileges.)**

Margolin will guess that NASA is referring to this part:

> Although Exemption 5 generally applies only to documents created by the federal government, courts have recognized that it also applies to documents created by private third parties when shared with the government in the furtherance of common legal interests. *See, e.g., Hanson v. Agency for Int'l Dev.,* 372 F.3d 286 (4th Cir. 2004); *Hunton & Williams, LLP v. Dep't of Justice,* 2008 WL 906783 (E.D. Va. 2008).

NASA has not responded to Margolin's argument that *Klamath* applies to the present case. (Margolin MSJ pages 14, 15)

From NASA Opposition & CMSJ page 3, line 20 through page 4, line 2:

> CIPL and Johnson Space Center personnel also communicated with persons associated with Rapid Imaging Software, Inc. ("Rapid Imaging") regarding Plaintiff's patent infringement claim. (Graham Dec. ¶ 16). Rapid Imaging is a NASA contractor that creates flight visualization tools such as software that permits users to fly through virtual terrain — a technical area related to case number I-222. (Graham Dec. ¶ 16). Rapid Imaging had separately received allegations of infringement relating to the same patents asserted against NASA in case number I-222. (Graham Dec. ¶ 16). Under the terms of a contract, NASA is responsible for any patent infringement activities conducted by Rapid Imaging in the performance of its contracts. (Graham Dec. ¶ 16). Under the circumstances, NASA and Rapid Imaging had a common interest in defending against Plaintiff's patent infringement claims. (Graham Dec. ¶ 16).

{Emphasis added}

1. NASA admits that RIS was a NASA contractor.

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

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

RIS's interest in defending itself against charges of patent infringement could only have been for the commercial use of its products. Thus, the financial interest RIS had in assisting NASA in defending itself from charges of patent infringement makes Klamath exactly on-point, where:

> In a unanimous decision, the Court ruled that the threshold of Exemption 5 did not encompass communications between the Department of the Interior and several Indian tribes which, in making their views known to the Department on certain matters of administrative decisionmaking, not only had "their own, albeit entirely legitimate, interests in mind,"

(Klamath, 532 U.S. at 12) but also were "seeking a Government benefit at the expense of other applicants." (Id. at 12 n.4)

1. Margolin wishes to note that, although RIS had a legitimate interest in defending itself from charges of patent infringement, the actions it (and NASA) took in their combined stealth attempt to destroy the patents are far from legitimate and constitute criminal conspiracy. The attempt by Courtney Graham ("Graham") to characterize NASA and RIS' criminal activities by calling it "a common interest in defending against Plaintiff's patent infringement claims" (Graham Dec. ¶16) is distasteful and disgraceful.

2. The Government benefit that RIS was seeking came to pass. After July 2004 RIS received a number of Government contracts. The following table was constructed from data contained in Exhibit 3 Appendix at A40.

Amount	Parent Company Name	Major Agency	Product or Service	Date
$88,141	RAPID IMAGING SOFTWARE IN	Dept. of Defense	Research and development	2004-09-10
$75,000	RAPID IMAGING SOFTWARE IN	NASA	Research and development	2004-12-16
$117,000	RAPID IMAGING SOFTWARE IN	NASA	Research and development	2005-07-26
$248,000	RAPID IMAGING SOFTWARE IN	NASA	Research and development	2006-03-09
$207,500	RAPID IMAGING SOFTWARE IN	NASA	Research and development	2007-12-19
$100,000	RAPID IMAGING SOFTWARE IN	NASA	Research and development	2008-02-01
$18,000	RAPID IMAGING SOFTWARE IN	NASA	Research and development	2008-04-28

$12,000	RAPID IMAGING SOFTWARE IN	NASA	Research and development	2008-09-23
$1,761,886	RAPID IMAGING SOFTWARE IN	Dept. of Transportation	Miscellaneous	2009-03-20
$150,000	RAPID IMAGING SOFTWARE IN	NASA	Research and development	2009-01-28

According to The Federal Rules of Civil Procedure Rule 56(e)(2)

> (2) Opposing Party's Obligation to Respond. When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must — by affidavits or as otherwise provided in this rule — set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

Margolin's MSJ is properly made and supported.

In NASA's Opposition they have only made allegations and denials.

1. NASA failed to properly respond to Margolin's argument that they denied Margolin's claim in July 2004 and that all documents after that are post-decisional. The July 2004 email from Fein to Delgado says, "Your effort, together with valuable input from Mike Abernathy, will be the basis for NASA's denying the administrative claim." NASA's subsequent actions show that they never contemplated granting Margolin's claim. NASA responded in their Opposition by saying "Plaintiff is mistaken."

2. Instead of responding to Margolin's arguments in re Klamath, NASA says, "Plaintiff's reliance on Klamath is misplaced" and introduces, for the first time, "Common Interest Privilege."

B. The Third Footnote

An additional footnote, at the very end, states (NASA Opposition & CMSJ page 18, lines 27-28):

> [5] Plaintiff also appears to argue for an award of attorney fees and costs. Any such request is premature. Accordingly, Defendant will respond to such a request at the conclusion of this case if and when Plaintiff files a motion seeking fees and costs.

Margolin was following NASA's lead. In NASA's ANSWER TO SECOND AMENDED COMPLAINT (Document 30) page 14, line 4, NASA asked the Court "3. For costs of suit;"

1. Margolin did not ask for attorney's fees. From Margolin's Second Amended Complaint (Document 16-1) page 97, lines 9-10, Margolin asked only: "D. Award plaintiff his costs incurred during the administrative proceedings and in this action;". Margolin is acting *pro se* in the present action and is not an attorney, and is therefore not entitled to attorney's fees. Margolin did not ask for attorneys' fees. This may be an inconsequential error by NASA but it is probative because it shows NASA's carelessness with details.

2. When Margolin saw in NASA's ANSWER TO SECOND AMENDED COMPLAINT that NASA was asking for their "costs of suit" he freaked. This issue was a major distraction until Margolin figured it out. It turns out that defendants in a FOIA lawsuit are not entitled to costs because there is no statutory authority in 5 U.S.C. § 552 *et seq*. for assessing costs against a losing Plaintiff. There is only statutory authority for assessing costs against a losing Defendant. (Margolin's MSJ, page 80, line 10 - page 81, line 2.) NASA's attorneys and Counsel (all experienced attorneys) would have known this. Their intent was to distract Margolin. It was deliberate, it worked, and it merits sanctions.

C. NASA says it has acted in good faith

A short paragraph that pertains to NASA's Opposition is NASA Opposition & CMSJ page 9, lines 6 -13:

> **H. NASA's good faith**
>
> In responding to Plaintiff's FOIA request, NASA did not act in bad faith. (Graham Dec. ¶ 41). The NASA Headquarters FOIA Office maintained a significant backlog of requests in 2008 and 2009. (Graham Dec. ¶ 41). The NASA Headquarters FOIA Office reported a backlog of 210 FOIA requests at the end of 2008 and a backlog of 195 FOIA requests at the end of 2009. (Graham Dec. ¶ 41); *see also* NASA FOIA Report for Fiscal Year 2009 at page 17 (Graham Dec. ¶ 41; Ex. L).

NASA's excuse ("The NASA Headquarters FOIA Office maintained a significant backlog of requests in 2008 and 2009.") is not permitted by 5 U.S.C. § 552 (a)(6)(C) *et seeq*:

> (C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.
>
> (ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

{Emphasis added}

At the end of 2008, having seen the FOIA request backlog, NASA had a duty to devote more resources to the backlog. Apparently they didn't, which explains the 2009 backlog.

After Margolin filed his FOIA request in June 2008 NASA asked Margolin for a 90-day extension, which Margolin gave. But, instead of working on Margolin's FOIA Request, NASA engaged in questionable activities as documented in Margolin's Second Amended Complaint page 67 line 21 - page 69, line 23. NASA spent its time getting Court documents in the then-ongoing litigation between Universal Avionics Systems Corporation ("UASC") and Optima Technology Group (OTG) and Jed Margolin[3]/ instead of responding to Margolin's FOIA request.

D. NASA wants to make this case about "Exemption 6 (personnel, medical or "other" files the disclosure of which would constitute a clearly unwarranted invasion of privacy)" (NASA Opposition & CMSJ page 1, lines 25-26; page 6, lines 24-25; and page 16, line 14 - page 17 line 17). In particular, NASA wants the case to be about "private information such as names, addresses and social security numbers contained within the documents. (NASA Opposition & CMSJ page 17, lines 14-15; and Graham Dec. ¶ 33). Until now, Margolin was unaware that any of the documents contained social security numbers and he has never asked NASA for any. NASA's May 2009 response to Margolin's FOIA request contained only a (b)(5) justification for withholding documents. (Second Amended Complaint Exhibit 9 Appendix Volume 1 at A45). Even NASA's denial of his FOIA Appeal -produced only after Margolin filed the present case- refers only to a (b)(5) exemption. (Second Amended Complaint Exhibit 16 Appendix Volume 1 at A84) It was only when NASA sent him approximately 4,000 pages of documents in

[3] U.S. District Court for the District of Arizona: Universal Avionics Systems Corporation vs. Optima Technology Group, et. al; No. CV 07-588-TUC-RCC. See Second Amended Complaint Exhibit 25 at Appendix Volume 2 A99.

November 2009 that NASA's cover letter added (b)(3), (b)(4), and (b)(6). (Second Amended Complaint Exhibit 18 Appendix Volume 2 at A6).

NASA's statement that names and addresses are private information is disingenuous. NASA openly posts the names and addresses of many NASA employees on their Web sites. For example:

1. The names, phone numbers, and email addresses for the **Headquarters and Center Chief Counsel Contacts** (From http://www.nasa.gov/offices/ogc/about/cccdirectory.html) (See Exhibit 1 Appendix at A4.)

2. The **NASA Commercial Technology Directory** was available online as recently as December 2009. It may still be available someplace. Even if it isn't, that rocket has launched. (See Exhibit 2 Appendix at A6.)

Courtney Graham's Declaration adds commercial information and bank account information to the mix (Graham Dec. ¶33), specifically "Optima Technology Corporation" (Graham Dec. ¶34)

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

However, In NASA's initial disclosure of documents in May 2009 they produced an email referring to Optima Technology Group's (OTG's) offer of settlement. See Exhibit 4 Appendix at A46.

Also, one of the documents NASA produced in May 2009 in response to Margolin's FOIA request was a patent license agreement between Optima Technology Group and Honeywell dated October 12, 2007. Bank account information was not redacted. When Margolin filed his FOIA

Appeal with NASA he included the license agreement in his FOIA Appeal Appendix A but redacted the information himself with the notation:

> **Under 5 U.S.C. 552(b)(4) NASA was required to redact sensitive financial information. They didn't, so I did. - JM**

Since NASA provided this document unredacted to Margolin as a result of his FOIA request he assumed NASA would also provide it to other FOIA requestors. Margolin informed Optima Technology Group of this breach so they could take the necessary steps to change their bank account number. If challenged by NASA Margolin will produce this document under seal. Better yet, NASA should be compelled to provide it to the Court under seal. Margolin has not asked for bank account information and is not interested in it. Graham's statement in this regard is hypocritical and probative because it shows that her possession of the facts is not as firmly rooted as she asserts.

E. NASA continues to assert that Optima Technology Corporation is the rightful owner of the Patents. From NASA Opposition & CMSJ {Emphasis added}:

Page 2, lines 6-7	Plaintiff owned the patents at the time of the claim, but the patents were subsequently acquired by Optima Technology Corporation. (Graham Dec. ¶ 7).
Page 7, lines 14 - 16	Redacted information under Exemption 4 included Optima Technology Corporation's offers of settlement, specific information regarding license fees and other financial details relating to the patents asserted in case number I-222. (Graham Dec. ¶ 34)
Page 8, lines 9 - 14	NASA also withheld certain agency records under Exemption 4 as confidential commercial or financial information received from Optima Technology Corporation. (Graham Dec. ¶ 37). Those records include offers of settlement, with specific financial terms, received from Optima — the owner of the patents asserted in case number I-222.
Page 11, lines 17 - 19	**D. Exemption 4 applies — The records contain commercial or financial information from Optima Technology Corporation and Rapid Imaging and the information is confidential or privileged.**

Page 12, lines 9 - 12	The withheld information qualifies as "commercial" under those standards. (Graham Dec. ¶¶ 16-17, 36-38). The documents relate to commerce and to the business or trade of Optima Technology Corporation and Rapid Imaging. (Graham Dec. ¶¶ 16-77, 36-38).
Page 12, lines 21 - 22	Here, Optima Technology Corporation and Rapid Imaging qualify as "persons" under those authorities.
Page 13, lines 4 - 6	Here, if NASA were to disclose the withheld information, Optima Technology Corporation and Rapid Imaging would likely refrain from turning over any information to the agency in the future for fear that the agency would again release the information. (Graham Dec. ¶ 40).

The Graham references also say "Optima Technology Corporation." See Graham ¶7, ¶34, ¶37, and ¶40.

Margolin set the record straight in Margolin MSJ page 28, line 3 - page 29 line 20:

> NASA denies Margolin assigned the patents to Optima Technology Group and casts doubt on the ownership of the patents ('073 and '724).
>
> The patents were litigated in U.S. District Court For the District of Arizona in case No. CV-00588-RC. Before the case began an individual named Reza Zandian fraudulently filed documents with the Patent Office assigning the patents to his company (Optima Technology Corporation) whose name was similar to the proper owner (Optima Technology Group). In an order dated August 18, 2008 the Arizona Court ruled:
>
> 1. Optima Technology Corporation has no interest in U.S. Patents Nos. 5,566,073 and 5,904,724 ("the Patents") or the Durable Power of Attorney from Jed Margolin dated July 20, 2004 ("the Power of Attorney");
>
> 2. The Assignment Optima Technology Corporation filed with the USPTO is forged, invalid, void, of no force and effect, and is hereby struck from the records of the USPTO;
>
> 3. The USPTO is to correct its records with respect to any claim by Optima Technology Corporation to the Patents and/or the Power of Attorney; and
>
> 4. OTC is hereby enjoined from asserting further rights or interests in the Patents and/or Power of Attorney; and
>
> 5. There is no just reason to delay entry of final judgment as to Optima Technology Corporation under Federal Rule of Civil Procedure 54(b).

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

Despite this NASA continues to assert, both in their Opposition & CMSJ and in Graham's Declaration that the patents are owned by Optima Technology Corporation, not Optima Technology Group.

This is not a simple mistake. NASA (and Graham) know better. The **Margolin FOIA Withheld Index** (Document 44) does refer properly to Optima Technology Group. In the following examples the Bates Numbers and other columns have been omitted here for legibility:

	C	D	E	G	I	J
1	**Date**	**Sender**	**Recipient**	**Subject**	**FOIA Exemption Claimed**	**Notes**
113	8/5/2008	Kenneth H. Goetzke	Robert F. Rotella	Pending or hreatened Litigation Report	(b)(5)	NASA legal office internal email re Optima Technology Group (OTG) claim
114	8/5/2008	Robert F. Rotella	Jan McNutt	FW:Pending or Threatened Litigation Report.	(b)(5)	NASA legal office internal email re whether Optima Technology Group claim is reportable
117	8/7/2008	Kenneth H. Goetzke.	Jan.McNutt, Robert F. Rotella, Edward K. Fein	Margolin case reportable as threatened legal Action	(b)(5)	NASA legal office internal-email re whether Optima Technology Group (OTG) claim is reportable
197	8/5/2008	Robert F. Rotella	Jan McNutt	FW: Pending or Threatened Litigation Report	(b)(5)	NASA legal office internal email re whether Optima Technology Group (OTG) claim is reportable

{Emphasis added}

There are two possibilities here.

1. That NASA has been in communications with Optima Technology Corporation/Reza Zandian after the U.S. District Court for the District of Arizona ruled that Optima Technology Corporation/Reza Zandian does not own the Patents, and NASA has completely withheld documents containing the communications.

2. This is part of NASA's illegal and extralegal effort to destroy the value of the patents for the benefit of its partners, such as Rapid Imaging Software.

Either way, NASA's conduct is reprehensible and Margolin asks the Court to sanction NASA and Graham for their repugnant conduct under Federal Rules of Civil Procedure Rule 56(g).[4] Margolin also asks that the Court not give Graham's Declaration substantial weight as is customarily given to declarations and affidavits by Federal officials.

Conclusion

For the foregoing reasons, Margolin respectfully requests:

1. That the Court grant his motion for summary judgment; and

2. That the Court sanction NASA and Graham for their repugnant conduct in continuing to assert that the Patents are owned by Optima Technology Corporation (Reza Zandian).

[4] Federal Rules of Civil Procedure Rule 56(g):
(g) AFFIDAVIT SUBMITTED IN BAD FAITH. If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.

Respectfully submitted,

/Jed Margolin/

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

Dated: October 4, 2010

CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the foregoing REPLY TO NASA's OPPOSITION TO MARGOLIN's 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