



1 Jurisdiction and Venue

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

5  
6 3. Venue is proper in this district pursuant to Section 552(a)(4)(B), as this is the district in  
7 which plaintiff resides.

8  
9 Parties

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

12  
13 5. Defendant National Aeronautics and Space Administration (“NASA”) is an independent  
14 administrative agency within the Executive Branch of the United States within the meaning of 5  
15 U.S.C. § 551(1) and 5 U.S.C. § 552(f)(1). Defendant Charles F. Bolden is the Administrator of  
16 the National Aeronautics and Space Administration.

17  
18 Statement of Facts - Background

19 6. Margolin is the named inventor on U.S. Patent 5,566,073 (‘073) **Pilot aid using a**  
20 **synthetic environment** and U.S. Patent 5,904,724 (‘724) **Method and apparatus for remotely**  
21 **piloting an aircraft**. The ‘073 patent teaches the use of what is now called *synthetic vision* in  
22 manned aircraft. The ‘724 patent teaches the use of synthetic vision for controlling unmanned

1 aerial vehicles (UAVs). The front page of the '073 patent is Exhibit 2 at Appendix Volume 1  
2 A20. The front page of the '724 patent is Exhibit 1 at Appendix Volume 1 A15.

3  
4 7. Margolin contacted NASA in May 2003 after he became aware that they had used  
5 synthetic vision in the X-38 project. Because the use of synthetic vision for controlling a UAV  
6 can be used to the detriment of this country by unfriendly entities he wanted a friendly  
7 conversation because he thought NASA should buy the '724 patent in order to control the  
8 technology.

9  
10 8. NASA immediately ordered copies of the file wrappers for U.S. Patent 5,566,073 and  
11 U.S. Patent 5,904,724. See Exhibit 3 at Appendix Volume 1 A22. Only a small portion of the file  
12 wrappers has been included in the present Appendix.

13  
14 9. In June 2003 Margolin was turned over to Mr. Alan Kennedy ("Kennedy") in the Office  
15 of the General Counsel. This is what Margolin recorded in his Contact Log:

16 Summary: He basically said that what most independent inventors have is junk and that  
17 since I am an independent inventor what I have is probably junk. If NASA evaluates it as a  
18 license proffer it will give it a pro forma rejection and I will file a claim anyway, so the  
19 same people who rejected it as a proffer will reject it as a claim, but in the process will have  
20 had to do more work, so to save them some work they will ignore the proffer and handle it  
21 as a claim.  
22

23 10. As a result, in June 2003 Margolin filed a claim, completely answering all the questions  
24 on NASA's claim form. See Exhibit 1 at Appendix Volume 1 A5. Then Kennedy informed him

1 that NASA would conduct an investigation (expected to last 3-6 months) and that the purpose of  
2 the investigation would be to find prior art to invalidate the patent.

3

4 11. After six months Margolin did not hear from NASA so he called Kennedy, who said:

5 a. The investigation had not been done.

6 b. NASA had a Research Exemption for using the patent. Margolin advised him this was  
7 not true. *See Madey v. Duke* 307 F.3d 1351 (Fed. Cir. 2002).

8 c. "The X-38 never flew." Margolin informed him of the video on NASA's web site  
9 showing the X-38 flying.

10 d. The Statute of Limitations gives NASA 6 years to respond to Margolin's claim.

11 e. It would cost Margolin more to sue NASA in Federal Claims Court than he could hope to  
12 recover from NASA.

13 Margolin sent Kennedy a letter dated January 8, 2004, asking him to confirm some of the things  
14 he had said. See Exhibit 4 at Appendix Volume 1 A33. Margolin received no response to his  
15 letter.

16

17 12. After that, Kennedy refused to talk to Margolin or respond to his letter. Then, various things  
18 came up and Margolin was unable to pursue his claim against NASA.

19

20 13. Margolin later assigned the patents to Optima Technology Group and the claim against  
21 NASA went with them.

22

1 Statement of Facts - Current Case

2 14. Although Margolin no longer owned the claim against NASA he still wanted to know the  
3 results of NASA's investigation so, on June 28, 2008 he filed a FOIA request. See Exhibit 5 at  
4 Appendix Volume 1 A35. It was assigned FOIA HQ 08-270. For some reason it was turned over  
5 to Mr. Jan McNutt ("McNutt") in the Office of the General Counsel. McNutt's response, dated  
6 August 5, 2008, is Exhibit 6 at Appendix Volume 1 A37. In his response he said,

7 We regret the delay in processing your claim and assure you that we are now undertaking  
8 measures to provide a resolution of your claim as soon as possible. Unfortunately, Mr. Alan  
9 Kennedy retired from NASA earlier this year and the action on your claim was not conveyed  
10 to management in a timely manner. In addition the local attorney responsible for review of  
11 your claim also departed from NASA. We are now cognizant of the importance of  
12 proceeding with a review of the claim and will contact you when we have reached a  
13 decision.

14  
15 In a telephone conversation with McNutt he said that Margolin's claim "had fallen between the  
16 cracks." This led Margolin to believe that no investigation had been done, or that it had not been  
17 completed ("We are now cognizant of the importance of proceeding with a review of the claim  
18 and will contact you when we have reached a decision.").

19  
20 In McNutt's letter he asked Margolin to give NASA a 90-day extension to his FOIA request.

21  
22 15. On August 8, 2008 Margolin agreed to the extension. See Exhibit 7 at Appendix Volume  
23 1 A39. However, despite being told several times that the requested documents were being sent  
24 out, NASA did not send any documents to Margolin until May 2009.

25  
26 It is likely that the reason NASA finally responded to Margolin's FOIA Request is the fax he  
27 sent to Acting Administrator Christopher Scolese where he asked Mr. Scolese to confirm that he

1 had exhausted all the administrative remedies that NASA had to offer. See Exhibit 8 at Appendix  
2 Volume 1 A41. Margolin had previously sent the letter to Mr. Scolese by Certified Mail, but  
3 USPS did not deliver it and had no explanation how or where it was lost.

4  
5 16. In its very tardy response to Margolin's FOIA Request, NASA withheld documents,  
6 citing 5 U.S.C. §552(b)(5). See Exhibit 9 at Appendix Volume 1 A45.

7  
8 a. One of the documents that NASA withheld from him is a letter dated March 19, 2009 that  
9 was sent by Gary G. Borda ("Borda") NASA Agency Counsel for Intellectual Property to  
10 Optima Technology Group ("OTG"). (This document was given to Margolin by OTG.) In this  
11 letter Borda denies Claim I-222 regarding NASA's infringement of U.S. Patent 5,904,724 ('724)  
12 in the X-38 project. See Exhibit 10 at Appendix Volume 1 A48. Margolin's FOIA 08-270  
13 request to NASA was to produce documents relating to Claim I-222 and NASA withheld the  
14 most material document at that point.

15  
16 The Borda Letter denied the claim based on a detailed claims analysis of '724 as applied to the  
17 X-38 project.

18  
19 It also made the assertion:

20 "... numerous pieces of evidence were uncovered which would constitute anticipatory prior  
21 knowledge and prior art that was never considered by the U.S. Patent and Trademark Office  
22 during the prosecution of the application which matured into Patent No. 5,904,724."  
23

24 and threatens, "... NASA reserves the right to introduce such evidence of invalidity in an  
25 appropriate venue, should the same become necessary."

1 However, the Borda Letter did not provide a detailed claims analysis of '724 against the  
2 purported prior art. It did not even list the purported prior art.

3  
4 NASA later claimed an exemption for the Borda Patent Report under Deliberative Process,  
5 Attorney Work Product, or Attorney-Client exemptions of 5 U.S.C. § 552(b)(5).

6  
7 However, documents that are subject to Discovery in a court action are not exempt. A good  
8 explanation can be found in *Martin v. Office of Special Counsel Merit Systems Protection Board*,  
9 819 F.2d 1181, 260 U.S.App.D.C. 382. (U.S. App. D.C., 1987) From ¶11:

10 FOIA Exemption (b)(5) protects from disclosure those "inter-agency or intra-agency  
11 memorandums or letters which would not be available by law to a party other than an  
12 agency in litigation with the agency." 5 U.S.C. Sec. 552(b)(5) (1982). Though the Supreme  
13 Court has noted that this language "clearly contemplates that the public is entitled to all such  
14 memoranda or letters that a private party could discover in litigation with the agency," Mink,  
15 410 U.S. at 86, 93 S.Ct. at 835, the exact relationship between ordinary civil discovery and  
16 Exemption (b)(5), particularly the application of discovery privileges under the exemption,  
17 has bedeviled the courts since the Act's inception. *Id.* The Supreme Court, seeing the need  
18 for a broadly sweeping rule on the matter, has insisted that the needs of a particular plaintiff  
19 are not relevant to the exemption's applicability, and has held repeatedly that only  
20 documents "normally" or "routinely" disclosable in civil discovery fall outside the protection  
21 of the exemption. See *NLRB v. Sears, Roebuck & Co.*, [421 U.S. 132](#), 149 & n. 16, 95 S.Ct.  
22 1504, 1515 & n. 16, 44 L.Ed.2d 29 (1975); *FTC v. Grolier Inc.*, [462 U.S. 19](#), 26, 103 S.Ct.  
23 2209, 2213, 76 L.Ed.2d 387 (1983); *United States v. Weber Aircraft Corp.*, [465 U.S. 792](#),  
24 799, 104 S.Ct. 1488, 1492, 79 L.Ed.2d 814 (1984).

25  
26 (Emphasis added)

27  
28 Therefore, if a document is "normally" or "routinely" available through Discovery, it is not  
29 exempt from production under 5 U.S.C. Sec. 552(b)(5).

30  
31 Even so, NASA's threatened use of the Borda Patent Report would not even require Discovery.

32

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

8  
9 b. Margolin already had most of the documents NASA sent him because they were  
10 documents he had sent to NASA.

11  
12 c. Although 5 U.S.C. § 552(a)(6)(F) requires agencies to give an estimate of the volume of  
13 the documents being withheld, NASA failed to do so.

14  
15 17. Margolin filed a FOIA Appeal on June 10, 2009. See Exhibit 11 at Appendix Volume 1  
16 A54. The Appendices in the appeal have been omitted due to their length. Margolin's FOIA  
17 Appeal was received at NASA Headquarters on June 12, 2009. See Exhibit 12 at Appendix  
18 Volume 1 A75.

19  
20 18. On Monday, July 21, 2009, Margolin called the NASA Office of the General Counsel to  
21 inform NASA that they had failed to respond by the 20 day statutory deadline required by 5  
22 U.S.C. § 552(a)(6)(A)(ii), and to ask what NASA's intentions were. He spoke to Mr. Randolph  
23 Harris who said he would look into the matter and call him back later that day. Mr. Harris did not

1 call him back that day, so the next day he called Mr. Harris. Mr. Harris said that NASA would be  
2 sending Margolin a bunch of documents but he did not know what the documents were or when  
3 they would be sent. He guessed seven days. Margolin also asked whether NASA would waive  
4 legal service and accept a Complaint by USPS Express Mail. Mr. Harris said, "No." Only  
5 Certified mail. After Margolin told him about the problem when he had sent NASA the letter of  
6 April 6, 2009 to Acting Administrator Scolese (USPS never delivered it) Mr. Harris still said,  
7 "No." Margolin emailed Mr. Harris a letter asking him to confirm what he had said in the  
8 telephone conversation. See Exhibit 13 at Appendix Volume 1 A77.

9  
10 19. Margolin did not receive a reply from Mr. Harris. Instead he received an email from Mr.  
11 Jan McNutt, who asked for a 20-day extension for NASA to respond to Margolin's FOIA  
12 Appeal. See Exhibit 14 at Appendix Volume 1 A79. Whereas Mr. Harris had promised him  
13 NASA would be sending more documents, McNutt did not. Since NASA had been acting in bad  
14 faith toward Margolin for over six years and McNutt had already taken improper advantage of  
15 the number of courtesies he had extended to him regarding McNutt's actions in the FOIA  
16 request, Margolin said "No" to McNutt's request for an extension. See Exhibit 15 at Appendix  
17 Volume 1 A81. NASA had failed to respond to Margolin's FOIA Appeal (or ask for an  
18 extension) within the 20 day statutory period required by FOIA, and there was no reason to  
19 believe NASA had changed course and was suddenly going to start acting in good faith.

20  
21 20. Margolin filed a FOIA lawsuit against NASA on July 31, 2009 in U.S. District Court for the  
22 District of Nevada, case No. 3:09-cv-00421-LRH-VPC.

1 21. After Margolin filed the Court action NASA sent him their Denial of his FOIA Appeal.  
2 See Exhibit 16 at Appendix Volume 1 A84 . On August 10, 2009 Margolin received NASA's  
3 Denial of his Appeal. The letter was from Thomas S. Luedtke, Associate Administrator for  
4 Institutions and Management. It was dated August 5 (four days after Margolin's Complaint  
5 appeared on Pacer and two days after he served the U.S. Attorney) and postmarked August 6,  
6 which was the same day the Post Office delivered the Summons and Complaint to NASA.  
7 NASA denied Margolin's FOIA Appeal and produced no additional documents, only more  
8 reasons to withhold them. NASA admitted to withholding 100 pages of documents.

9  
10 22. On November 16, 2009 Margolin received two boxes of documents from Stephen L.  
11 McConnell ("McConnell"), NASA Freedom of Information Act Officer. See Exhibit 17 at  
12 Appendix Volume 2 A4. The cover letter is Exhibit 18 at Appendix Volume 2 A6.

13  
14 According to NASA there are about 4,000 pages of documents, which is a great deal more than  
15 the 100 pages they admitted to withholding in their Denial of FOIA Appeal.

16  
17 They are not in any particular order. There is no index. There are many duplicates. Although the  
18 pages are numbered the numbers are frequently illegible. There are gaps in the numbers  
19 indicating that sections were entirely withheld, usually in the most interesting parts. Is NASA  
20 really this disorganized?

21  
22 The pages run from 00017 to 05605 indicating that around 1600 pages were entirely withheld.  
23 Many of the emails are redacted. Sometimes the entire body of the email is redacted under §552  
24 (b)(5) which McConnell characterizes as:

1 (b)(5) – which protects inter-agency documents generated which "are predecisional and/or  
2 deliberative in nature" and information protected as attorney work product; and ...  
3

4 That is what this entire case is about. However, by providing the documents (such as they are) it  
5 may mean NASA does not have to provide a Vaughn Index or provide them to the Court for in-  
6 camera inspection or have the Court appoint a Special Master to review them. This places the  
7 entire burden on Margolin. The documents are too voluminous to file in their entirety in this  
8 Court action. The most relevant parts are reproduced in Appendix Volume 2 and Appendix  
9 Volume 3.  
10

11 23. The approximately 4,000 pages of documents Margolin received from NASA on  
12 November 16, 2009 tell a very different, and very disturbing, story of the period of time from  
13 when he contacted NASA in May 2003 about their infringement of '724 to when they finally  
14 responded to his FOIA request in May 2009.

15  
16 They show:

17  
18 a. The synthetic vision software for the X-38 project had been done by Mike Abernathy  
19 ("Abernathy") of Rapid Imaging Software, working with NASA's Frank Delgado ("Delgado")  
20 (JSC-NASA).

21  
22 Delgado was brought onboard NASA's claim investigation in early 2004. Abernathy was  
23 brought onboard a few months later and has been heavily involved ever since.

24  
25 Delgado said the X-38 project did not infringe the '724 patent but his analysis has not been  
26 provided.

1 Abernathy provided a few references that he said were prior art that would invalidate '073 and  
2 '724. However, a true analysis report requires showing how the patent claim elements are present  
3 in the purported prior art. Abernathy failed to do that. A list of references without such a detailed  
4 analysis is worthless.

5  
6 Both Delgado and Abernathy are incensed that the '073 and '724 patents were even issued and  
7 argue that NASA should file a Request For Re-Examination with the Patent Office. Both  
8 Delgado and Abernathy display a profound ignorance of patents and the patent system. There is  
9 no evidence that NASA's attorneys (some of whom are patent attorneys) made any attempt to  
10 educate them.

11  
12 NASA appears to have accepted the Delgado and Abernathy reports uncritically, and in July,  
13 2004, decided to deny Margolin's claim.

14  
15 b. NASA decided in July 2004 to deny Margolin's Claim, relying heavily on information  
16 supplied by Abernathy. All of the documents dated after that are post-decisional. Therefore, they  
17 are not exempt under 5 U.S.C. §552(b)(5)

18  
19 c. In September 2004 NASA approved a plan to file a Request for Re-Examination with the  
20 Patent Office because:

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

24  
25 For reasons that are not given, the Request for Re-Examination was not filed.

26

1 d. In September 2006 the issue heated up again when Robert Adams of Optima Technology  
2 asked Abernathy to license the Patents. There was considerable communications between  
3 Abernathy and NASA on the subject even though much of it has been redacted. There was also a  
4 conference call between Abernathy and various NASA staff members. Although Abernathy  
5 showed a profound ignorance of patents and patent law, NASA continued to accept his work  
6 uncritically.

7  
8 e. The relationship between NASA and Mike Abernathy has been so close that it is  
9 reasonable to believe Mike Abernathy has been acting as NASA's Agent.

10

11 24. The following are the major players. For a fairly complete list of the players see Exhibit  
12 19 at Appendix Volume 2 A9.

- 13 • Alan Kennedy (Attorney, Office of the General Counsel, NASA HQ, now retired)
- 14 • Barry V. Gibbens (Attorney, Langely Research Center, now deceased)
- 15 • Edward K. Fein (Intellectual Property Counsel, NASA Johnson Space Center).
- 16 • John Muratore (Program Manager, X-38/Crew Return Vehicle).
- 17 • Franciso (Frank) J. Delgado of the Engineering Directorate (Johnson Space Center)  
18 headed up the software project for the X-38 program.
- 19 • Mike Abernathy (Rapid Imaging Software) is the contractor who supplied the  
20 synthetic vision software for the X-38 project.
- 21 • Gary G. Borda (Office of the Associate General Counsel, Agency Lead Attorney,  
22 NASA HQ)

- 1           • Robert F. Rotella (Attorney, Office of the General Counsel, Commercial and  
2           Intellectual Property Law Practice Group)
- 3           • Dan Baize (Project Manager, Synthetic Vision, NASA Langley Research Center)
- 4           • Mark W. Homer (Patent Counsel, NASA Management Office -JPL)
- 5           • John H. Del Frate is director of the Advanced Planning and Partnerships Office at  
6           NASA's Dryden Flight Research Center.
- 7           • Kurt G. Hammerle is a patent attorney at Johnson Space Center.
- 8           • Mr. Jan McNutt (Attorney, Office of the Associate General Counsel, Commercial  
9           and Intellectual Property Law Practice Group, NASA Agency Counsel for  
10          Intellectual Property, NASA HQ)

11

12 25.      The earliest email in the NASA documents starts February 13, 2004 at 10:52 AM and is  
13 part of a long complicated email thread. See Exhibit 20 at Appendix Volume 2 A13. In order to  
14 show them in a less confusing manner they have been converted to text and will be reproduced  
15 here in what appears to be the correct chronological order and without unnecessary duplication.  
16 The page numbers refer to the NASA page numbers followed by the Appendix Volume 2 page  
17 number. (When emails are part of a chain of quoted messages and they come from different time  
18 zones it can be difficult to precisely determine the proper chronological order.)

19

20 This first email is from Edward K. Fein (Intellectual Property Counsel, NASA Johnson Space  
21 Center) to John Muratore (Program Manager, X-38/Crew Return Vehicle). Unfortunately, NASA

1 has completely redacted the message under 5 USC, §552(b)(5) . They have completely redacted  
2 many messages under (b)(5).

3 \_\_\_\_\_  
4  
5 [Page 04605] [AV2-A17]  
6 -----Original Message-----  
7 From: FEIN, EDWARD K. (JSC-HA) (NASA)  
8 Sent: Friday, February 13, 2004 10:52 AM  
9 To: MURATORE, JOHN F. (JSC-MS) (NASA)  
10 Cc: 'Kennedy, Alan'  
11 Subject: Administrative Claim of Jed Margolin for Infringement of U.S. Patent 5,904,724 by  
12 the X-38 Project L

13  
14 **[redacted (b)(5)]**

15  
16 -Ed

17  
18 Edward K. Fein  
19 Intellectual Property Counsel  
20 NASA Johnson Space Center  
21 Fax: [redacted (b)(6)]  
22 EMail: [redacted (b)(6)]  
23 \_\_\_\_\_

24  
25 Alan J. Kennedy was a Patent Attorney in the Office of the Associate General Counsel  
26 (Intellectual Property). He was the NASA attorney who treated Margolin so rudely.

27  
28 The email chain continues.

29 \_\_\_\_\_  
30  
31 [Page 04604] [AV2-A16]  
32 -----Original Message-----  
33 From: MURATORE, JOHN F. (JSC-MS) (NASA)  
34 Sent: Friday, February 20, 2004 6:37 PM  
35 To: FEIN, EDWARD K. (JSC-HA) (NASA); DELGADO, FRANCISCO J. (FRANK) (JSC-  
36 ER2) (NASA)  
37 Cc: 'Kennedy, Alan'  
38 Subject: RE: Administrative Claim of Jed Margolin for Infringement of U.S. Patent  
39 5,904,724 by the X-38 Project  
40

1 [redacted (b)(5)]

2  
3 jm

4  
5  
6 Franciso (Frank) J. Delgado of the Engineering Directorate (Johnson Space Center) headed up  
7 the software project for the X-38 program.

8  
9  
10 [Page 04604] [AV2-A16]

11 -----Original Message-----

12 From: DELGADO, FRANCISCO J. (FRANK) (JSC-ER2) (NASA)

13 Sent: Friday, February 20, 2004 8:16 PM

14 To: MURATORE, JOHN F. (JSC-MS) (NASA); FEIN, EDWARD K. (JSC-HA) (NASA)

15 Cc: 'Kennedy, Alan'

16 Subject: RE: Administrative Claim of Jed Margolin for Infringement of U.S. Patent  
17 5,904,724 by the X-38 Project

18  
19 [redacted (b)(5)]

20  
21 Thanks,

22  
23 Frank Delgado

24  
25 Frank Delgado

26 Building 1, Room 920C

27 Phone: [redacted (b)(6)]

28 Fax: [redacted (b)(6)]

29 Pager: [redacted (b)(6)]

30  
31  
32 The next day.

33  
34  
35 [Page 04604] [AV2-A16]

36 -----Original Message-----

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

38 Sent: Monday, February 23, 2004 10:10 AM

39 To: DELGADO, FRANCISCO J. (FRANK) (JSC-ER2) (NASA)

40 Cc: 'Kennedy, Alan'; MURATORE, JOHN F. (JSC-MS) (NASA)

41 Subject: RE: Administrative Claim of Jed Margolin for Infringement of U.S. Patent  
42

1 5,904,724 by the X-38 Project

2  
3 Thanks, Frank!

4  
5 -Ed

6  
7  
8 By late June 2004, Mike Abernathy had been brought onboard. Abernathy (Rapid Imaging  
9 Software) is the contractor who supplied the synthetic vision software for the X-38 project.

10  
11  
12 [Page 04603] [AV2-A15]  
13 -----Original Message-----  
14 From: FEIN, EDWARD K. (JSC-HA) (NASA) [mailto: [redacted (b)(6)]  
15 Sent: Thursday, June 24, 2004 9:01 AM  
16 To: DELGADO, FRANCISCO J. (FRANK) (JSC-ER2) (NASA)  
17 Cc: [redacted (b)(6)] WHITTINGTON, JAMES (JSC-HA) (USA); DICKERSON, MARY  
18 E. (JSC-HA) (NASA); MURATORE, JOHN F. (JSC-MS) (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 Frank ... Haven't heard from you in a while. Where are we on this project? I just spoke with  
23 Mike Abernathy, Rapid Imaging, one of our SBIR contractors. He said he'd be happy to help  
24 us. He has information which may be relevant to antedating the subject patent.  
25  
26 -Ed

27  
28  
29 The distribution list had been expanded to James Whittington (SBIR Specialist at the Johnson  
30 Space Center) and Mary E. Dickerson (Paralegal Specialist at the Johnson Space Center).

31  
32  
33 [Page 04603] [AV2-A15]  
34 -----Original Message-----  
35 From: Mike Abernathy [mailto: [redacted (b)(6)]  
36 Sent: Monday, June 28, 2004 9:10 AM  
37 To: FEIN, EDWARD K. (JSC-HA) (NASA)  
38 Subject: RE: Administrative Claim of Jed Margolin for Infringement of U.S. Patent  
39 5,904,724 by the X-38 Project  
40

1  
2 Hi Ed,

3  
4 Frank is back in West Virginia presenting SmartCam3D for NASA Software of the Year.

5  
6 What kinds of things would be used to demonstrate that a patent is invalid? Is it necessary to  
7 show that people had done this before the patent was issued or before the patent application?  
8

9 This patent claims in the 1995 application that it developed the method of pilot aid using a  
10 3D synthetic environment. But at this webpage, you can see that a Dutch university had  
11 already flown such an environment in 1994:

12  
13 <http://www.synthetic-vision.tudelft.nl/>  
14

15 (See First flight of the DELPHINS Tunnel-in-the-sky display at the bottom of the list of  
16 links).

17  
18 The patent claims a pilot aid using a synthetic environment – if the method were used for  
19 another purpose than aiding the pilot like for example aiding a camera operator instead  
20 would that be infringement?  
21

22 What bothers me about this patent is that it appears to be not a patent on peanut butter, nor  
23 on jelly, but rather a patent on the method of making a sandwich by combining the two. This  
24 to me appears to be a non-novel use of existing technologies to create a "method". Everyone  
25 familiar with the field of synthetic vision is boggled that such a patent has been issued  
26 because it is obvious use of existing technologies.  
27

28 Let me know how I can help. Best regards,

29  
30 Mike Abernathy [redacted (b)(6)]  
31 Rapid Imaging Software, Inc  
32 [redacted (b)(6)]  
33

34 [www.landform.com](http://www.landform.com)  
35 [www.visualflight.com](http://www.visualflight.com)  
36

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37  
38 Abernathy and Delgado worked on the X-38 project together. Abernathy's ignorance of basic  
39 patent law concepts is profound and grows over the years.  
40

1 If Abernathy had done even a small amount of due diligence he would have discovered that there  
2 are a number of U.S. Patents for making peanut butter and jelly sandwiches. U.S. Patent  
3 3,552,980 issued June 5, 1971 to Cooper, et al. is a good example. See Exhibit 21 at Appendix  
4 Volume 2 A22. From Column 1 line 45 - Column 2 line 23:

5 This invention relates to new food products. More particularly, it relates to stable, packaged  
6 peanut butter-base foods such as sandwich spreads, and to methods of making them.  
7

8 This invention also relates to a process of treating sweet aqueous spreads such as preserves,  
9 jams, jellies, and the like, to make them stable against water loss when in contact with a  
10 hydrophilic material, such as peanut butter, without deleteriously affecting their texture,  
11 spreadability, flavor, color and mouthing characteristics.  
12

13 Various types of preserves, jellies, jams, and confections are ordinarily delicious when  
14 freshly mixed with peanut butter. Unfortunately, when sweet, aqueous spreads of this kind  
15 are mixed with peanut butter, and the mixture is allowed to stand for a few days, the peanut  
16 butter becomes hard, appears dry even though its moisture content has increased, and  
17 generally becomes an unattractive brown in appearance and very objectionable in taste. The  
18 aqueous spread in the mixture loses its moisture to the peanut butter spread and  
19 objectionable sugar crystallization occurs. If the mixture stands for any prolonged period of  
20 time, such as, for example, the several-week period that would be typical of transit time and  
21 shelf life for peanut butter or the like in a grocery store, the mixture changes so drastically  
22 that it is no longer a marketable product.  
23

24 Moreover, mixtures of peanut butter with some materials such as, for example, grape jelly,  
25 are very unattractive in appearance and, if thoroughly mixed and then packaged, probably  
26 would look too unattractive to be readily saleable even in the fresh state.  
27

28 One of the most popular sandwich combinations is peanut butter and fruit jelly, such as  
29 apple jelly. A stable packaged food product containing a combination of peanut butter and  
30 jelly would be a great convenience to the consumer, would be very pleasant to use, and  
31 could be packaged in a number of attractive ways. Unfortunately, it has not been possible in  
32 the past to make up stable packages of such mixtures.  
33

34 One object of the present invention is to provide a new, attractive packaged food product.  
35

36 Another object of the invention is to provide a new packaged food product that is a stable  
37 combination of different, foods that can be eaten together to provide a delicious taste that is  
38 attributable to their combination.  
39

1 This patent is probative because it shows Abernathy's ignorance of basic patent law concepts and  
2 his inability to do even a minimum amount of diligence.

3  
4 Yet, as later documents show, NASA relied on his work uncritically in making their decision to  
5 deny Margolin's claim. NASA's refusal to comply with the Freedom of Information Act is due,  
6 at least in part, to their desire to avoid embarrassment to the Agency.

7  
8 It should be noted that the above patent was assigned to CPC International, which was not trying  
9 to corner the market for peanut butter and jelly sandwiches and prevent the American People  
10 from enjoying same. CPC International was making it possible for more people to enjoy peanut  
11 butter and jelly sandwiches.

12  
13 CPC International has gone through a number of mergers, acquisitions, and divestitures in its  
14 long history.

15  
16 At one time they produced Entenmann's pastries, Mazola corn oil, Thomas' English muffins and  
17 dozens of other brand names.

18  
19 They owned Best Foods, which produces very fine mayonnaise under the brands Best Foods  
20 Mayonnaise (sold only West of the Rockies) and Hellman's Mayonnaise (sold only East of the  
21 Rockies).

22  
23 They also make Skippy Peanut Butter.

24  
25 If NASA was the Defendant in a Court action for infringing on the Margolin Patents would they  
26 really assert the PBJ Defense?

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[Page 04602] [AV2-A14]  
FW: Administrative Claim of Jed Margolin for Infringement of U.S. Patent 5,904,724 by the  
X-38 Project  
From: FEIN, EDWARD K. (JSC-HA) (NASA) [redacted (b)(6)]  
To: Kennedy, Alan [redacted (b)(6)]  
Date: Jul 09 2004 - 4:17pm  
Viewed On: - - ?date?

Alan ... Not sure I forwarded this one.

-Ed

---

Fein keeps Kennedy in the loop if only belatedly.

---

[Page 04605] [AV2-A17]  
FW: Margolin Infringement  
From: FEIN, EDWARD K. (JSC-HA) (NASA) [redacted (b)(6)]  
To: DICKERSON, MARY E. (JSC-HA) (NASA) [redacted (b)(6)]  
Date: Jul 09 2004 - 2:43pm  
Viewed On: --?date?

RE: - 267k  
RE: - 100k  
RE: - 9.7k  
FW: - 12k  
FW: - 12k

---

No idea what Fein is sending Dickerson.

---

[Page 04605] [AV2-A17]  
-----Original Message-----  
From: FEIN, EDWARD K. (JSC-HA) (NASA)  
Sent: Friday, July 09, 2004 2:41 PM  
To: 'Kennedy, Alan'

1 Cc: 'Bayer, Kathy;  
2 Subject: Margolin Infringement  
3

4 **[redacted (b)(5)]**  
5  
6  
7

8 Kathy Bayer is a Legal Technician in the Office of the Associate General Counsel.  
9  
10

11  
12 [Page 04606] [AV2-A18]

13 RE:

14 From: Mike Abernathy [redacted (b)(6)]

15 To: 'FEIN, EDWARD K. (JSC-HA) (NASA)

16 Date: Jun 28 2004 - 1:29pm

17 Viewed On: --?date?  
18

19 FW: Patents 5566073 and 5904724

20 From: FEIN, EDWARD K. (JSC-HA) (NASA) [redacted (b)(6)]

21 To: CULBERT, CHRISTOPHER J. (CHRIS) (JSC-ER) (NASA) [redacted (b)(6)]

22 Date: Jul 13 2004 - 1:26pm

23 Viewed On: --?date?  
24

25 -----Original Message-----

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

27 Sent: Tuesday, July 13, 2004 8:37 AM

28 To: BENZ, FRANK J. (JSC-EA) (NASA); GUY, WALTER W. (JSC-ER) (NASA);

29 FARMER, CLIFF L. (JSC-ER) (NASA)

30 Cc: GILBERT, CHARLENE E. (JSC-HA) (NASA); JAMES, JOHN E. (JACK) (JSC-HA)  
31 (NASA)

32 Subject: Patents 5566073 and 5904724  
33

34 **[redacted (b)(5)]**  
35

36 Edward K. Fein

37 Intellectual Property Counsel

38 NASA Johnson Space Center

39 Mail Code HA  
40

41 [redacted (b)(6)]  
42

43 Fax: [redacted (b)(6)]

1 E-Mail: [redacted (b)(6)]  
2  
3

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- 4 • Christopher J. Culbert is Deputy Division Chief of the Automation, Robotics, and  
5 Simulation Division at NASA/Johnson Space Center.
- 6 • Frank J. Benz is currently Manager of the NASA Johnson Space Center (JSC) White  
7 Sands Test Facility (WSTF) near Las Cruces, New Mexico. Appointed to this position in  
8 2005.
- 9 • Charlene E. Gilbert is Director of the Technology Transfer Office at Johnson Space  
10 Center.
- 11 • John (Jack) E. James John is Assistant Director, Technology Transfer Office, Johnson  
12 Space Center.
- 13 • Cliff L. Farmer is Chief, Display & Control Development Office, Johnson Space Center.
- 14 • Guy W. Walter is Chief, Automation, Robotics, and Simulations Division, Engineering  
15 Directorate. Mr. Walter is a real engineer who has made significant contributions to the  
16 space program. Why did they have to drag him into this mess?

17  
18 And now the result of these emails.

19  
20

---

21 [Page 04607] [AV2-A19]

22 -----Original Message-----

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

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

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

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

28 Subject: RE: Patents 5566073 and 5904724  
29

30 Frank ... Thank you so much for your detailed analysis and research on this matter. I know  
31 that you invested considerable time into assisting in the defense of this infringement claim.

1 Your effort, together with valuable input from Mike Abernathy, will be the basis for  
2 NASA's denying the administrative claim. There is always a chance that Margolin will file a  
3 law suit, but with all of the information you guys have turned up, I think the chance of that is  
4 small.

5  
6 Thanks again!

7  
8 -Ed  
9  

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10  
11 **NASA decided to deny the claim in July, 2004.** All of the documents that came afterwards are  
12 post-decisional documents that are, therefore, not exempt from disclosure. Traditionally, the  
13 courts have established two fundamental requirements, both of which must be met, for the  
14 deliberative process privilege to be invoked. *See Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537  
15 (D.C. Cir. 1993) ("The deliberative process privilege protects materials that are both  
16 predecisional and deliberative." (citing *Petroleum Info. Corp. v. United States Dep't of the*  
17 *Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992))). First, the communication must be  
18 predecisional, i.e., "antecedent to the adoption of an agency policy." (*Jordan*, 591 F.2d at 774)  
19 Second, the communication must be deliberative, i.e., "a direct part of the deliberative process in  
20 that it makes recommendations or expresses opinions on legal or policy matters." *Vaughn v.*  
21 *Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). The burden is upon the agency to show that  
22 the information in question satisfies both requirements. *See Coastal States*, 617 F.2d at 866.

23  
24 The statement, "There is always a chance that Margolin will file a law suit, but with all of the  
25 information you guys have turned up, I think the chance of that is small", makes no sense  
26 because NASA never informed Margolin of "all of the information you guys turned up."  
27 Margolin has learned of this only now, in 2009, as a result of the present lawsuit.  
28

1 In order for a deterrent to work, your opponent has to know of its existence. This is one of the  
2 messages of the classic 1964 Stanley Kubrick film **Dr. Strangelove, or How I learned to stop**  
3 **worrying and love the Bomb.**

4  
5 26. Abernathy's Detailed Analysis of Prior Art appears to be contained in the email from  
6 Mike Abernathy to Edward Fein dated June 28, 2004. See Exhibit 22 at Appendix Volume 2  
7 A32. A true prior art analysis requires an actual discussion of purported prior art pointing out  
8 where the elements in the patent claim being discussed are present in the purported prior art.  
9 Abernathy has failed to do this, especially with the article that is in Dutch. See Exhibit 22 at  
10 Appendix 2 A42.

11  
12 27. Although NASA had already made the decision to deny the claim, the story is just getting  
13 started.

14  
15 Exhibit 23 at Appendix Volume 2 A45 contains a complicated email thread that took place on  
16 September 1, 2004. They were in the same section in the NASA files as an email where Jan  
17 McNutt introduced himself to Edward Fein after Mr. McNutt started working at NASA and the  
18 case was dumped into his lap. The September 2004 documents may have been provided to  
19 McNutt as a result of his email to Mr. Fein. The following is an attempt to present the thread in  
20 order and without unnecessary duplicates.

21 \_\_\_\_\_  
22  
23 [Page 2646] [AV2-A56]  
24 From: McNutt, Jan (HQ-MC000)  
25 Sent: Wednesday, August 06, 2008 1:36 PM

1 To: Fein, Edward K. (JSC-AL)  
2 Cc: Borda, Gary G. (HQ-MC000); Rotella, Robert F. (HQ-MA000)  
3  
4 Subject: Patent Infringement claim from Jed Margolin; NASA Case No. I-222  
5

6 Hello Mr. Fein,  
7

8 I am a new attorney working commercial law and also helping out Gary and Bob. Do you  
9 remember working on this infringement claim, and if so, what was the outcome, if any? See  
10 attached.  
11

12 << File: Kennedy to JSC.pdf >>  
13 << File: Margolin FOIA.pdf >>  
14 << File: Letter from Optima 20080714.pdf >>  
15

16 Thank you,  
17

18 Jan S. McNutt  
19 Attorney-Advisor (Commercial)  
20 Office of the General Counsel  
21 NASA Headquarters  
22  
23

24 This is where the thread starts in September 2004.  
25  
26

27 [Page 2645] [AV2-A55]  
28 At 09:33 AM 9/1/2004 -0600, Mike Abernathy wrote:  
29

30 Good Morning Alan,  
31

32 Per our discussions this morning I called both Dan Baize and Barry Gibbens at Langley to  
33 discuss the resolution of questions surrounding patents 5566073 and 5904724. When we  
34 spoke earlier you indicated that based on the evidence of prior art uncovered so far, that  
35 NASA might move for an Ex-Parte re-examination of patent 5566073, provided that NASA  
36 patent counsel at LARC concurs. Mr. Baize feels that this patent may invalid because of  
37 copious prior art, and that it is therefore a significant impediment to the development of life-  
38 saving synthetic vision technologies. Mr. Gibbens has indicated that he and Ms. Blackwell  
39 feel it is now appropriate to for NASA LARC to proceed to request a re-examination.  
40

41 We will therefore forward them the same information on prior art that I forwarded to HQ.  
42 Please let us know how we can continue to be of help.

1  
2 Best regards,  
3  
4 Mike Abernathy  
5 Rapid Imaging Software, Inc.  
6 [redacted (b)(6)]  
7  
8 www.landform.com  
9 HYPERLINK "http://www.visualflight.com/"www.visualflight.com  
10  
11 Barry V. Gibbens  
12 NASA Langley Research Center  
13 Intellectual Property Law Team - Office of Chief Counsel  
14 wwwwebsite: http://tech-transfer.larc.nasa.gov/  
15 NEW E-MAIL ADDRESS: Please note that effective immediately, my e-mail address is n  
16 [redacted (b)(6)] Please update your mail systems accordingly. Thanks.  
17  
18

19 [Alan is presumably Alan Kennedy]

20  
21 [Page 2644] [AV2-A54]  
22 -----Original Message-----  
23 From: FEIN, EDWARD K. (JSC-HA) (NASA)  
24 Sent: Wednesday, September 01, 2004 10:06 AM  
25 To: 'Mike Abernathy'  
26 Subject: RE: US Patents 5566073 and 5904724  
27

28 Thanks, Mike, for keeping me in the loop.

29  
30 -Ed  
31  
32

33 -----Original Message-----  
34 From: Mike Abernathy [redacted (b)(6)]  
35 Sent: Wednesday, September 1, 2004 10:33 AM  
36 To: 'Kennedy, Alan'  
37 Cc: 'Barry V. Gibbens, LaRC'; Dan Baize; 'Trey Arthur'; DELGADO, FRANCISCO J.  
38 (FRANK) (JSC-ER2) (NASA); FEIN, EDWARD K. (JSC-HA) (NASA); BOE, ERIC A.,  
39 LTCOL. (JSC-CB) (NASA)  
40 Subject: US Patents 5566073 and 5904724  
41

1  
2 Good Morning Alan,  
3

4 Per our discussions this morning I called both Dan Baize and Barry Gibbens at Langley to  
5 discuss the resolution of questions surrounding patents 5566073 and 5904724. When we  
6 spoke earlier you indicated that based on the evidence of prior art uncovered so far, that  
7 NASA might move for an Ex-Parte re-examination of patent 5566073, provided that NASA  
8 patent counsel at LARC concurs. Mr. Baize feels that this patent may be invalid because of  
9 copious prior art, and that it is therefore a significant impediment to the development of life-  
10 saving synthetic vision technologies. Mr. Gibbens has indicated that he and Ms. Blackwell  
11 feel it is now appropriate for NASA LARC to proceed to request a re-examination. We  
12 will therefore forward them the same information on prior art that I forwarded to HQ. Please  
13 let us know how we can continue to be of help.  
14

15  
16 Best regards,  
17 Mike Abernathy  
18 Rapid Imaging Software, Inc.  
19 [redacted (b)(6)]  
20

21 www.landform.com  
22 www.visualflight.com  
23

24 *Claims Analysis of Patent.doc*  
25  
26

27 The above may be a duplicate, or Abernathy may have resent it with the attachment.

28 The following email is from Barry V. Gibbens, a patent attorney at Langley Research Center.

29  
30  
31 [Page 2645] [AV2-A55]  
32 Re: US Patents 5566073 and 5904724  
33 From: Barry V. Gibbens, LaRC [redacted (b)(6)]  
34 To: Mike Abernathy [redacted (b)(6)] Kennedy, Alan [redacted (b)(6)]  
35 CC: Linda B. Blackburn [redacted (b)(6)]  
36 Dan Baiz [redacted (b)(6)]  
37 'Trey Arthur' [redacted (b)(6)]  
38 DELGADO FRANCISCO J. (FRANK) [redacted (b)(6)]  
39 FEIN, EDWARD K. JSC-H (NASA) [redacted (b)(6)]  
40 Eric Boe [redacted (b)(6)]

1 Date: Sep 01 2004 - 11:29am  
2  
3

4 Hi Alan (and others),  
5

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

24 Thanks,  
25

26 Barry  
27  
28

---

29 Note that one of the reasons for filing a Request for Re-Examination is because:

30 It seems clear that the technical folks have determined that the Margolin patent on Synthetic  
31 Vision creates a substantial problem for many of our partners in the aviation safety industry  
32 for a variety of reasons.  
33

34 This has nothing to do with an infringement claim against NASA. This is not about NASA  
35 taking Margolin's private property for Public Use which, under the Fifth Amendment to the U.S.  
36 Constitution, requires that Margolin be compensated. This is about destroying (taking)

1 Margolin's private property, without compensation, for the financial benefit of NASA's  
2 *partners*, who are commercial companies. This is about theft.

3  
4 Note that the Subject is "Re: US Patents 5566073 and 5904724". U.S. Patent 5,904,724 was the  
5 subject of Margolin's infringement claim. U.S. Patent 5,566,073 was not. Why is NASA  
6 proposing to invalidate a patent that was not the subject of the infringement claim?

7  
8 Also note: "Baize has indicated he would be willing to fund."

9  
10 The email was sent by Barry V. Gibbens (Patent Attorney, Langley Research Center).

11  
12  
13 It was sent to:

- 14 • Mike Abernathy (Rapid Imaging Software) is the contractor who supplied the  
15 synthetic vision software for the X-38 project.
- 16 • Alan Kennedy (Attorney, Office of the General Counsel, NASA HQ, now retired)

17  
18 The following people were copied:

- 19 • Linda B. Blackburn (Patent Counsel in the Office of Chief Counsel, Langley  
20 Research Center. She retired on Oct. 26, 2009)
- 21 • Dan Baize (Project Manager, Synthetic Vision, NASA Langley Research Center)
- 22 • Trey Arthur (NASA Langley Research Center) He is listed as the co-author on  
23 several reports from the early 2000's on synthetic vision.
- 24 • Franciso (Frank) J. Delgado of the Engineering Directorate (Johnson Space Center)  
25 headed up the software project for the X-38 program.

- 1 • Edward K. Fein (Intellectual Property Counsel, NASA Johnson Space Center)
- 2 • Eric Boe [Lt Col Eric A. Boe, (JSC-CB) (NASA), now Colonel] Colonel Boe is an
- 3 astronaut.

4  
5 If any of them objected to the proposed theft under Cover of Authority there is no indication of it  
6 in the NASA documents.

7  
8 There is an earlier email from Mike Abernathy that is part of the quoted chain. It appears to have  
9 been sent to Alan Kennedy. It is accompanied by a reply from Edward Fein. From NASA  
10 documents page 2645 [AV2-A55]:

11 \_\_\_\_\_  
12  
13 At 09:33 AM 9/1/2004 -0600, Mike Abernathy wrote:

14  
15 Good Morning Alan,

16  
17 Per our discussions this morning I called both Dan Baize and Barry Gibbens at Langley to  
18 discuss the resolution of questions surrounding patents 5566073 and 5904724. When we  
19 spoke earlier you indicated that based on the evidence of prior art uncovered so far, that  
20 NASA might move for an Ex-Parte re-examination of patent 5566073, provided that NASA  
21 patent counsel at LARC concurs. Mr. Baize feels that this patent may invalid because of  
22 copious prior art, and that it is therefore a significant impediment to the development of life-  
23 saving synthetic vision technologies. Mr. Gibbens has indicated that he and Ms. Blackwell  
24 feel it is now appropriate to for NASA LARC to proceed to request a re-examination.

25  
26 We will therefore forward them the same information on prior art that I forwarded to HQ.  
27 Please let us know how we can continue to be of help.

28  
29 Best regards,

30  
31 Mike Abernathy  
32 Rapid Imaging Software, Inc.  
33 [redacted (b)(6)]

34  
35 www.landform.com

36 HYPERLINK "http://www.visualflight.com/"www.visualflight.com

1  
2 Barry V. Gibbens  
3 NASA Langley Research Center  
4 Intellectual Property Law Team - Office of Chief Counsel  
5 wwwwebsite: <http://tech-transfer.larc.nasa.gov/>  
6 NEW E-MAIL ADDRESS: Please note that effective immediately, my e-mail address is n  
7 [redacted (b)(6)] Please update your mail systems accordingly. Thanks.

8  
9 \_\_\_\_\_

10 [Page 2644] [AV2-A54]  
11 -----Original Message-----  
12 From: FEIN, EDWARD K. (JSC-HA) (NASA)  
13 Sent: Wednesday, September 01, 2004 10:06 AM  
14 To: 'Mike Abernathy'  
15 Subject: RE: US Patents 5566073 and 5904724

16  
17 Thanks, Mike, for keeping me in the loop.

18  
19 -Ed

20 \_\_\_\_\_

21  
22 Abernathy makes the statement:

23  
24 Mr. Baize feels that this patent may invalid because of copious prior art, and that it is  
25 therefore a significant impediment to the development of life-saving synthetic vision  
26 technologies.

27  
28 Abernathy has done the equivalent of “Wrapping Himself in the Flag.” The Margolin patents  
29 were not an impediment to the development of life-saving synthetic vision technologies.

30 Margolin developed the technology in order to improve aircraft safety. Margolin never refused to  
31 license the patents. When Margolin owned them he was never asked to license them. NASA  
32 never asked Margolin how much he wanted for them. Margolin spent several years contacting  
33 aerospace companies to promote his patents and was rather uniformly ignored. Did NASA have  
34 something to do with that?

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[Page 02642] [AV2-A52]  
-----Original Message-----  
From: Mike Abernathy [redacted (b)(6)]  
Sent: Wednesday, September 01, 2004 11:45 AM  
To: FEIN, EDWARD K. (JSC-HA) (NASA)  
Cc: DELGADO, FRANCISCO J. (FRANK) (JSC-ER2) (NASA)  
Subject: RE: US Patents 5566073 and 5904724

Hi Ed,

Happy to keep you involved. I appreciated that article you sent me on the topic. The one thing that concerned me in the article is that I realized if Alan just sends the claims analysis to the PTO without requesting a re-exam then the owner will have the leisure to think up excuses for why this is not so, and prepare a defense maybe even ask for his own re-exam. Yikes! If NASA does not ask for the re-exam upon finding the prior art, we are basically strengthening his position to sue NASA by allowing him the time to synthesize a defense against the defects of his patent. It appears that Barry Gibbens is ready to press forward, happily.

Have I sent you the claims analysis yet? Best regards,

Mike Abernathy  
Rapid Imaging Software, Inc.  
[redacted (b)(6)]  
[www.landform.com](http://www.landform.com)  
[www.visualflight.com](http://www.visualflight.com)

---

Let's attack Margolin and not give him the chance to defend himself.

---

[Page 2643] [AV2-A53]  
-----Original Message-----  
From: FEIN, EDWARD K. (JSC-HA) (NAS  
Sent: Wednesday, September 01, 2004 11:19 AM  
To: 'Mike Abernathy'  
Subject: RE: US Patents 5566073 and 5904724

Barry Gibbens is a good man, Mike, and no, you haven't sent me the claims analysis. I am

1 pleased to learn that the Agency is moving on this.

2  
3 -Ed  
4  
5  
6  
7

---

8 [Page 2643] [AV2-A53]

9 -----Original Message-----

10 From: Mike Abernathy [redacted (b)(6)]  
11 Sent: Wednesday, September 01, 2004 12:25 PM  
12 To: FEIN, EDWARD K. (JSC-HA) (NASA)  
13 Subject: RE: US Patents 5566073 and 5904724  
14

15 Here it is.

16 Best regards,

17  
18 Mike Abernathy  
19 Rapid Imaging Software, Inc.  
20 [redacted (b)(6)]  
21

22  
23 www.landform.com  
24 [www.visualflight.com](http://www.visualflight.com)  
25  
26  
27  
28

---

29 [Page 2643] [AV2-A53]

30 -----Original Message-----

31 From: FEIN, EDWARD K. (JSC-HA) (NASA)  
32 Sent: Wednesday, September 01, 2004 11:41 AM  
33 To: 'Mike Abernathy'  
34 Subject: RE: US Patents 5566073 and 5904724  
35

36 thanks!  
37  
38  
39  
40

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41 [Page 2643] [AV2-A53]

42 RE: US Patents 5566073 and 5904724  
43 From: Mike Abernathy [redacted (b)(6)]  
44 To: FEIN, EDWARD K. (JSC-HA) (NASA)

1 Date: Sep 01 2004 - 12:44pm

2  
3 Sir,

4  
5 Could you read this and let me know what you think of it? I know it will evolve a lot in  
6 Barry's hands – which is good. But I would like your thoughts on it for my own and Frank's  
7 edification.

8  
9 Best regards,

10  
11 Mike Abernathy  
12 Rapid Imaging Software, Inc.  
13 [redacted (b)(6)]

14  
15 [www.landform.com](http://www.landform.com)  
16 [www.visualflight.com](http://www.visualflight.com)

17  
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19  
20  
21 [Page 2641] [AV2-A51]  
22 FW: US Patents 5566073 and 5904724

23  
24 From: FEIN, EDWARD K. (JSC-HA) (NASA) [redacted (b)(6)]

25  
26 To: RO, THEODORE U., JD (JSC-HA) (NASA) [redacted (b)(6)] CATE, JAMES M., JD  
27 (JSC-HA) (NASA) [redacted (b)(6)]

28  
29 CC: KRISHEN, KUMAR (JSC-HA) (NASA) [redacted (b)(6)]  
30 WHITTINGTON, JAMES (JSC-HA) (USA)- (NASA) [redacted (B0)(6)]  
31 HAINES, DAVID D. (JSC-HA) [redacted (b)(6)]  
32 HIEGER, COLLIN (JSC-HA) (UNK) [redacted (b)(6)]  
33 LANE, HELEN W. (JSC-AD) (NASA) [redacted (b)(6)]  
34 HAYES, GREG W. (JSC-AD) (NASA) [redacted (b)(6)]  
35 ROAN, BERNARD J. (JSC-AL) (NASA) [redacted (b)(6)]  
36 REMINGTON, DANIEL R. (DAN) (JSC-AL) (NASA) [redacted (b)(6)]

37 Date: Sep 01 2004 - 12:51 pm

38  
39 *Claims Analysis of Patent.doc - 2.1 MB - View in Outlook*

40  
41 **[redacted (b)(5)]**

42  
43 -Ed  
44

1 Abernathy's claim analysis was widely distributed. However, NASA's documents do not contain  
2 the Claim Analysis itself or any responses to it.

3  
4 There are some new players.

- 5 • James M. Cate is currently a Patent Attorney at Johnson Space Center.
- 6 • Theodore U. Ro is currently a Patent Attorney at Johnson Space Center.
- 7 • Kumar Krishen (JSC-HA) is currently Technology Account Manager at Johnson Space  
8 Center.
- 9 • David D. Haines (JSC-HA) is currently Technology Account Manager at Johnson Space  
10 Center.
- 11 • Collin Hieger (JSC-HA) (UNK) is current SBIR Associate at Johnson Space Center.
- 12 • Dr. Helen W. Lane (JSC-AD) (NASA) is currently National Aeronautics and Space  
13 Administration (NASA), Johnson Space Center (JSC) Chief Nutritionist and Manager of  
14 the NASA JSC University Research and Affairs Office.
- 15 • Greg W. Hayes (JSC-AD) (NASA) is currently Director of Human Resources and  
16 Education at Johnson Space Center.
- 17 • Bernard J. Roan (JSC-AL) (NASA) is currently Chief Counsel of the Legal Office at  
18 Johnson Space Center, and provides in-depth legal support to the center's activities,  
19 including satellite installations and offices.
- 20 • Daniel R. Remington (DAN) (JSC-AL) (NASA) was Deputy Chief Counsel of the Legal  
21 Office at Johnson Space Center.

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[Page 2639] [AV2-A49]  
-----Original Message-----  
From: Barry V. Gibbens, LaRC [mailto:Barry.V.Gibbens@)NASA.GOV~  
Sent: Wednesday, September 01, 2004 2:21 PM  
To: FEIN, EDWARD K. (JSC-HA) (NASA)  
Subject: RE: US Patents 5566073 and 5904724

Thanks Ed - I'll pass the word. Just for future reference, if any of us were to apply for the job, how would you feel about tele-commuting from, say, the Bahamas?????

**[redacted (b)(5)]**

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---

[Page 2639] [AV2-A49]  
At 12:30 PM 9/1/2004 -0500, you wrote:

Thanks Barry ...

**[redacted (b)(5)]**

-Ed

Btw, Jim Cate is retiring at the end of the month, and we definitely will be filling the slot. So please spread the word. Good things about JSC is the high locality pay differential in Houston, and the relatively low cost of living here. The downside is that the poor person will have to deal with my bad a\*\* on a daily basis.

Take care ...

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[Page 2638] [AV2-A48]  
RE: US Patents 5566073 and 5904724  
From: FEIN, EDWARD K. (JSC-HA) (NASA [redacted (b)(6)]  
To: Barry V. Gibbens, LaRC [redacted (b)(6)]  
BCC: ROAN, BERNARD J. (NASA) [redacted (b)(6)]  
Date: Sep 01, 2004 - 2:44pm

No need to telecommute from the Bahamas, Barry. Nassau Bay is right across the street

1 from JSC! Check out <http://www.nassaubay.com/>. See -- we got it all! And please do pass  
2 the word. I'd even risk the wrath of Linda and Kathy to snag one of you guys.

3  
4 **[redacted (b)(5)]**

5  
6 -Ed  
7  
8  
9  
10

11 [Page 2636] [AV2-A46]

12 -----Original Message-----

13 From: Barry V. Gibbens, LaRC [mailto:[\[redacted \(b\)\(6\)\]](#)]

14 Sent: Wednesday, September 01, 2004 3:26 PM

15 To: FEIN, EDWARD K. (JSC-HA) (NASA)

16 Cc: Linda B. Blackburn

17 Subject: RE: US Patents 5566073 and 5904724  
18  
19

20 Very nice! I went to the Nassau Bay website, and looked under "New Things . . . Check It  
21 Out." Three of the highlights were "Storm Preparedness Information," "Hurricane Tracking  
22 Chart," and "You Can Now Pay Traffic Fines On Line." Sounds like my kind of place!!!  
23

24 BG  
25  
26

27 Linda Blackburn was Patent Counsel in the Office of Chief Counsel, Langley Research Center.

28 She retired on Oct. 26, 2009.  
29  
30

31 [Page 2635] [AV2-A45]

32 RE: US Patents 5566073 and 5904724

33 From: FEIN, EDWARD K. (JSC-HA) (NASA [\[redacted \(b\)\(6\)\]](#))

34 To: Barry V. Gibbens, LaRC [\[redacted \(b\)\(6\)\]](#)

35 CC: Linda B. Blackburn [\[redacted \(b\)\(6\)\]](#)

36 Date: Sep 01 2004 - 4:33pm  
37  
38

39 Rats! I guess I'd should research things better before I blindly send them out. Btw, the real  
40 Bahamas get hurricanes too.  
41

1 Although these last emails contain personal banter the subject line is “US Patents 5566073 and  
2 5904724” so it is reasonable to assume that the redacted parts pertain to the patents, which is  
3 why the redacted parts were redacted. These emails are post-decisional since the decision to deny  
4 Margolin’s claim was made in July 2004.

5  
6 28. Despite NASA’s Plan to file a Request for Re-Examination with the Patent Office, they  
7 didn’t do it.

8  
9 It’s possible that NASA concluded they did not infringe. However, they had already decided they  
10 did not infringe when they decided to deny Margolin’s claim in July. Besides, NASA’s reason  
11 for wanting to invalidate the Patents was to benefit their partners.

12  
13 There is another possibility to consider, which is that an analysis of Abernathy’s purported prior  
14 art did not stand up to careful scrutiny. Thus, the patents would survive a Re-Examination and  
15 come out of it even stronger.

16  
17 Since NASA’s reason for wanting to invalidate the Margolin patents was to benefit their  
18 partners, this places any and all communications between NASA (or any NASA employee or  
19 anyone outside NASA acting at NASA’s direction) and NASA’s partners (or anyone acting for  
20 NASA’s partners) that relate to the Margolin patents, the Infringement Claim, and Margolin’s  
21 FOIA request subject to Margolin’s FOIA request.

22  
23 Not only are the documents post-decisional the threshold issue under Exemption 5 is whether a  
24 record is of the type intended to be covered by the phrase "inter-agency or intra-agency

1 memorandums" -- a phrase which appears to encompass only documents generated by an agency  
2 and not documents circulated beyond the executive branch. *See United States Dep't of Justice v.*  
3 *Julian*, 486 U.S. 1, 19 n.1 (1988).

4  
5 However, the Supreme Court shed light on this issue when it ruled on the contours of Exemption  
6 5's "inter-agency or intra-agency" threshold requirement for the first time in *Department of the*  
7 *Interior v. Klamath Water Users Protective Ass'n*. 532 U.S. 1 (2001). In a unanimous decision,  
8 the Court ruled that the threshold of Exemption 5 did not encompass communications between  
9 the Department of the Interior and several Indian tribes which, in making their views known to  
10 the Department on certain matters of administrative decisionmaking, not only had "their own,  
11 albeit entirely legitimate, interests in mind," (*Klamath*, 532 U.S. at 12) but also were "seeking a  
12 Government benefit at the expense of other applicants." (*Id.* at 12 n.4)

13  
14 Thus, records submitted to the agency by the Tribes, as "outside consultants," did not qualify for  
15 attorney work-product and deliberative process privilege protection in the case. (*Id.* at 16)  
16  
17 NASA partners, especially Abernathy, have an interest in having U.S. Patents 5,566,073 and  
18 5,904,724 declared invalid.

19  
20 29. There was no apparent activity in the case until two years later, in September 2006 when  
21 Robert Adams of Optima Technology Group contacted Mike Abernathy about licensing the  
22 Margolin Patents. See Exhibit 24 at Appendix Volume 2 A59.

23  
24 In the numerous exchanges between Adams and Abernathy several things are apparent.

1 a. Abernathy showed a deeply flawed understanding of patents.

2  
3 One of Abernathy's themes is that an autopilot is absolutely essential in flying a UAV, that the  
4 '724 patent does not have an autopilot, and therefore, the '724 patent is "defective." Abernathy's  
5 understanding of what constitutes a "defective" patent is defective. See 35 U.S.C. 251.

6  
7 For example, suppose Margolin were to get a patent for

- 8  
9 1. A powerplant for an automobile comprising:  
10  
11 a first spherical container containing a fuel;  
12  
13 a smaller second spherical container containing the same said fuel;  
14  
15 whereas said smaller second spherical container is located in approximately the center  
16 of said first spherical container;  
17  
18 whereas said fuel comprises deuterated acetone substantially saturated with uranium  
19 hexafluoride gas;  
20  
21 whereas said second smaller spherical container is made using a jacket of lithium-6  
22 deuteride;  
23  
24 whereas cavitation fusion is used to produce a fusion reaction in said smaller second  
25 spherical container;  
26  
27 whereas said fusion reaction in said smaller second spherical container is amplified by  
28 said jacket of lithium-6 deuteride and creates a fission reaction in said first spherical  
29 container; and  
30  
31 whereas the heat from said fusion reaction and said fission reaction is used to perform  
32 useful work.

33  
34 Margolin's patent would not be defective because he failed to include windshield wipers for the  
35 automobile.

36  
37 Also, Abernathy does not understand the Doctrine of Equivalents or Contributory Infringement.

1 b. Abernathy sent copies of everything to NASA and had a conference call on the matter.

2  
3 c. In his correspondence, Abernathy harps on the theme, “provide evidence that the  
4 invention was built.” One of the requirements for a patent is that the Specification describe the  
5 claimed invention in enough detail that it may be built by a Person having Ordinary Skill in the  
6 Art (POSITA) without undue experimentation.

7  
8 In the proposed example, Margolin would not have to build the hybrid fusion/fission powerplant  
9 in order to patent it. All he would have to do is describe it in enough detail so a POSITA could  
10 build it without undue experimentation.

11  
12 Patents do not exist in order to benefit inventors. Patents exist in order to benefit Society. The  
13 Founding Fathers considered the matter important enough to put it in the U.S. Constitution.

14  
15 Article I, Section 8 lists one of the powers of Congress:

16 **To promote the Progress of Science and useful Arts, by securing for limited Times to**  
17 **Authors and Inventors the exclusive Right to their respective Writings and**  
18 **Discoveries;**  
19

20 Authors get a limited-time monopoly to their work through Copyrights. Inventors get a limited-  
21 time monopoly to their work through patents. (Authors get a much better deal.)

22  
23 Patents aren’t free. In return for a patent you have to fully disclose your invention. That is how  
24 patents **Promote the Progress of Science and useful Arts**. Note that it doesn’t say **Promote the**  
25 **Economic Interests of Big (or small) Companies**.

1 Without Patents the only way to protect your invention is to keep it a secret. You might think,  
2 “How can you sell something and also keep it a secret? Someone can buy one and reverse  
3 engineer it.”

4  
5 Oftentimes that is true, but there are many products where the secret is in how it was  
6 manufactured. That is especially true in the Chemical Industry.

7  
8 Whether you build a working prototype or not is irrelevant. Whether you produce a product or  
9 not is irrelevant. The test is whether the application Promotes the Progress of Science and useful  
10 Arts. When you comply with the Patent Rules without building a prototype, it is called  
11 Constructive Reduction to Practice. Many big companies get patents for things they never build  
12 or produce.

13  
14 Again, this complicated email chain will be unwrapped in an attempt to make sense of it.

15 \_\_\_\_\_  
16  
17 [Page 00080] [AV2-A74]  
18 From: Robert Adams [redacted (b)(6)]  
19 Sent: Tuesday, September 19, 2006 7:53 AM  
20 To: [redacted (b)(6)]  
21 cc: [redacted (b)(6)]  
22 Subject: [Norton AntiSpam] Rapid Imaging Software, Inc. patent infringement

23  
24 It has come to our attention that your company provides Synthetic Vision to fly UAV both  
25 in real time and in simulation.

26 \_\_\_\_\_  
27  
28 September 19, 2006  
29 Michael F. Abernathy  
30 Rapid Imaging Software, Inc.  
31 [redacted (b)(6)]  
32 [redacted (b)(6)]  
33

1 Sent via US MAIL, FAX & EMAIL  
2

3  
4 Mr. Abernathy,  
5

6 It has come to our attention that your company provides Synthetic Vision to fly UAV both  
7 in real time and in simulation.  
8

9 I am sure that Mr. Francisco Delgado of NASA and your other clients would agree with  
10 your company having a proper license of our intellectual property.  
11

12 Hence as a legal formality, we are inviting your company to license our technology seeing  
13 that your company is already commercially using and selling said technology as covered by  
14 our IP listed below:  
15

16 United States Patent 5,566,073 Margolin October 15, 1996 Pilot aid using a synthetic  
17 environment  
18

19 United States Patent 5,904,724 Margolin May 18, 1999, Method and apparatus for remotely  
20 piloting an aircraft  
21

22 We are pleased that you recognize the value of using Synthetic Vision to allow UAV's to  
23 See-and-Avoid other aircraft; this is covered by our patents as noted above.  
24

25 Please contact us so that we can a proper legal license with our attorneys for your use of our  
26 technology and/or you may contact our attorneys (HYPERLINK) [redacted (b)(6)] to  
27 arrange a proper license of said intellectual property. You have 15 days to do so.  
28

29  
30 Sincerely,  
31

32 Robert Adams, CEO  
33 Optima Technology Group  
34

35 RA/cp  
36  
37  
38  
39

40 [Page 00079] [AV2-A73]

41 From: Mike Abernathy [redacted (b)(6)]

42 Sent: Sunday, September 24, 2006 4:29 PM

43 To: 'Robert Adams'

44 Subject: RE: [Norton AntiSpam] Rapid Imaging Software, Inc. patent infringement

1  
2 Dear Mr. Adams,  
3

4 I have just returned from business travel, and have not had a chance to look over your  
5 communications in detail. Thank you very much for bringing your concerns to our attention.  
6 Let me assure you that we will do everything in our power, now and in the future, to avoid  
7 infringement of these or any patents. We have already begun another careful analysis of  
8 them and will act swiftly upon what we learn, should any problems be found. We have been  
9 aware of these patents for some years and have not ever infringed upon them, and will not  
10 do so. When we first learned of them we carefully examined our activities and those of our  
11 customers to make sure there was no possible infringement of them. As soon as we learned  
12 of it, we also informed the legal departments of our major customers to alert them to the  
13 existence of USP 5,904,724, but so far no UAV manufacturers have been seriously  
14 interested in offering synthetic vision for their UAV pilot stations.  
15

16 We discovered that the system described in the patent pertaining to remotely piloted vehicles  
17 USP 5,904,724 contains an entire clause in claim 1 that did not exist in the X38 or other  
18 UAVs that we have seen – this is the final paragraph of claim 1 regarding the method for  
19 handling delay in the control loop by "adjusting control sensitivity". This simply is not  
20 present in any form in any vehicles with which we have experience. Since all claims of this  
21 patent include this clause by reference, that patent is not relevant to these vehicles because  
22 none of them have this feature.  
23

24 More important however, is that all UAV control systems with which we are familiar require  
25 a device called an autopilot which is not contemplated at all in the subject patent. This  
26 device is similar to ones in modern manned aircraft, but it is used to control the aircraft  
27 flight in the pitch, heading, and roll axes. On UAVs, the communications delay is not  
28 handled by determining the delay and adjusting the control sensitivity as Margolin  
29 prescribes. Instead, an autopilot is installed onboard the aircraft where it senses changes in  
30 pitch, heading, and roll locally on board the aircraft. The pilot still makes control inputs to  
31 fly the airplane, but only via the autopilot on board the aircraft. The autopilot corrects  
32 attitude drift instantaneously avoiding the problem of substantial communication delays, and  
33 allows the pilot to control the vehicle in a more stable manner. Most important, the autopilot  
34 is absolutely required to deal with the frequent communications outages which occur .  
35 between the UAV and the ground control segment (This can be anywhere from a second to  
36 an hour in length, generally). In the system of Margolin, a communications outage would  
37 often result in the loss of the aircraft, because the pilot would be unable to correct attitude  
38 drift during communication link loss and the air vehicle would go out of control and could  
39 crash. In the last decade of working with UAVs never have I witnessed a flight in which the  
40 communication link was not lost at least once during the flight. If the control communication  
41 link goes down, no control inputs can be made to the aircraft from the pilot on the ground,  
42 but the autopilot keeps the airplane from crashing by flying straight and level or gently  
43 banking until the link is restored. The system of Margolin does not recognize the problem of  
44 link loss, and fails to offer any solution. The autopilot functionality can be located in various

1 components in the X38 it was in the on board GNC (Guidance Navigation and Control)  
2 computer, as I recollect.  
3

4 There is another on-board component called a SAS or Stability Augmentation System found  
5 on most large modern UAVs such as Predator, and which performs additional real-time  
6 stabilization to that done by the autopilot. Again, the SAS is not contemplated by the  
7 Margolin patent, yet is required to dampen control system oscillations in order to safely  
8 operate a UAV in systems that may suffer from communications delays to remote user  
9 control inputs. There are many more differences that we found when we first examined it,  
10 but as you can see we have never worked with a vehicle upon which your system could have  
11 been implemented and safely flown, and therefore we realized that it is impossible for us to  
12 have infringed this patent 5,904,724. You may easily independently verify the fact of these  
13 profound and fundamental differences from your system by examining the printed published  
14 materials regarding UAV control system and NASAs many publications on X-38 control  
15 systems.  
16

17 We have never allowed our software to be used as an aid in piloting manned aircraft and  
18 thus cannot have infringed 5,566,073. If you aware of anyone doing this with our software,  
19 kindly inform us immediately, and we will ask them to desist.  
20

21 Finally, let me set your mind at ease by informing you that our software product license  
22 currently explicitly contains the following clause: "The user is prohibited from using this  
23 software to pilot manned or unmanned aircraft." Alas, the requirements of our current  
24 company insurance policy, combined with the profound lack of a market for this possible  
25 application of our technology facilitated this business decision. Your letter said we  
26 recognize the "value" of this technology, but in view of the current situation "lack of value"  
27 is probably more appropriate.  
28

29 We will get back to you just as soon as we have had a chance to study these patent claims  
30 further. For now, is there anything else that our company can reasonably do in regard to the  
31 concern that you expressed?  
32

33 Sincerely,  
34

35 Mike Abernathy  
36 Rapid Imaging Software, Inc.  
37  
38  
39  
40

41 [Page 00096] [AV2-A90]  
42 From: Mike Abernathy [redacted (b)(6)]  
43 Sent: Sun 9/24/2006 6:38 PM  
44 To: Fein, Edward K. (JSC-AL); Delgado, Francisco J. (JSC-ER2)

1 Subject: Rapid Imaging Software, Inc. patent infringement

2  
3 Gentlemen,

4  
5 I strongly believe that these two patents are defective, but more important I feel strongly that  
6 NASA and RIS did not infringe either one of them, in spite of these accusations.

7  
8 I would like to ask for your help urgently since these people are threatening to sue us and  
9 since they have falsely accused us of infringement.

10  
11 I therefore would like to ask both of you to read my letter attached below which has been  
12 sent to Mr. Adams, to make sure that I am stating things properly. Would it be possible for  
13 me to call you tomorrow on the phone?

14  
15 Mike Abernathy  
16 Rapid Imaging Software, Inc.

17  
18  
19 *{ copy of email sent to Robert Adams at 5:29pm }*  
20  
21  
22  
23

---

24 [Page 00096] [AV2-A90]

25 RE: Rapid Imaging Software, Inc. patent infringement

26  
27 From: Delgado, Francisco J. (JSC-ER2) [redacted (b)(6)]

28 To: Mike Abernathy [redacted (b)(6), Fein, Edward K. (JSC-AL)

29 Date: Sep 25 2006 - 1:13am  
30

31 Please work with Mr. Fein on a time to call. I can 'sneak' away from any activity tomorrow  
32 to join a conference call. thanks,

33  
34 Frank  
35  
36  
37

---

38 [Page 00095] [AV2-A89]

39 RE: Rapid Imaging Software, Inc. patent infringement

40 From: Fein, Edward K. (JSC-AL) [redacted (b)(6)]

41 To: Delgado, Francisco J.(JSC-ER2) [redacted (b)(6)], Mike Abernathy [redacted (b)(6)],  
42 Kennedy, Alan [redacted (b)(6)]

43 Date: Sep 25 2006 - 8:55am  
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[redacted (b)(5)]

Edward K. Fein  
Deputy Chief Counsel/  
Intellectual Property Counsel  
NASA Johnson Space Center  
[redacted (b)(6)]

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[Page 00095] [AV2-A89]  
RE: Rapid Imaging Software patent infringement

From: Fein, Edward K. (JSC-AL [redacted (b)(6)])  
To: Mike Abernathy [redacted (b)(6)], Delgado, Francisco J.(JSC-ER2), [redacted (b)(6)]  
Kennedy, Alan J. (HQ-MC000) [redacted (b)(6)]  
Date: Sep 25 2006 - 9:59am

Thanks, Mike!

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[Page 00091] [AV2-A85]  
From: Robert Adams [redacted (b)(6)]  
Sent: Monday, September 25, 2006 8:55 AM  
To: 'Mike Abernathy'  
Subject: RE: Rapid Imaging Software, Inc. patent infringement

Mike,

Thanks for your email, I will forward it today over to my patent and review legal team. Once they complete a review of your comments, I will give you a ring on the phone and a response via the post and/or attorneys.

Respectfully,  
  
Robert Adams

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[Page 00091] [AV2-A85]  
From: Mike Abernathy [redacted (b)(6)]

Sent: Monday, September 25, 2006 10:32 AM  
To: Fein, Edward K. (JSC-AL); DELGADO FRANCISCO J. (FRANK)  
Cc: Kennedy, Alan J. (HQ-MC000)  
Subject: FW: Rapid Imaging Software, Inc. patent infringement

FYI

Mike Abernathy  
Rapid Imaging Software, Inc.

[copy of Adams email 8:55AM]

---

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[Page 00091] [AV2-A85]  
From: Fein, Edward K. (JSC-AL)  
To: Mike Abernathy [redacted (b)(6)] DELGADO FRANCISCO J. (FRANK) [redacted (b)(6)]  
CC: Kennedy, Alan J. (HQ-MC000) [redacted (b)(6)]  
Date: Sep 25 2006 - 10:38am

Thanks, Mike.

-Ed

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[Page 00082] [AV2-A76]  
From: Mike Abernathy [redacted (b)(6)]  
Sent: Monday, September 25, 2006 10:08 AM  
To: 'Robert Adams'  
Subject: question

1  
2 Robert,

3  
4 Thanks for your offer to call but I am still getting over throat surgery from 2 weeks ago so  
5 my phone is forwarded, but I look forward to email from you and/or your attorneys.  
6

7 In trying to understand the value of your IP I would like to ask 2 questions regarding USP  
8 5,904,724. Was this system ever built? Was it ever flight tested? Of course you need not  
9 answer, but it really would be helpful in understanding what is required to get your  
10 technology to market.  
11

12  
13 Mike Abernathy  
14 Rapid Imaging Software, Inc.  
15  
16  
17  
18

19 [Page 00082] [AV2-A76]  
20 FW: question  
21 From: Mike Abernathy [redacted (b)(6)]  
22 To: DELGADO FRANCISCO J. (FRANK) [redacted (b)(6)], Fein, Edward K. (JSC-AL),  
23 [redacted (b)(6)], 'Kennedy, Alan J. (HQ-MC000)'[redacted (b)(6)] [redacted (b)(6)]  
24 Date: Sep 25 2006 - 11:44am  
25  
26

27 One more FYI.  
28  
29

30 Mike Abernathy  
31 Rapid Imaging Software, Inc.  
32  
33

34 [copy of email sent to Robert Adams]  
35  
36  
37  
38

39 [Page 00073] [AV2-A67]  
40 From: Robert Adams [redacted (b)(6)]  
41 Sent: Monday, September 25, 2006 12:26 PM  
42 To: 'Mike Abernathy'  
43 Subject: Privileged and Confidential Settlement Communications Protected Under Rule 408  
44 of the Federal Rules of Evidence

1  
2 Privileged and Confidential Settlement Communications Protected Under Rule 408 of the  
3 Federal Rules of Evidence  
4

5  
6 Mike,  
7

8 My legal team has read your response and it is a personal shame since you would rather cut  
9 and run verse facing the facts and take a license for past and future business, as I am sure it  
10 would be substantially less then litigation.  
11

12 As you have been made aware in our prior communications, among other inventions, the  
13 Patents protect a number of features that are implemented in products capable of flying any  
14 and all UAV's (1.3) remotely and/or using Synthetic Vision and/or using a synthetic  
15 environment.  
16

17 1.1 "Patent Portfolio" shall mean the portfolio consisting of United States Patent Numbers  
18 5,904,724 (Method and Apparatus for Remotely Piloting an Aircraft), 5,566,073 (Pilot Aid  
19 Using a Synthetic Environment), and those future United States patents that may be added in  
20 accordance with the covenants and warranties.  
21

22 1.2 "RPV" shall mean "remotely piloted vehicle." A "remotely piloted aircraft" is an RPV.  
23 "UAV" shall mean "unmanned aerial vehicle." RPV is an older term for UAV. "UCAV"  
24 shall mean "Unmanned Combat Aerial Vehicle." UCAV is also sometimes defined as an  
25 "Uninhabited Combat Aerial Vehicle." UCAV is a UAV that is intended for use in combat.  
26 UCAS means "Unmanned Combat Air System."  
27

28 1.3 "Synthetic Vision" is the current term for "Synthetic Environment" and is the three  
29 dimensional projected image data presented to the pilot or other observer.  
30

31 Of the ten companies responsible for the establishment of UAV Specifications or standard,  
32 eight of those companies sell UAV-Devices under brands they control, and each of those  
33 companies, i.e., Boeing Aerospace; Lockheed; Nakamichi Corporation; General Atomics  
34 Corporation; L-3 and Jacor Corporation; Raytheon; and Geneva Aerospace, pay Optima  
35 running royalties for the above referenced patents.  
36

37 The substantial terms and conditions of our licensing Agreement: i) resulted from  
38 negotiations with the market leading manufacturers of UAV's; ii) are subject to most favored  
39 nation clauses; and iii) are, therefore, not negotiable.  
40

41 The Agreement i) is exceedingly fair; ii) does not obligate Infringer to anything more than  
42 an industry accepted reasonable royalty for the Patents; iii) does not obligate Infringer to  
43 anything more than an industry accepted reasonable terms; and iv) may be canceled by  
44 Infringer at any time.

1  
2  
3 Mike, there is no reason to permit Infringer (Your company) to further drag on the execution  
4 of said Agreement based on the facts present on the infringement matter.  
5

6 Infringer must appreciate that the Patents cover a range of different inventions required to  
7 implement the UAV using Synthetic Vision Specifications; and there exists pending  
8 divisions of the Patents having claims that are read on by implementation of the UAV  
9 Specifications.  
10

11 Infringer principal competitors have appreciated the exceptional litigation strength and  
12 flexibility of my patent portfolio and have decided to accept a license rather than expose  
13 themselves to an injunction.  
14

15 Infringer must appreciate that if litigation between the parties is initiated: i) the matter will  
16 immediately become personal for both parties; ii) I do not have to account to any other  
17 person; and iii) no license or settlement of any kind will ever be possible under any of my  
18 intellectual properties. Infringer's competitors require that Infringer be either licensed or  
19 enjoined.  
20

21 I have resolved myself to this course of action in the event an agreement reached shortly, I  
22 firmly believe that enjoining Infringer from selling UAV-Devices will not result in lost  
23 royalties; and it is in Optima's long-term interests to make an example of a company that has  
24 refused to take a license.  
25

26 Anyone who is fully knowledgeable of the strength and scope of my patent portfolio, and  
27 who appreciates the risk-taking and tenacity that I have demonstrated, would not, in light of  
28 the terms being offered, recommend jeopardizing the UAV business Infringer enjoys in the  
29 U.S.  
30

31 1.  
32 I have just returned from business travel, and have not had a chance to look over your  
33 communications in detail. Thank you very much for bringing your concerns to our attention.  
34 Let me assure you that we will do everything in our power, now and in the future, to avoid  
35 infringement of these or any patents. We have already begun another careful analysis of  
36 them and will act swiftly upon what we learn, should any problems be found. We have been  
37 aware of these patents for some years and have not ever infringed upon them, and will not  
38 do so. When we first learned of them, we carefully examined our activities and those of our  
39 customers to make sure there was no possible infringement of them. As soon as we learned  
40 of it, we also informed the legal departs of our major customers to alert them to the  
41 existence of USP 5,904,724, but so far no UAV manufacturers have been seriously  
42 interested in offering synthetic vision for their UAV pilot stations.  
43  
44

1 RIS own admission they knew about '724 will go to show that their infringement was  
2 willful, which means treble damages Robert. (They probably found out about it when NASA  
3 interviewed Jed about their X-38 project.) We will find out at trial and/or during the  
4 discover phase.

5  
6 From their web site: <http://www.landform.com/>  
7

8 SmartCam3D provides unparalleled situation awareness for UAS sensor operators. It fuses  
9 video with synthetic vision to create the most powerful situation awareness technology  
10 currently available. SmartCam3D is an augmented reality system that has been developed,  
11 flight tested, and deployed in the most demanding conditions including combat, and as a  
12 result it is highly evolved technology which is in use today around the world. The reason  
13 that SmartCam3D is so popular is simple: it makes sensor operators more effective, and  
14 reduces the target response time. SmartCam3D is deployed with US Army Shadow UAV,  
15 and is at present being integrated to the USAF Predator, as well as the Army Warrior UAS.  
16 SmartCam3D is the war fighter's choice for sensor operator situational awareness.  
17

18 Improving a patented invention by adding something to it (in this case fusing video with  
19 synthetic vision) is still infringement. Indeed, you may be able to patent the improvement.  
20 However, you may not practice the improved invention without the permission of the  
21 original patent holder. (It also means that the holder of the original patent may not practice  
22 your improvement without your permission.)  
23

24 Since they publicly admit SmartCam3D is being used with US Army Shadow, USAF  
25 Predator, and Army Warrior his statement "no UAV manufacturers have been seriously  
26 interested in offering synthetic vision for their UAV pilot stations" is obviously false.  
27

28 Also from their web site:  
29

### 30 Software License Changes 31

32 RIS, Inc. changed insurance carriers, and effective September 1st, 2006 we updated our  
33 Software User License agreement. It now states that "The user is prohibited from using this  
34 software to pilot manned or unmanned aircraft." Our licenses have always prohibited use of  
35 our software for piloting manned aircraft. As you know, we had hoped that we would find a  
36 market for our UAV Glass Cockpit Product line. However, there is simply not sufficient  
37 market interest for us to bring such a product to market at this time, so we have decided not  
38 to release it. As a small company, we need to focus on our energy on the Sensor Operator  
39 and Intelligence Analyst at this time.  
40

41 He is saying that his product should not be used for the very purpose it being advertised,  
42 sold, and used for. Lame. And it doesn't get him off the hook as he is still legally liable.  
43

44 Since it did not state this until September 1, 2006, he has started to take this seriously, and

1 he is clearly worried thus, he changed the terms to try to reduce the liability. I will have our  
2 team use wayback site and pull up the old Software User License agreement prior to Sept 1,  
3 2006 this is when I bet they made all their sales and that is what OTG would be entitled too  
4 as well.

5  
6 Here is a short lesson on infringement for Mike.

7  
8 From: <http://inventors.about.com/library/bl/toc/bl patent-infringement.htm>

9  
10 Text Box: Infringement can be direct, indirect, or contributory. Anyone who makes, uses, or  
11 sells the patented invention is a direct infringer. If a person actively encourages another to  
12 make, use, or sell the invention, the person so inducing is liable for indirect infringement.  
13 Contributory infringement can be committed by knowingly selling or supplying an item for  
14 which the only use is in connection with a patented invention. Good faith or ignorance is no  
15 defense for direct infringement, but it can be for indirect or contributory infringement. The  
16 remedies for infringement consist of: 1. Injunctive relief,  
17 2. damages (including treble damages for willful infringement),  
18 3. attorneys' fees in some cases, and  
19 4. court costs.

20  
21  
22 2.

23 We discovered that the system described the in patent pertaining to remotely piloted vehicles  
24 USP 5,904,724 contains an entire clause in claim 1 that did not exist in the X38 or other  
25 UAVs that we have seen — this is the final paragraph of clause 1 regarding the method for  
26 handling delay in the control loop by "adjusting control sensitivity". This simply is not  
27 present in any form in any vehicles with which we have experience. Since all claims of this  
28 patent include this clause by reference, that patent is not relevant to these vehicles because  
29 none of them have this feature.

30  
31 The clause he is referring to is:

32  
33 a set of one or more remote flight controls coupled to said computer for inputting said flight  
34 control information, wherein said computer is also for determining a delay time for  
35 communicating said flight data between said computer and said remotely piloted aircraft,  
36 and wherein said computer adjusts the sensitivity of said set of one or more remote flight  
37 controls based on said delay time.

38  
39 Time delays in a control system are unavoidable. Normally, a control system has fixed time  
40 delays and the system is designed to operate properly with these time delays. Because of the  
41 complexity of a UAV system these time delays may not be known at the time the system  
42 (including the control laws) are designed. These time delays may also change during a  
43 mission due to the communications path changing. If the system does not properly deal with  
44 these changing time delays it will lead to pilot-induced oscillation and there is a good chance

1 the aircraft will crash.

2  
3 Anyone designing a UAS that does not adjust for changing time delays is an idiot. I don't  
4 think the people making UAVs are idiots. That does not relieve him of contributory  
5 infringement. It is likely that these time delays are dealt with as part of the control law  
6 system which Abernathy might not be privy to and thus a court order will provide us his  
7 insider info.

8  
9  
10 3.

11 More important however, is that all UAV control systems with which we are familiar require  
12 a device called an autopilot which is not contemplated at all in the subject patent. This  
13 device is similar to ones in modern manned aircraft, but it is used to control the aircraft  
14 flight in the pitch, heading, and roll axes. On UAVs, the communications delay is not  
15 handled by determining the delay and adjusting the control sensitivity as Margolin  
16 prescribes. Instead, an autopilot is installed onboard the aircraft where it senses changes in  
17 pitch, heading, and roll locally on board the aircraft. The pilot still makes control inputs to  
18 fly the airplane, but only via the autopilot on board the aircraft. The autopilot corrects  
19 attitude drift instantaneously avoiding the problem of substantial communication delays, and  
20 allows the pilot to control the vehicle in a more stable manner.

21  
22 Most important, the autopilot is absolutely required to deal with the frequent  
23 communications outages which occur between the UAV and the ground control segment  
24 (This can be anywhere from a second to an hour in length, generally). In the system of  
25 Margolin, a communications outage would often result in the loss of the aircraft, because the  
26 pilot would be unable to correct attitude drift during communication link loss and the air  
27 vehicle would go out of control and could crash. In the last decade of working with UAVs  
28 never have I witnessed a flight in which the communication link was not lost at least once  
29 during the flight. If the control communication link goes down, no control inputs can be  
30 made to the aircraft from the pilot on the ground, but the autopilot keeps the airplane from  
31 crashing by flying straight and level or gently banking until the link is restored. The system  
32 of Margolin does not recognize the problem of link loss, and fails to offer any solution. The  
33 autopilot functionality can be located in various components in the X38 it was in the on  
34 board GNC (Guidance Navigation and Control) computer, as I recollect.

35  
36 The fact that '724 does not explicitly teach an autopilot is irrelevant. Adding an autopilot to  
37 '724 is still infringement, just as adding a video overlay is infringement.  
38 There is also the matter of the Doctrine of Equivalence. See attached file patentsl.pdf  
39 Consider Column 2, lines 12-18:

40  
41 The computers in the system allow for several modes of operation. For example, the remote  
42 aircraft can be instructed to fly to given coordinates without further input from the remote  
43 pilot. It also makes it possible to provide computer assistance to the remote pilot. In this  
44 mode, the remote flight control controls absolute pitch and roll angles instead pitch and roll

1 rates which is the normal mode for aircraft.

2  
3 That legal sounds like a defined autopilot to me and that as we need to show infringement at  
4 the Markman hearing..

5  
6  
7 4.

8 There is another on-board component called a SAS or Stability Augmentation System found  
9 on most large modern UAVs such as Predator, and which performs additional real-time  
10 stabilization to that done by the autopilot. Again, the SAS is not contemplated by the  
11 Margolin patent, yet is required to dampen control system oscillations in order to safely  
12 operate a UAV in systems that may suffer from communications delays to remote user  
13 control inputs. There are many more differences that we found when we first examined it,  
14 but as you can see we have never worked with a vehicle upon which your system could have  
15 been implemented and safely flown, and therefore we realized that it is impossible for us to  
16 have infringed this patent 5,904,724. You may easily independently verify the fact of these  
17 profound and fundamental differences from your system by examining the printed published  
18 materials regarding UAV control system and NASAs many publications on X-38 control  
19 systems.

20  
21 Again, adding something to '724 is still infringement.

22  
23 As far as examining the control systems on NASA's X-38 project is concerned, in a  
24 telephone conversation with NASA's Alan Kennedy in the Office of the General Counsel on  
25 February 9, 2006, he repeated his claim that, "The X-38 does fly." NASA has a video of the  
26 X-38 (flying) on its web site. (See [http://www.dfrc.nasa.gov/Gallery/Movie/X-](http://www.dfrc.nasa.gov/Gallery/Movie/X-38/HTML/EM-0038-)  
27 [38/HTML/EM-0038-](http://www.dfrc.nasa.gov/Gallery/Movie/X-38/HTML/EM-0038-)

28  
29  
30 5.

31 We have never allowed our software to be used as an aid in piloting manned aircraft and  
32 thus cannot have infringed 5,566,073. If you aware of anyone doing this with our software,  
33 kindly inform us immediately, and we will ask them to desist.

34  
35 We still have him on infringing on '724.

36  
37  
38 6.

39 Finally, let me set your mind at ease by informing you that our software product license  
40 currently explicitly contains the following clause: "The user is prohibited from using this  
41 software to pilot manned or unmanned aircraft." Alas, the requirements of our current  
42 company insurance policy, combined with the profound lack of a market for this possible  
43 application of our technology facilitated this business decision. Your letter said we

1 recognize the "value" of this technology, but in view of the current situation "lack of value"  
2 is probably more appropriate.  
3  
4  
5  
6

7 [Page 00073] [AV2-A67]

8 **latest from Optima**

9 From: Mike Abernathy [redacted (b)(6)]

10 To: FEIN, EDWARD K. (JSC-HA) (NASA) [redacted (b)(6)] Kennedy, Alan J. (HQ-  
11 MCOOO)

12 Date: Sep 25 2006 - 3:08pm  
13

14 \* image002.gif - 6.9k - View in Outlook  
15

16 Ed,  
17

18 This has not blown over. We would rather lose our company than see NASA hurt by this.  
19 Ed, it appears that RIS situation is hopeless. They know that we did not infringe, yet they  
20 continue because they know that we lack the funds to fight them. Our situation appears  
21 hopeless but we cannot accept a license for technology that we know is dangerous to the  
22 public, so I cannot accept this deal that they have offered.  
23

24 Let us know what you think as soon as possible.  
25  
26

27 Mike Abernathy  
28 Rapid Imaging Software, Inc.  
29  
30  
31  
32

33 [Page 00072] [AV2-A66]

34 From: Mike Abernathy [redacted (b)(6)]

35 Sent: Monday, September 25, 2006 1:29PM

36 To: 'Robert Adams'

37 Subject: License  
38  
39

40 Please tell the legal team thanks for getting back to us right away - we appreciate it.  
41

42 You have asked us to consider licensing and this we are now doing. In the interest of due  
43 diligence as a prospective licensor of your technology, we ask that you provide us with the  
44 following information about the subject invention:

1  
2 Was this invention ever constructed? If so when, where, and how?  
3

4 Was this invention ever flight tested? Please provide us with the name of the Pilot in  
5 Command, the responsible Flight Test Engineer, the model and block number of the vehicle  
6 and GCS, and the range or location at which such testing might have taken place. Also,  
7 indicate the dates of such testing. If flight test reports are available please provide them to  
8 us, as well.  
9

10 I know that you are anxious for us to consider your license offer, please provide us with this  
11 information.  
12

13 Mike Abernathy  
14 Rapid Imaging Software, Inc.  
15  
16  
17  
18

19 [Page 00072] [AV2-A66]  
20 From: Robert Adams [mailto: [redacted (b)(6)]  
21 Sent: Monday, September 25, 2006 2:49 PM  
22 To: 'Mike Abernathy' Subject: RE: license  
23

24 Mike,  
25

26 Neither the company nor I are in any way anxious in signing any more licensees's as we  
27 have many already, but as you know we must protect our patents in order to preserve said  
28 Intellectual Property.  
29

30 As to your questions, they do not relate to a license and/or a licensee. Our Intellectual  
31 Property has been tested in court and is proven solid by far such standards the Federal Court  
32 including the Federal Appeals Court. In addition, as to matters of disclosure, all such  
33 development at OTG and by our licensee is covered by NDA's.  
34

35 Should you wish to challenge such, then I advise you to seek proper legal counseling as we  
36 are not an attorney nor will ours advice you on such a matters.  
37

38 Your company has clearly infringed and OTG must protect itself against such matters just as  
39 your company would do if in the same position.  
40

41  
42 Robert Adams  
43  
44

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[Page 00071] [AV2-A65]  
From: Mike Abernathy [redacted (b)(6)]  
Sent: Monday, September 25, 2006 2:26 PM  
To: 'Robert Adams'  
Subject: RE: license

Robert,

You have offered to license your technology to our company. You have stated that this technology is useful for "see and avoid applications" for UAVs which is an interesting market arena. We are making a good faith effort to consider your offer. We must know whether this technology has been brought into existence and whether it was ever test flown as a matter of due diligence.

We are not asking these questions out of idle curiosity and we certainly not trying to be difficult — we need this information in order to know the market value of the technology to our users, and there are certain elements of the method that we have concerns about. A flight test report — even if the system was implemented on a model airplane — will almost certainly allay our concerns and we can get on with this. The fact of whether or not this technology has been tested does not require an NDA.

Robert, throughout our dealings I have been honest and responsive to all of your requests, perhaps at peril to our company. I now ask you to please reciprocate my efforts in a small way and provide the requested information so that we may consider your offer of license.

Mike Abernathy  
Rapid Imaging Software, Inc.

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[Page 00070] [AV2-A64]  
From: Robert Adam [redacted (b)(6)]  
Sent: Monday, September 25, 2006 3:51 PM  
To: 'Mike Abernathy'  
Subject: RE: license

Mike,

1 Let me try and be clear, all such development at OTG on behalf and or/or by our licensee is  
2 covered by NDA's and thus our company can be sued should we violate such agreements.  
3 As to your company's infringement of our patents, since that was clearly not covered by a  
4 NDA with us; please provide said information in detail:  
5

6 Other then those items listed at your website and NASA's, what other projects did you do  
7 that infringed on our invention? If so when, where, and how?  
8

9 Who at NASA flight-tested your product that used our invention? Please provide us with the  
10 name of the Pilot in Command, the responsible Flight Test Engineer, the model and block  
11 number of the vehicle and GCS, and the range or location at which such testing might have  
12 taken place with NASA and others. Also, indicate the dates of such testing. If flight test  
13 reports are available, as well please provide them to us.  
14

15 Mike, I have no time to play games with someone who clearly infringes and thinks nothing  
16 of respecting our IP.  
17

18 I will forward said matter to our legal department for further research and filing in  
19 accordance with the Federal laws. Please have your legal IP counsel contact our attorneys.  
20  
21

22 Robert Adams  
23  
24  
25  
26

27 [Page 00069] [AV2-A63]

28 From: Mike Abernathy [mailto:[redacted (b)(6)]]

29 Sent: Monday, September 25, 2006 6:25 PM

30 To: FEIN, EDWARD K. (JSC-HA) (NASA); DELGADO FRANCISCO J. (FRANK) v);  
31 [redacted (b)(6)]

32 Kennedy, Alan J. (HQ-MC000); [redacted (b)(6)]; 'Moore, Thomas, Mr, OSD-ATL'; 'Davey,  
33 Jon (Bingaman)'

34 Subject: and the very last communication of the day  
35  
36

37 Hi All,  
38  
39

40 Let me summarize what I think has just happened to our company.  
41

42 In late 1995 we introduce our LandForm synthetic vision system to the market as COTS  
43 software product.  
44

1 In 1997/8 we sell this to NASA and together we are the first people on earth to create a  
2 synthetic vision flight guidance system for a remotely piloted vehicle. Starting in 1998 the  
3 X38 is captive carried and test flown using this system. We documented our success in the  
4 attached document written in 1998 and published in early 1999. It was my privilege to be at  
5 Edwards when it happened, and is the highlight of my career until the program is cancelled  
6 in 2002.

7  
8 We go on and demonstrate that our software can be used as pilot aid to other UAVs  
9 including Predator, Shadow, Tern, and many more. We receive no interest in this  
10 application, but instead they use it for sensor operator stations. It is a commercial success  
11 and people say good things about it. It is sold to mostly to a commercial UAV manufacturer  
12 named AAI Corporation. Many tests are done and the military guys all like it.

13  
14 In 1999 the patent office issues a patent to a former Atari employee named Margolin for a  
15 Synthetic Environment for Remotely Piloted Vehicle. He had evidently applied for it in  
16 1996. Shortly thereafter he begins to complain to NASA that they and RIS infringed upon  
17 his patent presumably by flying a system 2 years before he received his patent. Is this a  
18 joke?

19  
20 In 7 years he never so much as asked RIS about using his technology. Margolin as best I can  
21 tell never built this system and never test flew it. Can't say as I blame him because his  
22 system looks to me like a crater looking for an address. It cannot be safely operated in the  
23 form patented (no autopilot). No one is even stupid enough to build it this way, not even  
24 him.

25  
26 Sometime after that, I am alerted to the patent. I read it, but since there are major differences  
27 in the way X-38 worked with our software, I felt strongly that we had not infringed. I  
28 provide this information, plus evidence of prior art to NASA legal counsel. I am troubled  
29 because really I can't see how his system could fly because it would fail during link loss.  
30 Margolin also had a patent on synthetic vision for manned aircraft (if you can imagine) and  
31 we found copious prior art for that. I am also troubled because I never hear that the request  
32 for reexamination has been sent in by NASA.

33  
34 Last week I received an email from Optima technology group threatening (thinly veiled) to  
35 destroy our relationships with our customers and sue us if we don't license their  
36 technologies. We explain that we do not sell software for use in piloting unmanned aerial  
37 vehicles any more owing to insurance which is true. We had demonstrated this in the past,  
38 but there really is not much market that we could see. We also explained that we had not  
39 infringed and why we thought we had been respectful of their patent, but they just tried to  
40 make it look like we infringed. But we did not.

41  
42 They know we cannot withstand the onslaught of their lawsuits, even though we are clearly  
43 and obviously not guilty of infringement. They think that we will have to fold and accept  
44 their license, but we cannot do this because they are legal blackmailers, and because they are

1 selling defective technology. If we give in, then they will just destroy some other little  
2 companies they way they did ours. And we cannot let anyone pay them off for us, because  
3 that just gives them funds to go destroy another company. For many years our company has  
4 tried to provide an innovative product with an excellent value and never compromise our  
5 integrity. I cannot let this nonsense bring that to an end by pretending that we are licensing  
6 technology when what they are selling is a fraud.  
7

8 When I asked politely if their system has ever been tested Mr. Adams simply tells us to go  
9 get a lawyer, he is referring the matter for filing. I felt that it was not unreasonable to ask to  
10 know this but it really made him furious. Anyway I told him to tell it to our lawyer Mr. Ben  
11 Allison of Sutinfirm with whom I shall meet tomorrow. Tonight they said that they will  
12 issue a cease and desist order, which I believe means that we will be unable to sell our  
13 software anymore which will destroy our income stream and that will be it. I can't waste  
14 anymore time on this now. It is time for me to get back to work on things that matter for our  
15 users.  
16

17 I have a docs appointment tomorrow at 8-10 local time. I had throat surgery recently so I  
18 really can't talk and frankly I find I tend to break into tears very frequently when I try to do  
19 so. But I want you all to know that I will stand firm until it is over. What would the soldiers  
20 who have used our software in combat think of me if I gave ground? Then bring it on.  
21

22 I know it sounds bad for us right now, but remember that whatever happens to us no one can  
23 take away the honor and the privilege of working with NASA, the OSD, and all the other  
24 completely excellent people with whom we have worked.  
25  
26

27 Mike Abernathy  
28 Rapid Imaging Software, Inc.  
29

30 Attached are the other communications from them.  
31  
32

---

33 Note that Abernathy sent a copy of the above email to the Office of the Secretary of Defense in  
34 the person of Mr. Thomas Moore (OSD-ATL). "OSD" indicates he is with the Office of the  
35 Secretary of Defense. "ATL" might mean Atlanta, but it probably means Acquisition,  
36 Technology & Logistics (AT&L).

37  
38 He also sent a copy to his U.S. Senator Jeff Bingaman (D-NM) in the person of Jon Davey. Jon  
39 Davey is Senator Bingaman's Legislative Assistant for issues related to the military and veterans'

1 affairs. He graduated from Carleton College in 2003 with a bachelor's degree in International  
2 Relations.

3 \_\_\_\_\_

4

5 [Page 00068] [AV2-A62]

6 FW: and the very last communication of the day

7

8 From: Fein, Edward K. (JSC-AL) [redacted (b)(6)]

9 To: Kennedy, Alan J. (HQ-MC000) [redacted (b)(6)]

10 CC: Borda, Gary G. (HQ-MC000) [redacted (b)(6)]

11 Date: Sep 26 2006 - 8:11 am

12

13

14 [redacted (b)(5)]

15

16

17 [redacted (b)(5)]

18

19

20

21

22 [Page 00067] [AV2-A61]

23 From: Robert Adams [redacted (b)(6) ]

24 Sent: Mon 9/25/2006 5:58 PM

25 To: Delgado, Francisco J. (JSC-ER2)

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

28

29

30 Sir,

31

32 Since you have clearly refused to cooperate, please provide us your department's heads  
33 information and said contact information including a contact in your IP litigation  
34 department. We are aware that you received your read receipt of our email sent to you  
35 regarding:

36

37 Let us chat on about SCOUT, SC3D, the X-38 program, and RIS; noted below are our  
38 patents that cover said technology that RIS and your groups are using.

39

40 United States Patent 5,566,073 Margolin October 15, 1996 Pilot aid using a synthetic  
41 environment

42

1 United States Patent 5,904,724 Margolin May 18, 1999, Method and apparatus for remotely  
2 piloting an aircraft  
3

4 We simple have one goal in mind and that is have a chat regarding the technology and that  
5 RIS and NASA take a license of said IP technology.  
6

7  
8 Thank you  
9  
10

11 From: Delgado, Francisco J. (JSC-ER2) [redacted (b)(6)]  
12 Sent: Tuesday, September 19, 2006 7:30 AM  
13 Subject: Read: Let us chat on about SCOUT, SC3D, the X-38 program and RIS; noted  
14 below are our patents that cover said technology that RIS and your groups are using.  
15

16 Your message  
17

18 To: Delgado, Francisco J. (JSC-ER2)  
19 Cc:  
20

21 Subject: Let us chat on about SCOUT, SC3D, the X-38 program and RIS; noted below are  
22 our patents that cover said technology that RIS and your groups are using.  
23

24 Sent: Tue, 19 Sep 2006 08:52:25 -0500  
25

26 was read on Tue, 19 Sep 2006 09:30:05 -0500  
27  
28  
29  
30

31 [Page 00067] [AV2-A61]

32 From: Delgado, Francisco J. (JSC-ER2) [redacted (b)(6)]  
33 Sent: Monday, September 25, 2006 9:42 PM  
34 To: Mike Abernathy; Fein, Edward K. (JSC-AL); Kennedy, Alan J. (HQ-MC000); [redacted  
35 (b)(6)]  
36 Cc: Delgado, Francisco J. (JSC-ER2); Fredrickson, Steven E. (JSC-ER)  
37 Subject: FW: Read: Let us chat on about SCOUT, SC3D, the X-38 program and RIS; noted  
38 below are our patents that cover said technology that RIS and your groups are using.  
39  
40

41 See email from "Mr. Adams" below.  
42  
43

44 This is getting more ridiculous by the minute. I have resisted replying in any form as

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

9 The folks pressing forward with this claim do not have solid ground to stand on (IMHO).  
10 Based on the previous research performed, I do not see how their patent claims are valid and  
11 I would like to request that NASA's council take this matter seriously and get the patents  
12 invalidated (as it should have been done when this first showed up a couple of years ago).  
13 This is not only the right legal thing to do, but also the right moral thing to do. If we allow  
14 an individual to continue to harass small companies and stand-by with little/no action, then  
15 we are no better than the company doing the harassing. As a government organization, we  
16 need to keep the public faith and trust and again, "do the right thing." I realize that patience  
17 is important in legal matter, but believe that the time for sitting idle and hoping that this  
18 matter goes away is way past due and that something needs to be done ASAP. Putting  
19 companies that NASA relies on to help move technology forward out of business with a  
20 barrage of unwarranted litigation does not seem like it is in NASA's (or our taxpayers) best  
21 interest.  
22

23 Please let me know what I need to do on my end to help move this along.  
24

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

32  
33 Thank You,  
34

35 Frank Delgado  
36  
37

38 The above email from Delgado is especially probative. NASA had already denied Margolin's  
39 claim and was convinced that Margolin would not sue them for infringement. Why is it intent in  
40 attacking the Margolin Patents?  
41

1 Delgado states:

2 Based on the previous research performed, I do not see how their patent claims are valid and  
3 I would like to request that NASA's council take this matter seriously and get the patents  
4 invalidated (as it should have been done when this first showed up a couple of years ago).  
5 This is not only the right legal thing to do, but also the right moral thing to do. If we allow  
6 an individual to continue to harass small companies and stand-by with little/no action, then  
7 we are no better than the company doing the harassing. As a government organization, we  
8 need to keep the public faith and trust and again, "do the right thing." I realize that patience  
9 is important in legal matter, but believe that the time for sitting idle and hoping that this  
10 matter goes away is way past due and that something needs to be done ASAP. Putting  
11 companies that NASA relies on to help move technology forward out of business with a  
12 barrage of unwarranted litigation does not seem like it is in NASA's (or our taxpayers) best  
13 interest.  
14

15 Delgado is also Wrapping Himself in the Flag.

16  
17 NASA is not the Court. NASA is not the Patent Office. NASA is not the Protector of the Public  
18 Faith and Trust. The only interest NASA has shown in this case has been its own and the  
19 interests of its Partners.

20  
21 This is more than NASA trying to help a former contractor. This looks like NASA trying to help  
22 someone who is acting as their Agent.

23  
24 NASA evidently spent a great deal of time trying to help Abernathy. What project or account did  
25 they charge their time to?

26  
27  
28 \_\_\_\_\_  
29 [Page 00064] [AV2-A59]  
30 From: Fein, Edward K. (JSC-AL)  
31 Sent: Wednesday, August 06, 2008 3:29 PM  
32 To: McNutt, Jan (HQ-MC000)  
33 Cc: Borda, Gary G. (HQ-MC000); Rotella, Robert F. (HQ-MA000)  
34 Subject: RE: Patent Infringement claim from Jed Margolin; NASA Case No. 1-222

1  
2 **[redacted (b)(5)]**  
3  
4

5 RE: Read: Let us chat on about SCOUT, SC3D, the X-38 program and RIS; noted below are  
6 our patents that cover said technology that RIS and your groups are using.  
7

8 From: Mike Abernathy [redacted (b)(6)]

9 To: 'Delgado, Francisco J. (JSC-ER2)[redacted (b)(6)] 'Fein, Edward K. (JSC-  
10 AL)' [redacted (b)(6)] 'Kennedy, Alan J. (HQ-MC000)' [redacted (B)(6)]

11 Cc: 'Fredricson, Steve E. (JSC-ER)' [redacted (b)(6)]

12 Date: Sep 26 2006 12:13pm  
13

14 Thank you very much. It means very much to Carolyn and I right now.  
15

16 Mike Abernathy

17 Rapid Imaging Software, Inc.  
18  
19  
20

21 30. Margolin filed his FOIA Request on July 1, 2008. It was turned over to McNutt of the  
22 Office of the General Counsel. McNutt asked Margolin for a 90-day extension on July 24, 2008.  
23 Margolin agreed on August 8, 2008.

24  
25 Shortly thereafter McNutt asked Laura Burns (Law Librarian for the Office of the General  
26 Counsel) for Court documents in the then-ongoing litigation between Universal Avionics  
27 Systems Corporation (“UASC”) and Optima Technology Group (OTG) and Jed Margolin in U.S.  
28 District Court for the District of Arizona (Universal Avionics Systems Corporation vs. Optima  
29 Technology Group, et. No. CV 07-588-TUC-RCC). See Exhibit 25 at Appendix Volume 2 A99.  
30

31 [Page 02666] [AV2-A99]

32 **[redacted]**  
33

34 From: Burns, Laura (HQ-MA000)

35 Sent: Friday, August 15, 2008 2:10 PM

1 To: McNutt, Jan (HQ-MC000)  
2 Subject: UAS.vs.OTG  
3  
4

5 Jan,  
6

7 Attached are some documents from the Universal case. Several of the documents were not  
8 available because they were sealed. If you have any questions, let me know.

9 UAs.vs. OTG. docket.pdf  
10 OTG.Answer.to.UAS.Complaint.pd...  
11 OTG.Amended.Answer.pdf  
12 UAS. Reply.Counterclaims.pdf  
13 UAS.Order.Motion.Dismiss.4.9.0...  
14 USA.2ndAmendedComplaint.pdf  
15 OTG.Answer.2nd.Amended.Complai...  
16 UAS.Reply.to.OTG. Counterclaims...

17  
18 Laura  
19 Law Librarian for the Office of the General Counsel  
20 NASA Headquarters  
21 300 E Street, SW, Suite 9W39A  
22 Washington, DC 20546  
23

24 202-358-2078 (v)  
25 202-358-4355 (f)  
26  
27

28 In October McNutt asked Ms. Burns for an update. See Exhibit 25 at Appendix Volume 2 A100.  
29

30  
31 [Page 002968] [AV2-A100]  
32 McNutt, Jan (HQ-M0000)  
33 Sent: Wednesday, October 01, 2008 11:05 AM  
34 To: Burns, Laura (HQ-MA000)  
35 Subject: RE: UAS.vs.OTG  
36

37 Laura,  
38

39 Could you get an update on this case for me. I've included the last docket document you sent  
40 me for the case.  
41

42 << File: UAs vs OTG docket.pdf >>

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Thanks, Jan

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From: Burns, Laura (HQ-MA000)  
Sent: Wednesday, October 01, 2008 2:18 PM  
To: McNutt, Jan (HQ-MC000)  
Subject: RE: UAS.vs.OTG

Jan,

Attached is the update for the docket. Please let me know which documents you would like.

PDF: docket.update.pdf

Laura

Law Librarian for the Office of the General Counsel  
NASA HeadQuarters

---

Why did McNutt do this? The litigation between UASC and OTG had nothing to do with Margolin's Claim or Margolin's FOIA Request.

Since NASA wanted the Margolin patents invalidated it is reasonable to ask the following questions:

a. Did McNutt (or any NASA employee or anyone outside NASA at NASA's direction) have communications with UASC regarding the Margolin Patents, Margolin's Claim, or Margolin's FOIA Request?

b. Did McNutt (or any NASA employee or anyone outside NASA at NASA's direction) aid UASC in its litigation with OTG?

1 McNutt's actions place any and all communications between NASA (or any NASA employee or  
2 anyone outside NASA acting at NASA's direction) and Universal Avionics Systems Corporation  
3 (or anyone acting for Universal Avionics Systems Corporation) that relate to the Margolin  
4 patents, the Infringement Claim, and Margolin's FOIA request subject to Margolin's FOIA  
5 request.

6  
7 It should be noted that the UASC litigation was settled long before it even got to the part that  
8 was supposed to be about the patents.

9  
10 31. In or around October 2008 NASA Dryden (DFRC-NASA) was apparently asked if any of  
11 their projects might infringe on the Patents. The answers are informative. See Exhibit 26 at  
12 Appendix Volume 2 A103.

13  
14 In the following email (written by Mark Homer, quoting John Del Frate - October 21, 2008),  
15 although he concludes that Dryden's work does not infringe he pays the patent ('724) a high  
16 compliment.

17 Since May of 1999, we have tested a number of UAVs. This patent would be addressed to  
18 our most sophisticated UAVs which would include: X-36, X-45 (UCAV), Pathfinder Plus,  
19 Helios/Centurion, Altus, Altair, Ikhana, Hyper-X (X-43) and X-48B (currently flying). As I  
20 mentioned in a previous e-mail, our level of complexity in the ground control stations never  
21 reached the level described in the patent. It could go there, but it is very costly and our niche  
22 is in testing the aircraft and doing research to enable capabilities. The environment described  
23 in the patent is more for the operational level UAVs.

24  
25 And he also reveals which projects probably infringe.

- 26
- X-36, X-45 and X-48B were done by Boeing.

- 1 • Pathfinder Plus and Helios/Centurion were sponsored by the Office of Aerospace  
2 Technology at NASA Headquarters. They were managed by the NASA Dryden Flight  
3 Research Center in partnership with AeroVironment, Inc., Monrovia, Calif.
- 4 • Altus and Altair are General Atomics.
- 5 • Lkhana is a modified version of the Predator B manufactured by General Atomics.
- 6 • Hyper-X (X-43) was a project managed by NASA-Langley and included partners Boeing,  
7 Micro Craft, Pratt & Whitney, RJK Technologies, and Boeing, who was responsible for  
8 the vehicle design, thermal protection system, flight control system and the navigation.

9  
10  
11 [Page 00618] [AV2-A103]

12 From: Homer, Mark W. (JPL-0910)

13 Sent: Tuesday, October 21, 2008 11:17 AM

14 To: Borda, Gary G. (HQ-MC000); Rotella, Robert F. (HQ-MA000)

15 Subject: FW: UAV Patent Infringement Issue

16 Attachments: Patent 5904724 Margolin.jd.pdf

17  
18  
19 Gentlemen,

20  
21 According to DFRC's technical folks (as you can see by the attached), the UAVs flown at  
22 Dryden don't infringe on the patent (several elements in the independent claims aren't found  
23 in these aircraft). Please let me know if you need any further assistance.

24  
25 Mark Homer

26 818-354-7770

27  
28 From: Del Frate, John H. (DFRC-Z)

29 Sent: Tue 10/21/2008 11:00 AM

30 To: Homer, Mark W. (JPL-0910)

31 Cc: Brent Cobleigh; Samuels, David A. (DFRC-L)

32 Subject: Re: UAV Patent Infringement Issue

33  
34 Mark,

35  
36 Attached is the patent document with my notes for each sub-element in claims 1 and 13. Let

1 me know if you have any trouble seeing them. I could not do a copy and paste off the pdf  
2 file (it must have been locked) so rather than re-typing the sections, I just used the "note"  
3 tool in Acrobat to capture my responses.  
4

5 Since May of 1999, we have tested a number of UAVs. This patent would be addressed to  
6 our most sophisticated UAVs which would include: X-36, X-45 (UCAV), Pathfinder Plus,  
7 Helios/Centurion, Altus, Altair, Ikhana, Hyper-X (X-43) and X-48B (currently flying). As I  
8 mentioned in a previous e-mail, our level of complexity in the ground control stations never  
9 reached the level described in the patent. It could go there, but it is very costly and our niche  
10 is in testing the aircraft and doing research to enable capabilities. The environment described  
11 in the patent is more for the operational level UAVs.  
12

13 Again, please let me know if you need anything else.  
14

15 John  
16

17  
18 On 10/20/08 1:54 PM, "Homer, Mark W. (JPL-0910)" <mark.w.homer@nasa.gov> wrote:  
19

20 John,  
21

22 Thanks for your effort. Based on this information, it appears that the UAVs Dryden has used  
23 do not infringe the patent (in order for infringement to occur, all of the "sub-elements" in the  
24 independent claims (1 and 13) must be met. If you could simply provide me with why you  
25 believe that certain of the sub-elements of these two claims weren't used by Dryden, a little  
26 more specifically, so I can provide this info to HQ, that would be great. Thanks again.  
27

28 Mark  
29  
30

31 Mr. Del Frate pays another compliment to the '724 patent in this email sent October 20, 2009.  
32

33 The patent in question, in general, captures some typical features that are inherent in all  
34 UAVs. However when it shifts into using computer generated terrain models and head  
35 mounted displays, that level of sophistication was never found in our Ground Control  
36 Stations – it was possible, but we were cost and schedule constrained and it was not a  
37 requirement for meeting our goals.  
38

39 And we find out that Brent Cobleigh knows if General Atomics infringes.  
40

41 I'm not sure how best to respond to your request, but I will take a stab, and then you can tell  
42 me what else you need. I will be responding to the Patent Claims fairly broadly but I will let  
43 Brent Cobleigh speak for the capability of the General Atomics family of aircraft.  
44

1 But there is no evidence in the NASA Documents that Mr. Cobleigh was asked.

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[Page 00618] [AV2-A104]  
From: Del Frate, John H. (DFRC-Z)  
Sent: Mon 10/20/2008 10:56 AM  
To: Homer, Mark W. (FL-0910)  
Cc: Brent Cobleigh  
Subject: Re: UAV Patent Infringement Issue

Mark,

I'm not sure how best to respond to your request, but I will take a stab, and then you can tell me what else you need. I will be responding to the Patent Claims fairly broadly but I will let Brent Cobleigh speak for the capability of the General Atomics family of aircraft.

The patent in question, in general, captures some typical features that are inherent in all UAVs. However when it shifts into using computer generated terrain models and head mounted displays, that level of sophistication was never found in our Ground Control Stations – it was possible, but we were cost and schedule constrained and it was not a requirement for meeting our goals.

I will list the claim numbers followed by a Y or N or ?. I use "?" when I'm not sure if we had that feature.

- 1 – By my count 6 sub-claims: Y, Y, N, N, N, N
- 2 – 2 sub-claims: Y, ?
- 3–Y
- 4–Y
- 5–Y
- 6–Y
- 7–N
- 8–N
- 9–Y
- 10-?
- 11-?
- 12–N
- 13 – Y, N, Y, N (in some parts of this paragraph), N (but it depends how this is defined)
- 14–Y
- 15–Y
- 16–N
- 17–Y
- 18-?

1 19-?  
2 20 – Y (some of the UAVs could do this)

3  
4 Let me know what else you need.

5  
6 John

---

7  
8  
9 32. In early October 2008 McNutt contacted Abernathy and asked for help in the  
10 infringement action. This is another tangled email thread. Again, in order to show them in a less  
11 confusing manner they have been converted to text and will be reproduced here in what appears  
12 to be the correct chronological order and without unnecessary duplication. The page numbers  
13 refer to the NASA page numbers followed by the Appendix Volume 2 page number. (When  
14 emails are part of a chain of quoted messages and they come from different time zones it can be  
15 difficult to precisely determine the proper chronological order.) See Exhibit 27 at Appendix  
16 Volume 2 A106.

17  
18  
19 [Page 01864] [AV2-A110]  
20 From: McNutt, Jan (HQ-M0000)  
21 Sent: Friday, October 03, 2008 1:37 PM  
22 To: mikea@landform.com  
23 Subject: Optima Technology Group - Margolin Patents

24  
25 Dear Mr. Abernathy,

26  
27 I am a new attorney working on Intellectual Property and Commercial Law matters at  
28 NASA and have been assigned to handle a long outstanding claim against the agency for  
29 patent infringement due to NASA's collaboration with your company in the late 90s. Mr. Ed  
30 Fein of the Johnson Space Center suggested I contact you to discuss the infringement action  
31 brought against us by the Optima Technology Group regarding a patent they own by the  
32 inventor Jed Margolin. I would like to set up a conference next week sometime for this  
33 purpose. Please let me know if you are inclined to speak with NASA on this and if so, when  
34 would be a good time for you.  
35

1       Regards,  
2

3       Jan S. McNutt  
4       Senior Attorney (Commercial)  
5       Office of the General Counsel  
6       NASA Headquarters  
7       [redacted (b)(6)]  
8

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10  
11       [Page 01863] [AV2-A109]  
12       From: Mike Abernathy [redacted (b)(6)]  
13       Sent: Friday, October 03, 2008 2:49 PM  
14       To: 'McNutt, Jan (HQ-MC000)'  
15       Cc: Benjamin W. Allison; krukar@olpatentlaw.com  
16       Subject: RE: Optima Technology Group - Margolin Patents  
17

18       Privileged and Confidential  
19

20       Dear Jan,  
21

22       We will of course be happy to help however possible. Our company prepared a request for  
23       re-examination of these patents based on prior art and would have used it had OTG not gone  
24       away.  
25

26       These patents are defective because the invention is both obvious and non-novel as  
27       evidenced by numerous printed published works. (We can provide these references if  
28       needed). Ironically, they claim patent on work already published by NASA over a decade  
29       earlier.  
30

31       The attached NASA technical publication by Shahan Serrafian, *Simulator Evaluation of a*  
32       *Remotely Piloted Vehicle Lateral Landing Task Using a Visual Display*, dates from 1984  
33       and fully anticipates both Margolin patents, and is referenced by neither one.  
34

35       [http://en.wikipedia.org/wiki/Highly Manueverable Aircraft Technology](http://en.wikipedia.org/wiki/Highly_Maneuverable_Aircraft_Technology)  
36

37       In other words, OTG is attempting force NASA to pay for a patent infringement on  
38       something that NASA in fact invented and published more than a decade prior to the patent  
39       filing.  
40

41       Would Wednesday at 10AM MT be convenient for you?  
42

43       Mike Abernathy

1 Rapid Imaging Software, Inc.

2  
3 www.landform.com

---

4  
5  
6 About the Serrafian reference: **Simulator Evaluation of a Remotely Piloted Vehicle Lateral**  
7 **Landing Task Using a Visual Display**. Serrafian published two reports about HiMat.

8 NASA Technical Memorandum 84916 (May 1984):

9 NASA Technical Memorandum 85903 (August 1984):

10  
11 Although the material in both reports is mostly the same they are not identical. Abernathy's  
12 failure to distinguish the two reports (or note that there are two reports) is poor scholarship.

13  
14 Abernathy also failed to mention that neither report shows the use of synthetic vision.

15  
16 The Serrafian report that Abernathy should have read is NASA Technical Memorandum 88264

17 **Effect of Time Delay on Flying Qualities: An Update** by Rogers E. Smith and Shahan K.

18 Sarrafian. See Exhibit 29 at Appendix Volume 3 A4.

19  
20 From the Introduction:

21 The advent of modern, full-authority electronic flight control systems produced many  
22 exciting advances in aircraft handling and performance capabilities. Unfortunately, this  
23 improved capability has not evolved without cost. Chief among the problems related to this  
24 modern technology is the introduction of additional time delay in the response of the aircraft  
25 to pilot input. These time delays can produce a significant degradation in the flying qualities  
26 of the aircraft during demanding tasks.

27  
28 This Serrafian report is about the need to compensate for time delays in the control systems used  
29 in modern manned aircraft. There are additional time delays with unmanned aircraft which must  
30 be considered, and they are considered in the '724 patent.

31

1 Abernathy cited Wikipedia as a source. Anyone can edit Wikipedia. Wikipedia states

2 (<http://en.wikipedia.org/wiki/Wikipedia:About>)

3 Wikipedia is written collaboratively by an international group of volunteers. Anyone with  
4 internet access can write and make changes to Wikipedia articles. There are no requirements  
5 to provide one's real name when contributing; rather, each writer's privacy is protected  
6 unless they choose to reveal their identity themselves.

7  
8 The Wikipedia article on Highly Maneuverable Aircraft Technology was started March 24, 2006  
9 by a contributor named *Arado*, and simply said:

10 The Highly Maneuverable Aircraft Technology (HiMAT) was a NASA-program to develop  
11 technologies for future fighter aircraft. Among the technologies explored were close-coupled  
12 canards, fully digital flight control (including propulsion), composite materials (graphite and  
13 fiberglass), winglets etc.

14  
15 The article did not mention synthetic vision until February 5, 2008. That contributor, using the  
16 name *SoarIT*, has chosen to remain anonymous.

17  
18 In short, Wikipedia cannot be relied upon for reliable information on subjects where people have  
19 an agenda to promote.

20 \_\_\_\_\_  
21

22 [Page 01860] [AV2-A106]  
23 **[redacted]**  
24 From: McNutt, Jan (HQ-M0000)  
25 Sent: Monday, October 06, 2008 11:18 AM  
26 To: Rotella, Robert F. (HQ-MA000)  
27 Cc: Borda, Gary G. (HQ-MC000)  
28 Subject: FW: Optima Technology Group - Margolin Patents

29  
30 First attorney.

31  
32 -----Original Message-----

33  
34 From: krukar@olpatentlaw.com [redacted (b)(6)]  
35 Friday, October 03, 2008 5:13 PM  
36 To: Mike Abernathy

1 Cc: McNutt, Jan (HQ-MC000); [redacted (b)(6)]  
2 Subject: RE: Optima Technology Group - Margolin Patents  
3

4  
5 Hi Jan,  
6

7 Richard Krukar, the guy that prepped the reexam request here.  
8

9 Another issue we found is that Rapid Imaging Software (RIS) is not infringing either  
10 directly or indirectly.  
11

12 ... richard  
13  
14

15 On Fri, October 3, 2008 2:48 pm, Mike Abernathy wrote:

16 > Privileged and Confidential

17 >

18 > Dear Jan,

19 >

20 > We will of course be happy to help however possible. Our company  
21 > prepared a request for re-examination of these patents based on prior art  
22 > and would have used it had OTG not gone away.  
23 >

24 > These patents are defective because the invention is both obvious and  
25 > non-novel as evidenced by numerous printed published works. (We can  
26 > provide these references if needed). Ironically, they claim patent on  
27 > work already published by NASA over a decade earlier.  
28 >

29 > The attached NASA technical publication by Shahan Serrafian, Simulator  
30 > Evaluation of a Remotely Piloted Vehicle Lateral Landing Task Using a  
31 > Visual Display, dates from 1984 and fully anticipates both Margolin patents, and  
32 > is referenced by neither one.  
33 >

34 > [http://en.wikipedia.org/wiki/Highly Manueverable Aircraft Technology](http://en.wikipedia.org/wiki/Highly_Maneuverable_Aircraft_Technology)  
35 >

36 > In other words, OTG is attempting force NASA to pay for a patent  
37 > infringement on something that NASA in fact invented and published more  
38 > than a decade prior to the patent filing.  
39 >

40 > Would Wednesday at 10AM MT be convenient for you?  
41 >

42 > Mike Abernathy

43 > Rapid Imaging Software, Inc.

44 > [redacted (b)(6)]

1 >  
2 > www.landform.com  
3

---

4  
5 [Page 01863] [AV2-A109]  
6 **[redacted]**  
7 From: McNutt, Jan (HQ-M0000)  
8 Sent: Monday, October 06, 2008 11:18 AM  
9 To: Rotella, Robert F. (HQ-MA000)  
10 Cc: Borda, Gary G. (HQ-M0000)  
11 Subject: FW: Optima Technology Group - Margolin Patents

12  
13 Second attorney.

14  
15 From: Benjamin W. Allison [redacted (b)(6)]  
16 Sent: Friday, October 03, 2008 5:46 PM  
17 To: Mike Abernathy; McNutt, Jan (HQ-MC000)  
18 Cc: krukar@olpatentlaw.com  
19 Subject: RE: Optima Technology Group - Margolin Patents

20  
21 Jan,

22  
23 We're assisting RIS in the Optima matter as well, and I would like to participate in the call  
24 Wednesday. Let me know call-in information when you can.

25  
26 Regards, Ben

27  
28 Benjamin Allison  
29 Sutin Thayer & Browne PC  
30 [redacted (b)(6)]

---

31  
32  
33 [Page 01865] [AV2-A111]  
34 **[redacted]**  
35 From: McNutt, Jan (HQ-M0000)  
36 Sent: Monday, October 06, 2008 11:19 AM  
37 To: Rotella, Robert F. (HQ-MA000); Fein, Edward K. (JSC-AL)  
38 Cc: Borda, Gary G. (HQ-MC000)  
39 Subject: FW: patent  
40 Attachments: HiMAT Claims Analysis of Patent 5904724.doc;

1 HIMAT\_Kempel\_1988\_0006558\_1989006558.pdf

2  
3 Second email from Abernathy.

4  
5 -----  
6 From: Mike Abernath [redacted (b)(6)]  
7 Sent: Saturday, October 04, 2008 7:08 PM  
8 To: McNutt, Jan  
9 Cc: [redacted (b)(6)]  
10 Subject: patent

11  
12 Privileged and confidential

13  
14 Hi Jan,

15  
16 Richard is quite correct to point out that we did not infringe. Our software license in fact  
17 prohibits this use of our software.

18  
19 I have attached a claims chart regarding NASA research fully anticipating the patent, to help  
20 you become familiar with the patent in question. Please keep this information confidential  
21 for now.

22  
23 Mike Abernathy  
24 Rapid Imaging Software, Inc.  
25 [redacted (b)(6)]  
26 www.landform.com

27  
28  
29  
30  
31 [Page 01960] [AV2-A113]  
32 From: McNutt, Jan (HQ-MC000)  
33 Sent: Tuesday, October 07, 2008 9:27 AM  
34 To: Mike Abernathy  
35 Cc: [redacted (b)(6)]  
36 Subject: RE: patent

37  
38 Hello Mike,

39  
40 I've set up a telephone conference for 10:00 AM MT (12:00 PM EDT), Wednesday, October  
41 15th. The call in number is Toll Free: [not redacted by NASA] and the Passcode is: [not  
42 redacted by NASA]. I think I have the time right. Please check this (Arizona??).  
43

1 Mr. Bob Rotella from HQ and Mr. Ed Fein with JSC will be joining us. Thanks and looking  
2 forward to talking to you.

3  
4 Regards, Jan

5  
6 This document, including any attachments, contains information that may be confidential,  
7 protected by the attorney-client or other applicable privileges, or constitutes non-public  
8 information. All content is intended only for the designated recipient(s). If you are not an  
9 intended recipient of this information or have received this message inadvertently, please  
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11 destruction. Use, dissemination, distribution, or reproduction of this information by  
12 unintended recipients or in a manner inconsistent with its provision is not authorized and  
13 may be unlawful.

14  
15  
16  
17  
18 [Page 01962] [AV2-A115]

19 From: [redacted (b)(6)]

20 Sent: Wednesday, October 08, 2008 12:59 PM

21 To: McNutt, Jan (HQ-MC000)

22 Cc: Rotella, Robert F. (HQ-MA000); Fein, Edward K. (JSC-AL)

23 Subject: RE: patent

24  
25 It was a pleasure to hear your viewpoints on the Margolin patent. I'm just shooting a side  
26 email to mention how thankful I am for NASA's work over the last 50 years and for how  
27 much of it is searchable online. I've actually used some NASA reports from the '60s (Apollo  
28 program) in filing a reexamination request for another client.

29  
30 all for now

31  
32 Richard Krukar

33 Ortiz and Lopez, PLLC

34  
35  
36  
37  
38 [Page 01963] [AV2-A116]

39 **[redacted]**

40 From: Mike Abernathy

41 Sent: Wednesday, October 08, 2008 1:29 PM

42 To: McNutt Jan (HQ-MC000)

43 Cc: [redacted (b)(6)] Rotella, Robert F. (HQ-MA000); Fein,

44 Subject: RE: patent

1  
2 Privileged and confidential

3  
4 Dear Jan,

5  
6 After speaking with Richard and Ben RIS, Inc. has decided to honor your request to provide  
7 NASA with our research regarding the subject patent.

8  
9 We sincerely appreciate your interest in protecting NASA's important published work in  
10 synthetic vision research for the benefit of the American people.

11  
12 I will begin forwarding the subject research papers and Richard's claims charts in several  
13 emails.

14  
15 Mike Abernathy  
16 Rapid Imaging Software, Inc.  
17 [redacted (b)(6)]  
18 www.landform.com

19  
20  
21  
22  
23 [Page 01965] [AV2-A118]

24 **[redacted]**

25 From: McNutt, Jan (HQ-MC000)

26 Sent: Wednesday, October 08, 2008 2:30 PM

27 To: Mike Abernathy

28 Cc: [redacted (b)(6)] Rotella, Robert F. (HQ-MA000); Fein., Edward K. (JSC-AL)

29 Subject: RE: patent

30  
31  
32 Hi Mike,

33  
34 I'm sorry we were cut off earlier when you called. I must have pushed the wrong button  
35 when I put on my headset.

36  
37 Thank you also for taking the time and effort and to allow us to benefit from your years of  
38 dealing with this technology. A quick look confirms that I have received all the attachments  
39 that you sent, so we will spend a little time looking them over. It's nice to know NASA  
40 technology has been of such benefit for all of you. NASA tries hard to make technology  
41 available to the world without restrictions unless absolutely necessary. In fact, my main job  
42 is to assist the efforts of technology transfer, rather than have it locked up in our agency.  
43 See: <http://www.ipp.nasa.gov/>. I will let you know the development of this in as much as I  
44 can. Hopefully, we will find a solution that everyone can share in.

1  
2  
3       Regards,

4  
5       Jan

6  
7       This document, including any attachments, contains information that may be confidential,  
8       protected by the attorney-client or other applicable privileges, or constitutes non-public  
9       information. All content is intended only for the designated recipient(s). If you are not an  
10       intended recipient of this information or have received this message inadvertently, please  
11       take appropriate steps to destroy this content in its entirety and notify the sender of its  
12       destruction. Use, dissemination, distribution, or reproduction of this information by  
13       unintended recipients or in a manner inconsistent with its provision is not authorized and  
14       may be unlawful.

15  
16       Privileged and confidential

---

17  
18  
19       The preceding emails show there was a conference call with at least Jan McNutt, Bob Rotella, Ed  
20       Fein, Mike Abernathy, and Abernathy's attorneys.

21  
22       The close cooperation between these parties constitute agency, misconduct, or conspiracy.

23  
24       McNutt says, "Hopefully, we will find a solution that everyone can share in."

25  
26       Everyone except Margolin and Optima Technology Group, that is.

27  
28       And who did McNutt mean by "everyone" ?

29  
30       It is not known if McNutt kept his promise to Abernathy, "I will let you know the development  
31       of this in as much as I can." The NASA documents are silent on the matter.

32  
33  
34       [Page 01968] [AV2-121]  
35       [redacted]  
36       From: Mike Abernathy [redacted (b)(6)]

1 Sent: Wednesday, October 08, 2008 4:18PM  
2 To: McNutt, Jan (HQ-MC000)  
3 Cc: [redacted (b)(6), Rotella, Robert F. (HQ-MA000); Fein, Edward, K. (JSC-AL)  
4 Subject: draft article  
5 Attachment  
6 Attachments: REVISED AUVSI column v5 clean.doc  
7

8 Hi All,  
9

10 The attached article is one written by myself and Dr. Mark Draper and Gloria Calhoun of the  
11 Air Force Research Lab about the history of synthetic vision naturally with particular focus  
12 on the USAF and with an eye toward UAVs. This is a draft technical journal article which  
13 has not yet been published, but which will be submitted for publication in the near future as  
14 soon as it is approved through AFRL channels.  
15

16 I am sending it to you because it tells the story of how NASA and USAF developed this  
17 powerful technology called synthetic vision. The article is entitled "*Synthetic Vision*  
18 *Technology for Unmanned Aerial Vehicles: Historical Examples and Current Emphasis*". I  
19 hope you find it interesting and useful.  
20

21 Mike Abernathy  
22

23 Rapid Imaging Software, Inc.

24 [redacted (b)(6)]

25 [www.landform.com](http://www.landform.com)  
26  
27

28 33. The article that Abernathy sent to NASA to preview (See Exhibit 30 at Appendix Volume  
29 3 A18) was published in the December 2008 issue AUVSI's *Unmanned Systems Magazine* as

30 **Synthetic Vision Technology for Unmanned Systems: Looking Back and Looking Forward.**

31 The authors are Jeff Fox, Michael Abernathy, Mark Draper and Gloria Calhoun. See Exhibit 31  
32 at Appendix Volume 3 A26.

33 Abernathy is with Rapid Imaging Software, Mark Draper and Gloria Calhoun are with AFRL,  
34 and Jeff Fox is listed as Flight Operations Engineer at NASA Johnson Space Center. (See  
35 Exhibit 31 at Appendix Volume 3 A27) Jeff Fox was not listed as a co-author on the preview  
36

1 copy Abernathy gave to NASA. A comparison of the two versions shows that it was tightened  
2 up and made more readable, presumably by AUVSI Editor Brett Davis. There are no major  
3 additions. The addition of Mr. Fox's name and affiliation with NASA indicates that NASA gave  
4 its approval to the article. It also gave the article more credibility.

5  
6 The article presents a spurious history of synthetic vision.

7  
8 Margolin responded with the article **Synthetic Vision – The Real Story**. See Exhibit 32 at  
9 Appendix Volume 3 A29. Although the editor of AUVSI Magazine had promised Margolin the  
10 opportunity to respond in the magazine, he later refused to even mention the controversy about  
11 the Abernathy article. See Exhibit 33 at Appendix Volume 3 A87. As result, Margolin posted his  
12 response on his personal web site at [www.jmargolin.com](http://www.jmargolin.com) .

13  
14 NASA decided to deny Margolin's claim in July, 2004. (See Exhibit 20 at Appendix Volume 2  
15 A19]. Everything after that is post-decisional and therefore not exempt from production.

16 Although NASA has now provided approximately 4,000 pages of documents many are redacted  
17 and it is likely that many have been entirely withheld.

18  
19 NASA must disclose all these documents in their entirety, preferably in their original electronic  
20 format.

21  
22 34. Margolin sent a copy of his response to McNutt. See Exhibit 34 at Appendix Volume 3  
23 A91. There is no evidence in the NASA documents that anyone at NASA discussed the Margolin  
24 Response. It is hard to believe that no one at NASA discussed it.

1 The NASA documents from Abernathy end with one where he expresses pleasure at the apparent  
2 misfortune of others. (See Exhibit 28 at Appendix Volume 2 A125)

3

4 35. Finally we find out what this has all been about in these emails from Robert F. Rotella,  
5 Senior Patent Attorney, Office of the General Counsel, NASA Headquarters. [See Exhibit 34 at  
6 Appendix Volume 3 A94]

7

8 The first one appears to have been sent when he was offsite and sent the email to himself. The  
9 second one was to his staff. Emphasis has been added.

10  
11

---

[Page 02363] [AV3-A94]

12

[redacted]

13

From: Bob Rotella [r.rotella@att.net]

14

Sent: Thursday, March 19, 2009 10:17 AM

15

To: Rotella, Robert F. (HQ-MC000)

16

Subject: **war**

17

18

NASA Administrative Claims - Jed Margolin and its successor in interest, Optima, have  
19 pursued an administrative claim for patent infringement. Upon completion of investigation  
20 by JSC and DFC, reviewed all materials and prepared initial draft of final agency  
21 determination letter denying claim based on lack of infringement. (Rotella, McNutt,  
22 Borda)(3/9/09)

23

24

25

26

27

---

[Page 02364] [AV3-A95]

28

[redacted]

29

From: Rotella, Robert F. (HQ-MC000)

30

Sent: Thursday, March 19, 2009 10:24 AM

31

To: Borda, Gary G. (HQ-MC000); Graham, Courtney B. (HQ-M0000)

32

Cc: Bayer, Kathy (HQ-MC000)

33

Subject: **WAR item**

34

35

36

1 NASA Administrative Claims - Jed Margolin and its successor in interest, Optima, have  
2 pursued an administrative claim for patent infringement. Upon completion of investigation  
3 by JSC and DFC, reviewed all materials and prepared initial draft of final agency  
4 determination letter denying claim based on lack of infringement. (Rotella, McNutt, Borda)  
5

6 Robert F. Rotella  
7 Senior Patent Attorney  
8 Office of the General Counsel  
9 NASA Headquarters  
10 [redacted (b)(6)]  
11  
12

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14 protected by the attorney-client or other applicable privileges, or constitutes non-public  
15 information. It is intended only for the designated recipient(s). If you are not an intended  
16 recipient of this information, please take appropriate steps to destroy this document in its  
17 entirety and notify the sender of its destruction. Use, dissemination, distribution, or  
18 reproduction of this information by unintended recipients is not authorized and may be  
19 unlawful.  
20  
21

---

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

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

26 The very next document is also interesting.  
27  
28

---

29 [Page 02367] [AV3-A96]  
30 [redacted]  
31 From: Rotella, Robert F. (HQ-MC000)  
32 Sent: Tuesday, May 05, 2009 2:14 PM  
33 To: Graham, Courtney B. (HQ-MC000)  
34 Subject: CIPLG Practice Group  
35

36 1) Node 3 module of ISS online naming contest: Drafted set of rules and entry conditions for  
37 participants; the most significant was that the agency was not bound to accept the results of

1 the online voting which avoided having to name Node 3 after Stephen Colbert, who  
2 encouraged viewers to nominate him.  
3  
4

5 2) Administrative Claims for Patent Infringement:  
6

7 a) Delta Engineers' allegation of infringement of its U.S. patent covering a "High  
8 Performance Cold Plate." Claim was denied in a final agency decision following extensive  
9 review;  
10

11 b) Margolin/Optima allegation of patent infringement by X-38 Project, based on patent  
12 covering "Synthetic Vision." Claim was denied in a final agency decision following  
13 extensive review and coordination with Center patent staffs.  
14

15 3) NASA trademarks: agency will pursue formal trademark registration in US and European  
16 Community for NASA brands, including: meatball, NASA seal, NASA acronym, "National  
17 Aeronautics and Space Administration.  
18  
19

20 Robert F. Rotella  
21 Senior Patent Attorney  
22 Office of the General Counsel  
23 [redacted (b)(6)]  
24  
25

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27 protected by the attorney-client or other applicable privileges, or constitutes non-public  
28 information. It is intended only for the designated recipient(s). If you are not an intended  
29 recipient of this information, please take appropriate steps to destroy this document in its  
30 entirety and notify the sender of its destruction. Use, dissemination, distribution, or  
31 reproduction of this information by unintended recipients is not authorized and may be  
32 unlawful.  
33

---

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

35  
36 It then decided to pursue formal trademark registration for various NASA brands.

37  
38 Why should anyone respect NASA's Intellectual Property when NASA refuses to respect the

39 Intellectual Property of others?

1 36. Over a period of only a few days in early November 2009 Margolin's personal web site  
2 ([www.jmargolin.com](http://www.jmargolin.com)) was visited by Abernathy's attorneys (Sutin Thayer), Universal Avionics  
3 Systems Corporation (both Arizona and Washington State), and the law firm of Greenberg  
4 Traurig.

5  
6 This is known because every server on the Internet keeps a log of accesses containing  
7 information such as the IP address of the computer accessing the server, time and date of access,  
8 and the page or file being accessed. As the Webmaster for his web site, Margolin has access to  
9 his server's logs.

10  
11 Every computer on the Internet has an IP address. It is how data packets are routed to where they  
12 are supposed to go.

13  
14 Through publicly available tools it is generally possible to determine who the IP Address belongs  
15 to and if it is assigned to a named server. For example, using the Whois service provided by  
16 Network Solutions it is possible to determine that the IP Address of 209.191.175.42 belongs to a  
17 range of IP Addresses assigned to Greenberg Traurig.

18  
19 <http://www.networksolutions.com/whois/index.jsp>

20  
21 209.191.175.42

22 Record Type: IP Address

23  
24 Internap Network Services Corporation PNAP-1-98 (NET-209-191-128-0-1)  
25 209.191.128.0 - 209.191.191.255

26  
27 Greenberg Traurig INAP-NYC-GREENBERG-3496 (NET-209-191-175-40-1)  
28 209.191.175.40 - 209.191.175.47  
29

1 This says that IP addresses from 209.191.175.40 to 209.191.175.47 are assigned to Greenberg  
 2 Traurig. IP Address 209.191.175.42 is within that range so it belongs to Greenberg Traurig.  
 3  
 4 By using a program that uses the Reverse IP Lookup command supported by DNS Servers it was  
 5 determined that the IP Address 207.114.136.186 is associated with the domain name  
 6 sutinfirm.com, which is the web site for Sutin Thayer.  
 7  
 8 Sutin Thayer, Universal Avionics Systems Corporation, and Greenberg Traurig have all been to  
 9 Margolin's web site before, but such visits have been relatively rare. For all of them to occur  
 10 within such a short period of time attracted Margolin's attention.

11  
 12 The following are exemplars. For all the Web accesses from Greenberg Traurig, Sutin Thayer,  
 13 and Universal Avionics Systems Corporation for 2009 see Exhibit 36 at Appendix Volume 3  
 14 A98.

15  
 16 Items of interest have been emphasized.

17  
 18 Greenberg Traurig

19  
 20 **209.191.175.42** 209.191.175.42 - - [03/Nov/2009:22:48:23 -0500] "GET /tomcat/**tomcat.htm**.  
 21 HTTP/1.1" 301 258 www.jmargolin.com "-" "Mozilla/4.0 (compatible; MSIE 6.0; Windows NT  
 22 5.2; SV1; .NET CLR 1.1.4322; .NET CLR 2.0.50727)" "-"

23  
 24 **209.191.175.42** 209.191.175.42 - - [06/Nov/2009:15:51:26 -0500] "GET /nasa/**nasa.htm**  
 25 HTTP/1.1" 200 60378 jmargolin.com "http://jmargolin.com/" "Mozilla/4.0 (compatible; MSIE  
 26 7.0; Windows NT 5.1; .NET CLR 1.1.4322; .NET CLR 2.0.50727; InfoPath.1; .NET CLR  
 27 3.0.04506.30; .NET CLR 3.0.04506.648)" "-"

28  
 29 **209.191.175.42** 209.191.175.42 - - [06/Nov/2009:15:56:35 -0500] "GET  
 30 /svr/**auvsi\_answer.htm** HTTP/1.1" 200 392069 jmargolin.com  
 31 "http://jmargolin.com/svr/auvsi\_response\_index.htm" "Mozilla/4.0 (compatible; MSIE 7.0;

1 Windows NT 5.1; .NET CLR 1.1.4322; .NET CLR 2.0.50727; InfoPath.1; .NET CLR  
2 3.0.04506.30; .NET CLR 3.0.04506.648) "-"

3  
4  
5 Universal Avionics Systems Corporation - Tucson, AZ

6  
7 **mx.uasc.com** 206.169.91.33 - - [04/Nov/2009:00:14:09 -0500] "GET /tomcat/**tomcat.htm**  
8 HTTP/1.1" 200 21340 www.jmargolin.com "-" "Mozilla/4.0 (compatible; MSIE 7.0; Windows  
9 NT 5.1; .NET CLR 1.1.4322; .NET CLR 2.0.50727; InfoPath.1)" "-"

10  
11  
12 Universal Avionics Systems Corporation - Redmond, WA

13  
14 **phoenix.uascwa.com** 206.169.227.226 - - [04/Nov/2009:11:23:19 -0500] "GET  
15 /tomcat/**tomcat.htm** HTTP/1.1" 200 21340 www.jmargolin.com "-" "Mozilla/5.0 (Macintosh; U;  
16 Intel Mac OS X 10\_6\_1; en-us) AppleWebKit/531.9 (KHTML, like Gecko) Version/4.0.3  
17 Safari/531.9" "-"

18  
19 [They came to [www.jmargolin.com](http://www.jmargolin.com) from a Google search for: **Jed Morgolin**]

20 **phoenix.uascwa.com** 206.169.227.226 - - [04/Nov/2009:12:44:56 -0500] "GET / HTTP/1.1"  
21 200 16200 www.jmargolin.com  
22 "http://www.google.com/search?sourceid=navclient&aq=t&ie=UTF-  
23 8&rlz=1T4ADBF\_enUS312US312&q=Jed+Morgolin" "Mozilla/4.0 (compatible; MSIE 7.0;  
24 Windows NT 5.1; .NET CLR 1.1.4322; .NET CLR 2.0.50727; InfoPath.1)" "-"

25  
26 **phoenix.uascwa.com** 206.169.227.226 - - [04/Nov/2009:12:45:05 -0500] "GET  
27 /svr/**auvsi\_response\_index.htm** HTTP/1.1" 200 2673 www.jmargolin.com  
28 "http://www.jmargolin.com/" "Mozilla/4.0 (compatible; MSIE 7.0; Windows NT 5.1; .NET CLR  
29 1.1.4322; .NET CLR 2.0.50727; InfoPath.1)" "-"

30  
31 **phoenix.uascwa.com** 206.169.227.226 - - [04/Nov/2009:12:45:25 -0500] "GET  
32 /nasa/**nasa.htm** HTTP/1.1" 200 60378 www.jmargolin.com "http://www.jmargolin.com/"  
33 "Mozilla/4.0 (compatible; MSIE 7.0; Windows NT 5.1; .NET CLR 1.1.4322; .NET CLR  
34 2.0.50727; InfoPath.1)" "-"

35  
36 **phoenix.uascwa.com** 206.169.227.226 - - [04/Nov/2009:13:06:08 -0500] "GET  
37 /patents2/**pilot.htm** HTTP/1.1" 200 12578 www.jmargolin.com  
38 "http://www.jmargolin.com/tomcat/tomcat.htm" "Mozilla/5.0 (Macintosh; U; Intel Mac OS X  
39 10\_6\_1; en-us) AppleWebKit/531.9 (KHTML, like Gecko) Version/4.0.3 Safari/531.9" "-"

1 Sutin Thayer

2  
3 **mail.sutinfirm.com** 207.114.136.186 - - [02/Nov/2009:20:11:13 -0500] "GET  
4 /svr/**auvsi\_answer.pdf** HTTP/1.0" 200 268354 www.jmargolin.com  
5 "http://www.jmargolin.com/svr/auvsi\_response\_index.htm" "Mozilla/4.0 (compatible; MSIE 7.0;  
6 Windows NT 5.1; GTB6; .NET CLR 1.1.4322; .NET CLR 2.0.50727; .NET CLR 3.0.4506.2152;  
7 .NET CLR 3.5.30729)" "-"

8  
9 [They came to [www.jmargolin.com](http://www.jmargolin.com) from a Google search for: **jmargolin**]  
10 **mail.sutinfirm.com** 207.114.136.186 - - [02/Nov/2009:19:35:58 -0500] "GET / HTTP/1.0"  
11 200 16200 www.jmargolin.com  
12 "http://www.google.com/search?hl=en&source=hp&q=**jmargolin&aq=f&oq=&aqi=&rlz=1**  
13 **R2ADFA\_enUS342**" "Mozilla/4.0 (compatible; MSIE 7.0; Windows NT 5.1; GTB6; .NET CLR  
14 1.1.4322; .NET CLR 2.0.50727; .NET CLR 3.0.4506.2152; .NET CLR 3.5.30729)" "-"

15  
16  
17 The web page **tomcat.htm** is the article Margolin wrote in 2001 titled **TomCat - Atari's Last**  
18 **XY Game** . TomCat was a 3D flying game that was never produced. It became an object of  
19 controversy during the Universal Avionics Systems Corporation lawsuit. Because Margolin is  
20 the Keeper of the TomCat History he was obliged to write about its role in the case. See Exhibit  
21 37 at Appendix Volume 3 A130. Although Margolin expended considerable effort to make  
22 videos of the game, none of the Visitors bothered to look at them.

23  
24 The web page **auvsi\_answer.pdf** is Margolin's response to the Abernathy AUVSI article. See  
25 Exhibit 32 at Appendix Volume 3 A29.

26  
27 The web page **auvsi\_answer.htm** is an html version of Margolin's Response.

28  
29 The web page **pilot.htm** is Margolin's index page for the '073 patent.

30  
31 The web page **nasa.htm** is Margolin's article/blog on the current case. When Margolin filed his  
32 FOIA request he asked for the Journalist Exemption on the grounds he intended to write an

1 article on How NASA Treats Independent Inventors, and that is what he is doing.

2 ([www.jmargolin.com/nasa/nasa.htm](http://www.jmargolin.com/nasa/nasa.htm))

3  
4 At one point Universal Avionics Systems Corporation did a Google search for **Jed Morgolin**.

5 Although they spelled Margolin's name wrong, Google took them to Margolin's web site  
6 anyway.

7

8 37. The reason for these visits was revealed on December 3, 2009 when Margolin received  
9 an email from Scott J. Bornstein ("Bornstein") of the law firm of Greenberg Traurig. See Exhibit  
10 38 at Appendix Volume 3 A134.

11  
12 Margolin points out that:

- 13 • He has never threatened to sue Abernathy for infringement of the Patents.
- 14 • He does not own the Patents and, therefore, does not have standing to sue Abernathy  
15 for infringement. Thus, Abernathy does not need to fear that Margolin will sue him  
16 for infringement.
- 17 • Optima Technology Group/Robert Adams is not Margolin's agent and does not  
18 represent him.
- 19 • Margolin is not Optima Technology Group/Robert Adams' agent and does not  
20 represent them.

21  
22 Bornstein represented Universal Avionics Systems Corporation in its lawsuit against Optima  
23 Technology Group and Margolin. He now also represents Abernathy.

24

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

3 It seems clear that the technical folks have determined that the Margolin patent on Synthetic  
4 Vision creates a substantial problem for many of our partners in the aviation safety industry  
5 for a variety of reasons.  
6

7 See Exhibit 23 at Appendix Volume 2 A55.  
8  
9

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

13  
14 They have waged a war (NASA's own word) against Margolin, one conducted by stealth and  
15 deception, all the while telling themselves it was for the Public Good. It was not for the Public  
16 Good. It was for their own benefit and the benefit of their Partners.

17  
18 And now Bornstein (representing NASA's agent Abernathy) has threatened Margolin with  
19 unspecified legal action which, if taken, would subject Margolin to a frivolous and malicious  
20 lawsuit.

21  
22 NASA has crossed a line.

23  
24 This line separates civilized behavior from uncivilized behavior.

25  
26 This line separates decency from indecency.

27  
28 This line separates bureaucratic self-interest from criminal misconduct.

29

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

3 We regret the delay in processing your claim and assure you that we are now undertaking  
4 measures to provide a resolution of your claim as soon as possible. Unfortunately, Mr. Alan  
5 Kennedy retired from NASA earlier this year and **the action on your claim was not**  
6 **conveyed to management in a timely manner.** In addition the local attorney responsible  
7 for review of your claim also departed from NASA. We are now cognizant of the  
8 importance of proceeding with a review of the claim and will contact you when we have  
9 reached a decision.

10  
11 {Emphasis added}  
12

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

16  
17 Still, since the core group was relatively small, they might have been able to operate under the  
18 radar.

19  
20 This Rogue Group has committed criminal misconduct under cover of authority.

21  
22 Normally, the department charged with investigating criminal misconduct is the Department of  
23 Justice. However, DOJ is representing NASA in the present case, which presents an  
24 insurmountable conflict of interest.

25  
26 The only way a proper investigation can be conducted is for the United States Attorney General  
27 to appoint Special Counsel as provided by 28 C.F.R. § 600 .

28

1 38. It is ironic that the documented unethical and criminal acts were committed by, at the  
2 behest of, or with the knowledge of NASA's Office of the General Counsel. Under the Code of  
3 Federal Regulations Title 14 Aeronautics and Space, Part 1207—Standards of Conduct:

4  
5 § 1207.103 Designations of responsible officials.  
6

7 (a) *Designated Agency Ethics Official*. The General Counsel of NASA is the Designated  
8 Agency Ethics Official and is delegated the authority to coordinate and manage NASA's  
9 ethics program as set forth in 5 CFR 2638.203.  
10

11  
12  
13 **Cause of Action**  
14 (Breach of Duty to Disclose Responsive Documents)  
15

16 39. Plaintiff incorporates and re-alleges all preceding paragraphs as if fully set out herein.  
17

18 40. Defendants have violated their duty of disclosure under 5 U.S.C. § 552(a)(2) *et seq.* by  
19 failing to disclose all documents related to the Administrative Claim of Jed Margolin for  
20 Infringement of U.S. Patent Nos. 5,566,073 and 5,904,724; NASA Case No. I-222.  
21

22 41. Plaintiff has constructively exhausted all his administrative remedies as set forth in 5  
23 U.S.C. § 552(a)(6)(C)(i).  
24

25 **Requested Relief**

26 WHEREFORE, plaintiff respectfully requests that this Court:

27 A. Order defendant to disclose requested records in their entireties and provide  
28 copies to plaintiff, said records to include: the patent report alleged to exist, but not

1 provided, in the Borda letter; contacts between NASA and Mike Abernathy (and/or Rapid  
2 Imaging Software and/or its employees and/or agents); contacts between NASA (and/or  
3 those acting at NASA's direction) and Universal Avionics Systems Corporation; and  
4 contacts between NASA (and/or those acting at NASA's direction) and its partners  
5 including, but not limited to, Boeing, General Atomics, and AeroVironment.

6 B. Issue an Order finding that defendant's actions were in bad faith, arbitrary,  
7 capricious, and contrary to law;

8 C. Provide for expeditious proceedings in this action;

9 D. Award plaintiff his costs incurred during the administrative proceedings and in  
10 this action;

11 E. Recommend to the United States Attorney General that he appoint Special  
12 Counsel to investigate criminal misconduct committed by NASA employees under color of  
13 authority; and

14 F. Grant such other relief as the Court may deem just and proper.

15  
16 Respectfully submitted,

17  
18 /Jed Margolin/

19 Jed Margolin, plaintiff pro se  
20 1981 Empire Rd.  
21 VC Highlands, NV 89521-7430  
22 775-847-7845  
23 [jm@jmargolin.com](mailto:jm@jmargolin.com)  
24

25 Dated: December 22, 2009

1

2

**CERTIFICATE OF SERVICE**

3

4 The undersigned hereby certifies that service of the foregoing SECOND AMENDED  
5 COMPLAINT has been made by electronic notification through the Court's electronic filing  
6 system on December 22, 2009.

7

8 /Jed Margolin/

9

10 Jed Margolin

11

12