

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
36 [Page 04604] [AV2-A16]
37 -----Original Message-----
38 From: FEIN, EDWARD K. (JSC-HA) (NASA)
39 Sent: Monday, February 23, 2004 10:10 AM
40 To: DELGADO, FRANCISCO J. (FRANK) (JSC-ER2) (NASA)
41 Cc: 'Kennedy, Alan; MURATORE, JOHN F. (JSC-MS) (NASA)
42 Subject: RE: Administrative Claim of Jed Margolin for Infringement of U.S. Patent

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
35 www.visualflight.com
36

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

- 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 _____
22 [Page 04607] [AV2-A19]

23 -----Original Message-----

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

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

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

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

29 Subject: RE: Patents 5566073 and 5904724

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

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 be 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 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.

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Best regards,

Mike Abernathy
Rapid Imaging Software, Inc.
[redacted (b)(6)]

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

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

[Alan is presumably Alan Kennedy]

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

Thanks, Mike, for keeping me in the loop.

-Ed

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

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Good Morning Alan,

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

Best regards,
Mike Abernathy
Rapid Imaging Software, Inc.
[redacted (b)(6)]

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Claims Analysis of Patent.doc

The above may be a duplicate, or Abernathy may have resent it with the attachment.
The following email is from Barry V. Gibbens, a patent attorney at Langley Research Center.

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

1 Date: Sep 01 2004 - 11:29am

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Hi Alan (and others),

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

Thanks,

Barry

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 be 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 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 wwwbsite: <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
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

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23 www.landform.com
24 www.visualflight.com
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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

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)'
45

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
16 www.visualflight.com

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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 (B)(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)]

[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 ...

[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
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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 departs 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 the in 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 clause 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)

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Subject: Rapid Imaging Software, Inc. patent infringement

Gentlemen,

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

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

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

Mike Abernathy
Rapid Imaging Software, Inc.

{ copy of email sent to Robert Adams at 5:29pm }

[Page 00096] [AV2-A90]
RE: Rapid Imaging Software, Inc. patent infringement

From: Delgado, Francisco J. (JSC-ER2) [redacted (b)(6)]
To: Mike Abernathy [redacted (b)(6), Fein, Edward K. (JSC-AL)]
Date: Sep 25 2006 - 1:13am

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

Frank

[Page 00095] [AV2-A89]
RE: Rapid Imaging Software, Inc. patent infringement
From: Fein, Edward K. (JSC-AL) [redacted (b)(6)]
To: Delgado, Francisco J.(JSC-ER2) [redacted (b)(6)], Mike Abernathy [redacted (b)(6)], Kennedy, Alan [redacted (b)(6)]
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)]

[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!

[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]

[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

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

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Robert,

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

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

Mike Abernathy
Rapid Imaging Software, Inc.

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

One more FYI.

Mike Abernathy
Rapid Imaging Software, Inc.

[copy of email sent to Robert Adams]

[Page 00073] [AV2-A67]
From: Robert Adams [redacted (b)(6)]
Sent: Monday, September 25, 2006 12:26 PM
To: 'Mike Abernathy'
Subject: Privileged and Confidential Settlement Communications Protected Under Rule 408 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:

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

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

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

Mike Abernathy
Rapid Imaging Software, Inc.

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

Mike,

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

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

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

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

Robert Adams

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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.

[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
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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)]**

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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

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26 was read on Tue, 19 Sep 2006 09:30:05 -0500
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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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34

Thanks, Jan

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

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

9

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
10 take appropriate steps to destroy this content in its entirety and notify the sender of its
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.

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Regards,

Jan

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Privileged and confidential

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

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

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

Everyone except Margolin and Optima Technology Group, that is.

And who did McNutt mean by "everyone" ?

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

[Page 01968] [AV2-121]
[redacted]
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: REVISEDAUVSIcolumn 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
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 .

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

12 [Page 02363] [AV3-A94]
13 [redacted]
14 From: Bob Rotella [r.rotella@att.net]
15 Sent: Thursday, March 19, 2009 10:17 AM
16 To: Rotella, Robert F. (HQ-MC000)
17 Subject: **war**

18
19 NASA Administrative Claims - Jed Margolin and its successor in interest, Optima, have
20 pursued an administrative claim for patent infringement. Upon completion of investigation
21 by JSC and DFC, reviewed all materials and prepared initial draft of final agency
22 determination letter denying claim based on lack of infringement. (Rotella, McNutt,
23 Borda)(3/9/09)

24 _____
25

26 _____
27

28 [Page 02364] [AV3-A95]
29 [redacted]
30 From: Rotella, Robert F. (HQ-MC000)
31 Sent: Thursday, March 19, 2009 10:24 AM
32 To: Borda, Gary G. (HQ-MC000); Graham, Courtney B. (HQ-M0000)
33 Cc: Bayer, Kathy (HQ-MC000)
34 Subject: **WAR item**

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

13 This document, including any attachments, contains information that is confidential,
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

26 This document, including any attachments, contains information that is confidential,
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) 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 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" "-"

40
41

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 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)

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
24

25 Dated: December 22, 2009

1

2

CERTIFICATE OF SERVICE

3

4

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

6

7

8

/Jed Margolin/

9

10

Jed Margolin

11

12