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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JED MARGOLIN, Plaintiff, v. NATIONAL AERONAUTICS AND SPACE ADMINISTRATION Defendant.	Case No. 3:09-CV-00421-LRH-VPC **OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT**

COMES NOW Defendant, National Aeronautics and Space Administration ("NASA"), by and through its undersigned counsel, and submits this Opposition and Cross-Motion for Summary Judgment in response to Plaintiff's Motion for Summary Judgment.

This is a Freedom of Information Act ("FOIA") action in which Plaintiff appeals NASA's decision to withhold certain information in response to Plaintiff's FOIA request. The withheld information is protected from disclosure based on the following FOIA exemptions: Exemption 3 (information withheld pursuant to federal statute); Exemption 4 (trade secrets, commercial and financial information, attorney-client communications and attorney work product); Exemption 5 (deliberative process information, attorney-client communications and attorney work product); and Exemption 6 (personnel, medical or "other" files the disclosure of which would constitute a clearly unwarranted invasion of privacy). Accordingly, this Court should deny Plaintiff's Motion for Summary Judgment and grant Defendant's Cross-Motion for Summary Judgment, as

explained more fully below. This motion is made pursuant to Federal Rule of Civil Procedure 56 and is supported by the declaration of Courtney B. Graham.

BACKGROUND

A. June 7, 2003 — Plaintiff's claim for patent infringement against NASA

On June 7, 2003, Plaintiff submitted an administrative claim for patent infringement against NASA. (Graham Dec. ¶ 7; Def. Ex. B).[1]/ Plaintiff owned the patents at the time of the claim, but the patents were subsequently acquired by Optima Technology Corporation. (Graham Dec. ¶ 7).

An administrative claim for patent infringement is a claim for money damages for patent infringement against the federal government. (Graham Dec. ¶ 8). A claimant may challenge an agency's final determination on a patent infringement claim by seeking review in the Court of Federal Claims. 28 U.S.C. § 1498(a). (Graham Dec. ¶ 8). A successful claimant may recover "reasonable and entire compensation" for a patent infringement. *Ibid.* (Graham Dec. ¶ 8).

The Commercial and Intellectual Property Law practice group ("CIPL") in the NASA Office of Special Counsel was assigned to review Plaintiff's patent infringement claim. (Graham Dec. ¶¶ 9-11; Def. Ex. B). The claim was designated case number I-222. (Graham Dec. ¶ 7; Def. Ex. B). The CIPL personnel assigned to investigate and review case number I-222 were CIPL attorneys Gary Borda, Jan McNutt, Robert Rotella, Alan Kennedy and CIPL legal technician Kathy Bayer. (Graham Dec. ¶ 11).

When NASA receives a patent infringement claim, the assigned CIPL attorneys transmit the claim to NASA field centers that are likely to have technology or activities related to the claim. (Graham Dec. ¶ 9). Field center patent attorneys review the patent infringement claim and investigate the patent infringement allegations. (Graham Dec. ¶ 9). As part of their

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[1]/ "Def. Ex. ___" refers to "Defendant's Exhibit" and the respective exhibit number. "Graham Dec. ¶ ____" refers to the declaration of Courtney Graham and the respective paragraph of her declaration.

investigation, the patent attorneys interview scientists and engineers who may have knowledge of relevant technology. (Graham Dec. ¶ 9). The patent attorneys also review the asserted patents and analyze the activities and technologies at the NASA field centers to determine whether the patents covers those activities. (Graham Dec. ¶ 9). The patent attorneys summarize the results of their review and investigation and provide to the CIPL attorneys a legal opinion about the patent infringement claim. (Graham Dec. ¶ 9). The assigned CIPL attorneys then prepare a consolidated analysis in consultation with the field center patent attorneys and develop the legal opinion that supports a final determination on the claim. (Graham Dec. ¶ 10).

Here, the CIPL attorneys communicated extensively with the patent attorneys from the field centers in reviewing and investigating Plaintiff's patent infringement claim. (Graham Dec. ¶ 18). Personnel from the following field centers were assigned to investigate the patent infringement claim: NASA Langley Research Center, Johnson Space Center and Dryden Flight Research Center. (Graham Dec. ¶ 12). At NASA Langley Research Center, attorneys Helen Galus and Barry Gibbens investigated the patent infringement claim. (Graham Dec. ¶ 13). At Johnson Space Center, attorneys Edward Fein, Kurt Hammerle and Theodore Ro and engineer Francisco Delgado investigated the claim. (Graham Dec. ¶ 14). At Dryden Flight Research Center, attorney Mark Homer and engineer John Del Frate investigated the claim. (Graham Dec. ¶ 15).

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

Dec. ¶ 16). Under the circumstances, NASA and Rapid Imaging had a common interest in defending against Plaintiff's patent infringement claims. (Graham Dec. ¶ 16).

In reviewing Rapid Imaging's work, NASA communicated with Michael Abernathy, Benjamin Allison, and Richard Krukar regarding the substance of the claims at issue in case number I-222. (Graham Dec. ¶ 17). Mr. Abernathy is the principal of Rapid Imaging. Mr. Allison and Mr. Krukar are Rapid Imaging's legal counsel. (Graham Dec. ¶ 17). As a result of these discussions, Rapid Imaging provided NASA with copies of attorney work-product documents prepared by Mr. Krukar in anticipation of litigation in response to the patent claims asserted against Rapid Imaging. (Graham Dec. ¶ 17). Rapid Imaging also provided NASA with privileged attorney-client communications between Rapid Imaging and its attorneys. (Graham Dec. ¶ 17). These documents were provided by Rapid Imaging to assist NASA's attorneys in determining the agency's potential liability as a result of the claims of patent infringement against Rapid Imaging, as a NASA contractor. (Graham Dec. ¶ 17).

On March 19, 2009, NASA issued a final determination denying Plaintiff's claim for patent infringement. (Graham Dec. ¶¶ 7, 18; Def. Ex. C).

B. June 28, 2008 — Plaintiff's FOIA request

By e-mail dated June 28, 2008, Plaintiff submitted a FOIA request to NASA, seeking copies of "all documents related to Administrative Claim of Jed Margolin for Infringement of U.S. Patent Nos. 5,566,073 and 5,904,724; NASA Case No. I-222." (Graham Dec. ¶ 4; Def. Ex. A; Complaint Ex. 2). The FOIA specialist at NASA Headquarters determined that records responsive to the FOIA request would be found at the CIPL in the NASA Office of Special Counsel. (Graham Dec. ¶ 6). Accordingly, Plaintiff's FOIA request was forwarded to that office. (Graham Dec. ¶ 6).

The CIPL reviewed Plaintiff's FOIA request and searched its records for responsive documents. On January 21, 2009, the CIPL forwarded a copy of the case file for case number I-222 to the FOIA specialist. (Graham Dec. ¶ 19).

C. May 14, 2009 — NASA's response to Plaintiff's FOIA request

On May 14, 2009, the NASA FOIA specialist produced approximately 63 documents in response to Plaintiff's FOIA request. (Graham Dec. ¶ 20).[2]/ Approximately 227 documents were withheld from disclosure. (Graham Dec. ¶ 20). The NASA FOIA specialist determined that the withheld documents were protected by Exemption 5 — the deliberative process privilege. (Graham Dec. ¶ 20; Def. Ex. D).

D. June 10, 2009 — Plaintiff's administrative appeal

On June 10, 2009, Margolin sought administrative review of NASA's response to his FOIA request. Specifically, Plaintiff appealed the following:

- NASA's failure to provide a copy of the March 19, 2009 final determination on case number I-222 in response to Plaintiff's FOIA request;
- NASA's failure to release a copy of a "patent report" containing evidence related to the validity of the patent at issue in case number I-222; and
- NASA's failure to produce records between NASA and Rapid Imaging "which provided the synthetic vision system for the X-38 project."

(Graham Dec. ¶ 21; Def. Ex. E).

On August 5, 2009, NASA affirmed the agency's response to Plaintiff's FOIA request. (Graham Dec. ¶ 25; Def. Ex. F). First, NASA determined that the March 19, 2009 final determination was already in Plaintiff's possession, as evidenced by Plaintiff's quoting the final determination in his appeal and including the document as an appendix attached to his appeal. (Graham Dec. ¶ 25; Def. Ex. F). Second, NASA concluded that the documents relevant to the patent infringement claim were either prepared by NASA attorneys or developed by NASA employees at the direction of NASA's attorneys in order to evaluate the claims of patent infringement against NASA. As such, those records were created in anticipation of litigation and constitute attorney work product or privileged attorney-client communications exempt from

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[2]/ Those documents were also produced in a November 5, 2009 supplemental response to Plaintiff's FOIA request. (Graham Dec. ¶ 20; Ex. I).

disclosure under Exemption 5. (Graham Dec. ¶ 25; Def. Ex. F). Lastly, NASA found that a general request for records exchanged between NASA and Rapid Imaging relating to the X-38 project exceeded the scope of Plaintiff's FOIA request. (Graham Dec. ¶ 25; Def. Ex. F).

E. July 31, 2009 — Plaintiff's FOIA lawsuit against NASA

On July 31, 2009, Plaintiff filed suit against NASA, arguing that the agency wrongfully withheld documents that are responsive to his FOIA request.

F. November 5, 2009 — NASA's supplemental response to Plaintiff's FOIA request

On August 12, 2009, the CIPL requested the field center patent attorneys with the NASA Langley Research Center, Johnson Space Center, and Dryden Flight Research Center to provide all documents related to case number I-222. (Graham Dec. ¶ 27). The field center patent attorneys gathered an additional 5,600 documents and NASA determined that those records contained information that was responsive to Plaintiff's FOIA request. (Graham Dec. ¶¶ 28-29). NASA also reviewed records in its possession from Rapid Imaging to determine whether any of those documents warranted disclosure. (Graham Dec. ¶ 30). Lastly, NASA reviewed for the second time the 227 documents that were withheld from disclosure on May 12, 2009. (Graham Dec. ¶ 31).

On November 5, 2009, NASA released approximately 4,000 pages of additional documents to Plaintiff. (Graham Dec. ¶ 40; Def. Ex. K). The documents withheld — approximately 1,600 pages — were determined to be protected based on the following privileges: Exemption 3 (information withheld pursuant to federal statute); Exemption 4 (trade secrets, commercial and financial information, attorney-client communications and attorney work product); Exemption 5 (deliberative process information, attorney-client communications and attorney work product); and Exemption 6 (personnel, medical or "other" files the disclosure of which would constitute a clearly unwarranted invasion of privacy). (Graham Dec. ¶¶ 31-40; Def. Ex. K).

1. The redacted documents

NASA reviewed for segregability all of the documents that were responsive to Plaintiff's FOIA request. (Graham Dec. ¶¶ 31-32). If releasable and exempt information appeared in the same document, NASA redacted the document and released it. (Graham Dec. ¶ 32). The redacted documents were marked with the applicable FOIA exemption when redacted. (Graham Dec. ¶ 32).

Redacted information under Exemption 6 included telephone numbers, street addresses, personal e-mail addresses and bank account information. (Graham Dec. ¶ 33). Redacted information under Exemption 5 included pre-decisional communications exchanged among NASA attorneys and between NASA attorneys and technical personnel regarding the review of case number I-222. (Graham Dec. ¶ 33). Those redactions were withheld under Exemption 5's deliberative process privilege and as attorney-client communications and attorney work product. (Graham Dec. ¶ 33). Redacted information under Exemption 4 included Optima Technology Corporation's offers of settlement, specific information regarding license fees and other financial details relating to the patents asserted in case number I-222. (Graham Dec. ¶ 34). That information was withheld under Exemption 4 as confidential or financial information received from a person. (Graham Dec. ¶ 34).

2. The documents withheld in their entirety

NASA also withheld certain documents from disclosure in their entirety. A contract proposal by Rapid Imaging to NASA under the NASA Small Business Innovation Research program was withheld under Exemption 3 because two statutes — 10 U.S.C. § 2305(g) and 41 U.S.C. § 253b(m)(1) — prohibited disclosure of those documents. (Graham Dec. ¶ 35).

NASA also withheld certain records received from the NASA field centers under Exemption 5. (Graham Dec. ¶ 36). Those documents included e-mails among NASA attorneys and technical personnel discussing case number I-222. As such, they constitute pre-decisional communications within Exemption 5's deliberative process privilege. (Graham Dec. ¶ 36).

Moreover, many of those documents were either prepared by NASA attorneys or developed by NASA employees at the direction of NASA attorneys in order to evaluate the claims of patent infringement asserted against NASA in case number I-222. (Graham Dec. ¶ 36). As such, those records were created in anticipation of litigation and they constitute attorney work product or attorney-client privileged communications exempt from disclosure under Exemption 5. (Graham Dec. ¶ 36). Lastly, NASA created claim charts to assist attorneys in evaluating Plaintiff's patent infringement claim. Those claim charts constitute attorney work product that is protected under Exemption 5. (Graham Dec. ¶ 36).

NASA also withheld certain agency records under Exemption 4 as confidential commercial or financial information received from Optima Technology Corporation. (Graham Dec. ¶ 37). Those records include offers of settlement, with specific financial terms, received from Optima — the owner of the patents asserted in case number I-222. (Graham Dec. ¶ 37). Examples of those documents are identified at lines 7 through 12 of the index. (Graham Dec. ¶ 37; Ex. I).

Exemption 4 further protects information prepared by Rapid Imaging's attorneys in anticipation of litigation and attorney-client privileged communications between Rapid Imaging and its attorneys. (Graham Dec. ¶ 37). These privileged work product documents and attorney-client communications were disclosed to NASA by Rapid Imaging to support NASA's review of the agency's potential liability for patent infringement by Rapid Imaging as a NASA contractor under case number I-222. (Graham Dec. ¶ 37). Examples of those documents are identified at lines 221 through 247 of the index. (Graham Dec. ¶ 39; Ex. I).

G. January 11, 2010 — NASA provides notice to Rapid Imaging of the FOIA action

NASA advised Rapid Imaging that a FOIA request for Rapid Imaging information had been received by the agency and that litigation had been commenced seeking disclosure of the Rapid Imaging documents. (Graham Dec. ¶ 39). In response to that notice, Rapid Imaging provided a basis for its objection to NASA's proposed disclosure of those records. (Graham

Dec. ¶ 39; Ex. J). NASA made a determination to withhold the Rapid Imaging records as privileged attorney-client communications and attorney work product under Exemption 4. (Graham Dec. ¶ 36; Ex. J). NASA's notice to Rapid Imaging and the Rapid Imaging objections are not included with this motion because they include information sufficient to identify the withheld documents. (Graham Dec. ¶ 39).

H. NASA's good faith

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

ARGUMENT

A. Standard of review

FOIA represents a balance struck by Congress "between the right of the public to know and the need of the Government to keep information in confidence." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). FOIA requires disclosure of agency information "consistent with a responsible balancing of competing concerns included in nine categories of documents exempted from the Act's disclosure requirements." *Halpern v. FBI*, 181 F.3d 279, 284 (2nd Cir. 1999). Thus, although FOIA generally promotes disclosure, the act recognizes "that public disclosure is not always in the public interest." *Baldridge v. Shapiro*, 455 U.S. 345, 352 (1982). The statutory exemptions must be construed "to have meaningful reach and application." *John Doe Agency*, 493 U.S. at 152.

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

147, 172 (2004).

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

FOIA cases are typically resolved on summary judgment. *Miscavige v. Internal Revenue Service*, 2 F.3d 366, 369 (11th Cir. 1993). Review of FOIA matters is *de novo*. *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989).

B. Summary judgment standard

A party is entitled to summary judgment if the evidence shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial and summary judgment is appropriate. *Id.* The burden of proving the absence of a genuine issue of material fact falls on the moving party. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248-49 (1986). All reasonable inferences from the facts must be drawn in the light most favorable to the nonmoving party. *Id.* To demonstrate a genuine issue of material fact, the nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts. *Id.* If the evidence offered by the nonmoving party is merely colorable — or not significantly probative — summary judgment is proper. *Id.*

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

Exemption 3 incorporates into the FOIA certain non-disclosure provisions that are contained in other federal statutes. 5 U.S.C. § 552(b)(3). Specifically, Exemption 3 allows the withholding of information prohibited from disclosure by another federal statute. *Ibid.*

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

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

Exemption 4 applies to "trade secrets and commercial or financial information obtained from a person which is privileged or confidential." 5 U.S.C. § 552(b)(4). A three-part test determines the applicability of this exemption: (1) the document must contain trade secrets or commercial or financial information; (2) the document must have been obtained from a person; and (3) the document must contain information of a confidential or privileged nature. *Miller, Anderson, Nash, Yerke & Wiener v. Dep't of Energy*, 499 F.Supp. 767, 770 (D. Or. 1980). The withheld information at issue here satisfies that test.

1. The information is commercial.

Commercial records are those that relate to a business or trade. *See, e.g., Dow Jones Co. v. FERC*, 219 F.R.D. 167, 176 (C.D. Cal. 2002) (information relating to "business decisions and practices regarding the sale of power, and the operation and maintenance" of generators); *Merit Energy Co. v. U.S. Dep't of the Interior*, 180 F.Supp.2d 1184, 1188 (D. Colo. 2001) ("[i]nformation regarding oil and gas leases, prices, quantities and reserves"), *appeal dismissed*, NO. 01-1347 (10th Cir. Sept. 4, 2001). Commercial records also include those "pertaining or relating to or dealing with commerce." *Miller, Anderson, Nash, Yerke*, 499 F.Supp. at 771.

The withheld information qualifies as "commercial" under those standards. (Graham Dec. ¶¶ 16-17, 36-38). The documents relate to commerce and to the business or trade of Optima Technology Corporation and Rapid Imaging. (Graham Dec. ¶¶ 16-77, 36-38).

2. The information was obtained from a person.

The term "person" is broadly construed; the term refers to individuals and a wide range of entities, including corporations, banks, state governments, agencies of foreign governments and Native American tribes or nations, who provide information to the government. *See, e.g., FlightsafetyServs. v. Dep't of Labor*, 326 F.3d 607, 611 (5th Cir. 2003) (business establishments); *Lepelletier v. FDIC*, 977 F.Supp. 456, 459 (D.D.C. 1997) (banks); *Hustead v. Norwood,* 529 F. Supp. 323, 326 (S.D. Fla. 1981 (state government); *Stone v. Exp.-Imp. Bank*, 552 F.2d 132, 137 (5th Cir. 1977) (foreign government agency); *Flathead Joint Bd. of Control v. Dep't of Interior,* 309 F.Supp. 2d 1217, 1221 (D. Mont. 2004) (Indian tribes). Here, Optima Technology Corporation and Rapid Imaging qualify as "persons" under those authorities.

3. The information is confidential or privileged.

a. The information is confidential.

The withheld information is confidential in nature. Information is confidential for purposes of Exemption 4 if disclosure of the information would (1) impair the government's ability to obtain necessary information in the future; or (2) cause substantial harm to the

competitive position of the person from whom the information was obtained. *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C.Cir. 1974); *Pacific Architects and Eng'rs Inc. v. Dep't of State*, 906 F.2d 1345 (9th Cir. 1990).

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

b. The information is privileged.

1. Attorney-client privilege

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

2. Work product privilege

The withheld records also include documents prepared in anticipation of litigation. (Graham Dec. ¶¶ 17, 36-38). The work product doctrine recognizes that it is essential that a lawyer work with a certain degree of privacy — free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant facts, prepare his legal theories and plan his strategy without undue and needless interference. *See Hickman v. Taylor*, 329 U.S. 495, 511

(1947) (protecting witness statements taken by counsel "with an eye toward litigation" after a claim had arisen but before litigation had begun); *Upjohn Co v. United States*, 449 U.S. 383 (1981) (holding that work-product doctrine applied to information gathered by in-house counsel long before any legal proceedings were threatened). The work-product doctrine applies to materials prepared by a non-lawyer representative as well as to materials prepared by a party itself. *Admiral*, 881 F.2d at 1494; *see also* Fed. R. Civ. Pr. 26(b)(3). Documents prepared by Rapid Imaging's counsel in anticipation of litigation are thus protected by Exemption 4. *See Indian Law Res. Ctr. v. Dep't of Interior*, 477 F.Supp. 144, 148 (D.D.C. 1979) ("The vouchers reveal strategies developed by *Hopi* counsel in anticipation of preventing or preparing for legal action to safeguard tribal interests. Such communications are entitled to protection as attorney work product.").

3. Common Interest privilege

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

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

E. Exemption 5 applies — The information is protected by the deliberative process, work-product and attorney-client privileges.

The deliberative process privilege of Exemption 5 is designed to "prevent injury to the quality of agency decisions." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). The privilege protects the "decision making processes of government agencies" and encourages frank and uninhibited communication among government officials in the course of creating public policy. *NLRB*, 421 U.S. at 149-51. Specifically, Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than the agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The exemption shields those documents that are normally privileged in the civil discovery context. *Lahr v. Nat'l Transportation Safety Board*, 569 F.3d 964, 979 (9th Cir. 2009).

Exemption 5 is commonly understood to include documents subject to the attorney-client privilege and attorney work-product doctrine. *NLRB*, 421 U.S. at 132; *FTC v. Grolier, Inc.*, 462 U.S. 19 (1983). Although Exemption 5 generally applies only to documents created by the federal government, courts have recognized that it also applies to documents created by private third parties when shared with the government in the furtherance of common legal interests. *See, e.g., Hanson v. Agency for Int'l Dev.*, 372 F.3d 286 (4th Cir. 2004); *Hunton & Williams, LLP v. Dep't of Justice*, 2008 WL 906783 (E.D. Va. 2008).

Here, Exemption 5 protects drafts of NASA's response to Plaintiff's patent infringement claim and drafts of letters prepared by NASA attorneys. *See Donham v. U.S. Forest Service*, 2008 WL 2157167 at 5 (S.D. Ill.) (finding draft documents to be "precisely the kind of documents that Exemption 5 and the deliberative process privilege seek to protect from disclosure"); *Gerstein v. CIA*, No. 06-4643, 2008 WL 4415080 at 16 (N.D. Cal) (protecting draft letters). Exemption 5 also protects e-mails, memos and comments exchanged among NASA attorneys and technical personnel regarding Plaintiff's patent infringement claims. *See Buckner v. IRS*, 25 F. Supp. 2d 893, 900 (N.D. Ind. 1998) (protecting "documents that are

communications among attorneys" where IRS personnel and attorneys were involved in bankruptcy proceedings against requester); *Judicial Watch, Inc. v. Dep't of Commerce*, 337 F. Supp. 2d 146, 174 (D.D.C. 2004) (applying privilege to documents written by agency attorneys to superiors describing advice given to clients within agency). The exemption further protects claims charts that NASA created to assist attorneys in evaluating Plaintiff's patent infringement claim. (Graham Dec. ¶ 36).[3]/

Lastly, Exemption 5 protects attorney-client communications between Rapid Imaging and its attorneys and the work product of Rapid Imaging's attorneys. (Graham Dec. ¶¶ 25, 36). Those documents were provided to NASA to assist the agency in defending against Plaintiff's patent infringement claim. (Graham Dec. ¶¶ 16-17). Because NASA and Rapid Imaging shared a common interest in defending against Plaintiff's patent infringement claims, the documents are protected under the common interest privilege. (Graham Dec. ¶ 16).[4]/

F. Exemption 6 applies — The information is contained in personnel, medical or "similar" files the disclosure of which would constitute a clearly unwarranted invasion of privacy.

Exemption 6 protects information in personnel, medical and "similar" files when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). To warrant protection under Exemption 6, information must first meet the threshold requirement of being located in personnel, medical or "similar" files. *Id.* Once that threshold is met, the focus of the inquiry turns to whether disclosure of the information would constitute a clearly unwarranted invasion of privacy. *Id.* At this stage of the analysis, it must be ascertained if a protected privacy interest exists that would be threatened by disclosure.

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

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

Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 874 (D.C. Cir. 1989). If no privacy interest is found, further analysis is unnecessary and the information at issue must be disclosed. *Ibid.*

If a privacy interest is found to exist, the public interest in disclosure, if any, must be weighed against the privacy interest in non-disclosure. *See Associated Press v. DOD*, 554 F.3d 274, 291 (2d Cir. 2009) ("Only where a privacy interest is implicated does the public interest for which the information will serve become relevant and require a balancing of the competing interests."); *NARA v. Favish*, 541 U.S. 157, 171 (2004) ("The term 'unwarranted' requires us to balance the family's privacy interest against the public interest in disclosure."). If no public interest exists, the information must be protected because "something, even a modest privacy interest, outweighs nothing every time[.]" *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989).

Here, NASA redacted identifying private information such as names, addresses and social security numbers contained within the documents. (Graham Dec. ¶¶ 32-33). Plaintiff has not identified any public interest that would justify disclosing that personal information. Accordingly, NASA is entitled to summary judgment on that issue.

G. NASA released all reasonably segregable information to Plaintiff.

NASA reviewed each requested document individually for segregability of non-exempt information. (Graham Dec. ¶¶ 31-34). The agency then released all segregable non-exempt information to Plaintiff. (Graham Dec. ¶¶ 31-34). The declaration addressing the issue of segregability is entitled to substantial weight and a presumption of good faith. *See Minier*, 88 F.3d at 800. The level of detail provided throughout the index further confirms that NASA carefully reviewed the requested documents and considered the possibility of redacting rather than withholding. In sum, both the declaration and the index included with this motion demonstrate that all reasonably segregable non-exempt information has been disclosed to Plaintiff. Under the circumstances, NASA is entitled to summary judgment.

CONCLUSION

For the reasons argued above, this Court should enter an order granting summary judgment in favor of NASA.[5]/

Respectfully submitted,

DANIEL G. BOGDEN
United States Attorney

/s/ Holly A. Vance
HOLLY A. VANCE
Assistant United States Attorney

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

CERTIFICATE OF SERVICE

JED MARGOLIN,

Plaintiff,

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION.

Defendant.

Case No. 3:09-CV-00421-LRH-VPC

The undersigned hereby certifies that service of the foregoing **"OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT"** has been made by electronic notification through the Court's electronic filing system or, as appropriate, by sending a copy by first-class mail to the following addressee(s) on September 7, 2010:

Addressee:

JED MARGOLIN
1981 Empire Road
Reno, NV 89521-7430

/s/ Holly A. Vance