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9 **IN THE UNITED STATES DISTRICT COURT**
10 **DISTRICT OF NEVADA**

11 JED MARGOLIN,

12 Plaintiff,

13 v.

14 NATIONAL AERONAUTICS
15 AND SPACE ADMINISTRATION,

16 Defendant.

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

GOVERNMENT'S REPLY

17
18 COMES NOW Defendant National Aeronautics and Space Administration ("Defendant")
19 and submits this Reply in response to Plaintiff's Opposition to Defendant's Cross Motion for
20 Summary Judgment. (#50). This Court should disregard all factual assertions in Plaintiff's
21 opposition because Plaintiff has failed to present any admissible evidence to support those
22 assertions. In addition, Plaintiff's opposition exceeds by 46 pages the 30-page limit set by the local
23 rules of civil procedure. This Court should thus disregard those pages that exceed that page limit.
24 In any event, Exemptions 3, 4, 5 and 6 of the Freedom of Information Act ("FOIA") protect the
25 withheld documents from disclosure. Accordingly, Defendant's Cross Motion for Summary
26 Judgment should be granted, as explained more fully below.
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ARGUMENT

A. Plaintiff's factual assertions are not supported by admissible evidence and thus this Court should disregard them.

Plaintiff makes numerous factual assertions throughout his 76-page opposition brief (#50) but he offers no declaration or other admissible evidence to support them. *See Orr v. Bank of America*, 285 F.3d 764, 773 (9th Cir. 2002) ("A trial court can only consider admissible evidence in ruling on a motion for summary judgment."). For example, Plaintiff has not authenticated any of the exhibits he includes with his opposition. *See Orr*, 285 F.3d at 773 ("Authentication is a condition precedent to admissibility.") (internal quotation marks omitted); FRE 802 (setting forth authentication requirement). The exhibits also include hearsay references. *See* FRE 801 (defining hearsay); FRE 802 (precluding admission of hearsay). Because Plaintiff has failed to offer admissible evidence to support his factual assertions, this Court should disregard them. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) ("the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment").¹

B. This Court should disregard those portions of Plaintiff's opposition that exceed the 30-page limit established by the local rules of civil procedure.

Plaintiff's opposition brief is 76 pages long. (#50). But LR 7-4 of the local rules of civil procedure limits an opposition brief to 30 pages:

Unless otherwise ordered by the court, pretrial and post-trial briefs and points and authorities in support of, or in response to, motions shall be limited to thirty (30) pages including the motion but excluding exhibits.

LR 7-4. Because Plaintiff's opposition brief exceeds the 30-page limit, this Court should disregard those pages that exceed the page limit.

¹ In any event, many of Plaintiff's factual assertions address matters that are not material to the issues in this case and thus they are not germane to deciding Defendant's cross motion. *See Anderson*, 477 U.S. at 247-48 ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted."). For example, the issue of who currently owns the patents (#49 at pp. 4, 18-19) is not relevant to the resolution of this FOIA action, as Plaintiff readily concedes: "This issue [of who owns the patents] is irrelevant to the present case except to promote NASA's agenda for adding more poison to the well." (#49 at p. 20; #32 at 28).

1 **C. This Court should decline to review the *Vaughn* index entries that Plaintiff has not**
2 **addressed in his briefing.**

3 Defendant provided Plaintiff with a 57-page *Vaughn* index containing 396 entries that
4 describe the withheld documents and explain the basis for non-disclosure. (#46-1, Ex. I). Plaintiff's
5 opposition, however, does not discuss any of those entries and Plaintiff's reply discusses only nine
6 of those entries: 113, 114, 117, 197, 232, 233, 236, 237 and 247. (#49 at 7-9, 20). This Court
7 should decline to consider any challenge of the 387 index entries that Plaintiff has elected not to
8 address at all in his briefing. *See Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We will
9 not manufacture arguments for an appellant, and a bare assertion does not preserve a claim[.] * * *
10 Judges are not like pigs, hunting for truffles buried in briefs."); *Entertainment Research Group v.*
11 *Genesis Creative Group*, 122 F.3d 1211 (9th Cir. 1997) (declining to consider claims where party
12 failed to present "a specific, cogent argument for our consideration"). Plaintiff's failure to
13 specifically address the *Vaughn* index entries constitutes a waiver of his right to challenge them.
14 *See James River Ins. Co. v. Hebert Schenk*, 523 F.3d 915, 920 (9th Cir. 2008) (refusing to consider
15 issue that was "inadequately presented" and concluding issue to be waived).

16 **D. Courtney Graham has sufficient personal knowledge to testify about the documents**
17 **at issue.**

18 In a FOIA action, the agency official who provides the declaration in support of the agency's
19 action may demonstrate personal knowledge based on a review of the records in question. *See*
20 *Cucci v. DEA*, 871 F. Supp. 508, 513 (D.D.C. 1994) (finding that declarant "had the requisite
21 personal knowledge based on her examination of the records and her discussion with a
22 representative of the [state police]" to attest that information was provided with express
23 understanding of confidentiality); *Hoffman v. DOJ*, No. 98-1733, slip op. at 7 (W.D. Okl. April 16,
24 1999) (finding personal knowledge requirement was met because declarant was "aware of what was
25 done by virtue of information provided to him in his official capacity").

26 Here, Defendant offers a supporting declaration from Courtney Graham. (#46-1). Graham
27 was employed with NASA when Plaintiff made his FOIA request and she was assigned to work on
28 Plaintiff's FOIA request as both a staff attorney and supervisor of NASA's Commercial and
Intellectual Property Group practice group. (#46-1 ¶ 2; Graham Supp. Dec. ¶¶ 5-8, attached hereto).

1 During that time, she also interacted with Rapid Imaging Software concerning Plaintiff's FOIA
2 request. (Graham Supp. Dec. ¶ 7; #46-2, Ex. J). Moreover, her declaration plainly states that her
3 testimony is based on both her personal knowledge of the facts and a review of the records in
4 question. (#46-1 at ¶1). It is thus appropriate for her to testify concerning this FOIA action.
5 Contrary to Plaintiff's assertion, Graham did not rely on "what people told her (hearsay)" in
6 submitting her testimony. (#50 at p. 10). But even if she had done so, her declaration would
7 nonetheless withstand scrutiny. *See Brophy v. Dep't of Defense*, No. 05-360, 2006 WL 571901, at 4
8 (D.D.C. March 8, 2006) (stating that declarations "that contain hearsay in recounting of searches for
9 documents are generally acceptable"). Accordingly, this Court should reject Plaintiff's claim that
10 Graham lacks personal knowledge to testify.

11 **E. Courtney Graham's declaration does not contain legal conclusions.**

12 Plaintiff argues that Graham's testimony should not be given considerable weight because
13 her declaration contains legal conclusions. (#50 at pp. 10-12, 13). Specifically, Plaintiff asserts
14 that the following statements by Graham are legal conclusions that should not be considered by this
15 Court: Defendant denied Plaintiff's patent claim on March 19, 2009 (#50 at p. 56); the patents in
16 question were subsequently acquired by Optima Technology Corporation² (#50 at p. 56); Rapid
17 Imaging had a common interest with NASA in defending against patent infringement claims (#50 at
18 p. 60); Plaintiff requested the "Borda letter" from NASA (#50 at p. 65); and certain records contain
19 privileged communications. (#50 at pp. 66-68).

20 Plaintiff's arguments are unfounded. The Graham declaration gives a factual overview of the
21 case, including when NASA denied Plaintiff's patent claim, to provide context for the arguments in
22 Defendant's brief about the propriety of releasing and withholding certain documents. (#46-1 at ¶¶
23 4-18). Graham's factual overview is not the equivalent of a legal argument; the facts she offers
24 merely provide the basis on which Defendant makes its legal arguments. For example, Defendant
25 argues that the common interest doctrine applies based on the factual statement in Graham's

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28 ²Throughout its filings, Defendant uses "Optima Technology Group" interchangeably with
"Optima Technology Communication." (See Graham Supp. Dec. ¶ 9).

1 declaration that NASA and Rapid Imaging have a joint interest in defending against patent
2 infringement claims. (#46-1 at ¶¶ 16, 39; #46 at pp. 14, 16). Moreover, Graham's declaration
3 includes an explanation why Defendant released and withheld certain documents. (#46-1 at ¶¶
4 19-40). That explanation necessarily includes references to the applicable exemptions to relay as a
5 matter of fact what the agency did and why.

6 In any event, if this Court construes any of Graham's testimony as the equivalent of legal
7 conclusions, the inclusion of such statements would be harmless error. Defendant has fully briefed
8 the subjects at issue and provided legal authorities to support each of its arguments. Thus, this
9 Court may rely on that briefing and those legal authorities — not any purported legal arguments in
10 Graham's declaration — to reach a decision in this case.

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

13 Defendant's cross motion for summary judgment explains that Exemption 3 bars the
14 disclosure of Rapid Imaging's contract proposals based on 41 U.S.C. § 253b(m)(1) and 10 U.S.C. §
15 2305(g). (#46 at 11). Plaintiff cites no authority to refute Defendant's argument (or authorities) or
16 to otherwise establish that Exemption 3 does not apply. Instead, Plaintiff simply requests that this
17 Court conduct an *in camera* review of the documents in question.³ (#50 at 13-14). Plaintiff's failure
18 to offer any legal argument or authorities to refute Defendant's arguments entitles Defendant to
19 summary judgment regarding the applicability of Exemption 3. *See James River Ins. Co. v. Hebert*
20 *Schenk*, 523 F.3d 915, 920 (9th Cir. 2008) (refusing to consider an issue that was "inadequately
21 presented" and concluding issue to be waived); *Hashim-Tiggs v. Schneider*, 2207 WL 185095
22 (W.D. Wis. 2007) (court declined to address issues on the ground that they were "inadequately
23 briefed").

24 Moreover, this Court should decline Plaintiff's request for an *in camera* review of the
25 documents in question because *in camera* review is a limited remedy. *See Lions Raisins Inc. v.*
26 *USDA*, 354 F.3d 1072, 1082 (9th Cir. 2004) (acknowledging that *in camera* review is warranted

27 ³ Plaintiff also requests an *in camera* review to determine whether the documents are
28 commercial in nature under Exemption 4. (#50 at p. 17).

1 "[u]nder certain limited circumstances"). If this Court concludes that the *Vaughn* index and
2 supporting declaration are somehow deficient, a remand for an amendment of those submissions is
3 the preferred remedy. *See Elec. Privacy Info. Ctr. v. DHS*, 384 F.Supp. 2d 100, 120 (D.D.C. 2005)
4 (permitting agencies to submit revised *Vaughn* index to correct inadequacies in original); *Santos v.*
5 *DEA*, 357 F. Supp. 2d 33, 37-38 (D.D.C. 2004) (requiring supplemental declaration because initial
6 one failed to provide "sufficient detail" to establish connection between exemptions invoked and
7 documents withheld).

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

10 Exemption 4 bars the release of Optima Technology Corporation's and Rapid Imaging's
11 commercial and financial records because NASA satisfied the four-pronged test for withholding that
12 information:

- 13 • The documents are commercial in nature and relate to the business of Optima Technology
14 Corporation and Rapid Imaging;
- 15 • Optima Technology Corporation and Rapid Imaging qualify as "persons" for purposes of
16 Exemption 4;
- 17 • Disclosure would impair NASA's ability to obtain necessary information from those
18 companies in the future; and
- The documents are confidential and protected by the work product, attorney-client and
deliberative process privileges.

19 (#46 at pp. 11-14; Graham Dec. ¶¶ 16-17, 36-38).

20 Nonetheless, Plaintiff appears to argue that Exemption 4 does not apply because Defendant
21 previously released commercial and financial information to him, including bank account numbers
22 and Optima Technology Group's offer to settle with NASA. (#50 at p. 17; #49 at pp. 17-18).

23 Again, this Court should disregard all of Plaintiff's factual assertions because he offers no
24 admissible evidence to support them, as explained above. But even if Plaintiff's allegations were
25 supported by admissible evidence, Defendant has acknowledged that it inadvertently released
26 certain protected records in its first production of documents on May 14, 2009. (*See* Graham Supp.
27 Dec. ¶¶ 11-12, attached herewith). Plaintiff cites no authority that Defendant's inadvertent
28 disclosure of certain documents defeats Exemption 4's application as to other withheld records.

1 Plaintiff's claim that Optima Technology Corporation and Rapid Imaging do not qualify as
2 persons for purposes of Exemption 4 is equally unavailing. Plaintiff argues that Defendant "forgot
3 to cite" *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010) and *Santa Clara*
4 *County v. Southern Pac. R. Co.*, 118 U.S. 394 (1886). (#50 at pp. 17-18). But neither case
5 addresses Exemption 4's four-pronged test, described above. Thus, the cases are inapposite.

6 Plaintiff also contends that Defendant has not shown that the documents are confidential
7 because it is purely speculation that Rapid Imaging would refrain from releasing information to
8 Defendant in the future for fear that the agency might release the information. (#50 at p. 18). But
9 Defendant's argument is supported by the declaration of Courtney Graham. (#46-1). Graham was
10 authorized to testify on that subject because she has personal knowledge of that issue based on her
11 dealings with Rapid Imaging and her review of pertinent records. (See Graham Dec. ¶¶ 1, 39-40;
12 Graham Supp. Dec. ¶ 7). Plaintiff has offered no admissible evidence to refute Graham's testimony
13 on that subject.

14 Plaintiff next alleges that the documents are not confidential because Rapid Imaging "not
15 only turned the information over to NASA willingly, they asked to help NASA." (# 50 at p. 18). In
16 support of that argument, Plaintiff references an e-mail dated June 28, 2004 from Rapid Imaging to
17 NASA that includes the statement, "Let me know how I can help." (#50 at pp. 18-19). Plaintiff's
18 argument misses the point. Rapid Imaging voluntarily released confidential and privileged
19 documents to NASA to help the agency defend against patent infringement claims. (#46-1 ¶ 17).
20 The company would be less likely to do so in the future, however, if Defendant produced the
21 documents in response to Plaintiff's FOIA request.

22 Plaintiff also disputes Defendant's claim that the attorney-client and work product privileges
23 apply but he cites no authorities to support his position. (#50 at 19). On the contrary, he simply
24 argues that "NASA is trying to sell this Court a stinky old red herring." (#50 at p. 19). Because
25 Plaintiff has inadequately briefed the attorney-client and work-product issues, this Court should
26 grant summary judgment to Defendant on those questions. *See James River Ins. Co.*, 523 F.3d at
27 920 (refusing to consider an issue that was "inadequately presented" and concluding issue to be
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1 waived); *Hashim-Tiggs*, 2007 WL 185095 (court declined to address issues on the ground that they
2 were "inadequately briefed").

3 Plaintiff next argues that the common interest privilege applies only where the parties have
4 signed a joint defense agreement, they are co-defendants in a lawsuit and they have "turn[ed] on
5 each other." (#50 at p. 22). He cites two cases cited by Defendant — *Waller v. Financial Corp.*
6 *America*, 828 F.2d 579, 583 (9th Cir. 1987) and *Miller, Anderson, Nash Yerke & Wiener*, 499
7 F.Supp. 767 (D.Or. 1980) — to support that argument. (#50 at pp. 20-30). But neither *Waller* nor
8 *Miller* requires that those conditions be satisfied to invoke the common interest privilege.
9 Accordingly, this Court should reject Plaintiff's arguments in that regard. *See also Hunton &*
10 *Williams v. Dep't of Justice*, 590 F.3d 272, 287 (2010) ("The common interest doctrine requires a
11 meeting of the minds, but it does not require that the agreement be reduced to writing or that
12 litigation actually have occurred."). In any event, Graham's declaration states that NASA and Rapid
13 Imaging entered into a contract that makes NASA liable for Rapid Imaging's patent infringement
14 violations, thereby demonstrating a joint interest in defending against such claims. (#46-1 ¶16).

15 Plaintiff next contends that the common interest privilege does not apply because
16 Defendant has not presented evidence that disclosure would cause substantial harm to the
17 competitive position of the disclosing party. (#50 at 25). But Defendant has not asserted
18 confidentiality on that basis; Defendant argued that the information is confidential only because
19 disclosure would impair the government's ability to obtain necessary information in the future. (#46
20 at pp. 12-13; #46-1 ¶ 40).

21 Plaintiff also contends that Defendant's unfiled draft request for ex parte re-examination
22 should be disclosed because "it is not litigation." (#49 at p. 9). Plaintiff cites no legal authority to
23 support that argument. In any event, the *Vaughn* index (#46-1, Ex. I, entry #247) plainly states that
24 the document reflects the "privileged opinion of [Rapid Imaging] counsel" and thus it is protected
25 by the attorney-client privilege — an issue Plaintiff does not address. The document is also
26 protected by the work product privilege because the document was drafted in anticipation of
27 litigation related to the patent claims. The fact that the re-examination procedure itself might be
28 administrative in nature does not defeat this privilege.

1 Lastly, Defendant quoted the following language from *Center for Biological Diversity v.*
2 *Office of Mgmt. and Budget*, 2009 WL 1246690 in its opposition and cross motion for summary
3 judgment: "Courts have extended the attorney-client privilege to multiple parties who share a
4 common interest in a legal matter." (#46 at p. 14). Plaintiff could not locate the quoted language
5 and he claims that the case contains no such quotation. (#50 at pp. 22-23). He is mistaken. The
6 quotation is found on page 10 of the decision.

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

9 Exemption 5's deliberative process, work product and attorney-client privileges protect
10 records exchanged among NASA attorneys and their staff in preparing a response to Plaintiff's
11 patent infringement claim. (#46 at pp. 15-16). That response decision issued on March 19, 2009.
12 (#46-1 ¶7; Ex. C). Records generated before that date are therefore pre-decisional. *See Casad v.*
13 *HHS*, 301 F.3d 1247, 1252 (10th Cir. 2002) (holding that deliberative process privilege protects
14 redacted portions of "summary statements" created before agency's research grant funding
15 decisions). Exemption 5 also protects attorney-client communications between Rapid Imaging and
16 its attorneys and the work product of Rapid Imaging's attorneys because Rapid Imaging provided
17 those documents to assist Defendant in defending against potential patent infringement claims. (#46
18 at pp. 15-16; #46-1 ¶17). Defendant and Rapid Imaging thus shared that common interest, thereby
19 triggering the application of the common interest doctrine. (#46 at pp. 15-16).

20 Nonetheless, Plaintiff claims that the patent infringement claim was denied on July 12, 2004
21 — not March 19, 2009 — and documents generated before that date — not after — are protected by
22 the deliberative process privilege. In support of that argument, Plaintiff relies on an e-mail from
23 NASA attorney Edward K. Fein to Rapid Imaging attorneys Frank Delgado and Alan Kennedy.
24 That e-mail, dated July 12, 2004, states: "Your effort, together with valuable input from Mike
25 Abernathy, will be the basis for NASA's denying the administrative claim." (#49 at 6-7, 13).

26 Plaintiff's reliance on that e-mail is misplaced for six reasons. First, the e-mail is hearsay.
27 *See* FRE 801 (defining hearsay); FRE 804 (precluding admission of hearsay). Second, Plaintiff has
28 not included an affidavit or declaration subscribing that the contents of the e-mail are true under

1 penalty of perjury. *See Robinson v. Penner*, 2008 WL 544912 (E. D.Ca.) ("Motions for summary
2 judgment may be supported by affidavits or declarations sworn to be true under penalty of
3 perjury."); 28 U.S.C. § 1746 (requiring that declaration be subscribed as true under penalty of
4 perjury). Third, even if the e-mail were admissible, Plaintiff has not shown that Fein is the speaking
5 agent for NASA or that he had the legal authority to decide the patent infringement claim. In fact,
6 Gary G. Borda — not Fein — denied the patent claim. (#46, Ex. C). Thus, the e-mail does not
7 establish that the patent infringement claim was denied on July 12, 2004. *See Tax Analysts v. IRS*,
8 97 F. Supp. 2d 13, 17 (D.C.C. 2000) ("Because the drafters lack ultimate [decisionmaking]
9 authority, their views are not necessarily predecisional."); *Bouygues Telecom v. Tekelec*, 473
10 F.Supp.2d 692, 695 (E.D.N.C. 2007) (evidence qualifies as admission by party opponent where
11 showing is made that declarant is authorized to speak for party). Fourth, Plaintiff offers no legal
12 authority to support his novel argument that the date of something as informal as an e-mail may be
13 used to substitute for the date of a formal decision. Fifth, even if the document is not protected by
14 Exemption 5's deliberative process privilege, it is protected under the work product and attorney
15 client privileges. Plaintiff admits as much in his briefing:

16 What did NASA do after the Fein e-mail? They got ready for litigation. NASA
17 and [Rapid Imaging] formed an alleged Common Interest association because they
 were both afraid of being sued for patent infringement.

18 (#49 at 7). Sixth, even if NASA knew on July 12, 2004 that it would be denying the claim,
19 subsequent discussions about the reasons for that denial and any draft decisions would still
20 be protected under the attorney-client, work product and deliberative process privileges.

21 Plaintiff also cites *Dep't of Interior v. Klamath Water Users*, 532 U.S. 1 (2000) to support
22 his claim that Exemption 5 does not apply. In *Klamath*, the Court ruled that Exemption 5 did not
23 encompass communications between the Department of the Interior and Indian tribes who had given
24 opinions to the Department on certain administrative matters. *Id.* at 4-6, 16. The Court held that
25 the attorney work-product and deliberative process privileges did not protect records submitted to
26 the agency by the tribes, as "outside consultants." *Id.* at 16. The Court reached its decision based
27 on two factors: the tribes had "their own, albeit entirely legitimate, interests in mind" and they
28 sought "a Government benefit at the expense of other applicants." *Id.* at 12 n. 4. Plaintiff argues

1 that *Klamath* requires the release of Rapid Imaging's documents because Rapid Imaging had its own
2 financial interest in helping NASA to defend against charges of patent infringement. (#49 at pp. 10-
3 13; #50 at pp. 71).

4 *Klamath* is inapposite for three reasons. First, the case addresses the "consultant corollary"
5 principle of Exemption 5, which Defendant has not asserted in this case. Second, Plaintiff has not
6 shown that Rapid Imaging communicated with NASA with "[its] own, albeit entirely legitimate
7 interests in mind" and that Rapid Imaging sought "a Government benefit at the expense of other
8 applicants." Those two factors were dispositive in *Klamath* but neither factor is present in this case.
9 Plaintiff's claim that Rapid Imaging had its own financial interest in assisting NASA is insufficient
10 to satisfy the two-part test promulgated in *Klamath*. Third, Plaintiff's claim that Rapid Imaging had
11 its own financial interest in assisting NASA is not supported by admissible evidence. Thus,
12 *Klamath* does not apply.

13 Plaintiff next attempts to distinguish two cases that Defendant cited to establish that
14 Exemption 5 applies to documents created by private third parties when shared with the government
15 to further common legal interests: *Hanson v. U.S. Agency for International Development*, 372 F.3d
16 286 (4th Cir. 2004) and *Hunton & Williams v. Dep't of Justice*, 590 F.3d 272 (2010). Plaintiff's
17 attempt to distinguish those cases is unavailing.

18 In *Hanson*, the court ruled that Exemption 5 protected an analytical report from an
19 engineer's attorney concerning a construction dispute where the engineer and the government shared
20 a common interest in defending against the dispute. Plaintiff contends that *Hanson* is inapposite
21 because Abernathy, who is a principal of Rapid Imaging but not an attorney, waived the
22 attorney-client privilege when he released documents to NASA. (#50 at p. 34). As explained
23 previously, however, Plaintiff's factual assertions are not supported by admissible evidence. In
24 contrast, Graham's declaration indicates that Rapid Imaging's attorneys were involved in the
25 decision to release the documents:

26 In reviewing RIS's work, NASA communicated with Michael Abernathy,
27 Benjamin Allison, and Richard Krukar regarding the substance of the claims at
28 issue in Case Number I-222. Mr. Abernathy is the principal of RIS. Mr. Allison
and Mr. Krukar are RIS' outside attorneys. As a result of these discussions, RIS
provided NASA with copies of attorney work-product prepared by Mr. Krukar in

1 anticipation of litigation in response to the patent claims asserted against RIS and
2 its attorneys. These documents were provided by RIS to assist NASA's attorneys
3 in determining the agency's potential liability as a result of the claims of
4 infringement against RIS, as a NASA contractor.

5 (#46-1 at ¶ 17). Plaintiff cites no authority to indicate that the common interest privilege does not
6 apply where a client and his attorneys jointly decide to turn documents over to an entity with whom
7 they share a common interest in defending against certain litigation. Nor has Plaintiff presented
8 admissible evidence that Abernathy released documents to NASA unbeknownst to his lawyers.
9 Plaintiff's efforts to distinguish *Hanson* are thus unavailing. Plaintiff also appears to argue that
10 NASA was required to contract with Abernathy for his legal work and pay Abernathy's attorneys
11 (#50 at p. 34) but *Hanson* imposes no such requirements in order to invoke the common interest
12 doctrine.

13 As for *Hunton*, Plaintiff asserts that the case requires "a formal written common interest
14 agreement" to trigger application of the common interest doctrine. (#50 at 43). He further contends
15 that "there is no litigation to intervene in." (#50 at 43). He overlooks that *Hunton* explicitly
16 rejected both arguments: "The common interest doctrine requires a meeting of the minds, but it does
17 not require that the agreement be reduced to writing or that litigation actually have occurred."

18 *Hunton*, 590 F.3d at 287.

19 **I. Exemption 6 applies — The information is contained within personnel, medical or**
20 **"similar" files and would constitute a clearly unwarranted invasion of privacy.**

21 Exemption 6 protects from disclosure personnel, medical or "similar" files the disclosure of
22 which would constitute "a clearly unwarranted invasion of privacy." The term "similar files" is
23 construed broadly to encompass "information which applies to a particular individual." *See Dep't of*
24 *State v. Wash. Post Co.*, 456 U.S. 595, 602 (1982). Moreover, the privacy interest inherent in
25 Exemption 6 "belongs to the individual, not the agency holding the information." *Dep't of Justice v.*
26 *Reporters Comm.*, 489 U.S. 749, 763-65 (1989).

27 Here, NASA redacted from its records identifying private information about persons,
28 including their names, addresses and social security numbers. (Graham Dec. ¶¶ 32-33). Such
redactions are protected under Exemption 6. *See Dep't of State v. Wash. Post*, 456 U.S. 595, 600
(finding that information "such as place of birth, date of birth, date of marriage, employment

1 history, and comparable data is not normally regarded as highly personal, and yet * * * such
2 information * * * would be exempt from any disclosure that would constitute a clearly unwarranted
3 invasion of personal privacy"); *Associated Press v. Dep't of Justice*, 549 F.3d 62, 65 (2nd Cir. 2008)
4 ("Personal information, including a citizen's name, address, and criminal history, has been found to
5 implicate a privacy interest cognizable under the FOIA exemptions.").

6 Nonetheless, Plaintiff argues that Exemption 6 should not apply because NASA openly
7 posts online the names and addresses of many NASA employees. (#50 at p. 66; #49 at pp. 4, 17).
8 But Plaintiff offers no admissible evidence to support any of his factual assertion, as explained
9 previously. In any event, even if such names and addresses are posted online, Plaintiff offers no
10 authority that such postings would defeat the application of Exemption 6.⁴ On the contrary, the case
11 law is clear that private information such as names, addresses and social security numbers are
12 protected from disclosure. *Wash. Post*, 456 U.S. at 600; *Associated Press*, 549 F.3d at 65.
13 Accordingly, this Court should uphold Defendant's decision to withhold this information under
14 Exemption 6.⁵

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22 ⁴Nor has Plaintiff presented sufficient evidence to show that the online postings are truly
23 analogous to the release of the private information at issue here. For example, Plaintiff overlooks
24 that the individuals whose names and addresses are posted online may have consented to such
25 postings.

26 ⁵ Plaintiff also disputes Defendant's claim that Plaintiff has the burden to show that
27 disclosure of the information in question is in the public interest. (#50 at p. 7). Plaintiff is
28 mistaken. A FOIA requester challenging the application of Exemption 6 has the burden to show
that disclosure is in the public interest. *See, e.g., Salas v. Office of the Inspector General*, 577 F.
Supp.2d 105, 112 (D.C.C. 2008); *Rogers v. Davis*, 2009 WL 213034 (E.D.Mo.); *Associated Press v.*
DOJ, 549 F.3d 62 (2nd Cir. 2008). In any event, Plaintiff has not argued that a public interest
applies. Thus, this Court need not conduct a balancing of private versus public interests.

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CONCLUSION

For the reasons explained above, this Court should grant Defendant's Motion for Summary Judgment. If this Court determines that the *Vaughn* index and supporting declaration are somehow deficient, this Court should remand the case with an order that those submissions be modified to include more detailed information.⁶

Respectfully submitted,

DANIEL G. BOGDEN
United States Attorney

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

⁶ Plaintiff appears to ask this Court to resolve another FOIA matter that is not the subject of this case. (# 50 at p. 51). This Court lacks jurisdiction to do so. Plaintiff also asks this Court to sanction NASA and Graham but he has offered no admissible evidence to warrant such sanctions. (#50 at p. 21).

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA**

JED MARGOLIN

Plaintiff,

v.

NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION,

Defendant.

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

**SUPPLEMENTAL DECLARATION OF
COURTNEY B. GRAHAM**

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

1. I am the Associate General Counsel for Commercial and Intellectual Property Law ("CIPL") in the Office of General Counsel of the National Aeronautics and Space Administration ("NASA"). I respectfully submit this declaration in support of NASA's Reply to Plaintiff's Opposition to NASA's Cross-Motion for Summary Judgment (#50) based upon my knowledge of the facts set forth herein and my review of the pertinent documents referred to herein and annexed hereto. My initial declaration was submitted in support of NASA's Opposition to Motion for Summary Judgment and Cross-Motion for Summary Judgment. (#46).

2. I have been employed by NASA since October 6, 2006.

3. Plaintiff submitted the Freedom of Information Act ("FOIA") request which is the subject of this litigation on June, 28 2008, which is after the date I started my employment with NASA. Attached as Exhibit A is a true and correct copy of Plaintiff's FOIA Request, FOIA No. 08-270, dated June 28, 2008. Because I have been employed with NASA since before June 28,

1 2008, I have personal knowledge of Defendant NASA's actions in connection with Plaintiff's June
2 28, 2008 FOIA request.

3 4. My knowledge of the FOIA request that is the subject of this litigation is based on:
4 (1) my role as an attorney staff member of the CIPL practice group during the period from July 2008
5 through June 2009 and my personal support for the activity of that practice group during that time,
6 and (2) my role as direct supervisor of the CIPL practice group from June 2009 to the present.

7 5. The CIPL practice group had four attorney staff members during the period from
8 July 2008 through June 2009. This included me, Jan McNutt, Robert Rotella and Gary Borda. Mr.
9 Borda and Mr. Rotella were the primary attorneys working on Case No. I-222, with support from
10 Mr. McNutt. Mr. McNutt was the primary attorney working on FOIA No. 08-270, with support
11 from me. I continued my support for FOIA No. 08-270 after assuming supervisory responsibilities
12 for the CIPL practice group.

13 6. On August 12, 2009, I assumed direct responsibility for the FOIA request that is the
14 subject of this litigation. *See* E-Mail, ACTION REQUIRED: Margolin FOIA Suit, dated August
15 12, 2009. A true and correct copy of that e-mail is annexed hereto as Exhibit B. As a result, I
16 personally reviewed all of the documents and correspondence related to the matter as of that date.

17 7. I personally handled the correspondence with Rapid Imaging Software, Inc. ("RIS")
18 relating to NASA's determination of RIS's claim under FOIA Exemption b(4). *See* Letter from
19 Courtney Graham to Benjamin Allison, dated January 11, 2010. A true and correct copy of that
20 letter is annexed hereto as Exhibit C. NASA's notice to RIS and the RIS objections are not attached
21 to this Declaration as they include information sufficient to identify the withheld documents.

22 8. Publicly available documents in the record of Case No. 1-222 contain conflicting
23 information regarding the corporate name of the entity that received an assignment of Plaintiff's
24 patents. The name may be Optima Technology Group, Inc. or Optima Technology Corporation.
25 *See* Patent Assignment Abstract of Title and records from online databases, Bates Nos.
26

1 04780-04785. True and correct copies of that Abstract of Title and those online database records
2 are annexed hereto as Exhibit D. This uncertainty was highlighted in Defendant's final
3 determination in Case No. 1-222. *See* NASA Final Determination, Case I-222 at 3, dated March 19,
4 2009. A true and correct copy of that Final Determination is annexed hereto as Exhibit E. For
5 clarity, all references to "Optima Technology Corporation" and "Optima Technology Group" in
6 Defendant's documents should be read interchangeably to reference the entity referred to by Plaintiff
7 as "Optima Technology Group."

8 9. When the CIPL practice group received Plaintiff's FOIA request No. 08-270, the
9 group conducted a search of its records. A copy of the CIPL practice group file for Case I-222 was
10 forwarded to the FOIA office on January 21, 2009. On May 14, 2009, the NASA Headquarters
11 FOIA Office issued an initial determination in response to Plaintiff's FOIA request No. 08-270
12 releasing responsive documents to Plaintiff. *See* NASA's Initial Determination on Plaintiff's FOIA
13 Request, FOIA No. 08-270, dated May 14, 2009. A true and correct copy of that Initial
14 Determination is annexed hereto as Exhibit F.

15 10. In September 2009, when I initiated the second review of Document Nos. 04639
16 through 04866, the 227 pages of documents that were withheld in connection with the May 14,
17 2009 initial determination, I also reviewed the documents that had been released in connection with
18 the May 14, 2009 initial determination.


19 11. My review revealed that none of the documents that had been released in connection
20 with the May 14, 2009 initial determination had been redacted. I did not direct a second review of
21 the documents that had already been released but did direct that care should be taken to ensure that
22 unreleasable information was redacted from documents that had not yet been provided to Plaintiff.
23 As a result, Plaintiff may have received redacted documents in the November 2009 supplemental
24 disclosure of documents and an unredacted version of the same documents with the May 14, 2009
25 initial determination.
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12. Any disclosure of information covered by one or more FOIA exemptions in connection with the May 14, 2009 initial determination was inadvertent.

I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Dated: November 1, 2010


COURTNEY B. GRAHAM
Associate General Counsel for Commercial
and Intellectual Property Law of NASA
Office of General Counsel

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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 **GOVERNMENT'S REPLY, SUPPLEMENTAL DECLARATION OF COURTNEY B. GRAHAM, and Exhibit A through Exhibit F** have 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 on November 1, 2010:

JED MARGOLIN
1981 Empire Road
Reno, NV 89521-7430

/s/ Holly A. Vance
Holly A. Vance