

**App. 1 – Appendix A**

Case: 17-1507 Doc: 106 Filed: 12/06/2018

Note: This disposition is nonprecedential.

**United States Court of Appeals For the Federal  
Circuit**

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**David Grober, Voice International, Inc.,**  
*Plaintiff-Appellants*  
v.

**Mako Products, Inc.,**  
*Defendant-Appellee*  
**AIR SEA LAND PRODUCTION, INC.,**  
**CINEVIDEOTECH, INC. SPECTRUM EFFECTS,**  
**INC., BLUE SKY AERIALS, INC. DOES 1-10**  
*Defendants*

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2017-1507

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Appeal from the United States District Court for the  
Central District of California in No. 2:04-cv-08604  
JZ-DTB, Judge Jack Zouhary.

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**JUDGMENT**

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Robert J. Lauson & Tarver, LLP, El Segundo, CA,  
argued for plaintiffs-appellants. Voice International,  
Inc. also represented by JON HOKANSON, Lewis  
Brisbois Bisgaard & Smith LLP, Los Angeles, CA.

**App. 2 – Appendix A**

David Lietz, Varnell & Warwick, PA, Lady Lake, FL, argued for defendant-appellee. Also represented by BRIAN W. WARWICK.

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THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (PROST, Chief Judge, MOORE and WALLACH, *Circuit Judges*).

**AFFIRMED, See Fed. Cir. R. 36.**

ENTERED BY ORDER OF THE COURT

December 6, 2018

/s/ Peter R. Marksteiner

Date

Peter R. Marksteiner  
Clerk of Court

**App. 3 - Appendix B**

Case: 17-1507 Doc: 111 Page: 1 Filed: 01/15/2019

NOTE: This order is nonprecedential.

**UNITED STATES COURT OF APPEALS FOR THE  
FEDERAL CIRCUIT**

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**DAVID GROBER, VOICE  
INTERNATIONAL, INC.,**  
*Plaintiffs-Appellants*

**v.**

**MAKO PRODUCTS, INC.,**

*Defendant-Appellee*

**AIR SEA LANDPRODUCTIONS,  
INC., CINEVIDEOTECH, INC.,  
SPECTRUM EFFECTS, INC.,  
BLUE SKY AERIALS, INC., DOES  
1-10,**

*Defendants*

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2017-1507

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**App. 4 - Appendix B**

Appeal from the United  
States District Court for the  
Central District of California in  
No. 2:04-cv-08604-JZ- DTB,  
Judge Jack Zouhary.

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**ON PETITION FOR PANEL REHEARING**

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Before PROST, *Chief Judge*, MOORE and  
WALLACH, *Circuit Judges*.

PER CURIAM.

**ORDER**

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**GROBER v. MAKO PRODUCTS, INC.**

Appellant David Grober filed a petition for panel rehearing.

Upon consideration thereof,

**IT IS ORDERED THAT:**

The petition for panel rehearing is denied.

The mandate of the court will issue on January 22, 2019.

**FOR THE COURT**

January 15, 2019

Date

/s/ Peter R. Marksteiner

Peter R. Marksteiner

Clerk of Court

**App. 6 – Appendix C**

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA- EASTERN  
DIVISION

DAVID GROBER and Case No. CV 04-08604 SGL  
VOICE INTERNATIONAL, INC.  
A California Corporation

Plaintiffs,

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DEFENDANTS ANSWER  
TO SECOND AMENDED,  
*CONSOLIDATED*  
COMPLAINT FOR PATENT  
INFRINGEMENT,  
DECLARATORY  
JUDGEMENT, AND  
COUNTER-CLAIM OF  
MAKO PRODUCTS, INC.

vs.

MAKO PRODUCTS, INC.,  
AIR SEA LAND PRODUCTIONS,  
INC., CINEVIDEOTECH, INC.,  
SPECTRUM EFFECTS, INC.,  
DOES 1-10, OPPENHEIMER CINE  
RENTAL, LLC, BLUE SKY  
AERIALS, INC., JORDAN KLEIN,  
SR., and JORDAN KLEIN, JR.  
Defendants.

For its Answer to Plaintiffs David Grober and VOICE  
INTERNATIONAL, INC., (hereafter "Plaintiffs")  
Second Amended Consolidated Complaint,  
Defendants MAKO PRODUCTS, INC., AIR SEA  
LAND PRODUCTIONS, INC., CINEVIDEOTECH,  
INC. SPECTRUM EFFECTS, INC., OPPENHEIMER  
CINE RENTAL, LLC, BLUE SKY AERIALS, INC.,  
JORDAN KLEIN, SR., JORDAN KLEIN, JR., and  
DOES 1-10 hereafter, ("Defendant) admit, deny and  
allege as follows:

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### **ANSWER**

#### **JURISDICTION AND VENUE**

1. Defendants admit that this action purports to be one for patent infringement arising under the 35 U.S.C. §§271 et seq., and admit that this Court has subject matter jurisdiction over this patent infringement action under 28 U.S.C Sections 1331 and 1338(a). Defendants deny that this Court has personal jurisdiction over all defendants named in the Second Amended Complaint and demands strict proof thereof.

2. Defendants admit that this action purports to be one seeking declaratory relief under 28 U.S.C. 28 U.S.C. §§ 2201 and 2202 and admit that this Court has subject matter jurisdiction over this patent infringement action under 28 U.S.C. § 1332(a).

3. Defendants deny that this Court has personal jurisdiction over all defendants named in the Second Amended Complaint and demands strict proof thereof. Defendants admit that venue is proper in this district as to Defendant Mako Products, Inc.; as to Defendant Spectrum Effects, Inc. and as to Defendant Blue Sky Aerials, Inc. but not for the remaining defendants and further denies that any Defendant has committed any acts of infringement.

4. Defendants deny that any infringement occurred in this or any other district and thus denied the allegations of paragraph 4.

5. Defendants admit the first sentence of Paragraph 5, but are without personal knowledge or



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information sufficient to form a belief as to the truth of the remaining allegations of this Paragraph and on that basis, deny those allegations.

### **THE PARTIES**

6. Defendants are without personal knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 6 and on that basis, denies those allegations.

7. Defendants admit that Plaintiff Grober is listed as the inventor and owner of U.S. Pat. No. 6,611,662, but specifically denies that Plaintiff Grober is actually the sole inventor of the device at issue and denies the remaining allegations of Paragraph 7, as well as denies the validity of the '662 patent itself.

8. Defendants admit to the allegations contained in the first sentence of Paragraph 8, but deny the remaining allegations of Paragraph 8.

9. Defendants admit the allegations of Paragraph 9

10. Defendants admit the allegations of Paragraph 10

11. Defendants admit the allegations of Paragraph 11

12. Defendants admit the allegations of Paragraph 12

13. Defendants admit the allegations of Paragraph 13

14. Defendants admit the allegations in Paragraph 14

15. Defendants admit the allegations of Paragraph 15

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**FIRST CAUSE OF ACTION**

**Infringement of the '662 Patent, 35 USC  
Sec. 271 (Plaintiffs Against All Defendants)**

16. Defendants hereby re-allege and incorporate all previous responses.

17. Defendants admit that Plaintiff Grober is listed as inventor and owner on the '662 patent but denies that Plaintiff Grober is the sole inventor of the device set forth in the '662 patent and therefore denies that the patent was either "duly" or "lawfully" issued. Defendants are without information sufficient

**ELEVENTH AFFIRMATIVE DEFENSE**

50. Under the provisions of 35 U.S.C. §287, Plaintiffs are precluded from recovering damages for any alleged infringement occurring prior to providing actual notice to Defendants of the alleged to form a belief as to the remaining allegations of Paragraph 17.

18. Defendants are without information sufficient to form a belief as to whether Plaintiff Grober's products are "marked" and denies that his device embodies the apparatus claimed in the "662 patent".

19. Defendants admit that Defendant Mako Products, Inc. manufactures rents and sells the MakoHead. Defendants deny that Jordan Klein, Sr. and/or Jordan Klein Jr. are the manufacturers of the MakoHead or that they make it publically available. Defendants admit that Mako uses, sells, rents and offers for use, sale a device known as

## **App. 11 – Appendix C**

MakoHead. Defendants deny that the MakoHead infringes any claims of the '662 patent.

20. Defendants admit that Mako was an exhibitor at the 2004 CineGearExpo and that Jordan Klein, Sr. appeared in his capacity as shareholder of Mako Products. The remaining allegations of this paragraph are not specific enough for Defendants to admit or deny.

21. Defendants admit that ASL is a New York rental house that rents, among many other items, the MakoHead to third parties for use in New York. Defendants deny the remaining allegations in Paragraph 21.

22. Defendants deny the allegations in Paragraph 22.

23. Defendants admit that CVT is a Florida rental house that rents, among many other items, the MakoHead to third parties for use in Florida and the Caribbean. Defendants deny the remaining allegations in Paragraph 23.

24. Defendants admit that Spectrum is a California rental house that rents, among many other items, the MakoHead to third parties for use in California. Defendants deny the remaining allegations in Paragraph 24.

25. Defendants admit that Blue Sky Aerials, Inc. is a California rental house that rents, among many other items, the MakoHead to third parties for use in California. Defendants deny the remaining allegations of Paragraph 25.

26. Defendants admit that Oppenheimer Camera is a Washington rental house that rents, among

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many other items, the MakoHead to third parties for use in business located in Washington. Defendants deny the remaining allegations of Paragraph 26.

- 27. Defendants deny the allegations of Paragraph 27
- 28. Defendants deny the allegations of Paragraph 28
- 29. Defendants deny the allegations of Paragraph 29
- 30. Defendants deny the allegations of Paragraph 30
- 31. Defendants deny the allegations of Paragraph 31

### **SECOND CAUSE OF ACTION**

#### **For Declaratory Relief (Plaintiff Grober Against Defendants Mako Products, Jordan Klein Sr. and Jordan Klein Jr.)**

- 32. Defendants hereby re-allege and incorporate all previous responses.
- 33. Defendants admit that Plaintiffs filed a patent infringement lawsuit against them in 2004.
- 34. Defendants admit that Plaintiff Grober has made slanderous statements regarding Mako Products, Klein, Jr. and Klein, Sr. but deny the remaining allegations set forth in paragraph 34.
- 35. Defendants admit that Plaintiffs attached a Florida Complaint to their Second Amended Complaint. However, the details of Defendants' Slander Claim are set forth below under Defendant's counterclaim.
- 36. Defendants deny the allegations set forth in Paragraph 36.

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37. Defendants admit that an actual controversy exists regarding Plaintiff Grober's slanderous statements, but denies that those statements were privileged, lawful, or that any claims are barred by the limitations period.

38. Defendants deny the allegations set forth in Paragraph 38.

#### **PRAYER FOR RELIEF**

39. Defendants deny that Plaintiffs are entitled to the relief enumerated in Paragraphs 1 through 18 of the Prayer for Relief.

#### **AFFIRMATIVE DEFENSES**

##### **FIRST AFFIRMATIVE DEFENSE**

40. Plaintiffs' Second Amended Consolidated Complaint fails to state a claim upon which relief may be granted.

##### **SECOND AFFIRMATIVE DEFENSE**

41. The claims of the '662 Patent (referred to as the Patent in Suit) is invalid for failing to comply with the provisions of the patent laws, Title 35, U.S.C., including, without limitation, 35 U.S.C. §§ 102, 103, 112, 115 and/or 116.

##### **THIRD AFFIRMATIVE DEFENSE**

42. The prior art restricts possible scope of construction of the Patent-In-Suit to such an extent that Plaintiffs are estopped from asserting that any claim of the Patent-In-Suit encompasses the accused product.

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### **FOURTH AFFIRMATIVE DEFENSE**

43. Defendants allege on information and belief that the claims of the Patent-In-Suit cannot be construed to cover any product manufactured, used, sold or offered for sale by Defendants because of false statements made and/or improper positions taken by or on behalf of the applicant for the Patent-In-Suit during the prosecution of the applications that matured into that Patent.

### **FIFTH AFFIRMATIVE DEFENSE**

44. Defendants do not make, use, sell, or offer to sell, and has not made, used, sold or offered for sale in the United States any product which infringes, either literally or under the doctrine of equivalents, any valid and enforceable claim of the Patent-In-Suit either directly or indirectly, contributory or otherwise, and has not induced any others to infringe said patent.

### **SIXTH AFFIRMATIVE DEFENSE**

45. Plaintiffs' claim for relief is barred by the doctrines of laches and estoppel. Moreover, the Plaintiffs' claim is barred for failing to comply with the statutory notice requirements of the Patent Statute.

### **SEVENTH AFFIRMATIVE DEFENSE**

46. Plaintiffs' claim for relief is barred by the doctrine of unclean hands.

### **EIGHTH AFFIRMATIVE DEFENSE**

47. Plaintiffs' claim for relief is barred due to Inequitable Conduct committed by the Plaintiffs

## **App. 15 – Appendix C**

and/or its agents before the U.S. Patent and Trademark Office, including but not limited to failing to incorporate the best use of the device and final improvements into the patent; failing to identify the co-inventors of the '662 device; failing to identify prior art; and improperly describing the device.

### **NINTH AFFIRMATIVE DEFENSE**

48. Plaintiffs' claim for relief is barred in whole or in part under the doctrine of patent misuse.

### **TENTH AFFIRMATIVE DEFENSE**

49. Plaintiffs' claim is not subject to equitable relief because it can be adequately compensated in damages.

### **ELEVENTH AFFIRMATIVE DEFENSE**

50. Under the provisions of 35 U.S.C. §287, Plaintiffs are precluded from recovering damages for any alleged infringement occurring prior to providing actual notice to Defendants of the alleged infringement of the Patent-In-Suit.

## **COUNTERCLAIMS**

### **MAKO'S FIRST COUNTERCLAIM FOR DECLARATORY RELIEF**

51. Defendant and Counterplaintiff Mako (hereafter "Mako") brings this counterclaim against Plaintiff (hereafter "Grober") pursuant to Rule 13 of the Federal Rules of Civil Procedure and states:

52. Mako is a Florida corporation, having its principal place of business at Summerfield, Florida.

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53. Mako alleges on information and belief that Grober is a resident of the State of California.

54. This Counterclaim is for declaratory judgment of non-infringement, invalidity and/or unenforceability pursuant to the Declaratory Judgment Act, 28 U.S.C. §§2201(a) and 2202, and arises under the Acts of Congress relating to patents, Title 35 of the United States Code. This Court has subject matter jurisdiction over this Counterclaim pursuant to 28 U.S.C. §§ 1331 and 1338(a).

55. Grober alleges in his Complaint that the '662 Patent was duly and legally issued to him. Grober further alleges that Mako has infringed and continues to infringe the '662 Patent.

56. Mako has not infringed and is not now infringing any valid or existing claim of the '662 Patent.

57. Mako alleges on information and belief that all claims of the '662 patent are invalid for failing to comply with the requirements of the patent laws, Title 35 U.S.C., §§102, 103, 112, 115 and/or 116, including but not limited to; failing to incorporate the best use of the device and final improvements into the patent; failing to identify the co-inventors of the '662 device; failing to identify prior art; and improperly describing the device.

58. On one or more of the grounds set forth above, Grober cannot enforce the '662 Patent against Mako due to Inequitable Conduct.

59. An actual controversy has arisen between Grober and Mako. Mako desires a judicial



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determination and declaration of the respective rights and duties of the parties herein. Such a determination and declaration is necessary and appropriate in order that the parties may ascertain their respective rights and duties regarding the validity, enforceability and infringement of the '662 Patent.

### **MAKO'S SECOND COUNTERCLAIM FOR ANTITRUST VIOLATIONS**

60. Defendant and Counterplaintiff Mako (hereafter "Mako") brings this counterclaim against Plaintiff (hereafter "Grober") pursuant to Rule 13 of the Federal Rules of Civil Procedure and states:

61. Mako is a Florida corporation, having its principal place of business at Summerfield, Florida.

62. Mako alleges on information and belief that Grober is a resident of the State of California.

63. This Counterclaim is for violation of the 15 U.S.C §2 ("The Sherman Act") on the basis of an attempt to eliminate competition in the relevant market and monopolize the relevant market by misusing the patent.

64. Mako alleges that the relevant market is properly defined as stabilization system for television and film cameras called for in the language of the patent claims.

65. Mako alleges that Grober intends to eliminate competition in the relevant market and monopolize the relevant market by requesting an injunction beyond the scope and the term of any valid patent

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and by demanding improper damages from multiple companies, including Mako.

66. Mako alleges that Grober engaged in predatory or anti-competitive conduct by requesting an injunction beyond the scope and the term of any valid patent and by demanding improper damages from multiple companies, including Mako.

67. Mako alleges that Grober has a dangerous probability of attaining monopoly power through predatory and anti-competitive conduct, and in particular by requesting an injunction beyond the scope and the term of any valid patent and demanding improper damages from multiple companies, including Mako.

68. Mako alleges that Grober's actions have proximately caused injury to competition in the relevant market, to consumers, and to the Defendant.

**MAKO'S THIRD COUNTERCLAIM  
FOR VIOLATION OF CALIFORNIA'S UNFAIR  
PRACTICES ACT  
(Cal Bus. & Prof. Code 17500 et seq.)  
AND UNFAIR COMPETITION LAW  
(Cal. Bus. & Prof.Code § 17200 et seq.)**

69. Defendant/Counterclaimplaintiff, Mako, hereby incorporates all preceding paragraphs of this Counterclaim as if fully set forth herein.

70. From approximately 1998 to the present, Grober has enjoyed a monopoly over the television and movie camera stabilization market. Mako is presently Grober's primary competition. More importantly, Grober obtained the subject patent by

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intentionally making knowingly false statements and improper omissions to the U.S. Patent Office through documents submitted thereto.

71. From approximately 1998 to 2003, Grober enjoyed his monopoly without a patent. At some point during this period of time, Grober prepared a patent application requesting the patent which ultimately resulted in the '662 Patent.

72. Grober intentionally sought and obtained the subject patent through fraudulent statements and omissions for the purpose of preventing lawful competition. As a result of Grober's intentional fraud on the Patent Office, he caused a fraudulent patent to be issued and published.

73. Grober's conduct in obtaining and attempting to enforce the '662 Patent through fraud on the U.S. Patent Office constitutes an unfair and unlawful business act or practice in violation of the California Unfair Practices Act and in violation of the Unfair Competition Law. This practice gives Grober an unfair and unlawful competitive advantage over Mako as an honest and fair competitor. Grober's fraudulent conduct has cost Mako and its co-Defendants substantial income through rental of the MakoHead. Mako and its co-Defendants seek treble damages and attorney fees available under the Unfair Practices Act as well as injunctive relief and restitution under the Unfair Competition Law.

74. Grober's fraudulent conduct is also unfair to consumers because Grober's system costs substantially more than the Mako system to rent. As a result, consumers in California and across the

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county are being forced to pay substantially more to rent Grober's more costly and less effective system.

### **MAKO'S FOURTH COUNTERCLAIM DEFAMATION**

75. Grober and Mako are competitors in the movie and television film industry. Grober owns a company that rents a camera stabilization device known as the Perfect Horizon. Mako has developed and rents a competing camera stabilization device known as the MakoHead. The MakoHead is a far superior device and rents for approximately half the cost of the Perfect Horizon. Angry about losing business to the MakoHead, Grober has continuously engaged in defamatory conduct against Mako by asserting that Mako did not invent the MakoHead themselves but conspired with one of Grober's former employees to "copy the design of the Perfect Horizon" and "steal his technology."

76. Jordan Klein, Sr. and Jordan Klein, Jr. are residents of Summerfield, Florida and are in the movie and television film industry. Jordan Klein, Sr. has been in the movie industry for over fifty years and has worked on hundreds of well known films such as Splash, Cocoon, Thunderball, Never Say Never Again, to name a few of the 75 feature films and 150 commercials. Mr. Klein, Sr. is also known for starting one of the first dive shop in the United States, out of Miami, Florida in the 1950's. Mr. Klein, Sr. has been inducted into the Scuba Diving Hall of Fame for his dedication and devotion. 1991 he was inducted into the Underwater Hall of Fame with the NOGI Award. In 2004, Mr. Klein Sr. received an Academy Award for Technical Achievement for his

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dedication and Advancements in Underwater Cinematography. Mr. Klein, Sr. is known as a pioneer in the underwater film industry. He has been contracted to work with the U.S. Navy on classified Navy Submarine projects requiring a security clearance of "Secret". He is well known for his early work on television shows such as the Flipper series and the Jaws films. He also holds two design patents.

77. Jordan Klein Jr., followed in his father's footsteps and began working for his father as a technician, assistant, and eventually a camera operator. Jordan Klein, Jr. now owns and operates a business known as Jordan Klein Film and Video, which is a full scale production company operating out of Summerfield, Florida. Like his father, Jordan Klein, Jr. specializes in underwater filming and fast-action video.

78. Mako Products, Inc. is a corporate entity owned by the Kleins. Mako Products owns and rents a device to the film industry known as the MakoHead. The MakoHead is a camera stabilization device developed by the Kleins and others which uses cutting edge technology to keep a camera steady and focused on the horizon despite unstable conditions, such as when filming at sea or underwater.

79. As stated above, Grober has developed and rents a movie camera stabilization device known as the Perfect Horizon. Mr. Grober received a patent on his device.

80. Sometime in 2001, Plaintiff Jordan Klein Jr. contacted Defendant David Grober about renting his device, for use in an underwater film sequence.

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Mr. Grober informed Mr. Klein that the Perfect Horizon was not waterproof and was not capable of handling the heavy cameras and equipment used in such a setting.

81. After seeing a need for a camera stabilizer in such conditions, the Kleins set out to create a device that could stabilize a camera both above and under water, and which could handle cameras of substantial weight. Inventors by nature, the Kleins contacted an engineer and stabilization expert, Mr. Tom Smith, to assist them in designing their new stabilization device, known as the MakoHead. The Kleins also contacted Steve Waterford, who had previously worked with Grober on the design of the Perfect Horizon to design the mechanical portion of the device. Waterford expressed his interest in working with Mako Products, the Kleins and Smith to develop the MakoHead. Waterford's primary role on the design team was to assist in the mechanical design of the MakoHead. Smith and the Kleins designed the MakoHead electronics and other mechanics of the device, without any knowledge of the Perfect Horizon. Waterford continuously made refinements to the MakoHead and continuously stated to Mako and the Kleins that the MakoHead was being designed by Waterford to be different from the Perfect Horizon to avoid.

82. After leaving Grober's employ, Waterford relocated to South Florida where he was visited in his office by David Grober in July of 2004. Waterford explained to Grober that the MakoHead had been developed based on technology familiar to Smith and that the electronics in the MakoHead were far more advanced than those used in the Perfect

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Horizon and that the systems were vastly different from one another and there were no infringement issues.

83. Once the MakoHead became available For rent, David Grober concocted a completely untrue and defamatory story regarding the development of the MakoHead. Grober began telling anyone that would listen that after renting his device on several occasions in the late 1990's, the Kleins conspired with Grober's former employee, Steve Waterford, to "copy" his device and "steal" his technology, and that the MakoHead was the result of these deliberate illicit activities.

84. Despite this story having no factual basis, Mr. Grober accused Mako and the Kleins of conspiring with Waterford to "copy his device" and "steal his technology" in conversations with several individuals in the motion picture industry including potential business partners of Mako, Mako Customers, and representatives of the Academy of Motion Pictures as follows:

85. On or about August of 2004, Grober contacted and personally met with Anthony Lento and Michael Warner of Air Sea Land, Inc. ("ASL") regarding its rental of the MakoHead. This meeting took place in New York City, New York. ASL is a rental house located in New York City, New York which rents camera equipment to the movie and television industry when filming in that area. One of the many products that ASL rents is the MakoHead. During his conversation with ASL, Grober falsely stated that the Kleins had rented his device and then conspired with Steve Waterford, to "copy the design of the

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Perfect Horizon" and "intentionally steal his technology."

86. About the same time, Grober relayed this same defamatory story to Egon Stephan, Jr., Jack Gary, and Rocardo Porven of Cine Video Tech ("CVT"), which is a rental house located in Miami, Florida which also offers the MakoHead for rent.. Grober made these defamatory statements to these individuals by telephone.

87. On or about June 2005, both Grober and Mako were exhibitors at the CineGearExpo which is a trade show for the movie and television industry. Potential customers would come and examine the MakoHead either before or after they examined the Perfect Horizon. Whenever a customer would ask Grober how his device compared with the MakoHead, or asked some question that alerted Grober that the customer was comparing the two devices, Grober would launch into the defamatory story of Mako and the Kleins copying his device and intentionally stealing his technology. Grober told this story many times a day to many individuals connected with the movie and television industry, including but not limited to, Bob Beverlin and Billy McConnell, Jr. Beverlin and McConnell are both involved in the film industry and work as cameramen for various production companies.

88. From 2004 to date, Grober has told his defamatory tale to other individuals such as Ed Gutentag, Andy Romanoff, Erik Curtis, Mathew O'Connor, Dan Malone, and Mike McGowan, who are all heavily involved in the Motion Picture industry.



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89. Most damagingly, Grober told this same defamatory story to the Academy' of Motion Pictures when the MakoHead and the Perfect Horizon were both under consideration for an Academy Award in 2006. Early in 2005, Grober explained to several individuals connected to the Academy, including but not limited to Pete Romano and Daryn Okata, that Mako and the Klein had "copied" his device and had "stolen" his technology. Grober again conveyed his false story that Mako and Waterford conspired to copy his device.

90. Mako did not receive the Academy Award. Mako believes that despite the MakoHead's superior performance, the award went to Grober rather than Mako as a result of Grober's false and defamatory statements to the Academy.

91. On or about June 23, 2007, Grober contacted Marty Oppenheimer, of Oppenheimer Camera, after learning that Oppenheimer had agreed to carry the MakoHead as part of its rental inventory. Oppenheimer Camera is a rental house that rents movie equipment to the television and movie industry in Washington State. During this conversation, Grober told Marty Oppenheimer, President of Oppenheimer Camera, the above defamatory tale including Mako's alleged copying of his device and stealing of his technology.

92. In 2004, Grober sued Mako and several rental houses for patent infringement. The claims in that case are limited to patent infringement and do not affect the defamatory statements complained of herein. While Grober may have had the right to contact potential defendants in a patent suit

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regarding allegations of patent infringement, Grober crossed the line when he stated that the Kleins and Waterford had conspired to intentionally copy his device and to intentionally steal his technology. These statements are false and not related to the patent claims at issue in that case and are defamatory per se. Even if the MakoHead inadvertently infringed Grober's Patent, Grober's claims of intentional copying and stealing are defamatory statements that have caused substantial damage to the Plaintiffs' business reputation.

93. Slander is a form of Defamation. Corporations as well as individuals can assert a claim for slander and/or defamation.

94. To establish a prima facie case for slander, Mako must demonstrate an oral publication to third persons of specified false matter that has a natural tendency to injure or that causes special damage.

95. Certain statements are deemed to constitute slander per se, including statements: 1) charging the commission of a crime, or 2) tending directly to injure the other party with respect to that party's business by imputing something with reference to that business that has a natural tendency to lessen its profits.

96. Slander per se is actionable without proof of special damages.

97. Grober's statements set forth above are all patently false and constitute slander per se because they accuse Mako, the Kleins, and Waterford of criminal and/or dishonest conduct in "copying his device" and in "stealing his technology."

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98. Allegations of "copying" and "stealing" the design of mother's device involve intentional wrongful conduct by Plaintiffs and are therefore slanderous per se.

99. The MakoHead was primarily designed by the Kleins and Tom Smith, a Florida Engineer with extensive experience in stabilization systems. Steve Waterford's limited role was with regard to basic mechanical elements of the MakoHead and did not involve any copying of Grober's device or the stealing of his technology.

100. In reality, after renting Grober's device, the Kleins determined that a better system could and should be developed and set out to do so. Grober's device simply did not accomplish the tasks required.

101. Even if the MakoHead inadvertently infringes the '662 patent, as Grober alleges, there is not a scintilla of truth to the story that Mako conspired with Waterford to "copy his device" and "steal his technology." These are defamatory statements that have damaged the Plaintiffs in their reputation and business. At the time Grober made these comments, Grober had never seen the inner workings of the MakoHead and had no actual knowledge of its design. Further, conversations with Waterford prior to filing suit informed Grober that the MakoHead did not infringe his device. Thus, his defamatory statements were based on pure speculation and made with ill intent.

102. Grober's false statements tend to directly injure Mako and the Kleins in respect to their business by imputing that they are dishonest individuals and not the true inventors of their device

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and therefore are not trustworthy, which has a natural tendency to lessen the profits of Mako.

103. Moreover, Grober's statements improperly make people believe that the MakoHead and the Perfect Horizon are the same product, when in reality, the MakoHead is a much more sophisticated and better suited piece of equipment. If people believe that the MakoHead and Grober's device are the same, then they may not even try or obtain further information regarding the MakoHead and therefore Mako's profits will be reduced. As a result, Plaintiffs have been damaged by Grober's defamatory statements.

104. A jury trial is demanded on all appropriate counter-claims.

### **PRAYER FOR RELIEF**

105. WHEREFORE, Mako requests that this Court enter appropriate Orders: (a) requiring Grober to cease making said defamatory statements; (b) awarding compensatory, consequential, and special damages to Mako; (c) awarding Mako their costs of suit, such as attorney's fees, expert fees, costs and interest, and (d) providing such other relief as the Court may deem just and appropriate.

106. WHEREFORE, Defendants prays for a judgment against Plaintiffs as follows:

107. That Plaintiffs take nothing by their claims for relief;

108. That Plaintiffs' claims be dismissed with prejudice;

**App. 29 – Appendix C**

109. That the Court enters judgment in favor of Defendants against Plaintiffs in all respects as to the affirmative defenses and the first through fourth counterclaims;

110. For a declaration that the Patent-In-Suit is invalid;

111. For a declaration that the Patent-In-Suit is unenforceable;

112. For a declaration that Defendant Mako has not infringed, induced others to infringe or contributed to the infringement of any of the claims of the Patent-In-Suit;

113. For a determination that this is an exceptional case under 35 U.S.C. §285 and an award of attorneys' fees and costs to Defendants in this action;

114. For an award of damages consistent with the first through fourth counterclaims, treble damages, and such other relief as the Court deems proper.

DATED: April 15, 2008.

VARNELL & WARWICK, P.A.

By: s/ Brian W. Warwick  
BRIANW. WARWICK  
Attorney for Defendants

JANET R. VARNELL  
BRIANW. WARWICK  
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**App. 30 – Appendix C**

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**App. 31 – Appendix D**

Case 2:04-cv-08604-JZ-OP Doc. 371 Filed 11/02/09  
Page 1 of 7 Page ID#: 4094

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
CIVIL MINUTES-GENERAL**

Case No. CV04-8604-SGL(OPx)  
Date November 2, 2009

Title DAVID GROBER, ET AL -V- MAKO  
PRODUCTIONS, INC., ET AL

MAYNOR GALVEZ      NONE      NONE

Deputy Clerk Court Reporter/Recorder      Tape No.

Attorneys for Plaintiffs:      Attorneys for Defendants:  
Robert J. Lauson      Janet Varnell

**Proceedings:**      (IN CHAMBERS)

- 1) Plaintiffs' Motion to Compel Deposition of Kleins and Dann in Los Angeles and for Sanctions Against Defendant Mako (Dkt. No. 227);
- 2) Plaintiffs' Motion to Compel Documents, Namely Emails, Photographs, and Videos from Defendant Mako (Dkt. No. 228);
- 3) Defendants' Motion to Strike Plaintiff's Supplemental Memorandum and Declaration in Support of Discovery Motions Pending Before District Judge (Dkt. No. 284);

## **App. 32 – Appendix D**

- 4) Defendants' Motion to Strike Pleadings and Discovery Signed by Plaintiff Grober (Dkt. No. 285);
- 5) Defendants' Motion for Protective Order for Terminating Further Paper Discovery (Dkt. No. 295);
- 6) Plaintiffs' Motion for Review of Defendants' Confidential Attorneys Eyes Only Designations, Compelling Re-Designations of All Documents, and For Sanctions For Abuse of Protective Order (Dkt. No. 233).

### **I.**

#### **Background**

On April 1, 2009, the aforementioned Motions were referred to this Court by District Judge Stephen G. Larson. (Dkt. No. 309.) On June 4, 2009, Judge Larson issued an order construing the claims of Plaintiffs' United States patent, U.S. Patent No. 6,611,662 ("662 patent"), following a Markman hearing. *Grober v. Mako Products, Inc.*, 2009 WL 1587158 (C.D. Cal. June 4, 2009). In that order, Judge Larson construed the claim term "payload platform" to mean "the horizontal plate, piece or surface upon which the device (e.g., a camera) is directly mounted upon or affixed to." *Id.* at \*12. The definition resulted in a finding of non-infringement. *Id.* On October 21, 2009, Judge Larson issued an order denying Plaintiffs' motion for reconsideration of the June 4, 2009, Markman decision and re-affirmed the earlier finding of non-infringement. (Dkt. No. 368.) Judge Larson further granted Plaintiff Grober's motion to discharge his attorneys and proceed pro se for the remainder of the litigation regarding the remaining non-



### **App. 33 – Appendix D**

infringement related claims. Finally, Judge Larson ordered that, before such discharge could be formalized, the parties were directed to either stipulate or hold a hearing before this Court to establish a “no-look list” regarding Plaintiff Grober’s ability to look at information or other discoverable evidence that constitutes Defendants’ trade secrets. Once the “no look” list is approved or ordered by this Court, present counsel will be officially discharged from further representing Plaintiff Grober in this matter.

On October 30, 2009, the Court held a hearing telephonically to discuss the status of the pending motions and to consider argument by counsel. Based on the pleadings filed in relation to these motions and the arguments presented by counsel, the Court rules as follows:

**1) Plaintiffs’ Motion to Compel  
Deposition of Kleins and Dann (Dkt.  
No 227).**

On October 13, 2008, the parties filed a Joint Stipulation Re: Plaintiffs’ Motion to Compel Deposition of Kleins and Dann in Los Angeles and for Sanctions Against Defendant Mako, along with supporting declarations. (Dkt. Nos. 227, 229.) On November 4, 2008, Plaintiffs filed a Declaration of Joel Bennet in Further Support of the Motion to Compel. (Dkt. No. 254.) On June 16, 2009, the parties filed a Joint Statement regarding all pending motions, including discovery motions. (Dkt. No. 333.)

In this Motion, Plaintiffs seek to make-up or complete certain depositions that were scheduled to take place in June 2008 in Florida. The depositions were to take

#### **App. 34 – Appendix D**

place after the agreed upon inspection of the Mako Head. Defendants refused to commence with the inspection of the Mako Head until Plaintiffs provided Defendants with detailed infringement contentions from Plaintiffs' expert, Jim Radford, as supplemental responses to interrogatories. Over the next several hours, Plaintiffs' expert prepared the detailed infringement contentions and provided them to Defendants the following day. As a result, Plaintiffs contend that they were unable to depose the Kleins or Mr. Dann, were unable to properly depose Mr. Waterford, and incurred additional costs involved with the deposition of Tom Smith. In the Joint Statement filed regarding the pending discovery motions and during argument, Defendants have acknowledged that Plaintiff Grober has additional claims that do not involve the issue of infringement. The parties have also acknowledged that the Kleins and Mr. Dann were never deposed.

The Court finds that, to the extent this Motion seeks discovery related to the issue of infringement, the Motion has been rendered moot by Judge Larson's finding of non-infringement. However, to the extent this Motion seeks discovery related to the remaining non-infringement issues, the Motion has not been rendered moot by Judge Larson's finding of non-infringement. As a result, the Court denies in part and grants in part Plaintiffs' Motion to Compel. Defendants shall make the Kleins and John Dann available for a make-up deposition limited only to the remaining non-infringement issues no later than January 15, 2010, at an agreed upon location. All other relief sought by Plaintiffs in this Motion is denied.

## **App. 35 – Appendix D**

### **2) Plaintiffs' Motion to Compel Documents, Namely E-mails, Photographs, and Videos (Dkt. No. 228).**

On October 13, 2008, the parties filed a Joint Stipulations Re: Plaintiffs' Motion to Compel documents, namely emails, photographs, and videos from Defendant Mako, along with supporting declarations. (Dkt. Nos. 228, 230.) On November 4, 2008, Plaintiffs filed a Declaration of Joel Bennet and Lee Wheelbarger in Further Support of the Motion to Compel. (Dkt. Nos. 254, 255.) On June 16, 2009, the parties filed a Joint Statement regarding all pending motions, including discovery motions. (Dkt. No. 333.)

In this Motion, Plaintiffs seek to obtain numerous documents and e-mails, relating to the "design of each version of the Mako Head," documents relating to Defendants ASL, CVT, Spectrum Effects, Oppenheimer, and sales and rentals of the Mako Head, and photographs and videos "showing the design, development and testing" of each version of the Mako Head. In the Joint Statement filed regarding the pending discovery motions and during argument, Defendants have acknowledged that Plaintiff Grober has additional claims that do not involve the issue of infringement.

The Court finds that, to the extent this Motion seeks discovery related to the issue of infringement, the Motion has been rendered moot by Judge Larson's finding of non-infringement. However, to the extent this Motion seeks discovery related to the remaining non-infringement issues, the Motion has not been rendered moot by Judge Larson's finding of non-infringement. As a result, the Court denies in part and

### **App. 36 – Appendix D**

grants in part Plaintiffs' Motion to Compel. Defendants shall produce all non-privileged documents and e-mails responsive to the discovery request limited only to the remaining non-infringement issues, subject to a protective order, no later than January 15, 2010. All other relief sought by Plaintiffs in this Motion is denied.

#### **3) Defendants' Motion to Strike Plaintiff's Supplemental Memorandum and Declaration in Support of Discovery Motions (Dkt. No. 284).**

On February 9, 2009, Plaintiffs filed a Supplemental Memorandum in Support of Discovery Motions Pending Before District Judge, along with a supplemental declaration. (Dkt. No. 272.) On March 16, 2009, Defendants filed a Motion to Strike Plaintiff's Supplemental Memorandum, along with supporting exhibits. (Dkt. No. 284.) On March 23, 2009, Plaintiffs filed an Opposition to Motion to Strike. (Dkt. No. 288.) On June 16, 2009, the parties filed a Joint Statement regarding all pending motions, including discovery motions. (Dkt. No. 333.)

The pleadings filed here are related to the discovery motions mentioned above regarding certain deposition testimony (Dkt. No. 227), and the production of documents, e-mails, photographs, and videos (Dkt. No. 228), as those Motions relate to the issue of infringement. The Court has denied that aspect of those Motions as moot due to Judge Larson's finding of non-infringement. As a result, this Motion is also rendered moot. Thus, the Court denies Defendants' Motion to Strike.

**App. 37 – Appendix D**

**4) Defendants' Motion to Strike Pleadings and Discovery Signed by Plaintiff Grober (Dkt. No. 285).**

On May 27, 2008, Plaintiff David Grober filed a Brief with the Court. (Dkt. No. 196.) On March 16, 2009, Defendants filed a Motion to Strike Pleadings and Discovery signed by Plaintiff Grober. (Dkt. No. 285.) On March 23, 2009, Plaintiffs filed an Opposition to the Motion to Strike Pleadings and Discovery. (Dkt. No. 289.) On June 16, 2009, the parties filed a Joint Statement regarding all pending motions, including discovery motions. (Dkt. No. 333.)

In the Joint Statement, the parties agree that this Motion is moot and can be withdrawn. Thus, the Court denies Defendants' Motion to Strike as moot.

**5) Defendants' Motion for Protective Order for Terminating Further Paper Discovery (Dkt. No. 295).**

On March 24, 2009, Defendants filed a Motion for Protective Order for Terminating Further Paper Discovery, along with supporting exhibits. (Dkt. No. 295.) On May 6, 2009, Defendants filed a Motion to Supplement Defendants' Motion for Protective Order. (Dkt. No. 323.) On May 26, 2009, Defendants filed a Second Motion to Supplement Defendants' Motion for Protective Order. (Dkt. No. 325.) On May 26, 2009, Plaintiffs filed an Opposition to Motion to Supplement Defendants' Motion for Protective Order. (Dkt. No. 326.) On June 1, 2009, Defendants filed a Reply in Support of the Motion for Protective Order. (Dkt. No. 327.) On June 16, 2009, the parties filed a Joint Statement regarding all pending motions, including discovery motions. (Dkt. No. 333.)

## **App. 38 – Appendix D**

The pleadings filed here are related to the discovery motions mentioned above regarding certain deposition testimony (Dkt. No. 227), and the production of documents, e-mails, photographs, and videos (Dkt. No. 228). The Court finds that, to the extent this Motion seeks discovery related to the issue of infringement, the Motion has been rendered moot by Judge Larson's finding of non-infringement. However, to the extent this Motion seeks discovery related to the remaining non-infringement issues, the Motion has been not rendered moot by Judge Larson's finding of non-infringement. As a result, the Court grants in part and denies in part Defendants' Motion for Protective Order. Defendants shall have until January 15, 2010, to produce the discovery as ordered above limited only to the remaining non-infringement issues.

**6) Plaintiffs' Motion for Review of Defendants' Confidential Attorneys Eyes Only Designations, Compelling Re-Designations of All Documents, and For Sanctions (Dkt. No. 233).**

On October 13, 2008, Plaintiffs filed a Motion for Review of Defendants' Confidential Attorneys Eyes Only Designations, Compelling Re-Designations of All Documents, and for Sanctions for Abuse of Protective Order. (Dkt. No. 233.) On February 9, 2009,

Defendants filed an Opposition to the Motion for Review, along with supporting declarations and exhibits (both sealed and unsealed). (Dkt. Nos. 269, 270, 278, 279.) On March 30, 2009, Plaintiffs filed a Reply to Defendants' Opposition, along with a supporting declaration of Robert Lauson (under seal).

## **App. 39 – Appendix D**

(Dkt. Nos. 306, 312.) On June 16, 2009, the parties filed a Joint Statement regarding all pending motions, including discovery motions. (Dkt. No. 333.)

The Court believes this Motion deals with discovery directly related to the issue of infringement and is rendered moot due to Judge Larson's finding of non-infringement. Further, Judge Larson has granted Plaintiff Grober's motion to discharge his attorneys and proceed pro se for the remainder of the litigation regarding Defendants' counterclaim for defamation against him. In so ordering, Judge Larson ordered that the parties were to either stipulate or hold a hearing before this Court to establish a "no-look list" regarding Plaintiff Grober's ability to look at information or other discoverable evidence that constitutes Defendants' trade secrets. Once the "no look list" is approved or ordered by this Court, present counsel will be officially discharged from further representing Plaintiff Grober in this matter. The parties have yet to submit such a list to the Court for approval. Should the parties reach an agreement on this issue, it could render this Motion moot. Thus, the Court denies Plaintiffs' Motion for Review without prejudice.

## **II.**

### **Conclusion**

Based on the foregoing, the Court rules as follows:

- 1) Plaintiffs' Motion to Compel Deposition of Kleins and Dann in Los Angeles and for Sanctions Against Defendant Mako (Dkt. No. 227) is granted in part and denied in part;

**App. 40 – Appendix D**

- 2) Plaintiffs' Motion to Compel Documents, Namely Emails, Photographs, and Videos from Defendant Mako (Dkt. No. 228) is granted in part and denied in part;
- 3) Defendants' Motion to Strike Plaintiff's Supplemental Memorandum and Declaration in Support of Discovery Motions Pending Before District Judge (Dkt. No. 284) is denied as moot;
- 4) Defendants' Motion to Strike Pleadings and Discovery Signed by Plaintiff Grober (Dkt. No. 285) is denied as moot;
- 5) Defendants' Motion for Protective Order for Terminating Further Paper Discovery (Dkt. No. 295) is granted in part and denied in part; and
- 6) Plaintiffs' Motion for Review of Defendants' Confidential Attorneys Eyes Only Designations, Compelling Re-Designations of All Documents, and For Sanctions For Abuse of Protective Order (Dkt. No. 233) is denied without prejudice.

**IT IS SO ORDERED.**

Initials of

\_\_\_\_\_ : \_\_\_\_\_  
mg

Preparer



**App. 41 – Appendix E**

Case 2:04-cv-08604-JZ-OP Document 504 Filed  
07/24/15 Page 1 of 2 Page ID #:5607

**IN THE UNITED STATES DISTRICT COURT FOR  
THE CENTRAL DISTRICT OF CALIFORNIA  
EASTERN DIVISION**

David Grober, et al.,            Case No. 2:04 CV 8604 JZ

Plaintiffs,    SHOW CAUSE ORDER

-vs-

Mako Products, Inc., et al.,

Defendants.

**JUDGE JACK ZOUHARY**

Pending before this Court is "Plaintiffs' Second Request for the Court to Order the Kleins and John Dann Produce Documents this Court Twice Previously Ordered Preserved for this Case." The Request is granted in part (Doc. 503).

The Request is in response to a "Motion to Quash or Modify Subpoena" signed by Jordan Klein Sr., Jordan Klein Jr., and John Dann which states "We do not have possession of information requested" in Plaintiffs' subpoena because "all assets, including records of Mako Products Inc. were sold by the trustee of the bankruptcy court, to Oceanic Production Equipment, Ltd. (Bahamas)" (Doc. 501-1

**App. 42 – Appendix E**

at 6). In their capacity as principals of Oceanic Production or as former parties to this litigation, this Court has ordered the Kleins and Dann to preserve all potential evidence (see Docs. 436 & 457), which would include any document responsive to Plaintiffs' subpoena.

Accordingly, Jordan Klein Sr., Jordan Klein Jr., and John Dann are each ordered to show cause by August 7, 2015 why this Court should not hold him in contempt for failing to comply with this Court's Orders requiring parties to adhere to their discovery obligations and to preserve all potential evidence.

It is unclear from the parties' request whether Plaintiffs' subpoena seeks documents already produced by the Kleins and Dann. To the extent Plaintiffs' recent subpoena seeks re-production of documents already produced by either the Kleins, Dann, or other parties, this Show Cause Order may be satisfied by each individual filing a sworn affidavit stating the basis upon which he has personal knowledge that all documents responsive to Plaintiffs' subpoena in his possession, custody, or control have been produced, by whom they were produced, and the date(s) of the production.

IT IS SO ORDERED.

\_\_\_\_\_  
/s/

JACK ZOUHARY  
U. S. DISTRICT JUDGE

July 24, 2015

**App. 43 – Appendix F**

Case 2:04-cv-08604-JZ-OP Doc. 506  
Filed 08/07/15. Page 1 of 17. Page ID#: 5615

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Jordan Klein, Jr.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA –  
EASTERN DIVISION

David Grober, et al., Case No.: 2:04 CV 8604 JZ

*Plaintiff,* )AFFIDAVITS OF JOHN  
)DANN, JORDAN KLEIN,  
)SR., and JORDAN  
)KLEIN, JR.

v. )Judge: HONORABLE  
)JACK ZOUHARY

Mako Products, Inc., et al.,

*Defendants.*

Pursuant to the Court's Order of July 24, 2015,  
(Dkt. 504) JOHN DANN, JORDAN KLEIN, SR.,  
and JORDAN KLEIN, JR., submit the following  
affidavits showing cause why this Court should not  
hold them in contempt for failing to comply with this

**App. 44 – Appendix F**

Court's Orders (Docs. 436 and 457).

Attached are the affidavits of Messrs. Dann, Klein, Sr., and Klein, Jr., together with Exhibit A (which is identical for all three affidavits) and the FedEx confirmation showing the scheduled pickup for today from John Dann of the package containing the CD's (referenced in ¶9 of Mr. Dann's Affidavit) being sent to Plaintiff's counsel.

Dated: August 7, 2015

VARNELL AND WARWICK, P.A.

By: s/ Brian W. Warwick, Esq.

Brian W. Warwick, Esq. (Pro Hac Vice)

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*ATTORNEYS FOR JOHN DANN, JORDAN  
KLEIN, SR. AND JORDAN KLEIN, JR.*

**App. 45 – Appendix F**

**AFFIDAVIT OF JOHN DANN**

**STATE OF FLORIDA    )  
COUNTY OF MARION   )**

Before me, the undersigned authority personally appeared John Dann who was sworn and states:

1. I am over eighteen years of age and am competent to give this testimony.
2. In June 2015, I was served with a subpoena from Plaintiffs asking for the extremely production of any and all documents equipment or otherwise related to the MakoHead.
3. Because all responsive documents were already produced through the discovery process over the pendency of this litigation, I believed that all documents responsive to the development of the MakoHead and the rental history of the device by the Rental House Defendants had been produced long ago when the depositions took place in this matter in 2008.
4. Therefore, I misinterpreted the request as seeking the actual MakoHead devices, the computer equipment and the records of Oceanic Production Equipment Ltd. as opposed To Mako Products, Inc. Because the prior orders of this Court ordered that we retain "evidence" and the bankruptcy Court allowed the "equipment" to be sold through bankruptcy I believed that there was nothing left to produce other than the computers and MakoHead

## **App. 46 – Appendix F**

devices themselves and filed a response accordingly.

5. On July 24, 2015 Judge Zouhary entered a Show Cause Order taking issue with my previous response. In the last paragraph of its Order this Court stated: "To the extent Plaintiffs recent subpoena seeks re-production of documents already produced by either the K. leins Dann or other parties, this Show Cause Order may be satisfied by each individual filing a sworn affidavit stating the basis upon which he has personal knowledge that all documents responsive to Plaintiffs ' subpoena in his possession, custody or control have been produced, by whom they were produced and the date(s) of the production." This affidavit is filed in compliance with this statement.

6. This matter was filed in 2004 and discovery proceeded through the Markman Hearing and the Appeal to the Federal Circuit in 2010. Between 2004 and 2009, myself, Mako Product the Klein Defendants, Fern Creek Electronics and the Rental House Defendants all produced discovery at various times. I have no way of determining, for certain, precisely when which documents were produced. I do recall producing everything in my possession responsive to the requests and there were many.

7. Fortunately recently Mr. Grober issued a subpoena to Mako's former counsel, Varnell & Warwick, P.A. and requested that all documents regarding the MakoHead be

## **App. 47 – Appendix F**

produced. Exhibit A attached hereto is correspondence from Mr. Warwick asserting that he produced the following documents to Plaintiffs on August 3, 2015.

- A. Documents Produced by Mako Products, Inc.  
bates Nos. 0045 - 2630
- B. Mako Products Income Statements and  
Balance Sheets;
- C. Documents Produced by Jordan  
Aero Marine/Jordan Klein Sr. bates No. 1-40;
- D. Documents Produced by Jordan Klein  
Film & Video bates Nos. 1-23;
- E. Documents Produced by Fern Creek  
Electronics, bates Nos. 1-1498;
- F. Documents Produced by Air Sea Land  
bates Nos. 1-548;
- G. Documents Produced by Blue Sky  
, bates Nos. 1-324
- H. Documents Produced by Cinevideotech,  
bates Nos. 1-119;
- I. Documents Produced by Spectrum  
Effects, bates Nos. 1-50;
- J. Confidential Photos of the MakoHead  
bates No. 2611
- K. Non-Confidential Photos of the Makohead.

8. These are the only responsive documents that I am aware of with one exception. In 2008 Plaintiffs sought to copy some emails from my business computer. There was some disagreement regarding which emails were to be copied and which were protected by the attorney-client privilege.

**App. 48 – Appendix F**

9. Regardless, simultaneous with the filing of this Affidavit I am producing six(6) CD 's containing approximately 9383 emails. These are the only documents not listed above that I know to exist.

10. The MakoHead units themselves and other equipment were purchased out of bankruptcy by Oceanic Production Equipment, Ltd., and not me personally.

/s/

---

JOHN DANN

On this 7<sup>th</sup> day of August, 2015 before me, the undersigned Notary Public in and for said state, personally appeared JOHN DANN known to me to be the person who signed on the preceding document and acknowledged to me that he signed it for the purpose therein stated.

/s/

---

Notary Public

My commission expires: Oct 23, 2015



**App. 49 – Appendix F**

**AFFIDAVIT OF JORDAN KLEIN, SR.**  
**STATE OF FLORIDA    )**  
**COUNTY OF MARION   )**

Before me the undersigned authority personally appeared Jordan Klein Sr. who was sworn and states:

1. I am over eighteen years of age and am competent to give this testimony.
2. In June 2015 I was served with a subpoena from Plaintiffs asking for the extremely production of any and all documents equipment or otherwise related to the Makohead.
3. Because all responsive documents were already produced through the discovery process over the pendency of this litigation, I believed that all documents responsive to the development of the MakoHead and the rental history of the device by the Rental House Defendants had been produced long ago when the depositions took place in this matter in 2008.
4. Therefore I misinterpreted the request as seeking the actual MakoHead devices, the computer equipment and the records of Oceanic Production Equipment Ltd., as opposed to Mako Products, Inc. Because the prior orders of this Court ordered that we retain "evidence" and the bankruptcy Court allowed the "equipment" to be sold through bankruptcy, I believed that there was nothing left to produce other than the computers and MakoHead devices themselves and filed a response accordingly.
5. On July 24, 2015 Judge Zouhary entered a

## **App. 50 – Appendix F**

Show Cause Order taking issue with my previous response. In the last paragraph of its Order, this Court stated: 'To the extent Plaintiffs' recent subpoena seeks re-production of documents already produced by either the Kleins, Dann or other parties, this Show Cause Order may be satisfied by each individual filing a sworn affidavit stating the basis upon which he has personal knowledge that all documents responsive to Plaintiffs subpoena in his possession custody, or control have been produced, by whom they were produced and the date(s) of the production.' This affidavit is filed in compliance with this statement.

6. This matter was filed in 2004 and discovery proceeded through the Markman Hearing and the Appeal to the Federal Circuit in 2010. Between 2004 and 2009 myself, Mako Product the Klein Defendants, Fem Creek Electronics and the Rental House Defendants all produced discovery at various times. I have no way of determining, for certain precisely when which documents were produced. I do recall producing everything in my possession responsive to the requests and there were many.

7. Fortunately, recently Mr. Grober issued a subpoena to Mako's former counsel, & Varnell & Warwick, P.A. and requested that all documents regarding the MakoHead be produced. Exhibit A attached hereto is correspondence from Mr. Warwick asserting that he produced the following documents to Plaintiffs on August 3, 2015.

- A. Documents Produced by Mako Products , Inc.,  
bates Nos. 0045 - 2630;
- B. Mako Products Income Statements and Balance  
Sheets;

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- C. Documents Produced by Jordan Aero  
Marine/Jordan Klein Sr. bates No. 1-40;
- D. Documents Produced by Jordan Klein Film &  
Video, bates Nos. 1-23;
- E. Documents Produced by Fem Creek Electronics  
bates Nos. 1-1498;
- F. Documents Produced by Air Sea Land, bates Nos.  
1-548;
- G. Documents Produced by Blue Sky Aerials, bates  
Nos. 1-324;
- H. Documents Produced by Cine Videotech , bates  
Nos. 1-119.
- I. Documents Produced by Spectrum Effects, bates  
Nos. 1-50;
- J. Confidential Photos of the MakoHead bates No.  
2611.
- K. Non-Confidential Photos of the Makohead.
- 8. These are the only responsive documents that I  
am aware of.
- 9. The MakoHead units themselves and other  
equipment were purchased out of bankruptcy by  
Oceanic Production Equipment Ltd.

/s/\_\_\_\_\_  
Jordan Klein, Sr.

On this 7<sup>th</sup> day of August, 2015, before me, the  
undersigned Notary Public, in and for said  
state, personally appeared JORDAN KLEIN,  
SR., known to me to be the person who signed on  
the preceding document, and acknowledged to  
me that he signed it for the purpose therein stated.  
My commission expires: Oct 23, 2015

**AFFIDAVIT OF JORDAN KLEIN, JR.**  
**STATE OF FLORIDA    )**

**App. 52 – Appendix F**

**COUNTY OF MARION )**

Before me, the undersigned authority personally appeared Jordan Klein, Jr., who was sworn and states:

1. I am over eighteen years of age and competent to give this testimony.
2. In June 2015, I was served with a subpoena from Plaintiff asking for the extremely production of any and all documents, equipment of otherwise related to the MakoHead.
3. Because all responsive documents were produced through the discovery produced over the pendency of this litigation, I believed that all documents responsive to the development of the MakoHead and the rental history of the device by the Rental House Defendants had been produced long ago when the depositions took place in this matter in 2008.
4. Therefore, I misinterpreted the request as seeking the actual MakoHead devices, the computer equipment and the records of Oceanic Production Equipment, Ltd., as opposed to Mako Products, Inc. Because the prior orders of this Court ordered that we retain "evidence" and the bankruptcy Court allowed "equipment" to be sold through bankruptcy, I believed that there was nothing left to produce other than the computers and MakoHead devices themselves and filed a responsive accordingly.
5. On July 24, 2015, Judge Zouhary entered a Show Cause Order taking issue with my previous response. In the last paragraph of its Order, this Court stated: "To the extent Plaintiffs' recent

## **App. 53 – Appendix F**

subpoena seeks re-production of documents already produced by either the Kleins, Dann, or other parties, this Show Cause Order may be satisfied by each individual filing a sworn affidavit stating the basis upon which he has personal knowledge that documents responsive to Plaintiffs' subpoena in his possession, custody, or control have been produced, by whom they were produced, and the date(s) of the production." This affidavit is filed in compliance with this statement.

6. This matter was filed in 2004 and discovery proceeded through the Markman Hearing and the Appeal to the Federal Circuit in 2010. Between 2004 and 2009, myself, Mako Product, the Klein Defendants, Fern Creek Electronics and the Rental House Defendants all produced discovery at various times. I have no way of determining, for certain, precisely when which documents were produced. I do recall producing everything in my possession responsive to the requests and there were many.

7. Fortunately, recently Mr. Grober issued a subpoena to Mao's former counsel, Varnell & Warwick, P.A. and requested that all documents regarding the MakoHead be produced. Exhibit A attached hereto is correspondence from Mr. Warwick asserting that he produced the following documents to Plaintiff on August 3, 2015.

- A. Documents Produced by Mako Products, Inc., bates Nos. 004-2630;
- B. Mako Products Income Statement and Balance Sheets;
- C. Documents Produced by Jordan Aero Marine/Jordan Klein St., bates No. 1-40;

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- D. Documents Produced by Jordan Klein Film & Video, bates Nos. 1-23;
- E. Documents Produced by Fern Creek Electronics, bates Nos 1-1498;
- F. Documents Produced by Air Sea Land, bates Nos. 1-548;
- G. Documents Produced by Blue Sky Aerials, bates Nos. 1-324;
- H. Documents Produced by Cinevideotech, bates Nos. 1-119;
- I. Documents Produced by Spectrum Effects, bates Nos. 1-50;
- J. Confidential Photos of the MakoHead, bates No. 2611;
- K. Non-Confidential Photos of the MakoHead.

8. These are the only responsive documents that I am aware of.

9. The MakoHead units themselves and other equipment were purchased out of bankruptcy by Oceanic Production Equipment, Ltd., and not me personally.

/s/

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Jordan Klein, Jr.

On this 7th day of August, 2015, before me, the undersigned Notary Public, in and for said state, personally appeared JORDAN KLEIN, Jr., known to me to be the person who signed on the preceding document, and acknowledged to me that he signed it for the purpose therein stated.

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/s/

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**Notary Public**

**My commission expires: Oct. 17, 2017**

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**EXHIBIT A**

**VARNELL & WARWICK  
COMPLEX CONSUMER LITIGATION**

August 3, 2015

Edwin P. Tarver, Esq.  
Lauson & Tarver LLP  
880 Apollo Street  
Suite 301  
El Segundo, CA 90245

Re: Voice International, Inc. v. Mako  
Products, Inc. et al.

Dear Mr. Tarver:

On July 23, 2015, I accepted service of three subpoenas issued by you in the above referenced litigation. Pursuant to Fed. R. Civ. Pro. 45(a) the subpoenas are improper as they state that they are being issued by the United States District Court of "Colorado," which is simply untrue. Rule 45(a) (2) states that "a subpoena must issue from the court where the action is pending." The fact that this information was hand-written on the subpoena indicates that you are still allowing Mr. Grober to prepare documents and file them under your name without review. Despite the facial violation of Rule 45, I will respond to the subpoenas as follows.

First, the unorthodox form of Exhibit A makes it extremely difficult to know exactly what is being requested. Towards the top, it states "Documents to be produced are those that relate in any way to the MakoHead, including prototypes or derivatives, and



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their development, construction, use, rental, lease, or sale to any party.” However, then the document goes on to discuss at length a document review that took place in May 2008 where Plaintiffs were not permitted to access attorney-client documents. Exhibit A goes on to state:

The fact that each of those emails have at least one or more of the restricted email addresses means that each of those emails additionally reside on the email servers of the individuals owning those addresses, and whom were stated to be Warwick and Varnell or their office assistants. This subpoena is specifically aimed at retrieving those 5,000 emails as well as any other documents that fall under the specifications of this subpoena.

Thus, it appears that you are seeking two categories of documents: All documents that relate in any way to the Makohead, and emails to my law firm from my clients. Although I must object to the scope of both requests, I will provide what I have.

First, at one time or another, I represented Jordan Klein, Jr., Jordan Klein Sr., Mako Products, Fern Creek Electronics, Air Sea Land Productions Inc., Cinevideotech, Spectrum Effects, and Blue Sky Aerials. “All responsive documents” relating to the Makohead were previously produced through Mako Products on one of the other entities listed above. Although this firm no longer represents any of these individuals, the information requested is so broad that it would include attorney-client privileged communications. The request is also so broad that it

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includes emails and work product which are privileged.

To the extent that the inner workings of the MakoHead are at issue, that information has already been produced prior to the first Markman hearing. Indeed, there was sufficient evidence that your expert was able to opine as to the infringing nature of the device. Therefore, this firm is unable to provide any documents responsive to the first category of documents that have not already been produced. In fact, approximately one year ago, new counsel for the rental house defendants, Coast Law Group, asked for a copy of the entire file for the rental house defendants. At that time, a copy was provided of all known discovery produced to date. I read this request as essentially the same.

In a final effort to finally extricate myself from this case once again, however, I am producing all the documents I have in my possession regarding the Makohead. Enclosed with this letter are 6 CD's which include the following documents:

1. Documents Produced by Mako Products, Inc.,  
bates Nos. 0045 – 2630;
2. Mako Products Income Statements and  
Balance Sheets;
3. Documents Produced by Jordan Aero  
Marine/Jordan Klein Sr., bates No. 1-40;
4. Documents Produced by Jordan Klein Film &  
Video, bates Nos. 1-23;
5. Documents Produced by Fern Creek  
Electronics, bates Nos. 1-1498;

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6. Documents Produced by Air Sea Land, bates Nos. 1-548;
7. Documents Produced by Blue Sky Aerials, bates Nos. 1-324;
8. Documents Produced by Cinevideotech, bates Nos. 1-119;
9. Documents Produced by Spectrum Effects, bates Nos. 1-50;
10. Confidential Photos of the MakoHead, bates No. 2611;
11. Non-Confidential Photos of the Makohead,

Neither myself nor any other member of my firm have any other documents related to the MakoHead or Mako Products.

To the extent you are seeking correspondence between me and my clients, such documents are protected by the attorney-client relationship and/or the work product doctrine. The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term in *Trammel v. United States*, 445 U.S. 40, 51, 100 S.Ct. 906, 913, 63 L.Ed.2d 186 (1980): "The lawyer-client

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privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 682, 66 L. Ed. 2d 584 (1981). This privilege survives bankruptcy and even death. See *Swidler & Berlin v. United States*, 524 U.S. 399, 406, 118 S. Ct. 2081, 2086, 141 L. Ed. 2d 379 (1998).

In addition, to the extent you are seeking emails sent to my law firm by clients that are referenced in Exhibit 1 to the Subpoena, those emails also do not exist. As you know, I have not represented any party in this litigation for several years. I have reviewed the file in this matter and discussed the request with my partner, Janet Varnell and my former employee, Mary Arnst. Suffice it to say, we have no emails responsive to this request. I will endeavor to explain why although I am not obligated to do so under Federal Rule 45.

Sometime during the first six months of 2010, Varnell & Warwick created a firm website, [varnellandwarwick.com](http://varnellandwarwick.com). Along with the website we created new email accounts for all employees at such as [bwarwick@varnellandwarwick.com](mailto:bwarwick@varnellandwarwick.com). Thereafter, all firm employees ceased using the prior email accounts to avoid any confusion. The firm took no steps to copy or save the former emails as they were not deemed necessary under our interpretation of Florida Bar Ethics Rules as attorney emails are generally covered

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by either attorney-client privilege, or work product and it is within the discretion of the attorney whether or not to keep such items. Downloading thousands of emails would serve no purpose and saving them on the server or cloud was deemed to be cost prohibitive.

Upon receipt of your subpoena I endeavored to determine if I could still access the AOL email account I used previously. After having to create a new password, I was able to access the account but there were no old emails listed. The email account was completely empty. It appears that if you do not access the AOL system regularly, the emails are not saved indefinitely. Ms. Varnell and Ms. Arnst confirmed the same for their old email accounts. Since none of these accounts were accessed recently, this is no surprise. As a result, I do not have access to any of the emails from John Dann or other Mako employees that are requested in your subpoenas.

In addition to the fact that the emails are not available, I must also object to this request as it appears that you specifically seek email correspondence between my law firm and my former clients at Mako Products. Even if this information was available, I would still have to object to this request pursuant to Federal Rule of Civil Procedure 45(e)(2), as correspondence between a lawyer and his client is protected by the attorney-client privilege.

Furthermore, I take issue with the form and improper and unprofessional attack on me in your subpoena. You infer that I somehow knowingly denied access to the emails in 2008. To the contrary, I had a lengthy conversation with Joel Bennett, then attorney for Mr. Grober, about the attorney-client protected

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information. He understood and agreed that such information could not be copied or downloaded and that any correspondence between myself, my staff and Mako was protected by the attorney-client privilege. I was not contacted by Mr. Wheelbarger or Mr. Bennett during the inspection at Mako regarding the number of emails at issue or Mr. Dann's understanding of our agreement. I would have been happy to discuss these issues. As my presence at the beginning of the inspection and my correspondence with Mr. Bennett shows, I was willing to allow relevant non-privileged documents to be copied because I was certain that all relevant documents had already been produced. However, Mr. Wheelbarger had been retained by Mr. Grober and not by an experienced lawyer and, as a result, he had little to no litigation experience and was wholly unfamiliar with the process and the work product doctrine. In fact, he appeared to have virtually no experience in litigation. An experienced expert would have been able to discuss and understand the difference between an email that was originated by Dann or another and one that was merely forwarded to me and my staff. If he had contacted Mr. Bennett I am sure we could have worked something out at that time. Why Mr. Wheelbarger did not contact Mr. Bennett in this regard is unknown to me.

Moreover, the email accounts of myself, my partner and my staff are not and have never been "evidence" in this case and a court order to "preserve evidence" does not apply to our email accounts as non-parties. Certainly, any order entered by the Bankruptcy Court cannot apply to this firm as this order was entered long after this firm ceased

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representing Mako Products. Your reference to these orders in the subpoena is therefore inappropriate.

Finally, in addition to providing a full copy of everything in my file to Coast Law Group, my recollection is that all relevant emails and pertinent information had already been provided by the time that the request for a review of Mr. Dann's computer came up. The review was simply to make sure that all responsive documents were produced and to dispel Mr. Grober's unfounded belief that there was some scheme to copy his device. Additional evidence from the bookkeeping software of Mako shows the very limited revenue obtained by this venture. Substantial documentation were also produced by Fern Creek electronics and the Rental House Defendants. Together, I am confident that all the relevant documents were timely produced in this matter and have been produced again in the above CDs. If your law firm has not maintained good records of the discovery produced in this matter, my firm is not obligated to produce it again. I am copying counsel for the Rental House defendants so that they are aware of what is being produced and request a copy of the same.

Sincerely,

/s/

Brian W. Warwick

BWW/kms

Enclosures. cc: Chris Polychron, Esq. Jordan Klein,  
Sr. Jordan Klein, Jr. Matt Kutcher, Spectrum  
Effects.

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**FEDERAL EXPRESS SHIPPING RECEIPT  
FOR DISKS**

From: pickup@fedex.com  
Date: August 7, 2015 at 1:39:43 PM EDT  
To: [jd@oceanicproductionequipment.com](mailto:jd@oceanicproductionequipment.com)  
Subject: FedEx Pickup Confirmation

FedEx Pickup Confirmation — FedEx Express  
OCFA88

Thank you for shipping with FedEx. Your  
pickup request is scheduled. FedEx will pick up your  
shipment at the address below.

Company	Select or enter	FedEx Express
Contact		
Name	John Dann	Total no. of packages
Country/	United States	1
Location		
Address	10197 SE 144th PL	
City	Summerfield	
State	Florida	
ZIP code	34491	
Phone no.	3522667794	

Total weight 1 lbs  
Pickup Date 08/07/2015  
Pickup Time 2:00PM - 6:00PM

Confirmation no. OCFA88

This is a post-only mailing. Please do not reply  
to this message.



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Case 2:04-cv-08604-JZ-OP Doc. 507 Filed 08/07/15

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**IN THE UNITED STATES DISTRICT COURT FOR  
THE CENTRAL DISTRICT OF CALIFORNIA  
EASTERN DIVISION**

David Grober, et al.,      Case No. 2:04 CV 8604 JZ  
Plaintiffs,

-vs-

Mako Products, Inc., et al.,  
Defendants.

**ORDER**

**JUDGE JACK ZOUHARY**

This Court has reviewed the Affidavits of John Dann, Jordan Klein, Sr. and Jordan Klein, Jr. (Doc. 506) in which each represents that all documents responsive to Plaintiffs' subpoena were produced by Mako's former counsel, Varnell & Warwick, P.A. on August 3, 2015. In addition, Dann is producing responsive e-mails that were initially withheld as potentially protected from disclosure under the attorney-client privilege. This Court's Order to Show Cause (Doc. 504) is now discharged.

**IT IS SO ORDERED.**

s/ Jack Zouhary  
JACK ZOUHARY  
U. S. DISTRICT JUDGE  
August 7, 2015

**Additional material  
from this filing is  
available in the  
Clerk's Office.**