In The United States Court Of Appeals For The Federal Circuit

No. 2014-1406

ALEXANDER SHUKH,
Plaintiff-Appellant

v.

SEAGATE TECHNOLOGY, LLC, a Delaware Limited Liability Company, SEAGATE TECHNOLOGY, INC., a Delaware corporation, SEAGATE TECHNOLOGY, a holding company of the Cayman Islands,
Defendants-Appellees

UNKNOWN OWNERS AND ASSIGNEES,
Defendant

SEAGATE TECHNOLOGY PLC, an Irish public limited company,
Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA IN 10-CV-404 HON. JOHN R. TUNHEIM, Presiding

RESPONSIVE BRIEF OF SEAGATE DEFENDANTS-APPELLEES

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CERTIFICATE OF INTEREST

Counsel for Defendants-Appellees, Seagate Technology LLC, Seagate Technology, Inc., Seagate Technology, and Seagate Technology plc certifies the following:

1. The full name of every party or amicus represented by me is:

Seagate Technology plc; Seagate Technology LLC; Seagate Technology; and Seagate Technology LLC and Seagate Technology as successors and assigns of Seagate Technology, Inc.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

Seagate Technology (US) Holdings, Inc.; Seagate HDD Cayman; Seagate Technology HDD Holdings; Seagate Technology; Seagate Technology Public Limited Company

4. The names of all law firms and the partners or associates that appeared for the party now represented by me in the trial court or agency or are expected to appear in this court are:

Faegre Baker Daniels LLP: Calvin L. Litsey, David J.F. Gross, Charles F. Knapp, Chad Drown, Timothy E. Grimsrud, Elizabeth Cowan Wright, Sarah E. Benjes, Lucas J. Tomsich, Jeya Paul, Joseph A. Herriges

December 5, 2014
Date

/s/ Calvin L. Litsey
Signature of Counsel

Calvin L. Litsey
Printed Name of Counsel

STATEMENT OF RELATED CASES

No other appeal in or from the same civil action in the lower court was previously before this Court or other appellate court, except for Appellant Alexander Shukh's ("Shukh") Petition for a Writ of Mandamus, *In re Shukh*, Misc. No. 12-132, which a panel of this Court (Linn, Dyk, and Wallach, JJ.) denied on October 16, 2012. *In re Shukh*, 485 Fed. Appx. 437 (Fed. Cir. 2012). Shukh also filed an appeal of the district court's decision on costs, No. 15-1012, which has been designated as a companion case to the present appeal. (Dkt. No. 52.)

STATEMENT OF ISSUES

1. Whether the district court erred in dismissing any of Shukh's claims raised on appeal (Counts 2-7 and 11-13) and in granting summary judgment on Seagate's breach of contract counterclaim.

2. Whether the district court abused its discretion or otherwise erred in deciding three ancillary issues raised by Shukh.

STATEMENT OF THE CASE

Shukh filed this lawsuit in 2010 against the Seagate Appellees ("Seagate"), asserting thirteen claims based on bold, conclusory allegations hoping that something would stick. The district court dismissed half of Shukh's claims for failure to state a claim, but allowed Shukh to conduct discovery and try to prove his remaining claims for fraud, correction of inventorship, and

discrimination/retaliation. After extensive discovery, Shukh failed to present evidence—as opposed to his conclusory rhetoric—sufficient to create a genuine issue of material fact for any of his remaining claims. Accordingly, the district court granted Seagate summary judgment. The district court's judgment should be affirmed in its entirety.

The original overarching premise of Shukh's complaint was that Seagate deliberately omitted him as an inventor on multiple patents—specifically, on U.S. Patent Nos. 6,525,902; 6,548,114; 6,738,236; 7,983,002; 7,684,150; and 7,233,457 (hereinafter, "Patents")—because of his foreign national origin. (A586, A4260-61, A4289.) From that starting point, Shukh asserted thirteen claims: correction of inventorship of the Patents pursuant to 35 U.S.C. § 256 (Count 2); rescission of his employment agreement (Count 3), breach of contract (Count 4); fraud (Count 5); breach of fiduciary duty (Count 6); unjust enrichment (Count 7); interference with business expectancy (Count 8); Title VII and Minnesota Human Rights Act (MHRA) national origin discrimination (Counts 9 and 10); and Title VII and MHRA retaliation (Counts 11 and 12). (A503-12.) In addition, Shukh sought a declaratory judgment that the arbitration and confidentiality provisions of his employment agreement were unenforceable (Counts 1 and 13). (*Id.*)[1]

[1] Count 1 was voluntarily dismissed.

During the four years that this case was pending before it, the district court carefully considered each of Shukh's claims and determined that they lacked merit. On March 30, 2011, the district court granted Seagate's Rule 12(b)(6) motion, dismissing the claims in the First Amended Complaint ("FAC") for rescission, breach of contract, breach of fiduciary duty, unjust enrichment, interference with business expectancy, and a declaratory judgment directed at his confidentiality obligations. (A2.) The district court also held in the March 30 order that with respect to Shukh's standing to assert the correction of inventorship claim, Shukh lacked an ownership or financial interest in the Patents because his Employment Agreement included an automatic assignment of all inventions to Seagate under *Filmtec Corp. v. Allied-Signal, Inc.*, 939 F.2d 1568 (Fed. Cir. 1991), and its progeny. (A12-14.) The district court explained, however, that Shukh may have standing "due to **potential** harm to his reputational interests." (A16 (emphasis added).)

Two years later, on March 25, 2013, after extensive discovery, the district court granted Seagate's motion for summary judgment on Shukh's correction of inventorship claim—finding a lack of evidence of an injury-in-fact to Shukh's reputation and thus a lack of standing—and on his fraud claim—finding a lack of evidence for the requisite elements. (A149.) Finally, on March 31, 2014, the

district court granted Seagate's motion for summary judgment on Shukh's discrimination and retaliation claims. (A215.)

During the course of the case, the district court also ruled on numerous discovery and ancillary issues. On July 3, 2012, the court granted Seagate's motion to dismiss a claim for Title VII punitive damages that Shukh added in his Third Amended Complaint. (A91.) It also denied multiple meritless discovery motions brought by Shukh and granted a protective order sought by Seagate in response to burdensome and harassing discovery targeting Seagate's experts.

On appeal, Shukh does not seek reversal of the dismissal of his discrimination and interference with business expectancy claims (Counts 8-10), but he does seek reversal of the dismissal of the other claims. He also appeals three ancillary decisions by the district court related to Seagate's privileged documents (A59/A74), certain discovery disputes (A132/A191), and Shukh's claim for punitive damages (A91).

STATEMENT OF FACTS

I. SHUKH WAS EMPLOYED AT SEAGATE FROM 1997 TO 2009.

A. Seagate Recruited Shukh from Belarus to Join Seagate's Already Diverse Workforce.

Seagate recruited and hired Shukh from Belarus in September 1997 to work on the development of hard disk drives. (A9002, A9178, A9230, A9253, A4241.) Seagate spent thousands of dollars to sponsor Shukh for work visas and ultimately

permanent residency. (A4252 ¶¶ 80-81, A9352, A5591.) Shukh joined a diverse Seagate workforce. Indeed, over half of the named inventors on the Patents and other applications that Shukh contends he was omitted from because of his national origin were themselves employees with foreign national origins—Russian, Czech, Polish, Austrian, Dutch, Indian, Chinese, Irish, Scottish, and Sri Lankan. (A9834.)

B. Shukh Assigned All Rights in His Inventions to Seagate and Agreed to Protect Seagate's Property.

Shukh executed Seagate's standard At-Will Employment, Confidential Information and Invention Assignment Agreement ("Employment Agreement"). (A541 ¶ 50, A598-606.) As part of the Employment Agreement, Shukh did "hereby assign" to Seagate "all [his] right, title, and interest in and to any and all inventions" that he may develop during his employment at Seagate. (A600.) In addition, Shukh agreed that when his employment ended he would "deliver to the Company (and will not keep in my possession, recreate or deliver to anyone else)" all Seagate work-related documents. (A601.)

C. Seagate Recognized Shukh's Technical Abilities and Innovation with Promotions, Pay Increases, and Patents.

During Shukh's employment at Seagate, Shukh's managers recognized his technical abilities. (A8963 at 246, A9098 at 782.) His evaluations acknowledged his technical skills. (A9836-38, A9843-47, A9851-56, A9860-64, A6283-89,

A9292-301, A9471-72.) And Seagate obtained seventeen patents on which Shukh was a named inventor. (A11195-417, A9005, A9362.)

Shukh also received numerous promotions, pay increases, and bonuses. Shukh's base salary increased from $80,080 to $138,984 per year, and Seagate promoted him three times. (A9421.) Shukh also received bonus compensation every year throughout his employment, varying between approximately $5,000 and $80,000 each year. (A9422.)

D. Shukh Engaged in Disruptive Conduct at Seagate, Alienating Many of His Coworkers.

Notwithstanding his technical skills, Shukh had difficulties being respectful of others. As Dr. Kenneth Allen, one of Shukh's managers, succinctly explained: "Alex has probably the single largest ego of any human being I have ever met. And he is because of that incapable of taking input from others at the level he needs to work in teams." (A9571 at 180, A9529 at 11-12, A9472.) Shukh's personality conflicts were documented in the majority of Shukh's evaluations by different managers, beginning as early as 1999. (A8969 at 270, A9836-38, A9843-47, A9851-56, A9860-68, A6283-89, A9292-301, A9471-72.) The record is replete with examples of Shukh insulting the work of other Seagate employees, accusing them of stealing his work, and generally conducting himself in a manner antithetical to Seagate's culture of collaboration. (A219-27, *see also, e.g.*, A9564 at 149, A9551-53, A9155, A9159, A3724-25.)

Shukh's conduct often interfered with productivity at Seagate. For example, he created a "Three-Strikes" rule under which he would stop communicating with certain coworkers (A8969 at 271-72, A9096 at 777), began branding his internal work with a personal Alexander Shukh "copyright" (A9189 at 190), and once told Allen he would not work until he got a percentage of Seagate's revenues (A9569-70 at 172-173, A9672). Eventually, coworkers refused to attend Shukh's presentations, or review his work, for fear of becoming a target of his theft accusations (A6287, A9087 at 738), and he "slowly alienated just about every designer in the recording heads operations" (A9558-59 at 127-128).

E. Seagate Tried to Help Shukh Succeed.

In about January 2007, Shukh requested to work alone. (A9320-21 at 64, 67.) Although Allen had never encountered "another employee who generated the amount of trouble" as Shukh, Allen also believed Shukh "had enough skills to be worth saving." (A9567.) Allen therefore decided to have Shukh report directly to him in or around February 2007. (*Id*., A9878 ¶ 2.) Allen hoped he could help Shukh reestablish better working relationships. (A9556 at 118, A9567 at 162.) Shukh welcomed this change—which did not impact his title, salary, or benefits (A9327 at 91)—viewing it as a promotion (A9159 at 70-71).

By the summer of 2008, Shukh's performance began to show some improvement (A9292-A9301), and Allen told Shukh that he would "go forward out of cycle" and promote him if the improvement continued (A9301).

F. Seagate's Reduction-in-Force Eliminated Shukh's Position.

In the fall of 2008, in response to one of the worst economic downturns in U.S. history, Seagate initiated a series of reductions-in-force. (A9878 ¶ 3.) Allen received six criteria to identify individuals to be laid off: position elimination, performance history, documented counseling for performance, misconduct or attendance issues, technical or specialized skills, and length of service. (*Id*. ¶ 4, A9885-88.) In consultation with human resources, Allen used a point system to identify 16 employees (nearly 10% of his department) for lay-offs. (A9879 ¶¶ 6-8, A9890-933, A9533 at 27-28.) Shukh was included in that group. (A9879.)

Overall, 179 employees at Seagate's Bloomington facility were notified that their jobs were being eliminated in January 2009. (A9817 ¶ 5.) Shukh was advised of his employment termination on January 14, 2009. (A9675 ¶ 3.) Shukh was not replaced. (A9534-35 at 32-34.)

G. Shukh Took Seagate Documents in Violation of His Employment Agreement When He Was Terminated.

When Shukh's employment was terminated, he decided to steal 49,607 pages of Seagate's documents. (A2391 ¶ 31, A1038, A1047, A4069.) The confidential and privileged Seagate documents stolen by Shukh included

"invention disclosures, internal IP docket and other records, emails, [his] weekly highlights, presentations," and an engineering logbook labeled "the permanent property of Seagate." (A2389-91 ¶¶ 23, 30-35, A2918-19 at ¶¶ 1-5, A2450.)

Someone noticed Shukh copying documents at the copy machine and alerted Allen. (A2919.) Allen confronted Shukh and told him that he must return all copies of Seagate documents. (*Id.*) Shukh refused. (*Id.*) He was then escorted from Seagate's premises. (A2919-20.)

II. SHUKH TESTIFIED UNDER OATH THAT HE LACKED EVIDENCE FOR THE ELEMENTS OF HIS FRAUD CLAIM AND THAT HIS REPUTATION WAS NOT INJURED.

Shukh pled with particularity only one fraud theory: "it was a material misrepresentation for Seagate to file various patent applications omitting Shukh as an inventor." (A20.) Seagate served a specific interrogatory to understand the basis for this theory, but Shukh's response was devoid of any facts to support the legal elements of fraud, including no facts explaining what he did or did not do in reliance on Seagate's alleged misrepresentations (or concealment). (A4884-97.)

At his deposition, Seagate asked Shukh about the factual basis for the elements required to prove his fraud theory. Shukh was unable to identify anything he did or did not do in reliance to his detriment on Seagate's conduct. (A4841.) The best he could muster—after prodding by his own counsel—was a generic statement that "I need to believe to the company because it's natural"

(A5047-48) and that "I truly relied" (A4841). And he testified that he was not "aware of anything that Seagate did to conceal the existence" of the applications for the six patents at issue. (A8968 at 267-68.)

Shukh also testified that his reputation was not harmed by not being named an inventor on the Patents. Shukh testified that he had a reputation for "good technical abilities and innovation." (A8963 at 246.) Shukh then agreed that his omission from the Patents did not cause injury because he "**had the same reputation** for each of those personal qualities from the time period from 1997 until today." (A8964 at 250 (emphasis added).)

III. SHUKH'S INVENTORSHIP CLAIM WAS MERITLESS.

The district court did not decide whether Shukh actually should have been named on the Patents because Shukh lacked standing. Nonetheless, because Shukh makes repeated inflammatory and conclusory allegations that Seagate did something mischievous in not naming him on the Patents in an attempt to color the real issues on appeal, it is worth recounting the complete lack of evidence for Shukh's inventorship claim.

A. There Is No Evidence of Collaboration to Support Shukh's Claim of Joint Inventorship.

Shukh contends that he collaborated with the named inventors on the Patents and should be listed as a coinventor. (A8912 at 48-49.) At Seagate, engineers fill out Invention Disclosure forms to communicate potential inventions to Seagate.

(A9941.) The form requires the engineers to list all coinventors for the invention. (*Id*.) For each of the Patents, the named inventors jointly submitted an Invention Disclosure that does not include Shukh. (A9941-10023.) Similarly, Shukh proffered Invention Disclosures of his own as purported evidence of his contribution to the Patents, but none of Shukh's Invention Disclosures identify as coinventors any of the inventors named on the Patents. (A8731-36, A8279-94, A8305-15, A8478-93, A8224-36.) Thus, the evidence, including Shukh's own Invention Disclosures, shows that Shukh would not meet the collaboration requirement for joint inventorship.[2]

[2] An anomaly occurred in the processing related to U.S. Patent No. 7,684,150. For that patent, Seagate filed a provisional patent application on July 9, 2003, using the Invention Disclosure STL11583 with the names of the listed coinventors, which did not include Shukh. (A1182-96, A9941-61.) In August 2003, Seagate combined STL11583 with one of Shukh's disclosures—STL11547—as part of its internal file on the invention. (A1178-79 (confirming the "correct" Shukh disclosure being combined was STL11547), A1212.) Shukh's STL11547 disclosure—which listed Shukh as the sole inventor—described a particular type of "magnetic shield" with a laminated structure and elliptical shape for a recording head. (A1168-70.) Seagate recognized Shukh with a filing award when a utility application was filed in 2004 for the 2003 provisional application. (A1244-45.) However, Shukh was correctly not listed as a coinventor on the issued patent because there is no evidence that he collaborated with the listed coinventors and because the elliptically-shaped and laminated shield listed in his own Invention Disclosure was not included in the issued claims, as those claims were canceled during prosecution. (A1246-56.)

B. There Is No Evidence of Shukh's Contribution to any Inventive Aspect of the Patents.

Shukh's work did not reflect contributions to the inventive aspects of the Patents. The relevant expert analysis confirmed the lack of contribution to the inventive aspects, as opposed to concepts already known in the art. Seagate's expert, Dr. Christopher Bajorek, evaluated the concepts that Shukh contends he contributed in view of the applicable legal standards and found that they did not encompass the inventive aspects of the claims. (A11471-603.) In contrast, Shukh's technical expert, Dr. Edward Grochowski, explicitly confirmed that he did not apply any legal standards relating to inventorship, did not consider the prior art, and did not seek to determine whether Shukh's alleged contribution was inventive rather than part of the prior art. (A8767 at 47, A8785 at 120, A8769 at 55.)

SUMMARY OF THE ARGUMENT

Shukh's brief raises no fewer than fifteen meritless issues for appeal. His treatment of the fifteen issues is often superficial and confusing. He frequently confuses the standard of review and record for an order based on a failure to state a claim—which only looks at the complaint—with the standard and record for a particular order granting summary judgment. Shukh also often asserts facts as true without any citation to the record for support, perhaps hoping the Court will "mine [the] summary judgment record searching for nuggets" to support his arguments. *Rodgers v. City of Des Moines*, 435 F.3d 904, 908 (8th Cir. 2006). But that is not a

burden Shukh may place on the Court. It is Shukh's burden for summary judgment to identify specific evidence showing that the district court erred in dismissing his claims, and Shukh has not come close to meeting that burden. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

In this brief, Seagate clarifies for this Court the precise claims pled in the complaint at issue on appeal, the record before the district court at the time the claims were dismissed (*i.e.*, through Rule 12(b)(6) or 56), and how Shukh has failed to show that any of the district court's rulings should be reversed.

Dismissal of the claims. There is no basis for reversing the district court's dismissal of any of the claims Shukh raises on appeal.

First, the district court properly granted summary judgment on Shukh's correction of inventorship claim (Count 2) for lack of standing because (1) under the automatic-assignment provisions of his Employment Agreement, Shukh lacked any ownership or financial interest in the Patents that could support standing, and (2) even if reputational harm could establish standing, Shukh failed to present evidence of such harm and testified under oath that his reputation was not harmed.

Second, the district court correctly dismissed for failure to state a claim Shukh's tort and contract claims. Shukh's rescission and breach of contract claims (Counts 3 and 4) failed because Seagate had no contractual obligations to "protect" Shukh's "inventorship interests," so no breach could occur. His claim for breach

of fiduciary duty (Count 6) failed because Shukh did not allege facts showing a special, fiduciary relationship with Seagate's attorneys, and Shukh had no "inventorship interests" that could be the basis for any "duty" Seagate owed to Shukh. Similarly, Shukh's claim for unjust enrichment (Count 7) failed because such a claim is unavailable where, as here, a contract exists.

Third, the district court correctly granted summary judgment on Shukh's fraud claim (Count 5). Shukh failed to present evidence to create a genuine issue of material fact on **any** of the eleven essential elements of fraud—the absence of evidence to support even one element is fatal. Shukh, for example, failed to present any evidence of what he did or did not do in reliance to his detriment on any of Seagate's actions or omissions or how Seagate's actions caused him pecuniary (monetary) damage. Shukh's last-minute attempt to rely on new fraud theories in response to summary judgment is not permitted and only shows the lack of merit of the theory he pled with particularity in the FAC.

Fourth, the district court correctly granted summary judgment on Shukh's retaliation claim (Counts 11 and 12). Shukh's theory of "retaliatory discharge" failed because, among other reasons, he was laid-off years after his alleged protected conduct and no evidence suggested that retaliation, rather than Seagate's reduction-in-force, was the real reason for his discharge. Shukh's "retaliation by hostile work environment" theory was not pled and may not be considered on

appeal. It fails for that reason alone. Moreover, it fails on the merits because most of the instances of alleged harassment pre-dated his purported protected conduct and the remaining instances were not materially adverse.

Fifth, the district court correctly dismissed Shukh's claim seeking a declaratory judgment of unenforceability of the document return provisions of the Employment Agreement (Count 13) and granted summary judgment to Seagate. Shukh's generic unclean hands argument failed all requirements of that doctrine. His unconscionability and unconstitutionality defenses failed because the relevant contractual provisions are standard in employment agreements and he made no showing that he could not have relied on litigation discovery procedures to obtain evidence for his claims. Furthermore, because Shukh did not dispute that he had taken almost 50,000 pages of Seagate's documents when he departed, the district court also correctly granted summary judgment to Seagate on its counterclaim for breach of his document return obligation.

Ancillary Issues. The district court did not abuse its discretion or commit other error in deciding three ancillary issues.

First, the district court did not err in refusing to compel production of Seagate's privileged documents. None of the privilege doctrines that Shukh tries to shoe-horn into this situation apply. The district court also did not abuse its discretion in limiting the scope of waiver for Shukh's Invention Disclosures.

Second, the district court did not abuse its wide discretion in deciding two discovery motions. The district court correctly denied—far from abusing its discretion—Shukh's motion to exclude the testimony of Dr. Bajorek, based on the harmless and inadvertent omission from his initial report of the past cases in which he had given expert testimony, which omission was promptly corrected.

In addition, the district court did not abuse its discretion in overseeing discovery by issuing a protective order preventing Shukh from taking wide-ranging third-party discovery regarding experts. The district court had clear discretion to issue the protective order where the discovery sought was unduly burdensome and Shukh failed to establish its relevance.

Third, the district court properly dismissed Shukh's admittedly "pro forma" Title VII punitive damages claim. This issue is also moot if this Court affirms summary judgment on Shukh's retaliation claim.

ARGUMENT

I. THE DISTRICT COURT'S THOUGHTFUL JUDGMENT DISMISSING ALL CLAIMS SHOULD BE AFFIRMED.

A. The District Court Correctly Determined that Shukh Lacked Standing for His Correction of Inventorship Claim.

The district court granted summary judgment against Shukh on his correction of inventorship claim because Shukh lacked standing. (A149-79.) This Court has confirmed that the Article III requirements for standing must be met to

sue under 35 U.S.C. § 256. *Chou v. Univ. of Chi.*, 254 F.3d 1347, 1358 (Fed. Cir. 2001). Thus, a plaintiff must show (1) an actual, concrete injury in fact; (2) a causal relationship between the injury and conduct complained of; and (3) that the injury is capable of redress. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

The district court first found that, like the former employee in *Larson v. Correct Craft, Inc.*, 569 F.3d 1319 (Fed. Cir. 2009), Shukh could not claim injury based on an ownership or financial interest in the Patents because under the automatic-assignment provision of his Employment Agreement, Shukh did "hereby assign" to Seagate all of his "right, title, and interest in and to" all inventions. (A166-67.) *See DDB Techs., LLC v. MLB Advanced Media*, 517 F.3d 1284, 1290 (Fed. Cir. 2008) ("hereby grant and assign" creates automatic assignment of "future inventions" and "'no further act [is] required'") (quoting *Filmtec Corp. v. Allied-Signal, Inc.*, 939 F.2d 1568, 1573 (Fed. Cir. 1991)); *Stanford Univ. v. Roche Molecular Sys.*, 583 F.3d 832, 842 (Fed. Cir. 2009) ("hereby assign").

Next, the district court acknowledged that "[r]eputational harm **may** be sufficient to confer standing" (A167 (emphasis added)), and so it considered at summary judgment whether Shukh presented evidence of injury to his reputation—that was redressable through correction of inventorship—sufficient to confer standing. *See Lujan* 504 U.S. at 561 (holding that because standing requirements

"are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter"). The district court found that Shukh "failed to present evidence of reputational damage sufficient to raise a genuine issue of material fact with respect to his standing to pursue correction of inventorship claims." (A170.)

On appeal, Shukh makes two arguments for reversing summary judgment on his correction claim. First, Shukh argues that the automatic-assignment rule originating with this Court's *Filmtec* case should be overruled, which Shukh argues would give him an ownership interest sufficient to confer standing. (Br. 42.) Second, Shukh argues that he created a genuine issue of material fact that his "reputation was damaged from the lost recognition of being an inventor of important patents." (Br. 50.) Both arguments fail.

1. Shukh does not have an ownership/financial interest in the Patents because of the automatic assignment provision in his Employment Agreement, and *Filmtec* is controlling.

Shukh concedes that he lacks an ownership or financial interest in the Patents under this Court's holding in *Filmtec* (Dkt. 41, Petition for En Banc Review at 4-5), and therefore argues that *Filmtec* should be overruled. This argument goes nowhere. Shukh already petitioned this Court for *en banc* review of the *Filmtec* decision, which holds that "hereby assign" language in an employment agreement automatically transfers all interests in patented inventions to the

employer. (Dkt. 41.) This Court denied Shukh's petition. (Dkt. 48.) "Panels of this court are bound by previous precedential decisions until overturned by the Supreme Court or by this court *en banc*." *Barclay v. United States*, 443 F.3d 1368, 1373 (Fed. Cir. 2006). Accordingly, the *Filmtec* rule must be followed, and the district court's decision that Shukh cannot derive standing from ownership of or a financial interest in the Patents must be affirmed. *E.g.*, *AFTG-TG, LLC v. Nuvoton Tech. Corp.*, 689 F.3d 1358, 1366 (Fed. Cir. 2012) ("[W]e are obligated to follow prior panel opinions of this court, not an observation that failed to receive endorsement from a majority of the Supreme Court's members.").

2. Even if a reputational injury were sufficient to confer standing for a § 256 claim, Shukh failed to present evidence to establish the *Lujan* elements for standing based on reputational injury.

This Court has not yet decided whether a reputational interest may satisfy the requirements of Article III standing to pursue correction. *See Chou*, 254 F.3d at 1359; *Larson*, 569 F.3d at 1327. That question need not be decided here, however, because even if reputational harm sufficed, Shukh has not presented evidence sufficient to raise a genuine issue of fact on any of the three *Lujan* elements. Accordingly, summary judgment should be affirmed. *Celotex*, 477 U.S. at 325.

No reputational injury. Shukh's deposition testimony forecloses standing based on reputational injury. Shukh affirmatively testified that his reputation was

not injured. In Shukh's own words, "It seems to me it didn't change since 1997 when I joined Seagate up to now." (A8964 at 250.) Shukh testified that he has had the same reputation for "extreme competitiveness" and "honesty, good organization, openness and straightforwardness, **good technical abilities and innovation**." (A8962-64 (emphasis added).) Shukh's lawyer now attempts to discount his testimony by claiming it addressed "personal traits" that "do not relate to a reputation as a patented inventor." (Br. 50-51.) This argument fails. Shukh himself identified these "personal qualities" as his reputation as a "scientist." (A8961 at 241, A8962 at 242, 245.) And he specifically agreed that his omission from the Patents did not cause injury because he "**had the same reputation** for each of those personal qualities from the time period from 1997 until today." (A8964 at 250 (emphasis added).) Thus, there was no genuine issue of material fact that Shukh's reputation was not injured by being omitted from the Patents.

Shukh's testimony was confirmed by other engineers. Allen testified that Shukh had a reputation for "excellent technical skills" throughout his time at Seagate. (A9567 at 162, A9557 at 121.) Shukh's former coworkers confirmed their high opinion of Shukh's reputation as a scientist, even after Shukh's lay-off. (A6317, A6325-A6326.) Two of his former coworkers even assisted Shukh in applying for positions at Hitachi (A6298, A6315, A6317), and one spoke of his reputation in especially glowing terms (A6305, A6308).

Shukh seeks to avoid his own testimony by pointing to his interrogatory response as evidence of injury to his reputation. (Br. 13.) But his response is no more than **his own** "perception of loss of reputation," which "is not evidence of loss of reputation." *Navarre v. S. Wash. Cnty. Sch.*, 633 N.W.2d 40, 56 (Minn. Ct. App. 2001), *rev'd in part on other grounds by*, 652 N.W.2d 9 (Minn. 2002). His interrogatory answer also contains only conclusory assertions—not specific facts—as to injury that does "not provide a basis upon which to deny motions for summary judgment." *Armour & Co. v. Inver Grove Heights*, 2 F.3d 276, 279 (8th Cir. 1993).

Shukh's supposed "experts" are no help either. His "patent expert," Howard Rockman, gave a half-page opinion on reputation (A8816-17) that was—as the district court found—entirely speculative and unsupported (A178-79). Rockman conducted **no investigation whatsoever** relating to Shukh's reputation (A8839-41) or any other case-specific evidence that could make his opinion anything but unsubstantiated and speculative. Rockman's opinion was the quintessential "conclusory" opinion that does "not aid the court" in resolving summary judgment, *Nw. Airlines, Inc. v. Phillips*, 675 F.3d 1126, 1134 (8th Cir. 2012), and certainly does "not provide a basis upon which to deny motions for summary judgment," *Jackson v. Anchor Packing Co.*, 994 F.2d 1295, 1303-04 (8th Cir. 1993). Similarly, Shukh's immigration expert merely stated that the Patents would have

strengthened his immigration petition, but his petition was approved (A5591) and so no actual injury resulted.

Finally, Shukh's generic allegations that he was "reputed to be difficult to work with," lost "salary raises," and had difficulty finding a job get him nowhere. (Br. 13-14.) This section of Shukh's brief is makeweight. First, Shukh himself does not even rely on these alleged harms when making his actual argument on his correction of inventorship claim. (Br. 50-51.) Second, the only basis for injury to reputation even arguably pled in the complaint was, as Shukh put it, "damage[] from the lost recognition." (Br. 50.) That theory is all he can rely on now. *Rodgers*, 435 F.3d at 910. Third, these interests cannot confer standing because this Court cannot redress these generic harms through Shukh's claim for correction of inventorship. The only relief the Court can provide for a correction of inventorship claim is to "order correction of the patent." 35 U.S.C. § 256; *accord Chou*, 254 F.3d at 1359. Thus, relief—ordering correction of the patent—"that does not remedy the injury suffered"—*e.g.*, less salary—"cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998).

No causal link. Even if there were evidence supporting these alleged injuries, the record is devoid of evidence showing that the injury is "fairly . . . trace[able] to" being omitted as an inventor on **these specific** Patents. *Lujan*, 504

U.S. at 560. For example, no evidence suggests that adding Shukh's name to the Patents would have affected his reputation. Shukh is already a named inventor on 20 other patents. And the record evidence shows that the opinion of Shukh's colleagues would not have changed based on the number of patents bearing his name. (A9792 at 139-140, A9189 at 189, A9287 at 195.)[3]

Without any evidence of actual reputational injury attributable to being omitted on the Patents, Shukh's position is effectively that there is generic reputational value to being named on any patent for anyone. But *Larson* rejected such a basis for standing, 569 F.3d at 1327-28 (dismissing correction claim without regard to any theoretical value of being named on a patent), and a reputational injury—like any other—must be "concrete and particularized" to Shukh, *Lujan*, 540 U.S. at 560; *see also Steel*, 523 U.S. at 107 ("psychic satisfaction" does not count).

***No redressability*.** As noted above, and as the district court also correctly observed, any financial (*e.g.*, salary) or other workplace injury that Shukh now attempts to assert is not redressable through correction. (A169.)

[3] Shukh also suggests that he was criticized for a drop in his "patent submissions," but the cited document shows that the comment related to the number of Invention Disclosures he submitted, not the number of patents naming him. (A6150.)

3. Inventorship rights are not constitutionally protected.

Shukh makes an incoherent argument that "inventorship rights are constitutionally protected." (Br. 41 (Heading).) First of all, Shukh does not explain why his statement matters for this appeal; he just says it. Second, Shukh is plainly wrong. The Patent Clause of the Constitution (Article I, § 8, Clause 8) does not confer rights. Rather, it is a "grant to Congress" of the "power" to regulate. *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966). Thus, like other Article I powers, such as the power to regulate commerce, the Patent Clause of the Constitution merely "empowers Congress to provide patent protection." *MySpace, Inc. v. Graphon Corp.*, 672 F.3d 1250, 1269 (Fed. Cir. 2012).

B. Shukh Failed to State a Claim for Rescission, Breach of Contract, Breach of Fiduciary Duty, and Unjust Enrichment.

The district court's March 30, 2011, order correctly dismissed Shukh's state law claims for rescission, breach of contract, breach of fiduciary duty, and unjust enrichment pled in the FAC for failure to state a claim under Rule 12(b)(6). To survive a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This standard demands more than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," or "'naked assertion[s]' devoid of 'further factual

enhancement.'" *Id.*; *accord Zutz v. Nelson*, 601 F.3d 842, 851-52 (8th Cir. 2010). None of these claims satisfy the Rule 12(b)(6) standard.

1. Shukh's breach of contract and rescission claims fail because Seagate had no contractual obligation of the type Shukh contends.

Shukh pled in the FAC that Seagate breached the Employment Agreement "by failing and refusing to protect Dr. Shukh's inventorship rights." (A588 ¶ 292, *see also* A549-50 ¶¶ 90-96.) His rescission claim depends on this same alleged breach. (A586-88.) There was no such contractual obligation imposed by the Employment Agreement whatsoever, and, therefore, Shukh failed to state a claim for breach or rescission. *See P'ship Invs. of Minn., Inc. v. Lybeck*, 243 N.W.2d 150, 153 (Minn. 1976) (confirming that without an obligation, no breach can occur).

Shukh does not dispute that the contract did not expressly create these obligations for Seagate. (A718.) Rather, he contends that an implied covenant of good faith and fair dealing in the Employment Agreement created a contractual obligation for Seagate to comply with provisions of the Patent Act and related regulations.[4] (A587.)

[4] Shukh previously argued the patent laws were actually incorporated into the Employment Agreement by operation of law (A718-21, A588), but he did not raise that theory on appeal and it is therefore waived. *E.g., Advanced Magnetic Closures, Inc. v. Rome Fastener Corp.*, 607 F.3d 817, 833 (Fed. Cir. 2010). That theory is meritless anyway. *Umland v. PLANCO Fin. Servs., Inc.*, 542 F.3d 59, 66 (3d Cir. 2008).

Shukh's attempt to concoct an implied covenant obligation fails for three reasons. First, the contract at issue is an at-will employment contract (A516), and "Minnesota does not recognize an implied duty of good faith and fair dealing in employment contracts," *Brozo v. Oracle Corp.*, 324 F.3d 661, 668 (8th Cir. 2003). The claim fails for this reason alone.

Second, even if there were an implied covenant, under Minnesota law, the implied covenant is limited to preventing one party from "hindering" the other party's performance under a contract, *In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502 (Minn. 1995), and cannot be used, as Shukh attempts here, to "give rise to new obligations not otherwise contained in the contract's express terms," *United States v. Basin Elec. Power Coop.*, 248 F.3d 781, 796 (8th Cir. 2001).

Third, the amended complaint does not in any way suggest that Seagate frustrated or hindered Shukh's performance under the Employment Agreement, which is all the implied covenant prohibits. On the contrary, Shukh repeatedly claims that he "performed all duties and conditions" of the contract. (A588 ¶ 291, A579 ¶ 238.)

Therefore, there was not an implied covenant in the Employment Agreement and even if there were, it did not create the obligation Shukh alleged. The breach and rescission claims fail as a matter of law.

2. Shukh's breach of fiduciary duty claim fails because there was no fiduciary relationship and no duty to protect Shukh's "inventorship interests."

Shukh's argument for this claim is contained in a single cryptic sentence in his opening brief: "Shukh's detailed allegations of 'Seagate's Legal and Fiduciary Duties to Dr. Shukh' stated a claim for breach of fiduciary duty." (Br. 64.) But it is a mystery how Shukh thinks he stated a claim. Shukh's undeveloped argument, "noted in a single sentence of the opening brief, is unpersuasive and insufficient to raise the issue on appeal." *SynQor, Inc. v. Artesyn Techs., Inc.*, 709 F.3d 1365, 1385 (Fed. Cir. 2013). Dismissal of this claim should be affirmed on this basis alone.

The breach of fiduciary duty claim also plainly failed to state a claim.

No Fiduciary Relationship. Shukh alleged a *de facto*, not a *per se*, fiduciary relationship in the FAC. (A21.) A *de facto* fiduciary relationship exists when the particular circumstances of the relationship create a fiduciary duty, *Swenson v. Bender*, 764 N.W.2d 596, 601 (Minn. Ct. App. 2009), but simply alleging legal catch-phrases, such as "trust and confidence" or "superior knowledge," is "**insufficient** to state a claim," *RBC Dain Rauscher, Inc. v. Fed. Ins. Co.*, 2003 WL 25836278, at *11-13 (D. Minn. Dec. 2, 2003) (emphasis in original).

Here, Shukh's basis for a *de facto* fiduciary relationship is unclear, but it appears to be that Seagate's IP Department handled patent applications (A550-52),

they had more knowledge about patents than he did (A553), he trusted them, and so there was a fiduciary relationship (A552-53). This is exactly the type of "formulaic recitation of the elements" that *Iqbal* demands the Court reject, 129 S.Ct. at 1949, and courts applying Minnesota law hold that these allegations are insufficient to state a claim. *RBC Dain Rauscher*, 2003 WL 25836278, at *11-13 ("Merely alleging a long acquaintance and confidence . . . is **insufficient** to state a claim."); *Larson v. Burlington N. & Santa Fe Ry. Co.*, 2002 WL 47005, at *15-16 (D. Minn. Jan. 10, 2002) (allegations that employees placed their trust in employer's claims representatives were "insufficient as a matter of law").

Moreover, Shukh "should have known," *Swenson*, 764 N.W.2d at 602, that the IP Department represented Seagate's and not Shukh's interests. *See Humphrey v. McLaren*, 402 N.W.2d 535, 540 (Minn. 1987) (confirming that corporate attorneys' "allegiance is to the organization" not employees). Shukh specifically admits that the patent application procedures were maintained "for the protection of Seagate's own business interests" and "to protect the rights of Seagate." (A550-51 ¶¶ 97-98.) Indeed, Seagate's corporate attorneys' "role prevented [them] from being bound to act only for [Shukh's] benefit on all matters." *Swenson*, 764 N.W.2d at 602. Accordingly, the FAC pled no facts that established a *de facto* fiduciary relationship and actually admitted Shukh's knowledge that Seagate was looking out for its own interests—not Shukh's—when applying for patents. *See S.*

Minn. Mun. Power Agency v. St. Peter, 433 N.W.2d 463, 468 (Minn. Ct. App. 1988) (no fiduciary relationship where plaintiff knew of the adverse interests).

Shukh's invocation of *Chou*, which was based on Illinois law, does not alter the outcome. In *Chou*, a graduate student's professorial supervisor had "superiority over her" and "had specifically represented to her that he would protect and give her proper credit for her research and inventions," and the student had a significant financial interest in receiving that credit. *Chou*, 254 F.3d at 1353, 1362-63. Shukh pled no analogous representations by Seagate or a financial interest for Shukh.

No Duty. Even assuming *arguendo* that a relationship existed, no corresponding duty arose as a matter of law. Shukh alleges that Seagate had a duty of "perfecting and protecting Dr. Shukh's legally cognizable inventorship interests." (A552-53 ¶ 110.) But Shukh contractually assigned all his "inventorship interests" to Seagate. Shukh therefore had no "inventorship interests" that such a duty could protect. Seagate could, among other things, do nothing with his alleged inventions, decide not to patent them and use them as trade secrets instead, publish papers about them, or use them in products without seeking intellectual property protection. (A1447.) Because Seagate did not have the duty alleged, the breach of a fiduciary duty claim fails.

3. Shukh's unjust enrichment claim failed because a contract governed the relationship.

Shukh acknowledges that he cannot state an unjust enrichment claim unless the Employment Agreement is rescinded (Br. 65), because "Minnesota does not allow recovery under an unjust enrichment theory when there is an express contract which governs the parties' relations," *Nw. Airlines, Inc. v. Astraea Aviation Servs.*, 111 F.3d 1386, 1392 (8th Cir. 1997). As discussed above, however, Shukh's breach of contract and rescission claims are not viable, so his unjust enrichment claim necessarily failed because of the existence of the Employment Agreement.

Moreover, Shukh did not allege facts in the FAC that would show that Seagate was "unjustly" enriched. *Mon-Ray, Inc. v. Granite Re, Inc.*, 677 N.W.2d 434, 440 (Minn. Ct. App. 2004). Shukh alleged that Seagate was enriched by "the inventions which are at issue." (A590 ¶ 305.) But the complaint does not allege how Seagate benefited "unjustly," when there is no dispute that Shukh was paid to develop Seagate's technology and assigned his inventions to Seagate.

C. Shukh's Fraud Claim Fails Because There was No Evidence of Reliance, Damages, and Other Required Elements Under Any of the Three Theories He Raises.

The district court properly granted Seagate's motion for summary judgment on Shukh's fraud claim, appropriately rejecting each of Shukh's three different theories he improperly raised at different times. This Court should affirm.

To be crystal clear, Shukh pled with particularity as required by Rule 9(b) **one and only one theory of fraud**: "it was a material misrepresentation for Seagate to file various patent applications omitting Shukh as an inventor." (A20.) That is the only theory he may pursue in this appeal under fundamental rules of pleading and procedure. *Rodgers*, 435 F.3d at 910. This first theory of fraud was baseless. After Seagate moved for summary judgment on this theory, Shukh abandoned it and adopted a **second, unpled theory** for the first time in his brief opposing summary judgment. According to the second theory, Seagate falsely told Shukh "that it would not be filing patent applications for his inventions and then did precisely that." (A181-182 n.17, A4965-66.) Not satisfied, in a second sur-reply brief, Shukh argued a **third, unpled theory**—asserting that Seagate's failure to notify the USPTO of Shukh's inventorship claim was a fraud on the PTO and a fraudulent concealment from Shukh. (A5907-08, *see also* A182 n.18.)

Shukh's fraud claim fails both procedurally and because there was no evidence to create a genuine issue on **any** of the eleven elements of fraud.

1. The district court correctly rejected Shukh's first two theories because he lacked evidence to support any elements of fraud.

Summary judgment on Shukh's fraud claim was appropriate because Shukh failed to present evidence to create a genuine issue of material fact on any of the eleven essential elements of fraud. *Newberg v. Schweiss*, 2009 WL 3202380, at *6 (D. Minn. Sept. 30, 2009) (eleven fraud elements). While the absence of evidence

to support **any one** of the elements of fraud is sufficient to require summary judgment against Shukh, *Banks v. Harley-Davidson, Inc.*, 73 F.3d 213, 215 (8th Cir. 1996); *Valspar Refinish, Inc. v. Gaylord's Inc.*, 764 N.W.2d 359, 368 (Minn. 2009), Shukh's failure is pervasive.

Shukh's argument for fraud is a single, superficial sentence in his opening brief: "There was extensive testimony and evidence of Dr. Shukh's reasonable reliance, most particularly his own testimony that the Judge simply brushed aside." (Br. 71.) Worse, Shukh included no record cite for the supposed extensive evidence of reliance—which is only one element of his claim. Shukh's undeveloped argument, "noted in a single sentence of the opening brief, is unpersuasive and insufficient to raise the issue on appeal." *SynQor*, 709 F.3d at 1385. Despite Shukh's failure to develop his argument for appeal, Seagate outlines below some of the most obvious reasons Shukh's first two theories fail.

No detrimental reliance. The "failure to establish detrimental reliance dooms a claim for common law fraud." *Popp Telecom, Inc. v. Am. Sharecom, Inc.*, 361 F.3d 482, 491 (8th Cir. 2004). There was an abject failure of evidence of detrimental reliance for the first two theories.

For starters, Shukh failed to provide any facts—or even a theory—regarding reliance (A4884-97) in response to Seagate's interrogatory that asked for "all actions that you took . . . or that you refrained from taking . . . in reliance on" each

allegedly fraudulent statement by Seagate (A4862). Shukh was therefore precluded under the exclusionary provisions of Rule 37(c), from even offering evidence of reliance at summary judgment. *Transclean Corp. v. Bridgewood Servs., Inc.*, 290 F.3d 1364, 1373-75 (Fed. Cir. 2002); *Cambridge Elecs. Corp. v. MGA Elecs. Inc.*, 227 F.R.D. 313, 333 (C.D. Cal. 2004).

On the merits, Shukh pointed to only two items of supposed evidence at summary judgment: his bald assertion that he "truly relied" on Seagate and the conclusory opinion offered by his so-called "patent expert," Howard Rockman, that Shukh "justifiably relied" on Seagate. (A4976-77, A5570.) But Shukh must show that he "took action" or "failed, to his detriment, to take action" to prove fraud, not just make a bald assertion of non-specific reliance. *Greeley v. Fairview Health Servs.*, 479 F.3d 612, 614 (8th Cir. 2007). And Rockman's utterly conclusory opinion—he did not even interview Shukh (A8829 at 22)—does "not provide a basis upon which to deny [a] motion[] for summary judgment." *Jackson*, 994 F.2d at 1303-04. Shukh simply failed to present evidence in the summary judgment record of what he did or did not do in reliance to his detriment on any of Seagate's alleged actions or omissions. (A184-85.)

What is more, "Minnesota common law . . . requires" a "**direct communication**" to Shukh to support fraud, not a communication to someone else. *Flynn v. Am. Home Prods.*, 627 N.W.2d 342, 350 (Minn. Ct. App. 2001) (emphasis

added). Any "statements" in Seagate's patent application filings (particularly for the first theory) were made to the USPTO, not to Shukh. His claim fails for this reason as well.

On top of that, under Minnesota law, a claim for fraud fails "where it was impossible for complainant to have relied on the representations, because they had not been made or communicated to him at the time of the transaction." *Nilsen v. Farmers' State Bank*, 228 N.W. 152, 153 (Minn. 1929) (citations/quotations omitted); *Karlstad State Bank v. Fritsche*, 392 N.W.2d 615, 618 (Minn. Ct. App. 1986) ("misrepresentations" were "undisputedly made to third parties," not plaintiff); *Mensing v. Wyeth, Inc.*, 588 F.3d 603, 613 (8th Cir. 2009). Here, Shukh could not and did not rely on allegedly fraudulent patent applications that were filed without his knowledge—Shukh stated in his complaint that he did not even know of the applications until up to seven years after they were filed. (A4261-71 ¶¶ 124, 137, 156, 174, 175.)

Furthermore, Shukh testified that once he found out about his omission as an inventor on the Patents he knew immediately that the filings were false. (A4625-26, A4672-73.) He therefore could not have relied on those statements under Minnesota law. *Provell, Inc. v. JetChoice I, LLC*, 2011 WL 2750717, at *2 (Minn. Ct. App. July 18, 2011) (cannot rely if "falsity is known or obvious"); *Burns v.*

Valene, 214 N.W.2d 686, 690 (Minn. 1974) (no reasonable reliance if statements believed to be inaccurate).

There was simply an abject failure of proof on reliance.[5]

No pecuniary damages. Shukh's only argument on the requirement for pecuniary damages is the single sentence that "damage to Dr. Shukh's reputation fulfilled the damage element of his fraud claim." (Br. 72.) This barren argument is meritless. Most importantly, "pecuniary damage [is] an essential element of fraud," *Nodland v. Chirpich*, 240 N.W.2d 513, 517 (Minn. 1976), and "'pecuniary' is generally defined as '**monetary**; relating to money; financial,'" *Skiftstrom v. Coon Rapids*, 524 N.W.2d 294, 295 (Minn. Ct. App. 1995) (emphasis added). Shukh has no evidence that he suffered **pecuniary** damages—as opposed to alleged harm to his reputation—proximately caused by his reliance. Moreover, Shukh had no damage to his reputation, as described above. Finally, Shukh cannot even assert damage to his reputation as a basis for fraud because he did not disclose that theory in response to Seagate's damages interrogatory. (A4940-49.) Without this critical element of fraud, summary judgment was required.

No showing on the other elements. Seagate specifically moved for summary judgment by "pointing out to the district court" that "there is an absence of evidence to support [Shukh's] case" on **all eleven** elements of fraud. *Celotex*,

[5] Shukh admitted under oath there is no evidence of concealment. (A8968 at 267-68.)

477 U.S. at 325. (A4593.) His failure to provide evidence on the other elements is another independent basis for affirming the summary judgment ruling.

2. The district court did not abuse its discretion in rejecting Shukh's third theory of fraud, which could not have succeeded anyway.

The district court ruled that it would not consider Shukh's third theory—that Seagate's failure to tell Shukh that Seagate did not tell the PTO of his inventorship claim amounted to fraud on Shukh—because Shukh never pled it (despite having amended his complaint three times) and never raised it in his initial response brief or first sur-reply brief. (A182 n.18.) There are five independent reasons to affirm this ruling.

First, a plaintiff claiming fraud is "limited to the specific allegations pleaded in [his] complaint," *McAnally v. Glidersleeve*, 16 F.3d 1493, 1496 (8th Cir. 1994), and may not "manufacture claims, which were not pled, late into the litigation for the purpose of avoiding summary judgment," *N. States Power Co. v. Fed. Transit Admin.*, 358 F.3d 1050, 1057 (8th Cir. 2004). Fraud, in particular, must be pled with particularity. Fed. R. Civ. P. 9(b); *United States ex rel. Costner v. United States*, 317 F.3d 883, 888 (8th Cir. 2003); *Scott v. Wells Fargo Bank*, 2011 WL 3837077, at *10 (D. Minn. Aug. 29, 2011) ("Plaintiff cannot, late into the litigation of this matter, assert unpled allegations in an effort to avoid summary judgment, especially given the requirement that allegations of fraud be pled with particularity."). Shukh simply never pled the third theory in the complaint at all,

let alone with particularity. The district court—far from abusing its discretion—was required by Eighth Circuit law to "refuse[] to consider [the] unpled allegations." *Rodgers*, 435 F.3d at 910.

Second, Shukh did not disclose the third theory in response to Seagate's interrogatory seeking the details of his fraud claim. (A4884-97.) Therefore, the district "court was within its discretion to impose a sanction" under Rule 37(c) excluding this theory. *Transclean*, 290 F.3d at 1373-75.

Third, Shukh did not even raise the third theory in his initial response brief at summary judgment. (A4951-97.) Thus, Shukh's failure to raise the argument in his response brief at "summary judgment constitutes waiver of that argument." *Satcher v. Univ. of Ark.*, 558 F.3d 731, 735 (8th Cir. 2009).

Fourth, Shukh submitted a sur-reply brief at summary judgment, but he again failed to raise the third theory in that brief. (A5567-75.) The third theory was waived yet again. It was not until Shukh's second sur-reply (his third brief) that he desperately tried to oppose summary judgment by raising the third theory, which plainly was not permitted. *Trade Fin. Partners, LLC v. AAR Corp.*, 573 F.3d 401, 412 (7th Cir. 2009) ("[T]he district court did not err by concluding that Trade Finance waived this alternative basis for its breach claims by raising it for the first time in its sur-reply during summary judgment proceedings.").

Shukh asserts that he raised the third theory in his motion seeking a preliminary injunction earlier in the case. (Br. 70.) Even assuming the third theory was described in the preliminary injunction motion, Shukh never followed the rules to amend his complaint to plead it with particularity—despite other amendments—and a "plaintiff may not amend [his] complaint through argument in a brief." *Thomas v. United Steelworkers*, 743 F.3d 1134, 1140 (8th Cir. 2014) (adopting this rule).

Finally, the third theory fails on the merits for the same reasons as the first two theories. Most notably, there was no evidence of what action Shukh took or failed to take to his detriment. There also was no evidence of a "misrepresentation" to Shukh, any intent to induce reliance, any act of concealment, any duty that Seagate had to tell Shukh anything (as opposed to a duty to the USPTO), or any pecuniary damages, among other elements.

3. The district court properly denied Shukh's cross-motion for summary judgment on Shukh's fraud claim as moot.

The district court properly denied Shukh's cross-motion for summary judgment on his fraud claim (which was filed nine months after Seagate's motion) as moot because the court **already had considered** and rejected **each** of Shukh's fraud theories in deciding Seagate's motion for summary judgment. (A188-89.)

Moreover, Shukh cites no authority for his position that a failure to simultaneously consider motions that were not filed at the same time "was error." (Br. 69.)[6] And the "district courts have broad discretion to manage their dockets," *Huggins v. FedEx Ground Package Sys.*, 592 F.3d 853, 856 (8th Cir. 2010), "'so as to achieve the orderly and expeditious disposition of cases,'" (A188, citing *Link v. Wabash R.R.*, 370 U.S. 626, 630-31 (1962)).

D. Shukh Failed to Present Evidence of Retaliation.

Shukh is originally from Belarus. On appeal, Shukh abandoned his discrimination claims and most of his prior retaliation theories. His appeal is limited to just two theories of retaliation: (1) retaliatory termination, and (2) "retaliatory hostile environment," a theory he articulated for the first time at the hearing on Seagate's motion for summary judgment. (Br. 79-81, A11172-73.) The district court properly concluded that Shukh failed to raise a genuine issue of material fact for his retaliation claims.

[6] The district court cases cited by Shukh (Br. 69) only point out the reasonableness of simultaneous consideration of concurrently-filed cross-motions and none suggests that it is an abuse of discretion to consider motions filed at different times separately. Shukh's citation of *Max Arnold & Sons, LLC v. W.L. Hailey & Co.*, 452 F.3d 494, 505 (6th Cir. 2006), also does not support his argument, because the case does not address how district courts should consider cross-motions.

1. The retaliation framework requires Shukh to establish a *prima facie* case and then show pretext.

Shukh concedes that he has no direct evidence of retaliation. (Br. 77.) Shukh must therefore establish his retaliation claims using the *McDonnell Douglas* framework. The same standards apply to Shukh's Title VII and MHRA claims. *Torgerson v. City of Rochester*, 643 F.3d 1031, 1043 (8th Cir. 2011); *Bahr v. Cappella Univ.*, 788 N.W.2d 76, 83 (Minn. 2010).

Prima Facie Case. Shukh must first establish a *prima facie* case of retaliation by showing that (a) he engaged in protected conduct, (b) he suffered a materially adverse employment action, and (c) the adverse action was causally linked to the protected conduct. *Guimaraes v. SuperValu, Inc.*, 674 F.3d 962, 978 (8th Cir. 2012). If Shukh cannot establish a *prima facie* case, summary judgment is appropriate. *Id.*

To establish protected conduct, Shukh must show he "opposed" an unlawful practice. 42 U.S.C. § 2000e-3(a); Minn. Stat. § 363A.15. Complaints are only protected for purposes of a retaliation claim if they identify a specific protected class and specific unlawful conduct. *Smith v. Int'l Paper Co.*, 523 F.3d 845, 849 (8th Cir. 2008). To establish that he suffered "materially adverse" action, Shukh must show adverse action that would "have dissuaded a reasonable worker from making or supporting a [complaint] of discrimination." *Littleton v. Pilot Travel Ctrs., LLC*, 568 F.3d 641, 644 (8th Cir. 2009). Title VII, however, "does not set

forth a general civility code for the American workplace." *Carpenter v. Con-Way Cent. Express, Inc.*, 481 F.3d 611, 619 (8th Cir. 2007). To be materially adverse, "retaliation cannot be trivial; it must produce some injury or harm." *Littleton*, 568 F.3d at 644 (quotations omitted). And the third element requires "more than a temporal connection between the protected conduct and adverse employment action" in order "to present a genuine factual issue on retaliation." *Green v. Franklin Nat'l Bank*, 459 F.3d 903, 915 (8th Cir. 2006).

Pretext. Even if Shukh can establish a *prima facie* case, summary judgment is still appropriate unless Shukh establishes a genuine issue of fact showing that Seagate's proffered, non-retaliatory reasons for the materially adverse actions were a pretext and the real reason for them was retaliation. *Soto v. Core-Mark Int'l, Inc.*, 521 F.3d 837, 841 (8th Cir. 2008).

2. There are only two instances of even arguably protected conduct.

Protected conduct is the starting point for a retaliation claim. On appeal, as he did below, Shukh provides a random laundry list of complaints that he claims to be the "protected conduct" that motivated Seagate's purported retaliation. (Br. 15-17.) However, the district court appropriately eliminated as alleged protected conduct those complaints that were unrelated to his national origin (Belarusian) or that just referred to unfair treatment generally without connecting the treatment to Shukh's Belarusian origin. *See Smith*, 523 F.3d at 849; *Tomanovich v. City of*

Indianapolis, 457 F.3d 656, 663 (7th Cir. 2006) ("Merely complaining in general terms of discrimination or harassment, without indicating a connection to a protected class or providing facts sufficient to create that inference, is insufficient."). The district court properly concluded that only two of Shukh's complaints arguably constituted protected conduct: (1) Shukh's complaint in response to his 2006 performance evaluation that occurred on or before August 18, 2006; and (2) Shukh's September 7, 2006 email to manager Pat Ryan. *See id.* (A258-61.)[7] With those complaints as the only potential basis for protected conduct, each of Shukh's two retaliation theories fails.

3. Shukh failed to create a genuine issue on his retaliatory termination theory.[8]

No causation. Shukh has absolutely no evidence linking his 2009 termination to his allegedly protected complaints that occurred in August and September 2006—more than **two years earlier**. Rather, the evidence of record affirmatively disproves any inference. Foremost, controlling Eighth Circuit law holds that passage of **even one year** "is insufficient to show, and in fact weakens the showing of, the required causal link." *Wallace v. Sparks Health Sys.*, 415 F.3d

[7] Seagate does not concede that these complaints were sufficient, but assumes so for purposes of argument.

[8] Retaliatory discharge was not adequately pled in Shukh's Complaint. (A28-A30 (identifying adequately pled adverse actions).) This is another ground for denying Shukh's appeal on this claim. *Satcher*, 558 F.3d at 735.

853, 859 (8th Cir. 2005); *see also Tyler v. Univ. Ark. Bd. of Trs.*, 628 F.3d 980, 986-87 (8th Cir. 2011).

Moreover, Shukh was laid off, along with 179 other employees, as part of a reduction-in-force at Seagate in January 2009 during a severe economic downturn. (A9817 ¶ 5.) This fact further diminishes any inference that the discharge was caused by his complaints because "even capable employees are released when an employer is down-sizing." *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 779 (8th Cir. 1995).

Still further, the existence of positive employment actions between the alleged protected conduct and the alleged adverse action, further eliminates any inference of causation. *Bradley v. Widnall*, 232 F.3d 626, 632 (8th Cir. 2000) (summary judgment on retaliation where plaintiff continued to receive positive performance evaluations, raises, and bonuses after complaint); *Manatt v. Bank of Am., NA*, 339 F.3d 792, 802 (9th Cir. 2003) (no causation where plaintiff received pay raise and positive assignment after complaint). Here, it is undisputed that one month after his first complaint and eleven days after his second complaint, Shukh was promoted to the position of Principal Engineer, and received a pay increase of more than $7,000. (A9421.) Thereafter, Shukh received regular pay increases in September 2007 and 2008 and was advised in September 2008 that he would be considered for a two-step promotion if he met certain goals and qualifications

related to teamwork. (*Id*., A9301.) These positive intervening events serve to affirmatively disprove any inference of causation.

No pretext. Even if Shukh had established a *prima facie* case of retaliatory discharge (which he did not), summary judgment would still have been appropriate because Shukh failed to raise any genuine issue that Seagate's legitimate, non-retaliatory reasons for his termination were pretextual. *Soto*, 521 F.3d at 841. The only record evidence of the reasons for Shukh's termination in 2009 shows that Shukh's position was eliminated under the application of pre-established, non-retaliatory criteria. (A9878-79 ¶¶ 4-6, A9817 ¶ 5, A9885-88.) Shukh has not presented one iota of evidence that the proffered reduction-in-force reason was pretextual.

Shukh's argument that Seagate has changed its explanation for his selection in the reduction-in-force is a non-starter. There is no dispute that Shukh was included in a reduction-in-force in 2009 during the economic downturn. (A638, A9878 ¶ 3.) And Seagate has always maintained, as the district court found in a thorough analysis (A269-72), that Shukh was selected for the reduction-in-force based on a set of neutral criteria (A9878-79 ¶¶ 4-6, A9885-937).

4. Shukh may not pursue and failed to create a genuine issue on his retaliatory hostile work environment theory.

Shukh cannot pursue a retaliatory hostile work environment claim—at all. The term "hostile work environment" does not even appear in **any** of the **four**

versions of Shukh's complaint or in his **brief** opposing Seagate's motion for summary judgment on his employment claims. (A4231-96, A10478-530.) The first mention of it was at the **hearing** on Seagate's motion. (A11172.) The district court assumed, without deciding, that the theory had been properly raised, because the court found dismissal on the merits would be warranted anyway. (A251.) As a matter of Eighth Circuit law, Shukh did not plead a retaliatory hostile work environment theory in his complaint, and therefore "he cannot rely on it now," *Satcher*, 558 F.3d at 735 (retaliation theory raised for first time in summary judgment brief may not be considered), and this Court must "refuse[] to consider [the] unpled allegations," *Rodgers*, 435 F.3d at 910; *accord N. States Power*, 358 F.3d at 1057. This Court should affirm on this basis alone.

But even if considered, Shukh's retaliatory hostile work environment theory also fails on the merits because, as the district court properly found, Shukh cannot establish the requisite causation or materially adverse action for his *prima facie* case. (A261-A264.) In support of his hostile environment theory, Shukh asserts a hodgepodge of retaliatory actions, hoping that something will stick to support a theory that Seagate created a hostile environment in retaliation for Shukh's alleged protected conduct: he was removed from his department, reassigned to another supervisor, isolated, criticized, excluded from meetings, required to undergo

training, omitted from patent applications, and had his alleged complaints ignored. (Br. 80-81.)

No materially adverse actions. The problem with Shukh's new theory is that most of the actions he identifies **pre-dated** Shukh's 2006 complaints that arguably amount to protected conduct and therefore, as a matter of law, cannot be materially adverse actions:

- Shukh was reassigned to another department and supervisor, pursuant to Shukh's request, in March 2006.[9] (A9064 at 650, A9088 at 744.)
- Shukh testified that he was isolated from others at work beginning as early as 1998. (A9031 at 517.)
- Shukh testified that he was criticized by most of his managers throughout his employment. (A8969 at 270.)
- Shukh received critical performance reviews as early as 1999. (*Id.*, A9836-41.)
- Shukh testified that he was excluded from meetings beginning in 1998. (A9032 at 520-21.)
- Shukh testified that he was omitted as an inventor in patent applications continuously since 1997.[10] (A9027-28 at 502-503.)

[9] Without citations (Br. 81) it is unclear whether Shukh also is referring to the time when Allen had Shukh report directly to him starting in February 2007. If included, that instance can be readily disregarded, since Shukh himself asked to work alone in January 2007 (A9320-21 at 64, 67) and viewed the new reporting line as a promotion (A9159 at 70-71).

[10] Shukh's retaliation allegations related to omission from patent applications additionally fail to establish a *prima facie* case because without ownership, financial, or reputational harm, the alleged omission cannot constitute a materially adverse action, alone or in combination. *See Littleton*, 568 F.3d at 644. But even if Shukh could establish a *prima facie* case, Seagate submitted legitimate, non-

The above incidents, which occurred prior to Shukh's purported protected conduct, cannot form the basis for Shukh's retaliation claims because they cannot be causally connected to his complaints in August and September of 2006. *Chivers v. Wal-Mart Stores, Inc.*, 641 F.3d 927, 933 (8th Cir. 2011).

The only remaining allegations that could form a basis for Shukh's hostile environment theory are: (1) Seagate required Shukh to attend one training class in 2007 and (2) Seagate allegedly failed to investigate Shukh's complaints in January 2007. These items do not amount to materially adverse actions sufficient for a retaliation claim. As for the required training class, Shukh was **commended** in his 2007 and 2008 performance reviews for attending and making improvements based on skills he learned in that class. (A6288, A10939.) As for the investigation, the undisputed evidence is that Seagate thoroughly investigated Shukh's complaints to Seagate Human Resources in January 2007, and the investigation included a review of his personnel records, interviews of other Seagate employees, and three meetings with Shukh. (A9321-24 at 68-78, A9325 at 82, A9327 at 89, A9099-100 at 789-90, A9106 at 814-15, A9668.)

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retaliatory reasons for not naming him on the Patents that Shukh has not rebutted. In particular, Seagate uses Invention Disclosures submitted by its employees as a basis for inclusion on patent applications, and for each of the applications, an Invention Disclosure was submitted that did not include Shukh. (A9941-42 ¶¶ 2, 4.)

Moreover, these actions (either alone or together) do not, as a matter of law, rise to the level of materially adverse action. *See Littleton*, 568 F.3d at 644 (listing examples of actions deemed insufficiently "materially adverse" for a *prima facie* case of retaliation); *Clegg v. Ark. Dep't of Corr.*, 496 F.3d 922, 929 (8th Cir. 2007) (combination of denying training, denying access to needed employment tools, failing to reinstate to prior position, interfering with employee's authority, unfairly adding negative reports to personnel file, treating differently than coworkers, excluding from meetings, and providing negative evaluations are not sufficiently materially adverse).

No Causation. Even if the two events—training class and investigation—could be deemed materially adverse, Shukh's theory would fail for lack of causation. Those events occurred four or more months after the alleged protected conduct, and courts have held that this is too long to create an inference of causation. *See Tyler*, 628 F.3d at 986-87; *Weger v. City of Ladue*, 500 F.3d 710, 727 (8th Cir. 2007) (four-month gap between complaint and adverse action not sufficient to show causation). Therefore, Shukh was required to come forward with evidence creating an issue of fact as to causation; specifically, that the human resources manager who allegedly failed to conduct an investigation or the manager who asked Shukh to attend training did so because of Shukh's complaints. Shukh presented no such evidence.

Moreover, as noted above, Shukh was promoted and received pay raises after his alleged protected conduct. These positive intervening events serve to affirmatively disprove any inference of causation. *E.g.*, *Bradley*, 232 F.3d at 633. Accordingly, the district court properly concluded that Shukh failed to establish a *prima facie* case of retaliation even under his new retaliation by hostile environment theory.

E. The District Court Correctly Dismissed Shukh's Claim for a Declaratory Judgment and Granted Seagate Summary Judgment on its Breach of Contract Counterclaim.

In a single section of his brief and without regard to the differences in motions that had been before the district court, Shukh contends that the dismissal of his declaratory judgment claim by the March 30, 2011, order and the grant of summary judgment to Seagate on its breach of contract counterclaim by a November 30, 2011, order constitute reversible error. The relevant portions of both orders relate to Shukh's removal of 49,607 pages of Seagate's documents.

Count 13 of the FAC sought a declaratory judgment of unenforceability of his confidentiality and document return obligations on unconscionability and public policy grounds. (A595 ¶ 336.) Seagate's counterclaims included one for breach of contract based on Shukh's taking of Seagate's documents. (A2221.) The March 30, 2011, order dismissed count 13 of the FAC (A30-32), and the November 30, 2011, order granted Seagate's motion for summary judgment on its

counterclaim and ordered return of the documents (A42-50). A proper consideration of each order confirms the propriety of both.

Shukh does not dispute that he agreed to the document return provision or took 49,607 pages of Seagate's documents. Rather, on appeal he presses three defenses that he contends should have precluded enforcement of his contractual obligation: unclean hands, unconscionability, and unconstitutionality. None warrants reversal of either of the district court's orders.

Unclean Hands. Shukh contends that Seagate's "fraudulent omission" of his name from the Patents gave it unclean hands that prevent enforcement of his contractual obligations. Shukh thinks if he repeats "unclean hands" enough it will block any claim by Seagate—like a magic shield. But unclean hands only applies when an unconscionable act has an "**immediate and necessary relation**" to the equitable relief sought. *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 245-46 (1933) (emphasis added). And the doctrine may only be invoked "to deny equitable relief to a party whose conduct has been unconscionable by reason of a bad motive or where the result induced by that party's conduct will be unconscionable either in the benefit to that party or in the injury to others." *Foy v. Klapmeier*, 992 F.2d 774, 779 (8th Cir. 1993); *accord Heidbreder v. Carton*, 645 N.W.2d 355, 371 (Minn. 2002).

Unclean hands was not a ground pled in the FAC for Shukh's declaratory judgment claim, so Shukh's arguments regarding unclean hands do not apply to the district court's dismissal under Rule 12(b)(6). Indeed, the words "unclean hands" appear nowhere in the FAC. Furthermore, despite its length, the FAC includes no allegations that meet the *Iqbal* pleading standards of a "bad motive" for Seagate's alleged failure to name Shukh on the applications. Likewise, the complaint does not and cannot allege an unconscionable "benefit" or "injury," because Shukh had assigned rights to inventions in exchange for salaried compensation. In addition, Shukh's claim fails to satisfy the tight nexus required between Seagate's alleged misconduct and the relief sought—*i.e.*, return of Seagate's property. *See Prow v. Medtronic, Inc.*, 770 F.2d 117, 121-22 (8th Cir. 1985).

In addition, declaratory judgment relief is discretionary. *Gulf Underwriters Ins. Co. v. Burris*, 674 F.3d 999, 1004 (8th Cir. 2012). Since unclean hands may only be invoked to deny equitable relief to a party and not damages, *see Bieter Co. v. Blomquist*, 848 F. Supp. 1446, 1451 (D. Minn. 1994), the district court acted within its discretion in declining to rule on the enforceability of the contractual provisions in the abstract on Shukh's request, but leaving the question to be decided, if necessary, in the context of any relief that Seagate would seek.

The district court also correctly rejected the defense in granting Seagate summary judgment on its breach of contract counterclaim. In response to

Seagate's motion for summary judgment, Shukh failed to proffer any actual evidence of a "bad motive" on Seagate's part. Shukh, for example, made no evidentiary showing—let alone one sufficient to survive summary judgment—that he should have been named as an inventor on the Patents or that Seagate had a bad motive for excluding him. (A3029-34.) Instead, he relied solely on the **allegations** of his complaint, which cannot meet his burden to show an affirmative defense like unclean hands. *See* Fed. R. Civ. P. 56(c)(1)(A). In light of the total absence of evidence for the unclean hands defense, the November 20, 2011, order correctly rejected it. (A48, n.8 (citing cases in support).)

***Unconscionability*.** Shukh's unconscionability argument effectively boils down to an assertion that without breaching his contractual obligations he could not litigate his claims against Seagate. But as the district court observed, Shukh could use the Federal Rules of Civil Procedure—like every other litigant—to lawfully obtain necessary evidence. (A46.)

In fact, the record reflects that Seagate readily produced during discovery 90% of the documents that Shukh had wrongfully taken from Seagate. (*See* A11431-35.) Those documents included Shukh's Invention Disclosures that he had identified as relevant to the Patents. (A3831, A4028-29.) While Seagate claimed privilege for 10% of the documents, following a motion to compel, the district court required Seagate to produce all communications related to Shukh's

Invention Disclosures. (A63-68, A74.) Thus, Shukh was able to use the proper judicial process to obtain the relevant documents to which he might have been entitled.

Moreover, a contract provision is only unconscionable if "it is such that no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." *Takacs v. Guardian Life Ins. Co*., 2004 WL 1260109, at *7 (D. Minn. June 8, 2004). And a standard provision in an agreement is not unconscionable even if not preferable for one party. *E.g., Weller v. Time Ins. Co*., 2008 WL 2952033, at *2-3 (D. Minn. July 28, 2008). Confidentiality and property-return provisions are standard clauses, routinely incorporated into employment agreements. Hundreds of Seagate employees accepted the identical provisions that Shukh contends are unconscionable. (A1446 ¶ 4.) Shukh cannot reasonably maintain that only one "under delusion" would accept them. And as a thoughtful district court opinion explained, a potential claim cannot be "a license to steal documents and break contracts." *JDS Uniphase Corp. v. Jennings*, 473 F. Supp. 2d 697, 702-03 (E.D. Va. 2007); *accord Cafasso v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047, 1061-62 (9th Cir. 2011) (summary judgment in nearly identical circumstances).

***Unconstitutionality*.** Without citing any authority, Shukh contends that the Patent Clause of the Constitution creates a "constitutionally exclusive right" for

inventors "to patent discoveries in their name" and "any contract provision that degrades or interferes" with that right is unconstitutional. (Br. 42, 68.) As explained above, Article 1 is a "grant to Congress" of the "power" to regulate, not a source of individual rights. *Graham*, 383 U.S. at 6. Moreover, as the district court noted, Shukh has not shown that the Employment Agreement prevented him from bringing his claim. (A46.)

II. NONE OF THE ANCILLARY ISSUES RAISED BY SHUKH HAVE MERIT.

A. The District Court Correctly Declined to Compel Production of Seagate's Privileged Documents Beyond the Limited Waiver.

The district court did not err in refusing to compel production of Seagate's privileged documents. (A59, A74.)

1. The district court thoroughly considered Shukh's arguments about the privileged documents twice.

As explained above, Shukh stole 49,607 pages of documents from Seagate when he was terminated. In response to Seagate's motions seeking a remedy for this wrongful conduct, the district court ordered Shukh to produce to Seagate copies of the documents that Shukh took, and Shukh did so. (A1047.) Shukh then served a request for production of documents asking Seagate to produce the 49,607 pages to Shukh as part of discovery. On September 16, 2011, Seagate produced to Shukh over 86,000 pages of documents, including the non-privileged documents

Shukh took from Seagate and the five Invention Disclosures that Shukh claims relate to the Patents. (A3831.)

On September 16, 2011, Seagate also produced two privilege logs identifying 575 documents. (A3835-59, A3863-71.) Privilege Log No. 1 included 392 Seagate-privileged documents corresponding to Seagate's re-production of the 49,607 pages of documents, and Privilege Log No. 2 included 183 other Seagate-privileged documents.

Shukh moved to compel the production of all 575 documents on a variety of privilege grounds. In ruling on Shukh's motion, the magistrate judge explained that "[Shukh] does not dispute the sufficiency of Seagate's privilege logs or that the 575 documents identified on the logs are . . . privileged in the first instance." (A62.) The magistrate judge found a narrow subject matter waiver resulted from Seagate's production of the five Invention Disclosures, but denied Shukh's motion on all other grounds in a thorough opinion, ordering Seagate to produce "only those communications between Dr. Shukh and Seagate that were made subsequent to Dr. Shukh's submission of the invention disclosures to [Seagate] and relate to those invention disclosures." (A61.)

Two weeks later, on December 29, 2011, Seagate produced to Shukh the documents that fell within the scope of the subject matter waiver. (A11604.) Shukh admits that "Seagate has now made discovery productions of the

overwhelming majority of documents" that he took when he left Seagate. (A11442.)

Shukh unsuccessfully appealed the magistrate judge's order to the district court, seeking production of the remaining documents on the privilege log not subject to the magistrate judge's order and not produced by Seagate on December 29, 2011 ("Remaining Documents"). In an opinion carefully setting forth the difference between the "common interest doctrine" and the "joint representation privilege," the district court affirmed the magistrate judge's ruling. (A74.) Shukh's Petition for a Writ of Mandamus followed, which this Court denied. (Misc. No. 12-132.)

2. None of Shukh's arguments warrant compelling production of the Remaining Documents.

Shukh makes four arguments for why the district court erred in refusing to order production of the privileged Remaining Documents. None has merit.

As a threshold matter, Shukh has made no showing to substantiate his claim that the documents at issue are relevant at all, let alone are needed "to prove his Section 256 inventorship and other claims." (Br. 3.) The scope of discovery is limited to non-privileged matters that are "relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). And a "**threshold showing of relevance** must be made before parties are required to open wide the doors of discovery and to produce a variety of information which does not reasonably bear upon the issues in

the case." *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1992) (emphasis added). Shukh's counsel's simple say-so that the documents are relevant fails the threshold requirement. This Court could affirm on this ground alone.

Common Interest. Shukh continues to incorrectly invoke the "common interest" doctrine and conflate it with the "joint representation" privilege to mistakenly argue that he is entitled to the Remaining Documents. Although both require a "common interest," the doctrines are entirely distinct. *See* 24 Charles Alan Wright et al., *Fed. Practice & Procedure* § 5505 (2012). More importantly, neither entitles Shukh to the Remaining Documents.[11] Shukh's argument implicates patent law, so Federal Circuit law applies, though the result is the same under established federal privilege law. *See In re Spalding Sports Worldwide, Inc.*, 203 F.3d 800, 803-804 (Fed. Cir. 2000).

The "joint representation" or "joint client" privilege provides that "[w]hen the same attorney represents the interests of two or more entities on the same matter, those represented are viewed as joint clients for purposes of privilege." *In re United States*, 590 F.3d 1305, 1310 (Fed. Cir. 2009) (quotations omitted); *see also In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 362-63 (3d Cir. 2007). Under the doctrine, while communications may be privileged as to outsiders, they

[11] Seagate's response to Shukh's petition for mandamus earlier in this matter discussed the subject in detail (Misc. No. 12-132, Dkt. No. 13 at 13-22).

are not between the joint clients. *Id.*; *In re United States*, 590 F.3d at 1310. But Shukh and Seagate were never joint clients of Seagate's attorneys, because Shukh was never Seagate's attorneys' client. *See In re Regents of Univ. of Cal.*, 101 F.3d 1386, 1389 (Fed. Cir. 1996) (referring to communications between multiple clients and their "jointly retained" counsel). Indeed, it is well settled that an employee-inventor who is required to assign his rights to any inventions to a company lacks an attorney-client relationship with the company's lawyers, *Univ. of W. Va. v. Van Voorhies*, 278 F.3d 1288, 1304 (Fed. Cir. 2002), and the privilege over the employee's communications with the lawyer is "solely" the company's, *Telectronics Proprietary, Ltd. v. Medtronic, Inc.*, 836 F.2d 1332, 1336-37 (Fed. Cir. 1988). Therefore, the joint representation privilege is entirely inapplicable.

The "common interest" doctrine, on the other hand, is "not an independent basis for privilege, but an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party." *Cavallaro v. United States*, 284 F.3d 236, 250 (1st Cir. 2002). It allows "attorneys for different clients pursuing a common legal strategy to communicate with each other" without triggering a privilege waiver. *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012); *In re Teleglobe Commc'ns*, 493 F.3d at 365. Thus, while the doctrine allows privileged information to be shared with a party with a

common interest without waiving privilege, it in no way requires it to be shared. The common interest exception simply has no applicability here whatsoever.

Waiver by Delay. Shukh contends in conclusory fashion—without discussing any of the facts found by the district court (A38-49, A49-50, A85-86)—that Seagate waived its privilege over the documents he stole by delaying too long to seek their return. (Br. 57.) This argument does not implicate patent law, so Eighth Circuit law applies. A split exists among circuits on the standard of review for waiver, *In re Pioneer Hi-Bred Int'l, Inc*., 238 F.3d 1370, 1373 n.2 (Fed. Cir. 2001), and the Eighth Circuit has not addressed the question, but reviews discovery orders for a "gross abuse of discretion," *Ahlberg v. Chrysler Corp*., 481 F.3d 630, 637-638 (8th Cir. 2007).

Shukh's waiver-by-delay contention ignores the facts. The district court's opinions and Seagate's response to Shukh's mandamus petition detail the repeated attempts that Seagate made to protect and obtain the documents. (A38-50, A85-86.) First, Shukh wrongly suggests that Seagate had an obligation on "Dr. Shukh's last day" in January 2009 to seek return of the documents that he took. (Br. 57.) A "party is not expected to take reasonable steps to reclaim documents until it has received notice" that the privileged documents have been disclosed. *Navajo Nation v. Peabody Holding Co.*, 255 F.R.D. 37, 45 (D.D.C. 2008). Here, Shukh **did not** "tell [Allen] or show [Allen] what documents [Shukh] had copied or had

otherwise taken from Seagate." (A3961.) It was not until September 28, 2010—when the magistrate judge ordered Shukh to produce copies of the stolen documents—that Seagate learned Shukh took 49,607 pages—far exceeding anything Shukh had suggested previously. (A1038, A1047; *see also* A4015-20.) The district court correctly concluded that Seagate took reasonable steps to seek return of the documents.

Furthermore, Seagate took reasonable steps to protect its privileged materials in the first instance: (1) Seagate's Employment Agreement required return of documents (A601); (2) Seagate physically stopped Shukh's activities once it learned that Shukh may be trying to take documents and "walked [Shukh] out" of the building (A3908-09, A2919-20); and (3) Seagate "repeatedly requested the return of the documents" (A38; *see also* A2452-53, A2457-59). The district court did not abuse its discretion in finding Seagate's protections and activities were reasonable.

Finally, "[t]o the extent documents can be viewed as stolen . . . they should not lose the protection of the privilege." *In re Berkley & Co., Inc.*, 466 F.Supp. 863, 869 (D. Minn. 1979). This is a case in which Shukh seeks to use his theft of Seagate documents to his advantage by claiming that Seagate waived its privilege, but "[Shukh] cannot now be heard to complain that his conduct should be excused

because others ought to have mitigated the effects of his actions." *Richards v. Jain*, 168 F. Supp. 2d 1195, 1208 n.8 (W.D. Wash. 2001).

Massaroni's Bar Membership. Shukh contends that communications with Seagate's General Counsel, Ken Massaroni, are not privileged because he is not admitted to the bar in Minnesota or California. As an initial matter, Shukh has not shown how many of the Remaining Documents include Massaroni's communications. Furthermore, Shukh's argument is meritless because "[a] **lawyer, for purposes of the privilege**, is a person authorized, or reasonably believed by the client to be authorized, to practice law **in any state or nation**," 3-503 Weinstein's Federal Evidence § 503.12 (emphasis added), and Shukh acknowledges that Massaroni "belonged to other bars" (Br. 58). Accordingly, Seagate may assert privilege over Massaroni's communications. *Paper Converting Mach. Co. v. FMC Corp.*, 215 F. Supp. 249, 251 (E.D. Wis. 1963); 3-503 Weinstein's Federal Evidence § 503.12 (same).

Scope of Waiver. The district court determined that Seagate's production of five of Shukh's Invention Disclosures resulted in a subject matter waiver as to communications that "relate to those invention disclosures" after their submission. (A61.) Shukh contends that the scope of the waiver should have been much broader to include "all communications about inventorship" because "[t]his case is about inventorship." (Br. 60.) The appropriate scope of subject matter waiver is

discretionary and requires a court to weigh various factors, *Fort James Corp. v. Solo Cup Co*., 412 F.3d 1340, 1349-50 (Fed. Cir. 2005), including "fairness balancing" under Federal Rule of Evidence 502, *Wi-LAN, Inc. v. LG Elecs., Inc*., 684 F.3d 1364, 1369 (Fed. Cir. 2012), and may entail a "factually intensive inquiry," *Bowles v. Nat'l Ass'n of Home Builders*, 224 F.R.D. 246, 260 (D.D.C. 2004). Because of the nature of this inquiry, a district court's determination of the scope of waiver should be reviewed for an abuse of discretion. *See In re Sealed Case*, 877 F.2d 976, 981 (D.C. Cir. 1989).

Shukh offers nothing to support the broad scope of waiver that he asserts. He also does not address the fairness considerations or standards for intentional waiver under Rule 502, which provide that the waiver only extends to undisclosed communications or information concerning "the same subject matter" that "ought in fairness to be considered together." The subject matter of the disclosure was the five Invention Disclosures, so the district court correctly limited the waiver to communications about them.

The district court also did not abuse its discretion in weighing the various factors relevant to the scope of waiver based on the other facts involved: Seagate had contractual protections in place for its privileged documents, it took appropriate action based on the information it had about privileged materials taken by Shukh, Shukh himself inserted the Invention Disclosures into the litigation

through improper conduct, and he has shown no unfair tactical advantage that Seagate initially sought by the disclosure or ultimately received as a result of the scope of waiver.

The district court's order on the privilege issues should be affirmed.

B. The District Court Did Not Abuse its Discretion in Deciding the Discovery Disputes.

The district court decided two other discovery issues. The district court (1) denied Shukh's motion to exclude the testimony of Seagate's technical expert, Dr. Bajorek (A191-92), and (2) issued a protective order requiring Shukh to withdraw five subpoenas directed at Seagate's experts and denying production of Dr. Bajorek's reports and testimony in other cases (A132-48, A192). The standard of review in the Eighth Circuit for "discovery orders is very narrow"—there must be a "gross abuse of discretion resulting in fundamental unfairness." *Ahlberg*, 481 F.3d at 637 (quotations omitted). The district court did not abuse its discretion at all, let alone grossly abuse its discretion.

1. The district court did not grossly abuse its discretion in denying exclusion of Dr. Bajorek's expert report.

Shukh tried to play a game of "gotcha" regarding the inadvertent (and promptly corrected) omission from Dr. Bajorek's comprehensive 152-page November 30, 2012, expert report of the list of three cases in which he had previously given expert testimony. The district court correctly held that exclusion

under Rule 37 was not triggered, and even if it were, it did not bar the testimony because the error was harmless. Fed. R. Civ. P. 37(c)(1) (no exclusion if "substantially justified" or "harmless").

Rule 37 was not triggered because it only applies "[i]f a party fails to provide" the information required under Rule 26(a) and fails to timely supplement under Rule 26(e) if it learns the disclosure was "incomplete." Here, Seagate cured its technical failure by promptly providing the list of three cases on January 2, 2013, when counsel realized the inadvertent omission. (A212-14, A7490-91, A7632.)

Even if triggered, the initial omission was entirely harmless for multiple reasons. The information was promptly supplemented four weeks before the close of expert discovery; over three weeks before Dr. Bajorek's deposition; and six months before the trial-ready date. (A7493-506, A4565-68.) Dr. Bajorek's opinions in the three cases had no relevance to his opinion on inventorship in the present case. (A140-43.) Shukh's counsel extensively questioned Dr. Bajorek about the three cases during his deposition. (A7598-602, A7610-16, A7619.) Shukh has pointed to no discovery that he would have been allowed to take that he was unable to because of the delayed disclosure.

2. The district court did not grossly abuse its discretion in issuing a protective order to prevent unduly burdensome and irrelevant discovery about Seagate's experts.

In December 2012 and January 2013, Shukh served thirteen subpoenas in five different districts directed at information about Dr. Bajorek and Seagate's vocational expert, Angela Heitzman. (A6381-6481, A6553-58, A6512-18.) The wide-ranging subpoenas sought irrelevant and unduly burdensome information designed to oppress Seagate's experts. Fed. R. Civ. P. 26(c). For example, Shukh sought "[a]ny and all documents … pertaining in any way" to the settlement of two lawsuits between Dr. Bajorek and IBM over **stock options** (A6399-40), his entire personnel file from a former employer, Intematix (A6388-93), and Ms. Heitzman's undergraduate transcript showing courses and grades, even though she has a Master's degree and is pursuing a Doctorate (A6447-51, A6496-510). He also wanted "the entire case file" from an arbitration relating to trade secret claims between Seagate and Western Digital, in a case lacking any relevance to Shukh's claims and so massive that it resulted in an award of over $500 million in favor of Seagate. (A6413.) *See Seagate Tech., LLC v. Western Digital Corp.*, 854 N.W.2d 750 (Minn. 2014).

Seagate moved for a protective order, pursuant to Rules 16 and 26, requiring withdrawal of five of the subpoenas and a document request. Even a cursory review of the subpoenas at issue, along with Dr. Bajorek's description of his work

on prior cases, confirms that the discovery sought lacked relevance and entailed undue burden. (A6519-24, A139-43.)

In claiming error, Shukh raises jurisdictional, standing, and waiver arguments premised on a mistaken belief that Seagate brought a motion under Rule 45 to quash third-party subpoenas. Seagate, however, properly brought the motion under Rule 16 and 26(c), which provides that "**[a] party** or any person from whom discovery is sought may move for a protective order in the court where the action is pending." Fed. R. Civ. P. 26(c)(1) (emphasis added). "The explicit mention of 'a party' in the rule has been interpreted to provide standing for a party to contest discovery sought from third-parties." *Underwood v. Riverview of Ann Arbor*, 2008 WL 5235992, at *2 (E.D. Mich. Dec. 15, 2008); *accord Fleet Bus Credit Corp. v. Hill City Oil Co.*, 2002 WL 1483879, at *2 (W.D. Tenn. June 26, 2002).

And Seagate was not merely asserting third-parties' rights, but its own interest in the efficient disposition of the case as well as in protecting the confidentiality of the materials in the Seagate and Western Digital arbitration. If Shukh were to obtain the large volumes of materials sought by the subpoenas, Seagate itself would need to incur costs to process and assess them for purposes of this case. The rules confer broad discretion on the district court "to decide when a protective order is appropriate and what degree of protection is required." *Roberts v. Shawnee Mission Ford, Inc.*, 352 F.3d 358, 362 (8th Cir. 2003). In light of the

unreasonableness and breadth of the requested discovery, the protective order was not only a proper exercise of the district court's authority under Rules 26(c) and 26(b)(2), but independently a proper exercise of discretion under Rule 16(a)(3) to manage the discovery process before it. It certainly was not a gross abuse of discretion.

C. Shukh's Admittedly "Pro Forma" Title VII Punitive Damages Claim Failed to State a Claim.

The district court correctly dismissed Shukh's Title VII punitive damages claim and denied his request to amend the complaint for a fourth time. (A91-102.) This issue is moot if this Court affirms summary judgment on Shukh's retaliation claim.

Federal law imposes a higher standard for claiming punitive damages as compared to the standard required to state a basic claim for employment discrimination or retaliation. *Kolstad v. ADA*, 527 U.S. 526, 534 (1999); *Canny v. Dr. Pepper/Seven-Up Bottling Grp.*, 439 F.3d 894, 903 (8th Cir. 2006) (referring to the "formidable burden on plaintiffs" asserting a Title VII punitive damages claim). A Title VII punitive damages claim requires the plaintiff to allege facts—as opposed to labels and conclusions—that the employer engaged in intentional discrimination "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1).

The district court found that the FAC was "barely sufficient" to clear the Rule 12(b)(6) hurdle for a basic Title VII claim. (A97, A26.) No new allegations of discrimination or retaliation were added in any of the four versions of Shukh's complaint. (A96-97.) Rather, Shukh conceded that his Title VII punitive damages claim was simply a bare-bones, "pro forma" allegation. (A92.) "Threadbare recitals of the elements of a cause of action," however, are exactly the type of claims that fail Rule 12(b)(6). *Iqbal*, 556 U.S. at 678.

Shukh also was not entitled to leave to amend his complaint for a fourth time because he did not follow Local Rule 7.1(a) regarding motions to amend, there were repeated (four) failures to cure the deficiencies, and the only suggested amendment (an allegation that "Defendants engaged in discriminatory [and retaliatory] practices with malice or reckless indifference" (A4376)) was merely a threadbare conclusion that was futile. *O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 505 (8th Cir. 2009).

Shukh's sole argument on appeal is that dismissal of his claim on July 3, 2012, cannot be reconciled with the district court's later comment in its March 31, 2014, summary judgment order that "Seagate may have mistreated Shukh." (Br. 93, A272.) Seagate respectfully disagrees that anyone could find mistreatment of any sort, especially in light of the great lengths to which Seagate went to accommodate a very challenging employee. But, in any event, Shukh's argument

wildly misses the mark. First, the analysis for Rule 12(b)(6) simply looks at the four corners of the complaint, which Shukh admitted had only "pro forma" allegations. Second, Shukh's partial quote of the district court's comment omits the rest of the sentence in which the district court confirms that a jury could **not** "conclude that the conflicts and mistreatment were a result of Shukh's national origin and in violation of the law." (A272.) Thus, the reference to hypothetical "mistreatment" is immaterial because it did not implicate Title VII. The district court correctly found that Shukh's pro forma Title VII punitive damages claim failed to state a claim.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Dated: December 5, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2014, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Federal Circuit using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

/s/ Calvin L. Litsey
Calvin L. Litsey

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B), as extended by Docket No. 39 and Federal Circuit Rule 28(c), because:

   The brief contains 15,848 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because:

   The brief has been prepared in a proportionally spaced typeface using

Microsoft Word 2007 in 14 point Times New Roman font.

Dated: December 5, 2014

/s/ Calvin L. Litsey
Calvin L. Litsey