**Appeal No. 14-1406**

# United States Court of Appeals for the Federal Circuit

ALEXANDER M. SHUKH,

*Plaintiff-Appellant,*

v.

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

*Defendants-Appellees*,

*and*

UNKNOWN OWNERS AND ASSIGNEES,

*Defendant*,

*and*

SEAGATE TECHNOLOGY PLC, an Irish public limited company,

*Defendant-Appellee*.

*Appeal from the U.S. District Court for the District of Minnesota in No. 0:10-cv-404-JRT-JJK, Judge John R. Tunheim.*

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February 2, 2015

## APPELLANT'S CERTIFICATE OF INTEREST

Counsel for the appellant Alexander M. Shukh certifies the following:

1. The full name of every party or amicus represented by me is: **Alexander M. Shukh.**

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: **Alexander M. Shukh.**

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: **None.**

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## ADDITIONAL STATEMENT OF FACTS

Regarding Seagate's fiduciary duty argument: (Seagate Brief 27-29.) ("SBrief"):

Dr. Shukh communicated about his inventions with Massaroni, and with other lawyers–Dietz, Jacobson, and Buenzow– who were Minnesota and Patent Bar members. (A3354.) (http://www.mncourts.gov/MARS/; https://oedci.uspto.gov/OEDCI/).

Seagate's Privilege Logs list some of those communications. (A3402-04; A3411-15: Priv. Log No. 1, Doc.#'s SGTPRV226-28, 230-32, 235, 237-38, 241, 243, 245-46, 247, 249-50, 254, 337, 342-43, 345, 347-49, 351-52, 354, 356, 358-59, 361, 363, 365, 367, 369-71, 373, 375-76, 380, 382, 386 (Dietz); SGTPRV243-44, 250, 256, 382 (Jacobson); SGTPRV258-59, 392 (Buenzow)). Privilege Log No. 2 (Priv. Log No. 2, Doc.#'s SGTPRV 395, 434 (Dietz)).

None advised Dr. Shukh that they represented Seagate, had a conflict of interest, or that he should get his own lawyer. (A3429-31, ¶¶27-29.)

## ARGUMENT

### I. THERE ARE NOT TOO MANY ISSUES.

> [A]lthough there may be one or two outstanding contentions, which to counsel seem conclusive, there may be several other

> sound contentions of comparatively lesser moment. It is good practice to put them in the brief.

E. Barrett Prettyman, *Some Observations Concerning Appellate Advocacy*, 39 Va.L.Rev. 285, 294 (1953). Moglin, *Raising Issues on Appeal: Fewer Is Not Always Better* (Nov. 3, 2014) (www.americanbar.org/groups/litigation/committees/appellate/news-analysis/articles-2014/open/fall2014-1114-raising-issues-appeal-fewer-is-not-always-better.html). (SBrief 12.)

## II. THE PATENT CLAUSE PROTECTS INVENTORSHIP.

The Patent Clause protects inventors. (SBrief 24.)

It "is both a grant of power and a limitation" but it is meant to encourage and the advance in the "Progress of Science and useful Arts" a constitutional standard that "may not be ignored." Patent laws, "passed to give effect to this purpose," must be construed in this spirit. *Bilski v. Kappos*, 130 S.Ct. 3218, 3252 (2010).

Therefore, "[b]ased on the Constitution's grant of power to Congress to promote science, a patent can be issued only to its inventors." Note: *The Importance of Correct Inventorship*, 7 J.Intell.Prop.L. 191 (Fall 1999) (approved in *Univ. of Colo. Found. v. Am. Cyanamid*, 105 F.Supp.2d 1164, 1175 (D.Colo. 2000)).

## III. DR. SHUKH HAS STANDING.

### A. Overruling *FilmTec* Is Properly Presented.

Seagate does not defend *FilmTec*, arguing only that it binds the panel, invoking *stare decisis*. (SBrief 18-19.)

This Court's *en banc* denial cited Circuit Rule 35(a)(1) allowing Dr. Shukh "to argue…to overrule a binding precedent," and leaving the panel to decide whether to ask for *en banc* review. *See also Henderson v. Shinseki*, 589 F.3d 1201, 1204 (Fed. Cir. 2009).

### B. *Stare Decisis* Does Not Apply.

Departing from precedent is appropriate when governing decisions are unworkable or badly reasoned. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Blind adherence to precedent that collides with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience is improper. *Helvering v. Hallock*, 309 U.S. 106, 119 (1940); *Lighting Ballast Control v. Philips Elecs. North Am.*, 744 F.3d 1272, 1297 (Fed. Cir. 2014) (Dissent of Judge O'Malley), *vacated & remanded*, __ S.Ct. __ (Jan. 26, 2015).

This Court has reconsidered precedent that was "wrongly decided," "is at odds with congressional directives," and "has had negative consequences." *Lighting Ballast*, 744 F.3d at 1298.

Those considerations pertain.

Seagate's silence concedes that *FilmTec* is indefensible. *CardSoft LLC v. VeriFone*, 769 F.3d 1114, 1119 (Fed. Cir. 2014).

### C. Even under the Uncertain Standards of "Reputational Standing," the Evidence of Reputational Injury Creates a Fact Issue.

#### *1. The Court Must Accept Dr. Shukh's Version of the Facts.*

Seagate does not dispute that review of dismissal and summary judgment is *de novo*, that facts are construed most favorably to Dr. Shukh who is entitled to all inferences and whose version of the facts controls.[1] (Appellant's Opening Brief 42, 50, 52, 68, 77.) ("AMSBrief").

#### *2. There Was Ample Evidence of Reputational Standing.*

Seagate argues that Dr. Shukh's reputation for personal traits was not damaged by his omission from the patents. (SBrief 19-23.)

But that's not what this Court and the District Court have said about reputation. *Chou v. Univ. of Chicago*, 254 F.3d 1347, 1359 (Fed. Cir. 2001):

> After all, being considered an inventor of important subject matter is a mark of success in one's field, comparable to

[1] Seagate is entitled to the same benefits on Dr. Shukh's Cross-Motion for Summary Judgment. *See* Argument, *infra*, p. 29.

> being an author of an important scientific paper. Pecuniary consequences may well flow from being designated as an inventor.

The District Court quoted that ruling and further stated "in the Court's view, *Chou* is correct that pecuniary and reputational consequences could easily flow from being named or omitted as an inventor." (A15.)

But *Chou* has left a doctrinal vacuum.

The rule that reputation conveys standing appears in *Czarnik v. Illumina*, 437 F.Supp.2d 252, 256 (D.Del. 2006); *Jardin v. Datallegro,* 2011 U.S.Dist.LEXIS 84509, *23 (S.D.Cal. 2011); *Krauser v. Evollution IP Holdings*, 975 F.Supp.2d 1247, 1261 (S.D.Fla. 2013). *Krauser*, the only decision to grapple with a rationale, concludes that omission from a patent constitutes *per se* reputational injury.

But others reject reputational standing, often for an absence of allegations or proof. *Cole v. Gummow*, 2003 U.S.Dist.LEXIS 18925, *10 (N.D.Tex. 2003); *Barnette v. Dicello*, 616 F.Supp.2d 709, 714 (N.D.Ohio 2007); *Hoang v. Abbott Labs*, 2009 U.S.Dist.LEXIS 49468, *10 (N.D.Ill.

2009); *Studio & Partners v. KI*, 2008 U.S.Dist.LEXIS 11321, *50-51 (E.D.Wis. 2008).[2]

The District Court in this case falls into both categories, first recognizing that inventorship may be a "mark of success" conferring standing (A15), but then rejecting Dr. Shukh's evidence demonstrating that precise point, holding that more patents are not better. (A176-79)

As a matter of common sense, that latter conclusion is wrong. The PTO lists prolific inventors because more patents obviously enhance reputation. *Prolific Inventors Receiving Utility Patents 1988–1997* (USPTO 1998) (www.uspto.gov/web/offices/ac/ido/oeip/taf/inv_prol.pdf. Prolific inventorship is also an area of academic interest. Le Bas &. Bouklia-Hassane, *Prolific Inventors: Who Are They and Where Do They Locate? Evidence from a Five Countries US Patenting Data Set*, Working Paper 14/2010 (Int'l Centre for Econ. Research 2010) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1625743).

[2] Other courts say the issue remains unresolved. *Armor Screen Corp. v. Storm Catcher,* 2008 U.S.Dist.LEXIS 112172, *31 (S.D.Fla. 2008); *Bio-Mimetics v. Columbia Labs*, 2010 U.S.Dist.LEXIS 31300, 17 (D.Mass. 2010); *Am. Navigation Sys. v. Michalson*, 2011 U.S.Dist.LEXIS 128155, *5 (D.Mass. 2011); *Informatics Applications Group v. Shkolnikov*, 836 F.Supp.2d 400, 411 n.4 (E.D.Va. 2011); *Ali v. Carnegie Inst. of Wash.*, (footnote continued . . .)

Finally, the district court's conclusion ignores the fact that Dr. Shukh had the negative reputation within Seagate for insisting on inventorship credit, a reputation that would have disappeared had he received proper credit. (A176-79.)

Moreover, Dr. Shukh's experts established reputational damage– Mr. Rockman in the patent area, and Mr. Benson as to Seagate's INS Petition. (AMSBrief 12-14.) Seagate's objections go to the weight of these opinions, not their admissibility. *Johnson v. Mead Johnson & Co.*, 754 F.3d 557, 564 (8th Cir. 2014); *Apple Inc. v. Motorola*, 757 F.3d 1286, 1314 (Fed. Cir. 2014).

Finally, Seagate's causation and redressibility arguments are incorrect. (SBrief 22-23.) If inventorship is a "mark of success in one's field," the wrongful omission of Dr. Shukh as an inventor deprived him of that mark of success. As *Krauser* noted:

> [An inventor] need not prove any concrete financial or economic injury to vindicate his reputation because, as in most defamation cases, such injuries will generally be impossible to prove, and success on the §256 inventorship claim serves a vindicatory purpose even if there is no concrete injury to be redressed. To hold otherwise would

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(. . . footnote continued)
967 F.Supp.2d 1367, 1381 n.1 (D.Or. 2013); *Vita-Herb Nutriceuticals v. Probiohealth*, 2013 U.S.Dist.LEXIS 40483, *11 (C.D.Cal. 2013).

> mean that the true inventor of a product who lacked any economic or ownership interest in his product would have no means of redress. Notwithstanding the contrary case law set forth above, this Court finds such a result untenable. 975 F.Supp.2d at 1261

But if there are other standards for reputational standing, this Court should delineate them and remand this case for discovery and trial on those standards.

### D. The Supreme Court Disapproves of Unique Patent Rules.

The Supreme Court has once again disapproved special patent law rules like *FilmTec*'s. *Teva Pharm. USA v. Sandoz*, __ S.Ct. __, 2015 U.S.LEXIS 628 (Jan. 20, 2015). (AMSBrief 47-48.)

### E. Seagate's Newly Fabricated Explanation about One Patent Should Be Rejected As Should Its Corroboration and Collaboration Arguments As to All Applications.

The Court should reject Seagate's newly conjured explanation that Dr. Shukh's omission from '150 application was an "anomaly." (*Compare* AMSBrief 10-12 and SBrief 11 n.2.)[3] It is completely unsupported by the record.

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[3] Seagate's failure to explain Dr. Shukh's omission from the applications also shows that Dr. Shukh has established a *prima facie* retaliation case. *See* Argument, *infra*, p. 39.

Seagate says nothing about the other patents, but even if it did, this new argument must be rejected simply because in this review of dismissal and summary judgment, the facts must be viewed most favorably to Dr. Shukh; he is entitled to all inferences, and his version of the facts must be accepted, including his collaboration and contribution, both fact-specific issues. *Fina Oil & Chem. Co. v. Ewen*, 123 F.3d 1466, 1473 (Fed. Cir. 1997). (AMS Brief 42, 50, 52, 68, 77.)

In any event, Dr. Shukh's verified Complaint, interrogatory answers, and testimony are clear and convincing evidence of both elements, corroborated by reams of documents and the report of his technical expert. (A1117-1226; A4260-82; A4783-4845; A5123-46; A8173-8753; A8755-87.)

## IV. DR. SHUKH WAS WRONGLY DENIED ACCESS TO COMMUNICATIONS ABOUT HIS OWN INVENTIONS.

Seagate's privilege arguments are meritless. (SBrief 54-63.)

### A. Because Seagate Listed the Withheld Documents on Privilege Logs, *Ipso Facto*, They Are Relevant.

Under Rule 26(b)(5)(A), simply because Seagate listed these documents on privilege logs, they are relevant. *CHill v. Mitchell*, 2010 U.S.Dist.LEXIS 103353, *26-27 (S.D.Ohio 2010); *Rawat v. Navistar Int'l Corp.*, 2011 U.S.Dist.LEXIS 98432, *8-9 (N.D.Ill. 2011).

### B. Seagate's Rejection of the "Common Interest" Doctrine Is Meritless.

This Court recognizes the "common interest" doctrine. *In re Regents of Univ. of Cal.*, 101 F.3d 1386, 1389 (Fed. Cir. 1996), uses the "common interest" and "community of interest" labels. *See also In re United States*, 590 F.3d 1305, 1310 (Fed. Cir. 2009).

As noted in *Regents*, "this issue has arisen before in connection with patent rights," under the "common interest" label. 101 F.3d at 1389 (quoting with approval *Baxter Travenol Labs v. Abbott Labs*, 1987 WL 12919, *1 (N.D.Ill. 1987), and *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 514 (D.Conn.).

This doctrine is invoked when two separately represented persons and their lawyers share communications. That is essentially the situation here. If it is correct that Seagate's lawyers did not represent Dr. Shukh as the District Court held (A79-80), and since he did not have his own lawyer, he was acting for himself, *pro se*, about his inventorship rights. Therefore, although not "jointly represented," the "common interest" "community of interest" doctrine applies.

Furthermore, another irreconcilable inconsistency arises from the Magistrate Judge's earlier ruling that these documents could be

reviewed by Dr. Shukh's counsel to determine if Dr. Shukh had a case. (A1920-21; AMSBrief 28, 33.) They can't be privileged for one purpose and not privileged for another.

A second inconsistency arises from the Magistrate Judge's finding that Seagate's and Dr. Shukh's interests were aligned "to get the inventorship of the patents right." (A72.) (*See* District Court's rationale at A80.) This is a "common interest."

### C. Seagate Took No Legal Steps to Assert the Rights It Now Claims Are So Important.

Seagate admits that on January 14, 2009, Dr. Shukh told his boss Allen that he had retained documents to make his legal case. (A820-24; A3175-77; AMSBrief 23-24.)[4]

Over the succeeding months Seagate's lawyers communicated with Dr. Shukh's attorneys and received documents that made it aware he had retained attorney-client communications. (A1719; A1731-37; A1738-49; A1750-52; A1753-65; A1766-68; A1769-70; A1776-77; AMSBrief 25-26.)

[4] Given this honest disclosure, the document retention cannot fairly be labeled "theft." (SBrief 7-8, 60.) In fact, in their March 26, 2010 letter making the tardy privilege assertion, Seagate's counsel did not say that (footnote continued . . .)

But Seagate made no privilege assertion until March 26, 2010, more than a year after Dr. Shukh's departure, and failed to file court papers asserting privilege until August 30, 2010, an additional six months later. (A1778-80.)

Expeditious "legal measures" were required to preserve the privilege. Seagate did not do so. (AMSBrief 56-57.)

### D. Massaroni's Illegal Practice of Law Vitiates Any Privilege Regarding His Communications.

Massaroni's illegal unauthorized practice is a criminal misdemeanor in California.

Such misconduct vitiates any privilege over his communications about Dr. Shukh. (AMSBrief 31-32, 57-59.)

## V. THE RULINGS AGAINST THE CONTRACT AND TORT CLAIMS, ENFORCING THE DOCUMENT RETURN PROVISIONS, WRONGLY REWARDED SEAGATE'S FRAUDULENT CONDUCT.

### A. Introduction.

Seagate's arguments against Dr. Shukh's common law contract, rescission, fiduciary duty, and unjust enrichment claims are substantially incorrect. (SBrief 25-30.)

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(. . . footnote continued)
the documents were "stolen" but only that they were "impermissibly
(footnote continued . . .)

Seagate does not dispute that the standard of review is *de novo*. (AMSBrief 61.)

Seagate does not dispute that Dr. Shukh's allegations and proof establish its inequitable conduct. (AMSBrief 61.)

Nor does Seagate defend the District Court's incorrect statement that "it [is not] clear that [Dr. Shukh] has inventorship rights once his work has been assigned to Seagate." (*Id.*; A22.)

These omissions alone demolish Seagate's argument.

### B. Seagate Breached the Implied Covenant of Good Faith and Fair Dealing by Omitting Dr. Shukh as an Inventor and Lying about It.

In any event, Dr. Shukh's inventorship rights are specifically referred to in, and not extinguished by the Employment/Agreement. (A827-28.) Nor could they be.

Seagate cites two inapposite cases that do not involve employment contracts. (SBrief 26.) The proper rule is as follows: "[A]n employer may not engage in bad faith conduct intended to deprive an employee of expected economic benefits. ***It makes no difference what that***

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(. . . footnote continued)
retained." (A1778-90; AMSBrief 26.)

***conduct might be***…." *Daum v. Planit Solutions*, 619 F.Supp.2d 652, 659 (D.Minn. 2009) (emphasis added).

### C. Seagate Breached Its Fiduciary Duty.

Seagate's fiduciary duty argument is wrong. (SBrief 27-29.)

Dr. Shukh's Opening Brief sets forth the elements of that Claim with ample authority and cites the Court to the detailed allegations supporting the fiduciary duty. (AMSBrief 9-13, 63-64.) These allegations are not "catch-phrases."

### D. Seagate Cannot Escape Its Fiduciary Duty Based on the Unethical Conduct of Its IP Lawyers in Failing to Advise Dr. Shukh to Hire His Own Lawyer.

Seagate's argument that Dr. Shukh knew its patent attorneys did not represent his interests relies on the professional misconduct of those lawyers in not advising him of their conflicting responsibilities and the need for him to seek his own lawyer. (*See* Additional Statement of the Case, *supra*, p. 1.)

When a lawyer knows that an employee's legal interests are adverse to the corporation that lawyer represents, he must advise the employee that he only represents the company and not the employee. Seagate's lawyers did no such thing.

The three lower level Seagate lawyers were members of the Minnesota and Patent Office Bars. Massaroni was also admitted to the Patent Bar, and to the D.C. and Indiana Bars. (AMSBrief 31.)

Minnesota requires that in dealing with employees, Seagate attorneys "***shall*** explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse" to those of the employee. *See* Minn. RPC 1.13(e) ("Organization as Client") (emphasis added).

The Comments advise that a company lawyer must take "care . . . to assure that the individual understands that, when there is such adversity of interest, the lawyer . . . cannot provide legal representation for that . . . individual, and that discussion between the lawyer for the organization and the individual may not be privileged." (*Id.* Comments.)

Similarly, Minnesota Rule 4.3(a)-(d) requires a company lawyer to properly caution the employee about just who the lawyer represents and mandates that a company lawyer "shall not give legal advice to the unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of the unrepresented person are or have a reasonable possibility of being in conflict with the interests of the client." Minn. RPC 4.3.

The D.C., Indiana and the PTO Rules are identical. D.C. Bar Rule 1.13(c) & 4.3(b); Ind. Rules of Prof'l Conduct 1.13(f) & 4.3; Section 10.87, 37 C.F.R. §10.87. *See also* D.C. Ethics Op. 328 (2005) (www.dcbar.org/bar-resources/legal-ethics/opinions/opinion328.cfm).

This is the weight of authority elsewhere. *See Home Care Indus. v. Murray*, 154 F.Supp.2d 861, 868 (D.N.J. 2001); *Professional Serv. Indus. v. Kimbrell*, 758 F.Supp. 676, 684 (D.Kan. 1991); Restat. 3d of the Law Governing Lawyers, §103 & Comment e. "Dealings with an unrepresented constituent of an organization client"; and *Annotated Model Rules of Professional Conduct* 211 (6th ed. ABA 2007).

Seagate's in-house lawyers repeatedly violated these ethical requirements. Seagate cannot rely on their professional misconduct to wriggle out of its fiduciary duty to protect Dr. Shukh's inventorship rights.

### E. Dr. Shukh Can Rescind the Employment/Assignment Agreement and Assert Unjust Enrichment.

The parties are at issue over unjust enrichment. If the contract can be rescinded because of Seagate's breach, Dr. Shukh can state a claim for unjust enrichment which is occasioned by Seagate's assertion

of ownership that Dr. Shukh never assigned to it. (AMSBrief 64-65; SBrief 30.)

### F. The Confidentiality and Document Return Provisions of the Employment/Assignment Agreement Are Unenforceable Due to Seagate's Misconduct.

#### *1. Seagate Has Unclean Hands.*

Seagate's arguments that Dr. Shukh has not made any showing of unclean hands is ridiculous. (SBrief 15, 50-52.)

An essential part of this case is the uncontested fact that Seagate did not include Dr. Shukh on patent applications for his inventions, lied to him about it, concealed the truth, and then failed to inform the PTO of his inventorship claims. Seagate disputes none of those facts.

This is the most serious kind of inequitable conduct before the PTO. *Advanced Magnetic Closures v. Rome Fastener Corp.,* 607 F.3d 817, 828 (Fed. Cir. 2010); *Frank's Casing Crew & Rental Tools v. PMR Techs.*, 292 F.3d 1363 (Fed. Cir. 2002); *PerSeptive Biosystems v. Pharmacia Biotech*, 12 F.Supp.2d 69 (D.Mass. 1998).

It constitutes unclean hands.

#### *2. The Confidentiality and Document Return Clauses Are Unconscionable.*

Any contract that requires an inventor to surrender his own invention communications without recourse is unconscionable on its

face. No inventor in his right senses would accept such a provision unless under extreme duress, as Dr. Shukh was in his desperation to escape Belarus. Such a clause also derogates the constitutional protection of inventorship rights. (AMSBrief 66-68.)

## VI. SEAGATE'S FRAUDULENT CONDUCT ENTITLED DR. SHUKH, NOT SEAGATE, TO SUMMARY JUDGMENT ON HIS FRAUD CLAIM.

The Court is required to accept Dr. Shukh's version of the facts. *Pye v. Nu Aire Inc.*, 641 F.3d 1011, 1022 (8th Cir. 2011).

### A. There Was Ample Evidence of the Elements of Fraud, Including Direct Statements to Dr. Shukh and His Reliance on them.

Seagate wrongly argues that Dr. Shukh abandoned his contentions about the false filings omitting him from patent applications at the PTO and that his theory about Seagate's fraudulent failure to notify the PTO was "unpled." (SBrief 31.)

Last month, the Supreme Court reiterated that dismissal of claims cannot be based on an imperfect statement of a legal theory. *Johnson v. City of Shelby*, 135 S.Ct. 346 (2014) (quoting 5 Wright & Miller, *Federal Practice and Procedure*, §1219, at 277-78 (2014 ed.) ("The federal rules effectively abolish the restrictive theory of the pleadings doctrine, making it clear that it is unnecessary to set out a

legal theory for the plaintiff's claim for relief.") Thus, any theories justified by the facts can be asserted at any time. *C&F Packing Co. v. IBP*, 224 F.3d 1296, 1306 (Fed. Cir. 2000) ("A complaint need not specify the correct legal theory, or point to the right statute, to survive a motion to dismiss.") (citing *Tolle v. Carroll Touch*, 977 F.2d 1129, 1134 (7th Cir. 1992) (complaint sufficient if it points to no legal theory or even the wrong legal theory).

Given that early in the case, Dr. Shukh raised Seagate's failure to properly notify the PTO of his inventorship claims (A32-34; A1056-88), Seagate and the Court had ample notice of that theory of recovery, and the refusal of the District Court to consider it was substantial legal error. Seagate's failure to properly notify the PTO that Dr. Shukh was an inventor in the applications is at the core of his allegations. Clearly, Seagate's failure to notify the PTO of his inventorship claims is subsumed in both these theories. (AMSBrief 10-13.)

At the very least, Massaroni's unexplained admissions of fraudulent non-disclosure to the PTO of Dr. Shukh's inventorship claims, were evidence relevant to the false filings/misrepresentation

issues pled in detail by Dr. Shukh.[5] The District Court's ruling that this was "manufactured" and "raised for the first time" to avoid summary judgment (A182 n.18.) was wrong. (A1056-88; *see* AMSBrief 27, 34.)

*Reliance*–Contrary to Seagate's argument (SBrief 30-36.), there are ample record cites regarding reliance. (AMSBrief 10-12, 70-72.)

As Dr. Shukh argues, his reliance was acquiescence–he refrained from protecting his inventorship rights. (AMSBrief 12, 70-72.) It is hornbook law that acquiescence constitutes reliance. Restatement2d Torts, §537 (cited with approval in *Therasense v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1295 (Fed. Cir. 2011), and *Amerinet v. Xerox Corp.*, 972 F.2d 1483, 1507 (8th Cir. 1992). *See also Atcas v. Credit Clearing Corp.*, 292 Minn. 334, 349, 197 N.W.2d 448, 457 (1972).

*Damages* –Dr. Shukh's evidence created a substantial issue of fact on damages, including reputation damages and pecuniary damages. (AMSBrief 12-14, 50-51.)

*Direct Communication* – Contrary to Seagate's argument (SBrief 33-34), there is substantial evidence of direct communications with Dr.

[5] Massaroni refused to explain this wrongdoing on the grounds of privilege. (A5961.)

Shukh–largely emails that he later discovered were false. (AMSBrief 10-13; A4787 (his testimony); *see also* A4624, A4955-56.)

And there is yet another irreconcilable inconsistency. The District Judge granted summary judgment on the grounds of the lack of reliance (A183-85), whereas in the earlier order denying dismissal of the fraud claim, he had ruled that "it can be inferred from the complaint that Shukh relied on Seagate's 'representations' to protect his inventorship rights." (A21.) That was precisely what Dr. Shukh proved.

*Seagate's Non-Specific Catchall Argument About Other Elements of Fraud* – As it did in the District Court, Seagate makes a non-specific blunderbuss argument that Dr. Shukh has failed to present evidence on "all [the] other essential elements of fraud." Seagate didn't inform the District Court what elements it was talking about, and doesn't bother this Court with an explanation either. The District Court completely ignored that useless argument, as should this Court. (A149-86.)

In fact, as outlined in Dr. Shukh's Summary Judgment Opposition to the District Court, the other elements of fraud were supported by substantial evidence. (A4984; s*ee* AMSBrief 9-15.)

### B. It Was *Per Se* Reversible Error for the Judge to Refuse to Consider the Massaroni Testimony.

Early in the case, Dr. Shukh argued that Seagate's failure to notify the PTO of his inventorship claims was a fraud. (A1069.) This is explained in Dr. Shukh's Opening Brief. (AMSBrief 27.)

Then, near the end of discovery, Dr. Shukh timely adduced deposition admissions from Seagate's General Counsel, that Seagate had not so notified the PTO after Dr. Shukh directly complained to him about the false patent applications omitting him (Dr. Shukh) as an inventor. Such conduct is also an explicit violation of the PTO's Regulations. 37 C.F.R. §1.56(a); MPEP 2001.01(6)(c).

The District Court refused to consider that timely-adduced evidence on the grounds it was "manufactured" to avoid summary judgment and not raised earlier in the case. That ruling was obviously completely wrong and unfair because that issue was in fact raised early in the case. (AMSBrief 27-28, 32-34, 69-70.)

Moreover, even if Massaroni's admission of wrongdoing was unpled in Dr. Shukh's Complaints, it was relevant admissible evidence on ***Seagate's*** Summary Judgment Motion on fraud, which even standing alone, was sufficient to raise a material issue of fact regarding

the fraud claims that were properly pled. It was serious error for the District Judge to decline to consider this timely-adduced evidence in ruling on Seagate's Motion. *Kangaroos U.S.A. v. Caldor*, 778 F.2d 1571 (Fed. Cir. 1985) (in inequitable conduct case error to refuse to consider timely proffered evidence of intent).

### C. Dr. Shukh's Summary Judgment Motion on Fraud Should Not Have Been Moot.

Without reference to the proper standard of review, Seagate argues that the District Court was correct in holding that Dr. Shukh's Summary Judgment Motion was mooted by the ruling on Seagate's summary judgment motion because the District Court had already considered and rejected Dr. Shukh's arguments. (SBrief 38-39.)

*Standard of Review* – The proper standard of review of mootness is *de novo* because mootness is a question of law. *Highway Equip. Co. v. FECO, Ltd.*, 469 F.3d 1027, 1031-32 (Fed. Cir. 2006); *Nissim Corp. v. ClearPlay*, 499 Fed. Appx. 23, 26 (Fed. Cir. 2012)

*Mootness*–Seagate's mootness argument is completely wrong because as noted in the preceding section of this Reply, the District Court refused to consider the timely-adduced Massaroni deposition

admission that Seagate had not properly notified the PTO. (AMSBrief 27-28, 32-34, 69-70.)

It was error to rule on Seagate's Motion and not Dr. Shukh's in such a way as to moot Dr. Shukh's by ignoring critical and timely evidence of Seagate's fraud.

## VII. THE DISTRICT JUDGE IGNORED PARTS OF DR. SHUKH'S RETALIATION EVIDENCE AND CONSTRUED THE REST AGAINST HIM.

### A. Seagate Fails to Rebut Dr. Shukh's *Prima Facie* Case That He Was Omitted from the Patent Applications.

Other than concocted unsupported arguments, Seagate has never explained Dr. Shukh's omissions from the patent in suit. *See* Argument, *supra*, p. 8.

Therefore, he is entitled to either judgment as a matter of law or a jury trial. (AMSBrief 77-78.)

### B. Because Dr. Shukh Properly Stated Claims for Retaliation, He Could Properly Advance Any Retaliation Theory Supported by the Evidence.

Seagate complains that the "retaliatory discharge" and "retaliatory hostile work environment" theories were not articulated earlier in the case, nor pled in the Complaint. (SBrief 39, 42 n.42, 44.)

In response to this canard, Dr. Shukh notes again the Supreme Court's recent reiteration that all the Federal Rules require in a

complaint is a "short and plain statement of the claim showing that the pleader is entitled to relief," and "do not countenance dismissal … for [an] imperfect statement of the legal theory supporting the claim asserted. *Johnson*, 135 S.Ct. at 346. *See* Discussion, *supra*, p. 18.

Dr. Shukh explicitly pled federal and state retaliation claims, and could therefore make these arguments based on the substantial evidence that supported them.

### C. Seagate's Brief Demonstrates Only That There Are Substantial Disputes of Fact That Should Have Been Resolved by a Jury.

Rejecting important parts of the District Court's conclusions, and ignoring the rule that all facts and inferences must be construed in Dr. Shukh's favor, Seagate recounts its own evidence and ignores most of Dr. Shukh's. (SBrief 5-8.)

This is a variant of the District Court's error which was to review isolated parts of Dr. Shukh's evidence, to construe almost everything against him based on Seagate's presentation, and to ignore or misstate the evidence that contradicted the conclusions the District Court reached. (AMSBrief 77-86.)

This is a *de novo* review of summary judgment. Dr. Shukh notes yet again the fundamental rule that all the facts must be viewed in the

light most favorable to him and all inferences must be drawn in his favor. He reiterates that the court is required to accept his version of the facts. *Pye*, 641 F.3d at 1022.

Seagate and the District Court do recount evidence they deem to support Seagate's version of this unfortunate saga: that Dr. Shukh was a problem employee. (SBrief 4-9; A215-46.)

But all this is substantially contradicted by Dr. Shukh's evidence.

Seagate contends that Dr. Shukh was an unmanageable and unruly employee who was in near constant confrontation with other employees with whom he was unable to work productively and collaboratively in teams.

But there was substantial contrary evidence:

> Testimony of another engineer that Dr. Shukh had a productive relationship with co-workers and had many coauthors on inventions, and that Dr. Shukh's difficulties were not with co-workers, but with managers who reacted badly in meetings when Dr. Shukh asked them difficult but legitimate questions;
>
> Teamwork awards in 1999, 2000 and 2007, the last from the supervisor Ken Allen, who now says Dr. Shukh could not work on teams;
>
> Dr. Shukh's authorship of hundreds of technical memos, comprising thousands of pages;
>
> Seagate could come up with only four instances of co-worker friction in Dr. Shukh's more than eleven years at Seagate;

> Dr. Shukh's co-inventorship with twenty-seven other engineers, with seven repeats, and other Invention Disclosures with twenty co-inventors, with seven repeats; and
>
> Seagate's INS Petitions for Dr. Shukh's admission to the U.S. as a permanent resident as an "Outstanding Researcher," that said nothing about any difficulties with co-workers.

(AMSBrief 21-23.)

Furthermore, in the three evaluations before Seagate retaliated against him in early 2007, for Fiscal Years 2004, 2005 and 2006, he was rated as "Effective" in the Performance Evaluations category "Teamwork." (A9864; A9871; A9662-63.)

Next, the District Court and Seagate grudgingly state that there were only two instances when Dr. Shukh made complaints of national origin discrimination, the September 2006 email to Ryan and the 2006 evaluation, but then both take those out of their true context. (A260; SBrief 41-42.) There were, of course, several others all interconnected, in which Dr. Shukh complained of discrimination because he was Russian and Soviet, had a strong accent, and was being denied his human rights, and harassed and discriminated against and not treated the same as others. (AMSBrief 16-17.)

Both ignore the fact that Dr. Shukh sent a copy of that email to the HR official Engelke in early 2007 as part of his complaints of discriminatory treatment, and Engelke admitted that the complaint was one of national origin discrimination but did not investigate it. (AMSBrief 18, 20.)

Inexplicably and inexcusably, both Seagate and the District Court omit any mention of either of those central facts which are critically important as a matter to timing because they coincide with the placement of Dr. Shukh into what was essentially solitary confinement,[6] exclusion from important meetings, and other punitive actions against him. (AMSBrief 19-20.)

The District Court was correct in its grudging admission that there was evidence on which a reasonable jury could find that Seagate mistreated Dr. Shukh for a decade. (A272.) That conclusion directly reflects the retaliatory conduct of Seagate supervisors that explains why Dr. Shukh was mistreated.

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[6] The District Court's statement that there was no evidence of actual physical isolation during that time period was completely wrong. (A263 n.12.) Dr. Shukh testified that he was physically isolated and isolated from other engineers, and felt an "atmosphere of hate and isolation." (AMSBrief 19.)

Furthermore, Seagate argues (and the District Court grudgingly concluded) that Dr. Shukh engaged in protected conduct in only one or two instances. Both carve out his other complaints as mere general complaints of unfair treatment unrelated to his national origin. (*E.g.*, A45; SBrief 41-42.)

But stark factual findings and inferences drawn against Dr. Shukh that certain complaints were not protected conduct violated the most basic rule of summary judgment: the evidence must be viewed entirely in his favor.

The standard for determining whether actions are "protected conduct" is whether a reasonable person could believe that the complaints were protected under Title VII. *Helton v. Southland Racing Corp.*, 600 F.3d 954, 960 (8th Cir. 2010); *Brannum v. Mo. Dep't of Corr.*, 518 F.3d 542, 547 (8th Cir. 2008).

Dr. Shukh complained repeatedly that he was being discriminated against because of his national origin, and his accent, the denial of his human rights, his desire to be treated equally with others, and so on. It is a completely fair inference that all his complaints were integrated related to those concerns protected by Title VII. The District Court's surgical parsing of some of these statements take them out of context,

and clearly invade the province of the jury. *Kelly v. Howard I. Shapiro & Associates Consulting Engineers, P.C.*, 716 F.3d 10, 14-15 (2d Cir. 2013).

Furthermore, *Harris v. Forklift Sys.,* 510 U.S. 17, 23 (1993), holds that the test for the existence of a hostile work environment "is not, and by its nature cannot be, a mathematically precise test . . . . But . . . whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances." Moreover, it is "the perspective of the victim" that should be the focus of the inquiry. *Ellison v. Brady*, 924 F.2d 872, 878-79 (9th Cir. 1991)

Seagate's arguments and the District Court's conclusions carving out Dr. Shukh's complaints as not conduct protected by Title VII ignore the totality of the circumstances. When viewed in the context of the complaint that the Court acknowledged were protected, the only fair inference is that all his complaints–of violations of his human rights his right to be treated equally with others, his Russian and Soviet origin, his accent–raised the same issue of discrimination all of those which more than permit the factual conclusion that all of Dr. Shukh's complaints were of national origin discrimination. It must also be remembered that Dr. Shukh is an immigrant whose first language is

not English, who, as he stated at the time, has a "complete lack of understanding of English legal terms." (A4238-39; A4242-45; A4247.) This is clearly a part of the totality of circumstances to be considered in his favor.

### D. Seagate's False and Shifting Explanations of Dr. Shukh's Firing Are Evidence of Pretext.

Seagate's Brief asserts a neutral downsizing rationale for Dr. Shukh's firing. (SBrief 8.)

But Seagate told the EEOC something quite different–that he was selected because of his "history of combative and unproductive behavior in his working relationships." (AMSBrief 24-25; A10913.) That statement is corroborated by Ken Allen's admission that Seagate's "difficulties" with Dr. Shukh were "part of the secondary set of factors" for selecting him for layoff. (A9570.)

Such a shifting explanation is evidence of pretext. *EEOC v. TransStates Airlines, Inc.,* 462 F.3d 987, 995 (8th Cir. 2006). Where employers "give two completely different explanations for their decisions to terminate their employees," such a substantial change is established. *Id.* (citing *Briscoe v. Fred's Dollar Store, Inc.*, 24 F.3d 1026,

1027-28 (8th Cir. 1994); *Baker v. Silver Oak Senior Living Mgmt. Co.*, 581 F.3d 684, 689 (8th Cir. 2009).

Moreover, Seagate flat out lied to the EEOC about Dr. Shukh's attempts to vindicate his rights, falsely stating that "at no time did Shukh claim a belief that he was being treated differently due to his national origin…. Accordingly, Shukh did not engage in any protected activity." (*Id.* A10917.)

That falsity is probative of pretext. *Bone v. G4s Youth Servs.*, 686 F.3d 948, 955 (8th Cir. 2012) (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515-16 (1993)).

Nor can Seagate hide behind the supposed "diversity" of its enormous workforce. Dr. Shukh had sufficient evidence to present that his decade-long mistreatment was by a small cabal of supervisors in his unit–Advanced Transducer Development–where no engineer of Russian descent was ever promoted to a supervisory position. (A9765-68.) They acted not only because he was Belarussian, but was more generically Russian and from Soviet Union (AMSBrief 16-17), although he and his family had fled to America seeking freedom and to escape both political repression in his native land and the lingering effects of Chernobyl on his wife and daughters. (A4242-45.) As Dr. Shukh pleaded in one of his

confrontations with one of his hostile supervisors, "Why you treat me like the enemy? Cold War is over." (A9088-91; A10825.) The evidence would show that the cabal could not distinguish a freedom-loving immigrant from the century-old American stereotype of a Soviet-Russian.[7]

Dr. Shukh became an U.S. Citizen on July 30, 2009. (A4239.)

## VIII. THE OTHER DISCOVERY RULINGS WERE REVERSIBLE ERROR.

### A. The District Court's Discovery Rulings Were In Error.

Seagate argues that the proper standard of review of the discovery rulings is "***gross*** abuse of discretion" under Eighth Circuit precedent. The following seems to be a statement of what the Eighth Circuit says of the standard:

> District court discovery decisions are reviewed for abuse of discretion. . . . "A district court has very wide discretion in handling pretrial discovery and [this court is] most unlikely to fault its judgment unless, in the totality of the circumstances, its rulings are seen to be a gross abuse of discretion resulting in fundamental unfairness in the trial of the case."

[7] When Allen walked Dr. Shukh out, he implied that Dr. Shukh should go back to Belarus by wishing him "every success in building a new political party in Belarus." (A5243, ¶46.)

*U.S. v. Kan. City Power & Light Co.*, 756 F.3d 1075, 1082 (8th Cir. 2014) (quoting *Voegeli v. Lewis*, 568 F.2d 89, 96 (8th Cir. 1977)).

But that seemingly self-contradictory statement ("abuse of discretion" vs. "gross abuse of discretion") seems clearly at odds with this Court's repeated holdings that the proper standard of review for discovery rulings is simply "abuse of discretion." *See*, *e.g.*, *Eli Lilly & Co. v. Teva Pharms. United States*, 557 F.3d 1346, 1350 (Fed. Cir. 2009) (citing *Rick's Mushroom Serv. v. U.S.*, 521 F.3d 1338, 1342 (Fed. Cir. 2008)).

There are strong reasons of procedural policy why this Court would not adopt a "gross abuse of discretion" standard in patent cases, not the least of which is the teachings of the Supreme Court that discretionary matters are reviewed under the straight "abuse of discretion" standard. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988) ("For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')"). The last thing this case needs is yet another modification of long existing law.

But the Court need not grapple with that decisional problem because there is no question that the District Court's expert discovery rulings were based on clear and inexplicable errors of law, were gross abuses of discretion under any statement of the standard and were fundamentally unfair. (AMSBrief 87-92.)

The Supreme Court recnelty reiterated that a court "'necessarily abuse[s] its discretion if it based its ruling on an erroneous view of the law.'" *Dart Cherokee Basin Operating Co., LLC v. Owens*, 190 L. Ed. 2d 495, 505, 2014 U.S. LEXIS 8435, *16 (2014).

Whatever the standard for abuse of discretion, the District Court's discretionary rulings were wrongly based on errors of law. (AMSBrief 96.)

**B. Bajorek's Testimony Should Be Barred.**

Seagate complains that Dr. Shukh is playing "gotcha." (SBrief 63.) But it is Seagate which plays that game.[8]

The core of Seagate's defense of the improper concealment of Bajorek's prior expert opinions, indeed another example of cover-up, is

[8] Another example of such sharp practice was Seagate's 280,000+ "Document Dump" in the middle of discovery. (AMSBrief 30.)

that the concealment was not harmless and was "promptly corrected." (SBrief 63-64.)

Both contentions are wrong. The expert discovery period was short, only eight weeks, December 1, 2012 to February 1, 2013. Seagate's disclosure of Bajorek's three prior expert cases came halfway through that period, insufficient time to investigate them.

Moreover, Seagate's concealment must be considered in connection with its tardy Motion to prevent Dr. Shukh's discovery about regarding these three cases and Bajorek's checkered background, containing the IBM fraud case against him. When Dr. Shukh deposed Bajorek shortly before the discovery cutoff, he was without Bajorek's prior reports, his prior depositions, and the evidence of his IBM fraud.

Moreover, these materials' importance is shown by the seriousness of the three cases in which Bajorek served as an expert–two for Seagate, and one for the very lawyers involved in this case:

> *Carnegie Mellon v. Marvell*, involving a ***$1.5 Billion*** verdict for Bajorek's client;
>
> *Seagate v. Western Digital*, a hard drive technology case with a ***$500 Million*** arbitration award for Seagate; and
>
> *Siemens v. Seagate*, another hard drive technology case involving the Seagate lawyers handling the instant case.

### C. Dr. Shukh's Expert Discovery Was Proper.

Seagate does not attempt to justify the lower court's holding that expert discovery is limited to "the events giving rise to the litigation at hand and the opinions to be received in evidence during that litigation." (A139.) Nor does Seagate discuss the law cited by Dr. Shukh regarding the proper scope of expert discovery. (AMSBrief 87-93.)

Experts testify falsely and conceal their prior reports. *Cardiac Pacemakers v. St. Jude Med.*, 2002 U.S.Dist.LEXIS 14767, *144 (S.D.Ind. 2002), *aff'd in part, rev'd in part*, 381 F.3d 1371 (Fed. Cir. 2004); *Rembrandt Vision Techs. v. Johnson & Johnson Vision Care*, 300 F.R.D. 694 (M.D.Fla. 2014); *Berkey Photo v. Eastman Kodak Co.*, 603 F.2d 263, 305 (2d Cir. 1979); *Walker v. Firestone Tire & Rubber Co.*, 412 F.2d 60 (2d Cir. 1969) (cross-examination about false testimony in unrelated trial OK).

Dr. Shukh was trying to investigate the background of Seagate's two central experts who concealed important parts of their backgrounds. *See* AMSBrief 35-37.

*IBM v. Bajorek*, 191 F.3d 1033 (9th Cir. 1999), reveals Bajorek's checkered past. He and Seagate touted his tenure at IBM, and opened the door to discovery about IBM's fraud charges against him.

Stopping that discovery was fundamentally unfair.

*Standing*–Seagate cites Sixth Circuit District Court cases that a party has standing to attack subpoenas to third-parties. (SBrief 66.)

But Eighth Circuit litigants don't such standing. *In re Digital Equip.*, 949 F.2d 228, 231 (8th Cir. 1991) (issuing court has exclusive jurisdiction); *Floorgraphics v. News Am. Mktg.*, 2007 U.S.Dist.LEXIS 37686, *8-9 (***D.Minn.*** 2007); (party has no standing to move protective order preventing non-party subpoena response). (AMSBrief 89-92.)

## IX. DISMISSING THE TITLE VII PUNITIVE DAMAGE CLAIM AND DENYING LEAVE TO AMEND WERE ERROR.

There is no "heightened pleading standard in employment discrimination cases." *Johnson*, 135 S.Ct. at 346. *See* Discussion, *supra*, p. 18. That includes Title VII punitive damages. (AMSBrief 94.)

## CONCLUSION

Dr. Shukh's relief should be granted. (AMSBrief 94-95.)

* * * *

February 2, 2015.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

THIS WILL CERTIFY THAT on February 2, 2015, the following were served with a copy of Appellant's Reply Brief and Appendix by email and that it will be served upon them by this Court's CM/ECF electronic filing system:

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**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).

The brief contains 7000 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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).

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Date: February 2, 2015

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