

No. _____

**In The
Supreme Court of the United States**

ALEXANDER M. SHUKH,

Petitioner,

v.

SEAGATE TECHNOLOGY, LLC, a Delaware Limited Liability Company, SEAGATE TECHNOLOGY, INC., a Delaware corporation, SEAGATE TECHNOLOGY, a holding company of the Cayman Islands, UNKNOWN OWNERS AND ASSIGNEES, and SEAGATE TECHNOLOGY PLC, an Irish public limited company,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit**

SEPARATE APPENDIX

CONSTANTINE JOHN GEKAS

GEKAS LAW LTD.
33 North LaSalle Street,
Suite 2220
Chicago, Illinois 60602
(312) 726-4501
CJG@gekaslaw.com
Counsel for Petitioner

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

ALEXANDER SHUKH,
Plaintiff-Appellant

v.

**SEAGATE TECHNOLOGY, LLC, A DELAWARE
LIMITED LIABILITY COMPANY, SEAGATE
TECHNOLOGY, INC., A DELAWARE CORPORA-
TION, SEAGATE TECHNOLOGY, A HOLDING
COMPANY OF THE CAYMAN ISLANDS,
SEAGATE TECHNOLOGY PLC, AN IRISH
PUBLIC LIMITED COMPANY,**
Defendants-Appellees.

UNKNOWN OWNERS AND ASSIGNEES,
Defendant

2014-1406

Appeal from the United States District Court for
the District of Minnesota in No. 0:10-cv-00404-JRT-
JJK, Judge John R. Tunheim.

Decided: October 2, 2015

CONSTANTINE JOHN GEKAS, Gekas Law LLP,
Chicago, IL, argued for plaintiff-appellant.

CHAD DROWN, Faegre Baker Daniels LLP, Minneapolis, MN, argued for defendants-appellees. Also represented by DAVID J.F. GROSS, ELIZABETH COWAN WRIGHT, AARON D. VAN OORT, CHARLES FEENEY KNAPP, JEYA PAUL; CALVIN L. LITSEY, East Palo Alto, CA.

Before MOORE, WALLACH, and TARANTO,
Circuit Judges.

MOORE, *Circuit Judge.*

Alexander Shukh appeals from the district court's dismissal of some of his claims for failure to state a claim and its grants of summary judgment on his remaining claims in favor of the defendants, Seagate Technology, LLC; Seagate Technology, Inc.; Seagate Technology; and Seagate Technology PLC (collectively, "Seagate"). Dr. Shukh also appeals from several of the court's discovery orders and other ancillary orders. For the reasons discussed below, we *vacate* and *remand* the court's grant of summary judgment on Dr. Shukh's claim for correction of inventorship under 35 U.S.C. § 256 and *affirm* its remaining holdings.

BACKGROUND

Dr. Shukh, a native of Belarus, is a leading scientist in the field of semiconductor physics, with a Ph.D. in Condensed Matter Physics and a B.S. and an M.S. in Electronics and Electronic Engineering. In 1997, Seagate recruited Dr. Shukh to move to the

United States and work for it. Dr. Shukh was employed at Seagate from September 1997 until his termination in early 2009. During his employment, Seagate sponsored Dr. Shukh for an H-1B work visa, a visa extension, and eventually permanent residency. At Seagate, Dr. Shukh was named as an inventor on 17 patents.¹ He received numerous awards for his achievement and innovation generally and on specific products, and was named to the Seagate Technology Inventor's Hall of Fame. The district court found that Dr. Shukh had a reputation as "an extremely successful innovator in the hard disk drives engineering community." *Shukh v. Seagate Tech., LLC*, No. CIV. 10404 JRT/JJK, 2013 WL 1197403, at *3 (D. Minn. Mar. 25, 2013) ("*Summary Judgment Order*").

When he was hired, Dr. Shukh executed Seagate's standard At-Will Employment, Confidential Information, and Invention Assignment Agreement ("Employment Agreement"), in which Dr. Shukh agreed to "hereby assign to [Seagate] all [his] right, title, and interest in and to any inventions" made while at Seagate. J.A. 600. Seagate policy prohibited Seagate employees from filing patent applications themselves for their inventions. Instead, they were required to submit Employee Invention Disclosure Forms to Seagate's Intellectual Property ("IP") Department. Inventors were responsible for identifying

¹ Dr. Shukh was also awarded fifteen patents by the former Soviet Union and a number of U.S. patents for inventions not at Seagate.

co-inventors of their inventions on these forms. The IP Department would then forward the form to the internal Patent Review Board, which would determine whether, for example, to pursue a patent application for the invention or to protect it as a trade secret.

Dr. Shukh's time at Seagate was undisputedly tumultuous. His performance evaluations indicated that he did not work well with others due to his confrontational style. Moreover, Dr. Shukh's conduct interfered with his productivity. For example, Dr. Shukh applied a "three-strikes" rule to interactions with his coworkers, under which he would stop communicating with coworkers who had engaged three times in behavior he considered dishonest. Dr. Shukh also frequently accused others of stealing his work, and his managers criticized him for his insistence on receiving credit for his work. To avoid accusations of plagiarism, some Seagate employees refused to attend presentations by Dr. Shukh.

In 2009, Seagate terminated Dr. Shukh and 178 other employees. Although he has submitted many job applications to other potential employers, Dr. Shukh has not yet secured employment. Dr. Shukh claims that the hiring manager of Hitachi, a company to which he applied, contacted a Seagate employee to discuss rumors the Hitachi manager had heard about Dr. Shukh. Moreover, a Hitachi engineer told Dr. Shukh during his interview that he would never find employment at Hitachi with his reputation.

This lawsuit stems, in part, from Dr. Shukh's allegations that Seagate has not properly credited him for his inventions. Specifically, Dr. Shukh alleges that during his tenure at Seagate, Seagate wrongfully omitted him as an inventor from six patents (U.S. Patent Nos. 7,233,457; 7,684,150; 6,525,902; 6,548,114; 6,738,236; and 7,983,002) and four pending patent applications, all relating to semiconductor technologies. He also claims that Seagate discriminated against him and wrongfully terminated him both on the basis of his national origin and in retaliation for complaining about the discrimination.

In his original complaint, Dr. Shukh asserted thirteen claims against Seagate, including claims for correction of inventorship of the disputed patents pursuant to 35 U.S.C. § 256, rescission of his Employment Agreement, breach of contract, fraud, breach of fiduciary duty, unjust enrichment, and federal and state retaliation and national origin discrimination claims. He also sought a declaratory judgment that certain provisions of his Employment Agreement were unenforceable.

Seagate moved to dismiss Dr. Shukh's § 256 claim for lack of standing. Dr. Shukh alleged three distinct interests in the patents: an ownership interest, a financial interest, and a reputational interest. At the motion to dismiss stage, the district court held that Dr. Shukh had no ownership or financial interest in the patents because he automatically assigned all of his inventions to Seagate in his Employment Agreement. The court left open the possibility that

Dr. Shukh had standing to sue based on reputational harm caused by his omission from the disputed patents. The district court also dismissed for failure to state a claim Dr. Shukh's claims for rescission of his Employment Agreement, breach of contract, breach of fiduciary duty, unjust enrichment, and declaratory judgment.

Two years later, Seagate moved for summary judgment on Dr. Shukh's § 256 claim. The court granted Seagate's motion, holding that there was no genuine dispute of material fact as to whether Dr. Shukh suffered reputational harm from not being named an inventor on the patents. *Summary Judgment Order* at *13. It also granted Seagate's motion for summary judgment on Dr. Shukh's fraud claim. One week later, the district court granted Seagate's motion for summary judgment on Dr. Shukh's federal and state retaliation and national origin discrimination claims. Throughout the course of the case, the district court made rulings on discovery and other ancillary issues. Dr. Shukh has appealed many of the district court's decisions. Because the district court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1338(a) and 1367, we have jurisdiction over this appeal under 28 U.S.C. § 1295(a)(1).

DISCUSSION

We review a district court's grant of summary judgment under the law of the regional circuit. *Grober v. Mako Prods., Inc.*, 686 F.3d 1335, 1344 (Fed.

Cir. 2012). The Eighth Circuit reviews a grant of summary judgment de novo. *Wilson v. Spain*, 209 F.3d 713, 716 (8th Cir. 2000). Summary judgment is appropriate if “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

We review standing de novo. *Rack Room Shoes v. United States*, 718 F.3d 1370, 1374 (Fed. Cir. 2013). To establish standing, a plaintiff must demonstrate that he suffered an injury-in-fact, that the injury is traceable to the conduct complained of, and that the injury is redressable by a favorable decision. *Chou v. Univ. of Chi.*, 254 F.3d 1347, 1357 (Fed. Cir. 2001). The alleged harm must be concrete and particularized. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Dr. Shukh challenges the district court’s decision that he lacked standing to pursue his § 256 claim on two grounds. First, he argues that we should overrule our holding in *Filmtec Corp. v. Allied-Signal, Inc.*, 939 F.2d 1568 (Fed. Cir. 1991). Under *Filmtec*, Dr. Shukh’s assignment in the Employment Agreement of his ownership and financial interests in his inventions conveyed legal title in those inventions to Seagate. *Id.* at 1573. Because of this conveyance, the district court found that Dr. Shukh has no ownership interest or financial interest in the patents that

would give him standing to pursue his § 256 claim. *See DDB Tech., L.L.C. v. MLB Advanced Media, L.P.*, 517 F.3d 1284, 1290 (Fed. Cir. 2008). As a panel, we are bound by *Filmtec*; we cannot overrule that holding without en banc action.

Dr. Shukh also argues that the district court erred in granting summary judgment to Seagate on his § 256 claim for lack of standing. He argues that a trier of fact could conclude that his reputation was damaged because he was not recognized as the inventor of the patents. In the past, we have declined to decide whether reputational injury, standing alone, may satisfy the constitutional standing requirements for a § 256 claim. *Chou*, 254 F.3d at 1359 (declining to consider whether reputational injury could satisfy Article III standing requirements because the claimed inventor had alleged a concrete financial interest in the patent); *Larson v. Correct Craft, Inc.*, 569 F.3d 1319, 1327-28 (Fed. Cir. 2009) (declining to decide whether reputational injury could satisfy Article III standing requirements because the claimed inventor had not alleged any reputational injury).

Today, we hold that concrete and particularized reputational injury can give rise to Article III standing. As we noted in *Chou*, “being considered an inventor of important subject matter is a mark of success in one’s field, comparable to being an author of an important scientific paper.” 254 F.3d at 1359. We reasoned that “[p]ecuniary consequences may well flow from being designated as an inventor.” *Id.* This is particularly true when the claimed inventor is

employed or seeks to be employed in the field of his or her claimed invention. For example, if the claimed inventor can show that being named as an inventor on a patent would affect his employment, the alleged reputational injury likely has an economic component sufficient to demonstrate Article III standing.

We find that there is a question of material fact as to whether Dr. Shukh's omission as a named inventor on the disputed patents caused him reputational injury. Dr. Shukh presented evidence such that a trier of fact could conclude that this omission injured his reputation in at least two ways: first, it harmed his reputation as an inventor in the field of semiconductor physics, and second, it contributed to his reputation for poor teamwork due in part to his accusations that others were stealing his work. Moreover, Dr. Shukh presented evidence from which a trier of fact could conclude that these reputational harms had economic consequences – namely, that Dr. Shukh was unable to find employment after he was terminated from Seagate. We address these three issues in turn.

I. Dr. Shukh's Reputation as an Inventor

First, a genuine dispute exists as to whether Dr. Shukh's omission as a named inventor on the disputed patents harmed his reputation as an inventor. Dr. Shukh presented evidence supporting his contention that a scientist's professional reputation is influenced by the number of patents on which that scientist is

named. He provided an expert report explaining that being named on a patent means that the inventor's "standing and reputation in the related technology community has been enhanced, including among their employers or potential employers." J.A. 8817. The expert also wrote that "inventors take great pride in their inventorship abilities and accomplishments" and that named inventors' contributions on patents are "considered positively when a technology professional is being considered for a promotion." J.A. 8816; *see also* J.A. 5592 (expert report stating that adding the disputed patents to Dr. Shukh's portfolio would have "significantly strengthened" his claim to the Immigration and Naturalization Service that he was an "outstanding professor or researcher" and therefore merited permanent residency).

Dr. Shukh also showed that Seagate itself valued the number of patents its employees were named on. For example, Seagate gave financial rewards, J.A. 5215, and enrolled employees in its Inventor's Hall of Fame, J.A. 5214, based on an employee's number of named patents. Dr. Shukh's Fiscal Year 2007 Performance Evaluation further reinforces this conclusion. In the performance evaluation, Dr. Shukh's manager wrote that Dr. Shukh "has a significant patent portfolio; however, I am concerned that the number of patent applications has been reduced over the last two years – albeit, partially due to issues with the [Seagate Patent Review Board] and Seagate policy." J.A. 5222. He concluded that he would "like to see

[Dr. Shukh] increase his patent portfolio in [Fiscal Year 2008].”² *Id.*

The district court acknowledged this evidence, but nonetheless concluded that Dr. Shukh did not raise a genuine issue of material fact with respect to his reputation as an inventor. In doing so, it relied on undisputed testimony from Dr. Shukh and his former manager and coworkers that Dr. Shukh had a reputation as a leading scientist in his field. *Summary Judgment Order* at *10. The court also noted that Dr. Shukh testified that his reputation for “honesty, good organization, openness and straightforwardness and communications, good technical abilities, innovation and extreme competitiveness did not change from 2002 until 2012.” *Id.* (quoting J.A. 8962-64) (alteration omitted). Finally, the court wrote that Dr. Shukh’s former co-workers testified that their impression of Dr. Shukh as an “excellent inventor with good technical skills” would not change based on the number of patents he was named on. *Id.* at *12. From

² The district court discounted this evidence because the manager “clarified in his deposition testimony that he was concerned with the decrease in the number of invention disclosures that [Dr.] Shukh made to Seagate, and not concerned with the decrease in the total number of patent applications filed with the USTPO [sic] that listed [Dr.] Shukh as an inventor.” *Summary Judgment Order* at *12. In doing so, the district court improperly made a factual finding on summary judgment. *Cf. Anderson*, 477 U.S. at 249-50. Moreover, this interpretation contradicts the plain language of the evaluation. The district court erred when it discounted Dr. Shukh’s performance evaluation at this stage.

all this, the district court concluded that Dr. Shukh's professional reputation had not been harmed by his omission from the disputed patents.

In coming to this conclusion, the district court improperly made findings of fact on summary judgment and did not make all factual inferences in Dr. Shukh's favor. A trier of fact could conclude that Dr. Shukh's omission from the disputed patents had a concrete impact on his reputation in his field. There is significant evidence that the number of patents an inventor is named on influences his reputation in the field of the patents. Dr. Shukh's professional reputation is based on his work in semiconductor physics – the same field as the disputed patents. Moreover, Dr. Shukh is named as an inventor on seventeen issued patents for work done at Seagate; he argues here that he should be named as an inventor on an additional six issued patents and four pending applications. The disputed patents would therefore form a significant portion of the patents granted to Dr. Shukh during his tenure at Seagate.

True, it is undisputed that Dr. Shukh had a reputation as an excellent inventor, and that this reputation did not decrease while he was at Seagate. However, this does not mean that Dr. Shukh's omission from the patents did not harm his reputation. The evidence supports the conclusion that Dr. Shukh's reputation as an inventor would have been higher had he been named on the patents. Likewise, the testimony of Dr. Shukh's coworkers that additional patents would not change their impression of Dr.

Shukh's technical abilities does not speak to whether additional patents would improve Dr. Shukh's reputation in the eyes of potential employers. Dr. Shukh's coworkers had years of experience working directly with Dr. Shukh, unlike potential employers, who likely lack that first-hand knowledge and are therefore more likely to rely on their knowledge of Dr. Shukh's reputation in evaluating their impression of him. Considering all of the evidence, we find there is a genuine dispute of material fact as to whether Dr. Shukh's reputation as an inventor was harmed by his omission from the disputed patents.

II. Dr. Shukh's Reputation for Seeking Credit for His Inventions

There is also a genuine dispute of material fact as to whether Dr. Shukh's omission from the disputed patents worsened his reputation as an employee, and whether his reputation would improve if he prevailed in this lawsuit. The record shows that Dr. Shukh had a negative reputation at Seagate, in part because he aggressively sought credit for his inventions. In his Fiscal Year 2007 Performance Evaluation, Dr. Shukh's manager wrote:

[Dr. Shukh's] insistence on getting appropriate credit for all design ideas and implementations stifles open discussion and adoption of his ideas. Since this issue has become more important to [Dr. Shukh] as time goes on, and since he believes he has not been fairly recognized for his past contributions,

it's an emotional issue. Most unfortunately, it appears to others that [Dr. Shukh] is more interested in being right and in getting credit than in ensuring that Seagate wins. [Dr. Shukh] will become more effective, and his contributions will increase significantly, if he can find ways to let others see that he truly is interested primarily in Seagate's success, rather than in his own advancement or preventing theirs.

J.A. 5222. Dr. Shukh's manager also indicated that Dr. Shukh demonstrated "unsatisfactory" teamwork skills, explaining that he "is often insistent on getting appropriate or complete credit for his work" and that he "repeatedly accused" Seagate workers of "stealing his work." J.A. 5223; *see also Summary Judgment Order* at *4. Dr. Shukh argues that if he is named an inventor on the disputed patents, it may rehabilitate his reputation for seeking credit for his ideas.

On summary judgment, the district court held that Dr. Shukh's "reputation for being antagonistic toward his employer and coworkers regarding ownership of patents . . . is too attenuated to confer standing." *Summary Judgment Order* at *11. It found that this harm was not traceable to Seagate's omission of Dr. Shukh as an inventor because Dr. Shukh first developed this reputation in 2005, before he learned of his omission from the disputed patents. *Id.* at *11. Moreover, it reasoned that this harm was not redressable by a § 256 claim because adding Dr. Shukh's name to the disputed patents would not "dispel [Dr.] Shukh's reputation for accusing others of

stealing his work in a manner that disrupts effective collaboration.” *Id.* at *11 n.13.

We disagree with the district court’s conclusions. First, we find there is a genuine dispute of material fact as to whether Dr. Shukh’s negative reputation for seeking credit for his inventions is traceable to Seagate’s omission of Dr. Shukh as an inventor from the disputed patents. In deciding that the harm was not traceable, the district court relied on the fact that “[Dr.] Shukh’s reputation for accusing others of stealing his work and insisting on credit for all of his ideas was established well before the disputed patents became an issue between [Dr.] Shukh and Seagate.” *Id.* It is true that Dr. Shukh did not know of the disputed patents before his reputation for seeking credit for his inventions began to develop. However, his disputes with Seagate over his omission from the patents and this subsequent lawsuit have likely significantly worsened Dr. Shukh’s reputation on this front. Moreover, the fact that Dr. Shukh did not know of his omission did not mean he was not responding (directly or indirectly) to Seagate’s actions in not crediting him as an inventor. There is evidence that Dr. Shukh’s accusations of plagiarism and insistence on receiving credit for his ideas stemmed from his concerns about not receiving proper credit for his inventions – concerns acknowledged by Dr. Shukh’s manager as valid. *See* J.A. 5223 (“I have come to see over the past 6 months that [Dr. Shukh] sometimes doesn’t receive proper credit for work he has done in the past.”). And Dr. Shukh’s omission from the

disputed patents occurred before he developed this reputation – five of them were filed before 2005. Certainly, the record suggests that an element of Dr. Shukh’s reputation arises from his own combative personality. But there is a genuine dispute of material fact as to whether Dr. Shukh’s negative reputation is traceable to Seagate’s actions. In deciding to the contrary, the district court improperly made factual inferences in Seagate’s favor.

There is also a genuine dispute of material fact as to whether finding for Dr. Shukh on his § 256 claim would rehabilitate his reputation for accusing others of stealing his work. If Dr. Shukh prevails in this lawsuit, outsiders may conclude that Dr. Shukh’s reputation on this point stemmed from Seagate’s failure to properly credit him. His reputation could change from an inventor with a “reputation for accusing others of stealing his work in a manner that disrupts effective collaboration,” *Summary Judgment Order* at *11 n.13, to that of an inventor wronged by his employer, properly seeking credit for his own work. Here, the district court improperly made factual findings on summary judgment and made factual inferences in Seagate’s favor when it found this harm was not redressable.

III. Dr. Shukh’s Unemployment

Finally, Dr. Shukh presented evidence that his alleged reputational harm had an economic component. Dr. Shukh has been unemployed since 2009,

and he seeks a job in the field of technology covered by the disputed patents. A trier of fact could infer that the stronger Dr. Shukh's reputation as an inventor, the more likely he is to be hired. This is particularly true in light of his difficult personality. Furthermore, there is evidence tying Dr. Shukh's negative reputation at Seagate – including, one presumes, his reputation for seeking credit for his own inventions – to his unemployment. *Summary Judgment Order* at *5 (writing that an engineer at a company Dr. Shukh interviewed with allegedly told Dr. Shukh that he would never get a job there because of his reputation at Seagate). Thus, a trier of fact could conclude that Dr. Shukh's employment prospects have been harmed by the impact of his alleged omission from the disputed patents on his reputation as an inventor and his reputation for seeking credit for his own ideas. Moreover, a trier of fact could infer that Dr. Shukh's employment prospects would improve if the inventorship of the disputed patents was corrected. Dr. Shukh's inability to obtain employment is a concrete and particularized financial harm that suffices to create Article III standing.

To be sure, we sympathize with the district court. It issued a number of thoughtful and thorough orders in what must have been a very difficult case. All things considered, the district court has done an admirable job dealing with the many issues raised below. We have considered Dr. Shukh's remaining arguments, and find no merit in them. We therefore vacate and remand this case only with respect to the

court's ruling on reputational injury, and affirm the rest of the district court's holdings challenged on appeal.

CONCLUSION

We *vacate* and *remand* the district court's grant of summary judgment on Dr. Shukh's claim for correction of inventorship under 35 U.S.C. § 256 and *affirm* its remaining holdings.

**VACATED AND REMANDED IN PART,
AFFIRMED IN PART**

COSTS

No costs.

NOTE: This order is nonprecedential.

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

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,

AND

UNKNOWN OWNERS AND ASSIGNEES,
Defendant,

AND

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

2014-1406

Appeal from the United States District Court for
the District of Minnesota in No. 0:10-cv-00404-JRT-
JJK, Judge John R. Tunheim.

ON PETITION FOR HEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK,
MOORE, O'MALLEY, REYNA, WALLACH, TARANTO,
CHEN, and HUGHES, *Circuit Judges*.

PER CURIAM.

ORDER

Appellant Alexander Shukh filed a petition for hearing en banc.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for hearing en banc is denied. The appeal will be heard by a panel. *See* Fed. Cir. R. 35(a)(1).

FOR THE COURT

September 25, 2014
Date

/s/ Daniel E. O'Toole
Daniel E. O'Toole
Clerk of Court

UNITED STATES DISTRICT COURT
District of Minnesota

ALEXANDER M. SHUKH

V.

**JUDGMENT IN A
CIVIL CASE**

SEAGATE TECHNOLOGY, LLC, Case Number:
SEAGATE TECHNOLOGY, INC., 10-cv-404 (JRT/JJK)
SEAGATE TECHNOLOGY, (Filed Apr. 1, 2014)
UNKNOWN OWNERS AND
ASSIGNEES, and SEAGATE
TECHNOLOGY, PLC

- Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

1. Defendants' Motion for Summary Judgment [Docket No. 465] is GRANTED. Counts nine, ten, eleven, and twelve of Plaintiff's Third Amended Complaint are DISMISSED with prejudice.
2. Defendants' Motion to Exclude the Expert Report and Opinions of Dr. Henry Lahmeyer [Docket No. 443] is DENIED as moot.
3. Defendants' Motion to Exclude the Expert Report and Opinions of Edward Grochowski, Ph.D. [Docket No. 448] is DENIED as moot.

4. Defendants' Motion to Exclude the Expert Report and Opinions of Howard B. Rockman [Docket No. 454] is DENIED as moot.
5. Plaintiff's Motion to Bar Expert Report and Testimony of Angela M. Heitzman [Docket No. 480] is DENIED as moot.

<u>April 1, 2014</u>	<u>RICHARD D. SLETTEN, CLERK</u>
Date	s/L. Brennan
	<u>(By) L. Brennan, Deputy Clerk</u>

Shukh v. Seagate Tech., LLC

United States District Court
for the District of Minnesota

March 31, 2014, Decided; March 31, 2014, Filed

Civil No. 10-404 (JRT/JJK)

Counsel: James H. Kaster and Christina Parra Herrera, NICHOLS KASTER, PLLP, Minneapolis, MN; and Constantine John Gekas, GEKAS LAW, LTD., Chicago, IL, for plaintiff.

Charles F. Knapp, Calvin L. Litsey and Elizabeth Cowan Wright, FAEGRE BAKER DANIELS LLP, Minneapolis, MN; and Sarah E. Benjes, FAEGRE BAKER DANIELS LLP, Denver, CO, for defendants.

Judges: JOHN R. TUNHEIM, United States District Judge.

Opinion by: JOHN R. TUNHEIM

Opinion

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Alexander M. Shukh filed this action against Defendants Seagate Technology, LLC, Seagate Technology, Inc., Seagate Technology, and Seagate Technology, PLC (collectively, "Seagate"), alleging numerous claims arising out of Seagate's eleven-year employment and eventual termination of Shukh. Shukh filed a complaint in February 2010 asserting thirteen claims against Seagate. After four years of

litigation only Shukh's claims under Title VII and the Minnesota Human Rights Act ("MHRA") for employment discrimination and retaliation based upon his national origin remain. Seagate now moves for summary judgment on these claims. Because Shukh has failed to present evidence upon which a reasonable jury could conclude that Seagate discriminated or retaliated against Shukh based on his national origin, the Court will grant Seagate's motion for summary judgment in its entirety.¹

BACKGROUND²

This employment termination case has been the subject of extensive litigation spanning four years, involving nineteen hearings before the Court, more than fifty Court orders, and over 500 docket entries.

¹ The parties also filed various motions to exclude expert reports and testimony at trial. Because the Court will grant Seagate's motion for summary judgment on the only remaining claims in the case, no trial will be held. Accordingly, the Court will deny the motions to exclude as moot.

² The Court recites the background only to the extent necessary to rule on the instant motion. A more complete recitation of the facts surrounding Shukh's termination and his employment at Seagate as it relates to his other claims appears in the Court's previous orders. *See, e.g., Shukh v. Seagate Tech., LLC*, Civ. No. 10-404, 2013 U.S. Dist. LEXIS 41262, 2013 WL 1197403 (D. Minn. Mar. 25, 2013); *Shukh v. Seagate Tech., LLC*, Civ. No. 10-404, 2011 U.S. Dist. LEXIS 137402, 2011 WL 6003951 (D. Minn. Nov. 30, 2011); *Shukh v. Seagate Tech., LLC*, Civ. No. 10-404, 2011 U.S. Dist. LEXIS 33924, 2011 WL 1258510 (D. Minn. Mar. 30, 2011).

The parties have produced thousands of pages of record material, and have presented the facts identified in the following background section as relevant to the present motion. As the Court’s analysis will show, many of these facts are irrelevant to the ultimate legal question presented by Shukh’s remaining claims – did Seagate discriminate against Shukh because of his national origin or retaliate against him for making complaints based on perceived discrimination. For the sake of completeness and to demonstrate that the Court has fully considered the myriad conflicts and incidents of mistreatment Shukh alleges he suffered at the hands of Seagate, the Court will lay out the facts identified by the parties before addressing the legal merits of the present motion.

I. SHUKH’S BACKGROUND

Shukh was born in Minsk, Belarus, in 1953 when Belarus was still part of the former Soviet Union. (Decl. of Sarah Benjes, Ex. 1 (Dep. of Alexander M. Shukh (“Shukh Dep.”) 10:17-11:24), Apr. 1, 2013, Docket No. 468.) Shukh describes his national origin as Belarusian, Soviet, and Russian. (Shukh Dep. 10:25-11:1, 357:13-15.)³ Shukh speaks both Belarusian

³ At least one court has criticized the assumption that “Russia and Belarus are of the same national origin, because they were once part of the Soviet Union.” See *Dolgaleva v. Va. Beach City Pub. Schs.*, 364 Fed. Appx. 820, 826 n.4 (4th Cir. 2010). *Dolgaleva* noted that “the term ‘national origin’ on its face refers to the country where a person was born, or, more broadly, the country

(Continued on following page)

and Russian. (*Id.* 11:20-12:2.) Shukh also speaks English with a strong accent. (*Id.* 361:17-25.)

Shukh holds a Ph.D. in Condensed Matter Physics and a B.S. and M.S. in Electronics and Electronic Engineering. (Fourth Decl. of Constantine John Gekas, Ex. 12, July 20, 2012, Docket No. 324.) Shukh is recognized as one of the leading scientists in his field, and his reputation has been one of an extremely successful innovator in the hard disk drives engineering community. (Benjes Decl., Ex. 12 at 28.) Prior to 1997, Shukh had over twenty-three years of experience in his field and was “recognized internationally as outstanding in the field of hard disk drive magnetic recording.” (Fourth Gekas Decl., Exs. 12, 14.)

from which his or her ancestors came.’” *Id.* (alteration omitted) (quoting *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88, 94 S. Ct. 334, 38 L. Ed. 2d 287 (1973)). Based on this definition “[a]s a matter of ancestry, it would seem that the nations comprising the former Soviet Union are distinct.” *Id.* Therefore, it is possible that Shukh’s definition of his national origin as Belarusian, Russian, and Soviet is overly broad. Seagate, however, has accepted this definition and for purposes of its motion uses “Belarus” or “Belarusian” to refer collectively to Belarusian, Russian, and/or Soviet national origins. (Defs.’ Mem. in Supp. of Mot. for Summ. J. at 1 n.1, Apr. 1, 2013, Docket No. 467.) Because Seagate has not challenged Shukh’s definition of his own national origin, the Court will assume, for purposes of this motion, that Shukh actually possesses these three distinct national origins.

II. SHUKH'S EMPLOYMENT AT SEAGATE

In 1997 Shukh was working in Minsk, Belarus, at the Belarusian State University of Informatics and Radio Electronics as a researcher. (Third Am. Compl. ¶ 35, Jan. 17, 2012, Docket No. 268.) Seagate recruited Shukh after observing his presentations at an international scientific conference in Louisiana. (*Id.* ¶¶ 36-37.) Shukh interviewed with numerous Seagate employees before Seagate offered him a position. (*Id.* ¶ 38; Shukh Dep. 584:7-24.) In September 1997 Shukh began working at Seagate's office in Bloomington, Minnesota, as a Senior Advisory Development Engineer. (Third Am. Compl. ¶ 33; Shukh Dep. 31:3-9.) After Shukh began his employment, Seagate sponsored Shukh for an H-1B work visa, a visa extension, and finally permanent residency status. (Third Am. Compl. ¶¶ 80-81.)

A. Inventorship Accomplishments at Seagate

During his tenure at Seagate, Shukh was named as an inventor on seventeen Seagate patents, and several of his inventions have been incorporated into Seagate products. (Shukh Dep. 415:9-13; Fourth Gekas Decl., Ex. 13 ¶¶ 14-15; Eighth Decl. of Chad Drown, Exs. 1-18, Apr. 1, 2013, Docket No. 475.) Shukh has received numerous awards from Seagate including awards for outstanding achievement and innovation generally as well as awards for his role in inventing specific products. (Fourth Gekas Decl., Ex. 12 at 2;

Benjes Decl., Ex. 9; Shukh Dep. 496:21-24.) Seagate also named Shukh to the Seagate Hall of Fame for Outstanding Inventions. (Shukh Dep. 495:21-24.)

Shukh was widely recognized during his employment at Seagate as having excellent technical skills and being an outstanding innovator. (*Id.* 246:1-10.) Shukh's managers consistently gave Shukh the highest ratings on performance evaluations of his knowledge, innovation, and creativity. (Decl. of Douglas Engelke, Ex. 4 at 0110-0111, Ex. 5 at 0101, 0103, Ex. 6 at 0223, Ex. 7 at 0214-0215, Ex. 8 at 0208, Apr. 1, 2013, Docket No. 469; Benjes Decl., Ex. 20.) Shukh's coworkers also testified that Shukh had a reputation as "a very good design person" with a "strong reputation for technical knowledge." (Benjes Decl., Ex. 2 (Dep. of Frank E. Stageberg ("Stageberg Dep.") 102:8-14).) Additionally, in sponsoring Shukh for the immigration statuses necessary to maintain his employment, Seagate consistently represented to immigration officials that Shukh was an outstanding researcher in his field and was an extremely valuable asset to Seagate. (*See, e.g.*, Fourth Gekas Decl., Exs. 14, 15.)

B. General Competitiveness and Ability to Work with Others

Shukh testified that he has a competitive nature that "sometimes create[s] a lot of issue[s] for others." (Shukh Dep. 247:21-23.) Shukh testified "I was discriminated [against] by Seagate because I'm different.

I'm different [in] nationality, the language I speak, my accent, my culture, to some extent because I am challenging. I like to challenge the problem and I was asking question[s], technical questions." (*Id.* 379:23-380:5.) As an example of some of the issues his nature created for coworkers, Shukh testified that he applies a "three-strikes" rule to his interactions with coworkers. (*Id.* 271:8-18.) Under the three-strikes rule if a coworker engages in dishonest behavior three times, Shukh "just stop[s] talking to him." (*Id.* 271:13-23, 351:4-8.)

1. Shukh's Managers

Shukh testified that most, but not all of his managers, described him as having a difficult time working with other people. (*Id.* 270:3-12.) For example, Shukh recalled that one of his managers had told him that he was "too competitive" and "too tough in playing by the rules." (*Id.* 360:17-19.) Early in Shukh's career at Seagate, performance evaluations from these managers reflected that he was too straightforward in criticizing other employees and their work. (*Id.* 243:5-244:12; 245:1-11, 369:21-370:12 (discussing evaluations in 1999 and 2003).) Shukh testified that his direct style in confronting coworkers about technical issues was a cultural difference, and coworkers in the United States took direct questions and discussions about technical issues more personally than his colleagues in Belarus. (*Id.* 370:1-12.)

For example, in 1999 Shukh received a rating of three out of five for organizational relationships in an evaluation from his manager at the time, Ed Murdock. (Engelke Decl., Ex. 4.) The evaluation stated that

Alex sometimes tends to sabotage recognition and appreciation of his knowledge and efforts and to create unnecessary antagonism by advocating his ideas without doing his own critical evaluation of their strengths and weaknesses first. Also, he has shown a tendency to implicitly put down the knowledge and experience of other engineers by comments in meetings such as “that’s clearly wrong” or “I know the answer” when contradicting or disputing others’ work. People who know Alex well realize that this arises from a sense of enthusiasm for new ideas, but he needs to work harder to listen to and appreciate other peoples’ ideas. . . . On numerous occasions, he has discounted the data, reservations or ideas of others as he expresses confidence in his own ideas. This has cut off discussion and leads to friction with other members of the work group.

(*Id.*, Ex. 4 at 0111.) Shukh was given an opportunity to respond to the evaluation and stated that he agreed with the evaluation of his organizational relationship skills, but stated that these difficulties were a result of practices learned in his “former country” and he understood “that this culture is not acceptable at [a] western company.” (*Id.*, Ex. 4 at 0113.)

A 2001 evaluation from manager Pat Ryan echoed Murdock's concerns, and scored Shukh at a three out of five for organizational relationships. (*Id.*, Ex. 5 at 0103.) Ryan noted that

Dr. Shukh will continue to be plagued by organizational relationship controversies until he learns to disagree without being disagreeable. Also he needs to understand that once an issue has been thoroughly debated and a conclusion has been reached, it is very destructive to publicly insist on one[']s minority point of view. The goal is not to have a muzzled or docile posture but to know where to draw the line. He must also learn to trust his management chain to sort out controversial and interpersonal issues fairly and to ensure that he receives the accolades and recognition that he deserves. . . . I will not hesitate to issue a failing grade in the future if I don't see improvement in Dr. Shukh's ability to exercise good judgment when conflicts arise.

(*Id.*) In 2002, Shukh was given a "learning" rating (the rating one step above unsatisfactory) by manager Sining Mao for his "Respect for People." (*Id.*, Ex. 6 at 0224.) Mao noted that Shukh needed to "understand differences between [people and get] the job done for team success. Put per[so]nal ego behind." (*Id.*) A 2004 evaluation from Ryan noted that Shukh's "delivery of . . . insightful comments can be improved," and that "all people are different. We need to keep this in

mind, and assume that everybody is trying to do their best.” (*Id.*, Ex. 7 at 0214.) Shukh responded that

it is very difficult to respect a person that cheats on you and your colleagues, [is] dishonest, has a h[a]bit to steal somebody’s ideas and presents them as their own, etc. In this situation there is only [one] way to keep [a] reasonable relationship with this person: try to reduce the interference with this person up to the possible limit. . . . Respect between people can be established on the mutual basis only. If somebody does not respect you how can you respect him/her? It’s impossible. Personally, I experienced many times with a hid[den] disrespect and all [of] my appeals to managers were without response.

(*Id.*, Ex. 7 at 0217.) A 2006 evaluation gave Shukh the second best score for “respect for people” and “teamwork” but similarly instructed Shukh to “work to cultivate relationships with colleagues” and to “make an effort to ensure people feel that you are listening to what they have to say and are giving consideration to their positions.” (Benjes Decl., Ex. 20 at 46205.) That evaluation also noted “[y]ou speak honestly and do not seek to mislead people. You can at times be harsh with others and I would like to see you work toward being more positive in your interactions with your colleagues.” (*Id.*, Ex. 20 at 46206.) With respect to these evaluations, Shukh testified that he received poor evaluations despite his “absolutely outstanding

performance,” based solely on the difference in his “cultural behavior.” (Shukh Dep. 384:7-17.)

Shukh made several references to his belief that Seagate managers were personally biased against him in responding to his performance reviews. In responsive comments to his performance review for the time period between July 1, 2003 and June 30, 2004, Shukh stated:

People make a difference [in] every organization. This is a well-known postulate. The right people [in] the right place is a major component of any company success. People are very sensitive to results of their evaluation. Therefore, a manager has a big responsibility evaluating [the] performance of his/her engineers or technicians. Any personal bias in this situation is forbidden. However, I feel there is a bias to me from my managers. I have [had] this feeling for a long time. [The] [n]ice thing is that I know the reason for that and can forgive them this bias to some extent. At the end, I would like to make a comment about [the] existing system of evaluation. [In] my mind, the existing system is too subjective.

(Engelke Decl., Ex. 7 at 0218.) Shukh also referenced his perception of bias in his comments to his evaluation for 2006. (Benjes Decl., Ex. 20.) Shukh stated:

Management style [on the team] is not a secret to me. I found out long ago that there is a strong bias to me from the management team. This is a fact. I do not pretend to

change it since this is useless. I do know that [I] cannot be promoted to a higher position even though the company makes millions of dollars per year by using my inventions, my head designs and my technical proposals. . . . I would like to give to the management team one suggestion: please change some [of] Seagate's policies such as "Equal Employment Opportunity", "Performance Management", "Rewards and Recognition", etc. since they are in . . . serious contradiction with . . . reality. Also, I can give the management team [a] couple of hints for future evaluations of my performance. You can always give me [an "excellent" rating (the second highest rating out of four)] for not going to café during lunch time, for a strong Russian accent, etc. I just don't know how the management team can expect a high performance from [an] employee by treating him like this.

(Benjes Decl., Ex. 20 at 46207.)

Kenneth Allen, who managed Shukh during his last three years of employment at Seagate testified that "Alex has probably the single largest ego of any human being I ever met. And he is incapable of taking input from others at the level he needs to to work in teams." (Benjes Decl., Ex. 15 (Dep. of Kenneth D. Allen ("Allen Dep.") 180:12-15).) Allen also testified that "[i]n general, Alex had a tendency in public forums, meetings, to accuse other people of stealing his ideas. He had a tendency to say they were stupid; only his ideas were right. . . . He was basically sort of insulting in a very personal way – not critiquing the

work necessarily, but being insulting in a very personal way.” (Allen Dep. 149:3-10.) Additionally, Allen testified that Shukh’s difficulty working with others increased during his time at Seagate and that over time he “slowly alienated just about every designer in the recording heads operations.” (*Id.* 127:20-128:4.)

2. Shukh’s Coworkers

Some of Shukh’s coworkers testified that at Seagate, Shukh had “a reputation of [being] sometimes hard to work with,” (Stageberg Dep. 103:20-25, 105:2-20; Benjes Decl., Ex. 16 (Dep. of Taras Pokhil (“Pokhil Dep.”) 140:4-7)) being patronizing in presentations, and having a very high opinion of himself, (Pokhil Dep. 142:2-24). Seagate’s brief in support of its motion for summary judgment cites a number of instances that it argues demonstrate the difficulty Shukh had working with others. Shukh contests the nature and extent of each of these incidents. Although some of these events are only peripherally related to the discrimination and retaliation claims at issue, for completeness, this Order presents a version of each story viewing the record facts in the light most favorable to Shukh.

In 2001 a controversy occurred between Niru Sharma, a Seagate engineer working in the Springfield office, and Shukh. (Allen Dep. 99:5-9.) Shukh discovered that portions of Sharma’s presentation contained ideas and designs he believed should have been accredited to him. (*Id.* 99:16-20.) Shukh wrote

an email to Sharma stating that “I didn’t have a chance to know you personally but the very first impression about you isn’t very good.” (Benjes Decl., Ex. 17.) Shukh requested that Sharma “please immediately make corrections in all presented materials” and warned her that “[w]hat you did in your presentation is [a] violation of corporate policy and some other laws. I hope you did that without intention.” (*Id.*) Allen testified that Shukh’s reaction to Sharma was “less than constructive” because “it wasn’t clear that there was any real or actual offense” and that “it doesn’t tend to be the best way to further your ongoing working relationship by accusing the other person of, you know, unfair practices without at least working through the process first.” (Allen Dep. 99:16-100:10.) Shortly after the incident, Allen reviewed the documents and sent an email in which he “agree[d] that Alex’s name should have been prominently included in the package since he did most/all of the design and simulation work.” (Ninth Decl. of Constantine John Gekas, Ex. 6, May 6, 2013, Docket No. 489; Shukh Dep. 728:8-730:8.) Allen concluded, “Let’s take these actions and then take a chill pill. When things we don’t like happen, we each get to decide how to react. I’m going to assume this was a simple oversight on Niru’s part – this can be easily corrected.” (Ninth Gekas Decl., Ex. 6.)

The record also contains evidence of an incident with coworker Eric Linville. (Allen Dep. 152:6-12.) During a meeting, Linville allegedly expressed concern that one of Shukh’s designs would not work.

(Ninth Gekas Decl., Ex. 7; Shukh Dep. 818:6-17.) Shukh responded that he was surprised by the comments since Linville had been involved in the modeling of the design at issue. (Ninth Gekas Decl., Ex. 7; Shukh Dep. 818:6-17.) Linville asked to see certain materials, and after the meeting came to Shukh's office. (Ninth Gekas Decl., Ex. 7.) Shukh testified that Linville "jump[ed]" into Shukh's cubicle, raised his hand over Shukh, and said "Go to the street." (Shukh Dep. 354:15-20.) During the incident, Shukh also stated that Linville repeatedly called him an idiot. (Ninth Gekas Decl., Ex. 7.) With respect to Linville, Shukh further testified "[h]e attacked me, called me to the street, used all my designs. He is [a] horrible person." (Shukh Dep. 354:9-14.) Linville did not physically make contact with Shukh at any point. (*Id.* 354:21-23.)

In response to the Linville incident, Shukh sent an email to his manager Sining Mao. (Ninth Gekas Decl., Ex. 7.) In the email Shukh stated that the day before he had informed Mao "about a rude behavior of Eric Linville against me and asked [you] to take required actions to prevent this kind of behavior in the future. I did not hear from you so far." (*Id.*) Shukh also stated "Sining. I have to admit, since you retook a position of manager on the design team a situation around me has got worse dramatically. I am continuously under a pressure from you and other team members close to you. I request to stop this practice and take required measures about reported accidents." (*Id.*) In a postscript to the email, Shukh noted

“[s]ince English is not my native language and I don’t have any experience in this kind of letters, I apologize in advance for an inappropriate use of some words.” (*Id.*) Shukh later asked that Linville be made to apologize to him before he would continue working with him. (Shukh Dep. 353:7-22.) Shukh further testified that, pursuant to his three-strikes rule, he did not talk to Linville after the incident. (*Id.* 272:4-9.)

At some point during his employment, Shukh asked coworkers Nurul Amin and Johannes van Ek about inaccurate data they had presented, in order to demonstrate that their own design was superior to Shukh’s. (*Id.* 352:16-353:5.) Shukh later asked Amin and van Ek to apologize to him. (*Id.*)

Coworker Frank Stageberg testified about a meeting during which Shukh told Stageberg that Stageberg wasn’t “really a designer.” (Stageberg Dep. 54:25-55:16.) Stageberg found this comment to be disrespectful and unconstructive. (*Id.* 64:5-21.) Stageberg testified that this statement fit his general impression that Shukh made statements that were unconstructive toward “Seagate collaborative, work-together goals.” (*Id.* 65:25-66:21.) Stageberg also recalled an incident when Shukh requested that Stageberg meet with him out in the back parking lot to have a discussion. (*Id.* 86:9-25.) During the discussion, Shukh insinuated to Stageberg that Shukh had been promoted, and had a direct line of communication with Allen, the vice president in Shukh’s area. (*Id.* 70:15-71:24.) Shukh told Stageberg that his modeling work on a particular project was “unacceptable, deficient, not good.” (*Id.*

71:8-12.) Stageberg reported the incident to his boss, which was the only time he had ever talked to a Seagate manager about another employee. (*Id.* 72:3-75:3.)

3. Shukh's Collaboration

The parties do not seriously dispute that Shukh did, in fact, collaborate with other Seagate engineers during his employment at Seagate. In his brief in opposition to the present motion, Shukh contends that he had no difficulty working collaboratively with other employees. As evidence of his collaboration, Shukh points to papers and presentations he co-authored as well as patents he co-invented with numerous other Seagate employees. (Ninth Gekas Decl., Exs. 3-5.) Additionally, coworker Vladyslav Vas'ko testified that Shukh had "a productive relation[ship]" with his coworkers. (Benjes Decl., Ex. 32 (Dep. of Vladyslav Vas'ko ("Vas'ko Dep.") 112:20-113:1).) Vas'ko further testified that the people Shukh primarily had trouble working with at Seagate were his supervisors. (Vas'ko Dep. 114:7-17.) Shukh also submitted evidence that he received awards from Seagate that listed Shukh as a member of a design team and thanked him for his work on the designs. (Ninth Gekas Decl., Ex. 10.)

C. Requests for Transfers and Promotions

In April 2002 Shukh asked his managers, Ned Tabat and Sining Mao, to promote him to a technologist

position. (Shukh Dep. 489:17-22, 546:20-23.) Shukh did not receive the promotion and believed that since April 2002 “management put [a] taboo” on any promotion requested by Shukh. (*Id.* 491:5-6.) Shukh also testified that the individuals in the position of technologist at that time were qualified for that position, and that he did not believe he was more qualified than them. (*Id.* 548:-549:2.)

Sometime in January 2006, Shukh met with a Seagate vice president, Dave Brown, to inquire about the possibility of transferring from Seagate’s advanced transducer department (“ATD”) to the transducer [sic] development team (“TDT”). (Shukh Dep. 580:21-25, 744:7-14.) Pat Ryan was the manager of ATD and Allen was the manager of TDT. (Shukh Dep. 744:7-14.) Ryan had had some previous discussions with Allen about the possibility of Shukh transferring teams. (Allen Dep. 153:19-154:8.) Ryan expressed to Allen that he “felt like it wasn’t going to work for Alex anymore, that Alex was very frustrated and unhappy and upset.” (*Id.* 154:2-4.) Ryan told Allen he “felt like it would be a good thing for [Shukh] to move over to [Allen’s] team and have a fresh start.” (*Id.* 154:6-8.)

During the meeting with Shukh about the proposed transfer from ATD to TDT, Dave Brown allegedly jumped up, turned red and said “[w]hat are you doing here.” (Shukh Dep. 581:1-3.) Shukh understood this comment to be questioning why Shukh had come to the United States. (*Id.* 581:3-4.) Shukh testified that he could not recall whether Brown had actually said the word “country,” (*id.* 583:17-25), but later

testified that Brown had said “[w]hat are you doing here in this country,” (*id.* 745:10-20), and still later testified that Brown had actually asked why Shukh had come to “the USA,” (*id.* 752:7-9). Brown apparently accused Shukh of hating America and told him that he needed to “know [his] place.” (*Id.* 746:2-10, 752:10-11.) Shukh responded that he had come to America to work and for democracy, and asked “Why you treat me like [an] enemy? Cold War is over.” (*Id.* 754:2-6.) Shukh could not recall how Brown responded to the question. (*Id.* 754:7-8.) Shukh also told Brown that he felt it was his duty to share his ideas to make America stronger, noting that at Seagate “initially people hate my ideas since they are [un]usual . . . then they accept them and put into products and so on.” (*Id.* 756:10-24.)

In February 2006 Allen interviewed Shukh for the ADT to TDT transfer and allegedly told him “[y]ou must stop talking about your designs. This is team work, this is team designs. This is your last chance to work at this company, otherwise you will not find a job anywhere.” (*Id.* 543:18-544:2; *see also id.* 490:4-13.) Shukh was transferred to the TDT team in March 2006. (*Id.* 650:21-24, 744:7-14.)

In August 2006, Shukh requested that Ryan promote him to the position of principal engineer. (*Id.* 578:9-17.) Ryan told him that he did not “match the corporate culture,” there was “a decision” about Shukh, and therefore he could not be made manager. (*Id.* 578:9-17.) Also at some point Shukh began requesting that Ryan promote him to the position of

manager of the writer team. (*Id.* 370:14-17.) Shukh testified that he asked Ryan to promote him at least three times, and Ryan told him “[n]obody will listen to you.” (*Id.* 370:20-24, 388:9-14.)⁴

On September 1, 2006, Shukh wrote an email to Ryan, in response to an earlier meeting between the two. (Ninth Gekas Decl., Ex. 13 at 46217.) In the email Shukh expressed his belief that Ryan was expressing “personal bias” toward Shukh and that Shukh wished to discuss the issue with top management. (*Id.*) Ryan responded, asking Shukh to “please outline, in writing, all of the complaints/issues/wishe[s] that you have concerning your career at Seagate.” (*Id.*, Ex. 13 at 46216.) On September 7, 2006, Shukh followed up with an email to Ryan, carbon-copying Allen, Brown, and Debra Reutiman – a human resources representative. (*Id.*, Ex. 13 at 46215.) In the email Shukh objected to his failure to be promoted since 2001, explaining:

Five years in a r[o]w I’ve asked you in writing to promote me. You never responded. Three times I asked you personally to promote me or to give me a chance to be a technical leader of writer team (I recognized long

⁴ It is unclear from the record whether these three discussions were separate from the request to be promoted to the position of principal engineer. Given the similarity of the comments testified to, it appears that one of the requests for promotion to manager may have been a request to be promoted to principal engineer.

ago that [I] cannot be a manager at Seagate, maybe since I am Russian). You always responded to my requests with the same sentence: "Nobody will listen to you?" What did you mean: my strong accent or something else? Since then I don't like to talk in public. Whether it is good or bad for the company I don't know but it is much more convenient for me.

(*Id.*) Shukh then detailed some of his technical achievements at Seagate. (*Id.*, Ex. 13 at 46215-16.) Shukh also referenced his experience with receiving appropriate credit for his work, explaining:

You created at ATD an atmosphere of plagiarism when lot[s] of engineers are used to us[ing] . . . my ideas and results of my work without referring [to] my name for their personal advantages. It seems to me, there is a taboo on my name at ATD. My numerous appeals to ATD management to stop this practice were not heard, even more, I was forced to apologize in one case and literally attacked by my colleague in another case.

(*Id.*, Ex. 13 at 46216.) Finally Shukh noted "August 16th in your office you said: 'There is a decision about you'. I have the same opinion: there is a decision about me. I would like to ask you: what is this decision about; who took this decision, when and why?" (*Id.*) Later in September, shortly after this email was sent, Shukh was promoted to the position of principal engineer. (Shukh Dep. 491:18-20.)

D. Escalation of Events in 2007

1. Human Resources Letter

In early January 2007 Allen and Mastain pressured Shukh to work on a project with Linville. (Shukh Dep. 434:22-435:1; Benjes Decl., Ex. 18.) When Shukh refused, Allen told Shukh that Shukh was “such a horrible person that nobody wants to work with you.” (Shukh Dep. 434:18-435:4.) When Shukh asked for evidence of other Seagate employee’s complaints against him, Allen told Shukh “[t]omorrow you will get ten of them.” (*Id.* 435:4-9.)

On January 9, 2007, in response to this interaction Shukh wrote a letter to Seagate’s human resources department, which he submitted two days later. (Benjes Decl., Ex. 18; Shukh Dep. 353:9-17, 434:18-435:13.) In the letter, Shukh discussed his refusal to work with either Linville or Ryan until they made formal apologies to him. (Benjes Decl., Ex. 18; Shukh Dep. 353:7-22.) Shukh also detailed some of his work on the project at issue and Seagate’s failure to give him appropriate inventorship credit for his work. (Benjes Decl., Ex. 18.) The letter addressed Shukh’s meeting with Allen and Allen’s comment that by tomorrow Allen could have ten complaints against Shukh. (*Id.*) Shukh explained:

I reminded [Allen] that his behavior is illegal, that for the third time during last year I am facing this kind of treatment from RHO managers. I told him, if he wants [to fire me] he should do it, but he must stop intimidat[ing me]. I added also, he can order

me to take [the] project and I'd do it. However, it would be much better for the company to cr[e]ate a NORMAL working condition[] for me. I reminded him about a history of human society when the slavery was replaced by feudalism, and the last [was] succeeded by capitalism. The slave cannot be productive.

(*Id.*) Shukh outlined the following thoughts and requests to Seagate's human resources department:

– I am asking for [prevention of] this kind of treatment in the future since it violates my human rights and I cannot be efficient for the company in these working conditions.

– I [am] afraid that [I] might face a provocative behavior from some of my colleagues or managers against me to create the “ten cases”. I have to point out; that *all cases created against [me now] will be unfair*. I do have a reason to take this threat seriously. For your information: In December 2005, just after [the] attack by Eric Linville, I found a flat tire on my car. A mechanic [at a] tire shop told me that my brand new tire cannot be repaired due to a long cut. Moreover, he found a piece of utility knife in the tire that was a cause of the cut. This is just information for consideration . . .

– Now I am convinced that there has been a persistent strong bias of the ATD and TDT managers against me. Therefore, the majority results of my evaluations cannot be fair. I would like to ask [the] HR department of the

company to check results of my evaluations. I can provide HR with copies of self-evaluations and manager evaluations during all my work with the company.

– ATD and TDT created an atmosphere of plagiarism in their organizations and support it. This atmosphere gave an opportunity to many people close[] to the management to take advantages of other engineers[] work results for getting promotions, salary raises, and other benefits.

– Once Pat Ryan told me “there is a decision about me”. This statement and an analysis of the situation artificially created around me lead me to the conclusion that the management wants me to quit[] the company. They might have some reason for that, which is not related to my performance defiantly. What is it?

(Id.)

After writing the letter, Shukh met with Doug Engelke, a human resources representative, on January 19, 2007. (Benjes Decl., Ex. 6 (Dep. of Doug Engelke (“Engelke Dep.”) 97:25-98:7).) At the meeting Shukh expressed his belief that his previous conversation with Allen was illegal regarding the threat to obtain ten complaints. (*Id.* 66:5-10; Benjes Decl., Ex. 18.) Shukh also requested that Engelke review his performance evaluations and compensation history. (Engelke Dep. 66:13-25.) Shukh told Engelke about the incident with Linville and also requested that

Engelke investigate responses to his patent applications from the intellectual property department. (*Id.* 67:11-25.) Shukh also told Engelke that he would like to work alone. (*Id.* 67:5-6.)

After the meeting, Engelke investigated Shukh's concerns. (*Id.* 70:6-71:3.) On January 24, Reutiman forwarded to Engelke the September 7, 2006 email from Shukh to Ryan outlining Shukh's frustration with failing to be promoted. (Ninth Gekas Decl., Ex. 20.) Engelke also received an email from Allen regarding Shukh. (*Id.*, Ex. 25.) In the email Allen noted that because Shukh was objecting to working on a particular project and could not work with Linville, Allen was going to transfer Shukh out of Mastain's team. (*Id.*) Allen noted:

I will assign him a series of special design projects, and will have him report directly to me. Jason Gadbois and I will provide him with a written set of project expectations and deliverables. We may consider physically isolating him as well, but probably not at first.

(*Id.*) Allen testified that by physical isolation, Allen was referring to moving the location of Shukh's cubicle because at the time he was seated in the middle of the team that he was having difficulty working with. (Allen Dep. 185:5-19.) In addition to these emails, Engelke reviewed Shukh's evaluations and other personnel records and met with Mastain, Allen, Linville, and Paul Dietz – an intellectual property attorney that had been involved in the patent review process – and two of Shukh's coworkers, among

others. (Engelke Dep. 68-78, 89:18-19.) Based on these complaints he received from Shukh, Engelke did not specifically investigate whether Shukh was being treated unfairly based on his national origin. (*Id.* 121:5-6; *see also id.* 94:22-95:1.)

After the investigation, Engelke concluded that Shukh's complaints were unfounded. (*Id.* 78-84; Benjes Decl., Ex. 21.) Engelke met with Shukh and explained that Engelke's investigation had revealed no unfairness in evaluations, that Shukh was being compensated appropriately, and that the patent review board was appropriately communicating its decisions to Shukh. (Engelke Dep. 81:11-82:15.) Engelke informed Shukh that the chief technologist position he wanted to be promoted to was not an open position. (*Id.* 83:12-19.) Engelke also provided Shukh with a confidential memorandum dated February 20, 2007, which summarized Engelke's findings in response to the issues raised by Shukh in his January 2007 letter to human resources. (Benjes Decl., Ex. 21.) In the letter Engelke stated that he "was unable to conclude that there have been any violations of Seagate policy." (*Id.*) Engelke noted that Shukh had "been provided written communication when the patent review committee has decided not to pursue a patent application on an invention for which you are a named inventor. This is in accordance with Seagate's procedure for pursuing patent applications to protect its intellectual property." (*Id.*) As for Shukh's evaluations, Engelke explained "[y]our performance evaluations reflect your contributions to Seagate and

there is no indication any adjustments need to be made to those documents.” (*Id.*) Engelke also addressed the Linville incident explaining “[a]lthough you were involved in a verbal disagreement with a coworker in 2005, it could not be characterized as an ‘attack.’ Site security has no record of a vehicle damage report being filed at that time.” (*Id.*) Finally, Engelke noted:

Please also be advised that Seagate has a strict policy prohibiting retaliation against an employee who makes a good faith report of a violation of the law or Company policy. Accordingly, you should immediately advise Human Resources if you experience any conduct, which you believe is in retaliation for having made your report or having participated in this investigation.

(*Id.*)

2. Supervision by Ken Allen

On February 13, 2007, Shukh met with Allen. (Ninth Gekas Decl., 23.) During the meeting, Shukh allegedly told Allen that he would not share any more of his ideas until he was promoted two levels and paid royalties. (Allen Dep. 173:6-20; Ninth Gekas Decl. Ex. 21.) Allen sent Shukh a memorandum regarding the meeting on February 20, 2007, and requested specific work product, noting that “failure to meet this request, or a more general continued failure to work cooperatively as a member of my team, will be viewed as grounds for disciplinary action up to and including

termination.” (Ninth Gekas Decl., Ex. 23.) Additionally, the memorandum noted that Shukh’s stance that he would not provide ideas until he was properly recognized for past contributions and given a promotion “is inconsistent with your employment by Seagate as a Principal Engineer.” (*Id.*) In response, Shukh sent an email to Allen, carbon-copying Engelke and Brown. (*Id.*, Ex. 24.) In the email, Shukh discussed various technical ideas, and also stated:

I did not take any stance. I just requested [that you] respect me like a human being and treat me equally to other people in the company. That was it. I understand, that you are looking for a reason [to] fire me and are preparing a ground to do that. Your motives are clear to me. In fact, they have very little to do with me as an employee and with my performance but I am not going to discuss them here.

(*Id.*)

At some point in February 2007, Allen decided that Shukh should report directly to him, in an effort to resolve some of the issues Shukh had been having. (Decl. of Kenneth Allen ¶ 2, Apr. 1, 2013, Docket No. 470.)⁵ Shukh’s pay, benefits, and title did not change –

⁵ It is not clear when this reassignment took place in relation to the memoranda written by Allen and Engelke to Shukh regarding the February 13 meeting and the human resources investigation.

he merely began reporting to Allen. (Engelke Dep. 91.)

Shukh testified that during this time period he was “completely isolated” from other engineers. (Shukh Dep. 472:16-23.) Shukh described this isolation as people avoiding him and his not being allowed to collaborate with other members of the production team. (*Id.* 472:16-474:6.) Shukh testified that this was not the first time he had experienced isolation at Seagate. Specifically, Shukh alleged that his isolation from others at work began in February 1998. (Shukh Dep. 481:24-482:12, 514:23-515:7, 521:13-15.) Shukh cited examples from 2004 or 2005 when he asked to be allowed to work with a WAMR team, and was told by the leader of the team that “[n]obody will work with you.” (*Id.* 477:3-18.) In 2006, one coworker asked Shukh why he had been told not to work with Shukh. (*Id.* 476:4-21.) Shukh testified that throughout his career his managers neglected his requests to have assistance from other people in developing his designs, and forced him to do difficult design point work alone. (*Id.* 508:6-24.) Shukh testified that he believed the reason for this behavior was that in his managers’ “mindset I am Soviet and in their mindset they [are] still at war with the Soviets. . . . It seems to me [the] obvious explanation of their absolutely irrational behavior.” (*Id.* 617:10-20.)

In July 2007, for example, Shukh learned that he had not been invited to brainstorming sessions. (Ninth Gekas Decl., Ex. 27.) James Wessel told Shukh that he had chosen not to invite Shukh because he “was

concerned that your presence would not be conducive to a free flowing brainstorming session. . . . I have witnessed a few meeting interactions which made me think that your demeanor would be counterproductive to brainstorming.” (*Id.*) Wessel then began inviting Shukh to the sessions. (*Id.*) In an email related to the brainstorming sessions, Allen told Brown and Engelke that Shukh has “been much more respectful of others in the way he says things . . . and has been very responsive to my requests for modeling work.” (*Id.*) Shukh also testified that the brainstorming session incident was not the first in which he had been excluded from meetings. Shukh testified that he stopped being invited to tech review sessions in November 2002 and writer team meetings from the beginning of his employment. (Shukh Dep. 507:2-122, 518:15-519:8, 520:8-521:12.) Shukh testified that he was pulled from roadmap development beginning in July 2003. (*Id.* 507:2-122, 518:15-519:8, 520:8-521:12, 601:1.)⁶

⁶ Shukh also testified generally that he was not allowed to publish papers he thought he should have been allowed to publish beginning in the fall of 1998. (Shukh Dep. 507:14-17, 519:14-20.) Shukh stated that Seagate would not allow him to publish certain results because they were sensitive with respect to the company’s technology. (*Id.* 610:2-4.) Shukh later learned that other people had published on the topic. (*Id.* 601:4-8.) Shukh concluded that “there is only one explanation when you put everything together. As I told you, they simply hate me because they look at me like – treated me like the – enemy.” (*Id.* 610:12-19.) Shukh also testified that other Soviet or Belarusian employees were given the opportunity to publish technical

(Continued on following page)

In a September 2007 meeting with Brown, Shukh testified that Brown told him that a coworker Declan Macken had received a technical award during the fiscal year, and noted to Shukh that “he is not American.” (Shukh Dep. 798:12-18.) Shukh sent Brown an email about the meeting, requesting that he receive the same implementation of his ideas as others, and again raising concerns that he had not been given proper credit for his inventions. (Ninth Gekas Decl., Ex. 17.) Brown responded that his and Allen’s goal “is to find a way to improve your ability to contribute to the team and also improve your job satisfaction. I realize we don’t have an obvious solution right now, but that is our goal, regardless of what you may have inferred. I am open for more discussion if you see fit.” (*Id.*, Ex. 17 at 46410.)

E. Inventorship of Disputed Patents

Throughout his employment Shukh frequently expressed concern that he was not being given appropriate credit for work he performed. This concern forms a large part of Shukh’s claims against Seagate in the present lawsuit.

papers and that he did publish several papers during his tenure at Seagate. (*Id.* 611:3-7, 613:3-19.).

1. Seagate's Patent Application Process

Shukh's employment with Seagate was governed by an Employment Agreement. (Fourth Gekas Decl., Ex. 9.) Pursuant to this agreement, Shukh assigned to Seagate his

right, title, and interest in and to any and all inventions, original works of authorship, developments, concepts, improvements or trade secrets, whether or not patentable . . . which [Shukh] may solely or jointly conceive or develop or reduce to practice, or cause to be conceived or developed or reduced to practice, during the period of time [Shukh is] in the employ of the Company.

(*Id.*, Ex. 9 at 2.) This provision prohibited Seagate employees from filing patent applications for their own inventions. (*Id.*; *see also* Third Am. Compl. ¶ 107.) Instead, employees were required to disclose inventions to Seagate by submitting an Employee Invention Disclosure Form to Seagate's Intellectual Property ("IP") Department. (Fourth Gekas Decl., Ex. 10; *see also* Decl. of Jennifer Buenzow ¶ 2, Ex. A, Apr. 1, 2013, Docket No. 471.) The invention disclosure form requires, among other things, a title and description of the invention, a technology classification code, and the names and signatures of each inventor. (Buenzow Decl. ¶ 2.) The inventors are responsible for filling out the disclosure form themselves and determining which individuals to identify as co-inventors. (*Id.* ¶ 4.) The IP Department would then forward the form "to the appropriate Patent Review

Board which [would] determine whether the invention w[ould] be pursued as a patent application, protected as a trade secret, or otherwise.” (Fourth Gekas Decl., Ex. 10 at 1; Buenzow Decl. ¶ 3.) If the Patent Review Board determined that an application would be pursued for patenting, Seagate would refer the application to outside counsel, who would, with the cooperation of the employee inventor(s), ensure that the applicable requirements of patent law had been met, then draft and file the necessary patent application. (Buenzow Decl. ¶ 5.)

2. The Disputed Patents

Shukh claims that Seagate discriminated and/or retaliated against him on the basis of his national origin by failing to name him as an inventor on six issued patents and four patent applications. (Third Am. Compl. ¶¶ 122, 196, 233.)

In his answers to interrogatories, Shukh contends that with respect to some of the disputed patents, Seagate’s IP Department informed Shukh that it had decided not to pursue his inventions for patenting, but later filed patent applications that allegedly contained Shukh’s inventions and failed to name Shukh as an inventor. (Benjes Decl., Ex. 12 at 16-17, 19, 23, 26.) For some of the disputed patents Seagate’s IP Department allegedly informed Shukh that although it had decided not to pursue his particular invention for patenting, Shukh’s work would be incorporated with other inventions for which Seagate

would pursue patenting. (*Id.*, Ex. 12 at 16-17; Shukh Dep. 719:5-8.) Seagate did not, however, list Shukh as an inventor in the final patent applications into which Seagate had represented it would incorporate Shukh's work. (Benjes Decl., Ex. 12 at 16-17.) With respect to other disputed patents, Seagate did not communicate its intentions regarding Shukh's inventions, but filed patent applications that allegedly contained Shukh's inventions and failed to name Shukh as an inventor. (*Id.*, Ex. 12 at 20-21.) Seagate never told Shukh that it had filed applications for any of the disputed patents, or that it had omitted Shukh as a co-inventor on the applications. (*Id.*, Ex. 12 at 16-17, 20.) Seagate did, however, present Shukh with inventorship awards, apparently recognizing Shukh for his work on at least two of the disputed patents. (*Id.*, Ex. 12 at 17, 19.)

On August 30, 2007, Shukh sent an email to Kenneth Massaroni, Vice President of Seagate's IP Department, notifying Massaroni that Shukh believed he had been wrongfully omitted as an inventor on two of the disputed patents. (Shukh Dep. 255:18-24; Benjes Decl., Ex. 11.) Massaroni indicated that he would investigate the matter, and informed Shukh in March 2008 that the stated inventorship on the patents was correct, because Shukh was not an inventor of the patented inventions. (Shukh Dep. 255:18-24; Benjes Decl., Ex. 11.) Seagate did not notify the United States Patent and Trademark Office ("USPTO") of Shukh's complaints. (Exs. in Supp. of Pl's Surreply, Ex. C (Dep. of Kenneth M. Massaroni ("Massaroni

Dep.”) 59:25-60:4), Oct. 23, 2012, Docket No. 360.)⁷ After receiving Massaroni’s response, Shukh searched the USTPO [sic] website for other patents embodying his inventions, and discovered the other disputed patents. (Fourth Gekas Decl., Ex. 13 ¶ 23.)

For the ten patents that Shukh disputes, the named inventors submitted Employee Invention Disclosures that did not identify Shukh as a co-inventor. (Buenzow Decl., Exs. A-I.) In three of these Employee Invention Disclosures other employees with Russian and/or Soviet backgrounds – Taras Pokhil and Vladyslav Vas’ko – were named as inventors. (*Id.*, Exs. A, G, I; *see also* Decl. of Douglas Engelke, Ex. 3, Apr. 1, 2013, Docket No. 469.)

3. Inventorship Rights of Other Employees with Soviet Backgrounds

Shukh testified that there was one instance in which a Russian woman from Seagate’s Boulder, Colorado office discussed with Shukh that an invention disclosure made by either her or a different Russian woman had been “taken over by [a] supervisor.”

⁷ Many of Shukh’s citations to the facts come from earlier submissions in the case. Shukh filed two sets of exhibits in support of his two surreply briefs to Seagate’s previous motion for partial summary judgment, but labeled the exhibits consecutively as a single set. Therefore, where reference is made to “Exs. in Supp. of Pl’s Surreply,” exhibits A and B can be found at Docket Number 360, filed on October 23, 2012, and exhibits C through P can be found at Docket Number 383, filed on December 14, 2012.

(Shukh Dep. 409:7-410:5.) Additionally, Shukh had a conversation with Vlad Vas'ko, another Seagate employee of Soviet origin, in which Vas'ko communicated that he was unhappy about being omitted as an inventor on a Seagate patent. (*Id.* 413:21-414:6.) Vas'ko testified that on one occasion he had submitted an invention disclosure to Seagate and the content of the disclosure had been included in a patent application without naming him as an inventor. (Vas'ko Dep. 81-82.)

4. Reason and Time Period for Infringement of Shukh's Rights

Shukh testified that he believed Seagate retaliated against him because of his "consistent request[s] about [his] inventorship rights." (Shukh Dep. 424:10-16, 427:10-17.) Shukh further testified that he thought Seagate failed to name him as an inventor because "they really hate me. In their mind [the] Cold War was still going on." (*Id.* 581:15-24.)

Shukh testified that Seagate stole his intellectual property "continuously from the very beginning of [his] employment through the end of [his] employment." (*Id.*) Shukh also testified that projects he had originated were given to others to develop, beginning in 1998. (*Id.* 506:23-507:1, 517:2-6.) Shukh testified that Seagate omitted his name on presentations and changed the names of Shukh's designs. (*Id.* 620:1-621:4.) Based on this treatment, Shukh said it was clear "they really hate me." (Shukh Dep. 620:11-14.)

F. Shukh's 2007 Evaluation

In his 2007 evaluation of Shukh, Allen gave Shukh unsatisfactory ratings in the "Respect for People" and "Teamwork" categories. (Benjes Decl., Ex. 19 at 0191, 0192. Allen explained that "Alex has demonstrated respect for some of my team members, but frankly, for very few. He is quite open about his lack of respect for the capability, motives, and accomplishments of many members of the design community." (*Id.*, Ex. 19 at 0192.) As for teamwork, Allen concluded that "some of Alex's behaviors severely limit his ability to collaborate effectively across the entire team – specifically, he acts as if he must always be right and he is often insistent on getting appropriate or complete credit for his work." (*Id.*) Allen explained:

I do understand [Shukh]'s concerns about credit for past work. He has made a number of contributions over the years, and I have come to see over the past 6 months that he sometimes doesn't receive proper credit for work he has done in the past. What Alex needs to understand is that much of this is self-inflicted. For example, Alex often insists that full design credit be give[n] to modeled optimization of head geometries – clearly, geometries are critical; however, they are not high-level intellectual concepts and generally must be optimized experimentally. He has also repeatedly accused a number of different people of stealing his work – I have learned that several members of the design

community now refuse to read his highlights or modeling work; they believe their only defense against accusations of plagiarism is to remain ignorant of his work. If Alex learns to collaborate more effectively, he will become more effective and get more credit for his work because he will be able to leverage the skills and efforts of many others, rather than work in isolation.

(Id.)

G. Shukh's Performance in 2008

At the beginning of 2008 Shukh wrote a memo to Seagate vice president Jerry Glembocki about his performance evaluations. In the memo, Shukh noted that he believed ten years ago Seagate's directors and managers had made "a special decision" about Shukh – that he would never become a manager because "he is too challenging, too competitive, too tough, too smart (this is not my definitions, I heard them from these people), and too different (of c[ourse], I am Soviet)." (Ninth Gekas Decl., Ex. 18.)

In his 2008 Evaluation, Allen gave Shukh a four out of five rating for in the "Respect for People" category. (Benjes Decl., Ex. 5 at 46658.) Allen explained that he was "pleased with the effort Alex has put into improving his working relationships. . . . There is still room to improve and there is, unfortunately, a lot of historical relationship damage to repair, but Alex is making progress." (*Id.*, Ex. 5 at 46659.) Allen rated Shukh a three out of five for teamwork, explaining

that “[c]ollaboration is the competency area where I would like to see the most focus on improvement in FY09. . . . I have seen signs that Alex understands these issues intellectually, but he need[s] to continue to improve how he supports his teammates on an ongoing basis.” (*Id.*) Allen gave Shukh an overall rating of three out of five, stating:

Overall, I am pleased with Alex’s progress in FY08 – especially in the past four to six months; I would have rated Alex as a “4” performer over this time period and intend to reflect that in the KCPB cycle. However, I have not yet seen sufficient sustained contribution to promote Alex to Grade 162 as per his request – but I will go forward out of cycle if I see improved integration and commitment to the larger team’s needs, and continue to see adequate teamwork.

(*Id.*, Ex. 5 at 46661.)

H. Termination

In the fall of 2008, in response to the economic downturn, Seagate initiated a series of reductions in force. (Allen Decl. ¶ 3.) In conducting the reduction in force, Allen assigned points to employees in his department based on position elimination, performance history, documented counseling for performance, misconduct or attendance issues, technical or specialized skills, and length of service. (*Id.* ¶ 4.) Allen recommended the elimination of sixteen positions (ten percent of his department), including Shukh’s position.

(*Id.* ¶ 6.) In total, Seagate’s Bloomington facility terminated 179 employees, including Shukh, in January 2009. (Engelke Decl. ¶ 5.)

Allen recommended Shukh’s elimination because Allen determined that elimination of one of the eight most senior staff persons would have the highest money saving potential, and Shukh scored lower than the other seven managers on the point assignment rubric. (Allen Decl. ¶ 7, Ex. 2.) Additionally, Allen chose to retain employees with more development and product design engineering experience than Shukh. (*Id.*) Allen indicated that Shukh’s primary skill was RSS modeling, which was already available at Seagate in sufficient quantity. (*Id.*) Allen testified that the difficulties he had with Shukh were not the primary reason for his termination but “[t]hey were part of the secondary set of factors.” (Allen Dep. 174:10-14.) Another employee had the same score as Shukh and was identified as a peer, but was retained due to greater seniority. (Allen Decl. ¶ 7.) The employee retained was also not a United States national. (Engelke Decl. ¶ 8.) Shukh alleges that when Allen walked him out of the building on his last day, Allen wished him “every success in building a new political party in Belarus.” (Ninth Gekas Decl., Ex. 31.)

III. DISCRIMINATION CHARGE

A. Job Applications

Since his 2009 termination, Shukh has submitted 135 job applications, but has been unable to secure

employment. (Fourth Wright Decl., Ex. 4 at 31, 37-57.) These applications resulted in only two interviews. (Shukh Dep. 570:20-571:4.) Shukh testified that the hiring manager at Hitachi, a company to which Shukh applied, contacted Vas'ko to discuss rumors the hiring manager had heard about Shukh. (*Id.* 534:9-21.) Shukh attributes these rumors to the statement made by Allen prior to Shukh's termination, wherein Allen instructed Shukh to stop talking about his designs, stating "[t]his is your last chance to work at [Seagate], otherwise you will not find a job anywhere." (*Id.* 543:22-544:2.) Vas'ko allegedly expressed to Shukh that he would not be able to get a job at Hitachi. (*Id.* 535:19-23.) Mirza Abatchev, a friend of Shukh's, told him that he would not be able to get a job at Western Digital, but did not specify why. (*Id.* 544:18-545:2.) Additionally, during Shukh's interview at Hitachi, a Hitachi engineer allegedly told Shukh that "[w]ith your reputation you will not find employ[ment] here." (*Id.* 541:23-542:11.)

Shukh also applied for six positions with Seagate. (Third Am. Compl. ¶ 243.) One of the positions was subsequently cancelled and the others filled either with internal candidates or applicants that were more qualified than Shukh. (*See* Decl. of Abebe Hailu, Apr. 1, 2013, Docket No. 472; Decl. of David Robinson, Apr. 1, 2013, Docket No. 473; Decl. of James Wessel, Apr. 1, 2013, Docket No. 474; Decl. of Lori Beal, Apr. 1, 2013, Docket No. 476.)

B. Discrimination Charge

On March 17, 2009, Shukh filed a charge of discrimination with the Equal Employment Opportunity Commission (“EEOC”), which was cross-filed with the Minnesota Department of Human Rights. (Third Am. Compl. ¶ 244.) In its response Seagate stated:

Shukh alleges that he was subjected to discrimination on the basis of his national origin and age in connection with his employment with Seagate and that he was also retaliated against. Shukh’s unsupported allegations are at direct odds with the facts surrounding his employment. After a history of combative and unproductive behavior in his working relationships, Shukh was selected for termination in connection with a Company-wide reduction in force conducted by Seagate. There is simply no merit to Shukh’s claims of unequal treatment. Nor is there any merit to his allegation of retaliation.

(Ninth Gekas Decl., Ex. 26.) The EEOC issued a right to sue notice on November 25, 2009, and the Minnesota Department of Human Rights issued a notice that Shukh was to file any claim under the MHRA within ninety days. (Third Am. Compl. ¶ 245, Ex. 2.)

IV. PROCEDURAL HISTORY

The Court has previously considered Shukh’s discrimination and retaliation claims in the context of Seagate’s motion to dismiss filed earlier in the

proceedings. (See Am. Mot. to Dismiss, May 18, 2010, Docket No. 14.) Although Shukh filed his third amended complaint following the Court's ruling on that motion to dismiss, the discrimination and retaliation claims presented in his amended complaint are identical to those currently before the Court in his third amended complaint. (Compare Am. Compl. ¶¶ 228-262, Apr. 7, 2010, Docket No. 7, with Third Am. Compl. ¶¶ 228-262.) The Court's previous ruling is therefore relevant to the scope of discrimination and retaliation claims that Shukh can now properly assert.

On March 30, 2011, the Court issued an order that, among other things, denied Seagate's motion to dismiss Shukh's discrimination and retaliation claims. *Shukh v. Seagate Tech., LLC*, Civ. No. 10-404, 2011 U.S. Dist. LEXIS 33924, 2011 WL 1258510, *1 (D. Minn. Mar. 30, 2011). With respect to Shukh's discrimination claims under Title VII and the MHRA, the Court noted that Shukh's allegations of discrimination "included disparate treatment in pay, promotions, and denial of recognition and inventorship." 2011 U.S. Dist. LEXIS 33924, [WL] at *12. The Court found that the complaint adequately alleged continuing violations for purposes of tolling the statute of limitations. 2011 U.S. Dist. LEXIS 33924, [WL] at *13. Specifically, the Court explained "[t]hough Shukh has not explicitly alleged that his work environment was 'hostile,' a plain reading of the complaint suggests that it is, in essence, what he claims." *Id.* The Court also found that Shukh's retaliation claims adequately

stated a claim for relief with respect to both pre- and post-termination retaliation. 2011 U.S. Dist. LEXIS 33924, [WL] at *14. Specifically, the Court found that Shukh had adequately pled retaliation “for pre-termination conduct based on allegations relating to his failure to be promoted, and to have his pay increased.” *Id.* With respect to post-employment conduct, the Court found that the retaliation was related to “statements and rumors from Seagate [that] have affected [Shukh]’s ability to be hired elsewhere and that he was not rehired for available positions at Seagate despite being well-qualified for them.” *Id.*

ANALYSIS

I. STANDARD OF REVIEW

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party can demonstrate that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A fact is material if it might affect the outcome of the suit, and a dispute is genuine if the evidence is such that it could lead a reasonable jury to return a verdict for either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A court considering a motion for summary judgment must view the facts in the light most favorable to the non-moving party and give that party the benefit of all reasonable inferences to be drawn from those facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d

538 (1986). Summary judgment is appropriate if the nonmoving party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). “To defeat a motion for summary judgment, a party may not rest upon allegations, but must produce probative evidence sufficient to demonstrate a genuine issue [of material fact] for trial.” *Davenport v. Univ. of Ark. Bd. of Trs.*, 553 F.3d 1110, 1113 (8th Cir. 2009) (citing *Anderson*, 477 U.S. at 247-49).

II. NATIONAL ORIGIN DISCRIMINATION AND RETALIATION

Title VII makes it “an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . national origin.” 42 U.S.C. § 2000e-2(a)(1). It is also unlawful for an employer “to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee” because of the employee’s national origin. 42 U.S.C. § 2000e-2(a)(2). Similarly, the MHRRA makes it unlawful for an employer to “discharge an employee” or “discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or

privileges of employment” because of an employee’s national origin. Minn. Stat. § 363A.08, subd. 2.

Title VII also prohibits an employer from retaliating against an employee for “oppos[ing] any practice made an unlawful employment practice by [Title VII].” 42 U.S.C. § 2000e-3(a). Under the MHRA, it is an “unfair discriminatory practice” for an employer to “intentionally engage in any reprisal” against a person because that person opposed “a practice forbidden under [the MHRA].” Minn. Stat. § 363A.15(1). The Court analyzes an employer’s liability under both Title VII and the MHRA using the same legal standards. *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).

Although Shukh’s brief in response to the present motion is not a model of clarity regarding the scope of his claims, counsel clarified at oral argument that Shukh brings claims for discrimination based on a hostile work environment and his termination. He also brings claims for retaliation based on a hostile work environment, denial of a promotion to Grade 162 in 2008, and his termination. Seagate disputes that each of these claims was either properly pled, carved out in the Court’s March 2011 order on Seagate’s motion to dismiss, or adequately briefed in response to the present motion. Because the Court concludes that summary judgment in favor of Seagate is warranted on each of these claims, it will assume, without deciding, that Shukh properly raised and

preserved the claims he identified at oral argument, and will address each of these claims in turn.

A. Discriminatory Hostile Work Environment

A work environment that is hostile because of an employee's national origin violates Title VII. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993); *Diaz v. Swift-Eckrich, Inc.*, 318 F.3d 796, 798 (8th Cir. 2003). To establish a claim for hostile work environment based on discrimination a plaintiff must show that (1) he is a member of a protected group, (2) there was unwelcome harassment, (3) there was a causal nexus between the harassment and membership in the protected group, and (4) the harassment affected a term, condition, or privilege of employment. *Watson v. CEVA Logistics U.S., Inc.*, 619 F.3d 936, 942 (8th Cir. 2010); *see also Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 571 n.11 (Minn. 2008). "To the extent non-supervisory employees are responsible for the harassment, 'the plaintiff must also show that the employer knew or should have known about the harassment but failed to take proper action.'" *Watson*, 619 F.3d at 941 (quoting *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 794 (8th Cir. 2004)).

To establish that harassment altered a term, condition, or privilege of employment, a plaintiff must "show that it was 'severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person

would find hostile or abusive.’” *Diaz*, 318 F.3d at 800 (quoting *Harris*, 510 U.S. at 21). This standard “is a demanding one, and ‘[s]imple teasing, offhand comments, and isolated incidents (unless extremely serious)’ will not suffice.” *Watson*, 619 F.3d at 942 (alteration in original) (quoting *Arraleh v. Cnty. of Ramsey*, 461 F.3d 967, 979 (8th Cir. 2006)). Instead, the plaintiff must demonstrate that the workplace was “permeated with discriminatory intimidation, ridicule, and insult.” *Id.* (internal quotation marks omitted). And the “[m]ere utterance of an epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to support a claim of hostile work environment.’” *Id.* (alteration in original) (quoting *Arraleh*, 461 F.3d at 979). “The environment must be both objectively hostile to a reasonable person and subjectively hostile to the victim.” *Sallis v. Univ. of Minn.*, 408 F.3d 470, 476 (8th Cir. 2005).

The Court assesses the existence of a hostile work environment “based on the totality of the circumstances.” *O’Brien v. Dep’t of Agric.*, 532 F.3d 805, 809 (8th Cir. 2008). Specifically, the Court examines “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Arraleh*, 461 F.3d at 979 (internal quotation marks omitted).

Shukh alleges that he was subjected to a hostile work environment because of (1) the comment by

Brown asking Shukh what he was doing here or doing in this country, (2) Allen's threat that he would get ten complaints against Shukh, (3) Seagate's failure to follow its policies in investigating a complaint of national origin discrimination, (4) failure to be named on patents, (5) physical isolation, (6) exclusion from meetings, and (7) prohibition on communicating with colleagues. Although not specifically addressed in connection with his hostile work environment claim it is also possible that Shukh relies upon the comments made by Ryan that "nobody will listen to you."⁸

⁸ Counsel clarified at oral argument that the various other grievances listed in Shukh's brief were not the basis of his hostile work environment claim. The Court notes, however, that its analysis would be the same even if it considered the totality of the examples of discrimination listed in Shukh's brief. (*See* Pl.'s Opp. to Mot. for Summ. J. at 38-40, May 6, 2013, Docket No. 488.) The only incidents cited by Shukh that have any relationship to his national origin are instances in which Shukh himself put his national origin at issue. For example, as evidence of discrimination Shukh cites his own September 2006 email to Ryan, Allen, Brown and Reutiman in which he stated "I recognized long ago that [I] cannot be a manager at Seagate, maybe since I am Russian" (Ninth Gekas Decl., Ex. 13 at 46215) and his January 2008 communication to Glembocki in which he indicated his belief that there was a decision about him at Seagate that he would never be a manager "[o]f course, because I am Soviet" (*id.*, Ex. 18). Although, as discussed below, Shukh's comments may be relevant to retaliation, a plaintiff cannot manufacture a discrimination claim by repeatedly invoking his own protected status in response to work place occurrences. Instead, Shukh must present evidence upon which a reasonable jury could conclude that anyone at Seagate, other than Shukh, put

(Continued on following page)

The Court finds that these facts, taken as a whole, fail to present sufficient evidence upon which a reasonable jury could find both that there was a causal connection between those incidents and Shukh's national origin and that the harassment was so severe or pervasive as to affect a term, condition, or privilege of his employment. The only incidents alleged by Shukh that contain any possible inference of a relationship to his national origin is the statement by Brown asking Shukh what he was doing in this country and the comment by Ryan that no one would listen to Shukh, which Shukh attributed to refer to his accent. Even if a jury could construe these statements as evidencing discriminatory animus based on Shukh's national origin, two isolated statements over the course of eleven years of employment is insufficient to meet the high standard for demonstrating the existence of a hostile work environment. *See Gordon v. Shafer Contracting Co.*, 469 F.3d 1191,

his national origin at issue, and used it to harass him or subject him to adverse employment actions. The other incidents identified by Shukh have no bearing upon his national origin, and he has not demonstrated how a reasonable jury could identify them as such. For example, Shukh cites to an incident in early 2006 when Allen warned Shukh that he "must stop talking about [his own] designs. This is team work, this is team designs. This is your last chance to work at this company, otherwise you will not find a job anywhere." Although this statement evidences hostility between Allen and Shukh, Shukh has presented no evidence as to how this statement could be related to his national origin or anything other than the problems that he was experiencing at Seagate in attempting to ensure that he received what he perceived to be appropriate credit for his work.

1195 (8th Cir. 2006) (finding that three to four racially offensive comments and additional sexually offensive comments were a “limited number of offensive comments . . . insufficient to create a hostile work environment”); *Al-Zubaidy v. TEK Indus., Inc.*, 406 F.3d 1030, 1039 (8th Cir. 2005) (finding no hostile work environment where plaintiff “produced only a few comments [a supervisor] allegedly made over a ten-month period. Most of these offhand and isolated comments were wholly unrelated to each other and had a tenuous connection to race, sex, religion or national origin. [The] comments were infrequent, were not severe, never physically threatened Al-Zubaidy, were more akin to mere offensive utterances, and did not interfere with Al-Zubaidy’s work performance.”).

With respect to the other bases for his hostile work environment claim – such as Allen’s threat to obtain ten complaints against Shukh, isolation, and failure to follow policies – Shukh has presented no evidence that would allow a reasonable jury to conclude that a causal connection existed between these incidents and his national origin. *See Palesch v. Mo. Comm’n on Human Rights*, 233 F.3d 560, 566 (8th Cir. 2000) (finding no hostile work environment where there was no evidence of a “causal nexus between the complained of harassment and the protected status of [plaintiff]”). Although “[a]ll instances of harassment need not be stamped with signs of overt discrimination to be relevant under Title VII” in order to be actionable they must be “part of a course of conduct which is tied to evidence of discriminatory

animus.” *Carter v. Chrysler Corp.*, 173 F.3d 693, 701 (8th Cir. 1999). Shukh has not presented evidence linking the complained of conduct to the isolated statements of Brown and Allen such that a jury could reasonably conclude all of the conduct was “part of the same pattern of harassment.” *See Diaz*, 318 F.3d at 800 (finding that a supervisor’s rude noises, laughter, and statements that plaintiff was stupid were sufficiently related to her Hispanic status because the supervisor had made earlier comments “in which she demeaned Hispanics and specifically referred to both Hispanics and [plaintiff] as ‘stupid’”). Therefore, those comments do not make Seagate’s otherwise neutral actions discriminatory.

The only record evidence possibly linking the incidents at Seagate to Shukh’s national origin in his own testimony that he believed his national origin was the reason for his alleged mistreatment at Seagate. (*See, e.g.*, Shukh Dep. 456:13-457:17 (testifying that he was discriminated against because he “was so different” and was not promoted to manager because of his “strong accent”); *id.* 617:10-20 (testifying the he believed that in his managers’ “mindset I am Soviet and in their mindset they [are] still at war with the Soviets. . . . It seems to me [the] obvious explanation of their absolutely irrational behavior.”); *id.* 666:3-14 (explaining his belief that he was discriminated against due to his national origin because “from the very beginning of my employment the whole picture of relation . . . how they treated me, my achievement and the history, how this kind of pressure intensified

while the time, when especially I started to complain, this is obvious to me. It's obvious this is retaliation, severe discrimination.”.) This is insufficient to satisfy the evidentiary showing required to survive summary judgment on a hostile work environment claim. *See Bradley v. Widnall*, 232 F.3d 626, 632 (8th Cir. 2000) (“Bradley has also been unable to provide any evidence, either directly or by inference, beyond her own speculation, that her alleged mistreatment was due to her protected status. To the contrary, close scrutiny of the record reveals that the majority of the problems encountered by Bradley stemmed from inter-office politics and personality conflicts rather than race based animus.”), *abrogated on other grounds by Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011). Because Shukh has failed to present sufficient evidence that any potentially discriminatory comments were severe or pervasive enough to create a hostile work environment and that other employment actions were causally connected to his national origin, the Court will grant Seagate’s motion for summary judgment with respect to his discriminatory hostile work environment claim.

B. Retaliation

In the absence of direct evidence, retaliation claims are analyzed under the *McDonnell Douglas* burden shifting framework. *See Guimaraes v. SuperValu, Inc.*, 674 F.3d 962, 978 (8th Cir. 2012); *Young-Losee v.*

Graphic Packaging Int'l, Inc., 631 F.3d 909, 912 (8th Cir. 2011).⁹ Under the *McDonnell Douglas* framework, a plaintiff must first establish a prima facie case of retaliation by showing that (1) he engaged in protected conduct, (2) he suffered a materially adverse employment action, and (3) the adverse action was causally linked to the protected conduct. *Guimaraes*, 674 F.3d at 978. After a plaintiff establishes a prima

⁹ Shukh's brief does not delineate between direct evidence and the evidence necessary to survive summary judgment under the *McDonnell Douglas* test, nor does it specify what test he intends to proceed under. Direct evidence of retaliation is evidence "showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action." *Torgerson*, 643 F.3d at 1044 (internal quotation marks omitted). "[D]irect' refers to the causal strength of the proof, not whether it is 'circumstantial' evidence." *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir.2004). "Direct evidence' does not include 'stray remarks in the workplace,' 'statements by nondecisionmakers,' or 'statements by decisionmakers unrelated to the decisional process itself.'" *Browning v. President Riverboat Casino-Missouri, Inc.*, 139 F.3d 631, 635 (8th Cir. 1998) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (O'Connor, J., concurring)). The Court has reviewed the record and found no evidence of retaliation that demonstrates a specific link between the alleged retaliation and any protected conduct that would meet the standard of direct evidence. *Bone v. G4s Youth Servs., LLC*, 686 F.3d 948, 953 (8th Cir. 2012) ("[Direct] evidence must be 'strong' and must 'clearly point[] to the presence of an illegal motive' for the adverse action." (alteration in original) (quoting *Griffith*, 387 F.3d at 736)); *Harnan v. Univ. of St. Thomas*, 776 F. Supp. 2d 938, 944 (D. Minn. 2011) (holding that vague comments subject to nondiscriminatory interpretations do not constitute direct evidence of discrimination).

facie case, the burden of production shifts to the employer “to produce a legitimate, non-retaliatory reason for the action it took against the plaintiff.” *Logan v. Liberty Healthcare Corp.*, 416 F.3d 877, 880 (8th Cir. 2005) (internal quotation marks omitted). If the employer identifies a legitimate, non-retaliatory reason for the action “the burden returns to the plaintiff who is then obliged to present evidence that (1) creates a question of fact as to whether defendant’s reason was pretextual and (2) creates a reasonable inference the defendant acted in retaliation.” *Stewart v. Indep. Sch. Dist. No. 196*, 481 F.3d 1034, 1043 (8th Cir. 2007) (alterations and internal quotation marks omitted). There must be a genuine issue of material fact at any step of the *McDonnell Douglas* analysis to defeat a defendant’s motion for summary judgment. See *Riley v. Lance, Inc.*, 518 F.3d 996, 1000 (8th Cir. 2008).

1. Protected Conduct

Seagate first argues that Shukh has not presented a prima facie case of retaliation because he did not engage in protected conduct. Specifically, Seagate argues that during his employment Shukh never complained that he was being discriminated against based on his Belarusian national origin. “A retaliation claim requires that the plaintiff have engaged in protected conduct, or, as the Civil Rights Act of 1964 states, ‘oppos[ing] any practice made an unlawful employment practice by this title.’” *Smith v. Int’l Paper Co.*, 523 F.3d 845, 848-49 (8th Cir. 2008) (alteration in

original) (quoting 42 U.S.C. § 2000e-3(a)). Discrimination on the basis of national origin is one such unlawful employment practice. *Id.* at 849. “[C]omplaints do not constitute protected activity for purposes of a retaliation (or reprisal) claim unless they implicate race or some other illegitimate criterion.” *Colenburg v. STARCON Int’l, Inc.*, 656 F. Supp. 2d 947, 957 (D. Minn. 2009); *see also Hunt v. Neb. Pub. Power Dist.*, 282 F.3d 1021, 1028-29 (8th Cir. 2002) (“While Hunt complained that she was entitled to a pay increase and a change in job title, she did not attribute NPPD’s failure to give her a raise or a promotion to sex discrimination. Thus, Hunt has not engaged in a protected activity for the purposes of Title VII. . . .”). Therefore “[m]erely 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.” *Tomanovich v. City of Indianapolis*, 457 F.3d 656, 663 (7th Cir. 2006).

Although Shukh’s brief raised a host of complaints that he made to Seagate, many of which are unrelated to his national origin, counsel clarified at oral argument that Shukh engaged in protected conduct (1) in responding to his performance evaluation for fiscal year 2006 when he stated “I found out long ago that there is a strong bias to me,” and “You can always give me an ‘E’ for not going to café during lunch time, for a strong Russian accent, etc.” (2) when he sent an email to Ryan in September 2006 in which he stated “I recognized long ago that [I] cannot be a

manager at Seagate, maybe since I am Russian,” and (3) when he sent the January 2007 letter to the human resources department in which he stated that his “human rights” were being violated, he was convinced that “there has been a persistent strong bias of . . . managers against me,” and that he was being subjected to unfair working conditions.

The **numerous** complaints identified in Shukh’s brief that he made to various supervisors at Seagate that were unrelated to his status as a Belarusian or referenced unfair treatment only generally do not constitute protected conduct. *See Miller v. Am. Family Mut. Ins. Co.*, 203 F.3d 997, 1008 (7th Cir. 2000) (finding no protected conduct where instead of alleging pregnancy discrimination plaintiff’s “complaints instead concerned a **general** displeasure with being paid less than her co-workers” (emphasis in original)). Similarly, the January 2007 letter to human resources fails to identify national origin as a basis for his complaint. Although the letter uses the terms “human rights,” “strong bias,” and “unfair,” these terms would not alert a reasonable person to the fact that Shukh was making complaints that he was being mistreated because of his Belarusian national origin. *See Smith*, 523 F.3d at 850 (explaining that an employee engages in protected conduct only if a reasonable person could believe that the complaints were protected under Title VII); *see also Tomanovich*, 457 F.3d at 664 (explaining that raising “issues of harassment” was insufficient to indicate that the alleged harassment was based upon his sex). With respect to

the 2006 evaluation and the September 2006 email to Ryan, however, the Court concludes that the complaints contained in these communications – albeit somewhat vague – were sufficient to put a reasonable person on notice that Shukh’s complaints were related to discrimination based on his national origin.¹⁰ Having determined that Shukh engaged in protected conduct, the Court will go on to consider whether each of Shukh’s retaliation claims involved an adverse employment action and whether any adverse employment actions were causally linked to the protected conduct in his 2006 evaluation and September 2006 email.

2. Hostile Work Environment

Shukh first argues that Seagate created a hostile work environment as retaliation for his complaints of discrimination. The Eighth Circuit has recognized that “retaliation claims under Title VII c[an] be based on a hostile work environment and need not be based solely on discrete adverse employment actions that affect the terms or conditions of employment.” *Stewart*,

¹⁰ Although the statement in Shukh’s 2006 evaluation was related specifically to his accent, not his national origin, this is likely sufficient to constitute protected conduct because “comments ridiculing an employee’s accent may be relevant evidence of national-origin animus.” *Guimaraes*, 674 F.3d at 974; see *Hossaini v. W. Mo. Med. Ctr.*, 97 F.3d 1085, 1086, 1089 (8th Cir. 1996) (finding that a reasonable jury could infer a discriminatory motive where, among other things, the defendant “ridiculed [plaintiff]’s accent” and “imitated it”).

481 F.3d at 1042 (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 66-67, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006)). In a prima face [sic] case for retaliation, proof of a hostile work environment satisfies plaintiff's burden of demonstrating that he suffered a materially adverse employment action. *Id.* at 1044-45.

Shukh appears to advance the same basis for his retaliatory hostile work environment claim as he did for his discriminatory hostile work environment claim. Specifically (1) the comment by Brown asking Shukh what he was doing here or doing in this country, (2) Allen's threat that he would get ten complaints against Shukh, (3) Seagate's failure to follow its policies in investigating a complaint of national origin discrimination, (4) failure to be named on patents, (5) physical isolation, (6) exclusion from meetings, (7) prohibition on communicating with colleagues, and possibly (8) comments made by Ryan that "nobody will listen to you."

The problem with the basis for Shukh's retaliatory hostile work environment claim is that he cannot establish that many of the adverse actions he relies on are causally linked to his protected conduct because they occurred prior to his protected conduct in raising complaints in his 2006 evaluation¹¹ and the

¹¹ The record reflects that the evaluations for a particular year were conducted in the summer and fall of the given year. Thus, Shukh's comments in his 2006 evaluation were likely made during that time period.

September 2006 email to Ryan. *See Stewart*, 481 F.3d at 1044 (“[A]lleged retaliation which precedes protected conduct cannot logically be used to show causation because a prior event cannot be caused by a later event.”). The comment by Brown took place in January 2006, prior to any protected conduct. Additionally, with respect to the failure to be named on patents, Shukh testified that Seagate stole his intellectual property “continuously from the very beginning of [his] employment through the end of [his] employment.” (Shukh Dep. 502:23-503:3.) Shukh also testified that projects he originated were given to other Seagate engineers to develop as early as 1998. As for exclusion from meetings and prohibition on communicating with colleagues, Shukh testified that his isolation from others at work began in February 1998. Shukh cited examples from 2002, 2004, and 2005, in which coworkers indicated that they would not work with Shukh and that he had stopped being invited to tech review sessions, writer team meetings, and roadmap development. Because this conduct occurred prior to Shukh’s protected conduct, it cannot form the basis of a retaliatory hostile work environment. *See Chivers v. Wal-Mart Stores, Inc.*, 641 F.3d 927, 933 (8th Cir. 2011) (finding that there was no causal connection between protected activity and adverse employment actions where the actions occurred “sometime before” plaintiff’s reports of discrimination).

Therefore, the only actions or incidents that could properly form the basis of a retaliatory hostile

work environment are Allen's threat that he would get ten complaints against Shukh, Seagate's failure to follow its policies in investigating a complaint of national origin discrimination, a threat of physical isolation,¹² and the comment made by Ryan that "nobody will listen to you." These incidents, even if causally related to Shukh's protected conduct, are not sufficient to meet the demanding standard of a hostile work environment. *See Devin v. Schwan's Home Serv., Inc.*, 491 F.3d 778, 788 (8th Cir. 2007) ("As for her claims she was denied a Route Builder, was unfairly disciplined, was paid less than male RMs, was not allowed to expense pay phone calls, and was required to make inventory changes on the computer, they, at best, amount to a frustrating work environment rather than an objectively hostile work environment."), *abrogated on other grounds by Torgerson*, 643 F.3d 1031 (8th Cir. 2011); *see also Bradley*, 232 F.3d at 631-32 (finding allegations that plaintiff's "supervisory duties were curtailed, that she was left out of the decision-making process, treated with disrespect, and subject to false complaints . . . may have resulted in a frustrating work situation [but were not] so severe or pervasive as to have affected a term, condition, or privilege of her employment"). Although Shukh argues that many of the alleged actions may

¹² The Court notes that although Allen communicated with Engelke that he may consider physically isolating Shukh, the record does not reflect that this physical isolation occurred. Instead, the isolation Shukh testified to was his inability to work with other engineers and his exclusion from important meetings.

have been taken against him due to cultural differences, and his direct style with coworkers, employers are allowed to require a certain level of conduct in the workplace, regardless of an employee's national origin. *See Rapold v. Baxter Int'l Inc.*, 718 F.3d 602, 613-14 (7th Cir. 2013). Because Shukh has failed to demonstrate a prima facie case with respect to his retaliatory hostile work environment claim, the Court will grant Seagate's motion for summary judgment with respect to this claim.

3. Failure to Promote

Shukh also alleges that his failure to be promoted to Grade 162 in 2008 was retaliation for engaging in protected conduct. It appears that the basis for this claim is the comment in Shukh's 2008 evaluation in which Allen states:

Overall, I am pleased with Alex's progress in FY08 – especially in the past four to six months; I would have rated Alex as a “4” performer over this time period and intend to reflect that in the KCPB cycle. However, I have not yet seen sufficient sustained contribution to promote Alex to Grade 162 as per his request – but I will go forward out of cycle if I see improved integration and commitment to the larger team's needs, and continue to see adequate teamwork.

(Benjes Decl., Ex. 5 at 46661.)

To establish a prima facie case, Shukh must present evidence of a causal connection between his protected conduct and the adverse employment action, showing that Seagate's "retaliatory motive played a part in the adverse employment action." *Hite v. Vermeer Mfg. Co.*, 446 F.3d 858, 865 (8th Cir. 2006) (internal quotation marks omitted). "Generally, more than a temporal connection between the protected conduct and the adverse employment action is required to present a genuine factual issue on retaliation." *Sisk v. Picture People, Inc.*, 669 F.3d 896, 900 (8th Cir. 2012) (internal quotation marks omitted). Where a plaintiff relies solely upon a temporal connection to show causation the protected conduct and the adverse employment action must occur close in time. *See Hesse v. Avis Rent A Car Sys., Inc.*, 394 F.3d 624, 633 (8th Cir. 2005); *see also Sisk*, 669 F.3d at 901 ("More than two months is too long to support a finding of causation without something more.").

Shukh has not identified evidence in the record establishing that Allen's decision not to promote him was due to retaliation in response to Shukh's complaints of discrimination in 2006. Accordingly, Shukh can only rely on temporal proximity to establish a causal connection between his protected activity and his failure to be promoted. But here the record reflects that Allen's evaluation denying Shukh's promotion was prepared in the summer of 2008 – almost two years after Shukh engaged in the protected conduct. *See Kipp v. Mo. Highway & Transp. Comm'n*, 280 F.3d 893, 897 (8th Cir. 2002) ("Here, the interval

of two months between the complaint and Ms. Kipp's termination so dilutes any inference of causation that we are constrained to hold as a matter of law that the temporal connection could not justify a finding in Ms. Kipp's favor on the matter of causal link."¹³

Furthermore, even if the protected activity and the 2008 promotion denial were closer in time "evidence that the employer had been concerned about a problem before the employee engaged in the protected activity undercuts the significance of temporal proximity." *Chivers*, 641 F.3d at 933 (alterations and internal quotation marks omitted). Here, the record reflects concerns with Shukh's team work dating back to evaluations completed in 1999. Therefore, Allen's reliance on documented issues with Shukh's team work in denying the promotion would serve to undercut the significance of any temporal proximity. Finally, Shukh **was** promoted to the position of principal engineer in September 2006 after the protected conduct at issue occurred. This promotion postdating Shukh's protected conduct suggests that Shukh's failure to be promoted in 2008 was not the result of a retaliatory motive. Because Shukh has not demonstrated

¹³ Even if the Court views additional incidents in the record, such as Shukh's forwarding of the September 2006 email to Engelke in January 2007 and his January 2008 complaint to Glembocki that he could not be manager because he is Soviet, as separate protected conduct, the timeline between the protected conduct and the failure to be promoted remains too broad to support an inference of causation between the protected conduct and the retaliation.

a causal connection between any protected conduct and his failure to be promoted in 2008, the Court will grant Seagate's motion for summary judgment with respect to that claim.

4. Termination

Shukh also claims that he was terminated in retaliation for engaging in protected conduct. Shukh was terminated in January 2009, which is even further in time from the protected conduct than his failure to be promoted. Accordingly, in the absence of other evidence demonstrating that Shukh's termination was related to his protected conduct, the Court similarly finds that Shukh has failed to demonstrate a causal connection between his protected activity and Seagate's termination decision. *See Recio v. Creighton Univ.*, 521 F.3d 934, 941 (8th Cir. 2008) (holding that six months was not close enough to raise inference of causation).

C. Discriminatory Termination

Finally, Shukh argues that Seagate terminated him because of his Belarusian national origin. As with Shukh's retaliation claims, the Court analyzes this claim under the *McDonnell Douglas* burden-shifting analysis because the record does not reveal any direct evidence of discriminatory termination. To establish a prima facie case of discrimination, Shukh must establish that (1) he is a member of a protected class, (2) he met Seagate's legitimate expectations,

(3) he suffered an adverse employment action, and (4) the circumstances give rise to an inference of discrimination. *Guimaraes*, 674 F.3d at 973-74. Here, Shukh's termination occurred as the result of an undisputed bona fide reduction in force. Once an employer has demonstrated that the employee was terminated based on a bona fide reduction in force, the plaintiff "then must show that the nondiscriminatory reason is a pretext for discrimination, and . . . that the protected criteria . . . was a factor in the adverse employment decision.'" *Hillins v. Mktg. Architects, Inc.*, 808 F. Supp. 2d 1145, 1152 (D. Minn. 2011) (quoting *Groves v. Cost Planning & Mgmt. Int'l, Inc.*, 372 F.3d 1008, 1009 (8th Cir. 2004)).

In the hundreds of pages of depositions and Shukh's recounting of eleven years of employment, he has identified only three statements – made by someone other than himself – that could possibly give rise to a suggestion of discriminatory animus on the basis of his national origin. These statements include (1) Brown's January 2006 statement, "What are you doing here in this country?" (2) Ryan's September 2006 statement, "Nobody will listen to you" and (3) Allen's statement, "every success in building a new political party in Belarus" made when walking Shukh out of Seagate's Bloomington office on his last day of employment. Even if these statements were sufficient to establish a prima facie case, the Court finds that Shukh has failed to demonstrate that his termination as part of a reduction in force was pretext for illegal discrimination.

A plaintiff may demonstrate a material issue of fact with respect to pretext by showing that an employer's explanation is unworthy of credence because it has no basis in fact or that a prohibited reason more likely motivated the employer. *See Torgerson*, 643 F.3d at 1047. "Either route amounts to showing that a prohibited reason, rather than the employer's stated reason, actually motivated the employer's action." *Id.* "[A]n employee's attempt to prove pretext requires more substantial evidence than it takes to make a prima facie case, because unlike evidence establishing a prima facie case, evidence of pretext is viewed in light of the employer's justification." *Logan*, 416 F.3d at 881 (alterations and internal quotation marks omitted). Although the evidentiary burden that a plaintiff must meet at the prima facie stage is minimal, "[w]here the evidence used to establish a prima facie case meets this minimal burden but is not strong, that evidence, standing alone, may be insufficient to sustain the plaintiff's case at the final stage of the burden-shifting analysis." *Stewart*, 481 F.3d at 1043.

Here Shukh argues that Seagate's stated reasons for termination are pretext because (1) Seagate shifted its explanation of the reasons for his termination and (2) the accusations that Shukh had numerous interpersonal conflicts with co-workers and management are false. Although evidence that an employer shifted its explanation can support a finding of pretext, *see Lake v. Yellow Transp., Inc.*, 596 F.3d 871,

875 (8th Cir. 2010), the Court finds that Shukh has failed to show that Seagate shifted its explanation.

Allen explained that Shukh's termination was part of the reduction in force. In determining what employees should be eliminated, Allen assigned points to employees in his department based on whether the employee's position could be eliminated, performance history, documented counseling for performance, misconduct or attendance issues, technical or specialized skills and length of service. Allen recommended that Shukh's position be eliminated because elimination of his managerial position would generate more money savings, and he had scored lower on the rubric than the other seven managers. Allen also determined that Shukh's primary skill in RSS modeling was already sufficiently available at Seagate, and therefore retention of employees with more development and product design engineering experience was preferred. This is identical to the explanation for termination given in Seagate's brief in support of the present motion. (Def.'s Mem. in Supp. of Mot. for Summ. J. at 12-13, Apr. 1, 2013, Docket No. 467.)

Shukh contends that Seagate shifted its explanation of the reason for his termination in its response to the EEOC when it stated that "Shukh's unsupported allegations are at direct odds with the facts surrounding his employment. After a history of combative and unproductive behavior in his working relationships, Shukh was selected for termination in connection with a Company-wide reduction in force conducted by Seagate." (Ninth Gekas Decl., Ex. 26.)

This document, however, does not contradict Allen's stated reasons for Shukh's termination. Although the document references the history of combative and unproductive behavior in his working relationships, it does not cite that history as the reason for Shukh's termination. Rather, consistent with Allen's testimony and the brief in support of this motion, the EEOC response indicates that "Shukh was selected for termination in connection with a Company-wide reduction in force conducted by Seagate." (*Id.*) Accordingly, the EEOC response does not provide evidence of pretext through a shifting explanation.

Shukh also contends that Seagate shifted its explanation in its brief in support of the present motion when it stated that the reason for Shukh's layoff was his "[i]nability to develop productive relationships with co-workers." (Def.'s Mem. in Supp. of Mot. for Summ. J. at 7, Apr. 1, 2013, Docket No. 467.) But Seagate's brief never states that this was the reason for Shukh's layoff. Instead, the brief merely indicates that "[t]he record is replete with examples of Shukh's inability to develop productive relationships with co-workers." (*Id.*) Given the host of adverse employment actions Shukh claimed he suffered in support of his discrimination and retaliation claims, the inclusion of Shukh's history with coworkers at Seagate was relevant to this motion independent of Shukh's termination claim. Therefore, Seagate's inclusion of this information in its brief cannot fairly be interpreted as an explanation of the reasons for Shukh's termination, particularly in light of the fact

that the brief specifically discusses the reason for Shukh's termination as arising out of the reduction in force. (*Id.* at 12-13.) Therefore, Seagate's brief does not provide evidence of pretext, because it does not demonstrate that Seagate has shifted its explanation for Shukh's termination.

Finally, Shukh contends that Seagate has shifted its explanation of the reasons for his termination because, in his deposition, Allen admitted that although the difficulties he had with Shukh were not the primary reason for his termination, they may have been part "of the secondary set of factors." (Allen Dep. 174:10-14.) This testimony does not establish a shifting explanation, as it does not contradict that the stated reasons for Shukh's termination in connection with the reduction in force were the primary factors for his termination. Even if this testimony provided evidence of a shifting explanation, it does not provide sufficient evidence of pretext to demonstrate a triable question of fact, because it does not show a genuine issue as to whether Allen acted "based on an intent to discriminate." *Gibson v. Am. Greetings Corp.*, 670 F.3d 844, 855 (8th Cir. 2012). "[I]n the context of the *McDonnell Douglas* analytical framework, a court's use of the words 'pretext,' 'pretextual' or similar terminology, often must be read as shorthand for indicating that a defendant's proffered discriminatory explanation for adverse employment action is a pretext **for unlawful discrimination**, not that it is merely false in some way." *Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011, 1017 (8th Cir. 2005)

(emphasis in original). Therefore, ultimately it is insufficient for Shukh to simply cast doubt on Seagate's true reason for termination because he has presented no evidence upon which a reasonable jury could find that he meets his "ultimate burden of proof and persuasion that [Seagate] discriminated against [him] based on [his] national origin." *Guimaraes*, 674 F.3d at 976 (internal quotation marks omitted).

At most, Allen's testimony shows that Shukh's history of conflicts with coworkers and managers was a secondary factor in his termination, but this is not a prohibited basis for termination. The record reflects that throughout his employment, managers and coworkers consistently found Shukh to be wanting in the areas of teamwork and interpersonal skills. Although Shukh has presented evidence that certain coworkers did not experience problems working with him, this testimony is irrelevant because "[t]he relevant inquiry is whether [Seagate] **believed** [Shukh] was guilty of the conduct justifying discharge." *Chivers*, 641 F.3d at 934 (emphasis in original) (internal quotation marks omitted). Here, Shukh has presented no evidence – and the record does not reflect – that a reasonable jury could conclude that Allen did not genuinely believe that Shukh had difficulty working with managers and coworkers. Accordingly, even if Allen relied on conflicts with Shukh as a secondary factor in his termination, this is insufficient to demonstrate pretext. *See Hervey v. Cnty. of Koochiching*, 527 F.3d 711, 725 (8th Cir. 2008) ("Hervey also disagrees with Mastin's assessment of

her insubordinate behavior and poor performance, but her evidence must do more than raise doubts about the wisdom and fairness of the supervisor's opinions and actions. It must create a real issue as to the genuineness of the supervisor's perceptions and belief."). Therefore, the Court finds that Shukh has failed to demonstrate a material issue of fact with respect to pretext, and will grant Seagate's motion for summary judgment with respect to his discriminatory termination claim.

Although the Court is not without empathy for what appears to have been a difficult decade of employment, it concludes, based upon a thorough review of the voluminous record, that Shukh has failed to articulate that the difficulties he experienced were due to his national origin. In other words, although a reasonable jury could determine that the relationship between Shukh and Seagate was rife with conflicts and that Seagate may have mistreated Shukh, it could not – based upon the evidence presented here – conclude that the conflicts and mistreatment were a result of Shukh's national origin and in violation of the law. Accordingly, summary judgment in Seagate's favor with respect to Shukh's discrimination and retaliation claims is appropriate.

ORDER

Based on the foregoing, and the records, files, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Defendants' Motion for Summary Judgment [Docket No. 465] is **GRANTED**. Counts nine, ten, eleven, and twelve of Plaintiff's Third Amended Complaint are **DISMISSED with prejudice**.

2. Defendants' Motion to Exclude the Expert Report and Opinions of Dr. Henry Lahmeyer [Docket No. 443] is **DENIED as moot**.

3. Defendants' Motion to Exclude the Expert Report and Opinions of Edward Grochowski, Ph.D. [Docket No. 448] is **DENIED as moot**.

4. Defendants' Motion to Exclude the Expert Report and Opinions of Howard B. Rockman [Docket No. 454] is **DENIED as moot**.

5. Plaintiff's Motion to Bar Expert Report and Testimony of Angela M. Heitzman [Docket No. 480] is **DENIED as moot**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: March 31, 2014 at Minneapolis, Minnesota.

/s/ John R. Tunheim

JOHN R. TUNHEIM

United States District Judge

Shukh v. Seagate Tech., LLC

United States District Court
for the District of Minnesota

March 25, 2013, Decided; March 25, 2013, Filed

Civil No. 10-404 (JRT/JJK)

Counsel: Constantine John Gekas, GEKAS LAW, LLP, Chicago, IL; and James H. Kaster, NICHOLS KASTER, PLLP, Minneapolis, MN, for Plaintiff.

Chad Drown, Calvin L. Litsey, Elizabeth Cowan Wright, and Jeya Paul, FAEGRE BAKER DANIELS LLP, Minneapolis, MN, for Defendants.

Judges: JOHN R. TUNHEIM, United States District Judge.

Opinion by: JOHN R. TUNHEIM

Opinion

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S [sic] MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S FRAUD CLAIM AND CORRECTION OF INVENTORSHIP CLAIM

Plaintiff Alexander M. Shukh filed this action against Defendants Seagate Technology, LLC, Seagate Technology, Inc., Seagate Technology, and Seagate Technology, PLC (collectively, "Seagate"), alleging numerous claims arising out of Seagate's employment and termination of Shukh. In particular, Shukh brought claims for correction of inventorship

and fraud¹ resulting from Seagate's filing of patent applications from which Shukh alleges he was wrongfully omitted as an inventor. Seagate now moves for summary judgment on Shukh's correction of inventorship and fraud claims. Because no issue of material fact remains, the Court will grant Seagate's motion for summary judgment.

BACKGROUND²

Shukh was employed by Seagate from September 1997 until he was terminated in early 2009. (Fourth Decl. of Elizabeth Cowan Wright, Ex. 1 (Dep. of

¹ The Court previously dismissed Shukh's claims for declaratory judgment regarding the enforceability of an arbitration agreement, rescission, breach of contract, breach of fiduciary duty, unjust enrichment, interference with business expectancy, and declaratory judgment regarding the confidentiality provisions of Shukh's employment contract. (*See* Order on Stipulation of Dismissal, Sept. 14, 2010, Docket No. 40); *Shukh v. Seagate Tech., LLC*, Civ. No. 10-404, 2011 U.S. Dist. LEXIS 33924, 2011 WL 1258510, at *17 (D. Minn. Mar. 30, 2011). Seagate has not moved for summary judgment on Shukh's claims for discrimination and retaliation under Title VII and the Minnesota Human Rights Act. (Third Am. Compl., 59-60, Jan. 17, 2012, Docket No. 268.).

² The Court recites the background only to the extent necessary to rule on the instant motion. A more complete recitation of the facts surrounding Shukh's termination and his employment at Seagate appear in the Court's previous orders. *See, e.g., Shukh v. Seagate Tech., LLC*, Civ. No. 10-404, 2011 U.S. Dist. LEXIS 137402, 2011 WL 6003951 (D. Minn. Nov. 30, 2011); *Shukh v. Seagate Tech., LLC*, Civ. No. 10-404, 2011 U.S. Dist. LEXIS 33924, 2011 WL 1258510 (D. Minn. Mar. 30, 2011).

Alexander Shukh (“Shukh Dep.”) 31:3-9), June 29, 2012, Docket No. 316.) Shukh held various positions at Seagate as an engineer involved in the development of magnetic recording heads for hard disk drives. (Shukh Dep. 492:14-493:2; Fourth Decl. of Constantine John Gekas, Exs. 12, 13 at 1, July 20, 2012, Docket No. 324.) Shukh’s correction of inventorship and fraud claims that are the subject of the present motion arise out of six issued Seagate patents and four Seagate patent applications on which Shukh alleges he was wrongfully omitted as an inventor. (Shukh Dep. 48:21-50:24; Third Am. Compl. ¶¶ 122, 196, Jan. 17, 2012, Docket No. 268.)

I. SEAGATE’S PATENT APPLICATION PROCESS

Shukh’s employment with Seagate was governed by an Employment Agreement. (Fourth Gekas Decl., Ex. 9.) Pursuant to this agreement, Shukh assigned to Seagate his

right, title, and interest in and to any and all inventions, original works of authorship, developments, concepts, improvements or trade secrets, whether or not patentable . . . which [Shukh] may solely or jointly conceive or develop or reduce to practice, or cause to be conceived or developed or reduced to practice, during the period of time [Shukh is] in the employ of the Company.

(*Id.*, Ex. 9 at 2.) This provision prohibited Seagate employees from filing patent applications for their own inventions. (*Id.*; *see also* Third Am. Compl.

¶ 107.) Instead, Seagate employees were required to disclose inventions to Seagate by submitting an Employee Invention Disclosure Form to Seagate's Intellectual Property ("IP") Department. (Fourth Gekas Decl., Ex. 10.) The IP Department would then forward the form "to the appropriate Patent Review Board which [would] determine whether the invention w[ould] be pursued as a patent application, protected as a trade secret, or otherwise." (*Id.*, Ex. 10 at 1.) If the Patent Review Board determined that an application would be pursued for patenting, Seagate attorneys, with the cooperation of the employee inventor or inventors, would draft and file the necessary patent application. (*Id.*, Ex. 10 at 1-2.) Once Seagate decided to file a patent application, every individual who qualified as an inventor under patent law was legally entitled to be named as an inventor on the application.³

II. THE DISPUTED PATENTS

Shukh alleges that Seagate wrongfully omitted Shukh as an inventor on six issued patents and four pending patent applications. With respect to some of the disputed patents, Seagate's IP Department informed Shukh that it had decided not to pursue his

³ See *Stark v. Advanced Magnetics, Inc.*, 119 F.3d 1551, 1553 (Fed. Cir. 1997) ("Title 35 requires that an applicant for a patent disclose the names of all inventors. The patent statute also authorizes correction of the inventors' names in applications and in patents." (citations omitted)).

inventions for patenting, but filed patent applications that allegedly contained Shukh's inventions and failed to name Shukh as an inventor. (Fourth Wright Decl., Ex. 4 at 16-17, 19, 23, 26.) For some of the disputed patents, Seagate's IP Department informed Shukh that although it had decided not to pursue his particular invention for patenting, Shukh's work would be incorporated with other inventions for which Seagate would pursue patenting. (*Id.*, Ex. 4 at 16-17; Shukh Dep. 719:5-8.) Seagate did not, however, list Shukh as an inventor in the final patent applications into which Seagate had represented it would incorporate Shukh's work. (Fourth Wright Decl., Ex. 4 at 16-17.) With respect to other disputed patents, Seagate did not communicate its intentions regarding Shukh's inventions, but filed patent applications that allegedly contained Shukh's inventions and failed to name Shukh as an inventor. (*Id.*, Ex. 4 at 20-21.) Seagate never told Shukh that it had filed applications for any of the disputed patents, or that it had omitted Shukh as a co-inventor on the applications. (*Id.*, Ex. 4 at 16-17, 20.) Seagate did, however, present Shukh with inventorship awards, apparently recognizing Shukh for his work on at least two of the disputed patents. (*Id.*, Ex. 4 at 17, 19; Ex. 5.)

In 2006, while searching the United States Patent and Trademark Office ("USPTO") website, Shukh discovered that he had not been named as an inventor on one of the disputed patents. (Shukh Dep. 61:6-7; Fourth Gekas Decl., Ex. 13 ¶ 16.) In July 2007, Shukh discovered the omission of his

inventorship on another of the disputed patents. (Fourth Gekas Decl., Ex. 13 ¶ 16.)

On August 30, 2007, Shukh sent an e-mail to Kenneth Massaroni, the Vice President of Seagate's IP Department, notifying Massaroni that Shukh believed he had been wrongfully omitted as an inventor on at least one of the disputed patents. (Shukh Dep. 255:18-24; Fourth Gekas Decl., Ex. 13 ¶ 18; Fourth Wright Decl., Ex. 4 at 8.) Shukh requested that Massaroni correct this omission. (Fourth Wright Decl., Ex. 4 at 18.) In March 2008, Massaroni allegedly responded to Shukh's requests by informing Shukh that the stated inventorship on the disputed patent was correct, because Shukh was not an inventor of the patented invention. (Shukh Dep. 255:18-24; Fourth Gekas Decl., Ex. 13 ¶ 22.) Seagate did not notify the USTPO [sic] of Shukh's complaints. (Exs. in Supp. of Pl's Surreply, Ex. C (Dep. of Kenneth M. Massaroni ("Massaroni Dep.") 59:25-60:4), Oct. 23, 2012, Docket No. 360.)⁴ After receiving Massaroni's response, Shukh searched the USTPO [sic] website for other patents embodying his inventions, and discovered the other disputed patents. (Fourth Gekas Decl., Ex. 13 ¶ 23.) With respect to all of the disputed

⁴ Shukh filed two sets of exhibits in support of his two surreply briefs, but labeled the exhibits consecutively as a single set. Therefore, where reference is made to "Exs. in Supp. of Pl's Surreply," exhibits A and B can be found at Docket Number 360, filed on October 23, 2012, and exhibits C through P can be found at Docket Number 383, filed on December 14, 2012.

patents, Shukh testified that upon discovering the patents he knew immediately that the stated inventorship was inaccurate and that Seagate should have listed him as a co-inventor. (Shukh Dep. 250-57.)

III. SHUKH'S FRAUD CLAIM

With respect to reliance, Shukh stated that he “truly relied” on the representations of Seagate’s IP Department. (*Id.* 924:18-22.) But Shukh was unable to testify to any actions he had taken in reliance on Seagate’s alleged misrepresentations, or anything he refrained from doing in reliance on Seagate’s statement that it would not be pursuing patent applications for Shukh’s inventions. (*Id.* 63:25-64:6; 925:17-25.)

Shukh also submitted expert testimony from Howard Rockman, an intellectual property attorney, in support of his fraud claim. (Exs. in Supp. of Pl’s Surreply, Ex. A.) For purposes of his opinion, Rockman assumed “that Seagate had knowledge that the documents filed with the USPTO that failed to name Dr. Shukh as an inventor were untrue, and that Seagate purposefully intended to deceive Dr. Shukh that his inventorship interests were being protected.” (*Id.*, Ex. A at 7.) Rockman then opined that “Dr. Shukh justifiably relied on the [IP] department of Seagate to protect his inventorship interests. . . . As a result of Seagate’s failure to protect, or even recognize Dr. Shukh’s inventorship rights, Dr. Shukh was injured as to his standing and reputation as an inventor in the technology community to which the

subject inventions pertain.” (*Id.*) Finally, Rockman concluded “it is my opinion that the inequitable conduct of Seagate before the United States Patent and Trademark Office has risen to the level of fraudulent conduct that has injured Dr. Shukh.” (*Id.*)

IV. SHUKH’S REPUTATION⁵

Shukh is recognized as one of the leading scientists in his field, and his reputation has been one of

⁵ As an initial matter, the parties dispute the types of damages that Shukh seeks in his correction of inventorship and fraud claims. Seagate asked Shukh in an interrogatory to “*Separately for each Claim for Relief* pled in the Amended Complaint (and any amendments thereto) describe fully and in complete detail all damages that you contend should be awarded to you for that Claim, including the types of damages you contend should be awarded for each Claim, the amount of damages you contend should be awarded for each specific type of damage listed, and the complete factual and legal basis for each specified claim of damages.” (Fourth Wright Decl., Ex. 6 at 3.) Shukh responded by incorporating his complaint and the damage computations of his **Rule 26(a)** disclosure by reference. (*Id.*, Ex. 6 at 4.) In the prayer for relief in his third amended complaint, Shukh seeks an order from the court to correct the inventorship of the disputed patents and “[j]udgment and an award of damages” on his fraud claim. (Third Am. Compl. at 61.) In his **Rule 26(a)** disclosures, which require “a computation of each category of damages claimed by the disclosing party,” **Fed. R. Civ. P. 26(a)(1)(A)(iii)**, Shukh asserted that he would seek “reputational damages” to be “computed on the basis of usual and reasonable royalty rates” for his correction of inventorship claim. (Fourth Wright Decl., Ex. 2 at 5.) In the following paragraph, with respect to “fraud and concealment” Shukh disclosed that “he expect[ed] to seek the same measure of damages.” (*Id.*, Ex. 2 at 6.).

an extremely successful innovator in the hard disk drives engineering community. (Fourth Wright Decl., Ex. 4 at 28.) Before joining Seagate, Shukh had over twenty-three years of experience in his field and was “recognized internationally as outstanding in the field of hard disk drive magnetic recording.” (Fourth Gekas Decl., Ex. 14.) In 1998, colleagues and peers described Shukh as “an excellent scientist,” “an innovative engineer,” “an outstanding researcher in th[e] field,” “a hard worker,” someone with “outstanding capabilities and knowledge of a critical high technology area,” and one of the “very few people in the world with a solid understanding of this important area.” (*Id.*, Ex. 14 at 3, 5-6; *see also id.*, Ex. 16.) Shukh is the author of numerous research papers, has been awarded twenty United States patents and fifteen patents of the former Soviet Union, and is currently listed on several pending patent applications. (*Id.*, Exs. 12, 13 ¶¶ 12-13.)

Federal Rule of Civil Procedure 37(c) provides that “[i]f a party fails to provide information . . . as required by **Rule 26(a)** or **(e)**, the party is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” Shukh did not supplement his **Rule 26(a)** disclosures or interrogatory answers to reveal damages he intends to seek other than those to his reputation. Therefore, to the extent Shukh’s submissions in opposition to summary judgment can be characterized as seeking damages other than reputation damages, the Court will not consider these damages. The only damages Shukh may seek with respect to his correction of inventorship and fraud claims are damages to Shukh’s reputation.

During his tenure at Seagate, Shukh was named as an inventor on seventeen Seagate patents, and several of his inventions have been incorporated into Seagate products. (Shukh Dep. 415:9-13; Fourth Gekas Decl., Ex. 13 ¶¶ 14-15.) Shukh has also received numerous awards, including awards from Seagate for outstanding achievement and innovation. (Fourth Gekas Decl., Ex. 12 at 2.) One of Shukh's managers, Kenneth Allen, testified that prior to 2005 he viewed Shukh "as an important contributor" to Seagate inventions, and a "[c]lever guy" with "[s]ome very good ideas." (Fourth Decl. of Jeya Paul, Ex. 4 (Dep. of Kenneth D. Allen ("Allen Dep.") 121:17-23), Dec. 21, 2012, Docket No. 386.) Allen also testified that even after the disputed patents became an issue between Shukh and Seagate, Allen viewed Shukh as having "excellent technical skills," and explained that Allen made a special effort to keep Shukh at Seagate because Allen had never "had another employee who generated the amount of trouble who also had enough skills to be worth saving." (*Id.* 162:6-19.)

Shukh's former co-workers testified that, even after Seagate terminated his employment, they held a high opinion of Shukh's reputation as a scientist in his field. (Fourth Paul Decl., Ex. 7 150:18-22, Ex. 8 189:25-190:2.) Two co-workers, who left Seagate to work for Hitachi prior to Shukh's termination, assisted Shukh in applying for various positions at Hitachi. (Fourth Paul Decl., Ex. 6 (Deposition of Vladyslav Vas'ko ("Vas'ko Dep.") 48:6-13); Ex. 7 28:15-20, 150:18-22.) Vladyslav Vas'ko testified that he was willing to

assist Shukh in finding employment because Shukh “is a very qualified engineer, and he is known as one of the best inventors in the hardware industry. And he contributed a lot to a successful hardware industry in general.” (*Id.* 55:16-24.) Vas’ko testified that other scientists in the field shared this view of Shukh’s reputation. (*Id.* 137:12-24.) Vas’ko further testified that as of January 2009, he believed Shukh was a “genius” and “prolific inventor” with “an outstanding ability when it came to technological skills.” (*Id.* 138:2-23.)

Shukh’s evidence regarding reputation focuses on three issues: (1) poor performance reviews and the perception at Seagate that Shukh inappropriately took credit for the work of others; (2) the inability to secure other employment after his termination; and (3) the importance to an inventor’s reputation of the number of patents to which he is attributed.

A. Performance Review

In an August 2007 performance review, evaluating Shukh’s performance for the previous year,⁶ Allen, noted that Shukh needed to improve his ability to “see[] this design review as part of the team effort

⁶ Allen completed his work on the performance review sometime in July 2007, and the review then would have been sent for approval to another level of management. The review was likely finalized in the first week of August 2007. (Allen Dep. 189:19-190:2.).

and . . . not overly stress that it is his work alone.” (Fourth Gekas Decl., Ex. 11 at 1-2.) Additionally Allen commented:

[Shukh’s] insistence on getting appropriate credit for all design ideas and implementations stifles open discussion and adoption of his ideas. Since this issue has become more important to [Shukh] as time goes on, and since he believes he has not been fairly recognized for his past contributions, it’s an emotional issue. Most unfortunately, it appears to others that Alex is more interested in being right and in getting credit than in ensuring that Seagate wins. [Shukh] will become more effective, and his contributions will increase significantly, if he can find ways to let others see that he truly is interested primarily in Seagate’s success, rather than in his own advancement or preventing theirs.

(*Id.*, Ex. 11 at 5.) Allen also gave Shukh unsatisfactory ratings in the “Respect for People” and “Teamwork” categories, explaining:

I do understand [Shukh]’s concerns about credit for past work. He has made a number of contributions over the years, and I have come to see over the past 6 months that he sometimes doesn’t receive proper credit for work he has done in the past. What Alex needs to understand is that much of this is self-inflicted. For example, Alex often insists that full design credit be give[n] to modeled optimization of head geometries – clearly, geometries are critical; however, they are not

high-level intellectual concepts and generally must be optimized experimentally. He has also repeatedly accused a number of different people of stealing his work – I have learned that several members of the design community now refuse to read his highlights or modeling work; they believe their only defense against accusations of plagiarism is to remain ignorant of his work. If Alex learns to collaborate more effectively, he will become more effective and get more credit for his work because he will be able to leverage the skills and efforts of many others, rather than work in isolation.

(*Id.*, Ex. 11 at 6.) Allen testified that these problems with Shukh's teamwork were prevalent in 2005, and that several of Shukh's previous managers had "a similar set of issues" as those described in Allen's 2007 evaluation. (Allen Dep. 118:16-25, 120:6-16, 121:4-6.) Other Seagate inventors perceived Shukh as quick to accuse others of stealing his inventions, and even refused to attend presentations by Shukh in order to "avoid future accusations of plagiarism." (Shukh Dep. 738:6-12.)

B. Post-Seagate Employment

Since his 2009 termination, Shukh has submitted 135 job applications, but has been unable to secure employment. (Fourth Wright Decl., Ex. 4 at 31, 37-57.) These applications resulted in only two interviews. (Shukh Dep. 570:20-571:4.) Shukh testified that the hiring manager at Hitachi, a company to

which Shukh applied, contacted a Seagate employee to discuss rumors the hiring manager had heard about Shukh. (*Id.* 534:9-21.) Shukh attributes these rumors to a statement made by Massaroni prior to Shukh's termination, wherein Massaroni instructed Shukh to stop talking about his designs, stating "[t]his is your last chance to work at [Seagate], otherwise you will not find a job anywhere." (*Id.* 543:22-544:2.) Additionally, during Shukh's interview at Hitachi, a Hitachi engineer allegedly told Shukh that "[w]ith your reputation you will not find employment here." (*Id.* 541:23-542:11.)

C. Number of Patents as Evidence of Reputation

The record also contains evidence that, as a general matter, inventorship on a greater number of patents typically improves an inventor's reputation in his or her field. In statements and recommendations accompanying Shukh's green card application, Seagate and Shukh's scientific peers often referenced Shukh's "numerous publications and patents" as one basis for their conclusion that he was internationally recognized as an outstanding scientist. (Fourth Gekas Decl. Exs. 14-16.) However, Shukh's former co-workers also testified that whether Shukh had "15" "25 or 30" patents would not affect their opinion of Shukh, and they would not think either more or less highly of him regardless of the number of patents on which he was listed as an inventor. (Vas'ko Dep. 139:17-140:11; Fourth Paul Decl., Ex. 8 189: 15-21, Ex. 9 195:1-4.)

Additionally, in the August 2007 performance review, Allen suggested that the number of patents associated with an inventor is an element of job performance, stating “I am concerned that the number of patent applications has been reduced over the last two years. . . . I’d like to see [Shukh] increase his patent portfolio.” (Fourth Gekas Decl., Ex. 11 at 5.) Despite this comment, Allen gave Shukh an Outstanding rating, the highest rating for innovation, a category that evaluates an employee’s ability to “seek new ideas . . . welcome change for the opportunities it brings us.” (*Id.*) Allen later told Shukh “I’m concerned about the decrease in your patent submissions over the past few years.” (Exs. in Supp. of Pl’s Surreply, Ex. P at SEA0145382.) Allen testified that his concern about the number of patent applications expressed in both the August 2007 performance review and the follow-up communication was based on the number of inventions Shukh disclosed to Seagate, not the number of Shukh’s inventions which were ultimately incorporated into Seagate patent applications. (Allen Dep. 190:5-19, 193:1-25.) Allen further testified that an increase in the number of patent applications submitted by Shukh may have had a positive effect on Shukh’s performance at Seagate. (*Id.* 196:3-19.)

Additionally, Shukh submitted two export [sic] reports related to reputation. Based on his interactions with inventors during his career as a patent attorney, Rockman stated that “inventors take great pride in their inventorship abilities and accomplishments.”

(Exs. in Supp. of Pl's Surreply, Ex. A at 7.) Rockman further stated that:

It is also my understanding that contributions as named inventors on patents [are] considered positively when a technology professional is being considered for a promotion. . . . [B]eing a named inventor on a patent provides the technology professional with the understanding that the patent symbolizes their inventive achievement, and that their standing and reputation in the related technology community has been enhanced, including among their employers or potential employers, their professional peers in the technology community, and members of their professional societies and organizations. Therefore, it is my conclusion that being named as an inventor in a patent directed to an invention to which they contributed is very important to an inventor.

(*Id.*, Ex. A at 7-8.) With respect to Shukh specifically, Rockman stated “[a]s a result of Seagate’s failure to protect, or even recognize Dr. Shukh’s inventorship rights, Dr. Shukh was injured as to his standing and reputation as an inventor in the technology community to which the subject inventions pertain.” (*Id.*, Ex. A at 7.) Similarly, John Benson, an immigration attorney, indicated that the United States Citizenship and Immigration Services considers the number of patents bearing the inventor’s name when determining whether an inventor can be classified as an

“outstanding professor or researcher” for purposes of obtaining a green card. (*Id.*, Ex. B at 5.)

D. Shukh’s Deposition Testimony

Finally, Shukh testified at his deposition that his reputation was not harmed. First, Shukh testified that reputation “means how well you’re accepted in the scientific society you belong to as a specialist.” (Shukh Dep. 241:11-13.) Then Shukh identified the numerous personal qualities which he believed formed his reputation as a scientist. These qualities include honesty, good organization, openness and straightforwardness, communications, good technical abilities, innovation, and extreme competitiveness. (*Id.* 244-48.) Shukh agreed that as of 2002 he had a reputation for all of those qualities. (*Id.* 247:1-8.) Seagate’s counsel then asked “[s]o . . . your reputation for each of those personal qualities of honesty, good organization, openness, straightforwardness and communications, good technical abilities, innovation and extreme competitiveness, did not change from 2002 until today?” to which Shukh responded, “[i]t seems to me it didn’t change since 1997 when I joined Seagate up to now.” (*Id.* 249:23-250:6.)

V. PROCEDURAL HISTORY

The Court has previously considered Shukh’s correction of inventorship and fraud claims in the context of arguments almost identical to those made by Seagate in the instant motion. In 2010, Seagate

brought a motion to dismiss Shukh's correction of inventorship and fraud claims, and Shukh also sought partial summary judgment on his claim for correction of inventorship. (Am. Mot. to Dismiss, May 18, 2010, Docket No. 14; Mot. for Partial Summ. J., Sept. 27, 2010, Docket No. 57.) On March 30, 2011, the Court issued an order that, among other things, denied Seagate's motion to dismiss Shukh's correction of inventorship and fraud claims and denied Shukh's motion for partial summary judgment. *Shukh v. Seagate Tech., LLC*, Civ. No. 10-404, 2011 U.S. Dist. LEXIS 33924, 2011 WL 1258510, at *17 (D. Minn. Mar. 30, 2011).

As to the correction of inventorship claim, Seagate argued that Shukh did not have standing to bring a correction of inventorship claim under 35 U.S.C. § 256 because Shukh had no ownership, financial, or reputational interest in the disputed patents. The Court denied Seagate's motion to dismiss, concluding that Shukh had alleged standing sufficient to survive a motion to dismiss. *Shukh*, 2011 U.S. Dist. LEXIS 33924, 2011 WL 1258510, at *8. The Court first determined that pursuant to the employment agreement between Seagate and Shukh, Seagate "is the sole owner" of the patents at issue. 2011 U.S. Dist. LEXIS 33924, [WL] at *6. Therefore the Court concluded that "Shukh cannot derive standing from ownership of the patents." *Id.* Additionally the Court found that "the facts in a light most favorable to Shukh provide no possibility that he could have a financial interest in any of the patents at issue."

2011 U.S. Dist. LEXIS 33924, [WL] at *7. However, the Court went on to consider whether a reputational interest alone is sufficient to confer standing, and reasoned that being

designated as an inventor of a patent that is widely known in an industry is an important mark of success, and in the Court's view [the Federal Circuit] is correct that pecuniary and reputational consequences could easily flow from being named or omitted as an inventor. Further, Shukh alleges that he has had difficulty finding new employment, and while he attributes some of this to "black-listing" and rumors instigated by Seagate, it is also logical that omission from important patents could affect his ability to get a new job.

Id. Thus, the Court found that Shukh's complaint sufficiently alleged "standing to challenge inventorship under [the Patent Act] due to potential harm to his reputational interests," and consequently denied Seagate's motion to dismiss Shukh's correction of inventorship claim. 2011 U.S. Dist. LEXIS 33924, [WL] at *8.⁷

⁷ The Court also denied Shukh's motion for summary judgment on his correction of inventorship claim, finding that although Shukh "has alleged sufficient facts to overcome a motion to dismiss, he has fallen well short of the standard required to be granted summary judgment on the issue of inventorship." *Shukh*, 2011 U.S. Dist. LEXIS 33924, 2011 WL 1258510, at *8.

With respect to Shukh's fraud claim, Seagate argued in its motion to dismiss that Shukh had failed to plead reliance and damages, and had otherwise failed to plead any misrepresentation with particularity. After reviewing the complaint in the light most favorable to Shukh, the Court concluded that Shukh had properly pleaded a material misrepresentation, explaining that

the complaint may allege that it was a material misrepresentation for Seagate to file various patent applications omitting Shukh as an inventor. It additionally could be a material misrepresentation because according to the complaint and various e-mails, Shukh was informed that his inventions . . . were to be incorporated into [another invention], but he was not listed as an inventor on the final patent application. . . .

2011 U.S. Dist. LEXIS 33924, [WL] at *10. With respect to reliance, the Court held that "it can be inferred from the complaint that Shukh relied on Seagate's 'representations' to protect his inventorship rights, that is, the actions of its IP department in receiving and applying for patents, and that he was damaged by doing so." 2011 U.S. Dist. LEXIS 33924, [WL] at *10. Finally the Court found that "[a]lthough Shukh has not alleged specific damages except as to his reputation," these alleged reputational damages were sufficient to overcome a motion to dismiss. *Id.*

The case is now before the Court on Seagate's motion for summary judgment on Shukh's correction of inventorship and fraud claims.⁸

⁸ In his initial response brief to Seagate's motion for summary judgment, Shukh argued that summary judgment was premature, because he had not had a fair and adequate opportunity to complete discovery. (Pl's Opp. to Mot. for Summ. J. at 3-8, July 20, 2012, Docket No. 323.) Seagate filed its motion for summary judgment on June 29, 2012, approximately five months before the December 1, 2012 deadline for fact discovery in the case to be completed. (See Mot. for Summ. J., June 29, 2012, Docket No. 313; Am. Pretrial Scheduling Order, May 2, 2012, Docket No. 309.) Under ***Federal Rule of Civil Procedure 56(d)*** "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." The affidavit or declaration must "show[] what specific facts further discovery might uncover." *Roark v. City of Hazen, Ark.*, 189 F.3d 758, 762 (8th Cir. 1999). Pursuant to ***Rule 56(d)***, Shukh submitted a declaration identifying co-inventors, Seagate IP Department personnel, and experts whom Shukh would need to depose in order to raise genuine issues of material fact with respect to his claims. (Fourth Gekas Decl., Ex. 5.).

Fact discovery has now closed, and the Court has twice permitted Shukh to file surreply briefs supplementing the record with expert reports and deposition testimony. (Pl's Surreply, Oct. 23, 2012, Docket No. 359; Pl's Second Surreply, Dec. 14, 2012, Docket No. 382.) The Court therefore finds that, even if the summary judgment motion may initially have been premature, a continuance is no longer warranted. At this time, Shukh has had adequate time for discovery, and has had the opportunity to present that evidence in support of his claims. See *Ray v. Am. Airlines, Inc.*, 609 F.3d 917, 923 (8th Cir. 2010) ("[S]ummary judgment is proper only after the nonmovant has had adequate time for discovery" (internal quotation marks

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ANALYSIS

I. STANDARD OF REVIEW

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party can demonstrate that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A fact is material if it might affect the outcome of the suit, and a dispute is genuine if the evidence is such that it could lead a reasonable jury to return a verdict for either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A court considering a motion for summary judgment must view the facts in the light most favorable to the non-moving party and give that party the benefit of all reasonable inferences to be drawn from those facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Summary judgment is appropriate if the nonmoving party “fails to make a showing sufficient to establish the existence of an element essential to

omitted)). Additionally, the majority of the discovery identified in Shukh’s initial **Rule 56(d)** declaration has now been completed. (See Pl.’s Second Surreply at 1-2 (“Plaintiff argued that he intended to depose several witnesses on essential facts likely relevant to the summary judgment motion. . . . Plaintiff has so done[.]”).) The Court finds that, in the absence of the discovery already completed, the original declaration no longer shows specific facts which further discovery might uncover, and is consequently insufficient to satisfy the standard for a continuance under **Rule 56(d)**. See *Roark*, 189 F.3d at 762. Therefore, the Court finds that it is proper to consider the summary judgment motion based on the evidence currently in the record.

that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "To defeat a motion for summary judgment, a party may not rest upon allegations, but must produce probative evidence sufficient to demonstrate a genuine issue [of material fact] for trial." *Davenport v. Univ. of Ark. Bd. of Trs.*, 553 F.3d 1110, 1113 (8th Cir. 2009) (citing *Anderson*, 477 U.S. at 247-49).

II. COUNT TWO: CORRECTION OF INVENTORSHIP

Seagate seeks summary judgment on Shukh's correction of inventorship claim, contending that Shukh has no standing, having failed to demonstrate harm to his reputational interests. The Court must determine whether Shukh has presented evidence of damage to his reputation sufficient to confer standing to pursue his correction of inventorship claim.

A. Standing Based on Reputational Damage

"Once a patent issues . . . 35 U.S.C. § 256 provides a private right of action to challenge inventorship." *HIF Bio, Inc. v. Yung Shin Pharm. Indus. Co.*, 600 F.3d 1347, 1354 (Fed. Cir. 2010). To establish standing to sue under Section 256, a plaintiff must demonstrate (1) an actual or imminent, concrete injury in fact; (2) a causal relationship between the injury and the conduct complained of; and (3) that the injury is capable of being redressed

by a decision of the court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); *see also Chou v. Univ. of Chicago*, 254 F.3d 1347, 1357 (Fed. Cir. 2001) (applying the *Lujan* factors to determine whether a plaintiff had standing to sue under Section 256).

Standing under Section 256 is typically established when a plaintiff has either an expectation of ownership of a patent or a concrete financial interest in the patent. *See Chou*, 254 F.3d at 1358-59. As described above, however, the Court previously determined that, pursuant to his employment agreement, Shukh has no ownership or financial interest in the disputed patents. *Shukh*, 2011 U.S. Dist. LEXIS 33924, 2011 WL 1258510, at *8. Therefore Shukh's standing to sue for correction of inventorship can only derive from his reputational interests in the disputed patents. *Id.*⁹

⁹ The Court previously determined that Shukh's complaint alleged **potential** harm to his reputational interests sufficient to survive Seagate's motion to dismiss for lack of standing. *Shukh*, 2011 U.S. Dist. LEXIS 33924, 2011 WL 1258510, at *8. Because the Court was determining Shukh's standing in the context of a motion to dismiss, "general factual allegations of [reputational] injury" were sufficient to establish Shukh's standing at that stage of the litigation. *See City of Clarkson Valley v. Mineta*, 495 F.3d 567, 569 (8th Cir. 2007) (quoting *Lujan*, 504 U.S. at 561). But "the manner and degree of evidence required" to establish standing changes when the Court considers a motion for summary judgment. *Lujan*, 504 U.S. at 561. "In response to a motion for summary judgment, 'the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other

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Reputational harm may be sufficient to confer standing under Section 256, and flows from the underlying premise that “being considered an inventor of

evidence[,] specific facts, which for purposes of the summary judgment motion will be taken as true.” *City of Clarkson Valley*, 495 F.3d at 569 (quoting *Lujan*, 504 U.S. at 561); see also *Kilper v. City of Arnold, Mo.*, No. 4:08cv0267, 2009 U.S. Dist. LEXIS 63471, 2009 WL 2208404, at *9 (E.D. Mo. July 23, 2009) (considering standing on a motion for summary judgment and requiring “a factual showing of perceptible harm” (quoting *Eckles v. City of Corydon*, 341 F.3d 762, 767 (8th Cir. 2003))).

“[S]tanding is a jurisdictional prerequisite that must be resolved before reaching the merits of a suit.” *City of Clarkson Valley*, 495 F.3d at 569. As such, the Court can consider standing and dismiss a claim at any point in the proceedings when it becomes apparent that a plaintiff lacks standing to bring the claim. See *South Dakota v. U.S. Dep’t of Interior*, 665 F.3d 986, 989-91 (8th Cir. 2012); see also *Ark. ACORN Fair Hous., Inc. v. Greyston Dev. Ltd.*, 160 F.3d 433, 434 (8th Cir. 1998) (considering a question of standing on summary judgment). Because standing is a jurisdictional question for the Court, not a jury, the Court must resolve any issues of fact necessary to make a standing determination. See *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 485 U.S. 59, 72, 98 S. Ct. 2620, 57 L. Ed. 2d 595 (1978); see also *United States v. 1998 BMW “I” Convertible*, 235 F.3d 397, 399-400 (8th Cir. 2000). “When standing is challenged on summary judgment, ‘[t]he court shall [not] grant summary judgment if the movant shows that there is [a] genuine dispute as to any material fact. . . .’ Therefore, if there is a genuine issue of material fact, then summary judgment is inappropriate without the district court resolving the factual dispute.” *In re ATM Fees Antitrust Litig.*, 686 F.3d 741, 747 (9th Cir. 2012) (quoting **Fed. R. Civ. P. 56(a)**). Because the Court ultimately concludes that no genuine issue of material fact remains with respect to Shukh’s reputational damage, this case does not require the Court to resolve any factual disputes in order to determine that Shukh lacks standing.

important subject matter is a mark of success in one's field." *Chou*, 254 F.3d at 1359. Therefore, reputational harm may give a plaintiff standing to challenge the omission of inventorship where, for example, the failure to be named as an inventor caused the plaintiff to lose "standing within the scientific community," be denied "the reputational benefits associated with being named as an inventor," and to suffer "a loss of prestige within the scientific community resulting from his inventions being recognized as another's." *Czarnik v. Illumina, Inc.*, 437 F. Supp. 2d 252, 256 (D. Del. 2006) (internal quotation marks omitted).

It is not enough, however, for a plaintiff to allege a reputational interest in a patent generally, rather, the plaintiff must point to specific facts which demonstrate reputational damage. *See Cole v. Gummow*, No. 3-02-CV-0705, 2003 U.S. Dist. LEXIS 18925, 2003 WL 22455387, at * 3 (N.D. Tex. Oct. 22, 2003) (granting defendant's motion to dismiss a correction of inventorship claim where the only evidence of plaintiff's reputational interest was "his bald assertion that 'I have a reputational interest as inventor of the [patents]'""). These specific facts will often take the form of evidence demonstrating "[p]ecuniary consequences" flowing from the reputational damage that resulted from the failure to be named as an inventor. *See Chou*, 254 F.3d at 1359 (concluding that it "is not implausible" that reputational interest may confer standing under Section 256 because "[p]ecuniary consequences may well flow from being designated as an inventor"). For example, showing

that reputational damage has caused the plaintiff to lose employment opportunities may be enough to confer standing. *See Czarnik*, 437 F. Supp. 2d at 256 (denying a motion to dismiss where “[p]laintiff has alleged that he has suffered harm to his reputation and standing in the scientific community. As a result, Plaintiff alleges that he has been unable to secure a position at a start-up company and earn a salary comparable to his [previous] salary. . . .”).¹⁰

Any pecuniary consequences stemming from reputational damage must be redressable by the court in order to satisfy the requirements of standing. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 107, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (“Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.”). In an action to correct inventorship the court is only empowered to order correction of the patent to reflect the plaintiff’s inventorship and cannot alter contractual agreements regarding ownership of the patent. *See* 35 U.S.C. § 256(b). Therefore, where a plaintiff can only rely on reputational interests to form the basis of standing under Section 256 – because he has no ownership or pecuniary interest in the disputed

¹⁰ *See also Hoang v. Abbott Labs.*, No. 08 C 189, 2009 U.S. Dist. LEXIS 49468, 2009 WL 1657437, at *3 (N.D. Ill. June 12, 2009) (explaining that to show reputational standing, a plaintiff would have to at least allege “that she lost employment opportunities due to her omission from the three patents”).

patent – any pecuniary consequences alleged by a plaintiff to have flowed from his damaged reputation cannot be tied to a financial or ownership interest in the patent itself, as the court is powerless to address such consequences. *See Larson v. Correct Craft, Inc.*, 569 F.3d 1319, 1327-28 (Fed. Cir. 2009) (distinguishing between “a purely reputational interest” and financial harms associated with a plaintiff’s ownership of an inventor such as “the right to license or assign his interest, the right to manufacture, use, and sell the subject matter of the patents to his inventions”).

B. Undisputed Testimony

The Court finds that Shukh has 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 for the disputed patents. The record is replete with undisputed evidence that prior to beginning his employment with Seagate, Shukh was internationally recognized as a leading scientist in his field, with a reputation as an extremely successful inventor, named on at least 35 patents. Shukh has not presented evidence that the failure to be named on the six disputed patents¹¹ damaged his undisputed reputation

¹¹ In determining whether Shukh has presented evidence of reputational damage sufficient to confer standing, the Court considers only the allegations regarding the six disputed patents, and not the allegations regarding the four disputed patent

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as a leading scientist in his field. Indeed, Shukh's own deposition testimony reflects the opposite proposition – that his reputation as a leading scientist in his field and an extremely successful inventor was not damaged as a result of Seagate's omission of Shukh as an inventor on six patents. Shukh stated repeatedly in his deposition that his reputation for "honesty, good organization, openness and straightforwardness and communications, good technical abilities, innovation and extreme competitiveness did not change from 2002 until [2012]." (Shukh Dep. 244-50.)¹² Inventorship may have reputational

applications. Unlike Section 256, which expressly authorizes district courts to make changes to inventorship on issued patents, 35 U.S.C. § 116, which governs patent applications, vests authority to make changes to pending applications solely in the Direction of the Patent and Trademark Office. *HIF Bio, Inc. v. Yung Shin Pharms. Indus. Co.*, 600 F.3d 1347, 1353 (Fed. Cir. 2010). Therefore, Section 116 "does not provide a private right of action to challenge inventorship of a pending patent application." *Id.* at 1354. The Court would, however, reach the same conclusion on standing even if it considered the patent applications.

¹² Shukh does not contend that his deposition testimony was incorrect, but instead argues that the deposition testimony is irrelevant, as it pertains to "personality traits, [which] although desirable, are not at issue." (Pl.'s Memo. in Opp. to Summ. J. at 36, July 20, 2012, Docket No. 323.) Shukh's argument is belied by his own testimony stating that the personality traits of honesty, good organization, openness, straightforwardness and communications, good technical abilities, innovation, and extreme competitiveness are the very traits he considers to comprise a scientist's reputation, or a measure of "how well you're accepted in the scientific society you belong to as a specialist." (Shukh Dep. 241:11-13.) If an inventor's reputation is

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consequences precisely because being recognized as an inventor on a particular patent may provide the inventor with a reputation for the good communication, organizational skills, innovation, excellent technical skills, and competitive drive that resulted in the patent. Shukh's testimony establishes that his own reputation for possessing the traits associated with inventorship of a patent that make inventorship a mark of success in a particular field remained unchanged during his tenure with Seagate. Therefore, the omission of Shukh's name on the six disputed patents could not have damaged his reputation.

The only other evidence in the record directly bearing upon Shukh's reputation as an inventor confirms Shukh's deposition testimony that his reputation as an internationally renowned inventor in his field did not change after he was not named as an inventor on the six disputed patents. During his tenure at Seagate, Shukh received numerous awards for outstanding innovation. Shukh's manager, Allen, also regarded Shukh as "an important contributor" to Seagate inventions and having "excellent technical skills," both before and after the six disputed patents were issued. Multiple former co-workers testified that they consider Shukh to be a very qualified engineer,

damaged by his omission as an inventor on a patent, it seems that such damage would necessarily be to the inventor's reputation for traits directly associated with inventorship, such as, "good technical abilities," "innovation," and "extreme competitiveness."

and one of the best inventors in his field. These co-workers testified that their opinion of Shukh did not change after Seagate terminated Shukh. Indeed two of these co-workers helped Shukh apply for jobs at their company, specifically because they consider him to be a prolific inventor with outstanding technical skills. Additionally, Vas'ko testified that his high opinion of Shukh was shared by other non-Seagate scientists in Shukh's field. The deposition testimony of Shukh, his manager, and his coworkers establishes that Shukh did not lose standing or prestige in his field and did not suffer a loss of reputational benefits associated with inventorship when Seagate omitted Shukh as an inventor on the six disputed patents. Instead, Shukh retained his reputation as a leading inventor in his field with excellent technical skills throughout his employment with Seagate. In light of the deposition testimony of Shukh and his co-workers, none of the other evidence presented by Shukh regarding his performance reviews, his employment prospects after leaving Seagate, or the number of patents attributable to Shukh creates a genuine issue of material fact regarding damage to Shukh's reputation.

C. Shukh's Other Reputational Evidence

1. Performance Review

Shukh relies upon the August 2007 performance review to support his argument that he suffered reputational damage. Specifically, Shukh argues that

he developed a negative reputation for taking credit for work that was not his own, and that this reputation would not have developed had Shukh's work on the six disputed patents been properly attributed to him. In the August 2007 performance review, Allen indicated that Shukh demonstrated unsatisfactory teamwork skills because he "repeatedly accused" other Seagate employees of "stealing his work." Allen also expressed concern regarding Shukh's "insistence on getting appropriate credit for all design ideas." The performance review does not establish an issue of material fact with respect to damage to Shukh's reputation, because the reputational harm on which Shukh focuses is not the type of reputational harm needed to confer standing to pursue a correction of inventorship claim.

Reputational interest in a patent is based on the understanding that "being considered an inventor of important subject matter is a mark of success in one's field, comparable to being an author of an important scientific paper." *Chou*, 254 F.3d at 1359. Therefore, failure to be named on an important patent could negatively affect a scientist's reputation, as the inventor in question could be considered less innovative, creative, and technically skilled in the absence of inventorship on the patent in question. Subsequent correction of inventorship could redress the reputational damage, as the inventor would be considered more innovative, creative, and technically skilled as a result of being named on the patent.

Shukh is instead describing a reputation for being antagonistic toward his employer and coworkers regarding ownership of patents. Although this reputation may be tangentially related to being named as an inventor on the six disputed patents, the relationship is too attenuated to confer standing because an order from the Court correcting inventorship on the patents would not rehabilitate the reputation Shukh has obtained. In other words, even if the Court corrected inventorship on the six disputed patents, this action would not change Shukh's reputation for "insist[ing] on getting appropriate credit for all design ideas," appearing "more interested in being right and in getting credit than in ensuring that [his employer] wins," and "repeatedly accus[ing]" others of "stealing his work."¹³ Because this reputational harm cannot be redressed in an action for correction of inventorship, it cannot confer standing upon Shukh. *See Chou*, 254 F.3d at 1359 (determining that plaintiff had standing under Section 256 because the loss of royalty benefits suffered

¹³ Shukh has never alleged that the named inventors on the six disputed patents are not actually inventors of the patents in question. Rather, Shukh alleges that he should be added as a co-inventor on these patents. Therefore, correcting inventorship on the six disputed patents would not seem to dispel Shukh's reputation for accusing others of stealing his work in a manner that disrupts effective collaboration.

by plaintiff could be redressed by naming her as an inventor on the disputed patent).¹⁴

Additionally, even if the type of reputational harm claimed by Shukh was sufficient to establish standing, the timing of the August 2007 performance review indicates that Shukh had the reputation described in the review before Shukh ever alerted Seagate to his concerns about the six disputed patents. Allen's undisputed testimony indicates that

¹⁴ Shukh also makes a generic allegation that he was passed over for promotions, denied salary raises, bonuses, additional stock options, and inventor awards by Seagate because he was not listed as an inventor on the six disputed patents and because he developed a reputation for antagonism regarding ownership of patents. The Court finds that these allegations do not raise a genuine issue of material fact with respect to Shukh's reputation for several reasons. First, most of these allegations – such as the denial of promotions, salary raises, and stock options – are entirely speculative, and Shukh has not identified any particular benefits that he was denied or presented any evidence that denial of those benefits was linked in any way to his omission as an inventor on the six disputed patents. Second, with respect to some of the allegations – such as bonuses and awards associated with particular inventions – Shukh's argument is belied by the fact that he actually did receive inventor awards and bonuses for some of the disputed patents. Third, Shukh attributes all of the alleged negative financial consequences to his reputation for taking credit for the work of others. As explained above, this aspect of Shukh's reputation is irrelevant to standing to pursue correction of inventorship, and, in any case, was well-developed before any conflict over the disputed patents surfaced between Seagate and Shukh. Finally, Shukh has not presented any evidence that receiving or failing to receive inventorship awards with respect to the disputed patents had any effect on his reputation.

Shukh had this reputation in 2005, at least a year before Shukh discovered that he had been omitted as an inventor on the disputed patents. The performance review was finalized in early August 2007, and reflected Shukh's work for the previous year, but Shukh did not alert Seagate to his concerns about inventorship on the six disputed patents until August 30, 2007, when he sent an e-mail to Kenneth Massaroni. Therefore Shukh's reputation was not damaged **because** he tried to vindicate his right to be named as an inventor on the six disputed patents. Shukh's reputation for insisting on appropriate credit and accusing others of plagiarism documented in the August 2007 performance review was established prior to the dispute over the six patents, and cannot have been a product of seeking to correct inventorship on those patents or a product of the fact that he was omitted from the patents. Because Shukh's reputation for accusing others of stealing his work and insisting on credit for all of his ideas was established well before the disputed patents became an issue between Shukh and Seagate, the Court finds that any reputational injury claimed by Shukh is not traceable to Seagate's conduct in omitting Shukh as an inventor and therefore cannot confer standing upon Shukh. *See Chou*, 254 F.3d at 1359 (determining plaintiff had standing under Section 256, because the loss of royalties was directly traceable to defendant's conduct in omitting plaintiff as a co-inventor of the patent).

2. Post-Seagate Employment

The Court does not consider Shukh's inability to obtain employment after submitting 135 applications to be sufficient evidence of damage to reputation to defeat summary judgment because Shukh has offered no evidence that he has not been hired due to damage to his professional reputation resulting from the failure to be named on the six disputed patents. For example, Shukh has presented no evidence that any of the jobs he applied for required unique technical skills that Shukh could have demonstrated through named inventorship on the six disputed patents. Indeed, Shukh and numerous Seagate co-workers testified that Shukh's reputation as a leading inventor in his field with excellent technical skills did not change during and after his employment with Seagate.

Instead, Shukh attributes his failure to be hired to blacklisting and rumors instigated by Seagate. Specifically, Shukh references Massaroni's statement to Shukh that "you will not find a job anywhere." In its previous Order, the Court indicated that Shukh's failure to find new employment because of "blacklisting' and rumors instigated by Seagate," was distinct from failure to find new employment as a result of damage to Shukh's reputation because of omission from important patents. *Shukh*, 2011 U.S. Dist. LEXIS 33924, 2011 WL 1258510, at *7. Therefore, Shukh's failure to obtain other employment as a result of rumors instigated by Seagate is irrelevant to the question of whether Shukh's reputation was

damaged when he was not named as an inventor on the six disputed patents. Because Shukh has presented no evidence indicating that being omitted from six patents resulted in his inability to find other employment, the Court finds that evidence of Shukh's post-Seagate job applications does not create an issue of material fact with respect to Shukh's reputation.

3. Number of Patents as Evidence of Reputation

The Court also finds that Shukh's general evidence that more patents are typically associated with a better reputation as an inventor, does not create a genuine issue regarding whether Shukh's reputation was damaged by omission as an inventor on the six disputed patents. Although the number of patents attributed to Shukh is one factor which has contributed to his reputation as an outstanding internal [sic] scientist, it is insufficient to demonstrate standing to sue for correction of inventorship for Shukh to allege generally that inventorship on more patents may improve the reputation of an inventor. Shukh has presented no evidence demonstrating how inventorship on the six disputed patents at issue would have altered his own reputation. Rather, the undisputed testimony of three of Shukh's former co-workers establishes that with respect to Shukh specifically, his reputation as an excellent inventor with good technical skills would not have changed whether Shukh was an inventor on 15, 25, or 30 patents.

Shukh's reliance on Allen's statements expressing concern about the number of Shukh's patent submissions is similarly misplaced. Allen clarified in his deposition testimony that he was concerned with the decrease in the number of invention disclosures that Shukh made to Seagate, and not concerned with the decrease in the total number of patent applications filed with the USTPO [sic] that listed Shukh as an inventor. Therefore, Allen's statements are irrelevant to the question of whether omission of inventorship on the six disputed patents damaged Shukh's reputation, because Shukh submitted invention disclosures for inventions allegedly embodied in all six of the disputed patents. Moreover, despite the comment about the decrease in Shukh's patent submissions, Allen still gave Shukh an "outstanding" rating for innovation on the performance review section where the comment was made, suggesting that the decrease in patent submissions did not affect Shukh's reputation as an outstanding inventor.

Finally, to the extent Shukh seeks to rely on the expert testimony of Rockman and Benson, the Court finds that, in light of the undisputed evidence that Shukh's reputation as an internationally recognized inventor in his field did not change, neither of these expert reports creates a genuine issue of material fact as to whether Shukh suffered reputational damage. Rockman's report concludes that when an inventor is named on a patent the inventor's "standing and reputation in the related technology community has been advanced." Rockman also stated,

without analysis, that “Shukh was injured as to his standing and reputation as an inventor.” Benson concludes generally that the number of patents bearing an inventor’s name is considered by immigration officials when determining whether a green card applicant is an outstanding professor or researcher.

The opinions of both experts are essentially “more is better” statements with respect to the relationship between patents and an inventor’s reputation. Neither of these opinions raises an issue of material fact with respect to whether Shukh’s reputation was affected by Seagate’s failure to name Shukh as an inventor on the six disputed patents. Neither expert appears to have reviewed or considered Shukh’s professional credentials, Shukh’s career, the disputed patents, the importance of the disputed patents to Shukh’s field, or the importance of the disputed patents in light of other patents on which Shukh is a named inventor. Additionally, neither expert interviewed Shukh or reviewed Shukh’s deposition testimony, indicating that these experts lack the proper basis to opine about Shukh’s reputation. *See Sykes v. Napolitano*, 634 F. Supp. 2d 1, 7 (D.D.C. 2009) (determining that expert opinion on a plaintiff’s reputation lacked foundation because the expert did “not provide any basis for knowing [plaintiff’s] reputation before, or after,” the relevant event).¹⁵

¹⁵ *See also Pfannenstiel v. Osborne Publ’g Co.*, 939 F. Supp. 1497, 1502 (D. Kan. 1996) (finding that affidavits did not raise a
(Continued on following page)

Instead, the experts offer only conclusory, general statements about reputation, which are ultimately insufficient to establish that Shukh actually suffered reputational harm in this case. *See Jackson v. Anchor Packing Co.*, 994 F.2d 1295, 1304 (8th Cir. 1993) (“Conclusory affidavits, even from expert witnesses, do not provide a basis upon which to deny motions for summary judgment.”). Finally, the opinions of both experts contradict Shukh’s own undisputed deposition testimony that his reputation did not change during his tenure at Seagate. Because the expert opinions are contradicted by the record evidence, they cannot create a genuine issue of material fact with respect to Shukh’s reputation. *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993) (“When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the [expert] opinion unreasonable it cannot support a jury’s verdict.”).

Because no issue of material fact remains with respect to Shukh’s lack of standing to bring correction of inventorship claims, the Court will grant Seagate’s motion for summary judgment as to those claims.

genuine issue of fact with respect to reputation where the affiants “had no personal knowledge of plaintiff’s reputation”).

III. COUNT FIVE: FRAUD

To establish a claim for fraud under Minnesota law, Shukh must prove: (1) a false representation by Seagate of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made without knowing whether it was true or false; (3) with the intention to induce Shukh to act in reliance thereon; (4) that the representation caused Shukh to act in reliance thereon; and (5) that Shukh suffered pecuniary damages as a result of the reliance. *See Valspar Refinish, Inc. v. Gaylord's Inc.*, 764 N.W.2d 359, 368 (Minn. 2009). A plaintiff's failure to demonstrate a genuine issue of material fact on even a single element of fraud is sufficient for a court to grant summary judgment in defendant's favor. *See id.* at 368-69.

A. Characterization of Fraud Claim

As an initial matter, the parties dispute the scope of Shukh's fraud claim. In his complaint, Shukh alleges that Seagate defrauded him "by affirmative acts and by acts of fraudulent concealment" by:

- a. preparing false documents and records that failed to include or list him as an inventor of those inventions;
- b. filing with or submitting to the United States Patent Office falsified documents failing to list Dr. Shukh as an inventor or co-inventor of those inventions, including documents with false oaths;

- c. concealing from Dr. Shukh that he would not be listed as an inventor, and that instead defendants, and Seagate and its IP Agents intended to and in fact did interfere and destroy Dr. Shukh's inventorship rights;
- d. by concealing from Dr. Shukh that the applications and oaths required of him to apply for patents would not be requested from him; and
- e. at least as to the invention patented by Patent No. 7,233,457, and the invention for which defendants and Seagate and its IP Agents filed Application No. 10/881,015 . . . by falsely denying to Dr. Shukh that he was entitled to any inventorship rights to those inventions.

(Third Am. Compl. ¶ 114; *see also id* ¶¶ 132, 148, 168-69, 183-84, 190-91.) Shukh also alleges that Seagate fraudulently concealed the fact that the patent applications were filed, and also the fact that Shukh "had been omitted as a co-inventor in the application[s]." (*Id.* ¶¶ 133, 149.)

In responding to a motion for summary judgment, a plaintiff is only entitled to rely on facts supporting the fraud theory that were pled with particularity in the complaint. *Stowell v. Huddleston*, Civ. No. 09-192, 2010 U.S. Dist. LEXIS 68589, 2010 WL 2733179, at *7 n.12 (D. Minn. July 9, 2010) (declining to consider misrepresentations forming the basis of a fraud claim that were "raised for the first time in response to a motion for summary

judgment”). A plaintiff must also identify “specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Therefore, when a defendant moves for summary judgment on a fraud claim and the plaintiff fails to identify evidence supporting a particular fraud theory, even if that theory appears in the complaint, summary judgment on any theories unsupported by the plaintiff is appropriate. *See Satcher v. Univ. of Ark. at Pine Bluff Bd. of Trs.*, 558 F.3d 731, 734 (8th Cir. 2009) (“[F]ailure to oppose a basis for summary judgment constitutes waiver of that argument); *Roders v. City of Des Moines*, 435 F.3d 904, 908 (8th Cir. 2006) (“Without some guidance, we will not mine the summary judgment record searching for nuggets of factual disputes to gild a party’s arguments.”).

Seagate argues that, based upon the allegations in the third amended complaint, Shukh’s fraud claim is limited to the allegation that “it was a material misrepresentation for Seagate to file various patent applications omitting Shukh as an inventor.”¹⁶ Shukh denied that this was his theory of fraud. Instead, in his opening brief in response to the current motion Shukh repeatedly¹⁷ explained his theory of fraud as

¹⁶ (Def.s’ Memo. in Supp. of Mot. for Summ. J. at 9, 12, June 29, 2012, Docket No. 315.).

¹⁷ (Pl.’s Memo. in Opp. to Mot. for Summ. J. at 12-13, July 20, 2012, Docket No. 323.) The Court finds that this is the only fraud theory that Shukh articulated in its opening brief. Shukh

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“Seagate falsely told Dr. Shukh that it would not be filing patent applications for his inventions and then did precisely that – filed patent applications for his inventions that omitted him as an inventor – and then concealed those filings from him.”¹⁸ The Court

exclusively described his fraud claim in this manner, and did so consistently throughout his opening brief. (*See id.* at 16, 17, 19, 21-22, 24-25, 34 (“Seagate repeatedly told [Shukh] that it would not be seeking to patent his inventions, but then did so without ever informing or otherwise notifying him that it had done so.”)).

¹⁸ In his second surreply brief, however, Shukh asserted, for the first time, that his fraud claim was based on events occurring after Shukh sent Massaroni the August 30, 2007 e-mail indicating that Shukh believed he had been wrongfully omitted as an inventor on one of the disputed patents. Specifically, Shukh argued that Seagate’s failure to notify the USTPO [sic] of Shukh’s complaint to Massaroni that Shukh was improperly omitted as an inventor on the disputed patent applications was a fraud on the patent office and a fraudulent concealment from Shukh. (Pl’s Second Surreply at 5, 8, Dec. 14, 2012, Docket No. 382.) The Court will not consider this claim because Shukh made no mention of these allegations in his initial brief or first surreply brief pertaining to this motion. Additionally these allegations do not appear in Shukh’s third amended complaint. *See N. States Power Co. v. Fed. Transit Admin.*, 358 F.3d 1050, 1057 (8th Cir. 2004) (explaining that the Federal Rules “do not entitle parties to manufacture claims, which were not pled, late into the litigation for the purpose of avoiding summary judgment”); *Scott v. Wells Fargo Bank, N.A.*, Civ. No. 10-3368, 2011 U.S. Dist. LEXIS 97301, 2011 WL 3837077, at *10 (D. Minn. Aug. 29, 2011) (preventing a plaintiff from relying on four alleged misrepresentations which were not contained in plaintiff’s complaint, amended complaint, or previous motions in the case, but were instead raised for the first time “in his opposition to Defendants’ motion for summary judgment”); *Plumbers & Pipefitters Local Union No. 630 v. Allscripts-Misys Healthcare*

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concludes that it need not determine if Shukh's theory of his fraud claim was pled with particularity in the third amended complaint, or whether Shukh's claim is limited to Seagate's characterization, because under either version of his fraud claim Shukh has failed to create a genuine issue of material fact with respect to reliance or damages.

B. Reliance

A plaintiff's detrimental reliance "is an essential element of a common law fraud claim." *Popp Telecom, Inc. v. Am. Sharecom, Inc.*, 361 F.3d 482, 491 (8th Cir. 2004); see also *Nilsen v. Farmers' State Bank of Van Hook, N.D.*, 178 Minn. 574, 228 N.W. 152, 153 (Minn. 1929). "In defending a motion for summary judgment, the nonmoving party must come forward with some evidence demonstrating a genuine issue as to the actual reliance and the reasonableness of the reliance." *Hoyt Props., Inc. v. Prod. Res. Grp., L.L.C.*, 736 N.W.2d 313, 321 (Minn. 2007). Actual reliance "means that the plaintiff took action, resulting in some detriment, that he would not have taken" if the defendant had not made a misrepresentation, or that plaintiff "failed, to his detriment, to take action that he would have taken" had the defendant

Solutions, Inc., 778 F. Supp. 2d 858, 882 (N.D. Ill. 2011) (limiting plaintiff's fraud claim to the "actual allegations in the complaint").

been truthful. *Greeley v. Fairview Health Servs.*, 479 F.3d 612, 614 (8th Cir. 2007).

Shukh has presented only two pieces of evidence related to reliance.¹⁹ First, Shukh identifies his deposition testimony in which he stated that he “truly relied” on the representations of Seagate’s IP Department. Second, Shukh identifies Rockman’s report stating that “Dr. Shukh justifiably relied on the [IP] department of Seagate to protect his inventorship interests.”²⁰ The Court finds that this evidence is

¹⁹ Shukh has made other arguments regarding reliance, but these arguments relate only to the **reasonableness** of Shukh’s reliance, and not to whether Shukh actually relied. The parties do not dispute that it may have been reasonable for Shukh to rely on the representations of the Seagate IP Department regarding his inventorship rights. *See Berg v. Xerxes-Southdale Office Bldg. Co.*, 290 N.W.2d 612, 616 (Minn. 1980) (describing relevant inquiries in determining whether a plaintiff’s reliance was reasonable). Both actual and reasonable reliance are required, however, to maintain a fraud claim. *See Hoyt Props., Inc.*, 736 N.W.2d at 321. Therefore the Court cannot rely upon evidence of whether reliance would have been reasonable to create a genuine issue of material fact with respect to whether Shukh actually took any action or failed to take any action in reliance upon Seagate’s alleged misrepresentations.

²⁰ The Court finds that Rockman’s statement additionally fails to create a genuine issue of material fact for all of the reasons outlined in the previous section discussing Rockman’s report. Rockman’s statement about reliance lacks a factual foundation and is too conclusory to provide a basis to deny Seagate’s motion for summary judgment. *See Jackson v. Anchor Packing Co.*, 994 F.2d 1295, 1304 (8th Cir. 1993) (“Conclusory affidavits, even from expert witnesses, do not provide a basis upon which to deny motions for summary judgment.”). Moreover, Rockman’s opinions regarding fraud appear to be little more

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insufficient to create a genuine issue of material fact with respect to reliance, because Shukh has at no time identified any particular actions he took, or failed to take in reliance either on Seagate's representation that it would not be filing patent applications for his inventions or Seagate's filing of patent applications that failed to list Shukh as an inventor.²¹ Shukh was unable to identify in his deposition, answers to interrogatories, three briefs related to this motion, or oral argument something that he would have done differently had Seagate told Shukh that it would file patent applications for his inventions and alerted

than legal conclusions, suggesting that the report would be inadmissible. *See Schmidt v. City of Bella Villa*, 557 F.3d 564, 570 (8th Cir. 2009).

²¹ Similarly, the Court finds that Shukh's claims for fraudulent concealment fail for the same lack of reliance. A fraud theory based on concealment still requires evidence of reliance. Nondisclosure can constitute fraud "when disclosure would be necessary to clarify information already disclosed, which would otherwise be misleading." *L&H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 380 (Minn. 1989). Minnesota has adopted the Restatement in defining the tort of fraudulent nondisclosure. *See id.* The Restatement explicitly requires reliance for nondisclosure of the type alleged by Shukh. The Restatement provides that "[o]ne who, having made a representation which when made was true or believed to be so, remains silent after he has learned that it is untrue and that the person to whom it is made is relying upon it in a transaction with him, is morally and legally in the same position as if he knew that his statement was false when made." Restatement (Second) Torts § 551 (1976). Because Shukh has demonstrated no evidence of reliance upon Seagate's statements that they would not file patent applications for his inventions, his fraudulent concealment also fails.

Shukh that he would not be listed as an inventor on these applications. Instead, Shukh has consistently maintained that if Seagate had told him the truth – that it would be filing patent applications for his inventions and omitting him as an invention [sic] – there was no action Shukh could or would have taken. It is possible to present a theory of reliance based on the type of misrepresentations that Shukh alleges Seagate made. *See Czarnik v. Illumina, Inc.*, 437 F. Supp. 2d 252, 260 (D. Del. 2006) (denying a motion to dismiss a fraud claim which alleged that plaintiff relied upon his employer’s concealment of patent applications “by failing to take action to ensure his name was on other patents and applications containing his inventions”).²² However, in the absence of any evidence presented by Shukh that there was some action he did or did not take because of Seagate’s misrepresentations, the Court will not speculate as to what his reliance may have been. *See Greeley*, 479 F.3d at 615 (finding that the plaintiff “failed to make a showing of detrimental reliance” because the plaintiff “offered no evidence that he changed his course of conduct or otherwise relied on the” misrepresentations (internal quotation

²² *See also Univ. of Colo. Found., Inc. v. Am. Cyanamid Co.*, 196 F.3d 1366, 1373 (Fed. Cir. 1999) (stating in dicta that inventors relied upon the fraudulent concealment of patent applications because they “did not either seek recognition as inventors on the application or prevent the issuance of the patent with [another scientist] named as the inventor”).

marks omitted)).²³ Therefore the Court concludes that Shukh has failed to put forward evidence creating a genuine issue of material fact with respect to a necessary element of his fraud claim.

C. Pecuniary Damages

Finally, the Court concludes that even if Shukh had presented evidence of reliance, he has failed to create a genuine issue of material fact with respect to pecuniary damages, “an essential element of fraud.” *Nodland v. Chirpich*, 307 Minn. 360, 240 N.W.2d 513, 517 (Minn. 1976). In the Court’s previous Order, it determined that the only damages supporting Shukh’s fraud claim were potential damages to Shukh’s reputation, stating:

Although Shukh has not alleged specific damage except as to his reputation and various inventorship rights that are in dispute, because the Court finds standing predicated at least in part on Shukh’s allegation that his reputational interests were harmed, the Court also finds that Shukh has alleged sufficient facts to overcome a motion to dismiss for failure to state a claim of fraud[.]

²³ See also *In re Digi Int’l, Inc. Sec. Litig.*, 6 F. Supp. 2d 1089, 1103 (D. Minn. 1998) (finding insufficient evidence of actual reliance where the plaintiff “allege[d] generally that it directly or constructively relied,” upon the misrepresentations (internal quotation marks omitted)).

Shukh, 2011 U.S. Dist. LEXIS 33924, 2011 WL 1258510, at *10. Because the Court has concluded that Shukh has not raised an issue of material fact with respect to damage to his reputation caused by the omission of his name from the disputed patents, he cannot rely on such damages for purposes of allowing his fraud claim to defeat a motion for summary judgment. Therefore, the Court finds that Seagate is entitled to summary judgment on Shukh's fraud claim on this basis as well.

ORDER

Based on the foregoing, and the records, files, and proceedings herein, **IT IS HEREBY ORDERED that** Defendants' Motion for Summary Judgment on Plaintiff's Fraud Claim (Claim Five) and Correction of Inventorship Claim (Claim Two) [Docket No. 313] is **GRANTED**. Count two and count five of Plaintiff's Third Amendment [sic] Complaint are **DISMISSED with prejudice**.

DATED: March 25, 2013

at Minneapolis, Minnesota.

/s/ John R. Tunheim

JOHN R. TUNHEIM

United States District Judge

Shukh v. Seagate Tech., LLC

United States District Court
for the District of Minnesota

October 18, 2011, Decided; October 18, 2011, Filed

Counsel: Constantine John Gekas and John C. Gekas, GEKAS LAW, LLP, Chicago, IL and James H. Kaster, Katherine M. Vander Pol, and Sarah W. Steenhoek, NICHOLS KASTER, PLLP, Minneapolis, MN, for plaintiff/counter defendant.

Calvin L. Litsey, Chad Drown, Jeya Paul, Charles F. Knapp, Elizabeth Cowan Wright, and David J.F. Gross, FAEGRE & BENSON LLP, Minneapolis, MN, for defendants.

Judges: JOHN R. TUNHEIM, United States District Judge.

Opinion by: JOHN R. TUNHEIM

Opinion

MEMORANDUM OPINION AND ORDER DENYING MOTION TO CERTIFY INTERLOCUTORY APPEAL

INTRODUCTION

Plaintiff Alexander M. Shukh (“Shukh”) filed this action against defendant Seagate Technology (“Seagate”), alleging thirteen claims arising out of Shukh’s employment with and termination by Seagate. This Court dismissed six of Shukh’s claims, and

another was dismissed by stipulation, leaving Shukh with six surviving claims, including a claim for correction of inventorship under 35 U.S.C. § 256. (Docket Nos. 40, 140.) Prior to filing this motion, Shukh requested leave to file a motion for reconsideration regarding the Court's analysis of his correction of inventorship claim. (Docket No. 171.) That request for leave was denied by this Court in an order dated July 18, 2011. (Docket No. 191.) Shukh now moves to amend this Court's order dated March 30, 2011 to certify for interlocutory appeal on this same issue. (Docket No. 179.) Because Shukh's motion fails to meet the criteria requisite for an interlocutory appeal, the Court denies Shukh's Motion to Certify Interlocutory Appeal.

ANALYSIS

Pending before the Court is Shukh's Motion to Amend this Court's March 30, 2011 Memorandum Opinion (Docket No. 140) to Certify Interlocutory Appeal under 28 U.S.C. § 1292(b). (Docket No. 179.) Section 1292(b) provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

“A party seeking an interlocutory appeal must therefore establish that (1) there is a controlling question of law, (2) there is a substantial ground for difference of opinion as to that controlling question of law, and (3) an immediate appeal may materially advance the ultimate termination of litigation.” *Fenton v. Farmers Ins. Exch.*, No. 07-4864, 2010 U.S. Dist. LEXIS 24233, 2010 WL 1006523, at *1 (D. Minn. Mar. 16, 2010). A motion for certification of interlocutory appeal “must be granted sparingly, and the movant bears the heavy burden of demonstrating that the case is an exceptional one in which immediate appeal is warranted.” *White v. Nix*, 43 F.3d 374, 376 (8th Cir. 1994); see also *Union Cnty. v. Piper Jaffray & Co., Inc.*, 525 F.3d 643, 646 (8th Cir. 2008) (interlocutory review is appropriate only in extraordinary cases).

Plaintiff states his question for appeal under § 1292(b) as follows:

Whether the rule of *FilmTec Corp. v. Allied Signal, Inc.*, 939 F.2d 1568, 1573 (Fed. Cir. 1991) and its progeny should be reconsidered, and it be determined that Plaintiff Alexander M. Shukh may claim an ownership interest in the inventions and patents in suit, and, upon those grounds, that he has standing under 35 U.S.C. [§] 256 to seek correction of those patents on the grounds of his alleged inventorship.

(Docket No. 180 at 31.) Under 35 U.S.C. § 256, federal courts may order the correction of the named inventor

on a patent, provided the “error arose without any deceptive intention” on the inventor’s part. 35 U.S.C. § 256. In order to bring a claim for the correction of inventorship, the plaintiff must have standing as determined by federal law. *DDB Tech., LLC, v. MLB Advanced Media, LP*, 517 F.3d 1284, 1290 (Fed. Cir. 2008). Standing may be based on a showing that the plaintiff has an ownership interest or a concrete financial interest in the disputed patent. *Larson v. Correct Craft, Inc.*, 569 F.3d 1319, 1324-26 (Fed. Cir. 2009). Standing may also be based on the plaintiff’s reputational interest in the disputed patent. (Docket No. 140 at 14-15.)

This Court analyzed Shukh’s standing on his claim for correction of inventorship in the March 30 Order. (Docket No. 140 at 9-15.) Seagate had challenged Shukh’s standing to challenge inventorship on grounds that he had no ownership or financial rights in the patents, because Shukh had signed an employment agreement assigning to Seagate his rights in any patents resulting from his inventions while employed by Seagate. (*Id.* at 10.) Seagate also argued that reputational interests cannot be a basis for standing. (*Id.*) In order to determine whether the employment agreement’s patent assignment clause was automatic or merely an obligation to assign, the Court relied on the holdings of *FilmTec* and its progeny. (Docket No. 140 at 11-12.) The Court compared the terms of Shukh’s assignment clause to very similar language interpreted by the Federal Circuit in *DDB Tech.*, a case following *FilmTec*. (*Id.* at 11-12.)

Because the assignment provision in the employment agreement was written in the present tense, the Court held that it created an automatic assignment of Shukh's ownership interest in the patents. (*Id.* at 12.) Therefore, Shukh could not derive standing from an ownership interest because that interest had been assigned to Seagate. (*Id.*) However, this ruling did not deprive Shukh of standing on the correction of inventorship claim, because the Court held that Shukh had standing based on a reputational interest. (*Id.* at 15.) There is no indication from the terms of § 256, case law, or Shukh's argument that the remedy differs depending on the type of standing achieved; the statute merely provides for correction of the named inventor on a patent. *See* 35 U.S.C. § 256.

Despite the ruling in favor of Shukh on the inventorship claim, Shukh now challenges the Court's reasoning in reaching its decision that Shukh has standing. Shukh argues that the Supreme Court's recent decision in *Bd. of Trs. of the Leland Stanford Junior Univ. v. Roche Molecular Sys.*, 131 S. Ct. 2188, 180 L. Ed. 2d 1 (2011), questioned the continuing validity of *FilmTec*. In support of that argument, Shukh points to three references to *FilmTec* in the *Stanford* opinion, concurrence, and dissent. *Stanford*, 131 S. Ct. at 2194 n.2; 131 S. Ct. at 2199 (Sotomayor, J., concurring); 131 S. Ct. at 2202-04 (Breyer, J., dissenting). These references state that the Federal Circuit's interpretation of assignment agreements was not at issue in *Stanford*, but the "majority opinion . . . permit[s] consideration of these arguments

[regarding the construction of assignment language] in a future case.” *Stanford*, 131 S. Ct. at 2199 (Sotomayor, J., concurring). Shukh argues that, for this reason, the Court should certify the issue for appeal to be decided by the Federal Circuit. (Docket No. 180 at 3.) Shukh contends that if *FilmTec* were overruled, the terms of his employment agreement would not have automatically assigned his rights in the patent, but would be considered merely a promise to assign his rights. (*Id.* at 22.) Under that interpretation, Shukh believes that he would have ownership standing to correct inventorship. (*Id.* at 14-15.)

In determining whether to certify an interlocutory appeal, the Court first decides whether there is a controlling question of law. 28 U.S.C. § 1292(b). The Second Circuit has held that if there is an alternative basis for an order, the basis challenged on appeal is not “controlling.” *Cal. Pub. Emps. Ret. Sys. v. World-Com, Inc.*, 368 F.3d 86, 95 (2d Cir. 2004). In this case, only the correction of inventorship claim rested on this Court’s analysis of the assignment agreement pursuant to *FilmTec* and its progeny. (Docket No. 140 at 9-15.) Even if the Federal Circuit Court of Appeals found that Shukh does, indeed, have an ownership interest in the patent, it would not affect this Court’s holding that Shukh has standing to pursue his claim for correction of inventorship. Therefore, the question of law Shukh seeks to certify is not “controlling” because the Court had an alternative basis for its Order.

The second issue is whether there is substantial ground for difference of opinion as to the question of law. 28 U.S.C. § 1292(b). “If a controlling court of appeals has decided the issue, no substantial ground for difference of opinion exists and there is no reason for an immediate appeal.” *Brown v. Mesirow Stein Real Estate*, 7 F. Supp. 2d 1004, 1008 (N.D. Ill. 1998). Controlling Federal Circuit precedent states that “[i]f the contract expressly grants rights in future inventions, no further act is required once an invention comes into being, and the transfer of title occurs by operation of law.” (Docket No. 191 at 2-3 (quoting *DDB Tech.*, 517 F.3d at 1290).) This Court found that the language in Shukh’s employment agreement was “almost identical” to the language interpreted by the Federal Circuit in *DDB Tech.* (Docket No. 140 at 12.) There is little doubt that this Court’s interpretation of the assignment agreement is consistent with the Federal Circuit’s cases following *FilmTec*.

Additionally, Shukh has the burden of establishing that there is a difference of opinion among courts. See *Fenton*, No. 07-4864, 2010 U.S. Dist. LEXIS 24233, 2010 WL 1006523, at *2. Shukh rests his argument primarily on the *Stanford* decision. (Docket No. 180 at 11-14, 16-17.) However, the vague criticism levied on *FilmTec* was in Justice Breyer’s dissent, which acknowledged that the dissent’s “views are tentative . . . because the parties have not fully argued these matters.” *Stanford*, 131 S. Ct. at 2204 (Breyer, J., dissenting). Even if those views were fully formed against *FilmTec*’s holding, the dissent does

not carry precedential weight. Shukh further supplements his argument with citations to treatises and cases decided long before *FilmTec*, and the most recent decisions cited were made by state courts. (See Docket No. 180 at 16-22.) These sources lack precedential value for the present action. Therefore, the Federal Circuit's line of cases following *FilmTec* remain controlling law on which there is no substantial ground for difference of opinion.

Certification under § 1292(b) also requires that an immediate appeal materially advance the ultimate termination of litigation. 28 U.S.C. § 1292(b). "When litigation will be conducted in substantially the same manner regardless of [the circuit court's] decision, the appeal cannot be said to materially advance the ultimate termination of the litigation." *White*, 43 F.3d at 378-79. Because the Court has allowed the correction of inventorship claim to move forward, the litigation would likely be conducted in "substantially the same manner" regardless of the outcome of an interlocutory appeal.

The Court finds that Shukh has failed to satisfy all three of the requirements for certification of interlocutory appeal under § 1292(b). For the foregoing reasons, the Court denies Shukh's Motion to Certify Interlocutory Appeal.

ORDER

Based upon all the files, records and proceedings herein, **IT IS HEREBY ORDERED** that Plaintiff's Motion to Certify Interlocutory Appeal [Docket No. 179] is **DENIED**.

DATED: October 18, 2011

/s/ John R. Tunheim

JOHN R. TUNHEIM

United States District Judge

Shukh v. Seagate Tech.

United States District Court
for the District of Minnesota

July 18, 2011, Decided: July 18, 2011, Filed

Civil No. 10-404 (JRT/JJK)

Counsel: Constantine John Gekas and John C. Gekas, GEKAS LAW, LLP, Chicago, IL and James H. Kaster, Katherine M. Vander Pol, and Sarah W. Steenhoek, NICHOLS KASTER, PLLP, Minneapolis, MN, for plaintiff/counter defendant.

Calvin L. Litsey, Chad Drown, Jeya Paul, Charles F. Knapp, Elizabeth Cowan Wright, and David J.F. Gross, FAEGRE & BENSON LLP, Minneapolis, MN, for defendants.

Judges: JOHN R. TUNHEIM, United States District Judge.

Opinion by: JOHN R. TUNHEIM

Opinion

**ORDER DENYING LEAVE TO FILE MOTION
TO RECONSIDER**

Pending before the Court is plaintiff Alexander M. Shukh's request for leave to move for reconsideration of Part B.1 of this Court's March 30, 2011 Order. (Docket No. 140.) That Order addressed Shukh's standing to correct inventorship on grounds of ownership under 35 U.S.C. § 256. (Docket No. 171.) A

motion to reconsider under Local Rule 7.1(h) is granted “only upon a showing of compelling circumstances.” D. Minn. L.R. 7.1(h); see *Transclean Corp. v. Bridge-wood Servs., Inc.*, 134 F. Supp. 2d 1049, 1060 (D. Minn. 2001). A motion to reconsider should not be employed to relitigate old issues, but to “afford an opportunity for relief in extraordinary circumstances.” *Dale & Selby Superette & Deli v. United States Dept. of Agric.*, 838 F. Supp. 1346, 1347-1348 (D. Minn. 1993) (noting that granting leave to file a motion for reconsideration is warranted when evidence has been admitted or excluded improperly, evidence has been newly discovered, or improper actions of counsel have affected the outcome of the case).

Shukh argues that the recent United States Supreme Court case, *Board of Trustees of the Leland Stanford Junior University v. Roche Molecular Systems, Inc.*, 131 S. Ct. 2188, 180 L. Ed. 2d 1 (2011), calls into question this Court’s reliance on *FilmTec Corp. v. Allied-Signal, Inc.*, 939 F.2d 1568, 1573 (Fed. Cir. 1991). This Court applied *FilmTec* and its progeny to rule that Shukh did not have standing to pursue correction of inventorship on the grounds of ownership because his 1997 Employment Agreement automatically assigned ownership of his future inventions to Seagate. (Order at 12, Docket No. 140.) Shukh notes that Justice Breyer’s dissent in *Stanford*, which was joined by Justice Ginsberg, criticizes *FilmTec* as relying on “slight linguistic differences in the contractual language . . . mak[ing] too much of too little” to find that an assignment has been made

automatically. *Stanford*, 131 S. Ct. at 2202-03 (Breyer, J., dissenting). Shukh also points to Justice Sotomayor's concurrence, in which she states that she shares Justice Breyer's concerns about the Federal Circuit's holding in *FilmTec*. *Id.* at 2199 (Sotomayor, J., concurring).

Whether *FilmTec* will eventually be overturned or modified is immaterial to Shukh's claims: the law remains that "[i]f the contract expressly grants rights in future inventions, no further act is required once an invention comes into being, and the transfer of title occurs by operation of law." *DDB Tech., L.L.C. v. MLB Advanced Media, L.P.*, 517 F.3d 1284, 1290 (Fed. Cir. 2008) (alterations and internal quotation marks omitted) (citing *FilmTec*, 939 F.2d at 1573). The Court determined that Shukh's employment agreement created a present, automatic assignment of Shukh's ownership rights in his inventions. (Order at 12.) This Court has no authority to create a new rule of law based on a dissent in a Supreme Court decision, and no new facts have been proffered calling into question the Court's prior determination. Because Shukh has not shown "compelling circumstances" requiring the Court to reconsider its March 30, 2011 Order, the Court denies Shukh's request for leave to file a motion to reconsider. *See* D. Minn. L.R. 7(h).

Based upon all the files, records and proceedings herein **IT IS HEREBY ORDERED** that Shukh's request for leave to file a motion for reconsideration [Docket No. 171] is **DENIED**.

DATED: July 18, 2011 /s/
at Minneapolis, Minnesota.

/s/ John R. Tunheim

JOHN R. TUNHEIM

United States District Judge

Shukh v. Seagate Tech., LLC

United States District Court
for the District of Minnesota

March 30, 2011, Decided; March 30, 2011, Filed

Civil No. 10-404 (JRT/JJK)

Counsel: For Alexander M. Shukh, Plaintiff: Constantine John Gekas, John C Gekas, PRO HAC VICE, Gekas Law, LLP, Chicago, IL; James H Kaster, Katherine A Manuel, Sarah W Steenhoek, Nichols Kaster, PLLP, Mpls, MN.

For Seagate Technology, LLC, Delaware Limited Liability Company, Seagate Technology, Inc., a Delaware corporation, Seagate Technology, a holding company of the Cayman Islands, Defendants: Calvin L Litsey, Chad Drown, Charles F Knapp, David J F Gross, Elizabeth Cowan Wright, Jeya Paul, FAEGRE & BENSON LLP, Mpls, MN.

Judges: JOHN R. TUNHEIM, United States District Judge.

Opinion by: JOHN R. TUNHEIM

Opinion

MEMORANDUM OPINION AND ORDER

Plaintiff Dr. Alexander Shukh brought this case against his former employer asserting thirteen claims related to the termination of his employment. Defendants moved to dismiss the claims. In response, Shukh moved for summary judgment as to inventorship and

declaratory judgment, and brought a motion for a preliminary injunction. The Court finds that Shukh has standing to sue due to an injury to his reputational interests, but grants defendants' motion to dismiss Shukh's claims for breach of contract, rescission, breach of fiduciary duty, unjust enrichment, interference with business expectancy, and for declaratory judgment. The Court denies Shukh's motion for summary judgment, as genuine issues of material fact exist as to inventorship, and denies as moot Shukh's motion for summary judgment on his claim for declaratory judgment. The Court also denies Shukh's motion for a preliminary injunction as moot due to disclosures by defendants, and a lack of clarity regarding the Court's jurisdiction to award the relief requested.

BACKGROUND

I. EMPLOYMENT AT SEAGATE

Shukh was employed by defendants Seagate Technology, LLC, Seagate Technology, Inc., and Seagate Technology (collectively "Seagate") from September 1997 until early 2009. Shukh claims he was one of Seagate's most productive and distinguished scientists, and that he is a member of the Seagate Inventor Hall of Fame. (Shukh Decl. ¶ 11 Ex. A, Docket No. 71.) Shukh also claims that he holds thirty-five U.S. and foreign patents, ten of which he patented while at Seagate. Nine of his inventions have been

incorporated into Seagate product lines of hard disk drives and related products.

In 1997, Seagate hired Shukh as Senior Advisory Development Engineer, and he signed a document titled “At-Will Employment and Invention Assignment Agreement.” (Shukh Decl. ¶¶ 6, 9; Am. Compl. Ex. 1, Docket No. 7.) The agreement provided that Shukh assigned to Seagate “all [his] right, title, and interest in and to any and all inventions . . . which [he] may solely or jointly conceive . . . during the period of time [he is] in the employ of [Seagate].” (Am. Comp. Ex. 1 at 2.) At the time of his termination in 2009, his title was Development Principal Engineer.

The employment agreement also contained confidentiality provisions providing in part that Shukh

[agrees to,] at all times during . . . employment and thereafter, to hold in strictest confidence, and not to use, except for the benefit of the Company . . . any Confidential Information of the Company. . . . “Confidential Information” means any Company proprietary information, technical data . . . disclosed to me by the Company, either directly or indirectly. . . .

(Am. Compl. Ex. 1.) Further, the agreement provided that at the “time of leaving the employ of the Company, [Shukh] will deliver to the company (and will not keep in [his] possession, recreate or deliver to anyone else) any and all devices, records, notes, [etc.] developed by [him] pursuant to [his] employment

with the Company or otherwise belonging to the Company. . . .” (*Id.*)

On August 30, 2007, Shukh complained to Ken Massaroni, Seagate’s then-Vice-President of Intellectual Property and Chief Intellectual Property Counsel, about his omission as an inventor on an issued patent and a patent application submitted to the Patent and Trademark Office (“PTO”). (Shukh Decl. (“Shukh Decl. 13th Claim”) Ex. A6, Docket No. 81.) Massaroni responded that an attorney met with individuals identified as inventors of the patents Shukh referenced, and that none of those individuals identified Shukh as contributing to the inventions. (*Id.*) Believing that he was fraudulently omitted as an inventor on various applications, Shukh “gathered evidence of that fraud” from Seagate’s internal information sources that he claims he was fully authorized to access. In early 2008, Shukh consulted with attorneys about the potential for litigation related to his omission as an inventor from the patent and patent application.

On January 14, 2009, Shukh was notified by Karen Hason, Seagate LLC’s Senior Vice President of Human Resources that he was being terminated, effective March 16, 2009, due to the recent economic downturn. When presented with the termination documents, Shukh says he told Ken Allen, Seagate’s Vice-President of Transducer Development, that he would not sign because he was going to contact attorneys about his rights. Allen stated, and Shukh did not deny, that beginning on January 15, 2009, Shukh

copied a large number of documents, including his engineering log book. He also made copies of documents related to his innovative activity at Seagate.

II. SHUKH'S INVENTIONS

On May 8, 2003, Shukh submitted an invention disclosure to Seagate's intellectual property ("IP") department entitled "Magnetic Head for Perpendicular Recording with Reduced Sidetrack Erasure," internally identified as STL 11473.00. (Shukh Decl. Ex. A2.) Shukh's engineering log book entries for May 5 and 6, 2003, witnessed and signed by two other Seagate engineers, show his completed conception of that invention. (*Id.* Ex. A3.)

The invention disclosure and log book disclosures propose a solution to the problem of side-track erasure in hard drives arising from the fact that as information was written to one recording track on a hard drive, previously recorded information on adjacent tracks could be erased. (*Id.* Exs. A2-3.) The inventive concept included the use of a

main pole, a magnetic yoke positioned adjacent to the main pole, two antiferromagnetically biased return poles positioned on the opposite sides of the main pole, back vias positioned between the main pole and the return poles, a coil positioned in a gap formed by the main pole and the return poles and between an air bearing surface and the back vias, wherein the main pole, yoke, and back

vias have an elliptical shape to reduce the erasure of data on the media.

(Shukh Decl. ¶ 22.) On or about June 16, 2003, Shukh submitted another Employee Patent Disclosure Form for his earlier invention, titled “Stable Magnetic Shield for High Density Recording Head,” internally identified as STL 11547.00. (*Id.* Ex. A4.) The form related to an inventive refinement that the “magnetic reader shield received ellipse-like or circle-like shape and laminated structure formed by alternative ferromagnetic and nonmagnetic layers with antiferromagnetic exchange coupling implemented between adjacent ferromagnetic layers.” (*Id.* ¶¶ 33-34.)

On August 18, 2003, Anne Johnson, a representative of the IP department sent two emails to Shukh about his inventions, informing him that the “Head Patent Review Board” decided not to pursue the inventions, but would combine them with “STL 11583.00.” (*Id.* Exs. A5-6.) Later that day, Johnson emailed Shukh again and said “The Head Patent Review Board met and have decided to pursue this [STL 11583.00] invention, you will be contacted by an attorney in due course to prepare a utility application.” (*Id.* Ex. A7.)

III. DISPUTED PATENTS

This dispute involves the following issued patents which Shukh claims he invented or co-invented:

- U.S. Pat. No. 7,233,457
- U.S. Pat. No. 7,684,150
- U.S. Pat. No. 6,525,902
- U.S. Pat. No. 6,738,236

The motions raised by the parties largely deal with the '457 and '150 patents. Shukh also makes claims in the amended complaint related to five pending applications for patents. (Am. Compl. ¶ 196.)

On July 9, 2003, before Anne Johnson sent e-mails to Shukh, Seagate filed a provisional patent application titled "Perpendicular Recording Writer Design for Side Erasure Solution." (Shukh Decl. A8.) The provisional application named ten inventors, but not Shukh. The provisional application was based in part on results of work from various Seagate employees, including Shukh, that were summarized in a presentation entitled "Perpendicular writer design proposal," which was posted on Seagate's Advanced Transducer Database by Taras G. Pokhil, on January 22, 2003.

On June 30, 2004, Seagate filed a utility patent application that claimed priority to the July 9, 2003 provisional application and named the same ten inventors as listed on the provisional application. (*Id.* Ex. A12.) The utility patent application did not list Shukh as an inventor. The application was titled "Recording Head for Reducing Side Track Erasure," the same title of the invention disclosure internally identified by Seagate as STL 11583.00, into which Shukh

had been informed his disclosures STL 11473.00 and STL 11547.00 had been combined. The utility application issued as U.S. Patent No. 7,684,150 (the "'150 Patent") on March 23, 2010. (*Id.* Ex. A1.) The '150 Patent shows that Seagate LLC is the Assignee.

On November 4, 2004, Shukh was notified by email that he had been awarded an inventorship award pursuant to Seagate's Policy on Inventor Recognition for the invention in his two disclosures which had been combined into STL 11583.00. On June 30, 2004, Shukh also received a certificate from Seagate for his technological achievement for his contribution to the invention "Recording Head for Reducing Sidetrack Erasures."

Seagate's internal patent docketing system disclosed that he was a co-inventor of the invention that was the subject of the '150 Patent. (*Id.* Ex. A10.) Shukh claims he did not learn of his omission as an inventor on the application until approximately the fall of 2006.

Shukh claims he substantially contributed to the "Summary of the Invention" and to the concepts of Claims 1-5, 7, 9, 10-12, and 15 of the '150 Patent.

IV. EEOC CHARGES AND SUBSEQUENT ALLEGEDLY RETALIATORY CONDUCT

On March 17, 2009, the day after Shukh's termination took effect, Shukh filed charges of national origin discrimination with the Equal Employment

Opportunity Commission (“EEOC”) and the Minnesota Department of Human Rights. On May 18, 2009, Seagate filed a response to the charges. On May 26, 2009, Seagate’s Chief IP Counsel, William Zahrt, sent Shukh a letter stating in part:

If you have any confidential information in your possession, including any data on portable storage devices, it must be returned to Seagate. Retention of any confidential information beyond your separation date . . . may be considered a violation of your employment agreement. . . .

(Shukh Decl. Ex. A16.) Further, on March 26, 2010, Chad Drown, one of Seagate’s outside counsel, sent Shukh a letter citing the Confidentiality and Return of Documents provisions of Shukh’s employment agreement and demanded the return of all material in Shukh’s possession. (Gekas Decl. Ex. B5, Docket No. 81.)

Shukh alleges that though extremely well-qualified for positions he applied for when he began looking for a new job, including at Seagate in response to various posted vacancies, he was not hired. (Am. Compl. ¶¶ 259-262.) Shukh charges that this indicates he was “black-listed” by Seagate, in retaliation for filing the EEOC and Minnesota Human Rights Act (“MHRA”) charges.

ANALYSIS

I. SEAGATE'S MOTION TO DISMISS

A. Standard of Review¹

In reviewing a complaint under a Rule 12(b)(6) motion to dismiss, the Court considers all facts alleged in the complaint as true, and construes the pleadings in a light most favorable to the non-moving party. *See, e.g., Bhd. of Maint. of Way Emps. v. Burlington N. Santa Fe R.R.*, 270 F.3d 637, 638 (8th Cir. 2001) (per curiam). To survive a motion to dismiss, however, a complaint must provide more than “‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action. . . .’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). That is, to avoid dismissal, a complaint must include “sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Id.* (internal quotation marks omitted). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “Where a complaint pleads facts that are merely

¹ The motions at issue are, variously, to dismiss and for summary judgment. Because the majority of the arguments are brought under Rule 12(b)(6), that rule is set forth as the overarching standard by which the motions were evaluated. The Court has noted and set forth the standard for summary judgment where appropriate below.

consistent with a defendant's liability, it stops short of the line between possibility and plausibility," and therefore, must be dismissed. *Id.* (quoting *Twombly*, 550 U.S. at 557) (internal quotation marks omitted).

B. Claim Two: Correction of Inventorship

Seagate challenges Shukh's standing to correct inventorship under Rule 12(b)(1), and Shukh moved for summary judgment on inventorship.

1. Standing to Correct Inventorship

Though Seagate's motion was brought generally under Rule 12(b)(6) for failure to state a claim, Seagate also challenges Shukh's subject matter jurisdiction under Rule 12(b)(1), which requires the Court to examine whether it has authority to decide the claims. *Uland v. City of Winsted*, 570 F. Supp. 2d 1114, 1117 (D. Minn. 2008). A party invoking federal subject matter jurisdiction has the burden of proving by a preponderance of the evidence that jurisdiction exists. *V S Ltd. P'ship v. Dep't of Hous. and Urban Dev.*, 235 F.3d 1109, 1112 (8th Cir. 2000). In resolving a motion to dismiss under Rule 12(b)(1), the Court is not limited to a consideration of the face of the complaint, but may also consider evidence submitted by the parties if the essence of the motion is a factual attack. *Gilmore v. Nw. Airlines, Inc.*, 504 F. Supp. 2d 649, 653 (D. Minn. 2007).

Seagate asserts that Shukh does not have standing under 35 U.S.C. § 256 (“the Patent Act”) to correct inventorship of U.S. Patent Nos. 7,684,150, 7,233,457, 6,525,902, 6,548,114, and 6,738,236, because the employment agreement created an automatic assignment of all right, title, and interests in any invention Shukh created during his employment, thus: (1) Shukh has no ownership interest in anything he invented at Seagate; (2) he has no financial interest in anything he invented at Seagate; and (3) reputational interests cannot be a basis for standing.

The Patent Act expressly provides a private right of action to correct inventorship:

Whenever through error . . . an inventor is not named in an issued patent and such error arose without any deceptive intention on his part, the Director may . . . issue a certificate correcting such error. . . . The court before which such matter is called in question may order correction of the patent on notice and hearing of all parties concerned. . . .

35 U.S.C. § 256.

Though Shukh has brought a variety of state law claims, “[b]ecause inventorship is a unique question of patent law, the cause of action arises under § 1338(a).” 28 U.S.C. § 1338(a) (“The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents. . . . Such jurisdiction shall be exclusive of the courts of the states in patent . . . cases.”); see *Christianson v.*

Colt Indus. Operating Corp., 486 U.S. 800, 809, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988) (holding that § 1338(a) jurisdiction extends to a cause of action in which “patent law is a necessary element”); *HIF Bio, Inc. v. Yung Shin Pharm. Indus. Co., Ltd.*, 600 F.3d 1347, 1353 (Fed. Cir. 2010). The Federal Circuit “expressly hold[s] that . . . [o]nce a patent issues, . . . 35 U.S.C. § 256 provides a private right of action to challenge inventorship. . . .” *HIF Bio, Inc.*, 600 F.3d at 1354 (citing *Larson v. Correct Craft, Inc.*, 569 F.3d 1319, 1324-25 (Fed. Cir. 2009)).

Seagate argues that the employment agreement created an automatic assignment of all right, title, and interests in any invention Shukh created during his employment, thus he has no ownership or financial interest in any patent, and no standing. For a plaintiff to have standing to correct inventorship, the plaintiff must allege facts sufficient to show an “ownership interest” or a “concrete financial interest” in the patent in question. *Larson*, 569 F.3d at 1324-26.

Although state law governs the interpretation of contracts generally, the question of whether a patent assignment clause creates an automatic assignment, or merely an obligation to assign, is bound up with the question of standing in patent cases, thus it is treated as a matter of federal law. *DDB Tech., L.L.C v. MLB Advanced Media, L.P.*, 517 F.3d 1284, 1290 (Fed. Cir. 2008). The Federal Circuit has held that “whether an assignment of patent rights in an agreement . . . is automatic, requiring no further act on the part of the assignee, or merely a promise to assign

depends on the contractual language.” *Id.* at 1290. “If the contract expressly grants rights in future inventions, no further act is required once an invention comes into being, and the transfer of title occurs by operation of law.” *Id.* (alterations and internal quotation marks omitted) (quoting *Filmtec Corp. v. Allied-Signal, Inc.*, 939 F.2d 1568, 1573 (Fed. Cir. 1991)). “Contracts that merely obligate the inventor to grant rights in the future, by contrast, ‘may vest the promisee with equitable rights in those inventions once made,’ but do not by themselves ‘vest legal title to patents on the inventions in the promise.’” *Id.* (emphases omitted) (quoting *Arachnid, Inc. v. Merit Indus., Inc.*, 939 F.2d 1574, 1581 (Fed. Cir. 1991)).

Shukh’s employment agreement provides: “I agree . . . and hereby assign to the Company . . . all my right, title, and interest in and to any and all inventions. . . .” (Am. Compl. Ex. 1.) The *DDB Techs* court interpreted almost identical present-tense language, finding that the assignment was automatic. *DDB Techs.*, 517 F.3d at 1287 (“Employee agrees to and does hereby grant and assign. . . .”). Taking the facts in a light most favorable to either party (Shukh on the motion to dismiss, and Seagate on the motion for summary judgment), there is no path to arrive at the conclusion that the parties have co-ownership of the patent: Seagate is the sole owner.

The employment agreement further provides that:

[Shukh] agree[s] to assist the Company . . . to secure the Company’s rights in the Inventions . . . including . . . the execution of all

applications, specifications, oaths [and] assignments . . . which the Company shall deem necessary . . .

(Am. Compl. Ex. 1.) The *DDB Techs* court also evaluated nearly identical language in an employment contract, holding “we see nothing in this clause that conflicts with the clear language of the present, automatic assignment provision in the agreement.” *DDB Techs.*, 517 F.3d at 1290 n.3 (“Employee agrees to execute specific assignments and do anything else properly requested by company . . . to secure such rights.”). As a result, the Court finds the provisions of the employment agreement created an automatic assignment of rights because that language of the employment agreement does not conflict with the present, automatic assignment provision, thus Shukh cannot derive standing from ownership of the patents.

Financial interests can also convey standing to challenge inventorship. “[A]n expectation of ownership of a patent is not a prerequisite for a putative inventor to possess standing to sue to correct inventorship under § 256. The statute imposes no requirement of potential ownership in the patent on those seeking to invoke it.” *Larson*, 569 F.3d at 1326 (quoting *Chou v. Univ. of Chi.*, 254 F.3d 1347, 1358 (Fed. Cir. 2001)). In *Chou*, the Federal Circuit found that “concrete financial interests” in the patents, due to the inventor’s relationship with the university, were enough to satisfy standing under Article III. *Chou*, 254 F.3d at 1355.

In contrast to *Chou*, *Larson* involved a situation similar to Shukh's, in that Larson "assigned away all of his patent rights [to defendants]." 569 F.3d at 1321. Larson's "only path to financial reward . . . involves him . . . obtaining rescission of the patent assignments." *Id.* at 1326-27. The court held that

[w]ithout first voiding his patent assignments, Larson has no ownership interest in the . . . patents. . . . Larson's financial stake in the patents is contingent on him obtaining relief that a federal court has no jurisdiction . . . to provide. Because [he] lacks an ownership interest, and because being declared the sole inventor will not generate any other direct financial rewards . . . Larson has no constitutional standing to sue for correction of inventorship in federal court.

Id. at 1327. Here again, the facts in a light most favorable to Shukh provide no possibility that he could have a financial interest in any of the patents at issue.

Finally, in *Larson*, the Federal Circuit discussed, but declined to hold, whether a reputational interest alone was enough to confer standing. The court noted that it was "not implausible" for reputational interests to confer standing, as it had previously held in *Chou*, but did not expressly analyze the issue. *Id.*; *Chou*, 254 F.3d at 1359 ("[B]eing considered an inventor of important subject matter is a mark of success in one's field, comparable to being an author of an important scientific paper. **Pecuniary consequences**

may well flow from being designated as an inventor.” (emphasis added)). Shukh argues that reputational interests should give him standing, and that he has adequately alleged such damage. For instance, in the amended complaint Shukh alleges that he is “one of the world’s leading scientists and engineers in the area of computer hard disk drives.” (Am. Compl. ¶ 1.) Further, he claims that “[d]uring and after Dr. Shukh’s employment at Seagate, his inventions were incorporated into several hundred millions (probably closer to 1.1 billion) of product units sold by Seagate.” (*Id.* ¶ 2.)

It is clear that a failure to be designated as an inventor of a patent that is widely known in an industry is an important mark of success, and in the Court’s view, *Chou* is correct that pecuniary and reputational consequences could easily flow from being named or omitted as an inventor. Further, Shukh alleges that he has had difficulty finding new employment, and while he attributes some of this to “black-listing” and rumors instigated by Seagate, it is also logical that omission from important patents could affect his ability to get a new job.

Thus, the Court finds Shukh has standing to challenge inventorship under 35 U.S.C. § 256 due to potential harm to his reputational interests and Seagate’s motion to dismiss Claim Two for failure to state a claim is denied.

2. Shukh's Motion on Inventorship

Shukh also brought a motion for summary judgment on the issue of inventorship. A fact is material if it might affect the outcome of the suit, and a dispute is genuine if the evidence is such that it could lead a reasonable jury to return a verdict for either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A court considering a motion for summary judgment must view the facts in the light most favorable to the non-moving party and give that party the benefit of all reasonable inferences that can be drawn from those facts. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

Shukh has not demonstrated that there are no genuine issues of material fact that he contributed to the inventions embodied in the patents he challenges. Specifically, although he provides a large number of documents detailing his work, without expert testimony describing exactly how his work was incorporated into each claimed invention, the Court cannot simply compare his work to a different product and know to what extent his work was a part. Further, there is insufficient evidence demonstrating that Shukh's work was not predicated on the work of anyone else, and that he was in fact inventing, or contributing to a new invention. Overall, while Shukh has demonstrated standing to correct inventorship, and has alleged sufficient facts to overcome a motion to dismiss, he has fallen well short of the standard

required to be granted summary judgment on the issue of inventorship. Thus the Court denies Shukh's motion for summary judgment on Claim Two.

C. Claims Three and Four: Rescission and Breach of Contract

Claims Three and Four of the amended complaint both relate to an alleged breach of Shukh's employment agreement by Seagate's failure to protect and recognize his inventorship rights.

Seagate first argues that Shukh has failed to state a claim for breach of contract. *See* Fed. R. Civ. P. 12(b)(6). The amended complaint alleges that Seagate breached the employment agreement by "failing and refusing to protect Dr. Shukh's inventorship rights and by refusing to recognize his inventorship rights, and by interfering with his inventorship rights." (Am. Compl. ¶ 292.) Shukh acknowledges that he has not alleged Seagate expressly agreed to protect his inventorship rights. Instead, Shukh argues that the obligations of 35 U.S.C. §§ 111, 115, and 116 (provisions of the Patent Act) are incorporated into the employment agreement impliedly and by Minnesota law, including the implied covenant of good faith and fair dealing.

Incorporation by reference is a matter of law. *Northrop Grumman Info. Tech., Inc. v. United States*, 535 F.3d 1339, 1343 (Fed. Cir. 2008). "To incorporate material by reference, the host document must identify with detailed particularity what specific material it incorporates and clearly indicate where that material

is found in the various documents identified.” *Id.* at 1344 (alternations and internal quotation marks omitted). The employment agreement is governed by Minnesota law pursuant to its choice-of-law provision, which Minnesota traditionally enforces. (Am. Compl. Ex. 1); *Hagstrom v. Am. Circuit Breaker Corp.*, 518 N.W.2d 46, 48 (Minn. Ct. App. 1994). “[W]hen a contractual provision is clear and unambiguous, courts should not rewrite, modify, or limit its effect by a strained construction.” *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004).

The employment agreement nowhere states, or even implies, that the Patent Act’s obligations will be incorporated into the agreement, nor that a private right of action exists under the patent laws for the breach of contract Shukh alleges. The employment agreement states:

I agree to assist the Company . . . at the Company’s expense, in every proper way to secure the Company’s rights in the Inventions and any copyrights, patents . . . relating thereto in any and all countries, including the disclosure to the Company of all pertinent information and data with respect thereto, the execution of all applications . . . and all other instruments which the Company shall deem necessary in order to apply for and obtain such rights and in order to assign and convey to the company . . . the sole and exclusive rights, title and interest in and to such Inventions. . . .

(Am. Compl. Ex. 1. at 3.) Though §§ 111, 115, and 116 of the Patent Act include similar language to the employment agreement provision, the Court finds nothing in the employment agreement suggesting that it expects any, much less all, of the Patent Act to be incorporated by reference.

Next, Seagate argues that Shukh has failed to state a claim for breach because the patent laws and regulations are not implied through the covenant of good faith and fair dealing. “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); see *Hunt v. IBM Mid. Am. Emps. Fed. Credit Union*, 384 N.W.2d 853, 858 (Minn. 1986) (“[W]e have not read an implied covenant of good faith and fair dealing into employment contracts.”). Shukh has not cited any authority suggesting that a contract can be read in separate parts, such that a portion of the agreement governing inventions and the parties’ rights regarding those inventions are considered not related to employment and can thus be sheltered from the rule that Minnesota does not imply good faith and fair dealing into employment contracts. Further, the employment agreement’s first paragraph states “[i]n consideration of my employment with the Company . . . I agree to the following: . . .” (Am. Comp. Ex. 1.) This language suggests that the entire document is an employment agreement, and the various provisions are specifically written as obligations of, and related to, employment.

Further, the amended complaint does not suggest Seagate frustrated or hindered Shukh's performance under the employment agreement, which is what the implied covenant prohibits. "Under Minnesota law, every contract includes an implied covenant of good faith and fair dealing requiring that one party not 'unjustifiably hinder' the other party's performance of the contract." *In re Hennepin Cty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502 (Minn. 1995).

The Court grants Seagate's motion to dismiss Claim Three, as Shukh has not alleged sufficient facts to state a claim for breach of contract. Because Seagate did not breach the contract, any arguments that the agreement could be rescinded, or was ratified at a time it could be rescinded, are moot. Thus, Seagate's motion to dismiss Count Four for rescission is also granted.

D. Claim Five: Fraud

In Minnesota, a claim for fraud requires:

[A] false representation regarding a past or present fact, the fact was material and susceptible of knowledge, the representer knew it was false or asserted it as his or her own knowledge without knowing whether it was true or false, the representer intended to induce the claimant to act or justify the claimant in acting, the claimant was induced to act or justified in acting in reliance on the representation, the claimant suffered damages,

and the representation was the proximate cause of the damages.

Martens v. Minn. Mining & Mfg. Co., 616 N.W.2d 732, 747 (Minn. 2000). Seagate argues that Shukh has failed to plead reliance and damages, and has otherwise failed to support his claims of fraud. Fed. R. Civ. P. 9(b) (“In alleging fraud . . . , a party must state with particularity the circumstances constituting fraud. . . .”). A review of the complaint in the light most favorable to Shukh suggests that the complaint may allege that it was a material misrepresentation for Seagate to file various patent applications omitting Shukh as an inventor. It additionally could be a material misrepresentation because according to the complaint and various emails, Shukh was informed that his inventions STL 11473.00 and 11547.00 were to be incorporated into STL 11583.00, but he was not listed as an inventor in the final patent application, thus Seagate acknowledged a role for his inventions in the patent, but failed to credit them. (Am. Compl. ¶¶ 124-131.)

Further, it can be inferred from the complaint that Shukh relied on Seagate’s “representations” to protect his inventorship rights, that is, the actions of its IP department in receiving and applying for patents, and that he was damaged by doing so. (Am. Compl. ¶ 297) (“Seagate . . . knew that Dr. Shukh was relying on their candor and honesty to protect his inventorship rights and they further knew he was acting on the presumption that Seagate . . . would not interfere [with] his inventorship rights. . . .”).

Although Shukh has not alleged specific damages except as to his reputation, and various inventorship rights that are in dispute, because the Court finds standing predicated at least in part on Shukh's allegation that his reputational interests were harmed, the Court also finds that Shukh has alleged sufficient facts to overcome a motion to dismiss for failure to state a claim of fraud, and denies Seagate's motion to dismiss Claim Five.

E. Claim Six: Fiduciary Duty

Minnesota recognizes two types of fiduciary relationships, *per se* and *de facto*. *Swenson v. Bender*, 764 N.W.2d 596, 601 (Minn. Ct. App. 2001). Shukh does not claim that a fiduciary relationship and duty arises from the employment agreement, thus the only relevant analysis is under a *de facto* fiduciary relationship and duty.

A fiduciary relationship may arise "when one person trusts and confides in another who has superior knowledge and authority." *Id.* However, the Minnesota Supreme Court "has concluded that a fiduciary relationship cannot arise even out of a long, close, and trusting relationship when the purportedly trusting party 'should have known the [other party] was representing adverse interests.'" *Id.* at 602 (alteration in original).

Shukh relies heavily on *Chou* to suggest that a fiduciary duty existed between Seagate and Shukh. 254 F.3d at 1347. In *Chou*, a former graduate student

sued her professor, university, and patent licensee and assignee seeking correction of inventorship, and alleging, among other claims, a breach of fiduciary duty. The court found that a fiduciary duty existed when Chou's professor had a position of superiority over her, and had specifically represented to her that he would protect and give her proper credit for her inventions. *Id.* at 1362-63. Thus, Chou "adequately pleaded the existence of circumstances that place on [the professor] a fiduciary duty. . . ." *Id.* Unlike *Chou*, Shukh has not alleged that Seagate explicitly or implicitly represented that it would protect his rights and give him proper credit for his inventions. Though Seagate is bound to abide by the Patent Act, Shukh has pointed to no provision of the Act suggesting that filing a patent to which Shukh contributed creates a fiduciary relationship between the inventor and assignee.

Seagate also suggests that assuming a fiduciary relationship existed, there was still no duty for Seagate to perfect and protect Shukh's "legally cognizable inventorship rights." Even reading the complaint in a light most favorable to Shukh, Seagate does not have any obligation to protect his inventorship rights, nor is it clear that he has inventorship rights once his work has been assigned to Seagate. Thus, the Court finds Seagate had no duty to protect Shukh's inventorship rights beyond properly naming him as an inventor, and grants Seagate's motion to dismiss Claim Six.

F. Claim Seven: Unjust Enrichment

Shukh's claim for unjust enrichment alleges that Seagate failed to perfect his inventorship and thus wrongfully reaped the benefits of his inventions. (Am. Comp. ¶ 305.) To establish a claim for unjust enrichment, a party must show that another party knowingly received something of value to which he was not entitled. *Mon-Ray Inc. v. Granite Re, Inc.*, 677 N.W.2d 434, 440 (Minn. Ct. App. 2004). "Unjustly" could mean "unfairly" or "illegally." *Id.* "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. Astraeva Aviation Servs., Inc.*, 111 F.3d 1386, 1392 n. 4 (8th Cir. 1997) (citing *Sharp v. Laubersheimer*, 347 N.W.2d 268, 271 (Minn. 1984)). However, "where there has been such a breach of a contract by one party that the other may choose to rescind and recover in quasi-contract," recovery on the theory of quasi-contract is permitted. *Roberge v. Cambridge Co-op. Creamery*, 248 Minn. 184, 79 N.W.2d 142, 150 (Minn. 1956).

The complaint states "the circumstances render it inequitable for [Seagate] to retain the benefit [of his inventorship] without paying for it . . . either in the disgorgement of profits or payment of a fair license fee." (Am. Compl. ¶ 305.) As discussed earlier, by its terms, Shukh's employment agreement provides **no** right to profits, or licensing fees for inventions. Instead, Shukh was paid a salary and agreed to assign all of his inventions, and his rights to those inventions, to Seagate. There can be no claim for

unjust enrichment. Further, because the Court has determined that Shukh has not adequately pled a claim for breach of the employment agreement, Shukh cannot base a claim for unjust enrichment on a theory of recovery in quasi-contract. *See Roberge*, 79 N.W.2d at 150. Though Shukh's standing is derivative of harm to his reputational interests, unlike *Chou*, and similar to *Larson*, there are simply no expectations or promises of financial gain anticipated by the employment agreement, thus the Court grants Seagate's motion to dismiss Claim Seven.

G. Claim Eight: Interference with Business Expectancy

A claim for tortious interference with prospective economic advantage under Minnesota law must allege:

(1) the existence of a reasonable expectation of economic advantage or benefits belonging to the plaintiff; (2) that Defendants had knowledge of that expectation of economic advantage; (3) that Defendants wrongfully and without justification interfered with Plaintiffs' reasonable expectation of economic advantage or benefit; (4) that in the absence of the wrongful acts of Defendants, it is reasonably probable that Plaintiffs would have realized their economic advantage or benefit; and (5) that Plaintiffs sustained damages as a result of this activity.

Steinhauser v. City of St. Paul, 595 F. Supp. 2d 987, 1019-20 (D. Minn. 2008) (citing *Harbor Broad., Inc. v. Boundary Waters Broad, Inc.*, 636 N.W.2d 560, 569 (Minn. Ct. App. 2001)) *partially reversed on other grounds*.

Shukh does not allege what business expectancy was interfered with, that Seagate knew about such expectancy, why it is probable he would have realized such expectancy, or specific damages resulting from Seagate's actions. Thus, there was no realistic expectation of economic benefit that Seagate could have violated. Shukh's employment agreement clearly assigned all rights, title, and interest in his inventions to Seagate, with no expectation that he would receive compensation other than his salary. The Court grants Seagate's motion to dismiss Claim Eight.

H. Claims Nine and Ten: Title VII and State Law National Origin Discrimination

Shukh's ninth and tenth claims for relief allege national origin discrimination under Title VII and the Minnesota Human Rights Act ("MHRA"). 42 U.S.C. § 2000e2(a)(1); Minn. Stat. § 363A.08. Shukh argues that he need not plead discrimination with greater than usual particularity, and that an employment discrimination claim need not contain specific facts establishing a prima facie case of discrimination. The Supreme Court

has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss. . . . [The Court has rejected] the argument that a Title VII complaint requires greater particularity, because this would too narrowly constrict the role of the pleadings.

Swierkiewicz v. Sorema N.A., 534 U.S. 506, 511, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002) (alterations, citations, and internal quotation marks omitted); *see also Twombly*, 550 U.S. at 570 (in the employment discrimination context the Supreme Court does not “require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.”). As a result “[a]n employment discrimination plaintiff need only give the defendant ‘fair notice’ of what the plaintiff’s claims are and the grounds upon which they rest.” *Martin v. Reliastar Life Ins. Co.*, 710 F. Supp. 2d 875, 887 (D. Minn. 2010).

In the amended complaint Shukh alleges that he was discriminated against based on national origin, and that the discrimination included disparate treatment in pay, promotions, and denial of recognition and inventorship.

Shukh’s pleadings related to discrimination in pay, promotions, and failure to be recognized for achievements, consist of little more than bare statements that such events occurred. However, taking the

facts in a light most favorable to Shukh, and given that he was terminated despite being a very successful inventor and a member of the Seagate Inventor Hall of Fame, the pleadings are not so deficient they fail to state a claim that is plausible on its face. *Martin*, 710 F. Supp. 2d at 888 (“Unlike their white coworkers, Plaintiffs claim that they received lower pay, had unequal access to promotion opportunities . . . and were refused overtime opportunities. These are not conclusory statements, but rather assertions of fact that put the Defendants on fair notice of the basis for this lawsuit.”); *see also Swanson v. Citibank, N.A.*, 614 F.3d 400, 405 (7th Cir. 2010) (“[The] complaint identifies the type of discrimination that [plaintiff] thinks occurs (racial), by whom . . . and when (in connection with [plaintiff’s] effort in early 2009 to obtain a home-equity loan). This is all that [plaintiff] needed to put in the complaint.”).

Next, Seagate argues that Shukh’s Title VII claim is time barred because to properly bring such a claim, a charge of discrimination must be filed with the EEOC within 300 days of the alleged unlawful employment practice.² 42 U.S.C. § 2000e-5(e)(1). A

² If the charge had been filed **only** with the EEOC, then the time limits for filing would have been 180 days, however, because Shukh concurrently instituted proceedings with a state agency, the relevant limitations period is 300 days. 42 U.S.C. § 2000e-5(e)(1) (“[the period for filing a charge under this section is 180 days except] in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to

(Continued on following page)

Minnesota Human Rights Act (“MHRA”) claim must be filed with the Minnesota Department of Human Rights within one year after the alleged discriminatory conduct. Minn. Stat. § 363A.28. Shukh filed his charge of discrimination with both agencies on March 17, 2009. (Am. Comp. § 244.) Thus, if nothing tolls the time limitations, Shukh may only pursue claims for discrimination under Title VII that occurred from May 21, 2008 – March 17, 2009, and under the MHRA from March 17, 2008 – March 17, 2009. Seagate argues that if the discriminatory activity is defined as filing patents without including Shukh as an inventor, then they must be dismissed as beyond the statutory limitations period of Title VII and the MHRA.

“A charge alleging a hostile work environment claim . . . will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period.” *Nat. R.R. Passenger Corp v. Morgan*, 536 U.S. 101, 122, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002); *Walsh v. Nat’l Computer Sys.*, 332 F.3d 1150, 1157 (8th Cir. 2003). Courts have allowed plaintiffs to bring claims well after the statutory limitation period has passed when the claim is for a “hostile work environment.” *Morgan*, 536 U.S. at

grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred.”).

122; *Mems v. City of St. Paul, Dept. of Fire and Safety Servs.*, 327 F.3d 771, 785 (8th Cir. 2003). Though Shukh has not explicitly alleged that his work environment was “hostile,” a plain reading of the complaint suggests that it is, in essence, what he claims. Shukh alleges that the discrimination he faced at Seagate was ongoing and represented continuing violations, and that it was not limited only to a failure to be named on patents to which he contributed, but was also manifested through failures to be promoted and obtain increases in pay. Further, Shukh argues that even if certain acts are outside the limitation period, they can be used as background evidence in support of a timely claim.

Viewing the complaint in a light most favorable to Shukh, he has sufficiently alleged continued violations of state and federal law, tolling the relevant statutes of limitations. The Court thus denies Seagate’s motion to dismiss Claims Nine and Ten.

I. Claims Eleven and Twelve: Retaliation

Shukh’s claims for retaliation under Title VII and the MHRA relate to actions that occurred prior to, and after, he filed his discrimination charges on March 17, 2009.

Shukh’s allegation of retaliation **before** he filed his EEOC and MHRA actions were that “Seagate retaliated against him for his complaints” about “an extreme pattern of discrimination against him, because of his national origin, and accent. . . .” (Am.

Compl. ¶¶ 229-30.) The Court finds that Shukh adequately pled retaliation for pre-termination conduct based on allegations relating to his failure to be promoted, and to have his pay increased.

After filing his discrimination complaints, Shukh brought these claims, alleging that in retaliation for the EEOC and MHRA actions, Seagate or Seagate's counsel sent him a letter reminding him of his obligations under the employment agreement to return documents to Seagate, sent Shukh's counsel a letter requesting return of the documents, refused to rehire Shukh for jobs to which he applied after being terminated, and spread rumors about Shukh preventing him from obtaining other employment. (Am. Compl. ¶¶ 247-62.) These claims were brought under the MHRA. (*Id.*) Unlike under Title VII, the MHRA does not require discrimination plaintiffs to exhaust their administrative remedies before bringing a lawsuit in a court. Minn. Stat. § 363A.33 (“[A] person may bring a civil action seeking redress for an unfair discriminatory practice directly to district court.”). Shukh's MHRA claim did not need to be exhausted to be properly brought, and the post-EEOC-complaint retaliatory conduct claim was only brought under the MHRA, not Title VII, thus Seagate's exhaustion arguments are irrelevant. (Am. Compl. ¶ 258.)

Seagate argues that retaliation requires an adverse employment action that would have dissuaded a reasonable worker from making or supporting a charge of discrimination. *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67, 126 S. Ct. 2405, 165

L. Ed. 2d 345 (2006) (“The antiretaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm.”). However, courts have held illegal employer retaliation can encompass materially adverse actions unrelated to plaintiff’s employment. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 346, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997) (negative employment reference of a former employee was a prohibited retaliatory material adverse action); *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 200 (3d Cir. 1994) (post-employment threat to a teacher’s license who was pursuing Title VII discrimination claims was a prohibited action subject to suit). Shukh has alleged that statements and rumors from Seagate have affected his ability to be hired elsewhere and that he was not rehired for available positions at Seagate despite being well-qualified for them. Taking these allegations as true, the Court finds that he has stated a claim for relief for retaliation that is plausible on its face. As a result, the Court denies Seagate’s motion to dismiss as to claims Eleven and Twelve.

J. Claim Thirteen: Declaratory Judgment Regarding Confidentiality Provisions

Shukh sought and was granted leave to file an amended complaint (Docket No. 6), in which he added a claim seeking a declaratory judgment that provisions in the employment agreement requiring Shukh to return certain documents be declared unenforceable. (Am. Compl. ¶ 327.) Seagate moved to dismiss,

and Shukh brought a motion for summary judgment on the claim.

Seagate argues that as a condition of his employment, Shukh agreed to maintain the confidentiality of Seagate's confidential information, and to return all of Seagate's property upon termination of his employment. The relevant contract provision states:

Returning Company Documents: I agree that, at the time of leaving the employ of the Company, I will deliver to the Company (and will not keep in my possession, recreate or deliver to anyone else) any and all . . . records, notes, [and] other documents . . . developed by me pursuant to my employment with the Company.

(Am. Compl. Ex. 1.) Seagate notes that before being escorted from Seagate on March 16, 2009, Shukh took 49,607 documents, which the Magistrate Judge ordered be disclosed to Seagate. (Hearing Tr. at 36:10-14, Sept. 28, 2010, Docket No. 64.) Seagate argues that Shukh has not asserted facts excusing him from compliance with the employment agreement.

Shukh alleges that during the course of his employment, and after "discovering Seagate's theft" of his ideas and inventions, he created and maintained his own records evidencing his work and inventorship. (Am. Compl. ¶ 329.) Claim Thirteen requests a declaration that Shukh need not comply with the document return provisions of the employment

agreement. As support for this claim, Shukh argues that Seagate's fraudulent omission of Shukh as an inventor and filing of allegedly false patent applications demonstrates unclean hands. *Wind Turbine Indus. Corp. v. Jacobs Wind Elec. Co., Inc.*, No. 09-36, 2010 U.S. Dist. LEXIS 121372, 2010 WL 4723385, at *12 (D. Minn. Nov. 16, 2010) ("The doctrine of unclean hands will be invoked only to deny equitable relief to a party whose conduct has been unconscionable by reason of a bad motive."). Shukh then argues that the Court should not enforce a contractual provision, such as the document return provision, that is in violation of public policy. The public policy Shukh is concerned with is Seagate's alleged violation of the Patent Act, which, Shukh argues, the Court should not condone. Finally, Shukh argues that the contract is unconscionable. To establish unconscionability, a party must demonstrate it had no meaningful choice but to deal with the other party and to accept the contract as offered. *Sports and Travel Mktg., Inc. v. Chi. Cutlery Co.*, 811 F. Supp. 1372, 1380 (D. Minn. 1993).

Seagate argues that the provision is not unconscionable or against public policy because Shukh cannot violate a contractual duty not to take confidential materials simply because he needs them to support his claims. Seagate points to *JDS Uniphase Corp. v. Jennings*, in which the court said

By no means can [public] policy fairly be said to authorize disgruntled employees to pilfer a wheelbarrow full of an employer's proprietary documents in violation of their contract

merely because it might help them blow the whistle on an employer's violations of law. . . . Endorsing such theft or conversion would effectively invalidate most confidentiality agreements, as employees would feel free to haul away [documents] knowing they could later argue they needed the documents to pursue suits against employers. . . .

473 F. Supp. 2d 697, 702 (E.D. Va. 2007). Additionally, Seagate argues that the disputed provision is routinely accepted by reasonable people, and suggests that hundreds of Seagate employees have accepted the provision, thus rendering it reasonable, and not unconscionable.

The Court finds no evidence of unconscionability, or bad faith, and finds that public policy does not militate in favor of issuing a declaratory judgment that the document return provisions of Shukh's employment agreement are unenforceable. Thus, Seagate's motion to dismiss Claim Thirteen is granted, Shukh's motion for summary judgment is denied as moot.

II. MOTION FOR INJUNCTIVE RELIEF

Shukh also filed a motion for a mandatory injunction requiring Seagate to make disclosures Shukh alleges are mandated by the PTO's "Manual of Patent Examining Procedure" (MPEP"), and 37 C.F.R. § 1.56. These provisions combine to require that the PTO be informed of litigation relating to pending or issued patents, by the applicants. 37 C.F.R. § 1.56; MPEP

§ 2001.06(c) (“Where the subject matter for which a patent is being sought is or has been involved in litigation, the existence of such litigation and any other material information arising therefrom must be brought to the attention of the [PTO].”).

Shukh filed his original complaint on October 12, 2010, and alleges that after monitoring the “public File Wrappers” on the PTO’s website, he found no indication that Seagate had disclosed the fact of the litigation as it related to the five patents at issue in this case. Shukh wrote to Seagate asking whether it had informed the PTO and other co-inventors about the litigation. On October 29, 2010, Seagate filed a “Notice of Information from Related Litigation” with the PTO, disclosing the existence of this litigation and Shukh’s claims of inventorship for each pending Seagate patent application. (Drown Decl. Exs. 1-5, Docket No. 102.)

Seagate argues that this Court does not have the power to order the requested relief. The Federal Circuit has previously found that a district court exceeded its authority when it ordered parties to disclose information to the PTO in the context of a reexamination proceeding. *Emerson Elec. Co. v. Davoil, Inc.*, 88 F.3d 1051, 1054 (Fed. Cir. 1996); *see also In re Cont’l Gen. Tire, Inc.*, 81 F.3d 1089, 1093 (Fed. Cir. 1996) (compelling a district court to vacate an order requiring an alleged infringer in a patent suit to file a request for reexamination with the PTO). In *Emerson*, the Federal Circuit said that the district court is “not authorize[d] . . . to direct that [plaintiff]

must include [defendant's] documents in its filings in the [PTO] in the reexamination proceedings.” *Emerson Elec. Co.*, 88 F.3d at 1054. Shukh has not cited **any** case supporting the idea that this Court has the authority to issue a writ mandating that a litigant file something with the PTO in the context of patent litigation and other litigation related thereto.

Seagate also argues that its filing of five “Notice[s] of Information from Related Litigation” renders the subject of this motion moot. *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 287, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000) (“[A] case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” (alteration in original) (internal quotation marks omitted)).

Seagate’s disclosures include the following language:

Alexander M. Shukh filed a lawsuit in United States District Court . . . asserting claims for . . . Correction of Inventorship . . . Fraud and Fraudulent Concealment, Breach of Fiduciary Duty, Unjust Enrichment. . . .

(Drown Decl. Exs. 1-5.) Tellingly, Shukh has not cited **any** case setting forth a standard of materiality, or describing what specific information would meet the requirements he alleges must be met. Shukh has failed to detail the deficiencies in Seagate’s attempt to comply with his request, and has not suggested what Seagate should have done. Further, Shukh has failed to identify what he wants the Court to order Seagate

to do, unless it is to turn over all documents relating to this litigation, Shukh's employment with Seagate, and any other peripherally related materials, to the PTO. Though Seagate **could** have filed more documents with the PTO, it has not breached any identified rule or law requiring more. Even if the Court has the authority to require Seagate to provide additional documents to the PTO, which is uncertain at best, it will not issue such an order because Seagate has rendered the issue moot by disclosing the litigation to the PTO.

ORDER

Based upon all the files, records and proceedings herein **IT IS HEREBY ORDERED** that:

1. Defendants' Motion to Dismiss the Amended Complaint [Docket No. 14] is **GRANTED in part** and **DENIED in part** as follows:

a. The motion is **GRANTED** as to Claims Three, Four, Six, Seven, Eight, and Thirteen and those claims are **DISMISSED with prejudice**.

b. The motion is **DENIED** in all other respects.

2. Plaintiffs Motion for Partial Summary Judgment on His Second Claim for Relief [Docket No. 57] is **DENIED**.

3. Plaintiffs Motion for Partial Summary Judgment on Plaintiff's Thirteenth Claim for Relief For a

Declaratory Judgment Regarding the Unenforceability of The Confidentiality and Document Return Provisions of His Employment Agreement [Docket No. 78] is **DENIED as moot**.

4. Plaintiffs Motion for a Preliminary Injunction [Docket No. 65] is **DENIED**.

DATED: March 30, 2011

at Minneapolis, Minnesota.

/s/ John R. Tunheim

JOHN R. TUNHEIM

United States District Judge

NOTE: This order is nonprecedential.

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

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, SEAGATE TECHNOLOGY PLC,
AN IRISH PUBLIC LIMITED COMPANY,**
Defendants-Appellees

UNKNOWN OWNERS AND ASSIGNEES,
Defendant

2014-1406

Appeal from the United States District Court for
the District of Minnesota in No. 0:10-cv-00404-JRT-
JJK, Judge John R. Tunheim.

ON PETITION FOR REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, LOURIE,
DYK, MOORE, O'MALLEY, REYNA, WALLACH,
TARANTO, CHEN, HUGHES and STOLL *Circuit Judges*.

PER CURIAM.

ORDER

Plaintiff-appellant Alexander Shukh filed a petition for rehearing en banc. A response to the petition was invited by the court and filed by defendants-appellees. The petition was first referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied. The petition for rehearing en banc is denied.

The mandate of the court will issue on December 28, 2015.

FOR THE COURT

December 17, 2015
Date

/s/ Daniel E. O'Toole
Daniel E. O'Toole
Clerk of Court
