

Nos. 2020-1715, 2020-1716

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

OMNI MEDSCI, INC.,

Plaintiff-Appellee,

v.

APPLE INC.,

Defendant-Appellant,

On appeal from the United States District Court for the Northern District of California in Nos. 4:19-cv-05673-YGR and 4:19-cv-05924-YGR, Hon. Yvonne Gonzalez Rogers, and the United States District Court for the Eastern District of Texas in Case Nos. 18-cv-00429 and 18-cv-00134, Hon. Robert W. Schroeder III

**CORRECTED NON-CONFIDENTIAL REPLY BRIEF FOR
DEFENDANT-APPELLANT APPLE INC.**

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CERTIFICATE OF INTEREST

Counsel for Defendant-Appellant Apple Inc. certifies the following:

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

Apple Inc.

2. The names of the real parties in interest represented by me are:

Apple Inc.

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

None.

4. The names of all law firms, and the partners or associates, that appeared for the party represented by me in the trial court or are expected to appear in this Court and who are not already listed on the docket for the current case are:

SIDLEY AUSTIN LLP: Ching-Lee Fukuda, Thomas A. Broughan, III, Sharon Lee, Kelley A. Conaty (formerly), David T. Pritikin (formerly), David Anderson (formerly), Anna Weinberg (formerly), Hamilton C. Simpson (formerly).

GILLAM & SMITH LLP: Melissa R. Smith, Bobby Lamb, Harry Lee Gillam, Jr.

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal is:

- *Omni MedSci, Inc. v. Apple Inc.*, Case No. 4:19-cv-05673-YGR (N.D. Cal.) (“*Omni II*”)

- *Omni MedSci, Inc. v. Apple Inc.*, Case No. 4:19-cv-05924-YGR (N.D. Cal.) (“*Omni I*”)
- *Omni MedSci, Inc. v. Apple Inc.*, Case No. 3:20-cv-00563-YGR (N.D. Cal.) (“*Omni III*”)
- IPR2019-00916 (instituted Oct. 18, 2019)
- IPR2020-00175 (instituted June 17, 2020)

6. Information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees):

Not applicable.

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INTRODUCTION

Omni’s brief largely abandons the district courts’ flawed reading of the contract between Dr. Mohammad Islam (Omni’s founder) and his employer, the University of Michigan, and instead tries to convert this appeal into a referendum on the University’s factual determination that some University funds supported the patents. But the district court said the funding issue was one it *need not reach* and was *not necessary* to its decision, and the certified orders rest on the legal conclusion that “Dr. Islam’s employment agreement did not operate as an automatic assignment of any patent rights.” Appx11.

The critical inquiry in this appeal is thus not the correctness of the University’s determination (and it was correct), but of contract interpretation—an issue controlled by this Court’s law and reviewed *de novo*. The contract in question “govern[s] the assignment of property rights” and incorporates the University’s Bylaw 3.10, which provides that a patent “shall be” the property of the University if it is supported by *any* amount of University funds—only if the patent is supported by *no* University funds does title remain with the inventor. Given that the asserted patents were supported by some University funds, as the University determined, they automatically became the sole property of the University pursuant to Dr. Islam’s contract.

The district courts' contrary conclusion, as Apple and *amicus* the University of Michigan explained, misreads the operative assignment provisions of Dr. Islam's contract with the University, and cannot be reconciled with this Court's precedent finding comparable language to presently (and automatically) convey ownership of future inventions. It also cannot be reconciled with Dr. Islam's agreement in 2007 that the University, by operation of the same provision in Bylaw 3.10, automatically became the owner of another patent naming him as an inventor that was supported by University funds, and did so despite Dr. Islam's attempted assignment of the same patent to another company after the invention was made. The University has administered Bylaw 3.10 this way for decades.

Omni has no good response. Deserting the Texas court's reasoning entirely, Omni proposes reading the words "shall be" in Bylaw 3.10 in isolation, contending they are "not an assignment" because sometimes Bylaw 3.10 provides that future patents "shall be" the employee's property, and employees cannot assign patents to themselves. Omni Br. 6-7. But Omni ignores that Dr. Islam's operative contract expressly provides that Bylaw 3.10 "govern[s] the assignment of property rights" and that Dr. Islam, by that agreement, agreed that such property rights "shall be" the University's if they are supported by *any* UM funds (and "shall be" his only when there is *no* such funding support). That kind of upfront agreement is how *all* automatic assignments work: the individual agrees in advance to override his or

her default ownership rights and that, “once an invention comes into being, ... the transfer of title occurs by operation of law.” *DDB Techs., L.L.C. v. MLB Advanced Media, L.P.*, 517 F.3d 1284, 1290 (Fed. Cir. 2008). And neither Dr. Islam’s contract nor Bylaw 3.10 require any “further act” to transfer title to the University, aligning that contract with this Court’s automatic-assignment precedent. *Id.*

Omni’s remaining points—that a form-over-substance “magic words” standard should be used and that Dr. Islam’s self-interested deposition testimony can override the clear words in his 2007 agreement—change nothing. The district courts’ errors mean that the certified orders cannot stand.

Next, Omni’s assault on the University’s determination that University funds supported the patents is both misplaced and wrong. Initially, this is not the forum that Dr. Islam agreed to use to resolve disputes with the University involving patent ownership. Instead, by agreeing to comply with the University’s rules and regulations, he agreed to use the UM Tech Transfer Policy’s appeal procedure to resolve such disputes. Dr. Islam has never done that, despite having been repeatedly told of the University’s funding determination and of his option to use that appeal process if he disagreed with it. The University’s funding determination thus remains undisturbed for purposes of this case, and the Court should not allow Dr. Islam (by way of Omni) to use this litigation to evade his contractual obligations.

The record also refutes Omni’s selective and skewed portrayal of the basis for the University’s funding support determination. What it shows is that—at Dr. Islam’s request—the University twice investigated whether University funds supported the asserted patents, and twice found evidence that they did, including Dr. Islam’s use of physical space in the medical school, administrative support for his appointment, and interactions with University faculty to springboard ideas relating to the patents. And while Omni disparages these forms of University funding support, they are unquestionably legitimate—Bylaw 3.10 explicitly identifies them (“the use of University resources or facilities”) as examples of direct or indirect funding support that trigger application of paragraph 1.

Omni’s final overreach is to claim that Apple “must” prevail on both the automatic assignment and paragraph 1 funding questions to prevail in this appeal. Omni Br. 5. Certainly, the Court can (and should) reverse outright with instructions to dismiss. But the Court also can reverse and vacate the certified orders based on the only issue that the district courts purported to decide—namely, the automatic assignment question. Because the district court erred on that legal question, the certified orders resting on it cannot stand.

ARGUMENT

I. OMNI LACKS STANDING BECAUSE IT DOES NOT OWN THE ASSERTED PATENTS.

Omni agrees that there is a “basis to dismiss this case” if “(i) the patents-in-suit fall within Bylaw 3.10 ¶1 and (ii) ¶1 automatically transferred legal title to UM.” Omni Br. 28. Because both of those things are true, and because Omni therefore holds no “exclusionary rights” in the asserted patents, Omni “lack[s] constitutional standing,” *Morrow v. Microsoft Corp.*, 499 F.3d 1332, 1339-41 (Fed. Cir. 2007), and the cases should be dismissed.

A. Omni’s Inability to Establish Ownership Eliminates Omni’s Standing to Sue.

Apple’s opening brief explained that Omni cannot satisfy Article III if Omni does not own the asserted patents. Apple Br. 26-30. Article III standing often implicates patent ownership, because a plaintiff must “establish that it has an exclusionary right in a patent that, if violated by another, would cause the party holding the exclusionary right to suffer legal injury.” *WiAV Sols. LLC v. Motorola, Inc.*, 631 F.3d 1257, 1265 (Fed. Cir. 2010). Also, a “factual” attack on standing, like this one, disputes the truth of the plaintiff’s allegations, and, as a result, Omni’s mere allegations of ownership and PTO recording of a purported assignment from Dr. Islam do not control. Apple Br. 26-30.

In the middle of its brief, Omni half-heartedly contends that Apple’s “Article III standing arguments are moot” because “Omni’s complaint properly plead ownership and infringement.” Omni Br. 34-36. But Omni ignores the difference between facial and factual standing challenges, as well as Apple’s explicit contention that this challenge is not a facial attack on Omni’s complaint. Apple Br. 26-30. In a factual attack like Apple’s, “the challenger *disputes* the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction,” and the court may consider “evidence beyond the complaint” and “*need not* presume the truthfulness of the plaintiff’s allegations.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (emphasis added).

Omni’s assertion that its complaint was “properly pled” is also at odds with the remainder of its own brief, which reveals that Omni’s defense of the certified orders rests on arguments about the record—just as a “factual” (not “facial”) attack envisions. Indeed, none of Omni’s record-based contentions concerning the nature of the assignment or the University’s funding determination appears in Omni’s pleadings. Apple’s standing challenge plainly disputes the *truth* of Omni’s barebones allegations, and Omni cannot simply fall back on its pleadings to elude this challenge.

Omni also cites this Court’s decisions in *Lone Star* and *Schwendimann* (which relied on *Lone Star*) to contend that this “legal dispute” does not concern

Article III standing and that Apple “ignored *Lone Star*’s holding.” Omni Br. 34. Not so. Apple cited *Lone Star* multiple times and showed why it is fully consistent with the proper analysis here. Apple Br. 26-30. *Lone Star* began by reiterating what Article III requires in the patent context, including that only “those who possess ‘exclusionary rights’ in a patent” suffer a cognizable injury,” and cited the same cases that Apple’s opening brief cited. *Lone Star Silicon Innovations LLC v. Nanya Tech. Corp.*, 925 F.3d 1225, 1234 (Fed. Cir. 2019) (citing *Lujan*, *Morrow*, and *WiAV*); Apple Br. 26-30 (same). *Lone Star*’s ultimate analysis, however, is inapplicable because it concerned a *facial* challenge: it was “enough to confer standing *at the pleadings stage*” that the plaintiff “alleged that it possesses the sort of exclusionary rights that confer Article III standing,” including through a “transfer agreement, which [wa]s referenced in each complaint.” *Id.* (emphasis added). Apple’s challenge, by contrast, is factual and disputes the truth of the allegations.

Lone Star also considered a dispute that was fundamentally different from the one here. The question in that case was whether the plaintiff held “all substantial rights” to the asserted patents. *Lone Star*, 925 F.3d at 1234; Omni Br. 34. Citing *Morrow*, the Court observed that a plaintiff might be wrong about the all-substantial-rights question and still allege a constitutional injury, because a party “hold[ing] exclusionary rights and interests created by the patent statutes, but

not all substantial rights to the patent[,] still has constitutional standing.” *Id.* at 1234-35. This case, however, is not about *how many* rights Omni has; it is about whether Omni has *no* exclusionary rights and thus “lack[s] constitutional standing.” *Morrow*, 499 F.3d at 1341.

Finally, Omni mischaracterizes Apple’s argument that the motion’s label should not change the analysis. Apple Br. 30 n.13. According to Omni, Apple supposedly agreed that allegations alone are dispositive for Article III purposes, and that the only relevant inquiry is whether Omni qualifies as a “patentee” under 35 U.S.C. § 281. Omni Br. 35. Omni is wrong—Apple’s point was simply that, as in *Lone Star* and *Schwendimann*, nothing precludes the Court from considering the merits of the underlying dispute here. A “factual” attack under Rule 12(b)(1) allows the court to consider “evidence beyond the complaint *without* converting the motion to dismiss into a motion for summary judgment.” *Safe Air*, 373 F.3d at 1039 (emphasis added). But the distinction is “harmless” in any event, given that both types of motions are reviewed *de novo*. *Lone Star*, 925 F.3d at 1236 n.6. In the end, Omni *agrees* that Apple’s arguments about the legal effect of Bylaw 3.10, if correct, provide a “basis to dismiss this case.” Omni Br. 28.

B. Dr. Islam’s Contractual Obligations Cause an Automatic Assignment of His Future Inventions Supported by University Funds.

Apple showed that, by signing onto Bylaw 3.10 and the University’s rules and regulations, Dr. Islam automatically assigned to the University any future inventions he might make that are supported directly or indirectly by University funds. Apple Br. 30-36. UM agrees and filed a brief in support. UM Br. 6-11. Binding precedent has found analogous assignment language to operate “unambiguously” and “automatically.” Apple Br. 30-36. In addition, University rules are premised on these assignments being automatic, and the University testified that transfers happen automatically and without the need for an inventor to take any action after the invention subject to paragraph 1 is made in order to assign title to it to the University. Apple Br. 35-36; UM Br. 21-23.

Dr. Islam also has acknowledged this is how Bylaw 3.10 works. Appx618. In 2007, he agreed that one of his University-supported patents became “the property of the University” “pursuant to” Bylaw 3.10 despite him never having transferred title to the University. *Id.* In fact, Dr. Islam did so despite having previously executed an “assignment” of the same patent to another entity after that invention was made. Appx1481-1482; Appx1153. Omni consigns its response on this point to the Statement of the Case, but this Court has “declined to address arguments that appear in the statement of facts but not the summary of the

argument or argument sections of the brief.” *Fox Factory, Inc. v. SRAM, LLC*, 944 F.3d 1366, 1378-79 (Fed. Cir. 2019). It can do so again here.

Regardless, Omni’s response is unfounded. Omni seeks to brush aside Dr. Islam’s previous attestations, citing his deposition testimony that he believed he owned the other patent, and asserting his earlier agreement was a “form letter” he was “forced” to sign. Omni. Br. 15-16. But that contract was no form letter—it spelled out specific facts, attestations, and obligations that Dr. Islam voluntarily accepted to resolve a conflict he created by attempting to assign another University-owned patent to one of his companies. Appx617-619. And Dr. Islam’s transparently self-serving testimony—made years later in the midst of a litigation—cannot erase his clear contractual provision stating the opposite. *Cf. Solomon v. Kimberly-Clark Corp.*, 216 F.3d 1372, 1379 (Fed. Cir. 2000) (“litigation-derived inventor testimony ... is entitled to little, if any, probative value”). Omni’s embrace of Dr. Islam’s cavalier dismissal of his contractual representations speaks volumes.

After relegating Dr. Islam’s fateful concession to its Statement of the Case, Omni offers a grab bag of arguments concerning the automatic-or-not nature of the assignment. None are relevant or persuasive.

First, Omni’s attempt to distinguish Apple’s controlling authorities falls flat. According to Omni, cases considering language materially indistinguishable from

Bylaw 3.10 are all inapposite because they involve statutes where rights vest “ab initio,” or because there is supposedly a difference between “vesting” and a “transfer of ownership after vesting.” Omni Br. 51-54.

Apple’s cases, however, all support Apple’s plain-language reading of Bylaw 3.10 because they interpreted indistinguishable language (*e.g.*, that future inventions “shall be vested in, and be the property of,” the government, or that future inventions “shall be the exclusive property of the United States”). Apple Br. 30-33; *Bd. of Trustees of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 563 U.S. 776, 787 (2011). As the Supreme Court observed, the legal effect of these terms is “unambiguous[,]” and they automatically transfer title to future inventions when they are made. *Id.* The fact that *Roche* considered statutes, while Bylaw 3.10 is incorporated into a contract, makes no difference—both are written instruments conveying the same ordinary meaning. *Cf. Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 325 (2015). Omni nowhere confronts the ramifications of these textual parallels.

Omni also confuses what an automatic assignment entails. Title to all inventions—including those governed by federal statutes—vests originally with the inventor but “may be assigned before they are patented” or even made. *Cammeyer v. Newton*, 94 U.S. 225, 226 (1876). Indeed, that is what it means to convey a “present grant of rights ... to future inventions [that] vests immediately.”

Imation Corp. v. Koninklijke Philips Elecs. N.V., 586 F.3d 980, 986 (Fed. Cir. 2009). Once the invention subject to a preexisting obligation “comes into being, ... the transfer of title occurs by operation of law,” *DDB Techs.*, 517 F.3d at 1290, and its title “automatically” and “immediately vest[s]” in the designated entity, *FilmTec Corp. v. Hydranautics*, 982 F.2d 1546, 1553 (Fed. Cir. 1992). Whether mandated by contract or by statute, the transfer occurs instantaneously and “by operation of law.” There is no principled distinction between saying that title vests “ab initio” or that it transfers immediately “after vesting.” *Contra Omni* Br. 51-54.

Amidst these arguments, *Omni* spends two pages trying to distinguish cases, like this Court’s *Heinemann* decision, holding that future-tense language in Executive Order 10096 effectuates an automatic assignment. *Omni* Br. 52-54. According to *Omni*, *Heinemann* is inapposite because the Army properly “concluded” that the Executive Order “imposed an obligation to assign” before the PTO “turned that obligation into a present assignment with no reasoning or explanation.” *Id.* *Omni* is incorrect. After the Army concluded that the “Government is entitled to an assignment of the invention,” the PTO “concur[red] with the Army determination and concluded” that the Government was “entitled to retain” rights to the invention. *Heinemann v. United States*, 796 F.2d 451, 453-54 (Fed. Cir. 1986) (emphasis added). Later, the Court attributed to the Army a finding that the plaintiff’s “invention became the property of the Government”

under the Executive Order—echoing present assignment language. *Id.* at 455-56. And, throughout, the Court repeatedly affirmed the conclusions that “the United States [wa]s the owner” of the patent under the Executive Order, while the employee “was neither the legal nor the equitable owner.” *Id.* at 451, 454, 456. Omni’s perceived distinctions are illusory.

Second, Omni contends that other cases from this Court support its reading of the Bylaws, asserting that precedent draws a “clear line of demarcation,” which Omni describes variously as “the presence or absence of language immediately transferring legal title, e.g., the ‘hereby assigns’ or ‘hereby grants title.’” Omni Br. at 42-46. Omni is again wrong. For example, Omni’s suggestion that the word “hereby” is necessary is refuted by this Court’s precedent finding “the language ‘Employee assigns’” alone sufficient to effect an “automatic assignment.” *SiRF Tech., Inc. v. Int’l Trade Comm’n*, 601 F.3d 1319, 1326 (Fed. Cir. 2010). Similarly, Omni’s suggestion that a present-tense verb is necessary is refuted by numerous cases holding that future-tense language dictating the legal status of future inventions conveys that status automatically. Apple Br. 30-33; *supra* at 10-13. And none of the cases Omni cites mandates use of specific “formalities or magic words.” *Lone Star*, 925 F.3d at 1229.

Omni also contends two so-called “‘university’ cases” are “more on point.” Omni Br. 45-46. But neither confronted the distinction between an automatic

assignment and a promise to assign. In addition, *Chou* stated that future inventions “shall be assigned” and thus clearly specified a future (not present) assignment of rights. *Chou v. Univ. of Chicago*, 254 F.3d 1347, 1357 (Fed. Cir. 2001). *Knight* considered only whether the employees were “contractually obligated to assign” their inventions, and, even then, found the relevant contractual language was “more than sufficient” and thus did *at least that much*. *Regents of Univ. of N. Mexico v. Knight*, 321 F.3d 1111, 1118-20 (Fed. Cir. 2003).

Third, Omni contends that other provisions of the Bylaws and Tech Transfer Policy show that Bylaw 3.10 is only a promise to assign. Omni Br. 37-42. The relevant provisions, read accurately, instead confirm that Bylaw 3.10 operates as Apple and UM explained. The provisions contemplating the granting of rights to inventions made with University funding support “back to” employees, or the University “retain[ing]” ownership of such inventions, are premised on the University having *already* become the owner of those inventions, with no requirement for the inventor to transfer title to the University after the invention is made. Apple Br. 34-35; UM Br. 9-11. Omni dismisses these provisions as “reveal[ing] nothing about how UM obtained its rights in the first place.” Omni Br. 41. But the only way UM could “retain” title or grant rights “back to” employees without a post-invention assignment by the inventor is if title had already transferred to the University.

Omni also grasps at other provisions to support its view that “Bylaw 3.10 is not language of present assignment.” Omni Br. 36-41. None help Omni.

Omni starts with Bylaw 3.10 itself, claiming that the isolated phrase “shall be the property of” cannot effectuate an automatic assignment. *Id.* at 37-39. According to Omni, it is “impossible” for the phrase “shall be the property of” to “assign legal title” as used in Bylaw 3.10 (because sometimes inventors retain ownership), and Dr. Islam “did not ‘agree’ to assign patent rights” (because he just agreed to abide by the rules). *Id.* at 36-39, 43 n.6. But the provisions all work together—the automatic assignment derives from Dr. Islam’s agreement to abide by rules that “govern[] the assignment of property rights,” and those rules then dictate the future ownership status of those rights. Appx592. It thus does not render paragraph 4 “absurd” or do anything “impossible,” Omni Br. 37-38, to agree that an invention “shall be” UM’s property when there is funding support and that an invention “shall be” the inventor’s property when there is not. The two provisions define two alternative outcomes depending on the presence (paragraph 1) or absence (paragraph 4) of University funding support: once the future invention is made, it simply *is* UM’s property or *is* the inventor’s property.

Elsewhere, Omni argues that the Tech Transfer Policy requires additional action to effectuate an assignment because it tells inventors to “promptly” report inventions, and that the University’s Invention Report form is what actually

“transfers legal title.” Omni Br. 39-40 (citing Appx607; Appx1731). The record is exactly to the contrary. Nothing in the Tech Transfer Policy’s *reporting* obligation requires the inventor to assign rights to the invention being reported, much less requires a future assignment. Appx607. Omni ignores that the Policy itself identifies different and unrelated purposes for invention reporting: “to comply with federal law, to identify and assess University Intellectual Property as an asset of the University, and to facilitate fair treatment of researchers.” *Id.*

Consistent with these reporting purposes, the University’s Invention Report form “records the description and circumstances in which an invention was created or technology was developed.” Appx1732. Such reports provide the University with the information it needs to decide whether (or not) to file patent applications, or whether to reassign rights to an invention back to the employee. Appx525-526; Appx571; Appx1211, § VI. These provisions are thus fully aligned with the *automatic* nature of the assignment, because “no further act is required once [the] invention comes into being, and the transfer of title occurs by operation of law,” *irrespective* of the reporting obligations. *DDB Techs.*, 517 F.3d at 1290 (citing *Filmtec Corp. v. Allied-Signal Inc.*, 939 F.2d 1568, 1574 (Fed. Cir. 1991)); *Roche*, 563 U.S. at 787 (no obligatory action by patentee).

It is true that the current versions of the reporting form include a declaration stating “I/we hereby assign our rights....” Appx1731. But the University testified

unequivocally that this statement is merely “confirmatory” of what Bylaw 3.10 already does. Appx584. That makes perfect sense, as the University no doubt values a clean paper trail tied to particular inventions in addition to the operative transfer that Bylaw 3.10 effectuates. Indeed, Dr. Islam similarly sought a confirmatory paper trail back in January 2013 when he asked the University to relinquish ownership via “a release letter.” Appx1458-1459. The University’s invention reporting obligations are not assignments, and do not convert paragraph 1 of Bylaw 3.10 from a present assignment of future rights into an obligation to assign rights in the future.¹

Fourth, turning to extrinsic evidence, Omni argues that the University’s “actions” and policies show that Bylaw 3.10 does not effectuate an automatic assignment. Omni Br. 46-49. The record establishes the contrary. To the extent the record of extrinsic evidence is consulted, the most relevant portions of it are (i) Dr. Islam’s previous agreement that his patents became “the property of the University” “pursuant to the University’s Regents Bylaw 3.10” without his having assigned title to the invention to the University after it was made, Appx618, and (ii) the University’s sworn testimony that it owns the asserted patents through an

¹ Omni also nitpicks at the alleged differences between provisions stating that the University “does claim ownership” instead of just “owns,” or “are owned.” Omni Br. 40. But the cited part of the Tech Transfer Policy, § II.4, is entirely consistent with Bylaw 3.10’s approach to *employees* like Dr. Islam.

automatic assignment and always has, Appx537; Appx541-542; Appx550; Appx569-570.

Rather than confront either point in the Argument section of its brief, Omni points to other “University actions.” One is quitclaim language from a May 2019 settlement offer that the University made to Dr. Islam. Omni Br. 48 (citing Appx1104-1106). But Omni conveniently omits that the University’s draft was explicitly made “subject to FRE 408,” Appx1104, making it “not admissible ... either to prove or disprove the validity or amount of a disputed claim,” Fed. R. Evid. 408, as Omni purports to do now. Omni also omits additional language from this “Limitations of Liability” section, stating that the University made no representations “OR WARRANTY” and confirming that the University’s statement was intended to limit liability, not to declare a stance on ownership. Appx1106.

If that were not enough, when it was negotiating with the University, Omni apparently did not consider this language sufficient to reflect the University’s “understanding” on ownership. Omni Br. 48. Instead, Omni demanded that the University change its language to include an “acknowledge[ment]” that the University never owned the patents. The University categorically refused. Appx1110. The negotiating history thus confirms the University’s and Apple’s position, not Omni’s:

University's Original Language	Omni's Proposed Language
The University hereby irrevocably assigns to Omni its entire right, title and interest it may have in the Patents, subject to the terms of this Agreement.	The University acknowledges that it has never had any legal or equitable rights in or to the Patents. However, for the avoidance of doubt, University irrevocably assigns to Omni its entire right, title and interest it may have in the Patents, subject to the terms of this Agreement.

Next, Omni cites a blog post from Robin Rasor describing “the problematic Stanford language” from the Supreme Court’s *Roche* decision. Omni Br. 49. This, according to Omni, is proof that “UM is an example of a university who used ‘the problematic Stanford language’” but “fixed the problem by changing its *forms*, ... not the Bylaw or the Transfer Policy.” *Id.* Nothing supports Omni’s analytical leap. Of course, Bylaw 3.10 does not contain the “problematic” Stanford language that Ms. Rasor addressed, which expressly stated that an employee “agrees to assign” future inventions. And there is no basis in fact for Omni’s conjecture that the University “fixed” this nonexistent “problem” by changing certain forms in 2016—*five years after Roche*. Omni Br. 20-21, 49. If any conclusion could be drawn, it is not that the University inexplicably waited five years after *Roche* to “fix” a problem; instead, it is that there was no problem to “fix.” Indeed, as the University testified directly, the forms that Omni cites are at most “confirmatory” of the employee’s existing obligations. Appx584.

Omni also cites a website describing the University’s Bayh-Dole policy, contending this somehow “confirms that the Bylaw does not transfer rights automatically.” Omni Br. 46-47. Omni never made this assertion in the district courts, and it is not included in the record. Regardless, Omni’s claim is baseless. The website states that employees “hereby assign” their inventions “[a]s required by 37 CFR 401.14(f)(2) and other funding agreements.” *Id.* But the use of “hereby assign” on a website has no bearing on the Bylaw; the website “policy” does not appear to be a document that an employee could sign, much less would be required to sign in order to effectuate an assignment. If anything, the website simply repeats what the cited regulation mandates—that the University must “require, by written agreement, its employees ... to assign to the [University] the entire right, title and interest.” 37 C.F.R. § 401.14(f)(2). The University of Michigan does that via Bylaw 3.10.

Omni’s last University “conduct” point (again mentioned only in Omni’s Statement of the Case) chides the University for not participating in IPR proceedings against the asserted patents or taking legal action against Dr. Islam, a tenured professor. Omni Br. 22. Both are sensitive judgment calls, and both are irrelevant to the effect of Bylaw 3.10. For example, IPRs are instituted against “the challenged patent,” and patent owners thus have discretion to participate or not. *Mylan Pharm. Inc. v. Saint Regis Mohawk Tribe*, IPR 2016-01127, Paper No.

129 at 16-18, 2018 WL 1100950 at *6-7 (PTAB Feb. 23, 2018). And neither logic nor anything in the record supports Omni's suggestion that the University was required to initiate litigation against Dr. Islam to confirm ownership of patents that it already owned.

Finally, Omni contends that the Bylaws should be construed against the University as the drafter rather than deferring to the University's interpretation. Omni Br. 50-51. Omni again is mistaken. The deference that Michigan law gives to the University derives from its status as the "the equivalent of a co-equal branch of government," and requires courts to "defer to its judgment as to the wisdom of the ordinances it enacts." UM Br. 18-21 (quoting *Michigan United Conservation Clubs v. Bd. of Trustees of Michigan State Univ.*, 431 N.W.2d 217, 220 (Mich. Ct. App. 1988)). This situation is not akin to an administrative agency's technical "expertise." Omni Br. 50-51. Instead, the University's "unique" perspective is a byproduct of its place in Michigan's constitutional structure and its decades-long experience with the rules and regulations. UM Br. 18-21. To the extent the Court considers Michigan law here, the Court should defer to the University's longstanding interpretation.

C. Omni Has No Valid Basis to Challenge the University's Determination that the Asserted Patents Are Owned By the University.

Apple and the University also showed that paragraph 1, not paragraph 4, applies to the asserted patents for purposes of this case. The plain language of Bylaw 3.10 is clear, as is the evidence showing there was some (not “no”) direct or indirect University funding support for the asserted patents. Apple Br. 37-38.

Initially, Omni should not be allowed to collaterally attack the University's determination that University funds supported the patents-in-suit via this litigation, particularly given that it is Omni's burden to establish standing when it filed suit, and given that both Dr. Islam and Omni were fully aware of the University's ownership determination at that time. Dr. Islam agreed to use the University's appeal process to contest University determinations affecting patent ownership, but has never done so. Apple Br. 37-38; UM Br. 6. Allowing an “appeal” of that same funding determination here would not only enable Dr. Islam to bypass his contractual obligations, but it would deprive the University of its own contractual rights as a non-party to this case. The Argument section of Omni's brief again presents no response, leaving Apple's argument unrefuted. *Kao Corp. v. Unilever U.S., Inc.*, 441 F.3d 963, 973 n.4 (Fed. Cir. 2006) (refusing to consider such an argument).

Regardless, Omni's response lacks merit. Omni contends—incredulously—that the University has never made a determination that University funds provided “direct or indirect support” for the invention, leaving the ownership issue “unresolved” because, under Omni's tortured reading of the appeal authority, “neither side invoked the formal [appeal] process.” Omni Br. 17-19. But the University testified categorically that it *did* make that determination and found that University funds supported the patents. Appx542-543; Appx548; Appx564; Appx1073. The record likewise confirms that the University investigated the funding question on two separate occasions, finding each time that a variety of forms of University funding support existed. Appx880, Appx885, Appx898, Appx893, Appx1073-1074, Appx541-543, Appx565. It also shows that the University communicated this determination to Dr. Islam multiple times. Appx898, Appx1073, Appx543, Appx547-548, Appx564. And it shows that the University told Dr. Islam multiple times that he would need to invoke the formal appeal process to change the University's determination. Appx897-898; Appx901; Appx543; Appx548-549. Omni's claim that *the University* needed to “invoke[] the formal [appeal] process” to somehow appeal its own determination is simply illogical. Omni Br. 17-19. That would render every University determination ineffective (as the University would need to appeal all of its own determinations to itself) and would create chaos in the routine administration of University rules and

regulations. The Court should reject Omni's untenable reading of the University's Policy.

Omni then devotes the bulk of its brief to criticizing the basis of the University's funding determination, but its arguments are all misguided.

First, Omni claims that its own "evidence" of no direct or indirect support is "uncontested," "uncontroverted," "undisputed." Omni Br. 29-33. That is false. Omni principally relies on supposed statements from "CVC doctors" who were not co-inventors on the asserted patents and who said that "their work" with Dr. Islam was not related to the asserted patents. *Id.* According to Omni, this is "proof" the patents were not supported by UM funding. It is no such thing. The relevant question is whether UM funding supported the invention, not whether other faculty members are co-inventors. Moreover, the CVC doctors were addressing *their* work with Dr. Islam on a "renal denervation Med School project," which is unrelated to the work leading to the asserted patents. Appx1073. Omni knows that: in 2018, the University told Dr. Islam that his reliance on the CVC doctors' statements was not "entirely right" because the doctors spoke only of "**their** work" with Dr. Islam, not all of Dr. Islam's work at the Medical School. Appx1073. This sideshow is irrelevant.

Nor is Omni correct to claim that there is no "link" or "comparison" between the asserted patents and the University's funding support. Omni Br. 30-31. As the

University explains, “[d]irect or indirect support’ could include, but is not limited to, grants or other forms of research sponsorship; salary and time supported by salary; resources such as University facilities, labs, equipment, or materials; or advantaged or other unique access to other University professors or faculty as a resource.” UM Br. 7; *see also* Appx592.

The record here fully substantiates the University’s determination of University funding support, and the University’s sworn testimony explicitly connects its findings of University funding support to Dr. Islam’s patents. It shows, for example, that the University found that Dr. Islam’s “access to space there and his access to other faculty in that center enabled him to have an understanding of certain biomedical subject matter *that they believe led to aspects of the patent applications in question.*” Appx581 (emphasis added). Likewise, when the University noted that faculty members “helped springboard ideas with [Dr. Islam],” it did so in the midst of a discussion about Dr. Islam’s “patent applications” and Dr. Islam’s request that the University “disclaim all ownership in them.” Appx884-886. The patents-in-suit all claim priority to the “patent applications” in question that prompted the University’s investigation, and its funding determination is unquestionably linked to them. The “link” that Omni contends is missing is instead expressly preserved in the record.

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This link is also something that Dr. Islam himself made explicitly when it benefited him. In trying to market his work to Apple, before resorting to litigation, Dr. Islam repeatedly touted the University of Michigan's connections to the asserted patents. For example, in [REDACTED] to Apple scientists, he identified the priority applications of the patents-in-suit claim as arising out of [REDACTED]

[REDACTED] communication regarding background of patents in suit

Compare Appx923 with Appx179; Appx412. And Dr. Islam referenced these applications in meetings with Apple where he emphasized his and Omni's affiliations with the University, used the University's logo, and offered University resources as part of a proposed collaboration. Appx926, Appx952, Appx1003, Appx1088. Omni's claim of no link between the asserted patents and the University's funding support is at best disingenuous.

Second, Omni contends the district court actually made four "fact findings" on the paragraph-1-versus-4 question, and that those "findings" should be left "undisturbed." Omni Br. 33-34. But the only relevant "findings" that remain "undisturbed" are from the University, not the district court. *Supra* at 22-23.

The Texas court's decision itself makes that clear. The court stated directly that it was *not* going to "reach[]" the funding question and that the question of University funding was "not necessary" to its decision to rule against Apple. Appx11 n.1. Omni omits these caveats entirely, but they fundamentally undermine

Omni's reliance on the district court's footnote. Indeed, had the district court actually and squarely confronted the question, it would have had to address the University's still-operative funding determination and the record evidence showing that "direct or indirect support" for Dr. Islam's inventions went well beyond Dr. Islam's "mere employment." *Contra id.* The Texas court's perfunctory editorials in a footnote are not "findings" entitled to deference for the simple reason that the district court itself said they were not.

There are also pragmatic reasons not to decide this appeal based these self-described "[un]necessary" statements. This Court of course has the authority to "affirm a district court judgment on any ground shown by the record," but "that authority is discretionary, not mandatory." *Hydril Co. LP v. Grant Prideco LP*, 474 F.3d 1344, 1351 (Fed. Cir. 2007) (remanding when "answers may require careful study of an already substantial record or even augmentation of that record"). That authority is also "appropriate only when such affirmance does not depend on [appellate] fact-finding." *Int'l Med. Prosthetics Research Assocs., Inc. v. Gore Enter. Holdings, Inc.*, 787 F.2d 572, 573 n.2 (Fed. Cir. 1986) (declining to consider issues that "the district court did not rule on"). Here, the record contradicts the Texas court's insinuation that the University's funding support was limited to "mere employment." Appx11 n.1. If the Court does not hold that

paragraph 1 applies based on the University's unappealed determination, the district court should fully address the question in the first instance.

Finally, Omni claims that Apple “must prove” that paragraph 1 (not 4) applies, claiming that Omni's recorded assignment in the PTO is “presumptively valid.” Omni Br. 28. This is another distraction. Any presumptive value from the PTO assignment record does not control in a “factual” attack on standing like this one, as that would “permit jurisdictional manipulation” through a unilateral, unreviewed administrative filing. Apple Br. 26-30 (quoting *Hertz Corp. v. Friend*, 559 U.S. 77, 97 (2010)). The justification for that rule is particularly pronounced when the party relying on the PTO record is trying to sidestep an employer's adverse and undisturbed decision on ownership.

The Court should instead follow its approach under analogous facts in *Filmtech*. There, the inventor (1) co-founded a company (FilmTec) to commercialize his inventions, (2) “assigned his rights in th[e] application and any resulting patent to FilmTec,” which (3) “duly recorded th[e] assignment in the [PTO],” and (4) the United States had “not taken action to determine its rights.” 982 F.2d at 1549. Nevertheless, “when the invention was conceived by [the inventor], title to that invention immediately vested in the United States by operation of law.” *Id.* at 1553. The inventor thus “had no right to assign it to FilmTec,” and FilmTec could not “maintain th[e] suit for patent infringement.” *Id.*

at 1553-54. The Court can simply swap “the University” for “the United States,” and “Omni” for “FilmTec,” to reach the same result here.

II. THE DISTRICT COURTS’ DECISIONS ARE WRONG AND COULD HAVE SWEEPING IMPLICATIONS.

The certified orders rest on the Texas court’s holding about the assignment’s nature and risk overemphasizing formalities in assignment provisions. Omni’s brief is strikingly sparse on both points—it never defends the Texas court’s analysis, and demands a “magic words” standard while ignoring the resulting uncertainty it would create.

A. The District Courts Misread Dr. Islam’s Contract and Misunderstood This Court’s Precedent.

Apple’s opening brief walked through the district courts’ various errors in analyzing the assignment question. Apple explained that the Texas court’s focus on Bylaw 3.10’s preamble language confused two distinct issues, and that it incorrectly found the Bylaw’s “patents issued or acquired” language made Bylaw 3.10 only a promise to assign in the future. Apple Br. 40-42. The California court’s brief reconsideration decision also mistakenly suggested that the future tense words “shall be” ordinarily do not reflect a present assignment. *Id.* at 42-43.

Omni’s brief says nothing about the Texas court’s missteps that were the foundation of the certified orders. Although this Court reviews the nature-of-the-assignment issue *de novo*, it is telling that Omni does not stand by the Texas

court's reasoning. Omni does endorse the California court's insinuation that future-tense language represents a promise to assign, *e.g.*, Omni Br. 41, 43, but Apple has shown repeatedly how such a formalistic "magic words" standard is irreconcilable with precedent, Apple Br. 30-34; *supra* at 10-14.

B. The District Courts' Reasoning Risks Creating a "Magic Words" Rule and Needlessly Threatens Existing Contracts.

Apple explained in its opening brief that the nature of an assignment obligation "depends on the substance of what was granted rather than formalities or magic words," *Lone Star*, 925 F.3d at 1229, and urged this Court to confirm that proposition in order to avoid creating needless uncertainty over the ownership of inventions. Apple Br. 43-47. Omni's response doubles down on this Court adopting this ill-advised "magic words" standard with the curt statement that "words matter." Omni Br. 43.

Of course, "words matter," as they do in any legal analysis of written instruments. But what matters about words here is what their substance conveys. Prior decisions focused on particular assignment language provide important analytical guidance, but the inquiry ultimately depends on substance. *Lone Star*, 925 F.3d at 1229. That inquiry should analyze the language at issue in the context of precedent *and* the entire agreement and the parties' practices under it. This Court should reject Omni's apparent invitation to enshrine specific language as necessary (rather than sufficient) to create an automatic assignment.

Omni dismisses these concerns and their potential impact, asserting that “[n]ot all universities wish to own an employee’s inventions automatically.” Omni Br. 54-55. But that ignores that many do, and that those universities accomplish their common objective using different words. Indeed, even the 1962 article that Omni cites refutes Omni’s simplistic assertion when it observes that many universities “are willing to conduct such projects only when they retain complete control over both the patent rights and the publication of the findings of the investigation.” Palmer, “University Research and Patent Policies, Practices, and Procedures,” p. 9 (Washington, DC: National Academy of Sciences—National Research Council) (1962). That is the University of Michigan’s approach, and it accordingly “retain[ed] complete control” over the asserted patents.

CONCLUSION

For the foregoing reasons, and those in Apple’s opening brief, Apple respectfully submits that the Court should reverse the certified orders and remand with instructions to dismiss these cases.

Date: October 26, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2020, a true and correct copy of the foregoing was timely filed with the Clerk of the Court using the appellate CM/ECF system. I further certify that I caused a copy of the confidential version to be served on all parties by email at the email addresses listed below.

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This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) and the Rules of this Court, because it contains 6985 words (as determined by the Microsoft Word word-processing system used to prepare the brief), excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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

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