

## **APPENDIX**

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*Appendix A*

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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HUA CAI,

*Plaintiff - Appellant,*

v.

HUNTSMAN CORPORATION,

*Defendant - Appellee.*

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No. 19-4116

(D.C. No. 2:18-CV-00968-TS) (D. Utah)

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**ORDER AND JUDGMENT\***

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Appealed Date: August 13, 2019

Decided Date: April 20, 2020

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Before **HOLMES, PHILLIPS, and CARSON**,  
Circuit Judges.

GREGORY A. PHILLIPS, Circuit Judge.

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\* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Hua Cai, appearing pro se, appeals from the district court's entry of judgment on the pleadings in favor of Defendant Huntsman Corporation on his breach-of-contract claim. Exercising jurisdiction under 28 U.S.C. § 1291, we **affirm**.

### **I. Background**

Huntsman Corporation's Chinese subsidiary, Huntsman Chemical Trading (Shanghai) Ltd., employed Cai in Shanghai, China. But Huntsman Corporation was not a party to Cai's employment contract and it never employed Cai.

Huntsman Shanghai and Cai agreed in their contract that Cai's continued employment with the firm would be subject to satisfactory performance during a six-month probationary period. Near the end of Cai's probation, his supervisor at Huntsman Shanghai, Frank Xing, fired him ostensibly for being incompetent. Cai claims that Xing manufactured this pretense to cover-up his real reason for firing Cai—namely, retaliation for Cai's threat to report Xing's abusive conduct and falsification of data.

Cai sued Huntsman Shanghai in China, seeking reinstatement. His action “went through labor arbitration court, trial court, appellate court, superior court, and procuratorate.” R. at 7. Cai lost at every step. He also lodged several complaints with Huntsman Corporation's ethics and corporate

compliance department. The department investigated Cai's case and allegedly found abnormalities related to the " 'faking data' issue" but confirmed that Xing correctly fired Cai. *Id.* at 6.

Cai then brought this suit against Huntsman Corporation. He asserts certain Business Conduct Guidelines published by Huntsman Corporation constitute an enforceable contract between himself and Huntsman Corporation. Cai further avers that Huntsman Corporation breached this contract by failing to conduct an adequate investigation into his complaints and by failing to stop Huntsman Shanghai from using unethical and dishonest tactics to defeat his suit.

The district court granted judgment to Huntsman Corporation on the pleadings under Fed. R. Civ. P. 12(c), concluding that the Business Conduct Guidelines "do not constitute a binding contract." R. at 214.<sup>1</sup>

## II. Discussion

"A decision by the district court granting a defense motion for judgment on the pleadings is reviewed *de novo*, using the same standard of review

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<sup>1</sup> The district court also found that "[e]ven assuming the Business Conduct Guidelines did constitute a contract between [Cai] and [Huntsman Corporation], [Cai] has failed to show that [Huntsman Corporation] breached those Guidelines." R. at 214. Because we affirm the district court's conclusion that the parties did not form a binding contract, we do not address Cai's arguments related to Huntsman Corporation's alleged breach of contract.

applicable to a Rule 12(b)(6) motion.” *Aspenwood Inv. Co. v. Martinez*, 355 F.3d 1256, 1259 (10th Cir. 2004). “Thus, all the well-pleaded allegations of the complaint are accepted as true and construed in the light most favorable to the plaintiff.” *Id.* “[T]o survive judgment on the pleadings, [a plaintiff] must allege ‘a claim to relief that is plausible on its face.’” *Sanchez v. U.S. Dep’t of Energy*, 870 F.3d 1185, 1199 (10th Cir. 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). “To determine whether the claim to relief is ‘plausible on its face,’ we examine the elements of the particular claim and review whether the plaintiff has pleaded ‘factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’” *Id.* (quoting *Iqbal*, 556 U.S. at 678). In ruling on the motion, the court “may consider documents referred to in the complaint if the documents are central to the plaintiff’s claim and the parties do not dispute the documents’ authenticity.” *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002).

We construe Cai’s pro se filings liberally but do not serve as his advocate. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

#### **A. The Business Conduct Guidelines Do Not Constitute A Binding Contract**

The parties do not contest the district court’s application of Utah law to the question of whether

they formed a contract.<sup>2</sup> Under Utah law, “formation of a contract [generally] requires an offer, an acceptance, and consideration.” *Cea v. Hoffman*, 276 P.3d 1178, 1185 (Utah Ct. App. 2012) (citing *Golden Key Realty, Inc. v. Mantas*, 699 P.2d 730, 732 (Utah 1985)). “For an offer to be one that would create a valid and binding contract, its terms must be definite and unambiguous.” *DCM Inv. Corp. v. Pinecrest Inv. Co.*, 34 P.3d 785, 789 (Utah 2001). And “[t]he obligations of the parties must be ‘set forth with sufficient definiteness that [the contract] can be performed.’” *Cea*, 276 P.3d at 1185 (second alteration in original) (quoting *Ferris v. Jennings*, 595 P.2d 857, 859 (Utah 1979)).

Applying this law, the district court reasoned that “the terms of the Business Conduct Guidelines are far from ‘definite and unambiguous.’ Rather, the Guidelines speak in aspirational tones about the

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<sup>2</sup> Cai alleges Huntsman Corporation maintains its principal place of business in Utah and his complaint cited Utah law in support of his allegation that the “Business Conduct Guidelines’ is a kind of contract between headquarter[s] and I.” R. at 6 (citing *Uhrhahn Constr. & Design, Inc. v. Hopkins*, 179 P.3d 808, 813 (Utah Ct. App. 2008)). The district court applied Utah law to reject this allegation. While Cai’s opening brief claims generally that the district court applied the wrong law in deciding the case and cites Illinois, Massachusetts, and Utah law in support of his argument regarding contract formation, Cai does not explicitly argue that the district court erred by applying Utah law. *Cf. Kelley v. City of Albuquerque*, 542 F.3d 802, 819 (10th Cir. 2008) (“[P]erfunctory” allegations of error that “fail[] to frame and develop an issue” are insufficient “to invoke appellate review.” (internal quotation marks omitted)). And in his reply brief, Cai relies on Utah law to support his claim that Huntsman Corporation contracted directly with him.

values of the company and the type of workplace they seek to establish.” R. at 214. It further observed that “the Guidelines do not provide the basis for determining the existence of a breach or for giving the appropriate remedy.” *Id.* It therefore concluded that the Business Conduct Guidelines “do not constitute a binding contract.” *Id.*

Cai argues that “Utah Law only requires offer, acceptance and consideration to be definite and unambiguous.” *Aplt. Reply Br.* at 4. And he claims that “[t]he terms of [the Business Conduct Guidelines] are clear and definite enough to form a contract.” *Id.* at 1 (boldface omitted). But while he points to various statements in the Guidelines outlining Huntsman Corporation’s policies on reporting alleged violations, retaliation for such reporting, and discipline for violating the Guidelines,

Cai does not grapple with the district court’s reasoning that the Guidelines were too nebulous to constitute a binding contract. Indeed, Cai does not point to any language in the Guidelines that evinces an offer, acceptance, or exchange of consideration.

Cai also notes that an employee handbook can constitute a contract. But the unpublished Utah case he cites holds that the type of contract created is an employment contract and that the employee’s continued employment constitutes acceptance of the employer’s offer and supplies the consideration. *See First Am. Title Ins. v. Nw. Title Ins. Agency*, No. 2:15-CV-00229-DN, 2016 WL 6902473, at \*22 (D. Utah Nov. 23, 2016) (“An employee manual may create a unilateral contract.’ . . . ‘[T]he employee’s

retention of employment constitutes acceptance of the offer of a unilateral contract; by continuing to stay on the job, although free to leave, the employment supplies the necessary consideration for the offer.” (quoting *Reynolds v. Gentry Fin. Corp. & Royal Mgmt.*, 368 P.3d 96, 100 (Utah Ct. App. 2016)). Cai concedes the Business Conduct Guidelines do not form an employment contract and does not claim Huntsman Corporation ever employed him. We therefore conclude the employee handbook cases have no relevance here.

We affirm the district court’s conclusion that the Business Conduct Guidelines do not constitute a binding contract between Cai and Huntsman Corporation.

**B. B. The District Court Did Not Err By  
Considering Huntsman Corporation’s  
Argument**

Cai also asserts that the district court erred by considering Huntsman Corporation’s argument that the Business Conduct Guidelines do not constitute a binding contract because Huntsman first asserted this argument in its reply in support of its motion for judgment on the pleadings. *Cf.* D. Utah Civ. R. 7-1(b)(2)(A) (“Reply memoranda . . . must be limited to rebuttal of matters raised in the memorandum in opposition.”).

Huntsman Corporation argued in its motion for judgment on the pleadings that it “is not—and has never been—a party to any contract with [Cai].” R. at 35. In response, Cai clarified his position that “the



contract [Huntsman Corporation] breached is . . . named ‘Business Conduct Guidelines[,]’ . . . made between [Cai] and . . . Huntsman Corporation.” *Id.* at 90. Huntsman Corporation then argued in reply that “the Business Conduct Guidelines alone are nowhere near sufficiently definite to form an offer that would constitute a binding contract.” *Id.* at 155. Huntsman Corporation’s reply directly rebutted the contention from Cai’s opposition brief that the Business Conduct Guidelines constituted a binding contract between Huntsman Corporation and himself. The district court did not err by considering this rebuttal argument.

### **C. Cai’s Remaining Arguments Lack Merit**

Cai contends that Huntsman Corporation mischaracterized his complaint in its filings with the district court by construing his claims as breach-of-contract claims against Huntsman Shanghai. He then argues that the district court accepted this alleged ruse and failed to consider his “actual allegation . . . that [Huntsman Corporation] breached [the Business Conduct Guidelines].” *Aplt. Opening Br.* at 7. We reject this frivolous argument since the district court squarely addressed Cai’s assertion that Huntsman Corporation formed a contract with him and then breached that contract.

Cai also avers the district court erred by stating that his employment contract with Huntsman Shanghai “incorporated Defendant Huntsman Corporation’s Business Conduct Guidelines.” *R.* at 211. The district court’s view tracks closely with

Cai's own allegation in the complaint that "by signing the employment contract [with Huntsman Shanghai] plaintiff acknowledged [he would] fully abide by the corporate 'Business Conduct Guidelines.'" *Id.* at 5. In any event, the district court's disposition did not relate to its assessment of whether Cai's employment contract incorporated the Business Conduct Guidelines. We therefore will not review this allegation of error. *See, e.g., Orr v. City of Albuquerque*, 417 F.3d 1144, 1154 (10th Cir. 2005) (observing that the court "will not address [an] issue [that] has no bearing on the ultimate outcome of [the] case").

### III. Conclusion

We **affirm** the district court's dismissal of Cai's breach-of-contract claim against Huntsman Corporation.

Entered for the Court

Gregory A. Phillips  
Circuit Judge

*Appendix B*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH**

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HUA CAI,  
*Plaintiff,*

v.

HUNTSMAN CORPORATION,  
*Defendant.*

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Case No. 2:18-CV-968 TS-DBP

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**MEMORANDUM DECISION AND ORDER  
GRANTING DEFENDANT'S MOTION FOR  
JUDGMENT ON THE PLEADINGS**

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filed Date: December 21, 2018

Decided Date: June 17, 2019

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TED STEWART, District Judge.

This matter is before the Court on Defendant's Motion for Judgment on the Pleadings. For the reasons discussed below, the Court will grant the Motion.

## I. BACKGROUND

Plaintiff signed an employment contract with Huntsman Chemical Trading (Shanghai) Limited, a subsidiary of Defendant Huntsman Corporation. As part of that contract, Plaintiff agreed to “fully comply with the policies, procedures, <Employee Handbook> and other rules and regulation of Company.”<sup>1</sup> Plaintiff alleges that this provision incorporated Defendant Huntsman Corporation’s Business Conduct Guidelines. Among other things, those Guidelines state that Defendant Huntsman is committed to providing a respectful workplace. The Guidelines also provide a number of different ways employees can report concerns and request assistance.

Plaintiff alleges that he was subjected to “evildoing” by his supervisor and was ultimately terminated.<sup>2</sup> Plaintiff alleges that he complained of this to Defendant Huntsman’s Ethics and Corporate Compliance Department (“ECCD”), but that it took “no action to correct Huntsman Shanghai’s evildoing.”<sup>3</sup> Plaintiff contends that this inaction was a breach of the Business Conduct Guidelines.

## II. STANDARD OF REVIEW

Defendant seeks judgment on the pleadings under Rule 12(c). The Court applies the same

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<sup>1</sup> Docket No. 12 Ex. 4, at § 3.4.

<sup>2</sup> Docket No. 3 ¶ 9.

<sup>3</sup> *Id.* ¶ 19.

standards in evaluating motions under Rule 12(b)(6) and Rule 12(c).<sup>4</sup>

In considering a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6), all well-pleaded factual allegations, as distinguished from conclusory allegations, are accepted as true and viewed in the light most favorable to Plaintiff as the nonmoving party.<sup>5</sup> Plaintiff must provide “enough facts to state a claim to relief that is plausible on its face,”<sup>6</sup> which requires “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.”<sup>7</sup> “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’ Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’”<sup>8</sup>

“The court’s function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff’s complaint alone is legally sufficient to state a claim for which relief may be granted.”<sup>9</sup> As the Court in *Iqbal* stated,

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<sup>4</sup> See *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 n.2 (10th Cir. 2002).

<sup>5</sup> *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997).

<sup>6</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

<sup>7</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

<sup>8</sup> *Id.* (quoting *Twombly*, 550 U.S. at 557) (alteration in original).

<sup>9</sup> *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991).

[o]nly a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief.<sup>10</sup>

In considering a motion to dismiss, a district court not only considers the complaint, “but also the attached exhibits,”<sup>11</sup> the “documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.”<sup>12</sup> The Court “may consider documents referred to in the complaint if the documents are central to the plaintiff’s claim and the parties do not dispute the documents’ authenticity.”<sup>13</sup>

### III. DISCUSSION

Plaintiff brings a single cause of action for breach of contract. “The elements of a *prima facie*

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<sup>10</sup> *Iqbal*, 556 U.S. at 679 (internal citations and quotation marks omitted).

<sup>11</sup> *Commonwealth Prop. Advocates, LLC v. Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 1194, 1201 (10th Cir. 2011).

<sup>12</sup> *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

<sup>13</sup> *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002).

case for breach of contract are (1) a contract, (2) performance by the party seeking recovery, (3) breach of the contract by the other party, and (4) damages.”<sup>14</sup> Here, Plaintiff has failed to establish the existence of a contract and, even if he had, has not demonstrated a breach by Defendant.

Generally, formation of a contract requires an offer, an acceptance, and consideration. An offer is a manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to the bargain is invited and will conclude it. For an offer to be one that would create a valid and binding contract, its terms must be definite and unambiguous. The obligations of the parties must be set forth with sufficient definiteness that [the contract] can be performed. The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.<sup>15</sup>

Here, the terms of the Business Conduct Guidelines are far from “definite and unambiguous.” Rather, the Guidelines speak in aspirational tones about the values of the company and the type of workplace they seek to establish. The Guidelines do not contain those types of things normally contained

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<sup>14</sup> *Bair v. Axiom Design, L.L.C.*, 20 P.3d 388, 391 (Utah 2001).

<sup>15</sup> *Cea v. Hoffman*, 276 P.3d 1178, 1185 (Utah Ct. App. 2012) (alteration in original) (internal quotation marks and citations omitted).

in an employment contract, such as duration of employment, the work to be done, and the price to be paid.<sup>16</sup> Additionally, the Guidelines do not provide the basis for determining the existence of a breach or for giving the appropriate remedy. As such, they do not constitute a binding contract.

Even assuming the Business Conduct Guidelines did constitute a contract between Plaintiff and Defendant, Plaintiff has failed to show that Defendant breached those Guidelines. Plaintiff complains that Defendant took no action to correct those things he complained of. However, nothing in the Guidelines requires Defendant to take any action. The Guidelines provide that employees can report concerns and request assistance and that information “will be relayed to Huntsman for investigation.”<sup>17</sup> Nothing in this provision requires Defendant to take a particular action in response a report or request. At most, it would require Defendant to investigate the claim. Plaintiff alleges that the EECD did not investigate, but this is a conclusory allegation devoid of any factual support. Therefore, even if the Guidelines constituted a binding contract, Plaintiff has failed to establish a breach by Defendant.

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<sup>16</sup> See 1 Williston on Contracts § 4.21, at 644 (4th ed.) (discussing the definiteness of offers and noting that “[a] lack of definiteness in an agreement may concern the time of performance, the price to be paid, work to be done, property to be transferred, or miscellaneous stipulations to the agreement”).

<sup>17</sup> Docket No. 13 Ex. 3, at 8.



**IV. CONCLUSION**

It is therefore

**ORDERED** that Defendant's Motion for Judgment on the Pleadings (Docket No. 12) is **GRANTED**.

DATED this 17th day of June, 2019.

**BY THE COURT:**

/s/ Ted Stewart

Ted Stewart

United States District Judge

Ted Stewart  
United States District Judge

*Appendix C*

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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HUA CAI,

*Plaintiff - Appellant,*

v.

HUNTSMAN CORPORATION,

*Defendant - Appellee.*

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No. 19-4116

(D.C. No. 2:18-CV-00968-TS) (D. Utah)

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**ORDER**

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Petitioned Date: May 3, 2010

Decided Date: June 4, 2020

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Before **HOLMES, PHILLIPS, and CARSON**,  
Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/CHRISTOPHER M. WOLPERT

CHRISTOPHER M. WOLPERT, Clerk