No. _____

In the

Supreme Court of the United States

CARLO GIUSEPPE CIVELLI;
ASTER CAPITAL S.A. (LTD) PANAMA,
Petitioners,

v.

J.P. MORGAN CHASE SECURITIES, L.L.C.;
JP MORGAN CHASE BANK, N.A.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD A. SCHWARTZ
MUNSCH HARDT KOPF & HARR, P.C.
700 Milam Street
Suite 2700
Houston, Texas 77002
(713) 222-9790
dschwartz@munsch.com

NOLAN C. KNIGHT
Counsel of Record
MUNSCH HARDT KOPF & HARR, P.C.
3800 Ross Tower
500 North Akard
Suite 3800
Dallas, Texas 75201
(214) 855-7500
nknight@munsch.com

May 8, 2023

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONSS PRESENTED

For decades preceding 2010, this Court and several circuit courts held it was improper for a trial court to *sua sponte* grant summary judgment, without first affording a non-movant notice and an opportunity to respond. In 2010, the proscription formally was memorialized in Federal Rule of Civil Procedure 56, with Rule 56(f)(3) providing: "After giving notice and a reasonable time to respond, the court may . . . consider summary judgment on its own . . . ."

Although the proscription is directed to trial courts, it would be made meaningless if a *reviewing* court—notwithstanding the proscription—could *sua sponte* affirm a summary judgment based on grounds that were not in the first instance noticed and preserved in the trial court. The appellate court held otherwise in the below proceedings, invoking a parallel principle whereby summary judgment sometimes can be affirmed on "alternative" grounds supported by the record. But to be consistent with Rule 56(f)(3), that principle requires the "alternative" grounds first to have been noticed and preserved in the trial court.

The questions presented are as follows:

1. Whether an appellate court may *sua sponte* raise grounds for summary judgment, which were not noticed or preserved in the trial court.

2. Whether an appellate court is precluded from affirming summary judgment on a ground for which the non-movant was not given notice and opportunity to respond.

3. Whether the United States Court of Appeals for the Fifth Circuit erred in this matter, by affirming summary judgment dismissal of a claim based on an "alternative" ground that had not been noticed and preserved.

PARTIES TO THE PROCEEDING

Petitioners Carlo Giuseppe Civelli and Aster Capital S.A. (LTD) Panama were plaintiffs in the District Court and appellants in the Court of Appeals.

Respondents J.P. Morgan Securities, L.L.C. (incorrectly identified in the trial court and appellate caption as J.P. Morgan Chase Securities, L.L.C.) and JP Morgan Chase Bank, N.A. were defendants in the District Court and appellees in the Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Aster Capital S.A. (LTD) Panama does not have parent companies, and there is no publicly held company that owns 10% or more of the stock of Aster Capital S.A. (LTD) Panama.

STATEMENT OF RELATED PROCEEDINGS

- *Carlo Giuseppe Civelli, et al. v. J.P. Morgan Chase Securities, L.L.C., et al.*, No. 21-20618 (5th Cir.) (opinion issued January 11, 2023; rehearing *en banc* denied February 7, 2023; and judgment and mandate issued February 15, 2023)
- *Carlo Giuseppe Civelli, et al. v. J.P. Morgan Chase Securities, L.L.C., et al.*, No. H-17-3739 (S.D. Tex.) (appealable Rule 54(b) Partial Final Judgment entered May 18, 2021; stayed June 15, 2021 to enable resolution of attorneys' fees; and stay lifted October 20, 2021)
- *Carlo Giuseppe Civelli, et al. v. J.P. Morgan Chase Securities, L.L.C., et al.*, No. H-17-3739 (S.D. Tex.) (claims between parties that were not subject to Rule 54(b) certification remain before the trial court)

There otherwise are no other directly related proceedings in any court.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Rules

PETITION FOR WRIT OF CERTIORARI

Petitioners Carlo Giuseppe Civelli and Aster Capital S.A. (LTD) Panama (collectively, the "Civelli Petitioners") respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's merits opinion is published in the Federal Reporter at 57 F.4th 484 (5th Cir. 2023) and reproduced at Appendix ("App.") page 1. Its Order denying the Petitioners' request for rehearing *en banc* is not published, but reproduced at App. 37.

The district court's summary judgment ruling is available at *Civelli v. J.P. Morgan Chase Securities, LLC*, Civil Action H-17-3739, 2021 WL 2766388 (S.D. Tex. April 29, 2021) and reproduced at App. 20, and a related ruling by the district court on attorneys' fees is available at *Civelli v. J.P. Morgan Chase Securities, LLC*, Civil Action H-17-3739, 2021 WL 2886305 (S.D. Tex. July 9, 2021) and reproduced at App. 28.

JURISDICTION

The Fifth Circuit issued its merits opinion on January 11, 2023; issued its ruling denying rehearing *en banc* on February 7, 2023; and entered judgment on February 15, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

LEGAL PROVISIONS INVOLVED

Federal Rule of Civil Procedure 56(f)(3) provides:

> After giving notice and a reasonable time to respond, the court may:
>
> (1) grant summary judgment for a nonmovant;
>
> (2) grant the motion on grounds not raised by a party; or
>
> (3) consider summary judgment on its own *after* identifying for the parties material facts that may not be genuinely in dispute. (emphasis added).

INTRODUCTION

An already difficult summary judgment procedural landscape has been made exponentially more difficult by the Fifth Circuit's ruling in the underlying appeal. A trial court is not supposed to grant summary judgment on an issue *sua sponte*, without giving the non-movant notice and an opportunity to respond. A derivative proscription should preclude a court of appeals from affirming a summary judgment on grounds not presented to the trial court.

Otherwise, an issue as fundamental as when a summary judgment non-movant is obligated to propound a "rebuttal" record, and what that record must include, is subject to unworkable uncertainty. Although this should not be the case—it is, due to the current state of circuit jurisprudence.

The specific cause of uncertainty in this matter arose because the Fifth Circuit affirmed a summary judgment disposition based on a ground that *never* had been raised in the trial court and was not even briefed in context of the appeal. But there are related causes for the uncertainty, reflected in divergent circuit jurisprudence that provides inconsistent guidance regarding the antecedent question whether it is reversible error for a *trial* court to *sua sponte* enter summary judgment, without first affording the non-movant advance notice.

The collective implications of the uncertainty is it has become exceedingly challenging for parties to know—before it is too late—what exactly is required of them under Federal Rule of Civil Procedure 56. In particular, non-movants cannot reasonably predict whether to respond only to a movant's expressly proffered grounds for summary judgment, or to prophylactically propound a trial-caliber presentation on every claim or defense, and every element thereof—notwithstanding a movant challenges only *certain* claims, defenses, or elements thereof (and although the trial court did not provide advance notice *sua sponte* dismissal was at risk).

This case provides the Court the opportunity to resolve these critically important, foundational issues regarding summary judgment procedure. The case also provides the Court the opportunity to facilitate uniformity amongst the circuits on basic questions regarding summary judgment procedure.

STATEMENT OF THE CASE

A. The Trial Court Proceedings

1. Petitioners Carlo Giuseppe Civelli and Aster Capital S.A. (LTD) Panama (collectively, the "Civelli Petitioners") filed the underlying lawsuit and named Respondents J.P. Morgan Securities, L.L.C. and JP Morgan Chase Bank, N.A. (collectively, the "J.P. Morgan Respondents") as defendants—in addition to other persons. (ROA.92).[1] Jurisdiction was based on diversity of citizenship, and the substantive law of Texas applied to the dispute.

The claims against the J.P. Morgan Respondents related to the wrongful transfer of assets that were deposited in a J.P. Morgan Securities, LLC ("J.P. Morgan Securities") account. The Civelli Petitioners contended Aster Capital S.A. (LTD) Panama ("Aster") was the beneficial owner of the assets. J.P. Morgan Securities nonetheless transferred the assets beyond the control of Aster based on a wire instruction from a titular accountholder, notwithstanding J.P. Morgan Securities was (the Civelli Petitioners contended) on notice the assets could not be transferred in a manner that jeopardized Aster's ownership.

The operative pleading in the trial court was a *First Amended Complaint*, which included claims for breach of trust/fiduciary duty, negligence, and conspiracy against the J.P. Morgan Respondents.

---

[1] The Civelli Petitioners cite the appellate Electronic Record on Appeal ("ROA") where appropriate.

(ROA.597). The J.P. Morgan Respondents filed two summary judgment motions challenging the claims.

In the first motion, they asserted *statute of limitations* defenses as bases to dismiss the negligence and conspiracy claims and further asserted JP Morgan Chase Bank, N.A. was not a proper party. (ROA.4493). The J.P. Morgan Respondents thereafter filed a second summary judgment motion and sought dismissal of the breach of trust/fiduciary duty claim. (ROA.13853). In that filing, they asserted alternative grounds for dismissal of the negligence claim, but did *not* brief, raise, or assert additional grounds for dismissal of the conspiracy claim. (ROA.13859, 13888). Limitations remained the *only* asserted bases for dismissal of the conspiracy claim.

3. The lower court granted summary judgment dismissal of the three claims. (ROA.5999). The J.P. Morgan Respondents thereafter moved for attorneys' fees, (ROA.6335), and the trial court stayed the deadline to appeal the merits ruling pending resolution of the attorneys' fees request. (App. 34).

The lower court entered a fee award in favor of the J.P. Morgan Respondents. (ROA.7401). The Civelli Petitioners thereafter timely appealed the summary judgment rulings and fee award. (ROA.7458).

B. The Appellate Proceedings

1. In the trial court, the Civelli Petitioners had no cause to, and did not, propound summary judgment argument or evidence pertinent to the

substantive elements of their conspiracy claim, because the JPMorgan Respondents never in the first instance placed the elements of the claim in issue. This was entirely consistent with the commonly held understanding of Federal Rule of Civil Procedure 56(a), which provides: "A party may move for summary judgment, *identifying* each claim or defense--or the part of each claim or defense--on which summary judgment is sought." (emphasis added).

As discussed above, the JPMorgan Respondents' first summary judgment filing included *only* assertions that the negligence and conspiracy claims were *time-barred* and that there purportedly were no material fact issues to warrant claims against JP Morgan Chase Bank, N.A. (ROA.4493, 4496) (summarizing grounds for relief). In their second summary judgment motion, the JPMorgan Respondents did *not* assert additional grounds for dismissal of the conspiracy claim. They incorporated by reference their first motion, (ROA.13853, n.1; ROA.13859), but otherwise limited the second filing to the claims for breach of trust/fiduciary duty and negligence. (ROA.13853 – 13888).

There consequently was no record, at all, developed in the trial court regarding material issues of fact, or legal principles, pertinent to substantive elements of the conspiracy claim, because none of the elements were challenged in the summary judgment submissions. This did not, however, deter the Fifth Circuit from considering the merits of the conspiracy claim and ultimately premising its appellate ruling on the merits—not limitations.

2. The Fifth Circuit affirmed the summary judgment disposition of the Civelli Petitioners' claims for breach of trust/fiduciary duty and negligence for reasons that were asserted by the JPMorgan Respondents in the trial court, and ultimately relied upon by the trial court. (App. 6 – 13). But the court declined to affirm the summary judgment dismissal of the conspiracy claim based on limitations—although that was the only ground for dismissal raised in the JPMorgan Respondents' summary judgment submissions.

The court instead recited the elements of conspiracy, (App. 14) ("In Texas, '[t]he essential elements [of civil conspiracy] are: (1) two or more persons; (2) an object to be accomplished; (3) *a meeting of minds* on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result.'") (emphasis added), and then evaluated the sufficiency of the evidentiary record relative to the substantive elements.

It held:

> even in a summary judgment posture, plaintiffs have not provided *enough evidence* to show that J.P. Morgan owed a fiduciary duty to the plaintiffs. Without such a duty, J.P. Morgan's transfer was nothing more than compliance with its client's request and, without *further evidence*, cannot evince *an intent of minds* to steal from Civelli and Aster Panama. The summary

> judgment on this claim was therefore correct.

(App. 15) (emphasis added).

Nowhere in the summary judgment record, or even in the appellate briefing, had any party raised an issue regarding whether there was "a meeting of the minds" sufficient to support the conspiracy claim. Accordingly, no evidentiary submission was propounded to specifically address the issue, and no legal briefing was submitted to address what considerations are sufficient under Texas law to satisfy the meeting of the minds requirement. The Fifth Circuit indeed made no effort to substantiate its suggestion that in the absence of an independent legal "duty" owed by one party, it somehow is impossible under Texas law to conspire with some *other* party, *cf. Carroll v. Timmers Chevrolet, Inc.*, 592 S.W.2d 922, 925 – 26 (Tex. 1979) ("civil conspiracy 'came to be used to extend liability in tort . . . beyond the active wrongdoer to those who have merely planned, assisted, or encouraged his acts.'" (quoting W. Prosser, Handbook of the Law of Torts § 46, at 293 (1971))—and that issue never had been developed in the trial court as a predicate for appellate review.

The Fifth Circuit's ruling effectively conceded its speculative character, because the court surmised, without briefing from the parties, that: "Plaintiffs' theory *appears* to be that the 'meeting of the minds' occurred when J.P. Morgan transferred the funds without plaintiffs' consent . . . ." (Appx. 14) (emphasis added).

The Fifth Circuit justified its election to resolve the summary judgment disposition based on this never-before-raised merits consideration (as opposed to limitations) by holding: "Although the district court dismissed this claim as time-barred *without reaching* the merits, we can affirm on any basis supported by the record. *Smith v. Reg'l Transit Auth.*, 827 F.3d 412, 417 (5th Cir. 2016) . . . ." (App. 15, n.6) (emphasis added).

This holding conflicts with the Fifth Circuit's own historical jurisprudence. *See, e.g.*, *Int'l Ints., L.P. v. Hardy*, 448 F.3d 303, 304, n.1 (5th Cir. 2006) ("This argument was not before the district court at the time summary judgment was entered, and accordingly we cannot consider it."); *All. for Good Gov't v. Coal. for Better Gov't*, 901 F.3d 498, 506 (5th Cir. 2018) ("'an appellate court, in reviewing a summary judgment order, can only consider those matters presented to the district court.'") (quoting *Frank C. Bailey Enterps. v. Cargill, Inc.*, 582 F.2d 333, 334 (5th Cir. 1978)); *Munoz v. Int'l All. of Theatrical Stage Emp. & Moving Picture Mach. Operators of U. S. & Canada*, 563 F.2d 205, 209 (5th Cir. 1977) ("The decision whether to grant a summary judgment is for the district court alone in our three-tiered federal court system. We are merely authorized to review the propriety of the grant on the basis of the matters of record at the time the summary judgment was entered.").

It also renders useless the directive of Federal Rule of Civil Procedure 56(f)(3), whereby only "[a]fter giving notice and a reasonable time to respond, the [trial] court may . . . consider summary judgment on

its own after identifying for the parties material facts that may not be genuinely in dispute." (emphasis added). Rule 56(f)(3) is no protection at all, if an appellate court can do what a trial court cannot, by resolving a summary judgment on *sua sponte* grounds. Indeed, as problematic as it is for a trial court to disregard the Rule 56(f)(3) directive, at least in that instance an aggrieved party in principle could pursue corrective relief from the trial court (e.g. reconsideration) or through appellate review (although as discussed below, the standards circuit courts use to evaluate Rule 56(f)(3) error are inconsistent).

Yet here, the Fifth Circuit for the first time justified the summary judgment disposition based on *sua sponte* grounds—effectively eliminating any viable redress. The Civelli Petitioners raised these concerns with the Fifth Circuit through a *Petition for Rehearing En Banc*, but the court declined to reconsider. (App. 37). The Civelli Petitioners therefore file this Writ and request much-needed guidance regarding the interrelationship between the Rule 56(f)(3) proscription, relative to the proper scope of appellate review.

REASONS FOR ALLOWING THE WRIT

A. Certiorari is Warranted regarding the Relationship between Rule 56(f) and Proper Scope of Appellate Review

1. This Court has not provided guidance that an *appellate* court may not usurp rules intended to ensure summary judgment non-movants are given advance notice and a fair opportunity to respond,

before a claim is dismissed. The proposition, however seemingly obvious, was not acknowledged by the Fifth Circuit, and notwithstanding practitioners routinely construe Rule 56 to provide a protection of the kind, which should inure to their benefit on appeal, circuit courts have taken inconsistent positions regarding the notice requirements of Rule 56.

For instance, historical jurisprudence from several circuits forbade a *trial* court from *sua sponte* granting summary judgment without advance notice. *See, e.g.*, *Herzog and Straus v. GRT Corp.*, 553 F.2d 789, 792 (2d Cir. 1977) ("Fed.R.Civ.P. 56(c) requires that a motion for summary judgment be served at least ten days before a hearing is held. While this rule applies expressly only to summary judgment motions by a party, '(w)e think the spirit of the rule requires the same notice and hearing where the court contemplates summary dismissal on its own motion.'") (quoting *Bowdidge v. Lehman*, 252 F.2d 366, 368 – 69 (6th Cir. 1958)); *Bryson v. Brand Insulations, Inc.*, 621 F.2d 556, 559 (3d Cir. 1980) ("Bryson had no prior knowledge that the court was considering judgment on the pleadings or summary judgment. Without notice, he had no reasonable opportunity to present to the court material relevant to a Rule 56 proceeding. Because the procedure of Rule 56 requiring an opportunity to present pertinent material, which presumes notice to the party so that he may take advantage of the opportunity, was not followed, the entry of judgment must be reversed."); *Bowdidge*, 252 F.2d at 369 (holding with respect to a *sua sponte* summary

judgment, "Since attorney for appellants was given neither notice nor opportunity to be heard upon the question of summary dismissal the judgment was erroneous."); *Choudhry v. Jenkins*, 559 F.2d 1085, 1089 (7th Cir. 1977) ("On those few occasions when district courts have attempted the sua sponte entry of summary judgment, the courts of appeals have reversed, recognizing that the notice and hearing policies of Rule 56 otherwise would be slighted."); *Twin City Fed. Sav. & Loan Ass'n v. Transamerica Ins. Co.*, 491 F.2d 1122, 1126 (8th Cir. 1974) ("a court may not pose the issue and then proceed to decide the same without a motion for summary judgment. Twin City argues that the district court should be deemed to have treated the submission as a motion for summary judgment. This may have been the intention of the district court, but, if so, it was error. Rule 56 provides for service of the motion for summary judgment, an opportunity for service of opposing affidavits and a hearing.").

There were, however, exceptions to this view regarding the advance notice requirement. The United States Court of Appeals for the Tenth Circuit, at times, suggested a trial court indeed could enter summary judgment *sua sponte*—under certain conditions. *See, e.g.*, *Holcomb v. Aetna Life Ins. Co.*, 255 F.2d 577, 580 (10th Cir. 1958) ("Where at pre-trial admissions and pleadings show that no issue of fact remains to be determined, the court has the power to decide the questions of law and enter summary judgment thereon . . . ."). The Ninth Circuit adopted an approach similar to the Tenth Circuit. *See Portsmouth Square Inc. v. S'holders*

Protective Comm., 770 F.2d 866, 869 (9th Cir. 1985) ("Where the district court grants summary judgment in the absence of a formal motion, we review the record closely to ensure that the party against whom judgment was entered had a full and fair opportunity to develop and present facts and legal arguments in support of its position. . . . Although it would have been preferable for the district court specifically to notify the parties that it intended to consider granting a summary judgment at the pretrial conference, Portsmouth Square was adequately notified that it might have to defend the sufficiency of its claim.").

The Fifth Circuit also allowed for a similar result—albeit indirectly—by holding even if erroneous for a trial court to *sua sponte* grant summary judgment, the error would be reversible only upon a showing of "harmless" error. *See, e.g.*, *Norman v. McCotter*, 765 F.2d 504, 508 (5th Cir. 1985) ("the district court's failure to give sufficient notice and an opportunity to respond, assuming both were required, was harmless error").

The latter proposition was fraught with peril, because of the impracticality (in many instances) of forcing an aggrieved party to marshal argument and evidence on appeal, to demonstrate why it was "harmful" for the trail court to have denied the aggrieved party an opportunity to marshal the necessary argument and evidence in the first instance. As a further complication, various circuits (even some who in general were hostile to the proposition of *sua sponte* summary judgments) applied variations of the "harmless error" standard,

although the practical implications of the standards were not particularly onerous.

The Third Circuit, for instance, measured harmless error by adopting a liberal framework akin to Rule 12(b)(6) practice, inquiring "whether there is *any* state of facts on which plaintiff could conceivably recover." *Davis Elliott Int'l, Inc. v. Pan Am. Container Corp.*, 705 F.2d 705, 708 (3d Cir. 1983) (emphasis added). Precisely because that standard mirrored the standard for dismissal on the pleadings, it was not unduly burdensome or unfair—because the Rule 12(b)(6) analysis is not evidentiary and not dependent on the presence or absence of an evidentiary record. The Sixth Circuit also adopted a liberal standard of review by imposing a "prejudice" requirement that could by shown simply based on the fact "that not having an opportunity to respond constitutes prejudice." *Yashon v. Gregory*, 737 F.2d 547, 552 (6th Cir. 1984).

2. Two developments ostensibly should have eliminated the above-described tensions between the circuit courts' approaches to *sua sponte* summary judgment procedure. In 1986, this Court issued its ruling in *Celotex Corp. v. Catrett*, wherein it held "district courts are widely acknowledged to possess the power to enter summary judgments sua sponte, *so long as* the losing party was on notice that she had to come forward with all of her evidence." 477 U.S. 317, 326 (1986) (emphasis added). Moreover, in 2010, subsection (f)(3) was added to Rule 56, which as discussed above provides: "[a]fter giving notice and a reasonable time to respond, the [trial] court may . . . consider summary judgment on

its own after identifying for the parties material facts that may not be genuinely in dispute." (emphasis added).

Even now, however, there is tension between circuit jurisprudence regarding the practical implications of the Rule 56(f)(3) protection against *sua sponte* summary judgments. The circuits that historically treated *sua sponte* summary judgment dispositions as *de facto* reversible error, or at minimum applied *liberal* variations of the harmless error standard (i.e., the Second, Third, Sixth, Seventh, and Eighth)—do not appear to have departed from those positions.

But circuits that approved—under certain conditions—*sua sponte* summary judgment dispositions, continue to allow the practice. For instance, less than a month prior to this filing, the Tenth Circuit forgave a trial court's *sua sponte* basis for summary judgment (purported lack of "reasonable reliance" to support a fraud claim) by rationalizing:

> Plaintiffs argue in their appeal . . . that the district court committed reversible error because it *sua sponte* and "without prior notice or opportunity to brief or present evidence on the issue, . . . analyzed whether EFLO and Pacific . . . reasonably relied on statements made by Devon Energy and Devon Canada for purposes of the Fraud claim." . . . . We reject this argument for three reasons. First, the district court applied well-established principles of Oklahoma law

> regarding fraud claims to the undisputed facts of the case. Second, plaintiffs make no attempt in their appellate brief to challenge the substance of the district court's analysis. And third, we conclude that the district court's analysis on this point was correct, i.e., the statements alleged by plaintiffs to be fraudulent . . . in one instance, could not reasonably be relied on by plaintiffs.

EFLO Energy v. Devon Energy Corp., No. 22-6051, 2023 WL 3047967, at *15 (10th Cir. Apr. 24, 2023)

The Fifth Circuit also has carried over its harmless error standard of review. *See, e.g.*, *Markel Am. Ins. Co. v. Verbeek*, 657 F. App'x 305, 310 (5th Cir. 2016). In so doing, it adopted historical Fifth Circuit jurisprudence that held the measure of harmless error is as follows: "'A district court's grant of summary judgment *sua sponte* is "considered harmless if the nonmovant has no *additional* evidence or if all of the nonmovant's *additional* evidence is reviewed by the appellate court and none of the evidence presents a genuine issue of material fact."'" *Id.* at 310 (quoting *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 28 F.3d 1388, 1398 (5th Cir. 1994)) (emphasis added).

The Fifth Circuit's legacy standard continues to invite the paradoxical dilemma discussed above, whereby the appellate record by definition can consist of only "evidence" propounded in the trial court, but in the absence of notice to the non-movant

to prompt submission of pertinent evidence—in many instances only fortuity will dictate whether "additional evidence" is present in the record.

3. In light of the ongoing, inconsistent positions taken by the circuit courts—even after this Court's ruling in *Celotex Corp.* and the addition of subsection (f)(3) to Rule 56—the summary judgment landscape has been challenging to maneuver. The challenge now has been made exponentially more onerous by what the Fifth Circuit has done in the underlying appeal.

Even though enforced by inconsistent standards utilized by the circuit courts, the Rule 56(f)(3) protection has offered at least some possibility *sua sponte* grounds for summary judgment would be subject to review on appeal. But the utility of the Rule 56(f)(3) protection is rendered moot, if the goal of the protection can be disregarded for the first time *during* appeal.

As discussed above, when trial courts enter summary judgment *sua sponte*—the aggrieved party in principle is in a position to recognize the derivative hazards caused by circuits that have adopted a harmless error (or similar) standard and proactively supplement the evidentiary record though a reconsideration request or similar procedural device as a precautionary measure. The aggrieved party likewise could seek to propound supplemental briefing regarding principles of law to adequately preserve the matters for appeal.

But when the appellate court *itself* elects to scrutinize a summary judgment record and affirm on

issues neither the trial court nor the parties ever intended to address, the aggrieved party has no viable recourse. The appellate court instead is positioned to rely on largely unavoidable voids in the record, to support the summary judgment outcome preferred by the reviewing court.

The only practical insulation to risk of the kind is for summary judgment non-movants to propound inflated—largely gratuitous—summary judgment evidence on all claims or defenses, and all elements thereof, regardless whether effort of the kind is prompted by the summary judgment movant, or a Rule 56(f)(3) invitation from the trial court. So doing does nothing to further the judiciary's interest in treating summary judgment "as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, *speedy* and *inexpensive* determination of every action." *Celotex Corp.*, 477 U.S. at 327 (quoting FED. R. CIV. PROC. 1) (emphasis added). The process instead would necessitate costly, unduly burdensome trials on the papers—likely frustrating many courts who would be forced to review material outside the scope of viable grounds for summary judgment. The practice indeed would likely frustrate even opposing parties, who would be forced to contend with gratuitous summary judgment materials that go well beyond grounds even the opposing parties perceive warrant summary judgment. Neither of these outcomes are proper or desirable.

Rule 56(f)(3) requires notice and opportunity to respond before summary judgment may be granted. An appellate court should be bound by the same restrictions. Review by this Court is warranted to remedy the Fifth Circuit's improper application of summary judgment procedure.

B. Certiorari is Warranted because this Appeal is an Ideal Vehicle to Clarify the Relationship between Rule 56(f) and the Scope of Appellate Review

This appeal is not bogged down by factual or procedural considerations that obscure the nature of the Fifth Circuit's error. In the Fifth Circuit's opinion, it plainly acknowledged the trial court had not premised its summary judgment ruling on the meeting of the minds element of conspiracy; yet, it decided the conspiracy claim on that basis. (Appx. 15). Moreover, the Fifth Circuit did not hold it in any event would have affirmed dismissal of the conspiracy claim based on limitations, even assuming *arguendo* it had not considered the merits of the conspiracy claim. (*Id.*).

The record instead plainly, without obfuscation, reflects the Fifth Circuit elected not to address limitations *at all* as grounds to affirm dismissal of the conspiracy claim. The record also plainly, without obfuscation, reflects the J.P. Morgan Respondents neither sought summary judgment on the merits of the conspiracy claim in the trial court *nor* sought to defend the summary judgment ruling by proffering alternative merits arguments in their appellate briefing.

The issue was not presented or preserved anywhere. It first was raised and relied upon by the Fifth Circuit.

This case therefore presents the rarest of occasions in which an exceedingly important question regarding Rule 56 procedure and appellate review, with system-wide significance, is cleanly at issue and will have a direct impact on the disposition of this case. The opportunity to clarify these important matters should not be forfeited.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Nolan C. Knight
Counsel of Record
MUNSCH HARDT KOPF &
HARR, P.C.
3800 Ross Tower
Suite 3800
500 North Akard
Dallas, Texas 75201
(214) 855-7500
nknight@munsch.com

Richard A. Schwartz
MUNSCH HARDT KOPF &
HARR, P.C.
700 Milam Street
Suite 2700
Houston, Texas 77002
(713) 222-9790
dschwartz@munsch.com

Counsel for Petitioners