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No. 24-

IN THE

Supreme Court of the United States

CICEL (BEIJING) SCIENCE & TECHNOLOGY CO., LTD.,
Petitioner,

v.

MISONIX, INC.,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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September 9, 2024

QUESTIONS PRESENTED

This Court has long held that summary judgment is appropriate only in the absence of genuine issues as to any material fact, viewing the evidence in a light favorable to the opposing party. *Tolan v. Cotton*, 572 U.S. 650, 660 (2014) (per curium) (granting summary reversal); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Here, however, the courts below uncritically adopted the movant's version of the facts and granted summary judgment based on a disputed interpretation of certain email correspondence drafted by non-native English speakers—all while ignoring non-movant's witness testimony and other evidence that supported an alternative reading of those emails.

The questions presented are:

1. Whether the Court should summarily reverse the Second Circuit decision affirming summary judgment against Petitioner.
2. Whether the Second Circuit, after disregarding evidence in the record that favored the non-movant, erred in adopting a "whole record" summary judgment standard that entitles the court to adopt its own disputed interpretation of email correspondence, a standard that is in conflict with the other circuits?

CORPORATE DISCLOSURE STATEMENT

Petitioner Cicel (Beijing) Science & Technology Co., Ltd. is a nongovernmental corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

STATEMENT OF RELATED CASES

Counsel is aware of no directly related proceedings arising from the same trial-court case as this case, other than those proceedings appealed here.

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Petitioner Cicel (Beijing) Science & Technology Co., Ltd. ("Cicel") respectfully petitions the Court to summarily reverse the judgment of the United States Court of Appeals for the Second Circuit granting summary judgment in favor of Misonix, Inc. ("Misonix"). In the alternative, Petitioner respectfully requests that the Court grant its petition to address the proper standard for summary judgment where courts are asked to evaluate the meaning and implication of email correspondence.

OPINIONS BELOW

The summary order of the court of appeals (App. 1a-10a) affirming the district court's grant of summary judgment in favor of Misonix on Cicel's breach of contract and defamation claims is unreported. The district court opinion granting summary judgment in

favor of Misonix is reported at 581 F. Supp. 3d 454 (App. 11a-21a).

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2024. A petition for rehearing or rehearing en banc was denied on April 26, 2024 (App. 22a). On July 19, 2024, Justice Sonia Sotomayor extended the time within which to file a petition for a writ of certiorari to and including September 9, 2024.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

This Court has long held that summary judgment under Federal Rule of Civil Procedure 56 is appropriate only if there exists "no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis omitted). The burden of demonstrating "[the] absence of evidence to support the nonmoving party's case" rests on the movant. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Summary judgment rules promote judicial economy by reserving for trial only those cases where there remain genuine issues to be resolved. Nevertheless, to preserve civil litigants' entitlement to a jury trial, federal courts must be mindful that "[c]redibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson*, 477 U.S. at 255.

Here, the lower courts overstepped the bounds of FRCP 56 and flagrantly violated the summary judgment standards set forth by this Court and adopted by other appeals courts. In the past, this Court has

intervened when lower courts clearly err in their application of summary judgment standards. See *e.g.*, *Tolan v. Cotton*, 572 U.S. 650, 659 (2014) (summarily reversing where "the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents."). The lower courts' blatant disregard for the appropriate basis for summary judgment warrants this Court's attention.

Cicel, a Chinese company, contracted with Misonix, an American company, to act as Misonix's exclusive distributor in China for certain medical products. As a pretext to terminate a fixed-term deal, Misonix alleged, including directly to the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC"), that Cicel's practices violated the Foreign Corrupt Practices Act ("FCPA"). C.A. App. 436. Cicel subsequently sued Misonix for terminating the agreement. During the course of the litigation, Misonix relied on the New York illegality defense, claiming that termination was justified given Cicel used sub-distributors to pay bribes to distribute Misonix's product in China. C.A. App. 795. Despite lodging these various accusations, Misonix admitted that it had no actual evidence of such conduct.

In granting summary judgment in favor of Misonix, the lower courts construed disputed evidence in Misonix's favor. They uncritically adopted Misonix's pretextual reasons for terminating the fixed-term agreement with Cicel and regurgitated wholesale Misonix's allegation that its internal investigation uncovered [redacted] Sealed C.A. App. 7.

The lower courts based their grant of summary judgment to Misonix on a handful of emails, written by non-English speakers, which the courts construed

as admitting Cicel's involvement in bribery. Indeed, the lower courts went so far as to use an **altered quotation** from key email correspondence, creating a false impression of illegality, which the courts then relied on to support Misonix's version of events.

The record, however, contains evidence from the authors and others supporting reasonable and material alternative constructions of these emails: namely, that Cicel did *not* participate in such practices but rather was warning Misonix *against* such a market strategy.

These kinds of determinations, which rely heavily on the assessment of the credibility of witnesses, are quintessentially the province of a jury. Most circuits have reversed summary judgment rulings where, as here, the trial court improperly selected among disputed interpretations of email correspondence.

At bottom, the unpublished, two-judge decision below presumes that, because corruption is a problem in China, the Chinese company must also be corrupt. That does not follow as matter of logic, fairness, or from the record. Misonix's wrongful termination and defamatory accusations have decimated Cicel's business and its founder's reputation. Cicel is at minimum entitled to a trial on its claims.

For the reasons outlined above, the courts' usurpation of the role of the jury in this case constitutes a clear error that warrants summary reversal. In the alternative, this Court should grant the petition to clarify that courts reviewing summary judgment motions must credit contradictory evidence that favors the non-movant and not resolve the resulting conflicts in material evidence.

A. Background

Cicel is a Chinese medical company, based in Beijing, that registers, distributes, markets, sells, services, and provides clinical support for medical devices in China. Misonix is a publicly traded, American-based manufacturer of medical products incorporated under the laws of the State of New York. Misonix manufacturers a variety of ultrasound surgical products, including SonaStar, a device used in neurosurgery and liver surgery for removing soft tumors, and BoneScalpel, a device used to assist with cutting the spine. Sealed C.A. App. 5. Prior to the present dispute, Cicel and Misonix were engaged in a multi-year commercial relationship wherein Cicel distributed Misonix products to customers in the Chinese market.

[redacted] Sealed C.A. App. 413 at 17:15-25. In 2013, Cicel signed a new agreement (the "Agreement") with Misonix, under which Cicel would enjoy the exclusive right to distribute both SonaStar and the novel technology, BoneScalpel, to Chinese customers. Sealed C.A. App. 2221 at 137:5-7; Sealed C.A. App. 34-55.

With respect to BoneScalpel, Misonix aimed to [redacted] Sealed C.A. App. 971 at 226:15-229:5.

But Cicel [redacted] Sealed C.A. App. 1823; Sealed C.A. App. 192. [redacted]

[redacted] Sealed C.A. App. 305-06 at 176:20-177:3; Sealed C.A. App. 372.

Although the 2013 Agreement between Cicel and Misonix had a five-year term, [redacted] See Sealed C.A. App. 1572-73 [redacted] Sealed C.A. App. 1582-83. [redacted] Sealed C.A. App. 1719, [redacted] Sealed C.A. App. 1573-74. [redacted]

[redacted] (Sealed C.A. App. 297 at 143:6-8) [redacted] Sealed C.A. App. 1573.

[redacted] Sealed C.A. App. 1573 [redacted] Sealed C.A. App. 836.

[redacted] (Sealed C.A. App. 1820-27; Sealed C.A. App. 345 at 320:14-19), [redacted] (Sealed C.A. App. 1573). [redacted] (Sealed C.A. App. 1593 at 12:4-16) [redacted] Sealed C.A. App. at 317:5-16. [redacted] (Sealed C.A. App. 1827-56), [redacted]

[redacted] Sealed C.A. App. 1848. [redacted] Sealed C.A. App. 1848, [redacted] (Sealed C.A. App. 1831).

[redacted] Sealed C.A. App. 2217 at 118:7-12, [redacted] Sealed C.A. App. 2142, which then developed a pretext for termination of its relationship with Cicel in internal emails written by then Director of Sales for APAC David Battles in April of 2016. See *e.g.*, Sealed C.A. App. 179 (email from D. Battles to Misonix Chief Financial Officer Richard Zaremba). In his first email to Misonix's CFO, Battles wrote that, while he had "no evidence that there actually has been any violations of the FCPA by our distributor in China," [redacted] Sealed C.A. App. 179-80. The second email reported a purported conversation about business practices with Cicel's principal, May Lee. Sealed C.A. App. 172 at 191:7-192:25. Battles does not speak Mandarin, May Lee's English abilities are very limited, and no interpreter was present. Sealed C.A. App. 172 at 191:5-6; Sealed C.A. App. 537 at 18:2-13; Sealed C.A. App. 594 at 125:16-126:2; Sealed C.A. App. 267 at 22:5-27:16.

Battles' implications contradicted his own representations from only a few months prior, [redacted]

[redacted]

Sealed C.A. App. 1240-41 [redacted] (emphasis added).

Yet two months later, when facing termination, Battles sought the protections afforded by whistleblower status. [redacted]

Sealed C.A. App. 443 at 136:6-15.

Battles' allegations catalyzed an internal investigation for which Misonix retained law firm Morgan Lewis. Sealed C.A. App. 357-58. The attorney leading the investigation, Martha Stolley, [redacted] Sealed C.A. App. 358. Her investigation returned no actual evidence of any FCPA violation; [redacted] Sealed C.A. App. 507-08. [redacted]

[redacted] Sealed C.A. App. 511.

Misonix's efforts to be rid of Cicel continued. [redacted] (Sealed C.A. App. 241 at 142:7-19), [redacted] (Sealed C.A. App. 166 at 166:14-16). [redacted] Sealed C.A. App. 1540 at 174:7-10.

Ultimately, in September 2016—approximately three years into the parties' five-year term—Misonix terminated its relationship with Cicel without providing a reason. C.A. App. 439. Misonix subsequently made disclosures to the DOJ and the SEC, stating that it may have had knowledge of certain business practices of an independent Chinese entity that distributed its products in China, which raised questions under the FCAP. C.A. App. 436. Nevertheless, no charges were brought by either DOJ or the SEC based on the evidence proffered by Misonix. C.A. App. 745.

After terminating its distribution agreement with Cicel, [redacted]

[redacted] Sealed C.A. App. 1324 at 299:18-21. [redacted] Sealed C.A. App. 705-39, [redacted] See *e.g.*, Sealed C.A. App. 1739 [redacted] Following the revelation that Weigao's sub-distributors had been subject to administrative penalties due to bribery, see *e.g.*, Criminal Judgment of People's Court of Gaoyou City in Jiangsu Province No. (2016) Su 10847 Penal No. 542; Criminal Judgment of the People's Court of Baoying County, Jiangsu Province No. (2017) Su 1023 Penal No.105; Criminal Judgment of Xiangcheng District People's Court in Suzhou City No. (2017) Su 0507 Penal No.399, [redacted] Sealed C.A. App. 1797; Sealed C.A. App. 1609 at 70:9-72:9. [redacted] See *e.g.*, Sealed C.A. App. 8131 [redacted] Sealed C.A. App. 1848 [redacted]

Not until later did Misonix reveal its true motivations for terminating Cicel. [redacted]

[redacted] Sealed C.A. App. 1712. [redacted]

Sealed C.A. App. 1318-19 at 275-77.

B. Procedural History

In March 2017, Cicel sued Misonix in the Eastern District of New York to vindicate its contractual rights. Cicel also raised a variety of other claims stemming from the termination of the Agreement. Cicel's initial complaint alleged unfair competition, tortious interference with contract, tortious interference with a prospective contract, breach of the Agreement, conversion, and fraudulent inducement. C.A. App. 122. Cicel later moved to amend its complaint to add, *inter alia*, claims for defamation *per se* under state law and misappropriation of trade secrets under both state law and the federal Defend Trade Secrets Act ("DTSA"). C.A. App. 670. The district court granted leave for Cicel to amend its complaint with respect to the defamation and trade secrets claims, App. 21a, and Cicel submitted its second amended complaint, which included a jury trial demand, C.A. App. 223.

In discovery, Cicel sought to probe Morgan Lewis' internal investigation. Cicel first filed a motion to compel Misonix to produce documents, notes, recordings, or videotape evidence created during Morgan Lewis' interview of May Lee, Cicel's president. C.A. App. 122. In opposing the motion, Misonix submitted a declaration from Martha Stolley, dated November

16, 2018, denying the existence of any recordings or transcripts created by her or any other Morgan Lewis attorney. C.A. App. 73-76. That representation, however, was contradicted by deposition testimony and declarations submitted by Cicel, Sealed C.A. App. 1359-60; Sealed C.A. App. 1112. Misonix also represented that it would not rely on the investigation itself for purposes of the litigation, and asserted privilege over investigation documents. C.A. App. 82. Relying on Misonix's representations, the district court ruled that the internal investigation documents were privileged. C.A. App. 138; C.A. App. 143.

Misonix subsequently moved for summary judgment against Cicel on all counts. With regard to the breach of contract claim, Misonix invoked New York law's illegality defense, which has two elements: first, the illegal performance must "take[] the form of commercial bribery or similar conduct"; and second, the illegality must be "central to or a dominant part of the plaintiff's whole course of conduct in performance of the contract." *McConnell v. Commonwealth Pictures Corp.*, 7 N.Y.2d 465, 471 (N.Y. 1960). Specifically, Misonix argued that the parties' contract was unenforceable given there were [redacted] Sealed C.A. App. 2314.

In support of its motion, Misonix submitted another declaration from Stolley, dated August 24, 2021, [redacted] Sealed C.A. App. 30-33. [redacted]

[redacted] Sealed C.A. App. 1089-1104. Cicel also submitted its own declarations supporting its opposition and contradicting Stolley's claims. Sealed C.A. App. 1109-1115. The district court did not rule on either request; Cicel was not allowed to depose any attorney from Morgan Lewis, and the 2021 Stolley declaration remains part of the evidentiary record.

In January 2022, the district court granted summary judgment in favor of Misonix on Cicel's breach of contract and defamation claims, leaving intact only the trade secrets claim. With regards to the breach of contract claim, notwithstanding Misonix's own statements to the contrary, the district court found that "Misonix's investigation of these allegations [of bribery] yielded incontrovertible proof." App. 15a. This "inconvertible proof" came not in the form of proof of any actual bribery, but rather of "emails authored by Cicel's management" that discussed generally Cicel's business in the region and concerns regarding corruption.[1] Shortly after the district court issued its summary judgment decision, the parties stipulated to a voluntary dismissal of Cicel's misappropriation of trade secrets claim.

Cicel timely appealed to the Second Circuit on August 16, 2022. C.A. App. 1279. On March 6, 2024, a two-judge panel affirmed the district court's summary judgment decision in an unpublished opinion. With respect to Cicel's breach of contract claim, the Second Circuit agreed with the district court that five emails drafted primarily by non-management mem-

[1] The specific emails at issue are discussed in detail in the Reasons for Granting the Petition.

bers of Cicel's staff constituted ***inconvertible*** proof of illegal conduct under New York state law. App. 5a-8a.

Cicel filed a petition for rehearing and/or en banc rehearing on April 3, 2024. Cicel pointed out *inter alia* that the panel's assumption that Cicel was using a corrupt sub-distributor, APD, was based on an *altered* quotation in one of the emails, and that in fact Cicel had never subcontracted APD:

> As you may know, APD has good experiences on handling business under the table. Sometimes, it's very helpful, but sometimes it could be very danderous. So for big cities, such as Shanghai and Guangzhou, we could not take the risk. We would rather be safe. But for some small place, where under table business is very popular and well accepted, APD may help, or may be we could cooperate with them on some specific project. But we should be very careful about the territory and we should have full supervision for their behaviors during the whole process, which we believe it's best for our mutual benefit.

Figure 1 *Original text of the September 26, 2014 email draft. Sealed C.A. App. 529.*

> As you may know, [Cicel sub-distributor] APD has good experiences on handling business under the table. Sometimes, it's very helpful, but sometimes it could be very dan[g]erous. So for big cities, such as Shanghai and Guangzhou, we could not take the risk. We would rather be safe. *But for some small place, where under table business is very popular and well accepted, APD may help, or may be we could cooperate with them on some specific project.* But we should be very careful about the territory and we should have full supervision for their behaviors during the whole process, which we believe it's best for our mutual benefit. [*sic*]

Figure 2 *Altered block quotation from the September 26, 2014 email relied upon by the Second Circuit. App. 7a (emphasis added). A nearly identical version of the altered quotation also appears in the district court's summary judgment decision. App. 15a-16a.*

This alteration was not trivial. Misonix's illegality defense relied upon the claim that Cicel facilitated payments through sub-distributors. Cicel, however, denies that it ever worked with suspect sub-distributors like APD. Sealed C.A. App. 294-308. [redacted]

[redacted] By altering the September 26 email to state conclusively that APD had been a Cicel sub-distributor, the courts below neatly—though wildly inappropriately—resolved a material factual dispute in the movant's favor.

Nonetheless, the court of appeals denied the petition on April 26. App. 22a.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD SUMMARILY REVERSE THE SECOND CIRCUIT'S HOLDING AFFIRMING SUMMARY JUDGMENT.

A. This Court may grant certiorari to summarily reverse the misapplication of a properly stated rule of law. Sup. Ct. R. 10. Summary reversal is appropriate to correct "palpably clear cases of ... error." *Leis v. Flynt*, 439 U.S. 438, 457 (1979) (Stevens, J., dissenting) (citation omitted); see also *Pavan v. Smith*, 582 U.S. 563, 567 (2017) (Gorsuch, J., dissenting) (summary reversal is used where "the law is settled and stable ... and the decision below is clearly in error") (citation omitted); *Kalamazoo Cnty. Rd. Comm'n v. Deleon*, 574 U.S. 1104, 783 (2015) (Alito, J., dissenting from denial of petition for writ of certiorari) ("Certiorari is appropriate when 'a United States court of appeals ... has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power.'") (citing Sup. Ct. R. 10); *Marmet Health Care Ctr., Inc. v. 1104 Brown*, 565 U.S. 530, 532 (2012) (summarily reversing decision that "was both incorrect and inconsistent with clear instruction in the precedents of this Court"); see also *Gonzales v. Thomas*, 547 U.S. 183, 185 (2006) (noting that summary reversal is appropriate where the decision below is errone-

ous, and the error is obvious). For the reasons discussed in detail below, the erroneous rulings of the district court and Second Circuit warrant summary reversal.

This Court's precedent clearly instructs that, under FRCP 56, when there exists a "genuine" issue of material fact "such that a reasonable jury could return a verdict for the nonmoving party," summary judgment is inappropriate, and the case should proceed to the jury. *Anderson*, 477 U.S. at 248. It is the movant who bears the burden of showing that there is no genuine issue of fact. *Id.* at 256. Courts reviewing summary judgment motions must consider the entire record, and a grant is warranted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex*, 477 U.S. at 322 (citation omitted).

This Court has summarily reversed court of appeals decisions that have eased the burden on movants by failing to properly apply the proper summary judgment standards. See *e.g.*, *Tolan*, 572 U.S. at 657-60 ("the ... Circuit failed to adhere to the axiom that in ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor'"); see also *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) (reversing grant of summary judgment because respondent did not carry its burden, as the moving party, of showing an absence of a genuine issue as to any material fact); *Erickson v. Pardus*, 551 U.S. 89, 89-90 (reversing the lower court's summary judgment holding that "depart[ed] in so stark a manner from the

pleading standard mandated by the Federal Rules of Civil Procedure.").

In *Tolan*, the court of appeals was faced with competing accounts of events, and "failed to view the evidence at summary judgment in the light most favorable to Tolan with respect to the central facts of this case." *Tolan*, 572 U.S. at 657. "By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly weighed the evidence and resolved disputed issues in favor of the moving party." *Id.* (cleaned up). Among other things, the court of appeals drew inferences contrary to certain deposition testimony, "did not credit directly contradictory evidence," and ignored that a jury could reach different conclusions about the meaning of certain statements when viewed "in context." *Id.* at 657-59. The court concluded: "[c]onsidered together, these facts lead to the inescapable conclusion that the court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion." *Id.* at 659. And "while this Court is not equipped to correct every perceived error coming from the lower federal courts," such clear and egregious error warranted summary reversal. *Id.* (cleaned up; collecting cases).

B. In this case, as in *Tolan*, *Adickes*, and *Erickson*, the district court and the two-judge court of appeals panel starkly departed from the summary judgment standard mandated by FRCP 56. The courts below did not credit any evidence that favored Cicel. Instead, they impermissibly resolved disputed material issues of fact in favor of Misonix by accepting the moving party's disputed gloss on a handful of emails. They even altered the language of one email in favor of Misonix.

Specifically, the court of appeals unequivocally concluded on the basis of this vague and edited correspondence that "Cicel was willing to use a sub-distributor to pay bribes." App. 7a. The two-judge panel agreed with the district court that portions of five emails—primarily written by non-management members of Cicel's staff—constituted "overwhelming[] support" for the fact that Cicel engaged in "commercial bribery or similar conduct" and that the illegality "[wa]s central to or a dominant part of [Cicel's] performance of the contract." App. 3a (citing excerpts of email from May Lee to Michael McManus dated January 15, 2015 (Sealed C.A. App. 367); email from Lily Jiang to John Dobash dated December 18, 2014 (Sealed C.A. App. 371); email from Sunny Li to Howard Kleven dated August 26, 2013 (Sealed C.A. App. 520); email from Sunny Li to Michael McManus dated September 5, 2014 (Sealed C.A. App. 524); September 26, 2014 draft email from Sunny Li to May Lee (Sealed C.A. App. 529)).

None of this correspondence, however, contains direct evidence of any bribe—no specific time, location, amount, or identities of any individuals or entities. Instead, the emails discuss corruption in China generally, outline Cicel's position on working with sub-distributors in this environment, and inform Misonix that Cicel does not engage in any form of incentive sales business for fear of crossing the line into corrupt practices.

The record also contains evidence supporting Cicel's alternative reading of these communications: Cicel recognized the challenges of operating in a corrupt business climate and sought to operate carefully within that reality. Earnest review of witness testimony in favor of Cicel lays bare that Misonix did not foreclose the possibility that Cicel was demonstrating

resistance, not acquiescence, to pressure to engage in illegal activity.

The courts below made no effort to square their recitation of the correct standard—that the record should be reviewed as a "whole," App. 6a (citing *Lyons v. Lancer Ins. Co.*, 681 F.3d 50, 57 (2d Cir. 2012))—with their actual approach of ignoring evidence offered by and supporting Cicel's positions. Instead, the district court and the Second Circuit indulged their own speculative reasoning and concluded that Cicel used sub-dealers to conduct bribery based on five ambiguous emails. In so doing, the courts below set aside and failed to credit substantial evidence in Cicel's favor, which amply supported material disputes of fact:

1. The grants of summary judgment below rely heavily on portions of a September 26, 2014 email—drafted by a non-management Cicel staff member and sent to May Lee—regarding another Chinese company, APD. Sealed C.A. App. 529.

As discussed, see pp. 6-7, *supra*, [redacted] Sealed C.A. App. 1574. [redacted] Sealed C.A. App. 1573-74. [redacted] Sealed C.A. App. 2198 at 42:3-43:4.

Notwithstanding this record evidence, the court of appeals uncritically accepted that APD was a Cicel sub-distributor and thus found that "[t]he only reasonable interpretation of this email is that Cicel was

willing to use a sub-distributor to pay bribes in small cities ...". App. 7a. This conclusion is not supported by either the plain text of the September 26 email or the record when reviewed as a whole.

Unaltered, the September 26, 2014 email reads: "[a]s you may know, APD has good experiences on handling business under the table." Sealed C.A. App. 529. The opinions below, however, changed the text of the email to read: "[a]s you may know, *[Cicel sub-distributor]* APD has good experiences on handling business under the table." App. 7a (emphasis added). This alteration thus took the company with "good experience" paying bribes and, without support, transmogrified it into Cicel's subcontractor, favoring Misonix's position.

Other evidence in the record supports the fact that APD was never a Cicel sub-distributor. See *e.g.*, Sealed C.A. App. 296 at 140:16-21 [redacted]; Sealed C.A. App. 500 at 365:19-24 [redacted]

Thus, the lower courts not only drew inferences in favor of *the moving party*, Misonix, but also relied on altered language that more strongly favored the moving party. This flies in the face of this Court's directive in *Anderson* that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." If lower courts cannot even weigh the evidence, surely they cannot alter evidence that obscures ambigui-

ties in written text. This editing alone constitutes a clear error that should be summarily reversed.

Moreover, it is patently incorrect to claim, as the court of appeals did, that no witness addressed the issues in that email or provided an alternative explanation for its communication. App. 7a. If the record is viewed as a whole, as the Second Circuit claimed to be doing, the testimony from May Lee, McManus, and Dobash creates a genuine issue of fact as to whether the September 26 email should be read to suggest that Cicel wanted to work with APD to engage in bribery, or—in the alternative—that it wanted to ensure it had adequate control over APD if it was forced to work with the company given its purported history of engaging in illegal payments. It was at least equally reasonable to infer that Cicel was concerned about APD's past dealings, and sought to relay those concerns to Misonix. Indeed, it is clear that Cicel felt pressured by *Misonix* to work with APD. See *e.g.*, Sealed C.A. App. 299 [redacted] (emphasis added).

Fundamentally, when the language is read in its original, unmodified form, the September 26, 2014, email is no different than all other emails in the record: reasonably susceptible to the contrary interpretation that Cicel was merely relaying its concerns regarding the practices of other companies and corruption in the medical industry.

2. The courts below also relied on portions of three other emails in which May Lee and other non-management members of Cicel's staff describe general instances of corruption in the Chinese medical

industry and refuse to engage in stimulated sales. See email from May Lee to Michael McManus dated January 15, 2015 (Sealed C.A. App. 367); email from Lily Jiang to John Dobash dated December 18, 2014 (Sealed C.A. App. 371); email from Sunny Li to Howard Kleven dated August 26, 2013 (Sealed C.A. App. 520). Those emails similarly do not evidence bribery.

In one of those emails, Cicel President May Lee calls bribery "appalling." Sealed C.A. App. 367. [redacted] Sealed C.A. App. 371; see also Sealed C.A. App. 520 [redacted] The courts also ignored other testimony that clarified that references to "under the table" deals referred to the kinds of deals in the arena of consumables that Cicel did not want to do. Sealed C.A. App. 294 at 132:18-19.

Countervailing deposition testimony supports the conclusion that it was Misonix which pressured Cicel to engage in aggressive business practices to market BoneScalpel. Cicel resisted, attempting to relay the risks associated with pervasive corruption in the Chinese medical industry when it came to consumables. [redacted] Sealed C.A.

App. 294-95 at 131:13-133:20; see also Sealed C.A. App. 2142; Sealed C.A. App. 1573.

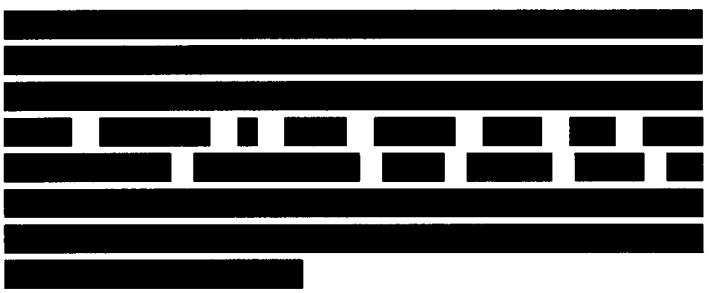
3. Finally, the portions of two emails that touch on Cicel's view of and relationship to Chinese sub-distributors, see email from Sunny Li to Howard Klevens dated August 26, 2013 (stating "in such cases, we will definitely seek for cooperation with sub-dealers or other sources") (Sealed C.A. App. 520); email from Sunny Li to Michael McManus dated September 5, 2014 (noting "[a]s you know, there are many deals under the table, which Cicel could not handle by itself, so we have to seek partners in such a situation") (Sealed C.A. App. 525), do not constitute undisputed evidence of illegal activity either. There is a genuine and material dispute as to whether these emails should be read to mean (i) Cicel actually used sub-distributors to engage in bribes, or (ii) Cicel recognized the risks of corrupt practices and sought to use only lawful sub-distributors to avoid corruption. In fact, in view of the whole record, the better reading of these emails is that Cicel was ***resisting pressure from Misonix*** to cooperate with companies that were willing to do whatever it took to drive sales of consumables.

In particular, the courts below failed to consider and credit deposition testimony that the emails reflected Cicel's desire to avoid corrupt practices. For example, May Lee explained that the sentence "in such cases, we will definitely seek [] cooperation with sub-dealers or other sources," means that [redacted] Sealed C.A. App. 295. [redacted]

[redacted] Sealed C.A. App. 295 (emphasis added).

Whether to credit May Lee's reading of the emails is a paradigmatic question for the jury. The jury—not the court on summary judgment—is responsible for assessing credibility. And the jury would be entitled to find that when someone with limited English-speaking ability writes an email, the words and phrases may come out differently than intended.

This is all the more so given that Misonix CEO McManus shared Cicel's interpretation. [redacted]



Sealed C.A. App. 462 (emphasis added).

4. Both courts below also made cursory reference to two emails from David Battles, Misonix's former director of sales in the APAC region. See App. 8a; Sealed C.A. App. 179; Sealed C.A. App. 192. They made no attempt, however, to credit Cicel's evidence drawing into question the conclusions in those emails or Battles' credibility. Indeed, the Second Circuit panel simply accepted Misonix's contention that Battles' emails informed its good faith belief regarding Cicel's illegal activities. See App. 10a (holding that "Cicel's email admissions, *combined with Misonix's actions of launching an internal investigation,* negotiating its CEO's departure, and self-reporting to regulators, establish beyond any genuine dispute that, at

a minimum, Misonix '*may* have' had knowledge of certain business practices by Cicel that '*raise[d] questions* under the [FCPA]'") (emphases added).

Battles' emails emphasize that he had "no evidence that there actually has been any violations of the FCPA by our distributor in China." Sealed C.A. App. 186. And he had previously reported to his management that [redacted] Sealed C.A. App. 1240-41. [redacted] Sealed C.A. App. 431 at 86:5-87:20.

The record also contains plentiful evidence that calls into question Battles' honesty and credibility. [redacted] See Sealed C.A. App. 146, 443. [redacted]

Sealed C.A. App. 443 at 136:6-15. In unilaterally crediting Battles' allegations, the Second Circuit ignored Cicel's evidence that they supported a pretextual scheme to escape a disfavorable fixed-term deal.

Looming large over the lower courts' reading of Battles' emails is Misonix's repeated reliance on a heavily disputed declaration included in support of its motion for summary judgment that attempts to bolster his allegations. Sealed C.A. App. 29-33; Sealed C.A. App. 1925. In that declaration—submitted after the close of discovery—Morgan Lewis attorney Stolley claimed, *inter alia*, [redacted] Sealed C.A. App. 30.

Though the district court disclaimed reliance on the contested declaration, App. 12a n.1, that statement remains lodged in the record. It remains despite Cicel being repeatedly denied discovery into the investigation due to Misonix's "unusual and nettlesome invocation of attorney-client privilege." *Id.* Moreover, its contents were contradicted by declarations submitted by Cicel. See Declaration of M. Lee (Sealed C.A. App. 1110-14); Declaration of S. Li (Sealed C.A. App. 1108-09); *cf. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 606 (1986) (holding one party's affidavit sufficient to create a genuine factual issue). The district court did not grant Cicel's motion to strike the declaration and can only have been influenced by it.

The courts below also failed to credit other evidence that favored Cicel's interpretation of events, including the repeated statements of Misonix's own employees that Misonix could not prove any actual

wrongdoing by Cicel. See *e.g.*, Sealed C.A. App. 1260 at 43:5-17 [redacted]

* * *

At bottom, this extensive countervailing evidence leads to the inescapable conclusion that the courts below credited the evidence of the party seeking summary judgment and "failed properly to acknowledge key evidence offered by the party opposing that motion." *Tolan,* 572 U.S. at 659. Summary reversal is therefore warranted.

The clear error below is on all-fours with *Tolan.* As in *Tolan,* this case hinges on disputed inferences to be drawn from competing testimony, credibility determinations, and communications that may be viewed differently when considered in context. *Anderson* teaches that cases like this go to a jury. *Anderson,* 477 U.S. at 255; see also *Poller v. Columbia Broad. Sys., Inc.,* 368 U.S. 464, 473 (1962) ("Trial by affidavit is no substitute for trial by jury. ...."). But here, as in *Tolan,* the lower court did not credit the nonmoving party's witnesses. It credited the moving party's witnesses, and thus improperly "weigh[ed] the evidence" in contravention of this Court's precedent. *Tolan,* 572 U.S. at 660; see *Anderson,* 477 U.S. at 255.

That the Second Circuit recited the correct standard for summary judgment, but failed to apply it anyway, does not make its error less serious. Summary reversal is especially appropriate where a decision purporting to faithfully apply this Court's precedents reveals that a lower court may have willfully evaded that precedent. See *e.g.*, *Caetano v. Massachusetts,* 577 U.S. 411, 415 (Alito, J., concurring) ("Although

the Supreme Judicial Court professed to apply *Heller*, each step of its analysis defied *Heller's* reasoning."); *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 20 (2012) ("The Oklahoma Supreme Court acknowledged the cases on which Nitro-Lift relied, as well as their relevant holdings, but chose to discount these controlling decisions."). Here, the Second Circuit's application of *Anderson* was equally suspect. Like the lower court in *Caetano*, the Second Circuit cited this Court's rule in theory, but dismantled it in practice. Purported review of "the record ... as a whole" does not countenance interpreting ambiguous emails, written by a non-native English speaker, in a manner contrary to the way their recipients testify they understood them, regardless of the Second Circuit's opinion of these witness's credibility. App. 5a. Weighing evidence is weighing evidence.

Accordingly, this court should summarily reverse the decision of the Second Circuit.

II. THE SECOND CIRCUIT SUMMARY JUDGMENT STANDARD IS CONTRARY TO THE PRECEDENT OF THIS COURT AND THE OTHER TWELVE CIRCUITS.

In the alternative, this Court should grant the petition in order to clarify the correct standard for summary judgment to ensure uniformity across the circuits and prevent non-native English speakers from being penalized for conducting business in a language that is not their own.

In 1986, this Court decided a trilogy of cases that set out the modern framework for summary judgment: *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Under this framework,

it is axiomatic that in ruling on a motion under FRCP 56, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255; *accord e.g., Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 456 (1992). This Court has been clear that the lower courts must resist the temptation to usurp the role of the fact finder: "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter." *Anderson*, 477 U.S. at 249.

The summary judgment standards set forth in the 1986 trilogy have been faithfully adopted by the other circuits. The Second Circuit's distorted application of FRCP 56, in contrast, creates a stark split, and risks disrupting the balance carefully crafted by this Court. The Second Circuit adopts a novel and destabilizing rule: reviewing the "whole record" means that courts are entitled to weigh the evidence, with the effect of crediting evidence favorable to the movant and ignoring or discounting evidence to the contrary. They are entitled to go so far as to accept altered language favorably to the movant.

The erroneous nature of Second Circuit's ruling is compounded by the fact that the decision ignores the fact that the emails at issue were written in English by non-native speakers. The ruling further wholly discounts any attempt by those non-native speakers to clarify the meaning of this ambiguous English text. The Second Circuit's application of FRCP 56 thus threatens the openness of the American economic system to global participants and undermines the stability of American civil ligation to a degree that warrants intervention from this Court. See *e.g.*, *Victory Dollar Inc. v. Travelers Cas. Ins. Co. of Am.*, 2023 WL 9003012, at *5 (C.D. Cal. Nov. 22, 2023) (denying

summary judgment in a case where "[a] reasonable juror crediting [the non-movant's] account could determine that he was a hungry and dehydrated person with non-native command of English who was made to answer unclear questions ..."); see also Maxwell Miller et al., *Finding Justice in Translation: American Jurisprudence Affecting Due Process for People with Limited English Proficiency Together with Practical Suggestions*, 14 Harv. Latino L. Rev. 117, 117 (2011) ("no defendant should face the Kafkaesque spectre of an incomprehensible ritual") (citing *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973)).

Other circuits that have faithfully adhered to the summary judgment principles set forth by this Court have reversed summary judgment rulings in cases just like this one. In *Schnell v. State Farm Lloyds*, 98 F.4th 150 (5th Cir. 2024), for example, the Fifth Circuit addressed a challenge to a grant of summary judgment on a breach of contract claim. There, the court of appeals admonished the district court for "choosing the interpretation" of email evidence that favored the non-moving party. *Id.* at 157. The *Schnell* court concluded that a "genuine dispute of material fact exists" given the existence of declarations that proffered alternative intentions behind language conveyed in key emails. *Id.* at 157-58. In assessing the conflicting evidence in the record, the Fifth Circuit found summary judgment to be inappropriate, correctly remarking that "courts may not evaluate the credibility of the witnesses, weigh the evidence, or resolve factual disputes on summary judgment." *Id.* at 158 (citation omitted).

The Seventh Circuit ruled similarly in *Castro v. DeVry University, Inc.* 786 F.3d 559 (7th Cir. 2015). There, the court of appeals contended with the trial court's grant of summary judgment based on a find-

ing that there was only one possible way to read certain emails. At issue was whether that email correspondence could be read to reasonably support a finding that defendants had retaliatory intent when they fired employees who previously complained of a racially and ethnically discriminatory work environment, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The *Castro* case court admonished the trial court for drawing "an inference against the non-moving part" by accepting the moving party's reading of the emails, which it held "is of course not appropriate at summary judgment stage." 786 F.3d at 574 (citation omitted).

Other courts of appeals have come to similar conclusions based on the appropriate standard for summary judgment under FRCP 56. See *e.g., Robl Constr., Inc. v. Homoly*, 781 F.3d 1029, 1033-34, 1039 (8th Cir. 2015) (citing *Anderson* and reversing the district court's grant of summary judgment in a case where the trial court "premised its holding exclusively on [an] email exchange" and failed to consider other evidence favorable to the non-moving party in the record); *Peters v. Aetna Inc.*, 2 F.4th 199, 231 n.15 (4th Cir. 2021) (noting that the district court "impermissibly drew an inference in favor of [the moving party]" when it credited movant's interpretation of email language, and failed to credit testimony from a corporate designee that offered an alternative explanation). The decision in *McLaughlin v. Liu* is particularly salient. 849 F.2d 1205 (9th Cir. 1988). There, the Ninth Circuit reversed the grant summary judgment, rejecting the argument that the lower court was permitted to assess the "plausibility" of the non-movant's direct evidence. *Id.* at 1207. The court also criticized the district court for its failure to accept as true the non-movant's sworn statement on the central

issue in the case relating to whether the non-movant correctly paid an overtime premium. *Id.* As the Ninth Circuit explained, trial courts cannot "weigh conflicting evidence with respect to a disputed material fact," nor may they "make credibility determinations with respect to statements made in ... depositions" because such "determinations are within the province of the fact-finder at trial." *Id.* at 1208; see also *id.* at 1209 n.9 ("[D]irect evidence ... hinges on the witness' credibility and cognitive abilities, [and thus] a true conflict concerning such evidence is exclusively within the province of the jury."). The Ninth Circuit emphasized that if "the nonmoving party produces direct evidence of a material fact, the court may not assess the credibility of this evidence nor weigh against it any conflicting evidence presented by the moving party." *Id.* at 1209. In short, the "nonmoving party's evidence must be taken as true."

Here, the courts below paid no mind to any testimony or sworn statements favoring Cicel. They instead made a variety of credibility determinations in favor of Misonix, going so far as to alter language in email correspondence to further undermine Cicel's version of events. This stands in marked contrast to the standards adopted by the other circuits. Thus, if this Court finds that summary reversal is not warranted, the Court should grant the petition to address and correct the Second Circuit's distorted view of FRCP 56.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari and either summarily reverse the court of appeals' ruling or address proper standards for summary judgment.

Respectfully submitted,

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September 9, 2024