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APPENDIX A

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT

22-1834-cv

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

Plaintiff-Appellant,

v.

MISONIX, INC.,

Defendant-Appellee,

STAVROS VIZIRGIANAKIS, SCOTT LUDECKER,
JOHN SALERNO, RICHARD ZAREMBA, JOHN W. GILDEA,
CHARLES MINER, III, PATRICK MCBRAYER,
THOMAS M. PATTON,

Defendants.

March 6, 2024

SUMMARY ORDER

Plaintiff-Appellant Cicel (Beijing) Science & Technology Co., Ltd. ("Cicel"), a Chinese distributor of medical devices, appeals from an award of summary judgment on its claims of breach of contract and defamation in favor of Defendant-Appellee Misonix, Inc. ("Misonix"), a New York-based medical device manufacturer. We review an award of summary judgment *de novo*, viewing the facts "in the light most favorable to the losing party," *Bethpage Water Dist. v. Northrop Grumman*

Corp., 884 F.3d 118, 124 (2d Cir. 2018), and affirm when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(a); *see also Buttry v. Gen. Signal Corp.*, 68 F.3d 1488, 1492 (2d Cir. 1995) (applying the same standard to grant of summary judgment on an affirmative defense). In so doing, we assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, which we reference only as necessary to explain our decision to affirm.[2]

I. Breach of Contract

Cicel's breach-of-contract claim arose from its contract with Misonix to distribute medical devices to Chinese hospitals. The district court concluded that Misonix was entitled to summary judgment on Cicel's breach-of-contract claim because Misonix had proven its defense of illegal performance under New York law—namely, that its contract with Cicel was unenforceable because Cicel had paid bribes to Chinese surgeons in order to induce them to purchase Misonix products at inflated prices. *See Cicel (Beijing) Sci. & Tech. Co. v. Misonix, Inc.*, 581 F. Supp. 3d 454, 456–59 (E.D.N.Y. 2022). Cicel argues that the district court made two fundamental errors in applying the illegality defense. First, Cicel contends that New York law requires a party invoking the defense to prove that the plaintiff's conduct violated a particular statute or common-law proscription, and that Misonix failed to make this specific showing. Second, Cicel asserts that the factual record—consisting primarily of emails and deposition testimony of individuals at the two companies—

[2] Neither party disputes that New York law governs the claims at issue here.

presents a genuine dispute of material fact about whether Cicel paid such bribes. As set forth below, we find Cicel's arguments unpersuasive.

In a diversity action such as this, we determine the substantive state law *de novo*, affording "the greatest weight to decisions of" the state's highest court. *McCarthy v. Olin Corp.*, 119 F.3d 148, 153 (2d Cir. 1997). Where the state's highest court is silent on an issue, we "carefully ... predict how [it] would resolve the uncertainty or ambiguity," considering decisions of the state's lower courts. *Id.* (internal quotation marks and citations omitted). Under New York law, it is "well settled" that a party asserts a complete defense to breach of contract when it proves that the contract, "although legal in [its] inducement and capable of being performed in a legal manner, [has] nonetheless been performed in an illegal manner[.]" *Prote Contracting Co. v. Bd. of Educ. of N.Y.C.*, 230 A.D.2d 32, 40 (1st Dep't 1997) (citing *McConnell v. Commonwealth Pictures Corp.*, 7 N.Y.2d 465, 470–71 (1960)). The New York Court of Appeals has stated that this defense applies only when: (1) "the illegal performance of a contract originally valid takes the form of commercial bribery or similar conduct," and (2) "the illegality is central to or a dominant part of the plaintiff's whole course of conduct in performance of the contract." *McConnell*, 7 N.Y.2d at 471.

The illegal-performance defense is available even when the non-breaching party has violated a common-law rule, rather than a particular statute. *McConnell* stated:

> The issue is not whether the acts alleged in the defense[ ] would constitute the crime of commercial bribery under section 439 of the Penal Law .... We are not working here with narrow questions of

> technical law. We are applying fundamental concepts of morality and fair dealing not to be weakened by exceptions.... Consistent with public morality and settled public policy, we hold that a party will be denied recovery even on a contract valid on its face, if it appears that he has resorted to gravely immoral and illegal conduct in accomplishing its performance.

7 N.Y.2d at 470–71. As the Appellate Division explained in *Prote Contracting*, the rule in *McConnell* "adopt[s] the [Restatement's] doctrine of illegal performance," 230 A.D.2d at 40, which provides that "[a] bargain is illegal ... whether the law is statutory or is developed by the courts for reasons of public policy" and notes that it "does not list all kinds of illegal bargains" because "[s]uch a list is indeed impossible, for the variety of agreements that can be made in violation of statutes *or of rules of the common law* is almost infinite," Restatement (First) of Contracts § 512, cmt. a, b (Am. L. Inst. 1932) (emphasis added). This doctrine is consistent with the New York Civil Practice and Rules, which provide for the pleading of an illegality affirmative defense by "facts showing illegality either by statute or common law." N.Y. C.P.L.R. § 3018(b).

Under New York common law, a party commits commercial bribery when it (1) "confer[s] a benefit upon [another party's] employee," (2) "without [that party's] consent," and (3) "with the intent to influence the employee's conduct." *Niagara Mohawk Power Corp. v. Freed*, 265 A.D.2d 938, 939 (4th Dep't 1999). Thus, Misonix's burden is to demonstrate that Cicel resorted to "commercial bribery or similar conduct" in performing the contract, and that such conduct was "central to or a dominant part of" its performance of the contract as a whole. *McConnell*, 7 N.Y.2d at 471.

Here, even viewing the facts in the light most favorable to Cicel, Misonix has shown that there is no dispute of material fact on either element, and that it is therefore entitled to summary judgment on its illegal-performance defense.[3] The record contains five emails in which Cicel President May Lee, or English-speaking employees writing on her behalf, explain that the Chinese medical industry is characterized by "hidden rules," "bribes in orthopedics," "a large demand of under-table deals," and "many businesses under the counter." App'x at 367, 371, 520.[4] These emails describe a context in which individuals are "alwa[ys] seeking ... money and benefit, from top to bottom," *id.* at 520, and, more specifically, the surgeons making purchasing decisions on behalf of hospitals "prefer incentive sales" because they "usually get a low salary," *id.* at 371. The emails explain that, "in such cases, [Cicel] will definitely seek for [*sic*] cooperation with sub-dealers or other sources.... [who] have more close connections in their local hospitals, and [who] know what will be the best way to take care of [Cicel's] customers." *Id.* at 520; *see also id.* at 525 ("there are many deals under the table, which Cicel could not handle by itself, so we have to seek for [*sic*] partners in such a situation"). These emails overwhelmingly support Misonix's assertion that Cicel's execution of the distribution contract "t[ook] the form of commercial bribery or similar conduct," and that this "illegality [wa]s central to or a dominant part of [Cicel's] performance of the contract." *McConnell*, 7 N.Y.2d at 471; *see also* App'x at 294 (deposition of May Lee agreeing that "under the table" "does not have

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[3] Cicel does not contest the centrality element of the defense. *See* Appellant's Reply Br. at 27.

[4] "App'x" refers to the Appendix filed at docket numbers 48–56.

a good meaning" and "there may be the concept of corruption here").

Cicel argues that these emails can reasonably be viewed as evidence of the opposite: that Cicel sought to *avoid* paying bribes by working only with legitimate, law-abiding partners, because (1) the emails were written by non-native English speakers, and (2) both May Lee and Misonix's then-CEO Michael McManus testified at deposition that this was how they understood certain of the emails quoted above.[5] Thus, Cicel contends that the district court made impermissible credibility assessments in granting summary judgment. We disagree.[6]

Although Cicel attempts to downplay the substance of the emails in piecemeal fashion, we are required to look at the record, including the emails, as a whole. *See Lyons v. Lancer Ins. Co.*, 681 F.3d 50, 57 (2d Cir. 2012) (explaining that a court ruling on a motion for summary judgment "may not properly focus on individual strands of evidence and consider the record in piecemeal fashion; rather, it must consider all of the evidence in the record, reviewing the record taken as a whole" (internal

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[5] Misonix notes that McManus was not apprised of the results of the investigation by Misonix's Audit Committee that resulted in the termination of the contract and McManus' departure from the company. McManus stated that had he been aware of certain facts uncovered by the investigation, he would have been concerned and potentially reconsidered the contractual relationship with Cicel.

[6] In support of its illegality defense, Misonix also points to, *inter alia*, evidence in the record that, in 2014, the Chinese government fined Cicel for bribery in connection with payments made from 2010 to 2011 to an individual at a hospital where Cicel later marketed Misonix products. Cicel contests whether evidence of this fine is admissible. We need not address this issue because we find the other evidence, summarized above, sufficient to support summary judgment for Misonix.

quotation marks and citations omitted)). Moreover, beyond the emails discussed above, there was evidence in the record, the validity of which is not in dispute, as to which no witness was able to provide any explanation other than that Cicel was engaged in bribery. In a September 26, 2014 email written by a Cicel employee to May Lee, and addressed (but never sent) to McManus, the Cicel employee discusses efforts to market BoneScalpel, a Misonix product, and writes:

> 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*]

App'x at 529 (emphasis added). The only reasonable interpretation of this email is that Cicel was willing to use a sub-distributor to pay bribes in small cities with weaker anti-corruption controls, but was concerned about using a sub-distributor to pay bribes in large cities where the risk of detection was greater.

Notwithstanding its clear meaning, Cicel asserts that this email indicates "Cicel's refusal to use APD in the large cities and only in the smaller cities if Cicel can have full supervision over them to make sure that APD does not engage in illegal activity." Appellant's Br. at 47; *see also* Appellant's Reply Br. at 15. However, when presented with this email at her deposition, May

Lee provided no such interpretation or explanation. Instead, she sought to blame Misonix for encouraging Cicel to use APD, stating that McManus had pressured Cicel to use APD as a sub-distributor in "big territories, including Beijing." App'x at 298–300. In any event, the alternate explanation Cicel puts forward in its briefs—that Cicel was willing to engage APD only in small markets where it could control APD's actions—is not supported by the plain language of the email or by any other evidence in the record, even when viewing that evidence in the light most favorable to Cicel. When the September 26, 2014 email is viewed alongside this full record, including the other emails written by Cicel employees and two emails written by David Battles, Misonix's former director of sales for the Asia/Pacific region, which detail Cicel's practice of bribing surgeons to sell Misonix products, the only conclusion that a jury could rationally reach is that Misonix has demonstrated, beyond genuine dispute, that Cicel engaged in "commercial bribery or similar conduct" in performing the contract. *McConnell*, 7 N.Y.2d at 471.[7]

Accordingly, the district court properly granted summary judgment in favor of Misonix on the breach-of-contract claim.

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[7] The fact that the Department of Justice and the Securities and Exchange Commission issued declination letters to Misonix regarding the conduct at issue, after Misonix investigated and reported the conduct, and never charged Cicel with any crime or violation provides insufficient basis for reasonably inferring that Cicel did not engage in commercial bribery or similar conduct and does not undermine the evidence in the record indicating otherwise.

II. Defamation

Cicel also argues that the district court erred in granting summary judgment to Misonix on its defamation claim, which is based entirely on Misonix's statement, in an 8-K filing, that Misonix "may have had knowledge of certain business practices of the independent Chinese entity that distributes its products in China, which practices raise questions under the Foreign Corrupt Practices Act ('FCPA')."[8] No. 2:17-cv-01642-GRB-LGD, ECF No. 183-18 at 3.

Under New York law, a plaintiff in a defamation claim must prove "(1) a written defamatory statement of and concerning the plaintiff, (2) publication to a third party, (3) fault, (4) falsity of the defamatory statement, and (5) special damages or per se actionability." *Palin v. N.Y. Times Co.*, 940 F.3d 804, 809 (2d Cir. 2019). "[T]ruth is a complete defense to a defamation claim." *Birkenfeld v. UBS AG*, 172 A.D.3d 566, 566 (1st Dep't 2019).

In support of its contention that the district court erred in granting summary judgment on its defamation claim, Cicel cites the fact that Misonix informed federal investigators that, as of September 2016, "Misonix had not uncovered ... evidence sufficient to establish that an 'offense' had been committed" under the FCPA. App'x at 507–08. This statement, however, is consistent with Misonix's 8-K, which stated only that "certain business practices" of its Chinese counterpart "raise[d] questions under the [FCPA]." No. 2:17-cv-01642-GRB-LGD, ECF No. 183-18 at 3. It can simultaneously be true that (1) Misonix lacked sufficient evidence to

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[8] The FCPA prohibits bribing foreign officials for the purpose of "obtaining or retaining business for or with, or directing business to, any person." 15 U.S.C. §§ 78dd-2(a)(1)(B), 78dd-3(a)(1)(B).

prove that an offense had been committed under the FCPA, and (2) the available evidence nonetheless "raise[d] questions" under the statute.[9] *Id.* In short, 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]." *Id.* (emphasis added). On this record, even viewing the facts most favorably to Cicel, no rational jury could find otherwise. Therefore, summary judgment on the defamation claim in Misonix's favor was warranted.

* * *

We have considered Cicel's remaining arguments and find them to be without merit. Accordingly, we AFFIRM the judgment of the district court.

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[9] Misonix points out, for instance, that Cicel had taken the position, independent of any evidence of bribery, that Cicel "is not a 'domestic concern' and therefore is not subject to the FCPA." No. 2:17-cv-01642-GRB-LGD, ECF No. 13 at 9.

APPENDIX B

UNITED STATES DISTRICT COURT,
E.D. NEW YORK

17-CV-1642 (GRB)

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

Plaintiff,

v.

MISONIX, INC.,

Defendant.

Signed 01/20/2022

MEMORANDUM & ORDER

GARY R. BROWN, United States District Judge:

Some things are just easy.

Notwithstanding four years of hard-fought litigation, numerous court rulings, hundreds of filings encompassing thousands of pages, and a summary judgment motion that fills a bookshelf, this case turns on three questions that, properly phrased, almost answer themselves. First, upon discovering that Cicel, its main distributor in China, was likely engaged in bribery of government employees in connection with the sale of its products, did Misonix have to continue its relationship with Cicel? Second, did Misonix defame Cicel by accurately disclosing this information in its SEC

filings? Third, did Misonix have the right to secretly purloin Cicel's customer lists and pricing information?

The answer is, uniformly, no. As such, Misonix's motion is largely granted. The only vestige of this overly litigated dispute is Cicel's trade secret claim, leaving one interesting question that must be answered by the parties: is the game worth the candle?

DISCUSSION

Misonix's motion for summary judgment is decided under the oft-repeated and well understood standard for review of such matters, as discussed in *Bartels v. Inc. Vill. of Lloyd Harbor*, 97 F. Supp. 3d 198, 211 (E.D.N.Y. 2015), *aff'd sub nom. Bartels v. Schwarz*, 643 F. App'x 54 (2d Cir. 2016), which discussion is incorporated by reference herein. The procedural and factual background set forth in Judge Spatt's October 7, 2017 Memorandum and Order (dismissing all counts other than the breach of contract count), Judge Locke's April 11, 2019 Memorandum and Order (granting a protective order in connection with an internal investigation)[1] and Judge Spatt's January 23, 2020 Memorandum and Order is referentially incorporated herein.

1. Discovery and Disclosure of Bribery Allegations and the Termination of the Distribution Agreement

The undisputed facts conclusively evidence Cicel's involvement in illegal conduct, first raised by David

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[1] Much ink has been spilled and energy expended (before both Judge Locke and the undersigned) regarding Misonix's unusual and nettlesome invocation of attorney-client privilege as to its internal investigation. This amounted to "sound and fury signifying nothing," given the unassailable evidence obtained independent of that investigation. William Shakespeare, *Macbeth*, Act. V, Scene V.

Battles,[2] a former Misonix employee. In April 2016, he wrote to the CFO, stating:

> China is a country that is notorious for corruption, the head of the company is reported as having many high-ranking contacts in government (including government hospitals) and, they have been known for engaging in possible bribery (paying a now dismissed, Misonix representative as a consultant, presumably for favoritism in pricing, etc.). Cicel is also known to charge unrealistically high prices for our products (approximately a 10x markup in some cases, where most international distributors are happy with a 1.7x markup). Please note that I have no evidence that there actually has been any violations of the FCPA by our distributor in China, I am only raising this to your attention because certain things seem to fit the profile that was included in the training materials I was recently given, which stated that I should report any similar situations to either the CFO or the CEO.

DE 177-7 at 5. A few days later, following a conversation with May Lee, the owner of Cicel, Battles added:

> I told her that one observation that was causing concern was the unusually high sales prices for our BoneScalpel (reported in some cases to be in the $300,000 to $400,000 range which would have reflected more than a 30x markup. Ms. Li [sic] acknowledged that there had been sales in that price range but that the presence of other similar

[2] Cicel tries to paint Battles as a besieged employee who raised the issue solely to seek whistleblower protection. It matters little, as Battles' allegations are fully corroborated by indisputable statements by Cicel's employees.

technologies in the marketplace had since driven these prices down to around $185,000 (since our prices have been raised to $22,500, that would be an 8.2x markup.) However, as Ms. Li explained, virtually all BoneScalpel sales involve at least a year's supply to [sic] tubing (50) and blades (30).

Ms. Li further explained to me the way medical equipment sales are conducted in China. Cicel sells directly to hospital in only about 30% of cases. In these cases, the doctor does not expect any payment for himself, but rather he seeks funding and support for his department. Examples might be; [sic] a requirement that Cicel support research projects for the next five years, or that Cicel would provide funding so that the surgeons can visit meetings and conferences for the next five years, etc. In virtually all cases of direct sales, there are extensive extra benefits that Cicel must provide and therefore calculate into the price charged for the device. Apparently these funds are channeled through third parties to avoid the appearance that cash is going to enrich the doctors personally.

The other 70% of Cicel's sales go through sub-distributors. Cicel performs all the sales and promotion and after-sale service in these cases and the sub-dealer is only there to handle the financial transaction – to effectively facilitate an illegal payment to the doctor. In fact; [sic] approximately half of the sub-distributors that Cicel works with are owned by the surgeon who is purchasing the device. In all sub-distributor transactions, the surgeon names the price and the specific sub-distributor that he wants to work with.

DE 177-8 at 3.

Misonix's investigation of these allegations yielded incontrovertible proof, mainly in the form of emails authored by Cicel's management. In August 2013, a Cicel employee wrote:

> we have to admit that the market environment in China now is very complicated, many businesses under the counter. People are alwasy [sic] seeking for money and benefit, from top to bottom, which is beyond our control. Then in such cases, we definitely seek cooperation with sub-dealers or other sources. On one hand, to be honest, we have no idea in what way they will manage everything; on the other hand, we could not be responsible for any behaviors by sub-dealers.

DE 178-7 at 3. A September 2014 email from another Cicel employee states:

> You may notice that most of the products were sold by distributors. As you know, there are many deals under the table, which Cicel could not handle by itself, so we have to seek for partners in such a situation. We will make direct sales only when there is a firm connections [sic] between Cicel and hospitals, or hospitals will ask us to make direct sales with them.

DE 178-8 at 4. Later that month, another Cicel employee informed the Company's owner, May Lee, that:

> As you may know, APD [a Cicel sub-distributor] has good experiences [sic] on handling business under the table. Sometimes, it's very helpful, but sometimes it could be very danderous [sic]. 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 [sic] 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 [sic] best for our mutual benefit.

DE 178-9 at 3. Three months later, a Cicel employee noted:

> In China, the surgeons usually get a low salary, so they prefer incentive sales, which stimulates the growth of a large demand of under-table deals. This is our national situation. Cicel never do [sic] these deals, we have to go through our sub-dealers if we want to do the business.

DE 178-3 at 3. Finally, in January 2015, an email from May Lee, Cicel's owner, stated:

> Indeed, China government has made some big movements on anti-corruption, but such hidden rules still exist in medical industry, especially orthopedics. You may make the investigation through Angie or your resources on the bribes in orthopedics, which is appalling. Cicel is not able to handle this kind of matters, so we have to find partners (sub distributors) to help us. They may do some promotion, but Cicel will be the only one to provide training and service to our end customers.

DE 178-2 at 3. Taken together, this undisputed[3] evidence establishes that Cicel was using illegal methods in connection with the contract.

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[3] That several authors of these bombshells later disavowed knowledge of phrases like "under the table" and "under the counter" does not raise an issue of fact. *See* DE 208-1, ¶ 39.

But there's more. As a result of the investigation, Misonix learned that Cicel had been fined by the Chinese Government in 2014 for commercial bribery and failed to disclose this fact. While counsel for Cicel endeavors to mischaracterize the incident, the Chinese language document plainly indicates that Cicel "us[ed] property or other means to bribe to sell or purchase goods." DE 89-1 at 10 (imposing fine of 150,00 yuan, approximately $24,000). While this activity may not have involved Misonix's products, *see* Oct. 27, 2021 Hr. Tr. at 14:10-13, the imposition of this sanction during the agreement and its concealment from Misonix further supports defendants' case.

Unsurprisingly, given the existential threat to public companies posed by *potential*[4] Foreign Corrupt Practices Act (FCPA) violations,[5] Misonix quickly ter-

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In some sense, such denials strengthen the unassailable import of these communications.

[4] Cicel speciously argues that "Misonix did not follow the DOJ's guidance and, instead, self-disclosed prematurely before it was aware of an offense." *See* DE 218-2 at 9. Yet the one DOJ memorandum submitted by Cicel (and cherry-picked from a wide array of authorities) requires, for example, "[p]rovision of all facts relevant to *potential* criminal conduct by all third-party companies" in order to receive credit for full cooperation. *Id.* at 42 (emphasis added).

[5] *See, e.g.*, GlaxoSmithKline plc., Exchange Act Release No. 79005 (SEC Sept. 30, 2016) (enforcement action based on payment to Chinese health care professionals); Bristol-Myers Squibb Comp., Exchange Act Release No. 76073 (SEC Oct. 5, 2015) (same); Wong, et al., "The Foreign Corrupt Practices Act and Pharma in the Chinese Market" (2010) available at gibsondunn.com. ("China possesses certain cultural and governmental particularities that pose specific problems to Western companies considering investment or opening operations there. The vast majority of the healthcare system in China is run by the Chinese government, putting many doctors firmly under the purview of the FCPA as

minated its agreement with Cicel and commenced an internal investigation, voluntary self-reporting and public disclosure.[6] "[D]efendants certainly had a right and an obligation to act promptly to protect themselves from FCPA liability." *Fabri v. United Techs. Int'l, Inc.*, 387 F.3d 109, 123 (2d Cir. 2004). Under New York law, the well-documented illegal conduct here renders the contract unenforceable. *McConnell v. Commonwealth Pictures Corp.*, 7 N.Y.2d 465, 471, 199 N.Y.S.2d 483, 166 N.E.2d 494 (1960) ("a party will be denied recovery even on a contract valid on its face, if it appears that he has resorted to gravely immoral and illegal conduct in accomplishing its performance"). This holds true for violations of foreign law, including Chinese anti-bribery laws. *See Lehman Bros. Com. Corp. v. Minmetals Int'l Non-Ferrous Metals Trading Co.*, 179 F. Supp. 2d 118, 138 (S.D.N.Y. 2000) ("New York law does not ignore an illegality in China. A contract that is illegal in its place of performance is unenforceable in New York if the parties entered into the contract with a view to violate the laws of that other jurisdiction.").

'foreign officials.' In addition, cultural traditions such as 'red envelopes,' as well as long-established business practices such as paying commissions to doctors, increase the potential likelihood of FCPA violations.").

[6] Cicel argues that Misonix "sought to benefit financially from getting rid of Cicel." DE 218-2 at 18. This contention is fundamentally ridiculous. For public companies, FCPA disclosures are anathema, and this case is no exception: as a result of the disclosure, Misonix had to bear millions in legal and investigation costs, resolve a derivative lawsuit (*see Feldbaum v. Misonix*, 17-CV-3385(ADS), DE 60 ($500,000 settlement)), loss of reputation and, of course, defend the instant case. DE 208-1, ¶ 31 (identifying $2.6 million in investigative and legal costs). Cicel's contention that Misonix took these steps "to further its business interests," DE 218-2 at 18, is, therefore, absurd.

Thus, defendant is entitled to summary judgment on the breach of contract claims.

Defamation

Endeavoring to contain the damage, Misonix made voluntary disclosures to the Department of Justice and the Securities and Exchange Commission. Then:

> On September 28, 2016, Misonix disclosed in an 8-K filing that it had contacted the Securities and Exchange Commission and the U.S. Department of Justice "to voluntarily inform both agencies that the Company may have had knowledge of certain business practices of the independent Chinese entity that distributes its products in China, which practices raise questions under the Foreign Corrupt Practices Act ...."

DE 183-18. Cicel brings a defamation claim based solely[7] on this filing.

Attorneys for Misonix argue that the statement cannot be defamatory because it's *true.* They're right about that. *Guccione v. Hustler Mag., Inc.*, 800 F.2d 298, 301 (2d Cir. 1986) ("truth is an absolute, unqualified defense to a civil defamation action") (citation omitted). Counsel for Cicel's arguments to the contrary amount to nothing more than obfuscation.[8] Thus,

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[7] Judge Spatt limited the defamation claim to this one 8-K filing, finding other claims time-barred. *Cicel (Beijing) Sci. & Technology Co. v. Misonix, Inc.*, 2020 WL 376581, at *7 (E.D.N.Y. Jan. 23, 2020).

[8] Though the Court need not reach the issue, the statements are also likely subject to immunity. *See Loughlin v. Goord*, No. 20-CV-6357 (LJL), 558 F.Supp.3d 126, 151-53 (S.D.N.Y. Sept. 1, 2021), reconsideration denied, No. 20-CV-6357 (LJL), 2021 WL 4523504 (S.D.N.Y. Sept. 30, 2021) ("the New York Court of Appeals would conclude that the 10-Q statement at least is

summary judgment will be entered in favor of Misonix on the defamation claim.

Theft of Trade Secrets

It is undisputed that Misonix obtained certain information from Cicel including customer lists, margins and pricing data.[9] "To succeed on a claim for the misappropriation of trade secrets under New York law, a party must demonstrate: (1) that it possessed a trade secret, and (2) that the defendants used that trade secret in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means." *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 117 (2d Cir. 2009) (citation omitted). In addition, "[u]nder New York law, a 'distributorship agreement may, in some rare instances, create a confidential relationship out of which duty of fiduciary care arises.'" *Abernathy-Thomas Eng'g Co. v. Pall Corp.*, 103 F. Supp. 2d 582, 602, 604 (E.D.N.Y. 2000) (citation omitted).

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subject to a qualified privilege"); *see also Betz v. Fed. Home Loan Bank of Des Moines*, No. 4:21-CV-00022, 549 F.Supp.3d 951, 964-66 (S.D. Iowa July 19, 2021) (qualified privilege may apply to statement made in Form 8-K).

[9] Misonix argues, unpersuasively, that Cicel's customer lists and pricing data are not trade secrets. *See Intertek Testing Servs., N.A., Inc. v. Pennisi*, 443 F.Supp.3d 303, 341 (E.D.N.Y. 2020) (client list and pricing information that did "not appear to be otherwise readily ascertainable to others in the industry" were trade secrets because of "the care with which plaintiff guarded such information"). Given that a former Cicel employee asked Misonix to not share a 2014 "business plan" and that the Misonix representative promised he would "protect the info," DE 208-1, ¶ 99, Misonix's argument that the business data at issue do not constitute trade secrets strains credulity.

Under the leadership of its prior CEO, and before the termination of the contract, Misonix enticed a former Cicel employee to provide a "business plan," with mutual assurances that Cicel would not be advised of the transaction. DE 208-1, ¶¶ 99, 176. There are factual disputes as to whether this activity would constitute "discovery by improper means" under the trade secret doctrine, as well as whether Misonix and Cicel enjoyed a confidential relationship. *See Abernathy-Thomas Eng'g Co.*, 103 F. Supp. 2d at 602–04. Thus, summary judgment must be denied as to the trade secret claim.

That does not end the inquiry, however. The parties quarrel over whether Cicel can demonstrate damages as to this limited (and perhaps tenuous) claim. Despite the voluminous record (or perhaps because of its heft), the evidence of damages is unclear. As such, Cicel would be advised to carefully consider whether continuing its efforts here represents a judicious use of resources.[10]

CONCLUSION

For the reasons set forth, summary judgment is GRANTED as to the breach of contract and defamation claims, and DENIED as to the trade secret claims. Plaintiff will submit a status update within 14 days of the date of this Order.

SO ORDERED.

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[10] For avoidance of doubt, should the plaintiff opt to continue this endeavor, the Court will require plaintiff to demonstrate "to a 'reasonable probability that the claim is in excess of the statutory jurisdictional amount' of $75,000." *Hicks v. Leslie Feely Fine Art, LLC*, No. 1:20-CV-1991(ER), 2021 WL 982298, at *4 (S.D.N.Y. Mar. 16, 2021) (quoting *Tongkook Am., Inc. v. Shipton Sportswear Co.*, 14 F.3d 781, 784 (2d Cir. 1994)).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 22-1834

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 26th day of April, two thousand twenty-four.

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

Plaintiff-Appellant,

v.

MISONIX, INC.,

Defendant-Appellee,

STAVROS VIZIRGIANAKIS, SCOTT LUDECKER, JOHN SALERNO, RICHARD ZAREMBA, JOHN W. GILDEA, CHARLES MINER, III, PATRICK MCBRAYER, THOMAS M. PATTON,

Defendants.

ORDER

Appellant, Cicel (Beijing) Science & Technology Co., Ltd., filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe, Clerk

[SEAL Catherine O'Hagan Wolfe, United States Court of Appeals Second Circuit]