No. S274701
(Court of Appeal No. G061250)
(Orange County Super. Ct. No. 30-2020-01172780-CU-BC-NJC)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CYNOSURE, LLC,
Petitioner,
v.
SUPERIOR COURT FOR THE STATE OF CALIFORNIA, COUNTY OF ORANGE, ***Respondent.***

ORANGE COUNTY PLASTIC SURGERY MEDICAL ASSOCIATES, INC.; JURIS BUNKIS,
Real Parties in Interest.

REVIEW OF A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE, CASE NO. G061250
ORANGE COUNTY SUPERIOR COURT CASE NO. 30-2020-01172780-CU-BC-NJC

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Petitioner and its cohort, Ascentium Capital, convinced Real Parties in Interest to purchase a defective medical device through the use of oral misrepresentations and multiple forms of documents, all of which formed the subject contract. (See: Cross-Complaint: Exhibit 2 in Petitioner's Amended Exhibits, pages 29, 35 and paragraphs 16 and 36 therein.) These documents include, and are not limited to, the pages that have the permissive venue clause at issue in this Petition.[1]

The Petition raises as its second issue whether the phrase included in the adhesion contract drafted by Petitioner: (". . . agree to submit all disputes arising out of, or relating to, this Agreement") is permissive, as was found by the Trial Court, because it lacks words of mandate ("shall", or "must", or "exclusive", or "only").

Petitioner would like the words it drafted to equate to either : '. . .all disputes are *mandated* to be submitted only . . .' to courts in Boston, or, '. . .all disputes *must* be submitted *only* . . ' to courts in Boston, or, '. . . all disputes *shall exclusively be tried*" in courts in Boston. However, the words chosen by Petitioner in its written portion of the contract do not include words of "mandate" or "must only" or "exclusive", or anything which requires the interpretation Petitioner desires. Instead, the parties merely agreed that Boston courts are an alternative forum for litigation.

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[1]These documents also include an offensive jury waiver clause which prevents transfer of the Cross-Complaint to the Massachusetts courts, as argued in the opposition to the Motion to Dismiss in the Trial Court. (For review of that Opposition, Please See: Exhibit 4 in Petitioner's Amended Exhibits.) In summary, Massachusetts law would enforce an advance waiver of the right to a jury and California has strong public policy reasons to invalidate advance jury waivers. (Handoush v. Lease Finance Group, 41 Cal. App. 4th 729, 741 (2019).)

Simply put: If Petitioner had intended all disputes to exclusively be tried in Boston, and if the parties had made that agreement, then the contract should have so stated.

Indeed, similar language to that drafted by Petitioner has commonly been found to make the choice of venue permissive. (See: Weil & Brown {The Rutter Group 2021} Cal. Prac. Guide: Civil Pro. Before Trial, Jurisdiction and Venue CH 3-C §3:444.7, citing *Animal Film, Inc. v. D.E.J. Productions, Inc.* (2011) 193 Cal.App.4th 466, 471; and, See reference in the Trial Court's Minute Order, Exhibit 10 in Petitioner's Amended Exhibits, Page144 to one example: "In the event of litigation arising under this agreement, the parties agree to submit to the jurisdiction of the designated forum".)

It is further submitted that Petitioner's failure to include words in the phrase that would mandate Massachusetts as the only possible venue creates, at best, an ambiguity which the Trial Court has now resolved in favor of Real Parties in Interest. As the scrivener of the contract, the Petitioner must be bound by an interpretation of the ambiguous words most strongly against Petitioner as the party who caused the uncertainty to exist, pursuant to the Doctrine of *Contra Proferentem* (codified in California Civil Code Section 1654).

Furthermore, there is no integration clause, no severance clause, and no waiver of Civil Code 1654, in the entire set of written documents that are part of the contract. (See: Copies of these documents located in Petitioner's Amended Exhibits, at pages 13-16 and 46-50; and, See: Petitioner's Amended Exhibits at pages 29 and 35). This ambiguity required the Trial Court to determine the intentions of the parties when the contract was formed. Here, the Trial Court has found that the parties intended that the clause be permissive. (Pet. Ex.10 at 143-145.)

Therefore, Petitioner's Application for this Writ must fail because the words chosen by

Petitioner in the subject clause are *not* mandatory. As a result, there should be no need to separate out and try in California the multiple non-contract Causes of Action in the Cross-Complaint [2], and the entirety of this lawsuit should be tried in the Trial Court below.

Trial of the issues in California would serve the ends of justice and California citizens. This would be a proper result in light of the decision of Petitioner to avail itself of the benefits of California commerce, and due to Petitioner's obvious ability to defend itself in California, where all witnesses and all evidence and all victims and are located. Petitioner seems to be proud of the fact that there are 4 courts around the country who have interpreted its venue clause in its favor based upon other states' laws and other facts. That pride underscores the ability of Petitioner to be at home in any venue. It also underscores that there are many lawsuits brewing around the country about the defective machine sold by Petitioner. California would be an apt venue to judge the wrongful acts committed against California citizens such as Real Parties in Interest, as alleged in detail in the subject Cross-Complaint. (See: Pet. Exh, 2, Pages 23-51.)

THE FIRST ISSUE PRESENTED BY THIS PETITION IS BASED ON CONJECTURE AND HAS NEVER BEEN RAISED BEFORE

The first issue presented in this Petition erroneously claims that Petitioner's attempt in the Court of Appeal to enforce the subject venue clause failed "on the ground that an adequate remedy is available by appeal after final judgment". (Petition, at Page 6.)

[2] If needed, it can be argued that the multiple non-contractual Causes of Action are not subject to the clause for venue selection of contractual Causes of Action. This adds another reason for keeping all Causes of Action tried in one Court in California, to avoid multiplicity of suits and potential conflicting results.

This newly introduced point was not raised or argued before now, and it requires complete speculation about the reasons for the Appellate Court's denial of the Writ Application.

The Appellate Court obviously read the Trial Court's Minute Order (Pet. Ex.10 at 143-145), and knew that the grounds for denial of the Motion to Dismiss were succinctly stated by the Superior Court in its Minute Order. In a well reasoned and detailed opinion, the Minute Order specifically finds that the venue clause chosen by Petitioner in its contract is permissive and that Real Parties in Interest did not contractually agree that the claims in this action must be brought exclusively in Boston, Massachusetts. The Minute Order amounts to findings of fact about the parties' intention for the contract, and it is obviously supported by sufficient evidence, including those facts which are cited in the Minute Order.

As for the decision by the Court of Appeal, its Order did not, and need not, state the grounds for denial of the Writ. The Petition speculates on two possible grounds for the decision of the Court of Appeal to deny the Writ. First, the Petition says (without any factual basis) it is "highly likely the majority concluded the threshold requirements for writ review were not met" (Petition at Page 9). Then, the Petition doubles down with further conjecture that it "seems to have been the case. . ." that the Court of Appeal concluded that an appeal after final judgment is an adequate remedy. (Petition at Page 10). However, there is nothing in the record to support either of these presumptions.

As it turns out, there are multiple grounds upon which the Court of Appeal could have based its decision. Just a few examples could include, and would not be limited to: 1) The fact that the Superior Court did determine as a factual matter that the parties intended the venue

clause to be permissive [3]; and/or, 2) The language used in the agreement, drafted solely by Petitioner, does not expressly mandate that the venue is limited solely to Boston [4]; and/or, 3) The Trial Court did not abuse its discretion in choosing to deny the Motion to Dismiss, after review of all the facts presented in the pleadings and then making a factual determination that the parties did not agree to a mandatory choice of venue in only Boston; and/or, 4) It would not be reasonable, nor would it achieve substantial justice, if the Courts were to enforce the Petitioner's erroneous interpretation of the venue clause.

It may safely be presumed that the Courts of Appeal throughout California all know what factors to use when they decide whether to grant or deny a Writ. Certainly there is no need for the Supreme Court to devote its precious resources to a non-issue that has never before been raised in this case. Simply put, the first issue which the Petition attempts to raise lacks sufficient substance to require the Supreme Court to provide the instructions to the Appellate Courts desired by Petitioner.

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[3] The Minute Order states: "The court finds that the forum selection clause in the Purchase Agreement is permissive. As such, the traditional forum non conveniens analysis applies and the court engages in a two-step process for which Cynosure bears the burden of proof." (Exhibit 10, Minute Order, Page 144 of Exhibits.)

[4]The minute order also states: "While the choice of law provision mandates that the Agreement be governed by and construed under the laws of the Commonwealth of Massachusetts, the forum selection portion of the contractual clause is permissive." (Exhibit 10, Minute Order, Pages 143-144 of Exhibits: Note that the word "shall" was used for the choice of law clause, but not for the other.) By eliminating the word "shall" from the venue clause, Petitioner distinguished the mandatory nature of the choice of law clause from the permissive nature of the venue clause. There should be no doubt that the parties' did not mutually intend or agree to force all litigation to occur only in a Boston court, on the other side of the continent, beyond the reach of subpoenas, where no witnesses, evidence, victims, and parties (other than Petitioner), are located.

RELEVANT FACTS OMITTED FROM THE PETITION

The Petition fails to include some relevant facts, including the following:

1) The Trial Court's Minute Order recognizes that a trial in a location other than California would be unreasonable:

> "Here, the balance strongly supports selecting California as the convenient forum. Bunkis declares all of the evidence and witnesses are located in California. Cynosure's representatives are in California. The patients who were purportedly harmed by the alleged misrepresentations made by Cynosure are in California and the case is of concern to the local community with Bunkis a Newport Beach physician. Cynosure has not provided any evidence or argument to the contrary. ." (Emphasis added.) (Exhibit 10, Minute Order, Page 144 of Exhibits.)

2) Seven of the Eight Causes of Action in the Cross-Complaint are based on torts or other non-contractual theories, such as Fraud, Negligent Misrepresentation, Breach of Implied Warranty of Merchantability, Violation of Business & Professions Code §17200 et Seq., Unjust Enrichment and Constructive Trust, Implied Contractual Indemnity, and, Tort of Another. (See: Petitioner's Amended Exhibits, Exhibit 2.) These non-contractual Causes of Action do not arise out of or relate to the contract and so should not be affected by the venue clause.

3) Real Parties in Interest entered into a partly oral and partly written contract that included, and was certainly not limited to, the document with the subject venue clause in it. This contract also included an offensive clause that attempts an advance waiver of a jury. (See: Pet. Amended Exh. 2, at pages 29 and 35, and Exh 1, at page 13 - mid page). California's public policy against advance jury waivers would be violated if Real Parties in Interest were forced to litigate the contractual claims in Boston. (Handoush v. Lease Finance Group, 41 Cal. App. 4th 729, 741 (2019).)

4) Review of the portion of the contract with the venue clause which is the subject of this Petition reveals that the font size is very small (well below 10 point type). (See: Petitioner's Amended Exhibits, page 47.)

5) There is no integration clause in any of the contract documents. Therefore all provisions of the agreements between Real Parties in Interest, on the one hand, and Petitioner and its cohorts, on the other hand, are part of the same agreement, including the offensive clause which would cause an advance jury waiver. (See: Pet. Amended Exh. 2, at pages 29 and 35, and Exh 1, at page 13 - mid page).

6) There is no clause in any of the contract documents which might cause a waiver of the Doctrine of *Contra Proferentem*, so that the interpretation of any vague wording must be construed against Petitioner as the drafter of the documents. (See: The contract documents in Petitioner's Amended Exhibits, at pages 13-16 and 46-50.)

THE VENUE CLAUSE IS NOT MANDATORY

Despite citations in the Petition to seventeen cases, only ten of the cases cited are State Court decisions in which the venue clause was mandatory. However, every one of those cases is distinguishable. The language used in those ten venue clauses was mandatory because they each contained mandatory language that is different from the permissive language in the venue clause now at issue, as is shown below.

It is significant that the Petition fails to cite to *any* authority with the precise words used by Petitioner in its venue clause, which words merely add Massachusetts as an alternative venue.

For a quick compendium of the mandatory language used in the ten State law cases,

please note the following:

-Cal-State Bus. Prods. & Servs., Inc. v. Ricoh, 12 Cal. App. 4th 1666, 1672 (ftnt4) (1993):

> "[A]ny appropriate state or federal district court located in the Borough of Manhattan, New York City, New York **shall have exclusive jurisdiction** over any case of controversy arising under or in connection with this Agreement...." (Emphasis added.)

-CQL Original Prods., Inc. v. Nat'l Hockey League Players' Ass'n, 39 Cal. App. 4th 1347, 1352 (1995):

> "This Agreement shall be governed by the law of Ontario, Canada and any claims arising hereunder **shall**, at the Licensor's election, **be prosecuted in the appropriate court of Ontario**. The **Licensee hereby attorns to the jurisdiction and judgment of the courts of the Province of Ontario**, Canada, and agrees that a judgment of an Ontario court shall be enforceable in the jurisdiction in which the Licensee is located." (Emphasis added.)

-Glob. Fin. Distribs. Inc. v. Superior Court, 35 Cal. App. 5th 179, 185 (2019):

> "The loan agreement underlying the transaction included a forum selection clause stating that parties to the agreement submitted to "the exclusive jurisdiction" of the state or federal courts in Georgia. The loan agreement also stated that the parties to the agreement waived "NOW OR HEREAFTER" any objection "TO THE LAYING OF VENUE" in Georgia and the parties' right to argue Georgia was an inconvenient forum." (Emphasis in original.)

-Intershop Commc'ns v. Superior Court, 104 Cal. App. 4th 191, 195 (2002):

> "To the extent permitted by the applicable laws the parties elect Hamburg to be the place of jurisdiction." (Note: The holding of this case turned on wording that "***the*** place of jurisdiction" meant only one place, Hamburg Germany.)

-Lu v. Dryclean-U.S.A. of Cal., Inc., 11 Cal. App. 4th 1490, 1492 (1992):

> "[a]ny and all litigation that may arise as a result of this Agreement **shall be**

litigated in Dade County, Florida." (Emphasis added.)

-Net2Phone, Inc. v. Superior Court, 109 Cal. App. 4th 583, 586 (2003):

> "Any dispute between you and Net2Phone regarding this agreement will be subject to the **exclusive jurisdiction** of the state and federal courts **in the State of New Jersey**. You agree to submit to **exclusive jurisdiction** in the State of New Jersey, and you expressly waive all defenses to jurisdiction." (Emphasis added.)

-Olinick v. BMG Entm't, 138 Cal. App. 4th 1286, 1291 (2006):

> "The parties agree to the **exclusive jurisdiction and venue of the Supreme Court of the State of New York** for New York County and/or the United States District Court for the Southern District of New York for the resolution of all disputes arising under this Agreement." (Emphasis added.)

-Ryze Claim Sols. LLC v. Superior Court, 33 Cal. App. 5th 1066, 1068 (2019):

> "Applicable Jurisdiction. [Ryze] is based in Indiana, and Employee understands and acknowledged [Ryze's] desire and need to defend any litigation against it in Indiana. Accordingly, the parties agree that any claim of any type brought by Employee against [Ryze] or any of its employees or agents **must be maintained only in a court sitting in** Marion County, **Indiana**, or Hamilton County, Indiana, or if a federal court, the Southern District of Indiana, Indianapolis Division." (Emphasis added.)

-Smith, Valentino & Smith, Inc. v. Superior Court, 17 Cal. 3d 491, 494 (1976):

> "The contract included a reciprocal forum selection clause whereunder Smith agreed to **bring all actions** arising out of the agency agreement **only in Philadelphia,** and Assurance in turn agreed to bring all such actions only in Los Angeles." (Emphasis added.)

-Verdugo v. Alliantgroup, L.P., 237 Cal. App. 4th 141, 144 (2015):

> "The clause designates Harris County, Texas, as the **exclusive forum** for any

> dispute arising out of Verdugo's employment, and also includes a provision designating Texas law as governing all disputes. Verdugo contends the trial court erred because enforcing the forum selection clause and related choice-of-law clause violates California's public policy on employee compensation. We agree and reverse the trial court's order." (Emphasis added.)

The recurring theme in every case cited by the Petition is that a mandatory clause requires words to make the clause mandatory, such as: “Exclusive”, “Attorns”, “Shall”, “Must”, and “Only”.

Although Real Parties in Interest could cite to many cases which find venue clauses to be permissive, there is no need to catalogue them at this point in the proceedings. Suffice it to say that even the cases cited by the Petition discuss the distinction between Mandatory and Permissive, and the subject clause in Petitioner’s contract is in the Permissive category.

It is important to note that the controlling case of *Animal Film, LLC v. D.E.J. Prods., Inc.*, 193 Cal. App. 4th 466 (2011) uses the language Petitioner included in the subject venue clause. The Animal Film language provided that the parties will *submit* to the jurisdiction of another state. In fact, the Animal Film language is even more emphatic than the language at issue in the Petition, and still it is Permissive:

> “That provision states in bold capital letters: "***APPLICABLE LAW*. THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF THE STATE OF TEXAS APPLICABLE TO AGREEMENTS MADE IN AND WHOLLY TO BE PERFORMED IN THAT JURISDICTION, AND THE PARTIES HERETO SUBMIT AND CONSENT TO THE JURISDICTION OF THE COURTS PRESENT IN THE STATE OF TEXAS IN ANY ACTION BROUGHT TO ENFORCE (OR OTHERWISE RELATING TO) THIS AGREEMENT."** (All Emphasis in original.)

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Ultimately, Real Parties in Interest submit that the lack of any caselaw to support the claim that the subject clause is a mandatory venue clause underscores that the Trial Court and the Appellate Court correctly decided this issue. This Petition should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Review should be denied.

DATED: June 7, 2022 Respectfully Submitted,

/s/ Joseph R. Manning , Jr.
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CERTIFICATE OF COMPLIANCE PURSUANT TO

CAL. R. CT. 8.504(d)(1)

Pursuant to Rule of Court 8.504(d)(1), and in reliance upon the word count feature of the software used, I certify that the attached Informal Response contains 3,103 words, exclusive of those materials not required to be counted under Rules 8.504(d)(3).

DATED: June 7, 2022

/s/ *Joseph R. Manning , Jr.*

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PROOF OF SERVICE
California Supreme Court No. S274701
(Orange County Super. Ct. No. 30-2020-01172780-CU-BC-NJC)

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 20062 SW Birch Street, Ste. 200, Newport Beach, California 92660.

On June 7, 2022, I served the following document(s) described as: **ANSWER TO PETITION FOR REVIEW** on the interested parties in this action by sending a true copy addressed to each through TrueFiling, the electronic filing portal of the California Supreme Court, pursuant to Local Rules, which will send notification of such filing to the email addresses denoted on the case's Electronic Service List.

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Furthermore, as the below recipients are not able to be served electronically via TrueFiling, I enclosed the document(s) in a sealed envelope or package designated by Federal Express or other Express Service Provider addressed to the persons at the address(es) listed below, with delivery fees prepaid or provided for. I placed the sealed envelope or package for collection and delivery, following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for express delivery. On the same day the correspondence is collected for

delivery, it is placed for collection in the ordinary course of business in a box regularly maintained by the Express Service Provider or delivered to a courier or driver authorized by such Express Service Provider to receive documents.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Newport Beach, California on June 7, 2022.

/s/ Linda Sanchez
Linda Sanchez