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.

REPLY TO ANSWER TO PETITION FOR REVIEW

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ISSUE 1: GRANT AND TRANSFER SHOULD BE ORDERED TO REQUIRE A REASONED DECISION ON WHETHER WRIT REVIEW WAS WARRANTED IN THIS MATTER.

The Petition for Review showed that, on a 2-1 vote, the Court of Appeal summarily denied Petitioner Cynosure, LLC's ("Cynosure") writ petition challenging the trial court's decision not to enforce a forum selection clause. The Petition explained that neither the majority nor the dissent stated reasons for that decision and that a grant and transfer order was appropriate so that the basis for the split decision could be discerned. The Petition explained that was significant because, while current precedent holds that an order denying a forum non conveniens motion is appealable after final judgment, no case explains what factors an appellate court should consider in deciding whether to grant writ review at the outset of the case.

In response, Real Parties in Interest criticize Cynosure for "conjecture" that the denial was based on Cynosure for some reason not establishing the threshold requirements for writ review, rather than on the merits of Cynosure's forum selection clause argument. Ironically, that highlights Cynosure's central point: the Court of Appeal majority's failure to explain why writ review was not appropriate here leaves an important gap in precedent and imposes an unjust result on Cynosure.

It is hard to understand how an appeal after final judgment could be an adequate remedy, because by the time of such an appeal the dispute would have been fully adjudicated in the wrong forum. It would be wasteful and inefficient to stand by while this dispute is resolved in the wrong forum, only to require the dispute to be adjudicated anew in the correct forum on appeal after final judgment. And, given Real Parties' aggressive (not to

mention inaccurate and even bewildering) reliance on various waiver arguments in their Answer, there can be no doubt that Real Parties will argue in opposition to any later appeal that resolution of this case in the wrong forum was harmless error and that Real Parties should not be forced to litigate the issue in the correct forum. The forum selection clause on which Cynosure relies is plain and unambiguous, which means the Court of Appeal must have denied writ relief on the basis that Cynosure's ability to appeal after final judgment supposedly provides an adequate remedy. That issue warrants a reasoned decision.

ISSUE 2: REAL PARTIES FAIL TO SHOW THAT THEIR AGREEMENT TO SUBMIT *ALL* DISPUTES FOR DECISION IN BOSTON DID NOT CONSTITUTE A MANDATORY FORUM SELECTION CLAUSE.

Real Parties devote the majority of their Answer to the issue of whether the forum selection clause was, as Cynosure demonstrated, mandatory. But, despite all of their verbiage, Real Parties fail to explain why the clause's requirement that the parties "submit all disputes . . . to a court in Boston, Massachusetts" does not mean what it says: that any dispute arising from the parties' agreement must be submitted to a Boston court. The reason is evident: the contractual language is plain and unambiguous.

Cynosure is not proposing that this Court decide the correct interpretation of the forum selection clause in the first instance and, for that reason, will not dwell on the merits. As just shown, the key reason why a grant and transfer order should be entered is that the threshold issue of whether writ review should have been afforded warrants a reasoned decision so that this Court would have an opportunity to consider the merits of that issue. In addition, because Real Parties' arguments on the

correct interpretation of the forum selection clause are so lacking in merit, the Court of Appeal's summary denial of writ review visits unfairness on Cynosure, particularly when four other courts have enforced the forum selection clause in other cases.

Real Parties' scattershot arguments on the merits of the forum selection clause include numerous incorrect statements, often made for the first time in their Answer. As just a few examples, consider the following:

- Real Parties argue that the trial court made factual findings (Answer 8), when contract interpretation is a question of law absent conflicting extrinsic evidence,[1] of which none was presented below.
- Real Parties assert that the forum selection clause is ambiguous and must therefore be interpreted against the clause's drafter, Cynosure. Answer 6. However, Real Parties do not explain *why* the clause is supposedly ambiguous, and it is not. It plainly requires the parties to submit "all" disputes to a court in Boston.
- Real Parties repeatedly assert they will be subject to an "offensive" jury waiver provision were this matter to be decided in Massachusetts, ignoring Cynosure's showing that no such clause exists in the agreement between Cynosure and Real

[1] *See City of Hope Nat'l Med. Ctr. v. Genentech, Inc.*, 43 Cal. 4th 375, 395 (2008) ("Interpretation of a written instrument becomes solely a judicial function only when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or when a determination was made based on incompetent evidence."); *see also Burch v. George*, 7 Cal. 4th 246, 254 (1994) ("The interpretation of a will or trust instrument [i.e., legal instruments] presents a question of law unless interpretation turns on the credibility of extrinsic evidence or a conflict therein.").

Parties. Pet. 10, 15. In response, Real Parties point again to the jury waiver in their financing agreement with Ascentium, a company separate from Cynosure. Real Parties for the first time urge—with no explanation or supporting evidence—that the financing company and Cynosure are "cohort[s]" in an apparent effort to merge Real Parties' contracts with two separate parties into one. *See* Answer 11. No legal doctrine supports Real Parties' "cohort" contention. In any event, for the avoidance of doubt, Cynosure committed before the Court of Appeal *not* to seek enforcement of the jury waiver in the Ascentium contract so this is a red herring. Reply to Informal Opposition 5.

- Real Parties argue that, because Cynosure has prevailed in four other court decisions in enforcing the forum selection clause, those victories "underscore[] the ability of [Cynosure] to be at home in any venue." Answer 7. However, the whole point of those decisions was to require litigation to take place in Boston, where Cynosure is in fact "at home" for purposes of personal jurisdiction. That Cynosure was able to have other cases transferred from multiple improper forums to the correct forum shows that the trial court ruling here was an aberration that should be corrected.
- For the first time, Real Parties suggest that non-contract claims fall outside the forum selection clause (Answer 7 n.2, 10), once again ignoring the clause's application to "all disputes arising out of, *or relating to*" the agreement between Cynosure and Real

Parties. Petitioner's Amended Exhibits 2 at 47 (emphasis added).

- Real Parties set forth extensive quotes from various cases about forum selection clauses, none of which support Real Parties' interpretation of the clause. As before (*see* Pet. 12–14), Real Parties incorrectly suggest the clause had to use words like "must" or "shall" for the clause to be mandatory and point to distinguishable cases involving a mere consent to jurisdiction in a particular court, as distinguished from an agreement to submit all disputes to a particular court.

CONCLUSION

For the foregoing reasons, review should be granted and the matter transferred to the Court of Appeal with directions to issue an alternative writ or order to show cause.

DATED: June 16, 2022.

Respectfully,

ARNOLD & PORTER KAYE SCHOLER LLP

By: */s/ Sean M. SeLegue*
SEAN M. SELEGUE

Attorney for Petitioner Cynosure, LLC

CERTIFICATE OF COMPLIANCE
PURSUANT TO CAL. R. CT. 8.504(d)(1)

Pursuant to California Rule of Court 8.504(d)(1), and in reliance upon the word count feature of the software used to prepare this document, I certify that the foregoing **Reply To Answer To Petition For Review** contains 1,236 words, exclusive of those materials not required to be counted under Rule 8.504(d)(3).

DATED: June 16, 2022.

/s/ Sean M. SeLegue
SEAN M. SELEGUE

PROOF OF SERVICE

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 Three Embarcadero Center, 10th Floor, San Francisco, California 94111-4024. On June 16, 2022, I served the following document(s) described as:

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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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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 addressed to the persons at the

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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 San Francisco, California on June 16, 2022.

JANE RUSTICE