IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
SUPREME COURT CASE NO: S282521

EPICENTRX, INC., TONY REID, BRYAN ORONSKY, FRANCK BRINKHAUS, SCOTT CAROEN, MEAGHAN STIRN, RAJAN KUMAR,

Defendants and Petitioners,

v.

EPIRX, L.P.,

Plaintiff and Respondent, Real Party in Interest.

OPENING BRIEF ON THE MERITS

After a Decision by the California Court of Appeal, Fourth Appellate District, Division One, Case No. D081670

Appeal from the San Diego County Superior Court, Case No. 37-2022-00015228-CU-BT-CTL, Hon. Timothy Taylor, Dept C-72

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I. ISSUE PRESENTED

This Court granted review on the following issue: Did the Court of Appeal correctly hold that this action must remain in California despite the contractual forum selection clause in EpicentRx's bylaws and certificate of incorporation, which calls for this action to be filed in the Delaware Court of Chancery?

II. INTRODUCTION

There is well-established California public policy favoring the enforceability of freely negotiated forum selection clauses that this Court specifically recognized in *Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal. 3d 491, 495. Moreover, there is well-established legal precedent that forum selection clauses are enforceable if the alternative forum is "suitable." *Investors Equity Life Holding Co. v. Schmidt* (2011) 195 Cal. App. 4th 1519, 1528-1530. This policy and precedent flow from California courts' acknowledgement that "[f]orum selection clauses play an important role in both national and international commerce." (*Lu v. Dryclean-U.S.A. of California, Inc.* (1992) 11 Cal. App. 4th 1490, 1493.)

In spite of these important precepts, the Court of Appeal's decision in this case (hereinafter "COA Opinion," attached as

Exhibit A ("Ex. A") to Petitioners' Petition for Review),[1] flies in the face of this post-*Smith* movement, which favors enforcement of forum selection clauses in California. Instead, the COA Opinion has applied the problematic framework presented in *Handoush v. Lease Finance Group* (2020) 471 P. 3d 328, threatening comity and the important role of forum selection clauses, by rendering unenforceable in California the contractual forum selection clause in EpicentRx's bylaws and certification of incorporation, calling for this action to be filed in the Delaware Chancery Courts, which are on the cutting edge of corporate law.

Indeed, each of the cases cited by the COA Opinion in support its extension and application of the erroneous *Handoush* ruling to this case, post-date this Court's *Smith* decision, and runs counter to the "modern trend" noted in *Smith* of forum selection clause cases wherein the burden remains on the party resisting enforcement to persuade a court that public policy precludes enforcement of the clause. Under the "modern trend," the burden of persuading a court that a forum selection clause should not be enforced rests squarely with the party seeking to evade the clause. It does not shift to the party asking the court to honor the parties' contractually selected forum. (*See, e.g.,*

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[1] It is confirmed on this Court's case docket that on October 31, 2023, this Court requested and received the Court of Appeal record on this appeal.

Atlantic Marine Constr. Co., Inc., supra, 571 U.S. at p. 64; *Lee, supra,* 34 F. 4th at 780.)

The flawed *Handoush* ruling, now extended by the COA Opinion, has enormous consequences for commerce, and unduly aggravates this Court's precedence, which presumes that agreed-upon forum selection clauses are binding and enforceable. (Ex. A, p. 15.) The COA Opinion frustrates the reasonable, contractual expectations of commercial actors. It deprives litigants of their agreed-upon forum. It deprives business and individuals of the certainty and predictability they sought when they initially agreed to a forum selection clause.

Such gamesmanship will not only increase motion practice in the courts and draw on scarce resources, but it will also bring additional litigation to the California courts from parties seeking to escape their commitment to litigate in a non-California forum, and to engage in forum-shopping. By having their disputes settled in one court, entities can take comfort in being able to operate under a consistently-applied body of law.

Accordingly, Petitioners respectfully request that this Court: (1) reverse the judgment of the Court of Appeal in its COA Opinion, which denies Petitioners' Writ and awards costs on appeal to EpiRx; and, instead, (2) hold that Petitioners' Writ be granted, thus resulting in the grant of Petitioners' Motion to

Dismiss pursuant to Section 418.10 of the California Code of Civil Procedure on forum non-conveniens grounds.

The reversal of the COA Opinion and the subsequent grant of Petitioners' Motion to Dismiss will realign California law with the "modern trend" favoring forum-selection-clause enforcement that this Court previously already approved and acknowledged in *Smith.* Such reversal and grant of the Motion to Dismiss will also bring uniformity to the law of enforceability of forum selection clauses in California, which issue this Court felt worthy of attention given its previous grants of review in *Handoush* and in *Gerro v. Blockfi Lending LLC,* No. B307156, 2022 WL 2128000 (Cal. Ct. App. June 14, 2022), *review granted* (Sept. 14, 2022), and in its recent grant of review in *Giblin v. Lockton Companies, et al.,* No. S282136, *review granted* (Dec. 13, 2023).

III. STATEMENT OF THE CASE: FACTUAL AND PROCEDURAL HISTORY

A. A Contractual Forum Selection Clause Existed Between EpiRx and Petitioners

Neither EpiRx nor EpicentRx are California residents. (Petition for Writ of Mandate ("Writ"), Ex. 1, p. 13, ¶16; p. 66, ¶2.) EpiRx is a limited partnership chartered in Delaware, and organized and existing under the laws of Delaware. (Writ, Ex. 1, p. 13, ¶16.) EpiRx's residency is determined by the residency of

its partners, and there is nothing in the record on appeal to establish that EpiRx's partners are California residents.

EpiRx is a minority stockholder in EpicentRx, a Delaware corporation. (Writ, Ex. 1, p. 13, ¶16.) EpicentRx is a clinical stage immuno-oncology company developing immunotherapies to treat and ameliorate the severity of cancer and other inflammatory diseases. (Writ, Ex. 1, p. 11, ¶3.)

Like many Delaware corporations, EpicentRx's charter contains a mandatory forum selection provision specifying the Delaware Chancery Court as the sole and exclusive forum for certain actions brought by stockholders. Specifically, the Company's certificate of incorporation provides that the Court of Chancery in the State of Delaware "shall be the sole and exclusive forum for any stockholder (including a beneficial owner) to bring (i) any derivative action or proceeding brought on behalf of the Company, (ii) any action asserting a claim of breach of fiduciary duty owed by any director, officer or other employee of the Company to the Company or the Company's stockholders, (iii) any action asserting a claim against the Company, its directors, officers or employees arising pursuant to any provision of the DGCL or the Company's certificate of incorporation or bylaws or (iv) any action asserting a claim against the Company, its directors, officers or employees governed by the internal affairs doctrine …." (Writ, Ex. 4, p. 86, Section VII.A.)

EpicentRx's bylaws also contain a forum selection provision that similarly specifies the Delaware Chancery Court as the sole and exclusive forum for stockholder actions that assert a claim of breach of fiduciary duty, a derivative claim, or a claim arising pursuant to the DGCL or the Company's certificate of incorporation. (Writ, Ex. 4, p. 101, Section 8.)

B. EpiRx Sued Petitioners In California

In April 2022, EpiRx sued Petitioners in this action in the San Diego Superior Court. In its Complaint, EpiRx alleged that certain defendants solicited investments in EpicentRx stock from approximately 25 third parties (not EpiRx), and then diverted the putative investors' funds for those defendants' personal benefit. (Writ, Ex. 1, pp. 13-17, ¶¶18-25.) The Complaint asserted causes of action for fraudulent concealment, promissory fraud, breach of contract, breach of fiduciary duty, and unfair business practices in violation of California Business and Professions Code Section 17200. (Writ, Ex. 1, pp. 13-27, ¶¶18-63.) The Complaint named as individual defendants certain directors, officers, employees, and external counsel of EpicentRx. (Writ, Ex. 1, pp. 11-13.) Defendant InterWest Partners, L.P. ("InterWest"), a stockholder of EpicentRx, and its COO, are also named as defendants, along with two other third parties. (Writ, Ex. 1, pp. 11-13, ¶¶4, 6, 10, 14.)

C. The Trial Court Denied Petitioners' Motion to Dismiss Based On The Delaware Forum Provision

Petitioners moved to dismiss this action on the grounds of forum non conveniens pursuant to California Code of Civil Procedure Section 418.10(a)(2) (the "Forum Motion"), based on the mandatory and exclusive forum provision in EpicentRx's bylaws and certificate of incorporation, which requires stockholder disputes such as this case to be filed in the Delaware Court of Chancery. (*See generally* Writ, Ex. 2, pp. 37-55.) The trial court denied the Forum Motion and extended *Handoush* to the Delaware forum bylaw stating, "By requiring the parties to litigate their disputes in the Court of Chancery, the forum selection clause constitutes a *de facto* predispute waiver of the right to a trial by jury." (Writ, Ex. 24, p. 510.) As a result, the trial court held that Petitioners had the burden of "showing that litigation in the Delaware Court of Chancery will not diminish in any way plaintiff's substantive rights under California law." (*Id.*)

The trial court rejected Petitioners' argument that EpiRx was not entitled to a jury trial on its claims. (*Id.* at p. 510.) The trial court did not address Petitioners' argument that the gist of this action is, in any event, equitable, eliminating any right to a jury trial that EpiRx might otherwise assert, thus rendering the jury trial waiver issue moot. (*See id.*) The trial court declined Petitioners' request to bifurcate EpiRx's claims to allow the

parties to first litigate the equitable claims in Delaware. (*Id.* at p. 511.)

D. Petitioners Filed a Petition for Writ of Mandate, Which Resulted In Oral Argument and the Published COA Opinion

On February 23, 2023, Petitioners filed a Petition for Writ of Mandate to the Court of Appeal, Fourth Appellate District, Division One, presenting the question relating to standard Delaware forum selection provisions contained in the charter documents of many Delaware corporations that are present in California: Does California's constitutional right to a jury trial trump an otherwise valid and binding Delaware forum provision included in the bylaws and certificate of incorporation of a Delaware corporation where the relief sought is primarily equitable?

On September 21, 2023, the Court of Appeal issued the published COA Opinion denying Petitioners' request for writ relief, holding that "enforcement of the forum selection clauses in EpicentRx's corporate documents would operate as an implied waiver of EpiRx's right to a jury trial – a constitutionally-protected right that cannot be waived by contract prior to the commencement of a dispute." (Ex. A, p. 2.)

E. Petitioners Filed a Petition for Rehearing Which Resulted In a Published Order

On October 6, 2023, Petitioners filed a Petition for Rehearing, asserting that a serious question exists as to whether the Opinion correctly determined that the trial court properly declined to enforce the forum selection clause, based on the following issues: the Opinion presented and relied upon a presumption that was not briefed by the Parties, namely that the *Wimsatt, America Online, Verdugo* and *Handoush* cases, which involved California resident plaintiffs, and which the Opinion depended upon to deny Petitioners' request for Writ relief, conferred upon EpiRx the right to a jury trial; the Opinion failed to address the issue of whether this was a derivative case and, instead, mistakenly assumed that this case was not a derivative case, resulting in a finding of an error of law that EpiRx had the right to a jury trial; the Opinion overlooked well-established law which confirmed that the Delaware Court of Chancery does not deprive EpiRx of a trial by jury; the Opinion is premature as it overlooked the reality that the *Gerro* case remains pending before the California Supreme Court; the Opinion contains a material error of law in its incorrect application of the standard of review; the Opinion relied upon immaterial considerations that were not briefed by the Parties as to the alleged risks of inefficiencies and inconsistent findings between the Delaware Court of Chancery

and the California courts on this case; and the Opinion contains a material error of fact given its misstatement of the proceedings, in that Petitioners argued that EpiRx's suit is one for equitable relief.

On October 10, 2023, the Court of Appeal issued a published Order Modifying Opinion and Denying Rehearing, No Change in Judgment. (*See* Exhibit B ("Ex. B") to Petitioners' Petition for Review.)

F. Petitioners Filed a Petition for Review With This Court, Which This Court Granted

On October 31, 2023, Petitioners filed their Petition for Review, Immediate Stay Requested" with this Court, attaching Exs. A and B. On December 12, 2023, this Court granted the Petition for Review and denied the application for stay, citing California Rules of Court 418.10(c). Petitioners now file this Opening Brief On the Merits with this Court.

IV. ARGUMENT

A. California's Well-Established Public Policy Favors Enforcement of the Subject Forum Selection Clause

The right to a jury trial in California is constitutionally protected. (*Grafton Partners, L.P. v. Superior Court* (2005) 36 Cal.4th 944, 951, 956.) California public policy also favors the enforcement of forum selection clauses. Indeed, in *Smith,*

Valentino & Smith, Inc. v. Superior Court (1976) 17 Cal.3d 491, this Court specifically held that California law is "in accord with the modern trend which favors enforceability of [freely negotiated] forum selection clauses." (*Id.* at pp. 495–496 ("No satisfying reason of public policy has been suggested why enforcement should be denied a forum selection clause appearing in a contract entered into freely and voluntarily by parties who have negotiated at arm's length."). *Accord, Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court for Western Dist. of Texas* (2013) 571 U.S. 49, 64 (enforcing such clauses "except in unusual cases").)

The COA Opinion herein, however, is not in keeping with the "modern trend" favoring the enforcement of forum selection clauses as endorsed by this Court in *Smith*. "Both the United States Supreme Court and the California Supreme Court have recognized that '[f]orum selection clauses play an important role in both national and interstate commerce.'" (Net2Phone, Inc. v. Superior Ct. (2003) 109 Cal. App. 4th 583, 587–588.) "Such clauses provide a degree of certainty, both for businesses and their customers, that contractual disputes will be resolved in a particular forum," and thus "California courts routinely enforce forum selection clauses even where the chosen forum is far from the plaintiff's residence." (*Ibid.*) The COA Opinion upsets this

modern trend favoring the enforcement of freely negotiated forum selection clauses. (*See* Smith, supra, 17 Cal. 3d at p. 495.)

Indeed, this Court last weighed in on forum selection clauses nearly 50 years ago in *Smith*. Since then, several Court of Appeal decisions post-dating *Smith* have adopted a framework under which the burden shifts from the party resisting enforcement to the party seeking enforcement of the forum selection clause. (*See, e.g., Handoush*, *supra*, 41 Cal. App. 5th at p. 734; *Verdugo v. Alliantgroup, L.P.* (2015) 237 Cal. App. 4th 141; *America Online, Inc. v. Superior Court* (2001) 90 Cal. App. 4th 1; *Wimsatt v. Beverly Hills Weight Loss Clinic Internat., Inc.* (1995) 32 Cal. App. 4th 1511.) Under this framework, "when the claims at issue are based on unwaivable rights created by California statutes" or the right to a jury trial under California law, the ordinary burden "reverse[s]" and the "party seeking to enforce the forum selection clause bears the burden" of showing that "litigating the claims in the" parties' selected forum "will not diminish in any way" those California rights. (*See Handoush.* at pp. 734, 741.)

First, however, each of these cases, including *Handoush,* post-date this Court's decision in *Smith* and, thus, run counter to the "modern trend" of forum selection clause cases under which the burden remains on the party resisting enforcement to

persuade a court that public policy precludes enforcement of the clause.

Second, this Court of Appeal's burden-shifting framework in the COA Opinion places California law out of the mainstream,[2] and a few steps behind the "modern trend" favoring forum-selection-clause enforcement that this Court approvingly adopted in *Smith*. (*See Smith, supra*, 17 Cal. 3d at p. 495.) Under that modern trend, "a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases," and the party seeking to evade the clause bears the burden of showing that enforcement is unwarranted—even in a situation where (as here) the plaintiff claims "enforcement of the clause 'would contravene a strong public policy of the forum in which suit is brought." (*See, e.g., Atlantic Marine Const. Co.*, *supra*, 571 U.S. at pp. 63–64; *Lee v. Fisher* (9th Cir. 2022) 34 F. 4th 777, 780 (*citing, e.g., M/S Bremen v. Zapata Off-Shore Co.* (1972) 407 U.S. 1, 15). *See also* Stephen J. Ware, *Arbitration Clauses, Jury–Waiver Clauses and Other Contractual Waivers of Constitutional Rights* (2004) 67 Law & Contemp. Probs. 167, 189–193 & n. 147 (observing that federal courts have enforced forum selection clauses even when they select a "forum in which there is no jury-

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[2] Only four other States have laws on the books holding pre-dispute jury trial waivers to be unenforceable.

trial right" and the "claims appear to have been legal, rather than equitable").)

Third, with the exception of *Handoush*, other cited cases do not arise in the jury-waiver context. In fact, as EpiRx itself noted in its Response to Petitioners' Petition for Review ("Response"):

- In *Wimsatt,* the court found a Virginia forum selection clause to be unenforceable against franchisees suing their franchisor because it would effectuate a waiver of rights under the California Franchise Investment Law which that law provided were non-waivable. (Response, p. 12).
- In *America Online,* the court found that a Virginia forum selection clause would effectuate a waiver of non-waivable rights under the Consumer Legal Remedies Act, even though it contained no explicit waiver. (Response, p. 12).
- In *Verdugo,* the court held that a forum selection clause requiring the plaintiff to litigate labor claims in Texas under Texas law effectuated a waiver of non-waivable claims under the California Labor Code. (Response, p. 12).

Fourth, the *Handoush* court recognized that the prior California cases that refused to enforce forum selections on public policy grounds addressed unwaivable substantive statutory

rights. The California jury trial right, on the other hand, is likely procedural. (See Verdugo, supra, 237 Cal. App. 4th at 147 (contract "purport[ed] to waive the unwaivable wage and hour protections the Labor Code provides to all California employees"); America Online, Inc., supra, 90 Cal. App. 4th at 17 (forum selection risked non-application of unwaivable provisions in the Consumer Legal Remedies Act); Wimsatt, supra, 32 Cal. App. 4th at 1520 (choice of forum risked non-application of an "antiwaiver statute which voids any provision in a franchise agreement which waives any of the other protections afforded by the Franchise Investment Law"); Hall v. Superior Court, 150 Cal. App. 3d 411, 418 (1983) (choice of forum risked non-application of anti-waiver provisions in the Corporate Securities Act of 1968).

Reversing the COA Opinion, thus granting the Petitioners' Motion to Dismiss, will result in this Court placing California law back in step with the "modern trend" it has previously recognized favoring enforcement of forum selection clauses, without shifting the burden to the party seeking enforcement. (*See, e.g., Atlantic Marine Const. Co.*, *supra*, 571 U.S. at p. 64; *Manetti-Farrow, Inc. v. Gucci America, Inc.* (9th Cir. 1988) 858 F.2d 509, 514; *Lu v. Dryclean-U.S.A. of California, Inc.*, *supra,* 11 Cal. App. 4th at 1493 ("Given the importance of forum selection clauses, both the United States Supreme Court and the California Supreme Court

have placed a heavy burden on a plaintiff seeking to defeat such a clause'").)

B. The Forum Selection Clause Is Enforceable Since the Alternative Forum, the Chancery Court, Is "Suitable"

Forum selection clauses are enforceable if the alternative forum is "suitable." *Investors, supra,* 195 Cal. App. 4th at 1528. An alternative forum is unsuitable only if it "provides no remedy at all." *Id.* at 1530. This applies only in "'rare circumstances,' such as where the alternative forum is a foreign country whose courts are ruled by a dictatorship. (*Ibid.)* It is irrelevant that the alternative forum's law is less favorable to plaintiffs or that recovery would be difficult or impossible. (*Ibid.)* Indeed, "a court may not even consider the fact that an alternative forum does not recognize a cause of action which would be available to the plaintiff under California law." (*Ibid.*)

Herein, following the above principles, the Delaware Chancery Court provides a "suitable" forum for EpiRx's claims against Petitioners. Therefore, reversal of the COA Opinion is warranted as the forum selection clause herein is enforceable.

First, the Court of Chancery has authority to submit factual issues to determination by a jury in the Superior Court. Indeed, when matters of fact, proper to be tried by a jury, arise in any cause depending in Chancery, the Court of Chancery may

order such facts to trial by issues at the Bar of the Superior Court. (10 Del. C. sec. 369. *See also Norm Gershman's Things to Wear, Inc. v. Dayon*, No. 11733, 1992 WL 368587, at *2 (Del. Ch. Dec. 11, 1992) ("I furthermore have the discretion to grant a jury trial on the liquated damages claim should I determine that it is warranted.").) The fact that the plaintiff joins legal and equitable claims in a complaint should not automatically deprive a defendant of the right to a trial by jury on the purely legal issues. This is so because otherwise a plaintiff could deprive a defendant of a jury trial merely by adding a spurious equitable claim to a demand for money damages and then commencing the action in Chancery instead of at law. (*Getty Refining and Marketing Company v. Park Oil, Inc., et al.* (1978) 385 A.2d 147, 151.)

Second, when the equitable jurisdiction of the Court of Chancery has been invoked, it may exercise jurisdiction over legal claims under the equitable clean-up doctrine. (*Prospect St. Energy, LLC v. Bhargava*, 2016 WL 446202, at *10 (Del. Super. Ct. Jan. 27, 2016).) It is the Chancery Court that is nationally recognized for its expertise in corporate law and stockholder disputes and deference should be shown to that expertise. (*See, e.g.*, *Drulias v. Guthrie*, 2019 WL 13240415, at *4 (C.D. Cal. Oct. 23, 2019) ("The Delaware Chancery Court has intentionally developed a specialty in resolving substantial issues of corporate

governance and questions of fiduciary duty and corporate control.").) That is why thousands of companies designate the Delaware Chancery Court rather than some other court.

It is irrelevant that the alternative forum's law is less favorable to plaintiffs or that recovery would be difficult or impossible. (*Investors, supra, 195 Cal. App. 4th* at 1528.*)* Indeed, "a court may not even consider the fact that an alternative forum does not recognize a cause of action which would be available to the plaintiff under California law." (*Ibid.*)

"Fundamentally, once a right to relief in Chancery has been determined to exist, the powers of the Court are broad and the means flexible to shape and adjust the precise relief to be granted so as to enforce particular rights and liabilities legitimately connected with the subject matter of the action." (*Wilmont Homes, Inc. v. Weiler* (Del. 1964) 202 A.2d 576, 580 (*citing* 1 John N. Pomeroy, A Treatise on Equity Jurisprudence §115 (5th ed. 1941).) The "clean-up doctrine" gives this court ancillary jurisdiction "to resolve purely legal causes of action that are before it as part of the same controversy over which the Court originally had subject matter jurisdiction in order to avoid piecemeal litigation." (*Kraft v. Wisdom Tree Invs., Inc.* (Del. Ch. 2016) 145 A. 3d 969, 974.)

The court has described the policies underlying the clean-up doctrine as follows: Some of the reasons why equity, once

having acquired jurisdiction over part of a controversy, will, in the Court's discretion, continue to exercise jurisdiction over the entire controversy, even over those portions where there is an adequate remedy at law are: to resolve a factual issue which must be determined in the proceedings; to avoid multiplicity of suits; to promote judicial efficiency; to do full justice; to avoid great expense; to afford complete relief in one action; and to overcome insufficient modes of procedure at law. (*Getty*, 385 A.2d at 150 (*citing Mackenzie Oil Co. v. Omar Oil & Gas Co.* (Del. Ch. 1923) 120 A. 852.)

Third, EpiRx would not be entitled to a jury trial on its causes of action, notwithstanding EpiRx's characterization of their claims as "fraud" and "damages," because EpiRx's causes of action were truly equitable in nature and, thus, the **gist** of this action is equitable in nature, not legal. In fact, EpiRx made a judicial admission that, "EpiRx is seeking rescission of its investment as primary relief." EpiRx made a judicial admission that the **gist** or nature of its action is rescission, especially where EpiRx seeks to rescind its purchase of EpicentRx shares. (C*&K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal. 3d 1, 9 ("The determination of whether an action is one in law or in equity, and thus whether the right to a jury trial attaches, turns not on "the form of the action," but rather, on "the nature of the rights involved and the facts of the particular case—the gist of

the action.")) Therefore, a jury trial is plainly not available as a matter of right for EpiRx because rescission is an equitable remedy for the court. It was EpiRx, not Petitioners, who characterized the primary relief as being rescission. (*See Spreckels v. Gorill* (1907) 152 Cal. 383, 390-394 (It is well established that suits brought "to enforce a rescission which has been offered and refused .. is of equitable origin and nature.")) A party suing to rescind a contract for the purchase of stock, but for alleged fraud, is by all measures a suit in equity. These are undisputedly EpiRx's allegations. (Id. at 392 ((the gist of the action was equitable where plaintiff stockholder sued to rescind a stock repurchase agreement).) EpiRx cannot flip-flop by recharacterizing its suit as one of law through a lens of monetary relief – particularly where EpiRx offered no legal authority for its proposition.

The case of *Van de Kamp v. Bank of America* (1988) 204 Cal. App. 3d 819, is instructive and applicable. In *Van de Kamp,* although plaintiffs' causes of action were styled as claims for breach of fiduciary duty and fraud, they did not entitle plaintiffs to a jury trial because equitable principles were required to assess damages, such as an accounting. The *Van de Kamp* court noted that "[w]here an accounting is required, the action is equitable." (Id. at 864.) The Van de Kamp court added: "While plaintiffs sought damages, that fact by itself does not make the

action one at law. As noted in *C&K Engineering Contractors v. Amber Steel Co.* (citation omitted): 'Although we have said that 'the legal or equitable nature of a cause of action ordinarily is determined by the mode of relief to be afforded' (citation omitted), the prayer for relief in a particular case is not conclusive, (citations omitted). Thus, 'the fact that damages is one of a full range of possible remedies does not guarantee ... the right to a jury....' [citations omitted]." An action is one in equity where the only manner in which the legal remedy of damages is available is by application of equitable principles. (Citation omitted)." (*Van De Kamp, supra*, 204 Cal. App. 3d at 865.) "[T]he fact plaintiffs sought money damages did not make an equitable action into one at law." (Id.)

This Court emphasized in *C&K Engineering Contractors, supra*, 23 Cal. 3d at 9: "In determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case the Gist of the action. … On the other hand, if the action is essentially one in equity and the relief sought 'depends upon the application of equitable doctrines,' the parties are not entitled to a jury trial. (Citation omitted.) Although we have said that 'the legal or equitable nature of a cause of action ordinarily is determined by the mode of relief to be afforded' (citation omitted), the prayer for relief in a

particular case is not conclusive (citations omitted). Thus, 'the fact that damages is one of a full range of possible remedies does not guarantee . . . the right to a jury . . . .'" (*See also Interactive Multimedia Artists, Inc. v. Superior Court* (1998) 62 Cal. App. 4th 1546, 1555.)

Herein, EpiRx's claims are also labeled as breach of fiduciary duty and fraud. Because EpiRx needs access to corporate books and records, EpiRx concedes an accounting is necessary. This is entirely consistent with EpiRx's judicial admission that its primary request is rescission. Moreover, EpiRx is challenging the manner in which Petitioners conducted themselves with respect to EpicentRx shares. Accordingly, it is clear that EpiRx's ancillary prayer for damages is equitable. EpiRx's Section 17200 claim also does not implicate a right to a jury trial. (*Nationwide Biweekly Administration, Inc. v. Superior Court of Alameda County* (2020) 9 Cal. 5th 279, 297-305.)

Fourth, derivative claims are equitable claims to which there is no right to a trial by jury. (*Caira v. Offner* (2005) 126 Cal. App. 4th 12, 39. "California entertains no right to jury trial in stockholders' derivative actions." (*Rankin v. Frebank Co.* (1975) 47 Cal. App. 3d 75, 92 (reviewing California case law and declining to follow federal cases holding that the federal Constitution guarantees a right to jury trial in shareholder derivative claims); *Nelson v. Anderson* (1999) 72 Cal. App. 4th

111, 127 ("A shareholder derivative suit is an action in equity").) This is true even where punitive damages are sought on such derivative claims. (*Caira, supra*, 126 Cal. App. 4th at 38-40.) The California Supreme Court in *C&K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal. 3d 1, 11, held that "[T]he addition ... of a prayer for damages does not convert what is essentially an equitable action into a legal one for which a jury trial would be available." One of the issues was whether there was a right to a jury trial on a complaint that sought damages premised on the equitable theory of promissory estoppel.

Herein, the Complaint asserted derivative claims triggering the forum provisions. EpiRx was required to file its claims in the Chancery Court under the forum selection clause because the Complaint asserted "claims that are derivative because they seek to recover based on purported harm to the corporation and its shareholders as whole rather than Plaintiff individually." EpiRx's "claims allege an injury to the corporation and its shareholders generally, not an injury that is unique to Plaintiff individually, therefore Plaintiff seeks to pursue derivative claims that belong to the corporation." The "gravamen of the injury is the decreased value for the entire body of EpicentRx's stock." Because this case is a derivative case, there can be no *de facto* waiver of a right to a jury trial where no such right to a jury trial existed in the first place.

Fifth, given that there was a finding that the forum selection clause is valid and binding at least as to equitable claims, those claims should have been severed and dismissed since EpiRx is required to bring those claims in the Chancery. (*See Elliemmaria Toronto Esa v. NortonLifeLock, Inc.* (N.D. Cal. Aug. 30, 2021) No. 20-CV-05410-RS, 2021 WL 3861434, at *3; *Ocegueda v. Zuckerberg* (N.D. Cal. Mar. 19, 2021) 526 F.Supp.3d 637, 2021 WL 1056611, at *8.) Petitioners specifically noted that there is no reason that the equitable claims should not proceed to resolution in Delaware first, as required under the bylaws, with any remaining legal claims to be decided thereafter, as necessary.

Accordingly, the forum selection clause herein should be enforceable because the alternative forum, the Delaware Chancery Court, is "suitable."

C. The COA Opinion Exacerbates the Problem Created By *Handoush*—a Decision Which This Court Previously Agreed To Review But Never Decided

The COA Opinion herein followed the erroneous rule set forth in *Handoush*, by applying the burden-shifting framework to the party seeking to enforce the forum selection clause (Ex. A. at p. 15.) Pursuant to *Handoush*, the Court concluded that Petitioners had the burden of proving that enforcement of the forum selection clause in EpicentRx's corporate documents would not diminish EpiRx's rights under California law, found that

Petitioners failed to satisfy their burden of proof and, therefore, denied the motion to dismiss on forum non conveniens grounds. (Ex. A, pp. 15, 17, 22-23.)

In *Handoush*, "the California Court of Appeal was called upon to decide whether a forum selection clause selecting New York should be enforced when the practical effect would be to validate a jury waiver clause that was unenforceable under the California Constitution." (John F. Coyle & Katherine C. Richardson, *Enforcing Outbound Forum Selection Clauses in State Court* (2021) 96 Ind. L.J. 1089, 1117 (explaining the Court of Appeal's decision in *Handoush*).) The *Handoush* Court "began by observing that while California generally favors the enforcement of forum selection clauses, its courts will refuse to defer to the selected forum if to do so would substantially diminish the rights of California residents in a way that violates our state's public policy." (*Ibid.* (internal quotations omitted).) It then described the burden-shifting analysis that has been developed by the Courts of Appeal, explaining that "the party seeking to enforce the forum selection clause bears the burden to show that litigating the claims in the contractually designated forum 'will not diminish in any way the substantive rights afforded . . . under California law.'" (*Ibid.* (internal quotations omitted).) *Handoush* then "expressed the view that a New York court was likely to enforce the jury waiver provision" and "[s]ince

this provision was invalid under the California Constitution, the court deemed the forum selection clause requiring the dispute to be heard in New York unenforceable." (*Ibid.*)

The trigger under *Handoush* is whether a pre-dispute jury trial waiver is present in a contract containing a non-California forum selection clause. The decision in *Handoush*, which has had wide-ranging statewide, national and international commercial implications, has raised red flags in several different ways, as follows:

- "This decision brings into question all manner of agreements, including operating agreements for LLCs organized outside of California, and the choice-of-law/forum provisions thereof." (Thomas E. Rutledge, *Choice of Law/Forum and Waiving the Right to a Jury Trial: California Courts Holds That the Former Cannot Do the Latter* (Sept. 3, 2020) American Bar Association, Business Law Today.)
- "This decision cautions though that if a lawsuit is filed in California, you may very well find yourself litigating your claims before a California jury even if your agreement expressly provides otherwise." (Steven W. Cardoza & Jacqueline G. Luther, *Start Spreadin' the News: California Court Says No to New York, New York; Rejects Forum Selection Clause* (Nov.

9, 2019) 9 Nat. L.Rev. 313.)

- "[I]t appears that a contractual jury trial waiver provision might give a plaintiff greater rights to litigating in California than might otherwise exist. In the absence of the jury trial waiver provision, the forum selection clause might have been enforceable." (Rafael M. Langer-Osuna, *Do California Jury Trial Waivers Inadvertently Guarantee Plaintiffs the Option of a California Jury Trial?* (Jan. 14, 2020) 10 Nat. L.Rev. 14.)
- "Without our endeavoring to address all of the issues raised by the *Handoush* decision—including its implications for forum selection clauses generally when they select a forum that does not provide for a jury trial—corporations should recognize that the interaction of a jury trial waiver with [a federal forum provision] can introduce enforcement risk in California court, particularly because jury trial waivers are potentially enforceable in federal court." (Hon. William B. Chandler III (Ret.), et al., *FAQS About Federal Forum Provisions,* (2021) 2021 Columbia Bus. L.Rev. 569, 599.)
- "Although *Handoush* involved a choice of forum provision that called for transfer of the litigation from

> one U.S. state to another, there is no reason to believe that its impact will be limited to domestic litigation." (Peter Selvin, *California court declines enforcement of choice of forum and choice of law provisions, citing right to Jury Trial*, (May 2020) International Bar Association, Legal Practice Division, International Legal News.)

Accordingly, this Court decided to grant review in *Handoush* to address these problematic indicators.

The COA Opinion now exacerbates the complications created by *Handoush* by adopting the *Handoush* framework, and holding that a pre-dispute contractual jury waiver in and of itself relieves a party from having to honor a forum selection clause, unless the party seeking to enforce the clause can somehow show that the jury waiver somehow has no potential to operate as a waiver of the California jury trial right. (Ex. A. at pp. 16-17.) The reality is that this shifting standard adopted by the COA Opinion serves to negate and abolish forum selection clauses in California because of the mere presence of a jury waiver. That does not seem to be this Court's intended holding or result.

D. ***Handoush* Has Tremendous Commercial Consequences, And Impacts A Myriad Of Contracts**

The COA Opinion—which followed the rule in *Handoush* and further extended it to a situation where the party seeking

enforcement of the forum selection clause wholly disavowed the pre-dispute jury trial waiver—has huge commercial implications and consequences. (Ex. A. at p. 15.)

Specifically, "[f]orum selection clauses are a staple of modern business law." (John F. Coyle & Katherine C. Richardson, supra, (a "recent study of more than 500,000 contracts filed with the Securities and Exchange Commission between 2000 and 2016 found that 30% of these agreements contained forum selection clauses.").) And forum selection clauses are "strongly associated with jury trial waiver rates." (Elizabeth M. Fraley, *Of What Value Is a Jury Today? An Updated Empirical Study of Jury Trial Waivers in Large Corporate Contracts* (2020) 53 Creighton L. Rev. 283, 289.) Indeed, in a recent empirical study of around 4,000 public filings by "sophisticated, well-informed parties," over 350 of those contracts had both a pre-dispute jury trial waiver and forum selection clause. (*See id.* at pp. 283, 294.)

By one estimate, the rule in *Handoush* followed by the Court of Appeal decision in this case impacts "thousands, if not millions, of contracts." (*See* Amicus Letter on Behalf of the Chamber of Commerce of the United States of America, the Securities Industry and Financial Markets Association, and the International Swaps and Derivatives Association (June 30, 2020) Cal. S. Ct. No. S259523 at pp. 2–3 (emphasis added).) After all,

pre-dispute jury trial waivers are quite common in numerous types of contracts, including, for example, loan agreements, loan guarantees, financing agreements, franchise agreements, mortgage agreements, and a whole host of other agreements. (*See, e.g., Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp., Inc.* (E.D. La. 1999) 56 F.Supp.2d 694, 706 (observing that "jury trial waivers are common in loan agreements and loan guarantees, and these are regularly enforced"); *Okura & Co. v. Careau Group* (C.D. Cal. 1991) 783 F. Supp. 482, 489 (financing agreement); *Collins v. Countrywide Home Loans, Inc.* (M.D. Fla. 2010)680 F. Supp. 2d 1287, 1294–1296 (home mortgage agreement); W. Andrew Scott & R. Samuel Snider, *California Populism, Contract Interpretation, and Franchise Agreements* (2005) 24 Franchise L.J. 248 (franchise agreements).)

The commercial implications from the *Handoush* ruling are immense. There can be no doubt that the COA Opinion implicates questions of statewide, national, and international importance. Indeed, as noted above, only four other States—Arkansas, Georgia, North Carolina, and Oklahoma—have laws on the books holding pre-dispute jury trial waivers to be *unenforceable*.[3] Accordingly, the vast number of contracts likely

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[3] (E.g., *Tilley v. Malvern Nat'l Bank* (Ark. 2017) 532 S.W.3d 570, 578 (Arkansas); *Bank S., N.A. v. Howard* (Ga. 1994) 444 S.E.2d 799, 800 (Georgia); *N.C. Gen. Stat. Ann. § 22B-10* (North (footnote continued)

to be impacted underscores the need for this Court to find that the forum selection in this case is enforceable.

In addition, Petitioners submitted a list of thousands of affected *public* companies such as Qualcomm, Facebook (Meta), and Gap, that have adopted Delaware forum bylaws despite being located in California or other states. (Writ, Ex. 18, Ex. A.) The COA Opinion would allow stockholders to bypass Delaware forum bylaws and file lawsuits in California against those companies, as well as their officers, directors, or employees, and anyone else the company could sue in a derivative capacity. The same goes for countless *privately held* companies like Petitioners and stockholder InterWest. Designating all Delaware courts would not change the outcome, and in any event, it is the Chancery Court that is nationally recognized for its expertise in corporate law and stockholder disputes like this one. This Court should continue to show deference to that expertise by reversing the COA Opinion.

It is the Chancery Court that has special expertise in corporate law, not the Delaware Superior Court, Family Court, or small claims courts. (*See, e.g.*, *Drulias v. Guthrie*, 2019 WL 13240415, at *4 (C.D. Cal. Oct. 23, 2019) ("The Delaware Chancery Court has intentionally developed a specialty in

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Carolina); *Home Vest Cap., LLC v. Ret. Application Servs., Inc.* (Okla. Civ. App. 2018) 466 P.3d 1, 2–3 (Oklahoma).)

resolving substantial issues of corporate governance and questions of fiduciary duty and corporate control.").) That is why thousands of companies designate the Delaware Chancery Court rather than some other court.

Moreover, if California courts decline to enforce Delaware forum bylaws, it likely will result in forum-shopping by the plaintiff's shareholder litigation bar, and far more work for California courts. (Writ, pp. 41-43.) Indeed, the very fact that an out-of-state plaintiff, like EpiRx, is now suing Petitioners in California actually makes the case of forum-shopping a justifiable concern. As evidenced by the court's opinion in *Atlantic Marine Construction Company*, plaintiffs, such as EpiRx herein, who view California courts as providing a more friendly forum than the Chancery Court can easily append weak statutory or common law claims that entail the right to a jury trial to cases that are clearly about corporate governance and stockholder rights simply to avoid Delaware forum bylaws to which they are otherwise bound. Out of state plaintiffs—like EpiRx— would flock to California to circumvent states that enforce these forum provisions. The COA Opinion has broad and significant implications, potentially affecting thousands of entities with Delaware forum provisions operating in this state. California public policy, therefore, supports enforcing Delaware forum

bylaws, because doing so will conserve California's scarce judicial resources and avoid forum-shopping.

E. The COA Opinion Makes Clear That There is a Split of Authority Among Courts Applying California Law On Whether a Pre-Dispute Jury Trial Waiver Impacts the Enforcement of a Forum Selection Clause

It is obvious from the COA Opinion that there is a split of authority among courts which have applied California law regarding whether a pre-dispute jury trial waiver impacts the enforcement of a forum selection clause. Specifically, state and federal courts have diverged on what effect a pre-dispute jury trial waiver has on the enforcement of a forum selection clause.[4] Some courts have treated pre-dispute jury trial waivers and forum selection clauses as wholly different procedural creatures and thus declined to allow a jury trial waiver to preclude enforcement of a freely negotiated forum selection clause. Such treatment makes sense herein:

- (*Lightfoot v. MoneyonMobile, Inc.* (N.D. Cal., June 13, 2019, No. 18-CV-07123-YGR) 2019 WL 2476624, at *9 ["Whether to enforce the jury waiver provision, however, is a separate

[4] The unpublished California decisions are cited herein not as precedent but, rather, to show that the issues set forth in this Opening Brief have already infiltrated several California cases.

issue from the enforceability of the forum selection clause and is a question best left to the transferee court."].)

- (*Balducci v. Congo, Ltd.* (N.D. Cal., Sept. 21, 2017, No. 17- CV-04062-KAW) 2017 WL 4176464, at *5 [similarly rejecting party's arguments that forum-selection clause enforcement would violate California public policy].)
- (*Marcotte v. Micros Systems, Inc.* (N.D. Cal., Sept. 11, 2014, No. C 14-01372 LB) 2014 WL 4477349, at *7 ["The court concludes that the jury waiver does not require invalidation of the forum selection clause merely because they are in the same paragraph."].)
- (*AJZN, Inc. v. Yu* (N.D. Cal., Jan. 7, 2013) No. 12-CV- 03348-LHK, 2013 WL 97916, at *4 ["Nor has AJZN suggested that a Delaware court would be likely to enforce the jury trial waiver. A mere unspecified 'risk' that a court could, in theory, enforce the waiver, without any citation to authority suggesting that this is a likely outcome, cannot carry AJZN's heavy burden to establish that 'enforcement of the

clause would contravene a strong public policy' of California."] (emphasis in original).) Under 9th Circuit law, burden is on Plaintiff to establish that public policy requires the Court to set aside the forum selection clause by showing that enforcement of the clause would contravene a strong California public policy. Plaintiff has not even argued, let alone proven, that a Delaware court will be unable to protect the interests of California citizens. Other considerations include whether the Delaware court might apply California law or some other laws that would be equally protective of the interests of California citizens.

- *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas* (2013) 571 U.S. 49, 63–64. Party defying forum selection clause bears burden of establishing that transfer to the forum for which the parties bargained is unwarranted. When a plaintiff agrees by contract to bring suit only in a specified forum – presumably in exchange for other binding promises by the defendant—the plaintiff has effectively exercised its "venue privilege" before a dispute

arises. Only that initial choice deserves deference, and the plaintiff must bear the burden of showing why the court should not transfer the case to the forum to which the parties agreed.

- *Home Sav. of Am. v. FTI Consulting, Inc.,* No. 11CV2641-IEG (RBB), 2012 WL 13175961 (S.D. Cal. Feb. 1, 2012) at *3 (Under federal law, the right to a civil jury trial may be waived by a contract knowingly and voluntarily executed).
- *LaCross v. Knight Transp., Inc.*, 95 F. Supp. 3d 1199, 1206 (C.D. Cal. 2015) (Unless a plaintiff can demonstrate that his/her remedy is altogether foreclosed and unavailable in the transferee court, courts do not consider policy arguments unrelated to venue).
- *Besag v. Custom Decorators, Inc.*, 2009 WL 330934, at *4 (N.D. Cal. Feb. 10, 2009) (A party challenging enforcement of a forum selection clause may not base its challenge on choice of law analysis because a forum selection clause is different from choice of law provisions. Forum selection clause determines where the case will

be heard, not what law applies.).

Herein, the enforcement of the forum-selection clause will be in accord with the modern trend favoring forum-selection-clause enforcement that this Court approvingly adopted in *Smith*. (*See Smith, supra*, 17 Cal. 3d at p. 495.) As noted above, under that modern trend, "a valid forum- selection clause [should be] given controlling weight in all but the most exceptional cases," and the party seeking to evade the clause bears the burden of showing that enforcement is unwarranted—even in a situation where (as here) the plaintiff claims "enforcement of the clause 'would contravene a strong public policy of the forum in which suit is brought." (*See, e.g., Atlantic Marine Const. Co.*, *supra*, 571 U.S. at pp. 63–64.

F. <u>This Court Previously Granted Review In *Gerro* and *Lockton*, Which Cases Present Similar Issues Relating To *Handoush* and the Enforceability Of Forum Selection Clauses</u>

1. <u>Review in *Gerro*</u>

This Court granted review in *Gerro v. Blockfi Lending LLC*, No. B307156, 2022 WL 2128000 (Cal. Ct. App. June 14, 2022), *review granted* (Sept. 14, 2022). The issue to be briefed in *Gerro* is the same as in this case, namely: Did the Court of Appeal

correctly hold that the *Gerro* action must remain in California despite the contractual forum selection clause, which called for the action to be filed in Delaware?

In *Gerro*, the Court of Appeal considered a loan agreement that included a pre-dispute jury waiver and a Delaware forum selection clause (*Gerro, supra,* 2022 WL 2128000, at *1). Following *Handoush,* the *Gerro* opinion held that the forum selection clause was unenforceable because, under Delaware law, contractual provisions that waive the contracting parties' right to trial by jury have been upheld, and relevant case law provided insufficient assurance that Delaware courts would apply California's public policy to the dispute (*Gerro, supra,* 2022 WL 2128000 at pp. *7- 9).

Although this Court's review of *Gerro* is currently pending, it was previously suspended due to an automatic bankruptcy stay. Then, on December 27, 2023, this Court noted on the *Gerro* court docket that it "construes BlockFi Lending LLC and BlockFi Inc.'s fourth quarterly report regarding the status of federal bankruptcy proceedings, filed on November 30, 2023, as a motion to dismiss review and remand this matter with instructions that it be dismissed with prejudice.

It appears, therefore, that with the dismissal of *Gerro,* this Court will again lose the opportunity to decide the enforceability of the forum selection clause issue that it wanted to take up when

it granted review in *Handoush*. Such dismissal will now allow other future court decisions to further expand the erroneous ruling in *Handoush*. This Court's reversal of the COA Opinion is now more urgent than ever.

2. Review in *Lockton*

This Court recently granted review in *Giblin v. Lockton Companies, et al.,* No. S282136, *review granted* (Dec. 13, 2023). The question to be briefed in *Lockton* similarly involves issues relating to the enforceability of the out-of-state forum-selection clause, and whether the Court of Appeal correctly determined that the trial court properly declined to enforce the Missouri forum selection clause by denying Lockton's Writ Petition. More specifically, the issues in *Lockton* are as follows: (1) Is a forum-selection clause unenforceable on the ground that a separate choice-of-law clause might require application of another state's law that does not provide the exact same remedy as California law?; and (2) Under what circumstances, if any, may the burden of proof on a motion to enforce a forum selection clause be shifted to the party seeking enforcement of the clause?

In its grant of review, this Court noted that "[f]urther action in this matter is deferred pending consideration and disposition of a related issue in *EpicentRx v. S.C. (EpiRx),* S282521 (see Cal. Rules of Court, rule 8.512(d)(2)), or pending further order of the court. Submission of additional briefing,

pursuant to California Rules of Court, rule 8.520, is deferred pending further order of the court."

This Court's reversal of the COA Opinion will provide it with the correct direction it needs to dispose of the related issues in *Lockton,* as well as with the opportunity to reorient California law with the modern trend favoring forum-selection-clause enforcement that this Court previously already approved in *Smith*.

V. CONCLUSION

The commercially dangerous ruling in the COA Opinion conflicts with this Court's precedent favoring the enforcement of forum selection clauses, and contradicts California law supporting the modern trend favoring forum selection clause enforcement that this Court approved in *Smith*, by shifting the burden to EpicentRx and by rendering unenforceable the presumptively reasonable contractual forum selection clause which calls for this action to be filed in the Delaware Chancery Court.

The far-reaching rule set forth in *Handoush*, amplified by the COA Opinion, has enormous commercial consequences and important ramifications for commerce statewide, nationally and internationally. The COA Opinion, based on *Handoush,* has negative commercial implications and impacts a myriad of contracts and comity, given the growing presence of pre-dispute

jury trial waivers in agreements with forum selection clauses, and the fact that there are only four remaining states in the United States where pre-dispute jury trial waivers are unenforceable. The COA Opinion magnifies the obvious split of authority among state and federal courts applying California law on whether a pre-dispute jury trial waiver impacts the enforcement of a forum selection clause. The COA Opinion deprives the parties herein of their agreed-upon "suitable" forum, and frustrates the reasonable contractual expectations of the parties as to their agreed-upon forum.

Accordingly, Petitioners respectfully request that this Court: (1) reverse the judgment of the Court of Appeal in its COA Opinion, which denies Petitioners' Writ and awards costs on appeal to EpiRx; and, instead, (2) hold that Petitioners' Writ be granted, thus resulting in the grant of Petitioners' Motion to Dismiss pursuant to Section 418.10 of the California Code of Civil Procedure on forum non-conveniens grounds.

Respectfully submitted,

Dated: January 12, 2024 **O'HAGAN MEYER**

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CERTIFICATE OF COMPLIANCE

This brief is set using 13-pt Century Schoolbook. According to Microsoft Word, the computer program used to prepare this brief, this brief contains 8,641 words, exclusive of the matters that may be omitted under Rules 8.520 and 8.204.

The undersigned certifies that this brief complies with the form requirements set by California Rules of Court, and contains fewer words than permitted by the rules or by Order of this Court.

Dated: January 12, 2024 O'HAGAN MEYER

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Proof of Service

EPICENTRx, Inc., et al., v. The Superior Court of the State of California for the County of San Diego

Case No: S282521

I am a citizen of the United States, over 18 years of age, and not a party to this matter. My office address is: O'HAGAN MEYER, 21650 Oxnard Street, Suite 530, Woodland Hills, California 91367.

On January 12, 2024, I served true copies of the within OPENING BRIEF ON THE MERITS on the Respondent and the real parties in interest in this proceeding as follows:

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