No. S256927

IN THE SUPREME COURT OF CALIFORNIA

IXCHEL PHARMA, LLC.
Plaintiff and Appellant,

v.

BIOGEN, INC.
Defendant and Respondent.

On Certified Questions From The United States Court Of Appeals For The Ninth Circuit, Case No. 18-15258
Judge William B. Shubb, Case No. 2:17-CV-00715-WBS-EFB

RESPONSE TO AMICUS CURIAE BRIEF OF BECKMAN COULTER, INC.

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INTRODUCTION

Amicus Curiae Beckman Coulter, Inc. ("Beckman") misreads Business and Professions Code section 16600 to void all restraints that "*prohibit* one of the parties from engaging in a lawful business"—a test Beckman says voids a counter-party's promise "to refrain from buying or selling with other parties." (Brief of Amicus Curiae Beckman Coulter, Inc. ("BC Br.") pp. 45-46, italics added.) Beckman's commerce-chilling approach finds no support in the text, legislative history, or caselaw applying section 16600 or its predecessor, Civil Code section 1673.

Biogen demonstrated that section 16600 voids *per se* (as section 1673 voided) naked restraints and restraints incident to separations, absent a statutory exception. Other "contract[s] by which anyone is *restrained* from engaging in a lawful profession, trade or business"—the actual language of the statute, not "prohibit[ed]"—remain subject to the rule of reason, the same standard the legislature enshrined in the Cartwright Act. Beckman seeks to explain away cases deeming restraints reasonable under section 16600 or its predecessor as instead holding "that the statute did not apply at all." (BC Br. p. 39.) But those decisions stand for the opposite proposition: The statute, although applicable, exonerated restraints that did not "stifle competition or create a monopoly" even though "in some degree [they] may be said to restrain trade"—classic early articulations of the rule of reason. (*Great Western Distillery Products v. John A. Wathen Distillery Co.* (1937) 10 Cal.2d 442, 449 (*Great Western*); accord, *Associated Oil Co. v. Myers* (1933)

217 Cal. 297, 306 (*Associated Oil*).)

Amicus briefs filed by the California Chamber of Commerce and the California Business Roundtable, by a group of legal and economic scholars, and by Quidel Corporation all agree that the rule of reason governs section 16600's application to business-to-business restraints of the type at issue here.[1] Those amici also highlight the perils of an approach such as that taken by Beckman (and Plaintiff/Petitioner Ixchel Pharma, LLC): Misreading section 16600 to void *per se* all agreements between businesses "to refrain from buying or selling with other parties" (BC Br. p. 46) would hobble California's economy. Beckman's misreading would invalidate ordinary-course exclusive dealing, franchise agreements, joint ventures, and licensing agreements.

THIS COURT SHOULD REJECT BECKMAN'S MISREADING OF SECTION 16600

A. Beckman Miscasts Section 1673/16600's Text, Structure, and Judicial Elaboration.

Biogen and Beckman agree that the legislature, in enacting section 16600 in 1941, intended to carry forward the then-existing interpretation of section 16600's predecessor, section 1673. (Compare Biogen's Answer Brief on the Merits ("Biogen Br.") pp. 54-56 with BC Br. pp. 18-20.) Beckman, however,

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[1] See Brief of California Chamber of Commerce and California Business Roundtable as Amici Curiae p. 15 (Brief of Amici Scholars pp. 8-9 ("Scholars Br."); Brief of Amicus Curiae Quidel Corporation pp. 19-20 ("Quidel Br.").

misstates the operation and judicial elaboration of both statutes.

1. Statutory Text and Structure. Beckman asserts that section 16600 (and section 1673 before it) condemns "prohibit[ions] . . . from engaging in a lawful business" but not other "limitations on trade freedom." (BC Br. p. 45). The statute, Beckman says, unambiguously voids the former and has no application to the latter. (BC Br. pp. 25, 39, 45.) Beckman ignores the actual language of the statute, which voids not "prohibitions" but rather every "contract by which anyone is *restrained* from engaging in" (or in section 1673, "exercising") a "lawful . . . business." Beckman's substitution of "prohibitions" for contractual "restraints" lacks *any* textual basis.

As Biogen showed, the statute's exceptions illuminate the meaning of the phrase "contract[s] by which anyone is restrained from engaging in a lawful . . . business." (Biogen Br. pp. 47-51.) That is, section 1673/16600 voids (i) naked restraints; and (ii) restraints incident to separations. The legislature left *other* "restraints of trade," even if they could in some sense be characterized as a restraint from "engaging" in a "business," subject to the common-law rule of reason, which the legislature in 1872 did not intend to displace for such restraints. (*Id.*) The 1941 legislature intended no further substantive change. (Biogen Br. pp. 55-56.)

Beckman also errs when it claims that this Court has repeatedly deemed section 16600 "unambiguous" for purposes of the issue presented here, and thus in no need of construction. (BC Br. pp. 25-27.) Beckman relies mainly on *Howard v. Babcock*

(1993) 6 Cal.4th 409—but *Howard* was discussing *section 16602*, not section 16600, when it found "no ambiguity in the terms of the statute." (6 Cal.4th at pp. 417-418.) *Howard* dealt exclusively with whether and how section 16602 redeems post-termination restraints—otherwise void *per se*—on partners who depart law firms. (*Ibid.*) It held that "an agreement among partners imposing a reasonable cost on departing partners who compete with the law firm in a limited geographical area is not inconsistent with rule 1-500 and is not void on its face as against public policy." (6 Cal.4th at p. 425.) Beckman relies secondarily on the statement in *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 950 (*Edwards*) that "Section 16600 is unambiguous." (BC Br. P. 26, fn. 8.) But as Biogen has explained, that observation and others in *Edwards* were tied to *Edwards*' context of "employee noncompetition agreements" (44 Cal.4th at pp. 941-942, 950)—a *per se void* restraint incident to separation. (Biogen Br. pp. 60, 70-71.)

Lack of ambiguity as to the voiding of restraints incident to separation, where the statute withdrew the common law, does not control section 16600's operation in the case of *other* restraints, where the rule of reason governs. (Biogen Br. § II.B.1.)[2] As with the Cartwright Act, section 16600 "is written

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[2] Beckman later cites more cases concerning restraints incident to separation, all of which would fall within section 1673/16600's *per se* category absent the exceptions addressed therein. (See BC Br. pp. 47-50, citing *Merchants' Ad-Sign Co. v. Sterling* (1899) 124 Cal. 429; *Swenson v. File* (1970) 3 Cal.3d 389; and *Monogram Industries, Inc. v. Sar Industries, Inc.* (1976) 64 Cal.App.3d 692.)

in absolute terms" but must be read in light of the common law it drew upon. (*In re Cipro I & II* (2015) 61 Cal.4th 116, 136-137 (*Cipro*).) The Court should say so here, to curtail mischief like Beckman's.

2. Legislative History. Confirming Biogen's textual analysis, the Code Commissioners identified restraints where section 1673 withdrew the rule of reason in favor of a *per se* rule: naked restraints, such as *California Steam Nav. Co. v. Wright* (1856) 6 Cal. 258, and restraints incident to separations, such as *Whittaker v. Howe* (1841) 49 Eng.Rep. 150. (See Biogen Br. pp. 49-50; Annotated Code (1872) pp. 502-503.) The Code Commissioners also confirmed that the legislature left the rule of reason applicable to *other* restraints. As amicus Quidel Corporation explains, the Code Commissioners expressed no quarrel with the rule of reason, but rather "that some courts had not properly followed the common law to void unreasonable restraints" of trade. (Quidel Br. pp. 31-32.)

Contrary to Beckman's claim (BC Br. pp. 31-32), the Commissioners' invocation of *Wright v. Ryder* (1868) 36 Cal. 342 supports Biogen's reading of section 1673 and undermines Beckman's. This Court has characterized *Wright v. Ryder* as involving a naked non-compete, a class of restraint Biogen agrees the statute voids *per se*, as would the antitrust laws. (*Cipro*, *supra*, 61 Cal.4th at p. 149.) But that does not mean the Commissioners only had "per se invalidity" in mind. (BC Br. p. 32.) On the contrary, the Code Commissioners' suggestion that a reformed version of the restraint in *Wright v. Ryder* would pass

muster (Annotated Code (1872) p. 503) supports applying the rule of reason to restraints outside section 1673's two *per se* categories. Indeed, *Wright* applied the rule of reason, but deemed a state-wide territorial restraint *per se* illegal under then-applicable rule of reason principles. (36 Cal. at p. 358 [explaining that "[t]he difficulty lies in determining what are reasonable and unreasonable restrictions" but that "if the restriction operates throughout the kingdom, the contract is void."])

3. Judicial decisions. As Biogen explained, this Court's decisions applying section 1673 implemented the statute through two tracks—applying a *per se* rule to naked non-competes and restraints incident to separation, while continuing to apply the rule of reason to other restraints. (Biogen Br. pp. 51-54.) Beckman's argument, that cases upholding reasonable restraints under section 1673 failed to apply the statute at all, misreads those decisions by taking language out of context.

Beckman places great weight on *Vulcan Powder Co. v. Hercules Powder Co.* (1892) 96 Cal. 510. But as Beckman concedes, *Vulcan* involved a naked cartel. (BC Br. p. 14.) Going well beyond legitimate patent cross-licensing, the parties agreed (among other things) to divide fixed shares of the market for dynamite powder and set prices via standing committee. (96 Cal. at pp. 514-515.) And, as Beckman highlights, the cartel included "manufacturers who participated in the non-compete despite having no patents of their own to contribute to the pool." (BC Br. p. 24.) *Vulcan* thus involved the type of naked restraint of trade that, Biogen agrees, section 1673/16600 voids *per se*, as would the

common-law rule of reason. This Court agreed: "The above-stated provisions of the contract are clearly in restraint of trade and against public policy; and this conclusion is too obvious to need argument, authorities, or elucidation." (*Vulcan*, *supra*, 96 Cal. at p. 515). *Vulcan* lends Beckman's "prohibition" test no support.

The same is true of *Getz Bros. & Co. v. Federal Salt Co.* (1905) 147 Cal. 115, where one party paid a competitor to exit the industry and to discourage new entrants. (*Id.* at pp. 116-118.) The Court expressed "no doubt" that such a naked restraint violated both section 1673 and the Sherman Act. (*Id.* at p. 118.) This Court's voiding of a naked restraint is, again, entirely consistent with Biogen's reading of section 16600: naked restraints are *per se* illegal. The case, however, does not support Beckman's broader "prohibition" test that condemns any arrangement—whether or not a naked non-compete—that apparently prohibits one party "from buying or selling with other parties" in other settings. (BC Br. p. 46.)[3]

Put differently, Beckman's argument misapprehends section 1673/16600's order of operations. Beckman contends that because these cases did not engage in an "analysis of the

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[3] *Pacific Wharf & Storage Co. v. Standard Am. Dredging Co.* (1920) 184 Cal. 21 is inapposite because this Court affirmed the judgment on severability grounds. (*Id.* at p. 25.) The Court did not rule on whether section 1673 was "controlling" (*id.* at p. 24), nor did it assess how to apply the statute. In any event, *Pacific Wharf & Storage* arguably involved a naked non-compete with respect to San Diego, where plaintiff did not employ the defendant. (*Id.* at p. 23.)

economic impact of" restraints before "declaring [them] void," section 1673 precluded considerations of "reasonableness." (BC Br. p. 16.) But *Vulcan* and *Getz* had no occasion to consider reasonableness because the restraints before the Court plainly fell within a class that section 1673 voided *per se*. The same is true of *Chamberlain v. Augustine* (1916) 172 Cal. 285 (*Chamberlain*, cited at BC Br. pp. 16-17). That case voided a post-separation restraint on an individual for competing, so the question of reasonableness was never on the table. (*Id.* at pp. 287-288.) *Chamberlain*'s observation that "[t]he statute makes no exception in favor of contracts only in partial restraint of trade" (*id.* at p. 289, quoted at BC Br. p. 17), perfectly fits section 1673/16600's framework. *When* the statute voids a class of restraint *per se*, it does so regardless of the restraint's limited scope. None of these cases establish, as Beckman claims, that a rule of reason approach is not appropriate for restraints outside the two *per se* classes.

Beckman is also wrong about *Morey v. Paladini* (1922) 187 Cal. 727 (*Morey*), which *did* involve "analysis of the economic impact" of the challenged restraint. (BC Br. pp. 15-16.) This Court held the contract "illegal" because its "result would tend toward a monopoly of the trade in appellant." (*Morey*, at p. 736; see also *id.* at p. 738 [arrangement "wholly void" because the parties intended to "secure" a "monopoly"].) The Court thus condemned the restraint because of its *anticipated impact on competition*, consistent with the Court's further conclusion that the restraint violated the antitrust laws. (*Id.* at pp. 736-737,

citing the seminal rule of reason decision *Standard Oil Co. v. United States* (1911) 221 U.S. 1; see also *Nash v. U.S.* (1913) 229 U.S. 373, 376-378 [conspiracy to achieve forbidden result unlawful under the Sherman Act].) So Beckman misses the mark when it attempts to distinguish *Morey* on the ground that this Court deemed actual attainment of a full monopoly "'immaterial.'" (BC Br. pp. 17, 23, BC's italics omitted.) The parties' intent to gain a monopoly, and the tendency of their deal to achieve it, would have been irrelevant if, as Beckman argues, section 1673/16600 turned on a mechanical "prohibition" test.[4]

Beckman's construction of the statute also cannot be right because it is under-inclusive. Beckman's "prohibition" reading does not account for the result in *Chamberlain*, discussed above. The liquidated damages clause there did not "prohibit" Augustine from engaging in a lawful profession; rather, it *deterred* competition by requiring Augustine to pay a penalty if he entered the foundry business after selling plaintiff his shares in a foundry. (172 Cal. at p. 288.) Yet the statute voided it. Similarly, the contract in *Edwards*, *supra*, did not "prohibit" the former employee from engaging in his profession, but only from competing to serve clients of his former employer. (44 Cal.4th at

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[4] *Hunter v. Superior Court* (1939) 36 Cal.App.2d 100, cited at page 44 of Beckman's brief, similarly undermines Beckman's "prohibition" test. Part of the contract in *Hunter* violated section 1673 because it "set[] forth an intention of the parties to create a monopoly" (*id.* at p. 115), an inquiry irrelevant to Beckman but consistent with early formulations of the rule of reason. The court also invalidated a ten-year post-separation non-compete—a restraint in the *per se* category. (See *id.* at p. 114.)

pp. 937, 948.) The Court nonetheless held the clause to violate section 16600 because it "*restricted* [Edwards's] ability to practice his accounting profession." (*Ibid.*, italics added.)

By contrast, Biogen's reading of the statute aligns with both *Chamberlain* and *Edwards*. Both cases involved restraints from engaging in a profession *imposed incident to a separation*, one of two categories of restraints that section 1673/16600 voids *per se*. (Biogen Br. p. 51.)

Finally, and most importantly, *Great Western* and *Associated Oil* confirm Biogen's reading of the statute and refute Beckman's. Those cases did not deem section 1673 *inapplicable* (BC Br. p. 36), but rather validated the restraints as *reasonable*.

Associated Oil engaged in the very "analysis of the economic impact" of the restraint that Beckman says section 1673/16600 forbids. (BC Br. p. 16.) The passage Beckman cites (BC Br. p. 38) explains that the restraint passed muster because (1) "*competition is not stifled*," and (2) the agreement "[i]n no way . . . attempt[ed] to limit production or fix the price of the commodity involved." (217 Cal. at p. 306, italics added.) In other words, the restraint did not fall within section 1673's *per se* track, because it did not amount to a naked restraint—so the Court saw "nothing unreasonable" about it.[5]

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[5] The same is true of *Grogan v. Chaffee* (1909) 156 Cal. 611, which explained that the resale price maintenance agreement at issue there, one outside the *per se* track, presented "no question of an attempted monopoly" and that "[t]here [wa]s nothing … *unreasonable*" about the provision. (*Id.* at pp. 613-614, emphasis added.)

Beckman also gets *Great Western* backward. The restraint there compelled plaintiff to purchase all whiskey warehouse receipts that it required exclusively from the defendant, and prohibited the defendant from selling its receipts to anyone else (10 Cal.2d at pp. 444-445)—just the kind of "prohibition" Beckman says on page 46 that the statute condemns. But this Court exonerated the restraint, as Beckman admits on page 45 with no attempt at reconciliation. (See also Biogen Br. pp. 53-54.) Contrary to Beckman's contention (BC Br. p. 39), *Great Western* nowhere held section 1673 *inapplicable* because the restraint did not fall into a category section 1673 reached. Rather, the Court *evaluated* the restraint under rule-of-reason principles, finding no section 1673 violation because the restraint had no "tendency to stifle competition or create a monopoly," instead benefiting competition. (10 Cal.2d at p. 449.) Under Beckman's explanation of the statute, this Court's detailed analysis of the restraint's economic consequences was superfluous.

Beckman rips out of context the Court's statement that the contract "does not restrain anyone from exercising a trade or business." (BC Br. pp. 38-39, internal quotations and Beckman's italics omitted.) That statement reflects a conclusion *following* the rule of reason analysis, as other language in the passage Beckman quotes makes plain: The contract was procompetitive because it "promote[d]" trade rather than "restricting" it. (10 Cal.2d at pp. 445-446.)

Beckman also draws the wrong lesson from *Great Western*'s treatment of earlier cases. (BC Br. pp. 40-41.) *Great Western*'s

distinction of *Chamberlain*, *supra*, as "disclos[ing] a contract directly within the contemplation of [the statute]" (10 Cal.2d at 448) explained why the *type* of restraint there—incident to separation—fell within the statute's *per se* track. The statement does not support Beckman's incorrect conclusion that *Great Western* held section 1673 inapplicable; instead, it explains why *Great Western* conducted a case-specific rule of reason analysis rather than voiding the restraint *per se*.

And *Great Western*'s treatment of *Morey*, *supra*, lends Beckman no more support. *Great Western* recited that *Morey* found "at least a partial restraint of trade." (10 Cal.2d at 448.) But this Court actually *distinguished Morey* on quite different grounds: that the parties there sought to "stifl[e] competition and secur[e] a monopoly," while the contract in *Great Western* had no such object or impact, even though "in some degree [it] may be said to restrain trade." (*Id.* at pp. 448-449.) This, of course, is the very rule-of-reason economic analysis that Beckman wrongly argues the statute forbids. (BC Br. pp. 16-17.)[6]

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[6] Beckman takes *Morey*'s invocation of "'partial restraint'" out of context. (BC Br. p. 17.) *Morey* and other cases made no exception for "partial" restraints *where* the contract fell within section 1673's two *per se* categories. (BC Br. pp. 16-17, 21, 40, citing *Vulcan*, *Chamberlain*, and *Morey*, *supra*.) But as *Great Western* shows, other reasonable restraints passed muster even though in some sense "partial"—that is, "in some degree [they] may be said to restrain trade." (10 Cal.2d at p. 449.) Notably, early Sherman Act cases applying the *per se* rule used the same formulation as *Morey*. (Compare *U.S. v. Trans-Missouri Freight Ass'n* (1897) 166 U.S. 290, 334 [condemning price-fixing "however partial"] with *U.S. v. Trenton Potteries Co.*, (1927) 273 U.S. 392,

In sum, *Great Western* and *Associated Oil*—against which the 1941 legislature enacted section 16600—reflect this Court's recognition of a rule of reason track for restraints not voided *per se* as naked restraints (as in *Vulcan*) or restraints incident to separation (as in *Chamberlain*). (See also Chamber Br. p. 18.)

B. Beckman's Misreading of Section 16600 Would Hobble the Cartwright Act.

Biogen showed that the California legislature's 1941 co-location of section 16600 with the Cartwright Act, which specifically preserves the rule of reason in section 16725, precludes reading section 16600 to supplant the rule of reason for a wide swath of commercial restraints. (Biogen Br. pp. 58-59.) Other amici agree. (See Chamber Br. pp. 19-22; Scholars Br. pp. 14-15; Quidel Br. pp. 18, 21.) Beckman's response fails to persuade.

First, *Cianci v. Superior Court* (1985) 40 Cal.3d 903 did not abrogate the need to harmonize section 16600 with the Cartwright Act. (BC Br. pp. 33-34.) *Cianci* rejected a different argument: that the two statutes were "sufficiently related" to infer a "legislative intent to exclude the professions from the Cartwright Act, based upon nothing more than" the nearby section 16600's use of that term. (40 Cal.3d at p. 922, internal quotations omitted.) Nothing in *Cianci* lifts the long-settled imperative to harmonize statutes that the legislature chose to

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398, 400, fn. 1 [explaining *Trans-Missouri* and *Vulcan* as both applying a *per se* rule].)

"consolidat[e]" alongside each other. (*Ibid.*) Biogen's reading of section 16600 does. Beckman's leaves the two in conflict—a point it nowhere disputes.

Second, Beckman downplays how its misreading of section 16600 effectively displaces the Cartwright Act by (a) asserting that section 16600 has a "limited scope" and (b) citing the Cartwright Act's broader remedies. (BC Br. p. 34.) The first argument is circular; it presumes Beckman's misconstruction of section 16600. The second ignores how litigants can leverage an alleged section 16600 violation to seek relief beyond invalidation. Indeed, in this case, Ixchel invokes section 16600 as a predicate for claims of tortious interference and violation of section 17200. (See ER 100-108.)

Third, Beckman's argument that the legislature has shown it can amend section 16600 when it wants to (BC Br. at pp. 46-50) also (wrongly) presumes Beckman's reading of the law is correct. Moreover, post-1941 amendments to the statute's exceptions all delineate the boundaries of restraints incident to separations, a class of restraints voided *per se* by section 16600 (and section 1673). (See fn. 2, *ante*; Biogen Br. p. 56, fn. 13.) The legislature's refinement of when to exonerate restraints falling into section 16600's *per se* track comports with the long-standing application of the rule of reason to other restraints. Finally, the legislature's acquiescence in courts' post-1941 application of the rule of reason to restraints not involving separations but rather collaborations—as illustrated by key cases described below—supports Biogen's reading of the statute, not Beckman's.

C. Beckman Has No Answer to Section 16600 Cases Applying the Rule of Reason.

Numerous post-1941 appellate decisions illustrate section 16600's rule of reason track. Beckman is wrong to call those decisions "uninformative and unpersuasive." (BC Br. pp. 41-43.)

Beckman seeks to dismiss *Dayton Time Lock Service, Inc. v. Silent Watchman Corp.* (1975) 52 Cal.App.3d 1, *Centeno v. Roseville Community Hospital* (1979) 107 Cal.App.3d 62, *Martikian v. Hong* (1985) 164 Cal.App.3d 1130, *Lafortune v. Ebie* (1972) 26 Cal.App.3d 72, and *Rolley, Inc. v. Merle Norman Cosmetics* (1954) 129 Cal.App.2d 844 as irrelevant because they invoked "federal antitrust" standards in applying section 16600. (BC Br. at pp. 42-43, italics omitted.) Reliance on the Sherman Act supports, rather than undermines, application of the rule of reason to restraints not governed by section 16600's *per se* track.[7] Beckman also omits any discussion of *Quidel Corp. v. Superior Court* (2019) 39 Cal.App.5th 530, except to acknowledge that *Quidel* required a "'full-blown anti-trust analysis'" of the provision at issue. (BC Br. p. 9.)

Beckman's other cases (p. 44) comport with Biogen's two-track analysis of the section 16600 precedents. As Biogen showed, *Kelton v. Stravinski* (2006) 138 Cal.App.4th 941 and

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[7] Beckman misrepresents *Centeno*, quoting the part of the opinion assessing plaintiff's claimed right to a pre-termination hearing. (107 Cal.App.3d at p. 76.) The contract's compliance with the rule of reason, by contrast, underlay exoneration of the restraint under section 16600. (See *id.* at pp. 69-74.)

Robinson v. U-Haul Co. of California (2016) 4 Cal.App.5th 304 involved conduct falling within section 16600's two *per se* categories. (See Biogen Br. at p. 70.) The same is true of *Beatty Safeway Scaffold, Inc. v. Skrable* (1960) 180 Cal.App.2d 650, which (like *Robinson*) involved a restraint incident to separation. (See *id*. at p. 656 [contract prevented individual from competing against former supplier for three years *after* exclusive distributorship terminated].) None of Beckman's post-1941 decisions supports its "prohibition" test.[8]

D. Beckman's Misreading of Section 16600 Would Deter Many Procompetitive Agreements.

As explained, Beckman misconstrues section 16600 to turn on whether a contract "prohibit[s] one of the parties from engaging in a lawful business." (BC Br. at p. 45.) What does this mean? Beckman says that its reading voids all "non-compete covenants between businesses," and indeed all "covenants not to compete" generally. (BC Br. at pp. 10, 50.) The "non-compete" category apparently includes—at least—naked non-competes and post-separation non-competes, restraints also void under Biogen's reading.[9]

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[8] Another case Beckman cites at page 44 did not interpret section 16600 at all, holding instead that an exception exonerated a non-compete agreement incident to a sale. (*Fleming v. Ray-Suzuki, Inc.* (1990) 225 Cal.App.3d 574, 583-584, cited at Biogen Br. p. 70 [mistakenly referring to "16602" instead of "16601"].)

[9] See BC Br. p. 15 (endorsing result in *Getz*); *id.* at pp.16-17 (endorsing results in *Chamberlain* and *Edwards*).

But Beckman's list of forbidden "prohibitions" goes further, and includes any commitment to "refrain from buying or selling with other parties." (BC Br. p. 46.) *Any* exclusive dealing commitment, along with many ordinary and procompetitive restrictions in distribution, licensing, franchise, and joint venture agreements, can be characterized as an agreement "to refrain from buying or selling with other parties." A commitment by a Ford dealer not to sell other vehicle brands is a commitment "to refrain from buying or selling with other parties." So, too, is a commitment by a Dunkin Donuts franchisee to refrain from selling Starbucks coffee. As other amici persuasively explain, a reading of "restrain[t] from engaging in a lawful . . . business" that *per se* voids such ordinary-course commercial agreements threatens to chill commerce. (Bus. & Prof. Code, § 16600; see, e.g., Chamber Br. pp. 21-25; Amici Scholars Br. pp. 15-16; Quidel Br. pp. 46-50.)

Beckman denies that "limitations on trade freedom" previously held lawful under section 1673/16600 fall within its ill-defined "prohibition" test. (BC Br. p. 45.) It does not explain why. (See *id*.) The restraints upheld in *Associated Oil* and *Great Western*, among other cases, involved a counter-party agreeing to "refrain from buying or selling with other parties." (BC Br. p. 46; see *Associated Oil, supra*, 217 Cal. at p. 299 [lessee required to purchase all gasoline sold at the station from lessor]; *Great Western, supra*, 10 Cal.2d at pp. 444-445 [promise to "refrain[] from selling and exploiting warehouse receipts" from other distilleries].) A carve-out for specific fact patterns previously

upheld under section 1673/16600 provides no coherent limiting principle for Beckman's view of the statute.

The lack of principles bounding Beckman's "prohibition" test, and its potential to invalidate any promise to "refrain from buying or selling with other parties," would deter or prevent too many commercially useful agreements:

1. What of a joint venture by two firms to develop a new software product, where the parties agree that one will sell the product to one class of customers, and the other to another class of customers, to promote sales and control for free riding, with a price ceiling? The antitrust enforcement agencies would analyze the customer allocation under the rule of reason.[10] But under Beckman's "prohibition" test, one party could seek to invalidate the restriction after the other has sunk its investment by arguing that the agreement requires it to "refrain from … selling [to] other parties," and thereby from engaging in the "lawful business" of selling to that customer segment. No boundary identified by Beckman defeats that argument, and embracing such an argument would impair innovation.

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[10] See Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000) Federal Trade Commission and the U.S. Department of Justice <https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf>, at pp. 28-29 (Example 2).

2. What if two patent holders contribute patents to a pool to establish a technical standard for a product category, and agree not to compete against the pool by sponsoring a competing standard? (*Princo Corp. v. International Trade Com'n* (Fed.Cir. 2010) 616 F.3d 1318, 1322-1323.) Such a "pool[ing of] research efforts is analyzed under the rule of reason." (*Id.* at p. 1335.) But under Beckman's misreading of section 16600, one party could claim that the agreement, designed to induce productive technological cooperation, impermissibly prohibits it from engaging in a lawful business of selling to other parties.
3. What if competing hospitals agree that they will only purchase certain supplies jointly, so as to reduce costs by pooling volumes? The U.S. antitrust enforcement agencies would evaluate this horizontal commitment to purchase exclusively through the joint venture under the rule of reason, even when the participants have very large downstream shares.[11] But a challenger could wield Beckman's misreading of section 16600 to claim that the arrangement is *per se* unlawful because it involves a prohibition to "refrain from buying . . . [from] other parties."

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[11] See U.S. Department of Justice, Business Review Letter re: Memorial Health, Inc. and St. Joseph's/Candler Health System, Sept. 4, 2009 <https://www.justice.gov/atr/response-memorial-health-inc-and-st-josephscandler-health-systems-request-business-review-letter>.

4. What if a franchisor directs that its franchisee must buy supplies (e.g., burgers, napkins) from a single approved supplier unaffiliated with the franchisor, and forbids purchasing such supplies from others? Such agreements are generally lawful under the rule of reason; they serve to safeguard quality. (Accord, Chamber Br. at p. 25; Quidel Br. at pp. 48-49.) But it takes little imagination to envision a suit by the franchisee claiming, under Beckman's test, that this restraint requires it to "refrain from buying or selling with other parties." Here again, no principle Beckman identifies precludes the argument—but if successful, such a suit would deter franchise deals by eroding their major advantage, brand consistency.
5. What if a national van line conditions participation in its network on a local affiliate not servicing interstate traffic in competition with the national line, where the local affiliate can free ride on the national line's "reputation, equipment, facilities, and services"? (*Rothery Storage & Van Co. v. Atlas Van Lines, Inc.* (D.C. Cir. 1986) 792 F.2d 210, 221.) Even though such a prohibition on competition is subject to the rule of reason because it counters free riding (*id.* at pp. 214, 223), a local affiliate could contend, under Beckman's test, that the restraint "prohibit[s]" the affiliate "from engaging in a lawful . . . business" of offering interstate service under its own brand.[12]

[12] The same is true of the restraint upheld in *Polk Bros., Inc. v. Forest City Enterprises, Inc.* (7th Cir. 1985) 776 F.2d 185, 187-

This handful of endlessly multipliable examples confirms that section 16600 cannot turn on Beckman's one-size-fits-all "prohibition" test—even if it had any support in the statute or case law, which it does not. Instead, outside of *per se* naked non-competes and restraints incident to separation, section 16600 preserves the rule of reason.

In contrast to Beckman's "prohibition" test, the evolving rule of reason protects competition and consumers by permitting benign and procompetitive restraints while condemning anticompetitive restraints. (See *Cipro, supra*, 61 Cal.4th at pp. 135-137.) California courts are well equipped to apply the antitrust rule of reason, honed through over a hundred years of application, to business restraints challenged under section 16600. As amici Chamber of Commerce and Business Roundtable explain, under the rule of reason "more than a century of precedent . . . inform[s] businesses' understandings of what constitutes lawful" conduct. (Chamber Br. pp. 21-22.)

CONCLUSION

Beckman's misreading of section 16600 has never been, and should not be, the law in California. The Court should reject Beckman's position and instead adopt the reading proposed by Biogen. Applying the rule of reason to restraints other than naked non-competes and separation-related restraints comports

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189, described by amici California Chamber of Commerce and California Business Roundtable. (See Chamber Br. pp. 22-23.) Beckman's test would likely void the provision requiring each party to "refrain from . . . selling" certain items to customers.

with this Court's jurisprudence, honors the choices the California legislature has made, and protects this state's economy. This Court should continue reading section 16600 "'in the light of reason and common sense.'" (See *Great Western*, *supra*, 10 Cal.2d at p. 446.)

Respectfully submitted,

March 30, 2020

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.520(c)(1), I certify that this RESPONSE TO AMICUS CURIAE BRIEF OF BECKMAN COULTER, INC. contains **5,265** words, counted by the word processing program used to generate it.

Dated: March 30, 2020

/s/ Laurie J. Hepler
Laurie Hepler

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3/30/2020

Date

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