# S256927

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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**IXCHEL PHARMA, LLC,**

Plaintiff and Appellant,

v.

**BIOGEN, INC.,**

Defendant and Respondent.

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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

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## APPELLANT'S CONSOLIDATED RESPONSE TO BRIEFS OF AMICUS CURIAE SUPPORTING BIOGEN OR NEITHER PARTY

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## INTRODUCTION

Under California Rules of Court, rule 8.520(f)(7), Ixchel Pharma, LLC ("Ixchel") respectfully submits this Consolidated Response to three *amicus curiae* briefs filed in this case: (i) Brief of California Business Roundtable and California Chamber of Commerce ("Roundtable"); (ii) Brief of *Amici* Scholars ("Scholars"); and (iii) Brief of Quidel Corporation ("Quidel") (collectively, "*amici*" or "*amicus* briefs").[1]

## DISCUSSION[2]

### I. *Amici*'s Interpretation of Section 16600 Is Wrong.

It is important at the outset to keep in mind the underlying facts alleged in Ixchel's Complaint. Ixchel alleges that Biogen paid Forward Pharma over $1 billion in exchange (in part) for a promise not to engage in Forward's business of developing DMF drugs – drugs that would have competed with Biogen's own products – to terminate its development relationship with Ixchel, and never work with Ixchel or Dr. Cortepassi again. (ER 98). Business and Professions Code section 16600 states that

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[1] As used in this Response, the term *amici* does not refer to the *amicus curiae* brief submitted by Beckman Coulter, Inc. ("Beckman"); where appropriate, that brief is separately referenced herein.

[2] As stated in prior briefing, it is unnecessary for this Court to decide how section 16600 applies to businesses; the question posed by the Ninth Circuit was whether the statute applies, and the parties agree that it does. Nevertheless, if the Court decides to address that issue, this brief responds to *amici's* arguments on that issue.

"every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." The Biogen/Forward contract restrains Forward from engaging in the DMF drug development business. It also restrains Forward from working with Ixchel on a new treatment for Fredeich's ataxia. Thus, on the plain language of the statute alone, the Biogen/Forward agreement violates section 16600.

For their part, *Amici* each adopt the same flawed interpretation of section 16600, and in particular, each makes two core mistakes. First, they ignore the textual limitation "from *engaging in* a lawful . . . business" (Section 16600 (emphasis added)), and short-hand the statute as applying to all contractual "restraints" of any kind. From that initial error naturally flows the second. Reasoning that it would be absurd for the Legislature to have banned all forms of contractual restraint, *amici* argue that the Legislature must have intended for section 16600 to prohibit only unreasonable restraints of any kind. In that way, *amici* argue section 16600 should mirror both the pre-existing common law standard that the statute was adopted to overturn, and the subsequently-developed federal and state antitrust standards that would make the statute redundant.

This interpretation is wrong. It violates both the plain language of the statute, and the clear history surrounding its adoption. Properly understood as a statute that is narrowly focused on *non-compete* covenants—that is, agreements which restrain one from "engaging in" a

lawful business, in whole or in part—there is nothing dangerous, implausible, or absurd about the Legislature's decision to ban altogether that *specific category* of restraint. Indeed, *amici* acknowledge the Legislature's ability to ban a specific category of restraint in all cases, as each argues that section 16600 does exactly that for "price-fixing," "monopolies," and other discrete categories. *Amici* just failed to define the prohibited category correctly. Rather, section 16600 imposes a *per se* ban on agreements that restrain anyone from engaging in a lawful business. Under this approach, myriad other forms of contractual restraint remain valid and permissible under section 16600, as long as they do not contain that prohibited element.

Accordingly, to apply section 16600, a court must first determine whether the agreement falls within the statute's ambit. An agreement triggers section 16600 only if one is "restrained from engaging in a lawful profession, trade, or business of any kind." (Section 16600.) Not every restraint does; as *amici*'s own citation, the Jurisprudence Treatise, explains: "It is not every limitation on absolute freedom of dealing that is prohibited" by the statute. (6 Cal. Jur. (1922) Contracts, § 94, p. 134 ("Jurisprudence Treatise").) If such a restraint is found, the next inquiry is whether any of the statute's enumerated exceptions also applies; if not, the agreement is void, but only "to that extent." (Section 16600.) To be sure, this standard requires California courts to analyze the nature of the restraint imposed, to

assess whether it is a restraint on engaging in a business. But this is not, and has never been, a "rule of reason" analysis.

### A. *Amici*'s Analysis Of The Case Law Is Wrong.

*Amici* argue that "California's courts have never imposed a textualist-only construction on the 'superficially absolute language' of" section 16600.[3] (Scholars Br. 14; *see also* Quidel Br. 24 & n.6 (similar).) To the contrary, this Court and the Court of Appeal repeatedly applied a plain language, textualist construction to both section 16600 and its predecessor, former Civil Code section 1673. (*See* Beckman Br. at 14-18, 26-27 & n.8 (citing decisions of this Court); *id.* at 43-45 (citing decisions of the Court of Appeal).) *Amici's* arguments depend upon ignoring or mischaracterizing the holdings of those cases, and upon misreading other cases that they incorrectly cite as support for a rule of reason standard.

#### 1. *Amici* Selectively Omit And Mischaracterize Cases That Contradict Their Interpretation.

The plain language interpretation articulated in *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937 has deep roots in California law—roots that *amici* mostly choose to ignore. Starting in 1892, this Court explained in *Vulcan Powder Co. v. Hercules Powder Co.* (1892) 96 Cal. 510, that "if the contract . . . sued on is obnoxious to said section 1673,"

[3] Scholars base this argument on cases interpreting the Cartwright Act, not section 16600. (*See* Scholars Br. 14 (relying on *In re Cipro Cases I & II* (2015) 61 Cal. 4th 116, at 136, 145-46).)

and if "[n]either of the[] two exceptions apply," then the agreement violates section 1673. (96 Cal. at 513.) Finding that it was "clear that the contract [in *Vulcan Powder*] is in restraint of trade," and that the statutory exceptions did not apply, the Court declared the agreement "void." (*Id.* at 514.)

*Amici* attempt to distinguish *Vulcan Powder* as uniquely situated to the context of "price-fixing" (Roundtable Br. 16; Quidel Br. 35), but that ignores the Court's actual holding, which focused on the plain language of the statutory prohibition and the existence of only two exceptions. (*See Vulcan Powder*, 96 Cal. at 513.) While the conduct in that case may have made it particularly clear that the agreement was "in restraint of trade and against public policy" (*id.* at 515), nowhere did this Court suggest that the statute was therefore limited to that particular fact pattern.

A similar construction was given in numerous other cases. For instance, in *Merchants' Ad-Sign Co. v. Sterling* (1899) 124 Cal. 429, the Court explained that "the language of the code is unmistakable," so the "only question here is, as it was in the Vulcan Powder Company Case, [w]as the contract in restraint of trade?" (*Id.* at 434.) Since the at-issue agreement "was an agreement in restraint of trade" and no exception applied, it was "therefore void." (*Id.*)

In *Getz Bros. & Co. v. Federal Salt Co.* (1905) 147 Cal. 115, the Court articulated and applied the same, clear standard: "[s]aving for"

agreements satisfying section 1673's two exceptions, "all others which restrain the exercise of a lawful business, trade, or vocation, are void." (*Id.* at 119.) The non-compete agreement in *Getz Bros.* was added onto an exclusive sales arrangement, whereby one party sold the other "their entire demands for salt" for a period of two years. (*Id.* at 117.) The Court invalidated a further provision prohibiting the purchaser from importing salt from other sources, and requiring it to discourage third parties from importing salt as well. (*Id.* at 117-19.)

The same interpretation was given in *Chamberlain v. Augustine* (1916) 172 Cal. 285, where the Court explained that section 1673 "makes no exception in favor of contracts only in partial restraint of trade," such that "every contract by which anyone is restrained from exercising a lawful business . . . otherwise than is provided by the next two sections, is to that extent void." (*Id.* at 288-289.) In rejecting an exception for partial restraints, the Court stated "the very language" of the statute compelled that result. (*Id.*)

Likewise, in *Pacific Wharf & Storage Co. v. Standard Am. Dredging Co.* (1920) 184 Cal. 21, the Court stated that the "language of [sections 1673 and 1674] is clear and unambiguous," and that they "provide that every contract by which anyone is restrained from exercising a lawful business is to that extent void." (184 Cal. at 23.)

In *Morey v. Paladini*, the Court stated that "[t]he statute (Civ. Code, sec. 1673) makes no exception in favor of contracts only in partial restraint of trade," and instead "every contract by which one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than relating to exceptions in favor of sales of goodwill and in favor of partnership arrangements, is to that extent void." (187 Cal. at 736, 738.)

All of these cases adopted a "textualist" construction of the statute. (Cf. Scholars Br. 14). Scholars acknowledge none of these decisions, essentially attempting to write them out of California jurisprudence altogether. Notably, a different case they cite refers to some of these decisions as the controlling precedent. (*See* Scholars' Br. at 16 (citing *Swenson v. File* (1970) 3 Cal.3d 389, 394 (citing *Pacific Wharf* and *Morey* as "authoritative" and rejecting other cited cases).)

For their part, Roundtable and Quidel cite *Vulcan Powder* and a few other cases, but then they ignore the holdings of those decisions and attempt to impose artificial limitations that were nowhere evident on the face of the Court's opinions. (*See* Roundtable Br. at 16 (citing *Vulcan Powder* as only holding that Civil Code section 1673 "condemned as *per se* unlawful naked restraints of trade, such as market divisions and price-fixing"); Quidel Br. at 35 (citing *Vulcan Powder* and other cases as showing "that this Court voided only those challenged restraints that would lead to a monopoly or restricted a business after the relationship ended").)

Significantly, *none* of these *amici* make any mention of this Court's decision in *Pacific Wharf*, as that case cannot be explained away in the same manner. *Pacific Wharf* involved a plaintiff's sale of "a certain [harbor] dredge" to defendant for $36,000 and an agreement to operate it on defendant's behalf for a fee. (*Id.* at 22.) In return, defendant had to "agree not to build any dredge or dredging plants in Los Angeles or San Diego harbors, or to engage in the dredging business at either of said places." (*Id.* at 23.) The parties, therefore, were engaged in an ongoing business relationship, and the at-issue non-compete prevented a single company from building or operating dredges in just two places. (*Id.* at 23.) There is no mention anywhere in the opinion of a concern over monopoly, price-fixing, or any of the other categories to which *amici* attempt to restrict section 16600's plain and ordinary meaning. Instead, the Court held that the non-compete was void because it restrained the plaintiff from a lawful business, and none of the statute's enumerated exceptions applied. (*Id.* at 23-25 (discussing section 1673 and stating that the at-issue restraint was "the illegal portion of the contract").) The Court then deemed that illegal portion severable from the remainder of the contract, consistent with section 1673's directive that such contracts are "*to that extent* void." (*Id.* at 24-25, emphasis added.)

Roundtable and Quidel likewise mischaracterize *Morey*, saying that it was a case that held a restraint was "unreasonable" because it would lead

to "a monopoly." (Quidel Br. at 36; *see also* Roundtable Br. at 16 (citing *Morey* and stating section 1673 "condemned as *per se* unlawful . . . monopolies").) That is wrong. In fact, the Court expressly declared that "whether or not" the agreement led to a monopoly "*is immaterial*"; the restraint was "wholly void" regardless, as section 1673 "makes no exception in favor of contracts only in partial restraint of trade." (*Id.* at 738 (emphasis added).) The Court's refusal to engage in a reasonableness analysis in declaring void the restriction in *Morey* cannot be reconciled with *amici*'s interpretation.

Half a century later, this Court still pointed to those decisions as reflecting "the public policy of this state with respect to contracts in restraint of trade." (*Swenson*, 3 Cal.3d at 394 (citing *Pacific Wharf* and *Morey*).) The policy is that "such contracts [are] 'void' to the extent they exceed statutory limitations" (*id.*), *i.e.*, to the extent they restrain anyone from engaging in a lawful business. The non-collaboration clause in the contract between Biogen and Forward Pharma ("Forward") is just such a provision. It restrains Forward from engaging in the lawful business of DMF drug development and restrains Forward from collaborating with Ixchel in the development of a new treatment for disease. Accordingly, the contract violates California public policy, and is void to that extent. That the non-collaboration clause may only be a partial restraint of trade is immaterial, as "[t]he statute . . . makes no exception in favor of contracts

only in partial restraint of trade." (*Morey*, 187 Cal. at 738; *Chamberlain*, 172 Cal. at 289.)

**2. *Amici* Misread Their Own Key Cases.**

To support their position that section 16600 permits reasonable restraints, *amici* principally rely upon the same three cases as Biogen: *Grogan v. Chaffee* (1909) 156 Cal. 611, *Great Western Distillery Products v. John A. Wathen Distillery Co*. (1937) 10 Cal.2d 442, and *Associated Oil Co. v. Myers* (1933) 217 Cal. 297. Beckman discussed these cases in its *amicus* brief, and Ixchel incorporates that discussion herein. (*See* Beckman Br. 36-41).

Each of the three cases involved a form of restraint other than a covenant not to compete, and therefore Civil Code section 1673 did not prohibit those agreements. In *Grogan*, the parties had entered into a minimum re-sale price maintenance agreement—a class of restraint that was *per se* illegal under federal antitrust law for nearly a century, but withstood scrutiny under section 1673 because it did not involve a restraint against engaging in a lawful businesses. (*See Grogan*, 156 Cal. at 613 (noting that the grocer was still free to "sell other olive oil at any price and on any conditions satisfactory to him").)[4] In *Associated Oil*, the agreement

[4] *Compare with Dr. Miles Medical Co.* v. *John D. Park & Sons Co.* (1911) 220 U. S. 373, 407-08 (holding such contracts *per se* illegal),

was a re-sale brand exclusivity agreement for petroleum products sold at a service station. (217 Cal. at 299.) In *Great Western*, it was an exclusive sales agreement that facilitated the sale of a distillery's entire allotment of warehouse receipts for branded whiskey. (10 Cal.2d at 444.)

While each of these cases involved a restraint at some level, none involved an agreement to refrain from "engaging" in another "lawful business." (Section 16600.) The defendant in *Associated Oil* may not have been able to compete against its landlord's petroleum products *on the landlord's own property*, but nothing in that agreement would have restrained the defendant from opening a different service station across the street and selling the competing products there. Likewise, the defendant in *Great Western* may not have been able to divert its stores of whiskey to other buyers (at least, not as long as the plaintiff stood willing to buy them), but nothing in that agreement would have restrained it from distilling other spirits and selling those to anyone it wished, on whatever terms it could secure. These cases are distinctly unlike this one, where the contract at issue directly forbids a company, Forward, from collaborating with other businesses in the development of a new drug. Forward may choose for its own reasons not to engage in such collaboration. But it cannot validly

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*overruled by Leegin Creative Leather Prods. Inc. v. PSKS, Inc.* (2007) 551 U.S. 877.

agree with another company that it *will not* enter into such an arrangement, if and when it otherwise desires to do so.

To be sure, differentiating lawful from unlawful agreements under this standard still requires "assess[ing] the purposes and effects of contractual restraints." (Quidel Br. 32). But that is not the same thing as conducting a "rule of reason analysis." Instead, the inquiry is the two-step analysis described in *Merchants' Ad-Sign* and other cases: Does the agreement restrain anyone from engaging in a lawful business? If yes, do any of the statutory exceptions apply? (*Merchants' Ad-Sign*, 124 Cal. at 433-34.)[5]

Finally, certain *amici* suggest that *Great Western* was the Court's last word on section 1673 before *Edwards*, and that the case somehow invalidates the many earlier decisions applying the statute to void non-compete covenants between businesses. (*See* Roundtable Br. 18 ("On its own, *Great Western* is fatal"); Quidel Br. 36-37 (similar).) Among other things, that argument fails to account for the Court's decision in *Swenson*,

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[5] In contrast, under the rule of reason, "[o]nce a plaintiff has made out a prima facie case that a [restraint] has anticompetitive effects, a court 'must weigh these anticompetitive effects against the possible justifications' for the challenged restraint." (*In re Cipro Cases I & II* (2015) 61 Cal. 4th 116, 157.) "At this point, we deem it appropriate to shift the burden to the defendants to offer legitimate justifications and come forward with evidence that the challenged settlement is in fact procompetitive." (*Id.* at 157-58.)

which favorably cited both *Morey* and *Pacific Wharf*, making clear that the principles articulated in those cases continue to reflect California public policy. (*Swenson*, 3 Cal.3d at 394.)

### B. *Amici's* Statutory History Arguments Are Wrong.

#### 3. *Edwards'* Discussion of the Statute's History is Not "Dicta"

In *Edwards*, this Court clearly and succinctly restated section 16600's statutory history:

> Under the common law, as is still true in many states today, contractual restraints on the practice of a profession, business, or trade, were considered valid, as long as they were reasonably imposed. [Citation.] This was true even in California. [Citation.] However, in 1872 California settled public policy in favor of open competition, and *rejected the common law "rule of reasonableness,"* when the Legislature enacted the Civil Code. [Citations.] Today in California, covenants not to compete are void [under section 16600], subject to several exceptions . . . .

(*Id.* at 945 (emphasis added).)

Quidel now argues that this entire discussion was mere "dicta." (Quidel Br. 44.) That is wrong. The Court's analysis of the legislative history was a central pillar for its conclusion that section 16600 had no narrow restraint exception. (*See Edwards*, 44 Cal.4th at 949-50 (deferring to the Legislature's intention not to create a narrow restraint exception).)

*Edwards'* discussion of the legislative history also is supported by other such analyses conducted much closer in time to the statute's enactment. For example, in 1892 this Court decided *Vulcan Powder* and

provided a description of the statutory history that is substantively indistinguishable from the one in *Edwards*. As the Court explained, the "common law" rule had been "relaxed" to permit reasonable restraints, but this relaxed rule "was uncertain, and led to much perplexing legislation." (*Id.* at 513.) Accordingly, California enacted "section 1673 of the Civil Code," declaring "void" "[e]very contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections." (*Id.*) *Vulcan Power* involved an ongoing business agreement "between several powder companies" (*id.*), a fact that the parties and *amici* do not dispute.

The Court revisited the issue seven years later in *Merchants' Ad-Sign Co. v. Sterling* (1899) 124 Cal. 429, and directly refuted the argument now made by *amici*:

> We are pointed to *Carpet Works v. Jones* [(1894) 102 Cal. 506], where it was said that 'the Code introduces no new principles; it simply eliminates from the controversy arising upon such restrictions the question as to what is a reasonable territorial limit.' And so we are told that the Code commissioner's note shows that this one question of territorial restriction is the only departure from common-law principles sought to be effected by the Code provisions. *We think the Code provision was intended to and in fact went further than is here suggested.* In *Vulcan Powder* [*supra*,] the rule at common law, even as finally relaxed and applied, was said to be 'uncertain, and led to much perplexing legislation, and the law upon the subject in this state is now declared in section 1673 of the Civil Code.' . . . . The cases cited by appellant from our Reports and other cases not cited, where these sections [1674 and

> 1675] have been referred to, are cases where the business and good will were sold, and the liberal construction given the sections was in aid of agreements coming within the exceptions of, and permitted to be made by, the Code. It seems to me that the only question here is, as it was in the *Vulcan Powder Company* Case, was the contract in restraint of trade? The language of the Code is unmistakable: 'Every contract by which one [i. e. any person] is restrained from exercising a lawful * * * business of any kind * * * is to that extent void.' The allegation is that defendant agreed not to engage in the business of bill posting, which is a lawful business. This was an agreement in restraint of trade, and therefore void.

(124 Cal. at 433-34 (emphasis added).)

These decisions were issued at a time when the members of the Court were within living memory of the Code's adoption. Indeed, Justice De Haven, who joined the Court's opinion in *Vulcan Powder*, was serving in the California Senate at the time of enactment.[6] It is fanciful to think that litigants today have developed a better understanding of the statutory purpose than the one articulated in these cases.

**4. Quidel Misuses the Annotated Code.**

Quidel relies upon an annotated copy of the Civil Code. (Quidel Br. 29-32 (relying on Ann. Civ. Code, § 1673 (1st ed. 1872, Haymond & Burch, Commrs. annotators) p. 503 (hereafter "Haymond & Burch")).) Quidel misreads that annotated code to suggest the Code Commissioners

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[6] *See* Federal Judicial Center, *De Haven, John Jefferson,* https://www.fjc.gov/history/judges/dehaven-john-jefferson.

only intended to displace the common law reasonableness standard in certain kinds of cases.

Quidel argues that the Code Commissioners "explain[ed] the purpose of Civil Code section 1673" by "citing approvingly cases applying the rule of reason." (Quidel Br. 29.) Specifically, Quidel argues that the Commissioner's citations to *Wright v. Ryder* (1868) 36 Cal. 342 and *More v. Bonnet* (1870) 40 Cal. 251, "applied the law as the Legislature intended." (Quidel Br. 29.) That is wrong. The cases to which Quidel refers were cited to explain the operation of section *1674*, the exception made for non-compete agreements reached upon the sale of the good will of a company, not section 1673. (*See* Haymond & Burch, at p. 503.) Both cases involved restraints adopted in that context, and the Commissioners' citation shows only that when applying section 1674's *exception*, qualifying restraints must still be reasonable. This is evident in at least two ways.

First, in their discussion of section 1673, the Code Commissioners noted that the restrictions at issue in *Wright*, *More*, and one other case, *California Navigation Co. v. Wright* (1856) 6 Cal. 258, could be upheld "under the terms of this section [1673], *and by the following section* [1674]," provided that they were "limited to a specified county." (Haymond & Burch at p. 503 (emphasis added).) The invocation of "the following section" plainly indicates that the Commissioners were referring to a scenario in which a restraint was upheld because it fit an *exception* to

the statute, as does the phrase "specified county," language that appeared verbatim in Civil Code section 1674, but not in section 1673. Quidel's suggestion that section *1673* tolerated a restraint when "limited to a specified county" (Quidel Br. 31), completely ignores the section in which the quoted text was placed. It is found in section 1674, not in section 1673.

Second, the Code Commissioners cited *Wright* and *More* a second time in the annotation beneath section 1674. (Haymond & Burch at p. 503.) That placement again shows that the Code Commissioners were using these cases to explain the basis for the territorial limitations contained in section 1674's exception, not to introduce some form of general reasonableness standard under section 1673.

Quidel further relies upon the 1922 edition of California Jurisprudence on Contracts. (*See* Quidel Br. 39.) That treatise, however, explains that while the "tendency of the modern decisions has been to view with greater liberality contracts claimed to be in restraint of trade," California law is explicitly different: "[A] contract in restraint of trade, otherwise than as expressly excepted in section 1674 and 1675 of the Civil code, is against public policy and void by the terms of section 1673 of the same code." (6 Cal. Jur. (1922) Contracts, § 94, p. 136.) Accordingly, "all contracts which restrain the exercise of a lawful business, trade or vocation are void," unless they meet the statute's limited, enumerated exceptions. (*Id.* at 137.) The Jurisprudence treatise did not cabin its discussion to the

employment context. To the contrary, it relied on various business cases, including *Vulcan Powder* and *Getz Brothers*. (*Id.*)

### C. *Amici*'s Arguments Based On The Cartwright Act Are Meritless.

This case concerns section 16600, not California's antitrust statute, the Cartwright Act, section 16720 et seq. Nevertheless, *amici* repeatedly invoke the Cartwright Act in hopes of importing its rule of reason standard to section 16600. For example, the Roundtable *amici* state that the Legislature enacted section 16600 and the Cartwright Act "*in the same bill*," the two statutes were "re-enacted simultaneously," and the statutes must therefore be "harmonize[d]." (Roundtable Br. 20-21 (emphasis in original).) Likewise, Quidel suggests the two statutes are part of the same "overall legislative scheme," and so they must be read together. (Quidel Br. 20-21.) These arguments are meritless.

As explained in *Cianci v. Superior Court* (1985) 40 Cal.3d 903, these statutes were enacted thirty-five years apart, patterned after different acts, housed in different parts of the Civil Code, and passed for different reasons. (*Id*. at 922.) "[T]hese two code sections were not *new* enactments '*added*' to the Business and Professions Code in 1941." (*Id.* (emphasis in original).)

*Amici* also argue that the plain language of section 16600 conflicts with section 16725. (Quidel Br. 18, 21-22 (arguing section 16725

"explicitly allows restraints that are procompetitive"); Roundtable Br. 21-22 ("Section 16725 is simply irreconcilable with an interpretation of Section 16600 that would impose a sweeping rule of *per se* illegality . . . .").) *Amici* are mistaken. Section 16725 functionally operates as the Cartwright Act's burden-shifting provision, and it first becomes applicable after a restraint has been shown to have anticompetitive effects under a different part of that law. (*See Cipro Cases I & II*, 61 Cal.4th at 158 (section 16725 "shift[s] the burden to the defendants to offer legitimate justifications"); *People v. Building Maintenance Contractors' Ass'n* (1953) 41 Cal.2d 719, 727 (section 16725 "is the converse of . . . section 16720, which defines an invalid trust as one created 'to . . . carry out restrictions in trade or commerce'").) For that reason, the provision has no application at all to litigants pursuing remedies under a different statute, as in the present case.

Ultimately, the core underlying suggestion in *amici's* arguments is that section 16600 cannot mean what it plainly says, because that would make one aspect of California law different from subsequently created federal and state antitrust laws. But section 16600 is not an antitrust law, and even if it were, there is nothing new or inherently troubling about a state adopting different policies than other states or the federal government. Indeed, contrary to Roundtable's suggestion, the Cartwright Act is *not* "patterned after the federal Sherman Act" (Roundtable Br. 19), so

differences already exist between California and federal antitrust law.[7] That additional differences would exist between those statutes and section 16600 is not a basis to counteract a deliberate policy decision of the Legislature.

## II. A Rule Of *Per Se* Invalidity Under Section 16600 Does Not Threaten Or Render Void All Business Restraints.

*Amici* state a truism that Ixchel does not dispute: "every contract necessarily restrains business activity in some manner while promoting it in others." (Roundtable Br. 11; Quidel Br. 18 ("Of course, all contracts restrain—that is the nature of a contract.").) Based on this fact, *amici* attack a straw man, stating that "Ixchel urges this Court to make a dramatic change in the law and hold, for the first time, that section 16600 voids *all* restraints in business contracts." (Quidel Br. 19 (emphasis in original); *see also* Roundtable Br. 10; Scholars Br. 10.) But Ixchel nowhere made this argument. Instead, Ixchel asks this Court to re-affirm the *per se* standard that this Court long ago recognized had been intended by the Legislature.

Under that standard, as explained above, an agreement triggers section 16600 only if it "restrain[s]" one from "engaging in a lawful profession, trade, or business of any kind." (Section 16600.) Countless

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[7] *See Aryeh v. Canon Bus. Sol., Inc.* (2013) 55 Cal.4th 1185, 1195 ("[T]he Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th century.")

agreements do not satisfy that requirement and therefore remain valid and permissible under the statute. (See also Jurisprudence Treatise at p. 134 ("It is not every limitation on absolute freedom of dealing that is prohibited" by the statute).)

Nevertheless, *amici* invoke a parade of horribles, stating that continued recognition of a *per se* legal standard for section 16600 would lead to "disastrous consequences" (Roundtable Br. 13), "radically rewrite California competition law" (Scholars Br. 16), "void thousands of contracts across the state, in every industry" (Quidel Br. 18), and cripple the California economy. They further predict a *per se* standard would doom all "exclusivity" agreements, and that many "business ventures . . . that depend on exclusivity arrangements" "would be outlawed or restrained." (Roundtable Br. 31; *see also* Quidel Br. 46-47 (arguing that a *per se* approach "would void ubiquitous business arrangements" that "depend on exclusivity").) That hyperbole is unfounded.

*First*, section 16600 does not inherently prohibit exclusivity agreements, as this Court's cases show. For example, the exclusivity provision in *Great Western* was upheld, because the parties were not restrained from engaging in any line of business. (10 Cal. 2d at 446 (agreement did "not restrain anyone from exercising a trade or business of any kind within the purview of section 1673 of the Civil Code.").) There was not, for example, a further promise that having sold all of its interest in

bourbon whiskey, the distillery would refrain from making or selling rum, vodka, or gin. Such a hypothetical agreement would violate section 16600, as it would involve a "restraint" against "engaging in a lawful . . . business." (Section 16660.)

In contrast, and for this very reason, this Court deemed void the exclusivity agreement in *Getz Bros. & Co. v. Federal Salt Co.* (1905) 147 Cal. 115. There, the parties entered into an exclusivity agreement under which the plaintiffs agreed to purchase all of their requirements for salt for two years from the defendant. (*Id.* at 117.) There is no indication in the opinion that this form of exclusivity was of any concern, or that it was prohibited by the statute. Yet the agreement went further, prohibiting plaintiffs from "import[ing] or causing to be imported . . . any salt to the Pacific Coast of North America other than [defendant's] salt." (*Id.*) It also required plaintiffs to "discourage in any possible manner any such shipments or importations of salt by any other parties." (*Id.*.) It was these further promises—to not deal with others and discourage other shipments of salt—that left the Court with "no doubt" that the contract was void under section 1673. (*Id.* at 118.)

The principle that emerges from these cases is that parties who wish to deal exclusively with one another validly may do so. A seller may agree to sell all of its wares to a single buyer, just as a buyer make agree to purchase exclusively from a single seller. Such agreements are consistent

with both parties engaging in business to the fullest extent of their abilities. But what they may not do, consistent with section 16600, is agree not to carry on other business at all.

*Second*, *amici* claim that "franchise agreements . . . would be called into grave doubt" if a *per se* rule applied to section 16600. (Roundtable Br. 26; *see also* Quidel Br. 46-48 (suggesting that a *per se* approach would "void ubiquitous business arrangements" including franchising.) For instance, Quidel argues, "exclusive dealing is . . . at the heart of franchising," under which "McDonald's franchisees cannot sell Burger King's fries" and "Ford dealers cannot sell Cadillacs." (Quidel Br. 48.) *Amici* again miss the point. Under a *per se* approach to section 16600, these arrangements remain valid; restricting the McDonald's franchisee to only selling McDonald's brand food, or restricting the Ford dealer to only sell Ford brand vehicles, does not restrain either of them from "engaging in a lawful profession, trade, or business of any kind." (*Id.*) The same would be true of agreements setting a promotional price that all franchises would offer for their hamburgers; or an agreement identifying authorized and unauthorized sources of supply (e.g., all soft drinks sold at the McDonald's must be from the Coca-Cola company instead of Pepsi, or vice versa). Such agreements simply do not restrain the franchise owner from engaging in any business, because the business opportunity presented from a franchise *is* the opportunity to sell a consistent and predictable product that

meets company-wide standards. But such principles are completely irrelevant here, because the relationship between Biogen and Forward shares none of those same characteristics. (*See Kelton v. Stravinski* (2006) 138 Cal.App.4th 941, 948 (voiding non-compete under section 16600 because the "relationship between Kelton and Stravinski as equal partners is vastly different from the relationship between a franchisor and a franchisee").

Even in the franchise context, the statute would be triggered if an agreement restrains the franchisee from also owning other competing businesses. Thus, in California, while the McDonald's franchisee cannot sell Burger King fries at his McDonald's, he nevertheless may own a Burger King across town or across the street. Likewise, although the Ford dealer cannot sell Cadillacs at that dealership, his franchise agreement cannot restrain him from owning a separate Cadillac dealership even though it may compete to some degree with the Ford dealership. To the extent that makes California different from other states, that difference is a function of the strong public policy set by the Legislature, and maintained for nearly the past 150 years. (*Swenson*, 3 Cal.3d at 394 ("[W]e believe that in making such contracts 'void' to the extent they exceed statutory limitations (Bus. & Prof. Code, s. 16600), the Legislature thereby adopted a rule of public policy . . . .").)

*Third*, *amici* wrongly assert that, under the plain language interpretation of section 16600, all "joint ventures . . . would be outlawed or restrained." (Roundtable Br. 31; *see also* Quidel Br. 46, 48 (arguing that a *per se* approach would void "joint venture[s]" in which parties "commonly agree to avoid competing with the venture during the term of the joint venture").) That hyperbole is again plainly wrong and unrelated to the agreement at issue in this case. Nothing in the statute would prohibit two parties from joining forces to develop a new product or service, and then selling that product in whatever manner best serves the interests of the venture. Any asset either of them pledged to the venture (e.g., an intellectual property right; or the knowledge and expertise of key employees), validly would belong to the venture, where it would be engaged in the business of the venture. Such arrangements are entirely consistent with the statute, because to this extent they do not restrain any of the parties from any lawful businesses.

What *amici* really mean when they say that section 16600's plain language would outlaw joint ventures, is that it would prohibit the parties to a joint venture from agreeing that they would not engage in *other businesses*, so as to protect their joint venture from competition. *Amici's* prediction that the inability to make such a promise in California would crash California's economy is baseless rhetoric, equivalent to stating that no one would have dredged Los Angeles harbor without the protections of a

non-compete clause in their agreement with the dredge operator. One hundred years ago, this Court declared such a clause to be per se void (*Pacific Wharf*, 184 Cal. at 23), and California's economy has been none the worse for it.

## III. Roundtable *Amici* Present No Compelling Reason To Change The Law Of Tortious Interference.

The Court in *Reeves v. Hanlon* carved out a narrow exception to the long-understood tort of tortious interference with contract when it added the requirement that plaintiffs plead and prove an independently wrongful act in the unique case of tortious interference with at-will employment relationships. (*Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1145). There, the Court found that adding the requirement to show an independently wrongful act was "particularly appropriate" in the case of soliciting at-will employees to work somewhere else. (*Id.*). Outside of the employment context, the long-established law of tortious interference remains unchanged. (*Refearn v. Trader Joe's Co.* (2018) 20 Cal.App.5th 989, 1003, 1004-05; *Popescu v. Apple Inc.*, 1 Cal.App.5th 39, 62 (2016)).

Lacking any evidence of any compelling policy reason to change the law, Roundtable *amici* simply argue by assertion that "Ixchel asks the Court to transform … lawful and beneficial competition into an actionable civil wrong." (Roundtable Br. 29). But it is the Roundtable *amici* who seek to transform the law by adding a new element to a long-established tort.

Knowingly interfering with an established contract is not, as Roundtable *amici* claim, "lawful competition." (*Id.*). Rather, such interference is "a wrong in and of itself." (*Quelimane Co. v. Stweart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55).

Roundtable *amici* claim that Ixchel somehow "bargained away" its claim against Biogen when Ixchel signed its contract with Forward. (Roundtable Br. 29). But whatever bargaining occurred, it is clear from the pleadings – and Roundtable *amici* have no evidence to the contrary – that Biogen's interference in the Ixchel/Forward relationship was *not* something Ixchel considered or bargained for. Instead, Ixchel is presumed to have bargained with Forward in the light of the law – a law that this Court has repeatedly stated protected Ixchel's contract with Forward from intentional outside interference, even if the contract could be characterized as "at will." (*Edwards,* 44 Cal.4th 937, 954 ("All applicable laws in existence when an agreement is made, which laws the parties are presumed to know and to have in mind, necessarily enter into the contract and form a part of it … as if they were expressly referred to and incorporated."); (1990) *Pacific Gas & Electric Co. v. Bear Stearns*, 50 Cal.3d. 1118, 1127 ("interference with an at-will contract is actionable interference … a contract at the will of the parties, respectively does not make it one at the will of others")).

Finally, as they attempt with their Section 16600 arguments, Roundtable *amici* argue without evidence that failing to change the law to

impose a new element will lead to economic harm. "Seeking to win customers by offering a better deal than that provided by a competitor is the essence of competition," Roundtable *amici* assert. (Roundtable Br. 29). Maybe so.

But no amount of straining could allow one to read those facts here. In this case, Biogen is not accused of "seeking to win customers by offering a better deal." Ixchel alleges that Biogen paid off Biogen's only potential competitor in the U.S. DMF drug market specifically to prevent competition. (ER 98). The effect, alleged in the Complaint, was to crush a promising new drug, preserve Biogen's multi-billion-dollar market dominance, destroy Ixchel and Dr. Cortepassi's business and leave Fredreich's ataxia patients with no approved treatment. (*Id.*). This isn't the kind of "better deal" that benefits anyone (other than Biogen). Such conduct, if proved, is abhorrent on its face and, if anything, demonstrates the value of the current legal remedy for this wrong. In seeking to use Biogen's alleged misconduct as a springboard to change the law to make it harder to right this wrong, Roundtable *amici* invite only injustice.

## CONCLUSION

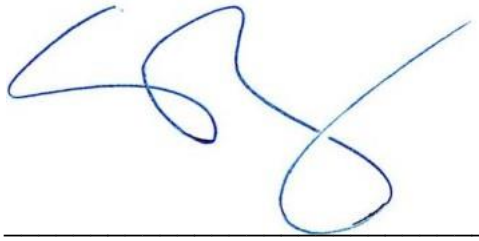
Ixchel respectfully submits that the Court should answer the first certified question in the affirmative. Nothing more is required. To the extent the Court is inclined to go beyond that, Ixchel respectfully submits the Court should reaffirm long-standing precedent holding that section

16600 voids as a matter of law all restraints against engaging in a lawful business.

Similarly, Ixchel requests that this Court uphold the longstanding precedent that the tort of interference with contract does not require showing of an "independently wrongful act." This Court has long held that knowledge of the contract, combined with an intent by a third party to disrupt that contractual relationship, is a wrong in itself – and that even so-called "at-will" contracts are not terminable at the will of third parties. This case, where Biogen stands accused of paying Forward over $1 billion to terminate its relationship with Ixchel – not for a "better deal" – but to permanently remove a competitor and prevent a new medication from reaching patients, provides no compelling reason to change ancient law. This Court should answer the second certified question with a resounding *no*.

## CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(c)(1) of the California Rules of Court, the undersigned Counsel of Record hereby certifies that the enclosed Appellant's Consolidated Response Brief is produced using 13-point Times New Roman type, and that inclusive of footnotes but exclusive of the sections set forth in Rule 8.520(c)(3), this brief contains 6,666 words. Counsel relies on the word count functionality of the Microsoft Word program.



Christopher D. Banys

**STATE OF CALIFORNIA**
Supreme Court of California

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