S256927

IN THE SUPREME COURT
OF THE STATE 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

APPELLANT'S OPENING BRIEF ON THE MERITS

---

*Christopher D. Banys, SBN 230038
Richard C. Lin, SBN 209233
BANYS, P.C.
567 Marsh Street
San Luis Obispo, CA 93401
Telephone: (650) 308-8505
Email: cdb@banyspc.com
rcl@banyspc.com

Attorneys for Plaintiff and Appellant
IXCHEL PHARMA, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. ISSUES CERTIFIED FOR REVIEW

This Court granted the Ninth Circuit's request to resolve the following certified questions:

> Does section 16600 of the California Business and Professions Code void a contract by which a business is restrained from engaging in a lawful trade or business with another business?
>
> Is a plaintiff required to plead an independently wrongful act in order to state a claim for intentional interference with a contract that can be terminated by a party at any time, or does that requirement apply only to at-will employment contracts?

II. INTRODUCTION

The Ninth Circuit asks this Court to resolve whether California Business and Professions Code section 16600, which voids "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind," applies to contracts that restrains businesses, or whether it is limited to contracts that restrain the activities of individuals. Plaintiff/Appellant Ixchel Pharma, LLC ("Ixchel") submits that the plain language of the statute (which refers to restraints on "anyone"), as well as the language set forth in related statutes (which carve out exceptions for various business entities), shows beyond any doubt that section 16600 is intended to apply to contracts that restrain any type of entity, be it a business or an individual person. And California courts have consistently applied section 16600 to businesses as well as individuals. Thus, this Court should confirm that all types of contracts between all types of entities are subject to review under section 16600.

The Ninth Circuit also asks this Court to resolve a question regarding the necessary elements for a claim of intentional interference with contract. Almost three decades ago in *Pacific Gas & Elec. Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, this Court clearly articulated the elements necessary to plead a claim of intentional interference with an at-will contract. Those elements are:

> (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.

(*Id.* at 1126.) Fourteen years later, in *Reeves v. Hanlon* (2004) 33 Cal.4th 1140, this Court carved out a narrow exception to this rule, finding that where the alleged interference is inducing an employee to terminate an at-will employment contract, the plaintiff must plead and prove the additional element of an independently wrongful act. The Court added this element for specific situations involving at-will employment contracts, in recognition of the public policy of promoting employee mobility and protecting employees' right to choose where they are employed.

The Ninth Circuit asks this Court to resolve whether the narrow rule announced in *Reeves* (requiring an independently wrongful act for a contract interference claim where the alleged interference is inducing an at-will employee to quit) should be expanded to apply to all at-will contracts, including those outside of the employment context. Ixchel asserts that it should not. There is no

public policy reason to expand the *Reeves* holding to apply to all at-will contracts. In fact, the opposite is true. The pro-contract rationale underlying the longstanding principle discouraging intentional interference with at-will business agreements remains as strong as ever. Indeed, in *Pacific Gas* this Court already stated the necessary elements for a contract interference claim involving an at-will contract outside of the employment context, and there is no reason to change that law. Moreover, two Court of Appeals decisions have already confirmed that the independently wrongful act requirement set forth in *Reeves* is limited to situations where the alleged interference is inducing the termination of an at-will employment contract.

III. STATEMENT OF FACTS AND PROCEEDINGS BELOW

A. Allegations In Ixchel's Second Amended Complaint

This case involves intentional acts by Defendant/Respondent Biogen, Inc. ("Biogen") to prevent Ixchel from bringing to market a "DMF" drug that would have been the first available treatment for a debilitating neurological disease, but posed a threat to Biogen's extremely profitable dominance of the overall DMF market. Ixchel is a small biotechnology company that had partnered with a well-funded pharmaceutical company, Forward, to bring the medicine to market. The complaint alleges that Biogen, with full knowledge of the Ixchel/Forward contract, paid Forward a large sum – over one billion dollars – with the explicit requirement that Forward cease development of the drug and that it never work with Ixchel or its founder and lead scientist again.

The operative complaint in the action is the Second Amended Complaint ("SAC"), which contains the following factual allegations:

1. Ixchel And Its Collaboration Agreement With Forward

Ixchel is a biotechnology company that develops small-molecule drugs that ameliorate mitochondrial disease. (ER 90, ¶1.)[1] Since 2012, Ixchel has been working on the development of a therapeutic drug to treat Friedreich's ataxia, a rare neurological disease. (ER 92, ¶10.) The active pharmaceutical ingredient ("API") in Ixchel's experimental therapeutic drug is a compound called dimethyl fumarate ("DMF"). (*Id.*) DMF has already been approved by the FDA for use in the treatment of another neurological disease, multiple sclerosis. (ER 93, ¶16.) That approval was secured by Biogen, which currently sells its DMF drug for the treatment of multiple sclerosis under the brand Tecfidera. (*Id.*) The FDA has approved Tecfidera for the treatment of multiple sclerosis only, not any other diseases. (ER 93-94, ¶¶16, 20.) And even though Biogen has FDA approval to sell Tecfidera in the United States, Biogen does not have the right to prevent other companies from also seeking FDA approval to sell other DMF-based drugs to treat neurological diseases in the United States. (*Id.*)

In January 2016, Ixchel entered into a Collaboration Agreement with Forward Pharma FA ApS ("Forward") in furtherance of its efforts to develop and commercialize its new DMF drug. (ER 94, ¶26.) Forward is a biotechnology company based in Denmark that, like Ixchel, is in the business of developing

[1] "ER" citations are to the Excerpts of Record filed in the Ninth Circuit.

drugs containing DMF as an API for the treatment of neurological diseases. (ER 93, ¶15.) One of Forward's experimental drugs in development is FP187, a drug containing DMF as an API for the treatment of neurological diseases such as multiple sclerosis. (*Id.*) Given Forward's overlapping work in the development of DMF-based drugs and its substantial financial resources, Forward was a natural partner for Ixchel in its efforts to bring its experimental DMF drug to market.

Under the Collaboration Agreement, Ixchel and Forward agreed to pool their respective resources to work together on a development program for a new drug that would contain DMF as an API for the treatment of Friedreich's ataxia ("the new DMF drug"). (ER 94-95, ¶26.)

In this development program, Forward would first assess the feasibility of conducting clinical trials for the new DMF drug. (ER 95, ¶27.) If Forward determined that such clinical trials were feasible, then under the terms of the Collaboration Agreement Forward would be responsible for carrying out those clinical trials and for paying for all of their costs. (*Id.*) Ixchel, in turn, would provide assistance with the clinical trials, including but not limited to the expertise of Dr. Cortopassi. (*Id.*)

Assuming that the clinical trials were successful and resulted in FDA approval of the new DMF drug, the parties agreed that Forward would be responsible for managing the manufacturing and commercialization of the drug, and for paying all of the costs associated with that process, with Ixchel providing assistance in the manufacturing and commercialization process. (ER 96, ¶32.)

Furthermore, Ixchel would be entitled to receive a percentage royalty on sales of the approved product. (ER 96, ¶33.)

2. Ixchel And Forward's Progress In Clinical Trials For The New DMF Drug

After Ixchel and Forward executed the Collaboration Agreement in January 2016, the parties moved forward in earnest on the development of their new DMF drug. In October 2016, Forward sent a written notice informing Ixchel that Forward had confirmed the feasibility of conducting cost-effective clinical trials for the new DMF drug, and that it would be moving forward with developing and implementing these clinical trials. (ER 96, ¶34.) One month later, in November 2016, Forward sent to Ixchel a detailed plan for a 20-patient, 48-week clinical trial study of the new DMF drug to treat Friedreich's ataxia. (ER 97, ¶34.)

3. Biogen's Interference With The Collaboration Agreement

Unbeknownst to Ixchel, at some point in late 2016, Forward was secretly negotiating a deal with Biogen that would take Forward out of the DMF drug market permanently, protect Biogen's market dominance in the DMF drug market, and settle a pending intellectual property dispute between Forward and Biogen. (ER 98, ¶39.) As part of the deal, Biogen agreed to pay Forward $1.25 billion in cash and Biogen required Forward to end its collaboration with Ixchel and the development of Ixchel's Friedreich's ataxia treatment. (ER 98, ¶¶39, 43.)

During the negotiations between Biogen and Forward, Forward disclosed to Biogen its work with Ixchel and provided a copy of the Collaboration Agreement

to Biogen, without Ixchel's consent. (ER 98, ¶41.) Knowing that Ixchel's development work on the new DMF drug posed a threat to its business, Biogen demanded from Forward that any deal between the parties would require Forward's agreement to cut off all ties with Ixchel. Thus, as part of the deal ultimately reached between Biogen and Forward, the two companies agreed that Forward would terminate its relationship with Ixchel, that neither Forward nor Biogen would have any dealings with Ixchel or its co-founder and CEO Dr. Cortopassi, and that neither company would provide Ixchel with any assistance with respect to the development of any drugs involving the use of DMF. (ER 98, ¶42.) Consistent with this agreement, in January 2017 Forward and Biogen executed a Settlement and License Agreement ("the Forward-Biogen Agreement") that contains the following provision that relates specifically to Forward's relationship with Ixchel:

> SECTION 2.13. Ixchel. Each of the Additional Parties and Licensor [Forward] shall, and shall cause each of its respective controlled Affiliates to, terminate any and all existing, and not enter into any new, Contracts or obligations to Ixchel Pharma LLC, Dr. Gino Cortopassi and/or any other Person, to the extent related to the development by any of the Additional Parties, Licensor or any of their respective controlled Affiliates of any pharmaceutical product having dimethyl fumarate as an API for the treatment of a human for any indication, including Friedreich's ataxia.

(ER 99, ¶45; ER 77.)

Importantly, the term "Contract" is defined broadly in the agreement to mean "any contract, agreement, deed, lease, or similar instrument, and any legally binding obligation, commitment, arrangement or understanding, whether written

or oral." (ER 99, ¶47; ER 76.) In addition, the restrictions set forth in Section 2.13 do not apply just to Forward. Rather, they also apply to "Additional Parties," which the Forward-Biogen Agreement defines as the following companies: Aditech Pharma AG ("Aditech"), NB FP Investment General Partner ApS, NB FP Investment SLP ApS, and Tech Growth Invest ApS. (ER 99, ¶48; ER 87.) Aditech is another biopharmaceutical company based in Sweden that is controlled by Forward. (ER 99, ¶49.)

Both Forward and Aditech's only business, trade, or profession is the development of drugs containing DMF as an API to treat humans. (ER 100, ¶¶52-53.) Thus, the restrictions set forth in Section 2.13 effectively preclude Forward and Aditech from continuing to do their chosen business. (*Id.*) It is impossible for any company like Forward or Aditech to be involved in the business, trade, or profession of developing pharmaceutical products having DMF as an API to treat humans when the company is prohibited from entering into any "Contracts or obligations" with respect to that field, as required by Section 2.13 – especially when "Contracts" is defined broadly to mean "any contract, agreement, deed, lease, or similar instrument, and any legally binding obligation, commitment, arrangement or understanding, whether written or oral." (ER 99-100, ¶50.)

It is also important to note that there is no time or geographical limit to the restrictions set forth in Section 2.13 of the Forward-Biogen Agreement. (ER 100, ¶51.) Thus, Section 2.13 effectively prohibits Forward and Aditech from engaging in their business, trade, or profession of developing and selling pharmaceutical

products that have DMF as an API to treat humans anywhere in the world, and in perpetuity. (ER 99-100, ¶¶50, 52, 53.)

On or about January 18, 2017, Forward notified Ixchel that it had entered into the Forward-Biogen Agreement and that, as part of that agreement, Forward was terminating the Collaboration Agreement with Ixchel. (ER 101-02, ¶62.) Under the terms of the Collaboration Agreement, however, Forward was required to provide Ixchel with at least 60 days' notice prior to any termination of the agreement. (*Id.*) Shortly after January 18, 2017, however, and before the 60-day notice period had lapsed, Forward, as a direct result of Section 2.13 of the Forward-Biogen Agreement, ceased all work with Ixchel with respect to development of the new DMF drug, including any work relating to the planned clinical trials. (*Id.*) Thus, not only did forward terminate the Collaboration Agreement because of its new agreement with Biogen, but Forward also breached its obligations under paragraph 4.1 of the Collaboration Agreement with respect to the planned clinical trials prior to the termination date of the agreement. (*Id.*) As a result of losing its contract with Forward, Ixchel suffered various damages including lost development costs, lost revenues, lost grant money, and reputational harm. (ER 102, ¶64; ER 103-04, ¶¶69-71.)

4. Ixchel's Asserted Causes Of Action

Based on Biogen's conduct in disrupting Ixchel's business relationship with Forward and sabotaging Ixchel's attempt to bring its new DMF drug to market, Ixchel asserted various causes of action against Biogen. The causes of action

relevant to this appeal are Ixchel's claims for tortious interference with contract (Second Cause of Action) and intentional and/or negligent interference with prospective economic advantage (Third and Fourth Causes of Action). (*See* ER 104-08, ¶¶74-115.)

B. The District Court's Dismissal Of The Second Amended Complaint

Biogen moved to dismiss all of the claims in the SAC. On January 25, 2018, the District Court granted Biogen's motion to dismiss. (ER 1.) With respect to Ixchel's claim for tortious interference with contract, the District Court held that "[w]hile tortious interference with a contract does not generally require independent wrongfulness, . . . interference with an at-will contract requires a pleading of wrongful means," citing *Reeves v. Hanlon* (2004) 33 Cal.4th 1140 as support. (ER 4.) The District Court further found that the Collaboration Agreement "was an at-will contract because Forward could terminate it at any time," and therefore concluded that Ixchel needed to plead an independently wrongful act as part of its contract interference claim. (ER 4-5.) The District Court further held that Ixchel had failed to plead sufficient facts in the SAC to support that Biogen engaged in any independently wrongful act. (ER 5-6.)

Importantly, Ixchel had pleaded in the SAC that Biogen's use of a contractual provision (Section 2.13) to limit the ability of Ixchel, Forward, and Aditech from engaging in their business, trade, or profession constituted a violation of Business and Professions Code section 16600, and thereby satisfied

any requirement of an independently wrongful act. (ER 100-01, ¶¶56-59, ER104, ¶73.) The District Court rejected Ixchel's reliance on section 16600 as the basis for the independently wrongful act, however, holding that "California courts have concluded that Section 16600 does not apply outside of the employment context" but citing no authority to support this holding. (ER 9.)

In its order dismissing the SAC, the District Court also dismissed Ixchel's separate claims for intentional and negligent interference with prospective economic advantage for the same reason that it dismissed Ixchel's contract interference claim, *i.e.*, failure to sufficiently plead independently wrongful conduct. (ER 6-7.)

C. The Ninth Circuit's Decision

Ixchel appealed the District Court's dismissal order in the Ninth Circuit, arguing that the District Court had erred in finding that: 1) Ixchel needed to plead an independently wrongful act in order to state a claim for intentional interference with contract; and 2) Ixchel's allegation of a section 16600 violation was insufficient to support an independently wrongful act. Following the conclusion of briefing and oral argument, the Ninth Circuit certified to this Court the following questions, which it believed to be unresolved and critical to deciding the appeal:

> Does section 16600 of the California Business and Professions Code void a contract by which a business is restrained from engaging in a lawful trade or business with another business?

> Is a plaintiff required to plead an independently wrongful act in order to state a claim for intentional interference with a contract that can be terminated by a party at any time, or does that requirement apply only to at-will employment contracts?

(*Ixchel Pharma, LLC v. Biogen, Inc.* (9th Cir. 2019) 930 F.3d 1031, 1033.)

IV. ARGUMENT

A. California Business And Professions Code Section 16600 Applies To Contracts Restraining Businesses As Well As Employees

1. The Plain Language Of Section 16600 And Its Related Statutes Establishes That It Applies To Business Restraints

With respect to the Ninth Circuit's first question of whether Business and Professions Code section 16600 applies to contracts restraining businesses rather than just individuals in the employment context, the plain language of the statute as well as its related statutes shows that it does.

In interpreting statutes, this Court must "follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law . . . ." (*California Teachers Ass'n v. Governing Bd. of Rialto Unified Sch. Dist.* (1997) 14 Cal.4th 627, 632.) Section 16600 states that "[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." (Bus. & Prof. Code § 16600.) The plain language of this statute states that it applies to any contract that restrains "anyone," which is not limited to individual persons. Thus, section 16600 on its face applies to contracts that restrain businesses as well as individuals.

In addition, the statutes that follow section 16600 show that the California legislature intended section 16600 to apply to restraints against all types of entities, and not just individuals. Business and Professions Code section 16601, for example, was passed by the California legislature as an exception to section 16600. (*See Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 945-46, 947.) That section states:

> Any person who sells the goodwill of a business, or **any owner of a business entity** selling or otherwise disposing of all of his or her ownership interest in the business entity . . . may agree with the buyer to refrain from carrying on a similar business within a specified geographic area in which the business so sold, or that of the business entity, division, or subsidiary has been carried on, so long as the buyer, or any person deriving title to the goodwill or ownership interest from the buyer, carries on a like business therein.
>
> . . .
>
> For the purposes of this section, **"owner of a business entity" means any partner**, in the case of a business entity that is a partnership (including a limited partnership or a limited liability partnership), **or any member**, in the case of a business entity that is a limited liability company (including a series of a limited liability company formed under the laws of a jurisdiction that recognizes such a series), **or any owner of capital stock**, in the case of a business entity that is a corporation.

(Bus. & Prof. Code § 16601 (emphasis added).) Thus, section 16601 creates an exception to section 16600 (permitting certain business restraints where a part of a business is being sold) that is intended to cover not just individual persons, but also any "owner of a business entity," defined in the statute as any entity that has an ownership interest in any partnership, limited liability company, or corporation.

But if section16600 did not apply to businesses, then there would be no need for the language in section 16601 identifying an exception for both persons and "owners of a business entity."[2] Interpreting section 16600 to be limited to individuals would therefore render section 16601 superfluous to the extent it discusses restraints on "owners of a business entity." Such an interpretation cannot be correct, as "[a]n interpretation that renders related provisions nugatory must be avoided." (*People v. Shabazz* (2006) 38 Cal.4th 55, 67; *see also Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 345 (in construing statutes, "we must avoid interpretations that would render related provisions unnecessary or redundant.").)

Likewise, Business and Professions Code section 16602.5 also serves as an exception to section 16600. (*See Edwards*, 44 Cal.4th at 945-46.) That section states:

> Any member may, upon or in anticipation of a dissolution of, or the termination of his or her interest in, a limited liability company (including a series of a limited liability company formed under the laws of a jurisdiction recognizing such a series), agree that **he or she or it will not carry on a similar business within a specified geographic area** where the limited liability company business has been transacted, so long as any other member of the limited liability company, or any person deriving title to the business or its goodwill from any such other member of the limited liability company, carries on a like business therein.

---

[2] Instead, the California legislature could have simply used the term "person" throughout the statute rather than creating the separate category of "owner of a business entity."

(Bus. & Prof. Code § 16602.5 (emphasis added).) This section allows for contracts in which the parties agree that an individual **or** a limited liability company (*e.g.*, "he or she or it") will not do business within a certain geographic region. Again, the plain language of section 16602.5 shows that the statute is intended to cover contracts that restrain the activities of business entities as well as individuals. Here again, interpreting section 16600 as being limited to individuals cannot be correct because such an interpretation would render the portions of section 16602.5 that relate to limited liability companies unnecessary. (*See Shabazz*, 38 Cal.4th at 67; *Kleffman*, 49 Cal.4th at 345.)

The exceptions set forth in Business and Professions Code sections 16601 and 16602.5 also refute Defendant's argument that section 16600 applies only in the employment context. Sections 16601 and 16602.5 create exceptions to section 16600 that allow an individual or business to agree to refrain from commercial activities within a certain geographic region or certain lines of business if that agreement is made as part of the transfer of an ownership interest in a business. These exceptions to section 16600 are plainly outside of the employment context, and would be unnecessary if the scope of section 16600 was limited to the employment context. It therefore cannot be the case that section 16600 applies only to employment contracts.

2. Multiple Court Of Appeals Decisions Have Held That Section 16600 Applies To Business Restraints Outside Of The Employment Context

Notably, there are numerous Court of Appeals decisions that have already held that section 16600 applies to contractual restraints on businesses outside of the employment context.

In *Kelton v. Stravinski* (2006) 138 Cal.App.4th 941, two companies that developed industrial warehouses entered into a partnership agreement that included a provision whereby the parties agreed "to not build, develop and operate a warehouse without including the other." (*Id.* at 943.) One of the companies sued the other for violating this provision, and in its defense, the accused company argued that the provision was an unenforceable covenant not to compete under section 16600. The court agreed and found the covenant to be void under section 16600 and not subject to any of the exceptions set forth in sections 16601 and 16602. (*Id.* at 946-47.)

In *Robinson v. U-Haul Co. of Cal.* (2016) 4 Cal.App.5th 304, a self storage company entered into a contract with a truck rental company that included a "Noncompetition Covenant" whereby the self storage company agreed not to lease any competitors' trucks for a certain period of time. (*Id.* at 309.) The court recognized that the Noncompetition Covenant violated section 16600. (*Id.* at 316 and n.5; *see also Fleming v. Ray-Suzuki, Inc.* (1990) 225 Cal.App.3d 574, 583 n.4 (noting that tennis company's covenant not to compete would be unenforceable under section 16600 unless it fell under exception set forth in section 16601).)

And most recently, *Quidel Corp. v. Superior Court* (2019) 39 Cal.App.5th 530, 251 Cal.Rptr.3d 823 involved a contract between two biotechnology companies, Biosite Inc. and Beckman Coulter, Inc. One of the provisions in the agreement, section 5.2.3, prohibited Beckman from researching or developing a particular type of diagnostic assay for a certain period of time. Beckman later challenged section 5.2.3 in court, arguing that the section violated section 16600.

The trial court in Quidel granted Beckman's motion for summary adjudication that section 5.2.3 of the agreement was a non-compete clause that was void under Business and Professions Code section 16600. On appeal, the Court of Appeal considered the applicability of section 16600 outside of the employment context and affirmed that section 16600 can apply to contracts between businesses outside of the employment context. (*See Quidel*, 251 Cal.Rptr.3d at 833.) The Court of Appeal, however, vacated the summary adjudication order, finding that there was a factual dispute as to whether the agreement violated section 16600. (*See id.*)

The common theme throughout these cases is that they all involved contracts between businesses that restrained the activities of one of the parties, and were entirely outside of the employment context. Thus, California courts have consistently applied section 16600 to contracts that restrain businesses, and have not limited the applicability of section 16600 to the employment context. There is therefore no need for this Court to disturb the already well-settled presumption by

the lower courts in California that section 16600 is not limited to restraints on individuals, nor is it limited to the employment context.

3. There Is No Need To Address Defendant's Arguments Regarding The Standard For Reviewing Business Restraints Under Section 16600

Finally, Ixchel notes that Biogen has asked this Court to certify the separate question of what standard applies to the review of business restraints under section 16600. (*See* Letter from M. Popofsky to Hon. Tani G. Cantil-Sakauye, Chief Justice, and Associate Justices (Aug. 2, 2019) p.1.) This Court's order granting the Ninth Circuit's request for guidance does not mention Biogen's separate question, which Ixchel understands to mean that this Court is limiting its review to the specific questions posed by the Ninth Circuit.

Ixchel agrees that it is unnecessary for this Court to provide any opinion regarding the standard for reviewing business restraints under section 16600. Resolution of this issue is unnecessary to the disposition of the present appeal, as the trial court dismissed Ixchel's claims at the pleading stage, before the parties had engaged in any discovery on the alleged business restraint. Thus, the evidentiary standard for proving a section 16600 violation is not at issue in the appeal. Indeed, the Ninth Circuit has noted that, if this Court confirms that section 16600 applies to businesses as well as individuals, then Ixchel has adequately pleaded an independently wrongful act and the trial court's dismissal order must be reversed. (*See Ixchel*, 930 F.3d at 1037 n.6.) Consequently, this Court need go

no further than the specific questions posed by the Ninth Circuit in order to resolve this appeal.

B. Independently Wrongful Conduct Is Not A Required Element For An Intentional Interference With Contract Claim Except For Limited Circumstances Involving Employment Contracts

The longstanding rule in California is that an independently wrongful act is not required for an intentional interference with contract claim, even when the contract is at-will. This was clearly articulated by this Court nearly three decades ago in *Pacific Gas & Elec. Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118. In that case, the plaintiff alleged that the defendant tortiously interfered with the plaintiff's contract to purchase power from the Placer County Water Agency by inducing the Agency into terminating the contract. In its defense, the defendant, Bear Stearns, argued that it could not be liable for tortious interference with contract because the contract was at-will and the Agency had a legal right to terminate the contract. This Court rejected this argument, stating:

> Bear Stearns claims initially that there can be no cause of action for inducing a contracting party to seek to terminate the contract according to its terms. The claim runs afoul of the rule, established in this and the majority of other jurisdictions, giving rise to a cause of action for inducing termination of an at-will contract, as the Court of Appeal perceived. . . . We have affirmed that interference with an at-will contract is actionable interference with the contractual relationship, on the theory that a contract at the will of the parties, respectively does not make it one at the will of others.

(*Id.* at 1127 (internal quotations omitted).)

Importantly, in *Pacific Gas* this Court also reiterated the necessary elements for a contract interference claim:

> The elements which a plaintiff must plead to state the cause of action for intentional interference are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.

(*Id.* at 1126.) Nowhere in this recitation of elements is there any mention of a requirement of an independently wrongful act. Thus, *Pacific Gas* established the default rule that, for an intentional interference with contract claim, there is no requirement of an independently wrongful act, even where the alleged misconduct is inducing a party to terminate an at-will contract.

In *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, this Court explained the rationale for why an independently wrongful act is not required for a contract interference claim, but it is required for a claim for intentional interference with prospective economic advantage. The Court stated:

> Because interference with an existing contract receives greater solicitude than does interference with prospective economic advantage . . . , it is not necessary that the defendant's conduct be wrongful apart from the interference with the contract itself. . . .
>
> As we explained in *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, *supra*, 11 Cal.4th at page 392, 45 Cal.Rptr.2d 436, 902 P.2d 740, it is necessary to distinguish the tort of interference with an existing contract because the exchange of promises which cements an economic relationship as a contract is worthy of protection from a stranger to the contract. Intentionally inducing or causing a breach of an existing contract is therefore a wrong in and of itself.

(*Id.* at 55.) Thus, as the Court noted in *Quelimane*, no independently wrongful act is required to state a cause of action for intentional interference with contract, because the act of interfering with the contract is "a wrong in and of itself." (*Id.*)

Fourteen years after *Pacific Gas*, this Court carved out a narrow exception to this general rule in *Reeves v. Hanlon* (2004) 33 Cal.4th 1140. *Reeves* involved a dispute between an attorney and his former law firm, which he left to start his own law firm. The former law firm asserted a tortious interference with contract claim against the attorney, under the theory that he had interfered with the law firm's contracts with its employees when he convinced several of them to quit their jobs and join his new firm. This Court characterized the issue presented in *Reeves* as "whether a defendant may be held liable under an intentional interference theory for having induced an at-will employee to quit working for the plaintiff." (33 Cal.4th at 1144.) On this narrow issue, this Court held that "to recover for a defendant's interference with an **at-will employment relation**, a plaintiff must plead and prove that the defendant engaged in an independently wrongful act . . . that induced the at-will employee to leave the plaintiff." (*Id.* at 1145 (emphasis added).)

Thus, the *Reeves* court explicitly limited its holding to the narrow situation where the alleged interference is inducing an at-will employee to quit his or her job. The court reasoned that requiring an "independently wrongful act" for this particular type of claim was appropriate given the need to "respect both the right

of at-will employees to pursue opportunities for economic betterment and the right of employers to compete for talented workers . . . ." (*Id.* at 1154.)

Subsequent decisions by different California Courts of Appeal have recognized the narrow application of *Reeves*. First, in *Redfearn v. Trader Joe's Co.* (2018) 20 Cal.App.5th 989, the California Court of Appeal addressed the exact issue presented to the District Court in this case – namely, whether an independently wrongful act is a necessary element of a contract interference claim when the contract is at-will. In that case, Redfearn owned a company, Caliber, that acted as a food brokerage for two manufacturers of food products, Seneca Foods and Sunsweet Growers. In that capacity, Caliber assisted Seneca and Sunsweet in getting their products sold in Trader Joe's stores. Redfearn alleged, however, that in 2014 a Trader Joe's executive started spreading false statements about Redfearn's reputation and insisted to Seneca and Sunsweet that Trader Joe's would stop doing business with them unless they terminated their contracts with Caliber. Seneca and Sunsweet complied with Trader Joe's demand and terminated their contracts with Caliber. Redfearn then filed suit against Trader Joe's, asserting a claim for intentional interference with contract as well as other related claims. (*See id.* at 994-95.) The trial court sustained Trader Joe's demurrer to the complaint, and Redfearn appealed.

On appeal, Trader Joe's argued that "because the brokerage contracts with Caliber were terminable at will, Redfearn must allege an independently wrongful act to plead a viable cause of action [for intentional interference with contract]" –

exactly what the District Court held in the present case. (*Id.* at 1003.) But the *Redfearn* court squarely rejected this argument, holding that there was no such independently wrongful requirement outside the context of employment contracts. (*See id.* at 1004-05.) Importantly, the *Redfearn* court carefully considered the impact of the *Reeves* decision, and concluded that "[t]he holding in *Reeves* is properly limited to the situation the Supreme Court actually considered: an employer inducing at-will employees to leave their current positions to come to work for it." (*Id.* at 1004.) Thus, the Court of Appeal held that Redfearn, who was alleging interference of an at-will commercial contract rather than an employment contract, need not allege independently wrongful conduct as part of his contract interference claim. The court reasoned:

> The present action does not involve an at-will employment agreement, and neither the rights of at-will employees to pursue economic opportunities nor the rights of employers to compete for talented workers are at issue. The general rule that wrongful conduct apart from interference with the contract itself need not be pleaded or proved governs this case.

(*Id.* at 1004-05.)

A second Court of Appeal decision, *Popescu v. Apple Inc.*, 1 Cal.App.5th 39 (2016), is also consistent with *Redfearn* in holding that *Reeves* applies only to a very narrow situation involving employment contracts. In *Popescu*, the plaintiff sued Apple Inc. after he was fired by his employer, a company that provided a component for Apple's iPhone products. The plaintiff asserted a claim for tortious

interference with contract against Apple, alleging that Apple had improperly induced his employer to fire him after he complained about Apple's attempts to impose onerous contractual restrictions on his company. In its defense, Apple argued that the plaintiff could not assert a tortious interference with contract claim because his employment contract was an at-will contract. The Court of Appeal considered whether the plaintiff needed to prove an independently wrongful act as part of his contract interference claim because his employment contract was at-will. The *Popescu* court declined to impose such a requirement. The *Popescu* court reasoned:

> [T]he dispositive language in *Reeves* shows that our high court intended the "independently wrongful act" requirement to apply to the specific circumstances of that case: "[T]o recover for a defendant's interference with an at-will employment relation, a plaintiff must plead and prove that the defendant engaged in an independently wrongful act . . . *that induced an at-will employee to leave the plaintiff*. . . ."
>
> We hold that *Reeves*'s additional requirement of pleading and proof of an independently wrongful act in contract interference claims involving at-will employment contracts does not apply where, as here, the employee is the alleged victim of a third party's conduct in inducing its business partner to terminate his or her employment contract.

(*Id.* at 62 (emphasis in original).) Thus, as the *Popescu* court also recognized, *Reeves* explicitly limits its holding to one particular fact pattern involving inducing an at-will employee to quit his or her job, and is not to be interpreted

generally as requiring proof of an independently wrongful act for all contract interference claims that involve at-will contracts.

Two California Court of Appeal decisions therefore recognize the narrow applicability of *Reeves* and support that there is no independently wrongful act requirement for an intentional interference with contract claim, except for the unique circumstances involving at-will employment contracts set forth in *Reeves*. Biogen, however, asks that this Court broaden the narrow exception in *Reeves* to encompass all at-will contracts, in contravention to *Pacific Gas*. There is no reason to transform *Reeves*' narrow exception into the general rule, however. Aside from *Reeves*, in the nearly three decades since the *Pacific Gas* decision issued, the law regarding intentional interference with contract has remained unchanged. There is no reason to disturb the well-settled law that an intentional interference with contract claim requires only the five elements of: 1) a valid contract; 2) defendant's knowledge thereof; 3) defendant's intentional acts designed to disrupt the contractual relationship; 4) actual breach or disruption; and 5) resulting damage.

The *Reeves* court found it necessary to add an independently wrongful act requirement only in a particular context where public policy considerations – namely, the policy of promoting employee mobility – counseled in favor of adding an additional independently wrongful act requirement for an intentional interference with contract claim. No such public policy consideration supports

broadening the *Reeves* exception to encompass all at-will contracts. To the contrary, there are public policy reasons not to do so.

As this Court noted in *Pacific Gas*, the cause of action of intentional interference with contract is based on the notion that contracts should be protected against "officious intermeddlers." (30 Cal.3d at 1128.) Making it harder to plead and prove claims of intentional interference with at-will contracts could have the detrimental effect of promoting third party interference with at-will contracts. It could also have the detrimental effect of dissuading parties from entering into at-will contracts, for fear of the lack of legal recourse should a third party interfere with such a contract. These potentially large-scale impacts on the behavior of contracting parties in California should be carefully considered before completely upending the current state of the law.

In requesting guidance from this Court, the Ninth Circuit noted that there was language in the *Reeves* decision suggesting that "interference with a contract terminable at will was more like an interference with the future relation between the contracting parties, similar to claims for intentional interference with prospective economic advantage." (*Ixchel*, 930 F.3d at 1038.) But *Reeves* did not hold that all claims of interference with an at-will contract should be treated as claims for intentional interference with prospective economic advantage, rather than intentional interference with contract. Indeed, such a holding would be directly at odds with *Pacific Gas*. As this Court noted in *Pacific Gas*, the fact that a contract contains a termination provision does not create a privilege to interfere

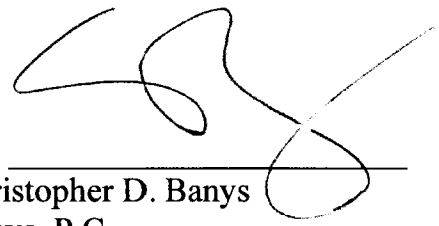
with the contract. (50 Cal.3d at 1128.) Rather, "interference with an at-will contract is **actionable interference with the contractual relationship**." (*Id.* at 1127 (emphasis added).) *Pacific Gas* therefore plainly states that interference with an at-will contract is ordinarily to be treated as a contract interference claim, not a claim for interference with prospective economic advantage. (*See also Quelimane*, 19 Cal.4th at 55 (interfering with a contract is "a wrong in and of itself.").) Thus, it would be contrary to longstanding precedent from this Court to add an independently wrongful act requirement for any contract interference claims that involve at-will contracts.

V. CONCLUSION

For the foregoing reasons, Ixchel urges this Court to conclude that: 1) Business and Professions Code section 16600 applies to restraints on businesses as well as individuals, and is not limited to the employment context; and 2) an independently wrongful act is not a necessary element for an intentional interference with contract, except in limited circumstances involving at-will employment contracts as described in *Reeves*.

Dated: October 9, 2019

Respectfully submitted,

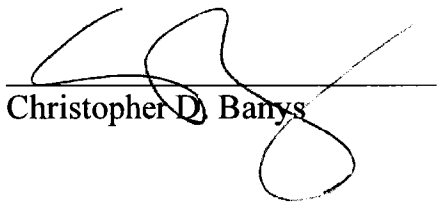


By: _____
Christopher D. Banys
Banys, P.C.

Attorneys for Plaintiff and Appellant
IXCHEL PHARMA, LLC

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(c) of the California Rules of Court, the undersigned Counsel of Record hereby certifies that the enclosed Appellant's Opening Brief on the Merits 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 6,821 words. Counsel relies on the word count functionality of the Microsoft Word program used to prepare this brief.



Christopher D. Barys

PROOF OF SERVICE

I, the undersigned, declare:

I am a citizen of the United States and employed in Santa Clara County, California. I am over the age of eighteen years and not a party to the within entitled action. My business address is 1030 Duane Avenue, Santa Clara, California 95054. On October 9, 2019, I served a copy of the within document:

APPELLANT'S OPENING BRIEF ON THE MERITS

on the parties in this action as follows:

BY MAIL SERVICE: I placed a true and correct copy of the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Clara, California addressed as set forth below:

Mark S. Popofsky
Ropes & Gray LLP
2099 Pennsylvania Avenue, NW
Washington, DC 20006

Rocky C. Tsai
Ropes & Gray LLP
Three Embarcadero Center
San Francisco, CA 94111

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 9th day of October, 2019 at Santa Clara, California.

Richard C. Lin