S256927

IN THE SUPREME COURT OF CALIFORNIA

IXCHEL PHARMA, LLC,

Petitioner,

v.

BIOGEN, INC.,

Respondent.

ON CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, CASE NO. 18-15258

APPLICATION TO FILE AMICUS CURIAE BRIEF & BRIEF OF AMICUS CURIAE BECKMAN COULTER, INC., IN SUPPORT OF PETITIONER

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APPLICATION TO FILE BRIEF OF AMICUS CURIAE BECKMAN COULTER, INC., IN SUPPORT OF PETITIONER

Introduction

Beckman Coulter, Inc. ("Beckman") respectfully applies for leave to file the accompanying amicus curiae brief in support of petitioner Ixchel Pharma, LLC, pursuant to rule 8.520(f) of the California Rules of Court. Amicus is familiar with the content of the parties' briefs.

Interest of Amicus Curiae

Beckman is the Plaintiff and Appellant in a related matter pending before this court, *Quidel Corporation v. Superior Court (Beckman Coulter, Inc.)*, No. S258283. In that litigation, Beckman is challenging a contractual non-compete clause that prevents it from developing new technology and competing head-to-head against Defendant-Respondent Quidel Corporation in a market for the development and sale of medical tests used to detect evidence of cardiac disease.

The central issue presented in the *Quidel* case is whether Business and Professions Code section 16600 renders the non-compete clause void as a matter of law. The Court of Appeal found that "[t]here is no dispute that section 5.2.3 of the Agreement limits Beckman's ability to develop a competing assay to diagnose cardiac disease." (*Quidel Corp. v. Superior Court* (2019) 39 Cal.App.5th 530, 544.) Nevertheless, the Court of Appeal held that section 16600 does not render that provision void as a matter of law, and that "full-blown anti-trust analysis" was required before Beckman could obtain relief from the restrictive provisions of the non-compete clause. (*Id.* at p. 545 ["we conclude such factual development is relevant and necessary here"].)

After this court granted review of *Quidel*, briefing was held pending the court's decision in this case. Accordingly, Beckman

has an interest in how the court decides the related issues presented in this case.

How This Brief Will Assist the Court

In this amicus curiae brief, Beckman addresses a controlling line of decisions relevant to the first certified question that has been largely overlooked or misread by the parties.[1] In particular, this brief explains why the court should not approach this case from the perspective of having to decide whether to extend the holding of *Edwards v. Arthur Andersen, LLP* (2008) 44 Cal.4th 937, to a different factual setting. Instead, the question before the court is whether to adhere to an existing line of decisions – spanning from 1892 through at least 1970 – upholding the plain, unambiguous meaning of section 16600 as prohibiting all covenants not to compete except those specifically exempted by the Legislature. Those decisions, which are entirely consistent with *Edwards*, directly resolve the additional questions briefed by the parties: Section 16600 applies in full measure to non-compete covenants between businesses, and where it applies, the statute renders such covenants void as a matter of law without inquiry into their reasonableness.

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[1] This brief is limited to addressing the Ninth Circuit's first certified question and the parties' arguments relating thereto. Beckman takes no position on the second certified question.

This brief will assist the court because the controlling pre-*Edwards* precedents have not been cited at all by Appellant Ixchel Pharma, LLC ("Ixchel"), which instead treats the applicability of section 16600 to businesses as a matter of first impression in this court. (See AOB, at p. 16 [arguing that "the plain language of the statute as well as its related statutes shows" that "section 16600 applies to contracts restraining businesses"]; *id.* at pp. 21-22 [citing "the already well-settled *presumption by the lower courts* in California that section 16600 is not limited to restraints on individuals," italics added].)

Respondent Biogen concedes the statute's applicability in this context and cites some of the controlling pre-*Edwards* decisions. (See RB, at pp. 41, 51-53.) Yet, it seeks to cabin the reach of those decisions through a novel reading that consigns them to a limited "*per se* track" applicable only to two specific fact patterns. (*Id.* at p. 51.) Biogen argues that a "distinct [rule of reason] track govern[s] restraints outside these two categories." (*Ibid.*) While Ixchel responds to this attempt "to create a second tier of protection" under the statute (see ARB, at p. 9), it does not address Biogen's reading of the pre-*Edwards* case law. This brief addresses those cases, and explains why this court's section 16600 jurisprudence cannot be divided into the "two tracks" proposed by Biogen.

Accordingly, this brief will assist the court by addressing relevant issues and cases that the parties did not.

No party, counsel for a party, or any other person or entity apart from the amicus curiae and its counsel, authored the proposed amicus brief in whole or in part, or made any monetary contribution intended to fund the preparation or submission of the brief. (Cal. Rules of Court, rule 8.520(f)(4)(A).)

February 27, 2020

Respectfully submitted,

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BRIEF OF AMICUS CURIAE BECKMAN COULTER, INC., IN SUPPORT OF PETITIONER

Introduction

The Ninth Circuit and the parties all frame the first certified question in terms of whether "the interpretive approach mandated by *Edwards*" should be extended to "contracts restraining a business from engaging in a lawful business." (*Ixchel Pharma, LLC v. Biogen, Inc.* (9th Cir. 2019) 930 F.3d 1031, 1036; see also RB, at p. 45 ["Does the antitrust rule of reason govern, or does *Edwards* . . . ?"]; ARB, at p. 8 ["*Edwards* squarely rejected the 'rule of reason' that Biogen now claims 'governs' section 16600"].)

However, *Edwards* is not the first case in which this court construed California's statutory prohibition on covenants not to compete. In fact, the very *first* case discussing former Civil Code section 1673, the predecessor to Business and Professions Code[2] section 16600, concerned a non-compete covenant between businesses. This court struck down that covenant as violating the statute, just as it would go on to strike down numerous other non-compete agreements in a variety of business settings. The consistent rule of decision handed down in those cases was

[2] All future statutory citations are to the Business and Professions Code, unless otherwise specified.

carried forward into the Business and Professions Code by an express legislative directive, and it remains the law today.

Discussion

I. The Controlling Decisions of This Court Pre-Date, but Are Aligned with, *Edwards*.

A. *Vulcan Powder* and Its Progeny.

This court's first reasoned opinion interpreting California's statutory prohibition against covenants not to compete concerned an agreement among businesses that manufactured dynamite. (See *Vulcan Powder Co. v. Hercules Powder Co.* (1892) 96 Cal. 510, 513-515.)[3] In that case, this court recognized that former Civil Code section 1673 had been adopted to overturn a common law rule that had become "relaxed so as to countenance contracts for the partial restraint of trade,—that is, contracts in which the restraint was confined to reasonable limits. . . ." (*Id.* at p. 513.) The common law rule "was uncertain, and led to much perplexing legislation" (*ibid.*), so in 1872 the Legislature replaced it with a bright-line standard that made all such agreements void as against public policy unless they met one of two statutory exceptions. (*Ibid.*) Finding that an agreement among several

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[3] In one earlier case, the parties debated the meaning of former Civil Code section 1673 as applied to a restraint on the sale of lime, but the court issued only a two-sentence disposition without any analysis. (See *Schwalm v. Holmes* (1875) 49 Cal. 665, 668-669.)

manufacturers of dynamite to pool their patent rights and fix their collective output was "clearly in restraint of trade and against public policy" (*id.* at p. 515), and that neither of the statutory exceptions applied (*id.* at p. 513), this court declared that agreement "void" and unenforceable as a matter of law. (*Id.* at pp. 515-517.)

In the years following *Vulcan Powder*, this court repeatedly applied the same interpretation and declared other non-compete agreements between businesses void as a matter of law. (See, e.g., *Getz Bros. & Co. v. Federal Salt Co.* (1905) 147 Cal. 115, 119 [restraint on importation of salt was void; "[t]he only exceptions [are] contemplated by the succeeding sections. . . . Saving for these two classes of agreement, *all others* which restrain the exercise of a lawful business, trade, or vocation, are void," italics added]; *Pacific Wharf & Storage Co. v. Standard Am. Dredging Co.* (1920) 184 Cal. 21, 23 [restraint on the sale and operation of harbor dredges was void; "[i]n substance, these sections [former 1673 and 1674 of the Civil Code] provide that every contract by which anyone is restrained from exercising a lawful business is to that extent void, except where he has sold the goodwill of a business. . . . The language of these code sections is clear and unambiguous."]; *Morey v. Paladini* (1922) 187 Cal. 727, 736 [restraint on the importation of lobsters was void; "[w]e think the contract is illegal . . . as being contrary to the provisions of our

own code section, which provides that 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."].)

None of these decisions included an analysis of the economic impact of the non-compete agreement as relevant to declaring it void. Such an inquiry would have been inconsistent with the Legislature's purpose of overturning the common law rule that tolerated "partial restraint[s] of trade" as long as they were "confined to reasonable limits[.]" (*Vulcan Powder*, *supra*, 96 Cal. at p. 513.) Indeed, at least twice following *Vulcan Powder* this court rejected arguments that a non-compete covenant could be upheld on the basis that it was reasonably narrow.

In *Chamberlain v. Augustine* (1916) 172 Cal. 285, it was argued that a contract prohibiting the defendant from operating a foundry business was valid because it "applied only to business carried on in the states of California, Washington or Oregon, and that this constituted only a partial restraint." (*Id.* at p. 288.) This court rejected that contention: "The obvious answer to this is the very language of section 1673 providing 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 pp. 288-289, ellipses in original).

"The statute makes no exception in favor of contracts only in partial restraint of trade." (*Id.* at p. 289.)

Likewise, in *Morey*, *supra*, the court held that "[w]hether or not the defendant obtained what he sought, an entire monopoly of the [lobster] trade, is *immaterial*." (187 Cal. at p. 738, italics added.) Citing *Chamberlain*, *supra*, the court re-affirmed: "The statute (Civ. Code, sec. 1673) makes no exception in favor of contracts only in partial restraint of trade." (*Ibid.*)

These decisions are entirely consonant with *Edwards*, *supra*, in which this court likewise concluded that "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." (44 Cal.4th at p. 945.) But what they also show is that the principles that this court articulated in the employment setting of *Edwards* were neither new nor unique to that context. Rather, they reflected the court's long-standing interpretation of section 16600's predecessor as applied to cases involving restraints on individuals and businesses alike. As one pair of legal scholars has argued:

> In one sense, *Edwards* is not a watershed opinion. It created no new law in California courts, opting instead to reaffirm long-standing rules. But by laying to rest the Ninth Circuit's "narrow restraint" exception, *Edwards* took an important step in reaffirming the strength of California's policy against covenants not to compete.

(Lemley & Pooley, *California Restrictive Employment Covenants after Edwards* (2009) 23 Cal. Lab. & Emp't. L.Rev., No. 3, at p. 4, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1295606; see also *id.* at p. 3 [citing *Chamberlain* and *Morey*, *supra*, as having made "state decisional law . . . robust and clear" "that there was no such thing as a 'partial restraint' under the predecessor to section 16600."].)

B. Decisions Interpreting Former Civil Code Section 1673 Control the Interpretation of Section 16600.

This court's decisions applying former Civil Code section 1673 remain controlling law for cases arising under section 16600. (See, e.g., *Swenson v. File* (1970) 3 Cal.3d 389, 394 [citing *Pacific Wharf* and *Morey*, *supra*, as still containing "authoritative statements regarding the public policy of this state with respect to contracts in restraint of trade"].)

When the Legislature enacted the Business and Professions Code, it included a section directing that "[t]he provisions of this code in so far as they are substantially the same as existing statutory provisions relating to the same subject matter *shall be construed as restatements and continuations thereof*, and not as new enactments." (§ 2, italics added; see also *Speegle v. Bd. of Fire Underwriters of the Pac.* (1946) 29 Cal.2d 34, 48 [adhering to pre-existing interpretation of the Cartwright Act, in part because "section 2 of the Business and Professions Code specif[ies] that

the provisions of that code should be construed as restatements and continuations of similar provisions of existing statutes rather than as new enactments"].)

Section 16600 unquestionably meets the Legislature's definition of a substantially equivalent statute that should be construed as a continuation of existing law, rather than as a new enactment. (§ 2.) There are few textual differences between the two statutes at all, and none that conveys a different substantive meaning.[4] Moreover, this court has previously characterized section 16600 as a re-enactment of "[t]he relevant portions of . . . Civil Code section 1673[.]" (*Cianci v. Superior Court* (1985) 40 Cal.3d 903, 922, internal quotation marks omitted; see also *Edwards, supra*, 44 Cal.4th at p. 946 ["In the years since [section 16600's] original enactment as Civil Code section 1673. . . . "].)

As a result, section 16600 carries forward this court's long-standing interpretation of Civil Code section 1673. It therefore invalidates all non-compete covenants except for those specifically exempted by the Legislature, without regard for whether they are full or partial restraints, or for whether they

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[4] Compare former Civ. Code, § 1673 ("Every 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, is to that extent void"), with § 16600 ("Except 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").

restrain businesses or individuals. (See *Vulcan Powder*, *supra*, 96 Cal. at p. 513; *Getz*, *supra*, 147 Cal. at p. 119; *Chamberlain*, *supra*, 172 Cal. at pp. 288-289; *Pacific Wharf*, *supra*, 184 Cal. at p. 23; *Morey*, *supra*, 187 Cal. at p. 738; *Swenson*, *supra*, 3 Cal.3d at p. 394.)

II. Biogen's "Two Track" Hypothesis Has No Basis in the Text of Section 16600, Its History, or the Decisions of This Court.

Biogen advances the novel argument that "[a]pplication of section 16600 has proceeded on two tracks. . . . " (RB, at p. 18; see also *id.* at pp. 51-54 [same].) According to this theory, "Section 16600's *per se* track voids, absent statutory exception: (i) naked non-competes and (ii) restraints incident to a *separation*," while a separate "rule of reason" track governs all others, "including restraints that induce or support *business collaborations*." (*Id.* at p. 18, italics in original.) Biogen's "two track" hypothesis finds no support in the text of section 16600, its history, or this court's cases interpreting the statute.

Biogen is also wrong to suggest that absent these "two tracks" section 16600 would invalidate "all limitations on trade freedom." (RB, at p. 69.) That alarmist counter-position presents the court with a false choice. As this court has held, there are many forms of contractual "restraint" that affect the *conduct* of a business, without restraining either party from *engaging in* a business. (*Post*, §§ II.C.1, 3.) Such agreements are outside the

purview of section 16600 altogether, making it wholly unnecessary to water down the statute's legal standard to preserve the enforceability of that which the statute does not purport to prohibit in the first place.

A. This Court Has Not Recognized Multiple "Tracks" Under Section 16600, and It Has Specifically Rejected a "Rule of Reason" Track.

As an initial matter, it bears emphasizing that Biogen has not identified a single California decision, from this court or any other, explicitly endorsing its "two tracks" interpretation of section 16600. The cases cited by Biogen are ones that it believes are consistent with its hypothesis, but none actually describes the law in those terms or otherwise endorses this theory. Biogen's description of these "tracks," and the identity of the cases it has placed within them, arise from its own post hoc attempt at rationalizing the case law.

Biogen's attempt at constructing a separate "rule of reason track" overlooks this court's repeated rejection of that legal standard on the basis that "[t]he statute (Civ. Code, sec. 1673) makes no exception in favor of contracts only in partial restraint of trade." (*Morey*, *supra*, 187 Cal. at p. 738; see also *Chamberlain*, *supra*, 172 Cal. at pp. 288-289 [same]; *Vulcan Powder*, *supra*, 96 Cal. at p. 513 [statute's purpose was to displace common law rule permitting non-compete agreements when "confined to reasonable limits"].) Contrary to Biogen's

attempts to distinguish these cases (RB, at pp. 51-53), this court did not qualify its analysis by saying that the statute fails to make such an exception only in *certain kinds of cases*. It held that the statute does not contain such an exception at all, and more broadly, that the *only* exceptions permitted are those originally codified as Civil Code sections 1674 and 1675.[5] (See also *Getz, supra*, 147 Cal. at p. 119 ["Saving for these two classes of agreement, *all others* which restrain the exercise of a lawful business, trade, or vocation, are void," italics added]; *Pacific Wharf, supra*, 184 Cal. at p. 23 [same].)[6]

Pacific Wharf and *Morey* in particular contradict Biogen's "two tracks" hypothesis because each involved a non-compete agreement underlying an *ongoing* "business collaboration" – the exact circumstance for which Biogen argues a separate "rule of reason" track exists. (Cf. RB, at p. 54.) In *Pacific Wharf,* the defendant sold a harbor dredge and agreed to operate it on the plaintiff's behalf "to do certain dredging in Los Angeles harbor at a certain price per cubic yard." (184 Cal. at p. 23.) The "obnoxious" restriction struck down by this court was the parties' attempt to limit competition against that venture through the

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[5] Today, modified versions of these exceptions plus one other are located at sections 16601, 16602, and 16602.5.

[6] As further explained below, Biogen also misreads three cases from this court that it describes as having applied the rule of reason to section 16600's predecessor. (See *post*, at § II.C.1.)

defendant's agreement 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." (*Ibid.*)

In *Morey*, the parties agreed to use plaintiff's access to lobsters sourced from Mexico to overcome defendant's supply shortages during a "closed season" in which lobsters could not be caught in California waters. (187 Cal. at p. 735.) The illicit provision, in which plaintiff agreed not to sell imported lobsters to anyone but the defendant, was "part of the consideration for the contract" (*id.* at p. 736), because it assured the defendant of a stronger re-sale market. The dispute arose when the provision was not fully enforced, leaving the market "overstocked" and the defendant unable to "sell [his lobsters] as fast as they were to be delivered under the contract." (*Id.* at p. 735.)

Under Biogen's "two tracks" hypothesis, the non-compete agreements in both of these cases should have been analyzed under the rule of reason, because each related to an ongoing business collaboration. (Cf. RB, at pp. 51-54.) But this court instead held that they were per se invalid, and that whether a covenant succeeded in creating a monopoly was "*immaterial*." (*Morey*, *supra*, 187 Cal. at p. 738, italics added; *Pacific Wharf*, *supra*, 184 Cal. at p. 23; see also *Swenson*, *supra*, 3 Cal.3d at p. 394 [citing *Pacific Wharf* and *Morey* as support for the

conclusion that section 16600 "mak[es] such contracts 'void' to the extent they exceed statutory limitations"].)

Finally, even *Vulcan Powder*, *supra*, which Biogen identifies as the prototypical example of a "naked restraint of trade . . . between businesses" justifying the "*per se* track" (RB, at p. 52), was in reality not as simple as Biogen suggests. In that case, three of the five parties had pooled their respective patent rights for the manufacture of different forms of dynamite, and mutually released one another from claims of infringement – a form of collaboration equivalent to the supposedly "legitimate business collaboration" between Biogen and Forward Pharma. (RB, at p. 67.)[7] To be sure, there were two other manufacturers who participated in the non-compete agreement despite having no patents of their own to contribute to the pool. (*Vulcan Powder*, *supra*, 96 Cal. at p. 515.) But the point remains that if the statute contained two different legal standards – one for "naked" restraints and another for "business collaborations" – then one would expect there to have been at least some discussion of those competing standards in a case containing elements of each.

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[7] Compare *Vulcan Powder*, *supra*, 96 Cal. at p. 515 ("There is a good deal of recitation in the contract about these patents, and mention is made of an 'interchange of rights' under them"), with RB, at p. 67 ("This alleged purpose was valid; 'clearing blocking positions' posed by others' patents is 'procompetitive.' ")

There was no such discussion because Biogen's "rule of reason track" does not exist. (Cf. RB, at p. 54.)

B. Biogen's Two-Track Hypothesis Is Contrary to the Text and History of Section 16600.

Biogen also errs in arguing that support for a "two track" approach can be extrapolated from the text, legislative history, and even the location of the statute within the Business and Professions Code. (RB, at pp. 47-51, 58-66.) Section 16600 is not susceptible to the type of judicial construction in which Biogen asks the court to engage, and even if it were, Biogen misunderstands the statute's text, history, and location.

1. Judicial construction requires ambiguity, and section 16600 is "unambiguous."

It is axiomatic that "in construing a statute [this court must] ascertain the Legislature's intent in order to effectuate the law's purpose." (*Kobzoff v. Los Ang. Cnty. Harbor/UCLA Med. Ctr.* (1998) 19 Cal.4th 851, 860.) "We must look to the statute's words and give them their usual and ordinary meaning." (*Id.* at p. 861.) "If the plain language of a statute is unambiguous, no court need, or should, go beyond that pure expression of legislative intent." (*Ibid.*; see also *Cal. Teachers Ass'n v. Gov. Bd. of Rialto Unified Sch. Dist.* (1997) 14 Cal.4th 627, 632-633 [same].)

The clearest evidence that there is only one "track" of analysis under section 16600 is the statute's text, which specifies

not only who may claim its protections – "anyone" – but also what legal standard the court must apply to agreements meeting the statutory criteria – "every" such contract "is to that extent void." (§ 16600.) It is difficult to imagine how the Legislature could more clearly articulate a single, per se legal standard applicable to all.

On at least five occasions, this court has stated that section 16600 or its predecessor are "unambiguous," or used words to that effect. Of particular significance, in *Howard v. Babcock* (1993) 6 Cal.4th 409, the court rejected an argument that an unstated exception should be inferred for non-compete agreements between lawyers: "While it may be true that in 1872, when these statutes were enacted, and in 1941, when section 16602 of the Business and Professions Code was enacted, it was not customary for lawyers to enter into noncompetition agreements, we do not view this historical circumstance as creating for all time an unspoken exception to the statute." (*Id.* at p. 417.) "[F]inding no ambiguity in the terms of the statute, and finding no demonstrated legislative intent to create a silent exception for lawyers, we may apply the statute according to its terms without further judicial construction." (*Id.* at p. 418, internal quotation marks omitted.)[8]

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[8] See also *Edwards*, *supra*, 44 Cal.4th at p. 950 ("Section 16600 is unambiguous, and if the Legislature intended the

For the same reasons, the court should reject Biogen's invitation to deduce an intended meaning different from the one supported by the plain text of the statute. Section 16600 is unambiguous in rendering "void" "every" agreement restraining "anyone" from engaging in a lawful trade, profession, or business. No further construction is warranted to effectuate the wishes of the Legislature. (§ 16600; see *Kobzoff, supra*, 19 Cal.4th at pp. 860-861.)

2. The term "anyone" plainly encompasses businesses in addition to individuals.

Biogen argues that former Civil Code "section 1673 is best read to alter the common law *only* as to restraints on *individuals*," and that this makes it "particularly appropriate to exercise caution in applying its successor, section 16600, to business-to-business restraints." (RB, at pp. 50-51, italics in original.) While Biogen bases this argument on an inference it draws from the interplay between Civil Code section 1673 and the exceptions of sections 1674 and 1675 (*id.* at p. 50), it

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statute to apply only to restraints that were unreasonable or overbroad, it could have included language to that effect."); *Chamberlain, supra*, 172 Cal. at pp. 288-289 (stating that the "very language of section 1673" foreclosed an implied exception for partial restraints); *Pacific Wharf, supra*, 184 Cal. at p. 23 (statutory scheme was "clear and unambiguous"); *Merchants' Ad-Sign Co. v. Sterling* (1899) 124 Cal. 429, 434 ("The language of the code is unmistakable").

overlooks a far more direct and authoritative statement of the statute's intended meaning.

The drafters of the Civil Code included a guide to definitions and usage in section 14. As originally enacted in 1872, that guide stated in relevant part:

> Whenever the terms mentioned in this section are employed in this Code, they are employed in the senses hereafter affixed to them, except where a different sense plainly appears: [¶] . . . [¶]
>
> 13. Where the term "person" is used to designate the party whose property may be the subject of any offense, action, or proceeding, it includes . . . *private corporations*, or joint associations, as well as individuals.
>
> 14. The word "person," except when used by way of contrast, includes *not only human beings, but bodies politic or corporate.*

(Former Civ. Code (1872), § 14, subds. (13), (14), italics added.) That guide was amended several times over the years, but still today provides that "the word person includes a corporation as well as a natural person." (Civ. Code, § 14, subd. (a).)

Biogen may argue that the relevant language in former Civil Code section 1673 is different because it uses "any one" instead of "any person." However, those terms are synonymous. Indeed, this court made that exact association in *Merchants' Ad-Sign*, *supra*:

> 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."

(124 Cal. at p. 434, quoting Civil Code section 1673, ellipses and brackets in original.) Likewise, in its Order Certifying Questions, the Ninth Circuit recognized that although " 'anyone' is not defined" it holds the same meaning as " 'any person.' " (*Ixchel*, *supra*, 930 F.3d at p. 1036, citing Webster's 3d New Internat. Dict. (2002).) As a result, the plain meaning of "any one" in former Civil Code section 1673 is any natural person *or any corporation* – which of course is exactly how this court understood and applied the statute in a series of cases beginning with *Vulcan Powder*, *supra*. (*Ante*, at § I.A.)

Biogen makes a similar error when it argues that a reference to "him" in Civil Code section 1674's exception for the sale of the goodwill of a business, implies that both the exception as well as the underlying prohibition are limited to individuals. (RB, at pp. 50, 60-61 & fn. 15.) Leaving aside that a limitation on the scope of an *exception* implies nothing about the breadth of the underlying *prohibition*, Biogen is simply misreading the statutory text. In the Civil Code as originally drafted, "[w]ords used in the masculine gender comprehend as well the feminine and neuter." (Former Civ. Code (1872), § 14, subd. (20); see also Civ. Code, § 14, subd. (a) [same].) The term "him" in Civil Code section 1674 did not restrict that provision to *individuals* any more than it restricted it to *men*. "Him" equally meant "her" or "*it*," and was plainly broad enough to encompass business

entities. (See also § 16602.5 [modern exception defining a circumstance in which "he or she or it" may enter a non-compete agreement].)

For all of these reasons, Biogen's argument that the Legislature most likely intended "[s]ection 1673's 'any one' . . . to encompass only individuals," is meritless. (RB, at pp. 50, 60-61.) The presumption created by the Legislature is that the provisions of the Civil Code applied to corporations and individuals alike, and nothing in the language of Civil Code section 1673 or its exceptions suggests an intention to depart from that default practice.

3. Legislative history does not support Biogen's "two tracks" hypothesis.

Relying upon an annotated copy of the Civil Code, Biogen argues that former section 1673's prohibition should be understood as limited to the specific factual circumstances at issue in a handful of common law cases cited in the annotation. (RB, at pp. 49-50 [arguing that the Code Commissioners "cite[ed] *only two types of examples*," italics in original].) However, the annotation is hardly a comprehensive legislative history, as its drafters acknowledged: "This, the Civil Code, must, *in the main, speak for itself*." (Ann. Civ. Code (1871), MJN, at p. JN 188, italics added.) "There is so much urgent labor to be performed by the Commission before the meeting of the Legislature, that a

more elaborate exposition must be left to a future occasion." (*Ibid.*)

In *Vulcan Powder*, this court pointed to *Wright v. Ryder* (1868) 36 Cal. 342, as containing "[q]uite a full statement of the rule at common law" (*Vulcan Powder*, *supra*, 96 Cal. at p. 513), and *Wright* is also cited in the annotated code (see MJN, at p. JN 207.) That citation alone shows that the common law rule was not restricted to individuals, as both *Wright* itself and other cases cited therein concerned non-compete agreements *between businesses.* (See *Wright*, *supra*, 36 Cal. at p. 356 [asking "[w]hether or not the covenants of the Oregon Steam Navigation Company to the California Steam Navigation Company . . . are void, as being in restraint of trade and against public policy"].)[9] Indeed, in *Wright*, this court struck down such a covenant despite expressing "grave doubts" that it "*could be deemed an appreciable restraint upon trade*, or result in the slightest inconvenience to the public." (*Wright*, *supra*, 36 Cal. at p. 361, italics added.)

Biogen's assertion that the code commissioners "*approved* of" the analysis in *Wright* (RB, at p. 50, italics in original), hardly shows an intention to limit Civil Code section 1673's prohibition

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[9] See also *Stearns v. Barrett* (1823) 18 Mass. 443 (market allocation agreement for the sale of co-invented machine); *Stanton v. Allen* (N.Y. Sup. Ct. 1848) 5 Denio 434, 440 (non-compete agreement among "all the transportation lines on the Erie and Oswego Canals"); *Dunlop v. Gregory* (1851) 10 N.Y. 241 (agreement not to operate a steamboat in certain waters.)

in the manner argued by Biogen. If anything, it shows the opposite: that the per se invalidity standard adopted in the statute had support in at least some common law decisions of which the commissioners were aware, making their election of that standard in Civil Code section 1673 all the more knowing and deliberate.

4. Section 16600 and the Cartwright Act are not "co-located," were enacted at different times, and serve different purposes.

Biogen argues that section 16600 is "co-locat[ed] with the Cartwright Act," and that the two statutes should therefore be read in "harmon[y]." (RB, at pp. 47, 58-59.) Biogen's argument is factually wrong, and reflects a line of reasoning previously rejected by this court. (See *Cianci*, *supra*, 40 Cal.3d at pp. 921-922 [overruling *Willis v. Santa Ana Comm. Hosp. Ass'n* (1962) 58 Cal.2d 806].)

Section 16600 is clear that its only authorized exceptions are those "provided *in this chapter.*" (§ 16600, italics added.) The Cartwright Act is not contained in the same chapter as section 16600 (Chapter 1 of Part 2, Division 7 of the Business and Professions Code). Rather, it is contained in the subsequent Chapter 2. (See §§ 16700 et seq.) Thus, while it is literally true that the two statutes, along with dozens of others, are "in the same *Part*" of the Business and Professions Code (RB, at p. 58, italics added), that has nothing to do with how they should be

interpreted or whether provisions of the Cartwright Act can be exceptions to section 16600 despite being located outside "this chapter."

This court did – for a time – credit an argument nearly identical to the one now made by Biogen. (Compare *Willis*, *supra*, 58 Cal.2d at p. 809 [construing the Cartwright Act in light of section 16600, and finding it "significant that" this "related legislation [was] added to the Business and Professions Code at the same time as the Cartwright Act"], with RB, at p. 58 [arguing the two statutes should be "harmoniz[ed]" because "the legislature placed section 16600 in the same Part of the same Code as the simultaneously reenacted Cartwright Act."].) But after crediting that argument in *Willis*, the court subsequently came to regard it as error:

> On closer examination . . . the two code sections are not sufficiently related to support the result the opinion reaches. "Section 16600 . . . was first enacted in 1872 and was placed at section 1673 of the Civil Code. On the other hand, section 16720 . . . was first enacted in 1907 as part of the then uncodified Cartwright Act. . . . The California Business and Professions Code came into existence in its present general form in 1937. The relevant portions of the Cartwright Act and Civil Code section 1673 were moved into this, then new, codification in 1941. It is significant that these two code sections were not *new* enactments '*added*' to the Business and Professions Code in 1941. Rather, they were the result of the Legislature engaging in statutory consolidation. Under these circumstances, a finding of legislative intent . . . based upon nothing more

> than language differences between the two code sections, exceeds the limits of plausible inference."

(*Cianci, supra*, 40 Cal.3d at p. 922, quoting Note, *Should the Medical Profession Be Exempt from California Antitrust Law?* (1979) 7 Western St. U. L.Rev. 91, 102-103, second and third ellipses in original.)

Biogen similarly overreaches when it argues that giving section 16600 its own independent meaning "would nullify much of the Cartwright Act by replacing the rule of reason with effective *per se* illegality." (RB, at p. 59.) Not only does that ignore section 16600's more limited scope (*post*, at § II.C.), it ignores the panoply of additional remedies that the Cartwright Act makes available but section 16600 does not. Plaintiffs that prove a violation of the Cartwright Act are entitled "to recover three times the damages sustained by him or her, interest on his or her actual damages . . ., and shall be awarded a reasonable attorneys' fee together with the costs of suit." (§ 16750, subd. (a).) The attorneys' fees provision in particular exists "to encourage injured parties to broadly and effectively enforce the Cartwright Act in situations where they otherwise would not find it economical to sue." (*Carver v. Chevron U.S.A., Inc.* (2004) 119 Cal.App.4th 498, 504, internal quotation marks omitted.) Moreover, both direct and indirect victims of a violation may obtain those remedies, permitting broader civil enforcement than even the federal Sherman Act allows. (*Cellular Plus, Inc. v.*

Superior Court (1993) 14 Cal.App.4th 1224, 1235.) Section 16600 provides none of those remedies, and therefore could never "nullify" the Cartwright Act's independent role.

In short, just as *Willis* erred by using "section 16600 as an aid to the construction of the Cartwright Act" (*Cianci, supra*, 40 Cal.3d at p. 921), so too would it be error to use the Cartwright Act as an aid to the construction of section 16600. The statutes were enacted decades apart, for different purposes, and neither one determines the intended meaning of the other.[10]

C. Cases Cited by Biogen Show the Limits of Section 16600's Reach, Not the Existence of a Second Legal Standard.

Biogen cites three decisions of this court as support for the existence of a separate "rule of reason" track. (RB, at pp. 52-54,

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[10] A bar journal commentary frequently cited by Biogen proceeds from the same mistaken premise and misreads the statute as a result. (See Perry & Howell, *A Tale of Two Statutes*: Cipro, Edwards, *and the Rule of Reason* (Fall 2015) 24 Comp: J. Antitrust, UCL & Privacy Sec. St. B. Cal. 21 [arguing that section 16600 and the Cartwright Act should be construed similarly because they are "statutory neighbors" which "were enacted around the same time"]; see also RB, at pp. 45, 51, 54, 59, 69, 71 [citing Perry & Howell].) The remaining arguments made in the commentary are incorrect for the reasons discussed herein. Beckman also notes that the commentary was authored by counsel whose firm represented an amicus curiae in *In re Cipro Cases I & II* (2015) 61 Cal.4th 116, where it advocated for a broad application of the "rule of reason" standard.

citing *Grogan v. Chaffee* (1909) 156 Cal. 611; *Assoc. Oil Co. v. Myers* (1933) 217 Cal. 297; and *Great W. Distillery Prods., Inc. v. John A. Wathen Distillery Co.* (1937) 10 Cal.2d 442.) Not only do those decisions fail to support the existence of such a track, they demonstrate why Biogen is wrong to fear that section 16600 will otherwise amount to a "commerce-crushing iceberg" (RB, at p. 72), that threatens to "inhibit routine and procompetitive contracts." (*Id.* at p. 19.)

1. Biogen relies upon cases falling outside "the purview" of section 16600.

In each of the three decisions cited by Biogen, this court held that Civil Code section 1673 was *inapplicable* because the contracts at issue did not restrain anyone from engaging in a lawful business. Biogen's contrary suggestion that the cases not only applied section 1673, but did so under a lesser legal standard, does not hold water. (Cf. RB, at pp. 52-54.)

In *Grogan*, *supra*, the court addressed a vertical re-sale price maintenance agreement that obligated a grocer to charge a fixed price for a particular brand of olive oil. (156 Cal. at pp. 612-613.) The manufacturer had advertised his oil as uniquely "pure and wholesome," and sought to have retailers charge a higher price for his olive oil than for others. (*Id.* at p. 612.) To that end, he had "affixed to every bottle or package of his oil a notice stating that the article 'is sold upon the condition that the purchaser, if he retails these goods, will maintain my fixed retail

selling price on them; and that if he wholesales them, he will sell them subject to this same condition.' " (*Ibid.*) This court upheld that agreement from a challenge under section 1673:

> [W]e see no reason why the contract alleged by plaintiff should not, as between the parties to it, be held to be valid. It violates no canon of public policy. *By its terms the buyer is not precluded from engaging in any lawful trade.* He may sell other olive oil at any price and on any conditions satisfactory to him. . . .
>
> Section 1673 of the Civil Code makes void every contract by which one is restrained from "exercising a lawful profession, trade, or business," except in certain instances. *But this is far different from* a contract limiting his right to dispose of a particular piece of property, except upon certain conditions. As the owner of property has the right to withhold it from sale, he can also, at the time of its sale, impose conditions upon its use without violating any rule of public policy.

(*Id.* at pp. 614-615, italics added, internal quotation marks omitted.)

In *Associated Oil*, *supra*, the court considered a lease agreement obligating the proprietor of a service station to display advertising for, and to only sell petroleum products of, the oil company from whom he had leased the premises. (217 Cal. at pp. 299-300.) A year into that agreement, the service station operator began using "the property . . . for the purpose of selling gasoline purchased from vendors other than plaintiff" and also "changed and altered the advertising theretofore displayed." (*Id.* at p. 300.) This court again upheld the parties' agreement:

> It requires no argument to demonstrate that appellant had the right to decline to sell any but its own product upon the leased property. We can see nothing unreasonable in requiring the licensees to do the same thing. The public interest is not involved *and competition is not stifled. In no way does the agreement attempt to limit production or fix the price of the commodity involved.*

(*Id.* at p. 306, italics added; see also *id.* at p. 304 [citing Civil Code section 1673 and *Morey*, *supra*, before concluding "[i]t is obvious that we are not dealing with a situation comparable to those cases"].)

Finally, in *Great Western Distillery Products*, *supra*, this court considered a contract under which a distillery agreed to sell its entire allotment of warehouse receipts for branded whiskey primarily to a single buyer, who in return agreed to purchase such receipts from the distillery and no others. (10 Cal.2d at pp. 444-445.) This court upheld that agreement as well:

> The first contention of the defendant is that the foregoing contract . . . violates section 1673 of the Civil Code, which provides, in effect, that every contract by which anyone is restrained from exercising a lawful profession, trade or business of any kind is to that extent void. In our view of the contract its terms indicate that it was entered into, not for the purpose of restricting any trade or business, but for the purpose of promoting one. It is true the contract makes the plaintiff, except one other, the exclusive purchaser in California of the defendant's warehouse receipts, but obviously, both the purpose and effect of the contract are, not to restrict the sale of the defendant's receipts, but to create an instrumentality by which the receipts will be exploited and sold. *The contract does not restrain*

> *anyone from exercising a trade or business of any kind within the purview of section 1673 of the Civil Code.*

(*Id.* at pp. 445-446, italics added, internal quotation marks omitted; see also *id.* at p. 450 ["In other words the plaintiff was in reality employed by the defendant to develop a market for the sale of the commodity . . ."].)

Contrary to Biogen's characterization, none of these cases truly applied "the antitrust rule of reason" (RB, at pp. 44, 54, 66), and certainly none did so as an *application of Civil Code section 1673*. Instead, this court considered the nature of the challenged restraints, concluded that they did not amount to restraints against "exercising a lawful . . . business" (former Civ. Code, § 1673), and on that basis declared them to be outside the scope of the statutory prohibition. None of these decisions announced a second (lower) legal standard *under the statute*; they all held that the statute did not apply at all.

Biogen leans heavily upon the statement in *Great Western Distillery Products* that "[s]tatutes are interpreted in the light of reason and common sense." (10 Cal.2d at p. 446, quoting from the opinion of the Court of Appeal, internal quotation marks omitted; see RB, at pp. 19, 53, 66-67, 72.) But that does not mean, as Biogen suggests, that the court was thereby adopting the antitrust "rule of reason" as the operative legal standard *for Civil Code section 1673*. Read in context with the immediately preceding sentence, the quotation simply means that Civil Code

section 1673 should not be read to prohibit – under any legal standard – contracts that do "not restrain anyone from exercising a trade or business of any kind." (10 Cal.2d at p. 446, internal quotation marks omitted.)

Further confirmation of Biogen's misreading can be found in the court's discussion of *Morey* and *Chamberlain*, *supra*, both of which it distinguished. *Morey* was distinguishable, this court wrote, because "it was contemplated by the parties that the contract was one which would result *in at least a partial restraint of trade*." (*Great W. Distillery*, *supra*, 10 Cal.2d at p. 448, italics added.) That distinction would not make sense if the court was adopting the "rule of reason" for challenges brought under former Civil Code section 1673. After all, the entire point of the rule of reason standard is that *partial* restraints of trade are potentially legal or illegal, depending upon the facts and circumstances. (See *Bd. of Trade of City of Chicago v. United States* (1918) 246 U.S. 231, 238 ["But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition"]; see also RB, at pp. 15, 54, 66 [citing same].) On the other hand, that distinction is perfectly consistent with the conclusion that Civil Code section 1673 did not apply at all to the parties' agreement, because it did not involve even a partial restraint against engaging in a lawful business.

Similarly, the court distinguished *Chamberlain* on the basis that the facts of that case "disclosed a contract *directly within the contemplation of said section 1673*" because the defendant "had agreed not to engage in a business to compete with the corporation's business." (*Great W. Distillery, supra*, 10 Cal.2d at p. 448, italics added.) That distinction would also not make sense if *Great Western Distillery* was purporting to apply a new legal standard to the very same statute. It only makes sense if, as this court plainly indicated, it regarded the parties' contract to fall outside the statutory prohibition altogether.[11]

2. Court of Appeal decisions cited by Biogen do not support a "rule of reason" track.

Biogen also relies upon certain decisions of the Court of Appeal to support the existence of a "rule of reason" track. (RB, at pp. 56-58.) To the extent that any of these decisions adopted the rule of reason as the legal standard applicable to section 16600, they should be rejected as inconsistent with the

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[11] Biogen also appears to argue that *Great Western Distillery* applied the rule of reason because it cited the "seminal" decision in *Board of Trade, supra*. (RB, at pp. 54, 66.) But that case appears only once in the opinion, as part of a string-cite, where it is the ninth of thirteen listed cases. (See *Great W. Distillery, supra*, 10 Cal.2d at p. 449.) To interpret that as radically altering this court's interpretation of former Civil Code section 1673 strains credulity.

controlling decisions of this court. In truth, however, the extent to which any of them did so is questionable at best.

In each of *Dayton Time Lock Service, Inc. v. Silent Watchmen Corp.* (1975) 52 Cal.App.3d 1, *Martikian v. Hong* (1985) 164 Cal.App.3d 1130, and *Lafortune v. Ebie* (1972) 26 Cal.App.3d 72 (RB, at pp. 56-57), there is only a single, unexplained reference to section 16600 as a statute that *condemns* restraints of trade.[12] Thereafter, each case principally discusses *federal antitrust* authorities, rather than decisions addressing the unique origin, purpose, or meaning of section 16600 or its predecessor. It is therefore unclear whether any of these decisions should even be considered as having interpreted section 16600 at all. But if they are, the absence of any true analysis leaves them uninformative and unpersuasive.[13]

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[12] See *Dayton Time Lock, supra*, 52 Cal.App.3d at p. 6 ("Defendant concedes the post-franchise anticompetitive provision of the agreement violates anti-trust laws (Bus. & Prof. Code, § 16600). . ."); *Martikian, supra*, 164 Cal.App.3d at p. 1133 ("certain kinds of restraints of trade uniformly have been condemned both by the common law [citation] and by federal and state statutes (see 15 U.S.C. § 1; Bus. and Prof. Code, §§ 16600 . . .)"); *Lafortune, supra*, 26 Cal.App.3d at p. 74 ("section 16600 renders void 'every contract by which anyone is restrained from engaging in a lawful profession, trade, or business.' ")

[13] The decision in *Rolley, Inc. v. Merle Norman Cosmetics* (1954) 129 Cal.App.2d 844, is similar. Although that case discussed certain decisions applying former Civil Code section

Likewise, *Centeno v. Roseville Community Hospital* (1979) 107 Cal.App.3d 62 (RB, at p. 57), proceeds from a clear mistaken premise: The belief that "[s]ection 16600 is basically a codification of the common law relating to restraints of trade" and involved "no express intent to depart from, alter, or abrogate the common law rules." (*Centeno*, at pp. 68-69.) That is incorrect, as this court has repeatedly held. (*Vulcan Powder*, *supra*, 96 Cal. at p. 513; *Edwards*, *supra*, 44 Cal.4th at p. 945.) In any event, the hospital policy challenged in *Centeno* would not have violated section 16600 under any legal standard because it left affected doctors "free to treat patients in the hospital, . . . render second opinions when patients so desire, and . . . provide radiological services to anyone." (*Centeno*, at p. 76.) There was, accordingly, no restraint against engaging in a lawful profession within the meaning of section 16600.

Finally, even if these cases did support a rule of reason standard, they would be against the great weight of authority in the Court of Appeal. Overwhelmingly, the decisions of that court

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1673, it also noted that "there was no contract pleaded that was binding on defendant retailers to purchase exclusively from defendant Norman." (*Id.* at p. 848.) It is therefore unclear how the statute could have applied at all. The court's holding was specific to the plaintiff's claim for damages under the Cartwright Act. (*Id.* at pp. 851-852 [finding it "quite a step to say" under the circumstances "that a single competitor . . . *is liable for damages* and can be enjoined by another competitor," italics added].)

have held that section 16600 (and its predecessor) render non-compete agreements between businesses void as a matter of law, including – as in *Kelton* – when the covenants arise from ongoing business collaborations. (See *Kelton v. Stravinski* (2006) 138 Cal.App.4th 941, 947-948 [rejecting argument that the "covenant not to compete is valid because the parties were involved in an ongoing business relationship"], review den. Jul. 12, 2006; *Robinson v. U-Haul Co. of Cal.* (2016) 4 Cal.App.5th 304, 316, fn. 5 ["Section 16600 . . . has long been understood to make garden variety noncompetition covenants void" (citing *Edwards, supra*, 44 Cal.4th at p. 945)]; *Fleming v. Ray-Suzuki, Inc.* (1990) 225 Cal.App.3d 574, 583-584 & fn. 4 ["If the covenant is invalid under section 16601, which is an exception to the general prohibition against covenants not to compete in section 16600, then the covenant is unenforceable"], review den. Feb. 21, 1991; *Beatty Safway Scaffold, Inc. v. Skrable* (1960) 180 Cal.App.2d 650, 656 [non-compete agreement for the sale of scaffolding material was void because it did "not come within the exceptions provided by section 16601 (sale of good will of business) or section 16602 (partnership dissolution)"]; *Hunter v. Superior Court of Riverside County* (1939) 36 Cal.App.2d 100, 115 [non-compete agreement by maker of machines to fabricate venetian blinds was "void as against public policy and therefore . . . unenforceable"]; *Summerhays v. Scheu* (1935) 10 Cal.App.2d 574, 575, 577

[agreement "restraining defendants from manufacturing and selling orchard heaters" was "void under the provisions of section 1673 of the Civil Code"].)

3. Contractual restraints are only prohibited by section 16600 when they restrain the *exercise* of a lawful business.

While the cases cited by Biogen did not create a new legal standard for section 16600, they do nevertheless explain why Biogen's prediction that section 16600 will "inhibit routine and procompetitive contracts" (RB, at p. 19), and become a "commerce-crushing iceberg" (*id.* at p. 72), are entirely unfounded.

This court has already recognized several limitations on trade freedom that nevertheless were not *restraints against engaging in a lawful business.* (§ 16600.) Whether those agreements take the form of an exclusive buyer-seller relationship for a particular commodity (*Great W. Distillery, supra*, 10 Cal.2d at pp. 445-446), a vertical re-sale price maintenance agreement for a particular brand of a product (*Grogan, supra*, 156 Cal. at pp. 614-615), or something else, they will not violate section 16600 unless they go further and prohibit one of the parties from engaging in a lawful business. It is that further promise that brought the agreements in *Getz Brothers*, *Pacific Wharf*, and *Morey*, within the statutory prohibition, as each promised not only to buy or sell a particular product under

specified conditions, but also to refrain from buying or selling with other parties as well. The inability to make that further promise in California for nearly the last one hundred fifty years has been no threat to "routine" or "ordinary" commercial transactions.

III. The Separation of Powers Requires Rejection of Biogen's Policy Arguments.

Much of Biogen's argument appears motivated by a concern for what the policy implications would be if section 16600 were read as imposing a single, per se legal standard. (See, e.g., RB, at pp. 19, 69-71). While those arguments are unfounded for the reasons explained above, they should also be rejected for an additional reason: The Legislature has actively decided this state's policy on the validity of covenants not to compete, and it has shown a willingness to adjust that policy over time as circumstances warrant.

This court faced similar policy contentions in *Edwards*, and made clear they were misdirected: "We . . . leave it to the Legislature, if it chooses, either to relax the statutory restrictions or adopt additional exceptions to the prohibition-against-restraint rule under section 16600." (*Edwards, supra*, 44 Cal.4th at pp. 949-950.) That conclusion followed from well-established principles of statutory interpretation prohibiting reliance upon the sort of policy-based arguments offered by Biogen to aid the

construction of an unambiguous statute.[14] If Biogen believes that section 16600 amounts to unwise public policy, then the appropriate forum at which to direct those arguments is the Legislature.

The history of section 16600 shows that the remedy of legislative correction is more than theoretical. Not only has the Legislature amended the statute to overturn one of this court's rulings, it has done so in a way that ratifies the interpretive approach taken in *Vulcan Powder* and subsequent cases.

In *Merchants' Ad-Sign*, *supra*, this court relied upon *Vulcan Powder* to conclude that *all* covenants not to compete are void apart from those specifically exempted by statute. (124 Cal. at pp. 433-434 [summarizing *Vulcan Powder* and noting: "[T]he only question here is, as it was in the *Vulcan Powder Company* case, Was the contract in restraint of trade?"].) The court then interpreted the exception contained in former Civil Code section 1674, and held it inapplicable because the parties' non-compete covenant was adopted upon the sale of corporate stock, whereas

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[14] See, e.g., *Cal. Teachers Ass'n*, *supra*, 14 Cal.4th at p. 632 ("In interpreting statutes, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law, whatever may be thought of the wisdom, expediency, or policy of the act," internal quotation marks omitted); *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 53 ("absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function").

the statute only provided an exception for the sale of the goodwill of a business. (*Id.* at p. 434.) Because no statutory exception applied, the non-compete covenant was "void as in restraint of trade[.]" (*Id.* at p. 435.)

In 1945, the Legislature amended the statutory scheme to abrogate *Merchants' Ad-Sign* by allowing covenants not to compete to be adopted upon the sale of corporate stock. (See *Bosley Med. Grp. v. Abramson* (1984) 161 Cal.App.3d 284, 289-290 [discussing purpose and effect of 1945 amendment to section 16601].)[15] Had the Legislature disagreed with the bright-line rule of invalidity stated in both *Vulcan Powder* and *Merchants' Ad-Sign*, it could have adopted an amendment to the effect that courts could uphold non-compete covenants other than those specifically exempted by statute in appropriate cases. It did not. Instead, the Legislature left in place the statutory prohibition exactly as it had been construed by this court in *Vulcan Powder*, and narrowly expanded the statutory exceptions to include sellers of corporate stock. (See *Bosley*, *supra*, 161 Cal.App.3d at p. 289.)

The Legislature's response to *Merchants' Ad-Sign* shows that while it may have disagreed with the *result* in that case, it nevertheless agreed with the adjudicative process followed by the court both there and in *Vulcan Powder*. In the ensuing years, the

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[15] An explanatory memorandum accompanying the bill directly criticized *Merchants' Ad-Sign* and identified it as the reason for the amendment. (*Ibid.*)

Legislature enacted further amendments to expand the statutory exceptions for other reasons – all again without altering the scope of the prohibition itself.[16] While none of these exceptions is applicable here, they demonstrate two things. First, that the Legislature did not understand this court's decisions before 1945 to have already adopted a catch-all reasonableness exception. Had it done so, then there would have been no need thereafter to amend the statutory scheme to specify limited factual circumstances in which non-compete covenants could be adopted within reasonable limits. (See *Monogram Indus., Inc. v. Sar Indus., Inc.* (1976) 64 Cal.App.3d 692, 698 ["[S]ection 16601 is a codification of this rule of 'reasonableness' in connection with the sale of a business"]; *Swenson*, *supra*, 3 Cal.3d at p. 396 ["We may assume that in enacting former section 16602 the Legislature intended to embody the common law concept of reasonableness"]; see also RB, at pp. 65-66, fn. 18 [same].) Such amendments

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[16] See, e.g., *Swenson*, *supra*, 3 Cal.3d at p. 392 [discussing "1961 amendment to section 16602 [which] broadened the permissible geographic scope of covenants not to compete"]; *Alliant Ins. Svcs., Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1301, fn. 9 [same for 2002 amendment to section 16601]; § 16602.5 [new exception for limited liability companies adopted in 1994]; see also Lemley & Pooley, *supra*, at p. 2 ["The legislature has amended various portions of the statute in 1945, 1963 and 2002, without changing the prohibitory language or questioning its interpretation by California courts as a broad prohibition against all forms of restraints which are not expressly allowed."].

would only have been necessary if the Legislature understood this court to have construed former Civil Code section 1673 as it did in *Vulcan Powder*, *supra*, as embodying a strict prohibition on covenants not to compete subject only to statutory exceptions. (96 Cal. at pp. 513-515.)

Second, the amendments show that if the Legislature wants to allow non-compete covenants in particular circumstances for policy reasons, it knows how to create such exceptions. Nothing less should be true of Biogen's policy-based arguments. It is the Legislature that should decide whether those arguments have merit, and if so, craft any appropriate changes to the statutory scheme.

Conclusion

For all of these reasons, the Ninth Circuit's first certified question should be answered in the affirmative. Section 16600 renders non-compete agreements between businesses void as a matter of law, unless they meet one of the exceptions contained in sections 16601, 16602, or 16602.5.

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By /s/ Anna-Rose Mathieson
Anna-Rose Mathieson

Certificate of Word Count
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February 27, 2020

/s/ Anna-Rose Mathieson
Anna-Rose Mathieson

Proof of Service

I, Kathryn Parker, declare as follows:

I am employed in the County of San Francisco, State of California, am over the age of eighteen years, and am not a party to this action. My business address is 96 Jessie Street, San Francisco, CA 94105. On February 27, 2020, I mailed the following document:

- **APPLICATION TO FILE AMICUS CURIAE BRIEF & BRIEF OF AMICUS CURIAE BECKMAN COULTER, INC., IN SUPPORT OF PETITIONER**

I enclosed a copy of the document identified above in an envelope and, following the ordinary business practices of the California Appellate Law Group LLP, I mailed the above document to the parties listed below. I am readily familiar with the practice of the California Appellate Law Group LLP for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service in San Francisco, California, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing.

The envelopes were addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on February 27, 2020, at San Francisco, California.

/s/ Kathryn Parker
Kathryn Parker