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 REPLY BRIEF ON THE MERITS

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I. INTRODUCTION

The first certified question, whether Civil Code section 16600 applies to business entities as well as individuals, has now been answered. In its Answer Brief, Biogen concedes that section 16600 does apply to business entities. (Ans. Br. at 18). Thus, the answer to the first certified question is *yes*.

Likewise, this Court has already answered the second question, whether a plaintiff must plead an independently wrongful act in order to state a claim for intentional interference with a contract that can be terminated by any party at any time. The answer to the second certified question is *no*. For example, in *Pacific Gas & Elec. Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118 this Court reasoned 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*" and such a claim does not require any addition element of "independently wrongful" conduct. (*Id.* at 1126-27). And while a narrow exception exists for at-will employment contracts, this Court and subsequent California Courts of Appeal have made clear that the requirement to plead "independently wrongful" conduct is limited to at-will employment relationships.

Rather than address the two questions posited by the Ninth Circuit and certified by this Court, Biogen has chosen to formulate its own questions – questions not before this Court or addressed by Ixchel in its opening brief. Indeed,

on August 2, 2019, Biogen sent this Court a letter seeking to have Biogen's questions addressed in place of the Ninth Circuit's, an invitation this Court rightly declined. Undeterred, Biogen's Answer Brief attempts to address questions only Biogen has asked – rather than those this Court has certified. Biogen's approach creates confusion, wastes time and resources on irrelevancies, and risks diverting the Court away from providing the answers the Ninth Circuit seeks.[1]

II. ARGUMENT

A. The Statutes, Courts And Parties Agree That Section 16600 Voids Restraints Against Businesses

1. Biogen Concedes That Section 16600 Applies To Businesses As Well As Individuals

At the heart of the first certified question, "Does section 16600 ... void a contract by which a business is restrained from engaging in a lawful trade or business with another business?" is whether section 166000 applies to business entities or only to individuals. The Ninth Circuit's question, and this appeal, germinated from the District Court's erroneous conclusion in dismissing Ixchel's complaint that "Section 16600 does not apply outside of the employment context." (ER. 9 (citing no authority)).

Biogen now concedes and agrees with Ixchel that section 16600 *does* apply to business entities and not just to restraints on individuals' ability to engage in

[1] Biogen has moved for judicial notice of legislative history and of a version of the Biogen/Forward agreement available online. Ixchel objects to judicial notice of the legislative history as irrelevant to the questions actually presented and certified and objects to the online version of the contract as extraneous heresay evidence outside the record about which Ixchel has not been able to take any discovery.

lawful trade. (Ans. Br. at 18 ("Biogen does not contest that section 16600 can govern restraints on businesses.")). The statutes, California courts and the parties to this action all agree that section 16600 applies to restraints on business entities as well as individuals. Thus, the answer to the certified question before this Court is, quite simply, *yes*. This Court need not pursue the inquiry further.

2. The Court Should Not Entertain Biogen's Separate "Rule Of Reason" Inquiry

Neither this Court, the Ninth Circuit or Ixchel has asked "*how*" to apply section 16600, but rather *whether* section 16600 can apply to business entities. (Ans. Br. at 18). Nonetheless, relying on an antitrust case that *never even cites section 16600*, Biogen proceeds to argue that the antitrust "rule of reason" somehow has been applied to a subset of section 16600 claims. (Ans. Br. at 18. ("section 16600 applies the antitrust rule of reason")(citing *In re Cipro Cases I & II* (2015) 61 Cal.4th 116, 146)).

Not only is the question of whether the antitrust "rule of reason" applies to section 16600 *not* before this Court and *not* what the Ninth Circuit asked, such an inquiry would be premature. This appeal proceeds from a pleading-stage dismissal. The parties have had no opportunity to engage in discovery and the Court cannot properly weigh the evidence as to, for example, whether Biogen, as the pleadings allege, intentionally restrained Forward from engaging in a business competitive to Biogen, or whether, as Biogen now posits, Biogen was engaging in some sort of "*business collaboration*" when it paid Forward to terminate

development with Ixchel of a treatment for Fredreich's ataxia and cease all development of competitive Dimethyl Fumarate (DMF) drugs. (Ans. Br. at 18 (emphasis original)).

3. There Is No "Rule Of Reason" In Section 16600

What's more, this Court has already explicitly held that the antitrust "rule of reason" *does not apply* to section 16600 claims. (*Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937). *Edwards* addresses section 16600 directly and discusses that "Under the common law ... contractual restraints on profession, business or trade were considered valid, as long as they were reasonably imposed." (*Id.* at 945). But "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." (*Id.*). *Edwards* squarely rejected the "rule of reason" that Biogen now claims "governs" section 16600, holding instead that "in California, covenants not to compete are void" under section 16600. (*compare* Ans. Br. at 18 "section 16600's rule of reason governs" *with Id.; Golden v. Cal. Emergency Med. Grp.* (2018) 896 F.3d 1018, 1022 "California has rejected the common law 'rule of reasonableness'" in the context of section 16600 claims).

Wishing the law were different, Biogen now asks this Court to harmonize section 16600 with the antitrust Cartwrite Act. But Biogen can show no legal basis nor any need for any such "harmonization" of the Cartwrite Act and section 16600. Biogen cites many cases applying the "rule of reason" in the antitrust

context, but not a single case dividing section 16600 into two tracks, or applying the "rule of reason" to restraints against one type of entity but not another.

Section 16600 is plainly-worded, and, if the legislature wanted to create a second tier of protection, or include the section in the Cartwrite Act, it could have easily done so. "Section 16600 is unambiguous, and if the Legislature intended the statute to apply only to restraints that were unreasonable or overbroad, it could have included language to that effect." (*Edwards*, 44 Cal.4th at 950).

Biogen asks this Court to re-write the plain language of section 16600 to include weakened protections for certain classes of restraints. But this Court has already considered such an approach and squarely rejected it. Indeed, section 16600 "represents a strong public policy of the state which should not be diluted by judicial fiat." (*Id.* at 949). As *Edwards* makes clear, the legislature has already considered the policy ramifications of section 16600 in drafting the statute – if Biogen seeks a weakened standard, or to "harmonize" section 16600 with the Cartwrite Act, it should contact the legislature. (*See Id.* at 950 ("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.").

As this case demonstrates, to impose the "rule of reason" on some restraints but not others would undermine the very point of section 16600. Ironically, Biogen portrays the restraint alleged here – preventing Forward from engaging in its trade of producing DMF drugs – as somehow *pro* competitive. In truth, the

allegations are exactly what 16600 was designed to address – contractual restraints that prevent commerce and competition. (*See* Cal. Civ. Code 16600 "...every contract by which anyone is restrained from engaging in a lawful ... trade or business of any kind is to that extent void."). Should the Court even address Biogen's two-tiered approach, it should once again hold that the rule of reason, and the Cartwrite Act for that matter, do not apply to section 16600 restraints.

B. Independently Wrongful Conduct Is Not An Element Of Intentional Interference With Business Contracts

1. Longstanding Precedent, And Recent Decisions Make Clear That Independently Wrongful Conduct Is Not Required

Likewise, this Court has long upheld the public policy favoring the preservation of contracts against third party interference and has made clear that the elements for intentional interference by a third party with a valid contract – "terminable at will" or otherwise. Under the law as annunciated in *PG&E*, a third party's knowledge of a contract and its intentional interference with the contractual relationship are required elements – an "independent wrongful act" is not. (*PG&E* 50 Cal.3d at 1126 (elements of intentional interference with contract 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.")).

The additional "wrongful" element that Biogen asks this Court to impose is required where the economic relationship is prospective, but once that relationship is consummated in contract, a third party with knowledge of the contract who nonetheless interferes with the relationship causing harm is liable. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55 ("interference with an existing contract receives greater solicitude than does interference with prospective economic advantage")). In essence, Biogen seeks to hold interference with contract to the standard of interference with prospective business advantage. But protecting a consummated relationship, in the form of a valid contract, is the goal of the current law. Indeed, intentionally inducing the termination of an existing contract "is a wrong in and of itself." (*Id.*).

Lacking any authority for the proposition that current California law requires the showing of an independently wrongly act in a contract interference claim where the contract is terminable at the will of a party, Biogen seeks to distinguish the current caselaw. For example, Biogen claims that *PG&E*, where the Court literally said "*interference with an at-will contract is actionable interference with the contractual relationship,*" supports Biogen's bid to change the law. (*PG&E* 50 Cal.3d at 1127). Biogen cites to a section of the opinion urging "caution" lest the courts protect contracts at the expense of a freely competitive economy. (Ans. Br. at 42). But the full context of that passage

reveals something different altogether. The *PG&E* court, citing a law review article, noted that some had criticized the tort of inducing a breach of contract as favoring contractual relations over economic freedom. (*PG&E* 50 Cal.3d at 1136).

The word "caution" does not appear as quoted by Biogen. But, the *PG&E* court does go on to explain that, in the context of these economic concerns, the Court "has been cautious in defining the interference torts, *to avoid promoting speculative claims*." (*Id.* at 1136-37 (emphasis added) declining to "expand these torts so they begin to threaten the right to free access to the courts" a concern not present here). Similarly, Biogen's attempts to distinguish *Quelimane* also fall short. *Quelimane* plainly states that "it is not necessary that the defendants' conduct be wrongful apart from the interference with contract itself." (*Quelimane*, 19 Cal.4th at 55). The fact that *Quelimane* doesn't specifically call out "at will" agreements does not support Biogen's quest to change the law here.

Instead, the law remains as set forth most recently in *Redfearn v. Trader Joe's Co.* (2018) 20 Cal.App.5th 989, 1003: "Inducing termination of an at-will contract is actionable interference with the contractual relationship … a defendant's wrongful conduct apart from interference with the contract itself is generally not an element of the tort of intentional interference with contract."

2. *Reeves* Is Properly Limited To At-Will Employment Cases

At the heart this appeal is *Reeves v. Hanlon* (2004) 33 Cal.4th 1140, a case applying the "independently wrongful act" element to the claim of intentional

interference with a special kind of contract – at-will employment. There, the Court found that applying the tort standard of interference with prospective business advantage, which requires the additional showing of an "independent wrongful act," in the context of soliciting at-will employees was "particularly appropriate." (*Id.* at 1145). The Court reasoned that adding the additional element would "promote the public policies supporting the right of at-will employees to pursue opportunities for economic benefit and the right of employers to compete for talented workers." (*Id.*).

No such public policies are at issue in this case, where Biogen stands accused of intentionally interfering with Ixchel's drug-development relationship with Forward in order to prevent competition and, as a result, prevent a new treatment for disease from reaching patients. Under the circumstances alleged, public policy strongly favors the protection of the Ixchel-Forward relationship from such interference by Biogen.

And nothing in *Reeves* mandated, or even supports, its broad application beyond employment to all contractual relationships. The public policy underlying *Reeves*, that of employee mobility, 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.) bears no relation to the public policy supporting the preservation of contractual business relationships against "officious intermeddlers." (*PG&E* 30 Cal.3d at 1128). As this Court has explicitly held, a contract terminable at will of the parties is no less protected from

third party interference than a contract with a more restrictive termination clause. Indeed, "*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)(emphasis added).

Acting as if the central rationale for *Reeves* – employee mobility – was merely an afterthought, Biogen urges the Court to expand *Reeves* to any so-called at-will contract by following the Restatement. (Ans. Br. at 33). But Biogen's desire to interfere with the Ixchel/Forward relationship is a poor foundation upon which to rest a new public policy promoting contractual interference, ignoring *stare decisis*, and reversing the established precedent of this Court. In California, interfering with even an at-will contractual relationship is a "a wrong in and of itself." (*Quelimane* 19 Cal.4th at 55). Outside the context of employment, the Restatement approach is not the law. (*See Redfearn* 20 Cal.App.5th at 1004-05 "The general rule that wrongful conduct apart from interference with the contract itself need not be pleaded or proved governs this case."); *Popescu v. Apple Inc.*, 1 Cal.App.5th 39, 62 (2016) "*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" outside of the narrow context of that case)).[2]

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[2] Biogen's attempted distinguishment of *Redfearn* and *Popescu* falls flat. (Ans. Br. at 43). Both cases stand for the proposition that *Reeves* is limited to its facts and the unique situation of at-will employment. Both cases found that

The Court should not act to change precedent absent a strong reason – Biogen has supplied none. Acting as if *PG&E* were not the law these last 30 years, Biogen lists a parade of horribles should the Court not act to change the law. (Ans. Br. at 35 "Suitors would hesitate before competing for suppliers, customers, or other business partners ... firms such as Forward would think twice before entering into long-term contracts"). And yet, Biogen presents no evidence that any such problems have befallen California companies in all these long years that the tort of intentional interference has remained unchanged. And, even if the Restatement approach were more economically efficient – and there is no evidence presented to show that it is – that alone is not sufficient reason for the Court to reverse *PG&E* and change the law – Biogen in essence asks this Court to become the Legislature. In truth, the conduct alleged here – intentionally inducing Forward to terminate its contractual relationship with Ixchel was highly detrimental to a California business: Ixchel, and to California. Only Biogen, which reduced competition through its interference, and Forward, which received a handsome payout, benefitted. These allegations cut strongly in favor of preserving the current law.

"independent wrongful act" is not an element of tortious interference with contract outside of the at-will employment context. The minor factual differences between the manner of interference in *Redfearn, Popescu* and the present case do not change the proposition for which these cases stand: even in the case of an "at-will" contract, a plaintiff need not allege an independently wrongful act in a tortious interference with contract case.

3. The Court Should Not Entertain Biogen's "New Business Partner" Question

Rather than address the question the Ninth Circuit specifically asked of this Court, Biogen formulates its own – adding for the first time the concept of a "new business partner:" "can inducing *a new business partner* to terminate an at-will contract amount to intentional interference, absent allegations that the defendant engaged in an independently wrongful act ('wrongful means')." (Ans. Br. 28 (emphasis added)). Biogen's re-write of the Ninth Circuits question merely serves to introduce confusion. What does a "new business partner" have to do with the question before the court? There is no basis in law or public policy to excuse tortious interference with contract for "new business partners." Why should a new business partner be privileged to induce the termination of a contractual relationship when others are not? And Biogen appears to argue that the act of paying a party to a contract to terminate makes the third party and the breaching party "new business partners." But how is that different from inducement generally? Most cases alleging intentional interference with contract will involve a third party inducing a party to the contract to terminate with the offer of something valuable – money or otherwise.

Moreover, there is no allegation in the Complaint that Biogen and Forward were "new business partners," but rather, the gravamen of the allegations is that Biogen paid Forward over $1 billion, at least in part, to cease development of a potentially competing drug (and thereby preserve Biogen's current multi-billion

dollar U.S. monopoly in DMF drugs), to terminate the competitive Forward-Ixchel and Forward-Dr. Cortopassi relationships and, as a byproduct, prevent a viable treatment for a horrible disease from reaching patients. Regardless, Biogen cannot explain why the Court should change the law to encourage "new business partners" to knowingly induce breaches of contract. The Court, the Ninth Circuit and the Parties would be better served by addressing the actual question before the Court: "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." This question has already been answered by *PG&E*, *Redfearn* and *Popescu* – and the answer is *no*.

III. 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: January 28, 2019

Respectfully submitted,

By: _____
Christopher D. Banys

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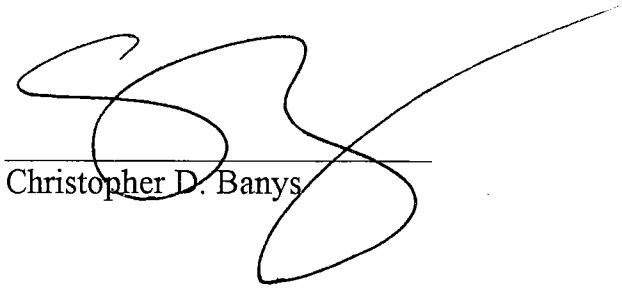
CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(c) of the California Rules of Court, the undersigned Counsel of Record hereby certifies that the enclosed Appellant's Reply 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 3,457 words. Counsel relies on the word count functionality of the Microsoft Word program used to prepare this brief.



Christopher D. Banys

PROOF OF SERVICE

I, the undersigned, declare:

I am a citizen of the United States and employed in San Luis Obispo County, California. I am over the age of eighteen years and not a party to the within entitled action. My business address is 567 Marsh Street, San Luis Obispo, California 93401. On January 28, 2020, I served a copy of the within document:

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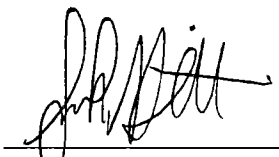
Executed this 28th day of January, 2020 at San Luis Obispo, California.



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