THE LAW OFFICE OF MANUEL DE LA CERRA

September 1, 2020

Via ECF

Clerk of the Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington D.C. 20439

Re: ***Whitewater West Industries, Ltd. v. Alleshouse et al, Case No. 2019-1852.***

To the Clerk of the Court:

Pursuant to FRAP 28(j), Appellants direct the Court's attention to new pertinent and significant authority that published after Appellants' brief was filed. On August 3, 2020, the California Supreme Court in *Ixchel Pharma, LLC v. Biogen, Inc.*, 9 Cal.5th 1130, 2020 WL 4432623(2020), confirmed that under Cal.Bus.&Prof.Code §16600:

> an employer cannot by contract restrain a former employee from engaging in his or her profession, trade, or business unless the agreement falls within one of the exceptions to the rule.

Ixchel, 2020 WL 4432623 at *15, *quoting Edwards v. Arthur Andersen LLP*, 44 Cal.4th 937, 946–947(2008). Any post-employment restriction, no matter how minimal, triggers §16600. *See id*. (reconfirming *Edwards*' rejection of 9th Circuit's "narrow restraint" exception to §16600).

Ixchel explains at length why post-employment restrictions must be *per se* invalid unless they fall into one of the expressly delineated exceptions—none of which apply here. *Ixchel,* 2020 WL 4432623 at *11-15. *Ixchel* further explains that there is no rule of reason when evaluating post-employment restrictions, and expressly confirmed the rejection of earlier

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case law that had applied "'reason and common sense' so as to uphold reasonable limited restrictions.'" *Id*. at *14 (citations omitted).

As argued in the Opening Brief at pgs. 30-38 and the Reply at pgs. 1-21, the Employee Assignment Provision (EAP) unquestionably restrains Mr. Alleshouse from freely engaging in his profession after employment because his inventions conceived post-employment must be assigned-back to his former employer, which is now his competitor. *Ixchel* confirms that such a post-employment restriction on employee mobility is a *per se* violation of §16600, and thus the EAP cannot be salvaged, regardless of "reason and common sense[.]" *Id*. at *14-15. But instead of following the law, here the District Court followed its "common sense" (Appx0032), finding the post-employment restriction was not "unfair" (Appx0027) because it "only requires [Mr. Alleshouse] to assign inventions resulting from his work at Wave Loch" (Appx0030), irrespective of whether the inventions are conceived of post-employment and without Wave Loch's trade secret.

Since the EAP is unenforceable, all of Appellee's claims fail and the entire judgment must be reversed.

Appellants certify under Rule 28(j) that the body of this letter does not exceed 350 words.

Respectfully Submitted,

/s/ Manuel de la Cerra

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