BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-9496
File: 02-372857 Reg: 14080298

SILVER OAK WINE CELLARS L-PSHIP,
dba Silver Oak Cellars
120 Foss Creek Circle, Healdsburg, CA 95448-4284,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: January 7, 2016
Sacramento, CA

ISSUED MARCH 22, 2016

Appearances: *Appellant*: Rebecca Stamey-White of the law firm Hinman & Carmichael, LLP as counsel for Silver Oak Wine Cellars L-PSHIP, doing business as Silver Oak Cellars.
Respondent: Dean Lueders as counsel for the Department of Alcoholic Beverage Control.

OPINION

This appeal is from a decision of the Department of Alcoholic Beverage Control[1] suspending[2] Silver Oak Wine Cellars' license because it "directly or indirectly . . . furnished, gave, or loaned" a $20,000 sponsorship fee to Bottle Rock Festivals LLC, two of whose principals were also allegedly engaged in "operating, owning, or maintaining"

[1]The decision of the Department, dated February 10, 2015, is set forth in the appendix.

[2]The suspension was for ten days, stayed subject to one year of discipline-free operation by the licensee.

an on-sale licensed premises. The Department found this arrangement a violation of Business and Professions Code section 25500, subdivision (a)(2) (hereinafter, section 25500(a)(2), a "tied-house" prohibition).

FACTS AND PROCEDURAL HISTORY

Appellant's type 02 winegrower license was issued on April 17, 2001. There is no prior record of Department discipline against the license. On April 14, 2014, the Department filed a single-count accusation against appellant. The pertinent language of the charge within the accusation reads:

> On or about February 19, 2013, respondent-licensee, by and through its officer(s), agent(s), or employee(s) did, directly or indirectly, furnish, give, or lend a thing of value, to wit: $20,000.00 sponsorship fee, to BR Festivals, LLC, of which Gabriel Meyers and Robert Vogt are mangers [*sic*] and/or members, and who are also engaged in the operating, owning, or maintaining of an on-sale premises, namely: Uptown Theatre, LLC, which holds a type 41 on-sale beer and wine eating place license, in violation of Business and Professions Code Section 25500(a)(2).

(Exh. 1.) At the August 27, 2014 administrative hearing, documentary evidence was received, and testimony was presented by Israel Hernandez, an agent for the Department; by Gabriel Meyers, a principal of Bottle Rock Festivals LLC; by Kathleen McLeod, appellant's senior director of marketing, hospitality, and retail; and by Timothy Duncan, appellant's executive vice president. The facts of this case inform and define the legal issues presented. Accordingly, we state the facts in some detail because regardless of whether a "narrow" or "broad" interpretation of the pertinent "tied-house" law is applied, the evidentiary supported facts make for the same outcome here.

A. <u>The Bottle Rock Napa Valley Festival and Bottle Rock Festivals LLC</u>

Bottle Rock Napa Valley 2013 (hereinafter, the "Festival") was a music and entertainment festival that took place in Napa Valley between May 9, 2013 and May 12, 2013. The Festival featured live music, live comedy, and food, wine, and beer, and was the brainchild of Gabriel Meyers and Robert Vogt. These two created Bottle Rock Festivals LLC (hereinafter, "BRF") in 2012 to promote and execute the Festival. Both Meyers and Vogt were managers of BRF, but Vogt resigned from his duties in November 2013.

Meyers and Vogt sought financing for the Festival through sponsorships. Meyers, the chief marketing individual for BRF, made pitches for funding to the City of Napa, various private enterprises, and equity investors. He also solicited members of the wine industry and sold them sponsorship deals that included ticket packages and hospitality tents for the wineries to promote their product to festival-goers. In addition to Meyers' efforts, BRF hired independent contractors to solicit alcoholic beverage suppliers and other sponsors for the Festival. Lastly, given the anticipated amount of attendees to the Festival, multiple venues throughout Napa were needed to accommodate the crowds, and BRF sought agreements with said venues for food, wine, and music.

The sponsorship monies from all participants in the Festival were placed into a General Operating Account (hereinafter, the "General Account"). The funds in the General Account were used to pay the artists participating in the event as well as BRF's other obligations as they came due. All of the monies BRF received for the Festival were therefore commingled and, according to Meyers, it is not possible to "trace" where

any sponsorship monies — including those paid by appellant (see below) — went with regard to BRF's liabilities.

B. Uptown Theatre LLC

The Uptown Theatre (hereinafter, "Uptown") is licensed by the Department with a retail on-sale beer and wine public eating place license (type 41). BRF rented Uptown as well as another venue, Copia, as venues for VIP "after parties" at the Festival. Meyers testified he believes there was a rental contract between BRF and Uptown, although he never saw it. BRF directed certain functions at Uptown both before and during the Festival. Specifically, BRF told Uptown which events would be held there and at which times. BRF also oversaw the entertainment to be featured at Uptown during the events. Again, although Meyers did not know the exact contractual obligation, he testified he believes Uptown was paid the full rental amount for the use of the facility during the Festival. By contrast, Meyers testified he believes that Copia, the other "after party" venue, was not fully compensated according to the terms of its rental agreement. Meyers believes Copia received 50 to 60 percent of the rent money owed to them, and there is no evidence that either Meyers or Vogt has or had any financial interest in Copia. When he was interviewed by Department agents, Vogt told them that alcoholic beverages were served at VIP "after parties" during the Festival, but no evidence was presented throughout the investigation or at the administrative hearing whether appellant's wines were sold or available at Uptown.

At the time of the Festival, Uptown Theatre, LLC was comprised of three members: George Altamura, Sr., who owned a 46.433% interest; the Margaret E. Herman Credit Trust, which owned a 32.133% interest; and Premier Real Estate

Investments LCC (hereinafter, "Premier"), which owned a 21.433% interest in Uptown. Premier has numerous members, including Meyers, who has a 0.078% ownership, and the William T. Vogt Special Needs Trust (hereinafter, the "Vogt Trust"), which owns an 80.575% interest in Premier. The Vogt Trust is managed by Robert Vogt for his son.

C. **Agreement between Appellant and BRF**

1. Timothy Duncan's interactions with BRF

Timothy Duncan's initial exposure to the Festival was through Vogt, who told Duncan that he (Vogt) was considering putting on a music festival in Napa. Duncan, representing appellant, negotiated the agreement with BRF regarding appellant's participation in the Festival. Duncan spoke to Vogt about appellant's participation in the Festival as a sponsor. Specifically, the two discussed "ticketing" issues for the winery. The details of appellant's sponsorship package were spelled out in the "Winery Sponsorship Contract" (hereinafter, the "Contract") template BRF used for wineries participating in the Festival. (Exh. 2.) When Vogt initially presented the Contract to Duncan, Duncan objected to the terms because they were not consistent with the terms he and Vogt previously discussed. Duncan's objections led to some "pen and ink" amendments to the terms. Duncan agreed to the terms of the Contract — including the "pen and ink" modifications — on behalf of appellant and executed it on February 20, 2013.[3] (*Ibid*.)

[3]We note that in his proposed decision, the administrative law judge (ALJ) initially erroneously found that the agreement was executed on April 20, 2013. (Findings of Fact, ¶ 5.) However, the ALJ subsequently rectified this mistake by acknowledging that Duncan executed the contract on February 20, 2013. (Findings of Fact, ¶ 12.)

The Contract expressly identified certain venues to be used during the Festival. More specifically, the Contract stated: "The Event shall consist of five days of music and comedy, from May 8, 2013, through May 12, 2013, in downtown Napa, California, at the Napa Valley Expo . . . , the Uptown Theatre . . . , and other venues to be determined." (Exh. 2, attach. 5, at p. 1, ¶ 1.1.) There were no amendments or modifications to the Contract concerning Uptown before or during the Festival.

When Duncan signed the Contract on behalf of appellant, he knew Vogt was a minority player in Uptown as Vogt had told him as much. Thus, Duncan was aware that Vogt was "part of the theatre" before signing the contract. Indeed, according to Duncan, Vogt's involvement with Uptown was how the two met. However, Duncan did not check Uptown's alcoholic beverage license status at any time. Moreover, six to eight weeks before the Festival began, Vogt told Duncan that Uptown would not be used as a venue for the Festival because of issues relating to George Altamura, another member of Premier.

On or about February 19, 2013, appellant paid $20,000 to BRF for its sponsorship package. The sponsorship fee entitled appellant to specified benefits:

- Appellant was one of only sixty (60) featured wineries at the Festival, and its logo was placed in all media advertising and promoting the Festival.
- Appellant had the prerogative to sell its wines exclusively from a VIP hospitality tent through a Department-licensed caterer, Fish Market LLC, who purchased appellant's wine and then sold it from appellant's tent. Notably, appellant would not have had the opportunity to sell its wine in this manner at the Festival had it not purchased the sponsorship package.

- Appellant had access to the names, emails, Facebook accounts, and Twitter accounts of Festival-goers, which could then be utilized for appellant's marketing efforts.
- Appellant received two hundred twenty-five (225) VIP 1-day passes for the Festival, which were given to its employees. The Contract initially entitled appellant to forty (40) VIP 4-day passes, but appellant modified the agreement to include the 1-day passes. Interestingly, there was no written modification of the Contract to reflect this change.
- Appellant received four (4) All-Access "Cellar Rat" passes, which entitled the holders to access all VIP areas and Reserve events.
- Appellant was permitted to sell wine by the case or bottle for a 10% commission, and BRF indicated it would purchase up to $10,000 of appellant's wine to sell at beverage stations throughout the Festival. There was no evidence presented that appellant exercised this particular entitlement.
- Appellant's sponsorship provided it an "[o]pportunity to participate as presenting sponsors of VIP late night after-parties." (Exh. 2.) None of appellant's representatives, however, attended these events. Also, appellant did not sponsor any late night after parties.

In all, Duncan estimated the value of the package it received from BRF, including the VIP passes and "Cellar Rat" passes, was over $43,000.

Duncan testified he wanted to sponsor the Festival in order to support Napa Valley. In Duncan's view, the sponsorship money was for the VIP ticket package and

the placement of appellant's tent. He did not know how the funds appellant paid to BRF would be dispersed or utilized, and he never intended the sponsorship money to specifically benefit a retail licensee. He did not, however, request an accounting from BRF, and he was not concerned with alcoholic beverage licensing because all appellant was doing was buying tickets and arranging to have a booth.

2. Kathleen McLeod's interactions with BRF

Kathleen McLeod learned about the Festival from Duncan. She was tasked with executing the event through appellant's sponsorship participation. According to McLeod, appellant agreed to sponsor the Festival for the following reasons: (1) it was a good marketing event to get appellant's wine product in front of a younger demographic — approximately 25,000 to 40,000 patrons according to the Contract; (2) the Festival might help support the Napa community; and (3) there was a charitable component for non-profit organizations that could possibly benefit from appellant's support. McLeod testified that it was not appellant's intent to sell more wine through their procurement of the $20,000 sponsorship.

McLeod met Meyers at the first informational meeting for the Festival. Meyers never advised McLeod of his relationship with Uptown, and McLeod never met Vogt. She did know, however, that Vogt was somehow affiliated with Uptown and thought perhaps he was a manager. McLeod was unaware of the ownership interests Meyers or Vogt had in Uptown. Finally, while McLeod was concerned with alcoholic beverage licensure at the Festival, she did not make any inquiries regarding Uptown's licensure.

D. <u>The Department's Investigation</u>

The Department investigated the Festival for potential tied-house violations. Agent Hernandez discovered the potential tied-house problem by conducting a Google search for Bottle Rock Festival. The search revealed that Vogt and Meyers were associated with BRF, and that they also had an ownership interest in Uptown. Hernandez also searched the Department's web-based License Query System — which is accessible to the public — as well as documents from the California Secretary of State and the Department's internal database for licensee information, ABIS.[4] Hernandez's research revealed that Vogt was the manager and attorney of record for Premier.

After the hearing, the ALJ issued his proposed decision determining that appellant violated section 25500, subdivision (a)(2). The Department adopted the proposed decision and imposed a penalty of ten days' suspension with all ten days stayed subject to one year of discipline-free operation.

Appellant filed a timely appeal contending: (1) the Department's decision misapplied section 25500(a)(2); and (2) the Department's discretion to apply section 25500(a)(2) is circumscribed by the First Amendment.

DISCUSSION

I

Appellant contends the Department abused its discretion by misconstruing and misapplying section 25500(a)(2). More specifically, appellant argues that case law interpreting the statute does not support the Department's interpretation. (App.Br. at

[4]"ABIS" is an acronym for the system used by the Department. The ABIS system is not available for use by the public.

pp. 5-7.) Appellant refers to Department's approach as a "strict liability" construction of the statute, which it claims "improperly and unfairly burdens Appellant and the industry as a whole by requiring it vet the ownership of every party, vendor, promoter and third party with which it does business." (*Id*. at pp. 9-10.) The Department counters that the "tied-house" statute at issue is entitled to a broad or liberal interpretation to effectuate its principal purpose. We do not find this argument especially helpful in deciding this case because, as mentioned earlier, whether a "liberal" or more "narrow" and "strict" construction of the pertinent code section is employed, the result here is the same.

The scope of the Appeals Board's review is limited by the California Constitution, statute, and case law. In reviewing the Department's decision, the Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the factual findings and legal conclusions. The Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing. (Cal. Const., art. XX, §§ 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].) As one court explains:

> If the Department's administrative action declares or applies legal rules, or sets forth conclusions of law which are drawn from adjudicated or undisputed facts, it is subject to review only for insufficiency of the evidence, excess of jurisdiction, errors of law, or abuse of discretion. [T]he discretion exercised by the Department is not absolute but must be

> exercised in accordance with the law, and the provision that it may revoke [or deny] a license "for good cause" necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare or morals.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Deleuze*) (2002) 100 Cal.App.4th 1066, 1072 [123 Cal.Rptr.2d 278], citations and internal quotation marks omitted.) This same standard applies to review of the Department's decision to discipline a license. (*Ibid*.)

When it comes to this Board's review of the evidence supporting the factual findings of the decision below, we must adhere to the "substantial evidence" standard:

> There are two aspects to a review of the legal sufficiency of the evidence. First, one must resolve all explicit conflicts in the evidence in favor of the respondent and presume in favor of the judgment all *reasonable* inferences.[fn] [Citation.] Second, one must determine whether the evidence thus marshaled is substantial. While it is commonly stated that [an appellate court's] "power" begins and ends with a determination that there is substantial evidence [citations],[fn] this does not mean [it] must blindly seize any evidence in support of the respondent in order to affirm the judgment. The Court of Appeal "was not created . . . merely to echo the determinations of the trial court. A decision supported by a mere scintilla of evidence need not be affirmed on review." (*Bowman v. Bd. of Pension Comrs.* (1984) 155 Cal.App.3d 937, 944 [202 Cal.Rptr. 505].) "[I]f the word 'substantial' [is to mean] anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It must be reasonable . . . , credible, and of solid value . . . ." (*Estate of Teed* (1952) 112 Cal.App.2d 638, 644 [247 P.2d 54].) The ultimate determination is whether a *reasonable* trier of fact could have found for the respondent based on the *whole* record. [Citation.] While substantial evidence may consist of inferences, such inferences must be "a product of logic and reason" and "must rest on the evidence" [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding [Citations].

(*Kuhn v. Dept. of Gen. Services* (1994) 22 Cal.App.4th 1627, 1632-1633 [29 Cal.Rptr.2d 191], emphasis in original.)

Here, appellant challenges what it calls the Department's "strict liability" interpretation of subdivision section 25500(a)(2), which provides, in pertinent part:

> (a) No . . . winegrower . . . shall:
>
> [¶ . . . ¶]
>
> (2) Furnish, give, or lend any money or other thing of value, directly or indirectly, to, or guarantee the repayment of any loan or the fulfillment of any financial obligation of, any person engaged in operating, owning, or maintaining any on-sale premises where alcoholic beverages are sold for consumption on the premises.

As in any case involving statutory interpretation,

> our fundamental task is to determine the Legislature's intent so as to effectuate the law's *purpose*. (*People v. Lewis* (2008) 43 Cal.4th 415, 491 [75 Cal.Rptr.3d 588, 181 P.3d 947].) "We begin with the text of the statute as the best indicator of legislative intent" (*Tonya M. v. Superior Court* (2007) 42 Cal.4th 836, 844 [69 Cal.Rptr.3d 96, 172 P.3d 402), but we may reject a literal construction that is contrary to the legislative intent apparent in the statute or that would lead to absurd results (*Ornales v. Randolph* (1993) 4 Cal.4th 1095, 1105 [17 Cal.Rptr.2d 594, 847 P.2d 560]).

(*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 27 [109 Cal.Rptr.3d 329], emphasis added.) After all, "if a statute is to make sense, it must be read in the light of some assumed *purpose*. A statute merely declaring a rule, with no purpose or objective, is nonsense." (Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed* (1950) 3 Vand.L.Rev. 395, 400, emphasis added, reprinted in Singer, *Statutes and Statutory Construction* (6th ed. 2000) § 48A:08, p. 639.) It is through this lens that the Board must scrutinize the Department's interpretation.

The accusation in this matter tracks the purpose of the tied-house statutes in alleging that appellant:

> On or about February 19, 2013 . . . did, directly or indirectly, furnish, give, or lend a thing of value, to wit: $20,000.000 sponsorship fee, to BR Festivals, LLC, of which Gabriel Meyers and Robert Vogt are mangers [*sic*] and/or members, and who are also engaged in the operating, owning, or maintaining of an on-sale premises, namely: Uptown Theatre, LLC, which holds a type 41 on-sale beer and wine eating place license, in violation of Business and Professions Code Section 25500(a)(2).

(Exh. 1.)

Further, the Department argues that Meyers and Vogt

> were engaged in the ownership of the Uptown Theater because Vogt managed an LLC named Premier Real Estate Investments and Meyers owned a portion of said LLC. Premier Real Estate Investments LLC owned nearly 25% of the Uptown Theater. (Exhibit 2, Attachment 1, 2, & 3: RT 88: 5-10.) Thus, both Vogt and Meyers were engaged [involved in the activity] of owning Uptown Theater.

(Dept.Br. at p. 5.) The Board is not persuaded that the evidence supports these allegations.

Neither Meyers nor Vogt directly owned any interest in Uptown. Rather, Uptown's ownership was divided among George Altamura, Sr., the Margaret E. Herman Credit Trust, and Premier.[5] (Exh. 2, attach. 3; Findings of Fact, ¶ 11.) Vogt was the manager of Premier (Exh. 2; RT at p. 16), and also the manager of the Vogt Trust, which owned a majority interest (80.575%) in Premier. (Findings of Fact, ¶ 11.) Meyers, on the other hand, has a comparatively small ownership interest in Premier (0.078%). (Exh. 2, attach. 4, p. 2.) Premier is a legally distinct entity from its

[5]Notably, Premier is the minority owner of Uptown, owning only a 21.433% share. (Finding of Fact, ¶ 11.)

members.[6] Therefore, it does not necessarily follow that property owned by Premier — in other words, Uptown — was property owned by its members.[7]

Meyers testified as follows regarding his participation in Uptown:

> [MR. HINMAN, COUNSEL FOR APPELLANT]: Now, I'd like to draw your attention to the Uptown Theater. You're aware of the substance of the accusation is, in fact, your and Mr. Vogt's interest in the Uptown Theater, correct?
>
> [MR. MEYERS:] I'm aware of the — I'm aware of the issue that we are involved in the Uptown Theater. Mr. Vogt's not an owner of the Uptown Theater, and my ownership is inconsequential.
>
> Q. Did you operate the Uptown Theater in 2013 during the time of this particular event?
>
> A. No.
>
> Q. Did you maintain the Uptown Theater in 2013 during the time of this particular event?
>
> A. No.
>
> Q. Did you receive any income from the Uptown Theater in 2013?
>
> A. No, I did not.
>
> Q. Did you receive any revenue from the Uptown Theater in 2013?
>
> A. No, I did not.

(RT at pp. 73-74.)

[6]"A limited liability company is an entity distinct from its members." (Corp. Code, § 17701.04(a).)

[7]"'A membership interest and an economic interest in a limited liability company constitute personal property of the member or assignee. *A member or assignee has no interest in specific limited liability company property.*'" (*Paclink Communications Internat. v. Superior Ct.* (2001) 90 Cal.App.4th 958, 964, fn. 4 [109 Cal.Rptr.2d 436], emphasis in original, quoting former Corp. Code, § 17300 [repealed Jan. 1, 2014, by the terms of former Corp. Code, § 17657].)

The Department seeks to overcome this lacuna in the factual nexus between Vogt, Meyers, and their respective ownership interests in Uptown by arguing that (1) the plain language of section 25500(a)(2) prohibits furnishing, giving, or lending money to "any person **engaged**[fn.] **in** . . . **owning** . . . any on-sale premises" (Dept.Br. at p. 4, emphasis in original, quoting Bus. & Prof. Code, § 25500, subd. (a)(2)); (2) that "engaged in" is defined as "involved in activity"; and (3) that the Legislature's deliberate choice of the words "engaged in [i.e., involved in activity of]. . . owning" — as opposed to "ownership" or "maintaining an ownership" — suggests it intended a more expansive, all-encompassing prohibition on such activities with regard to ownership of an on-sale premises. This interpretation, the Department claims, is consistent with the purpose of section 25500(a)(2). (*Id.* at pp. 4-6.)

The Department's interpretation slights both the spirit and letter of section 25500(a)(2). First, the language of the statute evinces that the Legislature was well aware of how to draft a qualifying provision susceptible to expansive interpretation, and chose not to apply such a provision to the retail-licensee's ownership interests. For instance, the statute prohibits a winegrower from "furnish[ing], giv[ing], or lend[ing] any money or other thing of value, *directly or indirectly*, to . . . any person engaged in . . . owning . . . any on-sale premises." (Bus. & Prof. Code, § 25500(a)(2), emphasis added.) Under the "last antecedent rule," "qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote." (*White v. County of Sacramento* (1982) 31 Cal.3d 676, 680 [183 Cal.Rptr. 520].) Thus the clause "directly or indirectly" modifies the language immediately preceding it regarding the manner in

which money or a thing of value is conferred to the on-sale premises, not the manner in which the recipient of said money or thing of value holds an interest in an on-sale premises. Vogt and Meyers' indirect *ownership* of Uptown[8] is insufficient to establish liability on the part of appellant under the language of section 25500(a)(2).

Likewise, the Department's argument about the Legislature's use of the phrase "engaged in . . . owning" is unconvincing. There is no evidence to support the Department's assertion that inclusion of the words "engaged in" before "owning" establishes a legislative intent to expand the statute's reach with regard to the ownership of the on-sale premises. Indeed, the very definition of "engaged" cited in the Department's brief suggests the opposite is true. More specifically, the Department cites the Merriam Webster Online Dictionary which defines "engaged" as "involved in activity." (Dept.Br. at p. 4, fn. 2.) The website referenced by the Department reveals that the definition it selected is one of six variations included as part of the "Full Definition." (See Merriam-Webster.com, <http://www.merriam-webster.com/dictionary /engaged> [as of March 9, 2016].) Certain of the various definitions listed on the website, including the one cited by the Department, include synonyms for the term "engaged" as used in the context specific to the respective definition. The Department's definition — "involved in activity" — includes two synonyms: "occupied" and "busy." (*Ibid*.) Also, the second "Simple Definition" for "engaged" is listed on the same page is "busy with some activity." (*Ibid*.)

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[8]That is to say Meyers' ownership of 0.078% interest in Premier, which owns a 21.433% interest in Uptown, and Vogt's management of Premier and management of the Vogt Trust, which owns an interest in Premier. Notably, nothing in the record establishes that Vogt himself actually owns an interest in Uptown.

Taking each of these terms and definitions at face value as the Department does in its brief and as the ALJ did in his proposed decision, the Legislature's inclusion of the word "engaged" prior to "ownership" evinces an intent to *narrow* the type of ownership interests in on-sale premises subject to the statute to those where the alleged owner is "busy with" or "occupied" by his or her ownership. This interpretation would exclude instances where, as here, one alleged "owner" — Vogt — does not own any direct interest in the on-sale premises, while the other alleged "owner" — Meyers — owns a less-than-one percent interest in a limited liability company (Premier), which happens to own a 21.433% interest in an on-sale premises, but does not maintain or operate the on-sale premises in any fashion during the relevant time period. (See RT at pp. 73-74.) The type of passive, indirect ownership of a retail-licensed establishment in this case does not appear to be the type of ownership section 25500 contemplates.

The above-referenced interpretation of section 25500(a)(2) is consistent with the established legislative intent and purpose of the statute, which have been discussed extensively in case law. As one court informs us of the "purposes" animating the tied-house law:[9]

> Tied-house statutes are so named because they were enacted to prevent the return of saloons operated by liquor manufacturers, a practice that had been common in the early 1900's. (*Actmedia, Inc. v. Stroh* (9th Cir. 1986) 830 F.2d 957, 959 (*Actmedia*).) The California Supreme Court has explained that the Legislature enacted the tied-house provisions after the repeal of the 18th Amendment to prevent two particular dangers that had been common before Prohibition. (*California Beer Wholesalers Assn., Inc. v. Alcoholic Bev. etc. Appeals Bd.* (1971) 5 Cal.3d 402, 407 [96

[9]We note that numerous exceptions to the "tied-house" prohibitions in section 25500 have been enacted over the years — so many that some may say the exceptions "swallow the rule" or weaken its intended purpose. (See, e.g., Bus. & Prof. Code, §§ 25500.1 through 25503.58 et. seq.)

> Cal.Rptr. 297, 487 P.2d 745] (*California Beer Wholesalers*).) First, the Legislature aimed to prevent "the ability and potentiality of large firms to dominate local markets through vertical and horizontal integration." (*Ibid.*) Second, the Legislature wanted to curb "the excessive sales of alcoholic beverages produced by the overly aggressive marketing techniques of larger alcoholic beverage concerns." (*Ibid.*) The Legislature established a triple-tiered distribution and licensing scheme for alcoholic beverages. (*Ibid.*) Manufacturers were to be separated from wholesalers, and wholesalers were to be separated from retailers. (*Ibid.*) "In short, business endeavors engaged in the production, handling, and final sale of alcoholic beverages were to be kept 'distinct and apart.'" (*Ibid.*, quoting 25 Ops.Cal.Atty.Gen. 288, 289 (1955).) The Legislature intended that firms operating at one level of distribution "were to remain free from involvement in, or influence over, any other level." (*California Beer Wholesalers*, *supra*, 5 Cal.3d at p. 408.)
>
> The drafters of the tied-house provisions believed that if manufacturers and wholesalers were allowed to gain influence through economic means over retail establishments, they would then use that influence to obtain preferential treatment for their products and either the exclusion of or less favorable treatment for competing brands. (*Actmedia*, *supra*, 830 F.2d at p. 966.) Legislators were concerned that such practices would lead to an increase in alcohol consumption as retailers adopted aggressive marketing techniques to encourage customers to purchase the alcoholic beverages they stocked. (*Ibid.*; *California Beer Wholesalers*, *supra*, 5 Cal.3d at p. 407, fn. 7.)

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Schieffelin*) (2005) 128 Cal.App.4th 1195, 1207 [27 Cal.Rptr.3d 766].) In addition, the California Supreme Court has noted, interpreting Business and Professions Code section 25502, a companion statute to section 25500 pertaining to off-sale retail licensee:

> [S]ection 25502 prohibits any *substantial* integration between commercial interests holding wholesale beer and wine or distilled spirits licenses and interests *holding* general off-sale retail liquor licenses. This legislative bar to a consolidated operation was not conditioned upon the means by which such a consolidation might be accomplished. Rather, it was to be operative regardless of whether the impetus for the integration came from the wholesaler's or the retailer's side; it was the end result, rather than the method of its attainment, that the Legislature exorcised.

(*California Beer Wholesalers*, *supra*, at p. 409, emphasis added.)

What risk of *substantial* integration between a licensed winegrower and an on-sale premises licensee exists where the only connection between them is a transaction involving a third party limited liability company (BRF) owned by two third party individuals — one holding no direct interest in the on-sale premises, and the other holding only a 0.078% ownership interest in a limited liability company that owns a 21.433% stake in said premises? What risk is there that such a business relationship will lead the on-sale premises to adopt aggressive marketing campaigns to sell the winegrower's product, particularly when there is no evidence presented that the winegrower's product was even sold at the licensed premises? (Findings of Fact, ¶ 9.) How are the answers to these questions shaped by the fact that the winegrower is informed the retail licensee will not be used — and, thus, will not reap the benefit of anything of value — in the agreement at issue? (Findings of Fact, ¶ 12.) The obvious answers to these rhetorical questions suggest that the Department's interpretation and application of section 25500(a)(2) in this case is not conducive to the statute's purpose.

In addition, the Board's interpretation avoids the absurd result about which appellant warns us – if the Department were able to enforce section 25500(a)(2) in this manner, a winegrower who enters into an otherwise legal and valid contract with a promoter for an event such as the Festival would be subject to liability under the statute if one of the promoter's principals had invested in a mutual fund that holds stock in an large chain on-sale retail licensee. It is difficult to imagine the diligence required by the winegrower to discover the tied-house issue in this hypothetical; nevertheless, according to the Department's reasoning, said winegrower's license would be subject to discipline. Now, the Department may well respond to this argument by claiming that, in

this hypothetical situation, the "owner" of the licensed establishment has no control over the establishment whatsoever. This argument would carry water except there is no evidence in the record apart from BRF's direction of the activities at the Festival as to how Uptown was run and who was actually running it. This cannot be the result intended by the Legislature when it enacted section 25500(a)(2).

Nonetheless, the ALJ found the Department's contrary arguments on this point particularly persuasive:

> As the Department correctly notes, the broad language of the statute prevents the utilization of multiple business entities and structures to circumvent the tied-house provisions. PREI LLC is a good example. Robert Vogt manages PREI LLC, a large portion of which is owned by his son's special needs trust. Under the Respondent's theory, Robert Vogt is not engaged in operating, owning, or maintaining Uptown Theatre, despite his management responsibilities of PREI LLC, which owns 21.433% of Uptown Theatre. The Department's fear of subverting the tied-house laws through an LLC that has a significant ownership in a retail license, but is managed by a person not named as an owner of the LLC, is tangible. Robert Vogt is responsible for appropriately managing PREI LLC through his fiduciary duties to that entity, which in turn contributes to the operation, ownership, and/or management of Uptown Theatre.
>
> The Department's misgivings about creating subterfuge with an LLC owned by many entities, but "managed" by a person who has no ownership interest but complete control of the LLC, is punctuated by what actually occurred in this case. The Uptown Theatre was being operated, owned, and maintained during the entire course of Bottle Rock Festival 2013 as a venue for VIP "after parties." Alcoholic beverages were being served in the premises.
>
> BRF LLC paid Uptown Theatre rental fees for the use of the premises. It is not coincidental that Uptown Theatre was paid in full for the service it provided, while another venue (Copia) of which Vogt and Meyers had no pecuniary interest was not. Robert Vogt and Gabriel Meyers had a material interest in ensuring the Uptown Theatre was fully compensated because PREI LLC, of which they were engaged in operating, owning, and maintaining, had a 21.433% ownership stake in Uptown Theatre LLC.

> Respondent contends Vogt and Meyer's [*sic*] connection to the Uptown Theatre was not equivalent to "owning, operating or maintaining" the theatre. This argument rests on Meyer's [*sic*] testimony that he did [*sic*] operate or maintain the Uptown Theatre during BRNV 2013. This broad assertion overlooks the following facts; BRF LLC was directing functions at the Uptown Theatre during the Festival. BRF LLC told Uptown Theatre what events would be held at the theatre, as well as the times for those events. They were involved in overseeing the placement of entertainment in the Uptown Theatre.
>
> The statutory language, " . . . engaged in operating, owning or maintaining an on-sale premises . . " should be viewed in a broad context to effectuate the meaning of the tied-house statutes. In this legal construct, Vogt and Meyers were engaged in the operation, ownership, and/or maintenance of the Uptown Theatre, a Department retail licensee, through PREI LLC. Vogt and Meyers were also members of BRF LLC, which paid Uptown Theatre rent for the use of the theatre during the Festival.

(Determination of Issues, ¶ 9.)

The are a number of aspects of the ALJ's determinations we find troubling. First, evidence in support of the contention as to Vogt's ownership of Uptown via the management of Premier — which, notably, only owns a minority, 21.433% interest in Uptown — is lacking. Beyond Meyers' testimony that he played no role in the operating or maintaining of Uptown in 2013 (see RT at pp. 73-74), there was no evidence presented *in this record*[10] as to how Uptown was run, which owners had a say in the day-to-day operations and to what extent, and who was responsible for managing the premises. Moreover, the ALJ's concern — shared by the Department — about Vogt

[10]We include this here because, during oral argument, it became abundantly clear that, because there were so many wineries that had accusations filed against them by the Department as a result of the Festival, both parties to this case had difficulty recalling which evidence concerning Vogt, Meyers, and BRF — the persons/entities responsible for the conduct at the heart of each accusation — appeared in which appellate record. As an appellate review board, we are limited to considering only the record before us for each case.

and Meyers' creation of a "subterfuge" of corporate identities in order to form an illegal, tied-house relationship between appellant and Uptown ignores a critical fact — there was no evidence presented to show that appellant's wines were sold at Uptown. Vogt and Meyers' intentions are inconsequential in this instance because it is appellant that is being charged with the wrongful conduct, not them.

Next, the ALJ's concern about the rental fees paid to Copia and Uptown is unsupported by evidence. Meyers' testimony regarding the after party venues proceeded as follows on cross-examination:

> [MR. LUEDERS:] And do you recall whether or not Copia was paid?
>
> [MR. MEYERS:] *I don't know* if they received their entire payment. They were *probably* one of the creditors that received half or 60 percent, but they were not able to be fully compensated. *I don't know* what the remaining balance is on their particular amount. But they were paid something. There was a contract to pay them.
>
> Q. But you also testified in a different proceeding yesterday, correct?
>
> A. I did.
>
> Q. And from that proceeding, Uptown Theater, though, was paid in full for the rental for the BottleRock week?
>
> A. I *believe* it was, but I don't have those documents in front of me. And, frankly, I haven't looked at them for a while, *so it wouldn't surprise me if they were owed something else*.

(RT at p. 80, emphasis added.) How the ALJ managed to surmise, based on Meyers' expressly uncertain testimony — which, notably, also calls into doubt Uptown's own compensation — that Uptown was fully compensated for its participation in the Festival while Copia was not, is a complete mystery. What is clear is that a finding that Uptown was fully compensated because of Vogt and Meyers' interest in Premier — which is

subsequently used as a basis for a determination that appellant violated section 25500(a)(2) — is not supported by any evidence in the record.

Finally, we are unconvinced that BRF's direction of the events and times for the events to be held at Uptown throughout the Festival constitutes BRF "owning," "operating," or "maintaining" Uptown. Based on the paltry record we have before us, it appears that said control is nothing more than what would be typically expected in an agreement where a promotional entity — BRF — contracts with a venue — Uptown — to host an event. If anything, these facts establish that BRF was owning, operating, or maintaining the Festival, not Uptown. All in all, the Department's determinations about what truly transpired in this instance are based on inferences grounded in speculation, not fact. As such, these determinations are not supported by substantial evidence. (See *Kuhn*, *supra*, at pp. 1632-1633.)

In its decision, the Department attempts to divert attention away from the question of Vogt and Meyers' involvement in Uptown by reclassifying the issue in the case, claiming: "[T]he issue becomes whether Silver Oak's sponsorship payments to Bottle Rock Festival LLC for the Bottle Rock Festival 2013 events provided an *indirect* benefit to a retail licensee, Uptown Theater." (Determination of Issues, ¶ 8, emphasis in original.) There are two things about this modified issue statement that we find curious. First, the language of the one and only count in the accusation necessarily implicates Vogt and Meyers' ownership interest in Uptown. Therefore, as appellant argues, in order to prove the violation charged, the burden was on the Department to establish that the furnishing of a thing of value to Vogt and/or Meyers was, in essence, the furnishing of the same to Uptown. Suffice it to say, given the utter lack of evidence

that either Vogt or Meyers had the type of direct ownership interest in Uptown that the statute contemplates, the record does not support this rationale. Thus, the Department's burden was not met and its attempt to perform an end-run around the language of the accusation fails.

Second, even if we were to concur with the Department's issue statement, the applicable law does not support its ultimate determination. In *Schieffelin*, *supra*, the court of appeal applied section 25500(a)(2) to a case involving Chevys restaurant chain — a retail licensee — and Schieffelin, a wholesale distributor of Grand Marnier products. (*Id*. at p. 1199.) Chevys had contracted with a company called "A Change of Pace" (ACOP) to organize numerous non-educational athletic events for which Chevys would be the title sponsor over several years. (*Id.* at p. 1200.) For this service, Chevys agreed to pay ACOP $10,000 per event. (*Ibid.*) Although ACOP was paid to manage and promote the events, ACOP and Chevys "worked closely" to promote the races, and Chevys was active in the promotion and planning of races, and even "approved the design of the entry forms, flyers, table tents, posters, and T-shirts promoting the events[,]" which were held at or near Chevys locations. (*Id*. at p. 1201.) Also, though Chevys was aware that it could not solicit alcoholic beverage suppliers, it provided ACOP with a list of potential sponsors that included alcoholic beverage suppliers, with Schieffelin, a supplier of Grand Marnier products, being one of them. (*Ibid*.)

In soliciting Schieffelin's support, "ACOP emphasized that the events would help create brand awareness, promote goodwill within the community, create product loyalty, and increase sales." (*Ibid*.) ACOP summarized its pitch: "In short, a Chevys Fresh

Mex Run Series sponsorship offers a platform to sell more Grand Marnier." (*Ibid.*) Schieffelin took advantage of the opportunity and agreed to pay ACOP $6,000 per event to become a sponsor. (*Id.* at p. 1202.) In return, advertisements for the events — including those on licensed premises, as well as at other locations, such as health clubs — would include the Grand Marnier logo. (*Ibid.*)

The Department filed an accusation contending that the arrangement violated section 25500(a)(2), among other provisions. (*Id.* at p. 1202.) Notably, unlike the accusation in this case, the accusation at issue in *Schieffelin* alleged that "Schieffelin, through its sponsorship fees, 'did, directly or indirectly, furnish, give or lend money or other thing of value . . . to Chevys, Inc.'" (*Ibid.*) The Department ultimately found that Schieffelin violated section 25500(a)(2) via its sponsorship. (*Id*. at p. 1203.) On appeal, this Board found the athletic events fell under a limited exception provided by rule 106(i)(2). (*Id.* at p. 1204.) The Department appealed. (*Ibid.*) Schieffelin urged the court to sustain the Board's holding. (*Ibid.*)

The court reviewed the Department's decision and held that Schieffelin's sponsorship, among other things, violated section 25500(a)(2). (*Ibid.*) The court declined to interpret the tied-house provisions "in a vacuum," and instead considered "the policies and purposes of the Alcoholic Beverage Control Act, recognizing that 'the purpose sought to be achieved and evils to be eliminated have an important place in ascertaining legislative intent.'" (*Id.* at p. 1206, quoting *Reimel v. Alcoholic Bev. Control Appeals Bd.* (1968) 263 Cal.App.2d 706, 711 [69 Cal.Rptr. 744].) The court observed that the Alcoholic Beverage Control Act is to intended to protect "the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of

unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages." (Bus. & Prof. Code, § 23001.)

After taking note of the above-cited purpose and intent behind section 25500(a)(2), the court found:

> Schieffelin indirectly furnished Chevys with a thing of value by providing a marketing-cost subsidy to Chevys for the Chevys Fresh Mex Runs. The evidence before the Department showed that Chevys had agreed to pay ACOP $10,000 per event to be the title sponsor of the Chevys Fresh Mex Runs. For the year 1999, this would have required Chevys to pay ACOP $70,000 for the seven Chevys events held in California that year.[fn.] Despite this agreement, the evidence showed that Chevys paid ACOP only $12,000 in sponsorship fees for that year and that Chevys covered roughly $21,000 in expenses for ACOP. Although Chevys did not make its promised sponsorship payments, the events went forward with Chevys as the title sponsor.

(*Id*. at p. 1210.)

The court then surveyed additional authority interpreting section 25500(a)(2) and reasoned:

> Schieffelin has contributed something of value to Chevys by participating in paying for the Chevys Fresh Mex Runs. Schieffelin's sponsorship payments provided Chevys with the benefit of ACOP's marketing services and the promotional value of the races for which Chevys otherwise would have had to pay. The Department's decision is consistent with the legislative purpose informing the tied-house provisions. "An ongoing relationship between a [supplier] and a retailer such as that between [Schieffelin] and [Chevys] could easily lead to the kind of influence of a supplier over a retailer the statutes were intended to prevent," by causing Chevys to favor the products of suppliers who choose to sponsor Chevys' promotional events. (*Deleuze*, *supra*, 100 Cal.App.4th at p. 1075.) There is substantial evidence for the Department to conclude that the purpose of Schieffelin's sponsorship was to increase the likelihood that consumers would purchase more Grant Marnier from Chevys. Indeed, Schieffelin's national account sales director testified that Schieffelin hoped that the point of sale promotional materials for which it paid would induce

> consumers to order more Grand Marnier from Chevys, as well as from other retailers.
>
> Schieffelin complains that the Department is seeking to hold it responsible for transactions between ACOP and Chevys to which Schieffelin was not a party and of which Schieffelin had no knowledge. The Department did not hold Schieffelin responsible for the acts of ACOP and Chevys. The accusation charged, and the Department proved, that Schieffelin indirectly furnished something of value to Chevys by subsidizing the marketing costs of the Chevys Fresh Mex Runs. That Schieffelin made its payments through an intermediary is not dispositive. It is "the end result, rather than the method of its attainment, that the Legislature exorcised." *(California Beer Wholesalers*, *supra*, 5 Cal.3d at p. 409.)
>
> The Department found that ACOP was "no more than an alter ego of Chevys for the purpose of the 1998 and 1999 Chevys Fresh Mex Runs" and that "ACOP was acting on Chevys' behalf in soliciting [Schieffelin], as a supplier of Grand Marnier[.]" This finding is supported by evidence of a lack of financial accounting between ACOP and Chevys, Chevys' direct involvement in the planning and promotion of the races, and Miramontes' dual role as vice-president of ACOP and independent contractor handling Chevys' promotions. Further, the Department found that Schieffelin's payments to ACOP were for the benefit of Chevys and that they helped promote and stage race events that "were significantly more associated with Chevys than they were with ACOP." Schieffelin cannot have been unaware that its payments would help underwrite the costs of events designed to promote Chevys, the title sponsor of the races.

(*Id*. at pp. 1211-1212.)

It is the above, extensively fact-specific reasoning from *Schieffelin* that the ALJ extrapolated to support his finding that the appellant here violated section 25500(a)(2) by indirectly providing a thing of benefit to Uptown. However, comparison of the pertinent facts of the two cases shows that the reasoning from *Schieffelin* is inapposite and misapplied to this case. For instance, the accusation in *Schieffelin* charged the supplier, Schieffelin, with providing a benefit directly to Chevys, the retail licensee. (*Id*. at p. 1202.) There was therefore no need for it to traverse a factual lacuna between

the entity charged with giving the money and the one in receipt of it. Here, as discussed above, the accusation establishes that the involvement, or lack thereof, of Vogt and Meyers in Uptown is critical for a determination of whether the violation actually charged was proved.

Next, with regard to the benefit Uptown purportedly received, the ALJ found:

> The payment of rent monies from sponsor's [*sic*] contributions provided a benefit to Uptown Theatre; a Department retail licensee. Without the *indirect* subsidies paid by the sponsors to BRF LLC the Festival may not have taken place, which would have precluded Uptown Theatre from receiving $60,000. The monetary payments from Silver Oak to BRF LLC were, in part, for the benefit of Uptown Theatre. Thus, such payments come within the statutory language that prohibits Silver Oak from making *indirect* payments to an on-sale retail license.

(Determination of Issues, ¶ 8, emphasis in original.) We disagree.

The ALJ's decision ignores that, in *Schieffelin*, there was no question the monies contributed would go to Chevys as the title sponsor of the race. (See *Schieffelin*, *supra*, at p. 1209.) The principal — and, indeed, the *only* — purpose of the funds solicited by ACOP was to obtain cosponsors of the races for the benefit of Chevys, the retail licensee. (See *ibid.*) Therefore, no tracing was required, and it did not take a huge leap in logic for the court to conclude that the money contributed by Schieffelin, and all of the other sponsors for that matter, found its way into Chevys' hands.

In this case, by contrast, the purpose of the sponsorship monies was to support the Festival, not Uptown. The funds paid by the Festival's sponsors, including appellant, were placed in a commingled account. (Findings of Fact, ¶ 9.) The sponsorship monies from the General Account were utilized to pay artists and various of BRF's obligations as they came due. (*Ibid*.) While BRF also paid the venue rental

fees out of the General Account, there is no way to trace which sponsor's dollars went to fulfill which of BRF's obligations. (*Ibid*.) Moreover, there were no accounting records from the Festival entered into evidence, so we know neither the Festival's overall budget[11] nor the amount each participant *other than appellant* paid. The only way for the ALJ to find that money must have changed hands from appellant and ultimately to Uptown is through inferences unsupported by any evidence in the record. Such inferences are legally insufficient to support a finding of fact to the detriment of a licensee. (*Kuhn*, *supra*, at pp. 1632-1633.) As the party bringing the accusation, the initial burden was on the Department to establish via a preponderance of the evidence that appellant paid money to Uptown. Once again, the Department failed to meet its burden, and we find the decision of the Department that appellant violated section 25500(a)(2) by indirectly paying money to Uptown to be unsupported by substantial evidence.

Finally, the ALJ was unpersuaded by appellant's contention that the potential for an improper, ongoing relationship between appellant and Uptown was minimal in this case as opposed to *Schieffelin*, *supra*. Specifically, the ALJ found:

> Silver Oak Winery argues it had no ongoing relationship with Uptown Theatre and its sponsorship payments had no effect on Uptown Theatre that could lead to the type of influence decried in *Schieffelin*. This contention ignores reality. By virtue of its $20,000 sponsorship payment, Silver Oak Winery was already placing itself in a favored position over non-participating wineries vis-à-vis the Uptown Theatre. The Winery notes it was not a customer of Uptown Theatre. However, its

[11]Appellant repeatedly asserts that the overall budget for the Festival was $14,000,000. (See, e.g., App.Br. at p. 6.) However, that figure does not appear anywhere within the record. Therefore, the Board is allowed to consider, as fact, neither that figure nor the calculations appellant extrapolates from it.

> willingness to pay a $20,000 sponsorship fee to BRF LLC, whose principals were also involved in the ownership of Uptown Theatre, most certainly could lead to the retailer favoring their product over non-contributors. This is a "valuable and tangible" benefit to Silver Oak Winery.
>
> In addition, the establishment of the likelihood of an "on-going" relationship through the payment of the sponsorship money can be gleaned from the Winery Sponsorship Contract. An express contractual provision afforded Silver Oak Winery elevated status for the subsequent Bottle Rock Festival; "Priority Sponsorship rights to Bottle Rock Napa Valley 2014." (State's Exhibit 2 — Attach. 5 — Exhibit A.)

(Determination of Issues, ¶ 10.)

We find the ALJ's reasoning unpersuasive. Again, the ALJ focuses on *what could have been* as opposed to *what was*, on supposition as opposed to evidence. There is no evidence in the record below that appellant's wines were sold at Uptown. Contrary to the *Schieffelin* case, there is no factual basis here for the contention that appellant entered the agreement to increase the likelihood that consumers would purchase more of its product from Uptown. (See *Schieffelin*, *supra*, at p. 1211). Moreover, testimony established that prior to the Festival, Vogt informed Duncan that Uptown was not going to be used as a venue for after parties, and yet Duncan went ahead with the agreement on behalf appellant. These facts support a finding that appellant's motivation was to participate in the Festival, not to push its product through Uptown. Therefore, for the ALJ to have determined that the facts somehow establish a motive to secure an ongoing relationship between appellant and Uptown is unsubstantiated by any facts in the record.

The Department responded to this position at oral argument by asserting that intent is not a required element of the offense under section 25500(a)(2). While the

word "intent' may not appear as an element on the face of the statute, the tied-house rules' judicially declared purposes[12] all suggest that the "intent" of the parties to the alleged illegal relationship is relevant to whether a tied-house violation occurred. Because the facts of this case establish that these concerns are absent here, even if there was a *literal* violation of the terms of section 25500(a)(2), the Board should not enforce them if doing so would not further the purposes of the statute itself. (See *Simpson Strong-Tie Co., Inc., supra*, at p. 27.)

Additionally, the ALJ's concern over the establishment of an ongoing relationship between appellant and Uptown vis-à-vis the Winery Sponsorship Contract ignores the facts in this case. The Agreement was between appellant and BRF, not appellant and Uptown. To the extent that it referred to Bottle Rock Napa Valley 2014, there is no evidence that Uptown would have been a venue for the 2014 festival. Also, as discussed above, because the statute does not portend to cover Vogt and Meyers' passive, indirect ownership in Uptown, there would be nothing improper about an ongoing relationship between appellant and BRF and/or Vogt and Meyers. Thus, the ALJ's concerns are unwarranted.

[12]As articulated by case law, the purposes of the tied-house statutory scheme include: preventing large firms' ability to dominate local markets through vertical and horizontal integration; preventing the overly aggressive marketing techniques of larger alcoholic beverage concerns from producing excessive sales of alcoholic beverages; ensuring that firms operating in one level of the legislatively established triple-tiered system did not exercise influence over or involvement in another level (*Cal. Beer Wholesalers*, *supra*, at pp. 407-408); and preventing a manufacturer's encouragement of a licensee to "push" its products (*Schieffelin*, *supra*, at p. 1210).

Further, appellant argues that the amount of it's "commingled" contribution with other sponsors to Uptown that benefitted, "directly or indirectly," the BRF principals was so de minimis that it should be excused. (See App.Br. at p. 6 [alleging, for example, that appellant's contribution to Uptown was $84, out of which the Vogt Trust's share was $14.51 and Meyers' share was 1.4 cents].) At oral argument, the Department responded that section 25500(a)(2) does not expressly mention excusing or excepting from its ambit any de minimis financial violation and, were the Board to recognize one, this could lead to groups of suppliers aggregating their trifling (but otherwise illegal) payments to reap the benefits of a tied-house arrangement and avoid the legal consequences.

This Board recognizes that section 25500(a)(2) does not mention de minimis financial benefits as a factor deserving of consideration in the context of tied-house violations. Nonetheless, Civil Code section 3533 expressly acknowledges that "the law disregards trifles," also expressed in the legal maxim "de minimis non curat lex." (*Harris v. Time, Inc*. (1987) 191 Cal.App.3d 449, 458 [237 CalRptr. 584].) Moreover, the Department's stated fear of future "aggregation" ills that may follow if actual de minimius benefits are weighed and considered in tied-house determinations is nothing more than a "slippery slope" argument: an attempt to discredit a proposition by arguing that "its acceptance will undoubtedly lead to a sequence of events . . . which are undesirable." (Almossawi, *An Illustrated Book of Bad Arguments* (2013) p. 36). This is recognized in logic as a fallacy and should not be a basis in law for drawing a "bright line" beyond which this Board shall never deviate. As Justice Story said, "It is always a doubtful course to argue against the use or existence of a power from the possibility of

its abuse." (*Martin v. Hunter's Lessee* (1816) 14 U.S. (1 What.) 304, 344.) The same point was made by Justice Holmes when he argued, in *Panhandle Oil*, that "[t]he power to tax is not the power to destroy while this Court sits." (*Panhandle Oil Co. v. Knox* (1928) 277 U.S. 218, 223 [48 S.Ct. 451] (dis. opn. of Holmes, J.).)

In sum, we find that the decision of the Department misapplies the spirit and letter of section 25500(a)(2). Moreover, *Schieffelin*, *supra*, the seminal case interpreting section 25500(a)(2)'s application to "indirect" relationships does not support the Department's decision because of the critical factual distinctions between the two cases. Altogether, the Department's decision is not supported by substantial evidence and must be reversed.[13]

II

Appellant contends that the Department's discretionary application of section 25500(a)(2) violates appellant's First Amendment right to engage in truthful commercial speech. Appellant argues that it "participated in BR 2013 in order to . . . promote its wines to the demographic attending the Festival," and that in order to penalize appellant's conduct, "the Department had the burden to prove that its proposed application of Section 25500(a)(2) complies with the *Central Hudson* test." (App.Br. at p. 11, citing *Central Hudson Gas & Electric Corp. v. Public Service Comm. of N.Y.* (1980) 447 U.S. 557 [100 S.Ct. 2343].)

[13]We need not consider appellant's "lack of knowledge" or "mistake of fact" arguments here.

It is outside the jurisdiction of this Board to rule on the constitutionality of a statute. (Cal. Const., art. III, § 3.5) While appellant contends it is not challenging the constitutionality of section 25500(a)(2) per se but merely the Department's application of the statute, we nonetheless decline appellant's invitation to proceed on this basis[14] because it is unnecessary for us to do so. As the United States Supreme Court has wisely observed,

> [We] will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, [we] will decide only the latter.

(*Ashwander v. TVA* (1935) 297 U.S. 288, 347 [56 S.Ct. 456] (conc. opn. of Brandeis, J.).)

Although we decline to rule on appellant's First Amendment argument, we are aware that on the same day as oral argument in this case, the Ninth Circuit remanded a District Court decision evaluating the constitutionality of another related tied-house statute, Business and Professions Code section 25503. (*Retail Digital Network v. Appelsmith* (9th Cir. 2016) 810 F.3d 638.) That opinion addresses the level of scrutiny to be applied to statutes restricting commercial speech and observes that the Court's decision in *Sorrell* "modified the *Central Hudson* test for laws burdening commercial speech," increasing the pertinent scrutiny from "intermediate" to "heightened." (*Retail*

[14]See, e.g., *Hansen v. Workers' Compensation Appeals Bd.* (1993) 18 Cal.App.4th 1179, 1182, fn. 1 [23 Cal.Rptr.2d 30] (noting the Workers' Compensation Appeals Board's refusal to consider an "as-applied" constitutional challenge under article III, section 3.5 of the California Constitution].

Digital Network, *supra*, at pp. 647-648, citing *Sorrell v. IMS Health Inc.* (2011) 131 S.Ct. 2653 [180 L.Ed.2d 544] and overruling *Actmedia, Inc. v. Stroh* (1985) 830 F.2d 957.)

While California has a legitimate interest in preventing the ills associated with tied-house arrangements, statements in the *Retail Digital Network* opinion denote skepticism about the Department's apparent "all-or-nothing" application and enforcement of the tied-house statutes and invite legislative reexamination of the tied-house laws: "While we 'hesitate to disagree with the accumulated, common-sense judgments of [the] lawmakers' who enacted [the tied-house statutes], we cannot say on the record before us that the State's Prohibition-era concern about advertising payments leading to vertical and horizontal integration, and thus leading to other social ills, remains an actual problem in need of solving." (*Retail Digital Network*, *supra*, at p. 29, citations omitted.)

ORDER

For all the aforementioned reasons, the decision of the Department is reversed.[15]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[15]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.

PETER J. RODDY, MEMBER, listened to oral argument of this case by telephone, but did not participate in this decision, because the Board did not provide sufficient advance notice to all parties of this fact pursuant to Government Code section 11123, subdivision (b)(1)(C).