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

AB-9503
File: 02-184686 Reg: 14080306

FREIXENET SONOMA CAVES, INC.,
dba Freixenet Sonoma Caves
23555 Highway 121, Sonoma, CA 95476,
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 21, 2016

Appearances: *Appellants:* Rebecca Stamey-White, of Hinman & Carmichael, as counsel for appellant Freixenet Sonoma Caves, Inc., doing business as Freixenet Sonoma Caves.
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] Friexenet Sonoma Caves' license because it "directly or indirectly . . . furnished, gave, or loaned" a $15,000 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 March 12, 2015, is set forth in the appendix.

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

and 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 Freixenet Sonoma Caves is located in Sonoma County, California. Gloria Ferrer Caves and Vineyards (hereinafter, "Gloria Ferrer") is a subsidiary of appellant, and is also located in Sonoma County.

Appellant's type 02 winegrower license was issued on May 15, 1986. On March 14, 2014, the Department filed a two-count accusation against appellant. The pertinent language of the first charge reads:

> On or about February 28, 2013, respondent-licensee, by and through its officer(s), agents(s) [*sic*], or employees did, directly or indirectly, furnish, give, or lend a thing of value, to wit: $15,000.00, to BR Festivals LLC., of which Gabriel Meyers and Robert Vogt are managers and/or members, and who are also engaged in the operating, owning, or maintaining of an On-Sale Retail Licensee, namely: Uptown Theatre, LLC, in violation of Business and Professions Code Section 25500(a)(2).

(Exh. 1.) Count 2 alleged that on May 12, 2013, appellant, "by and through its officer(s), agent(s), or employee(s) did, [*sic*] deliver, or cause to be delivered alcoholic beverages, to wit: 10 cases of Sonoma Brut to an on-sale retail licensee, namely: Fish Market LLC, in violation of Business and Professions Code section 25633." (Exh. 1.) At the September 3, 2014 administrative hearing, documentary evidence was received, and testimony was presented by Elden Shepherd, an agent for the Department; by Gabriel Meyers, a principal of Bottle Rock Festivals LLC; and by Alma Hunter, appellant's events manager. 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. The Bottle Rock Napa Valley Festival and Bottle Rock Festivals LLC

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 was the creation of Gabriel Meyers and Robert Vogt. They wanted to promote a "world-class music festival" for Napa Valley, which they believed would complement Napa's renowned food and wine scene. Initially, Meyers and Vogt began work on the project through an entity called Willpower Entertainment, which they owned. However, they created Bottle Rock Festivals, LLC (hereinafter, "BRF") in 2012 to execute the Festival. When the Festival took place in May 2013, Willpower Entertainment and Vogt, or his family members, owned a portion of BRF as well. Meyers and Vogt were managers of BRF LLC.

Meyers and Vogt sought financing for the Festival through sponsorships. They focused on local wineries for funding because they are an integral part of Napa Valley industry. Although sponsorships were sold to non-alcohol-related entities, the primary source of sponsorships was the wine industry.

Additionally, BRF hired independent contractors and Willpower Entertainment employees to solicit alcoholic beverage suppliers and other businesses to sponsor the Festival. Lastly, given the anticipated 25,000 to 40,000 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 the participants were placed into a General

Operating Account (hereinafter, "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, generally accepted accounting principles were not used and there was "no earmarking whatsoever." (RT at p. 84.) It is therefore impossible to "trace" where any sponsorship monies — including those paid by appellant (see below) — went with regard to BRF's liabilities. BRF filed for bankruptcy protection following the Festival.

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). During the Festival, BRF rented Uptown as well as another venue, Copia, for VIP "after parties" where Festival musicians and artists performed on an ad hoc basis following their main performances during the day. BRF paid Uptown a rental fee for use of the facility, but the amount of the fee was not established at the hearing. The fee was paid out of a conglomeration of funds contributed by Festival sponsors, as well as from Festival ticket sales. Copia did not receive full reimbursement for the rental of its venue. There is no evidence that either Vogt or Meyers 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 regarding whether appellant's wines were sold or available at Uptown.

At the time of the Festival, Uptown 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, LLC (hereinafter, "Premier"), which held a 21.433% interest. Premier has numerous members, including Meyers, who owned a 0.078% interest, and the William T. Vogt Special Needs Trust (hereinafter, the "Vogt Trust"), which owned an 80.575% interest. The Vogt Trust is managed by Robert Vogt for his son. Additionally, Vogt is designated as the manager of Premier in the Department's Limited Liability Company Questionnaire, which he executed.

C. Agreement between Appellant and BRF

Alma Hunter, appellant's consumer events coordinator, oversees product logistics, event coordination, and contract issues for all events in which appellant participates. She heard about the Festival through an email solicitation and thought it would be a good opportunity to promote appellant's wines. Hunter testified that appellant chooses events where it can reach the most customers, including "millennials," a target demographic. Appellant purchased its Festival sponsorship package with the intent to access a new customer base and encourage them to purchase Gloria Ferrer wines.

On April 3, 2013, Hunter executed a "Winery Sponsorship Contract" (hereinafter, the "Contract") on behalf of appellant. (See generally Exh. 2, attach. 4.) Hunter testified that she believed the sponsorship payment was for a hospitality tent, Festival tickets, social media use, placement of appellant's logo, and access to BRF's email distribution lists.

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. 4, at p. 1.) Neither Hunter nor any other representative of appellant made modifications to the Contract provisions.

Although the Contract explicitly indicated Uptown was a Festival venue, Hunter did not check whether Uptown was licensed by the Department. Hunter testified that she had no reason to determine Uptown's license status since appellant's hospitality tent would be set up at the Napa Valley Expo, not at Uptown, and appellant did not intend to use Uptown during the course of the Festival. Hunter thought appellant's compliance manager would have checked Uptown's license status. She testified that when she gets a contract, she gives it to the compliance manager, and trusts they "are all on the same page." (RT at p. 176.)

Hunter knew nothing about Vogt and Meyers' connection to Uptown. Neither she nor any other representative of appellant sought to identify Uptown's principals.

On February 28, 2013, appellant paid $15,000 to BRF for its sponsorship package. (Exh. 2.) The sponsorship fee entitled appellant to specified benefits:

- Appellant became an "official partner" of the Festival, with logo placement in all media and priority sponsorship rights to the following year's Festival. Appellant used the Festival logo to promote its wines in all its print, digital, and social media marketing efforts.
- Appellant had access to all VIP areas and tents.
- 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 wines and then sold them 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 received eight VIP 4-day festival passes and four 4-day staff passes. The VIP passes granted holders individual access to VIP after parties.
- 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's sponsorship provided it an "[o]pportunity to participate as presenting sponsors of VIP late night after-parties." (Exh. 2, attach. 4, at p. 3.) Appellant did not opt to sponsor any after parties.

Re-engagement with Festival attendees was a priority for appellant. Hunter testified that marketing exposure from the event was worth the $15,000 sponsorship fee.

D. Appellant's interactions with Fish Market, LLC

BRF contracted with Fish Market, LLC[3] (hereinafter, "Fish Market") to cater the Festival. Fish Market is licensed by the Department with a type 47 retail on-sale

[3]Throughout the Department's decision, Fish Market LLC is alternatively referred to as Fish Story, LLC. (See, e.g., Findings of Fact, ¶¶ 18-19; Determination of Issues, ¶¶ 14-16.) Given that there is no factual dispute as to the identity or license status of the Festival caterer, we will treat the interchanged names as harmless error, and refer to the caterer as Fish Market — as named in the accusation — throughout this opinion. (See Exh. 1.)

general eating place license and a type 58 caterer's permit.[4] (Exh. 2.) Fish Market would purchase wine from each of the sponsoring wineries and then pour each winery's product from its respective hospitality tent. (Exh. D.)

Appellant's hospitality tent at the Festival was an exclusive arrangement — that is, Gloria Ferrer wines were poured only at appellant's hospitality tent, not elsewhere within the Festival, and no other brands were poured at appellant's tent. Appellant's compliance manager confirmed that Fish Market was licensed to sell alcoholic beverages at the Festival. Appellant's employees were also in the tent talking to potential new customers about appellant's products. Some of these employees were designated "volunteers" for the Festival, but were still employed by appellant or by its subsidiary, Gloria Ferrer.

On Saturday, May 11, 2013, Hunter sent an email advising that appellant's hospitality tent was running out of wine. (Exh. E.) She advised Fish Market personnel that more wine could be arranged for Saturday, but that a purchase order was needed to confirm that Fish Market would be paying for additional wine.

Hunter wrote, "We can bring more in tomorrow once I have that confirmation. We'll also need access to bring the product in and have help bringing to the booth." (Exh. E.)

Hunter reached out to a Gloria Ferrer employee, Kathy Harshbarger, to get

[4]A type 47 license authorizes the sale of beer, wine, and distilled spirits for consumption on the licensed premises and requires the licensee to operate the premises in good faith as a bona fide public eating place in accordance with the laws of the State of California. A type 47 license also entitles the holder to obtain a type 58 caterer's permit.

additional wine and bring it to the tent. Harshbarger picked up ten cases of wine (Sonoma Brut) from Gloria Ferrer Caves and Vineyards on Sunday, May 12, 2013, and delivered the wine to appellant's hospitality tent on the same day. Harshbarger wrote in an email: "I believe I picked up 10 cases of Sonoma Brut 'Pour Only' for Sunday." (Exh. 4.) The wine was delivered to Fish Market in its capacity as caterer for the Festival.

Harshbarger did not testify at the hearing.

E. The Department's Investigation

The Department investigated the Festival for potential tied-house violations. Agent Shepherd discovered the alleged tied-house problem by examining the Department's licensing file for Uptown Theatre, which listed the ownership interests. (Exh. 2.) He searched the Department's external licensing information system, the License Query System (LQS). (Exh. A.) The LQS identified the members of Uptown, including George Altamura, Sr., the Herman Family Trust, and Premier. (Exh. A.) Agent Shepherd also searched BRF's filing with the Secretary of State. (Exh. 2.) The filings disclosed that Vogt and Meyers were members and managers of BRF.

Additionally, Agent Shepherd searched Vogt's name in the Department's internal database for license information, ABIS. It revealed Vogt was the manager and attorney of record for Premier, and identified Premier's shareholders, discussed above.

The ABIS system is not available to the public. Agent Shepherd testified it would not be difficult to discover the connection between Vogt and Meyers and the Uptown Theatre despite not having access to ABIS. The public can use the Department's external web-based database, the LQS, to search for license information.

Although LQS does not identify who has ownership interests in limited liability companies like Premier, according to Agent Shepherd, any member of the public can request information about a licensee from the Department, including membership information if the licensee is a limited liability company. Agent Shepherd believes an inquiry from appellant to the Department would have revealed Vogt and Meyers' interest in Uptown.

After the hearing, the ALJ issued his proposed decision determining that both counts had been proven and no defense was established. With regard to count 1, the ALJ found that appellant had provided an indirect benefit to Uptown:

> The Winery's $15,000 sponsorship payments, along with other sponsors['] monies, were comingled [*sic*] in BRF LLC's two receivables accounts; the Artist's Account and the General Operating Account. As BRF LLC's liabilities came due it would pay creditors from the co-mingled funds. One of those debts was a rent payment to Uptown Theatre for the use of the facility as a venue for the Bottle Rock Festival. The payment of rent monies from sponsor's 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 rent money. The monetary payments from Freixenet to BRF LLC were, in part, for the benefit of Uptown Theatre. Thus, such payments come within the statutory language that prohibits Freixenet from making *indirect* payments to an on-sale retail licensee.

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

With regard to count 2, the ALJ found that Harshbarger delivered wine to Fish Market on a Sunday, in violation of section 25633. He rejected appellant's contention that Harshbarger in fact executed a "dock pick-up" on behalf of Fish Market, and concluded that Harshbarger was indeed acting as an employee of appellant. (Determination of Issues, ¶¶ 15-16.)

The Department adopted the proposed decision and imposed a penalty of fifteen days' suspension with all fifteen days stayed subject to one year of discipline-free operation.

Appellant filed a timely appeal raising the following issues: (1) the Department's decision misapplied section 25500(a)(2); (2) the Department's discretion to apply section 25500(a)(2) is circumscribed by the First Amendment; and (3) count 2, alleging that appellant's employee delivered wine on a Sunday in violation of section 25633, is not supported by substantial evidence.

DISCUSSION

I

Appellant contends the Department abused its discretion by misconstruing and misapplying section 25500(a)(2) "to penalize conduct that is not fairly within the ambit of the statute." (App.Br. at p. 5.) More specifically, appellant argues that case law interpreting the statute does not support the Department's interpretation. (App.Br. at pp. 5-7.) Appellant refers to the Department's approach as a "strict liability" construction of the statute, which it claims "improperly and unfairly overburdens Appellant and the industry as a whole by requiring it to vet the ownership of every party, vendor, promoter and third party with which it does business." (*Id.* at p. 10.)

The Department counters that the "tied-house" statute at issue is entitled to a broad or liberal interpretation to effectuate its principal purpose. (Dept.Br. at pp. 5-6.) 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 section 25500(a), 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 (*Ornelas 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:

> On or about February 28, 2013, respondent-licensee, by and through its officer(s), agents(s) [*sic*], or employee(s) did, directly or indirectly, furnish, give, or lend a thing of value, to wit: $15,000.00, to BR Festivals LLC., of which Gabriel Meyers and Robert Vogt are managers and/or members, and who are also engaged in the operating, owning, or maintaining of an On-Sale Retail Licensee, namely: Uptown Theatre, LLC, 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 over 20% of the Uptown Theater. (Exhibit 2, Attachment 1 & 2.) 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. 2, at p. 1; Findings of Fact, ¶ 16.) Vogt was the manager of Premier (Exh. 2, attach. 2, at p. 2; RT at p. 98), and also the manager of the Vogt Trust, which owned a majority interest (80.757%) in Premier. (Findings of Fact, ¶ 16.) Meyers, on the other hand, has a comparatively small ownership interest in Premier (0.078%). (Exh. 2, attach. 2, at p. 3.) Premier is a legally distinct entity from its 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:

[BY MR. HINMAN, COUNSEL FOR APPELLANT]
Q Let me turn your attention to the Uptown Theatre.

A Sure.

---

[5]Notably, Premier is the minority owner of Uptown, holding only a 21.433% share. (Findings of Fact, ¶ 16.)

[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].)

Q Did you operate the Uptown Theatre in 2013, at any time between January and the end of this particular event in May?

A No, I did not.

Q Did you maintain the Uptown Theatre in 2013, at any time between January and the end of BottleRock '13?

A No, I did not.

Q Did you receive any income from the Uptown Theatre in 2013?

A Nope. No, I did not.

Q Did you receive any, participate in any revenue of any revenue [*sic*] that was received by the Uptown Theatre in 2013?

A No.

(RT at pp. 83-84.)

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 engage[fn.] in** . . . **owning** . . . any on-sale premises" (Dept.Br. at p. 4, emphasis in original, quoting Bus. & Prof. Code, § 25500(a)(2)); (2) that "engaged in" 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" in 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

[8]That is to say Meyers' ownership of a 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.

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. (See *ibid.*) The Department's definition — "involved in activity" — includes two synonyms: "occupied" and "busy." (*Ibid.*) Also, the second "Simple Definition" for "engaged" listed on the same page is "busy with some activity." (*Ibid.*)

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. 83-84.) 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 has been discussed extensively in case law. As one court informs us of the "purposes" animating the tied-house laws[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 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

[9]We note that numerous exceptions to the "tied-house" prohibition 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.)

> 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 licenses:

> [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.

(*Cal. 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, ¶ 14.) How are the answers to these questions shaped by the fact that the winegrower never intended to participate — and, in fact, did not participate — in any of the events held at the retail licensee's premises? (See Findings of Fact, ¶ 17-18.) 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 a 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 might carry water, except that 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. [Premier] is a good example. Robert Vogt manages [Premier], a large portion of which is owned by his sons'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 [Premier], 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 [Premier] 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 a 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. Robert Vogt and Gabriel Meyers had a material interest in ensuring the Uptown Theatre was compensated because [Premier], of which they were engaged in operating, owning, and maintaining, had a 21.433% ownership stake in Uptown Theatre, LLC.
>
> 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. Vogt and Meyers were engaged in the operation, ownership, and/or maintenance of the Uptown Theatre, a Department retail licensee, through [Premier]. Vogt and Meyers were also member of BRF LLC, which paid Uptown Theatre rental monies for the use of the theatre during the Festival.

(Determination of Issues, ¶ 9.)

There 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. 83-84), there is minimal evidence presented in this record[10] regarding how Uptown was generally run — that is, which

[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

owners had a say in the day-to-day operations and to what extent, and who was responsible for managing the premises. There *is* testimony that indicating that during the course of the Festival, at least, there was no overlap between the management of BRF and the management of Uptown:

> [BY MR. LEUDERS, COUNSEL FOR THE DEPARTMENT:]
> Q And during the time that BR Festivals, LLC rented the Uptown Theatre, is it correct that BR Festival [*sic*] had control over the theater during the after party?
>
> A I don't know what you mean by control.
>
> Q You decided what happened?
>
> A We rented the theater, they staffed the theater, they ran the bars. They ran their own theater, we rented the theater.
>
> [¶ . . . ¶]
>
> [BY MR. HINMAN:]
> Q Let's talk about the Uptown Theatre, Mr. Meyers. Now, counsel asked you on cross-examination about control of the Uptown Theatre; do you recall that testimony?
>
> A I do.
>
> Q During the after parties. In fact, you, Bob Vogt, or BottleRock Festivals did not provide the management of the theaters on that particular weekend, did you?
> A No, we did not.
>
> Q You did not run the bar that particular weekend, did you?
>
> A No, we did not.
>
> Q You did not take any of the revenues from the sales of alcohol that particular night, did you?

---

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.

A Not to my knowledge.

Q You did not hire the employees of the Uptown Theatre as employees of Bottlerock Festivals, did you?

A No, we did not.

Q You basically were booking a venue for a party?

A That's correct.

(RT at pp. 92, 119-120.) Moreover, the ALJ's concern — shared by the Department — about Vogt 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. (Findings of Fact, ¶ 14.) 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:

[BY MR. LEUDERS:]

Q Okay. During your direct testimony . . . you said that there were events also held at Copia; is that correct, and I think you referred to that as, what, 500 First Street, or something?A Yes, the space formally [*sic*] known as Copia, the American Center for food, wine, and the arts, is now commonly called 500 First Street. Copia is, in fact, in its own bankruptcy reality.

Q And they did not receive payment for the after event parties that BR Festival held at that premise?

A I think that they did, actually. I think that we entered into contract with them.

Q Do you know for certain whether they received payment or not?

A For certain, I, I do not know. There were more than 400 some, by my estimation, different people listed as creditors in the BR Festivals bankruptcy, and I can't be certain as to which holding company that maintains 500 First Street, if they have been paid in full or not.

(RT at pp. 118-119.) How the ALJ managed to surmise, based on Meyers' expressly uncertain testimony, that Uptown was compensated for its participation in the Festival while Copia was not, is a complete mystery.[11] (See Findings of Fact, ¶ 15.) 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 — contract with a venue — Uptown — to

---

[11]Indeed, based on Agent Shepherd's testimony, it appears the Department made no attempt to verify Uptown's receipt of rental payments in the course of its investigation:

[BY MR. HINMAN:]

Q In connection with this investigation you didn't seek out any records in the Uptown Theatre, did you?

A Are you speaking about the investigation we are having a hearing on today?

Q Yes.

A No.

(RT at p. 48.)

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 Freixenet Sonoma Caves sponsorship payments to Bottle Rock Festival LLC for the Bottle Rock Festival 2013 events provided an *indirect* benefit to a retail licensee, Uptown Theatre." (Determination of Issues, ¶ 8, emphasis in original.) There are two things about this modified issue statement that we find curious. First, the language of count 1 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 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." (*Id.* at p. 1206, quoting 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 Grand 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, a 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 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 rent money. The monetary payment from Freixenet to BRF LLC were, in part, for the benefit of Uptown Theatre. Thus, such payments

> come within the statutory language that prohibits Freixenet from making *indirect* payments to an on-sale retail licensee.

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

The ALJ 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 — 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 the other sponsors for that matter, found its way into Chevy's 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, ¶ 15.) 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[12] nor the amount each participant *other than appellant* paid. The only

---

[12]Appellant repeatedly asserts that the budget for the Festival was $14,000,000. (See, e.g., App.Br. at p. 7.) The only support for this in the record comes from one rather dubious snippet of Meyers' testimony:

> [BY MR. HINMAN:]
> Q How much cash did BottleRock 2013 bring in?
> [Objection; overruled.]
> A Total revenues, somewhere in the neighborhood of 14 and a half

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:

> Freixenet 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 $15,000 sponsorship payment, Freixenet was already placing itself in a favored position over non-participating wineries vis-à-vis the Uptown Theatre. The Winery noted it was not a customer of Uptown Theatre.
>
> However, its willingness to pay a $15,000 sponsorship fee to BRF LLC, whose principals were also involved in the ownership of Uptown Theatre,

---

> million dollars, if you are including initial capital investments.
> [¶ . . . ¶]
> Q So 14 and a half million dollars were brought in for the Festival?
> A Roughly.

(RT at p. 123.) This number is an offhand estimate, and is not supported by any documentary evidence. Given that Meyers also testified that "standard GAP accounting practices were not necessarily always adhered to," (RT at p. 91), this Board is not inclined to consider that figure as a fact sufficient to support the calculations appellant extrapolates from it.

> most certainly could lead to the retailer favoring their product over non-contributors. This is a "valuable and tangible" benefit to Freixenet Sonoma Caves.
>
> 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 Freixenet/Gloria Ferrer elevated status for the subsequent Bottle Rock Festival; "Priority Sponsorship rights to BottleRock Napa Valley 2014." (State's Exhibit 2 – Attach. 4 – 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, Hunter testified that appellant never intended to participate in the after parties or any other events at Uptown. (RT at p. 176.) Hunter understood the Winery Sponsorship Contract to be merely a "blanket" or "template" contract; she did not object to the inclusion of language referencing Uptown "because [appellant] wasn't doing any business there" and "wasn't conducting any events there." (RT at p. 177.) 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[13] 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.

Further, appellant argues that the amount of its "commingled" contribution with

[13]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).

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. 7 [alleging, for example, that appellant's contribution to Uptown was $64.29, out of which the Vogt Trust's share was $11.10 and Meyers' share was just over one cent].) 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 minimus 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 Cal.Rptr. 584].) Moreover, the Department's stated fear of future "aggregation" ills that may follow if actual de minimis 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 "the 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.[14]

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 pp. 11-12, citing *Central Hudson Gas & Electric Corp. v. Public Service Comm. of N.Y.* (1980) 447 U.S. 557 [100 S.Ct. 2343].)

It is outside the jurisdiction of this Board to rule on the constitutionality of a statute. 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

[14]We need not consider appellant's "lack of knowledge" argument here.

nonetheless decline appellant's invitation to proceed on this basis[15] 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. (See *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 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 [1986 U.S. App. LEXIS 25087].)

---

[15]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.

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. 652.)

III

Appellant contends that count 2, alleging a violation of section 25633, is not supported by substantial evidence. It argues that the Department ignored both the law and the evidence when it found that appellant's employee, Kathy Harshbarger, delivered wine to Fish Market, the Festival caterer, on a Sunday. Appellant argues that Harshbarger, though indeed employed by appellant as its wine club and e-commerce manager, was not acting as an employee of appellant, but rather as a volunteer for Fish Market when she picked up the wine at appellant's dock. Appellant insists that the terms of the sale fell under section 2401(2) of the California Commercial Code, and that title to the wine therefore passed at appellant's dock and not upon delivery to Fish Market at the Festival grounds. Appellant therefore characterizes the exchange as a "dock pickup" expressly authorized by the statute, and not as a delivery.

"Substantial evidence" is relevant evidence which reasonable minds would

accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Ct.* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) "Trial court findings must be supported by substantial evidence *on the record taken as a whole*. Substantial evidence is not [just] any evidence — it must be reasonable in its nature, credible, and of solid value." (*Hill v. Nat. Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 51 [26 Cal.Rptr.2d 834].)

When, as here, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (*Bowers v. Bernard* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouse v. State of Cal.* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

Section 25633 provides, in relevant part:

> Except as otherwise provided in this section, no person licensed as a manufacturer, winegrower, distilled spirits manufacturer's agent, rectifier, or wholesaler of any alcoholic beverage shall deliver or cause to be delivered any alcoholic beverage to or for any person holding an on-sale or off-sale license on Sunday or except between the hours of 3 a.m. and 8 p.m. of any day other than Sunday. Any alcoholic beverage may be delivered at the platform of the manufacturing, producing, or distributing plant at any time.

Section 2401(2) of the Commercial Code, cited by appellants, provides:

> Unless otherwise expressly agreed title passes to the buyer at the time and place at which the seller completes his performance with

> reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading.

According to appellants, Harshbarger was volunteering for the Festival caterer, Fish Market, when she "picked up" the wine on its behalf. (App.Cl.Br. at p. 11.) The title to the wine, under appellant's reasoning, therefore passed to Fish Market at the warehouse pursuant to section 2401(2) of the Commercial Code, and was not "delivered" under the meaning of section 25633 of the Business and Professions Code.

The ALJ made the following relevant findings of fact:

> 19. On Saturday May 11, 2013, Ms. Hunter sent an email advising that the Gloria Ferrer hospitality tent was running out of wine. (Respondent Exhibit E) She advised Fish Market personnel that more wine could be arranged for Saturday, but a purchase order was needed to confirm Fish Market would be paying for additional wine.
>
> Ms. Hunter wrote; "We can bring more in *tomorrow* once I have that confirmation. We'll also need access to bring the product in and have help bringing to the booth."
>
> Ms. Hunter reached out to a Gloria Ferrer employee, Kathy Harshbarger, to get additional wine and bring it to the Festival. Ms. Harshbarger picked up the additional ten (10) cases of wine (Sonoma Brut) from Gloria Ferrer Caves and Vineyards on Sunday May 12, 2013, and delivered the wine to the Respondent's hospitality tent on the same day. Kathy Harshbarger wrote in an email; "I believe I picked up 10 cases of Sonoma Brut "Pour Only" for Sunday." (State's Exhibit 4) The wine was delivered to Fish Story LLC [*sic*] in their capacity as the caterer for BRNV 2013.
>
> Kathy Harshbarger did not testify at the hearing.

(Findings of Fact, ¶ 19, emphasis in original.) Based on these findings, the ALJ reached the following conclusion:

> 14. The Department charged that the respondent-licensee violated Business and Professions Code Section 25633.

[¶ . . . ¶]

The Winery argues in order for the Department to prove a violation of Section 25633 it must show that Freixenet delivered alcoholic beverages to Fish Market at its retail location rather than the Winery.

Freixenet contends Ms. Harshbarger's activities were a permitted "delivery at the platform of the manufacturing, producing, or distributing plant" or a "dock pick-up." Respondent asserts Ms. Harshbarger did not *deliver* wine to a retailer, but rather she executed a "dock pick-up" on Sunday, May 12, 2013. The underlying premise of this argument is that Ms. Harshbarger was not acting in her capacity as an employee of Freixenet during this transaction, but instead was a "volunteer" for Fish Market and acting on behalf of the retail licensee in making the wine pick-up. This argument is contrary to the evidence and is unpersuasive.

15. On Saturday, May 11, 2013, the Respondents were advised by Fish Market employees that the hospitality tent was running out of wine for the Festival. Alma Hunter contacted Kathy Harshbarger, an employee of Freixenet/Gloria Ferrer, to produce more wine for the hospitality tent. On Sunday, May 12, 2013, Kathy Harshbarger picked up 10 cases of Sonoma Brut wine from the licensee's winery. Ms. Harshbarger then delivered the 10 cases of Sonoma Brut wine to Fish Story LLC [*sic*] at the Respondent's hospitality tent. Fish Story [*sic*] is a retail licensee. Alma Hunter testified that Kathy Harshbarger was never an employee for Fish Story LLC [*sic*]. Although she may have been "volunteering" to help out in the hospitality tent, this did not vitiate her employment status with Freixenet/Gloria Ferrer. Kathy Harshbarger was acting in her capacity as an employee of the Respondent, not as an employee or "volunteer" for Fish Story LLC [*sic*] when she delivered the alcoholic beverages. Therefore, this is not a "dock pick-up" by a retail licensee at a manufacturer's platform. Instead, this was a delivery by the manufacturer, through its employee, to a retail licensee at its premises.

16. The respondent-licensee, by and through its officer(s), agent(s), or employee(s) did, [*sic*] deliver, or cause to be delivered, alcoholic beverages, to wit: 10 cases of Sonoma Brut to an on-sale retail licensee, namely, Fish Market LLC, in violation of Business and Professions Code Section 25633.

(Determination of Issues, ¶¶ 14-16.)

Appellant argues that the Department's error emerged from its alleged failure to "recognize the Commercial Code Section 2401 legal difference between 'pick-up'

(transfer of title at the winery) and 'delivery' (transfer of title at the retail premises)."

(App.Br. at p. 5.) Appellant paraphrases testimony offered by Alma Hunter, appellant's Events Manager:

> Appellant's own representative's testimony was that the passage of title occurred at the winery and that the person who picked up the wine from the winery was doing so on behalf of and at the request of the retail-licensee, pursuant to a purchase order, making it a dock pick-up, not an unlawful delivery.

(App.Br. at p. 5.)

Curiously, appellant fails in this passage to name "the person who picked up the wine" or acknowledge the undisputed fact that the individual allegedly "picking up" the wine from appellant's winery was Harshbarger, appellant's paid employee. Regardless, Hunter testified as follows:

> [BY MS. STAMEY-WHITE:]
> Q. And did Fish Market, LLC also hire winery representatives to work at the event?
>
> A. Yes.
>
> Q. And when extra wine was needed on Saturday, did these Fish Market, LLC employees request additional wine?
>
> A. Yes.
>
> Q. Who picked up the wine from the winery on Sunday?
>
> A. Kathy Harshbarger picked up the wine.
>
> [¶ . . .¶]
>
> Q. Are you aware of who picked up the wine from the winery to take to the festival after the wine, after the caterer, Fish Market, LLC, requested additional wine?
>
> A. Yes.

Q. And who was that person?

[Objection; overruled.]

A. Kathy Harshbarger.

Q. As far as your understanding, who was Kathy Harshbarger picking up the wine for?

[Objection; overruled.]

A. My understanding was that it was on behalf of Cindy Pawclyn/Fish Market.

Q. So would you consider the wine to be Fish Market's wine when it was picked up from the winery?

A. Yes.

(RT at pp. 146-148.) Appellant, however, does not explain why an after-the-fact characterization of the transaction offered by a single self-interested employee[16] of the appellant should be considered dispositive.

In any event, Hunter's opinion on this point is negated by the evidence and undermined by her own testimony. Upon questioning by the ALJ, for example, Hunter detailed who exactly made the request for additional wine:

[BY JUDGE LOEHR:] Kelsey, who is from the Fish Market, the caterers, requested additional wine, right?

THE WITNESS: Right.

JUDGE LOEHR: Who did she make that initial request to?

THE WITNESS: She made it to Lauren, who was an employee of Freixenet, to relate to me.

[16]As appellant's events manager, Hunter stands to lose her job — or at least face internal discipline — should it be shown that her actions during the Festival contributed to a violation of alcoholic beverage law.

JUDGE LOEHR: And what does Lauren do?

THE WITNESS: Uhm, she is no longer with the company.

JUDGE LOEHR: What?

THE WITNESS: I believe she was marketing coordinator.

JUDGE LOEHR: So Lauren got ahold of you?

THE WITNESS: [Y]es.

JUDGE LOEHR: What did you do?

THE WITNESS: When Lauren got in touch with me, what did I do?

Oh, uhm, I think I reached out to Kathy. If I remember correctly, Lauren handled Saturday, because we ran out on Saturday. I don't really know. I wasn't on-site, so I don't know how she did that, but in regards to Sunday, she reached out to me and I reached out to Kathy.

JUDGE LOEHR: Harshbarger?
THE WITNESS: Kathy Harshbarger. Because she was going to be working the event on Sunday.

JUDGE LOEHR: Did you ask her to get the wine?

THE WITNESS: I asked her to pick up — per Kelsey, per the caterer, I asked her to pick up the wine because they were out of the wine.

(RT at pp. 169-170.) Based on Hunter's own testimony, Harshbarger retrieved additional wine from appellant's winery at Hunter's request, which, according to Hunter, was made based on information provided by "Lauren"[17] — yet another of appellant's employees. (*Ibid.*) This supports the inference, reached by the ALJ, that when Harshbarger retrieved the wine, she was acting as an employee of appellant and not as

[17]Presumably, Hunter was referring to Lauren Burkhart, who was included on emails exchanged regarding additional wine for Saturday and Sunday. (See, e.g., Exh. E.)

a volunteer for the caterer. (See Determination of Issues, ¶¶ 14-16.)

Moreover, appellant's Exhibit E includes an email from Hunter herself, dated Saturday, May 11, 2013, informing Festival and Fish Market staff — as well as one Lauren Burkhart — that "our table is running out of wine and we urgently need to get more." In it, Hunter requests a purchase order "to confirm you will be paying for the wine" (Exh. E.) She notes, "*We* can *bring more in* tomorrow once I have that confirmation. *We'll* also need access to bring the product in and have help bringing to the booth." (*Ibid.*, emphasis added.) "Tomorrow," of course, was Sunday the 12th — the date of the violation described in count 2. It is clear throughout this email that Hunter is speaking as appellant's employee, eager to keep appellant's table stocked with appellant's wine.[18] Moreover, Hunter's comment that "*We* can bring more in tomorrow" firmly supports the inference that she fully intended for appellant's employees — acting in that role — to bring more wine to the Festival on a Sunday, and *not* for employees of the caterer to travel to the winery dock in order to purchase more.

Hunter's insistence that the wine was "picked up" by the caterer is therefore undermined by the documentary evidence as well as her own testimony.

Appellant also relies on Commercial Code section 2401(2) to characterize the transaction as a "pick-up" as a matter of law. That section, however, applies "[u]nless otherwise expressly agreed" — and in this case, the invoice for the sale of the wine

[18]Later, in response to an July 10 email from appellant's compliance manager asking where the request for additional wine came from, Hunter insisted she "actually wasn't responsible for coordinating with the [tasting room]" that Saturday, and directed the compliance manager to another employee. (Exh. E.) This, of course, is belied by the email from Hunter herself — sent on Saturday, May 12th — requesting a purchase order and coordinating the delivery of additional wine.

makes it clear that parties expressly agreed otherwise.

Appellant's Exhibit D is the invoice for "additional wine required for Bottlerock event Saturday & Sunday."[19] The invoice includes a "shipped via" line, with the method listed as "delivery" — not, as appellant insists, as a dock pick-up. (Exh. D.) More importantly, the line immediately below adds "F.O.B. Destination." Though cryptic to a layperson, anyone familiar with the California Commercial Code — as appellant appears to be — would understand that this phrase implicates section 2319:

> (1) Unless otherwise agreed the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term . . . .
>
> [¶ . . . ¶]
>
> (b) When the term is F.O.B. the place of destination, *the seller must at his own expense and risk transport the goods* to that place and there *tender delivery* of them in the manner provided in this division. . . .(Comm. Code, § 2319(1)(b).) Thus, the terms of the invoice itself indicate that the wine was delivered by the seller — that is, appellant — at its own expense and risk, and was *not* "picked up" by an agent acting on behalf of Fish Market.[20] The express agreement of the parties, as disclosed on the

---

[19]Notably, the invoice is dated May 20, 2013 — eight days after the Sunday in question — and lists an order date of May 18 and a ship date of May 20. The error is explained in an email exchange contained in State's Exhibit 3, in which Lauren Burkhart and Harshbarger disclose the quantity of wine they supplied on Saturday and Sunday. Another employee, Wendy Mitchell, notes that she is on vacation and will bill the caterer the following week — and indeed, the invoice is dated the following Monday, May 20, 2013. The incorrect date, if anything, underscores appellant's haphazard business methods throughout this transaction.

[20]Prior to adoption of the Uniform Commercial Code, "F.O.B." was considered by some authorities to be a price term, not a delivery term. (See, e.g. *Johnson v. Banta* (1948) 87 Cal.App.2d 907, 910-912 [198 P.2d 100] [suggesting in dictum that F.O.B. is a price term]; *Meyer v. Sullivan* (1919) 40 Cal.App. 723, 730-731 [181 P. 847] [effect of the term depends upon "the connection in which it is used," i.e., price or delivery].) The official comments, however, note that "This section is intended to negate the uncommercial line of decision which treats an "F.O.B." term as "merely a price term." (Official Comments on U. Com. Code, Deering's Ann. Cal. U. Com. Code (2015)

invoice, overrides Commercial Code section 2401(2) and supports the conclusion, reached below, that Harshbarger was indeed acting as appellant's employee when she delivered wine to the Festival caterer, Fish Market, on a Sunday.[21]

ORDER

The decision of the Department is reversed as to count 1 and affirmed as to count 2, and is remanded to the Department for reconsideration of the penalty in light of this opinion.[22]

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

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).

---

§ 2319.) The adoption of the Uniform Commercial Code therefore makes F.O.B. a delivery term under California law — and indeed, "F.O.B. Destination" is included immediately under the "shipped via" line in this particular invoice. (See Exh. D.)

[21]An alternative inference, of course, is that appellant's billing department was entirely ignorant of the meaning or applicability of the Commercial Code and simply included the words "delivery" and "F.O.B. destination" as boilerplate. If that is the case, we have difficulty believing that either Hunter or Harshbarger — who were employed in events and promotion, not compliance — had any notion of the applicability of *any* section of the Commercial Code when they arranged for Harshbarger to bring additional wine to BRNV 2013 on a Sunday. In any event, this Board defers to the inferences reached below, provided they are supported by substantial evidence — and the language on the invoice supports the inference that Harshbarger delivered the wine as an employee of appellant.

[22]This order of remand is filed in accordance with Business and Professions code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.