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

AB-9515
File: 02-43754; Reg: 14080309

GRGICH HILLS CELLAR,
dba Grgich Hills Estate
1829 Saint Helena Highway, Rutherford, CA 94573,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: January 7, 2016
Sacramento, CA

ISSUED MARCH 28, 2016

Appearances: *Appellant*: Rebecca Stamey-White and John W. Edwards, II of Hinman & Carmichael LLP as counsel for Grgich Hills Cellar, doing business as Grgich Hills Estate. *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] Grgich Hills Cellar's 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" an on-sale licensed premises —

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

[2]The suspension was for 15 days, stayed subject to one year of discipline-free operation by the licensee.

an arrangement the Department found to be a violation of Business and Professions Code section 25500, subdivision (a)(2) (hereinafter, section 25500(a)(2), a "tied-house" prohibition) — and because it gave away free goods in connection with the sale or distribution of an alcoholic beverage, in violation of Business and Professions Code section 25600, subdivision (a)(1) and Department rule 106, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellant's type 02 winegrower license was issued on September 1, 1977. There is no prior record of Department discipline against the license. On April 14, 2014, the Department filed a two-count accusation against appellant. The pertinent language of the tied-house charge within the accusation reads:

> On or about February 1, 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 managers 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 October 23, 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 Lewis Perdue, a journalist who reports on the wine industry; by Elizabeth Kelly Murray, wine club administrator and event coordinator at Grgrich Hills Estate; and by Violet Grgich, vice-president of operations and sales at Grgrich Hills Estate. Following oral argument, the administrative law judge (ALJ) asked for closing arguments in the form of briefs, and the briefs were submitted. Thereafter, the Department issued its decision which determined that the charges had been proved and no defense had been established. Appellant filed a Petition for Reconsideration, but it was denied.

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 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. (RT at p. 67.)

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. 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 LLC (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

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, attach. 5.) 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." (*Id.*, at p. 1, ¶ 1.1.) There were no amendments or modifications to the Contract concerning Uptown before or during the Festival.

Appellant did not check Uptown's alcoholic beverage license status at any time because it did not participate in any events occurring there. (RT at p. 165.) Violet Grgich testified that she was unaware that any events were expected to occur in licensed premises — that appellant was only participating in an event at the fairgrounds — that is, the Napa Valley Expo. (RT at p. 164.) On or about February 1, 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 sixty (60) VIP 1-day passes for the Festival, valued at $599 each, and another sixty (60) 1-day passes, valued at $199 each, which were given to its employees.
- Appellant received two (2) 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, appellant estimated the value of the package it received from BRF, including the VIP passes and "Cellar Rat" passes, was $54,000. (RT at p. 124.)

Elizabeth Murray testified appellant wanted to sponsor the Festival in order to support Napa Valley and give visibility to a winery that has been operating since 1959. In her view, the sponsorship money was for the VIP ticket package and the placement of appellant's tent. She did not know how the funds appellant paid to BRF would be dispersed or utilized, and she never intended the sponsorship money to specifically benefit a retail licensee. She did not, however, request an accounting from BRF, and was not concerned with alcoholic beverage licensing because all appellant was doing was buying tickets and arranging to have a booth.

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. It was not appellant's intent to sell more wine through their procurement of the $20,000 sponsorship.

D. The Department's Investigation

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.[3] 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) and section 25600, subdivision (a)(1). 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 contending: (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) the decision regarding section 25600(a)(1) is not supported by substantial evidence.

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 pp. 6-7.) Appellant refers to Department's approach as a "strict liability" construction of the statute, which it claims

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

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 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. 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. [The 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 1, 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 managers 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, attach. 3 & 4.) Thus, both Vogt and Meyers were engaged [involved in the activity] of owning Uptown Theater.

(Dept.Br. at pp. 5-6.) 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.[4] (Exh. 2, attach. 4; Findings of Fact, ¶ IV.) Vogt was the manager of Premier (Exh. 2), and also the manager of the Vogt Trust, which owned a majority interest (80.575%) in Premier. (Findings of Fact, ¶ IV.) Meyers, on the other hand, has a comparatively small ownership interest in Premier (0.078%). (Findings of Fact, ¶ IV.) Premier is a legally distinct entity from its members.[5] Therefore, it does not necessarily follow that property owned by Premier — in other words, Uptown — was property owned by its members.[6]

Meyers testified that he personally did not operate, maintain, or receive income from Uptown in 2013. (RT at p. 65.) He also testified that BRF did not operate, maintain, or receive income from Uptown in 2013, and that none of the money received from appellant was earmarked to go to Uptown. (RT at p. 66.)

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"

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

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

[6]"'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].)

— 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[7] 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

[7]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.

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*.)

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. 65-67.) 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:[8]

> 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.)
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> 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

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[8]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.)

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.

(*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? 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? 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. 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.

I

> Mr. Meyers owned .078[%] of PREI. Mr. Vogt was the trustee of a trust which owned 80.57% of PREI as well as the manager of PREI. PREI owned 27% of the Uptown Theatre. As a result of their relationship with PREI, Mr. Meyers and Mr. Vogt were engaged (*de minimus*, as Respondent correctly argued) in the operating, owning, or maintaining of the theater. Therefore, Respondent's payment of $20,000 to BR Festivals LLC, which was owned by Mr. Meyers and Mr. Vogt, was a violation of Business and Professions Code Section 25500(a)(2) and constitutes cause for the suspension of Respondent's license.

II

> Even if Mr. Meyers and Mr. Vogt did not have involvement with PREI, Respondent's furnishing or giving of $20,000 to BR Festivals LLC would still be a violation of Section 25500(a)(2), since that money was commingled with other funds to pay for the rental of the Uptown Theatre. In other words, Respondent, by paying $20,000 to BR Festivals LLC, indirectly gave or furnished money to Uptown Theatre. As stated above, the violation of Business and Professions Code Section 25500(a)(2) constitutes cause for the suspension of Respondent's license.
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> [¶ . . . ¶]
>
> Thing of Value
> Respondent correctly argued that a purpose of Section 25500(a)(2) is to prevent ongoing relationships between winegrowers and retailers which would violate the tied-house laws. However, contrary to Respondent's argument, there is no requirement of proof of such a relationship for there to be a violation of the statute. . . .

(Determination of Issues, ¶¶ I-II, IV.)

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. 65-67), there was no evidence presented *in this record*[9] 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 seeming 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. Vogt and Meyers' intentions are inconsequential in this instance because it is appellant that is being charged with the wrongful conduct, not them.

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

[9]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.

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: "In other words, Respondent, by paying $20,000 to BR Festivals LLC, indirectly gave or furnished money to Uptown Theatre." (Determination of Issues, ¶ II.) There are two things about this modified issue statement that we find curious. First, the language of count one of 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.
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> 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.)
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> 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:

> Respondent noted that it did not have any interest in the Uptown Theatre in connection with the festival, it did not sponsor any of the parties at Uptown, it had no reason to be concerned about the ownership of Uptown, and that it had no interest in the Uptown Theatre at all. These facts are irrelevant to this case. The issue is whether Respondent gave or furnished money to an LLC whose

> principals were engaged in the owning, operation, or maintenance of the Uptown Theatre, or whether Respondent indirectly gave or furnished money to the Uptown Theatre. As discussed above, Respondent did.

(Determination of Issues, ¶ VI.) We disagree with this "indirect benefit" theory.

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, ¶ III.) The sponsorship monies from the General Account were utilized to pay artists and various of BRF's obligations as they came due. (RT at pp. 67-68.) 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[10] 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.

Furthermore, there is no evidence in the record below of an ongoing relationship between appellant and Uptown, nor evidence in that appellant's wines were sold at Uptown. Contrary to the *Schieffelin* case, there is no factual basis here for the contention that appellant

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[10]Appellant repeatedly asserts that the overall budget for the Festival was $14,000,000. (See, e.g., App.Br. at p. 7.) 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.

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 appellant never planned to participate in after parties, and, in fact, did not participate in after parties. 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 Department to determine 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[11] 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 Department'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

[11]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).

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 Department's concerns are unwarranted.

Further, appellant argues that the amount of its "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. 7 [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 no 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 "[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 in regards to count one is not supported by substantial evidence and must be reversed.[12]

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].)

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

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

nonetheless decline appellant's invitation to proceed on this basis[13] 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 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

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[13]See, e.g., *Hansen v. Workers' Compensation Appeals Board* (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].

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.)

III

Appellant contends the decision regarding section 25600(a)(1) is not supported by substantial evidence. Appellant was asked by BRF to provide, as a sponsor of the festival, two cases of wine for inclusion in gift bags for artists, and one case of wine for a charity auction. (Exh. 2, attach. 7.) It was appellant's understanding that it received promotional consideration for the wine, rather than payment, and that it was not a gift. (RT at pp. 139, 168.)

Section 25600(a)(1) of the Business and Professions Code states:

> No licensee shall, directly or indirectly, give any premium, gift, or free goods in connection with the sale or distribution of any alcoholic beverage, except as provided by rules that shall be adopted by the department to implement this section or as authorized by this division.

Rule 106(a) provides:

> No licensee shall, directly or indirectly, give any premium, free goods, or other thing of value in connection with the sale, distribution, or sale and distribution of alcoholic beverages, and no retailer shall, directly or indirectly, receive any premium, gift, free goods or other thing of value from a supplier of alcoholic beverage, except as authorized by this rule or the Alcoholic Beverage Control Act.

(Cal. Code Regs., tit. 4, § 106.)

While BRF's managers, as discussed in Section I, held indirect minority interests in an LLC which held an on-sale license at Uptown Theatre, no evidence was submitted that Uptown Theatre was the recipient of the wine provided for the gift bags and charity auction, or that the wine was provided in connection with the sale or distribution of alcoholic beverages.

Furthermore, testimony was given that appellant's wines were not sold at Uptown Theatre. (RT at p. 11.)

Even though no recipient of the supposed "free gift" is identified, the ALJ finds a violation — wine was provided for gift bags and an auction, therefore he finds there was a violation of section 25600. He states: "The three cases of wine which Respondent gave to BR Festivals LLC, with *the hope* that they would be promoted, were gifts or free goods in connection with the sale or distribution of Respondent's wines. . . ." (Determination of Issues, ¶ IX, emphasis added.) This misstates the facts. Appellant did not provide the wine with the *hope* that they would be promoted. Appellant provided wine and completed a contract outlining the intended use. (Exhibit 2, attach. 7.) That form explicitly states that the wine was intended for VIP after-parties, artist gift bags, and a charity auction called the "Ultimate Cellar" raffle. (*Ibid.*) Appellant relied on the promoters of BRF to use the wine as outlined in the contract, and in exchange, it received promotional consideration.

The ALJ goes on to state:

> However, there is no evidence that Respondent's wines were actually used for promotion purposes. In fact, the only relevant evidence regarding his issue is that Respondent gave three cases of wine to BR Festivals LLC, without charging any money for them, and Respondent does not know where the wines went.

(Determination of Issues, ¶ XI.) We believe the decision holds appellant to an impossible standard. Rather than asking appellant to prove the unknowable, the Department must prove their prima facie case.

Finally, the ALJ states:

> Respondent argued that the wines which it gave to BR Festivals LLC were not gifts or free goods. According to Respondent, "the benefit conferred by BRF LLC to (Respondent) for the wine was the agreement to put the wine in front of the artist, who, if they liked the wine, could potentially provide valuable publicity and social media endorsement. There was consideration on both sides of the sponsorship agreement . . . ." Respondent's Response Brief, page 17. If Respondent's argument is valid, that there was consideration on both sides, it is arguable that Respondent unlawfully sold, by barter, its wines at the festival.

(Determination of Issues, ¶ X.) We agree with appellant that there *was* consideration for the wine in the form of promotional consideration. However, the ALJ's assertion that appellant may have unlawfully sold, by barter, its wines at the festival is not supported by the evidence.

The burden of persuasion at the administrative hearing is the preponderance of evidence, and the Department's initial burden of producing evidence is to make a prima facie case — that is, to produce sufficient evidence to support a finding in its favor in the absence of rebutting evidence. (See *The Von's Corp.* (2002) AB-7819.) Insufficient evidence was presented to support the findings sustaining count two.

Rule 106(a), which was put in place to give guidance for the implementation of Business and Professions Code section 25600(a)(1), can be condensed and paraphrased as follows: no licensee shall give, and no retailer shall receive, any free goods, premiums, or things of value in connection with the sale or distribution of alcoholic beverages. Appellant established that the wine was given in exchange for promotional consideration, and no retailer was identified as having received these wines. Rather, the Department finds that a violation occurred because the contract states that part of the wine was for VIP after parties (Exh. 2, attach. 7) and, as discussed in Part I, one of the venues for after parties (Uptown) — among others to be announced — was a retailer. As we explained in Part I, the contract was between appellant and BRF, not between appellant and Uptown, and the passive, indirect involvement of Vogt and Meyers in the Uptown is an insufficient nexus to support a violation. We do not believe the Department has established a prima facie case to prove a violation of section 25600(a)(1) or rule 106 in this case. The decision in regards to count two is not supported by substantial evidence and must be reversed.

ORDER

For all the aforementioned reasons, the decision of the Department is reversed.[14]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD[15]

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[14]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.

[15]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).