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

AB-9532
File: 02-405515; Reg: 14080327

DON SEBASTIANI & SONS
INTERNATIONAL WINE NEGOCIANTS,
520 Airpark Road, Napa, CA 94558,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: March 3, 2016
Los Angeles, CA

ISSUED APRIL 19, 2016

Appearances: *Appellant:* Rebecca Stamey-White and John W. Edwards II, of Hinman & Carmichael LLP, as counsel for Don Sebastiani & Sons International Wine Negociants.
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] Don Sebastiani & Sons International Wine Negociants's license because it "directly or indirectly . . . furnished, gave, or loaned" a $15,000 sponsorship fee to Bottle

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[1]The decision of the Department, dated July 24, 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.

Rock Festivals LLC, two of whose principals were also allegedly engaged in "operating, owning, or maintaining" an on-sale licensed premises — 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); secondly, 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) (Cal. Code Regs., tit. 4, § 106); and, finally, because it violated sweepstakes law in violation of Business and Professions Code section 25600.2, subdivisions (a)(1)(D) and (a)(2)(B).

FACTS AND PROCEDURAL HISTORY

Appellant's type 02 winegrower license was issued on October 1, 2004. There is no prior record of Department discipline against the license. On April 15, 2014, the Department instituted a three-count accusation against appellant. The pertinent language of the tied-house charge (Count one) within the accusation reads:

> On or about April 5, 2013, respondent-licensee, gave money to wit: $15,000.00 sponsorship fee, to BR Festivals, LLC, of which Gabriel Meyers and Robert Vogt are managers and/or members, and who are also engaged in operating, owning, or maintaining 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 February 25, 2015 administrative hearing, documentary evidence was received and testimony was presented by Elden Shepard, an agent for the Department, and by Mark Feinberg, vice-president of marketing for appellant at the time of the festival. The testimony of Gabriel Meyers from several prior hearings was also

admitted into evidence. (See RT at p. 21.)

In addition to the sponsorship fee, as part of its participation in the event, appellant agreed to provide wine to be used for promotional purposes in artist gift bags, and for a silent auction for the benefit of charity. (Exh., attach. 6.) The pertinent language of the free goods charge (Count two) within the accusation reads:

> On or about Abril 23, 2013, respondent-licensee(s), directly or indirectly, gave a premium, gift or free goods in connection with the sale or distribution of an alcoholic beverage, to wit: 1 case of Don & Sons Sonoma Coast Pinot Noir, 1 case of B Side Red Blend, 2 bottles of 2008 Don & Sons Pinot Noir, 2 bottles of 2009 Don & Sons Pinot Noir, 2 bottles of 2010 Don & Sons Pinot Noir, 2 bottles of 2011 Don & Sons Pinot Noir, 2 bottles of 2010 B Side Red Blend, and 2 bottles of 2011 B Side Cabernet Sauvignon, to BR Festivals, in violation of Business and Professions code Section 24600(a)(1) and Rule 106 of the California Code of Regulations.

(Exh. 1.)

During the festival, appellant conducted a sweepstakes for which the prize was a clock radio. Attendees of the festival could enter the sweepstakes by going to appellant's hospitality tent and entering their personal information on an iPad. (Findings of Fact, ¶ IX.) Appellant also posted a description of the sweepstakes on its Facebook page. (RT at p. 84.) The pertinent language of the sweepstakes charge (Count three) within the accusation reads:

> Between the dates of May 8, 2013 and May 12, 2013, respondent-licensee(s), by or through its officer(s), agents(s) [*sic*] or employee(s) conducted a consumer sweepstakes that did not conform to statutory requirements, to wit: the sweepstakes was not open to all California residents and did not provide an alternative means of entry in violation of Business and Professions Code Section 25600.2(a)(1)(D) and 25600.2(a)(2)(B).

(Exh. 1.)

Following oral argument, the administrative law judge (ALJ) asked for closing

arguments in the form of briefs, and the briefs were submitted.

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 8, 2013 and May 12, 2013. The Festival featured live music, live comedy, and food, wine, and beer, and was the brainchild of Gabriel Meyers and Robert Vogt. These two created Bottle Rock Festivals LLC (hereinafter, "BRF") in 2012 to promote and execute the Festival. Both Meyers and Vogt were managers of BRF, but Vogt resigned from his duties in November 2013.

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

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

B. Uptown Theatre LLC

The Uptown Theatre (hereinafter, "Uptown") is licensed by the Department with a retail on-sale beer and wine public eating place license (type 41). BRF rented Uptown as well as another venue, Copia, as venues for VIP "after parties" at the Festival. Meyers testified he believes there was a rental contract between BRF and Uptown, although he never saw it. BRF directed certain functions at Uptown both before and during the Festival. Specifically, BRF told Uptown which events would be held there and at which times. BRF also oversaw the entertainment to be featured at Uptown during the events. Again, although Meyers did not know the exact contractual obligation, he testified he believes Uptown was paid the full rental amount for the use of the facility during the Festival. 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. 4.) 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.

On or about April 5, 2013, appellant paid $15,000 to BRF for its sponsorship package. The sponsorship fee entitled appellant to specified benefits:

- Appellant was one of sixty (60) featured wineries at the Festival, and its logo was placed in all media advertising and promoting the Festival.
- Appellant had the prerogative to sell its wines exclusively from a VIP hospitality tent through a Department-licensed caterer, Fish Market LLC, who purchased appellant's wine and then sold it from appellant's tent.

Notably, appellant would not have had the opportunity to sell its wine in this manner at the Festival had it not purchased the sponsorship package.

- Appellant had access to the names, emails, Facebook accounts, and Twitter accounts of Festival-goers, which could then be utilized for appellant's marketing efforts.
- Appellant received two (2) 4-day passes for the Festival, and forty (40) 1-day passes, 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, attach. 4 at p. 4.) 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 value of the tickets, hospitality tent, and exposure to consumers far exceeded the $15,000 sponsorship fee. (Resp. Closing Br. at p. 13.) As Mark Feinberg testified:

> We're not a tasting room. We don't have any real way to interact directly with the consumer, hence we do consumer events. So BottleRock allows us — allowed us at the time to market to an audience that is the future of the wine business, the millennial generation. So for us the opportunity to go out and meet at the end up to 120,000 consumers and expose them to our various wine brands was of tremendous value to us.

(RT at p. 61.)

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 $15,000 sponsorship, but, rather, to increase brand awareness.

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]

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

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); section 25600, subdivision (a)(1); and section 25600.2, subdivision (a)(2)(B). The portion of count two pertaining to individual bottles of wine was dismissed, and the portion of count three alleging a violation of section 25600.2, subdivision (a)(1)(D) was dismissed. 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 then filed a timely appeal raising the following issues: (1) appellant's sponsorship fee was given in exchange for valuable consideration rather than being an indirect thing of value given to a licensee, and the Department's decision misapplied section 25500(a)(2); (2) appellant's exchange of wine for promotional opportunities was a lawful commercial transaction — not the gift of free goods, and the decision regarding section 25600(a)(1) is not supported by substantial evidence; (3) appellant's sweepstakes complied with the statutory requirements, and the decision regarding section 25600.2(a)(2)(B) is not supported by substantial evidence; and (4) all these activities are protected commercial speech, and therefore the decision impermissibly infringes on appellant's First Amendment rights.

DISCUSSION

I

Appellant contends its sponsorship fee was given in exchange for valuable consideration rather than being an indirect thing of value given to a licensee. It

contends the decision misapplies section 25500(a)(2) to penalize conduct that is not fairly within the ambit of that statute. (App.Br. at p. 6.) Appellant refers to Department's approach as a "strict liability" construction of the statute, which it claims "means that marketing events involving suppliers must be vetted in a way that is impossible to accomplish with winery and Department resources and has been met with understandable confusion by non-licensees." (*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:
>
> [¶ . . . ¶]
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> (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 April 5, 2013, respondent-licensee gave money to wit: $15,000.000 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 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.[4] (Exh. 2, attach. 2.) Vogt was the manager of Premier and also the manager of the Vogt Trust, which owned a majority interest (80.575%) in Premier. (Findings of Fact, ¶ V.) Meyers, on the other hand, has a comparatively

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

small ownership interest in Premier (0.078%). (*Ibid*.) 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 testimony in previous cases — admitted into evidence (RT at p. 21) and appended to the ALJ's decision[7] — established that all of the funds collected by BRF were commingled in a single account, and that general accounting procedures were not adhered to. (*Freixenet*, RT at pp. 89-91.) Meyers testified that BRF did not staff, run, or provide management of the Uptown Theatre during the festival (*Id.* at pp. 92, 119); that BRF did not receive income from the Uptown after parties (*Id*. at pp. 120-122); and that, to the best of his knowledge, Premier did not receive money from the after parties either. (*Id.* at p. 122.) Meyers testified in another proceeding that he did not operate or maintain the Uptown in 2013 and never received income from the Uptown. (*Gundlach Bundschu*, RT at p. 69.)

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[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].)

[7]We note that this testimony was attached to the Department's decision without any differentiation between cases, and without labeling of any kind to enable the Board to know for certain the case origin of the various pages of testimony. References to individual cases were determined by context, and represent our best guess as to the source of such testimony. Should this matter be appealed to a higher court, the record will require augmentation to supply better documentation.

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

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

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

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

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[8]That is to say Meyers' ownership of 0.078% interest in Premier, which owns a 21.433% interest in Uptown, and Vogt's management of Premier and management of the Vogt Trust, which owns an interest in Premier. Notably, nothing in the record establishes that Vogt himself actually owns an interest in Uptown. (See Exh. 2, attach. 2.)

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. The type of passive, indirect ownership of a retail-licensed establishment in this case does not appear to be the type of ownership section 25500 contemplates.

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

> Tied-house statutes are so named because they were enacted to prevent the return of saloons operated by liquor manufacturers, a practice that had been common in the early 1900's. (*Actmedia, Inc. v. Stroh* (9th Cir. 1986) 830 F.2d 957, 959 (*Actmedia*).) The California Supreme Court

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

> 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 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 exorcized.

(*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 21% 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 $15,000 to them, the principals of BR Festivals LLC, was a violation of Section 25500(a)(2) and is cause for the suspension of Respondent's license.
>
> II
>
> Even if Mr. Meyers and Mr. Vogt did not have involvement with PREI, Respondent's payment of $15,000 to them to sponsor the festival 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 $15,000 to BR Festivals LLC, indirectly gave or furnished money to Uptown Theatre, thereby violating Business and Professions Code Section 25500(a)(2).
>
> [¶ . . . ¶]
>
> <u>Thing of Value</u>
>
> Respondent incorrectly argued that the Department must prove that it, Respondent, gave a thing of value to the Uptown Theatre. Actually, the law requires the Department to prove only that Respondent gave a thing of value to a person engaged in operating, owning, or maintaining the theater. As discussed above, the Department met this burden of proof.

> Moreover, because Respondent's sponsorship fee was commingled with BR Festival LLC's other funds to pay for the rental of Uptown Theatre, Respondent did indirectly give or furnish money to the Uptown Theatre, which sells alcoholic beverages for consumption on the premises. Accordingly, all the elements for a violation of Section 25500(a)(2) are met.
>
> 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 *Gundlach Bundschu* RT at p. 69), there was no evidence presented in this record 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 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 $15,000 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.
>
> 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 exorcized." *(California Beer Wholesalers*, *supra*, 5 Cal.3d at p. 409.)
>
> The Department found that ACOP was "no more than an alter ego of Chevys for the purpose of the 1998 and 1999 Chevys Fresh Mex Runs" and that "ACOP was acting on Chevys' behalf in soliciting [Schieffelin], as a supplier of Grand Marnier[.]" This finding is supported by evidence of a lack of financial accounting between ACOP and Chevys, Chevys' direct involvement in the planning and promotion of the races, and Miramontes' dual role as vice-president of ACOP and independent contractor handling Chevys' promotions. Further, the Department found that Schieffelin's payments to ACOP were for the benefit of Chevys and that they helped promote and stage race events that "were significantly more associated with Chevys than they were with ACOP." Schieffelin cannot have been unaware that its payments would help underwrite the costs of events designed to promote Chevys, the title sponsor of the races.

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

It is the above, extensively fact-specific reasoning from *Schieffelin* that the ALJ extrapolated to support his finding that the appellant here violated section 25500(a)(2) by indirectly providing a thing of benefit to Uptown. However, comparison of the pertinent facts of the two cases shows that the reasoning from *Schieffelin* is inapposite and misapplied to this case. For instance, the accusation in *Schieffelin* charged the supplier, Schieffelin, with providing a benefit directly to Chevys, the retail licensee. (*Id*. at p. 1202.) There was therefore no need for it to traverse a factual lacuna between the entity charged with giving the money and the one in receipt of it. Here, as discussed above, the accusation establishes that the involvement, or lack thereof, of Vogt and Meyers in Uptown is critical for a determination of whether the violation actually charged was proved.

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

> 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, however, are irrelevant. 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, ¶ IV.) 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. (*Freixenet*, RT at p. 90) 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, although Meyer’s testimony established that total revenues from the Festival were approximately $14,500,000. (*Id*. at p. 123.) 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 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 all suggest that the "intent" of the parties to the alleged illegal relationship is relevant to whether a tied-house violation occurred.[10] 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

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[10]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).

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 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. 17 [alleging, for example, that appellant's contribution to Uptown was $64.20, out of which the Vogt Trust's share was $11.08 and Meyers' share was .0107 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.[11]

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

II

Appellant contends the exchange of wine for promotional opportunities was a lawful commercial transaction, not the gift of free goods, and that the decision regarding section 25600(a)(1) is not supported by substantial evidence. As part of its sponsorship participation, appellant provided wine for inclusion in gift bags for artists and for a silent auction. (Exh. 2, attach. 6.) 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. 80-81.)

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 or that the wine was provided in connection with the sale or distribution of alcoholic beverages.

Even though no recipient of the supposed "free gift" is identified, the ALJ finds a violation — wine was provided for gift bags therefore he finds there was a violation of section 25600. He states: "The two 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, ¶ VII, 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. 6.) That form explicitly states that the wine was intended for VIP after-parties, artist gift bags, and a silent auction. (*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:

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

(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 it "sold" the two cases of wine to BR Festivals LLC (Respondent's closing brief, page 16), and received consideration in return. According to Respondent, "Respondent exchanged $15,000 and two cases of wine to BRF, who in turn provided tickets to BR 2013; a hospitality tent; email lists; website, social media and print advertising; and, most importantly, marketing opportunities to reach consumers personally in the hospitality tent and to musician influencers who routinely

> receive 'swag bags' as a form of encouraging informal endorsement to their fans. " Respondent's closing brief, page 17. The argument is rejected.

(Determination of Issues, ¶ VIII.) 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. 6) 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.

III

Appellant contends the sweepstakes complied with the statutory requirements, and that the decision regarding a violation of section 25600.2, subdivision (a)(2)(B) — the portion of count three that was sustained — is not supported by substantial evidence.

Business and Professions Code section 25600.2. provides, in pertinent part:

> (a) An authorized licensee may conduct or sponsor consumer sweepstakes, subject to the following conditions:
>
> (1) (A) No entry fee may be charged to participate in a sweepstakes authorized by this subdivision. Entry or extra chances in a sweepstakes shall not be made available via the purchase of an alcoholic beverage.
> (B) Entry into or participation in a sweepstakes shall be limited to persons 21 years of age or older.
> (C) No sweepstakes shall involve consumption of alcoholic beverages by a participant.
> (D) Subject to subparagraph (B), any sweepstakes offered in California shall be open to all residents of California.
> (E) A sweepstakes may not be conducted for the benefit of any permanent retail license.
> (2) (A) Closures, caps, cap liners, corks, labels, cartons, cases, packaging, or other similar material shall not be used as an entry to a sweepstakes or as a means of determining the amount or size of the prize or the winner in a sweepstakes, except as provided in subparagraphs (D) and (F).
> (B) The authorized licensee shall provide an alternative means of entry that does not require a visit to a licensed premises.
>
> [¶ . . . ¶]

The ALJ made the following findings regarding the sustained portion of count three:

> Because Respondent conducted a sweepstake which a person can enter only by going to Respondent's tent at the festival, respondent violated Business and Professions Code Section 25600.2(a)(2)(B). This violation is cause for suspension of Respondent's licence.

(Determination of Issues, ¶ XV.)

Appellant contends the Department's decision ignores evidence in the record supporting its position that the statutory requirements were met and that a visit to its tent was not the only means of entering the sweepstakes. To wit, they point out that in addition to being able to participate in the sweepstakes by entering information on an iPad at appellant's hospitality tent (RT at p. 85), appellant also posted a description of the sweepstakes on its Facebook page. (Exhibit C.) If a person wished to enter the sweepstakes, appellant maintains, they could send appellant an email, or leave a comment on its Facebook page indicating that they wished to enter. Appellant maintains that the fact that nobody entered the sweepstakes in this way is not relevant because the statute only requires that an alternate means of entry *be provided*, and it was. (RT at p. 84.)

The ALJ made the following finding regarding the sweepstakes:

> During the music festival, Respondent conducted a sweepstake for attendees at the festival. The prize was a radio. The only way for a person to enter the sweepstake was to go to Respondent's tent and enter his / her information on an IPAD which belonged to Respondent.

(Findings of Fact, ¶ IX.) This finding, and the ALJ's Conclusion of Law XV, *supra,* omit any reference to the testimony of Mark Feinberg that appellant's Facebook page provided an alternate means of entry. (RT at pp. 82-85.)

We agree that Exhibit C does not *explicitly* state that an individual could enter the sweepstakes by emailing appellant or posting to the Facebook page — a fact which led

the ALJ to disregard Feinberg's testimony about a possible alternate means of entry. This is within his discretion. As we have said many times, the ALJ is the finder of fact, and unless there is a clear abuse of discretion shown, the Board is bound by the factual findings of the Department:

> We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).)

(*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].

It is the Board's task to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department. (See 6 Witkin, Cal. Procedure (2d ed. 1971) *Appeal*, § 245, pp. 4236-4238.) *(Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815].)

In the instant case, we must affirm the ALJ's decision regarding the sustained portion of count two. While it is possible that the evidence could be interpreted to find that an alternate means of entry was made available, a contrary conclusion is equally plausible. In such a situation the Board's hands are tied and we must accept the ALJ's interpretation.

IV

Appellant contends the Department's interpretation of all the activities addressed in this matter are protected commercial speech, and therefore the decision impermissibly infringes on appellant's First Amendment rights.

It is outside the jurisdiction of this Board to rule on the constitutionality of a statute. The California Constitution provides:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
> (b) To declare a statute unconstitutional;
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

(Cal. Const., art. III, § 3.5.)

While appellant contends that it is not challenging the constitutionality of the statutes themselves, but merely Department's application of them, we are not certain that this distinction affects our authority to entertain appellant's argument. (See, e.g.,

Hansen v. Workers' Compensation Appeals Bd. (1993) 18 Cal.App.4th 1179, 1182, fn. 1 [23 Cal.Rptr.2d 30] [noting with approval the Workers' Compensation Appeals Board's refusal to consider an "as-applied" constitutional challenge under article III, section 3.5 of the California Constitution].) Moreover, certain other legal principles countenance against the Board's consideration of appellant's constitutional challenge. As the United States Supreme Court has 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. [Citation.]" (*Ashwander v. TVA* (1935) 297 U.S. 288, 347 [56 S.Ct. 456] (Brandeis, J. concurring).) Because we find this case reversible on other grounds (see Parts I and II, *supra*), we need not consider appellant's First Amendment challenge here.

Although we decline to rule on appellant's First Amendment argument, we have serious doubts whether section 25500(a)(2) in particular would pass constitutional muster. In a decision issued recently, the Ninth Circuit remanded a District Court decision evaluating the constitutionality of another of California's tied-house statutes, section 25503. (See generally *Retail Digital Network v. Appelsmith* (9th Cir. 2016) 810 F.3d 638 [2016 U.S. App. LEXIS 140].) The court's holding focused on the level of scrutiny to be afforded. It observed that the U.S. Supreme Court's decision in *Sorrell* "modified the *Central Hudson* test for laws burdening commercial speech," increasing the level of scrutiny to be applied in cases addressing restrictions on commercial

speech. (*Appelsmith*, *supra*, at p. *17, citing *Sorrell v. IMS Health Inc.* (2011) 131 S.Ct. 2653 [180 L.Ed.2d 544].)

"Section 25503," the court held, "is now subject to heightened judicial scrutiny, not the intermediate scrutiny applied in *Actmedia*." (*Appelsmith*, *supra*, at p. *25, overruling *Actmedia, Inc. v. Stroh* (1985) 830 F.2d 957.)

As appellant points out, *Central Hudson* outlined a four-part test for the constitutionality of a governmental limitation on commercial speech:

> [W]e must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

(*Central Hudson v. Gas & Electric Corp. v. Public Service Comm. of N.Y.* (1980) 447 U.S. 557, 566 [100 S.Ct. 2343].) According to *Retail Digital Network*, where the first two factors are established, *Sorrell* modifies the government's burden in establishing the remaining factors:

> With respect to the third *Central Hudson* factor, the government bears the burden showing "that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." [*Rubin v.*] *Coors Brewing Co.* [(1995)] 514 U.S. [476,] 487 [115 S. Ct. 1585]. With respect to the fourth *Central Hudson factor*, the government bears a heavier burden of

> showing that the challenged law "is drawn to achieve the [the government's substantial interest." *Sorrell*, 131 S. Ct. at 2667-68.

(*Retail Digital Network*, *supra*, at pp. 18-19.)

We repeat that we do not, as an administrative appellate body, have the authority to apply any scrutiny, heightened or otherwise, to a duly enacted California statute. We are troubled, however, by the apparently limitless reach of the statute in its present form. While the government certainly has a strong policy interest in preventing the ills associated with tied-house arrangements, we are left dissatisfied by its methods. Although the Ninth Circuit did not rule on the issue, certain comments the Court made in passing suggest that it, too, is skeptical of the Department's "all-or-nothing" application of the tied-house statutes. (See *Retail Digital Network*, *supra*, at p. 29 ["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."], citations omitted. Regardless, the Court's disposition of the case clearly established that the Department's application of the tied-house statutes requires case-by-case scrutiny to ensure licensees' rights are not unnecessarily infringed upon.

ORDER

The decision of the Department is reversed as to counts 1 and 2, affirmed as to count 3, and remanded to the Department for reconsideration of the penalty in light of the reversal of counts 1 and 2.[12]

FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

DISSENTING OPINION:

I concur with the majority's opinion on counts 1 and 2, but as to the majority opinion on count 3, I respectfully dissent.

The testimony and evidence (Exhibit C) presented at the hearing do not support the assertion of a violation of section 25600.2. The ALJ choose to ignore the testimony of appellant's witness, Mark Feinberg, who testified that information concerning the sweepstakes was available on the Don Sebastiani & Sons International Wine Negociant's Facebook page. The witness implied that had the investigator clicked on one or more portal on appellant's Facebook page, he would have been directed to the sweepstakes entry website. For those who use Facebook, this is a common means of communication.

[12]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.

In addition, there was no testimony that the investigator asked Mr. Feinberg whether or not an alternate means of entry was available to the general public, statewide. It was the Department's burden to prove there was no alternate means of entry — not the appellant's burden to prove that it provided an alternate means of entry. The Department failed to meet this burden when it failed to ask enough questions on this issue.

For these reasons, I would reverse the Department's decision as to count 3.

BAXTER RICE, CHAIRMAN
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD