S189577
2nd Civil No. B222784
LASC No. KC053945

IN THE SUPREME COURT OF CALIFORNIA

FAIZ ENNABE, Individually and as Administrator, etc., et al.

Plaintiffs and Appellants,

vs.

CARLOS MANOSA, et al.,

Defendants and Respondents.

ANSWER BRIEF ON THE MERITS

From a Decision of the Court of Appeal
Second Appellate District, Division One

Honorable Robert A. Dukes, Judge

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Statutes 1978, ch. 929, §§ 1-2 51

Statutes 1978, ch. 930, § 1 33

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Treatises

Singer, 2A Statutes and Statutory Construction (7th ed. 2007) 17, 37

2A Sutherland, Statutory Construction (4th ed. 1973) 29

Other Authorities

American Heritage Dictionary (2d College Ed. 1982) 29, 30

Comment, *Minor Drinking and Driving: California's Inconsistent and Inequitable Statutory Scheme Of Social Host Immunity* (1992) 25 U.C.Davis L.Rev. 463 34

PRELIMINARY STATEMENT

Does charging $3 to $5 to get into a party where alcohol is available constitute the "selling" of alcohol under section 25602.1 of California's Alcoholic Beverage Control Act? (Bus. & Prof. Code, § 23000 et seq. [the Act].) [1] Ennabe says yes, relying on a literal reading of the statutory definition of "sells" under section 23025. Section 23025 defines a "sale" of alcohol as occurring in any transaction, where for any consideration, title to alcohol is transferred. Ennabe sees a transfer of title occurring at the door, when the guest pays the entrance fee. The transfer-of-title-at-the-door theory does not work in this case. (See, pp. 16-26, *post*.)

The trial court focused on the social, non-commercial nature of the party to find no sale. Similarly, the Court of Appeal concluded that the entrance fee was to help defray costs, and looked to the communal nature of the alcohol to likewise find no sale. (*Ennabe v. Manosa* (2010) 190 Cal.App.4th 707, 716-717.) Both courts were right, but both labored under a statutory definition of "sale" that, on its face, does not require commercial gain. The trial court intuited a common sense definition. The Court of Appeal crafted a definition shaped by Ennabe's title theory, yet its holding only implicitly recognized the non-commercial nature of the party and the entrance charge.

---

[1] Section references are to the Business and Professions Code, unless otherwise stated.

Manosa submits that a "sale" under section 25602.1 means a sale for commercial gain based on the transfer of alcohol. It is the commercialization of alcohol transfers in an otherwise purely social setting that creates a "sale" under section 25602.1. That construction is not precluded by section 23025's definition of "sale," and is strongly supported by section 25602.1's language, structure and legislative history. As applied to this case, that definition raises no triable issue as to whether Manosa "sold" alcohol.

At most, Manosa furnished alcohol. But the Legislature did not make "furnishing" a basis of liability for non-licensees like Manosa. Of the three operative verbs used throughout section 25602.1 – sells, furnishes and gives – only "sells" imposes liability upon non-licensees. "Furnishing" had a well-established meaning in the case law when the Legislature created the statutory cause of action in section 25602.1. Inexplicably, Ennabe argues that Manosa furnished alcohol. So be it – Ennabe therefore failed to establish a prima facie case of statutory liability under the non-licensee clause of section 25602.1 or, alternatively, Manosa is protected by the social host immunity of Civil Code section 1714.

Under the Civil Code immunity, "furnishing" is an *immunity* verb. "Furnishing" is what social hosts do, and under any reasonable construction, Manosa was a "social host." That uninvited guests were charged $3 to $5 to get into Manosa's party did not transform Manosa from social host to saleswoman. Just as the line between "furnishes" and "sells" under section 25602.1 turns on the

absence of commercial gain, it is the absence of commercial gain that keeps Manosa's social host immunity intact.

Thus, Manosa respectfully submits that the decision of the Court of Appeal should be affirmed.

STATEMENT OF FACTS

I. Manosa Plans A Party And Contributes $60 Towards Alcohol

It was Manosa's idea to have a party to "hang out" and "socialize" with friends. (1 Appellants' Appendix [AA] 98; 2 AA 303 [Manosa Depo.].) Manosa was then twenty years old, and she understood that most – but not all – of her guests would be under 21. (1 AA 96 [Manosa Depo.]; 2 AA 312 [same].)

Manosa was the "organizer" (1 AA 104 [Manosa Depo.]) and "host" (2 AA 321 [same]). Her party was publicized via word-of-mouth, telephone, and text messaging. (2 AA 344 [Abuershaid Depo.]; 2 AA 372 [Diaz Depo.]; 1 AA 104 [Manosa Depo.].) Initially, Manosa invited her boyfriend and five other friends; eventually, forty to fifty people showed up. (1 AA 97 [Manosa Depo.]; 2 AA 331 [Abuershaid Depo.])

The party was held at Manosa's parents' vacant rental property, starting on the evening of April 27, 2007 through the very early morning of the next day. (2 AA 298 [Manosa Depo.]; 2 AA 402 [D. Ennabe Dec.]; 2 AA 389 [M. Bosley Dec.].) Manosa's parents neither knew about nor consented to the party. (1 AA

141, 143 [Decs. of Carlos and Mary Manosa]; 2 AA 299 [Manosa Depo.]; 2 AA 426 [Mary Manosa, Resp. To Request For Admission.].)

Manosa put in $60 toward the purchase of alcohol for her party. (1 AA 99-100 [Manosa Depo.]; 2 AA 308-309 [same]; 1 AA 139 [Manosa Dec.].) Rum, tequila and other beverages were set up outside on the table, and beer was put in the refrigerator. (1 AA 106 [Manosa Depo.]; 2 AA 311 [same].) The alcohol was "communal." (1 AA 100 [Manosa Depo.]; 2 AA 309, 312, 316 [same].) There was music and dancing (2 AA 335 [Abuershaid Depo.]) with music provided by a disc jockey paid for by Manosa. (2 AA 306 [Manosa Depo.].)

II. Some Guests Pay $3 To $5 To Get In. About $60 Is Collected

At the beginning of the party, no one stood in the side yard collecting money. (1 AA 111 [Manosa Depo.].) Later, there was. His name was Todd Brown. (2 AA 351-352 [M. Aquino Depo.].) The record does not show when Brown started collecting money.

One witness heard Manosa ask Brown to "stand by the side gate to kind of control the people that came in," and if Manosa did not know them, to "charge them some money to get into the party." (2 AA 352 [M. Aquino Depo.].) Thus, people who "weren't known or weren't invited were charged." (2 AA 334 [Abuershaid Depo.].) According to decedent's brother, Brown said the payment was "for entry and access to alcohol. . . ." (2 AA 402 [D. Ennabe Dec.].) Manosa did not personally collect any money. (1 AA 114 [Manosa Depo.].)

Some guests paid $3.00; others, $5.00. (2 AA 335 [Abuershaid Depo.]; 2 AA 389 [Bosley Dec.].) Still others were let in without charge. (1 AA 91 [Abuershaid Depo.]; 2 AA 343 [same]; 2 AA 402 [D. Ennabe Dec.].) There is no evidence as to the number of guests who were charged, or the reason why the charge varied.

Between $50 and $60 was collected from the entrance fee. (2 AA 335 [Abuershaid Depo.].) This was no more than what Manosa testified she contributed toward the purchase of alcohol. (1 AA 99-100 [Manosa Depo.]; 2 AA 308-309 [same]; 1 AA 139 [Manosa Dec.].)

III. Additional Alcohol Is Purchased From The Entrance Fees

Manosa was overheard telling others to use the door charge to buy additional alcohol. (2 AA 403 [D. Ennabe Dec.].) It was undisputed that additional alcohol was purchased during the party from funds collected at the door. (1 AA 179 [Undisputed Fact (UF) 13].) The record does not show much of the $50 to $60 collected at the door was used to buy additional alcohol.

While there was a triable issue as to whether Manosa's two co-defendants also contributed money to initially buy alcohol (1 AA 176-178 [UF 9 and 10], the source of alcohol is immaterial. The issue is whether Manosa sold the alcohol, not how she obtained it. [2] Similarly, whether or not guests brought their own alcohol

[2] Ennabe asserts that "no other alcohol was brought onto the premises by any guest in attendance at the party." (Appellants' Opening Brief [AOB] at p. 4, citing 2 AA

to the party, it is undisputed that money collected from guests was used to purchase additional alcohol. (1 AA 179 [UF 13].)

Food was also purchased and brought in during the party. (2 AA 345 [Abuershaid Depo.].)

IV. Ennabe Arrives At Manosa's Party

Manosa had seen Ennabe at the party at around 11:30 or midnight. Ennabe was a friend of Manosa's and not charged an entrance fee. (1 AA 120 [C. Ennabe's Discovery Response].) Ennabe appeared drunk, and had come from another party where he had been drinking. (1 AA 116 [Manosa Depo.]; 2 AA 403 [D. Ennabe Dec.]; 2 AA 390 [Bosley Dec.].) Manosa knew that Ennabe was under the age of 21. (1 AA 116 [Manosa Depo.].)

318:13-15.) The citation is to one question asked of Manosa during her deposition: "Q: And no one brought alcohol with them; right? A: From what I can remember, no."

The citation omits the follow-up questions: "Q: You provided it all; right? A: Not me entirely, but I allowed it. Q: You allowed it and you also provided it; right? A: Yes, some of it." (2AA 318:16-20.)

Another witnesses was unequivocal that guests brought their own alcohol to the party: (1 AA 82 [Abuershaid Depo; "some people showed up with their own alcohol"].)

V. Garcia Arrives, Is Belligerent, And Is Soon Asked To Leave – All Unbeknownst To Manosa

Twenty-year old Thomas Garcia and his friends arrived at the party at about 12:30 a.m. (1 AA 187, 194 [UF 21, UF 35]; 2 AA 361 [Garcia Depo.].) Garcia was not an invited guest. (1 AA 83 [Abuershaid Depo.]; 2 AA 336 [same].) He had never been to the Manosas' house before that morning. (2 AA 361 [Garcia Depo.].) Manosa did not know Garcia or his friends. (1 AA 107 [Manosa Depo.]; 2 AA 317 [same]; 1 AA 139 [Manosa Dec.].) Garcia did not meet Manosa. (1 AA 132 [Garcia Depo.].) Manosa did not know when Garcia arrived, and never saw Garcia during the party. (1 AA 107, 109 [Manosa Depo.].) She did not know he was even there. (1 AA 139 [Manosa Dec.].)

Garcia paid $20 for himself and six friends to enter the party. (1 AA 130 [Garcia Depo.]; 2 AA 362 [same].) Garcia was told, "You got to pay to get in, you know what I mean. We got alcohol if you guys want it." (2 AA 365 [Garcia Depo.].) None of Garcia's friends had money, and he recalled they all walked in as a group. (2 AA 362, 363 [Garcia Depo.].) Garcia gave the money to a "big, tall, husky Caucasian dude" who "looked older, like 25, 27." (2 AA 363 [Garcia Depo.].) Todd Brown is 6'4'' and weighs about 280 pounds. (2 AA 353 [Aquino Depo.].)

No tickets were given in exchange for the entrance fee. (2 AA 363 [Garcia Depo.].)

Witnesses saw Garcia drinking at the party. (2 AA 389 [Bosley Dec.]; 2 AA 340 [Abuershaid Depo.]; 1 AA 86 [same]. He was belligerent, had slurred speech and impaired balance, and was harassing female guests. (2 AA 404 [D.Ennabe Dec.]; 2 AA 389-390 [Bosley Dec.].)

Garcia had been at the party for about 90 minutes when Ennabe asked him to leave. (1 AA 87 [Abuershaid Depo.]; 2 AA 342 [same].) [3] No one told Manosa that Garcia was asked to leave (1 AA 109 [Manosa Depo.]), and it was not until later when Manosa learned that Garcia was being obnoxious. (1 AA 108 [Manosa Depo.].)

VI. As Garcia Is Escorted Away From The Party, Someone Spits On Ennabe. It Ends In Tragedy

Garcia and his friends were escorted out to the street by Ennabe and Ennabe's high school soccer friends. (1 AA 87, 89 [Abuershaid Depo.].) Once outside and on the street, one of Garcia's friends spat on Ennabe. (1 AA 89 [Abuershaid Depo.].)

Ennabe and his teammates gave chase up a hill, and "[t]hat is when the truck came up and hit Ennabe." (1 AA 90 [Abuershaid Depo.].) As one witness put it, "Mr. Garcia got into his vehicle and proceeded to run over Ennabe." (2 AA 389 [Bosley Dec.].) Ennabe died, and Garcia received a 14-year sentence. (2 AA 433 [Criminal Sentencing Statement].

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[3] Garcia did not know Ennabe. (2 AA 361 [Garcia Depo.].)

It was undisputed that none of the defendants knew Garcia prior to the accident, that Manosa was not aware of any problems with Garcia or any other guests at her party, that Manosa did not know that Garcia was even at the party until after the accident, and that Manosa's parents were not at the property that night. (1 AA 190, 194, 197 [UF 25, 34, 38, 41].)

PROCEEDINGS BELOW

Ennabe alleged a statutory violation of section 25602.1, plus common law claims.[4] (1 AA 14-16.) Defendants moved for summary judgment under section 25602 and Civil Code section 1714, subdivision (c), both of which recognize an immunity for the furnishing of alcohol. (1 AA 42-47.) Ennabe contended that triable issues of fact existed as to whether defendants "sold" alcohol, thus forfeiting the immunities. (1 AA 198 [UF No. 43].) The trial court assumed, for purposes of the motion, that the alcohol was purchased at the direction of Manosa and from monies collected at the door. (Reporter's Transcript of Proceedings, January 12, 2010, at 3:26-28.) Even with those assumptions, the trial court did not find a "sale":

> Simply because a fee was charged for entry into the property where alcohol was accessible, does not

[4] Manosa and her parents were sued. The claims against Manosa's parents were abandoned in the Court of Appeal. (*Ennabe, supra,* 190 Cal.App.4th at p. 711 fn. 3.)

> constitute a 'sale' or 'furnishing' of alcoholic beverages requiring Defendant to be temporarily licensed at this 'social gathering.' Defendants were not acting as commercial suppliers of alcohol because it was a social setting. Manosa did not have profit as a chief aim and on that night was not in the business of selling alcohol. (2 AA 489.)

The Court of Appeal, using slightly different phrasing, agreed. Because the entrance fee was to "help defray the cost" of serving alcoholic beverages – a fact mentioned three times in the Court of Appeal's opinion[5] – Manosa was not a person who 'sell[s], or causes to be sold' an alcoholic beverage within the meaning of section 25602.1." (*Ennabe, supra,* 190 Cal.App.4th at p. 717.)

The Court of Appeal also noted that Manosa's guests contributed money to obtain additional alcohol during the party. Thus, because Manosa and her paying guests "may be said to have provided alcoholic beverages to each other, [ ] Manosa and all of her guests were both sellers and purchasers." (*Ennabe, supra,* 190 Cal.App.4th at p. 717.) In that context, no sale occurred within the meaning of sections 25602.1 and 23025, the Court of Appeal reasoned.

The Court of Appeal did not separately address Civil Code section 1714 or the common law claims. Ennabe did not petition the Court of Appeal for rehearing to consider the omission of those issues.

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[5] Ennabe did not challenge this factual statement in his petition for rehearing. He is bound by it. (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1000 fn. 2.)

In this Court, Ennabe presents no argument as to why the judgment entered as to his common law claims should be reversed. His brief is limited to the statutory cause of action under section 25602.1 and the immunities.

STANDARD OF REVIEW

The issues presented involve questions of statutory construction. Review is de novo. (*Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 387.)

Because this is a summary judgment appeal, the record is reviewed independently in the light most favorable to plaintiff. (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64.)

ARGUMENT

The parties' dispute turns on how a "sale" is defined. Absent a triable issue as to sale, Ennabe has no prima facie case of Manosa's liability under section 25602.1; with a sale, Manosa forfeits her immunities under section 25602 and Civil Code section 1714.

We begin by setting forth the immunity statutes and their exceptions, and then examine the problems arising from Ennabe's reliance upon a literal application of the statutory definition of "sale." We then offer a more rational and workable definition that comports more closely with the statutes' structure, language and legislative intent.

I. The Two Immunity Statutes And Their Exceptions

As between the person who provided alcohol and the person who drank it, the common law held the drinker responsible. (*Cole v. Rush* (1955) 45 Cal.2d 345, 356.) During the 1970s, however, a trilogy of cases from this Court abrogated the common law rule immunizing the seller or furnisher of alcoholic beverages. (*Vesley v. Sager* (1971) 5 Cal.3d 153, 158-167 [common law rule does not bar statutory claim under section 25602 as against commercial vendor]; *Bernhard v. Harrah's Club* (1976) 16 Cal.3d 313, 323-326 [common law rule does not bar tort claim as against commercial vendor]; *Coulter v. Superior Court* (1978) 21 Cal.3d 144, 150-156 [common law rule does not bar statutory or tort claim as against social hosts].) In 1978, the Legislature restored the common law's immunity, abrogated *Vesley*, *Bernhard* and *Coulter,* and created a single exception to the newly-restored immunity that applied only in the context of an obviously intoxicated minor. (Bus. & Prof. Code, § 25602, subd. (b) and (c); 25602.1; Civil Code § 1714, subd. (b) and (c).] This case was pleaded under the statutory exception to immunity, as amended in 1986.

A. Section 25602 Immunity and The Exceptions In Section 25602.1

The Act's immunity provision appears in section 25602, subdivision (b). That provision states:

> No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage pursuant to subdivision (a) [6] of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage. (Bus. & Prof. Code, § 25602, subd. (b).)

The next section of the Act – section 25602.1 – sets forth three exceptions to the immunity, all limited to situations involving an obviously intoxicated minor.[7] The three exceptions to immunity are:

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[6] Subdivision (a) of section 25602 makes it a misdemeanor to sell, furnish or give away alcohol to a "habitual or common drunkard" or to an "obviously intoxicated person." Section 25658 makes the same conduct a misdemeanor in the context of a minor (with no requirement that the minor be obviously intoxicated). Ennabe does not rely upon section 25658 as a basis of Manosa's liability.

[7] Section 25602.1 states:

> Notwithstanding subdivision (b) of Section 25602, a cause of action may be brought by or on behalf of any person who has suffered injury or death against any person licensed, or required to be licensed, pursuant to Section 23300, or any person authorized by the federal government to sell alcoholic beverages on a military base or other federal enclave, who sells, furnishes, gives or causes to be sold, furnished or given away any alcoholic beverage, and any other person who sells, or causes to be sold, any alcoholic beverage, to any obviously intoxicated minor where the furnishing, sale or giving of that beverage to the minor is the proximate cause of the personal injury or death sustained by that person.
>
> (Bus. & Prof. Code, § 25602.1.)

First, ***licensees or persons required to be licensed*** forfeit their immunity when they sell, furnish or give, or cause to be sold, furnished or given away, any alcoholic beverage to an obviously intoxicated minor.

Second, ***military vendors*** – persons authorized by the federal government to sell alcoholic beverages on a military base or enclave – likewise forfeit their immunity when they sell, furnish or give, or cause to be sold, furnished or given away, any alcoholic beverage to an obviously intoxicated minor.

Third, ***"any other person"*** who sells, or causes to be sold, any alcoholic beverage to an obviously intoxicated minor forfeits their immunity. Only the act of "selling," or "causing to be sold," forfeits the immunity of "any other person." Neither "furnishing" nor "giving" of alcoholic beverages to an obviously intoxicated minor forfeits immunity under the "any other person" clause of section 25602.1. (*Ennabe, supra,* 190 Cal.App.4th at pp. 715-716.) [8]

Ennabe relies upon the "any other person" and "required to be licensed" clauses. Because they are exceptions to statutory immunity, these provisions must be strictly construed. (*Elizarraras v. L.A. Private Security Services, Inc.* (2003) 108 Cal.App.4th 237, 243 ["The statutory exception of section 25602.1 is a narrow one that is construed strictly."]; *Hernandez v Modesto Portuguese Pentecost Assn.*

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[8] In the Court of Appeal, Ennabe argued that all three verbs –sells, furnishes and gives – forfeit immunity under the "any other person" clause. That argument was rejected by the Court of Appeal and has not been renewed in this Court.

(1995) 40 Cal.App.4th 1274, 1281 ["As the sole exception to statutory immunity, section 25602.1 must be strictly construed to effect the Legislature's intent."].)

B. Civil Code Section 1714 Immunity And Its New, Inapplicable Exception

There is a separate immunity in the Civil Code. The Civil Code's immunity applies to a "social host" who "furnishes" alcohol to "any person." (Civ. Code, § 1714, subd.(c).) [9] The sole exception to the Civil Code's immunity occurs where a parent or other adult knowingly furnish alcoholic beverages at their residence to a minor. [10] The parent /adult exception to social host immunity took effect while this appeal was pending in the Court of Appeal (Stats. 2010, ch. 154, § 1) but Ennabe concedes the exception is not retroactive (AOB at p. 42) and in any event he has abandoned all claims against Manosa's parents, thus making the

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[9] Civil Code section 1714 (c) states:

> Except as provided in subdivision (d), no social host who furnishes alcoholic beverages to any person may be held legally accountable for damages suffered by that person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of those beverages. (Civ. Code, § 1714, subd. (c).)

[10] "Nothing in subdivision (c) shall preclude a claim against a parent, guardian or other adult who knowingly furnishes alcoholic beverages at his or her residence to a person under 21 years of age, in which case, notwithstanding subdivision (b), the furnishing of the alcoholic beverage may be found to be the proximate cause of resulting injuries or death." (Civ. Code, § 1714, subd. (d).)

parent/adult exception to the Civil Code's immunity not applicable to this case. (*Ennabe, supra,* 190 Cal.App.4th at p. 711 fn.3.)

The similarity in what forfeits the immunity under both statutes is important and telling. Under section 25602.1, the "selling" of alcohol to an obviously intoxicated minor – whether by a licensee, a person required to be licensed, a military vendor, or any other persons – forfeits the immunity. Under Civil Code section 1714, only the "furnishing" of alcohol by a social host is immunized. A "sale" is outside the scope and plain meaning of the social host immunity statute. Thus, a sale forfeits the immunity under both section 25602 and the Civil Code, and is also an element of statutory liability under section 26502.1.

II. Why The Statutory Definition Of Sale Does Not Fit This Case

In construing a statute, a court ascertains the Legislature's intent to effectuate the statute's purpose. The court looks to the statute's words, giving those words their usual and ordinary meaning. The statute's plain meaning controls, unless the words are ambiguous. (*Imperial Merchant Services, Inc., supra,* 47 Cal.4th at p. 388.)

Words that appear facially unambiguous may nonetheless contain latent ambiguity. (*Mosk v. Superior Court* (1979) 25 Cal.3d 474, 495, fn. 18; *Stanton v. Panish* (1980) 28 Cal.3d 107, 115.) Latent ambiguity exists "when some extrinsic factor creates a need for interpretation or a choice between two or more possible meanings" (*Varshock v. California Dept. of Forestry and Fire Protection* (2011)

194 Cal.App.4th 635, 644), or where a literal interpretation would either frustrate the statute's purpose or produce absurd consequences. (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.) "[I]ntent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act." (*Ibid.*)

Lastly, statutes are not construed in isolation. Rather, they are read "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." (*Horwich, supra,* 21 Cal.4th at p. 276.) If a statutory definition "is so discordant to common usage as to generate confusion, it should not be used." (Singer, 2A Statutes and Statutory Construction (7th ed. 2007), § 47:7, p. 301.)

A. Applied Literally, The Statutory Definition Of Sale Produces Illogical Results Under Section 25602.1

Section 25602.1 does not define "sells" or "causes to be sold." A different section of the Act defines "sell," "sale," and "to sell." (Bus. & Prof. Code, § 23025.) Applied literally, the statutory definition yields illogical results under section 25602.1.

The statutory definition of "sale" turns on transfer of title. Profit, whether expected or realized, is not an express component of the statutory definition. Section 23025 states:

> 'Sell' or 'sale' or 'to sell' includes any transaction whereby, for any consideration, title to alcoholic

> beverages is transferred from one person to another, and includes the delivery of alcoholic beverages pursuant to an order placed for the purchase of such beverages and soliciting or receiving an order for such beverages, but does not include the return of alcoholic beverages by a licensee to the licensee from whom such beverages were purchased. (Bus. & Prof. Code, § 23025.) [11]

In this case, the statutory definition of "sale" contains latent ambiguities, and a strict reading of the definition wholly blurs the distinction between "sells" and "furnishes." There are two ambiguities.

First, "title" is an unduly restrictive and unworkable concept in the context of communal alcohol. In the context of communal alcohol, how is title to be determined? If it belongs to everyone, it belongs to no one. As the Court of Appeal correctly observed, "it is difficult, if not impossible, to determine which individual or individuals held title to the alcoholic beverages" as Manosa and her guests were "both sellers and purchasers." (*Ennabe, supra,* 190 Cal.App.4th at pp. 716, 717.)

Second, "any consideration" is an overly broad and equally unworkable concept in the context of social parties.

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[11] Ennabe relies upon the transfer of title prong of the definition. No argument is made under the "deliveries pursuant to an order" prong.

Consideration need not be cash. (*H.S. Crocker Co. v. McFaddin* (1957) 148 Cal.App.2d 639, 645.) It encompasses "any value whatever, even that of a peppercorn, a tomtit, or one dollar in hand." (*In re Freeman's Estate* (1965) 238 Cal.App.2d 486, 489; Civ. Code, § 1605 [Defining "good consideration" as "[a]ny benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."].)

If "any consideration" supports a sale under section 23025, then the mere promise of a guest to attend a party where the host promises to furnish alcohol falls within the literal definition of "sale" under the statute. Where mutual promises to "furnish" become a "sale," "furnish" is rendered superfluous.

Likewise, the guest who brings the dessert has provided "consideration" for the host who furnishes the alcohol. Again, this conflates "furnishes" with "sale." If a sale arises out of mutual promises to furnish food and libations, there is no distinction between "selling" and "furnishing." To say that these scenarios describe a "sale" reads "furnishes" out of the statute and defies common sense.

Thus, in the context of a social gathering, "any consideration" sweeps too broadly as an element of what constitutes a "sale" of alcoholic beverages.

Ennabe's responses to the Court of Appeal's approach underscore the ambiguities of the statutory definition.

B. Ennabe's Transfer-Of-Title-Upon-Payment-At-The-Door Theory Illustrates The Limits Of The Statutory Definition

Ennabe argues a sale occurred under section 23025 because a transfer of title to alcohol occurred upon payment of the admission fee at the door. (AOB at p. 29.) It is an odd theory that yields irrational results.

What if an already intoxicated guest arrives, pays the $3 or $5 to get into the party, but leaves without having a drink? Has the guest, having paid only an admission fee and consumed no alcohol on the premises, nonetheless acquired title to alcohol? Is the host now exposed to civil liability under section 25602.1 even though the paying guest may not have consumed a drop of alcohol on the host's premises?

What if the guest arrives, sober, pays the $3 or $5 to get into the party, but drinks the alcohol provided by someone other than the host, i.e., the guest brings his own alcohol, or consumes alcohol provided by someone else, but not the host? Is the host subject to liability even though the guest again has not consumed a drop of the host's alcohol? Will proof turn on testimony as to the source of the alcohol consumed by the guest? Or, as the Court of Appeal implicitly asked, how is "title" to alcohol determined where buying and drinking is communal?

What if the guest arrives as part of a group and one pays for all? Who holds the title to alcohol if one pays for all to get in?

And what if the guest is admitted without charge? In this case, for instance,

not everyone was charged an entrance fee. (1 AA 91 [Abuershaid Depo.]; 2 AA 343 [same]; 2 AA 402 [D.Ennabe Dec.].) As to a "free admit" guest, Ennabe's theory holds there is no sale of alcohol. Can that guest overindulge without exposing his host to liability because no transfer of title occurred at the door?

Thus, Ennabe's construction leads to absurd results: the host is exposed to liability even if a paying guest consumes *no* alcohol, but is not exposed to liability if a free-admit guest consumes unlimited alcohol. That construction must be rejected. (*Upland Police Officers Ass'n v. City of Upland* (2003) 111 Cal.App.4th 1294, 1304 ["Even unambiguous statutes must be construed to avoid absurd results which do not advance the Legislative purpose."].)

Heedless of these concerns, Ennabe offers three legalistic rationales to support his transfer-of-title-at-the-door theory. None are persuasive.

1. The Commercial Code Analysis Is Inapt

Ennabe relies on a provision of the Commercial Code governing the passing of title. That provision states: "Title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods. . . ." (AOB p. 29, quoting Com. Code, § 2401.)

Ennabe cannot mix and match sections of the Commercial Code and the Act. The Legislature has expressly stated that the Commercial Code does not "impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers." (Com. Code, § 2102.) The Commercial Code and

the Act have their own definitions of what constitutes a "sale." (Compare Com. Code, § 2106, subd. (1) with Bus. & Prof. Code, § 23025.) Further, title does not pass under the Commercial Code "prior to their identification to the contract." (Com. Code, § 2401, subd. (1).) Where is the prior identification of goods to the contract when a guest pays $3 or $5 to get in the door?

The Commercial Code analysis is inapt.

So is Ennabe's reliance on a public nuisance statute.

2. The Definition Of Consideration Under The Public Nuisance Statute Likewise Is Inapt.

Section 25604 governs public nuisances under the Act. [12] It does not define what constitutes a sale of alcohol. It does define "consideration" to include "cover charge." Ennabe apparently contends that because a cover charge constitutes consideration under the public nuisance statute, a cover charge likewise constitutes a sale under section 25602.1. (AOB at p. 30.) He is mistaken.

Sections 25604 and 25602.1 apply to different types of conduct. Section 25602.1 prohibits certain "sales" of alcohol. In contrast, section 25604 prohibits

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[12] Section 25604 states, in pertinent part: "It is a public nuisance for any person to keep, maintain, operate or lease any premises for the purpose of providing therein for a consideration a place for the drinking of alcoholic beverages by members of the public or other persons, *unless the person and premises are licensed under this division.* As used herein 'consideration' includes cover charge, the sale of food, ice, mixers or other liquids used with alcoholic beverage drinks, or the furnishing of glassware or other containers for use in the consumption of alcoholic beverage drinks." (Bus. & Prof. Code, § 25604; italics added.)

one from providing, for a consideration, a *place* to drink alcohol unless the person and the premises are licensed under the Act. This built-in defense ("unless the person and premises are licensed under this division") implies that section 25604 assumes a licensable commercial operation. The two cases applying and interpreting section 25604 support that proposition. (*People v. Frangadakis* (1960) 184 Cal.App.2d 540, 543 [defendant operated a restaurant]; *Hammond v. McDonald* (1942) 49 Cal.App.2d 671, 675 [defendant operated a café and lunch counter].) Here, Manosa was not licensable. (See *post* at pp. 45-47.) And the premises – the residential rental property owned by her parents – were neither licensable nor a commercial operation.

3. The Indirect Sale Theory Is Legally Untenable

Lastly, Ennabe suggests that section 25602.1 prohibits what he calls "indirect sales." His relies upon a 1937 amendment to the statutory definition of sale, and an *Information Guide* published by the Department of Alcoholic Beverage Control. (AOB at pp. 28-29; 30-31.)

The original definition of sale was amended in 1937, and has continued without change since then. (Compare Stats. 1935, ch. 330, § 2(l), pp. 1124-1125 with Stats. 1937, ch. 758, § 2(l), p. 2129.) [13] The 1937 amendment deleted the

[13] After the repeal of Prohibition, California in 1935 adopted the Alcohol Beverage Control Act as an uncodified act. (Stats. 1935, ch. 330, § 1, p. 1123.) Eighteen years later, the Legislature codified the Act in Division Nine of the Business and Professions Code. (Stats. 1953, ch. 152, § 1, p. 1020.) The 1937 amendment

requirement that a transfer of title to alcohol must be accompanied by a transfer of possession. Ennabe views this as bolstering his transfer-of-title-at-the-door theory because while the original definition of "sale" required a transfer of possession (implicitly construed by Ennabe as a "direct" sale), the amended definition jettisoned the requirement for transfer of possession and thus embraced indirect sales as well. (AOB at pp. 28-29.) Not so.

The immunity is forfeited when one "sells" *or* "causes to be sold" alcohol. Ennabe offers no explanation as to how an "indirect" sale differs from "causes to be sold." "Causes to be sold" logically includes an indirect sale. Thus, Ennabe's "indirect" sale argument makes "causes to be sold" superfluous.

Moreover, the Legislature knows how to express both "direct" and "indirect" sales under the Act. (Bus. & Prof. Code, § 24070 [prohibiting licensee from "directly or indirectly" selling, in certain circumstances, a controlling interest in its shares]; Bus. & Prof. Code, § 25511 [permitting beer manufacturers and others to sell "directly or indirectly" equipment and fixtures in certain circumstances].) Even in 1937, the Legislature knew how to express "direct" and "indirect" transactions. (Stats. 1937, ch. 758, §§ 87, 89, pp. 2170-2174.) [14]

Fast forward to 2009. In that year, the Department of Alcoholic Beverage

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discussed by Ennabe is to the uncodified Act.

[14] Section 87 expanded the list of activities by manufacturers and others that are prohibited "directly or indirectly." Section 89 prohibited a licensee from "directly or indirectly" giving away a free gift in connection with a sale.

Control issued a *Trade Enforcement Information Guide* (TEIG). The TEIG says that "the definition of 'sale' includes indirect transactions[,]" and offers as an example payment of an admission fee. Ennabe believes the TEIG is persuasive authority. (AOB at pp. 30-32.) It isn't. The TEIG cites no legal authority for its interpretation, and does not discuss section 23025 or Civil Code section 1714. The TEIG's informal statutory interpretation has never been vetted through the administrative regulatory process. Absent the procedural and substantive protections attending a regulatory enactment (Gov't Code, §§ 11346 et seq.; 11350 et seq.), the TEIG's informal pronouncements carry no precedential value. The TEIG is not a rule or regulation entitled to judicial deference. (*Dep't of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2005) 128 Cal.App.4th 1195, 1205.) The Court of Appeal properly gave the TEIG no weight. (*Ennabe, supra,* 190 Cal.App.4th at p. 719.) So should this Court.

In summary, this is a situation where, as the Legislature anticipated, "context" calls for a modified definition. (Bus. & Prof. Code, § 23002.) If the statutory definition of sale does not fit this case, how then should "sale" be defined?

We contend that a "sale" under sections 25602 and 25602.1 connotes an element of commercial gain based on the transfer of alcohol. Ennabe's own authorities support this reading.

C. Ennabe's Case Law Supports A Construction Of Sale That Includes Commercial Gain

Ennabe discusses a California Attorney General opinion and two out-of-state cases to support the argument that the admission fee was a sale of alcohol under section 25602.1. (AOB at pp. 33-34, discussing 68 Ops.Cal.Atty.Gen. 263 (1985); *New York State Liquor Authority v. Sutton Social Club, Inc.* (Sup.Ct. 1978) 403 N.Y.S.2d 443,; and *New York State Liquor Authority v. Fluffy's Pancake House, Ltd.* (App.Div. 1978) 409 N.Y.S.2d 20.) In fact, these authorities demonstrate how "sale" includes an element of commercial gain.

Where commercial enterprises such as limousine, bus and air charter services offer complimentary alcoholic beverages to their paying customers, the commercial enterprises are selling alcohol, the California Attorney General concluded. (68 Ops.Cal.Atty.Gen. 263.) The Attorney General assumed a "commercial enterprise" and a guest who pays for a product or service while simultaneously being served "free" alcohol. (*Ibid.*) "Guest" was interpreted to mean "a paying guest, that is, one whose connection with the business enterprise is not just social." (*Id.* at p. 264, fn. 1.) Thus, the "complimentary" transfer of alcohol was designed to confer a commercial benefit upon these business entities.

Similarly, where a discotheque charges all customers $6 to $10 per person for admission (which includes free alcohol), the discotheque is "selling" alcohol. (*Sutton Social Club, Inc., supra,* 403 N.Y.S.2d at pp. 444-447.) The defendants in *Sutton Social Club* were not private individuals, but a "corporate social club"

known as "Top Floor Discotheque" and the club's president. (*Id.* at p. 444.) No one was admitted to the discotheque without paying, and the discotheque, which contained a cocktail lounge operated on weekends only, not like the "occasional dinner dance. . . ." (*Id.* at pp. 444, 445.) Thus, the "free" alcohol was designed to create a commercial benefit for the discotheque.

And where a restaurant advertises complimentary wine with dinner, the restaurant is selling alcohol. (*Fluffy's Pancake House, Ltd., supra,* 409 N.Y.S.2d 20.) Because the alcohol is available only to those who patronize the business by ordering a meal, payment for the meal includes payment for alcohol. (*Id.* at p. 21.) The "free" wine was designed to create a commercial benefit for the restaurant.

The entities in each of these cases provided alcohol to paying customers of an underlying business. The alcohol was offered for commercial gain – to further that underlying business. That is not the case here. Manosa threw a party for purely social reasons. (1 AA 98 [Manosa Depo.]; 2 AA 303 [same].) Between $50 and $60 was collected at the door. (2 AA 335 [Abuershaid Depo.].) Some of that money was used to buy alcohol during the course of the party. (1 AA 179 [UF 13].) Dance music for the party was provided by a disc jockey hired by Manosa. (2 AA 306 [Manosa Depo.].) Food was also purchased and brought in during the party. (2 AA 345 [Abuershaid Depo.].) This was a social gathering, not a commercial enterprise using alcohol to further a commercial purpose.

Moreover, none of Ennabe's authorities examined section 25602.1, or a comparable statute, where the operative verb "sale" is juxtaposed to "furnishes"

and "gives." Each of these authorities examined a statute with a single operative verb – "sale." [15] Thus, there was no need for these authorities to distinguish between "selling" and "furnishing."

III. Why A "Commercial Gain" Definition Of Sale Fits This Case

Construing "sale" under sections 25602 and 25602.1 to include an element of commercial gain harmonizes the three operative verbs used in the statutes, is consistent with their legislative history, and is not precluded by the statutory definition appearing in section 23025.

A. A Commercial Gain Definition Is Not Barred By Section 23025

The Legislature anticipated that its definition would not fit all cases. "*Unless the context otherwise requires*, the definitions and general provisions set forth in this chapter govern the construction of this division." (Bus. & Prof. Code, § 23002; italics added.)

When a statutory definition states that a word "includes" certain elements, the list of enumerated elements is not exclusive. "Includes" is "ordinarily a term of

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[15] The California Attorney General's opinion examined the statutory definition of sale under section 23025 in isolation, without reference to any other statute that juxtaposes "sale" with "furnishes" and "gives." Similarly, the New York cases turned on that state's statutory definition of what constitutes a "sale" of alcohol, a definition that, like California's, does not use the words "furnishes" and "gives." (N.Y. Alco. Bev. Cont. Law § 3, subd. 28.)

enlargement rather than limitation." (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1101; *Smyers v. Workers' Comp. Appeals Bd.* (1984) 157 Cal.App.3d 36, 41 ["Includes," when used in a statute, "conveys the conclusion that there are other items includable, though not specifically enumerated"]; quoting 2A Sutherland, Statutory Construction (4th ed. 1973) § 47.07, pp. 81-82; American Heritage Dictionary (2d College Ed. 1982) p. 651 ["*Include* is used most appropriately before an incomplete list of components: *The ingredients of the cake include butter and yolk.*"].)

Here, section 23025 states that a sale "includes" any transaction where, for any consideration, title to alcoholic beverages is transferred from one person to another. Thus, other types of transactions – including transactions for commercial gain – are not excluded from the definition.

B. A Commercial Gain Definition Harmonizes The Three Action Verbs Used In Sections 25602 and 25602.1

Definitional precision has not always marked the construction of alcohol-related statutes. Courts of Appeal reviewing criminal convictions in alcohol cases at the turn of the last century tended to read "sale," "furnish" and "give" synonymously.[16] (*People v. Hill* (1912) 20 Cal.App. 407, 411 [person described

[16] Before the repeal of Prohibition in 1933, California allowed qualified electors of an incorporated city or town to vote on whether to license the sale of alcoholic beverages. Under this "Local Option Act," jurisdictions rejecting the option were deemed "no license" territories where it remained unlawful to "sell, furnish or give away" alcohol. (Stats. 1911, § 13, p. 602; *Ex Parte Beck* (1912) 162 Cal. 701

as "furnishing" alcohol "might be proved to be one who had given it away"]; *People v. Joy* (1916) 30 Cal.App. 36, 38 ["furnish" means "to supply; to offer for use; to give"]; *People v. Epperson* (1918) 38 Cal.App. 486, 488 ["whether a person sells or gives to another alcoholic liquor, he at the same time furnishes such person with liquor"].) Contemporary courts likewise tend to view "furnish" and "give" as synonymous. (*Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, 1157 ["furnish" under section 25658 means, among other things, "to supply, to give, or to provide"; citing *Bennett v. Letterly* (1977) 74 Cal.App.3d 901, 904-905.] So does the dictionary. (American Heritage Dictionary, *supra* at p. 540 [defining "furnish" as "to supply; give"].)

While definitional overlap may be harmless as between "furnish" and "give," as between "furnish" and "sale" the line must be clear. Why? A sale, and only a sale, triggers liability under the "any other person" clause of section 25602.1. Further, Civil Code section 1714 immunizes a social host who "furnishes" alcohol – a social host who "sells" alcohol is outside the plain language of the Civil Code's immunity.

As shown below, reading "sale" to incorporate an element of commercial gain based on the transfer of alcohol draws the appropriate line between "furnishes" and "sells."

[upholding constitutionality of Local Option Act].)

First, "sale" keeps company with two other verbs, "furnishes" and "gives." Unlike "sale," however, neither "furnishes" nor "gives" are defined in the statute. Nonetheless, each verb must, if possible, be given a distinct meaning. Reading "sale" to require an element of commercial gain arising from the transfer of alcohol does so. (See, *ante* at pp. 17-20.)

Second, when the Legislature codified the Act in 1953, the provisions regarding sales to minors were placed in the Business and Professions Code, not the Civil Code. This suggests that the alcohol statutes were directed toward commercial activity, not private conduct motivated by considerations other than commercial gain. (See, Preface to Business and Professions Code ["An Act to establish a Business and Professions Code, thereby consolidating and revising the law regulating and protecting private business and licensed professions and callings . . . ."]; cf., *Van Horn v. Watson* (2008) 45 Cal.4th 322, 327 fn. 6 [noting that Court of Appeal reasonably concluded that a general immunity statute would more likely be found in the Civil Code, while an immunity for licensed professionals would appear in the Business and Professions Code].)

Third, "sale" is the only verb that applies to all three classes of defendants described in section 25602.1. When licensees and military vendors "sell" their alcohol, the transaction carries an element of commercial gain. Commercial gain is what makes a "sale" a "sale" by licensees and military vendors. No rational reason exists not to apply that same definitional element to the third class identified in section 25602.1 – "any other person."

C. A Commercial Gain Definition Is Supported By Section 25602.1's Legislative History

The statutory definition, as the Court of Appeal pointed out, "by itself does not resolve the issue of whether a social host who collects money from guests for a common fund with which to purchase alcoholic beverages or to help defray the cost of obtaining alcoholic beverages" is a person who "sells" within the meaning of section 25602.1. (*Ennabe, supra,* 190 Cal.App.4th at p. 716.) As discussed above, the statutory definition contains latent ambiguities in the context of this case. Thus, legislative history may properly be consulted. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.)

Commercial gain would not be an arbitrary interpretation of sale in the context of section 25602.1. Far from being made out of whole cloth, "commercial gain" is repeatedly and expressly called out by the Legislature as the distinguishing element of a "sale" when, in 1986, it enacted the current version of section 25602.1.

1. At First, The Exception To Immunity Was Based On Status: Only Licensees Who Sold, Furnished Or Gave Away Alcoholic Beverages To An Obviously Intoxicated Minor Forfeited The Immunity

The original version of section 25602.1 was a status-based exception to the immunity. Only licensees ran the risk of forfeiting their immunity, and they could

do so upon selling *or* furnishing *or* giving away alcohol to an obviously intoxicated minor. [17] Thus, there was no need to separately define "sale" because licensees generally are assumed to act for commercial gain. Non-licensees, however, bore no such risk of forfeiture – regardless of whether the non-licensee sold, furnished, or gave away the alcohol.

Litigants recognized this definitional gap. (*Cory v. Shierloh* (1981) 29 Cal.3d 430, 436 [parties agreed that section 25602.1 is inapplicable because defendant, a minor, was not licensed to sell or furnish alcohol; sustaining of demurrer affirmed].)

The Courts of Appeal recognized it. (*Cully v. Bianca* (1986) 186 Cal.App.3d 1172, 1175 [noting that section 25602.1 is "not applicable" because "defendants are not liquor licensees"]; *Ziff v. Weinstein* (1987) 191 Cal.App.3d 243, 248 ["section 25602.1 may not be invoked because defendants were not licensed vendors of alcoholic beverages"].)

So did the Ninth Circuit. (*Gallea v. United States* (9th Cir. 1986) 779 F.2d 1403, 1406 ["we find that California courts would not hold liable under section

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[17] Originally, section 25602.1 stated: "Notwithstanding subdivision (b) of Section 25602, a cause of action may be brought by or on behalf of any person who has suffered injury or death against any person licensed pursuant to Section 23300 who sells, furnishes, gives or causes to be sold, furnished or given away any alcoholic beverage to any obviously intoxicated minor where the furnishing, sale, or giving of such beverage to the minor is the proximate cause of the personal injury or death sustained by such person." (Former section 25602.1; Stats. 1978, ch. 930, § 1.)

25602.1 a private person who, although he or she served liquor to an obviously intoxicated minor, was not licensed under California law to serve liquor"].)

This status-based exception was seen as a "major flaw" in the statute. (Comment, *Minor Drinking and Driving: California's Inconsistent and Inequitable Statutory Scheme Of Social Host Immunity* (1992) 25 U.C.Davis L.Rev. 463, 474.) "It is interesting to speculate," Justice Kennedy wrote in *Gallea,* "what amendment the California legislature could adopt" to address the anomaly. (*Gallea v. United States, supra,* 779 F.2d at p. 1407.)

Speculation came to an end in 1986.

2. By "Sale," The Legislature Meant Sales For Commercial Gain Under The 1986 Amendments

Senate Bill 1053 was introduced on March 7, 1985 by Senator Lockyer. As introduced, it had nothing to do with alcohol. Rather, it would have amended the Vehicle Code to make it easier for courts to obtain copies of a defendant's current driving record. (Sen. Bill [SB] No. 1053 (1985-1986 Reg. Sess.) §§ 1-3; Request For Judicial Notice [RJN] Exhibit 1.) Those provisions were deleted in their entirety and replaced, on January 13, 1986, with the first rewrite of section 25602.1.

The Senate initially amended SB 1053 to expand beyond licensees the classes of individuals who could forfeit their immunity. As amended by the Senate, two additional classes risked losing their immunity: (1) persons "required

to be licensed" and (2) "any other person who sells or causes to be sold" any alcoholic beverage to any obviously intoxicated minor. (Sen. Amend. to Sen. Bill 1053 (1985-1986 Reg. Sess.) January 13, 1986; RJN Exhibit 1.) Five months later, the Assembly amended SB 1053 to add an additional class: persons authorized by the federal government to sell alcoholic beverages on a military base or other federal enclave. (Assem. Amend. to Sen. Bill 1053 (1985-1986 Reg. Sess.) June 18, 1986; RJN Exhibit 1.)

These amendments were simultaneously expansive and restrictive. The Legislature broadened the classes of individuals subject to liability from licensees to include "any other person." At the same time, as to this class of "any other persons," the Legislature narrowed the type of conduct that forfeited immunity. "Any other person" forfeited his immunity only when he sold, or caused to be sold, alcohol to an obviously intoxicated minor. Thus, "sale" was carved out from its historical juxtaposition with "furnishes" and "gives."

But the statutory definition of a sale found in section 23025 is nowhere mentioned in the legislative history of SB 1053. The legislative history is equally silent as to the concept of transfer of title for any consideration. What is clear from the legislative history is that by "sale," the Legislature envisioned conduct motivated by commercial gain.

Commercial gain is the qualifier expressly called out by Senator Lockyer in an analysis prepared for the Senate Committee on Judiciary. Noting that the then-current version of 25602.1 was applicable only to licensees, the analysis states that

the "purpose of this bill is to close gaps in the law which impose civil liability for selling alcohol to obviously intoxicated minors." (RJN, Exhibit 3, p. 2.) To close that gap, the Legislature replaced the status-based distinction with a renewed – but revised – emphasis on "sale."

> According to the author's office, there is no reason to maintain the distinction between a licensed and nonlicensed seller of liquor for purposes of imposing civil liability for such actions. It is asserted that the act of selling alcohol to obviously intoxicated minors *for commercial gain* should be a sufficient basis for imposing liability, and that imposing civil liability only upon licensed sellers does not serve the best interests of the public. (RJN Exhibit 3, pp. 3-4; emphasis added.)

The analysis noted that SB 1053 would "not affect the existing immunity for social hosts as it would not impose any liability for the free furnishing of alcohol." (RJN Exhibit 3, p. 4.) No other report adopts or repeats the concept of "free furnishing of alcohol."

When the Senate Rules Committee prepared its report on SB 1053, the Committee reiterated Senator Lockyer's point that it is the act of selling alcohol to an obviously intoxicated minor "for commercial gain" that should be the basis of liability. (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 1053 (1985-1986 Reg. Sess.) as amended June 18, 1986, p. 2, at RJN Exhibit 5 p.2; *Ennabe, supra,* 190 Cal.App.4th at p. 715.)

When the Assembly Committee on Judiciary took up SB 1053, it too noted that "the act of selling alcohol to obviously intoxicated minors *for commercial gain* should be a sufficient basis for imposing liability . . . ." (Assem. Com. on Judiciary, Analysis of SB 1053 (1985-1985 Reg. Sess.), p. 1, May 20, 1986 at RJN Exhibit 7 p. 1; emphasis added)

Two additional analyses prepared by the Assembly Committee on Judiciary likewise noted, expressly, Senator Lockyer's view that liability would be premised on selling to obviously intoxicated minors "for commercial gain." (RJN Exhibit 9.)

Thus, the Legislature repeatedly and without objection considered "sale" to mean commercial gain. While earlier lawmakers had previously defined "sale" in section 23025, that definition was nowhere evident fifty-one years later. "When the definition of a word varies from the accepted Legislative intent, the intent of the Legislature is followed." (2A Statutes and Statutory Construction (7th ed. 2007), § 47:7, pp. 304-305.)

IV. The Court of Appeal Impliedly Embraced A "Commercial Gain" Construction

Against the legislative backdrop described above, courts have not had to grapple with the meaning of "sale" under section 25602.1. The Court of Appeal in this case did, and its construction impliedly embraces a construction of "sale" that

includes commercial gain. As shown below, however, what the Court of Appeal implied should be made express.

A. The Path Leading To The Court Of Appeal's Opinion

Looking at the cases preceding the Court of Appeal's opinion, the absence of judicial authority construing "sale" under section 25602.1 can be explained by three reasons. Understanding those reasons illustrates why the Court of Appeal stopped short of an express holding on commercial gain.

First, the sale to a minor was obviously a sale because the defendant was a liquor store, a bar, or other licensee. (*Strang v. Cabrol* (1984) 37 Cal.3d 720, 722 ["Liquor For Less" sold alcohol to minor]; *Chalup v. Aspen Mine Co.* (1985) 175 Cal.App.3d 973, 975 ["Aspen Mine Company" sold alcohol to minor]; *Schaffield v. Abboud* (1993) 15 Cal.App.4th 1133, 1135-1136 ["AM/PM Mini Market" sold alcohol to minor].)

Alternatively, the case arose under the pre-1986 version of section 25602.1, and defendant's status as a non-licensee kept the immunity intact regardless of any underlying financial transaction. (*Cory, supra,* 29 Cal.3d at p. 436 [defendant was a minor throwing house party]; *Baker v. Sudo* (1987) 194 Cal.App.3d 936, 941 [defendants threw house party]; *Ziff, supra,* 191 Cal.App.3d at p. 245 [defendants threw house party].)

Third, the underlying financial transaction was not a "sale" in the bilateral sense of buyer and seller, but a pooling of funds for the purchase of alcohol.

Liability in these cases turned on the "furnishing" (not sale) of alcohol to a minor under section 25658. (*Bennett, supra,* 74 Cal.App.3d at pp. 904-905; *Sagadin, supra,* 175 Cal.App.3d at pp. 1153-1161; *Cully v. Bianca* (1986) 186 Cal.App.3d 1172, 1174-1175.) [18]

Below, the Court of Appeal analogized to these common fund cases to support its conclusion that, in the context of communal alcohol, Manosa and her guests were both sellers and purchasers. (*Ennabe, supra,* 190 Cal.App.4th at pp. 717-718 [discussing *Bennett* and *Sagadin*].) And three times, the Court of Appeal pointed out that the admission fee was "to help defray the cost" of providing alcohol. (*Id.* at pp. 716, 717.) That is just another way of saying Manosa acted with no intent to reap commercial gain from her party. As shown below, the legal rules fashioned by the Court of Appeal impliedly embrace the notion that a "sale" under section 25602.1 requires commercial gain.

B. The Court of Appeal's Construction Impliedly Embraces Commercial Gain

The Court of Appeal's interpretation of what constitutes a sale can be viewed from the perspective of the host, or of the host and her guests. From either

[18] *Bennett* was decided before the Legislature, in 1978, immunized a social host who "furnished" alcohol. (Civ. Code, § 1714, subd. (c).) *Sagadin* held the 1978 social host amendment non-retroactive. (*Sagadin, supra,* 175 Cal.App.3d at pp. 1154-1157.)

perspective, liability turns on the presence of commercial gain – even though that is not expressly spelled out in the Court of Appeal's holding.

From the host's perspective, if the admission fee was to "help defray the cost" of alcohol, there was, by definition, no commercial gain.

From the perspective of the host and her guests, if cost-sharing made the alcohol "communal," there was, by definition, no commercial gain. Some of Manosa's guests (including Garcia), paid an entrance fee. From those fees, additional alcohol was purchased during the party. Thus, as the Court of Appeal noted, Manosa and here guests were both sellers and purchasers, providing alcohol to each other. (*Ennabe, supra,* 190 Cal.App.4th at p. 717.) Nobody was selling alcohol for commercial gain.

Ennabe, however, argues that paying guests did not know the entrance fees were being used to purchase additional alcohol. (AOB at p. 15.) But if Manosa's guests did not know they were buying additional alcohol, how can there be a sale of alcohol? Ennabe's argument also misses the point by focusing on how the alcohol is acquired. Liability turns on how the alcohol was used – was it sold? – not on how the alcohol was acquired in the first place.

C. The Court of Appeal's Rule, Restated and Applied To This Case

The Court of Appeal's holding, stated in terms of the $3 to $5 entrance fee charged in this case, is a fact-specific rule. It is the correct rule yielding the correct result in this case.

But what about the next case where the entrance fee is $10, or $20? At what point does an entrance fee become a profit center? Conversely, what if a guest contributes a nominal sum – $1 – to get in to the party? Has that guest, by virtue of his nominal contribution, acquired "title" to alcohol and thus become a "seller" of communal beverages? Is there a minimum charge below which any notion of a "transfer of title" would be illusory? Does a 1¢ contribution buy title to alcohol?

A better rule would make explicit what was implicit in the Court of Appeal's opinion and repeatedly stated in the legislative history of section 25602.1 – a sale must be for commercial gain. And commercial gain, as gleaned from the cases, can be marked by:

Regularity. How often was the event held? Every weekend or only occasionally? (See, e.g., *Sutton Social Club, supra.*)

Nexus to an underlying commercial enterprise. Was the alcohol intended to induce a separate purchase of goods or services? (See, e.g., 68 Ops.Cal.Atty.Gen. 263, *supra.*)

Controlled or monitored consumption of alcohol. Did the price of admission entitle the guest to a specific amount of alcohol, or was unlimited consumption allowed? (See, e.g., *Childress, infra.*)

A price point for admission reflecting a reasonable expectation of profit. (See, e.g., *Childress, infra.*)

Applied to this case, Manosa was not selling alcohol at her party.

From the beginning, Manosa intended this to be a social occasion. It was a one-time event. She had no pre-conceived plan to turn a profit from her party. When the crowd grew, Manosa gave no instructions to charge a specific amount, or to collect a minimum or target amount. There was no evidence that the door charge was assessed to enrich Manosa or Manosa's parents. The charge bore no relation whatsoever to any underlying business. At most, the fee was an individualized, discretionary assessment to control admission to a private social gathering.

Upon admission, paying guests were not limited to one or two drinks for their $3 to $5 contribution. Garcia paid $20 for himself and six friends – less than $3 per admission. Consumption was neither limited nor monitored by tickets or otherwise. No commercial benefit inured to Manosa from the consumption of alcohol by her paying guests. The trial court got it right: "Defendants were not acting as commercial suppliers of alcohol because it was a social setting. Jessica did not have profit as a chief aim and on that night was not in the business of selling alcohol." (2 AA 489.)

Ennabe argues that the door charge was for Manosa's "own commercial gain." (AOB at p. 10.) His string cite to the record says otherwise.[19] The only

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[19] These are the portions of the record cited by Ennabe that allegedly show commercial gain. Only the cites are provided in Ennabe's brief. What those cites say is set forth below.

328:10-23. Describes Manosa's parents' rental house. [Abuershaid Depo.]

332:22-333:12. Description of "bouncer." [Abuershaid Depo.]

334:17-335:16. Door charge assessed to be "invited into the house" and "given access to whatever food and drink were there. . . ." Between $50 and $60 collected. [Abuershaid Depo.]

343:4-6. Single question and answer that money was taken from guests. [Abuershaid Depo.]

345:1-7. During the party, someone left to purchase additional alcohol and food. [Abuershaid Depo.]

346:13-347:6. Describes how the person who purchased the additional alcohol used, at Manosa's instruction, the money collected at the door. [Abuershaid Depo.]

351:22-352:13. Describes how unknown guests were charged by Todd Brown "some money to get into the party" [Aquino Depo.]

353:4-11. Physical description of Brown. [Aquino Depo.]

354:5-13. Guests paid to get in, get a D.J., a dance floor and alcohol. [Aquino Depo.]

362:19-363:4. Garcia pays the entrance fee for himself and his friends. [Garcia Depo.]

365:4-19. Bouncer tells Garcia, "you got to pay to get in, you know what I mean. We got alcohol if you guys want it." [Garcia Depo.]

387. Excerpt from police report. Garcia paid to get into the party.

389-391. Declaration of guest who was charged $5 "to be admitted onto the property and for the alcohol." [Bosley Dec.]

reasonable inference that can be drawn from these cites is that the entrance fees were designed to control admission and later pooled into a common fund to purchase additional alcohol. There was no sale of alcohol by Manosa.

V. No Other Clause Of Section 25602.1 Applies

Alternatively, Ennabe contends that Manosa may be liable under section 25602.1 because Manosa either (1) caused alcohol to be sold to an obviously intoxicated minor, or (2) was required to be licensed and thus was prohibited from selling, furnishing or giving alcohol to an obviously intoxicated minor. No question of statutory interpretation is raised as to the statute's "caused to be sold" clause. And Ennabe's interpretation of the "required to be licensed" clause misses the mark.

A. No "Caused To Sold" Liability

Absent an underlying sale, Manosa cannot be liable for "causing" alcohol to be sold. Thus, for the same reasons that charging a $3 to $5 entrance fee in this case does not constitute the sale of alcohol, no triable issue exists as to whether Manosa caused alcohol to be sold.

Further, Ennabe does not disagree with existing appellate authority defining "causes to be sold" under section 25602.1 as requiring malfeasance, not acquiescence. (*Hernandez, supra,* 40 Cal.App.4th at pp. 1276-1277; *Elizarraras,*

402-404. Declaration of decedent's brother. Admitted to the party without charge as an acquaintance of Manosa. [Ennabe Dec.]

supra, 108 Cal.App.4th at p. 243.) "Causes to be sold" requires "an affirmative act directly related to the sale of alcohol. . . ." (*Hernandez, supra,* 40 Cal.App.4th at pp. 1276-1277; *Elizarraras, supra,* 108 Cal.App.4th at p. 243.) "[M]ere inaction is not sufficient." (*Hernandez, supra,* 40 Cal.App.4th at p. 1281; *Elizarraras, supra,* 108 Cal.App.4th at p. 243.)

Ennabe disputes only the application of these standards, not the standards themselves. (AOB at pp. 31-32.) Under these legal standards, there is no triable issue as to whether Jessica caused alcohol to be sold to Garcia.

The alcohol was communal, and other than furnishing some of it, Manosa took no affirmative steps to "sell" alcohol to Garcia. Manosa did not invite him, did not know he was harassing her guests, and did not know he was even there until after Garcia - escorted out of the party and sitting behind the wheel of his truck - hit Ennabe. (1 AA 190, 194, 197 [UF #25, 34, 41]; 1 AA 132 [Garcia Depo.].) There is no triable issue as to Manosa's liability under the "causes to be sold" clause of section 25602.1.

B. No "Required To Be Licensed" Liability

If Manosa was "required to be licensed," the immunity would be forfeited under section 25602.1 if she sold, furnished or gave away alcohol to an obviously intoxicated minor. Ennabe contends Manosa was required to be licensed because there is a triable issue as to whether the premises were open to the public. (AOB

at pp. 27, 35, discussing section 23399.1.) [20] For four reasons, the analysis is incomplete and incorrect.

First, the "required to be licensed" clause applies to a limited class of individuals that does not include Manosa. The Legislature intended the "required to be licensed" clause to cover sellers operating without a license or with an expired, suspended or revoked license. (Senate Committee on Judiciary, Analysis of Sen. Bill No. 1053, p. 4 at RJN Exhibit 3, p. 4; Sen. Rules Com., Office of Sen. Floor Analyses, Analysis of Sen. Bill No. 1053 (1985-1986 Reg. Sess.)(3rd reading), as amended January 13, 1986, at RJN Exhibit 5, p. 2; Sen. Rules Com., Office of Sen. Floor Analyses, Analysis of Sen. Bill No. 1053 (1985-1986 Reg. Sess.)(Unfinished Business) at RJN Exhibit 11, p. 2.) [21] Manosa is not within that class.

Second, Manosa, as a minor, was unlicensable. If she could not buy alcohol, how could she be required to obtain a license to sell it?

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[20] Section 23399.1 states that no license is required where three conditions are met: (1) there is no sale of an alcoholic beverage; (2) the premises are not open to the general public when alcoholic beverages are served or consumed; and (3) the premises are not maintained for the purpose of keeping, serving, consuming or otherwise disposing of alcoholic beverages.

[21] The committee report states: "Liability for furnishing by illegal nonlicensed seller [¶] The bill would also impose liability for the sale or furnishing or alcohol to an obviously intoxicated minor by any person required to be licensed. *This provision is intended to cover the seller operating without a license or with an expired, suspended or revoked license.* The provision would not apply to the furnishing of alcohol by a social host." (Italics added.)

Third, assuming Manosa was within the covered class and licensable, what kind of license was Manosa to get? Ennabe never says.[22]

Fourth, Manosa's parents' premises were not open to the public that night. Manosa did not advertise her party via a website or other medium accessible to the public at large. Rather, her party was publicized via word-of-mouth, telephone, and text messaging. (2 AA 344 [Abuershaid Depo.]; 2 AA 372 [Diaz Depo.]; 1 AA 104 [Manosa Depo.].)

Thus, even if there is a triable issue as to whether the premises were "open to the public" under section 23399.1, Ennabe's reading of the "required to be licensed" clause is legally incorrect because Manosa was not licensable and not within the class of persons intended to be covered by that clause.

VI. If This Was Not A Sale Of Alcohol, What Was It? At Most, There Is A Triable Issue As To Whether Manosa "Furnished" Alcohol – But "Furnishing" Is Not A Basis Of Liability Under The "Any Other Person" Clause Of Section 25602.1

When the Legislature chose "sells" as the only verb creating liability under the "any other person" clause of section 25602.1, the other verb – "furnishes" – already had a clearly defined meaning in case law under the Act. (*Bennett, supra,*

[22] In the trial court, Ennabe pointed to a special license under section 24045. (1 AA 160.) That provision allows a licensee to obtain a special license to sell alcohol where the licensee temporarily occupies a premise for a picnic, social gathering or similar occasion. Section 24045 assumes a licensee, which Manosa isn't, and is therefore inapt.

74 Cal.App.3d at p. 905 [" 'furnish' connotes possession or control over the thing furnished" and implies "some type of affirmative action on the part of the furnisher; failure to protest or attempt to stop another from imbibing an alcoholic beverage does not constitute 'furnishing' "]; *Sagadin, supra,* 75 Cal.App.3d at p. 1157 ["mere act of contributing to a common fund for the purchase of liquor" is not "furnishing where the defendant never exercised any control over the alcohol consumed by his companions"].) [23]

In 1986, when the Legislature amended section 25602.1, it presumably was aware of these existing judicial constructions of "furnishes" in a similar statute addressing the "furnishing" of alcohol to minors. (*People v. Lopez* (2003) 31 Cal.4th 1051, 1060 ["When legislation has been judicially construed and a subsequent statute on a similar subject uses identical or substantially similar language, the usual presumption is that the Legislature intended the same construction...."]; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1096 ["It is a fundamental rule of statutory construction that "[t]he Legislature ... is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof."].) If the Legislature believed "furnishing" should be the standard for "any other person" liability, they could have done so in 1986. They did not.

Ennabe does not question these definitions of "furnishes," only their

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[23] *Bennett* and *Sagadin* arose under section 25658. See fn. 6 at page 13, *supra.*

application. (AOB at pp. 16-17 [arguing that Manosa "furnished" alcohol].) It's unclear why. Even if there is a triable issue as to whether Manosa "furnished" alcohol, "furnishing" is not a statutory basis of liability under the "any other person" clause of section 25602.1. If that is the point of Ennabe's argument, he is improperly trying to graft "furnishes" onto the "any other person" clause of section 25602.1. Moreover, as shown in the next section, "furnishing" is what social hosts do and is thus separately protected by Civil Code section 1714 (c).

VII. Manosa's Conduct Was Protected Under The Social Host Immunity Statute, Civil Code Section 1714(c)

Civil Code section 1714 (c) immunizes a "social host" who "furnishes alcoholic beverages to any person . . . ." "Social host" is not defined in the statute; it is derived from this Court's opinion in *Coulter*. "Furnishes" is not defined in the statute either; it is defined, as noted, in pre-existing case law. Manosa falls within both definitions.

A. Manosa Was A "Social Host"

Unlike a licensee who can be expected to supervise her patron's drinking, a social host typically attends to a multitude of tasks. Convention or protocol may restrain the social host from limiting her guests' alcohol consumption. The host may not have exclusive control (or any control) over who gets in to the party, or

over the alcohol brought in or consumed by guests once inside. Such is the plight of the social host; such was the predicament Manosa faced that night.

And profit?

Just as the absence of commercial gain distinguishes "furnishes" from "sells" under section 25602.1, the absence of commercial gain is the hallmark of a social host under Civil Code section 1714. *Coulter* and the Legislature's response to *Coulter* show why.

When this Court in *Coulter* rejected the absence of commercial gain as a defense to statutory liability under section 25602, the Legislature responded by expressly abrogating *Coulter* and creating social host immunity under Civil Code section 1714. And while the Legislature disagreed with this Court's view of the legal consequences of being a social host, what constituted a social host – the absence of commercial gain – remained common ground.

Coutler was the last of three dramshop cases decided by this Court before the Legislature weighed in with the passage of the social host statute. Of the trilogy, *Coutler* is the most pertinent because it involved social hosts. [24]

The defendants in *Coulter* were the owners and operators of an apartment complex, and the complex's manager. Repeatedly, they were characterized as "noncommercial suppliers," "noncommercial provider[s]" and "social hosts."

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[24] The other two cases involved commercial operators licensed to sell alcohol. (*Vesley, supra,* 5 Cal.3d at p. 157; *Bernhard, supra,* 16 Cal.3d at p. 315.)

(*Coulter, supra,* 21 Cal.3d at pp. 147, 149, 150, 152.) *Coulter* uses the phrase "social host" thirteen times.

The *Coulter* hosts served alcohol at a gathering in a recreational room. (The specific nature of the occasion is not spelled out in the opinion.) Alcohol was consumed by Janice Williams, whom the hosts knew or should have known drank excessively, lacked control over her alcohol consumption, and would be driving after drinking. (*Coulter, supra,* 21 Cal.3d at p. 148.) Williams and her passenger, James Coulter, were later injured in a car accident.

Coulter sued the social hosts under section 25602.[25] This Court concluded that "section 25602 is not limited by its terms to persons who furnish liquor to others for profit." (*Coulter, supra,* 21 Cal.3d at p. 150.) *Coulter* interpreted section 25602 as imposing liability "whether or not the supplier of such beverages was engaged in commercial, and therefore licensed, activities." (*Ibid.*) "We hold, accordingly, that the term 'person' within the meaning of section 25602 is not limited to those who are commercial suppliers, but includes those who are social hosts as well." (*Ibid.*)

The Legislative response was quick – and specific. As pertinent here, the Legislature abrogated *Coulter* and added a social host immunity provision to Civil

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[25] Section 25602 criminalizes the selling, furnishing or giving away of alcohol to, among others, a "habitual drunkard." See fn. 6 at p. 13, *supra.*

Code section 1714. (Stats. 1978, ch. 929, §§ 1-2, signed by the Governor on September 19, 1978.)[26] Civil Code section 1714 was amended to state:

> (b) The Legislature hereby declares that this section shall be interpreted so that the holdings in such cases as Vesley v. Sager (5 Cal.3d 153), Bernhard v. Harrah's Club (16 Cal.3d 313) and Coulter v. Superior Court (__ Cal.3d __) [27] be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person. (Stats. 1978, ch. 929, § 2, codified at Civ. Code, § 1714, subd. (b).)

If the apartment operators and manager in *Coulter* were social hosts, Manosa was even more so. Like the *Coulter* defendants, Manosa did not furnish alcohol for profit. She was a non-commercial provider. And her party bore no connection to an underlying business. This was a pure social gathering in which Manosa was, in every sense of the phrase, a social host.

Ennabe, however, suggests that one must be "legally capable of purchasing, possessing, and selling alcohol in the first place" to be a social host. (AOB at p. 41.) No such limitation appears in the statute or case law. It is also the mirror, but opposite, argument that Ennabe makes as to Manosa being "required to be

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[26] *Coulter* was decided on April 27, 1978.

[27] *Coulter* did not have an official citation when it was chaptered.

licensed." For liability purposes, Ennabe glosses over Manosa's minority – it doesn't matter if Manosa is unlicensable, she is still "required to be licensed" under section 25602.1. Yet for defense purposes, Ennabe uses Manosa's minority to deny her a defense as a social host. He cannot have it both ways.

That uninvited guests were charged $3 to $5 to get in did not change Manosa's status from social host to saleswoman.

B. Manosa Remained A Social Host Even Where $3 To $5 Was Charged To Uninvited Guests

"Furnishing" food and drink is what social hosts do, and "furnishing" of alcohol is what Civil Code section 1714 protects. Case law has sidestepped the question of whether an entrance fee forfeits the social host immunity. [28] Manosa submits that just as the absence of commercial gain distinguishes "furnishing" from "selling" under section 25602.1, the absence of commercial gain likewise constitutes "furnishing" under the Civil Code.

"Under well established principles of statutory construction, [ ] interrelated provisions must be construed together and harmonized if possible. [Citations omitted.] Additionally, when the same word or phrase is used, it should be given the same meaning in the related part of the law. [Citations omitted.]" (*Gruschka v. Unemployment Ins. Appeals Bd.* (1985) 169 Cal.App.3d 789, 792.) That principle

[28] See *Cory, supra,* 29 Cal.3d at p. 437; *Baker, supra,* 194 Cal.App.3d at p. 939; *Ziff, supra,* 191 Cal.App.3d at p. 245.

compels the conclusion that because Manosa's conduct, objectively viewed, showed no intent to commercially benefit from either her party in general or the entrance fees in particular, Manosa retained her immunity as a social host for the "furnishing" of alcohol to any person.

As Manosa argued below, courts in other states preserve a social host's immunity even where the social host charges an admission fee to cover the cost of alcohol. A nominal financial assessment, these cases reason, lacks the element of profit that crosses the line from social host to seller. (*Childress v. Sams* (Mo. 1987) 736 S.W.2d 48, 50 ("While the hosts here charged a nominal fee [$3 for men; $2 for women], that fee was not intended to generate a profit and the single cover charge provided no incentive for the hosts to encourage excessive alcohol consumption, rather it gave incentive to discourage excessive consumption. In this case, the invited guests were merely required to make a contribution to defray expenses. No commercial motive is evident."]; *Koehnen v. DuFuor* (Minn. 1999) 590 N.W.2d 107, 110-111; *McGee v. Alexander* (Okla. 2001) 37 P.3d 800, 804; *Heldt v. Brei* (Ill.Ct.App. 1983) 74 Ill.Dec. 413, 415; *Kuehn v. Edward Rose & Sons* (Mich.App. 1991) 189 Mich.App. 288, 289-290; *D'Amico v. Christie* (Ct.App. 1987) 524 N.Y.S.2d 1, 2-4.)

Ultimately, Ennabe's interpretation of the social host statute is driven by evidence suggesting that Garica was an "obviously intoxicated minor" who should not have consumed any alcohol at Manosa's party. Ennabe's interpretation is stymied, however, by the plain language of the social host immunity statute. The

Civil Code immunity, unlike section 25602.1, then contained no exceptions forfeiting the immunity for furnishing alcohol to "any person." [29] In the end, Ennabe wants a fourth exception grafted onto section 25602.1 for social hosts who furnish alcohol to obviously intoxicated minors. But that is a legislative, not a judicial, call.

VIII. A Response To Ennabe's Policy Arguments

Unintended consequences flow from Ennabe's title-driven notion of sale. Minors are not the only ones who charge money to get into a residence where alcohol is available inside. So do political fundraisers, charities and civic organizers who host events with private donors at private residences. Are they selling alcohol without a license by virtue of the entrance fee or donation, and thus at risk of civil and possibly criminal liability? The transaction at the heart of Ennabe's theory is not limited to teenage parties.

A host of *any* age who seeks personal profit from the consumption of alcohol by others is trading on good will and hospitality. In such cases, commercial gain, not a transfer of title, should be the dispositive factor as between

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[29] As noted earlier, there is now an exception for parents or other adults who furnish alcohol to minors in their residence. (See p. 15 at fn. 10, *supra*.) The parent/adult exception is not in play in this case because Ennabe concedes the exception is not retroactive (AOB at p. 42) and he has abandoned his claims against Manosa's parents. (*Ennabe, supra,* 190 Cal.App.4th at p. 711 fn. 3.)

selling and furnishing under both the Civil Code and the Act, and for hosts of all ages.

When this Court upheld the initial creation of the statutory cause of action in 1978, it noted the law's historical concern for minors. "As for limiting the class of protected consumers to minors, the Legislature might reasonably have deemed such persons more in need of safeguarding from intoxication than adults, because of the comparative inexperience of minors in both drinking and driving." (*Cory, supra,* 29 Cal.3d at p. 441.) That solicitude, however, must be applied equally. If a minor's lack of experience and judgment inures to a minor plaintiff's benefit for purposes of establishing liability, that same solicitude says that a minor defendant lacks the experience and judgment to control the alcohol consumption of others – contrary to the very premise of Ennabe's policy-driven closing. (AOB at pp. 41-42.) And where the minor host's guests are uninvited and perhaps strangers, the minor host's inability to detect and limit the alcohol consumption of these unknown guests is even more pronounced.

Underage drinking is a problem. But Ennabe's statutory gymnastics are not the solution. Rigid adherence to the literal words of a definition begets a baffling analysis that raises more questions than answers. And by the end of it all, the analytical torque runs threadbare.

All along, the simple, unifying answer to what constitutes a "sale" lay in what the trial court intuited, what the Court of Appeal implied, and what the Legislature in 1986 expressly said – a "sale" requires commercial gain. And on

this record, no triable issue is raised as to whether the $3 to $5 charge was assessed for Manosa's commercial gain.

CONCLUSION

For these reasons, defendants respectfully submit that the decision of the Court of Appeal should be affirmed.

Dated: July 6, 2011 **MORRIS POLICH & PURDY LLP**

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Dated: July 6, 2011

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