IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

FAIEZ ENNABE, individually and as Administrator, etc. et al., Plaintiffs and Appellants, v. CARLOS MANOSA et al., Defendants and Respondents.	Supreme Court Case No. S189577

Court of Appeal, Second Appellate District, Division One
Case Number B222784
Superior Court of the State of California for the County of Los Angeles
Case Number KC053945
The Honorable Robert A. Dukes, Judge

REPLY BRIEF ON THE MERITS

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I. INTRODUCTION

Defendant Jessica Manosa ("Defendant") argues that she cannot be held civilly liable under Business and Professions Code[1] section 25602.1 because: 1) she did not "commercially gain" from her acts of furnishing alcoholic beverages and charging an admission fee on the evening of the incident, nor 2) did she cause a "sale" for alcoholic beverages to occur within the meaning of section 23025. Defendant's position is neither supported by the plain language of the applicable Business and Professions Code sections nor is her argument supported by the legislative history and intent of these statutes. Instead, Defendant has attempted to mischaracterize the law and facts in an attempt to escape liability where the legislature has already determined liability exists.

Faiez and Christina Ennabe, individually and as Administrators of the Estate of Andrew Ennabe ("Plaintiffs") present a straightforward position: Defendant "furnished" and "sold" alcoholic beverages to "obviously intoxicated minors" in violation of section 25602.1. Simply put, Defendant's acts of "furnishing" and "selling" alcoholic beverages by way of an admission charge to individuals she did not know or invite for access to alcohol she exclusively provided, at a vacant rental property where she did not live, demonstrates the type of event for "commercial gain" the legislature specifically sought to prevent in amending section 25602.1 in 1987 and abrogating the holding in *Cory v. Shierloh*. Plaintiffs' position is supported by the plain language and stated legislative intent of the Business and Professions Code, the interpretations and guidelines of the California Department of Alcoholic Beverage Control ("the Department"), specifically the Trade Enforcement Information Guide of 2009 ("TEIG"), and the published opinions of the Office of the Attorney General for the State of California.

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

Based on the language, history, and purpose of the statutes contained within California's Alcoholic Beverage Control Act of 1935 ("ABC Act"), this Court must find that when Defendant furnished alcoholic beverages and charged an admission fee to uninvited minor guests, she is not immune from civil liability pursuant to Civil Code section 1714, subdivision (c), and can be held liable under section 25602.1.

II. ARGUMENT

A. DEFENDANT WANTS THIS COURT TO DISREGARD THE PLAIN LANGUAGE OF SECTIONS 23025 AND 25602.1 TO SUPPORT HER STRAINED INTERPRETATION OF THE LAW IN CONTRAVENTION TO THE RULES OF STATUTORY CONSTRUCTION.

"The basic rules of statutory construction are well established. 'When construing a statute, a court seeks to determine and give effect to the intent of the enacting legislative body.' "'We first examine the words themselves because the statutory language is generally the most reliable indicator of legislative intent. The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context." If the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls.'" (*People v. King* (2006) 38 Cal.4th 617, 622.)

Here, Defendant is liable under section 25602.1 because she "furnished" and "sold" alcohol to "obviously intoxicated minors" when she was "required to be licensed" pursuant to section 23300. Based upon Defendant's Answer Brief, it would appear that she concedes that she "furnished" alcohol to minors. (RAB at pp. 49 and 53) The only elements of section 25602.1 which Defendant appears to challenge is whether she "sold" alcohol or if she was "required to be licensed."

1. Defendant "Sold" Alcoholic Beverages.

Defendant is liable under either "any person... required to licensed" or the "any other person who sells, or causes to be sold, any alcoholic beverage" clause

of section 25602.1 because she "sold" or "caused alcoholic beverages to be sold" on the evening of the incident.

a. Indirect Transactions Constitute a "Sale."

Courts have interpreted that a person may sell, furnish, or give alcoholic beverages to others ***by a mere acquiescence in or consent to the drinking thereof without herself performing the physical act of transferring possession.*** (See Cal.Jur.3d, Alcoholic Beverages § 96 citing *People v. Bliss* (1919) 41 Cal.App. 65, 69 (emphasis added.) This proposition is supported by the language and legislative history of section 23025[2] and the language of Commercial Code section 2401, subdivision (2).[3] (AOB at pp. 28-30)

An analysis of section 23025, read in conjunction with Commercial Code section 2401, subdivision (2), leads to the conclusion that when an uninvited guest is charged a fee for entry and alcohol exclusively provided by a host, title passes at the moment admission is granted following receipt of payment. Under the instant facts, alcohol purchased exclusively by Defendant was made available to any guest admitted into her party. [1AA 139 and 2AA 308:5-310:17, 311:11-17, 312, 315:9-316:11, 318:13-15, 380-382.] Here, title to the alcohol passed to Defendant's guests when Brown, defendant's "bouncer," admitted paying guests into the residence for their payment of a fee. The moment paying guests were allowed admission, Defendant, the seller, completed her performance as the

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[2] Section 23025 provides: "Sell," "sale," and "to sell" to include "***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." (Bus. & Prof. Code § 23025 (emphasis added).)

[3] Commercial Code section 2401, subdivision (2) provides: "Unless otherwise explicitly agreed ***title passes to the buyer at the time and place at which the seller completes his performan***ce with reference to the physical delivery of the goods..." (Cal. Com. Code § 2401 subd. (2) (emphasis added).)

alcohol was made available to anyone within the residence because they were advised by Brown prior to entry that alcohol was available "if they wanted it."

Defendant argues that a plain reading of the definition of "sale" would yield irrational results. For example, Defendant hypothesizes that hosts would be liable even if alcohol is "furnished" or "sold" by someone other than the host. Such a hypothesis is not based in reality. If a guest drinks alcohol provided by someone other than the host, the host cannot be said to have "furnished" or "sold" alcohol because the host was not the source of the alcohol. This factual scenario has already been addressed in the case of *Salem v. Superior Court*, (1989) 211 Cal.App.3d 595. In *Salem*, a minor purchased a 12-pack of beer from a convenience store. The purchasing minor proceeded to share the beer with another minor in the parking lot of the store and subsequently became involved in an automobile accident together resulting in the death of a third party. The family of the third party victim brought an action pursuant to section 25602.1 against the corporate owner of a convenience store, the convenience store franchisees, and a store employee. The trial court denied defendants' motion for summary judgment, and defendants petitioned for a writ of mandamus under Code Civ. Proc., section 437c, subdivision l. On appeal, the court granted the petition holding that section 25602.1 provided no basis for imposing liability on the defendants since the statute required that the negligence resulting in liability of the alcohol purveyor ***be that of the very person who purchased the beverage***. (*Salem v. Superior Court*, (1989) 211 Cal.App.3d 595, 600 (emphasis added).)

Unlike *Salem*, the Defendant in this action was the very same person who purchased and provided the alcoholic beverages to "obviously intoxicated minors," Garcia and Ennabe. This fact is undisputed and supported by the record and the Order Modifying the Court of Appeal's Opinion in this matter. [1AA 139 2AA 295:9-10. 308:5-310:25, 311:1-17, 312, 313:9-24, 3159-316:11, 318:13-15, 350: 9-22, 373:2-8].

b. Judicial Deference should be given to the Department in Interpreting the ABC Act and Establishing its own Enforcement Guidelines including the TEIG.

Under section 25750, subdivision (a), the legislature has granted the Department broad authority to "'make and prescribe those reasonable rules as may be necessary or proper to carry out the purposes and intent of Section 22 of Article XX of the California Constitution and to enable it to exercise the powers and perform the duties conferred upon it by that section or by this division, not inconsistent with any statute of this state...'" (*Coors Brewing Co. v. Stroh* (2001) 86 Cal.App.4th 768, 773 quoting Bus. & Prof. Code § 25750, subd. (a).) The Department ***is authorized to interpret its own rules*** (*Samson Market Co. v. Kirby* (1968) 261 Cal.App.2d 577, 584), ***and it is generally appropriate for courts to accept the Department's administrative expertise on this point.*** (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (1999) 71 Cal.App.4th 1518, 1523 (emphasis added).) Courts should defer to the Department's interpretation of its own rules, "since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12.)

Defendant's position that the TEIG of 2009 is "not ...entitled to judicial deference" and should be given "no weight" is a blatant mischaracterization of the law as referenced by the above mentioned authority. (RAB, pg. 25, citing *Dep't of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 128 Cal.App.4th 1195, 1205.) Moreover, the Court of Appeal improperly gave "no weight" to the TEIG despite the fact that the Department is in the best position to understand and interpret the laws it enforces. Accordingly, this Court should accept the Department's administrative expertise in determining when an event is a "private party" or if a liquor license is required for a specific type of event. (AOB at 30-33.)

c. A Monetary Charge is "Good Consideration" for a "Sale" of Alcohol.

A monetary cover charge is clearly "good consideration" for the "sale" of alcoholic beverages. Civil Code section 1605 defines "good consideration" as follows: "***Any 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." (Civ. Code § 1605 (emphasis added).) "Consideration consists not only of benefit received by the promisor, but of detriment to the promise... 'It matters not from whom the consideration moves or to whom it goes. If it is bargained for and given in exchange for the promise, the promise is not gratuitous.'" (*Flojo Internat., Inc. v. Lassleben* (1992) 4 Cal.App.4th 713, 719.) "Consideration may be an act, forbearance, change in legal relations, or a promise." (1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 202.) Within the context of alcohol being provided to members of the public at a location for consideration section 25604[4] defines "consideration" to include "a ***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 (emphasis added).)

The Department, the administrative agent and enforcement arm for the ABC Act, published the TEIG in November 2009 which supports the definition of "consideration" outlined by section 25604 as applied to section 23025. (See http://www.abc.ca.gov/trade/TEU Information Guide 2009 v2.pdf). Although not

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[4] Section 25604 states that, "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***." (Bus. & Prof. Code § 25604 (emphasis added).)

binding authority, the TEIG illustrates the practical application of the current law as interpreted by the Department. Specifically, the TEIG states: "Be aware that the definition of 'sale' includes ***indirect transactions*** other than merely paying for a glass of wine or other drink containing alcohol. (*Id.*; Bus. & Prof. Code §§ 23025, 25604 (emphasis added).) For instance, ***if an admission fee is charged*** or there is a charge for food and the alcohol is included, but not separately charged, ***an ABC license is required.***" (*Id.* (emphasis added).) This legal position is also supported by the Office of the Attorney General for the State of California (See AOB at pp. 33-34.)

i. Defendant's Claimed Subjective Intent is Not Relevant to Determining a "Sale."

Based on the totality of the authorities, a "sale" of alcoholic beverages for "good consideration" occurred on the evening of the incident. ***There is no dispute that defendant charged a cover charge of $3 to $5 and furnished alcohol*** (mostly beer and "jungle juice"), ***glassware, mixers, and ice to strangers at her party to uninvited guests***. [2AA 354:5-13, 365:4-19, 389-391, 402-404.] By accepting the benefit of $3 to $5, Defendant transferred title to alcohol she purchased prior to the party to anyone who was admitted into the party at the time of admission. In exchange uninvited guests were ***required to pay*** $3 to $5 to their detriment for the benefit of access to alcohol they did not have the ability to purchase given their age of minority. The payment of the $3 to $5 cover charge was not discretionary, a donation, or gift by uninvited guests. Uninvited guests were not allowed to enter and drink alcohol provided by Defendant unless this payment was made. This ***monetary exchange*** for alcohol by its very definition is "good consideration" and not illusory as money has value and is the primary means to complete "any transaction" between two parties.

Defendant's desperate attempt to circumvent the language of sections 23025 and 25602.1 with two poor hypotheticals is highly specious. First, Defendant takes the position that applying the literal language of section 23025

leads to the conclusion that a "sale" of alcoholic beverages occurs if a guest promises to attend a party where a host promises to provide alcohol. However, Defendant's first hypothetical does not take into account that a "transaction" is a required component to any "sale" of alcohol. Moreover, Defendant's hypothetical also presumes the guest was not invited. If there is no "transaction," the host is said to have at best, "furnished" not "sold" alcohol. In such a case, a host would only be in violation of section 25602.1 if the party was "open to the general public" while alcohol is being consumed by an "obviously intoxicated minor" on the premises, because the host would have been "required to be licensed." (See Section II.A.2 below).

As for Defendant's second hypothetical where the guest exchanges a "dessert" for alcohol, such an exchange may be "good consideration" for a "sale" if a "transaction" occurs. For example, if the host made it mandatory to bring a dessert (or provide a service) in order to obtain access to the party and alcohol, then the dessert may be "good consideration" so long as there was not a mutual agreement to gratuitous pool resources (i.e., pot luck). Regardless, the hypothetical is not applicable in our case. Defendant charged ***uninvited*** guests $3 to $5 (***money***) for entry and access to the alcohol at her party. Moreover, payment was ***mandatory*** and was not discretionary. No matter how Defendant seeks to characterize her party's cover charge, a "transaction" occurred for "consideration" and therefore a "sale" took place.

Furthermore, the terms "any consideration" connote no requirement that Defendant actually realize a monetary profit from her "sale." Defendant takes the position that she did not "commercially gain" from her enterprise because she did not make a "profit." Just because Defendant's party may have been a poorly run enterprise or produced fewer guests than expected, does not negate the fact that a "sale" occurred. Ultimately, it is not the Court's role to determine profitability of the enterprise or the subjective intent of the host. It is only the Court's duty to determine if a "sale" has occurred. If the legislature sought to have a "sale"

predicated on a "profit" or the subjective intent of the host to yield a "profit," it would have used that specific type of language rather than use the terms "***any transaction***" for "***any consideration.***"

For practical purposes, it does not make any sense to determine that a "sale" occurred only if a profit was realized. Does a person or a bar not "sell" any alcohol if they lose money from not having enough patrons purchase alcohol for any given day? Defendant would take the irrational position that no "sales" occurred on that particular day because the host failed to make a profit. In fact, using Defendant's own logic that would mean no non-profit association, cooperative, or charitable organization would ever be held liable under section 25602.1 even if they were engaged in a commercial endeavor. Defendant's convoluted and strained interpretation of sections 23025 and 25602.1 wherein she requires a subjective intent to "profit" is simply not supported by the language or history of section 23025.

Nonetheless, Defendant did "profit" from her alcohol "sales." The record is clear that ***money*** was collected from uninvited guests by Defendant's "bouncer" with the understanding that the party was hosted by Defendant and that alcohol was supplied in exchange for a fee. This ***money was required payment*** if uninvited guests wished to enter the party and drink alcohol solely purchased and provided by Defendant. There was no mutual agreement between Defendant, the host, and her guests to "pool" or "help defray the costs" of the party as characterized by the Court of Appeal and Defendant. Assuming arguendo that Defendant was simply intending to "defray the costs of the party," the fact remains that her uninvited guests never knew of her subjective intentions. Moreover, there is no evidence indicating the uninvited guests intended to assist Defendant in "defraying the costs" of the party. Based upon the record, the facts reveal that the uninvited guests only knew that payment of the mandatory admission fee afforded them entry into the party and access to alcohol already purchased by Defendant.

Furthermore, ***some*** of the money collected from uninvited guests was used to purchase additional alcohol during the party. What Defendant did with some or all of the money she collected was solely her decision. However, that does not take away from the fact that she profited from the money she collected from uninvited guests. Perhaps, Defendant anticipated a larger number of uninvited guests upon the arrival of the initial guests. Frankly, it is nearly impossible to determine Defendant's true subjective intent. However, Defendant's objective intent ***to attempt to profit*** is clear by her overt actions. Defendant claims that she intended to "hang out" and "socialize" with her boyfriend and five friends in a vacant and unfurnished residential rental property. This claim is contradicted by the fact that Defendant had a "bouncer" collect money from uninvited guests, hired a professional disc jockey ("DJ") with professional sound equipment, and purchased enough alcohol for 50 to 60 people. (RAB p. 3; [2AA 332:22-333:12, 334:17-335:16, 343:2-6, 350:17-22, 351:22-352:13, 353:4-11, 354:5-13, 362:19-363:4, 365:4-19, 387, 389-391, 402-404.]) Given the substantial party arrangements made by Defendant, her attempt to "hang out" and "socialize" would seem to exceed a simple gathering of five friends.

ii. Defendant's Out-of-State Authorities Do Not Carry Any Weight Given the Existence of Applicable California Authority on this Subject Matter.

While Defendant is quick to point out that six other states do not impose liability when a host charges an admission fee to guests for alcohol, she completely fails to appreciate that California authority on this subject area clearly speaks to the contrary. Effectively, Defendant engages in a surface level analysis of six cases in a blatant attempt to evade liability and negate the language of the pertinent California statutes and the legislature's intent to impose liability in circumstances such as this case.

Defendant completely fails to discuss the specific language of the statutes which give rise to a civil action in these states or the reasoning which supports the

out-of-state holdings for the cases cited by Defendant. A review of these cases and their applicable state statutes reveals that liability arising from a sale of alcoholic beverages is exclusively limited to "licensees." (See Missouri Revised Statutes § 537.053, subd. 2; Illinois Compiled Statutes, 235 ILCS § 5/6-21; *Koehnen v. DuFuor* (Minn. 1999) 590 N.W.2d 107 reviewing and interpreting Minnesota Statutes § 340A.404 to allow for liability only against licensees; Michigan Compiled Laws §§ 436.1801, subds. (4) and (5) and 436.1707, and *McGee v. Alexander* (Okla. 2001) 37 P.3d 800, 804.) Moreover, in New York, liability is predicated on a showing or intent to profit by the seller. (See *D'Amico v. Christie* (Ct.App. 1987) 524 N.Y.S.2d 1, 2-5.) No such requirement exists in California.

d. Defendant's Admission Fee Constituted a "Sale" of Alcohol.

Defendant in the instant matter takes the position that no "sale" of alcoholic beverages occurred on the evening of the incident because she did not have a commercial purpose when she charged uninvited guests "admission fee" and provided them with free alcohol. Fortunately, that exact issue has been previously analyzed by the Department in an opinion prepared by the Office of the Attorney General of the State of California. The Office of the Attorney General ultimately concluded that the offering of a "complimentary" alcoholic beverage to any guests while at the same time charging for some other product or service is deemed to be a "sale" of alcoholic beverages, thereby necessitating a liquor license. (68 Ops. Cal. Atty. Gen. 263, 265-267 (1985).) This conclusion was reached by comparing a number of out-of-state cases which analyzed the definition of "sale" in reference to alcoholic beverage control statutes similar to that of California's section 23025. One case in particular, *New York State Liquor Authority v. Sutton Social Club, Inc. aka, Top Floor Discotheque* (1978) 403 N.Y.S.2d 443, concluded that a so-called

"social" club violated the New York Alcoholic Beverage Control Act[5] when it required "members" and guests to pay a $6 to $10 "admission" fee without a liquor license where "free" alcoholic beverages and dancing was made available to the attendees.

Frankly, the instant matter is no different than the *Sutton Social Club, Inc.* case. Neither the Defendant in the instant matter nor the defendant in *Sutton Social Club, Inc.* was in the business of selling alcohol. Similarly, both the Defendant in the instant matter and the defendant in *Sutton Social Club, Inc.* offered alcoholic beverages, music, and dancing upon payment of a required admission fee. The fact that the Defendant in the instant matter is an individual while the defendant in *Sutton Social Club, Inc.* was a so-called "social" club is of no material significance in the application of Sections 23025 and 25602.1 because a "person" as used in those statutes includes "***any individual***, firm, copartnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate, ***or any other group or combination acting as a unit, and the plural as well as the singular number***." (Bus. & Prof. Code § 23008 (emphasis added).)

More importantly, it appears Defendant concedes that when a host charges a fee for admission, which includes free alcohol, that host has caused a "sale" for alcoholic beverages to occur. (See RAB, pp.26; *New York State Liquor Authority v. Sutton Social Club, Inc. aka, Top Floor Discotheque* (1978) 403 N.Y.S.2d 443, 444-447.) The only distinction Defendant draws from the *Sutton Social Club, Inc.* case was that "members" and guests were charged while only uninvited guests where charged in the instant matter. This point is of no significance because: 1) only a single "sale" needs to occur for there to be "sale" (See Section II.A.1.e. below) and 2) purveyors of alcohol may chose to "furnish" or "give away" alcohol

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5 "Sale" was defined under the New York Alcoholic Beverage Control Act as "***any transfer***, exchange or barter ***in any manner or by any means*** whatsoever for ***a consideration***,..." (68 Ops. Cal. Atty. Gen. 263, 265 (1985); citing the New York Alcoholic Beverage Control Act (emphasis added).

(i.e., "the drink is on the house") and still have been deemed to have "sold" alcohol if there was a "sale" of alcoholic beverages at some point in time. (See Section II.A.2 below) It is reasonable to conclude that by admitting invited guests for "free," Defendant was attempting to attract a larger group of paying uninvited guests. Thus, Defendant's "free" alcohol was designed for a commercial benefit.

Moreover, the facts of this case support the conclusion that the admission fee charged by Defendant was a "sale" for alcohol. In this case alcohol was solely provided by Defendant without limitation in a vacant and unfurnished rental property. [1AA 139 and 2AA 308:5-310:17, 311:11-17, 312, 315:9-316:11, 318:13-15, 328:10-23, 380-382.] With exception to mixers, ice, and plastic cups, ***alcohol was the only consumable item*** made available by defendant to admitted guests at her party. [2AA 308:21-25, 309:1-12, 310:18-25, 311:1-17.] Other than the alcohol provided by Defendant no other alcohol was brought onto the premises by any guest in attendance at the party. [2AA 318:13-15.] Lastly, the vast majority of the people who attended defendant's party were under the age of 21. [2AA 312:22-25, 332:10-17.] In essence, the property in this matter was a public nuisance as defined by section 25604 when it became a safe haven for minors to illegally purchase and consume alcohol which was not otherwise legally available to them. To hold that the admission fee charged by Defendant was not a "sale" under section 23025 "would thwart the purposes of the alcoholic beverages control laws in our state..." (See 68 Ops. Cal. Atty. Gen. 263, 267 (1985).)

e. A Single "Sale" is Sufficient to Invoke Section 25602.1.

It is undeniable that the language of section 25602.1 does not require more than one sale for there to be a violation. Moreover, the language of this statute does not require the minor being sold the alcohol be the same person causing injury to themselves or others so long as alcohol is "sold, furnished, ***or*** given away" to "***any*** obviously intoxicated minor." (See Bus. & Prof. § 25602.1.) This

is supported by the plain language of the statute and the pertinent jury instruction[6] for section 25602.1. The second element of pertinent jury instruction states that the host need only have "***sold or g[iven]*** alcoholic beverages to ***a minor***." Moreover, the fourth element requires that the host only ***"provide"*** (not sell) alcoholic beverages to the minor who injures himself or a third-party. (See CACI No. 422 (emphasis added).) Clearly, based on this language, every guest need not be sold alcohol for there to be a violation of section 25602.1.

2. Defendant May be Liable under Section 25602.1 by Simply "Furnishing" Alcoholic Beverages.

Defendant does not seem to appreciate that a "person" can simply "furnish" alcohol (and not sell any alcohol) and still be held liable under section 25602.1. This is evidenced by the language of sections 25602.1 and 23300. Section 25602.1 provides:

> 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***

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[6] Under Judicial Council of California Civil Jury Instruction ("CACI") Number 422, liability will be imposed under section 25602.1 if:

(1) the defendant is licensed, authorized, or required to have a license to sell alcoholic beverages;
(2) the defendant ***sold or gave*** alcoholic beverages to ***a minor***;
(3) the minor was less than 21 years old at the time;
(4) the defendant provided the alcoholic beverages to the minor who displayed symptoms that would lead a reasonable person to conclude that he or she was intoxicated;
(5) while intoxicated, the minor harmed himself or herself or plaintiff; and
(6) defendant's selling or giving alcoholic beverages to the minor was a substantial factor in causing plaintiff's harm. (See Judicial Council of California Civil Jury Instruction (CACI) no. 422 (emphasis added).)

> ***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 (emphasis added).)

As previously stated, it is Plaintiffs' alternative position that Defendant was a "***person***" who was "***required to be licensed, pursuant to Section 23300***" on the evening of the incident and who "***furnished***" alcohol to an "obviously intoxicated minor." Under our circumstances Defendant is liable under section 25602.1.

a. Defendant is a "Person" Covered under Section 25602.1.

Under section 25602.1 a civil cause of action may be brought against "any person" licensed, "required to be licensed," or "any person who sells alcoholic beverages to an obviously intoxicated minor." (See Bus. & Prof. Code § 25602.1.) Section 23008 defines "person" to include "individuals" even when they are not generally engaged in commercial activities. (See AOB at pp. 25-27; RAB at pp. 51-53; Bus. & Prof. Code § 23008; *Coulter v. Superior* (1978) 21 Cal.3d 144, 150) Defendant is an "individual." Therefore, she is a "person" who may be liable under section 25602.1.

b. Defendant was "Required to Have a License."

The States traditionally have had great latitude under their police powers to legislate as "'to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" (United States Constitution, Tenth Amendment; *Metropolitan Life Ins. Co. v. Massachusetts* (1985) 471 U.S. 724, 756.)

Section 23000 et seq., also known as the ABC Act, governs the manufacture, sale, and disposition of alcoholic beverages within the State of California. (Bus. & Prof. Code § 23000 et seq.) The State, through the Department, has the exclusive power ***to license and regulate*** the manufacture, importation, ***and sale*** of alcoholic beverages in the State of California. Pursuant

to section 23001, the ABC Act is intended to be an exercise of the police powers of the State for the ***protection of 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 (emphasis added).) The primary purpose of this ABC Act requires the highest degree of economic, social, and moral well-being and safety of the State and all its people. (Bus. & Prof. Code § 23001.) When analyzing the ABC Act, ***all provisions*** of the ABC Act ***must be liberally construed*** for the accomplishment of these purposes. (Bus. & Prof. Code § 23001 (emphasis added).)

Under California's Constitution, ***no person shall sell, furnish, give, or cause to be sold*** any alcoholic beverage to any person under the age of 21 years, and ***no person*** under the age of 21 years shall purchase any alcoholic beverage. (California Constitution, article XX, section 22 (emphasis added).) The California Constitution makes it unlawful for ***any person*** other than a licensee of the Department to sell alcoholic beverages within the State of California. (California Constitution, article XX, section 22.)

More importantly, section 23300 provides "***no person*** shall ***exercise the privilege or perform any act*** which a licensee[7] may exercise or perform under the authority of a license unless the person is authorized to do so by a license issued pursuant to [the ABC Act]." (Bus. & Prof. Code § 23300 (emphasis added).)

Based on a plain reading of section 23300, there are "acts" other than a "sale" which create the need for licensing. This is supported by the statute's use of the terms "any acts" and the legislature's deliberate exclusion of the term "sale" in section 23300.

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[7] Section 23009 defines a "licensee" to mean "any person holding a license, a permit, a certification, or any other authorization issued by the department." (Bus. & Prof. Code § 23009.)

The "acts" under section 23300 which trigger when an alcoholic beverage license is required for an event are listed in section 23399.1. Section 23399.1, provides: "No license or permit shall be required for the serving and otherwise disposing of alcoholic beverages where ***all*** of the following conditions prevail:

1. That there is ***no sale*** of an alcoholic beverage.

2. That the ***premises are not open to the general public*** during the time alcoholic beverages are served, consumed or otherwise disposed of.

3. That the premises are not maintained for the purpose of keeping, serving, consuming or otherwise disposing of alcoholic beverages. (See Bus. & Prof. Code § 23399.1 (emphasis added).)

Defendant admits she did not have a license to sell alcohol on the day of the incident. [1AA 139.] Defendant further does not contest that an admission fee was charged to uninvited guests, including Garcia, on the evening of the incident. [See RAB at p. 7] As a consequence, Plaintiffs are of the position that an alcoholic beverage license was required because a "sale" occurred on the evening of the incident ***or***, in the alternative, the "premises were open to the general public during the time alcoholic beverages were served, consumed or otherwise disposed of." (See II.A.2.b.i. below) (See Bus. & Prof. Code § 23399.1.)

i. Defendant's "Premises were Open to the General Public."

Defendant was also "required to be licensed" under section 25602.1 on the evening of the incident because the "***premises were open to the general public*** during the time alcoholic beverages are served, consumed or otherwise disposed of" as required by section 23399.1 (See Bus. & Prof. Code § 23399.1 (emphasis added).)

Here, the *Ennabe* Court in its opinion glanced over the second element of section 23399.1, presuming Defendant's party was not open to the general public because as stated in the court's opinion "only those to whom the party was publicized" were admitted onto the premises. (See *Ennabe v. Manosa* (2010) 190

Cal.App.4th 707, 719.) The *Ennabe* Court took the position that if ***anyone*** becomes aware of an event on private property that the person becomes a "guest" of the host by virtue of their mere knowledge of the event. Is a stranger walking by Defendant's party who hears music blaring from the premises and decides to enter the party not a member of the public because that person heard the music from the street? Alternatively, is an uninvited person who heard about Defendant's party from Defendant's neighbor who subsequently enters the party not a member of public because the neighbor told them about the party? Applying this logic, the Court of Appeal would presume that ***anyone*** walking by defendant's property or hearing about her party from any third-party is an invited guest of defendant by virtue of their secondhand knowledge of the party. That proposition is absolutely illogical and would establish poor legal precedent for all cases involving land possessors and their respective duty towards those entering their property.

Moreover, Garcia and his friends were ***unknown to and uninvited*** by the Defendant. Defendant clearly admits she did not know Garcia or his friends nor did she invite them to the party. [2AA 318:13-15, 336:2-9, 362:19-363:4, 387.] If she did not know Garcia and his friends and she did not invite them, then they are clearly strangers and members of the general public. This is especially true if these same strangers are required pay to gain access to the property and the alcohol contained therein. Additionally, the record does not indicate that any of Defendant's friends invited Garcia or his friends to the party. In sum, Defendant was "required to be licensed" on the day of her party because the premises were open to the general public while alcohol was being consumed.

c. Defendant "Furnished" Alcohol.

The facts reveal Defendant took affirmative steps to "furnish" or "give away" alcohol to Garcia and Andrew Ennabe on the evening of the incident. "The word 'furnish' implies some affirmative action on the part of the furnisher..."

(*Bennett v. Letterly* (1977) 74 Cal.App.3d 901, 905.) Among other things, "furnish" means '***to supply, to give or to provide.***'" (*Id.* at 904-905 (emphasis added).) A host need not pour any alcoholic drinks to have "furnished" alcohol if that person has taken some affirmative step to supply it to the drinker. (*Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, 1158.) Ultimately, a person may sell, furnish, or give alcoholic beverages to others ***by a mere acquiescence in or consent to the drinking thereof without herself performing the physical act of transferring possession***. (See Cal.Jur.3d, Alcoholic Beverages § 96 citing *People v. Bliss* (1919) 41 Cal.App. 65, 69 (emphasis added.)

i. Defendant Mischaracterizes the Facts by Continually Referring to the Alcohol Provided Exclusively by Her as "Communal."

Defendant has made much of her testimony where she states that the alcohol at her party was "communal." The use of this testimony is presumably an attempt to draw the inference that the alcohol was not exclusively purchased and furnished by defendant, but rather was "pooled" by some or all of her guests similar to that of *Bennett v. Letterly* (1977) 74 Cal.App.3d 901. (AOB at 13-17). Defendant attempts to advance her "pooling" theory by continually referring to the Court of Appeal's Modified Opinion in *Ennabe* wherein the Court found that although a fee was obtained from uninvited guests entering the party, the cover charge was only intended to "defray the cost of the party." (See *Ennabe v. Manosa* (2010) 190 Cal.App.4th 707, 717.) The *Ennabe* Court concluded that the collection of the fee made this a "communal" party where everyone, including Garcia and other persons unknown to Defendant, contributed to providing the alcohol at the event.

Contrary to the Court of Appeal's analysis and Defendant's position, Defendant's party was not a "pot luck," where several participants provided money for alcohol or alcohol itself to be consumed by everyone. What is clear from the record and the Court of Appeal's Order Modifying Opinion is that

Defendant exclusively purchased and supplied the alcohol for all individuals, invited or uninvited, attending her event. (See Order Modifying Opinion and Denying Rehearing dated 12-20-10) ***In fact, the only source of alcohol at the party was solely and directly attributable to defendant's purchase and presentation of alcohol.*** [1AA 139 and 2AA 295:9-10, 308:5-310:17, 312, 313:9-24, 315:9-316:11, 318:13-15.] More importantly, no other alcohol was brought onto the premises by any partygoers in attendance. [2AA 318:13-15.]

Accordingly, the *Ennabe* Court's holding should not be given any weight as it is unsupported by the factual record and is not well reasoned. Given that the Court of Appeal modified its opinion and adopted the fact that Defendant was the ***only person*** responsible for the purchase and furnishing of the alcohol at the party, the *Ennabe* Court's analysis completely contradicts the conclusion that this is a case of "pooling" funds or a attempt to "defray the costs" of making alcoholic beverages available to her guests. Based upon simple logic, it is impossible to establish a "common fund" (i.e., a "pooling") with oneself. At a minimum, there must be a mutual agreement amongst various participants to "pool" resources to purchase and obtain alcohol.

B. THE LEGISLATURE HAS ALREADY DETERMINED THAT WHEN A MINOR HOST FURNISHES ALCOHOLIC BEVERAGES AND CHARGES AN ADMISSION FEE TO UNINVITED GUESTS SHE HAS "SOLD" ALCOHOLIC BEVERAGES FOR "COMMERCIAL GAIN" BASED UPON THE LEGISLATURE'S STATED INTENT TO ABROGATE *CORY V. SHIERLOH* IN AMENDING SECTION 25602.1 IN 1987.

The objective of statutory interpretation is to determine legislative intent. (*MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1082.) In construing a statute a court must ascertain the legislature's intent in order to effectuate the law's purpose. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386.) "If the statutory language permits more than one reasonable interpretation, courts may

consider other aids, such as the statute's purpose, legislative history, and public policy." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.)

On January 1, 1987, section 25602.1 was amended with the enactment of Senate Bill No. 1053 (Stats. 1986, Ch. 289), extending a cause of action against: 1) "***any person...required to be licensed***" pursuant to section 23300, 2) "***any person authorized by the federal government to sell alcoholic beverages on a military base or other federal enclave,***" and 3) "***any other person who sells, causes to be sold, any alcoholic beverage***" to an obviously intoxicated minor. (See Bus. & Prof. Code § 25602.1; Stats. 1986, Ch. 289.) Prior to 1987, liability under section 25602.1 was irrationally predicated on the possession of an alcoholic beverage license by the host.

In interpreting the 1987 amendment, the Court in *Baker v. Sudo* 194 Cal.App.3rd 936, noted that "Senate Bill No. 1053 did not clarify existing law in the area of liability for providers of liquor; ***it changed the law***." (*Baker v. Sudo* 194 Cal.App.3rd 936, 944 (emphasis added).) The Senate Committee's report on Senate Bill No. 1053, under the heading of "ANALYSIS" states:

> Existing law generally immunizes a provider of alcohol from liability for any injury caused by the consumer of the alcohol. However, it specifically holds a liquor licensee civilly liable for any injury or death proximately caused by the licensee's sale or furnishing of alcohol to an obviously intoxicated minor.
>
> The liability provision has been interpreted by the Ninth Circuit Court of Appeals to be inapplicable to a nonlicensed club on a United States military base which sells alcohol to an obviously intoxicated minor. (*Gallea v. United States* (1986)).
>
> This bill would revise the liability provision to impose civil liability upon ***any person*** who sells or causes to be sold any alcoholic beverage to an intoxicated minor

> where the sale proximately causes a death or injury. This liability includes any person authorized by the federal government to sell alcoholic beverages on a military base or other federal enclave. It would also impose liability for the ***sale or furnishing*** to an obviously intoxicated minor by nonlicensed liquor sellers required to be licensed. (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 1053 (1985-1986 Regular Session)(Unfinished Business) at RJN Exhibit 11, pp. 1-2.)

Under the heading of "Reason for Bill" the legislature explicitly intended to correct two prior judicial injustices created by the *Cory* and *Gallea* decisions caused by the limitations of the pre-1987 version of Section 25602.1. In doing so, the legislature extended a civil cause of action under section 25602.1 to aggrieved parties injured as a consequence of underage alcohol ***sales*** and consumption occurring within the context of residential parties where an admission fee was allegedly charged by the host. The Committee report provides:

> The purpose of this bill is to close gaps in the law which impose civil liability for selling alcohol to obviously intoxicated minors.
>
> According to the Senate Judiciary Committee analysis, the Business and Professions Code (Section 25602.1) presently imposes potential civil liability for serving obviously intoxicated minors only upon liquor (and beer and wine) licensees. Thus, the status of the provider, i.e., whether or not the person is a licensee, is a determinative factor.
>
> As a result of this distinction, ***a minor who allegedly sold alcohol*** to an obviously intoxicated minor escaped civil liability for injuries caused by the intoxicated minor because the provider was not a licensee. (***Cory v. Shierloh*** (1981)). Similarly, a military base which serves alcohol to an obviously intoxicated minor was also immunized from civil liability because the federal installation - - being exempt from state licensing

> requirements - - was not a licensee. (*Gallea v. United States.*)
>
> ***The narrowness of the statute has been criticized.***
>
> The bill would impose liability for the ***sale or furnishing*** of 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. (*Id.* at 2.)

Moreover, the in the section entitled, "ARGUMENTS IN SUPPORT," the Senate Rules Committee report states that:

> "...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. Further, the effect of the distinction may not have been foreseen or intended by the Legislature." (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 1053 (1985-1986 Regular Session)(3rd reading) at RJN Exhibit 9, p. 1 (emphasis added).)

Ultimately, the legislature wanted liability to be imposed in factual situations similar to *Cory* because it felt the admission fee allegedly charged by the host in *Cory* was a "sale" of alcohol for "commercial gain." Presumably, the logic is that a person intends to "commercially gain" if they take actions to "sell" alcohol. This logic is evidenced by the fact that the legislature deemed the minor host in *Cory* to have "***allegedly sold alcohol***" as referenced by the "Reason for Bill" section of the Senate Committee report.

In *Cory v. Shierloh*, a minor became intoxicated at a ***party held at a residence where an admission fee was allegedly charged by a minor host.*** Ultimately, the plaintiff was injured when he left the party and lost control of his

vehicle. (See *Cory v. Shierloh* (1981) 29 Cal.3d 430, 437.) The trial court sustained the host's demurrer based on section 25602, subdivision (b), and Civil Code section 1714, subdivision (c), barring plaintiff's action. The Court of Appeal and the Supreme Court affirmed the trial court's decision with reservations concluding that the defendant was not licensed to sell alcohol as required to find liability under the pre-1987 amended version of section 25602.1.

Similarly, in *Gallea v. United States,* the parents of a girl killed in a motorcycle accident, after a minor driver had been served alcoholic drinks at a naval base, brought a wrongful death action against the United States under the Federal Tort Claims Act ("FTCA"). The district court dismissed the United States from the action, and the parents challenged the judgment. The Court of Appeals affirmed, holding that the United States was not liable because the naval base was not a licensed provider of alcohol under state law. The Court of Appeals also held that at the time of the decedent's death, the state legislature intended the immunity exception to be limited to liquor suppliers licensed under state law. (*Gallea v. United States* (1986) 779 F.2d 1403, 1404-1406.)

The Senate Committee explicitly stated in its report under the heading "COMMENT":

> Imposing civil liability for any sale of alcohol to an obviously intoxicated minor ***would nullify the Cory*** (in part) ***and Gallea decisions***. The bill would not, however, affect the existing immunity for social hosts as it would not impose any liability for the free furnishing of alcohol. (*Baker v. Sudo* (1987) 194 Cal.App.3rd 936, 944, Footnote No. 10 citing (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1053 (1985-1986 Regular Session), at RJN Exhibit 3, p. 4 (emphasis added).)

Based on plain language of section 25602.1 and its expressed legislative intent to abrogate the holdings of *Cory* and *Gallea*, it is clear that the legislature intended to have this statutory exception apply to situations where "persons" are

"required to be licensed" "furnish" or "sell" alcohol to intoxicated minors similar to that of *Cory* and *Gallea*. This is evidenced by legislature's stated intent to nullify the decisions in *Cory* and *Gallea* and the inclusion of the three clauses specifically added to address the facts of each respective case. (AOB at 24-25.)

Defendant's analysis of *Coulter v. Superior* (1978) 21 Cal.3d 144 as applied to the current version of section 25602.1 is misguided. *Coulter* only further supports Plaintiffs' position that it was the legislature's intent in 1987 to hold those "persons" generally viewed as a "noncommercial suppliers" or "noncommercial providers" liable, at least when intoxicated minors are involved, when it amended section 25602.1. (See RAB at p. 51-53; *Coulter v. Superior* (1978) 21 Cal.3d 144, 150.) Just as the legislature intended to abrogate the *Coulter* decision by enacting 1978 amendments, the legislature subsequently intended to abrogate the *Cory* decision in amending section 25602.1 to limit the scope of immunity it previously created.

C. DEFENDANT'S AGE IS IMMATERIAL TO THE APPLICATION OF SECTION 25602.1.

Defendant argues that she should be absolved from liability because she is under the age of 21 and could not have been a licensee at the time of the incident. Such a position is clearly an affront to the intent of the legislature and the purpose of the ABC Act. (AOB at p. 40.) Further, Defendant's position would provide an irrational and arbitrary result, when an adult under the age of 21 furnishes and sells alcohol to another.

Consider the irrationality of Defendant's proposition: Is a 15 year old minor who negligently operates a vehicle not liable to persons she injures because she was not licensed (and could not be licensed) at the time of his accident? According to Defendant's logic, the unlicensed 15 year old driver would be free from liability for her improper acts.

Such an irrational position is not supported by the ABC Act or the law in general. The legislature specifically intended that liability under Section 25602.1

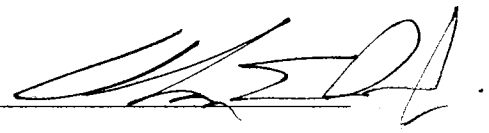
be applied in circumstances where a "sale or furnishing of alcohol to an obviously intoxicated minor [occurs] by ***any person required to be licensed.***" (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 1053 (1985-1986 Regular Session)(Unfinished Business) at RJN Exhibit 11, p. 2.) Liability under Section 25602.1 is intended to apply to the "seller [of alcohol] ***operating without a license*** or with an expired, suspended or revoked license..." (*Id.*) It is of no consequence that Defendant could not obtain a license. The only issue of significance under the statute is whether Defendant was required to obtain a license under the ABC Act.

III. CONCLUSION

For the forgoing reasons, Plaintiffs respectfully request that this Court reverse judgment and remand the matter for trial.

Respectfully submitted,

DATED: July 22, 2011

By 

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ESTATE OF ANDREW ENNABE

CERTIFICATE OF COMPLIANCE

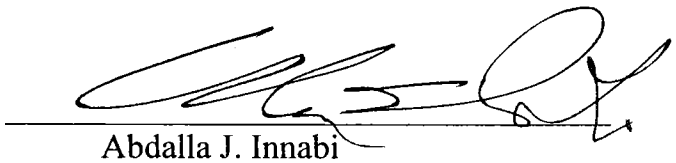
I, Abdalla J. Innabi, declare that:

I am an attorney in the law firm of Innabi Law Group, APC, which represent Plaintiffs and Appellants Faiez and Christina Ennabe, individually and Administrators of the Estate of Andrew Ennabe.

This Reply Brief on the Merits was produced with a computer using Microsoft Word. It is proportionately spaced in 13-point Times Roman typeface. The brief contains 8,392 words including footnotes, excluding the tables and this certificate.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 22, 2011 at Pasadena, California.



Abdalla J. Innabi

PROOF OF SERVICE
BY OVERNIGHT COURIER

CASE NAME: **Ennabe et al. v. Manosa et al.**
SUPREME COURT CASE NUMBER: **S189577**
COURT OF APPEAL CASE NUMBER: **B222784**
SUPERIOR COURT CASE NUMBER: **KC053945**

I, the undersigned, declare as follows:

1. At the time of service, I was at least 18 years of age and not a party to this legal action. I am a Citizen of the United States and resident of the County of Los Angeles where the within-mentioned service occurred.

2. My business address is 2500 E. Colorado Ave., Suite 230, Pasadena, California 91107.

3. On 07/25/11, I served the ***REPLY BRIEF ON THE MERITS*** by overnight courier as follows: I enclosed a copy in separate envelopes, with postage fully prepaid, addressed to each individual addressee named below, and Federal Express picked up the envelopes in Pasadena, California, for delivery as follows:

Richard H. Nakamura Dean A. Olson Sheena Y. Kwon MORRIS POLICH & PURDY, LLP 1055 West Seventh Street, 24th Floor Los Angeles, CA 90017 *(one copy)*	Clerk of the Court Supreme Court of the State of California 350 McAllister Street San Francisco, CA 94102 *(one original & 13 copies)*
Honorable Robert A. Dukes Superior Court of California, East District Los Angeles County–Department R 400 Civic Center Plaza Pomona, CA 91766 *(one copy)*	Clerk of the Court Court of Appeal Second Appellate District, Division 1 300 So. Spring St. 2nd Fl Los Angeles, CA 90013 *(one copy)*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 07/25/11

AMER INNABI
Print

Signature