

March 18, 2008

Mr. Frank Foote
Director, Regulations and Rulings Division
Alcohol and Tobacco Tax and Trade Bureau
1310 G. Street, N.W., Suite 200-E
Washington, D.C. 20005

RE: Comments in Opposition to Notice of Proposed Rulemaking No. 77

Dear Mr. Foote:

Napa Valley Vintners ("NVV") is a trade association representing 309 local vintners. Over sixty-five percent (65%) of NVV's members have an annual production of less than 10,000 cases of wine, and ninety percent (90%) of NVV's members are family-owned wineries. The mission of NVV is to promote and protect the Napa Valley American viticultural area ("AVA"). NVV members include wineries that are located in, and produce wine from, the proposed Calistoga AVA. NVV has a vested interest in protecting the integrity of Calistoga as a grape growing area because it is encompassed within the larger Napa Valley appellation.

NVV, in association with its legal counsel, Dickenson, Peatman & Fogarty, hereby submits this comment to TTB's Notice No. 77, published in the November 20, 2007 edition of the Federal Register, Volume 72 at page 65256. NVV fully supports the creation of the Calistoga AVA but strongly opposes the proposal to specially grandfather, under any circumstances, the use of post-1986 "Calistoga" brand names for wine not in compliance with the Calistoga AVA standards. Such brands are inherently misleading to consumers.

There are several legal and factual bases for prohibiting the continued use of post-1986 "Calistoga" brand names for wine not in compliance with the Calistoga AVA standards. First, the Certificates of Label Approval ("COLAs") that have been issued for the "Calistoga" brand names being considered for grandfather use were mistakenly issued as Calistoga was a clearly-established term of viticultural significance at the time, and long before, the applications for such COLAs were submitted to TTB. Second, it is clear that use of a "Calistoga" brand name will mislead consumers into believing the wine is a Calistoga appellation wine, and no disclaimer can prevent consumers from being misled in this way. Third, the proposed grandfathering of "Calistoga" brand names is incompatible with U.S. international obligations pursuant to Article 23 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS").

- I. The Post-1986 "Calistoga" Brand Name COLAs at Issue in Notice No. 77 Were Mistakenly issued and Should be Revoked.

A. Calistoga Constituted a Recognized Term of Viticultural Significance Prior to the Submission of Any Applications for the “Calistoga” Brand Name COLAs at Issue in Notice No. 77.

Contrary to assertions made by certain “Calistoga” wine brand owners in protesting the recognition of the Calistoga AVA, it cannot be disputed that Calistoga is a term of viticultural significance that was recognized as such for many years prior to the issuance of any of the COLAs for the “Calistoga” brand names at issue in Notice No. 77.

In acknowledging that there is substantial basis for the establishment of the Calistoga AVA, the TTB states that there “is ample evidence clearly showing that ‘Calistoga’ is the name by which the area is locally and regionally known and that the term ‘Calistoga’ by itself has been associated *historically* with viticulture...” 72 FR 65258 (emphasis added). In fact, Calistoga is one of the oldest viticultural areas in the United States. Calistoga was recognized by the trade and consumers as a viticultural area well before the 1998 COLA application for the Calistoga Cellars brand.

The geographical area that is the subject of the proposed Calistoga AVA is located in the upper end of California’s Napa Valley. In 1845, John York purchased land in what later came to be known as Calistoga and planted a small vineyard. William Heintz, *California’s Napa Valley, One Hundred Sixty Years of Winemaking* 61 (Scottwall Associates, 1999) (see Exhibit 1 attached hereto). In 1859, the land in the area was acquired by Sam Brannan. *Id.* Taking advantage of the warm springs in the area, Brannan built a resort destination and created the town’s name – “Calistoga” – by linking “California” and “Saratoga,” New York’s famous spa destination. *Id.*, at 62-63. In 1861, Brannan planted his first vineyard in Calistoga, and according to at least one source, was the largest grower in the Napa Valley with between 100,000 and 330,000 grape vines planted. *Id.* at 64.

In 1880, Alfred Tubbs purchased 275 acres of land in Calistoga and founded Chateau Montelena winery. George M. Taber, *Judgment of Paris* 118 (Scribner 2005) (see Exhibit 2 attached hereto). Chateau Montelena produced very good wines as the land and climate of the Calistoga area allow for the production of complex red wines. *Id.* Like most wineries in the United States, Chateau Montelena ceased the production of wine during prohibition and did not become fully operational again in any significant manner until it was purchased by James Barrett in 1972. *Id.* at 121. In 1976, the Calistoga winery made history in the famous “Judgment of Paris” where it’s 1973 Chateau Montelena Chardonnay – a blend including Chardonnay grapes from Calistoga – defeated top white Burgundies in a tasting in Paris that put the California wine industry on the map. *Id.* at 143, 201-202.

Beginning in 1978, Chateau Montelena began producing its Cabernet Sauvignon exclusively from its 70 acre vineyard in Calistoga. Matt Kramer, *Making Sense of California Wine* 115-16 (William Morrow & Co. 1992) (see Exhibit 3 attached hereto). In 1992, the wine was characterized by well-known wine writer Matt Kramer as “Napa Valley Cabernet at its best” that “also shows what the Calistoga area can do.” *Id.* at 116.

One of Napa Valley's most famous vineyards, Eisele Vineyard, is also located in Calistoga. For many years, beginning in the 1970s, Joseph Phelps Vineyards produced a Cabernet Sauvignon from Eisele Vineyard, with the 1975 vintage receiving a ranking of 97 from wine writer James Laube in his book *California Great Cabernets*, leading Laube to compare the vineyard to a first-growth Bordeaux. Bullard, Robyn "Cabernet Makers to Watch Passing the Torch at Eisele Vineyard" *Wine Spectator*, November 15, 1994 (see Exhibit 4 attached hereto). Commenting on the same Phelps Eisele Vineyard wine, Kramer noted that the "scale is such that it could only be Californian; the intensity reflects its warmer Calistoga origins." Kramer *supra* at p. 136.

The long tradition of excellence of this Calistoga vineyard was continued by Bart and Daphne Araujo who, after acquiring the property in the early 1990s, continued to produce critically acclaimed wine from the property. The Araujos' 1992 Eisele Vineyard Cabernet garnered a 96 rating from Laube who noted it was "a grand wine that captures the greatness of this vineyard near Calistoga with its rich currant and mineral flavors." Laube, James "No Better Time to Buy" *Wine Spectator* December 15, 1995 (see Exhibit 5 attached hereto). In 1995, the Araujos' Eisele Vineyard Cabernet and Chateau Montelena's Estate Cabernet, both Calistoga wines, were identified by *Wine Spectator* among the two dozen all-star California Cabernets of "first rank" ahead of all others. Laube, James "Cabernet All-Stars: Year in and year out, the best California Cabernet Sauvignon's to buy when stocking a stellar Cabernet cellar" *Wine Spectator* December 15, 1995 (see Exhibit 6 attached hereto).

In addition to Chateau Montelena and Eisele Vineyard, numerous other wineries and vineyards have long contributed to, and benefited from, the wine-growing reputation of Calistoga, including Clos Pegase, Cuvaison Winery, Robert Pecota Winery, Sterling Vineyards and Storybook Mountain Vineyards. See Halliday, James *Wine Atlas of California* 36-47 (Viking Penguin 1993) (see Exhibit 7 attached hereto); Sullivan, Charles *A Companion to California Wine* 72, 254-55, 347-48, 351 (University of California Press 1998) (see Exhibit 8 attached hereto); Marcus, Kim "Wine Country's Most Relaxing Spot" *The Wine Spectator* May 31, 1990, 73 (see Exhibit 9 attached hereto).

The grape-growing region of Calistoga is also referenced in numerous pre-1998 publications discussing wine regions. Perhaps the most prominent and well-known is the *Wine Atlas of California* (published 1993) in which James Halliday dedicates one, eleven-page chapter to the Calistoga region. Halliday, *supra* Exhibit 7 at 35-47. Halliday discusses the history, climate, soil and viticulture, wine vintages, wine styles, growers, topography, geography and wineries of the Calistoga region. *Id.*

The highly-regarded international wine atlas authored by well-known wine writer Oz Clarke in 1995 also discusses the Calistoga region in its coverage of Napa Valley. Clarke, Oz *Oz Clarke's Wine Atlas, Wine & Wine Regions of the World* 238-241 (Little, Brown and Company 1995) (see Exhibit 10 attached hereto). Clarke notes that Calistoga "has a daytime climate hot enough to ripen every known red variety," "has good vineyards," and produces "startling Zinfandel" and "good results with Cabernet and

Merlot.” *Id.* at 238-39. In identifying the top wineries of Napa Valley in 1995, Clarke identifies three located in the Calistoga region – Chateau Montelena, Cuvaison and Sterling. *Id.* at 241.

Charles Sullivan’s encyclopedia on California wine – *A Companion to California Wine* (published 1998) – has an entry for “Calistoga” which identifies the term as referring to a “winegrowing region at the northern end of Napa Valley.” Sullivan, *supra* at 51. The entry further states “[t]his portion of Napa Valley is quite warm and best suited to the production of Cabernet Sauvignon, Zinfandel, certain Rhône varieties, and Sauvignon blanc.” *Id.* at 52 (*see* Exhibit 8 attached hereto).

The May 31, 1990 edition of the well-known wine magazine *The Wine Spectator*, titled “Napa Valley U.S.A.,” features an article on Calistoga which begins by noting that the “serious wine aficionado can enjoy great estates such as Chateau Montelena, Cuvaison or Sterling.” Marcus, Kim “Wine Country’s Most Relaxing Spot” *The Wine Spectator* May 31, 1990, 71 (*see* Exhibit 9 attached hereto). The article further notes “[a]s you drive north on Highway 29 ... about 4 miles north of St. Helena, you’re into the Calistoga region proper, though still a few miles south of town itself.” *Id.* Marcus also comments on the unique grapegrowing climate of Calistoga: “The contrast in climate between Carneros and Calistoga couldn’t be greater ... with Calistoga being the warmest region of all in Napa Valley. ... Red grape varieties do best here.” *Id.* at 72.

In his 1989 treatise, *California’s Great Cabernets*, wine writer James Laube discusses California’s great Cabernet regions, including Napa Valley. Laube, James *California’s Great Cabernets* 33-38 (*Wine Spectator Press* 1989) (attached hereto as Exhibit 11). Laube utilizes a “commune” system to identify the different regions within Napa Valley since at the time of his book only four sub-appellations were recognized by BATF within Napa Valley. *Id.* at 36, 38. Laube identifies the valley floor townships, including Calistoga, as part of the commune system “because of their strong historical identification with winemaking in the valley.” *Id.* at 38. In his more detailed discussion of Calistoga, Laube states “Northernmost of the communes, Calistoga is the hottest region on the valley floor.” *Id.* at 44.

In his more comprehensive guide on California wine published in 1995 and aptly titled *California Wine*, Laube dedicates an entire chapter of the book to “Appellations and Vineyards.” Laube, James *California Wine* 25 (*Wine Spectator Press* 1995) (attached hereto as Exhibit 12). Within this chapter Laube identifies “major appellations, including AVAs and counties,” and singles out “Calistoga,” stating it’s “not an AVA, but sure to be one eventually as Napa Valley is further subdivided. This northernmost city in the valley is warm and excels with many grapes, but Cabernet is the star.” *Id.* at 27, 29.

In 1983, the seminal wine encyclopedia *Hugh Johnson’s Modern Encyclopedia of Wine* was published, and under the section titled “Appellations, Counties and Districts of California,” “Calistoga” is recognized and referenced under “Napa,” wherein Johnson states “Unofficially recognized appellations or sub-areas include Carneros, Mount Veeder, Yountville, Oakville, Rutherford (famous for Cabernet), St. Helena, Spring

Mountain and Calistoga on the western side ...” Johnson, Hugh *Hugh Johnson’s Modern Encyclopedia of Wine* 416 (Mitchell Beazley Publishers, 1983) (attached hereto as Exhibit 13).

The New Connoisseurs’ Handbook of California Wines, published in 1995, recognizes “Calistoga” in a section called “Wine Geography” stating “Calistoga provides a warmer climate for grape growing than its down-valley neighbors; its best-known products are the fat, rich Cabernets of Chateau Montelena and Robert Pecota, as well as the highly regarded Eisele Vineyard.” Roby, Norman S. and Olken, Charles E. *Connoisseurs’ Handbook of California Wines* 72 (Alfred A. Knopf 1995) (attached hereto as Exhibit 14).

The wine-writer Oz Clarke, in his 1996 tome *The Essential Wine Book*, discusses the Napa wine regions and states “indeed there has been a plan to define the boundaries of all of the main towns of the Napa, rather like the communes of the Médoc ...Rutherford, Oakville and St. Helena are the first of these new AVAs; Calistoga, Napa and Yountville could be next.” Clarke, Oz *The Essential Wine Book* 264-65 (Simon & Schuster 1996) (attached hereto as Exhibit 15).

The Complete Atlas of Wine, published in 1997, in its discussion of Napa Valley states: “The overall Napa AVA was, by the mid-1990s, being organized into a string of smaller appellations, based on the main towns along the valley highway. From north to south, they will be Calistoga, St. Helena, Rutherford, Oakville, Yountville and Napa.” Walton, Stuart *The Complete Atlas of Wine* 116-17 (Annes Publishing Limited 1997) (attached hereto as Exhibit 16).

In its section on the Napa Valley AVA, the 1993 edition of *The Wine Atlas of California and the Pacific Northwest* contains a subsection identified as “Calistoga to St. Helena” wherein the well-known vineyards and wineries located in Calistoga are listed and the climate is noted as being the warmest in the valley for grape growing. Thompson, Bob *The Wine Atlas of California and the Pacific Northwest* 40-41 (Simon & Schuster 1993) (attached hereto as Exhibit 17).

In another wine atlas, *Atlas of Wine*, published in 1989, one section discusses the wide range of wines produced in Napa Valley resulting from the varying microclimates in the valley. King, Alice *Atlas of Wine* 164 (W.H. Smith Publishers 1990) (attached hereto as Exhibit 18). The section goes on to note that the Napa Valley region stretches from Calistoga to Carneros and that Calistoga is hotter and is in Region III on the Davis scale for winegrowing climate. *Id.*

Napa Valley Wine Book, published in 1979, discusses the history and geography of Napa Valley, noting that Napa Valley comprises unique microclimates which allow it to produce a diverse range of wines. Hinkle, Richard Paul *Napa Valley Wine Book* 10 – 13 (Vintage Image 1979) (attached hereto as Exhibit 19). In discussing these different grape growing climates, the book states that “North of Lodi Lane and on into Calistoga the climate is classified as *transitional*. Distinctively warmer than its opposite, Carneros

(as pointed out by Mr. Tchelistcheff), the Calistoga area shows off Petite Sirah and Zinfandel, though many other grape varieties are grown here as well.” *Id.* At 13.

All of this evidence indisputably demonstrates the recognition of “Calistoga” as a winegrowing region well prior to 1998.

B. The “Calistoga” Brand Name COLAs at Issue in Notice No. 77 Should Be Revoked Under the FAA Act and Established TTB Rules As Calistoga Was a Recognized Term of Viticultural Significance When the Applications for Such COLAs Were Submitted.

In 1986, ATF (TTB’s predecessor, hereinafter referred to as “TTB”) amended 27 CFR 4.39(i) concerning geographic brand names and thereby prohibited the use of brand names of viticultural significance unless the wine meets the appellation of origin requirements for the geographic area named in the brand. 27 CFR 4.39(i)(1). TTB’s decision to amend the rule was based on its finding that a geographic brand name of viticultural significance on a label indicates to consumers the origin of the wine, that is, the place where the grapes are grown. 51 FR 20481. This is consistent with TTB’s statutory obligations as set forth in 27 USC §205(e) to prevent misleading statements on labels.

This amendment to 27 CFR 4.39 also provided that, apart from names of states, counties and approved U.S. and foreign viticultural areas, a name also has viticultural significance “when found to have viticultural significance by the Director.” 27 CFR 4.39(i)(3). In *The Beverage Alcohol Manual (BAM), A Practical Guide*, TTB explains in greater detail that a “brand name has viticultural significance if the brand name includes the name of ... a geographic area that: → Actually exists AND → Is described in at least two (2) reference materials as a grape-growing area.” *Id.* Vol. 1 at 4-1. The *BAM* further explains that where “new” brand names (i.e., those used on an application for a COLA submitted on or after July 7, 1986) include the name of a geographic area that actually exists and is described in at least two reference materials as a grape-growing area, the wine “CANNOT be labeled with such a brand name.” *Id.* Vol. 1 at 4-2.

As the *BAM* goes on to explain through the use of an example, where the brand name includes the name of a geographic area that actually exists and is described in at least two reference materials as a grape-growing area, and the geographic area is not an appellation of origin, i.e., it is not a state, county or approved viticultural area, the wine cannot possibly meet the appellation of origin requirements for the geographic area named in the brand name, so the wine cannot be labeled with such brand name. *Id.* Vol. 1 at 4-3.

The first COLA application for the brand Calistoga Cellars was submitted to the TTB in 1998 (*see* Exhibit 20 attached hereto, COLA database search results for “Calistoga Cellars”), twelve years after the enactment of 27 CFR 4.39(i). As demonstrated above, in 1998 Calistoga was a geographic area that had existed for 120 years and had been described in numerous – far more than two! – reference materials as a

grape-growing area, including an 11-page chapter on the region in the *California Wine Atlas* published in 1993. Accordingly, at the time of submission of the first COLA application for Calistoga Cellars, "Calistoga" was indisputably a term of viticultural significance.

Therefore, the first COLA for Calistoga Cellars, as well as all subsequent COLAs for Calistoga Cellars and other "Calistoga" brands, including Calistoga Estate, were issued in violation of 27 CFR 4.39(i). As the evidence demonstrates, even in 1998, consumers recognized Calistoga as a grape-growing area, and the use of a "Calistoga" brand name on wine would deceive consumers as there was no recognized appellation for Calistoga that would guarantee the origin of a "Calistoga" brand wine.

Pursuant to 27 CFR §13.41, a previously-issued COLA may be revoked upon a finding that the label at issue is not in compliance with the applicable laws or regulations. As TTB noted in its final rulemaking for 27 CFR §13.41, TTB "reviews approximately 60,000 applications for certificates of label approval, exemptions from label approval, and distinctive liquor bottle approvals every year. Because errors occasionally occur in the approval process, there is a need for some type of revocation procedure." 64 FR 2122, 2122-23 (1999). TTB went on to note:

The certificate of label approval was never intended to convey any type of proprietary interest to the certificate holder. On the contrary, Paragraph 1 of Form 5100.31 provides that 'This certificate is issued for [TTB] use only. This certificate does not constitute trademark protection.' Paragraph 2 of this form reminds applicants that the 'certificate does not relieve any person from liability for violations of the Federal Alcohol Administration Act.' The certificate of label approval is a statutorily mandated tool used to help [TTB] in its enforcement of the labeling requirements of the FAA Act.

Id. at 2123. As TTB further, rightly observed, "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order." *Id.* at 2124 (quoting *United Gas Improvement Co. v. Callery Properties*, 382 U.S. 223, 229 (1965)).

In noting that the statutory purpose of protecting the consumer from misleading labels is not furthered by placing an artificial time constraint on TTB's ability to revoke a COLA, TTB indicated that the final rule on COLA revocation does not set forth a time limit for revocation. *Id.* at 2125.

The COLAs for the "Calistoga" brands that are the subject of the proposed grandfather provision outlined in Notice No. 77 are all geographically misleading in violation of 27 CFR 4.39(i), and were so at the time of the COLA applications. The evidence provided herewith can lead to no other conclusion. Accordingly, TTB should, in the absence of compliance with the mandated percentages, revoke all of these COLAs pursuant to the clearly-established procedures set forth in 27 CFR §13.41. Pursuant to

the appeal procedures set forth in 27 CFR §§ 13.42 – 13.45, all of the “Calistoga” COLA owners, including those not grandfathered under the proposed rulemaking, will have a full opportunity to disprove the viticultural significance of “Calistoga” at the time of their respective COLA applications, including the right of appeal to the federal courts. Thus, the revocation process is the most equitable process by which to protect consumers from deception and give the “Calistoga” brand owners the due process which they have repeatedly requested. *See* TTB-2007-0067-0007 (Comment of Eileen Z. Joseph).

While it is unfortunate that any of the “Calistoga” COLAs issued in the first place, TTB cannot be expected to perfectly assess each COLA application among the tens of thousands received each year to determine whether it is misleading as to origin. This is exactly why the COLA revocation procedures were formalized, to correct such errors.

Of course, the “Calistoga” COLA owners will decry such revocation as unjust and unfair. However, as succinctly explained by TTB in the final rulemaking for the revocation procedure formalized in 27 CFR §13.41 *et seq.* (*see* 64 FR 2122 (1999)), such complaints of unfairness have no basis under the notice provisions of the law, nor should there be any expectation of any right based on the issuance of the COLA. All of the “Calistoga” brand owners were on notice as to the geographic brand name requirements of 27 CFR 4.39(i) when they adopted their “Calistoga” brand names. *See Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947) (“the appearance of rules and regulations in the Federal Register gives legal notice of their contents”). Furthermore, the revocation process is entirely just in that it nevertheless allows for due process through the appeals process.

All of the “Calistoga” brand owners adopted their “Calistoga” brand names with full knowledge of the viticultural significance of the term “Calistoga.” For any of these brand owners to suggest otherwise is unbelievable, for even if they were so unsophisticated in the wine industry as not to know of the reputation of the Calistoga area, which is highly doubtful, a neophyte need only drive one mile in any direction from any of the Calistoga properties owned by these brand owners to see the acres upon acres of grape vines and realize that Calistoga is a wine growing region. In fact, the very selection of “Calistoga” as part of these brand names indicates that the brand owners saw value in being associated with Calistoga and the favorable impression created by this wine region among wine consumers.

While TTB may sympathize with the “Calistoga” brand owners’ pleas because TTB did, in fact, issue COLAs for these brands, this should not drive the agency’s policy. TTB’s mission, as set forth in the FAA Act, is to protect consumers from misleading labeling as to origin of wine. The regulations that TTB has promulgated to achieve this have clear provisions related to the proper use of geographic brand names for wine encompassing terms of viticultural significance and clear procedures for revoking COLAs issued in violation of such provisions. Accordingly, any decision by TTB to grandfather the “Calistoga” brands instead of revoking the “Calistoga” brand COLAs would be arbitrary and capricious.

II. The “Calistoga” Brand Names Are Misleading to Consumers, and This Cannot be Cured by Any Additional Dispelling Information.

As set forth in Notice No. 77, upon the recognition of the Calistoga AVA, any COLAs for “Calistoga” brand names not protected by the 1986 grandfather provision of 27 CFR 4.39(i)(2) or not used on wine in compliance with the Calistoga AVA would be in violation of 27 CFR 4.39(i)(3) as Calistoga will be legally recognized as an “appellation.” 72 FR 65259. In enacting 27 CFR 4.39(i), TTB concluded that geographic brand names that encompass a recognized appellation are misleading if the wine does not comply with the appellation requirements because the geographic brand name indicates to consumers the origin of the wine, that is, the place where the grapes are grown. 51 FR 20481.

Nevertheless, TTB has proposed that “Calistoga” brand names in use for a certain period of time prior to the publication of the Notice of Proposed Rulemaking for the Calistoga AVA (March 31, 2005) may be used misdescriptively if the wine is labeled with information sufficient to “dispel the impression that the use of ‘Calistoga’ in the brand name conforms to the appellation of origin requirements.” 72 FR 65258. This is an acknowledgment by TTB that without additional information the use of the proposed Calistoga appellation as part of a geographic brand name will be misleading and that this misleading impression needs to be dispelled if the “Calistoga” brand owners are to be allowed continued use of the “Calistoga” brands on wine not from the Calistoga AVA.

Evidence in the field of marketing has shown that the attempt to add dispelling information to prevent consumers from being misled by misleading geographic brand names generally does not work, and in the context of the purchasing environment for wine, the inclusion of additional information most certainly will not prevent consumers from being misled concerning the origin of wine carrying “Calistoga” brand names.

A. As a General Rule, Experience Has Shown That the Addition of Disclaimers or Information to Labels to Attempt to Prevent Consumers from Being Misled Does Not Work.

The concept of the use of a disclaimer to prevent consumer confusion is not a new one in consumer protection law. While some courts have found disclaimers to be an adequate remedy when they are sufficient to avoid substantially the risk of consumer confusion, more frequently courts have found disclaimers to be ineffective in preventing such confusion and have therefore required the party arguing for the proposed disclaimer to demonstrate its effectiveness. *Home Box Office, Inc. v. Showtime/The Movie Channel Inc.*, 832 F.2d 1311, 1315 (2d Cir. 1987).

This judicial skepticism over disclaimers is supported by the scholarly literature on the subject. In an article entitled “Why Disclaimers Fail,” consumer behavior experts Jacob Jacoby and George Szybillo explain that disclaimers generally are not likely to be effective because the information provided does not automatically translate into the desired effect, i.e., comprehension. Jacoby, Jacob and Szybillo, George “Why

Disclaimers Fail” *The Trademark Reporter*, Vol. 84, at 225 (March-April 1994) (see Exhibit 21 attached hereto); see also Jacoby, Jacob and Raskopf, Lloyd “Disclaimers in Trademark Infringement: More Trouble Than They Are Worth?” *The Trademark Reporter*, Vol. 76 at 35 (1986) (see Exhibit 22 attached hereto).

Just because a person reads a message does not mean that he or she reads the entire message, or understands it, especially where the products carrying the message contain a considerable amount of information. *Id.* at 226. Furthermore, just because a person is exposed to information does not necessarily mean that he or she attends to that information. *Id.* This is especially so for frequently purchased inexpensive products as most people pay attention to only a fraction of the information to which they are exposed. *Id.*

In assessing the degree of care exercised by purchasers of wine in the context of trademark infringement, the court in *E. & J. Gallo Winery v. Consorzio del Gallo Nero* noted that wine is an impulse product and that the average wine consumer was unsophisticated and susceptible to deception. 782 F.Supp. 457, 465 (N.D.Cal. 1991) citing *Taylor Wine Co. v. Bully Hill Vineyards, Inc.*, 569 F.2d 731, 733-34 (2d Cir. 1978); accord *Palm Bay Imports, Inc. v. Veuve Clicquot*, 396 F.3d 1369 (Fed. Cir. 2005) (champagne sold at \$25 per bottle an inexpensive impulse product where consumers are susceptible to confusion). This indicates that the use of a disclaimer for Calistoga Cellars, as proposed by TTB, would have no impact on the relevant consumers.

The ineffectiveness of disclaimers was supported by an actual survey conducted by Jacoby. Consumers were tested to determine the impact of a disclaimer stating the producer of the product at issue was not affiliated with another similarly named producer. *Id.* at 228-237. The results indicated that the disclaimer failed to exert the desired impact on 85% of those respondents exposed to it. *Id.* at 235.

Another commentator also observed that a major reason for the failure of disclaimers is their susceptibility to market factors. Radin, Mitchell E. “Disclaimers as a Remedy for Trademark Infringement: Inadequacies and Alternatives” *The Trademark Reporter*, Vol. 76, at 65 (1986) (see Exhibit 23 attached hereto). Similar to Jacoby, Radin noted that certain market conditions, such as the bustling, self-service atmosphere of a supermarket, encourage consumers to exercise a low degree of care in a purchasing decision such that any descriptive labeling, including a disclaimer of association, is ignored. *Id.* at 66. Such difficulties are further heightened where “legal requirements and marketing techniques” result in numerous statements, claims and explanatory material appearing on packages and advertisements. *Id.* This is especially so for products that already have an extensive amount of package information as a consumer will face potential information overload and disregard any disclaimer statement. *Id.*

As set forth in more specific detail below, the concept of using a disclaimer or other dispelling label information to suggest that a “Calistoga” brand name wine is not a Calistoga AVA wine will be ineffective for the same reasons discussed by Jacoby and Radin – consumers will neither read nor absorb the disclaimer information in the retail

purchase environment. Furthermore, due to the unique manner in which wine is sold and marketed, in many instances consumers will not even be exposed to the dispelling label information when purchasing the product, thereby rendering it completely ineffective.

B. The Addition of Dispelling Information to "Calistoga" Brand Name Labels for Wine Will Not Prevent Consumers from Being Misled as to Origin Due to the Unique Consumer Purchasing Environment for Wine.

Generally, wine is purchased by consumers through one of three distribution channels: 1) off-premise brick and mortar retail outlets; 2) off-premise virtual or mail-order retail outlets; and 3) on-premise bars, restaurants, hospitality facilities, and the like. In every one of these retail channels, the proposed goal of dispelling the misleading nature of "Calistoga" brand names through the addition of surplus information to the wine label cannot be achieved.

1. Consumers Purchasing Wine in Retail Stores do Not Read Detailed Label Information and Instead Focus on Brand Names and Label Imagery.

As evidenced by multiple comments submitted by wine retailers, distributors and producers in opposition to the grandfathering of the "Calistoga" wine brand names, based on their experience, wine consumers generally do not spend much time reviewing the details of a wine label before making a purchase and instead base their purchasing decision on information such as the brand name. *See* TTB-2007-0068-0047 (Comment of Leslie Rudd, Dean & DeLuca); TTB-2007-0067-0025 (Comment of Rex Albright, Calistoga Chamber of Commerce); TTB-2007-0068-00—(Comment of Craig House, Bounty Hunter); TTB-2007-0068-0080 (Comment of Steven Hirsch, Heritage Wine Cellars)TTB-2007-0068-0058 (Comment of Patrick Stotesbery, Ladera Vineyards); TTB-2007-0068-0073 (Comment of Eric Sklar, Alpha Omega Winery); TTB-2007-0068-0062 (Comment of Shaun Richardson, Clos Pegase); TTB-2007-0068-0044 (Comment of Stephen Corley, Corley Family Vineyards); TTB-2007-0068-0084 (Comment of Richard Cacciato, Frederick Wildman and Sons). Thus, the inclusion of additional information on a label to dispel the notion that "Calistoga Cellars" brand wine is made from Calistoga AVA grapes would be ineffectual. Most consumers would still be misled by the brand name "Calistoga Cellars."

As previously discussed, the concept of consumer care in the purchase of wine has been evaluated by several different federal courts and the Trademark Trial and Appeal Board in the context of consumer confusion analyses related to trademarks. The findings support the fact that the majority of wine consumers do not exhibit very much care in their purchasing decisions. This is especially so with a wine like Calistoga Cellars which is mostly sold in the price range of \$16 - \$32 per bottle. *See* Exhibit 22 attached hereto (printout of Calistoga Cellars web site); *see Palm Bay*, 396 F.3d at 1376; *Consorzio del Gallo Nero*, 782 F.Supp. at 465; *see also E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1293 (9th Cir. 1992) (consumers tend to exercise less care when purchasing lower cost items like wine and rely more on brand names); *Vigneron*

Partners, LLC v. Woop Woop Wines Pty Ltd., 2006 WL 1214859 * 8 (N.D.Cal. 2006) (consumers may treat wine priced between \$16 and \$35 as an impulse purchase and not exercise great purchasing care); *In re Saviah Rose Winery, LLC*, 2006 WL 2414518 *4 (TTAB 2006) (even at \$30/bottle, a bottle of wine could be an impulse purchase made by a consumer without a great degree of care); *In re Vina Lo Miranda Ltda.*, 2002 WL 732146 *3 (TTAB 2002) (many purchasers of wine are members of the general public who would not necessarily be likely to exercise the high degree of care necessary to prevent confusion).

Because wine purchasers do not exercise a high degree of care in purchasing wine, they most likely will be misled as to the origin of the wine when purchasing the Calistoga Cellars brand, and the inclusion of dispelling label information will not prevent consumers from being misled.

A recent case involving a trademark dispute related to the use of an image of Marilyn Monroe on wine is particularly instructive on this issue. In *Nova Wine, Inc. v. Adler Fels Winery LLC*, 467 F.Supp.2d 965 (N.D.Cal. 2006), plaintiff owned a trade dress right in a wine bottle package featuring the image of Marilyn Monroe, and defendant used virtually the same image on its own bottle of wine. *Id.* Defendant claimed that consumers would not be confused between the respective uses because defendant also included on its package the source identifying information ("name and address") required by 27 CFR §4.35 which distinguishes defendant from plaintiff. *Id.* at 981.

In addressing this contention, the Court found that consumers "in selecting wine, are much more concerned with the distinctive design of the wine label than with the textual information regarding geographic origin, the dangers of alcohol to pregnant women, the presence of sulfides, or any of the other legally required verbiage." *Id.* at 981-82. The Court thus held that "plaintiff is likely to show that the ordinary degree of care exercised by typical wine purchasers will not lead these purchasers to verify the source of the wine by reading the reverse side of the Marilyn Monroe label." *Id.*

In the case of Calistoga Cellars, consumers seeing the brand name will be misled and believe the grapes for the wine emanate from the prestigious Calistoga appellation made famous by wineries such as Chateau Montelena, Cuvaison and Sterling. Any additional information required to be included by TTB to attempt to dispel such confusion will be ineffective as consumers will not go searching the label for the true origin of the wine before making the purchase. Indeed, why would a consumer seeing the brand "Calistoga Cellars" take the time to search the label to confirm what appears to be readily apparent, i.e., that the wine is made from grapes from the Calistoga area. See TTB-2007-0067-0045 (Comment of Leslie Rudd).

Thus, because most wine consumers are fairly unsophisticated and do not invest a great deal of time in reviewing the entire packaging for a wine, instead focusing on the brand name which is the most prominent feature on the label, TTB's attempt to require

additional information to dispel the misleading effect of certain "Calistoga" brand names will be ineffective.

2. Consumers Purchasing Wine from Online or Mail Order Retailers Will Be Misled by the Calistoga Brand Names

While only a small source of total off-premise sales of wine, the sale of wine over the Internet is growing at a remarkable pace. For example, online sales of wine during the 2007 holiday season were 35% above wine sales during the 2006 holiday season. "Online Wine Sales Flourish During Holidays" See Exhibit 24 attached hereto (*Wine Business, Daily News Links*, December 6, 2007).

Consumers purchasing wine in the virtual world or via mail-order make a purchasing decision before ever seeing the product label. See TTB-2007-0067-0045 (Comment of Leslie Rudd, Dean & DeLuca). Thus, the online or mail order purchase is based exclusively on the wine brand name and any other information the online or mail order retailer may choose to provide. See TTB-2007-0068-0047 (Comment of Leslie Rudd, Dean & DeLuca); TTB-2007-0068-00—(Comment of Craig House, Bounty Hunter); TTB-2007-0068-0058 (Comment of Patrick Stotesbery, Ladera Vineyards); TTB-2007-0068-0065 (Comment of David Pearson, Opus One); TTB-2007-0068-0086.1 (Comment of Laura Zahtila, Zahtila Vineyards).

One need look no further than the current online offerings of Calistoga Cellars wine to see that the inclusion of mandatory label information to attempt to dispel the misleading nature of the brand name will have absolutely no effect on the Internet shopper. See Exhibit 25, print-outs of Internet offerings of Calistoga Cellars wine. Most online and mail order retailers feature nothing more than the brand name of the wine at the point of sale, and even where they do provide additional information, it is very unlikely that that information would highlight that the brand name of the wine for sale is, in fact, misleading.

Since TTB has no authority to regulate the advertising of wine by third-party retailers, the only way in which TTB can prevent consumers from being misled in the online and mail-order distribution channel is by absolutely preventing the producers from using the misleading "Calistoga" brand names on wines not from Calistoga. TTB in this case must assert its regulatory authority under 27 CFR 4.39(i) to prohibit such misdescriptive and misleading labeling, as dispelling information on the label cannot accomplish this goal where consumers never see the label before purchasing the product.

3. Consumers Purchasing Wine On-Premise Will Be Misled by the Calistoga Brand Names

The purchasing environment with on-premise sale of wine at bars and restaurants is similar to that of Internet or mail-order retail sales. As explained in the various comments submitted by members of the restaurant industry, wine is purchased in bars or restaurants by the glass or by the bottle from a wine list or menu. See TTB-2007-0068-

0069 (Comment of Kevin Westlye, Golden Gate Restaurant Association); TTB-2007-0068-0047 (Comment of Leslie Rudd, Dean & DeLuca); TTB-2007-0067-0035 (Comment of Jeff Whitehead, River Terrace Inn); TTB-2007-0067-0025 (Comment of Rex Albright, Calistoga Chamber of Commerce). Thus, consumers will not see the wine label prior to making the purchasing decision and will base that decision on what appears on a wine list, not what appears on the label. See TTB-2007-0068-0069 (Comment of Kevin Westlye, Golden Gate Restaurant Association); TTB-2007-0068-0047 (Comment of Leslie Rudd, Dean & DeLuca); TTB-2007-0067-0035 (Comment of Jeff Whitehead, River Terrace Inn); TTB-2007-0068-00—(Comment of Craig House, Bounty Hunter); TTB-2007-0067-0025 (Comment of Rex Albright, Calistoga Chamber of Commerce); TTB-2007-0068-0073 (Comment of Eric Sklar, Alpha Omega Winery); TTB-2007-0068-0058 (Comment of Patrick Stotesbery, Ladera Vineyards); TTB-2007-0068-0044 (Comment of Stephen Corley, Corley Family Vineyards); TTB-2007-0068-0065 (Comment of David Pearson, Opus One); see also *Sutter Home Winery, Inc. v. Madrona Vineyards, L.P.*, 2005 WL 701599 (N.D.Cal. 2005) (non-brand name information on wine label will not prevent consumer confusion when consumers do not see it when ordering from a restaurant wine list).

The wine lists on which the Calistoga Cellars wines currently appear (see Exhibit 26, Internet print-outs of wine lists featuring Calistoga Cellars wine) are typical of most wine lists in that they feature only the most basic facts about the wine such as the brand name, varietal, vintage, appellation, and price. Furthermore, TTB has no regulatory authority to insure that third-party restaurateurs will place the dispelling information on the wine list, nor would they, as such information would stick out like a sore thumb relative to the typical information that appears on a wine list.

While some of these wine lists do, in fact, list the Calistoga Cellars wines' Napa Valley appellation, this only exacerbates the problem of consumers being misled. The Calistoga AVA is located within Napa Valley, and the use of the Napa Valley appellation in conjunction with the "Calistoga" brand name reinforces the misperception of the wine's Calistoga origin.

In fact, the geographic origin of Calistoga Cellars brand wine is so confusing that at least one restaurant has identified the geographic origin of the wine as "Calistoga" along with another brand of legitimate Calistoga origin, the Chateau Montelena Estate Cabernet Sauvignon. See Exhibit 27, Internet print out of Red Pheasant Inn wine list. This demonstrates that, not surprisingly, even sophisticated restaurateurs may be confused as to the geographic origin of Calistoga Cellars wine due to the use of Calistoga as part of the brand name.

In sum, consumers seeing "Calistoga" brand names on wine lists will believe the wine to be from the Calistoga AVA, and to the extent it is not, consumers will be misled regardless of any additional dispelling information which appears on the label because the label will not be seen by the consumer prior to ordering the wine.

C. The Addition of Dispelling Information to "Calistoga" Brand Name Labels for Wine Will Not Prevent Consumers from Being Misled as to Origin Due to the Nature of Marketing Channels for Wine.

Most advertising for wine to consumers occurs either via advertisements placed by retailers or by independent wine reviews by critics in publications. Each of these marketing channels motivates consumers to purchase the wine brands featured and influences the purchase decision absent any review of the label by the consumer.

Third-party retailer advertising of wines most often occurs through inserts in newspapers. These advertising inserts are all fairly standard in their advertisement of wine brands. While it is not unusual for the ads to feature an image of the wine bottle for the brand being advertised, the only wording that is usually legible in such images is the name of the brand, and little else. See Exhibit 28 attached hereto, copies of retailer advertising inserts featuring wine. Thus, any additional dispelling information added to the label would not be seen by the consumer in such advertisements even if the image of the package was included in such advertisement.

Furthermore, as demonstrated by the retailer ads, only the most basic information on the wine (e.g., brand name, varietal, bottle size and price) is provided in addition to the small image of the packaging. TTB cannot mandate that additional dispelling information be included in such third-party ads. Thus, consumers will be predisposed to buy "Calistoga" brand name wine based on such ads and will be misled by the brand name into thinking the wine is from the Calistoga AVA. Having been predisposed to purchase by the ad, the consumer will have little reason to further inspect the label at the retail location, especially to investigate the origin of the wine since the "Calistoga" brand name will cause the buyer to assume the wine is from the Calistoga AVA.

A similar situation is involved with wine reviews. Many consumers will seek out a wine brand based on a favorable review by a critic in a newspaper or wine publication. Typically, such reviews will discuss the taste and other characteristics of the wine itself. This is born out by the two reviews for Calistoga Cellars wine featured in *Wine Spectator*. See Exhibit 29 attached hereto, Internet printouts of *Wine Spectator* reviews for Calistoga Cellars.

As with the retailer advertising inserts, once a consumer sees a favorable review of the "Calistoga" brand name wine and seeks out the wine, there is little likelihood that prior to purchase he will survey the label to seek the "true" origin of the wine when such origin is assumed based on the brand name. A consumer who has read such a review and then encounters the brand in a bar or restaurant will not even have the opportunity to review the label for dispelling information and will order the wine under the mistaken impression that the wine is a Calistoga AVA wine.

D. Continued Use of "Calistoga" Brand Names in Conjunction with Dispelling Information will Harm Consumers and Producers Using the Calistoga AVA.

For all the reasons cited above, the proposed rule allowing the owners of “Calistoga” brand names to use those brand names on non-Calistoga AVA wine, provided the label also includes information to dispel any misleading impression conveyed as to Calistoga origin, will not prevent consumers from being misled and will devalue the AVA thereby harming the legitimate users whose efforts established Calistoga as a winegrowing region in the first place.

III. The Proposed Grandfather Provision Is Incompatible With Article 23 of TRIPS

The proposed grandfather provision for Calistoga brand names is also incompatible with TTB’s obligations to protect geographical indications for wine pursuant to Article 23 of TRIPS. TRIPS, Article 22, defines geographical indications as “indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given *quality, reputation or other characteristic of the good* is essentially attributable to its geographical origin.” (Emphasis added) TRIPS, Article 23(1), provides that “Each Member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question . . . , even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as ‘kind’, ‘type’, ‘style’, ‘imitation’ or the like.”

In implementing the TRIPS Agreement through the Uruguay Round Agreements Act, Pub. L. 103-465, 103 Stat. 4809, Congress approved a Statement of Administrative Action which provides that: “The United States will implement the Agreement’s provisions on geographical indications for wine and spirits through the labeling regulations of the Bureau of Alcohol, Tobacco and Firearms of the Department of the Treasury. The Agreement specifically recognizes that rights in geographic indications for wine and spirits may be enforced through administrative action.” Statement of Administrative Action, Agreement on Trade-Related Aspects of Intellectual Property Rights, H. Doc. 103-316, Vol. 1, 103rd Cong., 2d Sess. 1000, 1994 WL 761796, §B.2.c (Sept. 27, 1994); 19 U.S.C. §§3511-12.

In its November 20, 2007, Notice of Proposed Rulemaking No. 78, Proposed Revisions of American Viticultural Area Regulations, TTB stated that “AVA designations allow vintners and consumers to attribute a given *quality, reputation, or other characteristic of a wine* made from grapes grown in an area to its geographic origin.” 72 Fed.Reg. at 65261 (emphasis added). Thus, TTB recognizes that AVAs function as geographical indications under TRIPS, and the agency must enforce Article 23 administratively.

Under the strong common law tradition of the U.S., a geographical indication does not need to be “registered” in order to be protected against misuse on wine. This is most clearly demonstrated by the trademark examination rules of the U.S. Patent and Trademark Office (“USPTO”).

Under the implementing rules for TRIPS Article 23, Congress indicated that Article 23 must also be enforced in the registration of trademarks for wine, an area of responsibility belonging to the USPTO. Statement of Administrative Action, TRIPS, H. Doc. 103-316, Vol. 1, 103rd Cong., 2d Sess. 1000, 1994 WL 761796, §B.1.e (Sept. 27, 1994); 19 U.S.C. §§3511-12. Where TTB is responsible for administratively enforcing TRIPS Article 23 in relation to use on wine labels, USPTO is responsible for enforcing TRIPS Article 23 in relation to the registration of trademarks for wine.

In the Trademark Manual of Examining Procedure ("TMEP"), the USPTO sets forth the elements to establish a prima facie case for the refusal to register a trademark for wine under TRIPS Article 23: 1) the primary significance of the relevant term is geographic; 2) purchasers would be likely to think that the goods originate in the geographic place identified in the mark, i.e., purchasers would make a goods/place association; 3) the goods do not originate in the place identified in the mark; 4) a purchaser's erroneous belief as to the geographic origin of the good would materially affect the purchaser decision to buy the wine; and 5) the mark was first used in commerce by the owner on or after January 1, 1996. TMEP § 1210.08(b). Thus, it is readily apparent that a term need not be "registered" as a geographical indication or AVA to be entitled to protection as a geographical indication under TRIPS and U.S. law.

As demonstrated by the discussion in the preceding sections, Calistoga plainly qualifies as a geographical indication and the mark Calistoga Cellars is not entitled to protection or use as a trademark for wine pursuant to the provisions of TRIPS Article 23. To wit: 1) "Calistoga" is a fanciful term coined by the founder of the town as a combination of "California" and "Saratoga" and has no meaning other than as a geographic term; 2) by TTB's own statements, the term "Calistoga" is viticulturally significant such that consumers associate the term with wine; 3) the Calistoga Cellars wine does not meet the appellation standards for use of "Calistoga;" 4) the singular significance of "Calistoga" as a geographic term and the reputation of Calistoga as a winegrowing region must materially affect the consumer purchasing decision related to the Calistoga Cellars wine; and 5) the Calistoga Cellars mark was not used in commerce until after 1998.

If TTB were to simply enforce 4.39(i) against the Calistoga Cellars brand and revoke the COLAs issued to Calistoga Cellars or require Calistoga Cellars to comply with the appellation requirements for the Calistoga AVA, TTB would fulfill its obligations pursuant to Article 23. Instead, TTB is proposing rules that are completely contrary to the requirements of Article 23 in sanctioning the continued deceptive use of Calistoga Cellars on wine not complying with the appellation requirements for the Calistoga AVA, provided the wine label includes dispelling information. The dispelling information requirement proposed by TTB as a "cure" to misuse, in fact, is expressly forbidden by Article 23 which prohibits the use of a geographical indication on wine not from the place identified "even where the true origin of the goods is indicated."

It is NVV's understanding that USTR has indicated that the U.S. is not under any treaty obligations to enforce Article 23 in relation to domestic geographical indications. However, even if that were so, should TTB decide not to apply Article 23 to domestic geographical indications, U.S. geographical indications for wine would receive a lower-level of protection in and from the U.S. than that afforded to foreign geographical indications for wine. Clearly, this was not Congress' intent. The USPTO, by contrast, applies the same Article 23 standard to all trademarks and geographical indications, regardless of origin. We submit that TTB, in this rulemaking, should make no decision that is contrary to the provisions of Article 23 or that disadvantages U.S. geographical indications relative to those of foreign countries.

IV. Alternative Resolution

As clearly demonstrated above, TTB's grandfather proposal is insupportable, and enactment of the proposed rule would be arbitrary and capricious. However, contrary to public assertions being made by Calistoga Cellars, NVV has no interest in causing it commercial harm. NVV believes it would be reasonable to allow Calistoga Cellars to phase out, over a three year period, its use of the Calistoga Cellars brand name on wine not complying with the appellation requirements for the Calistoga AVA. In this way, the Calistoga AVA would receive the full and proper protection it deserves, and any commercial harm to Calistoga Cellars could be minimized. TTB has utilized a similar sunset principle for varietal names and even for the implementation of its original appellation rules in T.D.-53.

V. Conclusion

As mandated by the FAA Act, TTB's primary function in the regulation of wine labeling is to protect consumers by ensuring that they are not misled by the content of wine labels. Proposed rule 27 CFR §9.209 is directly contrary to this mandated purpose.

For all of the foregoing reasons, NVV strongly urges TTB to recognize the Calistoga AVA and amend the proposed rule, 27 CFR §9.209, to delete subpart (d), and to revoke the COLAs for those "Calistoga" brand names at issue in this notice; or in the alternative, to withdraw the proposed rule in its entirety