

CALISTOGA PARTNERS, L.P.  
dba "Calistoga Cellars"  
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July 29, 2005

VIA FEDERAL EXPRESS

Mr. Frank Foote  
Chief of Regulatory Branch  
Chief, Regulations & Procedures Division  
Alcohol & Tobacco, Tax & Trade Bureau  
Attn: Notice 36  
1310 "G" Street N.W.  
Washington D.C. 20220

**Re: Calistoga Partners, L.P. dba Calistoga Cellars  
Pending American Viticultural Area ("AVA") Petition for Calistoga**

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Dear Mr. Foote:

**INTRODUCTION:**

I am a Managing Member of the General Partner of Calistoga Partners, L.P., a California Limited Partnership ("Partnership"), dba Calistoga Cellars. I am writing this letter on behalf of the Partnership to seek relief from the effects of the proposed Calistoga AVA.

The Partnership owns about 32 acres of property in Calistoga, California, consisting of vineyards, a winery, tasting room, outbuildings, guest residence and equipment. Calistoga Cellars has invested heavily in Calistoga and is active in the community. Calistoga Cellars has created jobs in Calistoga and increased the tax base in Calistoga with the winery and vineyards it has developed over the years. The Partnership has been in existence using the name "Calistoga Partners, L.P." since 1996 and has been using the trade name, trademark and brand name "Calistoga Cellars" and making wine since about 1998. The Brand "Calistoga Cellars" is the only trade name we use, and all of our Certificates of Label Approval carry only that trade name. We currently produce about 8,500 cases of wine a year and we sell in about ten (10) states at the present time. The Partnership is under contract with a national marketing company expanding into all states of the United States, which is increasing

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its volume substantially. The name "Calistoga Cellars" is one of the Partnership's most valuable assets.

Calistoga Cellars is owned through the Partnership by the General Partner and by various individual limited partners, many of whom have invested a portion of their retirement funds in Calistoga Cellars. Collectively, we have all invested millions of dollars and years of effort in good faith, to build the trade name, trademark and brand name "Calistoga Cellars". The loss of that name or restrictions on its use will materially impact sales, growth and profits of Calistoga Cellars.

On July 7, 2005, Calistoga Cellars learned from the TTB that the TTB was processing a petition for the establishment of an AVA for "Calistoga" as filed by James P. "Bo" Barrett of Chateau Montelena Winery and Vineyard, one of its competitors located in Calistoga. (See the Conclusion Section where Mr. Barrett supports our requests for relief). Ms. Sutton of the TTB called the Tasting Room Manager of Calistoga Cellars on that date and asked him a variety of questions about our operations. In that conversation, he was informed that should the Calistoga AVA petition be granted, Calistoga Cellars would have to cease use of its Certificates of Label Approval ("COLAs") and trade and brand name, "Calistoga Cellars" in the sale of its wine to the extent that any of our wines contain less than 85% of grapes from the proposed Calistoga AVA. That, of course, panicked our employee, since he immediately thought of all the unfair and negative things that might mean to Calistoga Cellars, its brand, COLAs, trade name and its owners and employees. We were alarmed to discover that our winery and brand name are in jeopardy. Just after that conversation, Calistoga Cellars learned that the public comment period had expired on May 31, 2005. As will be seen, fundamental due process notions of fairness, notice and an opportunity to be heard have not been accorded to Calistoga Cellars.

#### **OBJECTION AND REQUEST:**

Calistoga Cellars objects to the establishment of an AVA for "Calistoga" unless concurrent actions are taken to guarantee the protection of its COLAs, brand, trade name and trademark that the principle of fairness requires. Our concerns regarding this proposed AVA is just one example of an ongoing and pressing problem in the industry. That industry-wide issue gives tremendous weight to our need for a fair resolution. In that context, we respectfully request that:

- (1) TTB reopen the public comment period on the pending Calistoga AVA, to allow Calistoga Cellars and others in the industry and the public to consider alternative solutions to the unfair predicament in which Calistoga Cellars would be placed if the Calistoga AVA were approved without protection for Calistoga Cellars. These alternative solutions could apply to Calistoga AVA only, as a prototype for possible use in connection with other AVAs, or as a general amendment to the wine regulations affecting all AVAs; or

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- (2) TTB incorporate in any final rule adopting a Calistoga AVA a provision allowing Calistoga Cellars and its successors and assigns to indefinitely continue to use "Calistoga Cellars" on its COLAs, as a brand name, trade name or trademark in the sale and distribution of its wine and wine-related products, subject to reasonable conditions, such as a TTB approved qualifier located on the back label, sufficient to dispel the impression that the wine bearing the name "Calistoga Cellars" is predominantly made from grapes from the new Calistoga AVA.

If the AVA for Calistoga Cellars is granted, we believe that the best solution to prevent economic loss to Calistoga Cellars and any possibility of future confusion of consumers will be an exemption allowing Calistoga Cellars, its successors and assigns to use its existing COLAs, brand and labels without restriction as to the source of the wine, under the following conditions: (1) that a correct appellation of origin appear on the front label and (2) that a simple statement of the percentage of Calistoga AVA grapes in the blend appear on the back label, at least 2 mm in height, perhaps with an additional statement about the grandfather status of the brand. (See Solutions Section). This type of solution could be implemented by any pre-existing brands whose use will otherwise be curtailed by the establishment of future AVAs.

#### **FAIRNESS AND DUE PROCESS:**

Accepting that the TTB must have satisfied its rules, regulations and enabling legislation (Federal Alcohol Administrative Act) with respect to notice for public comment or otherwise in reviewing the petition for a Calistoga AVA, we do not believe that such rules, regulations and enabling legislation meet the constitutional due process requirements.

The Fifth and the Fourteenth Amendments to the United States Constitution provide, in part, that no citizen shall be deprived of property without due process of law. Calistoga Partners, L.P., a California Limited Partnership, dba Calistoga Cellars is a U.S. citizen for purposes of such Amendments. Ignoring the taking argument, which was largely disposed of in *Bronco*, it is black letter law that due process requires reasonable notice and a reasonable opportunity to be heard. In ***Cabo Distributing Co. Inc. v. Brady*** (N.D. Cal 1992) 821 F. Supp. 601, at page 609, the Court held that a COLA is a protected property interest for purposes of the due process clause, requiring procedural due process before it may be revoked. Accordingly, the COLAs of Calistoga Cellars cannot be revoked or diminished in use or value without reasonable notice and a reasonable opportunity to be heard. Requiring that a permittee read the Federal Register on a daily basis to discover whether its COLAs may be revoked or restricted in use and/or that its trade names and marks are at risk of being effectively lost or substantially restricted in use and reduced in value does not satisfy the constitutional due process reasonable notice test.

The government knows that the approval of a Calistoga AVA will detrimentally affect any winery whose COLAs, brand, trade name or trademarks contains the name "Calistoga" and whose wine is not comprised of, at least, 85% of grapes from the proposed Calistoga AVA. It is axiomatic,

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therefore, that reasonable notice in such a situation must, at a minimum, include direct written notice of the proposed AVA to all wineries and brand owners who use the word "Calistoga". This would include use of the name Calistoga on their TTB basic permit and COLAs (in the case of Calistoga Cellars on dozens of recent TTB COLAs) as well as in the name of their winery, brand, trade name or trademark before the publication of the proposed notice or at least during the comment period. Such notice would satisfy the due process requirements. TTB did not do so. It did not satisfy the due process requirements. It did not notify Calistoga Cellars directly, in writing, or any of the other two (2) owners of COLAs, wineries, brands, trade names or trademarks similarly situated. TTB first contacted Calistoga Cellars by telephone on July 7, 2005 after the public comment period had expired!

If we are denied our opportunity to be heard regarding the relief we seek, we will have lost the opportunity to raise the objections and to make the suggestions contained in this letter that belong as part of the public discourse with TTB. We believe our ideas and suggestions will further the industry-wide consideration of this important problem; this issue is not limited to one AVA and a few brand owners. It is important to the entire industry. We strenuously request that the great disadvantage to Calistoga Cellars created by TTB's current rules may be remedied by giving TTB's full attention to this matter now, and acting in accordance with our requests.

#### **THE CALISTOGA AVA; EXEMPTION:**

We do not doubt that AVAs are useful mechanisms for identifying the source of wines. And we do not question the need to protect the identity of appellations of origin. However, the approval of a Calistoga AVA without relief for Calistoga Cellars will work an injustice and cause severe financial implications for Calistoga Cellars, if not ruin. Against such grave harm must be balanced the supposed good that will come from approving the AVA.

New AVAs are most necessary in cases where the only other appellations of origin available to wines from the area are either potentially unhelpful or misleading because the appellation is so very large (for example, North Coast) or because no existing AVA includes the area (eliminating the possibility to use estate bottling etc.). That is not the case for Calistoga. All vineyards that will qualify for the new Calistoga AVA also presently qualify for the prestigious Napa Valley appellation.

In addition, the potential to confuse consumers is highest when a name is clearly associated with viticulture and not well known in other contexts. For example, Carneros is a name whose public recognition is almost entirely derived from the efforts of the vintners and grapegrowers in the area to promote it as an AVA. Calistoga is at the opposite end of the spectrum. The consumer generally thinks of Calistoga as a quaint and interesting town located in the Napa Valley wine-growing region of Northern California, not as a specific winegrowing region. The town of Calistoga is locally and nationally known for tourism. It is also associated with mineral springs, health spas, and sparkling water. It is not currently thought of as a specific viticultural area, except by the vineyard and winery owners in the Calistoga area. Similar considerations might apply to other AVAs with previously well-

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known names, such as Mississippi Delta, San Francisco Bay, The Hamptons Long Island and Shenandoah Valley.

There is clearly no urgent need for the Calistoga AVA to be approved. On the other hand, there is compelling reason

- to exempt Calistoga Cellars, its successors and assigns, from any restrictive consequences of any such approval, or
- at the very least, to delay its approval until an industry-wide solution is implemented to protect Calistoga Cellars, its successors and assigns and others in the same position, from sudden devastating loss of the full use of their COLAs, trade names, trademarks and brand.

In the case of Calistoga, no immediate harm would be done by indefinitely delaying the establishment of the AVA, or by allowing Calistoga Cellars, its successors and assigns, to indefinitely continue to use its brand and labels as in the past. Frankly, I think it is quite doubtful that even if the AVA were approved, that consumers would suddenly or ever be misled by our brand, given the well-known reputation of the town of Calistoga, the longstanding usage of the brand, and the brand's relationship to the actual location of our winery. But, in the spirit of fairness, we are willing to subject ourselves, like any other owners of brand names with geographic significance, to well-considered regulatory restrictions that in a fair and balanced manner protect the integrity of American appellations while equally respecting the intellectual property rights of wineries.

#### **SOLUTIONS:**

If the AVA for Calistoga Cellars is to be granted, the best solution for the economic loss and predicament that Calistoga Cellars, its successors and assigns, will experience is to either exempt Calistoga Cellars, its successors and assigns, from the TTB rules and regulations that would thereafter otherwise be applicable to Calistoga Cellars, its successors and assigns, based on a "grandfathering" approach or allow Calistoga Cellars, its successors and assigns, to continue using its COLAs, trade name, trademark and brand, but with a TTB approved qualifier on the back label such as: "WE ARE LOCATED IN CALISTOGA, CALIFORNIA (NAPA VALLEY). CALISTOGA CELLARS IS AN ESTABLISHED BRAND IN USE BEFORE APPROVAL OF CALISTOGA AS A VITICULTURAL AREA. THIS BOTTLE CONTAINS WINE MADE FROM GRAPES, ABOUT 40% OF WHICH WERE GROWN IN THE CALISTOGA VITICULTURAL AREA."

#### **CONCLUSION:**

One of my Co-Managing Members, Roger B. Louer, has spoken with the Petitioner, Bo Barrett of Chateau Montelena, in the past few days, and Mr. Barrett has indicated that he will support the

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preservation of the COLAs, brand name, trade name and trademarks of Calistoga Cellars and their use and value. It was not his intention to harm our COLAs, brands, trade names or marks by the filing of his petition. He believes that Calistoga Cellars must be granted an exception or its COLAs and brand "grandfathered" to protect them. The unintended consequences of the Petitioner's AVA petition just demonstrates how important it is that TTB change its rules regarding how affected COLA owners are notified about AVA petitions and that the TTB and the industry conduct a comprehensive review and analysis and implement a lengthy comment period regarding all TTB rules and regulations regarding AVA's and COLAs before any pending AVAs are approved. We believe that there are many brand owners who are still ignorant of the effect of the TTB rules and regulations regarding AVA approvals and their effect on COLAs and brands. TTB should deal with this looming industry-wide issue now, before it gets out of control.

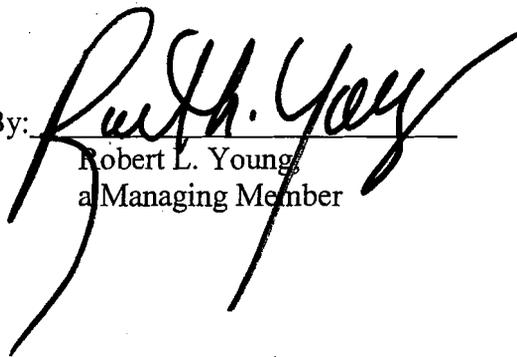
I HAVE SHOWN THE ADDRESS FOR CALISTOGA CELLARS ON THE LETTERHEAD IN CARE OF ME AT MY LAW FIRM'S ADDRESS. PLEASE DIRECT ALL CORRESPONDENCE AND RESPONSES TO ME USING THAT CONTACT DATA. WE WOULD LIKE TO INSULATE OUR EMPLOYEES AND STAFF FROM FURTHER WORRY AND STRESS UNTIL WE CAN SORT THIS OUT WITH YOU. THANK YOU IN ADVANCE.

Regards,

CALISTOGA PARTNERS, L.P.

By: Louer Partners, LLC, General Partner

By:

  
Robert L. Young  
a Managing Member

RLY:jlw

