To: Senate Judiciary Committee

From: Tracy Genesen, Vice President and General Counsel

Date: February 20, 2019

Re: **Opposition to SB 591**

Wine Institute (WI) is a public policy organization representing almost 1,000 California wineries and associated businesses. Copper Cane is not a Wine Institute member. Wine Institute in no way represents Copper Cane or its views on this or any matter.

Thank you for the opportunity to submit written testimony in opposition to SB 591. We understand the Oregon wineries' frustration with the Federal Alcohol and Tobacco Tax and Trade Bureau (TTB) enforcement response to date regarding its complaints about Copper Cane's Elouan and Willametter Journal labels, as well as the length of time it takes for the Oregon Liquor Control Commission (OLCC) to complete an investigation and enforcement process. WI members, like Oregon wineries, are concerned about the current inconsistent and inadequate enforcement regarding information on wine labels. We are currently working with members and other wine industry groups to determine what TTB rule changes or clarifications could strengthen label compliance and enforcement. However, we strongly disagree that creating an Unfair Trade Practices Act (UTPA) option in this context will achieve greater enforcement around misleading or deceptive labels and branding. To the contrary, subjecting regulatory violations to UTPA remedies, including private rights of action, class actions, punitive damages, payment of attorneys' fees and costs is an overreaction designed to punish one winery for questionable actions but will have far reaching detrimental impacts on Oregon wineries as well as all wineries selling wine in Oregon.

1) Wine is already regulated by dedicated, competent Federal and State agencies. If there are issues within the industry, the proper place to address these are within the agencies, who employ experts knowledgeable about the complicated laws and rules surrounding alcohol beverages. It also takes specific knowledge and experience to make reasoned judgements when the laws are subjective, for example what is "misleading" in branding and labeling. This proposal would supplant the established regulatory and enforcement processes with enforcement through private right of action or class action. This will be costly and detrimental not only to Oregon wineries, but to the wine industry on a national scale.

2) WI has serious concerns about applying Oregon Unfair Trade Practices Act remedies to minimum standards of wine and labeling and branding violations. We strongly believe that such remedies will have the unintended side effect of creating yet another legal basis for consumer class action lawsuits against the industry. We have already seen such lawsuits in the case of Tito's Handmade Vodka and against BevMo! in relation to tasting notes and vintage reference on retail shelves. When UTPA remedies are available, plaintiffs' lawyers look for violations and bring suits because of the potential for an award of punitive damages, costs and fees. Being in the right would not relieve a winery of the expense and potential negative market impacts of having to

defend themselves from an unwarranted UPTA action. Often the purpose of bringing such actions is an attempt to get a settlement and fees, not necessarily prevailing on the merits of the case.

3) The Oregon Unfair Trade Practices Act is intended to protect consumers not an industry. These bills do not arise out concern for the consumer. They arise out of complaints about a competitor and the related success in the marketplace. There is no claim of harm to consumers. To utilize UTPA to address claims of unfair competition would be an unwarranted major expansion.

   In a letter from the Oregon Wine Association to the Director of TTB dated December 12, 2018, the issues with Copper Cane were summarized as follows:

   > "Improper labeling potentially helped Copper Cane gain an unfair economic advantage over other members of the Oregon wine industry, who adhere to the stricter Oregon grape sourcing, varietal composition, and methods of manufacture standards as required by Oregon law, which is supported by 27 CFR 4.25(b)(1). Mislabeling wine produced in California with Oregon AVAs and other Oregon appellations of origin is likely helping the Elouan brand achieve the highest national retail scanned sales in the Oregon category for Pinot Noir at $17 and above and Rose $13 and above (Nielsen rankings 52 weeks ending 6/30/18). The Willamette Valley AVA and its sub-AVAs currently command retail price premiums of approximately 80% vs. wines labeled as Oregon. That pricing is driving a significant increase in Copper Cane's total dollar volume which earns the brand additional merchandising support. Scanner sales show the Elouan brand is growing at 60% year over year compared to a category average of only 10%.
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   > The approved label use-ups for mislabeled wine are also problematic for the Oregon wine industry because they allow for tremendous volumes of wine to be sold under improper labels, which harms the value of Oregon wine as a whole. For example, Elouan Pinot Noir 2017 (TTB ID 1817001000420) permits Copper Cane to sell off up to 72,957 cases of wine. At 2.378 gallons/case, this is 173,492 gallons of wine, much more wine that the vast majority of Oregon wineries produce in a single year. In the scope of the typically small producer Oregon wine industry, such sales can drown out Oregon wineries that follow the strict Oregon wine production, grape content, and labeling rules."

The complaints are clearly not relating to harm to consumers, but instead harm to an industry. We believe it would be a misuse of the UTPA to apply its remedies in such circumstances.

In addition to opposing the UTPA remedies in SB 591, WI objects to the bill because its scope far exceeds the problem. It not only applies UTPA penalties to regulatory violations relating to wines produced in Oregon or produced outside of Oregon and labeled Oregon, it applies to **all wines sold** in Oregon. This subjects wineries from across the United States and around the world to the possibility of a law suit under the UTPA in Oregon. This provision is a magnet for creative plaintiffs' attorneys to tie up wineries in protracted litigation based on common words and phrases used on wine labels that are vague and not defined in regulation, such as sustainably farmed, natural wine, biodynamic, reserve, private reserve, and proprietor's blend. A plaintiffs' lawyer could easily make a good faith argument that one of these terms is misleading, which likely overcome Rule 11 preventing frivolous lawsuit, and a winery would find themselves in a costly lawsuit and potentially a class action suit. It is also possible that other tiers of the industry, including wholesalers and retailers, could be sued based on common widely accepted, truthful phrases used in advertising and branding of wine. We implore you not to take this step which would have very negative impacts on the wine industry and market in Oregon.

Thank you for considering Wine Institute's comments. We urge you to rethink the application of UTPA remedies in this context. If you have any questions, please do not hesitate to contact me.

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