

# **A LEGAL ANALYSIS: 2020 WINEGRAPE REJECTIONS**

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For

Allied Grape Growers and  
California Association of Winegrape Growers

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Extensive wildfires and resulting smoke in 2020, seen in many regions of the West Coast, produced unprecedented challenges for winegrape growers and wineries, alike. Many growers experienced significant delays in scheduling deliveries of grapes as wineries struggled to make timely, fact-based decisions on the status of grapes exposed to smoke. Wineries often could not obtain timely laboratory test results to determine whether grapes were affected by the presence of certain smoke compounds. The few commercial labs serving the industry were overrun with demand for analysis. As a result, test results for grape samples could not be returned in time to aid harvest decisions. Due to these conditions and wineries' decisions to delay acceptance or reject delivery of grapes under contract, many growers experienced significant losses and economic injury.

Industry sources estimate that between 165,000 to 325,000 tons of California winegrapes went unharvested due to actual or perceived concerns of quality loss due to wildfire smoke exposure. As of April 4, 2021 the U.S. Department of Agriculture's Risk Management Agency reported paying \$187,920,862, on 30,120 acres, in crop insurance claims to growers due to wildfire and smoke related losses. Such indemnity payouts confirm the likely accuracy of \$601 million in total losses for grape growers.

The unprecedented scope and timing of wildfires in California during the 2020 crop year underscored the paramount importance of grape purchase contracts. The purpose of such contracts is to minimize uncertainty and provide guidance to buyers and sellers on how to transact business, even amidst exceptional events.

This paper analyzes numerous examples where wineries rejected winegrapes under contract in 2020 due to alleged smoke exposure from wildfires, as well as the differing justifications those wineries offered for their rejections. This paper also analyzes the potential liability of the wineries who rejected winegrapes, and how growers might seek to protect themselves in the future.

### **A. Winery Rejections of Winegrapes in 2020 Due to Smoke Exposure**

This paper is based on a review of numerous contracts for the purchase of 2020 winegrapes obtained from growers whose grapes were rejected. Where available, letters that wineries sent to growers explaining the basis for the rejection were also reviewed. Many rejection letters referenced the purported impact of excessive heat, ash, and smoke from the 2020 wildfires on winegrapes. While the letters contain differing justifications for the rejections based upon the particular language of each grower's contract, the overall basis for the rejections was the same – the claim that grapes did not meet the applicable “quality standards” set forth in the contract.

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<sup>1</sup> Paper prepared for Allied Grape Growers and California Association of Winegrape Growers by Downey Brand LLP, Sacramento, CA

The quality standards in winegrape contracts differ substantially. The quality standards in the contracts reviewed for purposes of this report generally fall into three categories.

1. Older contracts (typically prior to 2013) tend to define quality standards broadly and subjectively, simply requiring, for example, the grower deliver winegrapes that are “suitable for the production of premium wine” or “sound [and] fully matured.” These contracts generally predate the increased prevalence of wildfires that have impacted California vineyards in the past several years and contain no language that specifically applies to smoke exposure.

2. More recent contracts tend to contain a more detailed definition of quality with respect to specific attributes (i.e., color, sugar, acid, pH content), and some require that grapes be free from all “taints.” For example, one winery’s form contracts from 2013 through 2019 include a “Quality annex” that requires winegrapes have “fully developed color” and that they be delivered “in good and merchantable condition; free of all commercial defects; and with a sugar, acid and pH content and all other properties making them suitable for crushing into table wine,” and free of all contamination, “including taints.” These quality standards are still rather broad and subject to interpretation. Wineries with such contract provisions have taken the position that “taints” includes “smoke taint.” There is, however, no consistent interpretation of what “free of” or “free from” means in this context and the wineries’ application of this phrase to grapes varied significantly in 2020.

In situations where wineries reference “taint” or “smoke taint” in contracts, it is often the case that what defines “taint” is not clear. Some wineries have taken a default position that “taint” is the measurable presence of any undesirable compound associated with negative sensory impact from smoke exposure. The problem with this approach is that with today’s technology, it is possible to measure undesirable compounds in quantities as low as 0.5 part per billion. This approach leads to wineries rejecting grapes only because they are scientifically able to measure the presence of undesirable compounds, and not because there is any actual verified negative sensory impact on the grapes or potential wine.

3. The newest contracts (written post-2018) specifically address smoke exposure. While these provisions provide greater guidance and standards for the rejection of winegrapes due to smoke exposure (i.e., “the grapes must not have measurable exposure to smoke compounds in quantities shown to increase the risk of smoke taint in the finished wine”), these contracts still often fail to describe the specific levels of “smoke compounds” that would increase the risk of smoke taint in wine. Nor do many of these contracts describe how the measurement of these “smoke compounds” will be conducted. Further complicating the determination of smoke exposure, some newer contracts include a sensory analysis of a small batch of wine as part of the winery’s subjective decision whether to accept or reject grapes. Unfortunately, these contract provisions rarely describe the sensory analysis process in any detail (e.g., by whom will the analysis be performed? What methodology will be followed? And what criteria will be applied in reaching a conclusion on each sample analyzed?)

Regardless of the quality standards contained in their contracts, many wineries interpreted their contracts to include unwritten criteria for the presence of varying amounts of Guaiacol and other wildfire smoke markers that justified their rejection of winegrapes. In most instances, the

rejection letter was the first notice the grower had of this previously unwritten criteria for rejection. Alternatively, some wineries did not impose additional unwritten criteria, but rejected grapes based on the winery's "belief or understanding" that "smoke was present in the area," without actually testing the grower's grapes for the presence of these markers. In some instances, growers were surprised to learn that their grapes were being rejected and often had little time to find replacement buyers.

## **B. Interviews of Growers Impacted by 2020 Rejections**

In addition to reviewing grower contracts and rejection correspondence, several growers were interviewed to obtain additional facts regarding the rejection of their grapes. In the interviews, growers conveyed information about conversations they had with winery representatives, the testing that the wineries did or alleged to have performed on the grapes, the testing the growers did on their own grapes, and what the growers did with their rejected grapes.

### **1. Inconsistent Rejection Standards and Testing Methods**

The review of numerous contracts, rejection letters, and grower interviews showed that in 2020 wineries rejected winegrapes based on different numeric thresholds for smoke markers, different methods of sampling, and different methods of testing (if they tested at all). Growers relayed that wineries often provided little to no transparency regarding their sampling and testing protocols and results. Some wineries were unwilling to share any test results with growers. Others simply provided smoke marker numbers in a letter without allowing access to the underlying lab data or reports.

The numeric chemical marker thresholds applied by many wineries as the basis for rejecting grapes did not follow prevailing and accepted practices as determined by accredited commercial labs. For example, wineries often used a one-size-fits-all approach, applying the same thresholds for different varieties of grapes. The problem with this approach is that different varieties have been shown to have differing baselines for the presence of smoke-related chemicals and different uptake rates for those chemicals.

In fact, a technical notes document on smoke taint analysis and interpretation, published by the Australian Wine Research Institute, June 2018, makes clear that smoke taint analysis can produce 'false positive' interpretations for the presence of smoke taint. False positive interpretations can result because winegrapes, that have never been exposed to smoke, contain natural background levels of compounds associated with smoke taint. In addition, these smoke compounds vary in amounts from variety to variety. Researchers in the United States and abroad have repeatedly emphasized the paramount importance of documenting the levels of naturally occurring smoke compounds in winegrapes, by varietal.. Without data on these threshold amounts, it's difficult to make informed decisions about the extent and significance of damage that may have occurred when grapes are exposed to smoke.

Without established, transparent thresholds for these naturally occurring smoke compounds, a winery's decision to reject grapes quickly enters the realm of the subjective based on the type of lab analysis used and sensitivity of the test (the level of detection). Tests that are sufficiently

sensitive to measure a wide number of smoke compounds, that occur naturally, can deliver results which render a contract as an ‘option to buy.’ Such a contract is certainly not what most growers would have agreed with.

Several growers relayed that some winery representatives acknowledged the arbitrariness of the one-size-fits-all standard, and commented that they would consider applying different thresholds for different varieties in the future.

Growers also reported that the same set of rejection thresholds were applied by large buyers for grapes used in all of their wines, regardless of price point, rather than applying a declining level of tolerance as the price of grapes and wine increases.

Additionally, growers reported many wineries used sampling and testing protocols that are inconsistent with current prevailing and accepted practices as determined by accredited commercial labs. Some wineries relied upon test results from unaccredited labs, while others used in-house labs. Some wineries used different test methods entirely, including, for example, a “heat-acid index” test, which is not used in accredited labs in the United States serving the wine industry. Growers who independently provided grape samples to accredited labs often obtained results that significantly differed from the results obtained by wineries using differing sampling and testing protocols, which were not subject to third-party verification.

In numerous instances, the tests conducted by or on behalf of growers, using accredited labs, revealed samples testing at levels much below that which wineries reported for the same grapes (or wine made from those grapes). In instances where growers and wineries used accredited labs and prevailing and accepted testing protocols, test results come back with much higher consistency. Where there has been a stark inconsistency in the test results of the growers and wineries, there is often reason to doubt the reliability of the wineries’ testing protocols. The lack of agreement and consistency in test methods is highly problematic. Moreover, some lab test methods used by wineries might present “worst case scenarios” that exaggerate the impact of smoke exposure and fail to reflect the kind of quality that is achievable using commercial fermentation techniques and processes.

## 2. Predatory Conduct Related to Rejections

The timing of rejections by wineries was often quite unreasonable. Growers reported some wineries rejected grapes just prior to harvest, making it very difficult for the grower to locate another buyer. In one instance, a winery sent a rejection letter to a grower the day before the grower’s grapes were scheduled for harvest. In that case, the grower mitigated his damages by finding a replacement buyer for the grapes, but at a significantly reduced price. That same grower also reported the wine produced from those grapes did not show a trace of smoke taint, according to the new buyer, which undermines the basis for the original winery’s rejection.

Other wineries sought to put unreasonable conditions on taking delivery of growers’ grapes. Some wineries informed growers their grapes would be rejected – due to the likelihood of smoke exposure from nearby fires – unless the grower would execute an addendum provided by the winery. The addendums that were reviewed differed to some degree, but generally allowed the

winery to receive the grapes without “accepting” them. The winery could make wine from the grapes, test the wine for smoke markers anywhere from 30 days to 6 months after crush, and then decide whether to accept the grapes. In some cases, the decision to accept the grapes was solely in the winery’s discretion based upon a “sensory analysis” or no identified criteria at all. Some of the addendums contained even more egregious terms, such as requiring growers to pay for the crush, storage, and transport of any rejected wine made from their grapes. These addendums often provided no transparency regarding how each grower’s wine would be segregated, when acceptance of the grapes would occur, if at all, and how and by whom the wine would be tested for smoke markers.

Many wineries were quick to reject a grower’s winegrapes, often with little evidence to support the rejection and without basis in the grape purchase contract, but were unwilling to assist growers with the financial consequences. Growers were generally unable to obtain any form of financial assistance or concession from wineries that rejected their grapes. Growers described making requests to wineries for assistance through grower financing, renewal of contracts, or advanced payments for future grapes. Most of these requests went unanswered. Instead, many growers who were unable to make bulk wine from their grapes or find an alternate buyer, were forced to rely upon crop insurance (if they had it) to recoup a portion of their losses in 2020.

### 3. Rejection of Grapes that Proved to be Marketable and Free of Smoke Taint

Many growers whose grapes were rejected by their contracted winery sold the same grapes to a different winery of comparable quality and reputation, and the wine made from those grapes was determined to be commercially viable. Several growers reported they had grapes from one block rejected, but were able to sell grapes of the same variety from a neighboring block in the same vineyard under contract to another winery. Those grapes were accepted at full contract price and the wine made was of merchantable and sound quality.

Some growers themselves made bulk wine from their rejected grapes and found either no evidence of smoke taint or smoke impact at such low levels that the wine was still commercially viable. For example, one grower reported a winery rejected his grapes under contract, so he produced bulk wine from those same grapes and the bulk wine tested free of smoke impact. Faced with this evidence regarding the quality of the grapes, the winery still declined to offer him any credit for farming costs or future price adjustments. Another grower who made bulk wine from grapes which were unjustifiably rejected, was able to sell the bulk wine but had to accept a 15% reduction from the original contract price of his grapes because the bulk market was not able to provide a return equivalent to his original contract. There have been several examples where growers were able to create fully marketable bulk wine from their rejected grapes, showing that the grapes met all quality standards, but those growers received no concession from the rejecting winery and were unable to fully recover the amount of money lost due to the rejection of the grapes.

Many growers whose grapes were rejected reported resorting to the spot market to sell their grapes. Although many growers found buyers on the spot market, they lost money because they were forced to sell their grapes significantly below their contract price.

A few growers whose grapes were initially rejected by a winery, reported the same winery approached them later during harvest asking to purchase grapes of the same variety that were previously rejected. In at least two cases, the initially rejected grapes were accepted the second time around, but at a lower price than provided in the contract.

Several growers said wineries sought price discounts due to alleged smoke damage for grapes that were already delivered. When these growers stated they preferred to reclaim the discounted grapes, the winery suddenly decided the grapes were acceptable at full price and paid the growers. Other growers reported instances where a winery sought to reject grapes after delivery and offered to “destroy” the grapes for the grower. In one case, a grower who rejected that offer countered that he would come pick up the rejected grapes: the winery responded by accepting the grapes at the full contract price.

### **C. Potential Breaches of Contract and Violations of State Law**

There have been few grower claims stemming from wineries’ rejections in 2020, as previously described, but many aggrieved growers have viable claims against wineries if they choose to pursue them. These claims can take the form of arbitrations, civil lawsuits, and administrative complaints against wineries. Arbitrations and civil lawsuits would primarily focus on claims for breach of contract and breach of the covenant of good faith and fair dealing due to a winery’s wrongful rejection of grapes. In some cases, growers may also be able to file administrative complaints against the wineries with the Market Enforcement Branch of the California Department of Food and Agriculture (jeopardizing the winery’s processor license) for improperly rejecting and/or not paying for the contracted grapes.

Arbitration clauses exist in many grape contracts and are litigated privately, and thus do not create any legal precedent. However, grape contracts without arbitration clauses can be litigated in public court proceedings that not only afford the grower an opportunity to obtain compensation, but also may create valuable legal precedent.

#### **1. Breach of Contract and the Implied Covenant of Good Faith and Fair Dealing**

With many of the rejections reviewed for this paper, it is apparent that wineries breached their contractual obligations to growers. In those examples, the rejections were based on little, if any, reliable evidence that the grower’s grapes failed to comply with the quality standard set forth in the contract, and often the contracts were so lacking in specific quality standards that the wineries had to impose unstated standards in order to justify their rejections. Winegrape contracts, like all other contracts in California, include an implied covenant of good faith and fair dealing. As described above, it appears that some wineries did not act in good faith in the rejection of winegrapes, and thus their conduct also violated the implied covenant of good faith and fair dealing.

In order to properly reject a grower’s winegrapes due to alleged smoke exposure, a winery must establish that the grower’s grapes fail to meet the quality standards set forth in the contract. Until recently, many contracts either contained very broad and unspecific subjective quality standards, or contained only a general reference to grapes being free from “taints.” Newer contracts

included more specific clauses on smoke exposure, providing that grapes “must not have measurable exposure to smoke compounds in quantities shown to increase the risk of smoke taint in the finished wine.”

In cases where the contract contains more general and unspecific quality standards, the only way for wineries to impose specific quality standards (such as threshold levels of smoke exposure markers) is to unilaterally amend the contract to include these specific quality standards. The law does not allow wineries to unilaterally change such contract terms. In addition, in many cases, growers obtained test results that revealed their grapes did not exceed industry expectations for smoke exposure markers and wines made from many growers’ grapes were both free of smoke exposure markers and met all sensory standards. The lack of clear quality standards in many contracts coupled with a lack of reliable evidence of smoke exposure demonstrates that many wineries breached their contracts with growers by wrongfully rejecting grapes.

Given that a contract is largely an allocation of risks between the parties, a contract term is substantively suspect when it “reallocates the risks of the bargain in an objectively unreasonable or unexpected manner.” (*Cotchett, Pitre & McCarthy v. Universal Paragon Corp.* (2010) 187 Cal.App.4th 1405, 1419, as modified on denial of reh’g (Sept. 21, 2010).) Further, where a party with superior bargaining power has imposed contract terms on another, courts carefully assess claims that one or more of these provisions are unreasonable. (*USS-Posco Industries v. Case* (2016) 244 Cal.App.4th 197, 213.) Unreasonable terms encompass provisions that “seek to negate the reasonable expectations of the nondrafting party.” (*Lange v. Monster Energy Company* (2020) 46 Cal.App.5th 436, 448.) Accordingly, unreasonable terms are often found to exist when such terms would impact the reasonable expectations of the other party and allocate the risks in a different way than expected at the time the contract was negotiated and signed.

Further, both the farming of grapes and production of wine has always included risk given that the process is reliant on the unpredictable effects of nature. Historically, there have been years where environmental factors have impacted different grape varieties. However, it has never been permissible for nature’s effects on the grapes to be exclusively allocated to the grower. Instead, wineries themselves have had to adjust in order to produce wine at the quality they desire, such as by creating blends in certain years due to the impact of a wide variety of potential environmental factors on grapes. When it comes to the purported impact of smoke, another unpredictable force of nature, many wineries have unreasonably allocated all risks to the grower by unilaterally determining what is considered acceptable and what will be rejected. As such, these wineries’ purported justification for the rejections is indicative of the type of unconscionable behavior disallowed in contracts and is unlikely to constitute a reasonable cause for the rejections.

Many winery rejections appeared not to have been made in good faith. In every contract, the parties have implied promises to not do anything to unfairly interfere with the right of any other party to receive the benefits of the contract. (See California Civil Jury Instructions No. 325; *Cobb v. Ironwood Country Club* (2015) 233 Cal.App.4th 960, 963.) In this context, good faith means honesty of purpose without any intention to mislead or take unfair advantage of another. In numerous rejection letters reviewed, wineries stated their own in-house technical services



laboratory produced an analytical method to measure markers of potential smoke taint. When wineries determined these markers were above the wineries' thresholds, grapes were rejected. However, these thresholds were not made known to growers previously in the contracts with the wineries. By signing the contracts, the growers did not accept or agree to the unknown and undetermined testing methods and quality standards ultimately used by the wineries. Thus, in addition to being a breach of the contract, when wineries unilaterally impose standards for the rejection of grapes, after the contract has been signed, the implied covenant of good faith and fair dealing associated with that contract is violated.

Additionally, before 2018, wineries were using the prevailing and accepted testing methods and thresholds for the presence of free Guaiacol and free 4-methylguaiacol, the main and widely used indicators for assessing smoke exposure in the vineyard. Applying this standard in 2020, many of the rejected grapes were below the previously applied threshold requirements and were of acceptable quality. However, after 2018, some wineries decided to add an acid-release testing method applied to six additional markers to test for smoke exposure. This testing method and the added markers were not specified in the contracts that had already been negotiated and signed. Then, wineries relied on these new markers as a justification for the rejection of the grapes, determining that the total value for "all markers" exceeded their threshold. This unilateral shift in methods and standards allowed the winery complete control over the baseline indicators created after the contract was signed and enabled wineries to take unfair advantage of growers in violation of the implied covenant of good faith and fair dealing.

Finally, the well-known market conditions existing at the time of the rejections (i.e., oversupply) suggest that many wineries may have relied upon purported "smoke taint" to escape their contractual obligations, entitling growers to claim that the wineries rejected the grapes without reasonable cause. For example, one winery rejected grapes "due to smoke", but never even tested them. This winery refused to accept them at harvest because of the smoke in the air. The grower custom crushed the grapes and sold all of the wine on the bulk market for prices indicating perfectly merchantable grapes. This winery had been seeking to get out of the contract long before the fires for other reasons.

Further supporting the conclusion that some wineries breached their contracts and the implied covenant of fair dealing, growers reported that earlier in 2020, many of the same wineries who rejected grapes due to claims of smoke exposure had sought releases from contracts due to the drop in tasting room, restaurant, and other on-premises wine sales caused by the COVID-19 pandemic. Many wineries sought to rely upon force majeure provisions to avoid performing under contracts due to the ongoing pandemic and resulting lost sales. One winery even sought to repudiate the contract because of a "disruption in business" due to these factors, long before the fires.

## 2. Violations of California Food & Agricultural Code

Winery rejections that constitute a breach of contract are also likely to be in violation of various provisions of the California Food and Agricultural Code ("FAC").

### a. FAC Section 55872

Under FAC Section 55872, it is unlawful for a licensed processor to fail or refuse “to pay for any farm product at the time and in the manner which is specified in the contract with the producer.” If a winery has rejected grapes under contract without a valid justification for doing so and thus fails to pay the grower consistent with the terms of the contract, that licensed winery has violated FAC Section 55872.

b. FAC Section 55873

Under FAC Section 55873, it is a violation of law if a licensed processor “has rejected, without reasonable cause, or has refused to accept, without reasonable cause, any farm product which is bought or contracted to be bought from a producer.” If a winery has rejected grapes under contract without a valid justification for doing so consistent with the terms of the contract, that licensed winery has violated FAC Section 55873.

There is no case law or regulation that describes what constitutes “reasonable cause” to reject grapes for purposes of FAC Section 55873. In a similar context, under the federal Perishable Agricultural Commodities Act (PACA), to “reject without reasonable cause” means any of the following: “(1) Refusing or failing without legal justification to accept produce within a reasonable time; (2) advising the seller, shipper, or his agent that produce, complying with contract, will not be accepted; (3) indicating an intention not to accept produce through an act or failure to act inconsistent with the contract; or (4) any rejection following an act of acceptance.” (107 C.F. R. § 46.2(bb)). Applying a similar standard to the meaning of “reasonable cause” under FAC Section 55873 would mean that if a winery rejects grapes without legal justification under the terms of the contract, they have violated Section 55873.

In many of the rejection letters, wineries justified the rejection by claiming the grapes were over the threshold baseline value for “all markers,” utilizing thresholds without basis in established standards, even though in many instances the grapes were under the threshold for the main indicators of smoke exposure. Further, the threshold standards were often not part of the terms of the original contract and were unilaterally added by the winery during harvest in 2020. As such, in those instances, the wineries likely lacked the legal justification to refuse the grapes under the contract and thus violated FAC Section 55873.

c. FAC Section 41192

Under FAC Section 41192, “in order to prevent fraud and deception in any transaction which involves fresh grapes for wine and byproduct purposes, when the percentage of rot or foreign material has any effect on the amount of the purchase price, the determination of such percentage shall be made by the director.” The director (Secretary or her designee) is responsible for determining the percentage of “foreign material” in the grapes if that material has an impact on the amount of the purchase price.

In many of the winery rejection letters, the threshold levels for the identified smoke exposure markers in the grapes, which could be considered foreign materials, was the primary basis for rejection. The percentage of identified markers in the grapes was determined by the wineries, not

the director. The purpose of FAC Section 41192 is to prevent the type of fraud and unfair practices exhibited by wineries here – allowing one party to add requirements and establish threshold levels in order to relieve that party of their contractual obligations. Wineries may argue that Section 41192 only applies when the purchase price for the grapes is reduced, not when the delivered load of grapes is rejected altogether. There is no precedent on this point, so any decision on the applicability of this section to winegrape rejections would be a decision of first impression that could create valuable precedent for growers.

d. FAC Section 41193

Under FAC Section 41193, “[w]hen any transaction involves fresh grapes for wine and byproducts purposes, the purchaser shall notify the seller, in writing, prior to delivery, of the conditions relating to soluble solids, rot, and foreign materials affecting the purchase price to be paid for such grapes.”

By informing growers for the first time in rejection letters that the wineries were applying testing methods and quality standards for the presence of smoke exposure markers that were not identified in the contract, wineries likely violated FAC Section 41193.

3. Administrative Complaint with CDFA

In addition to the options described above, some growers may also be able to file administrative complaints against the wineries with the Market Enforcement Branch of the Department of Food and Agriculture for improperly rejecting and/or not paying for the contracted grapes. These administrative complaints can jeopardize a winery’s processor license or require wineries to post substantial performance bonds against future failures to comply with the FAC. As a practical matter, the filing of a complaint enables a grower to exercise leverage in negotiations over the terms of future agreements since the complaint may be withdrawn.

**D. Ways Growers Can Protect Themselves In Future Contracts**

In light of the experience of 2020 and the continued prevalence of wildfires, it is incumbent upon growers to seek to manage the uncertainty and risk in future harvest years through more clearly defined contract language. Smoke exposure should be expressly addressed in any future contract. These contracts should be negotiated to include provisions that address the following issues:

- Sampling of grapes: How will it be conducted? By whom? When? What are the chain of custody requirements for samples pulled from a vineyard or truck?
- Testing of samples: How will it be conducted? By a certified, third party lab? When? What methodology will be applied? How will results be shared?
- Smoke exposure standards or criteria: What thresholds for chemical compounds will be applied? What standards or criteria will apply if sensory analysis is part of the winery’s decision to accept or reject grapes, and will sensory analysis be coupled with lab results and not a standalone factor in the decision?
- Test results: How will the results of the tests affect the winery’s right to reject grapes or impose a price adjustment, if at all.

If the grower is presented with an agreement that fails to address each of these points, the grower should communicate with the winery before signing and ensure that any verbal agreement on these points is documented with a provision in the contract itself.

Additionally, growers may consider negotiating additional provisions to protect their interests in the event their grapes are rejected. For example, a grower-invoked contract cancellation clause could be used to provide a basis to cancel future years on a contract if the grower feels the winery has unjustly rejected their grapes. Where smoke exposure provisions are particularly onerous on the grower (i.e., requiring grapes be free from all smoke compounds), a grower might consider negotiating additional compensation for that additional risk, whether through an increased price per ton or pre-negotiated crop insurance compensation.” And where a sensory analysis component is included in the winery’s testing for smoke exposure, the sensory determination should be coupled with the results from a lab test in a way that prevents rejection based solely on subjective taste where the lab results would otherwise result in acceptance of the grapes.

The bargaining position of many growers will be unequal to that of the contracting wineries, which can make fair negotiation of these provisions difficult. Maintaining relationships that can foster cooperative solutions (for example, sharing the loss when fires do cause smoke exposure) should remain the goal. Growers can do this by communicating early and often with their winery field representatives, maintaining good relations with the key decision makers within the winery and working cooperatively to include more specific language in contracts that will set forth the criteria for the detection of smoke exposure as well as sampling and testing protocols.

However, the discussions described above remain important to ensure that any future contracts are as clear as possible on the treatment of smoke exposure in order to allow growers the ability to plan for the future and mitigate potential losses.

#### **E. In Summary – Understanding and Negotiating the Risk**

The risk of negative sensory impact from smoke exposure on grapes has become increasingly evident. However, the California wine industry can become much better equipped to manage these risks with additional research and understanding of smoke exposure and risk-mitigating measures. The issue at hand is one which the wine industry has to tackle collectively, with grower and winery interests and sustainability equally weighed.

Contractual arrangements between growers and wineries should be both fair and transparent and ultimately serve to preserve the interests of both parties. Risk transfer comes with a cost. For wineries that insist on very high standards for the absence of smoke impact, the cost to obtain grapes should be relatively higher. For wineries that exhibit various tolerances to impacts from smoke exposure, the cost to obtain grapes should be relatively lower. Price and terms discovery during contract negotiations should include considerations regarding smoke exposure risk.

An imperfect, but mitigating tool, in the form of crop insurance, is available to growers. However, crop insurance comes with cost and does not guarantee profitability. This cost should

be taken into consideration by growers and discussed with wineries during contract negotiations. Ultimately, there are tools and options available to both parties to help avoid total losses following a wildfire and smoke event. It is up to wineries and growers, collectively, to address the usefulness and applicability of these tools and options during the contract negotiation.