

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ATLAS BREW WORKS, LLC,)	
)	
Plaintiff,)	
)	
vs.)	Civil Action No. 19-0079 (CRC)
)	
MATTHEW G. WHITAKER, in his official)	
capacity as Acting Attorney General of the)	
United States,)	
)	
Defendant.)	
_____)	

DECLARATION OF JANET M. SCALESE

I, JANET M. SCALESE, am competent to state, and declare the following based on my personal knowledge:

1. I am the Director, Alcohol Labeling and Formulation Division (ALFD) of the Alcohol and Tobacco Tax and Trade Bureau (TTB), U.S. Department of the Treasury. As the Director of ALFD, I have supervisory authority over labeling specialists who are responsible for reviewing and taking action on applications for certificates of label approval (COLAs) under the Federal Alcohol Administration (FAA) Act, 27 U.S.C. § 205(e).

2. On November 28, 2018, Atlas Brew Works submitted an application for label approval for a malt beverage designated as "Fruited India Pale Ale." The brand name for the product is "Atlas Brew Works" and the fanciful name is "The Precious One." The COLA (TTB ID 18332001000415) was approved by TTB on December 17, 2018. See Cox Declaration, paragraph 7; Exhibit A.

3. On December 20, 2018, Atlas Brew Works submitted an application for label approval (TTB ID 18354001000593) for a malt beverage with the fanciful name "The Precious One,"

which was intended to be applied to kegs. See Cox Declaration, paragraph 8; Exhibit B. This label application was received by TTB, but it has not yet been reviewed. Some of the information on this label was the same as the label previously approved by TTB, but in some respects, the two labels differ.

4. On December 22, 2018, the Department of the Treasury (including TTB) was partially shut down due to a lapse of appropriations. As a result, approximately 90 percent of TTB's employees were placed on furlough, i.e. in a non-work, non-pay status, pursuant to TTB's shutdown plan. See, <https://home.treasury.gov/lapse-in-appropriations-contingency-plans>. Although some "excepted" functions may continue to operate at agencies subject to funding lapse shut down, e.g. employees may remain on duty to protect government property, none of the functions in my division, including reviewing applications for label approval, is considered "excepted." Accordingly, all employees assigned to my division, including me, were placed on furlough. In accordance with Title 31 of the U.S. Code, Section 1342, during the furlough we must stay away from the work place, may not perform government work and we are not otherwise permitted to serve the Federal Government as an unpaid volunteer. As of the date of this Declaration, TTB remains unfunded. Accordingly, TTB may not review or process label applications at this time.

5. Once TTB receives funding, it will resume its review of applications for label approval. In the interim, industry members may use approved labels on products subject to the COLA requirements of the FAA Act. Furthermore, pursuant to Section V ("Allowable Revisions to Approved Labels") of the COLA Form, TTB Form 5100.31, "Application for and Certification/Exemption of Label/Bottle Approval," industry members may make certain specified changes to previously approved labels without applying for a new COLA. The form

may be accessed on TTB's website at <https://www.ttb.gov/forms/f510031.pdf>. Any revision made to an approved label must be in compliance with the applicable regulations in 27 CFR parts 4, 5, 7, and 16, and any other applicable provision of law or regulation. The revisions must also comply with the allowable revisions instructions listed on the COLA application form, TTB Form 5100.31 (which also appear on COLAs Online for electronic submitters).

6. The COLA form lists 34 "allowable revisions." Last year, in Industry Circular 2018-2, "Expansion of Allowable Changes to Approved Alcohol Beverage Labels," https://www.ttb.gov/industry_circulars/archives/18-2.shtml, TTB added three additional changes that may be made to a previously approved label without submitting a new application for label approval. TTB plans to add these new provisions (as Items 35-37) to the COLA form when it is next revised. The Industry Circular also provided as follows:

Finally, TTB has received questions about Item 3, which allows, among other things, changes in the shape and proportionate size of a label. TTB wishes to caution industry members about using this allowable revision when changing between different types of containers, for example, when changing from a keg label to a bottle label, or from a bottle label to a bag-in-a-box label. Labels for different types of containers usually look very different and may contain label information specific to the container type (e.g., instructions for serving from a bag-in-a-box container) or different graphics. We remind you that you must comply with all applicable conditions for use of allowable revisions in the full list of allowable revisions. Thus, for example, you may not add information or graphics (unless specifically authorized by the list of allowable revisions) without obtaining a new COLA. These restrictions make it unlikely that you will be able to use a label approved for one type of container for a different type of container without submitting the new label to TTB for approval.

This language does not preclude the use of authorized allowable revisions to an approved label for use on a different type of container, as long as the revisions comply with all applicable conditions.

7. With regard to the approved label for "The Precious One" malt beverage, Atlas Brew Works may put the same information that appears on its approved COLA on new keg labels for

the product without applying for a new COLA. Atlas Brew Works may also make certain “allowable revisions” to that label for use on a keg. For example, pursuant to Allowable Revision Item 1, the certificate holder may “[d]elete any non-mandatory label information, including text, illustrations, graphics, etc.” Pursuant to Allowable Revision Item 2, the certificate holder may “[r]eposition any label information, including text, illustrations, graphics, etc.” subject to the requirement that the repositioning must comply with any placement requirements applicable to mandatory information. Pursuant to Allowable Revision Item 3, the certificate holder may “[c]hange the color(s) (background and text), shape and proportionate size of labels. Change the type size and font, and make appropriate changes to the spelling . . . Change from an adhesive label to one where label information is etched, painted or printed directly on the container and vice versa.”

8. The label that appears on the pending application for label approval (TTB ID 18354001000593) differs in several respects from the approved COLA (TTB ID 18332001000415). Several of these changes would be permitted as allowable revisions without the need for obtaining a new COLA. For example, as previously noted, non-mandatory label information, including text, illustrations and graphics, may be removed from the label as an allowable revision. A batch number may be added as an allowable revision under Allowable Revision Item 25, and a brewing date may be added as an allowable revision under Allowable Revision Item 18. The net contents of the container may be revised pursuant to Allowable Revision Item 10. All allowable revisions are of course subject to the conditions set forth on the Form 5100.31, including compliance with the applicable regulations.

9. Some of the changes on the pending application would not be authorized as allowable revisions. While the mandatory information appearing on the application for the

keg label is largely consistent with the mandatory information appearing on the approved label, the approved class/type designation (“Fruited India Pale Ale”) is not consistent with what appears on the pending application (which states both “beer” and “Fruit Ale”). Changes in the class/type designation are not authorized as allowable revisions. Furthermore, the appearance of other brand or fanciful names and class/type designations (for “Ninja Sauce”, “Festbier”, and “Rowdy” malt beverages) would not be authorized as an allowable revision. In general, new graphics on the keg label are not an authorized allowable revision. Finally, the addition of a warning statement about tapping a keg, which begins with “Attention - Read Before Tapping”, is not an authorized allowable revision unless covered by a specific allowable revision. In order to put this statement on a label affixed to the container, a new COLA application would be required. However, this information could be included in a hangtag tied to the container without obtaining label approval.

In accordance with 28 U.S.C. § 1746, I hereby certify and declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on January 18, 2019.

**Janet M.
Scalese**

Digitally signed by Janet M.
Scalese
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Janet M. Scalese
Director, Alcohol Labeling and Formulation Division
Alcohol and Tobacco Tax and Trade Bureau
United States Department of the Treasury