IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION; AND MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendant, by and through undersigned counsel, respectfully opposes Plaintiff's Motion for Preliminary Injunction (ECF No. 3) and moves to dismiss Plaintiff's Complaint (ECF No. 1) pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, for the reasons set forth in the accompanying Memorandum of Points and Authorities.

Dated: January 18, 2019

Respectfully submitted,

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DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

I. Introduction

In this case, Plaintiff Atlas Brew Works, LLC ("Atlas") brings a pre-enforcement challenge to enjoin Defendant Mathew G. Whitaker, in his official capacity as Acting Attorney General of the United States, from enforcing 27 U.S.C. § 207. Specifically, Atlas seeks a Temporary Restraining Order to permit it to immediately begin interstate sales of a seasonal beer that it calls "The Precious One" without an approved keg label, as well as a Preliminary Injunction to bar the Department of Justice from enforcing Section 207's labeling requirements altogether.

The extraordinary remedy of a preliminary injunction is unwarranted here. Plaintiff's First Amendment claims should be dismissed pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure for lack of jurisdiction and failure to state a claim upon which relief can be granted. Additionally, even if Plaintiff's claims are actionable, Plaintiff's requests

for injunctive relief should be denied as Plaintiff has not satisfied the standard for this extraordinary relief. *See Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004) (noting that a preliminary injunction is "an extraordinary remedy that should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion").

II. Background

A. The Anti-Deficiency Act.

Under our Constitution, Congress is vested with complete power over the purse. *See* U.S. Const., Art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."). For almost two centuries, Congress has enacted various statutes that closely regulate the circumstances under which federal officers and employees may incur obligations on behalf of the United States in the absence of appropriations. One of those statutes is the Anti-Deficiency Act, which was enacted to further enforce Congress's power over the purse by prohibiting the Executive from incurring any monetary obligation without an available appropriation for the payment of that obligation.

Specifically, pursuant to the Anti-Deficiency Act, officers and employees of the federal government "may not . . . involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law[.]" 31 U.S.C. § 1341. Additionally, federal officers and employees are prohibited from working, even on a voluntary basis, unless authorized by law. *Id.* § 1342.

During a lapse in appropriations, the Anti-Deficiency Act governs which activities the Executive Branch may continue ("excepted activities") and which activities must be suspended. On December 22, 2018, appropriations for the Department of Justice and the Department of the Treasury, among other government agencies, lapsed. In such a situation, consistent with the

Anti-Deficiency Act and guidance from the Office of Management and Budget ("OMB"),[1] only certain excepted activities are permitted, including activities in connection with "emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. Importantly, "the term 'emergencies involving the safety of human life or the protection of property' does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property." *Id.* Unless a governmental activity falls within one of the excepted categories, it must be discontinued during a lapse in appropriations.

B. The Federal Alcohol Administration Act.

Section 105 of the Federal Alcohol Administration Act ("FAAA") authorizes the Secretary of the Treasury to prescribe regulations to prohibit unfair competition and unlawful practices. *See* 27 U.S.C. § 205. In particular, with respect to labeling, the FAAA requires brewers who sell or ship their malt beverage products in interstate commerce to conform their product labels to Treasury regulations intended to prohibit consumer deception, provide adequate information as to the identity and quality of the product, and prohibit statements that are disparaging, false, misleading, obscene, or indecent. 27 U.S.C. § 205(e).

In order to prevent the sale or shipment of malt beverages in interstate or foreign commerce labeled in violation of the requirements of this subsection, the FAAA requires brewers to obtain from Treasury a certificate of label approval ("COLA") covering the malt beverages prior to bottling. *Id.*; *see also* 27 C.F.R. § 7.41(a). The COLA requirement is administered by the

[1] *See* OMB Mem. M-19-06, Status of Agency Operations (Dec. 21, 2018), *available* at https://www.whitehouse.gov/wp-content/uploads/2018/12/M-19-06-Status-of-Agency-Operations.pdf; *see also* OMB Mem. M-18-05, Planning for Agency Operations during a Potential Lapse in Appropriations (Jan. 19, 2018), *available at* https://www.whitehouse.gov/wp-content/uploads/2017/11/m-18-05-REVISED.pdf; and TTB Shutdown Plan (Dec. 6, 2017), *available at* https://home.treasury.gov/system/files/291/ttb-shutdown-plan-12062017.pdf.

Treasury Department's Alcohol and Tobacco Tax and Trade Bureau ("TTB"), and the regulations governing the procedure and practice in connection with the issuance, denial, and revocation of COLAs, and the appeal procedures in connection therewith, are set forth at 27 C.F.R. Part 13.[2]

The FAAA further provides that the Attorney General may bring suit to prevent and restrain violations of any provision of the Act, and that any person violating any of the provisions of 27 U.S.C. § 205, including the labeling provision, shall be guilty of a misdemeanor and upon conviction thereof be fined not more than $1,000 for each offense. 27 U.S.C. § 207.

C. Atlas's Applications for Label Approval.

On November 28, 2018, Atlas submitted an application for label approval for a malt beverage designated as "Fruited India Pale Ale." *See* Declaration of Janet M. Scalese ("Scalese Decl.") ¶ 2; *see also* ECF No. 3-2. The brand name for the product is "Atlas Brew Works" and the fanciful name is "The Precious One." The COLA was approved by TTB on December 17, 2018. *Id*.

On December 20, 2018, Atlas submitted another application for label approval for a malt beverage with the fanciful name "The Precious One," which was intended to be applied to kegs. *See* Scalese Decl. ¶ 3; *see also* Cox Decl. ¶ 8; ECF No. 3-3. This label application was received by TTB, but it has not yet been reviewed. Scalese Decl. ¶ 3. 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.

[2] The regulations implementing the FAAA do not require a brewer to obtain either a certificate of label approval or a certificate of exemption for a domestically bottled malt beverage that will be sold exclusively in the State in which it was bottled. *See* 27 CFR § 7.40 and TTB Ruling 2013-1. For purposes of this litigation, Defendant assumes that the products in question are subject to the COLA requirements of the FAAA.

On December 22, 2018, the Department of the Treasury (including TTB) was partially shut down due to a lapse of appropriations. Scalese Decl. ¶ 4. 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 (available at https://home.treasury.gov/lapse-in-appropriations-contingency-plans). *Id*. In accordance with the designated TTB shutdown plan, none of the functions in the Alcohol Labeling and Formulation Division, including reviewing applications for label approval, is considered "excepted." *Id*. Accordingly, all employees assigned to that division were placed on furlough and, in accordance with the Anti-Deficiency Act, must stay away from the work place and may not perform government work. *Id*. As of the date of filing of this brief, TTB remains unfunded and its employees thus may not review or process label applications at this time. *Id*. Once TTB receives funding, it will resume its review of applications for label approval. *Id*. ¶ 5.

III. Standard of Review

A. Dismissal Pursuant to Rule 12(b)(1) for Lack of Jurisdiction

Pursuant to Rule 12(b)(1), a court must dismiss a claim when it lacks subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). A motion to dismiss under Rule 12(b)(1) "presents a threshold challenge to the Court's jurisdiction," and thus "the Court is obligated to determine whether it has subject-matter jurisdiction in the first instance." *Curran v. Holder*, 626 F. Supp. 2d 30, 32 (D.D.C. 2009) (internal citation and quotation marks omitted). "[I]t is presumed that a cause lies outside [the federal courts'] limited jurisdiction," *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994), unless the plaintiff can establish by a preponderance of the evidence that the Court possesses jurisdiction. *See, e.g., U.S. ex rel. Digital Healthcare, Inc. v. Affiliated Computer*, 778 F. Supp. 2d 37, 43 (D.D.C. 2011); *Peter B. v. United States*, 579 F.

Supp. 2d 78, 80 (D.D.C. 2008) (plaintiff bears the burden of establishing that the court has subject matter jurisdiction).

When reviewing a Rule 12(b)(1) motion to dismiss, "the court must accept the complaint's well-pled factual allegations as true and draw all reasonable inference in the plaintiff's favor." *Id.* At the same time, "[t]he court is not required, however, to accept inferences unsupported by the facts alleged or legal conclusions that are cast as factual allegations." *Rann v. Chao*, 154 F. Supp. 2d 61, 64 (D.D.C. 2001), *aff'd*, 346 F.3d 192 (D.C. Cir. 2003); *see also Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13 (D.D.C. 2001) (noting that the "plaintiff's factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim"). "[T]he District Court may in appropriate cases dispose of a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) on the complaint standing alone." *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992). The Court also, however, may look beyond the allegations of the complaint, consider affidavits and other extrinsic information, and ultimately weigh the conflicting evidence. *Id.*; *see also Jerome Stevens Pharm., Inc. v. Food & Drug Admin.*, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

B. Dismissal Pursuant to Rule 12(b)(6) for Failure to State a Claim

Under Rule 12(b)(6), dismissal is appropriate if the plaintiff fails to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). In order to survive a Rule 12(b)(6) motions, the plaintiff's allegations, when read in a light most favorable to the plaintiff, must "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A court must "assume the truth of all material factual allegations in the complaint and construe the complaint liberally, granting

plaintiff the benefit of all inferences that can be derived from the facts alleged." *Am. Natl. Ins. Co. v. Fed. Deposit Ins. Corp.,* 642 F.3d 1137, 1139 (D.C. Cir. 2011) (internal quotation marks omitted). But a court need not accept "factual inferences drawn by plaintiffs if those inferences are not supported by facts alleged in the complaint," nor must a court give credence to "plaintiff's legal conclusions." *Disner v. United States,* 888 F. Supp. 2d 83, 87 (D.D.C. 2012) (internal quotation marks omitted).

C. Standard of Review for Preliminary Injunction

A party seeking a preliminary injunction must show: (1) a substantial likelihood of success on the merits, (2) that it will suffer irreparable injury if the injunction is not granted, (3) that the balance of equities tips in the movant's favor; and (4) that the public interest would be furthered by the injunction. *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014). The third and fourth factors "merge when the Government is the opposing party." *Colo. Wild Horse v. Jewell*, 130 F. Supp. 3d 205, 220–21 (D.D.C. 2015) (internal quotation marks omitted). Because the relief Plaintiff seeks is "an extraordinary remedy," a preliminary injunction "should be granted only [if they carry] the burden of persuasion." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006); *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *see also Dorfmann v. Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1969) ("The power to issue a preliminary injunction, especially a mandatory one, should be sparingly exercised." (internal quotation marks omitted)).

The D.C. Circuit has traditionally applied a "sliding scale" approach to these four factors, *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009), under which "a strong showing on one factor could make up for a weaker showing on another." *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011). Following the Supreme Court's decision in

Winter v. NRDC, Inc., 555 U.S. 7 (2008), however, the D.C. Circuit Court "has suggested, without deciding, that *Winter* should be read to abandon the sliding-scale analysis in favor of a 'more demanding burden' requiring Plaintiffs to independently demonstrate both a likelihood of success on the merits and irreparable harm." *Smith v. Henderson*, 944 F. Supp. 2d 89, 95-96 (D.D.C. 2013) (citing *Sherley*, 644 F.3d at 392).

IV. Argument

A. Plaintiff is Unlikely to Succeed on the Merits of its Claims

i. Plaintiff Lacks Standing

"The first component of the likelihood of success on the merits prong usually examines whether the plaintiffs have standing in a given case." *Kingman Park Civic Ass'n v. Gray*, 956 F. Supp. 2d 230, 241 (D.D.C. 2013). Here, Plaintiff fails to establish its standing to assert the claims alleged in its Complaint, and this case should accordingly be dismissed for lack of subject matter jurisdiction.

"The judicial power of the United States" is limited by Article III of the Constitution "to the resolution of 'cases' and 'controversies,'" *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982), and the demonstration of a plaintiff's standing to sue "is an essential and unchanging part of the case-or-controversy requirement," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The standing inquiry must be "especially rigorous" when reaching the merits of a claim would force a court to decide the constitutionality of actions taken by a coordinate Branch of the Federal Government. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). A plaintiff "'must demonstrate standing for each claim he seeks to press.'" *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 10 (D.C. Cir. 2015) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). Thus, to

establish standing for its claims here, for which Plaintiff seeks only injunctive and declaratory relief, Plaintiff must identify an injury in fact, fairly traceable to the statutory language at issue in the specific claim, and redressable by a favorable ruling, that is "concrete, particularized, and actual or imminent." *See id.*

The injury-in-fact requirement "helps to ensure that the plaintiff has a 'personal stake in the outcome of the controversy.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). "An injury sufficient to satisfy Article III must be concrete and particularized and actual or imminent, not conjectural or hypothetical. An allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Id*. (citations and quotations omitted). Where a plaintiff brings a pre-enforcement First Amendment challenge to a statute, "[s]ubjective chill alone will not suffice to confer standing." *Johnson v. District of Columbia.*, 71 F. Supp. 3d 155, 159 (D.D.C. 2014) (quoting *Act Now to Stop War & End Racism Coal. v. District of Columbia*, 589 F.3d 433, 435 (D.C. Cir. 2009)) (internal quotations omitted). Rather, in order to establish that threatened enforcement is "sufficiently imminent," a plaintiff must "allege[] an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there [must] exist[] a credible threat of prosecution thereunder." *Susan B. Anthony List*, 134 S. Ct. at 2342 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)); *see also Clapper*, 568 U.S. at 409 (the threatened injury cited by the pre-enforcement plaintiff must be "certainly impending"); *Blum v. Holder*, 744 F.3d 790, 798 (1st Cir. 2014) (applying *Clapper* to a pre-enforcement First Amendment challenge); *Johnson*, 71 F. Supp. 3d at 160 ("Where there is no expectation of enforcement, there is unlikely to be a 'credible threat' of prosecution."). A credible threat of prosecution exists when "the [challenged] law is aimed

directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988) (citations omitted).

Here, the statutory and regulatory scheme, which Plaintiff has not challenged, permits Atlas to produce a permissible keg label for "The Precious One" with only minimal changes to the proposed label that it submitted to TTB on December 20, 2018. The COLA Form, at Section V ("Allowable Revisions to Approved Labels"), provides that industry members may make certain specified changes to previously approved labels without applying for a new COLA, *see* https://www.ttb.gov/forms/f510031.pdf, and TTB has published a complete list of allowable changes to approved labels on its website at https://ttb.gov/labeling/allowable_revisions.shtml. Consistent with these allowable revisions, Atlas may put the same information that appears on its approved COLA for "The Precious One" on new keg labels for the product without applying for a new COLA. *See* Scalese Decl. ¶ 7. Atlas may also make certain "allowable revisions" to that label for use on a keg. *Id*. 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."

Specifically with respect to "The Precious One" keg label, several of Atlas's proposed changes would be permitted as allowable revisions without the need for obtaining a new COLA. Scalese Decl. ¶ 8. For example, 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. Moreover, while the "Attention - Read Before Tapping" warning statement may not be added as an allowable revision without a new COLA unless it falls within one of the specified allowable revisions (*e.g.*, in order to comply with the requirements of the State in which the malt beverage is to be sold), this information could be included in a hangtag tied to the container without obtaining new label approval. Scalese Decl. ¶ 9.

Accordingly, with only minimal changes to Atlas's proposed keg label for The Precious One, Plaintiff can obviate the need for a COLA, sell and distribute its product in interstate commerce, and avoid any credible risk of prosecution.

ii. Plaintiff Failed to Exhaust Its Administrative Remedies

The underlying regulations on the issuance of COLAs, which Plaintiff is not challenging, provide that TTB must notify an applicant whether the application has been approved or denied "[w]ithin 90 days of receipt of an application." 27 C.F.R. § 13.21(b). Further, TTB "may extend this period of time once, by an additional 90 days, if [it] finds that unusual circumstances require additional time to consider the issues presented by an application." *Id*. If no decision is issued within the time periods set forth in the regulations, then the applicant may file an appeal as provided in 27 C.F.R. § 13.25. *Id*.

Here, Atlas submitted its COLA application for the "The Precious One" keg labels on December 20, 2018. ECF No. 3-1 at ¶ 8; *see also* ECF No. 5-1 at ¶ 2. Pursuant to Section 13.21, TTB has 90 days (*i.e.*, until March 20, 2019) to review the application and issue a decision, and that deadline may be extended an additional 90 days if necessary. Plaintiff was on notice of this regulatory scheme yet failed to responsibly take these deadlines into account when it submitted its COLA application. As such, TTB has not unreasonably delayed any action and there is no ripe case or controversy, and Plaintiff's TRO and PI motions should be denied. *See, e.g., Wallace v. Lynn*, 507 F.2d 1186, 1189 (D.C. Cir. 1974) (""Where a failure to exhaust administrative remedies would likely preclude an award of relief at the end of the litigation, the party seeking relief has not made a sufficient showing of probability of ultimate success to obtain a preliminary injunction.").

B. The Other Preliminary Injunction Factors Weigh Against Emergency Relief

Plaintiff also fails to establish that the other three preliminary injunction factors support its motion for emergency relief. First, Plaintiff fails to demonstrate, as it is required to do, "that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22. As the Supreme Court emphasized in *Winter*, "[i]ssuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that plaintiff is entitled to such relief." *Id.* (citation omitted).

The D.C. Circuit "has set a high standard for irreparable injury." *In re Navy Chaplaincy*, 534 F.3d 756, 766 (D.C. Cir. 2008) (citing *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)). To qualify as irreparable, in injury must be "certain and great, actual and not theoretical, beyond remediation, and also of such imminence that there is a clear

and present need for equitable relief to prevent irreparable harm." *Id.* (quotation omitted). Petitioner's speculative fears, therefore, cannot constitute an irreparable injury sufficient to obtain injunctive relief. *See Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam) (It is a "well known and indisputable principle[]" that "[i]njunctive relief will not be granted against something merely feared as liable to occur at some indefinite time." (quotation omitted)). "The movant must provide proof . . . indicating that the harm *is certain to occur in the near future* . . . [and] that the alleged *harm will directly result from* the action which the movant seeks to enjoin." *Id.* (emphasis added).

The D.C. Circuit has recognized, "there is no *per se* rule that a violation of freedom of expression *automatically* constitutes irreparable harm." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006). This is not a case where the FAAA, by its own terms, prohibits Plaintiff's constitutionally-protected speech. To the contrary, Plaintiff recognizes and acknowledges that the statutory and regulatory provisions governing COLAs are reasonable and fair and well-within constitutional bounds, and does not challenge those provisions. Plaintiff has also acknowledged that its product ("The Precious One") will not perish for at least 120 days and that it began brewing the product on January 3, 2019, well after the lapse in appropriations began and thus with full knowledge of the temporary break in agency appropriations. Further, as previously noted, pursuant to 27 C.F.R. § 13.21 the label review process may take up to 90 days, and can be extended an additional 90 days if deemed necessary by TTB, and under TTB's regulations Atlas could bypass that process and produce a permissible keg label for "The Precious One" with only minimal changes to the proposed label that it submitted to TTB on December 20, 2018. Accordingly, Plaintiff's activities constitute nothing more than self-inflicted injury, to the extent that Plaintiff has even suffered injury, and fail to establish irreparable harm.

See Lee v. Christian Coal. of Am., Inc., 160 F. Supp. 2d 14, 33 (D.D.C. 2001) (noting that it is "well-settled that a preliminary injunction movant does not satisfy the irreparable harm criterion when the alleged harm is self-inflicted"); *see also Safari Club Int'l v. Salazar*, 852 F. Supp. 2d 102, 123 (D.D.C. 2012).

A party seeking a preliminary injunction also must demonstrate "that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. "These factors merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009); *see also Pursuing Am.'s Greatness v. Fed. Elec. Comm'n*, 831 F.3d 500, 511 (D.C. Cir. 2016) (balance of harms and public interest merge "because the government's interest *is* the public interest" (emphasis in original)). Here, they weigh decidedly against a preliminary injunction, particularly given that Plaintiff seeks to enjoin an Act of Congress that was "intended to serve the public interest," *Newdow v. Bush*, 355 F. Supp. 2d 265, 293 (D.D.C. 2005) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982)), and seeks unbounded relief that would effectively eliminate the statute's requirements and eviscerate its protections. *See* ECF No. 3-5.

V. Conclusion

For all of the various reasons discussed above, Defendant respectfully submits that Plaintiff's Motion should be denied and this case should be dismissed.

Dated: January 18, 2019

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
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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
Date: 2019.01.18 17:34:19 -05'00'

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

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE comes before the Court upon Defendant's Motion to Dismiss Plaintiff's Complaint.

UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that, for the reasons stated in the Motion, the Motion is GRANTED. Plaintiff's Complaint is DISMISSED. Any pending motions are hereby DENIED AS MOOT. The Clerk of Court is instructed to CLOSE this case.

DONE AND ORDERED in Chambers in Washington, District of Columbia, this ___ day of _____, 2019.

_____
CHRISTOPHER R. COOPER
UNITED STATES DISTRICT JUDGE