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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

LEO COMBAT LLC)	
<i>A Colorado Limited Liability Company</i>)	
)	
v.)	
)	Civ. No.1:15-cv-2323
UNITED STATES DEPARTMENT OF STATE)	
<i>An Executive Agency of the United States of</i>)	COMPLAINT FOR DECLARATORY
<i>America</i>)	AND INJUNCTIVE RELIEF
)	
<i>and</i>)	
)	
JOHN FORBES KERRY)	
<i>Secretary of State of the United States of</i>)	
<i>America, in his official capacity</i>)	

Plaintiff LEO COMBAT LLC hereby alleges:

PARTIES

1. Plaintiff LEO COMBAT LLC is a Limited Liability Company organized under the laws of the State of Colorado, with a principal place of business in Centennial, Colorado

2. Defendant UNITED STATES DEPARTMENT OF STATE is an executive agency of the United States of America
3. Defendant JOHN FORBES KERRY is the Secretary of State of the United States, named in his official capacity.

JURISDICTION AND VENUE

4. This case concerns the constitutionality of certain aspects of the Arms Export Control Act (“AECA”) and the International Traffic in Arms Regulations (“ITAR”), both facially and in their application to Plaintiff.
5. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331 as this case is founded upon the Constitution of the United States and no claim for money damages is made.
6. Venue is proper under 28 U.S.C. § 1402(a)(1), as Plaintiff has a principal place of business in this District, and is therefore a “resident” under 28 U.S. C. § 1391(c)(2).

DECLARATORY JUDGEMENT JURISDICTION

7. Plaintiff is a manufacturer engaged in the production of non-firearm products for use by law enforcement officers and private citizens.
8. Plaintiff is the holder of Federal Firearms License (“FFL”) No. 5-84-005-07-8G-06396, expiring July 1, 2018, and therefore entitled under the Gun Control Act of 1968 (“GCA”)

to manufacture and deal in firearms. This license was issued by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) in June 2015.

9. Plaintiff is in possession of several unique firearm designs which it wishes to bring to market.
10. Plaintiff has not, as of the filing of this complaint, manufactured any firearms, either as prototypes or for sale.
11. The AECA requires that manufacturers of “defense articles” register with the executive agency designated by the President and “pay a registration fee which shall be prescribed by such regulations.” 22 U.S.C. § 2778.
12. The executive agency charged with administration of the registration and export provisions of the AECA by Executive Order 11958, as amended, is the Defendant United States Department of State. Defendant Kerry is chief official of the Department of State.
13. Defendants have promulgated regulations that substantially duplicate the requirements of the AECA, found in Subchapter M of Title 22 of the Code of Federal Regulations (22 CFR §§ 120.1-130.17).
14. 22 CFR § 122.1 reads, in part:

For the purpose of this subchapter, engaging in the business of manufacturing or exporting defense articles or furnishing defense services requires only one occasion of manufacturing or exporting a defense article or furnishing a defense service. Manufacturers who do not engage in exporting must nevertheless register.

15. Plaintiff does not contest Defendants' authority to promulgate regulations implementing the AECA, including the designation of "defense articles," nor does Plaintiff contest the contents of the USML as it is currently written.
16. On April 6, 2015 Plaintiff submitted a Commodities Jurisdiction request to Defendant Department of State, detailing one of Plaintiff's designs for a firearm and requesting a determination as to whether or not this design constituted a "defense article."
17. On May 15, 2015 Defendant Department of State responded with a determination in Case No. CJ 0176-15, formally declaring Plaintiff's design a "defense article." This ruling is attached as Exhibit 1. Plaintiff has not contested this ruling, and agrees that ITAR and the USML currently in force require the classification of the disclosed design as a "defense article."
18. Defendant Department of State has subsequently sent two threatening letters to Plaintiff demanding that Plaintiff register and offering a phone number for a person within the Department of State who can allegedly assist. These letters are attached as exhibits 2 and 3.
19. Plaintiff has placed 12 phone calls to the number provided and has left numerous messages, but has never received a call back or other communication from Defendant Department of State other than the attached letters.
20. Plaintiff is unable to engage in the business of manufacturing, or even pre-production prototyping, of firearms, despite possession of an FFL, because of the threat of criminal and civil penalties attendant with failure to register.

21. Plaintiff asserts that the registration requirement and exaction of a fee for registration, as enacted by Congress and embodied in the regulations promulgated by Defendants, is unconstitutional for reasons enumerated in the counts below.
22. Due to Defendants' unconstitutional conduct, Plaintiff is suffering a real, immediate, and cognizable injury by being restrained from otherwise-legal business activities.
23. As an actual controversy exists between Plaintiff and Defendants, this court therefore may declare the rights of the parties under 28 U.S.C. § 2201.

COUNT 1: DECLARATORY JUDGMENT OF UNCONSTITUTIONALLY EXCESSIVE DELEGATION OF
THE LEGISLATIVE POWER IN MANDATORY FEES CHARGED BY DEFENDANTS.

24. All preceding allegations are realleged.
25. The AECA purports to empower an executive agency to charge a fee for the registration of specified businesses. The text of the relevant section reads, in full:

As prescribed in regulations issued under this section, every person (other than an officer or employee of the United States Government acting in an official capacity) who engages in the business of manufacturing, exporting, or importing any defense articles or defense services designated by the President under subsection (a)(1) of this section shall register with the United States Government agency charged with the administration of this section, and shall pay a registration fee which shall be prescribed by such regulations.

28 U.S.C. § 2778(b)(1)(A)(i)

26. There is no other guidance offered by the AECA on the appropriate level of the registration fee charged or its relationship to expenditures by any executive agency.

27. Defendants have taken full advantage of the lack of Congressional guidance, raising the fee from \$600 as of 2004 (62 Fed. Reg. 27497) to \$2,250 in 2008 (73 Fed. Reg. 55439).
28. There is nothing in the AECA to prevent the Defendants from doubling the fee annually, or imposing whatever arbitrarily high fee might be desired.
29. This *carte blanche* to set fees at any level constitutes excessive delegation of the legislative power and is therefore void on its face.

COUNT 2: DECLARATORY JUDGMENT OF UNCONSTITUTIONAL REGULATION OF DOMESTIC
COMMERCE UNDER THE FOREIGN COMMERCE POWER.

30. All preceding allegations are realleged.
31. The Arms *Export* Control Act (emphasis added) regulates exclusively export and import of “defense articles” found on the USML. Other than the registration requirement, no regulation of domestic commerce in defense articles is found within the AECA.
32. The AECA constitutes Chapter 39 (“Arms Export Control”) of Title 22 (“Foreign Relations and Intercourse”), and is codified at 22 U.S.C. §2751 et seq.
33. The 28 U.S.C. § 2778, which imposes the registration requirement at issue, is codified in Title 22, “Foreign Relations and Intercourse,” Chapter 39, “Arms Export Control,” Subchapter III, “Military Export Controls.”
34. The prefatory sections of the AECA found at 22 U.S.C. § 2751-52 make clear the goals that Congress had in seeking to control the export of weapons.

35. The goals and purposes found therein relate exclusively to “world peace” and foreign policy. None of these sections discuss any need to control the purely domestic commerce in arms or “defense articles.”
36. The AECA is thus grounded exclusively in Congress’ foreign commerce power found in U.S. Const. Art. I § 8. ITAR and the discretionary power to grant or refuse export licenses is grounded in a combination of Congress’ foreign commerce power and the President’s foreign relations power found in Art. II § 2.
37. In the absence of any nexus whatsoever, both the foreign commerce clause and the President’s foreign relations power stop “at the water’s edge.” Congress cannot regulate the purely domestic commerce in any product through the use of the foreign commerce power, nor can the President regulate purely domestic activities through the foreign relations power.
38. The requirement that domestic manufacturers of “defense articles” who are not engaged in foreign commerce register under the AECA and ITAR therefore exceeds Congress’ authority under the foreign commerce clause and the President’s foreign relations power, and is void.
39. Plaintiff does not engage in, has not engaged in, and has no intention of engaging in, either import or export of any defense article.
40. The AECA’s and ITAR’s registration requirement therefore lacks an Art. I § 8 or Art. II § 2 basis and are unconstitutional as applied to Plaintiff.

COUNT 3: DECLARATORY JUDGMENT THAT THE FEE CURRENTLY CHARGED BY DEFENDANTS BEARS NO RATIONAL RELATIONSHIP TO THE EXPENSE OF REGISTRATION, AND UNDULY BURDENS THE RIGHT OF LAWFUL COMMERCE IN FIREARMS PROTECTED BY THE SECOND AMENDMENT TO THE CONSTITUTION.

41. All preceding allegations are realleged

42. The right of individual citizens to own and use firearms for lawful purposes has been recognized by the Supreme Court of the United States as protected by the Second Amendment to the U.S. Constitution.

43. Governments may subject organizations whose activities involve protected rights to generally applicable economic regulation such as income and sales taxation, but may not specifically burden commercial activities related to the exercise of a protected right, such as by taxation specifically of ink and paper, license fees for door-to-door solicitors, or taxation on newspaper advertising.

44. Government regulation that burdens commercial activity central to the exercise of a protected right must be scrutinized by the same level of review that is used for direct regulation of that right, whether rational basis, intermediate, or strict scrutiny.

45. The AECA's imposition of a registration fee on firearm manufacturers singles out companies engaged in protected conduct, i.e. manufacture of products whose possession and use is constitutionally protected. No AECA or ITAR registration is required or fee imposed on manufactures of other consumer goods, such as

automobiles, domestic appliances, or household linens. AECA and ITAR therefore do not constitute generally applicable economic regulation and must be examined in light of the constitutional guarantee of the right to keep and bear arms.

46. The purpose of the AECA, as declared by Congress, is the prevention of export of weapons to hostile nations or terrorist groups contrary to the foreign policy goals and national security interests of the United States. This is unquestionably a legitimate government purpose.
47. The current registration fee charged by Defendants to a manufacturer who never engages in exports is \$2,250 annually. 22 C.F.R. § 122.3(a)(1)
48. A non-exporting manufacturer does not in any way affect the foreign policy goals or national security of the United States.
49. A non-exporting manufacturer imposes no costs on Defendants other than the inclusion of a small amount of data in a larger database maintained by Defendants.
50. The registration form created by Defendants is known as Form DS-2032. Form DS-2032 consists of less than 5 full pages , and includes large areas of text that need not be recorded in Defendants database. A facsimile of this form is included as Exhibit 4. (The original is not attached because it is a protected fillable PDF).
51. The annual fee charged by Defendants to non-exporting manufacturers is, on information and belief, between 100 and 1000 times the actual cost of including an entry in Defendants' database consisting of the basic information required by form DS-2032.

52. The ATF, which is charged by Congress with the regulation of interstate commerce in firearms, charges a license fee of \$50 annually to manufacturers of firearms. 27 C.F.R. § 478.42(a)(2). The annual fee charged by Defendants is therefore 45 times the fee charged by the ATF.
53. The ATF conducts periodic inspections of licensees to examine their books and ensure compliance with recordkeeping and substantive laws surrounding interstate commerce in firearms.
54. On information and belief, Defendants do not conduct similar inspections or otherwise supervise manufacturers who are not engaged in exporting.
55. The annual fee charged by Defendants to register non-exporting manufacturers thus bears no rational relationship to the government's purpose of preventing export of arms to hostile nations or terrorist groups.
56. Plaintiff does not engage in, has not engaged in, and has no intention of engaging in, either import or export of any defense article.
57. Even at the lowest level of constitutional scrutiny, the fee charged to non-exporting manufacturers is unconstitutional as applied to Plaintiff because it creates an undue burden on Second Amendment rights and lacks a rational basis.

PRAYER FOR RELIEF

Plaintiffs prays for entry of judgment as follows:

1. A declaration that fee provision of the Arms Export Control Act is unconstitutional on its face due to the excessive delegation of legislative power in the setting of fees.

2. A declaration that the Arms Export Control Act and the International Traffic in Arms Regulations are unconstitutional as applied to Plaintiff, because the foreign commerce and foreign relations powers cannot be used to regulate purely domestic commerce.

3. A declaration that the Arms Export Control Act and the International Traffic in Arms regulation are unconstitutional as applied to Plaintiff, because the fee charged bears no rational relationship to the government's interest in protection of national security and causes an undue burden on the exercise of Second Amendment rights.

4. Plaintiff further prays that the Defendants be enjoined from taking any enforcement action against Plaintiff under the AECA and ITAR for as long as Plaintiff does not engage in exportation of defense articles.

_____/s/ Robert N. Lyman_____

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