IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-02323-NYW

LEO COMBAT, LLC,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF STATE, and
JOHN FORBES KERRY, SECRETARY OF STATE

Defendants.

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

Defendants hereby respond briefly to new arguments raised in Plaintiff's Response to Defendant's Motion to Dismiss, ECF No. 21 ("Pl. Opp."), and incorporate by reference Defendants' Motion to Dismiss, ECF No. 19 ("MTD"), and Defendants' Opposition to Motion for Summary Judgment, ECF No. 22 ("MSJ Opp."). For the reasons set forth in those prior briefs, as well as those set forth below, Defendants' Motion should be granted and Plaintiff's challenges to the Arms Export Control Act ("AECA") should be dismissed.

I. PLAINTIFF IS NOT ENTITLED TO STANDING BASED ON AN ASSERTION OF INJURIES TO THIRD PARTIES.

Relying on this Court's decision in *Colorado Outfitters Ass'n v. Hickenlooper*, 24 F. Supp. 3d 1050, 1062 (D. Colo. 2014) (Krieger, C.J.), Defendants' opening brief explained why Plaintiff, as a corporate entity, does not have standing to bring a claim under the Second Amendment. *See* MTD at 9-11. In response, Plaintiff asserts for the first time an alternative basis of standing: that, under the so-called "third-party standing doctrine," Plaintiff may bring this lawsuit in reliance on the prospect of injury to its customers. *See* Pl. Opp. at 15-17. Plaintiff's claim is without merit.

As an initial matter, Plaintiff is precluded from relying on a new theory of standing entirely untethered from its Complaint, as Plaintiff's assertion of its customers' rights would be. In general, absent the introduction of evidence pertaining to a party's standing, a court must determine standing exclusively on the basis of the allegations found in the complaint. *E.g.*, *Warth v. Seldin*, 422 U.S. 490, 501-02. Here, Plaintiff's Complaint is devoid of any allegations that would support its new theory of third-party standing, particularly in support of its Second Amendment claim.[1] *See generally* Compl., ECF No. 1. For example, there is no mention in the Complaint of the supposed "customers seeking access to [Plaintiff's] products," on whose injury Plaintiff now seeks to rely. *See* Compl. ¶¶ 41-57. Absent such assertions, Plaintiff's newly-raised allegation of third-party standing must be rejected. *See, e.g.*, *Monroe v. Owens*, 38 F. App'x 510, 516 (10th Cir. 2002) (dismissing claim based on third-party standing where plaintiff "did not allege sufficient facts to establish his standing to assert alleged violations of the rights of unnamed disabled children"); *cf. Colorado Manufactured Hous. Ass'n v. Bd. of Cty. Comm'rs of Cty. of Pueblo*, 946 F. Supp. 1539, 1545 (D. Colo. 1996) (dismissing claim where "there are no facts alleged" in support of standing).

Even if Plaintiff had indicated in its Complaint that its standing is based on the third-party standing doctrine, such an argument would still fail. "Ordinarily, of course, a litigant must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990). The Supreme Court has recognized a limited exception to this general rule, "provided three important criteria are satisfied: The litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute; the litigant must have a close relation to

[1] For this reason, Defendants could not possibly have conceded that Plaintiff has third-party standing, as Plaintiff asserts. *See* Pl. Opp. at 17.

the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests." *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (citations omitted).

Plaintiff has not met any of these requirements. First, for the reasons explained in Defendants' Motion to Dismiss, Plaintiff has not alleged an injury in fact. *See* MTD at 9-11. Second, in both its Complaint and its Opposition, Plaintiff has failed to provide any facts suggesting that Plaintiff has a "close relation" to "customers seeking access to its products" —potential customers, that is, for a product that does not yet exist. *See* Compl. ¶ 10 ("Plaintiff has not, as of the filing of this complaint, manufactured any firearms, either as prototypes or for sale."); *compare Singleton v. Wulff*, 428 U.S. 106, 115 (1976) (providing examples of a sufficiently "close relationship," *e.g.* that between married persons or between a doctor and patient). Finally, Plaintiff has provided no reason to doubt that Plaintiff's potential customers—presumably of adult age and otherwise qualified to purchase a firearm from Plaintiff—can independently and capably assert their own rights.[2] *Cf. Lane v. Simon*, 495 F.3d 1182, 1187 (10th Cir. 2007) ("Nothing in the pleadings permits us to conclude that the publisher and current editors are hindered from bringing suit to vindicate their own First Amendment rights.").[3] Thus, because Plaintiff cannot rely on third-party standing to establish jurisdiction (and for the reasons explained in Defendants' motion), Plaintiff's Second Amendment claims should be dismissed for lack of standing.

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[2] *See, e.g.*, 18 U.S.C. §§ 922(b)(1) (licensed manufacturer may not sell or deliver firearms or ammunition to "any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age"); 922(d) (enumerating other restrictions on firearms sales and transfers).

[3] For similar reasons, any amendment to Plaintiff's complaint to add its theory of third-party standing would be futile. *See Hutchinson v. Pfeil*, 211 F.3d 515, 523 (10th Cir. 2000) (affirming denial of permission to amend complaint where amendment would not cure deficient standing).

II. THE AECA'S REGISTRATION REQUIREMENT FOR MANUFACTURERS OF DEFENSE ARTICLES IS A CONSTITUTIONAL EXERCISE OF CONGRESS'S AUTHORITY TO REGULATE DOMESTIC COMMERCE.

Defendants' opening brief explained that the AECA's registration requirement for domestic manufacturers of defense articles is a constitutional exercise of Congress's authority over foreign commerce, but also notes that even if that were not the case, Congress should be understood to have exercised its authority over domestic commerce. *See* MTD Br. at 19-22; MSJ Opp. at 15-18. Plaintiff now concedes that "Congress has the power to regulate the domestic sale of firearms under the Interstate Commerce Clause," Pl. Opp. at 30, and has complied with, and paid without complaint, a similar registration requirement imposed on it by the Bureau of Alcohol, Tobacco, Firearms and Explosives pursuant to the Gun Control Act. *See* MTD Br. at 21-22 (citing Compl. ¶¶ 8, 52); *see also Montana Shooting Sports v. Holder*, 727 F.3d 975, 982 (9th Cir. 2013) (holding Congress to have such authority under the domestic Commerce Clause). Plaintiff attempts to distinguish its concession on the basis that Congress cannot have exercised its domestic Commerce Clause authority in adopting the AECA. Plaintiff's arguments are meritless.

First, Plaintiff incorrectly asserts that that it is not "fairly possible" to interpret the AECA's registration requirement for domestic manufacturers as an exercise of the domestic Commerce Clause power. Pl. Opp. at 24 (quoting *Nat'l Fed'n of Independent Business* ("*NFIB*") *v. Sebelius*, 132 S. Ct. 2566, 2651 (2012)). The AECA's registration requirement states that "every person . . . who engages in the business of manufacturing, exporting, or importing any defense articles or defense services . . . shall register . . . and shall pay a registration fee." 22 U.S.C. § 2778(b)(1)(A). On its face, this requirement may be "fairly" read in at least two ways -- the two interpretations that Defendants proffered in their opening brief. *See* MTD Br. at 8-9. Either Congress is exercising authority over "manufacturing" as a necessary and proper adjunct to its authority over "exporting[]

or importing [] defense articles," or, by separately enumerating "manufacturing, exporting, or importing," is exercising *both* its domestic and foreign commerce authorities over these respective activities. *Id.* Both are "natural interpretation[s]" of the provision, *see* Pl. Opp. at 24, and pursuant to Supreme Court precedent, the judiciary should consider either source of legislative authority in any review of the constitutionality of the registration requirement, even if one is not the "most straightforward reading."[4] *NFIB*, 132 S. Ct. at 2593 (citing *Parsons v. Bedford*, 3 Pet. 433, 448–449, 7 L.Ed. 732 (1830)).

Plaintiff's second argument—that Congress's authority over domestic commerce cannot be exercised pursuant to the AECA because this would violate the nondelegation doctrine and authorize the use of the Commerce Clause as a "general police power"—is equally meritless. *See* Pl. Opp. at 27-28. Even "broad or general standards provide a sufficiently intelligible principle" to satisfy the Constitution. *United States v. Cotonuts*, No. 13-1539, 2015 WL 306188, at *4 (10th Cir. 2016); *see, e.g., Whitman v. Am. Trucking*, 531 U.S. 457, 472-76 (2001) (Congress may constitutionally rely on "requisite to protect the public health" as an intelligible principle). As Defendants explained in their opening brief, Congress set forth intelligible principles in the AECA for the delegation of authority. *See* MTD at 13-15. Specifically, Congress has required that the Executive Branch exercise its authority "[i]n furtherance of world peace and the security and foreign policy of the United States," and to advance "the ultimate goal of the United States . . . a world [] free from . . . the dangers and burdens of armaments." *Id*. at 14-15

[4] As Defendants previously outlined, Plaintiff's argument that the use of words such as "International" and "Export" in the AECA's titles precludes reading the AECA as an exercise of the domestic Commerce Clause power is meritless: a statute may not be "struck down because Congress used the wrong labels." *NFIB*, 132 S. Ct. at 2597; *see* MTD Br. at 9. This is particularly true where, as here, the imposition of a registration requirement on those engaged in domestic commerce may be straightforwardly read as an exercise of Congress's authority over domestic commerce.

(quoting 22 U.S.C. §§ 2551 & 2778(a)(1)). Defendants thereby demonstrated that Congress, in enacting the AECA, has satisfied the controlling, three-part standard for determining whether a delegation is pursuant to an "intelligible principle." *See* MTD at 12-14 ("[a]n intelligible principle exists so long as Congress clearly delineates [1] the general policy, [2] the public agency which is to apply it, and [3] the boundaries of this delegated authority") (quoting *United States v. Nichols*, 775 F.3d 1225, 1231 (10th Cir. 2014)); *see also id.* at 13 (citing *Samora v. United States*, 406 F.2d 1095, 1098 (5th Cir. 1969) (affirming predecessor statute to the AECA because the "policy is sufficiently defined and the standards sufficiently definite that the delegation . . . is constitutional").[5]

These same standards demonstrate that the inclusion of firearms on the United States Munitions List ("USML"), and the AECA's authorization of a registration fee, would not constitute an improper delegation as an exercise of Congress's domestic Commerce Clause authority, as Plaintiff appears to assert. *See* Pl. Opp. at 28-29. The delegation of authority to establish the USML is limited to "defense articles," and is further constrained by Congress's instructions that the Executive Branch exercise it in "[i]n furtherance of world peace and the security and foreign policy of the United States." 22 U.S.C. § 2778. Congress has provided additional guidance in the statutory text by including numerous examples of the types of items that constitute defense articles. *See, e.g.*, 22 U.S.C. §§ 2778 (a)(3)(b)(1)(B) (limits on the AECA's application to "military firearms (or ammunition, components, parts, accessories, and attachments of such firearms) of United States manufacture); 2778 (f)(5) (relating "defense

[5] Notably, Plaintiff does not contest these arguments directly in its Opposition, and therefore, Defendants' motion should be granted because Plaintiff has conceded the issue. *See People of Colo. ex rel. Suthers v. Gonzales*, 558 F. Supp. 2d 1158, 1165 (D. Colo. 2007); *accord 2-BT, LLC v. Preferred Contractors Insurance Company Risk Retention Group, LLC*, 2013 WL 5729932 at n.4 (D. Colo. 2013).

articles" to "major defense equipment"); 2778(j)(1)(C)(ii) (discussing "rocket systems," "unmanned aerial vehicle systems," "toxicological agents," and "biological agents"). Thus, in contrast to Plaintiff's unfounded interpretation, *see* Pl. Opp. at 29-30, this section thus does not authorize "the President . . . to arbitrarily select industries for regulation with no Congressional guidance whatsoever." *Id.* In short, there is no basis for the claim that the AECA's registration requirement exceeds Congress's enumerated authorities—particularly given Plaintiff's concession that such a registration requirement would be constitutional if enacted separately. *See* Pl. Opp. at 28 ("Defendants are correct that Congress can regulate the sale of firearms"). Count Two of Plaintiff's Complaint should therefore be dismissed.

III. PLAINTIFF'S SECOND AMENDMENT CLAIM SHOULD BE DISMISSED ON THE RECORD BEFORE THE COURT.

Defendants' Motion to Dismiss explained that the ITAR registration fee is lawful and permissible whether considered under the Second Amendment analytic framework adopted by the Tenth Circuit, or the approach adopted by other courts for Second Amendment challenges to registration fees. *See* MTD at 22-27 (citing, *e.g.*, *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010) (adopting a two-step framework for analyzing Second Amendment claims); *Kwong v. Bloomberg*, 723 F.3d 160, 165 (2d Cir. 2013) (applying "First Amendment fee jurisprudence" to Second Amendment "fee claims"). Rather than respond directly, Plaintiff instead insists that the Court should adopt a novel legal theory, never before applied in the Second Amendment context, to determine whether the fee imposes an "undue burden," and also contends further that factual issues preclude dismissal. *See* Pl. Opp. at 32-38. Plaintiff's approach is inapposite and, for the reasons set forth in Defendants' motion, Plaintiff's Second Amendment claims should be dismissed.

First, by failing to respond to Defendants' analysis—which applied, *inter alia*, the Tenth Circuit's controlling Second Amendment precedent—Plaintiff has conceded those arguments.

See, e.g., *Alioto v. Town of Lisbon*, 651 F.3d 715, 721 (7th Cir. 2011); *Greer v. Bd. of Trustees of Univ. of D.C.*, 113 F. Supp. 3d 297, 305 (D.D.C. 2015); *Ursery v. Fed. Drug Enf't Admin.*, No. 4:12CV1911 HEA, 2014 WL 117627, at *2 (E.D. Mo. Jan. 13, 2014); *Scognamillo v. Credit Suisse First Boston LLC*, No. C03-2061 TEH, 2005 WL 2045807, at *11 (N.D. Cal. Aug. 25, 2005) *aff'd sub nom. Scognamillo v. Credit Suisse First Boston*, 254 F. App'x 669 (9th Cir. 2007); *Lipton v. Cty. of Orange*, NY, 315 F. Supp. 2d 434, 446 (S.D.N.Y. 2004). This Court should therefore view Plaintiff's failure to respond to the arguments raised by Defendants—including those based on the two-step framework established by the Tenth Circuit—as a concession that its Second Amendment claim fails.

In addition, further factual development is not required to grant Defendants' motion because, even if the Court resolves Plaintiff's factual allegations in Plaintiff's favor, Defendants are still entitled to judgment on Plaintiff's Second Amendment claims. The standard for a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is that the Court should accept Plaintiff's allegations as true. *See Cressman v. Thompson*, 719 F.3d 1139, 1141 (10th Cir. 2013) ("At the motion-to-dismiss stage, [w]e must accept as true all well-pleaded factual allegations in a complaint and view these allegations in the light most favorable to the plaintiff." (citation omitted)). Plaintiff alleges that Defendants use fees imposed on non-exporting manufacturers to defray the costs associated with regulating exporting manufacturers, and that this allegation requires the Court to authorize "Plaintiff . . . to review the books" of the State Department. Pl. Opp. at 36. Plaintiff presents this proposition without citation to a single case, *see* Pl. Opp. at 35-38, and such discovery is unnecessary: even assuming that Defendants use the fee imposed on non-exporting manufacturers to administer and enforce the registration provisions more generally, it is Plaintiff's burden to establish that such use is impermissible *as a matter of law*. This is a

burden that Plaintiff cannot meet, given that the most persuasive precedent holds otherwise. *See, e.g., Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228, 1247-48 (10th Cir. 2004) (upholding flat do-not-call registry fee because fee defrayed broader expenses associated with administering entire registry); *cf. Kwong v. Bloomberg*, 723 F.3d 160, 166 n.10 (2d Cir. 2013) ("[A] fee is not unconstitutional simply because the revenues derived therefrom are not limited solely to the costs of administrative activities, such as processing and issuing fees." (citation omitted)). In light of this precedent cited by Defendants, and Plaintiff's lack of response thereto, Count Three of Plaintiff's Complaint should be dismissed as well. *See McDevitt v. Disciplinary Bd. of the Supreme Court for the State of N.M.*, 108 F.3d 341 at *3 (table) (10th Cir. 1997) (affirming dismissal of fee challenge, and relying on legal advertising rule providing how fee will be used); *Second Amendment Arms v. City of Chicago*, No. 10-CV-4257, 2015 WL 5693724, at *17 (N.D. Ill. Sept. 28, 2015) (dismissing claim challenging registration fee requirement, where "there is no indication [] that the [fee] was intended for any other purpose" (citing *Justice v. Town of Cicero*, 827 F. Supp. 2d 835, 842 (N.D. Ill. 2011))).[6]

IV. PLAINTIFF'S OTHER CLAIMS SHOULD BE DISMISSED FOR LACK OF STANDING OR ON THE MERITS.

Defendants' previous briefs largely anticipate and address the remaining arguments in Plaintiff's opposition brief. In sum, as Defendants explained in moving to dismiss, the conjecture in Plaintiff's complaint that Defendants might begin "doubling the fee annually, or imposing whatever arbitrarily high fee might be desired," Compl. ¶ 28, does not set forth an injury

[6] Plaintiff seeks leave to amend its Complaint to add factual details regarding the prevalence of the firearm of which Plaintiff's designs are a variant. Pl. Opp. at 31 n.4. But regardless of the popularity of that firearm, Plaintiff has alleged that its own designs are "unique." Compl. ¶ 9. Thus, Defendants oppose the filing of an amended complaint as futile. *See Brereton v. Bountiful City*, 434 F.3d 1213, 1219 (10th Cir. 2006). If the Court is inclined to consider permitting amendment, Defendants respectfully request the opportunity to further brief this issue.

sufficient to establish standing. *See* MTD Br. at 5; *Finstuen v. Crutcher*, 496 F.3d 1139, 1143 (10th Cir. 2007) (no standing where an injury is not "concrete in both a qualitative and temporal sense"). Although Plaintiff now asserts that the "imposition of *any fee of any amount*"—even, presumably, $1—"constitutes an injury to all manufacturers of defense articles," Pl. Opp. at 5-6 (emphasis in original), this does not change the analysis because Plaintiff has *not* yet manufactured a defense article and has *not* incurred the imposition of such a fee. *See* Compl. ¶ 10. And Plaintiff's effort to avoid this problem by casting its claims as a so-called "pre-enforcement challenge," Pl. Opp. at 6, is futile: such challenges satisfy Article III only where a party intends "to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute," and where there is a "credible threat of prosecution." *Id.* (quoting *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014)). Here, the AECA's registration requirement only imposes a registration fee and does not *proscribe* Plaintiff from manufacturing. *Driehaus*, 134 S. Ct. at 2342. In such circumstances, the rationale for a pre-enforcement challenge is absent: Plaintiff simply is not faced with a choice between "intentionally flouting [the] law" and "forgoing . . . constitutionally protected activity." *Steffel v. Thompson*, 415 U.S. 452, 462 (1974).[7]

[7] Plaintiff's purported "pre-enforcement challenge" is flawed in other ways. In the context of federal regulation of firearms, neither "a general threat of prosecution is not enough" nor the presumption that the Government will enforce the law is sufficient to establish a "credible threat of prosecution." *San Diego County Gun Rights Comm. v. Reno* ("*San Diego County*"), 98 F.3d 1121, 1126-27 (9th Cir. 1996); *see O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). The State Department's correspondence, *see* Compl. ¶¶ 17-18 & Ex. 1-3, states only that "[f]ailure to register . . . *could* result in civil and/or criminal penalties" and is also insufficient to meet Plaintiff's burden. *See Nat'l Rifle Ass'n v. Magaw*, 132 F.3d 272, 293-94 (6th Cir. 1997) (holding that "plaintiffs who telephoned [federal] agents, submitted a hypothetical question, and received an answer that the questioned activity could subject them to federal prosecution does not confer standing"); *accord Kegler v. Dep't of Justice*, 436 F. Supp. 2d 1204, 1212-19 (D. Wyo. 2006) (rejecting Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") letters as source of standing); *Crooker v. Magaw*, 41 F. Supp. 2d 87, 92 (D. Mass. 1999) (holding that plaintiff, who solicited and received a written ATF opinion, did not have standing).

As to standing for Plaintiff's Commerce Clause claim, Plaintiff wrongly suggests that Defendants have imported the "[l]ikelihood of success on the merits" into the standing analysis. Pl. Opp. at 9. But again that is incorrect; defendants have simply applied the standard for dismissal: even if Plaintiff could prove the claim set forth in its pleading (that Congress may not register domestic manufacturers under its *foreign* Commerce Clause authority), Plaintiff fails to allege that Congress lacks other authority for such regulation, an omission that precludes relief on this claim.[8] *See NFIB*, 132 S. Ct. at 2597. Because Plaintiff has failed to plead a claim that, even if successful, would entitle Plaintiff to relief, this flaw is jurisdictional.

Defendants also separately established that Plaintiff's claims should be dismissed on the merits. The AECA's registration requirement is a constitutional delegation of authority, guided by an intelligible principle set forth in the statute, assigned to an Executive Branch actor (the President), and bounded by its limits to "defense articles and services." MTD at 13-14. Contrary to Plaintiff's assertion, Defendants have properly "provide[d] a citation to [the] section of the law in which Congress provide[d] an 'intelligible principle,'" Pl. Opp. at 17: in fact, Defendants have cited two such sections, 22 U.S.C. § 2551 and 22 U.S.C. § 2778(a)(1).[9] *See* MTD at 15. And, as explained above, Defendants have demonstrated that the AECA's registration requirement neither exceeds the bounds of Congress's constitutional authority nor

[8] Contrary to Plaintiff's assertion that Defendants' argument ignores or contradicts pre-*NFIB* precedent, Pl. Opp. at 22-24, Defendants' opening brief amply explained how the Supreme Court's examination of other enumerated powers to "save the [Affordable Care] Act," is consistent with the judiciary's longstanding practice of avoiding an unconstitutional construction of a statute. *See* MTD Br. at 8-9 (citing, *e.g.*, *Blodgett v. Holden*, 275 U.S. 142, 148 (1927); *Parsons v. Bedford*, 3 Pet. 433, 448–449, 7 L.Ed. 732 (1830); *NFIB*, 132 S. Ct. 2566, 2593).

[9] To the extent Plaintiff objects to these standards as applying to the "larger regulatory scheme" of which the registration fee is a part, Pl. Opp. at 18, the authorities previously cited by Defendants demonstrate that Congress need not supply a separate "intelligible principle" for each subsection of a broad regulatory scheme. *See* MTD at 13 (citing *Federal Energy Admin. v. Algonquin SNG*, 426 U.S. 548 (1976)).

transgresses on the rights protected by the Second Amendment. *See generally* MTD at 17-27.

CONCLUSION

For the foregoing reasons, Plaintiff's Complaint should be dismissed.

Respectfully submitted this 3rd day of March 2016,

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Eric J. Soskin
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