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.

MEMORANDUM OPINION AND ORDER

Magistrate Judge Nina Y. Wang

This matter is before the court on Defendants' Motion to Dismiss [#19] and Plaintiff's Motion for Partial Summary Judgment [#20]. The court considers these motions pursuant to 28 U.S.C. § 636(c) and the Order of Reference dated November 20, 2015 [#11]. After considering the Parties' briefing, arguments at the March 17, 2016 hearing, and the applicable law, the court GRANTS Defendants' Motion to Dismiss and DENIES Plaintiff's Motion for Partial Summary Judgment.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff Leo Combat, LLC ("Plaintiff" or "Leo Combat") initiated this case by filing a Complaint on October 20, 2015, naming the United States Department of State and John Kerry, as the Secretary of State, as Defendants. [#1]. Plaintiff seeks a declaratory ruling that certain aspects of the Arms Export Control Act ("AECA"), 22 U.S.C. §§ 2751 *et seq.*, and the International Traffic in Arms Regulations ("ITAR"), both facially and in their application to

Plaintiff, are unconstitutional. [#1 at 2, ¶ 4]. It also seeks an injunction to prevent Defendants from taking any enforcement action against Plaintiff, "so long as Plaintiff does not engage in exportation of defense articles," *i.e.*, Plaintiff limits its manufacture and sale of defense articles to the United States domestic market. [*Id.* at 11, ¶ 4].

The Arms Export Control Act ("AECA"), 22 U.S.C. §§ 2751 *et seq.*, authorizes the President, "[i]n furtherance of world peace and the security and foreign policy of the United States" to "control the import and export of defense articles and defense services" and to promulgate regulations accordingly. 22 U.S.C. § 2778(a)(1). The AECA requires that manufacturers of "defense articles" register with executive agency designated by the President and "pay a registration fee which shall be described by such regulations." 22 U.S.C. § 2278. The President has delegated his authority to designate defense articles to the Secretary of State and the Department of State ("State Department"), *see* Exec. Order 13637(n)(iii), which has accordingly promulgated the International Traffic in Arms Regulations ("ITAR"), and which is administered by the Department's Directorate of Defense Trade Controls ("DDTC"). *See* Executive Order 13637(n)(iii); 22 C.F.R. § 120.2; *see generally* 22 C.F.R. §§ 120-130.

The United States Munition List ("USML") is one part of the ITAR and is an extensive listing of items that constitute "defense articles and defense services" that are governed by the AECA. 22 C.F.R. § 121.1. The ITAR requires "any person who engages in the United States in the business of manufacturing . . . to register with the Directorate of Defense Trade Controls." 22 C.F.R. § 122.1(a). The regulation is clear that a manufacturer who does not engage in exporting must still register. *Id.* The registration requirements, however, do not apply to "persons who engage in the fabrication of articles solely for experimental or scientific purposes,

including research and development." *Id.* at § 122.1(b)(4). Defendant John Forbes Kerry is the Secretary of State and chief official of the Department of State that oversees the implementation of ITAR.

Plaintiff is a limited liability company that has allegedly developed "several unique firearm designs." [#1 at ¶¶ 1, 8]. On April 6, 2015, it submitted one of these designs, for "an aluminum receiver for a 1911-style handgun, with a steel insert to reinforce critical areas subject to damage" ("subject handgun"), to DDTC and requested a determination of whether the design describes a defense article subject to the ITAR. [#1-1]. On May 15, 2015, DDTC responded, designating the item as a "defense article." *See* [*id.*]. Plaintiff concedes that DDTC's classification is proper under the "USML currently in force." [#1 at ¶ 17]. As of the filing of the Complaint, Plaintiff had not yet "manufactured any firearms, either as prototypes or for sale." [#1 at ¶ 9].

Plaintiff challenges the application of the AECA to it in three different ways. In Count 1, Plaintiff alleges that the registration fee imposed on manufacturers of "defense articles" is facially void because it constitutes excessive delegation of the legislative power. In Count 2, Plaintiff contends that the registration requirement promulgated pursuant to the Foreign Commerce Clause is invalid as applied to non-exporting manufacturers given the lack of any foreign commerce. Finally, in Count 3, Plaintiff contests the amount of the registration fee as an undue burden on the exercise of its Second Amendment rights.

The court held a Status Conference on December 22, 2015. [#15]. In that Status Conference, the Parties proposed starting the case by filing cross-motions on legal issues that could be dispositive of some or all of Plaintiff's claims. [*Id.*]. According to the Parties'

proposal, Defendants would submit a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6), and on the same date Plaintiff would submit a motion for partial summary judgment on Counts 1 and 2. [*Id.*]. The Parties would then file response briefs. [*Id.*]. No reply briefs would be filed, absent leave of court. [*Id.*]. On January 29, 2016, the Parties filed their respective motions. [#19; #20]. The Parties then filed response briefs. [#21; #22]. Defendants, with leave of court, also filed a reply brief in support of their Motion to Dismiss. [#25; #26].

In Defendants' Motion to Dismiss, they argue that the court should dismiss Plaintiff's claims due to a lack of subject matter jurisdiction. According to Defendants, Plaintiff lacks standing to bring Count 1 because Plaintiff's non-delegation theory rests on the theory that the Executive Branch might raise the AECA registration theory in the future, and such a speculative future injury is insufficient to establish standing. They also assert that Plaintiff lacks standing for Count 2 because Plaintiff's authorization of this fee under the foreign commerce power does not give rise to a redressable injury sufficient for standing. Further, for Count 3, they assert that Plaintiffdoes not have Second Amendment rights as a corporation that could be injured by the AECA. Finally, Defendants argue that even if Plaintiff could establish standing, it has failed to state a claim under any of its constitutional theories.

In Plaintiff's Motion for Partial Summary Judgment, it argues that it is entitled to summary judgment on Counts 1 and 2. As to Count 1 (unconstitutional delegation of legislative power), Plaintiff argues that there is no "intelligible principle" to guide the Executive Branch in setting fees charged for registration under the Arms Export Control Act (the "AECA"), and therefore the statutory language directing the State Department to charge "a fee" is an

impermissible delegation of the legislative power, and void on its face. As to Count 2 (unconstitutional regulation of domestic activity under the foreign commerce power), Plaintiff argues that the AECA is grounded exclusively in the foreign commerce power, and therefore may not constitutionally be applied to the regulation of purely domestic activity such as the Plaintiff's business.

As set out below, the court finds that it does not have subject matter jurisdiction over the claims in this case. Accordingly, the court will only address the parties' arguments regarding subject matter jurisdiction and will not reach dismissal under Rule 12(b)(6) or summary judgment under Rule 56. *See Colo. Outfitters Ass'n v. Hickenlooper* ("*Colorado Outfitters II*"), 823 F.3d 537, 543 (10th Cir. 2016) ("[A] federal court can't 'assume' a plaintiff has demonstrated Article III standing in order to proceed to the merits of the underlying claim, regardless of the claim's significance.").

LEGAL STANDARD

Though the Parties do not emphasize this point, Plaintiff proceeds under the Declaratory Judgment Act for all three of its claims. [#1]. The Declaratory Judgment Act provides, "[i]n a case if actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126 (2007) (citing 28 U.S.C. § 2201(a)). The Supreme Court has interpreted the language of "actual controversy" in the Declaratory Judgment Act as the type of "cases" and "controversies" that are within the court's subject matter jurisdiction under Article III of the Constitution. *Id.* at 126-27. Under Article III of the United States Constitution, federal courts

only have jurisdiction to hear certain "cases" and "controversies." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). As such, courts "are duty bound to examine facts and law in every lawsuit before them to ensure that they possess subject matter jurisdiction." *The Wilderness Soc. v. Kane Cty., Utah*, 632 F.3d 1162, 1179 n.3 (10th Cir. 2011) (Gorsuch, J., concurring). Indeed, courts have an independent obligation to determine whether subject matter jurisdiction exists, even in the absence of a challenge from any party. *1mage Software, Inc. v. Reynolds & Reynolds, Co.*, 459 F.3d 1044, 1048 (10th Cir. 2006) (citing *Arbaugh v. Y & H Corp*., 546 U.S. 500 (2006)). Plaintiff must establish standing to bring each of the three claims separately. *See Bronson v. Swensen*, 500 F.3d 1099, 1106 (10th Cir. 2007).

Under Fed. R. Civ. P. 12(b)(1), a court may dismiss a complaint for lack of subject matter jurisdiction. When a court dismisses a case under Rule 12(b)(1), this is not a determination on the merits of the case, but only a decision that the court lacks the authority to adjudicate the action. *See Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994) (recognizing federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so). A court that lacks jurisdiction "must dismiss the cause at any stage of the proceeding in which it becomes apparent that jurisdiction is lacking." *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). "Because the jurisdiction of federal courts is limited, 'there is a presumption against our jurisdiction.'" *Marcus v. Kansas Dep't of Revenue*, 170 F.3d 1305, 1309 (10th Cir. 1999) (quoting *Penteco Corp. v. Union Gas Sys., Inc.*, 929 F.2d 1519, 1521 (10th Cir. 1991)). If the court determines that it lacks subject matter jurisdiction over a claim, it may not consider any other issue. *See Cunningham v. BHP Petroleum Great Britain PLC*, 427 F.3d

1238, 1245 (10th Cir. 2005) ("Simply put, once a federal court determines that it is without subject matter jurisdiction, the court is powerless to continue.") (citation omitted).

Finally, the Declaratory Judgment Act also vests "unique and substantial" discretion within the district court to determine whether it should exercise jurisdiction over an action brought pursuant to the Declaratory Judgment Act.[1] *See MedImmune*, 549 U.S. at 136 (citations omitted).

ANALYSIS

I. Defendants' Motion to Dismiss

A. Subject Matter Jurisdiction

As discussed above, federal courts only have jurisdiction to hear certain cases and controversies. *Susan B. Anthony List*, 134 S. Ct. at 2341. To satisfy Article III's case-or-controversy requirement, a plaintiff is required to demonstrate standing by establishing "(1) an 'injury in fact,' (2) sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case." *Lujan*, 504 U.S. at 561. "[A] plaintiff must demonstrate standing for each claim he seeks to press . . . ." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). "When evaluating a plaintiff's standing at the stage of a motion to dismiss on the pleadings, 'both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe

[1] Because Defendants do not request that the court decline jurisdiction through the exercise of this discretion, the court does not consider whether discretionary dismissal is appropriate in this action.

the complaint in favor of the complaining party.'" *S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1152 (10th Cir. 2013) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

To establish the existence of an "injury in fact," "a plaintiff must offer something more than the hypothetical possibility of injury." *Colorado Outfitters II*, 823 F.3d at 544.

Instead, the alleged injury must be "concrete, particularized, and actual or imminent." *Id.* at *3 (citing *Lujan*, 504 U.S. at 560). The redressability requirement centers on whether it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561. The questions of justiciability (other than mootness) are ascertained as of the time the action is brought. *See Friends of the Earth, Inc. v. Laidlaw Envt'l Servs.*, 528 U.S. 167, 180 (2000).

1. Count I: Standing to Bring a Claim Alleging Unconstitutionally Excessive Delegation of the Legislative Power in Mandatory Fees Charged Under the AECA

Defendants' first argument regarding lack of jurisdiction attacks Plaintiff's non-delegation claim in Count 1. Defendants argue that Plaintiff has not satisfied the injury-in-fact prong of standing because it does not establish an imminent injury. [#19 at 6]. Imminent injury requires a threat of injury to a legally protected interest that "is real and immediate, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560; *State of Utah v. Babbitt*, 137 F.3d 1193, 1212 (10th Cir. 1998). The "underlying purpose of this imminence requirement . . . is to ensure that the court in which suit is brought does not render an advisory opinion in 'a case in which no injury would have occurred at all.'" *Animal Legal Def. Fund, Inc. v. Espy*, 23 F.3d 496, 500 (D.C. Cir. 2004) (quoting *Lujan*, 504 U.S. at 564 n.2). "[W]hile imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the

alleged injury is not too speculative for Article III purposes—that the injury is certainly impending." *Colo. Outfitters*, 823 F.3d at 544-45 (quoting *Lujan*, 504 U.S. at 564 n.2) (internal emphasis and quotation marks omitted).

Plaintiff acknowledges that it has not, as of the filing of the Complaint, manufactured any firearms, either as prototypes or for sale. [#1 at ¶ 10]. Nevertheless, Plaintiff seeks to challenge the constitutionality of the AECA's delegation of legislative power in the mandatory registration fees charged by Defendants for manufacturers of "defense articles." *See* [#1 at ¶¶ 24-29]. Plaintiff states that the AECA does not offer appropriate guidance on the level of the registration fee charged or its relationship to expenditures by any executive agency. [#1 at ¶ 26]. According to Plaintiff, Defendants have taken advantage of this lack of guidance by raising the fee from $400 in 2004 to $2,250 in 2008. [#1 at ¶ 27]. Plaintiff further asserts that "[t]here is nothing in the AECA to prevent the Defendants from doubling the fee annually, or imposing whatever arbitrarily high fee might be desired." [#1 at ¶ 28].

a. Challenge to the Ability to Change the Amount of the Registration Fee

Defendants argue that Plaintiff's theory of relief in Count 1 based on the premise that under the AECA, Defendants could arbitrarily raise the fees at some unknown point in the future is too speculative to constitute an imminent injury. Defendants argue that Plaintiff's allegations do not provide any reason to believe that the purportedly arbitrary raising of the fees are likely, particularly when, as Plaintiff concedes, the fee has only been increased once since 2004. *See* [#19 at 7]. The court agrees that Plaintiff's assertions about potential fee increases do not provide anything more than conjecture that the fees may be arbitrarily increased at some point in the future. If this was the sole basis for Plaintiff's challenge of the AECA in Count I, the court

would find that Plaintiff had not met the requirement of an imminent injury sufficient to confer standing, and conclude its consideration here. *See Lujan*, 504 U.S. at 560 (where "plaintiff alleges only an injury at some indefinite future time," this is insufficient to confer standing); *Colorado Outfitters II*, 823 F.3d at 550-51 ("someday" speculations by plaintiff that her ammunition magazines would "eventually" wear out or that it would be "possible" to lose them insufficient to establish standing). However, in response to Defendants' assertion that Plaintiff is challenging only the potential for future arbitrary changes to the fee structure, Plaintiff argues that its injury arises from the existence of the fee itself, not from a speculative fee increase in the future. *See* [#21 at 5].

b. Pre-Enforcement Challenge to Fee Itself

According to Plaintiff, because the fee provision of the AECA constitutes unlawful delegation of the legislative power, that provision is void on its face. [*Id.*]. Plaintiff asserts that that accordingly, a fee of any amount constitutes an injury to all manufacturers of defense articles. [#25 at 5]. While this theory is not entirely clear in the Complaint, the court draws all reasonable inferences in favor of Plaintiff and finds that Plaintiff's Complaint contains an allegation that any fee (not only an increase in fee) is void. [#1 at ¶ 29 ("This carte blance [sic] to set fees at any level constitutes excessive delegation of legislative power and is therefore void on its face.").

Plaintiff argues that it has standing to bring a pre-enforcement challenge to the constitutionality of the AECA registration fee based on the probability of future injury incurred by not paying the fee and being subjected to civil and criminal liability. Plaintiff bases this argument on Defendants' letters to it in which Defendants represents that "[f]ailure to register

with [the Office of Defense Trade Controls Compliance] constitutes a violation of the AECA and the ITAR and could result in civil and/or criminal penalties."[2] [#21 at 6]. Defendants disagree and contend that Plaintiff lacks standing to bring a pre-enforcement challenge because Plaintiff is not attempting to engage in an activity that is proscribed by statute. Rather, the AECA's registration requirement only imposes a registration fee and does not proscribe Plaintiff from manufacturing. [#26 at 10]. Defendant also argues that there is not a credible threat of prosecution because a general threat of prosecution is not enough and the State Department's two letters to Plaintiff state only that "[f]ailure to register . . . *could* result in civil and/or criminal penalties." [#26 at 10 n.7 (emphasis in original)].

While in some cases actual enforcement of a statute is not necessarily a prerequisite to bring suit, *Driehaus*, 134 S. Ct. at 2342, a plaintiff must still establish an injury-in-fact for a pre-enforcement challenge. The injury-in-fact inquiry for a pre-enforcement challenge has three prongs. First, the court considers whether the plaintiff has alleged "an intention to engage in a course of conduct arguably affected with a constitutional interest." *Susan B. Anthony List*, 134 S. Ct. at 2343. Second, the court examines whether the intended future conduct is arguably proscribed by the statute plaintiffs wish to challenge. *Id.* at 2344. Third, the court assesses whether the threat of future enforcement of the statute is substantial. *Id.* at 2345; *see also Colorado Outfitters II*, 823 F.3d at 545. Pre-enforcement declaratory actions require, at a minimum, "an objectively justified fear of real consequences, which can be satisfied by showing

[2] As previously noted, Plaintiff has not yet manufactured any firearms, either as prototypes or for sale. [#1 at ¶ 10]. Accordingly, there is no alleged injury from an actual payment of a registration fee.

a credible threat of prosecution." *In re Special Grand Jury 89-2*, 450 F.3d 1159, 1173-74 (10th Cir. 2006) (quoting *Winsness v. Yocom*, 433 F.3d 727, 732 (10th Cir. 2006)).

Here, Plaintiff alleges its intention to manufacture its firearm design without registration and payment of the AECA registration fees. *See, e.g.*, [#1 at ¶¶ 20-22]. Plaintiff argues that the AECA registration fees are unconstitutional. [#1 at ¶ 21]. If Plaintiff proceeds with the manufacture of the subject handgun, Plaintiff asserts that non-payment of the registration fees could subject it to penalties of not more than $1,000,000, imprisonment not more than 20 years, or both for each violation. 22 U.S.C.A. § 2778(c); *see also* [#1-2 ("Failure to register with this Office constitutes a violation of the AECA and the ITAR and could result in civil and/or criminal penalties."); #1-3 (same)]. Plaintiff contends that it is subject to a credible threat of prosecution because the State Department has sent letters to Plaintiff stating that "[f]ailure to register with this Office constitutes a violation of the AECA and could result in civil and/or criminal penalties." [#1-2; #1-3].

The court does not pass on the first two prongs of the pre-enforcement, injury-in-fact analysis because it finds the third prong dispositive. Plaintiff contends that it is subject to a credible threat of prosecution based on the letters the State Department sent after Plaintiff submitted a Commodities Jurisdiction request to the State Department. [#1 at ¶¶16-18]. But the court is not persuaded that these letters to Plaintiff following the State Department's classification of Plaintiff's firearm design as a "defense article" amount to a credible threat of prosecution. While both letters indicate that the State Department's Office of Defense Trade Controls Compliance "has reason to believe that Leo Combatt [sic] LLC is involved in the business of manufacturing and/or exporting defense articles or defense services." [#1-2; #1-3],

there is no indication that the State Department or any federal authority has initiated a specific investigation into or prosecution of Plaintiff for AECA violations. [#1-2, #1-3].

Nor do the additional facts as alleged by Plaintiff persuade this court to conclude that Leo Combat faces a credible threat of prosecution at this time, apart from or in addition to the State Department letters. Leo Combat contends that it "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." [#1 at ¶ 20]. However, the ITAR explicitly exempts from its registration requirements "persons who engage in the fabrication of articles solely for experimental or scientific purposes, including research and development." 22 C.F.R. § 122.1(b)(4). Therefore, Plaintiff has not articulated a credible threat of prosecution based on any pre-production prototyping.

In addition, as of the filing of the Complaint, Plaintiff concedes it had not yet "manufactured any firearms, either as prototypes or for sale." [#1 at ¶ 9]. The Complaint does not contain any averment that Leo Combat has taken any other steps to facilitate the manufacturing the subject handgun, including but not limited to identifying potential customers, entering contracts to develop a prototype, or securing funding for the manufacturing operation. [#1]. Nor does the allegation that Leo Combat's manufacture of "non-firearm products for use by law enforcement officers and private citizens" suggest that the manufacture of the subject handgun is a simple extension of an existing line of business. Counsel for Leo Combat conceded at oral argument that it did not know, and had no way of knowing, how long it might take to reach a point of actual manufacturing. [#29 at 10:20-11:3]. Given these facts as alleged in the Complaint, this court finds that any threat of prosecution is simply too attenuated to rise to the

level of a credible threat of prosecution. *See Nat'l Rifle Ass'n v. Magaw*, 132 F.3d 272, 293-94 (6th Cir. 1997) (holding that "plaintiffs who telephoned BATF agents, submitted a hypothetical question, and received an answer that the questioned activity could subject them to federal prosecution does not confer standing.").

In so ruling, the court distinguishes this case from others where courts have found standing to sue based on articulated allegations that supported a finding of tangible economic injury. In *Montana Shooting Sports v. Holder Ass'n*, 727 F.3d 975 (9th Cir. 2013), the Ninth Circuit held that the individual plaintiff had standing on the grounds of economic injury because the plaintiff alleged "much more than the 'some day' intentions without any description of concrete plans." *Id.* at 980. Unlike this case, the individual plaintiff in *Montana Shooting Sports* had alleged that he had "a background in running his own shooting range equipment manufacturing business," "ha[d] identified suppliers for the component parts of the [firearm], ha[d] design plans for the firearm ready to load into manufacturing equipment, and ha[d] identified hundreds of customers who have ordered the [firearm]." *Id.* In contrast, Leo Combat does not allege sufficient facts for this court to conclude that its plans are concrete, rather than aspirational.

On the basis of the foregoing, the court finds that Plaintiff does not have standing to pursue Count 1, and therefore, it would be improper for the court to substantively address Plaintiff's non-delegation challenge to the constitutionality of the AECA mandatory fees. [3]

[3] In a footnote, Defendant suggests that in the alternative, the court could find that Plaintiff's claims are unripe. [#19 at 7 n.3]. The question of whether a claim is ripe for review bears on the court's subject matter jurisdiction. *See New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1498 (10th Cir. 1995). The injury requirement is "particularly difficult to divorce" from the ripeness requirement. *Morgan v. McCotter*, 365 F.3d 882, 887 (10th Cir. 2004). "Like

2. Count II: Standing to Bring a Claim Alleging Unconstitutional Regulation of Domestic Activity Under the Foreign Commerce Power

Defendants next argue that Plaintiff has not demonstrated an injury that would confer standing for Count 2, Plaintiff's claim that Congress has exceeded its constitutional authority under the Foreign Commerce Clause with respect to the AECA registration and fee requirement as applied to Plaintiff's purely domestic activities. Defendants argue that Plaintiff does not appear to allege injury at all with respect to this claim. [#19 at 8]. Defendants further argue that even if Plaintiff has adequately alleged an Article III injury related to the purported burdens of the fee, such injury could not be redressed by a favorable decision because Plaintiff has not alleged that Congress entirely lacks the authority to register Plaintiff as a domestic manufacturer of defense articles—only that Congress lacks such authority under the Foreign Commerce Clause. [#19 at 8]. And according to Defendant, it is well-established that the court is not limited to considering whether a single provision of the Constitution serves as the basis for a lawful exercise of Congressional authority. [#19 at 8]. Plaintiff responds that Defendants are improperly attempting to "put the merits cart before the standing horse" by requiring it to prevail on the merits before it can establish standing. [#21 at 8].

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standing, the ripeness inquiry asks whether the challenged harm has been sufficiently realized," and is partly "rooted in the 'cases and controversies' requirement of Article III.'" *Id.* at 890. The doctrine of ripeness is intended to "forestall judicial determinations of disputes until the controversy is presented in 'clean-cut and concrete form." *See New Mexicans for Bill Richardson*, 64 F.3d at 1499. The Tenth Circuit applies a two-factor test analyzing whether an issue is ripe for judicial review: (1) the evaluation of whether the case involves uncertain or contingent future events that may not occur as anticipated, or might not occur at all; or (2) the hardship on the Parties, *i.e.*, whether the challenged action creates a direct and immediate dilemma for the Parties. *Id.* For the same reasons that the court finds that Leo Combat lacks standing, the court also concludes that this action does not present a controversy ripe for review as Plaintiff's manufacture the subject handgun is aspirational at this time.

Leo Combat states in its response to the Motion to Dismiss that its "injury consists of unconstitutional restraint of lawful business activities by threat of civil and criminal penalties, and the remedy consists of an injunction preventing enforcement against Plaintiff." [#21 at 9]. Put a different way, Plaintiff is alleging a potential economic injury. Consistent with the court's holding as set forth above, this court finds that Leo Combat's alleged injury-in-fact is too speculative to confer standing for its second claim for relief. Having found that Plaintiff fails to satisfy the injury-in-fact requirement for standing, the court declines to address whether any injury would be redressable.

3. Count III: Standing to Bring a Claim Alleging Violation of Second Amendment Rights

In the Complaint, Leo Combat alleges that the Government 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." [#1 at ¶ 43]. Plaintiff avers that "[t]he 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." [*Id.* at ¶ 45]. In other words, Leo Combat is asserting that it has cognizable Second Amendment rights as a corporation in manufacturing, and presumably selling, the subject handgun.

a. Second Amendment Right as a Corporation

The Second Amendment provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. art. II. In *District of Columbia v. Heller*, the Supreme Court found that the Second Amendment "confer[s] an individual right to keep and bear arms." 554 U.S. 570, 595 (2008); *see id.* at 574-626. The court explained that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635. In *Heller*, the plaintiff was a natural person, and the Supreme Court did not address the whether entities such as corporations have any Second Amendment rights, similar or co-extensive to the rights of natural persons.

Defendants argue that corporations do not have Second Amendment rights, relying upon *Heller*'s emphasis on the *individual*'s right to keep and bear arms in defense of hearth and home as being applicable only to natural persons. *See* [#19 at 10]. Defendants assert that the historic function of the Second Amendment supports this conclusion. [*Id.* (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978))].

Leo Combat argues that it has standing in its corporate form to assert an injury under the Second Amendment, because the corporation itself possesses Second Amendment rights. [#21 at 10]. Leo Combat further argues that even if it does not have Second Amendment rights in its corporate form, it still has standing to vindicate the Second Amendment rights of its potential customers. [*Id.*].[4] The court turns to each of these arguments separately.

After reviewing the Second Amendment and the applicable case law, this court concludes that Leo Combat does not have standing in its corporate form to assert a Second Amendment violation based on the AECA fee requirement. This conclusion is guided by, but not limited to,

[4] While Leo Combat makes this argument in response to Defendants' Motion to Dismiss, it does not assert in the Complaint that it is attempting to vindicate the rights of its potential customers. Rather, in the Complaint, Plaintiff asserts that it possesses its own Second Amendment rights as a corporation. [#1 at 42-45].

the historic context of the Second Amendment. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978) ("Certain 'purely personal' guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been to the protection of individuals.") (citing *United States v. White*, 322 U.S. 694, 698-701 (1944)). In *Heller*, the Supreme Court concluded that the Second Amendment afforded the *individual* right to bear arms, *i.e.*, a guarantee to an individual to access the type of arms "in common use at the time for lawful purposes like self-defense." *Heller*, 554 U.S. at 624-25; *see also id.* at 627 ("[T]he sorts of weapons protected were those in common use at the time."). However, the reach of the Second Amendment outside of the home remained undefined by the high Court. *See Heller*, 554 U.S. at 718 (Breyer, J., dissenting) ("The [majority] decision will encourage legal challenges to gun regulation throughout the Nation. Because it says little about standards used to evaluate regulatory decisions, it will leave the Nation without clear standards for resolving those challenges.").

In the District of Colorado, Chief Judge Krieger recently touched upon the issue of whether a corporation has Second Amendment rights in *Colorado Outfitters Ass'n v. Hickenlooper* ("*Colorado Outfitters I*"), 24 F. Supp. 3d 1050, 1064 (D. Colo. 2014), *vacated & remanded on other grounds*, 823 F.3d 537 (10th Cir. 2016). In passing on whether the plaintiff associations in that case had independent Second Amendment rights, Chief Judge Krieger observed that the historic purpose of the Second Amendment right to "keep and bear arms" was the ability to acquire, use, possess, or carry lawful firearms *for the purpose of self-defense*. *Colorado Outfitters I*, 24 F. Supp. 3d at 1064; *see, e.g.*, *Heller*, 554 U.S. at 599 ("Self-defense . .

. was the *central component* of the right itself.") (emphasis in original); *see also Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1125 (10th Cir. 2015 ("[T]he Second Amendment right recognized by the Supreme Court is predicated on the right of self-defense."). Chief Judge Krieger expressed "some doubt" that entities in their corporate form had standing to bring a Second Amendment challenge, and engaged in a rigorous analysis of the history and analytic framework for Second Amendment challenges, but ultimately, did not decide that precise issue.[5] *See Colorado Outfitters I*, 24 F. Supp. 3d at 1062.

While certain courts following *Heller* have found that the Second Amendment extends to an *individual*'s activities outside the home such as using shooting ranges and acquiring weapons and ammunition, neither the Supreme Court nor the Tenth Circuit has extended the reach of the Second Amendment to encompass corporate entities in their corporate form or to interpret the Second Amendment to be a "right to keep and carry any weapon whatsoever in any manner whatsoever for whatever purpose," *see Colorado Outfitters I*, 24 F. Supp. 3d at 1065, or the manufacture thereof. Without clear guidance of either the Supreme Court or the Tenth Circuit, this court declines to infer that a corporate entity, in and of itself, enjoys Second Amendment rights with an individual, or to define the contours of an individual's Second Amendment right to extend to the manufacture of firearms.

This court recognizes that corporations are in certain instances characterized as "individuals" and have been found to have certain constitutional rights, including rights under

[5] On appeal of Chief Judge Krieger's opinion in *Colorado Outfitters*, the Tenth Circuit did not address the issue of whether the four firearms business plaintiffs had standing as corporations to bring a Second Amendment challenge. Instead, the court found that plaintiffs did not challenge the district court's ruling that two of the four firearms businesses lacked standing and that plaintiffs had waived their challenge to the district court's ruling on standing for the other two firearms businesses. *See Colorado Outfitters II*, 823 F.3d at 546-47.

the contracts clause, equal protection clause, due process clause, free speech clause, double jeopardy clause, takings clause, and search and seizure clause. Even then, however, the rights afforded to corporations are not necessarily identical or co-extensive with the rights of natural persons. While courts in other circuits have addressed a variety of issues regarding the scope of the Second Amendment, this court is not aware of any decisions directly addressing a corporation's standing to assert a claim that it, in its corporate form, possesses Second Amendment rights to manufacture firearms.

The Ninth Circuit's holding in *Teixeira v. County of Alameda*, 822 F.3d 1047, 1056 (9th Cir. 2016), suggests otherwise, but it does not persuade this court that the Second Amendment confers rights upon a corporation. In *Teixeira*, the plaintiff, an individual gun store owner, based his Second Amendment challenge on a "right to purchase firearms – that is a right to *acquire* weapons for self-defense." *Id.* at 1054 (emphasis in original). The majority of the panel concluded that "the right to purchase and to sell firearms is part and parcel of the historically recognized right to keep and to bear arms." *Id.* at 1056. In dissent, Judge Silverman touched on the issue of standing, observing "[e]ven assuming for the sake of discussion that merchants who want to sell guns commercially have standing to assert the personal, individual rights of wholly hypothetical would-be buyers—a dubious assumption, in my opinion—the first amended complaint does not explain *how* Alameda County's zoning ordinance, on its face or applied, impairs any *actual* person's *individual* right to bear arms, no matter what level of scrutiny is applied . . . Conspicuously missing from this lawsuit is any honest-to-God resident of Alameda County complaining that he or she cannot lawfully buy a gun nearby." *Id.* at 1064.

In the absence of binding authority holding otherwise, this court is persuaded that the text and historical context of the Second Amendment shows that it confers *individual* rights, and that any rights extended to a corporation under the Second Amendment are dependent upon the entity's ability to assert *individual* rights of third-parties on their behalf.

b. Associational or Third-Party Second Amendment Rights

Plaintiff argues that without finding a Second Amendment right to manufacture firearms that inures to the corporation itself, the Second Amendment would be rendered "meaningless." [#21 at 31-32]. But in making this argument, Plaintiff ignores that even if a corporation itself may not have a Second Amendment right; that same corporation may, as Leo Combat argues in its Response to Defendants' Motion to Dismiss, have third-party or associational standing to assert on behalf of its customers. [#21 at 11]. Indeed, courts that find that entities have standing to challenge statutes on Second Amendment grounds have done so based not on an independent Second Amendment right that inures to the corporation, but upon on the concepts of associational or third-party standing, ruling, for example, that a corporation has standing to bring claims on behalf of its customers or members. *See, e.g.*, *Ezell v. City of Chicago*, 651 F.3d 684, 696 ("Action Target, as a supplier of firing-range facilities, is harmed by the firing-range ban and is also permitted to act as an advocate of the rights of third parties who seek access to its services.") (internal quotation marks and citation omitted); *Kole v. Village of Norridge*, 941 F. Supp. 2d 933, 945 (N.D. Ill. 2013).

Nonetheless, Leo Combat cannot avail itself of either associational or third-party standing for at least two reasons. First, Plaintiff's third-party standing argument, which was raised for the first time in its response brief, is not supported by the allegations in the Complaint and is belied

by Leo Combat' s own admission that it does not currently have any customers. *See Warth*, 22 U.S. at 501-02 (standing is considered based on the allegations in the complaint and any amendments to the complaint and/or affidavits allowed by the court). Indeed, Plaintiff acknowledged in the March 17, 2016 hearing that it does not yet have any customers. *See* [#29 at 26:8-11].

Second, there is no allegation that third parties have been harmed by the registration and fee requirements of AECA. Plaintiff has not paid the AECA fee and passed it on to its customers, and therefore, any commercial burden on any potential customer is entirely speculative. There are also no allegations that a third party has been prevented from exercising her Second Amendment rights because the subject firearm is not available. *Cf. Montana Shooting Sports*, 727 F.3d at 980 (taking plaintiff's allegation that "his customers 'do not want, have not ordered, and will not buy the [firearm] if it is manufactured by federal firearms licensees'"). Nor is there any argument that, or basis to conclude, that Plaintiff has standing to bring a pre-enforcement challenge of the AECA on behalf of unknown, potential customers who are not directly subject to the application of the AECA's imposition of a registration fee or any punishment for Plaintiff's failure to comply with such. *See Colorado Outfitters II*, 823 F.3d at 551 (observing that because plaintiffs failed to prove that an individual plaintiff had standing in her own right to challenge a statute, a representative entity likewise lacked standing to challenge the law on her behalf); *Kegler v. United States Dep't of Justice*, 436 F. Supp. 2d 1204, 1212 (D. Wyo. 2006) (citing *In re Special Grand Jury 89-2*, 450 F.3d 1159, 1173 (10th Cir. 2006)). Instead, Leo Combat generally avers that "*it* is suffering a real, immediate, and cognizable injury by restrained from otherwise-legal business activities," [#1 at ¶ 21 (emphasis added)] and

"[e]ven 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 as rational basis." [*Id.* at ¶ 57 (emphasis added)].

Like Judge Silverman of the Ninth Circuit, this court is concerned about the lack of an actual individual in this case whose right to bear arms has been impaired by the registration or fee associated with AECA. And without tangible injury-in-fact to Leo Combat as a corporate entity, this court concludes that Plaintiff has failed to carry its burden to establish standing for the claims in this case.

CONCLUSION

For the foregoing reasons, **IT IS ORDERED** that:

(1) Defendants' Motion to Dismiss [#19] is **GRANTED**; and

(2) Plaintiff's Motion for Partial Summary Judgment [#20] is **DENIED**; and

(3) This case is dismissed without prejudice due to lack of subject matter jurisdiction.

DATED: August 29, 2016

BY THE COURT:

s/Nina Y. Wang
United States Magistrate Judge