UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SANFORD ABRAMS, Plaintiff, v. CARL J. TRUSCOTT, Director, Bureau of Alcohol, Tobacco, Firearms & Explosives Defendant.	Civil Action No.: 06-643 (CKK)

MOTION TO DISMISS OR IN THE ALTERNATIVE TO TRANSFER

Defendant in this case, Carl J. Truscott, Director, Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), moves to dismiss this case for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1). Alternatively, Defendant moves to transfer the case to the U.S. District Court for the District of Maryland, pursuant to 28 U.S.C. § 1404(a). Plaintiff in this case seeks to bar the ATF from prosecuting him. Because there is no justiciable controversy, Plaintiff lacks standing and his case should be dismissed. In addition, Plaintiff is litigating essentially the same claims in a case he filed in the District of Maryland (now pending before the Fourth Circuit). Accordingly, transfer would be appropriate if the Court finds that it does have jurisdiction.

A memorandum in support of this motion is attached, along with a proposed order.

June 15, 2006

Respectfully submitted,

KENNETH L. WAINSTEIN, D.C. Bar # 451058
United States Attorney

RUDOLPH CONTRERAS, D.C. Bar # 434122
Assistant United States Attorney

/s/
ALAN BURCH, D.C. Bar # 470655
Assistant United States Attorney
555 4th St., N.W.
Washington, D.C. 20530
(202) 514-7204
alan.burch@usdoj.gov

Of Counsel:

Stephen R. Rubenstein
Chief Counsel

Joel J. Roessner
Associate Chief Counsel (Litigation)
Bureau of Alcohol, Tobacco, and Firearms

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DEFENDANT'S MEMORANDUM IN SUPPORT MOTION TO DISMISS OR IN THE ALTERNATIVE TO TRANSFER

Defendant in this case, Carl J. Truscott, Director, Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), moves to dismiss this case for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1). Plaintiff in this case seeks to bar the ATF from prosecuting him for dealing in firearms in violation of 18 U.S.C. § 921(a)(21)(C). Because there is no justiciable controversy presented in this case, Plaintiff lacks standing and his case should be dismissed. Alternatively, in the event the Court determines that it does have jurisdiction, Defendant moves to transfer the case to the United States District Court for the District of Maryland, pursuant to 28 U.S.C. § 1404(a). Transfer to Maryland is appropriate because Plaintiff brought suit in the District of Maryland and raised essentially the same claims.

Background

Plaintiff, as the president of RSM, Inc. d/b/a Valley Gun, held a Federal Firearms License as a dealer in firearms, (Compl. ¶ 4), meaning he could engage in the business "of dealing in firearms as a regular course of trade or business with the principle objective of livelihood or

profit through the repetitive purchase and resale of firearms" per 18 U.S.C. § 921(a)(21)(C). Much of the relevant background in this case is a matter of public record, because Plaintiff is challenging the ATF's seizure of RSM's Federal Firearms License in the a civil action he filed in the District of Maryland. See RSM, Inc. v. Herbert, No. WMN-05-847 (D. Md. filed Mar. 29, 2005).

A. Plaintiff's Challenge to ATF's Seizure of RSM's Federal Firearms License In the District of Maryland.

In 1997, an ATF inspection of RSM uncovered several violations of the Gun Control Act (GCA) of 1968, as amended, and its corresponding regulations, 27 C.F.R. Part 478. See RSM, Inc. v. Herbert, No. WMN-05-847, Mem. Op. at 2 (D. Md. Feb. 23, 2006), attached hereto as Ex. 1. The violations included deficiencies in RSM's Acquisition and Disposition Records ("A&D Book"), incorrectly or incomplete Firearms Transaction Records ("Form 4473"), and 45 missing firearms.

A 1999 inspection uncovered more discrepancies in the A&D Book, improperly completed Form 4473s, and missing firearms. See id. at 2-3. In January of 2000, a "warning conference" was held with plaintiff, at which he was warned that future violations could result in the revocation of his dealer's license. Id. Plaintiff indicated that he understood the recordkeeping requirements and would improve in the future. Id.

In September 2001, another ATF inspection found the same A&D Book and Form 4473 deficiencies and 133 missing weapons, as well as a failure to record National Instant Criminal Background Check System (NICS) information as required by 27 C.F.R. § 478.102 and a failure to record multiple handgun sales as required by 27 C.F.R. § 478.126a. Id. at 3. After the 2001 inspection a second warning conference was held with plaintiff. Id.

Another ATF inspection in May 2003 uncovered numerous problems again with RSM's A&D Book and Form 4473s, and found 422 firearms unaccounted for (later reduced to 287). Id. at 4. ATF issued a Notice of Revocation of License on May 4, 2004. Id.; Compl. ¶ 6. RSM requested an administrative hearing and one was held on October 6, 2004. RSM v. Herbert at 3; Compl. ¶¶ 7-8. On October 29, 2004, the hearing officer found that RSM willfully violated the GCA and its regulations and upheld the revocation. RSM v. Herbert at 4-5. A Final Notice of Revocation was issued on February 2, 2005; a stay of the effective date was issued while RSM sought judicial review. Id. at 5; accord Compl. ¶ 9.

RSM petitioned the United States District Court for the District of Maryland pursuant to 18 U.S.C. § 923(f)(3) for a *de novo* review of ATF's decision to revoke its license. RSM v. Herbert at 5; Compl. ¶ 10. The district court upheld the revocation and dismissed RSM's petition on February 23, 2006. RSM v. Herbert at 1, 11; Compl. ¶ 11. The ATF seized RSM's Federal Firearms License the next day. Compl. ¶ 12.

B. Plaintiff's Intentions to Sell the Firearms and This Case.

ATF agreed to give RSM thirty days from February 23, 2006 to wind down its operations. On February 24, 2006, plaintiff's attorney contacted ATF Assistant Chief Counsel Jeff Cohen via e-mail to clarify what could and could not be done within the 30-day window. See Ex. to Compl. (email chain). On February 27, 2006, Mr. Cohen advised Mr. Gardiner that no new sales of inventory could be conducted and no new firearm purchases could be made after February 23, 2006, and suggested that plaintiff contact other Federal firearms licensees to dispose of RSM's remaining inventory, which is believed to consist of thousands of firearms. Id. Mr. Gardiner then asked if the inventory could be transferred to plaintiff personally; Mr. Cohen responded yes, but cautioned Mr. Gardiner that because plaintiff no longer held a license,

he could not "engage[] in the business" of dealing in firearms. Id. Mr. Gardiner responded that the term "engaged in the business" means the repetitive purchase and resale of firearms, not only sales of firearms. Id. Mr. Cohen then replied that "If the situation arises, a court can interpret the meaning of that phrase applying the specific facts of that case. As always, you are free to advise your client based on your interpretation of the Gun Control Act." Id.

RSM then filed a motion in the district court in Maryland to compel the ATF to permit RSM to continue to operate until and unless the district court's decision became final and unappealable. See RSM, Inc. v. Herbert, No. WMN-05-847, Mem. Op. at 1 (D. Md. Mar. 15, 2006) (denying the motion), attached hereto as Ex. 2. RSM appealed the case to the Fourth Circuit. See RSM v. Herbert, No. 016-1393 (4th Cir. docketed Apr. 3, 2006).

In the instant action before this Court, Plaintiff alleges that "an agent and employee of Defendant has threatened Plaintiff Abrams with seizure and forfeiture of the inventory and with criminal prosecution. See Compl. ¶ 22; see also id. ¶ 26 ("Defendant's agent/employee has threatened Plaintiff Abrams with seizure and forfeiture of the inventory and with criminal prosecution[.]"). Plaintiff asks the Court to enjoin ATF from such forfeiture and prosecution and declare the prospective sale of plaintiff's firearms to be lawful.

Standard of Review

A motion under Rule 12(b)(6) tests the legal sufficiency of the complaint and, therefore, in deciding a motion to dismiss under Rule 12(b)(6), the Court must presume that the factual allegations in the complaint are true and liberally construe those factual allegations in favor of the plaintiff. See, e.g., Shear v. NRA, 606 F.2d 1251, 1253 (D.C. Cir. 1979). In addition to the liberally construed facts in the complaint, the Court may consider certain additional evidence in deciding the motion. For example, the D.C. Circuit specifically held that federal courts may take

"judicial notice of facts on the public record," including judicial decisions, as part of the factual assumptions used in evaluating a motion to dismiss under Rule 12(b)(6). See Covad Comm. Co. v. Bell Atlantic Corp., 407 F.3d 1220, 1222 (D.C. Cir. 2005). See also Arizmendi v. Lawson, 914 F. Supp. 1157, 1160-61 (E.D. Pa. 1996) ("In resolving a Rule 12(b)(6) motion to dismiss, a court may properly look beyond the complaint to matters of public record including court files, records and letters of official actions or decisions of government agencies and administrative bodies, documents referenced and incorporated in the complaint and documents referenced in the complaint or essential to a plaintiff's claim which are attached to a defendant's motion.").

Legal conclusions, assertions, or arguments in the complaint are not to be presumed true, liberally construed, or otherwise deferred to by the court. See In re Delorean Motor Co., 991 F.2d 1236, 1240 (6th Cir. 1993).

Argument

I. The Court Lacks Subject Matter Jurisdiction Over Plaintiff's Claims.

A. Plaintiff Does Not Present a Justiciable Case or Controversy.

Plaintiff fails to present a justiciable case or controversy. The "threshold inquiry" for subject matter jurisdiction is whether the complaint "alleges a 'case' or 'controversy' as required by both Article III of the Constitution and the Declaratory Judgment Act [28 U.S.C. § 2201]." Gem County Mosquito Abatement Dist. v. EPA, 398 F. Supp. 2d 1, 6 (D.D.C. 2005). "Serv[ing] to identify those disputes which are appropriately resolved through the judicial process is the doctrine of standing." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (internal citations omitted). To establish standing, a plaintiff must meet three requirements. "First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or

'hypothetical.'" Id. (internal citations omitted). "Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly … trace[able] to the challenged action of the defendant, and not … th[e] result [of] the independent action of some third party not before the court.'" Id. And third, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Id. at 561; see also Cruz v. American Airlines, Inc., 356 F.3d 320, 328 (D.C. Cir. 2004) ("To establish standing, the [plaintiff] must show that [defendant's] actions have caused them some concrete injury that this declaratory and injunctive relief will redress.")

1. There is no "Actual Controversy" Regarding 18 U.S.C. § 921(a)(21)(C).

"An Article III court … may not adjudicate a dispute until it has … crystallized as an actual 'case' or 'controversy.'" Pfizer Inc. v. Shalala, 182 F.3d 975, 980 (D.C. Cir. 1999).

> Before undertaking to decide any dispute brought before it, a federal court must first assure itself that the dispute presented by the parties represents a justiciable "case" or "controversy"; that is, … the factual claims underlying the plaintiff's challenge are concrete enough and the legal issues submitted for decision sharply focused enough to ensure that a genuine clash between the parties exists.

Gem County, 398 F. Supp. 2d at 6; see also Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979) ("The basic inquiry is whether the 'conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.'").

There is no "actual controversy" as to the meaning of "engaged in the business" as defined by 18 U.S.C. § 921(a)(21)(C). In order to be engaged in the business as a dealer, a person must in the regular course of business, with the principle objective of making a profit, *repeatedly purchase* and resell firearms. This is consistent with plaintiff's claim that he "will

not be 'engaged in the business of selling firearms at wholesale or retail' within the meaning of 18 U.S.C. § 921(a)[(21)](C) as he will not be repetitively purchasing and reselling firearms." Compl., Para. 21; see also id. Paras. 16-18. It has been ATF's long standing position that (in cases such as plaintiff's) when a dealer loses his license he can dispose of his inventory by selling those firearms without being deemed to have engaged in the business without a license in violation of 18 U.S.C. § 922(a)(1)(A). Plaintiff will only run afoul of section 922(a)(1)(A) *if* he chooses to *purchase and resell* firearms. Therefore, there is simply no dispute as to the language of section 921(a)(21)(C). See Gem County, 398 F. Supp. 2d at 8 (The court held that because "there is no real dispute between the Plaintiffs and EPA arising from its interpretations of the two environmental statutes … standing appears to be absent."); id. (The "mere fact that EPA issues or denies permits under the [Clean Water Act] does not by itself, create an adversarial relationship, nor does it create a case or controversy between it and the Plaintiffs.")

2. Plaintiff Has Suffered No Injury.

Plaintiff claims he has been threatened with "seizure and forfeiture of the inventory and with criminal prosecution." Compl. Para. 22. While the "D.C. Circuit has recognized that '[a] credible threat of imminent prosecution can injure [a] threatened party by putting [him] between a rock and a hard place,'" such a threat must still be "credible and immediate, and not merely abstract or speculative" to be considered an injury in fact. Gem County, 398 F. Supp. 2d at 8; see also United Farm Workers, 442 U.S. at 298 ("[P]ersons having no fears of … prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs."); Seegars v. Gonzales, 396 F.3d 1248, 1252 (D.C. Cir. 2005) ("If the threat is imagined or wholly speculative, the dispute does not present a justiciable case or controversy."), cert. denied, 126 S. Ct. 1187 (2006). "[A] general threat of prosecution is not enough to confer standing." San

Diego County Gun Rights Comm. v. Reno, 98 F.3d 1121, 1127 (9th Cir. 1996).

Here there is no credible threat of prosecution. In an e-mail exchange *in response to a question posed by Plaintiff's attorney*, agency counsel reminded Plaintiff's counsel that if Plaintiff "were to engage in dealing firearms without a license, the inventory involved in these violations would be subject to seizure and forfeiture and Mr. Abrams *could* be subject to criminal prosecution." Ex. to Compl. (emphasis added). This is simply a statement of what *could* happen *if* plaintiff violates the law. Moreover, the authority to bring a criminal prosecution for a violation of the Federal firearms laws is solely within the province of the United States Department of Justice, generally the United States Attorney's Offices. See United States v. Nixon, 418 U.S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"); accord United States Attorneys' Manual 3-2.140.

Several pre-enforcement challenges have been made to various provisions of the Gun Control Act, some involving claims of future prosecution like this case, and the courts uniformly dismiss such cases for lack of injury and standing. "Significantly, the mere 'possibility' of criminal sanctions applying does not itself create a case or controversy." San Diego Gun Rights Comm., 98 F.3d at 1126 (finding no standing based upon the threat of prosecution where the plaintiffs alleged an intention to violate the Gun Control Act). See Navegar, Inc. v. United States, 103 F.3d 994, 1001 (D.C. Cir. 1997) (finding no standing on the part of certain manufacturers because the court found the threat of prosecution inadequate, even where ATF agents visited the manufacturers and took an inventory of their weapons); National Rifle Ass'n of America v. Magaw, 132 F.3d 272, 293-94 (6th Cir. 1997) (although some of the individual plaintiffs telephoned ATF agents, "submitted a hypothetical question, and received an answer

that the questioned activity could subject them to federal prosecution," the Sixth Circuit still found that such activity "does not confer standing" because the "threat of prosecution against these plaintiffs is still abstract, hypothetical, and speculative"); Crooker v. Magaw, 41 F. Supp. 2d 87, 88-90 (D. Mass. 1999) (plaintiff, having received a negative response from ATF to his written request to possess a certain kind of ammunition, could not show an injury in the fear of possible future prosecution).

This facts presented in this case are similar to those in NRA and Crooker in that Plaintiff asked ATF for advice, did not like the answer, and thus claimed he was "threatened" with prosecution. However, an individual's dislike of, or disagreement with, the answer he receives is irrelevant. The "threat" faced by Mr. Abrams—if he breaks the law at some time in the future, he may be prosecuted as a result—is the same "threat" faced by every member of society.

> If the statutes that might be possibly enforced against respondents are valid laws, and if charges under these statutes are not improvidently made or pressed, the question becomes whether any perceived threat to respondents is sufficiently real and immediate to show an existing controversy simply because they anticipate violating lawful criminal statutes and being tried for their offenses …. But it seems to us that attempting to anticipate whether and when these respondents will be charged with crime and will be made to appear … takes us into the area of speculation and conjecture.

O'Shea v. Littleton, 414 U.S. 488, 496-97 (1974). "In so-called 'threat of prosecution' cases, the distinction has been made between specific and general threats of an intent to commence legal action." Venetian Casino Resort v. Cortez, 96 F. Supp. 2d 1102, 1107-08 (D. Nev. 2000) (The district court found a threat to be general, and thus not an injury, where, "according to the Complaint, the [defendant] has merely poised a 'threat of litigation' of 'significant legal repercussions' … [s]uch allegations, at best, establish only speculative and arguably chimerical fears."); see also Eckles v. City of Corydon, 341 F.3d 762, 768 (8th Cir. 2003) (The court found no injury in fact where plaintiff received a letter from the County stating that the failure of

plaintiff to remove signs from his property *could* result in action from the City.); Stubbs v. Goldschmitd, No. Civ. 04-6029-AA, 2004 WL 1490323, at *4 (D. Or. June 29, 2004) (dismissing for lack of standing where the University of Oregon sent plaintiff a letter stating that the University would enforce its policy of no weapons on campus, even if plaintiff had a valid state permit: "No threat to plaintiff's rights appear beyond that implied by the existence of the regulation itself.") The e-mail correspondence at issue here is analogous to the letters in Eckles and Stubbs--the possibility that action *could* be taken by some other, independent entity *if* plaintiff engages in certain conduct.

Like the cases cited above, the facts alleged by plaintiff Abrams do not show that he is injured by a *credible* or *imminent* threat of prosecution. His allegations are speculative at best: the Federal firearms laws *may* be enforced against him *if* he violates those laws. See National Rifle Ass'n, 132 F.3d at 294 ("Every criminal law, by its very existence, may have some chilling effect on personal behavior. That is the reason for its passage.")

3. Plaintiff Cannot Show Redressability Either.

Even if Plaintiff were able to show an injury, plaintiff is unable to show that a court could fully redress that injury as required by the third prong of the standing analysis. See Lujan, 504 U.S. at 561. Enjoining the ATF Director from prosecuting plaintiff, as plaintiff requests, would remedy nothing; it would prohibit the Director from taking an action he does not have the authority to do in the first place. For plaintiff to receive actual relief the appropriate official to be enjoined would be the United States Attorney for the District of Maryland—where plaintiff resides—*or* the district in which plaintiff would violate the law.

B. Plaintiff's Case Does Not "Arises Under" Federal Law or the Constitution

Plaintiff does not cite to any federal law or constitutional provision conferring jurisdiction upon the court; he cites only to 28 U.S.C. § 1331 as the basis for jurisdiction. See Compl. Para. 2. A party seeking to invoke a federal court's jurisdiction has the burden of establishing that jurisdiction exists." Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994). While section 1331 confers jurisdiction in the federal courts for cases that "arise under" the Constitution and laws of the United States, "[s]ection 1331 *does not independently or separately confer jurisdiction.*" Gem County, 398 F. Supp. 2d at 12 (emphasis added); see also Government of Guam v. American President Lines, Ltd., 809 F. Supp. 150, 154 (D.D.C. 1993) ("section 1331 … confers jurisdiction *only* when the claim 'arises under' a federal statute") (emphasis added), aff'd, 28 F.3d 142 (D.C. Cir. 1994); Mead Corp. v. United States, 490 F. Supp. 405, 407 (D.D.C. 1980) ("section 1331 does not in itself create substantive rights or causes of action, but only confers jurisdiction on the district court to hear certain cases that are supported by an independently created substantive cause of action") (internal citation omitted), aff'd, 652 F.2d 1050 (D.C. Cir. 1981). Plaintiff has provided no "independently created substantive cause of action" and section 1331, standing alone, is not sufficient to confer jurisdiction.

C. The United States Has Not Waived Sovereign Immunity.

Moreover, because Plaintiff has brought this claim against an official of the Federal government acting in his official capacity, the jurisdictional statute on which the claim is based must contain an express waiver of sovereign immunity. See FDIC v. Meyer, 510 U.S. 471, 475 (1994). "It is well established that the United States is immune from suit unless a waiver of federal sovereign immunity was 'unequivocally expressed' in the statutory text." Jordan v.

Evans, 404 F. Supp. 2d 28, 31 (D.D.C. 2005); see also El-Shifa Pharm. Indus. Co. v. United States, 402 F. Supp. 2d 267, 270 (D.D.C. 2005) ("A waiver of 'sovereign immunity must be unequivocally expressed in statutory text' and will be 'strictly construed, in terms of its scope, in favor of the sovereign.'") Plaintiff bases jurisdiction on 28 U.S.C. § 1331; however section 1331 is "only a general jurisdictional statute and such a statute does not provide a general waiver of sovereign immunity." Bliss v. England, 208 F. Supp. 2d 2, 4 (D.D.C. 2002); see also Cobell v. Babbitt, 30 F. Supp. 2d 24, 39 n.15 (D.D.C. 1998) (section 1331 does not constitute a waiver of sovereign immunity); Saunders v. Reno, Civ. A. No. 93-1829 (RCL), 1993 WL 771009, at *2 (D.D.C. Dec. 20, 1993) (Section 1331 "confers general jurisdiction, and sovereign immunity is not waived by general jurisdictional statutes. Rather, section 1331 presupposes a specific waiver of sovereign immunity under some other federal statute.") (internal quotation marks and citation omitted), aff'd, No. 94-5007, 1994 WL 541497 (D.C. Cir. May 12, 1994); Stich v. United States Department of Justice, Civ. A. No. 86-2523, 1987 WL 9237 (D.D.C. Mar. 27, 1987) ("[i]t is well-settled that neither the federal question statute, 28 U.S.C. § 1331, nor the Declaratory Judgment Act, 28 U.S.C. § 2201, constitute waivers of sovereign immunity.") Section 1331 does not waive the sovereign immunity of the United States, as such the United States is immune from suit.

D. Plaintiff's Request for Equitable Relief Does Not Remedy the Lack of Jurisdiction

1. Plaintiff is Not Entitled to Injunctive Relief.

Plaintiff's request for injunctive relief does not surmount the above jurisdictional defects, including his lack of injury for standing purposes. Regardless of how Plaintiff characterizes this action, he remains unable to show the alleged "threat" constitutes an injury. See Wisconsin Gas

Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) ("Injunctive relief 'will not be granted against something merely feared as liable to occur at some indefinite time.'"); San Diego County Gun Rights Comm., 98 F.3d at 1126 ("Because plaintiffs seek declaratory and injunctive relief only, there is a further requirement that they show a very significant possibility of future harm; it is insufficient for them to demonstrate only a past injury.")

As for the waiver of sovereign immunity, although plaintiff does not cite to the Administrative Procedure Act (APA), which does provide a waiver of sovereign immunity in certain situations, the APA's waiver of sovereign immunity is not available here because 5 U.S.C. § 704 provides judicial review for *final* agency action only. See El-Shifa Pharm., 402 F. Supp. 2d at 272 ("The APA, however, provides for judicial review only of final agency action. 5 U.S.C. § 704."); Gem County, 398 F. Supp. 2d at 11 ("Judicial review may be obtained under the APA if the agency action is considered 'final.'") "Absent an independent provision for review, however, the APA permits review only of 'final agency action.'" Public Citizen v. Office of United States Trade Representatives, 970 F.2d 916, 921 (D.C. Cir. 1992).

Final agency action "must mark the consummation of the agency's decision-making process, not be merely interlocutory in nature, and the action must be one by which rights or obligations have been determined." Gem County, 398 F. Supp. 2d at 11. Actions that are "purely advisory and in no way affected the legal rights of the relevant actors,' fall outside the definition of 'final agency action.'" Trudeau v. Federal Trade Comm'n, 384 F. Supp. 2d 281, 289 (D.D.C. 2005) (finding press release issued by the FTC about its settlement with plaintiff was not final agency action); see also id. at 294 (finding that even if plaintiff's argument that "section 702 waives sovereign immunity in the absence of final agency action under section 704," plaintiff still "must identify some provision other than section 704 of the APA that gives

rise to a cause of action"); Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Ashcroft, 360 F. Supp. 2d 64, 68 n.4 (D.D.C. 2004) (finding that "the advisory letter" of the General Counsel for the National Indian Gaming Commission which warned of possible future criminal prosecution if certain gaming continued "could not be considered a 'final agency action'"). An e-mail exchange with an ATF Attorney, initiated by Plaintiff's attorney, is in no way "final agency action"—it is not the "consummation of the decision-making process" nor did it determine "rights or obligations." Rather, like the letter in the Lac Vieux case, the "advisory" e-mail at issue here cannot be considered a final agency action; as such sovereign immunity has not been waived.

2. Plaintiff is Not Entitled to Declaratory Relief.

The fact that Plaintiff brings this suit pursuant to the Declaratory Judgment Act does not alter any of the above analysis. As discussed, plaintiff presents no actual case or controversy for purposes of standing; therefore he presents no actual controversy for purposes of the Declaratory Judgment Act. See Gem County, 398 F. Supp. 2d at 7 ("An 'actual controversy' under the Declaratory Judgment Act shares the same characteristics: 'the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'"); Federal Express Corp. v. Air Line Pilots Ass'n, 67 F.3d 961, 963-64 (D.C. Cir. 1995) ("The requirement of a case or controversy is no less strict when a party is seeking a declaratory judgment than for any other relief. In order to meet this threshold requirement, there must be 'a real and substantial controversy admitting of specific relief through decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'") (internal citation omitted); see also p. 6, supra.

Likewise, as Plaintiff has not established a proper basis for jurisdiction, he cannot remedy that failure by citing to the Declaratory Judgment Act. "Section 1331 does not independently or separately confer jurisdiction …. Similarly, it is well-settled that the Declaratory Judgment Act does not independently create jurisdiction." Gem County, 398 F. Supp. 2d at 12; see also id. ("[A]bsent [an] independent legal right, the Declaratory Judgment act does not confer jurisdiction.") "[T]he availability of [declaratory] relief presupposes the existence of a judicially remediable right." C&E Servs., Inc. v. District of Columbia Water & Sewer Auth., 310 F.3d 197, 201 (D.C. Cir. 2002). As there is no "independent legal right," plaintiff is unable to create jurisdiction by seeking declaratory relief.

Finally, the Declaratory Judgment Act does not provide the otherwise missing waiver of sovereign immunity. The Declaratory Judgment Act "does not waive sovereign immunity." Lac Vieux, 360 F. Supp. 2d at 66 n.3; see also Alaska Legislative Council v. Babbitt, 15 F. Supp. 2d 19, 26 n.8 (D.D.C. 1998) ("if the agency's action is not final so as to be reviewable under the [APA], appellant is not helped on the question of jurisdiction by the Declaratory Judgment Act"), aff'd, 181 F.3d 1333 (D.C. Cir. 1999); Stich, 1987 WL 9237, at *2 ("It is well-settled that neither the federal question statute, 28 U.S.C. §1331, nor the Declaratory Judgment Act, 28 U.S.C. § 2201, constitute waivers of sovereign immunity.").

II. Venue is More Appropriate in the District of Maryland.

The general venue provision of 28 U.S.C. § 1391(e) provides that:

> A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, … or (3) the plaintiff resides.

Because the ATF Director is named in his official capacity, he "resides" in the District of Columbia and in Maryland because the ATF carries out its duties in both districts. See Farmer v. Hawk, No. 94-CV-2274 (GK), 1996 WL 525321, at *2 (D.D.C. Sept. 5, 1996) ("Public officials, when sued in their official capacity, 'reside' in the District where they perform their official duties.").

However, a defendant in a civil case may seek to transfer the case pursuant to 28 U.S.C. § 1404(a), which provides that "[f]or the convenience of parties, and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The "burden is on the moving party to demonstrate that transfer would be proper." Deloach v. Philip Morris Cos., 132 F. Supp. 2d 22, 24 (D.D.C. 2000). A court "retains substantial discretion" as to whether to grant a transfer and should consider such motions "according to individualized, case-by-case considerations of convenience and fairness." Id.

A lawsuit may be transferred to another district only if it could have been brought in that district originally, therefore, "the threshold question is whether this suit could have been brought in the proposed transferee district." Deloach, 132 F. Supp. 2d at 24. This suit could have been properly brought in Maryland because it is the district in which the plaintiff resides and where a "substantial part of the events" occurred, within the meaning of the general venue statute in section 1391(e). Although the "plaintiff's choice of forum is ordinarily accorded a significant degree of deference … such a choice receives substantially less deference where the plaintiff[], as here, neither reside[s] in, nor ha[s] any substantial connection to, that forum." Id.; see also Reiffin v. Microsoft Corp., 104 F. Supp. 2d 48, 52 (D.D.C. 2000) ("[S]ubstantially less deference is warranted when the forum preferred by the plaintiff is not his home forum.").

Because plaintiff resides in the District of Maryland, conducted his business as a firearms dealer in the District of Maryland, had his licensed revoked in the District of Maryland, and challenged that revocation in the District of Maryland, his decision to bring this suit in the District of Columbia is entitled to "substantially less deference" than would otherwise be the case. See Deloach, 132 F. Supp. 2d at 25 (The Court transferred the case out of the District of Columbia because "the only real connection this lawsuit has to the District of Columbia is that a federal agency headquartered here … is charged with generally regulating and overseeing" the subject matter.); Reiffin, 104 F. Supp. 2d at 52 (transferring the case out of the District of Columbia to the Northern District of California where "plaintiff is a resident of the state of California" and "will not be burdened by litigating in the Northern District of California, because the plaintiff himself chose that district as the forum for his clearly related, earlier-filed … action").

In addition, courts frequently look to several other "public- and private-interest factors" to decide if a transfer is appropriate. "Private interest considerations traditionally include: (1) the plaintiff's choice of forum; (2) the defendant's choice of forum; (3) whether the claim arose elsewhere; (4) the convenience of the parties; (5) the convenience of the witnesses; and (6) the ease of access to sources of proof." Holland v. A.T. Massey Coal, 360 F. Supp. 2d 72, 76 (D.D.C. 2004). "Public interest considerations, by contrast, include (1) the transferee's familiarity with governing laws; (2) the relative congestion of the calendars of the potential transferee and transferor courts; and (3) the local interest in deciding controversies at home." Id. "In addition to these considerations, a transfer may also be appropriate where there is *ongoing related litigation in another jurisdiction*." Id. (emphasis added).

All of these factors weigh in favor of transferring this case to the District of Maryland

because it is: (1) Plaintiff's home forum, (2) Defendant's choice of forum, (3) where the underlying events took place, (4) the site of "local interest," and (5) the forum in which related litigation (i.e., the license revocation) has been adjudicated with an appeal currently pending. See Holland, 360 F. Supp. 2d at 77 ("[T]he fact that there is an ongoing case dealing with similar issues in another jurisdiction weighs very heavily in favor of a transfer under § 1404(a). Simply stated, judicial economy would not be best served by having similar claims proceed on parallel tracks in neighboring jurisdictions.") (internal citations omitted); Reiffin, 104 F. Supp. 2d at 55 ("As the D.C. Circuit has held, 'In fleshing out the phrase "for the convenience of the parties in the interest of justice," the courts have considered . . . whether one circuit is more familiar with the same parties and issues or related issues than other courts[.]'") Due to Plaintiff's petition for judicial review of the revocation, the District of Maryland is already familiar with the parties and related issues.

Moreover, there are no factors that weigh significantly in favor of the District of Columbia. The fact that ATF is headquartered in the District of Columbia is not controlling. "[M]ere involvement of the part of federal agencies, or some federal officials who are located in Washington D.C. is not determinative." Shawnee Tribe v. United States, 298 F. Supp. 2d 21, 25-26 (D.D.C. 2002). The dispute at issue arose between Plaintiff and ATF agency counsel, corresponding via email. Agency counsel was the attorney responsible for defending the revocation of RSM--in the District of Maryland. Mr. Cohen does not work at ATF Headquarters. Director Truscott, whose office is at ATF Headquarters, does not play an active role in license revocations made in the Field Divisions, had no active involvement in the revocation of RSM, or the e-mail exchange at issue. See id at 26 (Transfer is appropriate "especially where the involvement of government officials in Washington has not been

significant, and there is no real connection between the District of Columbia and this litigation other than the presence of federal agencies in this forum."); Cameron v. Thornburgh, 983 F.2d 253, 257 (D.C. Cir. 1993) (finding transfer proper where "Appellant's complaint did not allege a single rule or policy emanating from Washington that had affected his case."); Sierra Club v. Flowers, 276 F. Supp. 2d 62 (D.D.C. 2003) ("The court determines that the plaintiff's choice of forum merits little deference because the District of Columbia has 'no meaningful ties to the controversy and no particular interest in the parties or subject matter.'"); Trout Unlimited v. United States Dep't of Agric., 944 F. Supp. 13, 16 (D.D.C. 1996) (transfer proper where none of the decision-making at issue occurred in the District of Columbia); but see Greater Yellowstone Coalition v. Bosworth, 180 F. Supp. 2d 124, (D.D.C. 2001) (distinguishing Trout Unlimited on its facts and finding that where plaintiffs alleged high-ranking government officials in Washington D.C. were involved in the subject matter, an allegation defendants presented no evidence to disprove, transfer was not appropriate). As in Shawnee Tribe, Cameron, Sierra Club and Trout Unlimited, there has been no significant involvement by ATF officials in Washington D.C., nor is there any "real connection" between the District of Columbia and this litigation.

The only real advantage Plaintiff receives from litigating this lawsuit in the District of Columbia is to avoid the district court in which the revocation of his license was upheld. That is, Plaintiff is attempting to forum shop. "Indeed, courts in this circuit must be particularly careful in examining challenges to venue 'to guard against the danger that a plaintiff might manufacture venue in the District of Columbia.'" Holland, 360 F. Supp. 2d at 76; see also Cameron, 983 F.2d at 256 ("By naming high government officials as defendants, a plaintiff could bring a suit here that properly should be pursued elsewhere.") "[F]orum shopping must not be indulged in the face of multiple litigation especially where, as here, the shopper is offered an equally convenient

forum." Reiffin, 104 F. Supp. 2d at 54 n.12. The District of Maryland is a more convenient forum. Therefore, transfer is strongly indicated under all relevant factors.

Conclusion

For the foregoing reasons, this case should be dismissed for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1). In the alternative, if the Court finds that it could exercise jurisdiction, Defendant respectfully requests that the case be transferred to the District of Maryland, pursuant to 28 U.S.C. § 1404.

June 15, 2006

Respectfully submitted,

KENNETH L. WAINSTEIN, D.C. Bar # 451058
United States Attorney

RUDOLPH CONTRERAS, D.C. Bar # 434122
Assistant United States Attorney

/s/
ALAN BURCH, D.C. Bar # 470655
Assistant United States Attorney
555 4th St., N.W.
Washington, D.C. 20530
(202) 514-7204
alan.burch@usdoj.gov

Of Counsel:

Stephen R. Rubenstein
Chief Counsel

Joel J. Roessner
Associate Chief Counsel (Litigation)
Bureau of Alcohol, Tobacco, and Firearms

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RSM, INC. (d/b/a VALLY GUN)	:	
	:	
v.	:	Civil No. WMN-05-847
	:	
ARTHUR W. HERBERT	:	

MEMORANDUM

Petitioner RSM, Inc. has petitioned this Court pursuant to 18 U.S.C. § 923(f)(3) for a de novo review of the decision made by the Bureau of Alcohol, Tobacco, and Firearms (ATF) to revoke its Federal Firearm License. Respondent, the Director of Industry Operations for the Washington Field Office of the ATF, has moved for summary judgment, arguing that the undisputed facts establish that RSM committed willful violations of the laws regulating the sale of firearms and that no discovery or hearing in this matter is necessary. Paper No. 6. The Court concludes that no discovery or hearing is required and that Respondent is entitled to summary judgment.

Federal Firearm Licensees are subject to two major recordkeeping requirements. First, a licensed dealer must maintain a bound book for recording the acquisition and disposition of every firearm that enters and leaves its inventory. (hereinafter, the A&D Book). See 27 C.F.R. § 478.125(e). This requirement includes weapons that are left for

repair and remain in the possession of the dealer overnight.[1] Second, gun dealers are required to complete a Firearm Transaction Record, or "Form 4473" for every firearm that they sell. These Form 4473s include information about the weapon being sold and the purchaser, as well as a series of questions which enable the dealer to determine whether that individual can legally purchase the weapon.

In July 1997, the ATF conducted an inspection of RSM's inventory and records and discovered numerous deficiencies in RSM's A&D Book, incorrectly or incompletely filled-out Form 4473s, and 45 missing firearms (that is, firearms which should have been on the premises based upon the records in the A&D Book but could not be found in the physical inventory). In November 1999, the ATF conducted another inspection and found more

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[1]The regulations speak of "acquisitions," and do not distinguish between firearms "acquired" for purposes of repair and those acquired for sale. 27 C.F.R. § 478.125 (e) ("The purchase or other acquisition of a firearm shall . . . be recorded not later than the close of the next business day following the date of such purchase or acquisition."); Shyda v. Director, Bureau of Alcohol, Tobacco and Firearms, U. S. Dept. of Treasury 448 F. Supp. 409, 413 (D.D.C. 1977). See also Pinion Enterprises, Inc. v. Ashcroft, 371 F. Supp. 2d 1311, 1313 (N.D. Ala. 2005) (affirming revocation of license based in part on licensee's failure to record guns received for repairs in its acquisition and disposition records); Breit & Johnson Sporting Goods, Inc. v. Ashcroft, 320 F. Supp. 2d 671, 676 (N.D. Ill. 2004) (same).

discrepancies in the A&D Book, more improperly completely Form 4473s, and more missing weapons. A "Warning Conference" was held with RSM's president, Sanford Abrams, in January of 2000 at which Mr. Abrams indicated that he understood the record keeping requirement and would attempt to do better in the future. Mr. Abrams was warned that future violations could result in the revocation of RSM's firearm dealer license.

The ATF completed another inspection of RSM in September of 2001. Again, the ATF found problems in the A&D Book, the Form 4473s, and, this time, 133 missing weapons. In addition, the inspection revealed that RSM had failed to accurately record information regarding a "National Firearms Act" weapon[2] found in its inventory, failed to record National Criminal Instant Background Check (NICS) information within the prescribed time period, and failed to complete numerous reports of multiple handgun sales as required under ATF regulations. This inspection led to a second Warning Conference which included additional assurances from Mr. Abrams that he understood the relevant record keeping requirements and would strive to improve his compliance. Mr. Abrams was also given the repeated warning that continued violations would lead to the revocation of RSM's license.

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[2] National Firearm Act weapons are highly regulated weapons such as machine guns, sawed off shotguns, and silencers that are subject to special registration requirements. See 26 U.S.C. § 5841 et seq. The particular weapon found in RSM's inventory during this particular inspection was a silencer.

The ATF conducted another inspection in May of 2003. As the reader might anticipate, the inspection again uncovered numerous problems with the RSM's A&D Book and Form 4473s. Specifically, of the 1,524 firearms that should have been on the premises according to the A&D Book, only 1,052 were initially found in the inventory, leaving 472 unaccounted for. After the ATF gave RSM the opportunity to reconcile its inventory, the difference was reduced to 422. (RSM found 37 of the missing guns in its inventory and records for the sale of 13 more.)[3] In the A&D Book used to record firearms accepted for repair, records for 456 of the 475 weapons listed did not include information regarding the disposition of the weapon. Finally, the inspection revealed that RSM had failed to properly record A&D information related to three NFA firearms and had transferred a firearm after the NICS approval period had expired.[4]

As a result of this inspection, the ATF issued a Notice of Revocation of License on May 5, 2004. RSM requested a hearing that was held on October 6, 2004. On October 29, 2004, the

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[3] The number of unaccounted-for weapons was later reduced to 287. Hearing Transcript (Tr.) 107.

[4] Once a NICS check is completed, the transfer must take place within 30 days. See 27 C.F.R. § 178.102(c). Once that time period expires, a new background check on the purchaser must be completed before the weapon can be transferred to that individual. RSM acknowledges that the transfer in question took place 36 days after the NICS approval was obtained and no subsequent background check was undertaken.

hearing officer issued a 28-page report finding that all of the claims against RSM were substantiated by undisputed evidence and that RSM's violations were "willful." Consistent with those findings, the hearing officer concluded that revocation of RSM's license was appropriate. Respondent issued a Final Notice of Revocation on February 2, 2005, but stayed the effective date of revocation while RSM sought judicial review.

Under the de novo standard of review for a decision of the ATF, this Court may give the agency's finding and decision "'such weight as it believes they deserve,' but need not accord any particular deference to those findings." Article II Gun Shop, Inc. v. Ashcroft, Civil Action No. 03-4598, 2005 WL 701053 (N.D. Ill. March 25, 2005)(quoting Stein's Inc. v. Blumenthal, 649 F.2d 463, 467 (7th Cir. 1980)). Where appropriate, the reviewing court can receive and consider evidence in addition to that submitted in the administrative proceeding. DiMartino v. Buckles, 129 F. Supp. 2d 824, 827 (D. Md. 2001). The court can grant summary judgment, however, without conducting an evidentiary hearing if it is clear from the pleadings and exhibits that no genuine issue of material fact exists. Id.

Notwithstanding the posture of this case as an appeal of an administrative decision, the summary judgment standard is the same as in any other civil action. A district court may grant summary judgment when reviewing a firearms license revocation

pursuant to 18 U.S.C. § 923(f)(3), provided no issues of material fact are in dispute. DiMartino v. Buckley, 19 Fed. Appx. 114, 115 (4th Cir. 2001). In determining whether there is a genuine issue of material fact, the district court must assess the factual evidence and all inferences to be drawn therefrom in the light most favorable to the non-moving party. Smith v. Virginia Commonwealth Univ., 84 F.3d 672, 675 (4th Cir. 1996). The non-moving party, however, may not rely upon the mere allegations of his complaint. Rather, its response must, with affidavits or other verified evidence, set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); see Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the adverse party fails to so respond, summary judgment, if appropriate, shall be entered. Fed. R. Civ. P. 56(e).

Under 18 U.S.C. § 923, "the ATF may revoke a firearm dealer's license if the dealer willfully violates any statute or regulation governing the firearms industry." Willingham Sports, Inc. v. Bureau of Alcohol, Tobacco, Firearms and Explosives, 348 F. Supp. 2d 1299, 1302 (S.D. Ala. 2004). While "willfulness" must be found in order to support a revocation decision, there is no requisite quantum of violations that must be identified: "A single violation is sufficient for denying an application or revoking a license." DiMartino, 129 F. Supp. 2d at 827 (emphasis in original). This Court's role is to determine whether there was "substantial" evidence of a willful violation. Stein's Inc., 649 F.2d at 467. While the district court makes that

determination de novo, once that determination is made, the district court must defer to the ATF's selection of the appropriate penalty. Id. ("Selecting an appropriate penalty for the violations found is a matter committed to the [agency's] discretion."). Thus, the district court's only role in reviewing the choice of a penalty is to determine whether the penalty imposed was "authorized." 18 U.S.C. § 923(f)(3); Stein's, 649 F.2d at 464 n.2.

Petitioner raises a variety of arguments to show that some of the deficiencies identified by the ATF inspectors were not actual violations of federal firearms regulations. For example, among the deficiencies on Form 4473s was the failure to indicate the type of firearm in box 16 of the Form 4473s. RSM argues that, while 27 C.F.R. § 478.124(c) may require dealers to identify the type of firearm, the regulations do not require that it be identified in box 16. Opp'n 19-20. RSM contends it complied with the regulations by identifying the type of firearm in box 27 of the Form 4473s.

Elsewhere in its opposition, RSM attempts to downplay the scope of its violations. Noting that errors were found on only 24 of the 345 Form 4473s reviewed, and that each form required 37 different entries to be made, RSM calculated its error rate to be only .2%. Id. 18-19. Similarly, noting that it only transfered a firearm on one occasion based on a expired NICS check but transferred firearms on 344 occasions on unexpired NICS checks, RSM asserts that its error rate in that regard was only .3%. Id.

19. RSM also argues, at length, that some of the alleged violations cited by Respondent cannot form the basis for revocation as they took place outside of the applicable statute of limitations. Id. 27-36 (citing the five year limitations period of 28 U.S.C. § 2462).

Without commenting on the merits of any of these arguments, the Court notes that, even assuming their validity, there remain numerous violations that Petitioner does not contest and that undisputedly occurred within the limitations period. RSM acknowledges that there were 70 firearms sold after May 4, 1999, that were not entered into the A&D book. See id. 7. RSM concedes that there were errors on 24 Form 4473s. See id. 8. RSM does not dispute that in December of 2002, it transferred a firearm 6 days after the 30-day limitation on NICS checks. See id. 8-9. Thus, while RSM may challenge the numerousness or seriousness of its violations of federal firearms law, it makes no credible argument that there were no violations.

Instead, the primary thrust of Petitioner's pleading is that the violations that it did make were not "willful." Under Petitioner's definition of willfulness, Respondent has the burden to prove that RSM acted "intentionally and purposely and with the intent to do something the law forbids." Opp'n 16. While admitting violations, RSM attributes its violations to "human error" or deems them "inadvertent, technical record-keeping errors." Compl. ¶¶ 23, 24, 28. Mr. Abrams repeats this "human error" theme throughout his testimony at the administrative

hearing. When asked why there were so many open entries in RSM's A&D Book, he responds, "Human error. The guns were sold, paperwork has been mislaid." Tr. 189. When asked why three NFA weapons dispositions were not recorded, he responded, "[j]ust human error; forgot." Tr. 197. In his testimony, Mr. Abrams expressed his own frustration that his employees continue to make mistakes:

> So I tried to impress upon them as much as possible, and tried to check up on them as much as possible as they were doing their work. Has some of these things got lost, misplaced? I don't know. I mean, I am extremely frustrated that this had continued to happen; I lost many nights of sleep on it; my stomach has been in, you know, basically destroyed, because I can't figure out - we keep doing the best we can and we still keep coming up with mistakes.
>
> The only thing I can say is that when you sell an awful lot of firearms in a short period of time, like at a gun show or during hunting season, the chance of error rates go up. I think if you check the dates, you'd find that a lot of these errors were in our busiest seasons. And it's no excuse, I'm just explaining it.

Tr. 262-63.

The term "willful" is not defined in the statute. Courts interpreting the statute, however, have reached near unanimous consensus[5] that "a bad purpose or evil motive is not required"

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[5] The only court taking a view consistent with that taken by Petitioner is Rich v. United States, 383 F. Supp. 797 (D. Ohio 1974). The holding in Rich has been soundly rejected by other courts interpreting § 923. See 3 Bridges, Inc. v. United States, 216 F. Supp.2d 655, 658 (E. D. Ky. 2002) (observing that "[Rich's] holding finds no other support in the case law, and has been expressly rejected in Perri [v. Department of Treasury,

for a finding of willfulness. Willingham Sports, Inc. v. Bureau of Alcohol, Tobacco, Firearms and Explosives, 415 F.3d 1274, 1276 (11th Cir. 2005). As the Eleventh Circuit explained in a decision issued just last year, "[a] firearms dealer is considered to have acted willfully under § 923 if, with knowledge of what the regulations require, the dealer repeatedly violates those regulations." Id. at 1276-77 (emphasis added). In support of this definition of willful, the Eleventh Circuit cited decisions from five other circuit courts of appeals, including the Fourth Circuit.[6]

The undisputed evidence, including Mr. Abrams' own testimony, conclusively establishes that RSM was well aware of the regulations imposed on federal firearms dealers and yet, despite that knowledge, continued to violate those same regulations. Thus, RSM's conduct clearly meets the definition of willful. While Mr. Abrams may seek to minimize the significance of RSM's errors or to excuse its non-compliance by citing the busyness of gun shows and hunting seasons, the undisputed fact is that because of RSM's lapses, scores of firearms are unaccounted

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Bureau of Alcohol, Tobacco and Firearms, 637 F.2d 1332, 1336 (9th Cir. 1981)] and Cucchiara [v. Secretary of the Treasury, 652 F.2d 28, 30 (9th Cir. 1981)]).

[6] Prino v. Simon, 606 F.2d 449, 451 (4th Cir. 1979); Stein's, Inc., 649 F.2d at 467 (Seventh Circuit); Appalachian Res. Dev. Corp. v. McCabe, 387 F.3d 461, 464-65 (6th Cir. 2004); Lewin v. Blumenthal, 590 F.2d 268, 269 (8th Cir. 1979); Perri, 637 F.2d at 1336 (Ninth Circuit).

for, and therefor, untraceable. As one court recently observed,

> the gravity of the policy objectives of the Gun Control Act, from both a law enforcement standpoint and a safety standpoint, strongly militates in favor of allowing the ATF to insist on total compliance as a condition of retaining the privilege of dealing in firearms. Indeed, the Supreme Court has noted that one purpose of the Gun Control Act is "to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous." Barrett v. United States, 423 U.S. 212, 218 [] (1976). Where a dealer does not properly maintain ATF records to the agency's exact specifications, the ATF's ability to fulfill its legislative mandate may be compromised. See 3 Bridges, 216 F. Supp. 2d at 659. If ever there were a statutory scheme where a licensee should be obligated to "sweat the details," irrespective of how trifling they may appear, the Gun Control Act would appear to fit that bill.

Willingham Sports, 348 F. Supp. 2d at 1309.

As there is substantial evidence of willful violations on the part of RSM, and as the revocation of a dealer's license is clearly an authorized response to violations of the regulations, see 18 U.S.C. § 923(e), the Court therefore will grant Respondent's motion for summary judgment and dismiss RSM's Petition. A separate order consistent with this memorandum will issue.

/s/

William M. Nickerson
Senior United States District Judge

Dated: February 23, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RSM, INC.	:	
	:	
v.	:	Civil No. WMN-05-847
	:	
ARTHUR W. HERBERT	:	
	:	

MEMORANDUM

Before the Court are two motions filed by RSM. One is a motion to direct Respondent that RSM may continue to operate during the pendency of judicial review, Paper No. 14, and the other is a motion to alter or amend judgment. Paper No. 15. Both motions are ripe for decision. Upon a review of the pleadings and applicable case law, and in consideration of the arguments presented to the Court during a March 9, 2006, hearing, Respondent's motions will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

On February 23, 2006, this Court dismissed RSM's petition for review of ATF's decision to revoke its Federal Firearm License. On February 24, 2006, ATF seized RSM's license. ATF agreed to allow RSM to "wind down" its business for thirty days, until March 25, 2006. Under this agreement, RSM can dispose only of existing inventory for which sales had been made on or before February 23, 2006.

II. DISCUSSION

A. Motion to Direct Respondent that RSM May Continue to Operate During Pendency of Judicial Review, Paper No. 14.

On May 4, 2004, the ATF Director of Industry Operations

(DIO), Baltimore Field Division, revoked Petitioner's license to sell firearms after evidence presented at a revocation hearing established that RSM knew and understood the record keeping requirements of the Gun Control Act but violated the provisions on numerous occasions. RSM requested a hearing after being issued a notice of revocation.[1] Pursuant to 18 U.S.C. § 923(f)(2), which requires ATF to stay the effective date of the revocation if the licensee requests a hearing,[2] ATF stayed the revocation. After the hearing, ATF revoked the license. RSM then indicated that, pursuant to § 923(f)(3),[3] it intended to

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[1] 18 U.S.C. § 923(f)(1) requires notice of revocation:

> Any person whose application for a license is denied and any holder of a license which is revoked shall receive a written notice from the Attorney General stating specifically the grounds upon which the application was denied or upon which the license was revoked. Any notice of a revocation of a license shall be given to the holder of such license before the effective date of the revocation.

[2] 18 U.S.C. § 923(f)(2) states:

> If the Attorney General denies an application for, or revokes, a license, he shall, upon request by the aggrieved party, promptly hold a hearing to review his denial or revocation. In the case of a revocation of a license, the Attorney General shall upon the request of the holder of the license stay the effective date of the revocation. A hearing held under this paragraph shall be held at a location convenient to the aggrieved party.

[3] 18 U.S.C. § 923(f)(3) states:

> (3) If after a hearing held under paragraph (2) the Attorney General decides not to reverse his decision to deny an application or revoke a

file an action in federal court seeking de novo review of the revocation. Exercising its discretionary authority under 27 C.F.R. § 478.78,[4] ATF allowed RSM to continue operations while it sought judicial review. After this Court's February 23, 2006, dismissal of RSM's petition for judicial review, ATF lifted its stay of the license revocation. Now pending before the Court is RSM's petition requesting an order requiring ATF to re-stay the license revocation during further appeals of this Court's decision.

Petitioner asserts that ATF does not have authority to limit RSM's acquisitions and dispositions of firearms until there is a

> license, the Attorney General shall give notice of his decision to the aggrieved party. The aggrieved party may at any time within sixty days after the date notice was given under this paragraph file a petition with the United States district court for the district in which he resides or has his principal place of business for a de novo judicial review of such denial or revocation. In a proceeding conducted under this subsection, the court may consider any evidence submitted by the parties to the proceeding whether or not such evidence was considered at the hearing held under paragraph (2). If the court decides that the Attorney General was not authorized to deny the application or to revoke the license, the court shall order the Attorney General to take such action as may be necessary to comply with the judgment of the court.

[4] Section 478.78 gives a licensee 60 days to appeal a license revocation and states, "when the Director of Industry Operations finds that justice so requires, he may postpone the effective date of suspension or revocation of a license or authorize continued operations under the expired license, as applicable, pending judicial review."

final, unreviewable judgment. To support this proposition, Petitioner relies on a sentence extracted from the middle of § 923(f)(2), which states, "[i]n the case of a revocation of a license, the Attorney General shall upon the request of the holder of the license stay the effective date of the revocation." According to Petitioner, the mandatory stay of a license revocation triggered by a hearing request may not be lifted by ATF until all appeals are final. Petitioner supports this position by asserting that under § 923(f)(3), after a hearing during which the Attorney General upholds the decision to revoke a license, he is only required to give notice to the licensee of the decision; the subsection does not require the Attorney General at this time to lift any stay that may have been imposed. Petitioner thus reasons that, under the statute, the stay should remain in place throughout the pendency of judicial proceedings.[5]

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[5] Petitioner further supports its interpretation of the statute by noting that under 18 U.S.C. § 925(b), if a criminal prosecution is initiated against a licensee, the licensee may continue operations until any conviction pursuant to the indictment becomes final. Petitioner reasons that if § 923(f)(2) is not interpreted to require the revocation to be stayed, then "a licensee's continuance of operations has greater protection if he is the subject of criminal prosecution than if he is the subject of a license revocation." Reply 2. Petitioner notes that, "ATF has long taken the position that a conviction does not become final until all appeals have been exhausted." Reply 2 n.2 Notwithstanding the initial appeal of Petitioner's argument, it cannot overcome the persuasiveness of the guidance offered under § 923(e) and ATF's own regulations, which are both discussed below. In addition, the Court notes one potential reason for the different levels of protection pointed out by Petitioner. Under § 923(e) the license is being revoked due to the licensee's failure to meet the

Respondent argues that Petitioner takes the sentence from § 923(f)(2) out of context and that the section in its entirety clearly illustrates that, upon request, the license revocation should be stayed until a hearing is held. In addition, Respondent asserts that § 923(f) reads chronologically and that subsection (1) addresses notice, subsection (2) discusses the hearing process, and subsection (3) discusses a licensee holder's right to judicial review of a revocation. Respondent reasons that the clause mandating a stay of revocation upon request of a hearing is contained in the hearing subsection and, as such, pertains only to that hearing process. Subsection (3), which sets out the judicial review process, does not contain a similar stay provision.

The Court finds that while the language of § 923(f) does not provide a definitive answer as to when a stay of a revocation should be lifted, § 923(e) and ATF regulations at 27 C.F.R. § 478.78 make clear that ATF can revoke the license after a hearing has been held and a Notice of Revocation has been served on the licensee. Under § 923(e), "[t]he Attorney General may, after notice and opportunity for hearing, revoke any license issued under this section . . . ." Giving ATF the authority to revoke a license after a hearing, implies that the stay mandated by the licensee's request for such a hearing would no longer be in

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requirements of the license itself, while under § 925(b) a license holder, indicted for any crime punishable by a year imprisonment, can continue operation until conviction becomes final.

effect. Importantly, § 923(e) does not limit the Attorney General's power to revoke a license to a point in time after notice, opportunity for hearing, and pending judicial review. Further, pursuant to ATF regulations, any decision to stay the effect of the revocation after a hearing is held is entirely discretionary. Section 478.78 gives the ATF Director of Industry Operations authority to either "postpone . . . the revocation of a licensee or authorize continued operations under the expired license, as applicable, pending judicial review."

Petitioner contends that § 478.78 is void because Congress did not delegate authority to the ATF to promulgate the regulation. Specifically, Petitioner asserts that no such delegation exists under either § 923(e) or (f). Reply 4. Respondent counters that ATF had the proper authority to promulgate this regulation under § 926, which grants the Attorney General authority to prescribe "only such rules and regulations as are necessary to carry out the provisions of this chapter . . . ." Petitioner contends that § 926 grants ATF authority to promulgate regulations only where the statutory provision, in reference to which a regulation is promulgated, itself includes language that allows ATF to promulgate the regulation. This Court disagrees. Section 926 grants the ATF authority to promulgate rules that are "necessary" to carry out the chapter's provisions. As previously discussed, § 923(f) does not state when a stay should be lifted and § 478.78 was promulgated in order for ATF to carry out its responsibilities under the

statute. The Court also rejects Petitioner's contention that § 478.78 is contrary to the statute; § 923(f) fails to state when the stay is to be lifted and the regulation reasonably fills in this blank in accordance with the timing suggested in § 923(e).

"[I]n construing a statute, this Court normally accords great deference to the interpretation, particularly when it is longstanding, of the agency charged with the statute's administration." N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 522 n.12 (1982). Petitioner argues that "no deference is due ATF as the statute is not ambiguous and Congress did not delegate authority to ATF to promulgate § 478.78." Reply 4 n.4. As this Court has found, § 923(f) does not offer definitive guidance as to when a stay is to be lifted and ATF did have authority to promulgate § 478.78. Thus, the Court will defer to ATF's interpretation under which the decision to stay a license revocation pending judicial review is not mandatory but is discretionary.

Petitioner also argues that Fed. R. Civ. P. 62(a) requires an automatic stay - "no execution shall issue upon a judgment . . . until the expiration of 10 days after its entry." Respondent correctly points out that RSM's reliance on 62(a) is misplaced because the revocation of RSM's license did not result from enforcement of a judgment. The Attorney General has the authority under § 923(e) to revoke a license without a District Court judgment.

B. Motion to Alter or Amend Judgment, Paper No. 15.

The only issue raised in this motion is RSM's continued advocacy for a different definition of "willfulness" than that adopted by every circuit court of appeals to have addressed the issue.[6] Citing a recent Eleventh Circuit case, this Court stated in its February 23, 2006, Memorandum that, "'[a] firearms dealer is considered to have acted willfully under § 923 if, with knowledge of what the regulations require, the dealer repeatedly violates those regulations.'" Mem. 10 (quoting Willingham Sports, Inc. v. Bureau of Alcohol, Tobacco, Firearms and Explosives, 415 F.3d 1274, 1276 (11th Cir. 2005). RSM does not dispute that its conduct falls within this definition of wilfulness, and largely ignores the above quoted language from Willingham and the holdings of those other circuit court decisions cited in Willingham.

Petitioner's motion to alter or amend judgment will be denied.

III. CONCLUSION

For these reasons, RSM's motions will be denied. A separate order consistent with this Memorandum will follow.

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[6] RSM also argued at the hearing that the Court erred in applying a "substantial evidence" standard. While the Court did use that term in the concluding paragraph of its February 23, 2006 Memorandum, the Court clearly stated elsewhere in the opinion that its conclusion was based upon "undisputed" evidence. See Mem. 8, 10.

/s/

William M. Nickerson
Senior United States District Judge

Dated: March 15, 2006

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SANFORD ABRAMS, Plaintiff, v. CARL J. TRUSCOTT, Director, Bureau of Alcohol, Tobacco, Firearms & Explosives Defendant.	)	Civil Action No.: 06-643 (CKK)

ORDER

UPON CONSIDERATION of Defendant's Motion to Dismiss any opposition thereto, and the entire record herein, it is hereby

ORDERED that the motion is GRANTED and it is

FURTHER ORDERED that this case is dismissed for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1). This is a final and appealable order.

So ordered this _____ day of _____ 2006.

COLLEEN KOLLAR-KOTELLY
United States District Judge