UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIAM AKINS, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	)	Civil Action No. 8:08-cv-988-T-26TGW

DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 12(b)(6), defendant moves to dismiss plaintiff's Complaint for failure to state a claim for which relief may be granted. In the alternative, defendant is entitled to summary judgment on plaintiff's claims. A memorandum of points and authorities in support of this motion is appended hereto and incorporated by reference.

Dated: August 22, 2008

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MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff William Akins, inventor of a device called the "Akins Accelerator," challenges the decision of the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") to classify his device as a "machinegun," attacks the statute authorizing that classification as unconstitutionally vague, and alleges that constitutional due process entitled him to a hearing. Plaintiff's claims do not support his constitutional challenges, so these claims should be dismissed. Further, because the Akins Accelerator is properly and reasonably classified as a machinegun, the Court should dismiss or grant judgment to Defendant on the challenge to ATF's decision.

BACKGROUND

Under the Gun Control Act ("GCA"), Congress has prohibited any person from "possess[ing] a machinegun" manufactured after May 19, 1986, subject to a limited exception for law enforcement agencies. 18 U.S.C. § 922(o). In banning machineguns, Congress drew upon the definition of "machinegun" in the National Firearms Act ("NFA"), Internal Revenue Code of 1954, 26 U.S.C. § 5845, which defines a machinegun as:

> any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled, if such parts are in the possession or under the control of a person.

See 18 U.S.C. § 921(a)(23); § 922(b); 26 U.S.C. § 5845; see also 27 C.F.R. 478.11; 479.11. Manufacturers of machineguns are required to register in accordance with 26 U.S.C. § 5822 and may only manufacture them for the use of a Federal or state department or agency. See 18 U.S.C. § 922(o). Congress has delegated the authority to regulate under the NFA to the ATF. See 27 C.F.R. § 479; U.S. v. One Sentinel Arms Striker-12 Shotgun Serial No. 001725, 416 F.3d 977 (9th Cir. 2005) (recognizing delegation of authority to ATF).

In 1998, Plaintiff developed what he described as an "apparatus for accelerating the cyclic firing rate of a semi-automatic firearm," and applied for a patent from the United States Patent and Trademark Office. (Exhibit A). On or about August 15, 2000, Plaintiff received Patent No. 6,101,918 for his device, which he subsequently dubbed the "Akins Accelerator." (Compl. at Ex. B; Compl. at ¶ 7).

Apparently concerned that possession of an Akins Accelerator (plainly manufactured

after May 19, 1986) would violate the Gun Control Act, Plaintiff wrote to the Firearms Technology Branch ("FTB") of ATF on March 31, 2002, and asked whether the device would be classified as a machinegun, enclosing a copy of his patent abstract. (Compl. at Ex. B; Compl. at ¶ 9). On July 28, 2003, the Chief of the FTB asked that Plaintiff submit a sample of the device. In return, on August 21, 2003, Thomas Bowers, a business associate of Plaintiff, submitted a prototype to FTB. (Complaint at ¶ 15).

FTB examined the Akins Accelerator prototype, installed it in an SKS-type rifle, and test-fired it. (Compl. at Ex. E). On the second test firing, the prototype broke. Id. Nevertheless, FTB determined that "the submitted stock assembly does not constitute a machinegun . . . [nor] a part or parts designed and intended for use in converting a weapon into a machinegun." Id. FTB informed Mr. Bowers of its conclusion in a November 17, 2003 letter, noting that the "weapon did not fire more than one shot by a single function of the trigger." Id.

Mr. Bowers then submitted a followup letter on January 21, 2004. In that letter, Mr. Bowers expressed "confusion" over the meaning of the November 17, 2003 letter, and asked FTB to "clearly state[]" its opinion on the "application of the principle of operation" of the Akins Accelerator, not just on the physical prototype itself. (Compl. at Ex. F).

FTB replied to Mr. Bowers' letter on January 29, 2004. This letter described "the proposed theory of operation" as "the application of the movement of the counter recoiling rifle to initiate a rapid succession of semiautomatic fire." (Compl. at Ex. G). The January 29, 2004 letter then stated that the "classification of the stock assembly was rendered despite" the breakage of the prototype, noting that "[t]he theory of operation was clear even though the rifle/stock assembly did not perform as intended." Id. The letter emphasized, however, that its conclusions

were "valid provided that when the stock is assembled with an otherwise unmodified SKS semiautomatic rifle, the rifle does not discharge more than one shot by a single function of the trigger." Id.

On August 18, 2006, the website selling the Akins Accelerator came to the attention of ATF. (R. 25).[1] The website advertised the device as "Evaluated by FTB/USDOJ/BATFE" and quoted from FTB's letters and the National Firearms Act. Id. at 25-26. Shortly thereafter, an Akins Accelerator customer wrote FTB and requested "a written determination" of whether the device, "assembled with a standard Ruger 10/22 semiautomatic carbine as described by the manufacturer," would constitute a firearm within the NFA.[2] The letter writer expressed his concerns that the earlier letters to Mr. Bowers did not "specifically include the use of the device with a standard Ruger 10/22 semiautomatic carbine. Id. at 27-28. Around the same time, FTB received requests to evaluate other devices to accelerate the rate of fire of a semiautomatic firearm, including one to be used in conjunction with an AK-47 type semiautomatic rifle. (R. 50-52).

Accordingly, ATF opened an investigation into the now on-sale Akins Accelerator on September 22, 2006. R. 54. ATF obtained a retail-model device on October 6, 2006, and forwarded it to FTB on October 11, 2006. Id. Following a test-firing of the retail-model device, on November 22, 2006, FTB wrote a new letter to Mr. Bowers, advising him that FTB had tested the retail-model device with a Ruger 10/22 rifle and "demonstrated that a single pull of the

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[1] This brief employs the format "R." for citations to the administrative record, attached as Exhibits A through G.

[2] See 26 U.S.C. § 5845(a) (defining "firearm").

trigger initiates an automatic firing cycle that continues until the finger is released, the weapon malfunctions, or the ammunition supply is exhausted." (Compl. at Ex. H). The letter also noted that "[t]he Akins device assembled with a Ruger 10/22 is advertised to fire approximately 650 rounds per minute," and concluded that the device must be classified as a machinegun. Id.

Concerned about the public safety implications of other, similar devices, ATF also issued a new policy statement - ATF Ruling 2006-2 - on December 13, 2006. (Compl. at Ex. I). In that statement, ATF explained that "conversion parts that, when installed in a semiautomatic rifle, result in a weapon that shoots more than one shot, without manual reloading, by a single pull of the trigger, are a machinegun as defined in the National Firearms Act and the Gun Control Act." Id. In addition, ATF provided a description of the Akins Accelerator, and held that such a device would be a machinegun.

On February 6, 2007, Plaintiff, acting through counsel, requested that ATF reconsider its classification of the Akins Accelerator as a machinegun. (Compl. at Ex. J). The request for reconsideration asserted that... "[i]f . . . the trigger finger remains in contact with the trigger, only one shot can result until the trigger is released and then pressed again." It also observed that a number of other devices have not been classified as machineguns, including devices that fire two or three shots with a single pull of the trigger. Id.; R. 132. Ultimately, the request for reconsideration emphasized that the agency's original classification of the Akins Accelerator was "consistent" with "long-standing agency interpretations." Id.; R. 135. In conjunction with his request that ATF reconsider Ruling 2006-2, Plaintiff requested the opportunity "to present [his] case orally" to ATF. (R. 147). ATF did not agree to an oral presentation, and ultimately upheld the machine gun classification without a hearing. (Compl. at Ex. K).

On March 6, 2008, Akins filed a lawsuit in the Court of Federal Claims, requesting compensation under the Takings Clause of the Fifth Amendment, as well as declaratory and injunctive relief reversing ATF's classification of the Akins Accelerator. Akins v. United States, No. 08-136C (Ct. Fed. Cl. 2008). On May 2, 2008, the United States moved to dismiss the case, arguing with respect to Akins' declaratory and injunctive relief claims that the Court of Federal Claims "lack[ed] jurisdiction to (1) hear Plaintiff's due process claim, (2) conduct Administrative Procedures Act ("APA") review of ATF's ruling, (3) declare 18 U.S.C. § 922(o) unconstitutional, or (4) issue the requested declaratory and injunctive relief." Opinion and Order at 3, Akins v. United States, No. 08-136C (Ct. Fed. Cl. 2008) ("Akins I"). In response, Akins withdrew those claims and on May 21, 2008, filed this action to reassert them. Id.; Compl., dkt. no. 1. On July 24, 2008, the Court of Federal Claims dismissed Akins' remaining claims, holding that Akins' takings claims were "barred under the police power doctrine," and further holding that Akins "voluntarily entered an area subject to pervasive federal regulation," in which he could not have an "expectation interest . . . protected by the Fifth Amendment." Akins I at 6-7.

ARGUMENT

I. Legal Framework

In deciding a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court should construe the allegations of the complaint favorably to the pleader. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The complaint should be dismissed "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Mesocap Ind. Ltd. v. Torm Lines, 194 F.3d 1342, 1343 (11th Cir. 1999) (quoting Hishon v. King & Spalding, 467 U.S. 69,

73 (1984)). While courts must accept all precisely worded factual allegations as true, legal conclusions or unsupported inferences or assumptions contained in a complaint need not be accepted in the context of deciding a Rule 12 motion. see Gonzalez v. Reno, 325 F.3d 1228, 1235 (11th Cir. 2003); Oxford Asset Management, Ltd. v. Jaharis, 297 F.3d 1182, 1188 (11th Cir. 2002) ("conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal").

If the Court looks to matters outside the pleadings submitted in support of a motion to dismiss, the motion is converted to one for summary judgment pursuant to Fed. R. Civ. P. 56. See Fed. R. Civ. P. 12(d). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing the Court, by reference to materials on file that there are no genuine issues of material fact that should be decided at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Jeffery v. Sarasota White Sox, 64 F.3d 590, 593-94 (11th Cir. 1995); Clark v. Coats & Clark, Inc., 929 F.2d 604 (11th Cir. 1991). In determining whether the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law, the Court must draw inferences from the evidence in the light most favorable to the non-movant and resolve all reasonable doubts in that party's favor. Spence v. Zimmerman, 873 F.2d 256 (11th Cir. 1989).

The summary judgment procedure “is particularly appropriate in cases in which the court is asked to review . . . the decision of a federal administrative agency.” Florida Fruit & Vegetable

Growers Ass'n v. Brock, 771 F.2d 1455, 1459 (11th Cir. 1983) (internal citations omitted). In this case, "application of the arbitrary and capricious standard to the [agency's] conclusions in view of the facts in the administrative record raises legal questions, not factual ones." Miccosukee Tribe of Indians v. United States, 420 F. Supp. 2d 1324, 1332 (S.D. Fla. 2006).

II. ATF Properly Classified the Akins Accelerator as a Machinegun.

A. The Court Should Give Substantial Deference to ATF's Classification Decision.

Final agency actions such as ATF's classification of the Akins Accelerator as a machinegun may be challenged as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under the Administrative Procedure Act ("APA"). See 5 U.S.C. § 706(2); 5 U.S.C. § 704. If the reviewing court finds that the agency's action is arbitrary or capricious, the court may " hold [the action] unlawful and set aside agency action, findings, and conclusions." Sierra Club v. Flowers, 526 F.3d 1353, 1360 (11th Cir. 2008). "This standard of review is highly deferential, and presumes the validity of the agency action." Florida Manufactured Housing Ass'n, Inc. v. Cisneros, 53 F.3d 1565, 1572 (11th Cir. 1995); see also Sierra Club v. Antwerp, 526 F.3d 1353, 1360 (11th Cir. 2008) ("this standard is exceedingly deferential."). The reviewing Court should only "ensure that the agency came to a rational conclusion, not [] conduct its own investigation and substitute its own judgment for the administrative agency's decision." Van Antwerp, 526 F.3d at 1360. Although the agency must have "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made," the Court must "uphold a decision of less than ideal clarity if the agency's path may reasonably be

discerned." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).[3]

B. ATF's Decision to Classify the Akins Accelerator as a machine gun is reasonable.

ATF reasonably concluded that the Akins Accelerator is a machinegun based on its test-firing of a retail-model Akins Accelerator, installed in a Ruger 10/22 rifle in accordance with the manufacturer's instructions. A machinegun is defined as any weapon which shoots "automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b). The definition includes "any part designed and intended solely and exclusively , or combination of parts designed and intended, for use in converting a weapon into a machinegun." Id.[4] In the test-firing, FTB determined that "the person firing has to make one initial conscious effort to pull the trigger . . . [and] once the triggering cycle is initiated, the firearm continues to fire without interruption until a second, conscious releasing of the trigger stops the firing sequence." (R. 157). Thus, the Akins Accelerator fires more than one shot, automatically, without manual reloading, and without any additional conscious action to

[3] Because this case challenges final agency action under the APA, it is well established that this Court should confine its review to the administrative record. See Garcia v. United States, 2002 U.S. Dist. LEXIS 22704 at *18 (S.D. Fla. May 8, 2002 ("In an APA case, judicial review is based on an administrative record provided by the defendant agency to the Court"); Coastal Conservation Ass'n v. Gutierrez, Nos. 2:05CV400, 2:05CV419, 2005 WL 2850325, at *4 (M.D. Fla. Oct. 31, 2005) ("[t]he Court's review is limited to the administrative record"); see generally Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743 ("The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.").

[4] There is no dispute that ATF classified the Akins Accelerator as a machinegun pursuant to the latter portion of the statutory definition.

manipulate the trigger. The reasonableness of ATF's common-sense determination is supported by judicial precedent, legislative history, the text of the statute, and the need to protect public safety.

Although the National Firearms Act does not further explain the phrase "single function of the trigger," the Supreme Court has adopted the view that "single function of the trigger" is synonymous with "single pull of the trigger." See Staples v. United States, 511 U.S. 600, 603 n.1 (1994). In Staples, the Court interpreted the National Firearms Act definition and concluded that "any fully automatic weapon is a 'firearm' within the meaning of the Act." Id. at 602. As the Court further explained, an automatic weapon is one "that fires repeatedly with a single pull of the trigger. That is, once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted. Such weapons are 'machineguns' within the meaning of the Act." Id. at 603, n.1. In contrast, the Court "use[d] the term 'semiautomatic' to designate a weapon that fires only one shot with each pull of the trigger . . . ." Id.

Similarly, in analyzing a weapon that "required only one action-pulling [a user-installed] switch . . . to fire multiple shots," the Fifth Circuit concluded that a "single function of the trigger" should be interpreted as a single action – the trigger pull. United States v. Camp, 343 F.3d 743 (5th Cir. 2003). Courts in the Seventh and Tenth Circuits have followed a similar approach. See United States v. Fleischli, 305 F.3d 643, 655-56 (7th Cir. 2002) (superseded by statute on other grounds) (an "electronic switch served to initiate the firing sequence [causing] the minigun . . . to fire until the switch was turned off or the ammunition was exhausted. The minigun was therefore a machine gun as defined in the National Firearms Act."); United States v.

Oakes, 564 F.2d 384, 388 (10th Cir. 1977). By concluding that a "single pull" of the trigger constitutes a "single function," ATF has therefore chosen a position widely consistent with judicial authority.

In his submission to ATF, Plaintiff observed that an ATF agent testified in Camp that "the ATF understands [] trigger activators to be legal," and asserted that the Akins Accelerator is a similar type of trigger activator. Compl. at Ex. J. at 12. However, the expert explained that the difference is because a shooter using a trigger activator still had to separately pull the trigger each time to fire the gun. Id. Because the Akins Accelerator does not require separate conscious pulls of the trigger, the agent's analysis in Camp is not relevant to ATF's classification of the Akins Accelerator as a machinegun.

The legislative history of the NFA confirms that ATF, like the above-cited courts, reasonably reads the phrase "single function of the trigger" as encompassing any "single pull of the trigger." In testimony leading up to the passage of the National Firearms Act, the then-president of the National Rifle Association equated the phrase "single function of the trigger" with a "single pull of the trigger." As he explained:

> The distinguishing feature of a machine gun is that by a single pull of the trigger the gun continues to fire as long as there is any ammunition in the belt or in the magazine. Other guns require a separate pull of the trigger for every shot fired, and such guns are not properly designated as machine guns. A gun, however, which is capable of firing more than one shot by a single pull of the trigger, a single function of the trigger, is properly regarded, in my opinion, as a machine gun.

National Firearms Act: Hearings Before the Committee on Ways and Means, H.R. Rep. No. 9066, 73rd Cong., 2nd Sess., at 40 (1934).

Likewise, the ordinary meaning of the term "function" supports ATF's interpretation. In common usage, a "function" includes "any of a group of related actions contributing to a larger

action." Webster's Ninth New Collegiate Dictionary, 498 (1986); see also Random House Thesaurus College Edition, 297 (1984) (a synonym of function is "act"). The relevant act or action may be a pull of the trigger; it may be a push of the trigger, or it may be a single event initiating an automatic firing sequence.[5] Here the act is the most basic of weapons-firing techniques: the pull of the trigger, which initiates a continuous sequence of firing that continues until the conscious release of the trigger.[6] Consequently, Plaintiff is incorrect that the meaning of "function" is so narrow as to require that each vibration of the Akins-equipped trigger against a shooter's finger be defined as a separate function.

Finally, ATF's classification decision is consistent with the purpose of the National Firearms Act. Among the federal firearms statutes, the NFA focuses on regulating "especially dangerous weapons such as machine guns and silencers." RSM v. Herbert, 466 F.3d 316, 318 (4th Cir. 2006). The inclusion of machineguns in the NFA's prohibition stems from Congress's "specific declaration and finding that destructive devices (such as bazookas, mortars, antitank guns, bombs, missiles, etc.,) machine guns, short-barreled shotguns, and short-barreled rifles are

[5] Although a pull of the trigger is the most common firing action, several types of machineguns in existence at the enactment of the NFA "fired by pushing the trigger." (R. 159) (citing the Buffalo Arms, .30 caliber M2, M2 Browning .50 caliber, Maxim, and Vickers machineguns). Other, modern machineguns function through electrical switches. Id. (citing the helicopter-mounted minigun).

[6] That an Akins Accelerator-equipped rifle fits the definition of a machine gun as generally understood by firearms users is also true – indeed, it is a key part of the appeal of the Akins Accelerator. See R. 232 (Small Arms Review article) (the device sounds "too good to be true [as] a legal and inexpensive alternative to transferable machine guns"); see also George C. Nonte, Jr., Firearms Encyclopedia 13 (1973) (the term "automatic" is defined to include "any firearm in which a single pull and continuous pressure upon the trigger (or other firing device) will produce rapid discharge of successive shots so long as ammunition remains in the magazine or feed device – in other words, a machinegun"). Of singular importance, however, is that the Akins Accelerator fits the statutory definition of a machinegun as well.

primarily weapons of war and have no appropriate sporting use or use for personal protection." United States v. Jennings, 195 F.3d 795, 799 n.4 (5th Cir. 1999) (quoting S. REP. No. 90-1501, at 28 (1968)); see also United States v. Dunlap, 209 F.3d 472, 478 n.12 (6th Cir. 2000) ("Congress required registration of these types of weapons because it believed that these weapons, by their very nature, were extremely dangerous and served virtually no purpose other than furtherance of illegal activity."); United States v. Kirk, 1997 U.S. App. LEXIS 12670 at * 19 (5th Cir. 1997) ("machine guns are very different weapons from guns without the capability of automatic fire and have been the subject of federal commerce regulation for nearly sixty years."). The Ruger 10/22 rifle, modified with a retail-model Akins Accelerator, is precisely this type of "extremely dangerous" weapon. With its "continuous fire" at a rate of 650 rounds per minute, it has the "firepower of a machine gun," which "puts it in a quite different category from [] handguns, shotguns, and rifles." Kirk, 1997 U.S. App. LEXIS 12670 at * 17.[7]

C. ATF's Earlier, Contrary Position Does Not Affect the Reasonableness of Its Classification.

Although ATF changed its position on the proper classification of the Akins Accelerator, its new position is nonetheless entitled to significant deference. Like other agencies, ATF possesses the authority "to reconsider and rectify errors even though the applicable statute and regulations do not expressly provide for such reconsideration." Gun South Inc. v. Brady, 877 F.2d 858, 862 (11th Cir. 1989). The Eleventh Circuit has recognized that ATF possesses such authority, noting that an "agency, like a court, can undo what is wrongfully done by virtue of its

[7] Although the Akins Group advertised the Akins Accelerator as delivering performance of 650 rounds per minute, the Small Arms Review magazine suggested it could achieve a rate of fire as high as 800 rounds per minute. See R. 232.

order." Id. (quoting United Gas Improvement Co. v. Callery Properties, 382 U.S. 223, 229 (1965)). And the Supreme Court has "rejected the argument that an agency's interpretation 'is not entitled to deference because it represents a sharp break with prior interpretations' of the statute in question." Rust v. Sullivan, 500 U.S. 173, 186 (1991) (quoting Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837, 862 (1984)).

At the same time, however, when "[a]n agency's view of what is in the public interest" changes, it "must supply a reasoned analysis . . . ."). Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57 (1983). Without such a reasoned analysis, "[s]udden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be arbitrary, capricious [or] an abuse of discretion." Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 742 (1996); see also INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987) (where there is a "long pattern of erratic treatment" of an issue, an agency's view is "entitled to considerably less deference than a consistently held agency view"). Here, ATF has presented a "reasoned analysis," demonstrating that its new interpretation of the phrase "single function of the trigger" is necessary to protect the public from dangerous firearms.

ATF set forth its original position on the meaning of "single function of the trigger" in a September 28, 1989 memorandum. See R. 158-59. At the time, ATF applied its analysis to a "semi-automatic rifle which has a 'two stage trigger.'" This device "would fire one round of ammunition when the trigger is pulled and also one round when it is released." (R. 158). The memorandum notes that the agency had considered other firearms with a "two-stage" trigger design, and "interpret[ed] the phrase "single function of the trigger" to mean a single "movement of the trigger, whether that movement is the pull of the trigger or the release of the trigger." Id. at

159. Because of the limited operation of the two-stage trigger, ATF did not consider whether types of movements other than a "pull" or a "release" should be treated differently.

In Ruling 2006-2, ATF revisited the issue, with precisely the sort of "reasoned analysis" required for a reversal. The ruling explains the motivation for the agency's reconsideration: requests from "several members of the firearms industry to classify devices that are exclusively designed to increase the rate of fire of a semiautomatic firearm." (Compl. at Ex. I). Ruling 2006-2 then sets forth a mechanical description of how such a device works (using the Akins Accelerator as an example) and reaches the important conclusion: "a single pull of the trigger initiates an automatic firing cycle." Next, Ruling 2006-2 outlines the new policy, equating a "single function of the trigger" with a "single pull of the trigger," and connecting the new interpretation to the legislative history of the NFA. Finally, Ruling 2006-2 recognizes that this interpretation represents a policy change and states"to the extent that previous ATF rulings are inconsistent with this determination, they are hereby overruled."[8] Id.

Plaintiff claims to have had "legitimate reliance on [ATF's] prior interpretation." Smiley, 517 U.S. at 742. Nevertheless, although the "theory of operation" of the Akins Accelerator did not change after Plaintiff submitted his prototype, Plaintiff did make changes to the practical operation of the device and its marketing that contributed to ATF's reconsideration. Plaintiff decided to retail a device intended for mounting on a different rifle model than that submitted for testing (the Ruger 10/22 instead of the SKS-type, see infra at 3-4). In conjunction with requests

[8] Although it has taken a new position, ATF is not required to upset its resource allocation to revisit every prior classification conducted under the old interpretation. In any case, it is far from certain that any device other than the Akins Accelerator that was previously ruled "not a machinegun" would now fall within the definition. See R. 158-59 (discussing the"two-stage trigger" which fires multiple rounds of ammunition only with a pull and subsequent release of the trigger. In contrast, the Akins Accelerator fires multiple rounds with a single trigger pull).

that ATF review similar devices designed for other rifle models, this change highlighted the need for ATF to consider whether its interpretation of “single function of the trigger” remained appropriate. See R. 159. Further, in marketing the device, Plaintiff noted the potential for the extraordinary rate-of-fire as high as 650 rounds per minute, which demonstrated its actual dangerousness in a fashion that the theoretical operation and the testing of the prototype could not. These factors diminish the weight of Plaintiff’s reliance interest, which in any case cannot prevent agency reconsideration where the agency’s original opinion proves erroneous. See Belville Mining Co. v. United States, 999 F.2d 989, 999 (6th Cir. 1993).

In the face of technological innovation, the agency’s change of position is appropriate; indeed, the agency “must consider varying interpretations and the wisdom of its policy on a continuing basis.” Chevron, 467 U.S. at 863-64. The agency adopted its new position on the phrase “single function of the trigger” based on its experience and a reasoned analysis. Because “[t]he court need only be satisfied that the bureau's policy change . . . [was] not the result of arbitrary and capricious action,” the agency’s new position is entitled to deference and “it is not [the] court's role[] to determine that the bureau's prior practice was the better position.” Gilbert Equipment Co., Inc. v. Higgins, 709 F.Supp. 1071, 1078 (S.D. Ala. 1989) (upholding ATF’s classification of a semiautomatic shotgun as “not particularly suitable for or readily adaptable to sporting purposes.”); see also Springfield, Inc. v. Buckles, 292 F.3d 813, 819 (D.C. Cir. 2002) (“agency views may change . . . [and] courts may require only a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.”).

III. Plaintiff's Due Process Claim Should be Dismissed.

The APA does not require that Plaintiff receive a formal hearing. Plaintiff therefore advances an erroneous claim that he is entitled to a hearing under the Fifth Amendment due process clause. "Rather than setting categories of mandatory procedural protections in all cases," however, courts determine "the nature and timing of the requisite process in an individual case by accommodating the relevant competing interests." Gun South at 867 (citing Logan v. Zimmerman Brush Co., 455 U.S. 422, 434, 71 L. Ed. 2d 265, 102 S. Ct. 1148 (1982)). In considering a procedural due process claim, the "Supreme Court's balancing test essentially requires [the Court] to weigh three factors: (1) the nature of the private interest; (2) the risk of an erroneous deprivation of such interest; and (3) the government's interest in taking its action . . . ." Id. (citing Mathews v. Eldridge). In keeping with this flexible examination, "the right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances." Greene v. WCI Holdings Corp., 136 F.3d 313, 316 (2nd Cir. 1998). Because of the important interests in regulating Plaintiff's device and Plaintiff's actual presentation of his arguments in written form to the agency, R.123-R.136, the balancing of the interests demonstrate that Plaintiff has not been deprived of due process.

First, although Plaintiff identifies an important interest affected by the reclassification – his ability to manufacture and sell the Akins Accelerator without registering under 26 U.S.C. § 5822 – that interest is limited by the "pervasive federal regulation [of] the manufacture and sale of firearms." Akins I at 6.[9] As the Court of Federal Claims noted, a business owner beginning the

[9] Although the "pervasive" nature of the federal regulation eliminates Plaintiff's interest for Takings Clause purposes, see id., Defendant does not take the position that it has an identical effect for due process purposes. However, Plaintiff's reasonable expectations about the stability of a business in the firearms industry are necessarily limited by the extent of existing government

manufacture of rapidly-repeating firearms "ought to be aware of the possibility that new regulation might even render his property economically worthless." Id. Regardless of ATF's answer to Plaintiff's pre-production letters, Plaintiff should have been aware that a new statute or new regulations could instantaneously transform his operating environment. Plaintiff's interest – though important – is thus lessened by the regulatory environment.

At the same time, under the second Eldridge factor, there is little risk of an erroneous deprivation of Plaintiff's interest in this case. The cornerstone of procedural due process is notice and a meaningful opportunity to be heard, and when those conditions are satisfied, there is "no absolute due process right to an oral hearing." See Forjan v. Leprino Foods, Inc., 209 Fed.Appx. 8 (2nd Cir. 2006); see also Raditch v. U.S., 929 F.2d 478, 480 (9th Cir. 1991) (Due process principles may be satisfied through "notice and an opportunity to respond," but response may be written or oral.). After receiving notice of the agency's new position, Plaintiff presented a lengthy memorandum requesting that the agency reconsider its decision, a process for which he retained representation from two outside counsels. See Compl. at Ex. J. (Plaintiff's memorandum requesting reconsideration, identifying Steve Halbrook of Fairfax, VA and Mark Barnes of Washington, DC as plaintiff's counsel). Plaintiff presented 14 pages of supporting legal arguments in his brief. Id. On the subject of the agency's decision, Plaintiff included then most of the legal arguments which he raises now supporting his position. Together, these constitute the meaningful opportunity to be heard to which Plaintiff is entitled.

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regulation.

Nor has Plaintiff presented a suggestion that an oral hearing would have made a difference in the outcome.[10] Plaintiff's memorandum presented only questions of law and statutory interpretation, not factual disputes of the sort that require an oral hearing. See Dredge Corp. v. Penny, 338 F.2d 456 (9th Cir. 1964) ("[t]he opportunity to be heard orally on questions of law is not an inherent element of procedural due process, even where substantial questions of law are involved."). Moreover, the agency's determination, driven by the well-documented design of the device, has a low risk of error, because it is "easily documented and not based to a significant extent upon witness credibility or other subjective determinations." See York v. Secretary of Treasury, 774 F.3d 417, 421 (10th Cir. 1985). Indeed, in a follow-up letter, Plaintiff noted that he sought oral argument "because the public policy implications involved in this case will have long-term effects on the NFA community," not because he needed an opportunity to dispute the facts on which ATF based its decision. (R. 147). As Plaintiff had a meaningful chance to present his case to ATF in writing and there is little chance the agency's decision proved erroneous, the second Eldridge factor supports ATF's determination.

Finally, the third Eldridge factor weighs strongly in favor of the government's action. "The protection of the public's health and safety is a paramount government interest which justifies summary administrative action . . . [i]ndeed, deprivation of property to protect the public health and safety is 'one of the oldest examples' of permissible summary action." Gun South at

[10] Significantly, a new hearing before the agency is not the relief Plaintiff seeks for the agency's alleged violation of his procedural due process. Compare Ray v. Foltz, 370 F.3d 1079, 1085 n.8 (11th Cir. 2004) (observing that the ordinary remedy for a denial of due process is "the grant of the procedures due."). Instead, Plaintiff wants this Court to find that his device is cleverly designed to escape regulation under the system of laws that protect the public from extremely dangerous, high-firepower weapons. Where Plaintiff's cleverness and the public safety collide, however, the public interest should prevail.

867 (quoting Hodel v. Virginia Surface Mining and Reclamation Assoc., 452 U.S. 264, 300 (1981)). Weapons with a high rate of fire are extremely desirable to criminals, increasing the government's interest in summary action to close off a loophole by which they could be acquired. See generally United States v. Kirk, 1997 U.S. App. LEXIS 12670 at n.2 (5th Cir. 1997) (collecting cases in which criminals sought automatic weapons because of their high rate of fire while affirming validity of the NFA).

Notably, as Plaintiff correctly observed in his briefing to the Court of Federal Claims, if the Akins Accelerator is not classified as a machinegun, it would "not fall under any federal regulatory scheme of any kind." Plaintiff's Response to Motion to Dismiss, Akins v. United States, dkt. no. 08-136C (Ct. Fed. Cl. May 27, 2008). As with Plaintiff's own application of the theory of operation to the Ruger 10/22, the device could be adapted to outfit any semiautomatic weapon, including those with more powerful calibers, such as the "AK" type of semiautomatic weapon. This unhindered capability would be wholly inconsistent with the strict regulation of machineguns imposed by the NFA and the prohibition on post-1986 machineguns imposed by the GCA. See United States v. Golding, 332 F.3d 838, 840 (5th Cir. 2003) (discussing the "risk . . . presented by the inherently dangerous nature of machineguns," as shown by "Congress's decision to regulate the possession and transfer of this specific type of firearm"); United States v. Haney, 264 F.3d 1161, 1168 (10th Cir. 2001) ("banning possession of post 1986 machine guns is an essential part of the federal scheme to regulate interstate commerce in dangerous weapons."). Thus, ATF has a powerful interest in correctly interpreting the statute to close the loophole created by its earlier interpretation of the machinegun definition and preserve the integrity of the system regulating dangerous weapons.

Under similar circumstances in York v. Secretary of the Treasury, the Tenth Circuit weighed the three Eldridge factors, and concluded that although the plaintiff had an "important interest affected by the BATF decision," he was "not deprived of his constitutional due process right" because of the strength of the government's interests and the low risk of error. 774 F.2d 417 at 421. The York Court reached this conclusion despite the even stronger nature of the plaintiff's interest: there, ATF's decision "required him to recall and give refunds for guns already sold." Id. Here, Plaintiff has not claimed such a burden, and the Court should therefore dismiss Plaintiff's due process claim.[11]

IV. Plaintiff's Vagueness Challenge Should be Dismissed.

Finally, Plaintiff argues that the definition of machinegun found in 26 U.S.C. § 5845(b) "is unconstitutionally vague."[12] Compl. ¶ 43. A statute is unconstitutionally vague "only where no standard of conduct is outlined at all; when no core of prohibited activity is defined." Ford Motor Co. v. Texas Dep't of Transp., 264 F.3d 493, 509 (5th Cir. 2001). On the other hand, a statute is not unconstitutionally vague unless it is "substantially incomprehensible," and "men of common intelligence must necessarily guess at its meaning." Cotton States Mut. Ins. Co. v.

[11] The York Court did observe that due process would require a hearing if he had argued the agency had made a mistake of fact. 774 F.2d at 421. To the extent that Plaintiff here is arguing that ATF has made a mistake of fact, Defendant notes that, unlike the plaintiff in York, he has already received a meaningful opportunity to present his case to the agency in written form.

[12] Although Plaintiff alleges that the statute is vague both "on its face" and "as applied to Plaintiff," this Court need only review the statute as-applied, because "[v]agueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand." United States v. Awan, 966 F.2d 1415, 1424 (quoting Maynard v. Cartwright, 486 U.S. 356 (1988)). See United States v. Jackson, 250 Fed. Appx. 926, 930 (11th Cir. 2007), cert. denied 2008 WL 1803622 (U.S. May 19, 2008) (same).

Anderson, 749 F.2d 663, 669 (11th Cir. 1984) ("substantially incomprehensible"); United States v. Wilson, 175 Fed. Appx. 294, 297 (11th Cir. 2006), cert. denied, 127 S. Ct. 225 (2006) ("men of common intelligence . . ."). Plaintiffs' own allegations support the well-established precedent that 26 U.S.C. § 5845(b), although permitting multiple interpretations, does not fall to this level of incomprehensibility.

Plaintiff's own actions suggest that the statute gave him fair notice that Akins Accelerators might well fall within the prohibited standard of conduct. Mr. Akins sufficiently understood the section 5845(b) definition to submit the device to FTB for classification. (Compl. at Ex. B, Compl. at Ex. C.). His concern was not a mere formality; after receiving the November 13, 2003 letter, he followed up with a telephone call and a subsequent letter seeking confirmation. Indeed, even after receiving ATF's January 29, 2004 letter restating its earlier opinion, Mr. Akins so thoroughly recognized the likely application of the statute to his device that when he began to offer the device for sale, he used ATF's original opinion as a marketing tool. See, e.g., R. 196 (noting that "especially important was that the Accelerator™ had received not one, but two approval letters from BATFE through their Firearms Technical Branch.").

The fact that ATF's initial classification was later deemed in error does not render the statute invalid for vagueness. Lawful statutes may be susceptible of multiple interpretations, and the mere fact that "there may be some 'close cases' or difficult decisions does not render a policy unconstitutionally vague." Hills v. Scottsdale Unified School Dist. No. 48, 329 F.3d 1044, 1056 (9th Cir. 2003). See also Ford Motor Co. v. Texas Dep't of Transp., 264 F.3d 493, 509 (5th Cir. 2001) ("A statute is not unconstitutionally vague merely because a company or an individual can raise uncertainty about its application to the facts of their case.").; McConnell v. Federal Election

Commission, 251 F. Supp. 2d 176, 789 (D.D.C. 2003) ("if despite all of the mitigations, some slight potential for vagueness remains, 'uncertainty at the periphery' does not render a provision unconstitutionally vague.") (Opinion of Leon, J.), citing FEC v. National Right to Work Comm., 459 U.S. 197, 211 (1982).

Plaintiff is not the first to challenge 5845(b) as unconstitutionally vague, and every other court to review such a challenge has rejected it and affirmed the statute. See, e.g., United States v. Kelly, Nos. 05-4775, 06-1421, 2007 WL 2309761, at *5 (4th Cir. Aug. 14, 2007) (finding defendant's claim that section 5845(b) is unconstitutionally vague to be "without merit"), cert. pending, No. 07-776; United States v. Carter, 465 F.3d 658, 664 (6th Cir. 2006) ("The standard for determining vagueness in a criminal statute is 'if it defines an offense in such a way that ordinary people cannot understand what is prohibited or if it encourages arbitrary or discriminatory enforcement.' We find no such risk here."), cert. denied, 127 S. Ct. 2444 (2007); M-K Specialties Model M-14 Machinegun, 424 F. Supp. 2d at 872 ("Section 5845(b) provides fair notice to a person of ordinary intelligence that certain conduct is forbidden by statute."). This Court should interpret 5845(b) consistently with these examples and dismiss Plaintiff's vagueness challenge.

CONCLUSION

ATF acted reasonably in protecting the public from rapid-firing rifles by classifying Plaintiff's invention as a machinegun. Accordingly, the Court should dismiss Plaintiff's claims and grant judgment in favor of Defendant.

Dated: August 22, 2008

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