

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIAM AKINS,)	
)	
Plaintiff,)	CIVIL ACTION FILE NO.
)	
v.)	8:08CV00988T-26TGW
)	
THE UNITED STATES)	
)	
Defendant.)	

PLAINTIFF’S RESPONSE IN OPPOSITION TO DEFENDANT’S MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT¹

Introduction

This case is about mistreatment of a citizen by a government agency that admittedly predetermined, in consultation with its attorneys, the outcome it wanted *before* doing any testing, inspection, or evaluation. It then went about building its “legal case” to support its *predetermined* conclusion. In the process (or lack of process), the agency ignored the law, ignored the Constitution, and now ignores the orders of this Court, all without regard to the rights of citizens.

Defendant seeks dismissal for failure to state a claim, or in the alternative, summary judgment. As will be shown below, Defendant has not even come close to meeting its burden for a

¹ Defendant filed its motion in the alternative where the two are mutually exclusive. A Rule 12(b)(6) motion to dismiss cannot rely on matters outside the complaint. Defendant attached 328 pages to its motion and has manually filed additional materials. Defendant’s arguments are hopelessly intertwined with references to these materials. Given that Defendant relies on these materials in its motion, it is frivolous for Defendant to characterize the motion as one to dismiss under Rule 12(b)(6). This motion must, therefore, be treated as one for summary judgment. Fed. R. Civ. P. 12(d). Plaintiff also notes that Defendant made no attempt to comply with this Court’s Scheduling Order pertaining to motions for summary judgment [Doc. 18]. In particular, Defendant did not contact Plaintiff “for the purpose of narrowing the factual issues in dispute.” Because it cannot be said that “the parties are in full agreement as to the undisputed facts,” Defendant was required to “file a separate ‘Statement of Undisputed Facts,’ which Defendant failed to do. Plaintiff is filing a separate Statement of Disputed Facts as required by the Court’s scheduling order, but Plaintiff cannot know with much degree of certainty that *all* facts in Plaintiff’s statement truly are disputed (although clearly some are). It is apparent that Defendant filed its Motion in the alternative for the dual purpose of 1) avoiding having to file an answer by frivolously styling the Motion as one for dismissal, while 2) actually seeking summary judgment by relying on hundreds

motion on either ground, and the Motion must therefore be denied.

Argument

I. The Complaint States a Claim for Which Relief Can be Granted

When considering a motion to dismiss pursuant to Rule 12(b)(6), the Court must assume as true all allegations in the Complaint. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The case should be dismissed only if 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).

In the instant case, Plaintiff alleges that the Akins Accelerator does not “automatically” (or any other way) cause more than one shot to be fired with a single function of the trigger. He further alleges that he relied on ATF’s initial determination that the Akins Accelerator is not a machine gun. Furthermore, facts Plaintiff can prove consistent with the allegations in the Complaint are that 1) FTB’s Chief *pre-determined* the Akins Accelerator to be a machine gun without inspection, testing, or evaluation; 2) ATF failed to publish a notice of proposed rulemaking and seek comments; 3) ATF failed to hold a hearing and provide Plaintiff an opportunity to participate in an adjudicatory process; and 4) ATF has established a pattern of erratic and conflicting decisions.

These facts are sufficient to establish that Plaintiff may be entitled to relief. Defendant clearly denied Plaintiff Due Process and acted arbitrarily and capriciously.

More importantly, however, a court may not look to matters outside the pleadings when ruling on a Rule 12(b)(6) motion. Defendant has interspersed its arguments with citations to its record, to the point that it is impossible to consider any of Defendant’s arguments as being only related to a motion to dismiss. In short, Defendant’s Motion in reality only is one for summary

of pages of documents and not having to adhere to the formalities of a motion for summary judgment.

judgment. Plaintiff will not burden the Court with a repetition of his arguments in the alternative. Instead, he presents his arguments all in one place below.

II. There is a Genuine Issue of Material Fact

A motion for summary judgment cannot be granted unless there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). All inferences must be drawn from the evidence in the light most favorable to the non-movant. *Spence v. Zimmerman*, 873 F.2d 256 (11th Cir 1989).

It is clear that there are significant material facts at issue. Overshadowing all other facts is the issue of whether the Akins Accelerator enables firing more than one shot with a single function of the trigger. Defendant claims that it does and Plaintiff claims that it does not. This most material of all facts must be resolved before this case can be decided. Likewise, it appears that Defendant is not in agreement with Plaintiff that the Akins Accelerator is a device that assists bump firing. Because Defendant has ruled that bump firing is not a machine gun, a determination of whether the Akins Accelerator is a bump firing assisting device would go towards whether ATF acted arbitrarily and capriciously toward Plaintiff.

Presumably Defendant is not in agreement that Defendant had actual bias and prejudice towards Plaintiff when making its decision, another fact Plaintiff asserts (by referencing Defendant's own record. The existence of actual bias and prejudice is important in evaluating whether Defendant violated Plaintiff's Due Process rights.

Finally, Plaintiff also alleges, and Defendant presumably denies, that the Akins Accelerator does not operate "automatically," as that term is used in the statute.

III. Defendant is not Entitled to Judgment as a Matter of Law

The Record is Incomplete

Plaintiff observes that what Defendant calls a “record” appears to be a rag-tag compilation of 328 pages of documents that relate in some way to this case. They are numbered sequentially, but they are not in chronological order, indicating that this “record” was compiled hastily after the fact for filing in this Court (a fact further evidenced by the inordinate length of time it took for the agency to file the record). While there are few standards controlling an agency’s compilation of an administrative record, common sense dictates that some level of organization and understandability are required. Many documents in the record give no indication of the date, the author, or the person responsible for submitting it into the record. *See, e.g.* Doc. 19-4, p. 7. Moreover, 107 pages of the record have unexplained redactions on them, and 49 pages were omitted altogether (again without explanation).

[I]n making its review, the Court must have the whole record on which the agency acted.... This is so, because, in its review, the Court is to engage in a substantial inquiry into the reasonableness of the agency action and as a part of that inquiry it must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment since it is arbitrary and capricious for an agency not to take into account all relevant factors in making its determination.

Appalachian Power Co. v. EPA, 477 F.2d 495, 507 (4th Cir 1973). In the instant case, aside from Defendant’s failure to give Plaintiff a meaningful opportunity to participate in the process, Defendant has redacted large portions of the record. The Court cannot take into account the contents of these large redacted portions, so the Court cannot analyze the actions of Defendant.

Defendant’s Record Does Not Enable the Court to Review the Proceedings

Remarkable by its absence from the record is what one would have thought would be the cornerstone: a report from an unbiased ATF scientist who inspected, tested, and evaluated the Akins Accelerator using standard methodologies that can be duplicated to produce consistent results, perhaps with video documentation. The record contains no report at all. No where in the 328 pages

of materials and two video files is there anything even remotely resembling such a report or documentation. Instead, the conclusion that the Akins Accelerator is a machine gun seems to be based on nothing more than the *ipse dixit* conclusion that the Akins Accelerator is a machine gun. What is most remarkable is that ATF put video tests of five devices *besides* the Akins Accelerator into the record, but it did not video record whatever tests it performed (if it actually performed any tests) on the Akins Accelerator.

This court routinely defers to administrative agencies on matters relating to their areas of technical expertise. We do not, however, simply accept whatever conclusion an agency proffers merely because the conclusion reflects the agency's judgment. In order to survive judicial review in a case arising under § 706(2)(A), an agency action must be supported by reasoned decision making. Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational. Courts enforce this principle with regularity when they set aside agency regulations which, though well within the agencies' scope and authority, are not supported by the reasons that the agencies adduce.... We therefore owe no deference to ATFE's purported expertise because we cannot discern it."

Tripoli Rocketry Association, Inc. v. B.A.T.F.E., 437 F.3d 75, 76 (D.C. Cir 2006). "The agency has never provided a clear and coherent explanation for its classification.... ATFE has never articulated the standards that guided its analysis." *Id.* At 81. In the instant case, ATF (the same ATFE referred to in *Tripoli Rocketry*) has not articulated the standards for classifying firearms and has not provided a record from which the Court can discern any expertise on the part of the agency.

Defendant Committed Multiple Violations of the Administrative Procedures Act

At no point in its Motion does Defendant attempt to characterize its actions within the framework of the Administrative Procedures Act, 5 U.S.C. § 500 *et. seq.* ("APA"). That is, Defendant does not identify its "process" in this case as a rulemaking under § 553 or an adjudication under § 554. Although the text of the descriptions of these frameworks can be confusing, they can be summarized as: when an agency acts like a court, it is an adjudication. *N.L.R.B. v. A.P.W.*

Products Co., 316 F.2d 899 (1963). When an agency acts like a legislative body, it is a rulemaking. *Id.* In the instant case, Defendant acted like both a court (in determining the Akins Accelerator to be a machine gun) and a legislative body (in issuing a rule regarding devices like the Akins Accelerator). Thus, both § 553 and § 554 are implicated.

Under § 553(b), Defendant was required to provide a notice of proposed rule making via publication in the Federal Register, unless persons subject to the proposed rule are named (in which case they must be personally served or otherwise receive actual notice). While the final rule did not name Plaintiffs, it is undisputed that the final rule describes the Akins Accelerator with great specificity. Nothing in the record indicates Defendants published a notice in the Federal Register, but Plaintiff asserts that such a publication would have been insufficient anyway, given that the ruling made so narrowly applies to Plaintiff's patented invention. Plaintiff should have received actual notice of the proposed rule making so obviously aimed at his patent.

The only potentially applicable exception to this requirement is the "good cause" exception, where notice and publication may be dispensed with for good cause based upon a finding that notice and publication are impracticable, unnecessary or contrary to the public interest. No such finding is in the record. Even if there were such a finding, "the various exceptions to the notice and comment provisions of section 553 will be narrowly construed and only reluctantly countenanced." *State of New Jersey v. United States Environmental Protection Agency*, 626 F.2d 1038, 1045 (D.C. Cir. 1980). The rule is therefore invalid.

Finally, any rulemaking that is intended to have the force and effect of law must conform to the APA. *Chrysler Corp. v. Brown*, 44 U.S. 281, 303 (1979). Defendant obviously intended for its rulemaking to be binding on the nation, declaring that anyone who possessed an Akins Accelerator

possessed a machine gun that must conform to the law. Ultimately, Defendant seized the springs from Akins Accelerators, relying on its ruling. Thus, Defendant was obligated to provide notice and an “opportunity to participate in the rule making through submission of written data, views, or arguments.” 5 U.S.C. § 553(c). Defendant failed in its obligation.

Defendant now claims that Plaintiff’s receipt of Defendant’s *post hoc decision* and Plaintiff’s subsequent request for reconsideration “constitute the meaningful opportunity to be heard to which Plaintiff is entitled.” Doc. 19-1, p. 18. Defendant cites no authority for the proposition that § 553’s notice requirement is satisfied by announcing to the world *after the fact* what an agency has decided. Nor does Defendant cite any authority for the proposition that a party’s *sua sponte* request for reconsideration satisfies the opportunity to be heard requirement. There is no such authority.

Such authority, if it existed, would undermine the whole purpose of § 553. If an agency expects anyone to know of its rules, the rules will be published at some point. Theoretically, anyone can write an agency a letter at any time asking for reconsideration. If telling the world what the agency has decided and receiving mail are all that the APA requires, then the APA means nothing at all.

Defendant’s decision and declaration that Plaintiff’s invention is a machine gun are an adjudication. In coming to its decision, Defendant acted like a court. The result was specific to Plaintiff (and ultimately Plaintiff’s customers). It resulted in sanctions being imposed (as defined in § 551) in that property was confiscated (the springs from the Akins Accelerators). Under § 554, Defendant was obligated to give Plaintiff an opportunity for the submission and consideration of facts, arguments, offers of settlement, and a hearing and decision on notice when the matter was not resolved by consent. It is undisputed that Plaintiff received none of that. Plaintiff had no knowledge

that Defendant even was considering the matter until after a decision was made.

Plaintiff is Entitled to a Hearing as a Matter of Constitutional Due Process

Even if a hearing was not required under the APA (and one was), Plaintiff was entitled to a hearing on the merits as a matter of constitutional due process. Under *York v. Secretary of the Treasury*, 774 F.2d 417, 421 (10th Cir 1985), the court ruled that a person disputing the classification of a device as a machine gun on factual grounds is *constitutionally* entitled to a hearing on the merits. Plaintiff alleged in his Complaint, consistent with his position, that Defendant's decision was factually wrong. He is, therefore, entitled to a hearing on the matter.

Defendant Showed Prejudice and Actual Bias Against Plaintiff

It is clear from the record that ATF determined *a priori* that the commercial production Akins Accelerator was a machine gun, without even examining or testing it, and then set about looking for facts to support its conclusion. Doc. 19-3, p. 24. That is, ATF pre-judged the device before it ever opened its investigation.

[D]ue process requires a neutral and detached judge in the first instance.... That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is, of course, the general rule. Before one may be deprived of a protected interest, whether in a criminal or civil setting, one is entitled as a matter of due process of law to an adjudicator who is not in a situation...which might lead him not to hold the balance nice, clear and true.

Concrete Pipe & Products v. Construction Laborers and Pension Trust, 508 U.S. 602, 617 (1993).

In the instant case, it is apparent from Defendant's own record that Mr. Nixon, the chief of the branch that re-classified the Akins Accelerator, had his thumb on the balance when he requested the investigation and kept it there while his branch made its decision *before it ever inspected, tested, or evaluated* the device.

On August 16, 2006, Mr. Nixon wrote an internal email saying:

Two companies are manufacturing machineguns.... The firearms are using the

motion of the weapon to move the finger back and forth. FTB has always evaluated these devices as machine guns. One of the manufacturers sent us a sample that did not function. We classified it as nothing. The manufacturer then changed the device and made it function and is now selling it on the internet.... I have been talking to James Vann and Teresa Ficaretta [two ATF lawyers]. ***We feel that ATF needs to put a stop to the sales ASAP. In order to make a legal case, FTB needs to evaluate these machineguns.***

(Emphasis supplied). The subject heading in Mr. Nixon's email was "Illegal machine guns." Doc. 19-3, p. 24. In that email, Mr. Nixon included an email from Daniel Pinckney, of the National Firearms Act Branch of the ATF, which said, "I guess by the current definition of a machine gun, it technically isn't one, but it sure has a pretty quick rate of fire."

Mr. Nixon called the Akins Accelerator an "illegal machine gun" and then directed his staff to buy one and test it to "build a legal case." Soon, ATF employees across the country were calling it a machine gun. Doc. 19-3, pp. 24-33. ATF said, "We evaluated the device and conferred with counsel (9/8/06) and determined it to be a machine gun." Doc. 19-4, p. 3. Shockingly, ATF evaluated the device and conferred with counsel ***two weeks before*** it ordered the Akins Accelerator from Plaintiff on September 22, 2006 [Doc. 19-3, pp. 54-55], and ***33 days before*** it sent the Akins Accelerator to FTB for examination. [Doc. 19-3, p. 54].

Defendant Acted Arbitrarily and Capriciously

Even if ATF afforded Plaintiff the statutory and constitutional due process to which he was entitled, ATF acted arbitrarily, capriciously, and came to factually incorrect conclusions. When the existing statutory definition of a machine gun did not quite fit the Akins Accelerator, ATF changed the definition in multiple ways to make it easier to reach the result it wanted. It changed the words "single function of the trigger" to "single pull of the trigger." Doc. 19-4, pp. 5, 9, 18.

This was necessary because ATF must concede that the trigger of the Ruger 10/22 has to

move backward to fire the gun, forward to reset, and backward again in order to fire a subsequent shot. Arguably, however, the trigger is only “pulled” one time (for the first shot) and is then “pushed” against the trigger finger for subsequent shots. It is somewhat pedantic to distinguish between “pushing” and “pulling” of a device, when the difference between the two rests merely on the perspective of an observer. Nonetheless, by drawing this distinction, ATF can say with a semblance of a straight face that more than one shot is fired for a single “pull” of the trigger.

Of course, ATF does not want to constrain itself to a “single pull of the trigger” for future devices (that might have a push button trigger), so it has moved back to “single function of the trigger” (the actual words of the statute) now that “single pull of the trigger” has served its purpose. Doc. 19-4, p. 61; Doc. 19-5, p. 1. Even within its own brief, Defendant cannot decide if “function” means “pull,” or if it also means “act,” “push,” or “event.”

Seeking support for its “pull” instead of “function” analysis, Defendant cites a Supreme Court case where “pull” was used interchangeably with “function.” *See, e.g., Staples v. United States*, 511 U.S. 600, 603 n. 1 (1994). The problem with Defendant’s reliance on such cases is that the only trigger function of interest in *Staples* was the “pull.” There was no discussion of “pushing” or any other function of the trigger, so there was no need to make any other distinction.

Clearly, where other functions are significant, “pull” cannot be used synonymously with “function.” For example, there is no doubt that a device that uses an electric motor to pull a trigger repeatedly when the electric circuit is closed is a machine gun. The electric switch is deemed in such cases to be the “trigger.” *See, e.g., United States v. Fleischli*, 305 F.3d 643 (7th Cir 2002). If “function” meant just “pull,” it would not take much imagination to activate such a device by an electric “push” button. In such a case, the trigger never would be “pulled” and the device could not

possibly fit this cramped definition of machine gun.

Moreover, ATF has never classified so-called “trigger release” firearms, where the firearm fires once when the trigger is pulled, and again when the trigger released, as machine guns. This flies in the face of the “function” means only “pull” claim, for in those cases the weapon fires twice with a single pull of the trigger (i.e., the trigger only gets “pulled” once, but the gun fires twice).

Moving from the sublime to the ridiculous, Defendant calls the movement of the trigger on the Ruger 10/22 to be “vibration” against the shooter’s finger, without citation to the record. Doc. 19-1, p. 14. Lest there be any mistake, the trigger on the Ruger 10/22 moves in exactly the same way (forward and backward and the same distance) when installed in an Akins Accelerator as it does in the factory stock. There is no “vibration” of the trigger, as that term is normally used. The trigger moves its full distance both forward and backward. Indeed, Defendant’s own video recording [Doc. 19, Exh. G] shows Defendant not testing certain other devices on a Ruger 10/22 because the trigger could not move forward far enough after the rifle fired to reset. “Vibration” of the trigger is insufficient for repeat firing of a Ruger 10/22. The trigger must move its complete cycle. When the Ruger 10/22 is mounted in the Akins Accelerator, the Ruger 10/22 reciprocates a distance of about 5/8 inch, hardly what one would call a mere “vibration.”

Defendant concludes, without support or citation to the record, that Plaintiff’s use of “function” is so “narrow” as to require each “vibration” to be a separate function. It is Defendant, not Plaintiff, that seeks to narrow the definition of “function” to just the initial pull of the trigger. Defendant refuses to consider all remaining (and necessary) movements of the trigger to be functions. The Ruger 10/22 cannot and will not fire a second shot unless the trigger is allowed to move fully forward and reset after a shot. If, as Defendant suggests now for the first time (and

without support from the record), the trigger merely “vibrated,” the firearm would fire only once.

ATF introduced, also for the first time in this case, the concept of “conscious” effort on the part of the shooter to function the trigger. Doc. 19-4, p. 59. This was necessary because, again, ATF must concede that the trigger travels rearward and forward again for every shot fired. To get around this inconvenient truth, ATF decided that the effort of the shooter’s finger against the trigger must be “conscious.”

The difficulty with the “consciousness” concept is two-fold. First, the fact that ATF created the concept just for the Akins Accelerator makes it suspect (especially in light of the bias shown by ATF officials towards the Akins Accelerator). Second, this concept is inherently subjective and not susceptible to scientific testing (By what standard can consciousness of performing a function be determined?).

In addition, FTB assistant Chief Vasquez claims anecdotally to have fired the Akins Accelerator/Ruger 10/22 while keeping his finger on the trigger. Doc. 19-5, p. 1. Supposing *arguendo* that this is true, Mr. Vasquez is claiming that his finger followed the trigger back and forth on its approximately 5/8-inch journey at a rate of 600-800 times a minute. Unfortunately (for it would be amazing to see), Mr. Vasquez did not submit a video into the record of his moving his finger at hummingbird speed. Supposing, again *arguendo*, that Mr. Vasquez really accomplished this feat, he does not claim to have been possessed by a demon at the time. He must, therefore, have “consciously” moved his finger for each and every shot. While the spring in the Akins Accelerator stock would move the Ruger 10/22 (including the trigger) forward, only Mr. Vasquez’s finger could move it back again to fire. In the hands of Mr. Vasquez, the Akins Accelerator cannot be a machine gun, because he is able to pull the trigger “consciously” for each shot.

The forgoing example from Defendant's own record merely illustrates the utter hopelessness of introducing a subjective factor (conscious activity) into the statutory definition of a machine gun that contains no such factor. A device is machine gun in everyone's hands, or it is not a machine gun in anyone's hands.

Defendant also ignores the word "automatically" in the statute. In order to be a machine gun, a device must shoot "***automatically*** more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b). [emphasis supplied]. It is clear from Defendant's actions and brief that Defendant applies no meaning to the word "automatically." Defendant concentrates on "more than one shot" and "single function (or push, or pull, or act, or event) of the trigger."

The word "automatically" does have a meaning and its meaning is significant. The *Staples* court defined "automatically" as used in 26 U.S.C. § 5845(b) to "refer to a weapon 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." 511 U.S. at 602. [emphasis supplied].

Defendant's ignoring the word "automatically" undermines its entire defense. There is nothing in the record that indicates the trigger of the Ruger 10/22 mounted on an Akins Accelerator will "automatically continue to fire ***until its trigger is released***" because the trigger loses contact with the trigger finger every time the rifle fires (except in the extraordinary case of Mr. Vasquez, who consciously pulls the trigger several hundred times per minute). The trigger, therefore, can not be released, because it is not being held in position in the first place (i.e., there is nothing from which to "release" it). It cycles for every shot of the rifle.

Statutes should be interpreted to avoid making any word surplusage. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (“We are thus reluctant to treat statutory terms as surplusage in any setting”). By ignoring the word “automatically,” Defendant has rendered it surplusage. When the word is considered in the statute with the definition supplied by the Supreme Court, it is clear the Akins Accelerator cannot be a machine gun.

Defendant is Not Entitled to Deference

“An agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is entitled to considerably less deference than a consistently held agency view.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30 (1987). In the instant case, Defendant did a complete about face on the very same question.

FTB essentially declared the Akins Accelerator to be a machine gun by *ipse dixit*, when it previously had determined that it is not a machine gun.

A court reviewing an *ipse dixit* outcome that seems inconsistent with proffered precedent is left to attempt to discern for itself which factual differences might have been determinative, without guidance from the agency, and to assess whether making such distinctions controlling is rational or arbitrary, again without any agency explanation of why particular factors make a difference. The court really has no way of knowing if the rationale it discerns is in fact that of the agency, or one of the court’s own devise. Yet only the former can provide a legitimate basis for sustaining agency action.

Lemoyne-Owen College v. NLRB, 357 F.3d 55, 61 (D.C. Cir 2004). Without a rational explanation for the different treatment of the same device, this Court is unable to sustain Defendant’s actions.

Defendant claims its change in policy was due to two factors: 1) The Akins Accelerator commercially produced was intended for a Ruger 10/22, while the sample was for an SKS-type rifle; and 2) the production model was accompanied by advertising claiming rates of fire of 650 rounds per minute. These factors are irrelevant.

Defendant's concern about the "dangerousness" of the Akins Accelerator is not a legitimate factor. Defendant is interpreting a criminal statute and cannot make that statute more inclusive because of Defendant's fear. Even so, Defendant's fear of the "dangerousness" of the device should be lessened, not heightened, by the fact that the production model was built for a .22 caliber rifle rather than the world's premier military assault rifle caliber: 7.62 mm.² It is disingenuous for Defendant to imply that it would have preferred that the production model stay at this more powerful caliber, unless Defendant is prepared to say the identical device built for an SKS rifle is acceptable. Moreover, the Supreme Court has considered, and rejected, a concept of "dangerousness" as a measure of whether a person knew a particular device was a machine gun. *Staples v. United States*, 511 U.S. 600, 618 (1994) (noting that all guns are "dangerous" and half of all U.S. households contain them, so a person would not equate dangerousness of a gun with illicit behavior in owning one).

Even more disturbing, however, is Defendant's emphasis on the advertised rate of fire of the Akins Accelerator. First, there is not now, nor has there ever been, a rate-of-fire standard for determining if a device is a machine gun. Congress easily could have made such a test, and it arguably would be much simpler to apply such a test. Again, this argument of Defendant's, not applied to any other device, is another way of saying the Akins Accelerator works. The whole idea of the theory of operation is to increase the rate of fire.

Interestingly, Defendant does not discuss the rate of fire of any other device, be it machine gun or not. Several devices not classified as machine guns by FTB, such as the BMF Activator, also reportedly fire several hundred rounds per minute on a Ruger 10/22. In short, rate-of-fire is not only

² In case the Court is not aware, this is the caliber of the ubiquitous AK-47.

not determinative of classifying a device as a machine gun, it is not even a factor. If it were, any firearm in the hands of Mr. Vasquez of the FTB would be a machine gun, because he has the ability to pull the trigger several hundred times per minute. In addition, Defendant's video does not show Defendant attempting to see how fast the other tested devices could fire. If rate of fire were a factor, which it is not, Defendant would have to try to maximize rate of fire of other devices in order to make a useful comparison.

In approving the sample, FTB acknowledge the theory of operation and now concedes that the production model had the same theory of operation. Surely FTB, what must be the most technologically savvy governmental firearms agency in the world, was capable then of calculating how fast a given semiautomatic rifle would cycle and fire again when mounted on an Akins Accelerator. For this agency to express surprise now at high rates of fire in a device whose theory of operation it well understood when tested originally is disingenuous.

Defendant also claims to have reversed course because of "technological innovation." While this sounds intriguing, it is a hollow claim. Defendant points not to a single technological innovation that brought about its fickle behavior. The production Akins Accelerator was the same as the sample provided, it was just built to exacting commercial production standards.

ATF's real concern with the Akins Accelerator is that it works. When FTB tested the sample and it failed to work, FTB dismissed it as junk. The better-built production model caught FTB off-guard, and FTB looked for any excuse it could find to shut Plaintiff down.

Defendant all but concedes [Doc. 19, p. 21, n. 10] that the Akins Accelerator does not fit within the four corners of the statutory definition of a machine gun, calling it a "device cleverly designed to escape regulation." Defendant continues by boldly asserting without support that

Defendant's concept of public safety triumphs over the law and Plaintiff's "cleverness." That comment sums up the problem very neatly. Defendant, not wanting to be constrained with the technicalities of the law, prefers the standard of, "I know a machine gun when I see one." Defendant's position is what makes its application of law unconstitutional, as discussed below in Section IV.

Finally, ATF's rulemaking, promulgated in violation of the APA's notice and comment requirements, cannot stand. The only remaining determinations from ATF are opinions contained in letters, which are not entitled to deference. *Springfield, Inc. v. Buckles*, 116 F.Supp.2d 85 (D.D.C. 2000).

Defendant's Theory Makes a Plain Ruger 10/22 a Machine Gun

Ruger 10/22s are available in a variety of configurations, but models generally weigh between 4 and 5 pounds, according to Ruger's web site at www.ruger.com. Ruger does not appear to publish specifications for the 10/22's "trigger pull," the amount of force necessary to apply to the trigger to fire the gun, but several after-market manufacturers sell replacement 10/22 triggers that have trigger pulls ranging from a few ounces to about two pounds. A plain (i.e., not outfitted with an Akins Accelerator) Ruger 10/22 thus can be made to "bounce" on a shooter's trigger finger, as described in the Statement of Disputed Facts.

The same can be said for a large variety of rifles, especially higher caliber rifles that tend to be heavier yet have similar trigger pulls. In essence, ATF's "consciousness" standard could be applied to make virtually all semiautomatic firearms machine guns, because they all can be bump fired or "weight fired" without the shooter "consciously" pulling the trigger for each shot.

Plaintiff Relied on Defendant's Original Classification

Plaintiff relied to his detriment on Defendant's original classification. Without warning,

Defendant reversed itself and shut Plaintiff down in an arbitrary and capricious, if not malicious, manner.

Defendant claims incorrectly that Plaintiff was in the “firearms industry,” implying that Plaintiff consciously entered a regulated industry. This is not the case. Plaintiff scrupulously avoided becoming a manufacturer of firearms. He asked FTB to classify his device to make sure there would be no doubt. This was a prudent course of action, considering that FTB once classified a *shoestring* as a machine gun. Letter from FTB Chief Nixon, September 30, 2004. If Defendant had classified the Akins Accelerator as a machine gun in the first instance, Plaintiff never would have begun production at all (assuming any appeals were not resolved in Plaintiff’s favor). Plaintiff entered the firearms *accessory* industry, which is completely unregulated (at least at the federal level).

IV. Defendant’s Application of the Definition of Machine Gun is Unconstitutional

As noted above, Defendant prefers the standard of “I know a machine gun when I see one.” Depending on the circumstances, Defendant interprets “function” to mean “push,” “pull,” “action,” or sometimes “function.” Defendant applies a (non-existent in the statute) standard of rate of fire if it suits Defendant to do so. If all else fails, Defendant does not even attempt to fit within the statute and just says “public interest” prevails.

Defendant loses sight of the fact that Defendant is interpreting a criminal statute with severe penalties for violations. “It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits.” *City of Chicago v. Morales*, 527 U.S. 41, 57 (1999). When the agency responsible for primarily interpreting the statute applies such flimsy, fluid, and inconsistent standards, it is

impossible for the required notice to be made. In this case, Plaintiff had no way of knowing if his invention was to be evaluated on a basis of “push” or “function,” or on a basis of rate of fire, or on a basis of “dangerousness,” or on a basis of “consciousness,” or on a basis of “public interest” (or even that his device was being evaluated at all). The “standard” applied by Defendant is no standard and any standard that results in the result it seeks.

Defendant dismisses as “clever” Plaintiff’s attempts at *complying* with the criminal law. Criminal laws must be strictly construed against the government, with all doubts and ambiguities resolved in favor of non-criminality. *United States v. Bass*, 404 U.S. 336 (1971) *superseded on other grounds by congressional act*. Instead, Defendant astonishingly asserts that a “public interest” standard applies in determining what behavior is criminal and what is not. Defendant apparently missed the memo, now nearly 200 years old, that there are no federal common law crimes. *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). Moreover, only Congress can act to include conduct inadvertently omitted in a statute, no matter how salutary the purpose. *Viereck v. United States*, 318 U.S. 236, 243-245 (1943).

Congress laid out the boundaries of what constitutes a machine gun. ATF has no power to enlarge the boundaries in the “public interest.” If ATF believes the statutory definition of machine gun to be inadequate to protect the public interest, it may attempt to rectify the perceived inadequacy by bringing it to Congress’ attention. In the meanwhile, a device that does not fit the statutory definition of a machine gun is not a machine gun, and the degree of cleverness necessary to conjure up the device is irrelevant.

Defendant attempts to evade a finding of vagueness as applied to Plaintiff by citing cases where the same statute was not determined to be vague on its face or and as applied to others. An

as-applied challenge to the constitutionality of a statute cannot be resolved by looking to the results of facial challenges and challenges to other applications. To do so undermines the whole point of an as-applied challenge. Defendant does not cite to any case where it determined a device not to be a machine gun, then, applying different standards invented for that device only, changed its mind and determined that it was a machine gun. If there were such a case, it might have bearing. The cases cited by Defendant do not.

Conclusion

Defendant has failed to meet its burden for a motion to dismiss for failure to state a claim and for a motion for summary judgment. Plaintiff has stated a valid claim, and Defendant improperly refers the Court to matters outside the Complaint, requiring the conversion of a motion to dismiss to one for summary judgment.

As for a motion for summary judgment, there is a genuine issue of material fact. In addition, Defendant is not entitled to judgment as a matter of law because it is clear from the record and facts that Defendant deprived Plaintiff of statutory and constitutional due process and was factually incorrect in its conclusion that the Akins Accelerator is a machine gun.

For the foregoing reasons, Defendant's motion must be denied.

Dated September 5, 2008

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CERTIFICATE OF SERVICE

I certify that on September 4, 2008, I filed the foregoing PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT, together with a STATEMENT OF DISPUTE FACTS, DECLARATION OF WILLIAM AKINS, and LETTER FROM FTB CHIEF NIXON DATED SEPTEMBER 30, 2004 via the CMS/ECF system, which automatically will send a copy via email to:

Eris Soskin, Esq.
Eric.soskin@usdoj.gov

/s/ John R. Monroe
John R. Monroe
Attorney for Plaintiff