APPENDICES

APPENDIX A

760 Fed. Appx. 114

Armament Services Int'l, Inc. v. Attorney General of the United States

United States Court of Appeals
for the Third Circuit
Jan. 22, 2019, Filed

No. 18-1125

Before: CHAGARES, JORDAN, and VANASKIE*, Circuit Judges.

OPINION+

CHAGARES, Circuit Judge.

***117** Armament Services International, Inc. and Maura Kelerchian were denied firearms licenses by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). They petitioned for judicial review of that decision under 18 U.S.C. § 923(f)(3). The District

---

* The Honorable Thomas I. Vanaskie retired from the Court on January 1, 2019, after the argument and conference in this case, but before the filing of the opinion. This opinion is filed by a quorum of the panel pursuant to 28 U.S.C. § 46(d) and Third Circuit I.O.P. Chapter 12.

+ This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Court granted summary judgment to ATF without permitting discovery. We will affirm.

I.

Maura Kelerchian and her husband Vahan Kelerchian jointly owned and operated Armament Services International, Inc. ("ASI"), a federal firearms licensee, between 2002 and 2013.[1] In May 2013, Vahan was indicted for several violations of the Gun Control Act and other felonies.[2] Vahan and employees of the Sheriff's Department for Lake County, Indiana, bought 71 machineguns from the licensed firearms dealer Heckler and Koch ("H & K") purportedly for official use, but instead disassembled them and sold the parts for profit. Soon after Vahan's indictment, Maura informed ATF that Vahan was no longer a responsible person on ASI's licenses, effective immediately, and ASI applied to renew its licenses. Vahan was convicted. A few days later, Maura applied for her own license to operate as a firearms dealer.

ATF denied Maura and ASI's applications under 18 U.S.C. § 923(d)(1)(C) for willfully violating the Gun Control Act. ATF concluded that ASI had knowingly made false statements with respect to the information required to be kept in H & K's transaction records in violation of 18 U.S.C. § 924(a)(1)(A) and had unlawfully possessed machineguns in violation of 18 U.S.C. § 922(o), and that Maura had aided and

---

[1] Because we write only for the parties, we recite just those facts necessary to our decision.

[2] We use the Kelerchians' first names for ease of reference in distinguishing them.

abetted those violations. After a hearing, ATF affirmed this conclusion.

Maura and ASI filed a petition for judicial review under 18 U.S.C. § 923(f)(3). ATF moved for summary judgment, and Maura and ASI moved to stay that motion to conduct discovery. The District Court denied discovery and granted ATF summary judgment, finding that the undisputed evidence proved that Maura and ASI ***118** willfully violated 18 U.S.C. § 924(a)(1)(A) and § 922(o). The court also held that collateral estoppel, the statute of limitations in 28 U.S.C. § 2462, and the time limits in 18 U.S.C. § 923(f)(4) did not apply. Maura and ASI timely appealed.

II.

We have appellate jurisdiction over the District Court's final order granting summary judgment to ATF under 28 U.S.C. § 1291. The District Court had jurisdiction under 18 U.S.C. § 923(f)(3) and 28 U.S.C. § 1331.

Under 18 U.S.C. § 923(f)(3), a district court conducts "de novo judicial review of [the] denial or revocation" of a federal firearms license, under which it "may consider any evidence submitted by the parties to the proceeding whether or not such evidence was considered at the hearing" before ATF. Here, the District Court did not hold an evidentiary hearing and instead resolved the case on ATF's motion for summary judgment based on the administrative record. Our review of the District Court's summary judgment decision is plenary, and we apply the same standard as the District Court to determine whether summary judgment was appropriate. *E.g.*, *Sconiers v. United*

States, 896 F.3d 595, 597 n.3 (3d Cir. 2018). In a § 923(f)(3) proceeding, summary judgment is "appropriate if no genuine issue of material fact exists about whether [the licensee] willfully violated an applicable statutory or regulatory provision." *Armalite, Inc. v. Lambert*, 544 F.3d 644, 647 (6th Cir. 2008).

III.

Anyone who imports, manufactures, or deals in firearms must apply for and receive a license from the Attorney General. 18 U.S.C. § 923(a).[3] The Attorney General "shall" approve an application for a license if certain criteria are satisfied. Id. § 923(d)(1). The criterion relevant here requires that "the applicant has not willfully violated any of the provisions of this chapter or regulations issued thereunder." Id. § 923(d)(1)(C). A violation of the Gun Control Act is willful where the licensee: (1) knew of his legal obligation under the Gun Control Act, and (2) either purposefully disregarded or was plainly indifferent to its requirements. *Simpson v. Attorney Gen. United States of Am.*, No. 17-3718, 913 F.3d 110, 113–15, 2019 WL 81816, at *3 (3d Cir. Jan. 3, 2019).

ASI argues that it did not willfully violate either § 924(a)(1)(A) or § 922(o). Maura argues that she did not willfully aid and abet those violations. We disagree.

A.

As for § 924(a)(1)(A), there is no doubt that Vahan caused H & K to make false statements in its records, but ASI argues that Vahan's acts cannot be ascribed

[3] The Attorney General has delegated his licensing decisions to ATF. *See* 28 C.F.R. § 0.130(a)(1).

to ASI because they were outside the scope of his employment. But ASI cites no authority for this proposition. On this record, it is beyond reasonable dispute that ASI knew of Vahan's actions and is thus, under the licensing regime, responsible for his conduct. *See Stein's Inc. v. Blumenthal*, 649 F.2d 463, 467–68 (7th Cir. 1980). The fact that one subsection of § 923(d)(1) defines "the applicant" as "including, in the case of a corporation, ... any individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the corporation" suggests that the actions of a corporate licensee's president ***119** are ascribable to the corporate licensee. 18 U.S.C. § 923(d)(1)(B).

Maura willfully aided and abetted the violation of § 924(a)(1)(A). She was ASI's vice president and a responsible person on its licenses, and a co-conspirator testified that she appeared to know what was going on with the firearms based on his email communications with her. She argues that her role was merely secretarial, but offers no reason a secretary cannot aid and abet a violation of the Gun Control Act. The facts show that Maura did just that: she sent the Sheriff's Department templates for the falsified demonstration letters that they used to acquire the machineguns and, once they acquired the guns, instructions on how to cut them up to sell for parts. Since this information advanced illegal ends, it does not matter that the information itself was publicly available. Regardless of whether this evidence shows that Maura shared in her husband's criminal intent beyond a reasonable doubt, it surely gave ATF "reason to believe that [she was] not qualified to receive a

license" due to at least plain indifference to the requirements of the Gun Control Act. 27 C.F.R. § 478.71.

These facts make this case unlike *Harris News Agency, Inc. v. Bowers*, 809 F.3d 411 (8th Cir. 2015), upon which Maura relies. There, ATF denied Harris News a firearms license because ATF concluded that the company's principals had aided and abetted a violation of the Gun Control Act by "allowing" it to happen. *Id.* at 413. The Court of Appeals for the Eighth Circuit reversed because ATF had found no "affirmative conduct" by the principals, and only mere "negative acquiescence" in the underlying violation. *Id.* Here, Maura did not just "allow" the violation — she helped.

We also reject Maura and ASI's efforts to dispute that H & K's records contained misrepresentations. Even if the conspirators intended the Department ultimately to receive 15 to 20 complete firearms, the recipient of over 50 machineguns would still have been misrepresented. And, in actuality, none of these machineguns were ever "ultimately transferred via proper forms to the Sheriff's Department." ASI Br. 37. These arguments fail to raise genuine disputes of material fact over ASI and Maura's violations of § 924(a)(1)(A).

B.

Turning to § 922(o), ATF identified five machineguns that ASI acquired using falsified letters requesting the firearms for police department demonstrations and then unlawfully possessed from mid-2009 until ATF seized them in 2013. ASI disputes that its possession was unlawful — because the

letters were authorized by the Sheriff's Department and approved by ATF, because demonstrations need not actually occur, and so on. Maybe ASI could have acquired these machineguns lawfully under different circumstances. But here the demonstrations were fictitious from the outset and the weapons were cut up and sold for parts. That possession was unlawful.

Maura aided and abetted this violation. As discussed above, she emailed a co-conspirator in the Sheriff's Department to coordinate sending the demonstration letters, including telling him when to send them and sending him a sample letter. Later, although she knew that the machineguns had been acquired only for police demonstrations, she sent that same co-conspirator instructions on how to cut them up into parts. In doing so, she purposefully disregarded or was at least plainly indifferent to the prohibition on unlawful possession of machineguns in § 922(o).

In sum, the undisputed facts demonstrate that ASI and Maura willfully violated ***120** two provisions of the Gun Control Act, and summary judgment was appropriate.

IV.

We also reject ASI and Maura's remaining four challenges to ATF's license denials.

First, Maura argues that ATF is collaterally estopped from considering her a co-conspirator because there was a judicial determination that she was not a co-conspirator at Vahan's criminal trial. Not so. The court held that Maura acted as Vahan's agent and did not conclude that she was not a co-conspirator (on the contrary, the court stated that there was enough

evidence to consider Maura a co-conspirator). *United States v. Kelerchian*, 13-cr-66 (N.D. Ind.), ECF No. 192 at 229–232. And this point is irrelevant anyway, since ATF ultimately denied Maura's application as an aider and abettor, not a co-conspirator. So there is no basis for collateral estoppel.

Second, Maura and ASI argue that ATF cannot deny their applications because Vahan was indicted more than a year before the denials and because Vahan's convictions are not final. Under 18 U.S.C. § 923(f)(4), "[i]f criminal proceedings are instituted against a licensee" for violating the Gun Control Act but "the licensee is acquitted," ATF cannot deny or revoke its licenses based on the same conduct and cannot institute revocation proceedings more than a year after the indictment. But no criminal proceedings were instituted against Maura or ASI, since neither were indicted. Plus, ATF did not revoke their licenses; rather, Maura and ASI applied for new and renewed licenses. And Vahan's convictions — final or not — are not dispositive, since ATF's denials were also based on the guilty pleas of the co-conspirators, documentary and testimonial proof of affirmative acts by Maura, and Maura's interview with ATF. So, the limits imposed by § 923(f)(4) do not apply.

Third, Maura and ASI argue that ATF is time-barred from denying their applications by 28 U.S.C. § 2462, which as relevant provides that "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." Denying a license, however, is just that; it is

not an action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture. Accordingly, 28 U.S.C. § 2462 does not apply.

Fourth and finally, in a footnote, Maura and ASI "object to the consideration of H & K's Acquisition and Disposition Records under the Tiahrt Amendment." ASI Br. 32 n.30. "Federal courts of appeals refuse to take cognizance of arguments that are made in passing without proper development." *Johnson v. Williams*, 568 U.S. 289, 299, 133 S.Ct. 1088, 185 L.Ed.2d 105 (2013); *see also Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 815 (3d Cir. 2016) (refusing to consider argument raised only in a "footnote, standing alone, [that] does not sufficiently present [an] argument on the issue"). Thus, we need not consider this point. In any event, it is plain that ASI willfully violated the Gun Control Act and Maura aided and abetted those violations, even without considering H & K's records.

V.

We turn last to Maura and ASI's argument that the District Court should have permitted discovery before granting ATF summary judgment. Under Federal Rule of Civil Procedure 56(d), if a party "cannot present facts essential to justify its opposition" ***121** to summary judgment, the court may allow discovery. We review a district court's disposition of a Rule 56(d) motion for abuse of discretion. *See Woloszyn v. Cty. of Lawrence*, 396 F.3d 314, 324 n.6 (3d Cir. 2005). A district court abuses its discretion when it makes "a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact." *Int'l Union, United Auto., Aerospace & Agric.*

Implement Workers of Am., UAW v. Mack Trucks, Inc., 820 F.2d 91, 95 (3d Cir. 1987).

We cannot conclude that the District Court abused its discretion. The court was correct that the Gun Control Act does not require it to consider evidence outside the administrative record. And ASI and Maura's reasons for requesting discovery were unpersuasive. ASI sought discovery to support its arguments that § 932(f)(4) or 28 U.S.C. § 2462 bars ATF from denying its applications, but these provisions do not apply for the reasons set forth above. And Maura sought discovery about her involvement in the conspiracy, information she surely already possessed. Given this, and given that the statutory scheme permits the District Court to proceed solely on the administrative record, we conclude that the District Court acted within its discretion to deny discovery.

VI.

For these reasons, we will affirm the District Court's order granting summary judgment to ATF.

APPENDIX B

2017 WL 5886048

Armament Services Int'l, Inc. v. Yates

United States District Court
for the Eastern District of Pennsylvania

November 27, 2017, Filed

CIVIL ACTION NO. 17-mc-10

MEMORANDUM RE: RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

Baylson, District Judge

***1** Petitioners, Armament Services International, Incorporated ("ASI") and Maura Ellen Kelerchian ("Mrs. Kelerchian"), seek Judicial Review of Respondent's, Alcohol, Tobacco, Firearms and Explosives' ("ATF"), December 1, 2016 Final Notices of Denial of Application of Firearms License for both ASI and Mrs. Kelerchian. For the reasons discussed below, Respondents' Motion for Summary Judgment (ECF 13) is granted, and the Petition will be dismissed.

I. Factual and Procedural Background

The following facts are either undisputed or construed in the light most favorable to Petitioners and are based primarily on documents in the administrative record and Petitioners' Petition. In 2001 and 2002 ASI obtained three Federal Firearms Licenses

("FFL") for premises at 103 Camars Drive, Warminster, Pennsylvania: (1) an FFL Type 07—Manufacturer of firearms other than destructive devices license, which was renewed every three years; (2) an FFL Type 08—Importer of firearms other than destructive devices license, which was renewed every three years; (3) an FFL Type 10—Manufacturer of destructive devices license. (ECF 1, Petition ¶¶ 5–6). Since 2002, both Vahan Kelerchian ("Mr. Kelerchian") and Mrs. Kelerchian were identified as "responsible persons" for ASI's Licenses.[1] (Id. ¶ 6).

On May 17, 2013, a Grand Jury for the Northern District of Indiana indicted Mr. Kelerchian on multiple GCA violations from 2008 to 2010. The indictment included charges for providing and conspiring to provide false information to a Federal firearms licensee in violation of 18 U.S.C. §§ 371 and 924(a)(1)(A); and making and conspiring to make false representations to obtain machineguns for ASI under false pretense in violation of 18 U.S.C. §§ 371 and 1001. (Administrative Record at 0594–619); See also (Pet. ¶ 14). The court described the indictment against Mr. Kelerchian:

> The Indictment allege[d] that Mr. Kelerchian and his co-conspirators fraudulently represented to ATF and other federal firearms licensees that the machine guns were for the Lake County Sheriff's Department. To back up

[1] A responsible person is defined as "any individual possessing, directly or indirectly, the power to direct or cause the direction of the management, policies, and practices of [a] corporation, partnership, or association, insofar as they pertain to firearms." *See* 18 U.S.C. § 923(d)(1)(B).

> these claims, they used the Lake County Sheriff's Department letterhead, fabricated Lake County Sheriff's Department purchase orders, and issued false letters in the name of the Sheriff's Department. The machine guns were shipped to the Sheriff's department but taken by the co-conspirators to their homes. There they removed the barrels and sold them. Some of the barrels were sent to Mr. Kelerchian. On the basis of these allegations, the Grand Jury charged Mr. Kelerchian with conspiracy to provide false information to other federal firearms licensees in violation of 18 U.S.C. §§ 371 and 924(a)(1)(A).
>
> Mr. Kelerchian's conduct is analogous to a straw purchaser of firearms, except that the roles of the characters are reversed. Whereas the straw purchaser claims to be buying firearms for himself, the conspiracy here was to claim that the firearms were bought for someone else, that is, the Sheriff's Department.

***2** United States v. Kelerchian, No. 2:13-CR-66 JVB, 2015 U.S. Dist. LEXIS 80336 at *2, *4-5, 2015 WL 3832667 at *1, *1-2 (N.D. Ind. June 22, 2015). No charges were brought against ASI or Mrs. Kelerchian, but the individual sheriff's officers from the Lake County Sherriff's Department who were charged along with Mr. Kelerchian pleaded guilty. Only Mr. Kelerchian went to trial and on October 20, 2015, he was convicted of the GCA violations. (Rec. at 0594–619, 0620–28).

On June 4, 2013, after Mr. Kelerchian was indicted, Mrs. Kelerchian informed ATF that Mr. Kelerchi-

an was no longer a responsible person for ASI. (Rec. at 0588); *see also* (Pet. ¶ 15). Mrs. Kelerchian remained as a responsible person and assumed the role of President. On August 13, 2013, Mrs. Kelerchian submitted an FFL Renewal Application for the Type 07—Manufacturer of firearms other than destructive devices license, and Type 08—Importer of firearms other than destructive devices, on behalf of ASI. On July 22, 2014, Mrs. Kelerchian submitted an FFL Renewal Application for the Type 10—Manufacturer of destructive devices license on behalf of ASI. (Rec. at 3342–46, 0583–84). ATF did not approve or deny the renewal applications for ASI, but ATF did formally issue letters of authorization permitting ASI to continue operations for a period of over three years as the manufacturer of firearms other than destructive devices, and as an importer of firearms other than destructive devices; and for a period of over two years as the manufacturer of destructive devices.[2] On October 19, 2015, Mrs. Kelerchian applied for her own License as a dealer in firearms for the ASI premises and inventory. (Pet. ¶¶ 6, 19).

In December, 2015, ATF, through Industry Operations Investigator Philip Perkins ("IOI Perkins"), began investigating ASI's applications. IOI Perkins interviewed Mrs. Kelerchian and obtained documents relating to the criminal action against Mr. Kelerchian. (Rec. at 0181). On April 14, 2016, ATF denied Petitioners' application based on the findings of the investigation. (Rec. at 0441–55, 0466–80, 0492–506,

---

[2] *See* copy of the Letters of Authorization attached as Exhibit A to Petitioners' Brief in Opposition to Respondents' Motion for Summary Judgment.

0518–32); *See also* (Pet. ¶¶ 21-22.). By letter dated April 25, 2016, Petitioners made timely requests for a hearing to review the denials. (Rec. at 0550–58). Petitioners' letter also included a demand for discovery asking for all documents, including a list of witnesses to be called at the hearing. (Rec. at 0551). On June 3, 2016, ATF issued superseding notices to both ASI and Mrs. Kelerchian denying the license applications, and acknowledging Petitioners' requests for a hearing on the original Notices as extending to the Superseding Notices. (Rec. at 0429-549).

On September 21, 2016 ATF convened a hearing to review the application denials at ATF's Lansdale Area Office with ATF Hearing Officer Deborah Rankin presiding over the proceedings. (Rec. at 0132). Prior to ATF presenting its case, Attorney Prince made a number of objections that the Hearing Officer did not rule on, including most of the claims brought in the present case. (Rec. at 0162–66). ATF's only witness was IOI Perkins. Neither ASI nor Mrs. Kelerchian testified or had any witnesses testify on their behalf. (Rec. at 0171); *See also* (Pet. ¶ 36).

***3** After considering the evidence and argument presented at the hearing, ATF, through the Director of Industry Operations for ATF's Philadelphia Field Division, confirmed the conclusion that Petitioners had willfully violated the GCA. ATF found, among other things:

> Between on or about November 2008 and on or about January 2010, in the Eastern District of Pennsylvania, the Northern District of Indiana and elsewhere, ASI willfully violated the Gun Control Act by conspiring with Vahan

> Kelerchian, Joseph Kumstar, and Ronald Slusser to make false statements and representations with respect to information required by the Gun Control Act to be kept in the records of Heckler & Koch, a Federal firearms licensee, in willful violation of 18 U.S.C. §§ 371 and 924(a)(1)(A).
>
> Maura Kelerchian willfully violated the Gun Control Act and regulations by aiding and abetting this conspiracy between Vahan Kelerchian, Joseph Kumstar, Ronald Slusser, and ASI to make false statements and representations with respect to information required by the Gun Control Act to be kept in the records of Heckler & Koch, a Federal firearms licensee, in willful violation of 18 U.S.C. §§ 2, 371, and 924(a)(1)(A). Maura Kelerchian participated in the conspiracy as something she wished to bring about. Maura Kelerchian associated herself with the conspiracy knowingly and willfully. Maura Kelerchian sought by her actions to make the conspiracy succeed.
>
> On or about the dates stated below, ASI willfully violated the Gun Control Act by possessing machineguns in willful violation of 18 U.S.C. § 922(o).
>
> Maura Kelerchian willfully violated the Gun Control Act and regulations by aiding and abetting ASI to possess these machineguns in violation of 18 U.S.C. § 922(o).

(Rec. at 0002-110). On December 11, 2016, Petitioners' counsel requested a stay of the effective dates of the final denials pursuant to 27 C.F.R. § 478.78, so

that ASI could continue licensed operations during the pendency of a judicial review of the denials. (Pet. ¶¶ 53–54). On December 16, 2016, ATF granted Petitioners' requested stay, and postponed the effective dates of the denials of their applications pending the outcome of judicial review. (Rec. at 3394); *See also* (Pet. ¶ 55). On January 30, 2017, Petitioners filed their petition asking that this Court review ATF's denials of their applications pursuant to 18 U.S.C. § 923(f)(3). (ECF 1, Petition).

After the Petition was filed, Petitioners moved to stay the proceedings so they could engage in discovery. The Court denied this Motion, and ordered Petitioners to respond to the Government's Motion for Summary Judgment with permission to make any arguments concerning discovery in their response. (ECF 24).

II. Legal Standard

Rule 56(a) of the Federal Rules of Civil Procedure provides as follows: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion." For purposes of Rule 56, a fact is material if proof of its existence or nonexistence might affect the outcome of the suit under the applicable substantive law. *Haybarger v. Laurence Cnty. Adult Prob. & Parole*, 667 F.3d 408, 412 (3d Cir. 2012) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). For an issue to be genuine, "all that is required is that sufficient evidence supporting the claimed fac-

tual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Id.* (quoting *Anderson*, 477 U.S. at 248–49, 106 S.Ct. 2505). The initial burden is on the moving party to show that there exists an absence of genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the moving party meets this initial burden, then the non-moving party must set forth specific facts showing that there is a genuine issue for trial in order to defeat the motion. *Anderson*, 477 U.S. at 247–48, 106 S.Ct. 2505.

***4** Petitioners challenge the ATF's denial of their license applications pursuant to 18 U.S.C. § 923(f). A licensee may challenge an ATF revocation by filing a petition for review with the appropriate federal district court. The GCA provides that review of a revocation decision is de novo. 18 U.S.C. § 923(f)(3). Under the de novo standard of review for a decision of the ATF, the district 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. *Gilbert v. Bangs*, 813 F.Supp.2d 669, 672–73 (D. Md. 2011) (internal quotation marks omitted). In other words, the decision under review "is not necessarily clothed with any presumption of correctness or other advantage." *Stein's, Inc. v. Blumenthal*, 649 F.2d 463, 466–67 (7th Cir. 1980).

Although the district court's review must be de novo, it is "not required to hold an evidentiary hearing and may enter judgment solely based upon the administrative record." *Arwady Hand Trucks Sales, Inc. v. Vander Werf*, 507 F.Supp.2d 754, 758 (S.D. Tex.

2007); *see also Stein's*, 649 F.2d at 466–67. The district court may consider any evidence submitted by the parties to the proceeding whether or not such evidence was considered at the administrative hearing. The district court is afforded discretion to receive evidence additional to that contained in the administrative record "when some good reason to do so either appears in the administrative record or is presented by the party petitioning for judicial review." *Shawano Gun & Loan, LLC v. Hughes*, 650 F.3d 1070, 1076 (7th Cir. 2011).

Although the motion before the Court is styled as a motion for summary judgment, the nature of this action, and the federal laws implicated by the agency decision being challenged, require the Court to treat this motion differently than traditional dispositive motions brought pursuant to Rule 56 of the Federal Rules of Civil Procedure. *Taylor v. Hughes*, No. 1:12-CV-138, 2012 WL 7620316 (M.D. Pa. Dec. 27, 2012). There is a certain tension between the Court's obligation under the statute to perform a de novo review to determine whether the ATF decision was "authorized" and the Court's corresponding obligation under Rule 56 to view the facts in the light most favorable to the non-movant. 18 U.S.C. § 923(f)(3); Fed. R. Civ. P. 56; *see also Sudyam v. U.S. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 847 F.Supp.2d 146, 156 (D. Me. 2012). Noting that § 923(f)(3) permits the district court to enter judgment on the basis of the administrative record when no substantial reason to receive additional evidence is present, courts have developed a practice "to grant judgment summarily when the material facts developed at the administra-

tive hearing, which the court also concludes justify nonrenewal are not substantially drawn into question by the party petitioning for review." *Stein's*, 649 F.2d at 468 n. 7. Therefore, the ATF's "decision may be upheld when the trial court concludes in its own judgment that the evidence supporting the decision is substantial." *Id*. at 467.

Furthermore, the court in *Stein's* recognized that under the traditional summary judgment standard, "fact finding is inappropriate and all reasonable inferences must be drawn in favor of the party opposing the motion." *Id*. at 468 n. 7. In contrast, § 923(f)(3) authorizes the court to hear any evidence it wishes and make findings of fact, even without the benefit of conducting an evidentiary hearing. *Id*. at 466. Thus, while the court's decision may be "summary" in nature as a matter of form, procedurally the Court may issue a decision even if material issues of fact exist, based upon its evaluation of the record and any additional evidence it has received. *Taylor*, 2012 WL 7620316, at *8. This is so because the legal standard requires only that there has been evidence of even a single violation committed willfully, and if there are undisputed facts that establish a willful violation then summary judgment is authorized. See *Am. Arms Int'l v. Herbert*, 563 F.3d 78, 86 (4th Cir. 2009)

***5** In conducting a de novo review of ATF's decision, the question is whether ATF was authorized to deny Petitioners' applications for licenses. In order to uphold ATF's decision, a district court must be satisfied that ATF appropriately found that (1) the licensee violated one or more provisions of the GCA, and (2) the licensee willfully committed the violation. 27

C.F.R. § 478.73. A licensee's violation is willful "where the licensee knew of his legal obligation and purposefully disregarded or was plainly indifferent to the requirements." *In re Taylor*, 548 Fed.Appx. 822, 824 (3d Cir. 2013) (citing *Borchardt Rifle Corp. v. Cook*, 684 F.3d 1037, 1042 n.9 (10th Cir. 2012)). Willfulness is synonymous with "plain indifference" to the legal requirements imposed by federal firearms laws. *Vineland Fireworks Co. v. ATF*, 544 F.3d 509, 517–18, n.16 (3d Cir. 2008).

III. Discussion

Respondents have moved for summary judgment contending that ATF was authorized to deny Petitioners' applications based on Petitioner's willful violations of the GCA because "a single willful violation of the [GCA] by an applicant authorizes ATF to deny an application for a License or renewal of a License." (ECF 13, Resp'ts' Mot. for Summ. J. at 1–3) (citing 18 U.S.C. § 923(d)). In opposition, Petitioners argue that: (1) ATF is collaterally estopped from finding Petitioner Mrs. Kelerchian a co-conspirator because no charges were brought when Mr. Kelerchian was charged; (2) the five-year statute of limitations in 28 U.S.C. § 2462 bars consideration of any acts by Petitioners under the previous license; (3) under 18 U.S.C. § 923(f)(4), ATF's denial of their applications is legally barred both because it is beyond a statute of limitations and because it is premature; (4) ATF deprived Petitioners of their constitutional rights to due process and equal protection of the law; (5) the facts presented and relied on by the ATF cannot establish willful violations of the GCA by Petitioners. (ECF 25,

Petitioner's Brief in Opposition to Defendants' Motion for Summary Judgment).

A. Collateral Estoppel

Collateral estoppel bars the subsequent relitigation of the same fact or same issue between the same parties or their privies where that fact or issue was necessarily adjudicated in a former suit and the same fact or issue is presented in a subsequent action. It applies where the causes of action are not the same, but the same fact or question is again put in issue in a subsequent suit between the same parties.

Petitioners' argument that ATF is estopped from denying the license on the basis that Mrs. Kelerchian was a co-conspirator to her husband's violations need not be analyzed because the basis for ATF's denial was that Mrs. Kelerchian aided and abetted her husband in the gun-related crimes. These are two different issues. Assuming arguendo, ATF would be estopped from finding that Mrs. Kelerchian was a co-conspirator, this would not stop ATF from proving she was an aider and abettor in the violations. Petitioners further argue that neither the statute, nor the regulations, provide a mechanism for ATF to issue a notice of denial and then subsequently change it with a superseding notice. (Pet'rs' Opp'n at 17–18). However, there are cases in which the court has accepted ATF's superseding notice as a valid revocation of a person's license. The court in Simpson v. Lynch, 2016 WL 1660842 (M.D. Pa. 2016), focused on ATF's Superseding Notice of Revocation to determine whether ATF was authorized to revoke the license with no mention of any statute or regulation prohibiting ATF from using this type of revision. Thus, this does not

seem to be an uncommon action by ATF in determinations on license applications.

***6** Accordingly, the Court finds no basis for a collateral estoppel argument in this case.

B. 28 U.S.C. § 2462—Statute of Limitations

Petitioners' contend that the ATF improperly relied on the alleged violations occurring from 2008 through January, 2010 in denying Petitioners' applications in 2016 because of a five year statute of limitations contained in 28 U.S.C. § 2462. (Pet'ts' Opp'n at 21). 28 U.S.C. § 2462 provides in full:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

Furthermore, Petitioners' argue that ATF implemented the proceedings against Petitioner ASI, rather than ASI implementing the proceedings against the Government. After ASI applied for the renewal of its licenses, ATF granted letters of authorization for ASI to continue business. Subsequently, over two years later ATF constructively revoked ASI's licenses. (Pet'ts' Opp'n at 22).

However, Petitioners provide no authority that persuades this Court that this limitation statute would apply in this case and this Court finds no au-

thority that would substantiate Petitioners' argument. Moreover, Respondents cites several different cases that directly counter Petitioners' argument that this statute of limitations applies here. *See, e.g., Barany v. Van Haelst*, No. CV-09-253-RMP, 2010 WL 5071053 at *8 (E.D. Wash. Dec. 6, 2010), *aff'd*, 459 Fed.Appx. 587, 588 (9th Cir. 2011) (ATF's denial of an application for a License, or the renewal of one, is not an "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture" to which the provision applies in the first instance); *see also Lortz v. Gilbert*, 451 Fed. Appx. 503, 504 (6th Cir. 2011) (finding ATF's refusal to renew License not subject to § 2462; applicant, not ATF, commenced proceedings by filing its renewal application, and denial of a federal firearms license is not an action to enforce a penalty).

The court in *Gilbert* also held that ATF's action in denying a License application was not an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, but "part of ATF's duty to protect the public by screening applicants whose conduct may pose a safety risk." 813 F.Supp.2d at 675. The court concluded that interpreting ATF denials of license applications as remedial measures rather than penalties is correct because it upholds ATF's discretion, granted by the Attorney General, to make such determinations based on all the evidence before it. *Id*. This Court cannot ignore overwhelming authority holding that the five year statute of limitations in 28 U.S.C. § 2462 would not apply to ATF's decision to deny the License applications in this case.

Accordingly, the Court declines to interpret 28 U.S.C. § 2462 as barring ATF from considering Petitioners' alleged violations that occurred more than five years prior to ATF's decision to deny Petitioners' applications.

C. 18 U.S.C. § 923(f)(4)—Criminal Prosecution

***7** Petitioners argue that 18 U.S.C. § 923(f)(4) bars ATF from denying ASI's applications to renew its licenses because (1) ATF instituted proceedings against ASI's Licenses more than one year after the 2013 indictment against Mr. Kelerchian and (2) Mr. Kelerchian has not exhausted all of his appeals so there is not currently a final determination in his case. (Pet'rs' Opp'n at 18–19). 18 U.S.C. § 923(f)(4) provides in full:

> If criminal proceedings are instituted against a licensee alleging any violation of this chapter or of rules or regulations prescribed under this chapter, and the licensee is acquitted of such charges, or such proceedings are terminated, other than upon motion of the Government before trial upon such charges, the Attorney General shall be absolutely barred from denying or revoking any license granted under this chapter where such denial or revocation is based in whole or in part on the facts which form the basis of such criminal charges. No proceedings for the revocation of a license shall be instituted by the Attorney General more than one year after the filing of the indictment or information.

Neither side presents any case law on this issue nor is the Court able to find any cases that would provide assistance in its decision. Therefore, the Court will look to the plain language of the statute. The statute specifically states that criminal proceedings must be instituted against the licensee for this provision to be useful. In the present case, Petitioner was not charged criminally with any violation of the GCA. Mr. Kelerchian exclusively was charged with violations. Additionally, the statute requires that the proceedings be instituted by the Attorney General for the purpose of revoking a license. Here, the ATF is not instituting a proceeding as Petitioners' filed the applications for the licenses, and the ATF is not revoking the licenses, it is denying Petitioners' applications for a license and for renewal of a license.

The possibility that Mr. Kelerchian's appeal is heard and his conviction is overturned has no relevance in the present case because the licenses at issue were for ASI and Mrs. Kelerchian. Moreover, Mr. Kelerchian was specifically removed as a "responsible person" from the ASI license before Petitioners' applied for renewal. Although Mr. Kelerchian's actions may be tethered to Petitioners' alleged GCA violations, Respondents have made clear that there was enough undisputed evidence that even if Mr. Kelerchian's conviction is overturned, there will remain substantial evidence that Petitioners willfully violated the GCA.

Accordingly, the Court declines to follow Petitioners' interpretation. The plain language of the statute controls. Petitioner has no claims based on the criminal proceedings.

D. Denial of Constitutional Rights

Petitioners' argue that the ATF hearing was deficient in providing due process and that the Government failed to provide a pre or post-deprivation hearing in violation of Due Process. (Pet'rs' Opp'n at 22–25). Along with this due process argument, Petitioners also argue that they were denied the opportunity to prepare a defense for the hearing because the demand for discovery was never answered.

As noted by Respondents, courts have found that ATF's administrative hearing process comports with the requirements of due process. *See DiMartino v. Buckles*, 129 F.Supp.2d 824 (D. Md. 2001), aff'd, 19 Fed.Appx. 114 (4th Cir. 2001) (rejecting petitioners' contention they were denied due process rights because, among other reasons, the ATF combined the investigatory and adjudicatory roles in one entity, finding argument foreclosed by Supreme Court jurisprudence); *Weaver v. Harris*, 486 Fed.Appx. 503, 506 (5th Cir. 2012) (acknowledging that the petitioner had provided "generalized examples of additional procedures he wishes were in place during his revocation proceedings, [but] fails to provide any persuasive reason as to why those procedures are mandated by the Due Process Clause.").

***8** ATF's notice process and hearing procedures comport with due process. Petitioners received notice of the violations, had an opportunity to be heard, had an opportunity to present evidence on their behalf, and to challenge the government's evidence, prior to ATF revoking the licenses. Petitioners also exercised their right to seek de novo review in federal court.

Courts have found that these procedural protections satisfy due process. *See Sovereign Guns, Inc. v. U.S. Dep't of Justice*, No. 5:16-CV-182, 2016 U.S. Dist. LEXIS 170394, 2016 WL 7187316, at *5 (E.D. N.C. Dec. 9, 2016) ("[I]n light of a licensee's opportunity to present evidence, cross-examine witnesses, and seek de novo judicial review, it is readily apparent that the GCA offers licensees adequate opportunity to demonstrate any deficiencies or inaccuracies [in] the government's evidence."); *see also Shaffer v. Holder*, No. 1:09-0030, 2010 U.S. Dist. LEXIS 31415, 2010 WL 1408829 (M.D. Tenn. Mar. 30, 2010) (due process rights not violated where ATF did not apply rules of discovery, did not provide the petitioner with copies of exhibits prior to hearing, and did not apply the APA's standards). The Court reaches the same finding here.

Petitioners also contend that Respondents violated their right to equal protection under the Fifth Amendment by treating them differently from other similarly situated federal firearms licensees. Petitioners' argument is based on the assertion that ATF is inconsistent in its inspection and enforcement activities. Specifically, with respect to another licensee, petitioner claims that ATF allowed him to continue to operate while having engaged in the same conduct that ATF alleges precludes Mrs. Kelerchian from being granted a license, and that forms the basis for the revocation of ASI's licenses. Thus, Petitioners are making a class of one argument, which the Supreme Court has found may be a cognizable equal protection claim in some instances. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d

1060 (2000) (per curiam) (finding an equal protection claim brought by an individual where it was alleged that the claimant "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."); *see also Overly v. Garman*, 599 Fed.Appx. 42 (3d Cir. 2015) (holding that in order to establish a class of one equal protection claim a plaintiff must show that (1) the defendants treated him differently than others similarly situated, (2) the defendants did so intentionally, and (3) there was no rational basis for the difference in treatment).

The Third Circuit addressed a similar argument in *In re Taylor*, 548 Fed.Appx. 822 (3d Cir. 2013). In that case petitioner requested files on every FFL holder whose license had been revoked by ATF, as well as files on FFL holders who violated the GCA but whose licenses had not been revoked, in order to analyze ATF's internal policies and treatment of other licensees. The Court held that there is no basis to require a district court "to undertake an analysis of ATF's policies and the application of those policies to other [License] holders when the court has concluded that the statutory requirements for revocation have been met." *Id*. at 825. Furthermore, whether ATF did or did not investigate any other License holder with respect to any allegedly similar transaction is not relevant to the Court's inquiry into whether Petitioners willfully violated the GCA, and to whether ATF was authorized to deny Petitioners' applications for licenses. *Id*. For the same reasons, this Court rejects Petitioners' unsupported argument.

E. Evidence of Willful Violations

Petitioners argue that ATF cannot establish a "willful" violation of the GCA against Mrs. Kelerchian or ASI as required in denying or revoking an FFL. (Pet'rs' Opp'n at 34–58). However, Petitioners do not dispute the facts established in the administrative proceedings including the evidence presented in the criminal action against Mr. Kelerchian.

***9** Under the GCA, anyone engaged in the business of importing, manufacturing or dealing in firearms needs a Federal firearms license. 18 U.S.C. § 923(d)(1). The Attorney General must approve any application for a License if the applicant meets the legal requirements.[3] Id. One requirement is that the applicant has not willfully violated a single provision of the GCA or regulations issued thereunder. 18 U.S.C. § 923(d)(1)(C). A violation of the GCA is willful "where the licensee knew of his legal obligation [under the GCA] and purposefully disregarded or was plainly indifferent to the requirements." *In re Taylor*, 548 Fed. Appx. at 824. *See also Borchardt Rifle Corp.*, 684 F.3d at 1041; *Armalite, Inc. v. Lambert*, 544 F.3d 644, 648 (6th Cir. 2008); *RSM, Inc. v. Herbert*, 466 F.3d 316, 321–22 (4th Cir. 2006); *Article II Gun Shop, Inc. v. Gonzales*, 441 F.3d 492, 497 (7th Cir. 2006); *Willingham Sports, Inc. v. ATF*, 415 F.3d 1274, 1277 (11th Cir. 2005); *Perri v. ATF*, 637 F.2d 1332, 1336 (9th Cir. 1981); *Lewin v. Blumenthal*, 590 F.2d 268, 269 (8th Cir. 1979).

---

[3] The Attorney General has delegated his licensing decisions to ATF. 28 C.F.R. § 0.130(a)(1).

Through its investigation, ATF found that Petitioners conspired, and aided and abetted a conspiracy, to violate 18 U.S.C. § 924(a)(1)(A) by causing Heckler & Koch to keep false records. Petitioners argue that the acts committed by Mr. Kelerchian were not within the scope of his employment and therefore cannot be attributed to ASI. Thus, ASI was not involved in a conspiracy in any "knowing capacity." Further, Mrs. Kelerchian was merely relaying the information that Mr. Kelerchian told her to provide to customers and did not share "the criminal intent of the principal." Both Petitioners were also not charged in the criminal action brought against Mr. Kelerchian. (Pet'rs' Opp'n at 39–50).

Title 18 U.S.C. § 2 makes punishable as a principal one who aids or abets another in the commission of a substantive offense. *United States v. Greatwood*, No. 98-10079 1999 U.S. App. LEXIS 14942, *3, 1999 WL 451766, *1 (9th Cir. June 29, 1999); *See also Harris News Agency, Inc. v. Bowers*, 809 F.3d 411, 413–414 (8th Cir. 2015). Mrs. Kelerchian served as ASI's Vice President and was a responsible person on ASI's Licenses since 2002. She was mainly responsible for the billing, email communications, and payments for the firearms. (Rec. at 3052–228). One of Mr. Kelerchian's co-conspirators, Chief Kumstar, testified that Mr. and Mrs. Kelerchian were basically interchangeable when he communicated with ASI. (Rec. at 0888–90). The undisputed evidence obtained by ATF shows that Mrs. Kelerchian was directly involved in the illegal purchases under the GCA. She explained to the conspirators what paperwork was required to obtain the guns illegally, how to prepare

the false documentation, and where to send it; she pointed out a misspelled word on one of the false letters; she provided Chief Kumstar with a prepaid FedEx label to send the fraudulent paperwork; she sent out invoices from ASI to the purchasers of the machineguns; she collected money from various sources other than the Sheriff's Department for guns purportedly being purchased by the Sheriff's Department, deposited those funds into ASI's account, and paid H&K or its agents with ASI funds for the illegally purchased guns; she sent Chief Kumstar pictures on how to cut up a machinegun. (Rec. at 3141–55, 3193, 3210, 3216, 3218, 3229–31). These are not the actions of someone doing what any effective employee would have done in the same situation, as Petitioners argue. Mrs. Kelerchian was directly involved and assisted in the purchase of these illegal firearms.

***10** ATF also found that ASI illegally possessed five machineguns in violation of 18 U.S.C. § 922(o), and Mrs. Kelerchian aided and abetted that illegal possession. Petitioners argue that pursuant to 27 C.F.R. § 479.105(d), a licensee may possess a machine gun manufactured after May 18, 1986. The request for the transfer of these five firearms was sent to ATF with the proper documentation and ATF approved the transfers. In certain circumstances ATF has been known to allow samples to be purchased without demonstration letters. Mrs. Kelerchian was merely sending information to a customer and providing any necessary follow up response, Petitioners argue. (Pet'rs' Opp'n at 50–53).

The GCA provides, in relevant part: "(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun. (2) This subsection does not apply with respect to—(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof." 18 U.S.C. § 922(o). During its investigation, ATF found that ASI acquired machineguns by presenting to ATF fake letters in the name of the Sheriff's Department falsely requesting "demonstrations" of these machineguns in connection with their purchase for law enforcement purposes; the fake demonstration letters were merely a mechanism to get the weapons, which were only legal in the possession of law enforcement, into ASI's inventory. (Rec. at 3232–33). Mrs. Kelerchian was directly involved in obtaining the five machineguns for ASI. She explained to Mr. Kelerchian's co-conspirator Chief Kumstar the process for obtaining the machineguns by sending a demonstration letter to the ATF, and also updated Kumstar that more letters were needed.

Under 18 U.S.C. § 924(a)(1)(A), it is a crime to "knowingly make[ ] any false statement or representation with respect to the information required by [the GCA] to be kept in the records of a person licensed under this chapter." The statute does not require that the perpetrator transfer, receive, or possess the firearms that are the subject of the false statement or representation, or come into contact with those firearms in any way. The court in Mr. Kelerchian's criminal action analyzed this issue: even if the conspiracy had been only about the barrels, be-

cause they were imported into the country, as opposed to having been manufactured here, their sales were still restricted only to military or law enforcement agencies, and any attempt to deceive the federally licensed importer about the identity of the buyer violated § 924(a)(1)(A). *Kelerchian*, 2015 U.S. Dist. LEXIS 80336 at *4, 2015 WL 3832667 at *1-2.

ATF denied the licenses after concluding, based on the undisputed evidence, that Petitioners had committed these violations willfully. A violation of the GCA is willful "where the licensee knew of his legal obligation [under the GCA] and purposefully disregarded or was plainly indifferent to the requirements." *In re Taylor*, 548 Fed. Appx. at 824.

Accordingly, the undisputed evidence supports the conclusion made by ATF that Petitioners violated both 18 U.S.C. § 924 and 922(o) willfully.

IV. Conclusion

Following the Petitioners' response to the Government's Motion for Summary Judgment reviewed above, the Court noted that Petitioners requested this Court to suspend indefinitely its consideration of the Government's summary judgment motion, including the requests for discovery, until Petitioners could cross move for summary judgment. The Government is correct that there is no bar to Petitioners making a cross motion for summary judgment, but they did not do so. However, this is a question of form over substance. Petitioners filed a comprehensive response to the Government's Motion for Summary Judgment, which is the basis of the rulings in this foregoing Memorandum. There is no reason to delay any further. The Court notes also that even though this a de

novo review, that if the Court had considered this issue on the administrative record, it would have also found that the Petition would have to be denied under applicable law. The Court repeats its prior rulings that no discovery is necessary under settled precedent.

***11** For the foregoing reasons, Respondents' Motion for Summary Judgment (ECF 13) is **GRANTED** and the Petition for Judicial Review will be **DISMISSED**, with prejudice.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 18-1125

ARMAMENT SERVICES INTERNATIONAL INC.;
MAURA ELLEN KELERCHIAN,
Appellants
v.
ATTORNEY GENERAL UNITED STATES OF AMERICA; DEPUTY DIRECTOR BUREAU OF ALCOHOL TOBACCO FIREARMS & EXPLOSIVES; DIRECTOR INDUSTRY OPERATIONS BUREAU OF ALCOHOL TOBACCO FIREARMS & EXPLOSIVES; UNITED STATES OF AMERICA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(No. 2:17-mc-00010)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, and [1]VANASKIE, Circuit Judges

The petition for rehearing filed by Appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,
s/Michael A. Chagares
Circuit Judge

Dated: March 21, 2019

CJG/cc: Adam J. Kraut, Esq.
Joshua Prince, Esq.
Lauren E. DeBruicker, Esq.

---

[1] The Honorable Thomas I. Vanaskie, a member of the merits panel that considered this matter, retired from the Court on January 1, 2019. The request for panel rehearing has been submitted to the remaining members of the merits panel and the request for rehearing en banc submitted to all active members of the Court who are not recused.