

In the Supreme Court of the United States



DCV IMPORTS, LLC,

Petitioner,

—v—

BUREAU OF ALCOHOL, TOBACCO,
FIREARMS, AND EXPLOSIVES,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This petition seeks review of Respondent, ATF's interpretation of the unambiguous statutory phrase "willfully violated" found in 18 U.S.C. § 843(b)(2) of the Safe Explosives Act (SEA), 18 U.S.C. § 841, et seq. This statute requires the Attorney General to renew an application for a federal explosives license (FEL) unless the applicant is determined to have "willfully violated" the provisions of the SEA, and the regulations promulgated thereunder. ATF denied Petitioner, DCV Import, LLC's application for renewal of its federal explosives license (FEL) for a first-time violation of ATF's explosives inventory and recordkeeping regulations, concluding that DCV's owner, Darren Vinyard, had "willfully violated" 27 C.F.R. 555.127, because he had previously acknowledged awareness of the existence of these requirements, and purposefully disregarded or was plainly indifferent to compliance with them simply because they were inaccurate upon ATF's initial inspection.

The Seventh Circuit denied DCV's petition for judicial review without independently interpreting this statutory provision, or unaffectedly considering ATF's interpretation and application, stating only that "substantial evidence" supported the agency's decision.

THE QUESTIONS PRESENTED ARE:

1. Did the Seventh Circuit abdicate its judicial responsibilities to independently interpret and apply 18 U.S.C. § 843(b)(2), an unambiguous statutory provision, which requires the Attorney General to renew an application for a federal explosives license unless the applicant is shown to have "willfully violated" the agency's explosives recordkeeping requirements, see

27 C.F.R. 555.127, and therefore err by deferring instead to ATF's erroneous construction of this phrase to mean that a regulated entity be shown only to have been "plainly indifferent" to the recordkeeping regulations, without proof of knowledge on the part of its responsible corporate individual that the regulations were actually being violated?

2. Even if the Seventh Circuit's consideration of ATF's interpretation of the statutory phrase "willfully violated" in 18 U.S.C. § 843(b)(2) was an appropriate measure of deference, did the Seventh Circuit nonetheless err in applying the "substantial evidence" test to the ATF's review, rather than a *de novo* review of the ATF's interpretation and application, and therefore err in denying DCV's petition for a full judicial review of the ATF's decision, where discrepancies found in DCV's explosives inventory records were a first-time error of this kind, there were no past violations of this kind, and where no opportunities were given to DCV to correct its recordkeeping errors, *see* 27 C.F.R. 555.71, as in most other cases involving revocation and renewal of federal explosives licenses and federal firearms licenses, the latter of which are equally regulated by ATF as similar language exists in 18 U.S.C. § 923(d)(1)(C) of the Gun Control Act, 18 U.S.C. § 921, *et seq.*?

3. If ATF's interpretation was entitled to *Chevron* deference, whether its interpretation must be affirmed if it was within the permissible range of interpretations, or, whether that interpretation itself must be analyzed to determine whether the agency's application

was not arbitrary, capricious, an abuse of its discretion, or not in accordance with law as directed in 5 U.S.C. § 706(2)(A) of the APA?

**PARTIES TO THE PROCEEDINGS AND
CORPORATE DISCLOSURE STATEMENT**

Petitioner, DCV Imports, LLC (DCV), is a limited liability company operating in the state of Illinois. DCV is not a publicly held company, has no parent corporation, and no publicly held company owns 10 percent or more of DCV's stock.

Respondent is the United States of America, Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to the Seventh Circuit Court of Appeals.



OPINIONS BELOW

The circuit court's opinion (App.1a-10a) is reported as: *DCV Imports, LLC v. Bureau of Alcohol, Tobacco, Firearms and Explosives (BATF)*, 838 F.3d 914 (2016).



JURISDICTION

On February 14, 2017, Justice Kagan granted Petitioner's application for an extension of time to file its petition until April 22, 2017. This Court has jurisdiction over this Petition for a Writ of Certiorari to the Seventh Circuit pursuant to 28 U.S.C. § 2101(c) and 28 U.S.C. § 1254(1).



STATUTORY PROVISIONS INVOLVED

- Section 842(f)

It shall be unlawful for any licensee or permittee willfully to manufacture, import, purchase, distribute, or receive explosive materials without

making such records as the Attorney General may by regulation require

- **Section 843(b)(2) and (e)(2)**, in relevant part:

(b) Upon the filing of a proper application and payment of the prescribed fee, and subject to the provisions of this chapter and other applicable laws, the Attorney General shall issue to such applicant the appropriate license or permit if—

[. . .]

(2) the applicant has not willfully violated any of the provisions of this chapter or regulations issued hereunder

[. . .]

(e)(2) If the Attorney General denies an application for, or revokes a license, or permit, he shall, upon request by the aggrieved party, promptly hold a hearing to review his denial or revocation The Attorney General shall give written notice of his decision to the aggrieved party within a reasonable time after the hearing. The aggrieved party may, within sixty days after receipt of the Attorney General's written decision, file a petition with the United States court of appeals for the district in which he resides or has his principal place of business for a judicial review of such denial or revocation, pursuant to sections 701-706 of title 5, United States Code

- **27 C.F.R. 555.71**

Except in cases of willfulness or those in which the public interest requires otherwise, and the Director, Industry Operations so alleges in the

notice of denial of an application or revocation of a license or permit, no license or permit will be revoked or renewal application denied without first calling to the attention of the licensee or permittee the reasons for the contemplated action and affording him an opportunity to demonstrate or achieve compliance with all lawful requirements and to submit facts, arguments, or proposals of adjustment

- **27 C.F.R. 555.74**

If following the opportunity for compliance under § 555.71, or without opportunity for compliance under § 555.71, as circumstances warrant, the Director, Industry Operations finds that the licensee or permittee is not likely to comply with the law or regulations or is otherwise not eligible to continue operations authorized under his license or permit, the Director, Industry Operations shall issue a notice of denial of the renewal application or revocation of the license or permit, ATF F 5400.11 or ATF F 5400.10, as appropriate.

- **27 C.F.R. 555.127**

In taking the inventory . . . a licensee or permittee shall enter the inventory in a record of daily summary transactions to be kept at each magazine of an approved storage facility

- **5 U.S.C. § 704**

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

- **5 U.S.C. § 706**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts

of it cited by a party, and due account shall be taken of the rule of prejudicial error.



STATEMENT OF THE CASE

A. Introduction

This petition seeks review of ATF's interpretation of the unambiguous statutory phrase "willfully violated" found in 18 U.S.C. § 843(b)(2) of the Safe Explosives Act (SEA), 18 U.S.C. § 841, et seq. *See* 18 U.S.C. § 843(b)(2). This statute requires the Attorney General to renew an application for a federal explosives license (FEL) unless the applicant is determined to have "willfully violated" the provisions of the SEA, and the regulations promulgated thereunder.

Interpreting this phrase, ATF denied DCV's application for renewal of its federal explosives license (FEL) for a first-time violation of ATF's explosives inventory and recordkeeping regulations, concluding that DCV's owner, Darren Vinyard, had "willfully violated" 27 C.F.R. 555.127 because he had previously acknowledged awareness of the existence of these requirements, and purposefully disregarded or was plainly indifferent to compliance with them simply on a finding that they were inaccurate.

ATF applied this interpretation based on its treatment of nearly identical language in 18 U.S.C. § 923(d)(1)(C) of the Gun Control Act (GCA), 18 U.S.C. § 921, et seq, which also requires a showing of a willful violation to deny or revoke a federal firearms license.

Here, ATF concluded a single, first-time record-keeping error by employees of the regulated entity is sufficient to deny the application, and also to deprive the applicant of an opportunity to remedy the violations, as long as ATF proves by a preponderance of the evidence that the applicant simply knew about the existence of the regulations and the regulations were not complied with. *See* 18 U.S.C. § 843(b)(2); 27 C.F.R. 555.71 and 27 C.F.R. 555.127.

B. Facts.

DCV Imports, LLC (DCV), is a small, family-owned-and-operated Lincoln, Illinois-based fireworks company. It was founded in 2004 by Darren Vinyard, who purchased his parents' fireworks company, S&N Display Fireworks (S&N). DCV has imported fireworks and staged fireworks shows throughout the country since its founding in 2004. On October 20, 2004, DCV applied for and received Federal Explosives License (FEL), Number 3-IL-107-23-3L-00682.

When DCV was founded, its operations consisted of importing fireworks for S&N. App.47a. DCV would take orders from S&N and place orders in China; once DCV received the items, it would transfer them to S&N. App.47a-48a.

Darren's parents, Mary Vinyard and Stephen Vinyard, Sr., founded S&N in 1997 and operated it for approximately 33 years. App.44a. Mary served as the president of S&N. *Id.* Darren was an employee and identified as a "responsible person" for S&N. *Id.*¹

¹ 27 C.F.R. 555.11. A "responsible person" is defined as one "who

As Darren testified, he was a responsible person on S&N's federal explosives license because a "responsible person" was required to be on site at all times during ATF inspections and his parents would vacation in Florida during S&N's offseason. *Id.* at n. 4.

S&N imported fireworks, and packaged individual shows for distribution and display. *Id.* Up until 2011, S&N conducted every aspect of a fireworks business, except importing. *Id.* In 2011, Stephen Vinyard, Sr. ceased to be an active participant in S&N and Mary became the sole owner. App.14a.

While it held an FEL, S&N was inspected twice (first in 2006 and then again in 2009).² App.44a. After the 2006-2007 compliance inspection, ATF cited S&N for a number of violations at a "warning conference" that was held on April 29, 2008. App.44a-45a.

S&N was cited under, inter alia, 27 C.F.R. 555.127 for failure to maintain an accurate or complete DSMT. *Id.* Darren Vinyard was present at the April 2008 warning conference. App.45a.

In 2009, IOI Livingston conducted another inspection of S&N. *Id.* She found "numerous violations" with

has the power to direct the management and policies of the applicant pertaining to explosive materials."

² Even though S&N held its FEL since 1997, ATF did not begin conducting inventory compliance inspections every three years until the passage of the Safe Explosives Act in 2002, a part of the Homeland Security Act. The SEA "served to, inter alia, emphasize ATF's explosives-enforcement role." Tobey Elliott, Article: *A Review of the "Similar Context" Rationale for Applying the Gun Control Act Definition of, and Evidentiary Standard for, Willfulness in Administrative Actions Regarding Explosives Licensing*, 33 OKLA. CITY U.L. REV. 557, 558 (Summer 2008).

S&N's recordkeeping, and, again, specifically in its DSMTs. *Id.*

Both Darren and his brother, Stephen (Vinny) Vinyard, had signed acknowledgements of "federal explosives regulations" on behalf of S&N. App.47a.

Angie Myers and Darren Vinyard, among others, were present at a "closing conference" conducted by IOI Livingston on February 16, 2010. App.45a-46a. They signed a report of the violations found as to S&N. *Id.*

In August of 2010, ATF's Director of Industry Operations (DIO) issued a notice of denial of application for a license or permit (NODL) to S&N. App.46a. Darren Vinyard was listed as a "responsible person" on S&N's permit when the ATF DIO issued the NODL. *Id.* at n. 6.

Among the reasons for the denial was listed "willfully failing to maintain accurate DSMTs." *Id.* Mathematical errors in S&N's calculations led to inaccurate balances on its DSMTs for six line items in its inventory. *Id.* S&N also failed to accurately record acquisition quantities of explosive materials. *Id.* The NODL listed 21 other recordkeeping violations that were used as the basis for the NODL.

Between 2011 and 2012, Mary had been experiencing health issues and had grown tired of the business. App.46a-47a. She voluntarily surrendered S&N's license rather than contesting ATF's findings.

At some point near the beginning of 2011, Vinny stopped being an active participant in S&N. Up until S&N surrendered its license, Vinny did the DSMTs for S&N.

During this same time, in 2011 and 2012, DCV was in the process of purchasing S&N. *Id.*

Mary had been a “responsible person” listed on DCV’s federal explosives permit application in 2007 and 2010, but because of her health problems and her desire to retire from the day-to-day affairs of the family’s business, she requested that she be removed as a responsible person for DCV. *Id.*, p. 9, n. 8.

DCV’s 2013 FEL renewal application (the one that was denied by ATF) did not list Mary as a responsible person. *Id.*

After S&N surrendered its license and DCV’s purchase of its assets was completed, S&N maintained a corporate status, but only served as a shipping or carrier company for DCV.

Vinny would become a co-owner and vice president of DCV. Vinny held a 50% interest in DCV. His responsibilities included packing trailers for transportation to fireworks shows that DCV would put on throughout the country; shooting shows (setting up and performing the fireworks show), and “doing some of DCV’s accounting”. App.42a.

DCV’s principal location is at 1635 1800th Street, Lincoln, Illinois. App.40a-41a. Lincoln sits within the ATF’s “Central Illinois” region, which is headquartered at Springfield. *Id.* DCV also maintains a storage facility in Fairview Heights, where ATF maintains headquarters of its “Southern Illinois” region. *Id.* DCV and S&N operate out of the same premises. *Id.*

In 2011, DCV purchased S&N. App.48a. DCV’s purchase was structured over a five-year period. *Id.* DCV agreed to pay approximately \$500,000 for S&N’s

on hand inventory, equipment, customer lists, contacts, and show contracts. *Id.* Part of the monthly installment was also for lease of S&N's facilities. *Id.*

Darren and Vinny run DCV's day-to-day operations, although Darren makes most of the business decisions. App.48a. DCV utilizes multiple areas to store its fireworks. App.48a-49a. The two main areas are Lincoln Illinois, the business office location, and Illiopolis, Illinois. *Id.*

DCV imports fireworks from China to the Illiopolis site for bulk storage. Once a fireworks show is contracted, S&N drives to Illiopolis to pick up the bulk fireworks and transports them to DCV's Lincoln site. App.49a. There, the fireworks are sorted and arranged for the respective fireworks shows that have been contracted. *Id.* The shows are "staged" or "put together" from and on the deck of two trailers. There are several trailers at the Lincoln site. *Id.*

Trailers are referred to interchangeably as magazines. *Id.* Once a final show is packed, it is moved to two either "trailer 7 or 8". *Id.* Any leftovers are stored by product type in labeled wooden bins in trailer 1. *Id.*

During the fireworks busy season, which runs from approximately June 1 to mid-July, DCV employs approximately nine individuals working outside to pack show and take care of other logistics. App.50a and n. 12. During this time, thirty to forty shows can be packed in one day. *Id.* This requires multiple trips for transfer of fireworks from Illiopolis, to staging, and then packing in and from the magazines at Lincoln.

DCV employs five individuals "full time in the offseason", including Darren and Vinny. *Id.*

Darren instituted better business practices when S&N's license was not renewed, and Darren took steps "to assume the family's fireworks business as a whole." *Id.* In 2012, after DCV had just completed its purchase of S&N, Vinny began doing the DSMTs. *Id.* However, in 2013, Darren hired a cousin, Hailey, to do the DSMTs. Vinny ceased doing them, but trained Hailey on how the DSMTs were supposed to be kept. App.50a-51a.

From May 2013 to September 2013, Hailey completed the DSMTs herself. *Id.* Vinny testified that he "checked" Hailey's work, but did not "spot check" the DSMTs. *Id.* Another employee, Adam Hubrick, who worked sporadically for DCV, also helped work on the DSMTs during the 2013 season. App.51a.

Rob Fletcher another DCV employee "took over" doing the DSMTs after the 2013 season. *Id.* During the 2013 season, DCV experienced problems with employee turnover and new hires. *Id.* These problems were found to have contributed to DCV's recordkeeping problems. *Id.* DCV "instituted new recordkeeping procedures to ensure the DSMTs were done correctly." *Id.* The DSMTs are now handled by one person, Rob Fletcher. *Id.*

Prior to 2013, from its inception in 2004, DCV did not have any violations that were cited by ATF. App.52a. ATF also issued no warning letters to DCV from 2004 to 2013. *Id.*

Federal explosives licenses are renewed every three years upon application by the licensee. Upon initial application in 2004, and upon each of the two consecutive renewal periods prior to 2013, ATF conducted inspections at DCV; in 2004, 2008, and

2010, no violations were reported during these inspections.

An inspection was performed in 2004 pursuant to DCV's initial application for its federal explosives license (FEL). App.52a. Darren was the only responsible person listed on DCV's application at that time. *Id.* Since DCV was only importing the fireworks and then transferring them immediately to S&N, there was no inventory or storage and therefore no DSMTs were required to be kept.

A second inspection was performed in 2008 after approval of DCV's application for renewal of its FEL. *Id.* ATF found no violations in its 2008 inspection. App.53a.

Darren signed off after the inspections as was customary to acknowledge he was aware of the federal regulations applicable to DCV's FEL. *Id.*

In 2010, ATF conducted another compliance inspection of DCV for its renewal application. App.53a. At this time, Darren, Vinny, Angie Meyers, and Joe Snyder were listed as responsible persons on the FEL application. *Id.* In its application, DCV notified ATF that it was storing explosives in the Illiopolis, Illinois bunker. *Id.* ATF found no violations during the 2010 inspection. *Id.*

In 2013, responsible persons listed on DCV's FEL renewal application were Darren, Vinny, and Joe Snyder. App.54a.

Tamra Livingston, an industry operations investigator (IOI) for ATF with over nine years' experience, conducted investigations at both S&N and DCV beginning in 2009. App.43a. Prior to her employment

with ATF, Ms. Livingston worked for a large explosives manufacturing company, where she was an inventory and shipping manager responsible for maintaining DSMTs, Department of Transportation shipping records, and magazine storage worksheets. *Id.*

In January of 2013, DCV began using the Daily Summary of Magazine Transactions (DSMT's) as required by 27 C.F.R. 555.127. DSMTs keep track of explosive material that goes into a magazine and is taken out of a magazine in the ordinary course of business. The DSMTs are supposed to reflect an accurate balance of explosives placed into and taken out of a particular magazine at all times. *See* 27 C.F.R. 555.127. App.41a.

In September 2013, IOI Livingston conducted “an unannounced compliance inspection of DCV with a team of [four ATF] investigators.” App.54a. Darren submitted his renewal application for DCV's FEL on October 8, 2013, after Livingston's compliance investigation had already commenced. *Id.*

Darren gave Livingston an “on-hand inventory list” to begin her inspection. The list “consisted of computerized inventory totals indicating the ‘on-hand amounts’ of explosives that were at the Lincoln and Illiopolis locations.” *Id.* As the investigation progressed, IOI Livingston and her team of investigators noted the numbers on the list did not match the actual inventory in the trailers. *Id.* IOI Livingston then asked Darren for the DSMTs. App.54a-55a.

Between September 9 and 12, 2013, the investigators counted inventory at the Lincoln and Illiopolis locations. They also spent four days at ATF's office checking their results and comparing them. App.55a.

On September 13, 2013, IOI Livingston sent an email to Vinny, with a spreadsheet notifying him of the discrepancies the investigators had found. *Id.* IOI Livingston returned to DCV on October 2, 2013 and met with Darren and Robert Fletcher to discuss the results. *Id.* Darren had not seen the inventory discrepancies, but he and Vinny checked the inventory and did a recount and ultimately agreed there were discrepancies. App.55a-56a.

On January 30, 2014, IOI Livingston and IOI Boston conducted a “closing conference” with DCV, where she discussed her report of violations with Darren and Robert Fletcher. App.56a. Once again, Darren signed an acknowledgment of the report and the applicable regulations. App.56a-57a.

Pages 57a to 62a of the appendix detail the audits and findings of IOI Livingston and her team. There were several instances in which discrepancies were reconciled, although not properly recorded in the DSMTs, or where negative balances were recorded, indicating more explosives were in storage in the respective magazines than reflected on the DSMTs. *See id.*

Inspections of inventory magazines maintained by DCV during the season and located at Girard, Illinois, and St. Francisville, Illinois revealed no discrepancies or loss. In particular, IOI Furmanek reviewed DCV’s DSMTs for the St. Francisville magazine and found that seven fireworks shows had been shot between June 22, 2013 and July 5 2013. App.62a. These shows were stored at St. Francisville and no errors were noted in the DSMTs.

Despite the number of investigators, or perhaps because of it, and the amount of time they spent counting inventory and comparing them to DCV's records, the ALJ found that, despite her experience, IOI Livingston had also made errors in the audit of DCV's records. App.56a-57a and n. 18.

The administrative proceedings, discussed below, ultimately resulted in a finding that the 2013 inspection—the first and only inspection where DCV was required to maintain DSMTs—revealed only that DCV had not properly maintained its DSMTs, and did not therefore have an accurate account of inventory. All other charges and findings were dropped by ATF or dismissed by the administrative law judge (ALJ).

C. Administrative Proceedings

On May 2, 2014, ATF issued a “Notice of Denial for License or Permit” (NODL) regarding DCV's FEL. The DIO denied DCV's renewal application charging the following: (1) violations of 18 U.S.C. § 842(f) and 27 C.F.R. 555.127 for “willfully failing to keep required records”; (2) violations of 18 U.S.C. § 842(k), 27 C.F.R. §§ 555.30(a) and 555.165 for “willfully failing to report the theft or loss of explosive materials”; (3) violations of 18 U.S.C. §§ 842(f), 842(g) and 27 C.F.R. 555.121(c) for “willfully making false entries in its Daily Summary of Magazine Transactions (DSMT) record, and (4) violations of 18 U.S.C. § 842(j) and 27 C.F.R. 555.63 for “willfully failing to notify ATF prior to storing explosive materials in a magazine.” *See* App.12a.

On May 12, 2014, DCV Imports submitted a timely request for a hearing disputing the alleged violations.

On August 25, 2014, ATF filed a motion to amend its NODL eliminating some of the allegations. Administrative Law Judge Gail A. Randall granted the ATF's unopposed motion, and allowed the amended NODL. Hearings were held from December 9 to 11, 2014. App. 13a.

The amended NODL alleged three violations, each of which were designated as "willful violations" under 18 U.S.C. § 842(f) and 18 U.S.C. § 843(b)(2). *See* App.31a.

On February 6, 2015, the ATF filed a "Proposed Findings of Fact and Conclusions of Law". App.62a. ATF requested the ALJ to deny DCV's application for its FEL renewal alleging "DCV knew and understood its obligations to properly record and maintain federal explosives records, [and] willfully violated federal explosives laws by importing, purchasing, distributing, or receiving explosive materials without making such records as the Attorney General has by regulation required." App.62a-63a.

ATF further asserted that "S&N and DCV were essentially the same business operation, only paper transactions distinguished the two entities." App.63a. However, ALJ Randall made no such finding. App.80a.

ATF asserted that DCV had willfully engaged in DSMT recordkeeping violations because DCV was ultimately "unable to account for 1,897 items of explosives with a net weight of approximately 875 pounds." *Id.* ATF asserted that DCV's inability to account for these explosives items was willful because "DCV was aware of its legal duties under the law and was plainly indifferent to them or intentionally disregarded them." *Id.*

DCV countered that ATF found no violations during its renewal applications in 2004, 2007, and 2010. App.64a. DCV also took issue with ATF's contention that DCV Imports, LLC and S&N Fireworks were "one in the same". *Id.* In this regard, DCV contended that since it had no violations prior to 2013, but S&N had been cited for violations, ATF was using the prior and repeated violations of S&N to implicate DCV as having "willfully violated" the law and regulations. App.64a-65a.

DCV also stated IOI Livingston and other investigators gave conflicting interpretations of the regulations and took contradictory positions on implementing them throughout the inspection process. App.65a. DCV asserted each of the three IOI's that conducted inspections had a "slightly different interpretation of the statutes" and IOI Livingston had presented "no less than three different possible interpretations in the course of trial." *Id.* DCV urged it was doing its best to comply before, during and after the inspection process, in a situation where directions from the various officials continually appeared to change. *Id.*

Finally, DCV argued it did not "willfully violate" the law, and thus, should be afforded an opportunity to comply as provided in 27 C.F.R. 555.71.

DCV advanced an interpretation of willfulness enunciated by the 11th Circuit in *Luna Tech v. Bureau of Alcohol, Tobacco & Firearms*, 183 Fed. Appx. 863, 866 (11th Cir. 2006), which held that "a willful violation is an intentional disregard of, or plain indifference to the statutory requirements . . . [which]

can be established by repeated violations with knowledge of the regulations.” *Id.* DCV asserted since it had not engaged in repeated violations over a period of time with knowledge of the regulations, or acted with an intentional disregard of or plain indifference to the statutory requirements, its conduct did not constitute a “willful violation” as required by 18 U.S.C. § 843 (b)(2). App.66a.

1. ALJ’s Recommended Decision

On March 25, 2015, ALJ Randall issued her “Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision”.

ALJ Randall adopted the ATF’s interpretation of the phrase “willfully violated” in the parallel provision in the Gun Control Act, 18 U.S.C. § 923(d)(1)(C), that “a violation is willful where a violator knew of his legal obligation and purposefully disregarded or was plainly indifferent to the . . . requirements.” App.68a-69a, and n. 30.

ALJ Randall concluded that while “[a] clear pattern of repeat violations after warnings, or the existence of violations associated with a prior license, can establish plain indifference. . . . Repeat violations are not required to establish plain indifference; knowledge of one’s legal obligations and violations thereof will suffice.” App. 70a. and n. 31 (emphasis added). For this proposition, ALJ Randall cited an unpublished federal district court opinion, *Champion Arms, LLC, v. Van Helst*, 2012 U.S. Dist. LEXIS 141865 (U.S.D.C. W.D. Wash.).

She also cited to the Third Circuit’s case, *Vineland Fireworks Co. v. BATF*, 544 F.3d 509, 517 (3rd Cir.

2008), which adopted ATF's interpretation of 18 U.S.C. § 843(b)(2) that a finding of "willfulness" does not require a showing that the alleged violator "acted with a specific purpose to disobey the law". App.71a.

ALJ Randall concluded that the legal standard required only a showing that the regulations had been violated and that the regulated entity had knowledge of what the regulations required. App.68a-69a and n. 30.

She reasoned Darren's knowledge of the business and his past interactions with ATF made him "sufficiently knowledgeable of the ATF's federal explosives regulations." App.73a. ALJ Randall concluded Darren had encountered similar violations while a responsible person with S&N and imputed Darren's prior knowledge of ATF regulations to DCV. App.75a. In this regard, ALJ Randall noted that S&N had been cited for recordkeeping errors in violation of 27 C.F.R. 555.127 and "[w]hile the specific recordkeeping violations [were] not the same as the violations uncovered with DCV, the S&N warning conference underscores Darren Vinyard's knowledge of the importance of ATF recordkeeping requirements." App.76a, n. 38.

On this basis, ALJ Randall concluded DCV Imports willfully violated 27 C.F.R. § 555.127 requiring maintenance of Daily Summary of Magazine Transactions (DSMTs). App.13a.

There was never an agency finding that Darren knew DCV's 2013 DSMTs—the only year in which DCV was required to maintain DSMTs and thus the only inspection at which DSMTs were examined—were being improperly prepared or that they were inaccurate. There was also no agency finding that

S&N and DCV were connected as a single entity. App.63a, 80a.

2. DIO's Review

A Director of Industry Operations (DIO) for the Chicago Field Division, Roger M. Root, conducted a review of ALJ Randall's recommended decision, after which he issued an "Order Confirming Denial of Renewal Application" (the DIO Order). App.34a. DIO Root simply incorporated ALJ Randall's findings of fact and conclusions of law with respect to ATF's claim that DCV had willfully violated 27 C.F.R. 555.127 due to the recordkeeping discrepancies in the DSMTs.

3. The Director's Opinion

On October 23, 2015, Thomas E. Brandon, Acting Director of ATF issued an opinion and order affirming ALJ Randall's recommendation. App.11a-33a. The Director followed the legal reasoning of ALJ Randall and affirmed the ALJ's finding that DCV had "willfully violated" 18 U.S.C. § 842(f) and 27 C.F.R. 555.127 because discrepancies had been found in the DSMTs and Darren knew of the regulations requiring DCV to keep accurate DSMTs. App.12a. The Director concluded Darren's knowledge was sufficient to meet the "plain indifference/purposeful disregard" standard that had been adopted by ATF from its interpretation of 18 U.S.C. § 923(d)(1)(C) in the GCA.

The Director also ruled that repeated violations were not required to establish a willful violation. App.26a-27a. In regard to DCV's argument it should have been allowed an opportunity to comply in accordance with 27 C.F.R. 555.71, the Director ruled

that where a willful violation is the basis for denial of a renewal application the applicant is not entitled to an opportunity to comply. App.30a-31a.

The Director affirmed the denial of DCV's application on the basis that DCV willfully violated 18 U.S.C. § 842(f) and 27 C.F.R. 555.127 by having inaccurate DSMTs. App.13a. This was the only regulation DCV was ultimately found to have "willfully violated". *Id.* Further, as noted, there was never a finding that during the 2013 season, from January to the September inspection, Darren knew that the DSMTs were inaccurate or being improperly maintained.

4. The Seventh Circuit's Opinion

DCV petitioned for review of ATF's decision in the Seventh Circuit pursuant to 18 U.S.C. § 843(e)(2) and 5 U.S.C. § 701 through 706. The Seventh Circuit issued its opinion on October 4th, 2016. App.1a-10a.

Even though 18 U.S.C. § 843(e)(2) requires "judicial review", the court treated DCV's submission as a "petition for review", citing 27 C.F.R. 555.80. App.6a.

After briefing and oral argument, the Seventh Circuit concluded "substantial evidence supported the Deputy Director's decision" and "den[ie]d the petition for review." App.2a.

The court noted "DCV Imports did not dispute the violations, but argued instead that its violations should not be deemed willful given its perfect compliance record before 2013." *Id.*

Despite no agency finding that S&N and DCV were connected, the court nonetheless acknowledged

the agency's argument "that S&N Fireworks and DCV Imports were 'essentially the same business operation' and equated the violations of the former with the latter." App.5a-6a.

The court stated it would "uphold the agency's conclusion that DCV Imports acted willfully if supported by substantial evidence." App.6a., citing 18 U.S.C. § 843(e)(2); 5 U.S.C. § 706(2)(E). The court continued:

Congress has directed the Attorney General (and by delegation the Director of the ATF) to deny or refuse to renew a license to import or deal in explosive materials if the applicant has willfully violated any pertinent statute or regulation. 18 U.S.C. § 843(a), (b)(2). "Willfully" as used in § 843 is not defined, and only one of our sister circuits has addressed its meaning. In *Vineland Fireworks Co. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, the Third Circuit reasoned that explosives licensing is analogous to firearms licensing "because ATF administers both . . . and the statutory provisions governing the revocation of each type of license require that the licensee has 'willfully violated' a statutory provision or a regulation." 544 F.3d 509, 518 (3d Cir. 2008). The court concluded that decisions addressing firearms licensing under the Gun Control Act provide "a useful framework" for explosives licensing and observed that the six circuits that have interpreted the meaning of "willful" in proceedings to revoke the license of a firearms dealer agree that the term means plain

indifference to, or purposeful disregard of, a known legal duty. *Id.*; *See Shawano Gun & Loan, LLC v. Hughes*, 650 F.3d 1070, 1077-78 (7th Cir. 2011); *RSM, Inc. v. Herbert*, 466 F.3d 316, 320-23 (4th Cir. 2006); *Willingham Sports, Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 415 F.3d 1274, 1277 (11th Cir. 2005); *Appalachian Res. Dev. Corp. v. McCabe*, 387 F.3d 461, 464 (6th Cir. 2004); *Perri v. Dep't of the Treasury*, 637 F.2d 1332, 1336 (9th Cir. 1981); *Lewin v. Blumenthal*, 590 F.2d 268, 269 (8th Cir. 1979).

We adopt the Third Circuit's approach and conclude that the interpretation of "willfulness" applicable to firearms licensing applies as well to revocation of explosives licenses. Accordingly, no showing of bad purpose or evil motive is required to establish willfulness, and no *de minimis* exception is available. *See Article II Gun Shop, Inc. v. Gonzales*, 441 F.3d 492, 497-98 (7th Cir. 2006) (interpreting a parallel provision of the Gun Control Act). App.6a-7a.

The circuit court disagreed with DCV's position that it had been merely negligent or ignorant, and did not purposefully disregard its regulatory duties. App.8a.

While acknowledging ATF had not found during the prior 10 years that DCV Imports had violated any of the applicable explosive regulations, the Court adopted the ATF's perspective that the business operations of S&N, and the events that took place at

S&N, could be used to show a pattern that Darren was held to be aware of the recordkeeping regulations, and that this awareness led to ATF's conclusion that DCV had "willfully" violated the recordkeeping requirements on the single occasion. App.8a.

Finally, without careful analysis of ATF's reasoning, the circuit court casually adopted the agency's conclusion that a single violation is sufficient to deny a renewal application:

Anyway, one willful violation is enough; the ATF isn't required to cite a licensee repeatedly before revoking an explosives license. *Am. Arms Int'l v. Herbert*, 563 F.3d 78, 87 (4th Cir. 2009) ("Plain indifference can be found even where nine times out of ten a licensee acts in accordance with the regulations, if he was plainly indifferent to the one-in-ten violation."); *Vineland Fireworks Co.*, 544 F.3d at 518-19. Darren and Vinny were intimately involved with S&N Fireworks when their parents lost their license based largely on the same type of recordkeeping violations, yet neither of the brothers exercised the initiative to ensure that DCV complied. This more than supports a finding of willfulness. App.9a. (emphasis in original). Moreover, no principled basis exists on which to distinguish the facts of this case from *Vineland Fireworks Co.*, the only federal appellate decision directly addressing revocation of an explosives license. There the Third Circuit upheld a finding that a licensee willfully failed to maintain accurate daily transaction records

where the company's owner had been the responsible person of a predecessor company when its license was revoked for similar recordkeeping violations. 544 F.3d at 521-22. The Third Circuit specifically rejected an argument that the company's principal should be excused from compliance because her bookkeeper was undergoing cancer treatment when the violations occurred, finding that the owner's interactions with ATF during the predecessor company's revocation demonstrated her knowledge of the regulatory requirements. DCV's argument—that Darren's lack of experience and Vinny's apparent incompetence negates a finding of willfulness—is similarly unpersuasive.

The circuit court denied DCV's petition for review. DCV seeks review in this Court by way of this petition.



REASONS FOR GRANTING THE PETITION

- I. **NO *CHEVRON* DEFERENCE IS OWED TO AN ADMINISTRATIVE AGENCY'S INTERPRETATION OF A PLAIN AND UNAMBIGUOUS STATUTORY PROVISION ESPECIALLY WHERE THE AGENCY'S INTERPRETATION IS WHOLLY UNSUPPORTED BY THE PLAIN LANGUAGE OF THE STATUTE**

Since the Magna Carta, and forever ensconced within the Constitution by the founding fathers, due process has been understood to allow governments to

deprive persons of rights only pursuant to a coordinated effort of separate institutions that make, execute, and adjudicate claims under the law. Interpretation of statutory law presents a question of law, and it is fundamentally, indeed, “emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, J.). The judiciary’s characteristic role is to interpret statutes. *Japan Whaling Ass’n v. Amer Cetacean Soc’y*, 478 U.S. 221, 230 (1986). See also, Robert A. Anthony, *Which Agency Decisions Should Bind Citizens and the Courts?*, 7 YALE J. REG. 1 (1990).

With but “one small doctrinal shift” *Chevron* “effected a fundamental transformation in the relationship between courts and agencies under administrative law.” See Thomas W. Merrill, *Chevron’s Domain*, 89 GEO. L.J. 833, 909-911 (2009); Nathan A. Sales & Jonathan H. Adler, *The Rest is Silence: Chevron Jurisdiction, Agency Deference and Statutory Silences*, 2009 U. ILL. L. REV. 1497 (2009). Since then, in reviewing an administrative agency’s initial interpretations of statutory language, courts have now for many decades accorded them “respectful attention” and even “controlling effect”. See Anthony, *supra* at 3.

However, administrative agencies “have no comparative advantage in reading statutes” over courts. Indeed, an agency’s own self-interest, motivated by the ever-present desire to appear relevant, efficient, and competent, “may cloud its judgment” in executing its regulatory role. See Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 1008-09 (1999); Timothy K. Armstrong,

Chevron Deference and Agency Self-Interest, 13 CORNELL J.L. & PUB. POL'Y 203 (2004).

Rather than a de novo judicial review of ATF's decision to deny DCV's license renewal based on its interpretation of this unambiguous statutory language, and without independently analyzing that interpretation and its application, the Seventh Circuit simply denied DCV's petition for review after concluding there was substantial evidence supporting ATF's decision. *See* App.1a-10a. *See also* *See* 5 U.S.C. § 704 and 18 U.S.C. § 843(e)(2) (judicial review under 5 U.S.C. § 701 through 706 shall be conducted if the Attorney General denies an application for a license renewal).

While the circuit court did discuss ATF's interpretation of the phrase "willfully violated" in 18 U.S.C. § 843(b)(2), and its use of the similar phrase in 18 U.S.C. § 923(d)(1)(C) of the GCA, and approved of the Third Circuit's *Chevron*³ deference to ATF's interpretation in *Vineland Fireworks Co. v. BATF*, 544 F.3d 509 at 517, the court ultimately left the ATF's interpretation intact without acknowledging it had independent authority to review agency interpretations of non-ambiguous statutory provisions, and therefore without considering the propriety of the agency's interpretation. App.6a-10a.

Notably, the court conclude incorrectly, that *Vineland*, *supra*, was not distinguishable, *see* App.9a-10a, overlooking the fact that the licensee in that case had committed multiple repeated violations of the SEA, had received multiple warnings, and continued

³ *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

to fail to comply with the recordkeeping regulations. 544 F.3d at 511-512.

Most remarkable in the outcome of this display of blind deference to the agency's incorrect interpretation of the law, is the progressively greater reach ATF has now commandeered in this case compared to all others that have come before. Whereas in *Vineland*, the only other case to reach the circuit courts on interpretation of § 843(b)(2), ATF ultimately concluded that the fireworks company had "willfully violated" the SEA's recordkeeping requirements and denied renewal of its FEL, that came only after a significant history of repeated violations, multiple warnings, and continuing noncompliance inspection after inspection. *Vineland, supra* at 509-512.

Here, ATF has ratcheted up its enforcement by now concluding that it must only be shown that the applicant knew generally of the legal requirements concerning recordkeeping, and in the words of ATF's standard, exhibited "plain indifference to or purposefully disregarded" them, without proof of knowledge that they were being violated. Not only does this standard not require a demonstration of a "willful violation", *i.e.*, a knowing or purposeful intent of violating the law on the part of the applicant, but ATF has now succeeded in expanding the reach of this provision to recordkeeping errors that are discovered for the first time on an initial inspection.

Without a modicum of proof that the applicant was then aware of the violations, the applicant's general knowledge of the law coupled with a finding that it exhibited "plain indifference to or purposeful disregard" of those requirements can suffice to deny the applicant's

renewal even if the agency never proved that the applicant was aware that errors were being made in the first place.

The circuit court simply deferred to ATF's unwarranted extension of § 843(b)(2), by acquiescing in its view that "one willful violation is enough", *See* App.9a (emphasis in original), citing *Am. Arms Int'l v. Herbert*, 563 F.3d 78, 86, 87 (4th Cir. 2009) and *Vineland*, 544 F.3d at 518-519. Aside from the dire consequences of allowing such an interpretation to reign, the problem is that the ATF had no basis to extend the law in this way.

The former case merely stated this proposition *in dicta* because the firearms dealer there had committed prior violations and received prior warnings. *See id.* at 80-81 and 87. Moreover, what the court held was that while multiple violations had been alleged against the firearms dealer, a finding that a single violation was willful did not preclude the penalty of license revocation. *Id.* at 86. The case does not stand for the proposition that ATF asserts and, by rote acceptance, the Seventh Circuit approved.

There is no authority but the decision by ATF in this case to conclude a "willful violation" has occurred upon an initial inspection that results in a first-time discovery of recordkeeping discrepancies. *See* App.70a and n. 32. The ALJ relied on the previously distinguished *Am. Arms, supra*, and a host of unpublished cases also relying on that case, none of which found a "willful violation" upon a single, first-time inspection. *Id. See Champion Arms, LLC v. Van Haelst*, 2012 U.S. Dist. LEXIS 141865, *3-*7 (U.S.D.C. W.D. Wash. 2012) and *Borgelt v. BATF*, 2009 U.S.

Dist. LEXIS 89281, *4-*8 (U.S.D.C. W.D. Wash. 2009). Both of these cases involved revocations of federal firearms licenses where the licensees had been previously inspected and cited for violations.

Likewise, the circuit court's citation to *Vineland* is also a reliance on *obiter dictum*, because, as noted, in that case the company had a long history of violations over the course of many years, had received repeated warnings, and had been given multiple opportunities to come into compliance. *Vineland, supra* at 511-513.

ATF's interpretation, coupled with rote deference given to it by the circuit court, creates an unjust outcome because if ATF concludes there was a "willful violation" the regulation requiring ATF to assist the licensee to come into compliance cannot be invoked by the applicant. *See* 27 C.F.R. 555.71. Thus, an initial discovery of recordkeeping violations which are characterized as willful, even where the applicant was unaware of the existence of the violations, can now serve as the basis for denial of the renewal application and foreclose the regulated entity's opportunity to comply.

Willful means purposeful, intentional, knowing, not merely negligent or, even, careless. Otherwise the latter terms would have been used in the statute as the reason for denying a license, and, there would be no system in place to allow compliance for recordkeeping violations that are not deemed "willful". *See* 27 C.F.R. 555.71; 555.74.

This is extremely important for the regulated entity. For a variety of reasons inventory mistakes may be made. Compliance may be possible to attain

after these mistakes are discovered by allowing the regulated entity to work with the agency. *See* 27 C.F.R. 555.71.

If the agency interprets “willfully violates” to include simply a knowledge of the regulations and demonstrates that a violation occurred without showing the licensee knew of the violation, and then applies that interpretation upon an initial discovery (a first-time inspection resulting in the discovery of the recordkeeping violations—as occurred in this case) then there is little hope that regulated entities in DCV’s position could ever continue to do business.

By characterizing the “knowledge” element of “willfully violates” as requiring only a general awareness of the recordkeeping regulations without proof that the regulated entity was then aware that mistakes were being made, and concluding that a finding of willfulness can occur even after an initial inspection, ATF has now assumed the ultimate position as judge, jury and executioner.

Such an interpretation and application of this statutory language obviously has negative consequences on promoting new business development. Only those entities that have an established foothold after years of learning how to properly come into compliance will be able to survive.

Judge, now Justice Gorsuch, while sitting on the Tenth Circuit lamented the pervasive and ever-growing creep of agency control over the regulated community by the former’s nearly unbound ability to continually expand their interpretations of laws they are charged with enforcing against the latter free from the constraints of judicial oversight. He stated:

Administrative agencies enjoy remarkable powers in our legal order. Their interpretations of ambiguous statutes control even when most everyone thinks Congress really meant something else. Their regulations bind as long as they can make the modest boast that they haven't behaved arbitrarily or capriciously. Their factual findings rule the day unless someone can show they have not just erred but clearly erred. Still, there remains one thing even federal administrative agencies cannot do. Even they cannot penalize private persons and companies without some evidence the law has been violated. *Compass Envt'l Inc. v. OSHRC*, 663 F.3d 1164, 1170 (10th Cir. 2011) (Gorsuch, J., dissenting).

The outcome in this case represents an example where, with respect even to an agency's interpretation of an unambiguous statute, which merits no special Chevron deference by the judiciary, ATF has been allowed to hand down the ultimate penalty, forcing a modest, family-owned and operated fireworks company that has been delighting children and adults alike with fireworks displays for over three decades to shutter their business forever.

The Court's role "isn't so utterly ineffectual as to require (or permit) [it] to affirm an agency decision that is (as the ALJ found) unsupported by any proof on the (concededly) dispositive legal question." *Compass Envt'l*, *supra*. Petitioner would add, the Court's role is, fundamentally, indeed, "emphatically . . . to say what the law is," and this duty is especially

critical if the administrative agency has stretched its meaning well beyond its plain and unambiguous terms to the point of being able to determine whether the regulated entity survives or dies. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, J.).

Federal courts have the ultimate duty to determine whether an executive agency can interpret a plain, unambiguous statutory provision in a manner contrary to its plain and ordinary meaning. “The scope of judicial review is ultimately conditioned and determined by the major proposition that the constitutional courts of this country are the acknowledged architects and guarantors of the integrity of the legal system.” *Butz v Glover Livestock Comm’n Co.*, 411 U.S. 182, 190-191 (1973) (Stewart, J., dissenting). “An agency is not an island entire of itself . . . The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law; the law as it is found in the statute at hand, the statute book at large, the principles and conceptions of the ‘common law’ and the ultimate guarantees associated with the Constitution.” *Id.*

Therefore, federal courts should independently arrive at the conclusion that the agency’s interpretation on a statutory term is or is not reasonable. In such a case, there would be and should be “no occasion to defer and no point in asking what kind of deference, or how much.” *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 114 (2002).

II. EVEN IF *CHEVRON* DEFERENCE IS OWED TO ATF'S "INTERPRETATION" OF "WILLFULLY VIOLATED" THE CIRCUIT COURT ERRED IN FAILING TO CONDUCT INDEPENDENT "JUDICIAL REVIEW" OF THE AGENCY'S INTERPRETATION AND APPLICATION

Chevron instructs that deference must be given to an agency's reasonable policy choice when Congress gave the agency the authority to make such a choice. Here, ATF cannot even purport to be doing that. There is nothing in the ATF's decision that suggests that its interpretation was the result of an independent determination that its construction was desirable to further some policy goal. Instead, ATF relied entirely on decisions of the various Courts of Appeals interpreting that term in the firearms licensing contexts. *Vineland, supra*. The only other circuit court decision interpreting § 843(b)(2) blindly deferred back to ATF, and several unpublished district court opinions that offer helpful dicta to ATF's agenda. The concurring decision in *Vineland Fireworks Co. v. BATF*, 544 F.3d 509 at 521-524 (Jordan, J., concurring), while agreeing with the majority's approval of the revocation, noted that the Court had no authority to blindly defer to the agency's novel interpretation.

Interpreting the unambiguous language of 18 U.S.C. § 842(f); § 843(b)(2) with 27 C.F.R. 555.127's requirements appears, from an ordinary, plain language perspective to require only that the licensee "enter the inventory" in the DSMTs to be kept at each magazine.

Section 842(f) simply states it is unlawful a licensee to "willfully" manufacture, import, purchase, distribute or receive explosive materials without making such records as the Attorney General may by

regulation require.” The regulation referred to is the aforementioned § 555.127. 18 U.S.C. § 843(b)(2) says that upon the licensee’s filing of a proper application the Attorney General shall issue the FEL “if . . . the applicant has not “willfully violated” any of the provisions or regulations.

Reading these provisions together results in no ambiguity or “grey area”. The licensee must refrain from “willfully” failing to make such records, like the DSMTs required in this case by 27 C.F.R. 555.127. However, there is nothing in this language that would indicate that “plain indifference” or “purposeful disregard” can be established just because it is demonstrated that the licensee knew generally about the requirements, and because a first-time inspection reveals the records were not properly maintained, where the licensee was unaware of this fact.

Rather than conducting its own independent interpretation under this unambiguous language, the Seventh Circuit simply agreed with the ATF’s interpretation. In doing so, it cited to only one other circuit court case that agrees with ATF’s interpretation of this phrase in § 843(b)(2). App.9a-10a, citing *Vineland Fireworks Co. v. BATF*, 544 F.3d 509 (3rd Cir. 2008). Contrary to the circuit court’s statement, *Vineland* is distinguishable from the instant case. Moreover, the Seventh Circuit’s agreement with *Vineland* is tacit, if not explicit agreement with that court’s *Chevron* deference to the ATF’s interpretation even though there is no apparent ambiguity or “grey area” in this statutory language, other than the ATF’s progressively broadening interpretation, as explained herein. *Vineland, supra* at 519.

Finally, rather than examine the plain language of the statute and engage in its own interpretation, the Seventh Circuit simply applied the “substantial evidence” test to the agency’s decision and denied DCV’s petition for review. Presumably, this is because the circuit court believed it was only delving into the second step of *Chevron*, rather than pausing to consider whether it should just determine, for itself, whether this unambiguous statutory language has been interpreted properly and correctly applied by the administrative agency in this case. *See* 5 U.S.C. § 706(2).

In other words, the Seventh Circuit abdicated its Article III responsibility to independently interpret and apply the law, despite there being no ambiguity in the phrase “willfully violated”.

The rule of deference should not obtain where the plain language is evident. Federal courts are not to be blindly complicit with an agency’s interpretation of a statute. Thus, although an agency’s interpretation of a statute under which it operates is entitled to some deference, “this deference is constrained by [this Court’s] obligation to honor the clear meaning of a statute as revealed by its language, purpose, and history.” *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979).

Where a statute is unambiguous, and yet a federal administrative agency’s interpretation of the plain language of that statute is unreasonable, or, dare said, an extension well beyond its plain meaning, are federal courts to rely on the sanctity of the former, or blindly defer to the latter’s whimsical and often overly functional and self-serving interpretation?

The statute at issue says that the Attorney General shall grant a renewal of an FEL unless the applicant has “willfully violated” the recordkeeping requirements. ATF, in administering this provision, concluded that a single inspection revealing DCV’s errant recordkeeping was sufficient to deny its renewal application even though the only “mental state” it could point to was Darren’s general knowledge that DSMTs were supposed to be maintained for explosives inventory being held in DCV’s magazines. As noted, nowhere did the agency find Darren was aware that the DSMTs were being improperly maintained.

Additionally, because of ATF’s specious finding of “willfulness”, DCV is being forced out of business even though the agency usually allows the regulated entity multiple opportunities to correct its recordkeeping errors before outright denying a license renewal after a single inspection reveals a first-time violation. *See* 27 C.F.R. 555.71.

Unfortunately, the ongoing inspection in 2013 was occurring as Darren was transitioning the family’s business into DCV. And, even then, the Agency acknowledged, and it is demonstrated time and time again in the case law that in such circumstances (perhaps understandable hedge for the realization that inventory errors can often occur even under the best of circumstances), it allows rehabilitative measures to be taken upon the finding of a first-time violation (that it does not self-servingly characterize as willful). *See* 27 C.F.R. 555.71.

Even ATF made errors in its audits of DCV’s records. *See* App.56a-57a and n. 18. And, even though the inference was ultimately rejected by the ALJ (but

not by the circuit court, see App.8a-9a), ATF's attorneys continued to pursue the theory that the shortcomings of S&N while Darren's parents were operating it were merely transferred to Darren's operations at DCV. While the inference may be true that there was some unfortunate remnants of the pre-regulatory period at DCV,⁴ and some post-regulatory mistakes were made, understandably justified in a business with an extremely busy period, run by a handful of employees and family members, with the unsurprisingly high turnover of seasonal employment, does the statutory language give the agency the right to make that conclusion and, on that basis, deny the business an opportunity to comply? Does the biblical moral of harsh consequences befalling successive generations for the "sins of the father" have any place in following and applying the rule of the written law?

III. THIS CASE PRESENTS THE OPPORTUNITY TO FINALLY SETTLE THE QUESTION OF WHAT TYPE OF REVIEW THE COURTS SHOULD UNDERTAKE UNDER THE SECOND STEP OF *CHEVRON*

A sub-issue underlying the circuit court's conclusion that the agency was entitled to deference in its interpretation is whether the agency's interpretation under the second step of *Chevron* (where a statute is deemed to be ambiguous or to leave the agency with a "grey area" to interpret its language)

⁴ Elliott, *A Review of the "Similar Context" Rationale for Applying the Gun Control Act Definition of, and Evidentiary Standard for, Willfulness in Administrative Actions Regarding Explosives Licensing*, 33 OKLA. CITY U.L. REV. 557, 559 (Summer 2008).

must be affirmed if it lies within the permissible range of interpretations or outside it, or, whether that interpretation itself must too be analyzed to determine whether the agency's interpretation and application was not arbitrary, capricious or an abuse of its discretion as directed in 5 U.S.C. § 706(2)(A) of the APA. There are competing views on this question. For the former, *see* Stephenson & Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009); *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1846, n. 1 (2012) (Scalia, J., concurring). For the latter, Bamberger & Strauss, *Chevron's Two Steps*, 95 VA. L. REV. 611, 621 (2009); M. Elizabeth Magill, *Step Two of Chevron v. Natural Resources Defense Council*, A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES, 85, 97 & n. 167 (Duffy & Herz eds., 2005). Obviously, whether a court chooses one or the other can have significant consequences on the outcome of a case. This case provides the Court with an opportunity to clarify the cascade of diverted lower court opinions that have followed one of the latter of the two noted paths.



CONCLUSION

While *Chevron* may have focused the multiple theories regarding judicial review of an administrative agency's statutory interpretation, it did nothing to quell the concerns with giving agencies unbridled executive authority to impose congressional will. From that decision has spawned an endless stream of judicial discord over what appears as an unregulated source of authority to impose restrictions on ordinary

commercial enterprises. This is no small detail in the grand scheme of our republic. The founders of our nation vigilantly guarded against infringements of government upon the pursuit by citizens of their commercial enterprises.

Congress presumably ranks higher on the democracy scale than do administrative agencies. After all, Congress is directly elected by the people; agencies are at most indirectly accountable to the electorate through the President. Yet how do we know that Congress, the ultimate and indeed *de facto* delegate of democratic will, wants ambiguities, gaps, and grey areas in the law to be resolved by executive agencies, rather than by courts? *See* Thomas M. Merrill, *Judicial Deference to Executive Precedent*, 101 *YALE L.J.* 969, 976 (Mar. 1992).

Here, the agency has assumed the powers of all three branches in one fell swoop. ATF can interpret the term “willfully violated” to include a finding that a regulated entity was “plainly indifferent” just because the ATF finds, upon an initial inspection, that the entity knew of the recordkeeping requirements, but did not know the records were incorrectly maintained. On this basis, ATF can put the regulated entity out of business forever because a denial of a license for a “willful violation” prevents an opportunity for compliance and rehabilitation based upon ATF’s own regulations. *See* 27 C.F.R. 555.71.

Full review of ATF’s actions is especially important because ATF is exercising a relatively new role⁵ in enforcing these regulations, its own methods and

⁵ Elliott, *supra*.

processes may be in error, see App.57a and n. 18, and it appears that in all other cases, except this one, the regulated entity was given multiple opportunities to comply after an initial inspection reveals mere recordkeeping errors.

Aside from the fact ATF's decision has threatened to put DCV out of business forever, this case also presents issues of major jurisprudential significance for this country.

The authority and scope of an administrative agency's power to interpret and apply the plain and unambiguous language of a statute, where that role is one traditionally left to the judiciary, is still not settled. This case provides an opportunity for the Court to direct courts when to execute their independent judicial duty to interpret and apply the law and what standards they should apply to determine whether and to what extent the administrative agency's interpretation should be deferred to.

For the foregoing reasons, the Petition for Certiorari to the Seventh Circuit Court of Appeals should be granted.

Respectfully submitted,

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APRIL 24, 2017

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**OPINION OF THE SEVENTH CIRCUIT
(OCTOBER 4, 2016)**

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DCV IMPORTS, LLC,

Petitioner,

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS
AND EXPLOSIVES,

Respondent.

No. 16-1015

Petition for Review of an Order of the Bureau of
Alcohol, Tobacco, Firearms and Explosives
No. 3-IL-107-23-3L-00682

Before: BAUER, POSNER, and SYKES,
Circuit Judges.

SYKES, Circuit Judge.

DCV Imports, LLC, a family-operated fireworks importer in rural Illinois, petitions for review of an order denying renewal of its import license. An administrative law judge found that DCV Imports willfully failed to keep required records of its daily transactions, *see* 18 U.S.C. § 842(f); 27 C.F.R. § 555.127, and recommended that the company's license not be

renewed. The regional office of the Bureau of Alcohol, Tobacco, Firearms and Explosives accepted that recommendation, and the decision was upheld by the Deputy Director of ATF. We conclude that substantial evidence supports the Deputy Director's decision and deny the petition for review.

I. Background

The activities of two closely related, family-owned fireworks businesses are relevant to this case, although only the denial of DCV Import's license is directly at issue. Mary Vinyard and Stephen Vinyard, Sr., began operating S&N Fireworks in the late 1970s, and in 1997 they obtained from the ATF a license to import high explosives. Their son Darren founded DCV Imports in 2004 with the intention of eventually buying out his parents' business or running his own fireworks company. DCV (meaning Darren Clifford Vinyard) shared S&N's place of business in Lincoln, Illinois, and in 2004 obtained its own license to import high explosives. From 2004 until 2011, S&N Fireworks ordered bulk fireworks from DCV Imports, which imported the explosives from China and immediately transferred them to S&N Fireworks. S&N then packaged and sold the fireworks for individual shows.

In addition to the two companies' shared premises and symbiotic business relationship, Darren was employed by S&N Fireworks and was listed as a "responsible person" on S&N's license. ATF regulations define "responsible person" as one "who has the power to direct the management and policies of the applicant pertaining to explosive materials" and generally "includes partners, sole proprietors, site managers, corporate officers and directors, and majority share-

holders.” 27 C.F.R. § 555.11. Darren’s duties with S&N included delivering fireworks for shows and staging fireworks shows.

ATF agents periodically conduct compliance inspections of federal explosives licensees. *See id.* § 555.24. Agency regulations require that licensees maintain for each storage area or “magazine” an accurate “daily summary of magazine transactions,” including the quantity of explosives received and removed and the total on hand at day’s end. *See id.* § 555.127. Licensees also have an affirmative duty to notify ATF about discrepancies that “might indicate a theft or loss of explosive materials.” *Id.* ATF investigators inspecting DCV Imports in 2004, 2008, and 2010 did not uncover any regulatory violation. DCV was not storing any explosives during this period, however, because all fireworks it received were immediately transferred to S&N Fireworks. Following each inspection, an ATF investigator reviewed with Darren the applicable statutes and regulations, and each time he signed an Acknowledgement of Federal Explosives Regulations.

S&N’s compliance record, on the other hand, was spotty. ATF investigators cited the company for numerous violations during a 2006 inspection, including not maintaining accurate daily summaries and storing fireworks unsafely. That inspection led to a “warning conference” in 2008 attended by Darren and other S&N Fireworks personnel. Then in 2009 an inspection revealed a multitude of violations, including hundreds of instances where actual counts of stored fireworks contradicted inventory records, multiple inaccurate daily summaries, and the disappearance of roughly 10,000 pounds of shells. Stephen

“Vinny” Vinyard, Jr., Darren’s brother, was the S&N employee tasked with maintaining the daily summaries throughout the period when these infractions occurred. Darren attended a conference in early 2010 to wrap up the 2009 inspection, and after reviewing the violations with an ATF investigator, he signed a report acknowledging the citations. Later that same year the ATF’s Chicago Field Division, through its Director of Industry Operations, notified S&N Fireworks that its license would not be renewed because of willful violations uncovered during the 2009 inspection. Rather than contest the decision, S&N voluntarily surrendered its license.

DCV Imports then bought out S&N’s inventory, equipment, customer lists, and show contracts. As part of the transaction, Darren agreed to give Vinny a 50% stake in DCV and to make him vice president, although Darren retained operational control as president of the company. DCV Imports expanded its operations from importing fireworks to running a complete fireworks business, as S&N Fireworks had been. Darren made Vinny responsible for maintaining the required daily summaries (and consequently the magazine inventories) even though maintaining those same records for S&N Fireworks had been Vinny’s job when the lapses leading to the company’s demise had occurred. Vinny did not receive any formal recordkeeping training and struggled to complete the daily summaries; he told Darren that he was uncomfortable performing this task. In early 2013 Vinny hired a cousin to take over the recordkeeping duties. Vinny himself trained the cousin to maintain the daily summaries and then “stopped paying attention” to the records.

A team of ATF investigators arrived unannounced in September 2013 to inspect DCV Imports. The investigators began by counting the explosives in DCV's magazines and comparing those numbers to a computerized inventory, but when it became clear that the quantities did not match, the team asked Darren for the daily summaries. The investigators found 73 instances in which those records did not match the amount of fireworks added or removed from a magazine. Those 73 inaccurate daily summaries totaled 1,897 missing "units" or roughly 870 net pounds of explosives for which DCV Imports could not account. As before, this inspection concluded with a conference during which ATF investigators reviewed regulatory requirements and DCV's violations with Darren and required him to sign an Acknowledgement of Federal Explosives Regulations.

Based on these violations, ATF's Director of Industry Operations in Chicago notified DCV Imports in May 2014 that the agency did not intend to renew DCV's explosives license. The notice charged DCV Imports with willfully failing to comply with the recordkeeping mandate of 27 C.F.R. § 555.127. The notice placed special emphasis on the volume of missing fireworks.

DCV invoked its right to a hearing before an administrative law judge. *See* 18 U.S.C. § 843(e)(2). In a written submission to the assigned judge, DCV Imports did not dispute the violations but argued instead that its violations should not be deemed willful given its perfect compliance record before 2013. The agency responded that S&N Fireworks and DCV Imports were "essentially the same busi-

ness operation” and equated the violations of the former with the latter.

The administrative law judge conducted an evidentiary hearing in December 2014 and afterward issued a written order agreeing with the agency that DCV Imports had committed the recordkeeping violations willfully. The judge acknowledged that DCV Imports and S&N Fireworks are different entities, and although she did not impute S&N’s *violations* to DCV, the judge did hold Darren accountable for the *knowledge* he gained as a responsible person at S&N Fireworks. She also agreed with the agency that Darren’s decision to defer recordkeeping responsibility to Vinny—knowing that he was “at the center of the faulty recordkeeping that led to S&N’s 2010 denial”—strongly supported a finding of willfulness. The judge recommended that the agency confirm the decision not to renew DCV’s license.

That recommendation was accepted. DCV Imports sought review by the Deputy Director of the ATF, who after briefing and oral argument upheld the denial of DCV’s license renewal. *See* 27 C.F.R. § 555.79. DCV Imports petitioned for review by this court. *See id.* § 555.80.

II. Discussion

We will uphold the agency’s conclusion that DCV Imports acted willfully if it is supported by substantial evidence. *See* § 843(e)(2); 5 U.S.C. § 706(2)(E). Congress has directed the Attorney General (and by delegation the Director of the ATF) to deny or refuse to renew a license to import or deal in explosive materials if the applicant has willfully violated any pertinent statute or regulation. 18 U.S.C. § 843(a),

(b)(2). “Willfully” as used in § 843 is not defined, and only one of our sister circuits has addressed its meaning. In *Vineland Fireworks Co. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, the Third Circuit reasoned that explosives licensing is analogous to firearms licensing “because ATF administers both ... and the statutory provisions governing the revocation of each type of license require that the licensee has ‘willfully violated’ a statutory provision or a regulation.” 544 F.3d 509, 518 (3d Cir. 2008). The court concluded that decisions addressing firearms licensing under the Gun Control Act provide “a useful framework” for explosives licensing and observed that the six circuits that have interpreted the meaning of “willful” in proceedings to revoke the license of a firearms dealer agree that the term means plain indifference to, or purposeful disregard of, a known legal duty. *Id.*; see *Shawano Gun & Loan, LLC v. Hughes*, 650 F.3d 1070, 1077–78 (7th Cir. 2011); *RSM, Inc. v. Herbert*, 466 F.3d 316, 320–23 (4th Cir. 2006); *Willingham Sports, Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 415 F.3d 1274, 1277 (11th Cir. 2005); *Appalachian Res. Dev. Corp. v. McCabe*, 387 F.3d 461, 464 (6th Cir. 2004); *Perri v. Dep’t of the Treasury*, 637 F.2d 1332, 1336 (9th Cir. 1981); *Lewin v. Blumenthal*, 590 F.2d 268, 269 (8th Cir. 1979).

We adopt the Third Circuit’s approach and conclude that the interpretation of “willfulness” applicable to firearms licensing applies as well to revocation of explosives licenses. Accordingly, no showing of bad purpose or evil motive is required to establish willfulness, and no *de minimis* exception is available. See *Article II Gun Shop, Inc. v. Gonzales*,

441 F.3d 492, 497–98 (7th Cir. 2006) (interpreting a parallel provision of the Gun Control Act).

With this definition in mind, we turn to the question whether substantial evidence supports the administrative law judge’s finding that DCV Imports acted willfully. DCV Imports insists that the judge focused “so heavily” on establishing Darren’s knowledge of the explosives regulations that she “failed to address the more important issue of whether DCV intentionally disregarded or was plainly indifferent to its legal duties.”

DCV essentially takes the position that it lost 870 net pounds of explosives because of negligence or ignorance, not purposeful disregard of its regulatory duties. The company argues that the administrative law judge was wrong to fault Darren for giving Vinny responsibility for the daily summaries because Vinny was the “relatively more experienced brother.” Darren’s choice to defer to “the most experienced person available” evinces a “conscious effort to fulfill” the regulatory requirement, DCV argues. But that inference is unreasonable on this record; even if we accept that Vinny was the “more experienced brother,” his record-keeping history at S&N Fireworks was so poor that it led to the revocation of S&N’s license. DCV Imports also contends that the agency was wrong to impute to Darren knowledge gained from his time at S&N Fireworks because he did not hold an ownership interest and was at most a site manager. But Darren’s lack of an ownership interest in S&N Fireworks is irrelevant since DCV Imports cannot claim that he was unaware of the recordkeeping requirements.

DCV also argues that the agency was wrong to rely on the acknowledgments Darren signed because those

forms merely indicate that ATF gave him a general overview of the regulatory requirements and do not establish that Darren actually understood them. Again, that's not a reasonable argument on this record. Substantial evidence supports the agency's conclusion that Darren was sufficiently familiar with the regulatory requirements based on his long history in the fireworks business and numerous prior ATF inspections and warnings.

DCV tries to minimize its culpability by characterizing the many lapses uncovered in the 2013 inspection as a "single recordkeeping violation." Once again, that's not an accurate characterization of the facts; hundreds of pounds of explosives were lost on account of 73 inaccurate daily summaries. Anyway, one willful violation is enough; the ATF isn't required to cite a licensee repeatedly before revoking an explosives license. *Am. Arms Int'l v. Herbert*, 563 F.3d 78, 87 (4th Cir. 2009) ("Plain indifference can be found even where nine times out of ten a licensee acts in accordance with the regulations, if he was plainly indifferent to the one-in-ten violation."); *Vineland Fireworks Co.*, 544 F.3d at 518-19. Darren and Vinny were intimately involved with S&N Fireworks when their parents lost their license based largely on the same type of recordkeeping violations, yet neither of the brothers exercised the initiative to ensure that DCV complied. This more than supports a finding of willfulness.

Moreover, no principled basis exists on which to distinguish the facts of this case from *Vineland Fireworks Co.*, the only federal appellate decision directly addressing revocation of an explosives license. There the Third Circuit upheld a finding that a licensee

willfully failed to maintain accurate daily transaction records where the company's owner had been the responsible person of a predecessor company when its license was revoked for similar recordkeeping violations. 544 F.3d at 521-22. The Third Circuit specifically rejected an argument that the company's principal should be excused from compliance because her bookkeeper was undergoing cancer treatment when the violations occurred, finding that the owner's interactions with ATF during the predecessor company's revocation demonstrated her knowledge of the regulatory requirements. DCV's argument—that Darren's lack of experience and Vinny's apparent incompetence negates a finding of willfulness—is similarly unpersuasive.

Finally, DCV asserts that because it previously asked the ATF for guidance in interpreting a different set of explosives regulations, the finding of willfulness was improper. As far as we can tell, this contention concerns a separate, unrelated charge that the administrative law judge rejected and thus no longer is at issue. A licensee's effort to understand one regulation does not inoculate it against a finding that it intentionally disregarded another. DCV also suggests, without citation to evidentiary support, that the ATF investigators provided contradictory interpretations of the agency's regulations. The administrative law judge pointed out that no evidence in the record supports this contention.

In short, substantial evidence supports the agency's conclusion that DCV Imports willfully violated explosives regulations. The petition for review is, accordingly, DENIED.

**ORDER OF THE ACTING DIRECTOR AFFIRMING
THE RECOMMENDED DECISION AND ORDER
OF ADMINISTRATIVE LAW JUDGE
GAIL A. RANDALL
(OCTOBER 23, 2015)**

UNITED STATES DEPARTMENT OF JUSTICE
BUREAU OF ALCOHOL, TOBACCO, FIREARMS
AND EXPLOSIVES, WASHINGTON, D.C.

IN THE MATTER OF:
D.C.V. IMPORTS, L.L.C.,

LICENSE RENEWAL NO.3-IL-107-23-3L-00682

A Petition for Review was filed by John H. Brooke, Esq. and John M. Stevens, Esq., of the Law Offices of John H. Brooke, on behalf of DCV Imports, LLC (DCV), from the April 20, 2015 Order of Roger M. Root, Director of Industry Operations (DIO), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Chicago Field Division. Darren Vinyard is the president of DCV. The DIO's Order denied DCV's explosives permit renewal application based upon the March 25, 2015 Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision of Administrative Law Judge (ALJ) Gail A. Randall (Recommended Decision). I have examined and considered the administrative record in the proceeding, including ALJ Randall's Recommended Decision, DCV's Appeal on Petition, dated May 5, 2015, filed by Mr. Brooke, and the response filed by ATF Division Counsel Jason Libby, Chicago

Field Division, on behalf of the DIO. I have also considered the issues and points raised by the parties at the oral argument, which was held by telephone on October 21, 2015.

I HEREBY AFFIRM the Recommended Decision and Order of ALJ Randall, denying the renewal application of DCV as an importer of high explosives. Accordingly, I also affirm the DIO's Order of April 20, 2015.

PROCEDURAL BACKGROUND

On May 2, 2014, the DIO issued a Notice of Denial of Application for License or Permit (Notice of Denial) to DCV denying DCV's renewal application as an importer of high explosives pursuant to 18 U.S.C. § 843(b)(2). The Notice of Denial charged the following: (1) violations of 18 U.S.C. § 842(f) and 27 C.F.R. § 555.127 for willfully failing to keep required records; (2) violations of 18 U.S.C. § 842(k) and 27 C.F.R. §§ 555.30(a), 555.165 for willfully failing to report the theft or loss of explosive materials; (3) violations of 18 U.S.C. §§ 842(f), 842(g) and 27 C.F.R. § 555.121(c) for willfully making false entries in its Daily Summary of Magazine Transactions (DSMT) records; and (4) violations of 18 U.S.C. 842(j) and 27 C.F.R. § 555.63 for willfully failing to notify ATF prior to storing explosive materials in a magazine.

An Amended Notice of Violations (Amended Notice) was issued on August 26, 2014, which omitted the failure to report a theft/loss allegation. The Amended Notice alleged: (1) violations of 18 U.S.C. § 842(f) and 27 C.F.R. § 555.127 for willfully failing to keep records which resulted in discrepancies in its DSMT records on or about September 9, 2013; (2) violations of 18

U.S.C. § 843(f) and 27 C.F.R. § 555.63 at Girard, Illinois for willfully failing to submit a report describing an additional magazine and the class and quantity of explosives to be stored; and (3) violations of 18 U.S.C. § 843(f) and 27 C.F.R. § 555.63 at St. Francisville, Illinois for willfully failing to submit a report describing an additional magazine and class and quantity of explosives to be stored.

On May 12, 2014, DCV requested a hearing to review the denial of its renewal application pursuant to 18 U.S.C. § 843(e)(2) and 27 C.F.R. § 555.75. A hearing was held on December 9-11, 2014, in Peoria, Illinois, and was presided over by ALJ Randall. On March 25, 2015, ALJ Randall issued her Recommended Decision wherein she found “[d]ue to the Petitioner’s demonstrated willful recordkeeping violations, I conclude and recommend that the ATF Director uphold the denial of DCV’s application for its Federal Explosives License Renewal.” Rec. Dec. at 34. Specifically, ALJ Randall found that DCV willfully violated 18 U.S.C. § 842(f) and 27 C.F.R. § 555.127 for recordkeeping violations (Count One of the Amended Notice).¹ Rec. Dec. at 27-31.

On April 20, 2015, and pursuant to 27 C.F.R. § 555.76(b), DIO Root issued an “Order Confirming Denial of Renewal Application,” (DIO Order) affirming the ALJ’s Recommended Decision and upholding the initial denial of the application for DCV’s willful violation of the Federal explosives laws and regulations,

¹ ALJ Randall found that DCV did not violate 18 U.S.C. § 843(f) and 27 C.F.R. § 555.63 for storing explosives for longer than 24 hours in two additional magazines allegedly unknown to ATF (Counts Two and Three of the Amended Notice). Rec. Dec. at 31-33.

Title 18, Chapter 40, United States Code and 27 Code of Federal Regulations, Chapter 555, as alleged in Count One of the initial Notice of Denial.² By letter dated May 5, 2015, John H. Brooke, Esq. on behalf of DCV, petitioned for review of the DIO's Order pursuant to 27 C.F.R. § 555.79. The DIO, through his attorney, responded to DCV's appeal on June 29, 2015. A telephonic hearing was held before the Acting Director on October 21, 2015.

FACTUAL BACKGROUND

S&N Display Fireworks, Inc. (S&N), was issued a Federal Explosives License as an importer of high explosives by ATF in 1997. ALJ Ex. 15, p. 2. S&N conducted all aspects of a fireworks business with the exception of importing its own fireworks. Tr. At 724-26. S&N was owned by Mary Vinyard and Stephen Vinyard Sr. for approximately 33 years. Tr. at 601. Their son, Darren Vinyard, was an employee and responsible person for S&N. Tr. at 490, 660, 791. Sometime in the beginning of 2011, Stephen Vinyard, Sr. ceased to be an active participant of S&N, and Mary Vinyard became the sole owner of S&N. Tr. at 791.

ATF inspected S&N in 2006. Tr. at 69, 74; Gov't Ex. 7. During a warning conference on April 29, 2008, S&N was cited for numerous violations uncovered during the 2006 inspection, to include violations of 27 C.F.R. § 555.127 for failure to maintain an accurate

² DIO Root noted that he disagreed with ALJ Randall's findings and decisions regarding Counts Two and Three, however, he denied the renewal only on the basis of Count One, *see* DIO Order at 4, n.1, therefore only Count One is at issue.

and complete DSMT. Tr. at 69; Gov't Ex. 5. Darren Vinyard was present at the S&N warning conference on April 29, 2008. Tr. at 69; Gov't Ex. 6.

ATF inspected S&N again in 2009. Tr. at 69, 74; Gov't Exs. 5, 7. Numerous violations with S&N's record-keeping were revealed, again, specifically relating to DSMTs. Tr. at 141. A warning conference was held on February 16, 2010. Tr. at 303-05; Gov't Ex. 7. Darren Vinyard was present at the warning conference and signed the report of violations. *Id.* Stephen (Vinny) Vinyard Jr., Darren's brother, although not in attendance at the closing conference, also signed the closing conference document when the ATF Industry Operations Investigator (IOI) returned to S&N in March 2010. Gov't Ex. 7; Tr. at 303-08, 598, 610, 777-78.

Thereafter, on August 24, 2010, the DIO issued a Notice of Denial of Application for renewal of a license or permit to S&N for, among other things, willfully failing to maintain accurate DSMTs. Gov't Ex. 2; Tr. at 302. The DIO found that S&N's 2009 computerized records did not reflect their inventory on 379 occasions. Tr. at 402, 568-74; Gov. Ex. 2, p. 2. At the time, Darren Vinyard was a responsible person on the S&N permit. Tr. at 304.

Between 2011 and 2012, Mary Vinyard was experiencing minor health issues, was "fed up with" the business, and consequently, she voluntarily surrendered S&N's license sometime at the end of 2011 or beginning of 2012. Tr. at 796-97. At this time, Darren Vinyard as the owner of DCV was in the process of purchasing S&N. Tr. at 797, p. 6, *infra*.

Vinny Vinyard maintained the DSMTs for S&N up until S&N voluntarily surrendered its license. Tr. at

617-18. After S&N surrendered its license and was bought out by DCV, it maintained its corporate status, serving only as the shipping or carrier company for DCV. Tr. at 159, 612-13, 699-701.

Darren Vinyard started DCV Imports, LLC, which stands for Darren Clifford Vinyard, in 2004 with the intent that he would either buy out S&N, or start his own company. Tr. at 614-15, 778-79, 796-98. Darren Vinyard has been a responsible person for DCV since its inception in 2004. Tr. at 146. DCV was first issued a Federal Explosives License as an importer of high explosives by ATF on approximately October 20, 2004. ALJ Ex. 15, p. 2. DCV operated out of the same premises—1635 1800th Street, Lincoln Illinois—as S&N. *Id.* Darren Vinyard is a fifty-percent owner and president of DCV, while Vinny Vinyard is a fifty-percent owner and vice-president of DCV. Tr. at 598, 610, 777-78.

When DCV was founded in 2004, its operations consisted solely of importing fireworks for S&N. Tr. at 779-80. DCV took orders from S&N and placed orders through China. *Id.* Once DCV received the items, it transferred them to S&N. Tr. At 780. DCV did not import fireworks for any other business or entity. Tr. at 778. In approximately the end of 2011 or beginning of 2012, DCV purchased S&N. Tr. at 718, 795. DCV's purchase of S&N was a structured purchase in which DCV would make monthly installments over a five year period. Tr. 798-99. DCV agreed to pay approximately \$500,000 for S&N. *Id.* The sale of S&N included all S&N's on hand inventory, racks, rebar, tools, fire extinguishers, customer lists, show contacts, and show contracts. Tr. 799-800. Part of DCV's monthly

installment was for the lease of S&N's facilities. Tr. 800.

Darren and Vinny Vinyard ran the day-to-day operations of DCV together, but Darren Vinyard made the majority of DCV's business decisions. Tr. at 648-49, 654-56, 702. Vinny's responsibilities and duties included packing shows, shooting shows, and doing some of DCV's accounting. Tr. at 598.

At the hearing Darren Vinyard testified that he has instituted business practices for DCV that are different from S&N. Tr. at 490-91, 559. The shift in business practices happened after S&N's license was not renewed,³ and Darren Vinyard took steps to assume the family's fireworks business as a whole. Tr. at 492-93. After DCV bought S&N, Vinny Vinyard began maintaining the DSMTs for DCV. Tr. at 617-18, 647-48, 795. Vinny ceased maintaining the DSMTs in April 2013. Tr. at 618, 647-48. In 2013, Vinny Vinyard told Darren Vinyard he was planning to hire his cousin, Hailey Langley, to help with the DSMTs. Tr. at 620-21. At that same time, Vinny Vinyard also indicated to Darren Vinyard that he did not like maintaining the DSMTs. Tr. at 652-53. Even though he struggled with the DSMTs, Vinny Vinyard trained Hailey Langley on how to maintain the DSMTs. Tr. at 653. From May through September 2013, Ms. Langley completed the DSMTs. Tr. at 623-25. Vinny Vinyard checked Ms. Langley's work the "best [he] could." Tr. at 618, 620-22. Vinny Vinyard did not spot check any inventory to confirm the accuracy of the DSMTs in 2013. Tr. at

³ ATF sent S&N a Notice of Denial of Application for the renewal of a license as an importer of explosive material on August 24, 2010. Gov't Ex. 8, p. 1.

622-23, 647-48. Vinny Vinyard stopped paying attention to the DSMTs in 2013. Tr. at 639. Another employee, Adam Hubrick, who worked sporadically for DCV, also helped with the DSMTs during the 2013 season. Tr. at 624-25, 647-48. Mr. Hubrick had worked for S&N for several seasons, and maintained DSMTs for S&N from 2010-2011. Tr. at 625, 647-48. Vinny Vinyard never received any formal training with regard to proper DSMT record keeping. Tr. at 607-08, 653, 673-76. Vinny Vinyard struggled with the DSMTs up until Rob Fletcher took them over after the 2013 season. Tr. at 646-54. During the 2013 season, DCV experienced problems with employee turnover and new hires. Tr. at 616-17, 805-09. These problems also contributed to DCV's recordkeeping errors. Tr. at 617. After the DSMT problems in 2013, DCV instituted new record-keeping procedures to ensure the DSMTs were done correctly. Tr. at 639-41.

ATF conducted investigations of DCV in 2004, 2008 and 2010. Tr. at 59, 782-83, 784-85, 346, 786-87; DCV Ex. 3. No violations were cited. Tr. at 340. Darren Vinyard was listed as a responsible person on DCV's application each time. DCV Ex. 5; Gov't. Ex. 13; Tr. at 642. On July 12, 2004, February 14, 2008, and September 13, 2011, an ATF IOI reviewed the Federal explosives laws and regulations with Darren Vinyard, and he signed an Acknowledgment of Federal Regulations. Gov't. Exs. 12, 13, 14; ALJ Ex. 15, at pp. 1-3.

In September 2013, ATF conducted an unannounced compliance inspection of DCV.⁴ Tr. at 138.

⁴ Because S&N's renewal application was denied in 2010 and DCV was inspected in 2010, it is unclear if the 2013 inspection was the second or first inspection after Darren Vinyard instituted different business practices for DCV.

Shortly after the inspection commenced, DCV submitted a renewal application for its permit on October 8, 2013. Tr. at 148-49. During the inspection, an “on-hand inventory list,” was used, which was given to ATF by Darren Vinyard. This inventory list consisted of computerized inventory totals indicating the “on-hand amounts” of explosives. Tr. at 152-53, 175-76. As the inspection progressed, the IOIs noted that the numbers on the inventory lists did not match the actual inventory in the magazines, and asked Darren Vinyard for the actual DSMT records. Tr. at 185; Gov’t. Ex. 23, 25. In total, there were 73 instances where the DSMT records did not reflect the actual quantities of explosive materials in the magazine. Rec. Dec. ¶ 76. Actual quantities differed for 1,897 units, these units were made up of 35 different product types, with a net explosive weight of approximately 870 pounds. Tr. at 254, 271-73.

A conference with DCV was held on January 13, 2014, and the inspection findings and report of violations were discussed. Tr. at 227-34. Darren Vinyard was in attendance at the closing conference. Tr. at 234. During the closing conference, the applicable regulations were reviewed, and Darren Vinyard signed an Acknowledgment of Federal Explosives Regulations. Tr. at 236-40; Gov’t. Ex. 11.

STANDARD OF REVIEW

A renewal application for a Federal explosives permit is subject to denial if the applicant willfully violated Federal explosives laws or regulations. *See* 18 U.S.C. § 843(a), (b)(2). The Administrative Procedure Act (APA), 5 U.S.C. § 554, applies to adjudications required by statute to be determined on the record

after opportunity for an agency hearing. The governing statute here, 18 U.S.C. § 843, requires that a hearing be conducted in connection with a denial of an explosives license renewal. *See* 18 U.S.C. § 843(e)(2) (“If the Attorney General denies an application for, or revokes a[n] [explosives] license, or permit, he shall, upon request by the aggrieved party, promptly hold a hearing to review his denial or revocation”). APA section 554(c)(2) makes the provisions of 5 U.S.C. § 556 applicable to adjudicatory hearings. *See Marathon Oil Co. v. Environmental Protection Agency*, 564 F.2d 1253, 1262 (9th Cir. 1977) (if proceeding is adjudicatory in nature, it requires the special protections of APA sections 554, 556 and 557). Section 556(d) provides: “Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof” The burden of proof is by the preponderance of the evidence. *See Steadman v. Securities and Exchange Comm’n*, 450 U.S. 91, 101-02 (1981) (noting Congress intended to adopt the preponderance of evidence standard for the APA); *see also Director, Office of Workers’ Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 277 (1994) (noting that in *Steadman*, “we held that the proponent of a rule or order under [the APA] had to meet its burden by a preponderance of the evidence, not by clear and convincing evidence”).

On appeal from the recommended decision of an ALJ, the petitioner must show the recommended decision was arbitrary in nature, without reasonable warrant in fact, or contrary to law and regulations. *See* 27 C.F.R. § 555.79. The Director may not consider evidence outside of the administrative record. *See* 27 C.F.R. § 71.116 (2005). The Director may affirm,

reverse, or modify the recommended decision, and also may remand the case for further hearing. *See id.*

ANALYSIS

In its Appeal, DCV makes four arguments: 1) ATF hindered its ability to comply with the regulations by acting in an arbitrary manner; 2) it did not willfully violate either the Federal explosives laws or regulations; 3) it should have been given an opportunity for compliance; and 4) its post-Notice corrective actions should be viewed favorably. I find DCV's arguments are not persuasive.

I. ATF's Actions Were Not Arbitrary

DCV alleges that it was hindered in its ability to comply with ATF regulations due to conflicting and arbitrary interpretations of ATF regulations—specifically with respect to keeping DSMTs—presented by various ATF IOIs. In support of its argument, DCV cites to the deposition testimony of IOI Tamara Livingston. *See* Petition for Review at 4-8. However, on appeal, the Director “shall not consider evidence which is not a part of the record.” *See* 27 C.F.R. § 71.116 (2005). The ALJ is to certify the administrative record. *See* 27 C.F.R. § 71.106 (2005). Here, that deposition testimony is not part of this administrative record as certified by the ALJ. Accordingly, to the extent DCV is arguing that the ALJ's decision was arbitrary for not considering this argument, I find the ALJ did not err because the evidence was not in the record. *See Camp v. Pitts*, 411 U.S. 138 (“[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”)

Even assuming this claim should be considered, the ALJ did acknowledge DCV's argument that "the contradictory positions taken by ATF Investigators" hindered its compliance efforts. Rec. Dec. at 23. Nonetheless, the ALJ found that there was "substantial evidence" to support a finding that DCV "received in and removed explosive materials from its magazines" and "failed to record" such materials with knowledge of the recordkeeping requirements. Rec. Dec. at 28. DCV does not dispute that Darren Vinyard, on multiple occasions, acknowledged that he understood the Federal explosives laws and regulations. *See* Rec. Dec. at ¶¶ 32, 58. Nor does DCV claim they attempted to reconcile these allegedly contradictory positions by asking ATF for clarification, either during the acknowledgements or at any other time.

DCV further does not dispute it had a large number of recordkeeping discrepancies and does not explain how potentially conflicting information about overnight storage resulted in 870 pounds of missing explosive materials. Presumably, even if DCV received conflicting information, the total amount of explosive materials on hand should have been ultimately reconcilable with what was listed in the records as the "total remaining on hand at the end of the day." 27 C.F.R. § 555.127. This material should not be unaccounted for. While DCV may disagree with the ALJ, I find the ALJ's apparent rejection of their excuse is not arbitrary or contrary to law.⁵

⁵ In any event, no "justifiable excuse" defense to willful violations has been recognized. *See Vineland Fireworks Co. v. ATF*, 544 F.3d 509, 518 (3d Cir. 2008)(rejecting poor health excuse); *In re MacDonald Drilling and Blasting*, Order of the Director, at 7 (Nov. 19, 2008)(rejecting misinformation excuse).

Additionally, DCV alleges that the timing of ATF's inspections were suspect in that inspections occurred just before every renewal. To the extent DCV is insinuating that the timing of ATF's inspections reflect a predetermination by ATF to terminate the license, ATF's motivation to conduct an inspection is immaterial. One violation alone is sufficient to support a revocation of a Federal Explosives License. *Appalachian Res. Dev. Corp. v. McCabe*, 387 F.3d 461, 464 (6th Cir. 2004). As DCV notes, explosives licenses are renewed every three years (by statute). Thus, ATF was justified in conducting thorough compliance inspections on the schedule it chose. In the context of firearms cases, courts have upheld revocations based upon a minimal number of violations because the firearms industry involves a dangerous commodity and is heavily regulated. *See Article II Gun Shop, Inc. v. Gonzalez*, 441 F.3d 492 (7th Cir. 2006)).

Likewise, the same applies for explosives. The purpose of the Safe Explosives Act (Chapter 40, Title 18, United States Code) is "to protect interstate and foreign commerce against interference and interruption by reducing the hazard to persons and property arising from misuse and unsafe or insecure storage of explosive materials." Pub. Law No. 91-452, 84 Stat. 952, Section 1101 (emphasis added). This is the rudimentary foundation for storage and record-keeping requirements with which Federal explosives licensees are required to comply.

II. DCV Willfully Violated the Federal Explosives Laws and Regulations

Although the Federal explosives laws do not define the term willful, it has been defined by case law, in

both the firearms and explosives contexts, to mean plain indifference to, or intentional disregard of, a known legal duty. See *Willingham Sports, Inc. v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 415 F.3d 1274, 1276 (11th Cir. 2005); *Luna Tech, Inc. v. Bureau of Alcohol, Tobacco and Firearms*, 183 Fed. Appx. 863, 866 (11th Cir. 2006) (applying the willfulness standard in an explosives case to mean “‘an intentional disregard of, or plain indifference’ to [] statutory requirements”) (internal citations omitted). While it is true, as DCV pointed out during oral argument, that the Federal firearms and explosives regulatory regimes are not identical, they do share common characteristics, and this, as recognized by the Third Circuit, makes the Gun Control Act an appropriate comparator. “ATF administers both firearms licensing and explosives licensing, and the statutory provisions governing the revocation of each type of license require that the licensee has ‘willfully violated’ a statutory provision or a regulation. Thus, firearms licensing is analogous to explosives licensing and it is a useful framework for interpreting the term ‘willful.’” *Vineland Fireworks Co. v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 544 F.3d 509, 518 (3d Cir. 2008) (internal citation omitted).

As held in the context of firearms licensing cases, a showing of willfulness does not require a specific bad purpose on the part of the licensee. See *Appalachian Res. Dev. Corp. v. McCabe*, 387 F.3d 461, 465 (6th Cir. 2004) (concluding that the argument “that a revocation under the GCA [Gun Control Act, Chapter 44, Title 18, United States Code] requires proof of ‘bad intent . . .’ is unsupported by case law in this circuit or elsewhere”); *Stein’s, Inc. v. Blumenthal*, 649 F.2d

463, 467 (7th Cir. 1980) (concluding that “[t]he statute [18 U.S.C. § 923] does not require bad purpose or evil motive before a license may be revoked or a renewal application denied”); *Lewin v. Blumenthal*, 590 F.2d 268, 269 (8th Cir. 1979) (concluding that in a firearms licensing action “[t]here is no requirement of bad purpose as might be imposed were the Court faced with determining the definition of willfulness in a criminal prosecution”). A licensee “is considered to have acted willfully . . . if, with knowledge of what the regulations require, the dealer repeatedly violates those regulations.” *Willingham Sports*, 415 F.3d at 1276.

DCV argues that the Agency and the ALJ “advanced a definition of willfulness that is not fully supported by the explosives regulations, and one that is premised on the firearms statutes and case history.” Petition for Review at 11. DCV urges that the Agency should be held to the highest standards of proof, and should be evaluated under the definition of willfulness adopted in *Luna Tech*, “that a willful violation is an intentional disregard of, or plain indifference to the statutory requirements, which can be established by repeated violations with knowledge of the regulations.” *Id.*

In her Recommended Decision, the ALJ used the following willfulness standard in determining that DCV willfully violated 18 U.S.C. § 842(f) and 27 C.F.R. § 555.127 for recordkeeping violations:

The most applicable case law indicates that in the context of 18 U.S.C. §§ 842 and 843, “willfulness” means “plain indifference to, or intentional disregard of, a known legal duty.” [*Vineland Fireworks Co., Inc. v. ATF*,

544 F.3d 509, 517 (3rd Cir. 2008)]. Willfulness “does not require proof that [an entity] acted with the specific purpose to disobey the law.” [*Id.*]. Nor does willfulness require a “bad purpose.” [*Id.*]. A willful violation can simply be plain indifference to known requirements. [*Id.* citing *Lewin v. Blumenthal*, 590 F.2d 268, 269 (8th Cir. 1979)].

A clear pattern of repeat violations after warnings, or the existence of violations associated with a prior license, can establish plain indifference. Yet repeat violations are not required to establish plain indifference; knowledge of one’s legal obligations and violations thereof will suffice.

Rec. Dec. at 26-27.

In *Luna Tech*, the 11th Circuit defined a willful violation in the explosives context as “an intentional disregard of, or plain indifference to the statutory requirements.” *Luna Tech*, 183 Fed. Appx. at 866 (quoting *J.A.M. Builders, Inc. v. Herman*, 233 F.3d 1350, 1355 (11th Cir. 2000)). The *Luna Tech* Court further explained that “[w]illfulness can be established by repeated violations with knowledge of the regulations.” *Id.* (citing *Willingham Sports*, 415 F.3d at 1277).

The legal standard as applied by the ALJ and the *Luna Tech* legal standard DCV argues for are essentially the same. Although worded slightly differently, it is a matter of semantics. The application of the so-called *Luna Tech* standard does not result in a different outcome. Both expressions define willfulness as “plain indifference or intentional disregard” of known statutory or legal duties. Additionally, both expres-

sions state that willfulness can be established through prior, repeated violations; neither expression requires a showing of prior repeated violations.

I find even if the *Luna Tech* definition of willfulness was used as DCV suggests, the ALJ's findings of willfulness would still be supported. Contrary to DCV's argument, the *Luna Tech* definition of willfulness does not require repeated violations in order for a violation to be willful; it is simply one way to establish willfulness. There is nothing in the Federal explosives laws or case law to suggest that ATF is required to wait for years of repeat violations in order to establish willfulness. *See Manuele v. Acting DIO*, 2008 WL 2168734, at *4 (C.D. Ill. May 22, 2008) ("The regulations and the statute nowhere require a warning before a violation can be willful. A warning is not required.")

I find the ALJ's conclusion that DCV willfully violated 18 U.S.C. § 842(f) and 27 C.F.R. § 555.127 by not maintaining proper records was not arbitrary and is supported by the record. *See* Rec. Dec. at 27-31. DCV's failure to maintain accurate records resulted in 870 pounds of unaccounted-for explosive materials. There is no dispute that violations occurred. Rec. Dec. at 28.⁶

As the ALJ noted, Rec. Dec. at 28, a finding of violations alone is not sufficient to deny DCV's license;

⁶ At oral argument DCV asserted that based on its inventory, its error rate was far less than ten percent. However, in *Shawano Gun & Loan v. Hughes*, 650 F.3d 1070, 1078 (7th Cir. 2011), the Court of Appeals rejected the plaintiffs argument that "its violations were not willful based upon the infrequency of the errors in comparison to the number of transactions conducted," noting there was "no de minimis exception" to willfulness.

18 U.S.C. § 842(f) requires willful violations, which as stated above requires “plain indifference to, or intentional disregard of, a known legal duty.” I agree with the ALJ that Darren Vinyard had knowledge of the Federal explosives laws and regulations. *See* Rec. Dec. at 28 (“Darren Vinyard grew up in and around the fireworks industry, and was well versed in the fireworks business by the time he founded DCV.”) He was an employee and responsible person for S&N. Darren Vinyard was also present during ATF inspections, a 2008 warning conference, and a 2010 closing conference (to include violations for failing to keep proper DSMTs under 27 C.F.R. § 555.127). Darren Vinyard also signed many statements acknowledging his understanding of the Federal explosives laws and regulations as both a responsible person for S&N and DCV.

During oral argument, DCV maintained that Darren Vinyard should not have been considered a responsible person for S&N, that he was employed mainly as a pyrotechnician and truck driver. Assuming Darren Vinyard did have technician and driver duties, it remains undisputed he was listed as a responsible person on S&N’s license, including in 2010 when ATF issued S&N its Notice of Denial of Application. Rec. Dec. at 29.

DCV argues that it is improper to bootstrap S&N’s violations to DCV to find willfulness. I agree with the ALJ that S&N and DCV are different corporations, Rec. Dec. at 29, and I am not imputing S&N’s violations to DCV but I am imputing the knowledge Darren Vinyard gained at S&N to DCV. This is consistent with common sense and case law. *See Champion Arms v. Van Haelst*,

2012 WL 4511393, at *7 (W.D. Wash. Sept. 30, 2012)⁷; *Gladden v. Bangs*, 2012 WL 604027, at *5 (E.D. Va. Feb. 23, 2012).

It is noteworthy that Darren Vinyard deferred the responsibility for DCV's recordkeeping to his brother, Vinny Vinyard, all the while knowing that Vinny Vinyard was the root of the improper recordkeeping of S&N, was not provided with any training or corrective action for proper recordkeeping, and did not wish to keep the DSMTs. Vinny Vinyard then turned the recordkeeping over to his cousin Hailey Langley, but did not provide her with proper training or confirm the accuracy of the DSMTs. Vinny Vinyard admitted that he stopped paying attention to the DSMTs in 2013. DCV is responsible for its DSMT failures, regardless of which employee performed that function. *See Bankston v. Then*, 615 F.3d 1354, 1368-69 (11th Cir. 2010) ("An employee's knowledge can be imputed to the employer when the employee acts for the benefit of the [employer] and within the scope of his employment.") (internal quotation marks omitted).

Accordingly, I find the ALJ did not act arbitrarily in applying the definition of willful and, ultimately, in finding DCV's violations were willful as to Count 1.⁸

⁷ DCV argues that *Champion Arms* is distinguishable because there was no question the plaintiff was a responsible person and there was a long history of violations. First, as stated above, it is not disputed that Darren Vinyard was listed as a responsible person for S&N and second, also as stated above, repeat violations are not required to find willfulness.

⁸ To the extent DCV is arguing, see Petition for Review at 7-8, it lacked willfulness because DCV had no violations prior to 2013, that argument is a bit disingenuous; from 2004 to 2010, DCV only imported fireworks that they would immediately

III. The ALJ Was Correct in Concluding that DCV Was Not Entitled to an Opportunity for Compliance

DCV argues that it should have been entitled to an opportunity for compliance under 27 C.F.R. § 555.71 prior to its license being denied. 27 C.F.R. § 555.71 provides that a renewal application is not to be denied “without first calling to the attention of the licensee or permittee the reasons for the contemplated action and affording him an opportunity to demonstrate or achieve compliance with all lawful requirements and to submit facts, arguments, or proposals of adjustments.” 27 C.F.R. § 555.71. However, there is an exception to this provision where willfulness is alleged in the notice of denial of any application or revocation of a license or permit. *Id.* (“[e]xcept in cases of willfulness”). Thus, in cases where a willful violation is alleged, a renewal application may be denied without first affording the licensee with an opportunity for compliance under 27 C.F.R. § 555.71. Denial of an opportunity for compliance in the case of willfulness is not unique to ATF but part of the APA, *see* 5 U.S.C. § 558(c)(1) (“[e]xcept in cases of willfulness . . . , the withdrawal, suspension, revocation or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licenses has been given opportunity to demonstrate or achieve compliance with all lawful requirements”).

transfer to S&N and thus had no inventory. *See* DIO Response at 9.

DCV was charged with willful violations in the Notice of Denial of Application⁹ and the Amended Notice.¹⁰ ALJ Exhibits 1, 4. Therefore, because willfulness was alleged in the Notice and the Amended Notice, the opportunity period for compliance under 27 C.F.R. § 555.71 does not apply to DCV. *See Vineland*, 544 F.3d at 520 (finding § 555.71 inapplicable because “the notice the licensee received from the DIO alleged willfulness” and “the licensee need not be afforded an opportunity to comply prior to revocation or denial of renewal of a license”); *see also Luna Tech*, 183 Fed. Appx. At 865-66 (finding Luna Tech was not entitled to an opportunity for compliance).

DCV argues that the regulation essentially permits ATF to render its regulation irrelevant and ignores the opportunity for compliance in 5 C.F.R. § 555.71. However, based on the plain unambiguous language of the regulation, because willfulness was alleged in the Notice of Denial of Application and the Amended Notice, I find DCV was not entitled to an opportunity for compliance.

⁹ In the Notice of Denial of Application for License or Permit issued by the Acting DIO, DCV was charged with six violations of 18 U.S.C. Chapter 40, and its implementing regulations at 27 C.F.R. Part 555. ALJ Ex. 1. Each of the six violations was alleged in the Notice to be a willful violation. *Id.*

¹⁰ The Amended Notice of Violations amended and superseded the enumerated allegations contained in the Notice of Denial of Application for License or Permit and alleged three violations, each of which were designated as willful violations. ALJ Ex. 4.

IV. The ALJ Was Correct in Finding DCV's Post-Notice "Corrective Actions" Not Relevant to the Proceedings

DCV argues that although they have had record-keeping problems, they have taken additional corrective action pending resolution of this matter, which should be viewed favorably.¹¹ *See* Petition for Review at 13-16.

This argument was addressed and rejected by the Third Circuit in *Vineland*. The *Vineland* Court held that a licensee's post corrective actions "have no bearing" on the willfulness determination and are "not relevant" to whether the violations were willful at the time they occurred. *See* 544 F.3d at 519-20 ("the inquiry turns on the past conduct of the licensee"). Likewise, the same argument has been rejected in the firearms context. *See Shawano Gun & Loan v. Hughes*, 650 F.3d 1070, 1079 (7th Cir. 2011) (finding corrective action measures came too late).

Additionally, from a practical standpoint, if a licensee's promise of later compliance was all that was necessary to overturn a license denial or revocation, such promises would render denial and revocation proceedings meaningless. *See also T.T. Salvage Auction Co. v. Sec'y, United States Dep't of the Treasury*, 859 F. Supp. 977, 979 (E.D.N.C. 1994) (concluding that "if a court were to consider such evidence [of

¹¹ Specifically, DCV states they have evaluated their procedures, implemented corrective action, moved an employee (Rob Fletcher) to a responsible person role to take over sole management of DSMTs, removed Vinny Vinyard as a responsible person, and Darren Vinyard has taken a more active role, to include spot checking inventory and DSMTs. *See* Petition for Review at 13-15.

later compliance], it would be rare that the ATF would ever be able to successfully revoke a license, as all the licensee would have to do is bring its dealership into compliance between the time of the revocation hearing and . . . review”).

In her Recommended Decision, although the ALJ noted that DCV presented credible evidence of implementation of new policies and procedures, the ALJ did not consider DCV’s remedial actions as relevant to her finding of willfulness. *See* Rec. Dec. at 34. While I appreciate DCV’s efforts, I find the ALJ’s refusal to consider the remedial actions was appropriate, and thus was not arbitrary.

CONCLUSION

Based upon the record, I find that the ALJ’s Recommended Decision and Order was not arbitrary and capricious or unwarranted in law or fact. As a result, I further find that DCV’s renewal application was appropriately denied.

Wherefore, on this 23rd day of October, 2015, I affirm the ALJ’s Recommended Decision and Order in its entirety. The DIO’s Order of April 20, 2015, denying DCV’s explosives permit renewal application, stands.

/s/ Thomas E. Brandon
Acting Director
Bureau of Alcohol, Tobacco,
Firearms and Explosives

**ORDER CONFIRMING
DENIAL OF RENEWAL APPLICATION
(APRIL 20, 2015)**

UNITED STATES OF AMERICA DEPARTMENT
OF JUSTICE BUREAU OF ALCOHOL, TOBACCO,
FIREARMS AND EXPLOSIVES

IN RE:
DENIAL OF FEDERAL EXPLOSIVE LICENSE
RENEWAL No. 3-IL-107-23-3L-00682, as an
Importer of High Explosives of DCV IMPORTS, LLC,

DCV Imports, LLC, 1635 1800th Street, Lincoln, Illinois (“DCV”) has a pending renewal application for Federal Explosives Licenses No. 3-IL-107-23-3L-00682, as an Importer of High Explosives.

The Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge (“Recommended Decision”) dated March 25, 2014, by the Hon. Gail A. Randall, Administrative Law Judge, Drug Enforcement Administration, sets out the procedural actions in this matter occurring prior to the date of this Order Confirming Denial of Renewal Application. The Recommended Decision is attached to this Order Confirming Denial of Renewal Application. Paragraphs 1 through 4 of the Recommended Decision include statements regarding the administrative procedures in this matter and are hereby incorporated by reference as if fully set out herein. Paragraph 1 specifies the alleged violation that is the basis of the actions in this matter. DCV

contests the allegations, as indicated in the documents filed by DCV in this matter and the information provided by DCV in the administrative hearing.

Under the authority of 18 U.S.C. § 843(b) and 27 C.F.R. § 555.49, a Federal Explosives License application is subject to denial if the Attorney General has reason to believe that the applicant is not entitled to such license for specified reasons, including willful violations of Federal explosives laws and regulations. In this matter, DCV is alleged to have willfully violated the Federal explosives laws and regulations, as more fully described in the attached Recommended Decision, Paragraph 1, incorporated by reference as if fully set out herein.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A hearing was held on this matter December 9-11, 2014, in Peoria, Illinois. The Hon. Gail A. Randall, Administrative Law Judge, Drug Enforcement Administration, presided at this hearing and subsequently issued the attached Recommended Decision, which included Findings of Fact from the evidence presented by the parties. The Recommended Decision also stated Conclusions of Law which resulted from applying the facts to the applicable authorities of law. The Recommended Decision included a Recommended Conclusion and Recommendation regarding this matter.

Count One

The Findings of Fact and Conclusions of Law, regarding Count One, as set out in the attached Recommended Decision, Finding of Facts, §§ (A) through (D), and Conclusions of Law, Analysis, § (C)(1),

are incorporated herein by reference as if fully set out in this Order Confirming Denial of Renewal Application I, Roger M. Root, Director of Industry Operations, Chicago Field Division, agree with the Conclusion by the Hon. Gail A. Randall, as stated in the Conclusion and Recommendation section of the attached Recommended Decision, that DCV willfully violated the provisions of the Federal Explosives Control Act, Title 18, Chapter 40, United States Code and 27 Code of Federal Regulations, Chapter 555, as alleged in Count One of the initial Notice of Denial.

CONCLUSION

Based on the Findings of Fact and the Conclusions of Law, incorporating sections of the attached Recommended Decision as referenced herein, and in consideration of the allegations and authorities cited, I, Roger M. Root, Director of Industry Operations, Chicago Field Division, find that the renewal applicant, DCV, LLC, 1635 1800th Street, Lincoln, Illinois 62656, willfully violated the provisions of Chapter 40, Title 18, United States Code, as alleged in the initial notices in this matter on Counts One¹.

The application for renewal of Federal Explosive Licenses as an Importer of High Explosives, Federal Explosives License, No. 3-IL-107-23-3L-00682, submitted by DCV is hereby DENIED, effective thirty (30) days from the date of this Order Confirming Denial of Renewal Application, based on the grounds that

¹ Although I disagree with Judge Randall's findings and decision as set out in the attached Order regarding Counts Two and Three, there is nothing regarding the violations alleged in Counts Two and Three that forms the basis for this Order Confirming Denial of Renewal Applications

App.37a

DCV willfully committed violations of Chapter 40, Title 18, United States Code, and the regulations promulgated thereunder.

/s/ Roger M. Root

Director of Industry Operations
Chicago Field Division
Bureau of Alcohol, Tobacco,
Firearms and Explosives

Dated this 20th day of April, 2015.

**RECOMMENDED RULINGS, FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION OF
THE ADMINISTRATIVE LAW JUDGE
(MARCH 25, 2015)**

UNITED STATES DEPARTMENT OF JUSTICE
BUREAU OF ALCOHOL, TOBACCO, FIREARMS
AND EXPLOSIVES

IN THE MATTER OF:
DCV IMPORTS, LLC,

ATF Docket No. 14-3

Before: Gail A. RANDALL,
Administrative Law Judge

I. Introduction and Procedural Posture

On May 2, 2014, the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF” or “ATFE”) by its Director of Industry Operations (“DIO”), Chicago Field Division, issued a Notice of Denial of Application for License or Permit, (“Notice of Denial”) regarding License Number 3-IL-107-23-3L-00682, addressed to DCV Imports, LLC (“DCV”) in Lincoln, Illinois. After the investigation was complete, ATFE determined that DCV violated 18 U.S.C. 842(f) and 27 C.F.R. 555.127 for willfully failing to keep required records. [Administrative Law Judge “ALJ” Exh. 1] This violation served as the basis for the denial of DCV’s renewal application. [*Id.*].

On May 12, 2014, DCV Imports, LLC, submitted a timely request for hearing, disputing the alleged violations. [ALJ Exh. 5]. Thereafter, the matter was submitted to me for adjudication. [ALJ Exh. 6].

After authorized delays, on August 25, 2014, the ATF filed a motion to amend the Notice of Denial [ALJ Exh. 2], asserting that some of the allegations in the original Notice of Denial had been eliminated, and the amended allegations neither added to nor altered the theory of the Government's case. DCV's counsel had no opposition to the motion. On August 26, 2014, I granted the ATF's motion and allowed the amendment of the Notice of Denial. [ALJ Exh. 3]. The allegations in the amended Notice of Denial were adjudicated in this matter.

On September 26, 2014, I issued a Prehearing Ruling, which includes the parties' stipulations. [ALJ Exh. 15]. On November 21, 2014, again after authorized delays, I issued the Notice of Hearing, informing both parties of the time and place for the hearing. [ALJ Exh. 19]. The hearing was conducted in Peoria, Illinois, on December 9 through 11, 2014. [Transcript of Hearing ("Tr.") at 4].

II. Issue

The issue in this proceeding is whether or not the record as a whole establishes by a preponderance of the evidence that the Bureau of Alcohol, Tobacco, and Firearms ("ATF" or "Government") Director of Industry Operations in the Chicago Field Division should deny the application by DCV Imports, LLC, to renew its federal explosives license, number 3-IL-107-23-3L-00682, for willful violations of Title 18 U.S.C. §§ 842(f) and 843(f) (2006) (the "Safe Explosives

Act”), and Title 27 C.F.R. Part 555, subsections as cited in the Amended Notice of Denial of Application for License or Permit, ATFE E-Form 5400.11. [ALJ Exh. 15].

III. Findings of Fact

I find, by a preponderance of the evidence, the following facts:

A. Stipulated Facts

The parties have stipulated to the following facts:

1. All of the fireworks and any other explosives and explosive materials referenced in the Notice of Denial of Application for License, ATFE Form 5400.11, served on DCV were explosives materials and explosives as those terms are defined in 18 U.S.C. § 841. [ALJ Ex. 15, at 1-2].

2. All of the documents listed below in Section 6 of this Prehearing Statement are what they are purported to be. [*Id.* at 2].

3. In 1997, ATF issued S&N Display Fireworks, Inc. (“S&N”) a Federal Explosives license as an importer of high explosives. [*Id.*].

4. On or about October 20, 2004, ATF issued DCV a Federal Explosives license (“FEL”) as an importer of high explosives, and DCV held this license at all applicable times stated in the Amended Notice of Denial of Application for License or Permit. [*Id.*].

5. Both S&N and DCV operated out of the same premises at 1635 1800th Street, Lincoln, Illinois. [*Id.*].

6. DCV began using the Daily Summary of Magazine Transaction (“DSMT”)¹ records referenced in the Amended Notice of Denial of Application for License or Permit on or about January 1, 2013. [*Id.*].

7. On or about September 13, 2011, an ATF Industry Operations Investigator reviewed the Federal explosives laws and regulations with Darren Vinyard, who signed an Acknowledgement of Federal Explosives Regulations, as a representative of DCV evidencing the same. [ALJ Ex. 15, at 1-3; Gov’t Exh. 12].

8. On or about February 14, 2008, an ATF Industry Operations Investigator reviewed the Federal explosive laws and regulations with Darren Vinyard, who signed an Acknowledgement of Federal Explosives Regulations, as a representative of DCV evidencing the same. [ALJ Ex. 15, at 2; Gov’t Exh. 13].

9. On or about July 12, 2004, an ATF Industry Operations Investigator reviewed the Federal explosive laws and regulations with Darren Vinyard, who signed an Acknowledgement of Federal Explosives Regulations, as a representative of DCV evidencing the same. [ALJ Ex. 15, at 2; Gov’t Exh. 14].

B. ATFE Investigation

10. Darren Vinyard is the owner and president of DCV. [Tr. at 777].

¹ DSMTs are the records used to keep track of explosive material that goes into a magazine and is taken out of a magazine. The DSMTs need to reflect an accurate balance of explosives within a magazine at all times. [Tr. 52-53; 27 C.F.R. § 555.127].

11. Darren Vinyard is the son of Mary and Stephen Vinyard Sr., former owners of DCV's predecessor, S&N Fireworks, LLC ("S&N"). [Tr. at 791].

12. Stephen ("Vinny") Vinyard² is the brother of Darren Vinyard and co-owner and vice president of DCV. Vinny Vinyard holds a 50% interest in DCV. [Tr. at 598, 610, 777-78]. Vinny's responsibilities and duties include packing shows, shooting shows, and doing some of DCV's accounting. [Tr. at 598].

13. Robert Fletcher is an employee of DCV Imports, and has worked for DCV since 2004. [Tr. at 487]. Mr. Fletcher also worked for S&N, beginning in 2008. [*Id.*]. Mr. Fletcher is currently responsible for DCV's inventory. [*Id.*].

14. Angela Meyers is the Plant Manager for DCV. [Tr. at 698]. Ms. Meyers has worked for DCV since February 2012.³ Ms. Meyers also worked for S&N, beginning in 2006. [Tr. at 694]. As part of her duties, Ms. Meyers manages employees and handles customer correspondence, including bids and complaints. Ms. Meyers also completes paperwork required for the Department of Transportation ("DOT"), ATFE, fire marshal, and Illinois Department of Natural Resources

² The transcript lists Stephen Vinyard Jr.'s nickname as "Vinnie." The pleadings filed in this matter spell Stephen Vinyard Jr.'s nickname as "Vinny." This recommended decision will refer to Stephen Vinyard Jr.'s nickname as it is spelled in the pleadings, "Vinny."

³ Ms. Meyers indicated that her employment with DCV has not been continuous. She did not work for DCV from May 2013-January 2014. This was due to a personal dispute between herself and Darren Vinyard. Ms. Meyers returned to DCV on January 20, 2014 at the request of Darren Vinyard. [Tr. at 694].

(“IDNR”). [Tr. at 692]. Ms. Meyers was a responsible person for S&N from 2008-2012, and a responsible person for DCV from 2008-2013. [Tr. at 722].

15. Tamra Livingston is a Bureau of Alcohol, Tobacco, Firearms, and Explosives Industry Operations Investigator with over nine years’ experience. [Tr. 137-38]. Ms. Livingston conducted Industry Operations inspections of both DCV and S&N starting in 2009. [Tr. 140-141]. Ms. Livingston is assigned to the Chicago Field Division, Springfield Region. [Tr. at 138]. Prior to her ATFE experience, Ms. Livingston worked for a large explosives manufacturing company, where she was the inventory and shipping manager responsible for maintaining DSMTs, DOT shipping records, and magazine storage worksheets. [Tr. at 338].

16. Robert Furmanek is an ATFE Industry Operations Investigator with over thirteen years’ experience. [Tr. at 36]. Mr. Furmanek is assigned to the Chicago Field Division, Fairview Heights region. [Tr. at 36]. Mr. Furmanek credibly testified to the duties and responsibilities of an Industry Operations Investigator. [Tr. at 37-38].

17. The ATFE Chicago Field Office is broken up into three regions: Springfield, Fairview Heights, and Downers Grove. [Tr. at 130]. DCV’s principal location, located at Lincoln, Illinois, is in the Springfield (Central Illinois) region. DCV also had storage in the Fairview Heights (Southern Illinois) region. [Tr. at 38-39].

C. S&N

18. Mary (“Necie”) Vinyard and Stephen Vinyard Sr. owned S&N for approximately 33 years. [Tr. at 601] Mary was the president of S&N. [Tr. at 490, 660].

19. Darren Vinyard was an employee and responsible person for S&N.⁴ [*Id.*].

20. At some point near the beginning of 2011, Stephen Vinyard, Sr. stopped being an active participant of S&N. [Tr. at 791]. Mary Vinyard then became the S&N’s sole owner. [*Id.*].

21. Prior to its buyout by DCV, S&N imported bulk fireworks and packaged individual shows for distribution and display. [Tr. at 313, 377, 424, 564-65, 725-26]. Up until 2011, S&N conducted every aspect of a fireworks business with the exception of importing its own fireworks. [Tr. at 795-96].

22. S&N was inspected by the ATF several times during its tenure as a federal explosives licensee. First, in 2006, and then again in 2009. [Tr. at 69, 74; Gov’t Exh. 5, 7].

23. IOI Furmanek was the lead investigator on the S&N compliance inspection from August 21, 2006, through August 22, 2007. [Tr. at 69, 74-75; Gov’t Exh. 5].

24. Pursuant to IOI Furmanek’s 2006-2007 compliance inspection, S&N was cited for a number

⁴ Darren Vinyard testified that he was a responsible person on S&N’s license because his parents would vacation in Florida during S&N’s offseason, and a responsible person was required to be on site for ATFE inspections. [Tr. at 792]. Darren Vinyard further testified that he was not in charge of S&N, even when his parents were in Florida. [Tr.at 793].

of violations during a warning conference on April 29, 2008. Specifically, S&N was cited for: (1) violation of 27 C.F.R. § 555.29 for a failure to properly store bulk salutes and igniter cord; (2) violation of 27 C.F.R. § 555.127 for failure to maintain an accurate or complete DSMT; (3) violation of 27 C.F.R. 555.206(a), 27 C.F.R. § 555.218, and 27 C.F.R. § 555.224 for storing high explosives and display fireworks closer to an inhabited build than the minimum distance specified; (4) violation of 27 C.F.R. § 555.210 for failure to maintain construction requirements of type four magazines; (5) violation of 27 C.F.R. § 555.214(a) for failure to properly store explosive materials; (6) violation of 27 C.F.R. § 555.215 for failure to maintain house-keeping of storage magazines in accordance with ATFE regulations; and (7) violation of 27 C.F.R. § 555.217(c) for failure to provide copies of invoices, work orders or similar documents which indicate the lighting in magazines. [Tr. at 69; Gov't Exh. 5].

25. Among others, Darren Vinyard was present at the S&N warning conference on April 29, 2008. [Tr. at 69; Gov't Exh. 6].

26. Thereafter, in 2009, S&N was inspected again, this time by IOI Livingston. [Tr. at 140]. IOI Livingston's inspection revealed numerous violations with S&N's recordkeeping, specifically its DSMTs. [Tr. at 141].

27. On February 16, 2010, IOI Livingston conducted a closing conference for the 2009 inspection with Angie Meyers, Brea Lawrence, Joe Snyder, and

Darren Vinyard. All four attendees signed a report of violations [Tr. at 303-05; Gov't Exh. 7].⁵

28. Thereafter, on August 24, 2010, the Director of Industry Operations issued a notice of denial of application for license or permit to S&N for, among other things, willfully failing to maintain accurate DSMTs.⁶ [Gov. Exh. 2; Tr. at 302]. The DIO found that S&N's 2009 computerized records did not reflect their inventory on 379 occasions. [Tr. at 402, 568-74; Gov't Exh. 2 at 2].⁷

29. Between 2011 and 2012, Mary Vinyard was experiencing some minor health issues and was "fed up with" the business. [Tr. at 796-97]. Due to this,

⁵ Vinny Vinyard was not present for the initial closing conference, but signed the closing conference document when IOI Livingston returned to S&N in March 2010. [Gov't Exh. 7; Tr. at 303-308].

⁶ Darren Vinyard was a "responsible person" on the S&N permit when the ATF Director of Industry Operations issued the notice of denial of application for S&N's license or permit. [Tr. at 304].

⁷ Overall, S&N lost approximately 30,000 shells with a weight of about 10,000 pounds, and failed to maintain separate DSMTs for trailers 1 and 2. [Tr. at 400-402; Gov't Exh. 2 at 2]. Mathematical errors in S&N's calculations led to inaccurate balances on their DSMTs for six line items in its inventory. [*Id.*]. S&N failed to maintain DSMT records for explosive materials in its inventory on 18 occasions. [Tr. at 403; Gov't Exh. 2 at 2]. S&N failed to accurately record acquisition quantities of explosive materials. [Tr. at 404; Gov't Exh. 2 at 3]. The Notice of Denial of Renewal Application for S&N lists twenty-one other recordkeeping violations that were used as the basis for the Notice of Denial. The above listed violations were highlighted by counsel for DCV who purported to show that S&N's record-keeping violations were not the same as DCVs. [Tr. at 400-408].

Mary voluntarily surrendered S&N's license. [Tr. at 796]. At the same time in 2011, DCV was in the process of purchasing S&N. [Tr. 797].⁸

30. Vinny Vinyard did the DSMTS for S&N up until S&N voluntarily surrendered its license. [Tr. at 617-18].

31. After S&N surrendered its license and was bought out by DCV, it maintained its corporate status, but only served as the shipping or carrier company for DCV. [Tr. at 159, 612-13, 699-701].

32. Also on March 11, 2010, Joe Snyder, Darren Vinyard, and Stephen Vinyard signed an acknowledgement of federal explosives regulations on behalf of S&N. [Gov't Exh. 9; Tr. at 308-309].

D. DCV

33. DCV Imports, LLC, which stands for Darren Clifford Vinyard, was founded in 2004 by Darren Vinyard with the intent that he would one day either buy out S&N, or start his own company. [Tr. at 614-15, 778-779, 796-98]. Darren Vinyard has been a responsible person for DCV from 2004-present [Tr. at 146].

34. When DCV was founded in 2004, its operations consisted of importing fireworks for S&N. [Tr. at 779-80]. DCV would take orders from S&N and place orders through China. [*Id.*]. Once DCV

⁸ Mary Vinyard was a responsible person on DCV's federal explosives permit application in 2007 and 2010. [Tr. at 797-98; DCV Exh. 4]. Darren Vinyard testified that at the time DCV purchased S&N, Mary Vinyard wished to be removed as a responsible person for DCV. [Tr. at 797-98]. DCV's 2013 federal explosives renewal application does not list Mary Vinyard as a responsible person. [Gov't Exh. 1].

received the items, it would transfer them to S&N. [Tr. at 780]. DCV did not import fireworks for any other business or entity. [Tr. at 778].

35. In 2011, DCV purchased S&N. Pursuant to the purchase, DCV prepared a notification packet that was sent to the ATFE in November 2011. [Tr. at 718].

36. DCV's purchase of S&N was a structured purchase in which DCV would make monthly installments over a five year period. [Tr. at 798-99]. DCV agreed to pay approximately \$500,000 for S&N. [*Id.*]. The sale of S&N included all S&N's on hand inventory, racks, rebar, tools, fire extinguishers, customer lists, show contacts, and show contracts. [Tr. at 799-800]. Part of DCV's monthly installment was for the lease of S&N's facilities. [Tr. at 800].

1. DCV's Day-to-Day Operations

37. Darren Vinyard and Vinny Vinyard run the day-to-day operations of DCV together, but Darren Vinyard makes most of DCV's business decisions. [Tr. at 648-49, 654-56, 702].

38. DCV utilizes multiple areas to store its fireworks. The two main areas are Lincoln, Illinois, the business office location and where DCV packs its shows, and Illiopolis, Illinois, the location where bulk and high explosives are stored. [Tr. at 173]. The Illiopolis, Illinois bunker is rented from a third party who owns the entire bunker complex. [Tr. at 801].⁹

⁹ DCV uses the same storage facilities that S&N used to store its fireworks. [Tr. 559-60].

39. The Lincoln, Illinois DCV compound is comprised of magazine trailers¹⁰ 1, 2, 7, and 8 [Tr. at 161-177; Gov't Exh. 37, 38, 44, 45].¹¹ DCV's Illiopolis, Illinois location is comprised of bunker magazines 1, 2, 3, 4, 5, and 6. [Tr. at 183; Gov't Exh. 40, 41].

40. DCV operates by importing fireworks from China to the Illiopolis, Illinois bunker. [Tr. at 501-503]. The bunkers at Illiopolis are leased, and are only used to store bulk cases of fireworks. [Tr. at 172, 705-07]. Once a customer requests a show, S&N drives to Illiopolis, picks the bulk fireworks, and transports them to DCV's Lincoln location. [Tr. at 812-814]. The fireworks are then processed and sorted at the Lincoln, Illinois location. As part of the sorting and packing process, the shows are put together on the deck of trailers 1 and 2. [Tr. at 666-67]. Once the final show is packed, it is moved to trailer 7 or 8. [Tr. at 667]. Any leftovers are stored by product type in labeled wooden bins in trailer 1. [Tr. at 667, 670-71]. At certain times, the leftover product housed in trailer 1 is used to pack shows as well. [Tr. at 671-72].

41. When a finished show is packed, it can be delivered or picked up. [Tr. at 814]. A customer must have a special license to pick up and transport a show, so most shows are delivered. [Tr. at 814]. At

¹⁰ At the hearing, the term "trailer" was used interchangeably with "magazine." Similarly, the term "bunker" was also used interchangeably with "magazine." While there are other storage trailers on the DCV property, they are either not qualified for use as a magazine, or DCV uses them for alternative purposes. [Tr. at 186-87; Gov't Exh. 39].

¹¹ The trailers at DCV's Lincoln facility are type 4 trailers. Type 4 Trailers are those that are suitable for storing low explosives. [Tr. at 42-44].

times, shows are delivered to outlying bunkers and the process is the same, a customer can have the show delivered or they can pick it up. [Tr. at 815].

42. In season, DCV has about nine individuals working outside to pack shows and take care of other matters.¹² [Tr. at 809-810]. DCV employs five individuals full time in the offseason, including Darren Vinyard and Vinny Vinyard.

43. Darren Vinyard has instituted business practices that are different from S&N. [Tr. at 490-91, 559]. The shift in business practices happened after S&N's license was not renewed, and Darren Vinyard took the step to assume the family's fireworks business as a whole. [Tr. at 492-93].

44. After DCV bought S&N in 2012, Vinny Vinyard began doing the DSMTs for DCV. [617-18, 647-48]. Vinny ceased doing DCV's DSMTs in April 2013. [Tr. at 618, 647-48].

45. In 2013, Vinny Vinyard told Darren Vinyard he was planning to hire his cousin, Hailey Langley, to help him with the DSMTs. [Tr. at 620-21]. At that same time, Vinny indicated to Darren that he did not like doing the DSMTs. [Tr. at 652-53].

46. Even though he struggled with the DSMTs himself, Vinny trained Hailey Langley how to keep them. [Tr. at 653]. From May 2013 through September 2013, Hailey completed the DSMTs herself. [Tr. at 623-25]. Vinny checked Hailey's work the "best [he] could." [Tr. at 618, 620-22]. Vinny did not spot check

¹² Darren Vinyard testified that during the busy season, thirty to forty shows could be packed in one day. [Tr. at 816]. The busy season lasts from the first of June until mid-July. [Tr. at 817].

any inventory to confirm the accuracy of the DSMTs in 2013. [Tr. at 622-23, 647-48]. By his own admission, Vinny stopped paying attention to the DSMTs in 2013. [Tr. at 639].

47. Another employee, Adam Hubrick, who worked sporadically for DCV, also helped work on the DSMT's during the 2013 season. [Tr. at 624-25, 647-48]. Mr. Hubrick had worked for S&N for several seasons, and did DSMTs for S&N from 2010-2011. [Tr. at 625, 647-48].

48. Vinny Vinyard never received any formal training with regard to proper DSMT keeping. [Tr. at 607-08, 653, 673-76]. Vinny struggled with the DSMTs up until Rob Fletcher took them over after the 2013 season. [Tr. at 646-54].

49. During the 2013 season, DCV experienced problems with employee turnover and new hires. [Tr. at 616-17, 805-809]. These problems also contributed to DCV's recordkeeping errors. [Tr. at 617].

50. After the DSMT problems in 2013, DCV instituted new recordkeeping procedures to ensure the DSMTs were done correctly. [Tr. at 639-41]. The DSMTs are now handled by one person, Rob Fletcher. [Tr. at 639-40].

51. Rob Fletcher explained the problems DCV encountered during the 2013 season that contributed to DCV's DSMT problems. Mr. Fletcher stated that Darren Vinyard recognized the problems though, and put Mr. Fletcher in charge in hopes of correcting them. [Tr. at 518-536, 548]. Mr. Fletcher explained how the business operations and paperwork has evolved with him in charge. Now there are far fewer errors because Mr. Fletcher has implemented a system that

allows him to catch errors earlier in the cycle so that he can go back and make corrections if necessary. [Tr. at 535-540].

2. Compliance Inspections Prior to 2013

52. Prior to 2013, DCV did not have any violations that were cited by the ATFE. [340-41]. Likewise, prior to 2013, ATFE did not issue a warning letter, or hold a warning conference with DCV. [Tr. at 340].

53. In 2004, IOI Furmanek inspected DCV at the Lincoln, Illinois DCV compound. [Tr. at 59]. The inspection was made pursuant to DCV's initial application for permit. [Tr. at 782-83]. At that time, Darren Vinyard was the only responsible person listed on DCV's application for permit. [DCV Exh. 5].

54. DCV did not have any inventory in 2004 because it was importing fireworks and then immediately transferring the material to S&N. [Tr. at 59]. Because there was no inventory or storage, DCV did not have any DSMTs in 2004. [Tr. 59-60].

55. IOI Furmanek did not uncover any violations during his 2004 inspection of DCV. [Tr. at 59-60, 143].

56. In 2008, the ATFE conducted an inspection of DCV after it approved the renewal of DCV's permit. [Tr. at 784-85; Gov't Exh. 13].

57. Darren Vinyard and Mary Vinyard are listed as the Responsible persons on DCV's 2007 renewal application for an importers license. [DCV Exh. 4].

58. IOI Furmanek reviewed an Acknowledgement of Federal Regulations¹³ with Darren Vinyard on February 14, 2008. [Tr. at 60-61, 93; Gov't Exh. 13]. Darren Vinyard signed the document. [Gov't Exh. 13]. No violations were uncovered during DCV's 2008 inspection. [Tr. at 94-95].

59. In 2010, another compliance inspection was conducted in response to DCV's 2010 renewal application. [Tr. at 346, 786-87; DCV Exh. 3]. Even though ATFE was conducting an inspection of S&N at the same time, DCV's 2010 inspection was unrelated. [Tr. at 787].

60. DCV's 2010 Federal Explosives Permit reflected that Darren Vinyard, Vinny Vinyard, Angie Meyers, and Joe Snyder are listed as responsible persons. [Tr. at 642]. DCV's 2010 FEL permit application, which was granted by the ATFE, was prepared by Angie Meyers. [Tr. at 703-05].

61. In its 2010 application, DCV notified the ATFE of the Illiopolis, Illinois bunker, which indicated DCV was storing explosives. [Tr. at 346; DCV Exh. 3].

62. There were no violations noted during the 2010 inspection of DCV. [Tr. at 347, 787-88].

¹³ IOI Furmanek testified that the acknowledgement of federal explosives regulations form is designed to reinforce ATF regulations. It is used as a tool to educate the licensee on their responsibilities as described in the regulations. During the review of the form, the licensee has the opportunity to ask questions regarding regulatory requirements. IOI Furmanek explained that after his compliance inspections he leaves a copy of the ATFE Federal Explosives Law and Regulations ("orange book") with the licensee. [Tr. 61-66].

3. 2013 DCV Inspection

63. In 2013, the responsible persons listed on DCV's FEL permit were Darren Vinyard, Steven Vinyard, and Anthony "Joe" Snyder. [Tr. at 145].

64. In September of 2013, IOI Livingston conducted an unannounced compliance inspection of DCV with a team of investigators. [Tr. at 138]. Present with IOI Livingston were investigators Pat Koegler, Judy McGlothlin, Reese Schneider, and Randy Boston. [Tr. at 184].

65. Darren Vinyard submitted a renewal application for DCV's permit on October 8, 2013, after IOI Livingston's compliance investigation commenced. [Tr. 148-49].

66. IOI Livingston used an "on-hand inventory list," given to her by Darren Vinyard to begin her inspection. This inventory list consisted of computerized inventory totals indicating the "on-hand amounts" of explosives that were at the Lincoln and Illiopolis locations. [Tr. at 152-53, 175-76].¹⁴

67. As the investigation progressed, IOI Livingston and her team of investigators noted that the numbers on the inventory lists did not match the actual inventory in the trailers. [Tr. at 185]. Then, when it was discovered that the inventory lists did not match up, IOI Livingston asked Darren Vinyard

¹⁴ Trailer 8 was indicated on the "on-hand inventory lists" as having no inventory. Trailer 8, as IOI Livingston testified, is used for storage and carryover another trailer DCV could use to store packaged displays if trailer 7 was full. [Tr. at 176-77, 187-88].

for the actual DSMT records. [Tr. at 185; Gov't Exh. 23, 25].¹⁵

68. On the first day of the inspection, IOI Livingston and her team spent the day counting at the Lincoln and Illiopolis locations. Subsequently, IOI Livingston spent the next four days at the ATFE Office tallying the inventories and comparing them with the DSMTs. [Tr. at 195].

69. Then, on September 12, 2013, IOI Livingston and IOI Boston returned to DCV to conduct a follow-up of their inspection. [Tr. 195-97]. When IOI Livingston and IOI Boston returned to DCV's Lincoln, Illinois location, they recounted trailers 1 and 2 to ensure their September 9, 2013 inventory was correct. [Tr. at 199]. IOI Livingston and IOI Boston traveled to Illiopolis to conduct a recount there as well. [*Id.*].

70. After the recount, on September 13, 2013, IOI Livingston sent an email to Stephen "Vinny" Vinyard with an attached spreadsheet that indicated the discrepancies the investigators found during their inventory. [Tr. at 199-200].

71. IOI Livingston then returned to DCV on October 2, 2013, to discuss the discrepancies. When she arrived, IOI Livingston spoke with Darren Vinyard and Rob Fletcher. [Tr. at 200-202]. Darren Vinyard told IOI Livingston that he had not seen the list of discrepancies that IOI Livingston sent to Vinny Vinyard. [Tr. at 201].

72. On October 15, 2013, IOI Livingston returned to DCV again to meet with both Darren and Vinny

¹⁵ Gov't Exh. 23 and 25 are the DSMT records that were given to IOI Livingston. [Tr. at 188; Gov't Exh. 23, 25].

Vinyard. [Tr. at 204-205]. Darren and Vinny Vinyard told IOI Livingston that they had recounted and checked the inventory, and they agreed to IOI Livingston's discrepancy numbers. [Tr. at 205-207].

73. Thereafter, on December 4, 2013, IOI Livingston traveled to DCV's Lincoln, Illinois location to resume her inspection. [Tr. at 219-20]. Specifically, IOI Livingston inquired into DCV's storage facilities other than Lincoln and Illiopolis, Illinois, and whether DCV was utilizing the same bunkers S&N used in the past. [Tr. 211-213, 220-225; Gov't Exh. 36]. She also asked Darren Vinyard about the Girard, Illinois bunker. [Tr. at 221]. Darren Vinyard told IOI Livingston that DCV was not using the Girard bunker for storage, product is picked up day of only.¹⁶ [Tr. 208-216; 220-225].

74. IOI Livingston later conducted a closing conference with DCV on January 13, 2014, where she discussed her report of violations¹⁷ and inspection findings. [Tr. at 227-234].

IOI Livingston, IOI Boston, Darren Vinyard, Rob Fletcher, and Helen Clemens were in attendance at the January 13, 2014 closing conference. [Tr. at 234]. Vinny Vinyard was not present at the conference. [*Id.*]. During the January 13, 2014 closing conference, IOI

¹⁶ IOI Livingston explained that the term "day of only" is used in the fireworks industry to indicate that the fireworks are picked up the day of the show. This means there is no overnight storage. [Tr. at 211].

¹⁷ IOI Livingston testified that her report of violations is a recommendation to the Director of Industry Operations of violations to pursue. The director can choose to act upon the violations in whole, in part, or not at all. [Tr. at 232-33].

Livingston reviewed the applicable regulations with the personnel present, and Darren Vinyard signed an Acknowledgement of Federal Explosives Regulations. [Tr. at 236-240; Gov't Exh. 11].

75. IOI Livingston's complete findings indicated that there were 10 incidents in which DCV committed recordkeeping errors. The specific errors are listed below in Findings of Fact 76-84.

76. In 73 instances,¹⁸ DCV's DSMT records did not reflect the actual quantities of explosive materials contained in its magazines. [Tr. at 254-56; Gov't. Ex. 16, 17, 18, 19, 20, 21]. IOI Livingston created spreadsheets to display the instances where the DSMT's differed from the actual inventory amounts. [Gov't

¹⁸ Government Exhibit 16 is a spreadsheet compiled by IOI Livingston that lists 75 instances where DCV's DSMTs did not reflect the actual quantities of explosive materials contained in its magazines. In two instances, however, the accounting methods IOI Livingston utilized in determining the discrepancies listed in Government Exhibit 16 were not accurate. [Gov't Exh. 16; Tr. 255-283]. The first instance is on page 2 of 5, line 27 of Gov't Exh 16, where IOI Livingston listed the DSMT quantity as (26) for the twenty-five shot in Bunker 2. The actual physical inventory indicated that there were (27) twenty-five shot in Bunker two, and the actual DSMT indicated that there were (27) twenty-five shot in Bunker two. Thus there is no discrepancy. [Tr. at 268-69; Gov't Exh 16 at 2, Gov't Exh. 23]. The second instance is indicated on page 3 of 5, line 37 of Gov't Exh. 16. The DSMT Quantity listed on IOI Livingston's spreadsheet states (33) fifty shot as the DSMT Quantity. The actual physical inventory amount was (30) fifty shot, the same number listed on the actual DSMT (30). Thus, there is no discrepancy with line 37. [Tr. 268-270; Gov't Exh. 16, 23]. Therefore, the correct total number of discrepancies between the DSMTs and the actual physical inventory is 73. [Tr. 268-270; Gov't Exh. 16, 23].

Exh. 16,]. The actual quantities differed from the DSMTs for 1,897 units. [Tr. at 254]. These 1,897 units were made up of 35 different product types, with a net explosive weight of approximately 870 pounds. [Tr. at 254, 271-73].¹⁹

77. DSMT records for trailer 1 indicated that it contained 10 units of 60' WP Match. In fact, this product was not present in this magazine. [Tr. at 273-74; Gov't Exh. 16].

78. DSMT records for trailer 2 failed to account for 10 units of 60' WP Match contained within trailer 2. [Tr. 273-74; Gov't Exh. 16].

79. In 19 instances, DCV's DSMT records for eight types of explosives products incorrectly stated that there were negative balances of these products. [Tr. at 275-283; Gov't. Exh. 16, 23].²⁰

80. In 14 instances, DCV's DSMT records failed to state the actual quantities of explosive materials that DCV moved between magazines. [Tr. 283-84; Gov't. Exh. 17, 23].

81. On or about May 30, 2013, DCV imported a shipment that included 20 pieces of "130 Shot." DCV

¹⁹ IOI Livingston testified that the net explosives weight is a percentage of the gross explosives weight assigned by the ATFE. It is always less than the total gross weight of the fireworks because the net weight, in theory, does not include non-explosive materials. [Tr. 272-73, 414-16].

²⁰ While it is not indicative of repeat violations with regard to DCV, IOI Livingston testified that during her 2009 inspection of S&N, there were also negative number issues with S&N's DSMTs. [Tr. 282-83]

did not record the receipt of these pieces in any of its DSMT records. [Tr. at 284; Gov't Exh. 20]

82. On or about May 30, 2013, DCV imported a shipment that included 3,960 pieces of an explosive product called "4" Shells. DCV's DSMT records for Bunker 6 show all 3,960 pieces of this product being received on May 30, 2013. DCV's DSMT records for Trailer 1 also show 72 pieces of product being received on May 30, 2013. This is a recordkeeping error of 72 pieces. [Tr. 284-86; Gov't. Exh. 20, 27].

83. DCV's DSMT records for Trailer 7 did not reflect the receipt of 286 pieces of display fireworks (containing approximately 70 pounds of explosive materials) that were present in Trailer 7. [Gov't. Ex. 19, 25].

84. In 22 Instances, DCV failed to record the removal of 313 boxes of explosives products (containing approximately 1,970 pounds net weight of explosives) from Trailer 7. [Tr. at 288 -290; Gov't. Ex. 19, 25, 28, 29].

85. From on or about June 22, 2013 to on or about July 6, 2013, DCV received explosive materials into a magazine at Girard, Illinois, and removed explosive materials from the same without maintaining any DSMT records for these receipts and removals. [Tr. 290- 292; Gov't. Ex. 21].

86. DCV's DSMTs indicated that the Girard and St. Francisville, Illinois bunkers had been used for storage during the 2013 season. [Tr. At 244-49, 292; Gov't. Exh. 25].

E. Girard Bunker

87. On or about March 19, 2010, S&N submitted an Explosives Storage Magazine Description Worksheet notifying the ATFE of the Girard Illinois Magazine. [Tr. at 351, 468-471; DCV Exh. 10].²¹

88. ATFE was aware of the existence of the Girard, Illinois bunker with regard to S&N. [DCV Exh. 10].

89. During her 2013 investigation, IOI Livingston asked Darren Vinyard if DCV was using the Girard Bunker. Darren Vinyard told IOI Livingston that DCV was not using the Girard Bunker. [Tr. at 828-830].²²

²¹ DCV Exh. 7 was brought up during the cross examination of IOI Livingston and IOI Randall Boston purporting to show that DCV notified the ATFE of the Girard bunker. [Tr. 351-54, 468-71; DCV Exh. 7]. DCV Exh. 7 is not signed. Even though there is no requirement for DCV Exh. 7 to be signed, I will afford no weight to this incomplete exhibit because I find insufficient testimony to corroborate whether this document was actually submitted to the ATFE.

²² Darren Vinyard stated in his testimony that he told IOI Livingston he was no longer using the Girard Bunker.

Q. Now, IOI Livingston testified that you informed the ATF that DCV no longer uses the magazine in Girard, do you recall that?

A. The day of. Without looking at the documents and paperwork, I probably did tell her that. It's a seasonal bunker.

Q. So you probably did tell her in September[?]

A. One year I can use it. The next year I don't have to if I don't want to.

[Tr. at 828-29].

90. As part of the 2013 DCV Investigation, IOI Boston reviewed DCV's show list. IOI Boston determined that DCV might be utilizing the Girard Bunker S&N previously used based on DCV's DSMT entries. IOI Boston contacted Bob Sons, the magazine keeper. [Tr. at 457-58; Gov't Exh. 25].

91. Subsequently, on November 7, 2013, IOI Randall Boston inspected the Girard, Illinois Bunker. [Tr. at 459-60].

92. Bob Sons told IOI Boston that he had stored DCV's fireworks for approximately one week around July 4, 2013. [Tr. at 456-461]. Bob Sons produced three bills of lading that corresponded to the shipments stored around July 4, 2013. [Tr. at 460-62; Gov't Exh. 25, 32-34].

F. St. Francisville Bunker

93. S&N submitted magazine description worksheets for the St. Francisville bunker in 2009 and 2010.²³ [Tr. at 356, 359-60; DCV Exh. 8, 9].

94. ATFE was aware of the existence of the St. Francisville bunker with regard to S&N. [Tr. at 40, 708-09; DCV Exh. 8, 9].

²³ DCV Exh. 6 and 7 were brought up during the cross examination of IOI Furmanek, and the direct of Ms. Meyers. [Tr. 89-90, 737-39, 748-49; DCV Exh. 6, 7]. The testimony purported to show that DCV notified the ATFE of the St. Francisville bunker. DCV Exh. 6 and 7 are not signed. Even though there is no requirement for DCV Exh. 6 or 7 to be signed, I will afford no weight to these incomplete exhibits because I find insufficient testimony to corroborate whether this document was actually submitted to the ATFE. [Tr. at 755-59].

95. In 2013, IOI Furmanek received a referral from IOI Livingston regarding DCV's St. Francisville bunker. [Tr. at 40]. The Springfield ATFE office provided IOI Furmanek with an address for the bunker, and the contact information for Mr. Johnson, owner of the St. Francisville bunker. [Tr. at 82, 86-87; DCV Exh. 8, 9]. IOI Furmanek was not given any documents before conducting his investigation of the St. Francisville Bunker. [Tr. at 92]. Subsequently, IOI Furmanek met with Mr. Johnson at the St. Francisville bunker.²⁴ [Tr. at 40-41].

96. During his inquiry, IOI Furmanek reviewed DCV's DSMTs. IOI Furmanek found that seven shows were shot between June 22, 2013, and July 5, 2013. [Tr. at 50]. The shows were stored in St. Francisville magazine between June 22, 2013, and July 5, 2013 for DCV. [Tr. at 51-52]. IOI Furmanek did not note any errors with the St. Francisville DSMTs during this inspection. [Tr. at 58].

IV. Conclusions of Law and Discussion

A. Position of the Parties

1. The Government

On February 6, 2015, the Government timely filed its Proposed Findings of Fact and Conclusions of Law ("Gov't Brief"). In it, the Government pleaded that I deny DCV a Federal Explosives License because as a licensee, DCV "knew and understood its obligations

²⁴ At the hearing, IOI Furmanek explained that the St. Francisville bunker is a magazine. In ATFE terms, a magazine is a structure that holds high explosives. The structure of the magazine is based on the explosives type. [Tr. at 42-43].

to properly record and maintain federal explosives records, [and] willfully violated federal explosives laws by importing, purchasing, distributing, or receiving explosive materials without making such records as the Attorney General has by regulation required.” [Gov’t Br. at 1].

As support for this contention, the Government first avers that S&N and DCV were essentially the same business operation, only paper transactions distinguished the two entities. The Government states “[t]he fact that importing explosive material was occurring under DCV’s FEL was largely a matter of paperwork as the business operations remained virtually unaffected.” [Gov’t Br. at 3-4]. Further, “DCV did not store any inventory as it was immediately transferred on paper to S&N.” [*Id.*].

Next, the Government maintains that DCV willfully engaged in DSMT recordkeeping violations. Specifically, the Government contends “DCV was unable to account for 1,897 items of explosives with a net weight of approximately 875 pounds.” [Gov’t Br. at 6]. According to the ATF, this inability to account for these explosives items is willful because “DCV was aware of its legal duties under the law and was plainly indifferent to them or intentionally disregarded them.” [Gov’t Br. at 9].

Last, the Government argues that because DCV was “utilizing both the Girard and St. Francisville magazines to store explosive materials for more than 24 hours, they were required by 27 C.F.R. 555.63 to provide notice to ATF,” but such notice had not been given. [Gov’t Br. at 8]. The Government avers that one of DCV’s employees, Angela Meyers, made “uncorroborated assertions that notice had been given” of the

Girard and St. Francisville bunkers, while this notice had not been provided. [Gov't Br. at 8 n.12]. The Government also notes that Darren Vinyard acknowledged during his deposition that notice of the Girard and St. Francisville bunkers was not given. [*Id.*].

In conclusion, the Government requests that I recommend denial of DCV's federal explosives permit for willful failure to keep DSMTs, and a willful failure to notify the ATF of DCV's St. Francisville, Illinois and Girard, Illinois bunkers. [Gov't Br. at 1-2].

2. The Petitioner (DCV)

DCV also timely filed its Post Trial Brief ("DCV Brief") on February 6, 2015. Therein, DCV disputed having willfully violated ATF explosives regulations as alleged in the Amended Notice of Denial. [DCV Br. at 17].

DCV first avers that prior to 2013 there were no explosive regulation violations noted during any of DCV's compliance inspections. [DCV Br. at 13]. DCV states that in 2004 ATF conducted an inspection which resulted in no violations. [*Id.* at 3]. Again, in 2007, ATF conducted an inspection that also resulted in no violations. [*Id.*]. Finally, in 2010, ATF conducted an inspection of DCV that resulted in no violations. [*Id.*].

Second, DCV disputes the ATF's contention that DCV Imports, LLC, and S&N Fireworks were one in the same. DCV highlights the differences between it and S&N, and states that the "ATF is inappropriately painting DCV with the broad brush of S&N." [DCV Br. at 15]. DCV avers that the reason the ATF argues S&N and DCV are the same is that "DCV Imports has a perfect record of zero violations prior to 2013." [DCV

Br. at 13 (emphasis in original)]. DCV argues that under the ATF's theory of "willfulness," the agency must tie S&N and DCV together to show repeat violations of the regulations. [*Id.*].

Third, DCV contends that "the contradictory positions taken by ATF Investigators" hindered its efforts to comply with the regulations. [DCV Br. at 9]. Specifically, DCV argues that IOI Livingston's testimony was sufficiently contradictory to lead DCV to believe that if they did not store fireworks overnight in a particular magazine, the fireworks did not have to be recorded in the DSMTs. [DCV Br. at 11]. DCV states that IOI Livingston's testimony illustrates the problem DCV faced when trying to reach compliance, "[t]he fact that each IOI who visited DCV Imports has a slightly different interpretation of the statutes, and that IOI Livingston presented no less than three different possible interpretations in the course of trial, shows the difficulties that DCV Imports faced. DCV Imports was doing its best to comply with the regulations in a real world situation where the directions coming from government inspectors continually changed." [DCV Br. at 13].

Last, DCV asserts that it did not willfully violate the regulations, and thus should be afforded an Opportunity for Compliance in accordance with 27 C.F.R. § 555.74. DCV urges me to adopt a definition of willfulness put forth in *Luna Tech v. Bureau of Alcohol, Tobacco, & Firearms*, 183 Fed. Appx. 863, 866 (11th Cir. 2006), "that a willful violation is an intentional disregard of, or plain indifference to the statutory requirements . . . , [which] can be established by repeated violations with knowledge of the regulations." [DCV Br. at 7; *Luna Tech*, 183 Fed. Appx.

at 866 (internal citations omitted]. DCV contends that there is no evidence that it has engaged in repeat violations with knowledge of the regulations, or that it acted with an intentional disregard of or plain indifference to the statutory requirements. [DCV Br. at 9]. DCV also states that even though it had certain issues which were identified in the 2013 inspection, it has taken necessary steps to correct those issues. [DCV Br. at 16].

B. Statement of the Law

Pursuant to 18 U.S.C. 843(b)(2) (2006), a licensee may have his license revoked, or an applicant may be denied renewal or application for a new license, if he engages in a “willful” violation of the provisions of 18 U.S.C. §§ 842 and 843. Specifically, 18 U.S.C. 843(b)(2) states that the “Attorney General shall issue to such applicant the appropriate license or permit if . . . (2) the applicant has not willfully violated any of the provisions of this chapter or regulations issued hereunder.” (emphasis added). Similarly, 18 U.S.C. 842(f)²⁵ states that it is “unlawful for any licensee or

²⁵ 18 U.S.C. § 842(f) states:

[i]t shall be unlawful for any licensee or permittee willfully to manufacture, import, purchase, distribute, or receive explosive materials without making such records as the Attorney General may by regulation require, including, but not limited to, a statement of intended use, the name, date, place of birth, social security number or taxpayer identification number, and place of residence of any natural person to whom explosive materials are distributed. If explosive materials are distributed to a corporation or other business entity, such records shall include the identity and principal and local places of business and the name, date, place of birth, and place of residence of the natural person acting as agent of the corporation or other business entity in arranging the distribution.

permittee willfully to manufacture, import, purchase, distribute, or receive explosive materials without making such records as the Attorney General may by regulation require.” (emphasis added).

Here, the first alleged violations are based on “willful” violations of 18 U.S.C. 843(f),²⁶ and its implementing regulation, 27 C.F.R. § 555.127.²⁷ The

²⁶ 18 U.S.C. § 843(f) states:

Licensees and holders of user permits shall make available for inspection at all reasonable times their records kept pursuant to this chapter or the regulations issued hereunder, and licensees and permittees shall submit to the Attorney General such reports and information with respect to such records and the contents thereof as he shall by regulations prescribe. The Attorney General may enter during business hours the premises (including places of storage) of any licensee or holder of a user permit, for the purpose of inspecting or examining (1) any records or documents required to be kept by such licensee or permittee, under the provisions of this chapter or regulations issued hereunder, and (2) any explosive materials kept or stored by such licensee or permittee at such premises. Upon the request of any State or any political subdivision thereof, the Attorney General may make available to such State or any political subdivision thereof, any information which he may obtain by reason of the provisions of this chapter with respect to the identification of persons within such State or political subdivision thereof, who have purchased or received explosive materials, together with a description of such explosive materials. The Secretary may inspect the places of storage for explosive materials of an applicant for a limited permit or, at the time of renewal of such permit, a holder of a limited permit, only as provided in subsection (b)(4).

²⁷ 27 C.F.R. § 55.127 requires:

[i]n taking the inventory required by §§ 555.122, 555.123, 555.124, and 555.125, a licensee or permittee shall enter the inventory in a record of daily summary transactions to be kept at each magazine of an approved storage facility; however,

second and third violations are based on “willful” violations of 18 U.S.C. § 843(f) and its implementing regulation, 27 C.F.R. § 555.63.²⁸

1. Willfulness in the Context of Federal Explosives Violations

While 18 U.S.C. §§ 842 and 843 do not define “willfulness,” the Federal District Courts and U.S. Courts of Appeals have issued extensive precedent interpreting its definition in the context of federal firearms²⁹ and federal explosives licensing.³⁰ The

these records may be kept at one central location on the business premises if separate records of daily transactions are kept for each magazine. Not later than the close of the next business day, each licensee and permittee shall record by manufacturer's name or brand name, the total quantity received in and removed from each magazine during the day, and the total remaining on hand at the end of the day. Quantity entries for display fireworks may be expressed as the number and size of individual display fireworks in a finished state or as the number of packaged display segments or packaged displays. Information as to the number and size of display fireworks contained in any one packaged display segment or packaged display shall be provided to any ATF officer on request. Any discrepancy which might indicate a theft or loss of explosive materials is to be reported in accordance with § 555.30.

²⁸ 27 C.F.R. 555.63 (a)-(d) details the requirements applicable to magazines used for other than temporary (under 24 hours) storage of explosives. The pertinent section to this matter is subpart d which states “[a] licensee or permittee who intends to construct or acquire additional magazines shall notify the Director, Industry Operations in accordance with paragraph (a)(4).” Paragraph (a)(4) states that “notification of the Director, Industry Operations may be made by telephone or in writing.” [*Id.*].

²⁹ See *Vineland Fireworks Co., Inc. v. ATF*, 544 F.3d 509, 518 & n. 16 (3d Cir. 2008) (explaining that federal firearms

most applicable case law indicates that in the context

licensing is useful for interpreting federal explosives licensing issues because the ATF administers both licenses. Also, “the statutory provisions governing the revocation of each type of license requires that the licensee has “willfully violated” a statutory provision or a regulation. *Compare* 18 U.S.C. § 923(e), *with* 18 U.S.C. § 843(b)(2). Thus, firearms licensing is analogous to explosives licensing, and it is a useful framework for interpreting the term “willful”).

30 There have been numerous U.S. Courts of Appeals that have addressed what constitutes a “willful” violation of the firearms licensing regulations. These courts agree that a violation is willful where a violator “knew of his legal obligation and purposefully disregarded or was plainly indifferent to the . . . requirements.” *Lewin v. Blumenthal*, 590 F.2d 268, 269 (8th Cir.1979); *see also Armalite, Inc. v. Lambert*, 544 F.3d 644, 648 (6th Cir. 2008) (requiring intentional, reckless, or knowing violations of known legal requirements); *RSM, Inc. v. Herbert*, 466 F.3d 316, 321-322 (4th Cir.2006) (requiring either “deliberate disregard” or “plain indifference”); *Willingham Sports, Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 415 F.3d 1274, 1276 (11th Cir. 2005) (same); *Appalachian Res. Dev. Corp. v. McCabe*, 387 F.3d 461, 464 (6th Cir.2004) (same); *Perri v. Dep’t of the Treasury*, 637 F.2d 1332, 1336 (9th Cir.1981) (same); *Stein’s Inc. v. Blumenthal*, 649 F.2d 463, 467 (7th Cir. 1980) (same). A number of these Courts of Appeals have expressly stated that, in finding willfulness, there is no requirement of bad purpose. *See Willingham*, 415 F.3d at 1276; *Appalachian Res. Dev.*, 387 F.3d at 465; *Cucchiara v. Sec’y of the Treasury*, 652 F.2d 28, 30 (9th Cir. 1981); *Stein’s*, 649 F.2d at 467; *Lewin*, 590 F.2d at 269. Instead, these Courts merely require violation of the regulations with knowledge of the regulatory requirements. *See RSM*, 466 F.3d at 321-22; *Willingham*, 415 F.3d at 1276; *Appalachian Res. Dev.*, 387 F.3d at 464; *Cucchiara*, 652 F.2d at 30; *Stein’s*, 649 F.2d at 469; *Lewin*, 590 F.2d at 269. Finally, these courts have never permitted a “justifiable excuse” defense. *See, e.g., RSM*, 466 F.3d at 321 (rejecting the licensee’s arguments that the violations were not willful, but instead were inadvertent errors due to a high volume of sales).

of 18 U.S.C. §§ 842 and 843, “willfulness” means “plain indifference to, or intentional disregard of, a known legal duty.” [*Vineland Fireworks Co., Inc. v. ATF*, 544 F.3d 509, 517 (3rd Cir. 2008)]. Willfulness “does not require proof that [an entity] acted with the specific purpose to disobey the law.” [*Id.*]. Nor does willfulness require a “bad purpose.” [*Id.*]. A willful violation can simply be plain indifference to known requirements. [*Id.* citing *Lewin v. Blumenthal*, 590 F.2d 268, 269 (8th Cir. 1979)].

A clear pattern of repeat violations after warnings, or the existence of violations associated with a prior license, can establish plain indifference.³¹ Yet repeat violations are not required to establish plain indifference; knowledge of one’s legal obligations and violations thereof will suffice.³²

³¹ *Champion Arms, LLC v. Van Haelst*, 2012 WL 4511393, at *6 (W.D. Wash. Sept. 30, 2012). In *Champion Arms*, the petitioner asserted that his changed legal structure (from sole proprietorship to limited liability company) made violations associated with the sole proprietorship irrelevant to the limited liability company. The *Champion Arms* court disagreed, and affirmed the ATF director’s interpretation stating “Champion Arms’ prior violations, review conferences, and other interactions with the ATF demonstrate that [the licensees] knew of the GCA’s legal requirements and continued to violate them. [*Id.*].

³² *Champion Arms*, 2012 WL 4511393, at * 5 (holding that repeat violations after warning are only one of the ways in which plain indifference can be shown. “Plain indifference can be found even where nine times out of ten a licensee acts in accordance with the regulations, if he was plainly indifferent to the one—in—ten violation.” [*Id.* citing *Borgelt v. ATF*, 2009 WL 3149436 (W.D. Wash. Sept. 24, 2009) (quoting *Am. Arms Intl v. Herbert*, 563 F.3d 78, 87 (4th Cir.2009))]. I find *Champion Arms* particularly persuasive in this instance because DCV was not warned for

To rebut a prima facie showing that an alleged violator has, in fact, committed willful violations of 18 U.S.C. §§ 842(f) or 843(f), the alleged violator must put on evidence that controverts the underlying prima facie assertions. Along those lines, the ATF Director has determined that a “justifiable excuse” defense will not refute a prima facie finding of willfulness. Nor will a finding of willfulness require a showing that the alleged violator “acted with a specific purpose to disobey the law.” [*Vineland Fireworks Co.*, 544 F.3d 509, 517 (3rd Cir. 2008)].

The ATF Director has further held that “a licensee’s corrective actions ‘have no bearing’ on a determination of whether the licensee has ‘willfully violated’ federal explosives laws or regulations.” [*Id.* at 519]. Therefore, evidence of remediation or post-violation corrective matters is not relevant to a finding of “willfulness.”³³

violations prior to the ATFE issuing its notice of contemplated denial. DCV’s president, Darren Vinyard, was notified of record-keeping violations with regard to S&N].

³³ *Vineland* upheld the ATF Director’s determination that corrective actions subsequent to recordkeeping violations were immaterial because the Director’s decision was in accordance with U.S. Courts of Appeals precedent. [(544 F.3d at 519 (stating “that the likelihood that the licensee will correct the violations is not relevant to whether the licensee has “willfully violated” the regulations—is reasonable”) ; *see also Cucchiara v. Sec’y of the Treasury*, 652 F.2d 28, 30 (9th Cir.1981) (holding that a licensee’s correction of its recordkeeping system subsequent to the license revocation “is immaterial to the question of willfulness at the time the violations occurred.”)]]].

C. Analysis

1. Violations of 18 U.S.C. 842(f) and 27 C.F.R. 555.127

ATF regulation 27 C.F.R. § 555.127 requires a licensee to record the inventories required by 27 C.F.R. §§ 555.122, 555.123, 555.124, and 555.125 in daily summary transactions to be kept at each magazine of an approved storage facility. These inventories are subject to inspection, and are the main issue in this proceeding before me.

During her 2013 Investigation, IOI Livingston determined that between on or about January 1, 2013 and September 9, 2013 at Lincoln and Illiopolis, Illinois, DCV imported, purchased, distributed, or received explosive materials without making such records as required by the Attorney General. Specifically, DCV received in and removed explosive materials from its magazines and failed to record by the close of the next business day, by manufacturer's name or brand name, the total quantity received in and removed from each magazine during the day, and the total remaining on hand at the end of the day. [FOF 76-85]. There is substantial evidence in the record to support this finding, and DCV has failed to present evidence that controverts it. [*Id.*].

This finding alone is not enough to deny DCV's Federal Explosives License though. Title 18 U.S.C. § 842(f) states it is "unlawful for any licensee or permittee willfully to manufacture, import, purchase, distribute, or receive explosive materials without making such records as the Attorney General may by regulation." [18 U.S.C. § 842(f)]. Therefore, the next step in this analysis is to determine whether DCV's

recordkeeping violations were willful. For the reasons set forth below, I find that DCV willfully violated 18 U.S.C. 842(f) and its implementing regulation 27 C.F.R. § 555.127.

Darren Vinyard grew up in and around the fireworks industry, and was well versed in the fireworks business by the time he founded DCV. [FOF 33; Tr. at 852, 859]. Darren Vinyard's extensive knowledge of the fireworks industry, coupled with his long relationship and close interaction with the ATF, demonstrate that he was sufficiently knowledgeable of the ATF's federal explosives regulations. [FOF 19, 23-27, 32-33, 37, 42-43, 50, 53-60, 62]. In fact, Darren Vinyard signed multiple statements of acknowledgement of the Federal Explosives Regulations as a responsible person for both S&N and DCV. [FOF 7-9, 27, 32].

Darren Vinyard's involvement as a responsible person for both S&N and DCV further proves that he was sufficiently aware of ATF's recordkeeping requirements.³⁴ Darren Vinyard was present during and after all of the ATF's inspections, S&N's 2008 warning conference, and S&N's 2010 closing conference where IOI Livingston issued a Report of Violations. [FOF 25-28; Gov't Exh.7, 9]. Darren Vinyard had been involved in the fireworks business for practically his entire life. He had close interaction with the ATF in many capacities, the most relevant as a

³⁴ In *Champion Arms, LLC v. Van Haelst*, 2012 WL 4511393, at *7 (W.D. Wash. Sept. 30, 2012) the court held that a "licensee's prior knowledge of the legal requirements under the GCA is extremely probative to the determination of whether the licensee was plainly indifferent to a known legal requirement at a later point in time." [*Id.*].

responsible person for S&N when the ATF issued S&N its 2010 Notice of Denial of Application for License. [FOF 19, 26-28; Gov't Exh. 2, 7].

Knowing well Darren Vinyard's continuous involvement with both entities, the petitioner implores me not to impute S&N's violation ridden history to DCV. [DCV Br. at 9]. While I agree that DCV and S&N are different corporations started with different business goals, I find it undeniable that the corporate identities of DCV and S&N should not be utilized to cover up a continual indifference to recordkeeping requirements perpetuated by the same principal.³⁵ Here, the recordkeeping violations were not repeat violations specific to DCV. But the violations were of the same nature as those Darren Vinyard encountered as a responsible person for S&N.

In *Champion Arms v. Van Haelst*, 2012 WL 4511393, at *7 (W.D. Wash. Sept. 30, 2012), a Federal District Court denied a petitioner's argument that the changed legal structure of his business (from sole proprietorship to limited liability company) made violations associated with the sole proprietorship irrelevant to the limited liability company. The

³⁵ *Champion Arms*, 2012 WL 4511393, at *7 (W.D. Wash. Sept. 30, 2012) (citing *Barany v. Van Haelst*, 459 F. App'x 587, 588 (9th Cir. 2011) (affirming denial of license based on willful violations of corporate licensee when the individual, a former corporate officer, applied for a separate license); *Gladden v. Bangs*, 2012 WL 604027, at *1 (E.D.V.A. Feb. 23, 2012) *aff'd*, 487 F. App'x 105 (4th Cir. 2012) (noting that "[o]f the multiple violations cited, Petitioner had been advised of nine similar violations under a previous license.") (emphasis in original); *Trader Vic's Ltd. v. O'Neill*, 169 F.Supp.2d 957, 960 (N.D.Ind.2001) (affirming denial of license where applicant, an individual, had been principal of company cited for violations).

Champion Arms court disagreed and affirmed the ATF director's interpretation that "Champion Arms' prior violations, review conferences, and other interactions with the ATF demonstrate that [the licensees] knew of the GCA's legal requirements and continued to violate them." [*Id.*]. In essence, the court found that even though a different corporate structure was in place, the fact that the principals were the same was enough to impute prior violations from one business entity to the other.

This matter is much the same. S&N and DCV are different business entities with a common responsible person: Darren Vinyard. S&N and DCV both shared a relatively long history of interaction with the ATF in which the ATF reviewed the regulations with S&N and DCV. [FOF 7-9, 25, 27]. The record is further replete with testimony that indicates Darren Vinyard's integral involvement in both S&N and DCV.³⁶ Needless to say, Darren Vinyard was aware of the seriousness of keeping accurate records, and the seriousness of the consequences of violating ATF's recordkeeping regulations.³⁷ For these reasons, I will impute to DCV Darren Vinyard's prior knowledge of ATF regulations, and the violations S&N was cited for while Darren Vinyard was a responsible person of S&N.

³⁶ To be sure, Darren Vinyard does not deny any involvement with DCV. Instead he attempts to use his involvement with DCV to distance himself from S&N.

³⁷ This is especially true from the fact that Darren Vinyard was present at S&N's warning conference in 2008, and the 2010 closing conference wherein IOI Livingston issued a report of violations. [Gov't Exh. 5, 7].

I also find particularly persuasive the Government's assertion that "Darren chose to defer responsibility for the DSMTs to his brother 'Vinny.'" [FOF 46; Gov't Br. at 13]. Darren knew well that Vinny was at the center of the faulty recordkeeping that led to S&N's 2010 denial of application, but still entrusted him with the DSMTs. Darren did not provide Vinny with any additional or remedial training for the proper keeping of DSMTs, even after S&N's faulty recordkeeping led to the 2010 revocation proceedings. [FOF 44-46; Tr. at 673-76]. Further, Darren Vinyard knew that his brother did not wish to do the DSMTs. [FOF 45].

Therefore, because Darren Vinyard had extensive interaction with the ATF as a responsible person for S&N and DCV, and his experience with S&N related to the same categorical recordkeeping errors that the ATF uncovered at DCV, I find that Darren Vinyard was well aware of the importance of the ATF's recordkeeping requirements, but intentionally disregarded them. For this reason, DCV was plainly indifferent to the ATF's recordkeeping regulations in committing recordkeeping errors as alleged in the Amended Notice of Denial.³⁸ I therefore find that DCV willfully violated 27 C.F.R. § 555.127 in ten separate incidents listed in Findings of Fact 76 through 85.

³⁸ Important to the analysis here is that S&N was cited for recordkeeping errors in violation of 27 C.F.R. § 555.127. [*Id.*]. While the specific recordkeeping violations are not the same as the violations uncovered with DCV, the S&N warning conference underscores Darren Vinyard's knowledge of the importance of ATF recordkeeping requirements. [Gov't. Exh. 5, 7].

2. Violations of 18 U.S.C. § 843(f) and 27 C.F.R. § 555.63

The Government's second and third violations allege that DCV did not notify the ATF it stored explosives in the Girard and St. Francisville magazines for more than 24 hours, as required by 27 C.F.R. § 555.63. The pertinent part of this regulation as it applies to this proceeding is § 555.63(a)(4) which requires a licensee to notify the regional director (compliance) of the licensee's magazines. [27 C.F.R. § 555.63(a)(4)]. Notification can be in writing or by telephone. [*Id.*]

It is undisputed that DCV did, in fact, utilize the Girard and St. Francisville bunkers during the 2013 season. [FOF 86-96]. The dispute here centers on whether DCV willfully violated 27 C.F.R. § 555.63 by not notifying the ATF that it had utilized the magazines at issue.

In its brief, the Government avers that because there is no paperwork notifying the ATF of these magazines, and no ATF representative present at the hearing knew that DCV was using these magazines, DCV willfully violated the applicable regulation. DCV counters this by stating that it did notify the ATF of its use of these magazines in DCV Exhibits 6 and 7.³⁹

For the reasons listed below, I find that the DCV did not willfully violate 27 C.F.R. § 555.63.

³⁹ See *supra* note 23. I afford no weight to DCV Exh. 6 and 7 purporting to show that the ATF was notified of the Girard and St. Francisville bunker with regard to DCV because these exhibits are incomplete.

First, there are indications in the record that DCV took the correct steps to comply with the applicable regulation. When questioned about whether DCV notified the ATF with regard to the magazines at Girard and St. Francisville, Darren Vinyard indicated that “[f]or some reason either you guys overlooked it or we overlooked it, but it should have went in with our paperwork.” [Tr. at 910].⁴⁰ Evidence corroborating Darren Vinyard’s assertions is the testimony Angela Meyers and S&N’s storage magazine description worksheets. [Tr. at 737-39, 747-49, DCV Exh. 9-10].

Angela Meyers testified that she completed the magazine description worksheets for St. Francisville and Girard with respect to S&N.⁴¹ DCV Exhibits 8, 9, and 10 confirm that the ATF was aware of the magazines in St. Francisville and Girard with respect to S&N. [DCV Exh. 8, 9, 10]. Further, Government Exhibit 35, a letter with storage magazine description worksheets attached, confirms that the ATF Chicago Field Division was notified of DCV’s magazines in 2011. [Gov’t Exh. 35]. While this exhibit does not list St. Francisville and Girard with respect to DCV, it purports to show that DCV was aware of its obligation to notify the ATF of its

⁴⁰ Darren Vinyard’s testimony is credible in that it establishes DCV was aware of its obligation to notify the ATF of its magazines. [Tr. at 910].

⁴¹ The ATF contends in its brief that Ms. Meyers’ testimony must be viewed with skepticism because it lacks corroboration and is contradicted by Government Exhibit 35. [Gov’t Br. at 8, n. 12]. Even taking the Government’s concerns into account, I cannot sustain a finding of willfulness as to violations of § 555.63 for the reasons described in this section.

magazines, and had undertaken steps to comply with that obligation.

For this reason, the record does not support a finding of willfulness as it relates to these allegations. A finding of willfulness requires plain indifference. Plain indifference does not constitute mere negligence or mistake.⁴² Instead, it is a conscious or reckless disregard to a known legal obligation.

Here, even if Ms. Meyers or DCV did fail to submit the completed storage magazine description worksheets for St. Francisville and Girard, the actions would have been negligent, not reckless. This is because Ms. Meyers filed the correct storage magazine description worksheets in 2009 and 2010 listing the St. Francisville and Girard magazines for S&N, [DCV Exh. 8, 9, 10], and she mailed the ATF explosive storage magazine description worksheets for DCV in 2011 (excluding St. Francisville and Girard). [Gov't Exh. 35]. These exhibits demonstrate that DCV, through its employee Ms. Meyers, took the appropriate action to comply with its obligation under 27 C.F.R. § 555.63, but neglected to include the St. Francisville and Girard magazines.

Looking at the evidence before me, the ATF has not presented substantial evidence to show that DCV was “plainly indifferent” to its obligation under 27

⁴² *General Store, Inc. v. Van Loan*, 560 F.3d 920, 923-24 (9th Cir. 2009) (citing *Perri v. ATF*, 637 F.2d at 1336 (citing *Lewin v. Blumenthal*, 590 F.2d 268, 269 (8th Cir.1979); *Shyda v. ATF*, 448 F.Supp. 409, 415 (M.D.Pa.1977)). Plain indifference “is the same as ‘reckless disregard,’ which means ‘[c]onscious indifference to the consequences of an act.’ [*General Store, Inc.*, 560 F.3d at 923-24 (citing Black’s Law Dictionary 506 (8th ed.2004) (emphasis added))].

C.F.R. 555.63 with regard to the St. Francisville and Girard magazines. I therefore conclude that the omission of the St Francisville and Girard bunkers from Ms. Meyers' 2011 letter was a negligent mistake, not a conscious or reckless disregard of the regulations. For this reason, I find that the ATF failed to show that DCV willfully violated 27 C.F.R. § 555.63.⁴³

3. Opportunity for Compliance

Last, DCV disputes the ATF's allegations that it willfully violated the explosives regulations as alleged in the Amended Notice of Denial. [DCV Br. at 5; ALJ Exh.]. DCV contends that the violations of the regulations were not "willful," and it should be allowed an opportunity for compliance as explained in 27 C.F.R. § 555.71. I note that the issue before me is not whether DCV should be allowed an opportunity for compliance. Rather, the issue before me is whether DCV willfully violated the regulations as alleged. If I were to rule that DCV did not willfully violation the regulations as alleged, it would follow that DCV should be given the opportunity for compliance. But because the ATF has alleged "willful" violations of the regulations, and my ruling in this matter finds willful violations of 18 U.S.C. 842(f), and its implementing regulation 27 C.F.R. § 555.127,

⁴³ As part of its theory of the case, the ATF continually suggests that DCV and S&N are one and the same entity, and that DCV was a mere continuation of S&N. [(See Gov't Br. at 4, "In fact, S&N had sold its assets and inventory to DCV, which again, was largely a matter of paperwork since the day-to-day operations remained mostly unaffected")]. While not essential to this decision, I believe a finding that S&N and DCV were one and the same entity would also preclude a finding that DCV did not notify the ATF of its use of S&N's magazines.

I find that the opportunity for compliance was properly denied to DCV.

V. Conclusion and Recommendation

Due to the Petitioner's demonstrated willful recordkeeping violations, I conclude and recommend that the ATF Director uphold the denial of DCV's application for its Federal Explosives License Renewal. I note that DCV presented credible evidence that it has instituted new policies and procedures which should mitigate against a continued indifference toward the ATF's recordkeeping requirements. Unfortunately, evidence of compliance after the alleged violations is irrelevant to my finding of willfulness here.⁴⁴

If DCV should apply for a permit at some point in the future, I recommend that the ATF look favorably on the practices and procedures DCV has implemented to mitigate recordkeeping errors.

/s/ Gail A. Randall
Administrative Law Judge

Dated: March 25, 2015

⁴⁴ See *supra* note 33.

**ORDER OF THE SEVENTH CIRCUIT DENYING
PETITION FOR REHEARING
(NOVEMBER 23, 2016)**

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DCV IMPORTS, LLC,

Petitioner,

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS
AND EXPLOSIVES,

Respondent.

No. 16-1015

Petition for Review of an Order of the Bureau of
Alcohol, Tobacco, Firearms and Explosives.
No. 3-IL-107-23-3L-00682

Before: William J. BAUER, Circuit Judge,
Richard A. POSNER, Circuit Judge Diane S. SYKES,
Circuit Judge.

On consideration of the petition for rehearing,
all of the judges have voted to deny rehearing. It is
therefore ordered that the petition for rehearing is
DENIED.