

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AEM (HOLDINGS), INC.)
6610 Cobra Way)
San Diego, CA 92121)
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Plaintiff,)
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v.)
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UNITED STATES OF AMERICA)
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and)
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DEPARTMENT OF STATE)
Washington, D.C. 20520)
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and)
))
HILLARY RODHAM CLINTON,)
Secretary of State)
))
and)
))
ANDREW J. SHAPIRO)
Assistant Secretary of State)
Bureau of Political-Military Affairs,)
))
Defendants.)
))

Civ. Action No. 10-_____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, AEM (Holdings), Inc. ("AEM"), for its Complaint against the United States Department of State, alleges as follows:

NATURE OF THE DISPUTE

1. This case arises from the U.S. Department of State's Directorate of Defense Trade Controls' ("DDTC") action of April 10, 2009, instituting a "policy of denial"

against AEM, which action had the effect of presumptively denying AEM's and third parties' requests for export licenses seeking permission under the International Traffic in Arms Regulations, 22 C.F.R. Parts 120 to 130 ("ITAR") to export AEM High Reliability fuses and related products ("Hi-Rel fuses"). The Arms Export Control Act, 22 U.S.C. § 2778 ("AECA"), authorizes the President to enact regulations governing the export of defense articles, defense services and related technical data, and further authorizes the President to designate those items to be controlled by including them on the United States Munitions List ("USML"). The President delegated the authority under the AECA to the Secretary of State. Within the State Department, DDTC has been delegated authority for implementing the AECA, which it accomplishes through the ITAR.

2. Nothing in the ITAR authorizes DDTC's enforcement division to institute a "policy of denial" as an enforcement action. Further, despite repeated requests from AEM, DDTC has declined to provide AEM with specific reasons for DDTC's enforcement action. Instead, DDTC has asserted only vague, general allegations regarding purported activities, which in all events took place outside the applicable limitations period.

3. Simultaneous with its refusal to provide the basis for its actions, DDTC has also declined to provide AEM with any semblance of procedural due process. Despite having included procedural protections for enforcement actions under the ITAR, DDTC, as discussed further below, has refused to take the action necessary to allow AEM to invoke the procedural protections available in the ITAR.

4. Under color of its authority in the ITAR, DDTC has further required AEM to notify third parties of DDTC's actions, thereby damaging AEM's reputation, causing

AEM to lose substantially all of its export-related Hi-Rel fuse business, all while leaving AEM without recourse to contest DDTC's arbitrary enforcement actions. These actions have resulted in a change in AEM's legal status under the ITAR from eligible to ineligible, all without any due process protections.

5. As a small company, employing fewer than 100 people, AEM has nonetheless carved a significant niche in the market for Hi-Rel fuses. These fuses, which are used primarily on satellites, require the highest quality production and manufacturing. AEM's Hi-Rel fuses are recognized the world over for their superior characteristics and reliability.

6. DDTC's enforcement actions in arbitrarily imposing a policy of denial on AEM have threatened the very existence of this small company. Further, DDTC's actions are inconsistent with the agency's treatment accorded larger defense and satellite manufacturers when facing enforcement actions under the ITAR.

7. In taking its action, therefore, DDTC has not only acted beyond the scope of its regulatory authority, relied upon actions outside the statute of limitations, and failed to provide AEM even minimal due process protections, but DDTC has also engaged in actions which resulted in disparate treatment of AEM designed, not to punish, but to destroy AEM as a satellite fuse manufacturer.

8. Through its actions, DDTC has effectively debarred AEM. The Government has denied all AEM license applications since imposing its "policy of denial," has denied all but a few third party license applications for the export of AEM products, has forced AEM to notify third parties of DDTC's action, and has even used language in letters to AEM that track word for word the description of debarment in

ITAR § 127.7(a) when describing its own actions. Even without license applications pending, the Government prospectively and peremptorily determined that no licenses would issue absent undefined circumstances. This prospective and preemptory debarment is not an exercise of discretionary authority since the presumption already exists that licenses will be denied.

9. The effective debarment imposed by DDTC came without **any** warning to AEM, and after no action for approximately four years by DDTC on AEM's disclosure and at least eight years after the actions that form the basis for its imposition. In so doing, AEM was afforded no advance notice, and no process at all that might have allowed AEM to contest issuance of the devastating and unwarranted punishment that DDTC has inflicted.

JURISDICTION

10. This action arises under the Constitution of the United States, Amendment V, and is brought pursuant to both the Constitution and 28 U.S.C. § 1331, which provides federal question jurisdiction. The Court also has jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 702, and has authority to grant the relief requested in this action pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.* The award of attorneys' fees and costs is authorized pursuant to 28 U.S.C. § 2412. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

PARTIES

11. Plaintiff AEM (Holdings), Inc. is a privately held corporation organized and existing under the laws of California, with a principal place of business at 6610 Cobra

Way, San Diego, California 92121. AEM is, and has been at all times relevant to this lawsuit, a manufacturer of Hi-Rel fuses and fuse components.

12. Defendant Department of State is a branch of the United States Government.

13. Defendant Hillary Rodham Clinton is the Secretary of State.

14. Defendant Andrew J. Shapiro is the Assistant Secretary of State for the Bureau of Political-Military Affairs with direct oversight responsibility for DDTTC. DDTTC is a part of the Bureau of Political-Military Affairs.

LEGAL FRAMEWORK

15. The Fifth Amendment to the United States Constitution provides in relevant part that “No person . . . shall be deprived of life, liberty, or property, without due process of law. . . .”

16. The AECA contains no statute of limitations provision. As a result, the AECA is governed by the general federal statute of limitations found at 28 U.S.C § 2462.

17. Neither the AECA nor the implementing regulations, the ITAR, authorize imposition of a “policy of denial” as an enforcement action. The ITAR limit imposition of debarment in accordance with ITAR Part 127. Part 127 specifically requires that debarment can occur only when the procedural protections of ITAR Part 128 are available to the party that is the subject of the enforcement action.

FACTS

18. AEM was founded in 1986 as an engineering consulting firm, beginning activity in 1988.

19. AEM's founder and co-owner, Mr. Daniel Chang, emigrated from the People's Republic of China in 1981 and became a U.S. citizen in 1990. As the son of jailed dissidents, Mr. Chang came to the United States with almost nothing, earned a scholarship to the University of Southern California, worked as an engineer for the Phillips Corporation, and pursued the American dream of entrepreneurial success.

20. Having achieved a level of success, Mr. Chang, and his wife and business partner, Mrs. Cai Li Chang, also a U.S. citizen as of 1990, now find the business that they own the victim of arbitrary government action.

21. In 1995, the Company's founders acquired two entities — Wallace Technical Ceramics, Inc. and the Mepcopal Hi-Rel business unit of Phillips. The Mepcopal business unit ultimately became AEM's Hi-Rel division following the acquisition.

22. Since acquiring Mepcopal, AEM's Hi-Rel business has grown exponentially. AEM produces a broad range of fuses and electronic components for both space and commercial applications. AEM's Hi-Rel fuses are used on satellites for a number of reasons, including their proven high reliability in space environments. Through painstaking manufacturing and extraordinary customer service, AEM has distinguished its company and products within the Hi-Rel fuse industry. As a result, satellite manufacturers seek to use AEM Hi-Rel fuses over other fuses.

23. Because of their use in satellites, a number of AEM's Hi-Rel fuses are currently classified as USML items and subject to the licensing restrictions of the ITAR when exported. This was not always the case, however, and the DDTC determination regarding the ITAR jurisdiction over these Hi-Rel fuses remains an issue open to debate

when compared to the export jurisdiction over other U.S. companies' comparable fuses. To AEM's knowledge, DDTC does not control any other comparable Hi-Rel fuses.

HISTORICAL EXPORT CLASSIFICATION OF SATELLITES AND SATELLITE COMPONENTS

24. Prior to 1992, the export of most satellites and satellite components were regulated by the Department of State pursuant to the ITAR. In October 1992, the Departments of State and Commerce agreed that jurisdiction for the licensing of certain commercial communications satellites should be moved from the control of the State Department to the Commerce Department.

25. In 1996, President Clinton issued a directive moving all commercial communications satellites to Commerce Department jurisdiction. 61 Fed. Reg. 56894-96. The Commerce Department has regulated so-called "dual-use" technology under the authority of the Export Administration Act, 50 U.S.C. § 2401, et seq. ("EAA"). The implementing regulations for the EAA are the Export Administration Regulations, 15 C.F.R. Chapter VII, Subchapter C. Since the EAA lapsed in 2001, the President has exercised his authority pursuant to the International Economic Emergency Powers Act, 50 U.S.C. § 1701, et seq. to declare a national emergency and require that the EAR remain in effect.

26. In 1999, Congress, by enactment of The Strom Thurmond National Defense Authorization Act of 1999 ("STNDAA"), returned commercial satellites and "related items" to the exclusive jurisdiction of the Department of State for export control purposes.

27. Despite the Congressional action relating to satellites themselves, the appropriate export jurisdiction for satellite components, especially components such as fuses — AEM's product — was not clear, in part, because of confusion over the scope of the term "related components" as used in the STNDAA. As a result, most component manufacturers were left in limbo with respect to whether their components required export authorizations from the State or Commerce Departments. To address this unclear jurisdictional issue, companies, including AEM, submitted official requests to DDTC — known as Commodity Jurisdiction requests ("CJs") — for a decision on whether specific "related items" included products such as AEM's Hi-Rel fuses. AEM submitted its CJ request in 2000. DDTC did not respond to that request until mid-2003, leaving the Company without definitive guidance for the entire time the request remained pending.

28. In 2002, the National Security Council clarified the types of components that transferred to State Department jurisdiction for export licensing purposes. That clarification resulted in DDTC informing the business community, on a case-by-case basis, of the "related items" that were determined to be under ITAR control.

29. On September 23, 2002, the Departments of State and Commerce issued guidance concerning the appropriate export control jurisdiction for "space-qualified" components. 67 Fed. Reg. 59722-33. Relevant to AEM's business, these notices informed the public that all components "specifically designed or modified" for satellites in ITAR Category XV would henceforth be considered ITAR-controlled by DDTC, although the guidance indicated that pending CJs would now be reviewed and decisions issued.

AEM'S ATTEMPTS TO OBTAIN CLARIFICATION BETWEEN 1999 AND 2003

30. AEM, like many other satellite component manufacturers, became aware of the STNDAA after its enactment. As with many other component manufacturers, as well as the Government, AEM was unsure whether its fuses remained subject to Department of Commerce jurisdiction or would be moved to Department of State jurisdiction as a result of the STNDAA.

31. As a result, AEM filed a Commodity Jurisdiction ("CJ") request with DDTC on March 23, 2000, seeking clarification from DDTC regarding the proper licensing jurisdiction for its Hi-Rel fuses — specifically, its P600L model.

32. During the time that its CJ request was pending, DDTC published no guidance to satellite component manufacturers regarding product classification and issued no rules regarding satellite component classification. Both the Department of State and the Department of Commerce, in final rules issued September 23, 2002, acknowledged that a backlog of commodity jurisdictions was allowed to lie fallow while these Departments, in conjunction with the National Security Council, hammered out which items would remain controlled by the Department of Commerce and which would be moved to the USML under the control of DDTC.

33. The Department of Commerce's notice at 67 Fed. Reg. 59722 stated that the "transfer of 'related items' has engendered confusion concerning licensing authority for certain 'space qualified' items."

34. AEM's CJ was one of the many requests that sat idle during these discussions. In fact, not until May 21, 2003, some eight months after the Federal Register postings and over three years after AEM submitted its CJ request, did DDTC

issue CJ 064-00, which determined that AEM's P600L fuses were subject to the controls of the ITAR under USML Category XV.

AEM'S ACTIVITIES FROM 2000 TO 2003

35. Prior to 2000, AEM exported Hi-Rel fuses directly to the People's Republic of China ("PRC" or "China") on three occasions, classifying its exports as subject to the EAR under EAR99, and thus not requiring a license for these exports from the Department of Commerce.

36. AEM, like many other companies in the satellite industry, built a business based on the existing regulatory structure as confirmed by Government agencies and published in regulations included in the Code of Federal Regulations. The Company made investment decisions to acquire two entities in reliance upon the regulatory structure in place. Even when Congress enacted legislation changing the regulatory landscape, AEM altered its business to comply with the new regulations, which took almost four years to be clarified by the cognizant government agencies.

37. Before exporting its P600L fuses to China, AEM submitted a classification request to the Department of Commerce in 1997 using the Commodity Classification Automated Tracking System ("CCATS"). This process serves a purpose similar to the DDTC CJ process in that decisions issued through a CCATS request reflect the US Government's official position on where, within the Export Administration Regulations, Commerce Control List ("CCL") items fall. On August 8, 1997, the Department of Commerce issued CCATS #G006932 classifying AEM's P600L fuses as EAR99. Under this classification, AEM could, with little exception, export its fuses to China without obtaining a license or authorization from Commerce prior to shipment.

38. In 1999, AEM became aware that the STNDAA transferred jurisdiction for commercial satellites back to the Department of State for export control purposes. Lacking guidance from either the Department of Commerce or the Department of State as to whether its fuses would fall within the definition of “related components” as used in that act, AEM submitted its CJ request to DDTC on March 23, 2000.

39. Over a year later, having received no determination from DDTC regarding its CJ request, AEM filed a registration request with DDTC, and submitted a DSP-5 license application seeking authorization to export its P600L fuses to an end user in China. That license request was denied by DDTC. In its denial, DDTC informed AEM that “The People’s Republic of China is a proscribed destination with presumption of denial for exports of articles controlled under the USML.” AEM interpreted this denial as applying only to exports to the PRC.

40. At the time of this license denial, however, the Government had not concluded yet whether AEM’s fuses, in particular, or similar satellite components, in general, were “related components” as used in the (“STNDAA”), and thus subject to ITAR controls. Thus, while AEM used a conservative approach by registering with DDTC and submitting a license request to State, it still lacked an official determination from DDTC whether its P600L fuses were actually ITAR controlled.

41. During the time period from 2001 to May 21, 2003, AEM exported P600L Hi-Rel fuses to companies in countries other than China, classifying them as EAR99, relying upon the only official U.S. Government classification decision it had received — the 1997 Department of Commerce CCATS response.

42. AEM's foreign sales included sales to distributors. Some of those distributors re-exported AEM's fuses to end users in the PRC.

DDTC'S INVESTIGATION OF AEM

43. DDTC began its investigation of AEM's export activities before November 2003.

44. DDTC's investigation has continued for over seven years.

45. On November 12, 2003, DDTC requested by letter that AEM submit to the DDTC Compliance and Registration division "a list of any and all shipments of [P600L] fuses, as well as any other fuses falling within [CJ 064-00] to the People's Republic of China."

46. AEM's first response to DDTC's request was sent on November 19, 2003.

47. Subsequent to that response, AEM met with DDTC compliance personnel and eventually submitted additional information to DDTC which responded to DDTC's questions. AEM filed a responsive disclosure report with DDTC on April 26, 2004, and supplemented that submission on June 25, 2004, July 23, 2004, August 16, 2004 and September 16, 2005.

48. In early 2007, DDTC asked for additional information regarding an AEM distributor — Top-Rel, an Italian company. AEM responded to that request on April 6, 2007 and July 5, 2007. DDTC informed AEM at that time that no further information was needed from the Company.

49. AEM's counsel contacted DDTC in 2007 and twice in 2008 concerning the status of DDTC's investigation. In each instance, DDTC advised the Company's counsel that no further information was requested of AEM. AEM had no further contact

from DDTC until April 10, 2009, when the Director of the Office of Defense Trade Controls Compliance, DDTC's enforcement division notified AEM that DDTC was instituting a so-called "policy of denial" against AEM.

50. Under the "policy of denial," DDTC directly altered AEM's legal status before the agency by declaring the Company to be ineligible pursuant to ITAR § 120.1(c). One of the consequences of this arbitrary action was the shift in licensing presumption for AEM from a presumption of approval to one of denial. Under this legal change, DDTC is not exercising any discretionary authority, radically altering the operating assumption of its licensing approach. Whereas DDTC normally requires license requests to include certain information and grants the license unless national security issues exist, under the "policy of denial" DDTC presumes, prior to any specific license submission, that AEM's licenses should be denied unless AEM can demonstrate that narrow, undefined "exceptions" require that the license issue.

51. DDTC's April 10, 2009 letter cited two unspecified grounds for its enforcement action:

1. "AEM's [previously disclosed] unauthorized activities"; and
2. AEM's "apparent involvement in other unauthorized exports to prohibited destinations."

52. In addition to declaring that the Department "may apply a policy of denial to all applications for licenses or other approvals," DDTC's April 10, 2009 letter declared that because of DDTC's own action, AEM was therefore "ineligible" under ITAR § 127.1(c), and further ordered AEM to "inform customers of its ineligible status under the ITAR."

53. AEM immediately sought clarification of the grounds for DDTC's action, and has continued, without success, to request that DDTC provide AEM with greater detail regarding DDTC's decision. This information is necessary to allow AEM to respond to DDTC's assertions and to afford AEM the opportunity to attempt to have the policy of denial lifted.

54. Despite repeated requests over the last eighteen months, DDTC has refused to identify for AEM either the specific activities that warranted the policy of denial, or the activities which constitute the alleged "other unauthorized exports" as set forth in the April 10, 2009 letter.

55. Since the policy of denial issued, AEM has submitted thousands of pages of additional documentation to DDTC's compliance division. In each instance, AEM demonstrated why assumptions made by DDTC were incorrect or inaccurate, and each submission reiterated AEM's request that the policy of denial be explained or lifted.

56. AEM has dedicated hundreds of man hours to this effort and incurred hundreds of thousands of dollars in legal expense without any progress in resolving the matter.

57. Despite AEM's Herculean efforts, DDTC has refused to identify the reasons for its decision to implement the policy with sufficient specificity to allow AEM to further rebut DDTC's allegations.

58. AEM has requested, on multiple occasions, that DDTC articulate the reasons for imposing its policy of denial. In response to AEM's inquiries, DDTC has not provided any details regarding the reasons for the policy of denial nor indicated that the

policy of denial implicates any classified or law enforcement concerns prohibiting DDTC from informing AEM of the reasons for imposition of the policy.

59. AEM has further pointed out to DDTC that all of the activities in the category of previously disclosed violations occurred well beyond the five year limitations period applicable to the AECA (28 U.S.C. § 2462). Despite this legally relevant information, DDTC nonetheless continues to focus its written requests wholly upon actions occurring in 2000 and 2001 as the basis for imposing the punishment of a policy of denial.

60. On June 22, 2010, AEM submitted to DDTC a substantial legal brief outlining its statute of limitations and constitutional concerns for DDTC. AEM requested that DDTC lift the policy, and provide detailed information regarding violations within the statute of limitations justifying the policy. AEM also indicated to DDTC that the agency's failure to provide the Company with the opportunity to know and challenge the reasons for DDTC's actions left the Company with no recourse under the regulations because DDTC had effectively debarred the Company without affording it the procedural protections of ITAR Part 128. DDTC has declined to respond to any of the issues raised by AEM in that submission and continues the policy of denial.

61. DDTC's most recent communication of November 4, 2010, reaffirmed that the "policy of denial" remains in place and continues the Department's pattern of refusing to provide details concerning the precise elements AEM needs to satisfy for the Department to terminate the policy of denial.

62. DDTC also sent three officials from its Enforcement Division to “visit” AEM on October 12 and 13, 2010. The visit was posited as part of DDTC’s “Company Visit” program and not an audit or investigation of the Company.

63. Prior to the visit, DDTC represented to AEM, verbally and in writing, that the visit was not intended as an enforcement activity. Specifically, DDTC officials stated that the visit bore no direct relationship to DDTC’s ongoing, seven-year investigation and was not designed to assess whether to continue the policy of denial, which it characterized as a separate enforcement matter.

64. Despite DDTC’s representations, during the visit, DDTC’s enforcement personnel spent considerable time asking AEM personnel about past compliance activities.

65. DDTC’s visit also revealed both the Enforcement Division’s foot-dragging and its bias. DDTC’s senior compliance specialist handling the AEM investigation revealed to AEM’s senior management team that he had not completed reading all of AEM’s submissions, most of which were made in 2004 to 2005.

66. The same compliance specialist astoundingly admitted that, although he had not read all of the AEM submissions, he nonetheless concluded that AEM’s submissions were incomplete and further, on this basis, he did not trust AEM. No further explanation was provided regarding the grounds for this alleged lack of trust.

AEM’S COMPLIANCE AND LICENSING FROM 2004 TO 2009

67. DDTC’s behavior is particularly anomalous given its treatment of AEM from May 23, 2003, when it issued a registration to AEM, through April 10, 2009, when it issued the policy of denial.

68. From 2003 through 2009, while AEM's disclosure was pending, and with full awareness of the facts in that disclosure, DDTC issued and renewed AEM's registration eight (8) times.

69. From 2003 through April 10, 2009, DDTC issued over 160 ITAR licenses to AEM for exports to numerous customers, in more than 20 countries, and for numerous products. These licenses were issued by seventeen (17) different, qualified DDTC licensing officers. In fact, one of the licensing officers is now the Deputy Director of Licensing for DDTC and is well-known within the industry and the Government as an expert on space and satellite licensing.

70. At no time prior to April 10, 2009, did DDTC indicate to AEM that its disclosure in 2004 raised any concerns regarding AEM or its products.

THE IMPACT OF DDTC'S POLICY OF DENIAL

71. As a result of DDTC's policy of denial, AEM has experienced numerous order cancellations.

72. Since the policy of denial was imposed, and regardless of the level of details included in AEM's requests for an exception to the policy of denial, DDTC has rejected every single license request made by AEM for the export of its Hi-Rel fuses.

73. DDTC's policy of denial has caused a number of AEM customers to seek to qualify an alternative source. One such source was previously not a direct competitor in the Hi-Rel fuse market. This competitor, Schurter Group, a Swiss company, has moved to qualify its fuses for space application and displaced AEM with respect to a sizable portion of the European market.

74. Because of the long lead time for incorporating fuses into satellites and satellite components, the policy of denial is depriving AEM of business extending as far as fifteen years out.

75. DDTC has gone out of its way to damage AEM beyond the imposition of the policy of denial. Despite lacking statutory or regulatory authority for its action, DDTC has, on at least two occasions known to AEM, affirmatively recommended to third parties that they seek alternative fuse manufacturers for Hi-Rel fuses.

CLAIMS

COUNT I — DEPRIVATION OF DUE PROCESS

76. AEM incorporates by reference the allegations made in paragraphs 1 through 75.

77. Under the Fifth Amendment to the U.S. Constitution, no person may be “deprived of life, liberty or property without due process of law.” U.S. Const. Amend. V.

78. DDTC’s actions in this case have deprived AEM of its constitutionally protected liberty interest without affording AEM any due process of law.

79. DDTC imposed the policy of denial without warning to AEM. This initial imposition denied AEM any due process.

80. Despite repeated requests by AEM, DDTC has altered AEM’s legal status under the ITAR, refused to articulate the detailed reasons for its institution of the policy of denial and has declined to take actions necessary to allow AEM to invoke the administrative review process available under ITAR Part 128.

81. The policy of denial has caused and continues to cause irreparable harm to AEM's good name and reputation, adversely affecting its constitutionally protected liberty interest.

82. Unless the policy of denial is enjoined, AEM will continue to suffer harm without any opportunity to know the basis for the implementation of the policy and without an opportunity for a hearing to determine the adequacy of the charges.

83. Even were a Part 128 hearing granted, which AEM cannot independently initiate, according to DDTC's support for the policy of denial, all of the activities forming the basis for the institution of the policy of denial are beyond the applicable statute of limitations and therefore cannot properly form the basis for depriving AEM of its constitutionally protected liberty interest. In fact, DDTC unilaterally controls the ability to initiate any Part 128 proceeding in which due process protections are embedded.

84. Monetary damages, or any other remedy at law, are inadequate to compensate AEM for the continuing deterioration of its business for years to come.

COUNT II — DDTC'S ACTIONS EXCEED THE SCOPE OF ITS STATUTORY AND REGULATORY AUTHORITY

85. AEM incorporates by reference the allegations made in paragraphs 1 through 84.

86. The ITAR includes no authority for the issuance of a "policy of denial." DDTC can cite no clear authority for the imposition of this particularly named enforcement action.

87. DDTC relies on ITAR § 126.7(a) for a preemptive policy, but that section applies only to individual licensing determinations.

88. Even if DDTC could bootstrap the concept of a policy of denial through the invocation of ITAR § 126.7(a), the policy of denial imposed on AEM is the legal and functional equivalent of a debarment imposed under ITAR § 127.7 – a *de facto* action which altered AEM's legal status and occurred without affording AEM the regulatory due process protections required by the ITAR for debarment.

89. DDTC's own words, included in letters to AEM, parrot the restrictions included in ITAR § 127.7(a), further evidencing that DDTC is, in fact, imposing a debarment penalty under the guise of a regulatorily undefined "policy of denial."

90. By using the policy of denial as a subterfuge for a debarment, DDTC has evaded all of the legal and procedural requirements for debarment:

- a. DDTC refuses to cite explicit reasons for the imposition of the policy;
- b. DDTC refuses to afford AEM any hearing before an impartial decision maker;
- c. DDTC refuses to provide AEM with the procedural protections of ITAR Part 128, which are mandatory before the agency may impose debarment.

91. By its actions, DDTC has exceeded its regulatory and statutory authority, thereby rendering its actions *ultra vires* and an abuse of discretion.

92. AEM has been and continues to be harmed by the policy of denial as AEM has no avenue for review or appeal of the DDTC Enforcement Division's actions and no means by which to pursue its Part 128 rights and remedies.

93. AEM has thus been and continues to be irreparably harmed by DDTC's actions.

94. Monetary damages, or any other remedy at law, are inadequate to compensate AEM for the continuing deterioration of its business for years to come.

COUNT III – VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT/*ULTRA VIRES* ACTIONS

95. AEM incorporates by reference the allegations made in paragraphs 1 through 94.

96. DDTC's refusal to articulate the precise and detailed reasons for its actions, acting beyond the scope of its statutory and regulatory authority, and concomitantly refusing to allow AEM any opportunity for impartial and independent review of DDTC's policy of denial individually and collectively constitute an abuse of discretion and ultra vires actions beyond DDTC's statutory and regulatory authority.

97. DDTC has failed to follow its own regulations.

- a. Nothing in the ITAR authorizes the implementation of a policy of denial as an enforcement action.
- b. The ITAR do not authorize DDTC to encourage license applicants to take business away from a registrant and do business with other parties.
- c. ITAR Parts 127 and 128 set forth the mandatory procedures for DDTC to follow when acting to debar a registrant. DDTC has failed and refused to follow these procedures, while effectively debarring AEM from obtaining export licenses.

- d. DDTC's actions have resulted in an effective debarment of AEM without providing AEM the procedural protections contemplated by the ITAR.

98. DDTC has further failed to follow its own regulations by relying on actions outside the statute of limitations as a basis for imposing its policy of denial on AEM.

99. DDTC has further abused its discretion by treating AEM inconsistently when compared to enforcement actions taken against other companies appearing before DDTC. A number of companies – both comparably sized and larger than AEM – have been either convicted of or pled to violations of law relevant to DDTC or have had their actions determined to have harmed US national security interests. Yet no published record of the institution of a policy of denial exists in any of these matters. On the basis of publicly available information, DDTC has treated AEM in a disparately harsher manner than companies convicted of criminal violations or found to have harmed U.S. national security.

100. Monetary damages, or any other remedy at law, are inadequate to compensate AEM for the continuing deterioration of its business for years to come.

COUNT IV — DEPRIVATION OF DUE PROCESS — REGULATORY TAKING

101. AEM incorporates by reference the allegations made in paragraphs 1 through 100.

102. Under the Fifth Amendment to the U.S. Constitution, no person may be “deprived of life, liberty or property without due process of law.” U.S. Const. Amend. V.

103. DDTC's actions in this case have deprived AEM of its constitutionally protected property interest without affording AEM any due process of law.

104. DDTC imposed the policy of denial without warning to AEM. This initial imposition denied AEM any due process.

105. Despite repeated requests by AEM, DDTC has refused to articulate the reasons for its institution of the policy of denial and has refused to take actions necessary to allow AEM to invoke the administrative review process available under the ITAR under 22 C.F.R. Part 128.

106. Through the policy of denial, DDTC has altered AEM's legal status under the ITAR, § 120.1(c) without due process. The policy of denial therefore has caused and continues to cause irreparable harm to AEM's business.

107. AEM has built its business, including making significant and ongoing investments in the growth and future of the Hi-Rel fuse business, with the expectation that DDTC had reviewed and considered AEM's disclosure and, after almost eight years following the actions in question, determined that those actions did not warrant enforcement action of the sort imposed here.

108. AEM's continued investment has been made in reliance on DDTC's actions from 2003 through April 2009 issuing export licenses and in the expectation of an ability to export its fuses.

109. DDTC's sudden imposition of the policy of denial threatens the very existence of AEM's business, thereby constituting a regulatory taking.

110. Unless the policy of denial is enjoined, and AEM's legal status under the ITAR changed, AEM will continue to suffer harm without any opportunity to know the basis for the implementation of the policy and without an opportunity for an impartial hearing to determine the adequacy of any charges.

111. Even if a hearing were granted, according to DDTC's representations, all of the activities forming the basis of the policy of denial are beyond the applicable statute of limitations and therefore cannot properly form the basis for depriving AEM of its constitutionally protected interest.

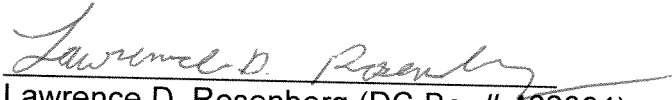
112. AEM is entitled to a declaration that the policy of denial constitutes a regulatory taking and has resulted in as yet undetermined harm to AEM.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court issue an Order:

- A. declaring that DDTC lacks authority to impose a policy of denial;
- B. declaring that DDTC has violated AEM's due process rights and that DDTC's actions are therefore void and unenforceable;
- C. declaring that DDTC has acted outside the scope of its authority in and has violated the AECA and the ITAR in instituting a policy of denial against AEM and in directing third parties to seek other sources for Hi-Rel fuses;
- D. granting a permanent injunction enjoining Defendants from taking further enforcement action against AEM for acts beyond the applicable statute of limitations;
- E. granting Plaintiff the attorneys' fees and costs incurred in connection with this action;
- F. retaining ongoing jurisdiction over this action for purposes of ensuring compliance with any relief this Court sees fit to afford; and
- G. granting such other relief as this Court deems just and proper.

Dated: November 12, 2010


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