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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LYCURGAN, INC., a California corporation, d/b/a Ares Armor, Plaintiff, vs. B. TODD JONES, as Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives, EARL GRIFFITH, an individual, UNKNOWN NAMED TECHNOLOGIST, an individual, UNKNOWN NAMED AGENTs I-VII, individuals, and DOES I-XI, in their individual capacities.	Case No.: 14-cv-00548-JLS-BGS **REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL/AMENDED COMPLAINT** Hon.: Judge Janis L. Sammartino Dept.: 4A Date: October 30, 2014 Time: 1:30 P.M.

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I. INTRODUCTION

The present motion to supplement the complaint was brought in an effort to maintain some semblance of administrative organization between the cases. Plaintiff Lycurgan has a civil action for damages and injunctive relief, an unsealing-of-the-affidavit case, and an anti-forfeiture case to recover its property. What would be nice to avoid is yet another, fourth case – because that would unnecessarily complicate the already complicated docket.

Yet, Defendants oppose Plaintiff's motion to seek leave of court to amend his complaint under two grounds. First, Defendants argue the United States has not waived its sovereign immunity for Plaintiff's first, fourth, and eighth claims for relief of his Proposed Amended Complaint. *Defs' Opp'n*. 7:12. Thus, Defendants argue that the Court should strike this motion under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Second , Defendants argue that venue is improper in the United States District Court of the Southern District of California because Plaintiff cannot establish that venue is proper for its first, second, fourth, and eighth claims for relief in his Proposed Amended Complaint. *Defs' Opp'n*. 8:6-7.

Defendants' contentions have no merit for the reasons discussed below. Therefore, Plaintiff respectfully requests that this Court should grant Plaintiff's Leave to File Supplemental/Amended Complaint.

Defendants factual support is non-existent as the Declaration of Paul Ware does not comply with 28 U.S.C. § 1746. Mr. Ware did not affix a date. Thus, the Government's factual showing is statutorily untrustworthy.

II. ARGUMENT

The United States cannot raise a sovereign immunity defense every time a plaintiff brings Constitutional claims. "When Constitutional questions are at issue, the availability of judicial review is presumed," and a court should not take the extraordinary step of dismissing Constitutional claims unless Congress's intent to do so is manifested by "clear and convincing evidence." Califano v. Sanders, 430 U.S. 99, 109 (1977).

In their Opposition, Defendants failed to meet their burden to show that Congress barred the Plaintiff from raising the disputed Constitutional claims. As discussed below, Defendants cannot do so because Congress expressly waived sovereign immunity for certain Constitutional claims through the Administrative Procedure Act ("APA"). Additionally, the United States District Court, Southern District of California is the appropriate venue for the instant litigation because venue is proper under 28 U.S.C. § 1391(b)(2) or § 1391(e)(1)(b).

A. Sovereign Immunity Does Not Apply to Federal Officials and Their Agents, In Their Official Capacity, For Claims Made Under The APA.

Typically, actions against federal officers or agents in their official capacity are suits against the United States. Therefore, such actions are barred by the doctrine of sovereign immunity. Chilicky v. Schweiker, 796 F.2d 1131, 1137 n.7 (9th Cir. 1986). However, actions made under the Administrative Procedure Act ("APA") are not subject to a federal government defendant's sovereign immunity defense.

Accordingly, this Court should grant Plaintiff's Motion for Leave to File Supplemental/Amended Complaint because Congress expressly waived sovereign immunity for the disputed Constitutional claims. Section 702 of the APA provides that:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702. Here, Plaintiff's Constitutional claims arose from a government agency, Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"), making a faulty determination by which Plaintiff suffered a legal harm. *Proposed Amended Compl.* ¶ 46-

54. Furthermore, the APA also provides a "right of judicial review" in the Plaintiff for a final agency action, "if no special statutory review proceeding is applicable." 5 U.S.C. §§ 703-04. No such special statutory review proceeding exists. Accordingly, the APA expressly provides a "right of judicial review" in the Plaintiff, and abrogates the United States's sovereign immunity defense in such circumstances.

Here, Plaintiff alleges that a final agency action determining that the unfinished lower receivers are firearms resulted in his harm. *Proposed Amended Compl.* ¶¶ 46-54. Because the ATF's decision was a final agency action without a special statutory review, this Court should find that the instant case is the exact kind of case where Congress, through 5 U.S.C. § 702, explicitly eliminated Defendants' sovereign immunity defense. Accordingly, Defendant's contention that Plaintiff's claims is barred by sovereign immunity is without merit.

Defendants' cited cases do not change this analysis. In Ingram v. Commissioner of Social Security, 401 Fed. Appx. 234 (9th Cir. 2010) (unpublished), the district court properly dismissed Ingram's Constitutional claims because Ingram "failed to exhaust his administrative remedies before seeking judicial review." Id. at 235. The issue is the same in FDIC v. Meyer, 510 U.S. 471 (1994). There, the Court found that a terminated employee plaintiff exhausted his claim when he "properly" brought his claim to the Federal Savings and Loan Corporation, the reviewing agency. Id. at 478. Here, Plaintiff brings the instant case because he alleges that administrative remedies were not available. Therefore, neither *Ingram* nor *Meyer* is applicable to the instant analysis.

Therefore, Defendants' sovereign immunity arguments are without merit, and this Court should grant Plaintiff's motion in his favor.

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B. The Instant Case Is Not Subject To Dismissal Under Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. 12(b)(6) Because There is Proper Subject Matter Jurisdiction for All Causes of Action.

Defendants cannot raise the sovereign immunity defense when a plaintiff brings Constitutional causes of action against an Agency, as Plaintiff does so here. Therefore, there can be no dismissal under lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1) or failure to state a cause of action under Fed. R. Civ. P. 12(b)(6).

The following chart shows that for each cause of action, this Court has subject matter jurisdiction over the cause of action. Additionally, for each cause of action, sovereign immunity would be improper either under either Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) for individual capacity defendants, or under 5 U.S.C. § 702 for official capacity defendants.

Plaintiff's claims arise out of Federal Question jurisdiction under 28 U.S.C. § 1331. Additionally, 28 U.S.C. § 1361 provides that the district court shall have original jurisdiction to "compel an officer or employee of the United States or any agency thereof to perform a duty owed to plaintiff." 28 U.S.C. § 1361. As shown below, a number of Plaintiff's claim arise under 28 U.S.C. § 1361's equitable relief jurisdiction.

Furthermore, venue is proper under 28 U.S.C. § 1391(b) for individual capacity defendants and under 28 U.S.C. § 1391(e) for official capacity defendants.

28 U.S.C. § 1391(b) provides that:

> (b) Venue in General.— A civil action may be brought in—
> (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
> (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
> (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

28 U.S.C. § 1391(e) provides that:

> (e) Actions Where Defendant Is Officer or Employee of the United States.—
> (1) In general.— A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which
> (A) a defendant in the action resides,
> (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or
> (C) the plaintiff resides if no real property is involved in the action.
> Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

28 U.S.C. § 1391(e)

All claims have proper venue. The following chart illustrates this concept.

Cause of Action - Capacity	Subject Matter Jurisdiction Exists	Venue is Proper	Sovereign Immunity is Waived
1 - Official	28 U.S.C. § 1331; 28 U.S.C. § 1361.	28 USC § 1391(e)(1)(B)	5 U.S.C. § 702
2 - Personal	28 U.S.C. § 1331	28 USC § 1391(b)(2)	N/A under *Bivens*
3 - Personal	28 U.S.C. § 1331	28 USC § 1391(b)	N/A under *Bivens*
4 - Official	28 U.S.C. § 1331; 28 U.S.C. § 1361.	28 USC § 1391 (e)(1)(B)	5 U.S.C. § 702
5 - Personal	28 U.S.C. § 1331	28 USC § 1391(b)	N/A under *Bivens*
6 - Personal	28 U.S.C. § 1331	28 USC § 1391(b)	N/A under *Bivens*
7 - Personal	28 U.S.C. § 1331	28 USC § 1391(b)	N/A under *Bivens*
8 - Official	28 U.S.C. § 1331; 28 U.S.C. § 1361.	28 USC § 1391(e)(1)(B)	5 U.S.C. § 702

9 - Official	28 U.S.C. § 1331; 28 U.S.C. § 1361.	28 USC § 1391(e)(1)(B)	5 U.S.C. § 702

Therefore, Defendants' argument that the Proposed Amended Complaint would fail under Fed. R. Civ. P. 12(b)(1) or 12(b)(6) has no merit.

C. Venue is Proper Under 28 U.S.C. § 1391(b)(2) and § 1391(e) Because The Alleged Harm Took Place Within This Court's Jurisdiction.

The disputed Constitutional claims have proper venue under 29 U.S.C. §1391(b)(2) or 29 U.S.C. §1391(e)(1)(B). This Court should review questions of venue for individual capacity defendants (e.g., for *Bivens* claims) under § 1391(b) and official capacity defendants (e.g., 5 U.S.C. § 702 claims) under § 1391(e). See cf. Stafford v. Briggs, 444 U.S. 527, 544 (1980). Under § 1391(b)(2) or § 1391 (e)(1)(B), venue is proper in a "judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(b)(2);(e)(1)(B). The rationale behind the venue rules is to ensure that "a defendant is not haled into a remote district having no real relationship to the dispute." Woodke v. Dahm, 70 F.3d 983, 985 (8th Cir. 1995). In evaluating venue claims under either §1391(b)(2) or §1391(e)(1)(B), this Court should focus on the relevant activities of the Defendant. Id. The appropriate question, then, is where Defendant harmed Plaintiff. Id.

In Woodke v. Dahm, plaintiff-appellant argued that venue under §1391(b)(2) should be where the plaintiff resided when the alleged harm took place. Id. Plaintiff's rationale was that his residence was the location of the "ultimate effect" of the harm. Id. The court disagreed, and explained that the alleged place of harm would be the "obviously correct venue." Id.

And here, as explained in the following chart, each disputed Constitutional claim is properly under the jurisdiction of this Court.

Claim	Allegation	Where Alleged Harm Took Place
1	Defendant Todd B. Jones's censorship policy resulted in Defendants' agents seizing Plaintiff's unfinished lower receivers, and holding them indefinitely in violation of the First Amendment. *Proposed Amended Complaint*, ¶¶ 100, 111. Furthermore, Defendant Todd B. Jones's censorship policy chilled Plaintiff's ability to engage in his business, and chilled the production of indexing marks on the unfinished receivers. Id. ¶ 115.	Plaintiff suffered harm in San Diego County through Defendants' raids on his offices and his inability to engage in business, located in San Diego County. Id. ¶ 3, 78.
2	Defendants'intent to prevent Plaintiff and others in possession of EP Armory unfinished lower receivers resulted in Defendants' agents seizing Plaintiff's unfinished lower receivers, and holding them indefinitely in violation of the First Amendment. Proposed Amended Complaint, ¶¶118, 120. Furthermore, Defendants' intent to prevent Plaintiff from others from possession the unfinished lower receivers chilled Plaintiff's ability to engage in his business, and chilled the production of indexing marks on the unfinished receivers. Id. ¶ 115.	Plaintiff suffered harm in San Diego County through Defendants' raids on his offices and his inability to engage in business, located in San Diego County. Id. ¶ 3, 78.
4	Plaintiff has a right, protected by the Second Amendment, to purchase, distribute, and sell any firearm-related item which is not a firearm, frame, or a receiver, including the subject EP Arms Unfinished Lower Receivers in violation of the Second Amendment. Id. ¶ 140.	Plaintiff suffered harm in San Diego County through Defendants' raids on his offices and his inability to engage in business, located in San Diego County. Id. ¶ 3, 78.

8	Plaintiff has Second Amendment protection and a protected liberty interest in conducting business. Id. ¶ 186-87. Defendants intruded upon its protections, and thus, its policies violated the Due Process Clause of the Fifth Amendment. Id. ¶ 187. In addition, the inability to appeal the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) Decision resulted in Plaintiff's harm. Id. ¶ 192	Plaintiff suffered harm in San Diego County through Defendants' raids on his offices and his inability to engage in business, located in San Diego County. Id. ¶ 3, 78.

Here, Plaintiff alleges that Defendants' agents harmed him in San Diego County. And for each disputed cause of action, Plaintiff alleges that Defendants and Defendants' agents committed harm where venue before the Southern District of the United States District Court is proper. Defendants, after raiding Plaintiff's business and bringing his business to a crawl, cannot now claim that Plaintiff hales them into a jurisdiction where there is "no real relationship to the dispute." Defendants' actions are intimately involved in Plaintiff's harm. Finally, Plaintiff declares that the Southern District of California is the judicial district in which a substantial part of the events or omissions giving rise to the claims set forth in the proposed amended complaint occurred within the meaning of 28 U.S.C. § 1391(b) and 28 U.S.C. § 1391(e)(1)(B). Karras Decl. ¶ 4. Therefore, venue in this Court is the "obviously" correct venue.

Defendants' cases do not alter the above analysis in their favor. Defendants cite Multimin USA, Inc. v. Walco Int'l, Inc., 2006 U.S. Dist. LEXIS 33624, *5 (E.D. Cal. 2006), a Lanham Act case, for the position that a plaintiff must show that venue is proper as to each defendant and to each claim. *Defs' Opp'n*, 8:5-8. Yet, the court in *Multimin USA, Inc.* decided venue on the basis of neither 28 U.S.C. § 1391(b) nor (e). The court found that venue was proper under a forum selection clause that the parties agreed on. Multimin USA, Inc., 2006 U.S. Dist. LEXIS 33624 at *11.

Defendants' case of Kings County Economic Development Ass'n v. Hardin, 333 F.Supp. 1302 (N.D. Cal. 1971) is equally unhelpful. In *Hardin*, the issue before the court was whether Plaintiff's venue of choice in the Eastern District of California was proper

under 28 U.S.C. § 1391(e)(1)(A) when two of the defendants resided the Northern District of California. Id. at 1303. There, the court simply held that the lower court could transfer venue "in the interest of justice." Id. at 1304. Defendants' cases do not change the correct analysis that venue for Plaintiff's Constitutional causes of action are proper under 28 U.S.C. § 1391(b)(2) and (e)(1)(B).

Therefore, this Court should find that venue is proper in the United States District Court, Southern District of California.

III. CONCLUSION

For the foregoing reasons, Plaintiff Lycurgan, Inc. respectfully requests the Court to grant Plaintiff an order for leave to file the proposed "FIRST AMENDED COMPLAINT FOR DAMAGES; DEPRIVATION OF CIVIL RIGHTS (BIVENS ACTION); INJUNCTIVE AND DECLARATORY RELIEF; JURY TRIAL DEMAND".

Respectfully submitted:

Dated: October 23, 2014

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