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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

LYCURGAN INC. dba ARES ARMOR, Plaintiff v. B. TODD JONES, in his official capacity as Head of the San Diego Bureau of Alcohol, Tobacco, Firearms and Explosives; and DOES 1-10, Defendants.	Case No.: 14CV548 JLS (BGS) OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL/AMENDED COMPLAINT DATE: October 30, 2014 TIME: 1:30 p.m. Hon. Janis L. Sammartino

I

INTRODUCTION

Plaintiff seeks leave of court to amend its original two claim, one defendant complaint (which was mooted by subsequent events) with a 56 page, nine claim complaint against multiple named and unnamed defendants. Plaintiff's motion for leave to amend should be denied because its Proposed Amended Complaint is subject to dismissal on two grounds. First, the United States has not waived its sovereign immunity for three of the proposed claims for relief. Second, this District is not the proper venue to litigate the central issue that Plaintiff seeks to litigate in its Proposed

Amended Complaint: whether an individual (whom Plaintiff seeks to sue in his personal capacity) acted constitutionally when he opined that the EP Arms EP80 lower receivers are firearms. The Court should therefore deny Plaintiff's motion for leave to file its Proposed Amended Complaint.

II

FACTUAL BACKGROUND

This is one of three cases that Plaintiff has filed in response to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) execution of a search warrant issued by Magistrate Judge Skomal. See also In the Matter of the Search of: Ares Armor et al., Case No. 14-cv-1424-JLS (BGS) (seeking to unseal the search warrant affidavit); Lycurgan Inc. dba Ares Armor v. Jones, Case No. 14-cv-1679-JLS (BGS) (seeking the return of the items seized under the Civil Asset Forfeiture Reform Act). The search warrant relates to a criminal investigation of EP Arms in the Eastern District of California. [See Ex. 2 to Defendant's Motion to Dismiss in Case No. 14-cv-1679-JLS (BGS) (ECF #7-3).]

EP Arms, which is located in the Eastern District of California, manufactures "EP80 lower receivers". [Id.] The EP80 lower receiver is commonly used to make AR-15 style rifles. [See Ex. 1 to Defendant's Motion to Dismiss in Case No. 14-cv-1679-JLS (BGS) (ECF #7-2).] The AR-15 is a semi-automatic, civilian version of the .223-caliber M16 machine gun used by the United States military. [Id.]

EP Arms (which is not a party to this lawsuit) requested ATF's opinion whether its EP80 is a firearm. [See Ex. A to Plaintiff's Proposed Amended Complaint ("PAC").] ATF's Firearms Technology Branch opined that it is. [See Ex. B to PAC.]

Because it is a firearm, the EP80 is required to bear a manufacturer's mark and a serial number, but it does not. [See Exs. 1 and 2 to Defendant's Motion to Dismiss in Case No. 14-cv-1679-JLS (BGS) (ECF #7-2 and 7-3).] And only Federal Firearms Licensees can manufacture and/or engage in the business of selling firearms. [Id.] EP Arms is not a Federal Firearms Licensee. [Id. (Ex. 2, ¶ 3).]

Plaintiff possessed more than 5,000 of the EP Arms EP80s. [Id. (Ex. 1, ¶ 8).] The EP80s bear neither a manufacturer's mark nor a serial number, and therefore are untraceable. [Id. (Ex. 2, ¶ 5)] Plaintiff also is not a Federal Firearms Licensee, and presumably was selling the EP80s without performing background checks on the purchasers. [Id. (Ex. 1, ¶ 7).]

ATF attempted to resolve this matter informally with Plaintiff. ATF (through its division counsel) and Plaintiff (through its retained attorney) successfully negotiated Plaintiff's voluntarily surrender of the EP80s in its possession. [See Declaration of Paul Ware, ¶¶ 2-6 (submitted with Defendant's Response in Opposition to Motion for a Temporary Restraining Order) (ECF #9-1).] But, while agreeing through one retained attorney to voluntarily surrender the EP80s, Plaintiff (unbeknownst to ATF) retained a second attorney to file this case and apply for and obtain (without notice to the United States) a temporary restraining order prohibiting ATF from taking possession of the EP80s, which it served on the ATF agents who appeared to take possession of the EP80s. [Id., ¶ 7; see also Declaration of Dimitros Karras (ECF #1-2) at 2, ¶ 9(b).] The United States then obtained ex parte relief from this Court permitting ATF to apply for and obtain a search warrant to seize the EP80s. [See ECF #5 and #6.] Magistrate Judge Skomal issued the warrant, and ATF agents executed it on March 15, 2014. [See Ex. 1, ¶ 8 to Defendant's Motion to Dismiss in Case No. 14-cv-1679-JLS (BGS) (ECF #7-2).]

Plaintiff's original complaint in this case contained two claims against ATF: (1) that ATF's desire to obtain EP80s and customer lists in Plaintiff's possession violated its "protected right to be free from seizure of its inventory and customer list" under the Fourth Amendment [see Complaint (ECF #1) at 8-9], and (2) that "BATFE's planned action violates the rights of Ares Armor's Customers." [Id. at 9.] These claims were mooted by ATF's execution of the search warrant issued by Judge Skomal. [See Order Granting Joint Motion to (1) Take Hearing on Preliminary Injunction of Calendar (ECF #12) at 1.]

Plaintiff now seeks leave of court to file a 56 page, 200 paragraph amended complaint. Ironically (because Plaintiff's own agreement to voluntarily surrender the EP80s caused ATF to forego obtaining a search warrant at the outset), Plaintiff's Proposed Amended Complaint seeks to sue ATF agents in their personal capacities, alleging that their application for a search warrant was an unconstitutional retaliation against Plaintiff for obtaining a temporary restraining order. See Proposed Amended Complaint at 39-41, ¶¶ 127-34.

But the gravamen of Plaintiff's Proposed Amended Complaint concerns a letter that Earl Griffith, the Chief of ATF's Firearms Technology Branch, wrote in response to EP Arms request for an opinion whether its EP80s are firearms. (Confirming the centrality of the Griffith letter to its new claims, Plaintiff has attached the correspondence between EP Arms' attorney and Mr. Griffith as Exhibits A, B, C, and D to its Proposed Amended Complaint.) Plaintiff (which is not the party that requested Mr. Griffith's opinion) now seeks to sue Mr. Griffith personally for providing the opinion that EP Arms (which is not a party to this litigation) requested. Plaintiff's Proposed Amended Complaint alleges that Mr. Griffith's letter opining that the EP80 receivers are firearms violated the First, Second, Fourth, and Fifth Amendments of the United States Constitution.

Specifically, Plaintiff's Proposed Amended Complaint alleges that Mr. Griffith's opinion letter violated the Constitution in the following claims for relief:

Claim	**Allegation**	**Defendants**
1	Griffith's letter opining that the EP80 lower receivers are firearms constitutes a prior restraint on speech in violation of the First Amendment. See Proposed Amended Complaint (PAC) (ECF #35-4) at 35-38, ¶¶ 99-117.	Jones (official capacity)

2	Griffith's letter opining that the EP80 lower receivers are firearms constitutes a prior restraint on speech in violation of the First Amendment. Id. at 38-39, ¶¶ 118-126.	Griffith and Unknown Technologist (personal capacity)
4	Second Amendment violated because "EP Arms Unfinished Lower Receivers" are not firearms, frames, or receivers. Id. at 41-42, ¶¶ 135-142.	Jones (official capacity)
5	Griffith and unnamed defendants knew that Griffith's opinion that the EP80s were firearms "would be used to deceive a Magistrate Judge and wrongfully obtain a search warrant," in violation of the Fourth Amendment. Id. at 42-49, ¶¶ 143-156.	Griffith, Unnamed Agent I, Unnamed Technologist, and Does (personal capacity)
7	False or misleading affidavit submitted to a Magistrate Judge, resulting in an improper taking in violation of the Fifth Amendment. Id. at 50-52, ¶¶ 166-175.	Unnamed Agent I and Does (personal capacity)
8	Lack of promulgated standards for determining whether an item is a firearm and lack of appeal rights violates the Due Process clause of the Fifth Amendment. Id. at 52-56, ¶¶ 176-196.	Jones (official capacity)

The United States, however, has not waived its sovereign immunity for Plaintiff's official capacity claims. Moreover, the Southern District of California is not the proper venue to litigate the conclusions in Mr. Griffith's opinion letter, which was sent from his office in West Virginia (located in the District of West Virginia) to EP Arms' attorney's office in Mission Viejo (located in the Central District of California) regarding EP Arms, which is in Bakersfield (located in the Eastern District of California).

III
ARGUMENT

A. Leave to Amend Should be Denied When the Proposed Amended Complaint is Subject to Dismissal

A plaintiff may amend a complaint once as a matter of course within 21 days of serving it or within 21 days of service a responsive pleading (including a Rule 12(b)

motion). See Fed. R. Civ. P. 15(a)(1). Other amendments require leave of court, which generally is freely given "when justice so requires." See Fed. R. Civ. P. 15(a)(2). But justice does not require freely granting leave to amend if the Proposed Amended Complaint is subject to dismissal. Moore v. Kayport Package Express, Inc., 885 F.2d 531, 538 (9th Cir.1989) ("Leave to amend need not be given if a complaint, as amended, is subject to dismissal.").

Plaintiff filed its motion to file its Proposed Amended Complaint on September 22, 2014. [See ECF #35.] That is more than 21 days after purported service of its original complaint on April 4, 2014. [See ECF #13.] Plaintiff therefore may not file its amended complaint without leave of court. See Fed. R. Civ. P. 15(a)(1) and (2). Because Plaintiff's Proposed Amended Complaint is subject to dismissal, the Court should deny Plaintiff's motion for leave to amend.

B. Plaintiff's Proposed Amended Complaint is Subject to Dismissal

Plaintiff's Proposed Amended Complaint is subject to dismissal on at least two grounds: (1) the United States has not waived its sovereign immunity for Plaintiff's constitutional claims, and (2) this district is not the proper venue to litigate Mr. Griffith's opinion letter.[1]

1. The United States Has Not Waived Its Sovereign Immunity for Constitutional Claims

The United States is immune from suit unless it consents. See generally United States v. Dalm, 494 U.S. 596, 608 (1990) ("Under settled principles of sovereign immunity, the United States, as sovereign, is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.") (internal quotations omitted). "A waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." Quarty v. United States, 170 F.3d 961, 972 (9th Cir. 1999)

[1] Plaintiff's Proposed Amended Complaint may also be subject to dismissal for lack of standing and other grounds. The United States does not intend to waive any additional bases for dismissal by not raising them here.

(quoting Lane v. Pena, 518 U.S. 187, 192 (1996)). See also United States v. Mitchell, 445 U.S. 535, 538 (1980) ("A waiver of sovereign immunity cannot be implied but must be unequivocally expressed.") (internal quotation omitted).

The United States has not waived its sovereign immunity for constitutional claims. See Ingram v. Commissioner of Social Security, 401 Fed. Appx. 234, 235 (9th Cir. 2010) (unpublished) ("The district court properly dismissed Ingram's constitutional claims because the United States has not expressly waived its sovereign immunity."). See also FDIC v. Meyer, 510 U.S. 471, 477-78 (1994) (Congress did not waive the United States' sovereign immunity for constitutional claims in the Federal Tort Claims Act).

Plaintiff proposes to bring constitutional claims against the United States in the first, fourth, and eighth claims for relief of its Proposed Amended Complaint. These official capacity claims violate the United States' sovereign immunity and therefore are subject to dismissal pursuant to Fed. R. Civ. P. 12(b)(1) and (b)(6). See Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985) (affirming dismissal of constitutional claims against the United States; "It has long been the rule that the bar of sovereign immunity cannot be avoided by naming officers and employees of the United States as defendants. Thus, a suit against IRS employees in their official capacity is essentially a suit against the United States. As such, absent express statutory consent to sue, dismissal is required.").[2]

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[2] Plaintiff's Proposed Amended Complaint cites 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C.§ 1343 (civil rights jurisdiction), and 28 U.S.C. §§ 2201 and 2202 (the Declaratory Relief Act), as the bases for jurisdiction. See PAC at 2, ¶ 1. But, as the Ninth Circuit has held, Congress did not waive the United States' sovereign immunity in any of these statutes. See United States v. Park Place Associates, 563 F.3d 907, 924 (9th Cir. 2009) ("28 U.S.C. § 1331 grants district court's jurisdiction over 'all civil actions arising under the Constitution, laws or treaties of the United States,' but it does not waive sovereign immunity."); Jachetta v. United States, 653 F.3d 898, 907-08 (9th Cir. 2011) ("Because we fail to see how this text can be construed as an unequivocally expressed waiver of the government's sovereign immunity, we hold that 28 U.S.C. § 1343(a)(3) does not waive sovereign immunity."); Brownwell v. Ketcham Wire & Mfg. Co., 211 F.2d 121, 128 (9th Cir. 1954) ("It is true that the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, is not a consent of the United States to be sued, and merely grants an additional remedy in cases where jurisdiction already exists.").

2. This District is Not the Proper Venue to Litigate the Griffith Opinion Letter

"Where there are multiple parties and/or multiple claims in an action, the plaintiff must establish that venue is proper as to each defendant and as to each claim." Multimin USA, Inc. v. Walco Internation, Inc., 2006 WL 1046964, *2 (E.D.Cal. 2006). Plaintiff cannot establish venue in this district for the first, second, fourth, and eighth claims for relief in its Proposed Amended Complaint. Those claims for relief therefore are subject to dismissal pursuant to Fed. R. Civ. P. 12(b)(3).

The first, second, fourth, and eighth claims for relief in Plaintiff's Proposed Amended Complaint seek to litigate the conclusion in Mr. Griffith's letter that the EP80s (referred to as "EP Arms Unfinished Lower Receivers" in the Proposed Amended Complaint) are firearms. The first and second claims for relief allege that Mr. Griffith's letter constituted a prior restraint on speech in violation of the First Amendment. See PAC at 35-38. The fourth claim for relief alleges Mr. Griffith's letter violated the Second Amendment. Id. at 41-42. The eighth claim for relief alleges that the process that resulted in Mr. Griffith's letter violated the Fifth Amendment. Id. at 52-56.

This district is not the proper venue for these claims. None of the bases for venue in 28 U.S.C. § 1391(b) (which governs venue for the individual defendants) or 28 U.S.C. § 1391(e) (which governs venue for the official capacity defendants) is met. First, no defendant resides in this district. See 28 U.S.C. § 1391(b)(1) and (e)(1). "A public official is deemed to 'reside' for purposes of § 1391(e) in the judicial district where he performs his official duties." Kings County Economic Community Development Ass'n v. Hardin, 333 F.Supp. 1302, 1303 n.1 (N.D.Cal. 1971)) (citing 1 Moore's Federal Practice 1487-88); accord Airport Working Group of Orange County, Inc. v. United States Dept. of Defense, 226 F.Supp.2d 227, 228 (D.D.C. 2002) ("the Department of Defense . . . [has its] official residence for venue purposes in the District of Columbia"). Mr. Griffith resides in Maryland and performs his

official duties in West Virginia. See Exhibit 1 (Declaration of Paul Ware) at ¶¶ 2-3. Mr. Jones performs his official duties at ATF's headquarters in Washington, D.C. [Id., ¶ 4.]

Second, none of the events surrounding Mr. Griffith's drafting of his letter occurred in this district, see 28 U.S.C. § 1391(b)(2) and (e)(2), which is the basis for venue invoked by Plaintiff's complaint. See PAC at 2, ¶ 2 ("Venue is proper in the Southern District of California pursuant to Title 28, United States Code, Section 1391€(1)(B), because a substantial part of the events or omissions giving rise to the claim occurred in this district."). The EP Arms attorney sent his letter requesting Mr. Griffith's determination whether the EP80 is a firearm from his office in Mission Viejo, California (located in the Central District of California) to Mr. Griffith's office in Martinsburg, West Virginia (located in the District of West Virginia). [See PAC, Ex. A.] The EP Arms attorney also sent an exemplar EP80 to West Virginia for Mr. Griffith's review and examination. [Id.] Mr. Griffith conducted his examination in Martinsburg, West Virginia [Ex. 1 (Ware Declaration) at ¶ 3], and sent his response from West Virginia back to EP Arms' attorney's office in Mission Viejo. [See PAC, Ex. B.] EP Arms itself is located in Bakersfield (which is located in the Eastern District of California). [See www.eparmory.com.] In sum, neither EP Arms request for analysis and determination, nor Mr. Griffith's examination and response took place in this district. Venue therefore does not lie in this district under 28 U.S.C. § 1391(b)(2) or (e)(2). Accord Kings County Economic Development Ass'n, 333 F.Supp. at 1303.

Finally, there are other districts where a challenge to the Griffith letter may be brought. See 28 U.S.C. § 1391(b)(3) and (e)(3). Indeed, a lawsuit challenging the Griffith letter is presently pending in the Eastern District of California, where EP Arms resides. That complaint involves the same issue that Plaintiff seeks to litigate in its Proposed Amended Complaint: whether Mr. Griffith correctly concluded that the EP80 is a firearm. See California Rifle & Pistol Ass'n v. Bureau of Alcohol,

Tobacco, Firearms, and Explosives, et al., Case No. 14-cv-1211-SAB (E.D. Cal.) (attached as Exhibit A to Plaintiff's Notice of Related Case filed in Case No. 14-cv-1679 (ECF #5)).[3]

In sum, this district lacks venue for four of the claims in Plaintiff's Proposed Amended Complaint. Leave to file the Proposed Amended Complaint therefore should be denied because it is subject to dismissal pursuant to Fed. R. Civ. P. 12(b)(3). See Multimin, 2006 WL 1046964 at *2 (in multi-party, multi-claim cases, "the plaintiff must establish that venue is proper as to each defendant and as to each claim.").

III

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's motion for leave to file its Proposed Amended Complaint.

DATED: October 16, 2014

Respectfully submitted,

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s/ Daniel E. Butcher
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[3] Defendant is not conceding here that venue is proper in the Eastern District of California. That is a matter that the court there must resolve if the parties elect to raise that issue.