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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10
11 LYCURGAN, INC. d/b/a ARES
ARMOR,

12 Plaintiff,

13 v.

14 B. TODD JONES, in his official
capacity as Head of the San
15 Diego Bureau of Alcohol,
Tobacco, Firearms and
Explosives; and DOES 1-10,
16 Defendants.

CASE NO. 14-CV-1679 JLS (BGS)

DECLARATION OF SCOTT A.
MCMILLAN IN SUPPORT OF
EMERGENCY APPLICATION FOR AN
ORDER FOR EXPEDITED RULE 34
INSPECTION AND TO CONTINUE
HEARING DATE AND RELATED
FILING DEADLINES.

Judge: Hon. Janis L. Sammartino
Dept.: 4A
Date: November 6, 2014
Time: 1:30 P.M.

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19 **DECLARATION OF SCOTT A. MCMILLAN**

20 I, Scott A. McMillan, declare:

21 1. I am Plaintiff Lycurgan's lawyer in the above captioned case. If
22 called before this court, I could and would testify competently to the following
23 from my own personal knowledge:

24 2. There has been no case management order issued in this case.
25 The parties have not had their Rule 26(f) conference. Thus, absent a court order,
26 discovery is prevented according to Rule 26(d)(1). By this application I request
27 leave to serve, and expect a response on an expedited basis, to the single request
28 for production of documents attached hereto as Exhibit 'A'.

1 3. The basis for this is as follows:

2 4. On September 22, 2014, the Government filed its motion to
3 dismiss according to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). [Doc.
4 7]. The Government supported its motion with the declarations of two ATF
5 agents, a Mr. Marks [Doc 7-2], and a Mr. Brice McCracken [Doc 7-3]. Both
6 declarations, and the motion, make reference to the proposition that the seized
7 5,804 unfinished lower receivers are “firearms.” [Memo., pg. 2, Doc 7-1.]

8 5. On September 23, 2014, I wrote Assistant U.S. Attorney Daniel
9 Butcher the following e-mail, with the following substance:

10 “The affidavit on the search warrant which was filed as document
11 14-1, in case 14-cv-01424 refers to an ATF/FTB Technical Bulletin
12 14-01. [Affidavit, page 9, para 21.]
13 Could you please provide us a copy of that bulletin?
14 ATF has not updated its bulletins in 11 years. Last bulletin (*sic*) online is
15 from 2003!”

16 6. That same day Mr. Butcher replied:

17 “I was not involved in the search warrant and do not otherwise have
18 a copy of the referenced technical bulletin.”

19 7. I responded to Mr. Butcher with:

20 “Are you able to ask for it? Apparently, it supports the ATF's
21 opinion of whether it is a firearm.”

22 8. On September 24 2014, Mr. Butcher responded as follows:

23 “If I had a copy, I would give it to you as a courtesy. But I do not.
24 Any discovery that you wish to obtain from the agency will have to
25 await the court’s case management order and be conducted in
26 accordance with the Federal Rules of Civil Procedure.”

27 9. I have asked United States Attorney Andrew Haden for a copy of
28 Technical Bulletin 14-01. He does not have it either.

 10. The Technical Bulletin is referenced in the Affidavit offered in
Support of the Search Warrant. A copy of the affidavit as filed as document
14-1, in case 14-cv-01424, is attached hereto as Exhibit B.

 11. I have engaged Daniel O’Kelly as an expert witness on
Lycurgan’s behalf. It is my expectation that Mr. O’Kelly will testify that the

1 5,804 unfinished polymer lower receivers are not “firearms.” I expect that Mr.
2 O’Kelly will further explain his reasoning for that conclusion. I want to provide
3 Mr. O’Kelly a copy of the technical bulletin so that we can discuss its application
4 to these facts. A true and correct copy of Mr. O’Kelly’s curriculum vitae is
5 attached hereto as Exhibit C.

6 12. Thus, the technical bulletin, which was referenced in the warrant
7 application is helpful to understand the ATF’s reasoning in calling 5,804
8 unfinished lower receivers “firearms.”

9 13. We have submitted a FOIA request some time ago for the
10 Technical Bulletin 14-01, as the subject is central to the dispute. There was no
11 response so far to that request.

12 14. I have researched the Internet to find a copy published
13 elsewhere. It is not on the Internet. Nor is it at the ATF’s website. I reviewed
14 Regulations.Gov to determine whether it was published in the Federal Register, to
15 no avail.

16 15. I have been unable to locate this document. Thus, absent
17 discovery, our retained expert will not be able to address the ATF’s reasoning in
18 declaring the subject items firearms.

19 16. I declare under the penalty of perjury according to the laws of
20 the United States that the foregoing is true and correct and that this declaration
21 was executed on September 4, 2014, in the City of La Mesa, County of San
22 Diego, State of California.

23 /s/ Scott A. McMillan

24 _____
25 Scott A. McMillan
26 Attorneys for Lycurgan, Inc.
27 Plaintiff
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