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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LYCURGAN, INC., a California corporation, d/b/a/ ARES AMOR,

Plaintiff,

v.

EARL GRIFFITH, an individual,
UNKNOWN NAMED
TECHNOLOGIST, an individual
UNKNOWN NAMED AGENTS I-VII,
individuals, and DOES 1-X, in their
individual capacities,

Defendants.

Case No.: 14CV548-JLS-BGS

**ORDER DENYING WITHOUT
PREJUDICE PLAINTIFF'S MOTION
TO TAKE IMMEDIATE
DISCOVERY OF PERSON(S) MOST
KNOWLEDGEABLE AT THE
BUREAU OF ALCOHOL,
TOBACCO, FIREARMS, AND
EXPLOSIVES REGARDING
IDENTITIES OF UNKNOWN
NAMED DEFENDANTS**

[Doc. No. 117]

Presently before the Court is plaintiff's *ex parte* Motion to Take Immediate Discovery From the Person(s) Most Knowledgeable at the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("BATFE") Regarding the Identities of the Unknown Named Defendants in this case ("Motion"). [Doc. No. 117.] Also before the Court is defendants' Opposition to the Motion [Doc. No. 131] and plaintiff's Reply in Support of the Motion [Doc. Nos. 132-1; 134].

1 Specifically, plaintiff seeks to conduct immediate discovery by serving the Proposed
2 Notice of Deposition and Request for Production of Documents “on the person(s) most
3 knowledgeable at the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE or
4 the Agency) prior to a conference of the parties required by Federal Rule of Civil
5 Procedure 26(f) in order to learn the identities of Defendants (1) Unknown Named
6 Technologist, (2) Unknown Named Agents I-VII, and (3) Does I-XI, in their individual
7 capacities (the ‘Unknown Named Defendants’) and to serve them with process.” [Doc.
8 No. 117-3, at pp. 10, 34.] Plaintiff asserts that the information sought is necessary “in
9 order to amend its pleadings to name the Unknown Named Defendants” and contends that
10 he will “suffer undue prejudice without such discovery in the form of dismissals and
11 delays from suit.” *Id.* For the reasons provided below, the Court denies without prejudice
12 plaintiff’s Motion.

13 I. FACTUAL AND PROCEDURAL BACKGROUND

14 On March 11, 2014, plaintiff filed a Complaint, seeking a declaratory judgment that
15 its “EP Arms unfinished lower receiver is not a firearm,” a temporary restraining order
16 (“TRO”), and injunctive relief forbidding the BATFE from seizing plaintiff’s unfinished
17 lower receivers and customer list. [Doc. Nos. 1, 2.] The same day, the Court granted
18 plaintiff’s request for a TRO. [Doc. No. 4.] On March 14, 2014, the Court clarified that
19 the TRO did not enjoin defendants from lawfully seizing evidence and contraband pursuant
20 to a valid search warrant. [Doc. No. 6.]

21 After the issuance and execution of a search warrant in which BATFE agents seized
22 property from four of plaintiff’s facilities, plaintiff filed a First Amended Complaint
23 (“FAC”) on December 17, 2014, alleging First, Second, Fourth and Fifth Amendment
24 violations. [Doc. No. 42.] Plaintiff brought its FAC against B. Todd Jones in his official
25 capacity as Director of the BATFE. *Id.* The FAC also named the following individual
26 defendants: Earl Griffith, Unknown Named Technologist, Unknown Named Agents I-VII,
27 and Does I-X. *Id.* On November 19, 2015, the Court dismissed without prejudice
28 plaintiff’s first, fourth, eighth, and ninth claims against Defendant Jones under both Federal

1 Rules of Civil Procedure 12(b)(1) and 12(b)(6). [Doc. No. 106.] On July 5, 2016, the Court
2 issued an Order Directing Plaintiff to Either File a Second Amended Complaint or Face
3 Involuntary Dismissal of Action for Failure to Prosecute noting that “[i]n the more than
4 seven months since [the Court’s Order at Doc. No. 106], Plaintiff has taken no further
5 action in this case.” [Doc. No. 108, at p. 1.] The Court cited Federal Rule of Civil
6 Procedure 41(b) and gave plaintiff thirty (30) days to file a second amended complaint. *Id.*
7 at p. 2.

8 On August 5, 2016, plaintiff filed a Second Amended Complaint (“SAC”). [Doc.
9 No. 109.] Plaintiff brought its SAC against Earl Griffith, in his individual capacity, and
10 the Unknown Named Defendants, in their individual capacities. *Id.* On February 28, 2017,
11 defendants filed a Motion to Dismiss as to Mr. Griffith on the following grounds: (1)
12 plaintiff cannot establish personal jurisdiction over Mr. Griffith; (2) plaintiff did not timely
13 serve Mr. Griffith (citing Federal Rule of Civil Procedure 4(m)); (3) plaintiff’s SAC does
14 not state a plausible claim for relief against Mr. Griffith; and (4) Mr. Griffith is entitled to
15 qualified immunity. [Doc. No. 115-1.] On May 30, 2017, defendants also filed a Motion
16 to Dismiss Unknown Named Defendants under Federal Rule of Civil Procedure 4(m) and
17 12(b)(5), contending that the Rule 4(m) deadline expired in this case more than two years
18 ago, and plaintiff has neither applied for nor obtained an extension. [Doc. No. 126-1.] Both
19 of defendants’ Motions to Dismiss are currently pending before Judge Sammartino.

20 II. LEGAL STANDARD FOR EXPEDITED DISCOVERY

21 Discovery is generally not permitted without a court order before the parties have
22 conferred pursuant to Federal Rule of Civil Procedure 26(f). Fed.R.Civ.P. 26(d)(1). Courts
23 in the Ninth Circuit generally grant requests for expedited discovery when the moving party
24 shows good cause. *Semitoil, Inc. v. Tokyo Elec. Am. Inc.*, 208 F.R.D. 273, 275-276 (N.D.
25 Cal. 2002). “Good cause may be found where the need for expedited discovery, in
26 consideration of the administration of justice, outweighs the prejudice to the responding
27 party. [Citation omitted.] In determining whether there is good cause to allow expedited
28 discovery to identify doe defendants, courts consider factors including whether: (1) the

1 plaintiff can identify the missing party with sufficient specificity such that the Court can
2 determine that defendant is a real person or entity who could be sued in federal court; (2)
3 the plaintiff has identified all previous steps taken to locate the elusive defendant; (3) the
4 plaintiff's suit against defendant could withstand a motion to dismiss; and (4) the plaintiff
5 has demonstrated that there is a reasonable likelihood of being able to identify the
6 defendant through discovery such that service of process would be possible." *Columbia*
7 *Ins. Co. v. seescand.com*, 185 F.R.D. 573, 578-80 (N.D. Cal. 1999).

8 III. DISCUSSION

9 A. Plaintiff's Argument

10 Plaintiff argues at length in the Motion about the facts which plaintiff establish good
11 cause to take early discovery, including: (1) how the defendants are real persons subject to
12 a lawsuit whom plaintiff has identified with specificity; (2) the steps taken to serve the
13 Unknown Named Defendants; (3) the claims against the Unknown Named Defendants are
14 not subject to dismissal; and (4) that plaintiff will likely identify the Unknown Named
15 Defendants through what plaintiff contends is narrowly targeted discovery. [Doc. No. 117-
16 3, at pp. 17-33.] Further, plaintiff's counsel contends in his Declaration attached to the
17 Reply in Support of the Motion as follows:

18 Plaintiff seeks narrowly tailored discovery to obtain the names of the
19 Unknown Named Defendants who participated in a specific event: the
20 raids on [p]laintiff's four facilities on March 15, 2014, as well as those
21 individuals who were responsible for obtaining the search warrant and
its supporting affidavit.

22 The only step left in obtaining the names of the Unknown Named
23 Defendants is to ask for their identities, to which the person(s) most
24 knowledgeable at the Bureau of Alcohol, Tobacco, Firearms, and
25 Explosives should have access. Good faith responses to the proposed
26 deposition topics and requests for production of documents should reveal
27 the requested names and identities. The proposed subpoena to testify at
28 a deposition in a civil action for the person most knowledgeable at the
BATFE, and request for production of documents, is attached as Exhibit
D [to McMillan's Declaration for Reply in Support of the Motion].

1 [Doc. No. 132-1, at p. 13.]
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3 Plaintiff's initial proposal to conduct immediate discovery was to serve the Proposed
4 Notice of Deposition and Request for Production of Documents on the person(s) most
5 knowledgeable at the BATFE, which are attached to the Motion as Exhibit G. [Doc. No.
6 117-3, at p. 34.] However, in the Reply, plaintiff changed its proposed method of obtaining
7 the discovery sought in response to an argument made by the defendant detailed below.
8 [Doc. No. 132-1, at p. 8; *see also* Doc. No. 131, at pp. 9-10]. Specifically, in the Reply,
9 plaintiff "respectfully requests that the Court allow Plaintiff to substitute the proposed
10 Notice of Deposition for a Rule 45 subpoena to the BATFE, attached as Exhibit D to Scott
11 A. McMillan's supporting declaration." [Doc. No. 132-1, at p. 8.]

12 ***B. Defendants' Arguments***

13 Defendants make four general arguments in the Opposition to plaintiff's Motion.
14 [Doc. No. 131, at pp. 4-10.] First, defendants assert that the Court should deny plaintiff's
15 Motion until Judge Sammartino rules on defendants' pending Motion to Dismiss for failure
16 to prosecute. [Doc. No. 131, at p. 4 (*See, e.g., Berlin Media Art v. Does* 1-654, Case. No.
17 11-03770, 2001 WL 36383080, at *4 (N.D. Cal. Oct. 18, 2011) (denying motion for
18 expedited discovery into the identity of anonymous Doe defendants because "Plaintiff's
19 motion of expedited discovery has failed to demonstrate that the complaint could withstand
20 a motion to dismiss.".)] Defendants contend that plaintiff "took no action in this case to
21 identify and serve the Unknown [Named] Defendants for 2 ½ years after naming these
22 Defendants in the FAC filed on December 17, 2014." [Doc. No. 131, at p. 4.] Defendants
23 argue that plaintiff failed to meet the requirements of Federal Rule of Civil Procedure 4(m),
24 to identify and serve these defendants within 120 days, or show good cause for an
25 extension. *Id.*

26 Second, defendants contend that if the pending Motion to Dismiss for Failure to
27 Prosecute [Doc. No. 126] is granted, then the instant discovery Motion will be moot. [Doc.
28 No. 131, at p. 5.] However, if the Motion to Dismiss is denied, then defendants contend

1 that a renewed meet and confer will be more productive than in the instant procedural
2 posture. Defendants highlight that one of the objections raised in the meet and confer in
3 connection with the instant Motion was “that the time for serving the Unknown [Named]
4 Defendant[s] under Fed. R. Civ. P. 4(m) expired long ago.” *Id.* (internal citation omitted).
5 Defendants argue that the Court’s ruling on this same issue in the pending Motion to
6 Dismiss will inform this objection. *Id.*

7 Third, defendants argue that the scope of the discovery sought by plaintiff exceeds
8 what is necessary to identify the Unknown Named Defendants. [Doc. No. 131, at p. 5.]
9 Plaintiff’s proposed Notice of Deposition would require production of multiple witnesses
10 to testify about ten different topics. *Id.* at p. 6. Further, the proposed Notice of Deposition
11 includes a “lengthy Request for Production of Documents with three pages of instructions
12 and definitions, and fifteen Requests for Production of Documents.” [Doc. No. 131, at p. 7
13 (internal citation omitted).] Specifically, defendants contend:

14 [T]he discovery that Plaintiff actually seeks permission to conduct
15 against ATF is not ‘limited solely to discovery that would aid in
16 identifying the Unknown Named Defendants,’ as Plaintiff’s Ex Parte
17 Application represents. Instead, Plaintiff seeks discovery bearing on the
18 merits of its case (*see especially* Request for Production Nos. 11-14), and
19 expressly demands production of attorney-client communications (*see*
20 Request for Production No. 12). The breadth of this discovery and the
burden that it will impose on [BATFE] far exceeds what is necessary and
proportionate to accomplish the limited purpose of identifying the
Unknown Defendants.

21 *Id.* at p. 9 (internal citations omitted).

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23 Finally, defendants contend that plaintiff’s initial proposal of serving a Notice of
24 Deposition and Request for Production of Documents on the person(s) most knowledgeable
25 at the BATFE, attached as Exhibit G to the Motion “would have no legal effect” because
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1 BATFE is not a party to this case.¹ [Doc. No. 131, at p. 9.] Defendants assert that a Rule
2 45 subpoena is required to obtain testimony and documents from third parties. *Id.* (internal
3 citation omitted). In response to this argument, in the Reply, plaintiff requests that the
4 Court allow plaintiff to substitute the proposed Noticed of Deposition for a Rule 45
5 subpoena to the BATFE, attached as Exhibit D to Scott A. McMillan’s declaration. [Doc.
6 No. 132-1, at p. 8.]

7 ***C. Analysis***

8 Based on a review of plaintiff’s moving papers, it is apparent that it would be overly
9 burdensome at this early stage of the litigation for defendants and/or third parties to be
10 ordered to provide plaintiff with access to the information that plaintiff now seeks.
11 Contrary to plaintiff’s representations, the expedited discovery sought here is not narrowly
12 tailored and seeks far more than the minimum amount needed to identify the Unknown
13 Named Defendants.

14 For example, the proposed Notice of Deposition would require a witness to testify
15 about topics that go well beyond the identity of the Unknown Named Defendants, including
16 but not limited to the following: (1) the identities and contact information for all BATFE
17 personnel responsible for forming the affidavit; (2) the identities and contact information
18 for all BATFE personnel involved in advising on the legal grounds for the formation of the
19 affidavit and search warrant; (3) the identities and contact information for all BATFE
20 personnel who were custodians of plaintiff’s inventory as described in the SAC ¶¶ 12, 63,
21 79-82, 134, 144, and 164, including but not limited to, business documents [SAC ¶ 80],
22 contents of plaintiff’s safe [SAC ¶ 81], 5,804 unfinished polymer lower receivers [SAC ¶
23 82], plaintiff’s “Rudius” unfinished pistol frames [SAC ¶ 134], plastic bins [*Id.*], and
24 customer list [SAC ¶ 144]; (4) communications regarding the determination that 80% of
25 unfinished AR-15 lower receivers were classified as a “firearm” as applied to plaintiff; and,
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28 ¹ BATFE was dismissed from this case on November 19, 2015 and is not a named defendant in the
instant SAC. [Doc. Nos. 106, 109.]

1 (5) the identities and contact information for all custodians of all documents pertaining to
2 the above-listed topics/requests [Doc. No. 131, at pp. 6-7]. Similarly, almost all of the
3 fifteen requests for production of documents proposed by plaintiff are overbroad and go to
4 the merits of the case. *Id.* at pp. 8-9 (*see, e.g.*, RFP No. 13 seeking “all documents relating
5 to the search warrant” and RFP No. 14 seeking “all documents relating to the affidavit”).

6 Plaintiff argues that “injustice would prevail if [p]laintiff’s proposed Motion is
7 denied, as [p]laintiff has no other recourse to proceed in this case than to take early
8 discovery.” [Doc. No. 132-1, at p. 7.] Further, plaintiff argues that its requests are “made
9 so that it may determine the identities of the unknown, named defendants, as well as Does
10 who should be added to the case based on the allegations and those individuals involved in
11 the raid and events leading up to them.” *Id.* at p. 8.

12 Notwithstanding plaintiff’s argument, there is no suggestion that the time necessary
13 to narrow the issues in the case through the currently pending Motions to Dismiss made
14 pursuant to Federal Rule of Civil Procedure 12(b) will make it difficult or impossible for
15 plaintiff to obtain access to the discovery he seeks in the normal course. In fact, the
16 defendants have raised a legal challenge to plaintiff’s SAC contending that the Federal
17 Rule of Civil Procedure Rule 4(m) deadline expired more than two years ago, and plaintiff
18 has neither applied for nor obtained an extension. [Doc. No. 126-1, at p. 2.] Therefore, the
19 Court should first be given an opportunity to decide defendants’ pending Motions to
20 Dismiss, which appear to raise potentially valid legal challenges, before considering
21 plaintiff’s overarching discovery requests. If the Court denies the pending Motions to
22 Dismiss, such rulings will necessitate renewed meet and confer sessions between the
23 parties regarding the scope of necessary discovery. After discovery commences in the
24 normal course, plaintiff will have an opportunity to serve subpoenas and written discovery

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1 requests on defendants and third parties, and to then, if necessary, request leave to amend
2 his SAC to add new parties that could not have been discovered earlier.²

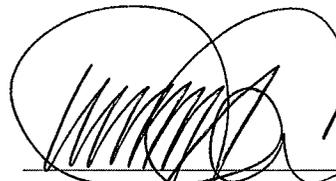
3 Accordingly, under the circumstances presented, including the overbroad nature of
4 plaintiffs' discovery demands and the procedural posture of the case, the Court finds that
5 plaintiff has not established good cause for expedited discovery.

6 **IV. CONCLUSION**

7 Based on the foregoing, the Court finds that plaintiff's Motion [Doc. No. 117] must
8 be **DENIED** without prejudice. Plaintiff has not shown good cause for an order allowing
9 him to proceed with discovery on an expedited basis.

10 **IT SO ORDERED.**

11 Dated: June 21, 2017


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13 Hon. Karen S. Crawford
14 United States Magistrate Judge
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25 ² Under Federal Rule of Civil Procedure 15(a)(2), a complaint may be amended after responsive
26 pleadings have been filed "with the court's Leave." Fed. R. Civ. P. 15(a)(2) "The Court should freely
27 give leave when justice so requires." *Id.* Even after the Court enters a Scheduling Order under Federal
28 Rule of Civil Procedure 16(b) and sets a deadline for amending the pleadings, the deadline can be
modified upon a showing of "good cause." Fed. R. Civ. P. 16(b). "Rule 16's 'good cause' standard
focuses on the diligence of the party seeking amendment." *Jackson v. Laureate, Inc.*, 186 F.R.D. 605,
607 (E.D. Cal. 1999).