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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ARIIX, LLC,  
  
Plaintiff,  
  
v.  
  
NUTRISearch CORPORATION, et al.,  
  
Defendants.

Case No.: 17-cv-00320-LAB-BGS

**ORDER DENYING PLAINTIFF’S  
MOTION TO COMPEL RULE 26(f)  
CONFERENCE**

[ECF No. 15]

Before the Court is a motion filed by Plaintiff Ariix, LLC (“Plaintiff”), on June 6, 2017, to compel Defendants to participate in a discovery conference under Federal Rule of Civil Procedure 26(f). (ECF No. 15.) Defendant NutriSearch Corporation and Lyle MacWilliam (“Defendants”) filed an Opposition to Plaintiff’s Motion on June 14, 2017. (ECF No. 16.) Subsequently, on June 21, 2017, Plaintiff filed a Reply in support of their motion. (ECF No. 17.) For the reasons discussed below, Plaintiff’s request is **DENIED**.

**I. BACKGROUND**

Plaintiff filed a Complaint against Defendants on February 16, 2017. (ECF No. 1.) The Complaint alleges False Advertising under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125 (a). (Id.) Defendants filed a Motion to Dismiss or Stay the Proceedings on

1 March 8, 2017. (ECF No. 5.) In their Motion, Defendants state: “(1) consumer reports are  
2 exempt from the Lanham Act in these circumstances, and (2) the first-filed Canadian  
3 complaint is a more convenient forum and (3) the doctrine of international abstention  
4 dictates that the case should be stayed or dismissed.” (Id. at 4.)

## 5 **II. DISCUSSION**

### 6 **A. Parties’ Arguments**

7 This dispute between the parties arises from a discovery scheduling issue. Plaintiff  
8 filed the present Motion to Compel Defendants to participate in a Discovery Conference  
9 under Rule 26(f) to allow Plaintiff to proceed with discovery. (ECF No. 15.) Plaintiff’s  
10 Motion asserts that discovery is not stayed pending a Motion to Dismiss. (Id. at 3.)  
11 Plaintiff further asserts that since the Defendants have not requested a stay of discovery,  
12 they must participate in a Rule 26(f) conference now. (Id. at 6.)

13 In their Opposition to Plaintiff’s Motion to Compel, Defendants state that the Rule  
14 26(f) Conference does not occur until after the Early Neutral Evaluation (“ENE”) takes  
15 place. (ECF No. 16 at 2.) Defendants also state that Plaintiff lacks good cause to start  
16 discovery early. (Id. at 3.)

### 17 **B. Standard of Review and Analysis**

18 Federal Rule of Civil Procedure 26(d) states that “[a] party may not seek discovery  
19 from any source before the parties have conferred as required by Rule 26(f), except in a  
20 proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized  
21 by these rules, by stipulation, or by court order.” A Rule 26(f) conference is to be held  
22 “as soon as practicable—and in any event at least 21 days before a scheduling conference  
23 is to be held or a scheduling order is due under Rule 16(b).” Fed. R. Civ. P. 26(f)(1).  
24 However, Rule 16(b) allows the judge to delay issuance of a scheduling order (and  
25 consequently the Rule 26(f) conference) if good cause for delay is found. Fed. R. Civ. P.  
26 16(b). In this case, a Rule 26(f) conference had not yet been ordered, and discovery had  
27 not officially commenced in light of the Court’s Civil Local Rule 16.1.a.1, which finds  
28 good cause to adjust the timing for issuing a scheduling order in order to accommodate

1 this district’s Early Neutral Evaluation (ENE) procedure. In addition, our Local Rules  
2 provide that “[a]t the discretion of a judge assigned to the case, ENE and case  
3 management conferences need not be set in ... [c]ases in which a substantial number of  
4 defendants have not answered.” Civ. L.R. 16.1.e. Here, Defendants have not filed an  
5 answer, and a motion to dismiss is before the Court. As there has been no answer filed,  
6 the Court has not scheduled an ENE and the parties have not been given a timetable or  
7 directed to proceed under Rule 26(f). As such the Court finds good cause for the delay in  
8 scheduling the Rule 26(f) conference until the answer has been filed. See Civ. L.R. 16.1.

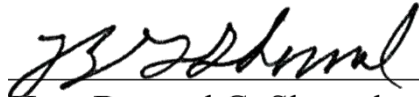
9 Further, the Ninth Circuit has held that the purpose of the 12(b)(6) motion is to  
10 challenge the legal sufficiency of a complaint before engaging in extensive discovery.  
11 *Rutman Wine Co. v. E & J Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) (explaining,  
12 “[i]t is a sounder practice to determine whether there is any reasonable likelihood that  
13 plaintiffs can construct a claim before forcing the parties to undergo the expense of  
14 discovery.”). The Court concurs, and therefore finds that the issues raised in the motion  
15 to dismiss should be resolved before the Plaintiff’s discovery requests.

### 16 17 **III. CONCLUSION**

18 For the reasons above, the Court **DENIES** Plaintiff’s Motion to Compel a Rule  
19 26(f) Conference.

20 **IT IS SO ORDERED.**

21 Dated: September 22, 2017

22   
23 Hon. Bernard G. Skomal  
24 United States Magistrate Judge  
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