IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

TOP BRASS SPORTS, INC. d/b/a Lucky Pawn,	)	
Plaintiff,	)	
vs.	)	**Civ. No. 05-2455 D/P**
ALBERTO GONZALEZ, et al.,	)	
Defendants.	)	

ORDER DENYING IN PART DEFENDANT'S MOTION FOR PROTECTIVE ORDER

Before the court is the defendant's Motion for Protective Order and Opposition to Petitioner's Request for Jury Trial, filed December 30, 2005 (dkt #10), by and through the United States Attorney for the Western District of Tennessee ("the Government"). Plaintiff Top Brass Sports, Inc. ("Top Brass") filed a response in opposition on January 13, 2006.[1] For the reasons below, the defendant's motion is DENIED in part and GRANTED in part.

I. BACKGROUND

Top Brass operates a firearms and sporting goods business in

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[1]Top Brass's response totals 38 pages, in violation of Local Rule 7.2(e) ("Memoranda in support of or in opposition to motions shall not exceed twenty pages without prior court approval"). Although the court will excuse the violation and will consider the response in its entirety, Top Brass is reminded that it must seek leave of court prior to filing a motion or response in excess of twenty pages.

Millington, Tennessee. Since 1985, Top Brass has been licensed by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("the Bureau") to sell firearms. Beginning on July 21, 2003, Drew Elmer, an employee of the Bureau, performed an inspection of Top Brass's inventory and records dating back to 1985. Following his inspection, Elmer recommended that Top Brass's firearms license be revoked. On October 15, 2003, the Bureau issued a Notice of Revocation of License to Top Brass. The notice alleged that Top Brass willfully failed to maintain records and receipts for the sale of 105 firearms and sold four firearms without first obtaining the required law enforcement certification from its purchasers. Each of these allegations were based upon Elmer's July 2003 inspection.

On December 9, 2004, an administrative hearing was conducted in Nashville, Tennessee, before Bureau Officer Connie Tuell. On May 2, 2005, the Bureau's Director of Industry Operations Harry L. McCabe provided Top Brass with its "Findings of Fact and Conclusions of Law" which summarized the hearing. McCabe simultaneously issued Top Brass a "Final Notice of Denial of Application or Revocation of Firearms License." On June 24, 2005, Top Brass filed a complaint in this case, seeking a *de novo* judicial review of the administrative hearing pursuant to 18 U.S.C. § 923(f)(3). Top Brass alleges that the Bureau failed to disclose pertinent, discoverable information prior to the December, 2004

administrative hearing, and that this failure prevented Top Brass from preparing an adequate defense. Top Brass alleges further that the December, 2004, hearing failed to comply with the requirements of the Administrative Procedures Act, and the administrative record is therefore incomplete and unreliable for purposes of a *de novo* review before the district court.

In the present motion, the Government asks this court to enter a protective order precluding either party from conducting any discovery in this case. The Government argues that discovery should not be conducted in a *de novo* review of the Bureau's administrative hearing unless "substantial doubt infects the agency's findings of fact." Def. Mem. at 12 (quoting Stein's, Inc. v. Blumenthal, 639 F.2d 463, 466 (7th Cir. 1980)). In the alternative, the Government seeks to limit discovery to any issues that undermine the Bureau's findings from its December, 2004 administrative hearing. The government argues further that the court should reject Top Brass's request for a jury trial, as it has no right to a jury trial in this action.

II. ANALYSIS

A. Motion for Protective Order

Title 18 U.S.C. § 923 governs the licensing requirements for businesses engaged in the sale of firearms. Subsection (f) sets forth the appeals process for any individual or business whose application for a license has been denied or for any license holder

whose license has been revoked. It provides in relevant part as follows:

> If after a hearing held under paragraph (2) the Attorney General decides not to reverse his decision to deny an application or revoke a license, the Attorney General shall give notice of his decision to the aggrieved party. The aggrieved party may at any time within sixty days after the date notice was given under this paragraph file a petition with the United States district court for the district in which he resides or has his principal place of business for a de novo judicial review of such denial or revocation. In a proceeding conducted under this subsection, the court may consider any evidence submitted by the parties to the proceeding whether or not such evidence was considered at the hearing held under paragraph (2). If the court decides that the Attorney General was not authorized to deny the application or to revoke the license, the court shall order the Attorney General to take such action as may be necessary to comply with the judgment of the court.

18 U.S.C. § 923(f)(3) (2005). The district court must therefore conduct a *de novo* review of the administrative decision to revoke Top Brass's license. See Kuss v. United States, No. 04-453, 2005 U.S. Dist. LEXIS 28773, at *9-10 (E.D. Ky. Nov. 18, 2005) (unpublished). Although the district court need not conduct a trial *de novo*, the "administrative decision is not clothed . . . with any presumption of correctness." 3 Bridges, Inc. v. United States, 216 F.Supp. 2d 655, 657 (E.D. Ky. 2002).

Cases interpreting an earlier version of 18 U.S.C. § 923(f)(3) concluded that "Congress intended to afford the district court the discretion to receive additional evidence to be considered along with that in the administrative record when some good reason to do so either appears in the administrative record or is presented by

the party petitioning for judicial review."[2] Stein's Inc., 639 F.2d at 466; Perri v. Department of Treasury, BATF, 637 F.2d 1332, 1335 (9th Cir. 1981). Seizing upon this "good reason" language, the Government argues that discovery should not be permitted in this case unless the court finds that "substantial doubt infects the agency's findings of fact." Def.'s Mem. at 12 (quoting Stein's, Inc., 639 F.2d at 466).

Title 18 U.S.C. § 923(f)(3) was amended in 1986, however, to provide specifically that "[i]n a proceeding conducted under this subsection, the court may consider any evidence submitted by the parties to the proceeding *whether or not such evidence was considered at the hearing under paragraph (2)*." See 18 U.S.C.

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[2]The earlier version of 18 U.S.C. § 923(f)(3) considered by these courts provided as follows:

> If after a hearing held under paragraph (2) the Secretary decides not to reverse his decision to deny an application or revoke a license, the Secretary shall give notice of his decision to the aggrieved party. The aggrieved party may at any time within 60 days after the date notice was given under this paragraph file a petition with the United States district court for the district in which he resides or has his principal place of business for a judicial review of such denial or revocation. In a proceeding conducted under this subsection, the court may consider any evidence submitted by the parties to the proceeding. If the court decides that the Secretary was not authorized to deny the application or to revoke the license, the court shall order the Secretary to take such action as may be necessary to comply with the judgment of the court.

Stein's, Inc., 649 F.2d at 465 n.3.

§ 923(f)(3) 1986 Amendments Pub. L. 99-308, § 103(6)(A) (emphasis added). Thus, nothing in the language of 18 U.S.C. § 923(f)(3) suggests that the court must find good cause or have substantial doubt in the agency's findings of fact to accept evidence that was not submitted by the parties for the administrative hearing. Rather, it is within the court's discretion to consider evidence that was not offered at the administrative hearing. Kuss, 2005 U.S. Dist. LEXIS 28773, at *10. Recent case law interpreting the amendment to 18 U.S.C. § 923(f)(3) further suggests that the parties may offer additional evidence at trial. See Clust, Inc. v. Bureau of Alcohol, Tobacco, Firearms and Explosives, No. 04-839, 2005 WL 1651794, at *4 (S.D. Ohio July 13, 2005) (unpublished) ("The district court must allow the parties an opportunity to present additional evidence, even if that evidence was not presented to the hearing officer."); Trader Vic's, Ltd. v. O'Neill, 169 F.Supp. 2d 957, 961 (N.D. Ind. 2001) (permitting additional evidence "so long as the evidence meets the other requirements of relevancy and admissibility under the Federal Rules of Evidence"); DiMartino v. Buckles, 129 F.Supp. 2d 824, 827 (D. Md. 2001) ("The reviewing court can consider any evidence submitted by the parties regardless of whether that evidence was submitted in the administrative proceeding.").

Nonetheless, the Government argues that the Federal Rules of Civil Procedure suggest that discovery is inappropriate in this

case. The Government points to Fed. R. Civ. P. 26(a)(1)(E)(i), which exempts, *inter alia*, "an action for review on an administrative record" from the Rule's initial disclosure requirement.[3] This argument is not well taken. As the committee notes to the 2000 amendments to Rule 26 make clear, "there is no restriction on commencement of discovery" in actions listed under subdivision (a)(1)(E). Fed. R. Civ. P. 26 (a)(1)(E) advisory committee notes (2000). Moreover, Rule 26(a)(1)(E)(i) only limits the initial disclosures a party must make in cases which involve

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[3]Rule 26(a)(1)(E) provides in full:

> The following categories of proceedings are exempt from initial disclosure under Rule 26(a)(1):
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> (i) an action for review on an administrative record;
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> (ii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence;
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> (iii) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision;
> (iv) an action to enforce or quash an administrative summons or subpoena;
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> (v) an action by the United States to recover benefit payments;
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> (vi) an action by the United States to collect on a student loan guaranteed by the United States;
>
> (vii) a proceeding ancillary to proceedings in other courts; and
>
> (viii) an action to enforce an arbitration award.

Fed. R. Civ. P. 26(a)(1)(E).

the review of an administrative record. "The objective of [this rule] is to identify cases in which there is likely to be little or no discovery, or in which initial disclosure appears unlikely to contribute to the effective development of the case." Fed. R. Civ. P. 26 (a)(1)(E) advisory committee notes (2000). Rather than preclude the use of discovery in these cases, Rule 26 merely attempts to avoid cumbersome disclosure requirements where a substantial amount of information has already been shared and where initial disclosures may be redundant. Thus, the court concludes that Rule 26 does not support the government's argument for a protective order prohibiting all discovery in this case.

As 18 U.S.C. § 923(f)(3) expressly contemplates the admission of additional evidence, it follows that some limited discovery should be permitted to determine what additional relevant evidence is available. Moreover, the Government has not cited to any reported case that has prohibited discovery under subsection 923(f)(3). Thus, the Government's motion for a protective order is DENIED. The appropriate areas and limits for discovery in this case will be discussed at the court's March 30, 2006 scheduling conference.

B. Right to Jury Trial

In its June 24, 2005, complaint, Top Brass demanded that "those issues which are triable to a jury be tried to a jury." Pl.'s Compl. at 18. In the present motion, the Government argues

that Top Brass has no right to trial by jury in this case. "It is fundamental that the United States, as sovereign, is immune from suit without its consent." Clay v. United States, 199 F.3d 876, 879 (6th Cir. 1999) (quoting United States v. Dalm, 494 U.S. 596, 608 (1990)). The terms of its consent to be sued define the court's jurisdiction to entertain the suit. Lehman v. Nakshian, 453 U.S. 156, 160 (1981); Clay, 199 F.3d at 879. Thus, the general rule is that the Seventh Amendment does not grant a plaintiff the right to trial by jury in suits against the United States. Harris v. United States Dep't of Agriculture, No. 96-5783, 1997 U.S. App. LEXIS 22839, at *8 (6th Cir. Aug. 26, 1997) (unpublished). Rather, the terms of the Government's waiver of immunity must unequivocally grant a plaintiff the right to a jury trial. Lehman, 453 U.S. at 160-61 (noting that "[w]hen Congress has waived the sovereign immunity of the United States, it has almost always conditioned that waiver upon a plaintiff's relinquishing any claim to a jury trial"); Harris, 1997 U.S. App. LEXIS 22839, at *8; Jones-Hailey v. Corp. of Tennessee Valley Authority, 660 F.Supp. 551, 552 (E.D. Tenn. 1987).

Here, the Gun Control Act does not unequivocally grant a plaintiff the right to a trial by jury in the *de novo* review of firearms license actions. The language of 18 U.S.C. § 923(f)(3), in fact, suggests the opposite: "In a proceeding conducted under this subsection, *the court* may consider any evidence submitted by

the parties to the proceeding whether or not such evidence was considered at the hearing held under paragraph (2). If *the court* decides that the Attorney General was not authorized to deny the application or to revoke the license, *the court* shall order the Attorney General to take such action as may be necessary to comply with the judgment of the court." 18 U.S.C. § 923(f)(3) (2005) (emphasis added). Moreover, Top Brass has not cited – and the court in conducting its own research could not find – any case that supports Top Brass's argument that it is entitled to a jury trial under section 923. The Government's motion with respect to its opposition to plaintiff's demand for a trial by jury is therefore GRANTED.

III. CONCLUSION

For the reasons above, defendant's Motion for Protective Order is DENIED. Defendant's opposition to Top Brass's demand for a trial by jury is GRANTED.

IT IS SO ORDERED.

S/ Tu M. Pham
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TU M. PHAM
United States Magistrate Judge

March 28, 2006
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Date