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Pro Querente

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA**

MISSOULA DIVISION

**MONTANA SHOOTING SPORTS
ASSOCIATION, INC., SECOND
AMENDMENT FOUNDATION,
Inc., and GARY MARBUT,**

Plaintiffs,

vs.

**ERIC H. HOLDER, JR.,
ATTORNEY GENERAL OF THE
UNITED STATES OF AMERICA,**

Defendant.

Cause No. CV-09-147-M-DWM-JCL

**SECOND AMENDED
COMPLAINT**

Plaintiffs Montana Shooting Sports Association, Inc.; Second

Amendment Foundation, Inc.; and Gary Marbut (“PLAINTIFFS”), by and through their counsel of record, submit, pursuant to the April 12, 2010, deadline in the Court’s Case Scheduling Order (Dkt. 17, ¶ 2), their Second Amended Complaint against Eric H. Holder, Attorney General of the United States of America (“DEFENDANT”) as follows:

1. PLAINTIFF Montana Shooting Sports Association, Inc. (“MSSA”) is a non-profit corporation organized under the laws of the State of Montana. The purpose of MSSA is to “support and promote firearm safety, the shooting sports, hunting, firearm collecting, and personal protection using firearms, to provide education to its members concerning shooting, firearms, safety, hunting and the right to keep and bear arms, to own and/or manage one or more shooting facilities for the use of its members and/or others, and to conduct such other activities as serves the needs of its members.” MSSA regularly lobbies the Montana Legislature and its efforts were instrumental in the passage of the Montana statutes at issue in this civil action. MSSA is a statewide organization and has a genuine and viable interest in this case, as its goals and existence depend upon asserting and protecting the rights and interests of its members and the enforcement of Montana law.

2. PLAINTIFF Second Amendment Foundation, Inc. ("SAF"), is a non-profit membership organization incorporated under the laws of the State of Washington, with its principal place of business in Bellevue, Washington. SAF has over 650,000 members and supporters nationwide, including Montana. The purposes of SAF include promoting the exercise of the right to keep and bear arms, education, research, publishing and legal action focusing on the Constitutional right to privately own and possess firearms, and the consequences of gun control.

3. PLAINTIFF Gary Marbut ("MARBUT") is the President of MSSA, a citizen of the United States, and a resident of Missoula County, Montana. Marbut is responsible for promoting and protecting the interests of MSSA and its members. Further, as an individual, Marbut desires to manufacture and sell small arms and small arms ammunition per the Montana Firearms Freedom Act.

4. Defendant Eric H. Holder, Jr. ("DEFENDANT"), is the appointed, qualified, confirmed and acting Attorney General and head of the Department of Justice of the United States of America and, as such, is the official charged with administering the United States Bureau of Alcohol,

Tobacco, Firearms and Explosives ("BATFE") and enforcement of both the National Firearms Act ("NFA"), and the Gun Control Act of 1968 ("GCA"). DEFENDANT maintains his office as Attorney General in the District of Columbia.

5. The NFA was passed with the purpose of and are intended by the United States Congress to restrict legal weapons that could be used readily and efficiently by criminals or gangsters." The GCA, as amended, was passed with the purpose of and are intended by the United States Congress to (A) regulate interstate commerce in firearms so as to reduce the likelihood that they fall into the hands of the lawless and those who might misuse them; (B) assist the States and their political subdivisions to enforce their firearms control laws and ordinances; and (B) help combat the skyrocketing increases in the incidence of serious crime in the United States. Neither the NFA nor the GCA were adopted for the purpose of regulating commercial activity. Both are intended instead to prevent violent crime.

6. This is an action for a declaratory judgment on a federal question under 28 U.S.C. §§ 1331, 2201 and 2202.

7. Jurisdiction over this action is proper in this Court pursuant to

the waiver of sovereign immunity provided under 5 U.S.C. §§ 702 and 704.

8. Venue for this action is proper pursuant to 28 U.S.C. § 1391(e) because PLAINTIFFS reside in this district and no real property is involved in this action.

9. The Montana Firearms Freedom Act ("MFFA"), Title 30, Chapter 20, Part 1, whose language is incorporated herein by this reference, became effective October 1, 2009. Its scope is limited to activity occurring exclusively within the State of Montana. The Montana Legislature declares, in MONT. CODE ANN. § 30-20-102, that the authority for the MFFA is the following:

- A. The Tenth Amendment to the United States Constitution guarantees to the states and their people all powers not granted to the federal government elsewhere in the constitution and reserves to the state and people of Montana certain powers as they were understood at the time that Montana was admitted to statehood in 1889. The guaranty of those powers is a matter of contract between the state and people of Montana and the United States as of the time that the compact with the United States was agreed upon and adopted by Montana and the United States in 1889.
- B. The Ninth Amendment to the United States Constitution guarantees to the people rights not granted in the constitution and reserves to the people of Montana certain rights as they were understood at the time that Montana was admitted to statehood in 1889. The guaranty of those

rights is a matter of contract between the state and people of Montana and the United States as of the time that the compact with the United States was agreed upon and adopted by Montana and the United States in 1889.

- C. The regulation of intrastate commerce is vested in the states under the Ninth and Tenth Amendments to the United States Constitution, particularly if not expressly preempted by federal law. Congress has not expressly preempted state regulation of intrastate commerce pertaining to the manufacture on an intrastate basis of firearms, firearms accessories, and ammunition.
- D. The Second Amendment to the United States Constitution reserves to the people the right to keep and bear arms as that right was understood at the time that Montana was admitted to statehood in 1889, and the guaranty of the right is a matter of contract between the state and people of Montana and the United States as of the time that the compact with the United States was agreed upon and adopted by Montana and the United States in 1889.
- E. Article II, section 12, of the Montana Constitution clearly secures to Montana citizens, and prohibits government interference with, the right of individual Montana citizens to keep and bear arms. This constitutional protection is unchanged from the 1889 Montana constitution, which was approved by congress and the people of Montana, and the right exists as it was understood at the time that the compact with the United States was agreed upon and adopted by Montana and the United States in 1889.

10. The activity authorized under the MFFA is primarily political. It has a commercial element, but the legislative purpose is to allow Montanans who wish to avoid interference by the United States

government in their legitimate and constitutionally-protected activity (specifically, manufacturing and selling small arms and small arms ammunition) to do so if they strictly confine such activity to the political boundaries of their own state. Although there are commercial elements to the statutory scheme, they are incidental to the object and function of the MFFA. Passage of the MFFA was an express exercise by the State of Montana of powers reserved to the states and to the people under the Ninth and Tenth Amendments of the United States Constitution. The MFFA is also authorized under the conditions of the compact with the United States that Montana entered upon admission to the union. The United States Congress therefore has no authority, under the limited powers granted to it by the United States Constitution, to preempt the MFFA.

11. PLAINTIFF MARBUT wishes to manufacture and sell small arms and small arms ammunition to customers exclusively in Montana, pursuant to the MFFA, without complying with the NFA or the GCA, or other applicable federal laws. PLAINTIFF MARBUT has sought permission and assurances from BATFE that he may proceed under MFFA without fear of criminal prosecution or civil sanction, so long as he strictly confines such activity to the State of Montana. He sought such permission by written

requests to the BATFE.

12. PLAINTIFF MSSA and PLAINTIFF SAF have members, along with other Montana citizens, who wish to manufacture and sell small arms and small arms ammunition to customers in Montana, pursuant to the MFFA, without complying with the NFA or the GCA, or other applicable federal laws.

13. Like PLAINTIFF MARBUT, other members of PLAINTIFF MSSA and PLAINTIFF SAF, and other Montana citizens, have expressly sought permission and assurances from BATFE that they may proceed under MFFA without complying with federal statutes and without fear of criminal prosecution or civil sanction, so long as they strictly confine such activity to the State of Montana. They sought such permission by written requests to BATFE.

14. BATFE, in response to the written requests by PLAINTIFFS and others, ruled on September 29, 2009, that "to the extent the [MFFA] conflicts with federal firearms laws and regulations, federal law supersedes the MFFA, and all provisions of the GCA and NFA, and their corresponding regulations, continue to apply." (See copy of letter attached hereto as Exhibit A.) It also ruled that for PLAINTIFF MARBUT or anyone else

similarly situated to manufacture firearms, firearms accessories or ammunition, they must first file ATF Form 1 (for "a National Firearms Act firearm") and/or ATF Form 7 (for other "firearms, firearms accessories, and ammunition"), and have such applications approved, and be licensed by BATFE prior to manufacture under the MFFA. (Id.) This final agency action on the question is consistent with an "open letter" BATFE issued to the general public on July 16, 2009, warning that MFFA conflicts with federal firearms law and regulations, and that federal law therefore supersedes the MFFA. (See copy of letter attached hereto as Exhibit B.) The ruling did not inform MARBUT or anyone else of any right to appeal BATFE's decision.

15. PLAINTIFF MARBUT has hundreds of customers who have offered to pay his stated asking price for both firearms and firearms ammunition manufactured under the MFFA. In particular, Marbut has a substantial opportunity to market a "Montana Buckaroo" youth model, single shot, bolt-action .22 caliber rifle to hundreds of customers who have placed orders for many hundreds of firearms. These sales, however, are all specifically conditioned on the "Montana Buckaroo" being manufactured pursuant to the MFFA, without NFA or GCA licensing or, as the customers

see it, BATFE interference. They do not want, have not ordered, and will not buy the "Montana Buckaroo" if it is manufactured by federal firearms licensees. The State of Montana has also expressed keen interest in buying non-lethal ammunition from PLAINTIFF MARBUT for law enforcement and game enforcement purposes. But for BATFE's ruling that PLAINTIFF MARBUT and anyone else similarly situated to manufacture firearms, firearms or ammunition, they must first file ATF Form 1 (for "a National Firearms Act firearm") and ATF Form 7 (for other "firearms, firearms accessories, and ammunition"), and have such applications approved, and be licensed by BATFE prior to manufacture, PLAINTIFF MARBUT would sell his manufactures for significant economic gain.

16. As a result of BATFE'S final action in issuing its September 29, 2009, decision to the effect that PLAINTIFF MARBUT and other Montana citizens are required to submit ATF Form 1 and/a AFT Form 7 for BATFE approval prior to exercising their rights under the MFFA, no Montanan who wishes to proceed under the MFFA can do so without becoming licensed by BATFE, and without fear of federal criminal prosecution and/or civil sanctions, including fines and/or forfeiture if they fail to obtain such licensing. Neither PLAINTIFF MARBUT nor the members of PLAINTIFF

MSSA and PLAINTIFF SAF are willing to submit to NFA or GCA licensing and registration procedures, record keeping requirements and marking mandates, or to pay the requisite BATFE licensing fees and taxes, nor are they willing to submit to what they see as BATFE's overreaching and arbitrary regulatory oversight, as set forth and required under the U.S. Code of Federal Regulations.

17. Federal law does not preempt the MFFA and cannot be invoked to regulate or prosecute Montana citizens acting in compliance with the MFFA because denying federal preemption of the provisions of MFFA regulating the class of activity protected by the MFFA would not undercut the regulation of the interstate market in that activity. Likewise, federal law does not preempt the MFFA because the class of activity protected by the MFFA does not and would not substantially affect interstate commerce.

18. Federal law does not preempt the MFFA and cannot be invoked to regulate or prosecute Montana citizens acting in compliance with the MFFA because the activity protected by the MFFA substantially advances the traditional interests of the state in promoting public health, safety and welfare.

19. BATFE'S ruling that those who wish to proceed pursuant to

MFFA must first submit ATF Form 1 and ATF Form 7, and obtain licensing from BATFE before doing so, does not comply with the United States Constitution, as amended.

20. There is therefore a real and actual controversy between PLAINTIFFS and DEFENDANT regarding whether the United States Constitution confers power on Congress to regulate activities contemplated by the MFFA. Under the Ninth and Tenth Amendments to the United States Constitution, all regulatory authority of all such activities within Montana's political borders is left to the sole discretion of Montana and its people. Federal law therefore does not preempt the MFFA and cannot be invoked to regulate or prosecute Montana citizens acting in compliance with the MFFA, so long as they do so solely within the political borders of the State of Montana.

21. There is also a real and actual controversy between PLAINTIFFS and DEFENDANT regarding whether federal preemption of the provisions of MFFA regulating the class of activity protected by the MFFA would undercut the regulation of the interstate market in that activity, and whether the class of activity protected by the MFFA actually affects interstate commerce in either a diminimus or insubstantial fashion.

22. In addition, PLAINTIFFS face irreparable harm from BATFE'S ruling that they must first submit ATF Form 1 and ATF Form 7, and obtain licenses from BATFE before proceeding pursuant to the MFFA, and from the BATFE'S threat to enforce the NFA and/or the GCA and other federal laws and regulations through the prosecution of civil actions and criminal indictments against Montana citizens who proceed in compliance with MFFA. The threat of federal civil action and/or criminal prosecution faced under the circumstances effectively blocks PLAINTIFFS and all law abiding citizens from exercising their rights under and otherwise benefitting from the MFFA, a wrong for which they have no adequate legal remedy at law.

REQUEST FOR RELIEF

PLAINTIFFS respectfully request:

A. An order reversing BATFE'S final agency decision requiring PLAINTIFFS, and anyone else similarly situated who wish to manufacture firearms, firearms accessories or ammunition, to first file with BATFE an ATF Form 1 and/or ATF Form 7, to have such applications approved, and to be licensed by BATFE prior to manufacturing any firearms, firearm accessories or ammunition;

B. A declaratory judgment pursuant to 28 U.S.C. § 2201 and

FED. R. CIV. P. 57 for the purpose of determining and adjudicating the questions of actual controversy between the parties as set forth above, that:

- (i) The United States Constitution confers no power on Congress to regulate the special rights and activities contemplated by the MFFA;
- (ii) Under the Ninth and Tenth Amendments of the United States Constitution, all regulatory authority of all such activities within Montana's political borders is left in the sole discretion of the State of Montana; and
- (iii) Federal law does not preempt the MFFA and cannot be invoked to regulate or prosecute Montana citizens acting in compliance with the MFFA.

C. A permanent injunction order enjoining DEFENDANT, and his successors, and any agency of the United States of America from prosecuting any civil action, criminal indictment or information under the NFA or the GCA, or any other federal laws and regulations, against PLAINTIFFS or other Montana citizens acting solely within the political borders of the State of Montana, in compliance with the MFFA;

D. An order awarding PLAINTIFFS costs and reasonable attorney fees under the private attorney general doctrine; and

E. PLAINTIFFS request such other and further relief as may be

proper in the circumstances.

Dated this 9th day of April, 2010.

Respectfully Submitted,
SULLIVAN, TABARACCI & RHOADES, P.C.

By: /s/ Quentin M. Rhoades
Quentin M. Rhoades
Pro Querente