

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION**

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MONTANA SHOOTING SPORTS)	
ASSOCIATION, et. al.,)	
)	09-CV-147-DWM-JCL
Plaintiffs,)	
)	Defendant’s Response to
v.)	Plaintiffs’ Surreply in
)	Support of Defendant’s
ERIC H. HOLDER, JR.)	Motion to Dismiss
)	
Defendant.)	
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INTRODUCTION

Plaintiffs Montana Shooting Sports Association, the Second Amendment Foundation, and Gary Marbut moved on June 2, 2010 to file a Surreply in Opposition to Defendant’s Motion to Dismiss. Plaintiffs attached a proposed memorandum as an exhibit to their Motion, in which they briefly discussed standing. In another exhibit, plaintiffs presented additional details regarding Mr. Marbut’s intent to manufacture and sell the Montana Buckaroo rifle and certain “non-lethal” ammunition under the Montana Firearms Freedom Act (“MFFA”). Despite plaintiffs’ attempts to supplement their pleadings with new facts as this litigation progresses, they have failed to cure the jurisdictional deficiencies raised by defendants in their Motion to Dismiss. Plaintiffs have not established standing to bring their pre-enforcement challenge, nor can they claim that an inability to

manufacture firearms under the MFFA has caused them direct economic injury. As such, plaintiffs' claims should be dismissed for lack of standing, pursuant to Fed. R. Civ. P. 12(b)(1).

ARGUMENT

A. Plaintiffs Do Not Have Standing to Bring a Pre-Enforcement Challenge.

Plaintiffs' wish to manufacture a pilot quantity of firearms on an indefinite future date, or once this Court finds that the MFFA is lawful, does not establish the concrete intent to violate Federal law required for pre-enforcement standing. Moreover, the additional facts in Exhibit B do not support an imminent threat of prosecution, nor do they point to a history of Federal law enforcement. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (plaintiff must demonstrate a "credible threat of prosecution" that is more than "speculative" to establish standing).¹

Plaintiffs have included a declaration from Gary Marbut, in which Mr. Marbut discusses his development of 12-gauge round beanbag ammunition and the Montana Buckaroo rifle. *See* Plaintiffs' Motion to Strike or File Surreply, Ex. B, Marbut Declaration [Dkt. No. 86-2] at 6. The declaration and attached exhibits

¹ Plaintiffs' Surreply is apparently limited to Mr. Marbut's standing, and thus adds nothing to rebut defendant's arguments against the Second Amendment Foundation's organizational standing.

communicate Mr. Marbut's desire to manufacture and sell small arms and ammunition pursuant to the MFFA and the means to complete a pilot project *if* the law is upheld. Thus, Mr. Marbut has not alleged a plan to violate Federal law at a particular time or on a date certain. He expressly refuses to manufacture or sell any firearms until the MFFA is declared valid. *See* Plaintiffs' Motion to Strike or File Surreply, Ex. B, Buckaroo Buyers E-mails [Dkt. No. 86-18] (asking customers to commit to purchasing a Montana Buckaroo rifle if Mr. Marbut succeeds in winning this lawsuit). These allegations amount only to " 'some day' intentions [without] any specification of when the some day will be," that are inadequate show an actual or imminent injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992); *see also San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1128 (9th Cir. 1996) (claimants should specify a "particular time or date on which [they] intend to violate the [statute]," especially when the "acts necessary to make plaintiffs' injury — prosecution under the challenged statute — materialize are almost entirely within plaintiff's own control").

Furthermore, the plaintiff has failed to explain the logistics of large-scale manufacture of firearms and ammunition under the MFFA. For example, Mr. Marbut has not disclosed production costs or how those costs will be financed. In addition, while plaintiff Marbut may have hundreds of persons willing to respond to an e-mail message in support of this lawsuit, whether these third parties will

ever purchase a firearm they have yet to see, hold, test-fire or know the cost of, is purely speculative.

Mr. Marbut's plans are juxtaposed with the facts supporting standing in *Raich v. Gonzales*, 500 F.3d 850, 857 (9th Cir. 2007), where plaintiff was producing and regularly using marijuana in violation of Federal law. The court found that plaintiff Raich was engaging in activity threatened by law enforcement at the time of her lawsuit. *See id.* Similarly, in *Navegar, Inc. v. United States*, 103 F.3d 994, 1001 (D.C. Cir. 1997), the D.C. Circuit permitted only certain gun manufacturers, whose guns were expressly named in the 1994 assault weapons statute, to challenge statutory bans on the specific models of firearms being produced by plaintiffs when the law was passed. According to the court, the statute targeted plaintiffs' engagement in ongoing and specified conduct. *See id.* In fact, other manufacturers with claims similar to Mr. Marbut's were denied standing. *See id.* In contrast to the plaintiffs in *Raich* and *Navegar*, Mr. Marbut can allege only a "hypothetical intent to violate [Federal] law." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000).

Moreover, the additional evidence put forth by Mr. Marbut does not establish a genuine threat of prosecution for any particular act at any particular

time or place.² The September 29, 2009 letter sent to plaintiffs by the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”), responded to plaintiffs’ own inquiry and re-stated their obligations under Federal law. The agency notified plaintiffs that “any unlicensed manufacturing of firearms or ammunition for sale or resale . . . is a violation of Federal law and *could* lead to the forfeiture of such items and *potential* criminal prosecution.” September 29 Letter at 2 (emphasis added). Therefore, plaintiffs have no basis for pre-enforcement standing, which may only be found where plaintiff is personally threatened with criminal penalties, or where a statute singles out the plaintiff for prosecution. *See Navegar*, 103 F.3d at 1001 (permitting gun manufacturers to challenge statutory bans on specific brands of firearms that plaintiffs produced because the statute targeted plaintiffs for prosecution). ATF’s guidance regarding the Federal firearms laws cannot form the basis of plaintiff’s pre-enforcement challenge. *See Nat’l Rifle Ass’n v. Magaw*, 132 F.3d 272, 293-94 (6th Cir. 1997) (rejecting plaintiffs’ standing claims based on ATF agents’ advice that questioned activity could prompt Federal prosecution);

² Plaintiffs analogize the facts in this case to a line of Supreme Court precedent that bases standing on environmental harm. According to plaintiffs, “fear of prosecution, like a fear of pollution, results in standing.” Plaintiffs’ Motion to Strike or File Surreply, Ex. A, Surreply Brief [Dkt. No. 86-1] at 5 (citing *Friends of the Earth v. Laidlaw Environmental Serv.*, 528 U.S. 167, 182 (2000); *United States v. SCRAP*, 412 U.S. 669, 689 n. 14 (1973); *Japan Whaling Ass’n v. American Cetacean Soc.*, 478 U.S. 221, 231 n. 4 (1986)). In these cases, however, the environmental injuries complained of directly affected plaintiffs’ daily activities. These authorities are inapposite to plaintiffs’ pre-enforcement challenge here.

Western Mining Council v. Watt, 643 F.2d 618, 626 (9th Cir. 1981) (finding statement by agency official that “plaintiffs cannot dig in the ground” did not constitute a specific threat of prosecution); *Rincon Band of Mission Indians v. County of San Diego*, 495 F.2d 1, 4 (9th Cir. 1974) (finding sheriff’s statement that ordinance prohibiting gambling would be enforced within his jurisdiction did not constitute credible threat of prosecution).

Plaintiff Marbut maintains only speculative plans to produce firearms pursuant to the MFFA, and he has never been threatened with prosecution under Federal law. In addition, plaintiffs have failed to show any history of prosecutions or enforcement of Federal law in light of the MFFA. *See San Diego County*, 98 F.3d at 1128 (“Plaintiffs’ inability to point to any history of prosecutions undercuts their argument that they face a genuine threat of prosecution”). According to both *Raich* and *San Diego County*, as well as other gun-related pre-enforcement challenges to legislation, Mr. Marbut does not have standing to bring a pre-enforcement challenge as to the validity of the MFFA.

B. Plaintiffs Have Not Asserted Direct Economic Injury Sufficient to Establish Standing.

Plaintiffs maintain that Mr. Marbut’s declaration establishes “indisputable economic injury.” *See* Plaintiffs’ Motion to Strike or File Surreply, Ex. A, Surreply Brief [Dkt. No. 86-1] at 6. This claim is unfounded, however,

considering that the plaintiff has yet to manufacture a single MFFA-firearm. The declaration and supporting records establish Mr. Marbut's intention to produce a quantity of firearms in the future — once the activity is deemed lawful — as a “pilot project.” *See* Plaintiffs' Motion to Strike or File Surreply, Ex. B, Buckaroo Report [Dkt. No. 86-6] at 2. Plaintiff Marbut has not described production costs, pricing, or demand for the firearms he plans to sell beyond this experimental phase. Without these facts, it is impossible to determine his loss of potential profit.

Furthermore, Mr. Marbut's prospective customers have pledged to order firearms in response to a “Help Needed” e-mail solicitation, the primary purpose of which was to establish standing for this lawsuit. *See* Plaintiffs' Motion to Strike or File Surreply, Ex. B, Buckaroo Buyers E-mails [Dkt. No. 86-18]. These customers have provided no down payment or enforceable assurances that they will complete their orders once the firearms are produced and definitively priced. At most, these e-mails constitute tentative expressions of interest, nothing more. They cannot form the basis for any claim of sufficient economic harm to establish standing. *Longstreet Delicatessen, Fine Wines & Specialty Coffees, L.L.C., et al. v. Jolly*, No. 106-cv-00986, 2007 WL 2815022 at *18 (E.D. Cal. Sept. 25, 2007) (“Plaintiff . . . has made allegations of economic harm but has offered no evidence of actual harm suffered other than by potential lost sales.”); *see also United Transp. Union v. I.C.C.*, 891 F.2d 908, 912 (D.C. Cir. 1989) (internal punctuation omitted)

(“When considering any chain of allegations for standing purposes, we may reject as overly speculative those links which are predictions of future events, especially future actions to be taken by third parties”).

Finally, and as plaintiffs concede, economic harm confers standing only where plaintiffs suffer a tangible loss. *See* Plaintiffs’ Motion to Strike or File Surreply, Ex. A, Surreply Brief [Dkt. No. 86-1] at 6 (citing *Nat’l Audubon Society, Inc. v. Davis*, 307 F.3d 835 (9th Cir. 2002)). In *National Audubon Society*, the case on which plaintiffs principally rely, animal trappers who utilized certain “leg-hold” traps had standing to challenge a California law banning the trap’s usage due to economic harm suffered. In fact, the Ninth Circuit in that case distinguished the circumstances in both *Thomas* and *San Diego County*, stating that “the core of the trappers’ injuries is not a hypothetical risk of prosecution but rather actual, ongoing economic harm resulting from [plaintiffs’] cessation of trapping.” *Nat’l Audubon*, 307 F.3d at 855. *See also Central Ariz. Water Conserv. Dist. v. EPA*, 990 F.2d 1531, 1537 (9th Cir. 1993) (plaintiffs suffered concrete financial harm, as they were required to repay up to twenty-four percent of the cost of installing and maintaining required emission controls); *Fair v. EPA*, 795 F.2d 851 (9th Cir. 1986) (plaintiffs had standing to challenge Federal regulation requiring them to finance construction of a sewer). Under *National Audubon*’s “tangible economic injury”

standard, Mr. Marbut's loss of a hypothetical profit from a hoped-for business is insufficient to establish standing.

CONCLUSION

Plaintiffs lack standing to challenge the conflict between the MFFA and the Federal firearms laws because they have not established an imminent, credible threat of prosecution. Nor have plaintiffs alleged a concrete financial loss sufficient to base standing on a theory of economic injury. Accordingly, the Court must dismiss this action for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

Dated: July 6, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.1(d)(2)(E), I certify that this Response to Plaintiffs' Surreply in Support of Defendant's Motion to Dismiss is 1,895 words, and thus complies with Rule 7.1(d)(2)(B).

s/ Jessica B. Leinwand
Jessica B. Leinwand

CERTIFICATE OF SERVICE

I hereby certify that, on July 6, 2010, a copy of this Response to Plaintiffs' Surreply in Support of Defendant's Motion to Dismiss was served upon counsel of record by electronic means through electronic filing.

s/ Jessica B. Leinwand
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