

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONTANA SHOOTING SPORTS ASSOCIATION; SECOND AMENDMENT FOUNDATION,
INC.; GARY MARBUT,

Plaintiffs-Appellants,

and

STEVE BULLOCK, Montana Attorney General,

Intervenor,

v.

ERIC H. HOLDER, JR., Attorney General of the United States,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

GOVERNMENT'S SUPPLEMENTAL EXCERPTS OF RECORD

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

MONTANA SHOOTING SPORTS)	CV 09-147-M-DWM-JCL
ASSOCIATION, SECOND AMENDMENT))	
FOUNDATION, INC., and GARY)	
MARBUT,)	
)	
Plaintiffs,)	
)	
vs.)	OPINION
)	
ERIC H. HOLDER, JR., ATTORNEY)	
GENERAL OF THE UNITED STATES OF)	
AMERICA,)	
)	
Defendants.)	
_____)	

Plaintiffs Montana Shooting Sports Association, Second Amendment Foundation, and Gary Marbut seek declaratory and injunctive relief allowing them to manufacture and sell firearms free from the constraints imposed by federal firearm laws. Their central contention is that the Montana Firearms Freedom Act

and the constitutional limitations on Congress' power to regulate intrastate activity preclude the application of the federal Gun Control Act and National Firearms Act to the manufacture and sale of firearms made exclusively in Montana from materials originating in Montana and sold to customers in Montana.

The contentions in the Second Amended Complaint ask for administrative review of the United States Bureau of Alcohol, Tobacco, Firearms and Explosives' ("ATF") letters advising Plaintiffs that federal firearms laws remain in effect regardless of the passage of the Montana Firearms Freedom Act. Plaintiffs also want a declaratory judgment that (1) Congress lacks the constitutional authority to regulate the activity covered by the Montana Firearms Freedom Act; (2) The Ninth and Tenth Amendments confer all such regulatory authority upon the State of Montana; and (3) federal law does not preempt the Montana Firearms Freedom Act and cannot be invoked to regulate activity covered by the state law. Finally, Plaintiffs request an injunction forbidding the United States from taking any action against Montana citizens acting in compliance with the Montana Firearms Freedom Act.

Eric H. Holder, Jr., Attorney General of the United States of America ("United States") has filed a motion to dismiss the Second Amendment Complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. United States Magistrate Judge Jeremiah C. Lynch issued

Findings and Recommendations in which he recommended that the United States' motion to dismiss be granted. Judge Lynch concluded that the Court lacks subject matter jurisdiction over the administrative review claim because the ATF's letters do not constitute final agency action and therefore the United States has not waived sovereign immunity under the Administrative Procedure Act, 5 U.S.C. § 702. Judge Lynch found no subject matter jurisdiction over the remaining constitutional claims because the individual Plaintiff and the organizational Plaintiffs lack standing. Plaintiff Marbut lacks standing, Judge Lynch determined, because he is not subject to a specific threat of imminent prosecution and because he has not alleged concrete plans to manufacture firearms in an existing business operation. Judge Lynch found the organizational Plaintiffs lack standing because they have not identified an individual member who meets the standing requirement.

Based his findings with respect to the Court's subject matter jurisdiction, Judge Lynch recommended that the United States' motion to dismiss be granted. Despite that recommendation, and because of the possibility that this Court might disagree with his conclusions on the question of subject matter jurisdiction, Judge Lynch then went on to consider the United States' argument for dismissal on the ground that the Plaintiffs have failed to state a claim upon which relief may be granted. Judge Lynch gave careful consideration to the existing case law

discussing the limits of the Congress' power to regulate intrastate commercial activity that substantially affects interstate commerce, and concluded that Plaintiffs have failed to state a claim because the federal firearms laws are legitimate exercises of the commerce power as applied to the activity that Plaintiffs seek to have protected from federal regulation. Judge Lynch then determined that the Plaintiffs' failure to state a claim provides an alternative basis for dismissal of the non-APA claims.

Plaintiffs filed nominal objections to Judge Lynch's Findings and Recommendations, as did Intervenor the State of Montana. Plaintiffs' objections consist of a list of 12 bullet points summarily describing aspects on Judge Lynch's analysis with which they disagree. The objections are not supported by any analysis or citation to legal authority, save for a generalized reference to the arguments presented before Judge Lynch. Plaintiffs conclude their objections with a citation to the recent United States Supreme Court case of McDonald v. City of Chicago, 561 U.S. ___, 130 S.Ct. 3020 (2010), and an argument that they should be granted leave to amend their pleadings a third time so that they may allege a Second Amendment claim.

A party filing objections to the findings and recommendations of a magistrate is entitled to do novo review of the issues that are "properly objected to." Fed. R. Civ. P. 72(b)(3); see also 28 U.S.C. § 636(b)(1). A party makes a

proper objection by identifying the parts of the magistrate's disposition that the party finds objectionable and presenting legal argument and supporting authority, such that the district court is able to identify the issues and the reasons supporting a contrary result. It is not sufficient for the objecting party to merely restate arguments made before the magistrate or to incorporate those arguments by reference. Hagberg v. Astrue, 2009 WL 3386595 at *1 (D. Mont. 2009). "There is no benefit if the district court[] is required to review the entire matter de novo because the objecting party merely repeats the arguments rejected by the magistrate. In such situations, this Court follows other courts that have overruled the objections without analysis." Id. Because the Plaintiffs made no effort to support their summary objections with argument or authority explaining why they disagree with Judge Lynch's disposition, their objections are reviewed for clear error. McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981). Clear error exists if the Court is left with a "definite and firm conviction that a mistake has been committed." United States v. Syrax, 235 F.3d 422, 427 (9th Cir. 2000).

As for the Plaintiffs' request that they be permitted to amend their pleadings, such a request is properly presented not in the Plaintiffs' objections to Judge Lynch's Findings and Recommendations, but rather in a motion made first before Judge Lynch, who is the presiding judge over such matters under 28 U.S.C.

§ 636(b)(1)(B). See Order dated February 11, 2010 (Doc. No. 20). Emboldened by a new Second Amendment history discovered in Heller,¹ and the Montana Legislature's prerogative to riddle the statutory code with "political statements,"² the Plaintiffs, having already twice amended their pleadings, failed to raise the Second Amendment issue until after Judge Lynch filed his Findings and Recommendations, despite being explicitly put on notice of the deficiency on May 18, 2010, when the United States noted in its Reply that the Second Amended Complaint does not allege a Second Amendment violation. Doc. No. 70 at 38.

The State of Montana's objections question Judge Lynch's determination that the application of the federal firearms laws to the intrastate manufacture and sale of firearms is a permissible exercise of the commerce power under Gonzalez v. Raich, 545 U.S. 1 (2005), and United States v. Stewart, 451 F.3d 1071 (9th Cir. 2006). Montana argues that Raich and Stewart are now distinguishable because unlike the marijuana and machine guns at issue in those cases, the guns manufactured under the Montana Firearms Freedom Act would be stamped with a "Made in Montana" logo. The State also argues Stewart was based on a faulty view of the Second Amendment.

There is no basis in Raich or Stewart for the assumption that the addition of

¹District of Columbia v. Heller, 554 U.S. _____, 130 S.Ct. 3020 (2008).

²See Judge Lynch's Findings and Recommendations, Doc. No. 103 at 57 n.18.

a logo specifying the origin of the product would have led to a different result. It is clear from Stewart that the focus is not on the uniqueness of the product, but rather on its potential to affect interstate commerce. To the Stewart court, the fact that the machine guns at issue there had never traveled in interstate commerce was “entirely irrelevant.” 451 F.3d at 1077. The court went on to explain:

Neither the fully mature homegrown marijuana at issue in Raich nor the harvested wheat at issue in Wickard had ever crossed state lines either. Nor does it matter that Stewart's activities alone did not have a substantial effect on interstate commerce. Since Wickard, it has been well established that we aggregate intra-state activities in as-applied Commerce Clause challenges. After Raich, the proper focus in that inquiry is not Stewart and his unique homemade machineguns, but all homemade machineguns manufactured intrastate. Moreover, we do not require the government to prove that those activities *actually* affected interstate commerce;³ we merely inquire whether Congress had a rational basis for so concluding.

Id. (emphasis in original).

Like the machine guns in Stewart, guns manufactured in accordance with the Montana Firearms Freedom Act would be interchangeable economic substitutes with other firearms, regardless of the existence of a stamp indicating the weapon was “Made in Montana.” The origin of the firearm is of no importance to a customer whose primary concern is that it functions properly, and

³This point disposes of the State of Montana’s objection faulting Judge Lynch for denying the Plaintiffs the opportunity to present proof of the nature of the intrastate market for firearms in Montana. Whether such a market exists goes to the *actual* affect of the proposed activity on interstate commerce; such proof is not necessary to the determination whether Congress had a rational basis for concluding that the activity would affect interstate commerce in the aggregate.

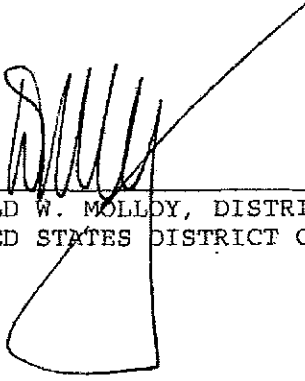
is especially irrelevant to the buyer whose primary purpose is to avoid federal regulation and registration because he is prohibited from possessing firearms under federal law. The State has failed to distinguish Raich and Stewart in a meaningful way, and Judge Lynch's application of them to this case is correct.

Having reviewed de novo those aspects of Judge Lynch's analysis that were properly objected to, and having reviewed the remainder of his analysis for clear error, the Court adopts Judge Lynch's Findings and Recommendations (Doc. No. 103) in full.

Accordingly, IT IS HEREBY ORDERED that the United States' motion to dismiss is GRANTED, and this case is DISMISSED due to lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted.

The Clerk of Court is directed to enter judgment in favor of the United States and against Plaintiffs in accordance with this Opinion.

DATED this 18th day of October, 2010.



DONALD W. MOLLOY, DISTRICT JUDGE
UNITED STATES DISTRICT COURT

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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.

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

EXHIBIT A

GRE24



U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Special Agent in Charge

*Denver Field Division
Denver, Colorado 80294
www.atf.gov*

September 29, 2009

788000: DJR
5300

Mr. Gary Marbut
P.O. Box 16106
Missoula, MT 59808

Dear Mr. Marbut,

I have reviewed your letter dated August 21, 2009. In that letter you indicate that you wish to manufacture firearms, firearms accessories, or ammunition consistent with the Montana Firearms Freedom Act (Montana HB 246.) You inquired whether under Federal law it is permissible to manufacture such items for your sole use, and whether you could manufacture such items for sale to others within Montana.

As a first matter, the manufacture of firearms, ammunition, and firearms accessories for your personal use does generally not require licensure under the Federal Gun Control Act of 1968, as amended (GCA). If the firearm, however, is of a type that is defined under 26 U.S.C. Section 5845 (i.e., a National Firearms Act firearm), you will need to file an ATF Form 1, and have it approved by ATF prior to manufacture. I note that in Montana HB 246, the definition of firearm accessory includes sound suppressors. A sound suppressor could come within the definition of a silencer or muffler under the National Firearms Act (NFA), and manufacture of such, even for personal use, would require filing an ATF Form 1, and approval from ATF.

Your other concern is whether it is permissible under Federal law to manufacture firearms, firearms accessories, or ammunition for sale to others within Montana. The manufacture of firearms or ammunition for sale to others within Montana requires licensure by ATF. In order to become a licensed manufacturer you will need to file an ATF Form 7 with ATF's Federal Firearms Licensing Center. I have attached a form with instructions for your use. The manufacture of firearms accessories for sale within Montana, with the exception of sound suppressors, does not require a license from ATF. If you desire to manufacture sound suppressors for sale, please contact our ATF Salt

GRE25

(2)

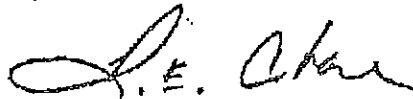
Lake City Industry Operations Office at 801-524-7000. That office can assist you in becoming a manufacturer of NFA firearms.

Also, if you are engaging in the business of manufacturing firearms or ammunition for sale to others, and desire ATF to examine a sample of such firearm or ammunition, please contact ATF's Firearms Technology Branch at 304-260-3414, who will arrange to have the firearm or ammunition evaluated at the local ATF office in Montana.

As a final matter, ATF hopes to work with you in obtaining any necessary manufacturing licenses required under the GCA, or registration of firearms covered by the NFA. However, you should be aware that any unlicensed manufacturing of firearms or ammunition for sale or resale, or the manufacture of any NFA weapons, including sound suppressors, without proper registration and payment of tax, is a violation of Federal law and could lead to the forfeiture of such items and potential criminal prosecution under the GCA or NFA. To the extent that the Montana Firearms Freedom Act conflicts with Federal firearms laws and regulations, Federal law supersedes the Act, and all provisions of the GCA and NFA, and their corresponding regulations, continue to apply.

If you have any questions about any of the matters addressed in this letter, please contact Resident Agent in Charge Ken Bray at 406-657-6886.

Sincerely,

A handwritten signature in black ink, appearing to read "R. E. Chase". The signature is fluid and cursive, with the first name "Richard" and last name "Chase" clearly legible.

Richard E. Chase
Special Agent in Charge
Denver Field Division

EXHIBIT B

GRE27



U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Assistant Director

Washington, DC 20216

JUL 16 2009


OPEN LETTER TO ALL MONTANA
FEDERAL FIREARMS LICENSEES

The purpose of this letter is to provide guidance on your obligations as a Federal firearms licensee ("FFL"). The Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") is dedicated to your success in meeting your requirements as a Federal firearms licensee. The following guidance is intended to assist you in accomplishing this goal.

The passage of the Montana Firearms Freedom Act, Montana House Bill 246 ("Act"), effective October 1, 2009, has generated questions from industry members as to how this State law may affect them while engaged in a firearms business activity. The Act purports to exempt personal firearms, firearms accessories, and ammunition manufactured in the State, and which remain in the State, from most Federal firearms laws and regulations. However, because the Act conflicts with Federal firearms laws and regulations, Federal law supersedes the Act, and all provisions of the Gun Control Act and the National Firearms Act, and their corresponding regulations, continue to apply.

As you may know, Federal law requires a license to engage in the business of manufacturing firearms or ammunition, or to deal in firearms, even if the firearms or ammunition remain within the same state. All firearms manufactured by a licensee must be properly marked. Additionally, each licensee must record the type, model, caliber or gauge, and serial number of each firearm manufactured or otherwise acquired, and the date such manufacture or other acquisition was made. The information required must be recorded in the licensee's records not later than the seventh day following the date such manufacture or other acquisition was made. Firearms transaction records and NICS background checks must be conducted prior to disposition of firearms to unlicensed persons. These, as well as other Federal requirements and prohibitions, apply whether or not the firearms or ammunition have crossed state lines.

If you have any questions regarding the Federal firearms laws and regulations, please contact your local ATF office. ATF works closely with the firearms industry and appreciates the important role the industry plays in combating violent crime. A listing of ATF office phone numbers can be found at <http://www.atf.gov/contact/field.htm>.


Carson W. Carroll
Assistant Director
(Enforcement Programs and Services)

GRE28

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 2011, I filed the foregoing Government Record Excerpts and four copies with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by overnight Federal Express.

I also caused the foregoing Government Record Excerpts to be served by overnight Federal Express on the following:

Quentin M. Rhoades, Attorney
Direct: 406-721-9700
Sullivan, Tabaracci & Rhoades, P.C.
3rd Floor
Firm: 406-721-9700
1821 South Avenue West
Third Floor
Missoula, MT 59801

A handwritten signature in cursive script, reading "Abby C. Wright", is written over a horizontal line.

Abby C. Wright
Abby.Wright@usdoj.gov