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**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 Opposition to
v.)	Plaintiffs’ Motion to Strike
)	Portions of Defendant’s
ERIC H. HOLDER, JR.)	Reply Memorandum or for
)	Leave to File a Surreply
Defendant.)	
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INTRODUCTION

Plaintiffs’ Motion to Strike or for Leave to File a Surreply is a meritless attempt to prevent the defendant from responding to plaintiffs’ Second Amended Complaint and also to add more facts in support of plaintiffs’ standing claims. Plaintiff alleges that defendant argued two “new issues” in his Reply Memorandum: (1) whether plaintiffs’ Second Amended Complaint was filed in accordance with Fed. R. Civ. P. 15(a); and (2) whether plaintiffs intend in fact to

manufacture the “Montana Buckaroo” and certain “less than lethal” firearms ammunition. *See* Plaintiffs’ Motion to Strike or File Surreply at 2. To the contrary, defendant properly focused, in his Reply, on the actions taken by plaintiffs after defendant filed his Motion to Dismiss and opening brief. In particular, defendant discussed plaintiffs’ filing of a Second Amended Complaint on April 9, 2010, and those facts alleged for the first time in support of jurisdiction. Nor can plaintiffs legitimately characterize the defendant as raising “new issues” regarding plaintiffs’ lack of standing to maintain this pre-enforcement challenge. This point has been extensively argued by both parties. Plaintiffs’ Motion is yet another effort to shore up the Complaint with additional allegations of fact after having read defendant’s jurisdictional arguments. Plaintiffs’ attempt to preclude defendant from responding to those new allegations should not be countenanced.

Accordingly, Plaintiffs’ Motion to Strike should be denied, and if the Court grants plaintiffs’ alternative Motion to File a Surreply, defendant would respectfully request an opportunity to respond. That proposed response is attached to this memorandum as Exhibit A.

ARGUMENT

A. Plaintiffs’ Motion to Strike Footnote 2 Should Fail.

Plaintiffs seek to strike Footnote 2 of Defendant’s Reply Memorandum, which points out that plaintiffs filed their Second Amended Complaint without

adhering to the requirements of Fed R. Civ. P. 15(a). Defendant notes the irony of plaintiffs' motion to strike that footnote, given that defendant could have moved to strike plaintiffs' Second Amended Complaint in its entirety for failure to comply with the Federal Rules.¹ Instead, defendant identified the procedural deficiency in Footnote 2 and accepted the Second Amended Complaint as the basis for plaintiffs' suit. In fact, defendant went on to discuss each of plaintiffs' newly-alleged facts in his Reply Memorandum. *See* Defendant's Reply Memorandum at 5-7, 9-10. Because the defendant did not ask the Court to disregard the Second Amended Complaint and instead addressed the allegations therein, Plaintiffs' Motion to Strike or File a Surreply on this point is baseless.

¹ As defendant pointed out in his Reply Memorandum, while plaintiffs' Second Amended Complaint was not untimely, it did not comply with Rule 15(a) and, therefore, was improper. Plaintiffs do not dispute their failure to adhere to Rule 15, but instead claim that their Second Amended Complaint was filed pursuant to the Court's Case Scheduling Order [Dkt. No. 17], which set an April 12, 2010 deadline for the parties to amend their pleadings. *See* Plaintiffs' Motion to Strike or File Surreply, Ex. A, Surreply Brief [Dkt. No. 86-1] at 3. Further, plaintiffs maintain that once the Court entered its Scheduling Order, their ability to amend the pleadings "was governed by Rule 16(b), not Rule 15(a)." *Id.* at 3 (quoting *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992)).

The *Johnson* decision, however, addressed the issue of filing time-limits. Plaintiff in that case sought to add a defendant to the complaint after the court-ordered deadline for joining additional parties had passed. The court denied plaintiff leave to amend after the deadline, finding that plaintiff could not establish "good cause" to join an additional defendant under Rule 16. *See Johnson*, 975 F.2d at 608; *see also* Fed. R. Civ. P. 16(b)(4) ("A schedule may be modified only for good cause and with the judge's consent."). According to the Ninth Circuit, "[o]nce the district court had filed a pretrial scheduling order pursuant to Federal Rule of Civil Procedure 16, which established a timetable for amending pleadings, that rule's standards controlled." 975 F.2d at 607-08. The court in *Johnson* did not suggest that amendments made within the established timetable need not comply with Rule 15 but, instead, that amendments made after the deadline would also need to comply with the more rigorous standard of Rule 16(b)(4).

B. Plaintiffs Improperly Seek to Strike Defendant’s Standing Arguments.

Next, plaintiffs improperly describe aspects of defendant’s standing argument as “new issues” that should be stricken or subject to further argument. *See* Plaintiffs’ Motion to Strike or File Surreply at 2-3. The details plaintiffs challenge,² however, are relevant to one of the three factors that need to be satisfied before the plaintiffs can obtain pre-enforcement review. According to the Ninth Circuit, a plaintiff bringing a pre-enforcement suit must articulate a concrete intention to violate the Federal statute at issue, in addition to showing an imminent threat of prosecution and a history and/or pattern of Federal law enforcement. *See San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1127-28 (9th Cir. 1996) (denying standing because plaintiffs alleged only that they “wish[ed] and intend[ed]” to violate the Crime Control Act and could not establish a specific threat or history of prosecution). Therefore, in order to decide standing, the Court must determine whether Mr. Marbut intends in fact to manufacture and sell MFFA-

² Plaintiffs take issue with the following portions of Defendant’s Reply:

- (a) [whether] plaintiffs have “material plans” to take part “in any activity threatened by Federal law enforcement.” Defendant’s Reply Memorandum at 6.
- (b) plaintiff Marbut has not claimed he has the means to manufacture MFFA-firearms, nor has he taken any steps toward realizing this commercial venture. *Id.*
- (c) purchases by the hundreds of customers who have placed orders with Marbut for the Montana Buckaroo rifle is [sic] speculative. *Id.*
- (d) plaintiffs have not decided to manufacture and sell MSSA [sic] firearms. *Id.* at 6.
- (e) Marbut has provided no details to describe production costs and pricing for the firearms he plans to sell [sic] customers have provided no compensation or any assurances that they will complete their alleged orders. *Id.* at 10.

Plaintiffs’ Motion to Strike or File Surreply at 2-3.

firearms prior to a holding that Federal law does not preempt the Montana statute. Nothing that plaintiffs have filed to date demonstrates their intention to violate Federal law.

Moreover, plaintiffs' Motion disregards the thorough briefing on this issue submitted by both parties. In his opening memorandum, defendant addressed the indefinite nature of plaintiff Marbut's plan to manufacture firearms under the Montana Firearms Freedom Act ("MFFA"), explaining that Mr. Marbut cited merely a "desire to manufacture and sell small arms and . . . ammunition per the Montana Firearms Freedom Act." *See* Defendant's Memorandum in Support of its Motion to Dismiss at 11; *see also San Diego County*, 98 F.3d at 1126-27 (citing plaintiffs' "indefinite" intention to violate the Crime Control Act as evidence that plaintiffs failed to show a "high degree of immediacy that is necessary for standing"). Plaintiffs subsequently amended their Complaint to allege that Mr. Marbut has "hundreds of customers who have offered to pay . . . for both firearms and firearms ammunition manufactured under the MFFA." *See* Second Amended Complaint ("Second Am. Compl.") ¶¶ 12-15. Plaintiffs also claimed that interested customers have placed orders for the "Montana Buckaroo" rifle, and that the State of Montana expressed interest in purchasing non-lethal ammunition. Second Am. Compl. ¶¶ 15-16. These allegations were expanded upon in Plaintiffs' Opposition to Defendant's Motion to Dismiss. *See* Plaintiffs' Opposition Brief at 9

(“Marbut has already secured hundreds of committed customers who are not merely willing to buy the Montana Buckaroo youth rifle, but who have already placed bona fide orders for it”).

Therefore, defendant, in his Reply, appropriately responded to plaintiffs’ arguments and any newly-alleged facts. Defendant asserted that while plaintiffs’ additional allegations affirmed a local interest in MFFA-manufactured firearms, Mr. Marbut’s plans to violate Federal law were no more definitive. *See* Defendant’s Reply Memorandum at 6-7. In addition, defendant mentioned certain factual omissions in the Second Amended Complaint, filed after defendant’s Motion to Dismiss, including how plaintiff Marbut intended to manufacture the Buckaroo rifle, and whether he had determined production costs or potential profit. *See id.* Without this information, defendant maintained that Mr. Marbut’s plans to manufacture firearms under the MFFA were too speculative and did not rise to an intention to violate Federal law. *See id.*

To the extent that plaintiffs object to defendant’s discussion of economic harm as a basis for standing, their argument is without merit.³ Plaintiffs explicitly raised this issue in their Opposition, claiming that “[p]laintiffs have suffered past

³ On this point, plaintiffs contest the following aspect of defendant’s Reply:

(f) ATF’s letter prohibiting Marbut from taking advantage of the MFFA has no effect on his day-to-day business. *Id.* at 16.

Plaintiffs’ Motion to Strike or File Surreply at 3.

injury in the loss of economic opportunities since September 29, 2009, because they must apply to the Government in order to sell MFFA firearms . . .

[c]onsequently, they have already suffered economic harm which is always enough to confer standing.” Plaintiffs’ Opposition Brief at 8. Plaintiffs should have expected defendant to argue — as he did in his Reply — that plaintiffs failed to allege direct economic injury sufficient to establish standing.

C. Plaintiffs’ Exhibit B to their Motion to Strike Does Not Support their Motion.

Plaintiffs, through their Motion to Strike or File a Surreply, once again seek to supplement their arguments with new facts. Exhibit B, which includes a declaration from plaintiff Marbut, attempts to bolster the Second Amended Complaint with more detailed allegations regarding the manufacture, production, and design of certain non-lethal ammunition and the Montana Buckaroo rifle.⁴ *See* Plaintiffs’ Motion to Strike or File Surreply, Ex. B [Dkt. Nos. 86-2 – 86-18]. In

⁴ In his declaration, Mr. Marbut discusses his development of 12-gauge round beanbag ammunition and the Montana Buckaroo. *See* Plaintiffs’ Motion to Strike or File Surreply, Ex. B, Marbut Declaration [Dkt. No. 86-2] at 6. The declaration and attached exhibits 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).

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.

addition, plaintiff Marbut has included e-mail correspondence from various Montana residents pledging to order MFFA-manufactured firearms once they are produced. *See* Plaintiffs' Motion to Strike or File Surreply, Ex. B, Buckaroo Buyers E-mails [Dkt. No. 86-18]. Plaintiffs included these facts only after defendant emphasized the jurisdictional hurdles plaintiffs continued to face.⁵ *See* Defendant's Reply Memorandum at 5-6, 10. By plaintiffs' own admission, Exhibit B could have been attached to the Second Amended Complaint or included as an attachment to plaintiffs' Memorandum in Opposition. *See* Plaintiffs' Motion to Strike or File Surreply, Ex. A, Surreply Brief [Dkt. No. 86-1] at 2 ("The pleader's memorandum or brief can be used to clarify allegations of the pleading to flesh out inferences that can be reasonably drawn from the pleadings." (citing *Pegram v. Herdrich*, 530 U.S. 211, 230 (2000))).

Plaintiffs should not be permitted to amend their Complaint a third time through opposition to defendant's motion, nor should they be allowed to continually add facts while seeking a Court order to prohibit defendant from responding to their new allegations. *See, e.g., Fabbrini v. City of Dunsmuir*, 544 F. Supp. 2d 1044, 1050 (E.D. Cal. 2008) (plaintiff's statements in opposition brief

⁵ Similarly, plaintiffs sought potential customers for the Montana Buckaroo rifle after defendant filed his Motion to Dismiss on January 19, 2010. The e-mail correspondence attached in Exhibit B indicates that a message entitled "Help needed – Youth .22 rifle buyers" was sent to the Montana Shooting Sports Association list-serve on February 9, 2010. The e-mail solicitation explained that the responses would be used to oppose defendant's standing argument. *See* Plaintiffs' Motion to Strike or File Surreply, Ex. B, Buckaroo Buyers E-mails [Dkt. No. 86-18].

cannot amend the Complaint under Rule 15); *Medical Benefits Admins. of MD, Inc., v. Sierra R.R. Co.*, No. Civ. S-06-2408, 2007 WL 2914824 at *4 (E.D. Cal. Oct. 5, 2007) (facts not alleged in complaint cannot be considered in ruling on motion to dismiss) (citing *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988)); *see also Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984) (“[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.”).

D. Defendant Should Have an Opportunity to Respond to Plaintiffs’ Surreply If Their Motion for Leave to File a Surreply Is Granted.

Plaintiffs, through the Marbut Declaration attached as Exhibit B, have included over forty pages of new facts in support of their standing. *See* Plaintiffs’ Motion to Strike or File Surreply, Ex. B [Dkt. No. 86-2 – 86-18]. If the Court grants Plaintiffs’ Motion to File a Surreply, defendant respectfully requests an opportunity to rebut plaintiffs’ standing argument and the additional factual support included in Exhibit B. A copy of defendant’s proposed response is attached as Exhibit A.

CONCLUSION

For the reasons stated above, Plaintiffs’ Motion to Strike, or in the Alternative, for Leave to File a Surreply should be denied.

Dated: June 16, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.1(d)(2)(E), I certify that this Opposition to Plaintiff's Motion to Strike or File a Surreply is 2,349 words, and thus complies with Rule 7.1(d)(2)(A).

s/ Jessica B. Leinwand
Jessica B. Leinwand

CERTIFICATE OF SERVICE

I hereby certify that, on June 16, 2010, a copy of this Opposition to Plaintiffs' Motion to Strike or File a Surreply was served upon counsel of record by electronic means through electronic filing.

s/ Jessica B. Leinwand
Jessica B. Leinwand