

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

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

CV-09-147-DWM-JCL

Plaintiffs,

vs.

ORDER

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

Defendant.

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Plaintiffs Montana Shooting Sports Association, Second Amendment Foundation, Inc., and Gary Marbut (“Plaintiffs”) have moved to strike portions of the reply brief filed by Defendant Attorney General Eric H. Holder, Jr. (“United States”) in support of its Rule 12(b) motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. Alternatively, Plaintiffs seek leave to file a surreply. The United States opposes Plaintiffs’ motion in its entirety.

The United States’ Rule 12(b) motion to dismiss challenges, among other things, whether the Plaintiffs have standing to pursue their claims. After the

United States filed its motion to dismiss, Plaintiffs filed a Second Amended Complaint bolstering their allegations relating to the question of standing. The United States responded to Plaintiffs' amended allegations in its reply brief, and also suggested that Plaintiffs' Second Amended Complaint was filed in violation of Fed. R. Civ P. 15(a). Plaintiffs ask the Court to strike these arguments on the ground that they were improperly raised by the United States for the first time in its reply brief.

As noted above, however, Plaintiffs amended their complaint for a second time after the United States filed its motion to dismiss, but before its reply brief was due. Because the United States should be allowed to address the Plaintiffs' amended allegations, the Court declines to strike any portion of its reply brief. The Plaintiffs are, however, entitled to respond to the United States' arguments. The United States has made a factual, or in other words, a substantive challenge to the Court's jurisdiction over the subject matter of this action. *See Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9<sup>th</sup> Cir. 2004) (explaining Article III standing is a jurisdictional question, properly addressed in a Rule 12(b)(1) motion). Plaintiffs, of course, bear the burden of establishing subject matter jurisdiction. *See e.g. Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Consequently, the Court must permit Plaintiffs to respond to the United States' motion with argument and evidence in support of their invocation of subject

