Quentin M. Rhoades
State Bar No. 3969
**SULLIVAN, TABARACCI & RHOADES, P.C.**
1821 South Avenue West
Third Floor
Missoula, Montana 59801
Telephone: (406) 721-9700
Facsimile: (406) 721-5838
qmr@montanalawyer.com

*Pro Querente*

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

| | |
|---|---|
| **MONTANA SHOOTING SPORTS ASSOCIATION, SECOND AMENDMENT FOUNDATION, Inc., and GARY MARBUT,**<br><br>Plaintiffs,<br><br>v.<br><br>**ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,**<br><br>Defendant. | Cause No. **CV-09-147-M-DWM**<br><br>***PLAINTIFFS' SURREPLY IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS*** |

Plaintiffs Montana Shooting Sports Association, Second Amendment Foundation, Inc., and Gary Marbut ("Plaintiffs"), by and through their

counsel of record, hereby submits in opposition to Defendant's Motion to Dismiss, the following:

***SURREPLY BRIEF***

In this case, Defendant Eric H. Holder, Jr., Attorney General of the United States of America ("Defendant") filed a Motion to Dismiss the first amended complaint. (Dkt. No. 10.) Subsequently, Plaintiffs filed a second amended complaint (Dkt. No. 33.) and a brief in opposition to the motion to dismiss (Dkt. No. 48). Defendant then filed a reply that raised two new issues:

1. Whether Plaintiffs' second amended complaint was filed in violation FED. R. CIV. P. 15(a). (Dkt. No. 70, fn. 2.)

2. Whether Plaintiffs intend in fact to manufacture the Montana Buckaroo youth rifle and certain "less than legal" ammunition, including whether:

    A. Plaintiffs have "material plans" to take part "in any activity threatened by Federal law enforcement." (Dkt. No. 70, p. 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 speculative. (*Id.*)

D. Plaintiffs have not decided to manufacture and sell MSSA firearms. (*Id.*, p. 8.)

E. Marbut has provided no details to describe production costs and pricing for the firearms he plans to sell; customers have provided no compensation or any assurances that they will complete their alleged orders. (*Id.*, p. 10.)

F. ATF's letter prohibiting Marbut from taking advantage of the MFFA has no effect on his day-to-day business. (*Id.*, p. 16.)

G. ATF's letter prohibiting Marbut from taking advantage of the MFFA has no effect on his day-to-day business. (*Id.*, p. 16.)

Plaintiffs therefore have not had an opportunity to address these issues.

Turning to them now, first, the Second Amended Complaint was filed in compliance with the Court's Case Scheduling Order (Dkt. No. 17), entered pursuant to FED. R. CIV. P. 16. Once the Scheduling Order was entered in this case, Plaintiffs' ability to amend their pleadings "was governed by Rule 16(b), not Rule 15(a)." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992). The deadline for filing amended pleadings was April 12, 2010. Plaintiffs' Second Amended Complaint complied with that deadline. Given that Rule 16(b) governs, the filing of the amended complaint was appropriate.

Second, the factual allegations regarding standing and the consent of the United States to be sued are set forth in the Second Amended Complaint. For the purposes of the Government's motion to dismiss under FED. R. CIV. P. 12(b)(6), the Court should assume all facts plead in the Second Amended Complaint to be true, should resolve all doubts and inference in the pleader's favor, and should view the pleading in the light most favorable to the non-moving party. *Tellabs, Inc. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). The pleading of tediously detailed factual allegations is not required. *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1949 (2009). Moreover, 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.

*Pegram v. Herdich*, 530 U.S. 211, 229 (2000).

Defendant argues that the factual allegations of the Second Amended Complaint are insufficient to confer standing. In *Friends of the Earth v. Laidlaw Environmental Services*, 405 U.S. 727, 734 (1972), the U.S. Supreme Court upheld a standing based on claims that plaintiffs had chosen to forego recreational opportunities on the river in question, out of mere fear of exposure to pollution, even though the Court accepted the

finding that there was, in fact, no basis for that fear. Thus, fear of prosecution, like a fear of pollution, results in standing. *See, United States v. SCRAP*, 412 U.S. 669, 689 & n.14 (1973) and *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 231 n.4 (1986).

In this case, the fear of prosecution arises from the factual circumstances which Plaintiffs have pled, and which underlay those facts. (*See*, Sworn Declaration of Gary Marbut dated May 25, 2010, Exhibit B, attached to Plaintiff's Motion to Strike Portions of Defendant's Reply Memorandum and To Allow for Leave to File Surreply.) Review of the declaration, and attached Exhibits, makes clear that Plaintiff Marbut has the means and opportunity to manufacture firearms and ammunition under the MFFA. The correspondence he has received from the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives make clear that his fear has an objective basis. (*See*, Second Amended Complaint, Dkt. No. 33, Exhibits A and B.) It arises not only from his subjective reading of U.S. statutes, but from the reading of the executive agency charged with enforcement of the statutes, which has taken the time to communicate its views on prosecution of the actions he proposes to undertake.

These factual issues including the fear of prosecution, confer

standing. *Friends of the Earth*, 405 U.S. at 727. For example, *In Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (rev'd on other grounds *sub nom. Washington v. Gluckburg*, 521 U.S. 702 (1997)), it was held that physicians had standing to contest an anti-euthanasia statute – even though there had been no threats to prosecute whatsoever. The physician cited *Doe v. Bolton*, 410 U.S. 179, 188 (1973) and *Babbit v. United Farm Workers*, 442 U.S. 289 198-99 & 302 (1979), correctly, for the proposition that no such threat was necessary. Finally, in this case, as the Declaration of Marbut establishes, there is indisputable economic injury. This is also always enough to confer standing: "When such tangible economic injury is alleged, we need not rely on the three factor test applied in *Thomas* and *San Diego Guns*."[1] *National Audubon Society v. Davis*, 307 F.3d 835, 855 (9th Cir. 2002). Given both the fear of prosecution and the economic harm, facts the Court must assume to be true, Plaintiffs have standing to sue.

///

///

---

[1] Note that *San Diego Guns* is the principal authority upon which the Government relies to support its standing arguments.

## CONCLUSION

For the reasons stated herein, Defendant's motion to dismiss should be denied.

Dated this 6th day of July, 2010.

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

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

## CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of July, 2010, I served a true and correct copy of the foregoing on the following persons by the following means:

__1__ CM/ECF
_____ Hand Delivery
__2__ Mail
_____ Overnight Delivery Service
_____ Fax
_____ E-Mail

1. Jessica B. Leinwand
U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs
P.O. Box 883
Washington, D.C. 20044
20 Massachusetts Avenue, NW
Washington, D.C. 20530
*Representing Defendant Eric H. Holder, Jr.*

1. James Edward Brown
John E. Bloomquist
DONEY CROWLEY BLOOMQUIST & PAYNE UDA, P.C.
Diamond Block ,Suite 200
44 West Sixth Avenue
P.O. Box 1185
Helena, MT 59624
*Representing Weapons Collectors Society of MT (Amicus)*
*Representing Western Tradition Partnership (Amicus)*

1. Mark L. Shurtleff
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 142320
Salt Lake City, UT 84114-2320
*Representing State of Utah & Other States (Amicus)*

**CERTIFICATE OF SERVICE**
***(continued)***

1. Patrick T. Fox
DOUBEK & PYFER
P.O. Box 236
Helena, MT 59624
*Representing State of Utah & Other States (Amicus)*

1. Jeffrey T. Renz
CRIMINAL DEFENSE CLINIC
School of Law
32 Campus Drive
University of Montana
Missoula, MT 59812
*Representing Montana Legislators (Amicus)*

1. Jennifer W. Bordy
ATTORNEY AT LAW
7720 A Shedhorn Drive
PMB 132
Bozeman, MT 59718
*Representing Montana Legislators (Amicus)*

1. Duncan Scott
SCOTT & KIENZEL
1001 South Main Street
Kalispell, MT 59901
*Representing Paragon Foundation, Inc. (Amicus)*

2. Arthur V. Wittich
WITTICH LAW OFFICE
602 Ferguson Avenue
Suite 5
Bozeman, MT 59718
*Representing Center for Constitutional Jurisprudence & Lawmakers from 17 States (Amicus)*

**CERTIFICATE OF SERVICE**
***(continued)***

1. Anthony T. Caso
LAW OFFICE OF ANTHONY T. CASO
8001 Folsom Blvd
Suite 100
Sacramento, CA 95826
*Representing Center for Constitutional Jurisprudence & Lawmakers from 17 States (Amicus)*

1. Nicholas C. Dranias
GOLDWATER INSTITUTE
500 East Coronado Road
Phoenix, AZ 85004
*Representing Goldwater Institute Scharf-Norton Center for Constitutional Gov't., et al. (Amicus)*

1. Timothy C. Fox
GOUGH SHANAHAN JOHNSON & WATERMAN
P.O. Box 1715
Helena, MT 59624-1715
*Representing Goldwater Institute Scharf-Norton Center for Constitutional Gov't., et al. (Amicus)*

1. Chris D. Tweeten
OFFICE OF THE MONTANA ATTORNEY GENERAL
P.O. Box 201401
Helena, MT 59620-1401
*Representing Montana Attorney Gen Steve Bullock (Intervenor)*

///

///

**CERTIFICATE OF SERVICE**
***(continued)***

1. Gregory A. Jackson
JACKSON LAW FIRM, P.C.
320 - 11th Avenue
Helena, MT 59601
*Representing Gun Owners Foundation, Gun Owners of America, Inc. & Virginia Citizens Defense League*

2. Herbert W. Titus
William J. Olson
John S. Miles
Jeremiah L. Morgan
WILLIAM J. OLSON, P.C.
370 Maple Avenue West
Suite 4
Vienna, VA 22180-5615
*Representing Gun Owners Foundation, Gun Owners of America, Inc. & Virginia Citizens Defense League*

1. Cynthia L. Wolken
P.O. Box 1222
Helena, MT 59624
*Representing Brady Center to Prevent Gun Violence; & Int'l Brotherhood of Police Officers, et al.*

1. Gil N. Peles
PROSKAUER ROSE, LLP
2049 Century Park East
32nd Floor
Los Angeles, CA 90067-3206
*Representing Brady Center to Prevent Gun Violence*

///

///

**CERTIFICATE OF SERVICE**
***(continued)***

2. Paul M. Kienzle
Attorney At Law
P.O. Box 587
Albuquerque, NM 87103
*Representing Paragon Foundation, Inc. (Amicus)*

By: */s/ Quentin M. Rhoades*
Quentin M. Rhoades