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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,**

Plaintiffs,

v.

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

Defendant.

Cause No. **CV-09-147-M-DWM**

***PLAINTIFFS' REPLY BRIEF IN
SUPPORT OF MOTION TO
STRIKE PORTIONS OF
DEFENDANT'S REPLY
MEMORANDUM IN SUPPORT
OF DEFENDANT'S MOTION TO
DISMISS, OR IN THE
ALTERNATIVE, TO ALLOW FOR
LEAVE TO FILE SURREPLY***

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

counsel of record, and in further support of Plaintiffs' Motion to Strike Portions of Defendant's Reply Memorandum in Support of Defendant's Motion to Dismiss, or in the Alternative, to Allow for Leave to File Surreply, submits the following:

REPLY BRIEF

Plaintiffs filed a motion (Dkt. No. 86) and brief (Dkt No. 87) requesting an order striking portions of arguments from Defendant's Reply Memorandum in Support of Defendant's Motion to Dismiss (Dkt. No. 48), or to allow Plaintiff to file a surreply brief. The basis for the motion was that Defendant Eric H. Holder, Jr., Attorney General of the United States of America ("Defendant") raised new issues in support of his motion to dismiss the first amended complaint. Defendant has now filed a response brief admitting that he discussed new issues, but blaming the need on Plaintiffs. He argues that the new matters were raised by Plaintiffs in their Second Amended Complaint. (Dkt. No. 33.)

The response brief makes clear two fatal flaws in Defendant's arguments: one technical, one substantive. The technical flaw is that presently, there is no pending motion to dismiss the Second Amended Complaint. The substantive flaw is that, plainly, Defendant does not want

this case decided on its actual merits. Given Defendant's insistence on procedural and technical arguments, he should be held to the same standard he seeks to impose. Under such standards, his motion to dismiss would be deemed moot by the filing of the Second Amended Complaint.

As to the merits of the pending alternative motion to strike or motion for surreply, moreover, it is no defense to argue that Defendant's reply brief merely addresses new issues raised in the Second Amended Complaint. The Second Amended Complaint was filed in accordance with the Scheduling Order per FED. R. CIV. P. 16. If Defendant seeks to have that particular pleading dismissed, then Plaintiffs should be allowed to contest his effort. In this instance, the most appropriate means of allowing Plaintiffs to dispute Defendant's arguments on the Second Amended Complaint – and thereby to address the motion to dismiss on its actual merits – would be to allow Plaintiffs' proposed surreply.

The only other alternative, and perhaps more technically correct, would be to deny the Motion to Dismiss the First Amended Complaint as moot, and if the Defendant wished to have the Second Amended Complaint dismissed, to require him to file a new motion and brief. Instead, the Court should allow the surreply and proceed directly to the

merits of Defendants' arguments for dismissal of this action. But, this seems a waste of time and resources when the avenue of surreply is so readily at hand.

CONCLUSION

For the reasons stated, the Court is requested to strike from the record, the new arguments in Defendant's reply brief, or to allow for the filing of Plaintiffs' proposed surreply brief.

Dated this 30th day of June, 2010.

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

By: /s/ Quentin M. Rhoades
Quentin M. Rhoades
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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of June, 2010, I served a true and correct copy of the foregoing on the following persons by the following means:

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