

Baltimore v. ATF, Docket Text (Mar., 4 2024)

MINUTE ORDER: Upon consideration of the parties' joint status report, Dkt. [24], it is hereby ORDERED that: (1) Defendant will submit a motion for summary judgment on or before April 15, 2024; (2) Plaintiff will submit its opposition and cross-motion for summary judgment on or before May 31, 2024; (3) Defendant will submit its reply and opposition on or before June 21, 2024; and (4) Plaintiff will submit its reply on or before July 12, 2024. It is further ORDERED that the initial scheduling conference on March 8, 2024 is hereby VACATED.

In addition, upon consideration of the National Shooting Sports Foundation's motion to intervene, Dkt. [11], Plaintiff's opposition, Dkt. [21], and NSSF's reply, Dkt. [23], it is hereby ORDERED that the motion is DENIED. NSSF does not claim that it has standing to intervene in its own right; rather, it claims that it has standing to sue on behalf of its members who are federally licensed firearms manufacturers, distributors, and retailers (also referred to as federal firearms licensees or "FFLs"). "An association has standing to sue on behalf of its members if: '(1) at least one of its members would have standing to sue in his own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit.'" *Chamber of Com. of U.S. v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011) (quoting *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002)).

When an organization claims that it has associational standing, "it is not enough to aver that unidentified members have been injured." *Id.* An organization "must specifically 'identify members who have suffered the requisite harm.'" *Id.* (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009)); see also *Am. Chemistry Council v. Dep't of Transp.*, 468 F.3d 810, 815, 820 (D.C. Cir. 2006) ("[A]n organization bringing a claim based on associational standing must show that at least one specifically-identified member has suffered an injury-in-fact.... At the very least, the identity of the party suffering an injury in fact must be firmly established.").

Here, NSSF has not met that requirement. NSSF only asserts that "its members include Baltimore-area FFLs who were selling firearms between from 2018 through 2022; those members either submitted information to the ATF or had their information submitted to the ATF; and they therefore would have standing to challenge on their own behalf Baltimore's FOIA requests." Dkt. 23 at 1213. But NSSF does not point to any specific member who falls into this generic description NSSF provides, nor does NSSF argue that all of its members are affected by the challenged activity, which can, in some circumstances, be sufficient to dispense with the identification requirement. *Summers*, 555 U.S. at 499 (citing, as an example of this principle, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958), where "all organization members [were] affected by release of membership lists"). As the record now stands, the Court cannot determine whether disclosure of the records sought in

this case would injure an NSSF member and, if so, how that member would be injured. As Plaintiff notes, for example, some of the information that they seek is already public and, thus, the requested disclosures may affect different FFLs in different ways, if at all. Nor can the Court, on the present record, assess the nature of the alleged injury that NSSF invokes in support of its derivative standing. It is one thing, for example, for a particular FFL to suffer reputational damage or lost sales due to a disclosure. It is quite another thing to argue, as NSSF seems to posit, that any disclosure of information relating to the sale of firearms will necessarily result in a concrete injury to the FFL, even if the FFL would suffer no reputational damage, lost sales, or any other distinct injury, and, indeed, might not even oppose the disclosure. Without some evidence that at least one member of NSSF will suffer a concrete injury in fact due to the proposed disclosures, the Court cannot discharge its obligation to ensure that NSSF has standing.

Seemingly aware of this shortcoming, NSSF refuses to identify any specific member, arguing that it would be "fundamentally unfair to randomly produce a member and subject him or her to exactly the kind of reputational harm NSSF's intervention seeks to prevent (and Baltimore's suit seeks to achieve)." Dkt. 23 at 13. But this Court lacks the ability to ignore Article III standing requirements. And, to the extent NSSF is concerned about the privacy interests of its members, NSSF can file a motion seeking leave to submit the necessary information under seal (although such a request is not before the Court at this time, and, absent a request supported by the necessary factual showing and an opportunity for the other parties to be heard on the question, the Court takes no position at this time whether it would grant such a request).

Because the Court concludes that NSSF has failed to demonstrate "that at least one member... has standing to pursue this challenge," *Am. Chemistry Council v. Dep't of Transp.*, 468 F.3d 810, 815 (D.C. Cir. 2006) (quoting *Am. Library Ass'n. v. FCC*, 406 F.3d 689, 696 (D.C. Cir. 2005)), the Court denies NSSF's motion to intervene as of right. *Compare with Advocs. for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 41 F.4th 586, 594 (D.C. Cir. 2022) (noting that "it is not enough to merely aver that unidentified members have been injured" but finding that "here we do not need to 'speculat[e]' whether 'one individual will meet all of the[] [standing] criteria'" because "[t]he Teamsters submitted survey responses with direct quotations from individual members affected by the proposed changes to the short-haul requirement" (internal citations omitted)).

In addition, the Court finds that NSSF's failure to demonstrate standing also forecloses its motion for permissive intervention. Although the question of whether standing is required for permissive intervention has been described as "open" by the D.C. Circuit, see *In re Endangered Species Act Section 4 Deadline Litig.-MDL No. 2165*, 704 F.3d 972, 980 (D.C. Cir. 2013), the D.C. Circuit recently upheld a district court order denying a party's motion for permissive intervention on the ground that the proposed intervenor lacked standing, see *Yocha Dehe v. United States Dep't of the Interior*, 3 F.4th 427, 43132 (D.C. Cir. 2021)

("Because Yocha Dehe does not currently satisfy the injury requirement of Article III standing, it lacks standing to intervene. Accordingly, we affirm the judgment of the district court and do not reach Rule 24(a)(2)'s requirements or permissive intervention."). Moreover, it is generally up to the agency to decide what FOIA exceptions to assert and a court cannot determine that an agency appropriately withheld records based on an exemption that the agency does not assert. *Cf. Maydak v. U.S. Dep't of Just.*, 218 F.3d 760, 765 (D.C. Cir. 2000). Here, NSSF seeks to intervene to argue that the withholdings were justified under Exemptions 4 and 6, Dkt. 11-3 at 13; Dkt. 23 at 11; exemptions that, to date, ATF has not asserted, Dkt. 1-2; Dkt. 14. To be sure, a private party can object to an agency's failure to protect that party's trade secrets, but there are procedures for doing so, which, among other things, require the private party to bring a reverse FOIA case, which NSSF does not purport to do here, and, if it did, would need standing to do so. *See EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998) (explaining that "the putative intervenor must ordinarily present: (1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action" because "the typical movant asks the district court to adjudicate an additional claim on the merits"). Accordingly, the Court declines in its discretion to find that permissive intervention is warranted here. *See Aristotle Int'l, Inc. v. NGP Software, Inc.*, 714 F. Supp. 2d 1, 18 (D.D.C. 2010) (outlining the factors a court can weigh when deciding whether to permit a party to intervene under Rule 24(b)).

For these reasons, the Court hereby DENIES NSSF's motion to intervene, as of right or permissively. The Court will, however, permit NSSF to file an amicus brief on or before April 21, 2024, setting forth its arguments on the merits. Signed by Judge Randolph D. Moss on 3/4/2024. (lcrdm1) (Entered: 03/04/2024)