UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

BERNARD VON NOTHAUS, individually and d/b/a LIBERTY DOLLAR	)	
Plaintiff,	)	
v.	)	Cause No. 3:07-cv-038-RLY-WGH
HENRY M. PAULSON, JR, Secretary of the Treasury,	)	
ALBERTO R. GONZALES, Attorney General of the United States,	)	
EDMOND C. MOY, Director, United States Mint,	)	
Defendants.	)	

BRIEF IN SUPPORT OF THE DEFENDANTS' MOTION TO DISMISS ACTION

STATEMENT OF THE CASE

On March 7, 2007, the Plaintiff Bernard Von Nothaus individually and d/b/a Liberty Dollar ("Von Nothaus") filed his lawsuit seeking a declaratory judgment that the "manufacture and distribution of the gold and silver Liberty Dollar medallions by the plaintiff and other persons who receive the medallions are not in violation of 18 U.S.C. § 486 provided they are not represented as 'legal tender', 'coin' or 'current money'" and that this Court declare that the "Liberty Dollar" is a "private voluntary barter currency."[1] (Complaint, ¶ 17.) Von Nothaus has also requested that this Court issue, "without limitation," a permanent injunction barring the

[1]A "private voluntary barter currency" is not defined by the United States Code.

Secretary of the Treasury, the Attorney General of the United States, and the Director, United States Mint (jointly "the United States") from publicly or privately declaring that the Liberty Dollar is an illegal currency and that the Court order the United States Mint to "remove or retract the current website warning regarding Liberty Dollar [ ] from its website and to cease from engaging in any further publication of statements which conclude or imply that the use of the Liberty Dollar is a Federal crime." (Complaint, ¶ 18.)

The United States file this motion to dismiss for lack of jurisdiction on the grounds that the statute cited by Von Nothaus, *i.e.*, 28 U.S.C. § 2201, does not confer subject matter jurisdiction upon this Court. In addition, Von Nothaus has failed to state a claim upon which relief can be granted by the Court. Indeed, at the heart of Von Nothaus's claim is his desire for this Court to find that the use of the Liberty Dollar as currency is not a crime that may be prosecuted under 18 U.S.C. § 486, and to constrain the Department of Justice from bringing any criminal actions concerning the Liberty Dollar. The law is clear that a declaratory judgment may not enjoin a criminal prosecution, particularly where a violation turns on multiple facts that cannot be taken in isolation or definitively known in advance. The United States respectfully requests this Court to dismiss Von Nothaus's complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

ARGUMENT

When considering a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), the "district court must accept as true all well-pled factual allegations and draw reasonable inferences in favor of the plaintiff." *Rueth v. United States Envtl. Prot. Agency*, 13 F.3d 227, 229 (7th Cir. 1993) (quoting *Capital Leasing Co. v.*

Fed. Deposit Ins. Corp., 999 F.2d 188, 191 (7th Cir. 1993)). However, where the defendant raises factual questions concerning jurisdiction, the court need not accept the allegations of the complaint as true, but may look behind the complaint and view the evidence to determine whether a controversy in fact exists. *Int'l Harvester Co. v. Deere & Co.*, 623 F.2d 1207, 1210 (7th Cir. 1980). Von Nothaus has the burden of supporting the jurisdictional allegations of his Complaint by competent proof. *Id.* In deciding whether Von Nothaus has carried this burden, the Court must look to the state of affairs as of the filing of the Complaint. *Id.* As the party asserting federal jurisdiction, Von Nothaus bears the burden to show that the United States has waived its sovereign immunity with respect to his claims. *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2003); Fed. R. Civ. P. 12(b)(1).

To survive a motion to dismiss based upon a failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), a plaintiff's complaint must "provide the 'grounds' of his 'entitle[ment] to relief'" based upon more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atlantic Corp. v. Twombly*, — U.S. —, 127 S.Ct. 1955, 1964-65 (2007). The complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* "'The pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action', on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.*, citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-36 (3d ed. 2004) (internal citations omitted).

I. Von Nothaus Has Not Stated Jurisdictional Grounds for Suing the United States and His Claims Must Be Dismissed

"The United States, as sovereign, is immune from suit save as it consents to be sued." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Indeed, "the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *Id.* "If the Government does waive its sovereign immunity, it alone dictates the terms and conditions on which it may be sued." *Macklin v. United States of America*, 300 F.3d 814, 820 (7th Cir. 2002). Further, "[a] suit against federal officers in their official capacity . . . is a suit against the United States." *Del Raine v. Carlson*, 826 F.2d 698, 703 (7th Cir. 1987).

> To maintain a viable claim against the United States in federal court, a party must satisfy two requirements. In particular, the plaintiff not only must identify a statute that confers subject matter jurisdiction on the district court but also a federal law that waives the sovereign immunity of the United States to the cause of action.

Macklin, 826 F.2d at 819; *see also Clark v. United States*, 326 F.3d 911, 912 (7th Cir. 2003). "Failure to satisfy either requirement mandates the dismissal of the plaintiff's claim." *Macklin*, 826 F.2d at 819. "Absent a waiver, sovereign immunity shields the federal government and its agencies from suit." *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994).

Here, Von Nothaus claims that jurisdiction is based upon 28 U.S.C. § 2201, the Declaratory Judgment Act. (Complaint, ¶ 6.) However, the Declaratory Judgment Act is not an independent source of federal jurisdiction; rather "jurisdiction must be predicated on some other statute." *See Rueth*, 13 F.3d at 231 (7th Cir. 1993) (refusing to grant declaratory judgment where jurisdiction in not predicated on some other statute); *Schilling v. Rogers*, 363 U.S. 666, 677 (1960). Where the United States has not consented to be sued, the court lacks subject matter jurisdiction and the action must be dismissed. *Meyer*, 510 U.S. at 475. Von Nothaus has failed

to carry his burden to show jurisdiction, and his Complaint must be dismissed in its entirety for this reason alone.

II. Von Nothaus Has Not Shown an Actual Controversy and His Complaint Must Be Dismissed

Even if sovereign immunity did not bar his claims, Von Nothaus's claims must still fail because he cannot show an actual controversy. Von Nothaus seeks a declaratory judgment that his actions and those of "others[2] who use the Liberty Dollar as a 'private voluntary barter currency'" or who engage "in manufactur[ing] and distribut[ing] . . . the gold and silver Liberty Dollar medallions . . . are not in violation of 18 U.S.C. § 486 . . ." "provided [the medallions] are not represented as 'legal tender,' 'coin'or 'current money.'" (Complaint, ¶ 15, 17.) Based upon this presumed declaratory judgment, Von Nothaus requests this Court issue, "without limitation," permanent injunctive relief barring the United States "from publicly or privately declaring that the Liberty Dollar is an illegal currency," barring the United States Mint from publishing statements that "conclude or imply that the use of the Liberty Dollar is a Federal crime," and ordering the United States Mint to alter its website.[3] (Complaint, ¶ 18.)

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[2]As noted by the Seventh Circuit, federal courts cannot use their injunctive power "just for the common weal or on behalf of those who, although not parties, are currently or may be in the future burdened by the defendant's allegedly illegal conduct." *Mazanec v. N. Judson-San Pierre Sch. Corp.*, 798 F.2d 230, 234 (7th Cir. 1986). As such, this Court cannot issue declaratory or injunctive relief to the "others" for which Von Nothaus is apparently attempting to seek relief.

[3]"A preliminary injunction is an extraordinary and drastic remedy that should not be granted unless the movant, by a clear showing, carries the burden of persuasion. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). It can be granted only if the plaintiff establishes the following four elements: (1) a reasonable likelihood of success on the merits, (2) no adequate remedy at law exists; (3) he will suffer irreparable harm which, absent injunctive relief outweighs the irreparable harm the respondent will suffer if the injunction is granted; and (4) that the injunction will not harm the public interest." *Goodman v. Illinois Dep't of Fin. and Prof'l*

The Declaratory Judgment Act provides: "[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201. The statutory requirement of an "actual controversy" is merely a recognition that the federal judicial power is restricted under the Constitution to cases and controversies. *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227 (1937); *Budget Rent A Car Corp. v. Miljack, Inc.*, 760 F. Supp. 135 (N.D. Ill. 1991); *see also Rizzo v. Goode*, 423 U.S. 362, 372 (1976) (requiring the existence of a "case or controversy" in case requesting injunctive relief.) If Von Nothaus does not satisfy the requirement, this Court is without jurisdiction of the claim.

The "case or controversy" clause of Article III of the Constitution imposes a minimal constitutional standing requirement on all litigants attempting to bring suit in federal court. To invoke the Court's jurisdiction, Von Nothaus must demonstrate, at an "irreducible minimum," that: (1) he has suffered a distinct and palpable injury as a result of the putatively illegal conduct of the United States; (2) the injury is fairly traceable to the challenged conduct; and (3) it is likely to be redressed if the requested relief is granted. *See Valley Forge Christian Col. v. Am. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982); *Gladstone, Realtors*

Regulation, 430 F.3d 432, 437 (7th Cir. 2005). The showing is even greater when a mandatory permanent injunction is sought. A clear or substantial showing of a likelihood of success is required where the injunction sought will alter, rather than maintain, the status quo–that is, where the injunction is properly characterized as mandatory rather than prohibitory. The standard for a permanent injunction is essentially the same as for a preliminary injunction with the exception that the plaintiff must show actual success on the merits. *See, e.g., Univ. of Texas v. Camenisch*, 451 U.S. 390, 392 (1981). Von Nothaus's request for injunctive relief fails for the same reasons as his request for declaratory judgment.

v. Vill. of Bellwood, 441 U.S. 91, 99 (1979); *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 37 (1976). In addition to the constitutional requirements of Article III, courts have developed a set of prudential considerations to limit standing in federal court to prevent a plaintiff "from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances' pervasively shared and most appropriately addressed in the representative branches." *See Valley Forge*, 454 U.S. at 474-75 (quoting *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975)). Speculative claims that a proposed governmental action may result in injury to a plaintiff are insufficient to confer standing. *See O'Shea v. Littleton*, 414 U.S. 488, 497 (1974). The required injury must be both real and immediate, not conjectural or hypothetical. *See Golden v. Zwickler*, 394 U.S. 103, 109-10 (1969).

Title 18, United States Code, § 486 provides that:

> [w]hoever, except as authorized by law, makes or utters or passes, or attempts to utter or pass, any coins of gold or silver or other metals, intended for use as current money, whether in the resemblance of coins of the United States or of foreign countries, or of original design, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 486. In his Complaint, Von Nothaus has requested that this Court issue a declaratory judgment that Von Nothaus is not violating the law so long as he does not represent the Liberty Dollar coins as "legal tender," "coin," or "current money." (Complaint, ¶ 17.)

In essence, Von Nothaus is seeking to immunize himself from future prosecution based upon generalized and non-specific circumstances. This does not support the requirement for an "actual controversy." As Von Nothaus concedes in his Complaint, each such circumstance must be evaluated separately to determine exactly how he represented the Liberty Dollar to the public

and others. These determinations are best left to the prosecutorial authorities and the criminal justice system to decide whether a criminal act has occurred. Otherwise, this Court will become embroiled in constant litigation to determine how the declaratory judgment applies to each situation regarding the use of the Liberty Dollar.

Von Nothaus also claims to fear imminent criminal prosecution; however, fear of possible future application of a federal criminal statute does not necessarily confer standing in a declaratory judgment action. *See Adult Video Ass'n v. United States Dep't of Justice*, 71 F.3d 563, 565-67 (6th Cir. 1995); *see also Crooker v. Magaw*, 41 F. Supp. 2d 87, 91 (D. Mass. 1999). *But see Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298-99 (1979). The mere existence of a statute, which may or may not ever be applied to Von Nothaus, is not sufficient to create a case or controversy within the meaning of Article III. *Crooker*, 41 F. Supp. 2d at 91 (quoting *Stoianoff v. Montana*, 695 F.2d 1214, 1223 (9th Cir. 1983)). Even where a plaintiff has been informed that certain actions could subject them to federal prosecution, courts have held that this threat of prosecution was still too speculative to confer standing. *Nat'l Rifle Ass'n v. Magaw*, 132 F.3d 272, 293-94 (6th Cir. 1997).

Von Nothaus is essentially requesting an advisory opinion that if his actions fall within certain parameters, *i.e.*, he does not make certain representations concerning the Liberty Dollar, then he has not violated 18 U.S.C. § 486. However, requests for advisory opinions are prohibited.

> The federal courts . . . do not render advisory opinions. For adjudication of constitutional issues[,] concrete legal issues, presented in actual cases, not abstractions[,] are requisite. This is as true of declaratory judgments as any other field. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties

> having adverse legal interest, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Golden, 394 U.S. at 108 (internal quotation omitted). This is particularly so where the relief sought is the construction of a federal statute providing criminal penalties. *Zemel v. Rusk*, 381 U.S. 1, 18 (1965). Section 486, as well as other sections within Chapter 25 of Title 18 of the United States Code, define when a criminal violation has occurred, and this Court need not further define their parameters. Von Nothaus has not stated a distinct and palpable injury and his Complaint should be dismissed on these grounds as well.

III. Declaratory and Injunctive Actions Which Interfere With the Criminal Process Are Not Appropriate

Even if Von Nothaus can show an actual injury, the general rule is that equity will not interfere with criminal processes by entertaining actions for injunctive or declaratory relief in advance of criminal prosecution. *See Zemel*, 381 U.S. at 18; *see also, Int'l Harvester Co.*, 623 F.2d at 1217 (court has discretion to deny declaratory judgment even when the court is presented with a justiciable controversy); *Muller v. Olin Mathieson Chem. Corp.*, 404 F.2d 501, 505 (2d Cir. 1968) (same).

In *Zemel v. Rusk*, 381 U.S. 1 (1965), the Supreme Court held that the trial court had properly dismissed Zemel's complaint requesting a declaratory judgment as to whether Zemel could be subjected to criminal prosecution for traveling to Cuba without a passport as well as an injunction enjoining the Secretary of State and Attorney General from interfering with his travel to Cuba. *Id*. at 18-20. Noting that the Declaratory Judgment Act inferred discretion on the district court rather than an absolute right upon the litigant, the Court observed that the complaint did not specify the sort of travel to Cuba that Zemel had in mind, what type of

criminal charges he might be charged with, or even whether the government would charge him at all. *Id*. at 19. The Court also noted that the various gradations of these facts and charges would make a difference as to criminal liability, and this was an issue "on which the District Court wisely took no position." *Id*. at 19-20. The Supreme Court held that adjudication of such issues "must await a concrete fact situation" because otherwise it could not avoid rendering a series of advisory opinions. *Id.* at 19-20.

Here, there are infinite graduations of facts and circumstances that would affect Von Nothaus's criminal liability under section 485, section 486, and any other applicable section of the criminal code. Further, Von Nothaus has no idea whether he will be charged at all. As in *Zemel*, these matters are wisely left to the criminal courts. *See also Spence*, 137 F.2d at 72-73 (reversing district court's grant of injunctive and declaratory relief where plaintiffs claimed defendant was threatening to prosecute them under an anti-hawking ordinance, but where the only effect of the court's decision would be to decide matters which could be better decided in the criminal courts).

CONCLUSION

Von Nothaus states that he brings his Complaint under 28 U.S.C. § 2201, but he has not met his burden of showing that the Court has subject matter jurisdiction over his Complaint. At the core of Von Nothaus's Complaint is his desire to anticipate and to circumvent the criminal justice system. The decision whether to grant declaratory and injunctive relief is squarely within this Court's discretion. *See* 28 U.S.C. § 2201(a); *Green v. Mansour*, 474 U.S. 64, 72 (1985) (characterizing the Declaratory Judgment Act as "an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant"); *Reno v. Catholic Soc. Servs.*, 509 U.S.

43, 57 (1993) (granting injunctive relief is discretionary). Von Nothaus has failed to state claims against the United States for declaratory judgment and injunctive relief. Any such claims are best dealt with, in any future criminal prosecution, should one ever occur. As such, this Court should grant the United States' motion to dismiss all claims for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document upon the Plaintiff herein by mailing a copy to the Counsel of Record at the address listed below, this 19th day of August, 2007.

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