

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FILED



DAVID W.R. BROWN,

CASE NO. 8:03-CV-2501-T-23EAJ

Plaintiff,

DISPOSITIVE MOTION

v.

UNITED STATES DEPARTMENT OF COMMERCE,
UNITED STATES DEPARTMENT OF JUSTICE,
UNITED STATES DEPARTMENT OF THE TREASURY,
UNITED STATES GENERAL ACCOUNTING OFFICE,
UNITED STATES OFFICE OF MANAGEMENT AND BUDGET,
UNITED STATES PATENT AND TRADEMARK OFFICE,
GALAXY SCIENTIFIC CORPORATION,

Defendants.

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**DEFENDANT GALAXY SCIENTIFIC CORPORATION'S MEMORANDUM OF
LAW IN SUPPORT OF ITS MOTION TO DISMISS
THE AMENDED COMPLAINT**

Defendant, Galaxy Scientific Corporation ("Galaxy"), by and through its undersigned counsel, hereby moves to dismiss with prejudice Plaintiff's Amended Complaint for failure to state a claim upon which relief can be granted. In addition, Galaxy respectfully joins in the motions filed by the government agency defendants (the "Government Defendants") in this matter, in all respects.¹

¹ Galaxy hereby incorporates by reference, in their entirety, the statement of facts and legal arguments raised by the Government Defendants in their moving papers.

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I. INTRODUCTION

Galaxy is a private corporation. It is not an agency or employee of the government. The Amended Complaint alleges only that Galaxy is a sub-contractor to the U.S. Patent & Trademark Office (“USPTO”).² At most, Plaintiff’s Amended Complaint can be read as a claim for a violation of the Freedom of Information Act (“FOIA”). In fact, Plaintiff relies on FOIA for purposes of establishing venue and avers that “[a] significant number of the Complaints [sic] are connected with FOIA related matter.” Amended Complaint at ¶ 4. As set forth herein, a private corporation may not be named as a defendant in an action for violation of FOIA. Thus, plaintiff’s true cause of action, to the extent one is stated, is against the Government Defendants.

The remaining constitutional and statutory violations complained of fail as a matter of law as the underlying statutes do not authorize a private right of action or suit against a private entity such as Galaxy.

Accordingly, for the reasons set forth herein, and in the Government Defendants’ Motions, the Amended Complaint as against Galaxy must be dismissed with prejudice.

II. ARGUMENT

None of the various constitutional or statutory claims asserted by plaintiff are sustainable against a private corporation or its private employees. Even if the Court determines that plaintiff has alleged a valid claims against any of the Government Defendants, he has not as to Galaxy. Therefore, Galaxy is not a proper party to this suit, and it should be dismissed.

A. FOIA Does Not Permit Claims Against A Private Entity

FOIA grants district courts “jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant” See 5 U.S.C. 552(a)(4)(B). “Agency” is defined to include “any executive department . . . or other establishment in the executive branch of the Government . . . or any independent regulatory agency.” 5 U.S.C. 552(f). Courts have consistently interpreted this to permit suits against agencies only, not their individual employees, or the United States. See Pray v. Federal Bureau of Investigations, 1995 WL 764149 at *3 (S.D.N.Y)(collecting cases); see also, 15 Fed. Proc., L.Ed., § 38:459. Plaintiff concedes as much in his Amended Complaint. See Amended Complaint at ¶4 (“A FOIA lawsuit must be brought against an Agency.”)

As Galaxy is not alleged to be, and is not, a federal “Agency” as defined in the statute, “plaintiff’s FOIA claim must be dismissed.” Webb v. Ashburn, 1997 WL 118355 (S.D.N.Y.), citing, Williams v. McCausland, 791 F. Supp. 992 (S.D.N.Y. 1992).

B. The Privacy Act Does Not Permit Claims Against a Private Corporation

Section 7(a)(1) of the Privacy Act states that “[i]t shall be unlawful for any Federal ... agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.” 5 U.S.C.A. § 552a (note). “The private right of civil action created by the Act is specifically limited to actions against agencies of the United States Government. The

² In subsequent filings with the Court, plaintiff has identified Galaxy correctly as a “contractor” to the USPTO. The difference is irrelevant for purposes of this motion and the legal arguments contained herein.

civil remedy provisions of the statute do not apply against private individuals ... [or] private entities.” *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1447 (9th Cir.1985).

As Galaxy is not a federal agency, any claims asserted under the Privacy Act must be dismissed for failure to state a claim.

C. There Is No Private Right of Action Under the Paperwork Reduction Act

Plaintiff’s alleged claims under 44 U.S.C. 3501, *et. seq.*, the “Paperwork Reduction Act,” similarly fail, as the statute once again applies only to the Federal Government, and not to private parties. See *Id.* (“[The purpose of this act is] to minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons resulting from the collection of information by or for the Federal Government;”). The act does not authorize a private right of action against the Government, and certainly not against a private entity. See *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826, 844 (9th Cir. 1999); *Teledyne v. United States*, 50 Fed. Cl. 155, 190 (2001); see also *Pierce v. Apple Valley, Inc.*, 597 F.Supp. 1480 (S.D.OH 1984) (Noting that the act was solely concerned with the cost and efficiency of government paperwork, and was not intended to create private rights in persons having an interest in such information.)

D. There Is No Private Right of Action Under Title 18 of the United States Code

Plaintiff’s claims of alleged violations of Title 18 of the United States Code, must also be dismissed as there there is no private right of action against any party under the various Title 18 criminal statutes cited by Plaintiff. See Federal Defendants Motion at 6.

E. Plaintiff's Amended Complaint Fails to Establish A Conspiracy

Where a plaintiff alleges a conspiracy, courts have held that more than mere conclusory notice pleading is required. See Fullman v. Graddick, 739 F.2d 553, 556-57 (11th Cir. 1984). In order to survive a motion to dismiss, the complaint must inform the defendant of the nature of the conspiracy alleged against him. Id. “It is not enough to simply aver in the complaint that a conspiracy existed. A complaint may justifiably be dismissed because of the conclusory, vague and general nature of the allegations of conspiracy.” Id. at 557 (citations omitted). See Rindley v. Gallagher, 890 F.Supp. 1540, 1557 (S.D.Fla.1995).

Plaintiff's Amended Complaint contains purely conclusory allegations of a conspiracy.³ Moreover, the statutes cited in Plaintiff's Amended Complaint do not allow plaintiff to assert a cause of action for conspiracy between a private party and the government. Plaintiff is similarly unable to establish a conspiracy based on any of its other underlying claims as detailed in the Government Defendants' Motions. Thus, plaintiff's Amended Complaint fails to allege a cause of action against Galaxy on either an individual basis or as part of any alleged conspiracy.

³ The Amended Complaint includes only a bald conclusory allegation, repeated throughout, that “USPTO/Galaxy/OMB conspired to perpetuate a flawed [form] PTO/SB/65.”


III. CONCLUSION

WHEREFORE, Galaxy respectfully requests that judgment of dismissal be rendered in favor of Galaxy and against Plaintiff in all respects and that Galaxy be awarded its costs of action, without prejudice to recovery by Galaxy of other sanctions and damages as may be permitted by law.

This the 20th day of February, 2004.

Respectfully submitted,

By:


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CERTIFICATE OF SERVICE

I hereby certify that, on this date, a true and correct copy of Defendant Galaxy Scientific Corporation's Memorandum Of Law In Support Of Their Motion To Dismiss The Amended Complaint has been furnished via and regular U.S. mail to the following:

David W.R. Brown
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February 20, 2004.


Kevin P. Mason

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

DAVID W.R. BROWN,
Plaintiff,

CASE NO. 8:03-CV-2501-T-23EAJ

ORDER

VS.

UNITED STATES DEPARTMENT OF COMMERCE,
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UNITED STATES GENERAL ACCOUNTING OFFICE,
UNITED STATES OFFICE OF MANAGEMENT AND BUDGET,
UNITED STATES PATENT AND TRADEMARK OFFICE,
GALAXY SCIENTIFIC CORPORATION,
Defendants.

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ORDER

AND NOW, this day of , 2004, IT IS HEREBY

ORDERED that Defendant Galaxy Scientific Corporation's Motion to Dismiss Plaintiff's
Amended Complaint with prejudice is GRANTED.

Judge Steven D. Merryday
United States District Court

**UNITED STATES DISTRICT COURT
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