

FILED

04 FEB 25 PM 3:29

CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

David W. R. Brown *et al.*,

Plaintiff,

v.

Case Number: 8:03-cv-2501-T-23EAJ

United States Department of Commerce *et al.*,

Defendants.

/

**OBJECTION TO
MOTION OF DEFENDANT GALAXY SCIENTIFIC CORPORATION
TO DISMISS PLAINTIFF'S AMENDED COMPLAINT**

There are seven defendants in this case: six federal agencies and Galaxy Scientific Corporation ("Galaxy"). Galaxy has filed a motion to dismiss the Plaintiff's Amended Complaint.

Plaintiff hereby moves to stricken Galaxy's motion to dismiss, in support which the Plaintiff offers the following information.

Plaintiff hereby incorporates by reference, in their entirety, the statements of facts and legal arguments raised by the Plaintiff in his objections to the federal defendant's motions to dismiss, including his plea for *pro se* leniency and Rule 8(f) of the Federal Rules of Civil Procedure which states that:

"All pleadings shall be so construed as to do substantial justice."

Galaxy is correct that venue is based on the Freedom of Information Act ("FOIA"). However, in several previous filings, the Plaintiff has requested that

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'all matters of this litigation be joined together for judicial economy - Rule 42(a) of Federal Rules of Civil Procedure.'

By invoking the FOIA for venue, the Plaintiff gave up the right to a jury trial, since FOIA violations do not allow them. Plaintiff would dearly love to try some of the matters in front of a Jury, particularly the behavior of the United States Patent and Trademark Office("Patent Office"). However, the Plaintiff assumes that just about everybody involved, including the Courts, the Defendants and the Plaintiff, would prefer a single non-jury trial for judicial economy and simplicity's sake.

Galaxy as Contractor **and** Employee

The Plaintiff has been referring to Galaxy as a "sub-contractor" of the Patent Office. Actually, Galaxy is a "contractor" of the Patent Office. Until discovery is completed later this year, it is unknown if their operation within the Patent Office is technically as a "sub-contractor" of the Corporation or as a direct "contractor" of the Patent Office. But the question is moot because one way or the other, Galaxy as a corporation is ultimately liable.

Galaxy asserts that they are not an "employee" of the Patent Office. The definition of "employee" as opposed to "contractor" isn't all that precise.

For example, in 5 USC 552a (m)(1) "any employee of such contractor ... shall be considered to be an employee of an agency." Plaintiff is not asserting that Galaxy is performing contract work under 5 USC 552a (m)(1), but merely that a

contractor's employee can also be considered an employee of the agency.

In *Norman v. U.S. v. Elywn Industries* (U.S. Court of appeals for the Third Circuit, No. 96-1645, On Appeal from the U.S. District Court for the Eastern District of Pennsylvania, D.C. No. 95-cv-04111), the Court wrote:

"The critical factor used to distinguish a federal agency employee from an independent contractor is whether the government has the power "to control the detailed physical performance of the contractor." *United States v. Orleans* 425 U.S. 807, 814 (1976) (citing *Logue v. United States*, 412 U.S. 521, 528 (1973)). "[T]he question here is not whether the [contractor] receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal government." *Id.* at 815. ..."

Exhibit 1 is part of the response to FOIA request 02-307. Note in the Original Message on the lower part of the page that Linda Engelmeier (on behalf of the government) is writing to Christina Sandberg (Galaxy) and states that someone "... was kind enough to work on **your** clearance request." A "clearance request" is the basis for the "Approval Request" which is mentioned in Plaintiff's complaints in connection with a number of violations.

Note, in particular, the last sentence of paragraph 2 in which Engelmeier gives a **direct mundane order** to Sandberg [i.e., Galaxy] as though she was a Patent Office employee: "So, please change your file accordingly."

The Very Close Relationship of USPTO and Galaxy

In Exhibit 2, the Government Computer News characterized the relationship as: "Galaxy will handle [Patent Office] systems support services, including ... data and records management."

The address for Galaxy's Patent Office operation is: Crystal Park 3 - 2231 Crystal Drive, Suite 800, Arlington VA 22202-3725. It would appear that Galaxy's computer terminals are even hard-wired directly into the Patent Office's computer system which is also located in the Crystal Park complex.

Exhibit 3 is the response to a FOIA request (02-293) for "the email addresses for Rob Flax and Christina Sandberg at Galaxy Scientific." Note that the two email addresses that were supplied are:

Christina.Sandberg@uspto.gov

Rob.Flax@uspto.gov

The server address of **@uspto.gov** for these two Galaxy employees, who worked on matters of concern in this case, is that of the **United States Patent and Trademark Office**, even though other Galaxy employees have email addresses that end with **@galaxyscientific.com**

Therefore, it's reasonable to conclude that the "agency/contractor" relationship of the Patent Office and Galaxy is a "tiny bit more" than, say, a plumber hired to fix a leaky faucet in a Patent Office restroom. It's more in the realm of "agency/**employee**."

A: FOIA Claims

Galaxy is only mentioned in Complaints 7, 8, 9, 10 and 12 which are non-FOIA. The Plaintiff has previously requested that "all" matters of this lawsuit be consolidated under Rule 42(a). If the Court permits this joining, then Galaxy's FOIA assertions are moot.

B: Privacy Act

The Privacy Act stipulates at 5 USC 552a (e)(3)(B): "Each agency that maintains a system of records shall inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual the [Privacy Act Statement]." Form PTO/SB/65, which this case revolves around (and is the reason for Galaxy's involvement), has never and still does not have the required Privacy Act Statement.

Exhibit 4 is the response for FOIA Request 02-286. The Original Message (starting at the middle of page 1 and going to the end) is from Rob Flax of Galaxy. The email concerns the "60-Day Notice for 0651-0016 Patent Maintenance Fees", which led to the Approval Request for Form PTO/SB/65. Note how he asks a number of questions to bring the notice into compliance with the law.

And yet, he never once mentions the Privacy Act Statement, which is required just as surely as the other items which he does mention. The failure to include a Privacy Act Statement in the past and currently was outright negligence and has done harm to the Plaintiff class.

Galaxy's assertions that they have no obligations under the Privacy Act are ludicrous.

C: Paperwork Reduction Act

After the "60-Day Notice..." was published in the Federal Register, over sixty comments from twenty-eight individuals were received.

Several sections of the Paperwork Reduction Act teach that the Patent Office (i.e., Galaxy) is to respond to the comments, including 44 USC 3507(d)(2)(A), 44 USC 3507(d)(2)(B) and 44 USC 3507(h)(1)(B).

Galaxy authored the Approval Request which subsequently went to OMB for approval. In that document, which is Exhibit 36 of this case's Docket Item 1 at circle "1", a number of the comments are ignored by simply noting that they are not "reasonably germane." Some of the comments that were so cavalierly dismissed by Galaxy included:

No Privacy Act Statement

Inadequate Showing Statement

Erroneous Time Burden

No Practical Utility

Galaxy should have addressed these matters just as they were contractually obligated to address the other matters, instead of simply dismissing them as not being "reasonably germane."

The Exhibits that are included are based on preliminary "discovery" that the

Plaintiff did leading up to the filing of the case. It's reasonable to assume that the formal Discovery, including Admissions, Interrogatories and Depositions, will turn up even more evidence of the "employee" nature of Galaxy's work.

Plaintiff requests that the Court will treat Galaxy as an employee of the Patent Office in essence, if not in fact.

D & E: Criminal Statutes and Conspiracy

If the ties between the Patent Office and Galaxy are as close as the preliminary evidence indicates, the criminal actions of the Patent Office might well translate to Galaxy.

For example, Form PTO/SB/65 does not have a Privacy Act Statement even though it was mentioned in the Federal Register comments.

Did Galaxy ever raise this question to the Patent Office? Did the Patent Office ever tell Galaxy to ignore the law? Did Galaxy go along with the Patent Office even though they knew it was a violation of the law?

Someone knew about it! - Someone made a decision! - Someone failed to obey the law! - Someone injured the Plaintiff! - Whooo did it?

Galaxy's Liability

If the Court will permit the close ties of the Patent Office and Galaxy to be acknowledged, then at the very least, Galaxy would be liable under 5 USC 702, 5 USC 703, 5 USC 704 and 5 USC 706.

Conclusion

The types of questions raised above and the close ties of the Patent Office and Galaxy and any subsequent co-conspirator wrongdoing by Galaxy against the Plaintiff can only be resolved by Discovery and Trial.

WHEREFORE, Plaintiff respectfully requests that Defendant Galaxy's Motion to Dismiss the Amended Complaint be stricken.

A handwritten signature in black ink, reading "David W. R. Brown". The signature is written in a cursive style with a long, sweeping tail on the letter "n".

David W. R. Brown, et al., *pro se*
1805 Burlington Cir
Sun City Center FL 33573-5219
Phone: (813) 634-6048

Exhibit 1

Rensch, Joy (Galaxy)

From: Sandberg, Christina (Galaxy)
Sent: Friday, October 08, 1999 4:02 PM
To: Rensch, Joy (Galaxy)
Subject: FW: Maintenance Fees Package

Joy,

Here's the second item that I had to forward to you. This came from Linda Engelmeier concerning 0651-0016. More information for us to stuff into our brains!

Christina

-----Original Message-----

From: LEngelme@doc.gov [SMTP:LEngelme@doc.gov]
Sent: Wednesday, October 06, 1999 4:38 PM
To: Christina.Sandberg@USPTO.GOV
Cc: GBanks2@doc.gov
Subject: Maintenance Fees Package

See 831-2000

Christina,

I just wanted you to know that Gwellnar Banks was kind enough to work on your clearance request and it will be going forward to OMB shortly.

One item that we wanted to bring to your attention is that when you have a "reinstatement" then there are no "current" inventory hours. So, the 831 form is being corrected to reflect that. It also means that when it is reinstated that it will be a "program change" and not a mixture of program and adjustments. It is just the way it works out under those circumstances. So, please change your file accordingly.

Thanks for all your hard work.

Linda

Exhibit 2

- Search
- [Subscribe](#)
- GCN Lab
- [Jobs](#)
- FOSE 99

News

GCN April 12, 1999

PTO awards \$35 million support contract to Galaxy Scientific Corp.

The Patent and Trademark Office recently awarded the five-year, \$35 million Information Technology Product Assurance contract to Galaxy Scientific Corp. of Falls Church, Va.

Galaxy will handle PTO systems support services, including independent testing and assessment of applications and hardware, year 2000 analyses and testing, and data and records management, PTO contract specialist Dave Sibik said.



Galaxy has four subcontractors: American Technical Resources Inc. of McLean, Va.; EAR Ltd. of Ashburn, Va.; J.G. Van Dyke & Associates of Alexandria, Va.; and MGS Inc. of Richmond, Va.

PTO awarded the contract under an accelerated procurement process five months after receiving vendors' bids.

The contract has one base year and four one-year options. Galaxy has been a PTO contractor since 1994, doing independent verification and validation work for the agency.



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GOVERNMENT COMPUTER NEWS

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Exhibit 3



UNITED STATES
PATENT AND
TRADEMARK OFFICE

General Counsel
Washington, DC 20231
www.uspto.gov

SEP 25 2002

**VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Mr. David W.R. Brown
1805 Burlington Circle
Sun City Center, FL 33573-5219

Re: Freedom of Information Act (FOIA) Request No. 02-293

Dear Mr. Brown:

This is in response to your September 3, 2002, e-mail, in which you requested, pursuant to the Freedom of Information Act, 5 U.S.C. § 552, a copy of: "the email addresses for Rob Flax and Christina Sandberg at Galaxy Scientific."

The United States Patent and Trademark Office (USPTO) has identified a one-page document that is responsive to your request. A copy of this material is enclosed.

The processing fee has been waived. See 37 C.F.R. § 102.11(d)(4).

Sincerely,

Robert Fawcett
Paralegal Specialist

Fawcett, Robert D.

From: Brown, Susan
Sent: Tuesday, September 10, 2002 8:31 AM
To: Fawcett, Robert D.
Subject: FW: Email address follow-up...

Christina.Sandberg@uspto.gov
Rob.Flax@uspto.gov

-----Original Message-----

From: lawsuit@tampabay.rr.com (mailto:lawsuit@tampabay.rr.com)
Sent: Tuesday, September 03, 2002 12:36 AM
To: Susan.Brown@uspto.gov
Subject: Email address follow-up...

Susan,

I was able to guess right for the USPTO email addresses...

Would you please send me the email addresses for Rob Flax and Christina Sandberg at Galaxy Scientific.

Thanks,

Dave

--

David W. R. Brown
1805 Burlington Cir
Sun City Center FL 33573-5219

Phone: 1 (813) 634-6048
Email: lawsuit@tampabay.rr.com
Homepage: <http://www.PatentOfficeLawsuit.com>

Exhibit 4



UNITED STATES
PATENT AND
TRADEMARK OFFICE

General Counsel
Washington, DC 20231
www.uspto.gov

SEP 19 2002

**VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Mr. David W.R. Brown
1805 Burlington Circle
Sun City Center, FL 33573-5219

Re: Freedom of Information Act (FOIA) Request No. 02-286

Dear Mr. Brown:

This is in response to your August 26, 2002, e-mail, in which you requested, pursuant to the Freedom of Information Act, 5 U.S.C. § 552, a copy of: “[the Agency] study that documents the 8-hour requirement [for completing Form PTO/SB/65].”

The United States Patent and Trademark Office (USPTO) has identified a two-page document that is responsive to your request. A copy of this material is enclosed.

The processing fee has been waived. See 37 C.F.R. § 102.11(d)(4).

Sincerely,

Robert Fawcett
Paralegal Specialist

Bahr, Robert

From: Bahr, Robert
Sent: Thursday, June 06, 2002 7:47 AM
To: Clark, Jeanne
Subject: RE: Draft 60-Day Notice for 0651-0016 Patent Maintenance Fees

call me (305-3009)

-----Original Message-----

From: Clark, Jeanne
Sent: Thursday, June 06, 2002 7:45 AM
To: Bahr, Robert
Cc: Jayne, Damell
Subject: FW: Draft 60-Day Notice for 0651-0016 Patent Maintenance Fees

Bob -

It has been suggested that the average time to complete an unavoidable petition under 378(b) is 8 hours. We currently have 1 hour. Do you want to make any adjustments?

Jeanne M. Clark
Legal Advisor
Office of Patent Legal Administration (OPLA)
Deputy Commissioner for Patent Examination Policy

-----Original Message-----

From: Flax, Rob (Galaxy)
Sent: Tuesday, May 21, 2002 2:56 PM
To: Clark, Jeanne
Cc: Sandberg, Christina (Galaxy)
Subject: Draft 60-Day Notice for 0651-0016 Patent Maintenance Fees

Jeanne,

Thank you for sending the estimates for 0651-0035 and for helping nudge Dave S. with the additional estimates related to the Excel submissions. I will let you know when I get the remaining data from Dave that we need to finish up the 60-Day Notice.

And....I actually have another one for you. I have completed a draft of the 60-Day Notice for the renewal of collection 0651-0016 Rules for Patent Maintenance Fees, which expires 12/31/2002. Thanks for answering my previous question about the new proposed fees for FY2003--I have included the new maintenance fees in this 60-Day Notice and noted that they increase every year effective October 1.

I have attached my draft of the 60-Day Notice below for your review. Please look it over and let me know if you would like to make any changes. In addition, I also have some specific questions and items to highlight for completing the Notice:

- Please verify the contact name and address (Bob Spar) and the Affected Public. For the Affected Public, I have listed the groups that were on the Form 83-I from the previous submission in 1999. Do you want to modify these? The other possible groups that are not listed here are Farms and State, Local, or Tribal Governments.
- With regard to your FYI in your email this morning re. fee addresses and customer numbers, I have a statement in this Notice for 0016 on p. 3 that "Only an address associated with a customer number can be established as a fee address," which is also stated in the instructions on form PTO/SB/47. Let me know if something changes on this front in case we need to make any adjustments. Also, when you look over the Abstract in the draft of this Notice, please check that I am describing the various fees and surcharges correctly.
- For paying fees online using the Electronic Maintenance Fee Form, can customers only use this to pay regular maintenance fees electronically over the Internet or can they also pay the various surcharges for paying during and/or after the 6-month grace period? (Or is there someone else I should ask about this?)
- As usual, one of the primary items we need is the updated burden estimates for the upcoming three-year renewal period, including the annual response estimates for the items in this collection (see the chart on p. 8 of the draft). I have already asked Dave Scherbel about the response and time estimates related to the Customer Number

Spreadsheet submissions for fee addresses, but I need to ask you for the estimated annual responses for the other items. If you can update the responses in the chart on p. 8, I will make the other calculations and changes in the rest of the draft. Also, please revise any of the time estimates for the items in this collection as necessary (I will get the Spreadsheet time estimate from Dave).

Do you want to revise the time estimate for the Electronic Maintenance Fee Form that is used to pay online? We have the time listed from the previous 1999 submission as 20 seconds, which we previously described as the sum of 10 seconds to enter the Patent Number and Serial Number in order to retrieve payment information and 10 seconds to select the fee codes to be paid.

Also for the Electronic Maintenance Fee Form, could you please provide a time estimate for printing out a copy of the updated payment statement screen that is displayed after a completed online transaction? I also need to verify which hourly rate to use for printing out the statement--paraprofessional or attorney rate?

- For the hourly rates in the Estimated Total Annual Respondent Cost Burden section, I have the petitions (PTO/SB/65 and 66) being prepared by attorneys and the other items being prepared by paraprofessionals. Please let me know if you want to change any of these.
- I have included a chart on p. 11 of the draft for the breakdown of the responses corresponding to the various fee levels and surcharges, with additional small entity discounts where applicable. Ideally, we would like to be able to obtain estimated responses for each of these fee/surcharge items so we can calculate the total filing fee costs. If that's not possible based on what you are able to get from the Office of Finance, we can revise our approach accordingly.
- Following their addition to 0651-0035 Representative and Address Provisions, I have also added the Excel spreadsheet submissions to this collection insofar as they cover fee addresses. Are there any other changes or updates to this collection? Along those lines, I wanted to ask you about two additional items I noticed while reviewing the rules associated with this package:
 - 37 CFR 1.377 provides for a petition to the Commissioner to accept and record a maintenance fee that was filed prior to patent expiration but refused by USPTO (with \$130 fee required by 1.17(h), refundable if refusal was due to USPTO error).
 - 37 CFR 1.378(e) provides for a petition for reconsideration of the refusal to accept a maintenance fee after patent expiration (again with the \$130 fee required by 1.17(h), refundable if refusal was due to USPTO error).

Do you want to add either of these petitions to this collection? Generally, for PRA we only cover original petitions and not petitions that are follow-ups to other petitions. From reading these rules, it looks like the 1.377 petition is one that may need to be covered. If so, we will need the usual information for estimated annual responses, time to submit the petition, forms (if any), and who will prepare it (attorney or paraprofessional). We will also add in the filing fees as noted above.

- Lastly, I have a few side items I noticed while looking at the current forms for this collection that are posted on the USPTO Forms web page. On the "fillable" version of PTO/SB/45, it looks like the fee/form submission address at the very bottom of the form at the end of the burden statement is the old address since it does not match the Pittsburgh, PA submission addresses at the top of the form. (The non-fillable PTO/SB/45 does have the Pittsburgh, PA address at the bottom.) The other item I noticed is that the burden statement at the bottom of PTO/SB/47 lists the time to complete the form as 0.08 minutes, which I think instead should be 0.08 hours (or 5 minutes). I just wanted to bring these to your attention for when the forms are next revised.

That should cover it for now. Thanks for your help and for looking over the draft, and let me know if you need any additional information on any of these items.

<< File: 0016-60Day-draft4.WPD >>

Rob

--
Rob Flax
Galaxy Scientific Corporation
Crystal Park 3 - 2231 Crystal Drive, Suite 800
Arlington, VA 22202
(703) 486-6126

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

David W. R. Brown *et al.*,

Plaintiff,

v.

Case Number: 8:03-cv-2501-T-23EAJ

United States Department of Commerce *et al.*,

Defendants.

/

CERTIFICATE OF SERVICE

This is in accordance with Federal Rule of Civil Procedure 5.

I hereby certify that a true and correct copy of:

Amended Objection to Federal Defendants' (Other than Department
of Treasury) Motion to Dismiss.

Motion of Defendant Galaxy Scientific Corporation to Dismiss
Plaintiff's Amended Complaint and Defendant Galaxy
Scientific Corporation to Dismiss Plaintiff's Amended
Complaint.

Plaintiff's Objection to same.

Plaintiff's Memorandum to the Court Concerning Plaintiff's Filings.

were furnished by U.S. Certified Mail to the U.S. Attorney in Tampa and to
Galaxy and by regular first class mail to the remaining parties on February 25,

2004. The Amended Objection to the Federal Defendants Motion to Dismiss, the Objection to Galaxy's Motion to Dismiss and the Memorandum to the Court were filed with the Court on February 25, 2004.

Defendants and Parties:

General Counsel
United States Department of Commerce
14th & Constitution Av NW
Washington DC 20230-0001

General Counsel
United States Department of Justice
950 Pennsylvania Av NW
Washington DC 20530-0001

General Counsel
United States Department of the Treasury
1500 Pennsylvania Av NW
Washington, D.C. 20220-0001

General Counsel
United States General Accounting Office
441 G St NW
Washington DC 20548-0001

General Counsel
United States Office of Management and Budget
725 17th St NW
Washington DC 20503-0001

General Counsel
United States Patent and Trademark Office
PO Box 15667
Arlington VA 22215-0667

Mr. Harry Wilson, Vice President
Galaxy Scientific Corporation
3120 Fire road
Egg Harbor Township NJ 08234-5886

Attorney General of the United States
United States Department of Justice
950 Pennsylvania Av NW
Washington DC 20530-0001

Civil Process Clerk
United States Attorney
400 N Tampa St Suite 3200
Tampa FL 33602-4798



David W. R. Brown, et al., *pro se*
1805 Burlington Cir
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Phone: (813) 634-6048

7003 2260 0003 4548 764J

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02/25/2004

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Restricted Delivery Fee (Endorsement Required)	\$0.00
Total Postage & Fees	\$ 5.20

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City, State, ZIP+4

PS Form 3800, Rev. 11/03/02 See Reverse for Instructions

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or PO Box No.
City, State, ZIP+4

PS Form 3800, Rev. 11/03/02 See Reverse for Instructions

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

David W. R. Brown *et al.*,

Plaintiff,

v.

Case Number: 8:03-cv-2501-T-23EAJ

United States Department of Commerce *et al.*,

Defendants.

/

ORDER

THIS CAUSE came before the court on plaintiff's objection to defendant Galaxy Scientific Corporation motion to dismiss plaintiff's amended complaint. The Court is sufficiently advised in the premises. Upon due consideration, it is hereby **ORDERED** and **ADJUDGED** that the foregoing motion by Galaxy to dismiss plaintiff's amended complaint be and the same is hereby **STRICKEN**.

So Ordered.

DONE and ORDERED the ____ day of February, 2004, in chambers
in Tampa, Florida.

STEVEN D. MERRYDAY
United States District Judge

Copies to:

David W. R. Brown
1805 Burlington Circle
Sun City Center FL 33573-5219

Warren A. Zimmerman
United States Attorney
400 N Tampa St Suite 3200
Tampa FL 33602-4798

Harry Wilson, Vice President
Galaxy Scientific Corporation
3120 Fire Road
Egg Harbor Township NJ 08234-5886